

PUBLICATION UPDATE

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No-Fault and Uninsured Motorist Automobile Insurance

Publication 469 Release 61 May 2017

HIGHLIGHTS

- Release 61 includes discussion of numerous recent decisions plus a number of new surveys have been added in the following sections:
- § 14.40[2][e] Multi-Jurisdictional Survey of No-Fault States Authorizing Independent Medical Examinations
- § 24.30[15] Multi-Jurisdictional Survey of Insurance Verification Requirements
- § 34.10[6] Multi-Jurisdictional Survey of Assigned Risk, Joint Underwriting and Reinsurance Funds
- § 34.10[7] Multi-Jurisdictional Survey of Insolvency Funds
- § 34.70[5] Multi-Jurisdictional Survey of Recovery of Punitive Damages against State Funds
- In addition to these new surveys, the following surveys have been updated:
- § 1.10[5] Multi-Jurisdictional Survey of Automobile Liability Insurance Laws
- § 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
- § 23.00[6][h] Jurisdictional Survey of Requirement for Uninsured/Underinsured Motorist
- § 23.20[1][e] Jurisdictional Survey of the Amount of Required Uninsured Motorist Coverage
- § 23.30[5] Jurisdictional Survey of the Workers' Compensation Exclusivity Provision
- § 24.20[3][b][iii] Multi-Jurisdictional Survey of Statutes Requiring that Transportation Network Providers Provide Uninsured/Underinsured Motorist Coverage
- § 24.20[3][b][iv] Multi-Jurisdictional Survey of Application of For Hire Exclusion to Transportation Network Provider
- § 29.40[3][b] Multi-Jurisdictional

Survey of Unfair Claims Practice Statutes

- § 29.40[4][e] Multi-Jurisdictional Survey of Obligation of Good Faith
- § 31.10[4] Jurisdictional Survey of Medical Payments Set-Off
- § 31.20[4] Jurisdictional Survey of Workers' Compensation Set-off.
- § 31.30[6] Jurisdictional Survey of Set-offs for Amounts Paid by Tortfeasor's Liability Insurer
- § 33.10[6] Jurisdictional Survey of Payment of Premium Argument.
- The following appendices also have been updated:
- APPENDIX H Stacking of Uninsured/Underinsured Motorist Coverage
- APPENDIX Q Owned Vehicle Exclusion
- APPENDIX R Subrogation of Uninsured/Underinsured Motorist Claims
- APPENDIX Y Insurer's Obligation to Provide Uninsured Motorist Coverage

Coverage of New Cases.

As part of the regular updating of this publication, a number of recent federal and state cases have been added in Release 61:

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

Out of State Insurer Must Pay No-Fault Benefits to Insured When the Insured Vehicle and the Accident is in Minnesota. *Minn. Stat. §65B.50 subd. 2.* The Minnesota statute, *Minn. Stat. § 65B.50 subd. 2*, applies to an out-of-state insurer when its insured is in an accident in Minnesota and the insured vehicle is in Minnesota, even though the insurer is not licensed by the State of Minnesota to issue motor vehicle insurance. *Founders Ins. Co.*

v. Yates, 888 N.W.2d 134 (Minn. 2016).

Chapter 3—Constitutionality

Caps on Recovery for Non-Economic Damages Upheld. The Kansas statute, *Kan. Stat. Ann. § 60-19a02*, which established caps on recovery for noneconomic damages in personal injury actions, was constitutional as applied to personal injuries resulting from collisions between motor carriers and motor vehicles because the statutory insurance schemes adopted in Kansas provide an adequate remedy for damages arising from personal injury. *Hilburn v. Enerpipe, Ltd.*, 52 Kan. App. 2d 546 (2016).

Statute Allowing for Reimbursement of Personal Injury Protection (PIP) Applied Prospectively. The 2011 amendment to *N.J. Stat. Ann. § 39:6A-9.1*, which allows a personal injury protection (PIP) provider to obtain reimbursement from the tortfeasor's insurer for payments that the PIP provider made to the injured insured only after the insured's claim is satisfied in full, does not expressly or implicitly present any of the factors necessary to rebut the presumption that, as a newly enacted law, it should be applied prospectively. The court declined to determine whether retroactive application would result in unconstitutional interference with "vested rights" or a "manifest injustice." *Johnson v. Roselle EZ Quick LLC*, 226 N.J. 370 (2016).

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

Test for Determining Who is a Resident Relative. In Michigan, the following factors can be considered when determining whether a relative is domiciled in the same household as an insured: (1) the subjective or declared intent of the person of remaining, either permanently or for an indefinite or unlimited length of time, in the place he or she contends is his or her

“domicile” or “household”; (2) the formality or informality of the relationship between the person and the members of the household; (3) whether the place where the person lives is in the same house, within the same curtilage or upon the same premises; (4) the existence of another place of lodging by the person alleging “residence” or “domicile” in the household. Applying this test, a claimant who was living with his parents while he worked on his differences with his wife but he left a vehicle for his wife and children to use at their home was domiciled with his children. *Westfield Ins. Co. v. Progressive Mich. Ins Co*, 2016 Mich. App. LEXIS 2267.

Chapter 8—Scope of Coverage: By Classification of Vehicle

Personal Injury Protection Requirements for Transportation Network Drivers Engaged in Pre-Arranged Rides. Massachusetts, *Mass. Gen. Laws ch. 175, § 228*, and Pennsylvania, *53 Pa. Cons. Stat. § 57A07*, require a transportation network driver who is engaged in a pre-arranged ride to have automobile liability insurance that provides personal injury protection.

Chapter 9—Scope of Coverage—Type of Incident

Bus Passenger Injured as a Result of an Explosion Unrelated to the Use or Operation of the Bus Not Covered. In *Matter of New York City Tr. Auth. v. Heights Med. Care P.C.*, 2016 N.Y. Misc. LEXIS 2829 (*Sup. Ct.* 2016), the New York City Transit Authority (NYCTA) brought an action pursuant to *N.Y. Ins. Law § 5106* for a judgment, upon *de novo* review, declaring that it was not liable for first party no-fault benefits to an accident victim and vacating a no-fault arbitration award exceeding \$5,000 in favor of a medical care facility to whom benefits were assigned by the accident victim. The accident victim

was on the bus and injured as a result of an explosion when a building near where the bus was operating blew up. The injuries were the result of an external explosion unrelated to the use or operation of the bus in which the accident victim was a passenger and the bus was not the proximate cause of his injuries. Thus, the use of the vehicle itself was not the proximate cause of the injury and the arbitration award was vacated.

Employee Injured While He Was Vacuuming on a Bus Not Covered Under Personal Injury Protection (PIP) Statute. A transit company was properly granted summary judgment on an injured employee’s claim for additional benefits under Delaware’s PIP statute, *12 Del. Code § 2118*. The employee was injured while he was vacuuming a bus. The bus was merely the situs of his injury rather than an active accessory in causing it. Therefore, the injury was not the type of accident that was covered by the PIP statute. The injuries were in no way caused by the use or operation of the bus and the bus had nothing more than a negligible effect on the events. *Jones v. Del. Transit Corp.*, 2016 Del. Super. LEXIS 510.

Chapter 10—Exclusions from Coverage

Maryland Authorizes an Owned but Uninsured Exclusion for Named Insured or Family Member. The Maryland statute authorizes an exclusion for the named insured or a family member of the named insured who resides in the named insured’s household for an injury that occurs while the named insured or family member is occupying an uninsured motor vehicle owned by the named insured or an immediate family member who resides in the named insured’s household. *Md. Ins. Code Ann. § 19-505*.

Owned But Uninsured Exclusion Applied to Insured Driving a Taxicab. In *Md. Ins. Admin. v. State Farm Mut. Auto. Ins. Co.*, 2017 Md. LEXIS 16, the policy's owned but not insured exclusion applied and thus the insured was not entitled to personal injury protection (PIP) coverage for injuries insured sustained while he was driving a taxicab he owned but not was covered by policy. The taxicab was a "motor vehicle" for purposes of statutory exclusion from PIP coverage set forth in *Md. Code Ann., Ins. § 19-505*. At the time of the accident, the insured owned two vehicles: a jeep and a taxicab. The jeep was insured under a liability and no-fault policy, which included PIP coverage. The taxicab was insured and carried liability-only coverage, which does not include PIP coverage. In Maryland, taxicabs are not required to carry PIP coverage. The taxicab was, in fact, an "uninsured motor vehicle" because it lacked PIP coverage.

Exclusion of Coverage for Pre-arranged Rides. Delaware, 2 *Del. Code § 1910*, Michigan, *Mich. Comp. Laws § 500.3017*, and Pennsylvania, 53 *Pa. Cons. Stat. § 57A07*, authorize insurers that write automobile insurance to exclude any and all coverage while a transportation network driver is logged onto a digital network or while a driver provides a prearranged ride.

Business Premises Included a Cargo Bay of a Truck and the Business Repair, Service, or Maintenance Exclusion Applied. In *Castillo v. Am. Std. Ins. Co. of Wis.*, 2017 Minn. App. LEXIS 11, the claimant, a business owner, was killed while he was working on a customer's vehicle at his primary business location—his truck's cargo bay. The term "business premises" may include a cargo bay of a truck in which a mobile auto-repair business typically conducts its services. The business repair ex-

clusion applied because the claimant's injury occurred while he was performing repair work for customers in his truck, which was his business premises.

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

Health Care Provider Not Required to Obtain a Medical Necessity Determination to Receive Payment From a No-Fault Insurer. In *St. John Maccomb Oakland Hosp. v. State Farm*, 2016 Mich. App. LEXIS 2253, the hospital made reasonable efforts to obtain payment from the health insurer and the hospital was not required to appeal the medical necessity determination in order to establish that the insured made reasonable efforts to obtain payments that were available from the health insurer. A plaintiff does not need to engage in a potentially lengthy and costly effort of challenging a medical necessity determination in order to obtain health insurance benefits before proceeding to obtain payment from a no-fault insurer. The purpose of the no-fault statute is to provide for assured, adequate, and prompt recovery for economic losses stemming from motor vehicle accidents.

Delaware Provides for a Workers Compensation Set-Off of No-Fault Benefits. Workers compensation is the exclusive remedy, except as to uninsured motorist benefits, underinsured motorist benefits, and personal injury protection benefits. 19 *Del. Code § 2304*.

Provision Provided Legally Sufficient Notice of the Insurer's Election to Use the Permissive Medicare Fee Schedules. In *Orthopedic Specialists v. Allstate Ins. Co.*, 2017 Fla. LEXIS 194, the Florida Supreme Court resolved a conflict among the appellate courts as to whether a policy provided legally sufficient notice of the insurer's election to use the permissive

Medicare fee schedules. The court found that a provision in a policy that amounts payable for personal injury protection (PIP) benefits “shall be” subject to any and all limitations authorized by *Fla. Stat. § 627.736*, including, but not limited to, all fee schedules” was not ambiguous. This language made it obvious that reimbursements would be made in accordance with all of the fee schedule limitations in the Florida statute.

Determining Customary Charges for Medical Products. The Pennsylvania statute, *75 Pa. Cons. Stat. § 1797*, provides that a provider of medical products to automobile accident victims is entitled to reimbursement from automobile insurers, and where, as here, there is no federally-determined Medicare fee for a product, reimbursement is limited to 80% of the provider’s usual and customary charge. The statute does not define the phrase “usual and customary charge,” but the Pennsylvania Department of Insurance has promulgated regulations defining it as the charge most often made by similarly-situated providers. *31 Pa. Code § 69.3*. The regulation permits, but does not require, that reimbursements be calculated predicated on the provider’s bill for services or the data collected by the carrier. *Freedom Med. Supply, Inc. v. State Farm Fire & Cas. Co.*, *131 A.3d 977 (Pa. 2016)*.

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

Question of Whether Parked Vehicles May Be Still Considered as Operating as Motor Vehicles Uncertain in Michigan. In *Lefevers v. State Farm Mut. Auto. Ins. Co.*, *828 N.W.2d 678, 679 (Mich. 2013)*, the court disavowed *Miller v. Auto Owners Ins. Co.*, *92 Mich. App. 263, 284 N.W.2d 525 (1979)* to the extent that it stated that *Mich. Comp. Laws § 3106(b)* recognizes that

some parked vehicles may still be operated as motor vehicles. In *Spectrum Health Hosps. v. Westfield Ins. Co.*, *498 Mich. 969 (2016)*, the court directed the parties to file supplemental briefs addressing: (1) whether *Miller v. Auto-Owners Ins. Co.*, *411 Mich. 633 (1981)* remains a viable precedent in light of *Frazier v. Allstate Ins. Co.*, *490 Mich. 381 (2011)* and *Lefevers v. State Farm Mut. Auto. Ins. Co.*, *828 N.W.2d 678, 679 (Mich. 2013)*; and (2) if so, whether *Miller* should be overruled.

Chapter 14—Claiming No-Fault Benefits

No-Fault Insurer Had Primary Liability Over Health Plan Governed by the Employee Retirement Income Security Act (ERISA). *Bronson Health Care Group, Inc. v. State Farm*, *2016 U.S. Dist. LEXIS 134819 (W.D. Mich. 2016)* involved a dispute between a health care provider and a no-fault regarding payment of an insured’s charges for medical care. The insured was covered both by a health plan governed by ERISA and a no-fault insurer. The no-fault insurer had primary liability for the insured’s medical expenses and the health care provider was entitled to payment from the no-fault insurer subject to the health care provider reimbursing the ERISA health plan for the payments the plan made to the health care provider.

New Jersey Statute Provides for Reimbursement From Tortfeasor’s Insurer Only After Insured’s Claim Satisfied in Full. The New Jersey statute allows a personal injury protection (PIP) provider to obtain reimbursement from the tortfeasor’s insurer for payments that the PIP provider made to the injured insured only after the insured’s claim is satisfied in full. *N.J. Stat. Ann. § 39:6A-9.1*.

Examinations Under Oath (EUO) Permitted in Oregon. The Oregon personal

injury protection (PIP) statute does not address the permissibility of EUOs but there is nothing to suggest that the legislature categorically intended to prohibit a PIP policy provision authorizing a defendant to “reasonably require” a plaintiff to submit to an examination under oath. There was a factual dispute as to whether the insurer reasonably required an EUO and thus the trial court erred by granting summary judgment for the insurer. *Kachan v. Country Preferred Ins. Co.*, 279 Ore. App. 403 (2016).

Insurer Must Strictly Adhere to No-Fault Regulations When Scheduling Independent Medical Examinations (IME). Although the plaintiff insurer provided proof that it sent the insured notices to appear for IMEs and that the insured failed to appear for the examinations, the insurer was not entitled to a default judgment because it failed to establish that it strictly adhered with the no-fault regulations. The insurer failed to show whether the IMEs were scheduled within 30 calendar days from the date it received the completed verification forms or when or if it sent such verification requests as required by 11 N.Y. C.R.R. § 65-3.5(d), which covers the no-fault claims procedure. The court denied the request for a declaratory judgment that the insured was not entitled to no-fault benefits with leave to renew upon proper papers. *Country-Wide Ins. Co. v. East Coast Acupuncture PC*, 2016 N.Y. Misc. LEXIS 4495 (Sup. Ct. 2016).

Failure to Appear for a Properly Noticed Examination Under Oath (EUO) Constitutes Breach of Condition Precedent. In *Nationwide Mut. Ins. Co. v. HMP Orthopedics, P.C.*, 2017 N.Y. Misc. LEXIS 134 (Sup. Ct. 2017), the insured’s failure of a person eligible for no-fault benefits to appear for a properly noticed EUO consti-

tuted a breach of a condition precedent vitiating coverage.

Chapter 15—Arbitration of No-Fault Claims

Enforceability of Anti-Assignment Clause in a No-Fault Policy a Question of Law. The issue of the enforceability of an anti-assignment clause in a no-fault policy was a question of law for the court, not the arbitrator. The interpretation of the Minnesota No-Fault Insurance Act, which regulates automobile insurance policies in Minnesota, is subject to de novo review because it presents a question of law. The policyholders executed assignments to the medical provider before being treated and billed for the medical services. Under the majority rule, the assignments of basic economic loss benefits would be pre-loss and so the insurer’s anti-assignment clause would preclude the assignments to the medical provider. *Stand Up Multipositional Advantage MRI, P.A. v. Am. Family Ins. Co.*, 2017 Minn. LEXIS 3.

Losing Party in a Subrogation Dispute Among Insurer and Self-Insurer May Appeal De Novo to the Court From an Adverse Arbitration Award. The Delaware statute, 21 Del. Code § 2118(g)(3), governing subrogation disputes among insurers and self-insurers, allows the losing party may appeal *de novo* to the superior court from an adverse arbitration award. The court’s authority to entertain appeals from administrative agencies must be statutorily conferred. The Delaware statute establishes two procedures for insurance subrogation disputes: (1) disputes among insurers are subject to mandatory arbitration proceedings before Arbitration Forums Inc. (the insurers clause); and (2) disputes arising between an insurer and a self-insurer are also subject to mandatory arbitration, but such proceedings must be con-

ducted by the Insurance Commissioner *in the same manner* as the arbitration of claims provided for the self-insurers clause. The most reasonable reading of the *in the same manner* language is that it encompasses all subparts of the statute, including the right to appeal. The statute provides no basis for denying a losing party the right to appeal solely based on one party's status as a self-insurer. *City of Wilmington v. Nationwide Ins. Co.*, 2017 Del. LEXIS 6.

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

Counsel for Medical Provider Not Entitled to Attorney's Fees. In *Freedom Med. Supply v. Allstate Fire & Cas*, 2015 Phila. Ct. Com. Pl. LEXIS 449, aff'd, 2016 Pa. Super. Unpub. LEXIS 4148 (2016), the insurer denied the medical provider's claim because the insured could not confirm receipt of the medical equipment—a whirlpool and an electrical muscle stimulator. The medical provider failed to establish that it provided any merchandise to the insured. Regardless of whether it was medically necessary or not, the insurer acted in a reasonable manner in denying its claim for reimbursement. Accordingly, counsel for the medical provider was not entitled to any attorney's fees under 75 Pa. Cons. Stat. § 1716.

Chapter 17—Tort Recovery: Tort Liability Retained

New Jersey Limitation on Lawsuit Option Applied to Former New Jersey Resident. In *Espinal v. Demoranville*, 2016 Conn. Super. LEXIS 2367, the plaintiff selected the limitation on lawsuit option in his New Jersey policy. The question before the court was whether his injuries fell within any of the exceptions to the limitations in the no-fault statute. New Jersey requires the insured to provide a statement from a licensed treating physician certifying

that the insured has sustained a serious injury. The court concluded that the physician's physical examination and resulting findings raised a genuine issue of material fact as to whether the automobile accident caused injuries to the plaintiff's lower back which have not healed to function normally and will not heal to function normally. Although the insured was now a Connecticut resident, New Jersey law applied because the plaintiff procured the policy in New Jersey, resided in New Jersey when it was procured, lived and worked in New Jersey when it was procured, and had a New Jersey driver's license. The plaintiff did not inform the insurer that he had moved to Connecticut.

Chapter 18—Tort Recovery Thresholds

Post-Concussion Syndrome as Serious Injury. After the accident, the insured was diagnosed with post concussion syndrome. The insured sought treatment for cognitive issues, including headaches, dizziness, short term memory loss, fatigue, insomnia, depression, and blurred vision. One of the insureds' proposed experts attributed these symptoms to a concussion the insured sustained in the accident. Summary judgment was not appropriate because the evidence the insured produced could lead reasonable minds to differ regarding whether he sustained a serious injury. *McCloskey v. Westfield Ins. Co.*, 2016 U.S. Dist. LEXIS 160017 (E.D. Pa. 2016).

Serious Impairment of a Body Function Requires Insured to Establish that Some of the Insured's Ability to Live in His or Her Normal Manner of Living Has Been Affected. In *Hall v. Miko*, 499 Mich. 889 (2016), the Michigan Supreme Court declined to reconsider the no-fault statute's "serious impairment" threshold for tort liability as construed by *McCor-*

mick v. Carrier, 487 Mich. 180, 795 N.W.2d 517, 534 (2010). The appellate court determined that in evaluating serious impairment of a body function the correct inquiry is whether there has been an influence on the person's capacity to live in her normal manner of living. The no-fault statute only requires that some of the person's ability to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected. It was enough that they presented evidence to establish that some of their general ability to lead their normal lives had been affected. Given the evidence presented by the plaintiffs demonstrating that some of their general ability to lead their normal lives had been affected, the trial court erred by granting summary disposition to the insurer. *Hall v. Miko*, 2015 Mich. App. LEXIS 1407.

Insured's Claim of Serious Injury Contradicted by His Facebook Posts. In *Lopez-Garcia v. United States*, 2016 U.S. Dist. LEXIS 125281 (E.D. Mich. 2016), the plaintiff's argument that his ability to lead a normal life was affected by the accident was contradicted by the overwhelming evidence in the record. On his Facebook page, the plaintiff admitted that "life is good" and he was "working 100 percent running his own crew." Other Facebook posts, which the plaintiff acknowledged at his deposition, show him participating in a family cookout, riding a train, visiting a water park, riding a four-wheeler, and taking a six-week cross-county road trip during which he and his wife did all the driving. The fact that the plaintiff claimed he could not engage in shoveling snow or playing sports was immaterial absent a showing that these activities were significant to his life prior to the accident.

Unsworn Letters or Medical Reports Not Objective Proof of an Injury. Sub-

jective complaints alone are not sufficient to defeat summary judgment. The plaintiff must provide "objective proof of an injury." The plaintiff must offer admissible evidence in the form of sworn medical records, such as magnetic resonance imaging (MRI) reports, and sworn affidavits or reports by physicians. Unsworn letters or medical reports are inadmissible, and may not be considered. *Kim v. Rodriguez*, 2016 U.S. Dist. LEXIS 153246 (E.D. N.Y. 2016).

Report of Insured's Doctor Contained Both Long-Term Qualitative and Quantitative Descriptions of Serious Injury. In *Heiser v. Coreas*, 2016 N.Y. Misc. LEXIS 4597 (Sup. Ct. 2016), the plaintiff met her burden of demonstrating the existence of a triable issue of fact as to whether she suffered a serious injury. The sworn medical report of the plaintiff's doctor contains both long-term qualitative and quantitative descriptions of the plaintiff's injuries, as required by *Toure v. Avis Rent-A-Car Sys.*, 98 N.Y.2d 345, 353, 746 N.Y.S.2d 865, 870, 774 N.E.2d 1197, 1202 (2002), as well as an opinion that plaintiff's injuries were permanent and a direct result of the accident. Although there was a gap in treatment for physical therapy between July 15, 2014 and December 22, 2015, the plaintiff's doctor argued that, absent surgery, additional physical therapy would no longer benefit the plaintiff and would only be palliative.

Chapter 23—Statutory Uninsured Motorist Coverage

Unambiguous Other-Owned Vehicle Exclusion Did Not Conflict with the Uninsured/Underinsured Motorist (UM/UIM) Statute. Policy exclusions are enforced as long as they are unambiguous, do not conflict with the UM/UIM statute, and are not against public policy. Unambiguous other-owned vehicle exclusions do

not conflict with the UM/UIM statute and do not violate public policy. *Graf v. State Farm Mut. Auto. Ins. Co.*, 2016 ME 153.

Tennessee Uninsured Motorist Coverage Protects Insureds From Those Who Do Not Purchase Liability Insurance. In Tennessee, uninsured motorist (UM) coverage does not actually insure the uninsured motorist but rather insures the insured and assures him or her of some recovery when the other parties do not have liability insurance. The purpose of the UM statute is to protect those who purchase motor vehicle liability insurance from those who do not. In *Martin v. Powers*, 2016 Tenn. LEXIS 736, the defendant drove a rental car into the plaintiff. The plaintiff brought an action against the defendant, the defendant's insurer and the rental car company. The plaintiff was insured under a policy that provided uninsured/underinsured motorist (UM/UIM) coverage in the amount of \$250,000 per person or \$500,000 per event and sought coverage under this policy. The insured denied coverage on the grounds that the rental car was not an uninsured motor vehicle. The rental car that injured the plaintiff was not owned by a self-insurer under any applicable motor vehicle law and, therefore, met the definition of an uninsured motor vehicle under the policy.

Arkansas Uninsured Motorist (UM) Coverage Follows the Automobile. In *Farm Bureau Cas. Ins. Co. v. Shelter Mut. Ins. Co.*, 2016 Ark. App. 563, the court inferred that the legislature intended that uninsured motorist (UM) coverage, Ark. Code § 23-89-403, like liability insurance, Ark. Code § 23-89-215, followed the automobile because it required that UM coverage be offered on every liability policy. The lower court erred in holding that coverage existed under an injured driver's policy where another insurer's policy covered the vehicle involved in the accident, thereby

providing the primary UM coverage available to the driver. The driver's claim was not covered under his policy because he was injured in a non-owned automobile that had primary coverage.

Commercial Umbrella or Excess Liability Policies Do Not Need to Provide Uninsured/Underinsured (UM/UIM) Coverage. In *Fireman's Fund Ins. Co. v. Ackerman*, 56 N.E.3d 1209 (Ind. Ct. App. 2016), the trial court erred in denying the insurer's motion for summary judgment regarding underinsured motorist (UIM) coverage under former Ind. Code Ann. § 27-7-5-1.5, which was repealed in 2010. The current statute eliminated the requirement that commercial umbrella or excess liability policies provide uninsured/underinsured (UM/UIM) coverage.

Business Automobile Coverage Applied to Covered Vehicles Only. In *Edens v. Neth. Ins. Co.*, 834 F.3d 1116 (10th Cir. 2016) applying Oklahoma law, the business automobile coverage form provided general auto-accident liability coverage as follows: "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'." The owner of the business covered by the business automobile sought coverage for the death of his son on a motorcycle. The son was not an "insured" because he was not "'occupying' a covered 'auto.'"

Vehicle Owner's Uninsured Motorist (UM) is Primary. Citing Legislative intent, the Kentucky Supreme Court found that in instances where both the vehicle owner and a non-owner passenger were separately insured with UM coverage, the

vehicle owner's coverage was primary. The lower court erred in concluding that the insurer of the injured passenger bore primary responsibility for the passenger's UM claim. *Countryway Ins. Co. v. United Fin. Cas. Ins. Co.*, 496 S.W.3d 424 (Ky. 2016).

Employee Injured in Workplace Accident Not Entitled to Recover Under Employer's Uninsured Motorist (UM) Policy. The plaintiff in *Vasquez v. Am. Cas. Co. of Reading*, 2016 N.M. LEXIS 186 was not legally entitled to recover damages from the uninsured tortfeasor because the plaintiff's exclusive remedy was workers' compensation. The New Mexico Workers Compensation Act provides the exclusive remedy for an employee injured in a workplace accident by an employer or its representative. The employee was not legally entitled to recover damages from the uninsured employer tortfeasor under the UM statute. The plaintiff was not legally entitled to recover damages from the employer, the tortfeasor and holder of the uninsured motorist policy.

Apportionment of Responsibility Between the Known and Unknown Defendants Allowed. In *Krzykalski v. Tindall*, 150 A.3d 1 (N.J. App. Div. 2016), a personal injury suit, the trial judge properly allowed the jury to apportion responsibility between the known and unknown defendants. To preclude the defendants from seeking an apportionment of liability against the phantom vehicles did not advance the purposes of the uninsured motorist law and frustrated the purposes of the joint tortfeasor and comparative fault law. To allow the plaintiff to obtain from the remaining defendant the full amount of damages assessed by the jury and, later, seek recovery from the UM insurer, could result in a windfall.

Insurer Elected to Include Underin-

ured Motorist (UIM) Coverage in Umbrella Policy. Although the insurer was not required to provide UIM coverage in the umbrella policy issued to the claimant's employer, once the insurer elected to afford UIM coverage, it was required under *Ind. Code § 26-7-5-2* to provide that coverage in limits equal to or greater than the policy's general liability limit, which was \$5,000,000. *Frye v. Auto-Owners Ins. Co.*, 845 F.3d 782 (7th Cir. 2017), applying Indiana law.

A Florida Jury Awarded Lost Past Earnings and Lost Future Earning Capacity in an Action to Collecting Uninsured Motorist (UM) Benefits. In *Safeco Ins. Co. v. Fridman*, 196 So. 3d 1284 (Fla. Dist. Ct. App. 2016), an action to establish his injuries for purposes of collecting under his UM coverage, the jury's award of lost past earnings and lost future earning capacity were primarily based on the insured's speculation about his potential earnings if he had been able to continue to operate a new wholesale marble and tile business. Although the insured presented evidence that he was unable to continue with his wholesale marble and tile business because of the injuries he suffered in the automobile collision, he failed to present any evidence of the amount of earnings that could reasonably be expected from such a business, other than his unsubstantiated speculation that he could make a \$100,000 to \$200,000 in a good year. This type of speculative testimony was insufficient to support an award of damages.

Evidence of Second Accident Improperly Excluded in Action to Recover Uninsured/Underinsured Motorist (UM/UIM) Benefits. In *State Farm Mut. Auto. Ins. Co. v. Woodgett*, 59 N.E.3d 1090 (Ind. Ct. App. 2016), the trial court abused its discretion in excluding evidence of an automobile accident involving the insured

that occurred after the accident which led to the lawsuit at an insured's trial to recover UM/UIM benefits. The court abused its discretion when it excluded evidence of the second automobile accident involving the insured because a logical nexus existed between the second accident and the migraine headaches which the insured began to suffer such that the second accident was a possible cause of the headaches.

Award of Attorney's Fees Reversed Where Insured Had Not Established That She Was Legally Entitled to an Amount of Damages That Exceeded the Limits of the Underinsured Motorist's Policy. Although the Uniform Declaratory Judgment Act (UDJA), which authorizes the court to award costs and reasonable and necessary attorney's fees, was the appropriate procedure for asserting an underinsured motorist (UIM) claim, attorney's fees could not be awarded to the insured. An insurer has no duty to pay UIM benefits until the plaintiff has established that she is legally entitled to an amount of damages that exceeds the limits of the UIM's policy. Therefore, the insurer has the right to make the plaintiff meet the liability and damages prerequisites to UIM recovery, through litigation or otherwise. Consequently, requiring an insurer to pay attorney's fees for exercising its right to require the plaintiff to establish its entitlement to recovery of UIM benefits under the policy would be inequitable and unjust under the UDJA, *Tex. Civ. Prac. & Rem. Code* § 37.009. *Allstate Ins. Co. v. Jordan*, 503 S.W.3d 450 (Tex. Ct. App. 2016).

Clause Prohibiting Punitive or Exemplary Damages Upheld. Louisiana courts have held that the uninsured motorist (UM) statute's language, which allows providers of UM coverage to exclude coverage for punitive or exemplary damages, does not violate public policy. The court upheld a

UM policy that clearly stated that there was no coverage for punitive or exemplary damages. The fact that the at-fault driver was intoxicated did not change the result. *Cazenave v. ANPAC La. Ins. Co.*, 2016 U.S. Dist. LEXIS 171806 (E.D. La. 2016).

Punitive Damages Denied In the Absence of Evidence Linking Insurer's Denial of Coverage to Improper Motive. In Arizona, punitive damages are appropriate only in the most egregious of cases upon proof of the defendant's reprehensible conduct and evil mind. In *Sobieski v. Am. Std. Ins. Co.*, 382 P.3d 89 (Ariz. Ct. App. 2016), the court affirmed a judgment against the insurer for breach of the duty of good faith and fair dealing after it denied the insured's uninsured motorist (UM) claim. The insurer knew that when an uninsured motorist claim was made in a comparative negligence state such as Arizona, even the slightest degree of fault on the part of the uninsured motorist could implicate the policy. The award of punitive damages to the insured was improper because there was no evidence linking the insurer's denial of coverage to an improper motive.

Made Whole Doctrine Applied in Subrogation Dispute. In *Prof'l Flooring Co. v. Bushar Corp.*, 2016 PA Super 274, the made whole doctrine applied in a subrogation dispute. The insured had to recoup the full value of its losses before the insurer could recover. The insurer's subrogation interest arose both from an express, contractual declaration and by implication under the common law, as a matter of equity and public policy.

Chapter 24—Uninsured Motorist Endorsement

Underinsured Motorist (UIM) Policy Limited Recovery to Bodily Injury Suffered By The Insured. In *Bono v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist.

LEXIS 177404 (D. Ariz. 2016), the plaintiff could not recover UIM benefits for damages resulting from bodily injury or death of an uninsured third person, her son. The policy limited coverage to accidents where bodily injury is suffered by the insured. The plaintiff's son was struck and killed by a drunk driver while he was walking in a crosswalk. The driver's insurer tendered the \$50,000 liability limit to the plaintiff for her son's wrongful death. The plaintiff's damages exceeded \$50,000 and thus the driver was therefore "underinsured." The plaintiff was insured by the defendant under a policy that contained underinsured motorist (UIM) coverage for \$100,000. The plaintiff's son did not live with her and was not a named insured on her policy.

Step Grandchild Not a Relative For Purposes of the Uninsured Motorist (UM) Policy. In *Yuan Lei v. Progressive Mich. Ins. Co.*, 887 N.W.2d 782 (Mich. 2016), the UM policy did not cover the plaintiff because she was the insured's step-grandchild and therefore not "a relative" as defined in the policy. The plaintiff was neither related to the insured by marriage, nor was she the insured's stepchild and thus she was not insured as "a relative" of the insured under the terms of the UM policy.

Policy Requiring Relative to Reside Primarily with the Named Insured for Recovery of Uninsured/Underinsured Motorist (UM/UIM) Policy Violated Public Policy. A policy's definition of "resident relative" that required a relative to reside primarily with the named insured to receive uninsured/underinsured motorist (UM/UIM) benefits violated public policy because it provided coverage to a narrower class of persons than the UM/UIM statute, *Colo. Rev. Stat. § 10-4-601*. The UM/UIM statute defined a resident relative as a person who, at the time of the accident, is

related by blood, marriage, or adoption to the named insured or resident spouse and who resides in the named insured's household, even if temporarily living elsewhere, and any ward or foster child who usually resides with the named insured, even if temporarily living elsewhere. *Grippin v. State Farm Mut. Auto. Ins. Co.*, 2016 Colo. App. LEXIS 1279.

Underinsured Motorist (UIM) Step-Downs Applied to Van Driver Requesting UIM Coverage From His Employer's Business Automobile Liability Insurer. Illinois does not have a strong public policy against underinsured motorist (UIM) step-downs. In *James v. SCR Med. Transp., Inc.*, 61 N.E.3d 1043 (Ill. App. Ct. 2016), the insurer denied a van driver's claim because the UIM coverage was limited to \$50,000, which was the amount the van driver had already received from the other driver, meaning that he was not "underinsured" within the meaning of the policy. After receiving the \$50,000 limit of the other motorist's insurance coverage and a \$28,608 settlement in workers' compensation benefits from his own employer, the van driver requested UIM coverage from his employer's business automobile liability insurer.

The insurance form executed by the employer that reduced its \$1,000,000 liability coverage to \$50,000 for UIM and UM coverage did not violate public policy. A van driver who was injured in a collision was not permitted to bring a claim against his employer for damages under the workers compensation statute, 820 Ill. Comp. Stat. 305/5 because he received workers' compensation benefits and a lump settlement to address all of his injuries.

Employee Who Had Not Reached Parked Vehicle When Struck Was Not an Occupant of the Insured Vehicle. In *J.*

Lawrence Constr. Corp. v. Republic Franklin Ins. Co., 43 N.Y.S.3d 452 (App. Div. 2016), an employee who was struck as he was about to enter his parked car was not an occupant of the car within the meaning of a supplemental uninsured/underinsured motorist (SUM) policy issued to his employer. The employee had parked and gone across the street and then crossed the street to return he was struck by a car. The employee had yet to reach the insured vehicle when he was struck.

Employee Who Had Exited the Truck Thirty Minutes Prior to Being Struck and Standing at Least Ten Feet Away from the Insured Vehicle Not Occupying the Vehicle. In *State Farm Mut. Auto. Ins. Co. v. Bailey*, 203 So. 3d 995 (Fla. Dist. Ct. App. 2016), an employee of the named insured, who was driving the named insured's truck prior to the accident, was not entitled to uninsured motorist (UM) coverage because he was not "occupying" the vehicle at the time he was struck. The policy defined the term occupying as "in, on, entering or alighting from" the insured truck. At the time of the accident, the employee had exited the truck some thirty minutes prior to being struck and was standing at least ten feet away from the vehicle. The separation between the employee and the truck in both time and distance precluded a finding that the employee was occupying the vehicle at the time he was struck.

Clear and Unambiguous Owned-But-Not-Scheduled Provisions May Exclude Underinsured Motorist (UIM) Coverage. In *Phila. Indem. Ins. Co. v. Tryon*, 502 S.W.3d 585 (Ky. 2016), the court determined that owned-but-not-scheduled provisions in a motor vehicle policy are enforceable as a matter of public policy to deny underinsured motorist (UIM) benefits so long as the plain meaning of the policy

clearly and unambiguously excluded that type of coverage. The insurer's policy failed to plainly exclude coverage and the court affirmed the appellate court's reversal of summary judgment and remanded to the trial court for proceedings.

Owned Vehicle Exclusion Barred Underinsured Motorist (UIM) Coverage. In *Walker v. Progressive Direct Ins. Co.*, 840 F.3d 491 (8th Cir. 2016) applying Missouri law, the wife of a man who died in a motorcycle accident could not recover underinsured motorist (UIM) coverage under policies insuring their six other cars. The "owned vehicle" exclusion barred coverage because the husband was a named insured who owned the vehicle he was driving and that vehicle was not covered under the policies.

Regular Use Exclusion Applied to Bar Uninsured Motorist (UM) Coverage. In *Shempert v. Cox*, 2016 Tenn. App. LEXIS 611, the insured was not entitled to UM benefits under *Tenn. Code § 56-7-1201* because the vehicle driven by the injured insured did not fall within the definition of "your insured car" as set forth in the policy. The regular use exclusion of the policy obviated coverage for the injured insured as the vehicle was made available by his employer for his regular use. The "regular use" exclusion was clear, unambiguous, and did not contravene Tennessee public policy.

Uninsured/Underinsured Motorist (UM/UIM) Requirements for Transportation Network Provides. Hawaii, *Haw. Rev. Stat. § 431:10C-703*, and Massachusetts, *Mass. Gen. Laws ch. 175, § 228*, require transportation network providers to provide UM/UIM coverage.

Insurers May Extend For Hire Exclusion to Transportation Network Providers. Delaware, *2 Del. Code § 1910*, Michi-

gan, *Mich. Comp. Laws* § 500.3017, and Pennsylvania, 53 *Pa. Cons. Stat.* § 57A07, allow insurers to exclude uninsured/underinsured motorist UM/UIM coverage to transportation network providers.

New Jersey Regulates Autocycles for Purposes of Compulsory Uninsured Motorist Coverage. The New Jersey statute requires every owner or registrant of an automobile or autocycle registered or principally garaged in New Jersey to maintain uninsured motorist coverage. *N.J. Stat. Ann.* § 39:6A-14.

Chapter 25—Prerequisites to Recovery

The District of Columbia Motor Vehicle Collision Recovery Act of 2016 Limits Pedestrian or Bicyclist’s Contributory Negligence As a Bar Recovery. The negligence of a pedestrian, bicyclist, or other non-motorized user of a public highway involved in a collision with a motor vehicle does not bar the plaintiff’s recovery in any civil action unless the plaintiff’s negligence is: (1) a proximate cause of the plaintiff’s injury; and (2) greater than the aggregated total amount of negligence of all of the defendants that proximately caused the plaintiff’s injury. *D.C. Code* § 50-2204.52.

Insured Seeking Noneconomic Benefits From Uninsured Motorist (UM) Insurer Must First Meet the Permanent Injury Requirement of the No-Fault Statute. In *Cadle v. GEICO Gen. Ins. Co.*, 838 *F.3d* 1113 (11th Cir. 2016) applying Florida law, the lower court correctly entered judgment as a matter of law for an insurer in a civil action for bad faith because the insured failed to establish permanent injury under *Fla. Stat.* § 627.727(7) for noneconomic damages. *Fla. Stat.* § 627.727(7) provides that the legal liability of an UM

insurer does not include damages in tort for pain, suffering, mental anguish, and inconvenience unless the injury or disease is described in the no-fault statute, *Fla. Stat.* § 627.737.

Six Month Delay in Providing Notice to Uninsured Motorist Insurer Was Unreasonable. In *GEICO Indem. Co. v. Smith*, 338 *Ga. App.* 455 (2016), the insured’s six-month delay in providing notice to uninsured motorist (UM) insurer was unreasonable and violated the obvious intent of the policy’s notice requirement. The policy required the insured to give notice soon as possible after an accident.

Oregon Authorized Examinations Under Oath. The Oregon statute provides that the insured and every other person making claim for uninsured motorist benefits submit to examinations under oath by any person named by the insurer as often as may reasonably be required. *Or. Rev. Stat.* § 742.504 (5)(a).

Chapter 26—Hit and Run Accidents

Michigan Recognizes Indirect Physical Contact As long as a Substantial Physical Nexus Exists. In *Herrera v. State Farm Mut. Auto. Ins. Co.*, 2017 *Mich. App. LEXIS* 97 (unpublished), the court denied the insurer’s motion for summary judgment because the presence of the metal object on the highway—based on the surrounding circumstances and the absence of any other reasonable explanation for the metal object’s presence—established a substantial physical nexus between a hit-and-run vehicle and the object. Indirect physical contact is sufficient under the policy language as long as a substantial physical nexus exists.

Claimant Not Entitled to Uninsured Motorist (UM) Benefits Because There Was No Physical Contact, Direct or Indirect, Between His Vehicle and the Un-

known Motorist. Uninsured motorist (UM) coverage in Michigan is optional and thus the policy determines under what circumstances such benefits will be awarded. The UM policy required actual physical contact with the injured person or the automobile the injured person is occupying and whose owner or operator is unknown. The claimant was not entitled to UM benefits because he conceded that there was no physical contact, direct or indirect, between his motorcycle and the unknown motorist. The claimant was injured when he took evasive action to avoid hitting an unidentified vehicle. The court declined to abandon the physical contact requirement even though there was no evidence of fraud. *Lang v. Auto-Owners Ins. Co.*, 2017 Mich. App. LEXIS 56 (unpublished).

Chapter 28—Arbitration of Uninsured Motorist Claims

Physical Contact Issue Must Be Decided By Court Not Arbitrator. In *Nationwide Ins. Co. of Am. v. Marquez*, 2016 U.S. Dist. LEXIS 167790 (E.D. Cal. 2016), the defendant moved to dismiss the insurer's claim for declaratory relief concerning the defendant's insurance coverage. The insurer sought a determination whether the defendant was entitled to uninsured motorist (UM) coverage for an accident suffered as an alleged hit-and-run. The arbitrable issues are strictly limited to whether the insured may recover against the uninsured motorist and what, if any, damages are appropriate. The physical contact issue—whether the plaintiff made contact with another vehicle while she was biking—goes to whether the plaintiff was covered under the policy.

Permanent Stay of Arbitration Denied as the Full Amount of the Insured's Bodily Injury From the Accident Had Not Been Determined. The maximum

supplemental uninsured/underinsured motorist (SUM) benefit is the difference between the SUM endorsement limit and the tortfeasor's automobile liability policy limit. The court denied the petition to permanently stay arbitration as the full amount of the insured's bodily injury damages from the accident had not been determined. *Matter of Government Empls. Ins. Co. v. Sherlock*, 140 A.D.3d 872, 32 N.Y.S.3d 635 (2016).

Special Rules about Medical Opinions and Issuance of Subpoenas. In Illinois, if the amount of damages sought is equal or less than the amount of the Illinois motor vehicle liability limits (625 Ill. Comp. Stat.5/7-203) then the American Arbitration rules apply. If the amount of damages exceeds that amount, the rules of the circuit court for placing medical opinions into evidence apply. Illinois has also updated the rules regarding the issuance of subpoenas for the attendance of a witness and the production of records. 215 Ill. Comp. Stat. 5/143a.

Chapter 29—The Litigation of Uninsured Motorist Claims

Attorney's Fees Awarded Against Insurer That Knew That the Claimant's Damages Exceeded Policy Limits. The Idaho statute allows for an award of reasonable attorney's fees where an insurer has failed to pay the amount justly due under an uninsured/underinsured motorist (UM/UIM) policy for a period of 30 days after proof of loss has been furnished to the insurer. *Idaho Code § 41-1839*. In *Gearhart v. Mut. of Enumclaw Ins. Co.*, 378 P.3d 454 (Idaho 2016), the court required an insurer to pay the policy limit on each of two separate policies for the benefit of an injured minor because the actual language employed in the policies was confusing to the extent that it was ineffec-

tive to establish a barrier to recovery of the child's actual damages in the full amount of the limit provided in each of the two policies. Attorney's fees were awarded to the child under *Idaho Code § 41-1839* because the insurer had knowledge for quite some time of the fact that the child's damages exceeded the limits of both of its policies.

Uninsured Motorist and Bad Faith Claims Bifurcated. In an insured's claim seeking uninsured motorist (UM) benefits from her insurer arising out of a hit and run accident, her claim against the insurer for bad faith was not intertwined, although much of the evidence would be duplicative, and therefore the claims were correctly ordered bifurcated. The court ordered that the trials of the two claims should occur separately to avoid prejudice to the insurer, but for convenience, the claims should be tried to the same jury, with the UM claim being tried first and the bad faith claim second. *McKinley v. Menahan*, 385 Mont. 539 (2016).

Ordinary Breach of Contract Claim Will Not Support Punitive Damages. In *Kelly v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 170777 (D. Nev. 2016), a case arising out of an insurer's alleged breach of an uninsured motorist (UM) policy following an automobile accident, the evidence demonstrated that the insurer acted reasonably in processing the claim. The insurer reviewed the information received from the insured's counsel and health care providers and learned of a worker's compensation benefit payment in the amount of \$13,720.62, which the insurer believed reflected the insured's actual medical special damages. The insurer communicated that it had applied this offset and disclosed the exact provisions of the policy contract which entitled it to apply the offset in a letter to the insured's counsel. The

insurer's characterizations of the insured's claim in the letter explaining the bases for its \$3,500 offer were not misrepresentations of the policy terms or of pertinent facts relating to coverage, but rather constituted its analysis of the policy and the facts pertinent to the claim. The insured presented no evidence to support her assertion that the payment of \$3,500 to settle the claim was unreasonable in light of the circumstances. To prove a claim of insurance bad faith, the plaintiff must establish that the insurer denied the insured's claim, without any reasonable basis, and with knowledge or awareness of the lack of any reasonable basis to deny coverage, or with reckless disregard as to the unreasonableness of the denial.

Attorney's Fees Denied as No Evidence That Insurer's Actions Were Vexatious or Without Reasonable Cause. In *Kern v. Progressive N. Ins. Co.*, 2016 SD 52, evidence of another case in which the insurer was found to have engaged in vexatious behavior and in which attorney's fees were awarded was properly excluded. The insured failed to meet his burden proving that the insurer's negotiations were vexatious or without reasonable cause as required under *S.D. Codified Laws § 58-12-3*.

Claimant Presented Sufficient Evidence That Insurer Breached Implied Duty of Good Faith and Fair Dealing. In Colorado, all contracts contain an implied duty of good faith and fair dealing. The insurer's adjuster acknowledged a duty to investigate the insured's claim, but failed to conduct a sufficient investigation to determine whether the insured assumed the risk for the accident and whether she was entitled to greater damages from the tortfeasor. The insurer acted unreasonably when determining without adequate investigation that the insured had known that the tortfea-

sor would drive away. The insurer did not try to speak with other passengers even though they could have shed light on whether they knew the tortfeasor had been intoxicated. Furthermore, the insurer unreasonably investigated the damages that the insured could obtain against the tortfeasor. *Peden v. State Farm Mut. Auto. Ins. Co.*, 841 F.3d 887 (10th Cir. 2016) applying Colorado law.

Dispute Between Insured and Insured Concerning the Proper Interpretation of Several Cases Following Sackett I, II and III Regarding When an Insurer is Obligated to Provide Stacked

Uninsured/Underinsured Motorist (UM/UIM) Coverage Did Not Support Bad Faith Claim. In *Trustgard Ins. Co. v. Campbell*, 2016 U.S. Dist. LEXIS 163606 (W.D. Pa. 2016), the basis for the plaintiffs' statutory bad faith claim against the defendant insurer rested solely upon a dispute between the parties concerning the proper interpretation of several cases following the *Sackett I, II and III* regarding when an insurer is obligated to provide stacked UM/UIM benefits to an insured pursuant to 75 Pa. Cons. Stat. § 1738. The plaintiffs argued that the insured's denial of stacked UIM benefits was unreasonable because the only reasonable interpretation of the policy and analysis of the legal precedents would have resulted in payment of stacked benefits. Although the insureds were entitled to stacked UIM benefits, the insurer's legal position was reasonable. The parties disagreed about whether the one of the vehicles was added to the policy by endorsement or by the "newly acquired vehicle" clause of the policy. Both parties' positions were reasonably supported by case law and thus the court could not find bad faith.

Third Circuit Adopted Test For Assessing Bad Faith Claims. In assessing the elements of a bad faith insurance claim, the

Third Circuit in *Talotta v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 167248 (E.D. Pa. 2016), adopted the test the Pennsylvania Superior Court enunciated in *Terletsky v. Prudential Prop. & Cas. Ins. Co.*, 649 A.2d 680, 688 (Pa. Super. Ct. 1994), which requires a plaintiff to recover under 42 Pa. Cons. Stat. § 8371, to show by clear and convincing evidence that the insurer: (1) did not have a reasonable basis for denying benefits under the policy; and (2) knew or recklessly disregarded its lack of a reasonable basis in denying the claim.

Florida Recognizes the Doctrine of Bad Faith in Uninsured/Underinsured Motorist (UM/UIM) Cases. In *Fridman v. Safeco Ins. Co.*, 185 So. 3d 1214, 1230 (Fla. 2016), the insured was entitled to a jury determination of liability and the full extent of his damages, which may be in excess of the policy limits, in the underlying UM/UIM action prior to litigating a first-party bad faith cause of action. This determination is then binding in the subsequent bad faith action.

Washington Insurance Fair Conduct Act (IFCA) Does Not Create Private Cause of Action for Regulatory Violations. The Washington IFCA, Wash. Rev. Code § 48.30.015, which addresses unreasonable denial of a claim for coverage or payment of benefits, did not create an independent cause of action for regulatory violations. The IFCA creates a cause of action for a first party insured who is unreasonably denied a claim for coverage or payment of benefits but does not create a separate cause of action for regulatory violations. *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 2017 Wash. LEXIS 92.

Chapter 30—Underinsured Motorist Coverage

Waiver of Underinsured Motorist

(UIM) Coverage Complied With Statutory Requirements. In *Petty v. Federated Mut. Ins. Co.*, 2016 PA Super 285, the alleged waiver of UIM coverage specifically complied with the Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. § 1731, and in fact contained a verbatim recitation of the language used in the statute. The trial court's reference to the intent of the contractual parties was consistent with fundamental tenets of statutory construction.

Indiana Law Does Not Permit a Limits-to-Limits Comparison in Determining Whether a Vehicle is Underinsured. Under Indiana law, a vehicle is underinsured if the payments that the insured has received are less than the limits of the insured's underinsured motorist (UIM) policy. *Sorrels v. Elliott*, 2016 U.S. Dist. LEXIS 169097 (E.D. Ky. 2016).

Insured Was Entitled to Her Full Limit of Underinsured Motorist (UIM) Coverage But No More. In *Ill. Emcasco Ins. Co. v. Tufano*, 63 N.E.3d 985 (Ill. App. Ct. 2016), a declaratory judgment action, the court determined the claimant passenger's entitlement to underinsured motorist (UIM) coverage must be considered individually. The passenger would ordinarily be entitled to receive \$400,000 in UIM coverage for the first driver (who was only insured for \$100,000) and \$205,000 in UIM coverage for the second driver (who paid \$295,000), for a total of \$605,000. However, the passenger's UIM policy with the plaintiff insurer was only for \$500,000 and she could not receive more than the \$500,000 for which she contracted, and on which the policy premiums were based. Thus, the passenger was not entitled to \$605,000. The passenger was entitled, at most, to the full limit of her UIM policy, which was \$500,000. UIM coverage exists to fill the gap between the amount received

from the tortfeasor's insurance and the amount of the insured's UIM policy limit.

Tortfeasor's Vehicle Was Not Underinsured Because His Policy Limits Exceeded the Plaintiff's Policy Limits. According to the Illinois statute, 215 Ill. Comp. Stat. 5/143a-2(4) and the express terms of defendant insurer's policy, the plaintiff and the estate of her deceased daughter could not recover the policy limits under the plaintiff's policy with the insurer because each recovered an amount under the policy of a drunk driver (\$100,000) that was greater than the plaintiff's policy limits (\$50,000). The drunk driver's vehicle was not underinsured because his policy limits (\$100,000) exceeded the plaintiff's policy limits (\$50,000). *Sherrod v. Esurance Ins. Servs.*, 65 N.E.3d 471 (Ill. App. Ct. 2016).

Factual Dispute as to Whether the Insured Electronically Signed a Waiver of Underinsured Motorist (UIM) Coverage. In *Johnson v. First Acceptance Ins. Co.*, 2017 Ala. Civ. App. LEXIS 4, the court denied the insurer's motion for summary judgment because there was a factual dispute as to whether the insured electronically signed the part of the insurance application that waived UIM coverage. The insured testified that the insurer did not provide him with that part of the application pertaining to UIM coverage, he had not selected a font for signing electronically, and he had not noted on a computer any indication that he wanted to decline UIM coverage.

Chapter 31—Duplicate Recoveries

Workers Compensation Provides Exclusive Remedy for Work Related Accidents. In *Soledad v. Tex. Farm Bureau Mut. Ins. Co.*, 2016 Tex. App. LEXIS 11826, the insured could not recover uninsured/underinsured motorist (UM/UIM) benefits after receiving work-

ers' compensation benefits under *Tex. Lab. Code* § 408.001, which provides that workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage for a work-related injury sustained by the employee. The insured made a claim under her UM/UIM policy.

Medical Payments Set-Off Invalidated in Colorado. In *Calderon v. Am. Family Mut. Ins. Co.*, 383 P.3d 676 (Colo. 2016), the trial court erred in reducing a jury award of \$68,338 for a driver injured by an uninsured motorist by the \$5,000 that his insurer had previously paid under his medical payments coverage. *Colo. Rev. Stat. 10-4-609(1)* prohibited setoffs against the amount of uninsured/underinsured motorist (UM/UIM) coverage. Although double recovery is disfavored, so is payment of duplicative premiums. Permitting an insured who purchased both UM/UIM and med-pay coverage to recover benefits equal to those obtainable for injury caused by an adequately insured motorist simply guaranteed that the insureds got what they paid for.

Medical Payments Set-Off Valid in South Dakota. In *Kern v. Progressive N. Ins. Co.*, 2016 SD 52, a driver who was rear-ended and who had recovered \$25,000 in medical payments benefits prior to suing his insurer for underinsured motorist (UIM) benefits and bad faith was required to set off the benefits received from his insurer and from the other driver's insurer from the amount of his total damages as found by the jury, giving him a recovery of \$18,650 in UIM benefits. It was undisputed that the insured received \$5,000 in medical payments from his insurer and that amount was properly subtracted from his final damages total. The UIM insurer was entitled to a credit for any amount that it paid to the plaintiff under the medical payments.

Underinsured Motorist (UIM) Insurer Entitled to a Set-Off for Workers' Compensation and Disability Payments. In *Foster v. Regent Ins. Co.*, 884 N.W.2d 534 (Wis. Ct. App. 2016) (unpublished), a setoff provision was properly construed to reduce an underinsured motorist (UIM) payment by the workers' compensation and disability benefits paid to the insured for the same injuries as the insured did not receive less than full compensation. Case law did not require an insurer to stand in the shoes of the tortfeasor for all purposes. Mandatory UIM coverage did not have to include collateral source payments.

Chapter 32—Conflict of Laws

Lex Loci Contractus Applied In Determining Stacking of Uninsured/Underinsured Motorist Coverage. In *Foster v. Wilet*, 2016 U.S. Dist. LEXIS 161924 (W.D. N.C. 2016), (applying California law), the plaintiff sought to "stack" multiple UM/UIM claims. By plaintiff's own admission, the contract was delivered to the plaintiff in California. Accordingly, the policy must be construed under California law as the contract was delivered in California. *Lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract. California does not allow "stacking" of insurance coverage.

Court Followed Louisiana's Center-of-Gravity Test. In *Kenney v. Foremost Ins. Co.*, 200 So. 3d 1048 (Miss. 2016), Louisiana law applied to a contract dispute regarding uninsured motorist coverage. While riding a motorcycle, the plaintiff, a Louisiana resident, was involved in an accident with an uninsured motorist in Mississippi. Mississippi contacts included the location of the accident and the resi-

dence of the uninsured motorist. However, the location of the accident was fortuitous and hence irrelevant.

Kentucky Court Followed Restatement (Second) of Conflicts of Law. In *Lacrosse v. Owners Ins. Co.*, 2016 Ky. App. LEXIS 204, the trial court properly applied Illinois law in determining the limits of two insurance policies where all the connections to the case, with the exception of its location and the residency of the at-fault driver, were to Illinois. Kentucky had no clear public policy on underinsured motorist (UIM) coverage. Kentucky's general choice-of-law rule is only disregarded when Kentucky's public policy clearly disfavors application of the foreign state's law. Illinois law determined the policy limits of the policies and whether each insurer's UIM coverage obligation was reduced by setoffs from collateral source payments received by the insured. The court adopted the *Restatement (Second) of Conflicts of Law* § 188 approach to resolving choice of law issues. Absent evidence of a written request/rejection, Illinois, 215 Ill. Comp. Stat. 5/143a-2, provides that UIM coverage is to be included in an amount equal to the insured's liability limits, which is \$1,000,000 in the instant case. The court remanded for a determination of the insured was provided a written request or rejection of the higher UIM limits. Kentucky public policy did not bar the UIM limits reduction permitted by Illinois law. Therefore, the trial court correctly used offsets to reduce the insurers' UIM liability.

Chapter 33—Stacking of Benefits

Court Enforced Clearly Worded Anti-Stacking Provision. In *Estate of Hughes v. State Farm Mut. Auto. Ins. Co.*, 485 S.W.3d 357 (Mo. Ct. App. 2016), the anti-stacking provisions clearly indicated a limitation on

the stacking of underinsured motorist (UIM) coverage from more than one policy to a single claim and the insurer fully met its obligation to provide UIM coverage under one policy.

If the After Acquired Clause is Finite, Insurer Required to provide New Uninsured/Underinsured Motorist (UM/UIM) Waiver Forms. In *Toner v. Travelers Home & Marine Ins. Co.*, 137 A.3d 583 (Pa. Super. Ct. 2016), appeal granted, 2016 Pa. LEXIS 1990, the court noted that the addition of a vehicle to an existing automobile insurance policy does not represent the purchase of new insurance and thus does not require the insurer to provide the insured with new UM/UIM stacking waiver forms. However, the courts must also look to the language of the "after acquired vehicle" clause to determine if that clause is finite in scope. If the clause is finite, the insurer will be required to provide the insured new UM/UIM waiver forms.

Nevada Authorizes Anti-Stacking Provisions If Three Conditions Are Met. Anti-stacking provisions are designed to prevent insureds from combining their coverage limits on separate policies or automobiles. *Nev. Rev. Stat. § 687B.145* authorizes anti-stacking provisions in insurance contracts if three conditions are met: the anti-stacking clause is (1) prominently displayed; (2) sufficiently clear, and (3) the insured cannot have purchased separate coverage on the same risk nor paid a premium calculated for full reimbursement under that coverage. *Schneider v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 115547 (D. Nev. 2016).

Insured With Uninsured/Underinsured Motorist (UM/UIM) Policies With Two Insurers Not Permitted to Collect Up to the Ag-

Aggregate Amount of Coverage for All the Insured Vehicles. In *Progressive Casualty Insurance Co. v. Dias*, 2017 R.I. LEXIS 5, the defendants were insured under two policies issued by companies bearing the “Progressive” label. The first policy, which Progressive Northern underwrote, covered the motorcycle that the defendant was operating when he was injured. The second policy, underwritten by plaintiff, Progressive Casualty, covered the defendants’ automobiles. The plaintiff insurer denied coverage, asserting that the policy did not provide coverage for the injuries the defendant sustained while he was riding the motorcycle because the policy contained an “owned-but-not-insured clause” that barred recovery. The defendant argued that the owned-but-not-insured clause was preempted by *R.I. Code 27-7-2.1*, which mandates that, when an insured has multiple UM/UIM policies with the same insurance company, the insured is permitted to collect up to the aggregate amount of coverage for all the vehicles insured, regardless of any language in the policy to the contrary. The two Progressive insurers, each of which is a different corporate entity, were legally distinct from one another and from their parent corporation for purposes of the Rhode Island statute.

Stacking of Underinsured Motorist (UIM) Coverage in Missouri Determined By Policy. Missouri does not require uninsured motorist (UM) coverage. The exis-

tence of underinsured motorist (UIM) coverage and its ability to be stacked are determined by the contract entered between the insured and insurer. *Mills v. State Farm Mut. Auto. Ins. Co.*, 2016 U.S. Dist. LEXIS 151600 (W.D. Mo. 2016).

Chapter 34—State Funds—General Framework

California Statute Authorizing California Insurance Guaranty Association (CIGA) Updated. The California statute does not require an insurer to become insolvent in order for California Insurance Guaranty Association (CIGA) to collect premium payments from the member insurers and requires CIGA to collect premiums in order to secure funds for the payment of its administrative expenses. *Cal. Ins. Code § 1063.2*.

Chapter 35—State Funds—Practice and Procedures

Insured Must Exhaust its Remedies Against the Vehicle’s Owner Before Seeking Relief from MVAIC. In *Daily Med. Equip. Distrib. Ctr., Inc. v. MVAIC*, 2017 N.Y. Misc. LEXIS 67 (Sup. Ct. App. Term 2017), the plaintiff medical provider and its assignor were aware of the identity of the owner of the vehicle in which the assignor had been a passenger at the time of the accident but failed to exhaust its remedies against the vehicle’s owner before seeking relief from MVAIC.

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Publication 469 Release 61

May 2017

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