

A TRUE COPY
ATTEST: ROBIN L. BLUME, CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BY: 
DEPUTY CLERK

TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA,

Plaintiff,

v.

BARBARA HAWTHORNE, as Personal
Representative of the Estate of Nathaniel
Hawthorne, Jr.,

Defendant.

Case No. _____



COMPLAINT FOR DECLARATORY JUDGMENT

NOW COMES the Plaintiff, Travelers Property Casualty Company of America (“Travelers”), by and through its undersigned counsel, and for its Complaint for Declaratory Judgment pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 against the Defendant, Barbara Hawthorne, in her capacity as Personal Representative of the Estate of Nathaniel Hawthorne, Jr. (the “Estate”), says and alleges as follows:

NATURE OF THE ACTION

1. This is a civil action seeking a declaration pursuant to 28 U.S.C. § 2201 concerning the rights, duties, and obligations, if any of Travelers and the Estate under a policy of insurance issued by Travelers with respect to a motor vehicle collision that occurred on December 2, 2020 in Greenville, South Carolina on North Pleasantburg Drive (the “Accident”).

2. The Accident resulted in the death of Nathaniel Hawthorne, Jr., the Estate’s decedent (the “Decedent”).

3. The Estate has made a claim for underinsured motorist insurance (“UIM”) benefits under a policy of insurance issued by Travelers to Terracon Consultants, Inc. as the principal named insured with a policy number of TC2J-CAP-131J3858-TIL-20 (the “Policy”).

4. A true and accurate copy of those portions of the Policy relevant to the UIM benefits provided under the Policy are attached hereto and incorporated herein by reference as **Exhibit A**.

5. The Estate contends that it is entitled to recover UIM benefits under the Policy and Travelers contends that it is not.

6. A justiciable controversy exists between Travelers and the Estate concerning whether the Estate is entitled to UIM benefits under the Policy or is otherwise entitled to recover damages from Travelers in connection with the Accident..

THE PARTIES

7. Travelers is a corporation organized and existing pursuant to the laws of the State of Connecticut with its principal place of business in Connecticut.

8. On information and belief, Barbara Hawthorne is the duly appointed Personal Representative of the Estate of Nathaniel Hawthorne, Jr., and is an individual citizen and resident of Greenville, South Carolina.

JURISDICTION AND VENUE

9. This Court has subject-matter jurisdiction over this case pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds \$75,000, exclusive of interest and costs, and is between citizens of different states.

10. Venue is proper in this District pursuant to 28 U.S.C. 1391(b)(1) because the Estate is the only defendant and is subject to this Court's personal jurisdiction with respect to this action.

11. The Greenville Division of this Court is the proper division pursuant to Local Civ. Rule 3.01 (D.S.C.) because the Estate resides in this Division.

THE ACCIDENT

12. On December 2, 2020, a corporal with the South Carolina Department of Public Safety (the "Officer") initiated a traffic stop of a 2015 Ford truck being driven by the Decedent.

13. On information and belief, the 2015 Ford truck is owned by Terracon Consultants, Inc. and is principally garaged in the State of South Carolina.

14. Decedent and the Officer both stopped their vehicles in the center turn lane of North Pleasantburg Drive between its intersection with North Garden Circle and Crescent Ridge Drive.

15. At some point during the traffic stop, the Decedent approached the passenger side of the Officer's vehicle to provide the Officer with the registration for a trailer being pulled by the Decedent's vehicle.

16. While the Decedent leaned into the passenger side of the Officer's vehicle, the Officer's vehicle was struck by a vehicle driven by Allan Lindsey Zack (the "Tortfeasor"). The collision of the Tortfeasor's vehicle with the Officer's vehicle forced the Decedent into traffic and he was hit and killed by a passing motorist.

THE POLICY

17. The Policy includes, among other benefits, underinsured motorist coverage subject to certain terms and conditions with policy limits of \$1,000,000 per accident with respect to insured vehicles principally garaged in South Carolina.

18. The insuring agreement of the UIM coverage under the Policy in connection with covered autos licensed or principally garaged in South Carolina provides, in relevant part, the following:

A. Coverage

We will pay in accordance with the South Carolina Underinsured Motorists Law all sums the “insured” is legally entitled to recover as damages from the owner or driver of an “underinsured motor vehicle”.

(the “Insuring Agreement”). *See* Exhibit A, p.36 of 38.

19. Pursuant to the Insuring Agreement, only persons who are an “insured,” as that term is defined by the Policy, are eligible to receive UIM benefits under the Policy.

20. The Policy defines the term “insured,” with respect to UIM benefits available in connection with covered autos licensed or principally garaged in South Carolina, in relevant part, as follows:

B. Who Is An Insured

If the Named Insured is designated in the Declarations as:

...

2. A partnership, limited liability company, corporation or any other form of organization, then the following are “insureds”:

a. Anyone “occupying” a covered “auto” ...

b. Anyone for damages he or she is entitled to recover because of “bodily injury” sustained by another “insured”.

See Exhibit A, p.36 of 38.

21. The Policy defines the term “occupying,” with respect to UIM benefits available in connection with covered autos licensed or principally garaged in South Carolina as follows:

F. Additional Definitions

As used in this endorsement:

2. "Occupying" means in, upon, getting in, on, out or off.

See Exhibit A, p.38 of 38.

22. At the time of the Accident, the Decedent was not “in, upon, getting in, on, out or off” a “covered auto” within the meaning of the UIM coverage available under the Policy in connection with covered autos licensed or principally garaged in South Carolina.

23. With respect to the Accident, the Decedent is not an Insured within the meaning of the UIM coverage available under the policy in connection with covered autos licensed or principally garaged in South Carolina.

24. The Estate is not a person who is entitled to recover because of “bodily injury” sustained by another “insured”.

25. With respect to the Accident, the Estate is not an Insured within the meaning of the UIM coverage available under the policy in connection with covered autos licensed or principally garaged in South Carolina.

26. The Estate is not entitled to recover UIM benefits from Travelers in connection with the Accident.

CLAIM FOR RELIEF
- DECLARATORY JUDGMENT -

27. Each of the preceding allegations are incorporated herein by reference as if fully set forth in their entirety.

28. Travelers has no obligation to provide UIM benefits to, and is not otherwise liable to the Estate in connection with the Accident because the Estate is not an insured with respect to the UIM benefits coverage under the Policy.

29. The Estate contends that it is entitled to recover UIM benefits under the Policy.

30. An actual controversy exists between Travelers and the Estate as to whether Travelers is obligated to provide UIM benefits to the Estate in connection with the Accident.

31. Pursuant to 26 U.S.C. § 2201, et seq., this Court is vested with the jurisdiction and power to declare the rights and other legal relations of the parties to which action including whether Travelers has any obligation to the Estate with respect to damages that may be recoverable by the Estate in connection with the Accident.

32. Travelers is entitled to a declaratory judgment that it has no obligation to provide UIM benefits and is not otherwise liable to the Estate for damages that may be recoverable by the Estate in connection with the Accident.

NOW, THEREFORE, having set forth its Complaint for Declaratory Judgment, Travelers respectfully prays this Court:

1. Take jurisdiction of the controversy and enter an order and declaratory judgment providing that Travelers has no obligation to provide underinsured motorist benefits and is not

otherwise liable to the Estate for damages that may be recoverable by the Estate in connection with the Accident;

2. Tax the costs of this action against the Defendant; and

3. Grants such other and further relief in favor of Plaintiff as the Court shall deem just and appropriate.

Respectfully submitted this 18th day of August, 2021.

MARTINEAU KING PLLC

/s/ Lee M. Thomas

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**Pro Hac Vice* application forthcoming

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Attorneys for Plaintiff,

Travelers Property Casualty Company of America

EXHIBIT A

Relevant Policy Language



One Tower Square, Hartford, Connecticut 06183

BUSINESS AUTO
 COVERAGE PART DECLARATIONS
 Issue Date: 02-06-20 RW

ITEM ONE: Policy Number: TC2J-CAP-131J3858-TIL-20

INSURING COMPANY:
 TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

Declarations Period: From: 01-01-20 to 01-01-21 12:01 A.M. Standard
 Time at your mailing address shown in the Common Policy Declarations.

The Commercial Automobile Coverage Part consists of these
 Declarations and the Business Auto Coverage Form shown below.

FORM OF BUSINESS: CORPORATION

ITEM TWO:
 A. COVERAGE AND LIMITS OF INSURANCE:

Coverage applies only to those Autos shown as Covered Autos by entry
 of one or more Symbols from SECTION 1 - Covered Auto of the
 BUSINESS AUTO COVERAGE FORM

COVERAGE	COVERED AUTO SYMBOL	LIMITS OF INSURANCE
		The most we will pay for any one accident or loss.
LIABILITY	1	\$ 2,000,000
COMPULSORY BODILY INJURY (Massachusetts Only)	1	\$20,000 EACH PERSON \$40,000 EACH ACCIDENT
PERSONAL INJURY PROTECTION (No Fault)	5	Separately stated in each PIP endorsement minus deductible shown in ITEM THREE-SCHEDULE OF COVERED AUTOS YOU OWN.
PERSONAL INJURY PROTECTION (No Fault) (New York Only)	5	\$ 50,000 minus deductible shown in ITEM THREE-SCHEDULE OF COVERED AUTOS YOU OWN.
PERSONAL INJURY PROTECTION (Massachusetts Only)	5	\$8,000

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One Tower Square, Hartford, Connecticut 06183

BUSINESS AUTO
 COVERAGE PART DECLARATIONS
 Issue Date: 02-06-20 RW

Policy Number: TC2J-CAP-131J3858-TIL-20

<u>COVERAGE</u>	<u>COVERED AUTO SYMBOL</u>	<u>LIMITS OF INSURANCE</u>
PROPERTY PROTECTION (COVERAGE) (Michigan Only)	5	Separately stated in the Endorsement Minus \$ 0 deductible.
AGGREGATE NO-FAULT BENEFITS AVAILABLE (New York Only)	5	\$ 50,000
MAXIMUM MONTHLY WORK LOSS (New York Only)	5	\$ 2,000
OTHER NECESSARY EXPENSES (PER DAY) (New York Only)	5	\$ 25
DEATH BENEFIT (New York Only)	5	\$ 2,000
AUTO MEDICAL PAYMENTS	2 13	\$10,000 EACH PERSON
UNINSURED AND UNDERINSURED MOTORISTS COVERAGE	2 13	SEE CA TO 30

B. AUDIT PERIOD: ANNUAL

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One Tower Square, Hartford, Connecticut 06183

BUSINESS AUTO
COVERAGE PART DECLARATIONS
Issue Date: 02-06-20 RW

Policy Number: TC2J-CAP-131J3858-TIL-20

C. DESCRIPTION OF COVERED AUTO DESIGNATION SYMBOLS:

Symbols 1-9, 19: SEE BUSINESS AUTO COVERAGE FORM Section 1
Covered Autos

Symbol 13: ANY AUTO YOU DO NOT OWN AND THAT IS A COVERED AUTO
UNDER THIS POLICY FOR LIABILITY INSURANCE AND IT IS
LICENSED OR PRINCIPALLY GARAGED IN LOUISIANA.
ANY AUTO YOU DO NOT OWN AND THAT IS A COVERED AUTO
UNDER THIS POLICY FOR LIABILITY INSURANCE AND IT IS
LICENSED OR PRINCIPALLY GARAGED IN ILLINOIS.
ANY AUTO YOU DO NOT OWN AND THAT IS A COVERED AUTO
UNDER THIS POLICY FOR LIABILITY INSURANCE AND IT IS
LICENSED OR PRINCIPALLY GARAGED IN WISCONSIN.
ANY AUTO YOU DO NOT OWN THAT IS A COVERED AUTO UNDER
THIS POLICY, THAT IS LICENSED OR PRINCIPALLY GARAGED IN
WISCONSIN, AND THAT IS REQUIRED TO HAVE MEDICAL
PAYMENTS COVERAGE BY WISCONSIN LAW.

D. LOSS PAYEE: Any loss under Physical Damage Coverages is payable as
interest may appear to you and the Loss Payee named in the Declarations
(see Loss Payable Clause on reverse side)

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One Tower Square, Hartford, Connecticut 06183

BUSINESS AUTO
COVERAGE PART DECLARATIONS
Issue Date: 02-06-20 RW

Policy Number: TC2J-CAP-131J3858-TIL-20

LOSS PAYABLE CLAUSE

- A. We will pay you and the loss payee named in the policy for "loss" to a covered "auto", as interest may appear.
- B. The insurance covers the interest of the loss payee unless the "loss" results from conversion, secretion or embezzlement on your part.
- C. We may cancel the policy as allowed by the CANCELLATION Common Policy Condition. Cancellation ends this agreement as to the loss payee's interest. If we cancel the policy we will mail you and the loss payee the same advance notice.
- D. If we make any payment to the loss payee, we will obtain their rights against any other party.

SCHEDULE OF LOSS PAYEES

VEHICLE NUMBER

LOSS PAYEE (Name and Address)

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One Tower Square, Hartford, Connecticut 06183

BUSINESS AUTO
COVERAGE PART DECLARATIONSPOLICY NUMBER: TC2J-CAP-131J3858-TIL-20
ISSUE DATE: 02-06-20

ITEM FOUR

SCHEDULE OF HIRED OR BORROWED COVERED AUTO COVERAGE AND PREMIUMS.

COVERED AUTOS LIABILITY COVERAGE COST OF HIRE RATING BASIS FOR AUTOS USED IN YOUR
MOTOR CARRIER OPERATIONS (OTHER THAN MOBILE OR FARM EQUIPMENT)

COVERED AUTOS LIABILITY COVERAGE	ESTIMATED ANNUAL COST OF HIRE FOR ALL STATES	PREMIUM
PRIMARY COVERAGE	\$	\$
EXCESS COVERAGE	\$	\$
TOTAL HIRED AUTO PREMIUM		\$

For "autos" used in your motor carrier operations, cost of hire means:

1. The total dollar amount of costs you incurred for the hire of automobiles (includes "trailers" and semitrailers) and if not included therein,
2. The total remunerations of all operators and drivers' helpers, of hired automobiles whether hired with a driver by the lessor or an "employee" of the lessee, or any other third party, and
3. The total dollar amount of any other costs (e.g., repair, maintenance, fuel, etc.) directly associated with operating the hired automobiles whether such costs are absorbed by the "insured", paid to the lessor or owner, or paid to others.

COVERED AUTOS LIABILITY COVERAGE COST OF HIRE RATING BASIS FOR AUTOS NOT USED IN
YOUR MOTOR CARRIER OPERATIONS (OTHER THAN MOBILE OR FARM EQUIPMENT)

COVERED AUTOS LIABILITY COVERAGE	STATE	ESTIMATED ANNUAL COST OF HIRE FOR EACH STATE	PREMIUM
PRIMARY COVERAGE		\$	\$
EXCESS COVERAGE		\$	\$
TOTAL HIRED AUTO PREMIUM			\$

For "autos" NOT used in your motor carrier operations, cost of hire means the total amount you incur for the hire of "autos" you don't own (not including "autos" you borrow or rent from your partners or "employees" or their family members). Cost of hire does not include charges for services performed by motor carriers of property or passengers.

PHYSICAL DAMAGE COVERAGES COST OF HIRE RATING BASIS FOR ALL AUTOS (OTHER THAN MOBILE OR FARM EQUIPMENT)

COVERAGE	STATE	LIMIT OF INSURANCE	ESTIMATED ANNUAL COST OF HIRE FOR EACH STATE (Excluding Autos Hired With a Driver)	PREMIUM
		-		
COMPREHENSIVE		ACTUAL CASH VALUE OR COST OF REPAIR, WHICHEVER IS LESS, MINUS \$ DEDUCTIBLE. FOR EACH COVERED AUTO.		\$
SPECIFIED CAUSES OF LOSS		ACTUAL CASH VALUE OR COST OF REPAIR, WHICHEVER IS LESS, MINUS \$ DEDUCTIBLE. FOR EACH COVERED AUTO FOR LOSS CAUSED BY MISCHIEF OR VANDALISM.		\$
COLLISION		ACTUAL CASH VALUE OR COST OF REPAIR, WHICHEVER IS LESS, MINUS \$ DEDUCTIBLE. FOR EACH COVERED AUTO.		\$
TOTAL HIRED AUTO PREMIUM				\$

For Physical Damage Coverages, cost of hire means the total amount you incur for the hire of "autos" you don't own (not including "autos" you borrow or rent from your partners or "employees" or their family members). Cost of hire does not include charges for any "auto" that is leased, hired, rented, or borrowed with a driver.

ITEM FIVE**SCHEDULE FOR NON-OWNERSHIP COVERED AUTOS LIABILITY**

NAMED INSURED'S BUSINESS	RATING BASIS	NUMBER	PREMIUM
OTHER THAN GARAGE SERVICE OPERATIONS AND OTHER THAN SOCIAL SERVICE AGENCIES	NUMBER OF EMPLOYEES		\$ INCL
	NUMBER OF PARTNERS (ACTIVE AND INACTIVE)		\$
GARAGE SERVICE OPERATIONS	NUMBER OF EMPLOYEES WHOSE PRINCIPAL DUTY INVOLVES THE OPERATION OF AUTOS		\$
	NUMBER OF PARTNERS (ACTIVE AND INACTIVE)		\$
SOCIAL SERVICE AGENCIES	NUMBER OF EMPLOYEES		\$
	NUMBER OF VOLUNTEERS WHO REGULARLY USE AUTOS TO TRANSPORT CLIENTS		\$
	NUMBER OF PARTNERS (ACTIVE AND INACTIVE)		\$
TOTAL NON-OWNERSHIP COVERED AUTOS LIABILITY PREMIUM			\$ INCL



One Tower Square, Hartford, Connecticut 06183

**BUSINESS AUTO/AUTO DEALERS/
MOTOR CARRIER COVERAGE PART
SUPPLEMENTARY SCHEDULE**

**POLICY NUMBER: TC2J-CAP-131J3858-TIL-20
ISSUE DATE: 02-06-20**

**ITEM TWO
COVERAGE AND LIMITS OF INSURANCE
UNINSURED MOTORISTS COVERAGE AND UNDERINSURED MOTORISTS COVERAGE**

The LIMIT OF INSURANCE for the coverages shown below is the LIMIT OF INSURANCE shown for the State where a covered "auto" is principally garaged. Refer to the specific coverage endorsement for description of the coverage provided for each State listed below.

Coverage					
UNINSURED MOTORISTS			LIMIT OF INSURANCE		
State	"Bodily Injury" and "Property Damage" Each "Accident"	"Bodily Injury" Each "Accident"	Each Person	"Bodily Injury" Each "Accident"	"Property Damage" Each "Accident"
AL		\$ 1,000,000			
AZ		\$ 1,000,000			
AR		\$ 1,000,000			
CA		\$ 1,000,000			
CO		\$ 2,000,000			
CT		\$ 1,000,000			
FL		\$ 2,000,000			
GA	\$ 2,000,000				
ID		\$ 1,000,000			
IL		\$ 2,000,000			

UNDERINSURED MOTORISTS **LIMIT OF INSURANCE**
(When not included in Uninsured Motorists Coverage)

State	"Bodily Injury" and "Property Damage" Each "Accident"	"Bodily Injury" Each "Accident"	Each Person	"Bodily Injury" Each "Accident"	"Property Damage" Each "Accident"
AZ		\$ 1,000,000			
AR		\$ 1,000,000			
CT		\$ 1,000,000			
ID		\$ 1,000,000			
IL		\$ 2,000,000			
IN		\$ 2,000,000			
IA		\$ 1,000,000			
KY		\$ 1,000,000			
MA			\$ 2,000,000	\$ 2,000,000	
MN		\$ 50,000			

POLICY NUMBER: TC2J-CAP-131J3858-TIL-20

COMMERCIAL AUTO
ISSUE DATE: 02-06-20**SCHEDULE EXTENSION**

This is an extension of CA T0 30 02 16

VARYING LIMITS

Coverage		LIMIT OF INSURANCE			
UNINSURED MOTORISTS					
State	"Bodily Injury" and "Property Damage" Combined Single Limit	"Bodily Injury" Each "Accident"	"Bodily Injury" Each Person Each "Accident"		"Property Damage" Each "Accident"
IN	\$ 2,000,000				
IA		\$ 1,000,000			
KS		\$ 1,000,000			
KY		\$ 1,000,000			
LA		\$ 2,000,000			
ME		\$ 1,000,000			
MD	\$ 1,000,000				
MA			\$ 2,000,000	\$ 2,000,000	
MN		\$ 2,000,000			
MS	\$ 1,000,000				
MO		\$ 2,000,000			
MT		\$ 2,000,000			
NE		\$ 1,000,000			
NV		\$ 2,000,000			
NH		\$ 2,000,000			\$ 25,000
NJ	\$ 1,000,000				
NM	\$ 2,000,000				
NY			\$ 25,000	\$ 50,000	
NC	\$ 1,000,000				
ND		\$ 2,000,000			

CA T0 30 SCHED

POLICY NUMBER: TC2J-CAP-131J3858-TIL-20

COMMERCIAL AUTO
ISSUE DATE: 02-06-20**SCHEDULE EXTENSION**

This is an extension of CA T0 30 02 16

VARYING LIMITS

Coverage		LIMIT OF INSURANCE			
UNINSURED MOTORISTS					
State	"Bodily Injury" and "Property Damage" Combined Single Limit	"Bodily Injury" Each "Accident"	"Bodily Injury" Each Person Each "Accident"		"Property Damage" Each "Accident"
OH		\$ 1,000,000			
OK		\$ 1,000,000			
OR		\$ 1,000,000			
PA		\$ 2,000,000			
SC	\$ 1,000,000				
TN	\$ 2,000,000				
TX	\$ 1,000,000				
UT		\$ 1,000,000			
WI		\$ 50,000			
WY		\$ 2,000,000			

POLICY NUMBER: TC2J-CAP-131J3858-TIL-20

COMMERCIAL AUTO
ISSUE DATE: 02-06-20**SCHEDULE EXTENSION**

This is an extension of CA T0 30 02 16

VARYING LIMITS**Coverage**UNDERINSURED MOTORISTS LIMIT OF INSURANCE
(When not included in Uninsured Motorists Coverage)

State of Principle Garaging	Each "Accident"	"Bodily Injury"		"Property Damage"
		Each Person	Each "Accident"	Each "Accident"
	\$	\$	\$	\$
MO	\$ 2,000,000			
ND	\$ 2,000,000			
OH	\$ 1,000,000			
PA	\$ 2,000,000			
SC	\$ 1,000,000			
UT	\$ 1,000,000			
WA	\$ 2,000,000			

CA T0 30 SCHED

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BUSINESS AUTO COVERAGE FORM

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BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

A. Description Of Covered Auto Designation Symbols

Symbol	Description Of Covered Auto Designation Symbols
1 Any "Auto"	
2 Owned "Autos" Only	Only those "autos" you own (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.
3 Owned Private Passenger "Autos" Only	Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4 Owned "Autos" Other Than Private Passenger "Autos" Only	Only those "autos" you own that are not of the private passenger type (and for Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5 Owned "Autos" Subject To No-fault	Only those "autos" you own that are required to have no-fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have no-fault benefits in the state where they are licensed or principally garaged.
6 Owned "Autos" Subject To A Compulsory Uninsured Motorists Law	Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
7 Specifically Described "Autos"	Only those "autos" described in Item Three of the Declarations for which a premium charge is shown (and for Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).
8 Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or borrow from any of your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9 Non-owned "Autos" Only	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households but only while used in your business or your personal affairs.

COMMERCIAL AUTO

- 19 Mobile Equipment Subject To Compulsory Or Financial Responsibility Or Other Motor Vehicle Insurance Law Only
- Only those "autos" that are land vehicles and that would qualify under the definition of "mobile equipment" under this policy if they were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where they are licensed or principally garaged.

B. Owned Autos You Acquire After The Policy Begins

1. If Symbols 1, 2, 3, 4, 5, 6 or 19 are entered next to a coverage in Item Two of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.
2. But, if Symbol 7 is entered next to a coverage in Item Two of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if:
 - a. We already cover all "autos" that you own for that coverage or it replaces an "auto" you previously owned that had that coverage; and
 - b. You tell us within 30 days after you acquire it that you want us to cover it for that coverage.

C. Certain Trailers, Mobile Equipment And Temporary Substitute Autos

If Liability Coverage is provided by this coverage form, the following types of vehicles are also covered "autos" for Liability Coverage:

1. "Trailers" with a load capacity of 2,000 pounds or less designed primarily for travel on public roads.
2. "Mobile equipment" while being carried or towed by a covered "auto".
3. Any "auto" you do not own while used with the permission of its owner as a temporary substitute for a covered "auto" you own that is out of service because of its:
 - a. Breakdown;
 - b. Repair;
 - c. Servicing;
 - d. "Loss"; or
 - e. Destruction.

SECTION II – LIABILITY COVERAGE**A. Coverage**

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos". However, we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident".

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

1. Who Is An Insured

The following are "insureds":

- a. You for any covered "auto".
- b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
 - (1) The owner or anyone else from whom you hire or borrow a covered "auto".

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This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

- (2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.
 - (3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.
 - (4) Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company) or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".
 - (5) A partner (if you are a partnership) or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.
- c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

2. Coverage Extensions

a. Supplementary Payments

We will pay for the "insured":

- (1) All expenses we incur.
- (2) Up to \$2,000 for cost of bail bonds (including bonds for related traffic law violations) required because of an "accident" we cover. We do not have to furnish these bonds.
- (3) The cost of bonds to release attachments in any "suit" against the "insured" we defend, but only for bond amounts within our Limit of Insurance.
- (4) All reasonable expenses incurred by the "insured" at our request, including actual loss of earnings up to \$250 a day because of time off from work.
- (5) All court costs taxed against the "insured" in any "suit" against the "insured" we defend. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the "insured".

- (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" against the "insured" we defend, but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

These payments will not reduce the Limit of Insurance.

b. Out-of-state Coverage Extensions

While a covered "auto" is away from the state where it is licensed we will:

- (1) Increase the Limit of Insurance for Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.
- (2) Provide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered "auto" is being used.

We will not pay anyone more than once for the same elements of loss because of these extensions.

B. Exclusions

This insurance does not apply to any of the following:

1. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

2. Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract" provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
- b. That the "insured" would have in the absence of the contract or agreement.

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3. Workers' Compensation

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

4. Employee Indemnification And Employer's Liability

"Bodily injury" to:

- a. An "employee" of the "insured" arising out of and in the course of:
 - (1) Employment by the "insured"; or
 - (2) Performing the duties related to the conduct of the "insured's" business; or
- b. The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph a. above.

This exclusion applies:

- (1) Whether the "insured" may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

But this exclusion does not apply to "bodily injury" to domestic "employees" not entitled to workers' compensation benefits or to liability assumed by the "insured" under an "insured contract". For the purposes of the coverage form, a domestic "employee" is a person engaged in household or domestic work performed principally in connection with a residence premises.

5. Fellow Employee

"Bodily injury" to:

- a. Any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business; or
- b. The spouse, child, parent, brother or sister of that fellow "employee" as a consequence of Paragraph a. above.

6. Care, Custody Or Control

"Property damage" to or "covered pollution cost or expense" involving property owned or transported by the "insured" or in the "insured's" care, custody or control. But this ex-

clusion does not apply to liability assumed under a sidetrack agreement.

7. Handling Of Property

"Bodily injury" or "property damage" resulting from the handling of property:

- a. Before it is moved from the place where it is accepted by the "insured" for movement into or onto the covered "auto"; or
- b. After it is moved from the covered "auto" to the place where it is finally delivered by the "insured".

8. Movement Of Property By Mechanical Device

"Bodily injury" or "property damage" resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered "auto".

9. Operations

"Bodily injury" or "property damage" arising out of the operation of:

- a. Any equipment listed in Paragraphs 6.b. and 6.c. of the definition of "mobile equipment"; or
- b. Machinery or equipment that is on, attached to or part of a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

10. Completed Operations

"Bodily injury" or "property damage" arising out of your work after that work has been completed or abandoned.

In this exclusion, your work means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

Your work includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in Paragraph a. or b. above.

Your work will be deemed completed at the earliest of the following times:

- (1) When all of the work called for in your contract has been completed.

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- (2) When all of the work to be done at the site has been completed if your contract calls for work at more than one site.
- (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

11. Pollution

"Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:
 - (1) Being transported or towed by, handled or handled for movement into, onto or from the covered "auto";
 - (2) Otherwise in the course of transit by or on behalf of the "insured"; or
 - (3) Being stored, disposed of, treated or processed in or upon the covered "auto";
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured".

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and

- (2) The "bodily injury", "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in Paragraphs 6.b. and 6.c. of the definition of "mobile equipment".

Paragraphs b. and c. above of this exclusion do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (a) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (b) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

12. War

"Bodily injury" or "property damage" arising directly or indirectly out of:

- a. War, including undeclared or civil war;
- b. Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- c. Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

13. Racing

Covered "autos" while used in any professional or organized racing or demolition contest or stunting activity, or while practicing for such contest or activity. This insurance also does not apply while that covered "auto" is being prepared for such a contest or activity.

C. Limit Of Insurance

Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for the total of all damages and "covered pollution cost or expense" combined resulting from any one "accident" is the Limit of Insurance for Liability Coverage shown in the Declarations.

All "bodily injury", "property damage" and "covered pollution cost or expense" resulting from

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continuous or repeated exposure to substantially the same conditions will be considered as resulting from one "accident".

No one will be entitled to receive duplicate payments for the same elements of "loss" under this coverage form and any Medical Payments Coverage endorsement, Uninsured Motorists Coverage endorsement or Underinsured Motorists Coverage endorsement attached to this Coverage Part.

SECTION III – PHYSICAL DAMAGE COVERAGE**A. Coverage**

1. We will pay for "loss" to a covered "auto" or its equipment under:

- a. **Comprehensive Coverage**

From any cause except:

- (1) The covered "auto's" collision with another object; or
 - (2) The covered "auto's" overturn.

- b. **Specified Causes Of Loss Coverage**

Caused by:

- (1) Fire, lightning or explosion;
 - (2) Theft;
 - (3) Windstorm, hail or earthquake;
 - (4) Flood;
 - (5) Mischief or vandalism; or
 - (6) The sinking, burning, collision or derailment of any conveyance transporting the covered "auto".

- c. **Collision Coverage**

Caused by:

- (1) The covered "auto's" collision with another object; or
 - (2) The covered "auto's" overturn.

2. **Towing**

We will pay up to the limit shown in the Declarations for towing and labor costs incurred each time a covered "auto" of the private passenger type is disabled. However, the labor must be performed at the place of disablement.

3. **Glass Breakage – Hitting A Bird Or Animal – Falling Objects Or Missiles**

If you carry Comprehensive Coverage for the damaged covered "auto", we will pay for the following under Comprehensive Coverage:

- a. Glass breakage;
 - b. "Loss" caused by hitting a bird or animal; and
 - c. "Loss" caused by falling objects or missiles.

However, you have the option of having glass breakage caused by a covered "auto's" collision or overturn considered a "loss" under Collision Coverage.

4. **Coverage Extensions**

- a. **Transportation Expenses**

We will pay up to \$20 per day to a maximum of \$600 for temporary transportation expense incurred by you because of the total theft of a covered "auto" of the private passenger type. We will pay only for those covered "autos" for which you carry either Comprehensive or Specified Causes Of Loss Coverage. We will pay for temporary transportation expenses incurred during the period beginning 48 hours after the theft and ending, regardless of the policy's expiration, when the covered "auto" is returned to use or we pay for its "loss".

- b. **Loss Of Use Expenses**

For Hired Auto Physical Damage, we will pay expenses for which an "insured" becomes legally responsible to pay for loss of use of a vehicle rented or hired without a driver under a written rental contract or agreement. We will pay for loss of use expenses if caused by:

- (1) Other than collision only if the Declarations indicate that Comprehensive Coverage is provided for any covered "auto";
 - (2) Specified Causes Of Loss only if the Declarations indicate that Specified Causes Of Loss Coverage is provided for any covered "auto"; or
 - (3) Collision only if the Declarations indicate that Collision Coverage is provided for any covered "auto".

However, the most we will pay for any expenses for loss of use is \$20 per day, to a maximum of \$600.

- B. **Exclusions**

1. We will not pay for "loss" caused by or resulting from any of the following. Such "loss" is excluded regardless of any other cause or

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event that contributes concurrently or in any sequence to the "loss".

a. Nuclear Hazard

- (1) The explosion of any weapon employing atomic fission or fusion; or
- (2) Nuclear reaction or radiation, or radioactive contamination, however caused.

b. War Or Military Action

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

2. We will not pay for "loss" to any covered "auto" while used in any professional or organized racing or demolition contest or stunt activity, or while practicing for such contest or activity. We will also not pay for "loss" to any covered "auto" while that covered "auto" is being prepared for such a contest or activity.
3. We will not pay for "loss" due and confined to:
 - a. Wear and tear, freezing, mechanical or electrical breakdown.
 - b. Blowouts, punctures or other road damage to tires.

This exclusion does not apply to such "loss" resulting from the total theft of a covered "auto".

4. We will not pay for "loss" to any of the following:
 - a. Tapes, records, discs or other similar audio, visual or data electronic devices designed for use with audio, visual or data electronic equipment.
 - b. Any device designed or used to detect speed-measuring equipment such as radar or laser detectors and any jamming apparatus intended to elude or disrupt speed-measurement equipment.
 - c. Any electronic equipment, without regard to whether this equipment is permanently

installed, that reproduces, receives or transmits audio, visual or data signals.

- d. Any accessories used with the electronic equipment described in Paragraph c. above.

5. Exclusions 4.c. and 4.d. do not apply to equipment designed to be operated solely by use of the power from the "auto's" electrical system that, at the time of "loss", is:

- a. Permanently installed in or upon the covered "auto";
- b. Removable from a housing unit which is permanently installed in or upon the covered "auto";
- c. An integral part of the same unit housing any electronic equipment described in Paragraphs a. and b. above; or
- d. Necessary for the normal operation of the covered "auto" or the monitoring of the covered "auto's" operating system.

6. We will not pay for "loss" to a covered "auto" due to "diminution in value".

C. Limit Of Insurance

1. The most we will pay for "loss" in any one "accident" is the lesser of:
 - a. The actual cash value of the damaged or stolen property as of the time of the "loss"; or
 - b. The cost of repairing or replacing the damaged or stolen property with other property of like kind and quality.
2. \$1,000 is the most we will pay for "loss" in any one "accident" to all electronic equipment that reproduces, receives or transmits audio, visual or data signals which, at the time of "loss", is:
 - a. Permanently installed in or upon the covered "auto" in a housing, opening or other location that is not normally used by the "auto" manufacturer for the installation of such equipment;
 - b. Removable from a permanently installed housing unit as described in Paragraph 2.a. above or is an integral part of that equipment; or
 - c. An integral part of such equipment.
3. An adjustment for depreciation and physical condition will be made in determining actual cash value in the event of a total "loss".

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4. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment.

D. Deductible

For each covered "auto", our obligation to pay for, repair, return or replace damaged or stolen property will be reduced by the applicable deductible shown in the Declarations. Any Comprehensive Coverage deductible shown in the Declarations does not apply to "loss" caused by fire or lightning.

SECTION IV – BUSINESS AUTO CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:

A. Loss Conditions**1. Appraisal For Physical Damage Loss**

If you and we disagree on the amount of "loss", either may demand an appraisal of the "loss". In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and amount of "loss". If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we will still retain our right to deny the claim.

2. Duties In The Event Of Accident, Claim, Suit Or Loss

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- a. In the event of "accident", claim, "suit" or "loss", you must give us or our authorized representative prompt notice of the "accident" or "loss". Include:
 - (1) How, when and where the "accident" or "loss" occurred;
 - (2) The "insured's" name and address; and
 - (3) To the extent possible, the names and addresses of any injured persons and witnesses.
- b. Additionally, you and any other involved "insured" must:

- (1) Assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost.

- (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".

- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit".

- (4) Authorize us to obtain medical records or other pertinent information.

- (5) Submit to examination, at our expense, by physicians of our choice, as often as we reasonably require.

- c. If there is "loss" to a covered "auto" or its equipment you must also do the following:

- (1) Promptly notify the police if the covered "auto" or any of its equipment is stolen.

- (2) Take all reasonable steps to protect the covered "auto" from further damage. Also keep a record of your expenses for consideration in the settlement of the claim.

- (3) Permit us to inspect the covered "auto" and records proving the "loss" before its repair or disposition.

- (4) Agree to examinations under oath at our request and give us a signed statement of your answers.

3. Legal Action Against Us

No one may bring a legal action against us under this coverage form until:

- a. There has been full compliance with all the terms of this coverage form; and
- b. Under Liability Coverage, we agree in writing that the "insured" has an obligation to pay or until the amount of that obligation has finally been determined by judgment after trial. No one has the right under this policy to bring us into an action to determine the "insured's" liability.

4. Loss Payment – Physical Damage Coverages

At our option we may:

- a. Pay for, repair or replace damaged or stolen property;

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- b. Return the stolen property, at our expense. We will pay for any damage that results to the "auto" from the theft; or
- c. Take all or any part of the damaged or stolen property at an agreed or appraised value.

If we pay for the "loss", our payment will include the applicable sales tax for the damaged or stolen property.

5. Transfer Of Rights Of Recovery Against Others To Us

If any person or organization to or for whom we make payment under this coverage form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

B. General Conditions

1. Bankruptcy

Bankruptcy or insolvency of the "insured" or the "insured's" estate will not relieve us of any obligations under this coverage form.

2. Concealment, Misrepresentation Or Fraud

This coverage form is void in any case of fraud by you at any time as it relates to this coverage form. It is also void if you or any other "insured", at any time, intentionally conceal or misrepresent a material fact concerning:

- a. This coverage form;
- b. The covered "auto";
- c. Your interest in the covered "auto"; or
- d. A claim under this coverage form.

3. Liberalization

If we revise this coverage form to provide more coverage without additional premium charge, your policy will automatically provide the additional coverage as of the day the revision is effective in your state.

4. No Benefit To Bailee – Physical Damage Coverages

We will not recognize any assignment or grant any coverage for the benefit of any person or organization holding, storing or transporting property for a fee regardless of any other provision of this coverage form.

5. Other Insurance

- a. For any covered "auto" you own, this coverage form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this coverage form is excess over any other collectible insurance. However, while a covered "auto" which is a "trailer" is connected to another vehicle, the Liability Coverage this coverage form provides for the "trailer" is:

- (1) Excess while it is connected to a motor vehicle you do not own.
- (2) Primary while it is connected to a covered "auto" you own.

- b. For Hired Auto Physical Damage Coverage, any covered "auto" you lease, hire, rent or borrow is deemed to be a covered "auto" you own. However, any "auto" that is leased, hired, rented or borrowed with a driver is not a covered "auto".

- c. Regardless of the provisions of Paragraph a. above, this coverage form's Liability Coverage is primary for any liability assumed under an "insured contract".

- d. When this coverage form and any other coverage form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our coverage form bears to the total of the limits of all the coverage forms and policies covering on the same basis.

6. Premium Audit

- a. The estimated premium for this coverage form is based on the exposures you told us you would have when this policy began. We will compute the final premium due when we determine your actual exposures. The estimated total premium will be credited against the final premium due and the first Named Insured will be billed for the balance, if any. The due date for the final premium or retrospective premium is the date shown as the due date on the bill. If the estimated total premium exceeds the final premium due, the first Named Insured will get a refund.
- b. If this policy is issued for more than one year, the premium for this coverage form will be computed annually based on our rates or premiums in effect at the beginning of each year of the policy.

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7. Policy Period, Coverage Territory

Under this coverage form, we cover "accidents" and "losses" occurring:

- a. During the policy period shown in the Declarations; and
- b. Within the coverage territory.

The coverage territory is:

- (1) The United States of America;
- (2) The territories and possessions of the United States of America;
- (3) Puerto Rico;
- (4) Canada; and
- (5) Anywhere in the world if:
 - (a) A covered "auto" of the private passenger type is leased, hired, rented or borrowed without a driver for a period of 30 days or less; and
 - (b) The "insured's" responsibility to pay damages is determined in a "suit" on the merits, in the United States of America, the territories and possessions of the United States of America, Puerto Rico or Canada or in a settlement we agree to.

We also cover "loss" to, or "accidents" involving, a covered "auto" while being transported between any of these places.

8. Two Or More Coverage Forms Or Policies Issued By Us

If this coverage form and any other coverage form or policy issued to you by us or any company affiliated with us applies to the same "accident", the aggregate maximum Limit of Insurance under all the coverage forms or policies shall not exceed the highest applicable Limit of Insurance under any one coverage form or policy. This condition does not apply to any coverage form or policy issued by us or an affiliated company specifically to apply as excess insurance over this coverage form.

SECTION V – DEFINITIONS

- A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage".
- B. "Auto" means:
 1. A land motor vehicle, "trailer" or semitrailer designed for travel on public roads; or

2. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

- C. "Bodily injury" means bodily injury, sickness or disease sustained by a person including death resulting from any of these.

- D. "Covered pollution cost or expense" means any cost or expense arising out of:

1. Any request, demand, order or statutory or regulatory requirement that any "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
2. Any claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

"Covered pollution cost or expense" does not include any cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:
 - (1) Being transported or towed by, handled or handled for movement into, onto or from the covered "auto";
 - (2) Otherwise in the course of transit by or on behalf of the "insured"; or
 - (3) Being stored, disposed of, treated or processed in or upon the covered "auto";
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured".

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other simi-

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lar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and
- (2) The "bodily injury", "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in Paragraph 6.b. or 6.c. of the definition of "mobile equipment".

Paragraphs b. and c. above do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (a) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (b) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

- E. "Diminution in value" means the actual or perceived loss in market value or resale value which results from a direct and accidental "loss".
- F. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
- G. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.
- H. "Insured contract" means:
 1. A lease of premises;
 2. A sidetrack agreement;
 3. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 4. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

5. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement;
6. That part of any contract or agreement entered into, as part of your business, pertaining to the rental or lease, by you or any of your "employees", of any "auto". However, such contract or agreement shall not be considered an "insured contract" to the extent that it obligates you or any of your "employees" to pay for "property damage" to any "auto" rented or leased by you or any of your "employees".

An "insured contract" does not include that part of any contract or agreement:

- a. That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
- b. That pertains to the loan, lease or rental of an "auto" to you or any of your "employees", if the "auto" is loaned, leased or rented with a driver; or
- c. That holds a person or organization engaged in the business of transporting property by "auto" for hire harmless for your use of a covered "auto" over a route or territory that person or organization is authorized to serve by public authority.
- I. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
- J. "Loss" means direct and accidental loss or damage.
- K. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:
 1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

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2. Vehicles maintained for use solely on or next to premises you own or rent;
3. Vehicles that travel on crawler treads;
4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - a. Power cranes, shovels, loaders, diggers or drills; or
 - b. Road construction or resurfacing equipment such as graders, scrapers or rollers;
5. Vehicles not described in Paragraph 1., 2., 3. or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - a. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well-servicing equipment; or
 - b. Cherry pickers and similar devices used to raise or lower workers; or
6. Vehicles not described in Paragraph 1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
 - a. Equipment designed primarily for:
 - (1) Snow removal;
 - (2) Road maintenance, but not construction or resurfacing; or
 - (3) Street cleaning;
 - b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
 - c. Air compressors, pumps and generators, including spraying, welding, building

cleaning, geophysical exploration, lighting or well-servicing equipment.

However, "mobile equipment" does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

- L. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
- M. "Property damage" means damage to or loss of use of tangible property.
- N. "Suit" means a civil proceeding in which:
 1. Damages because of "bodily injury" or "property damage"; or
 2. A "covered pollution cost or expense"; to which this insurance applies, are alleged.
 "Suit" includes:
 - a. An arbitration proceeding in which such damages or "covered pollution costs or expenses" are claimed and to which the "insured" must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages or "covered pollution costs or expenses" are claimed and to which the insured submits with our consent.
- O. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.
- P. "Trailer" includes semitrailer.

BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

A. Description Of Covered Auto Designation Symbols

Symbol	Description Of Covered Auto Designation Symbols	
1	Any "Auto"	
2	Owned "Autos" Only	Only those "autos" you own (and for Covered Autos Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.
3	Owned Private Passenger "Autos" Only	Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4	Owned "Autos" Other Than Private Passenger "Autos" Only	Only those "autos" you own that are not of the private passenger type (and for Covered Autos Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5	Owned "Autos" Subject To No-fault	Only those "autos" you own that are required to have no-fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have no-fault benefits in the state where they are licensed or principally garaged.
6	Owned "Autos" Subject To A Compulsory Uninsured Motorists Law	Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
7	Specifically Described "Autos"	Only those "autos" described in Item Three of the Declarations for which a premium charge is shown (and for Covered Autos Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).
8	Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or borrow from any of your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9	Non-owned "Autos" Only	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households but only while used in your business or your personal affairs.

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19	Mobile Equipment Subject To Compulsory Or Financial Responsibility Or Other Motor Vehicle Insurance Law Only	Only those "autos" that are land vehicles and that would qualify under the definition of "mobile equipment" under this policy if they were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where they are licensed or principally garaged.
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B. Owned Autos You Acquire After The Policy Begins

1. If Symbols 1, 2, 3, 4, 5, 6 or 19 are entered next to a coverage in Item Two of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.
2. But, if Symbol 7 is entered next to a coverage in Item Two of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if:
 - a. We already cover all "autos" that you own for that coverage or it replaces an "auto" you previously owned that had that coverage; and
 - b. You tell us within 30 days after you acquire it that you want us to cover it for that coverage.

C. Certain Trailers, Mobile Equipment And Temporary Substitute Autos

If Covered Autos Liability Coverage is provided by this Coverage Form, the following types of vehicles are also covered "autos" for Covered Autos Liability Coverage:

1. "Trailers" with a load capacity of 2,000 pounds or less designed primarily for travel on public roads.
2. "Mobile equipment" while being carried or towed by a covered "auto".
3. Any "auto" you do not own while used with the permission of its owner as a temporary substitute for a covered "auto" you own that is out of service because of its:
 - a. Breakdown;
 - b. Repair;
 - c. Servicing;
 - d. "Loss"; or
 - e. Destruction.

SECTION II – COVERED AUTOS LIABILITY COVERAGE**A. Coverage**

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos". However, we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident".

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Covered Autos Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

1. Who Is An Insured

The following are "insureds":

- a. You for any covered "auto".
- b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:
 - (1) The owner or anyone else from whom you hire or borrow a covered "auto".

This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

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- (2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.
 - (3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.
 - (4) Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company) or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".
 - (5) A partner (if you are a partnership) or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.
- c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

2. Coverage Extensions**a. Supplementary Payments**

We will pay for the "insured":

- (1) All expenses we incur.
- (2) Up to \$2,000 for cost of bail bonds (including bonds for related traffic law violations) required because of an "accident" we cover. We do not have to furnish these bonds.
- (3) The cost of bonds to release attachments in any "suit" against the "insured" we defend, but only for bond amounts within our Limit of Insurance.
- (4) All reasonable expenses incurred by the "insured" at our request, including actual loss of earnings up to \$250 a day because of time off from work.
- (5) All court costs taxed against the "insured" in any "suit" against the "insured" we defend. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the "insured".
- (6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" against the "insured" we defend, but our duty to

pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

These payments will not reduce the Limit of Insurance.

b. Out-of-state Coverage Extensions

While a covered "auto" is away from the state where it is licensed, we will:

- (1) Increase the Limit of Insurance for Covered Autos Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.
- (2) Provide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered "auto" is being used.

We will not pay anyone more than once for the same elements of loss because of these extensions.

B. Exclusions

This insurance does not apply to any of the following:

1. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

2. Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

- a. Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or
- b. That the "insured" would have in the absence of the contract or agreement.

3. Workers' Compensation

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits

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or unemployment compensation law or any similar law.

4. Employee Indemnification And Employer's Liability

"Bodily injury" to:

- a. An "employee" of the "insured" arising out of and in the course of:
 - (1) Employment by the "insured"; or
 - (2) Performing the duties related to the conduct of the "insured's" business; or
- b. The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph a. above.

This exclusion applies:

- (1) Whether the "insured" may be liable as an employer or in any other capacity; and
- (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

But this exclusion does not apply to "bodily injury" to domestic "employees" not entitled to workers' compensation benefits or to liability assumed by the "insured" under an "insured contract". For the purposes of the Coverage Form, a domestic "employee" is a person engaged in household or domestic work performed principally in connection with a residence premises.

5. Fellow Employee

"Bodily injury" to:

- a. Any fellow "employee" of the "insured" arising out of and in the course of the fellow "employee's" employment or while performing duties related to the conduct of your business; or
- b. The spouse, child, parent, brother or sister of that fellow "employee" as a consequence of Paragraph a. above.

6. Care, Custody Or Control

"Property damage" to or "covered pollution cost or expense" involving property owned or transported by the "insured" or in the "insured's" care, custody or control. But this exclusion does not apply to liability assumed under a sidetrack agreement.

7. Handling Of Property

"Bodily injury" or "property damage" resulting from the handling of property:

- a. Before it is moved from the place where it is accepted by the "insured" for movement into or onto the covered "auto"; or
- b. After it is moved from the covered "auto" to the place where it is finally delivered by the "insured".

8. Movement Of Property By Mechanical Device

"Bodily injury" or "property damage" resulting from the movement of property by a mechanical device (other than a hand truck) unless the device is attached to the covered "auto".

9. Operations

"Bodily injury" or "property damage" arising out of the operation of:

- a. Any equipment listed in Paragraphs 6.b. and 6.c. of the definition of "mobile equipment"; or
- b. Machinery or equipment that is on, attached to or part of a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

10. Completed Operations

"Bodily injury" or "property damage" arising out of your work after that work has been completed or abandoned.

In this exclusion, your work means:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

Your work includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in Paragraph a. or b. above.

Your work will be deemed completed at the earliest of the following times:

- (1) When all of the work called for in your contract has been completed;
- (2) When all of the work to be done at the site has been completed if your

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contract calls for work at more than one site; or

- (3) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

11. Pollution

"Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:
 - (1) Being transported or towed by, handled or handled for movement into, onto or from the covered "auto";
 - (2) Otherwise in the course of transit by or on behalf of the "insured"; or
 - (3) Being stored, disposed of, treated or processed in or upon the covered "auto";
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured".

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts if:

- (1) The "pollutants" escape, seep, migrate or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and

- (2) The "bodily injury", "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in Paragraphs 6.b. and 6.c. of the definition of "mobile equipment".

Paragraphs b. and c. above of this exclusion do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (a) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (b) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

12. War

"Bodily injury" or "property damage" arising directly or indirectly out of:

- a. War, including undeclared or civil war;
- b. Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- c. Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

13. Racing

Covered "autos" while used in any professional or organized racing or demolition contest or stunting activity, or while practicing for such contest or activity. This insurance also does not apply while that covered "auto" is being prepared for such a contest or activity.

C. Limit Of Insurance

Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for the total of all damages and "covered pollution cost or expense" combined resulting from any one "accident" is the Limit Of Insurance for Covered Autos Liability Coverage shown in the Declarations.

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All "bodily injury", "property damage" and "covered pollution cost or expense" resulting from continuous or repeated exposure to substantially the same conditions will be considered as resulting from one "accident".

No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Medical Payments Coverage endorsement, Uninsured Motorists Coverage endorsement or Underinsured Motorists Coverage endorsement attached to this Coverage Part.

SECTION III – PHYSICAL DAMAGE COVERAGE**A. Coverage**

1. We will pay for "loss" to a covered "auto" or its equipment under:

- a. **Comprehensive Coverage**

From any cause except:

- (1) The covered "auto's" collision with another object; or
 - (2) The covered "auto's" overturn.

- b. **Specified Causes Of Loss Coverage**

Caused by:

- (1) Fire, lightning or explosion;
 - (2) Theft;
 - (3) Windstorm, hail or earthquake;
 - (4) Flood;
 - (5) Mischief or vandalism; or
 - (6) The sinking, burning, collision or derailment of any conveyance transporting the covered "auto".

- c. **Collision Coverage**

Caused by:

- (1) The covered "auto's" collision with another object; or
 - (2) The covered "auto's" overturn.

2. **Towing**

We will pay up to the limit shown in the Declarations for towing and labor costs incurred each time a covered "auto" of the private passenger type is disabled. However, the labor must be performed at the place of disablement.

3. **Glass Breakage – Hitting A Bird Or Animal – Falling Objects Or Missiles**

If you carry Comprehensive Coverage for the damaged covered "auto", we will pay for the following under Comprehensive Coverage:

- a. Glass breakage;
 - b. "Loss" caused by hitting a bird or animal; and
 - c. "Loss" caused by falling objects or missiles.

However, you have the option of having glass breakage caused by a covered "auto's" collision or overturn considered a "loss" under Collision Coverage.

4. **Coverage Extensions**

- a. **Transportation Expenses**

We will pay up to \$20 per day, to a maximum of \$600, for temporary transportation expense incurred by you because of the total theft of a covered "auto" of the private passenger type. We will pay only for those covered "autos" for which you carry either Comprehensive or Specified Causes Of Loss Coverage. We will pay for temporary transportation expenses incurred during the period beginning 48 hours after the theft and ending, regardless of the policy's expiration, when the covered "auto" is returned to use or we pay for its "loss".

- b. **Loss Of Use Expenses**

For Hired Auto Physical Damage, we will pay expenses for which an "insured" becomes legally responsible to pay for loss of use of a vehicle rented or hired without a driver under a written rental contract or agreement. We will pay for loss of use expenses if caused by:

- (1) Other than collision only if the Declarations indicates that Comprehensive Coverage is provided for any covered "auto";
 - (2) Specified Causes Of Loss only if the Declarations indicates that Specified Causes Of Loss Coverage is provided for any covered "auto"; or
 - (3) Collision only if the Declarations indicates that Collision Coverage is provided for any covered "auto".

However, the most we will pay for any expenses for loss of use is \$20 per day, to a maximum of \$600.

B. Exclusions

1. We will not pay for "loss" caused by or resulting from any of the following. Such "loss" is excluded regardless of any other cause or

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event that contributes concurrently or in any sequence to the "loss".

a. Nuclear Hazard

- (1) The explosion of any weapon employing atomic fission or fusion; or
- (2) Nuclear reaction or radiation, or radioactive contamination, however caused.

b. War Or Military Action

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

2. We will not pay for "loss" to any covered "auto" while used in any professional or organized racing or demolition contest or stunt activity, or while practicing for such contest or activity. We will also not pay for "loss" to any covered "auto" while that covered "auto" is being prepared for such a contest or activity.

3. We will not pay for "loss" due and confined to:

- a. Wear and tear, freezing, mechanical or electrical breakdown.
- b. Blowouts, punctures or other road damage to tires.

This exclusion does not apply to such "loss" resulting from the total theft of a covered "auto".

4. We will not pay for "loss" to any of the following:

- a. Tapes, records, discs or other similar audio, visual or data electronic devices designed for use with audio, visual or data electronic equipment.
- b. Any device designed or used to detect speed-measuring equipment, such as radar or laser detectors, and any jamming apparatus intended to elude or disrupt speed-measuring equipment.
- c. Any electronic equipment, without regard to whether this equipment is permanently

installed, that reproduces, receives or transmits audio, visual or data signals.

- d. Any accessories used with the electronic equipment described in Paragraph c. above.

5. Exclusions 4.c. and 4.d. do not apply to equipment designed to be operated solely by use of the power from the "auto's" electrical system that, at the time of "loss", is:

- a. Permanently installed in or upon the covered "auto";
- b. Removable from a housing unit which is permanently installed in or upon the covered "auto";
- c. An integral part of the same unit housing any electronic equipment described in Paragraphs a. and b. above; or
- d. Necessary for the normal operation of the covered "auto" or the monitoring of the covered "auto's" operating system.

6. We will not pay for "loss" to a covered "auto" due to "diminution in value".

C. Limits Of Insurance

1. The most we will pay for:

- a. "Loss" to any one covered "auto" is the lesser of:

- (1) The actual cash value of the damaged or stolen property as of the time of the "loss"; or
- (2) The cost of repairing or replacing the damaged or stolen property with other property of like kind and quality.

- b. All electronic equipment that reproduces, receives or transmits audio, visual or data signals in any one "loss" is \$1,000, if, at the time of "loss", such electronic equipment is:

- (1) Permanently installed in or upon the covered "auto" in a housing, opening or other location that is not normally used by the "auto" manufacturer for the installation of such equipment;
- (2) Removable from a permanently installed housing unit as described in Paragraph b.(1) above; or
- (3) An integral part of such equipment as described in Paragraphs b.(1) and b.(2) above.

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2. An adjustment for depreciation and physical condition will be made in determining actual cash value in the event of a total "loss".
3. If a repair or replacement results in better than like kind or quality, we will not pay for the amount of the betterment.

D. Deductible

For each covered "auto", our obligation to pay for, repair, return or replace damaged or stolen property will be reduced by the applicable deductible shown in the Declarations. Any Comprehensive Coverage deductible shown in the Declarations does not apply to "loss" caused by fire or lightning.

SECTION IV – BUSINESS AUTO CONDITIONS

The following conditions apply in addition to the Common Policy Conditions:

A. Loss Conditions**1. Appraisal For Physical Damage Loss**

If you and we disagree on the amount of "loss", either may demand an appraisal of the "loss". In this event, each party will select a competent appraiser. The two appraisers will select a competent and impartial umpire. The appraisers will state separately the actual cash value and amount of "loss". If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If we submit to an appraisal, we will still retain our right to deny the claim.

2. Duties In The Event Of Accident, Claim, Suit Or Loss

We have no duty to provide coverage under this policy unless there has been full compliance with the following duties:

- a. In the event of "accident", claim, "suit" or "loss", you must give us or our authorized representative prompt notice of the "accident" or "loss". Include:
 - (1) How, when and where the "accident" or "loss" occurred;
 - (2) The "insured's" name and address; and
 - (3) To the extent possible, the names and addresses of any injured persons and witnesses.

- b. Additionally, you and any other involved "insured" must:

- (1) Assume no obligation, make no payment or incur no expense without our consent, except at the "insured's" own cost.
- (2) Immediately send us copies of any request, demand, order, notice, summons or legal paper received concerning the claim or "suit".
- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit".
- (4) Authorize us to obtain medical records or other pertinent information.
- (5) Submit to examination, at our expense, by physicians of our choice, as often as we reasonably require.

- c. If there is "loss" to a covered "auto" or its equipment, you must also do the following:

- (1) Promptly notify the police if the covered "auto" or any of its equipment is stolen.
- (2) Take all reasonable steps to protect the covered "auto" from further damage. Also keep a record of your expenses for consideration in the settlement of the claim.
- (3) Permit us to inspect the covered "auto" and records proving the "loss" before its repair or disposition.
- (4) Agree to examinations under oath at our request and give us a signed statement of your answers.

3. Legal Action Against Us

No one may bring a legal action against us under this Coverage Form until:

- a. There has been full compliance with all the terms of this Coverage Form; and
- b. Under Covered Autos Liability Coverage, we agree in writing that the "insured" has an obligation to pay or until the amount of that obligation has finally been determined by judgment after trial. No one has the right under this policy to bring us into an action to determine the "insured's" liability.

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4. Loss Payment – Physical Damage Coverages

At our option, we may:

- a. Pay for, repair or replace damaged or stolen property;
- b. Return the stolen property, at our expense. We will pay for any damage that results to the "auto" from the theft; or
- c. Take all or any part of the damaged or stolen property at an agreed or appraised value.

If we pay for the "loss", our payment will include the applicable sales tax for the damaged or stolen property.

5. Transfer Of Rights Of Recovery Against Others To Us

If any person or organization to or for whom we make payment under this Coverage Form has rights to recover damages from another, those rights are transferred to us. That person or organization must do everything necessary to secure our rights and must do nothing after "accident" or "loss" to impair them.

B. General Conditions**1. Bankruptcy**

Bankruptcy or Insolvency of the "insured" or the "insured's" estate will not relieve us of any obligations under this Coverage Form.

2. Concealment, Misrepresentation Or Fraud

This Coverage Form is void in any case of fraud by you at any time as it relates to this Coverage Form. It is also void if you or any other "insured", at any time, intentionally conceals or misrepresents a material fact concerning:

- a. This Coverage Form;
- b. The covered "auto";
- c. Your interest in the covered "auto"; or
- d. A claim under this Coverage Form.

3. Liberalization

If we revise this Coverage Form to provide more coverage without additional premium charge, your policy will automatically provide the additional coverage as of the day the revision is effective in your state.

4. No Benefit To Bailee – Physical Damage Coverages

We will not recognize any assignment or grant any coverage for the benefit of any per-

son or organization holding, storing or transporting property for a fee regardless of any other provision of this Coverage Form.

5. Other Insurance

- a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. However, while a covered "auto" which is a "trailer" is connected to another vehicle, the Covered Autos Liability Coverage this Coverage Form provides for the "trailer" is:
 - (1) Excess while it is connected to a motor vehicle you do not own; or
 - (2) Primary while it is connected to a covered "auto" you own.

- b. For Hired Auto Physical Damage Coverage, any covered "auto" you lease, hire, rent or borrow is deemed to be a covered "auto" you own. However, any "auto" that is leased, hired, rented or borrowed with a driver is not a covered "auto".

- c. Regardless of the provisions of Paragraph a. above, this Coverage Form's Covered Autos Liability Coverage is primary for any liability assumed under an "insured contract".

- d. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

6. Premium Audit

- a. The estimated premium for this Coverage Form is based on the exposures you told us you would have when this policy began. We will compute the final premium due when we determine your actual exposures. The estimated total premium will be credited against the final premium due and the first Named Insured will be billed for the balance, if any. The due date for the final premium or retrospective premium is the date shown as the due date on the bill. If the estimated total premium exceeds the final premium due, the first Named Insured will get a refund.

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- b. If this policy is issued for more than one year, the premium for this Coverage Form will be computed annually based on our rates or premiums in effect at the beginning of each year of the policy.

7. Policy Period, Coverage Territory

Under this Coverage Form, we cover "accidents" and "losses" occurring:

- a. During the policy period shown in the Declarations; and
b. Within the coverage territory.

The coverage territory is:

- (1) The United States of America;
- (2) The territories and possessions of the United States of America;
- (3) Puerto Rico;
- (4) Canada; and
- (5) Anywhere in the world if a covered "auto" of the private passenger type is leased, hired, rented or borrowed without a driver for a period of 30 days or less,

provided that the "insured's" responsibility to pay damages is determined in a "suit" on the merits, in the United States of America, the territories and possessions of the United States of America, Puerto Rico or Canada, or in a settlement we agree to.

We also cover "loss" to, or "accidents" involving, a covered "auto" while being transported between any of these places.

8. Two Or More Coverage Forms Or Policies Issued By Us

If this Coverage Form and any other Coverage Form or policy issued to you by us or any company affiliated with us applies to the same "accident", the aggregate maximum Limit of Insurance under all the Coverage Forms or policies shall not exceed the highest applicable Limit of Insurance under any one Coverage Form or policy. This condition does not apply to any Coverage Form or policy issued by us or an affiliated company specifically to apply as excess insurance over this Coverage Form.

SECTION V – DEFINITIONS

- A. "Accident" includes continuous or repeated exposure to the same conditions resulting in "bodily injury" or "property damage".
B. "Auto" means:

1. A land motor vehicle, "trailer" or semitrailer designed for travel on public roads; or
2. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

- C. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these.
D. "Covered pollution cost or expense" means any cost or expense arising out of:

1. Any request, demand, order or statutory or regulatory requirement that any "insured" or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
2. Any claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

"Covered pollution cost or expense" does not include any cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

- a. That are, or that are contained in any property that is:
 - (1) Being transported or towed by, handled or handled for movement into, onto or from the covered "auto";
 - (2) Otherwise in the course of transit by or on behalf of the "insured"; or
 - (3) Being stored, disposed of, treated or processed in or upon the covered "auto";
- b. Before the "pollutants" or any property in which the "pollutants" are contained are moved from the place where they are accepted by the "insured" for movement into or onto the covered "auto"; or
- c. After the "pollutants" or any property in which the "pollutants" are contained are moved from the covered "auto" to the place where they are finally delivered, disposed of or abandoned by the "insured".

COMMERCIAL AUTO

Paragraph a. above does not apply to fuels, lubricants, fluids, exhaust gases or other similar "pollutants" that are needed for or result from the normal electrical, hydraulic or mechanical functioning of the covered "auto" or its parts, if:

- (1) The "pollutants" escape, seep, migrate or are discharged, dispersed or released directly from an "auto" part designed by its manufacturer to hold, store, receive or dispose of such "pollutants"; and
- (2) The "bodily injury", "property damage" or "covered pollution cost or expense" does not arise out of the operation of any equipment listed in Paragraph 6.b. or 6.c. of the definition of "mobile equipment".

Paragraphs b. and c. above do not apply to "accidents" that occur away from premises owned by or rented to an "insured" with respect to "pollutants" not in or upon a covered "auto" if:

- (a) The "pollutants" or any property in which the "pollutants" are contained are upset, overturned or damaged as a result of the maintenance or use of a covered "auto"; and
- (b) The discharge, dispersal, seepage, migration, release or escape of the "pollutants" is caused directly by such upset, overturn or damage.

- E. "Diminution in value" means the actual or perceived loss in market value or resale value which results from a direct and accidental "loss".
- F. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
- G. "Insured" means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage. Except with respect to the Limit of Insurance, the coverage afforded applies separately to each insured who is seeking coverage or against whom a claim or "suit" is brought.
- H. "Insured contract" means:
 1. A lease of premises;
 2. A sidetrack agreement;
 3. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

4. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
5. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another to pay for "bodily injury" or "property damage" to a third party or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement; or
6. That part of any contract or agreement entered into, as part of your business, pertaining to the rental or lease, by you or any of your "employees", of any "auto". However, such contract or agreement shall not be considered an "insured contract" to the extent that it obligates you or any of your "employees" to pay for "property damage" to any "auto" rented or leased by you or any of your "employees".

An "insured contract" does not include that part of any contract or agreement:

- a. That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
- b. That pertains to the loan, lease or rental of an "auto" to you or any of your "employees", if the "auto" is loaned, leased or rented with a driver; or
- c. That holds a person or organization engaged in the business of transporting property by "auto" for hire harmless for your use of a covered "auto" over a route or territory that person or organization is authorized to serve by public authority.
- I. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".
- J. "Loss" means direct and accidental loss or damage.
- K. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

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1. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
2. Vehicles maintained for use solely on or next to premises you own or rent;
3. Vehicles that travel on crawler treads;
4. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - a. Power cranes, shovels, loaders, diggers or drills; or
 - b. Road construction or resurfacing equipment such as graders, scrapers or rollers;
5. Vehicles not described in Paragraph 1., 2., 3. or 4. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - a. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well-servicing equipment; or
 - b. Cherry pickers and similar devices used to raise or lower workers; or
6. Vehicles not described in Paragraph 1., 2., 3. or 4. above maintained primarily for purposes other than the transportation of persons or cargo. However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":
 - a. Equipment designed primarily for:
 - (1) Snow removal;
 - (2) Road maintenance, but not construction or resurfacing; or
 - (3) Street cleaning;
 - b. Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

- c. Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting or well-servicing equipment.

However, "mobile equipment" does not include land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

- L. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
- M. "Property damage" means damage to or loss of use of tangible property.
- N. "Suit" means a civil proceeding in which:
 1. Damages because of "bodily injury" or "property damage"; or
 2. A "covered pollution cost or expense";
 to which this insurance applies, are alleged.
 "Suit" includes:
 - a. An arbitration proceeding in which such damages or "covered pollution costs or expenses" are claimed and to which the "insured" must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages or "covered pollution costs or expenses" are claimed and to which the insured submits with our consent.
- O. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.
- P. "Trailer" includes semitrailer.

POLICY NUMBER: TC2J-CAP-131J3858-TIL-20

COMMERCIAL AUTO
ISSUE DATE: 02-06-20**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

SOUTH CAROLINA UNDERINSURED MOTORISTS COVERAGE

For a covered "auto" licensed or principally garaged in, or "auto dealer operations" conducted in, South Carolina, this endorsement modifies insurance provided under the following:

AUTO DEALERS COVERAGE FORM
BUSINESS AUTO COVERAGE FORM
MOTOR CARRIER COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

SCHEDULE

Limit Of Insurance: \$ SEE CAT030 Each "Accident"

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. Coverage

1. We will pay in accordance with the South Carolina Underinsured Motorists Law all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured motor vehicle". The damages must result from "bodily injury" sustained by an "insured" or "property damage" caused by an "accident". The owner's or driver's liability for these damages must arise out of the ownership, maintenance or use of the "underinsured motor vehicle".
2. We will pay under this coverage only after any liability bonds or policies have been exhausted by payment of judgments or settlements.

B. Who Is An Insured

If the Named Insured is designated in the Declarations as:

1. An individual, then the following are "insureds":
 - a. The Named Insured and any "family members".
 - b. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.
 - c. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

2. A partnership, limited liability company, corporation or any other form of organization, then the following are "insureds":
 - a. Anyone "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, "loss" or destruction.
 - b. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".
 - c. The Named Insured for "property damage" only.

C. Exclusions

This coverage does not apply to any of the following:

1. The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits or similar law.
2. Anyone using a vehicle without a reasonable belief that the person is entitled to do so.
3. That part of "property damage" for which an "insured" has been compensated by insurance or otherwise.
4. "Bodily injury" or "property damage" sustained by:
 - a. An individual Named Insured while "occupying" or when struck by any vehicle owned by that Named Insured that is not a covered "auto" for Underinsured Motorists Coverage; or

COMMERCIAL AUTO

- b. Any "family member" while "occupying" or when struck by any vehicle owned by that "family member" that is not a covered "auto" for Underinsured Motorists Coverage.
- 5. "Bodily injury" or "property damage" arising directly or indirectly out of:
 - a. War, including undeclared or civil war;
 - b. Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
 - c. Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

D. Limit Of Insurance

- 1. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for all damages resulting from any one "accident" is the limit of Underinsured Motorists Coverage shown in the Schedule. If the "bodily injury" is sustained by any "insured" while "occupying" a covered "auto", or if the Named Insured's covered "auto" sustains "property damage" in an "accident", our limit is the sum of:
 - a. The Limit Of Insurance shown in the Schedule for this coverage applicable to a covered "auto"; and
 - b. That part of the limit for this coverage that applies to each additional covered "auto" that does not exceed the limit of insurance applicable to the covered "auto" involved in the "accident".
- 2. Subject to the maximum limit of insurance for all damages:
 - a. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", the most we will pay for "bodily injury" sustained in an "accident" by an "insured" other than an individual Named Insured or any "family member" is that "insured's" pro rata share of the limit shown in the Schedule for this coverage that applies to the vehicle that "insured" was "occupying" at the time of the "accident".

- b. An individual Named Insured or any "family member" who sustains "bodily injury" or "property damage" in that "accident" will also be entitled to a pro rata share of the limit described in Paragraph a. above.

A person's pro rata share shall be the proportion that that person's damages bear to the total damages sustained by all "insureds".

- 3. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", if "bodily injury" is sustained by an individual Named Insured or any "family member" while not "occupying" any "auto", the most we will pay for all damages resulting from that "accident" is the sum of:
 - a. The highest limit of insurance for this coverage applicable to any one of such Named Insured's covered "autos"; and
 - b. That part of the limit for this coverage that applies to each additional covered "auto" that does not exceed the limit of insurance applicable to the covered "auto" involved in the "accident".
- 4. Regardless of the number of covered "autos", "insureds", premiums paid, claims made or vehicles involved in the "accident", if "bodily injury" is sustained in an "accident" by an individual Named Insured or any "family member", while "occupying" a vehicle not owned by that Named Insured or any "family member", the most we will pay for all damages resulting from that "accident" will be the highest limit of insurance for this coverage that applies to any one of such Named Insured's covered "autos".
- 5. No one will be entitled to receive duplicate payments for the same elements of "loss" under this Coverage Form and any Liability Coverage form or Uninsured Motorists Coverage endorsement attached to this Coverage Form.

We will not make a duplicate payment under the Coverage Form for any element of "loss" for which payment has been made by or for anyone who is legally responsible.

We will not pay for any element of "loss" if a person is entitled to receive payment for the same element of loss under any workers' compensation, disability benefits or similar law.

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E. Changes In Conditions

The **Conditions** are changed for **Underinsured Motorists Coverage** as follows:

1. **Other Insurance** in the Auto Dealers and Business Auto Coverage Forms and **Other Insurance Primary And Excess Insurance Provisions** in the Motor Carrier Coverage Form are replaced by the following:

- a. If an "insured" sustains "bodily injury" while "occupying" a vehicle not owned by that person or while not "occupying" any vehicle, the following priorities of coverage apply:

First Priority	The policy affording Underinsured Motorists Coverage to the vehicle the "insured" was "occupying" at the time of the "accident".
Second Priority	Any policy affording Underinsured Motorists Coverage to a Named Insured or a "family member", if the Named Insured is an individual.

- (1) If there is no applicable insurance available under the first priority, the maximum recovery under all policies in the second priority shall not exceed the highest applicable limit for any one vehicle under any one policy.
- (2) If there is applicable insurance available under the first priority:
 - (a) The limit of insurance applicable to the vehicle the "insured" was "occupying", under the policy in the first priority, shall first be exhausted; and
 - (b) The most we will pay in the second priority shall not exceed the highest limit for any one vehicle under any one policy in the second priority.
- b. We will pay only our share of the loss, not to exceed our share of the maximum recovery. Our share is the proportion that our limit of insurance bears to the total of all applicable limits on the same level of priority.
- c. For "property damage", this insurance is excess to all collectible insurance of any kind.
- d. For "bodily injury", this insurance is excess to any other collectible Underinsured Motorists Coverage.

2. **Duties In The Event Of Accident, Claim, Suit Or Loss** in the Business Auto and Motor Carrier Coverage Forms and **Duties In The Event Of Accident, Claim, Offense, Suit, Loss Or Acts, Errors Or Omissions** in the Auto Dealers Coverage Form are changed by adding the following:

Promptly send us copies of the legal papers if a "suit" is brought.

3. **Transfer Of Rights Of Recovery Against Others To Us** does not apply to **Underinsured Motorists Coverage**.
4. **Two Or More Coverage Forms Issued By Us** does not apply to **Underinsured Motorists Coverage**.
5. The following provision is added:

Conformity To Statute

This endorsement is intended to be in full conformity with the South Carolina Insurance Laws. If any provision of this endorsement conflicts with that law, it is changed to comply with the law.

F. Additional Definitions

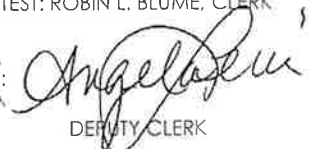
As used in this endorsement:

1. "Family member" means a person related to an individual Named Insured by blood, marriage or adoption, who is a resident of such Named Insured's household, including a ward or foster child.
2. "Occupying" means in, upon, getting in, on, out or off.
3. "Property damage" as used in this endorsement means injury to or destruction of the Named Insured's covered "auto". However, "property damage" does not include damage to property owned by the "insured" while contained in the Named Insured's covered "auto".
4. "Underinsured motor vehicle" means a land motor vehicle or "trailer" of any type to which a liability bond or policy applies at the time of the "accident" in limits equal to or greater than the minimum limit for liability specified by the South Carolina Motor Vehicle Financial Responsibility Act, but the limits of that bond or policy provide a limit that is less than the amount the "insured" is legally entitled to recover as damages caused by the "accident".

However, "underinsured motor vehicle" does not include any vehicle or equipment designed for use mainly off public roads while not on public roads.

A TRUE COPY
ATTEST: ROBIN L. BLUME, CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BY: 

DEPUTY CLERK

Travelers Property Casualty
Company of America,

Plaintiff,

v.

Barbara Hawthorne, as Personal
Representative of the Estate of Nathaniel
Hawthorne, Jr.,

Defendant.

C/A No.: 6:21-cv-02648-DCC



**ANSWER AND COUNTER CLAIM
(Jury Trial Demanded)**

Defendant Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr. (Decedent), hereby answers the Complaint of Plaintiff Travelers Property and Casualty Company (Travelers) and counterclaims for a declaratory judgment under 28 U.S.C. § 2201. The Court should declare that Travelers has wrongfully disclaimed underinsured motorist (UIM) coverage because a motorist struck and killed by an at-fault driver while outside his vehicle is still “upon” and “operating” the vehicle within the meaning of the policy if he was stopped and ordered out of the vehicle by a sworn law enforcement officer. Alternatively, to the extent Travelers’ policy can be read to disclaim coverage, it violates the definition of an insured under South Carolina Code § 38-77-30(7) and must be reformed by operation of law.

Defendant would respectfully show the Court as follows:

ANSWER

Defendant hereby answers Travelers’ Complaint as follows:

1. Paragraph No. 1 is admitted except as to the description of the collision as an “Accident.” The at-fault driver, Allen Lindsey Zack, was under the influence of drugs at the time

he drove his vehicle into the median and struck the left front corner of the State Transport Police vehicle, which in turn struck Decedent, and hurled him into oncoming traffic, causing his death. Zack has been charged with driving under the influence resulting in great bodily injury; hit and run, duties of driver involved in accident with death; hit and run, duties of driver involved in accident with great bodily injury; driving on wrong side of road, improper lane, or unsafely shifting lanes; endangering emergency services personnel; and possession of drugs. Defendant denies that Zack's conduct is properly described as an "accident"—it is grossly negligent and/or reckless conduct that should be punished with an award of punitive damages. For the sake of brevity below, each reference in the Complaint to the collision as an "Accident" is denied for the same reason.

2. Paragraph No. 2 is admitted.

3. Paragraph No. 3 is admitted.

4. Paragraph No. 4 is admitted to the extent that Exhibit A appears to be a portion of the Travelers' policy at issue in this case but is denied for lack of knowledge to the extent Travelers maintains those are the only portions of the Policy relevant to UIM benefits.

5. Paragraph No. 5 is admitted.

6. Paragraph No. 6 is admitted in that there is a controversy that can be resolved by the Court, but Defendant denies that Travelers' reading of the Policy or position in this litigation is reasonable or anything other than an effort to delay payment of UIM coverage.

7. Paragraph No. 7 is admitted.

8. Paragraph No. 8 is admitted.

9. Paragraph No. 9 is admitted.

10. Paragraph No. 10 is admitted.

11. Paragraph No. 11 is admitted.

12. Paragraph No. 12 is admitted.

13. Paragraph No. 13 is admitted.

14. Paragraph No. 14 is admitted.

15. Paragraph No. 15 is denied. As stated, the allegation is incomplete and misleading.

Decedent was ordered out of the vehicle by the Officer and directed to secure machinery on the trailer and then to approach the Officer's vehicle with registration information for the trailer. At all times relevant to this action, Decedent's physical presence outside of the vehicle was required by order(s) given by the Officer. Any suggestion to the contrary by Plaintiff is denied and strict proof is demanded.

16. Paragraph No. 16 is admitted.

17. Paragraph No. 17 is admitted.

18. Paragraph No. 18 is admitted in that the quoted language appears in the document attached to the Complaint as Exhibit A. Any further allegation is denied for lack of knowledge because Exhibit A is not the entire policy and the total pagination of that document does not match the pagination of the complete policy furnished to Defendant prior to this litigation. Defendant craves reference to the entire policy. Further, the policy language speaks for itself and any construction by Plaintiff inconsistent with that language is denied.

19. Paragraph No. 19 is admitted.

20. Paragraph No. 20 is admitted in part and denied in part for the reasons explained in Paragraph 18 above and that response is incorporated here verbatim.

21. Paragraph No. 21 is admitted in part and denied in part for the reasons explained in Paragraph 18 above and that response is incorporated here verbatim.

22. Paragraph No. 22 is denied, and strict proof is demanded. Further, Paragraph No.

22 also calls for a conclusion of law such that no response is required.

23. Paragraph No. 23 is denied. Further, Paragraph No. 23 calls for a conclusion of law such that no response is required.

24. Paragraph No. 24 is denied. Further, Paragraph No. 24 calls for a conclusion of law such that no response is required.

25. Paragraph No. 25 is denied. Further, Paragraph No. 25 calls for a conclusion of law such that no response is required.

26. Paragraph No. 26 is denied. Further, Paragraph No. 26 calls for a conclusion of law such that no response is required.

27. Paragraph No. 27 incorporates all prior allegations. Accordingly, Defendant incorporates all prior responses here as if set forth in their entirety.

28. Paragraph No. 28 is denied. Further, Paragraph No. 28 calls for a conclusion of law such that no response is required.

29. Paragraph No. 29 is admitted – Decedent’s Estate and statutory beneficiaries are entitled to recover UIM coverage under the Travelers policy.

30. Paragraph No. 30 is admitted but only to the extent that Travelers has initiated an adversarial proceeding over its obligation to pay UIM benefits. Defendant denies that this is a non-frivolous, good-faith controversy.

31. Paragraph No. 31 is admitted.

32. Paragraph No. 32 is denied. Further, Paragraph No. 32 calls for a conclusion of law such that no response is required.

33. The paragraph containing Plaintiff’s prayer calls for legal relief such that no response is required. To the extent a response is require, the prayer and all subparts are denied.

**COUNTERCLAIM FOR
DECLARATORY RELIEF**

1. Defendant Barbara Hawthorne is the duly appointed representative of the estate of her son, Nathaniel Hawthorne, Jr. She is a resident of Greenville County and filed a wrongful death and survival action in the Greenville County Court of Common Pleas styled Hawthorne v. Zack, C.A. No. 2021-CP-23-01754 (the “State Court Action”), on behalf of the Estate pursuant to South Carolina Code § 15-5-90, and on behalf of statutory beneficiaries pursuant to South Carolina Code §§ 15-51-10, et seq.

2. Decedent Nathaniel Hawthorne, Jr. was a resident of Greenville, South Carolina.

3. The Court has subject matter jurisdiction under 28 U.S.C. § 1332, because there is complete diversity of citizenship and the amount in controversy exceeds \$75,000. The Court also has personal jurisdiction over the parties and venue is proper in this District.

4. On December 2, 2020, Decedent was driving a commercial vehicle owned by Terracon Consultants, Inc. (Terracon) on Pleasantburg Drive in Greenville, South Carolina.

5. At approximately 12:10 p.m., Mr. Hawthorne was pulled over in the median by the State Transport Police and was ordered to step out of the vehicle to speak with the officer about securing equipment being transported on a trailer attached to his commercial vehicle.

6. The officer ordered Decedent to come around and stand next to his vehicle on the passenger side window to speak. While Decedent was standing in the median speaking to the officer, Zack was driving his vehicle north on Pleasantburg Drive.

7. As Zack approached Decedent and the officer, he suddenly veered into the median, striking the left front corner of the State Transport Police vehicle.

8. As a result of the collision, the officer was temporarily trapped in his vehicle before being rescued and taken to the hospital.

9. Decedent was struck by one of the vehicles and hurled into oncoming traffic where he was struck again by another vehicle and killed in a brutal collision that splattered parts of his brain onto the roadway.

10. At the time of his death, Decedent was just 49 years old. He was married and had a 17-year-old daughter. He had no significant health issues.

11. At all times relevant to the State Court Action, Decedent was acting in a reasonable and prudent manner and abiding by the express instruction of a sworn law enforcement officer in control of the traffic stop that the officer initiated.

12. Upon information and belief, Zack did not apply his brakes but struck the officer's vehicle at full speed.

13. Following the collision, Zack exited his vehicle and fled the scene on foot. He was later arrested and taken to the hospital.

14. Thereafter, Zack was arrested, and a search of his vehicle revealed syringes, heroin, and Xanax. Zack's blood tested positive for methamphetamine and fentanyl. He was charged with felony driving under the influence resulting in death; felony driving under the influence resulting in great bodily injury; hit and run, duties of driver involved in accident with death; hit and run, duties of driver involved in accident with great bodily injury; driving on wrong side of road, improper lane, or unsafely shifting lanes; and endangering emergency services personnel; and possession of drugs.

15. Zack has minimum insurance limits (\$25,000) and insufficient assets to satisfy a judgment in the State Court Action.

16. On June 1, 2021, Travelers was served with notice of the State Court Action through the South Carolina Director of insurance.

17. On August 9, 2021, Defendant petitioned the Greenville County Court of Common Pleas for approval of a settlement with the liability carrier for the \$25,000 in exchange for a covenant not to execute against Zack.

18. On August 10, 2021, the Honorable Perry H. Gravely, Circuit Court Judge, approved the settlement.

19. On May 17, 2021, Defendant issued a subpoena in the State Court Action to Terracon for, in relevant part, copies of any insurance policies that might apply to the collision.

20. Terracon produced a 760-page Commercial Insurance policy, Policy Number TC2J-CAP-131J3858-TIL-20, issued by Travelers and providing \$1 million in UIM coverage per occurrence on Terracon vehicles.

21. On August 16, 2021, Defendant, through counsel, sent Travelers a demand for the \$1 million in UIM coverage explaining (in part) that (1) the facts of the fatal traffic collision are on video and not reasonably in dispute and (2) the damages in the State Court Action were certain to exceed the available liability, workers' compensation, and UIM coverage (totaling \$1.3 million).

22. Defendant also cautioned Travelers that its refusal to pay Defendant's within-limits settlement offer could cause the insurer to become liable for attorney's fees and costs of up to one-third of any judgment under South Carolina Code § 38-59-40 without regard to any policy limit.

23. Instead of responding to Defendant's policy-limit demand, on August 18, 2021, Travelers initiated this action claiming (1) the Estate cannot recover under the Policy and (2) that Decedent was not "occupying" the vehicle within the meaning of the Policy.

**FIRST CAUSE OF ACTION
(Declaratory Judgment)**

24. Defendant incorporates each of the foregoing paragraphs as if set forth verbatim.

25. Travelers' contentions that the Estate cannot recover under the Policy and that

Decedent was not occupying the vehicle within the meaning of the Policy are unreasonable and legally flawed.

26. State law provides that a right of action survives a person's death, specifically:

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

S.C. Code Ann. § 15-5-90.

27. Accordingly, Defendant, as Decedent's duly appointed personal representative, is entitled to bring a claim to recover damages for Decedent's wrongful death, pain and suffering, and other legally cognizable damages.

28. In the State Court Action, Defendant has done precisely that.

29. Similarly, state law allows a personal representative to bring an action for wrongful death, specifically:

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony. In the event of the death of the wrongdoer, such cause of action shall survive against his personal representative.

S.C. Code Ann. § 15-51-10.

30. When such an action is brought, the proceeds inure to the benefit of the decedent's statutory beneficiaries:

Every such action shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused, and, if there be no such wife, husband, child or children, then for the benefit of the parent or parents, and if there be none such, then for the benefit of the heirs of the person whose death

shall have been so caused. Every such action shall be brought by or in the name of the executor or administrator of such person.

S.C. Code Ann. § 15-51-20.

31. In the State Court Action, Defendant has brought such a claim on behalf of Decedent's wife and child.

32. There is no legal authority for Travelers' contention that Defendant cannot recover UIM coverage on behalf of the Estate or statutory beneficiaries because "the Estate is not an insured with respect to UIM benefits coverage" under the Policy as stated in Paragraph No. 28 of the Complaint.

33. Similarly, there is no reasonable, non-frivolous basis to assert that Decedent was not occupying the vehicle within the meaning of the Policy.

34. In South Carolina Farm Bureau Mutual Insurance Co. v. Kennedy, 730 S.E.2d 862 (S.C. 2012), the South Carolina Supreme Court held that a motorist driving his employer's truck was entitled to UIM coverage when he was struck while standing outside the parked vehicle while having a conversation with his brother because he was still "occupying" and "upon" the vehicle within the meaning of the policy. See also McAbee v. Nationwide Mutual Insurance Co., 152 S.E.2d 731 (S.C. 1967) (motorist crushed by tractor at rear of his vehicle while stopped to render aid was "in or upon, entering or alighting from" for purpose of UIM coverage).

35. The Supreme Court explained that every case reasoned that "Kennedy was in physical contact with his employer's vehicle immediately prior to being struck by Counts's vehicle. *The fact that Kennedy had engaged in a conversation at the rear of the truck is not important.* Holding a conversation outside of an automobile is commonplace and is to be expected in the ordinary use of a vehicle." Kennedy, 730 S.E.2d at 866 (emphasis added).

36. Here, the circumstances of the collision legally obligated Decedent to follow the

officer's orders, exit the vehicle, and step away from it for a roadside conversation. See S.C. Code Ann. § 56-5-740 ("No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer, fireman or uniformed adult school crossing guard invested by law with authority to direct, control or regulate traffic.").

37. In this context, Decedent was upon, getting in, on, out or off the vehicle and was therefore occupying it within the meaning of the Policy.

38. Any other construction places the definition of an insured under Travelers' Policy in contravention of South Carolina law where an:

"Insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle *or otherwise*, and *any person who uses with the consent, expressed or implied, of the named insured the motor vehicle to which the policy applies* and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.

S.C. Code Ann. § 38-77-30(7) (emphasis added).

39. Thus, Travelers cannot define an "insured" under the Policy to be more restrictive than required under state law, which includes permissive users of the vehicle—a definition that necessarily includes Decedent.

40. To the extent Travelers has defined an insured in contravention of state law, the Policy must be reformed to extend coverage to Decedent.

41. The purpose of this action is delay so Travelers can hold onto the \$1 million it will have to pay once Defendant obtains a jury verdict in the State Court Action.

42. In declaring the rights of the parties, the Court should say as much so the trial court judge in the State Court Action can consider Travelers' bad-faith refusal to pay and frivolous litigation tactics when considering whether to award reasonable attorney's fees of up to one-third of the State Court Action judgment under South Carolina Code § 38-59-40.

43. Pursuant to 28 U.S.C. § 2201, the Court should declare:
- a. Decedent was a covered insured under the Policy at the time of the collision that caused his death because he exited the vehicle and was in proximity thereof as the result of an order issued by sworn law enforcement conducting a valid traffic stop and Decedent was not free to ignore or disregard those orders;
 - b. Alternatively, even if Decedent was not a covered insured under the Policy language, the Policy's exclusion of him contravenes South Carolina Code § 38-77-30(7), which requires he be covered as a permissive user of the vehicle such that the Policy must be reformed by operation of state law;
 - c. Defendant, as Personal Representative of the Estate, is entitled to recover UIM benefits under the Policy on behalf of Decedent and the statutory heirs;
 - d. Defendant is entitled to recover UIM benefits from Travelers in connection with the collision that caused Decedent's death;
 - e. Travelers had no good-faith basis for initiating this declaratory judgment action; and
 - f. Any such further rights or obligations as may be necessary to resolve this coverage dispute.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays that the Court (1) grant her judgment and deny Plaintiff the same, (2) issue a declaration consistent with the foregoing, (3) award attorneys' fees and costs under 28 U.S.C. § 1927, and (4) order such further relief as the Court may deem just and proper.

Respectfully submitted,

s/Christopher P. Kenney

Richard A. Harpootlian (Fed. ID No. 1730)

Christopher P. Kenney (Fed. ID No. 11314)

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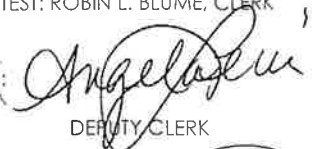
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ATTORNEYS FOR DEFENDANT
BARBARA HAWTHORNE AS
PERSONAL REPRESENTATIVE
OF THE ESTATE OF
NATHANIEL HAWTHORNE, JR.

September 8, 2021
Columbia, South Carolina.

A TRUE COPY
ATTEST: ROBIN L. BLUME, CLERK

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

BY: 
DEPUTY CLERK



TRAVELERS PROPERTY CASUALTY
COMPANY OF AMERICA,

Plaintiff,

v.

BARBARA HAWTHORNE, as Personal
Representative of the Estate of Nathaniel
Hawthorne, Jr.,

Defendant.

Case No. 6:21-cv-02648-DCC

**PLAINTIFF'S ANSWER TO
DEFENDANT'S COUNTERCLAIM**

NOW COMES the Plaintiff, Travelers Property Casualty Company of America ("Travelers"), by and through its undersigned counsel, serves its Answer to Defendant's Counterclaim (ECF #11, p. 5-11), and would show the Court:

1. Upon information and belief, Travelers admits the allegations in paragraph 1.
2. Upon information and belief, Travelers admits the allegations in paragraph 2.
3. Upon information and belief, Travelers admits the allegations in paragraph 3.
4. Upon information and belief, Travelers admits the allegations in paragraph 4.
5. Upon information and belief, Travelers admits that Mr. Hawthorne was pulled over in the median by State Transport Police and at some point left his vehicle and walked to the side of the officer's vehicle. Travelers is without knowledge and therefore denies the remaining allegations.
6. Upon information and belief, Travelers admits Decedent exited his vehicle and walked some distance to the passenger side of the officer's vehicle. Upon further information and belief, Travelers admits that while Decedent was standing in the median next to the officer's

vehicle, Zack was driving a vehicle north on Pleasantburg Drive. Travelers is without knowledge and therefore denies the remaining allegations in paragraph 6.

7. Upon information and belief, Travelers admits the allegations in paragraph 7.

8. Travelers is without knowledge and therefore denies the allegations in paragraph 8.

9. Upon information and belief, the collision between Zack's vehicle and the officer's vehicle forced Decedent into oncoming traffic where he was struck by another vehicle and killed. Travelers is without knowledge and therefore denies the remaining allegations in paragraph 9.

10. Travelers is without knowledge and therefore denies the allegations in paragraph 10.

11. Travelers is without knowledge and therefore denies the allegations in paragraph 11.

12. Travelers is without knowledge and therefore denies the allegations in paragraph 12.

13. Travelers is without knowledge and therefore denies the allegations in paragraph 13.

14. Travelers is without knowledge and therefore denies the allegations in paragraph 14.

15. Upon information and belief, Travelers admits Zack had \$25,000 of liability coverage. Travelers is without knowledge and therefore denies the remaining allegations in paragraph 15.

16. Upon information and belief, Travelers admits the allegations in paragraph 16.

17. Upon information and belief, Travelers admits the allegations in paragraph 17.

18. Upon information and belief, Travelers admits the allegations in paragraph 18.

19. Travelers is without knowledge and therefore denies the allegations in paragraph 19.

20. Travelers is without knowledge of what Terracon produced in response to a subpoena, and therefore denies that allegation. However, Travelers admits it issued Policy TC2J-CAP-131J3858-TIL-20 to Terracon, and that the policy provides \$1 million in UIM coverage, subject to the terms, conditions, exclusions, and limitations thereof.

21. Travelers admits that, through counsel, it received a written demand from Defendant's counsel in which the latter demanded the policy limits of \$1 million in UIM benefits, and made various assertions. Such document is set forth in writing and, to the extent the allegations of paragraph 21 are inconsistent therewith, such allegations are denied. Travelers denies the remaining allegations in paragraph 21.

22. Travelers admits that Defendant's counsel referenced South Carolina Code § 28-59-40. Travelers denies the remaining allegations in paragraph 22.

23. Travelers admits it filed this action on August 18, 2021, and Travelers admits the Complaint speaks for itself. Travelers further admits that it responded to Defendant's counsel's demand via a response dated September 3, 2021, which largely mirrored the allegations in Travelers' Complaint.

**FIRST CAUSE OF ACTION
(Declaratory Judgment)**

24. Travelers incorporates its prior responses to the foregoing paragraphs.

25. Travelers denies the allegations in paragraph 25.

26. Travelers admits that South Carolina law provides the listed statutory cause of action listed in paragraph 26.

27. Travelers admits the allegations in paragraph 27.

28. Upon information and belief, Travelers admits the allegations in paragraph 28.

29. Travelers admits that South Carolina law provides the listed statutory cause of action listed in paragraph 29.

30. Travelers admits the statutory language in paragraph 30.

31. Upon information and belief, Travelers admits the allegations in paragraph 31.

32. Travelers denies the allegations in paragraph 32. Further, Defendant misunderstands Plaintiff's position. Decedent does not qualify as an insured with respect to the UIM benefits under the Policy. Therefore, Estate (by and through Ms. Hawthorne), may not recover those benefits.

33. Travelers denies the allegations in paragraph 33.

34. Paragraph 34 does not contain any factual allegations, and therefore Travelers does not need to admit or deny it. To the extent a response is required, Travelers denies Defendant's characterizations of the holdings of the cases cited, and denies the cases are apposite to the facts of the loss surrounding Decedent's death.

35. Paragraph 35 does not contain any factual allegations, and therefore Travelers does not need to admit or deny it. To the extent a response is required, Travelers denies Defendant's characterization of the holding of the case cited, and denies the case is apposite to the facts of the loss surrounding Decedent's death.

36. Travelers is without knowledge and therefore denies the allegations in paragraph 36.

37. Travelers denies the allegations in paragraph 37.

38. Travelers denies the allegations in paragraph 38.

39. Travelers denies that the definition of an “insured” under the UIM coverage of the Policy is more restrictive than state law requires and denies that state law requires the UIM coverage of the Policy extent to permissive users. Travelers denies the remaining allegations in paragraph 39.

40. Travelers denies it has defined an “insured” in contravention of state law, and denies the Policy must be reformed to extend coverage to Decedent. Travelers denies any remaining allegations in paragraph 40.

41. Travelers denies the allegations in paragraph 41.

42. Travelers denies the allegations in paragraph 42.

43. Travelers denies the allegations in paragraph 43, including subparts.

44. Travelers denies the allegations in Defendant’s prayer for relief, and denies Defendant is entitled to any affirmative relief against Travelers or Travelers’ counsel.

**AS A FIRST AFFIRMATIVE DEFENSE BY WAY OF MOTION TO DISMISS
(Rule 12(b)(6))**

Travelers alleges Defendant’s prayer for an “award [of] attorneys’ fees and costs under 28 U.S.C. § 1927” fails to state a claim for relief and must be dismissed. (ECF #11, p. 11). This case presents a real and justiciable controversy as to Defendant’s claim for UIM benefits from Travelers, and it involves purely legal issues for the Court to adjudicate. Contrary to Defendant’s implicit allegation of delay, Travelers and its counsel aver this case can and should be decided at an early dispositive motion stage.

WHEREFORE, having set forth its Answer to Defendant’s Counterclaim, Travelers respectfully prays this Court:

1. Enter an order and declaratory judgment providing that Travelers has no obligation to provide UIM benefits to the Decedent or his Estate in relation to the December 2, 2020 accident, and that Travelers is not otherwise liable to Decedent or his Estate;
2. Tax the costs of this action against the Defendant; and
3. Dismiss Defendant's Counterclaim with prejudice, or enter judgment thereon in favor of Travelers;
4. Dismiss Defendant's prayer for attorney fees and costs;
5. Grant such other and further relief in favor of Plaintiff as the Court shall deem just and appropriate.

Respectfully submitted this 29th day of September, 2021.

MARTINEAU KING PLLC

/s/ Lee M. Thomas

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

A TRUE COPY
ATTEST: ROBIN L. BLUME, CLERK

BY: 
DEPUTY CLERK

Travelers Property Casualty
Company of America,

Plaintiff,

v.

Barbara Hawthorne, as Personal
Representative of the Estate of
Nathaniel Hawthorne, Jr.,

Defendant.

C/A No.: 6:21-cv-02648-DCC



**DEFENDANT'S MOTION FOR
JUDGMENT ON THE PLEADINGS**

Defendant Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., hereby moves under Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings. Judgment on the pleadings is warranted for two reasons.

First, the wreck that gives rise to this underinsured motorist (UIM) coverage dispute was captured on police dashcam video—an exhibit that is authentic and integral to the complaint—such that the operative facts are not reasonably in dispute.

Second, the Court should simply review the dashcam video and then declare Hawthorne is entitled to the benefit of UIM coverage because he was ordered out of his vehicle and was standing next to the police vehicle (just feet from his own vehicle) pursuant to the lawful order of the officer controlling the scene of a traffic stop when he was struck and killed, which falls within the meaning of the term “occupying” as that policy term has been construed by state and federal courts.

For these reasons (explained more fully in her memorandum in support), the Court should declare Hawthorne is entitled to UIM coverage and enter judgment in her favor.

Respectfully submitted,

s/Christopher P. Kenney

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Christopher P. Kenney (Fed. ID No. 11314)

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ATTORNEYS FOR DEFENDANT
BARBARA HAWTHORNE AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
NATHANIEL HAWTHORNE, JR.

November 3, 2021
Columbia, South Carolina.

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION**

Travelers Property Casualty
Company of America,

Plaintiff,

v.

Barbara Hawthorne, as Personal
Representative of the Estate of
Nathaniel Hawthorne, Jr.,

Defendant.

C/A No.: 6:21-cv-02648-DCC

Memorandum in support of Hawthorne's motion for judgment on the pleadings

Defendant Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., submits this memorandum in support of her motion for judgment on the pleadings and an order declaring she is entitled to the benefit of underinsured motorist (UIM) coverage.

As much as Plaintiff Travelers Property Casualty Company of America (Travelers) might wish otherwise, the facts are not reasonably in dispute: they were caught on the dashcam video of the police officer who detained Decedent during a traffic stop, ordered Decedent out of his vehicle, and directed him to stand next to the officer's passenger-side window, just feet away from Decedent's vehicle and the attached trailer. As Decedent stood next to the police vehicle, the at-fault driver veered across the yellow line and struck the police vehicle at full speed. The parties agree: the impact of that collision pushed Decedent into oncoming traffic, which struck and killed him. Because the dashcam video is authentic and integral to the complaint, the Court need not wait for time-consuming discovery, nor defer to the parallel state proceeding (a proceeding Travelers unsuccessfully attempted to stay). Instead, the Court should answer the question Travelers poses

with this case and hold Hawthorne is entitled to UIM coverage because Decedent was “occupying” the vehicle within the meaning of the UIM policy and federal and state precedents that have construed the term. To hold otherwise (as Travelers requests) invites motorists to make an impossible choice: either disobey the orders of a police officer during a traffic stop and remain in the vehicle to preserve coverage, or obey law enforcement and exit the vehicle, but lose coverage under an occupying exclusion clause. Such a result makes little sense and it is not the law.

FACTUAL AND PROCEDURAL BACKGROUND

According to the complaint in the Hawthorne v. Zack, 2021-CP-23-01754 (the “State Court Action”),¹ Decedent Nathaniel Hawthorne, Jr., (then 49 years old) was pulled over and ordered to step outside his employer’s commercial vehicle by State Transport Police when the State Court Action defendant Allan Lindsey Zack struck the police vehicle at full speed, which launched Decedent into oncoming traffic that struck and killed him. See Ex. A ¶¶ 2, 6–11. Zack fled, but later was arrested for felony driving under the influence resulting in a death, felony driving under the influence resulting in great bodily injury; hit and run, duties of driver involved in accident with death; hit and run, duties of driver involved in accident with great bodily injury; and driving on wrong side of road, improper lane, or unsafely shifting lanes. Id. ¶¶ 14–15. Hawthorne filed the State Court Action joining claims for wrongful death and survival, alleging negligence, gross negligence, carelessness, and/or recklessness causing death. Id. ¶¶ 17–30.

It is not disputed that the collision caused Decedent’s death. Traveler’s rendition of the moments prior to the collision makes the following allegations relevant to this motion:

- “On December 2, 2020, a corporal with the South Carolina Department of Public Safety (the ‘Officer’) initiated a traffic stop of a 2015 Ford truck being driven by the Decedent.” Dkt. No. 1 at ¶ 12.

¹ State Court Action complaint attached as **Exhibit A**.

- “On information and belief, the 2015 Ford truck is owned by Terracon Consultants, Inc. and is principally garaged in the State of South Carolina.” Id. ¶ 13.
- “Decedent and the Officer both stopped their vehicles in the center turn lane of North Pleasantburg Drive between its intersection with North Garden Circle and Crescent Ridge Drive.” Id. ¶ 14.
- “At some point during the traffic stop, the Decedent approached the passenger side of the Officer’s vehicle to provide the Officer with the registration for a trailer being pulled by the Decedent’s vehicle.” Id. ¶ 15.
- While the Decedent leaned into the passenger side of the Officer’s vehicle, the Officer’s vehicle was struck by a vehicle driven by Allan Lindsey Zack (the “Tortfeasor”). The collision of the Tortfeasor’s vehicle with the Officer’s vehicle forced the Decedent into traffic and he was hit and killed by a passing motorist. Id. ¶ 16.

Hawthorne’s counterclaim makes the following allegations:

5. At approximately 12:10 p.m., Mr. Hawthorne was pulled over in the median by the State Transport Police and was ordered to step out of the vehicle to speak with the officer about securing equipment being transported on a trailer attached to his commercial vehicle.
6. The officer ordered Decedent to come around and stand next to his vehicle on the passenger side window to speak. While Decedent was standing in the median speaking to the officer, Zack was driving his vehicle north on Pleasantburg Drive.

Dkt. No. 11 at 5, ¶¶ 5–6. Notwithstanding its own allegations and the dashcam video depicting the events in question, Travelers disclaims knowledge of some of these facts, answering:

5. Upon information and belief, Travelers admits that Mr. Hawthorne was pulled over in the median by State Transport Police and at some point left his vehicle and walked to the side of the officer’s vehicle. *Travelers is without knowledge and therefore denies the remaining allegations.*
6. Upon information and belief, Travelers admits Decedent exited his vehicle and walked some distance to the passenger side of the officer’s vehicle. Upon further information and belief, Travelers admits that while Decedent was standing in the median next to the officer’s vehicle, Zack was driving a vehicle north on Pleasantburg Drive. *Travelers is without knowledge and therefore denies the remaining allegations in paragraph 6.*

Dkt. No. 17 ¶¶ 5–6 (emphasis added). Thus, Travelers appears to dispute whether Decedent was acting at the officer’s direction when he stood next to the police vehicle and, as Travelers pled it, “leaned into the passenger side of the Officer’s vehicle.”

**Uncontradicted video evidence establishes
Decedent was outside the vehicle pursuant to the orders
of a sworn law enforcement officer with control over the scene.**

The dashboard camera footage (SCDPS_000025 (**Exhibit B**)) taken from the officer’s patrol vehicle is unimpeachable evidence of what occurred on the day in question.

As soon as the officer activates his lights, Decedent pulls his vehicle into the middle lane between double yellow lines on the six-lane road. Ex. A at 00:40. The officer approaches Decedent’s driver-side door and introduces himself as State Transport Police and asks for Decedent’s driver’s license and registration. Id. at 02:15.

After asking Decedent several questions, the officer says, “Come here and look at this,” whereupon Decedent exits the vehicle and follows the officer back to the trailer attached to the vehicle. Id. at 03:20. While standing adjacent to the trailer, the officer asks about the machinery loaded on the trailer and has a conversation with Decedent about whether the machinery is secured to the trailer. Id. at 03:30. After establishing the machinery is not secured on the trailer, the officer points to a place on the trailer that can be used to secure the machinery, whereupon Decedent states he has a chain, and the officer tells him he is going to write him a ticket before sending him on his way. Id. at 04:40. The officer follows Decedent back to the driver-side door to get the truck number and then follows Decedent back to the trailer where the two men inspect the trailer looking for the trailer plate number. Id. at 5:30. The officer states, “I’m going to start doing this,” meaning writing Decedent a ticket, “you start doing that,” meaning secure the machinery to the trailer, “*then you come back here, ok?*” Id. at 06:50 (emphasis added). The officer then walks to his vehicle and

reorients the police vehicle in the lane to make room for Decedent to stand on the passenger side while Decedent briefly returns to his cab, exits again, and walks back to the trailer and climbs onto the machinery. Id. at 07:00. Decedent jumps down off the trailer and begins securing the machinery to the trailer. Id. at 09:05. Once he finishes, he paces back and forth along the side of the trailer, periodically touching the trailer, while waiting for the officer. Id. at 10:50.

Decedent then walks off camera to the passenger side of the officer's vehicle where he was instructed by the officer where to stand while the two men converse for several minutes. Id. at 11:05. Decedent then walks back along the left side of the trailer to obtain numbers from the trailer license plate and returns to the passenger-side of the officer's vehicle. Id. at 13:40. The two men discuss that the trailer registration does not match, and the officer instructs Decedent to check the trailer for a VIN number, whereupon Decedent walks back to the trailer and does as instructed. Id. at 14:00. After a little more than a minute, Decedent walks back to the passenger side of the police vehicle where the men continue speaking for several minutes. Id. at 15:35.

While Decedent and the officer are still speaking, the vehicle driven by Zack veers left across the double yellow line and smashes into the police vehicle at full speed. Id. at 17:30. It is undisputed that the force of the collision sent Decedent flying into oncoming traffic that struck and killed him. Compare Dkt. No. 11 at p. 6 ¶ 9, with Dkt. No. 17 ¶ 9.

Travelers attempted and failed to stay the State Court Action

On April 15, 2021, Hawthorne filed the State Court Action in the Greenville County Court of Common Pleas. See Ex. A. Zack never answered. On June 29, 2021, Travelers' counsel filed an appearance purporting to reserve its rights under the policy and enter a general denial "[t]o the extent" one was required. On August 10, 2021, Hawthorne resolved her claims with Zack's liability carrier with a covenant not to execute in exchange for minimum policy limits. Through

counsel, Hawthorne furnished the dashcam video to Travelers and then made a demand (also through counsel) on August 16, 2021 referring to the dashcam video. This action was filed two days later, on August 18, 2021. See Dkt. No. 1. On August 23, 2021, Travelers filed an answer in the State Court Action, purporting to reserve its rights under the UIM policy. That same day, Travelers moved to stay the State Court Action, citing the pendency of this case and Zack's pending criminal charges. By Form 4 Order filed on October 20, 2021, the Honorable Eugene C. Griffith, Jr., Circuit Court Judge, denied Travelers' motion to stay. This motion followed.

STANDARD OF REVIEW

A motion for judgment on the pleadings is decided under the same standard as a motion to dismiss under Rule 12(b)(6). Deutsche Bank Nat'l Trust Co. v. IRS, 361 F. App'x 527, 529 (4th Cir. 2010); Van Connor v. One Life Am., Inc., No. 6:19-CV-03283-DCC, 2021 WL 2667063, at *1 (D.S.C. June 29, 2021), motion to certify appeal denied sub nom. Connor v. One Life Am., Inc., No. 6:19-CV-03283-DCC, 2021 WL 4272614 (D.S.C. Sept. 21, 2021). This means the court assumes the truth of all well-pled facts, E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship, 213 F.3d 175, 180 (4th Cir. 2000), and, to survive, the non-moving party must state enough facts to state a claim to relief that is plausible on its face without crediting as true unwarranted inferences, unreasonable conclusions, or arguments. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007); see also Van Connor, 2021 WL at, at *2.

The key difference is that on a Rule 12(c) motion, a court can also consider (1) exhibits attached to the complaint, see Wolfington v. Reconstructive Orthopaedic Assocs., II PC, 935 F.3d 187, 195 (3rd Cir. 2019); Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n, AFL-CIO v. Liberty Mar. Corp., 933 F.3d 751, 760 (D.C. Cir. 2019) or incorporated by reference, see Velarde v. GW GJ, Inc., 914 F.3d 779, 781 n.1 (2d Cir. 2019); Milwaukee Police Ass'n v. Flynn,

863 F.3d 636, 640 (7th Cir. 2017); Van Connor, 2021 WL at, at *1 (citing Fitchett v. Cty. of Horry, S.C., C/A No. 4:10-cv-1648-TLW-TER, 2011 WL 4435756, at *3 (D.S.C. Aug. 10, 2011)), and (2) motion exhibits that are integral to the complaint and are authentic. See Goines v. Valley Cmty. Servs. Bd., 822 F.3d 159, 166 (4th Cir. 2016); Wolfington, 935 F.3d at 195; MyMail, Ltd. v. ooVoo, LLC, 934 F.3d 1373, 1378–79 (Fed. Cir. 2019).

ARGUMENT

This motion should be granted, and judgment should be entered for Hawthorne because there is no good-faith factual dispute as to why Decedent was standing at the passenger window of the police vehicle when he was killed, and South Carolina law requires a finding that a motorist killed just feet from the insured vehicle after being ordered out of it by a police officer is entitled to UIM coverage. Travelers must concede the facts as portrayed on the police officer’s dashboard camera are what they purport to be and are not reasonably in dispute such that the Court should forego unnecessary, wasteful, and time-consuming discovery and reach the coverage question. A finding of UIM coverage in Hawthorne’s favor is warranted.

I. The uncontradicted evidence shows Decedent was standing at the passenger window of the police vehicle at the time of his death because of a lawful order of the officer in charge of the traffic scene.

The Court should find based on the dashcam video evidence that Decedent was standing next to the police vehicle, just feet away from his work vehicle, because of the verbal direction of the officer, which Decedent was legally obligated to heed.

When the officer stopped Decedent in his vehicle, Decedent was no longer at liberty with his movement. “In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light.” S.C. Code Ann. § 56-5-750(A).

Decedent did, in fact, stop when signaled, as required by law. Once stopped, Decedent was subject to the authority of the officer controlling the scene. “No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer ... invested by law with authority to direct, control or regulate traffic.” S.C. Code Ann. § 56-5-740; see also id. § 56-5-730 (making it “unlawful ... to do any act forbidden or to fail to perform any act required in this chapter.”). For example, a motorist can be ordered out of the vehicle, Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977), frisked, Arizona v. Johnson, 555 U.S. 323, 327 (2009), or even physically restrained. E.g., United States v. Smith, 396 F.3d 579, 582 (4th Cir. 2005).

Decedent had no lawful right to do anything other than what the officer ordered. The officer ordered him out of the vehicle, and he complied. He was told to follow the officer back to the trailer so they could discuss whether the machinery was properly secured, and he complied. He was instructed to secure the machinery while the officer worked on writing him a ticket, which he did. In the final minutes of the traffic stop, the officer is seen moving his patrol car to the left to make room for Decedent to stand at the passenger window, which he does. Decedent walks back to the trailer to retrieve a number from the trailer plate for the officer and returns to the passenger-side window where he is struck and killed. These facts are not reasonably in dispute.

Travelers seeks to interject ambiguity where there is none. Above-quoted paragraphs 5 and 6 from Hawthorne’s counterclaim and Travelers’ reply *suggest* a factual dispute over Hawthorne’s allegations that Decedent was (a) ordered to step out of the vehicle and (b) ordered to stand next to the officer’s window to speak. Compare Dkt. No. 11 at p. 5 ¶¶ 5–6, with Dkt. No. 17 ¶¶ 5–6. The Court should not permit this bit of slippery pleading to pose an obstacle to resolving this case for two reasons. First, the dashcam video is authentic, unimpeachable evidence of what happened that the Court can and should rely on. It is “integral to the complaint” (or in this case, the

Counterclaim), because the allegations track the events depicted in the dashcam. Cf. Goines, 822 F.3d at 166 (incident report arguably *not* integral where there were discrepancies with complaint allegations). Second, while Travelers purports to be “without knowledge” as to whether Decedent was acting at the direction of law enforcement, that demurrer is inconsistent with Travelers’ pleading elsewhere, where it states “that Mr. Hawthorne was pulled over in the median by State Transport Police[.]” Dkt. No. 17 at ¶ 5. Put differently, Travelers has *conceded* Decedent was stopped by the police. Notwithstanding whatever fact of which Travelers purports to lack knowledge, the notion that Decedent was somehow stopped by the officer but was nevertheless permitted to wander about the scene of the traffic stop (or even leave) is a fanciful effort to resist facts detrimental to Travelers’ coverage theory.

The Court should simply review the video and conclude the facts are what is clearly shown, namely, that Decedent’s movements adjacent to his vehicle on a public road were directed by the lawful orders of the officer in control of the traffic stop.

II. A motorist killed after being ordered out of his vehicle by a police officer, but still in proximity to the vehicle, is “occupying” the vehicle as a matter of law.

A motorist who is ordered out of his vehicle by a police officer during a traffic stop, who follows the officer’s commands, and who remains just feet from the insured vehicle is still “occupying” the vehicle within the meaning of the Policy language as it has been construed under South Carolina law. Any other conclusion leads to the absurd result whereby a motorist that complies with police commands and exits his vehicle thereby loses coverage under an exclusion like the one Travelers relies on here. Such a conclusion is inconsistent with precedents construing that same Policy term and the general proposition that “Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer.” Hallett v. Gov’t Emp. Ins. Co., No. CV 9:19-2319-RMG, 2020 WL 6580407 (D.S.C. Nov. 10, 2020) (quoting M and M Corp.

of S.C. v. Auto-Owners Ins. Co., 701 S.E.2d 33, 35 (S.C. 2010)). The Court should hold the occupying exclusion is no bar to UIM coverage here.

Travelers' theory is that Decedent is not an "insured" within the meaning of the UIM coverage because he was not "occupying" the vehicle, which is defined by the Policy as "in, upon, getting in, on, out or off" a "covered auto." Dkt. No. 1 ¶¶ 21–23. In the parlance of Travelers' coverage theory, "At the time of the Accident, the Decedent was not 'in, upon, getting in, on, out or off' a 'covered auto' within the meaning of the UIM coverage available under the Policy in connection with covered autos licensed or principally garaged in South Carolina." Id. ¶ 22. Travelers argues that because Decedent was not "occupying" the vehicle, "With respect to the Accident, the Decedent is not an Insured within the meaning of the UIM coverage available under the policy in connection with covered autos licensed or principally garaged in South Carolina." Id. ¶ 23. Thus, were the Court to find Decedent was "occupying" the vehicle as that term has been construed, then Decedent is also an "insured" under the Policy and judgment on the pleadings should be entered in Hawthorne's favor.

Precedent supports concluding *either* that Decedent was "upon" the insured vehicle within the meaning of the Policy *or* that he was getting in, out or off the vehicle. Hawthorne prevails here under either theory. They are considered in turn.

A. Decedent was "upon" the vehicle based on the circumstances surrounding the traffic stop and collision.

First, the Court should conclude Decedent was "upon" the vehicle based on the circumstances of the traffic stop and collision. Physical contact with the vehicle is not essential; what matters is the circumstances surrounding the accident.

In South Carolina Farm Bureau Mutual Insurance Co. v. Kennedy, 730 S.E.2d 862 (S.C. 2012), the state supreme court reinstated a trial court finding the claimant was entitled to UIM

coverage because he was “upon” and thus “occupying” the insured vehicle at the time of the accident. The claimant drove his employer’s truck to deliver a message to someone in a restaurant, parked the vehicle, left it running, went into the restaurant, and engaged his brother in conversation while walking back near the rear of the truck. Id. at 863. Similar to this case, a collision on a nearby highway knocked a vehicle into the restaurant parking lot and struck the claimant and pinned him against the truck. Id. The UIM insurer disputed coverage arguing (in relevant part) the claimant was not “occupying” the truck when he was standing near it but not in physical contact. Id. The supreme court rejected that argument, reasoning the insurer “erroneously assumes that this accident begins and ends at the exact moment of contact between the [tortfeasor] vehicle and Kennedy. This assumption is flawed because it ignores the unfolding events surrounding the accident.” Id. at 865. The court considered the plaintiff’s physical contact with the vehicle *until he was forced to relinquish it* while attempting to escape injury and “events immediately surrounding” the accident. Id. (emphasis added).

These considerations weigh heavily in favor of Hawthorne here because (as explained above) the circumstances of the traffic stop were such that Decedent was forced to relinquish contact with his vehicle—he was ordered out of the truck by the officer and told where to stand. In Kennedy, the court rejected the insurer’s argument that the inquiry should turn on physical contact alone because crediting such a view “would require Kennedy to succumb to the approaching danger rather than relinquish physical contact[.]” a result the court described as “unreasonable and unconscionable.” Id. The same reasoning applies to Hawthorne because it would be unreasonable, unconscionable, and unlawful to require Decedent to have disobeyed the officer to maintain coverage. Accordingly, Decedent had physical contact with the vehicle until he legally no longer could and the circumstances surrounding the accident warrant coverage.

B. Decedent was getting in, on or off the vehicle based his proximity and purpose in standing where he was when struck.

Alternatively, the Court should conclude Decedent was getting in, on or off the vehicle based on his proximity to it and the purpose for which he had exited and was standing where he was at the time of the collision, namely, complying with law enforcement instruction.

In Whitmire v. Nationwide Mutual Insurance Co., 174 S.E.2d 391 (S.C. 1970), the state supreme court construed the term “alighting from,” i.e., “getting out,” and therefore “occupying,” to include a passenger who exited and was in the process of walking around an insured vehicle to reach the adjacent shoulder when an uninsured motorist struck the parked vehicle and the passenger. The Whitmire Court reasoned:

Where the act of alighting is completed is uncertain. It must be determined under the facts of each case, considered in the light of the purpose for which coverage is afforded. Its meaning must be related to the particular use of the automobile and the hazards to be encountered from such use. It is reasonable to conclude that coverage was intended to protect a guest against the hazards from passing automobiles in the vicinity, while the guest, although not In or Upon the vehicle, is still engaged in the completion of those acts reasonably to be expected from one getting out of an automobile under similar conditions.

Id. at 394. The court then emphasized the passenger was struck “within two or three feet of the automobile and while he was proceeding promptly to the shoulder of the highway.... to remove himself from the hazards from passing vehicles.” Id. at 395.

More recently, in Cramer v. National Casualty Co., 690 F. App’x 135 (4th Cir. 2017), the Fourth Circuit looked to Whitmire and held an emergency medical technician (EMT) was not “occupying” her work vehicle when she was struck by an underinsured motorist. The EMT was sitting in the ambulance waiting for a patient to complete treatment at a cancer center when she and her co-worker noticed an automobile accident nearby. Id. at 137. The EMT moved the

ambulance to the nearby collision and, with the engine running, she and her partner exited the vehicle to check on the drivers. Id.

Cramer then crossed the road to the shoulder of the opposite lane to avoid traffic and call highway patrol. After completing the call, she tried to return to the ambulance and waved through a number of cars to clear the road so she could cross. Her stated purpose in returning to the emergency vehicle was to radio dispatch and notify St. Matthews of the accident. Unfortunately, one of the oncoming vehicles, driven by an underinsured motorist, hit her as she stood on the shoulder of the road. Cramer estimates that she was eight feet from the ambulance when the collision occurred.

Id. The UIM carrier denied coverage based on policy language that defined “occupying” as “in, upon, getting in, on, out of” an insured vehicle. Id.

The Fourth Circuit agreed, rejecting the theory she was “getting in” and therefore “occupying” the ambulance. The court pointed to evidence the EMT was “separate from the ambulance by a lane of traffic and passing cars” and “had not even started to cross the street”, reasoning: “We need not define the specific contours of ‘getting in’ a vehicle to conclude that a person standing on the shoulder of the road across from an insured vehicle is not ‘getting in’ by any reasonable construction of the phrase.” Id. at 138; cf. Hite v. Hartford Acc. & Indemnity Co., 344 S.E.2d 173, 177 (S.C. 1986) (“It cannot be said that being struck fifty feet from the insured automobile by another vehicle while answering a call for assistance of the night watchman is foreseeably identifiable with normal use, maintenance and ownership of the vehicle.”). The Cramer Court distinguished the EMT’s case from Whitmire due to the far greater physical distance between the EMT and the ambulance and the fact that, prior to being struck, she was in a place of relative safety, not attempting to reach safety as in Whitmire. See Cramer, 690 F. App’x at 139 (“As a result, we conclude that Cramer was not engaged in the completion of acts reasonably expected from one actually getting in a vehicle under similar conditions.”).

Proximity and purpose matter, and here, the facts are analogous to Whitmire, not Cramer or Hite. Decedent exited the vehicle when ordered during a traffic stop and at all times remained within feet of his vehicle and the trailer attached to it, and at times climbing back in the vehicle or on the trailer. At the officer's direction, Decedent was standing next to the police vehicle as a location of relative safety once he secured the machinery and retrieved the trailer number, as instructed. He did not cross the road. He did not even cross the double yellow lines. Instead, Decedent moved within the median lane adjacent to the truck and trailer before coming to rest next to the police vehicle, which was supposed to be a place of greater safety. Decedents' movement flowed from the officer's direction to exit the vehicle. Based on these facts, the Court should conclude Decedent was getting in, out or on the vehicle when struck.

CONCLUSION

For these reasons, the motion should be granted, and the Court should enter judgment in Hawthorne's favor accompanied by an order holding that Hawthorne is entitled to UIM benefits because when Decedent was ordered out of his vehicle by a police officer during a lawful traffic stop, he was not free to disobey the officer and he always remained in close physical proximity to the insured vehicle, such that he was upon and getting in, out and on and thus "occupying" the vehicle within the meaning of the Policy.

[signature page follows]

Respectfully submitted,

s/Christopher P. Kenney

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ATTORNEYS FOR DEFENDANT
BARBARA HAWTHORNE AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
NATHANIEL HAWTHORNE, JR.

November 3, 2021
Columbia, South Carolina.

Travelers Property Casualty Company of America v. Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr.

C/A No. 6:21-cv-02648-DCC

Memorandum in Support of Hawthorne's Motion for Judgment on the Pleadings

EXHIBIT A

(State Court Action Complaint)

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Barbara Hawthorne, as Personal
Representative of the Estate of Nathaniel
Hawthorne, Jr.,

Plaintiff,

v.

Allan Lindsey Zack,

Defendant.

C/A No.: _____

SUMMONS
(Jury Trial Demanded)

TO: ALLAN LINDSEY ZACK, THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, as the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Respectfully submitted,

s/Richard A. Harpootlian

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ATTORNEY FOR THE PLAINTIFF

April 15, 2021
Columbia, South Carolina.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE)

THIRTEENTH JUDICIAL CIRCUIT

Barbara Hawthorne, as Personal
Representative of the Estate of Nathaniel
Hawthorne, Jr.,

C/A No.: _____

Plaintiff,

v.

COMPLAINT
(Jury Trial Demanded)

Allan Lindsey Zack,

Defendant.

Plaintiff Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., by and through her undersigned counsel, brings this wrongful death and survival claim for negligence, gross negligence, carelessness, and/or recklessness resulting in the death of Nathaniel Hawthorne, Jr. and would respectfully show this Court the following:

PARTIES AND JURISDICTION

1. Plaintiff Barbara Hawthorne is the duly appointed representative of the estate of her son, Nathaniel Hawthorne, Jr. She is a resident of Greenville County and brings this action on behalf of the estate pursuant to South Carolina Code § 15-5-90, and on behalf of statutory beneficiaries pursuant to South Carolina Code §§ 15-51-10, et seq.

2. Decedent Nathaniel Hawthorne, Jr. was a resident of Greenville, South Carolina. At the time of his death, Mr. Hawthorne was just 49 years old.

3. Defendant Allan Lindsey Zack is believed to be a citizen of South Carolina and resident of Greenville County.

4. The Court has jurisdiction over the parties and the subject matter herein pursuant to Article V, Section 11 of the South Carolina Constitution.

5. Venue is proper in Greenville County pursuant to South Carolina Code § 15-7-30(C) as the most substantial part of the alleged acts or omissions giving rise to this cause of action occurred in Greenville County, South Carolina.

FACTUAL ALLEGATIONS

6. On December 2, 2020, Mr. Hawthorne was driving his commercial vehicle on Pleasantburg Drive in Greenville, South Carolina.

7. At approximately 12:10 p.m., Mr. Hawthorne was pulled over by the State Transport Police, stopped his vehicle in the median, and stepped out to speak to the officer while securing the equipment on his commercial vehicle.

8. While Mr. Hawthorne was standing in the median speaking to the officer, Defendant was driving his own vehicle north on Pleasantburg Drive.

9. As Defendant approached the Mr. Hawthorne and the officer, he suddenly veered into the median, striking the rear end of the State Transport Police vehicle.

10. As a result of the collision, the State Transport Officer was temporarily trapped in his vehicle before being rescued and taken to the hospital.

11. Meanwhile, Mr. Hawthorne was hit by one of the vehicles, which hurled him into oncoming traffic where he was struck by another vehicle.

12. Mr. Hawthorne died from blunt force trauma as a result of the collision.

13. Upon information and belief, Defendant did not apply his brakes but struck the officer's vehicle at full speed.

14. Following the collision, Defendant exited his vehicle and fled the scene on foot before he was later arrested and taken to the hospital.

15. Defendant was charged with felony driving under the influence resulting in death;

felony driving under the influence resulting in great bodily injury; hit and run, duties of driver involved in accident with death; hit and run, duties of driver involved in accident with great bodily injury; and driving on wrong side of road, improper lane, or unsafely shifting lanes.

16. Mr. Hawthorne was at all times conducting himself in a lawful and prudent manner in responding to a routine traffic stop.

FIRST CAUSE OF ACTION
(Wrongful Death – Negligence/Negligence *per se*/Gross Negligence/Recklessness)

17. Plaintiff incorporates each of the foregoing paragraphs as if set forth verbatim.

18. Drivers of motor vehicles on public roads owe a duty to exercise ordinary care at all times to avoid placing pedestrians and other motorists in danger and to use like care to avoid collisions.

19. Defendant breached his duty of care and was negligent, negligent *per se*, grossly negligent, and/or reckless in one or more of the following ways:

- a. In failing to maintain his lane by entering the median where Mr. Hawthorne and the officer were parked;
- b. In crashing full speed into a parked vehicle while failing to maintain his lane;
- c. Failing to maintain a proper lookout;
- d. Failing to stop or otherwise avoid the officer's vehicle, which, at all relevant times, was lawfully stopped;
- e. Driving while under the influence of alcohol or other drugs; and
- f. In such other particulars as may be ascertained through discovery.

20. Defendant's conduct was negligent *per se* because his conduct violated South Carolina Code §§ 56-5-1210, 56-5-1220, 56-5-1230, 56-5-1260, 56-5-1920, 56-5-2930, and 56-5-3230.

21. Defendant's conduct was grossly negligent because he failed to take even slight care to operate his vehicle in a safe and lawful manner by paying attention to his surroundings and remaining in his lane while driving at full speed on a public roadway.

22. Defendant's conduct was reckless in that he was conscious of his failure to exercise due care and he knew, or should have known, that his failure to exercise due care placed others, like Mr. Hawthorne, in mortal peril.

23. Mr. Hawthorne Hawthorne's wrongful death was the direct and proximate result of Defendant's negligence, negligence *per se*, gross negligence, and recklessness.

24. As a result of the above-described acts and omissions of the Defendant, Plaintiff and Mr. Hawthorne's other statutory beneficiaries have suffered and continue to suffer grief, shock, sorrow, wounded feelings, loss of companionship, emotional distress, pecuniary loss in funeral expenses, and loss of the deceased's financial support.

25. Plaintiff, on behalf of Mr. Hawthorne's statutory beneficiaries, is entitled to recover all damages, present and prospective, suffered as a result of Defendant's conduct, including an award of punitive damages sufficient to punish Defendant for the wrongfulness of his actions.

SECOND CAUSE OF ACTION
(Survival – Negligence/Negligence *per se*/Gross Negligence/Recklessness)

26. Plaintiff incorporates each of the foregoing paragraphs as if set forth verbatim.

27. As a result of the above-described acts and omissions of the Defendant, Mr. Hawthorne was severely injured and died.

28. Between the time Mr. Hawthorne saw Defendant's vehicle approaching and the time of his death, Mr. Hawthorne suffered extreme conscious pain and suffering, mental anguish, emotional distress, and shock from the impending collision and from the collision.

29. Plaintiff, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr., is

entitled to judgment against Defendant, in an amount sufficient to compensate the estate for damages suffered during Mr. Hawthorne's survival.

30. By reason of the recklessness of Defendant as set forth above, Plaintiff is also entitled to an award of punitive damages.

JURY TRIAL DEMANDED

Plaintiff respectfully demands a trial by jury on all claims so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant in this matter in a sum sufficient to adequately compensate the estate and the statutory beneficiaries for damages suffered, for punitive damages sufficient to impress upon Defendant the seriousness of his conduct, for attorneys' fees and costs incurred in this action, and for such other and further relief as the Court may deem just and proper.

[signature page follows]

Respectfully submitted,

s/Richard A. Harpootlian

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ATTORNEYS FOR THE PLAINTIFF

April 15, 2021
Columbia, South Carolina.

Travelers Property Casualty Company of America v. Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr.

C/A No. 6:21-cv-02648-DCC

Memorandum in Support of Hawthorne's Motion for Judgment on the Pleadings

EXHIBIT B

(Dashboard Camera Footage, SCDPS_000025)

Travelers Property Casualty Company of America v. Barbara Hawthorne, as Personal Representative of the Estate of Nathaniel Hawthorne, Jr.

C/A No. 6:21-cv-02648-DCC

Memorandum in Support of Hawthorne's Motion for Judgment on the Pleadings

PLACECARD HOLDER

(Traffic stop badge cam from South Carolina
State Transport Corporal J.D. Hand, December
2, 2020)

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
250 EAST NORTH STREET
GREENVILLE, SC 29601

OFFICIAL BUSINESS

TO:



PT 1