

# INSURANCE CONSUMER COUNSEL'S COLUMN UNDERINSURED MOTORIST COVERAGE IN MONTANA

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In 1979, the Mandatory Liability Protection Act, MCA 61-6-301, required for the first time that all motor vehicles operated in Montana carry minimum limits of liability insurance. Wise motorists who formerly bought first-party insurance to protect themselves from injury by uninsured motorists now faced a new risk. A driver carrying \$25,000 minimum liability limits could cause them serious injury while negating their first-party Uninsured Motorist coverage (UM) with bodily injury limits that wouldn't cover a one-week hospital stay. To cover that risk, the insurance industry began offering underinsured motorist coverage (UIM) in Montana in the 1980s. By the late 1980s, trial courts were litigating UIM claims that eventually reached the Montana Supreme Court. Since 1990, the court has issued a number of decisions important to consumer counsel. It is good to review these decisions and point out the rights insurance consumers have gained as well as pitfalls that the decisions may have produced.

## Protecting UIM Coverage

Since UIM coverage is not statutory or "compulsory," insurance consumer counsel sometimes lack the ability to protect the coverage from offsets, limitations, and exclusions as has been done with compulsory liability and uninsured motorist coverage. For example, in *Stutzman v. Safeco*, 284 Mont. 372, 945 P.2d 32 (1997), the court upheld what amounted to a household exclusion from optional UIM coverage even though it had invalidated such an exclusion for mandatory BI coverage in *Transamerica v. Royle*, 202 Mont. 173, 656 P.2d 820 (1983). The court noted that UIM was not a mandatory coverage and the "parties may freely contract to produce exclusions or limitations on underinsured motorist coverage."

## UIM as Compulsory UM Coverage

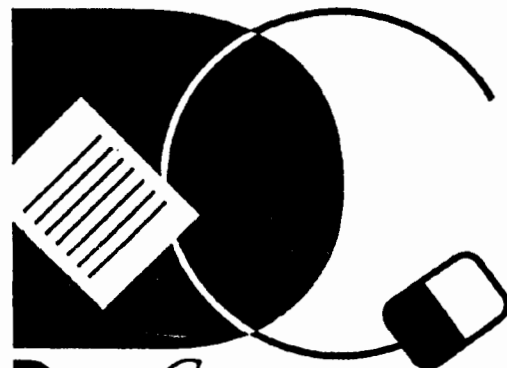
However, if the "underinsured motorist coverage" consists only of a definition contained in the uninsured motorist coverage (as seen, for example, in USAA and Nationwide company policies), then counsel is actually dealing with uninsured motorist coverage which is compulsory and protected by MCA 33-23-201. This can greatly limit the insurer's ability to offset, limit, or exclude coverage. The court in *Grier v. Nationwide Mutual Insurance Company*, 248 Mont. 457, 812 P.2d 347 (1991) held that, where the UIM is part of the UM coverage with no separate policy section or pre-

mium for UIM, public policy prohibits any offset for the amount of coverage carried by the third-party tortfeasor.

## Separate UIM Coverage and the Reasonable Expectations Doctrine

If the UIM coverage is in a separate section with separate premium (as seen in State Farm policies) it still can be protected against unreasonable offsets, limitations, or exclusions. The court has applied the reasonable expectations test to remedy situations where the insurer has drafted offsets, limitations, or exclusions that the court concludes defeat the reasonable expectations of the consumer. In *Bennett v. State Farm Mutual Automobile Ins. Co.*, 261 Mont. 386, 862 P.2d 1146 (1993), the court, in overriding the single-limit requirement in the "other insurance" clause, found irrelevant the fact that UIM is not statutorily required and awarded two UIM coverages on the ground that such coverage was within the consumer's reasonable expectations, which the clause defeated.

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The court has applied the reasonable expectations doctrine to UIM coverage primarily on issues of stacking. However, if a consumer's reasonable expectations are defeated by offsets against the coverage, limitations on the coverage, or exclusions from the coverage, such provisions may be void for violating the reasonable expectations doctrine. The language of *Bennett v. State Farm* is broad, stating that "an insurer may not place in an insurance policy a provision that defeats coverage for which the insurer has received valuable consideration." As the court said:

Montana citizens should have a reasonable expectation that when they purchase separate policies for underinsured motorist coverage, they will receive adequate compensation for losses caused by an underinsured motorist, up to the aggregate limits of the policies they have purchased.

#### Stacking of UIM Coverage

In *Farmers Alliance Mutual v. Holeman*, 278 Mont. 274, 924 P.2d 1315 (1996), the U.S. District Court, Billings Division, certified the question whether the insured can stack medical pay and underinsured motorist coverages ("optional coverages") under a single policy where a separate premium is charged for each coverage. The Montana Supreme Court said:

Section 33-23-203 MCA, does not prohibit the stacking of the medical payment coverage and the underinsured motorist coverage available under a policy of motor vehicle liability insurance where a premium is charged for coverage of

each motor vehicle listed within that policy.

#### Legislative Dashing of Consumer Expectations

However, in a major blow to auto insurance consumers, the 1997 Legislature amended MCA 33-23-203 in Senate Bills 266 and 44 with

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**"...Once an insured demonstrates a legal entitlement to damages, principles of contract law define the coverage afforded by an underinsurance motorist provision."**

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intent to prohibit stacking of any auto casualty coverage. The statute refers now to "each part of the policy" and applies regardless of "the number of policies issued by the same company covering the insured, or the number of separate premiums paid." The change, which is effective for policies entered into or renewed after May 2, 1997, would appear to invalidate *Farmers Alliance Mutual v. Holeman* and override the consumer expectations doctrine with regard to any expectation that if the consumer pays multiple premiums, the consumer should receive multiple coverage limits.

#### Can the Vehicle be Uninsured and Underinsured?

An important issue now is the validity of the provision that excludes an underinsured motor vehicle from also being an uninsured motor vehicle under the policy. In *Dakota Fire Ins. v. Oie*, 22 MFR 410, Nov. 5, 1997, the federal court (Holter/Lovell) certified to the Montana Supreme Court the question of whether the terms "uninsured motor vehicle" and "underinsured motor vehicle" are mutually exclusive under a policy. The court also certified the questions of whether Dakota Insurance Company can offset sums paid un-

der the uninsured motorist coverage against the underinsured motorist coverage. That decision is pending at the court.

#### Avoiding the Trap of the "Exhaustion" Clause

In *Augustine, Augustine and Gray v. Simonson and Farmers Ins. Exchange*, 283 Mont. 259, 940 P.2d 116 (1997), the court held that the insureds could recover under their own UIM coverage even though they failed to comply with the "exhaustion" clause because they settled for less than the tortfeasor's policy limits. The court said:

The provision requiring that the tortfeasor's liability insurance be entirely exhausted as a prerequisite to securing indemnification from the underinsured motorist coverage is contrary to Montana public policy and unenforceable to the extent that it violates public policy.

The court in *Augustine* cited *Sorenson, below*, for the proposition that UIM coverage may not be voided on technicalities. To remedy a major problem facing counsel, Justice Regnier, in *Augustine*, took the unusual step of setting out the procedure for calculating underinsured motorist coverage where there is potential recovery from a third party tortfeasor: While a claim must first be made with the tortfeasor's insurance company, the insured may claim against his or her UIM coverage even before disposing of the third party claim. In accordance with the policy language, the UIM claim commences whenever the insured's damages exceed the stated limit of

the tortfeasor's policy. In calculating the UIM coverage due, the parties assume that the insured recovered the entire single limit of the tortfeasor's available liability coverage. If there is more than one claim against the tortfeasor's liability coverage, the parties assume the claimants recovered pro rata for purposes of "exhaustion." The insured's pro rata share, or the amount actually received by the insured, whichever is greater, will be credited to the underinsured carrier for purposes of the exhaustion clause. The claimant may still "exhaust" the policy under traditional methods and then proceed against the UIM carrier.

#### **Being "Legally Entitled to Collect" Under UIM**

Two decisions have construed the "legally entitled to collect" language of the UIM basic insuring agreement. First, in *State Farm Mutual Automobile Insurance Company v. Estate of Braun*, 243 Mont. 125, 793 P.2d 253 (1990), the court expanded the "legally entitled to collect" language of the standard UIM basic insuring agreement to allow recovery of wrongful death damages not allowable under Canadian tort law (where the Gallatin County insured was injured). The court said, "tort law is relevant only as far as the fault requirement is concerned. Once an insured demonstrates a legal entitlement to damages, principles of contract law define the coverage afforded by an underinsurance motorist provision." Hence, claimant avoided the harsh Canadian restriction on wrongful death damages by relying on the contractual nature of the UIM coverage.

However, in *Liedle v. State Farm Mutual Automobile Insurance Company*, 283 Mont. 129, 938 P.2d 1379 (1997), the insured won an \$83,359 jury verdict with intention of recovering against underinsured motorist coverage. The trial judge reduced it to \$0 by deducting coverage limits already recovered as well as statutory offsets for collateral source under MCA 27-1-308. Liedle appealed on the ground that the action for UIM was a contract action, but the court held against her saying that the statutory offset applies only to reduce tort damages and not to reduce claimant's available underinsured motorist coverage. The court said that State Farm promised to pay those damages "an insured is legally entitled to collect from the owner or driver of an underinsured motor vehicle" and held that those damages are properly reduced by the statutory offset. *Liedle* may present difficulties for counsels who hope to use *Braun* to extend recovery of UIM benefits.

#### **Settling and the "No Prejudice" Rule for Subrogation**

In *Sorensen v. Farmers Insurance Exchange*, 279 Mont. 291, 927 P.2d 1002 (1996) claimant, Sorensen, settled with and released State Farm's insured tortfeasor, since that driver had no assets except the insurance. Sorensen's carrier, Farmers Insurance Company, refused her UIM claim on the ground that she had breached the Farmers provision that the insured would "do nothing after loss to prejudice our rights." Farmers contended that the release destroyed their right of subrogation. The court held: "in order to justify foreclosing an insured's right to indemnification from an otherwise applicable underinsured motorist insurance coverage, an insurer must show that it was prejudiced by the settlement of the tort claim." The court noted absence of prejudice from destruction of the subrogation right where the tortfeasor is judgment proof. Said the court, "a 'no prejudice' rule states that absent some showing of material prejudice to the underinsurance carrier, a claim for underinsured motorist coverage may not be precluded on a technicality." ■