THE INTERPLAY BETWEEN UNINSURED MOTORIST COVERAGE, WORKERS' COMPENSATION BENEFITS, AND WHEN SUCH BENEFITS ARE AVAILABLE

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Although an uninsured motorist carrier ("UMC") is entitled to set off the payments made by a workers' compensation insurer ("WCI") to the plaintiff from the damages to be paid by the UMC, the determination of how that set off is calculated is crucial for ensuring that the UMC is not providing recovery to the plaintiff that should have been provided by the WCI. By adding a provision to their insurance policies that they will not compensate the claimant for injuries that were compensated *or could have been compensated* by a WCI, UMCs may be in a better position to set off their damages to a plaintiff by the amount that the plaintiff was entitled to recover from the WCI rather than simply what the plaintiff did in fact recover.[1] An insured may have received less than the amount to which she was entitled because she may have settled out of haste in order to receive funds from a WCI or because she choose to receive treatment from a non-workers' compensation doctor. She even may have planned that the UMC would later pay the remainder of her damages up to the point of permissible coverage.

The relationship between uninsured motorist coverage and workers' compensation insurance is governed by Fla. Stat. § 627.727. Section (1) of that statute provides:

> [t]he coverage [provided by the UMC] described under this section shall be over and above, but shall not duplicate, the benefits **available to** an insured under any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; . . . and such coverage shall cover the difference, if any, between the sum of such benefits and the damages sustained, up to the maximum amount of such coverage provided under this section.[2] (emphasis added).

Thus, a UMC is only required to compensate an insured for damages that have not been covered by workers' compensation benefits or similar law. Florida courts have found that payments by a UMC to the insured are to be reduced by the present workers' compensation benefits that have been paid or are due and payable.[3] Thus, an insured may settle for a lower amount to receive funds immediately and then seek full damages from a UMC. Additionally, an insured could seek medical treatment from a non-workers' compensation doctor and then seek have UMC cover those costs when she could have been treated by a doctor who would have been paid for by a WCI. In so doing, the insured would claim that only the amount received, rather than the larger amount that could have been received, should be set off as the higher amount is no longer "available" under Fla. Stat. § 627.727, despite the fact that it had been available.

In *USAA Cas. Ins. Co. v. McDermott*, the Second District Court of Appeals for the State of Florida found that a UMC that provided coverage for a police officer injured in a car accident involving a fleeing suspect was not entitled to set off workers' compensation benefits that were likely payable to the officer in the future.[4] In finding that the UMC was not entitled to a setoff of workers' compensation benefits likely payable in the future, the court noted that the insurance policy did not contain a provision that entitled the UMC to set off such benefits.[5] The court suggested that such a provision would permit the UMC to set off future benefits so long as the provision did not run afoul of the statutory scheme created by Fla. Stat. § 627.727 or run contrary to Florida public policy.[6]

A provision in a UMC's insurance policy that states that the UMC will be entitled to a setoff of the workers' compensation benefits that are or *were* available to the insured may be enforceable because such a provision should be compatible with both Florida statutes and public policy. First, policy language that would permit the UMC to setoff workers' compensation benefits that "were available" would closely mimic the language already present in Fla. Stat. § 627.727. Importantly, the language in Fla. Stat. § 627.727 focuses on availability of the benefits but does not specify when those benefits are to be available, *i.e.* in the past or in the future. There is even an argument to be made that a contract provision would not be necessary to setoff benefits that had been available but not received because of the temporally ambiguous "available" language contained in Fla. Stat. § 627.727. A clear contractual provision, however, would be more likely to succeed than an argument only based on the statutory language.

Next, while there are no Florida cases directly addressing whether public policy would permit such a provision, it has arisen in other jurisdictions. For example, in *Dwight v. Tennessee Farmers Mutual Insurance Co.*, the plaintiff sought payment from a UMC even though she had failed to pursue a workers' compensation claim.[7] The insurance policy

between the UMC and the plaintiff included a provision that compensation under that policy would be reduced by the amount paid or payable under any workers' compensation law.[8] Even though the plaintiff had already waived her workers' compensation claim by the time of the ruling, the court permitted a setoff of the amount that the plaintiff *could* have received from her WCI because those benefits had been available.[9] In explaining the policy because its ruling, the court noted, "[t]he plaintiff's unilateral waiver of benefits may not operate to increase the contractual obligations of the [UMC]."[10]

Moreover, prohibiting UMCs from setting off their damages by the amount that could and should have been paid by a WCI would force UMCs to increase rates for fear that they would be required to cover expenses and risks that they reasonably believed would be covered by WCIs. Such a rule would thereby increase the cost of uninsured motorist coverage, and decrease the availability of uninsured motorist insurance for those individuals who truly need coverage for the expenses it was designed to cover. Thus, it should not be the responsibility of a UMC to cover for expenses that ought to be paid by a WCI. Therefore, it should not violate public policy to require a party to seek the highest amount of coverage possible from a WCI before demanding payment from a UMC. As a result, UMCs should adopt clear language in their policies that provides for a setoff of workers' compensation benefits that both are available and were available in order to increase any potentially obtainable setoff of workers' compensation benefits.

(Endnotes)

1 Although many UMC policies contain a clause that UMCs will not pay for any element of loss if a person is entitled to receive payment for that loss by a WCI, this clause may not be broad enough to cover elements of loss for which a person *had been* entitled to receive payment from a WCI.

2 Fla. Stat. § 627.727 (2010).

3 *See National Union Fire Ins. Co. of Pittsburgh v. Blackmon*, 754 So. 2d 840 (Fla. 1st DCA 2000); *see also Lobry v. State Farm Mut. Auto. Ins. Co.*, 398 So. 2d 877 (5th DCA 1981).

4 *See USAA Cas. Ins. Co. v. McDermott*, 929 So. 2d 1114 (2nd DCA 2006).

5 *See id.* at 1119.

6 *See id.*

7 *See Dwight v. Tennessee Farmers Mutual Insurance Co.*, 701 S.W.2d 621 (Tenn. Ct. App. 1985).

8 *See id.* at 622.

9 *See id.*

10 *Id.*