

**UNDERINSURED MOTORIST
(UIM) COVERAGE**

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I. UIM Statutory Background

A. Present Law

Motor vehicle insurance policies issued for motor vehicles in Minnesota must provide underinsured motorist (UIM) coverage. Minn. Stat. § 65B.49, subd. 3a. However, UIM insurance coverage is not mandated for motorcycles.

The statute explicitly allows an insurance company to sell UIM coverage which is broader in scope than the coverage required by the No-Fault Act. Minn. Stat. § 65B.49, subd. 7. Consequently, it is essential to review the terms of the applicable UIM contract when close issues are being resolved.

B. Historical Background

It is important to know some of the historical background of UIM coverage in order to determine which of the past Minnesota Supreme Court decisions have been superseded by statutory changes.

1972-1974	1975-1980	1980-1985	1985-1989	1989 to present
<ul style="list-style-type: none"> ▪ Required UIM coverage to be “made available” ▪ UIM provided “difference of limits” coverage ▪ Applicable statute: Minn. Stat. §65B.25 	<ul style="list-style-type: none"> ▪ Insurers required to offer optional UIM coverage ▪ Changed from “difference of limits” coverage to “add on” or “excess” coverage ▪ Applicable statute: Minn. Stat. §65B.49, subd. 6(e) 	<ul style="list-style-type: none"> ▪ No mention of UIM coverage in Minnesota statutes 	<ul style="list-style-type: none"> ▪ Made UIM coverage a single coverage combined with uninsured motorist (UM) coverage ▪ Changed back to “difference in limits” coverage ▪ Applicable statute: Minn. Stat. §65B.49, subd. 3a 	<ul style="list-style-type: none"> ▪ Made UM and UIM separate mandatory coverages ▪ Once again an “add on” coverage ▪ Applicable statute: Minn. Stat. §65B.49, subd. 3a and 4a

1. 1972 - 1974

Minn. Stat. § 65B.25 required that UIM coverage be “made available” by insurance companies. See Jacobson v. Ill. Farmers Ins. Co., 264 N.W.2d 804 (Minn. 1978). UIM was a “difference of limits” coverage. The UIM coverage actually available to an injured claimant would be calculated by first deducting liability insurance limits from the UIM limits. Lick v. Dairyland Ins. Co., 258 N.W.2d 791 (Minn. 1977). For example, in a “difference of limits” system, an accident involving a \$50,000 liability insurance policy and a \$50,000 UIM policy would result in having a total of \$50,000 in coverage, with no UIM coverage actually available to compensate for injuries caused by the accident.

2. 1975 - April 12, 1980

On January 1, 1975, the Minnesota No-Fault Act took effect. Insurers were now required to offer optional UIM coverage. Minn. Stat. § 65B.49, subd. 6(e). The coverage was changed from “difference of limits” to an “add on” or “excess” coverage. With an “add on” system, an accident involving a \$50,000 liability insurance policy and a \$50,000 UIM policy would result in having a total of \$100,000 in coverage for injuries caused by the accident.

Because the statute required an offer of UIM coverage, the courts would impose UIM coverage as a matter of law if an insurance company could not show that it had made a commercially reasonable offer of UIM coverage. Holman v. All Nation Ins. Co., 288 N.W.2d 244 (1980). In response to Holman, the legislature revised the statute.

3. April 12, 1980 - October 1, 1985

During this period, Minnesota statutes did not mention UIM coverage. Judicial decisions continued to clarify the nature and scope of the coverage. See Sobania v. Integrity Mut. Ins. Co., 371 N.W.2d 197 (Minn. 1985); Sibbert v. State Farm Mut. Auto. Ins. Co., 371 N.W.2d 201 (Minn. 1985); Hoeschen v. S.C. Ins. Co., 378 N.W.2d (Minn. 1985); Amco Ins. Co. v. Lang, 420 N.W.2d 895 (Minn. 1988).

4. October 1, 1985 - August 1, 1989

In 1985 legislative changes, UIM coverage was once again made part of the statute governing motor vehicle insurance. During this period, UIM was part of a single combined coverage with uninsured motorist (UM) coverage. It was a “difference of limits” coverage.

5. August 1, 1989 - present

Since August 1, 1989, UIM coverage has been a separate coverage which must be included in every Minnesota motor vehicle insurance policy. It is once again an “add on” coverage. Minn. Stat. § 65B.49, subds. 3a and 4a.

II. What is an Underinsured Motor Vehicle?

A. Applicable Definition of Underinsured Motor Vehicle

The statute defines “underinsured motor vehicle” to include both motorcycles and motor vehicles. See Minn. Stat. § 65B.43, subd 17. In close cases, the definitions in the applicable insurance policy must also be reviewed.

1. Motor Vehicle

Definition: Motor Vehicle
A motor vehicle is a vehicle with at least four wheels which is designed to be self-propelled for use primarily on public roads in transporting persons or property, and which is required to be registered under Minn. Stat. Ch. 168. See Minn. Stat. § 65B.43, subd. 2.

The definition includes a trailer when the trailer is attached to or being towed by a motor vehicle.

Under the statutory definition, a farm tractor would not be a “motor vehicle” since it is not designed primarily for use on public roads. Great Am. Ins. Co. v. Golla, 493 N.W.2d 602 (Minn. Ct. App. 1992). Close cases may arise focusing on whether or not a vehicle is required to be registered under Minn. Stat. Ch. 168. See Anderson v. St. Paul Fire & Marine Ins. Co., 427 N.W.2d 749 (Minn. Ct. App. 1988).

In Bell v. State Farm Mut. Auto. Ins. Co., No. C8-96-1704, 1997 WL 40664 (Minn. Ct. App. Feb. 4, 1997), a woman was killed in a collision with a grader which was being used to plow snow. Since the grader was “special mobile equipment” exempt from vehicle registration requirements, it was not a motor vehicle. There could be no UIM claim.

A more general issue exists with respect to certain police or other government vehicles since many are not required to be registered pursuant to chapter 168. In Mut. Serv. Cas. Ins. Co. v. League of Minn. Cities Ins. Trust 659 N.W.2d 755 (Minn. 2003), the court enforced a literal reading of Minn. Stat. § 65B.43 subd. 2 and confirmed that a police car was not a “motor vehicle” within the meaning of the No-Fault Act, since a marked police car was not required to be registered. Although this decision involved a claim for basic economic loss benefits under the No-Fault Act, the same reasoning leads to the conclusion that these unregistered vehicles would not fall within the statutory definition of an underinsured motor vehicle.

Public buses, although they may in fact not have registered license plates, do remain within the statutory definition of “motor vehicle.” State Farm Mut. Auto. Ins. Co. v. Metropolitan Council, 854 N.W.2d 249 (Minn. Ct. App. 2014).

Even though a marked police car or municipal ambulance would not be defined as a “motor vehicle” in the No-Fault Act, it may still be included within the definition of “motor vehicle” or

“underinsured motor vehicle” in a typical motor vehicle insurance contract. As already noted, it is important to review the applicable contract in cases when coverage may not be mandated by statute. For example, certain contracts have provided UM or UIM coverage for accidents caused by farm vehicles or other off-road equipment (which are not “motor vehicles” under the statutory definition) because the accident occurred on a public road. Kashmark v. Western Ins. Co., 344 N.W.2d 844 (Minn. 1984). Such contractual coverage is enforceable, even though not mandated by the provisions of the No-Fault Act.

In Ronning v. Citizen’s Sec. Mut. Ins. Co., 557 N.W.2d 363 (Minn. Ct. App. 1996), the court invalidated a policy provision that attempted to exclude all government vehicles from underinsured coverage. This decision remains valid, since the policy exclusion at issue in Ronning is too broad to be consistent with the No-Fault Act.

2. Motorcycle

Definition: Motorcycle

A motorcycle is a self-propelled vehicle with fewer than four wheels and an engine of more than five horsepower. See Minn. Stat. § 65B.43, subd. 13.

The no-fault act defines “motorcycle” at Minn. Stat. § 65B.43, subd 13. (The definition differs somewhat from the one in the Highway Traffic Regulation Act, Minn Stat. § 169.011, subd. 44.) The No-Fault definition of “motorcycle” includes an attached trailer.

Under this definition, a three wheel ATV would be considered a motorcycle. See Odegard v. St. Paul Fire & Marine Ins. Co., 449 N.W.2d 476 (Minn. Ct. App. 1988).

In addition, the No-Fault definition of motorcycle also explicitly includes a motorized bicycle.

It should be noted that, because UIM coverage for a motorcycle is optional, it is essentially unregulated by the No-Fault Act. Consequently, the No-Fault Act will generally not conflict with a policy provision that treats or calculates UIM coverage for a motorcycle in a manner that differs from the UIM coverage mandated for motor vehicles. See Johnson v. Cummiskey, 765 N.W.2d 652 (Minn. Ct. App. 2009). See also Mordini v. Amer. Fam. Mut. Ins. Co., 2016 WL 6570268 (Minn. Ct. App. Nov. 7, 2016) (A vehicle is underinsured only if the liability limits are lower than the UIM coverage. In Mordini, the UIM coverage was only \$30,000, so an at-fault vehicle with a \$50,000 liability policy did not meet the insurance policy definition of “underinsured.”

B. Meaning of “Underinsured”

Definition: Underinsured

A vehicle is underinsured when the applicable limits of bodily injury liability insurance are less than the amount needed to compensate an injured person for actual damages. See Minn. Stat. § 65B.43, subd. 17.

1. Actual Damages and Percentage of Fault

To get the basic idea of what is meant by an “underinsured” motor vehicle, go through a basic two-step process. First, determine how much money the at-fault driver owes in damages to the injured person. Second, determine how much motor vehicle insurance the at-fault driver has available to pay the damages. If the damages owed are more than the available motor vehicle insurance, the at-fault driver is “underinsured.”

In a UIM claim, “actual damages” refers to the net claim that an injured party would have against a tortfeasor after the total damages suffered are reduced by any applicable deductions for collateral source payments, for no fault benefits paid, and for comparative fault. Richards v. Milwaukee Ins. Co., 518 N.W.2d 26 (Minn. 1994).

In assessing a UIM claim, the damages being considered are generally assessed based on the at-fault driver’s specific percentage of fault. For example, a person 20% at fault for damages of \$250,000 owes only \$50,000. This at-fault driver will therefore not be underinsured if there is at least \$50,000 in liability insurance applicable to this claim. Lahr v. Am. Family Ins. Co., 551 N.W.2d 732 (Minn. Ct. App.1996).

The underlying issue in the Lahr case comes up when an at-fault driver is jointly and severally liable for 100% of the damages based upon the standards in Minn. Stat. §604.02. For example, assume that two drivers are negligent and injure a passenger. Fault is split 60% and 40%. Damages are \$50,000. The driver who is 60% at-fault is responsible for \$30,000 of the damages, but, under the standards of §604.02, this driver could be held liable for the full \$50,000 in damages if the other at-fault driver is unable to pay his share of the damages. In this example, the Lahr decision says that the 60% at fault driver who has only a minimum \$30,000 liability insurance policy will not be considered “underinsured.” The logic of the holding in Lahr is an extension of the reasoning in an earlier supreme court decision, Myers v. State Farm Mut. Auto Ins. Co., 336 N.W.2d 288 (Minn. 1983). (It is possible to come up with an unusual set of facts in which the logic of Myers and Lahr would not apply, but as a practical matter no exceptions to the Lahr decision have been litigated in the years since the decision was made in 1996.)

EMC Ins. Companies v. Dvorak, 603 N.W.2d 350 (Minn. Ct. App. 1999), reaches the same result as the decision in Lahr but provides a separate legal basis for the result, holding that any potential UIM claim based on joint and several liability was destroyed by the injured person’s partial settlement agreement with one of the tortfeasors.

2. Liability Coverage

In determining whether or not an at-fault driver is underinsured, both the liability insurance for the vehicle and any additional liability insurance for the at-fault driver must both be considered. A driver is underinsured if the applicable liability insurance is less than the amount needed to pay actual damages. (When the driver is operating a non-owned vehicle, both the insurance policy that the owner has for the vehicle and the insurance policy that insures the driver are generally available to pay damage claims. Consequently,

both are counted in assessing whether or not there is an “underinsured motor vehicle.” Royal-Millbank Ins. Co. v. Busse, 474 N.W.2d 441 (Minn. Ct. App. 1991).

If claims of multiple parties exhaust the available liability insurance, a UIM claim will exist even though a particular individual’s damages are less than the liability insurance limits. For example, when five people each received amounts between \$8,000 and \$16,000 to exhaust a \$60,000 liability policy, UIM claims could be made for damages in excess of the limited amount received because the at-fault vehicle was underinsured. Kothrade v. Am. Family Ins. Co., 462 N.W.2d 413 (Minn. Ct. App.1990).

In Ronning v. Citizen’s Sec. Mut. Ins. Co., 557 N.W.2d 363 (Minn. Ct. App. 1996), the insurer argued that there could be no UIM claim when the injury was caused by a government vehicle, because a \$200,000 statutory cap on damages created a limit on this tortfeasor’s legal obligation to pay damages. This argument was rejected. The cap on damages is not an absolute immunity from tort claims, and the government vehicle is therefore considered to be underinsured. The court also declared invalid an exclusion in the UIM insurance policy stating that a vehicle owned by a government agency could not be considered underinsured. (As previously noted, the 2003 decision in Mut. Serv. Cas. Ins. Co. v. League of Minn. Cities Ins. Trust, 659 N.W.2d 755 (Minn. 2003), dealing with the definition of a “motor vehicle” may complicate the analysis of such issues.)

The only liability insurance policies that are to be considered in determining whether or not the at-fault vehicle is “underinsured” are generally those liability policies providing coverage for the owner and operator of the vehicle. In Behr v. Am. Family Mut. Ins. Co., 638 N.W.2d 469 (Minn. App. 2002), the tortfeasor was operating his own vehicle while in the course of his employment. His employer’s liability insurance, while it protected the employer to the extent of the employer’s vicarious liability, did not actually insure either the employee or the employee’s vehicle. Consequently, the employer’s million dollar policy could not be considered in assessing whether or not the at-fault driver was underinsured.

3. Liability Coverage Dispute

To have an underinsured claim, the damages for the injured person must be in excess of the applicable liability insurance coverage for the driver and owner. What happens when a potential source of liability insurance coverage is disputed?

In White v. American Family Ins. Co., A16-1149, 2017 WL 1157889 (Minn. Ct. App. March 27, 2017), a passenger died in a two car collision. The car that he occupied was primarily at fault. It had a single limit liability policy of \$500,000. (\$50,000 of the policy was expended on other claims and the remaining \$450,000 was offered to plaintiff in the wrongful death action.) North Star Insurance Company had issued a 2 million dollar umbrella policy to the family that owned the at-fault car, but North Star claimed that the policy did not apply to the vehicle in the collision. North Star started a declaratory judgment action arguing that there was no coverage. While this action was pending, there was a mediation in the wrongful death lawsuit, and North Star offered \$40,000. The plaintiff was willing to accept this. A Schmidt notice was sent to American Family, the UIM insurance carrier. American Family did not substitute and the liability

settlement was completed. North Star then dismissed its declaratory judgment action. Damages in the wrongful death action were higher than the total settlement amount, so a UIM claim was made. American Family argues that the 2 million dollar North Star policy should be counted as part of the applicable liability insurance, even though the dispute over North Star's coverage had not been resolved and North Star continued to deny coverage.

The court of appeals affirmed the district court ruling that American Family had waived its right to challenge and dispute North Star's denial of coverage when it elected not to substitute its draft and thereby to preserve the right to litigate North Star's denial of coverage. (Presumably American Family could have preserved its right to challenge the scope of North Star's coverage by paying the plaintiff the \$40,000 that North Star had offered.)

American Family was obliged to pay its \$100,000 in UIM because the damages were agreed to be in excess of \$650,000.

This appears to be a practical and equitable result. One may infer from a settlement taking only \$40,000 from potential coverage of 2 million dollars that the claim against North Star was not strong. Who should bear the risk and cost of litigating the coverage issue? The Plaintiff made a judgment that it was best to compromise. If American Family disagreed, it had the option of investing \$40,000 by substituting its draft for North Star's offer, paying its \$100,000 in UIM, and litigating the claim against North Star to recover the full \$140,000. The decision of the court of appeals places the burden on American Family to determine whether or not to assume the risks and costs of such litigation. This is the type of risk allocation that was used in Schmidt v. Clothier (see section VI. C. below, dealing with notice requirements prior to settlement, for a discussion of the Schmidt decision.)

It should be noted that this UIM framework differs from that used in uninsured motorist (UM) cases. If liability coverage is denied in a UM case, the injured person may use the fact of that denial as a basis for asserting a claim against the UM coverage. If the injured person then makes a settlement with the potential liability insurer, even though liability coverage is never formally admitted, the court will not consider the at-fault vehicle to be uninsured. Nat'l Family Ins. v. Bunton, 509 N.W.2d 565 (Minn. App.1993); Jones v. Sentry Ins. Co., 462 N.W.2d 90 (Minn. App.1990).

Based upon the decision in White v. American Family Ins. Co., it appears that UIM cases will not follow this same pattern. See also Behr v. Am. Family Mut. Ins. Co., 638 N.W.2d 469 (Minn. Ct. App. 2002).

A UM case is ripe for adjudication immediately upon the denial of coverage by a liability carrier. The UM claim can therefore be resolved prior to litigation of disputed liability coverage. A UIM claim, however, is not ripe for adjudication until there has been a settlement of liability claims. The UIM insurer therefore must assert its right to prevent a

settlement by substituting its payment in order to preserve the right to litigate disputed liability claims.

III. Exclusions

Some accidents involving underinsured motor vehicles are nevertheless excluded from UIM insurance coverage, either by statute or by insurance policy exclusions.

A. Statute

The No-Fault Act imposes certain penalties when a person owns a motor vehicle and fails to insure it. Minn. Stat. § 65B.49, subd. 3a (7) provides that a person who owns an uninsured motor vehicle and who is occupying this uninsured vehicle at the time of an accident may not obtain UM or UIM coverage from any other insurance policy.

Although the statute explicitly refers to “motor vehicles,” its provisions were extended in Hanson v. Am. Family Mut. Ins. Co., 417 N.W.2d 94 (Minn. 1987) to include the owners of uninsured motorcycles.

With respect to motorcycles, UIM and UM coverages are not required. Consequently, a motorcycle may be legally insured and still lack UIM/UM coverage. Minn. Stat. § 65B.49, subd. 3a (8) addresses this situation. If the owner of a motorcycle is injured while occupying this motorcycle, the owner may not obtain UM or UIM coverage from any other policy which might otherwise have provided coverage. Consequently, a person who owns a motorcycle will have no UM or UIM coverage while occupying this motorcycle unless the optional UM or UIM coverage has in fact been purchased for the motorcycle.

It should be noted that the limitation on coverage created by these two provisions in the statute applies only to the “owner” of the involved motorcycle or uninsured motor vehicle. Because the statutes explicitly exclude coverage only for the “owner” of the vehicle, other occupants (even spouses or resident relatives) are not precluded by the statutes from making claims. Am. Nat’l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999); Northrup v. State Farm Mut. Auto. Ins. Co., 601 N.W.2d 900 (Minn. Ct. App. 1999); Milwaukee Mut. Ins. Co. v. Willey, 481 N.W.2d 146 (Minn. Ct. App. 1992).

It is also possible that contract language in a UIM policy may be construed to provide coverage that would otherwise be excluded by the statute. In Frauendorfer v. Meridian Security Ins. Co., A16-0818, 2017 WL 1316110 (Minn. Ct. App. April 10, 2017), a woman was injured while occupying her motorcycle that lacked UIM coverage. She was nevertheless able to obtain UIM coverage from a separate insurance policy on different vehicle because the court construed the UIM policy exclusion in her Meridian policy as not applying to her when she occupied her motorcycle.

B. Contract

1. Myers Exclusion

Motor vehicle insurance contracts contain a variety of provisions that limit or exclude coverage. Such limitations and exclusions will generally be enforced so long as they do not contradict provisions or policies of the No-Fault Act.

Myers v. State Farm Mut. Auto. Ins. Co., 336 N.W.2d 288 (Minn. 1983) involved a UIM contract exclusion. The Myers case has the following fact pattern. A passenger in a car is injured in a motor vehicle accident. The passenger brings a liability claim against the at-fault driver of the occupied car, based on the driver's negligence. Liability limits from the occupied vehicle are paid to the passenger. The damages of the injured passenger exceed the driver's liability insurance limits, so the at-fault driver is "underinsured." The passenger now wishes to make a claim for UIM benefits. The statute requires that the UIM claim be made first against the UIM coverage from the occupied vehicle. Minn. Stat. § 65B.49, subd. 3a (5). In Myers, State Farm's UIM endorsement for the occupied vehicle had an exclusion providing that term "underinsured motor vehicle" did not include any vehicle identified as being insured by the policy. The Supreme Court held that this type of exclusion is valid. If the UIM claim were allowed in these circumstances, the relatively inexpensive UIM coverage of the policy would be converted into additional (and more expensive) liability insurance for the negligent driver.

When this fact pattern is present, the UIM contract exclusion will be enforced. Myers and subsequent cases have uniformly upheld the validity of UIM contract provisions that exclude UIM coverage on this fact pattern, even though the contractual language creating the exclusion might differ from the contract language discussed in Myers. See Jensen v. United Fire & Cas., 524 N.W.2d 536 (Minn. Ct. App. 1995).

Although Minnesota law permits the enforcement of a Myers exclusion, the exclusion does have to be based upon insurance policy language. There is nothing in the No-Fault Act itself that creates this exclusion. Consequently, the court will not read a Myers exclusion into an insurance policy when the policy itself contains no language creating the exclusion. Lynch v. Am. Family Mut. Ins. Co., 626 N.W.2d 182 (Minn. 2001). The Lynch decision effectively overrules the holding in West Bend Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 586 N.W.2d 584 (Minn. Ct. App. 1998), which imposed a Myers exclusion based solely on public policy considerations.

It is sometimes said that Myers stands for the proposition that a passenger may not collect both liability insurance and UIM insurance from the policy covering the occupied vehicle. This overstates the Myers holding. In an accident involving multiple vehicles, when more than one driver is at-fault, the Myers exclusion does not necessarily prevent an injured person from collecting both UIM and liability insurance from the single policy covering the occupied vehicle. Consider the following example involving two negligent drivers. A passenger in car #1 is injured. The insurer of the occupied vehicle (car #1) pays its liability limits to the passenger based on the negligence of its insured driver. The passenger makes an additional liability claim against the driver of car #2. Car #2 pays its policy limits. If the passenger is still not fully compensated for damages suffered, the passenger may then also claim UIM coverage. A UIM claim based upon the negligence of the person driving car #2 can properly be made against the UIM coverage for the occupied vehicle. In this situation, the inexpensive UIM coverage is not being converted into additional liability coverage for the driver of the insured vehicle (car #1). Consequently, Myers does not apply, and the claim is permitted by the No-Fault Act. Lahr v. Am. Family Ins. Co., 528 N.W.2d 257 (Minn. Ct. App. 1995).

In cases where there are two or more negligent drivers, policy exclusions that effectively eliminate UM or UIM coverage simply because the liability limits on the occupied vehicle have already been paid to the injured party may be invalid and unenforceable. Such exclusions would deprive the injured person of coverage mandated by the No-Fault Act. Mitsch v. Am. Nat'l Prop. & Cas. Co., 736 N.W.2d 355 (Minn. Ct. App. 2007); Marchio v. Western Nat'l Mut. Ins. Co., 747 N.W.2d 376 (Minn. Ct. App. 2008).

2. Family Exclusion

UIM (and UM) endorsements typically contain language saying that an underinsured (or uninsured) vehicle will not include any vehicle owned by or furnished for the regular use of the named insured or any resident family member. For example, a family owns two cars. One of the children is injured as a passenger in one car and collects the liability insurance. A claim is then made on the UIM policy for the second family car. The only reason a UIM claim exists is because the family purchased inadequate liability insurance. Under such circumstances, the family exclusion will bar UIM coverage from the second family vehicle. See Linder v. State Farm Mut. Auto. Ins. Co., 364 N.W.2d 481 (Minn. Ct. App. 1985). See also Wintz v. Colonial Ins. Co. of Cal., 542 N.W.2d 625 (Minn. 1996). In such circumstances, the logic of the family exclusion is comparable to the logic underlying the Myers exclusion, i.e., the UIM coverage is being converted into extra liability insurance for the tortfeasor, who is also an insured on the UIM policy. Staley v. Metro. Prop. & Cas. Co., 576 N.W.2d 175 (Minn. Ct. App. 1998).

When the fact pattern changes, however, family exclusions have been held to be invalid or inapplicable. Am. Nat'l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999), indicates that a family exclusion will be invalid if it removes coverage which is otherwise applicable under the No-Fault Act. In Loren, a man was operating his son's motorcycle and was injured by an underinsured car. His son was a resident relative, and the man's policy with American National excluded UIM coverage for injuries occurring while occupying a vehicle owned by a relative. The court found the exclusion to be unenforceable, because the legislature had elected in Minn.Stat. § 65B.49, subd. 3a (7) and (8) to exclude UIM coverage only for the owner of the motorcycle. Because the injured person was not the owner of the motorcycle, he was not barred by the statute from seeking UIM benefits under his own policy and the family exclusion was unenforceable. Likewise, in Northrup v. State Farm Mut. Auto. Ins. Co., 601 N.W.2d 900 (Minn. Ct. App. 1999), a woman who owned her own pickup truck and had it insured with State Farm was permitted to make a UIM claim against this policy when she was injured as a passenger on her husband's motorcycle. The policy exclusion saying that State Farm would not cover underinsured motorist claims for a person occupying a family owned vehicle was invalid as applied to these facts. See also DeVille v. State Farm Mut. Ins. Co., 367 N.W.2d 574 (Minn. Ct. App. 1985); Great Am. Ins. Co. v. Sticha, 374 N.W.2d 556 (Minn. Ct. App. 1985); Erstad v. Mut. Serv. Cas. Co., No. C8-99-602, 1999 WL 1101720 (Minn. Ct. App. Dec. 7, 1999).

In Johnson v. St. Paul Guardian Ins. Co., 627 N.W.2d 731 (Minn. Ct. App. 2001), the facts of the accident were comparable to those in DeVille v. State Farm Mut. Ins. Co., 367 N.W.2d 574 (Minn. Ct. App. 1985); in each case a woman was injured as a passenger on a

motorcycle owned and operated by her husband. In DeVille, a family exclusion did not prevent the injured wife from collecting UIM benefits from a policy on her own motor vehicle. However, in Johnson, the family exclusion on the UIM policy was enforceable because both the wife and the tortfeasor husband were identified as insured on the UIM policy from which benefits were sought.

The most recent decision on the topic is Pepper v. State Farm Mut. Auto. Ins. Co., 813 N.W.2d 921 (Minn. 2012). Pepper confirms that the No-Fault Act permits the enforcement of an applicable policy exclusion if enforcing the exclusion would “prevent coverage conversion.” 813 N.W.2d, at 927. Tammy Pepper was injured as a pedestrian when she was struck by a vehicle that was being driven by her step-father. Her step-father had two separate policies with State Farm. One policy paid its liability limits to Pepper. Pepper then claimed underinsured motorist coverage under the second policy, which insured her as a resident relative. She argued that, because this second policy had not paid her any of its liability coverage, she was not barred from collecting the UIM coverage from this policy. The Supreme Court acknowledged that this particular fact pattern created an issue of first impression, but the Court reasoned that the step-father was at fault and that the UIM claim existed only because the step-father had not purchased adequate liability insurance to cover claims made against him. Consequently, the UIM claim against the step-father’s second policy would in effect be “supplementing his liability coverage and thus engaging in coverage conversion.” 813 N.W.2d, at 929.

The Minnesota Supreme Court also reviewed the family exclusion issue in Kelly v. State Farm Mut. Auto. Ins. Co., 666 N.W.2d 328 (Minn. 2003). In this case, Marcia Kelly and her husband had two cars. They jointly owned a Pontiac, which she generally used. Her husband was the sole owner of a Dodge. Both vehicles were insured with State Farm, and both husband and wife were named insureds on each policy. Mrs. Kelly was injured, due to her husband’s negligence, as a passenger in his Dodge. She sought UIM benefits from the policy on the Pontiac. Because she was not an owner of the Dodge (the occupied vehicle), there was no statute barring her from seeking UIM benefits on a personal policy of UIM insurance. However, because the at-fault party (her husband) was also a named insured on the policy from which she sought benefits (the one covering the Pontiac), the family exclusion in the Pontiac’s policy was enforced and coverage was denied.

As the case law demonstrates, the “family exclusion” language in a contract either can be valid and enforceable or can be unenforceable as a violation of No-Fault Act principles, depending on the underlying facts of the specific UIM claim being made. The following analysis of the facts needs to be made in order to determine when the “family exclusion” can be used to deny UIM (or UM) coverage:

Two-Step Analysis to Determine Enforceability of “Family Exclusion”

1. Identify the parties who can be held legally liable for paying damages to the injured person.

Typically, these parties will be:

- a. The negligent driver, and
- b. The owner of the underinsured vehicle operated by the negligent driver.

2. Identify the named insured(s) on the UIM policy against which a claim is being made.

- a. If one of the parties legally liable for paying damages is a named insured on this policy, the family exclusion will be enforced and coverage will be denied.
- b. If none of the legally liable parties is a named insured on this policy, the family exclusion will not be enforced and UIM coverage will apply.

There is an equitable basis for this selective enforcement of the family exclusion. The UIM claim exists because the negligent driver and/or the owner of the at-fault vehicle failed to purchase adequate liability insurance. If one of these parties who is liable for the liability claim is the also a named insured in the UIM policy from which coverage is sought, the family exclusion is enforced. As in Myers, the exclusion prevents the UIM from functioning as additional liability insurance for the at-fault person, who is also an “insured” on the UIM policy.

Given the case law concerning family exclusions, a married couple with two cars could be better off from an insurance perspective if each party separately owned and insured one vehicle. (This may be more expensive, since most companies provide a discount if more than one vehicle is insured; separate policies may also limit the ability to “stack” no-fault basic economic loss benefits.) A person injured as a passenger in a non-owned vehicle (e.g., husband as passenger in wife’s vehicle, or wife as passenger in husband’s vehicle) would then be able to claim liability insurance limits from the occupied vehicle and also be able to assert a UIM claim against his or her separate personal insurance policy. Under the Loren decision, the family exclusion would not bar such a UIM claim, and Johnson v. St. Paul Guardian would not bar coverage because the tortfeasor spouse would not be named on the UIM policy from which coverage is sought.

3. Other Exclusions – Business Use

Latterell v. Progressive Northern Ins. Co., 801 N.W.2d 917 (Minn. 2011), involved a UIM claim arising from a wrongful death. Jared Boom died in a car accident. He was driving his own car, insured with Progressive. He had a job delivering books. This is what he was doing at the time of the accident. Liability limits were paid by the tortfeasor’s insurance. A UIM claim was made against Progressive. Progressive denied payment based on a broadly worded but unambiguous “business use” exclusion in the policy.

The Supreme Court determined that the “business use” policy exclusion eliminates coverage required by the No-Fault Act and is therefore unenforceable. The Court confirms

that UIM coverage has consistently been treated as a “first-party” coverage – it is the type of coverage that a person buys to protect herself. Consequently, precedents involving policy exclusions in third-party liability insurance contracts do not govern. It is the intention of the No-Fault Act that the purchased coverage protect the insured from losses caused by underinsured motorists. The policy exclusion may not be enforced to eliminate this required coverage.

IV. UIM Priorities: Which Company Pays?

A. Minn. Stat. § 65B.49, subd. 3a(5)

The priorities for UIM and UM coverage are different from the priorities that apply to basic economic loss no-fault claims.

Minn. Stat. § 65B.49, subd. 3a(5) provides a reasonably simple structure for determining which company pays UIM benefits. The statutory scheme is most easily described by posing two questions.

Which Company Pays?
<ol style="list-style-type: none">1. Was the person injured while occupying a motor vehicle?<ol style="list-style-type: none">a. If the injured person was not occupying a vehicle, a UIM claim can be made against any one applicable policy.b. If the injured person was occupying a vehicle, the initial UIM claim must be made against the policy covering the occupied vehicle. Ask question 2 concerning additional UIM claims.
<ol style="list-style-type: none">2. If the injured person was occupying a vehicle, was this person an “insured” on the policy covering the occupied vehicle?<ol style="list-style-type: none">a. If the person is an “insured” on the policy for the occupied vehicle, there will be no excess coverage available from any other policyb. If the injured person is not an “insured” on the policy for the occupied vehicle, excess coverage can be sought from any one additional policy providing excess coverage.

In the statutory scheme, two key terms are significant: “occupying” and “insured.” The meaning of each term has been the subject of litigation. The meaning of the two terms is important both when determining the existence of UM and UIM claims and when identifying the specific policies against which such claims may be made.

1. Meaning of “Occupying”

The 1996 Supreme Court decision in Allied Mut. Ins. Co. v. Western Nat’l Mut. Ins. Co., 552 N.W.2d 561 (Minn. 1996) holds that the term “occupy” must be given its ordinary and commonly accepted meaning. On the facts in Allied, the court held that a person standing next to a car while it was being unlocked was not “occupying” the vehicle.

The decision in Allied should effectively reverse an earlier line of decisions from the court of appeals that deemed a person who was outside of the vehicle to be “occupying” it. See Klein v. U.S. Fid. & Guar. Co., 451 N.W.2d 901 (Minn. Ct. App. 1990) (person changing a flat tire); Horace Mann Ins. Co. V. Neuville, 465 N.W.2d 432 (Minn. Ct. App. 1991) (person standing in front of his stalled vehicle); Conlin v. City of Eagan, 482 N.W.2d 519 (Minn. Ct. App. 1992) (tow truck operator working on front of a car about to be towed). See also Short v. Midwest Family Mut. Ins. Co., 602 N.W.2d 914 (Minn. Ct. App. 1999), applying the Allied standards in another case involving a tow truck operator.

Policy language may define “occupying” to include entering into and alighting from a vehicle, and such language would be enforceable since it does not conflict with anything in the No-Fault Act. State Farm Mut. Auto. Ins. Co. v. Levinson, 438 N.W.2d 110 (Minn. Ct. App. 1989). In Ill. Farmers Ins. Co. v. Marvin, 707 N.W.2d 747 (Minn. Ct. App. 2006), a woman was judged to be occupying a Ford Explorer when she had been loading the rear cargo area of the vehicle and was climbing out of the Explorer as her legs were struck by another vehicle.

The Court of Appeals in Ill. Farmers Ins. Co. v. Marvin contains a statement that being an “occupant” of an insured vehicle does not end the enquiry about UIM coverage and that “some causal connection between the occupancy of the vehicle and the injury sustained” may also be required. 707 N.W.2d, at 752. It should be noted that this framework for analysis applies only when there is disputed factual question about whether or not someone is “occupying” the vehicle at the time of the injury. The Supreme Court decision in Allied did discuss the “causal connection” when deciding how far to extend the contractual definition of “occupancy” that was being used in an attempt to give coverage to a person who was standing outside of a vehicle. In general, however, when a person is actually seated inside of a vehicle at the time of the accident, there is no need for any additional enquiry about “causal connection.” The legislature has determined that the first priority for UM and UIM coverage will always be the coverage on the vehicle that the person is “occupying” at the time of the accident. When the fact of “occupancy” is not disputed, there is no need for any additional enquiry concerning causal connection.

2. Meaning of an “Insured”

Definition: Insured
The name insured, and Spouse, minors, and other relatives residing with the name insured, unless such individual is identified by name in his or her own policy of motor vehicle insurance. See Minn. Stat. § 65B.43, subd. 5.

When a person is injured while occupying a motor vehicle, the first priority for a UM or UIM claim is the insurance policy covering the occupied vehicle. If the injured person is not an “insured” on the policy for the occupied vehicle, excess UM or UIM may then be sought from a second policy under which the injured person is “otherwise insured.” Minn. Stat. §65B.49, subd. 3a(5).

The statutory definition of an “insured” at Minn. Stat. § 65B.43, subd. 5 will be applied to determine if an injured person is to be considered an “insured” on the policy covering the occupied motor vehicle. See Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000).

If the injured person is not an “insured” on the policy covering the occupied vehicle, the person is permitted to seek excess UM or UIM coverage from an additional policy under

which the person is “otherwise insured.” The statutory definition of “insured” at Minn. Stat. §65B.43, subd. 5 will again be used to determine whether or not the injured person is “otherwise insured” in the policy from which the excess coverage is sought. West Bend Mut. Ins. Co. v. Allstate Ins. Co., 776 N.W.2d 693 (Minn. 2009).

In Becker v. State Farm, a woman was driving a commercial truck in Iowa and was injured by an underinsured motorist. She collected both liability insurance from the tortfeasor and UIM coverage from the truck which she was driving. She then sought excess UIM coverage from her personal policy with State Farm. State Farm argued that she should be considered an “insured” on the policy covering the truck, since she was an employee of the named insured. If she were an “insured” on the policy for the occupied vehicle, she would be precluded from claiming any excess UIM coverage. The Supreme Court held that, because Becker was not a named insured or a relative of the named insured on the policy, she did not meet the statutory definition of an “insured” under Minn. Stat. § 65B.43 subd. 5. Becker was therefore able to claim excess UIM coverage through her personal policy with State Farm.

In some decisions prior to Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000), the court of appeals did not always focus on the categories created by this statutory definition of “insured” when discussing UM and UIM coverages. See LaFave v. State Farm Mut. Auto. Ins. Co., 510 N.W.2d 16 (Minn. Ct. App. 1993). The Becker decision does confirm that the two statutory categories in the definition of “insured” (i.e. named insured and resident relative) provide the only appropriate framework for determining when a person injured while occupying a vehicle is permitted to claim excess UM or UIM coverage under Minn. Stat. § 65B.49, subd. 3a(5).

It is important to note that, under the statutory definition, not every resident relative of a “named insured” will automatically qualify as an “insured” on a motor vehicle insurance policy covering this relative. An individual who is identified by name in his or her own policy does not become an “insured” in someone else’s policy based on status as a resident relative.

It should also be stressed that being identified as a “driver” on the declaration page of a motor vehicle insurance policy is not the same as being an “insured.” In Carlson v. Allstate Ins. Co., 749 N.W.2d 41 (Minn. 2008), a man leased a vehicle for the use of his adult son. They did not reside together. In the Allstate policy, the son was identified as a driver, but the father was the named insured. When the son was injured as a pedestrian, he had no claim to UM coverage from the Allstate policy on the leased vehicle. Under the statutory definition, he was not an “insured.”

When an insurance policy covers a business, it may be difficult in some cases to determine whether or not the business owner is an “insured” on the policy. Would the policy provide coverage to the business owner if she were not occupying the insured vehicle? Gen. Cas. of Wis. v. Outdoor Concepts, 667 N.W.2d 441 (Minn. Ct. App. 2003) reviewed existing precedents and concluded that a policy listing a sole proprietorship’s trade name as the

named insured also extended coverage to the sole proprietor as an individual. But in Turner v. Mut. Serv. Cas. Ins. Co., 675 N.W.2d 622 (Minn. 2004), a corporate policy did not extend coverage to an employee on a UIM claim when the employee was injured in a rental vehicle while on company business. The language of the policy restricted the coverage to vehicles owned by the business, and nothing in the No-Fault Act required an extension of coverage to an employee on a business trip in a rental vehicle. (The court of appeals decision in Turner, 663 N.W.2d 36 (Minn. Ct. App. 2003), noted that liability insurance coverage in the policy did extend to an employee in a rental vehicle, but the No-Fault Act does not require that the definitions from the liability portion of the policy be used in other parts of the contract as long as the language of each endorsement complied with the requirements of the No-Fault Act. This was not a holding in the Supreme Court decision.)

B. Motorcycle Coverage

A motorcycle is not included within the no-fault definition of a “motor vehicle.” See Minn. Stat. § 65B.43, subd. 2. Consequently, provisions of the No-Fault Act that apply to a “motor vehicle” do not automatically apply to motorcycles.

A motorcycle is required to carry liability insurance, Minn. Stat. § 65B.48, subd. 5, but UM and UIM insurance coverage are optional.

UM and UIM claims for motorcycle owners who are injured while occupying the owned motorcycle are limited by the No-Fault Act.

A person who owns and operates a motorcycle with no liability insurance is barred from making any UM or UIM claim. Minn. Stat. § 65B.49, subd. 3a(7) creates this penalty for motor vehicles, and it is applied to motorcycles in Hanson v. Am. Family Mut. Ins. Co., 417 N.W.2d 94 (Minn. 1987).

A motor cycle owner who does purchase the required liability insurance for the motorcycle is not barred from making a UM or UIM claim, but the UM or UIM claim is limited to the amount of optional UM or UIM coverage that has been purchased for the motorcycle. Minn. Stat. § 65B.49 subd. 3a(8). (Minn. Stat. § 65B.49 subd. 3a(8), enacted in 1990, reverses Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829 (Minn. 1989).) If the owner of the motorcycle has not purchased the optional UM or UIM coverage for the occupied motorcycle, the owner cannot collect UM or UIM from any other policy.

It should be stressed that both of these statutory limitations for motorcycles apply only to the owner of the motorcycle. Am. Nat’l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999); Milwaukee Mut. Ins. Co. v. Willey, 481 N.W.2d 146 (Minn. Ct. App. 1992). A careful reading of the statute will confirm that Minn. Stat. §65B.49 is actually silent when it comes to the handling of UM or UIM claims of a person who is injured while occupying a motorcycle that the person does not own. Nothing in the statute bars or limits UM or UIM claims made by a person occupying a motorcycle when that person is not the owner of the

motorcycle. In Am. Nat'l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999) the court treats the occupant of a motorcycle, who is not excluded from coverage by statute, just as the court would treat the occupant of a motor vehicle. A family exclusion that would not bar coverage for the occupant of a motor vehicle is not permitted to bar coverage for the occupant of a motorcycle.

C. Excess Coverage

Under the statute, an injured individual goes first to the occupied vehicle for UIM coverage. If the claimant is not "insured" on the policy of the occupied vehicle, excess coverage may then be sought from one other policy covering the injured person. The third sentence of Minn. Stat. § 65B.49, subd. 3a(5) provides the formula for calculating an excess insurance claim: Excess coverage exists only if the limits "for like coverage" on the excess policy "exceeds the limits of liability of the coverage available to the injured person from the occupied motor vehicle."

In Jirik v. Auto Owners Ins. Co., 595 N.W.2d 219 (Minn. Ct. App. 1999), a thirteen-year-old girl was injured as a passenger in her mother's car. The girl received UIM coverage from mother's insurance, based upon the negligence of the driver of the other vehicle (car #2) involved in the crash. The girl then tried to assert a UIM claim based upon her mother's negligence (car #1). She made this UIM claim against UIM coverage on a policy covering her father's car. (The parents were divorced, and the child was judged to be a resident relative in each home; she was therefore covered as a resident relative of both the mother and the father.) Because the injured child was a resident relative of her mother, the child was an "insured" on the policy covering the occupied vehicle. Under Minn. Stat. § 65B.49, subd. 3a(5), the child was therefore prohibited from seeking UIM coverage from any policy other than the one applicable to the occupied vehicle. (In a subsequent decision, Jirik v. Auto Owners Ins. Co., No. C0-98-2415, 1999 WL 1103361 (Minn. Ct. App. Dec. 7, 1999), the court held that no language in the father's insurance policy extended the scope of UIM coverage beyond the limits created in the statute.)

In Stewart v. Ill. Farmers Ins. Co., 727 N.W.2d. 679 (Minn. Ct. App. 2007), a man was injured while driving a vehicle that he owned. He worked for a delivery service and the delivery service insured the vehicle. The employer was the named insured on the policy covering the vehicle. Because the injured driver was neither the named insured nor a resident relative of the named insured on the policy covering the occupied vehicle, he was permitted to seek excess coverage (UM) from another policy under which he was personally insured.

As noted above, excess UM or UIM coverage exists only to the extent that the injured person's individual policy exceeds "the limit of liability of the coverage available to the injured person from the occupied motor vehicle." Minn. Stat. § 65B.49, subd 3a(5).

Basically, the system of excess insurance is intended to guarantee that a person will have access to the amount of UIM (or UM) insurance coverage that the individual has selected

and paid for. If the individual is an “insured” on the policy covering the occupied vehicle, the amount of insurance covering the occupied vehicle represents the amount that the insured person has selected and purchased. Consequently, no additional claim is permitted. However, if a person is injured while occupying someone else’s car, the injured person likely had no control over the amount of UIM coverage that the owner of the occupied vehicle may have purchased. The injured individual, in order to benefit from the amount of personal insurance which he or she had purchased, is therefore entitled to access whatever excess UIM or UM insurance coverage may be available from that personal policy.

In most cases, excess insurance is the difference (if any) between the stated policy limit of UIM coverage for the occupied vehicle and the policy limit of injured person’s personal insurance. If the occupied vehicle has UIM limits equal to or higher than those on the personal policy, there is no excess coverage. For example, if an injured person has \$50,000 available in UIM coverage from the occupied vehicle and has \$50,000 in UIM from a personal policy, there is no excess coverage. See LaFave v. State Farm Mut. Auto. Ins. Co., 510 N.W.2d 16 (Minn. Ct. App. 1993). The injured person bought \$50,000 in a personal policy and got \$50,000 from the occupied vehicle.

There are two situations in which this simple deduction of stated policy limits from the occupied vehicle would not be appropriate.

1. Myers Exclusion

In some cases, the occupied vehicle has UIM coverage but also has an exclusion that prevents the injured person from making a claim on this UIM coverage. How does this exclusion affect the claim for “excess” insurance coverage? In Davis v. Am. Family Mut. Ins. Co., 521 N.W.2d 366 (Minn. Ct. App. 1994), UIM coverage on the occupied vehicle was denied due to a Myers exclusion. Nevertheless, the excess insurance carrier claimed that it was entitled to an offset for the UIM coverage applicable to the occupied vehicle, even though the policy exclusion rendered the coverage unavailable to the injured person. The court rejected this argument. Consequently, the injured person was entitled to the full UIM coverage provided by his personal UIM policy. The “coverage available” from the occupied vehicle was zero, due to a valid Myers exclusion in that policy. Therefore, all of the UIM coverage from the personal policy was judged to be “excess coverage.”

2. Multiple Claimants

A similar analysis should apply when UIM limits on the occupied vehicle are exhausted by multiple claimants. Under Minn. Stat. § 65B.49, subd. 3a(5), each claimant should be credited with receiving only the actual “coverage available” from the occupied vehicle. For example, if six occupants of a vehicle each receive \$10,000 from a \$30,000/\$60,000 UIM or UM policy on the occupied vehicle, the “coverage available” to each from the occupied vehicle is only \$10,000. The amount of excess coverage should be calculated by

deducting only the \$10,000. If each of the six injured persons faced a deduction of the nominal \$30,000 limit of the policy, a total of \$180,000 would be credited when only \$60,000 had actually been paid. More importantly, injured people who were not “insured” on the policy for the occupied vehicle would be denied access to the amount of personal UIM insurance selected and paid for.

This equitable result was reached in Sleiter v. American Family Mutual Insurance Co., 868 N.W.2d 21 (Minn. 2015). In Sleiter, a pickup truck hit a school bus. Four children were killed and 15 others were injured. The combined damage claims were in excess of \$5 million. The at-fault driver had the minimum liability limits of \$60,000 per accident. The school bus had a \$1 million UIM policy. Limits were tendered and a special master allocated the funds among the claimants. Cody Sleiter was acknowledged to have damages of \$140,000. He received \$1,600.33 as his pro-rata share of the liability insurance and \$34,144.03 from the \$1 million dollar UIM policy. The Sleiter family had a 100/300 UIM policy with American Family. The issue in Sleiter was whether or not the “coverage available” from the bus was the \$1 million dollar policy limit or the \$34,144.03 actually paid to the child from this UIM policy covering the occupied bus. The supreme court held that the phrase “coverage available” as applied to “excess insurance protection” means the benefits actually paid to the insured under UIM coverage provided by the occupied vehicle’s policy. The court observed that this reading of the statute advances the No-Fault Act’s purposes of compensating accident victims while also limiting their claims to the amounts of coverage selected by the insured.

Some older cases on this topic had reached a different result. In Dilworth v. Dairyland Ins. Co., No. C8-91-1683, 1992 WL 83492 (Minn. Ct. App. May 1, 1992), an injured person received only \$13,250 in UM benefits when the 50/100 UM policy of the occupied vehicle was exhausted by multiple injured claimants. The court nevertheless credited the full \$50,000 in calculating excess coverage, so that Dilworth was left with no excess coverage. Although he had paid for \$30,000 in UM coverage, he was limited to a recovery of \$13,250 and his company paid nothing in UM benefits. Dilworth, an unpublished opinion, was referred to with approval in Davis v. Am. Family Mut. Ins. Co., 521 N.W.2d 366, 370 (Minn. Ct. App. 1994). The Sleiter decision by the Supreme Court corrects the error made in Dilworth.

D. Coverage by Multiple Policies

An individual may be covered by more than one policy of motor vehicle insurance. In many families, the household has more than one insured vehicle. A family member may be covered by the policy on each vehicle, either as a named insured or as a resident relative of a named insured. (For example, a minor child would not be a “named insured” in any motor vehicle insurance policy, but the child would be an “insured” under each policy owned by a resident relative in the household.)

Generally, the coverage on the various policies cannot be stacked. See discussion of stacking, below. When multiple policies exist, the question to be faced is whether or not the injured person has the ability to select the single policy against which the claim is going to be made.

When the claimant is not occupying a motor vehicle at the time of the accident, Minn. Stat. §65B.49 subd. 3a(5) explicitly allows the injured person to “select any one limit of liability for any one vehicle afforded by a policy under which the injured person is an insured.” Thus, in Holmstrom v. Ill. Farmers Ins. Co., 631 N.W.2d 102 (Minn. Ct. App. 2001), when a pedestrian was killed by a motor vehicle, the trustee for the next of kin was able to submit a UIM claim to the \$100,000 policy of his parents rather than to the \$30,000 policy on the decedent’s own car since he was an insured under each policy. (There is currently no case law limiting the term “insured” in this specific provision of the statute to the statutory definition in Minn. Stat. §65B.43 subd. 5. And, since Minn. Stat. §65B.49 subd. 7 does permit an insurer to offer benefits or coverage in addition to those required by the No-Fault Act, it may be argued that a policy’s definition of “insured” should be enforced even though it is more broad than the definition in the statute.)

In Gen. Cas. of Wis. v. Outdoor Concepts, 667 N.W.2d 441 (Minn. Ct. App. 2003), the court held that the language of the statute that restricts a claim to one insurance policy is intended to apply only to policies issued under Minnesota law. In the Outdoor Concepts case, the injured party, who was struck by an underinsured pickup truck, collected first on a Wisconsin UIM insurance policy, but this did not preclude a subsequent claim on a policy of Minnesota insurance that also covered him as an insured.

What happens when a person covered by multiple policies is occupying a vehicle at the time of the accident? The initial UIM claim must be made on the coverage for the occupied vehicle. If the person is not an insured on the policy covering this vehicle, a claim for excess coverage may then be made against UIM coverage “afforded by a policy in which the injured party is otherwise insured.” Minn. Stat. §65B.49 subd. 3a(5).

How does this statutory scheme apply to a person injured as a passenger in a friend’s uninsured car, when the passenger is insured both under his own policy and under a policy issued to his parents?

In West Bend Mut. Ins. Co. v. Allstate Ins. Co., 776 N.W.2d 693 (Minn. 2009), the Supreme Court held that the phrase “otherwise insured” is to be interpreted according to the no-fault statutory definition in Minn. Stat. §65B.43 subd. 5 (i.e. named insured and resident relative). In West Bend, Tom Oczak was the injured claimant. He was the owner of a company, an auto repair shop called North End 66 Inc. He was also an employee of the company. West Bend had issued a “garage policy” insuring the four vehicles owned by repair shop. The named insured was North End 66 Inc. Oczak was injured when he was doing a test drive on a customer’s vehicle. He collected liability limits from the tortfeasor and \$100,000 in UIM from the policy on the occupied (customer’s) vehicle. He then sought additional UIM coverage. West Bend acknowledged that its garage policy covered the customer’s vehicle when Oczak was driving it, but the court rejected Oczak’s argument that the West Bend policy was therefore “co-primary” with UIM policy of the customer. The court also held that Oczak was not “otherwise insured” under the garage policy since he was neither a named insured in the policy nor a resident relative of the named insured. Consequently, Oczak had no UIM claim against West Bend. (He did have an excess claim against another personal policy that he held with Allstate. He had sought payment from West Bend because this policy had higher UIM coverage limits than the Allstate policy.)

The decision in West Bend may render moot the discussion in Heinen v. Ill. Farmers Ins. Co., 566 N.W.2d 378 (Minn. Ct. App. 1997), where a “closeness to the risk” analysis was used to limit a young man to the \$30,000 UIM limit on his own policy and to deny him access to coverage under his parents’ policy, which had higher limits. Because he was a named insured in his own policy, he did not meet the statutory definition of an “insured” for coverage under his parents’ policy. Under the holding in West Bend, Heinen might be barred from seeking coverage because, applying the statutory definition of an insured, he was not “otherwise insured” by the parents’ policy. See also Frishman v. Ill. Farmers Ins. Co., 1995 WL 34842 (Minn. Ct. App. Jan. 31, 1995) and Nerud v. Nat’l Family Ins. Corp., 1994 WL 695040 (Minn. Ct. App. Dec. 13, 1994) for conflicting results on a similar fact pattern.

If more than one policy does provide coverage for a UIM or UM claim, the insurance company that makes a payment may be entitled to a partial reimbursement from other applicable policies on a claim for contribution. The right to such reimbursement, however, will depend upon the degree to which each policy contains language coordinating payment of benefits. Cont’l Cas. Ins. Co. v. Teachers Ins. Co., 532 N.W.2d 275 (Minn. Ct. App. 1995).

For network drivers (e.g. Uber, Lyft), the driver’s vehicle is going to be covered by insurance through the network as well as by any personal insurance the driver may have on the personal vehicle being driven. See Minn. Stat. §65B.472 governing Transportation Network Financial Responsibility. The driver’s personal policy is permitted to contain exclusions denying any and all coverage while the vehicle is logged on to the network system, so the network policy may be the only one that applies. In any event, the network insurance cannot require that the driver’s policy deny a claim as a precondition to coverage by the network policy.

V. The Amount of UIM Coverage

A. Add-On Coverage

Since 1989, UIM has been an “add-on” coverage. Minn. Stat. § 65B.49, subd. 4a. This generally means that the amount of UIM coverage purchased and identified in the declaration page of the policy will be available to the injured claimant in addition to any applicable liability insurance coverage.

In the period from October 1985 through August 1, 1989, UIM coverage was calculated, not as an “add-on” coverage but as a “difference of limits” (or “limits less paid”). During this period, the face value of UIM policy could be reduced by the amount of the available liability insurance. See Broton v. Western Nat'l Ins. Co., 428 N.W.2d 85 (Minn. 1988).

Because UIM is an optional coverage for a motorcycle, the court of appeals determined that a UIM policy for a motorcycle was not required to be an “add-on” coverage. In Johnson v. Cummiskey, 765 N.W.2d 652 (Minn. Ct. App. 2009), the \$100,000 in UIM coverage identified in the policy was reduced under applicable policy language by the \$34,000 liability settlement, leaving \$66,000 in coverage for the UIM claim.

Likewise, insurance policies issued in another state will generally not be required to comply with Minnesota’s “add on” system of UIM coverage, even when the collision occurs in Minnesota. In Warthan v. Am. Family Mut. Ins. Co., 592 N.W.2d 136 (Minn. Ct. App. 1999), the court enforced the provisions of a Wisconsin policy issued to a Wisconsin resident when the policy reduced UIM coverage by the amount of liability insurance held by the tortfeasor. Since no provision of Minnesota law governs or alters the Wisconsin policy, there was no conflict of law.

The holding in Warthan, however, is not applicable when the person involved in the accident is a Minnesota resident who is injured in Minnesota. Schossow v. First Nat'l Ins. Co. of Am., 730 N.W.2d 556 (Minn. Ct. App. 2007) involved a woman from North Dakota who came to work in Minnesota when her employer eliminated jobs in North Dakota. She rented an apartment and worked in Minnesota, and she returned to her home and husband in Fargo about one weekend a month. She planned to continue this arrangement until she qualified for retirement. On these facts, the court determined that, although she remained domiciled in North Dakota, she was also considered to be a Minnesota resident. Mrs. Schossow was killed as a pedestrian by an underinsured motorist. Because Mrs. Schossow was a Minnesota resident injured in a Minnesota accident, her next of kin were entitled under Minn. Stat. §65B.50 to claim UIM benefits under Minnesota legal standards. Minnesota’s law requiring that UIM benefits be paid as an “add-on” coverage was therefore applied to the policy that she and her husband had purchased in North Dakota.

B. Stacking

Since October 1, 1985, stacking of UM and UIM coverages has been prohibited by statute. Minn. Stat. § 65B.49, subd. 3a(6). The statute says that policies may not be “added together to determine the limits of insurance coverage available to an injured person from any one accident.”

In Johnson v. Progressive Northern Ins. Co., 2009 WL 438053 (Minn. Ct. App. Feb. 24, 2009), a badly injured person was insured under three UIM policies, each with a \$250,000 policy limit. One policy paid its limits, but the money went to reimburse an ERISA program for payment of medical expenses. The argument that there should be access to a second policy because the first payment was not “available” to the injured party was rejected.

Although there is a statutory provision prohibiting stacking, the law does permit an insurance company to offer benefits not required by the No-Fault Act. Minn. Stat. § 65B.49, subd 7. Consequently, courts have enforced stacking when it is provided by the terms of the applicable insurance contract. See for example Crapson v. Home Ins. Co., 495 N.W.2d 457 (Minn. Ct. App. 1993); Liberty Mut. Ins. Co. v. Crow, 451 N.W.2d 898 (Minn. Ct. App. 1990).

Likewise, when an insurance policy from another state allows stacking of UM or UIM coverage, Minnesota law does not bar the claim for stacked coverage. Kearns v. Am. Family Mut. Ins. Group, 486 N.W.2d 796 (Minn. Ct. App. 1992).

In some situations involving unusual facts, claims against more than one policy have been held to be permitted because they do not involve “stacking.” In Norton v. Tri-State Ins. Co., 590 N.W.2d 649 (Minn. Ct. App. 1999), a person bought a car and made payments over a period of time. The purchaser bought insurance for the car. The seller also maintained insurance on the car while payments were being made. While both policies were in effect, the purchaser and his family were injured by an uninsured motorist. The anti-stacking language of the statute did not prevent the injured people from making claims on separate coverages that were purchased for a single vehicle.

It should also be noted that a party injured by two underinsured motorists may in some circumstances have claims against more than one UIM policy. The existence of separate claims does not involve stacking. See the discussion below concerning claims involving multiple defendants.

VI. First Step in UIM Claim: Resolve the Liability Claim

Resolving the Liability Claims – Be Aware of Notice Requirements
1. Resolution by Verdict – give notice to the UIM insurer(s) when starting the lawsuit against the tortfeasor
2. Resolution by Settlement – give notice to the UIM insurer(s) of the proposed liability settlement 30 days before effecting any settlement

A. Nordstrom Analysis

In Employers Mut. Companies v. Nordstrom, 495 N.W.2d 855 (Minn. 1993), the Supreme Court determined that the liability portion of a claim must be resolved by trial or settlement before the injured person may bring a UIM claim. There is nothing to prevent an early settlement of a UIM claim if an insurer agrees to do so, but after Nordstrom an injured party cannot force a company to settle the UIM claims until liability claims are first resolved.

What happens if the liability claim is still being litigated six years after the accident? Does the six year statute of limitations on the UIM contract claim expire before the UIM claim can be started? Can the UIM claim be started if the liability claim has not yet been resolved? This potential dilemma was resolved by the Supreme Court in Oanes v. Allstate Ins. Co., 617 N.W.2d 401 (Minn. 2000) which held that the statute of limitations on the UIM claim does not begin to run until the liability claim has been resolved either by settlement or by adjudication.

Because the resolution of the liability claim is a condition precedent to bringing any UIM claim, in a case where the liability claim is lost due to the expiration of the statute of limitations on the liability claim, no UIM claim can be made. Ronning v State Farm Mut Auto. Ins. Co., 887 N.W.2d 35 (Minn. Ct. App. 2016).

B. Resolution by Verdict

1. Notice of Suit to UIM Insurer

The underinsured motorist contract will generally have a provision requiring that the UIM insurer be given prompt notice when the injured person sues the tortfeasor. Consequently, the injured person must give notice to the UIM insurer when starting a lawsuit against the tortfeasor. In Malmin v. Minn. Mut. Fire & Cas. Co., 552 N.W.2d 723 (Minn. 1996), the Supreme Court says in a footnote that notice within 60 days of starting the lawsuit would be appropriate.

2. Participation of UIM Insurer in Liability Trial

Does the UIM insurer have the right to intervene in the lawsuit by an injured insured against a tortfeasor? The general standards for intervention are described in a four part test set forth in Minneapolis Star & Tribune Co. v. Schumacher, 392 N.W.2d 197, 207

(Minn. 1986). In Husfeldt v. Willmsen, 434 N.W.2d 480 (Minn. Ct. App. 1989), a UIM insurer that had substituted its draft to prevent a settlement of the liability claim was denied the right to intervene because it could not meet the fourth part of the Minneapolis Star & Tribune test, which requires a showing that the insurer's interests were not adequately represented by the existing parties. Following the 1996 decision in Malmin, one might assume that the UIM insurer would be able to intervene as a matter or right in a proceeding to establish the amount owed by the tortfeasor. Malmin held that, if the UIM insurer has been given proper notice of the litigation against the tortfeasor, the UIM insurer will be bound by the results of the verdict in this litigation. Because the UIM insurer is going to be bound by the jury verdict in the litigation against the tortfeasor, it clearly has an interest in the proceeding that will establish the amount of damages (assuming that it moves to intervene promptly after receiving the Malmin notice). Nevertheless, in Econ. Premier Assurance Co. v. Hansen, 2011 WL 3557876 (Minn. Ct. App. Aug. 15, 2011), the insurance company was denied the right to intervene in a binding arbitration on the grounds that its rights were already adequately protected by the liability insurance company and defense attorney.

3. Effect of Jury Award

The UIM carrier will generally be bound by the jury's verdict against a tortfeasor. Policy considerations of the No Fault Act make it reasonable to resolve the damage claims in one lawsuit. Contract provisions saying that the UIM carrier will not be bound except by its consent are not enforceable. Malmin v. Minn. Mut. Fire & Cas. Co., 552 N.W.2d 723 (Minn. 1996).

There will still be an issue about the binding nature of the jury verdict if the UIM insurer did not receive reasonable prior notice that the litigation was being commenced. If timely notice is not given, the injured party must demonstrate by the preponderance of the evidence that the UIM insurer was not prejudiced by the untimely notice. Kluball v. American Family Mut. Ins. Co., 706 N.W.2d 912 (Minn. Ct. App. 2005).

It is clear that a jury verdict for less than the tortfeasor's liability limits will bar any subsequent claim for UIM payments. The low jury verdict means that the tortfeasor was not in fact an underinsured motorist, so the condition precedent to the existence of a UIM claim as a matter of law cannot be established. Costello v. Aetna Cas. & Sur. Co., 472 N.W.2d 324 (Minn. 1991).

4. Effect of Arbitration Award Against the Tortfeasor

Arbitration of a liability claim is not common, but it may be done by agreement between the injured person and the tortfeasor.

It is likely that the arbitration award against the tortfeasor can be used to set a cap on the damages that the injured person may recover in a UIM claim. Butzer v. Allstate Ins. Co., 567 N.W.2d 534 (Minn. Ct. App. 1997). In Butzer, the liability limits were \$50,000 and the arbitration award was for \$75,000. When Butzer sought a trial on damages, the court confirmed that neither the insured nor the underinsurer may relitigate damages in the UIM

claim. 567 N.W.2d, at 538. See also Econ. Premier Assurance Co. v. Hansen, 2011 WL 3557876 (Minn. Ct. App. Aug. 15, 2011); Mathena v. Allstate Ins. Co., 2007 WL 152225 (Minn Ct. App. Jan. 23, 2007).

In Murray v. Puls, 690 N.W.2d 337 (Minn. Ct. App. 2004), a lawsuit was started and a Malmin notice was given. The parties then elected to resolve the liability insurance claim through a “high/low” arbitration in which the plaintiff’s maximum payment from the defendant would be the \$100,000 liability policy limit. The plaintiff then obtained an award of over \$200,000 in damages in the arbitration. Plaintiff gave a Schmidt notice to the UIM insurer and the UIM insurer did not substitute its draft to prevent a settlement of the claim. The court determined that a UIM insurance carrier could be bound by an arbitration award only if the arbitration award against the tortfeasor was reduced to judgment. The injured party then sought a judgment against the tortfeasor for the full amount of the damages awarded by the arbitrators. On the facts in Murray v. Puls, the arbitration agreement was held to be ambiguous with respect to the effect of the arbitration award on any future UIM claim, and the Court did enter judgment for the plaintiff so that the plaintiff could assert the UIM claim. See also Cooper v. State Farm Auto Cas. Ins. Co., 1997 WL 561262 (Minn. Ct. App. Sept. 9, 1997); Mattila v. Am. Family Ins. Co., 1998 WL 170113 (Minn. Ct. App. Apr. 18, 1998).

The underlying and unresolved issue in these arbitration cases involves the ability of the UIM insurer to preserve its subrogation interest if it chooses to do so. In a proposed settlement, it may substitute its payment under Schmidt v. Clothier standards (see Resolution by Settlement discussion below). In a jury trial, its subrogation interest preserved when the verdict is reduced to a judgment against the tortfeasor. If an arbitration leads to a judgment against the tortfeasor, the arbitration is comparable to a jury verdict, and, assuming that a Malmin notice has been given, the UIM insured may be bound by the arbitration award. The difficulty arises when the arbitration agreement between the injured person and the tortfeasor’s liability insurance carrier includes a provision that limits the tortfeasor’s liability to the amount of the liability insurance policy.

These remaining underlying problems can be seen in George v. Evenson, 754 N.W.2d 335 (Minn. 2008). George submitted his liability claim to binding arbitration. However, he gave Auto Owners, the UIM insurer, only a couple of weeks’ notice prior to the arbitration hearing. He got a good award and the liability insurer tendered its policy limits. He then gave Auto Owners a Schmidt notice. Auto-Owners did not try to substitute its draft to prevent the settlement. Auto-Owners instead argued that the binding arbitration precluded George from bringing his UIM claim. During the course of this litigation against Auto-Owners, George gave up any attempt at binding Auto-Owners to the arbitration damage award. Instead, George treated the case as though he had simply received a policy limits settlement from the liability insurer following the arbitration. The Supreme Court labeled these proceedings as unorthodox and noted the inconsistent positions that the plaintiff’s lawyer had taken at various stages of the proceeding. It nevertheless held that the parties to the arbitration had intended to treat the arbitration as a settlement subject to Schmidt requirements, and that a valid Schmidt notice had been given so that the UIM claim could proceed. (If the UIM insurer had substituted its draft for the liability policy limits, the plaintiff

likely would have been in a more difficult position. The arbitration agreement had most likely included a provision limiting the recovery against the tortfeasor to the applicable liability insurance limits. This portion of the arbitration agreement would have been asserted by the tortfeasor as a defense to any claim for damages in excess of liability policy limits. And, if the tort claim were in fact limited in this manner, the UIM claim would have been waived because the potential subrogation rights of the UIM insurer would have been destroyed by the arbitration agreement.)

Given the unsettled state of the law, it is difficult to draft an arbitration agreement that balances all of the conflicting interests. In Strong v. Lange, 2014 WL 1517415 (Minn. Ct. App. April 21, 2014) the parties drafted a “high/low” arbitration agreement that the court found to be ambiguous. The plaintiff got an arbitration award of about \$90,000. Progressive had a \$30,000 liability policy and a “high” of \$30,000 specified in the agreement. The Court nevertheless allowed a judgment of \$90,000 to be entered, ordered the UIM insurer to be bound by the arbitration award, and held that the tortfeasor would be subject to State Farm’s subrogation claim of \$60,000.

In Strong v. Lange, the court cites Kluball v. American Family Mut. Ins. Co., 706 N.W.2d 912 (Minn. App. 2005) and says that the arbitration agreement must either be a settlement process leading to a Schmidt notice, or an alternative process for completing the tort action. It cannot be both.

C. Resolution by Settlement

The injured party is free to settle the tort claim against a negligent driver. However, if the injured person wants to preserve the option of pursuing a UIM claim after the tort settlement, a notice of the proposed settlement should be given to the UIM insurance company before the settlement of the tort claim is concluded.

1. Prior Notice to UIM Insurer(s)

If an injured party desires to preserve the right to make a UIM claim, Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983), requires the injured party to provide written notice of a proposed tort settlement with the negligent underinsured motorist to the appropriate UIM insurer. The notice is to be given at least 30 days prior to concluding a settlement. Consequently, when negotiating the liability settlement, the injured person should be explicit in making the proposed settlement contingent on giving a Schmidt notice. See Schulte v. LeClaire, No. C7-99-1000, 2000 WL 16302 (Minn. Ct. App. Jan. 11, 2000).

2. Content of Notice

Am. Family Mut. Ins. Co. v. Baumann, 459 N.W.2d 923 (Minn. 1990), outlines the terms of the notice required by Schmidt v. Clothier. “The notice shall identify the insured, the tortfeasor and the tortfeasor’s insurer and shall disclose the limits of the tortfeasor’s automobile liability insurance and the agreed upon amount of settlement.” 459 N.W.2d at 927.

3. Purpose of Notice

If a UIM insurer pays underinsured benefits to an injured person, the UIM insurer then becomes entitled to pursue a subrogation claim against the tortfeasor. However, if the injured party has already settled claims against the tortfeasor, any potential UIM subrogation claim would have been waived in the settlement by the standard release executed between the settling parties.

Prior notice of a proposed settlement is intended to give the UIM insurance company the option of preserving a potential subrogation claim against the tortfeasor. The right to bring a potential subrogation claim in the future can be preserved only if there is no settlement between the injured person and the negligent driver. The UIM insurance company is given advance notice of the proposed settlement so that it can ask the injured person to reject the settlement offer which the tortfeasor has made. So that the injured person will not be prejudiced by rejecting the settlement offer, the UIM insurance company must substitute its payment for the amount which the tortfeasor has offered.

Schmidt v. Clothier created a system in which the rights of the injured party to negotiate a settlement are balanced with the rights of the UIM insurer to preserve its future subrogation claims. The Schmidt system begins with the UIM insurer receiving a notice at least 30 days prior to any proposed settlement. The insurance company then has time to consider its options.

4. Requirement of “Best Settlement”

In Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983), the Supreme Court outlines a few of the reasons why an injured party may choose to settle for less than liability policy limits. In the partial dissent of three justices in Schmidt, there is a reference to achieving the “best possible settlement”. This phrase is repeated in footnote 3 of the Nordstrom decision, 495 N.W.2d at 857.

The use of this “best possible settlement” phrase, however, did not create some additional threshold requirement which the injured person must meet in order to bring a UIM claim. In Dohney v. Allstate Ins. Companies, 632 N.W.2d 598 (Minn. 2001), the injured person was permitted to bring a UIM claim after settling the liability claim for only \$20,000 out of a \$50,000 policy. As a practical matter, compromise settlements are common in claims with large damages and questionable liability. The compromise settlement avoids the risk of incurring litigation expenses and of getting no recovery due to a finding of no liability. With liability settlement proceeds secure, the injured person may then elect to take more risk in pursuing the UIM claim. The UIM insurer, on the other hand, will have little incentive to substitute its draft to prevent the settlement, because it would then face a substantial risk of losing its subrogation claim if the liability claim fails. Although this situation may be unfair to the UIM insurer, each alternative for creating some “best settlement” standard seemed likely both to spawn additional litigation and to interfere with a prompt resolution of claims.

Under Dohney, the settlement agreed to by the injured person will be deemed to be the best possible settlement. If the UIM insurer thinks that the proposed settlement is not “the best possible settlement,” it may substitute its payment in order to prevent the settlement. The UIM insurer may not, however, limit its contractual obligations with respect to UIM coverage merely by expressing its opinion that a better settlement might have been negotiated. See Washington v. Milbank Ins. Co., 551 N.W.2d 513 (Minn. Ct. App. 1996). In Zieglemann v. Nat’l Farmers Union Prop. & Cas. Companies, 686 N.W.2d 563 (Minn. Ct. App. 2004), a North Dakota resident was bound by the provisions of a North Dakota insurance policy requiring that liability limits be exhausted as a pre-condition to a UIM claim, even though the accident occurred in Minnesota.

5. Effect of No Notice

Cases following Schmidt v. Clothier held that a failure to provide notice prior to settlement with the tortfeasor automatically forfeited UIM coverage. Lenssen v. Farm Bureau Mut. Ins. Co., 421 N.W.2d 414 (Minn. Ct. App. 1988).

This automatic forfeiture rule was modified somewhat in Am. Family v. Baumann, 459 N.W.2d 923 (Minn. 1990). Under Baumann, lack of notice is presumed to be prejudicial, but this presumption is rebuttable. The claimant bears the burden of establishing by the preponderance of the evidence that the settlement did not prejudice the UIM insurer.

Two factors have emerged in cases on the issue of prejudice following the Baumann decision. First, if the original settlement was for less than policy limits, the claimant must probably begin by allowing a credit for policy limits rather than for the amount paid. See Murphy v. State Farm Ins. Co., No. C1-94-907, 1994 WL 534856 (Minn. Ct. App. Oct. 4, 1994). But see also Krueger v. Farm Bureau Mut. Ins. Co., No. C5-95-807, 1995 WL 687662 (Minn. Ct. App. Nov. 21, 1995), in which such a requirement is not mentioned. Second, the claimant must generally establish that the tortfeasor did not have assets which might have been used to satisfy a subrogation claim by the UIM insurer. Behrens v. Am. Family Mut. Ins. Co., 520 N.W.2d 763 (Minn. Ct. App. 1994); Kluball v. Am. Family Mut. Ins. Co., 706 N.W.2d 912 (Minn. Ct. App. 2005).

Claimants have been successful in showing lack of prejudice in some cases. Rousselow v. Am. Family, No. CO-91-575, 1991 WL 151357 (Minn. Ct. App. Aug. 13, 1991); Springstroh v. St. Paul Fire & Marine Ins. Co., No. C5-94-957, 1994 WL 687662 (Minn. Ct. App. 1994); Elwood v. Horace Mann Ins. Co., 531 N.W.2d 512 (Minn. Ct. App. 1995).

However, even inability to conduct a timely investigation has been cited as a source of possible prejudice to a UIM carrier which did not receive notice. Murphy v. State Farm, No. C1-94-907, 1994 WL 534856 (Minn. Ct. App. Oct. 4, 1994).

6. What Companies Must Receive Notice

Under Minn. Stat. § 65B.49, subd. 3a(5), a UIM claim may exist against more than one company. The first claim is generally made against the policy insuring an occupied

vehicle. A claim for excess UIM coverage may also exist. The Schmidt notice must be given to each company against which a UIM claim is going to be made. See Bukovich v. Farm Bureau, No. C4-94-1470, 1995 WL 1466 (Minn. Ct. App. Jan. 3, 1995) for a case in which UIM coverage against an applicable policy was lost when only one insurer was given notice.

7. UIM Insurer's Options After Receiving Notice

The UIM insurer has two options after receiving notice of a proposed settlement.

First, the UIM insurer may do nothing. (This is the most common result.) The injured person may then complete the settlement with the tortfeasor. The tortfeasor receives a release. The UIM carrier gives up the possibility of any future subrogation claim. The injured person then proceeds in trying to establish the claim against the UIM insurer.

Second, the UIM insurer may pay the injured person the amount of the proposed settlement. The injured person does not settle with the tortfeasor. No release is given to the tortfeasor; consequently, the UIM carrier remains free to pursue a subrogation claim at some later date. The effect of this "substitution" of settlement draft is discussed below.

8. Risks Faced by Insurance Company that Substitutes Draft

a. Statute of Limitations

When the UIM carrier substitutes its draft, it prevents the settlement between the injured person and the tortfeasor. There will generally be a six-year statute of limitations on the UIM carrier's subrogation claim against the tortfeasor. This will run from the date of the injury. The UIM insurer may have to start a lawsuit against the tortfeasor before the UIM claim itself is settled with the injured person or risk having the statute of limitations bar subrogation claims against the tortfeasor. See Hermeling v. Minn. Fire & Cas. Co., 548 N.W.2d 270 (Minn. 1996).

In Reinke v. State Farm Mut. Auto. Ins. Co., 2008 WL 2105309 (Minn. Ct. App. May 13, 2008) the UIM insurer substituted its payment to prevent a settlement of \$25,000 from a \$50,000 liability insurance policy. It then found that a subrogation claim could not be asserted within the applicable statute of limitations. (The UIM insurer did obtain a return of its substituted payment, and the proposed settlement between the claimant and the tortfeasor was effected.)

b. Subrogation Claim May Not be Recoverable

In Gusk v. Spencer, No. C4-95-2421, 1996 WL 344986 (Minn. Ct. App. June 25, 1996), a UIM carrier substituted its draft when the injured person wanted to accept \$80,000 from a \$100,000 liability policy. In a jury trial, the driver against whom the UIM carrier had its subrogation claim was found to be only 30% at fault, and its liability was limited to less than \$30,000. This was the maximum amount which the UIM insurance carrier could recover on

its \$80,000 subrogation claim. (See also Gusk v. Farm Bureau Mut. Ins. Co., 559 N.W.2d 421 (Minn. 1997), holding that the excess payment made by substituting payment in the UIM claim could not be used to offset obligations to pay UM benefits with respect to the negligence of a second driver, who was uninsured.)

Health insurers or other third parties may also be presenting competing subrogation claims. The competing subrogation claim can limit the ability of the UIM insurer to recover amounts that are payable by the tortfeasor. Commercial Union v. Minn. Sch. Bd. Ass'n, 600 N.W.2d 475 (Minn. Ct. App. 1999).

In Isaac v. Ho, 825 N.W.2d 379 (Minn. 2013), the plaintiff was willing to accept settlement of \$10,665. Plaintiff gave a Schmidt notice to the UIM insurer Auto Club. The liability limits were \$50,000. Auto Club substituted its draft to prevent the settlement. At trial, the net verdict against the tortfeasor was \$47,000. The defendant, with a \$50,000 liability policy, was not underinsured. The Supreme Court commented in footnote 1 of its decision that this litigation did not involve a subrogation claim and that the subrogation claim would arise “only after an insurer paid benefits to its insured.” In this analysis, the substitution of the payment to prevent a settlement may not fall into the category of a benefit paid to the insured.

An additional risk may exist for the UIM insurer. If the injured party obtains a judgment that exceeds the combined liability and UIM coverages, the injured person will argue that there has not been full compensation so that no subrogation claim should be paid until the injured plaintiff has been fully compensated. See Westendorf by Westendorf v. Stasson, 330 N.W.2d 699 (Minn. 1983); Weber v. Sentry Ins., 442 N.W.2d 164 (Minn. Ct. App. 1989). The UIM carrier would likely be entitled to get back its substituted payment from the liability insurance, but if the tortfeasor eventually paid additional sums from personal assets, it would be an open question as to whether or not the UIM insurer or the injured plaintiff would receive this money.

→ Practice Tip

The Minnesota Motor Vehicle Insurance Manual, published through the MTLA/MDLA Education Alliance, has a number of practical suggestions by Ted Smetak for a company seeking some alternative to substituting a draft when the injured person gives a Schmidt notice stating an intention to settle for less than the liability policy limits.

VII. Options If UIM Insurer Substituted Draft

A. Normal Procedure: Pursue the UIM Claim

Schmidt v. Clothier created the procedure for a UIM insurer to preserve subrogation rights by substituting its payment and thereby preventing a direct settlement between the injured person and the tortfeasor. The court anticipated that, after substitution, the next step would be to resolve the UIM claim. After substitution, “the underinsurer would then have to arbitrate the underinsured claim and could, thereafter, attempt to negotiate a better settlement or could proceed to trial in the insured’s name.” 338 N.W.2d at 263.

In Washington v. Milbank Ins. Co., 562 N.W.2d 801 (Minn. 1997), the UIM insurer substituted its draft and then insisted that the injured party litigate the liability claim. Instead, the injured person brought the UIM claim. The Supreme Court affirmed the right of the injured party to pursue the UIM claim. Contract clauses or settlement agreements requiring exhaustion of remedies against the tortfeasor are unenforceable.

If the UIM insurer substitutes its draft and is then sued by the injured person in a UIM claim, the UIM insurer may have the option of bringing a third party complaint against the tortfeasor. The UIM insurer does not have an existing subrogation claim based upon the substitution of its draft, Isaac v. Ho, 825 N.W.2d 379 (Minn. 2013), but it should nevertheless have the right to bind the tortfeasor in a single action with respect to any additional payment based upon the outcome of the UIM claim. See discussion in Hermeling v. Minn. Fire & Cas., 548 N.W.2d 270 (Minn. 1996).

B. Claimant’s Option to Pursue Tortfeasor

A 2013 decision of the Supreme Court confirms that the injured person does not have the option of continuing any claim against the tortfeasor after the UIM insurer has substituted its draft to prevent the settlement. Isaac v. Ho, 825 N.W.2d 379 (Minn. 2013).

In Isaac, the defendant had a \$50,000 liability policy with Progressive. Progressive offered \$10,665 to settle and the plaintiff accepted, subject to giving the Schmidt notice that would preserve a potential UIM claim. Auto Club, the UIM insurer, substituted its payment in order to prevent the settlement. On these facts, the Supreme Court held that the injured person was not entitled to pursue her negligence claim against the tortfeasor. The court stated that “Isaac elected to settle her negligence claim under the Schmidt-Clothier procedure.” 825 N.W.2d at 386.

The Isaac decision is consistent with the dicta in Washington v. Milbank Ins. Co., 562 N.W.2d 801 (Minn. 1997), where the Supreme Court at footnote three of its opinion said that, while “technically” there had been no settlement between the plaintiff and the tortfeasor, “the substitution operates as the equivalent of a settlement between the party claiming damages and the tortfeasor because the tortfeasor is released from further liability to the party claiming damages...” while remaining liable for a subrogation claim.

VIII. Amount of UIM Claim

A. Damages

1. Generally

An underinsured motor vehicle is one which has liability insurance that is less than the amount needed to compensate the insured for actual damages. Minn. Stat. § 65B.43, subd. 17. Consequently, the damages pertinent to a UIM claim should be identical to the “actual damages” that may be claimed in a verdict against the tortfeasor.

2. Consortium Claims

A loss of consortium claim will be part of a UIM claim. It is, however, a derivative claim and is therefore subject to the single limit of UIM coverage available to the injured person. Carlson v. Mut. Serv. Cas. Ins. Co., 527 N.W.2d 580 (Minn. Ct. App. 1995).

3. Interest

In litigation or arbitration of a UIM claim, pre-judgment or pre-award interest may be part of damages. Minn. Stat. § 549.09. Because pre-judgment interest is part of compensatory damages, such interest cannot be used to require a UIM insurer to pay more than its policy limits. Lessard v. Milwaukee Ins. Co., 514 N.W.2d 556 (Minn. 1994).

Interest is to be calculated only upon the net UIM award, after applicable deductions. Casey v. State Farm Mut. Auto. Ins. Co., 464 N.W.2d 736 (Minn. Ct. App. 1991).

In a UIM arbitration, the claim for interest will be lost if not requested from the arbitrator. Kersting v. Royal-Milbank Ins. Co., 456 N.W.2d 736 (Minn. Ct. App. 1990).

Post-judgment interest is not a part of the damage claim, and a UIM insurer should be responsible for post-judgment claims without regard to policy limits. See Lienhard v. State, 431 N.W.2d 861 (Minn. 1988).

B. Deductions

1. Comparative Fault

In Lahr v. Am. Family, 551 N.W.2d 732 (Minn. Ct. App. 1996), the court of appeals decided that the amount of a UIM claim would be limited by the percentage of fault attributed to the underinsured tortfeasor. For example, if a person with a \$30,000 policy were 10% at fault in a case with damages of \$500,000, the claim against that person would total \$50,000. Consequently, there would be a \$20,000 UIM claim. The court will not add to this amount any additional damages which might be allocated to the underinsured tortfeasor under

Minn. Stat. § 604.02, governing joint and several liability. This potential issue will be of less significance with the 2003 amendment of Minn. Stat. § 604.02 limiting the application of joint and several liability to defendants who are more than 50% at fault.

2. Liability Payments

If an injured person settles (after giving a proper Schmidt notice) for \$40,000 out of a \$50,000 liability insurance policy, what amount is credited to the UIM insurer in a subsequent UIM claim? Under Minn. Stat. § 65B.49, subd. 4a, the UIM insurer gets credit only for the amount paid in the liability settlement. The UIM insurer must pay the amount of damages sustained but not recovered from the liability insurance policy of the driver or owner of the underinsured motor vehicle. Brotton v. Western Nat'l Mut. Ins. Co., 428 N.W.2d 85 (Minn. 1988). In the example of the \$40,000 settlement, the underinsured carrier gets credit only for the \$40,000 paid, not for the \$50,000 in liability coverage.

Because the underinsured claim is assessed only by reference to the liability coverage for the driver and owner of the underinsured vehicle, payments made by a party that neither owns nor insures the at-fault vehicle are not considered in assessing UIM liability. Behr v. Am. Family Mut. Ins. Co., 638 N.W.2d 469 (Minn. Ct. App. 2002). In Behr, the negligent driver was operating his own vehicle but was in the course and scope of his employment at the time of the collision. The employer had liability insurance to protect itself, but this insurance policy did not insure the vehicle involved in the collision or the employee. Consequently, only the \$100,000 liability policy on the car could be considered in determining the amount of the UIM claim, and the \$400,000 paid by the employer's insurance company to settle claims against the employer could not be claimed as a credit by the UIM insurer.

What if there are multiple defendants and some settle on Pierringer releases? The UIM insurer is obligated to pay the amount owed by the underinsured driver, based upon this driver's percentage of fault. The amount paid by other settling tortfeasors is not relevant. For example, a driver with a \$30,000 liability policy is found to be 50% at fault in a case with net damages of \$100,000. The UIM insurer is obligated to pay \$20,000 in UIM benefits. This is true regardless of the amount which the injured party may have received through Pierringer releases with other joint tortfeasors. See Ricke v. Progressive Specialty Ins. Co., 577 N.W.2d 512 (Minn. Ct. App. 1998); State Farm Mut. Auto. Ins. Co. v. Galloway, 373 N.W.2d 301 (Minn. 1985); Rambaum v. Swisher, 435 N.W.2d 19 (Minn. 1989). An incorrect result, however, was affirmed by the court of appeals in Engle v. Estate of Fisher, 2003 WL 174541 (Minn. Ct. App. January 28, 2003) (No. C9-02-1088). In Engle, the court allowed an offset from total damages which included not only the settlement payments received from the uninsured motorist but also the settlement amounts from another driver to whom the jury attributed no fault in causing the accident. Under Minn. Stat. § 65B.49, subd. 4a, the UIM insurer's responsibility for payment should have been determined by considering "the damages sustained but not recovered from the insurance policy of the driver or owner of any underinsured at fault vehicle." The UIM coverage exists for the explicit purpose of providing coverage to compensate for the

amounts the injured person is “legally entitled to recover . . . from owners or operators of underinsured motor vehicles.” Minn. Stat. § 65B.43, subd. 19. It is not possible to reconcile the decision in Engle either with the statutory framework creating UIM coverage or with existing case law precedents relating to Pierringer settlements and releases. As an unpublished opinion, Engle has no value as precedent.

3. No-Fault Payments

Minn. Stat. § 65B.49, subd. 3a(4) states that UIM will not cover basic economic loss benefits paid or payable. There should be no double recovery. Consequently, amounts paid by no-fault will be deducted in determining the net amount owed in a UIM claim.

If there is to be a deduction for both the injured party’s comparative fault and for basic economic loss benefits, the basic economic loss is deducted first. Minn. Stat. § 65B.51, subd. 1.

4. Collateral Sources

a. Statute

Minn. Stat. § 548.251 (formerly codified as §548.36) provides for the deduction of certain collateral source payments after the entry of a verdict, assuming that a timely motion for the collateral source offset is made. If there to be is a reduction both for comparative fault and for a collateral source, the statute requires that the collateral source offset will be done first.

Under the collateral source statute, there will be no offset if a subrogation right is asserted by the party making the collateral source payment. In addition, there should be no reduction for collateral sources unless the offset of the collateral source payments is necessary to prevent a double recovery for the injured person. Imlay v. City of Lake Crystal, 453 N.W.2d 326 (Minn. 1990).

It should be noted that UIM or UM payments to an injured person will be considered collateral source payments when damages are sought from any non-settling tortfeasor.

b. Arbitration

The collateral source statute applies to civil actions. An arbitration is not a civil action. Consequently, cases had held that there would not be a collateral source offset in a UIM arbitration. Kersting v. Royal Milbank Ins., 456 N.W.2d 270 (Minn. Ct. App. 1990). This holding in Kersting was then changed by Western Nat’l Mut. Ins. Co. v. Casper with respect to UIM arbitrations. Casper holds that the arbitrators in a UIM arbitration should determine the amount which the injured party is legally entitled to recover from the tortfeasor. To the extent that collateral source offsets would be done in calculating the obligations of the tortfeasor, the arbitrators should calculate the same collateral source deductions in determining the amounts to be paid by a UIM insurer.

If the offset for collateral sources is not made by the arbitrators, a district court judge may not have the authority to modify the damage award by applying the collateral source statute. See Goberdhan v. Ill. Farmers Ins. Co., No. A04-732, 2004 WL 2984344 (Minn. Ct. App. Dec. 28, 2004), and Andersen v. United Fire & Cas. Co., No. A05-1603, 2006 WL 1320495 (Minn. Ct. App. May 16, 2006).

It should be noted that, in a UIM arbitration, the arbitrators should generally not be told anything either about the amount of liability insurance or about the amount of the liability settlement. See Aaron v. Ill. Farmers Ins. Group, 590 N.W.2d 667, 670 n. 1 (Minn. Ct. App. 1999).

c. Workers' Compensation Offset

Workers' compensation payments made to an injured person are generally not part of the damage claim in a UIM recovery. Workers' compensation payments would be offset as a collateral source, since there is no subrogation claim permitted for Workers Compensation against a UIM recovery. Fryer v. Nat'l Union Fire Ins. Co., 365 N.W.2d 249 (Minn. 1985); Western Nat'l Mut. Ins. Co. v. Casper, 549 N.W.2d 914 (Minn. 1996).

A simple offset of all workers' compensation payments, however, is not automatically appropriate in calculating the net UIM claim following a jury verdict. The purpose of the UIM claim is to compensate the injured person, to the extent that the UIM coverage permits, in the same manner which would have occurred if the tortfeasor had been fully insured. UIM claims should be calculated in a way that is consistent with this statutory purpose. For example, assume that workers' compensation has paid \$20,000 in benefits. The injured person then settles a liability claim for policy limits of \$30,000. The injured person then loses about \$20,000 of the settlement, because the liability settlement is subject to a workers' compensation subrogation claim. The injured person really receives a benefit of only \$10,000 from the settlement. What offsets should now apply to a UIM insurer in litigation of the UIM claim? Some UIM insurers will argue that the offset should be \$50,000, claiming both the full \$30,000 liability insurance payment and the full \$20,000 payment by workers' compensation. This calculation, of course, ignores the subrogation rights which have already been asserted against the liability insurance payment. There is currently no court of appeals decision which explicitly addresses this issue.

The general principles which should apply to the workers' compensation offset in such a UIM claim are clear. The injured person should make a UIM recovery that provides the same net payment as the injured person would have received from the tortfeasor, if the tortfeasor had not been underinsured. The injured person should not receive a double recovery, but the UIM insurer should not be entitled to "double count" deductions for both liability and workers' compensation payments.

Courts have held that an injured worker who settles a workers' compensation claim and who, in that settlement, takes an assignment of subrogation rights may avoid an offset for workers' compensation when calculating net damages in a UIM claim. See Austin v. State Farm Mut. Ins. Co., 486 N.W.2d 457 (Minn. Ct. App. 1992). The Austin decision was

followed in Salib v. Allstate Ins. Co., 2008 WL 570600 (Minn. Ct. App. 2008). Salib paid \$44,000 to the workers' compensation insurer for an assignment of subrogation rights of about \$194,000. The liability claim was settled for \$100,000. A court offset a net jury verdict of \$186,000 by the \$100,000 liability settlement but did not give any collateral source offset for the workers compensation benefits because valuable consideration had been paid for the assignment of subrogation rights.

Russell v. Haji-Ali, 826 N.W.2d 216 (Minn. Ct. App. 2013) confirms that if a UIM payment is made prior to the verdict in the liability claim, the payment falls within the statutory definition of a "collateral source." If the UIM insurer does not retain or assign to the plaintiff the subrogation rights related to the UIM payment the defendant will be permitted to offset the jury verdict by the amount of the UIM payment (minus a small allowance to the plaintiff for the two years of UIM premiums paid).

IX. Multiple Parties

A. Multiple Claimants

When liability limits are exhausted by multiple claims, the tortfeasor will be considered underinsured if an injured person is not fully compensated by the prorata recovery from the liability settlement. Kothrade v. Am. Family Mut. Ins. Co., 462 N.W.2d 413 (Minn. 1990); DiLuzio v. Home Mut. Ins. Co., 289 N.W.2d 749 (Minn. 1980).

B. Multiple Defendants

Minn. Stat. § 65B.49, subd. 4a was amended in 1989 to provide that a UIM claim will exist whenever one at-fault vehicle meets the definition of a underinsured vehicle. This amendment reversed the holding in Johnson v. Am. Family Mut. Ins. Co., 426 N.W.2d 419 (Minn. 1988) which required the claimant's damages to exceed the liability limits of all of the at-fault vehicles before a UIM claim could be asserted.

When there are multiple defendants, the UIM damage claim against any one defendant is based upon that defendant's percentage of fault. The provisions of Minn. Stat. § 604.02 providing for joint and several liability or for multiplying the percentage of fault generally will not apply. Lahr v. Am. Family, 551 N.W.2d 732 (Minn. Ct. App. 1996); EMC Ins. Companies v. Dvorak No. C6-99-954, 1999 WL 1216661 (Minn. Ct. App. Dec. 21, 1999).

The most typical fact pattern for claims against multiple defendants occurs when a person is injured as a passenger in a friend's car. The friend driving of the occupied car may be negligent, and the operator of the other vehicle involved in the collision may be negligent. How do the claims sort out?

When there are multiple defendants, it is possible for claims to arise against more than one UIM insurance policy. This situation arose in Schons v. State Farm Mut. Auto. Ins. Co., 621 N.W.2d 743 (Minn. 2001). Tamara Schons was a passenger in a friend's car when a head on collision occurred. Both drivers were negligent. Each had \$50,000 in liability coverage. After collecting both liability payments, two UIM claims existed. With respect to the negligence of driver #1 (the occupied vehicle), Schons should have a claim against her personal UIM policy. See Davis v. Am. Family Mut. Ins. Co., 521 N.W.2d 366 (Minn. Ct. App. 1994). With respect to the negligence of driver #2, Schons should have claim against the UIM policy of the occupied vehicle. See Lahr v. Am. Family, 528 N.W.2d 257 (Minn. Ct. App. 1995).

These two separate UIM claims do not involve the stacking of any coverages. The two claims arise because there are two negligent drivers and because a different UIM policy applies with respect to the UIM claim for each of the two drivers. The claim against each driver is also limited to the percentage of fault attributed to each driver. Lahr v. Am. Family, 551 N.W.2d 732 (Minn. Ct. App. 1996). Nevertheless, the Supreme Court in Schons held that the two claims would be treated in the same manner as "excess insurance" under

Minn. Stat. §65B.49 subd. 3a(5). On the facts of the Schons case, the \$50,000 in UIM coverage on the occupied car was being paid based upon the negligence of car #2. This amount was then credited against the \$50,000 in personal UIM coverage, and so that no additional UIM coverage existed for any other claim. The underlying logic of the decision is that, under the priority provisions in Minn. Stat. §65B.49 subd. 3a(5), Schons is entitled to receive only the amount of UIM coverage for which she paid a premium: “Although Schons might have recovered more than \$50,000 if she had preselected a higher level of UIM coverage, she could not reasonably expect to recover more than the \$50,000 of UIM coverage for which she paid premiums.” 621 N.W.2d at 747.

The logic of the Schons decision is applied in an inappropriate manner in Songkhamdet v. Am. Family Ins. Group, No. A05-1060, 2006 WL 1229498 (Minn. Ct. App. May 9, 2006). In Songkhamdet, a man was badly injured in a two vehicle collision while riding as a passenger in a friend’s car. The driver of the occupied vehicle was apparently the one with most of the fault, and the liability insurance carrier paid its policy limits of \$30,000. The second vehicle apparently had little if any fault, and the liability insurer for the second vehicle paid only \$15,000 of the \$100,000 liability policy limit. The injured person was not fully compensated by the liability settlements (his medical expenses alone had been about \$200,000). Having settled the two liability claims without being fully compensated, what options existed for the injured passenger in seeking compensation from applicable underinsured motorist coverage? He could (1) try to prove that the person with little if any fault and \$100,000 in liability insurance was “underinsured” (so, for example, if this driver were 10% at fault, he would be considered “underinsured” only if the total damages exceeded \$1,000,000), or (2) try to prove that the person with most of the fault and only \$30,000 in liability coverage was “underinsured.” Because it was most reasonable to pursue the claim against the person with low liability limits and a high percentage of fault, the injured person brought the claim against his own insurance company (American Family) based upon the negligence of the driver of the occupied vehicle. Unfortunately for the injured claimant, he stipulated in the litigation against American Family that both vehicles in the collision were in fact “underinsured.” The majority opinion for the court of appeals therefore concluded that, under Schons, the UIM coverage of \$30,000 from the personal policy with American Family should be reduced by the \$30,000 in UIM coverage from the occupied vehicle, leaving the injured person with no coverage from American Family.

A similar result occurred in Pagel v. State Farm Ins. Companies, 2003 WL 21911334 (Minn. Ct. App. August 12, 2003). In Pagel, a passenger in a motor vehicle accident was killed. Both drivers were partially at fault, but primary liability was with the driver of the occupied vehicle. Policy limits of \$100,000 were paid from the occupied vehicle. \$38,000 was paid by the insurance coverage for car #2, and the UIM carrier for the occupied vehicle paid \$5,000 of its \$100,000 in UIM coverage to obtain a release of potential UIM claims related to the negligence of the operator of car #2. The personal policy of Pagel provided \$100,000 in UIM coverage. The court of appeals reduced this coverage to zero, deducting from the personal policy the full \$100,000 in UIM coverage which had applied to the occupied vehicle. See also Drentlaw v. Mut. Serv. Cas. Ins. Co., 2002 WL 109318 (Minn. Ct. App. Jan. 29, 2002).

These cases (Songhamdet, Pagel, and Drentlaw) appear to misapply the reasoning in Schons. In the Schons fact pattern, the injured person paid for \$50,000 in UIM coverage and actually collected \$50,000 in UIM benefits. In each of the three unpublished opinions, however, the claimant selected and paid for personal UIM coverage but collected little or nothing. Each claimant was injured by an underinsured motorist, was not fully compensated, and then was denied access to the UIM insurance coverage which had been sold explicitly to protect from this risk.

In addition to the issues created by the Schons decision, a party with a UIM claim against multiple defendants has to be careful in drafting and signing releases in the liability claims. In Dearstyne v. Auto Club Ins. Ass'n, 2010 WL 2732912 (Minn. Ct. App. July 13, 2010). In this case the injured person was a passenger in a friend's car. The friend was insured by Auto Club. Although the friend had little or no fault, Auto Club paid a small amount for a settlement of the potential liability claim. The standard release in this small liability settlement contained typical language releasing both the driver and Auto Club from all future claims. When the injured passenger subsequently went to Auto Club, as the insurer of the occupied vehicle, for a UIM claim based upon the negligence of driver #2, the UIM claim was barred by the unambiguous language of the liability release.

→ Practice Tip

If the driver of the occupied vehicle is primarily at fault in causing a multi-car accident, it may be advisable for the injured passenger to resolve the liability claim against the driver of the occupied vehicle on a Pierringer release and then to pursue the UIM claim based on the negligence of this underinsured driver. There will be no UIM coverage from the occupied vehicle for this claim due to the Myers exclusion. The only UIM claim will then be against the personal UIM policy covering the injured passenger. If this is the only UIM claim being presented, it should fit the fact pattern in Davis v. Am. Family Mut. Ins. Co., 521 N.W.2d 366 (Minn. App. 1994), and making only this UIM claim should therefore provide the best chance of gaining access to the personal UIM coverage which was selected and purchased. Once all of these claims have been resolved, the injured person can consider an additional claim against the driver of the other involved vehicle and that driver's liability insurance based upon that driver's percentage of fault.

X. **UIM Insurer's Right of Recovery**

A. Subrogation Against the Underinsured Driver

In order to have subrogation rights, the UIM insurer must first make some payment to the injured person. After the 1993 decision in Employers Mut. Ins. Companies v. Nordstrom, 495 N.W.2d 855 (Minn. 1993), the UIM insurer need not pay UIM benefits until the liability claim is first resolved. Consequently, the existence of a subrogation claim will depend initially on the UIM insurer's decision to substitute its payment under Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983) to prevent a liability settlement.

The purpose of giving the Schmidt v. Clothier notice is to provide the UIM insurer with the opportunity to preserve subrogation rights. If the UIM does not substitute its payment pursuant to Schmidt, subrogation rights are waived.

If the UIM insurer does substitute its payment, the subrogation claim against the underinsured driver is preserved. However, the UIM insured may be competing with other third parties (e.g. health insurance) which may also assert subrogation claims. Commercial Union v. Minn. Sch. Bd. Ass'n, 600 N.W.2d 475 (Minn. Ct. App. 1999).

What happens when the injured party does not settle but obtains a jury verdict against the tortfeasor in an amount that exceeds the applicable liability insurance? If the injured person has given a Malmin notice, the UIM insurer will be bound by the verdict. When the UIM payment is made, a subrogation claim by the UIM insurer will exist. The subrogation claim may then be asserted through the judgment that should have been entered following the jury verdict.

The UIM insurer must actively assert its subrogation claim against the tortfeasor or these rights may be lost. In Ill. Farmers Ins. Co. v. Nash, 651 N.W.2d 205 (Minn. Ct. App. 2002), plaintiff obtained a jury verdict of \$62,496 against a defendant who had only a \$50,000 liability insurance policy. The UIM insurer was bound by the verdict, because a Malmin notice had been given, and it paid \$12,496. Judgment on the verdict was entered in December 2000. The plaintiff executed a satisfaction of judgment against the defendant in April 2001. The UIM insurer did not make a demand for payment on its subrogation claim until May, 2001. The court held that the satisfaction of judgment effectively terminated the claims against the defendant, and the subrogation claim was therefore lost.

In O'Brien v. State Farm Ins. Co., 2005 WL 1743810 (Minn. Ct. App. July 26, 2005) the injured person also got a verdict in excess of the liability insurance limits. The plaintiff gave a Schmidt notice to State Farm, the UIM insurer. It is not at all clear why the Schmidt notice was given, because there was no settlement. In any event, State Farm did not substitute its draft and permitted the plaintiff to accept a payment of the liability insurance limits. The plaintiff gave the tortfeasor and his insurance company a release acknowledging the receipt of the liability insurance payment but preserving State Farm's subrogation rights. In this context, the defendant (O'Brien) brought a claim arguing that

State Farm had waived its subrogation claim because it failed to substitute its draft following the Schmidt notice. The Court rejected the argument and correctly noted that Schmidt v. Clothier arose in the context of a settlement prior to trial and should really have no application after a verdict has been entered.

Given the issues that have arisen in the Nash and O'Brien decisions, it would be appropriate for a UIM insurer both to secure its subrogation rights in an appropriate release and assignment from the plaintiff at the time of the UIM payment and to give notice to the tortfeasor that these rights are being asserted.

B. Subrogation Against Other Tortfeasors

In cases with multiple tortfeasors, the UIM insurer is paying based only on the percentage of fault attributed to a specific underinsured driver. Lahr v. Am. Family Mut. Ins. Co., 551 N.W.2d 732 (Minn. Ct. App. 1996). Since the UIM carrier is paying only for that portion of damage caused by the underinsured motorist, it should not be entitled to claim a subrogation right against any amounts recovered from other tortfeasors. See also State Farm Mut. Auto. Ins. Co. v. Galloway, 373 N.W.2d 301 (Minn. 1985).

C. Contribution Claims

In certain cases, more than one UIM policy may apply to a claimant, who must then elect to submit a claim to only one UIM insurer. Equitable principles would favor pro rata contributions from the various policies which provided coverage. This result was reached in Cont'l Cas. Ins. Co. v. Teachers Ins. Co., 532 N.W.2d 275 (Minn. Ct. App. 1995) based upon the coordination of benefits clauses in the applicable policies. Since Teachers Insurance provided 1/6 of the total UIM coverage, it had to contribute to Continental 1/6 of the total payment made.

The Cont'l Cas. case was not followed in Kissoondath v. Safeco, No. CX-96-1462, 1996 WL 665906 (Minn. Ct. App. November 19, 1996). In Kissoondath, the injured party had a \$300,000 UIM policy with Prudential and a \$500,000 UIM policy with Liberty Mutual. Unlike the policy at issue in Cont'l Cas., the Prudential policy had no language stating that it would coordinate benefits. Nothing in the statute requires coordination of benefits. There is no explicit discussion of equitable claims to pro rata distribution. The court does discuss the "total policy intent" of each policy at issue and concludes that the Liberty Mutual policy should be primary. No contribution claim is permitted against the second company.

XI. Statute of Limitations

A. Claims Against UIM Insurer

A six-year statute of limitations will generally apply to contract claim against a UIM insurer. Minn. Stat. § 541.05.

In Oanes v. Allstate Ins. Co., 617 N.W.2d 401 (Minn. 2000), the Supreme Court held that the six year statute of limitations on a UIM claim would begin to run from the date of the settlement or adjudication of the liability insurance claim. This reversed earlier decisions which had the six year statute of limitations on the UIM claim run from the date of the accident. Nelson v. State Farm, 567 N.W.2d 770 (Minn. Ct. App. 1997). Johnson v. State Farm Mut. Auto. Ins. Co., No. 594 N.W.2d 243 (Minn. Ct. App. 1999); Cattnach v. State Farm Ins. Co., 577 N.W.2d 251, 254 (Minn. Ct. App. 1998); Addington v. Ill. Farmers Ins. Co., No. C6-98-2029, 1999 WL 243592 (Minn. Ct. App. April 27, 1999).

Prior to the Oanes decision, it was necessary to review the contract language for pertinent provisions concerning the commencement of actions against the company. In Sargent v. State Farm Auto. Ins. Co., 486 N.W.2d 14 (Minn. Ct. App. 1992) the policy said that there would be no UIM coverage until the liability insurance limits were paid. Based on this contract language, the claimant had six years to bring the UIM claim following the liability settlement. The contract language becomes less important now that the statute of limitations begins to run from the date of settlement or adjudication in all UIM claims.

1. Mandatory Arbitration

In those few policies which still require arbitration of UIM claims, the contract may specify when the period for commencing the arbitration begins. See Kappes v. Am. Family, No. C8-93-991, 1994 WL 1120 (Minn. Ct. App. Jan. 4, 1994). If the contract is silent as to when the arbitration must be commenced, some cases have allowed claims beyond a six year limit. Spira v. Am. Standard Ins. Co., 361 N.W.2d 454 (Minn. Ct. App. 1985); Edwards v. State Farm Mut. Auto. Ins. Co., 399 N.W.2d 95 (Minn. Ct. App. 1986).

2. Contracts with Shorter Statutes of Limitation

Some insurance contracts may impose a shorter statute of limitations for the commencement of an uninsured motorist claim. In Larson v. Nationwide Agribusiness Ins.Co., 739 F.3d 1143 (8th Cir. 2014), the Iowa contract being applied to a Minnesota accident stated that any action for UIM benefits had to be commenced within two years of the accident but provided that this limitation would not apply if within two years a civil action was filed against the tortfeasor. This language in the contract, construed under Minnesota law, barred Larson's claim.

Generally an insurance contract can set a time limit on the commencement of litigation under the contract so long as (1) the limit does not conflict with a specific statute, and

(2) the limitation period is not unreasonable in length. L&H Transp. Inc. v. Drew Agency, Inc., 403 N.W.2d 223 (Minn. 1987).

In a UIM claim, the claim is not ripe for adjudication until the underlying tort claim has been resolved. The court in Larson did not have to address this issue because the policy allowed the preservation of the UIM claim by filing the action against the tortfeasor within two years. To the extent that policy language requires commencement of a UIM action within a time period when the claim is not ripe for adjudication should be found unenforceable, both because it is unreasonable and because it conflicts with Minnesota law.

B. Subrogation Claims by UIM Insurer

Since the claims of a UIM insurer are subrogation claims, the UIM insurer has only those rights possessed by the injured claimant. This means that the UIM insurer's claims for subrogation against the tortfeasor must be commenced within six years from the date of the injury. Hermeling v. Minn. Fire & Cas. Co., 548 N.W.2d 270 (Minn. 1996).

XII. Effect of UIM Payment on Subsequent No-Fault Claims

If a claimant actually receives compensation for future medical and wage loss claims when resolving a UIM claim, the no fault insurance carrier may refuse payment of future claims on the grounds that it would provide a double recovery. Quam v. United Fire & Cas. Co., 440 N.W.2d 131 (Minn. Ct. App.1989); see also Ferguson v. Ill. Farmers Ins., 348 N.W.2d 730 (Minn. 1984).

A general release of all claims does not automatically waive future no fault claims. Geske v. State Farm Mut. Auto. Ins. Co., No. C3-89-1588, 1990 WL 10688 (Minn. Ct. App. Feb. 13, 1990). However, an insurer could argue that future no fault claims are waived by a release stating that the claimant is being compensated for all future medical and wage loss claims. The Fair Claims Practices Act does classify as an “unfair settlement practice” any request that a claimant sign a release which extends beyond the subject matter which gave rise to the claim payment. Minn. Stat. § 72A.201 subd. 7 (1).

→ Practice Tip

Care should be taken in the settlement of a UIM claim so that future no faults benefits are not inadvertently relinquished in the release that is signed. Unless the settlement negotiations included payment for future medical or wage loss claims, the claimant should not be required to sign a release which suggests that such potential no-fault claims have been satisfied.

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