

5-8-2012

Fuchs v. Idaho State Police Supplemental Respondent's Brief Dckt. 38714

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STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

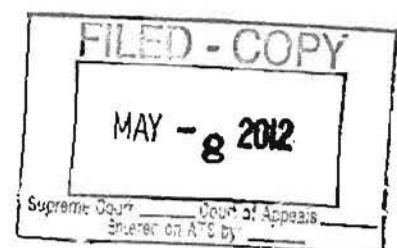
May 8, 2012

Re: *Daniel S. Fuchs, dba, Aubrey's House of Ale v. Idaho State Police,*
Alcohol Beverage Control, Case No. 38714-2011

RESPONDENT'S ADDITIONAL CITATIONS

Relating to the issue of the application of 2012 Idaho Senate Bill 1332:

1. House Bill 421 before the Sixtieth Legislature, Second Regular Session, State of Idaho, 2010.
2. IDAHO CODE § 73-101.
3. *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247, 1250 (2012).
4. *Hill v. American Family Mutual Insurance Company*, 150 Idaho 619, 628-629, 249 P.3d 812, 821-822 (2011).



HOUSE BILL 421

Full Bill Information

Individual Links:

Bill Text

Statement of Purpose / Fiscal Note

H0421.....by JUDICIARY, RULES, AND ADMINISTRATION COMMITTEE

ATTORNEY'S FEES - Amends existing law to clarify when attorney's fees, witness fees and expenses may be awarded in certain instances.

01/26 House intro - 1st rdg - to printing

01/27 Rpt prt - to Jud

02/04 Rpt out - rec d/p - to 2nd rdg

02/05 2nd rdg - to 3rd rdg

02/08 3rd rdg - **PASSED - 69-1-0**

AYES -- Anderson, Andrus, Barrett, Bayer, Bedke, Bell, Bilbao, Black, Block, Boe, Bolz, Boyle, Burgoyne, Chadderdon, Chavez, Chew, Clark, Collins, Crane, Cronin, Durst, Eskridge, Gibbs, Hagedorn, Hart, Hartgen, Harwood, Henderson, Higgins, Jaquet, Jarvis, Killen, King, Kren, Labrador, Lake, Loertscher, Luker, Marriott, Mathews, McGeachin, Moyle, Nielsen, Nonini, Palmer, Pasley-Stuart, Patrick, Pence, Raybould, Ringo, Roberts, Ruchti, Rusche, Sayler, Schaefer, Shepherd(02), Shepherd(08), Shirley, Simpson, Smith(30), Smith(24), Stevenson, Takasugi, Thayn, Thompson, Trail, Wills, Wood(27), Mr. Speaker

NAYS -- Wood(35)

Absent and excused -- None

Floor Sponsor - Burgoyne

Title apvd - to Senate

02/09 Senate intro - 1st rdg - to Jud

02/16 Rpt out - rec d/p - to 2nd rdg

02/17 2nd rdg - to 3rd rdg

02/24 3rd rdg - **PASSED - 35-0-0**

AYES -- Andreason, Bair, Bilyeu, Bock, Brackett, Broadsword, Cameron, Coiner, Corder, Darrington, Davis, Fulcher, Geddes, Goedde, Hammond, Heinrich, Hill, Jorgenson, Kelly, Keough, LeFavour, Lodge, Malepeai, McGee, McKague, McKenzie, Mortimer, Pearce, Schroeder, Siddoway, Smyser, Stegner, Stennett(Stennett), Werk, Winder

NAYS -- None

Absent and excused -- None

Floor Sponsor - Bock

Title apvd - to House

02/25 To enrol

02/26 Rpt enrol - Sp signed

03/01 Pres signed

03/02 To Governor

03/04 Governor signed

Session Law Chapter 29

Effective: 05/31/09 for all cases pending and filed as of
06/01/09

LEGISLATURE OF THE STATE OF IDAHO
Sixtieth Legislature Second Regular Session - 2010

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 421

BY JUDICIARY, RULES, AND ADMINISTRATION COMMITTEE

AN ACT

RELATING TO ATTORNEY'S FEES AND COSTS; AMENDING SECTION 12-117, IDAHO CODE, TO CLARIFY WHEN ATTORNEY'S FEES, WITNESS FEES AND EXPENSES MAY BE AWARDED IN CERTAIN INSTANCES AND TO INCLUDE A DEFINITION; DECLARING AN EMERGENCY AND PROVIDING RETROACTIVE APPLICATION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 12-117, Idaho Code, be, and the same is hereby amended to read as follows:

12-117. ATTORNEY'S FEES, WITNESS FEES AND EXPENSES AWARDED IN CERTAIN INSTANCES. (1) Unless otherwise provided by statute, in any administrative proceeding or civil judicial proceeding involving as adverse parties a state agency, a city, a county or other taxing district or political subdivision and a person, the state agency or political subdivision or the court, as the case may be, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if ~~the court it~~ finds that the nonprevailing party ~~against whom the judgment is rendered~~ acted without a reasonable basis in fact or law.

(2) ~~If the prevailing party is awarded a partial judgment and the court finds the party against whom partial judgment is rendered acted without a reasonable basis in fact or law, the court shall allow the prevailing party's attorney's fees, witness fees and expenses in an amount which reflects the person's partial recovery~~ a party to an administrative proceeding or to a civil judicial proceeding prevails on a portion of the case, and the state agency or political subdivision or the court, as the case may be, finds that the nonprevailing party acted without a reasonable basis in fact or law with respect to that portion of the case, it shall award the partially prevailing party reasonable attorney's fees, witness fees and other reasonable expenses with respect to that portion of the case on which it prevailed.

(3) Expenses awarded against a state agency, ~~city, county or other taxing district~~ or political subdivision pursuant to this section shall be paid from funds in the regular operating budget of the state agency, ~~the city, the county or the taxing district~~ or political subdivision. If sufficient funds are not available in the budget of the state agency, the expenses shall be considered a claim governed by the provisions of section 67-2018, Idaho Code. If sufficient funds are not available in the budget of the ~~city, county or taxing district~~ political subdivision, the expenses shall be considered a claim pursuant to chapter 9, title 6, Idaho Code. Every state agency, ~~city, county or taxing district~~ political subdivision against which litigation expenses have been awarded under this act shall, at the time of submission of its proposed budget, submit a report to the governmental

1 body which appropriates its funds in which the amount of expenses awarded and
2 paid under this act during the fiscal year is stated.

3 (4) For the purposes of this section:

4 (a) "Person" shall mean any individual, partnership, corporation,
5 association or any other private organization;

6 (b) "Political subdivision" shall mean a city, a county or any taxing
7 district.

8 (c) "State agency" shall mean any agency as defined in section 67-5201,
9 Idaho Code.

10 (5) If the amount pleaded in an action by a person is two thousand five
11 hundred dollars (\$2,500) or less, the person must satisfy the requirements
12 of section 12-120, Idaho Code, as well as the requirements of this section
13 before he or she may recover attorney's fees, witness fees or expenses
14 pursuant to this section.

15 SECTION 2. An emergency existing therefor, which emergency is hereby
16 declared to exist, this act shall be in full force and effect on and after its
17 passage and approval, and retroactively to May 31, 2009 and shall apply to
18 all cases filed and pending as of June 1, 2009.

STATEMENT OF PURPOSE

RS19257

In 1989, the Idaho Supreme Court construed Idaho Code Section 12-117 to permit awards of costs and attorney fees to prevailing parties not only in court cases, but also in administrative cases. Under the statute, such awards are only made if the non-prevailing party has pursued or defended the case without a basis in fact or law. On June 1, 2009, in the case of Rammell v. Department of Agriculture, the Supreme Court reversed its 1989 decision and ruled that attorney fees could not be awarded in administrative cases. This bill will restore the law as it has existed since 1989, and it will become effective on May 31, 2009 so that those administrative cases which were pending when the Rammell decision was issued will not be adversely affected by the Supreme Courts ruling.

FISCAL NOTE

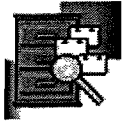
There will be no change in fiscal impact on the General Fund.

Contact:

Name: Representative Grant Burgoyne

Office:

Phone: (208) 332-1083



Idaho Statutes

TITLE 73 GENERAL CODE PROVISIONS

CHAPTER 1 CONSTRUCTION OF STATUTES

73-101. CODES NOT RETROACTIVE. No part of these compiled laws is retroactive, unless expressly so declared.

History:

[(73-101) C.C.P. 1881, sec. 2; R.S., sec. 3; reen. R.C., sec. 3; reen. C.L. 500:3; C.S., sec. 9443; I.C.A., sec. 70-101.]

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Westlaw

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Page 1

H

Supreme Court of Idaho,
Coeur d'Alene, September 2011 Term.
Lois M. BISHOP, personal representative of Patricia J. Shelton, deceased, Plaintiff–Respondent,
v.

R. Bruce OWENS and Jane Doe Owens, husband and wife, and the marital community composed thereof; Owens & Crandall, PLLC, a limited liability company operating in the State of Idaho; R. Bruce Owens and Jeffrey J. Crandall, individually, and in their capacities as principals, managers, agents, partners, representatives, and employees of Owens & Crandall, PLLC, Defendants–Appellants. Owens & Crandall, PLLC, Third–Party Plaintiff,
v.

Idaho State Insurance Fund, Third–Party Defendant.

No. 37992.

Jan. 12, 2012.

Rehearing Denied March 13, 2012.

Background: Client brought action against attorney alleging breach of contract and legal malpractice based on alleged breach of attorney-client relationship and contingency fee agreement. After client passed away during pendency of action, the District Court, First Judicial District, Kootenai County, 2010 WL 3393364, John P. Luster, J., held that legal malpractice claim did not abate upon client's death and that client's breach of contract action stated a claim. Attorney appealed.

Holdings: The Supreme Court, W. Jones, J., held that:

- (1) legal malpractice claim sounded in tort, rather than contract, and
- (2) client failed to state a breach of contract claim for which relief could be granted.

Reversed.

J. Jones, J., specially concurred and filed opinion.

Horton, J., dissented and filed opinion.

West Headnotes

[1] Appeal and Error 30 ⚙️ 358

30 Appeal and Error

30VII Transfer of Cause

30VII(B) Petition or Prayer, Allowance, and Certificate or Affidavit

30k358 k. Necessity of allowance or leave. Most Cited Cases

Generally, an appeal by permission will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation. Appellate Rule 12.

[2] Appeal and Error 30 ⚙️ 842(1)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(1) k. In general. Most Cited Cases

The Supreme Court exercises free review over controlling questions of law.

[3] Abatement and Revival 2 ⚙️ 52

2 Abatement and Revival

2V Death of Party and Revival of Action

2V(A) Abatement or Survival of Action

2k51 Causes of Action Which Survive

2k52 k. In general. Most Cited Cases

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Abatement and Revival 2 ⚡ 53

2 Abatement and Revival

2V Death of Party and Revival of Action

2V(A) Abatement or Survival of Action

2k51 Causes of Action Which Survive

2k53 k. Actions on contract. Most

Cited Cases

Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate.

[4] Attorney and Client 45 ⚡ 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(1) k. In general; limitations. Most Cited Cases

Legal malpractice actions are an amalgam of tort and contract theories.

[5] Attorney and Client 45 ⚡ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

The tort basis of legal malpractice actions flows from the elements of legal malpractice: (1) the existence of an attorney-client relationship; (2) the existence of a duty on the part of the lawyer; (3) failure to perform the duty; and (4) the negligence of the lawyer must have been a proximate cause of the damage to the client.

[6] Attorney and Client 45 ⚡ 106

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k106 k. Nature of attorney's duty. Most Cited Cases

The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained.

[7] Attorney and Client 45 ⚡ 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(1) k. In general; limitations. Most Cited Cases

Breach of an attorney's duty to a client in negligence is a tort.

[8] Attorney and Client 45 ⚡ 105.5

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k105.5 k. Elements of malpractice or negligence action in general. Most Cited Cases

The contract basis of legal malpractice actions is the failure to perform obligations directly specified in the written contract.

[9] Attorney and Client 45 ⚡ 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(1) k. In general; limitations. Most Cited Cases

Under the abatement rule, breach of an attorney's duty to a client is an action in tort, not contract; that is, unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney.

[10] Attorney and Client 45 ⚡ 129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(1) k. In general; limitations. Most Cited Cases

Breach of an attorney's duty to comply with a standard of care expected of an attorney is a tort.

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[11] Abatement and Revival 2 ⚡52

2 Abatement and Revival

2V Death of Party and Revival of Action

2V(A) Abatement or Survival of Action

2k51 Causes of Action Which Survive

2k52 k. In general. Most Cited Cases

Client's legal malpractice action against attorney alleging that attorney breached attorney-client relationship sounded in tort, rather than in contract, and therefore claim abated upon client's death, where the standard of care in the contract between the attorney and client was essentially the same as in any attorney-client relationship.

[12] Attorney and Client 45 ⚡106

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k106 k. Nature of attorney's duty. Most Cited Cases

The contours of the duties owed by an attorney to his or her client are defined by the rules of professional conduct.

[13] Attorney and Client 45 ⚡107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k107 k. Skill and care required. Most Cited Cases

If an attorney and client want to provide for a higher standard of care than provided for by the rules of professional conduct, they may do so by express language in the contract.

[14] Attorney and Client 45 ⚡107

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k107 k. Skill and care required. Most Cited Cases

Attorney and Client 45 ⚡129(1)

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k129 Actions for Negligence or Wrongful Acts

45k129(1) k. In general; limitations. Most Cited Cases

Allegations that attorney breached contingency fee agreement, which were the same allegations contained in client's legal malpractice claim, could not support a breach of contract claim; legal malpractice claims sounded in tort, rather than contract, and because the contingent fee agreement contained no express language providing for a higher standard of care, the duty owed by attorney was not defined by the contingent fee agreement.

*1249 Ramsden & Lyons, LLP, Coeur d'Alene, for appellants. Michael G. Ramsden argued.

Elsaesser, Jarzabek, Elliott & McDonald, Chtd., Sandpoint, for respondent. Joseph Jarzabek argued.

W. JONES, Justice.

I. NATURE OF THE CASE

Patricia Shelton ("Shelton") filed suit asserting breach of contract and legal malpractice based on an alleged breach of an attorney-client relationship and contingency fee agreement. During the pendency of this action, Shelton passed away. Lois Bishop ("Bishop") sought to assert Shelton's claims as her personal representative. R. Bruce Owens, Jeffrey Crandall, and Owens and Crandall, PLLC (herein referred to collectively as "Owens") asserted that the legal malpractice claim abated upon Shelton's death and that the breach of contract claim did not state a claim. Owens now appeals the district court's decision holding that Patricia Shelton's claim for legal malpractice did not abate upon her death and that Shelton's breach of contract action stated a claim. Furthermore, Owens seeks review of the district court's decision granting Lois Bishop's Motion to Substitute as Plaintiff. Because Patricia Shelton's legal malpractice claim sounds in tort and abated upon her death, and her breach of contract claim fails to state a claim, the district court erred in denying Owens's Motion for Summary Judgment and in granting Bishop's Motion to

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Substitute as Plaintiff.

II. FACTUAL AND PROCEDURAL BACKGROUND

On February 3, 1997, during the course of her employment, Patricia Shelton was involved in an automobile accident that left her a quadriplegic. The Idaho State Insurance Fund provided her with workers' compensation benefits, including medical benefits. On September 21, 2006, Shelton was admitted to North Idaho Advanced Care Hospital ("Advanced Care") to wean her off of a ventilator on which she was dependent. Advanced Care's treatment of Shelton resulted in further injury. Thereafter, Shelton retained attorney R. Bruce Owens to represent her in a medical malpractice claim against Advanced Care. Shelton entered into an attorney-client relationship with Owens and signed a contingent fee contract on December 25, 2007.

In September of 2008, Owens represented Shelton in mediation with Advanced Care, Idaho State Insurance Fund, and Advanced Care's insurer. Shelton's medical malpractice claim was settled on February 6, 2009, in the amount of \$1,150,000. Shelton, as a requirement of the settlement, signed the Full Release and Settlement Agreement releasing the hospital and the insurer from liability. After deducting costs and Owens's contingency fee, Idaho State Insurance Fund sought the remainder of the settlement funds in the amount of \$664,543.54, citing its subrogation claim under I.C. § 72-223. Idaho State Insurance Fund's subrogation claim was later settled in the amount of \$270,000. Owens did not represent Shelton during the settlement.

Patricia Shelton alleged that prior to her signing the Full Release and Settlement Agreement, Owens failed to inform her of the consequences of the settlement and release in regard to Idaho State Insurance Fund's subrogation claim. As a result, Shelton filed her legal malpractice and breach of contract claims on May 6, 2009, contending that Owens breached his duty to inform her of Idaho State Insurance Fund's subrogation claim and that

the medical malpractice settlement could terminate or reduce payment of compensation benefits paid by the Idaho State Insurance Fund. Shelton further contended that Owens breached his duty to seek a partial lump sum settlement, approved by *1250 the Idaho Industrial Commission, settling the subrogation interest in her claim.

During the pendency of this action, on or around November 10, 2009, Shelton passed away. Owens later filed and served the Second Motion for Summary Judgment on May 6, 2010. Thereafter, on May 10, 2010, Shelton's attorney Joseph Jarzabek filed its Motion to Substitute as Plaintiff pursuant to Rule 25(a)(1) of the Idaho Rules of Civil Procedure, seeking to appoint Bishop as personal representative. The district court denied the Second Motion for Summary Judgment by Memorandum Opinion and Order on July 21, 2010. Owens made timely application to the district court to appeal by permission under I.A.R. 12(b), which was denied. On October 20, 2010, this Court granted Owens's Motion for Appeal by Permission pursuant to I.A.R. 12(c). Owens timely filed the Notice of Appeal on November 8, 2010.

III. ISSUES ON APPEAL

1. Whether the district court erred in determining that Patricia Shelton's claim for legal malpractice did not abate upon her death?
2. Whether the district court erred in determining that Patricia Shelton's claim for breach of contract stated a claim upon which relief can be granted?
3. Whether the district court erred in ruling that Shelton's claim for legal malpractice was not barred by the economic loss rule?
4. Whether the district court erred in granting the Motion to Substitute as Plaintiff?
5. Whether Lois Bishop is entitled to attorney's fees on appeal according to I.C. § 12-120(3) and I.C. § 12-121 in her capacity as personal repres-

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entative of Patricia Shelton?

IV. STANDARD OF REVIEW

[1][2] On October 19, 2010, this Court granted Owens's Motion for Appeal by Permission pursuant to I.A.R. 12(c). "Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation." *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 149, 795 P.2d 309, 311 (1990). As this appeal involves controlling questions of law, this Court exercises free review over those issues. *Infanger v. City of Salmon*, 137 Idaho 45, 47, 44 P.3d 1100, 1102 (2002).

V. ANALYSIS

A. Shelton's Claim for Legal Malpractice Abated upon Her Death

[3] The abatement rule holds that in the absence of a legislative enactment addressing the survivability of a claim, the common law rules govern. See I.C. § 73-116 ("The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state."); see also *Evans v. Twin Falls Cnty.*, 118 Idaho 210, 215, 796 P.2d 87, 92 (1990). Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate. See *Helgeson v. Powell*, 54 Idaho 667, 674-79, 34 P.2d 957, 960-61 (1934); *Kloepfer v. Forch*, 32 Idaho 415, 417-18, 184 P. 477, 477 (1919).

The Idaho Legislature addressed whether negligence claims abate in amending I.C. § 5-327(2) to provide that negligence claims, including legal malpractice claims, do not abate on the death of the injured person. Because the Idaho Legislature failed to provide express language of retroactivity, I.C. § 5-327(2) is inapplicable to the present action, which arose prior to the statute's effective date.^{FN1} See I.C. § 73-101 (asserting that "[n]o part of these

compiled laws is retroactive, unless expressly so declared"); see also *Henderson v. Smith*, 128 Idaho 444, 448, 915 P.2d 6, 10 (1996). Thus, this Court's ruling is dependent on whether Patricia Shelton's legal malpractice claim sounds in pure tort or arises out of contract under the common law. *1251 See I.C. § 73-116; *Helgeson*, 54 Idaho at 674-79, 34 P.2d at 960-61; *Kloepfer*, 32 Idaho at 417-18, 184 P. at 477.

FN1. I.C. § 5-327(2) was amended effective July 1, 2010.

This Court previously held that legal malpractice actions sound in tort in the context of attorney's fees claims under I.C. § 12-120(3). See *Rice v. Lister*, 132 Idaho 897, 980 P.2d 561 (1999); see also *Fuller v. Wolters*, 119 Idaho 415, 807 P.2d 633 (1991). In restricting attorney's fees claims to commercial transactions under I.C. § 12-120(3), this Court held "that an action for legal malpractice is a tort action ... even though the underlying transaction which resulted in the malpractice was a 'commercial transaction....' " See *Rice*, 132 Idaho at 901, 980 P.2d at 565 (quoting *Fuller*, 119 Idaho at 425, 807 P.2d at 643). Although *Rice* and *Fuller* have since been overruled regarding their prohibition of I.C. § 12-120(3) attorney's fees claims in the context of legal malpractice actions, this Court recognized that they were not overruled on the characterization of legal malpractice actions as sounding in tort. See *City of McCall v. Buxton*, 146 Idaho 656, 664-65, 201 P.3d 629, 637-38 (2009) (holding that commercial transactions under § 12-120(3) are not limited to contract actions and may include legal malpractice tort actions even in the absence of an attorney-client contract); see also *Soignier v. Fletcher*, 151 Idaho 322, 256 P.3d 730 (2011) (holding that legal malpractice actions sound in tort, but I.C. § 12-120(3) only requires that there be a commercial transaction, which may be satisfied with the establishment of an attorney-client relationship).

[4][5][6][7][8][9][10] As this Court previously recognized, "[l]egal malpractice actions are an am-

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algam of tort and contract theories." See *Johnson v. Jones*, 103 Idaho 702, 706, 652 P.2d 650, 654 (1982). The tort basis of legal malpractice actions flows from the elements of legal malpractice: "(a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damage to the client...." *Id.* (quoting *Sherry v. Diercks*, 29 Wash.App. 433, 437, 628 P.2d 1336, 1338 (1981)). "The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained." *Johnson*, 103 Idaho at 704, 652 P.2d at 652; *Fuller*, 119 Idaho at 425, 807 P.2d at 643 (holding that the tort of legal malpractice is also a breach of the attorney-client relationship). Breach of an attorney's duty in negligence is a tort. See *Harrigfeld v. Hancock*, 140 Idaho 134, 136, 90 P.3d 884, 886 (2004); *Johnson*, 103 Idaho at 704, 706-07, 652 P.2d at 652, 654-55. The contract basis of legal malpractice actions is the failure to perform obligations directly specified in the written contract. See *Johnson*, 103 Idaho at 704, 706-07, 652 P.2d at 652, 654-55 (holding that a breach of contract claim would arise if the attorney did not do what he promised to do in the contract, e.g., failing to draw up a contract of sale). Thus, under the abatement rule, breach of duty is an action in tort, not contract; that is, unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney. Breach of that duty is a tort.

[11][12][13] As further elaborated by Justice Jim Jones in his special concurrence, the contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct. If an attorney and client want to provide for a higher standard of care, they may do so by express language in the contract. Here, the standard of care in the contract is essentially the same as in any attorney-client relationship. Because this claim sounds in tort, it abated upon Patricia Shelton's

death.

Owens also asserts that the personal nature of the attorney-client relationship suggests that legal malpractice claims are not assignable and, therefore, abate under *MacLeod v. Stelle*, 43 Idaho 64, 75, 249 P. 254, 257 (1926). This Court need not specifically address this issue because Shelton's legal malpractice claim abated.

B. Patricia Shelton's Breach of Contract Claim Fails to State a Claim upon Which Relief Can Be Granted

[14] Owens relies on *Trimming v. Howard*, 52 Idaho 412, 16 P.2d 661 (1932), and *1252 *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 33 P.3d 816 (2001), in asserting that the district court erred in holding that Patricia Shelton may bring her legal malpractice and breach of contract claims in the same cause of action. Bishop asserts that *Hayward* is inapplicable because it relates to medical malpractice claims and was based on a statute that strictly required all actions related to medical care to be pursued in the context of the local standard of care. See *Hayward*, 136 Idaho at 349-51, 33 P.3d at 823-25.

Trimming and *Hayward* were actions where the plaintiffs tried to assert contract claims in medical malpractice suits in order to avoid the statute of limitations defense applicable to tort claims. *Id.*; *Trimming*, 52 Idaho at 415-17, 16 P.2d at 662-63. Specifically, this Court rejected such claims, asserting that they pertain to "the provision of or failure to provide health care" under I.C. § 6-1012. *Hayward*, 136 Idaho at 349-50, 33 P.3d at 823-24 (quoting I.C. § 6-1012). This Court affirmed the claims as malpractice tort actions, "regardless of the label assigned to them." *Id.* at 350, 33 P.3d at 824. Thus, Owens contends that where legal malpractice actions based on breach of duty are asserted, not based on any obligations or undertakings specifically provided in a contract, a claim in tort remains the sole cause of action. See *Trimming*, 52 Idaho at 415-17, 16 P.2d at 662-63; *Hayward*, 136 Idaho at 349-50, 33 P.3d at 823-24.

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Although the medical malpractice cases on which Owens relies are governed by a specific statute, the fact that a proponent labels his or her action as sounding in contract as well as malpractice does not make the underlying action contract. The "theory" of relief sought is not different. A holding to the contrary would create a per se breach of contract action in every legal malpractice action. Legal malpractice has traditionally been treated as the proper claim where an attorney breaches his or her duty, which arises from the attorney-client relationship.

As noted in the previous section, because the contingent fee agreement in this matter contained no express language providing for a higher standard of care, the duty owed by Owens is not defined by the contingent fee agreement. The language in the contingent fee agreement that "[a]ttorneys shall represent Client in said matter and do all things necessary, appropriate, or advisable, in regard thereto" is not materially different from the standard applied in the legal malpractice claim. Thus, this action is really a legal malpractice claim disguised as a contract claim. A person cannot change a tort action into a contract action simply by labeling it as such. *Hayward*, 136 Idaho at 350, 33 P.3d at 824.

As previously discussed, professional malpractice actions traditionally have been characterized as tort actions in the context of the statute of limitations. To hold that this claim is clearly a separate contract cause of action would render the two year statute of limitations applying to legal malpractice actions moot. See *Lapham v. Stewart*, 137 Idaho 582, 585–87, 51 P.3d 396, 399–401 (2002). It would also call into question matters such as the standard of care regarding legal malpractice actions, which is to comply with the local standard of care by an attorney, as well as the application of the economic loss rule to legal malpractice claims.

Therefore, this Court holds that Bishop's breach of contract claim, which asserts the same claim as the legal malpractice theory, which has

traditionally been treated as the proper claim, fails to state a claim upon which relief can be granted.

C. The Issue Whether Shelton's Claim for Legal Malpractice Is Barred by the Economic Loss Rule Does Not Need to be Addressed Because Shelton's Claim for Legal Malpractice Abated

In the Notice of Appeal, Owens argues that the district court erred in ruling that Shelton's claim for legal malpractice is not barred by the economic loss rule. This issue does not need to be addressed because Shelton's claim for legal malpractice abated upon her death.

D. The Substitution of Lois Bishop as Personal Representative for Patricia Shelton Was Improper Because Shelton's Claim Extinguished as per I.R.C.P. 25(a)(1)

The basis of Owens's contention that the district court erred in allowing the substitution*1253 of Lois Bishop is that substitution of the parties under I.R.C.P. 25(a)(1) is only applicable "[i]f a party dies and the claim is not thereby extinguished..." Since the legal malpractice claim abated and the contract claim failed to state an independent action, the district court erred in allowing the substitution of Bishop.

E. Bishop Is Not Entitled to Attorney's Fees Under I.C. § 12–120(3) and I.C. § 12–121

Idaho Code section 12–120(3) and Idaho Code section 12–121 apply to prevailing parties in a civil action. Bishop is not the prevailing party in this action. Therefore, this Court denies Bishop's attorney's fees claims under I.C. § 12–120(3) and I.C. § 12–121.

VI. CONCLUSION

Patricia Shelton's legal malpractice claim abated upon her death, and her breach of contract claim fails to state a claim upon which relief can be granted. Therefore, the Motion to Substitute as Plaintiff was improperly granted under I.R.C.P. 25(a)(1). Bishop is not entitled to attorney's fees because she is not the prevailing party.

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The judgment of the district court is reversed. Appellants did not request attorney fees. Costs are awarded to the Appellants.

Chief Justice BURDICK and Justice EISMANN concur.

J. JONES, J., specially concurring.

I concur in the Court's opinion but write to make some additional observations regarding the matters at issue.

Characterizing a breach of duty action against an attorney has never been easy because, by definition, an attorney-client relationship arises out of some form of contract, but a lawyer's duty of care, which by implication becomes a part of that contract, is not necessarily spelled out in the contract terms agreed upon by the parties. A lawyer's duty to a client is established by professional obligations developed by the Idaho State Bar and this Court. The contours of an Idaho lawyer's duty of care are generally spelled out in the Idaho Rules of Professional Conduct (I.R.P.C.). "An attorney's duty arises out of the contract between the attorney and his or her client." *Harrigfeld v. Hancock*, 140 Idaho 134, 137, 90 P.3d 884, 887 (2004). The things an attorney is obligated to do for a client depend on the type of matter or proceeding that the attorney undertakes for the client. The attorney is obligated to observe the duty of care attendant to such matter or proceeding. An attorney may not make a contract with the client to limit compliance with his duty of care, except as authorized by the I.R.P.C., such as obtaining informed consent to reveal confidential client information (I.R.P.C. 1.6(a)) or obtaining informed consent to represent clients with conflicting interests (I.R.P.C. 1.7(b)(4)).

As the Court notes in its Opinion, a lawyer can agree to do things or perform tasks above and beyond those provided for in, and not prohibited by, the I.R.P.C. Such additional undertakings are not required by the I.R.P.C. or the lawyer's general duty of care and, therefore, are strictly contractual in nature. Such undertakings should be enforceable in a contract action and should survive the death of

the client, just as any other contractual obligation.

For instance, I.R.P.C. 1.5 spells out the general requirements pertaining to fees charged by attorneys, but the rule does not spell out the specific provisions that must be written into the fee agreement. I.R.P.C. 1.5 states the general contours of what an attorney may do and what the attorney must not do. Violation of I.R.P.C. 1.5 may give rise to a tort action for malpractice. Violation of the specific terms of the agreement made between the lawyer and the client, where there is no claim that the provisions of I.R.P.C. 1.5 were violated, gives rise to a contract action.

In this case, the breach of contract claim is couched in terms of Owens having violated his contractual duty to Shelton. It is claimed that Owens failed to adequately inform Shelton about the operation of I.C. § 72–223, resulting in the fact that Shelton might end up with nothing if the Idaho State Insurance Fund exercised its full right of subrogation. Owens was required to adequately inform *1254 Shelton in this regard but that duty arose under I.R.P.C. 1.4, rather than the Contingent Fee Contract (Contract) between the parties. In her briefing, Bishop also contends that Owens specifically violated paragraph 1 of the Contract, providing that, "[Owens' firm] shall represent [Shelton] in said manner and do all things necessary, appropriate, or advisable, in regard thereto, whether the same be by representation in legal proceedings or otherwise." However, these are obligations that Owens had under I.R.P.C. 1.1 and 1.3. Since the alleged breaches of duty for which Shelton sued Owens are duties emanating from the I.R.P.C., the action is tort in nature.

Had Shelton sued Owens for violating the specific fee provisions of the Contract, whereby she agreed to pay Owens "forty percent (40%) of the gross recovery of any and all funds received in settlement or recovered after filing an action in any Court," a contract action would have been appropriate. It appears from the record that Owens took a fee of \$460,000 off of the top of the \$1,150,000 set-

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tlement with Advance Care, representing 40% of the total settlement, along with reimbursing himself for \$25,456.46 in costs. That left a total of \$664,543.54, all of which (and much more) was subject to the Insurance Fund's subrogated claim. Other counsel negotiated a reduction of the subrogated claim down to \$270,000, leaving a balance of \$394,543.54. There is no indication as to whether such other counsel charged an additional fee for such negotiation with the Insurance Fund, nor is there any indication as to whether any portion of the \$460,000 fee obtained by Owens was taken into account as the Insurance Fund's responsibility for the Advance Care settlement under a common fund theory. The record does not disclose how the balance was distributed. Shelton possibly could have made the claim that Owens' fee should have been calculated on some amount other than \$1,150,000, where he obviously knew that the subrogated claim would greatly exceed any amount left after he obtained the full amount of his fee. However, the contract claim pursued by Shelton, and then Bishop, did not involve this contractual question so no valid contract claim was presented on appeal.

HORTON, J., dissenting.

I respectfully dissent from the Court's conclusion that Shelton's claim abated upon her death. I do so because I believe that her claim of breach of contract stated a claim upon which relief can be granted, and therefore, the cause of action did not abate.

This Court has long recognized that the duties owed in tort cases are those imposed by law, and do not have their origins in the explicit terms of the parties' contract.^{FN2} Recently, in *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 233 P.3d 1221 (2010), this Court addressed an earlier decision in *Inland Group of Companies, Inc. v. Providence Washington Insurance Co.*, 133 Idaho 249, 985 P.2d 674 (1999). In *Inland Group*, the Court upheld an award of punitive damages for the tort of bad faith where the insurance company had failed to timely pay the undisputed portion of a

claim. *Id.* at 259, 985 P.2d at 684. Although the insurance policy at issue contained an arbitration provision relating to disputed claims, this Court rejected the insurer's claim that it had no duty to pay under the policy until the insured complied with all provisions of the policy including arbitration. *Id.* at 255–56, 985 P.2d at 680–81. *Weinstein* explained the reasons for this decision as follows:

FN2. In this regard, I take issue with the majority's reliance on *Johnson v. Jones*, 103 Idaho 702, 652 P.2d 650 (1982), for the proposition that “[t]he contract basis of legal malpractice actions is the failure to perform obligations directly specified in the written contract.” However, *Johnson* cannot be said to hold that an attorney's negligent breach of the express terms of a written contract is only actionable in tort because in *Johnson* there was no written contract. Rather, the Court in *Johnson* noted that it was “undisputed that [the attorney] never spoke with the [plaintiffs] or affirmatively stated that he would represent them.” *Id.* at 703, 652 P.2d at 651. Indeed, the Court noted that “the earnest money agreement is admittedly vague as to what the attorney's fees that the parties were to ‘share equally in’ would purchase....” *Id.* at 704 n. 2, 652 P.2d at 652 n. 2. The Court concluded that the attorney “was retained solely to draw up a contract of sale.” *Id.*

In rejecting that argument we stated, “The duty to act in good faith exists at all *1255 times during the settlement process. Furthermore, a claim for breach of the obligation of good faith and fair dealing is independent of a technical breach of the obligation to pay.” [*Inland Group*, 133 Idaho] at 255, 985 P.2d at 680. We added, “The tort recognized by this Court in *White [v. Unigard Mutual Insurance Co.]*, 112 Idaho 94, 730 P.2d 1014 (1986)] is grounded upon the breach of this independent implied contractual duty of good faith. *It*

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cannot be properly regarded as a claim for tortious breach of the explicit terms of the contract such as the duty to pay. " 133 Idaho at 255, 985 P.2d at 680.

149 Idaho at 322, 233 P.3d at 1244 (emphasis added).

In *Baccus v. Ameripride Services, Inc.*, 145 Idaho 346, 179 P.3d 309 (2008), this Court explained the interplay between contract and tort actions in similar terms:

In addition, "[i]n order for a cause of action to arise in tort, Claimants must establish the breach of a tort duty, separate and apart from any duty allegedly created by the contract." *Vickers [v. Hanover Constr. Co., Inc.]*, 125 Idaho 832, 835, 875 P.2d 929, 932 (1994)]. Furthermore, "negligent conduct and breach of contract are two distinct theories of recovery. Ordinarily, breach of contract is not a tort, although a contract may create the circumstances for the commission of a tort." *Just's Inc. v. Arrington Constr. Co.*, 99 Idaho 462, 468, 583 P.2d 997, 1003 (1978). But, "[t]he mere negligent breach or nonperformance of a contract will not sustain an action sounding in tort, in the absence of a liability imposed by law independent of that arising out of the contract itself." *Steiner Corp. v. Am. Dist. Tel.*, 106 Idaho 787, 790, 683 P.2d 435, 438 (1984) (internal quotations omitted).

145 Idaho at 350, 179 P.3d at 313 (emphasis added).

In *Baccus*, Justice Warren Jones continued, emphasizing that tort duties arise by operation of law, whereas contractual duties arise from the mutual assumption of rights and duties by the contracting parties:

In *Just's*, this Court explained the difference between the purposes of contract law and tort law thusly:

The fundamental difference between tort and

contract lies in the nature of the interests protected. Tort actions are created to protect the interest in freedom from various kinds of harm. *The duties of conduct which give rise to them are imposed by the law*, and are based primarily upon social policy, and not necessarily upon the will or intention of the parties.... Contract actions are created to protect the interest in having promises performed. *Contract obligations are imposed because of conduct of the parties manifesting consent*, and are owed only to the specific individuals named in the contract.

Just's, 99 Idaho at 468, 583 P.2d at 1003 (quoting W. Prosser, *Handbook of the Law of Torts* § 92 at 613 (4th ed.1971)).

Id. at 350–511, 179 P.3d at 313–14 (emphasis added).

In *Hudson v. Cobbs*, 118 Idaho 474, 797 P.2d 1322 (1990), this Court similarly emphasized that the source of a duty in tort is not found within the terms of the parties' contract. The Court quoted its earlier decision in *Carroll v. United Steelworkers of America*, 107 Idaho 717, 719, 692 P.2d 361, 363 (1984), which held that "an alleged failure to perform a contractual obligation is not actionable in tort.... 'To found an action in tort, there must be a breach of duty apart from non-performance of a contract.' " 118 Idaho at 478, 797 P.2d at 1326 (internal citations omitted, emphasis original). Even prior to *Carroll*, this Court repeatedly made similar pronouncements. See *Steiner Corp.*, 106 Idaho at 790–91, 683 P.2d at 438–39 ("a clear duty must be shown to exist by operation of law, separate and apart from the contractual duty...."); *Taylor v. Herbold*, 94 Idaho 133, 138, 483 P.2d 664, 669 (1971) ("Ordinarily, a breach of contract is not a tort. A contract may, however, create a state of things which furnishes the occasion for a tort."); *Wallace v. Hartford Fire Ins. Co.*, 31 Idaho 481, 486–87, 174 P. 1009, 1010 (1918) ("to determine the form in which redress must be sought, it is necessary to ascertain source or origin. If *1256 it be

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found that right or duty was created independent of the consent of the parties concerned, the action is in tort; if because of such consent, it is on contract.”).

In *Harrigfeld v. Hancock*, 140 Idaho 134, 137, 90 P.3d 884, 887 (2004), this Court stated that “[a]n attorney’s duty arises out of the contract between the attorney and his or her client.” We have recently reiterated this language from *Harrigfeld* in *Soignier v. Fletcher*, 151 Idaho 322, 326, 256 P.3d 730, 734 (2011). However, the holding in *Harrigfeld* was not based upon the express terms of the attorney-client contract; rather, the Court noted that the existence of a duty was a question of law. 140 Idaho at 138, 90 P.3d at 888. In determining whether a duty would be imposed by operation of law, the Court then conducted a balance-of-the-harms test. *Id.*

I do not think that *Hayward v. Valley Vista Care Corp.*, 136 Idaho 342, 33 P.3d 816 (2001), discussed by the majority, provides guidance for resolution of the instant appeal. Although the *Hayward* Court addressed the holding in *Trimming v. Howard*, 52 Idaho 412, 16 P.2d 661 (1932), its decision that plaintiff was precluded from bringing a contract action against a health care provider was based upon an application of I.C. § 6–1012. *Id.* at 350, 33 P.3d at 824. In *Trimming*, this Court did make the following statement, which sounds much like the holding of the majority in the present case: “Respondent is not arraigned for breach of contract, but for delinquencies incidental to its performance. As alleged, these are the very foundation of the action, and, if true, constituted nothing but malpractice. The gist of a malpractice action is negligence, not a breach of the contract of employment.” 52 Idaho at 416, 16 P.2d at 662.

However, this statement followed a traditional statement, along the lines previously discussed, distinguishing the sources of duties imposed in tort and contract cases:

The complaint primarily alleges that a contract for treatment was entered into between the

parties. So far so good. But, in the performance of that contract, respondent impliedly contracted that he would exercise ordinary and reasonable care (48 C.J. 1115, par. 101), the [sic] *which is another way of saying that such duty is imposed by law. Denning v. State*, 123 Cal. 316, 55 P. 1000, 1002 [(1899)], enunciating as follows:

The contract of employment has nothing whatever to do with the liability, except to create a duty on the part of the employer, a duty not expressed in the contract, and for the violation of which the contract of employment furnishes no rule or standard for the estimation of damages. *Nor is the action grounded upon the contract, but upon the duty springing from the relation created by it, viz., that of employer and employee, and under the old system of pleading was always classed as an action ex delicto.*

Id. at 415, 16 P.2d at 662 (emphasis added).

Based upon the foregoing, I believe that the body of law discussed both in the majority opinion and in this dissent recognizes that the duties imposed by operation of law in malpractice actions flow from the relationship created by the contractual relationship of the parties, not the contract itself.

In this case, Owens specifically undertook and promised that “[a]ttorneys shall represent Client in said matter and do all things necessary, appropriate, or advisable, in regard thereto.” There is no suggestion that Owens was incompetent or otherwise lacked the capacity to contract. There is likewise no suggestion that he was unaware of the nature of his undertaking (after all, it was his firm’s form contract), or that he did not voluntarily enter into the agreement, or that there was no consideration for his promise. In the absence of such circumstances as might permit avoidance of the terms of an express contract, I am unaware of any prior instance where this Court has determined that a party may be relieved of liability for the breach of an express term of a written contract on the basis that the “wrong theory” was advanced by plaintiff.

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The majority expresses its concern that “[a] holding to the contrary would create a per se breach of contract action in every legal malpractice action.” I would first note *1257 that this is a gross overstatement. The position I espouse only applies in instances involving express contractual undertakings. In this case, no one forced Owens to enter a contract prescribing the manner in which he would represent his client. Had he not elected to identify the manner in which he would perform his services, his duty to his client would have been imposed by law, this action would sound in tort, and I would be joining with the majority.

I, too, have concern for the result of this appeal. There is the very real concern that the decision of this Court will reinforce the perception, shared by many in our society, that courts will go out of their way in order to protect members of the bar.^{FN3} My position, which I believe to be well-grounded in existing law, simply recognizes that lawyers do not hold a special place in society that insulates them from the type of liability that any other party to a contract would face.

FN3. This perception may well evaporate when trial courts begin to instruct juries in legal malpractice cases that the attorney's duty is to “do all things necessary, appropriate or advisable, in regard” to the subject of representation. Based upon the majority's statement that this is “not materially different from the standard applied in the legal malpractice claim,” it appears that such an instruction would be appropriate.

For these reasons, I would affirm the decision of the district court and hold that Shelton stated a claim for breach of contract upon which relief can be granted. As the majority correctly notes, a claim arising *ex contractu* survives the death of the claimant. *Kloepfer v. Forch*, 32 Idaho 415, 418, 184 P. 477, 477 (1919). Accordingly, I dissent from the Court's determination that the action abated and the case should be remanded for dismissal.

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H

Supreme Court of Idaho,
Boise, May 2010 Term.
Marcie Rae HILL, Plaintiff–Appellant,
v.

AMERICAN FAMILY MUTUAL INSURANCE
COMPANY, dba American Family Insurance, a
foreign insurance corporation licensed to do busi-
ness in the State of Idaho, Defendant–Respondent.

No. 36311.

Jan. 5, 2011.

Rehearing Denied April 29, 2011.

Background: Insured, who had been involved in car accident with tortfeasor, filed suit against her underinsured motorist (UIM) insurer, after insurer denied her claim for UIM benefits, alleging breach of contract and fraud. Parties filed cross-motions for summary judgment. The District Court, Bannock County, Stephen S. Dunn, J., granted summary judgment to insurer. Insured appealed.

Holdings: The Supreme Court, W. Jones, J., held that:

- (1) exhaustion clause in UIM policy, requiring insured to deplete all of the tortfeasor's bodily injury insurance before she could collect UIM benefits, was void, but
- (2) insured was not entitled to appellate attorney fees.

Vacated and remanded.

Eismann, C.J., dissented, with opinion, in which Horton, J., concurred.

West Headnotes

[1] Appeal and Error 30 ⚡863

30 Appeal and Error
30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In general. Most Cited Cases

The Supreme Court applies the same standard as the district court when reviewing a grant of a motion for summary judgment. Rules Civ.Proc., Rule 56(c).

[2] Appeal and Error 30 ⚡863

30 Appeal and Error
30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k862 Extent of Review Dependent on Nature of Decision Appealed from

30k863 k. In general. Most Cited Cases

Fact that the parties have filed cross-motions for summary judgment does not change the standard of review, and the court must evaluate each party's motion on its own merits. Rules Civ.Proc., Rule 56(c).

[3] Appeal and Error 30 ⚡934(1)

30 Appeal and Error
30XVI Review

30XVI(G) Presumptions

30k934 Judgment

30k934(1) k. In general. Most Cited Cases

Supreme Court, in reviewing a grant of summary judgment, will liberally construe the record in favor of the party opposing the motion for summary judgment and will draw all reasonable inferences and conclusions in favor of that party. Rules Civ.Proc., Rule 56(c).

[4] Appeal and Error 30 ⚡863

30 Appeal and Error

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30XVI Review
 30XVI(A) Scope, Standards, and Extent, in General
 30k862 Extent of Review Dependent on Nature of Decision Appealed from
 30k863 k. In general. Most Cited Cases
 On Supreme Court's review of a grant of summary judgment, the entire record is freely reviewed to determine if either side was entitled to summary judgment as a matter of law and to determine whether inferences drawn by the district court are reasonably supported by the record. Rules Civ.Proc., Rule 56(c).

[5] Contracts 95 ⚡143(1)

95 Contracts
 95II Construction and Operation
 95II(A) General Rules of Construction
 95k143 Application to Contracts in General
 95k143(1) k. In general. Most Cited Cases

Contracts 95 ⚡152

95 Contracts
 95II Construction and Operation
 95II(A) General Rules of Construction
 95k151 Language of Instrument
 95k152 k. In general. Most Cited Cases
 A contract must be interpreted according to the plain meaning of the words used if the language is clear and unambiguous.

[6] Insurance 217 ⚡1808

217 Insurance
 217XIII Contracts and Policies
 217XIII(G) Rules of Construction
 217k1808 k. Ambiguity in general. Most Cited Cases
 An insurance policy is ambiguous if it is reasonably susceptible to different interpretations.

[7] Appeal and Error 30 ⚡842(8)

30 Appeal and Error
 30XVI Review
 30XVI(A) Scope, Standards, and Extent, in General
 30k838 Questions Considered
 30k842 Review Dependent on Whether Questions Are of Law or of Fact
 30k842(8) k. Review where evidence consists of documents. Most Cited Cases
 Supreme Court freely reviews the question of whether an insurance contract is ambiguous.

[8] Insurance 217 ⚡2787

217 Insurance
 217XXII Coverage—Automobile Insurance
 217XXII(D) Uninsured or Underinsured Motorist Coverage
 217k2785 Uninsured Motorists or Vehicles
 217k2787 k. Underinsurance; exhausted coverage. Most Cited Cases
 Exhaustion clause in insured's underinsured motorist (UIM) policy, requiring her to deplete all of the tortfeasor's bodily injury insurance before she could collect underinsurance benefits, explicitly created a condition precedent to UIM benefits, such that insured was entitled to coverage only if she settled or received payment for the tortfeasor's policy limits.

[9] Insurance 217 ⚡1728

217 Insurance
 217XIII Contracts and Policies
 217XIII(A) In General
 217k1728 k. Questions of law or fact. Most Cited Cases
 Whether a provision of an insurance policy violates public policy is a question of law.

[10] Contracts 95 ⚡108(1)

95 Contracts
 95I Requisites and Validity

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95I(F) Legality of Object and of Consideration

95k108 Public Policy in General

95k108(1) k. In general. Most Cited Cases

The liberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare.

[11] Contracts 95 ⚡ 108(1)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k108 Public Policy in General

95k108(1) k. In general. Most Cited Cases

The usual test applied by courts in determining whether a contract offends public policy and is antagonistic to the public interest is whether the contract has a tendency toward such an evil.

[12] Contracts 95 ⚡ 108(1)

95 Contracts

95I Requisites and Validity

95I(F) Legality of Object and of Consideration

95k108 Public Policy in General

95k108(1) k. In general. Most Cited Cases

For purposes of determining whether contract violates public policy, public policy may be found and set forth in the statutes, judicial decisions or the Constitution.

[13] Insurance 217 ⚡ 1725

217 Insurance

217XIII Contracts and Policies

217XIII(A) In General

217k1720 Validity and Enforceability

217k1725 k. Public policy. Most Cited Cases

Whether an insurance contract is against public

policy is to be determined from all the facts and circumstances of each case; in addition, analogous cases involving the same general principles may be looked to by the court in arriving at a satisfactory conclusion.

[14] Insurance 217 ⚡ 2787

217 Insurance

217XXII Coverage—Automobile Insurance

217XXII(D) Uninsured or Underinsured Motorist Coverage

217k2785 Uninsured Motorists or Vehicles

217k2787 k. Underinsurance; exhausted coverage. Most Cited Cases

Exhaustion clause in underinsured motorist (UIM) automobile insurance policy, requiring insured to deplete all of the tortfeasor's bodily injury insurance before she could collect UIM benefits, was void, as it was against state's declared public policy aimed at protecting its citizens from underinsured drivers and it contravened doctrine of judicial economy, which included shielding parties from excessive litigation and preventing unnecessary demands on the judicial system, and, thus, insured, who was involved in car accident with tortfeasor, and who settled with tortfeasor for less than her automobile insurer's policy limit for bodily insurance coverage, was not required to exhaust limits of tortfeasor's policy, but instead, was required to credit to her UIM insurer the gap between settlement she entered into with tortfeasor and the policy limits. West's I.C.A. § 41-2502(1).

[15] Insurance 217 ⚡ 1727

217 Insurance

217XIII Contracts and Policies

217XIII(A) In General

217k1727 k. Evidence. Most Cited Cases

Insurance 217 ⚡ 1777

217 Insurance

217XIII Contracts and Policies

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217XIII(C) Formal Requisites

217k1777 k. Evidence. Most Cited Cases

Absent an assertion to the contrary, the Supreme Court presumes that an insurance policy was submitted to the Director of Insurance and was found to comport with public policy.

[16] Insurance 217 ⚡1727

217 Insurance

217XIII Contracts and Policies

217XIII(A) In General

217k1727 k. Evidence. Most Cited Cases

Insurance 217 ⚡1777

217 Insurance

217XIII Contracts and Policies

217XIII(C) Formal Requisites

217k1777 k. Evidence. Most Cited Cases

The fact that the Director of Insurance may have approved an insurance contract's terms merely creates a presumption that the terms are valid and is not conclusive.

[17] Insurance 217 ⚡2806

217 Insurance

217XXII Coverage—Automobile Insurance

217XXII(D) Uninsured or Underinsured Motorist Coverage

217k2804 Credits, Deductions, and Offsets

217k2806 k. Recovery under other insurance. Most Cited Cases

An underinsured motorist (UIM) insurer is always is allowed to credit full amount of tortfeasor's liability coverage against insured's damages.

[18] Statutes 361 ⚡236

361 Statutes

361VI Construction and Operation

361VI(B) Particular Classes of Statutes

361k236 k. Remedial statutes. Most Cited Cases

Remedial legislation is to be liberally con-

strued to give effect to the intent of the legislature.

[19] Insurance 217 ⚡2787

217 Insurance

217XXII Coverage—Automobile Insurance

217XXII(D) Uninsured or Underinsured Motorist Coverage

217k2785 Uninsured Motorists or Vehicles

217k2787 k. Underinsurance; exhausted coverage. Most Cited Cases

An exhaustion clause in an underinsured motorist (UIM) automobile insurance policy, requiring the insured to deplete all of the tortfeasor's bodily injury insurance before he may collect UIM benefits from his UIM insurer, is void, unenforceable, and severable; to collect against his insurer, a UIM insured may proceed against the UIM carrier, who must investigate and attempt to resolve the claim in good faith regardless of whether the insured settled with the tortfeasor's insurer or, if so, for how much, and the UIM carrier will receive credit for the full amount of the tortfeasor's policy, regardless of the insured's actual recovery. West's I.C.A. § 41-2502(1).

[20] Insurance 217 ⚡1725

217 Insurance

217XIII Contracts and Policies

217XIII(A) In General

217k1720 Validity and Enforceability

217k1725 k. Public policy. Most Cited Cases

Insurance 217 ⚡2973

217 Insurance

217XXIV Avoidance

217XXIV(A) In General

217k2971 Conditions Precedent

217k2973 k. Effect of insured's breach. Most Cited Cases

Insurance 217 ⚡3039

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217 Insurance
 217XXV Forfeiture
 217XXV(A) In General
 217k3037 Conditions Subsequent
 217k3039 k. Effect of breach. Most
 Cited Cases

To the extent that a term in an insurance policy requiring the occurrence of a condition is unenforceable for public policy reasons, a court may excuse the non-occurrence of the condition unless its occurrence was an essential part of the agreed exchange.

[21] Statutes 361 ⚡ 278.5

361 Statutes
 361VI Construction and Operation
 361VI(D) Retroactivity
 361k278.4 Prospective Construction
 361k278.5 k. In general. Most Cited
 Cases

Statutes 361 ⚡ 278.7

361 Statutes
 361VI Construction and Operation
 361VI(D) Retroactivity
 361k278.7 k. Express retroactive provisions. Most Cited Cases
 No statute is retroactive unless the legislature expressly declares that it is. West's I.C.A. § 73-101 .

[22] Contracts 95 ⚡ 108(1)

95 Contracts
 95I Requisites and Validity
 95I(F) Legality of Object and of Consideration
 95k108 Public Policy in General
 95k108(1) k. In general. Most Cited
 Cases

It is the court's responsibility not to enforce a contract provision that is contrary to public policy; public policy is not static, but may change as the relevant factual situation and the thinking of the

times change.

[23] Contracts 95 ⚡ 138(6)

95 Contracts
 95I Requisites and Validity
 95I(F) Legality of Object and of Consideration
 95k135 Effect of Illegality
 95k138 Relief of Parties
 95k138(6) k. Necessity of raising objection. Most Cited Cases
 The duty to avoid enforcing an invalid contract term is so strong that the court must raise the public policy issue sua sponte if necessary.

[24] Contracts 95 ⚡ 108(1)

95 Contracts
 95I Requisites and Validity
 95I(F) Legality of Object and of Consideration
 95k108 Public Policy in General
 95k108(1) k. In general. Most Cited
 Cases
 The court must not enforce any contract at any stage in the litigation in which it becomes apparent that the provision contravenes public policy; thus, whenever the court discovers that a provision is invalid, the court must refuse to enforce it.

[25] Contracts 95 ⚡ 108(1)

95 Contracts
 95I Requisites and Validity
 95I(F) Legality of Object and of Consideration
 95k108 Public Policy in General
 95k108(1) k. In general. Most Cited
 Cases
 Contracts can be eviscerated by a subsequent change in public policy.

[26] Insurance 217 ⚡ 3586

217 Insurance
 217XXXI Civil Practice and Procedure

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217k3586 k. Appeals. Most Cited Cases

Insured, who prevailed on appeal of summary judgment granted to her underinsured motorist (UIM) insurer, from whom she sought UIM benefits arising from a car accident with tortfeasor, was not entitled to attorney fees on appeal, as she had not yet established that an amount, if any, was justly due to her under policy, but had merely prevailed in having summary judgment entered against her vacated, which judgment was based on policy's invalid exhaustion clause. West's I.C.A. § 41-1839(1).

****814** Johnson Olson Chartered, Pocatello, for Appellant. L. Charles Johnson argued.

Trout, Jones, Gledhill Fuhrman, PA., Boise, for Respondent. Christopher P. Graham argued.

W. JONES, Justice.

***621 I. NATURE OF THE CASE**

In this case, an underinsured-motorist claimant asks this Court to invalidate an "exhaustion clause" requiring her to exhaust the full limits of the tortfeasor's insurance policy before being eligible for underinsured-motorist benefits.

II. FACTUAL AND PROCEDURAL BACKGROUND

Marcie Hill, the appellant, was injured in a two-car accident with Andrea Hamilton in November of 2005. Andrea, who was fifteen years old, was talking on a cell phone when she unexpectedly turned her vehicle left in front of Hill's, who was approaching in the opposing lane of traffic. Hill suffered injuries to her back and to her knee. Although she has received medical treatment, Hill claims that she still suffers from knee pain and loss of mobility for which she needs arthroscopic surgery.

At the time of the accident, Andrea's car was covered by an automobile-insurance policy held by her parents, Joseph and Jacqueline Hamilton. The

Hamiltons' policy provided for up to \$25,000 in bodily-injury coverage. Hill had an underinsured-motorist ("UIM") policy with American Family Mutual Insurance Company ("American Family"), the respondent, for up to \$100,000 per person. The policy contained an "exhaustion clause" requiring her to deplete all of the tortfeasor's bodily-injury insurance before she could collect underinsurance benefits.

Hill filed suit against the Hamiltons but settled for \$1000 less than the Hamiltons' \$25,000 policy limits rather than litigating the case. She then asserted a claim for an additional \$18,000 against American Family, an amount that included credit for the \$1000 that she did not collect from the tortfeasor. American Family nonetheless denied the claim because Hill had not yet "exhausted" the tortfeasor's bodily-injury policy. Hill then filed this lawsuit against American Family alleging breach of contract and fraud and the parties submitted cross-motions for summary judgment. The district court granted summary judgment to American Family, finding that the exhaustion clause unambiguously required Hill to exhaust the Hamiltons' bodily-injury policy limits before she could receive UIM benefits. The court also found there to be no countervailing public policy in Idaho that overrides the plain language of the contract and allows Hill to recover. On appeal, Hill contends that because insurers are now statutorily mandated ***622 **815** to offer UIM coverage in Idaho, the exhaustion clause offends public policy by requiring her to litigate her claim against the Hamiltons before being eligible to receive benefits.

III. ISSUES ON APPEAL

1. Whether the district court properly granted summary judgment to American Family on Hill's claim for UIM benefits.

2. Whether Hill is entitled to attorney fees on appeal.

IV. STANDARD OF REVIEW

[1][2][3][4] This Court applies the same stand-

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ard as the district court when reviewing a grant of a motion for summary judgment. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360, 93 P.3d 685, 691 (2004). Since filing cross-motions for summary judgment does not change the standard of review, the Court evaluates each motion on its merits. *Stafford v. Klosterman*, 134 Idaho 205, 206, 998 P.2d 1118, 1119 (2000). Summary judgment is proper “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c). “This Court will liberally construe the record in favor of the party opposing the motion for summary judgment and will draw all reasonable inferences and conclusions in favor of that party.” *Arreguin v. Farmers Ins. Co.*, 145 Idaho 459, 461, 180 P.3d 498, 500 (2008). The entire record is freely reviewed to determine if either side was entitled to summary judgment as a matter of law and to determine whether inferences drawn by the district court are reasonably supported by the record. *Potlatch Educ. Ass'n v. Potlatch Sch. Dist.*, 148 Idaho 630, 634, 226 P.3d 1277, 1281 (2010).

V. ANALYSIS

A. The Exhaustion Clause Is Void as Contrary to Public Policy

The dispositive issue here is whether American Family may rely on an exhaustion clause to deny Hill's UIM benefits solely because she settled for just under the tortfeasor's policy limits. The thrust of Hill's appeal is that the exhaustion clause contravenes Idaho's public policy of requiring UIM coverage, which is embodied in I.C. § 41–2502(1). Section 41–2502(1) requires all insurance carriers to offer UIM coverage with their policies. ^{FN1} Hill argues that this Court should adopt the doctrine of “constructive exhaustion” to allow her to collect UIM benefits above the tortfeasors' policy limits even if she settles for less than those limits. American Family responds that Idaho case law creates no public policy with respect to UIM claims.

FN1. This provision provides in relevant part:

[N]o owner's or operator's policy of motor vehicle liability insurance ... shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto ... for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured and underinsured motor vehicles because of bodily injury, sickness or disease, including death, resulting there- from.

I.C. § 41–2502(1) (emphasis added representing the 2008 amendment).

1. The Exhaustion Clause Unambiguously Requires Hill to Exhaust the Tortfeasor's Insurance Policy

[5][6][7] A preliminary issue is to determine the legal effect of the exhaustion clause. A contract must be interpreted according to the plain meaning of the words used if the language is clear and unambiguous. *Cascade Auto Glass, Inc. v. Idaho Farm Bureau Ins. Co.*, 141 Idaho 660, 663, 115 P.3d 751, 754 (2005). An insurance policy is ambiguous if it is reasonably susceptible to different interpretations. *Armstrong v. Farmers Ins. Co.*, 143 Idaho 135, 137, 139 P.3d 737, 739 (2006). This Court freely reviews the question of whether an insurance contract is ambiguous. *Clark v. Prudential Prop. & Cas. Ins. Co.*, 138 Idaho 538, 541, 66 P.3d 242, 245 (2003).

[8] Hill does not dispute that the UIM provision is clear. It reads:

****816 *623** We will pay compensatory damages for bodily injury which an insured person is legally entitled to recover from the owner or operator of an underinsured motor vehicle....

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....

We will pay under this coverage only after the limits of liability under any bodily liability bonds or policies have been exhausted by payment of judgments or settlements.

This language is boilerplate in the insurance industry, and a number of other jurisdictions have found virtually identical wordings to be unambiguous. *E.g. Robinette v. Am. Liberty Ins. Co.*, 720 F.Supp. 577, 579 (S.D.Miss.1989); *Birchfield v. Nationwide Ins.*, 317 Ark. 38, 875 S.W.2d 502, 503 (1994). The clause explicitly creates a condition precedent to UIM benefits, entitling Hill to coverage only if she settles or receives a payment for the tortfeasor's policy limits. *See Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 614, 114 P.3d 974, 984 (2005) ("A condition precedent is an event not certain to occur, but which must occur, before performance under a contract becomes due." (quotation omitted)).

2. Exhaustion Clauses in UIM Insurance Contracts Are Void Because They Violate Idaho State Public Policy

[9][10][11][12][13] Next, this Court must determine whether the exhaustion clause violates public policy, which is a question of law. *Quiring v. Quiring*, 130 Idaho 560, 566, 944 P.2d 695, 701 (1997). The "liberty of contract is not an absolute and unlimited right, but upon the contrary is always subservient to the public welfare." *J.F. v. D.B.*, 116 Ohio St.3d 363, 879 N.E.2d 740, 741 (2007) (citation omitted). "[T]he courts will not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way." 17A C.J.S. *Contracts* § 218 (2010). "The usual test applied by courts in determining whether a contract offends public policy and is antagonistic to the public interest is whether the contract has a *tendency* toward such an evil." *Stearns v. Williams*, 72 Idaho 276, 283, 240 P.2d 833, 837 (1952) (emphasis added). "Public policy may be found and set forth in the statutes, judicial decisions or the constitution." *Bakker v. Thunder*

Spring-Wareham, L.L.C., 141 Idaho 185, 189, 108 P.3d 332, 336 (2005). Whether an insurance contract is against public policy "is to be determined from all the facts and circumstances of each case." *Foremost Ins. Co. v. Putzier*, 100 Idaho 883, 887, 606 P.2d 987, 991 (1980). In addition, "analogous cases involving the same general principles may be looked to by the court in arriving at a satisfactory conclusion." *Smith v. Idaho Hosp. Serv.*, 89 Idaho 499, 504, 406 P.2d 696, 699 (1965).

[14] American Family is correct in that, as of yet, Idaho case law has only held that "[n]either the Idaho legislature nor the courts have declared that there exists a public policy applicable to underinsured motorist coverage." *Meckert v. Transamerica Ins. Co.*, 108 Idaho 597, 600, 701 P.2d 217, 220 (1985); *accord Erland v. Nationwide Ins. Co.*, 136 Idaho 131, 133, 30 P.3d 286, 288 (2001). The Court repeatedly indicated, however, that the sole reason there was no clear public policy regarding UIM coverage was because "Idaho statutes do not regulate underinsured motorist coverage." *Andrae v. Idaho Counties Risk Mgmt. Prog. Underwriters*, 145 Idaho 33, 36, 175 P.3d 195, 198 (2007) (citing *Meckert*, 108 Idaho at 600, 701 P.2d at 220). We have rejected public policy challenges related to UIM policies only because "our statutes do not require an automobile insurer to include underinsured vehicle coverage in its policies or even to offer this coverage to its insureds." *Farmers Ins. Co. v. Buffa*, 119 Idaho 345, 347, 806 P.2d 438, 440 (1991); *see also Nationwide Mut. Ins. Co. v. Scarlett*, 116 Idaho 820, 822, 780 P.2d 142, 144 (1989) (same).

In 2008, however, the Legislature did begin to require insurers to offer UIM coverage. It amended I.C. § 41-2502(1) to expressly require insurance companies to offer such provisions with automobile policies. Act of March 5, 2008, ch. 69, § 1, 2008 Idaho Sess. Laws 183, 183. Insureds now may only refuse this coverage if they do so in writing. *Id.* (codified at I.C. § 41-2502(2)). The amendment requires insurers to offer protection against "underinsured motor vehicles," *624 **817 defined

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as vehicles insured with limits at least at the statutory minimum for bodily injury or death.^{FN2} § 2, 2008 IDAHO SESS. LAWS At 184 (coDified at i.c. § 41-2503(2)). The Legislature accordingly intends to protect Idaho's citizens from drivers carrying policies above the statutorily required policy levels but who have insurance insufficient to compensate their tort victims.

FN2. The minimum amount of required insurance is \$25,000 per person and \$50,000 per accident. I.C. § 49-117(18). Subject to some limited exceptions, nobody may operate a motor vehicle on public highways in Idaho without carrying the statutory minimum amount of liability insurance. *Id.* § 49-1428(1).

The Legislature apparently enacted the amendment for two reasons. First, the most obvious is the threat that underinsured motorists pose to public safety. Idahoans suffering catastrophic injuries from drivers carrying insufficient coverage could find themselves without redress if they have no UIM policy.

Second, without UIM coverage, Idahoans injured by a totally uninsured driver sometimes recover more than those injured by underinsured drivers. Many drivers in Idaho injured by underinsured motorists had little recourse if they purchased uninsured-motorist ("UM") policies but had no UIM coverage, since those policies provided no benefits if the underinsured tortfeasor had at least the minimum required amount of insurance coverage. As this Court observed before the Legislature implemented the UIM mandate, many drivers in this state "may well be in a better position if a tortfeasor carries no insurance whatsoever rather than carrying the minimum coverage mandated by the statute," and that "the matter deserves legislative attention." *Blackburn v. State Farm Mut. Auto. Ins. Co.*, 108 Idaho 85, 90, 697 P.2d 425, 430 (1985); see also *Longworth*, 538 A.2d at 424 (stating that there is no reason why UM claimants should have immediate recourse against their insurer but not

UIM claimants). The Legislature has addressed this anomaly by mandating insurers to at least offer UIM coverage in all insurance policies.

[15] Before analyzing the public-policy issue further, however, it is necessary to note that the Director of the Department of Insurance presumably approved the terms in Hill's insurance policy. Absent an assertion to the contrary, this Court presumes that the insurance policy was submitted to the Director and was found to comport with public policy. *Am. Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 399, 94 P.3d 699, 704 (2004). The Legislature has empowered the Director to invalidate an insurance policy for a number of reasons, including because it contains "any inconsistent, ambiguous, or misleading clauses, or exceptions and conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract, or which are unfairly prejudicial to the policy holder." I.C. § 41-1813(2). Hill does not contend that the Director failed to review or disapproved her policy with American Family.

[16] The Dissent contends that the Court should simply defer to the Director and hold that the policy comports with public policy, but the fact that the Director may have approved these contract terms merely creates a presumption that they are valid and is not conclusive. *Hansen v. State Farm Mut. Auto. Ins. Co.*, 112 Idaho 663, 667-68, 735 P.2d 974, 978-79 (1987). Of course, even if the Director has reviewed the terms in this case, the insurance policy here was executed before the Legislature amended the Code to require insurers to offer UIM coverage. The Director could not have known about the Legislature's new public-policy decisions at that time.

[17] Nearly every jurisdiction with a statutory UIM mandate similar to Idaho's has found exhaustion clauses to be contrary to public policy. *E.g. Country Mut. Ins. Co. v. Fonk*, 198 Ariz. 167, 7 P.3d 973, 978 (Ariz.Ct.App.2000); *Taylor v. Gov't Employees Ins. Co.*, 90 Hawai'i 302, 978 P.2d 740, 746, 751 (1999); *Buzzard v. Farmers Ins. Co.*, 824

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P.2d 1105, 1112 (Okla.1992); *Aetna Cas. & Sur. Co. v. Faris*, 27 Mass.App.Ct. 194, 536 N.E.2d 1097, 1099–100 (1989); *Chambers v. Aetna Cas. & Sur. Co.*, 442 Pa.Super. 155, 658 A.2d 1346, 1348 (1995); *625**818*Rutgers Cas. Ins. Co. v. Vassas*, 139 N.J. 163, 652 A.2d 162, 166 (1995); *Mann v. Farmers Ins. Exch.*, 108 Nev. 648, 836 P.2d 620, 621 (1992) *overruled on other grounds by White v. Cont'l Ins. Co.*, 119 Nev. 114, 65 P.3d 1090, 1092 (2003). *But see Ploen v. Union Ins. Co.*, 253 Neb. 867, 573 N.W.2d 436, 443 (1998) (rejecting a public policy challenge).^{FN3} These cases comport with the overall majority position nationwide that exhaustion clauses are void and, under the constructive-exhaustion doctrine,^{FN4} do not prevent an insured from “exhausting” the tortfeasor’s policy by settling for an amount less than the policy limits. *Farmers Ins. Exch. v. Hurley*, 76 Cal.App.4th 797, 90 Cal.Rptr.2d 697, 700 (1999); *Horace Mann Ins. Co. v. Adkins*, 215 W.Va. 297, 599 S.E.2d 720, 729 n. 12 (2004); e.g. *New Hampshire Ins. Co. v. Knight*, 506 So.2d 75, 77 (Fla.Dist.Ct.App.1987); *Metcalf v. State Farm Mut. Auto. Ins. Co.*, 944 S.W.2d 151, 153 (Ky.Ct.App.1997). To prevent the UIM carrier from paying extra-contractual benefits, however, “the underinsurer always is allowed to credit the full amount of the tortfeasor’s liability coverage against the insured’s damages.” *Hamilton v. Farmers Ins. Co. of Washington*, 107 Wash.2d 721, 733 P.2d 213, 217 (1987); *accord Sorber v. Am. Motorists Ins. Co.*, 451 Pa.Super. 507, 680 A.2d 881, 882 (1996).

FN3. American Family relies heavily on a Wisconsin case, *Danbeck v. American Family Mut. Ins. Co.*, 245 Wis.2d 186, 629 N.W.2d 150 (2001), as an instance when a court rejected a public-policy challenge and enforced the literal language of an exhaustion clause. The Wisconsin Supreme Court, however, did not incorporate the state’s statutory UIM mandate into its public-policy analysis, nor even mention that such a mandate existed, as the public-policy challenge in that case apparently

rested only on common law. *Id.* at 156 (analyzing only an intermediate court’s ruling on state public policy). Indeed, jurisdictions in which a UIM statute did not play into the legal analysis have tended to be more evenly divided on whether to enforce exhaustion clauses. Compare *Birchfield*, 875 S.W.2d at 504 (enforcing the exhaustion clause as written), *State v. Mummert*, 879 S.W.2d 525, 528–29 (Mo.1994) (same), with *Omni Ins. Co. v. Foreman*, 802 So.2d 195, 197 (Ala.2001) (holding that the UIM claimant did not forfeit her benefits by settling for less than the policy limits), and *Augustine v. Simonson*, 283 Mont. 259, 940 P.2d 116, 120 (Mont.1997) (implementing the constructive-exhaustion doctrine). Here, of course, a statute does directly bear on the public-policy analysis, so these cases are inapplicable.

FN4. Although most cases adopt this position, they do not necessarily use the term “constructive exhaustion.” Instead, many jurisdictions state that the UIM carrier’s payments are “offset” by the tortfeasor’s policy limits. *Horace Mann Ins. Co. v. Adkins*, 215 W.Va. 297, 599 S.E.2d 720, 727 (2004).

Conversely, nearly every state that has rejected the constructive-exhaustion doctrine has done so because a statute either expressly allowed or expressly required UIM coverage to be conditioned on an exhaustion clause like the one at issue here.^{FN5} The Idaho statute, by comparison, simply requires insurance policies delivered or issued in Idaho to contain underinsurance coverage unless expressly rejected in writing by the insured. I.C. § 41–2502(1), (2).^{FN6} The Idaho Code neither requires nor expressly permits exhaustion clauses.

FN5. See *Curran v. Progressive Nw. Ins. Co.*, 29 P.3d 829, 832–33 (Alaska 2001) (citing Alaska Stat. § 28.20.445); *Hurley*, 90 Cal.Rptr.2d at 701 (citing Cal. Ins.Code

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§ 11580.2(p)(3)); *Continental Ins. Co. v. Cebe-Habersky*, 214 Conn. 209, 571 A.2d 104, 106 (1990) (citing Conn. Gen.Stat. § 38-175c(b)(1)); *Daniels v. Johnson*, 270 Ga. 289, 509 S.E.2d 41, 43 (1998) (citing Ga.Code Ann. §§ 33-7-11(b)(1)(D)(ii), 33-24-41.1); *Lemna v. United Servs. Auto. Ass'n*, 273 Ill.App.3d 90, 209 Ill.Dec. 942, 652 N.E.2d 482, 484 (1995) (citing 215 Ill. Comp. Stat. 5/143a-2(7) (1992)); *Federal Ins. Co. v. Watnick*, 80 N.Y.2d 539, 592 N.Y.S.2d 624, 607 N.E.2d 771, 774 (1992) (citing N.Y. Ins. Law § 3420(f)(2)); see also *McCrory v. Byrd*, 148 N.C.App. 630, 559 S.E.2d 821, 825 (2002) (citing N.C. Gen.Stat. § 20-279.21(b)(4) (1999), stating that exhaustion occurs when the policy limits "have been paid upon the claim").

FN6. Oregon, by contrast, has invalidated exhaustion clauses primarily on statutory grounds. *Vega v. Farmers Ins. Co.*, 323 Or. 291, 918 P.2d 95, 99, 101 (1996).

[18] This Court must therefore carefully evaluate whether requiring insureds to comply with UIM exhaustion clauses would thwart the Legislature's goal of protecting motorists from underinsured drivers. Because I.C. § 41-5202(1) is designed to remedy the public-safety problem created by underinsured drivers, it is a remedial statute. "It is a well-known canon of statutory construction that remedial legislation is to be liberally construed to give effect to the intent of the legislature." *626**819 *State v. Hobby Horse Ranch Tractor & Equip. Co.*, 129 Idaho 565, 567, 929 P.2d 741, 743 (1996).

Other courts invalidating exhaustion clauses also observe that UIM statutes are remedial in nature. They reason that the insured's ability to recover UIM benefits should be "scrupulously guarded" because "UIM coverage is intended to provide excess coverage to compensate an insured against losses for which there would otherwise be no coverage." FN7 *Horace Mann*, 599 S.E.2d at 725-26. Consequently, "[t]he exhaustion clause

must be construed as it was intended, i.e., a threshold requirement and not a barrier to underinsured motorist insurance coverage." *Bogan v. Progressive Cas. Ins. Co.*, 36 Ohio St.3d 22, 521 N.E.2d 447, 453 (1988) *overruled on other grounds by McDonald v. Republic-Franklin Ins. Co.*, 45 Ohio St.3d 27, 543 N.E.2d 456 (1989).

FN7. Some states take this a step further, holding that any attempt to condition, dilute, or limit UM or UIM coverage is void. *Union Ins. Co. v. Houtz*, 883 P.2d 1057, 1063 (Colo.1994); *Brown v. USAA Cas. Ins. Co.*, 17 Kan.App.2d 547, 840 P.2d 1203, 1205 (1992).

There might be reasons for a claimant to settle below policy limits that are unrelated to the amount of damages the claimant has suffered. Because it may be necessary or advantageous for insureds to accept a settlement, "[t]he insured should have the right to accept what he or she considers the best settlement available against the tortfeasor without relinquishing under-insurance protection." *Rucker v. Nat'l Gen. Ins. Co.*, 442 N.W.2d 113, 117 (Iowa 1989). The insured might wish to settle if the insurance limits are too low to justify trial. *Olivas v. State Farm Mut. Auto. Ins. Co.*, 850 S.W.2d 564, 567 (Tex.App.1993). The insured might also have immediate financial or medical reasons for needing to settle the UIM claim below policy limits. *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589, 597 (S.C.Ct.App.1997). If the insured has to exhaust the policy limits to keep his or her UIM coverage, the tortfeasor's insurance company could force the insured to go to court by offering just less than the policy limits. "In effect then, the victim is denied the perfectly reasonable choice of saving months, if not years, of delay, trial preparation expense, and all the ensuing wear and tear by simply accepting the offer." *Longworth v. Van Houten*, 223 N.J.Super. 174, 538 A.2d 414, 423 (N.J.Super.Ct.App.Div.1988). The litigation would also likely reduce the insured's net recovery. *Id.* There would be many instances where the claimant

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receives a greater recovery by settling than by paying a lawyer to pursue a lengthy and contentious trial for only a small amount more than the settlement offer.

Litigation would create drastic delays for litigants who may have suffered serious injuries and desperately need to collect benefits. These delays would be exacerbated by the fact that the claimant may have to undergo further arbitration against the UIM carrier after obtaining a judgment from the tortfeasor. See *Harper v. Providence Washington Ins. Co.*, 753 A.2d 282, 284–85 (Pa.Super.Ct.2000) (permitting arbitration against a UIM carrier while the insured's claim against the tortfeasor was still pending).

UIM claimants in Idaho subject to exhaustion clauses like this one would have even greater difficulty collecting UIM benefits in collisions caused by more than one defendant. Although this particular issue is not presently before this Court, it highlights another reason for which many other jurisdictions have refused to enforce exhaustion clauses. In such a case, the claimant would still have to exhaust “any bodily injury liability bonds or policies” before being able to collect UIM payments. The claimant might not be able to exhaust one of the tortfeasors' policy limits, especially if that tortfeasor was less liable relative to the other defendants. See I.C. § 6–802 (permitting the court to apportion damages among defendants). As a New York court reasoned, requiring the insured to exhaust all the insurance applicable to all vehicles involved in an accident “would emasculate the endorsement's intended effect ... to provide coverage over and above the limits of the tortfeasor's insurance.” *Colonial Penn Ins. Co. v. Salti*, 84 A.D.2d 350, 446 N.Y.S.2d 77, 79 (N.Y.App.Div.1982). Due to the inequity that UIM claimants might face when confronted with multiple tortfeasors, other courts have permitted UIM insureds to pursue arbitration against *627 **820 the insurer at the same time claims are pending against multiple tortfeasors. *Leslie v. W.H. Transp. Co.*, 338 F.Supp.2d 684, 689

(S.D.W.Va.2004); see also *Gen. Accident Ins. Co. v. Wheeler*, 221 Conn. 206, 603 A.2d 385, 387 (1992) (requiring the claimant to exhaust only one tortfeasor's policy even though a statute expressly required exhaustion of all policies).

UIM claimants, in other words, are better equipped than their UIM carriers to most efficiently resolve claims against the tortfeasor. They are in the best position to determine whether it is worth the time and expense to litigate.

The Dissent asserts that the Legislature's 2008 UIM amendment “does not in any way purport to address the procedures for making a claim under such coverage,” and therefore does not indicate that there is a legislative policy aimed at protecting Idahoans from underinsured motorists. The Legislature clearly enacted the UIM amendments to protect the citizens of this State from being undercompensated for their injuries, and exhaustion clauses impose a substantive, not merely procedural, obstacle in front of accident victims seeking UIM benefits. Requiring victims to actually exhaust the tortfeasor's policy limits is not the kind of UIM coverage the Legislature contemplated.^{FN8}

FN8. The Dissent also suggests that the Court is simply protecting accident victims who fail to read their insurance policies before settling for less than the tortfeasor's policy limits. Nothing in this Opinion should be read to relieve policyholders from having to read and understand their policies. As discussed throughout this Opinion, however, exhaustion clauses create myriad problems for insureds regardless of whether they read their policies. Insureds, aware of their exhaustion clauses, may have to undergo protracted and needless litigation despite needing immediate medical or financial support.

Apart from the remedial nature of the UIM-mandate statute is the entirely separate public interest in judicial economy. “Public policy favors the

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resolution of controversies and uncertainties through compromise and settlement rather than through litigation.” 15A Am.Jur.2d *Compromise & Settlement* § 5. Exhaustion clauses harm the public interest in judicial economy in two ways. First, they encourage tortfeasors’ insurers to litigate against UIM claimants. As previously mentioned, the tortfeasor’s insurer could use an exhaustion clause to compel litigation by offering to settle for only just under the policy limits. The injured collision victim could have to endure needless delay and expense litigating or lose his/her benefits.

Second, Idaho’s courts will have to contend with unnecessary litigation merely so that UIM claimants can preserve their benefits. *Schmidt v. Clothier*, 338 N.W.2d 256, 260 (Minn.1983) (superseded by statute); *Augustine v. Simonson*, 283 Mont. 259, 940 P.2d 116, 120 (1997). As this Court and the U.S. Supreme Court have held in cases discussing collateral estoppel and res judicata, reducing repetitive or unnecessary litigation is a legitimate goal, as it frees up judicial resources for legitimate disputes. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 415, 66 L.Ed.2d 308, 313 (1980) (stating that both collateral estoppel and res judicata conserve judicial resources); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552, 559 (1979) (similar); *Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767, 771 (1979) (holding that res judicata “frees the courts to resolve other disputes”); *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 617, 114 P.3d 974, 987 (2005) (collateral estoppel); *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002) (res judicata); *Anderson v. City of Pocatello*, 112 Idaho 176, 183, 731 P.2d 171, 178 (1986) (collateral estoppel); see also *Pines, Inc. v. Bossingham*, 131 Idaho 714, 717, 963 P.2d 397, 400 (Ct.App.1998) (collateral estoppel).

Promoting an efficient judiciary ultimately benefits the public. Given all the potential reasons that a UIM claimant may need to settle for just under policy limits, it would be contrary to principles

of judicial economy to require full exhaustion by litigation or settlement. *Cobb*, 482 S.E.2d at 596–97.

[19] For the foregoing reasons, we now hold exhaustion clauses in UIM automobile policies to be void, unenforceable, and severable in Idaho. To collect against his or her insurer, a UIM insured may proceed against the UIM carrier, who must investigate and *628 **821 attempt to resolve the claim in good faith regardless of whether the insured settled with the tortfeasor’s insurer or, if so, for how much. *Taylor*, 978 P.2d at 751. The UIM carrier will receive credit for the full amount of the tortfeasor’s policy, regardless of the insured’s actual recovery.

We decline to implement the constructive-exhaustion doctrine or to otherwise replace exhaustion clauses with any other judicially created language. This is primarily to prevent any confusion over how much settlement the insured must extract from the tortfeasor before approaching the UIM carrier for benefits. Hill suggested that courts should require the settlement amount to be “reasonable” in relationship to the tortfeasor’s policy limits. A “reasonableness” requirement is unnecessary for three reasons. First, the UIM claimant, not his or her insurer, has to absorb the gap between the settlement and the tortfeasor’s policy limits. So long as there is no prejudice resulting from the settlement, there is simply no need for courts to determine whether the amount was “reasonable.” Second, the UIM claimant is in the best position to efficiently resolve a claim by weighing the provable facts of the case, the financial or medical need for quick settlement, and the potential costs of litigation. A reasonableness requirement might obstruct otherwise efficient claim resolution or prolong the process by calling on the courts to evaluate whether the settlement amount was “reasonable.” Third, asking judges to determine whether settlements are reasonable would draw the parties back into court and undermine the goal of promoting swift claim resolution and judicial

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economy.

[20] Although Hill's exhaustion clause is void, the rest of her policy remains intact. "To the extent that a term requiring the occurrence of a condition is unenforceable [for public-policy reasons], a court may excuse the non-occurrence of the condition unless its occurrence was an essential part of the agreed exchange." Restatement (Second) of Contracts § 185 (1981); see also *Nelson v. Armstrong*, 99 Idaho 422, 426, 582 P.2d 1100, 1104 (1978) ("Where a transaction is composed of both benign and offensive components and the different portions are severable, the unobjectionable parts are generally enforceable."). Hill will not receive a better deal than she bargained for if she can show that an underinsured tortfeasor is liable to her for an amount exceeding his policy limits and then sets off those policy limits against her UIM recovery. *Augustine*, 940 P.2d at 121; *Rucker*, 442 N.W.2d at 117; see also *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir.1984) (stating that the court "will not enforce the remainder of the contract if the result will be to give the promisee a substantially better deal than he had bargained for").

3. Subsequent Changes in State Law That Are Designed to Protect the Public Welfare Can Invalidate a Contract Provision on Public Policy Grounds

American Family contends that since the Legislature only began requiring insurers to offer UIM coverage in 2009, no statutory public policy aimed at protecting the public from underinsured drivers existed when Hill entered into her insurance contract in July of 2005. See § 1, 2008 Idaho Sess. Laws at 183–84 (amending I.C. § 41–2502 effective January 1, 2009). American Family reasons that this Court would be applying the statute retroactively if it allowed Hill to collect UIM benefits without having settled for the tortfeasors' policy limits.

[21] It is true that § 41–2502 is not retroactive. No statute is retroactive unless the Legislature expressly declares that it is. I.C. § 73–101; *Henderson v. Smith*, 128 Idaho 444, 448, 915 P.2d 6, 10 (1996)

. "A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage." *Doe v. Boy Scouts of Am.*, 148 Idaho 427, 431, 224 P.3d 494, 498 (2009) (quoting *Ford v. City of Caldwell*, 79 Idaho 499, 509, 321 P.2d 589, 594 (1958)). The Legislature did not expressly provide for its amendment to § 41–2502 to apply to preexisting insurance policies. In addition, there is plenty of authority holding that contracts are interpreted according to the law at the time the contract is executed. *E.g. Smith v. Idaho Hosp. Serv., Inc.*, 89 Idaho 499, 503, 406 P.2d 696, 698 (1965); *629**822 *Northland Ins. Co. v. Boise's Best Autos & Repairs*, 132 Idaho 228, 231, 970 P.2d 21, 24 (Ct.App.1997), *rev'd on other grounds*, 131 Idaho 432, 958 P.2d 589 (1998) (applying the rule specifically to insurance contracts).

[22][23][24] Nonetheless, regardless of when I.C. § 41–2502(1) was enacted, it is the Court's responsibility not to enforce a contract provision that is contrary to public policy. "Public policy is not static, but may change as the relevant factual situation and the thinking of the times change." *Brown v. Snohomish Cnty. Phys. Corp.*, 120 Wash.2d 747, 845 P.2d 334, 338 (1993). The duty to avoid enforcing an invalid contract term is so strong that Idaho's courts must raise the public policy issue *sua sponte* if necessary. *Quiring*, 130 Idaho at 567, 944 P.2d at 702. The Court does not invalidate a contract only if it was void at the time it was entered. Instead, the Court must not enforce any contract "at any stage in the litigation" in which it becomes apparent that the provision contravenes public policy. *Id.* Thus, whenever the Court discovers that a provision is invalid, the Court must refuse to enforce it.

[25] It is widely accepted that contracts can be eviscerated by a subsequent change in public policy. *E.g. Pittsburgh Plate Glass Co. v. Jarrett*, 42 F.Supp. 723, 730 (M.D.Ga.1942); *V. & S. Bottle Co. v. Mountain Gas Co.*, 261 Pa. 523, 104 A. 667, 667 (1918) (per curiam); *Dorr v. Chesapeake &*

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Ohio Ry. Co., 78 W.Va. 150, 88 S.E. 666, 667 (1916); see also *Bd. of Educ. v. Emp. Ass'n of Willingboro Sch.*, 178 N.J.Super. 477, 429 A.2d 429, 430 (N.J.Super.Ct.App.Div.1981) (noting that contracts should be interpreted according to the law existing when they are formed but also that changes in the law may make a contract illegal). Courts have broadly articulated this rule. The U.S. Supreme Court has stated that "no contract can properly be carried into effect ... which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law." *Louisville & Nashville R.R. Co. v. Mottley*, 219 U.S. 467, 485, 31 S.Ct. 265, 271, 55 L.Ed. 297, 304 (1911) (quotation omitted).

Although there is expansive language in many cases, a rule permitting any change in public policy to eviscerate preexisting contracts would not serve Idaho well. Such a rule does not account for private agreements between parties that are unlikely to endanger the public welfare. A more refined approach is to nullify only those agreements that violate state policies designed to protect the public good, either because the object of the agreement is inherently harmful or because a condition in the agreement would, in the aggregate, tend to harm the public. See *Chicago, Burlington, & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 570, 31 S.Ct. 259, 263, 55 L.Ed. 328, 339–40 (1911) (holding that the state legislatures may nullify existing contracts "where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself"); 17A C.J.S. *Contracts* § 29 (stating that "legislation in exercise of a state's police power, or by subsequent statute announcing new public policy" can avoid preexisting contracts). This approach prevents relatively unforeseeable changes in public policy from undermining otherwise legitimate business arrangements. See *Wasserman's Inc. v. Township of Middletown*, 137 N.J. 238, 645 A.2d 100, 105 (1994) (upholding municipal-land leases that had not undergone public bidding as required by a new statute).

For example, New York limits the situations in which a shift in public policy can nullify contract terms. The rule there only applies to "acts of the Legislature which are strictly measures of public policy, not to those which are intended primarily to establish or affect the rights of parties to each other." *Goldfarb v. Goldfarb*, 450 N.Y.S.2d 212, 214, 86 A.D.2d 459, 461 (N.Y.App.Div.1982). New York's courts have considered voiding contract terms only when upholding them would harm the public or would be enforced at public expense. Compare *CKC Chiropractic v. Republic W. Ins. Co.*, 5 Misc.3d 492, 784 N.Y.S.2d 350, 352 (N.Y.Civ.Ct.2004) (discussing whether an insurer had to pay benefits to an unlicensed medical provider), *Bloomfield v. Bloomfield*, 97 N.Y.2d 188, 738 N.Y.S.2d 650, 764 N.E.2d 950, 953 (2001) (discussing whether a woman could agree to waive support from an ex-spouse), and *Glengariff Corp. v. Snook*, 122 Misc.2d 784, 471 N.Y.S.2d 973, 977–79 (N.Y.Sup.Ct.1984)**823 *630 (refusing to enforce a contract to pay a medical provider more than what the provider could collect under a new Medicaid law), with *Rotodyne, Inc. v. Consol. Edison Co. of New York*, 55 A.D.2d 600, 389 N.Y.S.2d 387, 388 (N.Y.App.Div.1976) (refusing to invalidate a subcontractor's waiver of mechanics-lien rights against a general contractor).^{FN9} Although we decline to adopt New York law on this subject, these cases are instructive.

FN9. Notably, California does not allow public-policy changes to affect preexisting contracts. *Bovard v. Am. Horse Enter.*, 201 Cal.App.3d 832, 247 Cal.Rptr. 340, 344 n. 3 (1988). Nonetheless, like New York, the cases in which California courts refuse to invalidate contracts due to changed public policy apparently always involve private rights between two arms-length parties. E.g. *Stephens v. S. Pac. Co.*, 109 Cal. 86, 41 P. 783, 786 (1895) (refusing to invalidate a warehouse lease agreement where leaseholder indemnified landowner for the landowner's own negligence); *Whitmire v.*

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H.K. Ferguson Co., 261 Cal.App.2d 594, 68 Cal.Rptr. 78, 82 (1968) (refusing to invalidate an agreement in which a construction subcontractor indemnified the general contractor for its negligence).

As explained above, Idaho's UIM mandate was designed to protect the public from underinsured motorists, and not merely to govern private relations between parties. The Legislature has required that insurers offer UIM coverage to all motorists, not UIM coverage conditioned on totally depleting the tortfeasor's policy. Exhaustion clauses have no purpose but to dilute Idahoans' protection against underinsured drivers and to prevent insureds from collecting legitimate claims. They are a product of the insurance company's sophistication and bargaining power. See *Hettwer v. Farmers Ins. Co. of Idaho*, 118 Idaho 373, 377, 797 P.2d 81, 85 (1990) (quotation omitted) (explaining that insurance companies enjoy a significant bargaining advantage over insureds). They also impose additional litigation demands on the court system, which directly impedes public access to the courtroom. These threats to public safety and demands on the justice system occur regardless of when the parties executed the insurance contract. Because exhaustion clauses impinge on a state public policy designed to protect the public welfare, they are void in the State of Idaho.^{FN10}

FN10. The Dissent argues that exhaustion clauses do indeed have a legitimate purpose, stating that our opinion today simply indulges in "a belief in a grand conspiracy among evil insurance companies." This assertion is hyperbole, as exhaustion clauses are only a matter between one insurer and its insured—we need not find a "conspiracy" to hold that this kind of clause violates public policy. In any event, the Dissent offers no legitimate alternative reason why an insurer would insert such a clause into its policies. It is possible that exhaustion clauses are useful to ensure that

the tortfeasor actually could not fully compensate the accident victim, but they are not necessary to accomplish this purpose if insurance carriers receive credit for the full limits of the tortfeasor's policy, as we hold today.

The Dissent also refuses to suggest a legitimate purpose for exhaustion clauses because the clauses' purpose "was not an issue litigated below," and the factual record on the matter is undeveloped. This position misunderstands how a public-policy analysis works. Whether a contract term is illegal is not a factual inquiry but a legal one. *Farrell v. Whiteman*, 146 Idaho 604, 608, 200 P.3d 1153, 1157 (2009). Since neither American Family nor the Dissent can come up with any legitimate reason to allow insurance companies to condition UIM coverage in this way, exhaustion clauses are illegal as a matter of law.

In summary, the exhaustion clause is void based on Idaho's declared public policy aimed at protecting its citizens from underinsured drivers and on the doctrine of judicial economy, which here includes shielding parties from excessive litigation and preventing unnecessary demands on the judicial system. Claimants need not exhaust the limits of the tortfeasor's policy, but instead must credit to the UIM insurer the gap between the settlement with the tortfeasor's insurer, if any, and the policy limits. Because Hill settled with the Hamiltons for just under their policy limits and is ready to credit the gap to American Family, the summary judgment in favor of American Family is vacated.

B. Hill Is Not Entitled to Attorney Fees on Appeal

[26] Hill has also not established that American Family actually owes her any amount under the policy and is still therefore not entitled to fees on appeal. The Idaho Code provides:

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*Any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity of any kind or nature *631 **824 whatsoever, which shall fail for a period of thirty (30) days after proof of loss has been furnished as provided in such policy, certificate or contract, to pay to the person entitled thereto the amount justly due under such policy, certificate or contract, shall in any action thereafter brought against the insurer in any court in this state or in any arbitration for recovery under the terms of the policy, certificate or contract, pay such further amount as the court shall adjudge reasonable as attorney's fees in such action or arbitration.*

I.C. § 41-1839(1) (emphases added). If Hill prevails on appeal, she has only succeeded in having the summary judgment against her vacated. Although the exhaustion clause would not bar her recovery, under I.C. § 41-1839(1) she still must establish the "amount justly due under [her] policy," if any. She therefore shall not receive attorney fees on appeal.

VI. CONCLUSION

Because the exhaustion clause in Hill's UIM policy with American Family violates public policy, it cannot bar her recovery. The district court's grant of summary judgment in favor of American Family is therefore vacated and this case is remanded to the district court for further proceedings consistent with this Opinion. Hill is not entitled to attorney fees on appeal because she has not yet established that an amount, if any, is justly due under the policy. Costs to Appellant.

Justices BURDICK and J. JONES concur.

Chief Justice EISMANN, dissenting.

Because the majority usurps the authority of the legislature and the director of the Department of Insurance to strike a provision from an insurance contract that the majority simply happens to dislike, I respectfully dissent.

This case revolves around a policy provision

which provides, with respect to underinsured motorist (UIM) coverage, "**We will** pay under this coverage only after the limits of liability under any bodily injury liability bonds or policies have been exhausted by payment of judgements or settlements." (Bold type in original.) This provision, an exhaustion clause, is concededly unambiguous. The majority strikes it from the insurance policy on the ground that it allegedly violates public policy and the newly created doctrine of judicial economy. As will be shown, there is no recognized public policy in Idaho that it violates and the doctrine of judicial economy is nonsensical. In actuality, it is the majority opinion that violates public policy as expressly declared by statute.

Before addressing Idaho's public policy, I will address the majority's assertion that "[n]early every jurisdiction with a statutory UIM mandate similar to Idaho's has found exhaustion clauses to be contrary to public policy." We would not condone our children's misconduct based upon the excuse that other kids were doing it too, and such an argument does not validate the majority opinion. Whatever may be the authority of courts in other jurisdictions to modify insurance contracts, in Idaho "[c]ourts do not possess the roving power to rewrite contracts in order to make them more equitable." *Lovey v. Regence BlueShield of Idaho*, 139 Idaho 37, 41, 72 P.3d 877, 881 (2003); accord *Losee v. Idaho Co.*, 148 Idaho 219, 223, 220 P.3d 575, 579 (2009). The exhaustion clause must violate the public policy of Idaho, not that of some other state.

"Public policy may be found and set forth in the statutes, judicial decisions or the constitution." *Bakker v. Thunder Spring-Wareham, LLC*, 141 Idaho 185, 189, 108 P.3d 332, 336 (2005). Thus, the question is what statute, judicial decision, or constitutional provision declares a public policy that is violated by the exhaustion clause. Each of the three sources of public policy will be addressed separately.

1. Constitutional provision. Public policy may be found in the Constitution. *Id.* The majority does

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not contend that the exhaustion clause violates any constitutional provision.

2. Statute. The majority cites Idaho Code § 41-2502 as amended in 2008, but it is clear that the exhaustion clause does not expressly or implicitly violate any public policy declared by that statute. First, that statute**825 *632 does not even apply to the insurance policy in this case. It only applies to “the issuance of any new policy or the first renewal or replacement of any existing policy of motor vehicle liability insurance *with an effective date on or after January 1, 2009.*” Idaho Code § 41-2502(3) (2010) (emphasis added).^{FN11} The insurance policy in this case had an effective date of July 19, 2005, almost three and one-half years prior to January 1, 2009.^{FN12} The majority's assertion that the exhaustion clause in this policy violates some public policy declared by the 2008 amendment to the statute is directly contrary to the legislature's expressly declared public policy regarding the insurance policies to which the amendment applies.

FN11. This subsection provides:

Prior to the issuance of any new policy or the first renewal or replacement of any existing policy of motor vehicle liability insurance with an effective date on or after January 1, 2009, a named insured shall be provided a standard statement approved by the director of the department of insurance, explaining in summary form, both uninsured and underinsured motorist coverage, and the different forms of underinsured motorist coverage that might be available from insurers in Idaho.

FN12. The policy stated that it was “ **EFFECTIVE FROM 07-19-2005 TO 12-22-2005.**” (Bold type in original.)

Second, the statute requires insurance companies to offer UIM coverage, but Idaho Code §

41-2502(2) grants the named insured “the right to reject either or both uninsured motorist coverage or underinsured motorist coverage.” Because the insured has the right to reject UIM coverage entirely, it is difficult to see how there is a public policy prohibiting an insured from entering into an insurance contract that requires exhaustion of the limits of the tortfeasor's liability policy before the insured can collect UIM benefits.

Third, even if the 2008 amendment had applied to the policy in this case, the statute does not expressly or implicitly address exhaustion clauses or any of the procedures applicable to making a claim under UIM coverage. The majority concedes, “The Idaho Code neither requires nor expressly permits exhaustion clauses,” and the majority does not identify any statutory provision even allegedly implicitly violated by the exhaustion clause. The 2008 amendment merely requires insurance companies to offer underinsured motorist (UIM) coverage in their motor vehicle liability policies. It does not in any way purport to address the procedures for making a claim under such coverage. The majority cannot explain how a requirement that an insured establish that the tortfeasor was in fact underinsured as a precondition to recovering UIM benefits violates the public policy requiring insurance companies to merely offer UIM coverage in their motor vehicle liability policies. It states, “The Legislature clearly enacted the UIM amendments to protect the citizens of this State from being undercompensated for their injuries....” It also refers to “Idaho's UIM mandate [that] was designed to protect the public from underinsured motorists....” The majority seems to think that UIM coverage is mandatory, rather than coverage that the insured has the option to purchase. The majority's hyperbole indicates it believes that a statute simply requiring insurance companies to offer UIM coverage will somehow magically reduce accidents caused by underinsured motorists.

In fact, it is the majority opinion, not the exhaustion clause, that violates public policy as ex-

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pressly declared by statute. Idaho Code § 41-2502(1) requires that insurers offer uninsured and underinsured coverage in their motor vehicle liability insurance policies “ *under provisions approved by the director of the department of insurance*, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured and underinsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.” (Emphasis added.) The public policy declared by statute is that the director of the Department of Insurance, not this Court, has the authority to determine whether provisions of an insurance policy that do not conflict with any express statutory requirement are consistent with public policy. There was a time when this Court correctly refused to usurp the authority granted by the legislature to the director.

****826 *633** In *Hammon v. Farmers Insurance Co. of Idaho*, 109 Idaho 286, 707 P.2d 397 (1985), the insureds were injured when they swerved to avoid an oncoming vehicle that had crossed into their lane of travel and crashed. The uninsured motorist coverage of their insurance policy included injury by “hit-and-run” vehicles, but it required that such vehicles have “physical contact” with the insured or the vehicle the insured was occupying. By swerving, the insureds had avoided colliding with the oncoming vehicle, so there was no physical contact with that vehicle. They sued, contending that the physical-contact requirement in their insurance policy was void as against public policy. In deciding that it was not, we stated, “Because the Idaho statute neither mandates nor prohibits uninsured motorist coverage in hit-and-run situations, the physical contact requirement becomes a matter of contract between the insured and the insurer which we will not disturb.” *Id.* at 289, 707 P.2d at 400.

We noted, referring to Idaho Code § 41-2502, that “the uninsured motorist statute itself specifically mentions that automobile insurance policies

must be approved by the director.” ^{FN13} We then stated, “The director’s construction of insurance policies is entitled to great weight and will be followed by this Court absent cogent reasons for holding otherwise.” *Id.*

FN13. Prior to the 2008 amendment of Idaho Code § 41-2502, it provided that motor vehicle liability policies must include uninsured motorist coverage, unless the insured rejected that coverage. The statute also stated that the coverage was to be “under provisions approved by the director of the department of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefore.” Ch. 61, § 1, 1967 Idaho Sess. Laws 124, 125. Except for adding “and underinsured” before the words “motor vehicle,” that provision remained unchanged when the statute was amended in 1988 to include underinsured coverage. Ch. 69, § 1, 2008 Idaho Sess. Laws 183, 183.

Justice Bistline dissented in *Hammon*, making arguments similar to those in the majority opinion in the instant case. He wrote, “a growing number of courts, like the Court of Appeals, have found that physical contact requirements violated the intent of these statutes [like Idaho Code § 41-2502].” *Id.* at 290, 707 P.2d at 401 (emphasis in original). He contended that this Court should not “dwell[] on the face value of the words of the statute,” but should “probe deeper for a statute’s meaning.” *Id.* at 291, 707 P.2d at 402. He argued, “In reviewing the uninsured motorist coverage statute, to end all analysis at the surface is to frustrate the statute’s purpose.” *Id.* Quoting from the Supreme Court of Hawaii, he called the physical-contact requirement an “arbitrary barricade erected to eliminate all claims for damages resulting from one car acci-

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dents” and stated that such requirement “unjustifiably impedes effectuation of the statutory policy of protection for insureds against damage from the negligence of unidentified drivers.” *Id.* He concluded by criticizing the director of the Department of Insurance, stating, “As a final thought, the Director of the Department of Insurance may be elated to discover that his apparent approval of the defendant carrier’s policy may be the very factor which today has thrown the scales of justice out of balance.” *Id.* at 292, 707 P.2d at 403. Fortunately, the majority in *Hammon* was not swayed by Justice Bistline’s hyperbole.

In *Hansen v. State Farm Mutual Automobile Insurance Co.*, 112 Idaho 663, 735 P.2d 974 (1987), the insureds brought an action to recover under the uninsured motorist (UM) coverage of three different motor vehicle policies issued by State Farm for three separate vehicles. Because the insureds claimed that their damages exceeded the policy limit of the UM coverage in the policy covering the vehicle they were occupying when it was struck by an uninsured driver, they contended that they were entitled to stack the uninsured motorist coverages of all three policies. The policies each had an anti-stacking clause, but the trial court held that such clause violated public policy. On appeal, we reversed the trial court.

In doing so, we recognized the authority granted by the legislature to the director of the Department of Insurance to determine whether insurance policy provisions comport with public policy. We stated, “The Director *634 **827 of the Department of Insurance is the person entrusted by the legislature to determine whether or not given policies comport with the public interest. Policies approved by the Director are thus presumed to be in harmony with public policy.” *Id.* at 667–68, 735 P.2d at 978–79. We then stated, “In the absence of proof that a policy contains provisions which conflict with *express legislative directives*, the Director’s approval of an insurance policy form is an administrative determination that the policy form is in the

‘public interest.’ ” *Id.* (emphasis added).

There is no contention that the exhaustion clause conflicts with any express legislative directives. Indeed, it is the majority opinion that conflicts with the express legislative directive that it is the director of the Department of Insurance who is granted the authority to approve of provisions in underinsured motorist coverage and to determine if they are in accordance with public policy. As we recently stated, “Policies that are approved by the Director of the Department of Insurance are presumed to be in accordance with public policy. Absent an assertion to the contrary, this Court assumes the policy was submitted to and approved by the Director.” *American Foreign Ins. Co. v. Reichert*, 140 Idaho 394, 399, 94 P.3d 699, 704 (2004) (citations omitted).

3. Judicial decision. Prior to 2008, there were no statutes in Idaho dealing with UIM coverage. In *Meckert v. Transamerica Insurance Co.*, 108 Idaho 597, 701 P.2d 217 (1985), this Court held that there was no public policy in Idaho regarding UIM coverage. We stated as follows:

[T]he Idaho statutes do not regulate *underinsured* motorist coverage. There are no requirements that insurance carriers offer such *underinsured* motorist coverage, nor that motorists have such *underinsured* coverage. Neither the Idaho legislature nor the courts have declared that there exists a public policy applicable to *underinsured* motorist coverage. While such a policy might be desirable, that public policy should be enunciated by our legislature and not by this Court.

Id. at 600, 701 P.2d at 220 (italics in original; citations omitted). We reiterated that holding in *Erland v. Nationwide Insurance Co.*, 136 Idaho 131, 133, 30 P.3d 286, 288 (2001), wherein we stated, “There exists no public policy in regard to underinsured motorist coverage.”

The majority contends that public policy has somehow changed and that “the exhaustion clause

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is void based on Idaho's declared public policy favoring UIM coverage and on the doctrine of judicial economy." Neither of these rationales makes sense.

The majority does not explain where this alleged doctrine of "favoring UIM coverage" arises, since the legislature only required that insurance companies offer such coverage and expressly provided that insureds can reject it. Does that mean UIM coverage is more favored than other types of insurance coverage? Can a court modify to its liking contractual provisions regarding UIM coverage, but not fire coverage or theft coverage?

This Court has never recognized a "doctrine of judicial economy," whatever that is. The majority's list of examples allegedly supporting this doctrine are totally unsupported by anything in the record, nor is there anything indicating how often, if at all, they have occurred in Idaho. We have encouraged court procedures that promote judicial economy and have recognized that the doctrine of *res judicata* is based, in part, upon judicial economy, but we have never stricken or modified a contractual provision on the ground that doing so would promote judicial economy. If that supposed doctrine trumps contractual provisions, a court presiding over a breach of contract case should simply declare void the contractual provision(s) allegedly violated in order to avoid the necessity of further court proceedings and thereby promote judicial economy. In actuality, in this case following the law and sustaining the exhaustion clause would promote judicial economy. The case would be ended.

In an attempt to justify its opinion, the majority states, "There might be reasons for a claimant to settle below policy limits that are unrelated to the amount of damages the claimant has suffered." That was certainly true in this case. Plaintiff settled for \$1,000 less than the tortfeasor's policy limits because**828 *635 prior to settling neither the Plaintiff nor her attorney had ever read her insurance policy, and neither of them knew she had UIM coverage. During oral argument, the followed ex-

changed occurred:

Justice Warren Jones: Do you say that she didn't think she had underinsured coverage at the time she settled?

Mr. Johnson: That's correct, your Honor. She thought that she just had a bare bones policy and didn't have underinsured motorist coverage.

Justice Warren Jones: Okay.

Mr. Johnson: She wasn't aware of the exclusion that I just mentioned on page nineteen of her policy that states that American Family will pay under coverage only after the limits of liability under any policy, liability bonds or policies have been exhausted by payment or judgments or settlement.

The policy states in bold letters at the top of the first page, "PLEASE READ YOUR POLICY." Had either the Plaintiff or her attorney read Plaintiff's insurance policy, they would have known of the exhaustion clause and undoubtedly would not have settled with the tortfeasor for \$1,000 less than the limits of his liability coverage. Had they refused to settle for less than the policy limits of \$25,000, the tortfeasor's insurer would undoubtedly have paid the policy limits rather than incurring thousands of dollars in legal fees in an attempt to save \$1,000. We have previously stated, "It is certainly not the law in Idaho that an insured has no obligation to read his policy...." *Foster v. Johnstone*, 107 Idaho 61, 67, 685 P.2d 802, 808 (1984). Apparently, the public policy underlying the newly created "doctrine of judicial economy" is that insureds, and their attorneys, should not be burdened with reading insurance policies and that there should be no consequences from failing to do so. Judicial economy is apparently also promoted by modifying insurance contracts to avoid malpractice claims against attorneys who advise their clients to settle claims against tortfeasors with insufficient liability insurance coverage before determining whether their clients have UIM coverage and, if so, the

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policy provisions applicable to such coverage.

In addition, the majority opinion does not merely apply to claimants who choose to settle for less than the tortfeasor's policy limits. It would also apply to cases in which the insured's claim against the tortfeasor went to trial, and the jury verdict was for less than the tortfeasor's policy limits. Under the majority opinion, the insured would be able to still make a claim under the UIM coverage, hoping to be more successful the second time.

The majority states, "Exhaustion clauses have no purpose but to dilute Idahoans' protection against underinsured drivers and to prevent insureds from collecting legitimate claims." Of course, there is absolutely nothing in the record supporting this hyperbole, and it is more indicative of a belief in a grand conspiracy among evil insurance companies than any understanding as to the purpose of an exhaustion clause. The majority faults me for not offering a "legitimate alternative reason why an insurer would insert such a clause into its policies." I have not done so because that was not an issue litigated below, and there is no evidence in the record regarding it. Although I could hypothesize a reason, I prefer to make decisions based upon facts in the record rather than upon wild accusations. There is likewise nothing in the record to support the majority's claims regarding the difficulties that may be caused by the exhaustion clause, nor is there any evidence as to how often, if ever, such difficulties have occurred in Idaho. By asserting that the court can void contractual provisions that may possibly, in some unknown percentage of cases, increase judicial workloads, the majority is confused about its proper role. It apparently believes it is also the legislative body in this state.

There was a time when this Court recognized its proper role and the limits of its knowledge and authority. In *Blackburn v. State Farm Mutual Automobile Insurance Co.*, 108 Idaho 85, 697 P.2d 425 (1985), the plaintiff had obtained a judgment for \$150,000 against the driver of a car that collided

with a vehicle occupied by his wife and three of his children. She and one child were killed and the other two children were injured. The tortfeasor's liability insurer *636 **829 paid the policy limits of \$20,000, of which the plaintiff received \$10,000. He then brought an action against his own insurance company seeking to recover under his uninsured motorist coverage. He contended that the tortfeasor was an uninsured motorist to the extent that his liability insurance was insufficient to compensate the plaintiff for his damages. The plaintiff asked this Court to so hold by following the reasoning of the Arizona and Hawaii Supreme Courts.

We noted "the anomaly [sic] presented by the circumstances, particularly that a holder of a policy containing uninsured motorist coverage may well be in a better position if a tortfeasor carries no insurance whatsoever rather than carrying the minimum coverage mandated by the statute." *Id.* at 90, 697 P.2d at 430. However, we correctly refused to follow the example of the Arizona and Hawaii courts because "such clearly would be to indulge in judicial legislation under the guise of statutory interpretation." *Id.* We understood that such judicial rewriting of insurance policies could likely result in an increase of insurance costs to the motoring public. *Id.* We recognized that the plaintiff was, in actuality, asking us to make a policy decision, which "should rest on factors militating for or against that decision." *Id.* We held, however, that such policy decision should be made by the legislature based upon adequate information. We stated, "However, all of such questions should be dealt with on the basis of adequate information (little of which is before this Court) by a legislative body equipped and authorized to make such policy decisions." *Id.*

In the instant case, the majority has indulged in judicial legislation under the guise of some ill-defined public policy and a newly created doctrine of judicial economy. The policy decision of whether to prohibit exhaustion clauses should be made by the legislature, or by the director of the Department of Insurance, based upon adequate information,

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which the majority lacks. In *Blackburn*, this Court “urge[d] legislative attention to the inequitable results which flow from the language of our statutes.” *Id.* However, in *Blackburn*, *Hammon*, and *Hansen*, this Court understood its proper role and had the rectitude to refrain from usurping the authority of the legislature and the director of the Department of Insurance. We should follow that example.

Justice HORTON concurs.

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