Monday, January 30, 2006

Open Umbrella

Courts face an open question about umbrella policy limits and the UIM credit

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Special to the Law Weekly

As automobile law practitioners are aware, persons injured during the course of a motor vehicle accident may pursue both a lawsuit against the tortfeasor and, where the negligent party is underinsured, a claim for underinsured motorist benefits under the injured party's own policy of automobile insurance.

Pennsylvania law allows such UIM claims to be pursued prior to the completion of any lawsuit as long as the UIM carrier is given a credit for the total amount of the liability coverage provided to the negligent party or parties. *Harper v. Washington Insurance Co.,* 753 A.2d 282 (Pa.Super. 2000); *Boyle v. Erie Insurance Co.,* 656 A.2d 941 (Pa.Super. 1995). This credit is designed to ensure that the injured party does not obtain a UIM recovery without first establishing that the value of his or her injuries exceeds the tortfeasor's liability insurance coverage, i.e. that the tortfeasor is "underinsured."

In some cases, a tortfeasor may be covered not only by an automobile policy, but also a substantial excess or umbrella liability policy. Such excess or umbrella policies typically offer a million or more dollars in liability coverage to the tortfeasor. An important and open issue that therefore arises, and which has not been definitively decided by any Pennsylvania state or federal court, is whether the amount of a separate excess or umbrella policy should also be included in the credit due to a UIM carrier.

Obviously, if the UIM carrier is allowed a credit for such excess or umbrella coverage over and above any automobile liability coverage also possessed by the tortfeasor, the injured party's claim for UIM benefits would likely fail as the tortfeasor would not be considered to be "underinsured." In other words, the injured party would have to prove that the value of his or her claim exceeds the over one million dollar credit due in order to realize any recovery of UIM benefits.

To date, no Pennsylvania court has definitively decided whether or not a UIM carrier is entitled to include the amount of any excess or umbrella policy limits in its computation of any credit due. As noted below, while there are compelling arguments for and against the computation of such a credit, it would appear that, if faced with the issue, the courts may find that carriers should be entitled to a credit for the excess or umbrella policy limits as well as the automobile policy limits. However, under the current status of the law, it appears that the issue presented is considered by the courts to be one to be decided by a UIM arbitration panel as opposed to the court by declaratory judgment action. Thus, the resolution of the question of the appropriate credit may be left to be resolved by the more liberal arbitration panels without any clear guidance from the courts.

Defense arguments

The UIM defense carriers typically rely upon reference to the generally worded provisions of the Motor Vehicle Financial Responsibility Law as well as general insurance policy language in asserting that the credit should be comprised of the tortfeasor's excess or umbrella policy in addition to the tortfeasor's automobile policy.

For example, under the MVFRL, an "underinsured motor vehicle" is defined as "[a] motor vehicle for which limits of *available* liability insurance and self-insurance are insufficient to pay losses and damages. 75 Pa.C.S.A. Section 1702 [emphasis added]. The argument is that this general reference to liability coverage should be considered as obviously applying to any and all types of liability policies covering a tortfeasor, including excess or umbrella policies.

The same argument is put forth with respect to the exhaustion clauses found within the UIM provisions of automobile policies. These clauses typically provide that there is no UIM coverage for bodily injury arising out of the ownership, maintenance or use of an underinsured motor vehicle until the "limits of *all* bodily injury liability bonds and policies that apply" have been exhausted by payments of judgments or settlements. Again, a plain reading of such general policy language arguably compels the conclusion that any and all liability policies are to be considered in calculating the credit due.

It is additionally argued, from a defense standpoint, that if excess or umbrella policy limits are not be considered as part of a credit due to a UIM carrier under an exhaustion clause, then the stated purpose of UIM coverage would not be realized, which is "to protect the insured from the risk that a negligent driver of another vehicle will cause injury to the insured and will have inadequate coverage to compensate for the injuries caused by his negligence." *Paylor v. Hartford Insurance Co.,* 640 A.2d 1234 (Pa. 1994) [citations omitted]. Arguably, this purpose would not be served if a UIM claim was permitted where a tortfeasor had more than adequate coverage, in the form of a primary and an excess policy, to compensate the injured party.

Moreover, allowing a UIM claim where more than adequate liability coverage already exists would arguably expand the scope of UIM coverage and could result in increased premiums, the exact opposite of the public policy the MVFRL was intended to promote. More specifically, under *Boyle*, the Superior Court explained, as follows:

[A]n exhaustion clause must be interpreted to provide protection to an insurance company against a demand by its insured to fill the "gap" after a weak claim has been settled for an unreasonably small amount. The statutorily mandated coverage for underinsured motorists benefits was not intended to permit the insured absolute and arbitrary discretion to determine how payment should be apportioned between his or her own insurance company and the tortfeasor's liability carrier.

Thus, the defense carriers typically argue that the general language as found in the MVFRL and the UIM provisions of an auto policy do not limit what constitutes liability coverage on a tortfeasor's vehicle to only the primary automobile policy. Rather, any and all personal injury liability policies of the tortfeasor should be considered in computing the credit due. *Doyle v. State Farm Mutual Auto Insurance,* 1996 WL 84293 (E.D.Pa. 1996)(in unpublished opinion carrier found to be entitled to credit for excess policy); compare *Northern Insurance Co. v. Dottery*, 43 F.Supp.2d 509 (E.D.Pa. 1998) (in a different context, court rules that excess or umbrella policy are not to be considered as automobile policies under the MVFRL).

It therefore follows, from a defense perspective, that where a Claimant has not exhausted the full amount of any available automobile, excess, or umbrella policies, then the UIM carrier should be entitled to a credit for the full amount of all such liability limits. See *Bremer v. Prudential Property & Casualty Insurance Co.*, 2004 WL 1920708 (M.D.Pa. Aug. 18, 2004) (Citing *Boyle*, the court ruled that where there are multiple responsible tortfeasors, the UIM carrier would be entitled to a credit for the full underlying limits of all available policies).

Claimant arguments

When faced with the same issue, claimants typically argue that the language of the UIM policy is to be strictly construed against the UIM carrier. *Quinney v. American Modern Home Insurance Co.*, 145 F.Supp.2d 603 (M.D.Pa. 2001). Along those lines, it is asserted that there can be no dispute that, although an express policy provision could have simply been added to the policy by the carrier prior to the time it was issued to the insured, there is typically no provision in the UIM policy specifically requiring the injured party exhaust any excess or umbrella coverage possessed by the tortfeasor prior to pursuing a UIM claim. Thus, the policy may be arguably ambiguous in this regard and all ambiguities are to be construed against the carrier.

Furthermore, a plain reading of typical UIM policy terms may also arguably confirm that the credit is indeed specifically limited to the liability limits of the tortfeasor's applicable automobile liability limits and not applicable to any excess or umbrella limits. Underinsured policies typically define an "Underinsured motor vehicle" as "a land motor vehicle…*whose limits of liability* for bodily injury liability…are less than the amount of the insured's damages." [emphasis added]. Thus, the very definition of an underinsured motor vehicle, as contained in the policy itself, and as strictly construed against the carrier, can be read to limit the credit allowed by the UIM carrier to those liability limits specifically found only under the tortfeasor's automobile

policy. Separate from an analysis of the insurance policy language, claimants may also argue that Pennsylvania law has generally limited the third party liability credit allowed to underinsured carriers to the limits found in the automobile liability policies of the tortfeasor operator(s) involved in the accident. For example, the Superior Court has held that the MVFRL "itself suggests that underinsurance motorist coverage requires the existence of at least *two applicable policies of motor vehicle insurance,*" i.e., only the tortfeasor's automobile liability policy and the injured party's UIM policy. *Maney v. Lloyd*, 634 A.2d 1139 (Pa.Super. 1993) citing 75 Pa.C.S.A. Section 1731(c) [italics in original].

The *Maney* court further stated:

Thus, the statute contemplates one policy applicable to the vehicle which is at fault in causing the injury to the claimant and which is the source of liability coverage (which is ultimately insufficient to fully compensate the victim), and a second policy, under which the injured claimant is either an insured or covered person. It is the second policy which the statute contemplates as the source of underinsured motorist coverage, which the liability coverage provided by the first policy of insurance is insufficient to fully compensate the claimant for his injuries. Note the lack of any reference or implication by the court to any excess or umbrella policies as being a part of the equation to determine the amount of any credit due to the UIM carrier.

Additionally, claimants typically refer to the decision of *Northern Insurance Co. v. Dottery*, 43 F.Supp. 2d 509 (E.D.Pa. 1998), which holds that, under Pennsylvania law, not all insurance policies that afford coverage for liability arising out of the operation or use of automobiles are considered motor vehicle policies. In the different factual context of *Dottery*, the court rejected the claimant's attempt to argue that an excess policy should be considered to be an additional source of UIM benefits for the claimant. In that decision, the court also specifically stated that excess and/or umbrella policies "are not subject to the requirements of the MVFRL," citing *Electric Insurance Co. v. Rubin*, 32 F.3d 814 (3<>rd Cir. 1994) and *Kromer v. Reliance Insurance Co.,* 677 A.2d 1244 (Pa.Super. 1996).

Thus, in the same manner that the *Dottery* case, and the many decisions cited therein, prevent a claimant from turning an excess or umbrella policy into a UIM policy from which the claimant may recover benefits, claimants may therefore argue that the law should also prevent insurers from successfully asserting that an excess or umbrella policy should be considered to be a policy issued in accordance with the MVFRL such that the carrier is entitled to a third party credit of the same.

Is the issue arbitrable?

While the above arguments may appear compelling on both sides, it may be that the open issue presented may never reach the courts, but rather will remain an issue to be decided by an arbitration panel in accordance with the terms of the arbitration clause of the UIM policy. Such was the result in the unpublished non-precedential opinion of *State Farm Mutual Automobile Co. v. Chrzan*, Case No. 3:05-CV-1468 (M.D.Pa. Nov. 8, 2005, Jones, J.).

In *Chrzan*, the UIM carrier filed a declaratory judgment action in federal court seeking a declaration that it was entitled to a credit of the tortfeasor's $500,000 primary policy as well as the tortfeasor's $5 million excess policy. In response, the claimant filed a Rule 12(b)(6) motion to dismiss arguing that the declaratory judgment action should be dismissed as the issue presented was one to be decided by a UIM arbitration panel in accordance with the arbitration clause found in the UIM carrier's policy. The *Chrzan* court granted the claimant's motion to dismiss and referred the question to arbitration for resolution.

After reviewing cases that held that the question of whether a vehicle was "uninsured" was an issue to be decided in arbitration, the court in *Chrzan* ruled that the question of whether a vehicle was "underinsured" was likewise one to be decided by an arbitration panel. The court indicated that the questions of whether the claimant's claim for UIM benefits was in violation of the exhaustion and consent to settle provisions of the UIM policy are "logical subparts to the larger analysis of whether the vehicle driven by [the tortfeasor] is underinsured and therefore these are proper issues to be decided by arbitration" under the language of the arbitration clause at issue. The *Chrzan* court felt that its decision was only logical given the purpose of arbitration clauses in insurance policies of alleviating the costs of litigation through alternative dispute resolution such as arbitration.

Note that the *Chrzan* decision was appealed by the carrier to the 3rd U.S. Circuit Court of Appeals. However, the case was settled prior to the appeal being decided and prior to any UIM arbitration. Thus, the argument remains that the issue presented is one to be decided by a UIM arbitration panel as opposed to the courts.

Conclusion

Under the above analysis, although it may appear that, if faced with the issue, the courts of Pennsylvania may rule that carriers are entitled to a credit for the tortfeasor's excess or umbrella policy limits in addition to the amount of his or her automobile liability policy limits, the courts may never get to squarely address the matter so long as the question is considered to be one within the authority of the UIM arbitration panel to decide.

Carriers may therefore be wise to alter their policies to either include express language confirming that excess or umbrella liability limits are to be exhausted before a UIM claim may be sought, or language that any disputes as to the amount of a credit due are to be decided by the courts as opposed to a UIM arbitration panel.

Alternatively, the claimant's counsel may lobby to oppose such changes to automobile policy language, which opposition may ultimately prove unsuccessful. For the time being, claimant's counsel may continue to pursue the arguments noted above, i.e., that the policy language is ambiguous and/or that the issue of the credit due should be decided by the more claimant-friendly forum of an arbitration panel.

Note, however, that under the very recent decision of the Supreme Court in *IFC v. Koken*, PICS Case No. 06-0006 (Pa. Dec. 30, 2005), the Court held that the Insurance Commissioner did not have the authority to compel carriers to include an arbitration clause in their policies. Accordingly, carriers may now be in a position to do away with the arbitration clause altogether in future policies issued to their insureds, thereby requiring the issue presented to be resolved by the courts. The fallout from the *IFC v. Koken* decision on this issue, as well as on UIM arbitrations generally, remains to be seen. •