PUBLICATION UPDATE

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No-Fault and Uninsured Motorist Automobile Insurance

Publication 469 Release 63 May 2018

HIGHLIGHTS

Highlights

- **Release 63 features the following updated jurisdictional charts:**
- § 1.10[6] Multi-Jurisdictional Survey of For-Hire Exclusion for Medical Payments Coverage
- § 23.10[6][h] Jurisdictional Survey of Requirement for Uninsured/Underinsured Motorist (UM/UM) Coverage in an Umbrella/Commercial Policy
- § 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
- § 23.50[2][g] Jurisdictional Survey of Pain and Suffering Recovery
- § 23.50[2][h] Jurisdictional Survey of Bystander Emotional Distress Claims
- § 23.50[2][i] Jurisdictional Survey of Statutory Definition of Bodily Injury
- § 24.20[3][c][iii] Multi-Jurisdictional Survey of Statutes Requiring that Transportation Network Providers Provide Uninsured/Underinsured Motorist Coverage
- § 24.20[3][c][iv] Multi-Jurisdictional Survey of Application of For Hire Exclusion to Transportation Network Provider
- § 26.200 [2] Multi-Jurisdictional Survey of the Statutory References to Hit and Run Vehicles
- § 26.200[3] Multi-Jurisdictional Survey of Physical Contact Requirement
- § 29.40[4][e] Multi-Jurisdictional Survey of Obligation of Good Faith
- § 29.40[4][f] Multi-Jurisdictional Survey of Recognition of Bad Faith
- § 31.20[4] Jurisdictional Survey of Workers' Compensation Set-off
- § 33.10[6] Jurisdictional Survey of Payment of Premium Argument
- § 34.10[6] Multi-Jurisdictional Survey of Assigned Risk, Joint Underwriting, Reinsurance and

Uninsured Motorist Funds

- § 35.50[3] Multi-Jurisdictional Survey of Exhaustion Requirement Against Solvent Insurers.
- **New Section added**
- § 29.30[8] Expedited or Summary Jury Trial
- **The Following Appendices have been updated:**
- APPENDIX H Stacking of Uninsured/Underinsured Motorist Coverage
- APPENDIX M Stacking by Occupancy Insured
- APPENDIX Q Owned Vehicle Exclusion

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 63:

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

Remedy for Failure to Pay Med-Pay Coverage. The insured in *Deoliveira v. Liberty Mut. Ins. Co., 2017 Mass. Super. LEXIS 163* sufficiently pleaded claims against her automobile insurer for breach of contract, declaratory judgment and violation of the Massachusetts Consumers Protection Act, *Mass. Gen. Laws ch. 93A, § 1*. The insured was injured in a car accident, incurred medical expenses not payable under the policy's personal injury protection (PIP) provision and the insurer refused to provide the insured with med-pay coverage.

Alaska and Connecticut Allow for Exclusion of Med-Pay Coverage for Pre-Arranged Rides. *Alaska Stat. § 21.96.018* and *2017 Ct. ALS 140*.

No Evidence That Accident Was Staged or Fraudulent. The insurer failed to show prima facie either that the accident was staged or that there was a valid foundation upon which to form a belief that either the claims or the billing were not causally related to the accident. The mere fact that the insured were allegedly involved in one or more prior accidents and may have received no-fault benefits does not imply that the accident was staged or that the claims arising from it were fraudulent or excessive. *Ace Am. Ins. Co. v. Dr. Watson Chiropractic, P.C., 2017 N.Y. Misc. LEXIS 4216 (Sup. Ct. 2017)*.

Parties May Not Compel Arbitration of Insurer's Fraud Based Claims. The defendants may not compel arbitration of the insurer's fraud-based claims, whether the underlying no-fault claims were paid to the defendants or not. *Gov't Emples. Ins. Co. v. Strutsovskiy, 2017 U.S. Dist. LEXIS 178514 (W.D. N.Y. 2017)*.

Chapter 3—Constitutionality

Punitive Damages Award of $2,750,000 Complied with the Supreme Court's Single Digit Ratio. The jury's $2,750,000 punitive damages award was not excessive. The United States Supreme Court has stated that stated that single digit multipliers are more likely to comport with due process. *State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 424-425* (2003). In *Dziadek v. Charter Oak Fire Ins. Co., 867 F.3d 1003 (8*th *Cir. 2017),* the total of $250,000 plus $387,511.70 in compensatory interest was $637,511.70. The punitive -to-compensatory ratio was 4.3 to 1, within the Supreme Court's single-digit rule.

The Decision in *Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co., 895 N.W.2d 490 (Mich. 2017)* Applied Retroactively. The court applied the holding in *Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co., 895 N.W.2d 490 (Mich. 2017)* retroactively. The health care

provider was allowed to move to amend its complaint so that it might advance alternative theories of recovery, including the pursuit of benefits under an assignment theory. The health care provider did not have a statutory right to recover personal injury protection (PIP) benefits directly from an insurer under the case law prior to *Covenant.* Summary disposition was properly entered in favor of the defendant insurer. *W A Foote Memorial Hosp. v. Mich. Assigned Claims Plan, 2017 Mich. App. LEXIS 1391*.

Chapter 6—Scope of Coverage: Overview

Priority of Personal Injury Protection (PIP) Coverage on Stolen Vehicle. The plaintiff was a passenger in a stolen vehicle when it was involved in a single vehicle accident. The vehicle was donated to a charity before the accident. An automobile dealership purchased the vehicle, but did not obtain a new registration for the vehicle. At the time of the accident, the auto dealership maintained a no-fault policy through Markel Insurance Company (Markel). Following the accident, Farmers Insurance Exchange was assigned as the insurer of last resort through the Michigan Assigned Claims Plan. The plaintiff was not a named beneficiary under a no-fault policy and did not live with any family members who were named beneficiaries under a no-fault policy. Therefore, the Mercury constituted a "covered auto" under Markel's policy and Markel was the insurer of highest priority to provide PIP benefits to plaintiff. *McMullen v. Citizens Ins. Co., 2017 Mich. App. LEXIS 933 (unpublished).*

Court Rejected Plaintiff's Argument That He Was Not Required to Maintain No-Fault Coverage When His Vehicle Was Parked. In *Russ v. Mich., 2017 Mich. App. LEXIS 1531 (unpublished)*, the court rejected the plaintiff's argument that he was not required to have no-fault coverage because his vehicle was in park at the time of the accident. The plaintiff drove his vehicle to his fiancée's home, placed the vehicle in park, and then the accident occurred. To interpret the no-fault act statute as the plaintiff suggested—that a vehicle must maintain no-fault coverage when it is driving or moving on a Michigan roadway but not when the driver shifts the vehicle into park—would lead to an absurd result.

Chapter 8—Scope of Coverage: By Classification of Vehicle

Tort and Underinsured Motorist Claim Barred for Owner of Vehicle Who Failed to Maintain No-Fault Coverage. In *Salmo v. Oliverio, 2017 Mich. App. LEXIS 1648*, the plaintiff owned a vehicle that his ex-wife insured under her business's no-fault policy. Because the plaintiff was the vehicle's only "owner," he was required to secure no-fault coverage. Because he failed to do so, the lower court summarily dismissed his tort claim against a third-party who injured him in a motor vehicle accident as well as his claim for underinsured motorist (UIM) benefits against the vehicle's insurer.

School Bus Did Not Qualify as Motor Vehicle For Purposes of Under Personal Injury Protection (PIP) Coverage. In *Koren v. State Farm Fire & Cas. Co., 2018 Wash. App. Lexis 26*, the court determined that a standard capacity school bus did not qualify as an automobile. School buses can carry more than ten people. Excluding a school bus accident from personal injury protection (PIP) coverage does not violate public policy as Washington law only contemplates PIP coverage for automobiles. The Washington statute refers to a passenger car designed for carrying ten passengers or less and used for the transportation

of persons. Wash. Rev. Code § 56.04.38.2.

Chapter 9—Scope of Coverage—Type of Incident

Insured Could Not Recover Personal Injury Protection (PIP) Benefits for Injuries Sustained in His Parked Vehicle. The insured sought damages from his insurer for breach of contract on a claim that the insurer improperly denied PIP coverage for personal injury sustained when he fell forward out of the driver's seat of his parked vehicle and struck his head on the pavement. It was irrelevant that the insured did not intend to have his vehicle remain in park for very long. The test was what was happening at the moment of the incident. Because the insured was in no sense operating his vehicle at the time the injuries were sustained, the insured did not qualify for PIP coverage. *Ramm v. Farmers Ins. Co. of Wash., 200 Wn. App. 1 (2017).*

Chapter 10—Exclusions from Coverage

Auto Repair Shop Policy Provided Comprehensive Coverage Not No-Fault Coverage. The plaintiff, the owner of an automobile repair shop, was working outside of a vehicle when the vehicle slipped into gear and injured him. The plaintiff then sought personal protection insurance (PIP) benefits under the no-fault statute, *Mich. Comp. Laws § 500.3101*. The insurer of the repair shop was not an insurer for purposes of the no-fault statute because it did not provide no-fault coverage to the plaintiff, only comprehensive coverage. *Gurski v. Motorists Mut. Ins. Co., 2017 Mich. App. LEXIS 1649*.

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

Hawaii Provides No-Fault Coverage for Acupuncture Treatments. In Hawaii, acupuncture treatments are allowed for no more than thirty visits and the charges for acupuncture treatments are tied to the workers' compensation supplemental medical fee schedule. *Haw. Rev. Stat. § 431:10C-103.6*.

Proof of Lost Earnings Insufficient as a Matter of Law. In *Freligh v. Government Empls. Ins. Co., 59 N.Y.S.3d 597 (App. Div. 2017)*, the proof of the plaintiff's no-fault claim for lost earnings was insufficient as a matter of law. The potential employer's and the plaintiff's subjective beliefs about the financial health of the parts business and the plaintiff's skills were immaterial to the resolution of whether it was reasonable to project that the parts business would have employed plaintiff at a salary of $2,000 a week. The evidence showed that the parts business was failing and it had not made any efforts to acquire or open an automobile repair shop. That evidence established as a matter of law that the projection that plaintiff would have received $2,000 a week from the parts business was unreasonable.

Chapter 14—Claiming No-Fault Benefits

Determining When No-Fault Benefits Are Overdue. In Minnesota, no-fault benefits are overdue if not paid within 30 days after the reparation obligor receives reasonable proof of the fact and amount of loss realized, unless the reparation obligor elects to accumulate claims for periods not exceeding 31 days and pays them within 15 days after the period of accumulation. *Minn. Stat. § 65B.54, subd. 1*.

Charges for Payment of No-Fault Benefits Must Be Submitted in Timely Manner. In *Western Nat'l Ins. Co. v. Nguyen, 2017 Minn. App. LEXIS 114*, the court concluded that the Center for Diagnostic Imaging (CDI) did not submit its charges to the insurer within the time period required

by the Minnesota Health Plan Contracting Act, *Minn. Stat. § 62Q.75, subd. 3*. Therefore, the insured never incurred medical expense and a loss never accrued. Furthermore, because the charges presented to the arbitrator were not transmitted to the insurer as required by *Minn. Stat. § 65B.54, subd. 1*, the benefits never became due. Therefore, the insured never suffered a loss for which he was entitled to no-fault benefits. With the exception of one bill, the insured did not suffer a "loss" as defined in *Minn. Stat. § 65B.54, subd. 1*. The court affirmed the district court's decision to vacate in part the arbitrator's award of medical expenses.

Failure to Submit No-Fault Claim to the Insurer With Highest Priority Resulted in Loss of No-Fault Benefits. The plaintiff, the sole owner of Envoy Trucking, entered into an owner-operator agreement with ADM Transit under which Envoy Trucking leased the semi-truck to ADM Transit, and ADM Transit agreed to pay plaintiff 18 cents for every loaded mile he drove on behalf of ADM Transit. Therefore, ADM Transit was a constructive owner of the semi-truck under *Mich. Comp. Laws § 500.3101(2)(k)*. The plaintiff was then injured while driving the semi-truck. Accordingly, the plaintiff suffered accidental bodily injury while an occupant of a motor vehicle owned or registered by his employer and was entitled to receive no-fault benefits from the insurer of the furnished vehicle. ADM Transit's insurer was OOIDA under a policy that included no-fault benefits. The plaintiff personally insured his household vehicles through defendant insurer. Accordingly, OOIDA was the insurer of highest priority under Mich. Comp. Laws § 500.3114. Therefore, the defendant was not liable for the plaintiff's no-fault benefits. However, the plaintiff's case against OOIDA was dismissed with prejudice because he failed to file the case within one year of suffering the injuries under *Mich. Comp. Laws § 500.3145*. Therefore, the plaintiff will likely be unable to recover PIP benefits from any source. The plaintiff's error does not change the order of priority or render the defendant liable. *Maroky v. Encompass Indem. Co, 2017 Mich. App. LEXIS 1675 (unpublished).*

Chiropractic Care Centers, Inc. V. Arbella Mut. Ins. Co., 2017 Mass. App. Div. Lexis 22. The insured's failure to appear for an independent medical examination (IME) that the insurer requested as part of the investigation was a defense to the nonpayment of personal injury protection (PIP) benefits.

Questioning Under Oath Required in Claim for Basic Reparation Benefits. The insureds were passengers in a car that was rear ended by another car, while they were stopped at a red light. The other vehicle, which could not be identified, fled the scene. The insured sought personal injury protection (PIP) and uninsured motorist (UM) benefits. The insurer made initial payments of PIP benefits but, after an investigator took recorded statements from the insureds suspended any additional payments. The insurer claimed that the insureds made inconsistent statements about where they were going that day, where they had been, and what happened when they were hit. The insurer also perceived inconsistencies between the statements and the police report and noted that two of the insured had been involved in a number of motor vehicle accidents in the preceding year. The court permitted the insurer to require that the plaintiffs who sought PIP coverage to undergo questioning under oath. The dissenting judge noted that the majority opinion unnecessarily permitted insurers to withhold payments of basic

reparation benefits until passengers injured in vehicular collisions agree to submit to a formal interrogation under oath, which was contrary to the letter and purpose of the Kentucky Motor Vehicle Reparations Act. *Farm Mut. Auto. Ins. Co. v. Adams, 526 S.W.3d 63 (Ky. 2017).*

Examination Under Oath is a Condition Precedent to No-Fault Coverage But Insurer Must Show That it Complied With Insurance Regulations. In *Ace Am. Ins. Co. v. Dr. Watson Chiropractic, P.C., 2017 N.Y. Misc. LEXIS 4216 (Sup. Ct. 2017)*, the insurer alleged that the defendants were not entitled to payment of the bills because: (1) the alleged injuries and subsequent billing by provider-defendants were not causally related to an insured incident; (2) that defendant pharmacy and magnetic resonance imaging (MRI) provider breached conditions precedent to coverage under the no-fault law by failing to appear at scheduled examination under oath (EUO); (3) the defendants breached conditions precedent to coverage under the no-fault law by failing to return subscribed copies of their EUO transcripts; and (4) that the collision was an intentional and staged event in furtherance of a scheme to defraud. The insurer moved for a stay of all arbitrations, lawsuits, or claims and for a judgment declaring that it owed no duty to claimant-defendants. The insurer failed to show prima facie either that the collision was staged or that there was no valid foundation upon which to form a belief that either the claims or the billing were not causally related to the collision. The mere fact that claimant-defendants were allegedly involved in one or more prior accidents and may have received no-fault benefits does not imply that the collision was staged or that the claims arising from it are fraudulent or excessive. The plaintiff also failed to show prima facie that it complied with the timeliness requirements of *11 N.Y. Comp. Codes R. & Regs. § 65-3.5(b)* and *11 N.Y. Comp. Codes R. & Regs. § 65-6(b)*.

Insurer Must Comply With Insurance Regulations To Deny No-Fault Coverage for Failure to Submit to an Examination Under Oath (EUO). The insurer failed to provide evidence showing the dates on which it received the claimant-defendants' verification forms. The insurer failed to provide copies of any completed verification forms it may have received from any of the health service provider defendants or any other evidence reflective of the dates on which plaintiff had received any such verification forms, or otherwise assert that it never received such forms. Thus, the insurer failed to meet its burden of establishing either that the EUOs were not subject to the procedures and time frames set forth in the no-fault regulations or that it properly noticed the EUOs in conformity with their terms. *Kemper Independence Ins. Co. v. Adelaida Physical Therapy, P.C., 46 N.Y.S.3d 579 (App. Div. 2017).*

When Order of Payment of Disputed Claims Exhausts Available No-Fault Coverage. In New York, there is a dispute among the appellate courts as to the amount that an insurer can be required to pay after it disputes a health care provider's claim for no-fault benefits so that it can investigate the claim for potential fraud or for other reasons. In a case in the First Department, the insurer made a prima facie showing of entitlement to summary judgment dismissing the action for first-party no-fault benefits. The evidentiary proof submitted by the insurer established that, following the timely denial of plaintiff-provider's claim on the ground of lack of medical necessity, the policy's coverage limits had been exhausted through payment of no-fault benefits in satisfaction of arbitration awards rendered in favor of other health

care providers and that such payments were made in compliance with the priority of payment regulation. The insurer was not precluded by the insurance regulations, *11 N.Y. Comp. R. & Regs. § 65-3.15*, from paying other providers' legitimate claims subsequent to the denial of the plaintiff's claims. *Harrmonic Physical Therapy, P.C. v. Praetorian Ins. Co., 15 N.Y.S.3d 711 (App. Div. 2015) (1st Dept)*. In a 2016 case in the First Department, the court concluded that the insurance regulations did not preclude the insurer from paying other legitimate claims subsequent to the denial of provider's claims. *Allstate Property and Casualty Ins. Co. v. Northeast Anesthesia and Pain Management, 41 N.Y.S.3d 448 (App. Div. 2016) (1st Dept.)* In the Second Department, the court noted that fully verified claims are payable in the order they are received. By denying the provider's claim, the insurer declared that the claim at issue was fully verified. The court rejected the insurer's argument that it need not pay the claim because it paid other claims after it had denied the provider's claim, which subsequent payments exhausted the available coverage. *Alleviation Medical Services, P.C. v. Allstate Ins. Co., 49 N.Y.S.3d 814 (App. Div. 2017) (2d Dept).*

Utah Authorizes Deduction of No-Fault Benefits. In Utah, monthly disability benefits are reduced or reimbursed by any amount received by, or payable to, the eligible employee from the automobile no-fault payments. *Utah Code § 49-21-402(2)*.

Claim for Payment of No-Fault Benefits Arises Under State Law Not Federal Law. The plaintiff in *MSPA Claim I, LLC v. Scottsdale Ins. Co., 2017 U.S. Dist. LEXIS 102927 (S.D. Fla. 2017)*, brought an action on its own behalf as the assignee of Florida Healthcare Plus (FHCP) and on behalf of a Florida class of Medicare Advantage Organizations (MAO). FHCP was an MAO that had contracted with the Centers for Medicare & Medicaid Services (CMS) to provide Medicare Part C benefits to members of FHCP's Medicare Advantage Plan. The plaintiff alleged that its claims arose from injuries sustained by FHCP Medicare Advantage enrollees in an accident on property insured under a commercial liability policy issued by the defendant and whose medical expenses were paid for by FHCP. The defendant's commercial liability policy contained a no-fault med-pay clause. The plaintiff claimed that its rights arose from the payments of the enrollee's medical expenses arising from the accident on the insured property made by FHCP as a secondary payer pursuant to the Medicare Secondary Payer Act (MSP Act), 42 U.S.C. § 1395, and its corresponding regulations and that the defendant was primarily responsible to make the medical payments as a result of the med-pay clause in the commercial liability policy. The plaintiff sought remand to state court on the grounds that the class action complaint only alleged state law breach of contract claims that neither raise substantial federal questions nor are completely preempted by federal law. Because the defendant had not met its burden to show that the plaintiff's breach of contract and subrogation claims arose under federal law, the plaintiff's motion to remand should be granted unless the defendant showed that complete preemption exists.

Chapter 15—Arbitration of No-Fault Claims

Grounds for Vacating a No-Fault Arbitration Award. *In Western Nat'l Ins. Co. v. Nguyen, 2017 Minn. App. LEXIS 114*, the court concluded that because the Center for Diagnostic Imaging (CDI) did not submit its charges to the insurer within the time period required by the Minnesota Health Plan Contracting Act, *Minn. Stat.*

§ 62Q.75, subd. 3, the insured never incurred medical expense and thus a loss never accrued. Furthermore, the charges presented to the arbitrator were not transmitted to the insurer as required by *Minn. Stat. § 65B.54, subd. 1* and thus, the benefits never became due. Therefore, the insured never suffered a loss for which he was entitled to no-fault benefits. With the exception of one bill, the insured did not suffer a "loss" as defined in *Minn. Stat. § 65B.54, subd. 1*. The court affirmed the district court's decision to vacate in part the arbitrator's award of medical expenses.

Discovery is Limited in No-Fault Arbitration. Within the special expedited arbitration procedures set forth in the regulations, discovery is limited or non-existent. *Gov't Emples. Ins. Co. v. Strutsovskiy, 2017 U.S. Dist. LEXIS 178514 (W.D. N.Y. 2017).*

Court May Vacate Arbitration Award If Award Exceeds No-Fault Limits. An arbitrator's award directing payment in excess of the monetary limit of a no-fault that exceeds the arbitrator's power constitutes grounds for vacating the award. *Allstate Property and Casualty Ins. Co. v. Northeast Anesthesia and Pain Management, 41 N.Y.S.3d 448 (App. Div. 2016).*

Chapter 16—Attorney's Fees, Penalties and Interest

Trial Court Abused Its Discretion in Awarding Attorney's Fees. The plaintiff *in Oliver v. Irvello, 2017 PA Super 184*, who had elected the limited tort option on his motor vehicle policy, filed a personal injury action against the defendant after a motor vehicle accident. Following trial, the jury found that: (1) the defendant was negligent; (2) the defendant's negligence was a factual cause of the plaintiff's harm; and (3) the plaintiff did not sustain a serious impairment of a body function as a result of the accident. The trial court abused its discretion in awarding the defendant attorney's fees because the plaintiff's petition to correct the record was not brought purely for the purpose of annoyance, nor was it so plainly obdurate or vexatious as to warrant the award of attorney's fees.

Chapter 17—Tort Recovery: Tort Liability Retained

Pennsylvania Policy With Limited Tort Option Subject to New Jersey Verbal Threshold. In *Finegan v. Dickenson, 2017 U.S. Dist. LEXIS 126665 (D. N.J. 2017)*, the parties conceded that the Connor vehicle was subject to the deemer statute. The plaintiff, a Pennsylvania resident, was a passenger in the Connor vehicle driven by a Pennsylvania resident when the vehicle was involved in a motor vehicle accident in New Jersey. The Connor vehicle was registered to Connor's parents and insured by a New Jersey authorized insurer. The plaintiff was a named driver on her parents' policy from a New Jersey authorized insurer with limited tort option under Pennsylvania law. The defendant was a New Jersey resident insured by a New Jersey insurer. The plaintiff was deemed to have the right to receive personal injury protection (PIP) benefits under the deemer statute, *N.J. Stat. Ann. § 17:28-1.4*, and no-fault statute, *N.J. Stat. Ann. § 39:6A-4*. Thus, the plaintiff's claim for non-economic damages was subject to the verbal threshold and the defendant was exempted from tort liability to the plaintiff.

Chapter 18—Tort Recovery Thresholds

Plaintiff Must Offer Direct Evidence of Actual Medical Expenses. In *Chenell v. Cent. Wheelchair & Van Transp., Inc., 2017 Mass. App. Div. LEXIS 31*, the plaintiff failed to certify medical bills pursuant to *Mass. Gen. Laws ch. 233, § 79G* or

otherwise attempt to offer medical bills into evidence. The Massachusetts statute, *Mass. Gen. Laws ch. 231, § 6D*, states that a plaintiff may recover damages for pain and suffering only if the reasonable and necessary medical expenses are determined to be in excess of $2,000. To allow a claimant to circumvent the tort threshold by not offering direct evidence of actual medical expenses would be contrary to the plain language of the Massachusetts statute.

Gap in Treatment Explained by Suspension of No-Fault Benefits. In *Hwang v. Rios, 2017 N.Y. Misc. LEXIS 3947 (Sup. Ct. 2017)*, the plaintiff alleged that as a result of the subject accident, she sustained serious injuries to her right shoulder, cervical spine, left shoulder, and lumbar spine. The plaintiff's treating doctor attested to the fact that the plaintiff sustained injuries as a result of the subject accident, finding that the plaintiff had significant limitations in ranges of motion both contemporaneous to the accident and in a recent examination, and concluding that the limitations are permanent and causally related to the accident. The plaintiffs' doctor adequately explained the gap in treatment by affirming that the plaintiffs' no fault coverage had stopped and plaintiffs could not afford treatment out of pocket.

Small Fracture Sufficient to Constitute Serious Injury. A microscopic fracture in the tarsal navicular bone of the insured's right foot is sufficient to constitute a serious injury. *Argigo v. Andrew's Taxi Express Corp., 2018 N.Y. Misc. Lexis 39 (Sup. Ct. 2018).*

Defendants Made Prima Facie Showing that Plaintiff Did Not Suffer a Disability. In *Fernandez v. Hernandez, 57 N.Y.S.3d 469 (App. Div. 2017)*, the defendants made a prima facie showing that the plaintiff did not suffer a 90/180-day injury given her admission that she was only confined to her bed or home for a period of five weeks.

Insomnia and Post-Traumatic Stress Disorder (PTSD) Not a Serious Injury as Defined by Pennsylvania Statute. The plaintiff in *Vetter v. Miller, 2017 PA Super 64* failed to establish that her inability to sleep constituted a serious injury. The plaintiff received counseling, was prescribed antidepressants and suffered from post-traumatic stress disorder (PTSD). However, insomnia and PTSD do not constitute a serious impairment of a body function. The plaintiff worked full-time, pursued a nursing degree and helped to care for her son. The insured selected limited-tort coverage under *75 Pa. Cons. Stat. § 1705* and thus, the insured was required to establish serious injury. Viewed in the light most favorable to the insured, reasonable minds could not differ on the issue of whether she had sustained a serious injury because her injury was conclusively not serious.

Loss of Hearing May Qualify as a Serious Impairment of a Bodily Function. In *Patrick v. Turkelson, 2018 Mich. App. Lexis 117*, a question of fact existed as to whether the plaintiff's hearing loss affects her general ability to lead a normal life. The lower court erred by failing to follow the factors set forth in *McCormick v. Carrier, 487 Mich. 180 (2010)* when deciding whether the claimant's impairment was objectively manifested and erred by making its own evaluations regarding the persuasiveness of the medical evidence related to the claimant's hearing. Hearing is an important body function. A question of fact existed as to whether the plaintiff's hearing loss affects her general ability to lead a normal life. There was conflicting evidence directly related to determining whether the claimant's claimed hearing loss injury

qualified as a serious impairment of body function, and a jury could reasonably conclude that, more likely than not, the claimant's hearing loss would not have occurred but for the car accident.

Chapter 23—Statutory Uninsured Motorist Coverage

Utah Requires Insured to Waive Underinsured Motorist (UIM) Coverage. In response to a certified question from federal district court, the Utah Supreme Court found that the Utah statute, *Utah Code § 31A-22-305.3*, required that all vehicles covered under the liability provisions of an automobile policy also be covered under the UIM provisions of that policy, and with equal coverage limits, unless a named insured waives the coverage by signing an acknowledgment form meeting certain statutory requirements. *Dircks v. Travelers Indem. Co. of Am., 2017 UT 73*.

Uninsured/Underinsured Motorist (UM/UIM) Coverage In Umbrella Policy. In *Massey v. Allstate Ins. Co., 341 Ga. App. 462 (2017)*, the trial court erred by granting summary judgment to the insurer on the insured's claim for UM/UIM coverage under an umbrella policy. The insurer did not establish that it complied with the statutory non-renewal notice requirements of *Ga. Code § 33-24-45*. Therefore, the insured's 2009-2010 umbrella policy, which included UM coverage, was renewed with the same coverage in 2010 and 2011.

Elements of a Claim for Negligent Misrepresentation. In *Abboud v. Liberty Mut. Ins. Group Inc., 2017 U.S. App. LEXIS 19881 (6*th *Cir. 2017), applying Ohio law,* the lower court erred in granting summary judgment in favor of the insurer on the insured's negligent misrepresentation claim because the court failed to consider the ambiguity in the umbrella coverage and overlooked the insured's consistent assertions that his understanding of that language was guided by the insurer's representations regarding the scope of his coverage. The unique facts of the case warranted sending the issue of comparative negligence to a jury along with the insured's negligent misrepresentation claim. The uninsured/underinsured motorist (UM/UIM) language in the personal liability protection or umbrella policy excluded UM/UIM coverage except as "specifically listed on your policy declarations," and the policy declarations pages specifically listed the auto insurance policy, which, in turn, specifically includes UM/UIM coverage. The insured discussed with the insurer's sales representatives his existing single limit policy providing UM/UIM limits of $500,000 and his intention to extend his coverage by converting to a $2,000,000 umbrella policy on top of a split limit policy. The insured viewed the umbrella policy paperwork through the lens of these conversations, leaving him with the impression that the umbrella coverage extended his entire automobile policy, UM/UIM coverage included. The policy was not silent on UM/UIM insurance—it created space for reasonable minds to disagree.

Primary Insured Exercised Apparent Authority When She Rejected Underinsured Motorist (UIM) Coverage. In *Tucker v. Gov't Emples. Ins. Co., 2017 U.S. App. LEXIS 10870 (10*th *Cir. 2017), applying Colorado law,* summary judgment in favor of the insurer was proper because a named insured could reject underinsured motorist (UIM) coverage for another named insured by exercising actual or apparent authority. The primary insured exercised apparent authority when she rejected UIM coverage on the co-insured's behalf. *Colo. Rev. Stat. 10-4-609(1)*(a) allows a named insured's agent to effectively reject

UIM coverage on behalf of the named insured under common-law agency principles. The agent acted as the primary point of contact between the couple and the insurer and she possessed apparent authority to reject UIM coverage on the plaintiff's behalf.

Implied Authority to Reject Uninsured/Underinsured Motorist (UM/UIM) Coverage. Nothing in the language of *Colo. Rev. § 10-4-609* precludes an agent from exercising either apparent or implied authority to reject UM/UIM coverage on behalf of a principal. The named insured delegated to his friend the task of purchasing insurance for their jointly owned car and that, in undertaking this task, the friend had implied authority to reject, and did in fact reject, UM/UIM coverage on the named insured's behalf. *State Farm Mut. Auto. Ins. Co. v. Johnson, 396 P.3d 651, 653 (Colo. 2017).*

Any Named Insured May Reject Uninsured Motorist (UM) Coverage. Kentucky provides that any insured named in the policy, rather than just merely the named insured, may reject UM coverage. *Ky. Rev. Stat. § 304.20-020.*

Knowing Rejection of Uninsured/Underinsured Motorist (UM/UIM) Coverage Including Stacking. The insurer's forms complied with New Mexico law in all respects as to what was required for a valid rejection of UM/UIM coverage, including stacking. The insured was sufficiently made aware of the maximum amount of insurance statutorily available, the premium cost for the bodily injury level of coverage appeared in the application and the declaration page, and the premium cost for the UM/UIM coverage appeared in the selection/rejection form. *Ullman v. Safeway Ins. Co., 2017 N.M. App. LEXIS 53.*

Insureds Could Not Recover Both Liability and Uninsured Motorist (UM) Coverage of Policy. The plaintiff in *Brenda Mills v. Randy Mills & State Farm Mut. Auto. Ins., 2018 La. App. LEXIS 48*, was seriously injured in a one vehicle accident involving her husband's motorcycle, caused solely by her husband's negligence. The plaintiff had an ownership interest in the motorcycle because it was purchased during her marriage and thus constituted community property. The defendant insurer paid the plaintiff $50,000 under the liability provision of the motorcycle policy. In addition to the motorcycle, both the plaintiff and her husband owned two other vehicles, each registered in both of their names and they purchased separate policies on each of the two vehicles from the defendant listing the plaintiff and her husband as named insureds. Each of the separate policies provided $50,000/$100,000 liability coverage and $50,000/$100,000 UM coverage. The plaintiff was precluded from simultaneously recovering under the UM provision of that same policy and from recovering UM benefits under the policies covering the other vehicles. The motorcycle policy stated that an uninsured motor vehicle does not include a vehicle whose policy provides liability coverage.

Insurer Liable to Insured for His Uncompensated Losses Up to Coverage Limit of His Uninsured Motorist (UM) Policy. In *Ga. Farm Bureau Mut. Ins. Co. v. Rockefeller, 2017 Ga. App. LEXIS 437*, the insurer was liable to the insured for his uncompensated losses up to the coverage limit of his UM policies because the text of *Ga. Code § 33-7-11* only permitted the exclusion of a UM insurer's liability for damages for which the insured has been compensated. The requirements of the statute control over the terms of the policy. The

insurer argued that because the amount of workers' compensation benefits the insured received exceeded the combined coverage limits of his UM policies, the insurer's liability under the UM policies was reduced to zero. The UM policies should cover up to $100,000 of the insured's uncompensated damages, including lost wages, damages for past and future pain and suffering and future medical expenses that were not covered by his settlement with the other driver's insurer or his workers' compensation award.

Insured Not Barred From Pursuing Uninsured Motorist (UM) Claim Against Bankrupt Driver. In *Easterling v. Progressive Specialty Ins. Co., 2017 Ala. LEXIS 93*, the insured was not barred from pursuing an UM claim because there was nothing preventing him from establishing that he was legally entitled to recover under the Alabama statute, *Ala. Code § 32-7-23*, from the driver on the merits of his claims. The insured was merely barred, by operation of the driver's bankruptcy discharge, from actually collecting demonstrated damages from the driver. The Bankruptcy Code, *11 U.S.C. § 524*, discharge does not affect the liability of any other entity for the debt. Therefore, the injunction against proceeding directly against the debtor in no way extended to the insured's own insurer. Before the trial, the other driver filed a "Suggestion of Bankruptcy" informing the trial court of her initiation of bankruptcy proceedings and asserting that the underlying action should release. Citing *1A Collier on Bankruptcy ¶ 16.15*, the court noted that the policy of the law was o discharge the bankrupt but not to release from liability those who are liable with him. Although the bankruptcy discharge enjoins further action against the debtor, the Bankruptcy Code specifies that the debt still exists and can be collected from any other entity that might be liable.

No Offset for Insured's Comparative Negligence. The insurer argued that the policy language on the first offset implicated the insured's liability by referring to "liability" for calculating supplemental uninsured/underinsured motorist (SUM) coverage. The insurer conceded that the policy did not contain specific language for a reduction for plaintiff's comparative fault. Even if an insured party were found partially liable for her injuries, the language of this provision provided only that the SUM coverage under the policy would be calculated by subtracting the amount received from the policy limit. Although the amount received from "all persons that may be legally liable" could be the result of a damages award that is affected by the insured's own liability, the plain language of the contract provision did not readily lend itself to the interpretation that the SUM coverage should automatically be subject to an evaluation of the insured's comparative fault. *Friedman v. Geico Gen. Ins. Co., 2017 U.S. Dist. LEXIS 6317 (E.D. N.Y. 2017).*

Serious Injury Threshold Factors Applied to Uninsured Motorist (UM) Claim. Assuming that the insured had a brachial plexus stretch injury, tremors, and weakness of grip strength, there was nothing in the record placing the insurer on notice that these injuries or conditions were permanent in nature. Thus, the insurer's offer of $1,500 was reasonable and there was no evidence that the insured acted in bad faith in the handling of the insured's uninsured motorist (UM) claim. The appeal focused on the narrow issue of the "permanency" of the insured's injuries. Under Florida law, the legal liability of a UM insurer does not include damages in tort for pain, suffering, mental anguish, and incon-

venience, that is non-economic damages, unless the injury consists of (a) significant and permanent loss of an important bodily function; (b) permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement; (c) significant and permanent scarring and disfigurement; or (d) death. *Duncan v. Geico Gen. Ins. Co., 2017 U.S. Dist. LEXIS 169347 (M.D. Fla. 2017).*

Parties Must Be Married At The Time of Accident to Pursue Loss of Consortium Claim. The committed intimate relationship doctrine, which is an equitable doctrine to protect unmarried parties who acquire property during their relationship, did not apply to the plaintiff's claim for loss of consortium under his wife's underinsured motorist (UIM) policy. The court adhered to the general rule in Washington that a spouse does not have a claim for loss of consortium when the injury to the spouse that causes the loss occurs before marriage. *Vance v. Farmers Ins. Co., 2017 Wash. App. LEXIS 2473 (unpublished).*

Bystander Claim for Post-Traumatic Stress Disorder (PTSD) Barred by Policy's Physical Contact Requirement. *In Allstate Fire & Cas. Ins. Co. v. Bochenek, 2017 Ill. App. LEXIS 624*, a husband's claim as a bystander under his policy for PTSD after his wife was struck by a hit and run driver was barred by the policy's physical contact requirement. For purposes of uninsured motorist (UM) and hit and run motor vehicle coverage, *215 Ill. Comp. Stat. 5/143a* was not intended to include unidentified cars that may be present at the scene of an occurrence of bodily injury without a physical contact of the unidentified motor vehicle with the insured or an automobile occupied by the insured. The policy expressly required that there be physical contact to recover under the UM provision.

Mental Anguish or Intangible Loss Do Not Constitute Bodily Injury. In *Warren v. Safeco Ins. Co., 2017 Ohio App. LEXIS 3948*, the insurer was entitled to summary judgment in an insured's action to recover UIM benefits because the insured's argument concerning his "bodily injury," the condition precedent under the policy, differed on appeal from what he argued in his motion for summary judgment, and, therefore, the insured forfeited the argument on appeal. The crux of the insured's argument within his summary judgment motion concerned his ability to recover for his "mental anguish" and "intangible loss," not for his hematoma and abrasions, which the insured argued on appeal. Because the insured failed to develop any argument below concerning his bodily injury as it pertains to his hematoma and abrasions, the insured forfeited this argument on appeal.

No Evidence to Support Recovery of Punitive Damages. Recovering punitive damages requires proof beyond the tort of bad faith. To receive punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant's conduct was undertaken with an evil mind. An "evil mind" requires either that the "defendant intended to injure the plaintiff" or that the "defendant consciously pursued a course of conduct knowing that it created a substantial risk of significant harm to others." The insured failed to establish by any evidence, let alone clear and convincing evidence, that the insurer acted with an "evil mind." Nothing indicated that the insurer intended to injure the insured or that it created a substantial risk of significant harm to anyone. Even when viewed in the light most favorable to the insured, the facts indicated that the insurer fairly investigated, evaluated, and reasonably denied his claim. *Guzman v. Liberty Mut. Ins. Co., 2017 U.S. Dist. LEXIS 160551 (D. Ariz. 2017).*

Oregon Supreme Court Adopted Restatement (Third) Test for Recovery of Emotional Distress. Examined in the light of the *Restatement (Third)* test, the plaintiffs stated a negligence claim for recovery of emotional distress damage. The plaintiffs' brother was killed as a result of defendant's negligence, they saw the collision and watched their brother die and as a result, they have suffered severe emotional distress. The court declined to adopt the zone of danger test. Philibert v. Kluser, 360 Or. 698 (2016).

Negligent Infliction of Emotional Distress Claims Refer to Emotional Distress Experienced at the Scene of the Accident. In *Cortese v. Wells, 2017 Wash. App. LEXIS 1385*, the insured's son died from mechanical asphyxiation after the pickup truck he was a passenger in overturned. The insured sued her underinsured motorist (UIM) insurer and others on several theories, including negligent infliction of emotional distress. The trial court summarily dismissed the insured's negligent infliction of emotional distress claim. The insured argued that she had a viable negligent infliction of emotional distress claim even though she learned of her son's accident before she drove to the accident scene. Negligent infliction of emotional distress is a limited tort theory of recovery. The kind of shock the tort requires is the result of the immediate aftermath of an accident.' It is not the emotional distress one experiences at the scene after already learning of the accident before coming to the scene.

Virginia Authorizes Punitive Damages For Victim of Intoxicated Drivers. *Va. Code § 8.01-44.5* permits the recovery of punitive damages for persons injured by intoxicated drivers.

Uninsured Motorist (UM) Carrier Not Entitled to Subrogation Against Excess Insurance Coverage. In *Raymond v. Taylor, 2017 OK 80*, the UM insurer was not entitled to subrogation against the underinsured tortfeasor's assets, including excess insurance coverage, in the amount the UM insurer had previously paid to the injured party. Contrary to the insurer's claims, the insured was not receiving a windfall. The insured paid a premium for UM protection and the insured recovered an amount not covering all of his damages within the limits of the primary liability policy and the UM policy. The insured also recovered an amount from the tortfeasor's other assets that, combined with the liability and UM funds, covered his damages. It would be unjust to permit the insurer to avoid its liability with its claim that the tortfeasor's other assets, an excess liability policy, thus denying the insured from receiving coverage for which the insurer was paid a premium.

Health Insurer's Subrogation Rights. In a case of first impression, the Hawaii Supreme Court determined that health insurers do not have a broad, unrestricted right against third party tortfeasors who cause injury to their insureds. Instead, a health insurer is limited to reimbursement rights established by the Hawaii statute, *Haw. Rev. Stat. § 663-10*. In this case, the insureds' wage loss and general damages claim was approximately $4,000,000. The insureds argued that the tortfeasor had only $1,100,000 of coverage. The insured and the tortfeasor agreed to the settlement. The tortfeasor did not admit fault for the accident. Coupled with a $50,000 underinsured (UIM) motorist claim that the insured submitted to their insurer, the insured's total recovery, before payment of attorneys' fees and costs, was $1,150,000 and they remained undercompensated by approximately $2,850,000. *Yukumoto v. Tawarahara, 140 Haw. 285 (2017).*

Chapter 24—Uninsured Motorist Endorsement

Oregon Expands Definition of an Insured's Child for Purposes of Uninsured Motorist (UM) Coverage. The Oregon statute defines an insured as any child residing in the household of the named insured if the insured has performed the duties of a parent to the child by rearing the child as the insured's own even though the child is not related to the insured by blood, marriage or adoption. *Or. Rev. Stat. § 742.504*.

Intentional Injury Exclusion Did Not Apply. In *Matter of Progressive Advanced Ins. Co. (Widdecombe), 2018 N.Y. App. Div. Lexis 51*, the insurer's disclaimer of coverage based upon an intentional acts exclusion in the insured victim's policy was not proper because the policy issued by the insurer did not contain an intentional acts exclusion for supplementary uninsured/underinsured motorist (SUM) coverage. The lower court erred in permanently staying arbitration between the insured and the insurer. The uninsured driver's intentional act of catching the insured's leg in the door of a car, throwing the car into drive, and then dragging the insured about 20 feet was, from the insured's perspective unexpected, unusual and unforeseen and qualified as an accident for purposes of the SUM endorsement in the insured's policy.

For Purposes of Recovery as an Occupancy Insured, the Term "Upon" Requires Physical Contact With the Insured Vehicle. In *Cramer v. Nat'l Cas. Co., 2017 U.S. App. LEXIS 9375 (4th Cir. 2017)*, an emergency medical technician (EMT) was not entitled to coverage under his employer's underinsured motorist (UIM) coverage after being struck by an underinsured motorist while returning to an ambulance from an accident scene. The EMT, who was separated from the ambulance by a lane of traffic and passing vehicles, was not getting in the ambulance and thus was not occupying the insured ambulance. The EMT argued that she was entitled to recover because she was "upon," "out," or "off," and therefore "occupying," the ambulance. The EMT suggested that "out" and "off" are completely independent from the gerund "getting." In other words, the definition of "occupying" should not be read as "in, upon, getting in, [getting] on, [getting] out or [getting] off" of an insured vehicle. The South Carolina Supreme Court has been clear, however, that "upon" requires physical contact with the insured vehicle. Severing these terms from "getting" would extend coverage to all persons both "in" and "out," or "upon" and "off," of an insured vehicle—meaning everyone. The court declined to read the policy so implausibly.

Owned But Uninsured Exclusion Advances Maryland Public Policy. The Maryland statute authorizes the exclusion of uninsured motorist coverage for "a named insured . . . for an injury that occurs when the named insured . . . is occupying . . . an uninsured motor vehicle that is owned by the named insured. "The purpose of this policy exclusion is to prohibit a person from purchasing insurance for one car only and using that coverage as to other vehicles owned by the insured through the 'in any accident' provision of the policy." Maryland courts have determined that allowing this exclusion advances the public policy interest of encouraging families to obtain coverage for all of their vehicles and thus maximize compliance with the purpose of the statute. *GEICO Gen. Ins. Co. v. Barnes-Simmons, 2018 Md. App. Lexis 22*.

Owned But Uninsured Exclusion Did

Not Apply. In *Lee v. GEICO Choice Ins. Co., 2017 Del. Super. LEXIS 50*, a driver qualified as an insured and was entitled to UIM under her sister's policy. The driver and the sister were relatives and were residents of the same household on the date of the accident. The driver was entitled to UIM coverage despite the owned but uninsured exclusion in the sister's policy because UIM coverage was personal to the insured rather than vehicle related. The driver was entitled to UIM coverage regardless of whether her personal vehicle was insured at the time of the accident. As a result, the insurer could not rely on the owned but uninsured exclusion in the sister's policy to restrict the driver's UIM coverage. The court cited the public policy in favor of protecting innocent victims in the Delaware statute, *18 Del. Code § 3902*.

Alaska and Connecticut Require Transportation Network. Driver or Company to Maintain Uninsured/Underinsured Motorist (UM/UIM) Coverage. Alaska requires a transportation network company driver, or transportation network company on behalf of the driver, to maintain primary automobile insurance that recognizes that the driver is a transportation network company driver or otherwise uses a vehicle to transport passengers for compensation and that covers the driver while the driver is logged onto the digital network of a transportation network company or while the driver is engaged in a prearranged ride. UM/UIM coverage applies while a participating transportation network company driver is logged onto the digital network of a transportation network company and is available to receive transportation requests but is not engaged in a prearranged ride. *Alaska Stat. § 28.23.050*. Connecticut requires a transportation network company driver or a transportation network company on the driver's behalf to procure and maintain an automobile liability insurance policy that recognizes that the driver is a transportation network company driver and provides coverage for the driver for the period during which the driver is connected to the transportation network company's digital network and is available to receive requests for prearranged rides but is not engaged in the provision of a prearranged ride for UM/UIM coverage. *2017 Ct. ALS 140.*

Permissive Use Exclusion Applied. In *Salinas v. Progressive Cty. Mut. Ins. Co., 2017 Tex. App. LEXIS 9334*, a minor injured in an accident while riding as a passenger in a stolen vehicle was not entitled to recover under his uninsured motorist (UIM) coverage because the policy excluded coverage for injury sustained while "using" a vehicle without the owner's permission. The accident arose out of the vehicle's "inherent nature" as an automobile, the insured was injured while inside the vehicle, and the injury-producing event was a car wreck. Thus, the insured was "using" the vehicle at the time of the accident.

Uninsured Motorist (UM) Coverage Follows Liability Coverage. In *Amica Mut. Ins. Co. v. Willis, 2018 Fla. App. Lexis 537*, a pedestrian's policy provided liability coverage for injuries she caused while operating a non-owned golf cart, but it excluded uninsured motorist (UM) coverage for injuries she sustained from an uninsured motorist operating a non-owned golf cart. *Fla. Stat. § 627.727* did not provide for the exclusion of particular uninsured vehicles. The UM exclusion was inconsistent with the policy of the UM statute because it failed to provide the insured with UM coverage in the same manner as liability coverage. The insured obtained liability coverage that exceeded the minimum required by law. Because UM coverage fol-

lows liability coverage, the UM policy was required to provide reciprocal coverage and therefore, the pedestrian was entitled to UM benefits under the policy.

Named Driver Exclusion Barring Liability and Uninsured/Underinsured Motorist (UM/UIM) Coverage for the Named Insured Violated Illinois Statute. A named driver exclusion in an insured's policy that barred liability and UM/UIM coverage for the named insured violated Illinois's mandatory insurance requirements and Illinois public policy. In this case, the other driver's vehicle was underinsured. The plaintiff sought to recover for her injuries under her own liability policy, which provided the UIM coverage mandated by the Illinois statute, *215 Ill. Comp. Stat. 5/143a-2*. The named driver exclusion endorsement in the plaintiff's automobile liability policies was not enforceable against the plaintiff, as the named insured. *Phoungeun Thounsavath v. State Farm Mut. Auto. Ins. Co., 82 N.E.3d 523 (Ill. App. Ct. 2017).*

Chapter 25—Prerequisites to Recovery

Three Year Statute of Limitations Applied to Claim Arising From Unidentified Driver. In *Leon v. State Farm Fire & Cas. Co., 2017 Ohio App. LEXIS 4526*, the fact that the driver who caused the plaintiff's motorcycle accident could not be identified did not make it impossible for the plaintiff to comply with the uninsured motorist (UM) policy. The policy contained a three-year contractual limitations clause that stated that legal action could not be brought against the insurer after three years of the date of the accident. The defendant directed the plaintiff's attorney on how to proceed and the plaintiff could have used *Ohio Civ. R. 15*. The limitations clause of the policy was not ambiguous. The language from the policy was clear that if the insured and the insurer did not come to an agreement about compensatory damages, then the insured could file a lawsuit against the insurer and the uninsured motorist.

Tennessee Statute Does Not Mandate Service on Uninsured Motorist (UM) Insurer Within One Year of Accident. *In Bates v. Greene, 2017 Tenn. App. LEXIS 503*, the insurer argued that the insured's UM claim was time barred because the insured did not serve the insurer within one year of the date of the accident. The court found no basis in the UM statute or case law for requiring the plaintiff to serve the uninsured motorist carrier within one year of the accident. *Tenn. Code § 56-7-1206* requires that a claim by an insured must be served upon an uninsured motorist (UM) insurer within one year from the date of a motor vehicle accident so long as the statute of limitations had not run against the uninsured motorist. The insured brought an action against the tortfeasor within one year of the accident but the complaint was returned unserved. The UM claim was subject to the six-year statute of limitations for contract actions.

Test for Determining The Number of Accidents for Liability Purposes. In *Hurst v. Metro. Prop. & Cas. Ins. Co., 401 P.3d 891 (Wyo. 2017)*, the cause theory was the appropriate test upon which to determine the issue of the number of accidents that occurred for liability purposes where applying varying definitions depending on the nature of the accident and whether the insured was the tortfeasor or the innocent injured party. The district court erred in granting the insurer summary judgment on its claim that the insureds' injuries were the result of one accident where the factual record was insufficient to determine whether the driver maintained or regained control of her vehicle after hitting one

insured and before hitting the second insured. In recognizing the cause theory, the trial court adopted the correct legal doctrine for the interpretation of the "one accident" language in the policy. Under the cause theory, the number of accidents is determined by the number of causes of the injuries. The court must determine if there was but one proximate, uninterrupted, and continuing cause that resulted in all of the injuries and damage.

Chapter 26—Hit and Run Accidents

Insured Established She Was Involved in Accident With Hit and Run Vehicle. In *Russell v. Sentinel Ins. Co., 2018 Minn. App. Lexis 8*, the policy defined an uninsured motor vehicle to include a hit-and-run vehicle whose operator or owner cannot be identified and that hits or causes an accident resulting in bodily injury without hitting the insured or any family member. To trigger uninsured motorist (UM) coverage under this provision, the insured must establish that the vehicle is a hit-and-run vehicle, whose operator or owner cannot be identified, and that hit her or caused an accident resulting in bodily injury without hitting her. Neither the policy nor the Minnesota statute defined a "hit-and-run vehicle." *Minn. Stat. 65B.41-71*. In this case, the unidentified driver did not stop and, due to her injuries, the insured was unable to obtain the driver's information. Applying the ordinary meaning of hit-and-run, the other driver's vehicle was a hit-and-run vehicle. The lower court erred in granting summary judgment to the insurer on the insured's UM claim as there was a genuine issue of material fact as to whether the unidentified driver was negligent.

Plaintiff Not Required to Prove That Both the Owner and the Operator Were Unidentified. In *Gonzalez v. Fram Bureau Gen. Ins. Co., 2018 Mich. App. Lexis 11*, the trial court erred in ruling that the policy required the plaintiff to offer proof that both the owner and operator of the vehicle that struck the plaintiff's car were uninsured at the time of the accident. The evidence established that the plaintiffs' vehicle was struck by another vehicle, causing bodily injury to the occupants of plaintiffs' vehicle, and the accident was reported to the police and the insurer. To meet the definition of a "hit-and-run auto," it is only necessary that either the owner or the operator be unknown. Burns was identified as the owner of the vehicle that struck the plaintiffs' vehicle, but Burns denied driving the vehicle at the time of the accident and claimed that the vehicle had been stolen. The plaintiffs presented evidence that the identity of the operator was unknown because the driver fled the scene after the accident and that they were involved in an accident with an "uninsured automobile" under the terms of the policy.

Issues of Fact Existed as to Whether the Hit and Run Driver Was Negligent. In *Koepke v. Metro. Prop. & Cas. Ins. Co., 2017 Ohio App. LEXIS 2123*, the trial court erred in granting summary judgment to an insurer in an action by its insured seeking uninsured motorist (UM) coverage that arose from when she was struck by a hit-and-run driver while attempting to cross a street. Genuine issues of fact existed as to whether the driver was negligent in crossing the double yellow lines of the median where the insured had been standing. Although the insured had to yield the right of way to the driver because she did not use a crosswalk while crossing the street, the driver's lack of a duty of care to her only existed if it was shown that he proceeded lawfully. Questions of fact existed regarding whether the hit-and-run driver violated *Ohio Rev. Code § 4511.33(A)(1)*. If a trier of fact concludes that the hit-and-run driver

was proceeding unlawfully when he hit the insured, then the driver may be liable for negligence.

Physical Contact Requirement Not Authorized by Delaware Statute. Although the policy was not provided, the Delaware statute, *18 Del. Code § 3902*, mandates hit and run coverage and there was no physical contact requirement in the statute. The question of whether the plaintiff attempted to avoid debris from a non-contact vehicle was a fact issue. The plaintiff's vehicle was an active accessory in causing the injury since he was driving his vehicle when he allegedly tried to avoid an unidentified object in the road. The act of swerving to avoid the object was not an act of independent significance that broke the causal link between the vehicle and the injuries inflicted. The vehicle was used for transportation purposes at the time of the accident. A fact issue as to whether the unidentified object came from another vehicle precluded summary judgment for the insurer. *Aruna Sampha Kanu v. Allstate Ins. Co., 2017 Del. Super. LEXIS 259.*

Questioning Under Oath Authorized to Determine Whether Injury Was Caused By Hit and Run Vehicle. In *State Farm Mut. Auto. Ins. Co. v. Adams, 526 S.W.3d 63 (Ky. 2017)*, the issue before the court was whether the insurer is permitted unilaterally to require that a person seeking coverage undergo questioning under oath. The insureds were passengers in a car that was rear ended by another car, while they were stopped at a red light. The other vehicle, which could not be identified, fled the scene. The insured sought personal injury protection (PIP) and uninsured motorist (UM) benefits. The insurer made initial payments of PIP benefits but, after an investigator took recorded statements from the insureds suspended any additional payments. The insurer claimed that the insureds made inconsistent statements about where they were going that day, where they had been, and what happened when they were hit. The insurer also perceived inconsistencies between the statements and the police report and noted that two of the insured had been involved in a number of motor vehicle accidents in the preceding year. The insureds were required to submit to questioning under oath regarding those issues as a condition precedent to coverage because some of the issues raised by the insurer involved the acquisition of accident related information.

Chapter 27—Settlement of Uninsured Motorist Claims

Insured Failed to Preserve Claim for Uninsured Motorist (UM) Benefits When He Settled With Tortfeasor. In *Newstrom v. Auto-Owners Insurance Company, 2017 Ga. App. LEXIS 529*, Georgia law applied in determining what the party injured by an unknown driver in another state must do to recover from his or her own uninsured motorist insurer as it was a procedural matter. Because the driver executed a general release of her claims against the other driver in the accident, the insurer was entitled to a declaration that the insureds could not recover under the policy. In Georgia, a claimant who settles with a tortfeasor must execute a limited release pursuant to *Ga. Code § 33-24-41.1* in order to preserve the claimant's pending claim for UM benefits against his or her own insurer.

Chapter 28—Arbitration of Uninsured Motorist Claims

Court Granted Permanent Stay of Arbitration Because Police Vehicle Not Motor Vehicle for Purposes of Supplementary Uninsured/Underinsured Motorist (SUM). In *Matter of U.S. Speciality Ins. Co. (Denardo), 57 N.Y.S.3d 743 (App. Div.*

2017), the trial court properly granted an application filed under *N.Y. C.P.L.R. § 7503* by a town's SUM insurer to permanently stay arbitration between the parties because a police officer was not an insured under the terms of the SUM endorsement. The police vehicle that he was operating at the time of an accident was not a "motor vehicle" for purposes of SUM coverage. Fire and police vehicles were expressly excluded from the definition of a "motor vehicle" under *N.Y. Veh. & Traf. Law § 388(2)*. The fact that the officer was operating an unmarked police vehicle at the time of the accident did not matter.

What Constitutes a Demand for Arbitration. In *Willis v. United Equitable Ins. Co., 82 N.E.3d 756 (Ill. App. Ct. 2017)*, the insured and a passenger were not entitled to uninsured motorist (UM) coverage under the insured's policy because the insured did not unequivocally request arbitration within two years of the accident. The arbitration demand in the letters sent by the insurer was a contingent demand—contingent on her claim not being settled within one or two years. A contingent demand, by definition, is not unequivocal. The focus of the request in these letters was on resolving the claim rather than demanding arbitration.

Insurer Did Not Waive Its Right to Arbitration. Absent other acts inconsistent with its right to arbitrate a claim for underinsured motorist (UIM) benefits, an insurer did not waive that right by waiting to assert it until the conclusion of the insured's action against the underinsured driver. The insurer was not a party to that action and thus could not fairly be charged with wasting judicial time and effort. The policy contained a specific provision requiring arbitration to resolve disputed issues of liability and damages for purposes of UIM coverage, which was consistent with the language of *Mass. Gen. Laws ch.175, § 111D*. The judgment against the underinsured driver had no collateral estoppel effect and did not preclude the insurer from contesting issues of liability and damages in connection with the UIM claim. *Chamberland v. Arbella Mutual Insurance Company, 78 N.E.3d 84 (Mass. App. Ct. 2017)*.

Chapter 29—The Litigation of Uninsured Motorist Claims

Insurer Needed to Raise Procedural Defense of Notice of Settlement At Trial. In *Travelers Indem. Co. of Conn. v. Worthington, 2017 Ala. LEXIS 107*, the insurer was not entitled to relief from judgment because it knew before trial that the insured had entered into a settlement agreement, but it went to trial without amending its answer or otherwise presenting to the trial court its argument that the insured had forfeited the policy's uninsured/underinsured motorist (UM/UIM) coverage by failing to give notice. A party may not wait until after a verdict has been rendered before objecting to a procedural defect, if the objection could have been raised in a timely manner. A litigant with knowledge of previously unserved pleadings and documents may not go to trial, gamble on a favorable outcome at the hands of the jury, and then raise this deficiency for the first time in a post-trial motion for a new trial. This rule is necessary to ensure fairness at trial, and it supports the public interest in judicial economy.

Breach of Contract Claim Does Not Accrue Until Insurer Refuses to Pay. In *Malone v. State Farm Mut. Auto Ins. Co., 2017 U.S. Dist. LEXIS 184955 (D. Nev. 2017)*, the insured brought a breach of contract action arising from an automobile accident. The insured was in her parked vehicle in a parking lot, a car backed into

her and caused her medical and incidental damages. At the time of the accident, the insured maintained a policy with an underinsured motorist (UIM) coverage with the defendant. The insured filed a negligence suit in state court against the purported tortfeaser and the defendant insurer intervened in that litigation. The court dismissed the breach of contract action. In Nevada, a cause of action for breach of contract of an underinsured motorist policy does not accrue until insurer breaches the contract by declining to pay an amount that has become due under the policy. Whether the insurer breached its contract by failing to pay depends on the outcome of the state court litigation against the alleged underinsured motorist and tortfeasor.

Severance of Claims Warranted in Action Involving Underinsured Motorist (UIM) Coverage and Evidence of Insurance Excluded. The trial court in *In re Progressive Cty. Mut. Ins. Co., 2017 Tex. App. LEXIS 4833* abused its discretion in denying an insurer's motion to sever a friendly suit by a child against his mother for injuries suffered in an accident from claims related to the insurer's petition in intervention on underinsured motorist (UIM) coverage. Severance of the claims was proper because the controversy involved more than one cause of action, specifically the child's claims against the mother for her negligence and the father's unpleaded claims for breach of contract against their insurer under their own policy for UIM benefits. The claims could have been brought as separate lawsuits from one another and were not so interwoven that they involved the same facts and issues. Severance of the claims was necessary to avoid prejudice. Furthermore, the mother had a right under *Tex. R. Evid. 411* to have evidence of insurance excluded.

Documents in Bad Faith Claim Protected by Attorney-Client and Work Product Privilege. The trial court in *Richardson v. Gov't Emps. Ins. Co., 200 Wn. App. 705 (2017)* abused its discretion to the extent it compelled the insurer to produce post-litigation documents or information protected by the attorney-client privilege or work product doctrine as to the insured's underinsured motorist (UIM) bad faith claim. Allowing the insured to access privileged information between the insurer and its attorney as to events that occurred after the insurer made its decision regarding the UIM claim and made after the insured filed suit would run afoul of the purpose of the attorney-client privilege, the work product doctrine, and the purposes of discovery. The discovery order was unsupported by and contrary to existing law.

Lower Court Improperly Ordered Discovery. The insurer's contractual obligations under a uninsured/underinsured motorist (UM/UIM) policy did not ripen until after the insured had obtained a judgment against the driver on liability, damages, and coverage. There had been no judgment or other judicial determination as to any of the issues. The information the insured sought may become relevant, but only if the insured first obtained a judgment establishing the driver's liability for the underlying accident, their underinsured status, and the existence and amount of the insured's damages. The lower court abused its discretion by granting the insured's second motion to compel and denying the insurer's motion for reconsideration. The insurer lacked an adequate remedy by appeal because the trial court's order compelled discovery irrelevant to the underlying case. *In re Allstate Fire & Cas. Ins. Co., 2017 Tex. App. LEXIS 10428.*

Restrictions on Mandatory Expedited Jury Trial Procedures. In California, a party may opt out of the mandatory expe-

dited jury trial procedures if punitive damages are sought or if damages are in excess of insurance policy limits are sought. *Cal. Code Civ. Proc. § 630.20.*

Failure to Allege Facts Constituting Bad Faith. In a case alleging bad faith, the plaintiff pled legal conclusions without facts. The plaintiff failed to point to any specific instances that would indicate the defendant's actions were in bad faith. The complaint alleged that the defendant did not promptly offer payment to the plaintiff but did not provide the date on which the plaintiff submitted his claim or the date of claim denial by the defendant. The court found that the plaintiff failed to allege any plausible claim of bad faith under *42 Pa. Cons. Stat. § 8371* and dismissed the case. *Toner v. GEICO Ins. Co., 2017 U.S. Dist. LEXIS 104075 (E.D. Pa. 2017).*

The Insurer Not Subject to Attorney Fee Provision Because It Fell Within the Statute's Safe Harbor. An insurer was not subject to attorney fee's under *Or. Rev. Stat. § 742.061* because it fell within the statute's safe harbor. The statute does not apply to actions to recover uninsured/ underinsured motorist (UM/UIM) benefits if, in writing, not later than six months from the date proof of loss is filed with the insurer, the insurer has accepted coverage and the only issues are the liability of the uninsured or underinsured motorist and the damages due the insured and the insurer has consented to submit the case to binding arbitration. In response to the insured's proof of loss for underinsured motorist (UIM) benefits, the insurer sent a letter that fully complied with the statute. The letter stated that the insurer had accepted coverage and agreed to binding arbitration, reserving only the issues of the UM liability and damages due to the insured. The insurer disputed the nature and extent of plaintiff's alleged injuries as well as the reasonableness and necessity of some of plaintiff's accident-related medical expenses. *Spearman v. Progressive Classic Ins. Co., 361 Ore. 584 (2017).*

No Bad Faith Based on Insurer's Settlement Offer. In support of its order granting the insurer summary judgment and dismissing the insured's bad faith suit, the court noted that the insured failed to produce sufficient evidence that the insurer lacked a reasonable basis for those offers. The fact the insured's arbitration award was almost twice that of the insurer's initial settlement offers was immaterial because what was relevant was the information that the insurer took into account in determining what amount to offer. *Boleslavksy v. Travco Ins. Co., 2017 Phila. Ct. Com. Pl. LEXIS 257.*

No Evidence That Insurer's Settlement Offer Was Unreasonable. Evening assuming that the insured had a brachial plexus stretch injury, tremors, and weakness of grip strength, there was nothing in the record placing the insurer on notice that these injuries or conditions were permanent in nature. Thus, the insurer's offer of $1,500 was reasonable and there was no evidence that the insured acted in bad faith in the handling of the insured's uninsured motorist (UM) claim. *Duncan v. Geico Gen. Ins. Co., 2017 U.S. Dist. LEXIS 169347 (M.D. Fla. 2017).*

Tennessee Does Not Recognize a Claim for Bad Faith. *Tenn. Code Ann. § 56-7-105* provides the exclusive remedy for bad faith claims against insurers by the insured. *Spicer v. Allstate Prop. & Cas. Ins. Co., 2017 U.S. Dist. LEXIS 121687 (M.D. Fla. 2017).*

Vexatious Litigation Claim Had to Be Determined at Trial Not on Summary Judgment Motion. The insured and his wife were injured in an automobile acci-

dent when a vehicle driven by an uninsured motorist struck their vehicle. There was no dispute that the uninsured motorist was at fault in the accident. The insured submitted a claim for uninsured motorist (UM) benefits to their insurer for the injuries they sustained in the accident. The insurer paid $25,000 to settle the wife's bodily injury UM claim and all related derivative claims. In exchange, the insured and his wife executed a release as to those claims. The release specifically included the insured's derivative claim but specifically excluded the insured's bodily injury UM claim. The insured then filed a complaint, pro se, against the insurer, the claims adjuster assigned to the insured's UM claim and others asserting claims of breach of contract, bad faith, fraud and violations of the Ohio Consumer Sales Practices Act based on the insurer's alleged failure to compensate the insured for the injuries he sustained in the accident. The order declaring the insured a vexatious litigator under *Ohio Rev. Code § 2323.52* was reversed and the case was remanded to the trial court for trial because the court found, based on the record before it, reasonable minds could disagree as to whether appellant habitually, persistently, and without reasonable grounds engaged in vexatious conduct. Therefore, the vexatious litigator claim had to be resolved at trial, not on summary judgment. Vexatious conduct is conduct of a party in a civil action that (1) obviously serves merely to harass or maliciously injure another party to the civil action; (2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification or reversal of existing law; or (3) is imposed solely for delay. Conduct includes the filing of a civil action, the assertion of a claim, defense, or other position in connection with a civil action, the filing of a pleading, motion, or other paper in a civil action, including, but not limited to, a motion or paper filed for discovery purposes, or the taking of any other action in connection with a civil action. *Davie v. Nationwide Ins. Co. of Am., 2017 Ohio App. LEXIS 4055*.

Insured Stated Claim for Deceit Based on Insurer's Failure to Disclose Existence of Underinsured Motorist (UIM). The independent-duty rule did not bar the plaintiff's deceit claim. The insurer not only failed to disclose the existence of $900,000 of underinsured motorist (UIM) coverage available to the plaintiff, but actively deceived the plaintiff and her attorney into believing that there was no such coverage. The jury was entitled to find that the defendant's deceit harmed the plaintiff. There was sufficient evidence that defendant's acts "contributed materially" to a two-year delay in formalizing plaintiff's UIM claim. In South Dakota, the tort of deceit is: (1) The suggestion, as a fact, of that which is not true, by one who does not believe it to be true; (2) The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true; (3) The suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or (4) A promise made without any intention of performing. *Dziadek v. Charter Oak Fire Ins. Co., 867 F.3d 1003 (8th Cir. 2017).*

No Breach of Good Faith for Seeking to Enforce Policy Terms. A party to a contract does not breach the implied duty of good faith and fair dealing by seeking to enforce the agreement as written or by acting in accordance with its express terms. *Lucarell v. Nationwide Mut. Ins. Co., 2018-Ohio-15.*

Chapter 30—Underinsured Motorist Coverage

Insurer Made Meaningful Offer of Increased Uninsured/Underinsured Motorist (UM/UIM) Coverage. In *Spivey v. USAA Cas. Ins. Co., 2017 Del. Super. LEXIS 399*, the court declined to reform a policy to increase the insureds' UM/UIM coverage limits to $ 100,000/300,000, which was the equivalent limits of their bodily injury liability coverage. The insurer made a meaningful offer of UM/UIM coverage. The insurer communicated the cost of additional coverage, provided reasonable notice that the insureds were being offered insurance coverage options, did not bury the offer in a sea of other insurance policy provisions, and made the offer for UM/UIM coverage in the same manner and with the same emphasis as the insureds' other coverage.

Insurer Not Required to Offer Underinsured Motorist (UIM) Coverage for Vehicle Not Covered for Liability Purposes. In *Baldridge v. Amica Mut. Ins. Co., 2017 U.S. Dist. LEXIS 102108 (W.D. Pa. 2017)*, the plaintiff argued that he never executed a valid waiver rejecting UIM coverage for the Mustang, and thus, he was entitled to a determination that he has UIM coverage on the Mustang in the amount of $300,000.00, just like he did on his three other vehicles, resulting in a total of $1,200,000.00 in UIM coverage. However, the defendant argued that because it never provided liability coverage on the plaintiff's Mustang, the defendant was never required to offer the plaintiff UIM coverage on the Mustang. The Pennsylvania statute, *75 Pa. Cons. Stat. § 1731*, refers to a motor vehicle liability policy. No signed waiver of UIM benefits with respect to the Mustang was required by law because it was not insured for liability.

Vehicles Covered Under the Liability Provision Covered for Underinsured Motorist (UIM) Provision Unless Insured Rejects UIM Coverage. In response to a certified question from federal district court, the court in *Dircks v. Travelers Indem. Co. of Am., 2017 UT 73* found that the Utah statute, *Utah Code § 31A-22-305.3*, required that all vehicles covered under the liability provisions of an automobile insurance policy also be covered under the underinsured motorist provisions of that policy and with equal coverage limits, unless a named insured waives the coverage by signing an acknowledgment form meeting certain statutory requirements.

Tortfeasor's Excess Policy Triggered Resulting In No Gap In Coverage. In *Wallace v. State Farm Mut. Auto. Ins. Co., 166 A.3d 989 (Me. 2017)*, the tortfeasor who injured the plaintiffs in a motor vehicle accident was not an underinsured driver under *24-A Me. Rev. Stat. § 2902* and thus, there was no gap in coverage requiring the insurer to pay underinsured motorist (UIM) benefits. The amount paid by the tortfeasor's excess policy was a compensatory payment received by the plaintiffs that had to be offset. The plaintiffs recovered far more from the tortfeasor's insurers than the maximum amount of UM coverage provided by the insurer's policies and thus, they surpassed the same recovery that would have been available had the tortfeasor been insured to the same extent. Accordingly, they have surpassed the same recovery which would have been available had the tortfeasor been insured to the same extent. The dissenting judge disagreed and argued that the plain language of Maine's UIM statute require that the plaintiffs be afforded the same recovery that they would have been entitled to had the underinsured driver's vehicle been insured to the same extent as their UM coverage. The automo-

bile accident produced disastrous consequences. The plaintiffs suffered serious brain injuries and numerous lacerations. By overlooking the $1,000,000 deductible contained in the policy, the court closed this donut hole and improperly credited the tortfeasor for having insurance it never purchased. The judge cited *4-24 New Appleman on Insurance Law Library Edition § 24.02(2)(a)* for the proposition that an excess policy does not broaden the underlying coverage. While an excess policy increases the amount of coverage available to compensate for a loss, it does not increase the scope of coverage." If, for example, the plaintiffs' damages totaled $1,000,000 (the equivalent of the deductible) and the excess policy was not triggered, the tortfeasor's vehicle would be deemed underinsured. Thus, the plaintiffs would be entitled to recover the difference between the $100,000 of UM coverage in the defendant's policy and the $50,000 tortfeasor's policy limits. However, because the plaintiffs' damages were so extensive that the excess insurer settled for the excess policy limits (notwithstanding the $1,000,000 deductible), the employer's insurer is absolved of its obligation to provide the underlying coverage, and the defendant insurer is relieved of its obligation to provide the UIM coverage the plaintiffs paid for. The plaintiffs were left to bear the brunt of this shortfall occasioned by the $1,000,000 deductible contained in the excess policy.

Chapter 31—Duplicate Recoveries

Claim for Uninsured/Underinsured Motorist (UM/UIM) Coverage Not Barred By Workers Compensation Exclusivity. In *Am. Family Mut. Ins. Co. v. Ashour, 2017 Colo. App. LEXIS 628*, an employee's claim for UIM coverage under his policy with the insurer was not precluded because the claim for UIM benefits under the policy was not barred by the exclusivity provisions of the Colorado Workers' Compensation Act or by the "legally entitled to recover" language of the policy. To preclude the employee from claiming benefits from his own insurer under his UM/UIM policy would effectively deny him the full protection for injuries caused by underinsured negligent drivers contrary to the intent of the statute. Allowing him to claim benefits from his own insurer would not in any way affect the immunity provided to his employer and co-employee by the Act.

Utah Authorizes Deduction of No-Fault Benefits. In Utah, monthly disability benefits are reduced or reimbursed by any amount received by, or payable to, the eligible employee from the automobile no-fault payments. *Utah Code § 49-21-402(2)*.

Chapter 32—Conflict of Laws

Court Applied Florida Conflict of Law Principle of Lex Loci Contractus. The plaintiff in *Spicer v. Allstate Prop. & Cas. Ins. Co., 2017 U.S. Dist. LEXIS 121687* (M.D. Fla. 2017) argued that Florida law governed the bad faith claim involving underinsured motorist (UIM) coverage and that the claim was brought in compliance with Florida law. However, the defendant insurer argued that Tennessee law controlled. The plaintiff purported to rely on a version of the policy she asserted did not include the Tennessee endorsement or the choice of law clause, but failed to provide it to the court. Therefore, the only policy before the court includes a choice of law endorsement that provides for the application of Tennessee law. Florida contract law follows the principle of *lex loci contractus*. Because it is undisputed that the insurance policy was executed in Tennessee, Florida's choice of law policy dictates that Tennessee law applies. The plaintiff made

no argument to the contrary and therefore Tennessee law controlled.

Procedural Law of the Forum State Applied. Georgia law applied in determining what the party injured by an unknown driver in another state must do to recover from his or her own uninsured motorist carrier as it was a procedural matter. The insured was injured in a car accident in California. At the time she was a California resident, but the car she was driving was registered in Georgia where her parents lived. After the accident, the insured settled her claims against the other driver for his policy limits and signed a general release of her claims against him arising from the accident. She then made a claim for UM benefits from the defendant insurer and sent the insurer a letter demanding binding underinsured motorist (UIM) arbitration under California law. The insurer declined to participate in the arbitration. The plaintiffs then brought this declaratory judgment action in Georgia, seeking declarations that the insurer must provide UM coverage under the policy for their claims and that the insurer had a duty to participate in the California arbitration procedure. The insurer counterclaimed, seeking declarations that the insured released her claims against the other driver and that, consequently, none of the plaintiffs were entitled to recovery under the UM policy. In Georgia, a claimant who settles with a tortfeasor must execute a limited release pursuant to *Ga. Code § 33-24-41.1* in order to preserve the claimant's pending claim for UM motorist benefits against his or her own insurer. The parties were not disputing the nature, construction, or interpretation of the policy. Instead, they were disputing the effect of a general release on the plaintiff's ability to recover UM benefits and the method of resolving that dispute. These questions involved procedural and remedial matters governed by Georgia law, the law of the forum in which the plaintiffs brought this action. *Newstrom v. Auto-Owners Insurance Company, 2017 Ga. App. LEXIS 529*.

Court Applied Illinois Restatement (Second) of Conflicts of Law. A federal district court sitting in Illinois must conform to Illinois' choice-of-law rules, which are grounded in the *Restatement (Second) of Conflicts of Law*. The *Restatement* rule requires that the court employ the substantive law of the state with the most significant relationship to the tort. The court considered the following factors: (1) Illinois was the place of injury; (2) Illinois was the place where the injury-causing conduct occurred; (3) Illinois was the state of domicile of the tortfeasor; (4) Illinois was the state where the tortfeasor worked out of for the defendant and Illinois was the place where the relationship between the parties is centered. Careful assessment of these factors led to the conclusion that Illinois has the most significant relationship to the torts alleged. Therefore, Illinois law governed and the plaintiff was not entitled to punitive damages. *Conway v. Adrian Carriers, LLC, 2017 U.S. Dist. LEXIS 186135 (S.D. Ill. 2017)*.

Chapter 33—Stacking of Benefits

Under Illinois Law, Unambiguous Anti-Stacking Provision Precluded Stacking of Underinsured Motorist (UIM) Limits. Under Illinois law, which governed the enforceability of the policies in *Ill. Farmers Ins. Co. v. Hagenberg, 167 A.3d 1218 (D.C. App. 2017)*, anti-stacking provisions were not contrary to public policy. The anti-stacking clause was not ambiguous under Illinois law because it unambiguously precluded the stacking of the UIM coverage limits of multiple policies issued by the insurer, including the three policies and the clause was therefore

enforceable. On remand, the trial court was instructed to enter summary judgment for the insurer on the anti-stacking-clause issue and reconsider the attorney's fees award in favor of the insured.

Insured Waived Stacked Uninsured/Underinsured Motorist (UM/UIM) Coverage. In *Ullman v. Safeway Ins. Co., 2017 N.M. App. LEXIS 53*, the insurer's forms complied with New Mexico law in all respects as to what was required for a valid rejection of stacked UM/UIM coverage. The insured was sufficiently made aware of the maximum amount of insurance statutorily available, the premium cost for the bodily injury level of coverage appeared in the application and the declaration page, and the premium cost for the UM/UIM coverage appeared in the selection/rejection form.

Policy Precluded Intra-Policy Stacking. When "per accident" and "per person" limits follow one another on a declarations page, the logical construction is that the "per person" limit modifies the "per accident" limit. When this occurs, the policy unambiguously provides that an insured individual is always limited to $100,000 regardless of how many individuals are injured in a single accident. The policy provided that the $100,000 "per person" limit is the most the insurer will pay regardless of the number of "vehicles or premiums shown in the Declarations." This language expressly foreclosed the plaintiff's stacking argument, which was based upon the number of vehicles and premiums shown in the declarations. Thus, the policy clearly and unambiguously precluded intra-policy stacking. *Estate of Rock v. Metro. Group Prop. & Cas. Ins. Co., 2017 N.H. LEXIS 148*.

Insurer Not Required to Provide the Insured With Another Opportunity to Waive Uninsured/Underinsured Motorist (UM/UIM) Stacking Coverage When He Subsequently Added a New Vehicle to His Policy. In *Kuhns v. The Travelers Home & Marine Ins. Co., 2017 U.S. Dist. LEXIS 163617 (M.D. Pa. 2017)*, the court refused to enunciate a generalized rule that the issuance of a new declarations sheet instantly nullifies the policy's after-acquired-vehicle clause, thereby requiring an insurer to secure new stacking waivers without any regard to the language of that after-required-vehicle clause. Because the insured's fourth vehicle was extended coverage under the policy's continuous after-acquired-vehicle clause, the court found that, pursuant to *Sackett II*, such coverage does not constitute a new purchase as contemplated by the Pennsylvania statute. Thus, the insurer was under no duty to provide or secure new or supplemental uninsured/underinsured motorist (UM/UIM) stacking waivers.

Insured Who Received a Multi-Car Premium Not Entitled to Stack Underinsured Motorist (UIM) Coverage. In *Gov't Emples. Ins. Co. v. Sayre, 800 S.E.2d 886 (W. Va. 2017)*, an insured who purchased a multi-car insurance policy that contained enforceable anti-stacking language was only entitled to recover up to the policy limits set forth in the single policy endorsement. As a result, the insured was not entitled to stack UIM coverage for every vehicle covered by a single policy. The insured received a multi-car premium discount and the policy contained language expressly limiting the insurer's liability regardless of the number of vehicles insured under the policy.

Insured Paid One Premium for One Policy Even Though Policy Referenced Two Policy Numbers. The trial court in *Allstate Prop. & Cas. Ins. Co. v. Musgrove, 2017 Ga. App. LEXIS 391* erred in finding

that the insureds had two separate policies, each of which provided $500,000 in uninsured motorist (UM) coverage. The policy declarations were unambiguous that there was only one policy but two policy numbers because of the amount of vehicles being covered by the policy. The insureds were issued a single bill, with a single premium, which referenced both policy numbers.

Class II Occupancy Insureds Could Not Stack Underinsured Motorist (UIM) Coverage. In *Consol. Ins. Co. v. Slone, 2018 Ky. App. Lexis 18*, an anti-stacking provision in an insurer's policy limited the total underinsured motorist coverages (UIM) coverage available to $ 500,000. The lower court erred in ruling that bus occupants were entitled to stack the UIM coverage provided in the issued to a county board of education because the bus occupants were Class II insureds who were precluded from stacking the UIM coverage under the unambiguous language of the fleet policy. There was no reasonable interpretation of the policy language that would permit the bus occupants, as class II insureds, to stack the UIM coverages. The bus occupants, as Class II insureds, could not have relied upon an affirmative misrepresentation made by an insurance agent.

Chapter 34—State Funds—General Framework

Recovery Under an Assigned Claims Plan. The plaintiff was a passenger in a stolen vehicle when it was involved in a single vehicle accident. The vehicle was donated to a charity before the accident. An automobile dealership purchased the vehicle, but did not obtain a new registration for the vehicle. At the time of the accident, the auto dealership maintained a no-fault policy through Markel Insurance Company (Markel). Following the accident, Farmers Insurance Exchange was assigned as the insurer of last resort through the Michigan Assigned Claims Plan. The plaintiff was not a named beneficiary under a no-fault policy and did not live with any family members who were named beneficiaries under a no-fault policy. Therefore, the Mercury constituted a "covered auto" under Markel's policy and Markel was the insurer of highest priority to provide personal injury protection (PIP) benefits to plaintiff. *McMullen v. Citizens Ins. Co., 2017 Mich. App. LEXIS 933 (unpublished).*

Health Care Provider's Right to Pursue Claim Against the Michigan Assigned Claims Plan. In *W A Foote Memorial Hosp. v. Mich. Assigned Claims Plan, 2017 Mich. App. LEXIS 1391*, the court rejected the healthcare provider's argument that the Michigan Assigned Claims Plan waived or failed to preserve the issue of whether the provider possessed a statutory cause of action against them. Because the health care provider did not have a statutory right to recover personal injury protection (PIP) benefits directly from an insurer under the case law prior to *Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co., 895 N.W.2d 490 (Mich. 2017)* and because it had no right under the no-fault act, summary disposition was properly entered in favor of the defendants. Health care providers had always been able to seek reimbursement from their patients directly, or to seek assignment of an injured party's rights to past or presently due benefits. The holding in *Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co., 895 N.W.2d 490 (Mich. 2017)* was applied retroactively and the health care provider was allowed to move to amend its complaint so that it might advance alternative theories of recovery, including the pursuit of benefits under an assignment theory.

Chapter 35—State Funds—Practice and Procedures

California Insurance Guarantee Association (CIGA) Has Right to Appear in Underlying Action. CIGA is a party in interest in all proceedings involving a covered claim, and has the same rights as the insolvent insurer would have had if not in liquidation, including the right to: (A) Appear, defend, and appeal a claim in a court of competent jurisdiction; (B) Receive notice of, investigate, adjust, compromise, settle, and pay a covered claim; and (C) Investigate, handle, and deny a noncovered claim. *Cal. Ins. Code § 1063.2(b)(1)*.

Indiana Insurance Guaranty Association (IIGA) Intervention as the Real Party in Interest. Two motorists were involved in a car accident. During the subsequent legal proceedings, the Indiana Insurance Guaranty Association (IIGA) intervened as the real party in interest and the trial court substituted the IIGA for the original insurance company defendant. The IIGA filed a motion to dismiss, arguing that the tortfeasor's insurance company's denial of coverage did not render him uninsured and thus the other motorist seeking damages could not recover under his own uninsured motorist (UM) provision. The court concluded that, as a matter of law and public policy, a vehicle that has liability insurance but was denied coverage meets the statutory definition of uninsured motor vehicle. The trial court did not err in denying the IIGA's motion to dismiss. *Ind. Ins. Guar. Ass'n v. Smith, 2017 Ind. App. LEXIS 403*.

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Publication 469 Release 63 May 2018

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