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Recommended Citation
Brief of Appellee, *Christiansen v. Farmers Insurance Exchange*, No. 20030836.00 (Utah Supreme Court, 2003).
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IN THE SUPREME COURT OF THE STATE OF UTAH

BYRON CHILD CHRISTIANSEN and MERRILEE CHRISTIANSEN, husband and wife, Plaintiffs/Appellees, vs. FARMERS INSURANCE EXCHANGE, Defendant/Appellant.	Appellate Court No. 20030836-SC District Court No. 030908140

BRIEF OF PLAINTIFFS/APELLEES BYRON CHILD CHRISTIANSEN AND MERRILEE CHRISTIANSEN ON THE INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT COURT, HONORABLE JOSEPH C. FRATTO, JR.

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FILED
UTAH APPELLATE COURTS
APR 23 2004

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JURISDICTION

Jurisdiction of this matter is properly before this Court pursuant to Article VIII, Section 3 of the Constitution of Utah and Utah Code Annotated §78-2-2.

ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court abuse its discretion in granting the Christiansen' Motion to Compel Farmers' Responses to Requests for Admissions and Requests for Production?

2. Did the Trial Court abuse its discretion in denying Farmers' Motion to Stay the Bad Faith Action?

Except for a difference in the standard of review, the issues above are the same as those listed by Farmers under Issues Presented for Review in its original Petition for Permission to Appeal Interlocutory Order, page 4. Such are the issues which this Court specifically agreed to address when it granted Farmers' Petition for Permission to Appeal Interlocutory Order on December 10, 2003.

Perhaps in an effort to avoid the "abuse of discretion" standard of review discussed in detail hereafter, Farmers has chosen in its Brief on Appeal to modify the issues that it originally presented for review, which issues formed the basis for this Court's Order granting the Petition for Permission to Pursue Interlocutory Appeal in the first place.

The Christiansens request that this Court consider addressing the permitted issues as originally presented for review.

STANDARD OF REVIEW

The appropriate standard of review of a trial court's ruling on a motion to compel discovery is the "abuse of discretion" standard (*Archeleta v. Hughes*, 969 P.2d 409, 414 (UT 1998); and *Roundy v. Staley*, 984 P.2d 404 (UT App. 99)). Indeed, trial courts have broad discretion in matters of discovery, and an appellate court will not find an abuse of discretion absent an erroneous conclusion of law or where there is no evidentiary basis for the trial court's ruling (*Askew v. Hardman*, 918 P.2d 469 (UT 1996)).

As to the second issue of whether the Trial Court properly denied Defendant Farmers' Motion for Stay, determination of the appropriate standard of review is more complicated. The decision of whether to grant or deny a motion for stay is controlled, in part, by § 78-31a-108(7) Utah Code Annotated, which states as follows:

> "If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court *may* limit the stay to that claim." (Emphasis added.)

A trial court's interpretation of a statute is generally "reviewed for correctness" (as in *Lieber v. ITT Hartford Insurance Center, Inc.*, 15 P.3d 1030 (UT 2000)). However, built into this particular statute is an express grant of discretion to the trial

court. Specifically, "the court may limit the stay to that claim [i.e., the claim being arbitrated]." That is precisely the way the Trial Court exercised its discretion in this case, - it limited the stay to the UIM claim which was diverted into arbitration. In severing the claims and limiting the stay to the UIM claim in arbitration, the Trial Court specifically referenced the statutory grant of discretion in its Minute Entry ("the court is afforded discretion in the statute . . .") (R. 174).

Where a trial court is expressly vested with discretion, the appropriate point on the standard of review spectrum should fall closer to an "abuse of discretion" standard than to "de novo" review or "review for correctness". This conclusion is stressed in the in-depth standard of review tutorial provided by this Court in the case of *State v. Pena*, 869 P.2d 932 (UT 1994), wherein the Court explained: "At this point, *we must attempt to determine when the articulated legal rule to be applied to a set of facts* - - a rule that we establish without deference to the trial courts - - *embodies a de facto grant of discretion which permits the trial court to reach one of several possible conclusions about the legal effect of a particular set of facts without risking reversal.*" (Italics added.)

Simply put, a statutory grant of discretion to the trial court favors use of the "abuse of discretion" standard of review. This principle was followed by the Utah Supreme Court in the case of *Lund v. Brown*, 11 P.3d 277 (UT 2000), where the high court reviewed a trial court's exercise of discretion afforded by Rule 60(b) Utah Rules

of Civil Procedure, in refusing to vacate a default judgment. Although the Justices cautioned that the Trial Court's discretion is not unlimited, the *Lund* Court concluded, "We review the Trial Court's decision in the instant case for abuse of discretion".

While Plaintiffs' agree with the Court's observation in *State v. Pena*, 869 P.2d 932 (UT 1994) that the answer to the standard of review question is not always black and white, Plaintiffs' urge this Court to acknowledge the discretion afforded trial courts in the Arbitration/Severance/Stay of Claims Statute and, accordingly, apply something approaching the "abuse of discretion" standard of review to the Trial Court's decision to limit the Stay to the UIM claim in arbitration.

PRESERVATION OF THE ISSUES IN THE TRIAL COURT

The issues presented on appeal were preserved by Defendant's Motion to Compel Arbitration and Request to Stay Breach of Contract, Bad Faith and Associated Causes; Defendant's Opposition to Plaintiffs' Motion to Compel and Request for a Protective Order pursuant to Rule 26(c) (R. 117-127)' and Defendant's Motion for Reconsideration (R. 177-178, 180-199).

DETERMINATIVE STATUTE

Section 78-31a-108(7) If the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may limit the stay to that claim.

History: C. 1953, 78-31a-108, enacted by L. 2002, ch. 326 § 8. Effective dates. Laws 2002, ch 326, § 34 makes the act effective on May 15, 2003.

STATEMENT OF THE CASE

Nature Of The Case: This is a first-party breach of contract lawsuit filed by Byron and Merrilee Christiansen against their own auto insurance carrier, Farmers Insurance Exchange.

In their Complaint, the Christiansen's stated two separate causes of action that are relevant to this appeal. The first was an action to enforce Farmers' contractual obligation to pay underinsured motorist (hereinafter "UIM") benefits to the Christiansens pursuant to the *written* provisions of the policy, in return for the Christiansens' payment of insurance premiums. That first claim stems from injuries Mr. Christiansen sustained when he was rear ended by an underinsured motorist on May 10, 2001. Farmers' obligation as to this first claim arose when the other driver's insurance company tendered inadequate liability policy limits, and the Christiansens filed a claim under their own Farmers UIM coverage for the remaining damages. Farmers failed to pay the UIM claim, or to even take a position as to the claim, which forced this cause of action to collect the Christiansens' UIM benefits.

The Christiansens' Second Cause of Action is for Farmers' first-party breach of *implied* contractual duties; namely, Breach Of The Implied Covenant Of Good Faith And Fair Dealing. As alleged, such duties include, "among others, duties to diligently

investigate the facts to determine if their claims are valid, duties to fairly evaluate their claims, duties to act promptly and reasonably in rejecting or settling their claims, duties to avoid conflicts of interest, and duties to refrain from actions which would injure Byron or Merrilee Christiansens' ability to promptly obtain appropriate UIM compensation" (R. 5).

The Christiansens' Second Cause of Action includes allegations that Farmers breached its good faith, implied contractual duties to the Christiansens, as well as allegations that Farmers instituted and followed, "a general bad faith business practice of compelling its own insureds to institute litigation or arbitration before granting reasonable settlement authority, or any dollar settlement authority, thereby deliberately delaying fair and equitable settlement of first-party claims in which liability is reasonably clear" (R. 6).

Relative to the Christiansens' second claim for breach of these implied, good faith duties, Farmers provided sworn Responses to Requests for Admissions wherein Farmers admitted to the liability of the adverse driver, and further admitted that 1) Farmers never communicated any denial of the Christiansens' UIM claim; 2) Farmers never communicated any settlement authority in connection with the Christiansens' UIM claim; and 3) Farmers never joined in any settlement negotiations in connection with the Christiansens' UIM claim (R. 212–214). Consequently, this case has never involved a true dispute as to the value of the claim because in the 16 months from the

time the Christiansen's claim was presented, until the arbitrator awarded benefits, Farmers never took a position on whether the claim was payable, and if so, in what amount.

Both of the Christiansens' causes of action are for breach of first-party insurer contractual duties. In order to avoid confusion, the Christiansens will hereinafter refer to their first claim as a cause of action for "breach of written contract", and to their second claim as a cause of action for "breach of implied contract".

Course Of Proceedings: Upon receiving Plaintiffs' Complaint, Farmers filed its Answer and a jury demand. A Scheduling Order was agreed upon and entered by the Court. Both parties commenced discovery, with Farmers sending out sixteen Notices of Records Depositions, and the Christiansens serving ten Requests for Admissions, one Interrogatory, and ten Requests for Production of Documents, including a request for a certified copy of the Christiansens' Farmers Insurance Policy. Within one week of seeing the Christiansens' discovery requests (responses to which the Christiansens eventually moved to compel), Farmers filed a Motion to Compel Arbitration and Stay the Christiansens' causes of action. After receiving from Farmers a copy of the Christiansens' policy, and reviewing the arbitration provision, the Christiansens agreed to stipulate to arbitration of their breach of written contract claim, but maintained their opposition to arbitration and stay of their breach of implied contract claim, which was outside the scope of the contractual arbitration provision (R. 99 – 116). Meanwhile,

Farmers filed a Motion for Protective Order relative to the Christiansens' discovery requests, which requests related to both causes of action.

Disposition In The Court Below: The Trial Court granted the Christiansens' Motion to Compel Farmers' Responses to Requests for Admissions, and Farmers filed Supplemental Responses to the Requests for Admissions. The Court reserved its ruling on Farmers' Motion for Protective Order in connection with the Requests for Production of Documents until later, when Farmers provided the Court with a copy of those requests (at which time Farmers' Motion for Protective Order was denied, except as to Request for Production 10). Additionally, the Court relied on the Severance Statute at Utah Code Annotated § 78-31a-108(7) to sever the UIM claim from the litigation and into arbitration, and to limit the Stay to the UIM claim in arbitration, allowing the claim for breach of implied contract to proceed in District Court.

Farmers then filed a Motion for Reconsideration. The Court denied that. Meanwhile Farmers had filed a Petition for Permission to Appeal Interlocutory Order Compelling Discovery and Denying Farmers' Motion to Stay the Action for Breach of the Implied Covenant of Good Faith and Fair Dealing. Since that Motion was still pending before the Supreme Court, Farmers requested that the Trial Court stay its above-described Orders until an Order was received from the Supreme Court on the pending Petition. The Court denied that request. Farmers then filed a Motion for

Expedited Stay with the Utah Supreme Court, which was granted, pending a decision on the Petition for Interlocutory Appeal.

The parties arbitrated the Christiansens' breach of written contract claim, resulting in Arbitrator Scott Daniels' December 8, 2003 award to the Christiansens of $74,867.50 in UIM benefits. Two days later, without notice of the arbitration award, the Utah Supreme Court granted Farmers' Petition for Permission to Appeal the Interlocutory Orders. Given the interim Arbitration Award, the Christiansens' filed a Motion to Set Aside Permission to Appeal the Interlocutory Orders based on mootness resulting from the change in circumstances, which motion was denied.

Statement Of The Facts: On May 10, 2001, Byron Christiansen was injured in a clear liability rear end motor vehicle accident. Within one week of the accident, Mr. Christiansen was examined by neurosurgeon John Sanders, who scheduled Mr. Christiansen for accident-related anterior cervical discectomy and fusion with plating at C4-5 to be performed on June 6, 2001. After obtaining a second opinion from neurosurgeon J. Charles Rich, Mr. Christiansen opted to try to postpone the surgery, or hopefully avoid it all together, by pursuing conservative treatment (R. 64–65).

The adverse driver's auto insurer, State Farm, tendered its $50,000.00 liability policy limits within 30 days of receiving Mr. Christiansen's June 25, 2002 settlement demand package (R. 61–69). Within a week of the tender, the Christiansens' own auto insurer, Farmers Insurance Exchange, consented to the liability policy limits settlement

and waived no-fault subrogation as to the $3,000.00 in medical payments and $4,750.00 in lost wages it had advanced (R. 71), thereby acknowledging that the value of Mr. Christiansen's damages exceeded the $50,000.00 liability policy limits by at least $7,750.00.

On August 19, 2002, the Christiansens sent Farmers their $100,000.00 UIM policy limits settlement demand package. They enclosed all of the same accident-related medical records, reports and bills that had triggered State Farm's prompt tender, including Dr. Rich's future neck surgery cost estimates (R. 73, 74). On October 24, 2002, Farmers (through attorney Michael Hansen) requested Mr. Christiansen's tax returns for the last five years, Mr. Christiansen's sworn statement, and documentation of Mr. Christiansen's participation in pre-accident racquetball tournaments (R. 76). Within one week thereafter, Mr. Christiansen gave his sworn statement, provided his tax returns, and provided the documentation of his racquetball tournaments before the accident (R. 78, 80). During Mr. Christiansen's November 1, 2002 sworn statement, Farmers requested all of Mr. Christiansen's radiological films. The films were copied and provided to Farmers on November 12, 2002, with a letter, once again, asking for Farmers' position on the UIM claim (R. 82). On November 25, 2002, Mr. Christiansen sent Farmers an updated medical report from his primary physician documenting his ongoing care. In the cover letter to that report, Mr.

Christiansen once again asked Farmers for its position concerning the UIM claim (R. 85, 86).

In a December 26, 2002 letter to Farmers, Mr. Christiansen reviewed his compliance with all of Farmers' requests for additional information. Mr. Christiansen reminded Farmers that a reasonable time for a reply to his UIM claim had passed, and Mr. Christiansen warned Farmers that in the absence of a responsible reply within a reasonable time, Mr. Christiansen would file a lawsuit against Farmers for his UIM benefits and for breach of Farmers implied covenant of good faith and fair dealing, in accordance with *Beck v. Farmers Insurance Exchange*, 701 P.2d 795 (UT 1985) (R. 88, 89). Still no reply.

On February 28, 2003 (six and one-half months after the UIM claim was presented), Farmers requested a list of all of Mr. Christiansen's pre-accident doctors. Mr. Christiansen provided the requested list to Farmers on March 11, 2003 (R. 92–93). Although it is not yet a matter of record on appeal, Mr. Christiansen's production of the list did not trigger any medical record requests by Farmers.

After waiting in vain for nearly eight months for Farmers to take a position on their UIM claim, the Christiansens filed suit in Third District Court on April 11, 2003. At the time suit was filed, no requests for additional information were pending. Farmers had made no requests for additional information during the 30 days prior to filing.

Fourteen months after the Christiansens submitted their UIM claim to Farmers, in Farmers' October 15, 2003 Supplemental Responses to Requests for Admissions, Farmers claimed it still had, "insufficient information to determine the liability of others involved in the accident"; and "insufficient information to make an evaluation as to Plaintiff's entitlement to underinsured motorist benefits." (R. 213.)

During the 16 month pendency of the Christiansens' UIM claim their health insurance was cancelled for non-payment because they could no longer afford the premiums (R. 240, p 20).

Because of the loss of the Christiansen's health insurance, and because Dr. Rich required payment of his surgeon's fee "up front" before performing the surgery, Dr. Rich's fee was paid entirely from the December 8, 2003 Arbitration Award, and Byron Christiansen finally underwent neck surgery on December 19, 2003, over two and one-half years after it was originally scheduled.

For the facts concerning the Course of Proceedings, and the Disposition in the Court Below, please refer to those subheadings in the preceding pages.

SUMMARY OF ARGUMENTS

This Court's November 2003 Stay pending resolution of the Petition for Interlocutory Appeal effectively resolved the issues on appeal by postponing the bad faith proceedings just long enough for the arbitration to conclude. The questions

presented for interlocutory review are now moot. For purposes of this case, it no longer matters whether the Trial Court was correct.

Farmers agrees that the Arbitration Award satisfied any alleged need for the Christiansens to demonstrate "legal entitlement" to UIM benefits before proceeding further in the bad faith litigation (See Farmers' Brief, pages 39, 40, 49). Likewise, the final resolution of the arbitration removed any potential for discovery in one side of the case to prejudice the other. Farmers' Supplemental Responses to Requests for Admissions compelled by the Trial Court did not affect the arbitration. Nor has Farmers claimed any such effect. Now that the arbitration is over, the only claim remaining is that before the Trial Court for breach of implied, good faith duties. Resuming appropriate discovery by lifting this Court's Stay of the Trial Court's Order denying Farmers' Motion for Protective Order no longer has any arguable potential to prejudice the arbitration. The Stay served its purpose and should now be lifted. No further analysis is needed, as far as this case is concerned.

On the other hand, should this Court decide to use this as an opportunity to provide further clarification and direction to others facing similar circumstances and issues in the future, the balance of the Christiansens' Brief will be devoted to those issues.

The Christiansens' First Cause of Action for Breach of the *Written* Contract, and the Christiansens' Second Cause of Action for Farmers' Breach of the *Implied*

Contract are two separate and independent causes of action, either one of which may stand alone on its own, in the absence of the other (*Beck v. Farmers Insurance Exchange* 701 P.2d 795 (UT 1985)).

Inspite of *Beck*, Farmers argues that the Christiansens' claim for breach of the implied good faith covenant is not a separate and independent cause of action, and may not stand on its own. Specifically, Farmers argues that the courts must superimpose "legal entitlement" and "breach of written contract" showings (which relate to the insurance policy and the UIM statute), on top of the requisite "breach of implied contract" factors outlined in *Beck*, in order for the Christiansens to pursue the breach of implied contract claim.

Farmers has failed to produce Utah caselaw involving a cause of action for breach of the implied covenant of good faith wherein a court held "legal entitlement" and/or "breach of the written contract" to be prerequisites to pursuit of the breach of implied contract claim. Nor has counsel for the Christiansens been able to find any such legal authority. In the absence of such authority, Farmers has resorted to reliance on two groups of cases, which are simply not on point. The first is a group of Utah cases including *Lyon v. Hartford*, *Lima v. Chambers*, *Peterson v. Utah Farm Bureau Insurance*, *Chatterton v. Walker*, *Leiber v. ITT Hartford Insurance*, and *Estate of Berkemeir v. Hartford Insurance*, none of which involved any cause of action for breach of the implied covenant of good faith and fair dealing. Thus, such breach of

written contract cases cannot offer legitimate support to Farmers' argument that such cases establish "legal entitlement" and "breach of written contract" prerequisites to maintenance of any cause of action for breach of implied contract.

The second group of cases on which Farmers' relies are "legal entitlement" cases from other states where no *Beck* remedy exists, even to this day. Some of those other states recognize statutory bad faith causes of action. Some of them recognize bad faith tort causes of action. But none of them recognize the *Beck* breach of implied covenant of good faith and fair dealing remedy controlling in Utah. Consequently, cases from outside Utah are simply not very helpful in determining how and when the *Beck* remedy applies.

Farmers also argues that the *Beck* case itself supports a required showing of "legal entitlement" and "breach of written contract" before pursuit of a claim for breach of the implied covenant of good faith. Importantly, however, the term "legal entitlement" is never mentioned, much less established as a prerequisite, in the *Beck* opinion.

In Point IV of Farmers' Brief on Appeal, Farmers argues that, despite the Christiansens' $75,000.00 award in the breach of written UIM contract claim that they arbitrated, the Christiansens are still precluded from resuming pursuit of their bad faith claim because a) the UIM claim was "fairly debatable"; and b) Farmers' breach of the implied duties of good faith resulted in no real damages to the Christiansens.

As will be explained hereafter in further detail, the "fairly debatable" defense presumes both parties took opposing positions. Farmers never did. By its own admission, Farmers never took a position. That failure at once serves to disqualify Farmers from maintaining the "fairly debatable" defense, while at the same time constituting an independent and actionable breach of its implied good faith duties.

As to damages, they have been properly alleged. For purposes of this appeal, that is all that is necessary.

ARGUMENT

HAVING SERVED ITS PURPOSE, THE STAY OF THE CHRISTIANSENS' CLAIM FOR FARMERS' BREACH OF IMPLIED CONTRACT SHOULD BE LIFTED, AND DISCOVERY SHOULD PROCEED AS PREVIOUSLY ORDERED BY THE TRIAL COURT.

POINT I: The Issues On Appeal Are Moot.

It is undisputed that the Christiansens were found to be "legally entitled" to UIM benefits in arbitration (see Satisfaction of Arbitration Award dated December 15, 2003, Farmers' Addendum A1). At the bottom of page 31 of Farmers' Brief on Appeal, it stated, "Inasmuch as the arbitration award issued after this Court granted Defendant's Petition to Appeal Interlocutory Order established Plaintiffs' "legal entitlement' to UIM benefits, ..." Still referring to this case, Farmers again acknowledged on page 49 of its Brief on Appeal, "Similarly, in this case, the insurance company promptly paid the benefits owing *once a finding of "legal entitlement" to the*

UIM benefits was made by the arbitrator, ..." (Emphasis added.) Therefore, for purposes of this appeal, legal entitlement is a moot point regardless of whether it is deemed to be an additional pre-requisite to pursuit of a claim for breach of the implied covenant of good faith and fair dealing, as Farmers argues.

Whether the Trial Court abused its discretion in compelling Farmers Responses to Requests For Admissions is also a moot question, since Farmers did supplement its Responses, and the Responses did not affect the arbitration. This conclusion is supported by the case of *Chatterton v. Walker*, 938 P.2d 255 (UT 1997). This was an uninsured motorist case in which State Farm Insurance intervened to protect its own interests under the UIM policy. State Farm appealed the District Court's entry of default against Walker on the issue of liability, and also claimed error in the District Court's refusal to grant a protective order shielding State Farm from answering certain interrogatories. State Farm promptly moved to Stay that Order pending its Petition For Interlocutory Appeal to the Utah Supreme Court. Concurrently, State Farm provided answers to most of the interrogatories. On appeal, the Supreme Court concluded as follows: "To the degree State Farm has fully responded to the interrogatories, its appeal with respect to them is now moot." (*Id.*, at 260.)

In the instant case, Farmers' Motion For Protective Order was dated July 23, 2003 (R. 128-9). The Trial Court's Order compelling Farmers' Responses to Requests For Admissions was dated October 3, 2003 (R. 174-5). Farmers dated its

supplemental admissions October 15, 2003. Concurrently, Farmers filed its Petition For Permission to Appeal Interlocutory Order on October 16, 2003.

Given the similar discovery and motion pattern, and the fact that Farmers already supplemented its Responses, the *Chatterton* rationale supports the Christiansens' position that whether the Trial Court's discovery order was an abuse of discretion is now a moot question.

POINT II: Farmers' Theory Is Contrary To *Beck v. Farmers*.

Although the Christiansens' legal entitlement to UIM benefits is no longer in dispute, prior to the Arbitration Award, Farmers based its Petition for Permission to File Interlocutory Appeal on the theory that, in order to proceed on their cause of action for breach of the implied covenant of good faith and fair dealing, the Christiansens should first be required to prove "legal entitlement" to UIM benefits, and breach of written contract. For the reasons explained below, this theory is directly contrary to controlling law in the landmark case of *Beck v. Farmers Insurance*, 701 P2.d 795 (UT 1995).

The Christiansens' First Cause of Action for Farmers' breach of the *written* UIM contract is governed by a) the language of the written contract (policy) itself, and b) by Utah's UIM statute, § 31A-22-305(9)(a). The Christiansens already prevailed on that claim. The Arbitration Award was satisfied, and the Christiansens' claim for breach of written UIM contract no longer exists.

The Christiansens' Second Cause of Action for Farmers' breach of the *implied* contract (the covenant of good faith and fair dealing) is governed neither by the policy language, nor by the UIM statute. Rather, it is governed by Utah common law established by this Court in the case of *Beck v. Farmers* (*Id.*)

Prior to *Beck*, Utah insureds had no remedy against their insurers when they refused to bargain or settle in good faith with their insureds. (See *Lyon v. Hartford*, 480 P.2d 739 (UT 1971)). In this regard, the *Beck* court stated as follows:

> "Our ruling in *Lyon* left an insured without any effective remedy against an insurer that refuses to bargain or settle in good faith with the insured. An insured who has suffered a loss and is pressed financially is at a marked disadvantage when bargaining with an insurer over payment for that loss . . . the temptation for an insurer to delay settlement while pressures build on the insured is great, especially if the insurer's exposure cannot exceed the policy limits. (Citations omitted.) In light of these considerations, we now conclude that an insured should be provided with a remedy . . . we hold that the good faith duty to bargain or settle under an insurance contract is only one aspect of the duty of good faith and fair dealing implied in all contracts and that a violation of that duty gives rise to a claim for breach of contract. In addition, we do not adopt the limitations suggested by Farmers [that a plaintiff must produce evidence of bad faith wholly apart from the 'mere failure' to bargain or settle] **but hold that the refusal to bargain or settle, standing alone, may, under appropriate circumstances, be sufficient to prove a breach.**" (*Id.*) (Insert added for clarification. Emphasis also added.)

The *Beck* Court continued, "We therefore hold that in a first-party relationship between an insurer and its insured, the duties and obligations of the parties are contractual".

In summarizing its newly created breach of implied contract cause of action, the *Beck* Court stated as follows:

> "We conclude that the implied obligation of good faith performance contemplates, at the very least, that the insurer will diligently investigate the facts to enable it to determine whether a claim is valid, will fairly evaluate the claim, ***and will thereafter act promptly and reasonably in rejecting or settling the claim***. (Cites omitted.) The duty of good faith also requires the insurer to 'deal with laymen as laymen and not as experts in the subtleties of law and underwriting' and to refrain from actions that will injure the insured's ability to obtain the benefits of the contract (cites omitted). These performances are the essence of what the insured has bargained and paid for, and the insurer has the obligation to perform them. When an insurer has breached this duty, it is liable for damages suffered in consequence of that breach." *(Id.)* (Emphasis added.)

The *Beck* remedy detailed above is precisely the one alleged in the Christiansens' Second Cause of Action (R. 5, 6).

As is clear from the above excerpts, the *Beck* remedy was created in response to Farmers' refusal to bargain in good faith with its Utah insureds, and was designed to be entirely independent of any written contractual or statutory causes of action.

The now moot dispute that triggered this Interlocutory Appeal stemmed from Farmers' renewed, but familiar, attempt to erect artificial, arbitrary barriers to recovery for its breach of good faith duties owed to its own insureds. The showings of "legally entitled" and "breach of written contract" which Farmers argues are pre-requisites to a *Beck* cause of action, arise out of the insurance policy and the UIM statute, and have never been identified as pre-requisites to the *Beck* remedy. Indeed, the term "legally

entitled" does not appear in the *Beck* opinion. Nor is that term mentioned in *Chatterton v. Walker*, 938 P.2d 225 (UT 1997), on which Farmers relies so heavily. Indeed, Farmers claims, on page 9 of its Brief on Appeal, as follows: "The court in *Chatterton* refused to allow discovery in a potential bad faith claim absent first showing that plaintiff was 'legally entitled' to benefits alleged under the insurance contract." In reality, not only is "legally entitled" never mentioned in the opinion, but importantly there was no bad faith cause of action in *Chatterton*. Consequently, the Court held that discovery requests intended to explore the mere possibility of a bad faith claim were irrelevant, and therefore not discoverable. Although Farmers would have this Court believe that *Chatterton* dicta overruled the hold in *Beck*, the basis for the *Chatterton* holding was irrelevance, not legal entitlement.

Moreover, Farmers has failed to cite any Utah cases involving a cause of action for breach of the implied covenant of good faith and fair dealing where a court has applied the barriers Farmers recommends. Nor has counsel for the Christiansens found any such case authority.

In its Brief on Appeal, Farmers cites five Utah "legally entitled" cases which it claims support its argument that the Christiansens are required to prove "legal entitlement" to contractual UIM benefits before they may proceed on the breach of implied contract allegations (*Lyon v. Hartford*, 480 P.2d 739 (UT 1971)(overruled on other grounds by *Beck*, supra); *Lima v. Chambers*, 657 P.2d 279 (UT 1982); *Peterson*

v. Utah Farm Bureau, 927 P.2d 192 (UT 1996); *Estate of Berkemeir v. Hartford*, 67 P3.d 1012 (UT AV 2003); and *Chatterton v. Walker*, 938 P.2d 255 (UT 1997). Interestingly, and importantly, none of these five Utah cases involve any formal bad faith allegations or any cause of action for breach of the implied covenant of good faith and fair dealing. Consequently, none of the dicta cited by Farmers from these five *written* breach of contract cases is helpful relative to the Christiansens' cause of action for breach of *implied* contract. Certainly these five cases do nothing to alter the explicit holding in *Beck* that a failure to bargain or settle may be actionable standing alone. No Utah court has ever imposed "legally entitled" or "breach of written contract" pre-requisites on a claim for breach of the implied covenant of good faith and fair dealing, as Farmers now asks this Court to do.

Farmers, in its Brief on Appeal, also places undo reliance on "legally entitled" bad faith cases from other states where no *Beck* remedy has ever been recognized. When it fashioned the *Beck* remedy, this Court acknowledged that, "this position has not been widely adopted by other courts", and "we recognize that a majority of states permit an insurer to institute a tort action against an insurer who fails to bargain in good faith in a 'first party' situation . . .." (*Beck*, *Id.*) Most of the many cases cited by Farmers in Points II and III of its Brief on Appeal, come from states that follow the tort approach to bad faith. The rest of the cases cited by Farmers come from jurisdictions that approach bad faith as a statutory cause of action. But none of the out-of-state cases

cited by Farmers comes from a jurisdiction that recognizes the *Beck* breach of implied covenant of good faith and fair dealing remedy which controls in Utah. Consequently, cases from outside Utah are simply not very helpful in determining how and when the *Beck* remedy applies.

In support of its argument that the Trial Court erred in allowing discovery to proceed in the breach of implied contract case before the conclusion of the breach of written contract case in arbitration, Farmers also mistakenly relies on two other distinguishable groups of cases. The first group of cases, all from other jurisdictions, involves causes of action for UIM / UM claims coupled with bad faith claims. In those cases, those courts refused to allow/compel production of discovery pertaining to offers of settlement and compromise. Such cases are not helpful to the issues in the Christiansens' case, since Farmers never made any offer of settlement to the Christiansens. Indeed, that refusal to join in negotiations *is the breach* at the center of the Christiansens' remaining cause of action.

In the second group of out-of-state cases relied upon by Farmers, the courts prevented bad faith claims from proceeding until coverage had been established. In the Christiansens' case, coverage has never been an issue. Thus, neither group of cases is very helpful or persuasive.

Despite clear language in the opinion to the contrary, as reviewed above, Farmers also argues that the *Beck* case itself supports a preliminary showing of legal

entitlement. In its Brief on Appeal, Farmers goes so far as to argue that *Beck* says, "that an insured could not bring an action for bad faith against his or her insurer, until a breach of that contract was established" (p. 20), and that, "It is clear that the insureds may not simply file a bad faith claim without having first established that they are "legally entitled" to the contract benefits and, second, that the insurance company breached the contract." (p. 21) Yet, that is precisely what *Beck* did, with the Utah Supreme Court's after-the-fact approval.

As noted earlier, the term "legally entitled" is never used in the *Beck* opinion, much less established as a pre-requisite. Farmers nevertheless argues that such pre-requisite was established by implication based on "the context of the claimant in that case having already been determined to be 'legally entitled' to uninsured motorist benefits . . .." (Farmers' Brief on Appeal, page 17.) Contrary to Farmers' description of the *Beck* context, careful reading of the opinion confirms that Beck raised and pursued the breach of written contract and the breach of implied contract claims simultaneously, just like the Christiansens. Indeed, in *Beck*, discovery was open and underway *in the absence of any stay* for two months after the Court bifurcated the claims, until the UIM claim settled. Comparably, in the Christiansens' case it was two and one-half months between the time their claims were severed, and the date of the Arbitration Award. The fact that the Trial Court in *Beck* did not stay the bad faith claim when it bifurcated it from the UIM claim conclusively refutes Farmers'

argument that *Beck* supports the "legally entitled" pre-requisite and Farmers' claim that the Trial Court erred when it severed the Christiansens' claims without staying the bad faith litigation.

The above point was further driven home when in *Beck*, like in the Christiansens case, Farmers tried to argue that for *Beck* to sustain a bad faith claim, he must produce evidence "wholly apart from the 'mere failure' to bargain or settle". The *Beck* Court answered as follows: "We do not adopt the limitations suggested by Farmers, but **hold that the refusal to bargain or settle, standing alone, may, under appropriate circumstances, be sufficient to prove a breach."** In short, Farmers' theory on appeal is directly contrary to *Beck*.

POINT III: Under *Beck*, Farmers Must Promptly Communicate Its UIM Claim Valuation.

Farmers' argues that it was prejudicial for the Trial Court to grant the Christiansens' Motion to Compel and to deny Farmers' Motion for Protective Order relative to discovery requests aimed at Farmers' valuation of the Christiansens' UIM claim, because such information could be used to Farmers' disadvantage in the severed arbitration of the UIM benefits claim. Farmers' notion demonstrates a fundamental lack of understanding of the *Beck* covenant of good faith and fair dealing. According to *Beck*, "The implied obligation of good faith performance contemplates, at the very least, that the insurer will diligently investigate the facts to enable it to determine

whether a claim is valid, will fairly evaluate the claim, *and will thereafter act promptly and reasonably in rejecting or settling the claim."* (Emphasis added.) (Citations omitted.) The Supreme Court added that the first-party insurer is *"to refrain from actions that will injure the insured's ability to obtain the benefits of the contract."* (Emphasis added.) (Citations omitted.) Indeed, the Court concluded that, "These performances are the very essence of what the insured has bargained and paid for and the insurer has the obligation to perform them." (*Beck, Id.*).

It stands to reason from the above excerpts in *Beck*, that it cannot be prejudicial to Farmers to have to disclose its valuation of its insured's UIM claim, when Farmers has a good faith implied duty to do so promptly in the first place. Otherwise, by hiding its valuation of the UIM claim from its insured, and by stalling communication of that valuation to the insured, Farmers would be in breach of its duties to 1) fairly evaluate the claim and thereafter act promptly in rejecting or settling it; and 2) to refrain from actions that will injure the insured's ability to obtain the benefits of the contract. Indeed, according to *Beck*, such disclosure in the form of a timely, good faith offer (or denial) is the essence of what the insured has bargained and paid for.

Therefore, when the Trial Court granted the Christiansens' Motion to Compel Farmers' Responses to Requests for Admissions (and later Farmers' Reponses to Requests for Production) and denied Farmers' Motion for Protective Order, the long-overdue disclosure of Farmers' UIM valuation (which has still not been disclosed)

could not be prejudicial. To protect Farmers from disclosing information evidencing its valuation of the UIM claim would be to further Farmers' breach of its *Beck* good faith duties. The undisputed fact on which this conclusion turns is that from August 19, 2002 when the Christiansens presented their UIM settlement demand, until the moment notice of the Arbitration Award was received *sixteen months later* on December 10, 2003, Farmers never communicated to the Christiansens its position on their UIM claim (despite repeated written requests from the Christiansens that it do so).

POINT IV: "*Beck*" And The Definition Of "Legally Entitled" Can Be Reconciled.

The meaning of "legally entitled" has fluctuated a lot since it was addressed for the first time by the Utah Supreme Court in the case of *Lyon v. Hartford (Id.)*. And the definition stills bears refinement in order to be reconcilable with the duties of good faith and fair dealing outlined in *Beck*.

Lyon was an uninsured motorist breach of written contract case filed after the injured passenger had already obtained a verdict against his own driver and two other at-fault drivers, one of which was uninsured. The *Lyon* Court used the "legally entitled" language in a UM policy as a tool to help calculate the time when interest on the judgment against the tortfeasor began accruing. Under the circumstances of that case, and for the purpose of calculating interest on the award, the *Lyon* Court

concluded that the claimant became "legally entitled" to recover damages (and interest) as of the date judgment was rendered against the tortfeasors. Given this background, if *Lyon* gave birth to the "legally entitled" defense asserted by Farmers in this case, it was a very shaky, partial, unintended birth at best.

The Utah Supreme Court next addressed the meaning of "legally entitled" in the *Lima v. Chambers* case 657 P.2d 279 (UT 1982). In *Lima*, the Court held that an uninsured motorist carrier may be allowed to intervene as of right in the underlying tort action against the uninsured motorist in order to raise defenses bearing upon the extent of the UM carrier's exposure. After citing the "legally entitled to recover damages" language from Utah's UM statute, the *Lima* Court reasoned, in dicta, as follows: "Thus, if an insured is injured by an uninsured motorist, the insured may recover damages from his own insurance company *upon showing that he is "legally entitled" to recover those damages from the uninsured tortfeasor. This showing of legal entitlement typically entails a lawsuit against the uninsured tortfeasor* to litigate the issues of liability and damages. A judgment favorable to the insured fixes the insurer's contractual duty to satisfy that judgment, within the policy limits." (Emphasis added.)

Of course, UM/UIM coverages and claims have evolved a lot since *Lima* was decided in 1982. For instance, the *Lima* comment that it typically takes a lawsuit to determine legal entitlement is no longer true, given the prevalence of arbitration

clauses in UM/UIM policy provisions. Nowadays, instead of suing the uninsured/underinsured tortfeasor, and having the UM/UIM carrier intervene, the UM/UIM insured and the UM/UIM insurer simply arbitrate, absent interim settlement. Nevertheless, *Lima* transformed the definition of "legal entitlement" from a mere marker of time when interest began accruing, into a statutorily recognized *showing* evidenced by a favorable judgment against the uninsured/underinsured tortfeasor. Basically, the *Lima* Court used "legal entitlement" as a tool to show that a tort action has a direct effect on an insurer's statutory and contractual duty to pay UM benefits, thereby justifying a right of direct intervention. Importantly, "legal entitlement" was not yet used to mean a prerequisite to collection of UM/UIM benefits.

The next step in the evolution of the definition of "legally entitled" was in the Utah Court of Appeals case entitled *Peterson v. Utah Farm Bureau*, 927 P.2d 192 (1996). *Peterson* was a passenger in a truck owned and operated by a co-employee within the scope of his employment. The co-employee driver fell asleep, there was an accident, the driver was killed, and *Peterson* was severely injured. After applying for, and receiving Workers Compensation benefits, *Peterson* filed a UIM claim with his own insurer. Relying on the *Lyon* and *Lima* language discussed previously, Utah Farm Bureau successfully defended the UIM claim by arguing that the Exclusive Remedy provision of the Workers Compensation Act prevented *Peterson* from pursuing a viable claim "that is able to be reduced to judgment in a court of law" against the

estate of his co-employee. Such was the context of the following language from the *Peterson* opinion: "We hold that Farm Bureau's 'obligation to perform, under the express terms of its contract with . . . [Peterson, does] not arise until their . . . [is] a legal determination of the liability of the [under-] insured motorist and the extent of the damages sustained,' (citation omitted), and that a judgment favorable to Peterson is necessary to fix Farm Bureau's contractual duty to satisfy that judgment. The Workers' Compensation Act prevents Peterson from satisfying this requirement." In context then, the *Peterson* Court used "legal entitlement" as a tool to enforce the Exclusive Remedy provision. Importantly, it was not defined to mean that an insurer could avoid responding to a UIM claim, with no duty to deny the claim or negotiate until the UIM insured produced a judgment. Nevertheless, that is precisely what Farmers has represented the *Peterson* case to stand for in Farmers' Brief on Appeal (page 15).

In *The Estate of Berkemeir v. Hartford Insurance Company*, 67 P.3d 1012 (UT App. 2003), Hartford Insurance used the above language from *Peterson* to argue that the estate of its insured was not "legally entitled" to UIM benefits because the insured died before obtaining an arbitration award. In *Berkemeir*, Hartford Insurance conceded that Ms. Berkemeir's damages exceeded the underinsured motorist's liability coverage; but Hartford disputed the amount of *Berkemeir's* UIM claim. Unfortunately, before the UIM arbitration could be concluded, Berkemeir died of

causes unrelated to the accident. Hartford argued that the *Peterson* language controlled, and that absent a legal determination of *Berkemeir's* damages, Hartford was under no contractual duty concerning Berkemeir's claim either before or after her death.

Retreating from the *Peterson* language, the *Berkemeir* Court held that "to qualify under the 'legally entitled to recover' language of a UIM contract, a party is *not* required to establish that a legal determination has been made." Rather the *Berkemeir* Court clarified, "a party is 'legally entitled to recover' if they can show the existence of a 'viable claim that is *able* to be reduced to judgment." Applying this relaxed standard, the *Berkemeir* Court stated:

> "Here Hartford accepted from the outset the fact that Alexander caused the accident that resulted in Berkemeir's injuries. Hartford, without objection, allowed *Berkemeir* to enter into a settlement and release with Alexander and his insurance company for the limits of his policy. Then, when Berkemeir approached Hartford and submitted a demand under the terms of her UIM policy, Hartford conceded that her injures exceeded the limits of Alexander's policy. To determine the amount due, the parties, under the terms of Berkemeir's policy, entered into arbitration. We conclude that Hartford's concessions concerning Alexander's liability and its concession that *Berkemeir's* damages exceeded Alexander's policy limits, as well as its reliance on language from Berkemeir's insurance contract relating to arbitration, qualify as a settlement 'that is able to be reduced to judgment in a court of law'. Thus, by its own actions, Hartford acknowledged its duty under the contract concerning Berkemeir's UIM claim."

The *Berkemeir* opinion was filed in March of 2003.

It is critical to note that if the *Berkemeir* Court had adopted the definition of "legally entitled" argued by Farmers in the present interlocutory appeal, the Estate of Berkemeir would have received nothing from Hartford. Additionally, Farmers' description of the *Berkemeir* case (on page 16 of its Brief on Appeal) is incorrect in several respects. Specifically, it was the adverse driver's insurer that settled and paid the liability policy limits, and it was Hartford Insurance that acknowledged that the plaintiff's damages exceeded the liability coverage and consented to the underlying settlement.

As demonstrated by the preceding review of the evolution of the definition of "legally entitled" in Utah over the past 25 years, the Utah courts have never defined "legally entitled" in a way that would excuse a UIM insurer from its implied, good faith *Beck* duties. However, the variety of different contexts in which the court has defined "legally entitled" has left room for confusion and misapplication of some of the language in Utah's "legally entitled" cases. In order to minimize further confusion and misunderstanding, the Christiansens' propose that the Court refine the definition of "legally entitled" to mean that a UM/UIM insured becomes "legally entitled" to recover UM/UIM damages when the UM/UIM insurer's timely, good faith claims evaluation shows the benefits to be owing; not just when the insured can produce a legal determination in the form of an arbitration award or judgment, and not just when

the insurer acknowledges its duty under the contract by its outward conduct (as in *Berkemeir*).

Since no public policy interest is served by allowing an insurer to breach its *Beck* implied contractual duties and postpone payment of UIM benefits (to the ongoing detriment of its insureds), when the insurer's own valuation already shows such benefits to be owing, this refinement/reconciliation works to no one's disadvantage. It merely holds the first-party insurer to its own good faith determination, rather than putting the insured to the delay and burden of having to either 1) settle short; 2) obtain an arbitration award; or 3) obtain a judgment, before the insured can proceed on a cause of action for the insurer's bad faith breach of implied contract. Furthermore, in the absence of a timely, good faith claims evaluation by the insurer (as in the Christiansens' case), "legally entitled" should not be construed to further the insurer's bad faith non-disclosure, delay and refusal to negotiate, by in effect, staying discovery of the insurer's own overdue UIM benefit valuation. This is true regardless of concurrent arbitration of a written breach of UIM contract claim.

POINT V: Farmers' Bad Faith Breaches Are Not "Fairly Debatable", And They Greatly Damaged The Christiansens, And Others Like Them.

While the amount of the Christiansens' UIM claim may have been fairly debatable, Farmers' breaches of the implied duties of good faith are not. The fact that Farmers' never denied the Christiansens' UIM claim, that Farmers never made an

offer of settlement; that Farmers never joined in negotiations; and that Farmers' failed to promptly investigate and evaluate the Christiansens' UIM claim is not "fairly debatable". Indeed, Farmers has admitted to such breaches as a matter of record in sworn Responses to the Christiansens' Requests for Admissions (R. 212, 213, 214 and 215). Farmers correctly argues on page 34 of its Brief on Appeal that, "An insurance company is not required to pay every claim submitted to it". However, as the Court taught us in *Beck*, there is no "fairly debatable" basis for never responding to a first-party claim.

Relative to the Christiansen's ability to prove real damages flowing from Farmers' breach of its implied duties of good faith and fair dealing, it is important to understand that what Farmers did to the Christiansens' is actually more egregious than what Farmers did to the claimant in *Beck*. At least in *Beck*, Farmers' took a position by promptly (albeit arbitrarily) rejecting *Beck's* claim. With the Christiansen's, the lack of a denial from Farmers kept leading the Christiansens to believe that Farmers would eventually join in good faith negotiations, maybe after the Christiansens supplemented the mountain of medical records, reports and bills already provided with a little bit more documentation. But despite the Christiansens repeatedly and promptly supplementing their claims information with whatever Farmers asked for, Farmers never did take a position. It never did bargain. It never negotiated. It never even rejected the claims outright, which would have at least saved the Christiansen's eight

months (the time wasted waiting for a reply, before filing suit) of financial hardship, saved them from losing their family's health insurance for inability to continue to afford the premiums, preserved their good credit rating from ruin, and enabled Mr. Christiansen to afford to have his surgery eight months sooner, saving him eight months of pain and suffering. Such are precisely the kinds of general and consequential damages for which the *Beck* Court fashioned a remedy. Moreover, the Christiansens have alleged that Farmers was not only doing this to them, but that Farmers had instituted, and was following, a deliberate policy of stonewalling its Utah UIM claimants generally. Such damages, together with the attorneys' fees incurred as a result of Farmers' bad faith breaches, are real, and are properly alleged. Besides, whether Farmers' bad faith breaches were "fairly debatable" and whether the Christiansens will be successful in proving the damages suffered due to Farmers' bad faith breaches are considerably outside the scope of the limited issues presented for review in this interlocutory appeal.

CONCLUSION

Based upon the foregoing facts, arguments and legal authorities, the Christiansens respectfully request the Court to either 1) declare the issues presented for interlocutory appeal to be moot, or 2) affirm the Trial Court's Orders by finding that it did not abuse its discretion in compelling discovery, denying the protective order and denying the motion to stay breach of implied contract action. In either event, the

Christiansens ask that this case be remanded to the Trial Court, that the Stay be lifted, and that the proceedings below be allowed to continue where they left off.

Should the Court decide to use this case as an opportunity to provide further clarification and guidance on the issues discussed herein, the Christiansens request that the Court hold that "legally entitled" and "breach of written contract" are not prerequisites to an action for breach of the *Beck* implied covenant of good faith and fair dealing.

Further, the Christiansens request that the Court refine the definition of "legally entitled" to mean that a first-party insured becomes "legally entitled" to UM/UIM benefits when the UM/UIM insurer's own timely, good faith claim valuation determines an amount of benefits to be owing; and that in the absence of a timely, good faith communication of the insurer's value determination to the insured, discovery of such value determination in a resulting bad faith action shall not be deemed prejudicial to the insurer's interests in any concurrent arbitration of the UM/UIM claim. This would reconcile "legally entitled to recover" language found in Utah's UM/UIM statute and most auto insurance policies, with the *Beck* covenant of good faith and fair dealing. This proposed solution would also allow a trial court to retain discretion to stay whatever claims it deems appropriate pursuant to the Severance Statute, after considering the nature of discovery sought and the circumstances of each particular case. For example, the courts would still be fully

empowered to order the discretionary stay of any bad faith claim that might appear to have been filed along with a UIM claim solely for the purpose of obtaining access to the insurer's files. This should minimize Farmers' concerns in that regard.

RESPECTFULLY SUBMITTED this 23rd day of April, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23 day of April, 2004, two true and correct copies of the foregoing **BRIEF OF PLAINTIFFS/APELLEES BYRON AND MERRILEE CHRISTIANSEN ON THE INTERLOCUTORY APPEAL FROM THE THIRD DISTRICT COURT, HONORABLE JOSEPH C. FRATTO, JR.** was mailed via First-Class Mail to the following:

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