

THE DUTY OF THE AGENT OR BROKER TO RECOMMEND UNDERINSURED MOTORIST COVERAGE WITH ADEQUATE LIMITS

Trial lawyers are all too familiar with cases in which an insured has purchased coverage that wasn't appropriate for the client's situation, either because the basic insuring agreement in the policy did not cover a foreseeable risk in the client's affairs or the policy contained exclusions or conditions that made the coverage illusory for the client. Often the client has the right coverage, but under limits of liability that are patently inadequate given the client's circumstances. Sometimes, for no apparent reason, the otherwise well-insured client simply lacks a single coverage important to the protection of that client. Too often, the client who has failed to secure the proper coverage in the correct amounts has supposedly had the benefit of an agent or broker in buying the insurance. Ironically, that agent or broker's insurance agency may have advertised using language such as "meeting all of your insurance needs."

An all too common example of the problem is that of auto insurance clients who carry policies containing substantial limits of Bodily Injury (BI), Property Damage (PD), Medical Pay (MP), and even Uninsured Motorist (UM) coverage but have no Underinsured (UIM) coverage or only \$25,000 of UIM coverage. When pressed by their counsel about that apparent inconsistency, the client will likely display a complete lack of knowledge about the import of the problem or the fact that an agent or broker has not made any recommendation to remedy it. Ultimately, the only thing worse than learning that the defendant driver only carried minimum (\$25,000) BI limits is to find out your otherwise well-insured client has no UIM coverage or \$25,000 limits of UIM.

The Issue in Montana

The problem of absence or inadequacy of UIM coverage presents so clearly because there is no statutory requirement for even a minimum limit of such coverage in Montana. BI and PD coverages are mandated in Montana in minimum amounts by the Mandatory Liability Protection Act, §61-6-301 and the Motor Vehicle Safety Responsibility Act, MCA §61-6-103 *et. seq.* Also, auto insurance carriers are required to offer UM coverage under MCA §33-23-201. However, there is no equivalent statute requiring carriers to offer UIM coverage.

This is ironic, because passage of the Mandatory Liability Protection Act in 1979 created the market for UIM coverage given that it meant more people in the state who drove uninsured before 1979 would be coerced into driving with minimum limits after enactment. This in effect rendered the UM coverage of the victims of those minimally insured drivers useless and left the victims at the mercy of BI policy limits inadequate to pay for a single week in a hospital.

Given that insurers don't have to offer UIM in Montana and its importance for protection of the state's motorists, the pressing question is: Does an insurance agent or broker have any duty in Montana to recommend a particular coverage in a specific adequate amount? More specifically, what is the agent or broker's duty, if any, to recommend that the insured purchase UIM coverage and do so with an adequate limit of liability? In this article, I will focus on the agent's duty to explain and recommend auto UIM coverage, though the law and arguments discussed can be extrapolated to other coverage lines such as homeowners or commercial general liability.

Those lawyers who started practice even as late in the century as the 1970s will remember when we resolved most insurance questions by looking to California cases, there being a dearth of case authority in Montana. In spite of the diligence with which the Montana Supreme Court has issued insurance opinions in the last 30 years, there are still occasional issues for which case law does not exist in the state. The specific question of the agent or broker's duty to recommend UIM insurance is one such issue. However, New Jersey in particular has developed a significant line of common law cases on this issue that span both the period before New Jersey statutorily required UIM coverage in 1984¹ and the period during which the state has required the coverage. The cases contain some well-reasoned law on the duty of agents and brokers in this situation, and, for that reason, I will base a good deal of this article on those precedents hoping they may be persuasive in Montana. Before doing so, however, it is good to review existing Montana law on the general duties of agents and brokers in procuring insurance for the insured and in advising the insured.

Montana Case Law on the General Duty to Procure Insurance

Our seminal authority on the agent's duty to procure insurance, *Gay v. Lavina State Bank*,² was decided in 1921. The Lavina State Bank operated an insurance business through its vice president who wrote hail insurance for Hartford Fire Insurance Company. Plaintiff, Gay, a local farmer, signed a promissory note with the bank in June to pay for hail insurance for which he applied. The bank, which later contended the hail insurance deal was expressly conditioned on approval of the transaction by its cashier, mailed a letter to plaintiff within days refusing the transaction unless the

promissory note was secured. Plaintiff, who denied the deal was conditional, took no action on the letter, and subsequently made a \$1,000 claim when the crop was later damaged by hail in August.

The court treated the claim as one for breach of the contract to procure insurance and found that the bank was a broker as opposed to an agent.

An insurance broker is one who acts as a middleman between the assured and the insurer, and who solicits insurance from the public under no employment from any special company, but, having secured an order, he either places the insurance with a company selected by the assured, or, in the absence of any selection by him, then with a company selected by such broker.

The court noted, "Every broker is in a sense an agent, but every agent is not a broker," differentiating the broker by the fact that, as an intermediary or middleman, he accepts insurance applications and "acts in a certain sense as the agent of both parties to the transaction." Also, the court found exclusivity or rather lack of it to be a distinguishing factor. The court stated the broker's liability in such circumstances as follows:

An agent who takes his principal's money under an express agreement to procure insurance, and unjustifiably fails to secure the same or make an effort in that direction, hereby assumes the risk and becomes liable, in case of loss, to pay as much of the same as would have been covered by the insurance policy for which his principal had paid, provided the same had been procured as directed.

And as between the insured and his own agent or broker authorized by him to procure insurance, there is the usual obligation on the part of the latter to carry out the instructions given him and faithfully discharge the trust reposed in him, and he may become liable in damages for breach of duty. If he is instructed to procure specific insurance and fails to do so, he is liable to his principal for the damage suffered by reason of the want of such insurance. The liability of the agent with respect to the loss is that which would have fallen upon the company had the insurance been effected as contemplated. Negligence on the part of the agent defeating in whole or in part the insurance that he is directed to secure will render him liable to his principal for the resulting loss.

Gay v. Lavina State Bank is often quoted and still good law on the duty of the agent or broker to procure insurance. One of the initial questions in claiming a duty to procure is whether the intermediary is an agent of the insured or an agent of the insurer or both. In *Marie Deonier & Assoc. v. Paul Revere Life Ins. Co.*,³ the court held that "a soliciting agent of an insurance company is the agent of the insurer and not of the insured for the purpose of soliciting and procuring the insurance and preparing the application." The court established that an independent insurance broker who is authorized to solicit applications from insureds and procure the sale of the insurer's policies is an agent of the insurer with respect to duties owed by the insurer to its agents. The corollary is that the agent's negligence in failing to procure insurance can be imputed to the insurer in such a case.

The Client's Request for Insurance

In the 1983 case of *Lee v. Andrews*,⁴ plaintiff, Lee, brought an action for breach of contract to procure auto insurance. Lee had a long-term relationship with Andrews, an agent for State Farm, and had at times carried auto, fire, and life insurance policies through him. When Lee wanted to lease a car, he told Andrews he would need insurance. Andrews said he "would take care of it." As the court later noted, "They did not discuss the amount of coverage, the terms of the policy, the amount of the premium, or the names of the insureds." However, the lessor of the vehicle later called the Andrews agency to verify insurance to satisfy GMAC, the vehicle's financier. Andrew's wife apparently provided the lessor information that the limits would be \$100,000/\$300,000 and \$25,000 for property damage and that "it would be taken care of." She left a note for Jim Andrews with the year, make, model, and serial number of the auto and the coverage sought. GMAC apparently also made telephone confirmation of the insurance with the Andrews agency. Lee never filled out an application or paid any premium, and no policy was issued.

Three months later, Lee collided with a motorcyclist and suffered a \$152,000 judgment for the motorcyclist's injuries and damages at which point State Farm denied the existence of any policy or coverage. State Farm won a declaratory action in Federal Court and ultimately proceeded to jury trial in State District Court against Jim Andrews on the single claim of breach of contract to procure insurance. The jury found Andrews liable but also found Lee's conduct had prevented the procurement. The Montana Supreme Court granted Lee a judgment notwithstanding the verdict and

remanded for a new trial on damages alone. In doing so, the court clearly had to supply much of the subject of the insurance by implication or inference, the insured having provided the agent with little more than the fact that he wanted auto insurance in order to lease an Oldsmobile Toronado.

With regard to damages, the court cited *Gay v. Lavina State Bank* for the proposition that, in a case for failure to procure insurance, the measure of damages “is that which would have fallen upon the company had the insurance been effected as contemplated” including costs of defense and the damage award to the amount of its policy. However, the court also noted that “damages from the [underlying] Wilson judgment, attorney fees in that action, and the damages resulting from having to borrow money at 20 percent interest are all proper evidence of damages.” As the court explained, “Montana law provides that the measure of damages for breach of contract ‘is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would be likely to result there from.’ §27-1-311, MCA.”

R.H. Grover, Inc. v. Flynn Ins. Co.,⁵ cited *Lee v. Andrews*⁶ to confirm that, in order to place an agent under a duty to procure, Montana law “requires a client’s request to procure certain insurance, followed by an agent’s commitment to do the same.” In *Grover*, the court found no duty to procure where the agency mistakenly issued a general contractor a certificate as proof that a subcontractor had insurance when, in fact, no such insurance existed. The court said with no duty to procure, no contract could be created where there was no offer or acceptance, just a mistake in issuing a certificate.

The insured’s duties were further developed in *McKevitt v. Munger*,⁷ where a contractor who needed an insurance bond to place a bid for an insurance contract waited until the last minute to request that the agent get the bond, sent the application to town in his friend’s truck, and was out of communication while the agent tried unsuccessfully to acquire the bond. In the circumstances, the court refused to impose a duty to procure on the agent. Instead, in dicta, the court recognized a duty of the insured to (1) let agent know where he is, (2) allow time for the agent’s best efforts, (3) make the application timely.

In *Fillinger v. Northwestern Agency, Inc. of Great Falls*,⁸ the court decided the insured has no absolute duty to read the policy to determine whether the agent has procured the insurance sought. Rather, the court said the issue is whether it is unreasonable in the circumstances not to do so. In *Fillinger*, the court approved a jury instruction that said, “An insurance policyholder has no duty to read the policy unless under the circumstances it is unreasonable not to read it.” The court also quoted with approval a statement from a 1978 Pennsylvania case of *Fiorentino v. Travelers Ins. Co.*:⁹

When the insured informs the agent of his insurance needs and the agent’s conduct permits a reasonable inference that he was highly skilled in this area, the insured’s reliance on the agent to obtain the coverage that he has represented that he will obtain is justifiable. The insured does not have an absolute duty to read the policy, but rather only the duty to act reasonably under the circumstances. The circumstances vary with the facts of each case, and depend on the relationship between the agent and the insured.

Also important in *Fillinger* is the court’s holding that it is within the common experience and knowledge of lay jurors to determine whether an insurance agent reasonably fulfilled his or her duty and procured the coverage requested.

Summary of Montana Law on General Duty to Procure

From the foregoing cases, Montana law regarding the agent’s duty to procure might include the following principles: If the insurance client makes a reasonably clear request for insurance and the agent undertakes to procure it, the agent has a duty to procure. If the agent breaches that duty by not making reasonable efforts to procure and either procuring or timely notifying of the inability to procure, then the agent is liable for the full amount of damages the insurer would have incurred if the insurance had been in place. The client, on the other hand, must place a clear order, make it timely so that the insurance can be procured, and be available for communication about the application.

Whether the intermediary’s negligence in not procuring insurance can be imputed to the insurance company depends on the intermediary’s status. If he is a soliciting agent for the insurer, his negligence may be imputed under the doctrine of respondeat superior. If he is a broker, that is, one taking offers from insureds and selecting insurers and placing insurance with them, then he owes a duty to procure insurance to the insured but is not deemed an agent of the insurer, so that his negligence will not be imputed. In that circumstance, the insured will have to look only to the broker for compensation if the broker negligently fails to procure the insurance. Once the insurance is procured, the insured has no absolute duty to read and analyze the policy to determine whether the agent has procured the right coverage. That duty may exist, however, if it would be unreasonable in the circumstances not to do so.

One can see that the general law of the agent's duty in Montana does not address our specific question, whether the automobile insurance agent has a duty to explain and recommend UIM coverage to an insured in Montana. This issue was raised in Federal Judge Molloy's court by Gary Zadick in *Moss v. State Farm Mut. Auto. Ins. Co.*, 28 M.F.R. 204 (2001). There, the parties stipulated that State Farm's agent had not advised Mosses of the existence of UIM and that Mosses would have purchased it had the agent done so. Zadick argued that the court should decide as a matter of law in summary judgment that the agent has a duty at common law to offer the insured UIM coverage. Judge Molloy declined to do so and ruled that the issue of whether there was such a duty in the circumstances was for the jury to decide. Judge Molloy indicated that the fact that the insurer's own manuals instructed the agent to offer UIM was not a basis for a finding of negligence per se but was evidence that the jury could consider in determining whether the agent had a duty to offer UIM. Because Montana has not answered the question whether the agent has a common law duty to offer UIM coverage, it is good to review the line of cases in which the New Jersey courts have dealt with this issue.

New Jersey's Line of Cases on the Specific Duty to Recommend UIM Coverage

We begin our look at New Jersey's common law on the agent's duty with *Rider v. Lynch*¹⁰ in 1964. The case actually involved auto BI coverage, but in remanding the case for trial against the agent for failing to recommend the needed coverage, the court set out an oft-quoted statement that would make an excellent jury instruction:

One who holds himself out to the public as an insurance broker is required to have the degree of skill and knowledge requisite to the calling. When engaged by a member of the public to obtain insurance, the law holds him to the exercise of good faith and to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected. If he neglects to procure the insurance or if the policy is void or materially deficient or does not provide the coverage he undertook to supply, because of his failure to exercise the requisite skill or diligence, he becomes liable to his principal for the loss sustained thereby.

The court made a second statement regarding request by implication that has become a quoted companion in subsequent decisions and would also make an excellent jury instruction:

Thus, an insurance broker, in dealing with his client, ordinarily invites them to rely upon his expertise in procuring insurance that best suits their requirements. It is not necessary for the client in order to establish a breach of duty to prove that he laid out for the broker the elements of a contract of insurance. It is sufficient to show that he authorized procurement of the insurance needed to cover the risks indicated and that the broker agreed to do so but failed or neglected to perform his duty. The terms of the contract to procure the insurance, the scope of the risk and subject matter to be covered, may be found by implication. The principal does not sue on a contract of insurance; he seeks recovery for the loss occasioned by the failure to procure such a contract or such a valid contract.

This law from *Rider* was subsequently quoted and made the basis of the New Jersey case of *Johnson v. MacMillan*,¹¹ which follows and is particularly compelling on the issue of the agent's duty to advise the client of UIM coverage.

The Duty to Advise of Availability of UIM Coverage

In 1983, plaintiffs Carl and Mildred Johnson, were severely injured in a collision with a car driven by McMillan who only carried the minimum \$15,000/\$30,000 BI coverage required by the State of New Jersey. The Johnson policy contained no Underinsured Motorist (UIM) coverage. Johnsons had, since the 1950s, bought all of their homeowners, commercial, and auto insurance through agent, Guy Puffer, President of the Puffer Agency, Inc. Puffer testified that he personally attended to Johnson's insurance needs and that Johnsons followed his recommendations. He placed Johnson's auto insurance with Selective Risks Insurance Company with whom he had entered an "Agency Agreement" by which he was an independent contractor in a non-exclusive relationship. Johnson's policy with Selective covered four vehicles for \$200,000 liability, but provided the minimum UM coverage of \$15,000/\$30,000 and no UIM coverage.

Puffer admitted that he never advised Johnsons about the existence of UIM coverage because he didn't know about it. However, evidence at trial showed that the insurer, Selective Risks, sent its agent/brokers notice of availability of the coverage in 1973 and again in 1983. Also, Puffer apparently received ISO mailings on UIM coverage. The trial

court found Puffer negligent and determined that Johnsons would have purchased \$200,000 UIM coverage if they had been advised of it. The court reformed the insurer's contract to include UIM coverage in that amount.

On appeal, the court quoted the above statements from *Rider* and affirmed that the agent had a duty to explain and recommend UIM to the Johnsons. The court agreed that Johnsons, if told, would have purchased \$200,000 limits of UIM coverage. However, it also found that the Puffer agency was an independent contractor, so that its negligence was not imputed to the insurer but born only by Puffer. Accordingly, it was error for the trial court to reform Selective's policy, and Johnson's recovery was limited to liability of Puffer.

The Duty to Advise of Higher Limits

Whether the agent has a duty to advise the insured of the availability of higher limits of UIM coverage is the next question. In the New Jersey case of *Sobotor v. Prudential Prop. & Cas. Ins. Co.*,¹² the insured asked the agent for BI limits of \$100,000/\$300,000 and also indicated he wanted the "New Jersey package that is the best available." The agent provided him BI limits of \$100,000/\$300,000 and UIM coverage for only the statutory minimum limit of \$15,000 even though Prudential offered UIM of \$100,000/\$300,000 for an additional \$5 premium.

The appellate court in *Sobotor* affirmed the trial judge's conclusion that "an insurance agent has an affirmative duty to advise his client of the availability of higher monetary limits for the coverage requested." The court found that the duty is owed regardless of whether the intermediary is an agent or a broker, since each owes the same duty to the insured, the difference only lying in their duties to their insurance companies. Whether the agent has a duty to advise of additional insurance coverage depends on the particular relationship between the insured and the agent or broker.¹³ It depends on the agent's holding himself out as having special expertise in insurance¹⁴ and may depend on the length of the relationship between agent and insured.¹⁵ However, the court in *Sobotor* said:

The "fiduciary nature of such a relationship should not depend on the length of the relationship. Because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies, the relationship between an insurance agent and a client is often a fiduciary one. Agents should be required to use their expertise with every client, not only those with whom they have a long-term relationship."

The insurer in *Sobotor* also contended that the duty owed the insured is limited to what the insured "specifically and expressly requested." However, the court found that argument did not "negate the existence of a fiduciary duty to inform respondent of the additional coverage" and that the client's request for the "best available" coverage actually invoked the duty.

Finally, the court noted the role of adhesion contracts in its reasoning by quoting from the earlier New Jersey case of *Harr v. Allstate Ins. Co.*:¹⁶

We have realistically faced up to the fact that insurance policies are complex contracts of adhesion, prepared by the insurer, not subject to negotiation, in the case of the average person, as to terms and provisions and quite unintelligible to the insured even were he to attempt to read and understand their unfamiliar and technical language and awkward and unclear arrangement. Recognition is given to the usual and justifiable reliance by the purchaser on the agent, because of his special knowledge, to obtain, the protection he desires and needs, and on the agent's representation, whether that agent be a so-called 'independent' but authorized representative of the insurer, or only an employee. We have stressed, among other things, the aim that average purchasers of insurance are entitled to the broad measure of protection necessary to fulfill their reasonable expectations; that it is the insurer's burden to obtain, through its representatives, all information pertinent to the risk and the desired coverage before the contract is issued; and that it is likewise its obligation to make policy provisions, especially those relating to coverage, exclusions and vital conditions, plain, clear and prominent to the layman.

The *Sobotor* court concluded that the agent must "deal with laypeople as laypeople and not as experts in subtleties of law."¹⁷

In *Walker v. Atlantic Chrysler Plymouth, Inc.*,¹⁸ the New Jersey court found that the agent had a duty to recommend that the insured obtain greater UIM coverage even though the insured had not requested (as in *Sobotor*) "the best available coverage" or given any specific instructions for coverage. There, the insured business's instructions were simply to "cover us." The agent arranged \$500,000 BI limits, excess liability coverage of \$5,000,000, and UIM limits of only \$15,000, the statutory minimum in New Jersey at that time. The court found the agent had a duty to exercise

“good faith and reasonable skill in procuring the insurance sought or needed by his client” and indicated the client was “entitled to rely on the special skill and knowledge possessed by the agent in order to best obtain the desired coverage.”

The Agent’s Duty to Advise the Insured when the Carrier has Dropped or Reduced Coverage

Does the agent or broker have a duty to advise the insured when the insurer drops or reduces a coverage and to recommend optional replacement coverage? In *Wasserman v. Wharton*¹⁹ the plaintiff Wassermans were struck by a taxicab while crossing an intersection. They were insured by Newark Insurance Company for auto coverage including BI limits of \$100,000/\$300,000 but no UIM coverage. In fact, UIM coverage had at one time been part of their auto policy package, apparently provided without separate premium, until the insurer sent them written notice canceling it and advising of the option to purchase it for a separate premium. Wasserman did not understand the import or gravamen of the insurer’s notice and did not purchase UIM coverage. The taxicab that struck Wassermans only carried the minimum mandatory limits of BI coverage of \$15,000/\$30,000.

Wassermans sued their broker contending that the broker had a duty to explain the import of the insurer’s notice and to recommend to them purchase of an appropriate amount of UIM coverage. The appellate court reversed the trial court’s grant of summary judgment to the broker. The appellate court said the proposition that a broker does not have a duty in all circumstances to explain available coverage cannot be used to justify “not advising a long-term client that critical coverage which he already has is not only being unilaterally withdrawn but is replaceable at nominal charge.” (The broker could have advised Wassermans to buy \$100,000/\$300,000 UIM coverage limits for under \$10.)

Limits on the Duty in New Jersey

Ultimately, New Jersey developed what its Supreme Court has described as a “proliferation of cases dealing generally with the duty of brokers and agents to insureds concerning UM/UIM coverage.”²⁰ Nevertheless, the New Jersey Supreme Court eventually set the limit on the duty of agents or brokers to recommend additional coverage to their clients. In *Chen Lin Wang v. Allstate Ins. Co.*²¹ in 1991, the New Jersey Supreme Court refused to find a general duty on the part of insurance agents and brokers to advise their insureds of the possible need for higher policy limits upon renewal of the policy.

That case involved severe injuries to plaintiff whose auto collided with a tree as a result of her attempt to avoid two dogs playing in the streets. She ultimately incurred a stipulated \$1.2 million in damages. One of the owners of the dogs had homeowners insurance first purchased in 1963 with liability limits of \$25,000. In successive renewals over more than 25 years, Allstate agents had never recommended increasing the limits of liability in spite of upward trends in costs, liability verdicts, and inflation in general. Similarly, the other defendant homeowner in the case bought a policy in 1977 with a \$25,000 liability limit that was never increased. Judgment was entered against each defendant who in turn asserted claims against their insurers for failing to advise them to increase their liability coverage. Allstate’s insured homeowner assigned his potential claims against Allstate to the injured plaintiff for a promise not to execute against that defendant on the judgment.

The issue that ultimately reached the New Jersey Supreme Court was whether an insurer owes a general duty to advise the client regarding the necessity of increasing coverage amounts. The court agreed that the duties developed in the UIM auto coverage cases like *Sobotor* and its progeny cited above also applied to agents and brokers in homeowner’s coverage. However, the court refused the invitation to find a general duty to review and recommend increased coverage indicating it would only do so in showings of “special circumstances” which it did not find in *Chen Lin Wang*. The court noted the absence of a specific request by the insured or specific representation by the agent or broker. Though the court disagreed with the insurer’s argument that the duty would be impossible to fulfill, it noted that the insurers had not been alerted to the possible duty by prior case law or legislation and that it was “difficult to fix the limits of such a proposed duty.”

The Duty to Recommend UIM in Other Jurisdictions

The agent’s duty to explain and recommend UIM coverage is recognized in at least one other jurisdiction. In 1981, during a period when Minnesota had no statute requiring UIM to be offered, the Minnesota Supreme Court held in *Carlson v. Mutual Service Ins.*²² that, under common law, an insurance agent can have a duty to offer, advise, or furnish insurance coverage to an insured provided that the special circumstances surrounding the transaction and the relationship of the agent with the insured create such a duty. (Minnesota now statutorily requires the offer of UIM coverage.²³) In the Connecticut case of *Dimeo v. Burns, Brooks & McNeil*,²⁴ the court also affirmed a “duty to

explain uninsured motorist coverage and the consequences of not having sufficient coverage.” Though the case involves UM and not UIM coverage, it may be persuasive precedent.

On the other hand, Missouri appellate courts consistently refuse to find such a duty and are reluctant even to find any fiduciary duty in the relationship of the insurance agent with the client. In *Farmers Ins. Co., Inc. v. McCarthy*,²⁵ the Missouri court recognized only the agent’s duty to procure insurance and to inform the client if the insurance ordered can’t be procured, but rejected any duty to advise the insured of the availability or advisability of UIM coverage. The court found such a duty would be too burdensome for the insurers, would make them financial advisers, would require them to shoulder the insured’s responsibility, would possibly require them to advise of better coverage at other companies, and would allow clients to assert after the fact that they would have bought the coverage had they known. The court noted the absence of any statute in Missouri requiring UIM coverage and refused to act by “judicial fiat.”

In *Banes v. Martin*,²⁶ and *Clifton v. Allstate Ins. Co.*,²⁷ Missouri courts summarily rejected the duty even though the insureds in each case asked for “full coverage” and were provided policies with no UIM coverage. The court in *Banes* noted that the client did not specify what “full coverage” included and did not say what she wanted in addition to her previous policy coverages. The court held the agent “had no duty under the facts of this case to advise Banes of underinsured motorist coverage.” In *Clifton*, the court said agents in Missouri “have no general duty to advise customers of their particular insurance needs or of optional coverage that may be available” citing the fact that the insurer had mailed out a written notice of availability of UIM coverage.

In the Kentucky case of *Mullins v. Commonwealth Life Ins. Co.*,²⁸ the court found no duty of the agent to advise the insured of UIM coverage but, in doing so, said that there could be such a duty if the course of dealing over an extended period of time would put the agent on notice that the insured was seeking and relying on the advice or if the insured clearly asked for the advice. Also, the court indicated that an agent could assume such a duty if their advertising said they advised or held themselves out as insurance advisers.

Conclusion

So long as Montana has no statute requiring that UIM coverage be offered by auto carriers in the same manner as UM coverage, many auto insurance consumers in Montana are going to lack UIM protection solely because the agents or brokers upon whom they rely will not explain the coverage to them and recommend that they buy it in adequate amounts. There should be no question that it would be unreasonable for an auto insurance agent to neglect to explain and recommend UIM coverage to the insured. What excuse can there be for selling an insured \$300,000 limits of BI coverage and then not encouraging them to protect their own family with UIM coverage in the same amount if available?

It is time for trial lawyers to advocate the good faith extension of Montana common law to impose a duty on auto insurance agents to offer UIM coverage. Insurers have entered a “tight market” again, and there is evidence that it may be in their interest to actually discourage the purchase of UIM coverage which is a necessary protection in a state like Montana where so many people carry mandatory minimum limits of BI coverage.

The problem of auto insurance agents neglecting to advise consumers of the existence of UIM coverage can be remedied by statutorily requiring insurers to offer it just as they do UM coverage. The present statute requiring carriers to offer UM, MCA §33-23-201, could easily be amended to include UIM coverage. Drafters would need to add a definition of an underinsured motor vehicle. Ideally, the statute should incorporate the language of the “Damages Less Limits”²⁹ coverage form. Under that language, an underinsured motor vehicle is one for which the available liability insurance limits are not adequate to cover the insured’s tort damages. Another option is to incorporate language from the “Limits Less Limits” or “Difference of the Limits”³⁰ coverage form thereby defining an underinsured motor vehicle as one having bodily injury liability limits less than the UIM limits of the insured plaintiff’s auto. For the consumer, the “Damages Less Limits” provision would be most advantageous because the “Difference of the Limits” provision can result in coverage that is illusory. For example, if the BI coverage on the tortfeasor’s vehicle has the same limit as the UIM coverage on the plaintiff’s vehicle, there is no “under-insured motor vehicle” under the “Difference of the Limits” form, so that plaintiff gets no benefit from the UIM coverage even though the declarations page shows a separate premium that the insured may have been paying for years. States like New Jersey³¹ and California³² require the auto carriers to offer UIM coverage just as they do with UM, while others like Minnesota³³ outright require the auto owners to purchase UIM coverage. It is unlikely that one could muster the political support to require that owners carry UM and UIM coverage, so the former option is more realistic.

Statutorily requiring that UIM be offered provides UIM coverage a certain degree of protection that it will not otherwise have. Because UM coverage is offered under statutory mandate, it is considered a “mandatory” coverage by the Montana Supreme Court which does not allow insurers to include in their policies offsets, conditions, and other

provisions that may in fact reduce the UM coverage below the statutory minimums. For example, in *Sullivan v. Doe*,³⁴ the court invalidated the “workers’ compensation offset” because it could reduce the UM coverage below the statutory minimum. In *McGlynn v. Safeco Ins. Co.*,³⁵ the court invalidated the requirement of “physical contact” between cars in hit-and-run uninsured motorist accidents on the ground that the UM statute contained no such condition. Such offsets and conditions may defeat UIM coverage because it lacks statutory protection.

One thing is certain: Auto insurance consumers in Montana need the legislative protection of an act requiring auto insurers to offer UIM coverage or the judicial protection of cases placing on auto agents and brokers the duty to explain and recommend UIM coverage. Either solution requires advocates who can persuade the respective branch of government of the necessity of this protection for consumers. It sounds like another job for the advocates of the MTLA.

1. N.J.S.A. 17:28-1.1 (1984).
2. 202 P. 753 (Mont. 1921).
3. 9 P.3d 622 (Mont. 2000).
4. 667 P.2d 919 (Mont. 1983).
5. 777 P.2d 338 (Mont. 1989).
6. 667 P.2d 919 (Mont. 1983).
7. 490 P.2d 1050 (Mont. 1971).
8. 938 P.2d 1347 (Mont. 1997).
9. 448 F.Supp. 1364 (E.D. Pa. 1978).
10. 201 A.2d 561 (New Jersey 1964).
11. 558 A.2d 24 (N.J. Super. 1989).
12. 491 A.2d 737 (N.J. Super. 1984).
13. *Hardt v. Brink*, 192 F.Supp. 879 (W.D. Wash. 1961).
14. Id.
15. See, for example *Stein v. Continental Cas. Co.*, 313 N.W.2d 299 (Ct. App. 1981).
16. 255 A.2d 208 (1969).
17. Citing *Bowler v. Fidelity Cas. Co. of New York*, 250 A.2d 580 (1969).
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