IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,052

RONNIE WOODALL, et ux.,

Petitioners,

vs.

TRAVELERS INDEMNITY COMPANY,

Respondent.

ON QUESTION CERTIFIED FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

AMICUS CURIAE FLORIDA DEFENSE LAWYERS ASSOCIATION'S AMENDED ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Plaintiffs/Appellants, Ronnie and Judith Woodall, will be referred to as "the Woodalls"; Defendant/Appellee, The Travelers Indemnity Company, will be referred to as "Travelers." Amicus Curiae Florida Defense Lawyers Association will be referred to as "FDLA."

References to the appendix will be denoted as (A. - followed by the appropriate appendix and page number).

STATEMENT OF THE CASE AND FACTS

Amicus Curiae FDLA respectfully adopts the statement of the case and facts contained in Respondent Travelers' answer brief.

SUMMARY OF ARGUMENT

This Court should not retreat from the well-reasoned principle set forth in Kilbreath that the cause of action against an underinsured/uninsured motorist carrier accrues at the time of the accident. No statutory or policy reason exists for a different accrual rule as to underinsured motorist coverage. The underinsured motorist carrier, like the uninsured motorist carrier, is in a position similar to the tort-feasors. The cause of action accrues on the date of the accident. The language in the underinsured statute existing at the time of the Woodalls claim, Section 627.727(6), Florida Statutes (1987), does not dictate a different result. Procedural requirements do not affect the accrual date.

In addition, the date the cause of action accrued against the underinsured motorist carrier is not affected by a plaintiff's failure to comply with contractual requirements. Coverage attaches at the time of the accident. This Court in Kilbreath held that contractual conditions precedent do not affect the accrual date. The Woodalls' contract stated that the Travelers would not pay underinsured coverage until limits of applicable liability policies were met and the Woodalls met conditions precedents. These clauses did not prevent the Woodalls from suing Travelers in fact or as a matter of law. The accrual date is not affected by contractual procedural requirements.

ARGUMENT

ISSUE I: WHETHER THE KILBREATH RULE THAT THE CAUSE OF ACTION AGAINST THE TORTFEASOR *AND* THE UNINSURED MOTORIST CARRIER ACCRUES ON THE DATE OF THE ACCIDENT APPLIES WHERE THE TORTFEASOR'S LIABILITY COVERAGE LIMIT IS LESS THAN THE INJURIES SUFFERED BY THE INJURED PARTY.

This Court's decision in State Farm Mutual Automobile Insurance *Co.* v. Kilbreath, 419 So. 2d 632 (Fla. 1982) established that the cause of action accrues and the statute of limitation against an uninsured/underinsured carrier begins to run on the date of the accident rather than the date of compliance with conditions precedent in the insurance contract. In this present appeal, the Woodalls argue that the Kilbreath decision should not apply to underinsured motorist coverage. Instead, the Woodalls argue that, in a suit for recovery of underinsured motorist benefits, the statute of limitation does not begin to run until (1) after the injured party has settled a claim with the liability insurer for limits of liability, and the settlement does not fully satisfy the claims for personal injuries, or (2) when the underinsured motorist carrier refuses to pay. Either rule would create an artificial distinction unsupported by law or by policy between uninsured motorist coverage and underinsured motorist coverage. The Woodalls' position should be rejected by this Court.

This Court recognized in Kilbreath that:

> [T]he cause of action for an uninsured/underinsured motorist claim arises on the date of the accident with an uninsured/underinsured

> motorist since the right of action stems from the plaintiff's right of action against the tortfeasor. The statute of limitations thus begins to run on the date of the accident rather than on the date of compliance with the conditions precedent contained in the insuring agreement.

Kilbreath, 419 So. 2d at 633. This Court stated that the uninsured motorist statute merely provides a new "procedure" by which the insured may recover his loss against his own insurer. Id. at 634. The loss arose at the time of the accident and stems from the plaintiff's right of action against the tort-feasor. As this Court recently stated in State Farm Mutual Automobile Insurance *Co.* v. Lee, 678 So. 2d **818,** 819 (Fla. 1996), the Kilbreath decision "took into account the fact that the uninsured motorist statute gives the insured the same cause of action against the insurer that he has against the uninsured/underinsured third-party tort-feasor for damages for bodily injury." Accordingly, the statute of limitations begins running against the uninsured/underinsured motorist carrier at the same time it begins running against the tort-feasor.

In short, the Kilbreath decision recognizes that the damages sought in an action against an uninsured/underinsured motorist carrier arise from the automobile accident. In fact, the Woodalls admit in page 34 of their initial brief to this Court that the personal injuries suffered by Mr. Woodall in the accident were the "basis for his cause of action" and the "measuring stick to determine whether or not Mr. Woodall had a cause of action." There was one accident, one date of injury and one date when the statute

of limitation begins to run for recovery of such injury. The underinsured/uninsured motorist statute merely provides a new "procedure" by which the injured party can recoup damages for his injuries. Kilbreath, 419 So. 2d at 634. The damages sought in a claim for uninsured or underinsured motorist coverage are those resulting from the automobile accident. Because the injury for which recovery is being sought against the tort-feasor as well as the underinsured or uninsured motorist carrier occurred during the accident, the cause of action to recover for such injuries must also accrue at the same time.

Furthermore, the public policy behind uninsured/underinsured motorist coverage is to ensure "that every insured is entitled to recover for the damages he or she would have been able to recover if the offending motorist had maintained a policy of liability insurance...Therefore, the uninsured motorist carrier should be considered the tortfeasor's liability insurer with policy limits as set forth in the uninsured motorist policy." Foremost Ins. *Co.* v. Warmuth, 649 So. 2d 939, 941 (Fla. 4th DCA 1995). The public policy behind uninsured/underinsured motorist coverage supports the rule that the statute of limitations begins to run on the date of the accident.

In addition, this Court's recent decision in Lee does not undercut this argument. Lee, 678 So. 2d at 818. In Lee, this Court held that the statute of limitations for an insurance company's failure to pay personal injury protection no-fault benefits will run when the insurer breaches its statutory

obligation to pay. Id. at 821. Because the Lee decision involved no-fault coverage, the insurance company is not in the same position as the tort-feasor and Kilbreath does not apply. Id. at 820.

Uninsured/underinsured coverage, which assumes the availability of a third party tort action, differs from no-fault coverage. Hughes v. State Farm Mutual Auto. Ins. Co., 294 So. 2d 398, 400 (Fla. 1st DCA 1974). The PIP insurer may not use substantive defenses available against the tort-feasor while the uninsured motorist carrier may. See Allstate Ins. Co. v. Boynton, 486 So. 2d 552, 557 (Fla. 1986) (substantive defenses of tort-feasor available to uninsured motorist carrier). Because the PIP insurer is not in a similar position as the tort-feasor, the running of the statute of limitations against the tort-feasor does not dictate the running of the statute of limitations against the PIP insurer. In short, the relationship between the PIP insurer and the insured is merely that of a contractual one. The date of the accident is unimportant. In contrast, claims for underinsured motorist coverage not only sound in contract but also sound in tort. See Lee, 678 So. 2d at 820; Burnett v. Fireman's Fund Ins. Co., 408 So. 2d 838 (2d DCA), review denied, 419 So. 2d 1197 (Fla. 1982).

The underinsured motorist statute relied upon by the Woodalls, Section 627.727(6), Florida Statutes (1987), does not affect the date the statute of limitations begins to run. This Court in Department of Transportation v. Soldovere, 519 So. 2d 616, 617

(Fla. 1988), held that statutory procedural requirements do not abrogate the general rule that a cause of action accrues when the injury occurs and damage is sustained. In Soldovere, the Court addressed Section 768.28(6), Florida Statutes (1981), which required that a notice of claim be filed with the Department of Insurance and a response received before suit could be brought against the Division *of* Drivers Licenses. This Court noted that the statutory conditions precedents were merely procedural requirements and did not affect the accrual of the action. The Kilbreath rule applied despite the statutory requirements.

Likewise, Section 627.727(6), Fla. Stat. (1987), merely established a procedure by which the injured party may recover underinsured motorist coverage. The Woodalls contend that the following language in Section 627.727(6), establishes the date in which the statute of limitations begins to run against an underinsured motorist carrier:

> If an injured party or in the case of death, the personal representative agrees to settle a claim with a liability insurer and its insured for the limits *of* liability, and such settlement would not fully satisfy the claim for personal injuries or wrongful death so as to create an underinsured motorist claim against the underinsured motorist insurer... however, in such action [against the underinsured motorist insurer], the liability insurer's coverage must first be exhausted before any award may be entered against the underinsured motorist carrier....

The Woodalls argue that this language in 627.727(6), Fla. Stat. (1987), creates a statutorily mandated accrual date which overrules Kilbreath. The Woodalls' interpretation is incorrect. This language merely establishes the 1987 procedure that must be followed by an insured before recovery may be made against the

underinsured carrier. The language does not alter the fact that the claim against the underinsured carrier arose when the injured party was injured by an underinsured motorist. The date in which the statute of limitations begins to run does not change each time the underinsured carrier statute is amended to reflect altered procedures. Statutory procedural requirements do not alter the date the cause of action accrues and the statute of limitations begins to run. Soldovere, 519 So. 2d at 617.

The Woodalls' focus on specific statutory procedures for uninsured/underinsured motorist carriers fails to recognize that Florida law clearly allows an insured to file suit against the uninsured/underinsured carrier even if the tortfeasor is not sued. Hartford Ins. *Co.* v. Minagorri, 675 So. 2d 142, 143-44 (Fla. 3d DCA 1996) (neither statutory provisions nor contract terms required injured party to proceed against tort-feasor or FIGA before suing UM carrier); see also Jones v. Integral Ins. Co., 631 So. 2d 1132, 1133 (Fla. 3d DCA 1994)(argument that must file suit against tort-feasor before suing UM carrier has been "long decried by Florida law"); Soliday v. State Farm Mutual Ins. Co., 497 So. 2d 717 (Fla. 3d DCA 1986)(per curiam); Arrieta v. Volkswagen Ins. Co., 343 So. 2d 918 (Fla. 3d DCA 1977).

Finally, the Woodalls argue that the accrual date of a cause of action against underinsured motorist coverage differs from that of an uninsured motorist carrier because a different statutory procedure must be followed. The Woodalls argue that the 1987 amendment to Section 627.727(6) provided a separate statutory

scheme for underinsured coverage and mandates a different accrual date. Section 627.727(6), Fla. Stat. (1987). Again, procedural requirements do not affect the date the statute of limitations begin to run. Soldovere, 519 So. 2d at 617. In addition, underinsured coverage is a subset of uninsured coverage. Arrieta, 343 So. 2d at 921; Dewberry, 363 So. 2d at 1081 n.5 (references to uninsured coverage encompasses underinsured coverage because statutory definition of uninsured vehicle at time included underinsured vehicles). At the time of the Kilbreath decision the uninsured motorist statute encompassed underinsured motorist coverage. See Dewberry v. Auto-Owners Ins. *Co.*, 363 So. 2d 1077, 1081 n.5 (Fla. 1978). Kilbreath applies to underinsured coverage.

No policy reason exists for an injured party who is entitled to underinsured benefits to be in a better position than an injured party who is entitled to uninsured benefits. In Dewberry, this Court recognized that the uninsured motorist statute was only intended to allow the insured the same recovery which had been available to the insured had the tort-feasor been insured to the same extent as the insured himself. "It could not have been intended to place the insured who was injured by an underinsured motorist in a better position than one who was harmed by a motorist having the same insurance as the insured". Dewberry, 363 So. 2d at 1081. The cause of action for underinsured and uninsured motorist coverage should accrue at the same time, Otherwise a plaintiff's misunderstanding of whether the tort-feasor has liability coverage could result in unjust results. While the plaintiff is waiting for

the cause of action for underinsured benefits to "accrue" under the Woodalls' analysis, the statute of limitations will run as to uninsured benefits if in fact the tort-feasor is uninsured or becomes "uninsured" because of insurance company insolvency. When the statute of limitations runs should not depend upon whether the tort-feasor's liability coverage is exceeded by the amount of damages suffered by the injured party. Whether the tort-feasor had liability insurance should not affect the accrual date. By way of illustration, the following chart shows the inconsistencies in the Woodalls' approach:

Statute of Limitations Runs Five Years from Date of Accident	**Statute of Limitations Runs From Date Settlement with Tort-Feasor Does Not Satisfy Claim**
Tort-Feasor is uninsured. Injured party has uninsured coverage.	
Tort-Feasor has liability coverage. Injuries within coverage limits.	
Tort-Feasor has liability coverage. Injuries not within coverage limits but injured party does not have underinsured motorist coverage.	
	Tort-Feasor has liability coverage. Injuries exceed limits, and injured party has underinsured motorist coverage

In conclusion, the cause of action for recovery of injuries suffered in an motor vehicle accident accrues as of the date of the accident. The uninsured/underinsured motorist statute places the

underinsured/uninsured carrier in a similar position as the tort-feasor. Accordingly, the cause of action against the underinsured/uninsured carrier accrues and the statute of limitations begins to run on the date of the accident. The public policy behind uninsured/underinsured coverage dictates such a rule.

The uninsured/underinsured motorist statute merely provides a different "procedure" by which the injured party's damages may be recovered. The Woodalls as a matter of law could have brought suit against Travellers at any time. The fact that a tort-feasor had liability insurance should not result in the delay in the running of the statute of limitations. The Woodalls' argument that the running of the statute of limitations as to an underinsured carrier is totally unrelated to the date of accident will undercut established law and would undercut the policy behind underinsured and uninsured motorist coverage. This Court's decisions in Kilbreath and Soldovere dictate that the cause of action accrues at the date of the accident for underinsured motorist coverage.

ISSUE 11: WHETHER THE KILBREATH HOLDING THAT THE PROCEDURAL REQUIREMENTS IN *AN* UNINSURED/UNDERINSURED POLICY DO NOT AFFECT THE DATE THE CAUSE OF ACTION ACCRUES APPLIES WHEN THE INSURANCE POLICY STATES THE INSURER WILL NOT PAY UNTIL ALL APPLICABLE BODILY INJURY LIABILITY POLICIES HAVE BEEN USED UP.

The uninsured/underinsured motorist statutes provide a procedure by which an injured party may recover losses against his own insurer when the tort-feasor does not have liability insurance or where the tort-feasor's liability insurance limits do not cover the extent of injury of damage to the injured party. The insured has the same cause of action against its insurer that he would have against the tort-feasor for damages for bodily injury. For both the tort-feasor and the underinsured/underinsured motorist carrier, the date on which the statute of limitations begins to run is the date of the accident. Kilbreath, 419 So. 2d at 634.

The Woodalls' policy provides that the insureds must have met all conditions precedent before bringing suit against the carrier. The policy also states that the insurer will not pay until all applicable bodily injury liability bonds or policies have been used up. (A.4, p. 17) The Woodalls characterize these clauses as "no action/exhaustion" clauses. The Woodalls argue that these contractual provisions affect the accrual date of the cause of action and the beginning of the running of the statute of limitations. Under Kilbreath and Soldovere, the Woodalls' argument must fail

In the Kilbreath decision, this Court refused to alter the accrual date and the date the statute of limitations begins to run because of conditions precedent contained in the insuring agreement. In Kilbreath, the conditions precedent were a requirement to attempt to reach an agreement with the insurance company as to the amount of damages and a requirement to arbitrate. Kilbreath, 419 ***So.*** 2d at 634. Like the Woodalls' policy, the policy in Kilbreath provided that "no action shall lie against the insurer unless as a condition precedent thereto there shall have been full compliance with all terms of the policy". Id. The Kilbreath Court noted that while the insured could not file suit against the insurance company until the conditions precedent were met, neither condition affected when the cause of action arose because the conditions precedent were merely "remedies" to exhaust before suit, Id. Similarly, a statement in a policy that claims will not be paid until the liability limits of other policies have been used up also should not affect when the cause of action arose.

In a previous brief, the Woodalls argued that the contractual language complained of does not constitute a condition precedent but instead is a condition subsequent. The Woodalls explained that "conditions subsequent" apply after the risk has attached (A.3, p.22). This argument correctly recognizes that the conditions in the Woodalls' contract do not affect the accrual of the cause of action and the related attachment of the risk.

The contractual language on its face does not affect the accruing of the cause of action. The language recognizes that

coverage already exists even though procedural requirements have not been met by the insured:

> Legal action may not be brought against *us* under any coverage provided by this policy, unless the insured has fully complied with all the provisions of the policy.

(A.4, p.17)(emphasis added) The language at issue does not affect whether coverage exists and the corresponding accrual of the cause of action but only deals with procedural matters. The Travelers' policy language at issue does not affect the establishment of coverage, but instead only affects the recovery of coverage. Furthermore, the plain language of the "condition" as to exhaustion of policy limits does not even require any action to be taken by the Woodalls, it merely states a time of payment by the insurer.

In addition, the Woodalls' argument that somehow they were prevented from filing suit by this language is unsupported by the record evidence. The Woodalls knew or should have known that case law established their right to file suit against Travelers. See Apodaca v. Old Security Casualty Ins. *Co.*, 348 So. **2d** *677* (Fla. **3d** DCA 1977) (insured could file suit even when contract stated that no suit could be brought until after judgment was obtained against the tort-feasors; Arrieta, 343 So. 2d at 918. The Travelers did not advise the Woodalls that they could not file suit because of the contractual language and then thereafter state that the contractual language was invalid and did not bar a suit. No factual support exists for estoppel. The Woodalls could have and should have filed suit against Travelers during the statute of limitations period.

In any event, the Woodalls' policy language, like the policy language in the Kilbreath decision, merely sets up procedural requirements which do not affect the running of the statute of limitations. Kilbreath, 419 So. 2d at 634; Soldovere, 519 So. 2d at 617. When the statute of limitations begins to run should not be dependent on actions taken by the person against whom the statute of limitations is applied.

In summary, the case law is clear that the Woodalls could have and should have filed suit against Travelers prior to the running of the statute of limitations. The Woodalls failed to do so within the statute of limitations period. Accordingly, the trial court appropriately granted summary judgment in favor of Travelers, and the First District Court of Appeal appropriately affirmed the summary judgment.

CONCLUSION

The certified question should be answered in the positive. Kilbreath applies to this case. The Kilbreath decision dictates that contractual provisions which require action to be taken by an insured before recovery of uninsured/underinsured motorist benefits do not affect the time the statute of limitations begins to run. Because the uninsured/underinsured motorist carrier is in a similar position as the tort-feasor, the statute of limitations against the underinsured/uninsured motorist carrier begins to run on the date of the accident. No public policy or statutory support exists for treating an underinsured motorist carrier differently from an uninsured motorist carrier because the only difference is whether the tort-feasor had liability insurance.

The decision of the First District Court of Appeal should be affirmed.

Respectfully submitted,

TAYLOR, DAY, CURRIE & BURNETT, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to DEBORAH C. DRYLIE, ESQUIRE, counsel for Appellee Travelers, Post Office Box 1526, Gainesville, Florida 32602; SUSAN J. SILVERMAN, ESQUIRE, counsel for Amicus Curiae American Trial Lawyers Association, 1800 Second Street, Suite 819, Sarasota, Florida 34236; ROBERT J. DENSON, ESQUIRE, counsel for Appellant Woodall, 3000 N.W. 83rd Street, Gainesville, Florida 32606-6200; and RICHARD J. DELMOND, ESQUIRE, counsel for Appellant Woodall, 9211 N. W. 13th Place, Gainesville, Florida 32606, this 26th day of February, 1997.

ATTORNEY

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RONNIE WOODALL and
JUDITH WOODALL,

Appellants,

v.

TRAVELERS INDEMNITY COMPANY,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 95-3293

Opinion filed September 11, 1996.

An appeal from the Circuit Court for Alachua County.
Nath C. Doughtie, Judge.

Robert J. Denson & Richard J. Dclmond, of Robert J. Denson, P.A., Gainesville, for Appellant.

Deborah C. Drylie, of Jones, Carter & Drylie, P.A., Gainesville, for Appellee.

MICKLE, J.

Appellants, Ronnie Woodall and his wife Judith Woodall, appeal a final summary judgment declaring their action for uninsured (UM) motorist benefits barred by the statute of limitations. We affirm on the authority of State Farm Mutual Automobile Insurance Co. v. Kilbreath, 419 So. 2d 632 (Fla. 1982). However, we certify a question of great importance based on the facts of this case.

On **December** 15, 1387, while insured by the Travelers Indemnity Company **(Travelers)**, Ronnie Woodall was injured in an automobile accident caused by an underinsured motorist. The Travelers policy held by Woodall contained the following pertinent provisions:

> We will pay damages that the insured is **legally** entitled ***to*** recover from the owner or operator of an uninsured motor vehicle because of bodily injury suffered by the insured and caused by accident. Liability for such damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.
>
> We will make payment under this coverage only after the limits of liability have been used up under all applicable bodily injury liability bonds or policies.
>
> The insured's right to recover these **damages** from the owner or operator of an uninsured motor vehicle and the amount of these damages will be agreed to **by** the insured and us. Disagreement as to such right or amounts of damages will **be** settled by arbitration upon written request *of* the insured or us.
>
> * * *
>
> Legal action may not be brousht against us under any coverage provided under this policy, unless the insured has fully complied with all the provisions of the policy.

(Emphasis added).

On **September** 9, 1993, almost six years after the accident, the tortfeasor's **bodily** injury liability limit of $10,000.00 was tendered tb the Woodalls. Thereafter, the Woodalls submitted a claim for UM coverage under their policy with Travelers. When the claim was denied on November 12, 1993, the Woodalls immediately filed the instant lawsuit against Travelers for recovery *of* UM

benefits. Travelers in turn moved for summary judgment on the grounds that the statute of limitations barred the action. The lower court entered summary judgment in favor of Travelers, citing as authority the Florida Supreme Court's holding in Kilbreath that a cause of action for an uninsured/underinsured motorist claim arises on the date of the accident with an uninsured/underinsured motorist since the right of action stems from the plaintiff's right of action against the tortfeasor

In Kilbreath, the plaintiff's policy language provided that no action shall lie against the insurer unless, as a condition precedent thereto, there shall have been full compliance with, the terms of the policy. The two pertinent conditions precedent therein were (1) an effort to agree amicably on the issue of entitlement and amount of damages, and failing that, (2) arbitration. The court held that, **while** both were conditions precedent to an action against the insurer, neither had any effect on when the cause of action arose. Id. at 634. Sub iudicc, the Travelers policy contains an additional proviso that payment will be made only after the limits of liability have been used up under all applicable bodily injury liability policies. Arguably, by its very terms, this clause effectively provides that the statute of limitations on the Woodalls' claim for UM benefits was not triggered until Travelers became obligated to **make** payments under the **policy** and **failed** to do so, thereby creating a cause of action on the **date the** contract was breached. Certainly, it can be argued

that while the Woodalls were awaiting the offer of the tortfeasor's policy limits, they also had the option to file an action against Travelers. However, by the very terms of the Travelers policy, the Woodalls' opportunity to recover UM benefits was obviated until the tortfeasor's liability insurer tendered payment. The tortfeasor's insurer tendered payment beyond the applicable statutory time limit under Kilbreath, and, when the Woodalls turned to Travelers for recovery, Travelers relied on the statute of limitations as a bar. Uncertain as to whether the court in Kilbreath envisioned such a result, and considering the issue presented in this appeal to be a matter of great public importance, we certify the following question to the Florida Supreme Court:

> Whether the holding in Kilbreath applies when a plaintiff's UM policy contains a no-action/exhaustion clause providing that payment will be made only after the limits of liability have been used up under all applicable bodily injury liability policies.

AFFIRMED.

WEBSTER and LAWRENCE, JJ., CONCUR.

IN THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT, IN AND FOR ALACHUA COUNTY, FLORIDA

RONNIE WOODALL and JUDITH WOODALL, his wife,

Plaintiffs,

vs

THE TRAVELERS INDEMNITY COMPANY,

Defendant.
_____/

CASE NO.: 93-4147

DIVISION: J

FINAL SUMMARY JUDGMENT

This cause came before the Court upon the Motion for Summary Judgment by the Defendant, The Travelers Indemnity Company, and the Court being fully advised in the premises, and having an Order granting Defendant's, The Travelers Indemnity company, Motion for Summary Judgment, it is hereby ORDERED AND ADJUDGED AS FOLLOWS:

1. Final Summary Judgment is entered in favor of the Defendant, The Travelers Indemnity Company. State Farm Mutual Auto Insurance Co. v. Kilbreath, 419 So.2d 632 (Fla. 1982). The cause of action for an uninsured motorist claim arises on the date of the accident with an uninsured motorist since the right of action stems from the plaintiff's right of action against the tort feasor. The action by the Plaintiffs, Ronnie Woodall and Judith Woodall, his wife, was not timely filed.

2. Based upon the above and based upon the rationale set forth in this Court's Order granting the Motion for Summary Judgment, the Court enters judgment in favor of Defendant, The Travelers Indemnity Company, and against Plaintiffs, Ronnie Woodall and Judith Woodall, his wife, and Plaintiffs shall take nothing by

this action and shall go hence without day. The Court reserves jurisdiction for the Defendant to file a notion requesting taxable costs, if any, incurred in this action.

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida, this 14 day of Aug, 1995.

ORIGINAL SIGNED BY
NATH C. DOUGHTIE
CIRCUIT JUDGE

NATH C. DOUGHTIE, CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished to Robert J. Denson, Esq., P.O. Box 2940, Gainesville, Florida 32602 and Deborah C. Drylie, Esq., P.O. Box 1526, Gainesville, Florida 32602, by U.S. Mail, this 14 day of Aug, 1995.

ORIGINAL SIGNED BY
PATRICIA D. [illegible]
JUDICIAL ASSISTANT

Judicial Assistant

DISTRICT COURT OF **APPEAL**
FIRST DISTRICT OF FLORIDA

CASE NUMBER: 95-3293

On Appeal from the Circuit Court
of the Eighth Judicial Circuit,
in and for Alachua County, Florida

Lower Case No.: 93-4147-CA

RONNIE WOODALL and JUDITH **WOODALL**

Appellants,

vs.

THE TRAVELERS **INDEMNITY** COMPANY,

Appellee.

APPELLANT'S AMENDED **INITIAL** BRIEF

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PRELIMINARY STATEMENT

Reference to the Record on Appeal will be denoted as (R -followed by the appropriate page number). Reference to the Transcripts of hearings will be denoted by (R - trans. followed by the appropriate page number).

The Plaintiffs/Appellants, Ronnie and Judith Woodall, will be referred to as "the Woodalls"; Defendant/Appellee, The Travelers Indemnity Company, will be referred to as "Travelers".

STATEMENT OF THE CASE AND THE FACTS

On or about December 15, 1987, John D. Stewart., Jr. was operating a motor vehicle which struck the rear of Ronnie Woodall's vehicle causing it to go out of control and roll over a distance of 88 feet before coming to rest on its wheels. As a result of the accident, Ronnie Woodall was injured.

At the time of 'chis accident, Mr. Stewart had an insurance policy with Superior Insurance Company which provided $10,000.00 coverage for bodily injury liability. Suit was filed against Mr. Stewart and it was not until September 9, 1993 that the full policy limits of this coverage were tendered to the Woodalls. As required, the Woodalls then requested Travelers' permission to settle with Mr. Stewart for his policy limits and to pursue an uninsured motorist claim. Travelers, alleging that *the* statute of limitations had run as *to* the uninsured motorist claim, refused to give consent *to* the settlement, but otherwise made no objection to the settlement. The Woodalls then accepted payment of the policy limits and subsequently released Mr. Stewart arid his liability insurance carrier from any further liability regarding this matter.

The Woodalls then turned to their own insurance carrier, Travelers, seeking benefits provided by their uninsured motorist coverage, in that the Woodalls' alleged that their damages exceeded the policy limits provided by Mr. Stewart's

policy. The Woodalls allege that on November 12, 1.333, Travelers breached its contract of insurance with the Woodalls by denying coverage under the policy, by incorrectly alleging that the statute of limitations had run.

A Complaint [R - 1] was filed on December 14, 1993 and Amended Complaints [R - 9 and R - 23] were filed on January 10, 1.994 and June 30, 1994. On July 13, 1994, Travelers filed a Motion to Dismiss Second Amended Complaint [R - 471 which was based on a theory that the statute of Limitations had run This Motion to Dismiss was denied by a detailed Order with findings of fact [R - 67] by Circuit Judge W. O. Beauchamp entered on September 27, 1994. Travelers subsequently filed a Motion for Summary Judgment [R - 183] on July 28, 1995, again under the same theory that the statute of limitations had run. Circuit Judge Nath C. Doughtie, ignoring the fact findings of Circuit Judge W.O. Beauchatnp, entered his Order Granting Motion for Summary Judgment [R - 233] which was filed on August 10, 1995. The Final Summary Judgment [R - 237] was entered on August 15, 1995

The applicable statutes are section 627.727, Florida Statutes (1987); Section 95.11 (2)(b), Florida Statues; Section 95.03, Florida Statutes; and Section 95.031, Florida Statutes. The express language of the Travelers uninsured motorist insurance policy provides:

> We will make payment under this coverage only after the limits of liability have been used up under all applicable bodily injury liability bonds or policies.

The express language of the Travelers policy also provides:

> Legal action may not be brought against us under any coverage provided by this policy, unless the insured has fully complied with all the provisions of the policy.

This appeal was timely filed by Notice of Appeal [R - 245] on Septetnber 9, 1995.

SUMMARY OF ARGUMENT

The entry of Final Summary Judgment was error under the facts and law of this *case*. The lower court entered an Order Granting Summary Judgment: erroneously predicated on a theory that the statute of limitations had run. The lower court failed to correctly apply Section 627.727(6), Florida Statutes (1987), in determining when the cause of action accrued. Section 627.727(6), Florida Statutes (1987), provides that an uninsured motorist claim is created when an injured person agrees to settle a claim with a liability insurer and its insured, and such settlement would not fully satisfy the claim for personal injuries. The lower court, relying on outdated case law as authority, determined that the uninsured motorist cause of action accrued on the date of the accident, almost six years before the applicable statute provides the uninsured motorist claim was created

The Woodalls contend that the cause of action arose either at the time that the claim was created under the provisions of the applicable statute, or in the alternative at the time that Travelers breached the insurance contract by its denial of coverage, which is consistent with the general contract law of Florida. In either circumstance, suit was timely filed against Travelers before the running of the five-year statute of limitations.

The Woodalls further contend that the plain language of the insurance policy, which includes a "no action" provision

that precludes litigation of any cause of action until certain conditions subsequent set forth in another provision of the policy are satisfied, must: be construed as tolling the statute of limitations from running until the conditions subsequent are satisfied.

An insurance contract is essentially an adhesion contract in which the insureds have no opportunity to negotiate terms. The insurer drafts the insurance contract and the insureds must, without benefit of negotiation, accept the language as drafted by the insurer.

Travelers is the drafter of the insurance contract. The Woodalls complied with the express terms of the contract drafted by Travelers and did not bring an action until the conditions subsequent were satisfied. Travelers now argues that the "no action" provision it drafted is void as against public policy. Travelers should be estopped from precluding the Woodalls from bringing suit under a "no action" provision, then claiming that the statute of limitations has run during the period that its "no action" provision precluded the Woodalls from filing suit, and then, after the statute of limitations has allegedly run, arguing that the "no action" provision is void as against public policy and that the Woodalls should have known the "no action" provision was void as against public policy and filed suit in contravention to the express language of the insurance policy.

The Woodalls were lulled or deceived into a false sense of security, relying on the express terms of the contract drafted by Travelers, believing they had no cause of action until after a settlement was reached with the uninsured motorist.

The terms contained in an insurance contract must be given their plain, unambiguous and common meaning. Where contractual language is clear and unambiguous, the contract must be enforced as written. The "no action" provision should be construed as contractually tolling the statute of limitations until such time as *the* conditions subsequent are satisfied.

ARGUMENT

ISSUE I: **WHETHER AN UNINSURED MOTORIST CLAIM AFTER 1977 IS CREATED ON THE DATE OF THE ACCIDENT OR ON THE DATE WHEN THE INJURED PERSON AGREES TO SETTLE A CLAIM WITH THE LIABILITY INSURER AND ITS INSURED AS STATED IN THE UNINSURED MOTORIST POLICY?**

The Woodalls and Travelers are in agreement that §95.11(2)(b), Florida Statues, providing for a five-year statute of limitations for actions based on contract, is the applicable statute of limitations to be applied in this cause of action. Hartford Accident & Indemnity Company v. Mason, 210 So.2d 474 (Fla. 3d DCA 1968). See also, Burnett v. Fireman's Fund Insurance Company, 408 So.2d 838 (Fla. 2d DCA 1982), rev. den. 419 So.2d 1197 (Fla. 1982). However, it is the Woodalls' position that the lower court erred in determining that the five-year statute of limitations had run, thereby granting Final Summary Judgment against the Woodalls. The lower court determined that the cause of action accrued on the date of the accident rather than upon the date of the breach of contract, and that more that than five years had elapsed between the date of the accident and the filing of the complaint which is the subject of the litigation. This was error.

The accident occurred on December 15, 1987. The applicable statute in force at the time of the accident was Section 627.727(6), Florida Statutes (1987), and it provides in pertinent part:

> If an injured person .... agrees to settle a claim with a liability insurer and its insured, and such settlement would not fully satisfy the claim for personal injuries .... so as to create an underinsured motorist claim, then written notice of the claim for personal injuries must be submitted by certified or registered mail to all underinsured motorist insurers that provide coverage. The underinsured motorist insurer then has a period of 30 days after receipt thereof to consider authorization of the settlement or retention of subrogation rights. If an underinsured motorist carrier authorizes settlement or fails to respond as required by paragraph (b) to the settlement request within the 30-day period, the insured party may proceed to execute a full release in favor of the underinsured motorist's liability insurer and its insured and finalize the proposed settlement without prejudice to any underinsured motorist claim. (Emphasis added).

The statute provides that an uninsured motorist claim is created at the time that an injured person agrees to settle a claim with a liability insurer and its insured, and such settlement does not fully satisfy the claim for personal injuries. The "so as to create an uninsured motorist claim against the uninsured motorist carrier" language was first enacted as the law of Florida in 1977. Section 627.727(6), Florida Statutes (1977).

Travelers filed a Motion for Summary Judgment (R - 183) under a theory that the statute of limitations had run. The authority relied upon by Travelers is State Farm Mutual Automobile Ins. Co. v. Kilbreath, 419 So.2d 632, 633 (Fla 1982) in which the Supreme Court held that "[t]he cause of

action for an uninsured/underinsured motorist claim arises on the date of the accident with an uninsured/underinsured motorist since the right of action sterns from the plaintiff's right of action against the tortfeasor." Relying on Kilbreath, the lower court granted Travelers' Motion for Summary Judgment and entered Final Summary Judgment.

The accident which gave rise to the action in Kilbreath occurred on June 11, 1972. Id. at 632. The applicable law of Florida at the time of the Kilbreath accident was Section 627.727, Florida Statutes (1972), and that statute was silent as to when an uninsured motorist claim was created. Five years after the Kilbreath accident, the Florida legislature enacted Section 627.727(6) which provided that an uninsured motorist claim is created at the time that an injured person agrees to settle a claim against the liability insurer and its insured for the limits of the liability coverage and such settlement would not fully satisfy the claim for personal injuries. This is consistent with the language in the uninsured motorist provisions of the Travelers policy.

The controlling law at the time of the Kilbreath accident was the 1972 statute, and the Florida Supreme Court properly applied that law in determining Kilbreath. The 1972 statute was silent as to when an uninsured motorist claim is created, and the Florida Supreme Court had to apply the law as it existed at the time of the accident. However, with regard to accidents occurring after the enactment of Section 627.727(6),

Florida Statutes (1977), the statutes are not silent as to when an uninsured motorist claim is created; they provide that an uninsured motorist claim is created when an injured person agrees to settle a claim with a liability insurer and its insured, and such settlement does not fully satisfy the claim for personal injuries. By its 1977 enactment, the Florida legislature made the holding in Kilbreath obsolete for accidents occurring after the date of the statutory enactment. Although Kilbreath was finally decided by the Florida Supreme Court in 1982, the Court was bound by the controlling statutory law in force at the time of Mr. Kilbreath's accident, to-wit, the 1972 uninsured motorist statute.

The lower court erred in applying the Kilbreath decision to the case sub judice. The controlling law of the case is Section 627.727(6), Florida Statutes (1987), which clearly provides that an uninsured motorist claim is created when an injured person agrees to settle a claim with a liability insurer and its insured, and such settlement does not fully satisfy the claim for personal injuries. This is a clear and specific statutory change from the law as it existed at the time of the Kilbreath accident. The statute enacted by the legislature had the effect of overturning Kilbreath by specifically defining the events which create an uninsured motorist claim. Under the new statute, a cause of action is no longer created at the time of the accident as determined by the Kilbreath court.

ISSUE II: WHETHER A CAUSE OF ACTION UNDER *AN* UNINSURED MOTORIST INSURANCE CONTRACT IS CREATED:

(1) ON THE DATE OF THE ACCIDENT;

(2) ON THE DATE WHEN THE EVENTS SET FORTH IN THE UNINSURED MOTORIST STATUTE ARE SATISFIED *SO* AS *TO* CREATE *AN* UNINSURED MOTORIST CLAIM; OR

(3) ON THE DATE WHEN THE UNINSURED MOTORIST INSURANCE CONTRACT IS BREACHED?

Travelers' position under the Kilbreath decision is that the cause of action for the uninsured motorist claim began on the date of the accident. Travelers has not considered the effects of Section 627.727(6), Florida Statutes (1987), and would have the Court believe that the cause *of* action was barred by the statute of limitations prior to the time that the claim was created. According to the provisions of Section 627.727(6), Florida Statutes (1987), at the time the Woodalls agreed to settle their claim with Mr. Stewart and his liability insurer for policy limits and the settlement did not fully satisfy the claim for personal injuries "so as to create an underinsured motorist claim", their uninsured motorist claim first came into existence. The claim, under Florida law, did not exist before then. The sequence of events required by the applicable statute began on September 9, 1993, when **policy** limits were offered by Mr. Stewart and his liability insurance carrier. Until that time, under Section 627.727(6), Florida Statutes (1987), an uninsured motorist claim did not exist. Applying Travelers' argument to the law and the facts, the uninsured motorist cause of action, which had to be predicated upon a legal claim, was barred by the

statute of limitations approximately *ten* months before it was ever created, a result clearly not intended by the legislature. The authority relied upon by Travelers to support this position is Kilbreath. The controlling statute in Kilbreath was Section 627.727, Florida Statutes (1972), which made no provision for when an uninsured motorist claim is created. When the legislature later enacted changes to Section 627.727 and statutorily mandated the events required for the creation of an uninsured motorist claim, the Kilbreath holding was rendered obsolete with respect to when a cause of action accrues. The legislature first enacted the "so as to create an uninsured motorist claim against the uninsured motorist carrier" language as the law of Florida in 1977. Section 627.727(6), Florida Statutes (1977). Section 627.727(6), Florida Statutes (1987), which continued the "so as to create an uninsured motorist claim against the uninsured motorist carrier" language, is the law upon which this case must be determined. It is clear from a reading of the statutes that Travelers' position, though correct for accidents occurring prior to 1977, has no support in the law since 1977, and since 1977 has not been the law of Florida. Travelers position that the Woodalls' uninsured motorist cause of action was barred by the five-year statute of limitations approximately ten months before their claim was created by statute is untenable and without legal support.

There are two other reasonable positions which may be evaluated for a determination as to when the statute of limitations begins *to* run for an uninsured motorist cause of action. The first is whether the cause of action begins on the date that the claim is created under the statute. The second is whether the cause of action begins on the date that *the* uninsured motorist contract is breached. Under either *of* these positions, the five-year statute of limitations had riot run with respect to the Woodalls' uninsured motorist claim at the time that they initiated litigation against Travelers

An uninsured motorist claim *is* created by statute at the time that the injured person agrees to settle a claim witn a liability insurer and its insured and such settlement does not fully satisfy the claim for personal injuries, so it is reasonable to consider whether a cause of action for an uninsured motorist claim *is* also created at that time.

The rights and obligations of the parties are governed by contract law, since the rights and obligations arise out of the insurance contract. "Without the policy there would be no claim against the company, and it is apparent that the limitation applicable should he that pertaining *to* written agreements." Hartford Accident & Indemnity Company v. Mason, 210 So.2d 474, 475 (Fla. 3d DCA 1968). In Bolin v. Massachusetts Bay Insurance company, 518 So.2d 393, 394 (Fla. 2nd DCA 1988) the Second District Court of Appeal held to the position "that despite the fact that an uninsured motorist

stands in a tort relationship to the company, the action arises out of an insurance contract between the parties."

Any determination concerning when the statute of limitations begins to run for an uninsured motorist cause of action must include an anaiysis of contract law. There is no Florida case which is exactly on point with the case sub judice. However, the Delaware Supreme Court in a cogent analysis addressed the specific issue of when a statute of limitations begins to run in an action to recover uninsured motorist benefits. Allstate Insurance Company v. Spinelli, 443 A.2d 1286 (Del. Super. Ct. 1982). Spinelli was injured in an automobile accident on August 28, 1976. He filed a personal injury suit against the tortfeasor (Gilday) who caused the accident and in March, 1979, obtained a default: judgment against Gilday. Spinelli was awarded a judgment of $16,000.00 in September, 1373. When the judgment: was determined to be uncollectible the following month due to the insolvency of the liability insurer, Spinelli, for the first time, informed Allstate of Gilday's uninsured status and sought information regarding the uninsured motorist provisions of his policy with Allstate.

On December 10, 1979, Spinelli filed suit against Allstate for recovery under his uninsured motorist benefits. Spinelli and Allstate agreed to arbitration, but before the arbitration hearing was held, Allstate withdrew, answered Spinelli's complaint and then moved for judgment on the

pleadings alleging the statute of limitations had run. The lower court ruled in favor of Spinelli and Allstate then appealed. The issue before the Delaware Supreme Court was the timeliness *of* Spinelli's suit. The Court held that "[u]nder general principles of contract law, the time limitation *of a* contract claim limitation statute begins to run from the date of the breach of contract." Id. at 1292. The court went on to state:

> Established contract: case law thus recognizes that until a breach occurs, there is no justiciable controversy under the contract (here a policy) upon which a party may sue. So long as the parties to a contract perform in accordance with the bargained-for obligations, no party has cause *to* complain. It is only when one party contends the other party has ceased to perform in violation of the contract that a justiciable controversy exists. Id.

The Spinelli Court, in ruling that uninsured motorist coverage claims are controlled by the applicable contract statute of limitations, stated that: there are compelling reasons for this which have to with contractual obligations. The claim against the insurance company exists solely by reason *of* the coverage provided by the policy, without which there "could be no conceivable basis for recovery against the insurer. The personal injuries suffered by a plaintiff are thus not the basis of the cause of action but merely the basis for measuring the damages sustained." Id. at 1290. The Court also stated that uninsured motorist benefits are not an immediately assertable right and that a claim for these

benefits becomes operative only after the injured party has established a legal entitlement to recover damages from the uninsured motorist. A claim for uninsured motorist benefits *doe:;* not arise on the date of the accident and is only indirectly related to the accident itself. The Court stated that Spinelli had no assertable claim against Allstate for uninsured motorist benefits until. he had established his legal right to recover damages and had determined that Gilday's status was that of an uninsured motorist. Id. at 1291. This is identical to the Woodalls' situation. The Woodalls had no assertable claim until the requirements of Section 627.727(6), Florida Statutes (1987), had been satisfied and a claim had been created according to statute and their insurance policy with Travelers. Under the Spinelli reasoning, the act which created the cause of action which allowed the Woodalls to bring suit against Travelers was Travelers' breach of contract, the breach being Travelers' denial of uninsured motorist coverage evidenced by its letter of November 12, 1993 to the Woodalls' attorney.

The reasoning in Spinelli is consistent with the general law of Florida on contracts. Briggs v. Fitzpatrick, 79 *So.*2d 848 (Fla. 1955), reh. den. May 23, 1955, involved an action to collect payment for nursing services to the deceased and for the control and care of his home for a number of years prior to his death. Briggs alleged in her complaint that she had an express "oral contract to perform services, when requested,

during the lifetime of the decedent, for which payment was to be postponed until the death of the decedent . . ." Id. at 851. The Florida Supreme Court held that:

> In such a situation the law is that the period of limitations does not begin to run, in the absence of a repudiation *of* the contract by one of the parties, until the death of the promisor, for the reason that: the debt is not due until that time. Id.

In its ruling, the Supreme Court set forth the definitive guideline for determining the event which creates the right to bring suit and which begins the running of the statute of limitations.

The facts in Briggs, while dissimilar to this case, allow for a cogent analogy to be drawn to the case sub judice. The uninsured motorist provisions of the Travelers insurance contract provide, "We will make payment under this coverage only after the limits of liability have been used up under all applicable bodily injury liability bonds and policies." This policy language is consistent with Section 627.727, Florida Statutes (1987). The obligation for payment in the Briggs case did not become due and payable until the death of the decedent, and a breach of the contract could not occur before that time. In the Woodalls' case, an obligation to pay uninsured motorist benefits', as provided for in the explicit terms of the insurance contract and also in the uninsured motorist statute in force at the time of the accident, did not become due and payable until after all the limits of liability under all liability policies were used up, and a breach of the

contract could not occur before that time. It is well established under Florida contract law that the statute of limitations for a breach of contract begins to run from the date of the breach.

Using the "plain language" of both the statute and the Woodalls' insurance policy, it is evident that the event giving rise to a cause of action against Travelers was Travelers' denial *of* coverage after the limits of liability had been used up under the applicable bodily injury liability policies. Until that time there was no cause of action that could have been brought by the Woodalls.

Section 95.03, Florida Statutes, provides that "[a]ny provision in a contract fixing the period of time within which an action arising out *of* the contract may be begun at a time less than that provided by the applicable statute *of* limitations is void." (Emphasis added.)

The computation of time for a determination of when the statute of limitations begins to run is set forth in Section 95.031, Florida Statutes, and in pertinent part, provides as follows:

> Except as provided in subsection (2) and in *s.* 35.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitations runs from *the* time the cause of action accrues.
>
> (1) A cause of action accrues when the **last element constituting the cause of action occurs**. Section 95.031, Florida Statutes. (Emphasis added.)

Under the general contract law of Florida, there must be a breach of contract before there can be a cause of action for breach of contract. It is axiomatic that without a breach of the contract there can be no cause of action for beach of contract. Section 95.031(1) Florida Statutes, provides that "[a] cause of action accrues when the last element constituting the cause of action occurs", and this would require that a breach of the contract has occurred before a cause of action can accrue. As a bare minimum requirement under Section 95.031(1), Florida Statutes, the breach of contract must occur before a cause of action can accrue, and in the case sub judice the breach of contract did not occur until Travelers denied coverage on ~~October~~ November 12, 1993

The relationship between the Woodalls and Travelers is a contractual relationship. Under Section 627.727(6), Florida Statutes (1987), an uninsured motorist claim is created when an injured person agrees *to* settle a claim with a liability insurer arid its insured, and such settlement would not fully satisfy the ciaim for personal injuries. Under Section 95.031(1), Florida Statutes, a cause of action does not accrue until the last element constituting the cause of action occurs. Since a cause of action for breach of contract cannot come into existence until there is a breach of the contract, the cause of action cannot accrue under Section 95.031(1), Florida Statutes, until there is a breach of contract. Given Florida's statutory scheme, it is consistent: with the

statutory law of Florida to conclude that an uninsured motorist cause of action accrues at the time that the contract is breached, and of necessity this would have to be at some point in tine after the claim is created under Section 627.727(6), Florida Statutes (1987).

The only relationship the uninsured motorist brings to the equation is his or her limits of liability coverage and it is only when the injured party's damages exceed this limit and the injured party has been tendered the limits of the liability policy that he or she has a right to turn to his or her uninsured motorist insurance carrier, either under the insurance contract or under the Florida statutes. Even though it is the accident which gave rise to the damages complained of, it is the uninsured motorist insurance contract and the statutes of Florida upon which the rights and obligations of the parties are determined. The contract the Woodalls entered into is with Travelers, and not the uninsured motorist. Until Travelers breached the contract, there could be no contract cause of action under Florida law.

It is clear that the Woodalls suit against Travelers was not barred by the statute of limitations, irrespective of whether a cause of action accrued at the time the uninsured motorist claim was created on September 9, 1993, or accrued at the time of the breach of insurance contract on November 12, 1993, since the Complaint [R -1] was timely filed on December 14, 1993.

ISSUE III: **WHETHER** *AN* **INSURANCE** CONTRACT **PROVIDING UNINSURED MOTORIST BENEFITS** *CAN,* **BY ITS LANGUAGE,** TOLL **THE RUNNING OF THE STATUTE OF LIMITATIONS?**

The Woodalls contend that the express language *of* two provisions of the Travelers insurance contract must he construed together under Florida law to toll the running of the statute of limitations.

The language of the first contract provision is a "no action" clause which states:

> Legal action may not he brought against us under **any** coverage provided by this policy, unless the insured has fully complied with all the provisions *of* the policy.

The language of the second contract provision states:

> We will make payment under this coverage only after the limits of liability have been used up under all applicable bodily injury liability bonds of policies.

Travelers contends that an uninsured motorist cause of action accrued on the date of the accident, citing the Kilbreath case as authority. However, the explicit language of the Travelers *contract* of insurance precludes the insured from bringing a legal action against travelers "unless the insured has fully complied with all the provisions of the policy", to-wit, "only after the limits of liability have been used up under all applicable bodily injcry liability bonds or policies". Travelers has placed itself in the untenable position of simultaneously saying that (1) a cause of action has accrued, but (2) no legal action may be brought for that

accrued cause of action until all the limits of liability have been used up under all applicable bodily injury liability bonds or policies, and (3) the statute of limitations ran during the time that the express terns of the insurance contract precluded the insured from filing suit for their accrued cause of action.

'Travelers claims that these provisions create a condition precedent akin to those addressed in the Kilbreath case which held that the "statute of limitations .... begins to run on the date of the accident rather than on the date of compliance with the conditions precedent contained in the insuring agreement:." Kilbreath at 633. Travelers argument is flawed, in that these insurance policy provisions create a condition subsequent, not a condition precedent, as stated in 30 Fla. Jur. 2d Insurance §567:

> Conditions in policies of insurance are part of the consideration for assuming the risk, and the insured, by accepting the policy, becomes bound by the conditions therein expressed. There are two kinds of conditions - precedent and subsequent. A condition precedent is one that is to be per-formed before the contract: becomes effective, while a condition subsequent pertains to the contract: of insurance after the risk ha5 attached and during its existence.

The "conditions" required of the Woodalls are conditions subsequent in that the risk has to have attached before any thought may be given to whether "the limits of liability have been used up under all applicable bodily injury liability bonds or policies." As a consequence, Kilbreath is

completely distinguishable from the case sub judice.

The "compliance with the conditions precedent" in Kilbreath were described *as* contractual remedies against State Farm. The policy language under consideration here that appears in the Woodalls' contract with Travelers, does not provide for remedies against Travelers. The policy language in the Woodalls' insurance contract with Travelers forms a "no action" provision, which is materially different from a remedy, and requires that the Woodalls settle with the uninsured motorist. who is not a party to the insurance contract, before bringing suit against Travelers. The Kilbreath Court, on the other hand, pointed out that Mr. Kilbreath's insurance policy provided two remedies against State Farm which he had to exhaust before he could sue State Farm. The two remedies, amicable settlement and arbitration, were said by the court to be "conditions precedent to an action against the insurer, but neither has any effect on when the cause of action arises." Id. at 634. These remedies applied only to the parries to the insurance contract and did not involve the tortfeasor.

The Woodalls' insurance contract with Travelers states "[l]egal action may not be brought against us under anv coverage provided by this policy. unless the insured has fully complied with all the provisions of the policy." The policy further states "[wle **will make** payment under this coverage only after the limits of liability have been used up under all

applicable bodily injury liability bonds or policies." The language in the Woodalls' policy *is* materially different from that in Kilbreath in that it: does not provide a remedy against Travelers, and in fact, precludes seeking a remedy against Travelers. The events which must occur before an action may be brought against Travelers involves others who are not a party to the insurance contract; namely, the third party tortfeasor and/or his or her insurance carrier. Circuit Judge W.O. Beauchatnp recognized this distinguishing factor in Kilbreath when he entered his detailed Order [R - 671 on September 27, 1994, denying Travelers' Motion to Dismiss Second Amended Complaint [R - 47]. However, Circuit Judge Nath C. Doughtie, ignored the findings of Circuit Judge W.O. Beauchamp, and entered his Order Granting Motion for Summary Judgment [R - 233] filed on August 10, 1995. This was error

The underlying Kilbreath case which was subsequently appealed *to* the Florida Supreme Court was Kilbreath v. State Farm Mutual Automobile Insurance Company, 401 So.2d 846, (Fla. 5th DCA 1981), reh. den. August 4, 1981. On appeal, the Florida Supreme Court, based its decision, in part, on the dissent of Judge Sharp in the Fifth District's opinion. Judge Sharp, in her dissenting opinion, stated that the Kilbreath *case* was distinguishable frotn a no action provision in an insurance contract. Kilbreath 401 So.2d *at* 847. The "no action" provision in the Woodalls' contract with Travelers prevented the Woodalls from filing suit for any cause of

action until after the limits of liability had been used up under all **applicable** bodily injury liability bonds or policies. Travelers now argues that the statute of limitations has run during the same period ior which its policy language provides that "no action can be brought against us." Under the facts of the case sub judice, Travelers argues that the only time in which the insured could have filed suit against the insurer under the statute of limitations *is* the period in which the insurer's policy language specifically precluded the insured from filing suit.

It is well established in Florida law that where the insurance contract language *is* clear and unambiguous, it must be enforced as written.

> Under Florida law, a trial court must construe an insurance contract in its entirety, striving to give every provision meaning and effect. To further this goal, the terms contained in an insurance contract must be given their plain, unambiguous and common meaning. Thus, where contractual language is clear and unambiguous, there is no need for judicial construction and the contract must be enforced as written. Florida Power & Liaht Company v. Penn America Insurance company, 654 So.2d 276 (Fla. 4th DCA 1995). (Citations omitted; emphasis added.)

> Terms in insurance policies, like terms in a statute, should be accorded their plain and unambiguous meaning. Where the plain meaning of terms contained in an exclusion is not ambiguous, there is no occasion for employing tne rule of construction against the insurer, and the court simply applies the plain meaning

> provision. (Citations omitted) Old Dominion Insurance Company v. Elysee, Inc., 601 So.2d 1243, 1245 (Fla. 1st DCA 1992).

Travelers is the drafter of the insurance contract. It was not drafted by the Woodalls. An insurance contract is essentially an adhesion contract in which the insureds have no opportunity to negotiate terms. The insurer drafts the insurance contract and the insureds must, without exception or negotiation, accept *the* language as drafted by the insurer. Travelers should be estopped from using certain policy language to preclude its insured from bringing suit under a "no action" provision, then claim that the statute of limitations has run during the period that its policy language precluded the insured from filing an action, and then, after the statute of limitations has allegedly run, argue that its own "no action" provision is void as against public policy and the insureds should have known the policy language was void as against public policy and filed suit in contravention to the explicit language of the policy. Because the Woodalls followed the terms of their contract with Travelers, they are now told they have no right to bring an action. Under the express language of the insurance contract drafted by Travelers, the Woodalls were lulled into a false sense of security, believing they had no cause of action until after a settlement was reached with the uninsured motorist.

Travelers claims that the "no action" policy language which the Woodalls relied upon is invalid and unenforceable,

citing as authority Liberty Mutual Insurance v. Rever, 362 So.2d 390 (Fla. 3d DCA 1978). (R - trans, P. 8). However, 'Travelers fails to recognize that the controlling law in Rever was Section 627.727, Florida Statures (1975), prior to the 1977 statutory enactment of Section 527,727(6), Florida Statutes (1377), which provided for the events required to create an uninsured motorist claim. Moreover, the case was decided in favor of the insured and against the insurer. The case did not involve a claim that the statute of limitations had run. The First District addressed this issue in Newton v. Auto-Owners Insurance Company, 560 So.2d 1310 (Fla. 1st DCA 1990), reh. den., June 5, 1990. The Newtons appealed an adverse summary judgment: on their claim for uninsured motorist coverage. The First District states the issue *as* being:

> ....whether *a* Florida insured must meet the threshold requirements of section 627.737(2), Florida Statutes (1984), when the claim is based upon the alleged negligence of an uninsured, nonresident motorist, and where the subject policy does not require the insured to meet such threshold requirements, and specifically states under the uninsured motorist provision that the company will pay damages for bodily injury which the insureds are legally entitled to recover from the owner or driver of an uninsured motor vehicle.

Id. at 1311. The First District defined the critical question to be whether the insurance carriers should be bound by the language of their contracts with the insureds, or whether they should be afforded the exemption from tort liability available under the provisions of sections 627.727(7) and 627.737(2),

Florida Statutes. The First District held that the insurance carriers should be bound by the language of their contracts reasoning that:

> Reasons for holding the insurers *to* the terms of their agreement include the rule that the terms of a contract should be construed strictly against the party drafting the agreement, and that policy language should be construed liberally in favor of the insured, and strictly against the insurer so as to effect the dominant purpose of payment. . . . An additional reason *for* holding the insurer to the terms of its contract with its insured is that the policyholder pays an additional premium for such coverage, and the carrier pays only if the tortfeasor would have to pay. Moreover, the insurer may bring suit against the tortfeasor to recover all sums it has paid its insured under the uninsured motorist provision of the subject policy. (Citations omitted)

Id. at 1312.

'Travelers is bound by the language of its policy as well as by Florida Statute, hut makes the claim that there is "[n]othing in Florida Statute 627.727 (which) indicates that an insured must exhaust all benefits available from all other sources before being eligible to recover under his own U.M. vehicle coverage." (R - trans P 8). In 1987, the year Mr. Woodall was involved in the accident, Section 627.727(6), Florida Statutes (1987), provided that: ".... the liability insurer's coverage must first be exhausted before any award may be entered against the underinsured motorist insurer .... Any award in such action against the liability insurer's insured is binding and conclusive as to the injured person and

underinsured motorist insurer's liability for damages up to its coverage limits."

The law of this state is a basic ingredient of every contract. "The law in existence at the time *of* the making of a contract: forms a part of that contact. as if it were expressly referred to in its terms." National Merchandise Co., Inc. v. United Service Automobile Association, 400 So.2d *526,* 531 (Fla. 1st DCA 1981).

Moreover, as was discussed earlier, Section 627.727(6), Florida Statutes (1987), provides that an uninsured motorist claim doesn't come into existence until an injured person agrees to settle a claim with the liability insurer and its insured and such settlement does not fully satisfy the claim for personal injuries. The Woodalls had no assertable claim against Travelers until after the limits *of* liability had been used up under the bodily injury liability policy.

The "no action" provision in the Travelers insurance policy is clear and unambiguous. it precludes the insured from bringing a cause of action against Travelers until certain conditions subsequent have been satisfied. This "no action" provision should be strictly construed against Travelers, who drafted the insurance contract, and the policy language should be construed liberally in favor of the Woodalls *so* as to effect the dominant purpose of the insurance policy, that of providing uninsured motorist coverage. The "no action" provision precludes the insured from bringing a

cause of action, and should be construed as contractually tolling any statute of limitations until such tine as the conditions subsequent are satisfied. In the case sub judice, these conditions subsequent were satisfied on September 9, 1993. Travelers subsequently denied coverage on November 12, 1993. Suit. was filed by the Woodalls against Travelers on December 14, 1994, a little more than two months after the uninsured motorist claim was first created pursuant to the requirements of Section 627.727(6), Florida Statutes (1987), a *little* more *than* a month after Travelers breached the insurance contract.

CONCLUSION

A cause of action for an uninsured motorist claim accrues at the time that the uninsured motorist insurance contract is breached. Under the applicable Florida statute, an uninsured motorist claim does not exist until an injured person agrees to settle a claim with a liability insurer and its insured, and such settlement would not fully satisfy the claim for personal injuries. Until a claim is created, there can be no cause of action. Uninsured motorist actions are founded upon contract law. The Florida statutes provide that a cause of action accrues when the last element constituting the cause of action occurs, so a cause of action for a breach of an insurance contract cannot accrue until there is a breach. The statutory law of Florida for uninsured motorist claims and limitation of actions are consistent with each other, and that law clearly mandates that the Woodalls cause of action for their uninsured motorist claim did not and could not accrue until Travelers breached the uninsured motorist contract.

Further, the language of Travelers' insurance contract must be construed according to its plain meaning, i.e. that the Woodalls had no cause of action until all of the conditions subsequent specified by the policy language had been satisfied. The two policy provisions drafted by Travelers work together to toll the statute of limitations. Travelers, after receiving the benefit of the Woodalls reliance on the adhesion language it drafted and imposed upon

the Woodalls, should be not be heard to argue that the contract language is now **void** and of no effect.

The Summary Judgment should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CEKTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Deborah C. Drylie, Esquire, at Post Office Box 1526, Gainesville, Florida, 32602, attorney for Appellee, on this 11 day of December, 1995.

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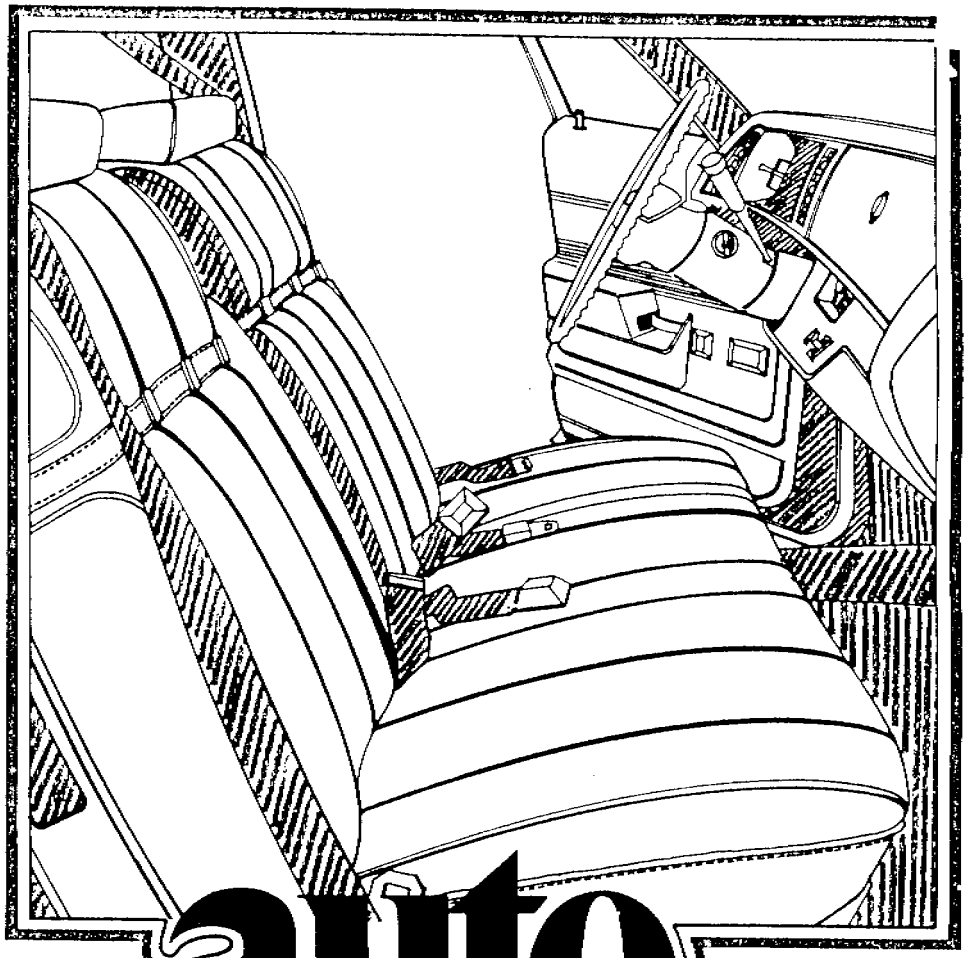
THE TRAVELERS INSURANCE COMPANIES



auto pac

An Automobile Policy From One of Your Travelers Companies

This is your Travelers car insurance policy. It consists of this jacket, describing the insurance coverages and how they apply, a declarations page and any endorsements which form a part of your policy. The declarations page shows a number of important items that apply specifically to you and the insurance you have bought. These items include:

- you as the named insured
- your car or cars insured by this policy
- the coverages and amounts of coverage you have chosen
- the premiums for these coverages
- the period your policy is in effect
- the member of The Travelers Companies providing your coverage
- your policy number
- identification of lienholder, if any, and on the reverse side, a loss payable clause.

Your policy has been designed to help you understand exactly what you have purchased. We think that's important and we ask that you take a few minutes to read this policy. We have made every attempt to use clear, simple language and a straightforward approach. If you have any questions, please contact your Travelers agent or representative who will be happy to help.

THE TRAVELERS
Insurance Companies
Hartford, Connecticut

Policy Provisions for:
Edition 3A of Policy Forms 100 *and* LP
Edition 2A *of* Policy Form 101
Edition 4A of Policy Forms 100 and 101

The Travelers Car Insurance Policy

POLICY CONTENTS

The Travelers Car Insurance Policy

The Travelers Insurance Companies

Hartford, Connecticut

(Each **a Stock Insurance** Company)

Definitions

Certain words, when printed in *italics*, have specific meanings when used in this policy. The definitions *are* located on the flap at the end of this policy. Other definitions which apply only to certain coverages are defined and italicized under those coverages.

Insuring Agreement

For payment of premiums **when** due, and subject to all the terms of this policy, ***we*** will provide the coverages selected up to the amounts chosen by the insured named in Item 1 of the declarations page. Coverages selected are indicated by premium entries on the declarations page. The declarations page forms a part of your policy.

Liability Insurance

Coverage A—Bodily Injury
Coverage B—Property Damage

We will pay damages for which the *insured* becomes legally responsible because of bodily injury or property damage caused by accident and arising out of the ownership, maintenance or use of your *car* or any *non-owned car.*

We will defend any lawsuit brought against the *insured* lor such damages. *We* reserve the right to investigate and settle any claim or lawsuit.

Our obligation to pay or defend ends when the applicable limit of liability is used up by the payment of judgments or settlements. The limits of liability are shown on the declarations page of this policy.

Additional Payments

For any accident covered by this insurance, *we* will also pay certain expenses in addition to the applicable limit of liability.

We will pay costs and any expenses *we* incur *to* defend a claim or lawsuit against the *insured*. *We* will pay interest which accrues after judgment in the lawsuit. *We* will pay court costs the *insured* must pay. *Our* obligation to pay this interest and these costs ends when *we* pay, offer or deposit in court that portion of *the* judgment not exceeding *our* limit of liability.

We will pay the premiums on appeal bonds in any lawsuit we appeal. *We* will pay premiums on bonds to release property attached in a lawsuit but only for that portion of the bond not exceeding *our* limit of liability. *We* will also pay up to $250 lor the cost of any bail bond required of the *insured* because of a traffic violation or accident. *We* are not obligated to apply for or furnish these bonds.

We will pay up to $50 a day for wages or salary the *insured* loses due to attendance at hearings or trials at *our* request. *We* will pay other reasonable expenses the *insured* incurs at *our* request.

We will **pay** the *insured's* costs for emergency medical aid to others at the scene of an accident.

Who Is An Insured

For *your car* - *you*, any *relative*, and anyone else using *your car* if the use is (or is reasonably believed to bej with *your* permission, are *insureds*. Any other persons or organizations are also *insureds* but only lor their liability for the acts or omissions of an *insured* described in the preceding sentence.

For a *non-owned* ***car*** - *you* and any *relative* are *insureds* while using that car it the use is (or is reasonably believed to be) with the owner's permission. Any other persons or organizations not owning or hiring the car arc also *insureds*, but only for their liability for the acts or omissions of an *insured* described in the precerlirig sentence.

Liability Insurance Exclusions

This insurance does not cox-er certain situations.

1. It does not cover an *insured* for bodily injury or property damage intentionally caused by or at the direction of that *insured*.
2. It does not cover damage to property that the *insured* owns, rents, has care of, or transports. It does, however, cover damage to a residence or private garage rented to the *insured*.
3. It does not cover any vehicle while being used to carry persons or property for a fee (other than in a car pool arrangement). It does, however, cover *you* or a *relative* while *occupying* such a vehicle as a passenger and not the driver, if the vehicle is a *non-owned car*.
4. It does not cover:
   (a) any vehicle while being used or maintained in an *auto business*. However, it does cover *you*, a *relative* or any partner or employee of either, for *your car* while it is being used or maintained in such a business.
   (b) any *non-owned car* while being used or maintained in any other business or occupation of the *insured*. However, it does cover the operation or occupancy by *you* or *your* domestic employee of a private passenger car or *trailer* used with a private passenger car covered under this policy.
5. It does not cover bodily injury to any person which arises out of and in the course of employment by the *insured*. It does, however, cover the *insured's* domestic employee who is not covered and is not required to be covered by any workers' compensation law.
6. It does not cover bodily injury to a fellow employee of the *insured* if the injury results from the use of a car in the course of employment. However, it does cover *your* liability for such injury.
7. It does not cover bodily injury or property damage for which the *insured* is also covered under a nuclear energy liability policy, even if that policy has terminated because its limits of liability have been used up.
8. It does not cover bodily injury or property damage arising out of the operation of farm machinery.

Limit of Liability

The most *we* will pay for damages for any accident is the applicable limit of liability shown on the declarations page. *Our* payment will not exceed this limit regardless of the number of *insureds*, claims made, vehicles or premiums shown on the declarations page, or vehicles involved in the accident.

If separate limits are shown on the declarations page for Coverage A (bodily injury) and Coverage B (property damage), then:

1. the amount shown under Coverage A, for "each person" is the most *we* will pay for all damages for bodily injury suffered by one person in any one accident. Subject to this limit, the amount shown under Coverage A for "each accident" is the most *we* will pay for all damages for bodily injury suffered by all people in one accident.
2. the amount shown under Coverage B, for "each accident" is the most *we* will pay for all damages for property damage resulting from any one accident.

If a single limit of liability is shown for both Coverage A (bodily injury) and Coverage B (property damage) combined, this limit is the most *we* will pay for all damages for bodily injury and property damage combined resulting from one accident. Damages will be paid first in the amounts required by the automobile financial responsibility or compulsory insurance law of the state in which the accident occurred.

Other Insurance

If the *insured* is covered by other liability insurance, *we* will pay only the share of the damages that this policy's applicable limit of liability bears to the total of the limits of all collectible insurance. However, for a *substitute car* or *non-owned car*, *we* will pay, up to the limit of *our* liability, only that part of the damages not covered by the other insurance.

Medical **Payments Insurance**

Coverage C— Medical Payments

This insurance covers reasonable and necessary expenses for medical, surgical, dental and chiropractic treatment, hospital, ambulance, X-ray and professional nursing services, prosthetic devices and funeral services. *We* will **pay** these expenses for bodily injury suffered by the *insured* and caused by accident.

These expenses must be incurred within three years of the date of the accident.

Who Is An Insured

You and a *relative* while *occupying your car* are *insureds*. Any other person while *occupying your car* which *you* or a *relative* is using, or which that person or another person is using if the use is (or is reasonably believed to be) with *your* permission, is also an *insured*.

You and a *relative* are *insureds* while *occupying* a *non-owned car* if the use of the car is (or is reasonably believed to be) with the owner's permission. *You* and a *relative* when struck by a *highway vehicle* while pedestrians are *insureds*. A pedestrian is a person who is not *occupying* a *highway vehicle*.

Medical Payments Insurance Exclusions

This insurance does not cover certain situations.

1. It does not cover anyone *occupying your car* while it is being used to carry persons or property for a fee (other than in a car pool arrangement).
2. It does not cover anyone *occupying* any vehicle while it is located for use as a residence or premises.
3. It does not cover anyone injured in the course of employment in an *auto business* if any benefits are payable or required to be provided under any workers' compensation law.
4. It does not cover any injury due to the intentional or accidental discharge of any nuclear weapon, declared or undeclared war, civil war, insurrection, rebellion or revolution or any consequence of these.

5. It does not cover any injury due to any nuclear reaction or explosion, radiation or radioactive contamination.

Limit Of Liability

The most *we* will pay for expenses incurred by or on behalf of each *insured* injured in any one accident is the applicable limit of liability for this coverage shown on the declarations page. *Our* payment will not exceed this limit regardless of the number of *insureds*, claims made, vehicles or premiums shown on the declarations page or vehicles involved in the accident.

Any amount otherwise payable for expenses under this coverage will be reduced by any amounts paid or payable for the same expenses under any auto liability or uninsured motorists coverage provided under this policy.

We will double the applicable limit of liability for *you* or a *relative* if wearing a properly installed seat belt at the time of the accident.

The highest limit of liability for this coverage shown on the declarations page will apply to expenses incurred for bodily injury suffered by the *insured* while *occupying* a *non-owned car*. This limit will also apply to *you* and a *relative* if struck by a *highway vehicle* while pedestrians. A pedestrian is a person who is not *occupying* a *highway vehicle*.

Claim Payments

We may pay the *insured* or any person or organization providing the services.

When *we* pay expenses under this coverage, the *insured* must, if we elect, agree in writing, that any damages recoverable by the *insured* under the liability or uninsured motorists coverages of this policy will not include any amount *we* have paid for the same expenses under this coverage.

Other Insurance

If the *insured* is covered by other auto medical payments insurance, *we* will pay only the share of the expenses that this policy's applicable limit bears to the total of the limits of all collectible insurance. However, for a *substitute car* or *non-owned car*, *we* will pay, up to the limit of *our* liability, only that part of the expenses not covered by the other insurance.

Uninsured Motorists Insurance

Coverage D—Uninsured Motorists (Bodily Injury Only)

We will pay damages that the *insured* is legally entitled to recover from the owner or operator of an *uninsured motor vehicle* because of bodily injury suffered by the *insured* and caused by accident. Liability for such damages must arise out of the ownership, maintenance or use of the *uninsured motor vehicle.*

We will make payment under this coverage only after the limits of liability have been used up under all applicable bodily injury liability bonds *or* policies.

The *insured's* right to recover these damages from the owner or operator of an *uninsured* motor *vehicle* and the amount of these damages will be agreed to by the *insured* and *us*. Disagreement as to such right or amounts of damages will be settled by arbit-ation upon written request of the *insured* or *us*. Disagreement as to any other issues may not be arbitrated.

No judgment against the owner or operator nf the *uninsured* motor *vehicle* will be binding on *us* unless it was obtained by the *insured* with *our* consent.

Definition

Uninsured motor vehicle means a *highway vehicle* or trailer of any type:

1. to which no bodily injury liability insurance policy or bond applies at the time of the accident.
2. to which a bodily injury liability insurance policy or bond applies at the time of the accident, but with limits of liability less than the applicable uninsured motorists limits of liability provided under this policy.
3. insured by a company which denies coverage, is insolvent or becomes insolvent.
4. which is a hit-and-run *highway vehicle*, if neither the driver nor the owner can be identified, which causes bodily injury to an *insured* by physical contact with the *insured* or a vehicle *occupied* by the *insured*.

However, an *uninsured motor vehicle* does not mean:

1. *your car*, a *non-owned car* while being operated by *you*, or any vehicle furnished or available to *you* or a *relative* for regular use.
2. a *highway vehicle* owned or operated by a self-insurer within the meaning of any financial responsibility law, motor carrier law or any similar law.
3. a *highway vehicle* owned by any governmental unit or agency.
4. a land motor vehicle or *trailer* while located for use as a residence or premises.

Who Is An Insured

You and a *relative* are *insureds*. Anyone else while *occupying your car* if the *occupancy* is (or is reasonably believed to be) with *your* permission, or while *occupying* a *non-owned car* which *you* are operating with the owner's permission, is also an *insured*. Any other person is also an *insured* but only for damages that person is entitled to collect because of bodily injury suffered by an *insured* described in either of the two preceding sentences.

Uninsured Motorists Insurance Exclusions

This insurance does not cover bodily injury suffered in certain situations.

1. It does not cover bodily injury suffered by the *insured* while *occupying* or when struck by a *highway vehicle* which *you* or a *relative* owns but does not insure for uninsured motorists coverage under this policy.
2. It does not cover bodily injury for which the *insured* entitled to payment under this coverage has made a settlement without *our* written consent.
3. It does not cover bodily injury suffered by any person while *occupying* any vehicle being used to carry persons or property for a fee (other than in a car pool arrangement). It does, however, cover *you* or a *relative* while *occupying* such a vehicle as a passenger and not the driver, if the vehicle is a *non-owned car*.
4. It does not cover bodily injury suffered by the *insured* while using a *non-owned car* without the owner's permission unless it is reasonably believed to be with the owner's permission.

This insurance will not apply directly or indirectly to benefit any workers' compensation or disability benefits carrier, or any self insurer under a workers' compensation, disability benefit, or similar law.

Limit of Liability

Regardless of the number of *insureds*, claims made, vehicles or premiums shown on the declarations page or vehicles involved in the accident, the most *we* will pay for damages resulting from bodily injury to the *insured* is the applicable limit of liability.

This limit is shown on the dcclarntinns page of this policy for Coverage D (uninsured motorists insurance).

The applicable limit shown for "each person" is the most *we* will pay for all damages suffered for bodily injury by one *insured* in any one accident.

Subject to the limit for "each person", the applicable limit shown for "each accident" is the most *we* will pay for all damages for. bodily injury suffered by all *insureds* in any one accident.

We will subtract the amount of damages paid by or on behalf of anyone responsible for tlie *insured's* injury from the amount otherwise payable under this coverage. This includes any damages paid under the liability insurance of this policy.

We will also subtract any amounts paid or payable under any workers' compensation law, disability benefits law, or any similar law.

Claim Payments

We may pay the *insured* or anyone authorized by law to receive payment.

Any payment made under this coverage to or ior the *insured* will reduce the amount of damages the *insured* is entitled tc recover for the same bodily injury under the liability insurance of this policy.

Arbitration of Disputed Claims

Any mutually agreed upon method of arbitration may be used. Otherwise, upon written request of either the *insured* or *us*, the *insured* will select and pay for one arbitrator. *We* will select and pay for another arbitrator. These arbitrators will then select a third. If they cannot agree upon a third arbitrator within 30 days, a judge in a court of record in the county where the arbitration is pending will appoint a third arbitrator.

We and the *insured* will share equally the expenses of the third arbitrator and all other arbitration expenses. Attorney fees and witness fees are not arbitration expenses. They must be paid by the party incurring them.

Arbitration will take place in the county where the *insured* lives, unless otherwise agreed. Local rules of law as to procedure and evidence will apply. The written decision of any two arbitrators will be binding on both parties, subject to the terms of this insurance. Judgment on the award made by the arbitrators may be entered in any court having jurisdiction.

Trust Agreement

If *we* make a payment under this coverage, the *insured* must repay *us* from money collected for the same damages from any persons or organizations legally responsible for the accident.

The *insured* will hold in trust for *us* all rights of recovery against any persons or organizations legally responsible for the accident. The *insured* will do whatever is necessary to secure these rights and do nothing after the accident to prejudice these rights.

At *our* request, the *insured* must take any necessary action, through a representative *we* select, to help *us* recover payments made under this coverage. If a recovery is made, recovery expenses will be reimbursed out of the recovery payments.

Other Insurance

An *insured* who is covered by other similar insurance may collect no more than the highest applicable limit of any one policy. *Our* share of the damages will be in proportion to *our* share of the total of the limits of all applicable policies.

If, however, the *insured* suffers bodily injury while *occupying* a car *you* do not own to which similar insurance applies, this coverage applies as excess insurance and then only in the amount by which it exceeds the applicable limits of liability of the other insurance.

Physical Damage Insurance

This insurance covers *loss to* an *insured car*

Definitions

1. *Loss* means direct and accidental loss of or damage to an *insured cur* or its equipment.
2. *Insured car* means *your car.* An *insured car* also means a private passenger car or *trailer* which *you* or *a relative* do not own but are using with the owner's permission. However, it does not include a car or *trailer* furnished or available for the regular use of *you* or a *relative.*

Coverage E—Collision

We will pay for *loss* to an *insured car* caused by collision with another object or vehicle, or by upset. *We* will pay for such *loss* minus the applicable deductible amount shown on the declarations page.

Under this coverage, *we* will not pay for *loss* covered under *your* comprehensive coverage.

We will riot subtract *the* deductible amount for any *loss* which is caused by collision with a vehicle not owned by *you* or a *relative but* insured *by* The Travelers.

Coverage F—Comprehensive

We will pay for *loss* to an *insured car* not caused by collision with another object or vehicle, or by upset.

Under this coverage, *we* will consider certain kinds of *loss* not to be caused by collision or upset. These are: breakage of glass; *loss* caused by fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion; *loss* inflicted by impact with a missile, falling object, bird or animal.

We will pay for such *loss* minus the applicable deductible amount shown on the declarations page.

Who Is An Insured

For *your car, you* are an *insured.* Any person or organization using or having custody of *your car,* if the use or custody is (or is reasonably believed to be) with *your* permission, is also an *insured* unless the use or custody is in the course of an *auto business.*

For any other *insured car, you* and any *relative* are *insureds.*

Additional Payments

Under comprehensive coverage, *we* will also pay up to $15 a day, to a maximum of $450, for transportation expenses, if an *insured car* is stolen. *We* will pay for transportation expenses incurred by the *insured* during the period beginning 48 hours after the theft is reported to the police and *us,* and ending when the car is returned to use or when *we* pay or offer to pay for the *loss.*

We will also pay up to $25 for towing and labor costs if an *insured car* is disabled. Labor, however, must be performed at the place of disablement. This payment will not be made if these towing and labor costs are payable elsewhere under *your* physical damage insurance.

Coverage G—Rental Reimbursement

We will reimburse *you* for the expense of renting a car while *your car* is disabled from a collision or from comprehensive *loss.* The car *you* rent, however, must be of the same general type as the disabled car.

Your car must be continuously out of use for more than 24 hours as a result of the disablement before reimbursement will be made. Reimbursement will be made only until *your car* is returned to use or until it could reasonably be expected to be repaired or replaced. The maximum amounts *we* will pay per day and for the total period of disablement are shown on the declarations page.

This coverage does not apply if *your car* is stolen. (See "Additional Payments" under comprehensive coverage above.)

Physical Damage Insurance Exclusions

This insurance does not cover certain *losses* or situations.

1. It does not cover any vehicle while used to carry persons or property for a fee (other than in a car pool arrangement).
2. It does not cover a *non-owned car* while being used or maintained in an *auto business* by anyone.

3. It does not cover any *loss* due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure unless the *loss* results from a theft covered by this policy.
4. It does not cover *loss* to tires unless caused by fire, theft or vandalism or unless the *loss* is part of other *loss* covered by *your* collision or comprehensive coverage.
5. It does not cover *loss* to any device designed for communication or for recording or reproducing sound unless the device is permanently installed in the vehicle. It does not cover any tapes, discs or similar items used with any such device.
6. It does not cover *loss* to any device or instrument designed as a citizens band radio, two-way mobile radio or telephone or any of their accessories.
7. For a motor home, or a home trailer or similar vehicle, it does not cover *loss* to radio or TV antennas or any equipment designed to create additional living space, such as awnings or cabanas. It does not cover *loss* to any equipment or accessories which are not built into the motor home. It does not cover *loss* to any other equipment which is not usual to a private passenger car.
8. It does not cover a camper or living quarters unit unless described on the declarations page.
9. It does not cover any *loss* due to the intentional or accidental discharge of any nuclear weapon, declared or undeclared war, civil war, insurrection, rebellion or revolution or any consequence of any of these.
10. It does not cover any *loss* due to any nuclear reaction or explosion, radiation or radioactive contamination.

Limit of Liability

The limit of *our* liability for *loss* to an *insured car* or to any of its parts will not exceed the actual cash value of either the vehicle or the parts at the time the *loss* occurs. This limit will also not exceed what it would then cost to repair or replace either the vehicle or the parts with other of like **kind** and quality.

The limit of *our* liability for *loss* to a *trailer* which neither *you* nor a *relative* owns is $500.

Claim Payments

We may pay for *loss* in money, or *we* may repair or replace the damaged or stolen property. *We* may also return stolen property with payment for any damage to it. *We* may also take all or part of the damaged property at an agreed or appraised value but it may not be abandoned to *us*.

Other Insurance

If *your car* (except a *substitute car*) is also covered by other physical damage insurance, *we* will pay only the share of *loss* that this policy's applicable limit of liability bears to the total of the limits of all collectible insurance.

If any other *insured car* (including a *substitute car*) is covered by other physical damage insurance, *we* will pay, up to the limit of *our* liability, only that part of the *loss* not covered by other insurance.

General Conditions

1. Where This Policy Applies

This policy covers only accidents or *losses* that occur in the United States of America, its territories or possessions, or in Canada, or directly between their ports.

2. When This Policy Applies (Policy Period)

This policy covers only accidents or *losses* that occur during the policy period shown on the declarations page. That policy period, and each successive policy period begins and ends at 12:01 a.m. standard time, at *your* address.

You may continue this policy, subject to our consent, for successive periods by paying required premiums when due.

3. Premium

The premium shown on the declarations page is for the policy period shown on that page. The premium for each successive policy period will be computed from the rates and rules *we* are using at that time.

4. Policy Changes

This policy contains all agreements between *you* and *us* or any of *our* agents relating to this insurance. If we change this policy form to broaden coverage without charge, *your* policy will be interpreted to provide the broadened coverage, beginning on the date the change is effective in *your* state. *We* will make any other change in this policy in writing. If the change requires a premium adjustment, ***we*** will make the adjustment as of the date of the change and use *our* rates and rules in effect on that date.

5. Financial Responsibility And No-Fault Laws

If the liability insurance provided under this policy applies and if the laws of a state or province require higher limits of liability for bodily injury and property damage than those provided by *your* policy, *we* will provide these higher limits for an accident in that state or province involving *your car* or a *non-owned* ***car.***

If the liability insurance provided under this policy applies and if tlie laws of a state or province require coverage not provided by *your* policy, *we* will provide such coverage for an accident in that state or province involving *your car* or a *non-owned car*. In nc case will anyone be entitled to duplicate payments for the same elements of *loss* as a result of the application of ***this*** provision.

6. Transfer Of This Policy

No interest in this policy may be transferred without *our* written permission.

If *you* die, *your* surviving spouse residing in *your* household at the time of *your* death becomes a person named in item 1 of the declarations page until the anniversary of this policy.

If *you* die, this policy also covers as *insured* for *your car*, until the anniversary of this policy, anyone having proper temporary custody of *your car*.

7. Action Against *Us*

Legal action may not be brought against *us* under any coverage provided by this policy, unless the *insured* has fully complied with all the provisions of the policy.

No one has the right to involve *us* in any action to determine the liability of an *insured*.

In addition, legal action may not be brought against *us* under liability coverage until judgment against the *insured* has been made after trial.

We will not be relieved of any obligation under the terms of this policy because of an *insured's* bankruptcy or insolvency.

8. Subrogation (Transfer Of Right To Recover)

If *we* make a payment under the liability, uninsured motorists or physical damage insurance of this policy, *we* have the right to recover the amount of this payment from any person or organization legally responsible for the bodily injury, property damage or *loss*. The *insured* must do whatever is necessary to transfer this right of recovery to *us* and do nothing after the injury, property damage or *loss* that would prejudice this right.

9. Cancellation During The Policy Period

The insured named in Item 1 of the declarations page may cancel this policy at any time by sending *us* written notice stating when thereafter the cancellation is to become effective.

Our right to cancel this policy, however, is limited.

We may cancel a new policy within the first 60 days of the policy period by sending written notice at least 10 days before the effective date of the cancellation.

We may cancel this policy at any time if *you* fail to pay premiums or premium installments when due, whether payable directly to *us*, or through any premium finance plan or credit extension. *We* will mail written notice at least 10 days before the effective date of the cancellation.

Otherwise, *we* may also cancel this policy, only if *you*, any resident of *your* household, or anyone who customarily operates *your* car, has their driver's license revoked or suspended during the policy period. *We* will mail written notice at least 30 days before the effective date of the cancellation.

We will mail any notice of cancellation to the insured named in Item I of the declarations page, at the address shown on that page. Such mailing will be sufficient proof of notice. Delivery of this notice will be considered the same as mailing.

The effective date and hour of cancellation stated on the notice will become the end of the policy period. *We* will refund any premium lor the unexpired portion of the policy period as soon as practical after the cancellation becomes effective.

10. Termination At The End Of The Policy Period

If *we* choose not to continue this policy for a successive policy period, *we* will mail a termination notice at least 30 days before the expiration date of the policy period.

We will mail any termination notice to the insured named in Item 1 of the declarations page, at the address shown on that page. Such mailing will be sufficient proof of notice. Delivery of this notice will be considered the same as mailing.

If the policy is written for a period of three or six months, *we* will terminate it only at the end of a policy period which coincides with the end of any annual period. An annual period begins on the original effective date of the policy, or, if that date is the 29th, 30th or 31st of a month, on the first day of the next month.

This policy will automatically terminate on the expiration date of any policy period without notice of termination if *you* fail to pay when due any premium or premium installment for this policy or its continuation whether payable directly to *us*, or through a premium financing plan or credit extension.

This policy, if not already terminated under ttie terms of this condition, will nutomatically terminate without notice of termination on the effective date of any other automobile insurance policy, but only for any vehicle described in both policies.

11. Two Or More Curs

When more than one car is insured by this policy, the terms ot the policy apply separately to each car

A car and attached *trailer* are considered one car for liability insurance. They are considered separate cars for physical damage insurance arid each is subject to the applicable deductible

Under any coverage, the limit of liability applicable to a described car is shown on the declarations page ior that car. The limit of liability shown on the declarations page for a described car is also the limit of liability for a *substitute car* or a replacement for the described car. For any other insurance provided under that coverage, the limit of liability is the highest applicable limit for that coverage shown on the declarations page for any described car.

However, if more than one car insurance policy issued to *you* by a member company of The Travelers applies to the same accident, the most that will be paid under all such policies combined will be the highest applicable limit of liability under any one policy.

What To Do In Case of Accident or Loss

The *insured*, or someone on behalf of the *insured* must notify *us* of the accident or *loss* as soon as possible. Phone *our* Instant Claim Service or contact *your* agent.

We will need the following information: *your* name, address, and policy number, the details of the accident or *loss*, the names of any witnesses and persons involved or injured.

The *insured* must assist *us* with any claim or law suit, and when requested, attend hearings and trials, secure and give evidence, permit medical examination by physicians *we* select, and authorize *us* to obtain medical reports or copies of records.

The *insured* must also fulfill certain obligations to *us* if seeking protection under the following coverages.

Bodily Injury or Property Damage Coverage under Liability Insurance—the *insured* must promptly provide *us* with all legal papers he or she receives because someone else claims the *insured* is responsible for the accident.

Medical Payments Insurance or Uninsured Motorists Insurance—the *insured* must give *us* written proof of claim and, if *we* request it, must answer questions under oath.

For an accident involving an uninsured motorist, the *insured* must promptly provide *us* with copies of all legal papers served because of legal action against any uninsured person or organization legally responsible for the accident. If struck by a hit-and-run driver, the *insured* must notify the police within 24 hours.

Collision or Comprehensive Coverage under Physical Damage Insurance—the *insured* must protect the damaged car and its equipment from any further *loss* and *we* will pay for reasonable expenses incurred in doing so. *We* will not pay for further *loss* due to the *insured's* failure to protect the car and its equipment. If *we* request it, the *insured* must make the car available to *us* for inspection before it is disposed of or repaired. The *insured* must give *us* written proof of *loss* within 91 days of the *loss*, and if *we* request it, must also answer questions under oath.

In addition, thefts must promptly be reported to the police.

This policy is signed by the President and Secretary of the member company of The Travelers Insurance Companies which is the insurer under this policy and countersigned on the declarations page by a duly authorized agent of that company.

John R. Kenney
Secretary

A. Wheeler Hess
President

(Fold out for Definitions)

DEFINITIONS

1. ***You*** and ***your*** mean the person named in Item 1 of the declarations page. They also mean that person's spouse if residing in the same household.

2. ***Relative*** means *your* relative, residing in *your* household.

3. ***Insured,*** for each coverage, means any person or organization shown as having coverage under the "Who is An Insured" paragraph for that coverage.

4. ***We, us*** **and** ***our*** mean the member company of The Travelers providing this insurance and shown as the insurer in Item 6 of the declarations page.

5. ***Your car*** means any vehicle described on the declarations page of this policy with premium charges showing which coverages apply. It also means a *trailer* which *you* own or a *substitute car*. For physical damage coverage, the *trailer* must be described on the declarations page with premium charges showing what coverages apply.

   Your car also means a vehicle of the following type of which ***you*** acquire ownership during the policy period provided *you* tell *us* about it within 30 days after *you* acquire it:

   (a) a four wheel private passenger car,

   (b) a motor home,

   (c) a four wheel sedan delivery, panel or pick-up type motor vehicle not used for wholesale or retail delivery other than farming or deliveries incidental to installing or repairing furnishings or equipment,

   (d) for physical damage coverages only, a *trailer*.

6. ***Substitute car*** means a vehicle which *you* do not own but are using temporarily with the owner's permission. However, this vehicle must be used as a replacement for *your car* while *your car* is out of service because of breakdown, repair, servicing, damage or destruction.

7. ***Trailer*** means a trailer designed for use with a private passenger car. However, for physical damage coverages it does not include a home, office, store or display trailer.

8. ***Non-owned car*** means a land motor vehicle with at least four wheels designed to be used mainly on public roads, or a *trailer*. However, it must not be owned by or furnished or available for the regular use of *you* or a *relative*. It does not include a *substitute car*.

9. ***Highway vehicle*** means a land motor vehicle designed to be used mainly on public roads, or a *trailer*. It does not include any vehicle operated on rails or crawler treads. Other motor vehicles are included only while used on public roads.

10. ***Auto business*** means the occupation or business of selling, repairing, servicing, storing, parking or transporting vehicles.

11. ***Occupying*** means in or on, getting into or out of