CURRENT TRENDS IN ALABAMA AUTO LAW

UNINSURED/UNDERINSURED MOTORIST LAW UPDATE

July 9, 2003
Birmingham, Alabama

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I. UNINSURED/UNDERINSURED MOTORIST LAW UPDATE

A. Legislative Update

As you might imagine, the Alabama Legislature has found itself occupied with issues of greater consequence than the uninsured motorist laws in this state. Also, since Alabama has now gone to a mandatory automobile insurance requirement for all drivers, there may be a belief in the legislature that uninsured/underinsured motorist insurance coverage should become obsolete. However, as practicing lawyers, we all know that is not true. The reality is that the streets of Alabama are filled with uninsured/underinsured motorists. However, the only bill brought forth in the 2003 legislative regular session was Senate Bill No. 279. This Senate Bill was presented by Senator Hank Sanders on March 14, 2003. The Bill was re-referred to the Judiciary Committee under the supervision of Senator Roger Smitherman. The text of the Bill is set out below:

SYNOPSIS: Existing law has been interpreted to prohibit an employee who received workers' compensation benefits because of injuries sustained in a work-related motor vehicle accident from receiving uninsured motorist benefits from his or her insurer.

This bill would allow an employee who received workers' compensation benefits because of injuries sustained in a work-related motor vehicle accident to receive uninsured motorist benefits from his or her insurer or the insurer of his or her employer, or both. The bill would repeal and supersede conflicting provisions of law.

A BILL
TO BE ENTITLED
AN ACT

To allow an employee who received workers' compensation benefits because of injuries sustained in a work-related motor vehicle accident to receive uninsured motorist benefits from his or her insurer; and to repeal and supersede conflicting provisions of law.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Notwithstanding any provision of law, an employee who received workers' compensation benefits because of injuries sustained in a work-related motor vehicle accident shall not be precluded from receiving uninsured motorist benefits from his or her insurer or the insurer of his or her employer, or both.

Section 2. To the extent that any other law or parts of law conflict with this act, those provisions of law are repealed and superseded by this act.

Section 3. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.

Interestingly, this is obviously an effort on the part of Senator Sanders (an attorney) to overrule through legislation the Alabama Supreme Court decisions in *Ex parte Carlton,* No. 1001781, 2003 Ala. LEXIS 112 (Ala. Apr. 11, 2003) and *Auto-Owners Ins. Co. v. Holland*, 832 So. 2d 76 (Ala. Civ. App. 2002). (These cases are outlined below).

It will be interesting to see if such a bill, in direct opposition to recent, rather strong, Alabama Supreme Court case law can get made into law.

B. Recent Cases Involving UM and UIM Coverage

1. ***Ex parte Carlton***, No. 1001781, 2003 Ala. LEXIS 112 (Ala. Apr. 11, 2003). The Alabama Supreme Court affirmed the Court of Civil Appeals decision[1] that a plaintiff may not recover under his personal uninsured motorist policy when he was hurt on the job and received workers' compensation benefits because workers' compensation was his exclusive remedy

[1] State Far Mut. Auto. Ins. Co. v. Carlton, No. 2991014, 2001 Ala. Civ. App. LEXIS 207 (Ala. Civ. App. May 11, 2001).

("Carlton Rule"). In this case, the Alabama Supreme Court extended the ruling by also **overruling** *Hogan v. State Farm Mut. Auto. Ins. Co.*[2] to the extent that it authorized recovery under a UM policy, despite the fact that the insured was not entitled to damages from the owner or operator of the vehicle because of the Alabama Guest Statute.

2. ***Auto-Owners Ins. Co. v. Holland***, 832 So. 2d 76 (Ala. Civ. App. 2002). This court extended the *Carlton* rule[3] to the employer's uninsured motorist policy. Therefore, a plaintiff who was injured while driving her employer's vehicle is not entitled to recover against the employer's uninsured motorist policy when the plaintiff receives workers' compensation benefits.

3. ***Miller v. Thompson***, No. 2010153, 2002 Ala. Civ. App. LEXIS 701 (Ala. Civ. App. Sept. 13, 2002). Absent a contractual provision to the contrary, there is no statutory requirement that the UM or UIM insurance company pay for attorney's fees and costs when the UIM carrier requires trial of the case through buyout of the settlement.

4. ***Omni Ins. Co. v. Foreman***, 802 So. 2d 195 (Ala. 2001). The Alabama Uninsured/Underinsured Motorist Statute allows for awarding of punitive damages to an insured against her insurer. Also, an insured's acceptance of a settlement from the tortfeasor in an amount less than the limits of liability insurance does not preclude recovery under UIM benefits.

[2] 730 So.2d 1157 (Ala. 1998)
[3] As established in the Court of Civil Appeals case, 2001 Ala. Civ. App. LEXIS 207 (Ala. Civ. App. May 11, 2001).

5. ***Ex parte State Farm Fire and Cas. Co.,*** 764 So. 2d 543 (Ala. 2000). The Court overturned the "made whole rule" that only allowed subrogation if the insured had fully recovered, reasoning that it would unjustly allow the tortfeasor to escape liability. In its place, the Court reinstated the rule that a subrogation claim may be modified by contract.

6. ***State Farm Auto. Ins. Co. v. Wallace,*** 743 So. 2d 448 (Ala. 1999). The right to recover interest on a payment due under an underinsured motorist provision accrues only when damages become liquidated, which occurs when the trial court has entered its judgment against the carrier.

C. Standards Applied in Multiple Vehicle Accidents

A unique problem arises in UM and UIM coverage when more than one party is responsible for the injuries of an injured party with uninsured motorist insurance because tortfeasors may have varying amounts of liability insurance or some tortfeasors may have no insurance, while others do. Although Alabama has not recently addressed this issue, courts around the country have taken varying approaches when dealing with this situation. A line has been drawn between courts which define "uninsured" to mean that the limits of the UM policy exceed the limits of the insured tortfeasor's policy and those which define "uninsured" to mean that the tortfeasor has less than the statutory minimum insurance. For the courts that define according to policy limits, two approaches have emerged. First, some courts compare the limits of the UM policy with the aggregate limits of all applicable liability insurance. Other courts compare the UM policy with each individual tortfeasor's liability insurance.

Three approaches have emerged under the view that uninsured means the tortfeasor has less than the statutory minimum insurance. One approach allows recovery under the statute, without regard to the insured tortfeasor's insurance policy. These courts focus on the statute and apply the view that an uninsured motorist is one with less than the statutory minimum liability insurance; therefore, if one of the tortfeasors fits the statutory definition of uninsured, the injured party may seek recovery under their uninsured motorist policy if the relevant uninsured motorist insurance statute allows such recovery, even if the other tortfeasors have sufficient insurance.

The second approach allows recovery under the terms of the policy, without regard to the insured tortfeasor's insurance . This is very similar to the first approach, except here you look to the policy, rather than the statute, to determine whether recovery is allowed. At least one court has interpreted Alabama law under this approach. In *Tholen v. Carney*[4], applying Alabama law, the Court held the plaintiff, who had been injured by two jointly responsible drivers, was able to get the full amount of judgment from each tortfeasor as if the other were nonexistent. The court reasoned that because the plaintiff had the right to seek full recovery from only the uninsured tortfeasor if he wished, the plaintiff was "legally entitled to recover" those damages from the uninsured motorist coverage because those were the terms of the policy.[5]

The third approach is to deny recovery. Some courts have held that the applicable uninsured motorist statute will not allow recovery where the liability insurance of the insured tortfeasor is sufficient to cover the plaintiff's damages.

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[4] 555 F.2d 479 (5th Cir. 1977).

For further discussion and a jurisdictional table of cases and statutes, see the attached ALR.[6]

D. Standards Applied in Contracts with Family Exclusions

Uninsured motorist coverage usually extends to family.[7] However, many exclusions have been attempted. These attempted exclusions are often based on the definition of family and from other language of the policy, particularly residence requirements. Given the high divorce rate and decline of "traditional" families, it is not surprising that insurance companies have often attempted to exclude on the basis of a person not being a family member. In *Boone v. Safeway Ins. Co. of Alabama*[8], the insurance company attempted to exclude a minor child from her stepfather's uninsured motorist coverage, claiming she did not fit the policy definition of family which was defined as "a person related to you by blood, marriage, or adoption who is a resident of your household. This includes a ward or foster child."[9] Although the insurance company conceded the child was a member of the household, they claimed the spouse was the only person "related by marriage." However, the Court disagreed finding that a reasonable person would likely believe the child was related by marriage and that where there was doubt, under contract law, it would be construed against the party that drafted the contract, in this case the insurance company.[10]

Uninsured motorist policies often contain residence requirements for coverage, and often

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[5] *Id*. at 480.
[6] Lee R. Russ, Annotation, *Right to Recover Under Uninsured or Underinsured Motorist Insurance for Injuries Attributable to Joint Tortfeasors, One of Whom is Injured*, 24 A.L.R. 4th 63 (2002).
[7] Not always, *see Funderberg v. Black's Ins. Agency*, 743 So. 2d 472 (Ala. Civ. App. 1999) (upholding the exclusion of a spouse because of a named exclusion in the policy).
[8] 690 So. 2d 404 (Ala. Civ. App. 1997).
[9] *Id*. at 406.

insurance companies attempt to exclude family members through this provision. In *B.D.B. v. State Farm Mutual Auto. Ins. Co*.[11], the insurance company successfully excluded a minor child from her father's uninsured motorist policy because his policy required that the family member "live primarily with you."[12] The Court found the fact that the child visited her father on a regular basis (every other weekend), maintained a room at her father's house, had some of her personal belongings there, and had both her mother and father's addresses listed on school documents, unpersuasive.[13] Therefore, the court held the term "primarily" to be unambiguous and its plain meaning not to include the child because she chiefly resided with her mother, not her father.[14] In *Harmon v. USAA*[15], the court allowed a family member to be excluded from the uninsured motorist policy because of the residence requirement. In *Harmon,* a child was injured in an automobile accident and claimed uninsured motorist coverage on his brother's policy, which required family members to be "resident[s] of the household" to qualify for coverage. The injured child resided with his mother, and although his brother was staying at the mother's home for two weeks at the time of the accident, the court found the insured brother resided at another residence where he paid rent and utilities and where his furniture and many belongings were housed.[16] The Court announced the standard for residency determinations is one of "intention and choice rather than one of geography."[17] The Court found that the brother did not intend to

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[10] *Id*.
[11] 814 So. 2d 877 (Ala. Civ. App. 2001).
[12] *Id*. at 879.
[13] *Id*. at 880.
[14] *Id*.
[15] 555 So. 2d 114 (Ala. 1989).
[16] *Id*. at 115.
[17] *Id*. (quoting Crossett v. St. Louis Fire and Marine Ins. Co., 269 So. 2d 869 (Ala. 1972))

make his mother's home his residence.[18]

E. Handling Conflicts of Law with Other States

In terms of uninsured and underinsured motorist provisions, choice of law concepts are often confusing and complex, given that it usually involves a contract issue based on an underlying tort. Two areas that the Alabama Supreme Court has particularly addressed choice of law issues, which have application to a broader array of topics, is stacking and guest statutes.

In *American Econ. Ins. Co. v. Thompson*[19], the Court held that Alabama law was the appropriate law to determine whether an employee was able to stack policies.[20] *Thompson* involved a Mississippi employee of a Mississippi company traveling through Alabama to assist a sister store in Alabama when he was injured in an accident with an uninsured driver. The policies in question were issued to the Tuscaloosa branch by a Tuscaloosa insurance company and all premium notices had been sent to the Tuscaloosa branch. Therefore, the court held the contract was to be governed by the law of the state where it was issued, which in this case was clearly Alabama.[21]

Alabama courts have not always chosen to apply Alabama law. In *Cotton v. State Farm Mutual Auto. Ins. Co.*[22], which the *Thompson* court cites[23], the Alabama Supreme Court chose to apply Tennessee law to a stacking issue when the accident was in Alabama. In *Cotton*, the plaintiff lived in Alabama during the week, worked in Alabama, and principally garaged the

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[18] *Id*. at 115-116.
[19] 643 So. 2d 1350 (Ala. 1994).
[20] Id. at 1355.
[21] *Id*. at 1354-1355.
[22] 540 So. 2d 1387 (Ala. 1989).

vehicle in Alabama, but lived in Tennessee on weekends. However, the Court held that the contract had been formed in Tennessee between a Tennessee insurance company and a Tennessee resident, and since all premium notices had been sent to the plaintiff's Tennessee address, the insurance contract had not been "delivered or issued for delivery" in Alabama.[24] Therefore, Tennessee law applied.[25]

The Alabama Supreme Court was recently faced with a choice of law question in regards to guest statutes in *Shelter Mutual Ins. Co. v. Barton*[26]. In that case, a passenger, who was a Missouri citizen, of a vehicle was injured in an accident in Alabama. Alabama has a guest statute which requires a guest to prove wantonness in order to recover, but Missouri does not have a guest statute, so mere negligence will suffice for a claim. The majority held that Missouri court should apply because the insurance policy had been purchased in Missouri and delivered in Missouri to a Missouri resident regarding a vehicle primarily garaged in Missouri.[27] However, the majority then looked to Missouri choice of law test, which is the Second Restatement's "most significant relationship" test, and determined the Alabama guest statute should apply because the guest-host relationship was created and the accident occurred in Alabama.[28]

F. Actual Physical Contact Requirement

The Alabama Uninsured Motorist Statute provides:

> No automobile liability or motor vehicle liability policy insuring against loss

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[23] 643 So. 2d at 1354-1355.
[24] *Cotton*, 540 So. 2d 1387, 1387-1388.
[25] *Id*.
[26] 822 So. 2d 1149 (Ala. 2001)
[27] *Id*. at 1155.
[28] *Id*. at 1156-1157.

> 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 delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of Section 32-7-6, under provisions approved by the Commissioner of Insurance for the protection of persons insured thereunder ***who are legally entitled to recover damages*** from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, that the named insured shall have the right to reject such coverage; and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.[29]

Many insurance policies require corroborating evidence when phantom drivers are involved. Until recently, these corroborating evidence provisions seemed perfectly safe in Alabama. In *Moreno v. Nationwide Insurance Co*.[30], the Eleventh Circuit held that a policy which required the facts of the accident to be proved by "only competent evidence other than testimony of any insured whether or not that insured is making a claim under this or any similar coverage"[31] did not violate § 32-7-23 because it only established a standard of proof necessary to recover under the policy.[32] In 1999, the Court of Civil Appeals followed suit, finding *Moreno* persuasive, and held a policy, which required corroboration by "competent evidence other than the testimony of any person making a claim under this or any other similar insurance as a result of such accident,"[33] was valid under the Alabama Uninsured Motorist Statue.[34]

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[29] ALA. CODE § 32-7-23(a) (1975).
[30] 114 F.3d 168 (11th Cir. 1997).
[31] *Id*. at 170.
[32] This case is a rare example of the Eleventh Circuit deciding a case of first impression under Alabama law. The Eleventh Circuit did certify this question, but the Alabama Supreme Court denied the question.
[33] Hannon v. Scottsdale Ins. Co., 736 So. 2d 616, 617 (Ala. Civ. App. 1999).
[34] *Id*. at 618.

In May 2002, the Alabama Supreme Court, in *Walker v. Guideone Specialty Mut. Ins. Co.,*[35] overruled *Hannon* and held that a corroboration requirement in an uninsured-motorist policy was unenforceable because it would require a higher burden of proof than is statutorily proscribed.[36] In this case, Walker, the insured, was severely injured and her husband, the only passenger, was killed when an alleged approaching vehicle crossed into Walker's lane causing Walker to swerve off the road and hit a tree. Walker's vehicle was destroyed by fire, the phantom vehicle left the scene and was unidentifiable, and Walker was the sole surviving witness. Walker's uninsured motorist policy included a provision that stated: "If there is no physical contact with the hit-and-run vehicle the facts of the accident must be proved. We [GuideOne] will only accept competent evidence other than the testimony of a person making [a] claim under this or similar coverage."[37] The Court stated that a motorist "legally entitled to recover damages under § 32-7-23 is one who can present sufficient facts to survive a motion for summary judgment or a judgment as a matter of law and to reasonably satisfy the fact-finder that the person should receive damages.[38] GuideOne's corroboration requirement excludes some motorists, who would be otherwise covered under § 32-7-23; therefore, GuideOne requires a higher evidentiary burden in violation of the statute.[39]

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[35] 834 So.2d 769 (Ala. 2002).
[36] *Id*. at 774.
[37] *Id*. at 770.
[38] *Id*. at 772.
[39] *Id*.

G. Interaction With Personal Injury Protective Benefits

Although Alabama does not have personal injury protection ("PIP"), legal issues surrounding PIP often affect Alabama lawyers because PIP has been adopted, and often litigated in Florida. For more information regarding PIP, Florida's PIP statute may be found at FLA STAT. ANN. § 627.736 (2002), and some recent cases involving PIP are Flores v. Allstate Ins. Co., [40] Harris v. Cotton States Mut. Ins. Co.,[41] and Norman v. Farrow.[42]

H. Primary/Excess Coverage

The Alabama Uninsured Motorist Statue provides:

The recovery by an injured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverage as may be provided for additional vehicles, but not to exceed two additional coverages within such contract.[43]

Alabama law regarding umbrella policies, although not recent in development, is important to note. The Alabama Supreme Court has held that umbrella policies are clearly intended to be excess insurance to protect against catastrophic judgments and is not an automobile liability or a motor vehicle liability policy within the scope of the uninsured motorist statute, even if one of these policies is the primary policy under which the umbrella policy is issued.44 The Court affirmed this position in 1990 by holding umbrella policies are not within the scope of subsection

[40] 819 So. 2d 740 (Fla. 2002).
[41] 821 So. 2d 1121 (Fla. Dist. Ct. App. 2002).
[42] 832 So. 2d 158 (Fla. Dist. Ct. App. 2002).
[43] ALA. CODE § 32-7-23(c) (1975)

(a) of § 32-7-23(a)[45] because automobile liability and motor vehicle liability policies are intended to insure against loss through the operation of specific automobiles and an umbrella policy is fundamentally excess insurance.[46] The court noted that before an umbrella policy may be issued, there must be an existing primary policy, which by law must provide uninsured motorist coverage.[47] The Court reasoned the umbrella policy assumes the risk of judgments in excess of primary policy limits, which is a much less frequent occurrence, and this lessened magnitude of risk is reflected in the lower premiums paid for umbrella policies.[48]

Acknowledgement: This paper was primarily written by Katie Hammett, a rising third year at the University of Alabama School of Law. She deserves credit for any praise associated with this paper. Buzzy Riis should receive any and all criticism.

[44] Trinity Universal Ins. Co. v. Metzger, 360 So. 2d 960, 962 (Ala. 1978).
[45] Reproduced in part F.
[46] Sweatt v. Great Am. Ins. Co., 574 So. 2d 732, 734 (Ala. 1990).
[47] *Id*.
[48] *Id*.