For questions, call Jason Callicoat
(312) 540-7646

Querrey & Harrow

www.querrey.com®

ILLINOIS LAW MANUAL

CHAPTER XI
INSURANCE COVERAGE AND DEFENSES

I. UNINSURED - UNDERINSURED MOTORIST COVERAGE

1. Uninsured Coverage

Uninsured motorist coverage protects the policyholder who is injured by an uninsured motorist who is at fault. Uninsured motorist coverage is required by statute. It is mandatory in limits of at least $20,000/$40,000. 625 ILCS 5/7-203. The public policy behind mandatory uninsured motorist coverage is to place the policyholder in substantially the same position he or she would have occupied if the wrongful driver carried the minimum limits of liability insurance.

a. Offer of Coverage

The insurer must offer the policyholder uninsured motorist coverage in an amount equal to the liability coverage. The policyholder may reject uninsured motorist coverage in any amount above the minimum limits. The offer must meet certain guidelines. The offer must be presented in a "commercially reasonable" manner, and the agent must adequately explain that the policyholder can buy uninsured motorist coverage up to an amount equal to the limits of liability for a certain premium. Burnett v.

Safeco Ins. Co., 227 Ill. App. 3d 167 (1992). The same offer does not have to be made every time the policyholder renews the policy, unless the policyholder increases the liability limits or adds additional automobiles to the policy. Makela v. State Farm Automobile Ins. Co., 147 Ill. App. 3d 38 (1986). A mailing may be commercially reasonable if it contains the appropriate information explaining the offer. Houser v. State Farm Mutual Automobile Ins. Co., 193 Ill. App. 3d 125 (1989).

b. Policy Terms

All of the definitions in the uninsured motorist section of the policy apply to the underinsured motorist section of the policy. Allstate Ins. Co. v. Gonzalez-Loya, 226 Ill. App. 3d 446 (1992). A policy generally provides that the insurer will pay damages for bodily injury that a policyholder is entitled to collect from the owner or driver of an uninsured motor vehicle.

This coverage is activated when one of the following occurs. First, the owner or driver must be at fault. Second, the owner or driver has no liability insurance. This may be satisfied in one of three ways:

(1) the owner or driver has no insurance at all;

(2) the owner or driver has insurance in an amount less than the minimum statutory limit; or

(3) the remaining limits of the owner or driver's liability insurance have been reduced by other judgments or settlements and are not enough to cover the policyholder's claim.

A motorist who has not filed proof of insurance is presumed to be uninsured. Miranda v. Coronet Ins. Co., 187 Ill. App. 3d 886 (1989). Finally, the motor vehicle is a hit-and-run motor vehicle, and the identity of the owner or driver is not known.

For an auto to qualify as a hit-and-run vehicle, there must be physical contact between the hit-and-run vehicle and the policyholder (as a pedestrian or as a driver or passenger in an auto).

Swan v. Country Mut. Ins. Co., 306 Ill. App. 3d 958 (1999) (no uninsured motorist coverage for policyholder who swerved and struck a median while avoiding a car which entered his lane). Either direct or indirect contact by the "hit-andrun" vehicle will create coverage. No coverage exists where the insured struck an unidentified object in the roadway. Yutkin v. USF&G, 146 Ill. App. 3d 953 (1986). Coverage exists where the hit-and-run vehicle strikes a third vehicle which strikes the insured vehicle. Hartford Accident & Indemnity Co. v. LeJeune, 114 Ill. 2d 54 (1986); Bachtell v. Illinois Farmers Ins. Group, 176 Ill. App. 3d 148 (1988). The policyholder does not need to pursue the "hit-and-run" vehicle in an attempt to determine the owner/driver's identity. Safeway Ins. Co. v. Hister, 304 Ill. App. 3d 687 (1999). As in the liability coverage section of the policy, the bodily injury also must arise out of the operation, maintenance, or use of the uninsured motor vehicle (Laycock v. American Family Mut. Ins. Co., 289 Ill. App. 3d 264 (1997)), and must be caused by an accident. Dyer v. American Family, 159 Ill. App. 3d 766 (1987) (uninsured motorist coverage found for injuries sustained in carjacking because they were accidental from standpoint of insured).

c. Limitations

Uninsured motorist policies may provide for a two-year limitations period for an insured to demand arbitration or file suit against the insurer. However, this two-year period may be tolled from the time when an insured makes a claim until the claim is denied. Hermanson v. Country Mutual Ins. Co., 267 Ill. App. 3d 1031 (1st Dist. 1994).

This principle applies to other first-party coverages as well. Mitchell v. State Farm Fire & Casualty Co., 343 Ill. App. 3d 281 (2003).

2. Underinsured Motorist Coverage

a. Coverages

Underinsured motorist (UIM) coverage protects the policyholder if injured by an underinsured motorist who is at fault. The policy generally provides that the insurer will pay damages for bodily injury that a policyholder is legally entitled to collect from the owner or driver of an underinsured motor vehicle. To satisfy this requirement, two things are necessary. First, the other owner or driver must be at fault. Second, the other owner or driver's liability limits or remaining liability limits must be less than the policyholder's underinsured motorist limits.

UIM coverage may exist where some of the at-fault driver's limits were paid to other claimants. Cummins v. Country Mut. Ins. Co., 281 Ill. App. 3d 5 (1996). However, where the at-fault driver's liability limits are the same as the insured's UIM limits, there is no UIM coverage. Mercury Indemnity Co. v. Kim, 358 Ill. App. 3d 1 (2005). As with uninsured or underinsured motorist coverage, the bodily injury must arise out of the operation, maintenance or use of the uninsured or underinsured motor vehicle. Laycock v. American Family Mut. Ins. Co., 289 Ill. App. 3d 264 (1997).

b. Exclusions

The policy also excludes certain vehicles from underinsured motorist coverage. Underinsured motor vehicles do not include:

(1) vehicles insured under the same insurer's policy; or

(2) vehicles furnished for the regular use of the policyholder, the policyholder's spouse, or the policyholder's relatives.

This is known as the "household" or "family car" exclusion and does not allow uninsured motorist coverage if the insured is injured by another car that he or she, or someone else in the family, regularly uses. The exclusion is valid and enforceable. State Farm Mut. Auto. Ins. Co. v.

Villicana,181 Ill. 2d 436 (1998). A household member whose injuries are excluded under the liability coverage may still recover under the UM or UIM provisions. Illinois Emcasco Ins. Co. v. Doran, 160 Ill. App. 3d 927 (1997). An exclusion denying coverage when the insured occupies a vehicle he owns, but which is not the insured auto, is enforceable. Allstate Ins. Co. v. Leuchtefeld, 167 Ill. 2d 148 (1995).

The policy also excludes the following from coverage:

(3) government vehicles;

(4) vehicles located for use as a premises (i.e., motor homes); and

(5) vehicles designed primarily for off-road use.

c. Requirement of Exhaustion

The policy generally requires that an underinsured owner's or driver's own liability limits be exhausted before the insurer has any obligation to pay underinsured motorist benefits. However, courts have held that the failure to exhaust the underlying insurance does not prohibit a claim for underinsured motorist coverage. Whether exhaustion is necessary before underinsured coverage will apply depends upon the facts and circumstances of the case. See e.g., Cummins v. Country Mut. Ins. Co.,178 Ill. 2d 474 (1997) (if an underinsured driver's limits have been substantially reduced by payments to other persons, complete exhaustion is not required); American Family Ins. Co. v. Hinde, 302 Ill. App. 3d 227 (1999) (if the policyholder's claim against the insured is settled for an amount equal to the underinsured driver's liability limits, regardless of the source(s) of the settlement funds, the underlying policy is considered to be exhausted).

d. Right of Subrogation

Regarding the exhaustion of the underinsured driver's policy limits, the insurer has a right to advance payment of the amount of the available limits to the insured, and become subrogated

to the insured's rights against the underinsured motorist. The policy protects these subrogation rights by requiring the underinsured motorist to give the insurer notice of a tentative settlement with the underinsured motorist so that the insurer has the opportunity to advance the payment and protect its subrogation rights. Subrogation is limited to proceeds recovered only from the underinsured motorist, not from related tortfeasors. Ness v. Ford Motor Co., 835 F. Supp. 453 (1993).

3. Provisions Applying to Both Uninsured and Underinsured Coverages

a. Who is an Insured

To be entitled to uninsured or underinsured motorist coverage, a person has to qualify as an insured. He or she must be one of four things:

(1) the person named in the declarations page;

(2) the spouse of the person named in the declarations page;

(3) a relative of the person named in the declarations page; See, e.g., State Farm Mut. Auto. Ins. Co. v. Taussig, 227 Ill. App. 3d 913 (1992) (to be considered a "relative," a person has to have some degree of permanence in the insured's home and actually be living with the insured); Casolari v. Pipkens, 253 Ill. App. 3d 265 (1993) (a child lives with a parent if the child regularly visits the home); or

(4) a passenger in a car covered by the insured's policy.

b. Arbitration/Deciding Fault and Damages

The insurer and the policyholder must agree on two things. First, they must agree on whether the underinsured driver is at fault. There is no coverage where an insured claimant and an underinsured driver are fellow employees, and there can be no legal liability. Williams v. Country Mut. Ins. Co., 28 Ill. App. 3d 274 (1975). Second, they must agree on the amount of damages to the policyholder. If there is no agreement on either or both of these issues, then the issues are submitted to arbitration.

There are several important aspects to arbitration. The parties have 45 days from the date of the arbitration demand in which to choose three arbitrators. One Illinois court has held that a demand for arbitration is implied when the insured makes its initial claim, even if the insured does not specifically demand arbitration at that time. Hale v. Country Mutual Ins. Co., 334 Ill. App. 3d 751 (5th Dist. 2002). However, this view remains a minority position among the Illinois courts. See i.e., Buchalo v. Country Mutual Ins. Co., 83 Ill. App. 3d 1040 (1st Dist. 1980). If the parties do not agree on a choice of arbitrators within 45 days, the dispute is automatically submitted to AAA**,** a much more favorable forum for plaintiffs. The arbitrators will decide only liability and/or damages. Any coverage issue must be raised before the arbitration hearing begins, or the coverage issue will be waived. Evidence and discovery rules apply at the arbitration, by custom and practice though not necessarily policy language. Two of the three arbitrators must agree to make an award. An award includes the arbitration fees and costs. A two-year limitations period for demanding arbitration is enforceable. Buchalo v. Country Mut. Ins. Co., 83 Ill. App. 3d 1040 (1980).

Some courts have held that a policyholder is barred from arbitrating a claim if there has been a judgment for an amount less than the underinsured policy limits, or in favor of the underinsured driver, prior to seeking arbitration. Coronet Ins. Co. v. Booker, 158 Ill. App. 3d 466 (1987); Preferred America Ins. Co. v. Dulceak, 302 Ill. App. 3d 990 (1999). Other courts have held that the issues of liability and damages must be determined by arbitration and not by a judgment. Elliott v. Inter-Insurance Exchange, 169 Ill. App. 3d 702 (1988).

The Illinois Supreme Court holds that an uninsured motorist policy may include language specifying that arbitration awards for less than $20,000 are binding, while awards in excess of $20,000 may be rejected. Reed v. Farmers Ins. Group, 188 Ill. 2d 168 (1999). However, that portion of underinsured motorist policies allowing rejection of awards in excess of $20,000 are

void, and no such rejection is alleged. Samek v. Liberty Mutual Fire Ins. Co., (2003 Ill. App. Lexis 756). The Illinois Supreme Court may address that issue further.

An insured cannot be charged with arbitration fees if the award is equal to or below the statutory minimum coverage, because the fees would dilute the award below the required statutory minimum coverage. Nickla v. Industrial Fire & Cas. Co., 38 Ill. App. 3d 927 (1976); Lihosit v. State Farm Mut. Auto. Ins. Co., 264 Ill. App. 3d 576 (1993).

c. Setoffs at Arbitration

An insurer is entitled to setoffs from an arbitration award when certain kinds of payments are made to the policyholder before the award. All setoffs to which an insurer claims entitlement must be made clear to the arbitrators at the outset of the arbitration. Zimmerman v. Illinois Farmers Ins. Co., 317 Ill. App. 3d 360 (2d Dist. 2000). The insurer receives a setoff for any payments made under the policy's medical payments provisions, and for any payments made to the policyholder for worker's compensation benefits, disability payments, or other similar payments from any source. Sulser v. Country Mut. Ins. Co., 147 Ill. 2d 548 (1992) (workers compensation); Terry v. State Farm, 287 Ill. App. 3d 8 (1997). To be entitled to a setoff, the amount to be set off must be subject to a lien by a third party. Pearson v. State Farm Mut. Auto. Ins. Co., 109 Ill. App. 3d 649 (1982).

d. Stacking of Policies

Stacking of policies is an attempt by the policyholder to have the entire limits of more than one UM or UIM policy or coverage part apply to the same loss, thereby increasing the available limits.

The uninsured and underinsured motorist policies generally prohibit stacking in sections addressing situations where other uninsured and underinsured motorist coverage exists. If there is

other coverage of either type, the total available limits of liability will generally equal those of the policy with the highest limit. If other coverage is provided by other insurers, the initial insurer will only be liable based on the percent of its own limits compared to the total available limits. For example, if an insurer has a $20/$40 policy at issue and the total available limits are $100/$300, the first insurer will only be liable for a maximum of 20 percent of the total. Clear and unambiguous antistacking provisions are valid and enforceable. Armstrong v. State Farm Mut. Auto. Ins. Co., 229 Ill. App. 3d 971 (1992); Grzaszczak v. Illinois Farmers Ins. Co., 168 Ill. 2d 216 (1995).

4. Medical Payments Coverage

The insurer will pay reasonable medical expenses incurred for services rendered within three years of the date of an accident. The expenses must relate to the bodily injury, and have been caused by an accident.

a. Persons Entitled to Medical Payments

An insurer will generally pay medical expenses for the following people:

(1) the named insured;
(2) the named insured's spouse;
(3) the named insured's relatives; and
(4) a passenger in a vehicle insured under the policy.

The issues as to whether a person qualifies as a "relative" are the same as those discussed earlier in this section.

The bodily injury must be sustained while the persons operate or occupy a vehicle covered under the liability section, or while struck as a pedestrian. If the insurer and the policyholder cannot agree on the amount of medical payments due, the dispute is often decided by arbitration.

Stacking of medical payments under multiple insurance policies is prohibited. Armstrong v. State Farm Mut. Auto. Ins. Co., 229 Ill. App. 3d 971 (1992). It is an open question as to whether payment of medical expenses under this coverage part prohibits or inhibits the argument that certain expenses were reasonable and necessary in an arbitration.

5. Insured's Duties Under the Policy

a. Reporting a Claim

A policy usually requires the policyholder to give the insurer written notice of an accident or loss as soon as reasonably possible. Notice is to include:

(1) the insured's name;
(2) the names and addresses of all persons involved;
(3) the time and place of the accident; and
(4) the names and addresses of witnesses.

If a claim or suit is brought, the policyholder is to at once send every demand, notice or claim, and every process received.

b. An Insurer's Obligation Upon Receiving Notice

While the policy calls for written notice of accidents or losses and the forwarding of claims or suits "at once," the Illinois Supreme Court has set out a general rule as to when an insurer's obligation to its policyholder begins after an accident, claim, or suit. This applies to any type of claim under the policy. An insurer is obligated to respond to any notice of claim or suit when it receives notice of any kind, from any source, that gives the insurer enough information to either begin to investigate the claim or locate and defend a suit. Cincinnati Cos. v. West American Ins. Co., 183 Ill. 2d 317 (1998). If an insurer receives notice of any kind relating to a claim or suit involving a policyholder, no matter where the notice comes from, the insurer must investigate or defend.

c. Other Duties of the Policyholder

The policyholder is also obligated under the policy to:

(1) provide details of all medical treatments;

(2) submit to an independent medical examination;

(3) answer questions under oath;

(4) provide photographs of the insured vehicle;

(5) report hit-and-run accidents to the police within 24 hours and provide notice to the insurer within 30 days (though the 24-hour reporting requirement will not be strictly enforced by courts if the policyholder has any reasonable excuse);

(6) discuss the necessary investigation before demanding arbitration (an arbitration demand must be made within two years of an accident); and

(7) cooperate and assist in making settlements, securing and giving evidence, and attending trials or hearings.

If the insured does not assist and cooperate in providing required information and in securing and giving evidence or appearing at trials or hearings, the lack of assistance and cooperation can be a defense to coverage. An insurer, however, will have to show that it was prejudiced by the lack of cooperation, which usually requires the entry of a money judgment against the insured.

6. Bad Faith Claims

a. Bad Faith Claims in Illinois are Statutory

Claims against an insurance company for bad faith claims handling are governed by 215 ILCS 5/155, which provides:

> Attorney fees.
>
> (1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance of the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorneys fees, other costs, plus an amount not to exceed any one of the following amounts:

(a) 25 percent of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;

(b) $25,000;

(c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action.

Actions for bad faith and vexatious or unreasonable claims handling practices have been extended to include uninsured and underinsured motorist claims. Buais v. Safeway Ins. Co., 275 Ill. App. 3d 587 (1995); Marcheschi v. Illinois Farmers Ins. Co., 298 Ill. App. 3d 306 (1998). The above statutory penalties are justified for an insurer's failure to pay an uncontested amount. Millers Mut. Ins. Assn. of Illinois v. House, 286 Ill. App. 3d 378 (1997). In addition to the award of attorney's fees and costs, the maximum statutory penalty to an insurer under Section 155 is $25,000. Cramer v. Insurance Exchange Agency, 174 Ill. 2d 513 (1996); Nelles v. State Farm Fire & Cas. Co., 318 Ill. App. 3d 399 (2000). A jury decides whether an insurer is liable for bad faith, and a judge decides whether to impose a statutory penalty.