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**PENNSYLVANIA
UNINSURED (“UM”)
&
UNDERINSURED (“UIM”)
MOTOR VEHICLE CLAIMS
- THE BASICS**

Prepared by:

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UNINSURED AND UNDERINSURED MOTOR VEHICLE CLAIMS IN PENNSYLVANIA - THE BASICS

1. BACKGROUND:

- a. Both coverages are optional. §1731(a). Both coverages must be offered by insurers. Id.

2. WHAT IS AN UNINSURED VEHICLE:

- i. The Financial Responsibility Law defines "uninsured motor vehicle" as any of the following:
 - (1) A motor vehicle for which there is no liability insurance or self-insurance applicable at the time of the accident. See also, 31 Pa. Code §63.2 II(c)(2)(ii) which provides that an uninsured automobile shall not include an automobile which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law.
 - (2) A motor vehicle for which the insurance company denies coverage or the insurance company is or becomes involved in insolvency proceedings in any jurisdiction. Sallom v. Peoples, C.P. Lackawanna Co., No. 94-CV-5745 (Aug. 3, 2000) (an uninsured motor vehicle includes an automobile for which the insurance company covering that vehicle becomes involved in insolvency proceedings; when a third-party liability insurer becomes insolvent, the claimant can file a UM claim, assuming
 - (3) An unidentified motor vehicle that causes an accident resulting in injury provided the accident is reported to the police or proper governmental authority and the claimant notifies his insurer within 30 days, or as soon as practicable thereafter, that the claimant or his legal representative has a legal action arising out of the accident.

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3. WHAT IS AN UNDERINSURED VEHICLE:

- i. **“Underinsured motor vehicle”** is defined in §1702 as “A motor vehicle for which the limits of available liability insurance and self-insurance are insufficient to pay losses and damages.” Damages are not defined in the MVFRL, but punitive damages are not recoverable under §1731. Robson v. EMC Ins. Cos., 785 A.2d 507 (Pa. Super. 2001).

4. WHO IS AN INSURED:

- a. Pennsylvania has two (2) classes of insured with different rights:
 - i. Named insured. §1702;
 - ii. If residing in the household of the named insured:
 - (a) a spouse or other relative of the named insured; or
 - (b) a minor in the custody of either the named insured or relative of the named insured. Id.

5. PRIORITIES OF RECOVERY:

- a. §1733 establishes “priorities” among different policies.
 - i. A policy covering a motor vehicle occupied by the person at the time of the accident.
 - ii. A policy covering a motor vehicle not involved in the accident with respect to which the injured person is an insured. 75 Pa.C.S. §1733(a).
 - (1) “Priority” requires that the policy limits of one policy must be exhausted before a lower-priority policy will apply. The burden initially falls on the uninsured/underinsured motorist policy covering the motor vehicle involved in the accident. If the limits of that policy, plus the tortfeasor’s insurance limits are insufficient to compensate the insured fully, then any other policy with respect to which the accident victim is an “insured” will apply.

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6. CONTRACT INTERPRETATION RULES:

- i. UM & UIM Statutes provide the same results. (75 Pa. Cons. Stat. Ann. § 1731(b), providing uninsured motorist coverage, and 75 Pa. Cons. Stat. Ann. § 1731(c), providing underinsured motorist coverage, are identical in all relevant respects. Bowersox v. Progressive Cas. Ins. Co., 781 A.2d 1236, 2001 Pa. Super. LEXIS 2041 (Aug. 3, 2001).
- ii. Liberally construed to provide coverage. Any ambiguity construed against insurer;
- iii. Insurer's policy provision that limited underinsured motorists benefits to insureds who were using cars or who were pedestrians conflicted with the Motor Vehicle Financial Responsibility Law, 75 Pa. Cons. Stat. Ann. 1731(c), and was held invalid as against public policy. Richmond v. Prudential Prop. & Cas. Ins. Co., 2004 PA Super 328, 2004 Pa. Super. LEXIS 2780 (Pa. Super. Ct. 2004).
- iv. Choice of law - the law of the state with the most significant contacts

7. ARBITRATION ISSUES:

- i. Arbitrability;
 - (1) Court/Question of law issue;
 - (2) Scope of arbitration clause is for arbitrators
 - (a) Neuhard v. Travelers, 2003 Pa. Super. 275 (Pa. Super. 2003)(Trial court erred by compelling arbitration of the injured party's underinsured motorist (UIM) claim; there was no agreement to arbitrate the claim where the insurance policy's arbitration provision did not apply to UIM claims.)
 - (3) Question of whether the arbitration provision applied to UIM claim could not be arbitrated where provision stated that issues or questions on contract interpretation could not be arbitrated. Neuhard v. Travelers, 2003 Pa. Super. 275 (Pa. Super. 2003)

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- ii. Essentially, all factual questions;
 - (1) All matters necessary to decide the claim; Northern Insurance Co. Of NY v. Resinski, 2003 Pa. Super. 246, 827 A.2d 1240 (2003), including:
 - (a) Independent medical exams, Cotterman v. Allstate Insurance Co., 446 Pa. Super. 202, 666 A.2d 695 (1995);
 - (b) Arbitrators may not:
 - (i) Award delay damages;
 - (ii) Consider bad faith claims; reform the policy unless there is an express remedy to do that. Nationwide v. Heintz, 804 A.2d 1209 (Pa. Super. 2002 (May not reform policy for violation of mandatory offer requirement unless the MVFRL provided the remedy.)).
- iii. Extent of coverage;
- iv. Exhaustion Clauses:
 - (1) Snyder v. Nationwide, 373 Pa. Super. 294, 541 A.2d 19, 20, (1988), appeal denied, 520 Pa. Super. 590, 551 A.2d 216 (1988)(Exhaustion questions are for arbitrators.)
 - (2) It is not apparently unnecessary to delay the UIM arbitration while a third party action is pending - despite concerns over inconsistent results - as long as the UIM carrier is provided with a credit for the policy limits for the underinsured policy. Krakower v. Nationwide, Pa. Super 12/1998) (Slip opinion)(This is an unreported decision and one that makes little sense)
- v. Policy Period;
 - (1) Statute of Limitations;
 - (a) Messa v. State Farm, 433 Pa. Super. 594, 641 A.2d 1167 (1994);

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- (b) If arbitration is not raised timely and claimant participates in a DJ action, the right to arbitrate is waived. St. Paul v. Perry, 227 F. Supp. 2d 430 (E.D. Pa. 2002); Contra if arbitration jurisdiction is raised timely. Glode Indemnity v. Derevjanuk, 1997 WL 397483 (E.D. 1997);
- (c) Statute of Limitations for Petition to compel arbitration is four years. Walker v. Providence Insurance Co., 1998 WL 195652 (E.D. Pa. 1998);

vi. Member of household/relationship;

(1) Covered person;

(2) Priorities of policies;

vii. Stacking;

viii. Uninsured status of tortfeasor;

8. COVERAGE/SET OFFS/CREDITS:

- a. Generally, UIM carrier receives credit for entire amount of tortfeasors' policy. Unlike New Jersey, the entire policy limits are applied above the tortfeasors' primary limits;
- b. Underinsured with one claimant and payments of less than the policy:
 - i. For example, Plaintiff Smith is injured in a collision with Jones. Jones has \$15,000 of liability insurance and no assets. Jones' liability insurer offers Smith \$12,000, but refuses to increase the offer. Smith accepts the \$12,000. In a subsequent arbitration with Smith's underinsured motorist carrier, Smith's recoverable damages are held to be \$20,000. Smith should be able to recover \$5000 from the underinsured motorist carrier. The underinsured carrier would be allowed to set-off the tortfeasor's full \$15,000 liability limit, with Smith accepting the \$12,000 as full compensation for the first \$15,000 of his recoverable injuries. Smith's underinsured motorist carrier receives a credit as if the third party liability policy limits had been paid, even though the settlement does not exhaust

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the tortfeasor's limits. Boyle v. Erie Ins. Co., 441 Pa. Super. 103,109, 656 A.2d 941,943 (1995). *See also* Kelly v. State Farm Ins. Co., 447 Pa. Super. 214, 668 A.2d 1154 (1995) (Insurer given full credit for liability coverage carried by tortfeasor before insureds were entitled to underinsured coverage); Chambers v. Aetna Cas. & Sur. Co., 422 Pa. Super. 155, 658 A.2d 1343 (1995); Harper v. Providence Washington Ins. Co., 753 A.2d 282 (Pa. Super. 2000) and Krakower v. Nationwide Mut. Ins. Co., 790 A.2d 1039 (Pa. Super. 2001).

- c. Claimant settles for less than tortfeasor's limits because there are multiple claimants:
- i. The purpose of the underinsured motorist sections of the Financial Responsibility Law is to make sure that the insured's recovery is not tied to the number of claimants. Therefore, the insured claimant's recovery also should not be bound by the fortuity of the number of plaintiffs. The insurer may set off only the amount actually received by the insured from the tortfeasor against the UIM limits. *See* Boyle v. Erie Ins. Co., *supra*. And Overfield v. Ohio Cas. Ins. Co., 100 Lackawanna Jurist 103 (1998)(Court held that in situation of multiple plaintiffs and defendants, the UIM insurer could only offset the amount of monies plaintiff received.)
- (1) For example: Jones is injured with another asset free and underinsured tortfeasor. That party has \$30,000.00 in coverage, but because there are multiple claimants, Jones only receives \$15,000.00 in settlement. If Jones's underinsured motorist carrier may offset the tortfeasor's total coverage, then it will be liable to pay Jones only \$10,000 (Jones's \$40,000 of damages less the \$30,000 offset). Jones's total recovery would only be \$25,000 (\$15,000, plus \$10,000 from his underinsured motorist carrier). Because his damages are \$40,000, this situation would leave him undercompensated. Jones insurer could assert only a credit for the liability proceeds the plaintiff actually received and not the full limits of the defendant's liability policies. Overfield v. Ohio Cas. Ins. Co., 100 Lackawanna Jurist 103 (1998)(Court held that in situation of multiple plaintiffs and defendants, the UIM insurer could only offset the amount of monies plaintiff received.)
- d. Mandatory Offer/Waiver:

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- i. 1731 provides that:
- (1) UM and UIM protection must be offered in each motor vehicle liability insurance policy;
 - (2) Purchasing UM and UIM protection is optional;
 - (3) Lowering UM and UIM limits requires adherence to §1734;
 - (4) The content and format of the rejection notices are standardized. Lucas v. Progressive Casualty Ins. Co., 451 Pa. Super. 492, 680 A.2d 873 (1996) (UM and UIM waivers printed on the same sheet of paper violated §1731 (c.1) and were therefore void); Winslow-Quattlebaum v. Maryland Cas. Co., 752 A.2d 878 (Pa. 2000) (UM and UIM rejection forms cannot be on the same page, but other matter can be). Duncan v. St. Paul Fire and Marine Ins. Co., 2001 WL 101737 (M.D. Pa.) (mem.) (section 1734 provides guidelines for reducing UM/UIM coverages, technical requirements of §1731 do not have to be complied with when reduction of coverage is at issue, UM/UIM rejections must be on separate pages but insurer can have UM reduction and UIM rejection on same page. *See also*, Lewis v. Erie Ins. Exchange, 793 A.2d 143 (Pa. 2002) (the technical and remedial prescriptions of §1731(c.1) apply solely in circumstances in which an insurer attempts to enforce outright waiver/rejection of UM/UIM coverage)
 - (5) The first named insured needs to execute and date the rejection forms;
 - (6) Any rejection form that does not specifically comply with this section is void. Lucas v. Progressive Casualty Ins. Co., 451 Pa. Super. 492, 680 A.2d 901 (1996);
 - (7) Where an insured rejected UM or UIM coverage, the policy renewals must contain notice in prominent type that the policy does not provide protection against damages caused by uninsured and underinsured motorists.
 - (8) The rejection forms in §1731 are intended to be conspicuous and

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easy to understand, inform the consumer as to the nature of UM and UIM coverage, and provide a signature line for the first named insured to execute thereby pronouncing that certain known rights are being foregone. Section 1734, identified in §1731(a), permits a deviation from the mandatory requirement that UM and UIM coverages be equal in amount to bodily injury liability limits.

- (9) If the insurer does not comply with §1734, the amount of UM/UIM coverage will be deemed equal to the amount of liability coverage. Nationwide Ins. Co. v. Resseguie, 782 F. Supp. 292 (M.D. Pa. 1992), aff'd in part, rev'd in part, 980 F.2d 226, 232 (3rd Cir. 1992). Cebula v. Royal & Sunalliance Ins. Co., 158 F. Supp. 2d 455 (M.D. Pa. 2001) (mem.) (UM/UIM policy coverage reformed where there was no written request for lower UM/UIM coverage than liability coverage). Nationwide Mut. Ins. Co. v. Heintz, 2002 WL 1334791 n. 7 (Pa. Super.) (if reduction was not made in writing, the lower limits allegedly selected by the insured are a nullity, and UM/UIM coverage is deemed to equal bodily injury liability limits). Note: §1731 rejection requirements do not apply to §1734 reduction. *See*, Lewis v. Erie Ins. Exchange, 753 A.2d 839 (Pa. Super. 2000), aff'd, 793 A.2d 143 (Pa. 2002), and Duncan v. St. Paul Fire & Marine Ins. Co., 129 F. Supp. 2d 736 (M.D. Pa. 2001) (mem.).
- (a) Insured spouse in bound by the sign down selected by spouse, even after the selecting spouse has died. State Farm Mutual Auto Insurance v. Flubacher, 2002 U.S. Dist. LEXIS 11270(2002)(Husband who waived limits died. Wife injured and still subject to his choices.)

e. Exclusions:

i. Government vehicle;

- (1) A vehicle owned by a state agency can be an underinsured vehicle. Kmonk-Sullivan v. State Farm Mut. Auto. Ins. Co., 788 A.2d 955 (Pa. 2001).

ii. Definitional exclusion;

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- (1) Must provide coverages for injuries related to motor vehicle registered or principally garaged in [Pennsylvania].
Prudential P&C v. Ziatyk, 2002 Pa. Super. 50; appeal denied 206 MAL 2002(Pa. 2003)(Exclusion defined vehicles as motor, insured injured while in a U-Haul truck. Exclusion void.)
- (2) More than four wheels - enforceable - Tico v. Turpin, 2002 WL 59346 (E.D. Pa 2002)(Motorcycle)
- iii. Named driver exclusion; - enforceable - Progressive Northern v. Schneck, 813 A.2d 828(2003)
- iv. Regularly used, Non-owned vehicle exclusion; - enforceable - Burstein v. Prudential Property & Casualty, _____ A.2d _____ (Pa. 2002)
- v. Household exclusion - enforceable - Old Guard Insurance v. Houck, 2002 Pa. Super. 161 (Pa. Super. 2002).
- vi. Non-Listed vehicle: enforceable - Nationwide Mutual v. Hampton, 935 F.2d 578 (rd. Cir. 1991);
- (1) Ditto for commercial policy - Northern Insurance v. Resinski, 827 A.2d 1240 (2003);
- vii. Vehicles for Hire - enforceable - Marino v. General Accident Inc. Co., 610 A.2d 477(1992);
- viii. Off road vehicle - enforceable - Herr v. Grier, 671 A.2d 224 (Pa. Super. 1995)(Golf cart);
- ix. Punitive damages - enforceable - Robson v. EMC Insurance Co., 785 A.2d 507 (Pa. Super. 2001)

9. DAMAGES:

- i. May recover damages for injury. §1702 & §1731(b); Jackson v. Travelers, 414 Pa. Super, 606 A.2d 1384(1992)(Emotional trauma not covered as injury defined in the MVFRL as "Accidentally sustained

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bodily harm to an individual and that individual's illness, disease or death resulting therefrom.) See also the Uninsured Motorist Act, 40 P.S. §2000, which specifically precluded recovery of property damage.

10. SUBROGATION:

- i. UIM carrier will be subrogated to the right of its insured in the following circumstances:
 - (1) The underinsured motorist carrier settles with the insured before the insured has settled with the tortfeasor or the tortfeasor's liability insurer Shankweiler v. Regan, No. 99-6101 (Delaware Co. Sept. 5, 2002) (on appeal) (UIM insurer who tendered UIM policy limits prior to conclusion of third-party litigation had common law right to pursue subrogation against the third-party).
 - (2) The insured is at that point fully compensated, and
 - (3) The policy requires the insured to preserve the underinsured motorist carrier's subrogation rights by not releasing the tortfeasor, and the insured complies. Nationwide Mut. Ins. Co. v. DiTomo, 330 Pa.Super. 117, 478 A.2d 1381 (1984).
 - (a) If the underinsured motorist carrier settles with the insured before the insured settles with the tortfeasor, but the insured is still not fully compensated, then the underinsured motorist carrier should be partially subrogated to the insured.

11. STACKING:

- a. Pennsylvania;
 - i. The Pennsylvania Supreme Court limited the class of insureds entitled to stack¹ in Utica Mut. Ins. Co. v. Contrisciane, 429 Pa. 389, 241 A. 2d 112 (1968)

¹ Hartford Ins. Co. v. O'Mara, 123 F. Supp. 2d 834 (E.D. Pa. 2000) (mem.) (stacking is a shorthand term for offering a total coverage limit equal to the sum of the individual limits for each vehicle). Insured may not combine the concepts of intra and inter-policy stacking to get the product of the limits. McGovern v. Erie Ins. Group, 796 A.2d 343 (Pa. Super. 2002); Nationwide Mut. Ins. Co. v. Harris, 2003 WL 21053912 (Pa. Super.) (an insured may not waive the right to inter-policy stacking; only intra-policy stacking may be waived). The Pennsylvania Insurance Department Guidelines, B-17, define stacking as follows: (t)he adding together of the limits of coverage applicable to multiple vehicles to obtain a limit of

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(Policy divided the insureds into three classes:

- (1) The named insured and any designated insured and, while residents of the same household, the spouse and relatives of either. (Class I)
 - (2) Any other person while occupying an insured highway vehicle. (Class II)
 - (3) Any person with respect to damages he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (1) or (2) above. (Class III);
 - (a) Stacking permitted to only Class I insured because they paid the premium and it is their contractual relationship;
- ii. §1738 specifically addresses stacking of coverages for UM/UIM.

12. SETTLEMENT:

- a. Pennsylvania;
 - i. PIGA: Injured party may continue an action against IGA insured even though the injured party settled for less than the policy limits of the UM carrier. Bethea v. Forbes, 519 Pa. 422, 548 A.2d 1215 (1988);
 - ii. Settlement received in third party action -whether vehicle, product liability or dram shop claims, are offset against UIM coverage. Bateman v. Motorist Mutual Insurance, 527 Pa. 2412, 590 A.2d 281 (1991);
 - iii. Settlement of UIM claim bars suit for interest on the settlement. Billman v. PACP, 349 Pa. Super. 448, 503 A.2d 932 (1986)

coverage greater than the limit of coverage applicable to any one motor vehicle. . . (or) the adding together of the limits of coverage of multiple motor vehicle policies to obtain a limit of coverage greater than the limit of coverage applicable to any one policy.

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13. STATUTES OF LIMITATIONS FOR CLAIMS - THIS IS A CONTRACT, SO THE FOUR (4) YEARS CONTRACTUAL LIMITATION PERIOD APPLIES. 42 P.S. §5255; WHEELER V. NATIONWIDE, 749 F. SUPP. 660 (E.D. PA. 1990):

a. Tolling the Limitations Period:

- i. Petition to Compel Arbitration; See Boyle v. State Farm Mut. Auto Ins. Co., 310 Pa. Super. 10, 456 A.2d 156 (1983) (filing of petition tolled statute of limitations).
- ii. Estoppel - Insurer deceptively lures claimant into sitting on his rights, see, e.g., Walker v. Providence Ins. Co., 1998 WL 195652, *3 (E.D. Pa.) (mem.) (conduct of insurer is a critical issue, because assurances from insurer that it will appoint a defense arbitrator, but fails to do so, will not excuse the claimant from filing a motion to appoint an arbitrator prior to the expiration of the statute of limitations).

b. Uninsured Claims

- i. The statute of limitations on uninsured motorist benefits starts when three events occur
 - (1) The insured is involved in a motor vehicle accident;
 - (2) The insured sustained bodily injury as a result of that accident; and
 - (3) The insured knew or should reasonably have known^{86.1} of the uninsured status of the tortfeasor.Walker v. Providence Ins. Co., 1998 WL 195652 (E.D. Pa.)
- ii. Discovery Rule:
 - (1) The four year statute of limitations begins to run when the "reasonable individual" knows, or, in the exercise of reasonable diligence, should have known of the tortfeasor's uninsured status. Seay v. Prudential Prop. & Cas. Co., 375 Pa. Super. 37, 543 A.2d 1166 (1988)

c. Underinsured Claims:

- i. The statute of limitations begins to run when three events occur:
 - (1) The insured is involved in an accident;
 - (2) The insured sustains bodily injury as a result of that accident; and

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- (3) There is a third party settlement for policy limits or a verdict exceeding the limits. Buhl v. Allstate Ins. Co., 46 D. & C. 4th 219 (2000); Smith v. U.S.F. & G., 20 Lycoming Co. Rpt. 391 (1998), the court held that the statute of limitations for UIM benefits began to run when the insurer waived its subrogation rights against the third-party tortfeasor, even though the insurer argued that the complaint for UIM benefits was untimely because it was filed more than four years after the insured determined that the tortfeasor was underinsured.
- (a) The claimant must not extinguish the UM or UIM carrier's subrogation rights by failing to file suit against the Tortfeasor within the statute of limitations, because if the claimant extinguishes the UM or UIM carrier's subrogation rights, the claimant will not be entitled to UM or UIM benefits. Zourelis v. Erie Ins. Group, 691 A.2d 963 (Pa. Super. 1997), appeal denied, 550 Pa. 721, 706

14. RECOVERY LIMITATIONS:

- a. An individual is not permitted to recover under both the uninsured and underinsured provisions of the same policy. Section 1731(d) provides:
- i. (d) Limitation of Recovery (1) A person who recovers damages under uninsured motorist coverage or coverages cannot recover damages under underinsured motorist coverage or coverages for the same accident. 75 Pa.C.S. §1731(d).
- b. If an individual has elected the limited tort option, and is therefore precluded from maintaining an action for noneconomic damages, he may not recover noneconomic damages from uninsured or underinsured motorist coverage.
- c. Underinsured coverage is excess coverage. The statutory language used in Section 1702, which defines "underinsured" in terms of losses and damages sustained by the insured, places Pennsylvania's underinsured motorist coverage in the category of "excess coverage." See Allwein v. Donegal Mut. Ins. Co., 448 Pa Super. 364, 671 A.2d 744 (1996), alloc. denied, 546 Pa.660, 685 A.2d 541 (1996). Nationwide Mut. Ins. Co. v. Reidler, 2000 WL 424286 (E.D. Pa.) (mem.), aff'd, No.00-1609 (3d Cir. April 9, 2001) (UIM coverage is intended as excess coverage).

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15. ARBITRATION RULES:

- A. Discovery, evidence and right to independent medicals and examinations under oath depends on the language of the policy;
- B. Look for, at least, a "cooperation" clause.

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