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SUPREME COURT OF THE STATE OF WASHINGTON

OLGA MATSYUK, individually and on behalf of all those similarly
situated,

Plaintiff/Appellant,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant/Respondent.

STATE FARM FIRE AND CASUALTY COMPANY'S
SUPPLEMENTAL BRIEF

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I. INTRODUCTION

The “common fund” doctrine requires an insurer to pay a share of the legal costs incurred in creating a common fund—but only when the insurer itself actually benefits from the fund created by the claimant’s efforts. In this case, Respondent State Farm Fire and Casualty Company (“State Farm Fire”) did not benefit from Ms. Matsyuk’s litigation against the tortfeasor.

After a brief overview of the doctrinal underpinnings of the common-fund doctrine viewed through the lens of *Hamm v. State Farm Mut. Auto. Ins. Co.*, 151 Wn.2d 303, 309, 88 P3d 395 (2004), State Farm Fire in this Supplemental Brief will focus on four issues presented by this case, some of which are also raised by the consolidated case of *Weismann v. Safeco*. This Court should affirm the lower courts’ decisions in this case for the following reasons:

First, Ms. Matsyuk did not create a common-fund. As provided by the tortfeasor’s insurance policy, State Farm Fire separately paid Ms. Matsyuk personal injury protection (“PIP”) payments covering her medical expenses, and a subsequent liability settlement covering her other damages—resulting in complete compensation for her injuries. Because the automobile accident involved the company’s own insured, State Farm Fire itself received no benefit from any party regarding either payment to

Ms. Matsyuk whether viewed in its capacity as PIP carrier or liability carrier. The lower courts correctly determined that Ms. Matsyuk's liability litigation benefited only herself, not State Farm Fire. Because she did not create a "common fund" benefiting the insurer, each party is responsible for its own attorney's fees under the American Rule.

Second, a plaintiff cannot avoid dismissal of a claim by making conclusory allegations in her complaint that contradict the plain language of the actual policies and releases at issue. In this case, Ms. Matsyuk's Complaint alleged that she reimbursed State Farm Fire its PIP payments as a result of her litigation efforts. But the documents that Ms. Matsyuk incorporated into her complaint show that she agreed to release her claims against the tortfeasor in exchange for payment under his liability coverage in the amount of her unpaid damages, together with the prior PIP payments she received. The lower courts correctly determined that Ms. Matsyuk did not reimburse State Farm Fire through offset or otherwise, so this is not a common-fund case.

Third, even if the courts were to rely on the misstatements in Ms. Matsyuk's Complaint, her common-fund claim against State Farm Fire would fail as a matter of law. The Court of Appeals correctly concluded that when—as in *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001), and in *Weismann v. Safeco*, 157 Wn. App. 168, 236 P.3d 240 (2010)—a

PIP insured/plaintiff obtains a judgment or enters into complete settlement with an injured person that includes damages already paid by PIP, the liability carrier may take into account and offset the amount of PIP benefits from a policy belonging to the same tortfeasor without assuming an obligation to reimburse a share of her legal expenses under the common-fund fee-sharing rule.

Finally, if this Court were to overrule *Young*, Ms. Matsyuk's bad faith claim against State Farm Fire would nevertheless fail as a matter of law.

This Court should affirm the decision below.

II. STATEMENT OF THE CASE

State Farm Fire's earlier briefs describe the factual background. *See* State Farm Fire's Opening Br. at 5-8; Answer to Pet. for Rev. at 3-6. Appendix 1 to this Supplemental Brief includes copies of the portions of the record cited herein, including (1) excerpts from the policy between State Farm Fire and its insured policyholder/tortfeasor; (2) Ms. Matsyuk's liability release; and (3) Ms. Matsyuk's Complaint.¹

¹ As the Court of Appeals correctly observed, the Court may consider the release and Mr. Stremditsky's policy in evaluating State Farm Fire's motion to dismiss because Ms. Matsyuk incorporated them into her complaint. *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 329 n.2, 229 P.3d 893 (2010) (citing *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008)).

As set forth in State Farm Fire's earlier briefs, this case differs from this Court's prior "common-fund" cases because it involves an injured person's recovery from a liability policy the tortfeasor purchased, without any recovery benefiting the carrier in its capacity as PIP insurer. On May 20, 2008, State Farm Fire's policyholder, Omelyan Stremditskyy, was involved in an accident while driving a car in which Ms. Matsyuk was a passenger. Mr. Stremditskyy—not Ms. Matsyuk—was the named insured and paid the premiums on that policy. CP 77 ¶ 4. Under the liability coverage in Mr. Stremditskyy's policy, State Farm Fire agreed to pay certain damages for which Mr. Stremditskyy might be liable from operating his car. CP 77, 86.

Mr. Stremditskyy's policy also included PIP coverage, which provided payment for certain accident-related medical expenses not only for Mr. Stremditskyy, but also for his passengers, regardless of fault. CP 77 ¶ 6; CP 90-91. State Farm Fire promptly paid \$1,874 under the PIP coverage of Mr. Stremditskyy's policy to cover medical expenses Ms. Matsyuk incurred as a result of the accident. CP 78 ¶ 7.

On October 21, 2008, Ms. Matsyuk sued State Farm Fire, alleging—erroneously—that she had recovered from Mr. Stremditskyy on her liability claim and had reimbursed State Farm Fire for its PIP payments to her. CP 4. Ms. Matsyuk sought a pro-rata share of her

alleged legal expenses in pursuing the liability claim. *Id.* In fact, on December 19, 2008—two months *after* the filing of the Complaint—State Farm Fire agreed under Mr. Stremditsky's liability policy to settle Ms. Matsyuk's additional claims against him for a payment of \$4,000, above and beyond the \$1,874 in PIP benefits it had paid months before. CP 32. Together, the PIP payments and the liability settlement added up to \$5,874, which Ms. Matsyuk characterized as the "total settlement" of her claims. CP 4 ¶ 11. Ms. Matsyuk released all of her claims against the tortfeasor and against State Farm Fire, with the exception of retaining the ability to pursue her claim for attorney's fees against State Farm Fire. CP 32. The release agreement Ms. Matsyuk executed and which she submitted to the trial court in support of her summary judgment motion confirms the parties' agreement that State Farm Fire would pay *only* an additional \$4,000 beyond the \$1,874 PIP payments Ms. Matsyuk received:

For the sole consideration of Five Thousand Eight Hundred Seventy-Four and No/100th Dollars (\$5,874.00) (*Four Thousand and No/100th Dollars (\$4,000.00) in addition to payments made/to be made under the Personal Injury Protection coverage* in the amount of One Thousand Eight Hundred Seventy-Four and No/100th Dollars (\$1,874.00)), the receipt and sufficiency whereof is hereby acknowledged, OLGA MATSYUK, the undersigned, hereby releases and forever discharges OMELYAN STREMDITSKY

CP 32 (emphasis added).

The trial court granted State Farm Fire's motion to dismiss the fee claim and denied Ms. Matsyuk's motion for partial summary judgment, concluding that the "common-fund" doctrine did not apply. Division One of the Court of Appeals affirmed.

III. ARGUMENT

A. **The Common-Fund Doctrine Applies Only When an Insurer Actually Benefits from a Fund the Claimant Created.**

The "common-fund" doctrine is "an exception to the American Rule on fees in civil cases," and "applies to cases where litigants preserve or create a common fund *for the benefit of others* as well as themselves." *Hamm*, 151 Wn.2d at 309 (quoting *Mahler v. Szucs*, 135 Wn.2d 398, 426-27, 957 P.2d 632 (1998) (emphasis added)).

In *Mahler*, this Court applied the common-fund doctrine to PIP reimbursement insurers received as a matter of contract interpretation. The Court subsequently recognized that the doctrine is based on equitable principles, including subrogation doctrines. *Hamm*, 151 Wn.2d at 310-11 (citing *Winters*, 144 Wn.2d at 878-79). Equity requires that a party who actually benefits from another's litigation expenses should pay the portion of the expenses corresponding to the benefit received. The doctrine is not intended to be punitive, or to shift the cost of litigation to insurers generally, or to create a windfall to any party. *See, e.g., Gossett v.*

Farmers Ins. Co. of Wash., 133 Wn.2d 954, 978, 948 P.2d 1264 (1997) (discussing examples of fee-shifting in insurance litigation). Rather, the common-fund doctrine shares the cost of litigation among those parties who actually benefit from the attorney's efforts, in proportion to the benefit each received.

Hamm illuminates these principles in the context of a carrier's obligation to pay a pro-rata share of the insured's legal expenses when the insured reimburses the carrier's PIP payments from funds the insured obtained through her efforts:

If the insured subsequently *recovers* [1] the **total amount of her damages** [2] **from another source** (the tortfeasor, her UIM [underinsured motorist] carrier, or both), the PIP coverage becomes redundant. Therefore, **when the insured receives full recovery**, the PIP carrier may seek reimbursement from its insureds for the PIP benefits it previously paid. . . . Pursuant to *Mahler* and *Winters* if the PIP carrier seeks reimbursement from the funds obtained through the insured's efforts, the PIP carrier must pay a pro rata share of the insured's legal expenses.

151 Wn.2d at 309 (emphasis added). The touchstone is whether the insured recovers the total amount of her damages (i.e., including damages already paid by PIP) from a source **independent** of her PIP payments—in *Hamm*'s case effectively from the tortfeasor because "payments made by the UIM carrier are treated as if they were made by the tortfeasor."

Hamm, 151 Wn.2d at 308. Applying these principles, this Court emphasized that the arbitrator entered a total damages award against the

carrier in its capacity as Hamm's underinsured UIM carrier (including amounts already paid by PIP), and that the UIM carrier could have been required to tender a check for the full damages amount and recover its PIP payments as PIP carrier by having the insured reimburse the PIP amount. *Id.* at 318. In that case, the PIP offset functioned as "an acceptable mechanism to account for the PIP reimbursement rights." *Id.* at 311.

B. Because State Farm Fire Did Not Benefit from a Common Fund, the Lower Courts Correctly Dismissed Ms. Matsyuk's Claims.

1. State Farm Fire Fully Compensated Ms. Matsyuk for Her Injury and Never Received Any Benefit from Her or Any Other Source, Whether Viewed in Its Capacity as PIP Carrier or Liability Carrier.

Ms. Matsyuk received full compensation for her injuries—\$1,874 in PIP payments for her medical costs, and \$4,000 under Mr. Stremditsky's liability coverage for her other damages—without recovering in fact or effect any amounts duplicating her damages paid by PIP. CP 32. This full compensation came solely from benefits the tortfeasor's insurance policy provided. No other parties or insurers were involved in the accident. State Farm Fire did not (and could not) seek reimbursement from the tortfeasor, its own insured Mr. Stremditsky. *See, e.g., Mahler*, 135 Wn.2d at 419 (insurer cannot subrogate against its own insured).

There is no “common fund” in this case, because Ms. Matsyuk did not share either her \$1,874 PIP payment or the \$4,000 liability payment with anyone else, including State Farm Fire. Unlike *Hamm*, Ms. Kwan did not recover “the total amount of her damages from another source” independent of the source of her PIP payments—the tortfeasor’s policy. Nor did State Farm Fire “seek[] reimbursement from the funds obtained through the insured’s efforts.” *Hamm*, 151 Wn.2d at 309. Instead of being obligated to pay Ms. Matsyuk’s total damages like Hamm’s UIM carrier, State Farm Fire in its capacity as the tortfeasor’s liability carrier had no obligation to pay Ms. Matsyuk anything other than the additional \$4,000 she agreed to accept with her prior PIP payments in full satisfaction of her claims against Mr. Stremditskyy. Unlike Ms. Hamm who effectively recovered from her UIM carrier the full amount of the arbitration award (including a duplicate payment of amounts paid by PIP), Ms. Matsyuk recovered from State Farm Fire in its capacity as Mr. Stremditskyy’s liability carrier only an additional, incremental liability payment for her remaining damages and shared none of it with State Farm Fire. Because Ms. Matsyuk’s litigation did not “preserve or create a common fund,” State Farm Fire has no obligation to contribute toward her legal expenses she incurred in pursuing claims arising from Mr.

Stremditsky's automobile accident. *Id.* at 309 (citing *Mahler*, 135 Wn.2d at 426-27).

2. The Conclusory Allegations in Ms. Matsyuk's Complaint Cannot Create a Claim for Relief.

Ms. Matsyuk's Complaint includes the conclusory allegations that she had recovered from Mr. Stremditsky and reimbursed State Farm Fire its PIP payments. CP 4-5. Ms. Matsyuk characterizes this alleged reimbursement as an "offset" of the PIP payments. CP 4 ¶ 11.² But under CR 12, a court may consider documents incorporated into the complaint. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008). And the plain language of Mr. Stremditsky's policy and Ms. Matsyuk's release confirms that State Farm Fire did not offset its PIP payments from its liability obligation.

For purposes of a motion to dismiss under CR 12(b)(6), courts are not required to accept as true a complaint's legal conclusions. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987). Further, the Court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in

² This Court has previously recognized the distinction between an *offset*, which "refers to a credit to which an insurer is entitled for payments made under one coverage against claims made under another coverage within the same policy," and a *set off* against insurance proceeds of "sums paid to the insured by another party." *Winters v. State Farm Mut. Auto. Ins. Co.*, 144 Wn.2d 869, 876, 31 P.3d 1164, 63 P.3d 764 (2001).

the complaint.” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998). Ms. Matsyuk’s conclusory allegation is indeed false: the undisputed record confirms that State Farm Fire did *not* offset its PIP payments against a total damages award (including the amount already paid by PIP) that it otherwise would be required to pay to Ms. Matsyuk in full, subject to a right to be reimbursed its PIP payments. CP 32. Instead, Ms. Matsyuk settled and released her personal injury claim against State Farm Fire’s insured driver in exchange for an additional payment of \$4,000 from State Farm Fire—period. *Id.* Ms. Matsyuk has not reimbursed State Farm Fire, through offset or otherwise, for the PIP benefits it extended to her as part of the insurance coverage Mr. Stremditsky purchased.³ The lower courts correctly determined that Ms. Matsyuk did not create a common fund benefiting State Farm Fire.

C. The Court of Appeals Also Correctly Determined that the Common-fund Doctrine Does Not Apply To Settlements Under a Tortfeasor’s Policy that Consider both PIP and Liability Payments.

As discussed in the previous section, the undisputed record properly before the trial court on State Farm Fire’s motion to dismiss confirms that State Farm Fire did *not* offset its PIP payment to Ms.

³ The allegations of the Complaint also confirm that the sole source of Ms. Matsyuk’s recovery is from insurance coverage extended under the *tortfeasor’s* auto policy, with nothing paid from or reimbursed as result of coverage extended under her own auto policy or from any source other than the tortfeasor’s insurance. CP 4, ¶¶ 6-10.

Matsyuk against amounts it owed her under Mr. Stremditskyy's liability coverage. In resolving Ms. Matsyuk's case, the Court therefore does not need to reach the central issue presented in the consolidated *Weismann v. Safeco* matter—whether *Hamm* effectively overruled the Court of Appeals's decision in *Young v. Teti*.

Nevertheless, in the event the Court accepts Ms. Matsyuk's characterization of her claim as involving a PIP offset against an agreed liability payment that included a duplicate payment for the damages paid by PIP, State Farm Fire joins Safeco in urging affirmance of the lower courts' decisions in *Matsyuk* and *Weismann* distinguishing *Young* from *Hamm*. As Division One and Division Two correctly recognized, the common-fund doctrine does not apply when both the PIP and liability payments are made under the *tortfeasor's* insurance policy—rather than when the PIP payments flow from another source. *Young v. Teti*, 104 Wn. App. at 727; *Weismann*, 157 Wn. App. at 178; *Matsyuk*, 155 Wn. App. at 338. The Court of Appeals correctly applied the equitable principles this Court identified in *Mahler* and its progeny.

First, denying Ms. Matsyuk's claim for common-fund fees leaves her in the same position as if she were to sue Mr. Stremditskyy and obtain a judgment for \$5,874, from which she reimbursed State Farm Fire's PIP payments, and had State Farm Fire paid a pro-rata share of her legal

expenses. Here, Ms. Matsyuk received \$1,874 in PIP benefits plus \$4,000 from Mr. Stremditsky's liability coverage, from which (assuming a one-third contingent fee agreement) she paid her lawyer \$1,333 (one-third of the \$4,000 liability recovery)⁴ for a total recovery of \$4,541.⁵ See Table A.

PIP & Liability Payments from State Farm Fire, \$4,000 Liability Payment Net of PIP Settlement (<i>Matsyuk</i>)		
PIP benefits from State Farm Fire	+	\$1,874
Recovery from tortfeasor's carrier (State Farm Fire)	+	\$4,000
Legal expenses to recover from tortfeasor (1/3 of \$4,000 liability recovery)	-	\$1,333
Reimbursement of PIP payments to State Farm Fire	-	\$0
PIP pro rata share of legal expenses (paid by State Farm Fire)	+	\$0
Matsyuk's total recovery	=	\$4,541

In contrast, if Ms. Matsyuk had obtained (as in *Young v. Teti*), a judgment against Mr. Stremditsky for her total damages and recovered, therefore, \$5,874 in addition to the \$1,874 in PIP benefits she received, she would have paid her lawyer \$1,958 (one-third of the \$5,874 total recovery) and reimbursed State Farm Fire its \$1,874 in PIP payments.

⁴ As Ms. Matsyuk points out repeatedly in her briefing, she was entitled to PIP benefits as a defined insured under Mr. Stremditsky's PIP coverage, which State Farm Fire paid promptly without dispute. Surely, her lawyer did not charge her attorney's fees on insurance benefits to which she was entitled—and State Farm Fire paid—without regard to fault upon request.

⁵ Like this Court did in the *Hamm* decision, State Farm Fire provides tables illustrating the economic impact of various scenarios on the PIP insured. Cf. *Hamm*, 151 Wn.2d at 314-17.

State Farm Fire in turn would have paid her \$625 as its pro rata share of her legal expenses.⁶ This would leave her with a total recovery of \$4,541. See Table B.

PIP & Liability Payments from State Farm Fire, \$5,874 Judgment (<i>Young v. Tetl</i>)		
PIP benefits from State Farm Fire	+	\$1,874
Recovery from tortfeasor's carrier (State Farm Fire) ⁷	+	\$4,000
Recovery from tortfeasor personally ⁸	+	\$1,874
Legal expenses to recover from tortfeasor (1/3 of total recovery of \$5,874)	-	\$1,958
Reimbursement of PIP payments to State Farm Fire	-	\$1,874
PIP pro rata share of legal expenses (paid by State Farm Fire)	+	\$625
Matsyuk's total recovery	=	\$4,541

Finally, denying Ms. Matsyuk's claim for common-fund fees puts her in the same position as if she had received \$1,874 in PIP payments

⁶ "The formula for calculating a PIP carrier's pro rata share of the insured's legal expenses is legal expenses multiplied by the ratio obtained by dividing the PIP reimbursement by total damages." *Hamm*, 151 Wn.2d at 314 n.6 (internal quotations omitted). In the example, that means \$1,958 in legal expenses multiplied by the \$1,874 PIP reimbursement divided by the \$5,874 total recovery equals \$625.

⁷ State Farm Fire's contractual liability obligation to *Mr. Stremdiskyy* is limited by *Mr. Stremdiskyy's* non-duplication of benefits clause, which Ms. Matsyuk lacks standing to challenge. *Infra* at 16. However, even if State Farm Fire paid the entire \$5,874 judgment, Ms. Matsyuk's total recovery would remain \$4,541.

⁸ This assumes Ms. Matsyuk recovers the damages for previously reimbursed medical expenses from the tortfeasor notwithstanding the inapplicability of the collateral source rule. If she were not to recover that amount, then the legal expenses she incurred in obtaining recovery would be correspondingly less—and the breakdown would be as in Table A.

from State Farm Fire that were *not* paid under Mr. Stremditsky's policy (such as from a separate policy she purchased herself), and had recovered her total damages of \$5,874 from the tortfeasor's carrier, from which she reimbursed State Farm Fire's PIP payments. In that case (as in *Mahler*), from Ms. Matyuk's \$1,874 PIP benefits and \$5,874 total liability recovery, she would have paid \$1,958 to her lawyer (one-third of the \$5,874 liability recovery), reimbursed State Farm Fire its \$1,874 PIP payments and received from State Farm Fire \$625 as its pro-rata share of her legal expenses. This would leave her with a total recovery of the same \$4,541. See Table C.

Table C		
Liability Payment from Tortfeasor's Policy, PIP Paid by State Farm Fire from Policy Ms. Matsyuk Purchased (<i>Mahler</i>)		
PIP benefits from State Farm Fire (under policy Ms. Matsyuk purchased)	+	\$1,874
Recovery from tortfeasor's carrier (not State Farm Fire)	+	\$5,874
Legal expenses to recover from tortfeasor (1/3 of total recovery of \$5,874)	-	\$1,958
Reimbursement of PIP payments to State Farm Fire	-	\$1,874
PIP pro rata share of legal expenses (paid by State Farm Fire)	+	\$625
Matsyuk's total recovery	=	\$4,541

In other words, *denying Ms. Matsyuk's claim for fee sharing ensures she is no worse off than if she had actually recovered and reimbursed State Farm Fire's PIP payments.*

Second, the non-duplication of benefits clause *between State Farm Fire and Mr. Stremditskyy* was not a means of obtaining PIP reimbursement while avoiding fee sharing. The *Hamm* Court's admonition that the UIM carrier could not use the UIM non-duplication of benefits clause to avoid its fee-sharing obligation, *Hamm*, 151 Wn.2d at 311 n.4, does not apply here for two reasons: (1) the policy concern that "[t]he insured should not be worse off simply because he or she purchased two coverages from the same insurer," *id.* at 315, is not implicated since Ms. Matsyuk purchased none of the coverages and, as shown in Appendix 2, Ms. Matsyuk is not worse off without pro-rata fee sharing here; and (2) Ms. Hamm had standing to challenge the non-duplication of benefits clause applicable to *her* UIM coverage, while Ms. Matsyuk has no standing to challenge the non-duplication of benefits clause in *Mr. Stremditskyy's* liability coverage. "Third-party claimants are not intended beneficiaries of liability policies and are owed no direct contractual obligation by insurers." *Walker-Van Buren v. Am. Intern. Group, Inc.*, 123 Wn. App. 863, 866-68, 99 P.3d 1256 (2004) (citing *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 394-95, 715 P.2d 1133 (1986)); *see also Neigel v. Harrell*, 82 Wn. App. 782, 783, 919 P.2d 630 (1996) ("an insurance company's duty is to the insured, not to third-party claimants of the insured") (citing *Tank*, 105 Wn.2d 381).

Third, extending the common-fund rule to claims like Ms.

Weissman's would conflict with basic subrogation principles. When it is the *tortfeasor's* insurance company—rather than the *injured* party's insurance company—that pays both PIP benefits and a liability award, the carrier does not have a third party against whom it can assert a subrogation right. *Mahler*, 135 Wn.2d at 419. In consequence, the PIP insured cannot recover from the tortfeasor and reimburse to the carrier money the carrier had no right to be reimbursed in the first place. Thus, these cases fundamentally differ from *Hamm* and *Winters*, where the injured individual recovered and reimbursed to the PIP carriers its PIP payments.

What appellants in the consolidated *Matsyuk* and *Weismann* cases request is not the application of the established *Mahler* common-fund doctrine to their claims, but the creation of a *new* exception to the American Rule that would require insurers to pay attorney's fees incurred in litigating liability claims even when there is no benefit to the insurer. No recognized equitable doctrine applies. Requiring an insurer to pay for attorney's fees when the insurer has not benefited from a common fund would be inconsistent with the fundamental equitable principles governing fee-shifting. As the Court of Appeals concluded in *Young* and *Weismann*, a liability insurer entering into complete settlement with an injured person that includes medical expenses may take into account the amount of PIP

benefits from a policy belonging to the same tortfeasor without becoming subject to the “common-fund” fee-sharing rule.

D. Even if this Court Were to Overrule *Young v. Teti*, Ms. Matsyuk’s Bad Faith Claims Against State Farm Fire Fail as a Matter of Law.

As discussed above, unlike the insurers in *Young* and *Weismann*, State Farm Fire did not offset Ms. Matsyuk’s PIP payments against an obligation it had as Mr. Stremditsky’s liability carrier to pay her total damages, including a duplicative payment for damages paid by PIP. Nevertheless, even if the Court accepts Ms. Matsyuk’s characterization of her claim as State Farm Fire in its capacity as PIP carrier effectively reimbursing itself its prior PIP payments through an “offset” against what it owed her in its capacity as the tortfeasor’s liability carrier, and even if the Court overrules *Young v. Teti*, the Court should nevertheless affirm the lower courts’ dismissal of Ms. Matsyuk’s bad faith claims against State Farm Fire for reasons discussed in State Farm Fire’s earlier briefs. *See* State Farm Fire’s Opening Br. at 38-41; Answer to Pet. for Rev. at 16-18.

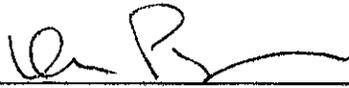
IV. CONCLUSION

Under the “common-fund” doctrine, a carrier must pay its share of attorney’s fees incurred in creating a fund *that benefits the carrier*. In this case, State Farm Fire did not benefit from Ms. Matsyuk’s litigation against the tortfeasor. The common-fund doctrine does not require a carrier to

pay for attorney's fees incurred in obtaining money from a liability policy covering its own insured. This Court should affirm the decision below.

RESPECTFULLY SUBMITTED this 30th day of December,
2010.

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gworden@barrett-worden.com (X) By E-Mail
cbarrett@barrett-worden.com

Dated at Seattle, Washington this 30th day of December, 2010.


Anita Griffin

FILED AS
ATTACHMENT TO EMAIL.

ORIGINAL

APPENDIX 1

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

JULIE SPECTOR

SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

OLGA MATSYUK, individually, and on behalf of
all those similarly situated,

Plaintiff,

vs.

STATE FARM FIRE & CASUALTY COMPANY,

Defendant.

CLASS ACTION
Case No. 36262-0 CPA

CLASS ACTION COMPLAINT FOR
VIOLATION OF THE WASHINGTON
CONSUMER PROTECTION ACT,
BAD FAITH, CONVERSION &
BREACH OF CONTRACT

Plaintiff, by and through her attorneys, complains against defendant as follows:

NATURE OF THE CASE

1. This matter is brought as a class action pursuant to Washington Superior Court Civil Rule 23 on behalf of all persons defined below as the "Class," asserting claims against State Farm Fire & Casualty Company for violations of the Washington Consumer Protection Act ("CPA"), RCW § 19.86.010, *et seq.*, Bad Faith, Conversion and Breach of Contract. Plaintiff seeks, *inter alia*, damages, injunctive relief and declaratory relief.

PARTIES

- 2. Plaintiff Olga Matsyuk is a resident of King County, Washington.
- 3. Defendant State Farm Fire & Casualty Company ("State Farm" or the "Company") is a foreign insurance company authorized to conduct business in the State of Washington. According to the records of Washington's Office of the Insurance Commissioner

CLASS ACTION COMPLAINT FOR VIOLATION OF THE
WASHINGTON CPA, BAD FAITH, CONVERSION &
BREACH OF CONTRACT - 1

IDE LAW OFFICE
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SEATTLE, WASHINGTON 98104-1500
PH: 206 625-1326

ORIGINAL

1 ("OIC"), the Company's registered address is One State Farm Plaza, Bloomington, IL 61710-
2 0001. In accordance with RCW §§ 48.05.200 and 48.05.210, service on State Farm is effected
3 through the OIC.

4 JURISDICTION AND VENUE

5 4. This Court has jurisdiction over the claims alleged herein pursuant to RCW §
6 2.08.010 and/or § 19.86.090. Venue is proper in King County pursuant to RCW § 4.12.020
7 and/or RCW § 4.12.025.

8 FACTUAL ALLEGATIONS

9 5. On May 20, 2008, plaintiff was a passenger in a vehicle being operated by
10 Omelyan Stremditskyy, when the vehicle was involved in an accident in Kent, King County,
11 Washington. Stremditskyy was at fault in the accident.

12 6. At the time of the accident, the Stremditskyy vehicle was insured by a motor
13 vehicle liability insurance policy issued by defendant State Farm (the "Policy"). The Policy
14 included, inter alia, Personal Injury Protection ("PIP") coverage.

15 7. As a result of the accident plaintiff sustained physical injury, and sought and
16 received medical treatment.

17 8. As a passenger in the Stremditskyy vehicle, plaintiff is a State Farm insured
18 under the Policy for purposes of PIP. Thus, plaintiff thereafter sought and received PIP benefits
19 from State Farm.

20 9. Plaintiff also sought to recover against Stremditskyy, the negligent driver of the
21 vehicle in which she was a passenger.

22 10. State Farm, as liability insurer for Stremditskyy, agreed to settle plaintiff's
23 personal injury claim against him for \$5,874.

24 11. State Farm indicated that it would offset the payments it had made under the PIP
25 coverage against the \$5,874 total settlement of plaintiff's personal injury claim, and provide
26 only a check for the difference.

CLASS ACTION COMPLAINT FOR VIOLATION OF THE
WASHINGTON CPA, BAD FAITH, CONVERSION &
BREACH OF CONTRACT - 2

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PH.: 206 625-1326

1 12. In order to recoup the payments it made to or for plaintiff under the PIP coverage
2 (whether by offset, reimbursement or otherwise), State Farm is obligated to pay its share of the
3 legal expenses plaintiff incurred in effecting the recovery from the tortfeasor.

4 13. State Farm asserted, however, that it could offset the full amount of the PIP
5 benefits paid, without any regard to or reduction for its share of the legal expenses plaintiff
6 incurred in connection with effecting the recovery from Stremditskyy.

7 14. State Farm's refusal to pay or otherwise account for its obligation to share in the
8 legal expenses incurred by plaintiff to effect the recovery from the tortfeasor is against the law
9 and public policy of Washington.

10 15. In addition, State Farm thereafter refused to effectuate the agreed liability
11 settlement on behalf of Stremditskyy unless plaintiff released her claims as a PIP insured against
12 State Farm.

13 16. On information and belief, State Farm's conduct in this matter is consistent with
14 its actions and conduct in connection with similar matters involving other State Farm insureds.

15 **CLASS ACTION ALLEGATIONS - PLAINTIFF CLASS**

16 17. Plaintiff brings this suit as a class action pursuant to Washington Superior Court
17 Civil Rules, CR 23. Plaintiff asserts claims on behalf of herself, and on behalf of all others
18 similarly situated (the "Class").

19 18. The proposed Class is comprised of the following:

20 All persons who received PIP benefits from State Farm policies issued in
21 the State of Washington ("PIP Insureds") who then incurred legal expense
22 in effecting a recovery from a third party also insured by State Farm,
23 where State Farm recovered any of its PIP payments from the PIP Insured
24 (through any means, including offset or reimbursement) but did not pay
25 its share of legal expense.

26 19. The Class excludes the defendant, any entity in which the defendant has a

1 controlling interest, and the legal representatives, officers, directors, agents, successors-in-
2 interest and assigns of any excluded person or entity.

3 20. This action satisfies the requirements of, and may properly be maintained as a
4 Class Action pursuant to CR 23.

5 21. The members of the Class are believed to be sufficiently numerous so that the
6 joinder of all members is impracticable. While the exact number of Class members is unknown
7 to plaintiff at this time and can only be ascertained through appropriate discovery, plaintiff
8 believes that Class members number at least in the hundreds, if not thousands. Moreover, the
9 disposition of the claims asserted herein through a class action rather than in individual actions
10 will benefit the parties and the Court.

11 22. There are questions of law and fact common to the Class including, but not
12 limited to, the following:

13 a. Whether defendant's conduct, as alleged herein, constitutes deceptive,
14 unfair, or otherwise unlawful business practices as construed under the CPA;

15 b. Whether defendant's conduct, as alleged herein, has occurred in the
16 conduct of trade or commerce, as construed under the CPA;

17 c. Whether defendant's conduct, as alleged herein, impacts the public
18 interest, as construed under the CPA;

19 d. Whether plaintiff, and the Class, are entitled to an award of damages and,
20 if so, the proper method of measuring such damages;

21 e. Whether plaintiff, and the Class, are entitled to treble damages and/or
22 attorneys' fees pursuant to RCW § 19.86.090;

23 f. Whether plaintiff, and the Class, are entitled to injunctive or other
24 equitable relief and, if so, the nature and scope of any such relief.

25 g. Whether defendant's conduct, as alleged herein, constitutes bad faith,
26 conversion, or breach on contract.

CLASS ACTION COMPLAINT FOR VIOLATION OF THE
WASHINGTON CPA, BAD FAITH, CONVERSION &
BREACH OF CONTRACT - 4

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1 23. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff
2 and all members of the Class have sustained injury and/or damages resulting from defendant's
3 deceptive, unfair and/or otherwise unlawful business practices, as complained of herein.

4 24. The plaintiff will fairly and adequately protect the interests of the members of the
5 Class. Plaintiff is committed to the vigorous prosecution of this action, and plaintiff's interests
6 do not conflict with the interests of the other members of the Class. Moreover, plaintiff has
7 retained competent counsel experienced in class action litigation. Thus, the interests of the
8 Class will be fairly and adequately protected by plaintiff and her counsel.

9 25. This action may be maintained as a class action because, in addition to satisfying
10 the requirements of CR 23(a), questions of law and fact common to the Class predominate over
11 any questions affecting only individual Class members, and a class action is superior to other
12 available methods for the fair and efficient adjudication of this controversy.

13 26. Reasons why a class action is superior to other available methods for the fair and
14 efficient adjudication of this controversy include the following:

- 15 (a) the number of Class members is believed to be sufficiently numerous;
16 (b) the interest of Class members in individually controlling the prosecution
17 of separate actions is small;
18 (c) concentrating the litigation of the claims in a single forum is desirable;
19 (d) since the damages suffered by individual Class members may be
20 relatively modest, the expense and burden of individual litigation would make it, at best,
21 extremely difficult for Class members to individually redress the wrongs alleged; and
22 (e) plaintiff foresees no difficulty in the management of this matter sufficient
23 to preclude its maintenance as a class action.

24 27. This action may also be maintained as a class action because, in addition to
25 satisfying the requirements of CR 23(a), defendant has acted or refused to act on grounds
26 generally applicable to the Class, thereby making it appropriate to grant final injunctive relief or

1 corresponding declaratory relief with respect to the Class as a whole.

2 **COUNT ONE**

3 **Violation of the Washington Consumer Protection Act**

4 28. Plaintiff hereby incorporates by reference each of the preceding allegations as
5 though fully set forth herein.

6 29. This cause of action is brought pursuant to the CPA.

7 30. State Farm violates the CPA in that refusing to pay its share of legal expense
8 when recovering PIP payments from its insureds constitutes unfair or deceptive conduct that
9 occurs in trade or commerce and affects the public interest.

10 31. State Farm also violates the CPA in that refusing to effectuate liability
11 settlements unless its PIP insureds release their claims against State Farm constitutes unfair or
12 deceptive conduct that occurs in trade or commerce and affects the public interest.

13 32. State Farm further violates the CPA *per se* in that claiming it has no obligation to
14 pay its share of legal expense when recovering its PIP payments violates provisions of the
15 Insurance Code, including RCW § 48.30.010 and RCW § 48.30.090, and provisions of the
16 Washington Administrative Code, including WAC § 284-30-330(1) and WAC § 284-30-350.

17 33. State Farm's wrongful conduct caused injury and damages to plaintiff and the
18 Class.

19 34. As a result, plaintiff, and the Class, are entitled to recover their damages from the
20 defendant in an amount to be proven at trial. Furthermore, pursuant to RCW § 19.86.090,
21 plaintiff and the Class are entitled to a trebling of their proven damages, and an award of
22 attorneys' fees pursuant to RCW § 19.86.090.

23 35. Plaintiff is also entitled to an order, *inter alia*, declaring defendant's conduct
24 unlawful, declaring that defendant must pay its share of legal expenses for the recoveries effected
25 by its insureds in these circumstances, and permanently enjoining defendant from further
26 violations of the CPA in the manner alleged herein.

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COUNT TWO

Tort of Bad Faith

36. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

37. As an insurer, defendant State Farm owes its insureds (plaintiff and the Class) fiduciary and/or quasi-fiduciary duties.

38. These duties include the duty to: (i) deal with its insureds fairly, honestly and truthfully, including truthfully and accurately representing all policy provisions; (ii) give at least equal consideration to its insureds' interests as compared to its own; (iii) promptly disclose to its insureds all facts that would aid them in protecting their interests; (iv) fully and promptly investigate matters related to the claims of its insureds; and (v) provide its insureds with assistance in obtaining the full benefits available to them under their insurance policy.

39. By its acts and conduct as alleged herein, Defendant has breached the fiduciary and/or quasi-fiduciary duties it owes to plaintiff and the Class, and caused plaintiff, and the Class, to suffer damages as a result.

COUNT THREE

Conversion

40. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein.

41. By refusing to pay its share of legal expense when recovering its PIP payments, State Farm possesses funds that rightfully belong to its insureds.

42. By retaining the funds rightfully belonging to plaintiff and the Class, defendant has converted those funds to its own use, and caused damages to plaintiff and the Class as a result.

COUNT FOUR

Breach of Contract

1 43. Plaintiff hereby incorporates by reference each of the preceding allegations as
2 though fully set forth herein.

3 44. Under the insurance policies defendant issued to plaintiff and the Class,
4 defendant expressly or impliedly agreed to, inter alia, share in legal expense incurred by its
5 insureds when defendant recovered its payments for the applicable loss.

6 45. Defendant broke its promises, causing plaintiff, and the Class, to suffer damages
7 as a result.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, plaintiff requests of this Court the following relief:

10 A. An order declaring that the conduct and actions of defendant complained of
11 herein are unlawful, and in violation of the CPA, RCW § 19.86.010, et seq.;

12 B. An order declaring that defendant must pay its share of legal expenses for the
13 recoveries effected by its insureds in these circumstances;

14 C. An order that permanently enjoins defendant, and its agents, from further
15 violating the CPA in the manner set forth herein;

16 D. An award of damages to plaintiff, and the Class, in an amount as proven at trial;

17 E. An award of treble damages to plaintiff, and the Class, pursuant to RCW §
18 19.86.090;

19 F. An award of prejudgment interest and costs of suit, including expert witness fees;

20 G. An award of attorneys' fees and expenses under any applicable grounds,
21 including RCW § 19.86.090 or any other basis; and

22 H. Such other and further legal and equitable relief as this Court may deem proper.

23 Dated: October 21, 2008.

IDE LAW OFFICE

24 
25 _____
26 Matthew J. Ide, WSBA No. 26002

CLASS ACTION COMPLAINT FOR VIOLATION OF THE
WASHINGTON CPA, BAD FAITH, CONVERSION &
BREACH OF CONTRACT - 8

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David R. Hallowell
David R. Hallowell & Associates
801 Second Avenue, Suite 1502
Seattle, Washington 98104-1576
Tel.: (206) 587-0344

Attorneys for Plaintiff

CLASS ACTION COMPLAINT FOR VIOLATION OF THE
WASHINGTON CPA, BAD FAITH, CONVERSION &
BREACH OF CONTRACT - 9

IDE LAW OFFICE
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RELEASE

For the sole consideration of Five Thousand Eight Hundred Seventy-Four and No/100th Dollars (\$5,874.00) (Four Thousand and No/100th Dollars (\$4,000.00) in addition to payments made/to be made under the Personal Injury Protection coverage in the amount of One Thousand Eight Hundred Seventy-Four and No/100th Dollars (\$1,874.00)), the receipt and sufficiency whereof is hereby acknowledged, OLGA MATSYUK, the undersigned, hereby releases and forever discharges OMELYAN STREMDITSKY, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known or unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the 20th day of May, 2008 at or near 116th Avenue S.E. and S.E. 192nd Street in Renton, Washington.

This release expressly reserves all rights of the parties released to pursue their legal remedies, if any, against the undersigned, her heirs, executors, agents and assigns.

Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims against OMELYAN STREMDITSKY arising out of the aforesaid accident.

Provided, however, that nothing in this Release shall preclude the undersigned from pursuing claims, if any, that she purports to have as an insured under the Personal Injury Protection coverage provided by OMELYAN STREMDITSKY's State Farm Fire and Casualty Company policy.

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.

DATED this 12.19.08 day of December, 2008



OLGA MATSYUK

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The Honorable Julie Spector
Hearing Date and Time: February 13, 2009, 11:00 a.m.
With Oral Argument

FILED
KING COUNTY, WASHINGTON
FEB 2 2009
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

OLGA MATSYUK, individually and on behalf
of all those similarly situated,

Plaintiff,

vs.

STATE FARM FIRE & CASUALTY
COMPANY,

Defendant.

No. 08-2-36263-9 SEA

DECLARATION OF BELINDA
GOODMAN OPPOSING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

I, Belinda Goodman, hereby declare as follows:

1. I have been employed by State Farm Mutual Automobile Insurance Company since October 24, 1977. I have been an Auto Claims Section Manager since November 1990. I have responsibility for one of the two auto claims sections that comprise Washington state. I provide this Declaration in opposition to Plaintiff's Motion for Partial Summary Judgment. I have personal knowledge of the facts set forth in this Declaration, and if called as a witness I could and would competently testify to those facts.

2. As an Auto Claims Section Manager, I have responsibility for all auto field claims units within the several offices that constitute my section regarding claims arising under auto policies issued by State Farm Mutual Automobile Insurance Company or State Farm Fire and Casualty Company in Washington state. As an Auto Claims Section Manager,

DECLARATION OF BELINDA GOODMAN - 1
DWT 12305858v1 008641-00001

Davis Wright Tremaine LLP
Law Offices
Suite 2200 - 1201 Third Avenue
Seattle, Washington 98101-3043
(206) 425-3100 • Fax (206) 428-7000

ORIGINAL

1 I am responsible for overseeing the entire operation of these auto field claims units, and I
2 supervise approximately 75 State Farm employees.

3 3. In my capacity as Auto Claims Section Manager, I am familiar with State
4 Farm's procedures and business practices regarding the handling of insurance claims,
5 including the handling of personal injury protection ("PIP") payments and reimbursements,
6 settlement and payment of liability claims, and State Farm's policies and practices regarding
7 payment of a pro rata share of its insureds' legal expenses when its insureds recover from
8 parties at fault and State Farm shares in such recoveries. I am familiar with the claim files
9 that contain documentation of claims made under State Farm's automobile insurance policies.
10 I am also familiar with State Farm's computerized claims records. It is State Farm's regular
11 practice to maintain these files and records. I am familiar with how State Farm stores and
12 manages access to these files and records. The information below is based on my own
13 personal knowledge and my review of the pertinent portions of State Farm's underwriting and
14 claims records relating to our policyholder Omelyan Stremditskyy and to Olga Matsyuk's
15 claims against Mr. Stremditskyy's PIP and liability coverages.

16 4. On May 20, 2008, Mr. Stremditskyy, was involved in an accident while
17 driving a car in which Ms. Matsyuk was a passenger. Mr. Stremditskyy had purchased a State
18 Farm Fire policy, which covered his vehicle. Mr. Stremditskyy—not Ms. Matsyuk—was the
19 named insured and paid the premiums on that policy.

20 5. Mr. Stremditskyy's policy at page 6 provided liability coverage by which State
21 Farm Fire agreed to pay damages for which Mr. Stremditskyy might become liable as a result
22 of operating his car. Attached to this Declaration as Exhibit A is a true and correct copy of
23 Mr. Stremditskyy's policy in force at the time of the accident.

24 6. Mr. Stremditskyy's policy at page 10 also included PIP (i.e., "personal injury
25 protection") coverage, which provided (among other things) payment for certain reasonable,
26 accident-related medical expenses not only for Mr. Stremditskyy, but also for his passengers,
27 regardless of fault. The law does not require automobile owners to buy this additional layer

DECLARATION OF BELINDA GOODMAN - 2
DWT 12395858v1 0088641-000001

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2700 • 1291 Third Avenue
Seattle, Washington 98101-3045
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1 of "no-fault" protection for the benefit of their passengers, but Mr. Stremditskyy's policy did
 2 include PIP coverage. Ms. Matsyuk became a defined insured for that coverage, even though
 3 she was not a named insured on the policy.

4 7. Between July 30, 2008 and October 20, 2008, State Farm Fire paid to Ms.
 5 Matsyuk a total of \$1,874 under the PIP coverage of Mr. Stremditskyy's policy to reimburse
 6 her for medical expenses she incurred as a result of the accident. On December 19, 2008,
 7 State Farm Fire agreed to settle Ms. Matsyuk's additional claims against Mr. Stremditskyy for
 8 a payment of \$4,000, above and beyond the \$1,874 in PIP benefits it had already paid.

9 8. I understand that Ms. Matsyuk claims that State Farm Fire "agreed to settle
 10 Matsyuk's personal injury claim against Stremditskyy for \$5,874" and "refused . . . to provide
 11 a check for the full \$5,874 liability settlement." This is not true. The parties never reached a
 12 settlement for payment of that amount; instead, State Farm Fire agreed to pay, and Ms.
 13 Matsyuk agreed to accept, \$4,000 in full and final settlement of her claims.

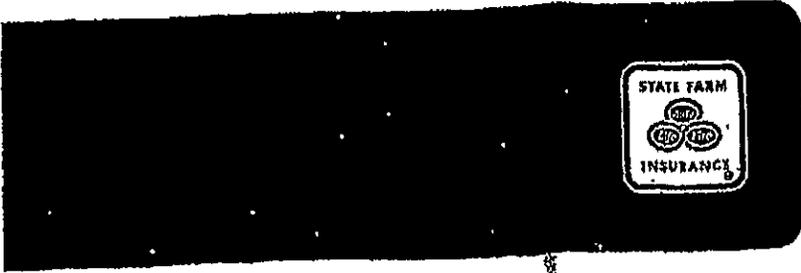
14 I declare under penalty of perjury of the laws of the State of Washington that the
 15 foregoing is true and correct to the best of my knowledge.

16 Executed this 2nd day of February, 2009 in Tukwila, Washington.

17 

18 Belinda Goodman
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BEST AVAILABLE IMAGE POSSIBLE



Please read the policy carefully. If there is an accident, contact your State Farm agent or one of our Claim Offices at once. (See "INSURED'S DUTIES" in this policy booklet.)

State Farm®
Car Policy
Booklet

Washington
Policy Form 9847A

MAT00000001Z

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MATO00000002Z

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THIS POLICY

1. This policy consists of:
 - a. the most recently issued Declarations Page;
 - b. the policy booklet version shown on that Declarations Page; and
 - c. any endorsements that apply, including those listed on that Declarations Page as well as those issued in connection with any subsequent renewal of this policy.
2. This policy contains all of the agreements between all named insureds and applicants and:
 - a. us; and
 - b. any of our agents.
3. We agree to provide insurance according to the terms of this policy:
 - a. based on payment of premium for the coverages chosen; and
 - b. unless otherwise stated in **EXCEPTIONS, POLICY BOOKLET, AND ENDORSEMENTS** on the Declarations Page; in reliance on the following statements:
 - (1) The named insured is the sole owner of *your car*, which is not subject to any lien or security agreement.
 - (2) Neither *you* nor any member of *your* household has, within the past three years, had:
 - (a) vehicle insurance canceled or nonrenewed by an insurer; or
 - (b) either:
 - (i) a license to drive; or
 - (ii) a vehicle registration suspended, revoked, or refused.
 - (3) *Your car* is used for pleasure and business.
4. All named insureds and applicants agree by acceptance of this policy that:
 - a. the statements in 3;b. above are made by the named insured or applicant and are true; and
 - b. we provide this insurance on the basis those statements are true.

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9847A

MATO0000003Z

LIABILITY COVERAGE

This policy provides Liability Coverage if "A" is shown under "Symbols" on the Declarations Page.

Additional Definition

Insured means:

1. you and resident relatives for:
 - a. the ownership, maintenance, or use of:
 - (1) your car;
 - (2) a newly acquired car; or
 - (3) a trailer; and
 - b. the maintenance or use of:
 - (1) a non-owned car; or
 - (2) a temporary substitute car;
2. the first person shown as a named insured on the Declarations Page and that named insured's spouse who resides primarily with that named insured for the maintenance or use of a car that is owned by, or furnished by an employer to, a person who resides primarily in your household, but only if such car is neither owned by, nor furnished by an employer to, the first person shown as a named insured on the Declarations Page or that person's spouse;
3. any other person for his or her use of:
 - a. your car;
 - b. a newly acquired car;
 - c. a temporary substitute car; or
 - d. a trailer while attached to a car described in a, b, or c. above.Such vehicle must be used within the scope of your consent; and
4. any other person or organization vicariously liable for the use of a vehicle by an insured as defined in Items 1, 2, or 3. above, but only for such vicarious liability. This provision applies only if the vehicle is neither owned by, nor hired by, that other person or organization.

Insured does not include the United States of America or any of its agencies.

Insuring Agreement

1. We will pay:
 - a. damages an insured becomes legally liable to pay because of:
 - (1) bodily injury to others; and
 - (2) damage to property, caused by an accident that involves a vehicle for which that insured is provided Liability Coverage by this policy;
 - b. attorney fees for attorneys chosen by us to defend an insured who is sued for such damages; and
 - c. court costs charged to an insured and resulting from that part of a lawsuit:
 - (1) that seeks damages payable under this policy's Liability Coverage; and
 - (2) against which we defend an insured with attorneys chosen by us.We have no duty to pay attorney fees and court costs incurred after we pay or deposit in court, with either the approval of the insured or as required by law, all amounts due under this policy's Liability Coverage.
 2. We have the right to:
 - a. investigate, negotiate, and settle any claim or lawsuit;
 - b. defend an insured in any claim or lawsuit, with attorneys chosen by us; and
 - c. appeal any award or legal decision for damages payable under this policy's Liability Coverage.
- ### Supplementary Payments
- We will pay, in addition to the damages, fees, and costs described in the Insuring Agreement above, the interest, premiums, costs, and expenses listed below that result from such accident:
1. Interest on damages owed by the insured that accrues:
 - a. before a judgment, where owed by law, but only on that part of the judgment we pay; and

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after a judgment. We will not pay interest on damages paid or payable by a party other than the insured or us.

We have no duty to pay interest that accrues after we deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage.

2. Premiums for bonds, provided by a company chosen by us, required to appeal a decision in a lawsuit against an insured. We have no duty to:

a. pay for bonds that exceed this policy's applicable Liability Coverage limit;

b. furnish or apply for any bonds; or

c. pay premiums for bonds purchased after we deposit in court, pay, or offer to pay, the amount due under this policy's Liability Coverage; and

3. The following costs and expenses if related to and incurred after a lawsuit has been filed against an insured:

a. Loss of wages or salary, but not other income, up to \$200 for each day an insured attends, at our request:

- (1) an arbitration;
- (2) a mediation; or
- (3) a trial of a lawsuit; and

b. Reasonable expenses incurred by an insured at our request, other than loss of wages, salary, or other income.

The amount of any of the costs or expenses listed above that are incurred by an insured must be reported to us before we will pay such incurred costs or expenses.

Limits

The Liability Coverage limits for bodily injury are shown on the Declarations Page under "Liability Coverage - Bodily Injury Limits - Each Person, Each Accident."

The limit shown under "Each Person" is the most we will pay for all damages resulting from bodily injury to any one person injured in any one accident, including all damages sustained

by other persons as a result of that bodily injury. The limit shown under "Each Accident" is the most we will pay, subject to the limit for "Each Person", for all damages resulting from bodily injury to two or more persons injured in the same accident.

The Liability Coverage limit for damage to property is shown on the Declarations Page under "Liability Coverage - Property Damage Limit - Each Accident". The limit shown is the most we will pay for all damages resulting from damage to property in any one accident.

These Liability Coverage limits are the most we will pay regardless of the number of:

1. insureds;
2. claims made;
3. vehicles insured; or
4. vehicles involved in the accident.

Non duplication

We will not pay any damages or expenses under Liability Coverage:

1. that have already been paid as benefits under Personal Injury Protection Coverage of any policy issued by the State Farm Companies to you or any resident relative;
2. that have already been paid as expenses under Medical Payments Coverage of any policy issued by the State Farm Companies to you or any resident relative; or
3. that have already been paid under the Underinsured Motor Vehicle Coverages of any policy issued by the State Farm Companies to you or any resident relative.

Exclusions

THERE IS NO COVERAGE FOR AN INSURED:

1. WHO INTENTIONALLY CAUSES BODILY INJURY OR DAMAGE TO PROPERTY;
2. OR FOR THAT INSURED'S INSURER FOR ANY OBLIGATION UNDER ANY TYPE OF WORKERS' COMPENSATION, DISABILITY, OR SIMILAR LAW;

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(2) liability coverage provided by one or more sources other than the State Farm Companies also applies as excess coverage for the same accident.

then the State Farm Companies will pay the proportion of damages payable as excess that the maximum amount that may be paid by the State Farm Companies as determined in item 1. above bears to the sum of such amount and the limits of all other liability coverage that apply as excess coverage.

Required Out-of-State Liability Coverage

- 1. an insured is in another state, the District of Columbia, or any province of Canada, and as a nonresident becomes subject to its

motor vehicle compulsory insurance law, financial responsibility law, or similar law; and

- 2. this policy does not provide at least the minimum liability coverage required by such law for such nonresident,

then this policy will be interpreted to provide the minimum liability coverage required by such law.

This provision does not apply to liability coverage required by law for motor carriers of passengers or motor carriers of property.

Financial Responsibility Certification

When this policy is certified under any law as proof of future financial responsibility, and while required during this policy period, this policy will comply with such law to the extent required.

PERSONAL INJURY PROTECTION COVERAGE

This policy provides Personal Injury Protection Coverage if "P1", "P2", "P3", "P4", "P5", or "P6" is shown under "Symbols" on the Declarations Page.

Additional Definitions

Automobile means every motor vehicle registered or designed for carrying ten passengers or less and used for the transportation of persons other than:

- 1. a motorcycle or a motor-driven cycle;
- 2. a farm-type tractor or other self-propelled equipment designed for use principally off public roads;
- 3. a vehicle operated on rails or crawler treads;
- 4. a vehicle located for use as a residence; or
- 5. a moped.

Insured means:

- 1. you;
- 2. resident relatives; and
- 3. any other person while occupying with your permission or

- b. struck as a pedestrian by your car or a newly acquired car.

Motor Vehicle means every vehicle which is self-propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.

Pedestrian means a person not occupying a motor vehicle.

Personal Injury Protection Benefits mean accident related:

- 1. Medical and Hospital Benefits, which are payments for reasonable medical expenses incurred within three years of the date of the accident;
- 2. Funeral Expense Benefits, which are payments for reasonable expenses actually incurred for funeral, burial or cremation.
- 3. Income Continuation Benefits, which are payments for the insured's actual loss of income from work because of continuous inability to perform the duties of his or her usual occupation.

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it applies during a period that:

a. begins on the 14th day after the date of the accident, and

b. ends either:

(1) when the *insured* is reasonably able to perform the duties of his or her usual occupation;

(2) 52 weeks after such 14th day begins; or

(3) on the date of the *insured's* death; whichever occurs first.

4. Loss of Services Benefits, which are payments for reasonable expenses actually incurred for services:

a. the *insured* would have performed without pay for his or her household except for the injury;

b. furnished by someone other than a member of the *insured's* household; and

c. furnished during a period that:

(1) begins on the date of the accident; and

(2) ends either:

(a) when the *insured* is reasonably able to perform those services;

(b) 365 days after the date of the accident; or

(c) when the *insured* dies;

whichever occurs first.

Reasonable Medical Expenses mean expenses:

1. that are the lowest one of the following charges:

a. The usual and customary fees charged by a majority of healthcare providers who provide similar medical services in the geographical area in which the charges were incurred;

b. The fee specified in any fee schedule:

(1) applicable to medical payments coverage, no-fault coverage, or personal injury protection coverage included in motor vehicle

liability policies issued in the state where *medical services* are provided; and

(2) as prescribed or authorized by the law of the state where *medical services* are provided;

c. The fees agreed to by both the *insured's* healthcare provider and us; or

d. The fees agreed upon between the *insured's* healthcare provider and a third party when we have a contract with such third party.

2. incurred for necessary:

a. medical, surgical, X-ray, dental, ambulance, hospital, and professional nursing services; and

b. pharmaceuticals, eyeglasses, hearing aids, and prosthetic devices

that are rendered by or prescribed by a licensed medical provider within the legally authorized scope of the provider's practice and are essential in achieving maximum medical improvement for the *bodily injury* sustained in the accident.

Subject to 1. and 2. above, semi-private room charges are the most we will pay unless intensive care is medically required.

Insuring Agreement

We will provide *personal injury protection benefits* to an *insured* for *bodily injury* sustained by that *insured* and caused by an *automobile accident*.

Determining Reasonable Medical Expenses

We have the right to:

1. obtain and use:

a. peer reviews; and

b. medical bill reviews

of the medical expenses and services to determine if they are reasonable and necessary for the *bodily injury* sustained.

2. use a medical examination of the *insured* to determine if:

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OFFICE RECEPTIONIST, CLERK

To: Griffin, Anita
Subject: RE: OLGA MATSYUK V. STATE FARM & CASUALTY COMPANY; NO. 84686-3

Rec. 12-30-10

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Griffin, Anita [<mailto:AnitaGriffin@dwt.com>]
Sent: Thursday, December 30, 2010 11:18 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: OLGA MATSYUK V. STATE FARM & CASUALTY COMPANY; NO. 84686-3

Attached for filing in the above-referenced matter is STATE FARM FIRE AND CASUALTY COMPANY'S SUPPLEMENTAL BRIEF, as well as APPENDIX 1 to the brief.

<<State Farm_s Supplemental Brief 12-30-10.PDF>> <<State Farm_s Appendix 1 to Supplemental Brief 12-30-10.PDF>>

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