**III. Litigating the Uninsured/Underinsured Motorist Claim**

1. **UM Coverage Obligations**
2. **The Statute**

UM is “Statutory coverage”

So if it’s required or forbidden by the statute, the statute controls

If it’s not required or forbidden by the statute, contract principles apply

Much amended statute

UM is found in 36 O.S. § § 3635-3638

Under the heading: “Genetic Nondiscrimination in Insurance Act” Where else would it be? If I forget, ask me about a case we won on the basis of this heading.

3635 just defines “motor vehicle” as it pertains to UM:

The term "motor vehicle" as used in this act means and includes a self-propelled land motor vehicle designed for use principally upon public roads or streets but does not mean or include crawler or farm-type tractors, farm implements and, if not subject to motor vehicle registration, any equipment which is designed for use principally off public roads and streets.

**No surprises there: vehicles designed for on-road use**

3635.1 sets expiration time for UM policies at 12:01 “Standard Time” on the expiration date

3637 excepts policies covering “motor carriers” from the requirement of an offer of UM

But only where the motor carrier provides workers’ compensation for its drivers

So, the “nuts and bolts” are found in **3636 (We’ll dissect each section further below):**

A. No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection B of this section.

B. The policy referred to in subsection A of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall be not less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47 of the Oklahoma Statutes, as the same may be hereafter amended; provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured. Policies issued, renewed or reinstated after November 1, 2014, shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier. The uninsured motorist coverage shall be upon a form approved by the Insurance Commissioner as otherwise provided in the Insurance Code and may provide that the parties to the contract shall, upon demand of either, submit their differences to arbitration; provided, that if agreement by arbitration is not reached within three (3) months from date of demand, the insured may sue the tort-feasor.

C. For the purposes of this coverage the term "uninsured motor vehicle" shall include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency. For the purposes of this coverage the term "uninsured motor vehicle" shall also include an insured motor vehicle, the liability limits of which are less than the amount of the claim of the person or persons making such claim, regardless of the amount of coverage of either of the parties in relation to each other.

D. An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within one (1) year after such an accident. Nothing herein contained shall be construed to prevent any insurer from according insolvency protection under terms and conditions more favorable to its insured than is provided hereunder.

E. For purposes of this section, there is no coverage for any insured while occupying a motor vehicle owned by, or furnished or available for the regular use of the named insured, a resident spouse of the named insured, or a resident relative of the named insured, if such motor vehicle is not insured by a motor vehicle insurance policy.

F. In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer. Provided, however, with respect to payments made by reason of the coverage described in subsection C of this section, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor. Provided further, that any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage. Provided further, that if a tentative agreement to settle for liability limits has been reached with an insured tort-feasor, written notice shall be given by certified mail to the uninsured motorist coverage insurer by its insured. Such written notice shall include:

1. Written documentation of pecuniary losses incurred, including copies of all medical bills; and

2. Written authorization or a court order to obtain reports from all employers and medical providers. Within sixty (60) days of receipt of this written notice, the uninsured motorist coverage insurer may substitute its payment to the insured for the tentative settlement amount. The uninsured motorist coverage insurer shall then be entitled to the insured's right of recovery to the extent of such payment and any settlement under the uninsured motorist coverage. If the uninsured motorist coverage insurer fails to pay the insured the amount of the tentative tort settlement within sixty (60) days, the uninsured motorist coverage insurer has no right to the proceeds of any settlement or judgment, as provided herein, for any amount paid under the uninsured motorist coverage.

G. A named insured or applicant shall have the right to reject uninsured motorist coverage in writing. The form signed by the insured or applicant which initially rejects coverage or selects lower limits shall remain valid for the life of the policy and the completion of a new selection form shall not be required when a renewal, reinstatement, substitute, replacement, or amended policy is issued to the same-named insured by the same insurer or any of its affiliates. Any changes to an existing policy, regardless of whether these changes create new coverage, do not create a new policy and do not require the completion of a new form.

After selection of limits, rejection, or exercise of the option not to purchase uninsured motorist coverage by a named insured or applicant for insurance, the insurer shall not be required to notify any insured in any renewal, reinstatement, substitute, amended or replacement policy as to the availability of such uninsured motorist coverage or such optional limits. Such selection, rejection, or exercise of the option not to purchase uninsured motorist coverage by a named insured or an applicant shall be valid for all insureds under the policy and shall continue until a named insured requests in writing that the uninsured motorist coverage be added to an existing or future policy of insurance.

H. The following are effective on forms required on or after April 1, 2005. The offer of the coverage required by subsection B of this section shall be in the following form which shall be filed with and approved by the Insurance Commissioner. The form shall be provided to the proposed insured in writing separately from the application and shall read substantially as follows:

OKLAHOMA UNINSURED MOTORIST COVERAGE LAW

Oklahoma law gives you the right to buy Uninsured Motorist coverage in the same amount as your bodily injury liability coverage. THE LAW REQUIRES US TO ADVISE YOU OF THIS VALUABLE RIGHT FOR THE PROTECTION OF YOU, MEMBERS OF YOUR FAMILY, AND OTHER PEOPLE WHO MAY BE HURT WHILE RIDING IN YOUR INSURED VEHICLE. YOU SHOULD SERIOUSLY CONSIDER BUYING THIS COVERAGE IN THE SAME AMOUNT AS YOUR LIABILITY INSURANCE COVERAGE LIMIT.

Uninsured Motorist coverage, unless otherwise provided in your policy, pays for bodily injury damages to you, members of your family who live with you, and other people riding in your car who are injured by: (1) an uninsured motorist, (2) a hit-and-run motorist, or (3) an insured motorist who does not have enough liability insurance to pay for bodily injury damages to any insured person. Uninsured Motorist coverage, unless otherwise provided in your policy, protects you and family members who live with you while riding in any vehicle or while a pedestrian. THE COST OF THIS COVERAGE IS SMALL COMPARED WITH THE BENEFITS!

You may make one of four choices about Uninsured Motorist Coverage by indicating below what Uninsured Motorist coverage you want:

\_\_\_\_ I want the same amount of Uninsured Motorist coverage as my bodily injury liability coverage.

\_\_\_\_ I want minimum Uninsured Motorist coverage $25,000.00 per person/$50,000.00 per occurrence.

\_\_\_\_ I want Uninsured Motorist coverage in the following amount:

$\_\_\_\_\_\_\_\_\_\_\_\_\_\_ per person/$\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ per occurrence.

\_\_\_\_ I want to reject Uninsured Motorist coverage.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Proposed Insured

THIS FORM IS NOT A PART OF YOUR POLICY AND DOES NOT PROVIDE COVERAGE.

I. The Insurance Commissioner shall approve a deviation from the form described in subsection H of this section if the form includes substantially the same information.

J. A change in the bodily injury liability coverage due to a change in the amount or limits prescribed for bodily injury or death by a policy meeting the requirements of Section 7-204 of Title 47 of the Oklahoma Statutes shall not be considered an amendment of the bodily injury liability coverage and shall not require the completion of a new form.

K. On the first renewal on or after April 1, 2005, the insurer shall change the Uninsured Motorist coverage limits to $25,000.00 per person/$50,000.00 per occurrence and charge the corresponding premium for existing policyholders who have selected Uninsured Motorist coverage limits less than $25,000.00 per person/$50,000.00 per occurrence. At the first renewal on or after April 1, 2005, the insurer shall provide existing policyholders who have selected Uninsured Motorist coverage limits less than $25,000.00 per person/$50,000.00 per occurrence a notice of the change of their Uninsured Motorist coverage limits and that notice shall state how such policyholders may reject Uninsured Motorist coverage limits or select Uninsured Motorist coverage with limits higher than $25,000.00 per person/$50,000.00 per occurrence. No notice shall be required to existing policyholders who have rejected Uninsured Motorist coverage or have selected Uninsured Motorist coverage limits equal to or greater than $25,000.00 per person/$50,000.00 per occurrence. For purposes of this subsection an existing policyholder is a policyholder who purchased a policy from the insurer before April 1, 2005, and such policy renews on or after April 1, 2005.

1. **The Statute Dissected**

Subsection A: *No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection B of this section.*

**This means every automobile liability policy “issued, renewed, or extended” in Oklahoma (aside from excepted motor carrier policies) must come with an “offer” of UM**

**The offer must be in writing (see subsection H)**

**Caselaw tells us the carrier (or agent) need not explain the benefits of UM**

Subsection B: *The policy referred to in subsection A of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall be not less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47 of the Oklahoma Statutes, as the same may be hereafter amended; provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured. Policies issued, renewed or reinstated after November 1, 2014, shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier. The uninsured motorist coverage shall be upon a form approved by the Insurance Commissioner as otherwise provided in the Insurance Code and may provide that the parties to the contract shall, upon demand of either, submit their differences to arbitration; provided, that if agreement by arbitration is not reached within three (3) months from date of demand, the insured may sue the tort-feasor.*

**(1) UM pays the damages an insured would otherwise have been able to collect from the liability coverage of an uninsured tortfeasor or a hit-and-run driver**

**(2) for bodily injury, sickness, disease, death**

**So, not property damage**

**(3) coverage must be no less than the $25,000 per person, $50,000 per occurrence limits required for liability coverage**

**(4) UM must be offered in higher amounts, up to a maximum set by the insured’s own liability limits**

**For this reason, we often recommend that people with little need to protect assets through liability coverage nevertheless take higher liability limit so they can also increase their UM**

**Still hear that many agents tell insureds no need for UM if they have health insurance—ouch!**

**(5) by 2014 amendment, stacking (of multiple UM limits) is no longer allowed unless the policy expressly states that the policy stacks (this is a game-changer)**

**(6) lets the insurance company write coverage that allows either party to demand arbitration**

Subsection C: *For the purposes of this coverage the term "uninsured motor vehicle" shall include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency. For the purposes of this coverage the term "uninsured motor vehicle" shall also include an insured motor vehicle, the liability limits of which are less than the amount of the claim of the person or persons making such claim, regardless of the amount of coverage of either of the parties in relation to each other*.

**(1) Defines “uninsured” to also include “insured by insolvent insurance company”**

**(2) Defines “uninsured” to also mean “underinsured”**

**(3) reverses cases that said UM does not apply if UM limits match tortfeasor liability limits**

Subsection D: *An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within one (1) year after such an accident. Nothing herein contained shall be construed to prevent any insurer from according insolvency protection under terms and conditions more favorable to its insured than is provided hereunder.*

**Limits UM based on insolvency of tortfeasor coverage to insolvency within one year of the wreck**

***Maybe:* see *Dicta in Burch v. Allstate:*** The dissent argues that in enacting § 3636 (D), the Legislature explicitly limited the use of UM coverage as a substitute for liability coverage to the situation in which the liability carrier becomes insolvent within one year after the date of the accident. The dissent is mistaken. Subsection (D) merely deals with an insolvent insurer as a special subclass of available UM insurance from indemnitors who become insolvent. It does not support the dichotomous treatment of claims generated by uninsured and underinsured tortfeasors.

**Not sure what that means but seems to say the 1-year language does not mean what we have heard.**

Subsection E: *For purposes of this section, there is no coverage for any insured while occupying a motor vehicle owned by, or furnished or available for the regular use of the named insured, a resident spouse of the named insured, or a resident relative of the named insured, if such motor vehicle is not insured by a motor vehicle insurance policy.*

**New amendment statutory overruling of the old “UM mantra” (“one defined as UM insured, cannot remove UM by virtue of occupancy of certain vehicles”) of *Cothren, Shepard, Wendt***

**No UM when UM insured occupies car that is not insured (This is further discussed in a later section)**

Subsection F: *In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer. Provided, however, with respect to payments made by reason of the coverage described in subsection C of this section, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor. Provided further, that any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage. Provided further, that if a tentative agreement to settle for liability limits has been reached with an insured tort-feasor, written notice shall be given by certified mail to the uninsured motorist coverage insurer by its insured. Such written notice shall include:*

*1. Written documentation of pecuniary losses incurred, including copies of all medical bills; and*

*2. Written authorization or a court order to obtain reports from all employers and medical providers. Within sixty (60) days of receipt of this written notice, the uninsured motorist coverage insurer may substitute its payment to the insured for the tentative settlement amount. The uninsured motorist coverage insurer shall then be entitled to the insured's right of recovery to the extent of such payment and any settlement under the uninsured motorist coverage. If the uninsured motorist coverage insurer fails to pay the insured the amount of the tentative tort settlement within sixty (60) days, the uninsured motorist coverage insurer has no right to the proceeds of any settlement or judgment, as provided herein, for any amount paid under the uninsured motorist coverage.*

**(1) gives UM carrier paying benefits right of subrogation against tortfeasor**

**You must understand the right of subrogation (discussed further in later section, but there are many ways to get sued for MP for destroying right of subrogation)**

**(2) right of subrogation limited to assets of insolvent carrier where tortfeasor has insolvent coverage**

**(3) creates requirement where tortfeasor offers limits that UM carrier either waive right of subrogation or “substitute” the tortfeasor’s payment in order to retain right of subrogation**

**(4) tells you what to put in the letter giving “notice” of the limits offer in order to trigger the duty to waive or substitute**

**It’s a list. Do what it says. That is what lists are for.**

**“Waiving” UM Coverage**

Statute requires an “offer” of UM

Minimum amount $25,000 to a maximum of the policy liability limit

Insured may waive UM, but must be in writing

Statute provides example form. Must substantially comply

Form must tell insured about purpose of UM (uninsured and underinsured coverage)

And must state premium for minimum, maximum, and other chosen amount

No requirement of explanatory offer or recommendation

A named insured (used to be all named insureds) must sign the form to reject coverage

If no signed form, coverage imputed by operation of law

Imputed coverage will be minimum statutory coverage

Unless can show greater amount would have been accepted if offered

What about electronic signature?

Probably okay under UCC (12A O.S. 15-101)

Used to be had to get new selection/rejection form with any change in policy—named insured, adding or substituting vehicles

No longer, by 2009 amendment, form is good until revoked in writing by insured

Open question: will imputed UM stack if policy language supports stacking?

Won’t matter for long as stacking is practically extinct

Subsection G: *A named insured or applicant shall have the right to reject uninsured motorist coverage in writing. The form signed by the insured or applicant which initially rejects coverage or selects lower limits shall remain valid for the life of the policy and the completion of a new selection form shall not be required when a renewal, reinstatement, substitute, replacement, or amended policy is issued to the same-named insured by the same insurer or any of its affiliates. Any changes to an existing policy, regardless of whether these changes create new coverage, do not create a new policy and do not require the completion of a new form.*

*After selection of limits, rejection, or exercise of the option not to purchase uninsured motorist coverage by a named insured or applicant for insurance, the insurer shall not be required to notify any insured in any renewal, reinstatement, substitute, amended or replacement policy as to the availability of such uninsured motorist coverage or such optional limits. Such selection, rejection, or exercise of the option not to purchase uninsured motorist coverage by a named insured or an applicant shall be valid for all insureds under the policy and shall continue until a named insured requests in writing that the uninsured motorist coverage be added to an existing or future policy of insurance.*

**(1) Lets “any named insured” reject UM (this change still creates confusion)**

**(2) Makes signed rejection good for all time, until changed by insured in writing (also a major change, that causes consternation)**

**No longer need new rejection with changes or additions to policy**

Subsection H: (is the suggested form for carriers to offer UM).

Subsection I: *The Insurance Commissioner shall approve a deviation from the form described in subsection H of this section if the form includes substantially the same information.*

Subsection J: *A change in the bodily injury liability coverage due to a change in the amount or limits prescribed for bodily injury or death by a policy meeting the requirements of Section 7-204 of Title 47 of the Oklahoma Statutes shall not be considered an amendment of the bodily injury liability coverage and shall not require the completion of a new form.*

Subsection K: **(Raised the limits from 10,000/20,000 to 25,000/50,000)**

**Use the version of the statute in force when policy issued or last renewed before the wreck**

Oklahoma UM statute only applies to policy “issued in” Oklahoma

Unless other state’s law offends Oklahoma public policy

or Oklahoma has greater relationship to the transaction

Creates problem when people move here and have wreck before new policy issue

Or wrecks with people passing through Oklahoma

*Leritz v. Yates,* asking to apply law of Oklahoma to Kansas policy due to “extraterritorial clause.” We won, but on a much narrower basis.

**B. Interpreting Policy Exclusions**

Because UM is “statutory coverage” exclusion must be condoned by the statute

So, the exclusion found in Subparagraph E is valid: no UM when occupying uninsured vehicle if it is owned by or available for the regular use of the injured person

Also, exclusion for injury caused by insured’s own negligence

Or caused by negligence of a child (who was incapable of legal negligence)

“Named Driver” exclusion has been held valid in *O’Brien v. Dorrough and Equity Fire and Casualty C.,* 1996 OK CIV APP 25, 928 P.2d 322, but invalid in *Alternative Medicine of Tulsa v. Cates,* 2006 OK CIV APP 65, 136 P.3d 716 (to the extent it prevents recovery of at least the minimum limits under some policy (liability or UM)

Policy “step-down” that steps UM down to compulsory limits when liability is reduced to minimum limits when driven by “permissive user” rather than named insured—since UM cannot exceed liability limit

Most other exclusions have been disavowed:

“Other insurance” clause (*Keel v. MFA,* 1976 OK 86, 553 P.2d 153) excluded coverage under multiple policies (said only one would cover)

“Limit of Liability” clause that prohibited stacking—invalid where multiple premium charged

“Actual Physical Contact” rule—Court rules hit and run in the statute is broad enough to cover when one vehicle runs another off the road, but flees

Clause that permitted offset for medpay—invalid as to named insured and resident relatives

But valid as to Class II insureds (this was based more on a medpay statute (36 O.S. 6092) than on the UM statute

Offset against own UM for WC payments

And the converse, offset of WC benefits for UM paid

Reversed by statue in the new WC code, as to employer provided UM (85a O.S. section 43)

Exclusion barring UM where SOL has run on TF (as long as no affirmative act by insured to destroy subrogation right, simply letting the SOL run does not prevent UM recovery)

Exclusion from definition of “uninsured” vehicle (underinsured really), the insured vehicle—this is what allows passengers to “double dip,” to collect both the UM and liability on the same policy

Policy definition that excludes from “uninsured” government owned vehicles

**C. Finding Sources and Limits of Coverage**

1. **What is Covered**

UM protects “persons insured thereunder”

Insured under the liability? One would think

Apparently not always (*Graham v. Travelers,*2002 OK 95, 61 P.3d 225; *NAICO v. Vallion,* 2008 OK CIV APP 41, 183 P.3d 175 employees covered under liability not covered by UM)

This can be a problem with small business which insures multi-use cars under business policy

Business is “named insured” and businesses do not have resident relatives

Add owners as additional named insured

Sometimes can reform business policy after wreck if show agent knew of intent to provide family and business coverage under single policy

Named insured must have insurable interest in the car (*Farmers v. Thomas,* 1987 OK 84, 743 P.2d 1080)

UM covers (because liability does), named insureds and resident relatives as “Class I insureds” and occupants of the insured car as “Class II insureds”

Class I insurance is “personal” meaning it follows the insured wherever he may go—Florida case: “even while sitting on porch rocking chair”

Family member must be living in household to be UM insured

Family member means: family member: may be spouse, child, sibling, grandchildren (or grandparent), adopted family, step-family, even perhaps even an unrelated “ward” (*Houston v. National General,* 817 F.2d 83 (10th Cir. 1987)—fact question whether unmarried mother of named insured’s grandchild was “ward” as defined in policy)

May be “family member” residing in more than one household:

Children of divorce

Kids away at school, or on military assignment (see Widdis *Uninsured and Underinsured Motorist Insurance,* Sections 4.10-4.13)

Used to be with very limited exception, resident family members were covered

Exception (*Shepard v. Farmers,* 1983 OK 103, 678 P.2d 250)—those who own their own cars

Why? They have had opportunity to purchase own coverage

ONLY IF DEFINED ON THAT BASIS OUT OF DEFINITION OF INSURED

So if “resident relative” is defined as one who is not an “insured” no UM

But if defined as resident relative and insured unless in an uninsured vehicle—illegal “diluting” of UM

**New amendment statutory overruling of the old “UM mantra” (“one defined as UM insured, cannot remove UM by virtue of occupancy of certain vehicles”) of *Cothren, Shepard, Wendt***

**No UM when UM insured occupies car that is not insured**

**Misinterpreted by COCA to mean not insured for UM (*Conner v. America First Ins. Co.,* 2009 OK CIV APP 28, 209 P.3d 850) *no coverage on parent’s policy for “resident” son, where son had liability but not UM on occupied motorcycle***

**Sort of corrected by *Morris v. America First Ins. Co.,* 2010 OK 35, 240 P.3d 661. Did not overrule *Conner*** **but limits that holding to where the occupant has no other UM. So if resident son had UM on his other car (a semi), but not on my otherwise insured motorcycle, his parents UM will extend while he is on the motorcycle**

**Logic of these cases applied to the language of the amendment, there is no “Class I” UM *even for named insured* when occupying one car that has no UM, though he has UM on a policy on another car**

**Sorry, these cases maketh no sense**

Class II coverage: can get creative with “occupancy” coverage:

Is one still an “occupant” when out the car, pumping gas, changing a tire, or even walking over to assist another driver? Perhaps.

1. **Hit and Run Coverage**

UM statute includes “hit and run” driver in definition of “uninsured”

Hit and run coverage applies where owner, but not driver, is identified.

Since owner may or may not be responsible *Brown v. USAA,* 1984 OK 55, 684 P.2d 1195

Insured has no duty to identify hit and run driver *(Brown*)

Per caselaw, hit and run does not require “actual contact,” but includes so-called phantom drivers

1. **"Arising out of Ownership, Maintenance or Use?"**

Need not be a classic “car accident”

Don’t limit consideration to “driving”

UM covers “persons insured thereunder who are legally entitled to recover damages from owners or operators”

Includes liability arising from “ownership” and “maintenance”

Operator of bucket truck was covered when a badly maintained bucket collapsed

Bad maintenance need not be contemporaneous with the wreck (*Ply v. National Union Fire Ins. Co.,* 2003 OK 97, 81 P.3d 643)

Police officer covered when he got out of his car and was shot by a criminal

(may have been fact question, actually)(*Willard v. Kelley*, 1990 OK 127, 803 P.2d 1124—useful case for both the question of what is “occupancy” as the officer was standing beside his cruiser at the time of injury and what is “injury caused by use of an uninsured vehicle” as the injury in this case was that the driver of the insured car stopped the car and shot officer Willard)

The “act” must be tied to a “transportation use”

Get creative with this requirement

Cases all over the map:

Murrah bombing—no (*Mayer v. State Farm Ins. Co.,* 1997 OK 67, 944 P.2d 288)

Burned in trunk—no (*Safeco v Sanders,* 1990 OK 129, 803 P.2d 688)

Shooting robber—yes—using car to get away (*Willard v. Kelley,* 1990 OK 129, 803 P.2d 1124)

Drive-by-shooting—maybe—if can show shooter exercised “control” of vehicle (*Byus v. Mid-Century Ins. Co.,* 1996 OK 25, 912 P.2d 845)

Drive-by-shooting—can be covered by hit and run coverage (*Hulsey v. Mid-America Preferred,* 1989 OK 107, 777 P.2d 932)

Murder of driver by passenger—no

Murder of driver to take car--no

Driver hits piece of tire left in road by semi

With proper maintenance, semi tires do not disintegrate on roadway

So injured party tapped their UM without ever knowing where the tire part came from

Operator of bucket on boom truck

Road worker occupying machine being towed by insured dump truck

“In, on, getting in, getting on”

Will depend on language of the policy rather than statute

No “bright line test” (*Wickham v. Equity F&C Co.,* 1994 OK CIV APP 148, 889 P.2d 1258; *Willard v. Kelley,* (1990 OK 129, 803 P.2d 1124)

Translation: somewhat close to the damn car

Good Samaritan who stops to help another motorist change a tire covered under motorist’s policy

Before wreck, had looked through trunk of insured car, was working on the tire, and was next to the car—that was “occupancy”

We had a case where a flagman was walking behind a dumptruck

That was arguably “occupancy”

**D. Valuing/Maximizing the Claim**

1. First maximize damages just as any other claim: a. past and future medical, wage, pain and mental and physical suffering damages; b. disability or impairment; c. Other damages.
2. Find all available coverages: a. liability coverages on car, driver, employer, other at-fault parties; b. Umbrella policies on the above; c. UM under various policies (see next section); d. Stacking, if available; e. both liability and UM on car for injured passenger (subject to drop-down provisions); f. don’t for get medpay (try to get them to hold medpay until after you resolve claim so your client gets benefit of medpay and provider discounts (and remember you can’t take a fee on uncontested medpay).
3. **Stacking**

Is mostly a thing of the past—2014 amendment eliminated stacking unless expressly provided in the policy

USAA is one of few offering intentional stacking, but is it “expressly stated”?

For other policies, look to see if the policy charges a UM premium that changes depending on how many vehicles are insured

Most policies now charge a “per policy” premium for UM rather than per car

That will likely not stack (unless poorly written policy creates ambiguity there)

If premium changes based on number of cars (one company charged a “multi-vehicle surcharge” at one point, will that let you stack? I doubt it.

Does the anti-stacking amendment prevent “double dip” stacking,

Where a passenger can collect both liability and UM? We don’t know.

**E. Practice and Procedure**

1. **Does the UM Apply to the Collision?**
2. First ask if the TF is uninsured or underinsured (has liability limits that are less than your client’s personal injury damages (measured the same as would be measured against at fault diver liability coverage)).

If no, do not pass go.

If yes, find that UM . . .

1. Bodily injury must be to the insured

child living with UM grandmother gets no UM for death of father who was not an insured (*London v. Farmers Ins. Co. Inc.,*2003 OK CIV APP 10, 63 P.3d 552)

1. **Which Policies Apply?**

Only look to auto policies in determining insured status of TF—need not include umbrella

Also, if you have car wreck that also has, say, seatbelt case, UM kicks in once auto coverage is exceeded (not collected, just exceeded)

Need not include liability policies of other defendants

Important—10th Cir. case says if any TF is un- or underinsured, UM is available (*Everaard v. Hartford,* 842 F.2d 1186 (1988)

Policy on the injured person:

Named insured?

Resident family member of someone with UM

Policy on the car

Other policy of the driver of the car if passenger injured (*Russell v. American States Ins. Co,* 813 F.2d 306 (10th Cir. 1987)(driver, unrelated to injured passenger, was using borrowed car. Driver’s policy on another car made a borrowed car “an insured vehicle”—passenger collected UM on own policy (as Class I), on, policy on car (as Class II, and on driver’s separate policy (as Class II insured) (and could have collected on some other policy if a resident relative in a household with a UM policy)

Be sure to obtain the signed rejection form for any of these policies that claim no UM.

If no form, then $25,000 imputed UM

Verify signatures

(signature photo)

Remember, spouse passenger can collect both UM and liability when spouse is driving

Policy may have step-down, or prevent recovery of both

Probably permissible under caselaw.

If your claim exceeds OGTCA limits, then governmental entity is “uninsured” to the extent damages exceed the OGTCA limits (*Karlson v. City of OKC,* 1985 OK 45, 711 P.2d 72)

But, OGTCA entity is not “uninsured” simply because OGTCA notice/filing deadlines have run

Workers comp bar of exclusive remedy does not prevent recovery of UM (*Barfield v. Barfield,* 1987 OK 72, 742 P.2d 1107; *Torres v. KC Fire and Marine Ins. Co.,* 1993 OK 32, 849 P.2d 407)

Also, no subrogation/offset for UM claim also covered by WC (unless employer provided UM)

All UM is primary, “first dollar,” coverage—UM must evaluate and, once damages exceed liability coverage, pay the entire loss, up to the UM limits, and then seek to recover subrogation from the tortfeasor. *Burch v. Allstate,* 1998 OK 129, 977 P.2d 1057; *Mustain v. USF&G Co.,* 1996 OK 98, 925 P.2d 533

So, 100,000 loss, $25,000 TF limits, 200,000 UM: UM pays $100,000, not $75,000 (but then gets the $25,000 TF limits if offered)

Cannot force insured to pursue tortfeasor (though you may need to if not enough UM). *Roberts v. Mid-Continent Cas. Co.,* 1989 OK CIV APP 92, 790 P.2d 1121; *Everaard v. Hartford,* 842 F.2d 1186 (10th Cir. 1988).

If multiple UM carriers, all have duty to pay first, resolve priority amongst themselves. *Pentz v. Davis,* 1996 OK 89, 927 P.2d 538

1. **Does the injury arise from the negligent ownership, maintenance, or use of a motor vehicle (we’ll get to this later)**
2. **What is Due?**

UM need not pay “undisputed amount” without release as long as it has paid special damages (*GEICO v. Quine*, 2009 WL 2497305 (W.D. Okla.)

All survivors of deceased UM insured must share single “per person” limit

Intentional acts may be covered (for instance, the cop who was shot by a motorist), since the question of whether act is “intentional” or not is viewed from perspective of insured

Punitives not covered—defeats the purpose to deter and punish if allowed to shift to insurance

(*Aetna v. Craig,* 1989 OK 43, 771 P.2d 212)

1. **Avoid Subrogation Pitfalls**

DO NOT SETTLE WITH TF FOR LESS THAN LIABILITY LIMITS

If you do, by definition you do not have a UM claim (*Porter v. State Farm,* 2010 OK CIV APP 8, 231 P.3d 691)

DO NOT SETTLE CLAIM WITH TF WITHOUT GETTING UM TO WAIVE SUBROGATION—YOU WILL DESTROY YOUR UM CLAIM (*Porter v. MFA,* 1982 OK 23, 643 P.2d 302)—follow the statute and require waiver or substitution

DO NOT EXECUTE A “COVENENT NOT TO SUE” WITH TF—THAT DESTROYS UM

(*Frey v. Independence Fire & Cas. Co.,* 1985 OK 25, 689 P.2d 17)

1. **What should be Offered?**

UM must offer its own evaluation of the claim

Bad faith otherwise *Newport v. USAA,* 2000 OK 59, 11 P.3d 190)

But see *Geico v. Quine,* 2011 OK 88 (not bad faith for UM to withhold payment of disputed general damages where special damages already recovered under liability or other policy.

1. **Standing**

Standing to sue: named insured, resident family member, occupant insured

All also have standing to sue for bad faith (*Townsend v. State Farm,* 1993 OK 119, 860 P.2d 236)

*Ouelette v. State Farm Mut. Ins. Co.,* 1994 OK 79, 918 P.2d 1363, holds that insured who is not next-of-kin lacks standing to sue UM carrier in death claim.

1. **How to Sue**

To get to the UM, can: (1) Sue the UM

(2) join the TF in that suit

(3) sue only the TF and put UM on “notice” which will bind UM if they do not intervene

(4) sue only the TF and not put UM on notice. Don’t do this—UM will not be bound by judgment

*Keel v. MFA,* 1976 OK 86, 553 P.2d 153

UM cannot force you to sue TF if damages exceed TF coverage

That’s because UM is “first dollar coverage”—once damages *exceed* TF coverage

not entitled to credit for liability limits but must subrogate to recover from TF

*Burch v. Allstate,* 1998 OK 129, 977 P.2d 1057

1. **Statute Problems**

Running of TF SOL does not prevent UM claim

But also does not make an otherwise insured TF “uninsured” (*Kavanaugh v. Maryland Ins.Co.,* 1997 OK CIV APP 41, 943 P.2d 629; *Boyer v. OFBMIC,* 1995 OK CIV APP 102, 902 P.2d 83)

Remember, SOL on UM runs five years from date of denial

Not date of wreck

Unless someone really screws up, SOL almost never runs on UM claim since the SOL does not start until a claim has been submitted and denied

1. **Bifurcation**

Bifurcation: if UM agrees to be bound by judgment against TF, may bifurcate to let case go against TF only to avoid prejudice of jury knowing there is coverage on the hook (*Tidmore v. Fullman,* 1982 OK 73, 646 P.2d 1278)

Cannot bifurcate UM claim for UM bad faith claim (*Buzzard v. McDanel,* 1987 OK 28, 736 P.2d 157)

1. **No Credit to Tortfeasor for UM Payment**

UM is “collateral source” so TF not entitled to credit for UM payment (*Weatherly v. Flourney,* 1996 OK CIV APP 109, 929 P.2d 296)

**F. Complexities of UM**

1. **Passenger Insured Under Driver’s Policy on Uninvolved Car**

*Russell v. American States Ins. Co,* 813 F.2d 306 (10th Cir. 1987),suggests an unusual source for passenger UM coverage. In *Russell,* a passenger was killed in a wreck. The driver, unrelated to the deceased, was using someone else’s car at the time of the wreck. The deceased collected liability money from the car policy and from the driver’s policy, and collected UM as a Class I insured (named insured or resident relative) from his dad’s policy (on a different car).

The owner of the car had UM, on the policy on the car, and the driver, had UM on his own, separate policy, both of the policies were with American States. The declaratory action was to decide whether the deceased was entitled to UM under these two policies. We would normally expect the policy on the car to provide UM for the passenger as a Class II insured (insured by virtue of “occupying” the insured car). The District Court held (erroneously) that policy did not cover the passenger because the policy definition of an “uninsured vehicle” did not include an “insured highway vehicle.” That would seem to negate the requirement of the UM statute that coverage extend to “underinsured” cars. Indeed, no big surprise, that is what the Court of Appeals decided. [[1]](#footnote-1)

More interesting here, though, is the UM on the driver’s policy. Remember, the driver did not own the car and so his policy was on a noninvolved auto, such that the passenger would not be a typical class II “occupant” insured. That policy, though, had a provision that defined an “insured highway Vehicle” to include a car “being operated by the named insured . . . or a resident [relative].” Since the car “operated by” the named insured was thus an insured vehicle, the deceased passenger became a Class II insured by virtue of occupancy of an “insured vehicle.”[[2]](#footnote-2) From experience, somewhere around half of the policies out there have this language.

1. ***Bohannan, Bernal,* and *Leritz v. Yates* and the “Place of Performance”**

*Bohannan v. Allstate Ins. Co.,* 1991 OK 64, 820 P.2d 787, has been the go-to case for deciding UM choice of law questions for more than 20 years. When I was with Rex we tried to change that. *Bohannan,* you may recall, holds that the general rule, absent a public policy conflict, is that the law of the place where the insurance contract is made governs the choice of law determination as it relates to UM coverage. with *Leritz v. Yates,* we asked the Court to change this rule. *Leritz* asks whether a Kansas citizen can stack his Kansas limits for a wreck in Oklahoma.

In *Bohannan,* the Court ruled as it did because of a choice of law statute directed at deciding contracts, 15 O.S. § 162:

A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

In *Bohannan,* the Court jump right over the “place of performance,” to apply the law of the place where the contract was made. Almost universally, however, insurance policies have a provision that makes them apply to “accidents and losses which occur within the United States, its territories or possessions. We argued in *Leritz,* that provision thus defines the “place of performance” (the United States, its territories or possession), such that the statutory preference for the law of the place of performance trumps the law of the place where the policy “is made.” This interpretation appears to be the majority rule, at least in the few states to have adopted the particular choice of law provision, which is from the old Field Codes. In fairness to *Bohannan* and *Bernal v. Charter Mut. Ins. Co.,*2009 OK 28, 209 P.3d 309, this argument was not raised in those cases. We won the battle, but not the war. The Court decided the matter on a much narrower basis. Now, with the change to stacking law, this issue is moot at least with respect to stacking cases which is where we saw the most dramatic difference in law between various states.

1. **Oklahoma Governmental Tort Claims Act and UM Coverage**

There are several ongoing discussions about the interaction between UM and the Governmental Tort Claims Act. 51 O.S. § 151, et seq.

First, the easy one. The OGTCA exempts governmental entities from “any loss to any person covered by any workers’ compensation act . . . .” 51 O.S. § 155(14). The exemption applies to both workers’ compensation claims by governmental employees as well as those by non-governmental employees. *Smith v. State ex rel. DOT,* 1994 OK 61, 875 P.2d 1147. There is a silver lining, though, in an auto case. The OGTCA exemption makes the governmental entity “uninsured” for purposes of UM. *Karlson v. City of OKC,* 1985 OK 45, 711 P.2d 72.

Now the trickier question: Is an OGTCA entity entitled to a set-off for UM payments made? I’m told a lot of OGTCA entities cite the exemption for “any claim based on the theory of indemnification or subrogation,” (51 O.S. § 155(28)) for this proposition. That provision seems clearly only to preclude a subrogated entity from subrogating against the GTCA entity. But apparently this bluff is working. I don’t know how they are still doing this in the face of *Salazar Roofing & Const. Co. v. City of OKC,* 2010 OK 34, 249 P.3d 950, but apparently they still are. See, e.g., *Moore v. Park View Hospital Trist Authority, et al.,* S. Ct. Case No. 112,134 (Okla. Ct. App. 2014 (not for publication). A related argument is based upon a stilted reading of 51 O.S. § 158, which gives a governmental entity a set when *its own coverage* pays a claim. The OGTCA entity claims Subparagraph E creates the setoff:

The state or a political subdivision shall not be liable for any costs, judgments or settlements paid through an applicable contract or policy of insurance but shall be entitled to set off those payments against liability arising from the same occurrence

This set off provision should be read in context with the rest of the statute, which tells how OGTCA settlements and verdicts may be negotiated and paid. Subparagraph E merely gives the OGTCA entity credit for payments made under any insurance policy covering that entity. Nothing about that statute suggests the governmental entity is allowed to reach out and take credit for the injured party’s insurance.

The final OGTCA topic I thought worth mentioning concerns the “waiver” of immunity created by the purchase of liability insurance. We had a car wreck case against a county, with bad injuries. The county had a liability policy with limits equal to the $125,000 OGTCA limits applicable to the county. The driver of the car (personal car used on OGTCA entity business) also had her own liability policy with $50,000 limits. Though the driver was immune from suit under the OGTCA, her policy had a provision required by the OGTCA entity, that made the county an additional insured (a definition of “insured” included any organization for acts or omissions of an insured).

We argued the OGTCA entity had waived immunity to the full extent of the available liability coverage, citing *Lamont Independent School Dist. v. Swanson*, 1976 OK 38, 548 P.2d 215. The OGTCA entity (well, NAICO, its insurance, really) claimed an offset for the $50,000, citing a provision *in its liability policy* that said the liability coverage “does not waive” the OGTCA limits. We argued the insurance company cannot, by such a provision, negate Oklahoma law with respect to such waivers of immunity. NAICO claimed it did not seek an “offset,” but that it’s policy only paid amounts the entity was “legally obligated to pay,” and that once the $50,000 had been tendered, that reduced that “obligation” to $75,000. The case settled before we could get it up on appeal, so we do not have an answer.

1. **UM and the Oklahoma Guarantee Fund**

Another area of concern that seems to be heating up in these troubled times is the interplay between the Oklahoma Property and Casualty Insurance Guarantee fund (26 O.S. 2001 *et seq.*) and UM coverage. We have run across this with both Pride Insurance and now Santa Fe in receivership. Who pays in this situation? The injured party has recourse to the state Guarantee fund, which pays claims for insolvent insurance companies. But what about UM? The UM statute (subparagraphs D and E) defines a car with insolvent liability coverage as an “uninsured” car, so that the UM steps in for the insolvent coverage. Also, the Guarantee fund requires exhaustion of all other available coverage before the fund kicks in. Though UM was at one time excluded from the exhaustion requirement (and before that included), UM is currently not excluded by 36 O.S. § 2012. Also, *Welch v. Armer,* 1989 OK 117, 776 P.2d 847. The tortfeasor is also protected by the payment under the Fund, but only up to the limits of the insolvent policy.

An unresolved issue is whether the UM statute’s definition of insolvency as creating an “uninsured” car is limited to those insolvency within one-year of the wreck. While 36 O.S. § 3636(C) defines insolvency to create uninsured status, subsection D purports to limit “[a]n insurer’s insolvency protection” to insolvency occurring within one year of the accident.

Although I’m told I am crazy, do not think this means that UM does not apply to insolvency that occurs more than one year after the wreck. I take comfort that a majority of our Supreme Court, in dicta at least, seems to agree (from *Burch v. Allstate Ins. Co.,* 1998 OK 129, 977 P.2d 1057):

The dissent argues that in enacting [§ 3636 (D)](https://advance.lexis.com/GoToContentView?requestid=f03a1349-2535-9bb1-9d78-699abb5f0c50&crid=151cf3ef-b856-c127-194e-9d8005369df4), the Legislature explicitly limited the use of UM coverage as a substitute for liability coverage to the situation in which the liability carrier becomes insolvent within one year after the date of the accident. The dissent is mistaken. Subsection (D) merely deals with an insolvent insurer as a special subclass of available UM insurance from indemnitors who become insolvent

I think maybe Subsection (D) speaks to the right of the UM carrier to look to the Guarantee Fund for repayment after the UM pays a claim based on the liability carrier’s insolvency. That’s my story--until the Supreme Court confirms I really am crazy.

Another unresolved issue is whether the Fund gets a pass once UM pays, though the injuries exceed the UM. The Fund, I’m told, takes the position that the insolvent insurance company’s limits are “fully reduced” by the UM payment, apparently regardless the extent of damages. That seems to be a misreading of the exhaustion statute, which says in Subparagraph (A)(2):

Any amount payable on a covered claim under the Oklahoma Property and Casualty Insurance Guaranty Association Act shall be reduced by the full applicable limits stated in the insurance policy or by the amount of the recovery under the insurance policy as provided herein. The Association shall receive a full credit for the stated limits, unless the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the other insurance policy. If the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the insurance policy, or if there are no applicable stated limits under the policy, the Association shall receive a full credit for the total recovery

If the Fund is right, the badly injured UM claimant loses any real benefit from the UM since that prevents payment by the Fund. If I were on the other side, I would argue, where injuries warrant, the exhaustion statute just reverses the priority of payment, making the UM pay first, with the Fund then kicking in after the UM. It seems that if the legislature intended by Subparagraph 2 to give the Fund a pass once another policy pays, it would have been much easier to say that than to create the “credit” that really negates any potential for coverage. I hear there is a case poised to address this question.

1. **Subrogation Claims**

I think 75% of what we do in our office is sort out subrogation claims, of one kind or another, including claims against UM proceeds. I will add just briefly raise a couple UM specific subrogation topics.

We all know by now, the UM carrier is subrogated to the insured’s claim against the tortfeasor (36 O.S. § 3636(F):

In the event of payment to any person … the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person . . . .

If the insured then takes action to defeat that right (such as settling with the tortfeasor without getting the UM to waive subrogation), the insured forfeits the right to UM*. Porter v. MFA Mut. Ins. Co.,* 1982 OK 23, 643 P.2d 302.

What happens though, when the UM refuses to waive subrogation? May the UM force a trial that neither its insured nor the tortfeasor want? Yup. It must first “substitute” payment of the liability limit. Doing so, though, may well force a trial unless the insured gives up the right to payment above the liability limit.

We had to do just that a few years ago in a case against a driver who ran into our young client who was riding her horse. State Farm did its discovery and offered up its minimum limits policy, but the UM, which had big limits, refused to waive subrogation, instead substituting payment of the $25,000. It did that because its reconstructionist put the horse on the roadway at the point of impact (we claimed the impact was on the shoulder). Though the UM may intervene (*Brown v. Patel,* 2007 OK 16, 157 P.3d 117), in our case it did not. We then had to try the case against the very charming lady who ran into this horse on her way home from church. Not a good result, though we did get to keep the substituted payment, we were zeroed by the jury and did not get to the big UM limits.

1. **UM and Workers Compensation Subrogation**

I suspect we all know by now that a workers compensation carrier is entitled to subrogate against liability, but not against UM. *Bill Hodges Truck Co. v. Humphrey,* 1984 OK CIV APP 55, 704 P.2d 94 (approved by S. Ct.)(because the workers compensation statutes forbids penalizing a worker for taking steps to assure financial security) A provision in the new workers compensation Code (85A § 43(B(4) modifies that rule with respect to an employee covered for UM under an employers’ policy:

An employer or carrier who is liable for compensation under this act on account of injury or death of an employee shall be entitled to maintain a third-party action against the employer's uninsured motorist coverage or underinsured motorist coverage

1. **Semi-Related Issue: Hospital Liens Now Attach to UM**

This is not really new “news,” but still worth repeating, both physician and hospital liens attach to UM. It used to be physician liens (42 O.S. § 46) attached to both liability and UM, but hospital liens (42 O.S. § 43) did not. The legislature “fixed” this problem in 2012. The two statutes now have similar language, making both kinds of liens attach both to “claims against another” and to “claims against an insurer” (this was missing from the hospital lien statute and catches UM). See, *Broadway Clinic v. Liberty Mutual Ins. Co.,* 2006 OK 29, 139 P.3d 873.

The physician lien statute was also broadened to include “any other professional who engages in the healing arts.” That would include physical therapists, MRI clinics, and many others.

Also, it used to be the provider had one-year from the filing of the lien to sue to enforce the lien (or renew the lien). That was changed in 1994. Now the providers have one year from the time they learn of settlement or verdict to enforce the lien. Much harder now to extinguish an old lien.

1. **Is Imputed UM Stackable UM?**

Though becoming rarer, it still sometimes happens that an insurance company is unable to produce a valid, signed, UM rejection. What happens when this is so with respect to a stackable policy? Is the UM that is “imputed” by reason of the insurance company failure to produce a rejection stackable UM? This question was answered in *Mid-Continent Group v. Henry,* 2003 OK CIV APP 46, 69 P.3d 1216—imputed UM does stack. But *Henry* was then overruled by *Spears v. Glens Falls Ins. Co.,* 2005 OK 35, 114 P.3d 448. We argued in a case several years ago that *Henry* was overruled on other grounds and that *Spears* actually affirms the holding regarding imputed stacking—at least where the underlying policy has “Stacking” language:

*[U]nder the facts presented*, where the UM/UIM coverage form provided to the insured conforms with the requirements of 36 O.S. Supp.2004 § 3636, the policy is renewed annually over a ten-year period with the insured being provided coverage summaries at each renewal, a single premium is charged for multiple vehicles having UM/UIM coverage, and *policy language provides that liability for UM/UIM coverage is limited to the maximum amount payable for all damages regardless of the number of vehicles insured*, an insurance company need not provide insureds with pre-policy notice that stacking of UM/UIM coverage is prohibited. (emphasis added)

Taken together, *Henry* and *Spears* seem to say that imputed coverage will stack if policy language supports stacking but will not stack if the policy is otherwise not a stackable policy.In our case, some good arguments were presented for both sides of this coin. The case settled before we got an answer, though.

1. **UM Priority and is Umbrella Counted in Determining Liability Limits**

Is there priority among UM and is Excess/Umbrella policy considered in determining tortfeasor coverage limits? We still hear from some adjusters that some other UM policy should pay before theirs. For instance, some still say, the UM on the car pays before the UM on the person. In fairness, these adjuster may be remembering dicta in *Keel v. MFA Ins. Co.,* 1976 OK 86, 553 P.2d 153, to that effect. Though there is such priority with respect to liability coverage, there is not with respect to UM. That is because UM is first party coverage for which the insured (or someone on their behalf) has paid a premium.

This is made clear in *Mustain v. United States Fid. & Guar. Co.,* 1996 OK 98, 925 P.2d 533. In *Mustain,* the injured party was defined as a UM insured under an employer’s policy and under his own policy. When he settled the claim against the employer’s UM for less than limits, his personal policy refused to pay, claiming he had to exhaust the employer’s policy on the truck he was in at the time of the injury.

On certified question for the Western District of Oklahoma, the Supreme Court determined all UM, with respect at least to the UM insured, is “primary” and thus there is no UM “priority.” *Mustain* makes clear, though, once the UM is paid, the insurance companies may still have a right to apportionment amongst themselves as to which ultimately bears the burden of the UM paid. *Burch v. Allstate Ins. Co.,* 1998 OK 129, 977 P.2d 1057, teaches since UM is primary, once the insured shows damages in excess of liability limits, the UM must pay the amount in excess of the liability, up to its limit, from “dollar one” without waiting for the insured to “exhaust” the liability coverage.

On a different, but sort of related matter, *Geico v. Northwestern Pacific Ind. Co.,* 2005 OK 40, 115 P.3d 856, holds that a UM insured need not count excess or umbrella liability coverage in determining whether injuries exceed liability limits. This is because the UM statute is intended to provide “minimum” protection when the primary *automobile* liability policy does not. The UM statute just does not “contemplate” the excess coverage found in a “comprehensive public liability policy.” *Moser v. Liberty Mut. Ins. Co.,* 1986 OK 78, 731 P.2d 406.

Finally, with respect to UM and umbrella coverage, *Raymond v. Taylor*, 2017 OK 80, holds there is no UM right of subrogation against umbrella coverage.

1. **What is “Occupancy” for purposes of UM coverage**

It can be important to remember UM does not just cover us while we are behind the wheel. We probably all know this as it relates to Class I insureds—named insureds and resident family members (UM “follows” Class I insureds wherever they may be), but sometimes this may also so with respect to Class II insureds—those insured solely by virtue of occupancy of an insured car.

This issue usually arises when an “occupant” steps out of the vehicle to do something. Is one still an “occupant” UM insured when fueling a car, changing a tire, or when getting into or out of the insured car? *Wickham v. Equity Fire Ins. & Cas. Co.,* 1994 OK CIV APP 148, 889 P.2d 1258, says yes. In *Wickham,* the potential Class II insured was following another car that lost a wheel. Wickham stopped to help that other driver change a tire when he was injured by the UM/UIM driver. Though he was never even “on” or “in” the insured car, he was a Class II UM insured under the policy on the car that lost the wheel.

The COCA, in *Willie,* cited the Supreme Court, in *Willard v. Kelly,* 1990 OK 127, 803 P.2d 1124, which defined “occupancy” (itself usually defined in an insurance policy to be “in, on, getting in, or on, or getting out off or out of) broadly enough to provide coverage to a police officer who was shot after he got out of his cruiser and was standing beside the cruiser when he was shot.

In *Wickham,* the COCA extends this reasoning even further. One need not have ever physically occupied the interior of the car, nor even have ever intended to. Without adopting a “bright line” test, the COCA reasoned that the term is broad enough to encompass someone who: (1) had looked through the trunk of the car for tools, (2) was performing repairs on the car when injured, and (3) was situated next to the car at the time.

Incidentally, the man who shot Officer Willard was not driving his car when he hurt the officer but had come to a stop. He was simply sitting in his car when he shot Officer Willard. That satisfied the “transportation use” requirement of the UM statute to qualify as injury arising from “ownership or operation” of a UM/UIM car. Moral, be creative about both sides of the UM coin—both who is a UM insured and what is injury caused by a UM/UIM driver. Beware, though, the cases on these questions are a bit all over the board.

1. ***Morris* and *Connor***

For some 40 years, we have relied upon a mantra in Oklahoma: “While an insurance company is free to decide at the outset who is and is not a UM insured, once it defines someone as a UM insured, it is not free to limit coverage based upon the particular vehicle occupied at the time of injury.” And, “it is up to the legislature to carve out any exceptions to this rule.” The mantra comes from a trilogy of cases:

First, *Cothren v. Emcasco,* 1976 OK 137, 555 P.2d 1037 invalidated an “owned but uninsured vehicle” exclusion in a UM policy (that policy excluded coverage to an insured while occupying a vehicle owned by an insured, but not insured under the policy). That was not okay since it took UM coverage away from someone already defined as a UM insured.

In *Shepard v. Farmers Ins. Co.,* 1976 OK 137, 555 P.2d 1037.by contrast, the Court upholds a policy definition of insured which said a resident relative who owned her own car was not a UM insured under the policy. That was okay since it did not take coverage away from a defined insured.

*State Farm Mut. Auto. Ins. Co. v. Wendt,* 1985 OK 75, 708 P.2d 581, then synthesizes the above two cases: Once one is defined as a UM insured (Class I, only—since Class II UM does not follow the person) “subsequent exclusions inserted by the insurer in the policy which dilute and impermissibly limit uninsured motorists coverage are void as violative of the public policy expressed by [the UM statute].”

In 2004 the legislature accepted the Court’s “challenge” and carved out an exception:

For purposes of this section, there is no coverage *for any insured* while occupying a motor vehicle owned by, or furnished or available for the regular use of the named insured, a resident spouse of the named insured, or a resident relative of the named insured, if such motor vehicle is not insured *by a motor vehicle insurance policy* (emphasis added)

The exception seems by its terms to apply only where the UM insured occupies a car that is not covered *for liability.* Apparently looks are deceiving.

In *Connor v. American Commerce Ins. Co*., 2009 OK CIV APP 61, 216 P.3d 850, a son who lived with his parents owned his own motorcycle, *which he insured for liability only* with AIG. His parents had a policy with American Commerce, which had UM that included a resident relative in the definition of UM insured. That policy then had *an exclusion* to the UM coverage when a resident relative occupied a car that was *not insured for UM.* This seems inconsistent with *Cothren/Shepard/Wendt,* so what about the only exception “carved out by the legislature”? Doesn’t the exception apply only when the occupied car is without liability coverage? COCA recites the amendment, and even notes it applies only where the occupied car is devoid of coverage, but then simply holds a policy exclusion that does not allow UM to extend to a vehicle Defendant insurance company does not insure and which is not otherwise covered for UM is "not inconsistent with" the UM statute.

We tried to get Supreme Court to overrule *Connor* in *Morris v. America First Ins. Co.,* 2010 OK 35, 240 P.3d 661. Instead, the Court limited *Connor* to where the resident relative has no other UM (that resident relative insured had liability but not UM on the occupied car (as in *Connor*), but also happened to have another policy on his semi, which did have UM. So, under these cases, if the resident relative has a separate policy that has UM, the resident relative is also entitled to the UM on the relative’s policy, but if the resident relative's separate policies have no UM, then there is no UM under the relative's policy either.

1. **UM Statute of Limitations Runs from Breach, not from Injury**

Most of us already know this, but it is still a good reminder, the statute of limitations on a UM claims begins to run from the time the contract is “breached.” This still comes up with calls to our office, with the questioning attorney calls after finding out years after a loss that the client had UM at the time. *Willie v. Geico,* 2000 OK 10, 2 P.3d 888, holds (citing *Uptegraft v. Home Ins. Co.,* 1983 OK 41, 662 P.2d 681) the UM statute of limitations is the contract statute of limitations and it cannot start to run until there has been a “breach.” The wreck is not a breach.

In *Willie,* the wreck was in 1994 and later that year the insured notified Geico the liability was adequate and there would be no claim for UM. In 1998 Willie’s lawyer wrote to Geico saying there would be a UM claim. Geico requested documentation which was not provided so Geico “denied” the claim and closed the file. Then, in 1999, Willie again demanded the UM. This time Geico cited the statute of limitations, claiming it ran earlier in 1999, five years from the date of the wreck.

The Court agreed with Willie that a claim has to “accrue” for the statute to run and that a UM claim cannot accrue until there has been a breach, such as the failure to pay, giving rise to suit. This is the majority position. And it makes it tough for the UM statute ever to truly run unawares.

1. **Selection/Rejection Concerns**

These still come up from time to time, so it is worth repeating: (1) rejection of UM by any named insured is rejection for all insureds. It used to be that “the named insured” had to reject UM. The Supreme Court interpreted that to mean “each named insured.” *Plaster v. State Farm Mut. Ins. Co.,* 1989 OK 167, 791 P.2d 813. The statute (current subparagraph G) was changed in 2004 to say “a named insured” may reject. *Traders Ins. Co. v. Johnson,*2010 OK CIV APP 37, 231 P.3d 790. (2) Also, the UM carrier need no longer get a new rejection anytime an additional (one that is not a replacement) car is added, this as a result of a 2009 change which did away with that requirement.

1. **Two Recent Cases**

*Martin v. Gray,* 2016 OK 114, 385 P.3d 64: Proper Conflict of Laws Rule for a Bad Faith Case Is the Tort Rule, Not the Contract Rule.

*Falcone v. Liberty Mutual Insurance Co.,* 2017 OK 11, 391 P.3d 105: UM Carrier May Be in Bad Faith for:

1. Submitting Medical Bills to Medical Review for Reasonableness AND

2. on that basis offering less than the policy limits

Was not bad faith to question reasonableness of medical billing. But UM carrier may be in bad faith for potentially arbitrary offers leading up to filing of suit and then paying the limits only after forcing suit. Raises question for the jury.

1. The District Court had applied a rule from *Heavner v. Farmers Ins. Co.,* 1983 OK 51, 663 P.2d 730, that predated the statutory addition of “underinsured motorists” coverage to our UM statute. [↑](#footnote-ref-1)
2. Distinguishing *Babcock v. Adkins,* 1984 OK 84,695 P.2d 1340 (Okla. 1985), which holds Class II insureds may not “stack” coverage from uninvolved cars *but are entitled to coverage from uninvolved cars as long as they qualify as “insureds” under the policy on the uninvolved car.* [↑](#footnote-ref-2)