Uninsured/Underinsured Motorist Coverage–

A Desk Reference for Alabama Lawyers

By Walter J. Price, III and David M. Fleming

Introduction

Alabama statutory law requires that any automobile liability insurance policy issued for delivery in this state must include uninsured and underinsured motorist coverage. At its heart, this statute provides that coverage is available to individuals, under their own automobile policies, for damages incurred as a result of an accident involving an uninsured motorist.

Further, if the adverse motorist has insurance coverage, but the limits of that coverage are not sufficient so as to cover the damages incurred, the insured may obtain underinsured motorist benefits. Although the statute requiring this coverage is rather short, the coverage created by the statute has been the subject of much litigation. In any case, it is important for counsel faced with such a claim to be familiar with the coverage and associated procedures.

Statutory Provision §§32-7-23

§§32-7-23. Uninsured Motorist coverage; "uninsured motorist" defined; limitation on recovery

(a) No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless injury or death set forth in subsection (c) of section 32-7-6, under provisions approved by the commissioner of insurance for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, that the named insured shall have the right to reject such coverage; and provided further, that unless the named insured request such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy with a named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.

(b) The term "uninsured motor vehicle" shall include, but is not limited to, motor vehicles with respect to which:

(1) Neither the owner nor the operator carries bodily injury liability insurance;

(2) Any applicable policy limits for bodily injury or below the minimum required under section 32-7-6;

(3) The insurer becomes insolvent after the policy is issued so there is no insurance applicable to, or at the time of, the accident; and

(4) The sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured party after an accident is less than the damages which the injured person is legally entitled to recover.

(c) The recovery by an injured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverage as may be provided for additional vehicles, but not to exceed two additional coverages within such contract.

Note that the provisions of this statute are implied in any automobile insurance policy delivered in Alabama. *Safeco Ins. Co. of Am. v. Jones*, 286 Ala. 606, 243 So.2d 736 (1970).

Policy Considerations

In considering whether UM or UIM coverage applies to a given claim, one must recognize that Alabama courts have consistently rejected efforts to limit the statutory coverage obligation:

> The principle is, the uninsured motorist statute is to be construed so as to assure a person injured by an uninsured motorist that he will be able to recover, from whatever source available, up to the total amount of his damages. The insurer will not be permitted to insert any provision in its policy limiting such recovery by the insured.

Alabama Farm Bureau Mutual Casualty Insurance Company v. Humphrey, 54 Ala. App. 343, 346, 308 So.2d 255, 258 (Ala. Civ. App. 1975).

For example, an exclusion rejecting UM and UIM coverage for vehicles of less than four wheels was found to be more restrictive than the statute and, therefore, unenforceable. *Peachtree Casualty Insurance Company, Inc. v. Sharpton*, 768 So.2d 368 (Ala. 2000). While riding a motorcycle, the Sharptons were injured in an accident. The motorcycle was not insured by Peachtree; however, the two automobiles owned by the Sharptons were insured by separate Peachtree policies. In a declaratory judgment action, Peachtree asserted that a motorcycle is not a "vehicle" as defined by the Uninsured Motorist Statute. In response to a certified question from the United States District Court for the Middle District of Alabama, the Supreme Court of Alabama stated that motorcycles are included in the definition of "motor vehicle" in the Uninsured Motorist Statute (*Ala. Code* §§32-7-2(4)).

The court also confirmed that the Sharptons were not barred from claiming UIM benefits since they were not injured while occupying the vehicles listed in the Peachtree policies. Moreover, the court noted that approval of the Peachtree policy by the Department of Insurance did not permit Peachtree to issue a policy more restrictive than the Uninsured Motorist Statute. As noted above, the Supreme Court of Alabama has previously held that any policy exclusion that is more restrictive than the Uninsured Motorist Statute is void and unenforceable.

Rejection

Uninsured motorist coverage (and underinsured motorist coverage) can be rejected by the named insured; however, oral rejection is not sufficient. The rejection of coverage must be in writing. *Insurance Company of North America v. Thomas*, 337 So.2d 365 (Ala. 1976).

However, each named insured must reject uninsured motorist coverage for the rejection to be effective. Rejection by one named insured is not effective as a rejection by other named insureds under the same policy. *Nationwide Ins. Co. v. Nicholas,* 868 So.2d 457 (Ala. Civ. App. 2003).

The named insured, however, can reject for all other non-named insureds. *Funderburg v. Black's Insurance Agency*, 743 So.2d 472 (Ala. Civ. App. 1999). In addition, the named insured can reject uninsured motorist coverage for some, but not all, additional insureds. In *Federated Mutual Insurance Company, Inc. v. Vaughn*, 961 So.2d 816 (Ala. 2007), the Supreme Court of Alabama held that an employer could reject uninsured motorist coverage for insured employees while accepting it for directors, officers, partners, owners, and their family members. Specifically, Vaughn was an employee of the insured, Farmers Tractor Company, Inc. At the time of the subject accident, Vaughn was driving a vehicle owned by Farmers and covered by an automobile insurance policy issued by Federated. Vaughn sought uninsured motorist benefits under the Federated policy; however, the insured, while maintaining UM coverage for its directors, officers, partners, owners, and family members who qualified as insureds, specifically rejected UM coverage for "any other person who qualifies as an insured." In holding that rejection was effective, the court determined that *Ala. Code* §§32-7-23, while providing the right to reject UM coverage, did not qualify or restrict that right. Thus, the named insured was entitled to reject uninsured motorist coverage with respect to some, but not all, additional insureds.

Proof of Uninsured Status

The burden of proving absence of liability insurance is on the insured. It shifts, however, to the carrier upon demonstration by the insured of reasonable diligence in attempting to determine the existence of insurance. On the other hand, simply filing a

lawsuit and taking a default judgment is not proof of "reasonable diligence" so as to shift the burden of proof to the insurer. *Ogle v. Long*, 551 So.2d 914 (Ala. 1989). This would not be the case, though, in the event of an accident involving a "phantom" vehicle. "Phantom" vehicles are deemed uninsured. *Wilbourn v. Allstate Ins. Co.*, 305 So.2d 372 (Ala. 1974).

The Alabama Supreme Court has upheld exclusions that deny uninsured motorist coverage for a vehicle that is covered under the liability portion of the same policy. *Allstate Insurance Company v. Hardnett*, 763 So.2d 963 (Ala. 2000). A vehicle cannot be insured under the policy and, at the same time, be "uninsured" for the purposes of recovery of UM benefits by virtue of the unavailability of liability coverage to a particular person where liability coverage was not available as a result of the insured driver's failure to provide timely notice of the suit to the insurer. *Watts v. Preferred Risk Mutual Insurance Company*, 423 So.2d 171 (Ala. 1982).

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Stacking

Pursuant to *Alabama Code* §§32-7-23(c) an insured may stack up to two additional coverages. Thus, under multi-vehicle policies the insured can recover up to three times the policy limit. There is, however, no such limitation on single-vehicle policies. As such, recovery by an insured under single-vehicle policies may exceed the three coverage limitation. *State Farm Mutual Automobile Insurance Company v. Fox*, 541 So.2d 1070 (Ala. 1989). In *Fox*, the court also held that the insured was not entitled to pre-judgment interest. *Fox* was a wrongful death case for which only punitive damages are available. As such, the claim could not be proven with the specificity necessary to recover pre-judgment interest.

Passengers insured under multi-vehicle policies can stack up to two additional coverages or three times the policy limit. *Travelers Insurance Company, Inc. v. Jones*, 529 So.2d 234 (Ala. 1988). However, passengers under single-vehicle policies are limited to one coverage. *State Farm Mutual Automobile Insurance Company v. Faught*, 558 So.2d 921 (Ala. 1990). The claimant first must be an insured before he or she can recover under the policy and, therefore, stack coverages. In *Faught*, since the passenger was not a named insured in the declarations and since the passenger did not meet the definition of "insured" (such as a relative of one named in the declarations), he was not entitled to recover. Likewise, in *Bright v. State Farm Insurance Company*, 767 So.2d 1111 (Ala. 2000), where the named insured was a corporation, an employee of that corporation was not entitled to recover UIM benefits under policies for vehicles not involved in the accident.

Under a fleet policy, both the driver and passengers can stack up to two additional coverage. Note that an insured under a fleet policy must exhaust the stacked coverages of that policy before recovering under his or her personal policy. *Isler v. Federated Guaranty Mutual Ins. Co.*, 594 So.2d 37 (Ala. 1992).

Attempts to limit liability through "other insurance" provisions, "limits of liability" clauses or other restrictive language are void. *Canal Indemnity Company v. Burns*, 682 So.2d 399 (1996); *Higgins v. Nationwide Insurance Co.*, 291 Ala. 462, 282 So.2d 301 (1973); *St. Paul Insurance Company v. Henson*, 479 So.2d 1253 (Ala. Civ. App. 1985).

Exhaustion and Set-Off

The insured is not required to exhaust the tort-feasor's liability limits before recovering underinsured motorist benefits. *State Farm Mutual Automobile Insurance Company v. Scott*, 707 So.2d 238 (Ala. Civ. App. 1997). However, the underinsured motorist carrier is entitled to a set-off of the full liability limits. *Adkinson v. State Farm Mut. Auto Ins. Co.*, 856 F.Supp. 637 (M.D. Ala. 1994). Thus, if the insured settles with the tort-feasor for $15,000 even though policy limits are $20,000, the underinsured motorist carrier's obligation does not begin until the insured has proven that he or she is entitled to recover over $20,000.

Note, however, that the insurer is entitled to only set off the limits of the tort-feasor's automobile liability policy. If, for example, there are liability limits available from a joint tort-feasor, the insured is not required to exhaust the total of that amount before recovering under his or her own underinsured motorist policy. Likewise, the insurer is not entitled to a set-off of the joint tort-feasor's general liability limits. *State Farm Mutual Automobile Ins. Co. v. Motley*, 909 So.2d 806 (Ala. 2005). *Burt v. Shield Insurance Company*, 902 So.2d 692 (Ala.Civ.App. 2004).

Legally Entitled to Recover

In order to obtain UM/UIM benefits, the insured must prove that he or she is "legally entitled to recover" from the tort-feasor. In such a case, the insurer is not required to pay benefits

where the insured is not entitled to recover against the tort-feasor as a result of a defense available to the tort-feasor. For example, an employee is not entitled to sue a co-employee for negligence under Alabama's Workers' Compensation Act. As such, the injured employee cannot obtain uninsured or underinsured motorist benefits arising out of an accident involving a co-employee. *Ex parte Carlton*, 867 So.2d 332 (Ala. 2003).

In *Ex parte Carlton*, the Supreme Court of Alabama overruled three prior cases in which it was held that uninsured motorist benefits were recoverable as a result of the inability of the injured party to bring a legal claim against the alleged tort-feasor. Thus, in these cases the tort-feasor is *not* deemed uninsured simply because the injured party may not make a claim against the tort-feasor. The cases overruled were *Hogan v. State Farm Mutual Automobile Insurance Company*, 730 So.2d 1157 (Ala. 1998) (claim against tort-feasor barred as a result of Guest Passenger Statute); *State Farm Mutual Automobile Ins. Co. v. Jeffers*, 686 So.2d 248 (Ala. 1996) (Claim against deputy sheriff who was immune from suit) and *State Farm Automobile Insurance Company v. Baldwin*, 470 So.2d 1230 (Ala. 1985)(involving claim against government employee). Note that a guest passenger would be able to recover against the driver for willful conduct and, therefore, could recover UM/UIM benefits if willful conduct is proven.

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Additionally, a policy provision requiring that an accident "arise out of the ownership, maintenance, or use of an uninsured motor vehicle" is enforceable. *Rich v. Colonial Insurance Company of California*, 709 So.2d 487 (Ala. Civ. App. 1997). *Rich* involved an attempted car-jacking where the insured was approached by two men who were on foot while his automobile was stopped at a traffic signal.

Contact and Corroboration

As noted above, "phantom" vehicles are deemed uninsured. *Wilbourn v. Allstate Insurance Company*, *supra*. In addition, the Supreme Court of Alabama has determined that any policy provision requiring proof of contact is void. *State Farm Fire and Casualty Co. v. Lambert*, 285 So.2d 917 (Ala. 1973). The question of whether an accident occurred in the fashion claimed by the insured is one of fact for the jury. In addition, any provision requiring that the insured present corroborating evidence where there has been no physical contact is, likewise, void. *Walker v. GuideOne Specialty Mutual Insurance Company*, 834 So.2d 769 (Ala. 2002). Note also that debris in the road is presumed to have been left by a phantom motorist. *Khirieh v. State Farm Mutual Automobile Ins. Co.*, 594 So.2d 1220 (Ala. 1992).

Insurer May Not Exclude Punitive Damages

While punitive damages generally may be excluded from liability policies, an insurer may not do so in the context of uninsured motorist coverage and such an exclusion violates the uninsured motorist statute. *Hill v. Campbell,* 804 So.2d 1107 (Ala. Civ. App. 2001).

Off-Set of Med Pay

Med pay benefits can only be deducted from the uninsured or underinsured motorist benefits if the policy specifically allows for this deduction. *Employers National Insurance Co. v. Parker*, 236 So.2d 699 (Ala. 1970); *Russell v. Griffin*, 423 So.2d 901 (Ala. Civ. App. 1982); *Griffin v. Battles*, 656 So.2d 1221 (Ala. Civ. App. 1995).

Statute of Limitations

The six-year contract statute of limitations applies to uninsured motorist insurance claims. In addition, the failure of the insured to make a claim within the statute of limitations applicable to the tortfeasor does not bar an uninsured motorist claim. *State Farm Mutual Automobile Insurance Company v. Bennett*, 2000 WL 1229210 (Ala.). Note, however, that the statute of limitations for a subrogation claim by the uninsured motorist carrier begins to run on the date of the involved accident. Therefore, the two-year tort statute of limitations applies to the subrogation claim and it begins to run at the time the insured's right to recovery arises. *Home Insurance Company v. Stuart-McCorkle, Inc.*, 291 Ala. 601, 285 So.2d 468 (1973) and *Hardin v. MetLife Auto and Home Insurance Company*, 2007 WL 2460068 (Ala. Civ. App.)

Opting Out

If the uninsured/underinsured motorist carrier is named as a party in a lawsuit against the tort-feasor, the uninsured/underinsured motorist may "opt out" of the litigation and be bound by the results. *Lowe v. Nationwide Insurance Company*, 521 So.2d 1309 (Ala. 1988).

Defense of Uninsured Tort-Feasor

Not only may an insurer opt out of a case in which it has been named as a defendant along with the uninsured tort-feasor, but, further, it may then take over the defense of the uninsured motorist. *Driver v. National Security Fire & Casualty Co.*, 658 So.2d 390 (Ala. 1995).

Tortfeasor Cannot Obtain a Set-Off of UM Benefits

In *Ex parte Barnett*, 2007 WL 2216911 (Ala.), the Supreme Court of Alabama determined that the collateral source rule applies to uninsured motorist and underinsured motorist claims thereby preventing the tortfeasor from obtaining a set-off of amounts paid by the insurer pursuant to the policy. In this holding, the court overruled the prior court of civil appeals' decision of *Batchelor v. Brye*, 421 So.2d 1267 (Ala. Civ. App. 1982). The court rejected Barnett's arguments that the uninsured motorist carrier should be characterized as a joint tortfeasor, stating that the UM insurer's liability is based solely on its contractual obligations as set forth in the policy.

Applicable Law

The law of the state where the policy was delivered applies to the interpretation of coverage issues. *Best v. Auto Owner's Ins. Co.*, 540 So.2d 1381 (Ala. 1989).

Settlement with Tort-Feasor

In *Lambert v. State Farm Mutual Automobile Insurance Company*, 576 So.2d 160 (Ala. 1991), the Supreme Court of Alabama set out the general procedure to be followed so as to protect the rights of the insured and the underinsured motorist carrier if the insured settles with the tort-feasor.

(1) The insured, or the insured's counsel, should give notice to the underinsured motorist carrier of the claim under the policy for underinsured motorist benefits as soon as it appears that the insured's damages may exceed the tort-feasor's limits of liability coverage.

(2) If the tort-feasor's liability insurance carrier and the insured enter into negotiations that ultimately lead to a proposed compromise or settlement of the insured's claim against the tort-feasor, and if the settlement would release the tort-feasor from all liability, then the insured, before agreeing to the settlement, should immediately notify the underinsured motorist carrier of the proposed settlement and the terms of any proposed release.

(3) At the time the insured informs the underinsured motorist carrier of the tort-feasor's intent to settle, the insured should also inform the carrier as to whether the insured will seek underinsured motorist benefits in addition to the benefits payable under the settlement proposal, so that the carrier can determine whether it will refuse to consent to the settlement, will waive its right of subrogation against the tort-feasor, or will deny any obligation to pay underinsured motorist benefits. If the insured gives the underinsured motorist insurance carrier notice of the claim for underinsured motorist benefits, as may be provided for in the policy, the carrier should immediately begin investigating the claim, should conclude such investigation within a reasonable time, and should notify its

insured of the action it proposes with regard to the claim for underinsured motorist benefits.

(4) The insured should not settle with the tort-feasor without first allowing the underinsured motorist insurance carrier a reasonable time within which to investigate the insured's claim and to notify its insured of its proposed action.

(5) If the underinsured motorist insurance carrier refuses to consent to a settlement by its insured with the tort-feasor, or if the carrier denies the claim of its insured without a good-faith investigation into its merits, or if the carrier does not conduct its investigation in a reasonable time, the carrier would, by any of those actions, waive any right to subrogation against the tort-feasor or the tort-feasor's insurer.

(6) If the underinsured motorist insurance carrier wants to protect its subrogation rights, it must, within a reasonable time, and in any event before the tort-feasor is released by the carrier's insured, advance to its insured an amount equal to the tort-feasor's settlement offer.

Lambert, 576 So.2d at 167. The primary reason for advancing the tort-feasor's offer would be to prevent release of the tort-feasor which not only preserves the underinsured motorist's right of subrogation, but, further, allows it to opt out and see the claim defended by the tort-feasor's carrier.

Attorney's Fees

In *Eiland v. Meherin*, 854 So.2d 1134 (Ala.Civ.App. 2002). *Eiland* sued his insurer, State Farm, seeking uninsured motorist benefits. Eiland also sued Meherin claiming that she had negligently struck his (Eiland's) vehicle from the rear. Meherin's insurer tendered to State Farm its policy limits of $100,000 to settle the claims against Meherin. State Farm, in turn, advanced to Eiland the $100,000 policy-limits offered pursuant to *Lambert v. State Farm Mutual Automobile Insurance Company*, 576 So.2d 160 (Ala. 1991) in order to protect its potential subrogation interest against Meherin.

Next, State Farm decided to "opt out" of the trial proceedings pursuant to *Lowe v. Nationwide Insurance Company*, 521 So.2d 1309 (Ala. 1988). As such, it would be bound by the findings at trial.

The jury awarded $50,000 in favor of Eiland. Meherin's liability insurer paid this amount into court. The trial court then held that State Farm was entitled to the $50,000 paid by Meherin's insurer. This was because it protected its subrogation right pursuant to the procedure outlined in *Lambert*. Moreover, the trial court held that there was no "common fund" generated by Eiland's work since State Farm was the only party entitled to recover. Thus, State Farm was not required to pay attorney's fees.

The court of civil appeals confirmed that State Farm was entitled to the entire $50,000 awarded to Eiland. However, even though there had been no common fund generated by the work of Eiland's attorney, the court held that State Farm must pay attorney's fees so as to avoid a "manifestly unjust" result. *Eiland,* 854 So.2d at 1138-39.

The "common fund doctrine," however, can apply in uninsured motorist cases. In *Government Employees Insurance Company v. Capulli*, 859 So.2d 1115 (Ala.Civ.App. 2002). Capulli was injured in a motor vehicle accident. She was a passenger in a vehicle owned and driven by GEICO's insured. The adverse driver was insured by Alfa. Capulli retained an attorney to represent her in a personal injury claim against the adverse driver. She agreed to a one-third contingency fee arrangement.

When the claim was settled, GEICO claimed a subrogation interest for medical expenses it had paid. Capulli sought to withhold one-third of GEICO's recovery as attorney's fees. The court of civil appeals agreed, finding that the "common fund doctrine" applied. Capulli's attorney's efforts had resulted in a common fund (monies that both Capulli and GEICO were entitled to) and the services of Capulli's attorney benefitted GEICO.

Conclusion

Uninsured and underinsured motorist coverages are unique in that in the case of a claim for either the insurer and its insured are in an adverse relationship. As such, all involved need to be familiar with the statutorily-required coverage as well as its associated procedures. Of course, as is the case in any insurance-related matter, review of the policy itself is necessary. However, as indicated above, one must also be familiar with the issues specific to this coverage such as the total amount of benefits available, the obligation to prove both that the tort-feasor is uninsured and that the insured is legally entitled to recover, and the specific steps required in a settlement with the tort-feasor. ▲▼▲

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