

IN THE SUPREME COURT OF OHIO

Jack R. Advent, Executor of the Estate of,
Valijeane D. Advent, Deceased,

Appellant,

v.

Allstate Insurance Company, et al.,

Appellees.

Consolidated Supreme Court
Case Nos: 2006-2271, 2006-2393

On Appeal from the Franklin
County Court of Appeals, Tenth
Appellate District
Case No: 06AP-103

MERIT BRIEF OF APPELLANT JACK R. ADVENT, EXEC.

John M. Gonzales (0038664) (Counsel of Record)

John M. Gonzales, LLC
140 Commerce Park Dr.
Westerville, OH 43082
614.882.3443
614.882.7117 Fax
jgonzales@gonzales-lawfirm.com
Counsel for Appellant Jack R. Advent, Exec.

Monica L. Waller (0070941) (Counsel of Record)

Lane, Alton & Horst, LLC
Two Miranova Place, Suite 500
Columbus, OH 43215.7052
614.233.4744
614.228.0146 Fax
mwaller@lah4law.com
Counsel for Appellee Allstate Insurance Co.

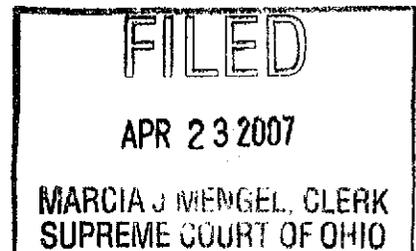


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STATEMENT OF FACTS¹

A. Procedural Background

This action arises out of an automobile collision that occurred on September 28, 2002 as a result of the negligence of Scott D. Rude. Valijeane D. Advent died from the injuries she sustained in the collision and is survived by her husband, Appellant Jack Advent (“Appellant”) and her children, Laura and Ryan. As executor of his late wife’s estate, Appellant settled the estate’s claims against Rude and Rude’s insurer, State Farm Mutual Automobile Insurance Company (“State Farm”), for the applicable \$100,000 bodily injury liability limit of Rude’s insurance policy, while preserving the right to pursue claims for uninsured/underinsured motorist (“UM/UIM”) coverage from Appellee Allstate Insurance Company (“Appellee” or “Allstate”), the Advents’ automobile insurer. Appellee consented to the estate’s settlement with Mr. Rude and State Farm.

At the time of the collision, Appellant and his wife were the named insureds on an Allstate automobile insurance policy, policy number 092005461, which provided bodily injury liability coverage with limits of \$300,000 each person/\$500,000 each occurrence. The September 12, 2002 to March 12, 2002 “Auto Policy Declarations” page of the Advents’ Allstate policy listed UM/UIM coverage with limits of \$50,000 each person/\$100,000 each occurrence.

On September 23, 2004, Appellant filed an action for wrongful death and declaratory judgment against Allstate and Dennis O. Norton, Appellant’s insurance agent, in the Franklin County Court of Common Pleas.² In his claims against Allstate, Appellant seeks to recover

¹ The underlying facts are undisputed. For a recitation, see the appellate court’s decision, ¶¶1 – 5. See also, Appellant’s Supplement containing the August 5, 2005 Affidavit of Appellant; Allstate’s Responses to “Requests for Admissions;” the September 12, 2002 – March 12, 2003 Allstate policy; the March 12, 2001 – September 12, 2001 declarations pages; the September 12, 2001 – March 12, 2002 declarations pages; the March 12, 2002 – September 12, 2002 declarations pages; Allstate Notice Form “XC15;” and, Allstate Notice Form “XC11.”

² In the case against the insurance agent resulted in a separate appeal. The trial court and the appellate court ruled in favor of the agent and against Appellant. Appellant appealed to this

\$200,000 in UM/UIM coverage under the Allstate policy. It is Appellant's position that UM/UIM arose by operation of law under the Allstate policy in an amount equal to the policy's bodily injury liability limit of \$300,000 each person/\$500,000 per occurrence.³ After setting off the \$100,000 paid by State Farm, Appellant contends the estate is entitled to recover \$200,000 from the \$300,000 "each person" limit. Allstate has admitted that the estate sustained compensatory damages in excess of \$300,000.

On November 15, 2005, the trial court issued a decision granting Allstate's motion for summary judgment and denying Appellant's motion for partial summary judgment. The trial court held Appellant was not entitled to UM/UIM coverage of \$300,000 each person as a matter of law because R.C. 3937.18, as amended by S.B. 97, precluded such coverage by operation of law and it had been incorporated into Appellant's policy prior to the date of the collision. The trial court entered judgment in accordance with its November 15, 2005 decision on January 4, 2006 and Appellant timely filed a notice of appeal in the Franklin County Court of Appeals, Tenth Appellate District.

On October 24, 2006, the appellate court issued an opinion and entered judgment affirming the trial court's decision. *Advent v. Allstate Ins. Co.*, 169 Ohio App.3d 318, 2006-Ohio-5522. Appellant filed a notice of appeal with this Court on December 8, 2006. On December 21, 2006 the court of appeals issued a decision and entry certifying to this Court a conflict between its decision and the court of appeals for Cuyahoga County in *Storer v. Sharp*, Cuyahoga App. No. 86525, 2006-Ohio-1577. The court of appeals stated the issue in conflict as:

Can the S.B. No. 97 amendments to R.C. 3937.18 be incorporated into an insurance policy during a two-year guarantee period that commenced subsequent to the S.B. No. 267 amendments to R.C. 3937.18 and R.C. 3937.31, but prior to the S.B. No. 97 amendments?

Court and on October 18, 2006, this Court declined to hear Appellant's discretionary appeal. *Advent v. Allstate Ins. Co.*, 111 Ohio St.3d 1432, 2006-Ohio-5351.

³ It is undisputed that this case involves the "each person" insurance limits.

Appellant filed a notice of certified conflict with this Court on December 28, 2006. On February 28, 2007, this Court determined a conflict existed and also accepted Appellant's discretionary appeal, ordered briefing and consolidated the cases.

B. Facts – Allstate Policy

In 1989, Agent Norton sold the Advents an Allstate automobile insurance policy. Mr. and Mrs. Advent were the named insureds on the Allstate policy, policy number 092005461. The policy was initially issued on March 12, 1989. The declarations page for the policy listed bodily injury liability coverage limits of \$300,000 each person/\$500,000 each occurrence. However, per the declarations page, the policy only had UM/UIM limits of \$50,000 each person/\$100,000 each occurrence. Neither Allstate nor the agent was able to produce the original application for insurance. Likewise, neither Allstate nor the agent was able to produce any written offer or any written rejection/reduction of UM/UIM coverage for the policy from the time of its inception up through the September 28, 2002 collision.

In addition, neither Allstate nor the agent was able to produce extrinsic evidence of a valid offer of UM/UIM coverage at any point from the policy inception up through the September 28, 2002 collision. They did not produce any notes or other documents setting forth that UM/UIM coverage was described to the Advents; that UM/UIM coverage premiums were provided to the Advents, including premiums for \$300,000/\$500,000 limits; or an express statement of the limits. At the time they initially purchased the policy, the Advents did not have any discussions with the agent, anyone from his agency, or anyone from Allstate about UM/UIM coverage, including the appropriate limits of such coverage; the purpose of the coverage; a description of the coverage and the premium cost of the coverage.

From 1989 up through the September 28, 2002 collision, the Advents never signed a UM/UIM rejection/reduction form and they never had any discussions with the agent, anyone from his agency, or anyone from Appellee Allstate about UM/UIM coverage, including the

appropriate limits of such coverage; the purpose of the coverage; a description of the coverage and the premium cost of the coverage, despite the fact the Advents had some contact with the agent's office over the years regarding routine policy changes. Appellant acknowledged that he was aware the declarations pages of his Allstate policy indicated UM/UIM policy limits of \$50,000 each person/\$100,000 each occurrence.

The Allstate policy was initially issued on March 12, 1989. The policy was issued for a guaranteed period of two years, but was actually guaranteed renewable for successive six-month policy periods within the two years. Pursuant to R.C. 3937.31 and *Wolfe v. Wolfe*, 88 Ohio St.3d 246, 2000-Ohio-322, the applicable two-year guarantee period at the time of the September 28, 2002 collision would have been March 12, 2001 to March 12, 2003. The last six-month policy period renewal prior to the September 28, 2002 collision would have been September 12, 2002. There was also a six-month policy period renewal on March 12, 2002. The S.B. 267 amendments to R.C. 3937.18 and R.C. 3937.31 were effective September 21, 2000. The S.B. 97 amendments to R.C. 3937.18 were effective October 31, 2001.

ARGUMENT

Certified Conflict Question:

Can the S.B. No. 97 amendments to R.C. 3937.18 be incorporated into an insurance policy during a two-year guarantee period that commenced subsequent to the S.B. No. 267 amendments to R.C. 3937.18 and R.C. 3937.31, but prior to the S.B. No. 97 amendments?

Answer and Proposition of Law No. I:

No. R.C. 3937.31(E), added by S.B. 267, does not permit an automobile insurer to unilaterally incorporate the S.B. No. 97 version of R.C. 3937.18 into an insurance policy during a two-year guarantee period mandated by R.C. 3937.31(A) because to do so would be an impermissible "cancellation" of the policy because the S.B. 97 version reduces the "coverages" and "policy limits" of the policy during the two-year guarantee period, which is expressly prohibited by R.C. 3937.31(A) and contrary to *Wolfe*.

Proposition of Law No. II:

R.C. 3937.31(E), which provides automobile insurers may incorporate changes into a policy during the two-year guarantee period that are “permitted or required” by the Revised Code does not allow the incorporation of any statutory language that would effect a “cancellation” of the policy as defined in R.C. 3937.31(A), including the incorporation of statutory language that would reduce “coverages, included insureds, and policy limits provided at the end of the next preceding policy period,” which is expressly prohibited by R.C. 3937.31(A) and contrary to *Wolfe*.

Based on the facts of this case (no original application, no written offer of UM/UIM coverage, no written rejection/reduction of UM/UIM coverage, no extrinsic evidence of a valid offer, no evidence of a knowing reduction by the Adverts), there is no dispute that, absent the application of the S.B. 97 amendments to R.C. 3937.18, Appellant is entitled to UM/UIM of \$300,000 each person/\$500,000 each occurrence as a matter of law, as opposed to the \$50,000 each person/\$100,000 each occurrence policy limits listed on the declarations page. There is no dispute that Allstate failed to comply with R.C. 3937.18 in effect prior to S.B. 97⁴ and also failed to comply with the requirements set forth in *Abate*,⁵ *Gyori*,⁶ *Linko*,⁷ *Kemper*,⁸ *Hollon*⁹ and their progeny, meaning Appellant is entitled to UM/UIM coverage by operation of law in amounts equal to his bodily injury liability limits, \$300,000 each person/\$500,000 each occurrence.

While *Hollon* was interpreting and applying the H.B. 261 version of R.C. 3937.18(C), the S.B. 267 R.C. 3937.18(C) language was identical to that of H.B. 261, so *Hollon* (and *Abate*, *Gyori*, *Linko*, *Kemper*, *Hollon*, etc.) is controlling when interpreting and applying S.B. 267 as well. See also, *Morton v. Continental Cas. Ins. Co.*, Hamilton County App. Nos. C-03-0771, C-030799, 2004-Ohio-7126, applying *Hollon*, et al. to S.B. 267 version of R.C. 3937.18.

⁴ The S.B. 267 version of R.C. 3937.18, effective September 21, 2000, was the version of R.C. 3937.18 in effect immediately prior to the S.B. 97 version and was in effect on March 12, 2001, the beginning of the applicable two-year guarantee period in this case.

⁵ *Abate v. Pioneer Cas. Co.* (1970), 22 Ohio St.2d 161, 258 N.E.2d 429.

⁶ *Gyori v. Johnston Coca-Cola Bottling Group, Inc.*, 76 Ohio St.3d 565, 1996-Ohio-358.

⁷ *Linko v. Indemnity Ins. Co. of North America*, 90 Ohio St.3d 445, 2000-Ohio-92.

⁸ *Kemper v. Michigan Millers Mut. Ins. Co.*, 98 Ohio St.3d 162, 2002-Ohio-7101.

⁹ *Hollon v. Clary*, 100 Ohio St.3d 526, 2004-Ohio-6772.

Therefore, it is clear that Appellant prevails and is entitled to UM/UIM coverage of \$300,000 each person/\$500,000 each occurrence if the S.B. 267 version of R.C. 3937.18 is the applicable law.

Consequently, the only way for Allstate to prevail is if the S.B. 97 version of R.C. 3937.18 is the applicable law. In order for S.B. 97 to be applicable, two things have to had happened: first, Ohio law had to permit Allstate to incorporate the S.B. 97 version into Appellant's policy at the beginning of a six-month renewal policy period (March 12, 2002 and/or September 12, 2002) before the end of the applicable two-year guarantee period ending on March 12, 2003; and, secondly, Allstate had to take the affirmative step of actually incorporating the S.B. 97 version into Appellant's policy at the beginning of one of the six-month renewal policy periods prior to the September 28, 2002 collision. Neither of these two things happened and, therefore, the S.B. 97 version is not applicable, meaning Appellant prevails.

A. Ohio law did not permit the incorporation of S.B. 97 into an automobile insurance policy prior to expiration of a two-year guarantee period that commenced prior to the effective date of S.B. 97.

In 2000, this Court, in *Wolfe*, held:

1. Pursuant to R.C. 3937.31(A), every automobile liability insurance policy issued in this state must have, at a minimum, a guaranteed two-year policy period during which the policy cannot be altered except by agreement of the parties and in accordance with R.C. 3937.30 to 3937.39.
2. The guarantee period mandated by R.C. 3937.31(A) is not limited solely to the first two years following the initial institution of coverage.

Wolfe v. Wolfe, 88 Ohio St.3d 246, 2000-Ohio-322, paragraphs 1 and 2 of the syllabus.

Applying *Wolfe* to this case leads to a simple and easy result. Since the applicable two-year guarantee period was March 12, 2001 to March 12, 2003, the S.B. 267 version of R.C. 3937.18 is the applicable version and, therefore, Appellant is entitled to UM/UIM coverage by operation

of law in the amount of \$300,000 each person/\$500,000 each occurrence.¹⁰ It is that easy. On the authority of *Wolfe*, this Court must reverse the court of appeals and judgment must be entered in favor of Appellant.

The court of appeals in this case, as well as the courts of appeals in *Arn v. McLean*, 159 Ohio App.3d 662, 2005-Ohio-654 and *St. Clair v. Allstate Ins. Co.*, Hamilton App. No. C-060028, 2006-Ohio-6159 all failed to properly apply *Wolfe* to the policies at issue because they were under the mistaken impression that *Wolfe* was no longer good law and had been superseded R.C. 3937.31(E). The Eight District Court of Appeals in *Storer*, *supra*, correctly applied *Wolfe*, holding that even after the passage of S.B. 267, *Wolfe* prevented an insurer from altering the policy during the two-year guarantee period. However, as this Court has recently made clear, *Wolfe* has not been overruled, is still good law and must be applied, even after the S.B. 267 amendments to R.C. 3937.31.

This Court recently decided *Shay v. Shay*, 113 Ohio St.3d, 2007-Ohio-1384, in which it examined the viability of *Wolfe* in light of the S.B. 267 amendments of R.C. 3937.31. Specifically, this Court addressed whether *Wolfe* had been superseded by the amendments, as some members of this Court felt it had been. A sentiment apparently echoed by the courts of appeals in *Advent*, *Arn* and *St. Clair*. However, in *Shay*, this Court made it clear *Wolfe* still applies even after S.B. 267 amendments to R.C. 3937.31.

{¶26} In light of that legislative action, three members of this court, Justices Lundberg Stratton, O'Connor, and Lanzinger dissented from a decision to dismiss an appeal of *Young v. Cincinnati Ins. Co.*, 8th Dist. No. 82395, 2004-Ohio-54, as having been improvidently accepted. The dissenters opined that S.B. 267 superseded the interpretation of R.C. 3937.31 found in *Wolfe* and that, as a result of S.B. 267, a policy that is renewed every six months could be modified at the time of renewal rather than only at the beginning of a two-year guarantee period,

¹⁰ “For the purpose of determining the scope of coverage of an underinsured motorist claim, the statutory law in effect at the time of entering into a contract for automobile liability insurance controls the rights and duties of the contracting parties.” *Ross v. Farmers Ins. Group of Cos.*, 82 Ohio St.3d 281, 1998-Ohio-381, syllabus.

as required by *Wolfe*. [Citations omitted.] The dissenters' analysis did not prevail, however, and the dissent in *Young* remained just that, 'a disagreement with a majority opinion,' Black's Law Dictionary (8th Ed.2004) 506, without force of law or precedential value."

"{¶27} Despite the dissent in *Young* questioning the viability of *Wolfe* in the wake of S.B. 267, there is no showing that the analysis set forth in *Wolfe* fails our tripartite test for overruling precedent. See *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of the syllabus. Thus, the dissent in *Young*, which is, essentially the appellee's argument here – must cede to the precedent of *Wolfe*. That deference to an established majority opinion, despite a jurist's disagreement with the opinion, is part of the court's rich tradition of adherence to stare decisis. [Citations omitted.]

"{¶31} We thus hold that absent an agreement between the insurer and the insured to amend the policy terms at the six-month renewal point, R.C. 3937.31(A) and our decision in *Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246, 725 N.E.2d 261, prevent an insurance company from amending the terms of its policy to increase the amount of coverage it provides, at the six-month point of renewal. In light of this disposition of the first certified question, the second certified question is moot.

Shay, supra, ¶¶ 26, 27 and 31. There was no agreement between Appellant and Allstate in this case to amend the policy terms at the six-month renewal point and, therefore, on the authority of *Wolfe* and *Shay*, the decision of the court of appeals must be reversed and judgment entered in favor of Appellant.

While there is no need to look past the aforementioned argument regarding the application of *Wolfe* and *Shay*, an examination of the S.B. 267 amendments to R.C. 3937.31 also reveals Allstate was not permitted to unilaterally incorporate S.B. 97 into Appellant's policy at the six-month renewal point.

The General Assembly used S.B. 267 to amend R.C. 3937.31 by adding subsection E, which provides:

"(E) Nothing in this section prohibits an insurer from incorporating into a policy any changes that are permitted or required by this section or other sections of the Revised Code at the beginning of any policy period within the two-year period set forth in division (A) of this section."

S.B. No. 267, 148 Ohio Laws, Part V, 11385. In amending the statute, the General Assembly enunciated its purpose:

“It is the intent of the General Assembly in amending section 3937.31 of the Revised Code to make it clear that an insurer may modify the terms and conditions of any automobile insurance policy to incorporate changes that are permitted or required by that section and other sections of the Revised Code at the beginning of any policy period within the two-year period.”

Id., at 11386.¹¹ Because S.B. No. 267 became effective less than six months after the decision in *Wolfe*, and R.C. 3937.31(E) suggests an insurer could incorporate changes into a policy at a renewal point within the two-year guarantee period, as stated earlier, it has been suggested this legislation was a response to *Wolfe* and an attempt to supersede or limit its application. However, it is interesting to note that the General Assembly made no mention of *Wolfe* at all in enunciating the purpose of the changes to R.C. 3937.31.

As this Court is well aware, the General Assembly, particularly in the automobile insurance arena, has never been shy about indicating its intent with respect to what court decisions it is trying to limit or supersede when amending statutes. In passing S.B. 97, the General Assembly announced its intent to supersede the Ohio Supreme Court holdings in *Linko*, *Scott-Pontzer*, *Schumacher v. Kreiner*, *Sexton*, *Gyori* [Citations omitted] and their progeny. In passing S.B. 267, the General Assembly stated its intent to supersede the Ohio Supreme Court holdings in *Sexton* and *Moore v. State Auto* [Citations omitted]. In passing S.B. 20, the General Assembly expressed its intent to supersede this Court’s decision in *Savoie*. It speaks volumes, therefore, that the General Assembly did not mention *Wolfe* at all when amending R.C. 3937.31. If it had wanted to supersede it, it clearly would have said so.

Looking at the plain language of R.C. 3937.31(E) and the General Assembly’s stated intent, it is clear that the incorporation of the S.B. 97 amendments to R.C. 3937.18 into Appellant’s Allstate policy at a six-month renewal period prior to the end of the March 12, 2003

¹¹ In addition to adding subsection (E), the only other changes made to R.C. 3937.31 were the deletion of the of the word “policy” before “period of not less than two years” in the introductory paragraph in division (A) and changes to reflect gender neutral language and other nonsubstantive changes.

guarantee period was not allowed by R.C. 3937.31, not to mention being in direct contradiction with *Wolfe* and *Shay*. R.C. 3937.31(E) and the legislative intent make it clear that an insurer can only unilaterally incorporate statutory changes into a policy at a renewal within the two-year guarantee period if the statutory changes are either permitted or required by R.C. 3937.31 and the statutory section that is trying to be incorporated.

In the case at bar, R.C. 3937.31 does not permit the incorporation of the S.B. 97 amendments to R.C. 3937.18. In fact, R.C. 3937.31(A) **specifically prohibits** the incorporation of S.B. 97 until the end of the two-year guarantee period. It provides:

“(A) Every automobile insurance policy shall be issued for a period of not less than two years or guaranteed renewable for successive policy periods totaling not less than two years. Where renewal is mandatory, “cancellation” as used in sections 3937.30 to 3937.39 of the Revised Code, includes refusal to renew a policy with at least the **coverages**, included insureds, **policy limits provided** at the end of the next preceding policy period. No insurer may cancel any such policy except pursuant to the terms of the policy, and in accordance with sections R.C. 3937.30 to 3937.39 of the Revised Code, and for one or more of the following reasons: ***”

(Emphasis added.) Appellant’s policy had mandatory renewal, meaning it could not be canceled except pursuant to the terms of the policy, in accordance with R.C. 3937.30 to 3937.39 and for one or more of the reasons set forth in R.C. 3937.31.¹² R.C. 3937.31(A) guarantees two years of coverage and per *Wolfe* (and *Shay*) that guarantee period is not a one-time period. Each successive two years starts another guarantee period, during which the insurer cannot unilaterally cancel the policy.

Allstate’s attempt to incorporate S.B. 97 into Appellant’s policy at a six-month renewal period is an attempted cancellation of the policy prohibited by R.C. 3937.31. That is because “cancellation” includes the refusal of the insurer to renew the policy with “at least the coverages and policy limits provided at the end of the next preceding policy period.” It is without dispute

¹² None of the reasons set forth in R.C. 3937.31 or any other reasons in R.C. 3937.30 to 3937.39 that would allow cancellation of a policy with a two-year guarantee period apply to the case at bar.

that because Allstate failed to comply with *Linko*, et al., Appellant had UM/UIM coverage as a matter of law in the amount of \$300,000 each person/\$500,000 each occurrence, the same policy limits as Appellant's bodily injury liability limits. Meaning, per the plain language of R.C. 3937.31, Allstate could not reduce the \$300,000 each person/\$500,000 each occurrence UM/UIM coverage and policy limits.

Because application of S.B. 97 would take away Appellant's UM/UIM coverage and reduce the policy limits to \$50,000 each person/\$100,000 each occurrence policy limits, and this is the exact effect Allstate is arguing occurs if S.B. 97 is incorporated, S.B. 97 cannot be incorporated into the policy until it was automatically incorporated into the policy on March 12, 2003, at the end of the applicable two-year guarantee period, per *Ross*, *supra*.¹³ As a result, because the incorporation of S.B. 97 into the policy is a "cancellation," of the policy, it is prohibited by R.C. 3937.31(A).

Not only is the incorporation of S.B. 97 into the policy at a six-month renewal period not "permitted or required" by R.C. 3937.31, there is nothing in the S.B. 97 amendments to R.C. 3937.18 that "permits or requires" the statutory changes to be incorporated into an existing two-year guarantee period at a renewal point within the two years. There is no language in the actual R.C. 3937.18 statute or in the uncodified law where the General Assembly indicates that the changes to R.C. 3937.18 are "permitted or required" to be incorporated into an insurance policy at a shorter renewal period within the two-year guarantee. The General Assembly, had it wanted, could easily have included such language in the statute itself, or the uncodified law. For instance, it could have included the following language: "pursuant to R.C. 3937.31(E), an insurer may (or must) incorporate the changes to R.C. 3937.18 into an existing policy at the point

¹³ The S.B. 97 amendments to R.C. 3937.18 represented a major change in Ohio UM/UIM law. Essentially thirty years of UM/UIM law was wiped out. UM/UIM coverage is no longer mandatory, written offers and rejections are no longer required and coverage cannot arise by operation of law. As stated earlier, the intent of S.B. 97 was to supersede many Ohio Supreme Court decisions, including *Linko* and its progeny.

of a policy renewal, even if that renewal is within the two-year guarantee period set forth in R.C. 3937.31(A),” or language to that effect. It did not use any such language, meaning the S.B. 97 changes to R.C. 3937.18 were not permitted or required until, per *Ross*, they would have automatically been incorporated into automobile policies at the beginning of new two-year guarantee periods – in this case, not until March 12, 2003, after the automobile collision and Appellant’s wife’s death.

For the foregoing reasons, pursuant to *Wolfe, Shay, Linko, et al.* and R.C. 3937.31, Appellant is entitled to UM/UIM coverage in the amount of \$300,000 each person/\$500,000 each occurrence and the court of appeals decision must be reversed and judgment entered for Appellant.

B. Assuming arguendo that Allstate was permitted to incorporate the S.B. 97 amendments to R.C. 3937.18 into Appellant’s policy at a six-month renewal period before the collision, it did not do so.

Even if this Court were to find Allstate could have incorporated the S.B. 97 amendments to R.C. 3937.18 into Appellant’s policy at a six-month renewal period, the question then becomes, did Allstate effectively incorporate the amendments? The answer is no.

By the express statutory language of R.C. 3937.31(E), as well as the uncodified law, an insurer is not required to incorporate all statutory changes that are permitted or required by the Revised Code prior to the expiration of the two-year guarantee. An insurer merely has the option of incorporating statutory changes that are “permitted or required.” Consequently, there is no “automatic” incorporation. If an insurer wants to incorporate statutory changes prior to the end of the two-year period, it must take some affirmative action to do so.

What is the necessary affirmative action that must be taken? The plain meaning of that language seems clear. A change has to be made to the policy itself. It is Appellant’s position that incorporating a statutory change into a policy prior to the expiration of a two-year guarantee

period can only be done by changing the terms of the policy itself, i.e. a policy endorsement, and that was not done by Allstate in this case.

The specific language of the Allstate policy itself makes it clear that any policy change that will reduce coverage or change policy limits must be done by endorsement. First, page 6 of the “Renewal Auto Policy Declarations” for September 12, 2002 to March 12, 2002 has a section titled “Your Policy Documents” that reads:

Your auto policy consists of this Policy Declarations and the documents listed below. Please keep these together.
– Ohio Auto Insurance Policy form PDU40 - Ohio Amendatory Policy Provisions form PDU89-3

(Appellant’s Supplement, p. 20.)¹⁴ Therefore, Form “XC15,” the notice sent to the Advents upon which Allstate relies for the incorporation of S.B. 97 into the policy, is not even part of Appellant’s policy. If it is not a part of the policy, it *certainly couldn’t* be “incorporated” into the policy as required by R.C. 3937.31.

The Allstate policy provides further guidance and instruction in this matter. The section titled “Coverage Changes” provides:

When Allstate broadens a coverage during the policy period without additional charge, you have the new feature if you have the coverage to which it applies. The new feature applies on the date the coverage change is effective in your state. **Otherwise, the policy can be changed only by endorsement.** Any change in your coverage will be made using the rules, rates and forms in effect, and on file if required, for our use in your state.

(Emphasis added.) (Appellant’s Supplement, p. 27.) Since applying the S.B. 97 amendments to the policy would result in a reduction of UM/UIM coverage and policy limits, not a broadening of coverage, Appellant’s Allstate policy requires that the change be done by endorsement. There is no dispute this wasn’t done; Allstate did not comply with R.C. 3937.31 and its own policy

¹⁴ The “Renewal Auto Policy Declarations” for Appellant’s Allstate policy for the six-month renewal periods of March 12, 2001 to September 12, 2001; September 12, 2001 to March 12, 2002 and March 12, 2002 to September 12, 2002, likewise indicate that “Form XC15 is not part of the policy. See Appellant’s Supplement, pp. 57-74.

language – meaning S.B. 97 wasn't incorporated. Form "XC15" is not an endorsement, merely a notice, and it is not part of the policy. Therefore, S.B. 97 was not incorporated into the policy in effect on the date of the collision.

Even the Form "XC15" notice itself gives no indication it is incorporating S.B. 97 or any other statutory changes into the policy. It provides:

"We'd like to let you know that we've changed the process for selecting and making changes to Uninsured Motorists Insurance for Bodily Injury and Uninsured Motorists Insurance – Property Damage.

Effective immediately, you can add or remove Uninsured Motorists Insurance for Bodily Injury and Uninsured Motorists Insurance – Property Damage and increase or decrease your limits under Uninsured Motorists Insurance for Bodily Injury by simply calling your Allstate representative. There will be no forms to sign.

Please refer to the enclosed Policy Declarations to determine if your policy currently has Uninsured Motorists Insurance for Bodily Injury and Uninsured Motorists Insurance – Property Damage.

If Uninsured Motorists Insurance for Bodily Injury or Uninsured Motorists Insurance – Property Damage is not included in your policy and you would like to purchase it, or if you would like to increase or decrease the Uninsured Motorists Insurance for Bodily Injury limits shown in the Policy Declarations, please feel free to contact your agent or the Allstate Customer Information Center at 1-800-ALLSTATE (1-800-255-7828)."

(Appellant's Supplement, p. 55). This notice makes no mention of any changes in the law. It doesn't mention that Allstate is incorporating changes in the law into the policy. It simply states Allstate has changed its own procedures for dealing with UM/UIM coverage. In fact, it misleads the insured by implying the changes were selected by Allstate.

Moreover, and most importantly, the notice makes no mention of what would happen to any UM/UIM coverage that an insured had by operation of law. Remember, at the beginning of the March 12, 2001 two-year guarantee period, Appellant had UM/UIM policy limits of \$300,000 each person/\$500,000 each occurrence by operation of law. In fact, because Allstate had never had a valid offer and reduction of UM/UIM coverage, Appellant's policy had always had the higher policy limits, notwithstanding any indication to the contrary on the declarations

pages. The mere fact that Allstate never raised the limits on the declarations pages to the correct amount of \$300,000 each person/\$500,000 each occurrence is irrelevant, Appellant had those policy limits just the same. When Appellant's first policy was written in 1989, *Abate, supra*, was nineteen year-old precedent that Appellant needed to expressly reject or reduce UM/UIM coverage. Had Allstate correctly listed Appellant's coverages and policy limits on the declarations pages, the March 12, 2001 renewal policy would have listed the actual UM/UIM policy limits of \$300,000 each person/\$500,000 each occurrence, meaning those limits (per R.C. 3937.31(A) and *Wolfe*) could not be reduced by the S.B. 97 amendments until the beginning of another two-year period, i.e. March 12, 2003.

It would have been simple for Allstate to issue an endorsement to the policy to accompany Form "XC15," but it didn't. For example, at the same time Form "XC15" was sent to the Adverts, Allstate also sent another "Important Notice" – Form "XC11," stating a change to the policy had been made increasing the UM/UIM statute of limitations to three years.¹⁵ Like Form "XC15," Form "XC11" was not a part of the policy. However, in addition to notice Form "XC11," Allstate also included an endorsement regarding the statute of limitations - "Policy Endorsement" Ohio Amendatory Policy Provisions for PDU89-3.¹⁶

As previously stated, S.B. 97 represented a monumental shift in Ohio UM/UIM law. In addition, R.C. 3937.31(E) gives insurers the power to unilaterally change insurance policies within the two-year guarantee period if such changes are permitted or required by statute. Consequently, because these changes are so drastic, it falls upon the courts to strictly uphold precedent, strictly interpret the statutory language of R.C. 3937.31 and hold insurance companies to the language they put in their policies.

¹⁵ See Appellant's Supplement, p. 56.

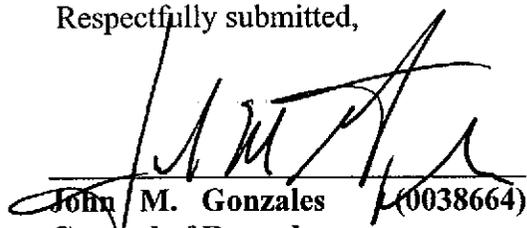
¹⁶ See Appellant's Supplement, p. 52.

Because Allstate did not actually incorporate S.B. 97 into Appellant's policy by issuing an endorsement or otherwise changing the policy language to indicate the incorporation, S.B. 97 was not incorporated and, therefore, Appellant is entitled to UM/UIM coverage in the amount of \$300,000 each person, \$500,000 each occurrence.

CONCLUSION

For the foregoing reasons, the court of appeals decision below must be **REVERSED** and the cause should be **REMANDED** with instructions to enter judgment in favor of Appellant in the amount of \$200,000, the \$300,000 each person UIM limits minus the \$100,000 previously received from the tortfeasor.

Respectfully submitted,

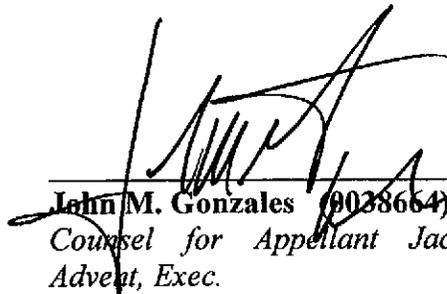


John M. Gonzales (0038664)
Counsel of Record
John M. Gonzales, LLC
140 Commerce Park Dr.
Westerville, OH 43082
614.882.3443
614.882.7117 Fax
jgonzales@gonzales-lawfirm.com
*Counsel for Appellant Jack R.
Advent, Exec.*

CERTIFICATE OF SERVICE

A copy of "Appellant's Merit Brief" was sent by ordinary U.S. mail on April 23, 2007 to:

Monica L. Waller
Lane, Alton & Horst, LLC
Two Miranova Place, Suite 500
Columbus, OH 43215.7052
Counsel for Appellee Allstate Insurance Co.



John M. Gonzales (9038664)
Counsel for Appellant Jack R. Advent, Exec.

APPENDIX

IN THE SUPREME COURT OF OHIO

Jack R. Advent, Executor of the Estate of,
Valijcan D. Advent, Deceased,

Appellant,

vs.

Allstate Insurance Company, et al.,

Appellees.

On Appeal from the Franklin
County Court of Appeals, Tenth
Appellate District

06-2271

Court of Appeals
Case No: 06AP-103

NOTICE OF APPEAL OF APPELLANT JACK R. ADVENT, EXEC.

John M. Gonzales (0038664) (Counsel of Record)

John M. Gonzales, LLC

140 Commerce Park Dr.

Westerville, OH 43082

614.882.3443

614.882.7117 Fax

jgonzales@gonzales-lawfirm.com

Counsel for Appellant Jack R. Advent, Exec.

Monica L. Waller (0070941) (Counsel of Record)

Lane, Alton & Horst, LLC

175 S. Third St., Suite 700

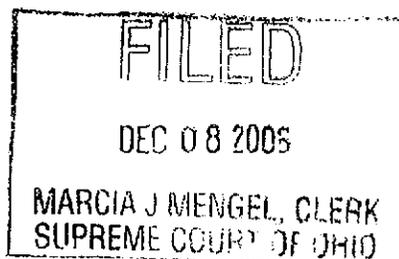
Columbus, OH 43215

614.233.4744

614.228.0146 Fax

mwall@lah4law.com

Counsel for Appellee Allstate Insurance Co.



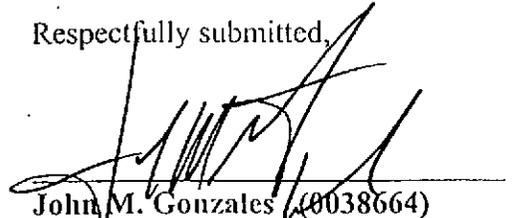
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Notice of Appeal of Appellant Jack R. Advent, Exec.

Appellant Jack R. Advent, Exec., hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No: 06AP-103 on October 24, 2006.

This case is one of public or great general interest.

Respectfully submitted,



John M. Gonzales (0038664)

Counsel of Record

John M. Gonzales, LLC

140 Commerce Park Dr.

Westerville, OH 43082

614.882.3443

614.882.7117 Fax

jgonzales@gonzales-lawfirm.com

*Counsel for Appellant Jack R.
Advent, Exec.*

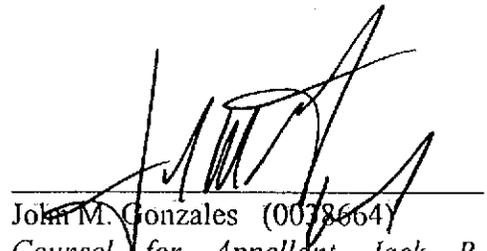
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CERTIFICATE OF SERVICE

A copy was sent by ordinary U.S. mail on December 8, 2006 to:

Edwin J. Hollern
Edwin J. Hollern Co., L.P.A.
77 N. State St.
Westerville, OH 43081
Counsel for Appellee Dennis O. Norton

Monica L. Waller
Lane, Alton & Horst, LLC
175 S. Third St., Suite 700
Columbus, OH 43215
Counsel for Appellee Allstate Insurance Co.



John M. Gonzales (0078664)
Counsel for Appellant Jack R. Advent, Exec.

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FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
OCT 24 PM 3:11
CLERK OF COURTS

Jack R. Advent, Executor of the Estate
of Valijean D. Advent, Deceased,

Plaintiff-Appellant,

v.

Allstate Insurance Company et al.,

Defendants-Appellees.

No. 06AP-103
(C.P.C. No. 04CVC09-9924)
(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on October 24, 2006, appellant's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

FRENCH, BRYANT, and TRAVIS, JJ.

By Judith L. French
Judge Judith L. French

John M. Gonzales

FILED
IN THE COURT OF APPEALS OF OHIO COURT OF APPEALS
FRANKLIN CO. OHIO
TENTH APPELLATE DISTRICT 2006 OCT 24 PM 2:43
CLERK OF COURTS

Jack R. Advent, Executor of the Estate
of Valijeane D. Advent, Deceased,

Plaintiff-Appellant,

v.

Allstate Insurance Company et al.,

Defendants-Appellees.

No. 06AP-103
(C.P.C. No. 04CVC09-9924)

(REGULAR CALENDAR)

O P I N I O N

Rendered on October 24, 2006

*John M. Gonzales, LLC, and John M. Gonzales, for
appellant.*

*Lane, Alton & Horst, LLC, Rick E. Marsh, and Monica L.
Waller, for appellee Allstate Insurance Company.*

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Plaintiff-appellant, Jack R. Advent, as executor of the estate of Valijeane D. Advent ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas granting summary judgment in favor of defendant-appellee, Allstate Insurance Company ("Allstate"), and denying appellant's motion for partial summary judgment. For the following reasons, we affirm the trial court's judgment.

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{¶2} This action arises out of an automobile accident that occurred on September 28, 2002, as a result of the negligence of Scott D. Rude. Valjean D. Advent died from injuries she sustained in the accident and is survived by her husband, appellant Jack Advent, and her children, Laura and Ryan. As executor of his late wife's estate, appellant settled the estate's claims against Mr. Rude and Mr. Rude's insurer, State Farm Mutual Automobile Insurance Company ("State Farm"), for the \$100,000 bodily injury limit of Mr. Rude's insurance policy, while preserving the right to pursue claims for uninsured/underinsured motorist ("UM/UIM") coverage from Allstate, the Advents' insurer.

{¶3} At the time of the accident, appellant and his wife were the named insureds on an Allstate insurance policy, which provided liability coverage up to \$300,000 per person/\$500,000 per occurrence. According to its declarations page, the Allstate policy provided UM/UIM coverage up to \$50,000 per person/\$100,000 per accident.

{¶4} On September 23, 2004, appellant filed an action for wrongful death and declaratory judgment against Allstate and Dennis O. Norton, appellant's insurance agent, in the Franklin County Court of Common Pleas.¹ In his claims against Allstate, appellant seeks to recover \$200,000 in UM/UIM coverage under the Allstate policy. Appellant contends that UM/UIM coverage arose by operation of law under the Allstate policy in an amount equivalent to the policy's liability limit of \$300,000 per person/\$500,000 per occurrence. After setting off the \$100,000 paid by State Farm,

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¹ Appellant's claim against defendant Norton was the subject of a separate appeal, *Advent v. Allstate Ins. Co.*, Franklin App. No. 05AP-1092, 2006-Ohio-2743.

appellant contends that the estate is entitled to recover \$200,000 under the Allstate policy. Allstate has admitted that the estate sustained compensatory damages in excess of \$300,000.

{¶5} On June 28, 2005, Allstate filed a motion for summary judgment, arguing that appellant was not entitled to recover UM/UIM benefits under the Allstate policy because Mr. Rude's liability coverage exceeded the Allstate policy's UM/UIM limits. Allstate also argued that, because the S.B. No. 97 version of R.C. 3937.18(A) applies, no additional UM/UIM coverage arises by operation of law under the Allstate policy. On August 8, 2005, appellant filed a memorandum contra Allstate's motion for summary judgment and a cross-motion for partial summary judgment. Allstate filed a reply memorandum in support of its motion on August 12, 2005. On November 15, 2005, the trial court issued a decision granting Allstate's motion for summary judgment and denying appellant's motion for partial summary judgment. The trial court entered judgment in accordance with its November 15, 2005 decision on January 4, 2006, and appellant filed a timely notice of appeal.

{¶6} Appellant raises a single assignment of error for our consideration:

THE TRIAL COURT ERRED IN GRANTING SUMMARY
JUDGMENT IN FAVOR OF APPELLEE ALLSTATE AND
DENYING APPELLANT'S MOTION FOR SUMMARY
JUDGMENT.

{¶7} Appellate review of summary judgments is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588, citing *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. When an appellate court reviews a trial court's disposition of a summary judgment motion, it applies the same standard as the trial court and conducts an independent review, without deference to the trial court's

determination. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107; *Brown* at 711.

{¶8} Pursuant to Civ.R. 56(C), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Accordingly, summary judgment is appropriate only where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) viewing the evidence most strongly in favor of the non-moving party, reasonable minds can come to but one conclusion, that conclusion being adverse to the non-moving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶9} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim." *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 292. Once the moving party meets its initial burden, the non-movant must set forth specific facts demonstrating a genuine issue for trial. *Id.* at 293. Because summary judgment is a procedural device to terminate litigation, courts should award it cautiously after resolving all doubts in favor of the non-moving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359, quoting *Norris v. Ohio Std. Oil Co.* (1982), 70 Ohio St.2d 1, 2.

{¶10} The parties' dispute over the amount of UM/UIM coverage afforded by the Allstate policy stems from their disagreement over which version of the Ohio uninsured motorist statute, R.C. 3937.18, governs the scope of the policy. "For the purpose of determining the scope of coverage of an underinsured motorist claim, the statutory law in effect at the time of entering into a contract for automobile liability insurance controls the rights and duties of the contracting parties." *Ross v. Farmers Ins. Group of Cos.* (1998), 82 Ohio St.3d 281, syllabus. However, as the Third District Court of Appeals has aptly recognized, "[t]his seemingly simple concept can become problematic because Ohio statutory law requires insurance carriers to give insureds a two-year guaranteed coverage period. R.C. 3937.31(A)." *McDaniel v. Rollins*, Allen App. No. 1-04-82, 2005-Ohio-3079, at ¶21.

{¶11} Allstate originally issued the Advents' policy on March 12, 1989, and the parties continuously renewed the policy through the time of the accident. Pursuant to R.C. 3937.31(A), "[e]very automobile insurance policy shall be issued for a period of not less than two years or guaranteed renewable for successive policy periods totaling not less than two years." In *Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246, 250, the Ohio Supreme Court addressed the effect of R.C. 3937.31(A), holding that the commencement of each two-year guarantee period brings into existence a new contract of insurance, whether the policy is categorized as a new policy or a renewal, and that R.C. 3937.31 applies "regardless of the number of times the parties previously have contracted for motor vehicle insurance coverage." The statutory law in effect as of the issuance date of each new policy governs the policy. *Id.* "Under *Wolfe*, insurance policies could * * * not be altered during the guaranteed two-year period 'except by

agreement of the parties and in accordance with R.C. 3937.30 to 3937.39.'" *Am v. McLean*, 159 Ohio App.3d 662, 2005-Ohio-654, at ¶15; *Wolfe* at 250. Consequently, under *Wolfe*, an insurer could incorporate statutory changes into an insurance policy only when a new two-year guarantee period began. *Wolfe* at 250-251.

{¶12} In *Wolfe*, the Ohio Supreme Court looked to the original issuance date of the appellants' automobile insurance policy and counted successive two-year periods from that date to determine the last guarantee period. Applying that method here, and counting successive two-year periods from the original issuance date of March 12, 1989, the last two-year guarantee period prior to the accident ran from March 12, 2001 until March 12, 2003. The statutory law in effect on March 12, 2001, included the statutory changes affected by S.B. No. 267, effective September 21, 2000. As the statutory law in effect at the beginning of the relevant guarantee period, the S.B. No. 267 versions of the insurance statutes govern the scope of the Allstate policy.

{¶13} Enacted subsequent to *Wolfe*, but prior to the beginning of the relevant guarantee period, S.B. No. 267 did not change the requirement of a two-year guarantee period mandated by R.C. 3937.31(A). However, as part of S.B. No. 267, the General Assembly added subsection (E) to R.C. 3937.31, which provides as follows:

(E) Nothing in this section prohibits an insurer from incorporating into a policy any changes that are permitted or required by this section or other sections of the Revised Code at the beginning of any policy period within the two-year period set forth in division (A) of this section.

Section 5 of S.B. No. 267 read:

It is the intent of the General Assembly in amending section 3937.31 of the Revised Code to make clear that an insurer may modify the terms and conditions of any automobile insurance policy to incorporate changes that are permitted or

required by that section and other sections of the Revised Code at the beginning of any policy period within the two-year period set forth in division (A) of that section.

Under R.C. 3937.31(E), where a policy is "guaranteed renewable for successive policy periods totaling not less than two years[,]" as permitted by R.C. 3937.31(A), an insurer may incorporate changes permitted by the Ohio Revised Code at the beginning of any policy period. Thus, to the extent that it held that insurance policies could not be altered during the two-year guarantee period except by agreement of the parties, R.C. 3937.31(E) abrogated *Wolfe*. See *Arm; McDaniel* at ¶12, fn. 1.

{¶14} The S.B. No. 267 version of R.C. 3937.18 required automobile insurers to offer UM/UIM coverage in an amount equal to the liability limits under any automobile insurance policy written or delivered in Ohio, and, if an insurer failed to offer UM/UIM coverage, such coverage arose by operation of law in the amount of the policy's liability coverage. *Hicks-Malak v. Cincinnati Ins. Cos.*, Lucas App. No. L-04-1272, 2005-Ohio-2745, at ¶11, citing *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St.3d 565, 568. Although the Allstate policy declarations state that UM/UIM coverage is provided with limits of \$50,000 per person/\$100,000 per accident, appellant argues that Allstate failed to offer UM/UIM coverage in an amount equal to the policy's liability limits and that Allstate cannot produce a written reduction of limits for UM/UIM coverage. Consequently, appellant argues that UM/UIM coverage arises under the Allstate policy by operation of law in the amount of \$300,000 per person/\$500,000 per accident, equivalent to the policy's liability coverage.

{¶15} Although S.B. No. 267 was in effect at the beginning of the relevant guarantee period, the General Assembly, during that guarantee period, again amended

R.C. 3937.18 through S.B. No. 97, effective October 31, 2001. Allstate argues that R.C. 3937.31(E), which was in effect at the beginning of the guarantee period, permitted incorporation of statutory changes at the end of any policy period within the two-year guarantee period and that Allstate incorporated the S.B. No. 97 version of R.C. 3937.18(A) into the policy prior to the accident. As amended by S.B. No. 97, R.C. 3937.18(A) provides, in part:

Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

In S.B. No. 97, the General Assembly expressed its intent to:

(1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

* * *

(4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy[.]

Allstate contends that, under the S.B. No. 97 version of R.C. 3937.18(A), no additional UM/UIM coverage may be imposed by operation of law on the Advents' policy.

{¶16} Simply stated, the essence of the parties' dispute becomes whether the S.B. No. 97 amendments to R.C. 3937.18(A) applied to the Allstate policy at the time of the accident. Two Ohio appellate districts have considered scenarios, like the one presently before us, involving a claim for UIM coverage arising out of an accident that occurred after the effective date of S.B. No. 97, where the insurance policy at issue had a guarantee period that began after the effective date of S.B. No. 267, but before the effective date of S.B. No. 97. The Second and Eighth District Courts of Appeals have reached differing conclusions as to whether the S.B. No. 97 changes to R.C. 3937.18 can be incorporated into an insurance policy during a guarantee period that began between the effective dates of S.B. Nos. 267 and 97. See *Am; Storer v. Sharp*, Cuyahoga App. No. 86525, 2006-Ohio-1577.

{¶17} In *Am*, the relevant guarantee period began on February 21, 2001, at which time the S.B. No. 267 versions of R.C. 3937.18 and 3937.31, including R.C. 3937.31(E), were in effect. During the guarantee period, the *Am* policy renewed on February 22, 2002, after the effective date of S.B. No. 97. Like here, the parties disagreed as to whether the S.B. No. 97 changes applied to the policy at the time of the accident. The Second District held that, because R.C. 3937.31(E) was in effect at the beginning of the guarantee period, the insurer "was free to modify the policy or to incorporate any changes that were then permitted or authorized by law" when the policy renewed on February 22, 2002. *Am* at ¶24. Accordingly, the court held that S.B. No. 97 governed the parties' rights under the policy.

{¶18} In *Storer*, the relevant guarantee period began on September 18, 2001, at which time the S.B. No. 267 versions of R.C. 3937.18 and 3937.31 were in effect. Like

the policy in *Am*, the *Storer* policy renewed after the effective date of S.B. No. 97. Unlike the Second District, the Eighth District Court of Appeals rejected the argument that the insurer could incorporate the S.B. No. 97 amendments into the policy in a mid-guarantee renewal, despite R.C. 3937.31(E). The court stated:

As noted by this court in *Young v. Cincinnati Ins. Co.*, [Cuyahoga] App. No. 82395, 2004-Ohio-54, a policy cannot be amended to reflect statutory changes that occur during the guaranteed two-year period; an amendment does not take effect until the expiration of that two-year period. R.C. 3937.31(A); *Shay v. Shay*, [164 Ohio App.3d 518], 2005-Ohio-5874; *Slone v. Allstate Ins. Co.*, Richland App. No. 2004CA0021, 2004-Ohio-3990.

Id. at ¶15. We disagree with the Eighth District's analysis in *Storer*.

¶19 The cases upon which the Eighth District based its conclusion that a policy cannot be amended to reflect statutory changes during a guarantee period involved insurance policies with guarantee periods that began prior to the effective date of S.B. No. 267 and, thus, prior to the enactment of R.C. 3937.31(E). In *Young v. Cincinnati Ins. Co.*, Cuyahoga App. No. 82395, 2004-Ohio-54; *Shay v. Shay*, 164 Ohio App.3d 518, 2005-Ohio-5874; and *Slone v. Allstate Ins. Co.*, Richland App. No. 2004CA0021, 2004-Ohio-3990, the guarantee periods at issue began prior to the effective date of S.B. No. 267 when, under *Wolfe*, an insurer could incorporate statutory changes into an insurance policy only when a new two-year guarantee period began. Accordingly, those courts properly concluded that the insurers could not incorporate the S.B. No. 267 amendments into the policies in the middle of a statutorily mandated guarantee period. Such cases are inapposite to this case because, here, the guarantee period of the Allstate policy began after the effective date of S.B. No. 267 and the enactment of R.C. 3937.31(E), which expressly permits an insurer to incorporate changes into policies at

the beginning of a policy period within the guarantee period. Accordingly, we find the Eighth District's reliance on such cases in *Storer* misplaced. We further find the Second District's analysis in *Am* sound.

{¶20} Appellant acknowledges that R.C. 3937.31(E) permits insurers to incorporate policy changes at the beginning of a policy period within a two-year guarantee period, but argues that the Allstate policy was issued for two-year policy periods rather than for shorter, successively renewable policy periods. Appellant contends that the policy period of the Allstate policy was the same as the guarantee period, ending March 12, 2003. Thus, appellant argues that Allstate could not incorporate the S.B. No. 97 changes into the policy until the beginning of the next two-year policy and guarantee period. Allstate, on the other hand, argues that it issued the Advents' policy for six-month policy periods, guaranteed renewable for successive periods totaling two years and that, during the applicable guarantee period, the policy renewed on September 12, 2001, March 12, 2002, and September 12, 2002. Allstate contends that it incorporated the S.B. No. 97 changes into the policy as of the March 12, 2002 renewal.

{¶21} To determine the policy period for the Allstate policy, we turn to the policy itself. Appellant argues that Allstate issued its policy for two-year policy periods based on the policy provision entitled "Guarantee Period," which provides:

A guarantee period required by Ohio law begins on the 90th day after the original effective date of the policy, and continues for two years from that original effective date. When this guarantee period expires, a new guarantee period will commence for another two year period unless we mail notice that we don't intend to continue the policy. Each guarantee period begins after the expiration of the prior guarantee period.

Although the Allstate period clearly provides for a two-year guarantee policy, as required by R.C. 3937.31(A), the policy does not use the terms "guarantee period" and "policy period" interchangeably. Rather, the policy defines the policy period in a provision entitled "When And Where The Policy Applies," which provides:

Your policy applies only during the policy period. During this time, it applies to covered losses to the insured auto, accidents, and occurrences within the United States, its territories or possessions; Canada, and between their ports.
The policy period is shown on the Policy Declarations.

(Emphasis added.)

{¶22} Allstate issued Renewal Auto Policy Declarations every six months. The Renewal Auto Policy Declarations issued at the beginning of the March 12, 2001 guarantee period identify the "policy period" as March 12, 2001, to September 12, 2001, at 12:01 a.m. standard time. The record contains additional Renewal Auto Policy Declarations listing policy periods of September 12, 2001, to March 12, 2002, March 12, 2002, to September 12, 2002, and September 12, 2002, to March 12, 2003.

{¶23} Despite policy language defining the policy period as the period set forth in the declarations, each of which identifies a six-month policy period, appellant argues that a six-month policy period is in direct contradiction to the specific language of the "Guarantee Period." Alternatively, appellant argues that the Allstate policy is ambiguous regarding the length of the policy period. We disagree. The "Guarantee Period" provision in the Allstate policy simply incorporates the guarantee period required by R.C. 3937.31(A), which permits insurers to issue a policy either for a two-year policy period or for lesser policy periods guaranteed renewable for at least two years. Nothing in R.C. 3937.31(A) requires insurers to issue policies for two-year policy periods, and

nothing in the Allstate policy's "Guarantee Period" provision suggests that the Allstate policy has a two-year policy period. Rather, the Allstate policy expressly provides that its policy period is shown on the policy declarations, each of which identifies a six-month policy period. Thus, upon review, we conclude that the Allstate policy was issued for successive six-month policy periods within each two-year guarantee period. Accordingly, pursuant to R.C. 3937.31(E), Allstate was permitted to incorporate the changes brought about by S.B. No. 97 into the policy at the beginning of any six-month policy period following the effective date of S.B. No. 97.

{¶24} Appellant next argues that, even if the Allstate policy was issued for six-month periods, Allstate took no action to incorporate the S.B. No. 97 version of R.C. 3937.18 into the policy. Appellant contends that the incorporation of a statutory change into a policy prior to the expiration of a two-year guarantee period may only be accomplished by a policy endorsement and that Allstate failed to issue a policy endorsement incorporating the S.B. No. 97 changes. Allstate, on the other hand, argues that the "Important Notice" sent to the Advents prior to the March 12, 2002 renewal was sufficient to incorporate the S.B. No. 97 changes into the policy. The notice stated:

We'd like to let you know that we've changed the process for selecting and making changes to Uninsured Motorists Insurance for Bodily Injury and Uninsured Motorists Insurance – Property Damage.

Effective immediately, you can add or remove Uninsured Motorists Insurance for Bodily Injury and Uninsured Motorists Insurance – Property Damage and increase or decrease your limits under Uninsured Motorists Insurance for Bodily Injury by simply calling your Allstate representative. There will be no forms to sign.

Please refer to the enclosed Policy Declarations to determine if your policy currently has Uninsured Motorists Insurance for Bodily Injury, and Uninsured Motorists Insurance – Property Damage.

If Uninsured Motorists Insurance for Bodily Injury or Uninsured Motorists Insurance – Property Damage is not included in your policy and you would like to purchase it, or if you would like to increase or decrease the Uninsured Motorists Insurance for Bodily Injury limits shown on the Policy Declarations, please feel free to contact your agent or the Allstate Customer Information Center at 1-800-ALLSTATE (1-800-255-7828).

We also note that, under the heading "Important Payment and Coverage Information," the Renewal Policy Declarations for the policy period from March 12, 2002, to September 12, 2002, explicitly informed the Advents that their chosen UM/UIM limits were less than their liability coverage limits and instructed them to contact their agent or Allstate if they wished to increase their UM/UIM limits.

{¶25} Appellant argues that the Notice is insufficient to incorporate the S.B. No. 97 changes into the Allstate policy because the policy itself expressly requires that any change to the policy that restricts or reduces coverage be accomplished by policy endorsement. The Allstate policy provision entitled "Coverage Changes" provides:

When Allstate broadens a coverage during the policy period without additional charge, you have the new feature if you have the coverage to which it applies. The new feature applies on the date the coverage change is effective in your state. Otherwise, the policy can be changed only by endorsement. Any change in your coverage will be made using the rules, rates and forms in effect, and on file if required, for our use in your state.

Appellant contends that the incorporation of the S.B. No. 97 changes into the Allstate policy constituted a change to the policy resulting in a reduction of coverage. Appellant claims that, prior to S.B. No. 97, UM/UIM coverage would have arisen by operation of

law with limits of \$300,000 per person/\$500,000 per accident, whereas, under S.B. No. 97, UM/UIM coverage is limited to \$50,000 per person/\$100,000 per accident, as set forth in the policy declarations.

{¶26} We reject appellant's position that S.B. No. 97 could only be incorporated into the Allstate policy by endorsement. The incorporation of the S.B. No. 97 changes to R.C. 3937.18 into the Allstate policy did not change the policy itself. From its inception, the terms of the Allstate policy provided for UM/UIM coverage with limits of \$50,000 per person/\$100,000 per accident. In his deposition, appellant admitted that, prior to the accident, he understood that the Allstate policy provided UM/UIM coverage with lower limits than the policy's liability coverage. It was only by operation of law that courts could, under the prior versions of R.C. 3937.18, impose higher UM/UIM coverage limits on the Allstate policy. The incorporation of the S.B. No. 97 version of R.C. 3937.18 simply validated the coverage that the policy had always purported to provide.

{¶27} The Twelfth District Court of Appeals recently rejected an argument similar to that which appellant makes here. In *Burton v. Allstate Ins. Co.*, Butler App. No. CA2004-10-247, 2005-Ohio-5291, the appellants sought UM/UIM coverage after a March 31, 2002 automobile accident. The insurance policy at issue in *Burton* was originally issued on December 6, 1997, and was renewed on December 6, 1999, and December 6, 2001. The appellants argued that the reduced UM/UIM limits stated in the policy were invalid and that UM/UIM coverage arose by operation of law in an amount equivalent to the policy's liability coverage. The insurer argued that, under the S.B. No. 97 version of R.C. 3937.18, the reduced UM/UIM limits were valid and precluded recovery. It was undisputed that the most recent policy renewal occurred after the

effective date of S.B. No. 97. Nevertheless, the appellants argued that the S.B. No. 97 changes were not incorporated into their policy because appellants were not properly notified of the changes in UM/UIM coverage when the policy renewed. The Twelfth District rejected the appellants' argument for two reasons:

* * * First, "[a]n insurer has no duty to inform an insured about changes in insurance laws." *Ryan v. The Hartford Co.* (June 25, 2001), Butler App. No. CA2000-10-210. Second, there was no change in the UM/UIM coverage limits of the renewal policy. The Burtons concede that the policy originally issued to them on December 6, 1997 included UM/UIM coverage in the amounts of \$25,000 per person and \$50,000 per occurrence. These amounts are identical to those declared in the renewal policy that went into effect on December 6, 2001. Thus, notice of a change in UM/UIM coverage was not required.

Id. at ¶16.

{¶28} Similarly, in *Arn*, the appellants argued that the S.B. No. 97 changes were not incorporated into their policy, under which UM/UIM coverage would have otherwise been imposed by operation of law. There, the renewal certificate issued with the post-S.B. No. 97 renewal informed the insureds that UM/UIM coverage had been declined and instructed the insureds to contact their insurance agent if they wished to purchase UM/UIM coverage. The appellants argued that, because their prior rejections of UM/UIM coverage were invalid under the pre-S.B. No. 97 versions of R.C. 3937.18, this was not a sufficient change to the policy. The Second District disagreed, stating:

* * * In our opinion, prior rejections or coverage imposed by operation of law were irrelevant, because State Farm had no obligation to offer UM coverage and there was no need for either a written offer or a rejection when the policy was renewed in February, 2002. On its face, the policy did not contain UM/UIM coverage and, in fact, had never contained UM/UIM coverage. The only way such coverage might have been in effect previously was through a legal fiction adopted

by courts—a fiction that was no longer viable in February 2002. Whether one wants to consider the statement on the renewal certificate a change or simply a return of the policy to what it always was before the many amendments to the UM statutes, the fact is that the insured was clearly informed that the policy did not contain UM/UIM coverage.

Am at ¶41.

{¶29} Like the policy at issue in *Burton*, the Allstate policy at issue here has always provided in its declarations for reduced UM/UIM coverage limits. Since its inception, the Allstate policy has provided UM/UIM coverage with limits of \$50,000 per person/\$100,000 per accident. The only way additional UM/UIM coverage might previously have been available to appellant "was through a legal fiction adopted by court—a fiction that was no longer viable[.]" *Id.* Additional coverage imposed by operation of law was, by definition, never explicitly included in the Allstate policy. Accordingly, there was no policy provision for Allstate to amend by endorsement. As the *Burton* court noted, an insurer has no duty to inform its insureds about changes in insurance law. Nevertheless, Allstate instructed its insureds to review the UM/UIM coverage expressly listed in their policy declarations and informed them how to make changes to such coverage if desired. Allstate also explicitly informed the Advents that their chosen UM/UIM limits were less than their liability coverage limits. Because the incorporation of the S.B. No. 97 changes to the insurance statutes occasioned no change in the terms of the Allstate policy, Allstate was not required to issue a policy endorsement to incorporate those changes into the policy.

{¶30} In support of its position that a policy endorsement was required to make changes to the policy, appellant cites to the fact that Allstate issued an endorsement, in addition to a notice, to enlarge the statute of limitations for UM/UIM claims from two to

three years. Allstate sent its notice regarding the extension of the statute of limitations at the same time it sent notice regarding the changes to the process for selecting UM/UIM coverage. We find Allstate's issuance of an endorsement changing the statute of limitations irrelevant. The enlargement of the statute of limitations involved a change to the express terms of the Allstate policy, which previously required that "[a]ny legal action against Allstate must have been brought within two years of the date of the accident." Unlike the change to the statute of limitations, application of amended R.C. 3937.18(A) did not involve any change to the terms of the Allstate policy. Rather, it simply validated the expressly stated limits of UM/UIM coverage set forth in the policy declarations, as negotiated by the parties and as appellant understood them to exist.

{¶31} For the foregoing reasons, we find that the S.B. No. 97 changes to R.C. 3937.18(A) applied to the Allstate policy at the time of the accident and that the Allstate policy provided UM/UIM coverage in the amounts of \$50,000 per person/\$100,000 per accident. Consequently, we conclude that the trial court did not err in granting Allstate's motion for summary judgment and denying appellant's motion for partial summary judgment. Therefore, we overrule appellant's assignment of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and TRAVIS, JJ., concur.

IN THE SUPREME COURT OF OHIO

Jack R. Advent, Executor of the Estate of,
Valijeau D. Advent, Deceased,

Appellant,

vs.

Allstate Insurance Company, et al.,

Appellees.

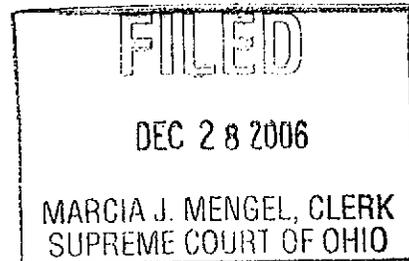
Supreme Court Case No: ~~06-227~~ **06-2393**

On Appeal from the Franklin
County Court of Appeals, Tenth
Appellate District
Case No: 06AP-103

NOTICE OF CERTIFIED CONFLICT

John M. Gonzales (0038664) (Counsel of Record)

John M. Gonzales, LLC
140 Commerce Park Dr.
Westerville, OH 43082
614.882.3443
614.882.7117 Fax
jgonzales@gonzales-lawfirm.com
Counsel for Appellant Jack R. Advent, Exec.



Monica L. Waller (0070941) (Counsel of Record)

Lane, Alton & Horst, LLC
175 S. Third St., Suite 700
Columbus, OH 43215
614.233.4744
614.228.0146 Fax
mwaller@lah4law.com
Counsel for Appellee Allstate Insurance Co.

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Notice of Certified Conflict between Decisions of the Tenth and Eighth Appellate Districts

Pursuant to *S. Ct. Prac. R. IV, §1*, Appellant Jack R. Advent, Exec., hereby gives notice to the Supreme Court of Ohio that the Tenth Appellate District has issued an order certifying a conflict with the Eighth Appellate District in the following decisions: *Advent v. Allstate Insurance Co.*, Franklin App. No. 06AP-103, 2006-Ohio-5522 and *Storer v. Sharp*, Cuyahoga App. No. 86525, 2006-Ohio-1577.

The Tenth Appellate District certified the following question as being in conflict between the two aforementioned decisions:

Can the S.B. No. 97 amendments to R.C. 3937.18 be incorporated into an insurance policy during a two-year guarantee period that commenced subsequent to the S.B. No. 267 amendments to R.C. 3937.18 and R.C. 3937.31, but prior to the S.B. No. 97 amendments?

Copies of the Tenth District's December 21, 2006 "Decision On Motion to Certify" and the corresponding "Journal Entry" are attached hereto. Copies of the actual decisions in *Advent* and *Storer, supra*, are also attached.

On December 8, 2006, Appellant also filed a discretionary "Notice of Appeal" and "Jurisdictional Memorandum" with the Supreme Court of Ohio in this matter as well.

Respectfully submitted,



John M. Gonzales (0038664)
Counsel of Record
John M. Gonzales, LLC
140 Commerce Park Dr.
Westerville, OH 43082
614.882.3443
614.882.7117 Fax
jgonzales@gonzales-lawfirm.com
Counsel for Appellant Jack R. Advent, Exec.

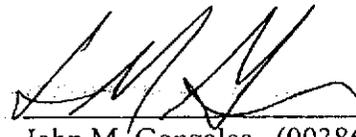
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CERTIFICATE OF SERVICE

A copy was sent by ordinary U.S. mail on December 28, 2006 to:

Edwin J. Hollern
Edwin J. Hollern Co., L.P.A.
77 N. State St.
Westerville, OH 43081
Counsel for Appellee Dennis O. Norton

Monica L. Waller
Lane, Alton & Horst, LLC
175 S. Third St., Suite 700
Columbus, OH 43215
Counsel for Appellee Allstate Insurance Co.



John M. Gonzales (0038664)
*Counsel for Appellant Jack R.
Advent, Exec.*

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Jack R. Advent, Executor of the Estate
of Valijeau D. Advent, Deceased,

Plaintiff-Appellant,

v.

Allstate Insurance Company et al.,

Defendants-Appellees.

No. 06AP-103

(C.P.C. No. 04CVC09-9924)

(REGULAR CALENDAR)

JOURNAL ENTRY

For the reasons stated in the decision of this court rendered herein on December 21, 2006, it is the order of this court that the motion to certify the judgment of this court as being in conflict with the judgment of the Court of Appeals for Cuyahoga County in *Storer v. Sharp*, Cuyahoga App. No. 86525, 2006-Ohio-1577, is granted and, pursuant to Section 3(B)(4), Article IV, Ohio Constitution, the record of this case is certified to the Supreme Court of Ohio for review and final determination upon the following issue in conflict:

Can the S.B. No. 97 amendments to R.C. 3937.18 be incorporated into an insurance policy during a two-year guarantee period that commenced subsequent to the S.B. No. 267 amendments to R.C. 3937.18 and R.C. 3937.31, but prior to the S.B. No. 97 amendments?

ON COMPUTER 12

FRENCH, BRYANT, and TRAVIS, JJ.

By Judith L. French
Judge Judith L. French

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John M. Gonzales

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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CLERK OF COURTS

Jack R. Advent, Executor of the Estate
of Valijean D. Advent, Deceased,

Plaintiff-Appellant,

v.

Allstate Insurance Company et al.,

Defendants-Appellees.

No. 06AP-103
(C.P.C. No. 04CVC09-9924)

(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 21, 2006

*John M. Gonzales, LLC, and John M. Gonzales, for
appellant.*

*Lane, Alton & Horst, LLC, Rick E. Marsh, and Monica L.
Waller, for appellee Allstate Insurance Company.*

ON MOTION TO CERTIFY

FRENCH, J.

{¶1} Pursuant to App.R. 25, appellant, Jack R. Advent, as executor of the estate of Valijean D. Advent ("appellant"), moves this court for an order certifying to the Ohio Supreme Court a conflict between our October 24, 2006 opinion in *Advent v. Allstate Ins. Co.*, Franklin App. No. 06AP-103, 2006-Ohio-5522, and the opinion of the

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Eighth Appellate District in *Storer v. Sharp*, Cuyahoga App. No. 86525, 2006-Ohio-1577. Appellee, Allstate Insurance Company ("Allstate"), opposes appellant's motion.

{¶2} Section 3(B)(4), Article IV, Ohio Constitution vests in the courts of appeals of this state the power to certify the record of a case to the Ohio Supreme Court for review and final determination "[w]henver the judges * * * find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state[.]" In *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St.3d 594, 596, the Ohio Supreme Court set forth the standard for courts of appeals to use when ruling on a motion to certify:

* * * [A]t least three conditions must be met before and during the certification of a case to this court * * *. First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law-not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. * * *

Before certification to the Supreme Court, there must exist an actual conflict between appellate judicial districts on a rule of law. *Id.*, paragraph one of the syllabus. However, as this court has noted, "'there is no reason for a Court of Appeals to certify its judgment as conflicting with that of another Court of Appeals where * * * the point upon which the conflict exists had no arguable effect upon the judgment of the certifying court.'" *Penrod v. Ohio Dept. of Adm. Servs.*, Franklin App. No. 04AP-1118, 2005-Ohio-6611, at ¶4, quoting *Pincelli v. Ohio Bridge Corp.* (1966), 5 Ohio St.2d 41, 44.

{¶3} Appellant proposes the following question for certification to the Supreme Court:

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Can the S.B. 97 amendments to R.C. 3937.18 be incorporated into an insurance policy during a two-year *Wolfe* [*v. Wolfe* (2000), 88 Ohio St.3d 246] guarantee period that commenced subsequent to the S.B. 267 amendments to R.C. 3937.18 and R.C. 3937.31, but prior to the S.B. 97 amendments?

{¶4} Both *Advent* and *Storer* involve claims for uninsured/underinsured motorist coverage. The relevant two-year guarantee period for the insurance policy at issue in *Advent* commenced on March 12, 2001, after the effective date of S.B. No. 267 but prior to the effective date of S.B. No. 97. Likewise, in *Storer*, the relevant two-year guarantee period for the insurance policy began on September 18, 2001, after the effective date of S.B. No. 267, but prior to the effective date of S.B. No. 97. Accordingly, at the commencement of the relevant guarantee periods, the S.B. No. 267 versions of the insurance statutes governed the scope of the policies in both *Advent* and *Storer*. As part of S.B. No. 267, the General Assembly added subsection (E) to R.C. 3937.31, which provides that "[n]othing in this section prohibits an insurer from incorporating into a policy any changes that are permitted or required by this section or other sections of the Revised Code at the beginning of any policy period within the two-year [guarantee] period[.]" In both *Advent* and *Storer*, after the effective date of S.B. No. 97, the insurance policies were renewed for new policy periods within the applicable two-year guarantee periods.

{¶5} Central to the judgment in both *Advent* and *Storer* was the question of whether an insurer may incorporate the S.B. No. 97 amendments to R.C. 3937.18 into a policy when the policy renews during a two-year guarantee period that commenced after the effective date of S.B. No. 267. Allstate agrees with appellant that this was the ultimate issue in both cases.

{¶6} In *Storer*, the Eighth Appellate District rejected the insurer's argument that, as a result of S.B. No. 267, the S.B. No. 97 changes to R.C. 3937.18 could be incorporated into a renewal policy before the beginning of a new two-year guarantee period. Despite a policy renewal after the effective date of S.B. No. 97, the court held that "a policy cannot be amended to reflect statutory changes that occur during the guaranteed two-year period[.]" *Id.* at ¶15, citing *Young v. Cincinnati Ins. Co.*, Cuyahoga App. No. 82395, 2004-Ohio-54.

{¶7} Here, in *Advent*, we rejected the Eighth Appellate District's reasoning in *Storer* and reached the opposite conclusion. We concluded that S.B. No. 267, with its amendment of R.C. 3937.31 to include subsection (E), expressly permitted Allstate to incorporate statutory changes into its policy at the beginning of a renewal policy period within the two-year guarantee period. Accordingly, contrary to the *Storer* opinion, we held that Allstate could incorporate the statutory changes brought about by S.B. No. 97 into its policy at the commencement of a new policy period within the two-year guarantee period.

{¶8} In opposing certification, Allstate contends that it is not clear from the *Storer* opinion that the judgments in *Advent* and *Storer* conflict. Allstate attempts to distinguish *Storer* based on the lack of discussion in *Storer* as to whether the insurer took steps to incorporate the S.B. No. 97 changes into the policy. Allstate claims that it is unclear from the *Storer* opinion whether the court's judgment would have been the same had it undertaken such consideration. We disagree. While Allstate is correct that this court considered the steps Allstate took to incorporate the S.B. No. 97 changes into its policy, such consideration was necessitated only by our conclusion that an insurer

was permitted to incorporate the S.B. No. 97 amendments into the policy before the commencement of a new two-year guarantee policy. To the contrary, whether or not the insurer in *Storer* acted to incorporate the S.B. No. 97 changes into its policy, the Eighth Appellate District concluded that an insurer could not incorporate such changes until the beginning of a new guarantee period. Thus, it is clear from the opinion in *Storer* that consideration of the issue identified by Allstate would not have altered the Eighth Appellate District's judgment.

{¶9} Upon review, we agree with appellant that our judgment in *Advent* conflicts with the Eighth Appellate District's judgment in *Storer* on the same question of law and that the cases are not distinguishable on their facts. Consequently, we certify the present case as being in conflict with the opinion of the Eighth Appellate District in *Storer*, on the following question:

Can the S.B. No. 97 amendments to R.C. 3937.18 be incorporated into an insurance policy during a two-year guarantee period that commenced subsequent to the S.B. No. 267 amendments to R.C. 3937.18 and R.C. 3937.31, but prior to the S.B. No. 97 amendments?

{¶10} For the foregoing reasons, we grant appellant's motion to certify, and we certify the above-stated question to the Ohio Supreme Court for resolution of the conflict pursuant to Section 3(B)(4), Article IV, Ohio Constitution.

Motion to certify conflict granted.

BRYANT and TRAVIS, JJ., concur.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
Civil Division

Jack R. Advent, Executor, :
 :
 Plaintiff, :
 :
 vs. : Case No: 04CVC09-9924
 : Judge Julie Lynch
 Allstate Insurance Co., et al., :
 :
 Defendants. :

**ENTRY GRANTING DEFENDANT ALLSTATE INSURANCE COMPANY'S
MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

Defendant Allstate Insurance Company and Plaintiff Jack R. Advent, Executor of the Estate of Vali Jean D. Advent each moved this Court pursuant to Rule 56 of the Ohio Rules of Civil Procedure for summary judgment as to Plaintiff's claims.

Upon consideration of evidence before this Court, no material issues of fact exist and Defendant Allstate Insurance Company is entitled to judgment as a matter of law. For the reasons stated in this Court's November 15, 2005 Decision, the Court hereby finds that Defendant's Motion for Summary Judgment is well-taken and **SUSTAINS** the same. The Court finds Plaintiff's Motion for Summary Judgment is not well-taken and **DENIES** the same. It is hereby **ORDERED** that all claims and causes of action for any liability against Defendant Allstate Insurance Company are **DISMISSED**.

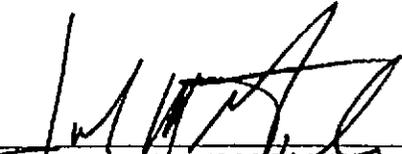
THIS CASE IN ITS ENTIRETY IS HEREBY TERMINATED AND DISMISSED, WITH PREJUDICE. THERE IS NO JUST CAUSE FOR DELAY. THIS IS A FINAL APPEALABLE ORDER. OUTSTANDING COSTS ARE TAXED TO PLAINTIFF.

IT IS SO ORDERED.

Judge Julie Lynch

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APPROVED:



John M. Gonzales (0038664)
John M. Gonzales, LLC
140 Commerce Park Drive
Westerville, Ohio 43082
Attorney for Plaintiff



Monica L. Waller (0070941)
LANE, ALTON & HORST, LLC
175 S. Third St., 7th Floor
Columbus, Ohio 43215
*Attorney for Defendant Allstate Insurance
Company*

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IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

Jack R. Advent, Executor of the
Estate of Valijeane D. Advent, :

Plaintiff, :

v. :

Allstate Insurance Co., et al., :

Defendants. :

Case No. 04-CVC-09-9924

JUDGE LYNCH

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CLERK OF COURT
FRANKLIN COUNTY
OHIO

**DECISION GRANTING ALLSTATE'S MOTION FOR SUMMARY JUDGMENT,
FILED JUNE 28, 2005**

and

**DECISION DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT, FILED AUGUST 8, 2005**

Rendered this 15th day of November, 2005.

LYNCH, J.

This matter is before the court upon Defendant Allstate Insurance Company's motion for summary judgment pursuant to Civ. R. 56. Plaintiff filed a memorandum contra and simultaneously filed a cross motion for partial summary judgment. Allstate replied. The court has considered all memoranda submitted.

This portion of this case is a declaratory action regarding \$200,000 in uninsured/underinsured motorist coverage. Plaintiff Jack R. Advent, Executor of the Estate of Valijeane D. Advent, deceased, seeks an order declaring that the Allstate insurance policy in question has applicable UM/UIM coverage limited of \$300,000 each person and \$500,000 each occurrence as implied by law. As plaintiff has settled with the tortfeasor for \$100,000, plaintiff seeks an additional \$200,000 in coverage from his own UIM policy.

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The facts in this matter appear to be undisputed and were raised in this court's decision granting Defendant Dennis O. Norton summary judgment. In the interest of brevity, the facts found in the earlier decision are incorporated herein by reference.

Now, Allstate has moved for judgment as a matter of law. It is Allstate's position that according to the plain language of Allstate's policy, plaintiff cannot bring a claim for underinsured motorist coverage as the limits of plaintiff's UM/UIM coverage of \$50,000/100,000 are less than the tortfeasor's liability limits of \$100,000/300,000. Accordingly, Allstate claims entitlement to judgment as a matter of Ohio law. The court agrees.

Summary judgment was established through Civ. R. 56 (C) as a procedural device designed to terminate litigation when there is no need for a formal trial. *See Norris v. Ohio Std. Co.* (1982), 70 Ohio St. 2d 1. The rule mandates that the following be established: (1) that there is no genuine issue of any material facts; (2) that the moving party is entitled to judgment as a matter of law, and (3) that reasonable minds can come to but one conclusion and, viewing the evidence most strongly in favor of the non-moving party, that conclusion is adverse to the non-moving party. *See, e.g., Bostic v. Connor* (1988), 37 Ohio St. 3d 144.

However, summary judgment will not be granted unless the movant sufficiently demonstrates the absence of any genuine issue of material fact. A "party seeking summary judgment on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material

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fact on the essential element(s) of the nonmoving party's claims." *Dresher v. Burt* (1996), 75 Ohio St. 3d 280, 293.

Civ. R. 56(C) sets forth an exclusive list of documentary evidence that may be considered by a court reviewing a motion for summary judgment. The rule states that the court may consider the: "... pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case, and written stipulations of fact, if any, timely filed in this action. . . . No evidence or stipulation may be considered except as states in this rule."

Where the moving party meets its initial burden, the nonmoving party has a reciprocal burden outlined in Civ. R. 56(E). Civ. R. 56(E) provides that when a motion for summary judgment is otherwise properly supported under division (C) of this rule, "[A]n adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The court finds that the policy was first purchased by plaintiff on March 12, 1989. Accordingly, a new coverage period came into existence two years later on March 12, 2001. See R.C. § 3937.31(A). This policy remained in effect for the two-year guarantee period during which the accident occurred. At the beginning of the new contract on March 12, 2002, the law in effect stated that an insurer could incorporate into a policy changes permitted by law at the beginning of any policy period within a two-year period. See R.C. § 3937.31(E) as amended by S.B. 267. Allstate correctly points out that the law in effect at the time the policy was renewed on March 12, 2002 changed the requirements for an offer

of uninsured motorist coverage. *See* R.C. § 3937.18 *as amended by* S.B. 97. At that point, Allstate was no longer required to make an offer of UM/UIM covered equal to the liability limits, or otherwise such limits would be implied as a matter of law.

The court finds that the six-month policy was renewed after the effective date of S.B. 97 and before the fatal accident. The court finds that Allstate notified plaintiff of the change in law stating that plaintiff no longer needed to sign a form to change his UM/UIM limits. The court also finds that plaintiff was aware that his UM/UIM limits were less than his liability coverage limits. Accordingly, the court finds that Allstate's notice to plaintiff is sufficient to incorporate S.B. 97 into the policy. *See Arn v. McLean* (2005), 159 Ohio App. 3d 662.

Upon review, the court finds that there exists no genuine issues of material fact and that Allstate is entitled to judgment as a matter of law. Accordingly, the court **GRANTS** Allstate's motion for summary judgment and **DENIES** plaintiff's cross motion. Counsel for Allstate shall prepare and file a proper judgment entry pursuant to Loc. R. 25.01.

IT IS SO ORDERED.


Julie M. Lynch, Judge

Copies to:

John M. Gonzales, Esq.
Counsel for Plaintiff

Rick E. Marsh, Esq.
Monica L. Waller, Esq.
Counsel for Allstate Insurance Company

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Westlaw.

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Baldwin's Ohio Revised Code Annotated Currentness

Title XXXIX. Insurance

§ Chapter 3937. Casualty Insurance; Motor Vehicle Insurance (Refs & Annos)

§ Motor Vehicle Insurance

→ 3937.18 Uninsured and underinsured motorist coverage

(A) Any policy of insurance delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state that insures against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, may, but is not required to, include uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages.

Unless otherwise defined in the policy or any endorsement to the policy, "motor vehicle," for purposes of the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, means a self-propelled vehicle designed for use and principally used on public roads, including an automobile, truck, semi-tractor, motorcycle, and bus. "Motor vehicle" also includes a motor home, provided the motor home is not stationary and is not being used as a temporary or permanent residence or office. "Motor vehicle" does not include a trolley, streetcar, trailer, railroad engine, railroad car, motorized bicycle, golf cart, off-road recreational vehicle, snowmobile, fork lift, aircraft, watercraft, construction equipment, farm tractor or other vehicle designed and principally used for agricultural purposes, mobile home, vehicle traveling on treads or rails, or any similar vehicle.

(B) For purposes of any uninsured motorist coverage included in a policy of insurance, an "uninsured motorist" is the owner or operator of a motor vehicle if any of the following conditions applies:

- (1) There exists no bodily injury liability bond or insurance policy covering the owner's or operator's liability to the insured.
- (2) The liability insurer denies coverage to the owner or operator, or is or becomes the subject of insolvency proceedings in any state.
- (3) The identity of the owner or operator cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of division (B)(3) of this section, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.
- (4) The owner or operator has diplomatic immunity.
- (5) The owner or operator has immunity under Chapter 2744. of the Revised Code.

An "uninsured motorist" does not include the owner or operator of a motor vehicle that is self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

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(C) If underinsured motorist coverage is included in a policy of insurance, the underinsured motorist coverage shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the underinsured motorist coverage. Underinsured motorist coverage in this state is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

For purposes of underinsured motorist coverage, an "underinsured motorist" does not include the owner or operator of a motor vehicle that has applicable liability coverage in the policy under which the underinsured motorist coverage is provided.

(D) With respect to the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance, an insured shall be required to prove all elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured or underinsured motor vehicle.

(E) The uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages included in a policy of insurance shall not be subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

(F) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

- (1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;
- (2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

(G) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages and that provides a limit of coverage for payment of damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

(H) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions requiring that, so long as the insured has not prejudiced the insurer's subrogation rights, each claim or suit for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages be made or brought within three years after the date of the accident causing the bodily injury, sickness, disease, or death, or within one year after the liability insurer for the owner or operator of the motor vehicle liable to the insured has become the subject of insolvency proceedings in any state, whichever is later.

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(I) Any policy of insurance that includes uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under specified circumstances, including but not limited to any of the following circumstances:

(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided;

(4) While any employee, officer, director, partner, trustee, member, executor, administrator, or beneficiary of the named insured, or any relative of any such person, is operating or occupying a motor vehicle, unless the employee, officer, director, partner, trustee, member, executor, administrator, beneficiary, or relative is operating or occupying a motor vehicle for which uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages are provided in the policy;

(5) When the person actually suffering the bodily injury, sickness, disease, or death is not an insured under the policy.

(J) In the event of payment to any person under the uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages, and subject to the terms and conditions of that coverage, the insurer making such payment is entitled, to the extent of the payment, to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of that person against any person or organization legally responsible for the bodily injury or death for which the payment is made, including any amount recoverable from an insurer that is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer that is or becomes the subject of insolvency proceedings, to the extent of those rights against the insurer that the insured assigns to the paying insurer.

(K) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage included in a policy of insurance.

(L) The superintendent of insurance shall study the market availability of, and competition for, uninsured and underinsured motorist coverages in this state and shall, from time to time, prepare status reports containing the superintendent's findings and any recommendations. The first status report shall be prepared not later than two years after the effective date of this amendment. To assist in preparing these status reports, the superintendent may require insurers and rating organizations operating in this state to collect pertinent data and to submit that data to the superintendent.

The superintendent shall submit a copy of each status report to the governor, the speaker of the house of representatives, the president of the senate, and the chairpersons of the committees of the general assembly having primary jurisdiction over issues relating to automobile insurance.

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(2001 S 97, eff. 10-31-01; 2000 S 267, eff. 9-21-00; 1999 S 57, eff. 11-2-99; 1997 H 261, eff. 9-3-97; 1994 S 20, eff. 10-20-94; 1987 H 1, eff. 1-5-88; 1986 S 249; 1982 H 489; 1980 H 22; 1976 S 545; 1975 S 25; 1970 H 620; 132 v H 1; 131 v H 61)

UNCODIFIED LAW

2001 S 97, § 3, eff. 10-31-01, reads:

In enacting this act, it is the intent of the General Assembly to do all of the following:

(A) Protect and preserve stable markets and reasonable rates for automobile insurance for Ohio consumers;

(B) Express the public policy of the state to:

(1) Eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(2) Eliminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages being implied as a matter of law in any insurance policy;

(3) Provide statutory authority for the inclusion of exclusionary or limiting provisions in uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages;

(4) Eliminate any requirement of a written offer, selection, or rejection form for uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages from any transaction for an insurance policy;

(5) Ensure that a mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages not be construed to be required by the provisions of section 3937.181 of the Revised Code, as amended by this act, that make uninsured motorist property damage coverage available under limited conditions.

(C) Provide statutory authority for provisions limiting the time period within which an insured may make a claim under uninsured motorist coverage, underinsured motorist coverage, or both uninsured and underinsured motorist coverages to three years after the date of the accident causing the injury;

(D) To supersede the holdings of the Ohio Supreme Court in those cases previously superseded by Am. Sub. S.B. 20 of the 120th General Assembly, Am. Sub. H.B. 261 of the 122nd General Assembly, S.B. 57 of the 123rd General Assembly, and Sub. S.B. 267 of the 123rd General Assembly;

(E) To supersede the holdings of the Ohio Supreme Court in *Linko v. Indemnity Ins. Co. of N. America* (2000), 90 Ohio St. 3d 445, *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.* (1999), 85 Ohio St. 3d 660, *Schumacher v. Kreiner* (2000), 88 Ohio St. 3d 358, *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St. 2d 431, *Gyori v. Johnston Coca-Cola Bottling Group, Inc.* (1996), 76 Ohio St. 3d 565, and their progeny.

2000 S 267, § 3 and 4, eff. 9-21-00, read:

Section 3. It is the intent of the General Assembly in amending division (A) of section 3937.18 of the Revised Code to supersede the holdings of the Ohio Supreme Court in *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69

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Ohio St.2d 431, and *Moore v. State Auto. Mut. Ins. Co.* (2000), 88 Ohio St.3d 27, that division (A)(1) of section 3937.18 of the Revised Code does not permit an insurer to limit uninsured or underinsured motorist coverage in such a way that an insured must suffer bodily injury, sickness, death or disease for any other insured to recover from the insurer.

Section 4. It is the intent of the General Assembly in amending division (C) of section 3937.18 of the Revised Code to make it clear that new rejections of uninsured and underinsured motorist coverages or decisions to accept lower limits of coverages need not be obtained from an insured or applicant at the beginning of each policy period in which the policy provides continuing coverage to the named insured or applicant, regardless of whether a new, replacement, or renewal policy that provides continuing coverage to the named insured or applicant is issued by the insurer or affiliate of that insurer with or without new policy terms or new policy numbers.

1994 S 20, § 7 to 10, cff. 10-20-94, read:

Section 7. It is the intent of the General Assembly in amending division (A)(2) of section 3937.18 of the Revised Code to supersede the effect of the holding of the Ohio Supreme Court in the October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, relative to the application of underinsured motorist coverage in those situations involving accidents where the tortfeasor's bodily injury liability limits are greater than or equal to the limits of the underinsured motorist coverage.

Section 8. It is the intent of the General Assembly in amending division (A)(2) of section 3937.18 of the Revised Code to declare and confirm that the purpose and intent of the 114th General Assembly in enacting division (A)(2) of section 3937.18 in Am. H.B. 489 was, and the intent of the General Assembly in amending section 3937.18 of the Revised Code in this act is, to provide an offset against the limits of the underinsured motorist coverage of those amounts available for payment from the tortfeasor's bodily injury liability coverage.

Section 9. It is the intent of the General Assembly in amending division (G) of section 3937.18 of the Revised Code to supersede the effect of the holding of the Ohio Supreme Court in its October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, relative to the stacking of insurance coverages, and to declare and confirm that the purpose and intent of the 114th General Assembly in enacting division (G) of section 3937.18 in Am. H.B. 489 was, and the intent of the General Assembly in amending section 3937.18 of the Revised Code in this act is, to permit any motor vehicle insurance policy that includes uninsured motorist coverage and underinsured motorist coverage to include terms and conditions to preclude any and all stacking of such coverages, including interfamily and intrafamily stacking.

Section 10. It is the intent of the General Assembly in enacting division (H) of section 3937.18 of the Revised Code to supersede the effect of the holding of the Ohio Supreme Court in its October 1, 1993 decision in *Savoie v. Grange Mut. Ins. Co.* (1993), 67 Ohio St. 3d 500, that declared unenforceable a policy limit that provided that all claims for damages resulting from bodily injury, including death, sustained by any one person in any one automobile accident would be consolidated under the limit of the policy applicable to bodily injury, including death, sustained by one person, and to declare such policy provisions enforceable.

1986 S 249, § 3, cff. 10-14-86, reads: The General Assembly hereby declares that in the amendment of section 3937.18 of the Revised Code in Amended House Bill No. 489 of the 114th General Assembly, effective with respect to automobile or motor vehicle liability policies delivered, issued for delivery, or renewed in this state on or after October 1, 1982, it was assumed that the legal principles opposed to authorization for insurance that would indemnify a person for conduct leading to the award of punitive damages were so well established that it was unnecessary to negate such an intention. Such being the case, no claim for punitive damages under coverage written pursuant to section 3937.18 of the Revised Code shall be paid after the effective date of this act unless a

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judgment to that effect had been rendered prior to such effective date and is no longer subject to the determination of an appeal after such date.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2001 S 97 rewrote this section which prior thereto read:

"(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are offered to persons insured under the policy due to bodily injury or death suffered by such insureds:

"(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury, sickness, or disease, including death under provisions approved by the superintendent of insurance, for the protection of insureds thereunder who are legally entitled to recover from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

"For purposes of division (A)(1) of this section, an insured is legally entitled to recover if the insured is able to prove the elements of the insured's claim that are necessary to recover from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity under Chapter 2744. of the Revised Code or a diplomatic immunity that could be raised as a defense in an action brought against the owner or operator by the insured does not affect the insured's right to recover under uninsured motorist coverage. However, any other type of statutory or common law immunity that may be a defense for the owner or operator of an uninsured motor vehicle shall also be a defense to an action brought by the insured to recover under uninsured motorist coverage.

"(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for insureds thereunder for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

"(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

"(C) A named insured or applicant may reject or accept both coverages as offered under division (A) of this section, or may alternatively select both such coverages in accordance with a schedule of limits approved by the superintendent. The schedule of limits approved by the superintendent may permit a named insured or applicant to select uninsured and underinsured motorists coverages with limits on such coverages that are less than the limit of liability coverage provided by the automobile liability or motor vehicle liability policy of insurance under which the coverages are provided, but the limits shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. A named insured's or applicant's rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's selection of such coverages in accordance with the

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schedule of limits approved by the superintendent, shall be in writing and shall be signed by the named insured or applicant. A named insured's or applicant's written, signed rejection of both coverages as offered under division (A) of this section, or a named insured's or applicant's written, signed selection of such coverages in accordance with the schedule of limits approved by the superintendent, shall be effective on the day signed, shall create a presumption of an offer of coverages consistent with division (A) of this section, and shall be binding on all other named insureds, insureds, or applicants.

"Unless a named insured or applicant requests such coverages in writing, such coverages need not be provided in or made supplemental to a policy renewal or a new or replacement policy that provides continuing coverage to the named insured or applicant where a named insured or applicant has rejected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer. If a named insured or applicant has selected such coverages in connection with a policy previously issued to the named insured or applicant by the same insurer or affiliate of that insurer, with limits in accordance with the schedule of limits approved by the superintendent, such coverages need not be provided with limits in excess of the limits of liability previously issued for such coverages, unless a named insured or applicant requests in writing higher limits of liability for such coverages.

"(D) For the purpose of this section, a motor vehicle shall be deemed uninsured in either of the following circumstances:

"(1) The liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction;

"(2) The identity of the owner and operator of the motor vehicle cannot be determined, but independent corroborative evidence exists to prove that the bodily injury, sickness, disease, or death of the insured was proximately caused by the negligence or intentional actions of the unidentified operator of the motor vehicle. For purposes of this division, the testimony of any insured seeking recovery from the insurer shall not constitute independent corroborative evidence, unless the testimony is supported by additional evidence.

"(E) In the event of payment to any person under the coverages offered under this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or becomes the subject of insolvency proceedings, to the extent of those rights against such insurer which such insured assigns to the paying insurer.

"(F) The coverages offered under this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

"(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

"(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

"(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

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"(H) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section or selected in accordance with division (C) of this section and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125, of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

"(I) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section.

"(J) The coverages offered under division (A) of this section or selected in accordance with division (C) of this section may include terms and conditions that preclude coverage for bodily injury or death suffered by an insured under any of the following circumstances:

"(1) While the insured is operating or occupying a motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured, if the motor vehicle is not specifically identified in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy under which the uninsured and underinsured motorist coverages are provided;

"(2) While the insured is operating or occupying a motor vehicle without a reasonable belief that the insured is entitled to do so, provided that under no circumstances will an insured whose license has been suspended, revoked, or never issued, be held to have a reasonable belief that the insured is entitled to operate a motor vehicle;

"(3) When the bodily injury or death is caused by a motor vehicle operated by any person who is specifically excluded from coverage for bodily injury liability in the policy under which the uninsured and underinsured motorist coverages are provided.

"(K) As used in this section, "uninsured motor vehicle" and "underinsured motor vehicle" do not include any of the following motor vehicles:

"(1) A motor vehicle that has applicable liability coverage in the policy under which the uninsured and underinsured motorist coverages are provided;

"(2) A motor vehicle owned by a political subdivision, unless the operator of the motor vehicle has an immunity under Chapter 2744. of the Revised Code that could be raised as a defense in an action brought against the operator by the insured;

"(3) A motor vehicle self-insured within the meaning of the financial responsibility law of the state in which the motor vehicle is registered.

"(L) As used in this section, "automobile liability or motor vehicle liability policy of insurance" means either of the following:

"(1) Any policy of insurance that serves as proof of financial responsibility, as proof of financial responsibility is defined by division (K) of section 4509.01 of the Revised Code, for owners or operators of the motor vehicles specifically identified in the policy of insurance;

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"(2) Any umbrella liability policy of insurance written as excess over one or more policies described in division (L)(1) of this section."

Amendment Note: 2000 S 267 deleted "for loss" before "due to bodily injury" in the introductory paragraph in division (A); deleted "damages" before "from owners or operators", before "if the insured is able to prove", and before "from the owner or operator", in division (A)(1); deleted "against loss" before "for bodily injury" in division (A)(2); inserted "a new or", "that provides continuing coverage to the named insured or applicant", and "or affiliate of that insurer" twice, in the second paragraph in division (C); deleted former division (K)(2); and redesignated former divisions (K)(3) and (K)(4) as new divisions (K)(2) and (K)(3). Prior to deletion, former division (K)(2) read:

"(2) A motor vehicle owned by, furnished to, or available for the regular use of a named insured, a spouse, or a resident relative of a named insured [.]"

Amendment Note: 1999 S 57 inserted "written as excess over one or more policies described in division (L)(1) of this section" in division (L)(2).

Amendment Note: 1997 H 261 rewrote this section, which prior thereto read:

"(A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following coverages are provided to persons insured under the policy for loss due to bodily injury or death suffered by such persons:

"(1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury or death under provisions approved by the superintendent of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, suffered by any person insured under the policy.

"For purposes of division (A)(1) of this section, a person is legally entitled to recover damages if he is able to prove the elements of his claim that are necessary to recover damages from the owner or operator of the uninsured motor vehicle. The fact that the owner or operator of the uninsured motor vehicle has an immunity, whether based upon a statute or the common law, that could be raised as a defense in an action brought against him by the person insured under uninsured motorist coverage does not affect the insured person's right to recover under his uninsured motorist coverage.

"(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for an insured against loss for bodily injury, sickness, or disease, including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person or persons liable were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

"(B) Coverages offered under division (A) of this section shall be written for the same limits of liability. No

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change shall be made in the limits of one of these coverages without an equivalent change in the limits of the other coverage.

"(C) The named insured may only reject or accept both coverages offered under division (A) of this section. The named insured may require the issuance of such coverages for bodily injury or death in accordance with a schedule of optional lesser amounts approved by the superintendent, that shall be no less than the limits set forth in section 4509.20 of the Revised Code for bodily injury or death. Unless the named insured requests such coverages in writing, such coverages need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverages in connection with a policy previously issued to him by the same insurer. If the named insured has selected uninsured motorist coverage in connection with a policy previously issued to him by the same insurer, such coverages offered under division (A) of this section need not be provided in excess of the limits of the liability previously issued for uninsured motorist coverage, unless the named insured requests in writing higher limits of liability for such coverages.

"(D) For the purpose of this section, a motor vehicle is uninsured if the liability insurer denies coverage or is or becomes the subject of insolvency proceedings in any jurisdiction.

"(E) In the event of payment to any person under the coverages required by this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made, including any amount recoverable from an insurer which is or becomes the subject of insolvency proceedings, through such proceedings or in any other lawful manner. No insurer shall attempt to recover any amount against the insured of an insurer which is or becomes the subject of insolvency proceedings, to the extent of his rights against such insurer which such insured assigns to the paying insurer.

"(F) The coverages required by this section shall not be made subject to an exclusion or reduction in amount because of any workers' compensation benefits payable as a result of the same injury or death.

"(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section may, without regard to any premiums involved, include terms and conditions that preclude any and all stacking of such coverages, including but not limited to:

"(1) Interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;

"(2) Intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.

"(H) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section and that provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury, including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

"(I) Nothing in this section shall prohibit the inclusion of underinsured motorist coverage in any uninsured motorist coverage provided in compliance with this section."

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R.C. § 3937.18, OH ST § 3937.18

Current through 2006 File 145 of the 126th GA (2005-2006),
apv. by 11/30/06, and filed with the Secretary of State by 11/30/2006.

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END OF DOCUMENT

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BALDWIN'S OHIO REVISED CODE ANNOTATED
 TITLE XXXIX. INSURANCE
 CHAPTER 3937. CASUALTY INSURANCE; MOTOR VEHICLE INSURANCE
 CANCELLATION AND NONRENEWAL OF AUTOMOBILE INSURANCE

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3937.31 POLICY PERIOD FOR AUTOMOBILE INSURANCE; GROUNDS FOR CANCELLATION LIMITED; EXCEPTIONS

(A) Every automobile insurance policy shall be issued for a policy period of not less than two years or guaranteed renewable for successive policy periods totaling not less than two years. Where renewal is mandatory, "cancellation," as used in sections 3937.30 to 3937.39 of the Revised Code, includes refusal to renew a policy with at least the coverages, included insureds, and policy limits provided at the end of the next preceding policy period. No insurer may cancel any such policy except pursuant to the terms of the policy, and in accordance with sections 3937.30 to 3937.39 of the Revised Code, and for one or more of the following reasons:

- (1) Misrepresentation by the insured to the insurer of any material fact in the procurement or renewal of the insurance or in the submission of claims thereunder;
- (2) Loss of driving privileges through suspension, revocation, or expiration of the driver's or commercial driver's license of the named insured or any member of his family covered as a driver; provided that the insurer shall continue the policy in effect but exclude by endorsement all coverage as to the person whose driver's license has been suspended or revoked or has expired, if he is other than the named insured or the principal operator;
- (3) Nonpayment of premium, which means failure of the named insured to discharge when due any of his obligations in connection with the payment of premiums on a policy, or any installment of such premiums, whether the premium is payable directly to the insurer or its agent or indirectly under any premium finance plan or extension of credit;
- (4) The place of residence of the insured or the state of registration or license of the insured automobile is changed to a state or country in which the insurer is not authorized to write automobile coverage.

This section does not apply in the case of a cancellation if the insurer has indicated its willingness to issue a new policy within the same insurer or within another insurer under the same ownership or management as that of the insurer which has issued the cancellation.

(B) Sections 3937.30 to 3937.39 of the Revised Code do not prohibit:

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(1) Changes in coverage or policy limits, cancellation, or nonrenewal for any reason at the request or with the consent of the insured;

(2) Lawful surcharges, adjustments, or other changes in premium;

(3) Policy modification to all policies issued to a classification of risk which do not effect a withdrawal or reduction in the initial coverage or policy limits;

(4) An insurer's refusing for any reason to renew a policy upon its expiration at the end of any mandatory period, provided such nonrenewal complies with the procedure set forth in section 3937.34 of the Revised Code.

(C) Sections 3937.30 to 3937.39 of the Revised Code do not apply to any policy or coverage which has been in effect less than ninety days at the time notice of cancellation is mailed by the insurer, unless it is a renewal policy.

(D) Renewal of a policy does not constitute a waiver or estoppel with respect to grounds for cancellation which existed before the effective date of such renewal.

CREDIT(S)

(1989 H 381, eff. 7-1-89; 1973 H 1; 1969 S 334)

CROSS REFERENCES

Cancellation of policy by unpaid premium finance company; notice necessary, 1321.81

LIBRARY REFERENCES

Insurance ↪177, 226.

WESTLAW Topic No. 217.

C.J.S. Insurance §§ 329 et seq., 442 et seq.

OJur 3d: 57, Insurance § 370 to 374, 376, 448; 58, Insurance § 948
Am Jur 2d: 7, Insurance § 380, 426; 43, Insurance § 397 to 399

NOTES OF DECISIONS AND OPINIONS

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1. Cancellation requirements

In order to terminate an automobile insurance policy for nonpayment of premiums and within the mandatory renewal period set forth in RC 3937.31, the issuer of the policy must send a notice of cancellation to the policyholder. DeBose v. Travelers

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BALDWIN'S OHIO REVISED CODE ANNOTATED
 TITLE XXXIX. INSURANCE
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3937.31 POLICY PERIOD FOR AUTOMOBILE INSURANCE; GROUNDS FOR CANCELLATION LIMITED; EXCEPTIONS

(A) Every automobile insurance policy shall be issued for a period of not less than two years or guaranteed renewable for successive policy periods totaling not less than two years. Where renewal is mandatory, "cancellation," as used in sections 3937.30 to 3937.39 of the Revised Code, includes refusal to renew a policy with at least the coverages, included insureds, and policy limits provided at the end of the next preceding policy period. No insurer may cancel any such policy except pursuant to the terms of the policy, and in accordance with sections 3937.30 to 3937.39 of the Revised Code, and for one or more of the following reasons:

(1) Misrepresentation by the insured to the insurer of any material fact in the procurement or renewal of the insurance or in the submission of claims thereunder;

(2) Loss of driving privileges through suspension, revocation, or expiration of the driver's or commercial driver's license of the named insured or any member of the named insured's family covered as a driver; provided that the insurer shall continue the policy in effect but exclude by endorsement all coverage as to the person whose driver's license has been suspended or revoked or has expired, if the person is other than the named insured or the principal operator;

(3) Nonpayment of premium, which means failure of the named insured to discharge when due any of the named insured's obligations in connection with the payment of premiums on a policy, or any installment of such premiums, whether the premium is payable directly to the insurer or its agent or indirectly under any premium finance plan or extension of credit;

(4) The place of residence of the insured or the state of registration or license of the insured automobile is changed to a state or country in which the insurer is not authorized to write automobile coverage.

This section does not apply in the case of a cancellation if the insurer has indicated its willingness to issue a new policy within the same insurer or within another insurer under the same ownership or management as that of the insurer that has issued the cancellation.

(B) Sections 3937.30 to 3937.39 of the Revised Code do not prohibit:

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(1) Changes in coverage or policy limits, cancellation, or nonrenewal for any reason at the request or with the consent of the insured;

(2) Lawful surcharges, adjustments, or other changes in premium;

(3) Policy modification to all policies issued to a classification of risk which do not effect a withdrawal or reduction in the initial coverage or policy limits;

(4) An insurer's refusing for any reason to renew a policy upon its expiration at the end of any mandatory period, provided such nonrenewal complies with the procedure set forth in section 3937.34 of the Revised Code.

(C) Sections 3937.30 to 3937.39 of the Revised Code do not apply to any policy or coverage that has been in effect less than ninety days at the time notice of cancellation is mailed by the insurer, unless it is a renewal policy.

(D) Renewal of a policy does not constitute a waiver or estoppel with respect to grounds for cancellation that existed before the effective date of such renewal.

(E) Nothing in this section prohibits an insurer from incorporating into a policy any changes that are permitted or required by this section or other sections of the Revised Code at the beginning of any policy period within the two-year period set forth in division (A) of this section.

CREDIT(S)

(2000 S 267, eff. 9-21-00; 1989 H 381, eff. 7-1-89; 1973 H 1; 1969 S 334)

UNCODIFIED LAW

2000 S 267, § 5, eff. 9-21-00, reads:

It is the intent of the General Assembly in amending section 3937.31 of the Revised Code to make it clear that an insurer may modify the terms and conditions of any automobile insurance policy to incorporate changes that are permitted or required by that section and other sections of the Revised Code at the beginning of any policy period within the two-year period set forth in division (A) of that section.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2000 S 267 deleted "policy" before "period of not less than two years" in the introductory paragraph in division (A); added division (E); and made changes to reflect gender neutral language and other nonsubstantive changes.

CROSS REFERENCES

Cancellation of policy by unpaid premium finance company; notice necessary, 1321.81

LIBRARY REFERENCES

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