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June 24, 2013

**VIA HAND DELIVERY**

The Honorable Daniel E. Shearouse  
Clerk of Court  
South Carolina Supreme Court  
1015 Sumter Street  
Columbia, South Carolina 29201

**RECEIVED**

JUN 24 2013

**S.C. Supreme Court**

In re: Kirven v, Philadelphia Life Insurance Co., et al.  
District Court Civil Action No.: 3:11-cv-2149-JFA  
SC Supreme Court Case Number: 2013-00273

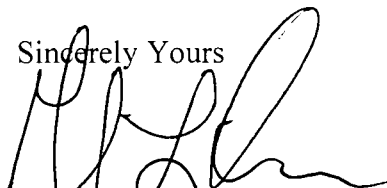
Dear Mr. Shearouse:

Enclosed for filing please find the original and twenty (20) copies of Plaintiff's Reply Brief with regards to this case. I would ask that you please file all copies and return the excess to my courier.

By copy of this correspondence, I am serving all counsel of record a copy of the same.

With warm regards, I am

Sincerely Yours



Graham L. Newman

/hnh

Enclosure

cc: All Counsel of Record

IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

APPELLATE CASE NO.: 2013-00273

RECEIVED

JUN 24 2013

S.C. Supreme Court

Diane Kirven, on behalf of herself and all others similarly  
situated,.....Plaintiffs,

v.

Central States Health & Life Company of Omaha and Philadelphia American Life  
Insurance Company, .....Defendants.

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Certified Questions by Order of  
The Honorable Margaret B. Seymour, District Court Judge  
District Court Civil Action No: 3:11-cv-2149-MBS

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**REPLY BRIEF**

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## ARGUMENTS IN REPLY

I. **Both the Policy's plain language and its characteristics dictate that the "conformity provision" incorporated State law at the policy's effective date, rather than every month thereafter**

Defendants argue that Section 38-71-242 may be applied to the insurance policies at issue in this case because its application is prospective, rather than retroactive. "Working in tandem with the Renewal Agreement, the Conformity Provision incorporates the law of South Carolina into the policy by amendment. Hence, the Policy was amended to conform to all statutes each time it renewed, or as here, monthly." (Defendant's Brief at 8) This argument is incorrect for two reasons: first, the plain language of Kirven's policy incorporates state law at the policy's effective date, January 1, 2000; and second, the characteristics of the policy indicate that the parties intended for it to be one, continuous contract rather than a series of contracts beginning and ending with each premium payment.

a. **Plain Language of the Policy Incorporates State Law at the Policy's Effective Date**

The plain language of the conformity provision conforms Kirven's policy to statutes in existence as of the effective date of the policy, not at the various dates of policy renewal. The provision reads as follows.

CONFORMITY WITH STATE STATUTES: The provisions of this policy conform with the law of the state in which you reside on the policy effective date. If any do not, they are hereby amended so that they do conform.

(Appx., DEF 0021). Kirven's policy defines its effective date as January 1, 2000 in three different locations. Thus, any incorporation of state statutes took place on that date and not at any subsequent times.

The first substantive provision of the policy indicates that “[t]he premium you paid and the application you completed put this policy in force as of the Policy Date. The Policy Date is shown in the Policy Schedule.” (Appx., DEF 0009) Two pages later, the Policy Schedule depicts “Policy Date: January 1, 2000.” (Appx., DEF 0011) Subsequent endorsements executed by the parties confirm this as the policy’s effective date. For example, it appears that Central States incorrectly recorded Kirven’s name after the execution of the contract. An adjustment endorsement was executed to correct Kirven’s name on the policy which also recognized the “Effective Date of Coverage” as “01/01/2000.” (Appx., DEF 0035) Four years later, Kirven added her husband, Herman G. Kirven, Jr., to her policy. The parties executed a second endorsement that noted November 11, 2004 as the “Effective Date of Change,” but again recognized “January 1, 2000” as the “Effective Date of Coverage” for Kirven’s policy. (Appx., DEF 0036)

Defendants ask the court to interpret the term “effective date” in the context of the “Term of Coverage” provision.

TERM OF COVERAGE: Coverage starts on the Policy Date at 12:01 a.m., Standard Time where you live. It ends at 12:01 a.m. on the same Standard Time on the renewal date, subject to the grace period. This policy may be renewed only as stated in the Renewal Agreement. Each time this policy is renewed, the new term begins when the old term ends.

(Appx., DEF 0021) According to Defendants, this provision entails that “a new and independent insurance contract was entered into each time Kirven paid her monthly premium.” (Defendants’ Brief at 16) However, even this provision distinguishes between the “Policy Date” (January 1, 2000) and the “renewal date” (the dates on which Kirven

paid her premiums). As such, the “Term of Coverage” provision is not helpful to the Defendants.

Another crucial flaw exists within Defendants’ position that Kirven entered into an entirely new contract with each and every monthly payment: if Defendants are correct, Kirven would enjoy no insurance benefits whatsoever. “Part G—Benefits” provides that “[t]he benefits of this policy are payable for loss that begins more than 30 days after this policy has been in force.” (Appx., DEF 0014) If, in fact, each monthly premium payment constituted the execution of a new policy, the policy’s benefits would be wholly illusory. This Court previously has rejected a policy interpretation leading to such an absurd result.

Otherwise, an insured might pay premiums over a period of years after purchasing this insurance, yet never become entitled to the full coverage of the insuring agreement. This would be a harsh result, not required by the provision that the policy was renewable only at the option of the company or by any other language of the contract.

Hudson v. Reserve Life Ins. Co., 245 S.C. 615, 618, 141 S.E.2d 926, 928 (1965).

Consistent with both this holding and the plain language of the policy, here the Court should interpret Kirven’s policy to conform to State law as of the effective date of the policy (January 1, 2000) rather than each time Kirven paid her premium to the Defendants.

**b. Remaining Characteristics of Kirven Policy Support One Contract**

Beyond the language of the Conformity Provision, the characteristics of the Kirven policy evidences intent of the parties to execute a single, guaranteed renewable insurance policy whose coverage initiated in January of 2000. Whether the acceptance of renewal premium constitutes the formation of a new contract turns upon “the intention of the parties as expressed in the writing.” Hudson at 617, 141 S.E.2d at 927. This precise

question was considered by District Judge Joseph Anderson in Montague v. Dixie Nat. Life Ins. Co., 2010 WL 2428805 (D.S.C. 2010)(unpublished):<sup>1</sup> “whether [the Plaintiff] entered into a single insurance policy in 1992 for an indefinite term, or whether she entered into a new insurance policy on the 26th of each month for sixteen years.” Id. at \*2. In ruling upon the matter, the District Court outlined the appropriate analysis for resolving the question under South Carolina law:

Reading Chastain,<sup>2</sup> Hodge,<sup>3</sup> and Hudson together, the South Carolina Supreme Court, in ascertaining the intent of the parties with respect to payment of renewal premiums, looks to (1) whether the policy is for a definite term; (2) the presence or absence of a grace period; (3) the presence and necessity of mutual consent to continue the policy; and (4) whether the contract is subject to forfeiture only for non-payment of premiums.

Montague at \*3. Applying this framework to the guaranteed renewable cancer policy in Montague, Judge Anderson found that the renewal provision in that policy did not give rise to the formation of a new contract every month. As will be shown below, the same analysis produces the same result in this case.

*i. Whether the Policy is for a Definite Term*

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<sup>1</sup> Unlike the conformity clause in Kirven’s policy, none of the Montague insurance policies contained conformity clauses that were time-specific. The Montague policies all contained the following language.

Conformity with State Law:

This policy is subject to the laws of the state where the application was signed. If any part of the policy does not comply with the law, it will be treated by us as if it did.

Montague, 3:09-cv-00687-JFA, Dkt. 71-2 at 13, 24, 33, 45, and 54.

<sup>2</sup> Chastain v. United Ins. Co., 230 S.C. 465, 96 S.E.2d 464 (1967).

<sup>3</sup> Hodge v. Nat'l Fid. Ins. Co., 221 S.C. 33, 68 S.E.2d 636 (1952).

Kirven's policy is a "guaranteed renewable for life" policy which Defendants promise to "renew ... each time you send us the premium." (Appx., DEF 0009) Her policy, in this way, is comparable to those examined in Montague.

The Policy provides that the benefits guaranteed by its provisions cannot change while it remains in force and that an insured has the right "to continue this policy during [her] lifetime by timely payment of the required premium." ... The Policy does not have a defined or fixed term. In this sense, offer issued and acceptance was solicited and obtained only at the execution of the Policy, and immaterial thereafter. Accordingly, the Policy provision guaranteeing Montague the right to continue "this policy" during her lifetime strongly suggests the parties envisioned and intended a single continuous contract rather than successive independent contracts.

Montague at \*4. Likewise, Defendants' description of their own policy as "guaranteed renewable for life" suggests the parties envisioned a single contract, rather than a series of new contracts subject to renegotiation.

***ii. The Presence or Absence of a Grace Period***

Where "[n]o grace period is provided" within an insurance policy, such evidence is indicative of the parties' intent to issue a new contract upon renewal. Hodge at 42, 68 S.E.2d at 639. However, Kirven's policy sets forth a 31 day grace period.

GRACE PERIOD: Your premium must be paid on or before the date it is due or during the 31 day grace period that follows. The policy stays in force during your grace period.

(Appx., DEF 0021) In fact, even if Kirven failed to pay her premium within the 31 day grace period, the policy provides for potential "policy reinstatement" upon payment. (Appx., DEF 0021) Again, this fact provides evidence that the parties envisioned Kirven's on-going policy as a single contract.

***iii. The Presence and Necessity of Mutual Consent to Continue the Policy***

Defendants set forth the “guaranteed renewal” provision of the policy as follows:

“We will renew your policy each time you send us the premium.” (Appx., DEF 0009)

The Montague order describes the importance of this language.

In so providing, the Insurance Companies deprived themselves of the ability to withdraw consent. Such a provision obviates the question of mutual consent upon renewal because the contract may continue in force, with benefits unaltered, at the pleasure of Montague.

Montague at \*3. Kirven’s policy and the Montague policy both stand in contrast to that in Hodge, which “could not be renewed or continued without the consent of both parties; that is, a new contract had to be made. The rights of the parties were mutual in the sense that neither was bound to renew the contract.” Hodge at 42, 68 S.E.2d at 639. As a result, consideration of this criterion mitigates in favor of Kirven’s policy being recognized as a continuous, single contract.

***iv. Whether the Contract is Subject to Forfeiture Only for Non-Payment of Premiums***

Quoting Hudson, the Montague court observed that “policy terms setting forth ‘agreed premiums, dates when premiums are due, [and] default in payment and reinstatement’ are inconsistent with ‘the view that the policy terminated on each premium paying date or within fifteen days thereafter.’” Montague at \*2, quoting Hudson at 618, 141 S.E.2d at 928. Here, Kirven’s policy schedule establishes both the amount of her premium (\$150.09 annually) and the agreement that her premium would be paid in monthly increments. (Appx., DEF 0011) Circumstances pertaining to default in payment, including a grace period and reinstatement, are also included within the policy. (Appx., DEF 0021) Thus, just as in Montague and Hudson, the Kirven policy’s conditions

surrounding payment and forfeiture for non-payment are consistent with the intent to execute a continuous, single contract.

*v. Other Considerations of the Policy*

While concentrating on the four criteria described above, Montague also noted that “[a]dditional evidence of the parties' mutual intent to form a continuous single contract may be found throughout the Policy.” Montague at \*3. Furthermore, Judge Anderson found numerous provisions within the Montague policy were “incompatible with a policy term of thirty days and that the intent of the parties as manifested by the Policy language reflects an intent to form a ‘continuous contract of insurance for life subject to forfeiture for nonpayment of premiums.’” Id., quoting Chastain, 96 S.E.2d at 468-69. Several of these provisions are comparable to language found within Kirven’s policy.

For example, both policies contain “pre-existing condition” exclusions that extend well beyond one month.

The [Montague] Policy provides that after two years the Insurance Companies promise to pay benefits regardless of when cancer was first diagnosed or treated, and that the Policy is incontestable after that time.

Montague at \*3. Very similar language appears in Kirven’s policy: “The benefits of this policy will not be payable for loss caused by pre-existing conditions during the first two years this policy is in force. After this two year period, however, loss due to such conditions will be payable unless specifically excluded from coverage.” (Appx., DEF 0014) Also,

The [Montague] Policy also states that coverage does not begin for 30 days after it is executed.

Id. As noted above, Kirven's policy states the same: "The benefits of this policy are payable for loss that begins more than 30 days after this policy has been in force."

(Appx., DEF 0014) Finally, the Montague order observes:

Provisions defining lifetime maximums, or the lack thereof, appear frequently throughout the Policy. For example, under paragraph (L) of the Policy, the hospice care benefit is explicitly limited to a lifetime maximum of 180 days.

Id. The hospice care provision within Kirven's policy contains the identical "lifetime maximum of 180 days." (Appx., DEF 0017) Likewise, Kirven's policy contains numerous other references to "lifetime maximums." (Appx., DEF 0018, "Physical or Speech Therapy"; Appx., DEF 0023, "Radiation, Radio-active Isotopes Therapy, Chemotherapy, or Immunotherapy"; Appx., DEF 0024, "There will be no lifetime maximum for benefits.") If, as Defendants contend, Kirven executed new contracts each and every time she paid monthly premiums, all of these provisions would be rendered meaningless.

**c. Webb is Inapposite to This Case**

Defendants insist that, notwithstanding the analysis within Montague, above, the case of Webb v. South Carolina Ins. Co., 305 S.C. 211, 407 S.E.2d 635 (1991) mandates a holding that "each policy renewal resulted in the creation of a new contract." (Defendants' Brief at 19) Montague, however, directly addressed Webb and noted as follows:

Webb's characterization of the effect of the renewal must be viewed in context. Webb dealt solely with "the extent of an exception to the rule that renewal constitutes a new contract." The rule to which Webb refers was announced in [Knight v. State Farm Mut. Auto. Ins. Co., 297 S.C. 20, 374 S.E.2d 520 (Ct. App. 1988).] And Knight specifically

couched its rule in terms of “the renewal of a policy of insurance for a fixed term.” The court reads Webb's requirement of an “expiring policy” as implicit recognition of its limited application to insurance contracts of fixed duration-contracts which expire by their own terms.

Here, because the Policy continues in effect at the pleasure of Montague, it is continuous and does not expire. Accordingly, the general rule regarding renewal of fixed-term contracts as announced in ... Knight is inapplicable, and the Webb exception to the general rule doubly so.

Montague at \*4 (internal citations omitted). Just as in Montague, Kirven's policy is continuous and does not expire so long as Kirven chooses to continue her premium payments. As such, Montague's distinguishing of Webb applies in this case, as well.

## **II. Defendants' Contract Clause analysis mistakenly relies upon the notion of a fictional "windfall"**

### **a. Vested Rights: the Fiction of the "Windfall"**

The Defendants' argument that Kirven possessed no “vested right” rests upon the Defendants' description of the sought-after actual charges benefits as a “windfall.”

Payment of benefits equal to billed amounts that Kirven will never owe is not, as Kirven suggests, “a ‘vested or substantial right’ that goes to ‘the right to collect some particular amount.’” In fact, her contractual right was not to collect a particular amount at all, as the term “actual charges” remained undefined in the policy.

(Defendant's Brief at 30) The “windfall” argument lay at the center of the defense in both Ward and Montague and, as Judge Anderson noted, was based upon a confusion of the purpose of primary health insurance policies with the purpose of supplemental insurance policies.

The court, however, finds [the concern of “windfall”] misplaced in the context of this case. This is because the legislation in question involves supplemental insurance

policies, as opposed to primary insurance policies. Supplemental insurance policies pay cash benefits directly to the policyholders, as opposed to primary insurance policies that pay benefits directly to a third-party health care provider. The reason for this difference lies in the purpose of the policies. Through primary insurance policies, insurance companies agree to pay a doctor for the treatment he or she provided an insured. Through supplemental insurance policies, the insurance companies agree to pay the insureds cash. Moreover, insureds of supplemental insurance policies are permitted to use the cash benefits in any manner they desire. For example, the Plaintiffs could use the cash received from the Defendants' supplemental insurance policies to pay for deductibles; to pay for normal living expenses, such as a car payment or a mortgage or rent payment; to pay for travel and lodging expenses accrued when receiving treatment away from their homes; to pay for household help; to pay for out-of-network specialists; etc. Therefore, the benefits under specified disease policies have nothing to do with how much a particular cancer treatment may cost because the benefits issued under those policies are not used to pay for the covered treatment. Because there is no rational relationship between these two, the ... concern about the Plaintiffs receiving a windfall in the form of a payment of benefits greater than sums actually paid to health care providers is misplaced.

Montague, 2011 WL 2294146 at \*18.

The Fifth Circuit Court of Appeals makes the same distinction, relying in part on the Fourth Circuit's opinion in Ward I.<sup>4</sup>

America's Health Insurance Plans, Inc.'s *amicus* brief in support of APL contends that Appellants' interpretation of "actual charges" is unreasonable because it contravenes the fundamental purpose of insurance and would lead to a windfall for Appellants. Although the fundamental purpose of *ordinary* health insurance coverage is to indemnify against loss from disease or illness, the purpose of a *supplemental* insurance policy, such as the one at issue in

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<sup>4</sup> Ward v. Dixie Nat. Life Ins. Co., 257 F. App'x 620 (4th Cir. 2007)(unpublished).

this case, is not only to cover medical expenses but also— according to America's Health Insurance Plans, Inc.—to provide supplemental income for “general living expenses or any other purpose.” Thus, the payment of benefits in amounts exceeding actual expenses does not lead to an unreasonable result.

Guidry v. Am. Pub. Life Ins. Co., 512 F.3d 177, 182 n.6 (5th Cir. 2007)(emphasis in original). See also Pierce v. Cent. United Life Ins. Co., 2009 WL 2132690 at \*7 (D. Ariz. 2009)(unpublished)(“If the Defendant wished to prevent a potential ‘windfall’ on behalf of the insured, Defendant could have defined the phrase ‘actual charges’ in the Policy, or at least remained consistent in its interpretation of the phrase.”)

Because Kirven’s policy is a supplemental insurance policy such as those in Montague and Guidry, the threat if a “windfall” is not implicated.

**b. Alteration of Reasonable Expectations**

Piggy-backing on the fictional concern of “windfall,” Defendants argue that application of Section 38-71-242 to Kirven’s policy does not alter her “reasonable expectations” because the term “actual charges” was not defined in the policy.

The term “actual charges” is not defined in the Policy, and Kirven had no agreement with either Defendant as to the meaning of “actual charges” or how payments therefore would be determined. Defendants were not prohibited from altering their interpretation of “actual charges” and indeed were obligated to do so after the passage of the Statute. ... A belief that benefits would be paid according to a phantom amount disproportionate to the actual loss does not suffice.

(Defendants’ Brief at 32) However, even if we ignore, for the sake of argument, that prior to the enactment of Section 38-71-242 Defendants paid (and Kirven accepted) benefits calculated on the basis of the Ward I definition of “actual charges,” we cannot ignore that “numerous health care dictionaries define “actual charge” as the amount billed.” Ward I

at 625-26, or in fact, the 2007 holding of Ward I itself. As a result, Kirven’s “reasonable expectations” of payment are buttressed not only by the prior performance of the parties, but by industry usage of “actual charges” and pertinent judicial rulings.

**c. Absence of “Significant and Legitimate” Public Purpose**

Finally, Defendants argue that any contractual impairment inflicted by Section 38-71-242 is permissible because “a legitimate purpose exists for a state to enact a statute that prevents one party from reaping a windfall profit under an insurance policy.” (Defendants’ Brief at 33) As set forth above, no such threat of “windfall” exists. In the absence of any other “significant and legitimate” public purpose, the contractual impairment of Section 38-71-242 is unconstitutional.

**III. Defendants’ Request Pertaining to the Department of Insurance Bulletin 2008-15 is Moot**

Should the Court rule in Kirven’s favor as to whether Section 38-71-242 applies to her policy, Defendants request the court “make clear that SCDOI is not entitled to enforce the Statute—by this Bulletin or otherwise—in a manner contrary to that holding.” (Defendants’ Brief at 36). The question is moot, because the Department has already disavowed any such intention in Montague.

The intent of the bulletin, which is obvious on its face, is to inform the affected insurers, and to ensure that the insurers inform their affected policyholders, of the new statute. Other than the directive to insurers to inform insureds of the existence of the statute, an innocuous requirement that the plaintiff cannot seriously argue is beyond the authority of the cabinet official charged with overseeing the most regulated industry in the state, the bulletin does not impose any requirement or restraint that is not specified in the statute.

Montague, 3:09-cv-00687-JFA (D.S.C.), Dkt. 10-1 at 4. The SCDOI further declared that “[t]he Department cannot ‘enforce’ Bulletin 2008-15.” Id. at 6. Finally, Judge Anderson—in dismissing the Department from Montague—ruled

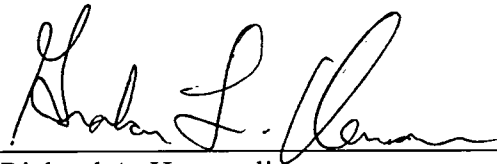
Bulletin 2008-15 appears to be a mere statement of policy guidance; lacking force of law and expressly contemplated in S.C. Code Ann. § 1-23-10(4). ...[T]he court finds that [the bulletin] cannot affect the legal relationship between any of the parties to this case.

Id., Dkt. 47 at 8. As a result of the foregoing, there is no need for this Court to address further the efficacy of SCDOI Bulletin 2008-15.

### CONCLUSION

To the extent arguments raised in Plaintiff’s initial brief were not referenced herein, Plaintiff incorporates those arguments so as not to waive any points set forth within that brief. Plaintiff Diane Kirven further prays for an order answering “no” to both questions certified by the District Court.

Respectfully submitted,



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IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPELLATE CASE NO.: 2013-00273

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Diane Kirven, on behalf of herself and all others similarly  
situated,.....Plaintiffs,

v.

Central States Health & Life Company of Omaha and Philadelphia American Life  
Insurance Company, .....Defendants.

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Certified Questions by Order of  
The Honorable Margaret B. Seymour, District Court Judge  
District Court Civil Action No: 3:11-cv-2149-MBS

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**CERTIFICATE OF SERVICE**

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I, Heather M. Hardy, Assistant to Richard A. Harpootlian, PA, hereby certify that I have served, via Hand Delivery and U.S. Mail, on June 24, 2013, the named individual(s) with a copy of the following:

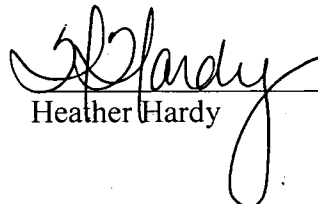
**DOCUMENT(S):**

*Reply Brief*

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