

COA Opinion: Underinsured motorist coverage equal to minimum liability coverage held illusory

18. July 2011 By Nicole Mazzocco

In *Ile v. Foremost Insurance Company*, No. 295685, the Court of Appeals upheld the trial court's finding that underinsured motorist coverage issued to the decedent was illusory. The decedent's motorcycle insurance policy provided uninsured motorist coverage and underinsured motorist coverage as a "bundle" with limits equal to the minimum liability coverage limits permitted under Michigan law (\$20,000/\$40,000). Under the policy, a vehicle involved in an accident with the policyholder's motorcycle is "uninsured" if "its limit for bodily injury is less than the limit of liability for this coverage" but "does not include any vehicle or equipment...[t]o which a bodily liability bond or policy applies at the time of the accident but its limits for bodily injury liability is less than the minimum limit for bodily injury liability specified by the financial responsibility law of the state..." After the decedent was killed in a motorcycle accident, the decedent's estate recovered \$20,000 from the insurer of the other vehicle involved in the accident. When the estate attempted to recover an additional \$20,000 in underinsurance coverage from Foremost, the claim was denied. Because the minimum liability limits under Michigan law are \$20,000/\$40,000 – equal to the coverage under the decedent's policy – the Court found that no vehicle could ever qualify as "underinsured" under the policy's definition and therefore "there exists no possibility for decedent to collect underinsured motorist benefits at the selected level of cover." The contract was found to be illusory because it was "[a]n agreement in which one party gives as consideration a promise that is so insubstantial as to impose no obligation." Based on this finding of illusory coverage, the Court of Appeals affirmed that the decedent's estate was entitled to recover up to \$20,000 for any damages incurred exceeding the \$20,000 already paid by the other vehicle's insurer.

Finding scarce Michigan case law on this issue, the Court looked to other jurisdictions to conclude that, if no benefits will ever be paid under a certain coverage form, that coverage is illusory. The Court rejected Foremost's argument that the coverage was not illusory because it was bundled with uninsured motorist coverage, under which benefits may be paid, because an insurer may not charge a premium for a combination of benefits if one of the benefits cannot be collected under the policy. Furthermore, the court found that the declarations page provision regarding the combined uninsured and underinsured coverage was "arguably deceptive" because it implied coverage that did not exist. Thus, the fact that the underinsured motorist coverage was part of a coverage bundle did not save it from being invalid as an illusory contract. The Court of Appeals found that the trial court appropriately based its remedy on the reasonable expectation of the insured, and concluded that "it would have been reasonable for the decedent to have believed that because he had obtained \$20,000 of UIM coverage, that damages exceeding that amount remitted by the tortfeasor's policy, up to the \$20,000 limit of the decedent's UIM motorist coverage, should be paid by the insurer." (internal quotations omitted) The Court of Appeals found that this remedy did not contradict the Michigan Supreme Court's "disfavor of use of the reasonable expectation doctrine based on the violation of public policy by this insurance policy because it is illusory."

Disclaimer: Warner Norcross & Judd LLP represented the Appellant in this matter.