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 counsel were bringing 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 uninsured 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 Stoneham 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 as exclusion for mandatory BI coverage in Transamerica v. Royle, 202 Mont. 173, 636 P.2d 820 (1981). 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 UIM 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 insured’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-

mim 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 reason-
able expectations test to remedy situations where the insurer has drafted offsets, limitations, or exclusions that the court concludes defeat the reasonable expecta-
tions of the consumer. In Bennett v. State Farm Mutual Automobile Ins. Co., 261 Mont. 386, 462 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 insured 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. Holstein, 274 Mont. 274, 924 P.2d 1315 (1996), the U.S. District Court, Billings Division, certified the question whether the insured can recover medical pay underinsured motorist coverage ("optional coverage") 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

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, 233 Mont. 239, 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 Sorensen, infra, for the proposition that UIM coverage may not be voided on technicalities. To remedy a major problem facing courts, 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 to 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

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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, 773 P.2d 253 (1989), 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 so 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 $82,359 jury verdict with insertion of recovering against underinsured motorists coverage. The trial judge reduced it to $6 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 "as 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 counsel 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. 31, 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 motorists insurance coverage, an insurer must show that it was prejudiced by the settlement of the tort claim." The court noted distance 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 underinsured carrier, a claim for underinsured motorist coverage may not be precluded on a technicality."