UNINSURED MOTORIST (UM) COVERAGE

MCELLISTREM FARGIONE RORVIG & MOE P.A.

Attorneys at Law
7900 International Drive, Suite 700
Minneapolis, MN 55425
(952) 544-5501
www.mcfarg.com

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When looking for precedents in uninsured motorist case law, it is important to note the date of the accident that gave rise to the uninsured motorist claim. There were significant legislative changes in 1975, 1985 and 1989 with respect to uninsured motorist coverage, so that the holdings in some older cases may have been superseded by subsequent legislative changes.

A. August 1, 1989 to Present

Uninsured motorist claims are governed primarily by Minn. Stat. § 65B.49, subd. 3a. An "uninsured motor vehicle" is defined at Minn. Stat. § 65B.43, subd. 16.

From 1985 until the changes effective August 1, 1989, uninsured motorist (UM) coverage was combined with underinsured motorist (UIM) coverage. The 1989 amendment made uninsured and underinsured separate coverages, each mandated by the No-Fault Act. Because the UM and UIM coverages are separate, an insurer may not reduce damages properly owed on a UM claim on the grounds that it had previously overpaid claims related to its UIM coverage from the same accident. Gusk v. Farm Bureau Mut. Ins. Co., 559 N.W.2d 421 (Minn. 1997).

The other changes created by the 1985 legislation were not altered in 1989.

B. October 1, 1985, to August 1, 1989

The statute governing uninsured motorist claims during this period was Minn. Stat. § 65B.49, subd. 3a.

When enacted in 1985, this statute made three significant changes with respect to uninsured motorist insurance:

(1) It eliminated stacking.
(2) It created a new system of priorities to determine which uninsured motorist policies would apply to an individual's UM claim. Minn. Stat. § 65B.49, subd. 3a(5).

(3) It made UM coverage a single coverage combined with underinsured motorist (UIM) coverage.

C. January 1, 1975, to October 1, 1985

From January 1, 1975, through October 1, 1985, uninsured motorist coverage was a mandatory coverage under the No-Fault Act. Coverage was required under Minn. Stat. § 65B.49, subd. 4.

The priority for payment of uninsured motorist coverage was based primarily on the insurance policy "closest to the risk." This generally meant:

(1) First the vehicle occupied by the claimant.
(2) Then any other policy where the claimant is an insured. This was true even though the claimant was occupying his own uninsured vehicle at the time the accident occurred.
(3) Uninsured motorist coverage during this period could be "stacked" by the claimant from all policies in which the claimant was an insured.

In Gudvangen v. Austin Mut. Ins. Co., 284 N.W.2d 813 (Minn. 1978), aff'd on reh'g (Minn. 1979), it was stated that the statutes dealing with uninsured motorist insurance prior to 1975 were generally intended to be incorporated in the No-Fault Act.

In 1977, the definition of an uninsured motor vehicle was amended to include both motor vehicles and motorcycles as uninsured motor vehicles. In Gudvangen, the change in definition was held to be a clarification of the existing law, not an addition to the law.

D. 1967 to 1974

Uninsured motorist coverage was first required in 1967. Prior to the effective date of the No-Fault Act on January 1, 1975, the statute governing uninsured motorist coverage was codified at Minn. Stat. § 65B.22. This section was repealed when the No-Fault Act went into effect.

II. Overview: Prerequisites for a UM Claim

The various elements of a UM claim will be discussed in detail in subsequent sections of this article. The summary below simply provides a checklist identifying each of the elements which must be considered in bringing an uninsured motorist claim.

Checklist for Uninsured Motorist Claim

- ❑ *Was the injury caused by a motor vehicle?*
  The injury must be caused by a motor vehicle, as defined either in the applicable statute or in the UM contract. For example, a snowmobile would not be expected to fit the definition of a "motor vehicle" in either the applicable statute or in the UM insurance contract. Consequently, an injury caused by an uninsured snow mobile would not give rise to a UM claim, because the injury is not caused by an uninsured motor vehicle. See Section 17.3: What is an Uninsured Motor Vehicle.

- ❑ *Was the injury caused by an uninsured motor vehicle?*
  Generally, a motor vehicle with less than the $30,000 in liability insurance coverage, the minimum required by Minnesota law for the claims of an injured individual, will be considered uninsured. See Section 17.3: What is an Uninsured Motor Vehicle.

- ❑ *Was the injury caused by a motor vehicle "accident"?*
  The injury in question must arise from a motor vehicle "accident," not from an intentional tort. If the driver of a motor vehicle intentionally causes an injury, the driver will likely have no liability insurance coverage to compensate the injured person. However, the injury caused by this uninsured motor vehicle does not give rise to a UM claim, because the incident causing the injury was not a motor vehicle "accident."

- ❑ *Can the injured person prove liability, causation and damages?*
  To be successful in pursuing the UM claim, the injured person must be able to prove the basic elements of any tort claim, that is liability, causation, and damages.

- ❑ *Can the injured person identify one or more policies of UM insurance against which a claim may be made?*
  To pursue a UM claim, the injured person must be able to identify one or more policies of UM insurance against which a claim may be made. See Section 17.4: Identifying the UM Coverage.

III. What Is an Uninsured Motor Vehicle?

Definition: Uninsured Motor Vehicle
An uninsured motor vehicle is defined as a motor vehicle or a motorcycle that does not have liability insurance meeting the requirements of Minnesota law. See Minn. Stat. § 65B.43, subd. 16.

Since Minnesota law requires liability limits of not less than $30,000 for one person and not less than $60,000 for two or more persons in any one accident, a motor vehicle with less than this coverage is considered uninsured . Minn. Stat. § 65B.49, subd. 3. See Murphy v. Milbank Mut. Ins., 320 N.W.2d 423 (Minn. 1983).

An uninsured motorist contract of insurance is permitted to use definitions that provide benefits or coverage over and above those mandated by the statute. Minn. Stat. § 65B.49, subd. 7. Consequently, in cases where a UM claim does not exist under the statutory standards, it would be reasonable to review the injured person's uninsured motorist contract to determine if the contract may provide UM benefits.

A. Vehicles Covered

The statutory definition of an "uninsured motor vehicle" explicitly includes both motor vehicles and motorcycles.

1. 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 definition of "motorcycle" includes an attached trailer and also explicitly includes a motorized bicycle (but not an "electric-assisted" bicycle).

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). If the three-wheel ATV is insured by a homeowner's policy with at least $30,000 in liability coverage, it will not be considered to be uninsured. Olson v. Milbank Ins. Co., No. C1-89-2156, 1990 WL 106016 (Minn. Ct. App. Aug. 3, 1990).

2. Motor Vehicle

Definition: Motor Vehicle
A motor vehicle is a vehicle with at least four wheels that is designed to be self-propelled for use primarily on public roads in transporting persons or property, and that 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.

Given the statutory definition, a farm tractor would not be a "motor vehicle" since it is not designed primarily for use on public roads and it is not subject to registration under Minn. Stat. Ch. 168. Great Am. Ins. Co. v. Golla, 493 N.W.2d 602 (Minn. Ct. App. 1992). However, as already noted, it is important to review the applicable uninsured motorist contract in cases when coverage may not be mandated by statute. The language in certain contracts provides UM or UIM coverage for an accident caused by a farm vehicle or other off-road motorized equipment if the accident occurs on a public road. Kashmark v. Western Ins. Co., 344 N.W.2d 844 (Minn. 1984).

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 the statutory definition of a "motor vehicle" in holding that a marked police car, because it was not required to be "registered," was not a "motor vehicle" for purposes of a claim for basic economic loss benefits under the No-Fault Act. Chapter 168.012 subd. 1(b) exempts from registration a variety of government vehicles, such as a clearly marked police patrol car, a fire engine, a clearly marked ambulance, and federally owned vehicles. Under the decision in Mut. Serv., such vehicles do not fall within the statutory definition of a "motor vehicle." This decision will impact a variety of motor vehicle insurance claims. However, as a practical matter, vehicles in these categories are rarely uninsured, so accidents involving these vehicles generally did not give rise to UM contract claims.

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). Cimbura v. City of Minneapolis Special Sch. Dist. No. 1, No. A-19-1338, 2020 WL 1130319 (Minn. Ct. App. March 9, 2020, confirms that a school bus is also a motor vehicle.

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); see also Bell v. State Farm, No. C8-96-1704, 1997 WL 40664 (Minn. Ct. App. Feb. 4, 1997) in which a construction grader used for plowing snow was held not to be a "motor vehicle" since it was not required to be licensed under Minn. Stat. Ch. 168.

B. Vehicles with No Insurance

When is a motor vehicle or motorcycle considered to be uninsured? The most obvious UM claim arises when neither the at-fault vehicle nor the at-fault driver is covered by any policy of liability insurance. (If the driver of the at-fault uninsured motor vehicle is covered by a personal policy of liability insurance so that $30,000 or more in liability insurance is applicable to the claim, there is no uninsured motorist claim even though the at-fault vehicle itself is uninsured. Sorbo v. Mendiola, 361 N.W.2d 851 (Minn. 1985).)

C. Less than $30,000 Liability Coverage

1. General Rule

The October 1, 1985, amendments to the No-Fault Act increased minimum liability limits in Minnesota from $25,000/$50,000 to $30,000/$60,000. Minn. Stat. § 65B.49, subd. 3. Since an uninsured motor vehicle is one which does not meet these limits, any vehicle that has less than $30,000/$60,000 in liability coverage is classified by Minnesota law as an "uninsured motor vehicle."

2. Accident Outside Of Minnesota.

In Murphy v. Milbank Mut. Ins., 320 N.W.2d 423 (Minn. 1983) an accident occurred in Iowa. The negligent party was an Iowa driver who had a $10,000 liability limit. Although this limit complied with Iowa law, it was less than the minimum required by Minnesota law. The Minnesota Supreme Court held that the Minnesota resident injured in this Iowa accident could assert an uninsured motorist claim against his own company. Because the liability coverage was less than that required by Minnesota law, an uninsured motorist claim existed.

In certain circumstances, a vehicle might be categorized either as an uninsured motor vehicle or as an underinsured motor vehicle. For example, a Minnesota resident is injured in Iowa by a negligent driver who has a $25,000 liability limit. The injured person has suffered $50,000 in damages. The Iowa vehicle fits the definition of either an uninsured motor vehicle or an underinsured motor vehicle. Consequently, the injured party can elect to submit a claim under either one (but not both) of the coverages. See Murphy v. Milbank Mut. Ins. Co., 388 N.W.2d 732 (Minn. 1986). See also Taylor v. Great Central Ins. Co., 234 N.W.2d 590 (Minn. 1975). Hedin v. State Farm Mut. Auto. Ins. Co., 351 N.W.2d 407 (Minn. Ct. App. 1984).

In cases where there is liability coverage of less than $30,000, the injured person may wish to settle the liability claim while preserving an additional UM claim. In these circumstances, the UM insurer must be given prior notice of the proposed settlement with the tortfeasor so that the UM insurer will have the opportunity to preserve its potential subrogation claims against the at-fault driver. See Liberty Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 463 N.W.2d 750, 754 n. 3 (Minn. 1990); Ruddy v. State Farm Mut. Auto. Ins. Co., 596 N.W.2d 679 (Minn. Ct. App. 1999).

➔ **Practice Tip**

When a Minnesota resident is injured in an auto accident in another state, as soon as possible one should determine the liability limits of the defendant. If the limits are *less* than 30/60 thousand, the case of Murphy v. Milbank Mut. Ins. Co., 388 N.W.2d 732 (Minn. 1986) allows the plaintiff to make an uninsured motorist claim. It may be easier and more beneficial for the injured person to make the uninsured claim in Minnesota rather than deal with the liability claim in an out of state venue.

3. Accidents in Minnesota.

What happens if a vehicle from another state has less than $30,000 in liability coverage and causes an accident in Minnesota? Under Minn. Stat. § 65B.50 subd. 1, an insurance company for the out-of-state vehicle is generally required to provide at least the minimum $30,000/$60,000 liability limit required by Minnesota law, even though the policy itself provides a lower limit, if the company is licensed to do business in Minnesota and the accident occurs in Minnesota. See Maas v. Allstate Ins. Co., 365 N.W.2d 256 (Minn. 1985).

What if the insurer for the out of state vehicle does not do business in Minnesota? Minn. Stat. § 65B.50, subd. 2 mandates that the liability limits be raised to $30,000 whenever the insured vehicle is in Minnesota. Founders Ins. Co. v Yates, 888 N.W.2d 134 (Minn. 2016). (The Founders decision reverses the holding in Burgie v. League Gen. Ins. Co., 355 N.W.2d 466 (Minn. Ct. App. 1984)).

For purposes of minimum liability limits (and no fault benefits), any insured vehicle involved in a collision in Minnesota will, under Minn. Stat. §65B.50, be held to provide the minimum insurance required by Minnesota law. Because the liability limits on the out-of-state policy are written up to $30,000 as a matter of law, the vehicle at issue is not “uninsured.”

D. Denial of Coverage or Insolvency

When an insurance company denies coverage or becomes insolvent, an uninsured motorist claim generally exists. Most uninsured motorist endorsements include in the definition of an uninsured motor vehicle a vehicle that is "insured at the time of the accident, but the insurance company denies coverage or becomes insolvent." See Fryer v. Nat’l Union Fire Ins. Co., 365 N.W.2d 249 (Minn. 1985).

With respect to insolvency, the Minnesota Insurance Guaranty Association (MIGA) may assume the obligations of an insolvent insurance carrier. Minn. Stat. Ch. 60C. The statute provides that MIGA will be “deemed the insurer to the extent of its obligation.” Minn. Stat. Ch. 60C.05, subd.1(a). However, the injured party must first exhaust any available UM coverage before looking to MIGA. Minn. Stat. Ch. 60C.13, subd.1. Consequently, the possibility of coverage through the MIGA fund does not preclude or limit a UM claim based upon insolvency.

With respect to a denial of insurance coverage, if a company first denies coverage but then, prior to the completion of an uninsured motorist settlement, admits that coverage exists, the uninsured motorist claim no longer exists. See Fryer, supra. However, once an uninsured motorist settlement is concluded, the settlement may be final even though liability coverage

was in fact acknowledged prior to settlement. Snesrud v. Elbers, 374 N.W.2d 830 (Minn. Ct. App. 1985).

In a situation where a liability insurance carrier initially denies coverage but then settles the liability claim without admitting coverage, the at-fault vehicle cannot be considered "uninsured" under the policy definition. Jones v. Sentry Ins. Co., 462 N.W.2d 90 (Minn. Ct. App. 1990).

What if the liability insurance company denies coverage because the injury was caused intentionally? Can an intentional tort lead to an uninsured motorist claim? In McIntosh v. State Farm, 488 N.W.2d 476 (Minn. 1992), the Supreme Court held that only a motor vehicle "accident" will give rise to an uninsured motorist claim. In McIntosh, a man assaulted another person with a car. Although the injury arose out of the use of a motor vehicle, it was not an "accident". Consequently, there was no uninsured motorist claim. This decision was consistent with earlier Court of Appeals rulings in Wilson v. State Farm, 451 N.W.2d 216 (Minn. Ct. App. 1990) and Petersen v. Croft, 447 N.W.2d 903 (Minn. Ct. App. 1989).

(It should be noted that McIntosh does allow the victim of an intentional tort to recover basic economic loss no-fault benefits. For no-fault purposes, the term "accident" is viewed from the perspective of the victim, who did not intend to be harmed.)

On occasion, a close question may exist as to whether an injury was caused accidentally or intentionally. Standards for assessing insurance denials based on an intentional tort are discussed in Am. Family Ins. Co. v. Walser, 628 N.W.2d 605 (Minn. 2001). See also Motzko v. State Farm Mut. Ins., No. C4-01-131, 2001 WL 1182356 (Minn. Ct. App. Oct. 9, 2001), in which injuries stemming from a truck pulling contest were judged to be the result of an accident because the parties did not intend the contest to end with one of the trucks rolling over.

E. Hit and Run or Phantom Vehicle.

The definition of "uninsured motorist coverage" explicitly includes "hit and run motor vehicles." Minn. Stat. § 65B.43, subd. 18.

In Halseth v. State Farm Mut. Auto. Ins. Co., 268 N.W.2d 730 (Minn. 1978), the court held that the term "hit-and-run" is synonymous with an accident where the driver flees from the scene, even though no physical contact occurred between the phantom vehicle and the vehicle of the person making the uninsured motorist claim. The court noted that, prior to 1975, the law limited uninsured motorist coverage to "colliding motor vehicles" in which the driver and operator of one vehicle is not known. See also Heldt v. Truck Ins. Exch., No. C7-94-1009, 1995 WL 1496 (Minn. Ct. App. 1995), a choice of law case confirming that Minnesota law does not require physical contact with the phantom vehicle for an uninsured motorist claim to exist.

The Halseth decision confirmed that the term "hit" in "hit and run" could encompass an incident in which a phantom vehicle did not physically contact the vehicle of the injured

person. A number of subsequent cases then clarified the meaning of the term "run" in "hit and run."

Russell v. Sentinel Ins. Co. Ltd., 906 N.W.2d 543 (Minn. Ct. App. 2018) involved a person injured while working in a parking ramp. She was power washing the second floor of the parking ramp when a small SUV drove past and caught the hose on one of its tires. The SUV kept driving and the hose knocked over the worker, causing an injury. The driver of the SUV did not stop and was never identified. The insurance company refused to recognize the incident as being a "hit and run" because the injured person could not prove that the driver fled from the scene in order to avoid liability. The court of appeals held that the intent of the phantom vehicle's driver is not an element of the UM claim. If the injured person was denied the opportunity to obtain information about the phantom vehicle driver because the driver left the scene without stopping, the incident would qualify as a "hit and run."

In Lhotka v. Ill. Farmers Ins. Co., 572 N.W.2d 772 (Minn. 1998), a pedestrian was hit by a motor vehicle. The driver stopped, but the pedestrian believed that she was not hurt and failed to obtain any identifying information. When she later found that injuries had occurred, she was not entitled to bring a UM claim. The incident did not meet the Halseth definition of a "hit and run," i.e., "an accident causing damages where the driver flees from the scene." 268 N.W.2d at 733. See also Sao v. Am. Family Ins. Group, 1999 WL 26213 (Minn. Ct. App. May 4, 1999) holding that no UM claim existed when the driver wrote down the wrong license plate number and did not ask for any additional information from the other driver (who had not fled from the accident scene).

Minn. Stat. § 169.09, subd. 3(a) requires a driver involved in a motor vehicle accident causing bodily injury to stop and to provide certain identifying information. If this is done, the driver has not been part of a "hit and run" accident, even if the identifying information is eventually lost and the driver can no longer be identified. In Kasid v. Country Mut. Ins Co.,776 N.W.2d 181 (Minn. Ct. App. 2009), there was a rear-end collision. Kasid was a passenger in the vehicle that had been struck from the rear. The at-fault driver stopped and provided identifying information to the owner of the vehicle in which Kasid was a passenger. When Kasid sought the information from the owner some months after the collision, it had been lost. The owner who had obtained the information was under no obligation to preserve it for Kasid's use, and Kasid had had the opportunity to obtain the information at the accident scene if he had elected to do so. These facts do not give rise to a UM claim.

In Nat'l Family Ins. v. Bunton, 509 N.W.2d 565 (Minn. Ct. App. 1993), there was one "phantom" vehicle at fault in causing an injury. The plaintiff thought he had identified the tortfeasor, but that individual denied having any involvement in the accident. Nevertheless, this person's insurance company made a settlement offer and it was accepted by the plaintiff on a Pierringer release. The plaintiff then tried to pursue a UM claim. The court denied the UM claim. In the court's view, UM coverage is there to compensate for the lack of insurance coverage by a tortfeasor. An injured party cannot first take advantage of insurance coverage from an alleged phantom vehicle and then pursue a UM claim. In these circumstances, in the absence of a reasonable settlement offer, the plaintiff's only

good option would be to start a lawsuit on alternative theories both against the alleged tortfeasor and against the UM carrier. Full damages will then be awarded against one or the other.

When an injured person brings a UM claim based on the negligence of a phantom or “hit and run” vehicle, the claimant has the burden of proving both the existence of the phantom vehicle and the negligence of the driver of that vehicle. In Wong v. Am. Family, 576 N.W.2d 742 (Minn. 1998), a man was injured when his car hit a deer carcass lying in the roadway. Expert testimony established that the deer had previously been struck by another motorist. The UM claim was dismissed because, on the facts of this case, the negligence of the first driver could not be established because this driver had no legal duty to remove the carcass from the highway.

The mere allegation that a "phantom tortfeasor" exists may not be sufficient to establish a UM claim. In Ripka v. Mehus, 390 N.W.2d 878 (Minn. Ct. App. 1986) a party attempted to introduce evidence of a "phantom tortfeasor" to influence a jury finding concerning comparative fault. In that case, the Court held that the evidence was not sufficient for the negligence of this phantom party to be submitted to the jury. Ripka involved issues of comparative fault, not a question of UM coverage. See also Pacyga v. Econ. Fire & Cas., No. C8-88-1818, 1989 WL 5757 (Minn. Ct. App. Jan. 31, 1989).

Mere speculation that another vehicle caused an accident is insufficient. In Coltrain v. American Family Mutual Insurance Co., No. A15-0700, 2015 WL 7941573, at *2 (Minn. Ct. App. Dec. 7, 2015), the plaintiff’s car window was shattered as she drove on Interstate 94. After the plaintiff exited the freeway and drove into a parking lot, another vehicle drove up and told the plaintiff they could fix the window, but the other vehicle left after a security officer approached and the driver was never identified. The plaintiff claimed that the driver of the other vehicle caused her window to shatter and that the driver was uninsured because the driver’s identity was unknown. No projectile was found inside the plaintiff’s car. The court of appeals held there was simply no evidence that the other vehicle caused the plaintiff’s car window to shatter.

➔ Practice Tip

Phantom vehicle cases often involve issues of credibility. An attorney should be hesitant to represent an individual who is claiming injuries from a phantom vehicle unless: (1) independent witnesses verify the existence and liability of the phantom vehicle, or (2) physical evidence supports the claimant's version of the facts, or (3) the veracity of the claimant cannot reasonably be questioned.

IV. Identifying the UM coverage

A. Minn. Stat. § 65B.49 subd. 3a(5): "Insured" and "Occupying"

Minn. Stat. § 65B.49, subd. 3a(5) creates the standards that determine which insurance company will initially be responsible for providing UM coverage. This portion of the statute also determines whether or not excess UM coverage can be sought from a second UM policy. Here is the language of the statute:

> 65B.49 subd. 3a(5): If at the time of the accident the injured person is occupying a motor vehicle, the limit of liability for uninsured and underinsured motorist coverages available to the injured person is the limit specified for that motor vehicle. However, if the injured person is occupying a motor vehicle of which the injured person is not an insured, the injured person may be entitled to excess insurance protection afforded by a policy in which the injured party is otherwise insured. The excess insurance protection is limited to the extent of covered damages sustained, and further is available only to the extent by which the limit of liability for like coverage applicable to any one motor vehicle listed on the automobile insurance policy of which the injured person is an insured exceeds the limit of liability of the coverage available to the injured person from the occupied motor vehicle.
>
> If at the time of the accident the injured person is not occupying a motor vehicle or motorcycle, the injured person is entitled to select any one limit of liability for any one vehicle afforded by a policy under which the injured person is insured.

The statute sets up a two-step process for identifying the UM coverage(s) that will be applicable to claims by the injured person. The process may be summarized as follows:

Which Company Pays?	
1.	Was the injured person **occupying a motor vehicle** at the time of the injury? a. If not occupying a vehicle, go to any one policy under which the injured person is insured. b. If occupying a vehicle, seek UM coverage first from the occupied vehicle and go to question 2.
2.	If the injured person was occupying a vehicle, was this person **an insured on the policy** covering the occupied vehicle? a. If the injured person is an "insured" on the policy for the occupied vehicle, there will be no additional coverage available from any other policy. b. If the injured person is not an "insured" on the policy for the occupied vehicle, additional coverage can be sought if there is another applicable policy providing excess coverage.

The statutory language limiting claims to a single insurance policy has been interpreted to apply only with respect to those policies issued pursuant to Minnesota law. In Gen. Cas. of

Wis. v. Outdoor Concepts, 667 N.W.2d 441 (Minn. Ct. App. 2003), a Wisconsin resident hit by a pickup truck in Wisconsin was able to assert claims both against his personal Wisconsin policy and against a Minnesota commercial policy issued to him as the sole proprietor of a business in Minnesota.

There has been litigation concerning the meaning of the words "occupying" and "insured" as used in this provision of the law.

1. "Occupying"

In 1996, the Supreme Court decided Allied Mut. Ins. Co. v. Western Nat'l Mut. Ins. Co., 552 N.W.2d 561 (Minn. 1996). Prior to the decision in Allied, a number of court of appeals decisions had held that a person could be "occupying" a motor vehicle even though the person was outside of the vehicle. Allied requires that the term "occupying" be given its ordinary and commonly accepted meaning. Thus, in Allied, a woman standing next to a car while it was being unlocked could not be considered to be "occupying" the vehicle when she was injured.

The Allied decision acknowledges that the meaning of "occupying" may be expanded somewhat by language in the insurance policy. See for example State Farm Mut. Auto. Ins. Co. v. Levinson, 439 N.W.2d 110 (Minn. Ct. App. 1989) in which the policy defined "occupying" to include "entering into" and "alighting from" the insured vehicle. See also Ill. Farmers Ins. Co. v. Marvin, 707 N.W.2d 747 (Minn. Ct. App. 2006) (coverage did exist for a woman who was struck by another car as she was loading packages into the back section of a Ford Explorer).

The Allied decision effectively reversed a line of cases from the court of appeals in which someone outside of a vehicle was nevertheless found to be "occupying" that vehicle. See Klein v. United States Fid. & Guarantee Co., 451 N.W.2d 901 (Minn. Ct. App. 1990) (person changing a flat tire was "occupying" the vehicle); Horace Mann Ins. Co. v. Neuville, 465 N.W.2d 432 (Minn. Ct. App. 1991) (person standing in front of his stalled car was "occupying" it); Conlin v. City of Eagan, 482 N.W.2d 519 (Minn. Ct. App. 1992) (tow truck operator working on the front of a car about to be towed was "occupying" the tow truck). Prior to Allied, the courts would engage in a very artificial analysis concerning nature of the on-going "relationship" between the injured party and the vehicle he was claimed to be "occupying." See also Dohmann v. Houseley, 478 N.W.2d 221 (Minn. Ct. App. 1991) and Gieser v. The Home Indemnity Co., 484 N.W.2d 256 (Minn. Ct. App. 1992). It appears that the courts initially adopted this strained analysis of the statutory language in order to reach the equitable result of denying UM coverage to a person who had been operating his own uninsured vehicle – "occupying" the owned but uninsured vehicle precluded UM coverage from any other UM policy that might otherwise have provided coverage.

2. “Insured”

Definition: Insured
The No-Fault statute defines the term “insured” at Minn. Stat. § 65B.43 subd. 5. Generally, an "insured" under the statutory definition includes both the named insured in the policy and any resident relative of the named insured unless that relative is "identified by name in any other contract" of motor vehicle insurance complying with the No-Fault Act.

The definition of an “insured” set forth in Minn. Stat. § 65B.43 subd. 5 will be used when interpreting the priority system set up by § 65B.49 subd. 3a(5) for UM and UIM claims. See Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000). See also West Bend Mut. Ins. Co. v. Allstate Ins. Co., 776 N.W.2d 693 (Minn. 2009).

Minn. Stat. § 65B.43 subd. 5 extends the status of an “insured” to certain individuals who are not identified by name on the policy’s declaration page as being “insured.” Insured status is extended by statute to certain resident relatives of the named insured, if the resident relative is not separately identified by name in his or her own Minnesota motor vehicle insurance policy.

It should be noted that being identified as an additional “driver” on a policy is not the same as being an “insured” under the policy. See Carlson v. Allstate, 749 N.W.2d 41 (Minn. 2008).

With respect to business policies, the court has held that a sole proprietor of a business is an “insured” under a policy which lists coverage under the trade name of the business. In Gen. Cas. of Wis. v. Outdoor Concepts, 667 N.W.2d 441 (Minn. App. 2003), the named insured was “Outdoor Concepts Joe Ebbertz DBA.” Mr. Ebbertz, a sole proprietor “doing business as” Outdoor Concepts, was covered as an “insured” by this contract. This decision casts doubt on the continued authority of Jensen v. United Fire & Cas. Co., 524 N.W.2d 536 (Minn. Ct. App. 1994), which, based on identical language in the declaration page of a policy, had held that the company (and not the proprietor “doing business as”) was the insured under the policy. Under the logic of the Outdoor Concepts decision, status as “insured” may also extend to the resident relatives of the proprietor.

Other disputes have arisen when applying the statutory definition of “insured” in the setting of commercial auto insurance policies. A business policy typically lists the business as the named insured. The business does not have any “resident relatives.” Consequently, the family members of the business’s owner or shareholder will generally be without UM (or UIM) coverage from the business policy unless they are injured while occupying a vehicle insured under the policy. See Kuennen v. Citizens Sec. Mut. Ins. Co., 330 N.W.2d 886 (Minn. 1983); Kaysen v. Fed. Ins. Co., 268 N.W. 2d 920 (Minn. 1978). Likewise, even the owner of the business or an employee of the business, when not identified as a named insured in the declaration page of the policy, is not considered to be an “insured” under the policy when applying the principles of Minn. Stat. § 65B.49 subd. 3a(5). West Bend Mut. Ins. Co. v. Allstate Ins. Co., 776 N.W.2d 693 (Minn. 2009). See also Mikulay v. Home

Indem. Co., 449 N.W.2d 464 (Minn. Ct. App. 1989) and Turner v. Mut. Serv. Cas. Ins. Co., 675 N.W.2d 622 (Minn. Ct. App. 2004).

B. Claimant Not Occupying a Vehicle or Motorcycle

Minn. Stat. § 65B.49, subd. 3a(5) provides: "If at the time of the accident, the injured person is not occupying a motor vehicle or motorcycle, the injured person is entitled to select any one limit of liability for any one vehicle afforded by a policy under which the injured person is insured."

A person not occupying a vehicle or motorcycle may make a claim against only one policy. It is important to review all potentially applicable policies when electing the one to which a claim will be submitted. See Holmstrom v. Ill. Farmers Ins. Co., 631 N.W.2d 102 (Minn. Ct. App. 2001).

If more than one insurance policy applies, the company required to make the payment may possibly have a claim for contribution against the company which was not selected. See the last section of this article (Part X. Other Issues) for a discussion of coordination of coverages.

It should also be noted that some vehicles are technically excluded from the statutory definition of "motor vehicle" because the vehicles are not required to be registered under Minn. St. Ch. 169. Mut. Serv. Cas. Ins. Co. v. League of Minn. Cities Ins. Trust, 659 N.W.2d 755 (Minn. 2003). So, for example, a police officer in a marked police car is technically not "occupying a motor vehicle." It would therefore follow logically that the uninsured (or underinsured) motorist claims of such an officer would be governed by the statute saying that any one policy of UM coverage may be selected when asserting a claim.

C. Claimant Occupying a Vehicle

Minn. Stat. § 65B.49, subd. 3a(5) (effective October 1, 1985) provides the basic rule for determining which policy will apply to a particular claim. When a person who is occupying a motor vehicle is injured by an uninsured motorist, the statute requires that the injured person go to the UM coverage on the occupied vehicle when asserting a UM claim.

It can be noted that this statute mentions only "motor vehicles" so does not appear to apply to motorcycles. Consequently, the language of the applicable policies will not conflict with any provision of the No-Fault Act and will be enforced. In *Eberlein v. Std. Fire Ins. Co.*, 2021 U.S. Dist. LEXIS 134917, 2021 WL 3051917, a man was injured while operating his motorcycle. He had purchased $50,000 in UIM coverage for the motorcycle, and this was paid. He then sought additional coverage from Standard Fire Insurance Company, the company that insured his four cars. Standard did not insure the motorcycle. Standard's UIM policy had an exclusion denying UIM coverage when the vehicle owned and occupied by an insured was not an insured vehicle under the Standard policy. This is the same result that would have been reached if the statute had been applicable.

1. Occupant of a Motor Vehicle That Is Not Insured.

What if, at the time of the accident, the injured person is occupying a motor vehicle that has no insurance?

If the injured person is the owner of the occupied but uninsured vehicle, the injured person is barred by statute from making a UM claim against any other UM policy that might otherwise apply. Minn. Stat. § 65B.49, subd. 3a(7). For purposes of this particular section of the law, a motorcycle is considered to be a "motor vehicle." Hanson v. Am. Family Mut. Ins. Co., 417 N.W.2d 94 (Minn. 1987).
This statutory exclusion of UM (and UIM) coverage imposed by Minn. Stat. § 65B.49 subd. 3a(7) applies only to the owner of the uninsured vehicle, not to anyone else. In Vue v. State Farm Ins. Co., 582 N.W.2d 264 (Minn. 1998), the court would not apply the statutory exclusion of coverage to a woman occupying her husband's uninsured car unless it could first be established, as a matter of fact, that she too was an owner of the car.

A person who occupies, but who does not own, the uninsured vehicle remains free under the statutory priorities to pursue a UM claim against any other policy which affords UM coverage to that person. (See Section V – B, below, for a discussion of "family exclusion" contract language that might apply to claims when the uninsured vehicle is owned by a family member.)

The statutory exclusion of UM coverage under Minn. Stat. § 65B.49 subd. 3a(7) will not apply if the occupied vehicle is in fact insured, even though the vehicle's owner may not be either a named insured on the policy or the purchaser of the policy. Stewart v. Ill. Farmers Ins. Co., 727 N.W.2d 679 (Minn. Ct. App. 2007).

A person who is not the owner of the occupied uninsured vehicle is not statutorily barred from seeking UM coverage from a policy under which that person is insured.

2. Occupant of an Insured Vehicle.

A person injured while occupying a vehicle must first go to the UM coverage on the policy covering that occupied vehicle. If the person's damages exceed the amount of UM insurance coverage afforded by the policy on the occupied vehicle, the injured person may wish to seek additional compensation from a second UM policy under which the person is insured. Will the injured person be permitted to obtain coverage from a second insurance policy?

a. No Excess Coverage for an "insured"

An injured person occupying a vehicle at the time of an accident must go first to the insurance coverage on this occupied vehicle for any UM claim. If the injured person is an

"insured" under the policy covering this vehicle, there can be no additional UM claim against any other insurance policy. Minn. Stat. § 65B.49, subd. 3a(5).

In Jirik v. Auto Owners Ins. Co., 595 N.W.2d 219 (Minn. Ct. App. 1999), a 13-year-old girl was injured as a passenger in her mother's vehicle. The child was insured as a resident relative on the mom's policy covering the occupied vehicle. Consequently, the child could seek coverage from the mom's policy but was barred from obtaining coverage from any other policy under which she may have been insured. Similarly, in State Farm Mut. Auto. Ins. Co. v. Merrill, 952 F.3d 941 (8th Cir. 2020), a two year old child who lived with his grandmother and who died while occupying his grandmother's vehicle was an insured on the policy for the occupied vehicle, and State Farm therefore properly denied additional coverage from its policy covering the child's mother and her vehicle.

By contrast, in Stewart v. Ill. Farmers Ins. Co., 727 N.W.2d 679 (Minn. Ct. App. 2007), a man was driving his own vehicle when he was injured by an uninsured motorist. The injured person was working for a delivery service at the time of the collision. The employer insured the vehicle that Stewart occupied, and the employer was the named insured on the policy. Although the injured person was the owner of the vehicle, he was neither a named insured nor a resident relative of the named insured on the policy covering the vehicle. Since he was not an "insured" on the policy covering the occupied vehicle, he was permitted to seek excess coverage from a second UM policy under which he was personally insured.

b. Possible Excess Coverage

If the injured person is not "an insured" on the policy covering the occupied vehicle, the injured person is free to seek additional coverage from a second policy. This "excess coverage" from a second policy applies only to the extent that the limit on the second policy exceeds "the limit of liability of the coverage available to the injured person from the occupied motor vehicle."

The injured person must first be able to identify some additional UM policy under which the injured person is an insured. Then, the injured person may access this additional coverage only to the extent that the coverage applicable to this second motor vehicle exceeds the coverage available from the occupied vehicle. For example, a person owns a car with $100,000 in UM coverage, and she is an insured on the policy covering this car. She is injured as a passenger in the car of a friend, who has purchased a minimum $25,000 in UM coverage. If she injured by an uninsured motorist while occupying the friend's car, she must go first to the $25,000 coverage on the occupied car, and then has $75,000 (her $100,000 in coverage minus the $25,000 available from the occupied motor vehicle) in excess coverage from her own vehicle. The injured person may go this excess personal UM coverage because she is not an "insured" on the UM policy covering the friend's car which she occupied. See also Thesing v. Imperium Ins. Co., 17-cv-1208, 2018 U.S.Dist. LEXIS 35957 (D. Minn. March 6, 2018), holding that the excess coverage is limited to $75,000 even though the primary coverage of $25,000 from the occupied vehicle has not yet been acknowledged or paid.

Basically, the system is set up so that an injured person can have access to the amount of UM coverage that the person has pre-selected and paid for. See Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000).

3. Issues in Excess Coverage Claims

A claim for excess insurance coverage against a second policy of UM insurance will arise only when the injured person is "occupying a motor vehicle of which the injured party is not an insured". Minn. Stat. § 65B.49, subd.3a(5). This claim for excess UM coverage can be litigated along with the claim for the primary UM coverage if the injured person wishes to do so. Resolution of the claim for primary coverage from the occupied vehicle does not have to be resolved as a "condition precedent" to starting the claim for the excess coverage. Hegseth v. American Family Mut. Ins. Co., 887 N.W.2d 191 (Minn. 2016).

a. Who is an "insured" on the policy covering the occupied vehicle?

A person may obtain excess coverage only if the individual is not an "insured" on the policy for occupied vehicle. As noted above, the Minnesota Supreme Court, in Becker v. State Farm Mut. Auto. Ins. Co., 611 N.W.2d 7 (Minn. 2000), has held that the term "insured" in this portion of the law will include only those persons specifically identified in the statutory definition of "insured" at Minn. Stat. § 65B.43, subd. 5. An "insured," according to the definition of the applicable statute, is limited to the named insured or to certain resident relatives or minors in the custody of the named insured, as detailed in § 65B.43, subd. 5.

(Before the Becker decision, there were cases that reviewed excess coverage issues without analyzing whether or not a claimant met the definition of an "insured" under the standards of Minn. Stat. § 65B.43, subd. 5. In light of the holding in Becker, these earlier cases should now be of little value as precedents. See LaFave v. State Farm, 510 N.W.2d 16 (Minn. Ct. App. 1993); Barton v. Am. Int'l Adjustment Co., Inc., No. CX-93-1737, 1994 WL11260 (Minn. Ct. App. Jan. 18, 1994).)

Engelke v. State Farm Fire & Cas. Co., 2011 WL 9170 (Minn. Ct. App. Jan. 4, 2011) involved a UIM claim under an umbrella insurance policy. The umbrella policy, however, did not extend coverage to the injured individual, who was not an "insured" under the definitions of the umbrella policy.

In Horn v. Progressive Preferred Ins. Co., 2011 WL 978932 (Minn. Ct. App. Mar. 22, 2011) a passenger was injured and collected liability insurance limits from the coverage for the driver of the occupied vehicle. Horn was a named insured in his own auto insurance policy, but he made a UIM claim against his sister's Progressive policy (with higher UIM limits) arguing that he was an "insured" as a resident relative. The policy definition of "insured" appeared to cover all relatives of the named insured, but the policy definition of "relative" excluded persons named in their own policies of insurance. This was sufficient to exclude Horn from coverage under the policy. It may be noted that this same result would appear to

be dictated by West Bend Mut. Ins. Co. v Allstate Ins. Co., 776 N.W.2d 693 (Minn. 2009), discussed below.

b. Which Policy Provides Excess Coverage?

An injured person who in not an "insured" on the policy covering an occupied vehicle may collect UM or UIM benefits from the policy covering the occupied vehicle and may then seek excess coverage from an additional policy that provides coverage. The statute permits this claim for excess coverage to be made for UM or UIM "protection afforded by a policy in which the injured person is otherwise insured." Minn. Stat. § 65B.49 subd. 3a(5). The Minnesota Supreme Court has determined that the phrase "otherwise insured" is to be interpreted according to the no-fault statutory definition of an "insured" found in Minn. Stat. § 65B.43, subd. 5. West Bend Mut. Ins. Co. v. Allstate Ins. Co., 776 N.W.2d 693 (Minn. 2009). Generally, this will mean that excess coverage can be sought only from a policy in which the injured person is covered as a "named insured" or as a resident relative of a named insured.

West Bend v. Allstate involved a garage policy issued to North End 66, Inc., an auto repair shop. Tom Oczak was the owner of the corporation and also an employee. West Bend issued a garage policy that insured four vehicles owned by North End. North End was the named insured. Tom Oczak was working on a customer's car and had taken it for a test drive. A collision occurred. He collected liability limits from the tortfeasor and also collected $100,000 in UIM policy limits from the MSI policy covering the occupied vehicle owned by the customer. West Bend acknowledged in a letter to Oczak that the customer's car was a "covered auto" under West Bend's garage policy. West Bend's garage policy provided $500,000 in UIM coverage. Oczak sought the excess coverage of $400,000 from the West Bend UIM policy.

Minn. Stat. § 65B.49, subd. 3a(5) required Oczak to first go to the coverage on the occupied vehicle for UIM. Although West Bend said that the occupied vehicle was a "covered auto" under its garage policy, the customer's MSI policy rather than the West Bend garage policy specifically identified and insured the customer's vehicle. The MSI policy was primary for UIM claims. The argument that West Bend's policy was additional coverage for the occupied vehicle and should therefore be considered "co-primary" along with MSI's was rejected.

With respect to the claim for excess coverage, the court determined that Oczak was not the named insured (North End was named), and that he was not a resident relative of the named insured. He did not meet the statutory definition of an "insured" under Minn. Stat. § 65B.43, subd. 5, and because Oczak was not "otherwise insured" by West Bend under Minn. Stat. § 65B.49, subd. 3a(5), he had no claim for excess UIM coverage against the West Bend policy. (The court reviewed the language of the West Bend policy and concluded that it did not explicitly offer more coverage than that mandated by statute. Minn. Stat. § 65B.49 subd. 7; which allows a company to provide additional benefits.

Oczak was a named insured in a personal policy with Allstate having $300,000 in UIM, and he was able to assert an excess claim for $200,000 against this Allstate policy.

In some earlier cases, disputes over excess insurance had arisen when a young person insured his own car with low limits but sought to make a claim as a resident relative against his parents' policy, which had higher limits. See Nerud v. Nat'l Family Ins. Corp., 1994 WL 695040 (Minn. Ct. App. Dec. 13, 1994); Frishman v. Ill. Farmers Ins., No. C3-94-1654, 1995 WL 34842 (Minn. Ct. App. Jan. 31, 1995); Heinen v. Ill. Farmers Ins. Co., 566 N.W.2d 378 (Minn. Ct. App. 1997). The discussions in these cases have been superseded by West Bend, because the injured young person, being a named insured in his own policy, does not qualify as an "insured" resident relative under his parents' policy when the statutory definition of "insured" is applied.

Issues may arise concerning the applicability of a second insurance policy. In Turner v. Mut. Serv. Cas. Ins. Co., 675 N.W.2d 622 (Minn. 2004) employees were injured in an out of state accident while occupying a car rented for business purposes by the employer. They sought benefits from the employer's commercial motor vehicle insurance policy. This insurance contract, however, limited the UIM/UM coverage to persons occupying vehicles owned by the business. The rental car was not owned by the business, so coverage under the business policy did not extend to the rental car. Nothing in the No-Fault Act mandates any additional extension of UM/UIM coverage to rental vehicles.

When more than one insurance company does provide UM coverage for an excess insurance claim, the one company called upon to make the UM payment to the injured person may possibly be entitled to contribution from the other applicable insurance. Cont'l Cas. Ins. Co. v. Teachers Ins. Co., 532 N.W.2d 275 (Minn. Ct. App. 1995).

Generally, an insurance policy can extend coverages beyond those required by the No-Fault Act. Minn. Stat. §65B.49 subd. 7. However, in Visser v. State Farm Mutual Automobile Insurance Co., 938 N.W.2d 830 (Minn. 2020), the court noted that the legislative history of the UM/UIM statute relating to the priority for payment and for excess coverage "suggests that subdivision 3a(5) governs every insurance policy, regardless of the policy's terms." Visser, 938 N.W.2d, at 833 n.2.

c. What Is the Amount of Excess Coverage?

Excess coverage involves a comparison of the policy from the occupied vehicle with the personal UM policy from which excess insurance is sought. Generally, there should be excess coverage to the extent that the claimant's personal insurance limits for UM "exceeds the limits of liability of the coverage *available to the injured person* from the occupied motor vehicle." Minn. Stat. § 65B.49, subd. 3a(5), emphasis added.

In the most simple example, a person who collects a $30,000 UM policy limit from the occupied vehicle's insurer, and who has a personal UM policy of $50,000, will have excess coverage of $20,000.

If the personal policy has limits equal to or lower than those available from the occupied vehicle, there will be no excess coverage. LaFave v. State Farm Mut. Auto. Ins. Co., 510 N.W.2d 16, 19 (Minn. Ct. App. 1993).

What if multiple claimants exhaust the UM policy from the occupied vehicle? Applying the statute literally, only the limits "available to the injured person" should be deducted in determining the amount of excess coverage.

In Sleiter v. American Family Mutual Insurance Co., 868 N.W.2d 21 (Minn. 2015), 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.

An earlier unpublished decision had reached a different result. See Dilworth v. Dairyland Ins. Co., No. C8-91-1683, 1992 WL 83294 (Minn. Ct. App. April 28, 1992). In Dilworth, four occupants of a car made claims against a 50/100 UM policy of Farmers Insurance. Farmers paid its policy limits but Dilworth's share was only $13,250. Dilworth sought excess coverage from his personal UM policy of $30,000. The court held that, because the 50/100 UM Farmers policy was greater than the 30/60 UM policy which Dilworth had with Auto Owners, there was no excess coverage. The Sleiter decision corrects this error.

What if, due to an enforceable policy exclusion, there is no UM coverage on the occupied vehicle? Is the face value of the policy considered even though the exclusion prevents a claim against the policy? In Davis v. Am. Family, 521 N.W.2d 366 (Minn. Ct. App. 1994), the court held that there should be no deduction from the individual's personal coverage when, due to a policy exclusion, there is no applicable coverage from the occupied vehicle. (Davis involved an underinsured rather than an uninsured claim, but the statute at issue applies equally to UIM and UM claims.) The analysis in Davis concludes that the UIM coverage on the excess policy is available because the excess policy is not "like coverage" when compared to the UIM coverage on the occupied vehicle. While this analysis yields the correct result, it is somewhat curious to conclude that two insurance policies that are absolutely identical in their language do not provide "like coverage." It would be more reasonable and straightforward to acknowledge that, because there is a valid exclusion in

the policy on the occupied vehicle, the “coverage available to the injured person from the occupied motor vehicle” is zero. The Sleiter decision permits this analysis.

D. Motorcycle Issues

Provisions of the law that apply to motor vehicles do not automatically apply to motorcycles, since a motorcycle is not a motor vehicle. Minn. Stat. § 65B.43, subd. 2. A motorcycle is required to carry only liability insurance, Minn. Stat. § 65B.48, subd. 5; UM and UIM insurance coverages for a motorcycle are optional.

Some provisions of the No-Fault Act do explicitly limit UM and UIM claims for motorcycle owners.

One provision deals with an uninsured motorcycle. A person who owns and operates an uninsured motorcycle is barred from making any UM claim against any policy which might otherwise apply. Minn. Stat. § 65B.49, subd. 3a(7) creates this penalty, and it was applied to motorcycles in Hanson v. Am. Family Mut. Ins. Co., 4l7 N.W.2d 94 (Minn. 1987).

A second provision deals with an insured motorcycle. A person who owns and is injured while operating an insured motorcycle is limited to whatever UM coverage has been purchased for the motorcycle. Minn. Stat. § 65B.49 subd 3a(8). Since UM coverage for motorcycles is optional, the motorcycle owner will simply lack all UM coverage while operating the motorcycle unless some optional UM/UIM coverage has been purchased for the motorcycle. (This provision of the law, enacted in 1990, reverses in part the result in Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829 (Minn. 1989).)

It should be stressed that both of these statutory limitations for motorcycles apply only the owner of the motorcycle. In Milwaukee Mut. Ins. Co. v. Willey. 481 N.W.2d 146 (Minn. Ct. App. 1992), the claimant was injured while riding as a passenger on his father's uninsured motorcycle. Minn. Stat. § 65B.49, subd. 3a(7) disqualifies a person occupying an uninsured motor vehicle from obtaining other UM coverage only if the occupied vehicle is "owned by the insured." This statute did not preclude coverage for the claimant in Willey because the claimant did not own the motorcycle that he was occupying. The injured person successfully made a UM claim against the coverage on the family van.

When optional UM or UIM coverage is purchased, it has been held that the scope of such optional coverage is essentially unregulated by statute. It is not clear how this might affect UM coverage sold for motorcycles, but in Johnson v. Cummiskey, 765 N.W.2d 652 (Minn. Ct. App. 2009), the court permitted UIM coverage for motorcycles to be limited in a manner that would have been illegal for a UIM policy on a motor vehicle.

A careful look at the No-Fault Act will disclose gap in the statutory language as it applies to persons who are injured while occupying a motorcycle that they do not own. There is really nothing in the statute that describes priorities for a person injured while occupying a motor cycle when the injured person is not the owner of the motorcycle. (Minn. Stat. § 65B.49 subd. 3a (5) sets priorities only for people “occupying a motor vehicle.”)

A 1989 decision, Roering v. Grinnell Mut. Reinsurance Co., 444 N.W.2d 829 (Minn. 1989), treated the occupant of a motorcycle in the same manner as a pedestrian (i.e. as one not occupying a motor vehicle). In 1990, Minn. Stat. § 65B.49 was amended to reverse the result in Roering so that the statutory right to select UM or UIM coverage from any one policy no longer applied to a person occupying a motorcycle. One might reasonably infer from this action that the legislature intends to treat non-owner occupants of motorcycles in the same way as non-owner occupants of motor vehicles. See Am. Nat'l Prop. & Cas. Co. v. Loren, 597 N.W.2d 291 (Minn. 1999).

V. Limitations on UM Coverage

A. Limitations Imposed by Statute

As noted above in the discussion of excess coverage, Minn. Stat. § 65B.49, subd. 3a(7) denies UM coverage to a person who is injured while occupying an uninsured motor vehicle that the person owns. This exclusion also applies to motorcycles.

In addition, the "owner" of a motorcycle who is injured while occupying the owned motorcycle is limited in UM and UIM claims to whatever optional UM or UIM coverage the owner purchased for the motorcycle. Minn. Stat. § 65B, subd. 3a(8). Since UM and UIM coverage for motorcycles is not required, the owner may not have any applicable UM or UIM coverage if injured while occupying the owned motorcycle.

Again, it must 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. Limitations Imposed by the Insurance Policy – Family Exclusion

A UM endorsement typically contains language saying that UM coverage does not apply when the claimant is occupying or is injured by an uninsured vehicle that is owned by or furnished for the regular use of the named insured or any resident family member. This is sometimes referred to as a "family exclusion." In a UM claim, the exclusion generally comes into play when members of a household own a number of vehicles and one of the vehicles is uninsured.

In some cases, there is a factual dispute as to whether or not the vehicle involved in the accident really is available for the regular use of the family member. In Milbank Ins. Co. v. Johnson, 544 N.W.2d 56 (Minn. Ct. App. 1995), the court applied the following three factors for determining if the use of a non-owned vehicle should be considered "regular": (1) the agreement between the owner and the driver concerning the use of the vehicle; (2) the actual use; (3) the purpose of including non-owned vehicle provisions in insurance policies. In Milbank, the vehicle in question had been loaned by a friend for a two-week period while the friend was out of town. The court held that this temporary use did not come within the scope of the policy exclusion.

In circumstances when the family exclusion does apply, can it be enforced? Whether or not a "family exclusion" is enforceable depends upon the specific facts of the case. The various decisions related to this exclusion seem to support the following two step analysis.

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 uninsured vehicle operated by the negligent driver.
2. Identify the named insured(s) on the UM policy against which a claim is being made. a. If any party legally liable for paying damages is a named insured on the UM policy, the family exclusion will be enforced and coverage will be denied. To provide coverage would effectively convert the UM coverage into liability insurance for the named insured. b. If the UM policy does not list as a named insured anyone who is legally liable for damages, the family exclusion will not be enforced and UM coverage will apply. The injured person should not be denied access to protection afforded by the UM coverage.

There is an equitable basis for this selective enforcement of the family exclusion. The UM claim exists because the negligent driver and the owner of the at-fault vehicle failed to have the liability insurance required by Minnesota law. If one of these responsible parties is the also a named insured in a policy providing UM coverage for a second vehicle, the family exclusion in the second policy will be enforced. To permit UM coverage from the second policy would be to substitute the UM coverage as liability insurance coverage for the uninsured vehicle.

A review of the case law shows the practical application of this general rule, even though the principles underlying the rule may not be articulated in every case.

The 2012 decision in Pepper v. State Farm Mut. Auto. Ins. Co., 813 N.W.2d 921 (Minn. 2012) did explicitly state that the No-Fault Act would permit the enforcement of an applicable policy exclusion if the exclusion would "prevent coverage conversion." 813 N.W.2d, at 927. (The case involved UIM coverage rather than UM coverage, but the same principles apply to both.) 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 Pepper v. State Farm decision followed the reasoning in Kelly v. State Farm Mut. Auto Ins. Co., 666 N.W.2d 328 (Minn. 2003). Kelly also involved an underinsured motorist claim. 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 the at-fault party was also a named insured on the policy covering the Pontiac, the family exclusion applied to deny UIM coverage.

Likewise, in Petrich by Lee v. Hartford Fire Ins. Co., 427 N.W.2d 244 (Minn. 1988), a man owned three cars and insured two of them. His stepson lived with him and was covered as an additional insured on the policies for the insured vehicles. The stepson was injured while in the stepfather's uninsured car. The family exclusion on the policies for the two insured vehicles was enforceable to bar any UM claim. The owner of the uninsured vehicle was an insured on the UM policies from which benefits were being sought.

The same pattern exists in Wintz v. Colonial Ins. Co. of Cal., 542 N.W.2d 625 (Minn. 1996). Here, a young man went to school in another city and left behind his uninsured motorcycle. His father operated the motorcycle and the boy's stepmother was a passenger. An accident occured, and the injured woman brought a UM claim based upon her husband's negligence. The husband was an insured on the UM policy in question. A policy exclusion stated that the term "uninsured motor vehicle" did not apply to a vehicle owned by or regularly available for use by you or a relative. Although the exclusionary language was overbroad, the court concluded that the motorcycle was regularly available for Mr. Wintz's use and that the exclusion was enforceable on these facts. The UM coverage cannot be converted into liability insurance covering his negligence. See also, Johnson v. St. Paul Guardian Ins. Co., 627 N.W.2d 731 (Minn. App. 2001); Linder v. State Farm Mut. Auto. Ins. Co., 364 N.W.2d 481 (Minn. Ct. App. 1985); Staley v. Metro. Prop. & Cas. Co., 576 N.W.2d 175 (Minn. Ct. App. 1998).

The result in Kelly v. State Farm can be contrasted to the result in Am. Nat'l Prop. & Cas. Co. v Loren, 597 N.W.2d 291 (Minn. 1999). Loren also involved the application of a "family exclusion" clause, but the underlying facts were different from those in Kelly. In Loren, a man was operating his son's motorcycle and was injured due to the negligence of another driver. The driver of the other vehicle was an underinsured motorist. Mr. Loren sought UIM benefits from his personal automobile insurance. His policy excluded coverage if the claimant suffered an injury while occupying a vehicle owned by a resident relative. The exclusion was held to be unenforceable on these facts because the exclusion was broader than the exclusions contained in the applicable portions of the No-Fault Act. Because Mr. Loren did not own the motorcycle he was driving, no statutory language barred his claim against his own insurance coverage. The UIM coverage on his own policy was intended to protect him from injuries caused by other negligent drivers. The family exclusion could not be enforced because it would remove the coverage required by the statute.

In Vue v. State Farm Ins. Co., 582 N.W.2d 264 (Minn. 1998), a woman was occupying her husband's uninsured van when it collided with a second uninsured vehicle. The at-fault person was the driver of the other vehicle. The family exclusion did not bar her UM claim on a second vehicle owned by the family and insured by State Farm. (There would be a statutory exclusion barring Mrs. Vue's claim if she were to be considered an owner of the occupied family vehicle; the case was remanded for a factual assessment on this issue of ownership.)

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 her own 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., 1999 WL 1101720 (Minn. Ct. App. Dec. 7, 1999).

In Stewart v. Ill. Farmers Ins. Co., 727 N.W.2d 679 (Minn. Ct. App. 2007), Stewart owned and occupied his own car at the time of the accident, but the car was insured by his employer and the employer was the named insured. He was hit by an uninsured motorist. He made a UM claim against a policy on a car that was owned by his wife in which his wife was the named insured. The insurance company claimed that the family exclusion in the wife's policy applied because Stewart did not have insurance on the car that he owned and occupied. The court of appeals held that this fact pattern did not fit the categories in which the family exclusion could be asserted.

The court of appeals in Stewart observed that there are currently two situations in which the family exclusion will be enforced: "(1) a policyholder attempts to recover UM benefits under his own policy when injured in an accident involving another family-owned vehicle that is uninsured; and (2) the insured attempts to convert coverage from first-party to third-party benefits." 727 N.W.2d 679, 684. It should be noted that this phrasing of the applicable law is likely not precise since the Supreme Court decision in Vue v. State Farm Ins. Co., 582 N.W.2d 264 (Minn. 1998) would permit the injured wife to collect UM benefits from one family policy even though she was occupying another family vehicle that was not insured. (She did have to establish that she was not an owner of the uninsured family vehicle that she occupied so that she would not come within the scope of the statutory exclusion imposed by Minn. Stat. § 65B.49, subd. 3a(7).)

C. Other Insurance Policy Exclusions

1. Geographical Exclusion

A Minnesota insurance policy is permitted to limit UM coverage to accidents in the United States, its possessions, and Canada. Smith v. Ill. Farmers Ins. Co., 455 N.W.2d 499 (Minn. Ct. App. 1990). Almost all Minnesota motor vehicle insurance policies will contain this geographical exclusion.

2. Business Use Exclusion

A "business use" exclusion was at issue in Latterell v. Progressive Northern Ins. Co., 01 N.W.2d 917 (Minn. 2011). Jared Boom died in a car accident. He was driving his own car, which was insured with Progressive Northern. He had a job delivering books, and was engaged in this work at the time of the accident. Liability insurance limits were paid. A UIM claim was made against Progressive Northern. The UIM policy contained an exclusion for claims arising while carrying property for "compensation or a fee." This "business use" exclusion was held to be broadly worded but unambiguous, and it applied on the facts of this case.

The issue then addressed by the Supreme Court was whether the unambiguous policy exclusion was in conflict with the No-Fault Act. The Court's analysis began by confirming

that UIM coverage has consistently been treated as "first-party coverage" under the No-Fault Act. Consequently, precedents involving policy exclusions in liability insurance policies (i.e. in third party coverage) would not apply. The Court acknowledged that, when determining the sequence of payment of UIM benefits under the No-Fault Act, the coverage does begin with the occupied vehicle. Nevertheless, the UIM coverage is essentially purchased by an insured as first party protection against an underinsured motorist. This categorization as "first party coverage" is important because the Court sees in the No-Fault Act an intention to provide first party coverage for the benefit of the insured. UIM is a first party benefit required by the Act. The "business use" policy exclusion, on the facts of this case, eliminates this required coverage and therefore conflicts with the No-Fault Act and is unenforceable.

3. "Drop Down" in Coverage Limits

The No-Fault Act mandates UM and UIM coverage in the amount of $25,000 for a claim by one person and $50,000 for claims of two or more persons. Minn. Stat. §65B.49 subd. 3a(1).

Many people buy limits that are higher than the statutory minimums. The amount of insurance purchased is typically set forth in a "declarations" page. This page typically is sent at the time of the initial insurance purchase and at each renewal, along with an itemized statement identifying the amount being charged for each purchased coverage.

Some companies use policy language that, under certain circumstances, reduces the amount of coverage below the amount identified in the declarations page. The reduction in coverage is commonly referred to as a "drop down" exclusion, since it drops from the amount of coverage stated in the declaration page down to some lower level of coverage.

A "drop down" provision in liability coverage of a United Services Automobile Association (USAA) policy was reviewed in Frey v. United Serv. Auto. Ass'n, 743 N.W.2d 337 (Minn. Ct. App. 2008). Under the terms of the policy, the liability insurance purchased by the insured would drop from the amount stated in the declarations page down to the minimum required by law (in the case of liability insurance, $30,000 for one person, $60,000 for more than one person) whenever the injured claimant was "a member of the covered person's family residing in that covered person's household." 743 N.W.2d, at 341. The Frey family had purchased liability coverage of $300,000 per person and $500,000 per accident. Frey's daughter was killed in a one car accident when her seventeen year old brother was driving. USAA took the position that only $30,000 in liability insurance was available for this wrongful death claim. The court of appeals held that the "drop down" provision did not violate any provision of Minnesota law and therefore was valid and enforceable. On the facts of the case, the court also held that the daughter, who was a twenty-one year old college student, was not residing in the family household so that her death was not covered by the drop-down provision.

These “drop down” provisions are not common in UM and UIM policies. A “family exclusion,” discussed above at page 22, is more typically used to deny all coverage.

4. Offsets that Reduce or Eliminate Coverage

In cases where there are two or more negligent drivers, policy exclusions that effectively eliminate UM or UIM coverage whenever the liability limits have already been paid to the injured party are 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). (The exclusions might be valid, however, in UM or UIM policy on a motorcycle, since this coverage is optional rather than mandatory.)

In Mitsch, there was an accident involving more than one negligent driver. American National paid its policy limits ($250,000) on a liability claim. It then faced a UIM claim, related to the negligence of a second driver who had only $30,000 in liability coverage. The American National policy permitted it to reduce its UIM coverage based upon the amount of its liability payment. This policy exclusion in effect eliminated required UIM coverage and was therefore invalid.

Similarly, in Marchio there was an accident involving more than one negligent driver. Western National paid its liability limits ($100,000) based on the negligence of its insured driver. The injured passenger then sought UM benefits from Western National based upon the claimed negligence of an uninsured motorist (hit and run). The Western National policy said that it was not obligated to make duplicate payments for the same “elements of loss” that had been paid through the liability coverage. As in Mitsch, this had the effect of eliminating the mandatory UM coverage and was therefore invalid and unenforceable. The court held that “Such attempts to reduce or eliminate mandated UM coverage violate the no-fault statute and are invalid.” 747 N.W.2d at 381.

VI. Asserting UM Claims

A. Tort Thresholds

In Minn. Stat. §65B.51, subdivisions 1 and 3 combine to require that a "tort threshold" be met in negligence claims arising out of the operation of a motor vehicle insured under the No-Fault Act. A damage claim for non-economic losses (e.g. pain, emotional distress) is not permitted in such cases unless the injured person can prove that one of the threshold requirements in the statute has been met.

In Johnson v. State Farm Ins. Co., 574 N.W.2d 468 (Minn. Ct. App. 1998) the court held that the tort threshold requirement of Minn. Stat. §65B.51 will also be applied in a claim for uninsured motorist benefits. In effect, the Johnson decision treats the first party UM insurer as if it were really providing liability insurance for the tortfeasor.

The decision in Johnson v. State Farm does have three drawbacks: (1) Johnson is in effect an advisory opinion, since no damages requiring a tort threshold were actually awarded by the jury. (2) The decision ignores the statutory history of the No-Fault Act. In 1980, a bill was introduced to amend the No-Fault Act to require tort thresholds in uninsured motorist cases (Senate file 1698). The bill did not pass. (3) The decision is inconsistent with any literal reading of the No-Fault Act. It is inconsistent with the No-Fault Act in two ways. First, a tort threshold under Minn. Stat. § 65B.51 subd. 1 is imposed only when the claimed injury arises out of the operation of a motor vehicle which is insured (i.e. "with respect to which security has been provided.") Second, uninsured motorist coverage is explicitly defined in the law to mean coverage for persons "who are legally entitled to recover damages for bodily injury from owners or operators of uninsured motor vehicles...." Minn. Stat. §65B.43, subd. 18. Because no tort threshold has to be met in a direct action by the injured person against the uninsured tortfeasor, (see Minn. Stat. §169.797, subd. 1), the injured person is "legally entitled to recover damages" without a tort threshold.

A reasonable public policy argument might be made for treating UM claims in the same manner as tort claims against an insured tortfeasor. However, it remains inappropriate for the court of appeals to enact its own version of public policy when the language of the statute clearly dictates the opposite result. There is a good likelihood that this inappropriate court of appeals decision will remain unchallenged, because it will be applied only to those relatively small claims in which the plaintiff fails to meet a tort threshold, and the damages at issue will make it impractical to pursue appeals of the issue to the Supreme Court.

Despite its shortcomings, Johnson does exist as precedent. Johnson will create some procedural issues in the trial court when the injured person elects to sue only the tortfeasor and the UM insurer then intervenes as a defendant in the case. The injured plaintiff will not have to reach a threshold in the direct claim against the uninsured tortfeasor, but Johnson will impose a tort threshold with respect to non-economic losses covered by the UM insurer.

The issue of tort thresholds was also addressed in Braginsky v. State Farm Mut. Auto. Ins. Co., 624 N.W.2d 789 (Minn. Ct. App. 2001). In Braginsky, the claimant was injured by an

uninsured motorcycle. Braginsky does cite the Johnson decision as authority for the proposition that Minn. Stat. §65B.51 will apply to UM contract claims. However, even under Johnson, the tort thresholds would not apply to a claim against an uninsured motorcycle, because Minn. Stat. §65B.51 does not impose tort thresholds to any claim arising from the negligent use of a motorcycle.

B. Risks and Benefits When Suing the Uninsured Driver

A person injured by an uninsured driver may also have claims against the uninsured driver for damage to property. However, litigating only the property damage against the uninsured driver, or settling the property damage claim through a general release, may destroy potential UM claims for bodily injury.

In Mattson v. Packman, 358 N.W.2d 48 (Minn. 1984), the injured person successfully brought a $500 property damage claim in conciliation court against the uninsured tortfeasor. This civil action for property damage barred any future claims of the plaintiff arising from the accident. The plaintiff has a single cause of action for damaged caused in the accident, so any later claim for bodily injury would be barred by res judicata based on the property damage litigation. Although a potential UM claim was not at issue in Mattson v. Packman, a UM insurer could likely argue UM coverage should be denied because the UM insurer's potential subrogation rights against the tortfeasor have been prejudiced.

Likewise, a general release given to an uninsured tortfeasor following a property damage settlement would likely waive any future claim for bodily injury arising from the accident. (However, it should be possible to settle a property damage claim with the uninsured tortfeasor without waiving rights to additional claims, if the signed release does not include bodily injury claims.)

➔ **Practice Tip**
If bodily injury litigation is commenced against the uninsured motorist, notice of the litigation should be given to the UM insurer.

UM policies typically contain language requiring notice of litigation against the uninsured motorist, and there is no reason why such policy language would not be valid. See Malmin v. Minn. Mut. Fire and Cas. Co., 552 N.W.2d 723 (Minn. 1996). If reasonable notice of the litigation is provided to the UM insurer, the insurer can then be bound by any judgment entered against the uninsured tortfeasor. UM contract language stating that the insurer will not be bound by the judgment will be unenforceable, provided that the UM insurer had proper notice of the litigation. Kwong v. Depositors Ins. Co., 627 N.W.2d 52 (Minn. 2001).

If an insurance company does receive prior notice of litigation against the uninsured motorist under Malmin and Kwong, can the UM insurer avoid being bound by the subsequent jury verdict on the grounds that the UM contract provides for mandatory arbitration of disputes? Gerdesmeier v. Sutherland, 690 N.W.2d 126, (Minn. 2004) holds that the UM insurer has a right to seek arbitration if it does so prior to the entry of the

default judgment. Once the default judgment has been entered, however, an insurance company that had prior notice of the litigation and failed to intervene will be bound by the judgment.

What if the tortfeasor is considered to be uninsured because liability coverage in an out-of-state accident is less than $30,000? Can the injured party settle the liability claim without losing the right to bring a future UM claim? In Ruddy v. State Farm Mut. Auto. Ins. Co., 596 N.W.2d 679 (Minn. Ct. App. 1999), the court applied the general principles first established in Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983), allowing settlement with the tortfeasor after prior notice of the proposed settlement is given to the UM insurer.

C. Arbitration of UM Claims

Arbitration clauses are no longer common in UM policies. Some contracts, however, do still require arbitration to resolve UM disputes. The contract must be reviewed to see if arbitration is mandatory.

If arbitration is mandatory, the decision of an arbitrator should resolve any dispute over damages. A contract provision giving the insurance company a right to a de novo jury trial following the arbitration is not enforceable. Schmidt v. Midwest Family Mut. Ins. Co., 426 N.W.2d 870 (Minn. 1988).

In most types of arbitration, arbitrators generally have the authority to decide questions of both law and fact. However, in UM and other types of automobile insurance arbitration, issues of law will be subject to de novo review by the court, unless the parties agree to submit such legal issues for decision by the arbitrators. Johnson v. Am. Family Ins. Co., 426 N.W.2d 870 (Minn. 1988).

Prior to July 1, 1991, pre-arbitration award interest was not recoverable under Minn. Stat. § 549.09. Lucas v. Am. Family Mut. Ins. Co., 403 N.W.2d 646 (Minn. 1987); Wisniewski v. State Farm Mut. Auto. Ins. Co., 403 N.W.2d 651 (Minn. 1987). Minn. Stat. § 549.09 was amended in 1991 to provide for pre-award interest in arbitrations. If the requirements of the statute are met, the award of interest is mandatory. The claim for interest can be waived, however, if not made in the arbitration. Kersting v. Royal Milbank Ins. Co., 456 N.W.2d 270 (Minn. Ct. App. 1990).

Although pre award interest is now required in arbitrations, the award of interest may not be used to increase the recovery to an amount in excess of the policy limits. Lessard v. Milwaukee Ins. Co., 514 N.W.2d 556 (Minn. 1994). The interest is considered as part of the damage claim and is therefore subject to the amount of UM insurance coverage provided by the contract.

If a UM claim is arbitrated, the arbitrators' decision on damages may be used to estop the injured person from re-litigating damages in a subsequent jury trial against another tortfeasor involved in the same accident. Aufderhar v. Data Dispatch, Inc. 437 N.W.2d 679 (Minn. 1989). However, when arbitration is mandatory, an earlier jury verdict adverse to the

claimant in related litigation may not estop the arbitrators from deciding the same claim. Liberty Mut. Ins. Co. v. Am. Family Mut. Ins. Co., 463 N.W.2d 750 (Minn. 1990); Nat'l Indem. Co. v. Farm Bureau Mut. Ins. Co., 348 N.W.2d 748 (Minn. 1984).

When the real dispute involves the existence of UM coverage, this issue is generally decided by the court rather than by the arbitrators. See Dunshee v. State Farm, 228 N.W.2d 567 (Minn. 1970); U.S. Fid. & Guaranty v. Fruchtman, 263 N.W.2d 66 (Minn. 1978).

VII. Asserting UM Claims: Multiple Defendants

What options are available to an injured person when there are two or more negligent parties, one of whom is an uninsured motorist?

There are two things to keep in mind.

First, the assessment of claims involving multiple tortfeasors must always start with an analysis of potential liability of each defendant under Minn. Stat. § 604.02, which governs joint and several liability among tortfeasors. (The statute was amended in 2003 to substantially limit joint and several liability.) Contract claims under UM or UIM coverage must be evaluated in light of 604.02, because damages under these contracts are based upon amounts that an injured person is "legally entitled to recover" from the uninsured or underinsured tortfeasor. See Minn. Stat. § 65B.43, subd. 18 and 19.

Staab v. Diocese of St. Cloud, 813 N.W.2d 68 (Minn. 2012) has established that, with respect to negligence claims, only a person whose fault is greater than 50% can be made jointly and severally liable for the entire award. Negligent persons whose fault is 50% or less will be liable only for the portion of damages related to their percentage of fault. This rule applies regardless of how many of the negligent parties are parties to the litigation.

Second, after an assessment is made with respect to the potential percentage of fault to be attributed to the uninsured tortfeasor, it must be understood that the settlement of the UM contract claim is distinct from the settlement of the tort claims.

Option 1

A. Pierringer Release with Insured Tortfeasor

One option is to settle first with the insured tortfeasor. This must always be done through a Pierringer release in order to preserve any additional claims. See Frey v Snelgrove, 269 N.W.2d 919 (Minn. 1978), adopting procedures used in Pierringer v. Hoger, 124 N.W.2d 106 (Wis. 1963).

Settling with the insured tortfeasor with a Pierringer release preserves the UM claim, both against the uninsured tortfeasor personally and against the UM insurer. However, the Pierringer release limits the remaining damage claim to the percentage of fault attributable to the remaining defendant. For example, if the uninsured driver were 60% at fault, the liability of the UM insurer and the uninsured driver would be limited to 60% of the damages.

The injured party is not required to provide prior notice of such a settlement to the UM insurer, although it would be courteous to do so. State Farm Mut. Auto. Ins. Co. v. Galloway, 373 N.W.2d 301 (Minn. 1985).

When there is a partial settlement through a Pierringer release with the insured tortfeasor, the uninsured motorist insurer does not get a credit for amounts paid to the injured person. Rather, the UM carrier's liability remains tied to the percentage of fault attributed to the uninsured motorist. The UM insurance carrier must pay for this percentage of the damages (up to its policy limits). For example, if an individual has a claim for $30,000 and if the uninsured motorist is 80% at fault in causing these injuries, the UM carrier must pay $24,000. This amount is owed even if the injured person has already been paid substantially more than $6,000 by the insured tortfeasor in the Pierringer release. See Galloway, supra.

In 1995, the Supreme Court decided that a Galloway type settlement is not valid if it is negotiated after a jury verdict has established both damages and fault. Dairyland Ins. v. Starkey, 524 N.W.2d 363 (Minn. 1995). In Starkey, the claimant sued an insured driver who had $100,000 in liability coverage. The jury verdict was for approximately $50,000. An uninsured driver, who was not a party to the action, was held to be 40% at fault in causing the collision. Before judgment was entered, plaintiff settled on a Pierringer Release with the defendant for approximately $48,500. Plaintiff then asked the UM insurance carrier to pay 40% of the $50,000 verdict, a total of $20,000. Since Minnesota's uninsured motorist laws are not intended to create a double recovery, Starkey was not entitled to UM benefits in this post-verdict settlement when the insured defendant had sufficient liability insurance to cover the entire verdict.

Option 2

B. Settlement with Uninsured Motorist Carrier

The claimant may choose to settle with the uninsured motorist carrier first. Once the uninsured motorist carrier has made a payment, it then has potential subrogation rights against any other tortfeasor to the extent that an insured tortfeasor may be jointly and severally liable for all damages under Minn. Stat. §604.02. Maday v. Yellow Taxi Co. of Minneapolis, 311 N.W.2d 849 (Minn. 1981) and Flanery v. Total Tree, Inc., 332 N.W.2d 642 (Minn. 1983).

The uninsured motorist carrier is entitled to be paid back from the joint tortfeasor's liability insurance carrier all of the monies it paid on behalf of the uninsured motorist. Generally, this subrogation claim can be enforced only after the injured insured has been fully compensated or otherwise has received a duplicate recovery. However, it is important to review the exact language of any release that is given to the UM carrier. In Matthews v. City of Minneapolis, No. C1-90-493, 1990 WL 96908 (Minn. Ct. App. July 20, 1990), the injured party was paid by the UM carrier and signed a general release of all claims. The UM carrier eventually collected on its subrogation claim and executed a general release to the tortfeasor. All potential additional claims that the injured person may have had were then barred by this general release given by the UM insurer to the tortfeasor.

Likewise, the UM payment may also allow the UM carrier to assert a common law subrogation claim directly against the uninsured tortfeasor, although this claim too can get complicated because the equitable subrogation claim exists only after the injured person has been fully compensated. See Am. Family Ins. v. Klingehoets, No. A-20-0078, 2020 WL 5507871 (Minn. Ct. App. Sept. 14. 2020).

If liability coverage for the at-fault vehicle is initially denied but then later established, the UM carrier that paid after the initial denial of coverage retains subrogation rights against the liability insurance carrier. State Farm Mut. Auto Ins. Co. v. Beauchane, No. A14-0986, 2015 WL 1514025 (Minn. Ct. App. Apr. 6, 2015).

Preferred Risk Mut. Ins. Co. v. Pagel, 439 N.W.2d 755 (Minn. Ct. App. 1989) involved a three-car accident in which the insured driver had claims against the drivers of the two other vehicles, one of which was uninsured. She received $35,000 in a UM arbitration, and her UM carrier then sued the insured tortfeasor. The Court of Appeals confirms that the UM insurer has a right to subrogation against any other tortfeasor. See also Milbank Mut. Ins. Co. v. Kluver, 255 N.W.2d 230 (Minn. 1974); Pfeffer v. State Auto. & Cas. Underwriters Ins. Co., 292 N.W.2d 743 (Minn. 1980); Tuenge v. Konetski, 320 N.W.2d 420 (Minn. 1982); Flanery v. Total Tree, Inc., 332 N.W.2d 642 (Minn. 1983); and Milbradt v. Am. Legion Post of Mora, 372 N.W.2d 702 (Minn. 1985).

Situations have arisen in which the injured person, after first receiving uninsured motorist benefits and signing a subrogation release, goes on to settle with the insured tortfeasor. See State Farm Mut. Auto. Ins. v. Galajda, 316 N.W.2d 564 (Minn. 1982) and Ill. Farmers Ins. Group v. Wright, 391 N.W.2d 519 (Minn. 1986). In both of these cases, the release executed between the injured person and the insured tortfeasor preserved all the subrogation rights of the uninsured motorist carrier against the uninsured motorist. The release was patterned after the type of settlement used to preserve the subrogation right of a workers' compensation carrier in a settlement by an injured worker with the third-party liability insurance carrier. See Naig v. Bloomington Sanitation, 258 N.W.2d 891 (Minn. 1977). It is important in these Naig type settlements that the subrogated insurer be given prior notice of the proposed settlement.

As of August 1, 2003, the joint and several liability provisions of Minn. Stat. § 604.02 were modified, so that for accidents after this date a negligent tortfeasor can generally be held liable for more than his percentage of fault only if the fault is more than 50%. This revision of the joint and several liability statute affects the risks and benefits associated with partial settlements.

It should be mentioned that the 1985 amendments to the Civil Damage Act specifically insulate dram shops from any subrogation claims, including those of an uninsured motorist carrier. Minn. Stat. § 340A.801, subd. 4. Dram shop claims are discussed in more detail below.

C. Practical Considerations in Settling Dram Shop Claims

As a practical matter, given the decision in Staab v. Diocese of St. Cloud, 813 N.W.2d 68 (Minn. 2012), a bar that illegally serves alcohol is going to be liable only for its percentage of fault. Because the intoxicated driver is in almost all cases going to be more at fault than the bar that served the alcohol, the bar is not going to face claims of joint and several liability.

The injured person does have three potential claims when injured by an uninsured intoxicated driver:

1. A tort claim against the uninsured intoxicated driver;
2. A potential dram shop claim under Minn. Stat. § 340A.801 against any bar making an illegal sale; and
3. A contract claim against the uninsured motorist carrier.

If the injured person's claims for damages will likely exceed the UM insurance coverage, it may be reasonable to maximize the potential recovery by starting a dram shop claim with the only the bar named as a defendant.

First, it must be understood that, under Minn. Stat. § 340A.801, subd. 4, any payment made under uninsured or underinsured motorist coverages cannot be asserted as a subrogation claim against the dram shop defendant. Consequently, payments that the injured party has collected from an uninsured motorist carrier might be deducted from a jury award against the dram shop carrier under the collateral source statute, Minn. Stat. § 548.251, in order to prevent a double recovery. To avoid a possible collateral source offset, the injured party would have to resolve the dram shop claim first (on a Pierringer release) before asserting any claim against the uninsured motorist carrier.

If the bar is sole defendant, the bar may certainly elect to bring a third party action for contribution against the uninsured drunk driver who caused the injury. However, the bar should not be able to bring a third party action against the uninsured motorist insurance carrier, since that claim would be based upon a separate contract which is not at issue in the litigation.

If the dram shop claim can eventually be settled on a Pierringer release, the injured party can then pursue the uninsured motorist claim against the uninsured motorist carrier. The UM insurance company will get a credit only for the percentage of fault attributed to the party responsible for making the illegal sale. See Rambaum v. Swisher, 435 N.W.2d 19 (Minn. 1989). The uninsured motorist insurance carrier does remain liable for the percentage of fault attributed to the uninsured intoxicated driver. See State Farm Mut. Auto. Ins. Co. v. Galloway, 373 N.W.2d 301 (Minn. 1985). Generally, the UM insurance company defending the UM claim can present to the jury an issue concerning the bar's comparative fault only if it elects to prove that the uninsured driver was obviously intoxicated. But the UM insurer may quite likely decide that it is wiser to exclude all

evidence of intoxication by admitting fault. In this circumstance, there would be no basis for an allocation of fault to the bar. Without an allocation of fault to the bar, the UM insurer would not have a legal basis for seeking an offset for amounts recovered from the bar in the dram shop claim.

VIII. Amount of UM Recovery

A. Stacking

Minn. Stat. § 65B.49, subd. 3(a)(6) prohibits stacking. The anti-stacking language became part of the law on October 1, 1985. Prior to this statute, the injured person could "stack" all of the uninsured motorist coverages under which the claimant was an insured, including the coverage on the vehicle he was occupying. Van Tassell v. Horace Mann Ins. Co., 207 N.W.2d 348 (Minn. 1973); Pleitgen v. Farmers Ins. Exch., 207 N.W.2d 535 (Minn. 1973); and Burgraff v. Aetna Life & Cas. Co., 346 N.W.2d 627 (Minn. 1984).

Despite the statutory language, stacking will be permitted if it is required by applicable contract language. Crapson v. Home Ins., 495 N.W.2d 457 (Minn. Ct. App. 1993); Austin Mut. Ins. Co. v. Templin, 435 N.W.2d 584 (Minn. Ct. App. 1989).

The issue of stacking has been litigated with respect to certain commercial "fleet" policies where the uninsured motorist endorsement states "If there is more than one covered auto, our limit of liability for any one accident is the sum of the limits applicable to each covered auto." Stacking has been required in Boroos v. Roseau Agency, Inc., 345 N.W.2d 788 (Minn. App. 1984), and in Rusthoven v. Commercial Standard Ins. Co., 387 N.W.2d 642 (Minn. 1986). But, see also, LaMotte v. Home Ins. Co., No. C3-90-88, 1990 WL 96954 (Minn. Ct. App. July 20, 1990) and Crane v. ABF Freight Sys., Inc., No. C2-95-1039, 1995 WL 635131 (Minn. Ct. App. Oct. 31, 1995) in which stacking was rejected despite language similar to that in Rusthoven.

In Kearns v. Am. Family Ins. Group, 486 N.W.2d 796 (Minn. Ct. App. 1992), a Wisconsin resident who owned two vehicles insured and garaged in Wisconsin was injured by an uninsured motorist while driving one of those vehicles in Minnesota. Her policy of insurance had a provision agreeing that any policy terms in conflict with the statutes of the state in which the policy was issued would be changed to conform to those statutes. Wis. Stat. §631.43(1) (1990) mandated stacking; therefore, the Wisconsin resident was permitted to stack her uninsured motorist benefits when injured in Minnesota.

Liberty Mut. Ins. Co. v. Crow, 451 N.W.2d 898 (Minn. Ct. App. 1990) involved a claim for excess UM coverage under an occupant's personal automobile policy after the injured party had settled with the insurer of the occupied vehicle. The primary policy on the occupied vehicle provided $25,000 in coverage per insured vehicle, but it also contained the "sum of the limits" language making insurance coverage from each covered vehicle available to the claimant. There were 791 vehicles covered, yielding almost twenty million dollars in coverage. That claim for multiplied limits against the primary carrier was settled for $800,000. For some reason, the claimant wanted excess coverage from a personal policy. The court rejected an argument that the personal policy should be considered “excess” because it exceeded the $25,000 in coverage for the occupied vehicle.

For more discussion of the "multiplied limits" issue and the interrelated role of the "reasonable expectation doctrine" see also Curtis v. Home Ins. Co., 392 N.W.2d 44 (Minn. Ct. App. 1986).

Stacking issues have sometimes arisen in the context of a "choice of law" question. During the time when Minnesota law required stacking, Minnesota Courts would be asked to add stacking to out-of-state policies when accidents occurred in Minnesota or involved Minnesota residents. Jepson v. Gen. Cas. of Wis., 513 N.W.2d 467 (Minn. 1994) involved a Minnesota resident injured in Arizona. He was covered by a policy issued to a North Dakota corporation in Fargo. The policy covered primarily North Dakota vehicles and was sold at North Dakota insurance rates, which were lower than those in Minnesota. The accident occurred in 1983 when stacking was mandatory in Minnesota. The Minnesota Supreme Court applied North Dakota law and denied stacking. In reviewing the "better choice of law" standards, the court observes that sometimes laws are not better or worse, just different. The court finds that Minnesota has a substantial interest in having people get what they paid for in a contract, nothing more and nothing less.

B. No-Fault Setoff

Minn. Stat. § 65B.49, subd. 3a(4) provides that there shall be no recovery from uninsured motorist coverage for any basic economic loss benefits which are paid or payable. Consequently, there will be a deduction of the no fault benefits paid so that the claimant will not make a double recovery.

Future wage loss and future medical benefits may be claimed against the UM coverage as part of the damage claim. If such a claim is made, the itemized future damages should be a credit against future no fault claims in order to prevent a double recovery. Ferguson v. Ill. Farmers, 348 N.W.2d 730 (Minn. 1984).

When settling a UM claim, some consideration should be given to the issue of future no-fault claims. If future no-fault claims are likely to exist, it would be a good practice to specify in the release settling a UM claim that the payment being received in the settlement does not duplicate either past or future no fault claims.

C. Workers' Compensation Benefits

In a UM or UIM claim, there is no right of subrogation by a workers' compensation carrier. The UM or UIM insurer does not have to reimburse workers compensation for payments made to the injured person. Cooper v. Younkin, 339 N.W.2d 552 (Minn. 1983); Fryer v. Nat'l Union Fire Ins. Co.,365 N.W.2d 249 (Minn. 1985). Kersting v. Royal Milbank Ins., 456 N.W.2d 270 (Minn. Ct. App. 1990); Austin v. State Farm Auto. Ins. Co., 486 N.W.2d 457 (Minn. Ct. App. 1992); Hewitt v. Apollo Group, 490 N.W.2d 898 (Minn. Ct. App. 1992).

If workers compensation cannot recover from UM coverage, does the UM coverage get an offset for amounts paid by workers' compensation? In an unpublished opinion, Becker v. State Farm Mut. Auto. Ins. Co., No C1-97-580, 2000 WL 1015867 (Minn. Ct. App. July 25,

2000), the court held that the 1985 Fryer decision remains good law and was not superseded by the 1986 collateral source statute. Citing Western Nat'l Mut. Ins. Co. v. Casper, 549 N.W.2d 914 (Minn. 1996), the Becker court denied State Farm any offset for workers' compensation payments when assessing the damages payable in a UM claim. It can certainly be argued, however, that this result in Becker is inconsistent with the decision in Western Nat'l Mut. Ins. Co. v. Casper. Casper, in the context of a UIM arbitration claim, did state that the insurer should be permitted to present evidence to the arbitrators about past workers' compensation benefits so that the arbitration award would not lead to a double recovery for past damages. But see Brunmeier v. Farmers Ins. Exch., 296 Minn. 328, 208 N.W.2d 860 (1973); Fryer v. Nat'l Union Fire Ins. Co., 365 N.W.2d 249, 255 (Minn. 1985).

D. Collateral Sources

The collateral source statute, enacted in 1986, reduces verdicts based upon certain third party payments made to the claimant, unless the third party asserts a subrogation claim. Minn. Stat. § 548.251.

The argument had been made successfully that collateral source deductions should not be made in an arbitration. The collateral source statute applies only in a "civil action." Minn. Stat. § 548.36, subd. 2. An arbitration is not considered a "civil action." Lucas v. Am. Family Mut. Ins. Co., 403 N.W.2d 646 (Minn. 1987). Consequently, the collateral source statute had been held not to apply to UM arbitration awards. Kersting v. Royal Milbank Ins., 456 N.W.2d 270 (Minn. Ct. App. 1990). The 1996 decision in Western Nat'l Mut. Ins. Co. v. Casper, supra, effectively rejects this argument. In the context of a UIM claim, arbitrators are to determine the amount which the injured party is legally entitled to recover from the tortfeasor. This requires the arbitrators to reduce damages pursuant to the collateral source statute. The same argument can be made in the context of a UM claim. But see Becker v. State Farm Mut. Auto. Ins. Co., No. C1-97-580, 2000 WL 1015867 (Minn. Ct. App. July 25, 2000) for a result denying the collateral source offset.

An issue has arisen concerning the application of the collateral source statute when the collateral source payments have been made by an employer benefit plan governed by the federal ERISA provisions. In Koch v. Mork Clinic, 540 N.W.2d 526 (Minn. Ct. App. 1995), a district court reduced a verdict on the grounds that a subrogation claim had not been properly asserted. The court of appeals reversed, holding that the collateral source statute was preempted by the provisions of ERISA that prohibit state law from regulating ERISA programs. See also Gilhousen v. Ill. Farmers Ins., No. C2-97-414, 1997 WL 55505 (Minn. Ct. App. Oct. 28, 1997) prohibiting a collateral source offset even though the ERISA plan apparently had not asserted a subrogation claim.

It does remain important for an insurance company to seek a decision at the arbitration concerning any collateral source deductions that may apply to the claims. In an appeal to district court, the court may lack jurisdiction to make any initial decision concerning the claimed offsets. See Goberdhan v. Ill. Farmers Ins. Co., No. A04-732, 2004 WL 2984344 (Minn. Ct. App. Dec. 28, 2004).

IX. Statute of Limitations for UM Claims

The statute of limitations for a contract claim is generally six (6) years, unless the contract itself provides a different time limitation. Minn. Stat. § 541.05(1). The six-year statute of limitations will generally apply to lawsuits against an uninsured motorist insurance carrier.

The six-year statute of limitations will generally begin to run from the date of the accident. Weeks v. Am. Family Mut. Ins. Co, 580 N.W.2d 24 (Minn. 1998). The date of the accident is the starting point for the statute of limitations both for the primary UM claim against the coverage on an occupied vehicle and for any excess UM claim that might exist. Hegseth v. American Family Mut. Ins. Co., 887 N.W.2d 191 (Minn. 2016).

When an uninsured motorist claim arises because the liability insurance company becomes insolvent, the statute of limitations for the UM claim starts when there is a formal declaration of the liability insurer's insolvency by an appropriate court. Oganov v. Am. Family Ins. Group, 767 N.W.2d 21 (Minn. 2009). This holding carves out an exception to the general rule in the Weeks decision, which held that the UM statute of limitations begins on the date of the accident. There is no logical inconsistency between the rulings in Oganov and Weeks, since in each case the statute of limitations begins to run on the date when the UM cause of action is ripe for adjudication and could survive a motion to dismiss.

A. Death Claims

The Minnesota Supreme Court decision in Miklas v Parrott, 684 N.W.2d 458 (Minn. 2004) held that the six-year contract statute of limitations will be applicable to a wrongful death claim against an uninsured motorist carrier. The insurance company argued that the wrongful death cause of action against the tortfeasor expired after three years and consequently, the plaintiff was not "legally entitled to recover" damages against the tortfeasor or the uninsured motorist carrier. The court in Miklas, however, construed the phrase "legally entitled to recover" in the No-Fault Act to mean only that the insured must establish fault and damages in order to claim UM benefits.

B. Mandatory Arbitration

There may be some additional statute of limitations issues when the UM contract provides for mandatory arbitration. With an arbitration clause, the six-year statute of limitations may not start to run from the date of the accident. The insurance contract must be read to determine if the contract specifies any statute of limitations for commencing an arbitration. See Kappes v. Am. Family, No. C8-93-991, 1994 WL 1120 (Minn. Ct. App. Jan. 4, 1994). When there is nothing in the UM insurance policy stating when arbitration has to be commenced, the statute of limitations in an uninsured motorist claim may be six years from the date when a request to arbitrate has been denied. Spira v. Am. Standard Ins. Co., 361 N.W.2d 454 (Minn. Ct. App. 1985) and Edwards v. State Farm Mut. Auto. Ins. Co., 399 N.W.2d 95 (Minn. 1987).

In Spira v. Am. Standard Ins. Co., 361 N.W.2d 454 (Minn. Ct. App. 1985), American Standard was unsuccessful in avoiding a request to arbitrate a UM claim on the grounds that the statute of limitations on the underlying tort claim in Tennessee had expired prior to the commencement of the UM arbitration.

C. Contracts that Shorten the Statute of Limitations

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 UM 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. The language of the contract, construed under Minnesota law, barred Larson's claim. The claim in this action was for underinsured benefits, but the reasoning applies equally to a UM 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).

X. Other Issues

A. Coordination of Coverages

Gross v. Gen. Cas. Ins. Co., 438 N.W.2d 378 (Minn. Ct. App. 1989) involved a 1984 accident. The injured party had two vehicles, each insured with a different company. He had damages of $50,000 and wanted to be paid this amount from each company, arguing that he had paid separate premiums for each coverage. The court would not permit such a double recovery.

When duplicate coverage does exist, an injured party will generally collect under only one policy. It may be possible for the one company that does pay the claim to assert a contribution claim against other applicable insurance. Cont'l Cas. Co. v. Teachers Ins. Co., a/k/a Horace Mann Ins., 532 N.W.2d 275 (Minn. Ct. App.1995).

In Cont'l Cas., the policy language was read as permitting contribution, so the court did not have to decide more general issues of contribution law. The opposite result was reached in Kissoondath v. Safeco, No. CX-96-1462, 1996 WL 665906 (Minn. Ct. App. Nov. 19, 1996). Here, in the absence of policy language requiring coordination of payment, Prudential Insurance was not required to make any contribution to Safeco when the injured party, who was insured under both policies, elected Safeco's $500,000 in coverage.

B. Coverage Imposed

Minn. Stat. § 65B.43, subd. 3a, can be read to require UM coverage for a motor vehicle insurance policy covering a vehicle principally garaged in Minnesota. In Laurich v. Emcasco Ins. Co., 455 N.W.2d 527 (Minn. Ct. App. 1990), a truck owned by an Iowa company was insured by a policy issued in Iowa, but the vehicle was principally garaged in Minnesota. This vehicle was involved in an accident in Wisconsin in 1986. UM coverage was imposed in the amount required by Minnesota law ($25,000/$50,000), even though such coverage was not in the policy.

In Cantu v. Atlanta Cas. Companies, 535 N.W.2d 291 (Minn. 1995), a person who moved from Florida to Minnesota asked to have UM coverage imposed as a matter of law as part of his policy after he became a Minnesota resident. (He had rejected the optional UM coverage when he purchased the original policy in Florida.) Since the automobile insurance policy in question had not been renewed, delivered, or issued in Minnesota, Minnesota law did not mandate that UM coverage be added to the policy. The fact that the claimant had become a resident of Minnesota did not require his insurance company to provide UM benefits.

Minn. Stat. § 65B.50, subd. 1 requires every insurer doing business in Minnesota to certify that the coverages required by Minn. Stat. § 65B.49 will be afforded even to non-resident policyholders with respect to accidents occurring in Minnesota. However, the statute has been interpreted to impose only liability and no-fault coverages. The statute does not create

UM or UIM coverage for an out-of-state vehicle involved in a Minnesota accident. Hedin v. State Farm Mut. Auto. Ins. Co., 351 N.W.2d 407 (Minn. Ct. App. 1984).

The assigned claims plan does not provide UM coverage for a person who has no UM insurance. Mohs v. Aetna Cas., 349 N.W.2d 580 (Minn. Ct. App. 1984).

C. Effect on Future No-Fault Claims

An injured person is not entitled to receive double compensation, from both no-fault and UM, for the same medical and wage loss claims. Consequently, a payment of UM (or UIM) benefits that includes future medical and wage loss claims may function to offset future no-fault claims for those same losses. See Ferguson v. Ill. Farmers Ins., 348 N.W.2d 730 (Minn. 1984).

A party who submits a claim for all future damages in an uninsured motorist arbitration may inadvertently lose claims for future no-fault benefits for medical expense or wage loss. See Richardson v. Employers Mut. Cas. Co., 424 N.W.2d 317 (Minn. Ct. App. 1988) and Quam v. United States Fire and Cas. Co., 440 N.W.2d 131 (Minn. Ct. App. 1989). It is important, therefore, that the arbitrators state whether or not future wage loss or medical expenses are being paid in the arbitration award. If such future damages are being awarded, the arbitrators should specify the amount of each such award so that an appropriate no fault offset may be calculated.

➔ Practice Tip

Care should be used in settling UM claims and in signing releases. If future wage loss and future medical expenses are claimed from the UM carrier in negotiations, and a general release is then signed, the no-fault carrier may try to terminate future basic economic loss benefits. **The UM release should specify that the payment does not duplicate past or future no-fault benefits.** The claimant should not sign a release saying that UM payments are being accepted as compensation for future losses, since this does suggest a double recovery if additional no fault benefits are then claimed.

D. Claims by Uninsured Motorist

This topic does not involve UM insurance coverage. Rather, it addresses injury claims made by the uninsured motorist.

Under certain circumstances, even a person operating his own uninsured car may be eligible for no fault benefits. If the operator of the uninsured vehicle is insured on some policy of motor vehicle insurance on another vehicle, the uninsured motorist can obtain no fault coverage from this other policy. Iverson v. State Farm Mut. Auto. Ins. Co., 295 N.W.2d 573 (Minn. 1980); Laffen v Auto Owners Ins. Co. 429 N.W.2d 264 (Minn. 1988). However, the uninsured motorist would be disqualified from seeking no-fault benefits through the assigned claims plan, as would any other adult living with the uninsured motorist in a family unit. Minn. Stat. § 65B.64 subd. 3.

Aside from disqualifying an uninsured motorist from the assigned claims plan, does the No Fault Act limit other damage claims by an uninsured motorist? In Ramsamooj v. Olson, 574 N.W.2d 751 (Minn. Ct. App. 1998), the court rejected defendant's argument that an uninsured motorist was not entitled to be paid general damages for pain and suffering. There is no provision of the No Fault Act that prevents the injured uninsured motorist from claiming non-economic losses, so long as the normal statutory thresholds for such a claim have been met.

Can the injured uninsured motorist, who has not received any no fault benefits, make a claim for medical expenses and income loss against the tortfeasor? In Munoz v. Kihlgren, 661 N.W.2d 301 (Minn. Ct. App. 2003), the defendant argued that he should be entitled to a setoff for damages which would have been paid by no-fault insurance. The court of appeals rejected the argument based upon language in the no-fault statute that allows a negligence action to include amounts not paid by no-fault due to a lack of insurance coverage. Minn. Stat. § 65B.51, subd. 2. The language in question was added to the law in 1989. Under an earlier version of the statute, the court had allowed the defendant to have an offset for those damages that should have been paid by no-fault. Rehnelt v. Steube, 197 N.W.2d 563 (Minn. 1986).

E. Asserting Claims under Out-Of-State Insurance Policies for Injury in Minnesota

When happens when a person who is insured under an out-of-state UM or UIM policy is injured in Minnesota?

Minn. Stat. §65B.50 appears to provide that every insurance company licensed to sell motor vehicle insurance in Minnesota must afford at least the minimum security required by Minn. Stat. §65B.49 to all policy holders, although for "nonresident" policy holders the insurance company need certify only that such coverage will be provided with respect to accidents occurring within Minnesota.

Despite the broad language of this section of the law, it has been interpreted to mandate only no-fault basic economic loss coverage and minimum liability (30/60) coverage. Consequently, an accident in Minnesota involving a nonresident covered by an out of state UM or UIM policy is not governed by the No-Fault Act, and coverage will generally be evaluated according to the terms set forth in the out of state policy. Warthan v. Am. Family Mut. Ins. Co., 592 N.W.2d 136 (Minn. Ct. App. 1999). See also *Friese v. Am. Family Mut. Ins. Co.*, No. A17-0908, 2018 WL 576772 (Minn. Ct. App. Jan. 29, 2018) (holding that recent case law involving 65B.50 had not altered the conclusions reached in *Warthan* with respect to UIM claims.)

If an out of state policy has a "conformity clause," i.e. a policy provision saying that the terms of the policy will be altered to conform with the laws of the state in which the accident occurs, this does not alter the result reached in *Warthan*. Because Minnesota law does not require the out-of-state policy to alter its UM or UIM coverages, the policy provisions concerning UM/UIM do not conflict with any applicable Minnesota statute. *Friese v. Am. Family,* No. A17-0908, 2018 WL 576772 (Minn. Ct. App. Jan. 29, 2018).

The result with respect to an out of state policy for UM and UIM will change, however, when the injured person is a Minnesota resident. Minn. Stat. §65B.50 applies to companies licensed to do business in Minnesota. On occasion, such a company may insure a Minnesota resident under the out-of-state policy. Although the policy was not issued in Minnesota, the Minnesota resident will be entitled to the type of coverage required by Minnesota's No-Fault Act.

In Schossow v. First Nat'l Ins. Co. of Am., 730 N.W.2d 556 (Minn. Ct. App. 2007), a woman from Fargo accepted a transfer to Minnesota when her employer terminated her job in North Dakota. She moved to Minnesota and rented an apartment in 2001. She went back to be with her family in Fargo about one weekend a month. She planned to remain in Minnesota until she was fully vested in her pension, which would have occurred in 2005. She was struck by a car and killed as a pedestrian in Minnesota in November 2002. She had kept her North Dakota driver's license, had registered her car in North Dakota, and with her husband had insured all of the family vehicles in a North Dakota policy. Nevertheless, because she was a Minnesota resident in 2002, her family in its wrongful death claim was entitled to have the terms of her North Dakota UIM policy altered to conform to Minnesota's UIM system of add-on UIM coverage.

Likewise, in Jacobson v. Universal Underwriters Ins. Group, 645 N.W.2d 741 (Minn. Ct. App. 2002), a Minnesota student killed in a Minnesota accident was judged to be a Minnesota resident so the UIM claim by surviving family members under an Iowa insurance policy would provide benefits under Minnesota law. (This claim related to the law governing the measure of damages rather than to the scope of the UIM coverage.)

Brill v. Mid-Century Ins. Co., 965 F.3d 656 (8th Cir. 2020) held that, even for a Minnesota resident, Minnesota law would not be applied unless the person's out of state policy had been renewed while the person was residing in Minnesota. The Minnesota statute requiring UM and UIM coverages, Minn. Stat. §65B.49 subd. 3a, requires these coverages only in a policy "renewed, delivered, or issued for delivery or executed" in Minnesota.

F. Subrogation Claims by the Uninsured Motorist Insurer

The No-Fault Act does not have any statutory provision addressing the subrogation rights that may exist for a UM insurer after the insurer has paid UM benefits. In *American Family Ins. v.* Klingehoets, A20-0078, 2020 Minn. App. Unpub. LEXIS 778, 2020 WL 5507871 (Minn. Ct. App. Sept. 14, 2020), the court of appeals held that, under existing case law, the injured insured must be fully compensated before the UM insurance carrier can seek subrogation for UM benefits that it has paid. *Am. Family Ins. v. Klingehoets*, 2020 Minn. App. Unpub. LEXIS 778, *6, 2020 WL 5507871.

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