PUBLICATION UPDATE

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No-Fault and Uninsured Motorist Automobile Insurance

Publication 469 Release 60 October 2016

HIGHLIGHTS

- The Release includes discussion of numerous recent decisions plus a new section—§ 32.10[4] Conflicts Involving Submission to a Medical Examination—and new charts in § 8.30[2][b] Jurisdictional Survey of Coverage for Pre-Arranged Rides; § 10.02[6][c] Jurisdictional Survey of Transportation Network Exclusion; § 11.50[1][c] Jurisdictional Survey of Workers Compensation Set-Offs of No-Fault Benefits; and § 23.50[2][i] Jurisdictional Survey of Statutory Definition of Bodily Injury and a new § 32.10[4] Conflicts Involving Submission to a Medical Examination.
- The following appendices also have been updated:
- APPENDIX G Stacking of No-Fault Benefits
- APPENDIX H Stacking of Uninsured/Underinsured Motorist Coverage
- APPENDIX Q Owned Vehicle Exclusion
- APPENDIX R Subrogation of Uninsured/Underinsured Motorist Claims
- APPENDIX X Statute of Limitations for Uninsured/Underinsured Motorist (UM/UIM) Claims

Chapter 1—Approaching a No-Fault or Uninsured/Underinsured Motorist Claim

Special Dollar-a-Day Policy Does Not Provide Underinsured Motorist (UIM) Coverage. New Jersey authorizes a special policy, also known as a dollar-a-day policy, which provides special emergency care personal injury protection (PIP) benefits. However, a special policy does not provide underinsured motorist (UIM) coverage. *N.J. Stat. Ann. § 39:6B-1* and *N.J. Stat. Ann. § 38:6A-3.3*. In *Rivera v. McCray*, 2016 N.J. Super. LEXIS 65 (App. Div. 2016), a step-down provision did not apply to the plaintiff, who was insured under a special policy, because she was not a named insured under another policy providing similar coverage and thus, the insurer was not entitled to summary judgment dismissing the plaintiff's complaint.

No-Fault Insurer Stated a Plausible Claim Against a Diagnostic Clinic for Ineligibility for No-Fault Benefits. In *Liberty Ins. Corp. v. Brenman*, 2016 U.S. Dist. LEXIS 26360 (E.D.N.Y. 2016), the insurer stated a plausible claim that the defendant diagnostic clinic violated applicable New York licensing laws and was therefore ineligible to receive no-fault reimbursements. The complaint alleged that defendant Brenman, a non-physician, played a significant role in the operation and management of the diagnostic clinic in violation of New York law, *N.Y. Bus. Law §§ 1507*, 1508.

Reporting of Fraudulent Claims. In New York, insurers are instructed to report to the health commissioner any patterns of overcharging, excessive treatment or other improper actions by a health provider within thirty days after such insurer has knowledge of such pattern. *N.Y. Ins. Law § 5108*.

Chapter 5—Fundamental Features of No-Fault Plans

Rejection of Optional Add-On Coverage. In Maryland, a first named insured is not required to obtain coverage for certain medical, hospital, and disability benefits. The election not to obtain coverage must be made on a certain form that explains coverage. *Md. Code Ann., Ins. § 19-506.1*.

Chapter 6—Scope of Coverage: Overview

No Exclusion of Personal Injury Protection (PIP) benefits for Owned Uninsured Vehicle. In *Shinn v. State Secy. of State*, 2016 Mich. App. LEXIS 644, the plaintiff owned a vehicle that was uninsured but was not operating. The vehicle was parked on the street in front of her house. While the plaintiff was seated and partially inside the vehicle, a vehicle crashed into the rear of the plaintiff's vehicle. The issue was whether the plaintiff was entitled to PIP benefits from the Michigan Assigned Claims Facility or the insurer of the vehicle that hit her. Security was not required on the plaintiff's parked vehicle presuming the facts were as the plaintiff stated them and thus PIP benefits should not have been excluded under *Mich. Comp. Laws §§ 500.3113 and 500.3101*.

Recovery for Plaintiff Injured in an Accident in Canada. In *Scheel v. GuideOne Mut. Ins. Co.*, 2016 U.S. Dist. LEXIS 39947 (D. Or. 2016), the plaintiff was involved in an automobile accident in Canada, which caused personal injury and required him to incur significant medical expenses. The plaintiff filed a claim with his automobile insurer and the insurer covered portions of his claim but denied compensation for medical expenses relating to back surgery he underwent following the accident. In an attempt to comply with Canadian laws governing minimum limits on personal injury protection (PIP) liability, the defendant filed a power of attorney and undertaking in 2001. Because Canadian courts have interpreted the power of attorney to hold insurers to the minimum liability limits of the territory in which the accident occurs, the power of attorney required that the defendant be held to the higher minimum liability limit of Canada.

Chapter 7—Scope of Coverage: By Classification of Injured Person

Fiancé Not A Covered Person for Purposes of Medical Payments Coverage. In *Steilberg v. Bradley*, 2016 U.S. Dist. LEXIS 4767 (S.D. Miss. 2016), a claimant who lived in the named insured's household, was engaged to marry her and was a co-owner of the motorcycle with her was not a covered person for purposes of medical payments coverage. The claimant may have lived in the same household as the

named insured but he was not related to her by blood, marriage, or adoption, nor was he the named insured's ward or foster child.

Relative By Marriage Not Insured. In *Lewis v. Farmers Ins. Exch.*, 2016 Mich. App. LEXIS 780, the plaintiff's purported relationship with the insured, through the marriage of her paternal aunt to the insured's paternal uncle, did not fall within the common understanding of relative by affinity under Michigan law. The definition of "family member" in the policy was substantively identical to the definition of "relative" found in *Mich. Comp. Laws § 500.3114*. The term relative as defined in the context of the statute referred to a person related "by marriage, consanguinity, or adoption." It was undisputed that the insured and the plaintiff were not married, were not related by blood, and were not related by adoption.

Chapter 8—Scope of Coverage: By Classification of Vehicle

No-Fault Coverage for Pre-Arranged Rides. A chart outlining the required no-fault coverage for pre-arranged rides through a transportation network has been added. *§ 8.03[10][b] Multi-Jurisdictional Survey of Coverage for Pre-Arranged Rides.*

Electric Bicycle Not a Motor Vehicle. In California, an electric bicycle is not a motor vehicle. A person operating an electric bicycle is not subject to the provisions of the statute relating to financial responsibility, driver's licenses, registration, and license plate requirements. *Cal. Veh. Code § 24016.*

School Buses Must Have Personal Injury Protection (PIP) Coverage. In Delaware, all buses operated by the Department of Education, any public school district, any charter school, or any person under contract with the Department Education, a school district, or charter school for the purpose of transporting school pupils either to or from school or for any other purpose under the jurisdiction of any school authority must be covered by personal injury protection (PIP) coverage of $100,000 per individual and $300,000 per total and medical payment coverage of $2,000 per person. *14 Del. Code § 2904.*

Chapter 9—Scope of Coverage—Type of Incident

No-Fault Benefits for Insured Who Suffered a Heart Attack. In *Winegar Pers. Representative for the Estate of Winegar v. Farm Bureau Ins. Co.*, 2016 Mich. App. LEXIS 883, the estate of an insured who died from a heart attack while unloading a parked vehicle was entitled to no-fault benefits. Where a heart attack occurs due to the exertion of unloading a vehicle and there is proof of its causal link to the unloading process, a jury may properly conclude that it was an accidental bodily injury.

Chapter 10—Exclusions from Coverage

For-Hire Exclusion as it Applies to Transportation Network Providers. A new survey highlighting the application of the for-hire exclusion to transportation network providers has been added. *§ 10.02[6][c] Multi-Jurisdictional Survey of Transportation Network Exclusion.*

Chapter 11—No-Fault Benefits: Economic Losses: Personal Injury Cases

No-Fault Statute Does Not Provide for Reimbursement for Health Insurer. In *Aetna Health Plans v. Hanover Ins. Co.*, 2016 N.Y. LEXIS 1689, a health insurer who paid for medical treatment that should have been covered by the insured's no-fault insurer could not maintain a reimbursement claim against the no-fault insurer. The

health insurer alleged that the no-fault insurer should have paid the medical bills. The medical providers submitted some of their bills for treatment directly to the health insurer and the health insurer paid the bills, initially totaling $19,649.10. The no-fault statute and regulations do not contemplate reimbursement to a health insurer, as opposed to a health care provider. The statute addresses reimbursement for a health care provider not a health insurer. *N.Y. Ins. Law § 5102*. New York insurance regulations provide for the payment of benefits for any element of loss other than death benefits, directly to the applicant or, upon assignment, to the providers of health care services. *11 N.Y.C.R.R. § 65-3.11*.

Reimbursements for Personal Injury Protection (PIP) Benefits Subject to Medicare Fee Schedules. In *Allstate Indem. Co. v. Markley Chiropractic & Acupuncture*, 2016 Fla. App. LEXIS 4818, an endorsement in a policy providing that amounts payable as personal injury protection (PIP) benefits were subject to all limitations and provisions of Florida's no-fault statute, including "all fee schedules," was unambiguous and put the parties on notice that the insurer could elect to use the Medicare fee schedule in *Fla. Stat. § 627.736* in paying benefits.

Submission of Medical Bills Under the Florida No-Fault Statute. Under the Florida no-fault statute, all statements and bills for medical services must be submitted to the insurer on a properly completed Centers for Medicare and Medicaid Services (CMS) form and must comply with the CMS form instructions as well as the American Medical Association Editorial Panel and the Healthcare Common Procedure Coding System (HCPCS) guidelines adopted by the United States Department of Health and Human Services in effect for the year in which services are rendered. *Fla. Stat. § 627.736(5)*.

Class Action Alleging Overcharge for Radiology Treatments for No-Fault Patients. In *Herrera v. JFK Med. Ctr., L.P.*, 2016 U.S. App. LEXIS 7530 (11th Cir. 2016), a class action involving the Florida no-fault statute, the plaintiffs alleged that the defendants overcharged personal injury protection (PIP) patients who received treatment after motor vehicle accidents unreasonable fees for radiological services. The fees were up to 65 times higher than the usual and customary fees charged to non-PIP patients for similar radiological services. The court ordered discovery to determine whether common issues predominate over any individualized questions.

Affirmative Defense in No-Fault Action. In *East Coast Acupuncture, P.C. v. Hereford Ins. Co.*, 26 N.Y.S.3d 684 (Civ. Ct. 2016), an insurer was entitled to summary judgment in an acupuncturist's action to recover assigned first-party no-fault benefits because the insurer's objection to the acupuncturist's alleged over billing remained an affirmative defense under *11 N.Y. C.R.R. § 65-3.8(g)(1)*. A fee schedule defense imposed no deadline on the insurer's determination, and based on the unopposed evidence, the insurer paid the acupuncturist in accordance with the fee schedule and did not owe the acupuncturist any additional payment.

Recovery of Personal Injury Protection Deductible. In *Sanborn v. Geico Gen. Ins. Co.*, 2016 Del. Super. LEXIS 61, the insured had standing to bring a declaratory action regarding the insurer's recovery of the personal injury protection (PIP) deductible because the value of the insured's PIP coverage was diminished by the insurer's practice of declining to pursue recovery of

the insured's PIP deductible via subrogation.

Chapter 12—No-Fault Benefits: Economic Losses: Death Cases

No-Fault Survivor Benefits for Replacement Services. In *Winegar Pers. Representative for the Estate of Winegar v. Farm Bureau Ins. Co.*, 2016 Mich. App. LEXIS 883, the plaintiff sought no-fault survivor benefits asserting that the insured's death arose out of unloading a parked vehicle. The jury found for the plaintiff and awarded $59,631.63 for loss of tangible things of economic value and $5,750 in replacement services.

Chapter 13—Injuries to Property and to Non-Economic Interests

Policy Limit for Property Damage Increased. Kansas increased the minimum policy limit for property damage to $25,000. Kan. Stat. Ann. § 40-3107(e).

Chapter 14—Claiming No-Fault Benefits

Exception to No-Fault Statute of Limitations. In Michigan, there is an exception to the one-year statute of limitations if the insurer has previously made a payment of personal protection insurance benefits for the injury. *Mich. Comp. Laws § 500.3145(1).* In *Jesperson v. Auto Club Insurance Ass'n*, 499 Mich. 29 (2016), an insurer's payment of no-fault benefits to a plaintiff more than one year after the date of the plaintiff's motor vehicle accident satisfied this exception to the one-year statute of limitations codified in *Mich. Comp. Laws § 500.3145(1).* The plaintiff was injured on May 12, 2009 when his motorcycle was struck from behind by a vehicle. On June 2, 2010, the defendant insurer was notified that it was it was the highest-priority no-fault insurer and began making payments to the plaintiff on July 23, 2010. If a payment is made on a late notice claim, the insurer is essentially restarting the clock on the one-year statute of limitation—thus creating liability where it was previously extinguished.

Assignment of No-Fault Benefits. In *Stand Up Multipositional Advantage MRI, P.A. v. Am. Family Ins. Co.*, 878 N.W.2d 21, 27 (Minn. Ct. App. 2016), a patient's assignment of a no-fault claim to a medical provider was invalid and unenforceable because the applicable policy forbid such an assignment and the patient made the assignment before the medical provider billed the patient for medical services.

Examination Under Oath (EUO) is a Condition Precedent to No-Fault Coverage. In *Mapfre Ins. Co. of N.Y. v. Manoo*, 2016 N.Y. App. Div. LEXIS 4296, the no-fault insurer sought a declaratory judgment that it was not obligated to pay a treatment provider under no-fault reimbursement because the insured had failed to comply with a condition precedent to coverage under his policy by failing to appear for an examination under oath (EUO). The insurer made a prima facie showing of its entitlement to summary judgment on the treatment provider's claim for first-party no-fault benefits. The insurer timely and properly mailed the notices for EUOs to the insured and the insured failed to appear. The insurer mailed the insured the original EUO request in accordance with the policy's personal injury protection (PIP) endorsement before the treatment provider prepared its verification. The insurer rescheduled the EUO twice after the treatment provider submitted its verification but the insured failed to appear. The EUO was a condition precedent to coverage. The dissenting judge argued that the insurer was not entitled to summary judgment because the insurer failed to tender proof as to the

exact date it received the treatment provider's verification.

Chapter 15—Arbitration of No-Fault Claims

No Claim for Punitive Damages in Utah No-Fault Arbitration. In Utah, which has adopted the Uniform Arbitration Act, a claim for punitive damages may not be made in an arbitration proceeding in a third party motor vehicle action or any subsequent proceeding even if the claim is later resolved through a trial de novo. *Utah Code § 31A-22-321(3).*

Chapter 16—Attorney's Fees, Penalties, and Interest

Michigan Modifies Standards for Determining Amount and Reasonableness of Attorney's Fees. The *Pirgu v. United Servs. Auto. Ass'n*, 2016 Mich. LEXIS 1095, the court noted that the amount in question and the results achieved as well as whether the fee is fixed or contingent are relevant factors in determining the reasonableness and amount of attorney's fees. The results obtained are indicative of the exercise of skill and judgment on the part of the attorney. Similarly, the nature of the fee arrangement is also a relevant factor because a contingency fee percentage may express an attorney's expectations of the case and the risks involved.

Interest on Late Payment of Personal Injury Protection (PIP) Benefits. In *Sweetman v. State Farm Mut. Auto. Ins. Co.*, 2016 Del. C.P. LEXIS 9, the insurer failed to comply with *21 Del. Code § 2118B* because it paid the insured's claim more than thirty day from the day the claim was made. The insured filled out her PIP application claim on November 25, 2013. The insurer reviewed her initial medical records from her emergency room visit and her PIP application on December 6, 2013 and thus, the insurer had until January 5, 2014 to either pay the insured's claim in full or provide a written explanation as to why it was denying her claim. The insurer approved the insured's initial claim on February 18, 2014, which was outside of thirty-day time provided by the statute.

Interest, Penalties and Costs for Failure to Pay Claim. In *Bronson Health Care Group, Inc. v. Titan Ins. Co.*, 2016 Mich. App. LEXIS 537, the trial court erred in concluding that the assigned no-fault insurer's initial position that the claimant might be ineligible for assigned claim benefits justified its failure to comply with *Mich. Comp. Laws § 500.3142*. The assigned no-fault insurer argued that it was not liable to pay penalty interest under *Mich. Comp. Laws § 500.3142* because it paid the plaintiff health care provider's claim within 30 days of its own investigation confirming the claimant's eligibility for benefits. The assigned no-fault insurer's defense to penalty interest was frivolous. The court reversed the trial court's denial of attorney's fees and costs and remanded to the trial court for a determination of appropriate sanctions.

Chapter 17—Tort Recovery: Tort Liability Retained

Recovery of Basic Economic Losses. To recover for basic economic losses under the New York no-fault statute, a plaintiff must establish that he or she incurred more than $50,000 in damages for medical expenses, lost wages, and other reasonable and necessary expenses. Mere speculation as to basic economic loss in excess of $50,000 is insufficient to sustain a cause of action under the no-fault statute. In *Buccilli v. United States*, 2016 U.S. Dist. LEXIS 13743 (W.D.N.Y. 2016), the plaintiff testified at her deposition that she had no out-of-pocket expenses related to the accident and that her insurance had paid for

everything. She has also claimed no lost income for the single day of work that she missed because of the accident. The plaintiff failed to satisfy the statutory requirements for basic economic loss and could not recover on this basis.

Chapter 18—Tort Recovery Thresholds

Injured Driver's Experts Provided a Valid Qualitative Assessment of a Significant Limitation of Use and Permanent Consequential Limitation of Use. In *McEachin v. City of New York*, 25 N.Y.S.3d 672, 674 (App. Div. 2016), the trial court properly denied the city's motion to set aside the jury verdict because there was a rational process by which the jury could have found that the injured driver sustained a serious injury within the meaning of *N.Y. Ins. Law § 5102(d)* under the significant limitation of use and permanent consequential limitation of use categories. The injured driver's experts provided a valid qualitative assessment of the claimant's condition as to both his lumbar spine and his left knee. The experts' evaluations had an objective basis and the city did not present the testimony of any physicians or other experts.

Reasonable Explanation for Gap in Treatment. In *Cook v. Peterson*, 28 N.Y.S.3d 501, 507 (App. Div. 2016), the court rejected the insurer's argument that the gaps in plaintiff's treatment were fatal to his claims. The court concluded that plaintiff provided a reasonable explanation for the gap in treatment that was substantiated by the record. The record failed to establish that the plaintiff in fact ceased all therapeutic treatment during those purported gaps as the plaintiff was still under the care of physicians who had provided nerve block injections, he had received referrals for other physicians and he was exploring alternative treatments to combat the pain caused by the occipital neuralgia.

Chapter 23—Statutory Uninsured Motorist Coverage

New Survey Highlighting Statutory Definition of the Term Bodily Injury. § 23.50[2] [i] Jurisdictional Survey of Statutory Definition of Bodily Injury.

School Buses Must Have Uninsured Motorist Coverage. In Delaware, all buses operated by the Department of Education, any public school district, any charter school, or any person under contract with the Department Education, a school district, or charter school for the purpose of transporting school pupils either to or from school or for any other purpose under the jurisdiction of any school authority must be covered by uninsured motorist coverage of $300,000, but not underinsured motorist coverage. *14 Del. Code § 2904.*

Requirement for Mandatory Underinsured/Underinsured Motorist (UM/UIM) Coverage Does Not Apply to Excess Policy. An excess liability policy provides limits in excess of the underlying liability policy, which is often an umbrella policy. In California, the statutory requirement for mandatory UM/UIM coverage does not apply to excess insurance policies. *Haering v. Topa Ins. Co.*, 244 Cal. App. 4th 725 (2016).

Claimant Not Engaged in a Business Endeavor for Employer Not Insured. In *Federated Mut. Ins. Co. v. Enright*, 2016 U.S. Dist. LEXIS 34669 (D. Colo. 2016), the court granted the insurer's motion for summary judgment on the grounds that it had no obligation to provide underinsured motorist coverage to the claimant because the claimant did not qualify as an insured. At the time of the accident, the claimant was not engaged in a business endeavor for his employer and was not using a "covered

auto" as required by the policy. Instead, the claimant was operating his separately owned motorcycle on personal time.

Newer Uninsured Motorist Selection Form Superseded Older Form. In *Draayer v. Allen*, 2016 La. App. LEXIS 727, the insurer required its insured to execute a new uninsured motorist (UM) selection form in 2009. The insured had signed a form in 2004 rejecting UM coverage. The insured argued that the insurer breached its affirmative duty to place the insured in a position to make an informed decision regarding UM coverage by requiring her to sign the 2009 UM selection form as a condition of maintaining coverage under the personal liability umbrella policy, thus depriving her of her statutory right to have UM coverage equal to the bodily injury limits in her insurance policy. The court found that there were genuine issues of material fact with respect to the validity of the 2009 UM selection form rejecting UM coverage under *La. Rev. Stat. § 22:1295*. The insurer could not obtain summary judgment based on a UM selection form executed in 2004 because the insurer was not entitled to pick and choose which one of the selection forms to enforce.

Electronic Signature Satisfied the Signature Requirement. In *Traynum v. Scavens*, 2016 S.C. LEXIS 85, the plaintiffs acknowledged they were not contesting the content of the insurer's offer of underinsured motorist (UIM) coverage but rather the method by which the offer was communicated and rejected by the insured through the insurer's website. Because the transaction occurred online, it was governed by South Carolina's version of the Uniform Electronic Transactions Act (UETA). Under the UETA, an electronic signature satisfies a law requiring a signature." *S.C. Code § 26-6-70*. The UETA also allows offers to be communicated online. The insurer was entitled to the conclusive presumption of a meaningful offer of UIM coverage provided by *S.C. Code § 38-77-350*.

Arizona Insureds are Bound by the Department of Insurance Approved Form Regardless of Their Subjective Understanding of the Form. The Arizona statute was revised in 2016 and provides that an insurer that uses a Department of Insurance approved form for offering uninsured motorist (U) coverage and confirming the selection of limits or rejection of coverage satisfies the standard of care in offering and explaining the nature and applicability of UM coverage. *Ariz. Rev. Stat. § 20-259.01*. Department of Insurance approved form are valid for all insureds under the policy. By approving such forms, the legislature sought to eliminate fact-intensive inquiries regarding whether the insurer had offered UM/UIM coverage. *Murray v. Farmers Ins. Co.*, 366 P.3d 117 (Ariz. Ct. App. 2016).

Long Term Relationship Insufficient to Create Affirmative Duty of Agent to Counsel on Availability of Underinsured Motorist (UIM) Coverage. In *Allstate Ins. Co. v. Smith*, 2016 Ky. LEXIS 168, although the insured had a lengthy relationship with the insurer, a lengthy relationship, standing alone, was insufficient to create an affirmative duty. There was no indication the plaintiff ever sought counsel from his agent or sought advice on his coverage. Instead, the insured simply asked for the "best" coverage. Given the lack of discussion regarding the plaintiff's coverage, the plaintiff's agent had no reason to believe his advice was sought or relied on in choosing coverage. The insurer had no affirmative duty under *Ky. Rev. Stat. § 304.20-040* or otherwise to notify or counsel the insured on the availability of UIM coverage.

New Policy Not a Renewal or Reinstatement of Existing Policy. In Utah, a new policy means any policy that does not include a renewal or reinstatement of an existing policy or a change to an existing policy that results in a named insured being added to or deleted from the policy or a change in the limits of the named insured's motor vehicle liability coverage. *Utah Code § 31A-22-305.3.*

Resolution of the Primary Uninsured Motorist (UM) Claim Not a Condition Precedent to the Assertion of a Claim for Excess UM Benefits. In *Hegseth v. Am. Family Mut. Ins. Group*, 877 N.W.2d 191, 198 (Minn. 2016), the resolution of the primary uninsured motorist (UM) claim was not a condition precedent to the assertion of a claim for excess UM benefits under the no-fault statute. Claims for excess UM benefits accrue on the date of the accident. A claim for excess benefits may be brought at any time after the date of the accident if the claimant has excess UM coverage and a good faith basis to believe that the amount of damages sustained exceeds the available primary UM coverage. The plaintiff asked the court to overturn its decision in *Weeks v. American Family Mutual Insurance Co.*, 580 N.W.2d 24 (Minn. 1998) and hold that all UM claims, both primary and excess, accrue on the date of the alleged breach of contract, the date an insurer denies the claim. Amicus curiae Minnesota Association for Justice (MAJ) argued for a more limited rule, asking the court to hold that excess UM claims accrue on the date of resolution of the primary UM claim. These arguments were premised on the contention that resolution of the primary UM claim was a condition precedent to assertion of an excess claim.

Defense of Comparative Fault. Citing *New Appleman on Insurance Law Library Edition* § 65.03[2], the court in *Hiltner v. Owners Ins. Co.*, 876 N.W.2d 460 (N.D. 2016) noted that courts generally allow the insurer to raise the tortfeasor's defenses and discount the amount the claimant would recover based on the claimant's own negligence. Thus, the scope of the damages underinsured motorist (UIM) coverage must pay was the compensatory damages attributable to the comparative fault of the owner or operator of the underinsured vehicle. The phrase "legally entitled to collect" in *N.D. Cent. Code § 26.1-40-15.3* was construed as defining the compensatory damages payable under UIM coverage and contemplating an initial allocation for comparative fault. The dissenting judge argued against the reduction for the percentage of fault attributable to the plaintiff citing the plaintiff's payment of a separate premium for UIM coverage.

Expert Testimony Not Required to Recover Non-Economic Damages in New York. In some jurisdictions, expert testimony is not required in order to recover non-economic damages. In *Boykin v. Western Express, Inc.*, 2016 U.S. Dist. LEXIS 14771 (S.D.N.Y. 2016), the court noted that it is well-settled in the Second Circuit that expert testimony is not required in order to recover non-economic damages. Therefore, the plaintiff's claim for noneconomic damages could be presented to the jury without the aid of expert testimony.

Loss of Consortium Damages for Uninsured/Underinsured Motorist Claim. In *Ky. Farm Bureau Mut. Ins. Co. v. Armfield*, 2016 Ky. App. LEXIS 23, although Kentucky provides for loss of consortium damages against a third person and loss of consortium is an independent cause of action, neither the husband or wife had a substantive, bodily injury claim against the insurer under the policy because the policy clearly and unambiguously excluded UIM coverage for bodily injury

sustained by an insured while occupying an owned motorcycle.

Expert Testimony About Need for Future Surgery. In *State Farm Mut. Auto. Ins. Co. v. Long*, 189 So. 3d 335 (Fla. Dist. Ct. App. 2016), a damage award in favor of an insured in his suit against his insurer for UM/UIM coverage could not stand because the trial court erred in allowing a physician's assistant to testify as an expert on the need and cost for a future surgery. The decision to diagnose the need for a future surgery rested solely with the physician, not the physician's assistant. The error in allowing this testimony was not harmless, as it was used exclusively to establish the insured's claim for future damages.

Advanced Payment Should Have Been Credited Against Award. In *Doe v. Pak*, 784 S.E.2d 328 (W. Va. 2016), a case involving uninsured motorist coverage, the insurer's advance payment to the insured should have been credited against the jury's judgment in favor of the insured as the letter accompanying the payment specifically indicated that the payment would be credited against any final determination of damages and any failure to do so would result in a double recovery for the insured. The trial court should have deducted the amount of the advanced payment from the verdict before calculating prejudgment interest on the special damages portion of the remaining amount. The insured was not entitled to prejudgment interest on the loss of household services award because she did not pay, or incur an obligation to pay, for those services.

No Basis for Award of Punitive Damages. In *Gonzales v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 54148 (D. Nev. 2016), the plaintiff did not provide any evidence demonstrating that her insurer's evaluation of her claim was not prompt, nor was there any evidence demonstrating it was reasonably clear that the insurer was liable to pay her uninsured motorist (UM) benefits. The court found no facts to support an award of punitive damages under *Nev. Rev. Stat. § 42.005*. The plaintiff failed to present any evidence of malice or oppression by the insurer and there was no evidence that the insurer acted with the intent to vex or injure.

No Subrogation Against Owner of Underinsured Motor Vehicle. The Connecticut statute, *Conn. Gen. Stat. § 38a-336b*, prohibits subrogation against the owner or operator of an underinsured motor vehicle paid or payable by the insurer. In *State Farm Fire & Cas. Co. v. Martinez*, 2016 Conn. Super. LEXIS 866 (unreported), the plaintiff could not escape the indisputable fact that the alleged tortfeasor was insured. The plaintiff was asking the court to allow a recovery based on equitable subrogation rather than conventional (contractual or statutory) subrogation. Even if there were an explicit claim being made for equitable subrogation, the court would be bound to reject it under these circumstances.

Procedure for Asserting Subrogation Rights for Underinsured Motorist Insurer. In Utah, a claimant may demand payment of policy limits from all liability insurers by sending notice to all applicable underinsured motorist insurers. The subrogation rights of an underinsured motorist insurer are waived, unless within five days of delivery of the notice of tender from the liability insurer, the underinsured motorist insurer affirmatively asserts its subrogation rights by delivering notice to the liability insurer of the underinsured motorist insurer's rights to subrogate and reimbursing the liability insurer for the policy limits paid to

the claimant. *Utah Code § 31A-22-305.3.*

Chapter 24—Uninsured Motorist Endorsement

Common Law Marriage and Status as Relative of Named Insured. In *Chaimberlain v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 62863 (W.D. Pa. 2016), the court declined to grant the insurer's motion for summary judgment because there was genuine issue of material fact as to whether the plaintiff insured had entered into a common law marriage with the plaintiff claimant who was injured in a motor vehicle accident. The jury must determine whether the plaintiffs have proven by clear and convincing evidence that a common law marriage was created by an "exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created." However, the claimant's federal and state tax returns indicated that he was "unmarried," "single," and "head of household."

Utah Creates Transportation Network Vehicle Recovery Fund. Utah has created the Transportation Network Vehicle Recovery Fund and requires companies to pay into the fund. Utah authorizes fund claims for damage vehicles by lien holders and provides that the drivers are independent contractors. *2016 Ut. SB 201.*

Required Uninsured Motorist Coverage for Transportation Network Vehicle. In Mississippi, a transportation network company driver must be covered by a primary automobile liability insurance that provides at least $1,000,000.00 for death, bodily injury and property damage and uninsured motorist while he or she is engaged in a pre-arranged ride. The coverage requirements may be satisfied by any of the following: automobile insurance maintained by the transportation network company driver, automobile insurance maintained by the transportation network company, or any combination of the driver or company. *2016 Miss. H.B. 1381.*

Exclusion of Uninsured/Underinsured Motorist Coverage for Transportation Network Vehicle. In South Dakota, any insurer that writes motor vehicle insurance may exclude any coverage afforded under the policy issued to an owner or operator of a personal vehicle for any loss or injury that occurs while a driver is logged on to a transportation network company's digital network or while a driver provides a prearranged ride. This right to exclude all coverage may apply to any coverage included in a motor vehicle insurance policy including: (1) liability coverage for bodily injury and property damage; (2) personal injury protection coverage; (3) uninsured and underinsured motorist coverage; (4) medical payments coverage; (5) comprehensive physical damage coverage; and (6) collision physical damage coverage. *2016 S.D. H.B 1091.*

Motor Vehicle Database Created in Nebraska. Nebraska implemented a motor vehicle insurance database and created a Motor Vehicle Insurance Data Base Task Force. *Neb. Rev. Stat. § 60-3*,136.

Use of Electronic Insurance Identification Card. In Maryland, if an insured and an insurer both consent, an insurance identification card may be produced in electronic format. Acceptable electronic formats include display of electronic images on a cellular phone or any other type of portable electronic device. *Md. Ins. Law § 19-503.1.*

All-Terrain Vehicle (ATV) Not Subject to Vehicle Registration. In *Gonzales v. Shelter Mut. Ins. Co.*, 2016 U.S. Dist. LEXIS 62514 (D. Kan. 2016), the plaintiffs filed a breach of contract action alleging

that the defendant insurer improperly denied their uninsured motorist (UM) claim for an accident that involved an all-terrain vehicle (ATV) on a public road. The defendant argued that the ATV was not a motor vehicle as defined in its policy because it was not originally designed for operation on public roadways and thus the plaintiffs were not entitled to recover UM benefits. The plaintiffs argued that because the ATV was being operated on a public highway, Kansas law required its registration, and therefore, an ATV met the statutory definition of a motor vehicle, making it subject to compulsory insurance. Kansas law exempts an ATV from vehicle registration requirements and thus it was not subject to compulsory insurance and the plaintiffs were not entitled to benefits.

Vehicle Insured Under the Liability Provisions of a Policy Is Not Simultaneously Deemed Uninsured. In *State Farm Mut. Auto. Ins. Co. v. Smith*, 2016 Fla. App. LEXIS 8482, the driver of an insured vehicle sought uninsured motorist (UM) coverage from his mother's policy under which he was insured for both liability and UM coverage. The vehicle owner's policy household exclusion excluded coverage for the driver's claim because the driver was an insured under that policy by virtue of having been permitted to drive the car. The driver's policy unambiguously defined the class of vehicles excluded from the definition of uninsured motor vehicle and did not provide UM coverage. The owners' vehicle, when used by the driver, was not considered an uninsured vehicle. An "uninsured motor vehicle" cannot be one that has been insured for liability under that policy. The dissenting judge objected to the denial of UM benefits for which the driver paid premiums simply because he has also paid for liability coverage for a passenger, a non-family member and third party beneficiary of the driver's policy who was found by a jury to be ninety-two percent at fault for the collision due to negligent maintenance of the vehicle.

Taxi Driver's Assault Not an Injury Arising From the Use of a Vehicle for Purposes of Uninsured Motorist (UM) Coverage. Alaska has identified three factors for determining whether an injury arises from the use of a vehicle for purposes of uninsured motorist (UM) coverage. These factors are: (1) The extent of causation between the automobile and the injury; (2) Whether an act of independent significance occurred, breaking the causal link between "use" of the vehicle and the injuries inflicted; and (3) What type of "use" of the automobile was involved. In *Chong v. Nat'l Cont'l Ins. Co.*, 2016 U.S. Dist. LEXIS 67883 (D. Alaska 2016), the estate of taxi driver who was stabbed to death after refusing to take a person for a ride was not entitled to UM benefits. The person then drove off with the taxi driver in the taxi and the taxi was later found with the taxi driver's body in the back seat. The person's violent actions during the assault were independent from the transportation intended by the taxi driver on her arrival and were of sufficient independent significance to disrupt any causal link between the taxi driver's bodily injuries and the use of the taxi.

Chapter 25—Prerequisites to Recovery

Two-Year Statute of Limitations in Policy Did Not Violate Public Policy. In *State Farm Mut. Auto. Ins. Co. v. Riggs*, 484 S.W.3d 724 (Ky. 2016), the policy contained a limitation provision that gave the insured two years from the date of the accident or date of the last basic reparation benefit payment, whichever occurred later, within which to make an underinsured

motorist (UIM) claim. The provision did not violate public policy because it encouraged the prompt presentation of all the potential insurance claims relating to a single accident.

Two-Year Statute of Limitation Applied to Third Party Beneficiary. In *Brown v. Mitsui Sumitomo Ins.* Co., 2016 Ky. App. LEXIS 72, the policy specified a two-year window for filing a claim when arbitration did not apply. The plaintiff knew the tortfeasor was underinsured during that two-year window because he filed a claim against the tortfeasor and his own UIM carrier within the allotted time. The two-year statute of limitations was a reasonable contractual window for filing a UIM claim. The plaintiff erroneously believed the defendants were immune from UIM liability because a workers' compensation carrier had already paid benefits. The two-year contractual window applied to the plaintiff, a third-party beneficiary who was not a signatory to the contract between the defendants.

Colorado's Collateral Source Rule Does Not Requires An Offset for Workers' Compensation Benefits. In *Adamscheck v. Am. Family Mut. Ins. Co.*, 818 F.3d 576, 585 (10th Cir. 2016), workers' compensation benefits could not be offset against underinsured motorist (UIM) coverage under *Colo. Rev. Stat. § 10-4-609*. In 2008, the General Assembly changed Colorado's UIM coverage scheme from "a 'reduction' approach in which UIM coverage was reduced by payment received or judgment against the tortfeasor to an 'excess' approach in which UIM coverage was payable for damages exceeding the tortfeasor's liability policy limit, subject only to the UIM coverage limit in the insured's policy. UIM policies cover the difference between the damages the insured party suffered and the limit of any liable party's legal liability coverage regardless of whether the insured party's recovery from the liable party exhausted that limit. The court rejected the insurer's argument that Colorado's collateral source rule, *Colo. Rev. Stat. § 13-21-111.6*, requires an offset for the plaintiff's workers' compensation benefits.

Undiscounted Hospital Charges Not Evidence of Damages. In *Hall v. USF Holland, Inc.*, 2016 U.S. Dist. LEXIS 12388 (W.D. Tenn. 2016), the defendant sought to limit the plaintiffs' recoverable damages to the amounts actually paid by the plaintiffs' insurer. The plaintiffs sought to recover their full, undiscounted medical bills as damages and argued that any attempt to reduce those damages would violate the collateral source rule. Applying Tennessee substantive law, the court held that a Tennessee court would not find healthcare provider charges in excess of what an insurer paid to a provider to be "necessary and reasonable" costs that may be recovered as damages in a personal injury suit. The plaintiffs were prohibited from introducing any undiscounted hospital charges as evidence of the plaintiffs' alleged damage.

Negotiated Discount of Medical Expenses Was a Collateral Source Subject to Offset. In *Auers v. Progressive Direct Ins. Co.*, 878 N.W.2d 350 (Minn. Ct. App. 2016), a subrogee that negotiated a discount of medical expenses could not assert a subrogation right for the discount under *Swanson v. Brewster*, 784 N.W.2d 264 (Minn. 2010). The subrogation right was limited to the amount of the subrogee's payment. An injured plaintiff who purchases the subrogation interest of a health insurance carrier is not entitled to recover the *Swanson* collateral source offset under *Minn. Stat. 648.251 subd.2*. By purchasing the Blue Cross Blue Shield lien of $72,216.85 for a payment of $5,000, the

plaintiff recovered a net of $95,000 from the tortfeasor's $100,000 liability coverage despite Blue Cross Blue Shield and her own personal injury protection coverage having satisfied nearly $178,000 in medical bills. If a health insurer negotiates a discount from the medical providers of an injured plaintiff and obtains a subrogation lien by virtue of payment of the negotiated amount, the subrogation lien is limited to the amount paid. The exception provided by *Minn. Stat. § 548.251 subd.2* that covers amounts of collateral sources for which a subrogation right has been asserted applies only to the amounts actually paid by the carrier. The negotiated discounts remain collateral sources to be deducted from the injured party's verdict or settlement.

Collateral Source Rule Applied to Payment for Medical Treatment. In *Dolan v. Dodge*, 2016 Me. Super. LEXIS 16, the defendant could not limit the plaintiff's award for expenses for medical treatment by introducing evidence that payment was made by a collateral source. The court noted that the collateral source rule has been the law in Maine for nearly 40 years. The Legislature has only chosen to to modify or limit the collateral source rule in actions involving professional negligence. *24 Me. Rev. Stat. § 2906(2).*

Chapter 26—Hit and Run Accidents

Actual Physical Contact Could Not be Corroborated. In *Am. Alternative Ins. Co. v. Bennett*, 334 Ga. App. 713 (2015), an injured truck driver could not recover uninsured motorist (UM) carrier from his employer's UM insurer. The vehicle that struck his truck was unknown and there were no witnesses to corroborate that the incident occurred as the driver described. The requirement of "actual physical contact" between the vehicles was not met by a large log protruding off the unknown vehicle striking the driver's truck cab because the log was not an integral part of the vehicle.

Nevada Changes the Word Accident to Crash in Uninsured Motorist Statute. The Nevada Uninsured Motorist (UM) statute substituted the word crash for accident in reference to the "arising out of" clause. The statute provides that a vehicle involved in a crash that results in bodily injury or death is presumed to be an uninsured motor vehicle if no evidence of financial responsibility is supplied to the Department of Motor Vehicles within 60 days after the crash occurs. *Nev. Rev. Stat. § 690B.020.*

Chapter 28—Arbitration of Uninsured Motorist Claims

No Claim for Punitive Damages in Arbitration. In Utah, which has adopted the 2000 version of the Uniform Arbitration Act, a claim for punitive damages may not be made in an arbitration proceeding in a third party motor vehicle action or any subsequent proceeding, even if the claim is later resolved through a trial de novo. *Utah Code § 31A-22-321(3).*

Whether Claimant is a Covered Person is an Issue of Coverage. In Utah, the arbitrator or arbitration panel may not decide an issue of coverage or extra-contractual damages, including whether the claimant is a covered person. *Utah Code § 31A-22-305.3.*

Unsworn and Uncertified Accident Report Not Proof of Identification of Offending Vehicle. In *Matter of Hertz Vehicles, LLC v. Monroe*, 30 N.Y.S.3d 643 (App. Div. 2016), although the trial court properly denied a lessor's petition to permanently stay arbitration of an uninsured motorist claim, it erred in admitting an uncertified and unsworn copy of a motor vehicle accident report into evidence. The MV-104 accident report did not meet the

criteria for admissibility as a memorandum of a past recollection. The lower court erred in considering the MV-104 accident report as proof of whether the alleged offending vehicle was insured at the time of the accident.

Arbitrator's Authority to Award Prejudgment Interest Exceeding Policy Limits. In *Lemerise v. Commerce Ins. Co.*, 2016 R.I. LEXIS 49, the reviewing court exceeded the authority granted to it by the arbitration statute by modifying an arbitration award in favor of the plaintiff and against defendant insurer in excess of policy limits. The court erred by hearing new evidence and considering documents not submitted to the arbitrator. However, the arbitrators did not err in awarding prejudgment interest exceeding policy limits because the arbitrators had such authority.

Chapter 29—The Litigation of Uninsured Motorist Claims

Res Judicata Did Not Bar Claim for Uninsured Motorist Benefits. In *Garrett v. Washington*, 2016 Mich. App. LEXIS 381, res judicata did not bar a subsequent claim for uninsured motorist benefits in light of the differences between such a claim under the serious injury threshold, *Mich. Comp. Laws § 500.3135*, and a previously resolved claim for personal injury protection benefits under *Mich. Comp. Laws §§ 500.3105, 500.3107, and 500.3145*. A voluntary dismissal of the allegedly uninsured driver without prejudice did not moot the case. Compulsory joinder did not apply because the claims did not arise out of the same transaction under the controlling case law.

Reference to Tortfeasor As Defendant Not Improper. In *Sackman v. N.J. Mfrs. Ins. Co.*, 2016 N.J. Super. LEXIS 61 (App. Div. 2016), the plaintiff settled his claims against the tortfeasor and sought underinsured motorist (UIM) compensation from his insurer. The trial court did not err in denying plaintiff's request for a curative instruction with respect to defense counsel's reference to the tortfeasor as "defendant" in her opening statement as that reference was not improper.

Bifurcation of Bad Faith Claim from Underinsured Motorist Claim. In *Aragon v. Allstate Ins. Co.*, 2016 U.S. Dist. LEXIS 61482 (D. N.M. 2016), bifurcation of the plaintiff's bad faith claims from the underinsured motorist (UIM) claim was appropriate. The plaintiff brought an action for UIM benefits and for violations of the Unfair Claims Practices Act and insurance bad faith. Bifurcation was mandatory because, under New Mexico law, resolution of the UIM claim was a condition precedent to the plaintiff bringing claims for bad faith. Until the plaintiff established that she was entitled to recover UIM benefits, she could not assert bad faith claims.

Chapter 30—Underinsured Motorist Coverage

Insurers Must Make Underinsured Motorist Coverage (UIM) Available to Insureds Upon Request. In *Allstate Ins. Co. v. Smith*, 2016 Ky. LEXIS 168, the court noted that the statute directs all insurers to make available to their insureds, upon request, underinsured motorist coverage (UIM) to pay the insured, according to the terms of the insurance policy, for any uncompensated damages the insured may recover in a judgment against an underinsured motorist for injury from a motor vehicle accident. The Kentucky Motor Vehicle Reparations Act (MVRA) defines an underinsured motorist as "a party with motor vehicle liability insurance coverage in an amount less than a judgment recovered against that party for damages on

account of injury due to a motor vehicle accident."

Underinsured Motorist (UIM) Coverage Limited to $500,000 Per Accident. In *Trotter v. Harleysville Ins. Co.*, 2016 U.S. App. LEXIS 8588 (7th Cir. 2016), even though there may have been an ambiguity in the policy's two endorsements and declaration page, underinsured motorist (UIM) coverage was limited to $500,000 per accident. Although the Illinois endorsement stated that UIM coverage was subject to both per person and per accident limits, the single limit endorsement removed the per person limit. Both endorsements stated that coverage was subject to a $500,000 per accident maximum, regardless of the number of insureds involved in the accident. The only difference between the two paragraphs was that the one in the Illinois endorsement contained a per person limit in addition to the per accident limit.

Verbal Threshold Must Be Met to Obtain Underinsured Motorist (UIM) Benefits. In *Sackman v. N.J. Mfrs. Ins. Co.*, 2016 N.J. Super. LEXIS 61 (App. Div. 2016), the UIM policy issued by the insurer to plaintiff contained a verbal threshold provision pursuant to the Automobile Insurance Cost Reduction Act and the tortfeasor's liability was stipulated. The trial judge did not err in denying the plaintiff's motion for a directed verdict as to permanency. Although his treating physician testified that his injury was permanent, in light of a defense expert's testimony to the effect that he was completely healed, permanency was for the jury to decide.

Subrogation Rights of Underinsured Motorist Carrier. In Utah, a claimant may demand payment of policy limits from all liability insurers by sending notice to all applicable underinsured motorist insurers. The subrogation rights of an underinsured motorist insurer are waived, unless within five days of delivery of the notice of tender from the liability insurer, the underinsured motorist insurer affirmatively asserts the underinsured motorist insurer's rights to subrogation by delivering notice to the liability insurer of the underinsured motorist insurer's rights to subrogate and the underinsured motorist insurer reimburses the liability insurer for the policy limits paid to the claimant. *Utah Code § 31A-22-305.3.*

Chapter 31—Duplicate Recoveries

Employee Retirement Income Security Act of 1974 (ERISA) Plan Subrogation Clause. In *Montanile v. Bd. of Trustees of the Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016), the plaintiff was seriously injured by a drunk driver and his ERISA plan paid more than $120,000 for his medical expenses. The plaintiff later sued the drunk driver and made an underinsured motorist (UIM) claim, obtaining a $500,000 settlement. The ERISA plan sought reimbursement from the settlement. The plaintiff's attorney refused that request and subsequently informed the plan that the fund would be transferred from a client trust account to the plaintiff unless the plan objected. The plan did not respond and the plaintiff received the settlement. The fiduciary could not sue to attach the participant's general assets under ERISA because the suit was not one for appropriate equitable relief. When an ERISA plan participant wholly dissipates a third-party settlement on nontraceable items, the plan fiduciary may not sue to attach the participant's separate assets. The plaintiff paid his attorneys $200,000 and repaid about $60,000 that they had advanced him. Thus, about $240,000 remained of the settlement. The plaintiff's attorneys held most of that sum in a client trust account.

Subrogation of Underinsured Motorist Claims. In Utah, underinsured motorist (UIM) coverage may not be subrogated by a workers' compensation carrier and may not be reduced by benefits provided by workers' compensation insurance. UIM coverage may be reduced by health insurance subrogation only after the covered person is made whole. *Utah Code § 31A-22-305.3.*

Chapter 32—Conflict of Laws

Discussion of Conflicts Involving Submission to a Medical Examination Added. § 32.10[4] Conflicts Involving Submission to a Medical Examination.

Application of Deemer Statute's Provision on Discovery. In *Goldman v. Allstate Ins. Co.*, 2016 U.S. Dist. LEXIS 1558 (E.D. Pa. 2016), the issue was whether the plaintiff would be required to submit to an insurer's demand for a "material" medical examination. Under Pennsylvania law, the plaintiff is required to submit to an insurer's demand for a medical examination pending a showing of good cause by the insurer. Application of the "deemer" statute arguably removes protections for insureds provided by the Pennsylvania Motor Vehicle Financial Responsibility Law (MVFRL). Because this accident occurred in New Jersey and the defendant was covered by the "deemer" statute, the plaintiff's policy with the defendant was read to include the provisions of the "deemer" statute including the "deemer" statute's provision on discovery. The court enforced the "deemer" statute's provision on discovery even though it conflicted with the Pennsylvania MVFRL.

Chapter 33—Stacking of Benefits

Claimant Must Be Qualified Insured to Stack. In *Hecht v. Mt. W. Farm Bureau Mut. Ins. Co.*, 2016 U.S. Dist. LEXIS 27384 (D. Mont. 2016), the court noted that Montana law, *Mont. Code § 33-23-203*, allows a claimant to stack multiple insurance coverage only if the claimant can show that he or she qualifies an "insured" under all of the coverage to be stacked.

Interpolicy Stacking Prohibited. Interpolicy stacking means recovering benefits for a single incident of loss under more than one policy. In Utah, interpolicy stacking is prohibited for underinsured motorist (UIM) coverage except in limited circumstances. *Utah Code 31A-22-305.3.*

Application of New Jersey's Anti-Stacking Statute to New York Policy. In *Polizzi v. Liberty Mut. Fire Ins. Co.*, 2016 U.S. Dist. LEXIS 42154 (D.N.J. 2016), the issue was whether the plaintiff was entitled to personal injury protection (PIP) coverage under the New York policy because New Jersey's "anti-stacking" law prohibited recovery of such benefits under more than one policy for injuries sustained in a single accident. The defendant argued that because the plaintiff received PIP benefits under the New Jersey policy, which covered the vehicle she was driving, she was not entitled to the same benefits under the New York policy. The plaintiff argued that she was not seeking to recover under both policies but rather, she requested only that the defendant provide PIP benefits under the New York policy, where the plaintiff was a named insured. PIP benefits were mistakenly paid to her under the New Jersey policy because the plaintiff and the defendant were unaware of the New York policy. The plaintiff alleged sufficient fact to show that she had a plausible claim for relief for excess PIP benefits under the New York policy.

Chapter 34—State Funds—General Framework

Risk Retention Group's Participation in New Jersey's Unsatisfied Claim and

Judgment Fund (UCJF). In *Onyx Ins. Co. v. N.J. Dep't of Banking & Ins.*, 2016 U.S. Dist. LEXIS 42596 (D.N.J. 2016), the New Jersey Property and Liability Insurance Guaranty Association (NJPLIGA) and the New Jersey Department of Banking and Insurance (DOBI) sought a declaratory judgment excluding the plaintiff, a risk retention group created under federal law, from participating in New Jersey's Unsatisfied Claim and Judgment Fund (UCJF). The UCJF pays damages to victims of hit and run accidents or accidents involving an uninsured motorist. The plaintiff provided liability insurance for taxis registered and garaged in New Jersey. Under New Jersey law, every motor vehicle liability insurance policy issued in the State of New Jersey that insures against loss resulting from injury sustained by any person arising out of the operation of a motor vehicle "shall provide personal injury protection coverage benefits . . . to pedestrians who sustain bodily injury in the State caused by the named insured's motor vehicle." *N.J. Stat. Ann. 17:28-1.3* New Jersey's exclusion of risk retention groups from participating in the pedestrian personal injury protection (PIP) claims risk-sharing fund does not violate the Federal Liability Risk Retention Act of 1986, *15 U.S.C. 3901*. Thus, the plaintiff failed to state a claim.

Claim Against Assigned Claims Plan Must Be Timely Fashion. In *Bronson Health Care Group, Inc. v. Titan Ins. Co.*, 2016 Mich. App. LEXIS 537, the trial court erred in concluding that the assigned insurer's initial position that the claimant might be ineligible for assigned claim benefits justified its failure to comply with *Mich. Comp. Laws § 500.3142*. The court rejected the assigned insurer's argument that it was not liable for costs, interest and attorney's fees because it paid the plaintiff health care provider's claim within 30 days of its own investigation confirming the claimant's eligibility for benefits. On September 12, 2013, the plaintiff health care provider submitted a third application for benefits under the Michigan Assigned Claims Plan (MACP) that indicated that the owner of the vehicle did not have automobile insurance for the vehicle on the date of the accident and that the claimant and the owner of the vehicle did not have automobile insurance at the time of the accident. On September 24, 2013, the MACP assigned the plaintiff's claim for benefits regarding its treatment of the claimant to the defendant assigned insurer. Although the defendant assigned insurer received the itemized statement for the plaintiff's medical charges on September 24, 2013, it did not issue payment to the plaintiff health care provider within 30 days.

Assignee of the Michigan Assigned Claims Plan Had a Right to Seek Reimbursement From Higher Priority Insurers. In *Citizens Ins. Co. of Am. v. Auto-Owners Ins. Co.*, 2016 Mich. App. LEXIS 568, the plaintiff, the assignee of the Michigan Assigned Claims Plan, had a right to seek reimbursement from higher priority insurers that should have paid the no-fault benefits in the first place. A person who suffers bodily injury while the occupant of a motor vehicle and has no available insurance policy of his or her own or through his or her family must claim personal injury protection (PIP) benefits from the insurer of the owner or the registrant of the vehicle occupied. The Michigan Assigned Claims Plan assignee was the lowest priority insurer and the insurer of the owner of the vehicle was the higher priority insurer. Once a claim is made to the Michigan Assigned Claims Plan, that claim will be assigned to a no-fault insurer—in this case—the plaintiff. The insurer that receives the claim must preserve and enforce

rights to indemnity or reimbursement against third parties. The "third parties" referenced in *Mich. Comp. Laws § 500.3175* include higher priority insurers.

Vehicle Owner Who Failed to Insure a Vehicle Could Not Participate in Assigned Claims Plan. In *Saengkeo v. Minn. Auto. Assigned Claims*, 877 N.W.2d 568, 574 (Minn. Ct. App. 2016), the plaintiff was not eligible for economic loss benefits under the Minnesota Automobile Assigned Claims Plan because the plaintiff's brother, with whom respondent resided, failed to maintain insurance on a vehicle that he co-owned with his former girlfriend. The plaintiff was injured while he was a passenger in an uninsured vehicle owned and operated by a third party. At the time of the single-car accident, the plaintiff was living with his brother and three friends and he did not own a vehicle or have a driver's license. Because there was no insurance policy in effect under which no-fault benefits could be paid, the plaintiff applied for coverage through appellant Minnesota Automobile Assigned Claims Bureau (MAACB). The MAACB then transferred the plaintiff's claim under the assigned claims plan to the defendant. The defendant denied the plaintiff's coverage request because the plaintiff's brother resided in the same household as the plaintiff and was an uninsured co-owner of a motor vehicle. The dissenting judge argued that the plaintiff was not a licensed driver, did not own a vehicle, and was an innocent passenger when he was seriously injured. He had no reason to obtain insurance. Likewise, his brother did not act irresponsibly by not insuring his girlfriend's vehicle that he did not use and that the girlfriend properly insured.

Chapter 35—State Funds—Practice And Procedures

Defense of Lack of Coverage Not Subject to Preclusion. In *Apollo Chiropractic Care, P.C. v. MVAIC*, 2016 N.Y. Misc. LEXIS 553 (App. Term 2016), the parties stipulated that the plaintiff had timely submitted its claim forms to recover assigned no-fault benefits to the defendant Motor Vehicle Accident Indemnification Association (MVAIC). MVAIC had attempted to send verification requests to the plaintiff, but had mailed them to an address other than the plaintiff's address. The lower court awarded judgment in favor of the plaintiff, finding that, since MVAIC had sent its verification requests to the wrong address, MVAIC was precluded from interposing its defense that the plaintiff did not establish compliance with a condition precedent to coverage, which was the failure to submit a sworn notice of intention to make claim form to MVAIC. According to *N.Y. Ins. Law § 5222*, an injured person must be a qualified person as that term is defined in *N.Y. Ins. Law § 5202* and must have complied with all of the applicable requirements of *N.Y. Ins. Law § 5208*. The filing of a timely affidavit providing MVAIC with notice of intention to make a claim was a condition precedent to the right to apply for payment from MVAIC. MVAIC's defense of lack of coverage was not subject to preclusion.

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No-Fault and Uninsured Motorist Automobile Insurance

Publication 469 Release 60 October 2016

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VOLUME 1

Revision

☐	1	1 thru 3
☐	Title page thru vii	Title page thru vii
☐	1-1	1-1
☐	1-13 thru 1-15	1-13 thru 1-16.1
☐	1-31 thru 1-43	1-31 thru 1-45
☐	5-11 thru 5-13	5-11 thru 5-13
☐	6-1 thru 6-17	6-1 thru 6-17
☐	7-7 thru 7-15	7-7 thru 7-16.1
☐	8-1 thru 8-9	8-1 thru 8-10.1
☐	8-29 thru 8-35	8-29 thru 8-35
☐	9-27 thru 9-45	9-27 thru 9-45
☐	10-1	10-1
☐	10-29 thru 10-35	10-29 thru 10-37
☐	11-1 thru 11-3	11-1 thru 11-3
☐	11-19 thru 11-21	11-19 thru 11-22.1
☐	11-31 thru 11-37	11-31 thru 11-37
☐	11-53 thru 11-73	11-53 thru 11-79
☐	12-1 thru 12-23	12-1 thru 12-25
☐	13-1 thru 13-13	13-1 thru 13-13
☐	14-7 thru 14-48.1	14-7 thru 14-48.2(1)
☐	14-51 thru 14-65	14-51 thru 14-65
☐	15-5	15-5 thru 15-6.1
☐	15-45	15-45

VOLUME 2

Revision

☐	Title page	Title page
☐	16-1 thru 16-9	16-1 thru 16-10.1
☐	16-17 thru 16-25	16-17 thru 16-27
☐	17-9	17-9 thru 17-10.1
☐	18-7	18-7 thru 18-8.1
☐	18-19 thru 18-33	18-19 thru 18-34.3
☐	23-1 thru 23-3	23-1 thru 23-3
☐	23-15 thru 23-17	23-15 thru 23-18.1
☐	23-25 thru 23-28.1	23-25 thru 23-28.1
☐	23-51 thru 23-77	23-51 thru 23-78.3
☐	23-97	23-97 thru 23-98.1
☐	23-117 thru 23-128.1	23-117 thru 23-128.1

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	23-145 thru 23-151	23-145 thru 23-152.1
☐	23-183 thru 23-197	23-183 thru 23-198.3
☐	23-204.1 thru 23-204.3	23-204.1 thru 23-204.3
☐	23-215 thru 23-227	23-215 thru 23-227
☐	24-43	24-43 thru 24-44.1
☐	24-81	24-81 thru 24-82.1
☐	24-115 thru 24-129	24-115 thru 24-130.7
☐	24-171 thru 24-173	24-171 thru 24-174.1
☐	24-203	24-203 thru 24-204.1
☐	24-226.1 thru 24-229	24-227 thru 24-231
☐	25-7 thru 25-37	25-7 thru 25-38.3
☐	26-19	26-19 thru 26-20.1
☐	26-33	26-33 thru 26-34.1

VOLUME 3

Revision

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*
☐	Title page	Title page
☐	28-7 thru 28-8.1	28-7 thru 28-8.1
☐	28-23 thru 28-27	28-23 thru 28-28.1
☐	28-63	28-63 thru 28-64.1
☐	29-13 thru 29-31	29-13 thru 29-33
☐	29-53 thru 29-61	29-53 thru 29-61
☐	29-77 thru 29-81	29-77 thru 29-82.1
☐	30-18.1 thru 30-25	30-19 thru 30-26.1
☐	30-39 thru 30-48.3	30-39 thru 30-48.5
☐	30-57 thru 30-59	30-57 thru 30-59
☐	30-73 thru 30-77	30-73 thru 30-78.1
☐	30-91 thru 30-98.1	30-91 thru 30-98.1
☐	31-26.1 thru 31-27	31-27 thru 31-28.1
☐	31-37	31-37 thru 31-38.1
☐	31-46.1 thru 31-46.11	31-46.1 thru 31-46.12(1)
☐	31-46.27 thru 31-46.33	31-46.27 thru 31-46.33
☐	31-55	31-55 thru 31-56.1
☐	32-1	32-1 thru 32-2.1
☐	32-25	32-25 thru 32-26.1
☐	32-45 thru 32-66.1	32-45 thru 32-59
☐	32-114.1 thru 32-114.3	32-114.1 thru 32-114.5
☐	33-39 thru 33-48.1	33-39 thru 33-48.1
☐	33-79	33-79 thru 33-80.1
☐	34-7	34-7 thru 34-8.1
☐	34-15 thru 34-17	34-15 thru 34-18.3
☐	34-35	34-35 thru 34-36.1
☐	35-15	35-15 thru 35-16.1
☐	35-25 thru 35-35	35-25 thru 35-35

Check As Done	*Remove Old Pages Numbered*	*Insert New Pages Numbered*

VOLUME 4

Revision

☐	Title page.	Title page
☐	App-G-1 thru App-G-5	App-G-1 thru App-G-5
☐	App-H-11.	App-H-11
☐	App-H-21 thru App-H-23	App-H-21 thru App-H-24.1
☐	App-H-33 thru App-H-43	App-H-33 thru App-H-43
☐	App-Q-3 thru App-Q-5	App-Q-3 thru App-Q-6.1
☐	App-R-1 thru App-R-7.	App-R-1 thru App-R-7
☐	App-X-1 thru App-X-17	App-X-1 thru App-X-19
☐	TC-1 thru TC-141.	TC-1 thru TC-141
☐	TS-1 thru TS-27	TS-1 thru TS-27
☐	I-1 thru I-77	I-1 thru I-77

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