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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

ERICA KLEIN, Plaintiff/Respondent vs. FARMERS INSURANCE COMPANY OF IDAHO, Defendant/Appellant.	Docket No. 46314-2018 Bannock County District Court CV-2017-4584-OC

RESPONDENT'S BRIEF

Appeal from the District Court of the Sixth Judicial District of the State of Idaho,

In and for the County of Bannock

Honorable Rick Carnaroli, District Judge, presiding

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STATEMENT OF THE CASE

A.

Nature of the Case/Course of Proceedings

This matter arises from a complaint, filed by Respondent Erica Klein ("Klein") against Appellant Farmers Insurance Company of Idaho ("Farmers"), seeking arbitration in an effort to resolve Klein's claim for underinsured motorist benefits ("UIM") as provided in her contract of insurance. (R., p. 7) Farmers moved for summary judgment based on the argument Klein's cause of action accrued either at the time of the underlying accident, or at the time of her settlement with the third party tortfeasor, and was therefore beyond the five year statute of limitations period provided in I.C. § 5-216. (R., p. 95)(R., p. 82) The district court denied summary judgment, finding that because the insurance policy is silent on when a demand for arbitration must be made, a genuine issue of material fact exists concerning whether Klein's complaint was filed within a reasonable time as determined by the subject matter of the contract of insurance, the situation of the parties, and the circumstances attending their performance under the terms of the contract. (R., p. 232) Upon Farmers' motion for reconsideration, the district court clarified its order and confirmed it chose to apply the "breach of contract" rule in determining when Klein's cause of action accrued for purposes of application of I.C. § 5-216. (R., p. 262) Because the issue of when a cause of action for UIM benefits accrues is an issue of first impression in Idaho, the district court also recommended appellate confirmation of this issue prior to trial. (R., p. 263).

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B.

Statement of Facts

On or about October 10, 2009, Farmers issued a policy of automobile insurance to Klein, identified as Policy Number 75-17608-01-97 ("the Policy"). (R., p. 107.)

Relevant to these proceedings, the Policy covered Klein's 2008 Chevrolet Malibu, was effective from October 10, 2009, through April 10, 2010, and provided $500,000 in UIM benefits. (R., p. 108.)

Pursuant to the terms of the Policy, Coverage C for uninsured coverage, which also includes underinsured motorist coverage, states:

> We will pay all sums which an **insured person** is legally entitled to recover as **damages** from the owner or operator of an **uninsured motor vehicle** because of **bodily injury** sustained by the **insured person**. The **bodily injury** must be caused by **accident** and arise out of the ownership, maintenance or use of the **uninsured motor vehicle**. Determination as to whether an **insured person** is legally entitled to recover **damages** or the amount of **damages** shall be made by agreement between the **insured person** and us. If no agreement is reached, the decision will be made by arbitration.

(R., p. 175.)

Pursuant to the terms of the Policy, there is a mandatory arbitration provision which states:

> If an **insured person** and we do not agree (1) that the person is legally entitled to recover **damages** from the owner or operator of an **uninsured motor vehicle**, or (2) as to the amount of payment under this part, either that person or we may demand that the issue be determined by arbitration.
>
> In that event, an arbitrator will be selected by the **insured person** and us. If agreement on an arbitrator cannot be reached within (30) days, the judge of a court having jurisdiction will appoint the arbitrator. The expense of the arbitrator and all

> other expenses of arbitration will be shared equally. Attorney's fees and fees paid for the witnesses are not expenses of arbitration and will be paid by the party incurring them.
>
> The arbitrator shall determine (1) the existence of the operator of an **uninsured motor vehicle**, (2) that the **insured person** is legally entitled to recover **damages** from the owner or operator of an **uninsured motor vehicle**, and (3) the amount of payment under this part as determined by this policy or any other applicable policy.
>
> Arbitration will take place in the county where the **insured person** lives. Local court rules governing procedures and evidence will apply. The decision in writing of the arbitrator will be binding subject to the terms of this insurance.
>
> Formal demand for arbitration shall be filed in a court of competent jurisdiction. The court shall be located in the county and state of residence of the party making the demand. Demand may also be made by sending a certified letter to the party against whom arbitration is sought, with a return receipt as evidence.

(R., p. 177.)

On February 1, 2010, Klein was driving her 2008 Chevrolet Malibu when her vehicle was t-boned by a vehicle driven by a third party tortfeasor insured by Allstate Insurance. (R., p. 150.)

Klein was injured in the accident and retained Ryan Lewis ("Lewis") to represent her. (R., p. 152.)

On December 14, 2010, Lewis provided Mike Morrissey ("Morrissey"), the Farmers' adjuster assigned to Klein's UIM claim, a copy of Klein's demand package sent to Allstate requesting settlement for the Allstate policy limits of $25,000. (R., p. 58.)

Allstate subsequently offered to resolve Klein's liability claim against the tortfeasor for the full policy limits and Lewis notified Morrissey of Allstate's offer. On January 4, 2011,

Lewis received confirmation from Morrissey that Farmers had been advised of the Allstate offer and was giving Klein permission to resolve her third party claim. (R., p. 154.) (R., p. 156.)

On April 25, 2011, Klein resolved her third party claim with Allstate Insurance for the full liability limits of $25,000. (R., p. 109.)

On November 7, 2012, pursuant to I.C. 41-1839, Lewis submitted Klein's UIM demand package to Morrissey with a proof of loss demand in the sum of $250,000.00. (R., p. 67.)

On December 12, 2012, Morrissey extended an offer to resolve Klein's UIM claim for the sum of $75,000. (R., p. 37.)

On December 13, 2012, Farmers issued a check to Klein in the amount of $75,000 for the undisputed portion of the UIM benefits owed to her pursuant to I.C. 41-1839. (R., p. 38.)

On December 13, 2012, Lewis clarified and Morrissey acknowledged that the $75,000 payment was for the undisputed portion of Klein's UIM benefits and did not resolve or otherwise constitute a final settlement and that Klein's UIM claim would be kept open, subject to her future medical needs. (R., pp. 97, 99, 104, 106.)

On January 30, 2013, Lewis acknowledged the assignment of Dan Emerson ("Emerson") as the new adjuster for Farmers and provided him with a status of Klein's ongoing medical treatment. (R., p. 40.)

On July 7, 2013, Emerson confirmed discussions with Mr. Lewis and requested updated medical information. (R., p. 41.)

On November 5, 2013, Dan Surmelis ("Surmelis") advised Lewis that Klein's UIM claim had been assigned to him and suggested mediation as an option to try to resolve the claim. (R., p. 42.)

On December 1, 2013, Surmelis again advised Lewis of his assignment as the new adjuster for Klein's UIM claim and requested information concerning the medical treatment Klein had received since Farmers' initial evaluation. (R., p. 43.)

On January 22, 2014, Surmelis confirmed discussions with Lewis concerning the status of Klein's UIM claim which included possible mediation following review of Klein's updated medical information. (R., p. 44.)

On July 7, 2016, the undersigned ("Lyon") advised Surmelis that Klein had changed counsel and of Klein's intent to submit a supplemental demand package with updated medical information in an effort to reach a final resolution of her UIM claim. Lyon also asked if Farmers' preference was still to try to resolve the matter by way of mediation. (R., p. 45.)

On August 12, 2016, Surmelis acknowledged Lyon's representation of Klein. Surmelis also advised Lyon of Klein's obligations under the Policy, of the $75,000 payment previously tendered, and of the arbitration provision of the Policy. Surmelis also indicated that Farmers was prepared to respond to any demand for payment under the terms of Klein's policy within sixty (60) days of receipt of the proof of loss. (R., p. 46.)

In subsequent discussions with Lyon, Surmelis confirmed that Klein's UIM claim was still open and that Farmers was still agreeable to resolving her claim by way of mediation. (R., p. 160.)

On February 17, 2017, Lyon provided Surmelis with Klein's supplemental demand package requesting the balance of her UIM benefits. (R., p. 48.)

On or about April 4, 2017, in discussions with Lyon, Surmelis confirmed receipt of Klein's demand package and advised that he had completed his evaluation of the claim and that his evaluation had been sent to his supervisors. Surmelis also advised he was waiting for a response from his supervisors and was therefore requesting a two week extension to respond to Klein's supplemental demand. (R., p. 160.)

On April 4, 2017, Lyon granted Surmelis a two week extension to respond to Klein's supplemental UIM demand. (R., p. 161.)

On May 17, 2017, Lyon requested an update from Surmelis concerning the status of Klein's UIM claim. (R., p. 161.)

On or about May 19, 2017, Lyon received a telephone call from attorney Gary Cooper ("Cooper") indicating he was representing Farmers. Cooper advised Lyon that Farmers believed Klein's claim was barred by the statute of limitations. After briefly discussing the issue, both Lyon and Cooper agreed to research the issue further and exchange their findings. (R., p. 161.)

On June 26, 2017, Lyon forwarded a letter to Cooper concerning Lyon's research on the issue of the application of the statute of limitations on Klein's UIM claim. (R., p. 116.)

On July 11, 2017, Cooper provided Lyon with Cooper's research concerning the application of the statute of limitations on Klein's UIM Claim. At that time, Cooper, on behalf of Farmers, also inquired as to whether Klein wished to participate in mediation in an effort to resolve her UIM claim. (R., p. 123.)

Klein agreed, and on September 22, 2017, the parties participated in mediation in an attempt to resolve Klein's UIM claim. The mediation was unsuccessful. (R., p. 161.)

On October 26, 2017, due to the inability of the parties to agree on a value of Klein's UIM claim, Lyon advised Farmers that it appeared the issue would need to be resolved through arbitration pursuant to the terms of her policy and put Farmers on notice that Klein intended to seek pre-judgment/pre-arbitration interest and attorneys fees as provided under I.C. 41-1839 unless other alternatives could be reached. (R., p. 128.)

On November 21, 2017, Cooper, acknowledged receipt of Lyon's October 26, 2017 letter and interpreted it as a demand for arbitration. At that time, Farmers proposed an arbitrator. As well, Cooper advised that he was seeking authority from Farmers to file a Declaratory Relief Action to resolve the statute of limitations issue. (R., p. 130.)

On November 21, 2017, Lyon responded to Cooper's email clarifying that the October 26, 2017 was not intended as a formal demand for arbitration. Rather, Lyon advised that a formal demand would be filed with the court pursuant to the terms of the Policy. (R., p. 132.)

On November 22, 2017, Klein filed her Complaint seeking an order from the district court compelling arbitration as provided under her policy of insurance. (R., p. 7.)

On November 28, 2017, Lyon provided Cooper with a courtesy copy of the Summons and Complaint, together with the names of potential arbitrators Klein was willing to agree to. (R., p. 135.)

On February 21, 2018, Farmers filed its Motion for Summary Judgment. (R., p. 95.)

ISSUES ON APPEAL

1. Whether the district court correctly determined that Klein's cause of action to compel arbitration to resolve her claim for underinsured motorist benefits does not accrue for purposes of application of the statute of limitations until there has been a breach of the insurance contract.
2. Whether the district court correctly determined that a genuine issue of material fact exists concerning whether Klein's cause of action to compel arbitration was made within a reasonable time as determined by the subject matter of the contract of insurance, the situation of the parties, and the circumstances attending the performance of the contract.

ARGUMENT

I.

DISTRICT COURT CORRECTLY DETERMINED KLEIN'S CAUSE OF ACTION FOR UNDERINSURED MOTORIST BENEFITS SHOULD BE GOVERNED BY THE "BREACH OF CONTRACT" RULE

The district court correctly recognized that "[t]he relationship between Klein and Farmers is contractual in nature." (R., p. 262) As such, the district court correctly chose to apply the "breach of contract" rule, rather than the "date of accident" rule or the "settlement/judgment" rule, in determining when Klein's cause of action to compel arbitration for UIM benefits accrued for purposes of application of I.C. 5-216. As set forth below, the district court's analysis is consistent with the majority rule applied by other jurisdictions, is consistent with Idaho law, and

is consistent with the arbitration provision in the insurance policy at issue in this case. Accordingly, the district court's decision should be affirmed.

A.

The Majority of Jurisdictions Apply the "Breach of Contract" Rule

Because the relationship between Klein and Farmers is governed by the policy of insurance, the applicable statute of limitations is five years as provided in I.C. § 5-216. Farmers correctly notes these points are not in dispute and that the dispute between the parties lies in when Klein's cause of action accrues. (App.Br., p. 8.) Although Idaho has not had to opportunity to consider the issue of when a cause of action for UIM benefits accrues, the majority of other jurisdictions which have considered the issue have favored the "breach of contract" rule as applied by the district court.[1]

[1] Jurisdictions which have adopted the majority view include: *McDonnell v. State Farm Mutual Automobile Insurance Co.*, 299 P.3d 715 (Alaska 2013); *Am States Ins. Co. v. LaFlam*, 69 A.3d 831 (R.I. 2013); *Snyder v. Case*, 611 N.W.2d 409 (Neb. 2000); *Eidemiller v. State Farm Mut. Auto. Ins. Co.*, 915 P.2d 161 (Kan.Ct.App. 1996), reversed on other grounds, 933 P.2d 748 (Kan. 1997); *Brooks v. State Farm Ins. Co.,* 154 P.3d 697 (N.M.Ct.App. 2007); *Blutreich v. Liberty Mut. Ins. Co.*, 826 P.2d 1167 (Ariz.Ct.App. 1991); *Spear v. California State Auto. Ass'n*, 831 P.2d 821 (Ca. 1992); *Allstate Ins. Co. v. Spinelli*, 443 A.2d 1286 (Del.1982); *Norfleet v. Safeway Ins. Co.*, 494 N.E.2d 720 (Ill.App. 1986); *Whitten v. Concord Gen. Mut. Ins. Co.*, 647 A.2d 808 (Me. 1994); *Palmero v. Aetna Casualty & Surety Co.*, 606 A.2d 797 (Me. 1992); *Lane v. Nationwide Mut. Ins. Co.*, 582 A.2d 501 (Md. 1990); *Berkshire Mut. Ins. Co. v. Burbank*, 664 N.E.2d 1188 (Mass. 1996); *Jacobs v. Detroit Auto. Inter-Insurance Exchange*, 309 N.W.2d 627 (Mich. 1981); *Grayson v. State Farm Mut. Auto. Ins.*, 971 P.2d 798 (Nev. 1998); *Metropolitan Property & Liab. Ins. Co. v. Walker*, 620 A.2d 1020 (N.H. 1993); *Wille v. Geico Cas. Co.*, 2 P.3d 888 (Okla. 2000); *Vega v. Farmers Ins. Co.*, 918 P.2d 95 (Or. 1996), superseded by statute on other grounds; *Webster v. Allstate Ins. Co.*, 833 S.W.2d 747 (Tex.Ct.App. 1992); *Schwindt v. Commonwealth Ins. Co.*, 997 P.2d 353 (Wash. 2000); *Plumley v. May*, 434 S.E.2d 406 (W.Va. 1993).

The rationale in favor of the "breach of contract" rule has been stated as follows:

> As a general matter, "a cause of action accrues and the applicable statute of limitations begins to run at the time of the injury to the aggrieved party." Additionally, as we explained in *Pickering*, an insured's action against his or her UM/UIM carrier is an action for breach of contract:
>
> > Although a tortious injury is an incidental element in the insured's suit against his [or her] insurer over a policy contract, the action is fundamentally one in contract. The plaintiff here would have no action if it were not for the coverage provided by her insurance policy. *The insurer's liability rises solely from the insurance contract and nothing else*.
>
> In light of these well-established principles, we are satisfied that the insured is not injured by his or her UM/UIM carrier and, therefore, has no right to seek judicial relief against the insurer unless and until the insurer breaches the insurance contract. "That breach does not occur until the insurer refuses payment (or arbitration if applicable)."

American States Ins. Co. v. LaFlam, 69 A.3d 831, 840-41 (R.I. 2013)(citations omitted) (emphasis in original).

B.

The "Breach of Contract" Rule is Most Consistent with Idaho Law

Despite the overwhelming number of jurisdictions which have adopted the "breach of contract" rule, Farmers maintains the rule has proven to be "unworkable" and "has fallen out of favor." (App.Br., p. 8-9.) However, Farmers fails to cite any authority in support of these assertions. Indeed, in apparent contradiction to Farmers' position, the Pennsylvania Supreme Court, in *Erie Ins. Exch. v. Bristol*, 174 A.3d 578 (Pa. 2017), recently addressed the issue of when a cause of action accrued in the context of UM and UIM benefits and recognized that the majority of jurisdictions have adopted the "breach of contract" rule over the other two rules.

Furthermore, although the *Bristol* decision was quite extensive in its analysis, there was no reference to any authority that has suggested the "breach of contract" rule has fallen out of favor as proposed by Farmers.

Nevertheless, Farmers contends the "breach of contract" rule is unworkable because it "not only indefinitely extends the time within which to make a UIM claim, but also leads to uncertainty as whether and when an insurer breaches its insurance policy with its insureds." (App.Br., p. 8.) However, these conclusions ignore the well-recognized legal principle that an insurance policy will be interpreted similar to any other contract. As stated in *Armstrong v. Farmers Ins. Co. of Idaho*, 147 Idaho 67, 205 P.3d 1203 (2009):

> When interpreting insurance policies, this Court applies the general rules of contract law subject to certain special canons of construction. Whether an insurance policy is ambiguous is a question of law over which this Court exercises free review. Where policy language is found to be unambiguous, this Court is to construe the policy as written, and the Court by construction cannot create a liability not assumed by the insurer nor make a new contract for the parties, or one different from that plainly intended, nor add words to the contract of insurance to either create or avoid liability. Unless contrary intent is shown, common, non-technical words are given the meaning applied by laymen in daily usage--as opposed to the meaning derived from legal usage--in order to effectuate the intent of the parties. Where there is an ambiguity in an insurance contract, special rules of construction apply to protect the insured. Under these special rules, because insurance contracts are adhesion contracts, typically not subject to negotiation between the parties, any ambiguity that exists in the contract must be construed most strongly against the insurer. In determining whether a particular provision is ambiguous, the provision must be read within the context in which it occurs in the policy.

147 Idaho at 69-70, 205 P.3d at 1205-06 (citations and internal quotations omitted.) As well, these conclusions ignore the fact that "[a] cause of action accrues and the statute of limitations begins to run <u>when a cause of action</u> exists." *Swafford v. Huntsman Springs, Inc.*, 163 Idaho

209, 212, 409 P.3d 789, 792 (2017), quoting *Lido Van and Storage, Inc. v. Kuck*, 110 Idaho 939, 942, 719 P.2d 1199, 1202 (1986)(emphasis added).

Thus, whether an insured has timely asserted a claim and whether the parties have complied with the terms and conditions of the insurance policy is determined in the same manner as any other contractual relationship, i.e., by reviewing the terms and conditions of the contract. Furthermore, "'[w]here no time is expressed in a contract for its performance, the law implies that it shall be performed within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance.'" *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 318, 233 P.3d 1221, 1240 (2010), quoting *Curzon v. Wells Cargo, Inc.*, 86 Idaho 38, 43, 382 P.2d 906,908 (1963). In light of these principles, there is certainly nothing unique or unusual in the way an insurance policy is interpreted to suggest the "breach of contract" rule is "unworkable." See also, *Erie Ins. Exch. v. Bristol*, 174 A.3d 578, 589 (Pa. 2017)("Absent a compelling public policy ground or legislative intent, we conclude there is no reason to create a special rule for determining when the statute of limitations starts to run in UM cases.")

Farmers also argues that the "breach of contract" rule is inconsistent with Idaho law, particularly this Court's decision in *Hill v. Am. Family Mut Ins. Co.,* 150 Idaho 619, 249 P.3d 812 (2011), which invalidated an "exhaustion clause" requiring an insured to exhaust the full limits of the tortfeasor's insurance policy before being eligible for UIM benefits. Given an Idaho insured can now make a UIM claim immediately following an accident, Farmers

maintains there is "no longer a reason to delay the accrual of the statute of limitations for pursuing UIM claims. (App.Br. p. 9.)

However, Farmers' logic is flawed and confuses the claim process with a legal cause of action. Simply because an Idaho insured can now seek UIM benefits prior to exhausting the liability limits of the third party tortfeasor does not mean that an Idaho insured has an immediate cause of action against the insurer following the accident. In fact, one of the main policy considerations in support of the Court's decision in *Hill* was the recognition that "[p]ublic policy favors resolution of controversies and uncertainties through compromise and settlement rather than through litigation." 150 Idaho at 627, *citing* 15A Am.Jur.2d Compromise and Settlement § 5. Thus, it was not the intent of *Hill* to create a cause of action for UIM benefits at the time of the accident. Rather, the intent of *Hill* was to give the insured the right to accept the best settlement available against the tortfeasor without relinquishing under-insurance protection. 150 Idaho at 626. Once a claim is made, the UIM carrier must still "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. The UIM carrier will receive credit for the full amount of the tortfeasor's policy, regardless of the insured's actual recovery." 150 Idaho at 627-28 (citation omitted.) Although not addressed in *Hill*, how the UIM claim should thereafter be resolved and how the rights and obligations of the parties should be determined would appear to depend on the language of the insurance policy.

Indeed, it is contractual relationship between the parties which gives rise to the "breach of contract" rule because it would be inconsistent to allow for a cause of action to accrue before

the insurer has been asked to perform under the contract of insurance. This rationale applies even in those jurisdictions which have invalidated the application of an exhaustion clause as Idaho has done. As stated in *Grayson v. State Farm Mut. Auto. Ins.* 114 Nev. 1379, 971 P.2d 798 (1998):

> This case presents an issue of first impression in Nevada: When does the statute of limitations begin to run on a cause of action for benefits under an UIM provision of an automobile policy? Courts in other jurisdictions have addressed this issue and the overwhelming majority of these jurisdictions have concluded that the limitations period begins to run on a UIM claim upon the insurer's breach of the insurance contract.
>
> These cases are based on the rationale that it would be illogical to begin the statute of limitations before the insured even has a justiciable claim for breach of contract. Although our UIM statutory scheme provides the insured with the option to file a suit against her UIM carrier prior to obtaining a judgment against the tortfeasor, if the insured chooses not to do so, an action for breach of contract will not lie at the time of the accident because the UIM carrier has not yet been called upon to fulfill a promise under the contract.
>
> Moreover, practically speaking, it would be fundamentally unfair to time-bar an insured from compensation she bargained for because an insured may not be aware until long after the accident that she will need to pursue a claim against her UIM insurer. Specifically, at the time of the accident or even several years thereafter, the insured may not know the extent of her injuries, the amount of the tortfeasor's available coverage, or whether the cost of her medical treatment will exceed the value of the tortfeasor's insurance policy and available assets.

114 Nev. at 1381-82 (citations omitted.)

This Court has consistently focused on the contractual relationship of the parties in determining the rights and obligations between an insurer and the insured. For example, in *Sullivan v. Allstate Ins. Co.*, 111 Idaho 304, 723 P.2d 848 (1986)(*Sullivan I*), the Court specifically rejected the proposition that an insurance carrier steps into the shoes of the

uninsured motorist resulting in a relationship which is always adversarial. The Court strengthened this position in *Weinstein v. Prudential Property and Cas. Ins. Co*., 149 Idaho 299, 233 P.3d 1221 (2010), inding that an insurance company's obligation to pay uninsured motorist benefits is based on terms of the contract of insurance. 149 Idaho 318. It is this contractual obligation which establishes a duty on the part of the insurance company to act in good faith even when its insured makes a claim under the UM coverage of the policy because "[t]he covenant requires the parties to perform, in good faith, the obligations contained in their agreement." 149 Idaho at 317, citing *Van v. Portneuf Med. Ctr.*, 147 Idaho 552, 562, 212 P.3d 982, 992 (2009)(emphasis added).

Likewise, in *Walden v. Nationwide Insurance Company*, 131 Idaho 18, 951 P.2d 949 (1998), the Court considered the import of an arbitration provision when determining whether a contract of insurance had been breached. Specifically, *Walden* involved claims for breach of contract and bad faith brought by the Walden against Nationwide based on Nationwide's failure to pay UM benefits. 131 Idaho at 19. Walden had submitted a proof of loss to Nationwide demanding the policy limits under her policy. *Id.* Nationwide advised Walden that it did not believe her claim was a limits case and demanded arbitration. *Id.* Walden's policy had an arbitration clause requiring arbitration if the insured and the insurer could not agree on either the insured's right to recover damages from an uninsured motorist, or the amount of the damages the insured was entitled to. *Id.*

Nationwide subsequently advised Walden of the name of the arbitrator it was designating pursuant to the arbitration provision. *Id.* Walden did not designate an arbitrator,

but instead filed suit alleging breach of contract and bad faith based on Nationwide's failure to pay the policy limits. *Id*. The district court granted summary judgment in favor of Nationwide, in relevant part, on a finding that Walden had "not shown a breach of contract or any other grounds for supporting a suit against the defendant." 131 Idaho at 20. In affirming the decision of the district court, this Court agreed that Nationwide was not in breach of the contract, finding:

> A term of the policy is that the parties will submit to binding arbitration to determine the amount of damages, if that amount is in dispute. In this case the amount of damages was in dispute. By refusing to designate an arbitrator, Walden was the party who failed to comply with the terms of the policy, not Nationwide. Nationwide was entitled to have the amount of damages determined in arbitration. Nationwide was not in breach of contract and did not act in bad faith in relying on the provisions of the arbitration agreement.

131 Idaho at 20.

Despite the plethora of Idaho case law focusing on the contractual relationship between the insurer and the insured, and despite the rationale that it would be illogical to begin the statute of limitations before the insured even has a justiciable claim for breach of contract, Farmres maintains that the "date of accident" rule is more consistent with Idaho law. Farmers argues that Idaho should consider the "date of accident" rule because of the advantage it offers by providing an accrual date which is objectively certain. (App.Br., p. 10.) However, the reasoning behind the "date of accident" rule is based on the premise "that the insured's claim for UIM benefits derives from the tort claim against the underinsured tortfeasor and that the insurer essentially stands in the shoes of the tortfeasor." *Hamm v. Allied Mutual Insurance Company*, 612 N.W.2d

775, 782 (Iowa 2000). As noted above, this reasoning is inconsistent with this Court's decisions in *Sullivan, Weinstein* and *Walden*.

Nevertheless, as support for its position, Farmers relies on *Swafford v. Huntsman Springs, Inc.*, 163 Idaho 209, 409 P.3d 789 (2017). In that case, the Swaffords brought suit against Huntsman Springs alleging breach of contract, breach of an express warranty, and breach of the covenant of good faith and fair dealing arising out of a contract to purchase undeveloped property. 163 Idaho at 211. The Swaffords claimed that Huntsman Springs breached its contract with them by failing to provide access to an adjacent street as required in the master plan which the Swaffords claim they relied upon when entering into the purchase contract. *Id.* The district court granted summary judgment in favor of Huntsman Springs, finding the Swaffords were on constructive notice of the breach based on improvements which were made next to their property which did not provide the agreed upon access. *Id.* Because these improvements were made prior to the five year statute of limitations, the district court found that the Swaffords' claims were timed barred. *Id.*

On appeal, this Court affirmed. Importantly, the Court's decision centered on the terms and conditions of the contract and the master plan. Specifically, because there was no time period expressed in either document for Huntsman Springs to provide the agreed upon access, the Court imposed a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the performance. 163 Idaho at 213. Applying this doctrine, the Court reasoned that if a reasonable time had run to provide the claimed access then the cause of action accrued at the time the improvements were made and the

claims were time barred. *Id.* On the other hand, if a reasonable time had not run, then the construction of the improvements constituted an anticipatory breach of contract and the statute of limitations had still run. *Id.* Critical to the Court's decision was a finding that the Swaffords were on notice of an anticipatory breach of contract which the Court defined as "a repudiation [by the promisor] of his contractual duty before the time fixed in the contract for his performance has arrived." 163 Idaho at 213, citing *Foley v. Munio*, 105 Idaho 309, 311, 669 P.2d 198, 200 (1983).

Based on the Court's analysis, which is layered in contract interpretation, it is unclear how *Swafford* supports the "date of accident" rule as suggested by Farmers. If anything, *Swafford* reinforces this Court's preference in allowing the terms and conditions of the contract to control the rights and obligations of the parties. Again this approach is most consistent with the "breach of contract" rule.

The final alternative recognized in some jurisdictions and proposed by Farmers as an alternative to the "breach of contract" rule is the "settlement/judgment" rule which states that the UIM claim accrues on the date of settlement with, or judgment against, the third party tortfeasor. However, even Farmers recognizes that this rule is inconsistent with Idaho law because it is has been applied to prevent the injustice created by an exhaustion clause which, as discussed above, has been deemed void in Idaho. See e.g., *Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401 (Minn. 2000).[2] Furthermore, the reasoning offered in support of this rule, that being the notation that

[2] *Oanes* is also distinguishable because the decision was necessary to address prior Minnesota case law which characterized a cause of action for UIM benefits as an action to

the UIM claimant would be able to postpone indefinitely the commencement of the limitations period by not submitting the claim, has been criticized by several courts. *See e.g., Palmero v. Aetna Casualty & Surety Co.*, 606 A.2d 797 (Me. 1992)(insured not injured by his UIM carrier and, therefore, has no right to seek judicial relief against the insurer unless and until the insurer breaches the insurance contract which occurs when insurer refuses payment or arbitration if applicable); *McDonnell v. State Farm Mutual Automobile Insurance Co.*, 299 P.3d 715 (Alaska 2013)(insurance company can require insured to make a claim or notice of potential claim within a certain period of time without requiring the insured to file suit); *Am States Ins. Co. v. LaFlam*, 69 A.3d 831 (R.I. 2013)(court hard-pressed to envision a scenario in which an insured who is in need of benefits and who has viable UIM claim would delay asserting the claim and remain less than fully compensated any longer than is necessary).

The other cases cited by Farmers are also distinguishable. For example, several of the cases are based on specific state authority. See e.g., *Brown v. American Family Ins. Group*, 989 P.2d 196 (Colo.App. 1999)(decided within backdrop of specific state statute delineating the statute of limitations for UIM claim and defining the time of accrual as the time when both the damages and cause of damages are known or should have been known); *Yocherer v. Farmers Insurance Exchange*, 643 N.W.2d 457 (Wis. 2002)(decision based on existing state law which

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establish an "implied-in-law contract" which accrued on the date of the accident. Furthermore, the *Oanes* Court relied in part on Pennsylvania authority which has been subsequently overturned by *Erie Ins. Exch. v. Bristol,* 174 A.3d 578 (Pa. 2017), wherein the Pennsylvania Supreme Court announced its adoption of the majority breach of contract rule. Finally, *Oanes* did not involve the issue of specific performance of an arbitration provision as presented in this case.

states that that, for insurance policies, the date of loss controls the accrual of the statute of limitations); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 880 So. 2d 336 (Miss. 2004)(decision based on state statute and policy language which required notice of claim once insured knows that his or her damages exceed the limits of liability coverage of the alleged tortfeasor).

The remaining cases cited by Farmers are actually consistent with the Klein's position. For example, both *Consiglio v. Transamerica Ins. Group*, 737 A.2d 969 (Conn.App. 1999), and *Prudential Prop. & Cas. Ins. Co. v. Perez-Henderson*, 714 A.2d 1281 (Conn. 1998), determined that the respective insureds had timely filed their application to compel arbitration given the language of the insurance policy which required them to exhaust all the limits of all the underlying liability insurance and which was silent as to the date by which a demand for arbitration had to be made. Similarly, in *North Carolina Ins. Guar. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 446 S.E.2d 364 (N.C. App. (1994), the court, in determining when the statute of limitations accrued for the purposes of a contribution action following the insolvency of the tortfeasor's carrier, found that the cause of action did not accrue at the time of the accident, but rather the "cause of action accrues when the injured party is at liberty to sue." 446 S.E.2d at 369. Finally, in *Westchester Fire Ins. Co. v. Imperiale*, 598 N.Y.S.2d 685 (N.Y. 1993), the court denied a stay of arbitration based on a finding that the exhaustion provision in the policy was a condition precedent to the accrual of the cause of action, and therefore the request for arbitration was not beyond the six year statute of limitations despite the fact that the demand for arbitration was made over ten years after the accident.

As can be seen, Idaho law is most consistent with the "breach of contract" rule. Not only does Idaho law emphasize the contractual relationship created by the policy of insurance, but it also recognizes that a cause of action accrues and the statute of limitations begins to run when a cause of action exists. Farmers' concern that the adoption of the "breach of contract" rule will indefinitely postpone the commencement of the limitations period for a cause of action for UIM benefits, and therefore a special rule should be adopted to curtail this possibility, is simply not warranted. As noted by the district court, when a contract is silent on the time of performance, Idaho law implies a reasonable time as determined by the subject matter of the contract of insurance, the situation of the parties, and the circumstances attending the performance of the contract. This principle affords sufficient protections against an insured unreasonably delaying either the claim process or the arbitration process, while at the same time giving due deference to the parties' performance as governed by the terms and conditions of the contract of insurance.

C.

The "Breach of Contract" Rule is Most Consistent with the Arbitration Provision found in Klein's Insurance Policy

As set forth above, the insurance policy in question unambiguously mandates arbitration when an agreement cannot be reached concerning the value of the UIM claim. Specifically, the Policy states: "Determination as to whether an insured person is legally entitled to recover damages or the amount of damages shall be made by agreement between the insured person and us. If no agreement is reached, the decision will be made by arbitration." (R., p. 175.) Importantly, the policy allows either party to demand arbitration. (R., p. 177.) An almost

identical arbitration provision was the subject of the California Supreme Court's decision in *Spear v. California State Auto. Assn.,* 831 P.2d 821 (Cal. 1992), which adopted the "breach of contract" rule in California.

Spear involved a petition to compel arbitration filed by Spear against CSAA for UM benefits which CSAA opposed on the argument the action was barred by the statute of limitations. 831 P.2d at 822. Although Spear had timely filed a lawsuit against the uninsured driver and had timely notified CSAA of his intent to pursue a UM claim, the claim was delayed pending the completion of Spear's associated worker' compensation action. *Id.* When the worker's comp action was resolved almost five years later, Spear notified CSAA of the settlement and his intent to negotiate his UM claim. *Id.* CSAA responded that it would not settle the claim, and if a petition for arbitration was filed, it would attempt to dismiss the action based on a statute of limitations defense. *Id.*

Spear subsequently filed a petition to compel CSAA into arbitration to resolve the UM claim. *Id.* The lower courts denied the petition, finding in relevant part, that the statute of limitations began to run when Spear filed his lawsuit against the uninsured motorist. *Id*. However, the California Supreme Court reversed, holding Spear's claim did not accrue until CSAA refused to arbitrate the controversy. 831 P.2d at 827.

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At issue in *Spear* was an arbitration provision which stated:

> "If an insured person making claim under this Part and we do not agree that such person is legally entitled to recover damages …., or if so entitled, do not agree as to the amount, then either party, on written demand of the other … shall institute arbitration proceedings…."

831 P.2d at 823. Applying this language, the *Spear* Court reasoned that the action to compel arbitration was akin to a suit in equity to compel specific performance of a contract. 831 P.2d at 824. As well, given the condition that arbitration was not required until an agreement could not be reached between the parties, the Court also determined that there could be no breach of the contract while the parties were negotiating in good faith before submitting to arbitration. 831 P.2d at 825. Rather, the contract is breached only when one party has refused to arbitrate the controversy. *Id.* It is at that time that the cause of action to compel arbitration accrues. *Id.*

The *Spear* decision exemplifies the consistency between the "breach of contract" rule and the application of the arbitration provision in Klein's insurance policy. It is also consistent with *Walden v. Nationwide Insurance Company*, *supra*, discussed above, which also considered the import of an arbitration provision when determining whether a contract of insurance had been breached. Given these decisions, it would be contrary to the express terms of Klein's contract of insurance to now establish an accrual date that is detached from the arbitration provision imposed by Farmers. Such a result would be fundamentally unfair as it would arbitrarily divest Klein of the benefits she contracted for and would excuse Farmers from its joint obligation to resolve the claim either by agreement, or through arbitration.

II.

DISTRICT COURT CORRECTLY DETERMINED THAT A GENUINE ISSUE OF MATERIAL FACTS EXISTS AS TO WHETHER KLEIN'S COMPLAINT TO COMPEL ARBITRATION WAS FILED WITHIN A REASONABLE TIME

In denying Farmers' motion for summary judgment and subsequent motion for reconsideration, the district court correctly recognized Klein's action to compel arbitration is controlled by the terms and conditions of the contract of insurance which does not provide a time period by which the parties must demand arbitration. (R., pp. 238-39.) Relying on *Weinstein*, *supra,* the district court also correctly recognized that when a contract is silent on the time for performance the law implies performance within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending their performance. (R., p. 238.) Finally, the Court correctly identified the issue of what constitutes a reasonable time as an issue of fact. (R., p. 239.)

As noted above, Farmers acknowledged that the payment of the $75,000 did not represent full and final payment to Klein and that her UIM claim would be kept open subject to her ongoing medical needs. (R., pp. 104, 106.) At no time did Farmers indicate Klein's claim would be denied, closed, or that it would no longer negotiate with her in an attempt to reach a final resolution of her claim. Indeed, Farmers subsequently confirmed Klein's claim was still open and confirmed it was still willing to participate in mediation as necessary to resolve her claim. (R., p. 160.) As well, following the submission of the supplemental demand package, Surmelis acknowledged that he had evaluated the claim and submitted his evaluation to his supervisors and needed a two week extension to reply to the demand. (R., p. 160.) It was only

after subsequent attempts to follow up with the status of Farmers' response that Farmers, through Cooper, first raised the issue of the statute of limitations. (R., p. 161.)

More importantly, even in light of this legal issue, negotiations continued. Specifically, both parties agreed to exchange their findings concerning their respective research on the statute of limitations. (R., pp. 161, 116, 123.) After this occurred, both parties agreed to participate in mediation in an effort to reach a final resolution of the claim. (R., p. 161.) Once the mediation proved unsuccessful, Klein promptly notified Farmers of her belief that arbitration would be necessary to resolve her claim and then timely filed her demand for arbitration as provided for under the terms of the Policy. (R., p. 128.)

Based on the foregoing, the district court correctly concluded that a genuine issue of material fact exists as to whether Klein's action was made within a reasonable time as determined by the subject matter of the contract, the situation of the parties, and the circumstances attending the parties' performance.

CONCLUSION

The district court properly denied Farmers' motion for summary judgment given that a genuine issue of material fact exists as to whether Klein's complaint to compel arbitration pursuant to the terms of her insurance policy was made within a reasonable time, taking into consideration the subject matter of the contract, the situation of the parties, and the circumstances attending their performance. Summary judgment was also appropriate as Klein's cause of action could not have accrued as a matter of law until there was a breach of the insurance contract, either by Farmers denying her claim, or by Farmers refusing to participate in

arbitration. As there has been no breach of the insurance contract, Klein's action has not accrued for purposes of application of the five year limitations period set forth in I.C. 5-216.

Accordingly, the orders of the district court should be affirmed and this matter returned to the district court for a determination of whether Klein's cause of action was made within a reasonable time.

DATED this 4th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2019, I electronically filed the forgoing ***Respondent's Brief*** with the Clerk of the Court using the Idaho I-Court E-File system and requested that a Notice of Filing be sent to the following persons:

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Dated this 4th day of February, 2019.

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