

**UNINSURED MOTORISTS COVERAGE:  
TIPS FOR THE PRACTITIONER;  
TRAPS FOR THE UNWARY**

By Reuben J. Donig

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**INTRODUCTION**

All personal injury lawyers inevitably come across potential clients who have suffered injury or loss as a result of an accident involving a motorist who was uninsured or whose insurance coverage was inadequate to afford full compensation for the client. As we all know, when that happens, we need to look at our client's automobile insurance policy to determine what uninsured motorist coverage benefits might exist which can be used in place of coverage (or, in the case of an underinsured motorist, supplement the lack of **adequate** coverage) for the at-fault motorist.

But the statute itself, and case law concerning it is often counter-intuitive and quirky. Sometimes coverages, and even additional policies can be made to apply, and give the injured victim a source for compensation which even an experienced lawyer wouldn't necessarily think of. Conversely, uninsured, (and particularly **underinsured**) motorist law often applies in a way which makes the coverage illusory, and where coverage which was purchased and seemingly should apply for the insured's benefit has been held not to apply.

Sometimes we give up too quickly, when we find that our client doesn't seem to have Uninsured Motorist Coverage, or that the client's UM coverage appears, on its face, to be insufficient to offer needed additional coverage. This paper is intended to illustrate effective means of, and helpful tips for finding and utilizing available UM coverage for our clients, as well as to offer some helpful advice for avoiding the pitfalls that are unique to Uninsured Motorist cases.

**I. THE BASICS**

**A. WHAT IS IT?**

Uninsured (and underinsured) motorist coverage is coverage designed to afford compensation, and pay damages to a certain class of "insured" persons, who are injured by a motor vehicle through the fault of someone who is uninsured and does not meet the financial responsibility requirements, or whose coverage is inadequate to fully compensate for the damages caused. Uninsured Motorist (UM) and Underinsured Motorist (UIM) coverage is a mandatory part of any automobile insurance policy issued, under Insurance Code §11580.2(a)<sup>1</sup>, unless the person obtaining the underlying automobile policy declines it in writing §11580.2(a)(2).

**B. WHAT IS AN UNINSURED MOTOR VEHICLE?**

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<sup>1</sup> Unless otherwise noted, all code section references are to the Insurance Code.

Insurance Code §11580.2(b) defines what qualifies as an uninsured motor vehicle:

1. A motor vehicle where which isnot covered by a policy of liability insurance for the its operation.
2. It includes an insured vehicle where coverage is denied (such as in the instance of an intentional tort by the operator thereof, or a vehicle being used without the permission of the owner, such as a stolen car).
3. A hit and run vehicle, where the owner or operator cannot be identified, also qualifies as an uninsured motorist, provided that there is some contact, either directly or through some other medium (most often an intermediary vehicle), with the claimant or with the vehicle being used by the claimant.
4. Also, an insured vehicle becomes an uninsured vehicle, for the purposes of the statute, if its carrier becomes insolvent while the claim is still pending.

#### D. WHAT IS AN UNDERINSURED MOTOR VEHICLE?

An underinsured motor vehicle is covered, or is being operated by a person who is covered by a policy of liability insurance with respect to the operation thereof, but which policy is for a lower amount than the UM/UIM policy in effect for the person injured by him. 11580.2(p)(2). As a practical matter, the policy limits of the underinsured, at-fault driver must be inadequate to fully compensate the claimant.

## II. HISTORY AND PURPOSE

Automobile insurance became mandatory in 1974. (Vehicle Code § 16000, et seq.) Before that time, most motorists could freely choose to carry insurance, or not. Car owners who chose not to carry insurance ran the risk of being completely personally responsible for any liability that might ensue from their operation of motor vehicle, or the operation of someone else using their motor vehicle with their permission and consent, or through negligent entrustment.

In November, 1996, the voters of California passed Proposition 213, (effective as of January 1, 1997) which became codified as Civil Code § 3333.4, and which established that, with few exceptions, a driver who did not meet the financial responsibility requirements, (usually by either having at least minimal coverage, or being adequately self-insured) would, after the date of the election, be ineligible to recover general damages from a third party tortfeasor. This punitive measure applied to everyone whose claim was pending, across the board, even those motorists whose injuries were sustained before the date of the election itself.

While uninsured motorists and vehicles obviously still are out on the road, and while hit-and-run incidents still all too frequently occur, the enactment of the Uninsured Motorist Statute

(Insurance Code § 11580.2) came about back in 1959 as a result of the high incidence of uninsured drivers who caused accidents and injury, and who, by virtue of the lack of insurance and personal assets, left the victims without any reasonable recourse or recovery for the damages caused.

The statute sought to offer protection for the benefit of those responsible citizens who properly insured themselves and their vehicles, by offering them similar protection against bad and uninsured drivers to the same extent as these responsible motorists purchased protection from the claims of others against their own liability. The law was not necessarily designed to “make the injured victim whole,” but rather to afford at least some measure of protection equal to that which the victim could have recovered from the tortfeasor, had the latter had insurance. *Interinsurance Exch. Automobile Club of So. Calif. vs. Alcivar*, (1979) 95 Cal App 3<sup>rd</sup>, 252

### III. MINIMUM LIMITS

The insurer must offer a minimum of \$30,000 per person, \$60,000 aggregate of UM coverage with every policy it offers, unless the liability limit written on the policy is for less than that amount, and in that case, the UM limit offered must at least match the liability limits. §11580.2(m)(1) and (2). And, under Vehicle Code §16056, a liability policy for bodily injury must be written for a minimum of \$15/30,000.

The insured does have the right to waive coverage, or accept an amount which is lower than the mandated minimum, provided that the waiver is in writing.

### IV. WHO IS COVERED?

§ 11580.2(b) sets forth the various classes of people covered by a policy, and the circumstances that afford coverage:

A. The following are covered by an applicable UM policy **under practically all circumstances**<sup>2</sup> when injured<sup>3</sup> by an uninsured or underinsured motorist:

1. The Named Insured Policy Holder;

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<sup>2</sup> There are exceptions in the highly unusual situation where an insured attempts to make a claim for UM benefits for injuries incurred when he is struck by, or injured as a passenger in his own vehicle. 11580.2(a)(2). Examples would be injured by the operation of his own vehicle (such as when he is a passenger while an uninsured permissive user is driving); or where he insures only one of several owned vehicles, and then attempts to obtain benefits even while one of the uninsured cars he owns is being operated. See Clifford: California Uninsured Motorist Law, Sixth Ed. 2007, Chapter 8.

<sup>3</sup> A person who qualifies to assert damages for emotional distress under Dillon vs. Legg (1968) 68 Cal 2d 728, or Long vs. PKS (1993) 12 Cal.App. 4<sup>th</sup> 1293, is deemed to have suffered his/her own, separate injury, and thus has standing to bring an individual, separate claim for UM or UIM benefits.

2. Members of family of the named insured, residing in his household. This includes in-laws, adoptions, step relationships; does not include foster children. 11580.2(b): The word “resident” is construed liberally; thus includes:

- a. Children temporarily away from the residence, so long as child maintains a form of residency, (such as a child at school, or a child who moves away temporarily, to test his or her own independence.) State Farm vs. Elkins (1975) 52 Cal.App.. 3d , 534.
- b. In cases of minor children whose parents are separated, the child may be able to claim under either parent’s policy, regardless of which household the child mainly resides in. Cal-Farm Insurance vs. Boisseranc (1957) 151 Cal.App.2d, 775.
- c. A spouse who is separated from wife/husband, even if they are in the process of getting a divorce. Robert C. Clifford, California Uninsured Motorist Law, Sixth Edition. §4.33 (But does not include a non-married partner living in the same household, who is not named on the policy.)
- d. Members of the military, away from home but who otherwise reside with a named insured relative.
- e. (In the case of wrongful death claims) Heirs of an insured.<sup>4</sup>

**Note**-persons belonging to this class of insureds **do not need** to have been in, upon, operating or otherwise using a vehicle to be able to claim UM or UIM benefits; they can have been pedestrians, bicyclists, skateboarders, on a scooter, or even sitting in park or building, so long as the injury was caused by a motorist.

B. The following are covered under the vehicle’s UM policy only when **using** the covered vehicle § 11580.2(b):

1. Anyone driving a covered vehicle with the permission of the owner, (who are not already otherwise covered by the policy);
2. Occupants or other users of a covered vehicle. (The actual description of a “user” is a person who is “in or upon or entering into or alighting from an insured motor vehicle...” 11580.2(b)

**Note:** The vehicle does not have to be running at the time. Also note that under existing case law, coverage has been extended beyond that which one would commonly associate the normal

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<sup>4</sup> Although beyond the purview of this paper, it should be noted that heirs of an uninsured motorist who is killed by in a motor vehicle accident may bring their claim for general damages, even though the victim would have been precluded from doing so for himself, under CC §3333.4

“use” of a vehicle. See, for example, Atlantic Mutual vs. Ruiz (2004) 123 Cal.App.4<sup>th</sup>, 1197, (discussed more fully below.)

**TIP:** Things to look for when your client himself/herself does not own a car, or for some other reason does not have (adequate) UM/UIM coverage:

- a. Does the client live with a family member who has coverage?
- b. Does the client have another place, which could also qualify as a residence, where a relative lives who has such coverage?
- c. Was the client in any way “using” a vehicle which was covered by a UM policy?

**TIP:** Always inspect renters and umbrella policies for coverage, as well.

## V. WHAT CONSTITUTES “USE” OF A MOTOR VEHICLE FOR THE PURPOSE OF QUALIFYING FOR COVERAGE BENEFITS?

“Use” (or, according to the language of the code, being “upon” the vehicle) requires only minimal causal connection between the injury and the insured vehicle, so as to afford protection under the insured vehicle’s UM policy. United Service Auto vs. Ledger (1987) 189 Cal. App. 3<sup>rd</sup> 779. See also National American Insurance vs. Ins. Company of North America (1977) 74 Cal.App 3d, 565, 571.

**EXAMPLE:** Peter is using Tom’s vehicle. At a time when it is not running, (Peter may be getting in or out of the car, preparing to get into it, servicing it at a gas station, putting on chains, or something similar), Peter is struck by an uninsured or underinsured driver.

ISSUE: Does Peter qualify as an insured under Tom’s UM policy?

HELD: Coverage applies. Peter is using or operating the vehicle in a manner which is foreseeable, and there is a nexus between that use and his injury caused by the uninsured or underinsured driver of another vehicle.

Cockin vs. State Farm (1970) 6 Cal.App. 3d, 965.

**EXAMPLE:** An even more farfetched example is found in the case of Atlantic Mutual vs. Ruiz (2004) 123 Cal. App. 4<sup>th</sup> 1197: The claimant, a certain Ruiz was involved in minor, non-injury accident. The other vehicle in that accident, (Vehicle #1) was insured, and carried uninsured motorist protection. Ruiz got out of his vehicle, and walked over to Vehicle #1, which had struck his car, presumably to exchange information, and check the condition of the occupants.

While standing near the vehicle which hit him, exchanging information with that driver, he was then struck by another vehicle (Vehicle #2). Vehicle #2 was uninsured. **Ruiz was never an occupant of, and had no intention of ever occupying vehicle #1, and his only contact with it had been opening the door of Vehicle #1, and he was standing**

**2-3 feet away from Vehicle #1 when he was struck by the uninsured vehicle, Vehicle #2.**

ISSUE: Can Ruiz claim to have been “using” or “upon” Vehicle #1, simply by standing beside it and talking to the driver?

HELD: Ruiz was held to be “using” the vehicle #1, the vehicle which collided with his in the first accident, to a great enough extent to satisfy the “use” requirement, so that vehicle #1’s UM policy applied to him for his benefit!!!

## **VI. WHEN DOES UNINSURED MOTORIST COVERAGE APPLY?**

As set forth in §11580.2(b)(2), an uninsured vehicle not only includes the standard situation, where the at-fault driver is uninsured, but also includes:

A. A hit and run vehicle where the identity of the vehicle/operator, cannot be determined. §11580.2(b). There is a minimal contact requirement between the hit and run vehicle, (11580.2(b)(1) ) in order to prevent people from fraudulently claiming that their accidents were caused, or set in motion by the unsafe actions of some phantom vehicle. State Farm vs. Yang (1995) 35 Cal.App.4<sup>th</sup>, 563.

However, the minimum contact requirement does not require **direct** contact, and even indirect contact through some other medium, can be used to satisfy the requirement.

### **EXAMPLES:**

1. A rock fell off of a dump truck, and struck the windshield of the insured vehicle, causing the driver to lose control, crash, and become injured. The dump truck could not be identified. The claimant was held to have a valid UM claim and the dump truck qualified as a “hit and run” vehicle. Pham vs. Allstate Ins. (1988) 206 Cal. App. 3d, 1193.
2. Egg or other projectile thrown from uninsured or unknown vehicle constitutes a “hit and run” (where egg thrown causes insured driver to lose control, become injured – actual contact must occur between the projectile and the covered vehicle or person. State Farm vs. Davis (1991) 937 F2d 1415 (9<sup>th</sup> Circuit) Also see National American Insurance vs. Ins. Co of N. America (1977) 74 Cal.App. 3d, 565.

CAVEAT – some “use” of the offending vehicle must be a predominant or substantial factor in causing the injuries to the insured driver. Thus, if the egg throwers in the example were inside a car that was not running, the coverage would not apply.

Robert C. Clifford, California Uninsured Motorist Law, Sixth Edition, §10.30

3. Similarly, stationary objects lying in the roadway which are struck, and thereby cause an accident with injury do not trigger UM protection; there must be some applied force from the uninsured (unidentified) vehicle. Barnes vs. Nationwide Ins. (1986) 186 Cal.App.3d, 541.

**TIP:** The line of reasoning in the Davis case (supra) would seem to give standing to a person injured in, for example, a drive-by shooting, so that such a person could bring a claim under an applicable UM policy.

**TIP:** Bear in mind that the “contact” requirement applies only in hit-and-run situations where the driver or owner cannot be identified; in situations where such driver or owner can be identified, there is no such requirement.

B. It applies where coverage is denied by the carrier of an insured vehicle, ( e.g. as in cases involving intentional tortious conduct of third party driver, stolen vehicle, etc.) State Farm vs. Spann (1973) 31 Cal 3d, 97; see also Clifford, California Uninsured Motorist Law, supra, §6.70-71

C. It applies where the carrier for an at-fault-motorist becomes insolvent.

## VIII. APPLICATION, PRE-REQUISITES, AND REQUIREMENTS FOR ASSERTING A CLAIM

A. UNINSURED MOTORIST CLAIMS: The following procedures comply with the conditions and requirements for asserting a claim

1. Establish that at fault/responsible party or parties are uninsured:
  - a. File an SR 1, and obtain a SR 19 from the DMV, setting forth whether or not the other vehicle/driver was properly insured.
  - b. UM Carrier’s acceptance of responsibility that UM policy applies?
2. Comply with two year statute of limitations by either settling the claim, filing an appropriate lawsuit, or serving a demand to compel arbitration within the statutory time frame. 11580.2(i)

**TRAP:** A claim for UM benefits will be defeated if it ultimately turns out that the at-fault driver had coverage! Thus, a failure to file suit within the statutory time period could result in a loss of the claim against both the third party tortfeasor **and** the UM insurance carrier.

**TRAP:** The time period is **NOT** extended for a minor’s or incompetent’s claims. State Farm vs. Superior Court (1965) 232 Cal. App. 2d, 808.

**TIP:** Filing suit against the uninsured driver (or Doe defendant in case of hit and run) prevents malpractice, in case it is later discovered, (after the two year period has expired) that the at-fault motorist did, in fact have insurance.

3. Where suit is filed, Insurer must be given notice, and furnished with a copy of the pleadings.

**TRAP:** Failure to give notice of filing suit can result in waiver of the benefits of the UM or UIM policy.  
§11580.2(p)(6)

NOTE: Insurer has duty to give 30 days notification to the insured of the Statute, unless the insured already has an attorney. § 11580.2(k)

4. Complete the arbitration within five years from service of initial demand to arbitrate § 11580.2(i)(2)(A)

**TRAP:** If a claim is made against the uninsured driver or owner, and a settlement is reached, the UM carrier **MUST** consent to the settlement. Failure to obtain such consent waives the UM coverage. §11580.2(c)(3)

NOTE: Since a settlement with a third party tortfeasor invariably results in a dismissal, the UM carrier's subrogation rights for indemnity against the uninsured motorist could be wiped out by such a settlement. The consent requirement therefore safeguards that subrogation right of the insurer.

B. UNDERINSURED CLAIMS: In order to proceed with an underinsured claim, the following conditions and requirements must be met:

1. Exhaustion of underlying third party policy. §11580.2(p)(3). See Farmers Insurance Exchange v. Hurley (1999) 76 Cal.App.4<sup>th</sup>, 797.

NOTE: Unlike in uninsured motorist cases, the insurer in underinsured cases is not given the right of subrogation, and thus there is no requirement that the carrier consent to the settlement. Such a requirement would be inconsistent with the "exhaustion" requirement by creating a conflict of interest; i.e. the insurer could withhold consent, thus depriving the insured of the ability to exhaust the underlying policy and assert the UIM claim. See Hartford vs. Macri (1992) 4 C 4<sup>th</sup> 318.

2. Obtain proof that the underlying applicable policy has been exhausted.

3. Make a timely demand for arbitration of UIM benefits.

NOTE: Since the right to benefits does not accrue until after the exhaustion of the underlying third party limits, it would appear as though ordinary contract principals would control the statutory time period for demanding arbitration. See Quintano v. Mercury Cas. Co. (1995) 11 Cal.4<sup>th</sup>, 1049.

## **VIII. UM/UIM CLAIMS IN WORKERS' COMPENSATION CASES**

Where the claimant has been injured in the course and scope of employment, he is entitled to receive workers comp benefits as well. Those benefits are a set-off against the UM policy. However, the worker's comp carrier cannot assert a lien claim against the UM benefits which are collectible. Insurance Code §11580.2(h)(1)

## **XI. ARBITRATING THE CLAIM**

Once a demand to compel arbitration has been tendered and accepted, or ordered by the court, the case is handled like any other binding arbitration. (CCP §1280 et seq.)

A. Discovery is the same as under the discovery act (CCP § 2016.010 et seq.)

B. Evidence is governed by the Rules of Court/Arbitration act

1. Check with arbitrator for any special evidentiary considerations

NOTE: If a lawsuit has been filed against an uninsured or underinsured motorist, discovery can also be obtained within the context of that action.

## **X. UNUSUAL APPLICATIONS: MULTIPLE ACCIDENTS AND ACCIDENTS INVOLVING MULTIPLE CLAIMANTS OR VEHICLES**

Most of the unusual results stem from accidents which involve more than one policy, either because of several concurrently negligent motorists combine to cause injury, or because multiple injured parties are involved in making claims against the liability and/or UM policies involved, or because multiple policies cover a particular injured victim.

A. THE ANTI-STACKING RULE:

There are a number of situations where more than one policy, including more than one UM policy could conceivably come into play. The Anti-stacking provision of §11580.2(q) holds that in every such instance, the most that any claimant can receive in UM or UIM

benefits (aside from collateral benefits, including med pay benefits) is the highest of any applicable liability or UM policy in play.

Where multiple policies would be in effect for a claimant, he may not stack them to obtain the benefits of all the policies purchased. Typically, the claimant must apply them in order of priority, unless the controlling policy language itself requires pro-rata participation. If one policy is primary, the secondary policy does not pay benefits until the more primary policy's limit has been exhausted. Conversely, if the policies do not have priority, they shall be applied pro-rata. §11580.2(d). The limit a claimant can receive is the greater of the following:

1. The policy limit of a tortfeasor, (in which case no UM or UIM policy would apply); or,
2. The largest applicable policy limits. 11580.2(d)<sup>5</sup>

#### B. LIMITATIONS WHERE AN UNDERINSURED MOTORIST IS INVOLVED IN A MULTI-VEHICLE COLLISION:

Differences in the code language, and court applications pertaining to uninsured motor vehicles as compared to underinsured motor vehicles can lead to vastly different results for the injured claimant. The provision of §11580.2(p)(4) for underinsured cases has no equivalent for uninsured cases. That language states in pertinent part:

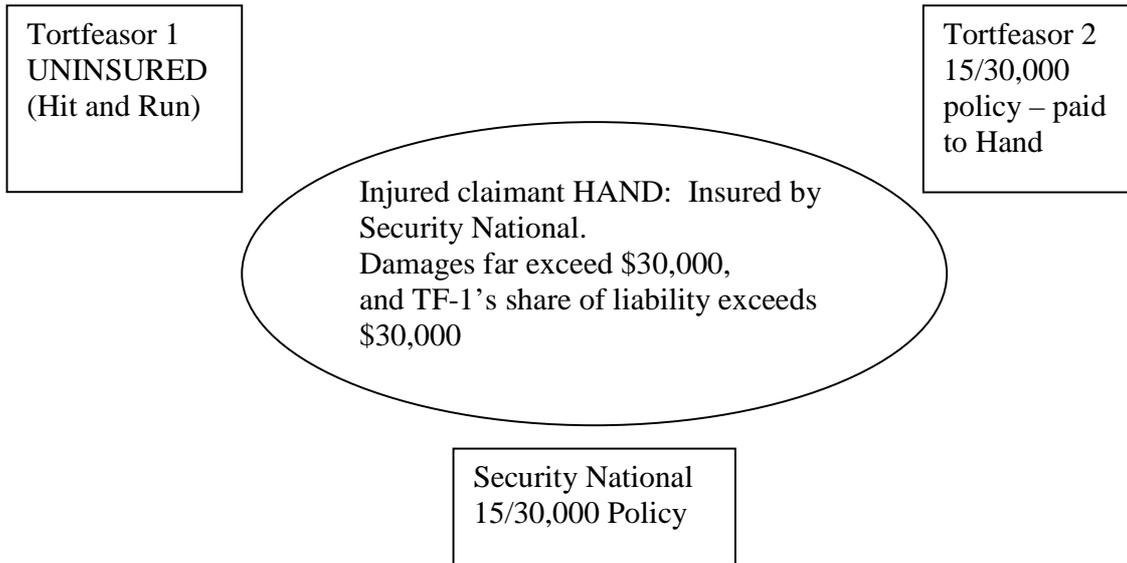
**“When bodily injury is caused by one or more motor vehicles, whether insured, underinsured, or uninsured, the maximum liability of the insure providing the underinsured motorist coverage shall not exceed the insured’s underinsured motorist coverage limits, less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury.”**

Examples of applications where someone has been (or sometimes several people have been) injured by the concurrent negligence of two or more tortfeasors, (some totally uninsured, some underinsured) follow:

Security National Insurance vs. Hand (1973) 31 Cal. App. 3d, 227

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<sup>5</sup> As will be illustrated later, in some underinsured cases involving multiple claimants, an insured may be unable to obtain his bargained-for UIM benefits, even though he receives a lower amount from the third party carrier.



FACTS: Two separate 3<sup>rd</sup> party tortfeasors contributed to cause an accident, with injury to Claimant, Hand, and wrongful death of Hand's wife. One of the tortfeasors is uninsured; the other has only minimal \$15/30,000 limits. Hand's damages for his own injury, his Dillon v. Legg damages, and damages claim for the wrongful death of his wife are each in excess of the \$30,000, and his aggregate damages well in excess of \$60,000. He has not been made remotely whole by payment of the \$30,000 from tortfeasor #2, (\$15,000 for his own injuries, and \$15,000 for the wrongful death claim for his wife.)

ISSUE: Do anti-stacking rules apply? Can claimant recover the \$30,000 from one of the 3<sup>rd</sup> parties, and still recover the additional uninsured motorist benefits as against the other 3<sup>rd</sup> party tortfeasor?

HELD: The anti-stacking rules did not apply, because the policy could be applied, without set-off or reduction, as against the totally uninsured driver. The court's primary concern, so long as it did not conflict with the wording of the statute, was to make Hand as whole as possible, within the confines of his policy limits.<sup>6</sup>

CSAA vs. Huddleston (1977) 68 Cal.App. 3d, 1061

<sup>6</sup> In uninsured cases, as opposed to underinsured cases, the insured's rights are not limited by the provisions of 11580.2(p)(4), (supra) and thus he courts are more focused on trying to make the injured party as "whole" as possible. Thus, in United Pacific-Reliance Ins. Companies vs. Kelly, (1983) 140 Cal App 3<sup>rd</sup> 72, the court held that the insured's right to be made whole takes precedence over any subrogation rights which the insurer might have.

TF-1  
15/30,000  
policy; limits  
paid to  
Huddlestons

TF-2:  
Uninsured

Mr. And Mrs. Huddleston:  
Damages for wrongful  
death of daughter exceed  
\$15,000 apiece/\$30,000  
aggregate

CSAA: UM policy  
insuring the Heddlestons  
for 15/30,000

**FACTS:** Two separate tortfeasors concurrently cause an accident in which Huddlestons' daughter, a passenger in TF-1's vehicle is killed. TF-1's carrier pays the single person policy limit of \$15,000 to Huddlestons.

**ISSUE:** Can Huddleston's apply their own UM coverage to the other driver, TF-2, so as to recover an additional \$15,000, or would that be a stacking of the policies?

**HELD:** Following the reasoning in *HAND*, the Huddlestons were entitled to the benefits of the own UM policy, as against TF-2, the UNINSURED driver. The court again held that the Huddlestons had not been "made whole" by the first \$15,000 (from TF-1's carrier), and were therefore entitled to their UM coverage.

More egregious are some cases where the 3<sup>rd</sup> party tortfeasor does have insurance, but because of a multiplicity of injured claimants, the total liability policy is with each injured claimant

receiving a pro-rated amount, rather than the full policy limit. **In such cases, the claimant not only receives less than he is entitled to from the third party, he loses much, if not all of the benefit of his bargain with his own insurer as well.** This is illustrated by the following example:

Example 3. Claimant is driving his own car, on which he has available UM coverage of \$1,000,000. He involved in a major pileup caused by vehicle which also carries a \$1,000,000 policy. The accident results in major injuries and substantial claims, both to the insured, and persons in the other involved vehicles.. After pro-rating the policy, the at-fault vehicles insurer pays out \$200,000 to the claimant.

ISSUE: Since claimant purchased \$1,000,000 of UM coverage to protect himself from uninsured and underinsured motorists, can he now collect all of his damages, up to an additional \$800,000 from his own policy?

ANSWER: NO. Since the at-fault-vehicle carried a \$1,000,000 liability policy, it was not UNDERINSURED vis-à-vis his own policy. §11580.2(p)(2) specifically states;

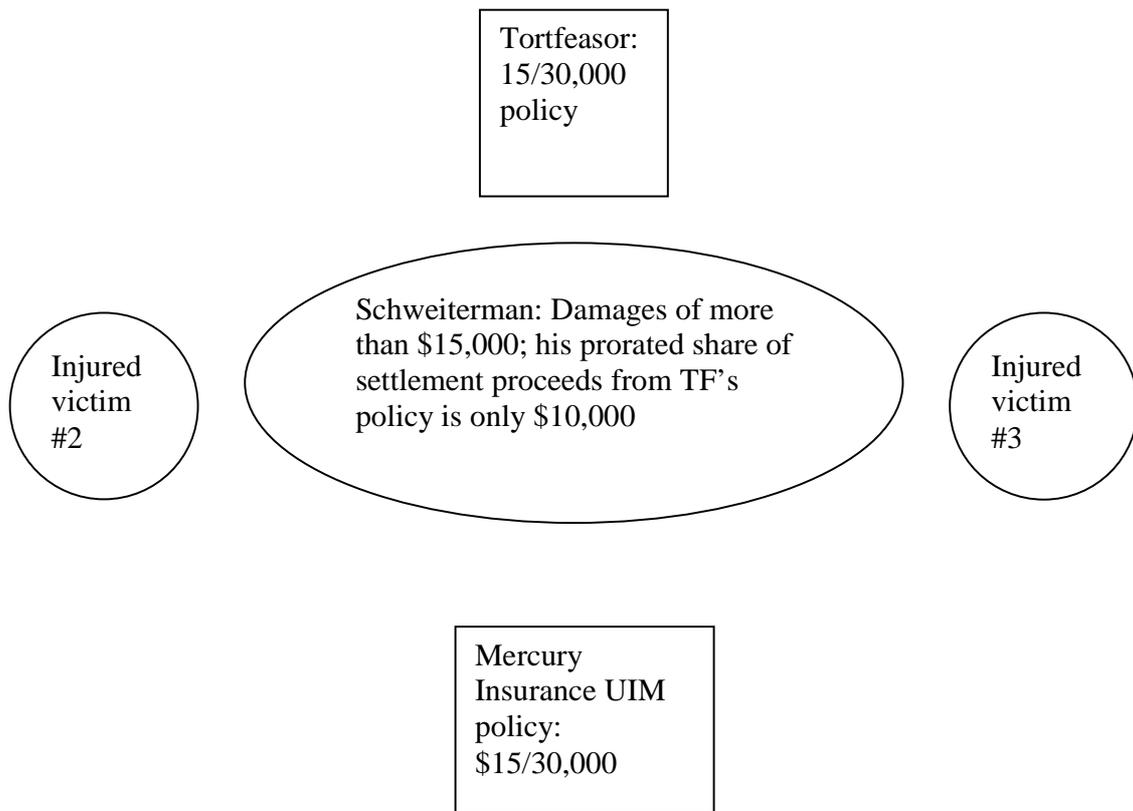
**“ ‘Underinsured motor vehicle’ means a motor vehicle that is an insured motor vehicle but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person.”**

In the Schweiterman and Bouzer cases, (discussed below) the tortfeasor’s liability limits were not less than the claimant’s UIM limits. And, since the tortfeasor was insured, the injured victim had no recourse, either as to his UM or his UIM policy.

COMMENT: Note the irony in the fact that, had the at-fault vehicle been uninsured, our claimant would have been entitled to all his damages, up to \$1,000,000 from his own policy. He was far worse off for being injured by an insured motorist than he would have been if the other driver had been uninsured!!!

This scenario played itself out, albeit on a smaller scale in the Schweiterman case as follows:

Schweiterman vs. Mercury Insurance (1991) 229 Cal.App. 3rd 1044, and its predecessor case of Travelers Insurance Co. vs. Bouzer (1974) 39 Cal App 3<sup>rd</sup> 992



**FACTS:** Schweiterman is one of several people injured by TF, who has a \$15/30,000 policy. His damages are in excess of the \$15,000 policy limit of TF's insurance coverage. TF's policy is apportioned pro-rata among the several victims, so that Schweiterman only receives \$10,000, instead of the per person minimum of \$15,000.

**ISSUE:** Is Schweiterman entitled to obtain the \$5,000 difference as between his own UIM policy and the \$10,000 he recovered from TF's policy?

**HELD:** No. The provisions governing underinsured policies determine that, as to Schweiterman's coverage, TF is NOT underinsured.

Mercury Insurance vs. VanWanselee-Walker (1996) 41 Cal. App. 4<sup>th</sup> 1093

TF-1 (driver):  
\$30/60,000  
policy –  
\$30,000 per  
person limits  
paid to  
claimants.

TF-2 (Toyota)  
Unlimited  
coverage. Paid  
about \$467,000  
to claimants

Insureds: Wife and children of  
decedent, killed while a  
passenger in TF-1's car. Their  
damages were undisputedly in  
excess of \$1,000,000.

Mercury Insurance issued \$100,000  
per person UM/UIM policy.

FACTS: Wife and children were heirs of wrongful death victim. Victim was a passenger in TF-1's car who was killed in accident caused by TF-1's driving negligence. Design defect on the part of TF-2, Toyota was a contributing factor. Heirs' damages were in excess of \$1,000,000.

TF-1's policy paid the \$30,000 limit, and Toyota paid an additional \$466,667 on account of its alleged liability.

ISSUE: Could insureds collect the balance of their UIM policy (the difference between \$100,000 and TF-1's policy limit of \$30,000, since they had not been made whole?

HELD: No. The specific language of §11580.2(p)(4) precludes any additional recovery from the UIM policy. In calculating the available coverage, the combined contributed amounts of all persons and organizations that may be held legally liable for the injury. Here, the total amount received, (over \$500,000) exceeded the UIM policy limit. Thus, the UIM carrier had no further obligation to the insureds.

Interinsurance Exch. Of Automobile Club of So. Calif. vs. Alcivar (1979) 95 Cal. App. 3d, 252

TF-1: Insured with Farmers Policy with \$15/30,000 liability; \$15/30,000 UM/UIM. \$15,000 liability limit paid to Alcivar. Remaining \$15,000 liability limit, and the total of \$30,000 UM limit paid to other passengers of TF-1

TF-2:  
Uninsured

Alcivar: One of several (at least four) passengers in TF-1's car. Damages exceeded \$15,000 liability limit received from TF-1's carrier, Farmers

CSAA  
UM/UIM  
policy of  
\$15/30,000

**FACTS:** Alcivar, a passenger in Samkow's car, was one of many persons injured in a crash with TF-2's uninsured vehicle. Both TF-1 (Samkow) and TF-2 were concurrently negligent. Both Samkow's liability policy and UM policy were brought into play, with Alcivar receiving her \$15,000 (the per person limit) against Samkow from the liability policy.

**ISSUE:** Since Alcivar did not receive any UM benefits from Samkow's policy, could she tap into her own UM policy? Alcivar argued that this would not be a stacking of UM benefits, since she did not receive any other UM benefits.

**HELD:** Alcivar was NOT eligible to receive benefits from her own policy. Since her UM policy was equal to Samkow's UM policy, further payment would represent a stacking of UM benefits, in contravention of §11580.2(q)

**TIP:** Creative lawyering in a case with these facts can open up the door to a driver's, such as TF-1's, liability and UM limits, by finding some concurrent liability to lie with the driver in TF-1's position.

A most egregious example of this kind of inequity can be found in the case of Holcomb vs. Hartford Insurance (1991) 230 Cal.App. 3d, 1000

TF-1:  
Uninsured

TF-2 \$50,000 per person liability; limit paid to Holcomb

Holcomb: Damages well in excess of \$100,000, caused by the concurrent negligence of TF-1 and TF-2

Hartford: UM/UIM policy limit of \$60,000 per person

FACTS: Holcomb was a passenger in TF-2's vehicle. He was injured by the concurrent negligence of TF-1 and TF-2. His total damages were well in excess of \$120,000, and each of the concurrent tortfeasors had liability to him for more than \$60,000. He accepted a policy limit offer of \$50,000 from TF-2's carrier.

ISSUE: Uninsured motorist TF-1 caused Holcomb damages in excess of \$60,000. He had his own, independent insurance coverage with UM/UIM limits of \$60,000 per person. What was Holcomb he entitled to under his own UM/UIM policy?

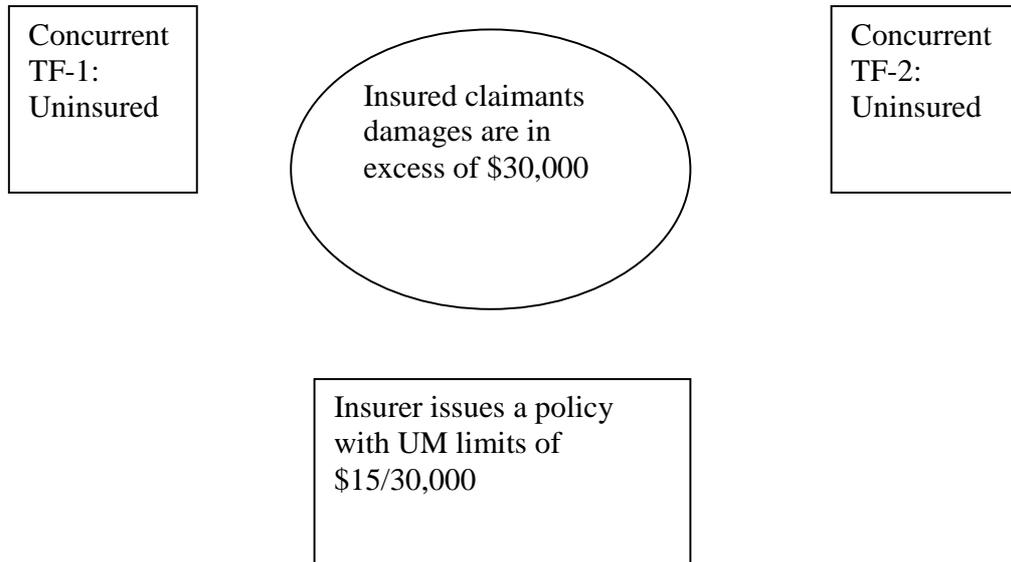
- a. \$10,000, representing the difference between the \$50,000 received from TF-2, and his own policy limit;
- b. \$60,000 representing the damages caused by uninsured motorist TF-1;
- c. \$70,000, representing the uninsured limit as to TF-1 and the \$10,00 balance of his entitlement as to TF-2?

HELD: Holcomb is limited to recovering the \$10,000 balance under his UIM policy vis a vis TF-2. Applying §11580.2(p)(4), (Underinsured language) the carrier is entitled to a credit for all sums received from all parties legally liable.

NOTE: IF TF-2 had had a \$60,000 or greater per person policy instead of \$50,000, UM law, not UIM language would have applied, and Holcomb could have received all his damages up to \$120,000; \$60,000 from TF-2's policy as well as \$60,000 from his own UM policy.

NOTE: Even the court noted this was an anomaly, and specifically stated that Holcomb could have obtained his entire UM benefits if only TF-2 not been underinsured, but had been fully insured vis-à-vis Holcomb's policy.

EXAMPLE: Hand CASE modified so that TF-2 is uninsured.



ISSUE: Since both tortfeasors are uninsured, can injured insured make himself whole by applying his UM limits twice; once against each of the two tortfeasors?

APPARENT RESULT: NO: Claimant would appear to be precluded due to the anti-stacking provisions of 11580.2(q) which states:

**“Regardless of the number of vehicles involved whether insured or not, persons covered, claims made, premiums paid or the number of premiums shown on the policy, in no event shall the limit of liability for two or more motor vehicles or two or more policies be added together, combined, or stacked to determine the limit of insurance coverage available to injured persons.”**

Also, see *Safeco vs. Simmons* (1986) N.D.California; 642 F Supp 1305

**TIP:** Arguably, however, if the two accidents are sufficiently separated by time so as to constitute two separate accidents (and the liability for damages for each tortfeasor can be separately determined), a claimant should be able to apply separately for benefits for each incident.

Fortunately, there are some, occasional instances where the anti-stacking rule can be used to a particular claimant’s advantage. The facts in the following example (taken from a real case handled by the author) illustrate such an example.

TF-1:  
Uninsured-  
Causes  
accident

Claimant is driver/owner of car with three passengers. Claimant's damages are in excess of \$30,000. Each passenger sustains damages in excess of \$100,000 apiece in medical specials alone.  
Claimant was driving 65 mph in 55 mph zone, arguably adding to the extent of passengers' injuries.

Farmers Insurance Policy: Liability of \$100/300,000; UM/UIM of \$30/60,000.

Claimant was driving her car, which had a \$100,000/300,000 liability policy, but only a \$30,000/60,000 UM policy.<sup>7</sup> She had three other passengers, (non-family members) in her car. An uninsured, reckless motorist crashed into her car, causing severe injuries to two of her passengers<sup>8</sup>, and moderately severe injuries to her.

The speed limit had been 55 mph. She told the police she was traveling 60-65 mph. The UM carrier initially refused claimants \$30,000 policy limit demand, because it would have to consider how to apportion the aggregate \$60,000 limit as between her and her two severely injured passengers.

By demonstrating that the claimant herself, by driving faster than the speed limit, was partially at fault, if not for causing the accident, then at least for exacerbating the injuries to her passengers, the passengers were able to make their demands against the liability policy, instead of the UM policy. Since they could not stack the UM policy on top of their (\$100,000 apiece) recoveries from the liability policy, the issue of fairly apportioning the \$60,000 UM policy was removed, and claimant was able to collect her full, \$30,000 UM policy.

### C. CREATING EXCEPTION TO THE MANDATORY ARBITRATION REQUIREMENT:

Accidents involving multiple tortfeasors, or situations where the insured is involved in several separate accidents involving injuries which overlap or are exacerbated also give

<sup>7</sup> It is not unusual for an insurance company to issue policies where the UM limit is lower than the liability limit. It is strongly suggest that an attorney advise his or her clients to raise the UM limit to match the liability limit in such cases.

<sup>8</sup> Both passengers had past and future medical specials alone which would exceed \$100,000.

rise to the possibility of litigating the case in court, rather than being forced into compulsory arbitration under the provisions of §11580.2(f).

Examples of such situations are the following:

1. In a multi-vehicle accident, where one of the claims is properly a litigated third party claim and the other is a UM or UIM claim, it may be appropriate to have the cases combined, to avoid mutually inconsistent and exclusive results which could occur if the claims were decided separately (e.g. as to liability as between the several defendants/tortfeasors.)
2. A claimant is injured in an accident, and then the injuries are exacerbated by a second accident. One accident is caused by a fully insured defendant, while the other by an uninsured or underinsured defendant. A dispute arises over issues including the amount of each defendant's liability for the extent of claimant's injuries.

Under CCP § 1281.2(c) as illustrated by the case of Prudential Property & Casualty Inc. vs Superior Court (1995) 36 Cal.App. 4<sup>th</sup> 275, one available remedy is to combine the claims into a single court action, and circumvent the mandatory arbitration provisions of 11580.2(f).

Alternatively, if the insured defendant agrees to submit to binding arbitration, the cases can be combined and submitted to that forum.

## XI. DERIVATIVE UM CLAIMS ARISING OUT INJURIES TO ANOTHER

### A. WHO HAS STANDING?

Persons who have recognized claims under the law, (wrongful death, loss of consortium, Dillon vs. Legg, or similar emotional distress claims) have standing to assert a claim under the applicable UM policy..

### B. DOES THE PER PERSON LIMIT, OR THE AGGREGATE LIMIT APPLY?

1. Unless the policy language provides otherwise, for solely derivative claims, such as loss of consortium or wrongful death, **the applicable per person policy limit** represents the maximum recovery available. (Mercury vs. Ayala (2004) 116 Cal.App. 4<sup>th</sup> 1198; Also see Mid Century Insurance vs. Bash (1989) 211 Cal App 3<sup>rd</sup> 431 (See Clifford: California Uninsured Motorist Law, 6<sup>th</sup> Edition 2007, 26.20-21) Gish vs. Los Angeles (1960) 181 Cal.App. 2d 86; Campbell vs. Farmers (1968) 260 Cal.App. 2d 105 Vanguard vs. Schabatka (1975) 46 Cal.App. 3d, 887 (parents bringing a wrongful death claim cannot each bring a separate claim for the per person policy limit; the per person limit is applied as to the injured, or in this case, killed individual.)

2.. Conversely, in instances where a person has an emotional distress claim based upon actually witnessing the injury to another, (Dillon vs. Legg, or where appropriate, Long vs. PKS (1993)(12 CA 4<sup>th</sup> 1293) the witness to the injury of another actually suffers physical or emotional injury by reason of the tortfeasor's conduct, and as such has his own personal injury claim. Such persons qualify to obtain damages from the **aggregate limit**, and are not confined to the left-overs of the single person limit applicable to the injured person. Employers Casualty Insurance Co v. Foust (1972) 29 Cal.App. 3d, 382.

## XII. MISCELLANEOUS APPLICATIONS

### A. CCP § 998 OFFERS:

The provisions of CCP §998 are deemed to be public policy, and language in an insurance policy which attempts to negate the same will be deemed void, as being against public policy. Guzman vs. City of Visalia (1999) 71 Cal.App. 4<sup>th</sup> 1370.

In the recent case of Pilami v. Farmers (2006) 39 Cal 4<sup>th</sup> 133, the court determined the extent to which a party who made a CCP §998 offer could capitalize by obtaining a more favorable result at arbitration:

1. Costs can be shifted and recovered, even if the policy language provides otherwise, and even to the extent that such costs cause the total award to exceed the policy limits.
2. Interest cannot be recovered, because the arbitration process is not one for bodily injury within the meaning of Civil Code §3291 (permitting addition of interest in personal injury claims), but is a contract action, in which the provisions of the contract must be given due credit (where not in contravention of public policy, of course.)

### B. RES JUDICATA EFFECT OF EXCESS VERDICT AGAINST THIRD PARTY UNDERINSURED

Frequently, particularly in cases involving underinsured motorists, a contested case proceeds to judgment in excess of the tortfeasor's policy limit. In the event that excess UIM benefits are available, can the result of the court case apply, (for better or for worse) as res judicata?

No, because Insurer denied participation in that forum which adjudicated the third party case. 11580.2(f).

NOTE: This is all the more applicable where the underlying court case is uncontested, as might occur in a claim against a totally uninsured motorist, since there would not have been a contested hearing with any unfavorable testimony or evidence.

### C. MED PAY AND RIGHT TO OFFSET:

As allowed by §11580.2(e), most med-pay insurance policies include a subrogation lien or offset provision. (Ordinarily, such recovery rights are subject to reduction, as provided in CC §3040.) In UM and UIM claims, the insurer's rights of offset are further subordinate to the "made whole doctrine."

**TIP:** Before conceding a dollar for dollar offset, consider the effects of CC §3145? In which a health care insurer's lien or subrogation rights are subject to procurement costs. In equivalent situations, except with a fully insured third party defendant, the recoupment of medical pay benefits is subject to pro-rata reduction for procurement costs. Shouldn't the same standard apply in UM cases?

**THIRD PARTY CASE:** (3<sup>rd</sup> party has ample insurance)

Claimant's medical specials are \$25,000, and his total damages are \$100,000

Claimant receives \$25,000 med pay benefits from his own insurer, and his full entitlement of \$100,000 from the third party. Med pay is subject to re-imburement.

Claimant reimburses his insurer a reduced amount of \$15,000 (60%) to account for pro-rata procurement costs.

Claimant's net receipts (prior to paying his own procurement costs) are **\$110,000**

**FIRST PARTY CASE:** (3<sup>rd</sup> party is uninsured)

Claimant's medical specials are \$25,000, and his total damages are \$100,000

Claimant receives \$25,000 med pay benefits from his insurer, and a balance of \$75,000 (\$100,000 minus an offset for the med pay benefits paid.)

Claimant's net receipts, (prior to paying his own procurement costs) are **\$100,000**

**TIP:** In negotiations and arbitrations, the "procurement costs reduction" argument should be made, to reduce the offset claim.

**D. BAD FAITH:**

It is well established and incontrovertible that the insurer has an absolute duty to deal in good faith with its insured. See for example Crisci v. Security Ins. (1967) 66 Cal 2<sup>nd</sup> 425; Gruenberg v. Aetna (1973) 9 Cal 3<sup>rd</sup> 566. It is bad faith for an insurer to promptly and fully pay the benefits due the insured. Austero v. National Cas. Co. (1978) 84 Cal.App. 3<sup>rd</sup> 1

Example: Insured's damages are clearly in excess of the \$100,000 policy limits, and liability clearly rests with the third party. The UM carrier rejects a policy limit demand, and

counters with a settlement offer of \$95,000, emphasizing the elimination of risk, immediacy of payment, and that the insured will save considerable costs of litigation, all of which more than compensate for the \$5,000 reduction.

The insurer's conduct is in bad faith, because it has failed to fully pay its obligation to the insured.

**TIP:** Do not give in to the temptation to accept this reduced, unfair offer, but instead proceed to arbitration. The arbitrator must not be informed of the policy limits, as his function is solely to determine damages. 11580.2(f); Furlough v. Transamerica Ins. (1988) 203 Cal.App. 3<sup>rd</sup> 40.

An arbitrator's award substantially in excess of the policy limits can be valuable evidence in a subsequent action for bad faith damages.

### **CONCLUSION**

The requirement of uninsured motorist protection as part of every automobile policy is undoubtedly a good thing. However, the code itself, and court interpretation of its language and legislative intent makes the application of uninsured motorist law extremely quirky. The law is rife with statutory language and court created rulings which often defy common sense.

People who have good UM coverage can sometimes be better off (particularly in multi-vehicle or multiple injury cases) if they are injured by someone with no insurance, rather than someone with a lot of insurance. Sometimes insured persons can obtain full UM benefits only by establishing their own contributory negligence, whereas they would be unable to recover the same were they entirely without fault!

In handling a case where the third party is uninsured or underinsured, be very careful, be very creative, read the statute carefully, read the applicable policy language, and do your research. And be very prepared for a surprising result.