UNINSURED AND UNDERINSURED MOTORIST LAW – MADE SIMPLE

**Clarifying UM/UIM Coverage - Carrier Obligations Made Simple**

**A. Insurance Coverage Obligations**

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”

(refuse photo)

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:**

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.

And not we can all go home

(the end photo)

**Parsing the “Insurance Coverage Obligations” under 36 O.S. 3636:**

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 (more on this later)**

**(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 limits so they can also increase their UM**

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

**(Story)**

**(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)](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. 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**

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**

**Not my topic, but you must understand the right of subrogation. Many ways to get sued for MP**

**(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**

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.*

**Blah, blah, blah**

**(lips photo)**

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.*

**More blah, blah, blah**

**(lips photo stays)**

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

Watch for *Leritz v. Yates,* asking to apply law of Oklahoma to Kansas policy due to “extraterritorial clause”

**B. Who's Covered? Defining "Family Member"**

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

(Photo of Oliver and his diaper)

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

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”

**C. Interpreting Exclusions in the Policy**

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 valid 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

**D. Policy Arbitration Requirements**

1960 case invalidated arbitration requirement in UM policy (violated public policy)

In response statute amended to permit (does not require) the insurance company to write coverage that allows either party to demand arbitration

allows the insured to file suit if no “agreement by arbitration” (nonsensical) within 3 months.

Not many policies have the provision any more

Statute not real clear on what is allowed

Insurance companies don’t do that well

If you do have a policy that allows arbitration, not a bad deal for insured

Usually the claim is given to an attorney when we demand arbitration and the two attorneys pick the panel (or each pick one and have those pick the third)

Often mediators don’t like to arbitrate as they perceive this may cause insurance companies to stop using them for mediations

For that reason we are not fond of using mediators as arbitrators, but usually pick a qualified practitioner

**E. Lawsuit Threshold**

Sue early, sue often

(sue 3 photo)

(1) Do you have available UM?

(2) Does the UM insured have bodily injury damages that:

(A) exceed liability limits

(B) arise from the negligent ownership, maintenance, or use of a motor vehicle (we’ll get to this)

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)

UM must offer it’s own evaluation of the claim

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

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.

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

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

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)

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. Finding Sources and Limits of Coverage**

First ask if the TF is uninsured or underinsured

If no, do not pass go.

If yes, find that UM

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)

Only look to at 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

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

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)

**Stacking**

will soon be a thing of the past once current policies are renewed

2014 amendment eliminates stacking unless expressly provided in the policy

(stacking photo)

USAA

For now, 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. That will let you stack

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

Where a passenger can collect both liability and UM

**G. 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

(touch photo)

**H. Waiving Coverage**

(waiving photo)

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

**I. "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

(shooting photo)

(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

(TLO photo)