

UNINSURED MOTORIST (UM) COVERAGE

HAUER, FARGIONE, LOVE,
LANDY & McELLISTREM, P.A.
Attorneys at Law
5901 S. Cedar Lake Road
Minneapolis, Minnesota 55416
(952) 544-5501

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I. History of Uninsured Motorist Statutes

| 1967-1974 | 1975-1985 | 1985-1989 | 1989 to Present |
|---|--|---|---|
| <ul style="list-style-type: none"> ▪ UM coverage first required in 1967 ▪ Applicable statute: Minn. Stat. §65B.22 | <ul style="list-style-type: none"> ▪ Became mandatory coverage under the No-Fault Act ▪ Set out priority for payment of UM claim ▪ Applicable statute: Minn. Stat. §65B.49, subd. 4 | <ul style="list-style-type: none"> ▪ Eliminated stacking ▪ Created new system of priorities for payment of UM claim ▪ Made UM coverage a single coverage combined with underinsured motorist (UIM) coverage ▪ Applicable statute: Minn. Stat. §65B.49, subd. 3a | <ul style="list-style-type: none"> ▪ Made UM and UIM separate coverages ▪ Applicable statute: Minn. Stat. §§65B.49, subd. 3a and 65B.43, subd. 16 |

When reviewing uninsured motorist case law, it is important to note the date on which the claim in each case occurred. There were significant legislative changes in 1975, 1985 and 1989 with respect to uninsured motorist coverage, so that the holdings in some older cases may have been superseded by subsequent legislative changes.

A. August 1, 1989 to Present

Uninsured motorist claims are governed primarily by Minn. Stat. § 65B.49, subd. 3a. An “uninsured motor vehicle” is defined at Minn. Stat. § 65B.43, subd. 16.

From 1985 until the changes effective August 1, 1989, uninsured motorist (UM) coverage was combined with underinsured motorist (UIM) coverage. The 1989 amendment made uninsured and underinsured separate coverages, each mandated by the No-Fault Act. Because the UM and UIM coverages are separate, an insurer may not reduce damages properly owed on a UM claim on the grounds that it had previously overpaid claims related to its UIM coverage from the same accident. Gusk v. Farm Bureau Mut. Ins. Co., 559 N.W.2d 421 (Minn. 1997).

The other changes created by the 1985 legislation were not altered in 1989.

B. October 1, 1985, to August 1, 1989

The statute governing uninsured motorist claims during this period was Minn. Stat. § 65B.49, subd. 3a.

When enacted in 1985, this statute made three significant changes with respect to uninsured motorist insurance:

- (1) It eliminated stacking.

- (2) It created a new system of priorities to determine which uninsured motorist policies would apply to an individual's UM claim. Minn. Stat. § 65B.49, subd. 3a(5).
- (3) It made UM coverage a single coverage combined with underinsured motorist (UIM) coverage.

C. January 1, 1975, to October 1, 1985

From January 1, 1975, through October 1, 1985, uninsured motorist coverage was a mandatory coverage under the No-Fault Act. Coverage was required under Minn. Stat. § 65B.49, subd. 4.

The priority for payment of uninsured motorist coverage was based primarily on the insurance policy "closest to the risk." This generally meant:

- (1) First the vehicle occupied by the claimant.
- (2) Then any other policy where the claimant is an insured. This was true even though the claimant was occupying his own uninsured vehicle at the time the accident occurred.
- (3) Uninsured motorist coverage during this period could be "stacked" by the claimant from all policies in which the claimant was an insured.

In Gudvangen v. Austin Mut. Ins. Co., 284 N.W.2d 813 (Minn. 1978), aff'd on reh'g (Minn. 1979), it was stated generally that the statutes dealing with uninsured motorist insurance prior to 1975 were generally intended to be incorporated in the No-Fault Act.

In 1977, the definition of an uninsured motor vehicle was amended to include both motor vehicles and motorcycles as uninsured motor vehicles. In Gudvangen, the change in definition was held to be a clarification of the existing law, not an addition to the law.

D. 1967 to 1974

Uninsured motorist coverage was first required in 1967. Prior to the effective date of the No-Fault Act on January 1, 1975, the statute governing uninsured motorist coverage was codified at Minn. Stat. § 65B.22. This section was repealed when the No-Fault Act went into effect.

II. Overview: Prerequisites for a UM Claim

The various elements of a UM claim will be discussed in detail in subsequent sections of this article. The following list simply provides a checklist identifying each of the elements which must be considered in bringing an uninsured motorist claim.

Checklist for Uninsured Motorist Claim

Was the injury caused by a motor vehicle?

The injury must be caused by a motor vehicle, as defined either in the applicable statute or in the UM contract. For example, a snowmobile would not be expected to fit the definition of a “motor vehicle” in either the applicable statute or in the UM insurance contract. Consequently, an injury caused by an uninsured snow mobile would not give rise to a UM claim, because the injury is not caused by an uninsured motor vehicle. See Section 17.3: What is an Uninsured Motor Vehicle.

Was the injury caused by an uninsured motor vehicle?

Generally, a motor vehicle with less than the \$30,000 in liability insurance coverage, the minimum required by Minnesota law for the claims of an injured individual, will be considered uninsured. See Section 17.3: What is an Uninsured Motor Vehicle.

Was the injury caused by a motor vehicle “accident”?

The injury in question must arise from a motor vehicle “accident,” not from an intentional tort. If the driver of a motor vehicle intentionally causes an injury, the driver will likely have no liability insurance coverage to compensate the injured person. However, the injury caused by this uninsured motor vehicle does not give rise to a UM claim, because the incident causing the injury was not a motor vehicle “accident.”

Can the injured person prove liability, causation and damages?

To be successful in pursuing the UM claim, the injured person must be able to prove the basic elements of any tort claim, that is liability, causation, and damages.

Can the injured person identify one or more policies of UM insurance against which a claim may be made?

To pursue a UM claim, the injured person must be able to identify one or more policies of UM insurance against which a claim may be made. See Section 17.4: Identifying the UM Coverage.

III. What Is an Uninsured Motor Vehicle?

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| Definition: Uninsured Motor Vehicle |
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| An uninsured motor vehicle is defined as a motor vehicle or a motorcycle which does not have liability insurance meeting the requirements of Minnesota law. See Minn. Stat. § 65B.43, subd. 16. |
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Since Minnesota law requires liability limits of not less than \$30,000 for one person and not less than \$60,000 for two or more persons in any one accident, a motor vehicle with less than this coverage is considered uninsured. Minn. Stat. § 65B.49, subd. 3.

An uninsured motorist contract of insurance is permitted to use definitions which provide benefits or coverages which are in addition to those mandated by the statute. Minn. Stat. § 65B.49, subd. 7. Consequently, in cases where a UM claim does not exist under the statutory standards, it would be reasonable to review the injured person's uninsured motorist contract to determine if the contract provides UM benefits.

A. Vehicles Covered

An "uninsured motor vehicle" can be either a motorcycle or a motor vehicle.

1. Motorcycle

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| Definition: Motorcycle |
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| 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. |
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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. § 169.011, subd. 44.) The definition of "motorcycle" includes an attached trailer and also explicitly includes a motorized bicycle.

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). If the three-wheel ATV is insured by a homeowner's policy with at least \$30,000 in liability coverage, it will not be considered to be uninsured. Olson v. Milbank Ins. Co., No. C1-89-2156, 1990 WL 106016 (Minn. Ct. App. Aug. 3, 1990).

2. Motor Vehicle

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| Definition: Motor Vehicle |
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| 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. |
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The definition includes a trailer when the trailer is attached to or being towed by a motor vehicle.

Given the statutory definition, a farm tractor would not be a “motor vehicle” since it is not designed primarily for use on public roads and it is not subject to registration under Minn. Stat. Ch. 168. Great American Ins. Co. v. Golla, 493 N.W.2d 602 (Minn. Ct. App. 1992). However, as already noted, it is important to review the applicable uninsured motorist contract in cases when coverage may not be mandated by statute. The language in certain contracts provides UM or UIM coverage for an accident caused by a farm vehicle or other off-road motorized equipment if the accident occurs on a public road. Kashmark v. Western Ins. Co., 344 N.W.2d 844 (Minn. 1984).

In Mutual Service Cas. Ins. Co. v. League of Minnesota Cities Ins. Trust, 659 N.W.2d 755 (Minn. 2003) the court enforced a literal reading of the statutory definition of a “motor vehicle” in holding that a marked police car, because it was not required to be “registered,” was not a “motor vehicle” for purposes of a claim for basic economic loss benefits under the No-Fault Act. Chapter 168.012 subd. 1(b) exempts from registration a variety of government vehicles, such as a clearly marked police patrol car, a fire engine, a clear marked ambulance, and federally owned vehicles. Under the decision in Mutual Service, such vehicles do not fall within the statutory definition of a “motor vehicle.” This decision will impact a variety of motor vehicle insurance claims. However, as a practical matter, vehicles in these categories were rarely uninsured, so accidents involving these vehicles generally did not give rise to UM contract claims.

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); see also Bell v. State Farm, No. C8-96-1704, 1997 WL 40664 (Minn. Ct. App. Feb. 4, 1997) in which a construction grader used for plowing snow was held not to be a “motor vehicle” since it was not required to be licensed under Minn. Stat. Ch. 168.

B. Vehicles with No Insurance

The most obvious UM claim arises when the at-fault vehicle is not covered by any policy of liability insurance. However, if driver of the at-fault uninsured motor vehicle is covered by a personal policy of liability insurance or \$30,000 or more that is applicable to the claim, there is no uninsured motorist claim even though the at-fault vehicle itself is uninsured. Sorbo v. Mendiola, 361 N.W.2d 851 (Minn. 1985).

C. Less than \$30,000 Liability Coverage

1. General Rule

The October 1, 1985, amendments to the No-Fault Act increased minimum liability limits in Minnesota from \$25,000/\$50,000 to \$30,000/\$60,000. Minn. Stat. § 65B.49, subd. 3. Since an uninsured motor vehicle is one which does not meet these limits, any vehicle that

has less than \$30,000/\$60,000 in liability coverage is classified by Minnesota law as an “uninsured motor vehicle.”

2. Accident Outside Of Minnesota.

In Murphy v. Milbank Mut. Ins., 320 N.W.2d 423 (Minn. 1983) an accident occurred in Iowa. The negligent party was an Iowa driver who had a \$10,000 liability limit. Although this limit complied with Iowa law, it was less than the minimum required by Minnesota law. The Minnesota Supreme Court held that the Minnesota resident injured in this Iowa accident could assert an uninsured motorist claim against his own company. Because the liability coverage was less than that required by Minnesota law, an uninsured motorist claim existed.

In certain circumstances, a vehicle might be categorized either as an uninsured motor vehicle or as an underinsured motor vehicle. For example, a Minnesota resident is injured in Iowa by a negligent driver who has a \$25,000 liability limit. The injured person has suffered \$50,000 in damages. The Iowa vehicle fits the definition of either an uninsured motor vehicle or an underinsured motor vehicle. Consequently, the injured party can elect to submit a claim under either one (but not both) of the coverages. See Murphy v. Milbank Mut. Ins. Co., 388 N.W.2d 732 (Minn. 1986). See also Taylor v. Great Central Ins. Co., 234 N.W.2d 590 (Minn. 1975). Hedin v. State Farm Mut. Auto. Ins. Co., 351 N.W.2d 407 (Minn. Ct. App. 1984).

In cases where there is liability coverage of less than \$30,000, the injured person may wish to settle the liability claim while preserving an additional UM claim. In these circumstances, the UM insurer must be given prior notice of the proposed settlement with the tortfeasor so that the UM insurer will have the opportunity to preserve its potential subrogation claims against the at-fault driver. See Liberty Mut. Ins. Co. v. American Family Mut. Ins. Co., 463 N.W.2d 750, 754 n. 3 (Minn. 1990); Ruddy v. State Farm Ins. Co., 596 N.W.2d 679 (Minn. Ct. App. 1999)

→ Practice Tip

When a Minnesota resident is injured in an auto accident in another state, as soon as possible one should determine the liability limits of the defendant. If the limits are less than 30/60 thousand, the case of Murphy v. Milbank Mut. Ins. Co., 388 N.W.2d 732 (Minn. 1986) allows the plaintiff to make an uninsured motorist claim. It may be easier and more beneficial for the injured person to make the uninsured claim in Minnesota rather than deal with the liability claim in an out of state venue.

3. Accidents in Minnesota.

What happens if a vehicle from another state has less than \$30,000 in liability coverage and causes an accident in Minnesota? Under Minn. Stat. § 65B.50, the insurance company for the out-of-state vehicle is generally required to provide at least the minimum \$30,000/\$60,000 liability limit required by Minnesota law, even though the policy itself provides a lower limit. This statute requires the additional coverage so long as the

insurance company is one that does business in the state of Minnesota. See Maas v. Allstate Ins. Co., 365 N.W.2d 256 (Minn. 1985).

What if the insurer for the out of state vehicle does not do business in Minnesota? A literal reading of Minn. Stat. § 65B.50, subd. 2 would mandate that the liability limits be raised whenever the insured vehicle is in Minnesota. Despite the statutory language, however, the courts have held that, if the company providing coverage for the out-of-state vehicle is not licensed to do business in Minnesota, the liability limit does not have to be increased and it remains at the limit specified in the insurance policy. See Burgie v. League General Ins. Co., 355 N.W.2d 466 (Minn. Ct. App. 1984).

Following Burgie, an uninsured motorist claim may exist for an accident in Minnesota when (1) the out-of-state liability policy is less than \$30,000/\$60,000, and (2) the insurer for the vehicle does not do business in Minnesota. In order to assert an uninsured motorist claim, the injured person would first have to obtain verification that the liability insurer for the at-fault vehicle is limiting its coverage under the applicable liability insurance policy to an amount of less than \$30,000.

D. Denial of Coverage or Insolvency

When an insurance company denies coverage or becomes insolvent, an uninsured motorist claim generally exists. Most uninsured motorist endorsements include in the definition of an uninsured motor vehicle a vehicle which is "insured at the time of the accident, but the insurance company denies coverage or becomes insolvent." See Fryer v. National Union Fire Ins. Co., 346 N.W.2d 353 (Minn. Ct. App. 1985).

If a liability insurance carrier first denies coverage and then, prior to the completion of an uninsured motorist settlement, admits that coverage exists, the uninsured motorist claim no longer exists. See Fryer, supra. However, once an uninsured motorist settlement is concluded, the settlement may be final even though liability coverage was in fact acknowledged prior to settlement. Snesrud v. Elbers, 374 N.W.2d 830 (Minn. Ct. App. 1985).

In a situation where a liability insurance carrier initially denies coverage, but then goes on to settle part of the liability claim without admitting coverage, a car cannot be considered "uninsured" under the policy definition. Jones v. Sentry Ins. Co., 462 N.W.2d 90 (Minn. Ct. App. 1990).

What if the liability insurance company denies coverage because the injury was caused intentionally? Can an intentional tort lead to an uninsured motorist claim? In McIntosh v. State Farm, 488 N.W.2d 476 (Minn. 1992), the Supreme Court held that only a motor vehicle "accident" will give rise to an uninsured motorist claim. In McIntosh a man assaulted another person with a car. Although the injury arose out of the use of a motor vehicle, it was not an "accident". Consequently, there was no uninsured motorist claim. This decision was consistent with earlier Court of Appeals rulings in Wilson v. State Farm, 451 N.W.2d 216 (Minn. Ct. App. 1990) and Petersen v. Croft, 447 N.W.2d 903 (Minn. Ct.

App. 1989).

(It should be noted that McIntosh does allow the victim of an intentional tort to recover basic economic loss no-fault benefits. For no-fault purposes, the term "accident" is viewed from the perspective of the victim, who did not intend to be harmed.)

On occasion, a close question may exist as to whether an injury was caused accidentally or intentionally. Standards for assessing insurance denials based on an intentional tort are discussed in American Family Ins. Co. v. Walser, 628 N.W.2d 605 (Minn. 2001). See also Motzko v. State Farm Mut. Ins., No. C4-01-131, 2001 WL 1182356 (Minn. Ct. App. Oct. 9, 2001), in which injuries stemming from a truck pulling contest were judged to be the result of an accident because the parties did not intend the contest to end with one of the truck's rolling over.

E. Hit and Run or Phantom Vehicle.

The definition of "uninsured motorist coverage" explicitly includes a hit and run motor vehicle." Minn. Stat. § 65B.43, subd. 18. In Halseth v. State Farm Mut. Auto. Ins. Co., 268 N.W.2d 730 (Minn. 1978), the court held that the term "hit-and-run" is synonymous with an accident where the driver flees from the scene, even though no physical contact occurred between the phantom vehicle and the vehicle of the person making the uninsured motorist claim. The court noted that, prior to 1975, the law limited uninsured motorist coverage to "colliding motor vehicles" in which the driver and operator of one vehicle is not known. See also Heldt v. Truck Ins. Exchange, No. C7-94-1009, 1995 WL 1496 (Minn. Ct. App. 1995), a choice of law case confirming that Minnesota law does not require physical contact with the phantom vehicle for an uninsured motorist claim to exist.

In Lhotka v. Illinois Farmers Ins. Co., 572 N.W.2d 772 (Minn. 1998), a pedestrian was hit by a motor vehicle. The driver stopped, but the pedestrian believed that she was not hurt and failed to obtain any identifying information. When she later found that injuries had occurred, she was not entitled to bring a UM claim. The incident did not meet the Halseth definition of a "hit and run," i.e., "an accident causing damages where the driver flees from the scene." 268 N.W.2d at 733. See also Sao v American Family Ins. Group, No. C7-98-2010, 1999 WL 26213 (Minn. Ct. App. 1999) holding that no UM claim existed when the driver wrote down the wrong license plate number and did not get any additional information from the other driver.

In National Family Ins. v. Bunton, 509 N.W.2d 565 (Minn. Ct. App. 1993), there was one "phantom" vehicle at fault in causing an injury. The plaintiff thought he had identified the tortfeasor, but that individual denied having any involvement in the accident. Nevertheless, this person's insurance company made a settlement offer and it was accepted by the plaintiff on a Pierringer release. The plaintiff then tried to pursue a UM claim. The court denies the claim. In the court's view, UM coverage is there to compensate for the lack of insurance coverage by a tortfeasor. An injured party cannot first take advantage of insurance coverage from an alleged phantom vehicle and then pursue a UM claim. In these circumstances, in the absence of a reasonable settlement offer, the plaintiff's only

good option would be to start a lawsuit on alternative theories both against the alleged tortfeasor and against the UM carrier. Full damages will then be awarded against one or the other.

In Wong v. American Family, 576 N.W.2d 742 (Minn. 1998), a man was injured when his car hit a deer carcass lying in the roadway. Expert testimony established that the deer had previously been struck by another motorist. The UM claim was dismissed because, on the facts of this case, the first driver had no duty to remove the carcass from the highway.

The mere allegation that a "phantom tortfeasor" exists may not be sufficient to establish an uninsured motorist claim. In Ripka v. Mehus, 390 N.W.2d 878 (Minn. Ct. App. 1986) a party attempted to introduce evidence of a "phantom tortfeasor" to influence a jury finding concerning comparative fault. In that case, the Court held that the evidence was not sufficient for the negligence of this phantom party to be submitted to the jury. Ripka involved issues of comparative fault, not a question of UM coverage. See also Pacyga v. Economy Fire and Casualty, No. C8-88-1818, 1989 WL 5757 (Minn. Ct. App. Jan. 31, 1989).

→ Practice Tip

Phantom vehicle cases often involve issues of credibility. An attorney should be hesitant to represent an individual who is claiming injuries from a phantom vehicle unless (1) independent witnesses verify the existence and liability of the phantom vehicle, or (2) physical evidence supports the claimant's version of the facts, or (3) the veracity of the claimant cannot reasonably be questioned.

IV. Identifying the UM coverage

Minn. Stat. § 65B.49, subd. 3a(5) sets the standards for determining which insurance company or companies will be responsible for providing UM coverage. This portion of the statute states:

“If at the time of the accident the injured person is occupying a motor vehicle, the limit of liability for uninsured and underinsured motorist coverages available to the injured person is the limit specified for that motor vehicle. However, if the injured person is occupying a motor vehicle of which the injured person is not an insured, the injured person may be entitled to excess insurance protection afforded by a policy in which the injured party is otherwise insured. The excess insurance protection is limited to the extent of covered damages sustained, and further is available only to the extent by which the limit of liability for like coverage applicable to any one motor vehicle listed on the automobile insurance policy of which the injured person is an insured exceeds the limit of liability of the coverage available to the injured person from the occupied motor vehicle.”

The statute sets up a two step process for identifying the coverages that will be applicable to an uninsured motorist (or underinsured motorist) claim. The process may be summarized as follows.

| Which Company Pays? |
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| 1. Was the injured person occupying a motor vehicle at the time of the injury? a. If not occupying a vehicle, go to any one policy under which the injured person is insured; b. If occupying a vehicle, seek UM coverage first from the occupied vehicle and go to question 2. |
| 2. If the injured person was occupying a vehicle, was this person an insured on the policy covering the occupied vehicle? a. If the injured person is an “insured” on the policy for the occupied vehicle, there will be no additional coverage available from any other policy. b. If the injured person is not an “insured” on the policy for the occupied vehicle, additional coverage can be sought if there is another applicable 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 UM (or UIM) insurance coverage. However, in Illinois Farmers Ins. Co. v. Marvin, 707 N.W.2d 747 (Minn. Ct. App. 2006), the court says that being an “occupant” of an insured vehicle does not end the inquiry, and that “some causal connection between the occupancy of the vehicle and the injury sustained” may also be required. This addition of some new element of “causal connection” after status as an “occupant” has already been determined does not really fit with the system created by the statute, and it is quite likely an inaccurate statement of the law.

In Illinois Farmers Ins. Co. v. Marvin a woman who was apparently exiting from the rear cargo area of a Ford Explorer had her legs pinned between the Explorer and another vehicle that backed into the Explorer. There was no question that the woman was injured in a motor vehicle accident. (The issue of “causal connection” most typically arises in determining 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, are there circumstances in which the “causal connection” between the car and injury is sufficient to give rise to a no-fault insurance claim? No such issue existed in Marvin.) 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 appears to be explicit in saying that she is entitled to seek UM (or UIM) coverage from that occupied vehicle. There would appear to be no reason to embark on some additional analysis of the “causal connection” between the occupied vehicle and the injury sustained.

It should also be noted that statutory language limiting claims to a single insurance policy applies only with respect to Minnesota motor vehicle insurance policies. 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.

A. Clarification of Terms: “Insured” and “Occupying”

There has been litigation concerning the meaning of the words “occupying” and “insured” as used in this provision of the law.

1. “Occupying”

In 1996, the Supreme Court decided Allied Mut. Ins. Co. v. Western Nat’l Mut. Ins. Co., 552 N.W.2d 561 (Minn. 1996). Prior to the decision in Allied, a number of court of appeals decisions had held that a person could be “occupying” a motor vehicle even though the person was outside of the vehicle. Allied requires that the term “occupying” be given its ordinary and commonly accepted meaning. Thus, in Allied, a woman standing next to a car while it was being unlocked could not be considered to be “occupying” the vehicle when she was injured. But see also Illinois Farmers Ins. Co. v. Marvin, 707 N.W.2d 747 (Minn. Ct. App. 2006), where a woman was judged to be occupying a Ford Explorer when she had been loading the rear cargo area of the vehicle and was climbing out of the Explorer as her legs were struck by another vehicle.

The Allied decision acknowledges that the meaning of “occupying” may be expanded somewhat by policy language. See for example State Farm Mut. Auto. Ins. Co. v. Levinson, 439 N.W.2d 110 (Minn. Ct. App. 1989) in which the policy defined “occupying” to include “entering into” and “alighting from” the insured vehicle.

The decision in Allied should effectively reverse a line of cases in which someone outside of a vehicle was nevertheless found to be “occupying” that vehicle. See Klein v. United

State Fidelity & Guarantee Co., 451 N.W.2d 901 (Minn. Ct. App. 1990) – person changing a flat tire was “occupying” the vehicle; Horace Mann Ins. Co. v. Neuville, 465 N.W.2d 432 (Minn. Ct. App. 1991) – person standing in front of his stalled car was “occupying” it; Conlin v. City of Eagan, 482 N.W.2d 519 (Minn. Ct. App. 1992) – tow truck operator working on the front of a car about to be towed was “occupying” the tow truck. Prior to Allied, the courts would engage in a very artificial analysis concerning nature of the on-going “relationship” between the injured party and the vehicle he was claimed to be “occupying.” See Dohmann v. Houseley, 478 N.W.2d 221 (Minn. Ct. App. 1991) and Gieser v. The Home Indemnity Co., 484 N.W.2d 256 (Minn. Ct. App. 1992).

2. “Insured”

| Definition: Insured |
|---|
| Generally, an "insured" under the statutory definition includes both the named insured in the policy and any resident relative of the named insured unless that relative is "identified by name in any other contract" of motor vehicle insurance complying with the No-Fault Act. See Minn. Stat. § 65B.43, subd. 5. |

The definition of an “insured” set forth in Minn. Stat. § 65B.43 subd. 5 will be used when interpreting the priority system set up by § 65B.49 subd. 3a(5) for UM and UIM claims. 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, Dec. 24, 2009]

It should be noted that the definition of “insured” in Minn. Stat. § 65B.43 subd. 5 does extend status as an “insured” to certain relatives who are not named as “insured” on the declaration page of the policy. “Insured” status in the statute is defined to include both the named insured and each resident relative of the named insured who is not separately identified by name in his or her own motor vehicle insurance policy.

Being listed as an authorized “driver” for an insured vehicle does not make a person an “insured” on the policy covering the vehicle. In Carlson v. Allstate Ins. Co., 749 N.W.2d 41 (Minn. 2008), a man leased a vehicle for his son’s use. The father insured the vehicle by adding it to his personal insurance policy, and the son was simply identified as a “driver” for the vehicle. The son was not a resident relative in the father’s home. Consequently, since the son was neither insured as a named insured nor insured as a resident relative, the son had no claim against the UM coverage on the policy when the son was injured by an uninsured motorist while walking across a street.

Disputes have arisen concerning the meaning of the term “insured” in policies covering a business as the named insured. As a general rule, the owner of the business and the employees of the business will not be considered to be an “insured” under such a policy for purposes of Minn. Stat. §65B.49 subd. 3a(5). See West Bend Mut. Ins. Co. v. Allstate Ins. Co., ___ N.W.2d ___ (Minn. 2009) [2009 WL 4981273, Dec. 24, 2009]. Exceptions to this general rule have occurred. In General Cas. of Wisconsin v. Outdoor Concepts, 667 N.W.2d 441 (Minn. App. 2003), the named insured was “Outdoor Concepts Joe Ebbertz

DBA,” and Mr. Ebbertz, as a sole proprietor “doing business as” Outdoor Concepts, was covered as an “insured” by this contract. In Roepke v. Western Nat’l Ins. Co., 302 N.W.2d 350 (Minn. 1980), status as “insured” was extended to the president and sole shareholder of a corporation when the corporation was the named insured, but the application of the holding in Roepke has been limited in both Kuennen v. Citizens Sec. Mut. Ins. Co., 330 N.W.2d 886 (Minn. 1983) and in West Bend Mut. Ins. Co. v. Allstate Ins. Co., ___ N.W.2d ___ (Minn. 2009) [2009 WL 4981273, Dec. 24, 2009].

B. Claimant Not Occupying a Vehicle

Minn. Stat. § 65B.49, subd. 3a(5) provides: "If at the time of the accident, the injured person is not occupying a motor vehicle, the injured person is entitled to select any one limit of liability for any one vehicle afforded by a policy under which the injured person is insured."

A person not occupying a vehicle may make a claim against only one policy. It is important to review all potentially applicable policies when electing the one to which a claim will be submitted. See Holmstrom v. Illinois Farmers Ins. Co., 631 N.W.2d 102 (Minn. Ct. App. 2001).

If more than one insurance policy applies, the company required to make the payment may possibly have a claim for contribution against the company which was not selected. See page 34, below, concerning coordination of benefits.

It should also be noted that some vehicles are technically excluded from the statutory definition of “motor vehicle” because the vehicles are not required to be registered under Minn. St. Ch. 169. Mutual Service Cas. Ins. Co. v. League of Minnesota Cities Ins. Trust, 659 N.W.2d 755 (Minn. 2003). So, for example, a police officer in a marked police car is technically not “occupying a motor vehicle.” This will lead to some confusion because the police car will likely be covered by an insurance policy that does provide some UM coverage for the officer, while the officer’s UM claim would technically be governed by the provision of the statute saying that the officer may select any one policy for coverage when asserting the UM (or UIM) claim.

C. Claimant Occupying a Vehicle

Minn. Stat. § 65B.49, subd. 3a(5) provides the basic rule for determining which policy will apply to a particular claim. When a person who is occupying a motor vehicle is injured by an uninsured motorist, the statute requires that the injured person go to the UM coverage on the occupied vehicle when asserting a UM claim.

1. Occupant of a Motor Vehicle Which Is Not Insured.

What if, at the time of the accident, the injured person is occupying a motor vehicle which has no insurance?

There will be no UM coverage if the injured person is occupying an uninsured motor vehicle that he or she owns. The injured person is barred by statute from seeking uninsured motorist coverage from a policy on any other vehicle. Minn. Stat. § 65B.49, subd. 3a(7). For purposes of this particular section of the law, a motorcycle is considered to be a "motor vehicle." Hanson v. American Family Mut. Ins. Co., 417 N.W.2d 94 (Minn. 1987).

The sanctions imposed by § 65B.49 subd. 3a(7) will not apply to the vehicle owner so long as the vehicle is in fact insured, even through the owner may not be a named insured on the policy or the purchaser of the policy. Stewart v. Illinois Farmers Ins. Co., 727 N.W.2d 679 (Minn. Ct. App. 2007).

The statutory exclusion of UM (and UIM) coverage imposed by Minn. Stat. § 65B.49, subd. 3a(7) applies only to the owner of the uninsured vehicle, not to anyone else. In Vue v. State Farm Ins. Co., 582 N.W.2d 264 (Minn. 1998), the court would not apply the statutory exclusion of coverage to a woman occupying her husband's uninsured car unless it could first be established, as a matter of fact, that she too was an owner of the car.

A person who occupies, but who does not own, the uninsured vehicle remains free under the statutory priorities to pursue a UM claim against any other policy which affords UM coverage to that person. (See Section V – B, below, for a discussion of "family exclusion" contract language that might apply to claims when the uninsured vehicle is owned by a family member.)

2. Occupant of an Insured Vehicle.

A person whose damages exceed the amount of insurance coverage afforded by the occupied vehicle may wish to seek additional compensation from a second UM policy under which the person is insured. Will the injured person be permitted to obtain coverage from a second insurance policy?

a. No Excess Coverage

An injured person occupying a vehicle at the time of an accident must go first to the insurance coverage on this occupied vehicle for any UM claim. If the injured person is an "insured" under the policy covering this vehicle, there can be no additional UM claim against any other insurance policy. Minn. Stat. § 65B.49, subd. 3a(5).

See, for example, Jirik v. Auto-Owners Ins. Co., 595 N.W.2d 219 (Minn. Ct. App. 1999). A 13 year old was injured as a passenger in her mother's car. Because she was a resident relative, she was an "insured" on her mother's policy. Because she was an "insured" on the policy covering the occupied vehicle, she was not permitted to seek additional benefits from any other policy (her father's policy, with higher limits, also covered her). This was a UIM claim, but the application of the statute applies in the same manner to UM claims.

b. Possible Excess Coverage

If the injured person is not “an insured” on the policy covering the occupied vehicle, the injured person is free to seek additional coverage from a second policy.

First, the injured person must be able to identify an additional UM policy under which the injured person is an insured. Then, the injured person may access this additional coverage only to the extent that the coverage applicable to this second motor vehicle exceeds the coverage available from the occupied vehicle. For example, a person owns a car with \$100,000 in UM coverage, and she is an insured on the policy covering this car. She is injured as a passenger in the car of a friend, who has purchased a minimum \$25,000 in UM coverage. If she is injured by an uninsured motorist while occupying the friend’s car, she must go first to the \$25,000 coverage on the occupied car, and then has \$75,000 (her \$100,000 in coverage minus the \$25,000 available from the occupied motor vehicle) in excess coverage from her own vehicle. The injured person may go to this excess personal UM coverage because she is not an “insured” on the UM policy covering the friend’s car which she occupied.

3. Issues in Excess Coverage Claims

A claim for excess insurance coverage against a second policy of UM insurance will arise only when the injured person is “occupying a motor vehicle of which the injured party is not an insured”. Minn. Stat. § 65B.49, subd.3a(5).

a. Who is an "insured" on the policy covering the occupied vehicle?

A person may obtain excess coverage only if the individual is not an "insured" on the policy for occupied vehicle. The Minnesota Supreme Court, in Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000), held that the term “insured” in this portion of the law will include only those persons specifically identified in the statutory definition of “insured” at Minn. Stat. § 65B.43, subd.5. An “insured,” according to the definition of the applicable statute, is limited to the named insured or to certain resident relatives or minors in the custody of the named insured, as detailed in § 65B.43, subd.5.

Before the Becker decision, there were cases that reviewed excess coverage issues without analyzing whether or not a claimant met the definition of an "insured" under the standards of Minn. Stat. § 65B.43, subd. 5. In light of the holding in Becker, these earlier cases should now be of little value as precedents. See LaFave v. State Farm, 510 N.W.2d 16 (Minn. Ct. App. 1993); Barton v. American Internat'l Adjustment Co., Inc., No. CX-93-1737, 1994 WL11260 (Minn. Ct. App. Jan. 18, 1994).

Status as the owner of a vehicle does not automatically make the owner an “insured” if the owner is neither the named insured on the policy nor a resident relative of the named insured. Stewart v. Illinois Farmers Ins. Co., 727 N.W.2d 679 (Minn. Ct. App. 2007).

b. Which Policy Provides Excess Coverage?

If a claimant is not an "insured" on the policy for the occupied vehicle, the claimant may seek additional excess coverage from one other policy.

Issues may arise concerning the applicability of a second insurance policy. Such disputes most typically arise in the context of business insurance policies.

In Turner v. Mutual Service Cas. Ins. Co., 675 N.W.2d 622 (Minn. 2004), employees were injured in an out of state accident while in a car rented for business purposes by the employer. They sought benefits from the employer's commercial motor vehicle insurance policy. This insurance contract, however, limited the UIM/UM coverage to persons occupying vehicles owned by the business. The rental car was not owned, so coverage under the business policy was denied. Nothing in the No-Fault Act mandates any additional extension of the coverage to rental vehicles.

In West Bend Mut. Ins. Co. v. Allstate Ins. Co., ___ N.W.2d ___ (Minn. 2009) [2009 WL 4981273 (Dec. 24, 2009)], the owner of a business was injured at work while occupying a non-owned car. He sought excess UIM coverage from a "garage policy" issued in the name of his auto repair company. Although the garage policy explicitly provided excess coverage to him in these circumstances, he was judged not to be an "insured" under the garage policy since he did not meet the statutory definition of an "insured" in Minn. Stat. §65B.43 subd. 5. In applying the priorities of Minn. Stat. §65B.49 subd. 3a(5), an injured person may seek excess coverage from a policy under which he or she is "otherwise insured" only if the injured person meets the statutory definition of an "insured" in the excess policy.

It is important to identify all of the UM (or UIM) contracts which might apply to the claim, because only one claim for excess coverage can be made. If the injured person is covered by more than one UM policy, which one will apply?

A few cases, which yielded inconsistent results, arose when an injured young person who had a minimum personal policy of UM insurance also had UM coverage as a resident relative under the terms of a policy issued to the injured person's parents. See Nerud v. National Family Ins. Corporation, No. CX-94-1702, 1994 WL 695040 (Minn. Ct. App. Dec. 13, 1994); Frishman v. Illinois Farmers Ins., No. C3-94-1654, 1995 WL 34842 (Minn. Ct. App. Jan. 31, 1995); and Heinen v. Illinois Farmers Ins. Co., 566 N.W.2d 378 (Minn. Ct. App. 1997). The reported decision in Heinen purported to apply a "closeness to the risk" analysis in denying the injured person access to the parent's policy. (The logic of the Heinen decision is not persuasive. In the court's analysis of the facts in the case, the court incorrectly states that Heinen's personal policy of \$30,000 covers the motor vehicle involved in the accident, and then relies on this mistake of fact to justify its conclusion.) The specific issues presented in these cases, however, appear to have been made moot by the Supreme Court decision in West Bend Mut. Ins. Co. v. Allstate Ins. Co., ___ N.W.2d ___ (Minn. 2009) [2009 WL 4981273 (Dec. 24, 2009)]. The injured young person, under West Bend would be limited to the coverage on the policy in which he or she was a named insured. A claim against the parents' policy could not be made because a resident relative who is named in his or her own policy of insurance would not be covered as an "insured" in

the statutory definition at Minn. Stat. §65B.43 subd. 5.

If an injured individual did have a potential claim for excess coverage by being an “insured” in more than one applicable policy, there is nothing in the statute or in applicable case law to preclude the injured person from asserting a claim against an applicable policy with the highest coverage. (When more than one insurance company provides UM coverage for an excess insurance claim, the one company called upon to make the UM payment to the injured person may possibly be entitled to contribution from the other applicable insurance. See Coordination of Benefits, page 34, below.)

c. What Is The Amount of Excess Coverage?

Excess coverage involves a comparison of the policy from the occupied vehicle with the personal UM policy from which excess insurance is sought. Generally, there should be excess coverage to the extent that the claimant's personal insurance limit for UM "exceeds the limits of liability of the coverage *available to the injured person* from the occupied motor vehicle." Minn. Stat. § 65B.49, subd. 3a(5), emphasis added.

In the most simple example, a person who collects a \$30,000 UM policy limit from the occupied vehicle's insurer, and who has a personal UM policy of \$50,000, will have excess coverage of \$20,000.

If the personal policy has limits equal to or lower than those available from the occupied vehicle, there will be no excess coverage. LaFave v. State Farm Mut. Auto. Ins. Co., 510 N.W.2d 16, 19 (Minn. Ct. App. 1993).

What if multiple claimants exhaust the UM policy from the occupied vehicle? Applying the statute literally, only the limits “available to the injured person” should be deducted in determining the amount of excess coverage. The opposite result, however, was reached in an unpublished opinion, Dilworth v. Dairyland Ins. Co., No. C8-91-1683, 1992 WL 83294 (Minn. Ct. App. April 28, 1992). In Dilworth, four occupants of a car made claims against a 50/100 UM policy of Farmers Insurance. Farmers paid its policy limits but Dilworth's share was only \$13,250. Dilworth sought excess coverage from his personal UM policy of \$30,000. The court held that, because the 50/100 UM Farmers policy was greater than the 30/60 UM policy which Dilworth had with Auto Owners, there was no excess coverage. The language of the Auto Owners policy did not extend UM coverage beyond that required by the statute. As an unpublished decision, Dilworth does not establish a precedent.

What if, due to an enforceable policy exclusion, there is no UM coverage on the occupied vehicle? Is the face value of the policy considered even though the exclusion prevents a claim against the policy? In Davis v. American Family, 521 N.W.2d 366 (Minn. Ct. App. 1994), the court held that there should be no deduction from the individual's personal coverage when, due to a policy exclusion, there is no applicable coverage from the occupied vehicle. (Davis involved an underinsured rather than an uninsured claim, but the statute at issue applies equally to UIM and UM claims.) The analysis in Davis concludes that the UIM coverage on the excess policy is available because the excess policy is not

“like coverage” when compared to the UIM coverage on the occupied vehicle. While this analysis yields the correct result, it is somewhat curious to conclude that two insurance policies which are absolutely identical in their language do not provide “like coverage.” It would be more reasonable and straightforward to acknowledge that, because there is a valid exclusion in the policy on the occupied vehicle, the “coverage available to the injured person from the occupied motor vehicle” is zero.

The purpose of allowing a claim for excess insurance coverage is to allow the injured individual to obtain the amount of UM (or UIM) insurance coverage that this person has selected and paid for in a personal policy. When coverage on the occupied vehicle, for whatever reason, cannot provide this amount of coverage to the injured person, the system created by the legislature is intended to permit a claim for excess coverage. This is an issue which is likely to be a subject for additional litigation when coverage on the occupied vehicle is diluted due to the number of injured persons occupying the vehicle and making claims on the policy.

D. Motorcycle Issues

Provisions of the law that apply to motor vehicles do not automatically apply to motorcycles because a motorcycle is, by definition, not a motor vehicle. Minn. Stat. § 65B.43, subd. 2. A motorcycle is required to carry only liability insurance, Minn. Stat. § 65B.48, subd. 5; UM and UIM insurance coverages for a motorcycle are optional. Consequently, a motorcycle owner can purchase all legally required coverage for the motorcycle and still lack UM and UIM coverage.

In this context, there are provisions of the statute which limit UM and UIM claims for motorcycle owners.

A person who owns and fails to insure a motorcycle is barred from making a UM claim against any policy which might otherwise apply if injured while occupying the owned motorcycle. Minn. Stat. § 65B.49, subd. 3a(7) creates this penalty for motor vehicle owners, and it is made applicable to motorcycles by Hanson v. American Family Mut. Ins. Co., 417 N.W.2d 94 (Minn. 1987).

A person who owns and operates an insured motorcycle is going to be limited to those optional UM coverages which have been purchased for the motorcycle. Minn. Stat. § 65B.49 subd 3a(8). This provision of the law, enacted in 1990, reverses in part the result in Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829 (Minn. 1989).

It should be stressed that both of these statutory limitations for motorcycles apply only the owner of the motorcycle. In Milwaukee Mut. Ins. Co. v. Willey, 418 N.W.2d 146 (Minn. Ct. App. 1992), the claimant was injured while riding as a passenger on his father's uninsured motorcycle. Minn. Stat. § 65B.49, subd. 3a(7) disqualifies a person occupying an uninsured motor vehicle from obtaining other UM coverage only if the occupied vehicle is "owned by the insured." This statute did not preclude coverage for the claimant in Willey because the claimant did not own the motorcycle which he was occupying. The injured

person successfully made a UM claim against the coverage on the family van.

A study of the statutory language will find a gap in the statute as it applies to persons who are injured while occupying a motorcycle that they do not own. Minn. Stat. § 65B.49 subd. 3a (8) deals with persons who own and occupy a motorcycle. Minn. Stat. § 65B.49 subd. 3a (5) sets priorities for people “occupying a motor vehicle” and for people “not occupying a motor vehicle or motorcycle.”

A 1989 decision, Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829 (Minn. 1989), treated the occupant of a motor cycle in the same manner as a pedestrian (i.e. as one not occupying a motor vehicle). However, in 1990, Minn. Stat. § 65B.49 was amended to reverse the result in Roering. One would reasonably infer that the intent of the 1990 amendment is to treat non-owner occupants of motorcycles in the same way as non-owner occupants of motor vehicles. See American Nat’l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999).

V. Limitations on UM Coverage

A. Limitations Imposed by Statute

As noted above in the discussion of excess coverage, Minn. Stat. § 65B.49, subd. 3a(7) denies UM coverage to a person who is injured while occupying an uninsured motor vehicle that the person owns. This exclusion also applies to motorcycles.

In addition, the “owner” of a motorcycle who is injured while occupying the owned motorcycle is limited in UM and UIM claims to whatever UM or UIM coverage the owner purchased for the motorcycle. Minn. Stat. § 65B, subd. 3a(8). Since UM and UIM coverage for motorcycles is not required, the owner may not have any applicable UM or UIM coverage if injured while occupying the owned motorcycle.

B. Limitations Imposed by Insurance Policy Exclusions – Family Exclusion

A Minnesota insurance policy is permitted to limit UM coverage to accidents in the United States, its possessions, and Canada. Minn. Stat. §65B.46 subd 2 (2). Minnesota motor vehicle insurance policies will typically contain this geographical exclusion. Smith v. Illinois Farmers Ins. Co., 455 N.W.2d 499 (Minn. Ct. App. 1990).

What has been called the “family exclusion” is another typical exclusion found in most UM and UIM insurance policies. Generally, such an exclusion comes into play in a UM claim when members of a household own a number of vehicles and one of the vehicles is uninsured. A typical “family exclusion” in a UM insurance contract states that UM coverage does not apply when the claimant is occupying or is injured by an uninsured vehicle that is owned by, or regularly available for use by, the insured or a resident relative of the insured.

Whether or not such a “family exclusion” is enforceable depends upon the specific facts of the case. The various decisions related to this exclusion seem to support the following two

step analysis.

| 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 uninsured vehicle operated by the negligent driver. |
| 2. | Identify the named insured(s) on the UM policy against which a claim is being made. a. If any party legally liable for paying damages is a named insured on the UM policy, the family exclusion will be enforced and coverage will be denied. To provide coverage would effectively convert the UM coverage into the liability insurance that this named insured failed to buy. b. If the UM policy does not list as a named insured anyone who is legally liable for damages, the family exclusion will not be enforced and UM coverage will apply. The injured person should not be denied access to protection afforded by the UM coverage. |

There is an equitable basis for this selective enforcement of the family exclusion. The UM claim exists because the negligent driver and the owner of the at-fault vehicle failed to have the liability insurance required by Minnesota law. If one of these responsible parties is the also a named insured in a policy on a second vehicle, the family exclusion in the second policy will be enforced. To permit UM coverage from the second policy would be to substitute the UM coverage as liability insurance coverage for the uninsured vehicle.

A review of the case law shows the practical application of this general rule, even though the equitable principles underlying the rule are not articulated in every case.

Kelly v. State Farm Mut. Automobile Ins. Co., 666 N.W.2d 328 (Minn. 2003) involves an underinsured motorist claim, but the logic applies equally to UM coverage. In this case, Marcia Kelly and her husband had two cars. They jointly owned 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 the at-fault party was also a named insured on the policy covering the Pontiac, the family exclusion was enforced to deny UIM coverage.

The result in Kelly can be contrasted to the result in American National Prop. & Cas. Co. v Loren, 597 N.W.2d 291 (Minn. 1999). Loren also involved the application of a “family exclusion” clause, but the underlying facts were different from those in Kelly. In Loren, a man was operating his son’s motorcycle and was injured due to the negligence of another driver. The driver of the other vehicle was an underinsured motorist. Mr. Loren sought UIM benefits from his personal automobile insurance. His policy excluded coverage if the claimant suffered an injury while occupying a vehicle owned by a resident relative. The exclusion was held to be unenforceable on these facts, because the exclusion was broader than the exclusions contained in the applicable portions of the No-Fault Act. Because Mr.

Loren did not own the motorcycle he was driving, no statutory language barred his claim against his own insurance coverage. The UIM coverage on his own policy was intended to protect him from injuries caused by other negligent drivers. The family exclusion could not be enforced because it would remove the coverage required by the statute.

In Vue v. State Farm Ins. Co., 582 N.W.2d 264 (Minn. 1998), a woman was occupying her husband's uninsured van when it collided with a second uninsured vehicle. The at-fault person was the driver of the other vehicle. The family exclusion did not bar her UM claim on a second vehicle owned by the family and insured by State Farm. (There would be a statutory exclusion barring Mrs. Vue's claim if she were to be considered an owner of the occupied family vehicle; the case was remanded for a factual assessment on this issue of ownership.)

In Petrich by Lee v. Hartford Fire Ins. Co., 427 N.W.2d 244 (Minn. 1988), a man owned three cars and insured two of them. His stepson lived with him and was covered as an additional insured on the policies for the insured vehicles. The stepson was injured while in the stepfather's uninsured car. The family exclusion on the policies for the two insured vehicles was enforceable to bar any UM claim. The owner of the uninsured vehicle was an insured on the UM policies from which benefits were being sought.

The same pattern exists in Wintz v. Colonial Ins. Co. of California, 542 N.W.2d 625 (Minn. 1996). Here, a young man went to school in another city and left behind his uninsured motorcycle. His father operated the motorcycle and the boy's stepmother was a passenger. An accident occurred, and the injured woman brought a UM claim based upon her husband's negligence. The husband was an insured on the UM policy in question. A policy exclusion stated that the term "uninsured motor vehicle" did not apply to a vehicle owned by or regularly available for use by you or a relative. Although the exclusionary language was overbroad, the court concluded that the motorcycle was regularly available for Mr. Wintz's use and that the exclusion was enforceable on these facts. The UM coverage cannot be converted into liability insurance covering his negligence. See also, Johnson v. St. Paul Guardian Ins. Co., 627 N.W.2d 731 (Minn. App. 2001)

(The standards for determining when a vehicle should be judged as "available for regular use" are discussed in Milbank Ins. Co. v. Johnson, 544 N.W.2d 56 (Minn. Ct. App. 1996). The issue involves a liability insurance policy. A seventeen year old was operating a friend's car and caused an accident. The friend's car was insured, but additional liability insurance was sought from an insurance policy of the driver's father policy, since this policy covered the daughter as an insured. Liability coverage under the father's policy, however, was excluded if the borrowed car that the young woman was driving in the accident was available for her regular use. The court discusses a three part test for determining if the use of a non-owned vehicle should be considered "regular". Consider (1) the agreement between the owner and the driver concerning use of the vehicle; (2) the actual use; (3) the purpose of including non-owned vehicle provisions in insurance policies. In Milbank, the vehicle in question had been loaned by a friend for a two week period while the friend was out of town. This temporary use did not come within the scope of the policy exclusion.)

C. Other Insurance Policy Exclusions

1. “Drop Down” in Coverage Limits

The No-Fault Act mandates UM and UIM coverage in the amount of \$25,000 for a claim by one person and \$50,000 for claims of two or more persons. Minn. Stat. §65B.49 subd. 3a(1).

Many people buy limits that are higher than the statutory minimums. The amount of insurance purchased is typically set forth in a “declarations” page. This page typically is sent at the time of the initial insurance purchase and at each renewal, along with an itemized statement identifying the amount being charged for each purchased coverage.

Some companies use policy language that, under certain circumstances, reduces the amount of coverage below the amount identified in the declarations page. The reduction in coverage is commonly referred to as a “drop down” exclusion, since it drops from the amount of coverage stated in the declaration page down to some lower level of coverage.

A “drop down” provision in liability coverage of a United Services Automobile Association (USAA) policy was reviewed in Frey v. United Services Auto. Ass’n, 743 N.W.2d 337 (Minn. Ct. App. 2008). Under the terms of the policy, the liability insurance purchased by the insured would drop from the amount stated in the declarations page down to the minimum required by law (in the case of liability insurance, \$30,000 for one person, \$60,000 for more than one person) whenever the injured claimant was “a member of the covered person’s family residing in that covered person’s household.” 742 N.W.2d, at 341. The Frey family had purchased liability coverage of \$300,000 per person and \$500,000 per accident. Frey’s daughter was killed in a one car accident when her seventeen year old brother was driving. USAA took the position that only \$30,000 in liability insurance was available for this wrongful death claim. The court of appeals held that the “drop down” provision did not violate any provision of Minnesota law and therefore was valid and enforceable. On the facts of the case, the court also held that the daughter, who was a twenty-one year old college student, was not residing in the family household so that her death was not covered by the drop-down provision.

Although the issue in the Frey case involved liability insurance coverage, the logic of the case would likely extend to UM and UIM coverages.

2. Offsets that Reduce or Eliminate Coverage

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).

In Mitsch, there was an accident involving more than one negligent driver. American National paid its policy limits (\$250,000) on a liability claim. It then faced a UIM claim, based on the negligence of a second driver who had only \$30,000 in liability coverage. The American National policy permitted it to reduce its UIM coverage based upon the amount of its liability payment. This policy exclusion in effect eliminated required UIM coverage and was therefore invalid.

Similarly, in Marchio there was an accident involving more than one negligent driver. Western National paid its liability limits (\$100,000) based on the negligence of its insured driver. The injured passenger then sought UM benefits from Western National based upon the claimed negligence of an uninsured motorist (hit and run). The Western National policy said that it was not obligated to make duplicate payments for the same “elements of loss” that had been paid through the liability coverage. As in Mitsch, this had the effect of eliminating the mandatory UM coverage and was therefore invalid and unenforceable. The court held that “Such attempts to reduce or eliminate mandated UM coverage violate the no-fault statute and are invalid.” 747 N.W.2d, at 381.

VI. Asserting UM claims

A. Tort Thresholds

In Minn. Stat. §65B.51, subdivisions 1 and 3 combine to require that a “tort threshold” be met in negligence claims arising out of the operation of a motor vehicle insured under the No-Fault Act. A damage claim for non-economic losses (e.g. pain, emotional distress) is not permitted in such cases unless the injured person can prove that one of the threshold requirements in the statute has been met.

In Johnson v. State Farm Ins. Co., 574 N.W.2d 468 (Minn. Ct. App. 1998) the court held that the tort threshold requirement of Minn. Stat. §65B.51 will also be applied in a claim for uninsured motorist benefits. In effect, the Johnson decision treats the first party UM insurer as if it were really providing liability insurance for the tortfeasor.

The decision in Johnson v. State Farm does have three drawbacks: (1) Johnson is in effect an advisory opinion, since no damages requiring a tort threshold were actually awarded by the jury. (2) The decision ignores the statutory history of the No-Fault Act. In 1980, a bill was introduced to amend the No-Fault Act to require tort thresholds in uninsured motorist cases (Senate file 1698). The bill did not pass. (3) The decision is inconsistent with any literal reading of the No-Fault Act. It is inconsistent with the No-Fault Act in two ways. First, a tort threshold under Minn. Stat. § 65B.51 subd. 1 is imposed only when the claimed injury arises out of the operation of a motor vehicle which is insured (i.e. “with respect to which security has been provided.”) Second, uninsured motorist coverage is explicitly defined in the law to mean coverage for persons “who are legally entitled to recover damages for bodily injury from owners or operators of uninsured motor vehicles....” Minn. Stat. §65B.43, subd. 18. Because no tort threshold has to be met in a direct action by the injured person against the uninsured tortfeasor, (see Minn. Stat. §169.797, subd. 1), the injured person is “legally entitled to recover damages” without a tort threshold.

A reasonable public policy argument might be made for treating UM claims in the same manner as tort claims against an insured tortfeasor. However, it remains inappropriate for the court of appeals to enact its own version of public policy when the language of the statute clearly dictates the opposite result. There is a good likelihood that this inappropriate court of appeals decision will remain unchallenged, because it will be applied only to those relatively small claims in which the plaintiff fails to meet a tort threshold, and the damages at issue will make it impractical to pursue appeals of the issue to the Supreme Court.

Despite its shortcomings, Johnson does exist as precedent. Johnson will create some procedural issues in the trial court when the injured person elects to sue only the tortfeasor and the UM insurer then intervenes as a defendant in the case. The injured plaintiff will not have to reach a threshold in the direct claim against the uninsured tortfeasor, but the Johnson will impose a tort threshold with respect to non-economic losses covered by the UM insurer.

The issue of tort thresholds was addressed in Braginsky v. State Farm Mut. Auto. Ins. Co.,

624 N.W.2d 789 (Minn. Ct. App. 2001). In Braginsky, the claimant was injured by an uninsured motorcycle. Braginsky does cite the Johnson decision as authority for the proposition that Minn. Stat. §65B.51 will apply to UM contract claims. However, even under Johnson, the tort thresholds would not apply to a claim against an uninsured motorcycle, because Minn. Stat. §65B.51 does not impose tort thresholds to any claim arising from the negligent use of a motorcycle.

B. Direct Claim against Uninsured Driver

A person injured by an uninsured driver may also have claims against the uninsured driver for damage to property. However, litigating only the property damage against the uninsured driver, or settling the property damage claim through a general release, may destroy potential UM claims for bodily injury.

In Mattson v. Packman, 358 N.W.2d 48 (Minn. 1984), the injured person successfully brought a \$500 property damage claim in conciliation court against the uninsured tortfeasor. This civil action for property damage barred any future claims of the plaintiff arising from the accident. The plaintiff has a single cause of action for all damages caused in the accident, so any later claim for bodily injury would be barred by res judicata based on the property damage litigation. Although a potential UM claim was not at issue in Mattson v. Packman, a UM insurer could likely argue UM coverage should be denied because the UM insurer's potential subrogation rights against the tortfeasor have been prejudiced.

Likewise, a general release given to an uninsured tortfeasor following a property damage settlement would likely waive any future claim for bodily injury arising from the accident. (However, it should be possible to settle a property damage claim with the uninsured tortfeasor without waiving rights to additional claims, if the signed release does not include bodily injury claims.)

→ Practice Tip

If bodily injury litigation is commenced against the uninsured motorist, notice of the litigation should be given to the UM insurer.

UM policies typically contain language requiring notice of litigation against the uninsured motorist, and there is no reason why such policy language would not be valid. See Malmin v. Minnesota Mut. Fire and Casualty Co., 552 N.W.2d 723 (Minn. 1996). If reasonable notice of the litigation is provided to the UM insurer, the insurer can then be bound by any judgment entered against the uninsured tortfeasor. UM contract language stating that the insurer will not be bound by the judgment will be unenforceable, provided that the UM insurer had proper notice of the litigation. Kwong v. Depositors Ins. Co., 627 N.W.2d 52 (Minn. 2001).

If an insurance company does receive prior notice of litigation against the uninsured motorist under Malmin and Kwong, can the UM insurer avoid being bound by the subsequent jury verdict on the grounds that the UM contract provides for mandatory

arbitration of disputes? Gerdesmeier v. Sutherland, 690 N.W. 2d 126, (Minn. 2004) holds that the UM insurer has a right to seek arbitration if it does so prior to the entry of the default judgment. Once the default judgment has been entered, however, an insurance company that had prior notice of the litigation and failed to intervene will be bound by the judgment.

What if the tortfeasor is considered to be uninsured because liability coverage in an out-of-state accident is less than \$30,000? Can the injured party settle the liability claim without losing the right to bring a future UM claim? In Ruddy v. State Farm Mut. Auto. Ins. Co., 596 N.W.2d 679 (Minn. Ct. App. 1999), the court applied the general principles first established in Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983), allowing settlement with the tortfeasor after prior notice of the proposed settlement is given to the UM insurer.

C. Arbitration of UM Claims

Arbitration clauses are no longer common in UM policies. Some contracts, however, do still require arbitration to resolve UM disputes. The contract must be reviewed to see if arbitration is mandatory.

If arbitration is mandatory, the decision of an arbitrator should resolve any dispute over damages. A contract provision giving the insurance company a right to a de novo jury trial following the arbitration is not enforceable. Schmidt v. Midwest Family Mut. Ins. Co., 426 N.W.2d 870 (Minn. 1988).

In most types of arbitration, arbitrators generally have the authority to decide questions of both law and fact. However, in UM and other types of automobile insurance arbitration, issues of law will be subject to de novo review by the court, unless the parties agree to submit such legal issues for decision by the arbitrators. Johnson v. American Family Ins. Co., 426 N.W.2d 870 (Minn. 1988).

Prior to July 1, 1991, pre-arbitration award interest was not recoverable under Minn. Stat. § 549.09. Lucas v. American Family Mut. Ins. Co., 403 N.W.2d 646 (Minn. 1987); Wisniewski v. State Farm Mut. Auto. Ins. Co., 403 N.W.2d 651 (Minn. 1987). Minn. Stat. § 549.09 was amended in 1991 to provide for pre-award interest in arbitrations. If the requirements of the statute are met, the award of interest is mandatory. The claim for interest can be waived, however, if not made in the arbitration. Kersting v. Royal Milbank Ins. Co., 456 N.W.2d 270 (Minn. Ct. App. 1990).

Although pre award interest is now required in arbitrations, the award of interest may not be used to increase the recovery to an amount in excess of the policy limits. Lessard v. Milwaukee Ins. Co., 514 N.W.2d 556 (Minn. 1994). The interest is considered as part of the damage claim and is therefore subject to the amount of UM insurance coverage provided by the contract.

If a UM claim is arbitrated, the arbitrators' decision on damages may be used to estop the injured person from relitigating damages in a subsequent jury trial against another

tortfeasor involved in the same accident. Aufderhar v. Data Dispatch, Inc. 437 N.W.2d 679 (Minn. 1989). However, when arbitration is mandatory, an earlier jury verdict adverse to the claimant in related litigation may not estop the arbitrators from deciding the same claim. Liberty Mut. Ins. Co. v. American Family Mut. Ins. Co., 463 N.W.2d 750 (Minn. 1990); National Indemnity Co. v. Farm Bureau Mut. Ins. Co., 348 N.W.2d 748 (Minn. 1984).

When the real dispute involves the existence of UM coverage, this issue is generally decided by the court rather than by the arbitrators. See Dunshee v. State Farm, 228 N.W.2d 567 (Minn. 1970); U.S. Fidelity & Guaranty v. Fruchtman, 263 N.W.2d 66 (Minn. 1978).

VII. Asserting UM Claims: Multiple Defendants

What options are available to an injured person when there are two or more negligent parties, one of whom is an uninsured motorist?

Option 1

A. Pierringer Release With Insured Tortfeasor

One option is to settle first with the insured tortfeasor. This must always be done through a Pierringer release in order to preserve any additional claims. See Frey v Snelgrove, 269 N.W.2d 919 (Minn. 1978), adopting procedures used in Pierringer v. Hoger, 124 N.W.2d 106 (Wis. 1963).

Settling with the insured tortfeasor with a Pierringer release preserves the UM claim, both against the uninsured tortfeasor personally and against the UM insurer. However, the Pierringer release limits the remaining damage claim to the percentage of fault attributable to the remaining defendant. For example, if the uninsured driver were 60% at fault, the liability of the UM insurer and the uninsured driver would be limited to 60% of the damages.

The injured party is not required to provide prior notice of such a settlement to the UM insurer, although it would be courteous to do so. State Farm Mut. Auto. Ins. Co. v. Galloway, 373 N.W.2d 301 (Minn. 1985).

When there is a partial settlement, the uninsured motorist insurer does not get a credit for amounts paid to the injured person. Rather, the UM carrier must pay its percentage of the damages (up to its policy limits). For example, if an individual has a claim for \$30,000 and if the uninsured motorist is 80% at fault in causing these injuries, the UM carrier must pay \$24,000. This amount is owed regardless of the amount paid by the insured tortfeasor in the Pierringer release. See Galloway, supra.

In 1995, the Supreme Court decided that a Galloway type settlement is not valid if it is negotiated after a jury verdict has established both damages and fault. Dairyland Ins. v. Starkey, 524 N.W.2d 363 (Minn. 1995). In Starkey, the claimant sued an insured driver who had \$100,000 in liability coverage. The jury verdict was for approximately \$50,000. An uninsured driver, who was not a party to the action, was held to be 40% at fault in causing the collision. Before judgment was entered, plaintiff settled on a Pierringer Release with the defendant for approximately \$48,500. Plaintiff then asked the UM insurance carrier to pay 40% of the \$50,000 verdict, a total of \$20,000. Since Minnesota's uninsured motorist laws are not intended to create a double recovery, Starkey was not entitled to UM benefits in this post-verdict settlement, when the insured defendant had sufficient liability insurance to cover the entire verdict.

Option 2

B. Settlement With Uninsured Motorist Carrier

The claimant may choose to settle with the uninsured motorist carrier first. Once the uninsured motorist carrier has made a payment, it has subrogation rights against all other tortfeasors who are jointly and severally liable. Maday v. Yellow Taxi Co. of Minneapolis, 311 N.W.2d 849 (Minn. 1981) and Flanery v. Total Tree, Inc., 332 N.W.2d 642 (Minn. 1983).

The uninsured motorist carrier may be entitled to be paid back from the joint tortfeasor's liability insurance carrier all of the monies it paid on behalf of the uninsured motorist. Older case law on this topic, however, may be superseded by the 2003 amendment to Minn. Stat. §604.02, which now extends joint and several liability in a negligence action only to a party that is more than 50% at fault. In a claim litigated against two negligent defendants, a defendant who is 50% or less at fault will be liable only for the percent of damages attributed to his or her negligence.

Generally, if there is an enforceable UM subrogation claim, it will be collectible only after the injured insured has been fully compensated or otherwise has received a recovery that duplicates the damages paid by the UM recovery. However, it is important to review the exact language of the release which is given to the UM carrier. In Matthews v. City of Minneapolis, No. C1-90-493, 1990 WL 96908 (Minn. Ct. App. July 20, 1990), the injured party was paid by the UM carrier and signed a release that assigned her damage claims (except for property damage) to the UM insurer. All potential additional claims of the injured person were barred by this general release given by the UM insurer.

Preferred Risk Mut. Ins. Co. v. Page, 439 N.W.2d 755 (Minn. Ct. App. 1989) involved a three-car accident in which the insured driver had claims against the drivers of the two other vehicles, one of which was uninsured. She received \$35,000 in a UM arbitration, and her UM carrier then sued the insured tortfeasor. The Court of Appeals confirms that the UM insurer has a right to subrogation against any other tortfeasor. See also Milbank Mut. Ins. Co. v. Kluver, 255 N.W.2d 230 (Minn. 1974); Pfeffer v. State Auto. & Casualty Underwriters Ins. Co., 292 N.W.2d 743 (Minn. 1980); Tuenge v. Konetski, 320 N.W.2d 420 (Minn. 1982); Flanery v. Total Tree, Inc., 332 N.W.2d 642 (Minn. 1983); and Milbradt v. American Legion Post of Mora, 372 N.W.2d 702 (Minn. 1985).

Situations have arisen in which the injured person, after first receiving uninsured motorist benefits and signing a subrogation release, goes on to settle with the insured tortfeasor. State Farm Mut. Auto. Ins. v. Galajda, 316 N.W.2d 564 (Minn. 1982) and Illinois Farmers Ins. Group v. Wright, 391 N.W.2d 519 (Minn. 1986). In both of these cases, the release executed between the injured person and the tortfeasor preserved all the subrogation rights of the uninsured motorist carrier. The release was patterned after the type of settlement used to preserve the subrogation right of a workers' compensation carrier in a settlement by

an injured worker with the third-party liability insurance carrier. See Naig v. Bloomington Sanitation, 258 N.W.2d 891 (Minn. 1977). It is important in these Naig type settlements that the subrogated insurer be given prior notice of the proposed settlement.

As noted above, as of August 1, 2003, the joint and several liability provisions of Minn. Stat. § 604.02 have been modified, so that for accidents after this date a negligent tortfeasor can generally be held liable for more than his percentage of fault only if the fault is more than 50%. This revision of the joint and several liability statute will affect the risks and benefits associated with partial settlements.

It should also be mentioned that the 1985 amendments to the Civil Damage Act specifically insulate dram shops from any subrogation claims, including those of an uninsured motorist carrier. Minn. Stat. § 340A.801, subd. 4. Dram shop claims are discussed in more detail below.

C. Practical Considerations in Settling Dram Shop Claims

All too frequently, a person is injured by an intoxicated person who is driving an uninsured car. The injured person has three potential claims:

1. A tort claim against the uninsured intoxicated driver;
2. A potential dram shop claim under Minn. Stat. § 340A.801 against any bar making an illegal sale; and
3. A contract claim against the uninsured motorist carrier.

If the injured person's claims for damages will likely exceed the UM insurance coverage, it may be reasonable to maximize the potential recovery by starting a dram shop claim with the only the bar named as a defendant. The logic behind this approach is somewhat complicated, and it requires assessment of the following factors.

First, it must be understood that, under Minn. Stat. § 340A.801, subd. 4, any payment made under uninsured or underinsured motorist coverages cannot be asserted as a subrogation claim against the dram shop defendant. Consequently, payments that the injured party has collected from an uninsured motorist carrier might be deducted from a jury award against the dram shop carrier under the collateral source statute, Minn. Stat. § 548.251, in order to prevent a double recovery. To avoid a possible collateral source offset, the injured party would have to resolve the dram shop claim first (on a Pierringer release) before asserting any claim against the uninsured motorist carrier.

Second, changes in Minn. Stat. § 604.02, the law controlling joint and several liability, have to be considered in approaching claims relating to an uninsured motorist who is drunk. If the bar is sued on a dram shop claim and either the drunk or the UM insurer is made a second defendant in the lawsuit, § 604.02 will clearly limit the liability of the bar to its percentage of fault (assuming that the bar is not more than 50% at fault). However, if the bar is the sole defendant in the lawsuit, the provisions of § 604.02 may not apply. This

statute concerning apportionment of damages is triggered only when there are two or more parties severally liable for the damages. See Imlay v. City of Lake Crystal, 453 N.W.2d 326, 330, footnote 3 (Minn. 1990). Suing the bar first, as the only defendant, leaves open the possibility that the bar could be held responsible for 100% of the damages. This increased risk may make the bar open to negotiation and to a reasonable settlement of the dram shop claim.

If the bar is sole defendant, the bar may elect to bring a third party action for contribution against the uninsured drunk driver who caused the injury. However, the bar may not be able to bring a third party action against the uninsured motorist insurance carrier, since that claim would be based upon a separate contract which is not at issue in the litigation. In any event, the Imlay decision cited above calls into question whether or not the presence of a third party defendant is sufficient to trigger the application of § 604.02.

If the dram shop claim can be settled on a Pierringer release, the injured party can then pursue the uninsured motorist claim against the uninsured motorist carrier. The UM insurance company will get a credit only for the percentage of fault attributed to the party responsible for making the illegal sale. See Rambaum v. Swisher, 435 N.W.2d 19 (Minn. 1989). The uninsured motorist insurance carrier does remain liable for the percentage of fault attributed to the uninsured intoxicated driver. See State Farm Mut. Auto. Ins. Co. v. Galloway, 373 N.W.2d 301 (Minn. 1985). Generally, the UM insurance company defending the UM claim can present to the jury an issue concerning the bar's comparative fault only if it elects to prove that the uninsured driver was obviously intoxicated. But the UM insurer may decide to exclude all evidence of intoxication by admitting fault. In this circumstance, there would be no basis for an allocation of fault to the bar, and there would therefore be no offset for payments received in the Pierringer release from the dram shop claim.

VIII. Amount of UM Recovery

A. Stacking

Minn. Stat. § 65B.49, subd. 3(a)(6) prohibits stacking. The anti-stacking language became part of the law on October 1, 1985. Prior to this statute, the injured person could "stack" all of the uninsured motorist coverages under which the claimant was an insured, including the coverage on the vehicle he was occupying. Van Tassell v. Horace Mann. Ins. Co., 207 N.W.2d 348 (Minn. 1973); Pleitgen v. Farmers Ins. Exchange, 207 N.W.2d 535 (Minn. 1973); and Burgraff v. Aetna Life & Casualty Co., 346 N.W.2d 627 (Minn. 1984).

Despite the statutory language, stacking may be permitted if it is required by applicable contract language. Crapson v. Home Ins., 495 N.W.2d 457 (Minn. Ct. App. 1993); Austin Mut. Ins. Co. v. Templin, 435 N.W.2d 584 (Minn. Ct. App. 1989).

The issue of stacking has been litigated with respect to certain commercial "fleet" policies where the uninsured motorist endorsement states "If there is more than one covered auto, our limit of liability for any one accident is the sum of the limits applicable to each covered auto." Stacking has been required in Boroos v. Roseau Agency, Inc., 345 N.W.2d 788 (Minn. App. 1984), and in Rusthoven v. Commercial Standard Ins. Co., 387 N.W.2d 642 (Minn. 1986). But, see also, LaMotte v. Home Ins. Co., No. C3-90-88, 1990 WL 96954 (Minn. Ct. App. July 20, 1990) and Crane v. ABF Freight Systems, Inc., No. C2-95-1039, 1995 WL 635131 (Minn. Ct. App. Oct. 31, 1995) in which stacking was rejected despite language similar to that in Rusthoven.

In Kearns v. American Family Ins. Group, 486 N.W.2d 796 (Minn. Ct. App. 1992), a Wisconsin resident who owned two vehicles insured and garaged in Wisconsin was injured by an uninsured motorist while driving one of those vehicles in Minnesota. Her policy of insurance had a provision agreeing that any policy terms in conflict with the statutes of the state in which the policy was issued would be changed to conform to those statutes. Wis. Stat. §631.43(1) (1990) mandates stacking; therefore, the Wisconsin resident can stack her uninsured motorist benefits when injured in Minnesota.

Liberty Mut. Ins. Co. v. Crow, 451 N.W.2d 898 (Minn. Ct. App. 1990) involved a claim for excess UM coverage under an occupant's personal automobile policy after the injured party had settled with the insurer of the occupied vehicle. The primary policy on the occupied vehicle provided \$25,000 in coverage per insured vehicle, but it also contained the "sum of the limits" language making insurance coverage from each covered vehicle available to the claimant. There were 791 vehicles covered, yielding almost twenty million dollars in coverage. That claim for multiplied limits against the primary carrier was settled for \$800,000. For some reason, the claimant wanted excess coverage from a personal policy. The court rejected an argument that the personal policy should be considered "excess" because it exceeded the \$25,000 in coverage for the occupied vehicle.

For more discussion of the "multiplied limits" issue and the interrelated role of the "reasonable expectation doctrine" see also Curtis v. Home Ins. Co., 392 N.W.2d 44 (Minn.

Ct. App. 1986).

Stacking issues have sometimes arisen in the context of a "choice of law" question. During the time when Minnesota law required stacking, Minnesota Courts would be asked to add stacking to out-of-state policies when accidents occurred in Minnesota or involved Minnesota residents. Jepson v. General Casualty of Wisconsin, 513 N.W.2d 467 (Minn. 1994) involved a Minnesota resident injured in Arizona. He was covered by a policy issued to a North Dakota corporation in Fargo. The policy covered primarily North Dakota vehicles and was sold at North Dakota insurance rates, which were lower than those in Minnesota. The accident occurred in 1983 when stacking was mandatory in Minnesota. The Minnesota Supreme Court applied North Dakota law and denied stacking. In reviewing the "better choice of law" standards, the court observes that sometimes laws are not better or worse, just different. The court finds that Minnesota has a substantial interest in having people get what they paid for in a contract, nothing more and nothing less.

B. No-Fault Setoff

Minn. Stat. § 65B.49, subd. 3a(4) provides that there shall be no recovery from uninsured motorist coverage for any basic economic loss benefits which are paid or payable. Consequently, there will be a deduction of the no fault benefits paid so that the claimant will not make a double recovery.

Future wage loss and future medical benefits may be claimed against the UM coverage as part of the damage claim. If such a claim is made, the itemized future damages should be a credit against future no fault claims in order to prevent a double recovery. Ferguson v. Illinois Farmers, 348 N.W.2d 730 (Minn. 1984).

When settling a UM claim, some consideration should be given to the issue of future no-fault claims. If future no-fault claims are likely to exist, it would be a good practice to specify in the release settling a UM claim that the payment being received in the settlement does not duplicate either past or future no fault claims.

C. Workers' Compensation Benefits

In a UM or UIM claim, there is no right of subrogation by a workers' compensation carrier. The UM or UIM insurer does not have to reimburse workers compensation for payments made to the injured person. Cooper v. Younkin, 339 N.W.2d 552 (Minn. 1983); Fryer v. National Union Fire Ins. Co., 365 N.W.2d 249 (Minn. 1985). Kersting v. Royal Milbank Ins., 456 N.W.2d 270 (Minn. Ct. App. 1990); Austin v. State Farm Auto. Ins. Co., 486 N.W.2d 457 (Minn. Ct. App. 1992); Hewitt v. Apollo Group, 490 N.W.2d 898 (Minn. Ct. App. 1992).

If workers compensation cannot recover from UM coverage, does the UM coverage get an offset for amounts paid by workers compensation? In an unpublished opinion, Becker v. State Farm Mut. Auto. Ins. Co., No C1-97-580, 2000 WL 1015867 (Minn. Ct. App. July 25, 2000), the court held that the 1985 Fryer decision remains good law and was not superceded by the 1986 collateral source statute. Citing Western Nat'l Mut. Ins. Co. v.

Casper, 549 N.W.2d 914 (Minn. 1996), the Becker court denied State Farm any offset for workers' compensation payments when assessing the damages payable in a UM claim. It can certainly be argued, however, that this result in Becker is inconsistent with the decision in Western Nat'l Mut. Ins. Co. v. Casper. Casper, in the context of a UIM arbitration claim, did state that the insurer should be permitted to present evidence to the arbitrators about past workers' compensation benefits so that the arbitration award would not lead to a double recovery for past damages. But see Brunmeier v. Farmers Ins. Exchange, 296 Minn. 328, 208 N.W.2d 860 (1973); Fryer v. National Union Fire Ins. Co., 365 N.W.2d 249, 255 (Minn. 1985).

When workers' compensation benefits have been paid, an injured worker may consider a work comp settlement in which all potential subrogation interests by work comp are assigned to the injured worker. In Austin v. State Farm Mut. Ins. Co., 486 N.W.2d 457 (Minn. Ct. App. 1992), such an assignment was held to preclude a reduction of damages under the collateral source statute. In the context of a UIM claim, Salib v. Allstate Ins. Co., No. A07-252, 2008 WL 570600 (Minn. Ct. App. 2008), the court also made no reduction in the damage award based upon past workers compensation benefits when the right to subrogation had been assigned to the injured worker.

D. Collateral Sources

The collateral source statute, enacted in 1986, reduces verdicts based upon certain third party payments made to the claimant, unless the third party asserts a subrogation claim. Minn. Stat. § 548.251.

The argument had been made successfully that collateral source deductions should not be made in an arbitration. The collateral source statute applies only in a "civil action." Minn. Stat. § 548.36, subd. 2. An arbitration is not considered a "civil action." Lucas v. American Family Mut. Ins. Co., 403 N.W.2d 646 (Minn. 1987). Consequently, the collateral source statute had been held not to apply to UM arbitration awards. Kersting v. Royal Milbank Ins., 456 N.W.2d 270 (Minn. Ct. App. 1990). The 1996 decision in Western Nat'l Mut. Ins. Co. v. Casper, supra, effectively rejects this argument. In the context of a UIM claim, arbitrators are to determine the amount which the injured party is legally entitled to recover from the tortfeasor. This requires the arbitrators to reduce damages pursuant to the collateral source statute. The same argument can be made in the context of a UM claim. But see Becker v. State Farm Mut. Auto. Ins. Co., No. C1-97-580, 2000 WL 1015867 (Minn. Ct. App. July 25, 2000) for a result denying the collateral source offset.

An issue has arisen concerning the application of the collateral source statute when the collateral source payments have been made by an employer benefit plan governed by the federal ERISA provisions. In Koch v. Mork Clinic, 540 N.W.2d 526 (Minn. Ct. App. 1995), a district court reduced a verdict on the grounds that a subrogation claim had not been properly asserted. The court of appeals reversed, holding that the collateral source statute was preempted by the provisions of ERISA which prohibit state law from regulating ERISA programs. See also Gilhousen v. Illinois Farmers Ins., No. C2-97-414, 1997 WL 55505 (Minn. Ct. App. Oct. 28, 1997) prohibiting a collateral source offset even though the ERISA

plan apparently had not asserted a subrogation claim.

It does remain important for an insurance company to seek a decision at the arbitration concerning any collateral source deductions that may apply to the claims. In an appeal to district court, the court may lack jurisdiction to make any initial decision concerning the claimed offsets. See Goberdhan v. Illinois Farmers Ins. Co., No. A04-732, 2004 WL 2984344 (Minn. Ct. App. Dec. 28, 2004).

IX. Statute of Limitations for UM Claims

The statute of limitations for a contract claim is generally six (6) years, unless the contract itself provides a different time limitation. Minn. Stat. § 541.05(1). The six-year statute of limitations will generally apply to lawsuits against an uninsured motorist insurance carrier.

The six-year statute of limitations will generally begin to run from the date of the accident. Weeks v. American Family Mut. Ins. Co., 580 N.W.2d 24 (Minn. 1998). However, when the UM claim arises due to the insolvency of the tortfeasor's insurer, the statute of limitations will begin to run on the date when a court declares that the insurance carrier is insolvent. Oganov v. American Family Ins. Group, 767 N.W.2d 21 (Minn. 2009)

The Minnesota Supreme Court decision in Miklas v Parrott, 684 N.W.2d 458 (Minn. 2004) held that the six-year contract statute of limitations will be applicable to a wrongful death claim against an uninsured motorist carrier. The insurance company argued that the wrongful death cause of action against the tortfeasor expired after three years and consequently, the plaintiff was not "legally entitled to recover" damages against the tortfeasor or the uninsured motorist carrier. The court in Miklas, however, construed the phrase "legally entitled to recover" in the No-Fault Act to mean only that the insured must establish fault and damages in order to claim UM benefits.

The Minnesota Supreme Court's decision in Miklas is consistent with the decision in Spira v. American Standard Ins. Co., 361 N.W.2d 454 (Minn. Ct. App. 1985) in which American Standard was unsuccessful in avoiding a request to arbitrate a UM claim on the grounds that the statute of limitations on the underlying tort claim in Tennessee had expired prior to the commencement of the UM arbitration.

There may be some additional statute of limitations issues when the UM contract provides for mandatory arbitration. With an arbitration clause, the six-year statute of limitations may not start to run from the date of the accident. The insurance contract must be read to determine if the contract specifies any statute of limitations for commencing an arbitration. See Kappes v. American Family, No. C8-93-991, 1994 WL 1120 (Minn. Ct. App. Jan. 4, 1994). When there is nothing in the UM insurance policy stating when arbitration has to be commenced, the statute of limitations in an uninsured motorist claim may be six years from the date when a request to arbitrate has been denied. Spira v. American Standard Ins. Co., 361 N.W.2d 454 (Minn. Ct. App. 1985) and Edwards v. State Farm Mut. Auto. Ins. Co., 399 N.W.2d 95 (Minn. 1987).

X. Other Issues

A. Coordination of Coverages

Gross v. General Casualty Ins. Co., 438 N.W.2d 378 (Minn. Ct. App. 1989) involved a 1984 accident. The injured party had two vehicles, each insured with a different company. He had damages of \$50,000 and wanted to be paid this amount from each company, arguing that he had paid separate premiums for each coverage. The court would not permit such a double recovery.

When duplicate coverage does exist, an injured party will generally collect under only one policy. It may be possible for the one company which does pay the claim to assert a contribution claim against other applicable insurance. Continental Casualty Co. v. Teachers Ins. Co., a/k/a Horace Mann Ins., 532 N.W.2d 275 (Minn. Ct. App.1995).

In Continental Casualty, the policy language was read as permitting contribution, so the court did not have to decide more general issues of contribution law. The opposite result was reached in Kissoondath v. Safeco, No. CX-96-1462, 1996 WL 665906 (Minn. Ct. App. Nov. 19, 1996). Here, in the absence of policy language requiring coordination of payment, Prudential Insurance was not required to make any contribution to Safeco when the injured party, who was insured under both policies, elected Safeco's \$500,000 in coverage.

B. Coverage Imposed

Minn. Stat. § 65B.43, subd. 3a, can be read to require UM coverage for a motor vehicle insurance policy covering a vehicle principally garaged in Minnesota. In Laurich v. Emcasco Ins. Co., 455 N.W.2d 527 (Minn. Ct. App. 1990), a truck owned by an Iowa company was insured by a policy issued in Iowa, but the vehicle was principally garaged in Minnesota. This vehicle was involved in an accident in Wisconsin in 1986. UM coverage was imposed in the amount required by Minnesota law (\$25,000/\$50,000), even though such coverage was not in the policy.

In Cantu v. Atlanta Casualty Companies, 535 N.W.2d 291 (Minn. 1995), a person who moved from Florida to Minnesota asked to have UM coverage imposed as a matter of law as part of his policy after he became a Minnesota resident. (He had rejected the optional UM coverage when he purchased the original policy in Florida.) Since the automobile insurance policy in question had not been renewed, delivered, or issued in Minnesota, Minnesota law did not mandate that UM coverage be added to the policy. The fact that the claimant had become a resident of Minnesota did not require his insurance company to provide UM benefits.

Minn. Stat. § 65B.50, subd. 1 requires every insurer doing business in Minnesota to certify that the coverages required by Minn. Stat. § 65B.49 will be afforded even to non-resident policyholders with respect to accidents occurring in Minnesota. However, the statute has been interpreted to impose only liability and no-fault coverages. The statute does not create UM or UIM coverage for an out-of-state vehicle involved in a Minnesota accident. Hedin v.

State Farm Mut. Auto. Ins. Co., 351 N.W.2d 407 (Minn. Ct. App. 1984).

The assigned claims plan does not provide UM coverage for a person who has no UM insurance. Mohs v. Aetna Casualty, 349 N.W.2d 580 (Minn. Ct. App. 1984).

C. Effect on Future No-Fault Claims

An injured person is not entitled to receive double compensation, from both no-fault and UM, for the same medical and wage loss claims. Consequently, a payment of UM (or UIM) benefits which includes future medical and wage loss claims may function to offset future no-fault claims for those same losses. See Ferguson v. Illinois Farmers Ins., 348 N.W.2d 730 (Minn. 1984).

A party who submits a claim for all future damages in an uninsured motorist arbitration may inadvertently lose claims for future no-fault benefits for medical expense or wage loss. See Richardson v. Employers Mut. Casualty Co., 424 N.W.2d 317 (Minn. Ct. App. 1988) and Quam v. United States Fire and Casualty Co., 440 N.W.2d 131 (Minn. Ct. App. 1989). It is important, therefore, that the arbitrators state whether or not future wage loss or medical expenses are being paid in the arbitration award. If such future damages are being awarded, the arbitrators should specify the amount of each such award so that an appropriate no fault offset may be calculated.

→ Practice Tip

Care should be used in settling UM claims and in signing releases. If future wage loss and future medical expenses are claimed from the UM carrier in negotiations, and a general release is then signed, the no-fault carrier may try to terminate future basic economic loss benefits. **The UM release should specify that the payment does not duplicate past or future no-fault benefits.** The claimant should not sign a release saying that UM payments are being accepted as compensation for future losses, since this does suggest a double recovery if additional no fault benefits are then claimed.

D. Claims by Uninsured Motorist

This topic does not involve UM insurance coverage. Rather, it addresses injury claims made by the uninsured motorist.

Under certain circumstances, even a person operating his own uninsured car may be eligible for no fault benefits. If the operator of the uninsured vehicle is insured on some policy of motor vehicle insurance on another vehicle, the uninsured motorist can obtain no fault coverage from this other policy. Iverson v. State Farm Mut. Auto. Ins. Co., 295 N.W.2d 573 (Minn. 1980); Laffen v Auto Owners Ins. Co. 429 N.W.2d 264 (Minn. 1988). However, the uninsured motorist would be disqualified from seeking no-fault benefits through the assigned claims plan, as would any other adult living with the uninsured motorist in a family unit. Minn. Stat. § 65B.64 subd. 3.

Aside from disqualifying an uninsured motorist from the assigned claims plan, does the No

Fault Act limit other damage claims by an uninsured motorist? In Ramsamooj v. Olson, 574 N.W.2d 751 (Minn. Ct. App. 1998), the court rejected defendant's argument that a uninsured motorist was not entitled to be paid general damages for pain and suffering. There is no provision of the No Fault Act which prevents the injured uninsured motorist from claiming non-economic losses, so long as the normal statutory thresholds for such a claim have been met.

Can the injured uninsured motorist, who has not received any no fault benefits, make a claim for medical expenses and income loss against the tortfeasor? In Munoz v. Kihlgren, 661 N.W.2d 301 (Minn. Ct. App. 2003), the defendant argued that he should be entitled to a setoff for damages which would have been paid by no-fault insurance. The court of appeals rejects the argument based upon language in the no-fault statute which allows a negligence action to include amounts not paid by no-fault due to a lack of insurance coverage. Minn. Stat. § 65B.51, subd. 2. The language in question was added to the law in 1989. Under an earlier version of the statute, the court had allowed the defendant to have an offset for those damages that should have been paid by no-fault. Rehnelt v. Steube, 197 N.W.2d 563 (Minn. 1986).

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