

DISTRICT COURT, BOULDER COUNTY,
COLORADO

Court Address: Boulder Justice Center
1777 6th Street
Boulder, CO 80302

Phone Number: 303-441-3750

Plaintiff: Chad A. Hicks, individually and on behalf of
all persons similarly situated

v.

Defendant: American Family Mutual Insurance
Company, a Wisconsin corporation

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▲ COURT USE ONLY ▲

Case Number:

Div.: Ctrm.:

CLASS ACTION COMPLAINT

Plaintiff, on behalf of himself and a class of others similarly situated, by and through their attorneys, Samuel G. Livingston, P.C., Beth Klein of the Klein Law Firm, LLP, and Joseph J. Archuleta & Associates, alleges as follows:

I. BACKGROUND ALLEGATIONS.

1. Defendant American Family Mutual Insurance Company (hereinafter “American Family”) is a Wisconsin corporation and maintains its principal place of business in Madison, Wisconsin.

2. American Family writes automobile insurance policies in the State of Colorado that are subject to the Colorado Auto Accident Reparations Act, C.R.S. §10-4-701, et seq.

3. Pursuant to C.R.S. §10-4-701, all persons who purchase automobile insurance in the State of Colorado must be offered additional PIP benefits to their prospective insureds. These benefits include medical benefits “without dollar or time limitations,” and loss of income benefits “equivalent to eighty-five percent of loss of gross income per week . . . without dollar to time limitations” (hereinafter referred to as “**Extended PIP Benefits**”).

4. American Family did not offer or produce policies that included **Extended PIP Benefits** (hereinafter “**Complying Extended Policies**”) to persons who purchased automobile insurance in the State of Colorado in violation of Colorado law.

5. Plaintiff brings this action on behalf of himself and all members of the proposed class to declare that all automobile insurance policies purchased from American Family between July 1, 1992 and January 29, 2001 automatically include **Extended PIP Benefits** as of the date each policy was issued.

II. JURISDICTION, VENUE AND CHOICE OF LAW

6. The Plaintiff brings this action on behalf of himself and all others who purchased an American Family automobile insurance policy between July 1, 1992 and January 29, 2001.

7. Plaintiff resides at 8110 Irving Street, Westminster, Colorado 80031 and purchased several automobile insurance policies from American Family that should have complied with the provisions of the Colorado Auto Accident Reparations Act, C.R.S. §10-4-701, et seq.

8. Colorado law applies to this dispute that involves application of the Colorado Auto Accident Reparations Act to all automobile insurance contracts entered into in the State of Colorado, such as the automobile insurance policy purchased by Plaintiff from American Family in this state.

9. Plaintiff and the members of the proposed class have been similarly and adversely effected by the Defendant's failure to comply with the provisions of C.R.S. §10-4-701 which requires the Defendant to offer and provide **Extended PIP Benefits**.

10. Jurisdiction is proper in this Court because American Family is licensed and authorized to do business in Colorado and currently does and, at all relevant times, did business in Colorado.

11. Venue is proper pursuant to C.R.C.P. 98 because American Family does, and at all relevant times did, business in Boulder County, Colorado.

12. Federal jurisdiction does not exist. Diversity jurisdiction pursuant to 28 U.S.C. 1332 does not exist because the Defendant is a mutual insurer that is deemed to be a resident of

each state where each mutual policy holder resides. Moreover, diversity jurisdiction does not exist because the claims at bar request only equitable forms of relief : declaratory relief and corrective notice. Plaintiff and the putative class assert no federal question, no claim for relief under any federal statute, and no claim concerning any provision of the United States Constitution. Plaintiff's state law claims are not federally preempted. The acts of which Plaintiff complains concern the regulatory and statutory scheme of automobile insurance in the State of Colorado.

III. CLASS ACTION ALLEGATIONS

13. Plaintiff brings this action on his own behalf and as a class action pursuant to C.R.C.P. 23, on behalf of the following class of persons:

The class consists of those persons or entities within the United States who purchased insurance policies from American Family in the State of Colorado subject to the Colorado Auto Reparations act between July 1, 1992 and January 29, 2001.

Excluded from the class are (a) the Defendant; (b) any affiliate, officer, director, employee or controlling person thereof; (c) any entity owned or controlled by the Defendant; and (d) any legal representative, heir, successor or assign of any such excluded person.

14. The class is so numerous and geographically dispersed throughout Colorado and other states that joinder of all members is impracticable.

15. American Family sold thousands of automobile policies in the State of Colorado between July 1, 1992 and January 29, 2001.

16. American Family has conceded in a similarly defined putative class action and

the District Court held in French v. American Family Mutual Insurance Company and American Standard Insurance Company of Wisconsin, Case No. 2000CV3162, District Court, El Paso County, Colorado, that the numerosity requirement for class certification under the facts is met.

17. Common questions of law and fact exist as to all members of the class and predominate over any questions solely affecting individual members of the class. The questions of law and fact common to the class include, but are not limited to, whether:

- a) American Family adopted business policies and practices that violated C.R.S. §10-4-710
- b) American Family failed to write **Complying Extended PIP Policies** in the State of Colorado in violation of C.R.S. §10-4-710;
- c) Certain provisions in the insurance contracts should be declared to automatically contain coverages pursuant to Colorado case law;
- d) American Family failed to adequately and timely notify its insureds that its policies were not **Complying Extended PIP Policies**;
- e) Corrective notice should be provided to all persons who purchased PIP insurance policies from American Family between July 1, 1992 and January 29, 2001;
- f) Whether principles of *res judicata* and *collateral estoppel* arising from the decision in Weber v. American Family Mutual Insurance Company, Case No. 2001CV2188, District Court, El Paso County, Colorado, dated November 14, 2003 apply to require all American Family insurance contracts written in the State of Colorado to be declared reformed effective from the date of issuance. Weber was dismissed with prejudice February 5, 2004.

18. Plaintiff's claims are typical of the claims of the class because other members of the class have purchased automobile insurance contracts from American Family and are similarly entitled to declaratory relief and notice due to a common course of conduct involving the same uniform policies and practices of American Family in violation of Colorado law. Specifically, from July 1, 1992 to January 29, 2001 American Family uniformly and

systematically failed to underwrite **Complying Extended PIP Policies** and failed to make offers of **Extended PIP Benefits** as mandated by C.R.S. §10-4-710 and Colorado case law to any of the members of the putative class.

19. Plaintiff will fairly and adequately protect the interests of the class. Moreover, Plaintiff has retained counsel who is competent and experienced in class action litigation who will vigorously prosecute this action. Plaintiff's interests are not antagonistic to nor in conflict with the interests Plaintiff seeks to represent as class representatives.

20. American Family has acted and refused to act on grounds generally applicable to the class, thereby making appropriate, declaratory relief and corrective notice with respect to the class as a whole.

21. A class action is superior to other available methods for the fair and efficient adjudication of this controversy since, among other things, joinder of all members of the class is impracticable. Furthermore, the expense and burden of individual litigation makes it impractical for all members of the class to individually seek to redress the wrongs done to them. Indeed, since the common harm involves technical issues of automobile insurance law and declaratory relief involving insurance contracts, many individual members of the class may be unaware of their rights and unable to protect themselves. The class is readily definable and will eliminate the possibility of repetitious litigation.

22. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action. This class action requests that the Court declare that the insurance contracts automatically contain **Extended PIP Benefits**

which has been clearly established in Colorado law and corrective notice to all class members.

Management of individual bad faith or damage claims is not requested in this action.

23. The class may be certified under the provisions of C.R.C.P. 23(b)(1)(A), 23(b)(2), and/or 23(b)(3) because:

- a) The prosecution of separate actions by individual members of the class would both create a risk of inconsistent or varying adjudication with respect to individual class members which would establish incompatible standards of conduct for American Family;
- b) American Family has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the members of the class as a whole, or;
- c) Questions of law and fact common to the class predominate over any questions affecting only individual members, and a class action is the superior method for ensuring a fair and efficient adjudication the controversy.

IV. GENERAL ALLEGATIONS

24. On January 11, 2001 Plaintiff was driving a 1988 Saab that was insured by American Family. He was seriously injured when the driver of another vehicle failed to stop and struck the Plaintiff.

25. As a result of the January 11, 2001 accident, Plaintiff suffered personal injuries and losses that have far exceeded the minimum coverage included in the American Family policy that covered this accident.

26. When selling the automobile insurance policy to Plaintiff, American Family was obligated under C.R.S. §10-4-710 to offer **Extended PIP Benefits** to their prospective insureds. American Family was further obligated to provide written explanations of all available PIP

benefits, including **Extended PIP Benefits**, prior to issuance of the policy.

27. From July 1, 1992 to January 29, 2001 American Family uniformly and systematically failed to underwrite **Complying Extended PIP Policies** and failed to make offers of **Extended PIP Benefits** as mandated by C.R.S. §10-4-710 and Colorado case law to any of the members of the putative class. This conduct is typical and affects all class members.

28. American Family continued to ignore these legal obligations after the September 5, 1996 Colorado Court of Appeals opinion, Thompson v. Budget Rent-a-Car Systems, Inc., 940 P.2d 987 (1996). This opinion held that failure to comply with the provisions of C.R.S. §10-4-710 results in legal reformation of automobile insurance policies to include **Extended PIP Benefits**.

29. At a meeting on December 27, 2000 attended by Mark Prouty, Paulette Thompson, Dawn Duchesneau, Jan Schattschneider, Dan Smith, Rodney Steinke, Marci Sadeck, Colin Maitland, Greg Cass, Dave Hendricks, Dan Reim and Doris Kilen, the subject of **Extended PIP Benefits** was discussed, and American Family consciously decided not to notify currently policy holders about their rights and the corporate and state-wide omission of **Extended PIP Benefits**.

30. American Family failed to write **Complying Extended PIP Policies** in Colorado until January 29, 2001. This included the very time period when Plaintiff purchased his policy.

31. On January 23, 2003, Judge David Gilbert in French, et al. v. American Family Mutual Insurance Company, 2000CV3162, El Paso County, Colorado held that American Family failed to offer enhanced coverage that complied with the clear mandate of Colorado's No-fault

system and that the failure to offer the required coverage options is a violation of Colorado law. The Court held that the insurance contract at issue in that case was reformed from the date of purchase to include unlimited medical and wage loss coverage defined as a mandatory option pursuant to C.R.S. §10-4-710.

32. On November 14, 2003, Judge David Giulbert in Weber v. American Family Mutual Insurance company, Case No. 2001CV2188, District Court, El Paso County, Colorado found that the insurance contracts issued by American Family were “*declared to automatically contain the highest coverage*” contained in C.R.S. §10-4-710 as of the date of the issuance of the policy.

V. DECLARATORY RELIEF

33. Plaintiff incorporates all previous allegations herein.

34. Under Colorado law, the failure of an automobile insurance company to offer a prospective insured extended PIP benefits requires that the PIP policy automatically include the **Enhanced PIP Benefits** available under C.R.S. §10-4-710. See, Thompson v. Budget Rent-A-Car Systems, 940 P.2d 997 (Colo. App. 1996).

35. From July 1, 1992 to January 29, 2001, American Family uniformly and systematically failed to underwrite **Complying Extended PIP Policies** and failed to make offers of **Extended PIP Benefits** as mandated by C.R.S. §10-4-710 and Colorado case law to any of the members of the putative class. This conduct is typical and affects all class members.

36. All automobile policies issued by American Family from July 1, 1992 to January 29, 2001 should be automatically declared **Complying Extended PIP Policies** which

specifically include the following coverages: **Medical benefits without dollar or time limitations and loss of income benefits equivalent to eight-five percent of loss of gross income per week without dollar or time limitations.**

VI. RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests, individually and on behalf of all members of the class, that judgment be entered in their favor and against American Family providing:

- A. An Order certifying this action as a class action and appointing Plaintiff and his undersigned counsel to represent the class.
- B. An Order declaring all automobile insurance policies issued by American Family in the State of Colorado between July 1, 1992 and January 29, 2001 automatically include **medical benefits without dollar or time limitations and loss of income benefits equivalent to eighty-five percent of loss of gross income per week without dollar or time limitations** as of the date that each policy was issued.
- C. Corrective Notice to be sent to all class members notifying them that their policy has automatically been declared a **Complying Extended PIP Policy** and advising them of their legal rights.
- D. Such other and further relief as this Court may deem just, equitable or proper.

Dated this 28th day of June, 2004.

Original signatures on file at the office of:

By: **Samuel G. Livingston**
Samuel G. Livingston, P.C.

By: **Beth Klein**
Klein Law Firm, LLP

By: **Joseph Archuleta**
Joseph J. Archuleta & Associates