

FILED
Mar 25, 2015
Court of Appeals
Division III
State of Washington

No. 91510-5

(Court of Appeals No. 32109-6-III)

SUPREME COURT OF THE STATE OF WASHINGTON

PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation,
Petitioner

v.

JORGE GUTIERREZ and JANE DOE GUTIERREZ, and their marital
community, and JAVIER GUTIERREZ,
Respondents,

**PATRIOT GENERAL INSURANCE COMPANY'S PETITION FOR
REVIEW**

FILED
APR -2 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON
CRF

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A. IDENTITY OF PETITIONER

Patriot General Insurance Company asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

In a published opinion filed February 24, 2015, Division III of the Court of Appeals ruled that Javier Gutierrez was an insured under the underinsured motorist (UIM) insurance policy issued by Patriot to Javier's father, Jorge Gutierrez.¹ The opinion is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

If review is accepted, the Court will be presented with these issues:

1. The Patriot policy provides UIM coverage only to the named insured, Jorge, and to certain relatives. The policy's definition section provides that any relative who is age 14 or older must be listed on the application or policy endorsement. Javier was 19 and not listed on the application or in any endorsement. Is Javier an "insured person" under the UIM coverage?

2. Under Washington law an insurer and an insured are free to define who is insured by a UIM policy, as long as the scope of the liability

¹ For clarity, the remainder of this petition will refer to the respondents by their first names. No disrespect is intended.

and UIM coverage is the same. The scope of liability and UIM coverage under the Patriot policy is the same, but the policy defines Javier as not being an “insured person.” Does the Patriot policy conform to this law?

D. STATEMENT OF THE CASE

1. Patriot issued a UIM policy to Jorge Gutierrez.

Jorge Gutierrez completed an application for a policy with Patriot on August 11, 2010.² It identifies Jorge Gutierrez as the named insured,³ and it lists two drivers, Jorge Gutierrez and Maria Recarmona.⁴ Jorge also initialed a paragraph stating that he had listed on his application everyone living with him age 14 or over:

I also certify that all persons age 14 or over who live with me temporarily or permanently and all persons who are regular operators of any vehicle to be insured have been listed on this application and reported to the Company. I declare that there are no operators of the vehicle(s) described in this application unless their names and ages are shown above or are provided in writing to the Company within 14 days of when they begin driving the vehicle(s) described in this application.⁵

Jorge never asked his agent or Patriot to add his son, Javier, to the policy.⁶

² Declaration of Tomas Miranda ¶ 2, Appx. at 38; Application, Appx. at 41–46.

³ Application, Appx. at 41.

⁴ Appx. at 42.

⁵ Application, Appx. at 45.

⁶ Miranda Decl. ¶ 6, Appx. at 39.

Patriot issued a personal automobile policy to Jorge with a policy period of October 29, 2010 to April 29, 2011.⁷ The policy includes several forms, one of which is titled “Underinsured Motorists Coverage Endorsement – Washington.” Its insuring agreement provides that Patriot will pay damages that an “insured person” is entitled to recover from the owner or operator of an underinsured vehicle. The policy defines “insured person,” to mean “you”, which includes the named insured and any “relative” residing in the same household. “Relative” is specifically defined as follows:

(3) “**Relative**” means a person living in **your** household related to **you** by blood, marriage or adoption, including a ward or foster child. **Relative** includes a minor under **your** guardianship who lives in **your** household. Any **relative** who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss.⁸

The Policy Declarations list the insured as Jorge and lists two drivers: Jorge and Maria Carmona. Javier is not listed on the application, the Policy Declarations, or any endorsement to the policy.⁹

2. Jorge’s son, Javier Gutierrez, filed a UIM claim with Patriot.

Jorge’s 19-year-old son, Javier was living in Jorge’s household, when he was a passenger in an automobile that was involved in an

⁷ Policy, Appx. at 16.

⁸ Appx. at 19.

⁹ Appx. at 17.

accident in Walla Walla on January 9, 2011.¹⁰ He alleges that he suffered personal injuries as a result of the accident.

Javier filed a UIM claim with Patriot under his father's policy.¹¹ Patriot denied the claim because Javier was not an "insured person" under that policy.¹²

3. Patriot sought a declaration of no coverage.

Patriot submitted the coverage questions to the Walla Walla County Superior Court, seeking a declaration that it had no duty to pay UIM benefits to Javier because he did not meet the definition of "relative" and thus was not an "insured person" under the policy. Javier counterclaimed for breach of contract, insurance bad faith, and violation of the Consumer Protection Act, alleging that Patriot had not only erred but also had acted unreasonably by denying Javier's claim.¹³

¹⁰ See Javier Gutierrez's Response to Patriot General's Request for Admission No. 3, Appx. at 56-57, 59; Jorge Gutierrez's Response to Patriot General's Request for Admission No. 3, Appx. at 64.

¹¹ Declaration of Kyle Mosbrucker ¶ 3, Appx. at 47.

¹² May 22, 2012 letter from Kyle Mosbrucker to Jorge Gutierrez, Appx. at 50-51.

¹³ Defendant Javier Gutierrez's Answer to Complaint for Declaratory Judgment and Counterclaims, Appx. at 145-54.

Patriot moved for summary judgment, seeking a ruling that Javier was not an “insured person” covered by the policy.¹⁴ Javier and Jorge opposed the motion, claiming that the definition of “insured” in RCW 48.22.005 included members of a named insured’s household, such as Javier, and that this definition applied to the UIM statute, RCW 48.22.030. The Court Commissioner denied Patriot’s motion and entered partial summary judgment for defendants regarding UIM coverage.¹⁵ The Superior Court denied Patriot’s motion for revision. The Court of Appeals granted discretionary review.

The Court of Appeals affirmed the grant of summary judgment to Javier and Jorge. However, the court did not base its decision on RCW 48.22. Rather, the court ruled that the policy definition of “relative,” i.e. “[a]ny relative who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss” functioned as an exclusion, rather than as a definition of who is an “insured person.”¹⁶ It further ruled that this policy language could be

¹⁴ Summary Judgment Motion, Appx. at 1–12.

¹⁵ Order Granting Defendants’ Motion to Strike, Denying Patriot General’s Motion for Summary Judgment and Establishing UIM Coverage for Defendant Javier Gutierrez, Appx. at 159–62.

¹⁶ Appendix at 231.

interpreted to merely impose on Jorge a duty to cooperate.¹⁷ Consequently, the court ruled that Javier qualified as a “relative” and thus an “insured person.”

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

- 1. The Court of Appeals decision conflicts with decisions from this court and Divisions of the Court of Appeals recognizing the distinction between permissible limitations on coverage grants and impermissible exclusions from coverage. (RAP 13.4(b)(1) and (2)).**

By characterizing the language of the policy’s definition of a term as an “exclusion,” the Court of Appeals has cast the basic framework for all insurance-policy analysis into disarray. And in so doing, it has placed itself in conflict with numerous decisions both from this court and from the Court of Appeals. Review is therefore proper under both RAP 13.4(b)(1) and (2).

Division III saw no difference between a limitation on a grant of coverage by defining who is an insured and an exclusion from coverage.¹⁸ But the courts of this state treat grants of coverage very differently from exclusions, both in general and in the context of the UIM statute. In all insurance policies, the grant of coverage and exclusions serve different

¹⁷ *Id.*

¹⁸ *Id.* (“Patriot General does not explain the practical difference between a limitation on coverage and an exclusion from coverage.”).

purposes. “Exclusion clauses do not grant coverage; rather, they subtract from it.”¹⁹ An insured has the initial burden of showing that the loss falls within the scope of the policy’s insured losses. If that burden is met, the insurer then has the burden to show that the loss is excluded by specific policy language.²⁰ Yet another distinction is that Washington courts strictly and narrowly construe exclusions.²¹

This court and divisions of the Court of Appeals have emphasized the critical distinction between a grant of coverage and an exclusion when interpreting the UIM statute, RCW 48.22.030. Washington courts have long held that the statute “does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.”²² As this court has explained,

The policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of ‘insureds’ that is at least as broad as the class in the primary liability sections of the policy. *It does not preclude the*

¹⁹ *Nat’l Union Fire Ins. Co. of Pittsburgh v. Nw. Youth Servs.*, 97 Wn. App. 226, 231, 983 P.2d 1144 (1999) (quoting *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Grp.*, 37 Wn. App. 621, 627, 681 P.2d 875 (1984)).

²⁰ *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

²¹ *Campbell v. Ticor*, 166 Wn.2d 466, 472, 209 P.3d 859 (2009).

²² *Smith v. Cont’l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995); *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976).

*parties from reaching agreement as to the scope of the class in the first instance.*²³

The Court of Appeals reiterated this holding in March 2013:

Underinsured motorist coverage is limited personal accident insurance chiefly for the benefit of the named insured. Limiting the scope of the definition of who else is an “insured” does not run afoul of the public policy behind Washington’s UIM statute.²⁴

A total of seven Washington cases spanning almost forty years supports this holding.²⁵

²³ *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 443, 563 P.2d 815 (1977) (emphasis added) (quoting *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 337, 494 P.2d 479 (1972)), *abrogated in other part by statute as stated in Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17 (1987).

²⁴ *Vasquez v. Am. Fire & Cas. Co.*, 174 Wn. App. 132, 138, 298 P.3d 94 (citing *Smith*, 128 Wn.2d at 83), *review denied*, 178 Wn.2d 1006, 308 P.3d 641 (2013).

²⁵ *See Fin. Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 353, 931 P.2d 168 (1997) (“[W]hen the question revolves around the initial extension of coverage, that is, the definition of who is and is not an insured, public policy is not violated so long as insured persons are defined the same in the primary liability and UIM sections of the policy.”); *see also Dairyland Ins. Co. v. Uhls*, 41 Wn. App. 49, 53, 702 P.2d 1214 (1985) (“[T]he parties may agree to a narrow definition of insured so long as that definition is applied consistently throughout the policy[.]”) (quoting *Raynes*, 88 Wn.2d at 444); *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 874, 103 P.3d 240 (2004) (stating that insurer may choose not to include certain persons in definition of “insured” in UIM policies).

Washington law does, by contrast, place limits on the type of exclusions in a UIM policy. For instance, a UIM policy cannot set forth an exclusion based on the identity of a victim injured by an insured driver.²⁶

This distinction between the extension or grant of coverage and exclusions from coverage is perhaps best illustrated by this court's decision in *Farmers Insurance Co. v. Miller*.²⁷ In that case, Lane Miller obtained an auto policy, which included uninsured motorist coverage, from Farmers. Miller's son was later killed while riding as a passenger in an uninsured vehicle. Farmers rejected Miller's uninsured motorist claim because his son was not an insured. The policy stated that Farmers would provide uninsured motorist coverage to "the insured or a relative," and the policy defined "relative" to include a relative of the named insured who was a resident of the same household and who did not own a motor vehicle. The trial court granted summary judgment to Farmers because Miller's son owned a car and thus did not come within the definition of insured. On appeal, Miller argued that the public policy expressed in RCW 48.22.030 prohibited this type of clause. This court rejected the argument because the statute "does not mandate any particular scope for the

²⁶ See *Tissell v. Liberty Mutual Ins. Co.*, 115 Wn.2d 107, 112, 795 P.2d 126 (1990).

²⁷ 87 Wn.2d 70, 549 P.2d 9 (1976).

definition of who is an insured in a particular automobile insurance policy.” Cases invalidating exclusions were not on point because the issue before the court was the scope of the policy’s initial grant of coverage, and not an exclusionary clause, and because the insured was defined consistently throughout the policy.

By disregarding the distinction between a coverage grant and an exclusion, Division III’s decision conflicts with prior Washington law as set forth in *Miller* and subsequent cases.

2. The lower court’s decision conflicts with Washington law regarding an insured’s duty to cooperate.

Review is appropriate under RAP 13.4(b)(1) and (2) because the decision also conflicts with Washington case law regarding an insured’s duty to cooperate with its insurer. The court held that the critical policy language, which provides that “[a]ny relative who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss,” could be interpreted as merely imposing a duty to cooperate, rather than defining who is or is not an insured. By implication, the court also ruled that Jorge’s failure to disclose Javier on the application justified denial of coverage only if Patriot could show it was prejudiced by

that failure.²⁸ Both rulings conflict with decisions from this court and the Court of Appeals.

An insured's duty to cooperate arises from a condition in most insurance policies explicitly requiring an insured to cooperate with the insurer's handling of claims.²⁹ No Washington case has held that the definition section of a policy, which does not mention cooperation, imposes a duty to cooperate in disclosing who is to be insured under a policy. Yet Division III's opinion now does just that.

Washington courts also have never imposed a prejudice requirement on a policy's definition of insured. The need to show prejudice has only been applied to procedures for handling a claim after a loss: the duty to notify the insurer of a claim,³⁰ the duty to cooperate with the insurer's investigation and defense of the claim,³¹ and the duty not to

²⁸ See Appx. at 233 ("Patriot General forwarded no evidence before the trial court that Jorge Gutierrez knew of any false statement. Nor did it provide evidence that Jorge's risk rating would change based on the fact that his two teenage children resided with him.").

²⁹ *Staples v. Allstate Ins. Co.*, 176 Wn. 2d 404, 410, 295 P.3d 201 (2013).

³⁰ *Canron, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 485, 918 P.2d 937 (1996).

³¹ *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 35 P.2d 816 (1975).

settle a claim without authorization.³² Division III's opinion is alone in extending the prejudice requirement to policy definitions determining who is insured by a policy. Now any policy definition can be parsed as merely imposing a "condition" subject to the prejudice requirement rather than imposing a bright-line definition. Under Division III's decision, consistent policy interpretation will disappear.

3. This case presents an issue of substantial public interest applicable to auto insurance policies in this state. (RAP 13.4(b)(4)).

Finally, review should be granted under RAP 13.4(b)(4) because interpretation of this policy involves an issue of substantial public interest. Because the definition at issue is included in a standard policy form rather than a manuscript policy, Division III's opinion has a broad impact on a large number of automobile insurance policies now in effect throughout the state.³³ A ruling from this court would bring clarity to all such policies.

³² *Pub. Util. Dist. No. 1 of Klickitat Cnty. v. International Ins. Co.*, 124 Wn.2d 789, 803-04, 881 P.2d 1020 (1994).

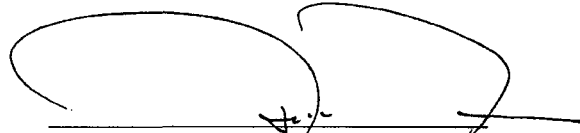
³³ In accordance with RCW 48.18.100, Patriot obtained the Washington State Office of the Insurance Commissioner's approval of the form before it was issued to policyholders in this state. Documents regarding OIC's approval of the form, known as PAP1, can be found at <https://fortress.wa.gov/oic/onlinefilingsearch/>.

F. CONCLUSION

The Court of Appeals' decision contradicts the decisions of this court as to the distinction between a coverage grant and an exclusion, as well as the distinction between language in an insuring agreement defining who is insured and the cooperation clause.

This court should accept discretionary review under RAP 13.4 and, on acceptance of review, reverse the trial court's entry of summary judgment for respondents and its denial of summary judgment to Patriot.

Dated this 25th day of March, 2014.



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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

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8 PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

9 Plaintiff,

10 v.

11 JORGE GUTIERREZ and JANE DOE
12 GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

13 Defendants.

No. 12-2-00908-3

PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT

14 I. Relief Requested

15 Plaintiff Patriot General Insurance Company moves under CR 56 for an order declaring
16 that it does not have a duty to pay underinsured motorist ("UIM") benefits to Javier Gutierrez
17 under the automobile insurance policy it issued to Javier's father, Jorge Gutierrez. Javier
18 Gutierrez is not entitled to UIM benefits because he is not a named insured under the policy. The
19 policy complies with the statute governing UIM, RCW 48.22.030, because that statute does not
20 limit the ability of insurers and insureds to define who is covered by a UIM policy. And contrary
21 to the defendants' position, another statute, RCW 48.22.005, does not require UIM policies to
22 cover a named insured's relatives.
23

24
25 PLAINTIFF PATRIOT GENERAL INSURANCE
26 COMPANY'S MOTION FOR SUMMARY
JUDGMENT - 1

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II. Statement of Facts

Jorge Gutierrez completed an application for a policy with Patriot on August 11, 2010.¹ It identifies Javier Gutierrez as the named insured,² and its lists two drivers, Javier Gutierrez and Maria Recarmona.³ Jorge also initialed a paragraph stating that he had listed on his application everyone living with him age 14 or over:

I also certify that all persons age 14 or over who live with me temporarily or permanently and all persons who are regular operators of any vehicle to be insured have been listed on this application and reported to the Company. I declare that there are no operators of the vehicle(s) described in this application unless their names and ages are shown above or are provided in writing to the Company within 14 days of when they begin driving the vehicle(s) described in this application.⁴

Jorge never asked his agent or Patriot to add Javier to the policy.⁵

Patriot issued a personal automobile policy to Jorge Gutierrez with a policy period of October 29, 2010, to April 29, 2011.⁶ The Policy Declarations list the insured as Jorge Gutierrez and list two drivers: Jorge and Maria Carmona. Jorge's son, Javier Gutierrez, is not listed on the Policy Declarations or any endorsement to the policy.⁷

Javier Gutierrez was a passenger in an automobile that was involved in an accident in Walla Walla on or about January 9, 2011.⁸ At the time, Javier was 19 years old.⁹ He alleges that

¹ Declaration of Tomas Miranda ¶ 2; Application, exhibit 1 to Miranda Decl.

² Application at 1, exhibit 1 to Miranda Decl.

³ *Id.* at 2.

⁴ Application, exhibit 1 to Miranda Decl.

⁵ Miranda Decl. ¶ 6.

⁶ Policy, exhibit 1 to the Declaration of Amy Brunner.

⁷ *Id.*

⁸ See Javier Gutierrez's Responses to Patriot General's Request for Admission No. 3, exhibit 1 to Declaration of Matthew Munson; Jorge Gutierrez's Responses to Patriot General's Request for Admission No. 3, exhibit 2 to Munson decl.

1 he suffered personal injuries as a result of the accident.

2 Javier filed a UIM claim with Patriot under his father's policy.¹⁰ Patriot denied the claim
3 because Javier was not an insured under that policy.¹¹

4 The Patriot policy issued to Jorge Gutierrez includes several forms, one of which is titled
5 "Underinsured Motorists Coverage Endorsement – Washington." It reads in part as follows:

6 **We will pay damages for bodily injury or property damage which an insured**
7 **person is legally entitled to recover from the owner or operator of an uninsured**
8 **motor vehicle. The bodily injury or property damage must be caused by a car**
9 **accident and result from the ownership, maintenance or use of an uninsured**
10 **motor vehicle.**

11 ...

12 **Additional Definitions Used in This Part Only**

13 As used in this Part:

14 (1) "Insured Person" means:

15 (A) You.

16 (B) Any other person occupying your insured car with your permission.

17 (C) Any person for damages that person is entitled to recover because of
18 **bodily injury to you or another occupant of your car.**¹²

19 Part I of a form titled "Personal Auto Policy" defines the liability coverage as follows:

20 **We will pay damages for which any insured person is legally liable because of**
21 **bodily injury and/or property damage caused by a car accident arising out of**
22 **the ownership, maintenance or use of a car or utility trailer. . . .**

23 ...

24 ⁹ See Javier Gutierrez's Responses to Patriot General's Request for Admission No. 2, exhibit 1 to
25 Munson decl.; Jorge Gutierrez's Responses to Patriot General's Request for Admission No. 2,
26 exhibit 2 to Munson decl.

¹⁰ Declaration of Kyle Mosbrucker ¶ 3.

¹¹ May 22, 2012 letter from Kyle Mosbrucker to Jorge Gutierrez, exhibit 1 to Mosbrucker Decl.

¹² See exhibit 1 to the Declaration of Amy Brunner.

1 **Additional Definitions Used in This Part Only**

2 As used in this Part:

3 (1) “**Insured Person**” or “**insured persons**” means:

4 (A) **You**,

5 (B) Any person using **your insured car**.¹³

6 The Personal Auto Policy form also sets forth definitions that are used throughout the policy:

7 (2) “**You**” and “**your**” mean the person shown as the named insured on the
8 Declarations Page and that person’s spouse if residing in the same household.
9 **You** and **your** also means any **relative** of that person if they reside in the same
10 household, providing they or their spouse do not own a **motor vehicle**.

11 (3) “**Relative**” means a person living in **your** household related to **you** by blood,
12 marriage or adoption, including a ward or foster child. **Relative** includes a minor
13 under **your** guardianship who lives in **your** household. Any **relative** who is age
14 fourteen (14) or older must be listed on the application or endorsed on the policy
15 prior to a car accident or loss.¹⁴

16 Patriot filed this declaratory judgment action seeking a declaration it that has no duty to pay UIM
17 benefits to Javier because he is not insured under the policy.

18 **III. Statement of Issues**

19 1. The Patriot policy provides UIM coverage only to the named insured, Jorge
20 Gutierrez, and to his relatives age 14 and over who are listed on the application or policy
21 endorsement. Javier Gutierrez was 19 and not identified in the application or in any endorsement.
22 Does the policy provide UIM coverage to Javier?

23 2. An insurer and insured are free to define the scope of who is insured by a UIM
24 policy, so long as the scope of the liability and UIM coverage is the same. The Patriot policy
25 defines coverage so that it does not include persons in the position of Javier Gutierrez. Does the
26 Patriot policy comply with the UIM statute?

27 ¹³ *Id.*

28 ¹⁴ *Id.*

1 3. RCW 48.22.030 requires automobile insurance policies to provide UIM coverage
2 to “persons insured thereunder,” and RCW 48.22.005 defines “insured” to include the named
3 insured or a resident of the named insured’s household. RCW 48.22.005 was enacted as part of a
4 PIP statute, and no case has applied it in a UIM dispute. Does the definition of insured in RCW
5 48.22.005 modify RCW 48.22.030 such that UIM policies must cover residents of a named
6 insured’s household?

7 IV. Evidence Relied Upon

8 This motion relies on the declarations of Matthew Munson, Tomas Miranda, Kyle
9 Mosbrucker, and Amy Brunner, the exhibits attached to those declarations, and the pleadings and
10 other documents on file.

11 V. Legal Authority

12 1. **The policy does not cover Javier Gutierrez because he is not an insured person**
13 **under the policy.**

14 Determining whether coverage exists is a two-step process. In the first step, the insured
15 must show the loss falls within the scope of the policy’s insured losses. To avoid coverage, the
16 insurer must then show the loss is excluded by specific policy language.¹⁵ It is the first step that
17 is at issue here: the defendants must show that Javier is an insured under the policy.
18

19 Insurance policies are contracts, and rules of contract interpretation apply.¹⁶ Washington
20 courts will enforce unambiguous insurance policy language.¹⁷ If policy language is clear, a court
21 must enforce it as written and may not create an ambiguity where none exists.¹⁸

22
23 ¹⁵ *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn. 2d 724, 731, 837 P.2d 1000 (1992).

24 ¹⁶ *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn. App. 394, 399, 135 P.3d 941 (2006).

25 ¹⁷ *Id.*

1 Javier Gutierrez is not entitled to UIM coverage because that coverage applies only to an
2 “insured person” and he does not come within that definition. The policy defines “insured
3 person” as “you.” “You” is defined as the named insured and any relative residing in the same
4 household who does not own a car. “Relative” in turn is defined as a person related by blood age
5 14 or older who is listed on the application or endorsed on the policy before a car accident. Jorge
6 does not qualify as “you” because the Declarations Page does not identify him as a named
7 insured, and he is over the age of 14 and not listed on the application or any endorsement. Javier
8 has no coverage under the UIM provision, and Patriot properly denied his UIM claim.

9
10 **2. The UIM statute does not mandate a definition of insured that includes a named insured’s relatives.**

11 The UIM statute did not require Patriot to include Javier among the class of persons
12 insured by the Patriot policy. Washington courts have long held that the UIM statute “does not
13 mandate any particular scope for the definition of who is an insured in a particular automobile
14 insurance policy.”¹⁹ As the Supreme Court has explained,

15
16 The policy of RCW 48.22.030 requires that insurers make available uninsured
17 motorist coverage to a class of ‘insureds’ that is at least as broad as the class in
18 the primary liability sections of the policy. *It does not preclude the parties from*
19 *reaching agreement as to the scope of the class in the first instance.*²⁰

20
21 ¹⁸ *Id.*

22 ¹⁹ *Smith v. Cont’l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995); *Farmers Ins. Co. v. Miller*,
23 87 Wn.2d 70, 75, 549 P.2d 9 (1976).

24 ²⁰ *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 443, 563 P.2d 815 (1977) (emphasis added)
25 (quoting *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 337, 494 P.2d 479 (1972)), *abrogated in*
26 *other part by statute as stated in Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17
(1987).

1 The Court of Appeals reiterated this holding in March of this year:

2 Underinsured motorist coverage is limited personal accident insurance chiefly for
3 the benefit of the named insured. Limiting the scope of the definition of who else
4 is an “insured” does not run afoul of the public policy behind Washington’s UIM
statute.²¹

5 Other Washington cases also support this holding.²²

6 Here, the scope of who is insured is consistent in the UIM and liability coverages because
7 each applies to “you,” which is defined the same way throughout the policy. The Patriot policy
8 therefore fully complied with the UIM statute.

9 **3. RCW 4.22.005 does not require automobile insurance policies to provide UIM**
10 **coverage to a named insured’s family members.**

11 The defendants have argued that the policy’s definition of “insured person” is invalid
12 because it conflicts with RCW 48.22.005. They contend that RCW 48.22.005 defines “insured”
13 as all residents of the named insured’s household, and that this definition is incorporated into the
14 UIM statute, RCW 48.22.030. This argument is, however, unsupported by the statutes, the
15 legislative history, or the case law.

16 **A. The definition of “insured” in RCW 48.22.005 does not include the insured’s**
17 **relatives.**

18 RCW 48.22.005 defines “insured” and “named insured” as follows:

19 ²¹ *Vasquez v. American Fire & Cas. Co.*, ___ Wn. App. ___, 298 P.3d 94, 98 (2013).

20 ²² *Fin. Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 353, 931 P.2d 168 (1997) (“[W]hen the
21 question revolves around the initial extension of coverage, that is, the definition of who is and is
22 not an insured, public policy is not violated so long as insured persons are defined the same in
23 the primary liability and UIM sections of the policy.”); *see also Dairyland Ins. Co. v. Uhls*, 41
24 Wn. App. 49, 53, 702 P.2d 1214 (1985) (“[T]he parties may agree to a narrow definition of
insured so long as that definition is applied consistently throughout the policy[.]”) (quoting
Raynes, 88 Wn.2d at 444); *Wheeler v. Rocky Mountain Fire and Casualty Co.*, 124 Wn. App.
868, 103 P.3d 240 (2004) (stating that insurer may choose not to include certain persons in
definition of “insured” in UIM policies).

1 Unless the context clearly requires otherwise, the definitions in this section apply
2 throughout this chapter.

3

4 (5) "Insured" means:

5 (a) The named insured or a person who is a resident of the named insured's
6 household and is either related to the named insured by blood, marriage, or
adoption, or is the named insured's ward, foster child, or stepchild; or

7 (b) A person who sustains bodily injury caused by accident while: (i) Occupying
8 or using the insured automobile with the permission of the named insured; or (ii) a
pedestrian accidentally struck by the insured automobile.

9

10 (9) "Named insured" means the individual named in the declarations of the policy
11 and includes his or her spouse if a resident of the same household.

12 The word "or" throughout the definition of "insured" in subsection (5) indicates that the term has
13 more than one meaning. "Insured" may mean "[1] [t]he named insured *or* [2] a person who is a
14 resident of the named insured's household . . . *or* [3] the named insured's ward, foster child, or
15 stepchild . . ." ²³ By using the disjunctive "or", ²⁴ the statute does not mandate that the insured
16 always include residents of the named insured's household; instead, the term may refer only to
17 the named insured and certain relatives, as with the Patriot policy.

18 The disjunctive nature of the definition of "insured" becomes even more apparent when
19 compared to the statutory definition of "named insured." RCW 48.22.005(9) defines "named
20 insured" as "the individual named in the declarations of the policy *and includes* his or her spouse
21

22 ²³ RCW 48.22.005(5)(a) (emphasis added).

23 ²⁴ *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 319, 190 P.3d 28 (2008)
24 ("[T]he word 'or' does not mean 'and' unless legislative intent clearly indicates to the
contrary."); *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 752, 600 P.2d 1272 (1979) ("The use of
the word 'or' is disjunctive.").

1 if a resident of the same household.”²⁵ By using the conjunctive phrase “and includes,” the
2 statute clearly indicates that “named insured” also encompasses a named insured’s spouse if
3 living in the same household. If the legislature had intended to define “insured” in the same
4 manner—that is, conjunctively—then it would have used “and”; instead, it used “or.” Because
5 the legislature used different terms in the same statute, we must assume the legislature intended
6 to convey different meanings.²⁶

7
8 **B. RCW 48.22.005’s definition of “insured” is not incorporated into the UIM
statute.**

9 Even if the definition of “insured” in RCW 48.22.005(5) were not disjunctive, that
10 definition would not modify the UIM statute, RCW 48.22.030, because the latter statute does not
11 use the term “insured” standing alone. Rather, the critical subsection of RCW 48.22.030,
12 subsection (2), uses the terms “person insured thereunder” and “named insured”:

13 No new policy or renewal of an existing policy insuring against loss resulting
14 from liability imposed by law for bodily injury, death, or property damage,
15 suffered by any person arising out of the ownership, maintenance, or use of a
16 motor vehicle shall be issued with respect to any motor vehicle registered or
17 principally garaged in this state unless coverage is provided therein or
18 supplemental thereto for the protection of *persons insured thereunder* who are
19 legally entitled to recover damages from owners or operators of underinsured
20 motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of
21 bodily injury, death, or property damage, resulting therefrom, except while
operating or occupying a motorcycle or motor-driven cycle, and except while
operating or occupying a motor vehicle owned or available for the regular use by
the *named insured* or any family member, and which is not insured under the
liability coverage of the policy. The coverage required to be offered under this
chapter is not applicable to general liability policies, commonly known as

22 ²⁵ RCW 48.22.005(9) (emphasis added).

23 ²⁶ See *Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)
24 (“Statutes must be interpreted and construed so that all the language used is given effect, with no
portion rendered meaningless or superfluous.”).

1 umbrella policies, or other policies which apply only as excess to the insurance
2 directly applicable to the vehicle insured.²⁷

3 If the legislature had intended “insured” in RCW 48.22.005(5) and “persons insured thereunder”
4 in RCW 48.22.030(2) to mean the same thing, it would have used the same term in both
5 statutes.²⁸

6 The legislative history of RCW 48.22.005 also makes it clear that that statute applies only
7 to personal injury protection (PIP) coverage, and not UIM coverage. To the extent the statutory
8 language is ambiguous, that legislative history is relevant.²⁹ The bill passed in 1993 that was
9 later codified in part as RCW 48.22.005 was entitled “Motor Vehicle Insurance—Personal Injury
10 Protection Benefits.”³⁰ That bill makes many references to PIP, but does not once mention
11 “underinsured” or “UIM.”³¹ Moreover, the House Bill Report describes the bill as one
12 “[r]egulating the mandatory offering of personal injury protection insurance.”³² The Report also
13 makes no mention of UIM. A 2003 amendment to RCW 48.22.005 also pertained exclusively to
14 PIP coverage.³³

16 _____
17 ²⁷ RCW 48.22.030(2) (emphasis added).

18 ²⁸ See *Whatcom Cnty.*, 128 Wn.2d at 546.

19 ²⁹ *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228, 232 (2007) (“If the statutory
20 language is susceptible to more than one reasonable interpretation, then a court may resort to
21 statutory construction, legislative history, and relevant case law for assistance in discerning
22 legislative intent.”).

23 ³⁰ See Laws of 1993, ch. 242, exhibit 3 to Munson Decl.

24 ³¹ *Id.*

25 ³² House Bill Report for Engrossed Substitute House Bill 1233 (1993), exhibit 4 to Munson Decl.

26 ³³ See Laws of 2003, ch. 115, exhibit 5 to Munson Decl.; House Bill Report for House Bill 1084
(2003), exhibit 6 to Munson Decl. (stating in summary that bill “[m]akes technical amendments
to the insurance code involving the clarification of existing statutory language pertinent to
personal injury protection coverage”).

1 A review of case law also shows that the definition of “insured” in RCW 48.22.005 is not
2 incorporated into the UIM statute. Not one of the scores of cases interpreting the UIM statute³⁴
3 relies on RCW 48.22.005 to define “insured” or any similar term in the UIM statute. Instead, as
4 discussed above, cases interpreting the UIM statute—including one decided less than four
5 months ago—hold that it does not mandate any particular scope for the definition of who is an
6 insured in a particular automobile insurance policy.³⁵ Indeed, only four published Washington
7 cases even cite RCW 48.22.005, and only one of those cases refers to that statute’s definition of
8 “insured.”³⁶ In sum, not a single legal authority supports the defendants’ position regarding
9 RCW 48.22.005.

11 VI. Conclusion

12 The policy that Patriot issued to Jorge Gutierrez does not cover relatives of the named
13 insured who are 14 or over. Jorge’s son Javier was 19 when the accident occurred, so he is not
14 entitled to UIM coverage. Under the UIM statute, Patriot was free to define the scope of UIM
15 coverage so as not to include relatives such as Javier. Finally, RCW 48.22.005 does not require
16
17
18


19 ³⁴ The statute’s annotations have 82 sections.

20 ³⁵ *Smith v. Cont’l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995) (quoting *Farmers Ins. Co. v.*
Miller, 87 Wn.2d 70, 75, 549 P.2d 9 (1976)); *Vasquez v. American Fire & Cas. Co.*, ___ Wn.
21 *App.* ___, 298 P.3d 94, 98 (2013).

22 ³⁶ *Am. States Ins. Co. v. Bolin*, 122 Wn. App. 717, 721 n.6, 94 P.3d 1010 (2004) (citing RCW
48.22.005(1)(b) for definition of “automobile”); *Boag v. Farmers Ins. Co.*, 117 Wn. App. 116,
23 122 n.4, 69 P.3d 370 (2003) (referring, in PIP case, to definition of “income continuation
24 benefits” in RCW 48.22.005(3)); *Daley v. Allstate Ins. Co.*, 86 Wn. App. 346, 355, 936 P.2d
1185 (1997) (citing definition of “bodily injury” in RCW 48.22.005(2)), *rev’d*, 135 Wn.2d 777,
958 P.2d 990 (1998); *Cherry v. Truck Ins. Exch.*, 77 Wn. App. 557, 563 n.3, 892 P.2d 768 (1995)
(citing, in dicta, definition of insured and named insured).

1 UIM coverage for a named insured's relatives. The Court should therefore enter an order that
2 states that Patriot is not required to pay benefits to Javier.

3
4 DATED this 11th day of June, 2013.

5
6 
7 Patrick M. Paulich, WSBA #10951
8 Matthew Munson, WSBA #32019
9 THORSRUD CANE & PAULICH
10 Attorneys for Plaintiff Patriot General
11 Insurance Company
12
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25 PLAINTIFF PATRIOT GENERAL INSURANCE
26 COMPANY'S MOTION FOR SUMMARY
JUDGMENT - 12

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THORSRUD CANE & PAULICH

A PROFESSIONAL SERVICE CORPORATION
1300 PUGET SOUND PLAZA
1325 FOURTH AVENUE
SEATTLE, WA 98101
(206) 386-7755

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5
6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

7
8 PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

9 Plaintiff,

10 v.

11 JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
12 and JAVIER GUTIERREZ,

13 Defendants.

No. 12-2-00908-3

DECLARATION OF AMY BRUNNER
IN SUPPORT OF PLAINTIFF
PATRIOT GENERAL INSURANCE
COMPANY'S MOTION FOR
SUMMARY JUDGMENT

14 I, Amy Brunner, declare as follows:

15 1. I am more than 18 years of age, and I have personal knowledge of the matters set
16 forth herein. I am employed by Sentry Insurance a Mutual Company ("Sentry") as the Director
17 of Compliance/Development. Patriot General Insurance Company is a wholly owned subsidiary
18 of Middlesex Insurance Company, which is a wholly owned subsidiary of Sentry.

19 2. Attached as exhibit 1 is a true and correct copy of the automobile insurance policy
20 that Patriot General Insurance Company issued to Jorge Gutierrez.
21

22
23
24
25 DECLARATION OF AMY BRUNNER IN SUPPORT
OF PLAINTIFF PATRIOT GENERAL INSURANCE
26 COMPANY'S MOTION FOR SUMMARY
JUDGMENT - 1

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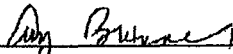
THORSRUD CANE & PAULICH

A PROFESSIONAL SERVICE CORPORATION
1300 PUGET SOUND PLAZA
1325 FOURTH AVENUE
SEATTLE, WA 98101
(206) 386-7755



1 I declare under penalty of perjury under the law of the State of Washington that the
2 foregoing is true and correct.

3 Executed at Freeport, Illinois on this 1st day of February, 2013.

4
5 
6 _____
7 Amy Brunner

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25 DECLARATION OF AMY BRUNNER IN SUPPORT
26 OF PLAINTIFF PATRIOT GENERAL INSURANCE
COMPANY'S MOTION FOR SUMMARY
JUDGMENT - 2

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THORSRUD CANE & PAULICH

A PROFESSIONAL SERVICE CORPORATION
1300 PUGET SOUND PLAZA
1325 FOURTH AVENUE
SEATTLE, WA 98101
(206) 386-7755

EXHIBIT 1

Patriot General Insurance Company
PO BOX 1080
FRREPORT, IL 61032-1080

INSURED COPY

I certify this is a
true and correct copy

Michelle Stupp 1/29/13

Insured
GUTIERREZ, JORGE
1201 MANTILLA ST
WALLA WALLA, WA 99362

471327125

POLICY DECLARATIONS

471327125

POLICY CHANGE
VEHICLE ADD 01/06/2011

01/02/2011

Effective Date: 10/29/2010
Expiration Date: 04/29/2011
Policy effective at time of application or time
event bound coverage whichever is later.

Agent
TOMAS MIRANDA INS AGENCY
P.O. BOX 381
WALLA WALLA, WA 99362

THIS IS NOT A BILL
Keep for your records

Agent Phone # 509-529-9600

\$515.00

10/29/2010

Nothing contained in this declaration page changes the effective dates listed on any outstanding bill or cancel notice sent to you.

IMPORTANT: This form shows changes that you have made to your insurance policy.
To continue your insurance, you must pay all outstanding bills which you received before the "Date Printed" shown at the upper right of this sheet.

Vel #	Year / Make / Model	VIN	PL	CD	Rate	Rate	Rate	Rate	Rate
#	Raw Data	Raw Data	CD	CD	Rate	Rate	Rate	Rate	Rate
1	1994 FORD ECONOLINE E-150 EXCESS VEHICLE	1FDEE14N7RHAG8392	OGF	DDC	99362	PER	R	27	000
2	1997 JEEP GRAND CHER. LAREDO/JT GUTIERREZ, JORGE	1J4B268Y5V0709731	OCF	EAB	99362	PER	R	27	000
3	1994 OLDS CUTLASS SUPREME EXCESS VEHICLE	1G3WT35X5R0338382	HAF	EEC	99362	PER	R	27	000
4	1998 GMC JIMMY GARMONA, MARIA D	1GKOT13W2T2515383	HCF	EAB	99362	PER	F	27	000

CREDIT DISCOUNTS ARE APPLIED TO POLICY RATES
MULTI-CAR

COVERAGES		PREMIUM				
Coverage	Limits/Deductibles	Vehicle # 1	Vehicle # 2	Vehicle # 3	Vehicle # 4	
This policy provides only those coverages where a charge is shown in the premium columns below.						
BODILY INJURY LIABILITY	\$25,000 EACH PERSON \$50,000 EACH ACCIDENT*	51.12	66.00	60.12	53.52	
UNDERINSURED MOTORIST BODILY INJURY	\$25,000 EACH PERSON \$50,000 EACH ACCIDENT*	36.06	42.90	36.06	43.86	
UNDERINSURED MOTORIST PROPERTY DAMAGE	\$10,000 EACH ACCIDENT*	4.08	4.86	4.08	4.98	
PERSONAL INJURY PROTECTION	REJECTED					
PROPERTY DAMAGE LIABILITY	\$25,000 EACH ACCIDENT*	49.08	55.98	48.00	55.20	
		VEHICLE PREMIUM TOTALS	140.34	169.74	148.26	157.56

* Limit of Liability each accident or occurrence as indicated by the Insuring Agreement

PREMIUM SUMMARY	
TOTAL TERM AMOUNT	\$615.90

DRIVER INFORMATION							
Driver #	Driver Name	Birth Date	Gender	Marital	SR22	MVR	DD Course Date
001	GUTIERREZ, JORGE	08/07/1956	M	M	N	Y	00/00/0000
002	CARMONA, MARIA D	03/15/1960	F	M	N	Y	00/00/0000

SURCHARGES THAT APPLY TO THIS POLICY
NONE

POLICY FORMS
The following policy forms and endorsements apply to the coverages as listed in the COVERAGE section:
DRE1-WA(11/08) L1102WA(05/10) PAP1(03/08) PPA-WA(08/10) UM4-WA(08/10) WA1101A(03/10)

ANY RENEWAL OF THIS POLICY SHALL BE SUBJECT TO THE RENEWAL PROVISION UNDER THE GENERAL POLICY PROVISIONS.

This policy is effective on the date shown on the face of these declarations. These declarations form a part of the policy and replace all previously issued declarations for this policy. If these declarations are accompanied by a new policy, this policy replaces any which may have been issued previously with the same policy number.

Important. This insurance policy is a legal contract between you and us.

Read Your Policy Carefully. This index of policy provisions provides a brief outline of some of the important features of your policy, but it is not the insurance contract. Only the actual policy provisions will control. The policy sets forth in detail the rights and obligations of both you and us.

PERSONAL AUTO POLICY

Agreement

What To Do In Case Of A Car Accident or Loss

Notice of Car Accident or Loss
Other Duties

Definitions Used Throughout This Policy

Part I – Liability Coverage

Additional Definitions Used in This Part Only
Additional Payments
Exclusions
Conformity with Financial Responsibility Laws
Out of State Insurance
Limits of Liability
Separate Application of This Coverage
Other Insurance

Part II – Medical Payments Coverage

Additional Definitions Used In This Part Only
Exclusions
Limits of Liability
Other Insurance

Part III – Uninsured Motorists Coverage

Additional Definitions Used in This Part Only
Exclusions
Limits of Liability
Other Insurance
Arbitration

Part IV – Car Damage Coverage

Additional Definitions Used in This Part Only
Your Deductible
Settlement of Loss
Appraisal
Transportation Expenses
Exclusions
Limits of Liability
No Benefit to Bailee
Other Insurance

Part V – General Provisions

Territory
Changes
Two or More Cars Insured
Lawsuit Against Us
Our Recovery Rights
Assignment
Bankruptcy
Out of State Insurance
Renewal of This Policy
Cancellation or Nonrenewal of This Policy
Misrepresentations

Notice of Our Information Practices

AGREEMENT

In return for your premium payment and subject to the terms and conditions of this policy, we will insure you for the coverages up to the limits of liability for which a premium is shown on the Declarations Page of this policy. This insurance applies only to car accidents and losses which happen while this policy is in force. This policy is issued by us in reliance upon the statements which you made in your application for insurance. If you have made any false statement in your application, this policy may not provide any coverage.

WHAT TO DO IN CASE OF A CAR ACCIDENT OR LOSS

Notice of Car Accident or Loss

In the event of a car accident or loss, notice must be given to us promptly. The notice must give the time, place and circumstances of the car accident or loss, including your name and address and that of any involved persons and witnesses. The information which you give to us must be truthful and accurate.

Other Duties

Any person claiming any coverage under this policy must also:

- (1) Cooperate with us and assist us in any matter concerning a claim or lawsuit.
- (2) Immediately send us any legal papers or other papers received relating to claim or lawsuit.

- (3) Submit to physical examinations at our expense by doctors we select as often as we may reasonably require.
- (4) Authorize us to obtain medical, wage and other records.
- (5) Individually submit to examinations under oath or provide such sworn statements as often as we may reasonably require.
- (6) Avoid making any voluntary payments except at your own expense, or making any obligation or incurring any expense other than for first aid for others necessary at the time of the car accident.
- (7) Promptly complete and return any forms we send to you.
- (8) Permit us to retrieve information from the event data recorder of the vehicle involved in the car accident.

Any person claiming Uninsured Motorists Coverage must notify the police within twenty-four (24) hours of the accident if a hit-and-run driver is involved.

A written statement telling us the facts of the car accident and the extent of any injuries or damages must be filed within thirty (30) days after the car accident has been reported.

If any claim is presented due to a hit-and-run accident involving your insured car, you must make the car available for our inspection before its repair or disposal.

Any person claiming Car Damage Coverage must also:

- (1) Provide us with sworn proof of loss within ninety (90) days from the date of loss unless more time is allowed by us in writing if we require it.
- (2) Take reasonable steps after loss to protect your insured car and its equipment from further loss. We will pay reasonable expenses incurred in providing that protection. If you fail to take reasonable steps to protect your insured car, any additional loss because of your failure will not be covered.
- (3) Immediately report any theft or vandalism of your insured car or its equipment to the police.
- (4) Allow us to inspect and appraise the damage to your insured car before its repair or disposal. If you do not comply with this duty, we may have the right to refuse to provide such coverage, or your loss payment may be substantially reduced.

If any person claiming any coverage under this policy fails to perform any of the duties required by this policy, we may refuse to provide any protection or coverage.

DEFINITIONS USED THROUGHOUT THIS POLICY

- | | |
|--|---|
| <ol style="list-style-type: none"> (1) "We", "us" and "our" mean the Company shown on the Declarations Page providing this insurance. (2) "You" and "your" mean the person shown as the named insured on the Declarations Page and that person's spouse if residing in the same household. You and your also means any relative of that person if they reside in the same household, providing they or their spouse do not own a motor vehicle. (3) "Relative" means a person living in your household related to you by blood, marriage or adoption, including a ward or foster child. Relative includes a minor under your guardianship who lives in your household. Any relative who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss. (4) "Regular operator" means any person age fourteen (14) or older and a resident of your household or any person who drives your insured car while it is furnished or available for their regular use. (5) "Bodily injury" means bodily harm, or sickness, disease or death. (6) "Property damage" means damage to or destruction of tangible property, including loss of its use. (7) "Car" means: | <ol style="list-style-type: none"> (A) A four-wheeled land motor vehicle weighing five thousand (5,000) pounds or less of the private passenger sedan, station wagon, mini van or jeep type, licensed for use on public roads; or (B) A four-wheeled land motor vehicle with a rated load capacity of two thousand (2,000) pounds or less of the pickup, sport utility, van, or panel truck type, licensed for use on public roads, provided it is not used for any commercial purposes. <ol style="list-style-type: none"> (8) "Utility trailer" means a vehicle designed to be towed by a car. It includes a farm implement or a farm wagon while towed on public roads by a car. It does not include a utility trailer while used as a home office, store, display, or passenger trailer. (9) "Your insured car" means: <ol style="list-style-type: none"> (A) Any car you own that is described on the Declarations Page and any car you replace it with. A replacement car will have the same coverage as the car it replaced. If you want coverage to apply to a replacement car, you must notify us within fourteen (14) days of its acquisition. You must pay any additional premium charges for coverage for the replacement car. (B) Any additional car of which you acquire ownership during the policy period, provided we insure all other cars you own on the date |
|--|---|

you acquire the additional car. For coverage to apply under Part I – Liability coverage, you must, however, notify us within fourteen (14) days of its acquisition. Car Damage Coverage will apply to the additional car only if you ask us to provide such coverage and we agree to do so. You must pay any additional premium charges for coverage for the additional car.

(C) Except for collision or comprehensive coverage under Part IV - Car Damage Coverage of this policy, any car not owned by you while being used temporarily with the permission of the owner as a temporary substitute for any other vehicle described in the Declarations Page because of its withdrawal from normal use due to breakdown, repair, servicing, loss or destruction.

(D) Any utility trailer you own, or any utility trailer not owned by you while being used with permission of the owner, except for collision or comprehensive under Part IV - Car Damage Coverage of this policy.

For the purpose of this policy, a car shall be deemed to be owned by a person if leased under a written agreement to that person for a continuous period of at least six (6) months.

(10) "Motor vehicle" means a land motor vehicle or a utility trailer, but does not mean a vehicle:

(A) Operated on rails or crawler-treads.

(B) Which is a farm type tractor or equipment designed for use principally off public roads when not used on public roads.

(C) Which is an all-terrain or other recreational vehicle type, not licensed for use on public roads and is designed for use principally off public roads, when not used on public roads.

(D) Being used as a residence or premises.

(11) "Auto Business" means the business or occupation of selling, repairing, servicing, storing, parking, transporting, delivering, testing, road testing or repossessing cars.

(12) "Occupying" means in, on, getting in or on, or getting off or out of.

(13) "Car Accident" means an unexpected and unintended event that causes bodily injury or property damage and arises out of the ownership, maintenance, or use of a car or motor vehicle.

(14) "Loss" means direct, sudden and accidental theft of or damage to your insured car, including its covered equipment.

(15) "State" means the District of Columbia, and any state, territory or possession of the United States.

(16) "Misrepresent" or "Misrepresentations" mean representation of information to us during the application for coverage and during the policy period that is known by you to be false or misleading and affects either the eligibility for coverage and/or the premium that is charged. This also includes concealment of such information relevant to the application and the maintenance of coverage once the policy is in force.

PART I – LIABILITY COVERAGE

This coverage applies only if a premium is shown for this coverage on the Declarations Page.

We will pay damages for which any insured person is legally liable because of bodily injury and/or property damage caused by a car accident arising out of the ownership, maintenance or use of a car or utility trailer. We will settle any claim or defend any lawsuit which is payable under the policy, as we deem appropriate.

We have no duty to defend any suit or settle any claim for bodily injury or property damage not covered under this policy.

Our duty to settle or defend ends when our limit of liability for this coverage has been paid.

Additional Definitions Used in This Part Only

As used in this Part,

(1) "insured person" or "insured persons" means:

(A) You,

(B) Any person using your insured car.

(C) Any person or organization with respect only to legal liability for acts or omissions of:

(1) Any person covered under this Part while using your insured car; or

(2) You under this Part while using any car or utility trailer other than your insured car if the car or utility trailer is not owned or hired by that person or organization.

No person shall be considered an insured person if the person uses a car or utility trailer without the permission of the owner or outside the scope of that permission.

The following persons are not insured persons for this coverage:

(1) The United States Government or any other government or civil authority, or any other level of the government; and

(2) Any person operating a motor vehicle as an employee of the United States Government when the provisions of the Federal Tort Claims Act apply.

(2) "Contamination" means any unclean, unsafe, damaging, injurious, or unhealthy condition arising from

the presence of **pollutants**, whether permanent or transient.

(3) "**Pollutants**" means smoke, vapors, soot, fumes, acids, sounds alkalis, chemicals liquids, solids, gases, thermal substances, or any other irritants and impurities.

Additional Payments

We will pay, in addition to our limit of liability:

- (1) All costs we incur in the settlement of any claim or defense of any lawsuit.
- (2) Interest on damages awarded in any lawsuit we defend accruing after entry of judgment and before we have paid, offered to pay, or deposited in court that portion of the judgment which is not more than our limit of liability.
- (3) Premiums on appeal bonds and attachment bonds required in any lawsuit we defend. We will not pay the premium for an attachment bond that is more than our limit of liability. We have no duty to apply for or furnish bonds.
- (4) Up to \$200 a day that you actually lose when you miss work, but not other income, when we ask you to attend trials or hearings.
- (5) Necessary expenses incurred for first aid for others at the time of the car accident because of **bodily injury** covered by this Part.
- (6) Any other reasonable expenses incurred at our specific request.

Exclusions

This coverage and our duty to defend does not apply to:

- (1) **Bodily injury or property damage** resulting from the ownership, maintenance or use of any vehicle when used to carry persons or property for compensation or a fee, including, but not limited to, delivery of newspapers, magazines, food, or any other products. This exclusion does not apply to shared-expense car pools.
- (2) **Bodily injury or property damage** caused intentionally by or at the direction of an **insured person**.
- (3) **Bodily injury or property damage** with respect to which any person is an insured under nuclear energy liability insurance or that results from nuclear reactions, radiation or fallout. This exclusion applies even if the limits of that insurance are exhausted.
- (4) **Bodily injury** to an employee or a fellow employee of an **insured person** arising during the course of employment. This exclusion does not apply to **bodily injury** to a domestic employee unless workers' compensation benefits are required or available for that domestic employee.
- (5) **Bodily injury or property damage** resulting from the ownership maintenance or use of any vehicle, including **your insured car**, in the course of any business other than an **auto business**, farming or

ranching, unless the business use is infrequent or is disclosed to and accepted by us.

- (6) **Bodily injury or property damage** resulting from auto business operations. This exclusion does not apply to you, or anyone associated as agent for, or employed by you, with respect to the operation of **your insured car**.
- (7) Damage to property owned by, rented to, or being transported by, used by, or in the charge of an **insured person**, except damage to a private residence or garage you rent. A **motor vehicle** operated by an **insured person** shall be considered to be property in the charge of an **insured person**.
- (8) **Bodily injury or property damage** assumed by an **insured person** under any contract or agreement.
- (9) **Bodily injury or property damage** arising out of the ownership, maintenance or use of **your insured car** while it is being leased or rented to others.
- (10) **Bodily injury or property damage** resulting from the ownership, maintenance or use of any vehicle other than **your insured car**, which is owned by, or furnished or available for regular use by you.
- (11) **Bodily injury to you**.
- (12) **Bodily injury or property damage** caused while **your insured car** is used in or preparing for any racing, speeding, stunt, performance or demolition activity, regardless of whether such activity is prearranged or organized.
- (13) **Bodily injury** resulting from, arising out of or related to **pollutants** and/or **contamination** whether by vehicle or an **insured person**.
- (14) **Bodily injury or property damage** arising out of the loading or unloading of any **car**. This exclusion does not apply to you or a lessee or bailee of any **car** or employee of any such person.
- (15) **Bodily injury or property damage** resulting from the use of a vehicle for snow removal.
- (16) Punitive or exemplary damages.

Conformity with Financial Responsibility Laws

If we certify this policy as proof of compliance under any financial responsibility law, it will comply with that law to the extent of the coverage required by the law. You must reimburse us if we have to make a payment that we would not have had to make if this policy were not certified.

Out of State Insurance

If an **insured person** becomes subject to the financial responsibility law or the compulsory insurance law or similar laws of another state because of the ownership, maintenance or use of **your insured car** in that state, we will interpret this policy to provide any broader coverage required by those laws. Any broader

coverage so afforded shall be reduced to the extent that other automobile liability coverage applies. No person may, in any event, collect more than once for the same elements of loss.

Limits of Liability

Subject to all the provisions below, the limits of liability shown in the Declarations Page are the maximum amounts we will pay in damages for any one car accident.

- (1) The **bodily injury** liability limit for "each person" is the maximum limit for all claims by all persons for damages from **bodily injury** to one person.
- (2) Subject to the **bodily injury** liability limit for "each person", the **bodily injury** liability limit for "each accident" is the total limit for all claims for damages from **bodily injury** to two or more persons in any one car accident.
- (3) The **property damage** liability limit for "each accident" is the limit for all claims for damages, direct or indirect, by all persons for damage to property in any one car accident.

We will pay no more than these maximums regardless of:

- (1) The number of vehicles described or premiums shown on the Declarations Page.
- (2) The number of **insured persons**.
- (3) The number of claims made or lawsuits filed.
- (4) The number of claimants making claims.

- (5) The number of policies issued by us.
- (6) The number of vehicles involved in the car accident.

Any amount payable to an **insured person** under this part will be reduced by any amount paid or payable for the same expense under Part II - Medical Payments or Part III - Uninsured Motorist Coverage.

No one will be entitled to duplicate payments under this policy for the same elements of damages.

If this policy provides coverage that exceeds the limits required by the applicable Financial Responsibility laws, then such excess coverage shall not apply to the operation, maintenance or use of **your insured car** by any person other than **you**, but this limitation shall not apply to liability incurred by **you**.

Separate Application of This Coverage

This coverage applies separately to each **insured person** against whom a claim is made or lawsuit is brought, except with respect to the limits of liability.

Other Insurance

If there is other applicable coverage on a loss covered by this Part, we will pay only **our** share of the damages. **Our** share is the proportion that the limits of liability bear to the total of all applicable limits. For coverage afforded under this Part for a **car** or **utility trailer** you do not own, this coverage is excess over any other applicable insurance.

PART II – MEDICAL PAYMENTS COVERAGE

This coverage applies only if a premium is shown for the coverage on the Declarations Page.

This coverage does not apply at all if there is any Personal Injury Protection Coverage in effect at the time of the **car accident**.

We will pay the **usual and customary charge** for reasonable and necessary expenses incurred within one year from the date of **car accident** for medical and funeral services because of **bodily injury** sustained by an **insured person** and caused by a **car accident**.

Reasonable medical expenses do not include expenses:

- (1) For treatment, services, products or procedures that are experimental in nature, for research, or not primarily designed to serve a medical purpose; or are not commonly recognized throughout the medical profession and within the United States as appropriate treatment of **bodily injury**;
- (2) Incurred for the use of thermography or other related procedures of similar nature;
- (3) Incurred for the use of acupuncture or other related procedures of a similar nature; or
- (4) Incurred for the purchase or rental of equipment not primarily designed to serve a medical purpose.

Additional Definitions Used In This Part Only

As used in this part

- (1) "**Insured person**" or "**insured persons**" means:
 - (A) **You** while occupying your **insured car**.
 - (B) **You** as a pedestrian when struck by a **motor vehicle** or **utility trailer**.
 - (C) Any other person while **occupying your insured car** while the **car** is being used by **you** or another person with **your** permission.
- (2) "**Usual and customary charge**" means an amount which we determine as a customary charge for services in the geographical area in which the service is rendered. We may determine this charge through the use of independent sources of **our** choice.

Exclusions

This coverage does not apply to **bodily injury** to any person:

- (1) Sustained while **occupying your insured car** when used to carry persons or property for compensation or a fee, including, but not limited to, delivery of newspapers, magazines, food, or any

other product. This exclusion does not apply to shared-expense car pools.

- (2) Sustained while **occupying** any vehicle being used as a residence or premises.
- (3) Sustained while **occupying** a **motor vehicle** with less than four wheels.
- (4) Sustained while **occupying** or when struck by any vehicle, other than **your insured car**, which is owned by or furnished or available for regular use by **you**.
- (5) Sustained while **your insured car** is being leased or rented to others.
- (6) Sustained while **occupying** any vehicle while the vehicle is being used in the business or occupation of an **insured person**. This exclusion does not apply while **occupying your insured car** if business use is disclosed to and accepted by **us**.
- (7) Occurring during the course of employment if benefits are payable or required to be provided under a workers' compensation law, disability benefits or other similar laws.
- (8) Caused by war (declared or undeclared), civil war, insurrection, rebellion, revolution, riot, nuclear reaction, radiation or radioactive contamination, or by any consequence of these.
- (9) Sustained while **occupying** any vehicle being used in or to prepare for any racing, speed, stunt, performance or demolition activity, regardless of whether such activity is prearranged or organized.
- (10) Intentionally caused by an **insured person** or at the direction of an **insured person**.
- (11) Sustained while **your insured car** is being used in the commission of a felony or for any other purpose which is legally recognized to be criminal.
- (12) Sustained while **your insured car** is being operated by a **regular operator** who was not

reported to **us** on the original application for insurance or otherwise disclosed to **us** and listed on the declarations page before the **car accident**.

Limits of Liability

We will pay no more than the limits of liability shown for this coverage on the Declarations Page for each person injured in any one **car accident** regardless of:

- (1) The number of vehicles described or premiums shown on the Declarations Page.
- (2) The number of **insured persons**.
- (3) The number of claims made or lawsuits filed.
- (4) The number of claimants making a claim.
- (5) The number of policies issued by **us**.
- (6) The number of vehicles involved in the **car accident**.

Any amount payable to an **insured person** under this part will be reduced by any amount paid or payable for the same expense under Part I - Liability or Part III - Uninsured Motorists Coverages.

No one will be entitled to duplicate payments under this policy for the same elements of damages.

Other Insurance

This Medical Payments Coverage is excess over any other applicable insurance.

Our Rights To Recover Payment

If **we** make payment under this Part, **we** shall be entitled, to the extent of such payment, to the proceeds of any settlement or judgment recovered from, or on behalf of, any responsible party.

In the event **you** recover payment from the responsible party, to the extent **you** recover payment from the responsible party, to the extent of such recover, any rights to payment under this Part no longer exist.

PART III – UNINSURED MOTORISTS COVERAGE

This coverage applies only if there is a premium shown for the coverage on the Declarations Page.

We will pay damages for **bodily injury** which an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle**. The **bodily injury** must be caused by a **car accident** and result from the ownership, maintenance or use of an **uninsured motor vehicle**.

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

Additional Definitions Used in This Part Only

As used in this Part:

- (1) "**Insured Person**" means:
 - (A) **You**.

- (B) Any other person **occupying your insured car** with **your** permission.
- (C) Any person for damages that person is entitled to recover because of **bodily injury to you** or another occupant of **your car**.

No person shall be considered an **insured person** if that person uses a **motor vehicle** without permission of the owner.

- (2) "**Uninsured motor vehicle**" means a **motor vehicle** which is:
 - (A) Not insured by a **bodily injury** liability bond or policy at the time of the accident.
 - (B) Insured by a liability bond or policy at the time of the accident, but which provides **bodily injury** liability limits less than the minimum **bodily injury** liability limits required by the financial

responsibility law of the state in which **your insured car** is principally garaged.

(C) A hit-and-run vehicle whose operator or owner is unknown and which strikes:

- (i) **You.**
- (ii) A vehicle which **you** are **occupying.**
- (iii) **Your insured car.**

There must be actual physical contact with the hit-and-run vehicle.

(D) Insured by a **bodily injury** liability bond or policy at the time of the accident but the insurer denies coverage or is or becomes insolvent.

"**Uninsured motor vehicle**" does not mean a vehicle:

- (A) Owned by or furnished or available for the regular use of **you.**
- (B) Owned or operated by a self-insurer within the meaning of any **motor vehicle** financial responsibility law, motor carrier law or any similar law except if that self-insurer is or becomes insolvent.
- (C) Owned by a governmental unit or agency.
- (D) Designed mainly for use off public roads, while not on public roads.
- (E) Operated on rails or crawler treads.
- (F) While used as a residence or premises.

Exclusions

This coverage does not apply to **bodily injury** sustained by an **insured person**:

- (1) While **occupying** or when struck by a **motor vehicle** owned by **you** for which insurance is not afforded under this Part.
- (2) While occupying a **motor vehicle** with less than four wheels.
- (3) If that person or the legal representative of that person agrees to any settlement without **our** written consent.
- (4) While **occupying your insured car** when used to carry persons or property for compensation or a fee, including, but not limited to, delivery of newspapers, magazines, food, or any other products. This exclusion does not apply to shared-expense car pools.
- (5) While **occupying** any vehicle while the vehicle is being used in the business or occupation of an **insured person**. This exclusion does not apply while **occupying your insured car** if business use is infrequent or is disclosed to and accepted by **us**.
- (6) While any vehicle is being used in or to prepare for any racing, speed, stunt, performance, or demolition activity, regardless of whether such activity is prearranged or organized.
- (7) While **your insured car** is being operated by a **regular operator** who was not reported to **us** on the original application for insurance or otherwise

disclosed to **us** and listed on the declarations page before the **car accident**.

This coverage shall not apply to punitive or exemplary damages.

Limits of Liability

Subject to all the provisions below, the limits of uninsured motorists insurance shown on the Declarations Page are the maximum amounts we will pay in damages for any one **car accident**:

- (1) The **bodily injury** limit for "each person" is the maximum limit for all claims by all persons for damages from **bodily injury** to any one person.
- (2) Subject to the **bodily injury** limit for "each person", the **bodily injury** liability limit for "each accident" is the total limit for all claims for damages from **bodily injury** to two or more persons in any one **car accident**.

We will pay no more than these maximums regardless of:

- (1) The number of vehicles described or premiums shown on the Declarations Page.
- (2) The number of **insured persons**.
- (3) The number of claims made or lawsuits filed.
- (4) The number of claimants making a claim.
- (5) The number of policies issued by **us**.
- (6) The number of vehicles involved in the **car accident**.

Any amounts payable to an **insured person** will be reduced by:

- (1) Any payments made by or on behalf of the owner or operator of the **uninsured motor vehicle**, or any other person or organization which may be legally liable.
- (2) Any amount paid or payable for the same expense under Part I - Liability Coverage or Part II - Medical Payments.
- (3) Any payments made or payable because of **bodily injury** under any workers' compensation law or disability benefits law or similar law.

No one will be entitled to duplicate payments under this policy for the same elements of damages.

Other Insurance

If there is other applicable coverage on a loss covered by this Part, **we** will pay only **our** share of the damages. **Our** share is the proportion that **our** limits of liability bear to the total of all applicable limits. When an **insured person** is **occupying a car or utility trailer you do not own**, this coverage is excess over any other applicable insurance. This coverage shall apply only in the amount by which the limits of liability for this

coverage exceed the applicable limits for such other insurance.

Arbitration

If we and an **insured person** claiming coverage under this Part do not agree:

- (1) On the legal liability of the operator or owner of an **uninsured motor vehicle**; or
- (2) As to the amount of damages;

then the matter may be arbitrated upon written agreement between both parties. In this event, each party will select an arbitrator unless the parties agree in writing on the use of a single arbitrator. If two arbitrators are used, they will select a third. If the two arbitrators cannot agree on the third within thirty (30) days, then on joint application by the insured and us, the third arbitrator will be appointed by a judge or court having jurisdiction.

Disputes concerning coverage under this Part may not be arbitrated.

Each party will:

- (1) Pay the expenses they incur; and
- (2) Bear the expenses of the single arbitrator, equally.
- (3) Bear the expenses of the third arbitrator, equally, if two arbitrators are used and a third is selected.

Unless both parties agree otherwise, arbitration will take place in the county in which the **insured person** resided at the time the policy was purchased. Local rules of procedure and evidence will apply. A decision agreed to by two of the arbitrators, or the single arbitrator, shall be binding as to:

- (1) The legal liability of the operator or owner of an uninsured vehicle; and/or
- (2) The amount of damages. The arbitrators shall have no authority to award an amount in excess of the limits of liability or which includes punitive or exemplary damages.

The decision of the arbitrators is binding only for the amount of the award that does not exceed our limits of liability or does not include punitive or exemplary damages.

If an award does exceed our limits of liability, or includes punitive or exemplary damages, either party may demand the right to trial. Such demand must be made within sixty (60) days of the arbitrator's decision, or such lesser time as provided by the rules of civil procedure for the jurisdiction where the arbitration occurs.

We will not pay the punitive or exemplary damages which the **insured person** may be legally entitled to collect. No valid arbitration award shall include amounts for punitive or exemplary damages.

PART IV – CAR DAMAGE COVERAGE

We will pay for loss to your **insured car** which is:

- (1) Caused by **collision**, but only if a premium is shown for the coverage on the Declarations Page.
- (2) Caused by **comprehensive**, but only if a premium is shown for the coverage on the Declarations Page.

Additional Definitions Used in This Part Only

As used in this Part:

- (1) "**Collision**" means actual physical contact between your **insured car** and another object or upset of your **insured car**.
- (2) "**Comprehensive**" means **loss** to your **insured car** not caused by **collision**. The following is considered **loss** caused by **comprehensive**, including, but not limited to:
 - (A) Missiles or falling objects;
 - (B) Fire;
 - (C) Theft or larceny;
 - (D) Explosion or earthquake;
 - (E) Windstorm;
 - (F) Hail, water or flood;
 - (G) Malicious mischief or vandalism;
 - (H) Riot or civil commotion;
 - (I) Contact with bird or animal; or

(J) Breakage of glass

If breakage of glass results from a **collision**, you may elect to have it treated as a **loss** caused by **collision**.

(3) "**Covered Equipment**" means:

- (A) Any permanently installed equipment, parts, or accessories which were purchased as standard or optional equipment from the manufacturer of the vehicle.
- (B) Any permanently installed device designed for the recording or reproduction of sound, provided the device is installed in the opening of the dash or console normally used by the manufacturer for the installation of a radio. The maximum we will pay for **loss** to the device and its accessories is \$500.

(4) "**Rental Vehicle**" means a **car** you rent or hire, only from an entity licensed to conduct such business under applicable state law, while such **car** is in your custody or is being operated by you or a **relative**.

(5) "**Your insured car**" also includes a **rental vehicle** while it is being used as a temporary substitute for a **car** described on the Declarations Page because of its withdrawal from normal use due to breakdown, repair, servicing, loss or destruction.

A rental vehicle, under this part, shall be provided the same coverage as the vehicle it temporarily replaces.

Your Deductible

The deductible amount shown on the Declarations Page will be subtracted from payment of any loss covered under this Part.

No deductible will apply to a loss to window glass when the glass is repaired instead of replaced.

We will waive the collision deductible if your insured car and another motor vehicle insured by us collide. This provision applies only if the other motor vehicle is not owned by you.

Settlement of Loss

We may pay the loss in money or repair or replace damaged or stolen property. We may, at any time before the loss is paid or the property is replaced, return, at our expense, any stolen property either to you or to the address shown on the Declarations Page, with payment for the resulting damage. If we repair or replace the damaged or stolen property, we reserve the right to use parts of like kind and quality. We may keep all or part of the property salvage upon payment to you of its agreed or appraised value. You may not abandon the damaged property to us.

Appraisal

You or we may demand appraisal of the loss. Each will appoint and pay a competent and impartial qualified appraiser. Other appraisal expenses will be shared equally. The appraisers, or a judge or a court having jurisdiction, will select an umpire to decide any differences. Each appraiser will state separately the actual cash value and the amount of loss. An award in writing by the two appraisers, or either of the appraisers and the umpire, will determine the amount payable.

We do not waive any of our rights under this policy by agreeing to an appraisal.

Transportation Expenses

We will pay you for reasonable actual incurred alternative transportation expenses if your insured car covered by this Part is stolen. Transportation expenses covered shall not exceed \$20 per day. The payment period begins forty-eight (48) hours after you have told us of the theft and have notified the police. The period ends:

- (1) Seventy-two (72) hours after we make an offer to pay the actual cash value of your insured car;
- (2) When your insured car is returned to use; or
- (3) When we have paid \$600 in alternative transportation costs,

whichever occurs first.

Exclusions

This coverage does not apply to loss:

- (1) To your insured car while used to carry persons or property for compensation or a fee, including, but not limited to, delivery of newspapers, magazines, food, or any other products. This exclusion does not apply to shared-expense car pools.
- (2) Caused by war (declared or undeclared), civil war, insurrection, rebellion, revolution, riot, nuclear reaction, radiation, or radioactive contamination, or any consequence of any of these.
- (3) To television antennas, awnings, cabanas or any equipment designed to provide additional living or transportation facilities.
- (4) To tapes, records, compact discs or other devices for use with equipment designed for the reproduction of sound including any cases or other containers used in storing or carrying such items.
- (5) To equipment designed or used for the detection or location of radar or laser.
- (6) To equipment used to either mechanically or structurally modify your insured car resulting in an increase in performance or change in appearance.
- (7) To any closed container designed to fit in the bed of a pickup truck, plow, winches and lift kits whether or not permanently attached.
- (8) To any facilities used for cooking.
- (9) To equipment, parts and accessories which are not defined as covered equipment unless items are declared as permanently installed in or on your car and a specific premium is paid.
- (10) Resulting from wear and tear, freezing, or other temperature changes, mechanical or electrical breakdown or failure, manufacturers defect, road damage to tires or other prior loss damage. This exclusion does not apply if the loss results from theft covered by this insurance.
- (11) While your insured car is being used in or preparing for any racing, speeding, stunt, performance or demolition activity, regardless of whether such activity is prearranged or organized.
- (12) Sustained while occupying any vehicle while the vehicle is being used in the business or occupation of an insured person. This exclusion does not apply while occupying your insured car if business use is infrequent or is disclosed to and accepted by us.
- (13) To any car not owned by you that is not your insured car.
- (14) To your insured car, if at the time of the loss, your insured car was driven by a regular operator who was not reported to us on the original application for

insurance or otherwise disclosed to us and listed on the declarations page before the car accident.

(15) To your insured car:

- (A) While being used in any illegal trade or transportation, or to commit a felony or for any other purpose which is legally recognized to be criminal.
- (B) Caused intentionally by or at the direction of you or any other person using your insured car with your permission.
- (C) Due to the destruction or confiscation by governmental or civil authorities. This exclusion 15 (C) does not apply to the interests of the Loss Payees in your insured car.
- (D) Due to theft or conversion of your car, or a non-owned car, or any optional equipment we insure, which occurs prior to its delivery to you, or which occurs after you have delivered your car or non-owned car to a third party to whom you have authorized to sell, trade or otherwise dispose of it.
- (E) Due to diminution of value, meaning the actual or perceived loss in market or resale value which results from a direct and accidental loss to a car and any optional equipment we insure.
- (F) Due to acquisition of a stolen vehicle.

(16) To your insured car due to mold damage or mold remediation costs, regardless of the source.

Limits of Liability

Our limits of liability for loss shall not exceed the lesser of:

- (1) The actual cash value of the stolen or damaged property at the time of loss, reduced by the applicable deductible; or
- (2) The amount necessary to repair or replace the property with parts or property of like kind and quality, reduced by the applicable deductible.

In determining the actual cash value of the property or damaged part of the property at the time of the loss, an adjustment for depreciation and physical condition will be made in relation to the physical condition and wear and tear. If new parts are used to replace parts subject to wear and tear, depreciation will be taken to the extent of the wear and tear.

No Benefit to Bailee

This coverage shall not in any way benefit any person or organization caring for or handling your insured car for a fee.

Other Insurance

If there is other applicable coverage on a loss covered by this Part, we will pay only our proportionate share of the damages. However, any insurance we may be required to provide with respect to any non-owned vehicle used as a temporary substitute for a vehicle you own shall be excess over any other collectible insurance.

PART V – GENERAL PROVISIONS

Territory

This policy applies only to car accidents and losses within the United States, its territories or possessions, or Canada, or between their ports.

Changes

This policy, your application (which is made a part of this policy as if attached), and the Declarations Page include all the agreements between you and us relating to this insurance.

We will automatically give you the benefits of any extension or broadening of this policy if the change does not require additional premium.

The only other way this policy can be changed is by endorsement. Any necessary adjustment of premium will be made at that time. We will accept certain changes to your policy that you request. However, some changes you request require your signature. These will be effective only after the proper signature is obtained. Any change will be confirmed by our issuance of a declarations page.

The premium for each of your cars is based on information we received from you or other sources. Changes in this information, such as but not limited to, addition or deletion of cars, coverages or operators of

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your cars, or a new place of principal garaging of your car, made during the policy period, may result in a premium increase or decrease. We will make such changes based on the rates in effect at the time of the change and in accordance with our manual rules and/or rate filings.

If you move to a state in which this policy is unavailable, we will continue this policy only for the current policy term, at the end of which time all coverages will cease. You must notify us within fourteen (14) days of a new address.

Two or More Cars Insured

With respect to any car accident or loss to which this and any other auto policy issued to you by us applies, the total limit of our liability under all the policies shall not exceed the highest applicable limit of liability under any one policy.

Lawsuit Against Us

We may not be sued unless there has been full compliance with all the terms of this policy. We may not be sued under the Liability Coverage until the obligation of an insured person to pay is finally determined either by judgment against that person at the actual trial or by written agreement of that person, the claimant and us. No one has any right under this policy to make us a

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party to a lawsuit to determine the liability of an **insured person**.

No person who is not an **insured person** under the terms of this policy shall have any interest in this policy, either as:

- (1) a third party beneficiary; or
- (2) otherwise;

unless there first is a rendering of a verdict against a person who is an **insured person** under the terms of this policy for a claim which is covered by this policy.

Our Recovery Rights

In the event of any payment by **us** under this policy, **we** are entitled to all the rights of recovery that any person or organization **we** have paid may have against another who might be held responsible. **You** and anyone **we** protect must sign any papers and do whatever else is necessary to enable **us** to exercise **our** rights. **You** and anyone **we** protect will do nothing to prejudice **our** rights.

If **we** ask, any person that **we** have paid must take appropriate action, in that person's own name, to recover any payment **we** have made from any responsible party or insurer. **We** will select the attorney and pay all related costs and fees.

When a person has been paid damages by **us** under this policy and also recovers from another, the amount recovered from the other shall be held by that person in trust for **us** and reimburse **us** to the extent of **our** payment plus any costs or attorney fees **we** have to pay.

If **we** make payment under any Part, **we** shall be entitled, to the extent of such payment, to the proceeds of any settlement or judgment recovered from, or on behalf of, any responsible party. In the event of recovery from the responsible party, to the extent of such recovery, any rights to payment under such Part no longer exists.

Assignment

Interest in this policy may not be assigned without **our** written consent. If the policyholder named on the Declarations Page or the spouse of the policyholder who lives in the same household dies, the policy will cover:

- (1) The surviving spouse.
- (2) The legal representative of the deceased while acting within the scope of the duties as a legal representative.
- (3) Any person having proper custody of **your insured car** until a legal representative is appointed.

However, if any person is an excluded driver under this policy, there would be no coverage while any person is driving an **insured car**.

Bankruptcy

We are not relieved of any obligation under this policy because of the bankruptcy or insolvency of any **insured person**.

Out-of-State Insurance

If this policy provides liability insurance and if **you** are traveling in a state which has compulsory motor vehicle insurance requirements for nonresidents, **we** will automatically provide the required insurance. However, this amendment will provide only excess insurance.

Renewal of This Policy

Subject to **our** consent, **you** have the right to renew this policy. When **we** consent to renewal, **you** must pay the renewal premium before the renewal date. This policy will automatically expire if **we** do not receive the required premium before the renewal date of the policy.

If **we** offer to renew the policy or bill for a balance due from a policy change and **you** or **your** representative fail to pay the required premium when due, **you** have not accepted **our** offer and this policy will automatically terminate on the date noted on the renewal or balance due notice.

If **we** decide not to renew this policy, **we** will mail to the person named on the Declarations Page at the address shown on the Declarations page notice of nonrenewal not less than twenty (20) days before the end of the policy period.

Cancellation or Nonrenewal of This Policy

You may cancel this policy by returning it to **us** or by advising **us** in writing when at a future date the cancellation is to be effective.

We may cancel by mailing notice of cancellation to the person named on the Declarations Page at the address shown on the Declarations Page:

- (1) Not less than ten (10) days prior to the effective date of cancellation:
 - (A) For nonpayment of premium; or
 - (B) If the policy has been in effect less than sixty (60) days and is not a continuation or renewal policy.
- (2) Not less than twenty (20) days prior to the effective date of cancellation for any other reason.
- (3) If this policy has been in effect for sixty (60) days **we** may cancel only:
 - (A) For nonpayment of premium; and
 - (B) For suspension or revocation of **your** driver's license or that of any other operator who either lives in **your** household or customarily operates **your insured car**. The suspension or revocation must have taken place during the policy period, or, if a renewal policy, within one year of the original effective date of the policy.

If different requirements for cancellation and non-renewal or termination of policies are applicable because of the laws of **your** state, **we** will comply with those requirements.

Proof of mailing a notice of cancellation or nonrenewal shall be sufficient proof of notice of cancellation or nonrenewal.

Upon cancellation you may be entitled to a premium refund. If so, we will send it to you or your agent, but a refund is not a condition of cancellation. If we cancel, the refund will be computed on a pro-rata basis. If you cancel, the refund will be computed in accordance with the customary short-rate table and procedure. The

effective date of cancellation stated in a notice is the end of the policy period.

Misrepresentations

If you misrepresent any fact or circumstance that affects the eligibility of a risk, contributes to a loss, or results in a premium lower than that which would have been charged if true and complete representations had been made, we reserve the right to rescind the policy and/or deny coverage..

In Witness Whereof, we have caused this policy to be signed by its President and Secretary, and, if required by state law, this policy shall not be valid unless countersigned by our authorized representative.

W. O'Rally
--Secretary

John W. MS
--President

NOTICE OF OUR INFORMATION PRACTICES

As required by Public Law 91-508, Fair Credit Reporting Act, this is to inform you that as part of our procedure for processing and reviewing applications, new policies, renewal policies and policies currently in effect, a credit report, motor vehicle report or an investigative report may be obtained through personal interviews with third parties, such as family members, business associates, financial sources, friends, neighbors, or others with whom you are acquainted. This inquiry includes

information as to your character, general reputation, personal characteristics, mode of living or driving history, whichever may be applicable. You have the right to make a written request to this company within a reasonable period of time for a complete and accurate disclosure of additional information concerning the nature and scope of the investigation and/or to dispute such information which you believe to be erroneous.

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AP1200 (3/08) b

PERSONAL AUTO POLICY AMENDATORY ENDORSEMENT – WASHINGTON

It is agreed that the policy is amended as follows:

PART I – LIABILITY COVERAGE

The fourth opening paragraph is replaced in its entirety by the following:

Our duty to settle or defend ends when our limit of liability for this coverage has been paid; and:

- (1) Judgment or settlement has been reached with the **insured person**; or
- (2) The **insured person** relieves us of our duty to defend.

Additional Definitions Used in This Part Only

The following definition is added:

"Domestic abuse" means:

- (1) Physical harm, **bodily injury**, assault or the infliction of fear of imminent physical harm, **bodily injury** or assault between family or household members;
- (2) Sexual assault of one family or household member by another;
- (3) Stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member; or
- (4) Intentionally, knowingly, or recklessly causing damage to property so as to intimidate or attempt to control the behavior of another family or household member.

Exclusions

Exclusion (2) does not apply to **property damage** caused by an act of **domestic abuse** by another **insured person**, if the **insured person** claiming **property damage**:

- (A) Files a police report and cooperates with any law enforcement investigation relating to the act of **domestic abuse**; and
- (B) Did not cooperate in or contribute to the creation of the **property damage**.

Limits of Liability

The following provision is added:

Our limit of liability for loss paid as a result of domestic abuse shall be limited to the insured person's insurable interest in the property less payments made to a loss payee or other party with a legal secured interest in the property. We reserve all rights to subrogation to recover any payments made to the insured person under this provision, to the extent of such payment, from the perpetrator of the act that caused the loss.

The following paragraph is deleted in its entirety:

If this policy provides coverage that exceeds the limits required by the applicable Financial Responsibility laws, then such excess coverage shall not apply to

the operation, maintenance or use of **your insured car** by any person other than **you**, but this limitation shall not apply to liability incurred by **you**.

PART II – MEDICAL PAYMENTS COVERAGE

The third opening paragraph is replaced in its entirety by the following:

We will pay the usual and customary charge for reasonable and necessary expenses incurred within three (3) years from the date of car accident for medical and funeral services because of bodily injury sustained by an insured person and caused by a car accident.

Reasonable medical expenses do not include expenses:

- (1) For treatment, services, products or procedures that are experimental in nature, for research, or not primarily designed to serve a medical purpose; or are not commonly recognized throughout the medical profession and within the United States as appropriate treatment of bodily injury;
- (2) Incurred for the use of thermography or other related procedures of similar nature;
- (3) Incurred for the use of acupuncture or other related procedures of a similar nature; or
- (4) Incurred for the purchase or rental of equipment not primarily designed to serve a medical purpose.

.Exclusions (10) and (11) are deleted in their entirety.

PART III – UNINSURED MOTORISTS COVERAGE

This Part is deleted in its entirety.

PART IV – CAR DAMAGE COVERAGE

Additional Definitions Used in This Part Only

The following definitions (6), (7) and (8) are added:

- (6) **"Actual cash value"** means the lesser of:
 - (A) The amount required to replace the damaged property with similar property in like-condition; or
 - (B) The amount to restore the property by repairs to its pre-damaged condition, at current market value.
- (7) **"Domestic abuse"** means:
 - (A) Physical harm, **bodily injury**, assault or the infliction of fear of imminent physical harm, **bodily injury** or assault between family or household members;
 - (B) Sexual assault of one family or household member by another;
 - (C) Stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member; or
 - (D) Intentionally, knowingly, or recklessly causing damage to property so as to intimidate or

attempt to control the behavior of another family or household member.

- (8) "Diminution of value" or "diminished value" means the actual or perceived loss in market or resale value, which results from a loss.

Appraisal

The last sentence is replaced by the following:

Neither we nor you waive any rights under this policy by agreeing to an appraisal.

Exclusions

Exclusion (15) (B) is replaced in its entirety by the following:

(15) To your insured car:

- (B) Caused intentionally by or at the direction of an insured person. This Exclusion (15)(B) does not apply to loss to your insured car caused by an act of domestic abuse, if the person claiming loss:
- (i) Files a police report and cooperates with any law enforcement investigation relating to the act of domestic abuse; and
 - (ii) Did not cooperate in or contribute to the creation of the loss.

Limits of Liability

The following provisions are added:

We may deduct for betterment and depreciation for parts normally subject to repair and replacement during the useful life of your insured car. Deductions for betterment and depreciation shall be limited to the lesser of:

- (1) An amount equal to the proportion that the expired life of the part to be repaired or replaced bears to the normal useful life of that part; or
- (2) The amount which the resale value of the car is increased by the repair or replacement.

Our limit of liability for loss paid as a result of domestic abuse shall be limited to your insurable interest in the property less payments made to a loss payee or other party with a legal secured interest in the property. We reserve all rights of subrogation to recover any payments made to the insured person under this provision from the perpetrator of the act that caused the loss.

No payment will be made for loss paid under Part III – Underinsured Motorists Coverage.

PART V – GENERAL PROVISIONS

Lawsuit Against Us

The following provision is added:

If an action is brought against us under the Insurance Fair Conduct Act, then twenty (20) days prior to filing such an action, we and the Office of the Insurance Commissioner must be provided written notice of the

basis for the cause of action. Such notice may be sent by regular mail, registered mail or certified mail with return receipt requested.

Our Recovery Rights

The first paragraph is replaced in its entirety by the following:

In the event of any payment by us under this policy, we are entitled, to the extent of such payment to all the rights of recovery that any person or organization we have paid may have against another who might be held responsible. You and anyone we protect must sign any papers and do whatever else is necessary to enable us to exercise our rights. You and anyone we protect will do nothing to prejudice our rights.

The third paragraph is replaced in its entirety by the following:

When an insured person has been paid damages by us under this policy and also recovers from another, the insured person shall hold the amount recovered in trust for us and shall reimburse us to the extent of our payment.

The following provision is added:

We shall be entitled to a recovery of damages sustained from the person or organization legally responsible only after the person has been fully compensated for damages by the responsible party or insurer.

Cancellation or Nonrenewal of This Policy

Provision (1) is replaced in its entirety by the following:

- (1) Not less than ten 10 days prior to the effective date of cancellation:
- (A) For nonpayment of premium; or
 - (B) If the policy has been in effect less than thirty 30 days and is not a continuation or renewal policy.

Provision (3) is replaced in its entirety by the following:

- (3) If this policy has been in effect for sixty 60 days we may cancel only:
- (A) For nonpayment of premium; and
 - (B) For suspension or revocation of your driver's license or that of any other operator who customarily operates your insured car. The suspension or revocation must have taken place during the policy period or the one hundred and eighty 180 days immediately preceding the effective date of the renewal policy.

The last paragraph is replaced in its entirety by the following:

Upon cancellation you may be entitled to a premium refund. If so, we will send it to you or your agent, but a refund is not a condition of cancellation. The refund will be computed on a pro-rata basis. The effective date of the cancellation stated in a notice is the end of the policy period.

If the payment received is less than the minimum premium tolerance no coverage will be afforded and

your policy will cancel for nonpayment of premium. Your payment will then be refunded within eleven 11 days of when it was received.

The following paragraph is added:

Notice of cancellation or nonrenewal will include the reason for such notice. We will mail a copy of the notice to your agent or broker and like-notice of cancellation or nonrenewal to any loss payee or additional insured shown on this policy, if applicable.

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Page 3 of 3

WA1250 (11/08) e

IMPORTANT NOTICE

What You Should Know About Our Protection of Your Privacy

Protecting the personal information of the individuals we serve is a priority for Sentry Insurance. We collect, retain and use personal information about individuals for the purpose of serving their insurance needs and providing services to them.

This notice describes how we handle personal information of the individuals we serve. It is only for your information. No action on your part is needed.

If you have questions regarding this notice, please write to Corporate Compliance/Privacy, 1800 North Point Drive, Stevens Point, WI 54481

What kinds of information are collected and disclosed?

The types of information we may collect about you include:

- ◆ Information you provide on applications or other forms, or in your verbal responses to our questions. This may include identifying information such as name, address and information about your assets and income.
- ◆ Information about your transactions with us including policies purchased and premium payment history.
- ◆ Information we receive from a consumer reporting agency that indicates your credit worthiness and credit history.

We do not sell customer lists or any personal information regarding our customers.

We do not disclose nonpublic personal financial information about customers or former customers to nonaffiliated third parties, except as permitted by law.

We may share personal financial information about you between companies within the Sentry Insurance Group in order to make additional services available to you. For example, auto insurance customers may receive information about life insurance products, and vice versa.

How do we safeguard your privacy?

We maintain physical, electronic and procedural safeguards to protect your personal information.

We restrict access to nonpublic personal financial data to those employees who need to know that information in order to provide products or services to you.

We communicate to employees in writing the importance of protecting confidential information.

We may amend our privacy policies at any time. If we do, we will inform you in writing.

O1T76230 05/08

This notice applies to each of the following companies. Companies may not be licensed in all states.

Sentry Insurance a Mutual Company

Dairyland County Mutual Insurance Company of Texas

Dairyland Insurance Company

Middlesex Insurance Company

Parker Assurance, Ltd

Parker Centennial Assurance Company

Parker Services, L.L.C.

Parker Stevens Agency, L.L.C.

Parker Stevens Insurance Agency of Massachusetts

Patriot General Insurance Company

Peak Property and Casualty Insurance Corporation

Sentry Casualty Company

Sentry Equity Services

Sentry Life Insurance Company

Sentry Life Insurance Company of New York

Sentry Lloyds of Texas

Sentry Select Insurance Company

Viking County Mutual Insurance Company

Viking Insurance Company of Wisconsin



SENTRY
INSURANCE

PH1191 (7/08) d

DRIVER RESTRICTION ENDORSEMENT - WASHINGTON

We agree with you, subject to all the provisions of the policy, except as changed by this endorsement, as follows:

PART V – GENERAL PROVISIONS

The following provision is added:

Driver Restriction

We will not provide coverage under Part I – Liability Coverage or Part IV – Car Damage Coverage while **your insured car** is being driven by any person under the age of 25 years old, unless that person is listed as an insured driver on the Declarations Page. This restriction does not apply to:

- (1) Part I – Liability Coverage while **your insured car** is being driven on a military base or reservation.
- (2) The protection of a loss payee's interest under Part IV – Car Damage Coverage.

This restriction does not apply to Underinsured Motorists coverage or Personal Injury Protection coverage if a premium is shown for the coverages on the Declarations Page.

You must reimburse us if we make a payment to a loss payee for a **loss** incurred while **your insured car** is being driven by any person under the age of 25 years old, unless that person is listed as an insured driver on the Declarations Page.

UNDERINSURED MOTORISTS COVERAGE ENDORSEMENT - WASHINGTON

This coverage applies only if there is premium shown for the coverage on the Declarations Page.

It is agreed that the policy is amended as follows:

WHAT TO DO IN CASE OF A CAR ACCIDENT OR LOSS

Other Duties

The unnumbered paragraph after paragraph (7) is replaced in its entirety by the following:

Any person claiming Underinsured Motorists Coverage must also notify the police within 72 hours of a "phantom" vehicle accident and shall file with us within 30 days a sworn proof of loss containing the facts and any other information pertinent to the car accident.

PART III - UNINSURED MOTORISTS COVERAGE

This Part is replaced in its entirety by the following:

PART III - UNDERINSURED MOTORISTS COVERAGE

This coverage applies only if there is a premium shown for Underinsured Motorists Bodily Injury Coverage, Underinsured Motorists Property Damage Coverage, or both on the Declarations Page and only for such coverages as are shown.

We will pay damages for **bodily injury** or **property damage** which an **insured person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle**. The **bodily injury** or **property damage** must be caused by a **car accident** and result from the ownership, maintenance or use of an **underinsured motor vehicle**.

Determination as to whether an **insured person** is legally entitled to recover damages or the amount of damages shall be made by agreement between the **insured person** and us. If no agreement is reached, the decision will be made by arbitration.

If a lawsuit is brought by any **insured person** against an owner or operator of an **underinsured motor vehicle** to determine legal liability or damages, the **insured person** must provide us a copy of the summons and complaint as soon as practicable.

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

Additional Definitions Used in This Part Only

As used in this Part:

(1) "Insured Person" means:

- (A) You.
- (B) Any other person **occupying your insured car** with your permission.

(C) Any person for damages that person is entitled to recover because of **bodily injury to you** or another occupant of **your car**.

No person shall be considered an **insured person** if that person uses a **motor vehicle** without permission of the owner.

(2) "**Underinsured motor vehicle**" means a **motor vehicle** which is:

- (A) Not insured by a bodily injury or property damage liability bond or policy at the time of the **car accident**;
- (B) Insured by one or more bodily injury or property damage liability bonds or policies at the time of the **car accident** of which the sum of the limits of liability is less than the applicable damages an **insured person** is entitled to recover; or
- (C) A hit-and-run or "phantom" vehicle whose operator or owner is unknown which strikes, or causes a **car accident** resulting in **bodily injury** or **property damage** without striking:

- (i) You.
- (ii) A vehicle which **you are occupying**.
- (iii) Your insured car.

When there is no physical contact with the hit-and-run or "phantom" vehicle, the facts of the **car accident** must be corroborated by competent evidence other than the testimony of the **insured person** or any other person having an underinsured motorists claim resulting from the **car accident**.

- (D) Insured by a bodily injury or property damage liability bond or policy at the time of the **car accident** but the insurer denies coverage or is or becomes insolvent within three years of the date of the **car accident**.

"**Underinsured motor vehicle**" does not mean a vehicle or its equipment:

- (A) To which Part I - Liability Coverage applies at the time of the **car accident**, for the claim of any **insured person** other than you.
- (B) Owned by a governmental unit or agency unless the unit or agency is unable to satisfy a claim because of financial inability or insolvency.
- (C) Designed mainly for use off public roads, while not on public roads.
- (D) Operated on rails or crawler treads.
- (E) While used as a residence or premises

(3) "**Property damage**" means damage to or destruction of **your insured car** caused by a **car accident**. However, **property damage** does not include:

- (A) Loss of use of **your insured car**; or
- (B) Damage to or destruction of any property while contained in **your insured car**.

- (4) **"Bodily injury"** means bodily harm to, or sickness or disease, and includes death resulting from the bodily harm, sickness or disease.

Exclusions

This coverage does not apply:

- (1) To **bodily injury** sustained by an **insured person** or a **relative** while **occupying** or when struck by a **motor vehicle**, other than **your insured car**, which is owned by or available for the regular use of **you** or a **relative**.
- (2) To **bodily injury** while occupying a vehicle with less than four wheels.
- (3) To **bodily injury** or **property damage** while **occupying your insured car** when used to carry persons or property for a charge. This exclusion does not apply to shared-expense car pools.
- (4) For the benefit, directly or indirectly, of any insurer or self-insurer under any workers' compensation law, disability benefits law or other similar laws or any insurer of property.
- (5) While occupying or when struck by a motor vehicle owned by you for which no premium is shown for coverage on the Declarations Page.
- (6) While **occupying your insured car** when used to carry persons or property for compensation or a fee, including, but not limited to delivery of newspapers, magazines, food, or any other products. This exclusion does not apply to shared-expense car pools.
- (7) While **occupying** any vehicle while the vehicle is being used in the business or occupation of an **insured person**. This exclusion does not apply while **occupying your insured car** if the business use is infrequent or is disclosed to and accepted by us.
- (8) While any vehicle is being used in or to prepare for any racing, speed, stunt, performance or demolition activity, regardless of whether such activity is prearranged or organized.
- (9) While **your insured car** is being operated by a **regular operator** who was not reported to us on the original application for insurance or otherwise disclosed to us and listed on the declarations page before the **car accident**.

This coverage shall not apply to punitive or exemplary damages.

Limits of Liability

Subject to all the provisions below, the limits of underinsured motorists insurance shown on the Declarations Page are the maximum amounts we will pay in damages for any one **car accident**, further defined as follows:

- (1) The bodily injury limit for "each person" is the maximum limit for all claims by all persons for

damages from **bodily injury** to any one person in any one **car accident**.

- (2) Subject to the bodily injury limit for "each person", the bodily injury liability limit for "each accident" is the total limit for all claims for all damages from **bodily injury** to two or more persons in any one **car accident**.
- (3) Subject to the property damage liability limit, the property damage liability limit for "each accident" is the maximum amount we will pay for **property damage** in any one **car accident**. We will pay for the **property damage** less a \$100 deductible. If **your property damage** is caused by a hit-and-run or "phantom" vehicle, we will pay for the **property damage** less a \$300 deductible.

We will pay no more than these maximums regardless of:

- (1) The number of vehicles described or premiums shown on the Declarations Page.
- (2) The number of **insured persons**.
- (3) The number of claims made or lawsuits filed.
- (4) The number of claimants making a claim.
- (5) The number of vehicles involved in the **car accident**.

No payment will be made for loss paid to an **insured person** under Part IV – Car Damage Coverage of this policy.

Other Insurance

If there is other similar insurance available to the **insured person** under another policy or policies, the total limits of all coverages shall be the highest of the limits applicable to any one policy. We will pay only our share of the damages. Our share is the proportion that our limits of liability bear to the total of all applicable limits. But, when an **insured person** is **occupying** a **car** or **utility trailer** you do not own, this coverage is excess over any other applicable insurance and this coverage shall then apply only in the amount by which the limits of liability for this coverage exceeds the applicable limits for such other insurance.

Arbitration

If we and an **insured person** claiming coverage under this Part do not agree:

- (1) Whether that **insured person** is legally entitled to recover damages under this Part; or
- (2) As to the amount of such damages;

Either party may make a written demand for arbitration. In this event, each party will select an arbitrator unless the parties agree in writing on the use of a single arbitrator. If two arbitrators are used, they will select a third; if the two arbitrators cannot agree on the third within thirty days, either party may request selection be made by a judge or court having jurisdiction.

We will pay all arbitration expenses, not including an insured person's attorney's fees or any expenses incurred in producing evidence or witnesses.

Unless both parties agree otherwise, arbitration will take place in the county in which the insured person resides. Local rules of procedure and evidence will apply. A decision agreed to by two of the arbitrators, or the single arbitrator, shall be binding as to:

- (1) Whether the insured person is legally entitled to recover damages; and/or
- (2) The amount of said damages, subject to our limits of liability, and excluding punitive or exemplary damages. Any award which exceeds the limits of liability or which includes punitive or exemplary

damages shall be beyond the arbitrator's scope of authority.

If an award does exceed our limits of liability, either party may demand the right to trial. Such demand must be made within 60 days of the arbitrator's decision, or such lesser time as provided by the rules of civil procedure for the jurisdiction where the arbitration occurs.

We will not pay punitive or exemplary damages which the insured person may be legally entitled to collect. No valid arbitration award shall include amounts for punitive or exemplary damages.

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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

7
8 PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

9 Plaintiff,

10 v.

11 JORGE GUTIERREZ and JANE DOE
12 GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

13 Defendants.

No. 12-2-00908-3

DECLARATION OF TOMAS
MIRANDA

14 I, Tomas Miranda, declare as follows:

15 1. I am more than 18 years of age, and I have personal knowledge of the matters set
16 forth herein. I own and operate the Tomas Miranda Insurance Agency in Walla Walla.

17 2. On August 11, 2010, Jorge Gutierrez completed an application for a motor vehicle
18 insurance policy with Patriot General Insurance Company. Attached as exhibit 1 is a true and
19 correct copy of the application completed by Jorge Gutierrez.

20 3. The upper right-hand corner of each page of the application shows that the
21 application consists of 10 pages. The attached application includes only pages 1 through 6. Pages
22 7 and 8 were receipts for payment of a portion of the premium. Pages 9 and 10 were proof-of-
23 insurance cards for the two listed drivers, Jorge Gutierrez and Maria Recarmona. Those four
24 pages were given to Mr. Gutierrez after the application was completed. My office does not retain
25

26 DECLARATION OF TOMAS MIRANDA- 1

C:\Users\mmunson\AppData\Local\Microsoft\Windows\Temporary
Internet Files\Content.Outlook\T8084Z8H\Declaration of Tomas
Miranda.docx

THORSRUD CANE & PAULICH

A PROFESSIONAL SERVICE CORPORATION
1300 PUGET SOUND PLAZA
1325 FOURTH AVENUE
SEATTLE, WA 98101
(206) 386-7755

1 copies of the receipts or the cards.

2 4. The application does not mention any insureds or drivers other than Jorge
3 Gutierrez and Maria Recarmona.

4 5. I gave a Mr. Gutierrez a copy of his application along with the policy issued to
5 him by Patriot General Insurance Company.

6 6. After completing the application, Jorge Gutierrez never requested that his son,
7 Javier Gutierrez, be added to the policy.
8

9
10 I declare under penalty of perjury under the law of the State of Washington that the
11 foregoing is true and correct.

12 Executed at Walla Walla, Washington on this 21st day of March, 2013.

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15 Tomas Miranda
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26 DECLARATION OF TOMAS MIRANDA- 2

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Internet Files\Content.Outlook\T808428H\Declaration of Tomas
Miranda.docx

THORSRUD CANE & PAULICH

A PROFESSIONAL SERVICE CORPORATION
1200 PUGET SOUND PLAZA
1325 FOURTH AVENUE
SEATTLE, WA 98101
(206) 386-7753

EXHIBIT 1

WASHINGTON AUTOMOBILE INSURANCE APPLICATION
PATRIOT GENERAL INSURANCE COMPANY
 Program: Dairyland



Policy Number 475814918 **Policy Effective Date** 08/11/2010 **Time** 10:21 AM **Policy Type** Auto Policy **Policy Term** 6 Months **Pay Plan Selected** Continuous

Named Insured Information

Gutierrez, Jorge
 1201 Umatilla St
 Walla Walla, WA-99362
 Business Phone:
 Home Phone: (509) 301-9298
 Residency:
 Years@Residence:
 Occupation:
 Prior Carrier / # Yrs:

Agent Information

Agency Code: 4705133
 Agency Sub-Code:
 Tomas Miranda Ins Agency
 P O Box 391
 Walla Walla, WA-99362
 Phone: (509) 529-9600

Employer/Years@Employer:
 Prior Policy #/Exp Dt:

Policy Type - Additional Information

BROAD FORM NAMED DRIVER POLICY: If this policy type is indicated above, this policy provides coverage for only the named insured while driving either owned or non-owned cars. Owned cars will not be listed.
LIMITED LIABILITY POLICY: If this policy type is indicated above, this policy does not provide coverage for anyone not listed on the policy.

Coverage Information

Vehicle	Limits	Veh 1	Ded 1	Veh 2	Ded 2	Veh 3	Ded 3	Veh 4	Ded 4
Rated Driver		1							
BI-PD	25/50/25	\$161.70							
UIM-BI	25/50	\$53.10							
UIM-PD	10,000	\$6.00							
Medical Payments		\$0.00							
Personal Injury Protection *	Reject	\$0.00							
Comprehensive		\$0.00							
Collision		\$0.00							
Car Loan Protection		\$0.00							
Lienholder Deductible		\$0.00							
Rental Reimbursement		\$0.00							
Special Equipment		\$0.00							
Towing And Labor		\$0.00							
Premium Subtotals		\$220.80							

Policy Fee: \$8.00

Policy Premium: \$228.80

* Please sign corresponding rejection on application.

Total Premium Submitted: \$52.16

4 Additional Payments of: \$52.16

Refer to agent guide for down payment requirements.

Discounts Applied

Surcharges Applied

Lienholder / Additional Insured Lessor Information

Veh#	Type	Name	Address	City	State	Zip
------	------	------	---------	------	-------	-----

Vehicle Information

	Vehicle 1	Vehicle 2	Vehicle 3	Vehicle 4
Vin Number	1FDEE14N7RHA98392			
Year	1994			
Make	FORD			
Model	ECONOLINE E-150			
Vehicle Specifics	VN,TR,08 Cyls			
Symbol	DGF/DDC///			
Cost				
Vehicle Use	Pleasure			
Garage Zip/Terr	99362 / 27			
Existing Damage (Please complete vehicle No inspection form)				

Driver Information

List all persons in household (including non-driving children/persons age 14 and over) and all operators. (If more than 4 persons, please contact Customer Care)

	Driver 1	Driver 2	Driver	Driver
Name	Gutierrez, Jorge	Recarmona, Marie		
DOB	08/07/1956	03/15/1960		
Gender	Male			
Marital Status	Married			
License #	GUTIEJ*447NG			
Date Lic./Years Lic.	08/07/1972			
D.L. State	WA			
Non Driver	No	Yes		
Excluded Driver	No	No		
SR-22				

Motor Vehicle Record

The following is a complete list of ALL ACCIDENTS and traffic violation convictions for all operators. Please Note: It is assumed that ALL ACCIDENTS LISTED ARE CHARGEABLE, UNLESS A POLICE REPORT OR PROOF OF OTHER CARRIER'S PAYMENT IS PROVIDED. All undated violations or accidents will be dated as of the effective date of the policy. (If more than 6 occurrences, please contact Customer Care.)

Driver #	Date of Occurrence	Type	Points	Description of Occurrence
----------	--------------------	------	--------	---------------------------

Additional Information

1. Is the NAMED INSURED the registered owner of the vehicles? Y N

If NO, who is? _____ Relationship _____

2. Are any owned vehicles not insured with Patriot General? Y N

If YES, explain? _____

Special Equipment

This policy covers the following equipment. Everything else is considered "Special Equipment".

- (A) Any permanently installed equipment, parts, or accessories which were purchased as standard or optional equipment from the manufacturer of the vehicle.
- (B) Up to the maximum of \$500, any permanently installed device designed for the recording or reproduction of sound, provided the device is installed in the opening of the dash or console normally used by the manufacturer for the installation of a radio.

I have had Special Equipment Coverage explained to me and fully understand it. I understand that my policy will not contain this coverage when it is issued or renewed unless I have purchased the Special Equipment Endorsement. If I have purchased it, the physical damage deductibles for comprehensive/collision will apply. I understand that I may add this coverage to my policy at any future date.

Signature of Insured/Applicant

Date

Washington Acceptance or Rejection of UIM-BI, UIM-PD, and PIP Coverages

Underinsured Motorists Bodily Injury (UIM-BI) Coverage, Underinsured Motorists Property Damage (UIM-PD) Coverage, and Personal Injury Protection (PIP) Coverage have been explained to me and I fully understand them.

If accepted, the Underinsured Motorists Bodily Injury (UIM-BI), Underinsured Motorists Property Damage (UIM-PD), and Personal Injury Protection (PIP) Coverage limits I have requested are shown on the Personal Auto Application or change request. I understand that \$10,000 UIM-PD will be added to my policy unless rejected.

Please initial for rejection:

Rejected:

_____ Underinsured Motorists Bodily Injury (UIM-BI) Coverage
 _____ Underinsured Motorists Property Damage (UIM-PD) Coverage
g. J. Personal Injury Protection (PIP) Coverage

A120BWA

Named Driver Exclusion Endorsement - Washington

This policy will not provide any insurance coverage when a vehicle is being driven, either with or without any insured's permission, by the following excluded drivers. However, this exclusion does not apply to Underinsured Motorists Bodily Injury Coverage, Underinsured Motorists Property Damage Coverage, or Personal Injury Protection if a premium is shown for such coverage(s) on the Declarations Page.

Excluded Driver	Date of Birth	Relationship
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This endorsement applies to this policy and any continuation, renewal, change or reinstatement of this policy by the named insured, or the reissuance of the policy by the Company.

By signing this Driver Exclusion Endorsement form you agree to this change in your policy. All other terms and conditions of your policy remain in full force and effect.

Named Insured's Signature

Date

NDE1-WA

Applicant Initials

I hereby apply to the Company for a policy of insurance as set forth in this application on the basis of statements contained herein. I understand and agree that a routine inquiry may be made which will provide applicable information concerning character, general reputation, personal characteristics, mode of living and credit history. Upon written request, additional information as to the nature and scope of the report, if one is made, will be provided. I understand and agree that such policy shall be cancelled and the benefits available under such policy may be denied if such information is known to be false and would affect acceptance of the risk or would in any way affect the rating of the risk by the Company. Further:

Applicant Initials J.S. I also certify that all persons age 14 or over who live with me temporarily or permanently and all persons who are regular operators of any vehicle to be insured have been listed on this application and reported to the Company. I declare that there are no operators of the vehicle(s) described in this application unless their names and ages are shown above or are provided in writing to the Company within 14 days of when they begin driving the vehicle(s) described in this application.

Applicant Initials J.S. I also certify that the garaging address listed on this application is my current full-time vehicle garaging location. I understand and agree that it is my responsibility to report any change of garaging location to the Company within 14 days of the change.

Applicant Initials J.S. I fully understand and agree that no coverage can be bound unless a premium deposit accompanies this application. If such deposit does accompany this application, coverage is bound no earlier than the time and date the application is signed by both the applicant and agent, as shown below, provided the application is postmarked within 72 hours of that time and date.

Applicant Initials J.S. I understand that driving records of all persons listed on this application may be checked. If the record for the rated driver differs from the information provided by me, my premium will be adjusted. I will receive written notice showing the adjusted premium term or a billing for the required premium.

Applicant Initials J.S. I understand and agree that, in the event of a lapse in coverage due to failure to make payment to the Company on any date specified by the Company, any rewrite of such coverage will reflect the coverages, limits and deductibles in force at the time of lapse of coverage.

Applicant Initials J.S. **DRIVER RESTRICTION - READ CAREFULLY:** I understand and agree that the insurance policy I am requesting will not apply for Liability and Car Damage coverages while the insured vehicle is being driven by any person under the age of twenty-five unless that person is listed as a driver on this application and on the policy at the time of the loss.

Applicant Initials J.S. It is a crime to knowingly provide false, incomplete, or misleading information to an insurance company for the purpose of defrauding the company. Penalties include imprisonment, fines, and denial of insurance benefits.

Applicant Initials J.S. I understand and agree that when I have purchased physical damage coverage, damages to stereo and sound producing equipment is limited to a maximum of \$600. I understand that I must purchase special equipment coverage in order to obtain a higher limit of coverage for stereo and sound producing equipment. I also understand that no coverage will exist for equipment that has not been factory installed unless Special Equipment coverage has been purchased.

Applicant and Agent Signatures

THE ABOVE FACTS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND THE INSURANCE IS TO BE ISSUED IN RELIANCE UPON THEM. I FURTHER UNDERSTAND THE INSURANCE PREMIUMS FOR THE ABOVE COVERAGES ARE SUBJECT TO CHANGE BASED ON THE DRIVING RECORDS OF ALL OPERATORS.

08-11-10
Date Signed

3:10
Time Signed

AM
 PM

George Lafriere
Signature of Insured/Applicant

Signature of Parent/Legal Guardian (if applicant is a minor)

I CERTIFY THAT I HAVE ASKED THE APPLICANT ALL OF THE QUESTIONS LISTED ON THE APPLICATION AND HAVE RECORDED THEIR ANSWERS TO THESE QUESTIONS.

Agents have the authority to bind coverage no earlier than the time and date the application is signed by the applicant and the agent and a premium deposit accompanies the application.

08-11-10
Date Signed

3:10
Time Signed

AM
 PM

[Signature]
Signature of Agent

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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

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8 PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,
9 Plaintiff,

No. 12-2-00908-3

10 v.

DECLARATION OF KYLE
MOSBRUCKER IN SUPPORT OF
PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT

11 JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
12 and JAVIER GUTIERREZ,
13 Defendants.

14 I, Kyle Mosbrucker, declare as follows:

15 1. I am more than 18 years of age, and I have personal knowledge of the matters set
16 forth herein. I am an employee of Viking Insurance Company of Wisconsin.


17 2. Patriot General Insurance Company issued a personal automobile policy to Jorge
18 Gutierrez with a policy period of October 29, 2010, to April 29, 2011 under policy number
19 471327125.

20 3. Jorge Gutierrez filed a UIM claim under that policy on behalf of his son, Javier
21 Gutierrez, regarding a motor-vehicle accident that occurred on January 9, 2011 in Walla Walla.

22 4. Patriot General Insurance Company denied the claim because Javier was not an
23 insured under that policy. Attached as exhibit 1 is a true and correct copy of May 22, 2012 letter
24

25 DECLARATION OF KYLE MOSBRUCKER IN
SUPPORT OF PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S MOTION FOR
26 SUMMARY JUDGMENT - 1


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 THORSRUD CANE & PAULICH
A PROFESSIONAL SERVICE CORPORATION
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1325 FOURTH AVENUE
SEATTLE, WA 98101
(206) 386-7755

1 insured under that policy. Attached as exhibit 1 is a true and correct copy of May 22, 2012 letter
2 I sent to Jorge Gutierrez regarding the denial of his claim.

3 I declare under penalty of perjury under the law of the State of Washington that the
4 foregoing is true and correct.

5 Executed at Stevens Point, Wisconsin on this 10th day of June, 2013.

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8 _____
9 Kyle Mosbrucker
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24 DECLARATION OF KYLE MOSBRUCKER IN
25 SUPPORT OF PLAINTIFF PATRIOT GENERAL
26 INSURANCE COMPANY'S MOTION FOR
SUMMARY JUDGMENT - 2

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Internet Files\Content.Outlook\J3D118HQ\Declaration of Kyle
Mosbrucker (2).docx

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SEATTLE, WA 98101
(206) 386-7755

EXHIBIT 1

May 22, 2012

JORGE GUTIERREZ
146 W TIETAN ST
WALLA WALLA WA 99362-4343

Claim Number: 92A330071-487
Insured: JORGE GUTIERREZ
Regarding: JORGE GUTIERREZ
Date of Loss: 01/09/2011



Mr. Gutierrez:

With respect to the accident your son was involved in on 1/9/11 in Walla Walla, Washington Patriot General Insurance Company disclaims and denies any and all liability or obligation to you and to others under its policies numbered 471327125.

This disclaimer is made because your son is over the age of 14 and is not listed on your policy with us. Our investigation shows that on 1/9/11 Javier Gutierrez was a passenger in a 1988 Ford Bronco which was involved in an accident. Our investigation also shows that Javier Gutierrez's date of birth is 1/17/1991. Based on this information, Javier Gutierrez does not qualify as a "You" under the policy, therefore, there is no coverage for this loss.

Please refer to your policy which states:

AGREEMENT

In return for **your** premium payment and subject to the terms and conditions of this policy, **we** will insure **you** for the coverages up to the limits of liability for which a premium is shown on the Declarations Page of this policy. This insurance applies only to **car accidents** and losses which happen while this policy is in force. This policy is issued by **us** in reliance upon the statements which **you** made in **your** application for insurance. If **you** have made any false statement in **your** application, this policy may not provide any coverage.

DEFINITIONS USED THROUGHOUT THIS POLICY

(2) "**You**" and "**your**" mean the person shown as the named insured on the Declarations Page and that person's spouse if residing in the same household. **You** and **your** also means any **relative** of that person if they reside in the same household, providing they or their spouse do not own a **motor vehicle**.

(3) "**Relative**" means a person living in **your** household related to **you** by blood, marriage or adoption, including a ward or foster child. **Relative** includes a minor under **your** guardianship who lives in **your** household. Any **relative** who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss.

PART III – UNINSURED MOTORISTS COVERAGE

This coverage applies only if a premium is shown for this coverage on the Declarations Page.

We will pay damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle. The bodily injury must be caused by a car accident and result from the ownership, maintenance or use of an uninsured motor vehicle.

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

Additional Definitions Used in This Part Only

As used in this Part:

(1) **"Insured Person"** means:

(A) **You.**

(B) Any other person **occupying your insured car with your permission.**

(C) Any person for damages that person is entitled to recover because of **bodily injury to you or another occupant of your car.**

No person shall be considered an **insured person** if that person uses a **motor vehicle** without permission of the owner.

Patriot General Insurance Company's listing of the foregoing basis for its coverage position does not limit any other grounds for denial of coverage if the facts or developing law warrant it. In that connection, please be advised that Patriot General Insurance Company's reference to the foregoing coverage provisions and exclusions should not be interpreted as a waiver or as an estoppel on the part of Patriot General Insurance Company to assert any other terms, conditions, exclusions or limits of liability contained in the policies.

The foregoing analysis is based upon the materials that have been provided to us. As Patriot General Insurance Company wants its insureds to receive all benefits to which they are entitled under policies of insurance which it issues, if you have any information that Patriot General Insurance Company should consider, please provide same to the undersigned as soon as possible. Additionally, if the allegations change or suit papers are received, please contact us to reconsider our position in light of any new claims presented.

If you have any questions, please contact me at 1-800-547-7830 ext.5664242.



Kyle Mosbrucker, Claims Representative II
Patriot General Insurance Company
A Member of the Sentry Insurance Group
800-547-7830 ext. 5664242 or 503-566-4242
888-729-2225 Fax
Kyle.Mosbrucker@Sentry.Com

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

v.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No. 12-2-00908-3

DECLARATION OF MATTHEW
MUNSON IN SUPPORT OF
PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT

I, Matthew Munson, declare as follows:

1. I am more than 18 years of age, and I have personal knowledge of the matters set forth herein. I am one of the attorneys representing Patriot General Insurance Company of in this lawsuit.
2. Attached as exhibit 1 is a true and correct copy of Javier Gutierrez's Responses to Patriot General Insurance Company's Requests for Admission.
3. Attached as exhibit 2 is a true and correct copy of Jorge Gutierrez's Responses to Patriot General Insurance Company's Requests for Admission.
4. Attached as exhibit 3 is a true and correct copy of chapter 242 of the Washington State Legislature's 1993 Session Law. This document is available at

DECLARATION OF MATTHEW MUNSON IN
SUPPORT OF PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S MOTION FOR
SUMMARY JUDGMENT - 1

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COPY

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SEATTLE, WA 98101
(206) 386-7755

1 http://www.leg.wa.gov/CodeReviser/Pages/session_laws.aspx.

2 5. Attached as exhibit 4 is a true and correct copy of the House Bill Report for
3 Engrossed Substitute House Bill 1233 of the 1993 legislative session. This document is available
4 at <http://search.leg.wa.gov/search> in the database for the 1993–1994 biennium.

5 6. Attached as exhibit 5 is a true and correct copy of chapter 115 of the Washington
6 State Legislature’s 2003 Session Law. This document is available at
7 http://www.leg.wa.gov/CodeReviser/Pages/session_laws.aspx.

8 7. Attached as exhibit 6 is a true and correct copy of the House Bill Report for
9 House Bill 1084 of the 2003 legislative session. This document is available at
10 <http://search.leg.wa.gov/search> in the database for the 2003–2004 biennium.
11

12 I declare under penalty of perjury under the laws of the State of Washington that the
13 foregoing is true and correct.

14 Executed at Seattle, Washington on this 11th day of June, 2013.

15 
16 _____
Matthew Munson

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25 DECLARATION OF MATTHEW MUNSON IN
26 SUPPORT OF PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY’S MOTION FOR
SUMMARY JUDGMENT - 2

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A PROFESSIONAL SERVICE CORPORATION
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SEATTLE, WA 98101
(206) 386-7755

EXHIBIT 1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

v.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No. 12-2-00908-3

PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S FIRST
SET OF REQUESTS FOR
ADMISSION TO DEFENDANT
JAVIER GUTIERREZ

TO: DEFENDANT JAVIER GUTIERREZ;

Plaintiff Patriot General Insurance Company hereby requests pursuant to Civil Rule 36 that you admit or deny in writing the following Requests for Admission within THIRTY (30) days of the date of service of these requests upon you. If you object to a Request for Admission, the reasons for your objections shall be stated.

The answer to each Request for Admission shall specifically deny the matter or set forth in detail the reason why you cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission. If you qualify an answer or deny only a part of the matter of which an admission is request, you shall specify so much of it as is true and qualify or deny the remainder.

PLAINTIFF PATRIOT GENERAL INSURANCE
COMPANY'S FIRST SET OF REQUESTS FOR
ADMISSION TO DEFENDANT JAVIER
GUTIERREZ - 1

COPY

THORSRUD CANE & PAULICH
A PROFESSIONAL SERVICE CORPORATION
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1325 FOURTH AVENUE
SEATTLE, WA 98101
(206) 386-7755

1 was involved in a motor vehicle accident in or near Walla Walla, Washington.

2 **RESPONSE:**

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8 DATED this 22nd day of March, 2013.

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11 PATRICK M. PAULICH, WSBA #10951
12 MATTHEW MUNSON, WSBA #32019
13 Attorneys for Plaintiff Patriot General Insurance Company
14 THORSRUD CANE & PAULICH
15 1325 Fourth Avenue, Suite 1300
16 Seattle, WA 98101
17 (206) 389-7755
18 ppaulich@tcplaw.com
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25 PLAINIFF PATRIOT GENERAL INSURANCE
26 COMPANY'S FIRST SET OF REQUESTS FOR
ADMISSION TO DEFENDANT JAVIER
GUTIERREZ - 3

1 STATE OF WASHINGTON)
2) ss:
3 COUNTY OF)

4 Javier Gutierrez, being first duly sworn upon oath, deposes and says:

5 I am one of the Plaintiffs herein, I have read the foregoing Requests for Admissions and
6 Responses, know the contents thereof, and believe the same to be true.

7 _____
8 Javier Gutierrez

9 SUBSCRIBED AND SWORN TO before me this ____ day of _____, 2013.

10 _____
11 NOTARY PUBLIC in and for the State
12 of Washington, residing at _____
13 My Commission expires on: _____
14 Printed Name: _____

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25 PLAINTIFF PATRIOT GENERAL INSURANCE
26 COMPANY'S FIRST SET OF REQUESTS FOR
ADMISSION TO DEFENDANT JAVIER
GUTIERREZ - 4

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A PROFESSIONAL SERVICE CORPORATION
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SEATTLE, WA 98101
(206) 366-7755

COPY RECEIVED

APR 22 2013

THORSRUD CANE & PAULICH

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7 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

8 IN AND FOR THE COUNTY OF WALLA WALLA

9 PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

10 Plaintiff,

11 vs.

12 JORGE GUTIERREZ and JANE DOE
13 GUTIERREZ, and their marital
community, and JAVIER GUTIERREZ,

14 Defendants.

NO: 12 2 00908 3

DEFENDANT JAVIER
GUTIERREZ' ANSWER TO
PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S
FIRST SET OF REQUESTS FOR
ADMISSION

15 _____ /
16 ANSWER TO REQUEST FOR ADMISSION NO. 1: Admit

17 ANSWER TO REQUEST FOR ADMISSION NO. 2: Admit

18 ANSWER TO REQUEST FOR ADMISSION NO. 3: Admit

19 The undersigned attorney certifies pursuant to Civil Rule 26(g) that
20 he or she has read each response and objection to these Requests for Admission,
21 and that to the best of his or her knowledge, information, and belief formed after a
22 reasonable inquiry, each is (1) consistent with the Civil Rules and warranted by
23 existing law or a good faith argument for the extension, modification, or reversal of
24 existing law; (2) not interposed for any improper purpose, such as to harass or to
25 cause unnecessary delay or needless increase in the costs of litigation; and (3)

26 DEFENDANT JAVIER GUTIERREZ' ANSWER TO
PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION/ 1

Hess Law Office, PLLC


415 N. Second Avenue
Walla Walla, WA 99362
Telephone (509) 525-4744
Fax (509) 525-4977
Email peter@hesslawoffice.com

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not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

DATED this 13th day of April, 2013.

Hess Law Office, PLLC

By: 
Peter J. Hess, WSBA #39721
Of Attorneys for Plaintiff

DEFENDANT JAVIER GUTIERREZ' ANSWER TO
PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION/ 2

Hess Law Office, PLLC
415 N. Second Avenue
Walla Walla, WA 99362
Telephone (509) 525-4744
Fax (509) 525-4977
Email peter@hesslawoffice.com

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the _____ day of April, 2013, I caused to be served the original of DEFENDANT JAVIER GUTIERREZ' ANSWER TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S FIRST SET OF REQUESTS FOR ADMISSION by the method indicated below, and addressed to the following:

Mr. Patrick M. Paulich
Thorsrud Cane & Paulich
1300 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile

Adrienne King,
Assistant to PETER J. HESS

DEFENDANT JAVIER GUTIERREZ' ANSWER TO
PLAINTIFF'S FIRST SET OF REQUESTS FOR ADMISSION/ 3

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EXHIBIT 2

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THORSRUD CANE & PAULICH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff

vs.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants

No.: 12-2-00908-3

PATRIOT GENERAL'S FIRST
REQUESTS FOR ADMISSION TO
JORGE GUTIERREZ AND
RESPONSES

REQUESTS FOR ADMISSION

REQUESTION FOR ADMISSION NO. 1.

Admit that defendant Javier Gutierrez's date of birth is January 17, 1991.

RESPONSE:

Admit.

PATRIOT GENERAL'S FIRST REQUESTS FOR ADMISSION
TO JORGE GUTIERREZ AND RESPONSES
Page 1 of 3

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and answers.doc

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Bellevue, WA 98004
(425) 453-8161
Fax: (425) 605-9540
dick@triallawyersnw.com
shannon@triallawyersnw.com

1 **REQUESTION FOR ADMISSION NO. 2.**

2 Admit that on January 9, 2011, defendant Javier Gutierrez was 19 years of age.

3 **RESPONSE:**

4 Admit.

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8 **REQUESTION FOR ADMISSION NO. 3.**

9 Admit that on or around January 9, 2011, Javier Gutierrez was a passenger in an
10 automobile hat was involved in a motor vehicle accident in or near Walla Walla,
11 Washington.

12 **RESPONSE:**

13 Admit.

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15 DATED: April 26, 2013

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Kilpatrick Law Group, P.C.

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Dick Kilpatrick, WSBA #7058
Shannon M. Kilpatrick, WSBA #41495
Attorneys for Jorge Gutierrez

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PATRIOT GENERAL'S FIRST REQUESTS FOR ADMISSION
TO JORGE GUTIERREZ AND RESPONSES
Page 2 of 3

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DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

<p>Patrick Paulich Thorsrud Cane & Paulich 1300 Puget Sound Plaza 1325 Fourth Ave Seattle, WA 98101 ppaulich@tcplaw.com F:206-386-7795</p> <p>Peter Hess Hess Law Office 312 N. Second Ave Walla Walla, WA 99362 peter@hesslawoffice.com F:509-525-4977</p>	<p><input checked="" type="checkbox"/> [XXX] Fax</p> <p><input type="checkbox"/> [] U.S. Mail</p> <p><input type="checkbox"/> [] Electronic Filing</p> <p><input type="checkbox"/> [] Legal Messenger</p> <p><input type="checkbox"/> [] FedEx</p>
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Dated this 26th day of April, 2013 at Bellevue, Washington.


Kendra Short, Legal Assistant

PATRIOT GENERAL'S FIRST REQUESTS FOR ADMISSION
TO JORGE GUTIERREZ AND RESPONSES
Page 3 of 3

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EXHIBIT 3

CHAPTER 242

[Engrossed Substitute House Bill 1233]

MOTOR VEHICLE INSURANCE—PERSONAL INJURY PROTECTION BENEFITS

Effective Date: 7/25/93 - Except Sections 1 through 5 which become effective on 7/1/94

AN ACT Relating to mandatory offering of personal injury protection insurance; adding new sections to chapter 48.22 RCW; creating a new section; and providing an effective date.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Automobile" means a passenger car as defined in RCW 46.04.382 registered or principally garaged in this state other than:

(a) A farm-type tractor or other self-propelled equipment designed for use principally off public roads;

(b) A vehicle operated on rails or crawler-treads;

(c) A vehicle located for use as a residence;

(d) A motor home as defined in RCW 46.04.305; or

(e) A moped as defined in RCW 46.04.304.

(2) "Bodily injury" means bodily injury, sickness, or disease, including death at any time resulting from the injury, sickness, or disease.

(3) "Income continuation benefits" means payments of at least eighty-five percent of the insured's loss of income from work, because of bodily injury sustained by him or her in the accident, less income earned during the benefit payment period. The benefit payment period begins fourteen days after the date of the accident and ends at the earliest of the following:

(a) The date on which the insured is reasonably able to perform the duties of his or her usual occupation;

(b) The expiration of not more than fifty-two weeks from the fourteenth day; or

(c) The date of the insured's death.

(4) "Insured automobile" means an automobile described on the declarations page of the policy.

(5) "Insured" means:

(a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or

(b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

(6) "Loss of services benefits" means reimbursement for payment to others, not members of the insured's household, for expenses reasonably incurred for services in lieu of those the insured would usually have performed for his or her household without compensation, provided the services are actually rendered, and ending the earliest of the following:

(a) The date on which the insured person is reasonably able to perform those services;

(b) The expiration of fifty-two weeks; or

(c) The date of the insured's death.

(7) "Medical and hospital benefits" means payments for all reasonable and necessary expenses incurred by or on behalf of the insured for injuries sustained as a result of an automobile accident for health care services provided by persons licensed under Title 18 RCW, including pharmaceuticals, prosthetic devices and eye glasses, and necessary ambulance, hospital, and professional nursing service.

(8) "Automobile liability insurance policy" means a policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage suffered by any person and arising out of the ownership, maintenance, or use of an insured automobile.

(9) "Named insured" means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

(10) "Occupying" means in or upon or entering into or alighting from.

(11) "Pedestrian" means a natural person not occupying a motor vehicle as defined in RCW 46.04.320.

(12) "Personal injury protection" means the benefits described in sections 1 through 5 of this act.

NEW SECTION. Sec. 2. (1) No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage benefits at limits established in this chapter for medical and hospital expenses, funeral expenses, income continuation, and loss of services sustained by an insured because of bodily injury caused by an automobile accident are offered as an optional coverage.

(2) A named insured may reject, in writing, personal injury protection coverage and the requirements of subsection (1) of this section shall not apply. If a named insured has rejected personal injury protection coverage, that rejection shall be valid and binding as to all levels of coverage and on all persons who might have otherwise been insured under such coverage. If a named insured has rejected personal injury protection coverage, such coverage shall not be included in any supplemental, renewal, or replacement policy unless a named insured subsequently requests such coverage in writing.

NEW SECTION. Sec. 3. (1) Personal injury protection coverage need not be provided for vendor's single interest policies, general liability policies, or other policies, commonly known as umbrella policies, that apply only as excess to the automobile liability policy directly applicable to the insured motor vehicle.

(2) Personal injury protection coverage need not be provided to or on behalf of:

(a) A person who intentionally causes injury to himself or herself;

(b) A person who is injured while participating in a prearranged or organized racing or speed contest or in practice or preparation for such a contest;

(c) A person whose bodily injury is due to war, whether or not declared, or to an act or condition incident to such circumstances;

(d) A person whose bodily injury results from the radioactive, toxic, explosive, or other hazardous properties of nuclear material;

(e) The named insured or a relative while occupying a motor vehicle owned by the named insured or furnished for the named insured's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made;

(f) A relative while occupying a motor vehicle owned by the relative or furnished for the relative's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made; or

(g) An insured whose bodily injury results or arises from the insured's use of an automobile in the commission of a felony.

NEW SECTION. Sec. 4. Insurers providing automobile insurance policies must offer minimum personal injury protection coverage for each insured with maximum benefit limits as follows:

(1) Medical and hospital benefits of ten thousand dollars for expenses incurred within three years of the automobile accident;

(2) Benefits for funeral expenses in an amount of two thousand dollars;

(3) Income continuation benefits covering income losses incurred within one year after the date of the insured's injury in an amount of ten thousand dollars, subject to a limit of the lesser of two hundred dollars per week or eighty-five percent of the weekly income. The combined weekly payment receivable by the insured under any workers' compensation or other disability insurance benefits or other income continuation benefit and this insurance may not exceed eighty-five percent of the insured's weekly income;

(4) Loss of services benefits in an amount of five thousand dollars, subject to a limit of forty dollars per day not to exceed two hundred dollars per week; and

(5) Payments made under personal injury protection coverage are limited to the amount of actual loss or expense incurred.

NEW SECTION. Sec. 5. In lieu of minimum coverage required under section 4 of this act, an insurer providing automobile liability insurance policies shall offer and provide, upon request, personal injury protection coverage with benefit limits for each insured of:

(1) Up to thirty-five thousand dollars for medical and hospital benefits incurred within three years of the automobile accident;

(2) Up to two thousand dollars for funeral expenses incurred;

(3) Up to thirty-five thousand dollars for one year's income continuation benefits, subject to a limit of the lesser of seven hundred dollars per week or eighty-five percent of the weekly income; and

(4) Up to forty dollars per day for loss of services benefits, for up to one year from the date of the automobile accident.

Payments made under personal injury protection coverage are limited to the amount of actual loss or expense incurred.

NEW SECTION. Sec. 6. Sections 1 through 5 of this act are each added to chapter 48.22 RCW.

NEW SECTION. Sec. 7. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 8. Sections 1 through 5 of this act shall take effect July 1, 1994.

NEW SECTION. Sec. 9. The commissioner may adopt such rules as are necessary to implement sections 1 through 5 of this act.

Passed the House April 20, 1993.

Passed the Senate April 16, 1993.

Approved by the Governor May 7, 1993.

Filed in Office of Secretary of State May 7, 1993.

CHAPTER 243

[Engrossed Substitute House Bill 1259]

FORFEITED FIREARMS—DESTRUCTION, SALE, OR TRADE OF

Effective Date: 5/7/93

AN ACT Relating to forfeiture of firearms; amending RCW 9.41.098; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Sec. 1. RCW 9.41.098 and 1989 c 222 s 8 are each amended to read as follows:

(1) The superior courts and the courts of limited jurisdiction of the state may order forfeiture of a firearm which is proven to be:

(a) Found concealed on a person not authorized by RCW 9.41.060 or 9.41.070 to carry a concealed pistol: PROVIDED, That it is an absolute defense to forfeiture if the person possessed a valid Washington concealed pistol license within the preceding two years and has not become ineligible for a concealed pistol license in the interim. Before the firearm may be returned, the person must pay the past due renewal fee and the current renewal fee;

(b) Commercially sold to any person without an application as required by RCW 9.41.090;

(c) Found in the possession or under the control of a person at the time the person committed or was arrested for committing a crime of violence or a crime in which a firearm was used or displayed or a felony violation of the uniform controlled substances act, chapter 69.50 RCW;

(d) Found concealed on a person who is in any place in which a concealed pistol license is required, and who is under the influence of any drug or under

EXHIBIT 4

HOUSE BILL REPORT

HB 1233

As Reported By House Committee On:

Financial Institutions & Insurance

Title: An act relating to mandatory offering of personal injury protection insurance.

Brief Description: Regulating the mandatory offering of personal injury protection insurance.

Sponsors: Representatives R. Meyers, Zellinsky, Dellwo, R. Johnson, Scott, Riley, Kessler, Dunshee, Dorn, Foreman, Grant, Kremen and Johanson.

Brief History:

Reported by House Committee on:

Financial Institutions & Insurance, February 4, 1993, DPS.

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass.

Signed by 16 members: Representatives Zellinsky, Chair; Scott, Vice Chair; Mielke, Ranking Minority Member; Dyer, Assistant Ranking Minority Member; Anderson; Dellwo; Dorn; Grant; R. Johnson; Kessler; Kremen; Lemmon; R. Meyers; Reams; Schmidt; and Tate.

Staff: John Conniff (786-7119).

Background: Most automobile insurance companies offer medical coverage, also referred to as personal injury protection (PIP) coverage, as part of a comprehensive auto insurance policy. PIP coverage includes disability, wage loss, and death benefit coverage. The Insurance Commissioner has adopted limited rules setting basic standards for the amount of coverage to be offered by insurers who market PIP coverage.

Summary of Substitute Bill: Automobile liability insurance companies must provide PIP coverage under nonbusiness auto insurance policies unless the named insured rejects PIP coverage in writing. Insurers need not provide PIP coverage for motor homes or motorcycles, for intentional injuries, for injuries arising from war, from toxic waste exposure or from

accidents while the insured is occupying an owned but uninsured auto, or from accidents to the insured's relatives while occupying an auto owned by the relative.

Coverage must extend to reasonable and necessary medical and hospital expenses incurred within three years from the date of the insured's injury up to \$10,000. Funeral expenses must be covered up to \$2,000. Loss of income benefits must be provided up to \$10,000 subject to certain limits. Loss of services benefits must be provided up to \$40 per day and not exceeding a total of \$5,000. Insurers must offer higher limits for all such benefits as provided.

Insurers and policyholders must adhere to the claim procedures outlined.

Insurance companies may not settle subrogation claims through intercompany arbitration until the policyholder's claim has been settled.

An insurer may not incorporate any exclusion, condition, or other provision in a policy that limits the PIP benefits required without the approval of the Insurance Commissioner.

Substitute Bill Compared to Original Bill: Many technical changes are made to clarify requirements for offering PIP coverage and several substantive changes are made to satisfy insurance company objections. Among these substantive changes: the deletion of rules requiring insurance companies to pay for plaintiff's attorney's recovery of amounts owed to the company; further limitations on the required PIP benefits including a weekly limit on loss of services coverage; and authority to condition or limit coverage as permitted by the Insurance Commissioner.

Fiscal Note: Requested January 28, 1993.

Effective Date of Substitute Bill: The bill takes effect July 1, 1994.

Testimony For: None.

Testimony Against: (Original Bill): Insurers should not be required to pay the policyholder's attorney a share of amounts owed to the insurer simply because such amounts were included in the settlement of the policyholder's claim. Required PIP benefits should be clarified in several sections to prevent benefit payments and limit benefit payments for persons not intended as beneficiaries of PIP coverage. (No testimony on substitute bill).

Witnesses: Craig McGee, PEMCO (Con); Jean Leonard and Paul Danner, State Farm Insurance Company (Con); Clark Sitzes, Independent Agents (Con); Mike Kupphahn, Farmers Insurance (neither pro nor con but amend); and Melodie Bankers, Insurance Commissioner's Office (with some concerns).

EXHIBIT 5

Sec. 1. RCW 48.22.005 and 1993 c 242 s 1 are each amended to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Automobile" means a passenger car as defined in RCW 46.04.382 registered or principally garaged in this state other than:

(a) A farm-type tractor or other self-propelled equipment designed for use principally off public roads;

(b) A vehicle operated on rails or crawler-treads;

(c) A vehicle located for use as a residence;

(d) A motor home as defined in RCW 46.04.305; or

(e) A moped as defined in RCW 46.04.304.

(2) "Bodily injury" means bodily injury, sickness, or disease, including death at any time resulting from the injury, sickness, or disease.

(3) "Income continuation benefits" means payments ~~((of at least eighty-five percent of))~~ for the insured's loss of income from work, because of bodily injury sustained by ~~((him or her))~~ the insured in ~~((the))~~ an automobile accident, less income earned during the benefit payment period. The combined weekly payment an insured may receive under personal injury protection coverage, worker's compensation, disability insurance, or other income continuation benefits may not exceed eighty-five percent of the insured's weekly income from work. The benefit payment period begins fourteen days after the date of the automobile accident and ends at the earliest of the following:

(a) The date on which the insured is reasonably able to perform the duties of his or her usual occupation;

(b) ~~((The expiration of not more than fifty-two weeks from the fourteenth day))~~ Fifty-four weeks from the date of the automobile accident; or

(c) The date of the insured's death.

(4) "Insured automobile" means an automobile described on the declarations page of the policy.

(5) "Insured" means:

(a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or

(b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

(6) "Loss of services benefits" means reimbursement for payment to others, not members of the insured's household, for expenses reasonably incurred for services in lieu of those the insured would usually have performed for his or her household without compensation, provided the services are actually rendered ~~((; and ending))~~. The maximum benefit is forty dollars per day. Reimbursement for loss of services ends the earliest of the following:

(a) The date on which the insured person is reasonably able to perform those services;

(b) ~~((The expiration of fifty-two weeks))~~ Fifty-two weeks from the date of the automobile accident; or

(c) The date of the insured's death.

(7) "Medical and hospital benefits" means payments for all reasonable and necessary expenses incurred by or on behalf of the insured for injuries sustained as a result of an automobile accident for health care services provided by persons licensed under Title 18 RCW, including pharmaceuticals, prosthetic devices and eye glasses, and necessary ambulance, hospital, and professional nursing service. Medical and hospital benefits are payable for expenses incurred within three years from the date of the automobile accident.

(8) "Automobile liability insurance policy" means a policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage suffered by any person and arising out of the ownership, maintenance, or use of an insured automobile. An automobile liability policy does not include:

(a) Vendors single interest or collateral protection coverage;

(b) General liability insurance; or

(c) Excess liability insurance, commonly known as an umbrella policy, where coverage applies only as excess to an underlying automobile policy.

(9) "Named insured" means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

(10) "Occupying" means in or upon or entering into or alighting from.

(11) "Pedestrian" means a natural person not occupying a motor vehicle as defined in RCW 46.04.320.

(12) "Personal injury protection" means the benefits described in this section and RCW 48.22.085 through 48.22.100. Payments made under personal injury protection coverage are limited to the actual amount of loss or expense incurred.

Sec. 2. RCW 48.22.085 and 1993 c 242 s 2 are each amended to read as follows:

(1) No new automobile liability insurance policy or renewal of such an existing policy may be issued unless personal injury protection coverage ~~((benefits at limits established in this chapter for medical and hospital expenses, funeral expenses, income continuation, and loss of services sustained by an insured because of bodily injury caused by an automobile accident are))~~ is offered as an optional coverage.

(2) A named insured may reject, in writing, personal injury protection coverage and the requirements of subsection (1) of this section shall not apply. If a named insured ~~((has rejected))~~ rejects personal injury protection coverage~~((:))~~:

(a) That rejection ((shall be)) is valid and binding as to all levels of coverage and on all persons who might have otherwise been insured under such coverage ((- If a named insured has rejected personal injury protection coverage, such coverage shall not be included)); and

(b) The insurer is not required to include personal injury protection coverage in any supplemental, renewal, or replacement policy unless a named insured subsequently requests such coverage in writing.

Sec. 3. RCW 48.22.090 and 1993 c 242 s 3 are each amended to read as follows:

~~((1) Personal injury protection coverage need not be provided for vendor's single interest policies, general liability policies, or other policies, commonly~~

~~known as umbrella policies, that apply only as excess to the automobile liability policy directly applicable to the insured motor vehicle.~~

~~(2) Personal injury protection coverage need not be provided))~~ An insurer is not required to provide personal injury protection coverage to or on behalf of:

- ~~((a))~~ (1) A person who intentionally causes injury to himself or herself;
- ~~((b))~~ (2) A person who is injured while participating in a prearranged or organized racing or speed contest or in practice or preparation for such a contest;
- ~~((c))~~ (3) A person whose bodily injury is due to war, whether or not declared, or to an act or condition incident to such circumstances;
- ~~((d))~~ (4) A person whose bodily injury results from the radioactive, toxic, explosive, or other hazardous properties of nuclear material;
- ~~((e))~~ (5) The named insured or a relative while occupying a motor vehicle owned by the named insured or furnished for the named insured's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made;
- ~~((f))~~ (6) A relative while occupying a motor vehicle owned by the relative or furnished for the relative's regular use, if such motor vehicle is not described on the declaration page of the policy under which a claim is made; or
- ~~((g))~~ (7) An insured whose bodily injury results or arises from the insured's use of an automobile in the commission of a felony.

Sec. 4. RCW 48.22.095 and 1993 c 242 s 4 are each amended to read as follows:

Insurers providing automobile insurance policies must offer minimum personal injury protection coverage for each insured with ~~((maximum))~~ benefit limits as follows:

- (1) Medical and hospital benefits of ten thousand dollars ~~((for expenses incurred within three years of the automobile accident))~~;
- (2) ~~((Benefits for funeral expenses in an amount))~~ A funeral expense benefit of two thousand dollars;
- (3) Income continuation benefits ~~((covering income losses incurred within one year after the date of the insured's injury in an amount))~~ of ten thousand dollars, subject to a limit of ~~((the lesser of))~~ two hundred dollars per week ~~((or eighty five percent of the weekly income. The combined weekly payment receivable by the insured under any workers' compensation or other disability insurance benefits or other income continuation benefit and this insurance may not exceed eighty five percent of the insured's weekly income))~~; and
- (4) Loss of services benefits ~~((in an amount))~~ of five thousand dollars, subject to a limit of ~~((forty dollars per day not to exceed))~~ two hundred dollars per week~~((; and~~
- (5) ~~Payments made under personal injury protection coverage are limited to the amount of actual loss or expense incurred))~~.

Sec. 5. RCW 48.22.100 and 1993 c 242 s 5 are each amended to read as follows:

~~((In lieu of minimum coverage required under RCW 48.22.095))~~ If requested by a named insured, an insurer providing automobile liability insurance policies ((shall)) must offer ((and provide, upon request,)) personal injury protection coverage for each insured with benefit limits ((for each insured of)) as follows:

(1) ~~((Up to))~~ Medical and hospital benefits of thirty-five thousand dollars ~~((for medical and hospital benefits incurred within three years of the automobile accident));~~

(2) ~~((Up to))~~ A funeral expense benefit of two thousand dollars ~~((for funeral expenses incurred));~~

(3) ~~((Up to))~~ Income continuation benefits of thirty-five thousand dollars ~~((for one year's income continuation benefits)),~~ subject to a limit of ~~((the lesser of))~~ seven hundred dollars per week ~~((or eighty-five percent of the weekly income));~~ and

(4) ~~((Up to forty dollars per day for loss of services benefits, for up to one year from the date of the automobile accident.~~

~~Payments made under personal injury protection coverage are limited to the amount of actual loss or expense incurred))~~ Loss of services benefits of fourteen thousand six hundred dollars.

Passed by the House February 10, 2003.

Passed by the Senate April 17, 2003.

Approved by the Governor May 7, 2003.

Filed in Office of Secretary of State May 7, 2003.

CHAPTER 116

[House Bill 1150]

INSURANCE—SINGLE PREMIUM CREDIT

AN ACT Relating to the sale of single premium credit insurance; and adding a new section to chapter 48.18 RCW.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. A new section is added to chapter 48.18 RCW to read as follows:

(1) For the purposes of this section:

(a) "Licensee" means every insurance agent, broker, or solicitor licensed under chapter 48.17 RCW.

(b) "Residential mortgage loan" means any loan primarily for personal, family, or household use secured by a mortgage or deed of trust on residential real estate upon which is constructed or intended to be constructed a single-family dwelling or multiple family dwelling of four or less units.

(c) "Single premium credit insurance" means credit insurance purchased with a single premium payment at inception of coverage.

(2) An insurer or licensee may not issue or sell any single premium credit insurance product in connection with a residential mortgage loan unless:

(a) The term of the single premium credit insurance policy is the same as the term of the loan;

(b) The debtor is given the option to buy credit insurance paid with monthly premiums; and

(c) The single premium credit insurance policy provides for a full refund of premiums to the debtor if the credit insurance is canceled within sixty days of the date of the loan.

(3) This section does not apply to residential mortgage loans if:

(a) The loan amount does not exceed ten thousand dollars, exclusive of fees;

EXHIBIT 6

HOUSE BILL REPORT

HB 1084

As Passed Legislature

Title: An act relating to regulating automobile insurance.

Brief Description: Regulating automobile insurance.

Sponsors: By Representatives Hunter, Benson and Schual-Berke; by request of Insurance Commissioner.

Brief History:

Committee Activity:

Financial Institutions & Insurance: 1/22/03, 1/28/03 [DP].

Floor Activity:

Passed House: 2/10/03, 93-0.

Passed Senate: 4/17/03, 48-0.

Passed Legislature.

Brief Summary of Bill

- Makes technical amendments to the insurance code involving the clarification of existing statutory language pertinent to personal injury protection coverage.
- Clarifies coverage provisions regarding personal injury protection benefits that insurers must offer with automobile insurance policies.

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: Do pass. Signed by 10 members: Representatives Schual-Berke, Chair; Simpson, Vice Chair; Benson, Ranking Minority Member; Newhouse, Assistant Ranking Minority Member; Cairnes, Carrell, Cooper, Hatfield, Hunter and Roach.

Staff: Thamas Osborn (786-7129).

Background:

Personal injury protection coverage: "Personal injury protection" (PIP) is a type of automobile insurance coverage obtained by most drivers as part of their comprehensive automobile insurance policy. The PIP insurance provides immediate benefits to an insured on a no-fault basis if he or she is injured in an automobile accident. The coverage generally provides limited financial compensation for injury, death, disability, wage loss, and other expenses incurred as the result of an accident. Automobile liability insurance companies must provide PIP coverage under non-business auto insurance policies unless the named insured rejects PIP coverage in writing. Insurers need not provide PIP coverage for motor homes or motorcycles.

Mandatory minimum PIP coverage: At minimum, an insurer must offer PIP benefits that cover medical and hospital expenses incurred within three years of the date of the insured's injury, up to a maximum of \$10,000. Funeral expenses must be covered up to \$2,000. A maximum of \$5,000 in coverage must be provided for loss of services, subject to a limitation of \$40 per day and \$200 per week. Loss of income benefits must also be provided, subject to the following conditions:

- Income losses must be incurred within one year of injury;
- A total of \$10,000 in coverage must be offered, subject to a limit of \$200 per week or 85 percent of average weekly income, whichever is less; and
- Weekly payments are limited to 85 percent of the insured's weekly income, and the calculation of the amount of the weekly payment must include the combined total of the insurance benefits and all other income loss benefits received by the insured.

Optional extended PIP coverage: When explicitly requested by an insured, insurers are required to offer PIP benefits that are much more extensive than the mandatory minimums discussed above. Under the optional coverage provisions, the coverage limit for medical and hospital expenses is raised to \$35,000. Coverage for loss of services is set at \$40 per day for up to one year, and is not subject to a specified yearly limit. The limit on loss of income benefits is raised to \$35,000, subject to a limit of the lesser of \$700 per week or 85 percent of the insured's average weekly income prior to the injury.

The Office of the Insurance Commissioner (OIC) requested this legislation in order to reorganize various sections of the PIP statutes and to clarify some of the statutory language.

Summary of Bill:

Technical revisions: The bill is – in essence – technical in nature, insofar as it focuses on rearranging the existing statutory provisions, clarifying some confusing statutory language, and eliminating redundant passages. Overall, the bill does not substantively change existing law, except to the extent that the reorganization and clarification may allow some subtle reinterpretation of the PIP statutes.

Substantive changes: Under current law, the language of the coverage provisions in the PIP statutes is confusing, as it can be misinterpreted as imposing maximum limits on the amount of PIP benefits that an insurer can offer. The technical revisions in the bill eliminate the potential for such confusion by clarifying that the specified coverages represent the minimum coverages that must be offered by an insurer, thus allowing insurers to offer more extensive PIP benefits should they so choose.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The language of the statutes pertaining to personal injury protection insurance coverage is very confusing. This bill is needed in order to clarify the problematic language and to make other purely technical changes.

Testimony Against: None.

Testified: Bill Daley, Office of the Insurance Commissioner.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

v.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No. 12-2-00908-3

NOTE FOR MOTION DOCKET

TO: THE CLERK OF THE COURT

AND TO: All Counsel of Record

PLEASE TAKE NOTICE that the undersigned will bring on for hearing: Motion for Summary Judgment

The hearing is to be held:

DATE: July 15, 2013

TIME: 9:30 AM

DATED this 12th day of June, 2013.



PATRICK M. PAULICH, WSBA #10951
MATTHEW MUNSON, WSBA #32019
THORSRUD CANE & PAULICH
Attorneys for Plaintiff Patriot General
Insurance Company

THORSRUD CANE & PAULICH

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NOTE FOR MOTION DOCKET - 1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

v.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No. 12-2-00908-3

[PROPOSED] ORDER GRANTING
PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT

THIS MATTER came on regularly before the Court for hearing on plaintiff Patriot
General Insurance Company's Motion for Summary Judgment. The Court having considered the
arguments of counsel and reviewed the records and files herein, including:

1. Patriot General Insurance Company's Motion for Summary Judgment;
2. The Declaration of Tomas Miranda and the exhibit to that declaration;
3. The Declaration of Amy Brunner and the exhibit to that declaration;
4. The Declaration of Kyle Mosbrucker and the exhibit to that declaration;
5. The Declaration of Matthew Munson and the exhibits to that declaration;
6. _____;
7. _____;

[PROPOSED] ORDER GRANTING PLAINTIFF
PATRIOT GENERAL INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT - 1

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1 8. _____; and

2 9. _____;

3 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff Patriot General
4 Insurance Company's Motion for Summary Judgment is granted and that Patriot General
5 Insurance Company has no duty to pay any benefits under the UIM coverage under Policy No.
6 471327125 arising from a motor vehicle accident involving Javier Gutierrez that occurred in
7 Walla Walla on or around January 9, 2011.

8
9
10 DONE IN OPEN COURT this _____ day of _____, 2013.

11
12 _____
13 The Honorable _____

14 Presented by:

15
16 _____
17 Patrick M. Paulich, WSBA #10951
18 Matthew Munson, WSBA #32019
19 THORSRUD CANE & PAULICH
20 Attorneys for Plaintiff Patriot General
21 Insurance Company

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23
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25 [PROPOSED] ORDER GRANTING PLAINTIFF
26 PATRIOT GENERAL INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT - 2

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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
7 FOR WALLA WALLA COUNTY

8 PATRIOT GENERAL INSURANCE
9 COMPANY, a foreign corporation,

10 Plaintiff,

11 v.

12 JORGE GUTIERREZ and JANE DOE
13 GUTIERREZ, and their marital community,
14 and JAVIER GUTIERREZ,

Defendants.

No. 12-2-00908-3

DECLARATION OF SERVICE

15 I declare under penalty of perjury under the laws of the State of Washington that I caused to
16 be served the listed documents on the following counsel in the manner described below:

- 17 1. Note for Motion Docket;
- 18 2. Plaintiff Patriot General Insurance Company's Motion for Summary Judgment;
- 19 3. Declaration of Kyle Mosbrucker in Support of Plaintiff Patriot General Insurance
20 Company's Motion for Summary Judgment;
- 21 4. Declaration of Matthew Munson in Support of Plaintiff Patriot General Insurance
22 Company's Motion for Summary Judgment;
- 23 5. Declaration of Amy Brunner in Support of Plaintiff Patriot General Insurance
24 Company's Motion for Summary Judgment;
- 25 6. Declaration of Tomas Miranda;
- 26

DECLARATION OF SERVICE- 1

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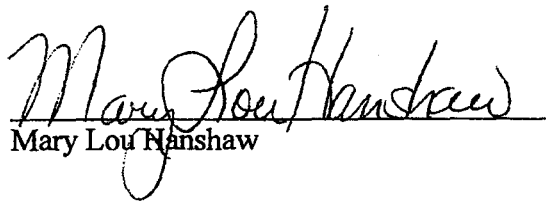
1 7. [Proposed] Order Granting Plaintiff Patriot General Insurance Company's Motion
2 for Summary Judgment; and


3 8. this Declaration of Service.

4 Peter J. Hess
5 Hess Law Office, PLLC
6 415 N. Second
7 Walla Walla, WA 99362
8 *Via U.S. Mail*

9 Dick Kilpatrick
10 Shannon M. Kilpatrick
11 Kilpatrick Law Group, P.C.
12 1750 112th Avenue NE, Suite D-155
13 Bellevue, WA 98004
14 *Via Messenger*

15 Executed at Seattle, Washington this 12th day of June, 2013.

16 
17 _____
18 Mary Lou Hanshaw

 COPY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

NO: 12 2 00908 3

Plaintiff,

vs.

DEFENDANT JAVIER
GUTIERREZ'S MEMORANDUM
OF LAW IN OPPOSITION TO
PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S
MOTION FOR SUMMARY
JUDGMENT

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital
community, and JAVIER GUTIERREZ,

Defendants.

ISSUES

1. Whether RCW 48.22.005 Requires Plaintiff Patriot General Insurance Company ("Patriot") to Insure Defendant Javier Gutierrez ("Javier").
 - a. Whether the Family Members Listed Under RCW 48.22.005(5)(a)'s Definition of "Insured" are People Whom Patriot **Must** Insure.
 - b. Whether The RCW 48.22.005(5)(a)'s Definition of "Insured" Applies to RCW 48.22.030 ("The UIM Statute").
2. Whether Patriot can Contract Around the Statutes and Exclude Javier from Coverage.

DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT/ 1

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Email petar@hesslawoffice.com

1 3. Whether the Actual Language of the Policy Excludes Javier from
2 Coverage.

3 **STATEMENT OF FACTS**

4 Javier basically agrees with Patriot's Statement of Facts. Additionally, at the
5 time of 1/9/11 collision, Javier was a resident of Defendant Jorge Gutierrez's
6 ("Jorge") household and is his natural son. (Declaration of Javier Gutierrez p. 1,
7 ln. 19-21)

8 **ARGUMENT**

9 **Standard for Summary Judgment**

10 Summary judgment shall only be granted "if the pleadings, depositions,
11 answers to interrogatories, and admissions on file, together with the affidavits, if
12 any, show that there is no genuine issue as to any material fact and that the
13 moving party is entitled to a judgment as a matter of law." CR 56

14 **1. RCW 48.22.005 Requires Patriot to Insure Javier**

15
16 a. RCW 48.22.005(5)(a) is a law that defines the people whom casualty
17 insurance policies MUST insure. Javier meets that definition; thus,
18 Patriot MUST insure him.

19 (5) "Insured" means:

20 (a) The named insured or a person who is a resident of the named
21 insured's household and is either related to the named insured by blood,
22 marriage, or adoption, or is the named insured's ward, foster child, or
23 stepchild..." RCW 48.22.005(5)(a).

24 Patriot contends that "[b]y using the disjunctive "or", the statute does not
25 mandate that the insured always include residents of the named insured's
26 household; instead, the term may refer only to the named insured and certain

25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
26 TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT/ 2

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1 relatives, as with the Patriot policy." (Plaintiff's Motion for Summary Judgment, p.
2 8, In. 15-17). In other words, Patriot contends that it can exclude people from the
3 statute's list because the statute merely provides a list of people whom it may
4 insure. This sort of wordplay to sidestep the actual meaning of the statute is akin
5 to the old joke about the insurance company that refuses to cover fire damage
6 under "fire and theft" coverage because the insured wasn't victim to both a fire
7 and a theft.

8 The word "or" in RCW 48.22.005(5)(a), when read literally, could be either
9 disjunctive (expressing alternative meanings) or conjunctive (synonymous with
10 "and"). As discussed below, in the context of RCW 48.22.005(5)(a), the word "or"
11 is clearly conjunctive because the disjunctive interpretation leads to absurd
12 results. Therefore, Patriot **must** insure every person listed in the statute.

13 "There has been, however, so great laxity in the use of these ["and" and
14 "or"] terms that courts have generally said that the words are interchangeable and
15 that one may be substituted for the other, if to do so is consistent with the
16 legislative intent. (Footnote omitted.)" *State v. Keller*, 98 Wn.2d 725, 729
17 (1983)(quoting 1A C. Sands, *Statutory Construction* § 21.14, at 91 (4th ed. 1972).
18 *See also State v. Tiffany*, 44 Wash. 602, 604, 87 P. 932 (1906)). Further, the
19 "court's primary objective in interpreting a statute is to ascertain and give effect to
20 the intent of the Legislature. Although courts may not read into a statute that
21 which the Legislature has omitted, [courts] may construe a statute so as to avoid
22 strained or absurd consequences which could result from a literal reading." *Id.* at
23 728.

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26 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT/ 3

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1 Although Patriots interpretation (that RCW 48.22.005(5)(a) uses the
2 disjunctive "or") is one of the feasible literal readings of the words of the statute,
3 this interpretation leads to absurd results. Did the Legislature really intend to
4 make a list of people whom insurance companies *could* insure, but did not *have* to
5 insure? If so, is that list exhaustive, or could they choose insure others? If the
6 Legislature intended for this to be an exhaustive list, then it would be illegal for a
7 mother put her twenty-year-old son, living out of the house, on her policy. It is
8 absurd to think that the Legislature would restrict the right of such a parent to
9 contract to insure her son. Thus, there is no way that the Legislature intended to
10 create an exhaustive list. If the list is not exhaustive, then why would the
11 Legislature bother to make a list permissible insureds? The answer is that it
12 wouldn't. The only logical conclusion is that the Legislature created the list
13 because it intended that all of the people on the list **must** be defined as "insured".

14 Finally, RCW 48.22.050(5)(a) states that insured means "[t]he named
15 insured *or* a person who is a resident of the named insured's household..."
16 (emphasis added). **If the "or" was disjunctive (presenting alternative**
17 **meanings), the statute would allow Patriot to issue a policy that didn't**
18 **actually insure the named insured.** This is, of course, absurd. Therefore, the
19 Legislature intended that insurance carriers, such as Patriot, **must** insure all of the
20 people listed in RCW 48.22.050(5)(a). Javier was a resident of the named
21 insured's household and is related to the named insured by blood. By
22 Washington State law, Patriot **must** insure him.

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25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
26 TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT/ 4

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b. RCW 48.22.005 expressly states that it applies to the UIM Statute.

The very first sentence of RCW 48.22.005 states that, “[u]nless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.” If the meaning of the statute is plain, the court discerns legislative intent from the ordinary meaning of the words. *Tesoro Ref. & Mktg. Co. v. State, Dep’t of Revenue*, 164 Wn.2d 310, 317 (2008).

Patriot’s extensive briefing on the legislative history of RCW 48.22.005 puts the cart before the horse. The legislative history is only relevant to statutory interpretation if the statute is ambiguous. *Id.* RCW 48.22.005 clearly states that the definitions apply throughout the chapter, and the UIM Statute (48.22.030) is in the same chapter. Therefore, the plain meaning dictates that RCW 48.22.005 applies to the UIM Statute.

Patriot claims that RCW 48.22.005’s definition of “insured” is not incorporated into the UIM Statute because the UIM Statute “does not use the term ‘insured’ standing alone” but rather “uses the terms ‘persons insured thereunder’.” Patriot relies on *Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537 (1996) to support the proposition. The *Whatcom Cnty.* case is about ambiguity and does not require statutes to use the exact same words. The plain and ordinary meaning of “insured” and “persons insured thereunder” are exactly the same. In other words, they are unambiguous. In fact, “persons insured” is simply a plural form of “insured”.

The Legislature needed to use the term “persons insured thereunder” to avoid ambiguity. As Patriot points out, the UIM Statute discusses the “named

DEFENDANT JAVIER GUTIERREZ’S MEMORANDUM IN OPPOSITION
TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY’S MOTION
FOR SUMMARY JUDGMENT/ 5

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1 insured" later in the statute. RCW 48.22.005 defines the "named insured" as an
2 "insured". The UIM Statute needed to make it clear that the "named insured" is a
3 subset of "insured". If the Legislature had used the term "insured" early in the
4 statute and "named insured" later, there is a risk that a reader (whom was
5 unfamiliar with RCW 48.22.050) may interpret the terms as distinct. To avoid this
6 confusion, the term "persons insured thereunder" clearly encompasses both the
7 "named insured" and the rest of the people "insured" under the policy.

8 Finally, RCW 48.22.005 explicitly states that its definitions "apply
9 throughout this chapter." If Patriot's contention (that "persons insured thereunder"
10 are different from "insured") were true, then there would be a conflict between
11 RCW 48.22.005 and The UIM Statute (48.22.030). "When two statutes apparently
12 conflict, the rules of statutory construction direct the court to, if possible, reconcile
13 them so as to give effect to each provision." *State v. Landrum*, 66 Wn. App. 791,
14 796 (1992). The way to reconcile these two statutes is to give the same meaning
15 to "insureds" and "persons insured thereunder". Also, "when two statutory
16 provisions dealing with the same subject matter are in conflict, the latest enacted
17 provision prevails when it is more specific than its predecessor." *Id.* RCW
18 48.22.005 is more recent, it specifically defines "insured" and specifically applies
19 the definition throughout the chapter. There is no way that the Legislature could
20 have intended for the UIM Statute to modify RCW 48.22.005 because RCW
21 48.22.005 was enacted long after the UIM Statute.

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25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
26 TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT/ 6

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1 **2. Patriot Cannot Contract Around the Statutes Because the Statutes**
2 **Become Part of the Policy.**

3 Deep within the language of the policy, Patriot has attempted to contract
4 around the statute. The policy states that it insures "any relative of [the named
5 insured] if they reside in the same household...." Thus, at first glance, it appears
6 that the policy language complies with the governing statutes (RCW 4.22.005 and
7 RCW 4.22.030). However, Patriot attempts to introduce a tricky exclusion with its
8 definition of the word "relative". The policy defines "relative" as follows:

9 (3) "Relative" means a person living in [the named insured's]
10 household related to [the named insured] by blood, marriage or
11 adoption, including a ward or foster child. **Relative** includes a minor
12 under [the named insured's] guardianship who lives in [the named
13 insured's] household. Any relative who is age fourteen (14) or older
14 must be listed on the application or endorsed on the policy prior to a
 car accident or loss.

15 Because Javier is older than 14 and not on the application, Patriot contends that
16 he is excluded from coverage. This is sneaky attempt to contract around RCW
17 4.22.030 (which incorporates RCW 4.22.005). However, as discussed below,
18 these statutes cannot be sidestepped by crafty policy trickery.

19 There is no longer any judicial doubt that the state may regulate
20 insurance, so closely is that industry affected with the public interest
21 (43 Am.Jur.2d Insurance s 60 (1969)), and regulatory statutes
22 become a part of the policy of insurance. *Occidental Life Ins. Co. v.*
23 *Powers*, 192 Wn. 475 (1937).

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25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
26 TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
 FOR SUMMARY JUDGMENT/ 7

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1 Thus, a valid statute becomes a part of and should be read into
2 the insurance policy. *Dowell, Inc. v. United Pac. Cas. Ins. Co.*, 191
3 Wn. 666 (1937); *Williams v. Steamship Mut. Underwriting Ass'n,*
4 *Ltd.*, 45 Wn.2d 209 (1954); *State Farm Mut. Auto. Ins. Co. v. Hinkel*,
5 87 Nev. 478, 488 P.2d 1151 (1971); *Hendricks v. Meritplan Ins. Co.*,
6 205 Cal.App.2d 133, 22 Cal.Rptr. 682 (1962). Read into the
7 insurance contract as a public policy designed to expand uninsured
8 motorist coverage to a significantly greater proportion of the
9 population, the statute should receive from the courts a construction
10 that will effectuate its manifest purpose. This principle, variously
11 stated in other jurisdictions, was so declared in *First Nat. Ins. Co. of*
12 *America v. Devine*, 211 So.2d 587, 589 (Fla.App.1968);
13 *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 332-33 (1972)(emphasis
14 added).

15 Patriot takes the position that it is free to contract around RCW 48.22.005's
16 definition of "insured" because "the UIM statute 'does not mandate any particular
17 scope for the definition of who is an insured in a particular automobile insurance
18 policy.'" The original source for this contention is the concurring opinion in the
19 1976 *Touchette* case (main opinion quoted above). In his concurring opinion,
20 Justice Neill stated:

21 The policy of RCW 48.22.030 requires that insurers make available
22 uninsured motorist coverage to a class of 'insureds' that is at least as
23 broad as the class in the primary liability sections of the policy. It
24 does not preclude the parties from reaching agreement as to the
25 scope of that class in the first instance. The majority correctly
26 removes the exclusionary clause in the contract before us, as a void
attempt to sidestep the statutory policy. The additional conclusion,

DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT / 8

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1 that plaintiff is an 'insured' for purposes of uninsured motorist
2 coverage, results from the terms of this contract rather than any
3 statutory policy.

4 *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 337 (1972).

5 There are two things that are particularly noteworthy about Justice Neill's
6 statement. First, this opinion was published in 1976 and, as Patriot points out,
7 RCW 48.22.005 was not enacted until 1993. So, at the time of the *Touchette*
8 opinion, RCW 48.22.005 did not exist and there was no statutory definition of
9 "insured".

10 Second, Justice Neill makes it clear that any "attempt to sidestep statutory
11 policy" is "void". This is consistent with *Touchette's* main opinion (quoted on page
12 7-8 above) that the statute becomes part of any insurance policy issued in this
13 state. Since 1993, the term "insured" has been defined by statute. Therefore, it is
14 clear that Justice Neill's contention that the policy can limit the scope of insured is
15 abrogated because (since 1993) the policy definition of "insured" must be at least
16 as broad as the definition of "insured" in RCW 48.22.005.

17 Patriot has cited several other cases (all based on *Touchette*) which
18 purportedly support its contention that it is free to limit the scope of the definition
19 of "insured". The following addresses each of those cases and explains why each
20 is inapplicable to the case at hand:

- 21 1. *Farmers Ins. Co. of Washington v. Miller*, 87 Wn.2d 70 (1976) states
22 that the UIM Statute (48.22.030) "does not mandate any particular
23 scope for the definition of who is an insured in a particular
24

25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
26 TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT/ 9

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automobile insurance policy." - This case is from 1976. As discussed above, this is pre-RCW 48.22.005 and this contention is abrogated by RCW 48.22.005, which is read into post-1993 policies.

2. *Smith v. Cont'l Cas. Co.*, 128 Wn.2d 73, 83 (1995)(quoting *Miller*) - This case involved the coverage of an employee on a UIM policy insuring a business. RCW 48.22.005 is not applicable to this situation as it speaks about family members not employees. In the case of the business policy the insurance company free to mandate the scope of the definition of insured. This has no bearing on the case at hand
3. *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 443 (1977) - Pre-1993 case quoting *Touchette*. Abrogated by RCW 48.22.005. ← But
4. *Vasquez v. Am. Fire & Cas. Co.*, ___ Wn.App. ___, 298 P.3d 94, 98 (2013) - The named insured was a business, which does not have family members. RCW 48.22.005 did not apply to the policy in *Vasquez* and, therefore, the insurer in that case was free to limit the definition of insured. This has no bearing on the case at hand.
5. *Fin. Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 353 (1997) - The policy definition of "insured" matched the RCW 48.22.005(5)(a) definition, thus, it was never discussed. The issue involved coverage for guest passengers. This case is not applicable.
6. *Dairyland Ins. Co. v. Uhls*, 41 Wn. App. 49, 54 (1985)(quoting *Raynes*, 88 Wn.2d at 444) - Another pre-1993 case quoting *Raynes*

DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT/ 10

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1 (see #3 above). Like *Raynes* this case is abrogated by RCW
2 48.22.005, which created an inescapable definition of "insured".

3 7. *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 874
4 (2004) - The policy definition of "insured" in this case complied with
5 the law and defined "insured" according to RCW 48.22.005.
6 Wheeler was not covered by her foster mother's policy because she
7 had turned 18 and was no longer met the definition of "foster
8 daughter". This has no bearing on the case at hand.

9 As Patriot points out, there are only four published Washington opinions
10 citing RCW 48.22.005. Of those four opinions, one reads RCW 48.22.005's
11 definition of "insured" directly in to the UIM statute and another implies that RCW
12 48.22.005(2)'s definition of "bodily injury" applies to UIM. *Cherry v. Truck Ins.*
13 *Exch.*, 77 Wn. App. 557, 563 n.3 (1995); *Daley v. Allstate Ins. Co.*, 86 Wn. App.
14 346, 355 (1997) *rev'd*, 135 Wn.2d 777 (1998). Thus, it is clear that when courts
15 consider the language of RCW 48.22.005, they realize that it must be read into
16 the UIM statute.

17 Finally;

18 The UIM statute does not contain a "legislative intent" section, but
19 this court has consistently stated that the **Legislature enacted the**
20 **UIM statute to increase and broaden the protection of members**
21 **of the public who are involved in automobile accidents. This**
22 **legislative purpose "is not to be eroded ... by a myriad of legal**
23 **niceties arising from exclusionary clauses. RCW 48.22.030**
24 **should be read, therefore, to declare a public policy overriding the**
25 **exclusionary language so that the intendments of the statute are**

26 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
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1 read into and become part of the contract of insurance." The UIM
2 statute "is to be liberally construed in order to provide broad
3 protection against financially irresponsible motorists." This
4 interpretation of legislative purpose has generally resulted in this
5 court's voiding any provision in an insurance policy which is
6 inconsistent with the statute, which is not authorized by the statute,
7 or which thwarts the broad purpose of the statute. The public policy
8 of protecting the innocent victim of an uninsured motorist is applied
9 to the underinsured motorist to the extent that it is compatible.

Clements v. Travelers Indem. Co., 121 Wn.2d 243, 251-52 (1993)

(emphasis added)(citations omitted).

10 Because, RCW 48.22.005(5)(a)'s definition of "insured" was explicitly incorporated
11 into The UIM Statute in 1993, The UIM statute now mandates a particular scope
12 for the definition of who is "insured". Patriot, in its attempt to "erode" the coverage
13 required by The UIM Statute, is engaging in the exact same "legal niceties" that
14 the *Clements* Court condemned. Patriot is attempting to insure fewer people than
15 the statute requires. This type of erosion creates a slippery slope.

16 Patriot seeks to decrease and narrow "the protection of members of the
17 public who are involved in automobile accidents." Not only is this contrary to the
18 intent of the Legislature, it also produces draconian and absurd results. Under
19 Patriot's interpretation of its policy, Jorge's 14-year-old children are not covered.
20 Patriot attempts to exclude vulnerable 14-year-olds, whom are not even old
21 enough to drive, let alone purchase their own UIM coverage. If the Court allows
22 such erosion of The UIM Statute, vulnerable members of the public will be
23 endangered. Under Patriot's interpretation, exclusion of 2-year-olds is perfectly
24

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1 legal. There is simply no way that the Legislature intended such a result. It is
2 both absurd and dangerous.

3 The law is clear, RCW 48.22.005(5)(a)'s definition of "insured" must be
4 read into all Washington UIM policies and this sets the minimum amount of
5 coverage permissible in Washington. Javier meets the statutory definition of
6 "insured". Consequently, Patriot must insure him. This cannot be sidestepped,
7 eroded, or contracted around.

8 **3. The Language of the Policy Does Not Exclude Javier from**
9 **Coverage.**

10 "A term is ambiguous if it is fairly susceptible to two different but
11 reasonable interpretations by an average insurance purchaser. We construe
12 ambiguous insurance contract language in favor of the insured." *Wheeler v.*
13 *Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 872 (2004).

14 Patriot's policy states that it insures "any relative of [the named insured] if
15 they reside in the same household...." Javier resided with his father, who was the
16 named insured; however, Patriot contends that Javier is not covered by the policy
17 because "he is over the age of 14 and not listed on the application or any
18 endorsement." Patriot contends that the policy clearly and unambiguously
19 excludes Javier from coverage. However, the policy actually is ambiguous
20 because it doesn't state the punishment for failure to list relatives over the age of
21 14.

22 The policy defines "relative" as follows:

23
24

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1 (3) "Relative" means a person living in [the named insured's]
2 household related to [the named insured] by blood, marriage or
3 adoption, including a word or foster child. **Relative** includes a minor
4 under [the named insured's] guardianship who lives in [the named
5 insured's] household. Any **relative** who is age fourteen (14) or older
6 must be listed on the application or endorsed on the policy prior to a
7 car accident or loss.

8 The language of the policy requires relatives over the age of 14 to be listed
9 on the application or endorsement. Patriot contends that such unlisted relatives
10 are no longer defined as "relatives" and, therefore, are not "insured". The policy
11 language provides no such punishment. In fact, the purported exclusionary
12 sentence itself implies that unlisted family members over 14 are still considered to
13 be "relatives"; and "relatives", as defined by the policy itself, are "insured".

14 The purported exclusionary sentence states, "[a]ny **relative** who is age
15 fourteen (14) or older must be listed." If such unlisted people are not considered
16 to be "relatives", the policy should say something like, "any household members
17 who are 14 or older must be listed or they will no longer be considered to be
18 "relatives" and will be excluded by the policy."

19 If the Patriot wishes to enforce such drastic policy exclusions upon its
20 insureds, it ought to at least inform the policyholder of the exclusion. Here, the
21 consequences for not listing a 14-year-old are not defined. Patriot claims that the
22 punishment is exclusion from coverage. But, another reasonable interpretation is
23 that there is no punishment at all. There are two reasonable ways to interpret this
24 clause, therefore, it is ambiguous. Ambiguity is construed against Patriot. Thus,
25 Javier is insured under the very terms of the policy.

26 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
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1 **CONCLUSION**

2 Patriot's contention that it may pick and choose whom it wishes to insure
3 from the list of people in RCW 48.22.005(5)(a) is both absurd and dangerous.

4 The only realistic reading of the statute is that it requires all listed relatives to be
5 "insured" by any policy issued in the State of Washington. Javier was a member
6 of his father's (the named insured) household. Thus, he meets the statutory
7 definition of insured and must be insured by his father's policy.

8 RCW 48.22.005(5)(a)'s definition of "insured" applies throughout chapter
9 48.22. RCW 48.22.003 (The UIM Statute) is within the chapter and, therefore, the
10 definition of insured is expressly incorporated into The UIM Statute. Patriot may
11 not contract around the statutory definition of "insured" because a valid statute
12 becomes part of, and is read into, all Washington insurance policies. Therefore,
13 Washington State law requires Patriot to insure Javier and there is no way around
14 it.

15 Even if Washington law allowed Patriot to contract around the statutory
16 definition of "insured" (which it does not), Patriot's policy language is ambiguous
17 regarding the punishment for failure to list relatives 14 and older on the
18 application. A literal reading of the policy implies that there is no punishment at
19 all. Any ambiguity is construed against the insurance company. Thus, even the
20 policy insures Javier.

21 Javier is in agreement with Patriot's recitation of the facts. The issues
22 raised have to do with the interpretation of Washington law. Therefore, there is no
23 genuine issue of material fact and the Court should rule that, as a matter of law,
24

25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
26 TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
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Javier is insured under Jorge's policy with Patriot.

DATED this 1st Day of July, 2013

Hess Law Office

By: 

Peter J. Hess, WSBA #39721

Of Attorneys for Plaintiffs

DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of July, 2013, I caused to be served a true and correct copy of the DECLARATION OF JAVIER GUTIERREZ, and DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT by the method indicated below, and addressed to the following:

Mr. Patrick M. Paulich	<u> X </u>	U.S. Mail, Postage Prepaid
Thorsrud Cane & Paulich	<u> </u>	Hand Delivered
1300 Puget Sound Plaza	<u> </u>	Overnight Mail
1325 Fourth Avenue	<u> X </u>	Facsimile
Seattle, WA 98101		

Ms. Shannon Kilpatrick
Kilpatrick Law Group, P.S.
1750 - 112th Ave. N.E., Suite D-155
Bellevue, WA 98004

Adrienne King,
Assistant to PETER J. HESS

DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR SUMMARY JUDGMENT/ 17

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

NO: 12 2 00908 3

Plaintiff,

vs.

DECLARATION OF
DEFENDANT JAVIER
GUTIERREZ

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital
community, and JAVIER GUTIERREZ,

Defendants.

/

Javier Gutierrez, being first duly sworn on oath, under penalty of perjury, states as follows:

1. I am a defendant in this action.
2. My date of birth is 1/17/1991.
3. Defendant Jorge Gutierrez is my natural father.
4. On 1/9/2011, I was a passenger in a vehicle that was involved in a single-vehicle collision.
5. At the time of the collision, I was residing in my father's household.

I certify under penalty of perjury under the laws of the state of Washington

///

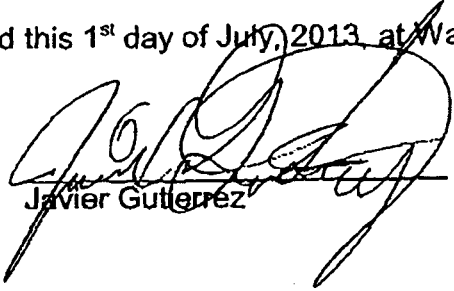
DECLARATION OF DEFENDANT JAVIER GUTIERREZ/ 1

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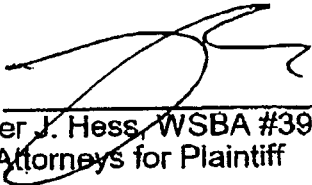
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that the foregoing is true and correct.

Dated this 1st day of July, 2013, at Walla Walla, Washington.


Javier Gutierrez

Presented by:
Hess Law Office, PLLC

By: 
Peter J. Hess, WSBA #39721
Of Attorneys for Plaintiff

DECLARATION OF DEFENDANT JAVIER GUTIERREZ/ 2

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THORSDORF SANE & PAULICH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff

vs.

JORGÉ GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants

No.: 12-2-00908-3

DEFENDANT JORGE
GUTIERREZ'S OPPOSITION TO
PATRIOT GENERAL INSURANCE
COMPANY'S MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION AND RELIEF REQUESTED

Patriot General asks this Court to be relieved from paying out a UIM claim to Javier Gutierrez, who was insured under his father, Jorge Gutierrez's policy. It relies on a breach of the section of the policy that requires disclosure of all relatives of the named insured age 14 or older. To support its motion, Patriot General misinterprets its own policy language and misinterprets the UIM statute and its companion definitions. It also erroneously claims that Jorge agreed none of his children would be covered when Jorge never intended to agree to that. In reality, the plain language of

DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 its policy insures Javier. While the defendants may have breached the disclosure
2 requirement, to avoid liability because of any breach Patriot General is required to
3 show actual prejudice. It made no effort to do so.

4 If this Court finds there is no coverage for Javier or finds Javier is excluded, it
5 will have to confront an issue that does not appear to be addressed in any published
6 case: does Washington law allow Patriot General to limit UIM coverage to only those
7 relatives of the named insured under the age of 14? Defendant asserts the provision
8 violates the UIM statute which requires UIM coverage for all relatives living with the
9 named insured without regard to age. Further, the provision violates public policy
10 because it excludes coverage for (1) parties who were passengers and had no
11 control over the vehicle, and (2) parties who had no other UIM insurance available to
12 them, including children. Patriot General's motion should be denied.

13 **II. FACTUAL AND PROCEDURAL HISTORY**

14 Jorge Gutierrez went to Tomas Miranda for insurance in 2010 in part because
15 he does not speak or read English. Jorge Gutierrez Decl. ¶ 4. He always intended for
16 his entire family to be covered by the insurance, including his son, Javier. *Id.* ¶ 5. The
17 application was all in English and Jorge provided the information to Mr. Miranda. *Id.* ¶
18 4 It is clear that Mr. Miranda typed in the information and printed out the form for
19 Jorge to sign because the only handwritten portion is the initials and signatures.
20 Miranda Decl., Ex. 1. Jorge elected UIM coverage. *Id.* He then signed and initialed
21 where Mr. Miranda told him to. Jorge Gutierrez Decl. ¶ 4.

22 Jorge had no understanding the insurer required disclosure of all his children
23 age 14 and over. *Id.* ¶ 5 He certainly never intended to agree that his children would

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1 not be covered. Jorge believed all his children had coverage, including Javier.

2 In January 2011 Javier was riding as a passenger in a friend's vehicle and
3 injured in a collision. Javier did not have any other automobile insurance. *Id.* ¶ 8. He
4 lived at home with his parents and did not own his own vehicle. *Id.*

5 Javier and Jorge made a claim with Patriot General, which it denied. The first
6 time Jorge found out the policy required disclosure of any relatives was when Javier's
7 claim was denied. Patriot General then sued both Jorge and his son Javier.

8 III. ISSUES PRESENTED

9 Does the policy at issue, which covers relatives living with the named insured,
10 cover Javier, Jorge's son and who lived with him at the time of the collision? Does a
11 breach of the provision requiring disclosure of family members age 14 and over
12 preclude coverage absent any showing of actual prejudice by the insurer?

13 If the policy language excludes Javier, is an insured allowed to define who is
14 an insured more narrowly than the UIM statute does?

15 If not, does public policy, which calls for broad UIM coverage to protect
16 innocent injured parties, prohibit an insurer from excluding coverage for Javier, who
17 has no other way to get his own UIM insurance?

18 IV. EVIDENCE RELIED UPON

19 In addition to the court files and the documents filed by defendant Javier
20 Gutierrez in opposition to plaintiff's summary judgment motion, this opposition relies
21 on the declaration of Jorge Gutierrez.

22 V. ARGUMENT AND AUTHORITY

23 Summary judgment is appropriate only when two factors are met: (1) when

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1 there is no genuine issue of material fact, and (2) the moving party is entitled to
2 judgment as a matter of law. CR 56(c). The moving party bears the burden of
3 establishing both requirements. Karl A. Tegland, 14A Washington Practice: Civil
4 Procedure, ¶ 25:12 (2d ed. 2012). All facts and reasonable inferences therefrom must
5 be taken in the light most favorable to the non-moving party. *Riley v. Andres*, 107 Wn.
6 App. 391, 395, 27 P.3d 618 (2001). Any doubt as to the existence of a genuine issue
7 of material fact should be resolved against the moving party, and the case should be
8 allowed to go to trial. Tegland, 14A Washington Practice: Civil Procedure, § 25:14.

9 **A. The Factual Basis For Patriot General's Motion Is Incorrect – Jorge**
10 **Gutierrez Did Not Agree To Patriot General's Insured Exclusion**

11 The strong assertion underlying Patriot General's motion for summary
12 judgment is that Jorge Gutierrez agreed that none of his children, including Javier,
13 would be covered. Setting aside the issue of whether parties are free to contract
14 around provisions in the UIM statute (which is addressed below in Section C), this
15 assertion could not be further from the truth.

16 As Jorge makes clear in his declaration, Jorge wanted full coverage for his
17 whole family, including Javier and Viviana, and thought he was getting it. Jorge
18 Gutierrez Decl. ¶ 5. Because he does not speak or read English, he could not
19 understand the insurance application, which was written entirely in English. He gave
20 Mr. Miranda the information he asked for. *Id.* ¶ 4. Mr. Miranda showed Jorge where to
21 initial and sign. *Id.*

22 As a result, Jorge did not understand that the Patriot General required
23 disclosure of his relatives age 14 and over that lived with him. *Id.* ¶ 5. He never

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1 intended to tell the insurer that none of his children would be driving. *Id.* ¶ 6. He never
2 understood that there would be any reason for his children, including Javier, to be
3 denied coverage until Patriot General denied Javier's claim. *Id.*

4 Given these facts, it is clear that Jorge never intended to agree that his
5 children living with him would not be covered. So to the extent Patriot General is
6 arguing there was agreement that his children would not be covered, its motion
7 should be denied. There is a genuine issue of material fact about whether the parties
8 actually agreed on anything.

9 **B. The Plain Language Of The Policy Does Not Actually Exclude Jorge**
10 **From Coverage, As The Insurer Claims**

11 The factual question would be moot, however, if this Court decided that the
12 policy actually covers Javier (addressed in this Section) or if the provision violated the
13 UIM statute or its public policy (addressed in Section C below). The construction of
14 an insurance policy is a question of law. *State Farm Gen. Ins. Co. v. Emerson*, 102
15 Wn.2d 477, 480, 687 P.2d 1139 (1984). Patriot General correctly noted the proper
16 framework for the analysis of whether there is coverage: (1) the insured must first
17 establish that the loss falls within the scope of the policy, and (2) then the insurer
18 must show that the loss is excluded by specific policy language. *Diamaco, Inc. v.*
19 *Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (1999).

20 Insurance policies are construed as contracts. *Austl. Unlimited, Inc. v. Hartford*
21 *Cas. Ins. Co.*, 147 Wn. App. 758, 765, 198 P.3d 514 (2008). The purpose of
22 insurance is to insure, so courts should use the construction that provides coverage,
23 rather than no coverage. *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65,

24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 69, 659 P.2d 509 (1983), modified on other grounds, 101 Wn.2d 830, 683 P.2d 186
2 (1984). The policy should be interpreted as it would be understood by the average
3 person purchasing insurance. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d
4 724, 733, 837 P.2d 1000 (1992). If there is ambiguity, it should be strictly construed
5 against the insurance company and in favor of the insured. *George v. Farmers Ins.*
6 *Co. of Wash.*, 106 Wn. App. 430, 439, 23 P.3d 552 (2001).

7 Patriot General misinterprets the policy language¹ and its legal effect, and it
8 confuses the issue of who is an insured with the duties imposed on the policyholders
9 by the policy. Further, it provided no evidence it suffered actual prejudice from any
10 breach of the duty to disclose family members. Thus, Patriot General cannot meet its
11 burden on summary judgment and its motion fails.

12 **1. Javier fits the definition of "relative" in the policy, and his insured**
13 **status is not negated by the late notice to plaintiff that he was**
14 **driving**

15 The insurer argues that the Javier was never an insured to begin with because
16 he was not disclosed to the insurer prior to the collision; therefore, it argues,
17 defendants cannot meet prong one of the two-step analysis and the burden does not
18 shift to the insurer to prove an exclusion applies. Plaintiff's argument rests on a
19 fundamentally faulty reading of the policy language and the legal effect of that
20 language. The provision requiring disclosure of all relatives age 14 and older has no
21 bearing on whether Javier is actually insured, as a careful reading of the policy

22 ¹ Perhaps not surprisingly, Patriot General interpreted the policy language to its own
23 benefit and not to the benefit of its insureds. This and other problems in the adjustment of
24 Javier's claim may be the basis of a later bad faith action.

1 language demonstrates.

2 The insuring language is found on page 1 of the policy, which is Exhibit 1 to
3 the Declaration of Amy Brunner. There the policy states (bold in the original):

4 In return for **your** premium payment and subject to the terms and
5 conditions of this policy, **we** will insure **you** for the coverages up to the
6 limits of liability for which a premium is shown on the Declarations Page of
7 this policy.

8 So if Javier fits under the definition of "you," he becomes an insured, and then the
9 burden shifts to the insurer to show an exclusion applies.

10 "You" is defined on page 2 of the policy (bold in original) (emphasis added):

11 "**You**" and "**your**" mean the person shown as the named insured on the
12 Declarations Page and that person's spouse if residing in the same
13 household. **You and your also means any relative of that person if they**
14 **reside in the same household**, providing they or their spouse do not own a
15 **motor vehicle**.

16 Relative is then defined as (bold in original) (emphasis added):

17 "**Relative**" means a person living in **your** household related to **you** by
18 **blood**, marriage or adoption, including a ward or foster child. **Relative**
19 includes a minor under your guardianship who lives in **your** household.
20 Any **relative** who is age fourteen (14) or older must be listed on the
21 application or endorsed on the policy prior to a car accident or loss.

22 The first two sentences of the definition of relative cover who is an insured.

23 The third sentence simply imposes a duty of disclosure on the insureds. This
24 language, by its plain terms, brings Javier under the umbrella (no pun intended) of
25 being an insured.² He is Jorge's son, living with Jorge. While the policy requires
disclosure of relatives 14 years and older, that provision has no effect on Javier's

² Plaintiff makes no allegation that Javier owned a vehicle as a reason for why coverage should be denied.

1 insured status. It is presumably a mechanism for the insurer to keep tabs on
2 everyone who might be an insured. And it is no different than any other policy
3 provision requiring the insureds to do something, such as notifying the insurer of an
4 accident or cooperating with the insurer's investigation. While any alleged breach of
5 the notice provision can ultimately affect whether there is coverage for Javier's loss, it
6 does not affect whether he was ever an insured in the first place.

7 **2. To avoid coverage for the breach of the duty of disclosure, Patriot**
8 **General was required – and failed – to show actual prejudice**

9 Because Javier is an insured, the burden shifts to the insurer to point to some
10 reason why Javier is not covered. Patriot General raise just one – the disclosure
11 requirement for Jorge's family age 14 and older. Thus the question becomes, what is
12 the legal affect of any alleged breach of disclosure requirement? Implicitly, Patriot
13 General argues that because defendants failed to timely disclose, there is no
14 coverage for Javier's injuries, period. In other words, Patriot General is implicitly
15 arguing that the disclosure of relatives age 14 and older is a condition precedent to
16 recovering under the policy. But this kind of argument has been rejected by
17 Washington courts for almost 40 years.

18 In situations involving disputes about whether a policy provision has been
19 breached, Washington courts require insurers to prove they were actually prejudiced
20 by some alleged breach of an insured's duty before an insurer can escape liability.
21 *See Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 535 P.2d 816 (1975). In
22 *Salzberg*, the insurer claimed the policyholder breached the cooperation clause,
23 which according to the policy language was a condition precedent to receiving

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1 benefits. By failing to cooperate, the insurer argued the insured was not entitled to
2 recover anything. The court rejected that approach and instead required the insurer
3 to prove it was prejudiced by a breach before being relieved of liability. *Id.* at 376.

4 In refusing to impose traditional contract principles on insurance policies, the
5 court reasoned:

6 insurance policies, in fact, are simply unlike traditional contracts, i.e., they
7 are not purely private affairs but abound with public policy considerations,
8 one of which is that the risk-spreading theory of such policies should
9 operate to afford to affected members of the public – frequently innocent
10 third persons – the maximum protection possible consonant with fairness
11 to the insurer. It is manifest that this public policy consideration would be
12 diminished, discounted, or denied if the insurer were relieved of its
13 responsibilities although it is not prejudiced by the insured's actions or
14 conduct

15 Such relief, absent a showing of prejudice, would be tantamount to a
16 questionable windfall for the insurer at the expense of the public.

17 *Id.* at 376-77.

18 This prejudice analysis has been applied to virtually every kind of policy
19 provision. *See, e.g., Carron, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 485, 918 P.2d
20 937 (1996) (late notice of the claim); *Tran v. State Farm Fire and Cas. Co.*, 136
21 Wn.2d 214, 961 P.2d 358 (1998) (breach of the cooperation clause); *Pub. Util. Dist.*
22 *No. 1 of Klickitat Cnty. V. Int'l Ins. Co.*, 124 Wn.2d 789, 803-04, 881 P.2d 1020 (1994)
23 (cooperation, notice and no-settlement clauses); *Unigard Ins. Co. v. Leven*, 97 Wn.
24 App. 417, 427, 983 P.2d 1155 (1999) (late tender).

25 The actual prejudice requirement was very recently reaffirmed by our Supreme
Court when it was applied to the policy provision requiring insureds to submit to
examinations under oath. *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 417-18, 295

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1 P.3d 201 (2013). The court stated:

2 We have required a showing of prejudice in nearly all other contexts to
3 prevent insurers from receiving windfalls at the expense of the public and
4 to avoid hinging relief on a discredited legalistic distinction. The same
5 concerns apply equally to the [examination under oath] requirement.

6 *Id.* at 418.

7 Just as prejudice must be shown with other policy provisions, Patriot
8 General must demonstrate prejudice with any breach of the provision requiring
9 disclosure of any relative age 14 and over. It has asserted no good reason not to
10 apply the actual prejudice rule in this situation.

11 Patriot General has also made no attempt to put forth any evidence of
12 prejudice from the breach, so its motion fails.³ The party claiming prejudice has the
13 burden of proof on that issue:

14 A claim of actual prejudice requires "affirmative proof of an advantage lost
15 or disadvantage suffered as a result of the [breach], which has an
16 identifiable detrimental effect on the insurer's ability to evaluate or present
17 defenses to coverage or liability.

18 *Id.* at 419. In other words, a party needs to put forth particularized proof and cannot
19 rely on general or vague allegations of harm.

20 It is highly unlikely Patriot General has suffered any specific harm the courts

1 are worried about from not knowing Javier was driving the insured vehicles. As the
2 *Staples* Court noted, the harm it is concerned with is something affecting "the
3 insurer's ability to evaluate or present defenses to coverage or liability." *Id.* Here, no
4 such harm of this type could exist because there have been no allegations that Jorge
5 and Javier have done anything to impede the plaintiff's coverage investigation or
6 liability investigation, to the extent any investigation occurred. There has been no
7 allegation that the policyholders refused to turn over documents and other information
8 and refused to answer questions, such as in *Tran v. State Farm Fire & Cas. Co.*, 136
9 Wn.2d 214, 218-21, 961 P.2d 358 (1998). Nor has there been any allegation that
10 defendants did anything to delay the claim and that delay somehow caused evidence
11 to be lost, as in *Sears, Roebuck and Co. v. Hartford Accident & Indem. Co.*, 50
12 Wn.2d 443, 453, 313 P.2d 347 (1957).

13 **C. Neither The UIM Statute Nor Public Policy Permit Patriot General To**
14 **Contract Around The Definition of Insured in RCW 48.22.005**

15 To the extent the policy provision calling for disclosure of relatives age 14 and
16 over affects coverage, it is void because its terms are inconsistent with the UIM
17 statute and its public policy. As courts have noted, our state has a comprehensive
18

19 ³ Because Patriot General failed to provide any proof of or make any argument about
20 prejudice in its moving papers, its motion must fail. According to CR 56, the party moving
21 for summary judgment has the burden of demonstrating in its moving papers – and not in
22 its rebuttal – why it is entitled to judgment as a matter of law. *White v. Kent Medical*
23 *Center, Inc.*, PS, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). "Allowing the moving party to
raise new issues in its rebuttal materials is improper because the nonmoving party has no
opportunity to respond." *White v. Kent Medical Center, Inc.*, PS, 61 Wn. App. 163, 168,
810 P.2d 4 (1991). Thus, any attempt by Patriot General to argue prejudice or put forth
evidence of prejudice in its rebuttal documents would be impermissible and should be
rejected.

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1 UIM scheme. *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 694, 926 P.2d
2 923 (1996). The UIM statute has been around in some form since 1967. When the
3 Legislature first enacted it, it was just the UNinsured motorist statute. Its purpose was
4 to be a financial security measure to cut down on the risk to innocent victims of
5 careless and insolvent drivers. *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d
6 327, 332, 494 P.2d 479 (1972); *Finney v. Farmers Ins. Co. of Wash.*, 92 Wn.2d 748,
7 751, 600 P.2d 1272 (1979). In order to effectuate its purposes, the statute was to be
8 liberally and broadly construed. *Id.*

9 When the Legislature amended the statute in 1980 to include UNDERinsured
10 motorists, nothing about those underlying policies changed. *Mut. of Enumclaw Ins.*
11 *Co. v. Wiscomb*, 97 Wn.2d. 203, 208, 643 P.2d 441 (1982). Our courts continue to
12 liberally construe the UIM statute to uphold the legislative mandate of broad UIM
13 coverage to protect innocent injured parties. *Greengo v. Public Employees Mut. Ins.*
14 *Co.*, 135 Wn.2d 799, 806, 959 P.2d 657 (1998). The Legislature was so concerned
15 with ensuring UIM coverage to protect innocent injured people, it requires insurers to
16 offer UIM insurance unless the insured "specifically and unequivocally" rejects the
17 coverage in writing. RCW 48.22.030(4); *First Nat'l Ins. Co. of Am. v. Perala*, 32 Wn.
18 App. 527, 531, 648 P.2d 472 (1982).

19 An insurance regulatory statute automatically becomes part of the insurance
20 policy. *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 85-86, 794 P.2d 1259 (1990). To
21 fulfill the mandate of broad UIM coverage, the courts routinely void any provision in a
22 policy which is (1) inconsistent with the UIM statute, (2) is not authorized by the

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1 statute, or (3) that thwarts the broad purpose of the statute. *Clements v. Travelers*
2 *Indem. Co.*, 121 Wn.2d 243, 251, 850 P.2d 1298 (1993). Thus, any UIM policy
3 provision that provides fewer benefits or protects a smaller class of insureds than
4 those mandated by the UIM statute are automatically void.

5 **1. The UIM statute requires coverage for “insureds” as defined in**
6 **RCW 48.22.005 – and not just “named insureds” – which**
7 **encompasses Javier**

8 Patriot General’s strained reading of the definition of “insured” in RCW
9 48.22.005(5) renders certain parts of that statute superfluous and leads to absurd
10 results. In construing statutes, courts must carry out the intent of the legislature. *State*
11 *v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). If the language of a statute is clear
12 on its face, then that plain meaning must be given effect and courts are to assume
13 the Legislature meant exactly what it said. *State v. Costich*, 152 Wn.2d 463, 470, 98
14 P.3d 795 (2004). Where definitions are provided by the legislature, courts are bound
15 to apply those. *Schrom v. Bd. for Volunteer Fire Fighters*, 153 Wn.2d 19, 27, 100
16 P.3d 814 (2004).

17 In interpreting statutes, words must not be read in isolation. *State v. Lilyblad*,
18 163 Wn.2d 1, 9, 177 P.3d 686 (2008). Courts must attempt to give effect to every
19 word, clause and sentence of a statute, so that no portion is rendered meaningless or
20 superfluous. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). In addition,
21 courts must avoid unlikely or absurd results. *Id.* It is only if a statute is susceptible to
22 more than one reasonable interpretation legislative history may be consulted. *Id.*

23 Patriot General makes several arguments why Javier, as Jorge’s son, is not
24 covered by the UIM statute. All of them fail. The more reasonable reading is the

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1 definitions contained in RCW 48.22.005 plainly apply to the UIM statute and therefore
2 Patriot General's policy. To the extent the provision requiring notice of relatives age
3 14 and over is an exclusion barring coverage for Javier, it is void.

4 Patriot General argues that section 2 of RCW 48.22.030 uses the term "named
5 insured" and not "insured," so it is only required to cover the named insured (Jorge)
6 and his wife and not any family members. This is incorrect. Section 2 uses more than
7 just the term "named insured."

8 While Section 2 of the UIM statute is not artfully worded, Patriot General
9 focuses on the wrong portion of it. The operative portion is:

10 No new policy ... shall be issued ... unless coverage is provided ... for the
11 protection of persons insured thereunder who are legally entitled to
12 recover damages from owners or operators of underinsured motor
13 vehicles

14 RCW 48.22.030(2). In other words, coverage has to be provided for all persons
15 insured in the policy. That is a broader class of people than just the "named insured"
16 and implicates the definition of "insured."

17 The portion of the UIM statute Patriot General focuses on – and which
18 contains the "named insured" reference – is the exception to the rule:

19 ... except ... while operating or occupying a motor vehicle owned or
20 available for the regular use by the named insured or any family member,
21 and which is not insured under the liability coverage of the policy.

22 *Id.* In other words, UIM insurers do not need to provide coverage for injuries received
23 in vehicles not insured in the policy but are owned by or available for the regular use
24 of the named insured or a family member. This clause does not address when UIM
25 coverage must be provided, so it is inappropriate to focus on it.

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1 Patriot General also reads section 2 in isolation, ignoring the other 12 sections
2 of the UIM statute some of which use the term "insured" in addition to "named
3 insured." A quick review of the other parts of the UIM statute make it clear UIM
4 insurance was intended to apply to more than just the named insured. For example,
5 Section 3 sets the parameters for the amount of UIM insurance to be offered:

6 ... coverage required under subsection (2) of this section shall be in the
7 same amount as the insured's third party liability coverage unless the
8 insured rejects all or part of the coverage as provided in subsection (4) of
9 this section.

10 RCW 48.22.030(3) (emphasis added). It would not make sense for the UIM statute to
11 apply to only a "named insured," but then use "insured" in other portions of the statute
12 when setting the rules for how much coverage must be provided. Because all
13 sections of a statute must be read in conjunction with one another and harmonized,
14 Patriot General's analysis is fatally flawed.

15 Next, Patriot General argues the Legislature intended RCW 48.22.005 to apply
16 to only the PIP statutes, citing legislative history. But in making this argument, Patriot
17 General ignores the plain language of RCW 48.22.005 and an important rule of
18 statutory interpretation: legislative history is only considered if there is an ambiguity.
19 *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

20 The Legislature made its intentions clear by the opening language of RCW
21 48.22.005: "the definitions in this section apply throughout this chapter," unless the
22 context "clearly requires otherwise." RCW 48.22.005. By making the definitions
23 applicable to the entire chapter, the Legislature plainly intended the definitions to
24 apply to the entirety of Title 48, Chapter 22, including the UIM statute at RCW

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1 48.22.030. If it intended the definitions to apply to only the PIP statutes, it would have
2 said so specifically. But it did not.

3 Patriot General then turns to the definition of "insured" to argue it is not
4 required to cover anyone other than the named insured. Because the definition of
5 "insured" contains multiple "or" clauses, its argument goes, the definitions should be
6 read disjunctively, such that it was permissible for it to cover just the named insured.
7 Yet this would produce an absurd result. Taken to its logical conclusion, the insurer is
8 arguing the Legislature intended only to require insurers to pick any single one of the
9 groups listed in the definition of insured in RCW 48.22.005(5):

- 10 • The named insured;
- 11 • A person who is a resident of the named insured's household and is
12 related to the named insured;
- 13 • The named insured's ward, foster child, or stepchild;
- 14 • A person who gets injured in an accident while using or occupying the
15 insured automobile; or
- 16 • A pedestrian accidentally struck by the insured automobile.

16 Under this interpretation, it would be allowed to pick one of the above – say,
17 the named insured's ward, foster child, or stepchild – and insure only that group to
18 the exclusion of the others, including the named insured. This is ridiculous.

19 Nor is plaintiff's legal analysis of the word "or" correct. While use of the word
20 "or" is often meant disjunctively, there are also cases where "or" means the
21 conjunctive: "[C]ourts need not mechanically interpret every 'or' as disjunctive, but
22 rather ... courts should interpret the word 'or' according to context." *Black v. Nat'l*

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1 *Merit Ins. Co.*, 154 Wn. App. 674, 688, 226 P.3d 175 (2010) (internal quotations and
2 citation omitted). As a result, the disjunctive “or” and the conjunctive “and” can often
3 be used interchangeably. *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 790, 6
4 P.3d 583 (2000). “Or” should not be given the disjunctive meaning where, as here, it
5 would lead to absurd results and where the context supports the conjunctive
6 meaning. *Id.* The more reasonable interpretation is that the Legislature intended the
7 “ors” to be “ands” to set the floor for which people must be insured for UIM purposes.

8 Plaintiff cites many cases that it claims stand for the proposition that it is
9 allowed to provide UIM insurance to whomever it wants. But those cases are
10 inapposite. Many were decided before the Legislature implemented the definition of
11 “insured” in 1993. None of the cases appear to deal with the issue of whether the
12 definition of “insured” in RCW 48.22.005 can be contracted around because none of
13 the parties ever raised the issue. In fact, there do not appear to be any published
14 cases analyzing whether an insurer can provide UIM insurance to a lesser class of
15 insureds than provided in the definition of “insured” in RCW 48.22.005.

16 In addition, the factual settings of some of the cases relied upon by plaintiff are
17 very different than here. For example, the policy in *Vasquez v. American Fire &*
18 *Casualty Co.*, ___ Wn. App. ___, 298 P.3d 94 (2013) was a commercial policy. That
19 case involved the issue of whether an employee who was running a personal errand
20 and was hit in a crosswalk was an insured under the commercial policy. The court
21 held he was not and part of its reasoning was that to adopt the plaintiff’s interpretation
22 would turn a business auto policy into a personal policy. *Id.* at 98. The policy at issue

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1 here is a personal policy and does not involve employees or a commercial setting.

2 In addition, unlike Javier, the passenger injured in *Financial Indemnity Co. v.*
3 *Keomanæthong* was not related to the named insured and was not living with the
4 named insured. 85 Wn. App. 350, 351, 931 P.2d 168 (1997). The plaintiff also
5 apparently never raised the argument that the policy conflicts with the definition of
6 "insured" in RCW 48.22.005 and the Court of Appeals never addressed it.

7 **2. In addition, public policy prohibits the exclusion of relatives age**
8 **14 and over from UIM coverage**

9 Our Supreme Court has invalidated provisions that exclude UIM coverage for
10 family members who are injured as passengers. *Tissell v. Liberty Mut. Ins. Co.*, 115
11 Wn.2d 107, 111-112, 795 P.2d 126 (1990). In *Tissell*, the insurer excluded coverage
12 for family members who were passengers while the named insured was driving.

13 The court invalidated both provisions and focused on public policy of broad
14 UIM coverage and full compensation for innocent injured parties. *Id.* at 111. The court
15 was particularly troubled by the fact that the exclusion barred coverage for family
16 members who had no other way to procure UIM insurance. *Id.*

17 The same concern underlies the decision in *Wiscomb*. That case involved the
18 family or household exclusion. In invalidating that exclusion the court reasoned:

19 The family or household exclusion ... is directed at a class of innocent
20 victims who have no control over the vehicle's operation and who cannot
21 be said to increase the nature of the insurer's risk. An exclusion which
22 denies coverage when certain victims are injured is violative of public
23 policy.

24 *Wiscomb*, 97 Wn.2d at 209. The court went on to explain that the exclusion affects
25 third parties who are in no position to contract for their own insurance coverage. *Id.* at

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1 211. For example, the exclusion applies to both children of the named insured as well
2 as adults who cannot have their own insurance. *Id.* at 211-12. This inappropriately
3 undermines the important public policy of our state's comprehensive UIM scheme.

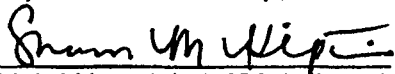
4 Similarly, the case here involves a provision that under Patriot General's
5 version excludes coverage for Javier, who as a passenger in a vehicle he had no
6 control over and who had no other UIM insurance available to him. Under Patriot
7 General's theory, the exclusion applies to everyone 14 or older, regardless of
8 whether they represent any increased risk⁴ and regardless of whether they have
9 the ability to get UIM insurance elsewhere. This provision is against public policy,
10 especially considering Patriot General's policy amounted to a "take it or leave it"
11 adhesion contract in an area – UIM insurance – imbued with the public interest.

12 **VI. CONCLUSION**

13 For all the reasons discussed above, Patriot General's motion for summary
14 judgment should be denied.

15 Respectfully submitted July 5, 2013.

16
17 Kilpatrick Law Group, P.C.

18 
19 Dick Kilpatrick, WSBA #7058
20 Shannon M. Kilpatrick, WSBA #41495
21 Attorneys for Jorge Gutierrez

22 ⁴ Patriot General has made no allegation nor presented any evidence to show that Javier
23 presented some kind of increased risk. Nor did it seek any additional premiums for Javier
once it found out Javier was driving. Jorge Gutierrez Decl. ¶ 7.

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DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

Patrick Paulich Matthew Munson Thorsrud Cane & Paulich 1300 Puget Sound Plaza 1325 Fouth Ave Seattle, WA 98101 <u>ppaulich@tcplaw.com</u>	<input type="checkbox"/> E-Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Electronic Filing <input checked="" type="checkbox"/> Legal Messenger
Peter Hess Hess Law Office 312 N. Second Ave Walla Walla, WA 99362 <u>peter@hesslawoffice.com</u>	<input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Fax

Dated this 5th day of July, 2013 at Bellevue, Washington.

Shannon Ullip

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TRAVIS J. ... & PAULICH

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA**

**PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,**

Plaintiff

vs.

**JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,**

Defendants

No.: 12-2-00908-3

**DECLARATION OF JORGE
GUTIERREZ OPPOSING PATRIOT
GENERAL'S MOTION FOR
SUMMARY JUDGMENT**

I am a defendant in this matter. I am over the age of 18, and testify to the matters in this Declaration from first-hand personal knowledge.

1. My name is Jorge Gutierrez. I speak and read almost no English.

This declaration was translated to me by an interpreter.

2. I am the father of Javier Gutierrez. Javier was seriously injured in a collision on January 9, 2011. At that time, Javier lived with his mother and me.

DECLARATION OF JORGE GUTIERREZ OPPOSING PATRIOT
GENERAL'S MOTION FOR SUMMARY JUDGMENT
Page 1 of 4

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1 3. After Javier was injured, we let the insurance company know
2 about the collision. Patriot General would not pay any benefits and denied the
3 claim. Javier and I were sued by Patriot General.

4 4. I first went to Tomas Miranda to purchase automobile insurance
5 for my vehicles in part because he spoke Spanish and could explain the
6 process to me in my own language. Because I could not understand the
7 insurance application which was all in English, Tomas Miranda helped me fill
8 out the form. He asked me questions and I gave him the information which he
9 put into the form. He showed me where to initial and sign but I had no
10 understanding that I was telling the insurance company my children would not
11 be covered.

12 5. I wanted full coverage for my family and it was my understanding
13 that they would be covered. I recall telling Mr. Miranda that my son Javier, and
14 my daughter, Viviana, would also be drivers. I did not understand that the
15 application asked me to certify my children would not be using the vehicles. I
16 did not understand that the application asked me to certify all my children age
17 14 and over had been disclosed.

18 6. Had I known any of this information, I would not have submitted
19 the application the way I did and would have told the insurance company about
20 my children, including Javier. Nobody ever told me that my children were not
21 covered under the Patriot General policy until after Javier's accident and
22

23 **DECLARATION OF JORGE GUTIERREZ OPPOSING PATRIOT**
24 **GENERAL'S MOTION FOR SUMMARY JUDGMENT**
25 **Page 2 of 4**

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1 injuries.

2 7. Since the insurance company found out about Javier driving our
3 vehicles, it has not asked for any additional money from me to cover premiums
4 for him.

5 8. At the time he was injured in the accident, Javier did not own any
6 vehicles of his own and had no other automobile insurance policy.

7 I declare under penalty of perjury, of the laws of the State of Washington,
8 that the foregoing as translated to me is true and correct.

9 DATED 7-5-13 at Walla Walla, Washington.

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Jorge Gutierrez
Jorge Gutierrez
Declarant

DECLARATION OF JORGE GUTIERREZ OPPOSING PATRIOT
GENERAL'S MOTION FOR SUMMARY JUDGMENT
Page 3 of 4

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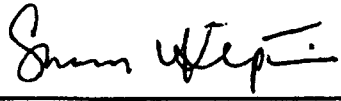
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DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

Patrick Paulich Matthew Munson Thorsrud Cane & Paulich 1300 Puget Sound Plaza 1325 Fourth Ave Seattle, WA 98101 ppaulich@tcplaw.com	<input type="checkbox"/> E-Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Electronic Filing <input checked="" type="checkbox"/> Legal Messenger
Peter Hess Hess Law Office 312 N. Second Ave Walla Walla, WA 99362 peter@hesslawoffice.com	<input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Fax

Dated this 5th day of July, 2013 at Bellevue, Washington.



DECLARATION OF JORGE GUTIERREZ OPPOSING PATRIOT
GENERAL'S MOTION FOR SUMMARY JUDGMENT
Page 4 of 4

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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

7
8 PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

9 Plaintiff,

10 v.

11 JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
12 and JAVIER GUTIERREZ,

13 Defendants.

No. 12-2-00908-3

PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S REPLY
ON ITS MOTION FOR SUMMARY
JUDGMENT

14 1. The definition of "insured" in RCW 48.22.005 does not apply to RCW 48.22.030
15 because the latter statute uses the separate phrase "persons insured thereunder."

16 Javier Gutierrez maintains that "insured" and "persons insured thereunder" are essentially
17 the same term and therefore have the same meaning.¹ But giving both terms the same meaning
18 would deviate from the fundamental rules that statutes must be interpreted so that all the
19 language used is given effect, with no portion rendered meaningless or superfluous,² and that
20 legislative definitions provided by the statute are controlling.³ If the legislature had intended

21
22 ¹ The arguments advanced by defendants herein were expressly rejected by the Washington Court of
Appeals, Division II in *Helgeson v. Viking Insurance Company of Wisconsin*, No. 41371-0-II (2011), a
23 copy of which is attached. Although this unpublished decision does not have precedential value under
GR 14.1(a), the court's analysis is nonetheless persuasive.

24 ² *Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

25 ³ *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001).

26 PLAINTIFF PATRIOT GENERAL INSURANCE
COMPANY'S REPLY ON ITS MOTION FOR
SUMMARY JUDGMENT - 1

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1 those terms to have the same meaning, it would have used precisely the same term. It did not.
2 The legislature therefore intended to convey different meanings. As the courts have said many
3 times, the intent of RCW 48.22.030 is to make each person who is an insured for liability
4 coverage also an insured for UIM coverage.⁴

5 Jorge⁵ argues that Patriot failed to focus on the phrase, “for the protection of persons
6 insured thereunder.” In fact, the motion did exactly that; it argues that “insured,” as defined in
7 RCW 48.22.005(5), is not the same term as “persons insured thereunder” and therefore the terms
8 should not be defined in the same way.⁶

9
10 Javier also maintains that “insured” is used in subsections of RCW 48.22.030 other than
11 subsection (2), and that therefore RCW 48.22.005(5)’s definition of “insured” must apply to
12 RCW 48.22.030. Subsection (2) is the critical portion of RCW 48.22.030 because it imposes on
13 insurers the duty to offer UIM coverage to the same extent as liability coverage. Other
14 subsections, including subsection (3), flesh out other aspects of that coverage. Subsection (3), for
15 instance, defines the amount of that coverage. Those subsections implicitly refer to subsection
16 (2).

17 To the extent the terms “insured” and “persons insured thereunder” create ambiguity, we
18 must turn to the statutory history. As demonstrated in the motion, that history leaves no doubt
19 that RCW 48.22.005 was intended to apply to the PIP statute, and not to the UIM statute.
20

21
22 ⁴ *E.g., Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 444, 563 P.2d 815 (1977) (“The policy of RCW
23 48.22.030 requires that insurers make available uninsured motorist coverage to a class of ‘insureds’ that is
24 at least as broad as the class in the primary liability sections of the policy.”), *abrogated in other part by*
25 *statute as stated in Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17 (1987).

26 ⁵ For clarity, this brief uses the defendants’ first names. No disrespect is intended.

⁶ See Motion at 5:1–7, 9:9–10:5.

1 **2. All case law supports Patriot's position.**

2 As noted in Patriot's motion, the Washington courts have stated in at least seven separate
3 cases that an insurer and an insured are free to determine the scope of UIM coverage, so long as
4 it is congruent with the scope of liability coverage.⁷

5 The defendants' attempts to distinguish this case law fail. First, they claim that the pre-
6 1993 cases are inapposite because they were abrogated by RCW 48.22.005(5). As shown above,
7 RCW 4.22.005(5) does not modify the UIM statute, and the pre-1993 cases are therefore still
8 binding. Moreover, the defendants cite not one case to support their position. If RCW 48.22.005
9 actually abrogated this line of cases, surely the Supreme Court or the Court of Appeals would
10 have made that clear in the 20 years since the statute's passage.

11 The defendants mistakenly claim that no post-1993 case addressed RCW 48.22.005's
12 definition of "insured" because the statute would have made no difference in those cases. It
13 would have affected the outcome in at least one of them, *Financial Indemnity Co. v.*
14 *Keomaneethong*.⁸ There, a passenger in the insured's vehicle was denied UIM coverage because
15 the policy only covered the named insured's relatives who lived in the same household. RCW
16 48.22.005(b) would include the claimant within the definition of "insured" because he was
17 "occupying . . . the insured vehicle with the permission of the named insured . . ." Yet the court
18 did not hold that this statute mandated coverage of the injured party. Rather, the court reiterated
19

20
21 ⁷ *Raynes*, 88 Wn.2d at 443; *Smith v. Cont'l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995); *Farmers*
22 *Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976); *Vasquez v. American Fire & Cas. Co.*, ___ Wn.
23 *App.* ___, 298 P.3d 94, 98 (2013); *Wheeler v. Rocky Mountain Fire & Cas. Co.*, 124 Wn. App. 868, 103
24 *P.3d* 240 (2004); *Fin. Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 353, 931 P.2d 168 (1997); see
25 *also Dairyland Ins. Co. v. Uhls*, 41 Wn. App. 49, 53, 702 P.2d 1214 (1985) ("[T]he parties may agree to
26 a narrow definition of insured so long as that definition is applied consistently throughout the policy[.]")
(quoting *Raynes*, 88 Wn.2d at 444).

⁸ 85 Wn. App. 350, 353, 931 P.2d 168 (1997).

25 PLAINTIFF PATRIOT GENERAL INSURANCE
26 COMPANY'S REPLY ON ITS MOTION FOR
SUMMARY JUDGMENT - 3

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1 the Washington courts' longstanding position: "[W]hen the question revolves around the initial
2 extension of coverage, that is, the definition of who is and is not an insured, public policy is not
3 violated so long as insured persons are defined the same in the primary liability and UIM
4 sections of the policy."⁹

5 Jorge also argues that *Cherry v. Truck Insurance Exchange*¹⁰ "reads RCW 48.22.005's
6 definition of 'insured' directly in to the UIM statute[.]" The cited portion of *Cherry* carries little
7 or no weight because it is dicta that appears in a footnote. The other case he cites, *Daley v.*
8 *Allstate Insurance Company*,¹¹ also has no precedential value because it was reversed by the
9 Supreme Court.
10

11 **3. The policy language unambiguously defines who is and is not insured.**

12 The defendants argue the final sentence of the definition of "relative" is ambiguous
13 because it does not set forth the penalty for not listing a relative age 14 or older. But there is no
14 ambiguity in this sentence. Policy language is ambiguous if it is susceptible to at least two
15 reasonable interpretations.¹² A reasonable person would interpret the sentence to mean that a
16 person otherwise qualifying as a relative who is 14 or over is not an insured unless listed on the
17 application or endorsed on the policy. The only alternative meaning the defendants suggest is
18 that there is no consequence to not listing such persons age 14 or older. That would read the
19 entire sentence out of the policy, which courts will not do.¹³
20

21 ⁹ *Id.* at 353.

22 ¹⁰ 77 Wn. App. 557, 563 n.3, 892 P.2d 768 (1995).

23 ¹¹ 86 Wn. App. 346, 355, 936 P.2d 1185 (1997), *rev'd*, 135 Wn.2d 777, 958 P.2d 990 (1998).

24 ¹² *Alaska Nat. Ins. Co. v. Bryan*, 125 Wn. App. 24, 30-31, 104 P.3d 1 (2004).

25 ¹³ *New Hampshire Indem. Co., Inc. v. Budget Rent-A-Car Systems, Inc.*, 148 Wn.2d 929, 933, 64 P.3d
26 1239 (2003) ("We interpret insurance contracts . . . in a manner that gives effect to each provision of the
policy.").

1 **4. Patriot can decline to provide coverage to persons who are not insured by the policy**
2 **without a showing of prejudice.**

3 Jorge argues that the final sentence of the definition of “relative” is akin to a cooperation
4 or notice clause, and that, like those clauses, it should be enforceable only if the breach of the
5 clause prejudices the insurer. The language is not, however, akin to a cooperation or notice
6 clause. Rather, it defines who is insured by the policy. Washington courts have never imposed a
7 prejudice requirement on such a term. The prejudice requirement has only been applied to
8 procedures for handling a claim after a loss: the duty to notify the insurer of a claim,¹⁴ the duty to
9 cooperate with the insurer’s investigation and defense of the claim,¹⁵ and the duty not to settle a
10 claim without authorization.¹⁶

11 An insurer is not required to establish that it would be prejudiced by including someone
12 within the definition of insured who is not in fact an insured. In *West Coast Pizza Co., Inc. v.*
13 *United National Insurance Co.*,¹⁷ the plaintiff completed an insurance application with National
14 Continental Insurance Company, listing various restaurants and pizza-delivery drivers. West
15 Coast did not disclose that it wanted coverage for a related business, Mad Pizza, which employed
16 some of the listed drivers and owned some of the listed restaurants. After a Mad Pizza employee
17 caused an auto accident, West Coast tendered to National Continental, which denied the claim.
18 In West Coast’s suit against the insurer, the Court of Appeals held that Mad Pizza was not
19 covered because it was not a named insured in the policy and there was no evidence that the
20 parties had mutually intended to include Mad Pizza as an insured. The court did not inquire
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22 ¹⁴ *Canron, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 485, 918 P.2d 937 (1996).

23 ¹⁵ *Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 35 P.2d 816 (1975).

24 ¹⁶ *Pub. Util. Dist. No. 1 of Klickitat Cnty. v. International Ins. Co.*, 124 Wn.2d 789, 803–04, 881 P.2d
1020 (1994).

25 ¹⁷ 166 Wn. App. 33, 41, 271 P.3d 894 (2011).

1 whether the carrier was prejudiced by West Coast's failure to list Mad Pizza on its application.
2 Rather, the court focused on whether Mad Pizza was a covered entity under the terms of the
3 policy. The court should use the same analysis here.

4 **5. Cases involving the household or family exclusion are inapposite.**

5 Jorge argues that the Patriot policy violates the public policy expressed in the UIM statute
6 because it does not provide coverage to Javier. That argument blurs the critical distinction
7 between a grant of coverage and an exclusion from coverage. Jorge cites a case invalidating
8 family-member exclusions, but neglects case law stating that the UIM statute and public policy
9 do not mandate any particular scope for the definition of who is an insured. Under the latter
10 cases, the policy is valid because Javier, rather than being subject to an exclusion, is not an
11 insured in the first instance.

12
13 Washington courts have long held that the UIM statute "does not mandate any particular
14 scope for the definition of who is an insured in a particular automobile insurance policy."¹⁸ The
15 distinction between grants of coverage and exclusions is not merely semantic; Washington courts
16 treat the two very differently. For instance, an insured has the initial burden of showing that the
17 loss falls within the scope of the policy's insured losses. If that burden is met, the insurer then
18 has the burden to show that the loss is excluded by specific policy language.¹⁹

19 The case on which Jorge relies struck down exclusions, and did not mandate a particular
20 definition of "insured." In *Tissell v. Liberty Mutual Insurance Co.*,²⁰ the Washington Supreme
21 Court invalidated a UIM provision that excluded coverage for a family member who was a
22

23 ¹⁸ *Smith v. Cont'l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995).

24 ¹⁹ *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 731, 837 P.2d 1000 (1992).

25 ²⁰ 115 Wn.2d 107, 795 P.2d (1990).

1 named insured. The policy in that case included the named insured's family as a "covered
2 person," but excluded UIM coverage for a vehicle owned by a family member. The insurer
3 denied UIM coverage to Tissell, a named insured, because she was injured while riding in the
4 family car. *Tissell* invalidated this so-called "family member exclusion" as against public policy
5 because it was directed at a class of victims, rather than conduct that affected the insurer's risk.

6 The distinction between the extension or grant of coverage and exclusions from coverage
7 is made clear in several Washington cases, one of which is *Farmers Insurance Co. v. Miller*.²¹ In
8 that case, Lane Miller obtained an auto policy, which included uninsured motorist coverage,
9 from Farmers. Miller's son was later killed while riding as a passenger in an uninsured vehicle.
10 Farmers rejected Miller's uninsured motorist claim because his son was not an insured. The
11 policy stated that Farmers would provide uninsured motorist coverage to "the insured," which
12 the policy defined to include a relative of the named insured who was a resident of the same
13 household and who did not own a motor vehicle. Miller's son owned a car, so he did not come
14 within the definition of insured. The trial court granted summary judgment to Farmers. On
15 appeal, Miller argued that the public policy expressed in RCW 48.22.030 prohibited this type of
16 clause. The court rejected this argument because the statute "does not mandate any particular
17 scope for the definition of who is an insured in a particular automobile insurance policy." Cases
18 invalidating exclusions from the definition of insured were not on point because the issue before
19 the court was the scope of the policy's initial grant of coverage, and not an exclusionary clause,
20 and because the insured was defined consistently throughout the policy.
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22

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24 ²¹ 87 Wn.2d 70, 549 P.2d 9 (1976).

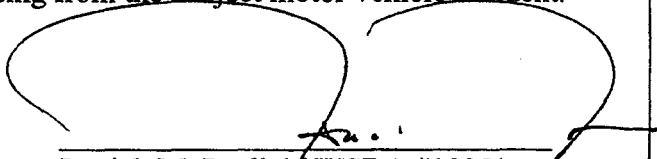
1 **6. Jorge Gutierrez's inability to read English does not nullify any terms in the policy**
2 **or the application because he is presumed to understand those documents.**

3 Jorge contends that Patriot cannot limit coverage to relatives over age 14 who are listed
4 in the application because he is not fluent in English and therefore did not understand the
5 application or the policy. Jorge's alleged inability to understand those documents does not nullify
6 this policy language. Policyholders have "an affirmative duty under Washington law to read their
7 policy and be on notice of the terms and conditions of the policy."²² This is true even if a party to
8 a contract does not speak the language in which the contract is written.²³ A lack of fluency in
9 English does not exempt a policyholder from a policy's terms, including those defining who is
10 and is not insured by the policy.

11 **7. Conclusion.**

12 For the foregoing reasons, Patriot respectfully submits that the court should grant its
13 motion for summary judgment and order that Patriot has no duty to pay any benefits under the
14 UIM coverage under Policy No. 471327125 arising from the subject motor vehicle accident.

15 DATED this 9th day of July, 2013.

16
17 
18 Patrick M. Paulich, WSBA #10951
19 Matthew Munson, WSBA #32019
20 THORSRUD CANE & PAULICH
21 Attorneys for Plaintiff Patriot General
22 Insurance Company

21 ²² *Dombrosky v. Farmers Ins. Co. of Wash.*, 84 Wn. App. 245, 257, 928 P.2d 1127 (1996); see also *Nat'l*
22 *Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973) ("It is a general rule that a
23 party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or
24 was ignorant of its contents.").

25 ²³ See *Del Rosario v. Del Rosario*, 152 Wn.2d 375, 385, 97 P.3d 11 (2004) (holding that party could not
26 set aside settlement agreement on ground that party could not read English and that other party
mistranslated agreement).

Not Reported in P.3d, 2011 WL 4790963 (Wash.App. Div. 2)
(Cite as: 2011 WL 4790963 (Wash.App. Div. 2))

Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington,
Division 2.
Jennifer HELGESON and Andrew Helgeson, Ap-
pellants,
v.
VIKING INSURANCE COMPANY OF WISCON-
SIN a foreign corporation, d/b/a/ Sentry Insurance,
d/b/a Dairyland Insurance, Respondent.

No. 41371-0-II.
Oct. 11, 2011.

Appeal from Kitsap Superior Court; Hon. Leila
Mills, J.
Natalie Kiddell Rasmussen, Gerald A. Kearney,
Law Offices of Gerald A. Kearney, PLLC, King-
ston, WA, for Appellants.

Patrick Michael Paulich, Herbert Matthew Munson,
Thorsrud Cane & Paulich, Seattle, WA, for Re-
spondent.

UNPUBLISHED OPINION
VAN DEREN, J.

*1 Jennifer Helgeson and her son, Andrew Helgeson,^{FN1} appeal the trial court's order granting Viking Insurance Company of Wisconsin's summary judgment motion and dismissing their claims against Viking in a dispute over whether Jennifer's underinsured motorist insurance (UIM)^{FN2} covered injuries sustained by Andrew when he was hit by an underinsured motor vehicle while he was skateboarding. The Helgesons argue that Jennifer's policy covered Andrew's injury because (1) Viking's broad form "named" driver endorsement excludes mandatory UIM coverage and, thus, violates RCW 48.22.005; (2) public policy prohibits

Viking's denial of UIM coverage to a named insured's minor child; (3) public policy prohibits family member exclusions in insurance contracts; and (4) Viking's conduct violated the Insurance Fair Conduct Act, RCW 48.30.010 - .015. We affirm the trial court's summary judgment order because Andrew was not insured under Jennifer's insurance policy and Viking's insurance policy does not violate public policy.

FN1. Because Jennifer Helgeson and Andrew Helgeson share the same last name, we refer to them by their first names to avoid confusion. We refer to them collectively as the Helgesons.

FN2. We note that "UIM is an acronym for either uninsured or underinsured motorist coverage." *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 306 n. 1, 88 P.3d 395 (2004). An "[u]nderinsured motor vehicle" is defined in part as "a motor vehicle with ... either no bodily injury or property damage liability bond [in effect] at the time of an accident." RCW 48.22.030(1).

FACTS

On October 5, 2008, Jennifer Helgeson renewed her personal automobile insurance coverage through Viking for the period of October 5, 2008, to April 5, 2009. Jennifer's policy provided definitions for terms used throughout the policy. CP at 36. It stated:

"You" and "your" mean the person shown as the named insured on the Declarations Page and that person's spouse if residing in the same household. You and your also means any relative of that person if they reside in the same household, providing they or their spouse do not own a car.

Clerk's Papers (CP) at 36. "Relative" was defined as "a person living in your household re-

Not Reported in P.3d, 2011 WL 4790963 (Wash.App. Div. 2)
(Cite as: 2011 WL 4790963 (Wash.App. Div. 2))

lated to you by blood, marriage, or adoption, including a ward or foster child." CP at 36.

The broad form "named" driver endorsement in Jennifer's automobile policy replaced the policy's general definition of "you" and "your," stating, " 'You' and 'your' mean the person shown as the named insured on the Declarations Page." CP at 47. Jennifer was the only named insured on the declarations page. The endorsement also amended the policy's liability coverage to state:

We will pay damages for which you are legally liable because of bodily injury and/or property damage caused by a car accident arising out of your use of your insured car. We will settle any claims or defend any lawsuit which is payable under the policy, as we deem appropriate.

CP at 47.

The endorsement further stated that the policy provided the named insured medical payment coverage while "occupying your insured car," "as a pedestrian when struck by a motor vehicle or utility trailer," or "any other person while occupying your insured car while the car is being used by you." CP at 47. The endorsement's UIM portion included coverage for

- (A) You.
- (B) Any other person occupying your insured car with your permission.
- (C) Any person for damages that person is entitled to recover because of bodily injury to you or another occupant of your car.^{FN3}

FN3. Although Viking's records indicate that Jennifer signed a UIM waiver form and she did not pay a separate premium for UIM coverage, Viking has been unable to locate the waiver. Thus, for purposes of its summary judgment motion and Jennifer's appeal, Viking concedes that Jennifer did

not waive UIM coverage.

*2 CP at 47.

On February 3, 2009, a motor vehicle struck Andrew while he was skateboarding in Kingston, Washington.^{FN4} Andrew was transferred by ambulance to a hospital and he was treated for fractures of his right leg. Andrew and the driver's insurer settled all claims Andrew had against the driver for \$50,000, the driver's policy's claim limit. When Jennifer applied for UIM coverage under her insurance policy for the remainder of Andrew's damages, Viking "disclaim [ed] and deni[ed] any and all liability or obligation" to provide UIM coverage to Andrew. CP at 81. Viking stated that "the policy of insurance covers only 'you' [Jennifer], as the named insured. Andrew ... does not meet the definition of 'you' under your policy and, therefore, there is no coverage under the [UIM] Coverage ." CP at 81.

FN4. The parties agree that a person on a skateboard is considered a pedestrian. *See generally Pudmaroff v. Allen*, 89 Wn.App. 928, 934, 951 P.2d 335 (1998), *aff'd*, 138 Wn.2d 55, 977 P.2d 574 (1999).

Andrew and Jennifer sued Viking, asserting that Viking breached its contract and violated the Insurance Fair Conduct Act. On the same day that Andrew and Jennifer filed their complaint against Viking, Viking filed a complaint for declaratory judgment, asking the trial court to rule that Viking did "not have a duty to pay any benefits under the UIM coverage of [Jennifer's] [p]olicy." CP at 225. The two cases were consolidated.

Both parties filed summary judgment motions. The trial court granted Viking's summary judgment motion, declared that Andrew was not entitled to UIM benefits under Jennifer's policy with Viking, and dismissed with prejudice the Helgesons' claims. The Helgesons appeal.

ANALYSIS

Not Reported in P.3d, 2011 WL 4790963 (Wash.App. Div. 2)
(Cite as: 2011 WL 4790963 (Wash.App. Div. 2))

I. Standards of Review

A. Summary Judgment

We review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Summary judgment is proper when the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue about any material fact and, assuming facts most favorable to the non-moving party, establish that the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

B. Interpreting Insurance Policies

"Interpretation of an insurance policy is a question of law, which we review de novo." *Hall v. State Farm Mut. Auto. Ins. Co.*, 133 Wn.App. 394, 399, 135 P.3d 941 (2006). Insurance policies are contracts, and rules of contract interpretation apply. *Hall*, 133 Wn.App. at 399.

The criteria for interpreting insurance contracts in Washington are well settled. We construe insurance policies as contracts. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000). We consider the policy as a whole, and we give it a ... "fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance."

[*Weyerhaeuser*, 142 Wn.2d] at 666.... Most importantly, if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists.

*3 ... Finally, in Washington the expectations of the insured cannot override the plain language of the contract. See *Findlay [v. United Pac. Ins. Co.]*, 129 Wn.2d 368, 378, 917 P.2d 116 (1996)].

Quadrant, 154 Wn.2d at 171–172 (citation omitted) (internal quotation marks omitted).

II. Washington Casualty Insurance—Chapter 48.22 RCW

The Helgesons argue that RCW 48.22.005(5)'s definition of "insured"^{FN5} is incorporated into the underinsured motor vehicle statute, RCW 48.22.030^{FN6} and, thus, RCW 48.22.030 requires Andrew, as Jennifer's seventeen year old son, to be included as an insured person under Jennifer's insurance policy even if he is not a "named" insured. They argue that Viking must pay Andrew's underinsured motorist claim under Jennifer's policy. We disagree because parties to an insurance policy are free to determine who is insured by the policy.

FN5. RCW 48.22.005(5) defines "[i]nsured" as:

(a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood, marriage, or adoption, or is the named insured's ward, foster child, or stepchild; or

(b) A person who sustains bodily injury caused by accident while: (i) Occupying or using the insured automobile with the permission of the named insured; or (ii) a pedestrian accidentally struck by the insured automobile.

FN6. Washington's underinsured motor vehicle insurance statute, RCW 48.22.030(1), states:

"Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or prop-

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erty damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

The issue raised by the Helgesons has long been resolved by our Supreme Court. It held that RCW 48.22.030 “does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy.” *Farmers Ins. Co. of Wash. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976). Furthermore, it explained that

[t]he policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of “insureds” that is at least as broad as the class in the primary liability sections of the policy. It does not preclude the parties from reaching agreement as to the scope of that class in the first instance.

Touchette v. Nw. Mut. Ins. Co., 80 Wn.2d 327, 337, 494 P.2d 479 (1972).

Here, the insurance policy's endorsement stated, “ ‘You’ and ‘your’ mean the person shown as the named insured on the Declarations Page.” CP at 47. Jennifer was the only person named on the declarations page. The parties to an insurance contract are free to delineate who is covered under the policy. *Miller*, 87 Wn.2d at 75. Additionally, the endorsement's UIM portion defined “insured person” as:

- (A) You.
- (B) Any other person occupying your insured car with your permission.
- (C) Any person for damages that person is entitled to recover because of bodily injury to you or another occupant of your car.

CP at 47. Andrew was not named on the declarations page, nor was he entitled to recovery under any of the policy's other provisions.

Because Andrew was not insured under Jennifer's policy for his injuries sustained when an underinsured motor vehicle injured him while he was skateboarding, we hold that the trial court did not err in finding that the Helgesons were “not entitled to underinsured motorist benefits under” Jennifer's policy with Viking. CP at 204.

III. Public Policy

A. UIM Coverage

The Helgesons also assert a public policy argument that “[t]he Endorsement [wa]s contrary to the public policy behind Washington State's UIM statu[t]e because the Endorsement forclos[e]d Andrew's only source of UIM coverage.”^{FN7} Br. of Appellant at 14 (italics and boldface omitted). The Helgesons rely on *Tissell v. Liberty Mutual Insurance Co.*, 115 Wn.2d 107, 109, 795 P.2d 126 (1990) to support this argument. But the Helgesons misconstrue the reach of the *Tissell* decision, and its rule is inapplicable here because Andrew was not an insured under Jennifer's policy and he was not a purchaser of UIM insurance.

FN7. We note that Andrew did have access to other insurance coverage for his injuries since the motorist's insurer paid policy limits to Andrew.

*4 In *Tissell*, the court held “that certain victim exclusions in [UIM] policies are invalid as against public policy when asserted against the purchaser of a UIM policy.” 115 Wn.2d at 108. Ada Tissell was seriously injured in a vehicle accident and died five years after the accident as a result of the injuries she sustained “when her husband accidentally drove the car off the road and into the Green River.” *Tissell*, 115 Wn.2d at 109. Tissell was the named insured on the automobile policy providing \$300,000 liability coverage and \$300,000 UIM coverage. *Tissell*, 115 Wn.2d at 109. The UIM portion of her policy defined “covered person” as “the named insured or a family member” but excluded (1) any vehicle owned by “you or any family mem-

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ber unless the covered person was neither operating nor occupying such vehicle at the time of the accident" and (2) if liability coverage of the policy applied. *Tissell*, 115 Wn.2d at 109. Liberty Insurance paid Tissell the full amount due under the liability portion of the policy but denied UIM coverage because her husband was operating the family vehicle at the time of the accident and because she recovered under the liability coverage of the policy. *Tissell*, 115 Wn.2d at 109-10. The *Tissell* court explained that, although an insurance company may exclude persons from their status as "insured," once an insurance company has decided to insure a driver, it cannot deny coverage based on the identity of a victim injured by its insured driver. 115 Wn.2d at 108.

Here, Andrew was not an insured under his mother's insurance policy under either the insurance policy's liability portion or under the UIM portion. *Tissell* does not suggest that public policy requires that Andrew be entitled to UIM coverage under his mother's policy because he does not have another source of UIM coverage. Here, Jennifer and Viking were free to determine who was covered under Jennifer's policy, Andrew was not included in that definition, and the circumstances of his vehicle/skateboard accident with an underinsured driver did not bring him under the UIM coverage of his mother's policy.

B. Family Member Exclusions

The Helgesons also contend that "[f]amily member exclusions in insurance contracts are invalid in Washington State because such exclusions contravene the public policy behind Washington State's statutory scheme of insurance legislation." Br. of Appellant at 19. To support their argument, the Helgesons rely on *Mutual of Enumclaw Insurance Co. v. Wiscomb*, 97 Wn.2d 203, 643 P.2d 441 (1982).

"Maura McGahan Wiscomb was seriously injured in a collision between the motorcycle she was operating and an automobile driven by her husband." *Wiscomb*, 97 Wn.2d at 204. The issue be-

fore the court was "to determine the validity and effect of family or household exclusion clauses in automobile insurance policies." *Wiscomb*, 97 Wn.2d at 205. The clause at issue prevented "those persons related to and living with the negligent driver, from receiving financial protection under [the] insurance policy." *Wiscomb*, 97 Wn.2d at 208. The court held that the insurer who agrees to indemnify the insured against damages caused by the insured's negligence may not exclude "an entire class of innocent victims." *Wiscomb*, 97 Wn.2d at 208.

*5 *Wiscomb* is inapplicable here and the Helgesons do not cite any other authority that supports the proposition that minors must always be insured under a parent's or guardian's policy.^{FN8} Insurance policies, as contracts, allow the parties to define the scope of that class of insured, and we will not rewrite that contract. Viking's denial of UIM coverage for Andrew did not involve applying a policy exclusion but, rather, interpreting who was insured under the policy.

FN8. Moreover, in *Progressive Casualty Insurance Co. v. Jester*, 102 Wn.2d 78, 78-79, 683 P.2d 180 (1984), our Supreme Court narrowed the reach of its decision in *Wiscomb*:

In ... *Wiscomb* ..., we reserved for another day the question of the validity of motor vehicle insurance policy exclusions consciously bargained for by the insurer and its insured. That day has arrived. We hold public policy is not violated by a motorcycle insurance policy provision which excludes liability coverage for claims made by passengers, when the insured intentionally rejected that coverage when offered.

Furthermore, " '[e]xclusion clauses do not grant coverage; rather, they subtract from it.' " *Nat'l Union Fire Ins. Co. of Pittsburgh v. Nw. Youth Servs.*, 97 Wn.App. 226, 231, 983 P.2d 1144

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(1999) (quoting *Harrison Plumbing & Heating, Inc. v. New Hampshire Ins. Grp.*, 37 Wn.App. 621, 627, 681 P.2d 875 (1984)). Here, Jennifer's policy covered only her as the insured under the liability portion and provided coverage for her in the UIM portion. Andrew was not insured under any portion of the policy nor did the policy state an exclusion applicable to him; thus, it did not have an exclusion clause that excluded "an entire class of innocent victims." *Wiscomb*, 97 Wn.2d at 208. Because Andrew was not an insured under the policy, it was not against public policy to deny him UIM coverage. We hold that the trial court did not err in granting Viking's summary judgment motion.

IV. Insurance Fair Conduct Act, RCW 48.30.010
-.015 ^{FN9}

FN9. RCW 48.30.015 states:

(1) Any first party claimant to a policy of insurance who is unreasonably denied a claim for coverage or payment of benefits by an insurer may bring an action in the superior court of this state to recover the actual damages sustained, together with the costs of the action, including reasonable attorneys' fees and litigation costs, as set forth in subsection (3) of this section.

(2) The superior court may, after finding that an insurer has acted unreasonably in denying a claim for coverage or payment of benefits or has violated a rule in subsection (5) of this section, increase the total award of damages to an amount not to exceed three times the actual damages.

(3) The superior court shall, after a finding of unreasonable denial of a claim for coverage or payment of benefits, or after a finding of a violation of a rule in subsection (5) of this section, award reasonable attorneys' fees and actual and stat-

utory litigation costs, including expert witness fees, to the first party claimant of an insurance contract who is the prevailing party in such an action.

Finally, the Helgesons argue that Viking violated Washington's Insurance Fair Conduct Act "[b]y denying Andrew ... insurance coverage based on an Endorsement that is both against statutory language and public policy." Br. of Appellant at 22-23. As discussed above, the endorsement was not contrary to statutory language or public policy and, thus, this argument is without merit. Andrew was not "unreasonably denied a claim for coverage or payment of benefits by an insurer" making RCW 48.30.015 inapplicable. RCW 48.30.015(1).

V. Attorney Fees

The Helgesons request attorney fees. Because they do not prevail, we deny their request.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: HUNT and JOHANSON, JJ.

Wash.App. Div. 2, 2011.
Helgeson v. Viking Ins. Co. of Wisconsin
Not Reported in P.3d, 2011 WL 4790963
(Wash.App. Div. 2)


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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

NO: 12 2 00908 3

Plaintiff,

vs.

DEFENDANT JAVIER
GUTIERREZ'S ANSWER TO
COMPLAINT FOR
DECLARATORY JUDGMENT
AND COUNTERCLAIMS

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital
community, and JAVIER GUTIERREZ,

Defendants.

COMES NOW Defendant Javier Gutierrez in reply to Plaintiff's complaint
and admits, denies, and alleges as follows:

I.

1.1 In reply to paragraphs 1.1, 1.2, and 1.3, Defendant Javier Gutierrez admits
same.

II.

2.1 In reply to paragraphs 2.1 and 2.2, Defendant Javier Gutierrez admits
same.

DEFENDANT JAVIER GUTIERREZ'S ANSWER TO
COMPLAINT FOR DECLARATORY JUDGMENT
AND COUNTER CLAIM

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III.

3.1 In reply to paragraph 3.1, Defendant Javier Gutierrez admits that his name is not on The Policy, but denies that The Policy doesn't cover him.

3.2 In reply to paragraphs 3.2 and 3.3, Defendant Javier Gutierrez admits same.

3.3 In reply to paragraph 3.4, Defendant Javier Gutierrez admits that Patriot General contends that he is not insured under The Policy, however, Defendant Javier contends that he is, indeed, covered under the policy.

IV.

4.1 In reply to paragraphs 4.1, Defendant Javier Gutierrez admits same.

4.2 In reply to paragraphs 4.2 and 4.3, Defendant Javier Gutierrez denies each and every allegation contained therein.

V. AFFIRMATIVE DEFENSES

FURTHER ANSWERING and by way of affirmative defenses, Defendant Javier Gutierrez alleges as follows:

5.1 Failure to State a Claim Plaintiff's Complaint fails to state a claim against defendants upon which relief may be granted, and therefore, all claims against defendants should be dismissed with prejudice.

5.2 Reservation of Right to Assert Additional Affirmative Defenses Defendant Javier Gutierrez hereby reserves his right to assert further and additional affirmative defenses as additional discovery and circumstances require or permit during the course of litigation.

DEFENDANT JAVIER GUTIERREZ'S ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND COUNTER CLAIM

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1 **VI. COUNTERCLAIM FOR BAD FAITH AND VIOLATION OF THE CONSUMER**
2 **PROTECTION ACT**

3 BY WAY OF FURTHER ANSWER AND AS A COUNTERCLAIM AGAINST
4 PLAINTIFF, Defendant Javier Gutierrez alleges as follows:

5 Parties, Jurisdiction & Venue

6 6.1 At all times relevant herein, Defendant Jorge Gutierrez and Defendant
7 Javier Gutierrez resided in Walla Walla County, Washington.

8 6.2 At all times relevant herein, Plaintiff Patriot General Insurance Company
9 ("Patriot General") was licensed and was doing business (i.e. selling
10 insurance) in Walla Walla County, Washington.

11 Facts

12 6.3 Plaintiff Patriot General sold a policy of insurance to Defendant Jorge
13 Gutierrez with a policy number of 471327125, which was in full force and
14 effect on January 9, 2011 and which contained uninsured motorist ("UIM")
15 benefits of \$25,000.00 per person/\$50,000.00 per accident.

16 6.4 Defendant Javier Gutierrez is related by blood to Defendant Jorge
17 Gutierrez and resided with him at all times relevant herein.

18 6.5 On or about January 9, 2011, Defendant Javier Gutierrez was a passenger
19 in an automobile that was driven by Matthew Vincent Lanier and was
20 involved in a single-vehicle-rollover collision on Middle Waitsburg Road in
21 Walla Walla County, Washington.

22 6.6 Driver Matthew Vincent Lanier was an uninsured motorist.
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25 DEFENDANT JAVIER GUTIERREZ'S ANSWER TO
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26 AND COUNTER CLAIM

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1 6.7 Driver Matthew Vincent Lanier was cited for driving under the influence,
2 reckless endangerment of emergency zone workers, and driving without
3 insurance.

4 UIM Claim against Patriot General

5 6.8 Defendant Javier Gutierrez re-alleges and incorporates by reference the
6 allegations set forth in paragraphs 6.3 through 6.7.

7 6.9 This is a contractual claim for UIM benefits based on Defendant Gutierrez's
8 coverage under the insurance contract with Plaintiff Patriot General.

9 6.10 Driver Matthew Vincent Lanier was 100% "at fault" as that term is defined
10 by RCW 4.22.015 for the automobile collision that gives rise to this lawsuit,
11 and is, thus, 100% responsible for the injuries and damages suffered by
12 Defendant Javier Gutierrez which proximately resulted from this collision.

13 6.11 Plaintiff Patriot General, which (as Defendant Javier Gutierrez's UIM
14 carrier) "steps into the shoes" of the uninsured negligent driver, is thus
15 100% responsible for Defendant Javier Gutierrez's injuries and damages
16 herein, subject to its UIM limits.

17 6.12 There are no non-party individuals or entities which are, in any way or
18 percentage, at fault for this collision, or for Defendant Javier Gutierrez's
19 injuries and damages resulting from the collision.

20 6.13 Plaintiff Patriot General has a duty under the terms of the UIM provision of
21 its policy to pay the amount of compensatory damages that the insureds
22 are legally entitled to recover from the owner or the driver of the uninsured
23 vehicle.

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25 DEFENDANT JAVIER GUTIERREZ'S ANSWER TO
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1 6.14 As a direct and proximate result of said collision, Defendant Javier
 2 Gutierrez was injured, suffered and continues to suffer physical disability
 3 and pain, emotional trauma, medical expenses, loss of earnings and
 4 earning capacity, and other damages, in an amount now unknown, but to
 5 be proven at the time of trial.

6 6.15 Defendant Javier Gutierrez made a timely claim for benefits under Plaintiff
 7 Patriot General's UIM policy and fully complied with any and all duties on
 8 his part to entitle him to recover and receive the first-party benefits that
 9 were due and owed to Defendant Javier Gutierrez for the covered losses
 10 under Plaintiff Patriot General's policy.

11 6.16 Defendant Javier Gutierrez submitted a \$25,000.00-policy-limit demand to
 12 Plaintiff Patriot General on May 15, 2012.

13 6.17 On May 22, 2012, Plaintiff Patriot responded that it had determined that
 14 Defendant Javier Gutierrez does not qualify for benefits and indicated that it
 15 was forwarding an explanation of the disclaimer to Defendant Jorge
 16 Gutierrez but it refused to send Defendant Javier Gutierrez an actual
 17 explanation of the reason for its denial of coverage until February 13, 2013.

18 Breach of Contract

19 6.18 Defendant Javier Gutierrez re-alleges and incorporates by reference the
 20 allegations set forth in paragraphs 6.3 through 6.17.

21 6.19 Plaintiff Patriot General's actions are in violation of the express and implied
 22 terms and conditions of the insurance contract and/or reasonable

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1 expectations of its insureds as to the terms and conditions of the insurance
2 policy.

3 6.20 Plaintiff Patriot General breached its duty to provide coverage for
4 Defendant Javier Gutierrez under the terms of the policy and under the
5 definition of "insured" in RCW 48.22.005(5)(a) which is automatically "read
6 into" the policy.

7 6.20 Plaintiff Patriot General breached its duty, under the terms of the UIM
8 provisions of the policy, to pay the amount of compensatory damages that
9 the insured is legally entitled to recover from the owner or driver of the
10 uninsured vehicle.

11 6.21 Plaintiff Patriot General is liable for all damages that have resulted from its
12 breach of the policy of insurance, including but not limited to payment of full
13 compensation for injuries sustained by Defendant Javier Gutierrez, loss of
14 use of funds which should have been promptly paid as part of the claims
15 process, damage to credit, general damages for the wrongful handling of
16 the UIM claim, and for having to institute litigation to obtain the benefits to
17 which Defendant Javier Gutierrez is entitled under the policy.

18 Bad Faith and Consumer Protection Act Violation

19 6.22 Defendant Javier Gutierrez re-alleges and incorporates by reference the
20 allegations set forth in paragraphs 6.3 through 6.21.

21 6.23 Plaintiff Patriot General's actions are in violation of RCW 48.30.010 and its
22 duty of good faith requiring that all its actions be actuated by good faith, to
23 abstain from deception, and practice honesty and equity in all matters

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1 related to the business of insurance. Plaintiff Patriot General's actions
2 were negligent and in violation of its duty to exercise reasonable care
3 towards its insureds.

4 6.24 Plaintiff Patriot General's actions are in violation of Specific Unfair
5 Settlement Practices as set forth in WAC 284-30 et. seq. As well as in
6 violation of other statutes or regulations governing UIM coverage, see RCW
7 48.22 et. seq.

8 6.25 Plaintiff Patriot General has unreasonably delayed payment in full to
9 Defendant Javier Gutierrez and has forced him to resort to litigation to
10 obtain the benefits he is entitled to under the terms of the policy, which
11 constitutes an unreasonable claims settlement practice.

12 6.26 Plaintiff Patriot General's actions are in violation of the Consumer
13 Protection Act, RCW 19.86 et. seq.

14 6.27 Plaintiff Patriot General is liable for all damages to Defendant Javier
15 Gutierrez that have resulted from the violation of the Consumer Protection
16 Act and implied common law duty of good faith.

17 6.28 Defendant Javier Gutierrez intends to amend this counterclaim to include
18 violations of the Insurance Fair Conduct Act (RCW 48.30.015) after he has
19 complied with the twenty day notice requirement set forth in RCW
20 48.30.015(8)(a), provided that Plaintiff Patriot General continues to refuse
21 cure its violations.

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25 DEFENDANT JAVIER GUTIERREZ'S ANSWER TO
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VII. LIMITED PHYSICIAN/PATIENT WAIVER

Defendant Javier Gutierrez hereby waives the physician-patient privilege ONLY to the extent required by RCW 5.60.060, as limited by Defendant Javier Gutierrez's constitutional rights of privacy, contractual rights of privacy, and the ethical obligations of physicians and attorneys not to engage in ex parte contact between a treating physician and the patient's legal adversaries.

VIII. PRAYER FOR RELIEF

WHEREFORE, having fully stated the foregoing claims against Plaintiff, Defendant Javier Gutierrez prays for relief as follows:

1. For an award of general damages in an amount proven at trial;
2. For an award of special damages including, but not limited to, past and future medical expenses, out-of-pocket costs, loss of earnings and earning capacity, and others, in an amount to be proven at trial;
3. For pre-judgment and post-judgment interest on all liquidated special damages as provided by law;
4. For an award of Defendant Javier Gutierrez's attorney fees and costs incurred in this action, as permitted by court rules, contract, statute, equitable doctrine, or case authority, including but not limited to *Olympic Steamship Co. v. Centennial Ins. Co.*
5. For leave to amend Defendant Javier Gutierrez's pleadings (including, but not limited to, adding an IFCA claim under RCW 48.30.015 per paragraph 6.28 above) as additional discovery and circumstances require or permit during the course of litigation, or to

DEFENDANT JAVIER GUTIERREZ'S ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND COUNTER CLAIM

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conform to the evidence presented at trial or other hearings herein;


and

6. For such other and further relief as the Court deems just and equitable.

DATED this 13th day of July, 2013

Hess Law Office, PLLC

By:


Peter J. Hess, WSBA #39721
Of Attorneys for Defendants

DEFENDANT JAVIER GUTIERREZ'S ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND COUNTER CLAIM

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of July, 2013, I caused to be served a true and correct copy of DEFENDANT JAVIER GUTIERREZ'S ANSWER TO COMPLAINT FOR DECLARATORY JUDGMENT AND COUNTERCLAIMS by the method(s) indicated below, and addressed to the following:

Mr. Patrick M. Paulich
Thorsrud Cane & Paulich
1300 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101
Fax: (206) 386-7795

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
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DEFENDANT JAVIER GUTIERREZ'S ANSWER TO
COMPLAINT FOR DECLARATORY JUDGMENT
AND COUNTER CLAIM

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6 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

7
8 PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

9 Plaintiff,

10 v.

11 JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
12 and JAVIER GUTIERREZ,

13 Defendants.

No. 12-2-00908-3

PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S ERRATA
TO ITS MOTION FOR SUMMARY
JUDGMENT

14 Plaintiff Patriot General Insurance Company hereby submits corrections to its Motion for
15 Summary Judgment. Page 2, lines 3 to 4 now read, "It identifies Javier Gutierrez as the named
16 insured, and its lists two drivers, Javier Gutierrez and Maria Recarmona." They should read, "It
17 identifies Jorge Gutierrez as the named insured, and its lists two drivers, Jorge Gutierrez and
18 Maria Recarmona."

19 Page 6, lines 5 to 8 now read, "Jorge does not qualify as 'you' because the Declarations
20 Page does not identify him as a named insured, and he is over the age of 14 and not listed on the
21 application or any endorsement." They should read, "Javier does not qualify as 'you' because the
22 Declarations Page does not identify him as a named insured, and he is over the age of 14 and not
23 listed on the application or any endorsement."
24

25 PLAINTIFF PATRIOT GENERAL INSURANCE
26 COMPANY'S ERRATA TO ITS MOTION FOR
SUMMARY JUDGMENT - 1


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DATED this 17th day of July, 2013.


Patrick M. Paulich, WSBA #10951
Matthew Munson, WSBA #32019
THORSRUD CANE & PAULICH
Attorneys for Plaintiff Patriot General
Insurance Company

PLAINTIFF PATRIOT GENERAL INSURANCE
COMPANY'S ERRATA TO ITS MOTION FOR
SUMMARY JUDGMENT - 2

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

No. 12-2-00908-3

DECLARATION OF SERVICE

v.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

I declare under penalty of perjury under the laws of the State of Washington that I caused to
be served the listed documents on the following counsel in the manner described below:

1. Plaintiff Patriot General Insurance Company's Errata to its Motion for Summary Judgment, and
2. this Declaration of Service.

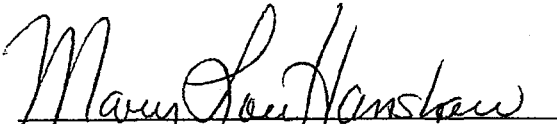
Peter J. Hess
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Via Facsimile and Email per agreement

Dick Kilpatrick
Shannon M. Kilpatrick
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Executed at Seattle, Washington this 17th day of July, 2013.


Mary Lou Hanshaw

COPY RECEIVED

AUG 16 2013

THORSDORF & PAULICH

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FILED

AUG - 9 2013

KATHY MARTIN
WALLA WALLA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

vs.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No.: 12-2-00908-3

ORDER GRANTING DEFENDANTS'
MOTION TO STRIKE, DENYING
PATRIOT GENERAL'S MOTION
FOR SUMMARY JUDGEMENT AND
ESTABLISHING UIM COVERAGE
FOR DEFENDANT JAVIER
GUTIERREZ

THIS MATTER came on for hearing on July 15, 2013 before the undersigned Commissioner of the above-entitled court, and the Court having considered the records and files herein, including:

1. Plaintiff Patriot General Insurance Company's Motion for Summary Judgment;

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE,
DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
JUDGEMENT AND ESTABLISHING UIM COVERAGE FOR
DEFENDANT JAVIER GUTIERREZ
Page 1 of 4

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2. Declaration of Tomas Miranda and the exhibit thereto;
3. Declaration of Amy Brunner in Support of Plaintiff Patriot General Insurance Company's Motion for Summary Judgment and the exhibit thereto;
4. Declaration of Kyle Mosbrucker in Support of Patriot General Insurance Company's Motion for Summary Judgment and the exhibit thereto;
5. Declaration of Matthew Munson in Support of Patriot General Insurance Company's Motion for Summary Judgment and the exhibits thereto;
6. Defendant Javier Gutierrez's Memorandum of Law in Opposition to Plaintiff Patriot General Insurance Company's Motion for Summary Judgment;
7. Declaration of Defendant Javier Gutierrez;
8. Defendant Jorge Gutierrez's Opposition to Patriot General Insurance Company's Motion for Summary Judgment;
9. Declaration of Jorge Gutierrez Opposing to Patriot General's Motion for Summary Judgment;
10. Plaintiff Patriot General Insurance Company's Reply on Its Motion for Summary Judgment;
11. Defendant Javier Gutierrez's Motion to Strike Plaintiff's Citation to an Unpublished Opinion; and
12. Defendant Jorge Gutierrez's Joinder in Defendant Javier Gutierrez's Motion to Strike Plaintiff's Citation to Unpublished Opinion

and the Court having heard the arguments of counsel, and being otherwise

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE,
DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
JUDGEMENT AND ESTABLISHING UIM COVERAGE FOR
DEFENDANT JAVIER GUTIERREZ
Page 2 of 4

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

v.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No. 12-2-00908-3

PLAINTIFF'S MOTION FOR
REVISION OF COURT
COMMISSIONER'S ORDER
DENYING PATRIOT GENERAL'S
MOTION FOR SUMMARY
JUDGMENT AND ESTABLISHING
UIM COVERAGE FOR DEFENDANT
JAVIER GUTIERREZ

I. Relief Requested

Plaintiff Patriot General Insurance Company ("Patriot General") moves under RCW 2.24.050 for an order revising the Superior Court Commissioner's Order Granting Defendants' Motion to Strike, Denying Patriot General's Motion for Summary Judgment and Establishing UIM Coverage for Defendant Javier Gutierrez ("The Order"). The Order was signed by Commissioner Michael S. Mitchell on August 9, 2013 and filed with the Walla Walla County Clerk that same day. Patriot General seeks revision of the summary judgment rulings only. It does not seek revision of the Commissioner's order granting defendants' motion to strike.

PLAINTIFF PATRIOT GENERAL'S MOTION FOR
REVISION OF COMMISSIONER'S ORDER
DENYING PATRIOT GENERAL'S MOTION FOR
SUMMARY JUDGMENT - 1

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1 In its summary judgment motion, Patriot General sought a declaration that it does not
2 have a duty to pay underinsured motorist ("UIM") benefits to Javier Gutierrez under the
3 automobile insurance policy it issued to Javier's father, Jorge Gutierrez. Javier Gutierrez is not
4 entitled to UIM benefits because he is not a named insured under the policy. The policy complies
5 with the statute governing UIM, RCW 48.22.030, because that statute does not limit the ability
6 of insurers and insureds to define who is covered by a UIM policy. And contrary to the
7 defendants' position, another statute, RCW 48.22.005, does not require UIM policies to cover a
8 named insured's relatives.

9 10 **II. Statement of Facts**

11 The relevant facts are set forth in Patriot General's summary judgment motion, which
12 was filed on June 13, 2013. The other briefs, declarations and exhibits that were filed in support
13 of and in opposition to Patriot General's summary judgment motion are identified in The Order,
14 a copy of which is attached.

15 On July 15, 2013, Commissioner Michael S. Mitchell of the Walla Walla County
16 Superior Court heard oral arguments from attorneys for Patriot General, Javier Gutierrez, and
17 Jorge Gutierrez on Patriot General's summary judgment motion. Commissioner Mitchell denied
18 the motion. The only explanation the Commissioner provided was that RCW 48.22.005 was
19 incorporated into the UIM statute, RCW 48.22.030.

20 **III. Statement of Issue**

21 Should this Court revise the Commissioner's order by granting Patriot General's
22 summary judgment motion and vacating the Commissioner's grant of summary judgment in
23 defendants favor?
24

25 **PLAINTIFF PATRIOT GENERAL'S MOTION FOR**
26 **REVISION OF COMMISSIONER'S ORDER**
DENYING PATRIOT GENERAL'S MOTION FOR
SUMMARY JUDGMENT - 2

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IV. Evidence Relied Upon

This motion relies on Patriot General's summary judgment motion and reply, the declarations of Matthew Munson, Tomas Miranda, Kyle Mosbrucker, and Amy Brunner, the exhibits attached to those declarations, and the pleadings and other documents on file.

V. Legal Authority

All decisions by Commissioners are subject to revision by the Superior Court. RCW

2.24.050. Any interested party may file a motion to revise a Commissioner's order within ten days of the order's entry. *Id.* On a revision motion, a trial court reviews a commissioner's ruling de novo based on the evidence and issues presented to the commissioner. *Williams v. Williams*, 156 Wn. App. 22, 27, 232 P.3d 573 (2010).

The Superior Court should revise The Order. The Commissioner erred by ruling that Javier Gutierrez is entitled to UIM coverage under the Patriot General policy. For all the reasons set forth in Patriot General's motion and its reply, this Court should enter summary judgment for Patriot General and vacate the Commissioner's grant of summary judgment in defendants favor.

DATED this 12th day of August, 2013.



Patrick M. Paulich, WSBA #10954
Matthew Munson, WSBA #32019
THORSRUD CANE & PAULICH
Attorneys for Plaintiff Patriot General
Insurance Company

PLAINTIFF PATRIOT GENERAL'S MOTION FOR
REVISION OF COMMISSIONER'S ORDER
DENYING PATRIOT GENERAL'S MOTION FOR
SUMMARY JUDGMENT - 3

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Hearing Date: November 4, 2013

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

vs.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No.: 12-2-00908-3

DEFENDANT JORGE GUTIERREZ'S
BRIEF OPPOSING PATRIOT
GENERAL'S MOTION FOR
REVISION OF ORDER DENYING
PATRIOT GENERAL'S MOTION
FOR SUMMARY JUDGMENT AND
ESTABLISHING UIM COVERAGE

I. INTRODUCTION AND RELIEF REQUESTED

This case arises out of a dispute over underinsured motorist (UIM) coverage. Defendant Javier Gutierrez was injured when he was the passenger in a one-car motor vehicle collision. He suffered significant injuries, and the driver was not insured. At the time of the collision, Javier¹ was living with his parents and did not own a vehicle. His father, defendant Jorge Gutierrez, had purchased an auto

DEFENDANT JORGE GUTIERREZ'S BRIEF OPPOSING
PATRIOT GENERAL'S MOTION FOR REVISION OF ORDER
DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
JUDGMENT AND ESTABLISHING UIM COVERAGE
Page 1 of 7

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1 policy with Patriot General that included UIM coverage for his whole family,
2 including Javier. Javier made a claim for UIM benefits with Patriot General. Patriot
3 General denied coverage, claiming Javier was excluded because Javier had not
4 been explicitly identified as a driver. Commissioner Mitchell disagreed, ruling that
5 Patriot General could not exclude from coverage a person defined as an "insured"
6 by the Legislature.

7 Defendant Jorge Gutierrez asks this Court to deny plaintiff Patriot General's
8 motion to revise Commissioner Mitchell's order denying its motion for summary
9 judgment. Commissioner Mitchell correctly determined that there was
10 underinsured motorist (UIM) coverage for Javier because Patriot General lacked
11 the authority to change the Legislature's definition of "insured" in its policy. In RCW
12 48.22.005(5), the definition section applicable to the UIM statute, the Legislature
13 defined as an "insured" all relatives living with the named insured. As Jorge's son
14 living with Jorge at the time of the collision, Javier fits the Legislature's definition of
15 "insured." Because all insurance statutes are read into the policy, Patriot General
16 could not redefine Javier's insured status. Accordingly, Javier is entitled to UIM
17 coverage.

18 Alternatively, this Court could deny Patriot General's motion for summary
19 judgment for a different reason – that the plain language of the policy does not
20 actually exclude Javier. It simply imposes a disclosure requirement on the

21
22 ¹ This brief refers to Javier and Jorge by their first names for ease of reference.

23 DEFENDANT JORGE GUTIERREZ'S BRIEF OPPOSING
24 PATRIOT GENERAL'S MOTION FOR REVISION OF ORDER
25 DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
JUDGMENT AND ESTABLISHING UIM COVERAGE
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1 insureds, and Patriot General was required – but made no effort – to show it was
2 actually prejudiced from any alleged breach of the disclosure requirement. Either
3 way, there is UIM coverage for Javier. This Court should deny Patriot General's
4 motion for summary judgment and find UIM coverage for Javier.

5 **II. FACTUAL AND PROCEDURAL HISTORY**

6 In 2010, Jorge Gutierrez went to Tomas Miranda for insurance, at least in
7 part because Mr. Miranda speaks Spanish and Jorge does not speak or read
8 English. Jorge Gutierrez Decl. ¶ 4 (attached here for ease of reference as
9 Appendix A). He always intended for his entire family to be covered by the
10 insurance, including his son, Javier. *Id.* ¶ 5. Because the application was all in
11 English, Jorge provided the information to Mr. Miranda, who typed in the
12 information. Mr. Miranda then printed out the form and told Jorge where to sign
13 and initial. *Id.*

14 Jorge had no understanding the insurer required disclosure of all his children
15 age 14 and over. *Id.* ¶ 5. He never intended to agree that his children would not be
16 covered. *Id.* ¶ 6. Jorge believed all his children had coverage, including Javier. *Id.*
17 The first time anyone ever told him Javier was not covered was after Javier's
18 accident. *Id.*

19 On January 9, 2011, Javier was seriously injured while a passenger in a
20 collision. *Id.* ¶ 2. Javier did not have any other automobile insurance. *Id.* ¶ 8. He lived
21 at home with his parents and did not own a vehicle. *Id.*

22 DEFENDANT JORGE GUTIERREZ'S BRIEF OPPOSING
23 PATRIOT GENERAL'S MOTION FOR REVISION OF ORDER
DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
24 JUDGMENT AND ESTABLISHING UIM COVERAGE
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1 After Javier made a claim for UIM benefits, Patriot General denied coverage
2 in May 2012. Patriot General then sued Javier and Jorge, asking for this Court to
3 declare Javier was not insured under the policy.

4 Patriot General moved for summary judgment, which was opposed by both
5 Jorge and Javier. Commissioner Mitchell heard the argument on July 15, 2013. At
6 the hearing, Patriot General did not dispute that Javier was Jorge's natural born
7 son who lived with his father at the time of the collision. By order dated August 9,
8 2013, Commissioner Mitchell denied Patriot General's motion for summary
9 judgment. The Order is attached as Appendix C for ease of reference. Based on
10 the agreed facts, Commissioner Mitchell also found that there was UIM coverage
11 for Javier's January 9, 2011 collision. He ruled that the Legislature's definition of
12 "insured" found in RCW 48.22.005(5) must be read into the policy, and because
13 Javier met that definition, he was an insured for purposes of UIM coverage in
14 Patriot General's policy. Patriot General then moved to revise the Commissioner's
15 August 9, 2013 order.

16 III. EVIDENCE RELIED UPON

17 In addition to the court files, this brief relies upon Defendant Jorge
18 Gutierrez's Opposition to Patriot General Insurance Company's Motion for
19 Summary Judgment, and Declaration of Jorge Gutierrez Opposing Patriot
20 General's Motion for Summary Judgment.

21 IV. ARGUMENT AND AUTHORITY

22 Rather than rehash his brief in opposition to Patriot General's Motion for

23 DEFENDANT JORGE GUTIERREZ'S BRIEF OPPOSING
24 PATRIOT GENERAL'S MOTION FOR REVISION OF ORDER
25 DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
JUDGMENT AND ESTABLISHING UIM COVERAGE
Page 4 of 7

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1 Summary Judgment, defendant Jorge Gutierrez will simply outline the reasons
2 why Patriot General's motion should be denied and refer the Court to his brief
3 opposing summary judgment attached as Appendix B.

4 Commissioner Mitchell did not err when he denied Patriot General's motion
5 for summary judgment and ruled Javier was covered under Patriot General's policy
6 for purposes of UIM insurance. Commissioner Mitchell correctly recognized that
7 Patriot General had no authority to change the definition of "insured" provided by
8 the Legislature in RCW 48.22.005(5) – a definition which explicitly applies to UIM
9 insurance. All insurance regulatory statutes are read into insurance policies,
10 including the definitions contained in RCW 48.22.005. Patriot General cannot
11 contract around this. For more detail and explanation, see Appendix B, Section
12 V(C), at 11-19.

13 Alternatively, this Court could still deny Patriot General's Motion for
14 Summary Judgment on the basis that the language of the policy does not actually
15 exclude Javier, as Patriot General claims it does. In defining who is an insured, the
16 policy plainly covers relatives of the named insured (here, Jorge) who live with the
17 named insured. The policy then goes on to impose a disclosure obligation for
18 those relatives age 14 or older. But the policy contains no language stating that
19 non-disclosed relatives are excluded. To reach the conclusion that Javier was
20 excluded, the Court would be required to infer language into the policy that isn't
21 actually there.

22 DEFENDANT JORGE GUTIERREZ'S BRIEF OPPOSING
23 PATRIOT GENERAL'S MOTION FOR REVISION OF ORDER
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24 JUDGMENT AND ESTABLISHING UIM COVERAGE
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1 Because the language imposes a duty on the insureds – to disclose family
2 members age 14 and over – different rules apply. Before an insurer can avoid
3 coverage for an insured's breach of a duty imposed in the policy, long-standing
4 Washington law requires an insurer to prove actual prejudice from the breach.
5 Patriot General made no attempt to show any kind of prejudice. Thus, there is UIM
6 coverage for Javier's injuries. This argument is explained in greater detail in
7 Appendix B, Section V(B), at 5-11. Under this reasoning, the Court would still deny
8 Patriot General's Motion for Summary Judgment, but for a different reason than
9 Commissioner Mitchell.

10 **V. CONCLUSION**

11 Defendant Jorge Gutierrez respectfully requests that this Court deny Patriot
12 General's summary judgment and find UIM coverage for Javier, either for the
13 same reason as Commissioner Mitchell or for the reason that the plain language of
14 the policy did not exclude Javier.

15 Respectfully submitted October 24, 2013.

16
17 Kilpatrick Law Group, P.C.

18 

19 Dick Kilpatrick, WSBA #7058
20 Shannon M. Kilpatrick, WSBA #41495
21 Attorneys for Jorge Gutierrez

22 DEFENDANT JORGE GUTIERREZ'S BRIEF OPPOSING
23 PATRIOT GENERAL'S MOTION FOR REVISION OF ORDER
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25 JUDGMENT AND ESTABLISHING UIM COVERAGE
26 Page 6 of 7

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DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

<p>Patrick Paulich Thorsrud Cane & Paulich 1300 Puget Sound Plaza 1325 Fouth Ave Seattle, WA 98101 ppaulich@tcpilaw.com</p> <p>Peter Hess Hess Law Office 415 N. Second Ave Walla Walla, WA 99362 peter@hesslawoffice.com</p>	<p><input checked="" type="checkbox"/> E-Mail</p> <p><input type="checkbox"/> U.S. Mail</p> <p><input type="checkbox"/> Electronic Filing</p> <p><input type="checkbox"/> Legal Messenger</p> <p><input type="checkbox"/> FedEx</p>
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Dated this 24th day of October, 2013 at Bellevue, Washington.


Kendra Short, Legal Assistant

DEFENDANT JORGE GUTIERREZ'S BRIEF OPPOSING
PATRIOT GENERAL'S MOTION FOR REVISION OF ORDER
DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
JUDGMENT AND ESTABLISHING UIM COVERAGE
Page 7 of 7

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Appendix A

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FILED
JUL - 5 2013
KATHY MARTIN
WALLA WALLA COUNTY CLERK

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA**

**PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,**

Plaintiff

vs.

**JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,**

Defendants

No.: 12-2-00908-3

**DECLARATION OF JORGE
GUTIERREZ OPPOSING PATRIOT
GENERAL'S MOTION FOR
SUMMARY JUDGMENT**

I am a defendant in this matter. I am over the age of 18, and testify to the matters in this Declaration from first-hand personal knowledge.

1. My name is Jorge Gutierrez. I speak and read almost no English.

This declaration was translated to me by an interpreter.

2. I am the father of Javier Gutierrez. Javier was seriously injured in a collision on January 9, 2011. At that time, Javier lived with his mother and me.

DECLARATION OF JORGE GUTIERREZ OPPOSING PATRIOT
GENERAL'S MOTION FOR SUMMARY JUDGMENT
Page 1 of 4

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1 3. After Javier was injured, we let the insurance company know
2 about the collision. Patriot General would not pay any benefits and denied the
3 claim. Javier and I were sued by Patriot General.

4 4. I first went to Tomas Miranda to purchase automobile insurance
5 for my vehicles in part because he spoke Spanish and could explain the
6 process to me in my own language. Because I could not understand the
7 insurance application which was all in English, Tomas Miranda helped me fill
8 out the form. He asked me questions and I gave him the information which he
9 put into the form. He showed me where to initial and sign but I had no
10 understanding that I was telling the insurance company my children would not
11 be covered.

12 5. I wanted full coverage for my family and it was my understanding
13 that they would be covered. I recall telling Mr. Miranda that my son Javier, and
14 my daughter, Viviana, would also be drivers. I did not understand that the
15 application asked me to certify my children would not be using the vehicles. I
16 did not understand that the application asked me to certify all my children age
17 14 and over had been disclosed.

18 6. Had I known any of this information, I would not have submitted
19 the application the way I did and would have told the insurance company about
20 my children, including Javier. Nobody ever told me that my children were not
21 covered under the Patriot General policy until after Javier's accident and
22

23 DECLARATION OF JORGE GUTIERREZ OPPOSING PATRIOT
24 GENERAL'S MOTION FOR SUMMARY JUDGMENT
25 Page 2 of 4

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1 injuries.

2 7. Since the insurance company found out about Javier driving our
3 vehicles, it has not asked for any additional money from me to cover premiums
4 for him.

5 8. At the time he was injured in the accident, Javier did not own any
6 vehicles of his own and had no other automobile insurance policy.

7 I declare under penalty of perjury, of the laws of the State of Washington,
8 that the foregoing as translated to me is true and correct.

9 DATED 7-5-13 at Walla Walla, Washington.

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Jorge Gutierrez
Jorge Gutierrez
Declarant

DECLARATION OF JORGE GUTIERREZ OPPOSING PATRIOT
GENERAL'S MOTION FOR SUMMARY JUDGMENT
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DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

Patrick Paulich Matthew Munson Thorarud Cane & Paulich 1300 Puget Sound Plaza 1325 Fourth Ave Seattle, WA 98101 ppaulich@tcpolaw.com	<input type="checkbox"/> E-Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Electronic Filing <input checked="" type="checkbox"/> Legal Messenger
Peter Hess Hess Law Office 312 N. Second Ave Walla Walla, WA 99362 peter@hesslawoffice.com	<input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Fax

Dated this 5th day of July, 2013 at Bellevue, Washington.

Shannon W. Shannon


DECLARATION OF JORGE GUTIERREZ OPPOSING PATRIOT GENERAL'S MOTION FOR SUMMARY JUDGMENT
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Appendix B

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA**

**PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,**

Plaintiff

vs.

**JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,**

Defendants

No.: 12-2-00908-3

**DEFENDANT JORGE
GUTIERREZ'S OPPOSITION TO
PATRIOT GENERAL INSURANCE
COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

I. INTRODUCTION AND RELIEF REQUESTED

Patriot General asks this Court to be relieved from paying out a UIM claim to Javier Gutierrez, who was insured under his father, Jorge Gutierrez's policy. It relies on a breach of the section of the policy that requires disclosure of all relatives of the named insured age 14 or older. To support its motion, Patriot General misinterprets its own policy language and misinterprets the UIM statute and its companion definitions. It also erroneously claims that Jorge agreed none of his children would be covered when Jorge never intended to agree to that. In reality, the plain language of

**DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
PATRIOT GENERAL INSURANCE COMPANY'S MOTION FOR
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1 its policy insures Javier. While the defendants may have breached the disclosure
2 requirement, to avoid liability because of any breach Patriot General is required to
3 show actual prejudice. It made no effort to do so.

4 If this Court finds there is no coverage for Javier or finds Javier is excluded, it
5 will have to confront an issue that does not appear to be addressed in any published
6 case: does Washington law allow Patriot General to limit UIM coverage to only those
7 relatives of the named insured under the age of 14? Defendant asserts the provision
8 violates the UIM statute which requires UIM coverage for all relatives living with the
9 named insured without regard to age. Further, the provision violates public policy
10 because it excludes coverage for (1) parties who were passengers and had no
11 control over the vehicle, and (2) parties who had no other UIM insurance available to
12 them, including children. Patriot General's motion should be denied.

13 II. FACTUAL AND PROCEDURAL HISTORY

14 Jorge Gutierrez went to Tomas Miranda for insurance in 2010 in part because
15 he does not speak or read English. Jorge Gutierrez Decl. ¶ 4. He always intended for
16 his entire family to be covered by the insurance, including his son, Javier. *Id.* ¶ 5. The
17 application was all in English and Jorge provided the information to Mr. Miranda. *Id.* ¶
18 4 It is clear that Mr. Miranda typed in the information and printed out the form for
19 Jorge to sign because the only handwritten portion is the initials and signatures.
20 Miranda Decl., Ex. 1. Jorge elected UIM coverage. *Id.* He then signed and initialed
21 where Mr. Miranda told him to. Jorge Gutierrez Decl. ¶ 4.

22 Jorge had no understanding the insurer required disclosure of all his children
23 age 14 and over. *Id.* ¶ 5 He certainly never intended to agree that his children would

24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 not be covered. Jorge believed all his children had coverage, including Javier.

2 In January 2011 Javier was riding as a passenger in a friend's vehicle and
3 injured in a collision. Javier did not have any other automobile insurance. *Id.* ¶ 8. He
4 lived at home with his parents and did not own his own vehicle. *Id.*

5 Javier and Jorge made a claim with Patriot General, which it denied. The first
6 time Jorge found out the policy required disclosure of any relatives was when Javier's
7 claim was denied. Patriot General then sued both Jorge and his son Javier.

8 **III. ISSUES PRESENTED**

9 Does the policy at issue, which covers relatives living with the named insured,
10 cover Javier, Jorge's son and who lived with him at the time of the collision? Does a
11 breach of the provision requiring disclosure of family members age 14 and over
12 preclude coverage absent any showing of actual prejudice by the insurer?

13 If the policy language excludes Javier, is an insured allowed to define who is
14 an insured more narrowly than the UIM statute does?

15 If not, does public policy, which calls for broad UIM coverage to protect
16 innocent injured parties, prohibit an insurer from excluding coverage for Javier, who
17 has no other way to get his own UIM insurance?

18 **IV. EVIDENCE RELIED UPON**

19 In addition to the court files and the documents filed by defendant Javier
20 Gutierrez in opposition to plaintiff's summary judgment motion, this opposition relies
21 on the declaration of Jorge Gutierrez.

22 **V. ARGUMENT AND AUTHORITY**

23 Summary judgment is appropriate only when two factors are met: (1) when

24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 there is no genuine issue of material fact, and (2) the moving party is entitled to
2 judgment as a matter of law. CR 56(c). The moving party bears the burden of
3 establishing both requirements. Karl A. Tegland, 14A Washington Practice: Civil
4 Procedure, ¶ 25:12 (2d ed. 2012). All facts and reasonable inferences therefrom must
5 be taken in the light most favorable to the non-moving party. *Riley v. Andres*, 107 Wn.
6 App. 391, 395, 27 P.3d 618 (2001). Any doubt as to the existence of a genuine issue
7 of material fact should be resolved against the moving party, and the case should be
8 allowed to go to trial. Tegland, 14A Washington Practice: Civil Procedure, § 25:14.

9 **A. The Factual Basis For Patriot General's Motion Is Incorrect – Jorge
10 Gutierrez Did Not Agree To Patriot General's Insured Exclusion**

11 The strong assertion underlying Patriot General's motion for summary
12 judgment is that Jorge Gutierrez agreed that none of his children, including Javier,
13 would be covered. Setting aside the issue of whether parties are free to contract
14 around provisions in the UIM statute (which is addressed below in Section C), this
15 assertion could not be further from the truth.

16 As Jorge makes clear in his declaration, Jorge wanted full coverage for his
17 whole family, including Javier and Viviana, and thought he was getting it. Jorge
18 Gutierrez Decl. ¶ 5. Because he does not speak or read English, he could not
19 understand the insurance application, which was written entirely in English. He gave
20 Mr. Miranda the information he asked for. *Id.* ¶ 4. Mr. Miranda showed Jorge where to
21 initial and sign. *Id.*

22 As a result, Jorge did not understand that the Patriot General required
23 disclosure of his relatives age 14 and over that lived with him. *Id.* ¶ 5. He never

24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
25 PATRIOT GENERAL INSURANCE COMPANY'S MOTION FOR
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1 Intended to tell the insurer that none of his children would be driving. *Id.* ¶ 6. He never
2 understood that there would be any reason for his children, including Javier, to be
3 denied coverage until Patriot General denied Javier's claim. *Id.*

4 Given these facts, it is clear that Jorge never intended to agree that his
5 children living with him would not be covered. So to the extent Patriot General is
6 arguing there was agreement that his children would not be covered, its motion
7 should be denied. There is a genuine issue of material fact about whether the parties
8 actually agreed on anything.

9 **B. The Plain Language Of The Policy Does Not Actually Exclude Jorge
10 From Coverage, As The Insurer Claims**

11 The factual question would be moot, however, if this Court decided that the
12 policy actually covers Javier (addressed in this Section) or if the provision violated the
13 UIM statute or its public policy (addressed in Section C below). The construction of
14 an insurance policy is a question of law. *State Farm Gen. Ins. Co. v. Emerson*, 102
15 Wn.2d 477, 480, 687 P.2d 1139 (1984). Patriot General correctly noted the proper
16 framework for the analysis of whether there is coverage: (1) the insured must first
17 establish that the loss falls within the scope of the policy, and (2) then the insurer
18 must show that the loss is excluded by specific policy language. *Diamaco, Inc. v.*
19 *Aetna Cas. & Sur. Co.*, 97 Wn. App. 335, 337, 983 P.2d 707 (1999).

20 Insurance policies are construed as contracts. *Austl. Unlimited, Inc. v. Hartford*
21 *Cas. Ins. Co.*, 147 Wn. App. 758, 765, 198 P.3d 514 (2008). The purpose of
22 insurance is to insure, so courts should use the construction that provides coverage,
23 rather than no coverage. *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65,

24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 69, 659 P.2d 509 (1983), modified on other grounds, 101 Wn.2d 830, 683 P.2d 186
2 (1984). The policy should be interpreted as it would be understood by the average
3 person purchasing insurance. *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d
4 724, 733, 837 P.2d 1000 (1992). If there is ambiguity, it should be strictly construed
5 against the insurance company and in favor of the insured. *George v. Farmers Ins.*
6 *Co. of Wash.*, 106 Wn. App. 430, 439, 23 P.3d 552 (2001).

7 Patriot General misinterprets the policy language¹ and its legal effect, and it
8 confuses the issue of who is an insured with the duties imposed on the policyholders
9 by the policy. Further, it provided no evidence it suffered actual prejudice from any
10 breach of the duty to disclose family members. Thus, Patriot General cannot meet its
11 burden on summary judgment and its motion fails.

12 **1. Javier fits the definition of "relative" in the policy, and his insured**
13 **status is not negated by the late notice to plaintiff that he was**
driving

14 The insurer argues that the Javier was never an insured to begin with because
15 he was not disclosed to the insurer prior to the collision; therefore, it argues,
16 defendants cannot meet prong one of the two-step analysis and the burden does not
17 shift to the insurer to prove an exclusion applies. Plaintiff's argument rests on a
18 fundamentally faulty reading of the policy language and the legal effect of that
19 language. The provision requiring disclosure of all relatives age 14 and older has no
20 bearing on whether Javier is actually insured, as a careful reading of the policy

21 _____
22 ¹ Perhaps not surprisingly, Patriot General interpreted the policy language to its own
23 benefit and not to the benefit of its insureds. This and other problems in the adjustment of
Javier's claim may be the basis of a later bad faith action.

24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 language demonstrates.

2 The insuring language is found on page 1 of the policy, which is Exhibit 1 to
3 the Declaration of Amy Brunner. There the policy states (bold in the original):

4 In return for your premium payment and subject to the terms and
5 conditions of this policy, we will insure you for the coverages up to the
6 limits of liability for which a premium is shown on the Declarations Page of
7 this policy.

8 So if Javier fits under the definition of "you," he becomes an insured, and then the
9 burden shifts to the insurer to show an exclusion applies.

10 "You" is defined on page 2 of the policy (bold in original) (emphasis added):

11 "You" and "your" mean the person shown as the named insured on the
12 Declarations Page and that person's spouse if residing in the same
13 household. You and your also means any relative of that person if they
14 reside in the same household, providing they or their spouse do not own a
15 motor vehicle.

16 Relative is then defined as (bold in original) (emphasis added):

17 "Relative" means a person living in your household related to you by
18 blood, marriage or adoption, including a ward or foster child. Relative
19 includes a minor under your guardianship who lives in your household.
20 Any relative who is age fourteen (14) or older must be listed on the
21 application or endorsed on the policy prior to a car accident or loss.

22 The first two sentences of the definition of relative cover who is an insured.

23 The third sentence simply imposes a duty of disclosure on the insureds. This
24 language, by its plain terms, brings Javier under the umbrella (no pun intended) of
25 being an insured.² He is Jorge's son, living with Jorge. While the policy requires
disclosure of relatives 14 years and older, that provision has no effect on Javier's

² Plaintiff makes no allegation that Javier owned a vehicle as a reason for why coverage
should be denied.

DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 insured status. It is presumably a mechanism for the insurer to keep tabs on
2 everyone who might be an insured. And it is no different than any other policy
3 provision requiring the insureds to do something, such as notifying the insurer of an
4 accident or cooperating with the insurer's investigation. While any alleged breach of
5 the notice provision can ultimately affect whether there is coverage for Javier's loss, it
6 does not affect whether he was ever an insured in the first place.

7 **2. To avoid coverage for the breach of the duty of disclosure, Patriot**
8 **General was required – and failed – to show actual prejudice**

9 Because Javier is an insured, the burden shifts to the insurer to point to some
10 reason why Javier is not covered. Patriot General raise just one – the disclosure
11 requirement for Jorge's family age 14 and older. Thus the question becomes, what is
12 the legal affect of any alleged breach of disclosure requirement? Implicitly, Patriot
13 General argues that because defendants failed to timely disclose, there is no
14 coverage for Javier's injuries, period. In other words, Patriot General is implicitly
15 arguing that the disclosure of relatives age 14 and older is a condition precedent to
16 recovering under the policy. But this kind of argument has been rejected by
17 Washington courts for almost 40 years.

18 In situations involving disputes about whether a policy provision has been
19 breached, Washington courts require insurers to prove they were actually prejudiced
20 by some alleged breach of an insured's duty before an insurer can escape liability.
21 *See Oregon Auto. Ins. Co. v. Salzberg*, 85 Wn.2d 372, 377, 535 P.2d 816 (1975). In
22 *Salzberg*, the insurer claimed the policyholder breached the cooperation clause,
23 which according to the policy language was a condition precedent to receiving

24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 benefits. By failing to cooperate, the insurer argued the insured was not entitled to
2 recover anything. The court rejected that approach and instead required the insurer
3 to prove it was prejudiced by a breach before being relieved of liability. *Id.* at 376.

4 In refusing to impose traditional contract principles on insurance policies, the
5 court reasoned:

6 insurance policies, in fact, are simply unlike traditional contracts, i.e., they
7 are not purely private affairs but abound with public policy considerations,
8 one of which is that the risk-spreading theory of such policies should
9 operate to afford to affected members of the public – frequently innocent
10 third persons – the maximum protection possible consonant with fairness
11 to the insurer. It is manifest that this public policy consideration would be
12 diminished, discounted, or denied if the insurer were relieved of its
13 responsibilities although it is not prejudiced by the insured's actions or
14 conduct

15 Such relief, absent a showing of prejudice, would be tantamount to a
16 questionable windfall for the insurer at the expense of the public.

17 *Id.* at 376-77.

18 This prejudice analysis has been applied to virtually every kind of policy
19 provision. *See, e.g., Cannon, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 485, 918 P.2d
20 937 (1996) (late notice of the claim); *Tran v. State Farm Fire and Cas. Co.*, 136
21 Wn.2d 214, 961 P.2d 358 (1998) (breach of the cooperation clause); *Pub. Util. Dist.*
22 *No. 1 of Klickitat Cnty. V. Int'l Ins. Co.*, 124 Wn.2d 789, 803-04, 881 P.2d 1020 (1994)
23 (cooperation, notice and no-settlement clauses); *Unigard Ins. Co. v. Leven*, 97 Wn.
24 App. 417, 427, 983 P.2d 1155 (1999) (late tender).

25 The actual prejudice requirement was very recently reaffirmed by our Supreme
Court when it was applied to the policy provision requiring insureds to submit to
examinations under oath. *Staples v. Allstate Ins. Co.*, 176 Wn.2d 404, 417-18, 295

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1 P.3d 201 (2013). The court stated:

2 We have required a showing of prejudice in nearly all other contexts to
3 prevent insurers from receiving windfalls at the expense of the public and
4 to avoid hinging relief on a discredited legalistic distinction. The same
5 concerns apply equally to the [examination under oath] requirement.

6 *Id.* at 418.

7 Just as prejudice must be shown with other policy provisions, Patriot
8 General must demonstrate prejudice with any breach of the provision requiring
9 disclosure of any relative age 14 and over. It has asserted no good reason not to
10 apply the actual prejudice rule in this situation.

11 Patriot General has also made no attempt to put forth any evidence of
12 prejudice from the breach, so its motion fails.³ The party claiming prejudice has the
13 burden of proof on that issue:

14 A claim of actual prejudice requires "affirmative proof of an advantage lost
15 or disadvantage suffered as a result of the [breach], which has an
16 identifiable detrimental effect on the insurer's ability to evaluate or present
17 defenses to coverage or liability.

18 *Id.* at 419. In other words, a party needs to put forth particularized proof and cannot
19 rely on general or vague allegations of harm.

20 It is highly unlikely Patriot General has suffered any specific harm the courts

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DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 are worried about from not knowing Javier was driving the insured vehicles. As the
2 *Staples* Court noted, the harm it is concerned with is something affecting "the
3 insurer's ability to evaluate or present defenses to coverage or liability." *Id.* Here, no
4 such harm of this type could exist because there have been no allegations that Jorge
5 and Javier have done anything to impede the plaintiff's coverage investigation or
6 liability investigation, to the extent any investigation occurred. There has been no
7 allegation that the policyholders refused to turn over documents and other information
8 and refused to answer questions, such as in *Tran v. State Farm Fire & Cas. Co.*, 136
9 Wn.2d 214, 218-21, 961 P.2d 358 (1998). Nor has there been any allegation that
10 defendants did anything to delay the claim and that delay somehow caused evidence
11 to be lost, as in *Sears, Roebuck and Co. v. Hartford Accident & Indem. Co.*, 50
12 Wn.2d 443, 453, 313 P.2d 347 (1957).

13 **C. Neither The UIM Statute Nor Public Policy Permit Patriot General To**
14 **Contract Around The Definition of Insured in RCW 48.22.005**

15 To the extent the policy provision calling for disclosure of relatives age 14 and
16 over affects coverage, it is void because its terms are inconsistent with the UIM
17 statute and its public policy. As courts have noted, our state has a comprehensive
18

19 ³ Because Patriot General failed to provide any proof of or make any argument about
20 prejudice in its moving papers, its motion must fail. According to CR 56, the party moving
21 for summary judgment has the burden of demonstrating in its moving papers – and not in
22 its rebuttal – why it is entitled to judgment as a matter of law. *White v. Kent Medical*
23 *Center, Inc., PS*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991). "Allowing the moving party to
raise new issues in its rebuttal materials is improper because the nonmoving party has no
opportunity to respond." *White v. Kent Medical Center, Inc., PS*, 61 Wn. App. 163, 168,
810 P.2d 4 (1991). Thus, any attempt by Patriot General to argue prejudice or put forth
evidence of prejudice in its rebuttal documents would be impermissible and should be
rejected.

24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 UIM scheme. *Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 694, 926 P.2d
2 923 (1996). The UIM statute has been around in some form since 1967. When the
3 Legislature first enacted it, it was just the UNinsured motorist statute. Its purpose was
4 to be a financial security measure to cut down on the risk to innocent victims of
5 careless and insolvent drivers. *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn.2d
6 327, 332, 494 P.2d 479 (1972); *Finney v. Farmers Ins. Co. of Wash.*, 92 Wn.2d 748,
7 751, 600 P.2d 1272 (1979). In order to effectuate its purposes, the statute was to be
8 liberally and broadly construed. *Id.*

9 When the Legislature amended the statute in 1980 to include UNDERinsured
10 motorists, nothing about those underlying policies changed. *Mut. of Enumclaw Ins.*
11 *Co. v. Wiscomb*, 97 Wn.2d. 203, 208, 643 P.2d 441 (1982). Our courts continue to
12 liberally construe the UIM statute to uphold the legislative mandate of broad UIM
13 coverage to protect innocent injured parties. *Greengo v. Public Employees Mut. Ins.*
14 *Co.*, 135 Wn.2d 799, 806, 959 P.2d 657 (1998). The Legislature was so concerned
15 with ensuring UIM coverage to protect innocent injured people; it requires insurers to
16 offer UIM insurance unless the insured "specifically and unequivocally" rejects the
17 coverage in writing. RCW 48.22.030(4); *First Nat'l Ins. Co. of Am. v. Perala*, 32 Wn.
18 App. 527, 531, 648 P.2d 472 (1982).

19 An insurance regulatory statute automatically becomes part of the insurance
20 policy. *Blackburn v. Safeco Ins. Co.*, 115 Wn.2d 82, 85-86, 794 P.2d 1259 (1990). To
21 fulfill the mandate of broad UIM coverage, the courts routinely void any provision in a
22 policy which is (1) inconsistent with the UIM statute; (2) is not authorized by the

23
24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 statute, or (3) that thwarts the broad purpose of the statute. *Clements v. Travelers*
2 *Indem. Co.*, 121 Wn.2d 243, 251, 850 P.2d 1298 (1993). Thus, any UIM policy
3 provision that provides fewer benefits or protects a smaller class of insureds than
4 those mandated by the UIM statute are automatically void.

5 **1. The UIM statute requires coverage for "insureds" as defined in**
6 **RCW 48.22.005 – and not just "named insureds" – which**
7 **encompasses Javier**

8 Patriot General's strained reading of the definition of "insured" in RCW
9 48.22.005(5) renders certain parts of that statute superfluous and leads to absurd
10 results. In construing statutes, courts must carry out the intent of the legislature. *State*
11 *v. Alvarez*, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). If the language of a statute is clear
12 on its face, then that plain meaning must be given effect and courts are to assume
13 the Legislature meant exactly what it said. *State v. Costich*, 152 Wn.2d 463, 470, 98
14 P.3d 795 (2004). Where definitions are provided by the legislature, courts are bound
15 to apply those. *Schrom v. Bd. for Volunteer Fire Fighters*, 153 Wn.2d 19, 27, 100
16 P.3d 814 (2004).

17 In interpreting statutes, words must not be read in isolation. *State v. Lilyblad*,
18 163 Wn.2d 1, 9, 177 P.3d 686 (2008). Courts must attempt to give effect to every
19 word, clause and sentence of a statute, so that no portion is rendered meaningless or
20 superfluous. *Killian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). In addition,
21 courts must avoid unlikely or absurd results. *Id.* It is only if a statute is susceptible to
22 more than one reasonable interpretation legislative history may be consulted. *Id.*

23 Patriot General makes several arguments why Javier, as Jorge's son, is not
24 covered by the UIM statute. All of them fail. The more reasonable reading is the

25 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 definitions contained in RCW 48.22.005 plainly apply to the UIM statute and therefore
2 Patriot General's policy. To the extent the provision requiring notice of relatives age
3 14 and over is an exclusion barring coverage for Javier, it is void.

4 Patriot General argues that section 2 of RCW 48.22.030 uses the term "named
5 insured" and not "insured," so it is only required to cover the named insured (Jorge)
6 and his wife and not any family members. This is incorrect. Section 2 uses more than
7 just the term "named insured."

8 While Section 2 of the UIM statute is not artfully worded, Patriot General
9 focuses on the wrong portion of it. The operative portion is:

10 No new policy ... shall be issued ... unless coverage is provided ... for the
11 protection of persons insured thereunder who are legally entitled to
12 recover damages from owners or operators of underinsured motor
13 vehicles

14 RCW 48.22.030(2). In other words, coverage has to be provided for all persons
15 insured in the policy. That is a broader class of people than just the "named insured"
16 and implicates the definition of "insured."

17 The portion of the UIM statute Patriot General focuses on -- and which
18 contains the "named insured" reference -- is the exception to the rule:

19 ... except ... while operating or occupying a motor vehicle owned or
20 available for the regular use by the named insured or any family member,
21 and which is not insured under the liability coverage of the policy.

22 *Id.* In other words, UIM insurers do not need to provide coverage for injuries received
23 in vehicles not insured in the policy but are owned by or available for the regular use
24 of the named insured or a family member. This clause does not address when UIM
25 coverage must be provided, so it is inappropriate to focus on it.

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1 Patriot General also reads section 2 in isolation, ignoring the other 12 sections
2 of the UIM statute some of which use the term "insured" in addition to "named
3 insured." A quick review of the other parts of the UIM statute make it clear UIM
4 insurance was intended to apply to more than just the named insured. For example,
5 Section 3 sets the parameters for the amount of UIM insurance to be offered:

6 ... coverage required under subsection (2) of this section shall be in the
7 same amount as the insured's third party liability coverage unless the
8 insured rejects all or part of the coverage as provided in subsection (4) of
9 this section.

10 RCW 48.22.030(3) (emphasis added). It would not make sense for the UIM statute to
11 apply to only a "named insured," but then use "insured" in other portions of the statute
12 when setting the rules for how much coverage must be provided. Because all
13 sections of a statute must be read in conjunction with one another and harmonized,
14 Patriot General's analysis is fatally flawed.

15 Next, Patriot General argues the Legislature intended RCW 48.22.005 to apply
16 to only the PIP statutes, citing legislative history. But in making this argument, Patriot
17 General ignores the plain language of RCW 48.22.005 and an important rule of
18 statutory interpretation: legislative history is only considered if there is an ambiguity.
19 *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

20 The Legislature made its intentions clear by the opening language of RCW
21 48.22.005: "the definitions in this section apply throughout this chapter," unless the
22 context "clearly requires otherwise." RCW 48.22.005. By making the definitions
23 applicable to the entire chapter, the Legislature plainly intended the definitions to
24 apply to the entirety of Title 48, Chapter 22, including the UIM statute at RCW

25 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 48.22.030. If it intended the definitions to apply to only the PIP statutes, it would have
2 said so specifically. But it did not.

3 Patriot General then turns to the definition of "insured" to argue it is not
4 required to cover anyone other than the named insured. Because the definition of
5 "insured" contains multiple "or" clauses, its argument goes, the definitions should be
6 read disjunctively, such that it was permissible for it to cover just the named insured.
7 Yet this would produce an absurd result. Taken to its logical conclusion, the insurer is
8 arguing the Legislature intended only to require insurers to pick any single one of the
9 groups listed in the definition of insured in RCW 48.22.005(5):

- 10 • The named insured;
- 11 • A person who is a resident of the named insured's household and is
12 related to the named insured;
- 13 • The named insured's ward, foster child, or stepchild;
- 14 • A person who gets injured in an accident while using or occupying the
15 insured automobile; or
- 16 • A pedestrian accidentally struck by the insured automobile.

16 Under this interpretation, it would be allowed to pick one of the above -- say,
17 the named insured's ward, foster child, or stepchild -- and insure only that group to
18 the exclusion of the others, including the named insured. This is ridiculous.

19 Nor is plaintiff's legal analysis of the word "or" correct. While use of the word
20 "or" is often meant disjunctively, there are also cases where "or" means the
21 conjunctive: "[C]ourts need not mechanically interpret every 'or' as disjunctive, but
22 rather ... courts should interpret the word 'or' according to context." *Black v. Nat'l*

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24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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1 *Merit Ins. Co.*, 154 Wn. App. 674, 688, 226 P.3d 175 (2010) (internal quotations and
2 citation omitted). As a result, the disjunctive "or" and the conjunctive "and" can often
3 be used interchangeably. *Guljosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 790, 6
4 P.3d 583 (2000). "Or" should not be given the disjunctive meaning where, as here, it
5 would lead to absurd results and where the context supports the conjunctive
6 meaning. *Id.* The more reasonable interpretation is that the Legislature intended the
7 "ors" to be "ands" to set the floor for which people must be insured for UIM purposes.

8 Plaintiff cites many cases that it claims stand for the proposition that it is
9 allowed to provide UIM insurance to whomever it wants. But those cases are
10 inapposite. Many were decided before the Legislature implemented the definition of
11 "insured" in 1993. None of the cases appear to deal with the issue of whether the
12 definition of "insured" in RCW 48.22.005 can be contracted around because none of
13 the parties ever raised the issue. In fact, there do not appear to be any published
14 cases analyzing whether an insurer can provide UIM insurance to a lesser class of
15 insureds than provided in the definition of "insured" in RCW 48.22.005.

16 In addition, the factual settings of some of the cases relied upon by plaintiff are
17 very different than here. For example, the policy in *Vasquez v. American Fire &*
18 *Casualty Co.*, ___ Wn. App. ___, 298 P.3d 94 (2013) was a commercial policy. That
19 case involved the issue of whether an employee who was running a personal errand
20 and was hit in a crosswalk was an insured under the commercial policy. The court
21 held he was not and part of its reasoning was that to adopt the plaintiff's interpretation
22 would turn a business auto policy into a personal policy. *Id.* at 98. The policy at issue

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1 here is a personal policy and does not involve employees or a commercial setting.

2 In addition, unlike Javier, the passenger injured in *Financial Indemnity Co. v.*
3 *Keomaneethong* was not related to the named insured and was not living with the
4 named insured. 85 Wn. App. 350, 351, 931 P.2d 168 (1997). The plaintiff also
5 apparently never raised the argument that the policy conflicts with the definition of
6 "insured" in RCW 48.22.005 and the Court of Appeals never addressed it.

7 **2. In addition, public policy prohibits the exclusion of relatives age**
8 **14 and over from UIM coverage**

9 Our Supreme Court has invalidated provisions that exclude UIM coverage for
10 family members who are injured as passengers. *Tissell v. Liberty Mut. Ins. Co.*, 115
11 Wn.2d 107, 111-112, 795 P.2d 126 (1990). In *Tissell*, the insurer excluded coverage
12 for family members who were passengers while the named insured was driving.

13 The court invalidated both provisions and focused on public policy of broad
14 UIM coverage and full compensation for innocent injured parties. *Id.* at 111. The court
15 was particularly troubled by the fact that the exclusion barred coverage for family
16 members who had no other way to procure UIM insurance. *Id.*

17 The same concern underlies the decision in *Wiscomb*. That case involved the
18 family or household exclusion. In invalidating that exclusion the court reasoned:

19 The family or household exclusion ... is directed at a class of innocent
20 victims who have no control over the vehicle's operation and who cannot
21 be said to increase the nature of the insurer's risk. An exclusion which
22 denies coverage when certain victims are injured is violative of public
23 policy.

24 *Wiscomb*, 97 Wn.2d at 209. The court went on to explain that the exclusion affects
25 third parties who are in no position to contract for their own insurance coverage. *Id.* at

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1 211. For example, the exclusion applies to both children of the named insured as well
2 as adults who cannot have their own insurance. *Id.* at 211-12. This inappropriately
3 undermines the important public policy of our state's comprehensive UIM scheme.

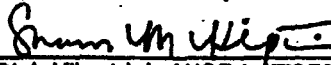
4 Similarly, the case here involves a provision that under Patriot General's
5 version excludes coverage for Javier, who as a passenger in a vehicle he had no
6 control over and who had no other UIM insurance available to him. Under Patriot
7 General's theory, the exclusion applies to everyone 14 or older, regardless of
8 whether they represent any increased risk⁴ and regardless of whether they have
9 the ability to get UIM insurance elsewhere. This provision is against public policy,
10 especially considering Patriot General's policy amounted to a "take it or leave it"
11 adhesion contract in an area – UIM insurance – imbued with the public interest.

12 **VI. CONCLUSION**

13 For all the reasons discussed above, Patriot General's motion for summary
14 judgment should be denied.

15 Respectfully submitted July 5, 2013.

16 Kilpatrick Law Group, P.C.

17 

18 Dick Kilpatrick, WSBA #7058
19 Shannon M. Kilpatrick, WSBA #41495
20 Attorneys for Jorge Gutierrez

21
22 ⁴ Patriot General has made no allegation nor presented any evidence to show that Javier
23 presented some kind of increased risk. Nor did it seek any additional premiums for Javier
once it found out Javier was driving. Jorge Gutierrez Decl. ¶ 7.

24 DEFENDANT JORGE GUTIERREZ'S OPPOSITION TO
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DECLARATION OF SERVICE

The undersigned hereby declares I am over the age of 18 and under the penalty of perjury under the laws of the State of Washington that on this date I caused to be served in a manner noted below a true and correct copy of the foregoing on the parties mentioned below as indicated:

Patrick Paulich Matthew Munson Thorarud Cane & Paulich 1300 Puget Sound Plaza 1325 Fouth Ave Seattle, WA 98101 ppaulich@tcpaw.com	<input type="checkbox"/> E-Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Electronic Filing <input checked="" type="checkbox"/> Legal Messenger
Peter Hess Hess Law Office 312 N. Second Ave Walla Walla, WA 99362 peter@hesslawoffice.com	<input type="checkbox"/> FedEx <input checked="" type="checkbox"/> Fax

Dated this 5th day of July, 2013 at Bellevue, Washington.

Shannon

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Appendix C

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA**

**PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,**

Plaintiff,

vs.

**JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,**

Defendants.

No.: 12-2-00908-3

**ORDER GRANTING DEFENDANTS'
MOTION TO STRIKE, DENYING
PATRIOT GENERAL'S MOTION
FOR SUMMARY JUDGEMENT AND
ESTABLISHING UIM COVERAGE
FOR DEFENDANT JAVIER
GUTIERREZ**

**THIS MATTER came on for hearing on July 15, 2013 before the
undersigned Commissioner of the above-entitled court, and the Court having
considered the records and files herein, including:**

- 1. Plaintiff Patriot General Insurance Company's Motion for
Summary Judgment;**

**ORDER GRANTING DEFENDANTS' MOTION TO STRIKE,
DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
JUDGEMENT AND ESTABLISHING UIM COVERAGE FOR
DEFENDANT JAVIER GUTIERREZ**
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Case: 12-2-00908-3, Date Filed: 08/09/2013, Page: 1 of 4
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- 2. Declaration of Tomas Miranda and the exhibit thereto;
- 3. Declaration of Amy Brunner in Support of Plaintiff Patriot General Insurance Company's Motion for Summary Judgment and the exhibit thereto;
- 4. Declaration of Kyle Mosbrucker in Support of Patriot General Insurance Company's Motion for Summary Judgment and the exhibit thereto;
- 5. Declaration of Matthew Munson in Support of Patriot General Insurance Company's Motion for Summary Judgment and the exhibits thereto;
- 6. Defendant Javier Gutierrez's Memorandum of Law in Opposition to Plaintiff Patriot General Insurance Company's Motion for Summary Judgment;
- 7. Declaration of Defendant Javier Gutierrez;
- 8. Defendant Jorge Gutierrez's Opposition to Patriot General Insurance Company's Motion for Summary Judgment;
- 9. Declaration of Jorge Gutierrez Opposing to Patriot General's Motion for Summary Judgment;
- 10. Plaintiff Patriot General Insurance Company's Reply on Its Motion for Summary Judgment;
- 11. Defendant Javier Gutierrez's Motion to Strike Plaintiff's Citation to an Unpublished Opinion; and
- 12. Defendant Jorge Gutierrez's Joinder in Defendant Javier Gutierrez's Motion to Strike Plaintiff's Citation to Unpublished Opinion

and the Court having heard the arguments of counsel, and being otherwise

ORDER GRANTING DEFENDANTS' MOTION TO STRIKE, DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY JUDGEMENT AND ESTABLISHING UIM COVERAGE FOR DEFENDANT JAVIER GUTIERREZ
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1 fully advised, the Court finds there are no genuine issues of material facts. All
2 parties agreed at the hearing that (1) Javier Gutierrez is the natural-born son of the
3 named insured, Jorge Gutierrez, and (2) Javier lived with father at the time of the
4 collision on or about January 9, 2011. Based on those agreed facts, the Court
5 finds there is underinsured motorist (UIM) coverage for Javier Gutierrez for the
6 January 9, 2011 collision under Jorge Gutierrez's Patriot General Insurance
7 Company policy. The definition of "insured" in RCW 48.22.005(5) is read into the
8 policy and replaces the policy definition. Accordingly, Javier qualifies as an
9 "insured" under Jorge Gutierrez's Patriot General policy for the purpose of UIM
10 coverage.

11 Further, pursuant to *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510 (2005),
12 unpublished opinions are not to be considered by the trial court.

13 IT IS, THEREFORE, HEREBY ORDERED that Defendants' motion to
14 strike Plaintiff's citation to an unpublished opinion is hereby GRANTED and
15 Plaintiff's citation to the unpublished opinion is stricken and was not considered
16 in the Court's analysis.

17 IT IS FURTHER ORDERED that Patriot General's Motion for Summary
18 Judgment is DENIED. FURTHER, the parties agreed that, given the Court's
19 ruling above and pursuant to *Impecoven v. Dep't of Revenue*, 120 Wn.2d
20 357 (1992), it is not inappropriate for the Court to grant summary judgment in

21 ORDER GRANTING DEFENDANTS' MOTION TO STRIKE,
22 DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
23 JUDGMENT AND ESTABLISHING UIM COVERAGE FOR
DEFENDANT JAVIER GUTIERREZ.
Page 3 of 4

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1 favor of the non-moving party, so summary judgment is GRANTED in favor of
2 defendants solely to the extent that the Court determines that there is UIM
3 coverage for defendant Javier Gutierrez

4
5 DONE this date: 8/9/13

6
7 MICHAEL S. MITCHELL

8 Michael S. Mitchell
9 Commissioner Michael S. Mitchell

10 Presented by:

11 Kilpatrick Law Group, P.C.

Hess Law Office, PLLC

12 Richard B. Kilpatrick
13 Shannon M. Kilpatrick
14 Attorneys for Jorge Gutierrez

15 Peter Hess 8/9/13
16 Attorneys for Defendant Javier
17 Gutierrez

18 Approved as to Form Only and
19 Notice of Presentation Waived by:

20 Patrick Paultich

21 Patrick Paultich, WSBA #10951
22 Attorneys for Plaintiff Patriot General Insurance Company

23 ORDER GRANTING DEFENDANTS' MOTION TO STRIKE,
24 DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY
25 JUDGEMENT AND ESTABLISHING UIM COVERAGE FOR
26 DEFENDANT JAVIER GUTIERREZ
Page 4 of 4

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

vs.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital
community, and JAVIER GUTIERREZ,

Defendants.

NO: 12 2 00908 3

DEFENDANT JAVIER
GUTIERREZ'S MEMORANDUM
OF LAW IN OPPOSITION TO
PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S
MOTION FOR REVISION OF
COURT COMMISSIONER'S
ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND
ESTABLISHING UIM
COVERAGE FOR DEFENDANT
JAVIER GUTIERREZ

ISSUES

It is undisputed that RCW 48.22.005 ("the Definition Statute") and RCW
48.22.030 ("the UIM Statute") become a part of (and are read into) Jorge
Gutierrez's insurance policy with Patriot General. Therefore, there are only two
issues before the court:

DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION
FOR REVISION OF COURT COMMISSIONER'S ORDER DENYING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
ESTABLISHING UIM COVERAGE FOR DEFENDANT JAVIER GUTIERREZ/ 1

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1 1. Whether Commissioner Mitchell Correctly Ruled That the Definition
2 Statute's Definition Requires Patriot General to Insure Javier; and,

3 2. Whether Commissioner Mitchell Correctly Ruled That the Definition
4 Statute's Definition of "Insured" Applies to the UIM Statute.

5 **STATEMENT OF FACTS**

6 Javier basically agrees with Patriot General's Statement of Facts.
7 Additionally, during the July 15, 2013, hearing, Commissioner Mitchell ruled that
8 the Definition Statute and the UIM Statute require Patriot General to insure Javier
9 Gutierrez. Accordingly, Commissioner Mitchell granted summary judgment in
10 favor of Defendants Javier and Jorge Gutierrez.

11 **ARGUMENT**

12 **1. Commissioner Mitchell Correctly Ruled That the Definition Statute**
13 **Defines Javier as an "Insured".**

14 "The goal of statutory interpretation is to discern and implement the
15 legislature's intent. In interpreting a statute, this court looks first to its plain
16 language. If the plain language of the statute is unambiguous, then this court's
17 inquiry is at an end." *State v. Armendariz*, 160 Wn.2d 106, 110 (2007)(citations
18 omitted).

19 RCW 48.22.005 ("the Definition Statute") states that:

20 (5) "Insured" means:

21 (a) **The named insured or a person who is a resident of the named**
22 **insured's household and is either related to the named insured by**
23 **blood, marriage, or adoption, or is the named insured's ward, foster child,**
24 **or stepchild..." RCW 48.22.005(5)(a). (emphasis added).**

25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
ESTABLISHING UIM COVERAGE FOR DEFENDANT JAVIER GUTIERREZ/ 2

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1 Jorge Gutierrez was the named insured in the policy with Patriot General. It is
2 undisputed that Javier was a resident of Jorge's household and is related to Jorge
3 by blood. Therefore, Javier meets the definition of "insured" based on the plain
4 language of the Definition Statute.

5 Patriot General contends that "[b]y using the disjunctive "or", the statute
6 does not mandate that the insured always include residents of the named
7 insured's household; instead, the term may refer only to the named insured and
8 certain relatives, as with the Patriot policy." (Plaintiff's Motion for Summary
9 Judgment, p. 8, ln. 15-17). In other words, Patriot General contends that the
10 Definition Statute merely provides a list of people whom it may insure and it can
11 pick and choose from the list.

12 In a literal reading of the Definition Statute, it is conceivable that the word
13 "or" could be either disjunctive or conjunctive. However, "the mere fact that two
14 interpretations are conceivable does not make a statute ambiguous." *Tesoro Ref.*
15 *& Mktg. Co. v. State, Dep't of Revenue*, 164 Wn.2d 310 (2008). If the "or" in the
16 Definition Statute were disjunctive, it would lead to absolutely absurd results. For
17 example, under such an interpretation, the Definition Statute would not require the
18 policy to insure the named insured.

19 It is undisputed that the Definition Statute is read into every single auto
20 insurance policy issued in the State of Washington. If Patriot General's contention
21 (that the term "or" allows insurers to pick and choose whom they want to insure)
22 were true, every single insurance claim in the State of Washington could be
23 denied. For example, if a named insured and his spouse were both injured by an
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25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
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1 uninsured driver, the insurance company could simply say, "our policy insures the
2 named insured, or his spouse, or his resident children. This company chooses to
3 insure the children only, therefore, you have no UIM coverage for this collision."
4 This is, of course, ridiculous. However, because the Definition Statute is
5 automatically read into the policy, this is precisely the same argument that Patriot
6 General is making.

7 The bottom line is that Definition Statute is not ambiguous - it clearly
8 requires that all Washington State auto policies insure the named insured and his
9 resident family members.

10 **2. Commissioner Mitchell Correctly Ruled That the Definition**
11 **Statute's Definition of "Insured" Applies to the UIM Statute.**

12 The very first sentence of the Definition Statute states that, "[u]nless the
13 context clearly requires otherwise, the definitions in this section apply
14 throughout this chapter." RCW 48.22.005 (emphasis added). The UIM Statute
15 (RCW 48.22.030) is in the same chapter as the Definition Statute. Therefore, the
16 Definition Statute's definition of "insured" explicitly applies to the UIM Statute.

17 Patriot General has crafted creative arguments in its attempt to exclude
18 coverage for children. However, all of Patriot General's arguments are predicated
19 on its contention that the term "persons insured thereunder" from the UIM Statute
20 "clearly" requires a different meaning than the term "insured" used in the Definition
21 Statute. Because these two terms are not clearly different, all of Patriot General's
22 arguments fail and the Definition Statute explicitly applies to the UIM Statute.

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25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
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1 Again, the term "persons insured thereunder" and the term "insured" are not
2 clearly different. In fact, the two terms have the exact same ordinary meaning.
3 The term "insured" implies the words "persons" and "thereunder" (meaning "under
4 an insurance policy").

5 The Definition Statute defines that term "insured" as "(a) The named
6 insured [who is a person] or a person who is a resident of the named insured's
7 household...(b) A person who sustains bodily injury caused by accident..."
8 (emphasis added). Because the Definition Statute defines "insured" as a list of
9 persons, there is no way that "persons insured" is clearly different than the term
10 "insured".

11 Further, the term "persons insured thereunder" in the UIM Statute refers to
12 persons insured under a "new policy or renewal of an existing policy". RCW
13 48.22.030(2). Thus, the word "thereunder" simply means "under a policy of
14 insurance" and the term "insured" impliedly means "insured under a policy of
15 insurance". Therefore, the term "persons insured thereunder" simply adds the
16 words that are implied by the term "insured". Patriot General's contention that the
17 two terms are "clearly" different is simply wrong.

18 CONCLUSION

19 As discussed above, Commissioner Mitchell was correct when he ruled that
20 the plain language of the Definition Statute and the UIM Statute unambiguously
21 require Patriot General to provide UIM coverage to Javier, a blood relative and
22 resident of the named insured's household. However, it is also important for the
23 Court to take notice of how dangerous it would be to rule otherwise.

24
25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
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1 If the Court were to agree with Patriot General's interpretation, the UIM
2 Statute could be effectively gutted by creative, sneaky and inconspicuous policy
3 language. For example, a policy may define the term "relative" as "a person living
4 in the named insured's household that is over the age of six"; and this language
5 may appear deep within a definition section on page ten of a twenty-page policy.
6 This would, of course, be devastating to little Washingtonians age six and under.
7 Nevertheless, under Patriot General's interpretation of the statutes, this would be
8 perfectly acceptable.

9 Because of this danger, the Washington State Supreme Court has held
10 that the type of exclusion that Patriot General wishes to enforce (that is, the
11 exclusion of resident relatives age fourteen or older) is void as it is against public
12 policy. In the *Tissell* case, the Court held that "an exclusion may be justified
13 where an insurer's risk is affected by the nature of the persons or conduct
14 excluded—such as when an unauthorized driver takes the wheel. However, where
15 the exclusion is aimed at a certain type of victim, that justification does not apply.
16 The nature of the victim has no bearing on the risk of an accident's occurring."
17 *Tissell By & Through Cayce v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 113 (1990).
18 Whether Patriot General wishes to exclude children under six or children over 13,
19 such an exclusion is aimed at a type of victim, and not the nature of their conduct.

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25 DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that: I am a competent person, eighteen (18) years of age or older, and a resident of the State of Washington; I am not a party to, nor an officer, director, or employee for any party, corporate or otherwise, in this action; and, on the below date, I caused to be served the foregoing document on:

Mr. Patrick M. Paulich	Ms. Shannon Kilpatrick
Thorsrud Cane & Paulich	Kilpatrick Law Group, P.S.
1300 Puget Sound Plaza	1750 - 112th Ave. N.E., Suite D-155
1325 Fourth Avenue	Bellevue, WA 98004
Seattle, WA 98101	() Via: U.S. Mail
() Via: U.S. Mail	() Via: Fax to (425) 646-7769
() Via: Fax to (206) 386-7795	() Via: Hand Delivery
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() Via: Email to ppaulich@tcplaw.com shannon@triallawyersnw.com	

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this ____ day of _____, _____, at Walla Walla, Washington.

Hess Law Office, PLLC

By: _____
Adrienne King

DEFENDANT JAVIER GUTIERREZ'S MEMORANDUM IN OPPOSITION TO PLAINTIFF PATRIOT GENERAL INSURANCE COMPANY'S MOTION FOR REVISION OF COURT COMMISSIONER'S ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND ESTABLISHING UIM COVERAGE FOR DEFENDANT JAVIER GUTIERREZ/ 8

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

v.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No. 12-2-00908-3

PLAINTIFF PATRIOT GENERAL
INSURANCE COMPANY'S REPLY
ON ITS MOTION FOR REVISION

1. A long line of cases holds that the UIM statute does not mandate a definition of insured that includes a named insured's relatives.

The UIM statute did not require Patriot to include Javier among the class of persons insured by the Patriot policy. Washington courts have long held that the UIM statute "does not mandate any particular scope for the definition of who is an insured in a particular automobile insurance policy."¹ As the Supreme Court has explained,

The policy of RCW 48.22.030 requires that insurers make available uninsured motorist coverage to a class of 'insureds' that is at least as broad as the class in

¹ *Smith v. Cont'l Cas. Co.*, 128 Wn.2d 73, 83, 904 P.2d 749 (1995); *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 75, 549 P.2d 9 (1976).

PLAINTIFF PATRIOT GENERAL INSURANCE
COMPANY'S REPLY ON ITS MOTION FOR
REVISION - 1

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1 the primary liability sections of the policy. *It does not preclude the parties from*
2 *reaching agreement as to the scope of the class in the first instance.*²

3 The Court of Appeals reiterated this holding in March of this year:

4 Underinsured motorist coverage is limited personal accident insurance chiefly for
5 the benefit of the named insured. Limiting the scope of the definition of who else
6 is an “insured” does not run afoul of the public policy behind Washington’s UIM
7 statute.³

8 Other Washington cases also support this holding.⁴

9 Here, the scope of who is insured is consistent in the UIM and liability coverages because
10 each applies to “you,” which is defined the same way throughout the policy. The Patriot policy
11 therefore fully complied with the UIM statute.

12 The passage of RCW 48.22.005 did not affect this line of cases. Of the many Washington
13 cases supporting Patriot’s position, four, including one Supreme Court opinion, were decided
14 after the statute’s passage in 1993.⁵ If the statute actually abrogated this line of cases, the
15 Supreme Court or the Court of Appeals would have made that clear in the last two decades.

16 ² *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 443, 563 P.2d 815 (1977) (emphasis added)
17 (quoting *Touchette v. Nw. Mut. Ins. Co.*, 80 Wn.2d 327, 337, 494 P.2d 479 (1972)), *abrogated in*
18 *other part by statute as stated in Vadheim v. Cont’l Ins. Co.*, 107 Wn.2d 836, 844, 734 P.2d 17
19 (1987).

20 ³ *Vasquez v. American Fire & Cas. Co.*, 174 Wn. App. 132, 138, 298 P.3d 94 (2013), *review*
21 *denied*, 178 Wn.2d 1006, 308 P.3d 641 (2013).

22 ⁴ *Wheeler v. Rocky Mtn. Fire & Cas. Co.*, 124 Wn. App. 868, 103 P.3d 240 (2004) (stating that
23 insurer may choose not to include certain persons in definition of “insured” in UIM policies);
24 *Fin. Indem. Co. v. Keomaneethong*, 85 Wn. App. 350, 353, 931 P.2d 168 (1997) (“[W]hen the
25 question revolves around the initial extension of coverage, that is, the definition of who is and is
26 not an insured, public policy is not violated so long as insured persons are defined the same in
the primary liability and UIM sections of the policy.”); *Dairyland Ins. Co. v. Uhls*, 41 Wn. App.
49, 53, 702 P.2d 1214 (1985) (“[T]he parties may agree to a narrow definition of insured so long
as that definition is applied consistently throughout the policy[.]”) (quoting *Raynes*, 88 Wn.2d at
444).

⁵ *Smith*, 128 Wn.2d at 83 (1995); *Vasquez*, 174 Wn. App. at 138 (2013); *Wheeler*, 124 Wn. App.
868 (2004); *Keomaneethong*, 85 Wn. App. at 353 (1997).

PLAINTIFF PATRIOT GENERAL INSURANCE
COMPANY’S REPLY ON ITS MOTION FOR
REVISION - 2

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1 The defendants' interpretation of RCW 48.22.005 would have resulted in a different
2 outcome in at least one of the post-1993 cases, *Financial Indemnity Co. v. Keomaneethong*.⁶
3 There, a passenger in the insured's vehicle was denied UIM coverage because the policy only
4 covered the named insured's relatives who lived in the same household. RCW 48.22.005(b)
5 would include the claimant within the definition of "insured" because he was "occupying . . . the
6 insured vehicle with the permission of the named insured . . ." Yet the court did not hold that this
7 statute mandated coverage of the injured party. Rather, the court reiterated the Washington
8 courts' longstanding position: "[W]hen the question revolves around the initial extension of
9 coverage, that is, the definition of who is and is not an insured, public policy is not violated so
10 long as insured persons are defined the same in the primary liability and UIM sections of the
11 policy."⁷

12
13 **2. The definition of "insured" in RCW 48.22.005 does not apply to RCW 48.22.030**
14 **because the latter statute uses the separate phrase "persons insured thereunder."**

15 Giving the same definition to the terms "insured," which appears in RCW 48.22.005, and
16 "persons insured thereunder," in RCW 48.22.030, would violate fundamental rules of statutory
17 interpretation. Those rules provide that statutes must be interpreted so that all the language used
18 is given effect, with no portion rendered meaningless or superfluous,⁸ and that legislative
19 definitions provided by the statute are controlling.⁹ By using different terms, the legislature
20 intended to convey different meanings. As the Washington courts have said many times, the
21 intent of RCW 48.22.030 is to make each person who is an insured for liability coverage also an

22
23 ⁶ 85 Wn. App. 350, 353, 931 P.2d 168 (1997).

⁷ *Id.*

⁸ *Whatcom Cnty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996).

⁹ *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001).

25 PLAINTIFF PATRIOT GENERAL INSURANCE
26 COMPANY'S REPLY ON ITS MOTION FOR
REVISION - 3

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1 insured for UIM coverage.¹⁰ To the extent the terms “insured” and “persons insured thereunder”
2 create ambiguity, the court should turn to the statutory history. That history leaves no doubt that
3 RCW 48.22.005 was intended to apply to the PIP statute, and not to the UIM statute.¹¹

4 **3. Cases involving the household or family exclusion are inapposite.**

5 Javier argues that the Patriot policy violates the public policy expressed in the UIM
6 statute because it does not provide coverage to Javier. That argument blurs the critical distinction
7 between a grant of coverage and an exclusion from coverage. Jorge cites a case invalidating
8 family-member exclusions,¹² but neglects case law stating that the UIM statute and public policy
9 do not mandate any particular scope for the definition of who is an insured.¹³ The policy is valid
10 because Javier, rather than being subject to an exclusion, is not an insured in the first instance.
11 Moreover, the practice of limiting who comes within the definition of “insured” under a policy is
12 not “dangerous,” as Jorge claims. It is precisely what the Washington courts have authorized for
13 decades.
14

15 **4. Patriot can decline to provide coverage to persons who are not insured by the policy**
16 **without a showing of prejudice.**

17 Jorge argues that the final sentence of the definition of “relative” is akin to a cooperation
18 or notice clause, and that, like those clauses, it should be enforceable only if the breach of the
19 clause prejudices the insurer. The language does not, however, require disclosure. Instead, it
20 defines who is insured by the policy. Washington courts have never imposed a prejudice
21

22 ¹⁰ *E.g., Raynes*, 88 Wn.2d at 444 (“The policy of RCW 48.22.030 requires that insurers make
23 available uninsured motorist coverage to a class of ‘insureds’ that is at least as broad as the class
24 in the primary liability sections of the policy.”).

¹¹ See Patriot’s Summary Judgment Motion at 10.

¹² *Tissell v. Liberty Mut. Ins. Co.*, 115 Wn.2d 107, 795 P.2d (1990).

¹³ See footnotes 2–4, *supra*.

25 PLAINTIFF PATRIOT GENERAL INSURANCE
26 COMPANY’S REPLY ON ITS MOTION FOR
REVISION - 4

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1 requirement on such a term. The prejudice requirement has been applied only to procedures for
2 handling a claim after a loss, such as the duty to notify the insurer of a claim.¹⁴ An insurer is not
3 required to establish that it would be prejudiced by including someone within the definition of
4 insured who is not in fact an insured.

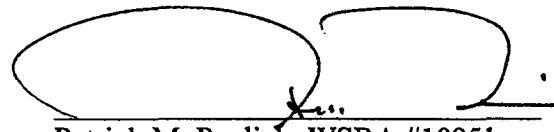
5 **5. The Court should disregard any new issues or arguments in Javier and Jorge's**
6 **oppositions to Patriot General's motion for revision.**

7 On a motion for revision, a Superior Court's review is limited to the evidence and issues
8 presented to the Commissioner.¹⁵ Patriot believes that Jorge and Javier's opposition briefs raise
9 the same issues as those before the Commissioner. But to the extent the Court interprets Jorge's
10 and Javier's arguments to vary from those below, the Court should disregard them.

11 **6. Conclusion**

12 For the reasons set forth above, and for the reasons set forth in Patriot's motion for
13 summary judgment and reply, this Court should revise the Commissioner's ruling and enter
14 summary judgment for Patriot.

15 DATED this 30th day of October, 2013.



16
17 Patrick M. Paulich, WSBA #10951
18 Matthew Munson, WSBA #32019
19 THORSRUD CANE & PAULICH
20 Attorneys for Plaintiff Patriot
21 General Insurance Company

22
23 ¹⁴ *Canon, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 485, 918 P.2d 937 (1996).

24 ¹⁵ *In re Marriage of Moody*, 137 Wn.2d 979, 992-93, 976 P.2d 1240 (1999); *Williams v.*
25 *Williams*, 156 Wn. App. 22, 27, 232 P.3d 573 (2010).

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WALLA WALLA COUNTY

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

v.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No. 12-2-00908-3

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that I caused to
be served the listed documents on the following counsel in the manner described below:

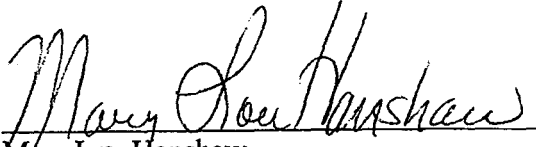
1. Plaintiff Patriot General Insurance Company's Reply on its Motion for Revision;
2. and this Declaration of Service.

Peter J. Hess
Hess Law Office, PLLC
415 N. Second
Walla Walla, WA 99362
Via Facsimile and E-Mail per agreement

Dick Kilpatrick
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Executed at Seattle, Washington this 30th day of October, 2013.


Mary Lou Hanshaw

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FILED
NOV -4 2013
KATHY MARTIN
WALLA WALLA COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WALLA WALLA

PATRIOT GENERAL INSURANCE
COMPANY, a foreign corporation,

Plaintiff,

vs.

JORGE GUTIERREZ and JANE DOE
GUTIERREZ, and their marital community,
and JAVIER GUTIERREZ,

Defendants.

No.: 12-2-00908-3

ORDER DENYING PATRIOT
GENERAL'S MOTION FOR
REVISION OF ORDER DENYING
PATRIOT GENERAL'S MOTION
FOR SUMMARY JUDGMENT AND
ESTABLISHING UIM COVERAGE

Clerk's Action Required

THIS MATTER came on for hearing on November 4, 2013 before the undersigned Judge of the above-entitled court and the Court having considered the records and files herein, including:

1. Patriot General's Note for Motion for Summary Judgment;
2. Patriot General's Motion for Summary Judgment;
3. Declaration of Tomas Miranda in Support of Patriot General's Motion for Summary Judgment;

ORDER DENYING PATRIOT GENERAL'S MOTION FOR
REVISION OF ORDER DENYING PATRIOT GENERAL'S
MOTION FOR SUMMARY JUDGMENT AND ESTABLISHING
UIM COVERAGE - Page 1 of 4

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motion revision 8-13-13\order denying patriot general mot. revision of order denying msj
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4. Declaration of Amy Brunner in Support of Patriot General's Motion for Summary Judgment;
5. Declaration of Kyle Mosbrucker in Support of Patriot General's Motion for Summary Judgment;
6. Declaration of Matthew Munson in Support of Patriot General's Motion for Summary Judgment;
7. Javier Gutierrez's Memorandum of Law in Opposition to Patriot General's Motion for Summary Judgment;
8. Declaration of Javier Gutierrez in Support of Javier Gutierrez's Memorandum of Law in Opposition to Patriot General's Motion for Summary Judgment;
9. Jorge Gutierrez's Opposition to Patriot General's Motion for Summary Judgment;
10. Declaration of Jorge Gutierrez in Support of Opposition to Patriot General's Motion for Summary Judgment;
11. Patriot General's Reply;
12. Defendant Javier Gutierrez's Motion to Strike Plaintiff's Citation to an Unpublished Opinion; and
13. Defendant Jorge Gutierrez's Joinder in Defendant Javier Gutierrez's Motion to Strike Plaintiff's Citation to Unpublished Opinion
14. Order Denying Patriot General's Motion for Summary Judgment;
15. Patriot General's Note for Motion for Revision;
16. Patriot General's Motion for Revision of Court Commissioner's Order Denying Patriot General's Motion for Summary Judgment;
17. Jorge Gutierrez' Opposition to Motion for Revision;

ORDER DENYING PATRIOT GENERAL'S MOTION FOR REVISION OF ORDER DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY JUDGMENT AND ESTABLISHING UIM COVERAGE - Page 2 of 4

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- 18. Javier Gutierrez' Memorandum of Law in Opposition to Motion for Revision;
- 19. Patriot General's Reply to Its Motion for Revision.

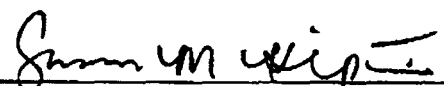
and the Court having heard the argument of counsel, and being otherwise fully advised, IT IS, THEREFORE, HEREBY ORDERED that Patriot General's Motion for Revision of Order Denying Patriot General's Motion for Summary Judgment and Establishing UIM Coverage is DENIED. The Court finds that there is no genuine issue of material fact and determines that there is UIM coverage for defendants Javier Gutierrez for the January 9, 2011 collision for the reasons laid out in Commissioner Mitchell's August 9, 2013 order.

DONE IN OPEN COURT this date: 11-4-13


 Judge M. Scott Wolfram

Presented by:

Kilpatrick Law Group, P.C.


 Richard B. Kilpatrick, WSBA #7058
 Shannon M. Kilpatrick, WSBA #41495
 Attorneys for Defendant Jorge Gutierrez

ORDER DENYING PATRIOT GENERAL'S MOTION FOR REVISION OF ORDER DENYING PATRIOT GENERAL'S MOTION FOR SUMMARY JUDGMENT AND ESTABLISHING UIM COVERAGE - Page 3 of 4

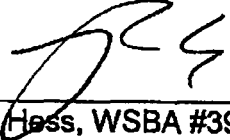
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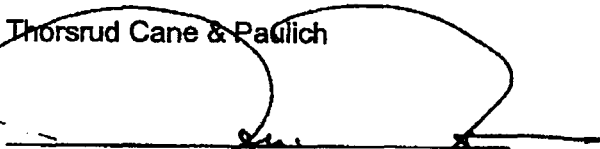
Approved as to Form; Notice of Presentation Waived by:

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ORDER DENYING PATRIOT GENERAL'S MOTION FOR
REVISION OF ORDER DENYING PATRIOT GENERAL'S
MOTION FOR SUMMARY JUDGMENT AND ESTABLISHING
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FILED
FEB 24, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

PATRIOT GENERAL INSURANCE)	
COMPANY, a foreign corporation,)	No. 32109-6-III
)	
Petitioner,)	
)	
v.)	
)	PUBLISHED OPINION
JORGE GUTIERREZ and JANE DOE)	
GUTIERREZ, and their marital)	
community, and JAVIER GUTIERREZ,)	
)	
Respondents.)	

FEARING, J. — We granted discretionary review of the trial court’s summary judgment ruling that Javier Gutierrez is an insured for purposes of underinsured motorist coverage on an automobile insurance policy purchased from Patriot General Insurance by Jorge Gutierrez, Javier’s father. Patriot General insists that Javier is not an insured because Jorge failed to disclose him, on his initial insurance application, as a member of

Jorge's household over the age of 14 years. We affirm summary judgment based on policy language that qualifies Javier as an "insured person," despite his father's failure to disclose him.

FACTS

On August 11, 2010, Jorge Gutierrez applied for car insurance from Patriot General Insurance Company, through the Tomas Miranda Insurance Agency, a local agency in Walla Walla. The application listed Jorge as the named insured, and Jorge and his wife, Maria Carmona, as authorized drivers. Jorge initialed a paragraph stating that he had listed on his application everyone living with him age 14 or older. That paragraph reads:

I also certify that all persons age 14 or over who live with me temporarily or permanently and all persons who are regular operators of any vehicle to be insured have been listed on this application and reported to the Company. I declare that there are no operators of the vehicle(s) described in this application unless their names and ages are shown above or are provided in writing to the Company within 14 days of when they begin driving the vehicle(s) described in this application.

Clerks Papers (CP) at 84. The policy application further states:

I hereby apply to the Company for a policy of insurance as set forth in this application on the basis of statements contained herein. I understand and agree that a routine inquiry may be made which will provide applicable information concerning character, general reputation, personal characteristics, mode of living and credit history. Upon written request, additional information as to the nature and scope of the report, if one is made, will be provided. I understand and agree that such policy shall be cancelled and the benefits available under such policy may be denied if

such information is known to be false and would affect acceptance of the risk or would in any way affect the rating of the risk by the Company.

CP at 84.

At the time of completing the policy application, Jorge Gutierrez's son, Javier, age 18, lived at home with his father. In a declaration opposing Patriot General Insurance Company's summary judgment motion, Jorge Gutierrez testified he desired "full coverage" for his family, and he averred that he relied on Patriot General's agent, Tomas Miranda, to translate and help him complete the application. CP at 106. Jorge is a monolingual Spanish-speaker and insists he did not understand that the application asked him to certify that his children would not be using the vehicles. Jorge Gutierrez recalls telling Tomas Miranda that his son, Javier, and his daughter, Viviana, would also be drivers. Neither party provided information to the trial court as to whether Patriot General would have charged a higher premium for the insurance policy if Jorge Gutierrez had listed his son in the application.

Patriot General issued an auto policy to Jorge Gutierrez with a coverage period running from October 29, 2010 to April 29, 2011. The policy listed only Jorge Gutierrez and Maria Carmona as authorized drivers.

The first page of the twelve-page Patriot General Insurance Company policy provides:

In return for **your** premium payment and subject to the terms and conditions of this policy, **we** will insure **you** for the coverages up to the

No. 32109-6-III

Patriot Gen. Ins. v. Gutierrez

limits of liability for which a premium is shown on the Declarations Page of this policy. This insurance applies only to **car accidents** and losses which happen while this policy is in force. This policy is issued by us in reliance upon the statements which you made in your application for insurance. If you have made any false statement in your application, this policy may not provide any coverage.

CP at 57. The policy includes a separate three-page amended “Underinsured Motorists Coverage Endorsement,” which covers injuries caused by an underinsured motorist. In relevant part, the endorsement reads:

We will pay damages for bodily injury or property damage which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle. The bodily injury or property damage must be caused by a car accident and result from the ownership, maintenance or use of an underinsured motor vehicle.

CP at 74.

To determine who constitutes “you” and, in turn, an “insured person” under the underinsured motorist endorsement, the reader must first journey to the beginning of the policy and then return to the endorsement. In a policy section titled “DEFINITIONS USED THROUGHOUT THIS POLICY,” the policy defines “you” and “your” as

the person shown as the named insured on the Declarations Page and that person’s spouse if residing in the same household. You and your also means any relative of that person if they reside in the same household, providing they or their spouse do not own a motor vehicle.

CP at 58. The policy defines “relative” in the paragraph directly below:

“Relative” means a person living in your household related to you by blood, marriage or adoption, including a ward or foster child. Relative includes a minor under your guardianship who lives in your household.

Any relative who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss.

CP at 58 (italics added). Patriot General's policy does not explicitly state that undisclosed relatives are not covered. The underinsured motorist endorsement lists exclusions from coverage, but does not specify whether household members above the age of 14, and not listed on the application or policy, are excluded from coverage.

Additional definitional language, on which we rely, is provided in the underinsured motorist endorsement. The language reads:

As used in this Part:

(1) "**Insured Person**" means:

(A) **You.**

(B) Any other person occupying your insured car with your permission.

(C) Any person for damages that person is entitled to recover because of **bodily injury to you** or another occupant of **your car.**

*No person shall be considered an **insured person** if that person uses a **motor vehicle** without permission of the owner.*

CP at 74 (italics added).

On January 9, 2011, Javier Gutierrez suffered serious injuries as a passenger in a single-car-rollover accident. Javier was 19 at the time of the accident and living with Jorge. The car's driver, Matthew Vincent Lanier, was uninsured. Javier tendered an uninsured motorist claim under the Patriot General Insurance Company policy, which claim Patriot General denied on May 22, 2012. Patriot General denied coverage because

Javier was over the age of 14 years, living with Jorge, and not listed on Jorge's policy; and therefore did not qualify as "you."

PROCEDURE

Patriot General Insurance Company filed an action for declaratory judgment against Jorge and Javier Gutierrez, seeking a declaration that it had no duty to pay uninsured motorist benefits to Javier because he was not covered by Jorge's policy. Javier Gutierrez counterclaimed for coverage, breach of contract, bad faith, and violation of Washington's Consumer Protection Act, chapter 19.86 RCW.

Patriot General filed a motion for summary judgment on the issue of whether Javier Gutierrez was covered by his father's underinsured motorist (UIM) policy at the time of the accident. Javier and Jorge Gutierrez opposed the motion. The trial court granted the nonmoving parties Gutierrezes summary judgment because it found that the undisputed facts supported their position. Javier and Jorge Gutierrez were granted judgment "solely to the extent that the Court determines that there is UIM coverage for defendant Javier Gutierrez." CP at 163. The trial court determined that the definition of "insured" provided in Washington's casualty insurance statute should be read into the policy and replace the policy's definition of "insured person." The statute provides, in relevant part:

- (5) "Insured" means:
 - (a) The named insured or a person who is a resident of the named insured's household and is either related to the named insured by blood,

marriage, or adoption, or is the named insured's ward, foster child, or stepchild.

RCW 48.22.005.

LAW AND ANALYSIS

On appeal, Patriot General Insurance Company complains that Jorge Gutierrez failed to list his son Javier as a member of Jorge's household above the age of 14. Patriot General contends this omission precludes coverage for Javier Gutierrez. Jorge and Javier Gutierrez argue that the Patriot General policy affords coverage, despite the omission, because the policy does not expressly exclude from coverage any family member above the age of 14 not listed in the application. According to the Gutierrezes, Jorge's failure to disclose Javier to Patriot only amounts to a breach of a duty to disclose and does not preclude coverage under the plain language of Jorge's car insurance policy.

The Gutierrezes also contend the statutory definition of "insured," under RCW 48.22.005, should be read into Jorge's policy in order to afford Javier uninsured motorist coverage. Patriot General responds that RCW 48.22.005's definition of "insured" does not require car insurance policies to provide uninsured motorist coverage to a named insured's family members. Patriot General contends RCW 48.22.005 only applies to personal injury protection coverage. We agree with Jorge and Javier Gutierrez that the language of the insurance policy, without reference to any statute, affords Javier

underinsured motorist coverage. Therefore, we do not address the application of RCW 48.22.005.

We agree with the trial court that Jorge and Javier Gutierrez should be granted summary judgment. When, as here, the relevant facts are not in dispute, we may order entry of summary judgment in favor of the nonmoving party. *Impehoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992); *Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967); *Wash. Ass'n of Child Care Agencies v. Thompson*, 34 Wn. App. 225, 230, 660 P.2d 1124 (1983).

Familiar principles of insurance policy construction compel our ruling that Javier Gutierrez is covered under the Patriot General underinsured motorist endorsement. The interpretation of an insurance policy is a question of law, and summary judgment is appropriate if the contract has only one reasonable meaning when viewed in the light of the parties' objective manifestations. *Port of Seattle v. Lexington Ins. Co.*, 111 Wn. App. 901, 907, 48 P.3d 334 (2002). Insurance policies are to be construed as a whole, with force and effect given to each clause. *Am. Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874, 854 P.2d 622 (1993). ““An inclusionary clause in an insurance contract should be liberally construed to provide coverage whenever possible.”” *Mercer Place Condo. Ass'n v. State Farm Fire & Cas. Co.*, 104 Wn. App. 597, 602, 17 P.3d 626 (2000) (quoting *Riley v. Viking, Ins. Co.*, 46 Wn. App. 828, 829, 733 P.2d 556 (1987)). Insurance limitations require clear and unequivocal language. *Bordeaux, Inc. v. Am. Safety Ins.*

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Co., 145 Wn. App. 687, 694, 186 P.3d 1188 (2008). If an insurer wants exclusions upheld, it has the burden of drafting them in “clear” and “unequivocal” terms. *Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 288, 313 P.3d 395 (2013).

Patriot General argues that in order to be an “insured person” entitled to UIM coverage under the car insurance policy it sold to Jorge Gutierrez, a person must meet the definition of “you.” We agree. Patriot General further argues that a “relative” can be insured only if the relative is disclosed on the policy’s application or endorsement if that “relative” is over the age of 14 and living with the named insured. We disagree. The policy does not expressly state that an undisclosed relative is excluded from being an insured.

Patriot General argues that the sentence, “Any relative who is age fourteen (14) or older must be listed on the application or endorsed on the policy prior to a car accident or loss,” should be read as defining who is insured under the policy. CP at 58. We agree that the sentence could be read in this light, but the Gutierrezes’ contention that the sentence only imposes a duty to cooperate and does not act as an exclusion is equally plausible.

Patriot General further argues that the relevant sentence is not an exclusion, but rather a permissible limitation on the definition of “insured.” Patriot General does not explain the practical difference between a limitation on coverage and an exclusion from coverage.

When reading the Patriot General insurance policy as a whole, we side with Javier and Jorge Gutierrez. The Patriot General underinsured motorist endorsement lists nine exclusions from coverage. The list could have, but did not, exclude from coverage injury to a household member above the age of 14 who was not listed on the application.

An important comparison of insurance policy language must be mentioned. In the underinsured motorist endorsement's additional definitions, the policy reads: "No person shall be considered an **insured person** if that person uses a **motor vehicle** without permission of the owner." CP at 74. If Patriot General wished to limit the definition of "insured" to achieve the meaning it advances on appeal, it could and should have drafted language that reads: "No **relative** shall be considered an **insured person** if that person is age fourteen (14) or older and not listed on the application or policy endorsement." It did not.

In addition, the first page of the Patriot General Insurance Company auto policy provides, in part: "This policy is issued by **us** in reliance upon the statements which **you** made in **your** application for insurance. If **you** have made any false statement in **your** application, this policy *may* not provide any coverage." CP at 57 (italics added). Significantly, the language does not read: "If **you** made any false statement in **your** application, this policy *shall* not provide any coverage." The policy does not tell the insured under what circumstances a false statement may lead to loss of coverage.

Finally, Jorge Gutierrez's application read, in part:

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Patriot Gen. Ins. v. Gutierrez

I hereby apply to the Company for a policy of insurance as set forth in this application on the basis of statements contained herein. . . . I understand and agree that such policy shall be cancelled and the benefits available under such policy may be denied if such information is known to be false and would affect acceptance of the risk or would in any way affect the rating of the risk by the Company.

CP at 84.

Patriot General forwarded no evidence before the trial court that Jorge Gutierrez knew of any false statement. Nor did it provide evidence that Jorge's risk rating would change based on the fact that his two teenage children resided with him.


In short, Patriot General controlled the language in its auto policy. The Gutierrezes played no role in drafting the language. If Patriot General wished to exclude underinsured motorist coverage to a household member, above the age of 14, who was not disclosed in the application for insurance, Patriot General could have expressly so stated in the policy. We will not assist Patriot General in rewriting the policy.

Both Javier and Jorge Gutierrez seek recovery of reasonable attorney fees and costs on appeal against Patriot General Insurance Company. We agree they are entitled to this recovery under *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 52-53, 811 P.2d 673 (1991) since they were required to litigate to gain coverage under the Patriot General insurance policy.

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Patriot Gen. Ins. v. Gutierrez

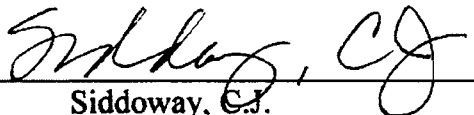
CONCLUSION

We affirm the trial court's declaration of coverage for Javier Gutierrez under the Patriot General insurance policy. We direct that this court's commissioner review Javier and Jorge Gutierrez's applications for fees and costs and to award a reasonable sum to both. We thereafter remand to the superior court for further proceedings.

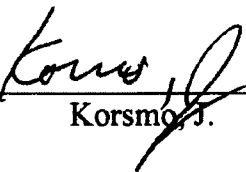


Fearing, J.

WE CONCUR:



Siddoway, C.J.



Korsmo, J.

FILED

Mar 25, 2015

Court of Appeals

Division III

State of Washington

No. _____

(Court of Appeals No. 321096 –III)

SUPREME COURT OF THE STATE OF WASHINGTON

PATRIOT GENERAL INSURANCE COMPANY, a foreign corporation,
Petitioner

v.

**JORGE GUTIERREZ and JANE DOE GUTIERREZ, and their marital
community, and JAVIER GUTIERREZ,**
Respondents,

DECLARATION OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington that I caused the below listed documents to be served on the following counsel in the manner described below:

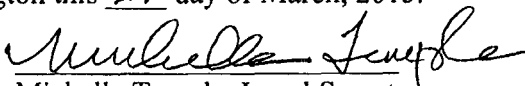
1. Patriot General Insurance Company's Petition for Review;
2. Appendix; and
3. Declaration of Service.

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Executed at Seattle, Washington this 25th day of March, 2015.


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