IN THE SUPREME COURT OF MISSOURI
EN BANC

OWNERS INSURANCE COMPANY,	)	
	)	
Appellant	)	
	)	
vs	)	Case No.: SC95843
	)	
VICKI CRAIG and CHRIS CRAIG	)	
	)	
Respondents	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY
STATE OF MISSOURI

THE HONORABLE JASON R. BROWN
CIRCUIT JUDGE

SUBSTITUTE BRIEF OF RESPONDENTS VICKY CRAIG AND CHRIS CRAIG

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STATEMENT OF FACTS

This matter came before the Trial Court through agreement of the parties to determine the sole contested issue of whether the policy of insurance sold by Owners Insurance Company ("Owners" or "Owners Insurance") to Dr. Chris and Vicki Craig ("the Craigs") provided the $250,000.00 of underinsured insurance set forth when the Craigs purchased the policy, or instead only provided $200,000.00 of coverage based on "set off" language. (Legal File, hereinafter "L.F." 70, 75). The parties stipulated to many of the facts at issue, and the few remaining additional facts were not contested as to their accuracy as they came from Owners own coverage confirmation form, and the policy itself. (L.F.66-70, 95-96, 167-168, 238-240, 260-261).[1]

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[1] Owners initially moved to strike the Craig defendants' additional facts, but also answered same. Its argument to strike the facts from its own policy and coverage form was based upon the argument that they were not included in the initial stipulation of facts agreed to by the parties. (L.F. 238-242). After the Craig defendants cited uncontested authority that a stipulation on some facts does not preclude evidence or argument of other facts, Owners found the facts to be accurate and did not pursue the request to strike further. (L.F. 260-261). When answering these facts, Owners confirmed the content after referencing Owners' own documents. (L.F. 238-242). These facts were therefore uncontested pursuant to Rule 74.04(c)(2). (A1-A5).

Owners' brief did not identify all of the facts necessary to understand why the Trial Court's judgment was, and is, the correct ruling. Respondents have therefore set forth the following statement of facts, to allow the Court to have a more complete view of the policy and the evidence before the Honorable Judge Brown.

A. THE PURCHASE OF $250,000.00 OF UIM COVERAGE BY THE CRAIGS

The Craigs purchased a policy of insurance from Appellant Owners which was to go into effect and provide coverage for the period of October 31, 2013, to October 31, 2014. (L.F. 15). Both Dr. Chris Craig, and his wife Vicki Craig, were named insureds under the Owners' insurance policy at issue, which provided multiple coverages. *Id.* One of those coverages was Underinsured Motorist (UIM) coverage for any uncompensated damages the Craigs might suffer at the hands of a driver without sufficient coverage for the harm he or she caused. (L.F. 15, 67-69).

The Craigs began the process of purchasing the insurance in question in September of 2013, well before the policy was set to go into effect at the end of October. (L.F. 88, 96, 161; Appendix, hereinafter "A" 12). By September 20, 2013, the Craigs had selected the coverages they desired for their new policy, including $250,000.00 of UIM coverage. (L.F. 159, 168-169, 230, 258, 264; A10). On September 20, 2013, Owners Insurance therefore sent the Craigs a coverage confirmation form, which stated it contained "AN IMPORTANT MESSAGE," requesting that the Craigs confirm the coverages Owners was providing them

were consistent with what they had selected when purchasing the policy. (L.F. 159-164; A10-A15). This Form, number 13691 (12-07), sent by Owners Insurance to the Craigs over a month before the policy went into effect, advised the Craigs that it was not a bill, as that would be sent several weeks later, "on or about October 12, 2013." (L.F. 159-160; A10-A11).

This coverage confirmation form advised the Craigs that "Enclosed is your policy Declarations" for the insurance coverages the Craigs were purchasing. (L.F. 96, 97-98, 159-164, 230, 258, 264; A10-A15). This form thereafter instructed the Craigs to review the attached Declarations to ensure they "accurately" showed the coverages the Craigs had selected during the purchase process. *Id.* The Declarations provided by Owners Insurance for the Craigs review showed the Craigs had purchased $250,000.00 of UIM coverage for both their 2008 Honda as well as their 2012 Ford. (L.F. 161-162; A12-A13). Further, the attached Declarations showed how much money they were paying for this $250,000.00 of UIM coverage for each of their vehicles. *Id.* There was no language provided with this form or the Declaration page attachments showing any amount other than $250,000.00 for UIM coverage, and there was no set off or other language contained in this form advising the Craigs that the full $250,000.00 would not be paid if the coverage became applicable. (L.F. 96, 159-164; A10-A15).

After receiving this Form and confirming the coverages set forth on the Declarations were the correct coverages purchased ($250,000.00), the policy went into effect on October

31, 2013. (L.F. 6, 15, 66). A week later, on November 6, 2013, the Craigs received a completely different form, Form 13649 (7-07). (L.F. 12). According to the documents attached by Owners Insurance to its Petition for Declaratory Judgment, this form provided for the first time not only the declarations, but also the actual policy, including the UIM endorsement identified in Owners Insurance's brief. (L.F. 11-61).

The Exhibit A attached to Owners' Petition includes Form 13649 (7-07), and then a copy of the insurance policy. The copy of the policy shows that it was assembled to show a "representation of coverage" that was in effect for the policy period. (L.F. 15). This form certification stamp, however, is dated July 31, 2014. As this version of the policy was not signed until July 31, 2014, it clearly could not have been the original attachment that went with Form 13649 (7-07) in November of 2013. Giving the greatest benefit of the doubt to Owners, a similar non-certified copy of the policy was provided to the Craigs on November 6, 2013, a week after the policy went into effect. The alternative would be that the Craigs never received a copy of the policy with the language relied upon by Owners.

Therefore, providing the greatest benefit of the evidence to Owners, the set off language that Owners Insurance discussed extensively in its brief was thus provided to the Craigs over a month after they had selected their coverage, several weeks after they had paid for their coverage, and a week after the coverage had already gone into effect. (L.F.159-164, 11-61; A10-A15).

B. AFTER THE POLICY WAS FINALLY PROVIDED, IT CONTINUED TO DIRECT THE CRAIGS TO THE DECLARATIONS TO DETERMINE HOW MUCH UIM COVERAGE THEY HAD PURCHASED.

As noted above, prior to receiving the policy, the Craigs were provided the Declarations, and told to review the Declarations to ensure the coverage purchased was accurate. A week after the policy went into effect, the Craigs received the full policy, including the UIM provision. (L.F. 11-61). When the Craigs received the entire policy, the Declarations were again prominent and at the front of the policy. (L.F. 15-16). Review of the Declarations provided with the full policy likewise showed that the coverages previously selected and confirmed by the Craigs, including the $250,000.00 in UIM coverage, remained unchanged. (L.F. 15-16, 159-164; A10-A15). The copy of the Declarations that were provided with the policy continued to use the word "LIMITS" when identifying the $250,000.00 of coverage provided for Underinsured Motorist Coverage. (L.F. 15-16).

Beyond identifying coverage limits such as the UIM limits of $250,000.00, the Declarations page also had a section for "item details," where Owners Insurance put notes about various coverages. (L.F. 112-113, 161-162; A12-A13). While these notations about the policy and coverages may be found on the Declarations, there are no comments, asterix, or any other notations that the amount of UIM Coverage set forth are not the actual "Limits" of available coverage. (L.F. 15-16, 95-96, 112-113, 161-162; A12-A13).

In the body of the policy itself, Owners Insurance at several places continued to reinforce the primacy of the Declarations in regard to how much coverage the Craigs had purchased. When the average insured received the policy and opened it, review shows that it contains a "**QUICK GUIDE TO YOUR POLICY**" index (L.F. 48, 68, 96), Emphasis in the original. This index advised the reader that the "DECLARATIONS" contain "COVERAGES" and "LIMITS OF LIABILITY" for the policy. (L.F. 48, 68, 96), emphasis in the original. Similarly, in the "INSURING AGREEMENT" section of the policy, Owners Insurance tells the insured that the "attached Declarations describe the **automobile(s) we** insure and the coverages and limits of liability for which **you** have paid a premium." (L.F. 49, 68, 96), emphasis in the original.

Prior to the wreck at issue, the Craigs had therefore been purposefully directed by Owners Insurance multiple times to look to the Declarations of the policy to determine the amount of coverage they had purchased. (L.F. 6, 11-61, 88, 96, 159-164; A10-A15).

C. THE WRECK, THE STIPULATED FACTS REGARDING DAMAGES BEING IN EXCESS OF ALL COVERAGES, AND THE SUBMISSION TO THE TRIAL COURT FOR RESOLUTION

On March 1, 2014, Vicki Craig was injured in an automobile accident when she was struck by another vehicle while stopped at a red light. (L.F. 8, 69). The at-fault driver, Mrs. Thang, was insured with Shelter Insurance, with policy limits of $50,000.00. (L.F. 8, 69). Mrs. Craig's injuries were admittedly significant, and it was stipulated between Owners

Insurance and the Craigs that the Craigs' damages exceeded $300,000.00. (L.F. 69). Given such significant injuries, the at-fault motorist's policy of $50,000.00 therefore left the Craigs with more than $250,000.00 in uncompensated damages. (L.F. 69). Based upon these damages, and the coverage they had previously purchased for such an eventuality, the Craigs sought coverage in the full amount of the policy's $250,000.00 per person UIM limit. (L.F. 6, 69).

Since the date of the accident was within the coverage period, the parties likewise stipulated that the policy was in full force and effect, provided coverage for the wreck at issue, and that the Craigs had paid the premium for $250,000.00 of UIM coverage. (L.F. 69). Owners Insurance, however, sought to pay only $200,000.00 of the $250,000.00 UIM coverage it sold to the Craigs, based upon the claim that it was entitled to a credit for the coverage of the at-fault driver. (L.F. 9, 69-70). To expedite the matter, the parties reached an agreement to present the $50,000.00 of contested UIM coverage to the Trial Court for determination. (L.F. 8, 62, 69-70).

Owners filed suit, the Craigs answered, and multiple briefs were filed by the parties. (L.F. 1-4). At the conclusion of the briefing, the Honorable Judge Brown held oral argument on the matter, and thereafter granted summary judgment to the Craigs, finding the policy was ambiguous. (L.F. 1-4, 278-280). In his judgment, the Honorable Judge Brown found that the policy was "replete" with references to the declarations page as the location of the various coverages and limits purchased by the insured. (L.F. 278). The Court also noted that the

declarations page had a place for explanation of coverages, but chose not to identify anywhere therein that it did not intend to actually pay the full limits of the coverage sold. (L.F. 278-279). After considering the policy in light of recent Missouri case authority, the Court found the average insured would be, at best, confused, and that the policy was therefore ambiguous. (L.F. 279). The Court therefore granted summary judgment to the Craigs, finding the disputed $50,000.00 in coverage was due and owing. (L.F. 279-280).

D. THE INSTANT APPEAL

Owners Insurance appealed the Trial Court's grant of coverage to the Southern District Court of Appeals. (L.F. 3-4). At the time of the Circuit Court's decision, the two most recent cases on UIM coverage from the Southern District Court of Appeals were *Shelter Mut. Ins. Co. v. Straw*, 334 S.W.3d 592 (Mo. App. S.D. 2011) and *Lynch v. Shelter Mut. Ins. Co.*, 325 S.W.3d 531 (Mo. App. S.D. 2010). (L.F. 278-279).

During the pendency of this appeal, the Southern District Court of Appeals handed down a new decision regarding set offs for UIM coverage in *Beshears v. Shelter Mut. Ins. Co.*, 468 S.W.3d 408411 (Mo. App. S.D. 2015)(Finding that this Court's opinion in *Manner v. Scheirmeier*, 393 S.W.3d 58 (Mo. banc 2013) had effectively overruled prior authority allowing set offs in UIM cases, and denying a set off from UIM coverage). The appeal in this case continued forward, and the Southern District reversed Judge Brown's finding of coverage, holding that the set off provision in this case did not create ambiguity, requiring coverage. *Owners Insurance v. Craig*, _____ S.W.3d ____, 2016, 2016 WL 3964628 (Mo.

App. S.D. July 19, 2016).[2] This matter was thereafter transferred to this Court for review.

POINT RELIED ON

The Trial Court properly entered summary judgment for Vicki and Chris Craig requiring Owners Insurance Company pay the full $250,000.00 of UIM coverage it sold the Craigs, because Owners Insurance Company was not entitled to reduce the coverage purchased by the Craigs, in that Owners Insurance Company multiple times during and after the sale of the policy identified the $250,000.00 limits as the amount of coverage the insured was purchasing, and allowing an offset would result in Owners Insurance Company never paying the amount of coverage sold to the insured, which is impermissible under Missouri law. (Responding to Appellant's Point Relied on).

Jones v. Mid Century Ins. Co., 287 S.W.3d 687 (Mo. banc 2009)

Manner v. Schiermeier, 393 S.W.3d 58 (Mo. banc 2013)

Ritchie v. Allied Property & Casualty, 307 S.W.3d 132 (Mo. banc 2009)

Seeck v. Geico General Ins. Co., 212 S.W.3d 129 (Mo. banc 2007)

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[2] Due to an oversight, Owners initially requested Oral Argument in its brief, rather than in a separate document, which led to the case being submitted to the Southern District on the briefs without argument. See e.g. Appellant's Request for Oral Argument, Motion to Extend Time for Filing Request for Oral Argument, Order of March 2, 2016 denying same, and Order of April 1, 2016 submitting the matter on the briefs.

ARGUMENT

POINT RELIED ON

The Trial Court properly entered summary judgment for Vicki and Chris Craig requiring Owners Insurance Company pay the full $250,000.00 of UIM coverage it sold the Craigs, because Owners Insurance Company was not entitled to reduce the coverage purchased by the Craigs, in that Owners Insurance Company multiple times during and after the sale of the policy identified the $250,000.00 limits as the amount of coverage the insured was purchasing, and allowing an offset would result in Owners Insurance Company never paying the amount of coverage sold to the insured, which is impermissible under Missouri law. (Responding to Appellant's Point Relied on).

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A. Summary of the Argument

In interpreting a policy of insurance, the Court must consider it in the light that an ordinary consumer would. *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). Here, Owners Insurance Company ("Owners") sought to reduce the amount of Underinsured Motorist ("UIM") coverage it sold Vicki and Chris Craig by the limits of the at fault driver, i.e. take a set off from its UIM coverage. Owners' entire argument is therefore premised on the claim that it sold the Craigs illusory coverage which will never be paid under any circumstances. In support of this position, Owners multiple times claims it never promised to actually pay the coverage that the Craigs bought and paid for. The actual facts, as they would be understood by an ordinary consumer, are directly contrary to this claim.

The primary flaws in Owners' argument are that (1) it relies on language which was not provided to the insured when the policy was purchased, or even at the time the policy went into effect, and (2) it requires the Court ignore the rest of Owners' policy and consider only this later added set off language. As neither is permissible, the Trial Court's judgment was correct.

When buying the coverage in question, the Craigs chose to purchase $250,000.00 of UIM coverage. After the Craigs selected $250,000.00 of UIM coverage as the amount they wished to purchase, Owners sent the Craigs the Declarations of the policy, showing $250,000.00 in UIM coverage, and asked the Craigs to carefully review and confirm this

accurately set out the coverage they wanted. Having done so, the Craigs were then billed, and paid for, $250,000.00 in UIM coverage, and the policy went into effect.

At best, it was not until a week **after** the policy was in effect that the Craigs were provided the full policy with the set off language on which Owners' entire argument rests. An ordinary consumer who purchases and pays for $250,000.00 in UIM coverage, which then goes into effect, would certainly understand that was the amount of the coverage the insurance company "promised" would apply should the UIM coverage ever be needed. Providing set off language for the first time a week into the policy period is the epitome of "taking away coverage which had previously been granted," requiring the Court find the policy ambiguous. *Jones v. Mid Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009). Simply put, Owners may not reduce the coverage the Craigs selected and paid for by sending offset language to the Craigs for the first time after the policy has been paid for and had already gone into effect.

While that is more than sufficient to find ambiguity (and thus coverage), Owners here went further. After the Craigs finally received the policy a week after it had gone into effect, Owners continued to reinforce the Declarations as the location an insured should look to determine the amount of coverage that Owners was "promising" to pay. When the Craigs received the entire policy, the Declarations which were prominently at the front of the policy again confirmed the coverage purchased remained unchanged. Having been preconditioned by Owners to go to the Declarations to confirm their coverage, the Craigs as ordinary

consumers would have been entitled at that point to look no further. However, when the insured opens the policy they find the policy has a "QUICK GUIDE TO YOUR POLICY," which yet again directs the insured that the Declarations are where they should look to determine both what coverage they had **and how much the limits are for that coverage**. (L.F. 48, stating the "Declarations contain" the coverages and limits of liability for each such coverage).

The very next page of the policy, page one of the "INSURING AGREEMENT" provision, once again directs the Craigs to go to the "attached declarations" if they wish to determine the coverages purchased, and the limits of those coverages. (L.F. 49). Following the instructions of Owners, in one of these trips to review the Declarations, the Craigs would have also seen that the Declarations have a specific place for explanations and notes about various coverages and premiums. (L.F. 15-16, 112-113). Owners included nothing, however, to suggest or even hint that it had any intention of refusing to pay the full coverage for which the Craigs had paid a premium. (L.F. 15-16, 112-113).

Throughout the entire process, from initial inquiry, to selection of coverages, confirmation of coverages, purchase, payment and the policy going into effect, the one consistent and over arching theme that Owners Insurance reinforced to the Craigs was that the Declarations set forth the limits of the UIM coverage they bought, and those limits were $250,000.00. Owners therefore chose to purposefully direct the Craigs to this $250,000.00 limit in the Declarations on multiple occasions. Owners' current claim that it made no

promise to pay $250,000.00 in UIM coverage is most certainly not what the average insured would think. Instead, the average insured, doing exactly what Owners Insurance told them, would have confirmed multiple times that they had been promised $250,000.00 in coverage. That is additional ambiguity.

Finally, the policy in question is a textbook example of this Court's prior admonitions that set offs in UIM cases inherently suffer from ambiguity, because unlike other coverages, if set offs are allowed in a UIM situation, the insurer will **never** pay the coverage the insured has purchased. *Jones v. Mid Century Ins. Co.*, 287 S.W.3d 687 (Mo. banc 2009); *Ritchie v. Allied Property & Casualty*, 307 S.W.3d 132 (Mo. banc 2009); *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013). While the facts here are worse than many such situations, the inherent ambiguity of set offs against UIM coverage continues to be a pervasive issue, with each insurer attempting to create a Court-condoned "insured trap," where the insured pays for coverage that the insurer intends to avoid paying at all costs. Confirmation that set offs in UIM coverage are inherently ambiguous would allow everyone to have certainty in regard to what coverage must be provided when UIM coverage is sold. For all of these reasons, the Trial Court's decision granting summary judgment was proper, and should be affirmed.

B. Standard of Review for the Court's Interpretation of the Insurance Policy at Issue

While summary judgment is rare in many circumstances, it is proper in insurance coverage cases such as this case where the facts are not in dispute. *Kennedy v. Safeco*, 413

S.W.3d 14 (Mo. App. S.D. 2013). In deciding insurance dispute questions, the Court should consider the following established principals of insurance law. An insurance policy is designed to furnish protection, and the Court must construe it to accomplish that objective. *American Family Mutual Ins. Co. v. Brown*, 657 S.W.2d 273, 275 (Mo. App. 1983). The Court when interpreting the policy therefore must do so to afford rather than defeat coverage if at all reasonably possible. *Murray v. American Family*, 429 F.3d 757, 764 (8th Cir. 2005). "In general, an insurance policy is a contract to afford protection to an insured" and should therefore be interpreted to provide such coverage. *Safeco Ins. Co. of America v. Smith*, 318 S.W.3d 196 (Mo. App. W.D. 2010). That a policy's coverage is required to be broadly construed, while all exclusions and exceptions narrowly construed, is "an accepted principle of insurance law and a fact of insurance life." *Great Central Ins. Co. v. Marble*, 369 F.2d 615, 617 (8th Cir. 1966).

"It is longstanding Missouri law that a court must not interpret an insurance policy provision in isolation, but rather assess an insurance policy as a whole." *Chamness v. Am. Family Mut. Ins. Co.*, 226 S.W.3d 199, 205 (Mo. App. E.D. 2007). In doing so, "the Court applies the meaning which would be attached by an ordinary person of average understanding if purchasing insurance . . . ." *Ritchie v. Allied Prop. & Cas. Ins. Co.*, 307 S.W.3d 132, 135 (Mo. banc 2009)(quoting *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129 (Mo. banc 2007); *Burns v. Smith*, 303 S.W.3d 505, 510 (Mo. banc 2010). A policy must be construed to find coverage if there exists any ambiguity. *Farm Bureau Town & Country Ins.*

Of Missouri v. Hilderbrand, 926 S.W.2d 944, 947 (Mo. App. W.D. 1996); *Arbeitman v. Monumental Life Ins. Co.*, 878 S.W.2d 915, 916 (Mo. App. E.D. 1994). This is because the insurance company, as the master of its policy, is in the best position to remove any ambiguity which might exist. *Burns v. Smith*, 303 S.W.3d 505, 512 (Mo. banc 2010). "Whether an insurance policy is ambiguous is a question of law." *Niswonger v. Farm Bureau*, 992 S.W.2d 308, 316 (Mo. App. E.D. 1999).

Several defects cause a policy of insurance to be ambiguous. An ambiguity exists in the policy if there is shown any duplicity, indirectness, or uncertainty. *Seeck v. Geico Gen. Ins. Co.*, 212 S.W.3d 129, 132 (Mo. banc 2007). Further, a policy must be declared ambiguous if it "promises something at one point and takes it way at another." *Behr v. Blue Cross Hospital Service, Inc.*, 715 S.W.2d 251, 256 (Mo. banc 1986); *Farm Bureau Town & Country Ins. Of Missouri* at 947. By example, a policy which implies to the insured that it provides a certain amount of UIM coverage, and then attempts to avoid ever paying that amount through a setoff is ambiguous, requiring the full coverage be paid. *Jones v. Mid Century Ins. Co.*, 287 S.W.3d 687, 690 (Mo. banc 2009).

C. <u>The Craigs Selected, Purchased, Were Billed, and Paid for $250,000.00 of UIM Coverage, Which Owners Now Seeks to Avoid Paying Based upon Language that Was Not Provided to the Craigs Until Well after the Policy Was Paid for and in Effect</u>.

The facts are not in dispute in this matter. The only issue for this Court therefore, is

what do those facts mean in regard to the UIM coverage at issue. Respectfully, Respondents would suggest it would be hard to find a more apt real world example of ambiguity in practice than the policy and facts before the Court. Under Missouri law, a policy is ambiguous when it is duplicitous, or when it grants a specific coverage on the one hand and then seeks to take it away with the other. *Jones v. Mid Century Ins. Co.* at 690. If either circumstance is shown, the policy is ambiguous, requiring coverage. *Id.*

Three times in the last seven years this Court has considered the issue of offsets for UIM coverage. In all three cases, this Court held the attempt by the insurer in question to offset the coverage of the at-fault driver from the stated limits of the UIM coverage sold to the insured would result in ambiguity and illusory coverage. *Jones v. Mid Century Ins. Co.*, 287 S.W.3d 687 (Mo. banc 2009); *Ritchie v. Allied Property & Casualty*, 307 S.W.3d 132 (Mo. banc 2009); *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013). The question before this Court is therefore whether Owners has crafted a policy which would not be ambiguous to the average insured. Put another way, the Court must determine whether Owners' policy is either duplicitous, or if it grants coverage only to take away that very same coverage elsewhere in the policy. *Jones* at 690; *Ritchie* at 139-140; *Manner* at 66. If it engages in either, it is ambiguous, requiring the full $250,000.00 coverage purchased be provided. *Id.*

In regard to duplicity, Merriam Webster's Dictionary defines "duplicity" to include behavior that is meant to trick someone, contradictory speech or action, or belying one's true

intentions by deceptive words or actions. Please see Merriam-Webster.com/ dictionary/duplicity. Synonyms for duplicity include deception, dissembling, and double dealing. *Id.* The bait and switch activity which Owners engaged in with the Craigs aptly fits "duplicity" under any of these definitions.

Here, Owners Insurance Company sold the Craigs $250,000.00 in Underinsured Motorist (UIM) coverage. (L.F. 6, 11-61, 66, 88, 96, 159-164; A10-A15). The Craigs selected this coverage many weeks before the coverage was to go into effect. (L.F. 159-164; A10-A15). After the Craigs selected the desired $250,000.00 in UIM coverage, Owners Insurance sent the Craigs one of its standard Forms with the Declarations of the policy attached to it. (L.F. 159-164; A10-A15). Owners told the Craigs to review the Declarations carefully to ensure they accurately reflected the coverages purchased. (L.F.159; A10). When the Craigs did as instructed by Owners Insurance, they found they had purchased $250,000.00 of UIM coverage for both their 2008 Honda and their 2012 Ford Fusion, and that they were paying separate premiums for $250,000.00 of UIM coverage for each vehicle. (L.F. 161-162; A12-A13). Having confirmed the UIM coverage limits of $250,000.00, the Craigs paid the subsequent bill, and the policy went into effect on October 31, 2013. (L.F. 6, 15, 66).

Only **after** the Craigs had selected, confirmed, and paid for their coverage, and then had the policy go into effect, did Owners send the Craigs the "set off" language it now seeks to rely upon. (L.F. 11-61, 88, 96). Having confirmed numerous times they had purchased

$250,000.00 of UIM coverage, when the Craigs finally received the policy in question, an ordinary insured would have at best checked the declarations page again to confirm the $250,000.00 of UIM coverage was accurately set out therein. *Miller v. Yun*, 400 S.W. 3d 779, 791 (Mo. App. W.D. 2013). Having done so, the ordinary consumer such as the Craigs would understand their UIM coverage to be exactly what they selected and paid for, $250,000.00.

Thereafter, Vicki Craig was in a serious accident. Her damages from this accident were stipulated to be greater than $300,000.00, the amount of the at-fault driver's coverage, as well as the full limits of the UIM policy Mrs. Craig and her husband had purchased and paid for. (L.F. 69). Despite the fact Owners sold the Craigs $250,000.00 of UIM coverage for exactly this situation, Owners, when called upon to pay the coverage owed, claimed it never actually intended to pay the Craigs the full amount of the coverage they had purchased. (L.F. 9, 67-70). Owners' entire argument for this set off, however, is based upon language in the UIM endorsement which was not provided to the Craigs until **at best** a week after the policy was already in effect. This was many weeks after the Craigs had selected and further confirmed at Owners' request that they were purchasing $250,000.00 of UIM coverage for the exact circumstances they later found themselves in, i.e. an at-fault driver who causes very significant damage.

Throughout the purchase of the policy of insurance, Owners identified only one amount of coverage it "promised" to pay, $250,000.00. After the Craigs selected their

coverage, Owners asked them to confirm it was accurate, and sent them **only** the declarations pages of the policy to do so. Holding back the language it now seeks to raise until after the policy was bought and paid for is the very definition of duplicity. It is hard to imagine a more direct example of "belying one's true intentions by deceptive words or actions" than sending Declarations to the insured which only identifies $250,000.00, without any indication or even a hint the insurer secretly intends to deny the insured the full benefit of the coverage being purchased.

Such conduct by itself is more than sufficient to require a finding of ambiguity, requiring coverage. Please see e.g. *Sturgis v. American Hospital & Life Ins. Co.*, 174 S.W.2d 917, 920 (Mo. App. 1943). In *Sturgis*, the issue was what were the limits of the coverage purchased by the plaintiff. As the surgery in question involved the removal of the appendix, rather than draining of the appendix, the Court held the $75.00 coverage limit applied instead of the $100.00 coverage for a drainage procedure. *Id.* at 920. In an attempt to limit its coverage even further, the insurer argued that a subsequent provision "purportedly restricted the maximum benefit to 50 percent" of the stated limits. *Id.* The Court of Appeals held this argument was "unavailing" in light of the fact "that in the case of inconsistent or repugnant provisions of a policy, the one most favorable to the insured must be adopted". *Id.* Here, the "subsequent" provision was the set off language which was not provided until a week after the policy went into effect, requiring the same outcome. Please see also *Hardy v. Progressive Specialty Ins. Co.*, 67 P.3d 892, 897 (Mont. 2003)(Holding that conduct of

selling one coverage, and then trying to pay another through a set off is an improper "bait and switch" tactic, which results in alleged set off being void as an attempt to sell illusory coverage); *Penn Star Ins. Co. v. Real Estate Consulting Specialist, Inc.*, 1 F.Supp.3d 1168, 1175 (D. Mont. 2014)(Endorsement provision created ambiguity because it would have accomplished removal of promised coverage by "bait and switch" tactics).

Respondents believe the duplicitous nature of relying on an alleged set off which was contained in a provision not provided to the insured until well after the policy was both paid for and in full force and effect, is dispositive. However, there exists in this circumstance a separate and equally improper ambiguity under well recognized Missouri law. "Where an insurance policy promises the insured something at one point but then takes it away at another, there is ambiguity." *Jones* Supra at 690; *Chamness v. Am. Family Mut. Ins. Co.*, 226 S.W.3d 199, 204 (Mo. App. E.D. 2007). Here again, the situation before the Court fits this description like a glove.

The insured selected a policy of insurance with $250,000.00 in UIM coverage. The insurer thereafter sent a confirming letter, showing that the insured had purchased and was going to be billed for $250,000.00 of UIM coverage if one of the Craigs were injured exactly as occurred. Owners Insurance next directed the Craigs to review the Declarations to confirm that the $250,000.00 amount listed therein was accurate for the coverage they desired. When the Craigs confirmed it was, they were billed for $250,000.00 of UIM coverage, paid that bill, and the policy went into effect. It was not until **after** the Craigs had

paid for this $250,000.00 in coverage, and the policy had actually gone into effect, that Owners attempted to take away the coverage granted through the "set off" language it now relies upon.

This after-the-fact-set-off-language is Owners' attempt to take away the coverage promised and sold, and at best creates ambiguity for this reason as well. *Jones* at 690. *Ritchie* at 140-141. As this Court held in *Manner* such an offset "*is not permitted*". *Id.* at 66, italics in original. Please see also *Crum-Vanlandingham v. Blue Cross Health Services, Inc.*, 734 S.W.2d 266, 267-269 (Mo. App. 1987)(Policy which promised $1,000,000.00 of coverage at one point, but then tried to restrict such coverage to only $10,000.00 in another provision, created an "obvious" ambiguity).

Indeed, the fact that Owners argues this should be the result is proof positive of why the rules of construction for insurance policies exist in the first place. If a car dealer sought to remove the engine from the purchaser's car a week after the sale and replace it with an engine only 80% as powerful as the one sold, based on a provision of the sales contract the buyer did not receive at the time of sale, no one would have any qualms about the absolute impropriety of such action. The same would be true if a buyer purchased 250 acres of land, but a week after the fact the seller attempted to take back 50 of the acres of the land granted in the deed based upon a "set off" provision the seller had never provided to the purchaser until a week after the closing. An insurance policy is a contract, governed by the rules of contract. *Shelter Mutual Ins. Co. v. MacVittie*, 423 S.W.3d 252, 255 (Mo. App. W.D. 2013).

As a basic premise of law, a party to a contract cannot unilaterally modify its terms. This rule of law is so entrenched that it is hard to find authority even raising this issue. The most recent case on point from this Court would appear to be the decision in *Independence-Nat. Educ. Ass'n v. Independence School Dist.*, 223 S.W.3d 131, 139-140 (Mo. banc 2007). In that case, this Court held there is no principle under Missouri law that would provide a governmental body the power no other entity has, i.e. the ability to unilaterally change the terms of a contract.

A unilateral change of coverage, however, is exactly what Owners Insurance seeks to do in this case. The Craigs purchased $250,000.00 of UIM coverage, not 80% of $250,000.00 of UIM coverage.[3] Indeed, according to Owners, there is no way to know how little of the coverage sold it actually intends to pay until the limits of the at-fault driver are identified. If the at-fault driver would have had $100,000.00 of liability coverage, Owners would seek to provide only 60% of the coverage bought and paid for by the Craigs. Owners and its policy of insurance promised $250,000.00 of UIM coverage, and then only after the sale it sought to add a provision to take away the very coverage bought, paid for and granted. This again creates at best ambiguity, requiring coverage. *Jones v. Mid Century Ins. Co.* Supra at 690- 692.

It has been the law of Missouri for over 80 years that an endorsement after the policy

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[3] The $200,000.00 of coverage Owners argues it should be required to pay after its "set off" is 80% of the $250,000.00 limits sold to the Craigs.

is in effect, which attempts to reduce coverage, cannot be relied upon by the insurer. Please see e.g. *Rice v. Provident Life & Accident Ins. Co.*, 102 S.W.2d 147 (Mo. App. 1937). In *Rice*, the insurance company sought to add a late endorsement that excluded coverage for a specific illness. *Id.* at 148-149. The Court held that allowing such a unilateral change to reduce coverage was not valid, as it would be "repugnant" to the policy actually issued, requiring the full coverage be paid. *Id.* at 151.

Rice was followed by the Eighth Circuit Court of Appeals in *Wackerle v. Pacific Employers Insurance Co.*, 219 F.2d 1 (8th Cir. 1955). In *Wackerle*, after the insured paid the premium for the policy, the insurance company sought to exclude the insured's son from the policy coverage. *Id.* at 3-5. The Court held that the insurance company could not reduce or take away coverage granted to the insured through a later added endorsement or rider. *Id.* at 5. This seemingly uncontroversial proposition remains the uniform rule to date. Please see e.g. *Assicurazioni Generali S.P.A. v. Black & Veatch Corp.*, 362 F.3d 1108, 1114 (8th Cir. 2004)(Applying Missouri law, and holding that a fundamental flaw to the insurance company's argument that an endorsement reduced coverage to the insured was the fact it was an attempt to modify the policy after it went into effect, and thus was void even if the insured consented to it). The *Assicurazioni* case derived this uniform rule of law from numerous cases, new and old, as well as commentators such as *Couch on Insurance*. *Id.* at 1114.

Having granted $250,000.00 of UIM coverage, Owners cannot after the fact reduce that coverage. Whether the Courts define this as granting coverage and then taking it away,

or instead a repugnant after-the-fact-attempt to restrict coverage, the result is the same; the coverage bought and paid for must be provided. Owners' policy under these circumstances is therefore fatally flawed for all of the above reasons. Any of these defects alone would require the Court affirm the Trial Court's grant of summary judgment. The combination of these defects makes this result especially proper.

D. The Owners Policy at Multiple Places Directs the Insured to the Declarations to Identify How Much UIM Coverage They Have Purchased.

While the above ambiguity is more than required to affirm the Trial Court's grant of Summary Judgment, Owners' policy continued to sow, at best, confusion in the mind of the average consumer who purchases the policy. As noted above, Owners cannot rely upon the set off language which was not provided to the insured until after the policy had been bought, paid for, and was in effect. Even if that were not sufficient by itself, Owners' own actions created additional ambiguity once the full policy was provided to the insured.

Here, the Craigs purchased and paid the premium for $250,000.00 in UIM coverage. (L.F. 66, 112-113, 159-164; A10-A15). When they purchased this insurance, the first thing they received from Owners was the Declarations and a notice confirming the importance of the Declarations for the UIM coverage they had purchased. (L.F. 159; A10). This form, Form 13691 (12-07) advised the Craigs before the policy went into effect that it contained "IMPORTANT" information, and advised they should review the attached Declarations "carefully" to ensure that they "accurately" showed the amount of the coverages they had

purchased. (L.F. 159; A10).[4] The importance and primacy of the Declarations is therefore driven home to the insured at the initial purchase of the policy.

When the insured follows these directions, the Declarations showed they had purchased UIM coverage of $250,000.00 for any one injury, and $500,000.00 for any occurrence. (L.F. 96, 159-162; A10-A13). It likewise showed the specific premium they were being charged was based on this $250,000.00 of UIM coverage. (L.F. 161-162; A12-A13).

When the Craigs later received the entire policy, the average insured would open the policy and go to the Declarations that Owners had already trained them was the location to confirm the coverage they bought and Owners "promised" to pay. Owners thus took affirmative steps before the policy was delivered to direct the Craigs to the Declarations, the

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[4] To ensure there is no confusion as to timing, there are two similar, but slightly different Forms found in the legal file. Form 13691 (12-07) was attached as Exhibit B to the Craig's Suggestions, and is found at L.F. 159 and A10. As noted on this form, it was sent to the Craigs on September 20, 2013, over a month before the policy went into effect, and included the Declarations only. (L.F. 96, 159-164; A10-A15). A similar, but later-dated form was also provided to the Craigs. (L.F. 12). This form, Form 13649 (7-07), was issued over a month later, on November 6, 2013, a week **after** the policy had gone into effect *Id.* This November notice is yet another instance of Owners directing the Craigs to the Declarations.

place the insurer from general knowledge recognizes the insured is most likely to look, even without such specific instructions. Please see e.g. *Miller v. Yun*, 400 S.W. 3d 779, 791 (Mo. App. W.D. 2013). This direction by Owners, however, did not end there. Instead, when the Craigs looked through the policy, they would find numerous other confirmation by Owners that the Declarations set forth the amount of coverage purchased.

Before the policy booklet, Owners placed a "QUICK GUIDE TO YOUR POLICY." This index to the newly provided additional policy provisions once again clearly and plainly told the Craigs that if they wanted to know what coverages they had, and how much Owners promised to pay if that coverage became due, they should look to the Declarations. (L.F. 48, stating the "Declarations contain" the coverages and limits of liability for each such coverage). When the insureds followed these instructions to go to the Declarations for coverages and limits, they would again receive confirmation that they had purchased and paid for $250,000.00 of UIM coverage. (L.F. 15-16, 112-113).

On the very next page of the policy, the insured is again directed to the Declarations page to determine how much coverage Owners promised to pay in return for the premium it was charging. Specifically, on page one, at the very top in the policy's "INSURING AGREEMENT" provision, Owners instructs the insured to look to the "attached declarations" to determine the coverages purchased, and the limits of those coverages, for which the insured has "paid a premium." (L.F. 49). Following Owners' direction to review the Declarations would also have shown that the Declarations have a specific place for

explanations and notes about various coverages and premiums. (L.F. 15-16, 112-113). This section contained multiple item details and notes about policy coverages. (L.F. 15-16, 112-113). However, nothing is listed in regard to the $250,000.00 UIM limits not being the actual limits of the policy. (L.F. 15-16, 112-113). Had it done so, the average insured might be less likely to buy Owners insurance, knowing Owners had no intent of providing the coverages the insured selected, confirmed, and then paid for.

Whatever the reason, Owners chose not to utilize any of the space it specifically set aside in the Declarations to state or even hint that $250,000.00 was not the amount of coverage being provided. (L.F. 15-16, 112-113). Instead, $250,000.00 was the sole and only number identified anywhere in the policy as the coverage the Craigs had purchased. (L.F. 15-16, 112-113, 159-164; A10-A15).

The ordinary insured is therefore told when initially considering purchase of the policy that the Declarations set out how much UIM coverage Owners Insurance promises to pay. At this point, the insured does not have the entire policy, but only the Declarations, which Owners tells them to "carefully review" to ensure they have been provided the coverage limits they selected. (L.F. 159; A10). Those limits were $250,000.00 for the UIM coverage at issue. (L.F. 159-164; A10-A15). When the Craigs later receive the policy itself, in multiple places it directs the insureds back to the Declarations to determine how much coverage they had purchased and paid for. (L.F. 48-49). The average insured therefore understands Owners Insurance would pay up to $250,000.00 in underinsured motorist (UIM)

coverage if the Craigs suffered sufficient injury. Please see e.g. *Burns v. Smith*, 303 S.W.3d 505, 512 (Mo. banc 2010)(Reasonable expectations of the insured created by ambiguous policy language requires coverage be decided in favor of such reasonable expectations); *American Nat. Property & Cas. Co. v. Wyatt*, 400 S.W.3d 417, 426 (Mo. App. W.D. 2013)(Existence of ambiguity in a contract of adhesion such as an insurance policy makes applicable the doctrine of reasonable expectations, even if a more thorough reading of other portions of the policy might negate that expectation under another possible connotation).

In its brief, Owners argues that the language of its policy should allow it to do what this Court, and numerous Courts of Appeal of this State, have held impermissible – sell coverage that they will never, under any circumstances, actually have to pay. In support of this argument, Owners therefore focuses on the limited portion of its policy where its proposed set off provision is located. In doing so, however, Owners virtually ignores the rest of its policy. When the entire policy is read as required by Missouri law, the ambiguity found by the Trial Court jumps off the pages of the Craigs' policy.

As numerous Missouri courts have stated, there is no authority to construe a policy provision in isolation. Instead, the entire policy must be considered. *Seeck v. Geico General Ins. Co.*, 212 S.W.3d 129, 133 (Mo. banc 2007). Owners therefore cannot ask this Court to ignore the rest of the policy which repeatedly directed the Craigs to the Declarations stating they had $250,000.00 in UIM coverage. *Versaw v. Versaw*, 202 S.W.2d 638, 643-644 (Mo.

App. S.D. 2006).[5] While Owners claims it made no promise to pay $250,000.00 in UIM coverage, that is most certainly not what the average insured would think. Instead, the average insured, doing exactly what Owners Insurance told them, would have confirmed multiple times that they had been promised the $250,000.00 in UIM coverage for which Owners was charging them.

Owners not only failed to resolve any ambiguity regarding its "set off," but instead compounded it beyond any reasonable argument that its policy is not ambiguous. In general, the insurer knows the insured is most likely to look at the Declarations to determine what coverage they have purchased. Please see e.g. *Wasson v. Shelter Mutual Ins. Co.*, 358 S.W.3d 113, 124 (Mo. App. W.D. 2011); *Miller v. Yun*, 400 S.W. 3d 779, 791 (Mo. App. W.D. 2013). Here, however, Owners purposefully chose to go well beyond that. Rather than rely on the general knowledge that this is where an insured is most likely to turn when trying to determine what coverage limits they have purchased, Owners, throughout the insurance process and in the policy it wrote, continually and purposefully directed the Craigs to the Declarations to determine how much UIM coverage they had purchased. The average insured, consistent with these multiple assurances, would reasonably understand the Owners' policy to provide the $250,000.00 in UIM coverage. Please see e.g. *Fanning v. Progressive Northwestern Ins. Co.*, 412 S.W.3d 360, 365-366 (Mo. App. W.D. 2013)(Holding that policy

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[5] Contrary to Owners' argument, it is thus Owners and not the Trial Court who seeks to avoid construction of the entire policy.

provision which points the insured to the Declarations to determine the limits of UIM coverage would cause the belief in the average insured that is the amount of coverage purchased, which creates ambiguity if the insurer thereafter tries to avoid paying those same limits through a set off).

This language and continual reinforcement of the Declarations as the "promised" amount of UIM coverage is again sufficient by itself to create ambiguity, and thus coverage. When compounded with the fact the Declarations were the only limits provided to the insured throughout the entire purchase process, and in fact until well after the policy was in effect, the Trial Court's finding of ambiguity should be affirmed.

E. The Intrinsic Ambiguity of Set Offs in the Unique Circumstances of UIM Coverage and the Need for Uniformity of Decisions.

While respondents feel the matter may be resolved by either or both of the ambiguities created above, the larger issue of offsets continue to be a point of uncertainty and contention. Here, Owners has attempted to avoid this Court's multiple holdings that set offs in UIM coverage create illusory coverage. When this issue of set offs for UIM coverage has been previously presented to this Court, all three times the Court held the policy was at best ambiguous, invalidating the proposed offset. *Jones v. Mid Century Ins. Co.*, 287 S.W.3d 687 (Mo. banc 2009); *Ritchie v. Allied Property & Casualty*, 307 S.W.3d 132 (Mo. banc 2009); *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013).

The last time the Court decided this issue in *Manner*, the Court started the discussion

by putting it under the heading "*Offset is Not Permitted*." *Id.* at 66, emphasis in original. Despite this seemingly clear statement, coming after multiple prior holdings that offsets created illusory coverage, Owners and other insurers continue to try and craft language which will result in judicial approval of policies which create the illusion of purchasing coverage the insurance company will never pay.

UIM coverage serves an important function. In cases like this, where the insured has suffered significant damages, far beyond the coverage of the at-fault driver, the UIM coverage steps in to provide coverage up to the limits of coverage for the insureds uncompensated damages. *Long v. Shelter Ins. Co.*, 351 S.W.3d 692, 696 (Mo. App. W.D. 2011); *Jones v. Mid Century*, Supra at 692-693. According to Owners, it "protects you and your passengers from losses and damages from losses and damages suffered if injury is caused by the negligence of a driver who does not have enough insurance to pay for all losses and damages." *Owners Ins. Co. v. Craig*, ____ S.W.3d ____, 2016 WL 3964628 at *9, dissent FN1.

Presently, there is continuing uncertainty among consumers, insurance companies, and Missouri citizens whether UIM coverage may be sold with limits which will never be paid. Here, Owners openly asserts that it created a "better" insured trap, by attempting a two-step process to sell coverage, and then add language in the policy that makes the coverage sold illusory. This back and forth attempt to write a policy which makes the insured think he or she is getting coverage they are not, needs a definitive answer which only this Court can

provide.[6]

For example, when Owners filed this declaratory judgment action, the Southern District Court of Appeals opinions allowing offsets in *Lynch v. Shelter Mutual Ins. Co.*, 325 S.W.3d 531 (Mo. App. S.D. 2010) and *Shelter Mutual Ins. Co. v. Straw*, 334 S.W.3d 592 (Mo. App. S.D. 2011) had not been affirmatively overruled. After the Trial Court found this policy ambiguous due to the offset, during the pendency of the appeal, the Southern District on July 16, 2015, issued its opinion in *Beshears v. Shelter Mutual Ins. Co.*, 468 S.W.3d 408, 411-412 (Mo. App. S.D. 2015). The Southern District in *Besehars* held that this Court's opinion in *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013) had "overruled sub silentio" the *Lynch* and *Straw* cases. The Southern District in *Beshears* therefore held that an offset to UIM coverage was not allowed, and that its prior opinions in *Lynch* and *Straw* in that regard should no longer be followed. *Id.* at 412 and FN4. The *Beshears* case became final on September 22, 2015, when this Court denied transfer.

Less than a year later, the Southern District's opinion in this case marked the third different standard for UIM set offs by that Court in a little more than a year. *Owners Ins. Co. v. Craig* at 8-9. As noted by the dissent below, the Court of Appeals decision in this case appears to be contrary not only to three holdings of this Court, but also the Southern

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[6] The Court's opinion in *Manner v. Schiermeier,* 393 S.W.3d 58, 66 (Mo. banc 2013) could be seen to have resolved the issue by stating "Offset is Not Permitted." However, as the present case shows, uncertainty continues to persist.

District's own recent *Beshears* case, as well as decisions of the Courts of Appeal for the Eastern and Western Districts in *Miller v. Ho Kun Yun*, 400 S.W.3d 779, 791 (Mo. App. W.D. 2013) and *Simmons v. Farmers Ins. Co., Inc.*, 479 S.W.3d 671, 677 (Mo. App. E.D. 2015). *Owners Ins. Co. v. Craig*, at *8-9.

Numerous other opinions of the Courts of Appeal which appear to be in conflict with the opinion below include *Nationwide Ins. Co. of America v. Tho*mas, 487 S.W.3d 9, 14-15 (Mo. App. E.D. 2016)(Holding that policy which seeks to charge a premium for UIM coverage, but never pay the coverage paid for is ambiguous, requiring the insurer pay the stated coverage); *Fanning v. Progressive*, 412 S.W.3d 360, 367-368 (Mo. App. W.D. 2013) (Holding that policy language directing the insured to the Declarations to identify coverage amounts creates ambiguity when an insurer tries to then enforce a set off such as in this case); *Wasson v. Shelter Mut. Ins. Co.*, 358 S.W.3d 113, 123-125 (Mo. App. W.D. 2011)(Set off provision may be applied to uncompensated damages only, or the policy is providing illusory coverage); and *Long v. Shelter Mut. Ins. Co.*, 351 S.W.3d 692, 701-705 (Mo. App. W.D. 2011)(Holding that set off would not be allowed in circumstances where the insured was told to review the Declarations to ensure the coverage was accurately set forth, similar to Owners' language in this case).

Missouri consumers and the insurance companies they purchase coverage from should not be subject to vagueness or uncertainty in regard to how much coverage the insured has purchased. The United States Supreme Court stated in *Martin v. Franklin Capital Corp.*, 546

U.S. 132, 139, 126 S. Ct. 704, 710 (2005), that it is a "basic principle of justice that like cases should be decided alike." Having no predictability of how a policy of insurance will be interpreted is inimical to the principles behind not only the law, but also general certainty in trade. As the Supreme Court stated in *Boddie v. Connecticut*, 401 U.S. 371, 374, 91 S.Ct. 780, 784 (1971), there is no characteristic of an organized and cohesive society more fundamental than a rule of law that is certain enough that the citizens' disputes can be resolved in a predictable manner.

Missouri, following the Restatement, has similarly focused upon the absolute need for certainty, predictability, and uniformity of results as a fundamental premise of jurisprudence. Please see e.g. *Dunaway by Dunaway v. Fellous*, 842 S.W.2d 166 168-169 (Mo. App. E.D. 1992)(Holding that a foundational basis for the Court to apply Missouri law to an issue is certainty, if the application of another state's laws would result in "varying interpretations"). Here, it is not another state's law that creates the risk of "varying interpretations", but instead which Court may hear the case.

This Court in recent history addressed the issue of set offs in *Jones v. Mid Century Ins. Co*, 287 S.W.3d 687 (Mo. banc 2009). The Court in discussing the issue of offsets in UIM coverage quickly identified the problem being they create illusory coverage. As the Court rightly noted in *Jones*, allowing an offset results in the insurer never being required to pay the total limits of liability stated in the policy. *Jones* at 692. This is because by operation of law there would always be some amount deducted from the coverage sold to the

insured, as liability insurance is a pre-requisite to the at fault driver being an underinsured motorist. *Id.* at 692 and FN2. UIM coverage is thus unique in that if an offset is allowed, the insurer never is required to provide the full coverage sold. *Id.* Further, how much coverage the insured paid for and loses can range significantly depending on the pure chance of how much coverage the at-fault driver has. *Id.*

The underinsured driver in *Jones* had a minimum limits policy of only $25,000.00. Despite this minimum limits policy, allowing the set off would have resulted in the insured receiving 25% less coverage than they purchased. *Jones* at 692-693, and FN2. The loss of coverage bought and paid for, however, if such offsets were allowed could be much more significant. Take for example the situation where an insured has $300,000.00 of UIM coverage, and suffers $600,000.00 of damage in an accident. If the at-fault driver were to have $250,000.00 of liability coverage, and set offs were allowed, the insured would lose over 80% of the coverage they purchased, and still have $350,000.00 of uncompensated damages, despite purchasing the insurance for exactly that scenario.

Mindful of these consequences, the Court again found an offset provision in a UIM policy created illusory coverage in *Ritchie v. Allied Property & Casualty Ins. Co.*, 307 S.W. 132 (Mo. banc 2009). The Court found that the different language used by the insurer in *Ritchie* to attempt an offset led to the same improper result, that the insurer would never be called on under any circumstances to pay the full limits sold to the insured. *Id.* at 140-141. Finding this would lead to illusory coverage, by taking away the coverage granted elsewhere,

the Court held the proper way to read such offset language in the unique case of UIM coverage is as an offset against damages. *Id.* This has the benefit of requiring the insurer provide the coverage sold, but also ensuring that the insured only recovers for uncompensated damages. *Id.*

Having recently addressed offsets in *Jones* and *Ritchie*, the Court in *Manner v. Schiermeier*, 393 S.W.3d 58 (Mo. banc 2013) rejected yet another attempt at an offset for these same reasons. The heading for this section of the opinion was clearly set forth as:

C. Offset is Not Permitted.

Id. at 66, italics in original.

The insurer in *Manner* argued that its language in the limits of liability section of the policy made it clear to the insured that the at-fault driver's coverage would be offset from the UIM limits. The Court rejected this argument, as a UIM policy promises to pay the listed limits of liability, not the limits reduced by the amount paid by the tortfeasor. *Id.* The Court again held that allowing an offset would result in illusory coverage, as the insurer would never be required to pay the full coverage sold, which "at best creates an ambiguity that must be resolved in favor of coverage" up to the coverage limits set forth in the policy if the insured's damages exceed such coverage limits. *Id.*

Indeed, the very word Owners (and most other insurers) choose to identify the coverage amount sold, i.e. describing them as the "LIMITS," shows the inherent ambiguity in allowing a set off in such circumstances. The word "Limits" is not defined in the policy.

As it is not defined, the Court should give this term a "reasonable construction." *Wilson v. American Family Mutual Ins. Co.*, 472 S.W.3d 579, 588 (Mo. App. W.D. 2015).

The common usage of the word limits in this context means the maximum amount of coverage that will be provided by the insurer for the described coverage. *Wilson v. American Family* at 588-589. This is consistent with the common usage of the word, which is defined as "an amount or number that is the highest or lowest allowed," or the maximum number of something that is allowed.[7] By choosing to use the word "LIMITS," Owners is indicating that under at least some circumstances, the maximum amount of coverage it will pay is $250,000.00 for underinsured coverage. Owners choice to describe the $250,000.00 of UIM coverage it identified as the "LIMITS" would lead the average insured to understand that under at least some circumstance the insurer will pay this amount of coverage. *Wilson* at 588-589. The later language added in the endorsement makes that representation literally impossible, and thus creates ambiguity which must be resolved in favor of the insured. *Id.*

While Owners has attempted to craft different language for its offset, it still results in the insurer selling more coverage than they will ever be required to pay if such an offset from the limits, as opposed to damages, is allowed. In the continuing quest to build a better "insured trap," insurers like Owners continue to seek ways to sell the insured a policy benefit it will never have to pay. Respectfully, the law should not encourage such duplicitous behavior.

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[7] Please see Merriam-Webster.com/dictionary/limit.

F. Owners Argument and Case Authority is not Applicable to the Policy it Wrote or UIM Set Offs in General Given the Unique Nature of UIM Coverage.

The majority of Owners' brief fights an argument that is not being made, with cases that do not apply to the situation before the Court. While Owners accuses the Craigs of putting an over abundance of importance on the Declarations, it was actually Owners who made the decision to place the Declarations in such a lofty position. While it is well recognized that the average insured will go to the Declarations to determine coverage, Owners went much further. First, it purposefully chose to direct the Craigs to the Declarations during the purchase of the policy by only providing the Declarations to confirm the amount of coverage purchased. Then, once additional portions of the policy were provided a week after it had gone into effect, Owners again chose to purposefully place extra importance on the Declarations. Owners, as the master of its policy, made the decision in multiple places of the policy to instruct the Craigs to look to the Declarations to determine both what coverage they had purchased, and the "LIMITS" of such coverage. Owners is fully and wholly responsible for the ambiguity this decision created, as it, not the Craigs, continually emphasized the $250,000.00 of UIM coverage as the amount of coverage that would be paid under the present circumstances.

As this Court has recognized on at least three occasions, UIM coverage is inherently different than other coverages because it requires the insured recover from the at-fault driver

some amount of compensation. This is a distinction with a significant difference from other types of coverages found in the cases that Owners relies upon. If the Declarations of a liability policy state $250,000.00 of liability coverage, but the policy has a "drop down" for such coverage in limited circumstances, the policy will still pay the full identified limits in the majority of cases. The same is true for an exclusion which eliminates coverage for limited circumstances such as a non insured but owned automobile, but does not prevent the full coverage from being paid in most cases. For UIM coverage, however, Owners conceded argument is that it sold illusory coverage because it will never, under any circumstances pay the "LIMITS," or the maximum coverage promised.

The significant difference between UIM and other coverages in terms of set offs can be seen by the four cases that Owners cites as its primary authority before this Court. Pursuant to Rule 84.04(d)(5), Owners "shall" list the three or four cases upon which it "principally relies." (A6-A9). Owners has done so on page 12 of its brief, citing four cases. While this Court has addressed UIM set offs in three cases in the last seven years, Owners does not "principally rely" on any of this directly on point authority. Even more interesting is the fact that only one of the cases Owners "principally" relies upon involves UIM coverage at all. While dealing with UIM coverage, that case, *Naeger v. Farmers Insurance Co.*, 436 S.W.3d 654 (Mo. App. E.D. 2014), does not address the issue before this Court, offsets.

In its prior briefing before the Southern District Court of Appeals, Owners did not "principally rely" upon *Naeger*, but instead *Long v. Shelter Ins. Co.*, 351 S.W.3d 692 (Mo.

App. W.D. 2011). Unlike *Naeger*, *Long* did address whether a set off to UIM coverage should be allowed. The likely reason for removing the *Long* case in its substitute brief is that the Court in *Long* held that an insurer was **not** allowed to do exactly what Owners seeks to do in this case. *Id.* at 702. Similar to the policy here, the insured in *Long* was told to check the Declarations to confirm the coverage they purchased was accurate, and likewise referred the insured to the Declarations as the location in the policy to find the limits of liability for the various coverages such as UIM. The *Long* Court held such language made the policy ambiguous, and thus no offset was allowed. *Id.* at 704.

Owners therefore removed the only case dealing with offsets in UIM coverage from its principal cases. It is left "principally relying" on none of this Court's three relevant opinions, nor the numerous other decisions of the Courts of Appeal dealing with set offs, all finding such set offs improper. Instead, the only case Owners "principally" relies upon which even involves a UIM policy deals with an exclusion to coverage, and not an offset. *Naeger* at 657-658.

In *Naeger*, Ms. Naeger was a passenger in another vehicle, which was struck by an underinsured driver. *Id.* at 657. The vehicle Ms. Naeger was a passenger in had UIM coverage with Allstate, which paid its UIM coverage. *Id.* Ms. Naeger also had her own policy of insurance with Farmers, which provided $250,000.00 in UIM coverage. *Id.* Farmers did not seek to take an offset from the at-fault driver, however. Instead, its position was that the policy contained an exclusion for injury to the insured while occupying a non-

owned vehicle which is insured for UIM coverage. *Id.* At 657-658.

The Court of Appeals held the policy was not ambiguous because the limits of liability provision for UIM coverage was only called for when there was coverage. *Id.* at 661. The exclusion therefore created a limited situation where no coverage was owed, but did not impede upon the payment of the full coverage "when the occurrence is covered by the Policy." *Id.* In distinguishing *Fanning v. Progressive*, 412 S.W.3d 360 (Mo. App. W.D. 2013), the *Naeger* Court held it was **not** faced with the ambiguity present in a UIM set off because:

> the Limits of Liability Provision used to calculate the extent of Farmers' liability are only relevant when the occurrence is covered by the Policy. If coverage for the accident is specifically excluded by the Non-Owned Vehicle Exclusion or the Other Insurance Clause, the Limits of Liability Provision are not invoked and any alleged inconsistencies are either non existent or irrelevant.

Id. at 661.[8] Here there is no dispute the injuries are covered under the policy. As such, the

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[8] On the actual issue before the Court, the Eastern District subsequent to *Naeger* held that in regard to UIM coverage set offs, ambiguity does exist when the insurer tries to reduce or eliminate policy limits such that the insurer would never pay the limits as understood by an ordinary insured. *Simmons v. Farmers Ins. Co., Inc.*, 479 S.W.3d 671, 677 (Mo. App. E.D. 2015).

limits of liability provision of the policy are "invoked" and the ambiguity between what the average insured would understand, and the slight of hand Owners wishes to employ is a significant and material difference.

Under *Naeger*, if the risk were covered, the full limits would have been paid, and no ambiguity would have existed. *Id.* Here, it is stipulated the coverage applies, and that the full coverage is called for due to the damages suffered. The ambiguity here, which the *Naeger* Court was quick to point out did not exist in that case, is that this is not an exclusion which takes away the coverage under "limited" circumstances, but instead a provision which under **every** possible circumstance takes away the coverage purchased. As this Court has noted multiple times, a UIM set off, unlike an exclusion, is not "limited" but instead pervasive and all encompassing. This is a material distinction between the cases and arguments made by Owners.

The other cases "principally" relied upon by Owners quite simply have nothing to do with UIM coverage set offs at all. *Todd v. Missouri United Schools Ins. Council*, 223 S.W.3d 156 (Mo. Banc 2007) involved whether or not a school district's liability policy provided coverage to a teacher for injuries he caused when assaulting a student. The decision in that case primarily hinged upon the fact the language the appellant was relying upon did not apply to the Coverage A for individuals, but instead only Coverage B which applied to the district only. *Id.* at 162-164. Further, the exclusion at issue was a limited exclusion from a broad grant of liability coverage for intentional, unlawful acts. *Id.* at 162. The *Todd* Court made

a point to note that exclusions or other limiting language of a policy is not prima fascia ambiguous if it is "limited" to certain circumstances. *Id.* at 163. Unlike *Todd*, Owners is not seeking to enforce an exclusion which eliminates UIM coverage in only a small portion of the broad grant of coverage. Instead, it seeks to eliminate in whole some of the coverage granted in every circumstance imaginable. There is nothing "limited" about the pervasive and all-encompassing set off Owners seeks to enforce in this case, and thus *Todd*, when read in context, is contrary to Owners' position.

Peters v. Farmers Ins. Co., 726 S.W.2d 749 (Mo. banc 1987) dealt with Uninsured Motorist (UM) coverage, and whether the injured insured's mother could claim a separate policy limit for her claim for loss of services for the injuries to her minor daughter, or instead, whether both claims were subject to one limit. Again, there was no issue in *Peters* of the insurer never paying the full coverage sold under any circumstances. Instead, this Court in *Peters* made quite clear that in circumstances like the present policy, where the policy benefits conferred in one part are sought to be taken away or reduced in another, such language is unquestionably "a problem" leading to ambiguity and coverage. *Id.* at 751.

Finally, *Floyd-Tunnell v. Shelter Mutual Ins. Co.*, 439 S.W.3d 215 (Mo. banc 2014) dealt with whether the insurer could limit uninsured motorist (UM) coverage to the statutory minimum for additional policies of insurance so as to reduce the amount of UM coverage which would stack. In *Floyd-Tunnell*, Shelter paid the full limits of coverage, $100,000.00, on the policy for the vehicle the insured was in when killed. *Id.* at 217. The drop down

exclusion thus applied in only the limited circumstances where the insured was in an owned vehicle which was not covered by the policy in question. *Id.* at 219. Thus, while in the specific circumstance at issue the coverage was reduced on two polices, the full policy limits were paid on the third. *Id.* at 217. Further, the drop down was limited in scope, applying not to every situation where UM coverage would apply, but only those circumstances where the insured was in an owned auto which was not covered by the policy in question. *Id.* at 219. The full coverage of the policy would therefore be paid if the insured auto was covered by the policy, if the insured were a pedestrian, or numerous other circumstances.

Citing *Todd*, this Court in *Floyd-Tunnell* held that a limited exclusion which does not reduce coverage in every circumstance is not per se ambiguous. *Id.* at 218-219. Again, the exclusion here is not limited, but applies a set off to every possible circumstance under the sun, ensuring that the coverage granted is never actually paid. Further, unlike in *Floyd-Tunnell*, there is no way for the insured to know how much of the coverage he or she bought will be reduced under the policy. If the at-fault driver had $200,000.00 of coverage, Owners' argument is that the insured would lose 80% of the coverage purchased. That is not a limited exclusion, but instead what the *Peters* Court decried as "a problem" of significant import.

The same inapplicability of authority applies to many of the other cases Owners cites in its brief. For instance, *Midwestern Indemnity Co. v. Brooks*, 779F.3d 540 (8th Cir. 2015) cited by Owners did not deal with whether the insured was entitled to the coverage set forth in the declarations, but instead whether the insured could stack all of her policies to create

$500,000.00 in coverage instead of the $100,000.00 set forth in the Declarations. *Id.* at 542-543. Similarly, *Jaudes v. Progessive Ins. Co.,* 11 F.Supp.3d 943 (E.D. Mo. 2014) did not involve the application of an offset to UIM coverage. Instead, it dealt with the issue of whether or not the vehicle which struck the insured was an underinsured vehicle under the definition of that term in the policy, and whether the insured could stack coverages, neither of which is at issue here. *Id.* at 946.

That Owners is required to "principally rely" on cases which quite literally have nothing to do with the issue before this Court speaks volumes about the authority for its position. This Court, as well as multiple Courts of Appeal, have on numerous occasions held it improper to attempt to sell coverage the insurer will never pays under any circumstance. These numerous opinions finding such attempts ambiguous fits perfectly with the facts and policy at issue here.

CONCLUSION

Owners sold the Craigs $250,000.00 of UIM coverage. Both before and after the policy went into effect, Owners repeatedly instructed the Craigs this was the amount of coverage they had bought and paid for. Owners initially trained the Craigs that the Declarations were where they should look to determine the limits of the UIM coverage they had purchased when selling the policy in question. Once sold, Owners again reinforced that they were selling, and the Craigs were purchasing, $250,000.00 of UIM coverage by sending only the Declarations, and asking the Craigs to review this carefully to confirm this was how

much UIM coverage they wished to purchase. Once the Craigs confirmed the Declarations properly set out the $250,000.00 of UIM coverage they wished to purchase, they were billed and paid for $250,000.00 of UIM coverage, and the policy went into effect. To argue when that same coverage comes due that Owners never really meant to provide the coverage it sold, based on language that was not provided to the Craigs until a week after the policy went into effect, is the very definition of both duplicity and taking away granted coverage.

While the above should be more than enough to require Owners pay the "promised" coverage, the ambiguity of Owners' policy does not end there. Instead, once the Craigs actually received the policy a week after it went into effect, Owners continued to direct the Craigs to the Declarations to convince them nothing was amiss with the coverage they had purchased. Again, the ambiguity this created would be sufficient by itself to affirm the Trial Court's judgment. When coupled with the prior conduct of Owners, and the intrinsic and all-pervasive ambiguity of set offs in UIM coverage due its unique nature, there should be no question that an "ordinary" insured would understand they had the full $250,000.00 of coverage they had selected, confirmed, purchased, and paid for.

Under the facts, the case authority, and general fairness, Owners should be required to provide the coverage it sold to the Craigs. The Trial Court's judgment requiring Owners pay the coverage it owed was in keeping with all three cases from this Court on similar matters, as well as the consensus opinions of the Courts of Appeals.

Respondents therefore would request the Court enter its opinion affirming the Trial

Court's grant of summary judgment.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Respondents' Substitute Brief, along with this Certificate of Service and Certificate of Compliance, was forwarded to counsel of record via **ECF**, **EMAIL**, and **U.S. MAIL** this 22nd day of November, 2016:

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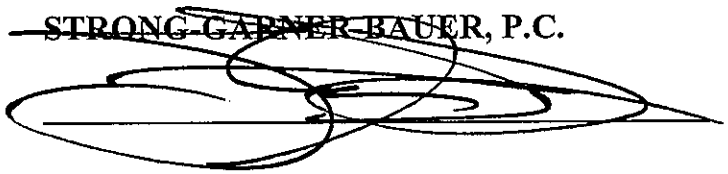
MO.R.CIV.P. 84.06(c) AND (g) CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Respondents' Brief complies with the limitations contained in Mo.R.Civ.P. 84.06(b). There are 12,715 words in the foregoing brief, according to the Corel Word Perfect X5 word count, the word processing software used to prepare the foregoing brief. A paper copy will be served on the attorney named in the *Certificate of Service* which appears on the page immediately preceding.

STRONG-GARNER-BAUER, P.C.



APPENDIX

Your Missouri Courts
THE JUDICIAL BRANCH OF STATE GOVERNMENT

Clerk Handbooks

Supreme Court Rules

Subject:	Rule 74 - Rules of Civil Procedure - Rules Governing Civil Procedure in the Circuit Courts - Judgments Orders and Proceedings Thereon	Section/Rule:	74.04
		Publication / Adopted Date:	May 22, 1987
Topic:	Summary Judgment	Revised / Effective Date:	July 1, 2008

74.04. Summary Judgment

(a) For Claimant. At any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment upon all or any part of the pending issues.

(b) For Defending Party. At any time, a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment as to all or any part of the pending issues.

(c) Motions and Proceedings Thereon.

(1) *Motions for Summary Judgment.* A motion for summary judgment shall summarily state the legal basis for the motion.

A statement of uncontroverted material facts shall be attached to the motion. The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts. An electronic copy of the statement of uncontroverted material facts in a commonly used medium, such as a diskette, CD-ROM or e-mail attachment, in a format that can be read by most commonly used word processing programs, such as Word for Windows or WordPerfect 5.x or higher, shall be served on the party to whom the motion for summary judgment is directed. In addition to the information normally in a certificate of service, the certificate of service shall also state the format of the electronic copy and the medium used to transmit the electronic copy to the responding party.

Attached to the statement shall be a copy of all discovery, exhibits or affidavits on which the motion relies.

Movant shall file a separate legal memorandum explaining why summary judgment should be granted.

(2) *Responses to Motions for Summary Judgment.* Within 30 days after a motion for summary judgment is served, the adverse party shall serve a response on all parties. The response shall set forth each statement of fact in its original paragraph number and immediately thereunder admit or deny each of movant's factual statements.

A denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.

Attached to the response shall be a copy of all discovery, exhibits or affidavits on which the response relies.

A response that does not comply with this Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement is an admission of the truth of that numbered paragraph.

The response may also set forth additional material facts that remain in dispute, which shall be presented in consecutively numbered paragraphs and supported in the manner prescribed by Rule 74.04(c)(1).

An electronic copy of the response shall be served as provided in Rule 74.04(c)(1).

The response may include a legal memorandum explaining the legal or factual reasons why summary judgment should not be granted.

(3) *Replies in Support of Motions for Summary Judgment.* Within 15 days after service of the response, the movant may file a reply memorandum of law explaining why summary judgment should be granted.

Within the same time, if the adverse party's response sets forth additional material facts that remain in dispute, movant shall set forth each additional statement of fact in its original paragraph number and immediately thereunder admit or deny each such factual statement. Denials shall be supported in the manner prescribed by Rule 74.04 (c)(2).

Within the same time, the movant may file a statement of additional material facts as to which movant claims there is no genuine issue. The statement shall be presented in consecutively numbered paragraphs and supported in the manner prescribed by Rule 74.04(c)(1).

An electronic copy of the reply shall be served as provided in Rule 74.04(c)(1).

Attached to the supplemental statement shall be a copy of any additional discovery, exhibits or affidavits on which the supplemental statement relies.

(4) *Sur-replies in Opposition to Motions for Summary Judgment.* Within 15 days of

service, if movant files a statement of additional material facts pursuant to Rule 74.04 (c)(3), the adverse party shall file a sur-reply. The sur-reply shall set forth each additional statement of fact in its original paragraph number and immediately thereunder admit or deny each such factual statement. The sur-reply shall be in the form and shall be supported in the manner prescribed by Rule 74.04(c)(2).

An electronic copy of the sur-reply shall be served as provided in Rule 74.04(c)(1).

Attached to the sur-reply shall be a copy of any additional discovery, exhibits or affidavits on which the sur-reply relies.

A sur-reply that does not comply with Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement of additional material facts is an admission of the truth of that numbered paragraph.

If the movant files a statement of additional material facts, the adverse party may file within the same time a sur-reply memorandum of law explaining the legal or factual reasons why summary judgment should not be granted.

(5) *Additional papers.* No other papers with respect to the motion for summary judgment shall be filed without leave of court.

(6) *Rulings on Motions for Summary Judgment.* After the response, reply and any sur-reply have been filed or the deadlines therefor have expired, the court shall decide the motion.

If the motion, the response, the reply and the sur-reply show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, the court shall enter summary judgment forthwith.

A summary judgment, interlocutory in character, may be entered on any issue, including the issue of liability alone, although there is a genuine issue as to the amount of the damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this Rule 74.04 judgment is not entered upon the whole case or for all the relief asked and a trial is necessary, the court by examining the pleadings and the evidence before it, by interrogating counsel, and by conducting a hearing, if necessary, shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavit.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that for reasons stated in the affidavits facts essential to justify opposition to the

motion cannot be presented in the affidavits, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavit Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any affidavit presented pursuant to this Rule 74.04 is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party presenting it to pay to the other party the amount of the reasonable expenses that the filing of the affidavit caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(Adopted May 22, 1987, eff. Jan. 1, 1988. Amended June 1, 1993, eff. Jan. 1, 1994; Sept. 28, 1993, eff. Jan. 1, 1994; February 27, 2002, eff. Jan. 1, 2003; Amended Dec. 18, 2007, eff. July 1, 2008)

COMMITTEE NOTE - 1959

This rule is the same as Rule 56 of the Federal Rules of Civil Procedure with the amendments to paragraphs (c) and (e) recommended by the Federal Advisory Committee in 1955; and with the addition of paragraph (h) to make clear that the procedure is not applicable where there is a factual issue to be determined by the court or jury. The reasons for the amendments to paragraphs (c) and (e) are stated by the Federal Advisory Committee as follows:

"Subdivision (c). The specific provision, made by the amendment, allowing summary judgment to be granted against the party who has moved therefore, is in accord with N.Y.C.P. Rule 113 and Wis.Stat. Sec. 270.635(3) (1951), as well as the urging of commentators. McDonald, Summary Judgments, 30 Tex.L.Rev. 285, 303 (1952); Clark, The Summary Judgment, 36 Minn.L.Rev. 567, 570-571 (1952); Comment, Summary Judgment, 25 Wash.L.Rev. 71, 76-77 (1950). It codifies a result already achieved by most federal courts. See 6 Moore's Federal Practice Par. 56.12 (2d ed. 1953); 3 Barron & Holtzoff, Fed.Prac. & Proc. § 1235 (1950) [See now, Wright, Federal Practice and Procedure: Civil].

"Subdivision (e). Some recent cases, particularly in the Third Circuit, have held that a mere allegation in the pleading is sufficient to create a genuine issue as to a material fact, and thus prevent summary judgment, even though the pleader has made no attempt to controvert affidavits and other evidentiary matter presented by his opponent; e. g., Frederick Hart & Co. v. Recordgraph Corp., 169 F.2d 580, 581 (3d Cir. 1948); Reynolds Metals Co. v. Metals Disintegrating Co., 8 F.R.D. 349 (D.N.J.1948), aff'd 176 F.2d 90 (3d Cir. 1949); Chappell v. Goltsman, 186 F.2d 215, 218 (5th Cir. 1950); and cases cited in 6 Moore's Federal Practice Par. 56.11[3], n. 16 (2d ed. 1953). This line of cases is termed "patently erroneous" in Note, 99 U. of Pa.L.Rev. 212, 214-215 (1950), citing many contrary authorities. The purpose of Rule 56 is to pierce the formal allegations of the pleadings and reach immediately the merits of the controversy. If pleading allegations are sufficient to raise a genuine issue as against uncontradicted evidentiary matter, this remedy then becomes substantially without utility. Engl v. Aetna Life Ins. Co., 139 F.2d 469, 473 (2d Cir. 1943). The view of most cases and commentators is that, where the motion for summary judgment is supported by depositions or affidavits, the opposing party must make a similar presentation to show the existence of a genuine issue of fact, or suffer judgment to be entered. 3 Barron & Holtzoff, Fed.Prac. & Proc. § 1235 (1950) [See, now, Wright Federal Practice and Procedure: Civil]. 6 Moore's Federal Practice 56.11[??], n. 21 (2d ed. 1953), and cases there cited; id. at 56.15[??]; Asbill & Snell, Summary Judgment Under the

Federal Rules--When An Issue of Fact Is Presented, 51 Mich.L.Rev. 1143, 1159-1165 (1953); Shientag, The Summary Judgment 24 (1941); Kennedy, The Federal Summary Judgment Rule, 13 Brooklyn L.Rev. 5 (1947); Comm., "Genuineness" of Issues on Summary Judgment, 4 Fed.Rules Serv. 940.

"The amendment to subdivision (e) states this last principle and thus makes it clear that pleading allegations cannot, in themselves, create a genuine issue of material fact when summary judgment is sought. By emphasizing the function of the motion for summary judgment, the amendment may stimulate more frequent and effective use of this device, as urged by the Judicial Conference of the United States, in its Report of Sept.1948, pp. 36-37, and by commentators. Yankwich, Summary Judgment under Federal Practice, 40 Calif.L.Rev. 204 (1952); Clark, Special Problems in Drafting and Interpreting Procedural Codes and Rules, 3 Vand.L.Rev. 493, 502-505 (1950); Clark, The Summary Judgment, 36 Minn.L.Rev. 567 (1952); Wright, Modern Pleading and the Pennsylvania Rules, 101 U. of Pa.L.Rev. 909, 936-937 (1953); Comment, Summary Judgment, 25 Wash.L.Rev. 71 (1950); Note, The Scope of Summary Judgment Under the Federal Rules, 5 Vand.L.Rev. 607 (1952); Note, Summary Judgments in the Federal Courts, 99 U. of Pa.L.Rev. 212 (1950); see McAllister, Pre-Trial Practice in the Southern District of New York, 12 F.R.D. 373, 378. Compare the holding that summary judgment granting specific performance can never be proper, for a party cannot be entitled to equitable relief as a matter of law, Seaboard Surety Co. v. Racine Screw Co., 203 F.2d 532 (7th Cir. 1953), with the grant of summary judgment of specific performance in Dale v. Preg, 204 F.2d 434 (9th Cir. 1953), and Palmer v. Chamberlin, 191 F.2d 532, 27 A.L.R.2d 416 (5th Cir. 1951), and as expressly authorized in N.Y.C.P. Rule 113. See also the grant of summary judgment of injunction in United States v. W. T. Grant Co., 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), and Houghton, Mifflin Co. v. Stackpole Sons, 113 F.2d 627 (2d Cir. 1940).

"The amended rule does not, of course, require the grant of summary judgment in a case where such judgment is not proper even though the facts be taken as in the moving party's affidavit.

"The court may deny the motion if for any reason summary judgment would be inappropriate, even though the opposite party has not submitted an affidavit. The court may order a continuance in accordance with the provisions of Rule 56(f) where a party makes a substantial showing by affidavit that he cannot then present the facts essential to justify his opposition to judgment."

Clerk Handbooks

Supreme Court Rules

Subject:	Rule 84 - Rules of Civil Procedure - Rules Relating to All Appellate Courts - Procedure in All Appellate Courts	Section/Rule:	84.04
		Publication / Adopted Date:	June 13, 1979
Topic:	Briefs - Contents	Revised / Effective Date:	January 1, 2013

84.04. Briefs - Contents

(a) **Contents.** The brief for appellant shall contain:

(1) A detailed table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with reference to the pages of the brief where they are cited;

(2) A concise statement of the grounds on which jurisdiction of the review court is invoked;

(3) A statement of facts;

(4) The points relied on;

(5) An argument, which shall substantially follow the order of the points relied on; and

(6) A short conclusion stating the precise relief sought.

(b) **Jurisdictional Statement.** Bare recitals that jurisdiction is invoked "on the ground that the construction of the Constitution of the United States or of this state is involved" or similar statements or conclusions are insufficient as jurisdictional statements. The jurisdictional statement shall set forth sufficient factual data to demonstrate the applicability of the particular provision or provisions of Article V, section 3, of the Constitution whereon jurisdiction is sought to be predicated. For example: "The action is one involving the question of whether the respondent's machinery and equipment used in its operations in removing rock from the ground are exempt from the state sales tax law as being machinery and equipment falling within the exemption provided by Section 144.030.3(4), and hence involves the construction of a revenue law of this state."

(c) **Statement of Facts.** The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument. Such statement of facts may be followed by a resume of the testimony of each witness relevant to the points presented.

All statements of facts shall have specific page references to the relevant portion of the record on appeal, i.e., legal file, transcript, or exhibits. If the matter cited is contained in the appendix, a page reference to the appendix shall be included.

(d) Points Relied On.

(1) Where the appellate court reviews the decision of a trial court, each point shall:

(A) identify the trial court ruling or action that the appellant challenges;
(B) state concisely the legal reasons for the appellant's claim of reversible error; and
(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]."

(2) Where the appellate court reviews the decision of an administrative agency, rather than a trial court, each point shall:

(A) identify the administrative ruling or action the appellant challenges;
(B) state concisely the legal reasons for the appellant's claim of reversible error; and
(C) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.

The point shall be in substantially the following form: "The [*name of agency*] erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error, including the reference to the applicable statute authorizing review*], in that [*explain why, in the context of the case, the legal reasons support the claim of reversible error*]."

(3) In an original writ proceeding, each point shall:

(A) state what relief the petitioner or relator seeks from the appellate court;
(B) identify the action that the petitioner or relator challenges;
(C) state concisely the legal reasons for the challenge to respondent's action; and
(D) explain in summary fashion why, in the context of the case, those legal reasons support the challenge.

For an action in prohibition, the point shall be in substantially the following form: "Relator is entitled to an order prohibiting Respondent from [*describe challenged action*], because [*state the legal reasons for the challenge*], in that [*explain why, in the context of the case, the legal reasons support the challenge*].". . . For other remedial writs, the introductory language should be altered appropriately.

(4) Abstract statements of law, standing alone, do not comply with this rule. Any reference to the record shall be limited to the ultimate facts necessary to inform the appellate court and the other parties of the issues. Detailed evidentiary facts shall not be included.

(5) Immediately following each "Point Relied On," the appellant, relator, or petitioner shall include a list of cases, not to exceed four, and the constitutional, statutory, and regulatory provisions or other authority upon which that party principally relies.

(6) If a party asserts error relating to damages, the party may assert its material effect on the judgment, including that the judgment is inadequate or excessive, in the same "Point Relied On."

(e) Argument. The argument shall substantially follow the order of "Points Relied On." The point relied on shall be restated at the beginning of the section of the argument discussing that point. The argument shall be limited to those errors included in the "Points Relied On." The argument shall also include a concise statement of the applicable standard of review for each claim of error. If a point relates to the giving, refusal or modification of an instruction, such instruction shall be set forth in full in the argument portion of the brief.

Long quotations from cases and long lists of citations should not be included.

All factual assertions in the argument shall have specific page references to the relevant portion of the record on appeal, i.e., legal file, transcript, or exhibits. If the matter cited is contained in the appendix, a page reference to the appendix shall be included.

(f) **Respondent's Brief.** The respondent's brief shall include a detailed table of contents and table of authorities as provided by Rule 84.04(a)(1) and an argument in conformity with Rule 84.04(e). If the respondent is dissatisfied with the accuracy or completeness of the jurisdictional statement or statement of facts in the appellant's brief, the respondent's brief may include a jurisdictional statement or statement of facts.

The argument portion of the respondent's brief shall contain headings identifying the points relied on contained in the appellant's brief to which each such argument responds. The respondent's brief may also include additional arguments in support of the judgment that are not raised by the points relied on in the appellant's brief.

(g) **Reply Briefs.** The appellant may file a reply brief but shall not reargue points covered in the appellant's initial brief.

(h) **Appendix.** A party's brief shall contain or be accompanied by an appendix containing the following materials, unless the material has been included in a previously filed appendix:

(1) The judgment, order, or decision in question, including the relevant findings of fact and conclusions of law filed in a judge-tried case or by an administrative agency;

(2) The complete text of all statutes, ordinances, rules of court, or agency rules claimed to be controlling as to a point on appeal; and

(3) The complete text of any instruction to which a point relied on relates.

An appendix also may set forth matters pertinent to the issues discussed in the brief such as copies of exhibits, excerpts from the written record, and copies of new cases or other pertinent authorities.

The appendix shall have a separate table of contents. If the appendix contains fewer than 30 pages, it shall be bound into the back of the party's brief. If the appendix is 30 pages or more, it shall be separately bound and shall have the same color cover as the brief it accompanies.

The pages in the appendix shall be numbered consecutively beginning with page A1. The pages in the appendix shall not be counted as a part of the brief. An appendix shall not be subject to Rule 84.06(g) relating to disks.

The inclusion of any matter in an appendix does not satisfy any requirement to set out such matter in a particular section of the brief.

(i) **Cross Appeals.** If a cross appeal is filed, the plaintiff in the court below shall be deemed the appellant for purposes of this Rule 84.04, unless the parties otherwise agree or the court otherwise orders. The appellant's initial brief shall be filed as otherwise provided in this Rule 84.04 and Rule 84.05. The respondent's initial brief shall contain the issues and argument involved in the respondent's appeal and the response to the brief of the appellant. The appellant may file a second brief in response to the respondent's brief setting forth respondent's appeal and in reply to the respondent's brief opposing appellant's appeal. The respondent may file a reply brief in reply to appellant's response to the issues presented by respondent's appeal. The briefs otherwise shall comply with Rule 84.06. No further briefs shall be filed without leave of the court.

(Adopted June 13, 1979, effective Jan. 1, 1980. Amended July 27, 1979; Amended June 1, 1993, eff. Jan. 1, 1994; Sept. 28, 1993, eff. Jan. 1, 1994; May 15, 1998, eff. Jan. 1, 1999; May 27, 1999, eff. Jan. 1, 2000; May 26, 2000, eff. Jan. 1, 2001; Dec. 15, 2000, eff. July 1, 2001; May 16, 2001, eff. July 1, 2001; May 23, 2001,

eff. Jan. 1, 2002; January. 28, 2002, eff. Jan. 1, 2003; June 21, 2005, eff. Jan. 1, 2006; Dec. 18, 2007, eff. July 1, 2008; June 28, 2011, eff. Jan. 1, 2012; May 30, 2012, eff. Jan. 1, 2013.)

COMMITTEE NOTE - [REPEALED]

(Repealed June 1, 1993, effective January 1, 1994.)

AGENCY 05-0742-00 POLICY 44-771-333-00 13691 (12-07)

INSURORS OF THE OZARKS
2104A E SUNSHINE ST
SPRINGFIELD MO 65804

09-20-2013

Your agency's phone number is (417) 881-0430

Auto-Owners Insurance
Life Home Car Business
The Right Choice. Right.

P.O. BOX 30660, LANSING, MICHIGAN 48909-8160 • 517-323-1200
AUTO-OWNERS INSURANCE COMPANY
AUTO-OWNERS LIFE INSURANCE COMPANY
HOME-OWNERS INSURANCE COMPANY
OWNERS INSURANCE COMPANY
PROPERTY-OWNERS INSURANCE COMPANY
SOUTHERN-OWNERS INSURANCE COMPANY

DR CHRIS CRAIG
VICKI CRAIG
1613 S NATIONAL AVE
SPRINGFIELD MO 65804-1121

You may view your policy online at www.auto-owners.com. To enroll, use the policy number 44-771-333-00 and Personal ID code V9A 7P6 1R7 . Once enrolled, you may choose to stop receiving the paper policy in the mail.

* * * * * * * THIS IS NOT A BILL. * * * * * * *

Please pay any unpaid bills. Your bill will be mailed separately from Lansing, Michigan on or about October 12, 2013.

AN IMPORTANT MESSAGE FOR YOU (CONTINUES ON REVERSE SIDE)

Thank you for selecting Auto-Owners Insurance Group to serve your insurance needs! Your policy comes with an agent. Feel free to contact your independent Auto Owners agent with questions you may have about your insurance needs.

Enclosed is your policy Declarations. **Please review your policy carefully to be sure that the policy accurately shows the coverages you have selected and contact your agent if you need to update your coverages.**

Please take this opportunity to review your insurance needs with your Auto-Owners agent. Auto-Owners and its affiliate companies offer a variety of programs. Each program has its own eligibility requirements, coverages and rates. You should discuss with your agent which company and program are most appropriate for your insurance needs.

Auto-Owners Insurance Group wants to write all of your eligible insurance coverages, and we are pleased to offer generous **Multi-Policy Discounts** when you place your automobile, home, personal liability umbrella insurance, life insurance, annuities, disability income or long term care insurance with us.

EXHIBIT # B

Auto-Owners Insurance Company was formed in 1916 and now the Auto-Owners Insurance Group comprises five property and casualty companies and a life insurance company. Auto-Owners Insurance Group property and casualty companies enjoy the highest possible ratings assigned by nationally recognized rating authorities.

Owners

19020 (10-80)
Issued 09-20-2013
Policyholder since 2003
AUTOMOBILE POLICY DECLARATIONS

INSURANCE COMPANY
5101 ANACAPRI BLVD., LANSING, MI 48917-3999

Renewal Effective 10-31-2013

AGENCY INSURORS OF THE OZARKS
05-0742-00 MKT TERR 033 (417) 881-0430

POLICY NUMBER 44-771-333-00

Company Use 75-06-MO-0310

INSURED DR CHRIS CRAIG
VICKI CRAIG

Company Bill

POLICY TERM
12:01 a.m. 10-31-2013 to 12:01 a.m. 10-31-2014

ADDRESS 1613 S NATIONAL AVE

SPRINGFIELD MO 65804-1121

In consideration of payment of the premium shown below, this policy is renewed. Please attach this Declarations and attachments to your policy. If you have any questions, please consult with your agent.

DESCRIPTION OF ITEM INSURED	TERRITORY
1. 2008 HOND ACCORD EX-L VIN: 1HGCP368X8A000862	006 Greene County, MO

COVERAGES	LIMITS	PREMIUM
Bodily Injury	$ 500,000 person/$ 500,000 occurrence	$535.54
Property Damage	$ 100,000 occurrence	243.54
Uninsured Motorist	$ 250,000 person/$ 500,000 occurrence	19.80
Underinsured Motorist	$ 250,000 person/$ 500,000 occurrence	25.85
Medical Payments	$ 10,000 person	44.14
Comprehensive	Actual Cash Value - $ 500 deductible - Full Glass	223.56
Collision	Actual Cash Value - $ 500 deductible (with waiver)	600.56
Road Trouble Service	$ 75 occurrence	4.07
Additional Expense	$ 30/Day, $ 900 Maximum	16.69
	TOTAL	$1,713.75

Interested Parties: See Attached Schedule
Additional Forms For This Item: 79730 (07-06) 79338 (07-10) 79339 (07-10) 79402 (07-94) 79527 (06-92) 79536 (07-94) 79537 (06-92) 79620 (03-99) 79939 (03-05)

ITEM DETAILS: Automobile driven to work or school 3 miles or less by a 18 year old unmarried male - principal operator.
Cost Symbol: 15-3B-15-3B-01.
5% ABS Discount applies to BI, PD, and Coll premiums.
Good Student Discount I applies.
Multi-Car Discount applies.
35% Air Bag Discount applies to Med Pay premium.
Rate Effective Date 05-09-2013

150

19020 (10-80)
Issued 09-20-2013

OWNERS INS. CO.

AGENCY INSURORS OF THE OZARKS
05-0742-00 MKT TERR 033

Company POLICY NUMBER 44-771-333-00
Bill Company Use 75-08-MO-0310

INSURED DR CHRIS CRAIG

Term 10-31-2013 to 10-31-2014

2. 2012 FORD FUSION SE
VIN: 3FAHP0HA3CR231299

006
Greene County, MO

COVERAGES	LIMITS	PREMIUM
Bodily Injury	$ 500,000 person/$ 500,000 occurrence	$146.10
Property Damage	$ 100,000 occurrence	68.44
Uninsured Motorist	$ 250,000 person/$ 500,000 occurrence	23.87
Underinsured Motorist	$ 250,000 person/$ 500,000 occurrence	31.17
Medical Payments	$ 10,000 person	31.31
Comprehensive	Actual Cash Value - $ 500 deductible - Full Glass	148.97
Collision	Actual Cash Value - $ 500 deductible (with waiver)	192.64
Road Trouble Service	$ 75 occurrence	2.25
Additional Expense	$ 30/Day, $ 900 Maximum	11.02
	TOTAL	$853.77

Interested Parties: See Attached Schedule
Additional Forms For This Item: 79730 (07-06) 79338 (07-10) 79339 (07-10)
79402 (07-94) 79527 (06-92) 79536 (07-94) 79537 (06-92) 79620 (03-99)
79939 (03-05)

ITEM DETAILS: Automobile driven to work or school 3 miles or less by a 54 year old operator.
Cost Symbol: 25-2A-30-6A-00.
5% Anti-Theft Device Discount applies to Comprehensive premium.
5% ABS Discount applies to BI, PD, and Coll premiums.
Multi-Car Discount applies.
35% Air Bag Discount applies to Med Pay premium.
Rate Effective Date 05-09-2013

150

Owners

19020 (10-80)
Issued 09-20-2013
Policyholder since 2003
AUTOMOBILE POLICY DECLARATIONS

INSURANCE COMPANY
6101 ANACAPRI BLVD., LANSING, MI 48917-3999

Renewal Effective 10-31-2013

AGENCY INSURORS OF THE OZARKS
05-0742-00 MKT TERR 033 (417) 881-0430

POLICY NUMBER 44-771-333-00

Company Use 75-06-MO-0310

INSURED DR CHRIS CRAIG
VICKI CRAIG

Company Bill

POLICY TERM
12:01 a.m. 10-31-2013 to 12:01 a.m. 10-31-2014

ADDRESS 1613 S NATIONAL AVE
SPRINGFIELD MO 65804-1121

In consideration of payment of the premium shown below, this policy is renewed. Please attach this Declarations and attachments to your policy. If you have any questions, please consult with your agent.

DESCRIPTION OF ITEM INSURED	TERRITORY TERM
TOTAL POLICY PREMIUM	$2,367.52
PAID IN FULL DISCOUNT	-260.44
TOTAL POLICY PREMIUM IF PAID IN FULL	$2,107.08

The Paid In Full Discount is based on favorable loss experience for the collective group of policyholders who choose to pay their premium in full directly to the company.

Forms That Apply To All Items:
79001 (03-99) 79273 (09-08) 79711 (10-06)
79609 (06-97) 89058 (04-07) 89177 (07-08) 89023 (07-06) 89024 (07-06)
89369 (06-11)

Policy Rate Code 0002
Auto/Home Multi-policy discount.
Auto/Umbrella Multi-policy discount.
Insurance Score: X888

19020 (10-80)
Issued 09-20-2013

OWNERS INS. CO.

AGENCY INSURORS OF THE OZARKS
05-0742-00 MKT TERR 033

Company POLICY NUMBER 44-771-333-00
B111 Company Use 75-06-MO-0310

INSURED DR CHRIS CRAIG

Term 10-31-2013 to 10-31-2014

SCHEDULE OF INTERESTED PARTIES

Applies to Item(s): 0001, 0002

COMMUNITY FINANCIAL CREDIT UNION
815 W TAMPA ST
SPRINGFIELD MO 65802-4062
Interest: Lienholder

SIP ID: MO010076