UNINSURED/UNDERINSURED MOTORIST COVERAGE ISSUES IN NEVADA

by Stephen S. Kent

I. THE COVERAGE

A. History

Primarily as a result of establishing financial responsibility, UM/UIM coverage began to be offered by insurers. By 1966, the coverage terms were established in a standard form. In 1977, the Insurance Services Office (ISO) developed a new basic form for personal automobile insurance. Some companies still use the 1966 standard form.

This coverage is designed to place the insured when injured in an automobile accident with an uninsured motorist in the position the insured would have been in if that motorist had carried liability insurance.

In 1971 Nevada adopted a UM/UIM statute (NRS 690B.020) as an addition to the Insurance Code requiring auto carriers to offer UM coverage in the statutory minimum amounts required for auto liability coverage.

A series of cases interpreted this coverage, refusing to create underinsured motorist coverage. *See, Gardner v. American Insurance Co.*, 95 Nev. 271, 593 P.2d 465 (1979); *Peacock v. Harper*, 95 Nev. 596, 600 P.2d 223 (1979). The legislature expanded the required coverage to include the underinsurance situation in 1979, in NRS 687B.145(2).

Disputes arose over whether UIM coverage was excess or reduction under 687B.145(2). Carriers took the position that UIM coverage was invoked only if the insured's UM/UIM limits exceed the underinsured motorist's liability coverage.

In *Mid-Century Insurance Co. v. Daniel*, 101 Nev. 433, 705 P.2d 156 (1985), the Nevada Supreme Court held UIM coverage was excess, so that the UIM protection is excess to the tortfeasor's liability limits and the UIM carrier does not get an offset for the liability limits.

B. Who is Covered

UM/UIM is personal coverage and not tied to a particular vehicle. As long as the insured and their family or a passenger is injured in connection with an automobile, coverage may exist. *State Farm Mutual Automobile Insurance Co. v. Hinkel*, 87 Nev. 478, 488 P.2d 1151 (1971); *Beeny v. California State Automobile Association*, 104 Nev. 1, 752 P.2d 756 (1988).

C. Liability vs. UM/UIM

Generally, an insured may not recover under the liability and UM/UIM portions of the same policy. *Peterson v. Colonial Insurance Co.*, 100 Nev. 474, 686 P.2d 239 (1984); *Baker v. Criterion Insurance*, 107 Nev. 25, 805 P.2d 599 (1991).

D. The Contact Rule

Physical contact with another vehicle is required. *Kern v. Nevada Insurance Guaranty*, 109 Nev. Adv. Opinion 115, 856 P.2d 1390 (1993).

E. No Punitive Damage Recovery

Recovery under UM/UIM for punitive damages against the tortfeasor is not allowed. *Siggelkow v. The Phoenix Insurance Co.*, 109 Nev. Adv. Opinion 7, 846 P.2d 303 (1993).

F. Determining Policy Limits - Stacking

Neither the insurer nor the insured can rely on the printed policy limits of the printed policy declarations page. The Nevada Supreme Court has generally approved "stacking" of UM/UIM coverages. In *United Services Automobile Association v. Dokter*, 86 Nev. 917, 478 P.2d 583 (1970), the Court allowed stacking of uninsured motorist coverages under two separate policies issued on two different cars by the same insurance carrier. In *State Farm Mutual Automobile Insurance Co. v. Christensen*, 88 Nev. 160, 494 P.2d 552 (1972), the Court upheld stacking of uninsured motorist coverages under five separate policies issued by an insurer for five different cars. In *Travelers Insurance Co. v. Lopez*, 93 Nev. 463, 567 P.2d 471 (1977), the Court allowed stacking under Nevada's no-fault act where two separate no-fault policies from two different companies covered the same vehicle. In *Allstate Insurance Co. v. Maglish*, 94 Nev. 699, 586 P.2d 313 (1978), the Court allowed stacking of uninsured motorist coverage where two vehicles were covered by a single policy of insurance, and in *Cooke v.*

Safeco Insurance Co., 94 Nev. 745, 587 P.2d 1324 (1978), the Court allowed stacking of basic reparation benefits under one insurance policy which insured two vehicles. And, in *Carrillo v. State Farm Mutual Automobile Insurance Co.*, 96 Nev. 793, 618 P.2d 351 (1980), the Court allowed stacking of survivor's benefits on each of five separate no-fault insurance policies issued by the same insurer.

On the contrary, the Nevada Supreme Court in *Rando v. California State Automobile Association*, 100 Nev. 310, 684 P.2d 501 (1984), rejected stacking of third-party liability insurance coverage.

The Court distinguished stacking of liability coverage from stacking UM/UIM coverage as follows:

> . . . [W]e are here concerned with third-party bodily liability coverage available to an insured as a result of the ownership, use or maintenance of a vehicle. The first-person insurance focuses on the person of the insured and specified beneficiaries, whereas the third-party liability coverage derives from the ownership or use by an insured of a vehicle.
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> The same policy considerations which have prompted judicial approbation of stacking in the areas noted above do not apply to third-party liability insurance. The latter coverage is written to protect an insured's assets from third-party claims resulting from an insured's operation or maintenance of an owned or non-owned vehicle. (*Rando, supra*, 684 P.2d at 504)

The Court also distinguished Class I named insured and Class II insureds, guests, by not allowing the Class II insureds to stack coverage. *Beeny v. California State Automobile Association*, 104 Nev. 1, 752 P.2d 756 (1988).

However, the Court has approved stacking of medical payments coverage. *State Farm Mutual Automobile Insurance Co. v. Knauss*, 105 Nev. 407, 775 P.2d 707 (1989).

The primary determination of whether policies are stackable is whether separate premiums were paid either for separate policies or separate vehicles.

NRS 687B.145 allows insurers to prohibit stacking if the language containing these provisions meets a three-part test, including clear language, prominently displayed, and a sufficient multi-car discount for the additional coverage. Cases interpreting these requirements are: *Neumann v. Standard Fire Insurance Co.*, 101 Nev. 206, 699 P.2d 101 (1985); *Torres v. Farmers Insurance Exchange*, 106 Nev. 340, 793 P.2d 839 (1990); and the only opinion approving language, *Bove v. Prudential Insurance Co.*, 106 Nev. 682, 799 P.2d 1108 (1990).

II. PRESERVING AND ASSERTING A CLAIM

A. Notice of the Claim

Notice of the claim should be made to the UM/UIM carrier in order to comply with the policy requirements. Notice is a condition precedent to coverage. *State Farm Mutual Automobile Insurance Co. v. Cassinelli*, 67 Nev. 227, 216 P.2d 606 (1950); *Las Vegas Star Taxi, Inc. v. St. Paul Fire & Marine Insurance Co.*, 102 Nev. 11, 714 P.2d 562 (1986).

B. Statute of Limitations

There is no clear case which specifies whether an action to recover UM/UIM benefits is governed by the contract (NRS 11.190(1)(b)) or tort (NRS 11.190(4)) statute of limitations.

California, however, has a specific, strictly-applied statute allowing only one year and great caution should be used if the insurance policy was issued in California or with a California resident (*See*, Ins. Code §1580.2(i)).

C. Information Provided in a Claim or Demand

Providing sufficient information so the claim can be evaluated will speed the claims processing and should include the accident report, accident reconstruction report, witness statements, and complete medical bills, reports and opinions.

III. PROBLEM AREAS

A. Choice of Law

Generally, under the Second Restatement of Conflicts, the law where the policy was issued and the greatest contacts occurred controls. *Sotirakis v. United Services Automobile Association*, 106 Nev. 123, 787 P.2d 788 (1990); *William v. United Services Automobile Association*, 109 Nev. Adv. Opinion 49, 849 P.2d 265 (1993).

B. Must Offer

NRS 687B.145(2) requires auto insurers to offer UM/UIM coverage equal to the liability coverage.

C. Who, How and When to Sue

The insurer must intervene or be barred by any action it has notice of. *Allstate Insurance Co. v. Pietrosh*, 85 Nev. 310, 454 P.2d 106 (1969); *State Farm Mutual Automobile Insurance Co. v. Christensen*, 88 Nev. 160, 494 P.2d 552 (1972).

D. Arbitration

Insurer cannot require arbitration. NRS 690B.017

E. Insurance Bad Faith

NRS 686A.310, the Unfair Claims Practices Act, applies to UM/UIM claims.

F. Multiple Party Action / Subrogation / Credits and Setoffs

1. SIIS cannot subrogate to UM/UIM benefits (NRS 616.560) purchased by employee.

2. UM/UIM carrier has no right of subrogation against insured.

3. UM/UIM carrier gets credit for medical payments coverage. *Ellison v. California State Automobile Association*, 106 Nev. 601, 797 P.2d 975 (1990).

G. Stipulated Confessions of Judgment

Increasingly, courts are refusing to bind an insurer to potentially collusive settlements in which the insured, without the insurer's consent, stipulates to a judgment in return for a covenant not to execute on personal assets and assignment of all rights against his or her insurer to the plaintiffs. *See, Smith v. State Farm Mutual Automobile Insurance Co.*, 5 C.A.4th 1104, 7 C.R.2d 131 (1992); *Wright v. Fireman's Fund Insurance Co.*, 11 C.A.4th 998, 14 C.R.2d 588 (1992); *Villarruel v. Arreola*, 66 C.A.3d 309, 136 C.R. 19 (1977); *Buchanan v. Buchanan*, 99 C.A.3d 587, 160 C.R. 577 (1979).

H. Advance Payments

This is an area where there is no case giving guidance.