CHAPTER 9: GENERAL AUTO INSURANCE

LIABILITY INSURANCE IS MANDATORY

Arizona requires all motor vehicles in the state to be insured. The policy must (1) be issued by an insurance carrier authorized to transact business in Arizona (2) for the benefit of the person named in the policy as the insured.

A.R.S. § 28-4009 requires an owner's policy to: (1) designate all motor vehicles covered by the policy, and (2) insure the named insured and any other person using the vehicle with the express or implied permission of the named insured. Policies issued or renewed after June 30, 2020 must cover liability for damages arising out of the ownership, maintenance or use of the motor vehicle within the United States or Canada, subject to the following limits:

- $25,000 for bodily injury or death of one person in any one accident;
- $50,000 for bodily injury or death of two or more persons in any one accident; and
- $15,000 for damage or destruction of property of others in any one accident.

By agreement in writing between the named insured and the insurer, the policy may exclude from the definition of "insured" any person or persons designated by name when operating a motor vehicle. The enforceability of a named driver exclusion pursuant to the statute is discussed in more detail below.

In Arizona, and a majority of states, the change of ownership of the insured vehicle automatically terminates automobile liability coverage. Arizona adopted this rule in ***Hults v. Pash***, 161 Ariz. 506, 779 P.2d 821 (Ct. App. 1989). In *Hults*, prior to the loss at issue, the named insured of an Aetna policy sold the listed vehicle to another. In ruling that coverage was extinguished when the insured sold the car subject to an installment payment contract, the Arizona court of appeals ruled that the sold vehicle was no longer "your car" as required by the policy. The court also quoted Aetna's similar "change of interest" clause ("Your rights and duties under this policy may not be assigned without our written consent"), in determining that coverage did not exist due to the change in the insured risk.

COVERAGE AND REASONABLE EXPECTATIONS

In ***Darner Motor Sales v. Universal Underwriters Ins. Co.***, 140 Ariz. 383, 682 P.2d 388 (1984), the Arizona Supreme Court formulated the "reasonable expectations" doctrine as a method for interpreting and determining the validity of standardized "boilerplate" language in insurance contracts. The court held that under certain circumstances an insured could offer evidence of oral representations made by the insurer's agent to show that (1) the "dickered deal" was different from the terms of the insurance contract, and (2) the insured had a "reasonable expectation" of coverage based on such oral representations.

In ***Gordinier v. Aetna Cas. & Sur. Co.***, 154 Ariz. 266, 742 P.2d 277 (1987), the Arizona Supreme Court expanded the reasonable expectations doctrine. The court reversed summary judgment for the insurer regarding a policy exclusion for non-resident family members. The court concluded that Arizona courts must interpret insurance contracts in light of the objective reasonable expectations of an average insured. These are the circumstances when Arizona courts will not enforce even unambiguous boilerplate terms in a standardized insurance contract:

- The contract terms, although not ambiguous, could not be understood by a reasonably intelligent consumer who tried to read the policy;
- The insured did not receive full and adequate notice of the term in question, and the provision is either unusual or unexpected, or one that emasculates apparent coverage;
- Some activity that can be reasonably attributed to the insurer would create an objective impression of coverage in the mind of a reasonable insured; and
- Some activity reasonably attributable to the insurer has induced a particular insured reasonably to believe that he has coverage, although such coverage is expressly and unambiguously denied by the policy.

In ***State Farm Mut. Auto. Ins. Co. v. Dimmer***, 160 Ariz. 453, 773 P.2d 1012 (Ct. App. 1988), the declarations page provided liability coverage of $50,000 for each person and $100,000 for each accident. However, a policy provision limited bodily injury coverage for an insured's family member to the liability limits required by law (then 15/30). Mrs. Dimmer was injured while riding as a passenger in the family car her husband, the insured, was driving. Mrs. Dimmer filed a claim with State Farm for $50,000. State Farm did not pay the $50,000 claim because the household exclusion clause in the contract limited liability coverage to $15,000. The court of appeals applied the *Gordinier* factors and determined that an average insured in the Dimmers' position would reasonably have expected liability protection in the amount of $50,000 for an automobile negligence claim against Mr. Dimmer, including Mrs. Dimmer. The court found the household exclusion unenforceable against the insured because of its technical wording and inconspicuous location within the policy, and because it reduced the coverage ostensibly granted by the declarations page. Pursuant to the reasonable expectations doctrine, Mrs. Dimmer was entitled to $50,000 in liability coverage.

Fortunately, subsequent Supreme Court decisions have reaffirmed the point originally made in *Darner* that "reasonable expectations" must be something more "than the insured's fervent hope of coverage following a loss." A clearly worded exclusion will still be enforced unless the insured can establish one of the factors described in *Gordinier. See, e.g.,* ***Philadelphia Indem. Ins. Co. v. Barerra***, 200 Ariz. 9, 21 P.3d 395 (2001).

WHICH STATE'S LAW WILL APPLY: THE PLACE OF RESIDENCE, THE PLACE OF CONTRACT OR THE PLACE OF LOSS?

This question will usually be resolved by a conflicts of law analysis. In tort and contract situations, conflicts of law questions are usually, although not always, governed by the laws of the state in

which the tort occurred or the contract was executed. However, other factors are considered, such as the place of loss, the contacts with the place of loss, and whether it is reasonable to expect the parties to litigate the case in the place where the loss occurred. Generally, conflicts issues will be resolved on a case by case basis and will depend on the facts and circumstances in each case.

Beckler v. State Farm Mut. Auto. Ins. Co., 195 Ariz. 282, 987 P.2d 768 (Ct. App. 1999), provides an example of the factors considered in choice of law questions. In *Beckler*, the issue was whether Nebraska or Arizona law applied to stacking of uninsured motorist coverage. The Becklers had several vehicles licensed in their state of residence, Nebraska, with separate State Farm policies issued on the vehicles. The Becklers' son brought one vehicle, a jeep, to Arizona to attend college and while in Arizona, was struck as a pedestrian by an uninsured vehicle. State Farm paid the uninsured limits from one of the other policies and filed a declaratory judgment action to preclude the Becklers from also receiving the UM benefits on the vehicle in Arizona. The parties stipulated that Arizona law would permit stacking and Nebraska law would not. The court found it most significant that the insured risk (the jeep) was located in Arizona and that Arizona was the principal location of the risk, for nine months per year. The court stated that applying Arizona law would further Arizona's interest in providing a greater recovery for the injured party.

A Policy Obtained By Fraud Or Misrepresentation Binds The Insurer Up To The Minimum Limits

A.R.S. § 28-4009(C)(5)(a) provides that in the event of an accident, no violation of the policy shall defeat or void the policy **up to the limits required by law** (25/50). Every motor vehicle liability policy is subject to this provision – even if the policy does not expressly provide so. ***Midland Risk Mgmt. Co. v. Watford***, 179 Ariz. 168, 876 P.2d 1203 (Ct. App. 1994). But any additional coverage under the policy (over 25/50) is not subject to the provisions of the statute. *See* A.R.S. § 28-4009 (D) (formerly A.R.S. § 28-1170(G)); ***Farmers Ins. Co. of Arizona v. Young***, 195 Ariz. 22, 985 P.2d 507 (Ct. App. 1998).

Prudential v. Estate of Rojo-Pacheco, 192 Ariz. 139, 962 P.2d 213 (Ct. App. 1997), reaffirmed that when the policyholder has been fraudulent and his policy provides for more coverage than the minimum, the insurer might have to pay only the minimum. But once the insurer decides to cancel coverage because the policyholder misrepresented information in his application, the insurer must give the policyholder notice by mail 10 days before coverage is cancelled. A.R.S. § 20-1632. In *Prudential*, the court said the notice requirement applies only to policies in effect more than 60 days. *Compare* A.R.S. § 28-4009(C)(5)(a) *and* A.R.S. § 20-1109.

The "Named Driver" Exclusion

A.R.S. § 28-4009(A)(3) provides that the owner's policy of liability insurance may "[b]y agreement in writing between a named insured and the insurer…exclude as insured a person or persons designated by name when operating a motor vehicle."

In ***State Farm Auto Ins. Co v. Dressler***, 153 Ariz. 527, 738 P.2d 1134 (Ct. App. 1987), the court, interpreting former A.R.S. § 28-1170(B)(3) in conjunction with the language of State Farm's

named driver exclusion clause, concluded that the exclusion clause was valid and relieved State Farm of liability for claims resulting from the excluded driver's operation of the insured vehicle. State Farm was not obligated to defend or indemnify the excluded driver for her negligence or the named insured for negligently entrusting the vehicle to the excluded driver.

A named driver exclusion might be enforceable or unenforceable, depending upon reasonable expectations of the insured. ***State Farm Mut. Auto Ins. Co. v. Falness***, 178 Ariz. 281, 872 P.2d 1233 (1994). But a named driver exclusion is not valid and enforceable under former A.R.S. § 28-1170(B)(3) unless the exclusion is in writing and signed by the insured. ***Transportation Ins. Co. v. Bruining***, 186 Ariz. 224, 921 P.2d 24 (1996). Strict adherence is required. A verbal understanding or a unilateral "confirmation letter" by the insurer to the insured is not sufficient. Moreover, if a named driver exclusion expires with the policy on a certain date, another fully executed named driver exclusion must be completed upon policy renewal.

THE HOUSEHOLD EXCLUSION

"Household exclusions" exclude coverage under the liability portion of an auto policy when a family member is injured by the negligence of another family member driving the insured vehicle. The insurer's main concern is familial collusion – namely, the negligent family member assisting the injured family member in securing a judgment and recovering proceeds. Attorneys representing insureds have argued for many years that to the extent it is the state's policy to allow tort claims to be asserted in the intra-family setting, the household exclusion frustrates the state's purpose by allowing liability insurers to deny coverage, or limit coverage, when a tort claim is being asserted. Household exclusions are not against Arizona public policy. ***Arceneaux v. State Farm Mut. Auto. Ins. Co.***, 113 Ariz. 216, 550 P.2d 87 (1976). But they might be unenforceable in light of the insured's reasonable expectations. *See, e.g.*, ***Gordinier v. Aetna Cas. & Sur. Co.***, 154 Ariz. 266, 742 P.2d 277 (1987) (because the policy was difficult to understand and took away coverage the Gordiniers might have thought they had, the household exclusion clause could be unenforceable; court remanded for determination of whether policy's limitations were brought to the insured's attention); ***State Farm Mut. Auto. Ins. Co. v. Dimmer***, 160 Ariz. 453, 773 P.2d 1012 (Ct. App. 1988) (upholding validity of household exclusion, but finding it unenforceable based upon the insured's reasonable expectations); ***Pruett v. Farmers Ins. Co. of Arizona***, 175 Ariz. 447, 857 P.2d 1301 (Ct. App. 1993) (household exclusions can be challenged on the basis of the insured's reasonable expectations); ***Averett v. Farmers Ins. Co. of Arizona***, 177 Ariz. 531, 869 P.2d 505 (1994) (remanding to the trial court to determine whether the household exclusion was enforceable in light of reasonable expectations doctrine). The reasonable expectations doctrine, however requires that the insurer have "reason to believe" the insured would not have agreed to the exclusion. In a trial concerning the reasonable expectations doctrine, the jury must be so instructed. ***State Farm Fire & Cas. Ins. v. Grabowski***, 214 Ariz. 188, 150 P.3d 275 (Ct. App. 2007)

Handling Claims Presented by The Insured's Family Members

Household exclusion clauses are generally enforceable and can limit coverage to the statutory minimum amount. **Averett v. Farmers Ins. Co. of Arizona,** 117 Ariz. 531, 869 P.2d 505 (1994). However, an insured is likely to claim he expected his family members to be covered up to the full limits of the liability coverage. Any claim involving a family member/household resident

should be flagged for immediate investigation. The investigation should consist of a telephonic or personal interview of the named insured, and the interview should be recorded.

Prior to the interview, the insured should be advised that the caller is a claims representative from the insurance carrier. Routine questions about the accident, the vehicle operator, passengers and known injuries should be asked. Following these preliminary questions about liability issues and potential claims, the discussion should then turn to the policy's benefits:

- The adjuster should confirm certain information with the insured, including: the name of the insured's agent, when the policy was purchased and how the insured received the policy (in person or by mail).
- The insured should be told that he has liability coverage which protects him against damages claims made by others in the amount of the available coverage, for example, 100/300/50. The insured should then be asked if he understands this policy provision.
- The insured should be told that for claims made against him by family members/household residents who were in the insured vehicle, the maximum protection afforded by the policy is the minimum amounts required by Arizona law, or 15/30/10.
- The insured should be told that his family member(s)/household resident(s) can recover under the policy for injuries up to $15,000 per person with a maximum of $30,000 for two or more family members/household residents making a claim against an insured driver.
- The insured should be asked if he understands that the household exclusion provision is part of his policy.
- If the insured says he understands the foregoing to be a part of his policy, the discussion should turn to other applicable coverages such as medical payments coverage and collision coverage. Claim handling procedures can also be explained.
- If the insured states he does not understand the amounts of coverage provided for family members/household residents under the policy, the insured should be told that the amounts are set forth in the policy. The insured should be asked if he/she received contrary information, and if so, what the information was, when it was received, and from whom.

The answers given during the interview can help determine whether the household exclusion applies and limits coverage for the particular accident.

"PERMISSIVE USE"

As is noted above, Arizona has adopted an omnibus insurance coverage statute, which requires all automobile policies to cover the named insured as well as anyone using the vehicle with express or implied permission of the insured. A.R.S. § 28-4009(A). The omnibus statute is to be construed broadly to favor coverage for permissive drivers. ***Hille v. Safeco Ins. Co. of Am.***, 25 Ariz. App. 353, 354, 543 P.2d 474, 475 (1975). Whether a person has permission to drive a vehicle is generally a "question of fact to be determined by the trier of fact." *Id.* The party claiming coverage under an insurance policy has the burden of establishing, under the facts and

circumstances, that the driver of the vehicle had the requisite permission. ***Home Ins. Co. v. Keeley***, 20 Ariz. App. 200, 202, 511 P.2d 213, 215 (1973).

In determining whether an actor's conduct is within the scope of permission, Arizona courts have adopted the "minor deviation rule." Under that rule, a permissive driver may extend the scope of use beyond the express or implied grant initially provided, as long as the use remains within the scope of the permission granted. ***James v. Aetna Life & Cas.***, 26 Ariz. App. 137, 546 P.2d 1146 (1976). Under this rule, if the actor's use of a vehicle is not a gross, substantial, or major deviation from the permission granted in a particular circumstance, even though the use may be a deviation, protection is still afforded to the actor under the omnibus clause. A deviation is considered material or major if the deviation is substantial in terms of duration, distance, time or purpose. [Note: a recent district court decision indicates that this list of factors—duration, distance, time, or purpose—is not an exclusive list. ***McGee v. Zurich Am. Ins. Co***., 2021 WL 5920132, at *1 (D. Ariz. Dec. 15, 2021).] Thus, a slight deviation will not change a permitted use into a non-permitted use. The justification for the minor deviation rule is that it furthers the purpose of the financial responsibility laws to protect the driving public from financial hardship caused by automobiles driven by financially irresponsible persons.

THE "UNDERAGE EXCLUSION"

A liability policy's exclusion of coverage for underage drivers is invalid at least to the extent of the minimum liability coverage limits (currently $25,000 per person / $50,000 per accident). ***Principal Cas. Ins. Co. v. Progressive Cas. Ins. Co***., 172 Ariz. 545, 838 P.2d 1306 (Ct. App. 1992) (invalidating policy provision excluding liability coverage for unlicensed drivers because the exclusion would leave the public unprotected).

THE "INTENTIONAL ACTS EXCLUSION"

The intentional acts exclusion precludes coverage of an injury caused when the insured intentionally acts wrongfully with a purpose to injure. ***Transamerica Ins. Group v. Meere***, 143 Ariz. 351, 649 P.2d 181 (1984). The intentional acts exclusion does not apply, however, when an insured acts intentionally, but the act unintentionally results in wrongful conduct. ***Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.***, 165 Ariz. 31, 796 P.2d 463 (1990). The intentional acts exclusion upholds the public policy designed to prevent an insured from acting wrongfully with the security of knowing that his insurance company will pay for the damages.

In ***Republic Ins. Co. v. Feidler***, 178 Ariz. 528, 875 P.2d 187 (Ct. App. 1993) ("*Feidler* I"), the Arizona court of appeals dealt with the interrelationship between intoxication and the enforcement of an intentional acts exclusion. Generally, there is a conclusive presumption of intent to injure when the insured commits an act "virtually certain to cause injury." For example, striking another person in the face or stabbing another person with a knife are the types of acts that ordinarily justify a conclusive presumption that the insured intended to harm the other person. However, this conclusive presumption of intent to injure does not apply when the insured lacks the "mental capacity to act intentionally." An insured's intoxication might deprive him of the mental capacity to act intentionally. Accordingly, where the insured is intoxicated, his "mental capacity to act intentionally" is a factual question and the conclusive presumption of intent to cause injury does not apply.

The *Feidler* court also held that "reckless," as defined by the Arizona criminal statutes, is not the equivalent of "intentional" for purposes of an intentional acts exclusion. Under the criminal code, an intoxicated person can act recklessly. But intoxication can still deprive the insured of the mental capacity necessary to form an intent to injure (the standard necessary to exclude coverage under an intentional acts exclusion).

THE FAMILY PURPOSE DOCTRINE

A.R.S. § 28-3160 states that the parent, guardian or responsible person who signs an application for a minor's instruction permit is not jointly and severally liable for the minor's negligent or willful misconduct, if proof of financial responsibility is maintained. Nevertheless, the Family Purpose Doctrine states that the head of the household who furnishes a motor vehicle to a member of the household, is jointly and severally liable with the household member to whom the vehicle is furnished. The household member to whom the vehicle is furnished need not be a minor. The Family Purpose Doctrine is alive and well in Arizona. ***Country Mut. Ins. Co. v. Hartley***, 204 Ariz. 596, 65 P.3d 977 (Ct. App. 2003) (A.R.S. § 28-3060 does not abrogate or limit liability arising under the Family Purpose Doctrine); ***Young v. Beck***, 227 Ariz. 1, 251 P.3d 380 (2011). In *Young*, the Becks provided their son, Jason, with a SUV subject to some limitations. Specifically, he was not allowed to taxi his friends around town. One night, while driving friends home, Jason was involved in an accident. The Becks argued that the family purpose doctrine should not apply because their son's use of the vehicle was outside the scope of their permission. The court rejected this argument and held that the family purpose doctrine "does not require that a parent give permission for every possible route taken or deviation made by a family member while operating the vehicle…To hold otherwise would enable parents to minimize themselves from liability by imposing general, unrealistic, or unenforced limitations on their child's use of the vehicle."

For the Family Purpose Doctrine to apply, there must be a family with sufficient unity so that there is a head of the family; the motor vehicle involved must have been furnished by the head of the family to a family member; the vehicle must have been used by the family member with the express or implied consent of the head of household; and, the vehicle was furnished for a family purpose. ***Blocher v. Thompson***, 169 Ariz. 182, 818 P.2d 167 (Ct. App. 1991). The Family Purpose Doctrine applies to general and special damages; punitive damages are not imputed to the head of the household. ***Jacobson v. Superior Court In and For Maricopa County***, 154 Ariz. 430, 743 P.2d 410 (Ct. App. 1987).

POLICY LIMITS APPLICABLE

Loss of consortium claims are typically deemed to be derivative of the injured person's claim, and thus the single limit of the policy and not the aggregate limit applies. A different standard applies to negligent infliction of emotional distress claims. In ***State Farm Mut. Auto. Ins. Co. v. Connolly***, 212 Ariz. 417, 132 P.3d 1197 (Ct. App. 2006), the court held that a negligent infliction of emotional distress claim was not derivative and therefore was compensable under the aggregate limit. To state a claim for negligent infliction of emotional distress, a plaintiff must have been in the zone of danger and must prove a physical injury resulting from the shock of witnessing an injury to a closely related person.

The person claiming negligent infliction of emotional distress need not witness injury to another person to recover. It is sufficient if the claimant's shock or mental anguish, manifested by physical injury, results from a threat to the claimant's personal security. In ***Quinn v. Turner***, 155 Ariz. 225, 745 P.2d 972 (Ct. App. 1987), for example, a child was standing with his mother beside a parked car when another car crashed into it. The child was entitled to recover for his emotional distress, because he was only a few feet from the point of impact. The emotional distress must be manifested in some physical way.

RENTAL CARS

General Coverage Requirements

In 2012, the legislature amended A.R.S. 28-2166, the statute dealing with rental cars. The amendment changed the legal responsibilities of vehicle rental companies when their renters are involved in accidents. Before 2012, the statute required rental companies to procure minimum liability insurance, or be self-insured, in the amount of $15,000/person, $30,000/accident and $10,000/property damage. This coverage was primary to any other available insurance coverage for damages caused by a renter. The statute also expressly stated that a rental company was not an insurer, and had no obligation to provide a defense after it had tendered its limits to the insured party or the next available coverage for the renter.

Amended A.R.S. 28-2166 still requires protection of the public, although in various forms, in accordance with the Financial Responsibility Act. The statute requires an owner renting cars to: (1) procure public liability insurance with limits of 15/30/10 with an insurance company approved by the department of insurance and financial institutions (the statute has not yet raised the minimum insurance requirements as they have been for private vehicle owners); or (2) furnish the Department of Transportation satisfactory proof of self-insurance. The policy or self-insurance must also cover the liability of the renter to a passenger unless the owner gives the renter a written notice that it does not provide coverage for a passenger.

The rental car company's policy, or its self-insurance, is primary unless it states the following in the rental or lease agreement: "The owner does not extend any of its motor vehicle financial responsibility or provide public liability insurance coverage to the renter, authorized drivers or any other driver." This language must be in at least ten point bold type, or in the terms of the master agreement maintained with a renter, and affirmatively acknowledged by the renter. If a reservation is made online, the disclosure must be made in a conspicuous manner. However, if the renter purchases public liability insurance from the rental car company in the 15/30/10 limits which covers the renter and authorized drivers against liability, it is designated by the statue as primary coverage.

Importantly, if the rental car company provides the requisite language that it is not providing any liability coverage, it is nevertheless required to provide primary coverage and a legal defense if the renter does not have any other liability coverage available and applicable, or the rental car company has not fully and accurately provided to the third party claimant the contact information for the person who rented the car. Otherwise, the rental car company must respond to the third party claim within twenty days following notification of a third party claim.

The statute continues to provide that in those situations in which it must furnish primary coverage, the rental car company has no obligation to provide a defense to the renter once it has paid its coverage limits if the renter has no other liability coverage available and applicable to the loss. When the rental car company does provide a defense, if there is excess coverage, the company must continue to provide a defense, and cannot tender the defense to the excess carrier without the written agreement of the excess insurer**.** If the excess insurer accepts the tender of defense, it is not responsible for any costs incurred by the rental car company before the tender is accepted. Interestingly, the statute now provides that where the rental car company has no obligation to provide primary coverage, its insurance, or self-insurance, is excess.

The statute continues to provide that the rental car company has the right to bring a lawsuit against the renter if it pays damages arising out of the operation of the rental vehicle by an unauthorized driver. This right of subrogation against the renter does not apply in any other situations.

Duty to Defend

A rental car company owes a duty to defend unless there is a coverage defense. This duty can apply to the person who rented the car, or to someone driving the car with the renter's permission. A.R.S. § 28-2166 defines "renter" to include "any person operating a motor vehicle with permission of the person who has rented it." This is important because the mandatory insurance obligations placed upon rental companies apply to liability coverage for the "renter's" alleged negligence. Therefore, the liability insurance applies to any person driving the car with the permission of the person whose name is actually on the rental contract.

This precludes rental car companies and/or their insurers from denying coverage for damages an unauthorized driver causes to a third party. Even if the rental insurance contract excludes coverage for liability arising out of the acts of an unauthorized driver, such clause would be against Arizona law based upon A.R.S. § 28-2166.

As before the amendment to Section 28-2166, there is a significant liability risk in the event the rental car company fails to respond or present a defense to a third party claim when required to do so. Interpreting a prior version of this statute, the Arizona Supreme Court held that a rental company was itself an insurer for all intents and purposes, indicating that a rental company that failed to meet its obligations as an insurer, including its obligation to defend and indemnify a renter, could be subject to a bad faith action. The legislature later amended the statute, explicitly stating that a rental company was not an insurer. The most recent amendment, however, removes this language. This again raises a question as to the rental company's status as an insurer or merely a guarantor of the policy limits, and whether it can be subject to a bad faith action if it fails to defend a renter when required by the statute. This will likely be the subject of future litigation.

To limit liability exposure and avoid the obligation to defend, rental companies will need to confirm that their renters have current and applicable liability insurance. They should also evaluate claims efficiently, and promptly forward a renter's contact and insurance information when notified of the complaint.

UM/UIM Coverage for Rental Cars

A.R.S. § 20-259.01 provides that insurers may make UM/UIM coverage available to rental and common carriers. It is not required.

If UM/UIM coverage is offered and accepted by the rental car company, and the renter also has his own policy providing UM/UIM, the renter may stack his/her UM/UIM coverage. A "set-off" or "other insurance" provision is invalid to the extent the insured is not fully compensated for his/her injuries. ***Rashid v. State Farm Mut. Auto. Ins. Co.***, 163 Ariz. 270, 787 P.2d 1066 (1990); ***Croci v. Travelers Ins. Co.***, 163 Ariz. 346, 788 P.2d 79 (1990).

Exclusions

A rental policy probably cannot exclude liability coverage for an unauthorized driver, an under-aged driver or for some other violation of the rental agreement, including driving under the influence. ***Philadelphia Indem. Ins. Co. v. Barerra***, 200 Ariz. 9, 21 P.3d 395 (2001). The legislative purpose of A.R.S. § 28-2166 is to protect the public from economic damages caused by persons operating rental vehicles. ***Lowry v. Tucson Diesel, Inc.***, 17 Ariz. App. 348, 498 P.2d 160 (1972); ***State Farm Mut. Auto. Ins. Co. v. Agency Rent-A-Car, Inc.***, 139 Ariz. 201, 677 P.2d 1309 (Ct. App. 1983). As a result, any exclusion or provision in the rental policy that is contrary to the legislative purpose will probably be held unenforceable.

In ***Consol. Enters., Inc. v. Schwindt***, 172 Ariz. 35, 833 P.2d 706 (1992), for example, Schwindt rented a car from Budget and was specifically advised that he could not allow his daughter, who was under the age of 21, to drive the car. Schwindt allowed his daughter to drive the car, and her negligent driving caused an accident. Budget paid the third-party victim in excess of $10,000 for property loss and personal injuries and then sued Schwindt to recover its payment to the third-party under a breach of contract theory. The Arizona Supreme Court held that nothing in former A.R.S. § 20-324 permits such a claim for breach of contract. Budget, required by statute to insure Schwindt and all permissive users against their negligence, could not avoid risk by inserting restrictive clauses in its rental agreement that removed its statutory requirements. Apparently in response to *Schwindt*, the legislature changed the rental car statute to specifically provide rental car companies/owners with a right of subrogation against the renter for damages arising out of unauthorized operation of the vehicle. This is the only right of subrogation available against a renter when a non-authorized driver's use of a vehicle results in damage to the rental car owner. A.R.S. § 28-2166(D)(2).

Subrogation

A.R.S. § 28-2166(D) contains the only right of subrogation for a rental car company. A rental car company/owner has a right of subrogation against the renter when the owner's damages are caused by a person operating the vehicle and is not authorized to do so by the written rental agreement, and when the damages arise out of the unauthorized operation of the vehicle.

Negligent Entrustment

A rental car company can be held responsible for the negligence of its renters under a theory of negligent entrustment. The plaintiff must show that the "defendant owned or controlled the

motor vehicle concerned and gave the driver permission to operate the vehicle." ***Lumbermens Mut. Cas. Co. v. Kosies***, 124 Ariz. 136, 138, 602 P.2d 517, 519 (Ct. App. 1979). The jury must also find that the defendant's conduct was the legal and proximate cause of the alleged injury. ***Tellez v. Saban***, 188 Ariz. 165, 171, 933 P.2d 1233, 1239 (Ct. App. 1996).

Negligent entrustment is not restricted to cases in which the owner entrusts a vehicle to one known to be incompetent or inexperienced. *Tellez*, 188 Ariz. at 171, 933 P.2d at 1239. It can also apply where the "third person's known character or the peculiar circumstances of the case are such as to give the actor good reason to believe that the third person may misuse [the instrumentality]." *Id.* In *Tellez*, a rental car company knowingly rented a car to an individual who did not have a driver's license. The rental agency did not inquire as to why the renter could not provide a valid license. If it had inquired, it would have discovered that the individual's license had been revoked for a DUI conviction. In light of these facts, a jury could find that the rental car company's negligence was a proximate and legal cause of the renter's accident.

If you have questions regarding the information in this chapter, please contact the authors or any JSH attorney.

CONTRIBUTING AUTHORS:

MICHAEL HALVORSON, PARTNER Mike's diverse practice focuses on trucking and transportation defense, including commercial cargo and property loss, as well as in the areas of products liability, dram shop claims, motor vehicle liability and premises liability defense.
mhalvorson@jshfirm.com | 602.263.7371 | jshfirm.com/mhalvorson

SERAPHIM D. SPARROW, ASSOCIATE Seraphim Sparrow works with insurers and commercial transportation companies to defend claims involving general civil litigation, product defect, and personal injury and wrongful death. Seraphim previously worked at JSH as a summer law clerk in 2020.
ssparrow@jshfirm.com | 602.263.4461 | jshfirm.com/ssparrow

THOMAS W. GRIMES, ASSOCIATE Thomas works in the transportation, auto, products and general liability trial group. Before graduating law school in 2020, Thomas gained valuable experience working as a 2020 summer law clerk at JSH.
tgrimes@jshfirm.com | 602.263.4426 | jshfirm.com/tgrimes