

IN THE SUPREME COURT OF OHIO

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CASE NO. 06-2271 & 2393

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JACK R. ADVENT, EXECUTOR  
Plaintiff-Appellant

-vs-

ALLSTATE INSURANCE COMPANY, *et al.*  
Defendant-Appellee

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ON APPEAL FROM FRANKLIN COUNTY  
COURT OF APPEALS CASE NO. 06AP-103

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BRIEF OF *AMICUS CURIAE*,  
OHIO ACADEMY OF TRIAL LAWYERS IN SUPPORT OF  
PLAINTIFF-APPELLANT, JACK R. ADVENT, EXECUTOR

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## INTRODUCTION AND INTERESTS OF *AMICUS CURIAE*

This *Amicus Curiae* represents the interests of the Ohio Academy Trial Lawyers (hereinafter "OATL"). OATL is comprised of approximately 1,850 attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

This *Amicus Curiae* intervenes in this appeal on behalf of Plaintiff-Appellant, Jack Advent, Executor of the Estate of his late wife. OATL urges this Court to carefully consider the issues presented herein. It is essential that this Court take great care in articulating its syllabus in this case, as the continued orderly administration of justice in Ohio's trial courts will be greatly impacted for years to follow by the rule of law to be announced. For the reasons which follow, this Court should reverse the Tenth District's decision on the grounds that it undermines the period of guaranteed coverage in R.C. §3937.31(A) and the entire statutory scheme of S.B. 334, (enacted in 1970 and codified as R.C. 3937.30 to .39), designed by the insurance industry itself to limit and restrict automobile insurers in canceling or not renewing insurance coverage, requiring its insureds, with advance, written notification and permitting cancellation only for the reasons specified in the statute, during the two-year periods of guaranteed coverage.

## ARGUMENT

**CERTIFIED ISSUE I: 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. 267 AMENDMENTS TO R.C. 3937.18 AND R.C. 3937.31, BUT PRIOR TO THE S.B. NO. 97 AMENDMENTS?**

**PROPOSED PROPOSITION OF LAW NO. 1: R.C. 3937.31(E), ADDED BY S.B. 267 IN 2000, DOES NOT PERMIT AN AUTOMOBILE INSURER TO REDUCE OR REMOVE COVERAGES, LIMITS, OR INSUREDS FROM POLICIES COVERING INDIVIDUAL OR FAMILY VEHICLES DURING THE TWO-YEAR GUARANTEED PERIOD MANDATED IN DIVISION (A) OF THAT SECTION, EXCEPT BY AGREEMENT OF THE PARTIES AND IN COMPLIANCE WITH R.C. 3937.30 TO .39. (*Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246, *applied and followed.*)**

**PROPOSED PROPOSITION OF LAW NO. 2: THE R.C. 3937.31(E) PROVISIO THAT AUTOMOBILE INSURERS MAY INCORPORATE CHANGES DURING THE TWO-YEAR PERIOD OF GUARANTEED COVERAGE THAT ARE "PERMITTED OR REQUIRED" DOES NOT ALLOW A "CANCELLATION" OF INSURANCE AS DEFINED IN R.C. 3937.31(A), EXCEPT BY AGREEMENT OF THE PARTIES AND IN COMPLIANCE WITH R.C. 3937.30 TO .39. (*Wolfe v. Wolfe* (2000), 88 Ohio St.3d 246, *applied.*)**

Since they are all interrelated, the issues that have been accepted for review by this Court will be addressed simultaneously herein.

**I. S.B. 334, CODIFIED AS R.C. 3937.30 TO .39, ENACTED TO RESTRICT ARBITRARY AND UNILATERAL CANCELLATION OF AUTOMOBILE INSURANCE POLICIES ISSUED TO OHIO INSUREDS, REMAINS THE LAW.**

This Court interpreted R.C. 3937.31(A) in *Wolfe v. Wolfe*, 88 Ohio St.3d 246, 2000-Ohio-322, paraphrasing the statute in the first paragraph of the syllabus that every automobile liability insurance policy "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.” This Court recently re-affirmed that explanation of the statute as established law in *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384. This statutory two-year period of guaranteed insurance coverage was enacted as part of Ohio’s law to restrict and limit automobile insurers in canceling insurance coverage in Ohio. The court of appeals ruling erroneously breaches this guarantee.

On October, 1969, then Governor James Rhodes, signed S.B. 334, into law to be effective on January 1, 1970, codified as R.C. 3937.30 to 3937.39. Am.Sub. S.B. 334, 133 Laws of Ohio, Book I, 1007. The enacted law was Ohio’s part in a national effort by the insurance industry to have the states regulate and limit an automobile insurer’s right to cancel insurance coverage to avoid the threatened involvement of federal regulation. As Professor Ghiardi and Robert O. Wienke, Research Directors of the Defense Research Institute, (“voice of defense bar”), stated in their law review article on the subject, “There has been increasing public concern over the right of insurers to arbitrarily cancel existing automobile insurance policies and the refusal to renew expired policies. . . . and there is a present danger that the Federal government may encroach upon the traditional and time honored system of the state regulation of the insurance industry.” Ghiardi and Wienke, “Recent Developments in the Cancellation, Renewal and Rescission of Automobile Insurance Policies,” 51 MARQ. L. REV. 219, 220 (1967-68). See also 1 Schermer, Automobile Liability Insurance 4th, §§8:12,16,18,33.

In the late 1960’s, there were many complaints to Congress about mistreatment of insureds by the insurance industry. See Note, 21 Cath. U. L. Rev. 436, 446-447 (1972). In 1968, Congress authorized the Department of Transportation to study the automobile reparation

system in the United States. 82 Stat. 126. *Id.*, at n.52. The report concluded that “abusive termination practices of insurance companies” was the chief complaint. *Id.* The states had left the matter to the private contracts of the insurance companies. (See Note, 1969 Duke L.J. 327, 330 (1969), noting that Ohio had no laws on the subject.) Where cancellation procedures existed, some insurance companies were avoiding them by simply not renewing instead of canceling. *Id.*, at 343. Regulation was needed to restrict cancellations to prevent reductions in the number of insured drivers so that injured persons could be compensated. *Id.*, at 344.

The major trade associations of the insurance industry took a leading role “working closely in the development and support of model cancellation legislation.” Ghiardi & Wienke, at 221. The essence of these “model bills” was (1) the requirement for advance notice of intention to cancel and (2) limitation on the reasons for cancellation or failure to renew. *Id.* The “model bills” originally applied only to automobile liability insurance, medical payments, and uninsured motorist coverage, but later added physical damage insurance also. *Id.*, at 228.

Ohio’s S.B. 334 was based on one of the “model bills” proposed by the trade associations, American Insurance Association, American Mutual Insurance Association, and the National Association of Independent Insurers. The Wisconsin Supreme Court has interpreted a similar bill enacted in that state. *Terry v. Mongin Ins. Agency and Utica Mut. Ins. Co.* (1982), 105 Wis.2d 575, 314 N.W.2d 349, 355. “The purpose of the 1967 statute was to assure the individual who purchased automobile insurance that he or she could rely on having insurance coverage during the period agreed upon. “The West Virginia Supreme Court, in *Dairyland Ins. Co. v. Conley* (W.Va. 2005), 624 S.E.2d 599, reviewed the history of its cancellation act from the models developed by the insurance trade associations. It noted the two goals of the state legislative response: “restricting the reasons insurance companies could rely

upon to terminate automobile liability policies, and requiring insurance companies to provide advance notice of the effective date of the termination.” *Id.* at 605. Ohio law is the same.

Am. Sub. S.B. 334, 133 Ohio Laws 1007, enacted “sections 3937.30 to 3937.39, inclusive, of the Revised Code, relative to cancellation and nonrenewal of auto insurance.” 133 Laws of Ohio, Book I, 10007. R.C. 3937.30 provides definitions for the Act, limiting its coverage to personal or family auto policies and not for more than four motor vehicles. These definitions follow the models developed by the insurance industry trade associations. Chiardi article, *supra*. R.C. 3937.32 deals with the required notice of cancellation, flatly stating, “No cancellation of an automobile insurance policy is effective, unless it is pursuant to written notice to the insured of cancellation.” It then sets forth what the notice must contain. R.C. 3937.33 provides the procedures in providing notice of cancellation. R.C. 3937.34 deals with the similar issue of refusing to renew a policy. R.C. 3937.35 provides for a hearing, at the request of the insured, before the superintendent of insurance, to review the basis for the cancellation. If the superintendent finds the cancellation is unlawful, “the policy continues in force”. Each of these sections, R.C. 3937.32, 3937.33, and 3937.35, deal strictly with “cancellation” as defined in R.C. 3937.31(A) to include reducing coverage provided before.

It is important to understand that S.B. 334 does not prohibit insurers from canceling or not renewing automobile policies. It merely provides a two-year period in which such coverages are protected from unilateral and arbitrary cancellation. After the initial 90-day probationary period, cancellation or non-renewal is restricted to the notification process and only for the four reasons specified in division (A)(1)-(4) – fraud, loss of driving privileges, failure to pay premiums, and moving out of state. Of course, an insurer may simply not renew after the two-year period for its own reasons.

As indicated, the court of appeals has held that the changes enacted by S.B. 267 in 2000 nullify the cancellation requirements and allow insurers to reduce or remove coverage even within the two-year guaranteed period. As described by another court of appeals, following it and a third court of appeals, “Like the *Arn[v. McLean]*, 159 Ohio App.3d 662] and the *Advent[v. Allstate Ins. Co. 2006-Ohio-5522]* courts, we hold that the amendments to R.C. 3937.31 have superseded a part of the holding in *Wolfe*.” *St. Clair v. Allstate Ins. Co.*, Ham. App. No. C-060028, 2006-Ohio-6159, ¶16. It noted that the court of appeals decision in *Storer v. Sharp*, Cuy. App. No. 86525, 2006-Ohio-1577, appeal declined, 110 Ohio St.3d 1443, 2006-Ohio-3862, upheld the guaranteed two-year period against the same arguments. *Id.*, fn. 17. Insurers agree with this ruling because has the effect of nullifying the “guaranteed” period of coverage and turning back the clock to pre-1970 law leaving the entire matter to the discretion of insurers in preparing contracts and endorsement and notices with their policies. OATL submits that even though such a construction is supported by the insurance industry, it is contrary to the history and purpose of the law as explained by this Court in *Wolfe v. Wolfe, supra*, and prior cases, and is inconsistent with the plain and ordinary meaning of the language of the amendments in S.B. 267 on which this construction is based, and conflicts with the public policy objectives of the statutory system. Accordingly, this Court should reverse the court of appeals.

**II. THE PLAIN AND ORDINARY MEANING OF THE LANGUAGE IN THE AMENDMENT IN S.B. 267 DOES NOT SUPPORT BYPASSING THE CANCELLATION PROCESS IN R.C. 3937.30 TO 3937.39.**

**A. RULES OF CONSTRUCTION; PLAIN MEANING; REMEDIAL STATUTE.**

“In order to determine the intent of the General Assembly in enacting legislation the court must give effect to the words used in the statute.” *Bernardini v. Conneaut Area City*

*School Dist. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4, 387 N.E.2d 1222. This means that statutes dealing with the same subject matter are to be construed together, *in pari materia*, to determine intent. *Mayfield Heights Firefighters Assn. v. DeJohn* ( 1993), 87 Ohio App.3d 358, 366. The Court is to construe the language of remedial statutes liberally consistent with the primary objective. *Moore v. State Auto Mut. Ins. Co.*(2000), 88 Ohio St.3d 27, 31, 723 N.E.2d 97; *Curran v. State Auto. Mut. Ins. Co.* (1971), 25 Ohio St.2d 33, 38, 266 N.E.2d 566; R.C. 1.11.

B. AID OF LEGISLATIVE COMMENTS IN UNCODIFIED S.B. 267.

The first inquiry must be whether the amendments enacted a few months after this Court's decision in *Wolfe v. Wolfe, supra*, express an intention to reject the cancellation process restricting automobile insurers since 1970 upheld in *Wolfe*. The context of S.B. 267 is important because its primary objective was to amend the UM/UIM statute, R.C. 3937.18, to allow insurers to remove the obligation to provide UM/UIM coverage to insureds who were entitled to damages because of the death of a relative who was not an insured. Sub. S.B. 267, 148 Laws of Ohio, Part V, 11380, effective on September 21, 2000. Thus, in section 3 of the uncodified portion of S.B. 267, the legislature expressly stated its intent to supersede the holdings of this Court in *Sexton v. State Farm Mut. Auto. Ins. Co.* (1982), 69 Ohio St.2d 431, 433 N.E.2d 555 and *Moore v. State Auto* (2000), 88 Ohio St.3d 27, 723 N.E.2d 97.

In stark contrast, section 5 of the uncodified portion of S.B. 267, expressing the intent with respect to R.C. 3937.31, did not contain any reference to the holdings of this Court in *Wolfe v. Wolfe, supra*. It cannot be assumed that just because the amendment occurred within months of *Wolfe v. Wolfe*, that the legislature was changing the law to supersede or, as the court of appeals stated, to "abrogate" *Wolfe v. Wolfe*. If that were the intent of the legislation in

2000, the legislature showed very specifically that it knew how to express that intention as it did in section 3 of S.B. 267, but it did not do so in section 5.

C. COMPARING *WOLFE V. WOLFE* WITH S.B. 267.

1. Changes to R.C. 3937.31(A).

Paragraph one of the syllabus in *Wolfe* is simply a paraphrase of the first sentences of the statute, R.C. 3937.31(A), that had been previously interpreted by this Court in *DeBose v. The Travelers Ins. Co.* (1983), 6 Ohio St.3d 65, 451 N.E.2d 753, applying the definition of cancellation in the statute. The first paragraph of the syllabus reads, as follows:

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.

Notably, the amendment in S.B. 267 made very little change to division (A) as paraphrased in *Wolfe v. Wolfe*. As this Court recently reviewed, the *Wolfe* Court followed the statutory language in R.C. 3937.31(A) and further held that the commencement of each policy period brought about a new contract of insurance, whether a new policy or a renewal of an existing policy, and that changes in the law during the “two-year policy period could not be used to alter the coverage until after that two-year period had expired and a new one had begun. *Id.* at 250-251.” *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, (re-affirming *Wolfe, supra.*)

S.B. 267 did one and only one thing to division (A) of R.C. 3937.31: it struck the word “policy” in the first sentence. “(A) Every automobile insurance policy shall be issued for a [policy (deleted)] period of not less than two years or guaranteed renewable for successive policy periods totaling not less than two years.” No other words were changed from the

language of R.C. 3937.31(A), as it stood before S.B. 267, except for changing the masculine word "his" to THE NAMED INSURED in a few places.

It is an inescapable conclusion that the deletion of the word "policy" could not reasonably be the basis for concluding that the purpose of the statutory scheme and this Court's interpretations in *Wolfe v. Wolfe* and *DeBose, supra*, has been "abrogated."

Furthermore, the legislature's retention of the definition of "cancellation" in the second sentence of R.C. 3937.31(A) cannot be ignored. *DeBose, supra*. This Court stated in paragraph two of the syllabus in *Woman's Bowling Congress v. Porterfield* (1971), 25 Ohio St.2d 271, "Where a statute defines terms used therein which are applicable to the subject matter by the legislation, such definition controls in the application of the statute." The amendments to R.C. 3937.31 in S.B. 267 did not change this definition. Thus, the triggering event for the cancellation process mandated by R.C. 3937.30 to .39, a reduction in coverage, limits, or insureds, remains unchanged.

2. Division (E) in S.B. 267.

Of course, Sub. S.B. 267 added division (E). Since the change in division (A) does not support the court of appeals decision, the question is what did division (E) do to division (A) as it had been explained by this Court in *DeBose* and *Wolfe v. Wolfe*, and by various appellate courts. R.C. 3937.31 (E) reads as follows:

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. [emphasis added]

Again, the inquiry is where, in division (E), is *Wolfe* or division (A) abrogated? Does the amendment remove the two-year guaranteed renewal period? No. Does the amendment make

the guaranteed renewals within the two-year period no longer mandatory renewals? No. Does the amendment provide another exception to the list in R.C. 3937.31(B) to the requirement that cancellations have to provide advance notification and be for a statutorily approved reason? No. The exclusive exceptions in division (B) remain. Does the amendment change the definition of "cancellation" in division (A) that includes changes in coverage? It does not.

Simply, division (E) allows insurers to incorporate "changes" into policies at the beginning of renewable policy periods within the two-year period in division (A). It coordinates with the deletion of the word "policy" in the first sentence of division (A) to recognize and distinguish between the two-year guarantee period and the mandatory renewable policy periods totaling two-years. The clearest response of the amendment to *Wolfe v. Wolfe*, and its reliance on the language of division (A) is making the language clear that the mandatory renewable policy periods can be shorter than the two-year period of guaranteed coverage. (Allstate's policy explains this also.) In other words, unlike the guarantee period, "policy periods" do not have to be for two years. (This conformed to industry practice, as is reflected in the Allstate policy.)

The Supreme Court follows the rule that, "the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute, it is inserted to accomplish some definite purposes." *Brown v. Martinelli* (1981), 66 Ohio St.2d 45, 50, 419 N.E.2d 1081 quoting *State ex rel. Cleveland Elec. Illum. Co. v. Euclid* (1959), 169 Ohio St. 476, 479, 159 N.E.2d 756. Also, it is not reasonable to presume that the legislature would "abrogate" the strict requirements for notification and specifically limited reasons before an insurer may reduce coverage, without specifically stating so in clear language. It is absurd to conclude that it did so implicitly or *sub silentio*. This Court has recognized the duty of the

courts “unless restrained by the clear language thereof, so to construe the statute as to avoid such [unreasonable or absurd] a result.” *Canton v. Imperial Bowling Lanes* (1968), 16 Ohio St.2d 47, 242 N.E.2d 566, par. 4, syllabus.

3. The Meaning of “permitted or required by this section . . . .”

The General Assembly’s careful use of the phrase “permitted or required” in division (E) describing changes that may be made during the two year period clearly indicates its intention to preserve the strict cancellation process contained in R.C. 3937.30 to 3937.39 since S.B. 334 became effective on January 1, 1970. It is clear that the purpose of the statutory scheme is remedial to protect insureds and the public from arbitrary and unilateral cancellation of insurance coverage for automobiles operated in Ohio so that those injured in automobile accidents would be compensated for their injuries. *DeBose, supra*. Thus, the courts have the obligation to construe this statute liberally to achieve that statutory objective. Certainly, the simple phrase “permitted or required” leaves room for some interpretation. However, in the context of providing an amendment to an important and carefully drawn statutory scheme with a specific objective, the arguments that an amendment is contrary to that purpose must be viewed with skepticism and construed strictly.

The court of appeals erred in its failure to identify these words of limitation that modify the phrase “any changes.” Contrary to the court of appeals reasoning, this Court must not presume that these simple words were intended to undo the purpose of the entire statutory scheme that had been in place in Ohio since 1970.

Allstate claims a right to delete UM/UIM implied by law. Since Allstate’s unilateral reduction or removal of UM/UIM coverage is not “required,” the only relevant question is whether it is “permitted.” Webster’s dictionary defines “permitted” as “1: to consent to

expressly or formally” and “2: to give leave; AUTHORIZE”. Webster’s Ninth New Collegiate Dictionary, at 876. Both the primary and secondary definition defeat Allstate’s argument that it could reduce or remove UM/UIM coverage during the two-year period of guaranteed coverage. Neither was expressly addressed by the court of appeals. As indicated below, Allstate was not granted “consent to expressly or formally” cancel UM/UIM without complying with R.C. 3937.30 to .39. There is also nothing that “give[s] leave” or “authorize[s]” it to cancel existing coverage during a guaranteed period of coverage and bypass the notification and justification requirements.

In the context of this statute designed to protect the public from arbitrary and unilateral cancellations of automobile insurance coverage, the Court should find the first definition in Webster’s the appropriate one. The word “required” is easily understood as a strong word implicitly meaning that either R.C. 3937.31 or some other section must specifically mandate the proposed change. It is something that is mandatory. There is no argument that either R.C. 3937.31 or even the amendments to R.C. 3937.18 by S.B. 97 in 2001 *mandate* any change for automobile insurers in Ohio. Thus, as indicated, the reduction of UM/UIM is not “required.”

Contrary to this clear interpretation of “required” the court of appeals apparently interpreted the companion word “permitted” in its most lenient sense, *i.e.*, the secondary dictionary meaning of “to give leave; authorize.” Adopting this most lenient definition is contrary to the mandatory nature of the word “required” and also would be contrary to the essential qualities of the statutory scheme enacted by S.B. 334, as R.C. 3937.30 to .39, all of which are mandatory in nature. Since the entire statutory scheme prohibiting unilateral and arbitrary cancellation of insurance coverages is mandatory, it would be inconsistent to interpret the word “permitted” in its secondary meaning as being anything that is permissive, opening it

to potentially unlimited assertions that some section of the Revised Code, somewhere in the many volumes, "authorized" a change. Such an interpretation is inconsistent with the strict statutory scheme in S.B. 334 enacted in 1970, and would lead to an absurd and unreasonable result. As indicated, courts are to construe statutory language to avoid such an absurd result.

Accordingly, this Court should adopt the primary definition of the word "permitted" as it is used in division (E) of S.B. 267 and added to R.C. 3937.31 in 2000, - "to consent to expressly or formally." As indicated, this definition is consistent with the nature of the statutory scheme as a whole and is *in pari materia* with the companion word "required."

4. The Change Must Be "Permitted" By R.C. 3937.31 And Another Section of the Revised Code.

The next question is whether the "or" between "permitted or required" should be read in the conjunctive or disjunctive. In other words, does the language require that the "change" be permitted by both R.C. 3937.31 *and* another section of the Revised Code, or, does it require that the "change" be permitted by either R.C. 3937.31 *or* another section of the Revised Code. Neither the court of appeals nor the Second District decision in *Arn v. McLean*, that it references, address this issue. They appear to presume the disjunctive, without analysis. Since the integrity of the statutory system governing cancellation of automobile insurance coverages is at stake, an interpretation that would allow that system to be undermined by changes in any other section of the Revised Code even if it conflicts with R.C. 3937.31 itself, would have to be suspect. Yet, it is the assumption that underlies what the court of appeals has allowed, *i.e.*, an automobile insurer to bypass and ignore the carefully designed statutory scheme restricting and limiting cancellation of coverage that has been in effect in Ohio since 1970.

The applicable rule in Ohio is set forth in *In re Estate of Marrs* (1952), 158 Ohio St. 95, 99, 107 N.E.2d 148, where the Supreme Court discussed the interchangeability of “or” and “and” stating:

However, an examination of the authorities shows that under certain conditions the word, ‘or,’ in a legislative enactment can be construed to read ‘and,’ and that word, ‘and,’ can likewise be construed to read ‘or.’ The word, ‘and,’ or, ‘or,’ will not be given its literal meaning where such meaning would do violence to the evident intent and purpose of the lawmakers and the other meaning would give effect to such intent.

Furthermore, the legislature, in R.C. 1.02(F) provides that “‘or’ may be read as ‘and’ if the sense requires it.” In this case, the “sense” or context of the statutory scheme does so.

The integrity of the system for restriction of cancellation of insurance coverages dictates that the Court should not read “or” in the disjunctive and “permit” changes that conflict with R.C. 3937.31 itself. In interpreting R.C. 3937.31(E), the sense in which the phrase “permitted or required” is used requires that it be construed in the conjunctive. It is used in the context of the statutory scheme for restricting arbitrary and unilateral reductions of insurance coverage and a contrary reading would allow another section of the Revised Code to supplant that process and ignore what R.C. 3937.31 itself prohibits. It would be an exception that swallows the rule.

Recently, in *Shay v. Shay*, 113 Ohio St.3d 172, 2007-Ohio-1384, this Court relied on the language in section 5 of S.B. 267 with respect to whether an insurer was required to broaden coverages during the two-year period in R.C. 3937.31(A). It referenced the word “may” in that uncodified section 5 as indicating that a change broadening coverage for the insureds was permissive and not mandatory. 2007-Ohio-1384, ¶25. Following that precedent, and looking at the same section 5 of S.B. 267 for aid in assessing whether the “permitted or required” phrase

should be interpreted to allow a change prohibited by R.C. 3937.31, itself, the Court will find the conjunctive reading is consistent with preserving the integrity of the cancellation process because section 5 does not use the word “or,” it uses the word, “and.” The implicit directive is that any change that an insurer plans to incorporate into an automobile policy during the two-year period of guaranteed coverage must be “permitted” by R.C. 3937.31 *and* some other section of the Revised Code dealing with coverages. Thus, this Court should construe the “permitted or required by this section or other sections of the Revised Code” to mean that the proposed change must be “permitted” – consented to expressly or formally – in both R.C. 3937.31 and some other section dealing with insurance coverages.

5. Court of Appeals Misread Section 5, S.B. 267.

Apparently, the court of appeals erroneously read the uncodified comments of the legislature in S.B. 267 to justify its conclusion that Allstate could incorporate a removal of UM/UIM coverage at a mandatory renewal during the two-year period of guaranteed coverage. *Advent v. Allstate Ins. Co.*, Franklin App. No. 06AP-103, 2006-Ohio-5522, ¶19. It quoted section 5 of S.B. 267 as “expressly” stating the legislature’s intent:

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. [emphasis added]

The only logical conclusion from this statement is that the legislature intended exactly what it said in division (E). While division (E) is stated in a negative, disclaimer type language, section 5 is stated positively. Otherwise, the language does not provide additional assistance in determining what change is “permitted or required”. It certainly does not provide any support

for the argument that division (E) removes the strict requirements for advance, written notification of intent to cancel coverage and/or removal of the limitation to the four reasons specified in division (A). In other words, it does nothing to undercut the requirement in division (A) that, during the two-year period of guaranteed coverage, an insurer may not reduce or remove an insured's coverages, without following the system devised by the insurance industry and enacted in Ohio in S.B. 334, effective in January, 1970. See *Wolfe v. Wolfe*, *supra*.

It is presumed that the legislature was aware of the requirements of R.C. 3937.31(A) and R.C. 3937.30 to .39, when it adopted new division (E). The courts had provided interpretation. In 1999 an appellate panel thoroughly reviewed R.C. 3937.31 before the amendment in S.B. 267. *Wodrich v. Farmers Ins. of Cols., Inc.* (May 21, 1999), Greene App. No. 98CA103. The Court's analysis of R.C. 3937.31, and its inconsistency with *Benson v. Rosler* (1985), 19 Ohio St.3d 41, was a forerunner to the Supreme Court decision in *Wolfe v. Wolfe* itself. In *Wodrich*, the late Judge Frederick Young, for the Court, stated:

In other words, because of the requirement that the same coverages must be offered, the insurer cannot unilaterally change the policy. This argument about the potential effect of the statute is buttressed by the fact that R.C. 3937.31(B) goes on to say: 'Sections 3937.30 to 3937.39 of the Revised Code do not prohibit: (1) Changes in coverage or policy limits, cancellation or nonrenewal for any reason *at the request or with the consent of the insured.* [emphasis, the Court's]. By obvious implication, changes in coverage cannot be made during the mandatory renewal period without the consent of the insured. *Id.*, at \*7-8. [italics original; underlining added]

Accord: *Townsend v. State Farm* (Aug. 14, 1998), Sandusky App. No. S-97-059, unreported; *DeBose v. The Travelers Ins. Co.*, *supra*; *Moroney v. Annis* (Oct. 12, 1999), Richland App. No. 99CA27, 1999 WL 1071758(Ohio App.5 Dist.), at \*4.).

R.C. 3937.31(E) merely codified existing industry practice, allowing changes, but not cancellations. R.C. 3937.31 still restricts and limits insurer conduct that amounts to a 'cancellation' and mandates advance notification and specific reasons for any such cancellation to be legal. R.C. 3937.32.

D. THE RE-WRITE OF R.C. 3937.18 BY S.B. 97 IS NOT A "PERMITTED" CHANGE.

Allstate asserts that the revision of the UM/UIM statute, R.C. 3937.18, by S.B. 97, allows it to deny any claim to UM/UIM implied by law. It argues that it is exempt from the entire mandatory system for advance, written notification and limitation of reasons before a cancellation of coverage can occur. However, the proper inquiry is whether the change in the UM/UIM statute, effective on October 31, 2001, as part of S.B. 97, provides "consent to expressly or formally" remove or reduce coverage during the two-year period of guaranteed coverage, coverage that was provided at the end of the preceding renewal period by operation of law. The plain and ordinary meaning of the word "provide" is "to supply or make available." Webster's, *supra*, 948. Since it is interpreting a remedial statute, the Court is obligated to construe it liberally and, therefore, it includes both an express and implied provision.

1. R.C. 3937.18, As Enacted By S.B. 97 Does Not Mention Removing or Reducing Existing UM/UIM Coverage.

The first and obvious observation about the change made by S.B. 97 is that it does not mention or refer in any way to R.C. 3937.31(A) or cancellation of insurance coverages, including UM/UIM. The change in the UM/UIM statute by S.B. 97 is a change in the process involved in requiring auto insurers to offer UM/UIM to insureds applying for automobile liability insurance at limits equal to the liability limits, but allowing insureds to reject the offer.

Compare: R.C. 3937.18, as effective as of September 21, 2000. Since the change in S.B. 97 does not “consent to expressly or formally” to canceling insurance coverage implied by law during the preceding policy period, the judicial inquiry is at an end. The statute simply does not address the mid-period change as argued by Allstate. Therefore, it does not “permit” the proposed change and it may not be incorporated into the policy so as to reduce an insured’s coverage during the two-year period of guaranteed coverage, --- UNLESS the insurer complies with the notification process and has one or more of the valid reasons for cancellation set forth in R.C. 3937.31(A).

## 2. UM/UIM Implied By Law.

In *Wolfe*, this Court emphasized the principle of UM/UIM implied by law where an insurer defaults in its obligation to make a valid offer of UM/UIM and provide the opportunity for a valid rejection, as supporting its conclusion that coverages were protected for the two-year period mandated by R.C. 3937.31(A). Of course, this Court recognized the strong public policy involved in adopting a UM/UIM statute to address the public interest in providing insurance to compensate the numerous Ohio motorists injured by uninsured or underinsured motorists. This public policy was explained in a line of cases detailing that a failure in the process of offer and rejection based on the lack of sufficient information for a voluntary and informed waiver of substantial rights by an insured, meant that the UM/UIM required to be offered by the insurer was implied by law. See *Abate v. Pioneer Mut. Cas. Co.* (1970), 22 Ohio St.2d 161, 163, 258 N.E.2d 429; *Gyori v. Johnston Coca-Cola Bottling Group, Inc.*, 76 Ohio St.3d 565, 1996-Ohio-358, 669 N.E.2d 824; and *Linko v. Indemnity Ins. Co. of Am.*, 90 Ohio St.3d 445, 2000-Ohio-92, 739 N.E.2d 338. The purpose of a mandatory offering of UM/UIM could not be served if it could be rejected or reduced without sufficient knowledge or

information, and leave those injured by uninsured and underinsured motorists without sufficient compensation. UM/UIM implied by law is not a “legal fiction,” but is a remedy or “sanction” to enforce the mandate to insurers to make a meaningful offer of UM/UIM so the injured insureds are protected. It is also consistent with the law in other jurisdictions. “When an insurer fails to make an effective offer to a purchaser, underinsured motorist insurance is imposed by operation of law.” 3 Widiss, *Uninsured and Underinsured Motorist Insurance* §32.6, p.46 (2001). The purpose of the “sanction” is to achieve the objective of the statute for protection of the innocent injured, despite the default by the insurer. Otherwise, by simply not following the mandate to properly offer UM/UIM, insurers could defeat the intended purpose for widespread UM/UIM coverage. Thus, UM/UIM implied by law served the same public purpose as express UM/UIM coverage.

### 3. Legislative Comments in Uncodified S.B. 97.

Nevertheless, the court of appeals, as well as the courts in *Arn* and *St. Clair, supra*, have found that insurers may use the changes to R.C. 3937.18 to avoid the claims of their insureds injured or killed by uninsured or underinsured motorists, where the controlling law prior to S.B. 97 provided UM/UIM implied by law. Since the revised R.C. 3937.18 does not mention it, the only possible source for the court of appeals decision is the legislative comments in the uncodified section of S.B. 97.

There is no question that the General Assembly expressed its intention in the uncodified section 2 of S.B. 97, to “eliminate any requirement of the mandatory offer of uninsured motorist coverage, underinsured motorist coverage, or both” and to “[e]liminate the possibility of uninsured motorist coverage, underinsured motorist coverage, or both . . . being implied as a matter of law in any insurance policy” and to “supersede the holding of the Ohio Supreme

Court” in several cases, including *Linko* and *Gyori, supra*. That does not end the inquiry. Division (E) in R.C. 3937.31 does not incorporate legislative intentions or desires. The Court’s role requires that it examine whether the change in the UM/UIM statute includes “consent to expressly or formally” remove UM/UIM implied by law during the clearly preserved two-year period of guaranteed coverage in R.C. 3937.31(A), explained by this Court in *Wolfe v. Wolfe* and *DeBose, supra*.

A perusal of S.B. 97 makes clear that it only deletes the offer and rejection process while continuing to provide for UM/UIM in automobile insurance policies in Ohio at the option of the insurer and insureds. It provides no consent. It does not “permit” the removal of UM/UIM implied by law prior to the end of the two-year period of guaranteed coverage.

#### 4. Legislature Knew About Existing Implied UM/UIM.

Under the clear language of division (A), as interpreted by the Supreme Court of Ohio and various courts of appeals, a renewal with less coverage than was “provided at the end of the next preceding period,” is not “permitted” except in compliance with division (A) and paragraphs (1)-(4). The legislature acted with full knowledge of the principle of UM/UIM implied by law and it did not distinguish it from express coverage and did not seek to re-define “cancellation” that triggers the entire R.C. 3937.30 to .39 process. If it had re-defined “cancellation” to exclude UM/UIM implied by law, it would have favored insurers that defaulted in their obligation under R.C. 3937.18 to provide a valid offer of UM/UIM, over those insurers that followed the law and made a valid offer. That would be unreasonable and contrary to the purpose of having as much UM/UIM as possible for compensation of the injured. Thus, the legislature knew in 2001 when it adopted S.B. 97, that express and implied

UM/UIIM had the same legal effect. See *e.g.*, *Schumacher v. Kreiner* (2000), 88 Ohio St.3d 358.

Accordingly, there is no rational basis for arguing that R.C. 3937.31(A) only protects express UM/UIIM and not UM/UIIM implied by law that fills the gaps on default by insurers.

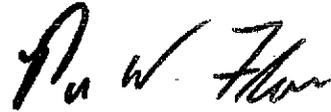
**CONCLUSION**

For the foregoing reasons, the members of the OATL hereby urge this Court to answer the certified question in the negative and reverse the decision of the Tenth District Court of Appeals in all respects.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **Brief** was served by regular U.S. Mail on this 20<sup>th</sup>

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