

## OTHER UNINSURED/UNDERINSURED MOTORIST COVERAGE ISSUES OF NOTE

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### I. Joint Tortfeasor Issues

In *Hanover Ins. Co. v Pascar*, 421 Mass 442 (1995), the Supreme Judicial Court established that when determining whether underinsured motorist coverage is triggered, the applicable underinsured coverage limit must be compared with the combined liability coverage of all joint tortfeasors responsible for the accident. In other words, an underinsured claim is only available if the limits of the applicable underinsured coverage exceed the sum of the bodily injury coverage limits for all responsible operators. This decision is fairly easy to apply when joint tortfeasor status is clear. In fact, the *Pascar* case was decided on an agreed statement of facts that included a stipulation of joint tortfeasor status among the operators who caused the accident. The rule, however, may cause significant practical difficulties in cases in which the fault of one or more of the purported joint tortfeasors is controversial -- the so-called "one percent" cases.

An insurer providing underinsured motorist coverage may seek to dispute the applicability of the policy by pointing to potential joint tortfeasor status of other operators based upon "one percent" fault on the other operators. Ordinarily, factual disputes concerning liability are subject to arbitration under the terms of the policy. Meanwhile, the driver whose one percent responsibility is in controversy, is not bound by any arbitration agreement and would not be bound by an arbitrator's finding of responsibility on his or her part in the context of an underinsured motorist proceeding. Plaintiffs' attorneys, therefore, must be cognizant of the significant potential for an accident victim

to encounter inconsistent decisions in which, on the one hand, an arbitrator declines underinsured motorist coverage based on a finding that other joint tortfeasors exist, and, on the other hand, a jury finds in favor of the purported joint tortfeasor.

The easiest solution to this problem would exist where the insurer for the alleged “one percent” joint tortfeasor agrees to participate in arbitration with the claimant and the underinsured carrier. Similarly, the potential for inconsistency can be avoided if the underinsured carrier agrees to be bound by the result of the civil trial involving the alleged joint tortfeasor. However, insurers do not readily volunteer to arbitrate thin liability cases, and thus the existence of such parallel forms would arguably permit uncooperative underinsured carriers to subject an accident victim to the potential of inconsistent results.

The best solution to this dilemma is probably to frame the issue concerning other operators’ liability as a coverage issue and to join together in one civil action a declaratory judgment action against the underinsured carrier and the bodily injury claim against the underinsured operator and purported joint tortfeasors. The same approach may help alleviate the risk of inconsistent findings in a “hit-and-run” uninsured motorist in which the identity (or ability to identify) the responsible operator is in dispute. Although hardly a model of efficiency, this nonetheless enables the claimant to obtain one ruling, binding on all affected parties.

Even aside from questions of coverage, in prosecuting a case that involves contested liability, causation or damage issues affecting both the bodily injury claim and the underinsured claim, it would be preferable to address the bodily injury claim and underinsured motorist claim together in one arbitration. Unfortunately for claimants,

bodily injury insurers' assent to such a procedure is infrequent, and thus plaintiffs' counsel is required to manage two parallel processes. It is not necessary to complete the bodily injury claim before proceeding with the underinsured motorist claim. *Aetna Cas. & Surety Ins. Co. v. Faris*, 27 Mass. App. Ct. 194, 536 N.E. 2d 1097 (1989). Nor is it essential to collect all of the available bodily injury coverage in order to access underinsured coverage, although the underinsured claim will proceed and be valued as if the claimant had received the entire amount of the tortfeasor's bodily injury coverage. *MacInnis v. Aetna Life & Cas. Co.*, 403 Mass. 220, 526 N.E.2d 1255. (1988).

How best to sequence and handle the parallel processes will vary from claim to claim. Tactical decisions are most frequently affected by concerns about collateral estoppel. As a general proposition, arbitration awards have the collateral estoppel effect, binding on the participants. *Miles v. Aetna Cas. & Surety Ins. Co.*, 412 Mass. 424, 589 N.E.2d 314 (1992); *Bailey v. Metropolitan Prop. & Cas. Liab. Ins Co.*, 24 Mass. App. 34, 505 N.E.2d 908 (1992). An arbitration award would not, however, be binding upon a tortfeasor, i.e. the underinsured motorist, who is not a party to the arbitration proceeding. Moreover, the policy provides that an underinsured motorist carrier is not bound by the results of a civil action unless the carrier has assented to be so bound.

Counsel should also recognize that unsuccessful surcharge appeals might result in collateral estoppel that precludes a favorable liability finding. *Almeida v. Travelers Ins. Co.*, 383 Mass. 226, 418 N.E.2d 602 (1981). In uninsured and underinsured motorist cases in which the proponent of the surcharge is same insurer as issued the applicable uninsured/underinsured policy, concerns about issue preclusion should be mutual. The insurer as party to the surcharge hearing would be bound by a finding that the insured

was less than 50% at fault for an accident. Issue preclusion arising from a surcharge hearing is usually considered a trap for the unwary. However, proceeding with the surcharge appeal may in some cases represent a reasonable tactical choice enabling a plaintiff obtain a binding ruling from a sympathetic hearing officer without the insurer retaining counsel and calling outside witnesses.

Massachusetts appellate courts have not addressed the question whether an uninsured motorist claim can proceed when there are joint tortfeasors, one of whom is uninsured and the other of whom is insured. Until this issue is resolved the presence of a potential joint tortfeasor may unduly complicate an uninsured motorist case. Thus, where the existence of an insured party (whether through negligence entrustment, failure to secure a subsequently stolen vehicle, passenger interference with operation, agency, etc.) is not obvious, it may be desirable to proceed with the uninsured motorist claim ahead of the bodily injury claim and only bring the case against the insured tortfeasor(s) after the uninsured aspect of the case is complete. This provides no great tactical advantage, but it does lessen the potential of having to litigate the meaning of uninsured motorist coverage in the presence of insured co-defendants.

## **II. Statute of Limitations**

In *Berkshire Mutual Insurance Company v Burbank*, 422 Mass. 659 (1996) the Supreme Judicial Court established that the statute of limitations for uninsured and underinsured motorist claims is the contract statute of limitations of six years. Moreover, the statute does not run from the date of accident, but rather from the date of the breach of the contract. *Id.* at 660. Such a breach of the contract, according to the Court, does not occur at the time of the accident or injury, but only when an insurer refuses to

participate in arbitration. See also *Peerless Ins. Co. v. Boyle*, 422 Mass. 1011 (1996).

Counsel should, however, anticipate that insurers would likely also argue that a denial of coverage triggers the running of the statute of limitations.

Another cautionary note relates to out-of-state uninsured or underinsured motorist policies. Even when dealing with a Massachusetts accident, an out-of-state policy will ordinarily be subject to the statute of limitations for the state in which the policy was issued. *Kahn v. Royal Ins. Co.*, 429 Mass 572, 709 N.E. 2d 822 (1999).<sup>1</sup>

### **III. Notice**

Due to the liberal statute of limitations applicable to uninsured and underinsured motorist claims, the battleground on timeliness questions has focused on the notice provisions of the policy. The policy requires the insured to “promptly notify” the insurer of any accident. Notice within 24 hours is required in cases of hit and run accidents. The insurer, however, will not be permitted to avoid coverage based on late notice unless it can demonstrate that it has been prejudiced by the claimant’s breach of the notice provision. *Goodman v American Casualty Company*, 419 Mass 138 (1994). When advancing a “late notice” argument, the insurer has the burden of proof of “identifying precisely how the delay caused [the insurer] to suffer prejudice.” *Lighter v. Lumbermens Mut. Cas. Co.*, 43 Mass App Ct. 415 (1997).

A similar prejudice requirement exists for breach of “consent-to-settle” provisions. In other words, issuing a release to the underinsured tortfeasor without prior permission from the underinsured carrier, in violation of the insurance policy, will not preclude coverage unless the insurer can demonstrate that the tortfeasor had sufficient

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<sup>1</sup> Because of the open-endedness of the limitations period on uninsured and underinsured claims, it is still helpful to be alert to the differences in coverage before and after 1989 policy renewals.

assets with which to reimburse the underinsured carrier. *MacInnis v. Aetna Cas. Co.* 403 Mass. 220, 526 N.E.2d 1255. (1988).<sup>2</sup>

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<sup>2</sup> The *MacInnis* case, although predating the 1988 amendments, nonetheless presents a very helpful discussion of the mechanics and rationale of the permission process.