CHAPTER 10: UNINSURED AND UNDERINSURED MOTORIST COVERAGE

Uninsured (UM) and Underinsured (UIM) motorist coverage provides insurance coverage if an at-fault party does not have insurance, or does not have enough insurance to cover the insured/victim's damages. A.R.S. § 20-259.01 states that an insurer must offer in writing both uninsured and underinsured motorist coverage to their insureds up to the liability limits in the policy. The statute also states that an offer need not be made in the event of reinstatement of a lapsed policy or the transfer, substitution, modification or renewal of an existing policy. Any previously valid UM/UIM rejection or purchase decision remains valid until the insured makes a written request to the insurer for the addition of, or increase to, the amount of coverage.

Because A.R.S. § 20-259.01 requires insurers to offer uninsured and underinsured coverage, Arizona courts have held that where such insurance is offered to and purchased by the insured, policy exclusions limiting that coverage are invalid. *See* ***Spain v. Valley Forge Ins. Co.***, 152 Ariz. 189 (1987) (holding invalid an insurer's contractual provision offsetting the available UM coverage by amounts already recovered under the liability coverage of the same policy; insured was entitled to both $100,000 liability coverage and $100,000 UM coverage); ***Employers Mut. Cas. Co. v. McKeon***, 159 Ariz. 111 (1988) (named driver exclusion was invalid; insured was entitled to recover full amount of UM coverage purchased, even though that amount exceeded the statutory minimum); ***Higgins v. Fireman's Fund Ins. Co.***, 160 Ariz. 20 (1989) ("other insurance exclusion" is void when insurer offers and insured purchases underinsured coverage).

In essence, once optional coverage is purchased in Arizona, it is subject to the same "public policy" considerations as mandatory coverage. That public policy in the UM/UIM context is to protect victims of financially irresponsible drivers. ***Lowing v. Allstate Ins. Co.***, 176 Ariz. 101 (1993). Arizona courts will carefully scrutinize any attempt to limit uninsured or underinsured coverage.

OFFER OF UM/UIM MOTORIST COVERAGE

Prior to 1997, A.R.S. § 20-259.01 required every insurer writing motor vehicle liability policies to offer, by written notice, uninsured and underinsured motorist coverage. In 1997, the Legislature amended A.R.S. § 20-259.01 to require insurers to describe the coverages afforded and reasons an insured should consider accepting or rejecting such benefits. In 1998, the Legislature again amended A.R.S. § 20-259.01 restoring it back to its pre-1997 version. Today, insurers may utilize a form prescribed by the Director of the Department of Insurance to meet the requirements of the statute. *See* A.R.S. § 20-259.01(A) and (B).

An insurer's failure to make the required offer will result in the inclusion of UM/UIM benefits in the policy by operation of law in amounts equal to the insured's bodily injury liability limits. *See generally* ***State Farm Mut. Auto. Ins. Co. v. Ash***, 181 Ariz. 167 (App. 1995). The offer does not need to contain an explanation of the nature of the UIM coverage.

Several cases have analyzed the statutory requirement that an insurer offer UIM coverage to insureds purchasing liability policies. In ***Ball v. American Motorist Ins. Co.***, 181 Ariz. 124 (1995), the Arizona Supreme Court held that an employer, as the named insured under an automobile fleet policy, could not waive the statutory requirement that the insurer extend a written offer of UIM coverage. And in ***State Farm Mut. Auto. Ins. Co. v. Ash***, 181 Ariz. 167 (App. 1995), the court held that the insurer must offer UIM coverage; the insurer need not prove that the insured either received the offer nor expressly rejected it. Further, although A.R.S. § 20-259.01 requires automobile insurers to offer insureds the option to purchase additional UM/UIM coverage in limits up to those they choose for their bodily injury liability coverage, it does not require an insurer to obtain written rejection of UIM coverage from an insured. ***Blevins v. Gov't Employees Ins. Co***., 227 Ariz. 456 (App. 2011).

In ***Lawrence v. State Farm Mut. Auto. Ins. Co.***, 184 Ariz. 145 (App. 1995), the Court of Appeals held that an insurer must make an offer of UIM coverage when a new named insured, such as a spouse, is added to the policy, holding that such an addition is more than a mere "modification" of the contract.

The court in ***Progressive Cas. Ins. Co. v. Estate of Palomera-Ruiz***, 224 Ariz. 380 (App. 2010), held that an offer of UIM/UM coverage must be conveyed by written notice and that the recording of a telephone conversation between the insurer and insured was insufficient. The plain meaning of the words "written notice" in A.R.S. § 20-259.01(B) required the offer of UM/UIM coverage to be communicated in writing. The failure to do so resulted in UM/UIM coverage being imputed into the policy.

Ballesteros v. American Standard Ins. Co., 226 Ariz. 345 (2011), held that the offer requirement did not require insurers to provide Spanish-language forms to Spanish speakers. Providing a Department of Insurance-approved form written in English provides sufficient notice in accordance with the statute.

In ***Newman v. Cornerstone***, 237 Ariz. 35 (2015), the Arizona Supreme Court held that written notice offering UIM coverage did not need to include a UIM premium quote as part of an offer of coverage. The statute merely requires insurers to "make available" by "written offer" UIM coverage in an amount not less than the liability limits for bodily injury and death under A.R.S. § 20-259.01(B). The court held that the statute does not require the insurer to convey all material terms of the proposed insurance contract to an insured. Moreover, whether an offer of UM/UIM coverage has been made does not depend on the insured's understanding of the terms being offered but rather on whether a reasonable person would understand that accepting the offer would bind the insurer to provide the coverage. Although the court recognized that the cost of the coverage might be useful information for an insured to have, the statute does not require that such information be provided.

As noted above, A.R.S. § 20-259.01(B) requires insurers to *offer* uninsured and underinsured motorist coverage to their insureds. In ***Wilks v. Manobianco***, 237 Ariz. 443 (2015), the Arizona Supreme Court held that an insured who rejected UM/UIM on a DOI-approved form may still sue the insurance agent for negligently failing to obtain UIM coverage the insured requested and the agent agreed to procure. The Wilkses contacted an insurance agency seeking full insurance coverage for the two vehicles they owned. The agency obtained a State Farm policy for the Wilkses, which included uninsured motorist

and underinsured motorist coverage. The Wilkses then changed insurance companies, obtaining a policy that also included UM and UIM coverage. A year later, Mrs. Wilks returned to the agency, asking for the same coverage she had previously had, that is, "full coverage" including UM and UIM coverage. The agency again obtained coverage through State Farm, assuring Mrs. Wilks she would have the same coverage she previously had. Mrs. Wilks ultimately signed a number of documents at the agency's office without reading them, including a Department of Insurance ("DOI") approved form that selected UM but not UIM coverage. Four years later, an underinsured motorist rear- ended Mrs. Wilks and State Farm denied her claim based on the form she had signed declining UIM coverage. The Wilkses sued the agency for negligence in failing to obtain the requested UIM coverage.

The court held that compliance with A.R.S. § 20-259.01(B) did not bar common law negligence claims against an insurance agent. The court noted that the statute only refers to "insurers" and does not mention "insurance agents." Had the legislature wanted the statute to cover insurance agents, it could have explicitly included agents within the statute's scope. It did not, and therefore the statute only applies to insurers.

The court also discussed the distinction between an insurer's *offer* of UM/UIM and the agent's *procurement* of the requested coverage. A.R.S. § 20-259.01(B) establishes a method by which insurers may satisfy their statutory obligation to make UM/UIM available by a written *offer*. When an insured completes a DOI-approved form, fact questions are eliminated concerning "whether UM/UIM coverage was sufficiently offered" and "whether the terms of the offer were understood." Thus, factual inquiries related to an insurer's *offer* are barred. However, the statute does not eliminate factual inquiries regarding other types of negligence, including claims that the agent failed to *procure* the UIM coverage requested.

The court also held that Mrs. Wilks' failure to read the DOI-approved form she signed despite its bold print "**WARNING**" and instruction to "read carefully before signing" was an issue for the jury to consider in assessing whether Mrs. Wilks was comparatively negligent. Additionally, a jury could consider the agent's compliance with A.R.S. § 20-259.01(B) as evidence that the agent acted reasonably under the circumstances.

As a result of the *Wilks* case, the Arizona legislature modified A.R.S. § 20-259.01 in 2016 and partially overturned the *Wilks* decision. The statute was modified again in 2019 and 2020, and it now states that an insurance producer that uses a DOI approved form satisfies the insurance producer's standard of care in both offering and explaining the nature and applicability of uninsured and underinsured motorist coverage. The statute also now requires that the insured's policy declarations page **must** be sent to the named insured and this will constitute the final expression of his or her decision to purchase or reject uninsured or underinsured coverage and this will be valid for all persons insured under the policy. The other change clarified that an offer form is not required to be sent when an insured purchases UM and UIM limits equal to his or her bodily injury limits. Specifically, A.R.S. § 20-259.01 has added the following language to its UM and UIM subsections (A) and (B):

> Every insurer writing automobile liability or motor vehicle liability policies shall make available to the named insured thereunder and by written notice offer the named

> insured and at the request of the named insured shall include within the policy uninsured motorist coverage that extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy. The offer of limits to a named insured or applicant shall be made on a form approved by the director. An insurance producer that uses such a form in offering uninsured [underinsured] motorist coverage satisfies the insurance producer's standard of care in offering and explaining the nature and applicability of uninsured [underinsured] motorist coverage. The policy declarations page must be sent to the named insured, constitutes the final expression of the named insured's decision to purchase or reject uninsured [underinsured] motorist coverage and is valid for, extends to and covers all persons insured under the policy. An offer form is not required where the named insured purchases such coverage in an amount equal to the limits for bodily injury or death contained in the policy.

HORSES

A horse is not an underinsured vehicle. ***Uhrhammer v. State Farm Mut. Auto. Ins. Co.***, 167 Ariz. 508 (App. 1991) (insured had an accident with a horse and was unable to recover under his UIM policy).

AUTOMOBILE USED IN DRIVE-BY SHOOTING

UM coverage does not apply to a passenger in a car who was shot by the driver of an uninsured car in a drive-by shooting. In ***Ruiz v. Farmers Ins. Co.***, 177 Ariz. 101 (1993), the court analyzed whether the gunshot wound was an injury arising out of the operation, maintenance, or use of an uninsured vehicle and held that a causal relationship did not exist between the injury and the use of the car.

Similarly, passengers in a vehicle shot by someone outside of the vehicle were not entitled to UM coverage because the incident did not involve an injury "arising from the ownership, maintenance or use of a car or other motor vehicle." ***Benevides v. Arizona Prop. & Cas. Ins. Guar. Fund***, 184 Ariz. 610 (App. 1995).

"HIT AND RUN," "MISS AND RUN," AND "UNIDENTIFIED" VEHICLES

An unidentified accident-causing motorist is an "owner or operator of an uninsured motor vehicle" within the meaning of A.R.S. § 20-259.01, and therefore, all automobile liability policies must afford coverage for injuries received from unidentified motor vehicles. ***Lowing v. Allstate Ins. Co.***, 176 Ariz. 101 (1993). A "hit and run" vehicle or a "miss and run" vehicle which causes injuries is an "uninsured motor vehicle" for purposes of UM coverage. No physical contact is required with the insured vehicle for UM coverage to exist, and any "physical contact" requirement is void as against public policy.

A.R.S. § 20-259.01(M) provides that if an insured makes a claim under uninsured or underinsured motorist coverage based on an accident that involved an unidentified motor vehicle and no physical contact with the motor vehicle occurred, then the insured must provide evidence "corroborating"

a claim that an unidentified motor vehicle caused the accident. Corroborative evidence is defined as any testimony, fact or evidence which strengthens and adds weight or credibility to the insured's representations about the accident. In ***Scruggs v. State Farm Mut. Auto. Ins. Co.***, 204 Ariz. 244 (App. 2003), the court of appeals held that an affidavit and report from an accident reconstructionist were "additional" evidence that satisfied the statute's corroboration requirement. The insured's statement at the scene of the accident, however, would not have satisfied the requirement. In ***Progressive Classic Ins. v. Blaud***, 212 Ariz. 359 (App. 2006), the court of appeals held that a motorcyclist met the corroboration requirement for submitting his UIM claim by providing an expert accident reconstructionist who opined that his motorcycle was hit by another vehicle's tire tread propelled into him rather than the motorcyclist merely running over the tread. The court further stated that this does not establish coverage under the policy. Rather, it only satisfied the "corroboration" requirement to submit the claim. ***Id.*** at 364.

BOARDING A BUS

Students waiting to board a bus who were injured when an uninsured motorist collided with the bus were insured parties under an uninsured motorist provision of the public school motor vehicle policy. ***Chavez v. Arizona Sch. Risk Retention Trust, Inc.***, 227 Ariz. 327 (App. 2011). The court in *Chavez* held that students were insured parties under the policy because at the time of the accident, the bus was functioning to protect the safety of the students by having its "lights and hazards" on and the students were "using" the bus's safety features to board the bus for purposes of A.R.S. § 28-4009(A)(2).

RELATIVES RESIDING IN AN INSURED'S HOUSEHOLD

UIM coverage applies to relatives residing in the insured's household. ***Mendota Ins. Co. v. Gallegos***, 232 Ariz. 126 (App. 2013). In *Mendota*, the court addressed whether an individual was entitled to underinsured motorist coverage under his brother's insurance policy. The brother's insurance policy provided underinsured motorist coverage to his family members including related individuals who also resided in his household. The central issue in this case was whether the individual resided in his brother's household. The court stated that the existence of a household is demonstrated by the totality of the circumstances. A household: 1) contemplates a close-knit group of individuals who treat each other like family, and deal with each other intimately and informally, 2) contemplates a connection to a shared dwelling place where its members develop and maintain their close-knit, intimate, and informal relationships, and 3) contemplates a settled or permanent status; it requires a degree of permanency and intention to integrate into the family unit and remain a member for more than a mere transitory period.

EXCLUSIONS

Statute: A.R.S. § 20-259.01

The provisions of the UM/UIM statute are considered a part of every insurance policy. ***Ins. Co. of N. Am. v. Superior Court In & For Cnty. of Santa Cruz***, 166 Ariz. 82 (1990).

Exclusions and limitations on UM/UIM coverage are generally invalid unless contemplated by statute. ***Lowing v. Allstate Ins. Co.***, 176 Ariz. 101 (1993).

What Can Be Excluded

Non-Permissive User

Vehicles operated by a non-permissive user (as distinguished from an "excluded" user) can be excluded.

Commercial UIM Policy and Family and Friends

A commercial UIM policy does not extend to family and friends. *See* ***Cullen v. Koty-Leavitt Ins. Agency, Inc.***, 216 Ariz. 509 (App. 2007) *aff'd in part, vacated in part sub nom*. ***Cullen v. Auto-Owners Ins. Co***., 218 Ariz. 417 (2008) (holding that a plaintiff, injured while riding in a third party's automobile, could not recover UIM benefits because the named insured was a company; to recover benefits under a UIM policy, the policy's named insured must be an individual and the claimant must be residing in that individual's household).

Resident Relatives Who Own Their Own Vehicle

An exclusion for a family member who lives with the named insured but owns his or her own motor vehicle not insured under the policy is valid if the policy definition of "relative" excludes such a person as an "insured" under the policy. ***Beaver v. American Family Mut. Ins. Co.***, 234 Ariz. 584 (App. 2014). Daughter lived with named insured dad who had his own American Family auto policy which would normally cover daughter. Daughter was injured on a motorcycle that she owned but was not covered under the dad's policy. The policy provided that an "insured person" included relatives living with the named insured, but excluded a relative who owned their own motor vehicle. The court held that the "Relative" definition under the American Family policy was not void under the Underinsured Motorist Act (A.R.S. § 20-259.01). As daughter owned the motorcycle, she was not considered a "relative" and thus not an "insured person" under her dad's policy and not entitled to UIM coverage.

Off-Road Vehicles (UM)

An exclusion for off-road vehicles used for off-road activity is valid, and the driver of such a vehicle will not be considered an uninsured motorist. ***W. Am. Ins. Co. v. Pirro***, 167 Ariz. 437 (1990). However, UM coverage does apply to an off-road vehicle when used on a public road. For a definition of "public road," *see* ***Gittings v. Am. Family Ins. Co***., 181 Ariz. 176 (App. 1994) ("those areas which a reasonable person using the highway, having cognizance of all pertinent road signs and markings, would consider to be intended for vehicular travel, including the berm or shoulder of the highway if the same is improved for vehicular traffic").

Off-Road Vehicles (UIM)

The Arizona Supreme Court recently held that Arizona's Uninsured/Underinsured Motorist Act ("UMA") does not require coverage for all-terrain vehicles ("ATV's") not operating on public roads and that an insurer may preclude such coverage in an Underinsured Motorist ("UIM") policy. ***State Farm Auto. Ins. Co. v. Orlando***, ---P.3d---(2025), 149 Arizona Cases Digest 21 (May 29, 2025).

Jacey Orlando was a passenger who was injured in a rollover accident on an ATV. She received policy limits from the driver and then made a UIM claim under her own State Farm policy. State Farm denied coverage, contending the vehicle was not an "underinsured motor vehicle" because it was an off-road vehicle and the accident did not occur on a public road. The Court of Appeals held that State Farm's ATV exclusion was void and unenforceable. The Arizona Supreme Court vacated the Court of Appeals opinion and affirmed the superior court's entry of summary judgment in State Farm's favor.

The Court reviewed whether the UMA required insurers to provide UIM coverage for accidents involving vehicles designed primarily for off-road use and that do not occur on public roads. The Court read the UMA along with the Arizona Financial Responsibility Act ("FRA") as they operate together in a congruent regulatory scheme. The primary purpose of the FRA is to protect the public from financially irresponsible persons by requiring minimum liability coverage limits for motor vehicles on public roads. The UMA is designed to "fill the gap" for insureds when a negligent driver fails to comply with the FRA or the insureds' injuries are greater than the minimum limits. While the UMA does not define a "motor vehicle," the FRA does, as "a self-propelled vehicle" that is "operated on a highway" and does not include an ATV operating off-road.

The Court followed Arizona Uninsured Motorist ("UM") cases which permit the ATV exclusion and noted that any textual differences between the UMA's provisions concerning UM and UIM coverage assume the existence of coverage. Therefore, those textual distinctions were irrelevant to determining whether coverage exists in the first place.

The Court concluded, "Applying the FRA definition of motor vehicle, we hold that UIM coverage of an off-road ATV accident is neither required nor prohibited under the UMA. UIM coverage in such a circumstance is a matter of contract. Therefore, the Policy's definition of 'underinsured motor vehicle,' resulting in preclusion of UIM coverage, is permissible under Arizona law."

Public Conveyance

Vehicles used as public conveyances (taxis) or rented to others or used in a business primarily to transport property or equipment can be excluded. Since the UM/UIM statute does not require UM/UIM coverage when an insured uses a vehicle as a public conveyance, a UM/UIM provision in a policy issued for a taxi, which excluded coverage for injuries sustained to people in "any auto while being used as a public conveyance," was valid with respect to injuries sustained by a taxi driver in an accident with an uninsured motorist. ***Warfe v. Rocky Mountain Fire & Cas. Co.***, 121 Ariz. 262 (App. 1978).

Personal Auto Policies for Accidents Occurring in Business/Commercial Vehicles

The UIM statute allows an insured's personal policy to exclude UIM for an insured who has an accident while driving a business/commercial vehicle. ***Gambrell v. IDS Property Cas. Ins. Co***., 238 Ariz. 165 (App. 2015). Gambrell was driving a milk semi-tractor for his employer when he was involved in an accident with another driver. He received $15,000 from the other driver and $100,000 UIM from his employer's policy. Gambrell sought an additional $100,000 from his personal auto IDS policy. IDS denied UIM coverage because Gambrell was driving a business vehicle at the time of the accident. The policy provided for UIM coverage while occupying a "private car or utility car, or as a pedestrian." The semi-tractor he was driving did not fit that definition. Gambrell sued for breach of contract and bad faith. The trial court granted IDS summary judgment and the court of appeals affirmed. Subsection (C) of A.R.S. § 20-259.01 makes the offer of UIM optional for vehicles used in business primarily to transport property or equipment. While UM/UIM is portable, A.R.S. § 20-259.01(C) is a legislatively-enumerated exception. The court held that the insurer's denial of coverage was not an exclusion or limitation on UIM coverage; rather the policy simply did not provide it.

Punitive Damages

There is no UM/UIM coverage for punitive damages unless the policy specifically states there is such coverage. ***State Farm Mut. Auto. Ins. Co. v. Wilson***, 162 Ariz. 247 (App. 1989), ***approved as modified***, 162 Ariz. 251 (1989).

What Cannot Be Excluded

Government Vehicles

A policy provision limiting UM/UIM coverage to statutory minimum coverage for an accident involving a government owned vehicle is invalid. ***Transportation Ins. Co. v. Martinez***, 183 Ariz. 33 (App. 1995).

Territorial Limitations

Public policy dictates that uninsured motorist coverage must be territorially co-extensive with liability coverage. Thus, territorial limitations restricting uninsured motorist coverage, but not liability coverage, to the United States and Canada are void as against public policy. ***Bartning v. State Farm Fire & Cas. Co.***, 162 Ariz. 344 (1989).

"Owned But Not Insured" Exclusion Is Invalid

An insured can select the UM/UIM from any policy under which he is covered, regardless of whether he was occupying any of them at the time of the accident. ***Calvert v. Farmers Ins. Co.***, 144 Ariz. 291 (1985); *see* A.R.S. § 20-259.01 (H). A policy provision that excludes UM/UIM coverage to an insured while occupying a vehicle he owns but which is not insured by that carrier is invalid. ***Calvert v. Farmers***,

supra; ***Higgins v. Fireman's Fund Ins. Co.***, 160 Ariz. 20 (1989). However, under a corporation's business automobile policy, the corporation's president was insured only while occupying a covered auto, and was, therefore, not entitled to UIM coverage under the policy when injured in a non-covered auto. ***American States Ins. Co. v. C&G Contracting, Inc.***, 186 Ariz. 421 (App. 1996).

"Named Driver" Exclusion Is Invalid for UM/UIM Coverage

A liability policy may exclude a specific individual from liability coverage. ***Employers Mut. Cas. Co. v. McKeon***, 159 Ariz. 111 (1988). However, this does not apply to UM coverage. The exclusion applies only to liability coverage, regardless of whether the policy has a "named driver exclusion." The excluded driver has UM/UIM coverage in the full amount of coverage specified under the policy and is not limited to 15/30 (unless that is the policy limit). *Employers Mut., supra.* Although this case deals with UM coverage, the rationale is equally applicable to UIM coverage.

"Furnished for Regular Use" Exclusion

A "furnished for regular use" exclusion in an underinsured motorist policy is void as against public policy. ***State Farm Mut. Auto. Ins. Co. v. Duran***, 163 Ariz. 1 (1989).

THE REASONABLE EXPECTATIONS DOCTRINE

In Arizona, the reasonable expectations doctrine is a rule of construction that enables courts to negate boilerplate terms of an insurance agreement that take away coverage provided elsewhere in the contract. ***Gregorio v. GEICO Gen. Ins. Co***., 815 F. Supp. 2d 1097 (D. Ariz. 2011). The Arizona Supreme Court recognized the doctrine in ***Darner Motor Sales v. Universal Underwriters Ins. Co***., 140 Ariz. 383 (1984), and the doctrine was expanded in ***Gordinier v. Aetna Cas. & Surety Co***., 154 Ariz. 266, 273 (1987). 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.

The doctrine does not operate to add coverage, however, where such coverage is nowhere stated in the policy. Thus, courts cannot invoke the doctrine to create a new bargain without any basis in the written terms of the agreement. *Gregorio.* Furthermore, the insured has the burden to prove that the insurer "had 'reason to believe' that the signing party would not have accepted a particular term" in the policy if the signing party had known of the term. ***State Farm Fire & Cas. In. Co. v. Grabowski***, 214 Ariz. 188 (App. 2007).

UM V. UIM

Uninsured (UM) and underinsured (UIM) motorist coverages are separate and distinct and apply to different accident situations. A.R.S. § 20-259.01(H). UM coverage applies to cover bodily injury or death caused by an uninsured motorist. A.R.S. § 20-259.01(E). An uninsured motorist includes a motorist whose liability insurer is, or becomes, insolvent. A.R.S. § 20-259.01(D). Underinsured motorist coverage provides coverage for a person if the sum of the limits of liability under all bodily injury or death liability bonds and liability insurance policies applicable at the time of the accident is less than the total damages for bodily injury or death resulting from the accident. *See* A.R.S. § 20-259.01(G).

Arizona courts have held that UM coverage guarantees coverage up to the statutory minimum amount. UIM coverage, if accepted, is not limited to the statutory minimum amount. ***Mancillas v. Arizona Prop. & Cas. Ins. Guar. Fund***, 182 Ariz. 389 (App. 1994); ***Porter v. Empire Fire & Marine Ins. Co.***, 106 Ariz. 274 (1970). Therefore, an insured injured in an automobile accident caused solely by the negligence of another, and who receives less than the statutory minimum for his injuries due to the splitting of the other's liability insurance among the injured parties, is entitled to UM benefits for the difference between the compensation from the liability insurer and the statutory minimum. This was true even after the advent of UIM coverage, and applied even where UIM coverage was offered and rejected. However, the Arizona Court of Appeals held that, when UIM coverage was available, the insured could only recover from UIM and was not entitled to recover from UM coverage even if the amount received from the tortfeasor's liability insurance was less than the statutory minimum. ***State Farm Mut. Auto. Ins. Co. v. Cobb***, 172 Ariz. 458 (App. 1992).

In response to *Mancillas* and *Porter*, in 1996 the Arizona Legislature amended A.R.S. § 20-259.01 to exclude a person insured under a liability policy that complies with A.R.S. § 28-1170 (currently A.R.S. §§ 28-4001, 4009). Any payment made under the bodily injury liability portion of a liability policy insuring the motor vehicle that caused bodily injury or death, regardless of the number of persons receiving payments, precludes any payment under UM coverage based on the fault of the person insured under the motor vehicle liability policy. A.R.S. § 20-259.01(F). The statute thus eliminates UM coverage where the insured receives any amount from the tortfeasor's liability coverage, even if the amount received does not meet the statutory minimum due to division among injured parties. This would apply whether UIM insurance is available or not, so long as the negligent party was insured under a motor vehicle policy that complies with A.R.S. §§ 28-4001, 4009 (formerly A.R.S. § 28-1170). Therefore, an injured party must have UIM coverage in order to satisfy any deficiency in recovery under the liability policy. *See* ***Taylor v. Travelers Indem. Co.***, 198 Ariz. 310 (2000).

PRIMARY/EXCESS ISSUES

In general, A.R.S. § 28-4010(A) (formerly A.R.S. § 28-1170.01) provides that if two or more policies of valid and collectible liability insurance apply to the same motor vehicle involved in the loss, it will be presumed that the policy in which the motor vehicle is described or rated as an owned automobile shall be primary and the insurance afforded by any other policy or policies shall be excess. A.R.S. § 28-4010 was enacted in an attempt to reduce the amount of litigation over which policy is primary.

AUTOMOTIVE BUSINESS

If a vehicle is being driven by someone engaged in an automotive business at the time of the accident, the policy covering that business is primary, and the car owner's policy is excess, regardless of what the policies say. A.R.S. § 28-4010. *See also* ***Jackson v. Nationwide Mut. Ins. Co***., 228 Ariz. 197 (App. 2011) (holding that individual could recover damages under a mechanic's business auto policy but that the business owner's liability policy was a commercial general liability policy not intended to be the first or only source of automobile liability insurance coverage and thus UM coverage could not be imputed to it).

If the vehicle is being driven by its owner, the owner's policy is primary and the automotive business policy is excess, regardless of what the policies say. *See* A.R.S. § 28-4010.

Other Than Automotive Business

In all situations other than those involving an automotive business, if two policies cover the same vehicle for an accident, the policy that names the vehicle involved in the accident is primary and any other policies that have coverage are excess, regardless of what the policies say. A.R.S. § 28-4010; ***State Farm Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co.***, 149 Ariz. 230 (App. 1985), *approved as modified,* 149 Ariz. 179 (1986).

Umbrella Policy

An excess liability policy used to be subject to the Uninsured Motorist Act. ***Ormsbee v. Allstate Ins. Co.***, 176 Ariz. 109 (1993). However, the Legislature eliminated this requirement on policies issued after January 1, 1994. *See* A.R.S. § 20-259.01(L).

Comprehensive General Liability

A comprehensive general liability (CGL) insurance policy that also provided automobile liability coverage by specific endorsement used to be subject to the requirements of the Uninsured Motorist Act. ***St. Paul Fire & Marine Ins. Co. v. Gilmore***, 168 Ariz. 159 (1991). However, the legislature eliminated this requirement on policies issued after January 1, 1994. *See* A.R.S. § 20-259.01(L).

A comprehensive general liability insurance policy's limitation of coverage where workers' compensation is available does not relieve a UM carrier of coverage. The Uninsured Motorist Act does not permit such a limitation of UM coverage. ***Farmers Ins. Co. v. USF&G***, 185 Ariz. 125 (1995).

If a business elects UM/UIM coverage, it may have different coverage limits for different employees. ***Carden v. Golden Eagle Ins. Co.***, 190 Ariz. 295 (1997).

STATUTE OF LIMITATIONS AND SUBROGATION

Time Limitation

Pursuant to A.R.S. § 12-555, a person may make an uninsured motorist claim by giving written notice to the insurer within three years after the date of the accident. Additionally, the insured may still assert a claim within three years after the earliest of: (1) the date the insured knew that the tortfeasor was uninsured, (2) the date the person knows or should know that coverage was denied by the tortfeasor's insurer, or (3) the date the person knew or should have known of the insolvency of the tortfeasor's insurer.

In an underinsured motorist claim, the insured must give written notice of intent to pursue a claim within three years after the date of the accident AND make a claim with the tortfeasor's insurer or file an action within the applicable statute of limitations; and may still make a claim within three years after the date the person knows or should have known that the tortfeasor has insufficient liability limits.

The Court of Appeals reviewed the application of an underinsured motorist ("UIM") claim under A.R.S. § 12-555. ***State Farm Mut. Auto. Ins. Co. v. Frank***, 547 P.3d 374 (App. 2024). In *Frank*, the State Farm insured was rear ended by another driver who maintained the state minimum insurance liability limits. After Frank made a claim with State Farm for UIM coverage under his personal auto policy and personal umbrella policy, State Farm denied both claims due to them being filed too late.

The Court of Appeals held that if a settlement is not reached on a UIM claim, A.R.S. § 12-555 sets a three-step process to resolve if the claim has been timely filed, whether in arbitration or court. First, A.R.S. § 12-555(B) provides that an insurer is not liable for UIM benefits unless the claimant provides written notice that she has a UIM claim under an insurance policy "within three years after the date of the accident that caused the bodily injury." Second, under A.R.S. § 12-555(C)(1), the UIM insurer must give written notice that it will not be liable unless the claimant "request[s] arbitration or file[s] suit pursuant to the terms of the insurance contract within three years" of providing the insurer notice of the UIM claim. The insurer has two years from receiving notice of the UIM claim to provide this written notice. Third, under A.R.S. § 12-555(C)(2), if "the person" does not request arbitration or file a lawsuit within three years of providing written notice of a UIM claim, "the insurer is not liable for" UIM benefits.

Applying this three-step process to the facts of the case, the Court of Appeals determined that Frank's UIM claim under her personal auto policy was barred because she did not request arbitration (as

required by the policy) within three years of the date of making the initial claim. Interestingly, State Farm itself requested arbitration during that period of time, but according to the court, that was insufficient to meet the statute of limitations. In addition, the court held that an insurer's failure to give notice under A.R.S. § 12-555(C)(1) did not extend the limitations period available to make a UIM claim. The court reached a different conclusion on Plaintiff's personal umbrella policy, which did not contain a provision requiring a notice of intent to pursue arbitration. Rather, the umbrella policy required that the insured file a lawsuit against State Farm within three years of providing notice of the claim if they could not resolve legal entitlement to UIM or the amount of damages in a UIM claim. The court found that Plaintiff did file suit within the three year period, and therefore her UIM claim under the umbrella policy was not time barred.

Thus, insurers may apply their policy language to A.R.S. § 12-555, under the three-step process described above, to determine if an insured has timely made a claim for UIM benefits, whether in arbitration or a lawsuit.

Claims Reporting Requirements

An insurer can enforce a "prompt notice of claim" requirement in the policy as long as the insurer is able to establish some prejudice caused by the late reporting. ***State Farm Mut. Auto. Ins. Co. v. Tarantino***, 114 Ariz. 420 (1977). The insurer bears the burden of establishing prejudice, ***Maryland Cas. Co. v. Clements***, 15 Ariz. App. 216 (1971), and delay alone is not enough to establish prejudice. ***Globe Indem. Co. v. Blomfield***, 115 Ariz. 5 (App. 1977).

Subrogation

Pursuant to A.R.S.§ 20-259.01(I), an insurer that makes payments to its insured for injuries caused by an uninsured motorist is subrogated in the name of the insured against the uninsured motorist for reimbursement for the UM payments made. An insurer may also file a claim for subrogation against the ancillary or domiciliary receiver of an insolvent insurer. *See* A.R.S. § 20-673(D). An insurer does not, however, have a right of subrogation against the insured of an insolvent carrier or against the Guaranty Fund. *See* A.R.S. § 20-673(A). Also, an insurer has no right to be subrogated to any proceeds the insured might recover from any party other than the uninsured motorists who caused the accident. ***State Farm Mut. Auto Ins. Co. v. Janssen***, 154 Ariz. 386 (App. 1987). Finally, there is no subrogation allowed against an underinsured motorist.

Limitation of Actions for Subrogation

In ***Safeway Ins. Co. v. Collins***, 192 Ariz. 262 (App. 1998), the court of appeals held that an insurer seeking subrogation was required to file a claim within two years after the accident, giving rise to that claim. This holding created an obvious dilemma for the insurer since that time period could theoretically pass before an insurer actually makes a payment on an uninsured motorist claim. In apparent response to this dilemma, the Legislature enacted A.R.S. § 12-555(D), which now allows the insurer to bring its subrogation claim within two years after the date the insurer first makes payment to the insured under the uninsured motorist coverage.

PORTABILITY

UM Coverage
UM coverage follows the insured, regardless of whether or not the insured is occupying the insured vehicle, or any vehicle at all. If the insured has UM coverage, and the insured is injured by an uninsured motorist, coverage applies. The insured can select which UM coverage he wishes to apply from any of his policies. *See* A.R.S. § 20-259.01(H). Furthermore, the "owned but uninsured" exclusion is invalid. ***Calvert v. Farmers Ins. Co.***, 144 Ariz. 291 (1985).

UIM Coverage

Like UM coverage, UIM coverage also follows the insured, regardless of what vehicle is involved. The insured can choose which UIM coverage he wishes to apply from any of his policies. *See* A.R.S. § 20-259.01(H). Again, the "owned but uninsured" exclusion is invalid. ***Higgins v. Fireman's Fund Ins. Co.***, 160 Ariz. 20 (1989).

STACKING

UM/UIM on UM/UIM, Different Companies – Permissible

UM policies from different companies that cover the insured for an accident (such as the driver's policy and the insured's personal policy), can be stacked. A set-off provision or "other insurance" provision is invalid. ***Rashid v. State Farm Mut. Auto. Ins. Co.***, 163 Ariz. 270 (1990); ***Croci v. Travelers Ins. Co.***, 163 Ariz. 346 (1990).

UIM on UIM, Different Companies – Permissible

Two vehicle accident. Car A is negligent and pays its full liability limits to passenger in Car B, who then recovers the full UIM limits from the policy covering Car B (as an additional insured under that policy). Passenger can also recover from his own UIM coverage up to the full amount of damages. A set-off provision or "other insurance" provision is invalid. ***Brown v. State Farm Mut. Auto. Ins. Co.***, 163 Ariz. 323 (1989).

UM/UIM on UM/UIM, Same Company – Generally Not Permissible

When an insured has two policies with the same company, an "other insurance clause" in the policy is valid to prevent the insured from stacking the UM benefits from one policy on the UM benefits from the other policy. ***Brown v. State Farm****, supra*; A.R.S. § 20-259.01. Additionally, a husband and wife are considered to be a single insured and are not entitled to stack UIM coverage contained in separate policies issued by the same insurer. ***State Farm Mut. Auto. Ins. Co. v. Lindsey***, 180 Ariz. 456 (App. 1994) (*"Lindsey I"*). The same analysis, based on community property principles, should apply to UM coverage

as well. However, *Lindsey I* was reversed by the Arizona Supreme Court in ***State Farm Mut. Auto. Ins. Co. v. Lindsey***, 182 Ariz. 329 (1995) (*"Lindsey II"*). The Supreme Court held that State Farm's "other vehicle exclusion" was ineffective to prevent stacking of coverage of three policies because the provisions did not track the language of the "anti-stacking" statute, A.R.S. § 20-259.01(F) (now (H)). Since then, the court of appeals has affirmed summary judgment in favor of an insurer, upholding an anti-stacking provision in an uninsured motorist policy. ***Farmers Ins. Co. v. Voss***, 188 Ariz. 297 (App. 1996) (reaffirming that insurers can enforce anti-stacking provisions in their policies as long as the policy language incorporates the anti-stacking provisions contained in the uninsured motorists' statute, and clearly advises the insured of the right to choose the applicable policy in the event of a claim). *See* A.R.S. § 20-259.01 (H).

In a 2016 unpublished ruling, however, the Arizona district court permitted stacking UIM on UIM from different insurers who claimed they were under "common management." In ***Delaney v. Depositors Insurance Company***, CV-15-02532-PHX-ROS, the insured attempted to stack UIM from two different insurance policies and companies. One policy was issued by AMCO Insurance Company while the other policy was issued by Depositors Insurance Company. AMCO and Depositors were affiliated companies under the common management of Nationwide Insurance Company. AMCO paid its UIM limits and then the insured made a UIM claim with Depositors. Depositors denied coverage based upon the anti-stacking language in its policy. The court held the anti-stacking language was ineffective because the word "us" meant "the company providing this insurance" and not other insurance companies under a "common management."

The Arizona court of appeals similarly held that the anti-stacking language in a particular policy was ineffective to preclude payment from an "affiliated insurer" in ***Hanfelder v. GEICO Indemnity Company*** 244 Ariz. 475 (App. 2018). There, Hanfelder had a UIM auto policy with GEICO Casualty Company and a separate UIM motorcycle policy with GEICO Indemnity Company. GEICO Casualty paid its UIM limits and Hanfelder made a UIM claim to GEICO Indemnity. GEICO Indemnity denied the claim based upon the anti-stacking language in its policy. Hanfelder sued GEICO Indemnity seeking UIM coverage under its policy. The anti-stacking language in the GEICO Indemnity policy provided "If separate policies or coverages with **us** are in effect for you or any person in your household, they may not be combined to increase the limit of our liability for a loss; however, you have the right to select which policy or coverage is to be applicable for the loss." (emphasis added) The GEICO Indemnity policy did not define the word "us." However, the policy used the word "we" to refer to "the Company named in the declarations," which was only "GEICO Indemnity." The court reasoned that it "defies common sense to construe the word "us" to include both GEICO Casualty and GEICO Indemnity when the word "we" only refers to one company- "GEICO Indemnity."

Moreover, the court found that GEICO Indemnity's policy did not incorporate the definition of "insurer" in the anti-stacking statute, A.R.S. § 20-259.01(H), which includes "every insurer within a group of insurers under a common management." GEICO Indemnity could have drafted its policy "to apply to all separate policies or coverages purchased from any GEICO affiliate but did not do so.

The Arizona Supreme Court held that under A.R.S. § 20-259.01, auto policies insuring multiple vehicles provide separate underinsured motorist (UIM) coverages for each vehicle rather than a single UIM

coverage that applies to multiple vehicles. The Court also held that an insured can receive UIM coverage from the policy in an amount greater than the bodily injury limits of the policy when stacking those multiple UIM coverages. ***Franklin v. CSAA Gen. Ins. Co.***, 255 Ariz. 409 (2023).

Plaintiff, Kay Franklin's mother died in an auto accident caused by a underinsured negligent driver. Her auto policy, which provided $50,000 of UIM coverage, covered two vehicles. Ms. Franklin sued CSAA, arguing she was entitled to stack the two $50,000 coverages for $100,000 in total coverage, even though the policy said the limit of liability shown on the declarations page was the most the company would pay regardless of the number of covered cars.

A.R.S. § 20-259.01(H) allows an insurer to limit coverage to only one policy or coverage "if multiple policies or coverages purchased by one insured on different vehicles apply to an accident or claim." The court found the "coverages purchased" language ambiguous—it could broadly mean whenever an insured pays multiple premiums for each vehicle under one policy (regardless of "technical policy language defining 'UIM coverage' to be a single coverage"); or it could mean only when the insurer defines "coverages" purchased in the policy to be a single coverage. Reviewing the statute's history and purpose, the court adopted the broad interpretation of "coverages purchased," which recognizes a separate UIM purchased for each vehicle in a multi-vehicle policy, and held that insurers cannot limit stacking (thus rendering subsection (H) meaningless) by defining UIM coverages in the policy as the sole coverage.

Subsection (H) also states that "If the policy does not contain a statement that informs the insured of the insured's right to select one policy or coverage as required by this subsection, within thirty days after the insurer receives notice of an accident, the insurer shall notify the insured in writing of the insured's right to select one policy or coverage." Despite the "thirty days'" language, the court rejected CSSA's argument that this sentence allows insurers to unilaterally limit coverage within thirty days after the accident, regardless of the policy's language. Reading the statute this way, said the court, would violate basic principles of contract law that require additional consideration and mutual assent for changes to an existing contract. The only way to prevent stacking is to "include in the policy unambiguous language plainly disavowing the possibility of stacking." *Id.*

The court also held, after reading the statute's subsections together, that A.R.S. § 20-259.01(B) did not set a ceiling on UIM coverage an insured can receive based on the policy's bodily injury or death liability limits. That subsection requires auto insurers to offer UIM coverage to the insured "in limits not less than" the policy's bodily injury or death limits. Rather than setting a ceiling on the UIM coverage insureds may buy, subsection (B) simply refers to per-vehicle coverage insurers must offer, as distinct from total UIM coverage an insured could receive in a stacked scenario. The "up to" language, said the court, merely obligates insurers to sell coverage in any amount the insured authorizes up to the liability amounts. The obligation to sell UIM coverage up to those limits does not prohibit the insured from receiving stacked UIM coverage in excess of those limits. *Id*.

UIM on UM, Same Company – Not Permissible

When the policy has paid the full UM limits, the insured cannot recover an additional amount under that policy's UIM coverage. *See* A.R.S. § 20-259.01(H); ***Evenchik v. State Farm Ins. Co.***, 139 Ariz. 453 (App. 1984).

UM on UIM, Same Company – Not Permissible

A.R.S. § 20.259.01(G) states that, to the extent an injured party's total damages exceed the total applicable liability limits, UIM coverage is applicable to the difference. Accordingly, if the injured party receives any amount from the tortfeasor's liability policy, even if less than the statutory minimum, the insured may only collect from UIM coverage, and is not entitled to any UM benefits. ***State Farm Mut. Auto. Ins. Co. v. Cobb***, 172 Ariz. 458 (App. 1992).

UM/UIM on Liability Limits

When an accident involves two negligent motorists, a passenger can collect from the liability policy of the driver of his car, and can also collect from the same policy's UM/UIM coverage for the negligence of the other driver, if the driver of the other car is uninsured or underinsured. ***Spain v. Valley Forge Ins. Co.***, 152 Ariz. 189 (1987). But when an accident involves two negligent uninsured motorists, a passenger cannot collect from more than one UM policy when the insured's policy contains the proper anti-stacking language under A.R.S. § 20–259.01(H) (formerly A.R.S. § 20–259.01(F)). ***Giannini v. State Farm Mut. Auto. Ins. Co***., 172 Ariz. 468 (App. 1992). In *Giannini*, the plaintiff passenger was in a two-vehicle accident with two uninsured vehicles and alleged both were negligent. Plaintiff insured two separate vehicles with two separate State Farm policies with UM coverage for each vehicle. Plaintiff argued she could recover under the two policies for both tortfeasors' negligence because she asserted two "claims" under A.R.S. § 20–259.01(H). The Arizona Court of Appeals rejected this argument and held that Plaintiff could not stack UM on top of UM for the negligence of two tortfeasors for one accident. The Court held:

> The fact that two separate tortfeasors share the blame for causing this accident has no bearing on whether State Farm, under the statute, is entitled to limit the coverage so that only one policy is applicable. Even though the negligence of two persons combined to cause [the plaintiff's] injuries, there is nothing to suggest that more than one accident occurred. The statute states clearly that the insurer may limit the coverage so that only one policy is applicable to any one "accident." Appellees would have us apply the statute to any one "claim." Such, however, is not the wording of the statute.

Id. at 470. Similarly, in an unpublished memorandum decision from 2017, Division One of the Arizona Court of Appeals held that when an accident involves two negligent underinsured motorists, a passenger can collect from the liability policy of the driver of each vehicle, but cannot collect from more than one UIM policy when the insured's policies contain the proper anti-stacking language under A.R.S. § 20–259.01(H). ***Yeager v. State Farm Mut. Auto. Ins. Co***., 2017 WL 491121 (Ariz. App. Feb. 7, 2017) (mem. decision).

In policies covering only one vehicle, a guest passenger cannot stack UIM coverage and liability coverage in the same policy. *See* ***Duran v. Hartford Ins. Co.***, 160 Ariz. 223 (1989) (holding that an injured passenger in one vehicle accident who recovered the full liability limit under the policy covering that vehicle could not stack liability and UIM coverage under the same policy so as to increase the name insured's liability coverage). This exclusion was upheld in ***Demko v. State Farm Mut. Auto. Ins. Co.***, 204 Ariz. 497 (App. 2003). Demko, a passenger in his own vehicle, was injured after the vehicle rolled over in a single vehicle accident. The vehicle was being driven by Parker, a permissive driver, and her negligence was the sole cause of the accident. Demko had one policy which afforded $100,000 in liability limits and a separate policy which provided $100,000 in underinsured limits. After receiving the liability limits from his policy and the underinsured limits from his other policy, he was paid $50,000 from Parker's liability policy for a total of $250,000 in payments. Demko then made a claim for Parker's $50,000 underinsured limits as well. The court granted summary judgment for State Farm holding that under Parker's policy, UIM coverage is excluded for any vehicle covered under the liability coverage of the policy. The court of appeals affirmed, holding that the passenger was not entitled to "stack" Parker's UIM coverage onto her liability coverage. UIM coverage is not intended to expand a tortfeasor's liability insurance limits. The court cited ***Duran v. Hartford Ins. Co.***, 160 Ariz. 223 (1989) (Duran I), which held that when the allegation of being "underinsured" is predicated on insufficient liability coverage from the same policy, underinsured coverage may not be "stacked" so as to in effect increase liability coverage. The court did, however, permit the insured passenger to receive the full $100,000 liability limits from his State Farm policy that insured his vehicle, plus the full $100,000 UIM limits of another State Farm policy he had on a different vehicle.

An exception exists if a plaintiff is unable to recover the tortfeasor's full policy limits. In such cases, the plaintiff may "bridge the gap between the amount paid and the full amount recoverable under the liability policy." ***Taylor v. Travelers Indem. Co.***, 198 Ariz. 310 (2000). In *Taylor*, Mrs. Taylor was injured in an accident resulting from the negligence of her driver/husband. The Taylors had liability and underinsured motorist coverage Travelers, with combined single limits of $300,000. Although Mrs. Taylor's injury claim exceeded $300,000, she recovered only $183,500 of liability because the limits were split with other claimants. The court allowed Mrs. Taylor to recover under the UIM portion of her policy to "bridge the gap" between her reduced recovery and the liability limits of her policy. In so holding, the *Taylor* court stated that this was not an impermissible "stacking" of coverages.

The Arizona Supreme Court in ***Am. Family Mut. Ins. Co. v. Sharp***, 229 Ariz. 487 (2012), held that the anti-stacking provision of A.R.S. § 20-259.01 (H) prohibited an insurer from denying UIM to its named insured on the ground that she was already partially indemnified under the liability coverage of a separate policy issued to her husband by the same company. In *Sharp*, wife was injured in a single-vehicle accident while riding as a passenger on a motorcycle driven by her husband. The Sharps had purchased two separate policies from the same insurer, one for the motorcycle, with husband as the named insured; and one for a car, with wife as the named insured. After the accident, the insurer paid wife the full limit of the liability insurance under the motorcycle policy but denied her claim for UIM under the car policy. The court disagreed. *Duran I* and *Taylor* were distinguishable because those cases did not involve different coverages under multiple policies and did not apply subsection (H). The court acknowledged that Sharp could not have received UIM coverage under the motorcycle policy because she recovered the full liability limits under that policy. But the court "disagreed with the notion that

'the legislature intended that an insured injured in her own car by another insured could be denied the UIM coverage she had purchased[,]'" and held: "That point is even more pronounced if, as occurred here, the UIM claimant is injured on a spouse's vehicle that is insured under its own policy, from which she received the liability limit, but no UIM coverage, and then seeks UIM coverage under a separate policy for which she paid a premium." *Id.* at 493, ¶ 20.

The court concluded that "[b]y claiming UIM coverage under the [car][p]olicy, from which she received no liability or other payment, Sharp is not seeking to duplicate recovery or receive more than she purchased." *Id.* As the court noted, "liability insurance is distinct from first-party UIM coverage. … An insured who purchased coverage against two separate risks, each of which occurred, generally may recover under both coverages" *Id*. at 492.

An unpublished court of appeals decision and a district court case have created another exception. Even in a one-vehicle, one-policy accident, the insured passenger may receive full bodily injury liability benefits plus UIM from the same policy if the policy covers more than one vehicle. *See* ***Hoelbl v. GEICO General Ins. Co.***, 2012 WL 5589909 (Ariz. App. Nov. 15, 2012) (mem. decision); ***GEICO General Ins. Co. v. Tucker***, 71 F. Supp. 3d. 985 (D. Ariz. 2014). The reasoning is that the insured paid more than one UIM premium and should be able to take advantage of "one of them" if the bodily injury liability benefits he purchased were insufficient to cover his injuries.

Guaranty Fund

An insured can stack UM coverage from an insolvent insurer's policy on other UM coverage from another insurance policy up to the total amount of damages. *See* ***Arizona Prop. & Cas. Ins. Guar. Fund v. Herder***, 156 Ariz. 203 (1988) (holding that a passenger who recovers UM limits from the driver's policy can then recover the UM limits from the guaranty fund up to the total damages, based on his own insolvent policy).

OFFSETS

UIM Offset for Liability Bonds and Insurance

Underinsured motorist coverage is defined as "coverage for a person [when] the sum of the limits of liability under all bodily injury or death liability bonds and liability insurance policies applicable at the time of the accident is less than the total damages." *See* A.R.S. § 20-259.01(G). Accordingly, an insurer is entitled to an offset for all amounts paid pursuant to all such bonds or policies. Moreover, where a liability insurer agrees with its insured to pay the full amount of any judgment or settlement, thereby effectively eliminating the applicable liability limit, then that insured is no longer an "underinsured" motorist. ***Hamill v. Mid-Century Ins. Co.***, 225 Ariz. 386 (App. 2010).

Workers' Compensation Offset

In the context of UIM claims, the Arizona Supreme Court struck down a workers' compensation offset provision. ***Cundiff v. State Farm Mut. Auto. Ins. Co.***, 217 Ariz. 358 (2008). In *Cundiff*, State Farm

claimed that amounts previously recovered by its insured in the form of workers' compensation benefits offset a UIM arbitration award. However, the court held that workers' compensation was not "liability insurance" within the meaning of the statutory definition of UIM coverage. The court's analysis was focused primarily on the statutory definition of UIM coverage and did not overrule prior authority, which upheld the validity of a workers' compensation benefits offset when applied to UM benefits. *See* ***Terry v. Auto-Owners Ins. Co.***, 184 Ariz. 246 (App. 1995).

Med-Pay Offset

A policy provision that offsets the amounts paid under the med-pay portion of the policy from the amount paid under the UM coverage is valid as long as the insured is fully compensated. A non-duplication endorsement is valid to prevent double recovery for medical payments. ***Schultz v. Farmers Ins. Grp. of Companies***, 167 Ariz. 148 (1991).

However, in ***Miller v. American Standard Insurance Company of Wisconsin***, 795 F.Supp.2d 1144 (D. Ariz. 2010), the court followed the reasoning in ***Cundiff*** and held that med-pay benefits could not be used to offset UIM payments. The court found that med-pay did not constitute "liability coverage" and thus, it could not be used to offset UIM payments even if it resulted in duplicate recovery. ***Id.*** at 1149.

LIENS

Workers' Compensation

Workers' compensation liens do not attach to UM/UIM coverage, even when the guaranty fund has picked up the coverage. ***Martinez v. State Workman's Comp. Ins. Fund***, 163 Ariz. 380 (App. 1990). *See also* ***Cundiff v. State Farm****, supra****.***

Health Care Provider

The lien of a health care provider does not extend to UM/UIM claims. *See* A.R.S. § 33-931(B).

Arizona Health Care Cost Containment System (AHCCCS)

AHCCCS is entitled to a lien with respect to charges for hospital or medical care and treatment of an injured person for which the administration or a contractor is responsible on any and all claims of liability or indemnity for damages accruing to the person to whom hospital or medical service is rendered or to the legal representative of such person on account of injuries giving rise to such claims and which necessitated such hospital or medical care and treatment. A.R.S. § 36-2915(A). However, the lien amount is calculated on what the plan pays and not on the total medical expenses. *See* ***Sw. Fiduciary, Inc. v. Arizona Health Care Cost Containment Sys. Admin.***, 226 Ariz. 404 (App. 2011) (AHCCCS, which had a Medicaid lien on settlements that automobile accident victims received from tortfeasors, could recover no more than that portion of the settlements which represented recovery of payments that AHCCCS actually made on behalf of the victims, less a deduction for legal expenses).

EXHAUSTION OF LIABILITY LIMITS

The court of appeals has answered the question of whether an underinsured carrier must consider a UIM claim when the insured settles for less than the tortfeasor's liability limits and if so, what credit the UIM carrier receives. In ***Country Mut. Ins. Co. v. Fonk***, 198 Ariz. 167 (App. 2000), the insured settled her claim against the tortfeasor for less than the available liability policy limits. The insured then made a claim to her carrier for payment under the UIM coverage following which a declaratory judgment action was filed by the company on the basis of its policy language requiring exhaustion of liability bonds or policies before UIM coverage applies. The court held that exhaustion was not required if the insured's damages exceeded the liability coverage, but the UIM carrier was entitled to an off-set for the full amount of liability coverage available to the insured.

DERIVATIVE CLAIMS

Consortium

Claims for derivative damages such as loss of consortium are not bodily injuries within the meaning of underinsured motorist coverage. In ***Green v. Mid-America Preferred Ins. Co.***, 156 Ariz. 265 (App. 1987), the victim died in an automobile accident. The family's insurance policy provided underinsured motorist coverage in the amount of $100,000 for each person and $300,000 for each accident. The decedent's wife and two children were not allowed to also recover $100,000 each under the underinsured motorist portion of the policy. Furthermore, since the survivors' injuries derived from the bodily injury to only one person, the plaintiffs' decedent, the "each person" rather than the "each accident" limit of the policy applied. *See also* ***Campbell v. Farmers Ins. Co.***, 155 Ariz. 102 (App. 1987).

Wrongful Death

In ***Herring v. Lumbermen's Mut. Cas. Co.***, 144 Ariz. 254 (1985), the survivors in a wrongful death action claimed they each had a bodily injury claim separate from the victim, and thus were each entitled to a per person limit of the UM coverage. The Arizona Supreme Court rejected this argument. Since the claimants' claims were not separate "bodily injury" claims, the claimants were entitled to only the one per person limit for the decedent's bodily injury. Thus, in wrongful death claims, the per person policy limit of UM/UIM applies based upon the injured person's or decedent's bodily injury, regardless of many wrongful death beneficiaries make claims arising from the death. The per occurrence limit is not applicable. ***Herring v. Lumbermen's Mut. Cas. Co.***, *supra*, (UM); ***Green v. Mid-America***, *supra* (UIM).

An insured cannot collect from his own UM/UIM coverage for loss of consortium or for the wrongful death of another person. The coverage must come from a policy covering the person who actually received the bodily injuries. ***Bartning v. State Farm Fire & Cas. Co.***, 164 Ariz. 370 (App. 1990).

In 1998, the Legislature limited the right to bring a wrongful death claim against uninsured and underinsured motorist coverages. If an insured covered under UM or UIM coverages is killed in an

accident, recovery under the policy is limited to surviving spouse, parents or children (A.R.S. § 12-612) who are also surviving insureds under the same coverages of the policy. *See* A.R.S. § 20-259.03.

The court of appeals in ***Bither v. Country Mut. Ins. Co.***, 226 Ariz. 198 (App. 2010), held that the clear legislative mandate of A.R.S. § 20-259.03 is to preclude recovery of UM benefits by a statutory beneficiary who is not also an insured under the policy. However, while A.R.S. § 20-259.03 limits recovery under a policy to surviving spouses, parents or children who are also surviving insured under the same coverages of the policy, a mother can recover for the death of her son killed in a collision with an underinsured motorist, despite not being a named insured on the policy since she was an "insured" within the definition of the policy. ***State Farm Mut. Auto. Ins. Co. v. White***, 231 Ariz. 337 (App. 2013).

CHOICE OF LAW

In the absence of a policy provision specifying the law that will apply to the policy's interpretation, Arizona courts follow the RESTATEMENT (SECOND) OF CONFLICT OF LAWS for UM/UIM coverage issues. In ***Beckler v. State Farm Mut. Auto. Ins. Co.***, 195 Ariz. 282 (App. 1999), opinion corrected, 196 Ariz. 366 (App. 2000), the court applied the most significant relationship test from the Restatement to determine which state's law applied. In *Beckler*, the insured son's parents resided in Nebraska, the policies were issued in Nebraska, the five cars in the household were licensed in Nebraska and primarily garaged in Nebraska. However, the court applied Arizona law to permit stacking because the son was attending college in Arizona with one of the insured vehicles and State Farm's agent understood that the principal location of the particular vehicle (the insured risk) was going to be in Arizona.

ARBITRATION

Many automobile insurance policies contain provisions requiring the arbitration of disputes for uninsured and underinsured motorist claims. Arizona public policy favors arbitration as a means of resolving a controversy. ***Allstate Ins. Co. v. Cook***, 21 Ariz. App. 313 (1972). A provision in a written contract requiring arbitration for any controversy arising between the parties is generally valid, enforceable and irrevocable. *See* A.R.S. § 12-1501. The authority of the arbitrator is limited to issues specified in the arbitration clause. *Allstate Ins. Co. v. Cook*. Trial de novo appeal provisions do not violate public policy and are therefore enforceable. ***Liberty Mut. Fire Ins. Co. v. Mandile***, 192 Ariz. 216 (App. 1997).

In a UM arbitration, the insureds waived their right to object to the arbitrator's partiality because their objections were untimely. **Fisher v. USAA**, 245 Ariz. 270 (App. 2018). The Fishers were aware of the alleged relationship between the arbitrator and USAA's counsel before the arbitration hearing, yet they did not raise an objection either before or during the hearing. Instead, they waited to challenge the arbitrator's impartiality after he handed down an unfavorable award. Also, the arbitrator did not breach his duty to disclose non-trivial relationships with parties and clients, where no evidence in the record supported the insureds' contention that a business relationship existed between the arbitrator and the insureds' counsel. Mere service as an arbitrator in other matters involving a party's counsel is not sufficient to trigger a presumption of partiality. The Fishers did not allege that the arbitrator had an interest in the outcome of the arbitration or that he had a relationship with either party.

TYPES OF INJURIES NOT COVERED

Contact with HIV-infected blood while providing emergency medical care to a victim of an automobile accident, without contracting HIV itself, is not a bodily injury as defined by UIM coverage. ***Transamerica Ins. Co. v. Doe***, 173 Ariz. 112 (App. 1992) (rescuers who suffered no physical injury, sickness, disease or substantial pain as a direct result of exposure to HIV were unable to recover under the UIM policy).

ATTORNEY'S FEES AND COSTS

Attorney's fees were recoverable in an UM/UIM claim dispute that sounded in contract and not tort, pursuant to A.R.S. § 12-341.01(A). ***Assyia v. State Farm Mut. Auto. Ins. Co.***, 229 Ariz. 216 (App. 2012). There, the tort was merely a trigger for the contractual duty and the action would not have existed but for the contract.

SETTLEMENT OF UM/UIM CLAIMS/BAD FAITH

See Chapter 7 for a discussion of bad faith claims.

In Arizona, there is an implied covenant of "good faith and fair dealing" in all insurance contracts. Each party is "bound to refrain from any action which would impair the benefits which the other had the right to expect from the contract or the contractual relationship." ***Voland v. Farmers Ins. Co. of Arizona***, 189 Ariz. 448 (App. 1997), citing ***Rawlings v. Apodaca***, 151 Ariz.149, 154 (1986). The tort of bad faith arises when an insurer "intentionally denies, fails to process or pay a claim without a reasonable basis." ***Noble v. National Am. Life Ins. Co.***, 128 Ariz. 188, 190 (1981). However, bad faith is not established by mere negligence or inadvertence. An "insurer must intend the act or omission and must form that intent without reasonable or fairly debatable grounds." ***Rawlings v. Apodaca***, *supra*. Thus, an insurer acts in bad faith when it unreasonably investigates, evaluates or processes a claim and either knows it is acting unreasonably or acts with such reckless disregard that such knowledge may be imputed to it. ***Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.***, 230 Ariz. 592 (App. 2012), citing ***Zilisch v. State Farm Mut. Auto. Ins. Co***., 196 Ariz. 234 (2000).

In ***Voland v. Farmers Ins. Co. of Arizona***, 189 Ariz. 448 (App. 1997), the court of appeals held that the implied covenant of good faith and fair dealing does not require a UM carrier to pay in advance the amount of an unaccepted settlement offer which fully covers all aspects of a UM claim including special and general damages.

In ***Zilisch v. State Farm***, the court held that whether an insurer knowingly acts unreasonably in regards to an insured's claim for underinsured motorist benefits is a question for the jury in a bad faith suit.

The Arizona Supreme Court in ***Deese v. State Farm Mut. Auto. Ins. Co.***, 172 Ariz. 504 (1992), reaffirmed that a breach of an express covenant is not a necessary prerequisite to an action for bad

faith. It further held that a plaintiff may sue for bad faith and breach of contract simultaneously and need not prevail on the contract claim in order to prevail on the bad faith claim, provided the plaintiff "proves a breach of the implied covenant of good faith and fair dealing."

Finally, in ***Nardelli v. Metro***, the court upheld a punitive damages award for bad faith because the insurer had acted with a conscious disregard for the insured's rights and the injury that might result.

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

CONTRIBUTING AUTHOR:

SANFORD GERBER, PARTNER

Sandy concentrates his practice on bad faith and extra- contractual liability, insurance coverage and fraud, construction litigation, and wrongful death and personal injury litigation.

sgerber@jshfirm.com | 602.263.1779 | jshfirm.com/sgerber