

UNDERINSURED MOTORIST (UIM) COVERAGE

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I. UIM Statutory Background

A. Present Law

Motor vehicle insurance policies issued for motor vehicles in Minnesota must provide underinsured motorist (UIM) coverage. Minn. Stat. § 65B.49, subd. 3a. However, UIM insurance coverage is not required for motorcycles. The statute does explicitly allow an insurance company to sell UIM coverage which is broader in scope than the coverage required by the No-Fault Act. Minn. Stat. § 65B.49, subd. 7. Consequently, it is essential to review the terms of the applicable UIM contract when close issues are being resolved.

B. Historical Background

It is important to know something of the historical background of UIM coverage in order to determine which of the past Minnesota Supreme Court decisions have been superseded by statutory changes.

1972-1974	1975-1980	1980-1985	1985-1989	1989 to present
<ul style="list-style-type: none"> ▪ Required UIM coverage to be “made available” ▪ UIM provided “difference of limits” coverage ▪ Applicable statute: Minn. Stat. §65B.25 	<ul style="list-style-type: none"> ▪ Insurers required to offer optional UIM coverage ▪ Changed from “difference of limits” coverage to “add on” or “excess” coverage ▪ Applicable statute: Minn. Stat. §65B.49, subd. 6(e) 	<ul style="list-style-type: none"> ▪ No mention of UIM coverage in Minnesota statutes 	<ul style="list-style-type: none"> ▪ Made UIM coverage a single coverage combined with uninsured motorist (UM) coverage ▪ Changed back to “difference in limits” coverage ▪ Applicable statute: Minn. Stat. §65B.49, subd. 3a 	<ul style="list-style-type: none"> ▪ Made UM and UIM separate mandatory coverages ▪ Once again an “add on” coverage ▪ Applicable statute: Minn. Stat. §§65B.49, subd. 3a and 4a

1. 1972 - 1974

Minn. Stat. § 65B.25 required that UIM coverage be “made available” by insurance companies. See Jacobson v. Illinois Farmers Ins. Co., 264 N.W.2d 804 (Minn. 1978). UIM was a “difference of limits” coverage. The UIM coverage actually available to an injured claimant would be calculated by first deducting liability insurance limits from the UIM limits. Lick v. Dairyland Ins. Co., 258 N.W.2d 791 (Minn. 1977). For example, in a “difference of limits” system, an accident involving a \$50,000 liability insurance policy and a \$50,000 UIM policy would result in having a total of \$50,000 in coverage, with no UIM coverage actually available to compensate for injuries caused by the accident.

2. 1975 - April 12, 1980

On January 1, 1975, the Minnesota No-Fault Act took effect. Insurers were now required to offer optional UIM coverage. Minn. Stat. § 65B.49, subd. 6(e). The coverage was changed from “difference of limits” to an “add on” or “excess” coverage. With an “add on” system, an accident involving a \$50,000 liability insurance policy and a \$50,000 UIM policy would result in having a total of \$100,000 in coverage for injuries caused by the accident.

Because the statute required an offer of UIM coverage, the courts would impose UIM coverage as a matter of law if an insurance company could not show that it had made a commercially reasonable offer of UIM coverage. Holman v. All Nation Ins. Co., 288 N.W.2d 244 (1980). In response to Holman, the legislature revised the statute.

3. April 12, 1980 - October 1, 1985

During this period, Minnesota statutes did not mention UIM coverage. Judicial decisions continued to clarify the nature and scope of the coverage. See Sobania v. Integrity Mut. Ins. Co., 371 N.W.2d 197 (Minn. 1985); Sibbert v. State Farm Mut. Auto. Ins. Co., 371 N.W.2d 201 (Minn. 1985); Hoeschen v. South Carolina Ins. Co., 378 N.W.2d (Minn. 1985); Amco Ins. Co. v. Lang, 420 N.W.2d 895 (Minn. 1988).

4. October 1, 1985 - August 1, 1989

In 1985 legislative changes, UIM coverage was once again made part of the statute governing motor vehicle insurance. During this period, UIM was part of a single combined coverage with uninsured motorist (UM) coverage. It was a “difference of limits” coverage.

5. August 1, 1989 - present

Since August 1, 1989, UIM coverage has been a separate coverage which must be included in every Minnesota motor vehicle insurance policy. It is once again an “add on” coverage. Minn. Stat. § 65B.49, subs. 3a and 4a.

II. What is an Underinsured Motor Vehicle?

A. Applicable Definition of Motor Vehicle

The statute defines “underinsured motor vehicle” to include both motorcycles and motor vehicles. See Minn. Stat. § 65B.43, subd 17. In close cases, the definitions in the applicable insurance policy must also be reviewed.

1. Motor Vehicle

Definition: Motor Vehicle
A motor vehicle is a vehicle with at least four wheels which is designed to be self-propelled for use primarily on public roads in transporting persons or property, and which is required to be registered under Minn. Stat. Ch. 168. See Minn. Stat. § 65B.43, subd. 2.

The definition includes a trailer when the trailer is attached to or being towed by a motor vehicle.

Under the statutory definition, a farm tractor would not be a “motor vehicle” since it is not designed primarily for use on public roads. Great American Ins. Co. v. Golla, 493 N.W.2d 602 (Minn. Ct. App. 1992). Close cases may arise focusing on whether or not a vehicle is required to be registered under Minn. Stat. Ch. 168. See Anderson v. St. Paul Fire & Marine Ins. Co., 427 N.W.2d 749 (Minn. Ct. App. 1988).

In Bell v. State Farm Mut. Auto. Ins. Co., No. C8-96-1704, 1997 WL 40664 (Minn. Ct. App. Feb. 4, 1997), a woman was killed in a collision with a grader which was being used to plow snow. Since the grader was “special mobile equipment” exempt from vehicle registration requirements, it was not a motor vehicle. There could be no UIM claim.

A more general issue exists with respect to certain police or other government vehicles, since many are not required to be registered pursuant to chapter 168. In Mutual Service Casualty Ins. Co. v. League of Minnesota Cities Ins. Trust, 659 N.W.2d 755 (Minn. 2003), the court enforced a literal reading of Minn. Stat. § 65B.43 subd. 2 and confirmed that a police car was not a “motor vehicle” within the meaning of the No-Fault Act, since a marked police car was not required to be registered. Although this decision involved a claim for basic economic loss benefits under the No-Fault Act, the same reasoning leads to the conclusion that these unregistered vehicles would not fall within the statutory definition of an uninsured motor vehicle.

The Mutual Service decision relates to coverages that are mandated by the No-Fault Act. A marked police car or municipal ambulance may still be included within the definition of “motor vehicle” or “underinsured motor vehicle” in a typical motor vehicle insurance contract. As already noted, it is important to review the applicable contract in cases when coverage may not be mandated by statute. For example, certain contracts have provided UM or UIM coverages for accidents caused by farm vehicles or other off-road equipment

when the accident occurs on a public road. Kashmark v. Western Ins. Co., 344 N.W.2d 844 (Minn. 1984). Such contractual coverage is enforceable, even though not mandated by the provisions of the No-Fault Act.

In Ronning v. Citizen's Security Mut. Ins. Co., 557 N.W.2d 363 (Minn. Ct. App. 1996), the court invalidated a policy provision that attempted to exclude all government vehicles from underinsured coverage. This decision remains valid, since the policy exclusion at issue in Ronning is too broad to be consistent with the No-Fault Act.

2. Motorcycle

Definition: Motorcycle
A motorcycle is a self-propelled vehicle with fewer than four wheels and an engine of more than five horsepower. See Minn. Stat. § 65B.43, subd. 13.

The no-fault act defines “motorcycle” at Minn. Stat. § 65B.43, subd 13. (The definition differs somewhat from the one in the Highway Traffic Regulation Act, Minn Stat. § 169.01, subd. 4.) The definition of “motorcycle” includes an attached trailer.

Under this definition, a three wheel ATV would be considered a motorcycle. See Odegard v. St. Paul Fire & Marine Ins. Co., 449 N.W.2d 476 (Minn. Ct. App. 1988).

In addition, the definition of motorcycle also explicitly includes a motorized bicycle.

B. Meaning of “Underinsured”

Definition: Underinsured
A vehicle is underinsured when the applicable limits of bodily injury liability insurance are less than the amount needed to compensate an injured person for actual damages. See Minn. Stat. § 65B.43, subd. 17.

1. Actual Damages and Percentage of Fault

To get the basic idea of what is meant by an “underinsured” motor vehicle, go through a basic two step process. First, determine how much money the at-fault driver owes in damages to the injured person. Second, determine how much motor vehicle insurance the at-fault driver has available to pay the damages. If the damages owed are more than the available motor vehicle insurance, the at-fault driver is “underinsured.”

In a UIM claim, “actual damages” refers to the net claim that an injured party would have against a tortfeasor after the total damages suffered are reduced by any applicable deductions for collateral source payments, for no fault benefits paid and for comparative fault. Richards v. Milwaukee Ins. Co., 518 N.W.2d 26 (Minn. 1994).

In assessing a UIM claim, the damages being considered are generally assessed based on the at-fault driver's specific percentage of fault. For example, a person 20% at fault for damages of \$250,000 owes only \$50,000. This at-fault driver will therefore not be underinsured if there is at least \$50,000 in liability insurance applicable to this claim. Lahr v. American Family Ins. Co., 551 N.W.2d 732 (Minn. Ct. App.1996).

The underlying issue in the Lahr case comes up when an at-fault driver is jointly and severally liable for 100% of the damages based upon the standards in Minn. Stat. §604.02. For example, assume that two drivers are negligent and injure a passenger. Fault is split 60% and 40%. Damages are \$50,000. The driver who is 60% at-fault responsible for \$30,000 of the damages, but under the standards of §604.02 could be held liable for the full \$50,000 in damages if the other at-fault driver is unable to pay his share of the damages. In this example, the Lahr decision says that the 60% at fault driver who has only a minimum \$30,000 liability insurance policy will not be considered "underinsured." The logic of the holding in Lahr is an extension of the reasoning in an earlier supreme court decision, Myers v. State Farm, 336 N.W.2d 288 (Minn. 1983). (It is possible to come up with an unusual set of facts in which the logic of Myers and Lahr would not apply, but as a practical matter no exceptions to the Lahr decision have been litigated in the years since the decision was made.)

EMC Ins. Companies v. Dvorak, 603 N.W.2d 350 (Minn. Ct. App. 1999), reaches the same result as the decision in Lahr but provides a separate legal basis for the result, holding that any potential UIM claim based on joint and several liability was destroyed by the injured person's partial settlement agreement with one of the tortfeasors.

2. Liability Coverage

A driver is underinsured if the liability insurance for the at-fault driver and for the vehicle is less than the amount needed to pay actual damages. (When the driver is operating a non-owned vehicle, both the insurance policy that the owner has for the vehicle and the insurance policy that insures the driver are generally available to pay damage claims. Consequently, both are counted in assessing whether or not there is an "underinsured motor vehicle." Royal-Millbank Ins. Co. v. Busse, 474 N.W.2d 441 (Minn. Ct. App. 1991).)

If claims of multiple parties exhaust the available liability insurance, a UIM claim will exist even though a particular individual's damages are less than the liability insurance limits. For example, when five people each received \$12,000 to exhaust a \$60,000 liability policy, UIM claims could be made for damages in excess of \$12,000. Kothrade v. American Family Ins. Co., 462 N.W.2d 413 (Minn. Ct. App.1990).

In Ronning v. Citizen's Security Mut. Ins. Co., 557 N.W.2d 363 (Minn. Ct. App. 1996), the insurer argued that there could be no UIM claim when the injury was caused by a government vehicle, because a \$200,000 statutory cap on damages created a limit on this tortfeasor's legal obligation to pay damages. This argument was rejected. The cap on damages is not an absolute immunity from tort claims, and the government vehicle is

therefore considered to be underinsured. The court also declared invalid an exclusion in the UIM insurance policy stating that a vehicle owned by a government agency could not be considered underinsured.

The only liability insurance policies that are to be considered in determining whether or not the at-fault vehicle is “underinsured” are generally those liability policies providing coverage for the owner and operator of the vehicle. In Behr v. American Family Mut. Ins. Co., 638 N.W.2d 469 (Minn. App. 2002), the tortfeasor was operating his own vehicle while in the course of his employment. His employer’s liability insurance, while it protected the employer to the extent of the employer’s vicarious liability, did not actually insure either the employee or the employee’s vehicle. Consequently, the employer’s million dollar policy could not be considered in assessing whether or not the at-fault driver was underinsured.

III. Exclusions

Some accidents involving underinsured motor vehicles are nevertheless excluded from UIM insurance coverage, either by statute or by insurance policy exclusions.

A. Statute

The No-Fault Act imposes certain penalties when a person fails to insure a motor vehicle. Minn. Stat. § 65B.49, subd. 3a (7) provides that a person who owns an uninsured motor vehicle and who is occupying this uninsured vehicle at the time of an accident may not obtain UM or UIM coverage from any other insurance policy. Although the statute explicitly refers to motor vehicles, its provisions were extended in Hanson v. American Family Mut. Ins. Co., 417 N.W.2d 94 (Minn. 1987) to include the owners of uninsured motorcycles.

With respect to this statutory exclusion at Minn. Stat. § 65B.49, subd. 3a (7), the sanction does not apply so long as the motor vehicle is in fact insured, even if the insurance was not purchased by the owner and even if the owner is not a named insured on the policy. Stewart v. Illinois Farmers Ins. Co., 727 N.W.2d 679 (Minn. Ct. App. 2007).

With respect to motorcycles, UIM and UM coverages are not required. Consequently, a motorcycle may be legally insured and still lack UIM/UM coverage. Minn. Stat. § 65B.49, subd. 3a (8) addresses this situation. If the owner of a motorcycle is injured while occupying this motorcycle, the owner may not obtain UM or UIM coverage from any other policy which might otherwise have provided coverage. Consequently, the owner of a motorcycle will have no UM or UIM coverage while occupying the motorcycle, unless such optional coverage has in fact been purchased for the motorcycle.

It should be noted that the limitation on coverage created by these two provisions in the statute apply only to the owner of the involved motorcycle or uninsured motor vehicle. Because the statutes explicitly exclude coverage only for the “owner” of the vehicle, other occupants (even spouses or resident relatives) are not precluded by the statutes from making claims. American Nat’l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999); Northrup v. State Farm Mut. Auto. Ins. Co., 601 N.W.2d 900 (Minn. Ct. App. 1999); Milwaukee Mut. Ins. Co. v. Willey, 481 N.W.2d 146 (Minn. Ct. App. 1992).

B. Contract

1. Myers Exclusion

Motor vehicle insurance contracts contain a variety of provisions which limit or exclude coverage. Such limitations and exclusions will generally be enforced so long as they do not contradict provisions or policies of the No-Fault Act.

Myers v. State Farm Mut. Auto. Ins. Co., 336 N.W.2d 288 (Minn. 1983) involved a UIM contract exclusion. The Myers case has the following fact pattern. A passenger is injured in

a motor vehicle accident. The passenger brings a liability claim against the driver of the car, based on the driver's negligence. Liability limits from the occupied vehicle are paid to the passenger. The damages of the injured passenger exceed the driver's liability insurance limits, so the at-fault driver is "underinsured." The passenger now wishes to make a claim for UIM benefits. The statute requires that the UIM claim be made first against the UIM coverage from the occupied vehicle. Minn. Stat. § 65B.49, subd. 3a (5). In Myers, State Farm's UIM endorsement for the occupied vehicle had an exclusion providing that term "underinsured motor vehicle" did not include any vehicle identified as being insured by the policy. The Supreme Court held that this type of exclusion is valid. To allow the UIM claim in these circumstances would convert the relatively inexpensive UIM coverage of the policy into additional (and more expensive) liability insurance for the negligent driver.

When this fact pattern is present, the UIM contract exclusion will be enforced. Myers and subsequent cases have uniformly upheld the validity of UIM contract provisions which exclude UIM coverage on this fact pattern, even though the contractual language creating the exclusion might differ from the language used in Myers. See Jensen v. United Fire & Cas., 524 N.W.2d 536 (Minn. Ct. App. 1995).

Although Minnesota law permits the enforcement of a Myers exclusion, it is an exclusion based upon insurance policy language. There is nothing in the No-Fault Act itself which creates this exclusion. Consequently, the court will not read a Myers exclusion into an insurance policy when the policy itself contains no language creating the exclusion. Lynch v. American Family Mut. Ins. Co., 626 N.W.2d 182 (Minn. 2001). The Lynch decision effectively reverses the holding in West Bend Mut. Ins. Co. v. American Family Mut. Ins. Co., 586 N.W.2d 584 (Minn. Ct. App. 1998), which imposed a Myers exclusion based solely on public policy considerations.

It is sometimes said that Myers stands for the proposition that a passenger may not collect both liability insurance and UIM insurance from the policy covering the occupied vehicle. This overstates the Myers holding. In an accident involving multiple vehicles, when more than one driver is at-fault, the Myers exclusion does not necessarily prevent an injured person from collecting both UIM and liability insurance from the single policy covering the occupied vehicle. Consider the following example involving two negligent drivers. A passenger in car #1 is injured. The insurer of the occupied vehicle (car #1) pays its liability limits to the passenger based on the negligence of its insured driver. The passenger makes an additional liability claim against the driver of car #2. Car #2 pays its policy limits. If the passenger is still not fully compensated for damages suffered, the passenger may then also claim UIM coverage. A UIM claim based upon the negligence of the person driving car #2 can properly be made against the UIM coverage for the occupied vehicle. In this situation, the inexpensive UIM coverage is not being converted into additional liability coverage for the driver of the insured vehicle (car #1). Consequently, Myers does not apply, and the claim is permitted by the No-Fault Act. Lahr v. American Family Ins. Co., 528 N.W.2d 257 (Minn. Ct. App. 1995).

In cases where there are two or more negligent drivers, policy exclusions that effectively eliminate UM or UIM coverage whenever the liability limits have already been paid to the injured party are invalid and unenforceable. Such exclusions would deprive the injured person of coverage mandated by the No-Fault Act. Mitsch v. American Nat'l Prop. & Cas. Co., 736 N.W.2d 355 (Minn. Ct. App. 2007); Marchio v. Western Nat'l Mut. Ins. Co., 747 N.W.2d 376 (Minn. Ct. App. 2008).

2. Family Exclusion

UIM (and UM) endorsements typically contain language saying that an underinsured (or uninsured) vehicle will not include any vehicle owned by or furnished for the regular use of the named insured or any resident family member. For example, a family owns two cars. One of the children is injured as a passenger in one car and collects the liability insurance. A claim is then made on the UIM policy for the second family car. The only reason a UIM claim exists is because the family purchased inadequate liability insurance. Under such circumstances, the family exclusion will bar UIM coverage from the second family vehicle. See Linder v. State Farm Mut. Auto. Ins. Co., 364 N.W.2d 481 (Minn. Ct. App. 1985). See also Wintz v. Colonial Ins. Co. of California, 542 N.W.2d 625 (Minn. 1996). In such circumstances, the logic of the family exclusion is comparable to the logic underlying the Myers exclusion, i.e., the UIM coverage is being converted into extra liability insurance for the tortfeasor, who is also an insured on the UIM policy. Staley v. Metropolitan Property & Cas. Co., 576 N.W.2d 175 (Minn. Ct. App. 1998).

When the fact pattern changes, however, family exclusions have been held to be invalid or inapplicable. American National Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999), indicates that a family exclusion will be invalid if it removes coverage which is otherwise applicable under the No-Fault Act. In Loren, a man was operating his son's motorcycle and was injured by an underinsured car. His son was a resident relative, and the man's policy with American National excluded UIM coverage for injuries occurring while occupying a vehicle owned by a relative. The court found the exclusion to be unenforceable, because the legislature had elected in Minn.Stat. § 65B.49, subd. 3a (7) and (8) to exclude UIM coverage only for the owner of the motorcycle. Because the injured person was not the owner of the motorcycle, he was not barred by the statute from seeking UIM benefits under his own policy and the family exclusion was unenforceable. Likewise, in Northrup v. State Farm Mut. Auto. Ins. Co., 601 N.W.2d 900 (Minn. Ct. App. 1999), a woman who owned her own pickup truck and had it insured with State Farm was permitted to make a UIM claim against this policy when she was injured as a passenger on her husband's motorcycle. The policy exclusion saying that State Farm would not cover underinsured motorist claims for a person occupying a family owned vehicle was invalid as applied to these facts. See also DeVillie v. State Farm Mut. Ins. Co., 367 N.W.2d 574 (Minn. Ct. App. 1985); Great American Ins. Co. v. Sticha, 374 N.W.2d 556 (Minn. Ct. App. 1985); Erstad v. Mut. Service Cas. Co., No. C8-99-602, 1999 WL 1101720 (Minn. Ct. App. Dec. 7, 1999).

In Johnson v. St. Paul Guardian Ins. Co., 627 N.W.2d 731 (Minn. Ct. App. 2001), the facts of the accident were comparable to those in DeVillie v. State Farm Mut. Ins. Co., 367

N.W.2d 574 (Minn. Ct. App. 1985); in each case a woman was injured as a passenger on a motorcycle owned and operated by her husband. In DeVille, a family exclusion did not prevent the injured wife from collecting UIM benefits from a policy on her own motor vehicle. However, in Johnson, the family exclusion on the UIM policy was enforceable because both the wife and the tortfeasor husband were identified as insured on the UIM policy from which benefits were sought.

The Minnesota Supreme Court reviewed the family exclusion issue in Kelly v. State Farm Mut. Automobile Ins. Co., 666 N.W.2d 328 (Minn. 2003). In this case, Marcia Kelly and her husband had two cars. They jointly owed a Pontiac, which she generally used. Her husband was the sole owner of a Dodge. Both vehicles were insured with State Farm, and both husband and wife were named insureds on each policy. Mrs. Kelly was injured, due to her husband's negligence, as a passenger in his Dodge. She sought UIM benefits from the policy on the Pontiac. Because she was not an owner of the Dodge (the occupied vehicle), there was no statute barring her from seeking UIM benefits on a personal policy of UIM insurance. However, because the at-fault party (her husband) was also a named insured on the policy from which she sought benefits (the one covering the Pontiac), the family exclusion in the Pontiac's policy was enforced and coverage was denied.

As the case law demonstrates, the "family exclusion" language in a contract either can be valid and enforceable or can be unenforceable as a violation of No-Fault Act principles, depending on the underlying facts of the specific UIM claim being made. The following analysis of the facts needs to be made in order to determine when the "family exclusion" can be used to deny UIM (or UM) coverage:

Two-Step Analysis to Determine Enforceability of "Family Exclusion"	
1.	Identify the parties who can be held legally liable for paying damages to the injured person. Typically, these parties will be: a. The negligent driver, and b. The owner of the underinsured vehicle operated by the negligent driver.
2.	Identify the named insured(s) on the UIM policy against which a claim is being made. a. If one of the parties legally liable for paying damages is a named insured on this policy, the family exclusion will be enforced and coverage will be denied. b. If none of the legally liable parties is a named insured on this policy, the family exclusion will not be enforced and UIM coverage will apply.

There is an equitable basis for this selective enforcement of the family exclusion. The UIM claim exists because the negligent driver and/or the owner of the at-fault vehicle failed to purchase adequate liability insurance. If one of these responsible parties is the also a named insured in the UIM policy from which coverage is sought, the family exclusion is enforced. As in Myers, the exclusion prevents the UIM from functioning as additional liability insurance for the at-fault person, who is also an "insured" on the UIM policy.

Given the case law concerning family exclusions, a married couple with two cars could be better off from an insurance perspective if each party separately owned and insured one vehicle. (This may be more expensive, since most companies provide a discount if more than one vehicle is insured; separate policies may also limit the ability to “stack” no-fault basic economic loss benefits.) A person injured as a passenger in a non-owned vehicle (e.g., husband as passenger in wife’s vehicle, or wife as passenger in husband’s vehicle) would then be able to claim liability insurance limits from the occupied vehicle and also be able to assert a UIM claim against his or her separate personal insurance policy. Under the Loren decision, the family exclusion would not bar such a UIM claim, and Johnson v. St. Paul Guardian would not bar coverage because the tortfeasor spouse would not be named on the UIM policy from which coverage is sought.

IV. UIM Priorities: Which Company Pays?

A. Minn. Stat. § 65B.49, subd. 3a(5)

The priorities for UIM and UM coverage are different from those applicable to no-fault claims for basic economic loss benefits.

Minn. Stat. § 65B.49, subd. 3a(5) provides a reasonably simple structure for determining which company pays UIM benefits. The statutory scheme is most easily described by posing two questions.

Which Company Pays?
1. Was the person injured while occupying a motor vehicle? a. If the injured person was not occupying a vehicle, a UIM claim can be made against any one applicable policy. b. If the injured person was occupying a vehicle, the initial UIM claim must be made against the policy covering the occupied vehicle. Ask question 2 concerning additional UIM claims.
2. If the injured person was occupying a vehicle, was this person an “insured” on the policy covering the occupied vehicle? a. If the person is an “insured” on the policy for the occupied vehicle, there will be no excess coverage available from any other policy b. If the injured person is not an “insured” on the policy for the occupied vehicle, excess coverage can be sought from any one additional policy providing excess coverage.

The initial statutory standard for coverage seems clear. If a person is “occupying a motor vehicle” at the time of the accident, “that motor vehicle” should provide the initial UIM (or UM) insurance coverage.

The rules established in Minn. Stat. §65B.49 subd. 3a(5) apply only with respect to insurance policies issued pursuant to Minnesota law. In General Casualty of Wisconsin v. Outdoor Concepts, 667 N.W.2d 441 (Minn. Ct. App. 2003), a Wisconsin resident hit by a pickup truck in Wisconsin was able to assert claims both against his personal Wisconsin policy and against a Minnesota commercial policy issued to him as the sole proprietor of a business in Minnesota. The limits imposed by the Minnesota statute did not apply to the coverage provided by the policy issued in Wisconsin.

Applying this statutory priority scheme should generally involve assessing the facts in terms of the statutory categories of “occupied vehicle” and “insured.” However, in Illinois Farmers Ins. Co. v. Marvin, 707 N.W.2d 747 (Minn. Ct. App. 2006), the court complicated the application of the statute. Illinois Farmers v. Marvin involved an injury to a woman who was loading toys into the back of a friend’s parked Ford Explorer. Another vehicle backed into the Explorer and pinned her legs between the vehicles. She was held to be an “occupant” of the Explorer at the time of the injury. The Court of Appeals did allow her claim against the UIM coverage of the Ford Explorer. Before reaching this result, however, the court said

that being an “occupant” of the Explorer at the time of the injury did not end the court’s enquiry about coverage. The court went on to consider whether or not there was a “causal connection” between occupying the parked Explorer and the injury. 707 N.W.2d, at 752.

The enquiry concerning “causal connection” in Marvin is really an incorrect application of the statute. There was no question that the woman in this case was injured in a motor vehicle accident. On the facts in Marvin, once it can be established that Marvin was an “occupant” of the Ford Explorer at the time of her injury, the statute is explicit in saying that she is entitled to seek UIM coverage from that occupied vehicle. There is no reason to embark on some additional analysis of the “causal connection” between the occupied vehicle and the injury sustained. This addition of some new element of “causal connection” after status as an “occupant” has already been determined does not fit with the system created by the statute.

The case law dealing with a “causal connection” between a vehicle and an injury arises in no-fault insurance cases (see the article on No-Fault) when a court must determine whether or not an injury should be classified as having been caused by a motor vehicle accident. For example, if a bicycle runs into a parked car, there are limited circumstances in which the “causal connection” between the car and injury is sufficient to give rise to a no-fault insurance claim. But no such issue existed in Marvin. The woman’s legs were clearly crushed in a motor vehicle accident.

Once the existence of the injury in a motor vehicle accident has been established, the only remaining issue involves which insurance policy pays the UIM claim. Under the statute, the policy on the “occupied vehicle” is primary. This coverage is primary under the statute regardless of whether or not the occupied vehicle was an active accessory and regardless of whether or not the injury arose out of the maintenance of use of the occupied vehicle. The status of being an “occupant” is, under the statute, sufficient to trigger the UIM (or UM) coverage.

1. Meaning of “Occupying”

The 1996 Supreme Court decision in Allied Mut. Ins. Co. v. Western Nat’l Mut. Ins. Co., 552 N.W.2d 561 (Minn. 1996) requires that the term “occupy” be given its ordinary and commonly accepted meaning. On the facts in Allied, the court held that a person standing next to a car while it was being unlocked was not “occupying” the vehicle.

Policy language often is explicit in describing “occupying” as including “getting into or out of” the covered vehicle. See, for example, Illinois Farmers Ins. Co. v. Marvin, 707 N.W.2d 747, 751 (Minn. Ct. App. 2006).

The decision in Allied Mutual should effectively reverse an earlier line of decisions from the court of appeals which found that a person outside of the vehicle could be deemed to be

“occupying” it. See also Short v. Midwest Family Mut. Ins. Co., 602 N.W.2d 914 (Minn. Ct. App. 1999).

2. Meaning of an “Insured”

Definition: Insured
<ol style="list-style-type: none">1. The name insured, and2. Spouse, minors, and other relatives residing with the name insured, unless such individual is identified by name in his or her own policy of motor vehicle insurance. See Minn. Stat. § 65B.43, subd. 5.

Generally, it is appropriate to interpret the term “insured” in Minn. Stat. 65B.49 subd. 3a(5) by reference to the statutory definition of “insured” at Minn. Stat. § 65B.43 subd. 5. See Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000) and West Bend Mut. Ins. Co. v. Allstate Ins. Co., ___ N.W.2d ___ (Minn. 2009) [2009 WL 4981273, Minn., December 24, 2009 (NO. A07-248, A07-357)].

It is important to note that, under this statutory definition, not every resident relative automatically qualifies as an “insured” on each motor vehicle insurance policy covering vehicles owned by other family members. An individual who is identified by name in his or her own policy does not become an “insured” in someone else’s policy based on status as a resident relative.

It is also important to note that a person identified as an insured “driver” in the declarations of a specific policy is not automatically classified as an “insured” under the policy. Carlson v. Allstate, 749 N.W.2d 41 (Minn. 2008). An insurance company has a right to identify the people who regularly drive a vehicle so that it can calculate an appropriate premium. However, most insurance companies require a person or a business to have some insurable interest in the covered vehicle before making that person or business a named insured on the policy. A named “driver” is not the same as a named “insured.”

Questions concerning status as an “insured” occur most frequently when a vehicle is owned or leased by a business. This occurred in Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000). In Becker, a woman was driving a commercial truck in Iowa when she was injured by an underinsured motorist. She collected both liability insurance from the tortfeasor and UIM coverage from the truck which she was driving. As will be discussed in more detail below in the section on “Excess Coverage,” her ability to get to any additional UIM coverage from another Minnesota policy would depend on her status as an “insured” on the policy covering the occupied vehicle. The Supreme Court held that, because Becker was neither a named insured or a relative of the named insured on the policy, she did not meet the statutory definition of an “insured” under Minn. Stat. § 65B.43 subd. 5. Her status as an employee and as an authorized driver who was covered as an insured while operating the covered vehicle did not make her an “insured” for purposes of the UIM claim governed by Minn. Stat. § 65B.49 subd. 3a(5).

In a number of decisions prior to Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000), the court of appeals had not always focused on the statutory definition of “insured” when discussing UM and UIM coverages. See LaFave v. State Farm Mut. Auto. Ins. Co., 510 N.W.2d 16 (Minn. Ct. App. 1993). The Becker decision holds that the two statutory categories in the definition of “insured” (i.e., named insured and resident relative of named insured) provide the only appropriate framework for analyzing the meaning of “insured” in UIM claims under Minn. Stat. § 65B.49, subd. 3a(5).

With an insurance policy covering a business, it may be difficult in some cases to determine whether or not the business owner is an “insured” on the policy. Would the policy provide coverage to the owner if he or she were not occupying the insured vehicle? General Casualty of Wisconsin v. Outdoor Concepts, 667 N.W.2d 441 (Minn. Ct. App. 2003) reviewed existing precedents and concluded that a policy listing a sole proprietorship’s trade name as the named insured also extended coverage to the sole proprietor as an individual. But in Turner v. Mutual Service Casualty Ins. Co., 675 N.W.2d 622 (Minn. 2004), a corporate policy did not extend coverage to an employee on a UIM claim when the employee was injured in a rental vehicle while on company business. The language of the policy restricted the coverage to vehicles owned by the business, and nothing in the No-Fault Act required an extension of coverage to an employee on a business trip in a rental vehicle. (The court of appeals decision in Turner, 663 N.W.2d 36 (Minn. Ct. App. 2003), noted that liability insurance coverage in the policy did extend to an employee in a rental vehicle, but the No-Fault Act does not require that the definitions from the liability portion of the policy be used in other parts of the contract as long as the language of each endorsement complied with the requirements of the No-Fault Act.)

The standards for evaluating status as an “insured” under a business policy were discussed by the Supreme Court most recently in West Bend Mut. Ins. Co. v. Allstate Ins. Co., ___ N.W.2d ___ (Minn. 2009) [2009 WL 4981273, Minn., December 24, 2009 (NO. A07-248, A07-357)]. The discussion in this case indicates that, when the corporation is the named insured on the policy, status as the owner of a corporation is not in itself sufficient to make the owner an “insured” for purposes of Minn. Stat. § 65B.49 subd. 3a(5).

B. Motorcycle Coverage

There are a few important ideas to keep in mind when reviewing UIM and UM coverages for motorcycles.

1. Not a motor vehicle

A motorcycle, by statutory definition, is not a motor vehicle. Minn. Stat. §§ 65B.43, subd. 2 and subd. 13. Consequently, references in the law that apply to motor vehicles do not automatically apply to motorcycles.

2. UIM coverage is optional, not mandatory

The only insurance coverage for motorcycles that is mandated by the No-Fault Act is liability insurance. Minn. Stat. § 65B.48, subd. 5. UM and UIM insurance coverage, although mandatory for motor vehicles, is optional for motorcycles. Consequently, a motorcycle may be legally insured and nevertheless lack UM and UIM coverage.

The optional nature of UIM and UM coverage for motorcycles becomes important when reviewing the exclusions contained in motorcycle insurance policies. A policy exclusion can be held to be invalid if it conflicts with a requirement of the No-Fault Act. But, since UIM and UM coverage for motorcycles is optional, a company can enforce policy exclusions for motorcycles that would be invalid as applied to motor vehicles. See Johnson v. Cumiskey, 765 N.W.2d 652 (Minn. 2009), in which Farmers Insurance enforced a UIM provision that reduced the amount of UIM insurance coverage for a motorcycle based upon the amount recovered by the injured person in the liability insurance settlement.

3. Application of the UIM statutes to motorcycles

a. Limits on coverage for the motorcycle owner

As noted above in the discussion of statutory exclusions above, there are provisions of the No-Fault Act that limit UM and UIM claims for motorcycle owners who are injured while occupying the owned motorcycle.

With respect to an uninsured motorcycle, a person who owns and operates the uninsured motorcycle is simply barred from making a UM or UIM claim. Minn. Stat. § 65B.49, subd. 3a(7) creates this penalty for owners of “motor vehicles,” and this provision of the statute is applied to motorcycles in Hanson v. American Family Mut. Ins. Co., 417 N.W.2d 94 (Minn. 1987).

With respect to an insured motorcycle, a person who owns and occupies the insured motorcycle is limited to whatever optional UM and UIM coverages may have been purchased for the motorcycle. Under Minn. Stat. § 65B.49 subd. 3a(8). (This portion of the statute was enacted in 1990, and it effectively reverses the result in Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829 (Minn. 1989).) As noted above, a legally insured motorcycle may not have any UM or UIM coverage.

It must be stressed that both of these statutory limitations for motorcycles apply only to the owner of the motorcycle. These statutes do not apply to UIM or UM claims by a person occupying a motorcycle when that person is not the owner of the motorcycle. American Nat’l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999); Milwaukee Mut. Ins. Co. v. Willey, 481 N.W.2d 146 (Minn. Ct. App. 1992).

b. Application of 65B.49 subd. 3a(5) to motorcycles

The language of Minn. Stat. §65B.49 subd. 3a(5), when read literally, actually has a gap with respect to its application to motorcycle insurance policies.

The first paragraph of this subdivision refers to persons “occupying a motor vehicle.” Read literally, this does not apply to motorcycles. See Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829 (Minn. 1989).

The second paragraph of 65B.49 subd. 3a(5), amended in 1990 to reverse the result in Roering, applies only to persons “not occupying a motor vehicle or motorcycle.”

Neither the first nor the second paragraphs of 65B.49 subd. 3a(5) actually states what is supposed occur when a person is injured while operating a motorcycle. There is currently no case law that explicitly addresses this gap in the statute.

As a practical matter, it seems that the priority system set forth in the first paragraph 3a(5) has been applied to the UIM and UM claims of injured persons who occupy but do not own the motorcycle involved in the collision. See, for example, American Nat’l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999).

C. Excess Coverage

The second paragraph of Minn. Stat. § 65B.49, subd. 3a(5) applies to pedestrians and to other people injured when “not occupying a motor vehicle or motorcycle.” Under this provision of the law, the injured person seeking UIM or UM coverage “is entitled to select any one limit of liability for any one vehicle afforded by a policy under which the injured person is an insured.” In this statutory framework, it is not anticipated that there will be any claim for “excess” UIM coverage by a pedestrian, because the person is authorized simply to select “one limit.” Selecting this “one limit” fulfills the general statutory goal of permitting the injured person to claim the amount of UIM or UM coverage that has been selected and paid for. Thus, in Holmstrom v. Illinois Farmers Ins. Co., 631 N.W.2d 102 (Minn. Ct. App. 2001), when a young man was killed as a pedestrian by a motor vehicle, the trustee for the next of kin was able to select a UIM claim on the \$100,000 policy of his parents rather than on the \$30,000 policy on the decedent’s own car since he was an insured under each policy. (The result in Holmstrom might now be called into question by the holding in West Bend Mut. Ins. Co. v. Allstate Ins. Co., ___ N.W.2d ___ (Minn. 2009)[2009 WL 4981273, Minn., December 24, 2009 (NO. A07-248, A07-357)], because the decedent would not have met the statutory definition of an “insured” even though he met the definition of “insured” in the policy purchased by the parents.)

It is the first paragraph of Minn. Stat. § 65B.49, subd. 3a(5) that creates the potential for a UIM “excess” insurance claim. Most typically, the claim for excess coverage arises when the injured person is a passenger in a non-owned vehicle. Under the statutory priorities, the injured person, after resolving the liability claim, goes first to the occupied vehicle for UIM coverage. Then, if the claimant is not “insured” on the policy of the occupied vehicle, the claimant is permitted to seek excess UIM coverage “afforded by a policy in which the injured party is otherwise insured.”

The idea is simple, if a man is injured as a passenger in a friend's car and collects a \$30,000 UIM insurance limit from this occupied vehicle, the man may then go to his personal policy to the extent that he has selected and paid for a higher UIM limit. If he paid for \$50,000, he has excess coverage of \$20,000. He gets the coverage that he has paid for. On the other hand, if the injured person is an "insured" on the policy covering the occupied vehicle, the \$30,000 policy on this vehicle now represents the amount selected and paid for. No additional claim on any other policy is permitted. See LaFave v. State Farm Mut. Auto. Ins. Co., 510 N.W.2d 16 (Minn. Ct. App. 1993).

The application of this system may be seen in Jirik v. Auto Owners Ins. Co., 595 N.W.2d 219 (Minn. Ct. App. 1999). A thirteen-year-old girl was injured as a passenger in her mother's car. The girl made a liability insurance recovery, and she then received UIM coverage from mother's insurance on the occupied vehicle. Because the injured girl was an "insured" as a resident relative on the mother's policy for the occupied vehicle, she was precluded from seeking excess coverage from any other policy. (She had been seeking additional coverage from her father's policy, in which she was also an insured.) (In a subsequent decision, Jirik v. Auto Owners Ins. Co., No. C0-98-2415, 1999 WL 1103361 (Minn. Ct. App. Dec. 7, 1999), the court held that no language in the father's insurance policy extended the scope of UIM coverage beyond the limits created in the statute.)

A number of issues may arise in applying this system in particular cases.

1. Who is an "insured" on the policy for the occupied vehicle?

As noted in earlier sections of this article, the definition of "insured" from the No-Fault Act, Minn. Stat. §65B.43 subd. 5 is used in determining who is an insured on the policy for the occupied vehicle. Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000).

2. What happens when UIM coverage from the occupied vehicle is limited?

Excess UIM coverage exists only to the extent that the limit on the second UIM policy exceeds "the limit of liability of the coverage available to the injured person from the occupied motor vehicle." Minn. Stat. § 65B.49, subd 3a(5).

There are a couple of common circumstances in which the UIM coverage available from the occupied vehicle will be limited.

There are two situations in which this simple deduction of limits would not be appropriate.

First, when the driver of the occupied vehicle is at fault and liability insurance from the occupied vehicle is paid to the injured passenger, the Myers exclusion (discussed above, p. 7) prevents the injured person from making a claim on the UIM coverage for the occupied vehicle. How does this exclusion then affect the calculation of "excess" insurance coverage for the injured passenger?

In Davis v. American Family Mut. Ins. Co., 521 N.W.2d 366 (Minn. Ct. App. 1994), UIM coverage on the occupied vehicle was denied due to a Myers exclusion. Davis, having access to none of the \$100,000 in UIM coverage for the occupied vehicle, sought access to the \$100,000 in personal UIM coverage afforded by American Family. American Family argued that it was entitled to reduce its policy limit of \$100,000 by the \$100,000 in UIM covering the occupied vehicle, leaving no excess coverage. The court rejected this argument. Consequently, the injured person was entitled to the full UIM coverage provided by his personal UIM policy. The “coverage available” from the occupied vehicle was zero, due to a valid Myers exclusion in that policy. The excess coverage provisions of Minn. Stat. §65B.49 subd. 3a(5) were held not to apply because the occupied vehicle did not provide “like coverage” to be deducted from the personal policy.

In addition to limits on recovery related to a Myers exclusion, a person’s recovery from the UIM coverage on an occupied vehicle may be limited when there are multiple claimants. For example, if six occupants of a vehicle each receive \$10,000 from a \$30,000/\$60,000 UIM policy on the occupied vehicle, how should the statutory system be applied to these facts? The applicable language is open to different interpretations. “Excess insurance . . . is available only to the extent by which the *limit of liability for like coverage* . . . exceeds the *limit of liability* of the *coverage available* to the injured person from the occupied motor vehicle.” The injured claimant will argue that the “coverage available” in the example given above is only \$10,000. The insurance company providing excess UIM coverage to the injured person will argue that it is entitled to a deduction for the “limit of liability” on the policy for the occupied vehicle. If the policy language were judged to be ambiguous as applied to the facts in such a case, a court might consider the purpose of the statute, which is to provide the injured person with access to the amount of UIM coverage selected and paid for. This analysis would favor the arguments of the claimant.

There is only an unpublished decision dealing with the fact situation set forth in the example above. In Dilworth v. Dairyland Ins. Co., No. C8-91-1683, 1992 WL 83492 (Minn. Ct. App. May 1, 1992), an injured person received only \$13,250 in UM benefits when the 50/100 policy of the occupied vehicle was exhausted by multiple claimants. Nevertheless, the court calculated the excess coverage provided by Dilworth’s personal policy with Dairyland by deducting the UIM limit of \$50,000. Although Dilworth had selected and paid for \$30,000 in UM coverage from Dairyland, his total recovery was limited to the \$13,250 paid by the coverage from the occupied vehicle. Dairyland paid nothing. As an unpublished opinion, Dilworth has no weight as a precedent. Minn. Stat. § 480A.08. However, Dilworth was referred to with approval in Davis v. American Family Mut. Ins. Co., 521 N.W.2d 366, 370 (Minn. Ct. App. 1994). The scope of the deduction to be applied in this factual setting does remain an open issue.

3. What policies provide excess coverage?

In some circumstances, an individual with a claim for excess insurance coverage may claim to be covered by more than one policy. What standards will be used to determine which policy may be liable for an excess insurance claim?

Generally, the coverage on the various policies cannot be stacked. See discussion of stacking, below. When multiple policies exist, the question to be faced is whether or not the injured person has the ability to select the single policy against which the claim is going to be made.

In General Casualty of Wisconsin v. Outdoor Concepts, 667 N.W.2d 441 (Minn. Ct. App. 2003), the court held that the language of the statute restricting a claim to one insurance policy applies only to policies issued under Minnesota law. In the Outdoor Concepts case, the claimant was injured by an underinsured pickup truck. He collected first on a Wisconsin UIM insurance policy, and it was held that this recovery on an out-of-state policy did not preclude a subsequent claim on a policy of Minnesota insurance that also provided UIM to him as an insured.

The standards for determining when a policy may be available for excess coverage were clarified in West Bend Mut. Ins. Co. v. Allstate Ins. Co., ___ N.W.2d ___ (Minn. 2009) [2009 WL 4981273, Minn., December 24, 2009 (NO. A07-248, A07-357)]. The statute says that the injured person may seek excess coverage from “a policy in which the injured party is otherwise insured.” The court held that the term “insured” in this provision of the statute was limited to the statutory definition of an “insured” in Minn. Stat. 65B.43 subd. 5. On the facts in West Bend v. Allstate, this meant that a garage policy issued to a corporation did not provide available excess coverage to the garage owner as an individual, since he was neither the named insured nor a resident relative of the named insured in the West Bend policy at issue.

In West Bend v. Allstate, Tom Oczak owned an auto repair shop, incorporated under the name North End. Three UIM policies were at issue in the case. Oczak was driving a customer’s car when he was injured by an uninsured motorist. He therefore had a claim to the UIM coverage from this occupied vehicle. Oczak was also a named insured in a personal policy with Allstate, so he had excess UIM coverage from all state. Finally, West Bend had issued a “garage” policy with North End as the named insured. The policy specifically covered four vehicles owned by North End. The policy also anticipated that employees of North End, like Oczak, would on occasion be driving vehicles left for repair by customers. In the policy, the term “insured” was defined to include anyone occupying a “covered auto.” And, although Tom Oczak was injured while operating a customer’s car, West Bend conceded that this customer’s car was considered to be a “covered auto” under the terms of its policy. Consequently, Tom Oczak was an “insured” under the policy by virtue of being in the “covered auto.” The issue in the case was whether or not Oczak could get to the \$500,000 in UIM coverage under the garage policy.

The UIM policy provisions of West Bend’s garage policy said that the “first priority” for UIM would be a policy applicable to the occupied vehicle and that the “second priority” would be

any policy in which the injured person was a “named insured.” In these circumstances, the court held that Oczak did not meet the statutory definition of an “insured” and that the West Bend policy itself did not explicitly extend coverage to Oczak under the policy’s priority system.

The holding in West Bend v. Allstate appears to resolve issues discussed in Heinen v. Illinois Farmers Ins. Co., 566 N.W.2d 378 (Minn. Ct. App. 1997). Heinen and some earlier unpublished decisions arose on the following facts: a young person was a named insured under a personal policy having minimum UM and UIM limits. This person was living at home. His parents had a policy with higher UM and UIM limits. The parents’ policy covered the young person as a “resident relative.” The issue was whether or not the injured young person was free to seek coverage from the parents’ policy with the higher limits. In Heinen, the court of appeals used a “closeness to the risk” analysis to require that the injured person go to the policy in which he was a named insured, but the analysis in the decision was flawed. Based on West Bend v. Allstate, it seems likely that in future cases with similar facts the young person may be denied access to the parents’ policy because he would not be an “insured” under that policy as that term is defined in Minn. Stat. §65B.43 subd. 5. (A “resident relative” is not an “insured” if he is separately named as an insured in his own policy of motor vehicle insurance.)

If more than one policy does provide coverage for a UIM or UM claim, the insurance company which makes the UIM or UM payment may be entitled to a partial reimbursement from other applicable policies on a claim for contribution. The right to such reimbursement, however, will depend upon the degree to which each policy contains language coordinating payment of benefits. Continental Cas. Ins. Co. v. Teachers Ins. Co., 532 N.W.2d 275 (Minn. Ct. App. 1995).

V. The Amount of UIM Coverage

A. Add-On Coverage

Since 1989, UIM has been an “add on” coverage. Minn. Stat. § 65B.49, subd. 4a. This means that the amount of UIM coverage listed on the declaration page will in fact be available in addition to any applicable liability insurance coverage.

As noted above in the discussion on motorcycles, Minn. Stat. § 65B.49, subd. 4a does not regulate UIM insurance coverage purchased for motorcycles. Because UIM is an optional coverage for motorcycles, an insurance company contract that uses the “limits less paid” calculation rather than the “add on” calculation does not conflict with the No-Fault Act and remains enforceable. Johnson v. Cummiskey Minn. 765 N.W.2d 652 (Minn. Ct. App. 2009). In Johnson v. Cummiskey, Johnson had purchased \$100,000 in UIM coverage for his motorcycle from Farmers Insurance. He collected \$34,000 from the at fault driver (\$30,000 in liability limits plus \$4,000 from the negligent driver). Farmers policy called for deduction of this \$34,000 payment from the \$100,000 UIM insurance limits. This policy provision was enforceable so that Johnson was entitled to only the remaining \$66,000 in UIM coverage.

Policies issued in another state will generally not be required to comply with Minnesota’s “add on” system of UIM coverage, even when the collision occurs in Minnesota. In Warthan v. American Family Mut. Ins. Co., 592 N.W.2d 136 (Minn. Ct. App. 1999), the court enforced the provisions of a Wisconsin policy issued to a Wisconsin resident when the policy reduced UIM coverage by the amount of liability insurance held by the tortfeasor. Since no provision of Minnesota law governs or alters the Wisconsin policy, there is no conflict of law.

(The “limits less paid” system at issue in Cummiskey is the one that existed in Minnesota UIM law during the period from October 1, 1985 through August 1, 1989. During this period, the face value of UIM policy would be reduced by the amount of the available liability insurance. See Broton v. Western Nat’l Ins. Co., 428 N.W.2d 85 (Minn. 1988). The 1989 amendment changed the UIM coverage mandated by statute into an “add on” coverage.)

The holding in Warthan, however, is not applicable when the person involved in the accident is a Minnesota resident who is injured in Minnesota. Schossow v. First Nat’l Ins. Co. of America, 730 N.W.2d 556 (Minn. Ct. App. 2007) involved a woman from North Dakota who came to work in Minnesota when her employer eliminated jobs in North Dakota. She rented an apartment and worked in Minnesota, and she returned to her home and husband in Fargo about one weekend a month. She planned to continue this arrangement until she qualified for retirement. On these facts, the court determined that she remained domiciled in North Dakota but was also considered to be a Minnesota resident. Mrs. Schossow was killed as a pedestrian by an underinsured motorist. Because Mrs. Schossow was a Minnesota resident injured in a Minnesota accident, her next of kin

were entitled under Minn. Stat. §65B.50 to claim UIM benefits under Minnesota legal standards. Minnesota's law requiring that UIM benefits be paid as an "add on" coverage would therefore be applied to the policy that she and her husband had purchased in North Dakota.

B. Stacking

Since October 1, 1985, stacking of UM and UIM coverages has been prohibited by statute. Minn. Stat. § 65B.49, subd. 3a(6). The statute says that policies may not be "added together to determine the limits of insurance coverage available to an injured person from any one accident."

Although there is a statutory provision prohibiting stacking, the law does permit an insurance company to offer benefits not required by the No-Fault Act. Minn. Stat. § 65B.49, subd 7. Consequently, courts have enforced stacking when it is provided by the terms of the applicable insurance contract. See for example Crapson v. Home Ins. Co., 495 N.W.2d 457 (Minn. Ct. App. 1993); Liberty Mut. Ins. Co. v. Crow, 451 N.W.2d 898 (Minn. Ct. App. 1990).

In an unusual set of facts, an individual wound up owning a car that was separately insured under two different policies, one with Austin Mutual and one with Tri-State. Norton v. Tri-State Ins. Co. of Minn., 590 N.W.2d 649 (Minn. Ct. App. 1999). While occupying the car, he was injured by an uninsured motorist. Collecting on two policies, each of which was written specifically to cover the occupied vehicle, does not constitute stacking.

C. "Drop-down" and Other Reductions in Stated Amount of Coverage

In Frey v. United Services Auto. Ass'n, 743 N.W.2d 337 (Minn. Ct. App. 2008), a liability insurance policy was written in the amount of \$300,000 for a single claimant and \$500,000 for all claims arising from a single accident. However, the policy contained an exclusion stating that these limits would be reduced to the statutory minimum of \$30,000/\$60,000 when the injured claimant was the insured or a resident relative of the insured. The court of appeals held that this "drop down" provision was valid and enforceable because it did not conflict with any provision of the No-Fault Act. The mandatory coverage still existed in the amount required by the statute. (On the facts of the case, the exclusion was held not to apply because the person who died was found not to be a resident of the insured's household.)

Although Frey involved a liability insurance claim, the logic of the case would apply to UIM or to UM provisions that dropped down to statutory minimums for these coverages.

However, in two other cases, exclusions that attempted to reduce UM or UIM coverage based upon other payments made by the insurance company were held to be unenforceable. In Mitsch v. American Nat'l Prop. And Cas. Co., 736 N.W.2d 355 (Minn. Ct. App. 2007), Mitsch was a passenger on her husband's motorcycle when it was involved in

an accident with a truck. The truck paid its liability limits of \$30,000. It is conceded that the truck was underinsured, considering its negligence and Mitsch's damages. Mitsch also collected the liability limits on the motorcycle, \$250,000. Mitsch then brought a UIM claim on the UIM coverage for the motorcycle (also \$250,000) based on the negligence of the underinsured truck driver. The motorcycle policy had a reducing clause, saying that the amount of the UIM coverage was to be reduced by the amount already paid to Mitsch under the motorcycle's liability insurance policy. The reducing clause was held to be in conflict with Minn. Stat. §65B.49 subd. 4a and therefore unenforceable. Likewise, in Marchio v. Western National Mut. Ins. Co., 747 N.W.2d 376 (Minn. Ct. App. 2008) a similar reducing clause was held to be invalid. In Marchio, a passenger died in an accident involving a hit and run vehicle. The Western National policy on the occupied vehicle paid its liability policy limits based on the negligence of its driver. When then faced with a UM claim related to the negligence of the hit and run vehicle, it asserted that there was no UM coverage because a "reducing clause" in its policy offset the UM coverage by the amounts it had paid in its liability settlement. The reducing clause was found to be unenforceable because it effectively eliminated coverage mandated by Minn. Stat. §65B.49 subd. 3a(1). "Such attempts by insurance carriers to contractually reduce or eliminate mandated UM coverage violate the no-fault statute and are invalid." 747 N.W.2d, at 381.

VI. First Step in UIM Claim: Resolve the Liability Claim

Resolving the Liability Claim – Be Aware of Notice Requirements
1. Resolution by Verdict – give notice to the UIM insurer(s) when starting the lawsuit against the tortfeasor
2. Resolution by Settlement – give notice to the UIM insurer(s) of the proposed liability settlement 30 days before effecting any settlement

A. Nordstrom Analysis

In Employers Mut. Companies v. Nordstrom, 495 N.W.2d 855 (Minn. 1993), the Supreme Court determined that the liability portion of a claim must be resolved by trial or settlement before the injured person may bring a UIM claim. There is nothing to prevent an early settlement of a UIM claim if an insurer agrees to do so, but after Nordstrom an injured party cannot force a company to settle the UIM claims until liability claims are first resolved.

What happens if the liability claim is still being litigated six years after the accident? Does the six year statute of limitations on the UIM contract claim expire before the UIM claim can be started? Can the UIM claim be started if the liability claim has not yet been resolved? This potential dilemma was resolved by the Supreme Court in Oanes v. Allstate Ins. Co., 617 N.W.2d 401 (Minn. 2000) which held that the statute of limitations on the UIM claim does not begin to run until the liability claim has been resolved either by settlement or by adjudication.

B. Resolution by Verdict

1. Notice of Suit to UIM Insurer

The underinsured motorist contract will generally have a provision requiring that the UIM insurer be given prompt notice when the injured person sues the tortfeasor. Consequently, the injured person must give notice to the UIM insurer when starting a lawsuit against the tortfeasor. In Malmin v. Minnesota Mut. Fire & Cas. Co., 552 N.W.2d 723 (Minn. 1996), the Supreme Court says in a footnote that notice within 60 days of starting the lawsuit would be appropriate.

2. Participation of UIM Insurer in Liability Trial

Does the UIM insurer have the right to intervene in the lawsuit by an injured insured against a tortfeasor? The general standards for intervention are described in a four part test set forth in Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 207 (Minn. 1986). In Husfeldt v. Willmsen, 434 N.W.2d 480 (Minn. Ct. App. 1989), a UIM insurer that had substituted its draft to prevent a settlement of the liability claim was denied the right to intervene because it could not meet the fourth part of the Minneapolis Star & Tribune test,

which requires a showing that the insurer's interests were not adequately represented by the existing parties. However, following the 1996 decision in Malmin, the UIM insurer will likely be able to intervene as a matter of right. Malmin held that, if the UIM insurer has been given proper notice of the litigation against the tortfeasor, the UIM insurer will be bound by the results of the verdict in this litigation. If the UIM insurer is going to be bound by the jury verdict in the litigation against the tortfeasor, it cannot reasonably be denied the right to participate in the trial.

3. Effect of Jury Award

The UIM carrier will generally be bound by the jury's verdict against a tortfeasor. Policy considerations of the No Fault Act make it reasonable to resolve the damage claims in one lawsuit. Contract provisions saying that the UIM carrier will not be bound except by its consent are not enforceable. Malmin v. Minnesota Mut. Fire & Cas. Co., 552 N.W.2d 723 (Minn. 1996).

There will still be an issue about the binding nature of the jury verdict if the UIM insurer did not receive reasonable prior notice that the litigation was being commenced. Although the insurer in Malmin was bound by the jury verdict despite lack of notice, the court in Malmin did make clear that the notice of the lawsuit should be given within 60 days of the commencement of litigation. After Malmin, a UIM insurer that is deprived of a reasonable opportunity to intervene due to lack of notice that a lawsuit had been commenced will argue that the absence of the notice relieves the UIM insurer of any obligations that might otherwise have been imposed by the verdict.

It is clear that a jury verdict for less than the tortfeasor's liability limits will bar any subsequent claim for UIM payments. The low jury verdict means that the tortfeasor was not in fact an underinsured motorist, so the condition precedent to the existence of a UIM claim cannot be established as a matter of law. Costello v. Aetna Cas. & Surety Co., 472 N.W.2d 324 (Minn. 1991).

4. Effect of Arbitration Award on the Liability Claim

Arbitration of a liability claim is not common, but it may be done by agreement between the injured person and the tortfeasor. In Murray v. Puls, 690 N.W.2d 337 (Minn. Ct. App. 2004), a lawsuit was started and a Malmin notice was given. The parties then elected to resolve the liability insurance claim through a "high/low" arbitration in which the plaintiff's maximum payment from the defendant would be the \$100,000 liability policy limit. The plaintiff then obtained an award of over \$200,000 in damages in the arbitration. Plaintiff gave a Schmidt notice to the UIM insurer and the UIM insurer did not substitute its draft to prevent a settlement of the claim. The court determined that a UIM insurance carrier could be bound by an arbitration award only if the arbitration award against the tortfeasor was reduced to judgment. The injured party then sought a judgment against the tortfeasor for the full amount of the damages awarded by the arbitrators. On the facts in Murray v. Puls,

the arbitration agreement was held to be ambiguous with respect to the effect of the arbitration award on any future UIM claim, and the Court did enter judgment for the plaintiff so that the plaintiff could pursue the UIM claim.

Some general principles concerning the effects of a binding arbitration on a UIM claim were set forth in George v. Evenson, 754 N.W.2d 335 (Minn. 2008). In this case, George submitted his claim to binding arbitration. He did give both a Malmin and a Schmidt notice to the UIM insurer (Auto Owners), but did so only a few days before the arbitration. Auto Owners did not participate. George then submitted a UIM claim, and a second Schmidt notice, based upon the arbitration award. The Supreme Court noted the “unorthodox” proceedings but concluded that “the parties to the arbitration agreement at issue here intended the arbitration to be characterized as a settlement subject to the Schmidt notice requirements.” 754 N.W.2d, at 341. The agreement should give effect to the intention of the parties. The court therefore viewed the arbitration as a form of settlement. Finally, the court concluded that the post-arbitration Schmidt notice met all of the requirements for a valid notice. Consequently, George would be permitted to pursue the UIM claim. (George had given up any claim that Auto Owners was bound by the amount of the arbitration award; the only issue was whether or not the UIM claim had been preserved in these proceedings.)

In some circumstances, an injured person has argued that the UIM insurer should be bound by the amount of the arbitration award. See Butzer v. Allstate Ins. Co., 567 N.W.2d 534 (Minn. Ct. App. 1997) and Mathena v. Allstate Ins. Co., unpublished, 2007 WL 152225 (Minn. Ct. App. Jan. 23, 2007). It appears that, assuming proper Malmin and Schmidt notices, a UIM insurer may be bound by the arbitration award if the award is first reduced to a judgment against the tortfeasor. (As a practical matter, this is not likely to occur because the arbitration agreement typically does not allow entry of a judgment against the tortfeasor for any amount in excess of the applicable liability insurance limits; if the only judgment is for the liability insurance limits, the tortfeasor is by definition not underinsured.)

C. Resolution by Settlement

The injured party is free to settle the tort claim against a negligent driver. However, if the injured person wants to preserve the option of pursuing a UIM claim after the tort settlement, a notice of the proposed settlement must be given to the UIM insurance company before the settlement of the tort claim is concluded.

1. Prior Notice to UIM Insurer(s)

If an injured party desires to preserve the right to make a UIM claim, Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983), requires the injured party to provide written notice of a proposed tort settlement with the negligent underinsured motorist to the appropriate UIM insurer. The notice is to be given at least 30 days prior to concluding a settlement. Consequently, when negotiating the liability settlement, the injured person should be

explicit in making the proposed settlement contingent on giving a Schmidt notice. See Schulte v. LeClaire, No. C7-99-1000, 2000 WL 16302 (Minn. Ct. App. Jan. 11, 2000).

2. Content of Notice

American Family Mut. Ins. Co. v. Baumann, 459 N.W.2d 923 (Minn. 1990), outlines the terms of the notice required by Schmidt v. Clothier. “The notice shall identify the insured, the tortfeasor and the tortfeasor’s insurer and shall disclose the limits of the tortfeasor’s automobile liability insurance and the agreed upon amount of settlement.” 459 N.W.2d at 927.

3. Purpose of Notice

Schmidt v. Clothier created a system in which the rights of the injured party to negotiate a settlement are balanced with the rights of the UIM insurer to preserve its future subrogation claims against the tortfeasor. The Schmidt system begins with the UIM insurer receiving a notice at least 30 days prior to any proposed settlement. The insurance company then has time to consider its options.

If a UIM insurer pays underinsured benefits to an injured person, the UIM insurer would ordinarily become entitled to pursue a subrogation claim against the tortfeasor. However, if the injured party has already settled claims against the tortfeasor, the standard release between the injured person and the tortfeasor waives any additional claims. The settlement and release thereby destroy the potential subrogation rights of the UIM insurer.

Prior notice of a proposed settlement is intended to give the UIM insurance company the option of preserving a potential subrogation claim against the tortfeasor. But the right to bring a potential subrogation claim in the future is preserved only if there is no settlement between the injured person and the tortfeasor. The UIM insurance company has a right to receive advance notice of the proposed settlement so that it can ask the injured person to reject the settlement offer which the tortfeasor has made. So that the injured person will not be prejudiced by rejecting the settlement offer, the UIM insurance company must substitute its payment for the amount which the tortfeasor has offered. This substitution by the UIM carrier gives the injured person the benefit of the settlement but also preserves the potential subrogation claims of the UIM insurance carrier.

4. Requirement of “Best Settlement”

One of the early issues in UIM involved potential settlements for less than the liability policy limits. Many UIM insurance policies had provisions stating that no UIM claim could be brought unless the underlying liability insurance limits were first exhausted. Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983) held such policy exclusions to be “void as against the policies of the no-fault act.” 338 N.W.2d, at 261.

If the “best settlement” possible on the liability claim was for less than the policy limits, the

next question was how the gap between the settlement and the policy limits was to be treated. Did the UIM insurer get the benefit of the full liability insurance policy or was it entitled to get a credit for only the amount of the actual settlement when calculating the UIM claim? The Schmidt decision in 1983 held that the insurance company should get the benefit of the full liability insurance policy, regardless of how much the injured person had accepted in a settlement. However, the statute was amended in 1985 and under current UIM law, Minn. Stat. 65B.49 subd. 4a, the UIM insurance company gets a credit only for the amount actually paid in the settlement. The UIM policy must pay the damages “sustained but not recovered” from the insurance policy of the driver or owner of the underinsured motor vehicle.

In this context, UIM insurers certainly have a financial interest in having the injured person achieve the best possible settlement of the liability insurance claim. In Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983), the Supreme Court outlined a few of the reasons why an injured party might choose to settle for less than liability policy limits. In the partial dissent of three justices in Schmidt, there was a reference to achieving the “best possible settlement”. This phrase was later repeated in footnote 3 of the Nordstrom decision, 495 N.W.2d at 857.

It was argued that the use of this “best possible settlement” language created some additional threshold requirement which the injured person had to meet in order to bring a UIM claim. This argument was rejected in Dohney v. Allstate Ins. Co., 632 N.W.2d 598 (Minn. 2001). In Dohney, the injured person was permitted to bring a UIM claim after settling the liability claim for only \$20,000 out of a \$50,000 policy. As a practical matter, such compromise settlements are common in claims with large damages and questionable liability. The compromise settlement avoids the risk of incurring litigation expenses and of getting no recovery due to a finding of no liability. With liability settlement proceeds secure, the injured person may then elect to take more risk in pursuing the UIM claim. The UIM insurer, on the other hand, will have little incentive to substitute its draft to prevent the settlement, because it would then face a substantial risk of losing its subrogation claim if the liability claim fails. Although this situation may be unfair to the UIM insurer, each alternative for creating some “best settlement” standard seemed likely both to spawn additional litigation and to interfere with a prompt resolution of claims.

Under Dohney, the settlement agreed to by the injured person will be deemed to be the best possible settlement. If the UIM insurer thinks that the proposed settlement is not “the best possible settlement,” it may substitute its payment in order to prevent the settlement. The UIM insurer may not, however, limit its contractual obligations with respect to UIM coverage merely by expressing its opinion that a better settlement might have been negotiated. See Washington v. Milbank Ins. Co., 551 N.W.2d 513 (Minn. Ct. App. 1996).

Although Minnesota law does not require an the injured person is to exhaust the liability insurance limits of the tortfeasor in order to present a UIM claim, a North Dakota resident was bound by the provisions of a North Dakota insurance policy requiring that liability limits be exhausted as a pre-condition to a UIM claim, even though the accident occurred in

Minnesota. Zieglemann v. Natl' Farmers Union Property & Casualty Companies, 686 N.W.2d 563 (Minn. Ct. App. 2004).

5. Effect of No Notice

Cases following Schmidt v. Clothier held that a failure to provide notice prior to settlement with the tortfeasor automatically forfeited UIM coverage. Lenssen v. Farm Bureau Mut. Ins. Co., 421 N.W.2d 414 (Minn. Ct. App. 1988).

This automatic forfeiture rule was modified somewhat in American Family v. Baumann, 459 N.W.2d 923 (Minn. 1990). Under Baumann, lack of notice is presumed to be prejudicial, but this presumption is rebuttable. The claimant bears the burden of establishing by the preponderance of the evidence that the settlement did not prejudice the UIM insurer.

Two factors have emerged in cases on the issue of prejudice following the Baumann decision. First, if the original settlement was for less than policy limits, the claimant must probably begin by allowing a credit for policy limits rather than for the amount paid. See Murphy v. State Farm Ins. Co., No. C1-94-907, 1994 WL 534856 (Minn. Ct. App. Oct. 4, 1994). But see also Krueger v. Farm Bureau Mut. Ins. Co., No. C5-95-807, 1995 WL 687662 (Minn. Ct. App. Nov. 21, 1995), in which such a requirement is not mentioned. Second, the claimant must generally establish that the tortfeasor did not have assets which might have been used to satisfy a subrogation claim by the UIM insurer. Behrens v. American Family Mut. Ins. Co., 520 N.W.2d 763 (Minn. Ct. App. 1994).

Claimants have been successful in showing lack of prejudice in some cases. Rousselow v. American Family, No. CO-91-575, 1991 WL 151357 (Minn. Ct. App. Aug. 13, 1991); Springstroh v. St. Paul Fire & Marine Ins. Co., No. C5-94-957, 1994 WL 687662 (Minn. Ct. App. 1994); Elwood v. Horace Mann Ins. Co., 531 N.W.2d 512 (Minn. Ct. App. 1995).

However, even inability to conduct a timely investigation has been cited as a source of possible prejudice to a UIM carrier which did not receive notice. Murphy v. State Farm, No. C1-94-907, 1994 WL 534856 (Minn. Ct. App. Oct. 4, 1994).

6. Which Companies Must Receive Notice?

Under Minn. Stat. § 65B.49, subd. 3a(5), a UIM claim may exist against more than one company. The first claim is generally made against the policy insuring an occupied vehicle. A claim for excess UIM coverage may also exist. The Schmidt notice must be given to each company against which a UIM claim is going to be made. See Bukovich v. Farm Bureau, No. C4-94-1470, 1995 WL 1466 (Minn. Ct. App. Jan. 3, 1995) for a case in which UIM coverage against an applicable policy was lost when only one insurer was given notice.

7. UIM Insurer's Options After Receiving Notice

The UIM insurer has two options after receiving notice of a proposed settlement.

First, the UIM insurer may do nothing. The injured person may then complete the settlement with the tortfeasor. The tortfeasor receives a release. The UIM carrier gives up the possibility of any future subrogation claim.

Second, the UIM insurer may pay the injured person the amount of the proposed settlement. The injured person does not settle with the tortfeasor. No release is given to the tortfeasor; consequently, the UIM carrier remains free to pursue a subrogation claim at some later date. The effect of this “substitution” of settlement draft is discussed below.

8. Risks faced by Insurance Company which Substitutes Draft

a. Statute of Limitations

When the UIM carrier substitutes its draft, it prevents the settlement between the injured person and the tortfeasor. There will generally be a six-year statute of limitations on the UIM carrier’s subrogation claim against the tortfeasor. This will run from the date of the injury. The UIM insurer may have to start a lawsuit against the tortfeasor before the UIM claim itself is settled with the injured person or risk having the statute of limitations bar subrogation claims against the tortfeasor. See Hermeling v. Minnesota Fire & Casualty Co., 548 N.W.2d 270 (Minn. 1996).

b. Subrogation Claim May Not be Recoverable

In Gusk v. Spencer, No. C4-95-2421, 1996 WL 344986 (Minn. Ct. App. June 25, 1996), a UIM carrier substituted its draft when the injured person wanted to accept \$80,000 from a \$100,000 liability policy. In a jury trial, the driver against whom the UIM carrier had its subrogation claim was found to be only 30% at fault, and its liability was limited to less than \$30,000. This was the maximum amount which the UIM insurance carrier could recover on its \$80,000 subrogation claim. (See also Gusk v. Farm Bureau Mut. Ins. Co., 559 N.W.2d 421 (Minn. 1997), holding that the excess payment made by substituting payment in the UIM claim could not be used to offset obligations to pay UM benefits with respect to the negligence of a second driver, who was uninsured.)

Health insurers or other third parties may also be presenting competing subrogation claims which can limit the ability of the UIM insurer to recover amounts which are payable by the tortfeasor. Commercial Union v. Minnesota School Board Assoc., 600 N.W.2d 475 (Minn. Ct. App. 1999).

VII. Options If UIM Insurer Substituted Draft

A. Normal Procedure: Pursue the UIM Claim

Schmidt v. Clothier created the procedure for a UIM insurer to preserve subrogation rights by substituting its payment and thereby preventing a direct settlement between the injured person and the tortfeasor. The court anticipated that, after substitution, the next step would be to resolve the UIM claim. After substitution, “the underinsurer would then have to arbitrate the underinsured claim and could, thereafter, attempt to negotiate a better settlement or could proceed to trial in the insured’s name.” 338 N.W.2d at 263.

In Washington v. Milbank Ins. Co., 562 N.W.2d 801 (Minn. 1997), the UIM insurer substituted its draft and then insisted that the injured party litigate the liability claim. Instead, the injured person brought the UIM claim. The Supreme Court affirmed the right of the injured party to pursue the UIM claim. Contract clauses or settlement agreements requiring exhaustion of remedies against the tortfeasor are unenforceable.

If the UIM insurer substitutes its draft and is then sued by the injured person in a UIM claim, the UIM insurer would have the option of bringing a third party complaint against the tortfeasor. The UIM insurer would have an existing subrogation claim based upon the substitution of its draft, and it should also have the right to bind the tortfeasor in a single action with respect to any additional payment based upon the outcome of the UIM claim. See discussion in Hermeling v. Minnesota Fire & Cas., 548 N.W.2d 270 (Minn. 1996).

B. Claimant’s Option to Pursue Tortfeasor

The law concerning the injured person’s options with respect to claims against the tortfeasor is somewhat muddled after there has been a substitution of payment by the UIM insurer.

In Washington v. Presley, No. C2-95-2093, 1996 WL 163634 (Minn. Ct. App. April 9, 1996), Ruth Washington sued the tortfeasor and then reached a proposed settlement agreement at a pretrial conference. At that time, the case was dismissed without prejudice. However, the UIM carrier later substituted its draft and prevented the settlement from being completed. No release was ever signed between the plaintiff and the tortfeasor. The UIM insurer then insisted that the injured person litigate the claim against the tortfeasor. When the injured party started a new lawsuit against the tortfeasor, this claim was dismissed on the grounds that the UIM insurer, Milbank Insurance, was the real party in interest.

Ruth Washington, after having her direct claim against the tortfeasor dismissed in Washington v. Presley, then sued her UIM insurer. In Washington v. Milbank Ins. Co., 562 N.W.2d 801 (Minn. 1997), the Supreme Court affirmed her right to bring this direct action against the UIM insurer, after the UIM carrier had substituted its draft. In *dicta* at footnote three of this opinion, the court states that “technically” there has been no settlement between the plaintiff and the tortfeasor, but the court also states that “the substitution operates as the equivalent of a settlement between the party claiming damages and the tortfeasor because the tortfeasor is released from further liability to the party claiming damages...” while remaining liable for a subrogation claim.

At the present time, there are many possible issues that can arise after the UIM insurer substitutes a draft to prevent a settlement, and neither the statute nor the existing precedents provide clear guidance as to how the issues should be resolved.

It remains possible to argue that, on those occasions when the UIM carrier does substitute, there simply is no settlement of the claim against the tortfeasor. A condition precedent to the final settlement, which presumably has been agreed upon in advance by the injured person and the tortfeasor, did not occur. The condition for the settlement should have been that a Schmidt notice would be given and the UIM claim preserved. Consequently, based upon the agreement of the parties, when the UIM carrier substituted its payment the case simply did not settle. (If the settlement negotiations did not proceed in this manner, the tortfeasor could be justified in claiming that a final settlement did occur, even though the UIM carrier has later attempted to substitute its draft. This is what happened in Schulte v. LeClaire, No. C7-99-1000, 2000 WL 16302 (Minn. App. Jan. 11, 2000). In Schulte, because the plaintiff had not made the settlement contingent upon the UIM insurer’s agreement not to substitute its draft, the direct claim between the plaintiff and the tortfeasor had in fact been settled.)

On the other hand, the footnote in Washington v. Milbank Ins. Co., 562 N.W.2d 801 (Minn. 1997) says that there has been the equivalent of a settlement. The logic of this comment is that the injured person has in fact received the full benefit of the negotiated settlement – the injured person was paid by the UIM insurance carrier the settlement amount offered by the tortfeasor. Having gotten the full benefit of the settlement, the injured person should not have any remaining claim against the tortfeasor, even though no release was executed. From the perspective of the injured claimant there has been the “equivalent of a settlement,” but this in no way binds the tortfeasor. All potential defenses remain. Thus, in Gusk v. Spencer, No. C4-95-2421, 1996 WL 344986 (Minn. Ct. App. June 25, 1996) a UIM insurer prevented a settlement by substituting its draft. When a jury found that the tortfeasor’s liability was limited to only 30% of the total damages, the judgment against the tortfeasor was less than the tortfeasor had offered in settlement and less than the UIM insurer had paid when it substituted its payment. The tortfeasor was in no way bound by the proposed settlement that had never been completed.

Given the existing precedents, it appears that, from the perspective of the injured person, the direct claims against the tortfeasor have been resolved and only the UIM claim against

the insurance company remains. From the perspective of the UIM insurance company, it has at least a partial claim against the tortfeasor based upon the substitution of its payment to prevent the settlement, but it also has an unresolved UIM claim that has to be brought to completion before it will know the amount of the total subrogation claim against the tortfeasor. From the tortfeasor's perspective, the only remaining claim being faced should be the one with the UIM insurer, and all available defenses on liability and damages may be presented.

In the real world, this assessment of the respective positions of the parties presents problems. What should occur when, just before before the scheduled jury trial between the tortfeasor and the injured person, the tentative settlement is reached? The UIM insurer has not intervened in the case, but it now wants to substitute its draft. The injured person cannot proceed with the trial against the tortfeasor because there has been the "equivalent of a settlement"; the UIM insurer cannot proceed with the trial because it has not liquidated its UIM obligations and therefore does not know the amount of its subrogation claim (which appears to be the only claim remaining against the tortfeasor). If the UIM claim does not settle promptly, the injured person now has six years to start litigation of the UIM claim. Neither the trial judge nor the tortfeasor is likely to find this option to be acceptable.

→ Practice Tip

It is essential for the plaintiff with a potential UIM claim to be clear in negotiating a proposed settlement with the tortfeasor. The proposed settlement leading to a Schmidt notice should explicitly be an agreement that is contingent upon the decision of the UIM carrier not to substitute its draft.

VIII. Amount of UIM Claim

A. Damages

1. Generally

An underinsured motor vehicle is one which has liability insurance that is less than the amount needed to compensate the insured for actual damages. Minn. Stat. § 65B.43, subd. 17. Consequently, the damages pertinent to a UIM claim should be identical to the “actual damages” that may be claimed from the tortfeasor.

2. Consortium Claims

A loss of consortium claim will be part of a UIM claim. It is, however, a derivative claim and is therefore subject to the single limit of UIM coverage available to the injured person. Carlson v. Mut. Service Cas. Ins. Co., 527 N.W.2d 580 (Minn. Ct. App. 1995).

3. Interest

In litigation or arbitration of a UIM claim, pre-judgment or pre-award interest may be part of damages. Minn. Stat. § 549.09. Because pre-judgment interest is part of compensatory damages, such interest cannot be used to require a UIM insurer to pay more than its policy limits. Lessard v. Milwaukee Ins. Co., 514 N.W.2d 556 (Minn. 1994).

Interest is to be calculated only upon the net UIM award, after applicable deductions. Casey v. State Farm Mut. Auto. Ins. Co., 464 N.W.2d 736 (Minn. Ct. App. 1991).

In a UIM arbitration, the claim for interest will be lost if not requested from the arbitrator. Kersting v. Royal-Milbank Ins. Co., 456 N.W.2d 736 (Minn. Ct. App. 1990).

Post-judgment interest is not a part of the damage claim, and a UIM insurer should be responsible for post-judgment claims without regard to policy limits. See Lienhard v. State, 431 N.W.2d 861 (Minn. 1988).

B. Deductions

1. Comparative Fault

In Lahr v. American Family, 551 N.W.2d 732 (Minn. Ct. App. 1996), the court of appeals decided that the amount of a UIM claim would be limited by the percentage of fault attributed to the underinsured tortfeasor. For example, if a person with a \$30,000 policy were 10% at fault in a case with damages of \$500,000, the claim against that person would total \$50,000. Consequently, there would be a \$20,000 UIM claim. The court will not add to this amount any additional damages which might be allocated to the underinsured

tortfeasor under Minn. Stat. § 604.02, governing joint and several liability. This potential issue will be of less significance with the 2003 amendment of Minn. Stat. § 604.02 limiting the application of joint and several liability to defendants who are more than 50% at fault.

2. Liability Payments

If an injured person settles (after giving a proper Schmidt notice) for \$40,000 out of a \$50,000 liability insurance policy, what amount is credited to the UIM insurer in a subsequent UIM claim? Under Minn. Stat. § 65B.49, subd. 4a, the UIM insurer gets credit only for the amount paid in the liability settlement. The UIM insurer must pay the amount of damages sustained but not recovered from the liability insurance policy of the driver or owner of the underinsured motor vehicle. Broton v. Western Nat'l Mut. Ins. Co., 428 N.W.2d 85 (Minn. 1988). In the example of the \$40,000 settlement, the underinsured carrier gets credit only for the \$40,000 paid, not for the \$50,000 in liability coverage.

The underinsured claim, under Minn. Stat. 65B.49 subd. 4a, is equal to “the amount of damages sustained but not recovered from the insurance policy of the driver or owner any underinsured at fault vehicle.” Given the language of the statute, payments made by an employer that did not own or insure the at-fault vehicle could not be deducted in assessing UIM liability. Behr v. American Family Mut. Ins. Co., 638 N.W.2d 469 (Minn. Ct. App. 2002). In Behr, the negligent driver was operating his own vehicle but was in the course and scope of his employment at the time of the collision. The employer, which had its own insurance to cover its exposure for vicarious liability, did not insure either the vehicle or the driver involved in the collision. Consequently, only the \$100,000 liability policy on the car could be considered in determining the amount of the UIM claim, and the \$400,000 paid by the employer’s insurance company could not be claimed as a credit by the UIM insurer.

What if there are multiple defendants and some settle on Pierringer releases? The UIM insurer is obligated to pay the amount owed by the underinsured driver, based upon this driver’s percentage of fault. The amount paid by other settling tortfeasors is not relevant. For example, a driver with a \$30,000 liability policy is found to be 50% at fault in a case with net damages of \$100,000. The UIM insurer is obligated to pay \$20,000 in UIM benefits. This is true regardless of the amount which the injured party may have received through Pierringer releases with other joint tortfeasors. See Ricke v Progressive Specialty Ins. Co., 577 N.W.2d 512 (Minn. Ct. App. 1998); State Farm Mut. Auto. Ins. Co. v. Galloway, 373 N.W.2d 301 (Minn. 1985); Rambaum v. Swisher, 435 N.W.2d 19 (Minn. 1989).

A different result, however, was affirmed by the court of appeals in Engle v. Estate of Fisher, 2003 WL 174541 (Minn. Ct. App. January 28, 2003) (No. C9-02-1088). In Engle, the injured person was a passenger. Continental insured the occupied vehicle and paid \$70,000 in settlement of the liability claim against its driver. Continental then faced a UIM claim based on the negligence of the driver of the second vehicle. At trial, the driver of this second vehicle was found to be 100% at fault. (Continental had settled the liability claim for \$70,000 prior to trial, but its insured driver was given 0% fault by the jury.) The Continental policy said that it could reduce its UIM liability by the \$70,000 it had already paid under its

liability coverage. This reducing clause was enforced. Technically, Engle reduced Continental's UIM coverage for the injured passenger from \$100,000 to \$30,000 based upon the \$70,000 liability insurance payment that Continental had already made.

The effect of the reduced UIM payment was to make Engle's recovery from all claims about equal to the damages awarded by the jury, so the result may be considered to be equitable.

Engle was discussed at some length and then distinguished based on the facts in Mitsch v. American National Prop. And Casualty Co., 736 N.W.2d 355 (Minn. Ct. App. 2007), but the court in Mitsch explicitly refused to agree that Engle was wrongly decided. 736 N.W.2d, at 361, footnote 3.

3. No-Fault Payments

Minn. Stat. § 65B.49, subd. 3a(4) states that UIM will not cover basic economic loss benefits paid or payable. There should be no double recovery. Consequently, amounts paid by no-fault will be deducted in determining the net amount owed in a UIM claim.

If there is to be a deduction for both the injured party's comparative fault and for basic economic loss benefits, the basic economic loss is deducted first. Minn. Stat. § 65B.51, subd. 1.

4. Collateral Sources

a. Statute

Minn. Stat. § 548.251 provides for the deduction of certain collateral source payments after the entry of a verdict, assuming that a timely motion for the collateral source offset is made. If there to be is a reduction both for comparative fault and for a collateral source, the statute requires that the collateral source offset will be done first.

Under the collateral source statute, there will be no offset if a subrogation right is asserted by the party making the collateral source payment. In addition, there should be no reduction for collateral sources unless the offset of the collateral source payments is necessary to prevent a double recovery for the injured person. Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990).

b. Arbitration

The collateral source statute applies to civil actions. An arbitration is not a civil action. Consequently, cases had held that there would not be a collateral source offset in a UIM arbitration. Kersting v. Royal Milbank Ins., 456 N.W.2d 270 (Minn. Ct. App. 1990). This holding in Kersting was then changed by Western National Mut. Ins. Co. v. Casper with respect to UIM arbitrations. Casper held that the arbitrators in a UIM arbitration should determine the amount which the injured party is legally entitled to recover from the tortfeasor. To the extent that collateral source offsets would be done in calculating the

obligations of the tortfeasor, the arbitrators should calculate the same collateral source deductions in determining the amounts to be paid by a UIM insurer.

If the offset for collateral sources is not made by the arbitrators, a district court judge may not have the authority to modify the damage award by applying the collateral source statute. See Goberdhan v. Illinois Farmers Ins. Co., No. A04-732, 2004 WL 2984344 (Minn. Ct. App. Dec. 28, 2004), and Andersen v. United Fire and Cas. Co., No. A05-1603, 2006 WL 1320495 (Minn. Ct. App. May 16, 2006).

It should be noted that, in a UIM arbitration, the arbitrators should generally not be told anything either about the amount of liability insurance or about the amount of the liability settlement. See Aaron v. Illinois Farmers Ins. Group, 590 N.W.2d 667, 670 n. 1 (Minn. Ct. App. 1999).

c. Workers' Compensation Offset

The situation with workers' compensation payments is complicated by the following facts: (1) Subrogation by workers' compensation is a firmly established right in claims against tortfeasors and against liability insurance. See Minn. Stat. §176.061. Consequently, when there is a resolution of the liability claim, whether by settlement or by verdict, a portion of the payment will almost always be made to the workers' compensation carrier. (2) Subrogation by workers' compensation is not permitted against UIM recoveries. Cooper v. Younkin, 339 N.W.2d 552 (Minn. 1983); Fryer v. Nat'l Union Fire Ins. Co. 365 N.W.2d 249 (Minn. 1985); Western Nat'l Mut. Ins. Co. v. Casper, 549 N.W.2d 914 (Minn. 1996); In re Freitag v. Am Cas. Co. of Reading, 2002 WL 485279 (Minn. Ct. App. April 2, 2002).

As discussed above, the general rule in the collateral source statute, Minn. Stat. §548.251, permits an offset for collateral source payments unless a right of subrogation has been asserted. But how does this general rule apply when an injured person has paid subrogation on the liability claim but will not face subrogation on the related UIM claim?

The principles in the law are clear. The UIM payment (up to the limits of the applicable UIM coverage) is intended to give the injured person the same recovery that would have been made against the tortfeasor if the tortfeasor had had adequate liability insurance coverage. Consequently, the UIM coverage should be used to achieve this full compensation goal. The goal of the collateral source statute is different. Its intent is to prevent an injured person from collecting the same damages twice, from making a double recovery. Consequently, the collateral source statute should be applied to achieve this purpose, so long as the literal application of the words in the statute is also satisfied (see Heine v. Simon, 702 N.W.2d 752, 766 (Minn. 2005)). There is nothing at all inconsistent with the goals of the two statutes. The law seeks a full recovery, but not a double recovery. Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990).

Here is a simple example applying the relevant statutes. Assume that workers' compensation has paid \$20,000 in benefits. The injured person then settles a liability claim

for policy limits of \$30,000. The injured person then faces subrogation and loses \$20,000 of the settlement, which goes toward repayment of workers' compensation and the workers' compensation share of attorney's fees. (Assuming a 1/3 contingent fee for the plaintiff's attorney, the distribution of the settlement under the work comp statute would be \$10,000 to the attorney, \$6,666.67 to the injured person and \$13,333.33 to the workers' comp subrogation claim.) The injured person really receives a benefit of only \$10,000 from the settlement -- the \$6,666 plus a pro-rata share of attorney's fees. Assume that there is now a jury award in the UIM claim that totals \$50,000 and includes amounts paid by workers' compensation. What offsets should apply to a UIM insurer in this litigation of the UIM claim? The liability insurance recovery of \$30,000 will be deducted as a matter of law under Minn. Stat. §65B.49 subd. 4a. But there should be no additional deduction for workers' compensation benefits, because subrogation has in fact been asserted in the liability claim. The injured person then receives the \$20,000 in workers' compensation and the \$30,000 in liability insurance, which totals the \$50,000 in damages. There is no double recovery.

In the example given above, Some UIM insurers will nevertheless argue that the total offset should be \$50,000, claiming both the full \$30,000 liability insurance payment and the full \$20,000 payment by workers' compensation. This calculation, of course, ignores the subrogation rights which have already been asserted against the liability insurance payment. There is, however, currently no appellate court decision that explicitly addresses this issue.

The application of the established principles does become more muddled as the facts of the underlying case change. In some cases, the injured person makes a compromise settlement of the workers' compensation claim and takes an assignment of the work comp subrogation claim. It has been held that this settlement process precluded any collateral source reduction of the liability damage claim based upon workers' compensation payments. Austin v. State Farm Mut. Ins. Co., 486 N.W.2d 457 (Minn. Ct. App. 1992); Salib v. Allstate Ins. Co., 2008 WL 570600 (Minn. Ct. App. Feb. 25, 2008).

IX. Multiple Parties

A. Multiple Claimants

When liability limits are exhausted by multiple claims, the tortfeasor will be considered underinsured if an injured person is not fully compensated by the prorata recovery from the liability settlement. Kothrade v. American Family Mut. Ins. Co., 462 N.W.2d 413 (Minn. 1990); DiLuzio v. Home Mut. Ins. Co., 289 N.W.2d 749 (Minn. 1980).

B. Multiple Defendants

Minn. Stat. § 65B.49, subd. 4a was amended in 1989 to provide that a UIM claim will exist whenever one at-fault vehicle meets the definition of a underinsured vehicle. This amendment reversed the holding in Johnson v. American Family Mut. Ins. Co., 426 N.W.2d 419 (Minn. 1988) which required the claimant's damages to exceed the liability limits of all of the at-fault vehicles before a UIM claim could be asserted.

When there are multiple defendants, the UIM damage claim against any one defendant is based upon that defendant's percentage of fault. The provisions of Minn. Stat. § 604.02 providing for joint and several liability generally will not apply. Lahr v. American Family, 551 N.W.2d 732 (Minn. Ct. App. 1996); EMC Ins. Cos. v. Dvorak No. C6-99-954, 1999 WL 1216661 (Minn. Ct. App. Dec. 21, 1999).

In an accident with more than one vehicle, it is possible that two or more drivers might be underinsured. A typical fact pattern would involve a passenger in a friend's car who is injured in a collision with a second vehicle. This situation arose in Schons v. State Farm Mut. Auto. Ins. Co., 621 N.W.2d 743 (Minn. 2001). Tamara Schons was a passenger in a friend's (Vogl's) car when a head on collision occurred with a second vehicle. Both drivers were negligent. Each had \$50,000 in liability coverage. Schons collected the liability limits from Vogl's insurer, and she also settled with the second driver (Bjorklund) for \$48,000 of the \$50,000 in liability coverage.

With respect to the negligence of the driver of the second car, Schons made a UIM claim against State Farm, which insured the occupied vehicle. See Lahr v. American Family, 528 N.W.2d 257 (Minn. Ct. App. 1995). State Farm paid its \$50,000 in UIM coverage based on Bjorklund's negligence.

Schons now asserted a claim against her own UIM insurance policy based on Vogl's negligence. If this had been a single car accident involving Vogl's, Schons personal policy with UIM coverage would have been liable for her uncompensated damages. See Davis v. American Family Mut. Ins. Co., 521 N.W.2d 366 (Minn. Ct. App. 1994). But because Schons had already been paid UIM based on Bjorklund's negligence, State Farm argued that it should be given a credit for this first UIM payment of \$50,000. Although Schons' claim was based upon the negligence of a different driver, State Farm argued that Minn.

Stat. §65B.49 subd. 3a(5) required that it's policy be considered to be "excess" UIM coverage.

The Supreme Court agreed with State Farm's analysis of the statute. The function of the statute is to connect the injured person's UIM recovery to the limits specified for the occupied vehicle, and to allow an additional recovery "where the injured passenger has preselected a greater level of UIM coverage." 621 N.W.2d, at 747. So long as the UIM coverage from the occupied vehicle was "available" to Schons, the personal policy for Schons will be reduced by this available coverage. Since Schons had selected a \$50,000 limit on her personal UIM policy, and since she had already been paid \$50,000 from the UIM on the occupied vehicle, she had no additional claim.

In Schons, the Supreme Court held that claims against two underinsured drivers would be treated in the same manner as an "excess insurance" claim involving a single negligent driver under Minn. Stat. §65B.49 subd. 3a(5). On the facts of the Schons case, the \$50,000 in UIM coverage on the occupied car was being paid based upon the negligence of car #2. This amount was then credited against the \$50,000 in personal UIM coverage, and so that no coverage existed for any additional claim. The underlying logic of the decision is that, under the priority and limitation provisions in Minn. Stat. §65B.49 subd. 3a(5), Schons is entitled to receive only the amount of UIM coverage for which she paid a premium: "Although Schons might have recovered more than \$50,000 if she had preselected a higher level of UIM coverage, she could not reasonably expect to recover more than the \$50,000 of UIM coverage for which she paid premiums." 621 N.W.2d at 747.

The logic of the Schons decision appears to have been applied in a questionable manner in Songkhamdet v. American Family Ins. Group, No. A05-1060, 2006 WL 1229498 (Minn. Ct. App. May 9, 2006). In Songkhamdet, a man was badly injured in a two vehicle collision while riding as a passenger in a friend's car. The driver of the occupied vehicle was apparently the one with most of the fault, and the liability insurance carrier paid its policy limits of \$30,000. The second vehicle apparently had little if any fault, and the liability insurer for the second vehicle paid only \$15,000 of the \$100,000 liability policy limit. The injured person was not fully compensated by the liability settlements (his medical expenses alone had been about \$200,000). Having settled the two liability claims without being fully compensated, what options existed for the injured passenger in seeking compensation from applicable underinsured motorist coverage? He could (1) try to prove that the person with little if any fault and \$100,000 in liability insurance was "underinsured" (so, for example, if this driver were 10% at fault, he would be considered "underinsured" only if the total damages exceeded \$1,000,000), or (2) try to prove that the person with most of the fault and only \$30,000 in liability coverage was "underinsured." Because it was most reasonable to pursue the claim against the person with low liability limits and a high percentage of fault, the injured person brought the claim against his own insurance company (American Family) based upon the negligence of the driver of the occupied vehicle. Unfortunately for the injured claimant, he stipulated in the litigation against American Family that both vehicles in the collision were in fact "underinsured." The majority opinion for the court of appeals therefore concluded that, under Schons, the UIM coverage of \$30,000 from the personal

policy with American Family should be reduced by the \$30,000 in UIM coverage from the occupied vehicle, leaving the injured person with no coverage from American Family.

A similar result occurred in Pagel v. State Farm Ins. Companies, 2003 WL 21911334 (Minn. Ct. App. August 12, 2003). In Pagel, a passenger in a motor vehicle accident was killed. Both drivers were partially at fault, but primary liability was with the driver of the occupied vehicle. Policy limits of \$100,000 were paid from the occupied vehicle. \$38,000 was paid by the insurance coverage for car #2, and the UIM carrier for the occupied vehicle paid \$5,000 of its \$100,000 in UIM coverage to obtain a release of potential UIM claims related to the negligence of the operator of car #2. The personal policy of Pagel provided \$100,000 in UIM coverage. The court of appeals reduced this coverage to zero, deducting from the personal policy the full \$100,000 in UIM coverage which had applied to the occupied vehicle. This is certainly a misapplication of the reasoning in Schons. In Schons, the injured person paid for \$50,000 in UIM coverage and collected \$50,000 in UIM benefits. In Pagel, the decedent paid for \$100,000 in UIM coverage and collected only \$5,000. She was injured by an underinsured motorist and then was denied access to the insurance coverage which had been sold to her by State Farm explicitly to protect her from this risk.

→ Practice Tip

If the driver of the occupied vehicle is primarily at fault in causing a multi-car accident, it may be advisable for the injured passenger to resolve the liability claim against the driver of the occupied vehicle and then to pursue only the UIM claim based on the negligence of this underinsured driver. There will be no UIM coverage from the occupied vehicle for this claim due to the Myers exclusion. The UIM claim will then be against the personal UIM policy covering the injured passenger. If this is the only UIM claim being presented, it should fit the fact pattern in Davis v. American Family Mut. Ins. Co., 521 N.W.2d 366 (Minn. App. 1994), and making only this UIM claim should therefore provide the best chance of gaining access to the personal UIM coverage which was selected and purchased. The case should be based on the assumption that the occupied vehicle is the only underinsured motor vehicle involved in the accident.

X. UIM Insurer's Right of Recovery

A. Subrogation Against the Underinsured Driver

In order to have subrogation rights, the UIM insurer must first make some payment to the injured person. After the 1993 decision in Employers Mut. Ins. Co. v. Nordstrom, 495 N.W.2d 855 (Minn. 1993), the UIM insurer need not pay UIM benefits until the liability claim is first resolved. Consequently, the existence of a subrogation claim will depend initially on the UIM insurer's decision to substitute its payment under Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983) to prevent a liability settlement.

The purpose of giving the Schmidt v. Clothier notice is to provide the UIM insurer with the opportunity to preserve subrogation rights. If the UIM does not substitute its payment pursuant to Schmidt, subrogation rights are waived.

If the UIM insurer does substitute its payment, the subrogation claim against the underinsured driver is preserved. However, the UIM insured may be competing with other third parties (e.g. health insurance) which may also assert subrogation claims. Commercial Union v. Minnesota School Board Association, 600 N.W.2d 475 (Minn. Ct. App. 1999).

What happens when the injured party does not settle but obtains a jury verdict against the defendant in an amount that exceeds the applicable liability insurance? If the injured person has given a Malmin notice (see page 18 above), the UIM insurer will be bound by the verdict. When the UIM payment is made, a subrogation claim by the UIM insurer will exist.

The UIM insurer must actively assert its subrogation claim against the tortfeasor or these rights may be lost. In Illinois Farmers Ins. Co. v. Nash, 651 N.W.2d 205 (Minn. Ct. App. 2002), plaintiff obtained a jury verdict of \$62,496 against a defendant who had only a \$50,000 liability insurance policy. The UIM insurer was bound by the verdict, because a Malmin notice had been given, and it paid \$12,496. Judgment on the verdict was entered in December 2000. The plaintiff executed a satisfaction of judgment against the defendant in April 2001. The UIM insurer did not make a demand for payment on its subrogation claim until May, 2001. The court held that the satisfaction of judgment effectively terminated the claims against the defendant, and the subrogation claim was therefore lost.

In O'Brien v. State Farm Ins. Co., 2005 WL 1743810 (Minn. Ct. App. July 26, 2005) the injured person also got a verdict in excess of the liability insurance limits. The plaintiff gave a Schmidt notice to State Farm, the UIM insurer. It is not at all clear why the Schmidt notice was given, because there was no settlement. In any event, State Farm did not substitute its draft and permitted the plaintiff to accept a payment of the liability insurance limits. The plaintiff gave the tortfeasor and his insurance company a release acknowledging the receipt of the liability insurance payment but preserving State Farm's subrogation rights. In this context, the defendant (O'Brien) brought a claim arguing that State Farm has waived its subrogation claim because it failed to substitute its draft following the Schmidt notice. The

Court rejects the argument and correctly notes that the entire Schmidt v. Clothier arose in the context of a settlement prior to trial. It really has no application after a verdict has been entered.

Given the issues that have arisen in the Nash and O'Brien decisions, it would be appropriate for a UIM insurer to secure its subrogation rights in an appropriate release and assignment from the plaintiff at the time of the UIM payment.

B. Subrogation Against Other Tortfeasors

In cases with multiple tortfeasors, Lahr v. American Family Mut. Ins. Co., 551 N.W.2d 732 (Minn. Ct. App. 1996) limits the UIM insurer's exposure to the percentage of fault of the underinsured driver. Since the UIM carrier is paying only for the percent of damage caused by the underinsured motorist, it should not be entitled to claim a subrogation right against any amounts recovered from other tortfeasors. See also State Farm Mut. Auto. Ins. Co. v. Galloway, 373 N.W.2d 301 (Minn. 1985).

C. Contribution Claims

In certain cases, more than one UIM policy may apply to a claimant, who must then elect to submit a claim to only one UIM insurer. Equitable principles would favor pro rata contributions from the various policies which provided coverage. This result was reached in Continental Cas. Ins. Co. v. Teachers Ins. Co., 532 N.W.2d 275 (Minn. Ct. App. 1995) based upon the coordination of benefits clauses in the applicable policies. Since Teachers Insurance provided 1/6 of the total UIM coverage, it had to contribute to Continental 1/6 of the total payment made.

The Continental Casualty case was not followed in Kissoondath v. Safeco, No. CX-96-1462, 1996 WL 665906 (Minn. Ct. App. November 19, 1996). In Kissoondath, the injured party had a \$300,000 UIM policy with Prudential and a \$500,000 UIM policy with Liberty Mutual. Unlike the policy at issue in Continental Casualty, the Prudential policy had no language stating that it would coordinate benefits. Nothing in the statute requires coordination of benefits. There is no explicit discussion of equitable claims to pro rata distribution. The court does discuss the "total policy intent" of each policy at issue and concludes that the Liberty Mutual policy should be primary. No contribution claim is permitted against the second company.

XI. Statute of Limitations

A. Claims Against UIM Insurer

A six-year statute of limitations will generally apply to contract claim against a UIM insurer. Minn. Stat. § 541.05.

In Oanes v. Allstate Ins. Co., 617 N.W.2d 401 (Minn. 2000), the Supreme Court held that the six year statute of limitations on a UIM claim would begin to run from the date of the settlement or adjudication of the liability insurance claim. This reversed earlier decisions which had the six year statute of limitations on the UIM claim run from the date of the accident. Nelson v. State Farm, 567 N.W.2d 770 (Minn. Ct. App. 1997). Johnson v. State Farm Mut. Auto. Ins. Co., No. 594 N.W.2d 243 (Minn. Ct. App. 1999); Cattnach v. State Farm Ins. Co., 577 N.W.2d 251, 254 (Minn. Ct. App. 1998); Addington v. Illinois Farmers Ins. Co., No. C6-98-2029, 1999 WL 243592 (Minn. Ct. App. April 27, 1999).

The “date of the settlement” for purposes of the beginning of the statute of limitations is the date on which the injured person receives notice that the UIM insurer will not be substituting its payment. At this point, all elements of the settlement agreement are complete. Stroop v. Farmers Insurance Exchange, 764 N.W.2d 384 (Minn.App. 2009). If the UIM insurer does not respond to the Schmidt notice, the settlement would presumably be complete when the thirty day time period for a response expires.

Prior to the Oanes decision, it was necessary to review the contract language for pertinent provisions concerning the commencement of actions against the company. In Sargent v. State Farm Auto. Ins. Co., 486 N.W.2d 14 (Minn. Ct. App. 1992) the policy said that there would be no UIM coverage until the liability insurance limits were paid. Based on this contract language, the claimant had six years to bring the UIM claim following the liability settlement. The contract language becomes less important now that the statute of limitations begins to run from the date of settlement or adjudication in all UIM claims.

In those few policies which still require arbitration of UIM claims, the contract may specify when the period for commencing the arbitration begins. See Kappes v. American Family, No. C8-93-991, 1994 WL 1120 (Minn. Ct. App. Jan. 4, 1994). If the contract is silent as to when the arbitration must be commenced, some cases have allowed claims beyond a six year limit. Spira v. American Standard Ins. Co., 361 N.W.2d 454 (Minn. Ct. App. 1985); Edwards v. State Farm Mut. Auto. Ins. Co., 399 N.W.2d 95 (Minn. Ct. App. 1986).

B. Subrogation Claims by UIM Insurer

Since the claims of a UIM insurer are subrogation claims, the UIM insurer has only those rights possessed by the injured claimant. This means that the UIM insurer’s claims for subrogation against the tortfeasor must be commenced within six years from the date of the injury. Hermeling v. Minnesota Fire and Cas. Co., 548 N.W.2d 270 (Minn. 1996).

XII. Effect of UIM Payment on Subsequent No-Fault Claims

If a claimant actually receives compensation for future medical and wage loss claims when resolving a UIM claim, the no fault insurance carrier may refuse payment of future claims on the grounds that it would provide a double recovery. Quam v. United Fire & Cas. Co., 440 N.W.2d 131 (Minn. Ct. App.1989); see also Ferguson v. Illinois Farmers Ins., 348 N.W.2d 730 (Minn. 1984).

A general release of all claims does not automatically waive future no fault claims. Geske v. State Farm Mut. Auto. Ins. Co., No. C3-89-1588, 1990 WL 10688 (Minn. Ct. App. Feb. 13, 1990). However, an insurer could argue that future no fault claims are waived by a release stating that the claimant is being compensated for all future medical and wage loss claims. The Fair Claims Practices Act does classify as an “unfair settlement practice” any request that a claimant sign a release which extends beyond the subject matter which gave rise to the claim payment. Minn. Stat. § 72A.201 subd. 7 (1).

→ Practice Tip

Care should be taken in the settlement of a UIM claim so that future no faults benefits are not inadvertently relinquished in the release that is signed. Unless the settlement negotiations included payment for future medical or wage loss claims, the claimant should not be required to sign a release which suggests that such potential no-fault claims have been satisfied.

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