

A SUMMARY OF
COLORADO UNINSURED AND UNDERINSURED INSURANCE
COVERAGE LAW

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Uninsured/Underinsured Motorist Coverage ["UM"/"UIM"], is the surviving portion of Colorado motor vehicle insurance law and a component of most motor vehicle policies. The law became effective as to all auto policies applied for or renewed on and after November 4, 1983. Uninsured Motorist Coverage by definition includes underinsured motorist situations.

In addition to requiring that insurers offer UM/UIM, the statute provides the *nature and amount of such coverage and defines how the UM/UIM system is to operate*. UM/UIM must be provided unless specifically rejected [in writing] by the named insured. After the policyholder's initial selection or rejection of the coverage, the insurer is not required to notify him of availability of the coverage in any subsequent renewal. UM/UIM benefits are those damages for bodily injury or death which an insured is legally entitled to collect from the owner or operator of an uninsured motor vehicle. The UM/UIM statute does not include property damage, but a special Uninsured Motorist Property Damage ["UMPD"] statute enacted in 1988 and amended in 1989 does through a somewhat different system.

An "underinsured motor vehicle" is defined as being one for which liability insurance is: (a) Less than the limits for Underinsured Motorist Coverage under the insured's policy; or (b) reduced by payments to other persons in the accident to an

amount less than the limits of UIM coverage. An uninsured vehicle is one where [except for "excluded driver" and "household exclusion" situations] there was, for whatever reason, no liability insurance available for the accident. See *generally*, C.R.S. §10-4-609.

The statute also specifies the maximum liability of the UM/UIM insurer. The insurer's maximum liability is the lesser of: (a) The difference between the UM/UIM limit and the amount paid the UM/UIM insured by the liable person or organization; or (b) The amount of injury or death damages sustained, but not recovered. Coverage is, available in both uninsured and underinsured motorist situations to provide a first-party substitute to a certain limit for the liability insurance the tortfeasor should have had but did not.

There are other aspects to the UM/UIM System that are not included in the statute but provided by and enforceable because of provisions in the policy.

TYPICAL POLICY PROVISIONS

It can be seen that the UM/UIM section of a policy is both statutory and contractual. It is divided into identifiable subparts. The subparts include: (a) insuring language; (b) definitions, including what and who are insured; (c) a mechanism for resolving disputes; (d) a facility of payment provision; (e) a statement of the company's limit of liability and how the limit operates; (f) exclusions; (g) provision for situations where there is other UM/UIM coverage; (h) provisions creating a right of subrogation in the insurer together with the insured's obligations in reference to that right; and (i) general policy conditions that apply to all coverages, including UM/UIM. A general familiarity with the contents of the UM/UIM section of an auto policy is helpful in considering and understanding Colorado's UM/UIM System.

UM/UIM IN A FAULT BASED COVERAGE

Damages recoverable are those the eligible injured person would have been entitled to recover against the uninsured or underinsured tortfeasor [subject

to UM/UIM monetary limits]. The UM/UIM statute and UM/UIM coverage, orient to the motorist's liability as the basis for recovery of UM/UIM benefits, with the UM/UIM insurer simply making up the difference between what is paid by or on behalf of the Uninsured or Underinsured tortfeasor [if any] and the lesser of either the value of the injury claim or the UM/UIM policy limit.

General principles of tort law are applicable to the determination of whether an eligible injured person is entitled to UM/UIM. Comparative negligence, C.R.S. §13-21-111, joint and several or several liability, causation, and general bodily injury damage.

Disputes concerning whether the eligible injured person is entitled to UM/UIM damages and their amount are resolved either by agreement or by arbitration. If the particular policy does not provide for arbitration, and the parties have not otherwise agreed to arbitrate, the claim can be asserted in Court. If there is no arbitration provision in the policy, the insurer will need to intervene in the insured's action against the uninsured or underinsured motorist because it will be bound [subject to its limits] to any judgment that results in that proceeding. If the policy's provision is for arbitration at the option of the parties, that option must be timely elected or it will be deemed waived. See *Peterman v. State Farm*, 948 P.2d 63 (Colo. 1998).

Persons entitled to UM/UIM damages are specified in the policy contract. Typically, they are the same persons eligible for other injury coverages under the policy, such as the "named insured," "resident relatives of the named insured," and "occupants" of the vehicle described in the policy contract if the occupant is occupying the vehicle with consent of the insured. Pedestrians struck or injured by a vehicle are usually not within definition of insured for UM/UIM under the policy on the involved vehicle, but can be eligible under their own UM/UIM. Persons who are neither a "named insured" nor "resident relative" of the named insured ordinarily do not have availability of UM/UIM when they are away from a vehicle they rent or borrow, but may have eligibility if they are "using" the vehicle.

There is no UM/UIM consequence if there is Liability insurance of the same amount as UM/UIM limits. By statute, the maximum liability of the UM/UIM insurer is the lesser of: (a) The difference between the UM/UIM limit and the amount paid the UM/UIM insured by or on behalf of the liable person; or (b) The amount of injury or death damages sustained but not recovered. Limits are not multiplied by involvement of multiple uninsured or underinsured motorists.

Another instance of the interrelationship of UIM to liability insurance is the requirement in most UIM policies that the UIM claimant first exhaust recovery against the insured motorist. That requirement is enforced in Colorado. The requirement can be met, however, by a settlement, even if the settlement is for

less than the at-fault motorist's Liability insurance limits. The UIM claimant must still have a claim that is worth more than the at-fault party's liability limit and obtain the insurer's consent to the settlement. However, unless the UIM insurer agrees to the settlement at a discount, the UIM claimant will not be able to force the UIM insurer to bear the amount of the discount.

For UM/UIM, a motorist coming into Colorado has whatever he bought in his home state, and the law that will apply to that coverage will usually be the law of his home state.

There may be instances where the person entitled to UM/UIM benefits has UM/UIM eligibility from several sources. Primary UM/UIM comes from coverage on the involved vehicle [if the claimant is occupying a vehicle]. Other coverage available to the claimant is then deemed secondary or excess depending upon "other insurance" provisions of the involved UM/UIM policy contracts. A person may be able to obtain coverage on multiple vehicles by purchase of coverage on only one of them. Whether UM/UIM policies will "stack" is dependent upon their individual language and whether the particular policy contains "anti-stack" provisions. A policy will provide that the claimant will be entitled to the highest of the limits of multiple policies, but cannot combine them, with the insurers then prorating between themselves. If a policy provides that it will be "excess" in certain instances, stacking will be permitted. By statute, a person is permitted to stack UM/UIM coverage of his own on top of coverage in which he is neither the named insured nor a resident relative of the named insured.

It should be noted that a claimant need not be occupying a vehicle to have UM/UIM eligibility. A "named insured" or "resident relative" of a named insured usually has eligibility away from the insured vehicle, and will be entitled to coverage as a pedestrian even if injured in a motor vehicle accident while sitting on his front porch. Because multiple policies may be available, it is necessary to review "other insurance" provisions of each policy and the statute to sort out UM/UIM coverage availability and primacy.

What constitutes an "uninsured motor vehicle" is often an issue. The statute does not specifically define uninsured motor vehicle." Case law then must be considered. Consider the following decisions by the court of Appeals and Supreme Court of Colorado:

DeHerrera v. Sentry Insurance Company, 30 P.3d. 167 (Colo. 2001).

In this case, the Court of Appeals very significantly broadened the coverage for UIM coverage. They held that UM/UIM coverage is not contingent upon what type of vehicle, if any, the insured was in but instead whether or not a motor vehicle

was involved in an accident causing the injuries. The case goes so far as to indicate that even where an insured is occupying a owned but uninsured vehicle he is still entitled to UM/UIM coverage under any other policies he or she might have. The Court's justification for their decision was the fact that the UM/UIM statute, C.R.S. §10-4-609, was a different Act than the PIP Act, C.R.S. §10-4-701 *et. seq.* and does not have the same limitations. Note, C.R.S. §10-4-701 was repealed on July 1, 2003. UM/UIM benefits

then are available to a person insured under a policy when the injured in an accident caused by an uninsured or underinsured motorist vehicle without regard to the vehicle occupied by the insured at the time of the injury.

Jones v. AIU Insurance Company, 2001 W.L. 1548718 (Colo. App. 2001).

The plaintiffs were the parents of a child who was killed in an automobile accident. Nevertheless, their child was not living with them at the time of the accident. The carrier denied UIM coverage because their son was not a resident of their household. The Court of Appeals upheld the exclusion. This is despite the fact that the language in §10-4-609 (1)(a) (protecting "persons insured ... who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death") (emphasis added) describing UM coverage is more restrictive than that in §10-4-609 (4) (providing insured with uninsured motorist "coverage for damage for bodily injury or death") (emphasis added). The provision in UIM policy limiting UIM coverage to resident relatives remains valid.

Borjas v. State Farm Mutual Automobile Insurance Company, 33 P.3d. 1265 (Colo. App. 2001).

In *Borjas*, the plaintiff was injured in an automobile accident involving the Alamosa police officer who was responding to an emergency. Her action against the police officer and his employer, The City of Alamosa, was dismissed because of the Governmental Immunity Act. The Court of Appeals held that she was entitled to UIM coverage. The Court of Appeals cited as justification for their decision their perception of the Colorado policy requiring "that insurance coverage be available to protect motorists from losses caused by other negligent drivers who cannot or will not pay for the damages they have caused." The Court of Appeals went on to hold that any policy provision that attempted to exclude coverage for accidents involving government owned vehicles was void and unenforceable. UIM coverage applies even though tortfeasor is immune from liability under the Governmental Immunity Act.

The Court held that UM/UIM exclusions must be based upon the classification of the person, not the type of vehicle occupied.

The UM/UIM statute does define "underinsured motor vehicle" as a land motor

vehicle, the ownership, maintenance or use of which is insured or bonded for injury or death at the time of the accident, but the limits of which are (a) less than the limits for uninsured motorist coverage under the insured policy; or (b) are reduced by payments to persons other than the insured to less than the limits of UM/UIM under the insured's policy.

In addition to there actually being no Liability policy, are instances where circumstances create the equivalent of no Liability insurance. By established Colorado case law, injuries resulting from "hit-and-run" and "miss-and-run" accidents are within UM. See *Farmers Insurance Exch. v. McDermott*, 527 P.2d 918 (Colo.App. 1974). Note, however, there is no requirement for contact between the vehicles or even corroboration evidence of the accident. See *Mavashev v. Windsor Insurance Co.*, 72 P.3d 469 (Colo. App. 2003). A denial of coverage by the auto Liability insurer triggers UM, even if its coverage contention is disputed. Generally, with underinsured motorist coverage in place, any instance where the motor vehicle tortfeasor has less Liability coverage than the value of the injury, there is a potential UM/UIM consequence, subject to the maximums specified in the UM/UIM statute. However, operation of a Household exclusion does not trigger UM. See *Allstate Ins. Co. v. Feghali*, 814 P.2d 863 (Colo. 1991).

The typical UM/UIM policy contains exclusions. Reviewed cases by the court of Appeals and Supreme Court of Colorado include:

***State Paul Fire and Marine Insurance Company v. Mid Century Insurance Company*, 2001 WL 8552 (Colo. App. 2001).**

In this case, the employee was delivering pizzas when he was involved in an automobile accident. Mid Century, which provided the auto policy, excluded coverage to any vehicle while used in employment by any person whose primary duties were the delivery of products or services. The Trial Court determined that business use delivery exclusion is invalid and enforceable under the No Fault Act. The Court of Appeals agreed stating that such an exclusion diluted conditions and limits statutorily mandated coverage which was unauthorized by the No Fault Act. Business use "Exclusion" in auto policies are invalid.

***Principal Mutual Life Insurance Company v. Progressive Mountain Insurance*, 1 P3 250 (Colo. App. 1999). (Certiorari granted May 30, 2000).**

In this case, a father, who was an excluded driver, backed over and injured his daughter. The medical insurer for the daughter paid the medical bills and sued the carrier claiming PIP coverage for the daughter. They claimed that although the father was an excluded driver, the daughter was a "relative" under §10-4-707 (1)(b). As a "relative", she was entitled to PIP coverage for injuries sustained while a passenger "in any motor vehicle." The medical insurer argued that the

question of coverage turned on the status of the claimant, not the motor vehicle involved in the accident. The Court held that the legislative intent was clear and unambiguous and that there was absolutely no coverage under the insurance policy when an excluded driver was operating the vehicle. Accordingly, there was no coverage. The Supreme Court granted certiorari and affirmed the Court of Appeals.

An exclusion is enforceable because it has a reasonable basis and is probably consistent with the spirit and objectives of the Colorado statute. Typically, this is through some direct recognition within the statutory scheme. However, that where an exclusion or limitation is imposed by an insurer that is not consistent with the UM/UIM Act, it will be deemed void as against public policy. See *Mavashev v. Windsor Insurance Co.*, 72 P.3d 469 (Colo. App. 2003).

UM/UIM is not a compulsory coverage. It must be offered by Colorado insurers on auto policies issued in this state on vehicles garaged here. The named insured, however, can elect against purchasing such coverage. This rejection, however, must be in writing. Further, if that documentation can not later be provided, UM/UIM coverage will be imposed.

The named insured also has a choice on UM/UIM limits he wishes to purchase. The insurer must offer the named insured the right to obtain higher limits of UM/UIM coverage in accordance with the insurers rating plan and rules, but is not required to provide limits higher than the insured's BI Liability limits or \$100,000 per person and \$300,000 per accident, whichever is less. If an insurer has written UM/UIM limits in an amount less than the insured's BI liability limits, there should be some written confirmation. If the insurer cannot demonstrate that it offered such higher limits, and that these limits were requested, the insurer may be required to provide the maximum limits applicable.

The right of subrogation creates some practical problems for both UM/UIM claimants and UM/UIM insurers. Because of a standard exclusion, an insured risks jeopardizing his UM/UIM coverage if he settles with and releases the uninsured or underinsured tortfeasor without first obtaining permission of the UM/UIM insurer to do so. This is because the insured's liability release destroys or at least jeopardizes the insurer's right of subrogation. An insured should never assume that the UM/UIM insurer will not wish to pursue subrogation, and, therefore, should do nothing to jeopardize that right. By the same token, when the UM/UIM insurer is faced with requested consent to the insured's settlement proposal with the motor vehicle tortfeasor, it must promptly determine whether it will seek subrogation. If it will, the insurer should probably advance the amount offered by the tortfeasor plus UM/UIM benefits. If the UM insurer is not willing to make such an advance, it should not interfere with its insured's tort settlement

and be prepared to promptly waive its subrogation rights. Other UM/UIM cases worthy of note, include:

Wright v. USAA, 2000 W.L. 1381152.

The insured was killed in a head on automobile collision. The tortfeasor vehicle was uninsured. The tortfeasor's conduct was considered by the court in the personal injury action to be a "felonious killing" pursuant to §15-11-803. The defendant had not plead guilty to the requisite murder in the first degree or second degree or manslaughter in the criminal action. The Court of Appeals held that, pursuant to §15-11-803 (7), the civil trial court could find that "at any time, upon petition of an interested party, shall determine whether, by a preponderance of the evidence standard, each of the elements of felonious killing a decedent has been established." Section 15-11-803 (7) (emphasis added).

The Court of Appeals found that since the uninsured driver plead guilty to a DUI vehicular homicide and the rest of the elements of manslaughter had been established by the preponderance of the evidence it held that the cap on non-economic damages did not apply. Since the UM/UIM carrier was responsible for all damages that the plaintiff was entitled to collect from the defendant, USAA was not entitled to claim the defenses of the non-economic damages bar. The cap on non economic damages is lifted where the court in the personal injury action finds, by a preponderance of the evidence, that the defendants conduct meets the definition of a "felonious killing" even though he has not been convicted of or plead guilty to such a crime in the criminal court.

Huizar v. Allstate Insurance Company, 2000 WL 1737939 (Colo. App. 2000).

In this case, an insured was injured and proceeded to arbitration on a UM provision. The insurer did not like the result and proceeded to a *trial de novo* pursuant to the terms of the policy. Eventually the Court of Appeals in *Huizar v. Allstate Insurance Company*, 952 P.2d. 342 (Colo. 1998), held that the *de novo* clause violated public policy and therefore void. The insured then demanded attorneys fees. The Court of Appeals confirmed an underlying Trial Court's decision that attorneys fees should be awarded for the *trial de novo* because the insurance company, in its policy, had agreed to pay those costs that it had asked that the insured incur. It did not matter that the insured failed to request those fees in either a post judgment motion or in the appeal. It was sufficient that he had raised it initially in the underlying action. Ultimately, the Colorado Supreme Court ruled that attorney's fees are not recoverable under the insurance contract.

James v. State Farm, 2002 WL 122511 (Colo. App. 2002).

An "owned but not insured" exclusion of underinsured motorist (UIM) coverage for

an insured occupying a car owned by him but not insured under his wife's policy was void in light of public policy that UIM coverage was personal and followed the insured; statute requires UIM coverage for the protection of persons insured under the policy who are legally entitled to recover damages from owners or operators of underinsured motor vehicles.