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WASHINGTON'S UNDERINSURED MOTORIST STATUTE: BALANCING THE INTERESTS OF INSURERS AND INSURED

The recent revision of Washington's uninsured motorist statute¹ brings about major changes in Washington's approach to the problem of under-compensated victims of automobile accidents.² These changes attempt to balance the interests of insureds and their insurers. Insureds gain added protection because they are now statutorily guaranteed the right to purchase protection against drivers with inadequate liability coverage. Underinsured motorist coverage allows covered victims to recover damages from their own insurers when the damages exceed the tortfeasor's liability limits. Insurers, on the other hand, will now be allowed to exclude coverage for insureds in certain situations. They can now also limit the amount of the insured's recovery to a single policy limit, regardless of the number of vehicles insured or the number of premiums paid.³

1. WASH. REV. CODE § 48.22.030 (Supp. 1980).

2. See notes 17-25 and accompanying text *infra* for discussion of previous approach to uninsured motorist statute.

3. (1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable to a covered person after an accident is less than the damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles and hit-and-run motor vehicles because of bodily injury or death, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy.

(3) Coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as provided in subsection (4) of this section.

(4) The insured may reject underinsured coverage and the requirements of subsections (2) and (3) of this section shall not apply. If the insured has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless the insured subsequently requests such coverage in writing.

(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

(6) The policy may provide that if an injured person has other similar insurance available to him under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.

The new underinsured motorist statute preempts many of the Washington Supreme Court's interpretations of the previous statute,⁴ and raises a number of new issues to be resolved in future litigation. These issues ought to be considered in light of the basic conceptual differences between *uninsured* motorist coverage and *underinsured* motorist protection.

This comment will distinguish the uninsured/underinsured motorist problem and coverages, and will outline the 1980 amendment to Washington's uninsured motorist statute. The comment will then discuss some areas of the law likely to cause controversy and suggest resolutions to these issues. The proposed resolutions follow the approach taken by the legislature, balancing the conflicting interests of insureds and insurers.

I. GENERAL BACKGROUND

A. *The Coverages*

1. *Uninsured Motorist Coverage*

Uninsured motorist coverage seeks to remedy the problem of uncompensated victims injured through the fault of uninsured persons.⁵ The coverage applies when at least one person legally responsible for an automobile accident is without liability coverage.⁶ Once the coverage applies, it allows the insured to collect directly from his own insurer the amount he would be legally entitled to recover from the uninsured tortfeasor up to his uninsured motorist policy limits.⁷ The insured is thereby guaranteed at least one fund or "deep pocket" from which to draw compensation.

In an attempt to limit their liability, insurers frequently place restrictions upon the uninsured motorist coverage.⁸ These restrictions will usually reflect the insurer's desire to eliminate coverage in high risk situations, such as where the insured is riding a motorcycle.⁹ Other restrictions, such as requiring the insured to make the claim within one

WASH. REV. CODE § 48.22.030 (Supp. 1980). See also WASH. REV. CODE § 48.22.040 (Supp. 1980)(underinsured motorist coverage also applies when the tortfeasor's insurer is insolvent).

See notes 21-25 and accompanying text *infra* for discussion of contractual limitations on the amount of recovery.

4. See notes 17-24 and accompanying text *infra* for discussion of cases rejected by the new statute.

5. See generally A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 16 (1969).

6. See *Finney v. Farmers Ins. Co.*, 92 Wn. 2d 748, 600 P.2d 1272 (1979).

7. WASH. REV. CODE § 48.22.030 (1979).

8. See A. WIDISS, *supra* note 5, at 281.

9. An exclusion for motorcycle riding was invalidated in *Federated Am. Ins. v. Raynes*, 88 Wn. 2d 439, 563 P.2d 815 (1977).

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year,¹⁰ attempt to obtain the insured's cooperation and preserve subrogation rights by the use of conditions. For the most part, state courts that have considered these purported restrictions have ruled that they are invalid attempts to limit statutorily required uninsured motorist coverage.¹¹

2. *Underinsured Motorist Coverage*

Underinsured motorist coverage differs from uninsured motorist coverage in that it allows the insured to recover when the tortfeasor has insurance but in an insufficient amount. There are two types of statutory definitions of underinsured motorists—those that focus on the policy limits of the tortfeasor¹² and those, like Washington's, that focus on the extent of the damages suffered by the insured victim.¹³

A statute which defines underinsured motorist by referring to the liability limits of the tortfeasor allows an underinsured motorist coverage reduction. The reduction works as follows: An insured whose underinsured motorist coverage is limited to \$50,000, may be involved in an accident with a tortfeasor whose liability limits are \$25,000. In this case, the insured whose recoverable damages are \$50,000 or more is allowed to recover \$25,000 from the underinsured tortfeasor and up to an additional \$25,000 from his own underinsured motorist carrier. The underinsured motorist coverage reduction allows the insurer to reduce the amount it must pay under the underinsured motorist coverage by the amount the insured has collected from the tortfeasor's liability insurer.

The second statutory definition of underinsured motorist permits coverage when the tortfeasor's liability limit is insufficient to compensate the injured insured fully for his injuries regardless of the limit on his underinsured motorist coverage.

B. *Washington's Underinsured Motorist Statute*

The 1980 amendments are radical in scope. Under the previous statute, an insured was protected only against uninsured motorists. As noted below,¹⁴ Washington courts interpreting the statute consistently rejected exclusions whose effect was to narrow the coverage required by statute.

10. See, e.g., *Signal Ins. Co. v. Walden*, 10 Wn. App. 350, 517 P.2d 611 (1973)(one year claim limitation held void).

11. See A. WIDISS, *supra* note 5, at 60.

12. See generally Comment, *Underinsured Motorist Coverage in Tennessee*, 43 TENN. L. REV. 664 (1976), for further discussion on the types of underinsured motorist statutes. See note 34 *infra* for examples of statutes which focus on the underinsured motorists liability limits.

13. See note 3 for complete text of the Washington statute.

14. See notes 17–26 and accompanying text *infra* for discussion of previous interpretations.

In the 1980 session, the legislature amended the statute. The legislature first changed "uninsured motorist" to "underinsured motorist."¹⁵ An underinsured motor vehicle is defined as one "with respect to . . . which either no bodily injury liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability . . . is less than the damages which the covered person is legally entitled to recover."¹⁶ In other words, the statute includes uninsured motor vehicles within the meaning of the term underinsured motor vehicle.

A second major change was the legislature's explicit sanctioning of certain contractual restrictions. These restrictions relate to the scope and amount of coverage that the statute requires. A better perspective of the function of these legislative changes can be gained by examining them in the context of the cases they preempt.

In *Touchette v. Northwestern Mutual Insurance Co.*,¹⁷ the Washington Supreme Court concluded that a provision in an uninsured motorist contract that purported to limit coverage based on the insured's physical location at the time of the accident was invalid. In that case the contract purported to exclude coverage when the insured was in a vehicle that he or a relative residing in the household owned, but did not insure. The court held that the exclusion violated the public policy of expanding uninsured motorist coverage to a greater proportion of the population.¹⁸

The 1980 amendments reject this proposition. The statute provides that underinsured motorist coverage must be offered to an insured. But it goes on to authorize certain exclusions. The insurer may restrict coverage while the insured is "operating or occupying a motorcycle or motor-driven cycle"¹⁹ and "while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member . . . which is not insured under the liability coverage of the policy."²⁰

The 1980 amendments also override the "stacking" cases. The Washington Supreme Court had ruled that an insured may aggregate, or "stack," multiple uninsured motorist coverages. In *Cammel v. State Farm Mutual Automobile Insurance Co.*,²¹ stacking was permitted, de-

15. WASH. REV. CODE § 48.22.030 (Supp. 1980).

16. *Id.*

17. 80 Wn. 2d 327, 494 P.2d 479 (1972).

18. *Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn. 2d 327, 494 P.2d 479 (1972). *Accord*, *Grange v. Great Am. Ins.*, 89 Wn. 2d 710, 575 P.2d 235 (1978); *Federated Am. Ins. v. Raynes*, 88 Wn. 2d 439, 563 P.2d 815 (1977); *Guaranty Ass'n v. Hill*, 19 Wn. App. 195, 574 P.2d 405 (1978).

19. WASH. REV. CODE § 48.22.030 (Supp. 1980).

20. *Id.*

21. 86 Wn. 2d 264, 543 P.2d 634 (1975).

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spite a contractual provision to the contrary, by invalidating the "other insurance" clause. An "other insurance" clause allocates insurers' liability when multiple policies apply. It also limits the insured's recovery to a single policy limit of uninsured motorist protection. The *Cammel* line of cases made it clear that stacking could be done in a variety of circumstances.²² For instance, an insured could stack uninsured motorist coverages when they were on the same policy but applicable to different vehicles.²³ He could stack them when he owned two or more vehicles that were insured on separate policies.²⁴ He could also stack uninsured motorist coverages between his policy and the one applicable to the vehicle he was occupying at the time of the accident.²⁵ The 1980 amendments expressly validate provisions in insurance contracts prohibiting all of these stacking variants.²⁶

II. PROBLEMS OF INTERPRETATION

A number of problems arise out of Washington's new underinsured motorist statute. In resolving the problems the courts ought to bear in mind the differences between the uninsured and underinsured motorist concepts. Policy analyses that have been developed in the uninsured motorist context may be inappropriate for the resolution of issues arising from statutes directed at problems created by underinsured motorists. Problems unique to underinsured motorist coverage will require new solutions.²⁷

22. See H. McGough, *Procedures and Techniques Relating to Uninsured Motorists, Underinsured Motorists, Stacking, and Arbitration, Including Recent Legislation 198* (March 21, 1980)(published by Washington State Trial Lawyers Association, Legal Education Seminars, Handling Insurance Related Cases)(copy on file with Washington Law Review).

23. *Cammel v. State Farm Mut. Auto. Ins. Co.*, 86 Wn. 2d 264, 543 P.2d 634 (1975).

24. See *American States Ins. Co. v. Milton*, 89 Wn. 2d 501, 573 P.2d 367 (1978).

25. See *Maurer v. Grange Ins. Ass'n*, 18 Wn. App. 197, 567 P.2d 253 (1977).

26. The 1980 amendments state that:

The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

WASH. REV. CODE § 48.22.030 (Supp. 1980). This language allows the insurer to prevent stacking between vehicles insured on the same policy. The following language prevents stacking of coverages between different policies: "The policy may provide that if an injured person has other similar insurance available to him under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages." WASH. REV. CODE § 48.22.030 (Supp. 1980). The practitioner should be aware that many policies applicable to accidents after the effective date of this statute may not contain these anti-stacking provisions. In that case the contract controls and the insured would be allowed to stack even if the policy does not so indicate because of the more liberal stacking clauses currently contained in most policies.

27. This is not to say that all precedents decided under the *uninsured* motorist statute should be disregarded. The new statute defines underinsured motor vehicles to include a vehicle to which no

Despite similarities in contractual language and function, uninsured motorist coverage differs conceptually from underinsured motorist coverage. Typically, uninsured motorist coverage provides the sole fund for compensating a victim of a financially irresponsible motorist. Underinsured motorist coverage, however, furnishes additional compensation when an insured tortfeasor's liability coverage is less than adequate to compensate the injured party. Two important distinctions should be recognized in comparing these coverages. First, in underinsured motorist coverage the problem is not an uncompensated injured party, but an insufficiently compensated one. This means that enforcing a contractual provision cutting off coverage may not result in the party being totally without compensation.²⁸ Second, the underlying rationale of uninsured motorists decisions—protecting the “innocent victims”²⁹—may not apply in the underinsured motorist situation. The concept of an “innocent victim” was developed from the idea that responsible motorists who carry liability insurance should not be uncompensated. They are the victim of two wrongs. First, they are injured and second, the lack of insurance most frequently means that this responsible motorist will be uncompensated or undercompensated. This second injustice may apply equally to each party in the underinsured motorist situation when both parties are

liability coverage applies. WASH. REV. CODE § 48.22.030 (Supp. 1980). Consequently, in some situations the precedents dealing with uninsured motorist coverage may be persuasive in a case involving an uninsured motorist. The court should note, however, that the new statute explicitly allows an insurer to narrow both underinsured and uninsured motorist coverage. *Id.* See notes 19–24 and accompanying text *supra*. This should alert the court that the broad public policy rationales relied upon in the past to justify liberal interpretation of the statute may be inappropriate given this legislative sanction of exclusions.

28. The only clear cases where an enforcement of an exclusion would result in the insured being totally without compensation are those in which either an uninsured motorist causes the accident (*see* note 27 *supra* for discussion of statute's uninsured motorist application) or other claimants exhaust the tortfeasor's liability coverage. Even in these cases, however, the existence of collateral sources casts doubt upon the validity of the court's previous interpretations.

29. *See Touchette v. Northwestern Mut. Ins. Co.*, 80 Wn. 2d 327, 494 P.2d 479 (1972). The *Touchette* court focused heavily on the protection of the innocent victim concept in describing the uninsured motorist statute. It said:

[The uninsured motorist statute] is but one of many regulatory measures designed to protect the public from the ravages of the negligent and reckless driver. It was enacted to expand insurance protection for the public in using the public streets, highways and walkways and at the same time cut down the incidence and consequences of risk from the careless and insolvent drivers. The statute is both a public safety and a financial security measure. Recognizing the inevitable drain upon the public treasury through accidents caused by insolvent motor vehicle drivers who will not or cannot provide financial recompense for those whom they have negligently injured, and contemplating the correlated financial distress following in the wake of automobile accidents and the financial loss suffered personally by the people of this state, the legislature for many sound reasons and in the exercise of the police power took this action to increase and broaden generally the public's protection against automobile accidents.

Id. at 332, 494 P.2d at 482.

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injured, both are in some degree at fault, and both are underinsured. For example, assume each insured has \$50,000 liability coverage, and \$50,000 underinsured motorist coverage. In an accident in which each party is equally at fault and each party has \$250,000 damages, each will bear some responsibility in causing injuries for which they may not be able to compensate the other. In this case the "innocent victim" rationale should no longer justify constructions of the policy against the insurer, since in this situation no one is truly innocent.

A. *Reduction in Underinsured Motorist Limits Due to Tortfeasor's Liability Payments*

An initial issue is whether the underinsured motorist carrier will be able to credit amounts paid by the tortfeasor's liability insurer against the underinsured motorist coverage. The alternative is that the coverage is a separate, distinct fund in addition to those payments. The following example illustrates the distinction. Assume that the injured party has \$75,000 in injuries, that the tortfeasor has \$25,000 in liability coverage, and that the underinsured motorist coverage applicable is \$50,000. If an underinsured motorist coverage reduction is permitted, the insurer is allowed to credit the \$25,000 liability coverage against the underinsured motorist payments available. The injured party thus receives only \$50,000. If the coverage reduction is not allowed, the injured insured receives a total of \$75,000; \$25,000 from the tortfeasor plus the full amount of his underinsured motorist coverage—in this case \$50,000.³⁰ Washington's statute does not clearly dictate whether an underinsured motorist coverage reduction provision would be valid.³¹

The problem will arise as a conflict in language between the typical underinsured motorist coverage now being sold and that which the statute seems to comprehend. The standard pre-statutory underinsured motorist policy states that the limit of liability under the policy is to be reduced by all sums paid because of bodily injury by or on behalf of persons who may be legally responsible for the injuries.³² This language allows the insurer to implement the underinsured motorist coverage reduction discussed above.³³ Statutes in other states either explicitly or implicitly in-

30. This type of underinsured motorist coverage is termed "excess" or a "floating" layer of liability coverage. See generally H. McGough, *supra* note 22.

31. This problem is analogous to the issue of the last dollar subrogation doctrine of *Thiringer v. Am. Motors Ins.*, 91 Wn. 2d 215, 588 P.2d 191 (1978). In that case the court determined that an insurer would be entitled to subrogation rights only after the insured had been fully compensated.

32. See H. McGough, *supra* note 22.

33. See note 12 and accompanying text *supra* for discussion of the underinsured motorist coverage reduction.

corporate this reduction provision.³⁴ The only language pertinent to this question in Washington, however, merely defines an underinsured motor vehicle. This definition states that an underinsured motor vehicle is one to which the sum of the liability limits is insufficient to compensate fully the covered person's damages.³⁵ The language of the statute does not directly answer the question of whether a coverage reduction provision would be valid.

The better view would invalidate provisions reducing underinsured motorist coverage by the amount of the tortfeasor's liability payments for the following reasons. First, reducing the underinsured motorist coverage conflicts with the statute's policy of full compensation. Second, denying the coverage reduction is in accord with the legislative history of the bill.³⁶ Third, a well-reasoned opinion by the Louisiana court construing a statute with similar language invalidated a coverage reduction.³⁷

B. Simultaneous Recovery for Passengers Under a Host's Liability and Underinsured Motorist Coverage

The issue of simultaneous recovery under two policies arises when an injured party is a passenger in the tortfeasor's underinsured vehicle. Both

34. The Texas statute provides a good illustration. It states:

The underinsured motorist coverage shall provide for payment to the insured of all sums which he shall be legally entitled to recover . . . in an amount up to the limit specified in the policy, reduced by the amount recovered or recoverable from the insurer of the underinsured motor vehicle.

TEX. INS. CODE ANN. art. 5.06-1(5) (Vernon Supp. 1979). The New Mexico statute illustrates the implicit underinsured motorist coverage reduction scheme. Although the issue has yet to be litigated (the statute took effect Jan. 1, 1980) the New Mexico statutory language parallels that of most common nonstatutory underinsured motorist coverages. See note 22 and accompanying text *supra*. The New Mexico statute provides:

The uninsured motorist coverage described in Subsection A of this section shall then include underinsured motorist coverage for persons protected by an insured's policy. For the purposes of this subsection an underinsured motorist means an operator of a motor vehicle with respect to the ownership, maintenance or use of which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured's uninsured motorist coverage.

N.M. STAT. ANN. § 66-5-301 (Supp. 1980).

35. WASH. REV. CODE § 48.22.030 (Supp. 1980).

36. One change the bill underwent in committee occurred in the section that defines an underinsured motor vehicle. The phrase "less than the damages which the covered person is legally entitled to recover," WASH. REV. CODE § 48.22.030 (Supp. 1980), originally read "less than the applicable limits of liability afforded by the insured's own policy." State of Washington, Engrossed Sub. H.B. 1983, 46th Sess. (1980).

This change in language reflects a broadening of the underinsured motorist coverage. The point of inquiry is not how much insurance is available to the insured but whether the damages exceed those limits.

37. See *Whitten v. Empire Fire & Marine Ins. Co.*, 353 So.2d 1071 (La. App. 1977). The Loui-

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the liability and the underinsured motorist coverage of the tortfeasor's policy apply to a passenger³⁸ (because underinsured motorist coverage typically protects anyone riding in the insured car) unless the courts will honor language in the policy that excludes the host vehicle from the definition of underinsured motor vehicle.

The narrow issue, then, is whether such an exclusion would be valid under the new underinsured motorist statute. This is not one of the exclusions that the statute specifically authorizes, nor does the legislative history address this matter. Under the previous uninsured motorist law in Washington, the presumption was that exclusions that narrowed the scope of uninsured motorist coverage violated the statute.³⁹ The better view for underinsured motorist coverage, however, would consider the differences between underinsured and uninsured motorist coverage.

Three considerations are important. First, in this situation, the injured party has not paid a premium for coverage to this insurer. Thus, there is no danger the insurer will gain a windfall if it is not forced to pay under both provisions of the policy. Second, unlike uninsured motorist coverage, the honoring of this kind of exclusion in underinsured motorist coverage does not leave the injured party completely without compensation. He has already received some compensation pursuant to the liability coverage of the policy. Third, assuming the injured party has automobile insurance of his own, he should be able to collect additional amounts as a result of that policy's underinsured motorist coverage. Weighing against these arguments, on the other hand, is the basic problem that the injured party has not been fully compensated.

The Louisiana Supreme Court dealt with the validity of this type of restriction in interpreting a statute very similar to Washington's.⁴⁰ The Louisiana court concluded that their statute contemplated that two distinct vehicles would be involved before underinsured motorist coverage would apply.⁴¹ In any accident, there would be the motor vehicle with respect to

siana Court of Appeals concluded that the "excess" interpretation was necessary to effectuate the 1974 legislative change in the definition of an uninsured motor vehicle. *Id.* at 1073-1075.

38. R.C.W. § 48.22.030 (Supp. 1980) mandates underinsured motorist coverage "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles." The typical insurance contract defines an insured for underinsured motorist coverage as the named insured or any family member, or any other person occupying the insured vehicle.

39. *See, e.g.*, *Federated Am. Ins. v. Raynes*, 88 Wn. 2d 439, 563 P.2d 815 (1977).

40. Louisiana is the only other state whose statute has language similar to Washington's. Their statute states: "[T]he term uninsured motor vehicle shall . . . also be deemed to include an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the amount of damages suffered by an insured . . ." LA. REV. STAT. ANN. § 22:1406(D)(2)(b) (West 1979).

41. *Breaux v. Gov't Employees Ins. Co.*, 369 So. 2d 1335, 1338 (La. 1979).

which underinsured motorist coverage is issued and there would be an uninsured or underinsured vehicle.⁴² This dichotomy was reflected throughout the statute. The court took this fact as evidence that the legislature did not intend for the insured to be permitted to collect underinsured motorist coverage from the tortfeasor's policy or policies in these situations.⁴³ Hence, the restriction was upheld as valid.

The Washington courts should adopt the Louisiana position for two reasons. First, R.C.W. § 48.22.030⁴⁴ reflects the same type of dichotomy relied upon in the Louisiana decision, which stated a sound rationale for that distinction. Second, the equities outlined above favor the insurer's position.

The Louisiana court noted that to afford protection to the guest passenger in this situation would require that the host driver be characterized both as a "person insured" and "an owner or operator of [an] uninsured or underinsured motor vehicle."⁴⁵

C. Insurer's Rights Relating to the Injured Insured's Settlement with the Underinsured Tortfeasor

Several issues surround the insurer's rights in its insured's settlement with the tortfeasor. This comment will address two of the more important ones.

1. Consent-to-Settle Provisions

The first issue is whether, pursuant to a provision in the policy, the insured must obtain the insurer's permission to settle with the tortfeasor and his insurer in order to preserve his rights to underinsured motorist coverage. Many courts have addressed this problem as it relates to uninsured motorist claims.⁴⁶ Several have concluded that the failure to procure the insurer's consent should not result in a forfeiture of the insured's rights to uninsured motorist coverage.⁴⁷ These courts invalidate consent-to-settle provisions because the broad public policy behind their statutes

42. *Id.*

43. *Id.* at 1339.

44. Washington's statute defines underinsured motor vehicle in a separate section (WASH. REV. CODE § 48.22.030(1) (Supp. 1980)) and then goes on to describe the coverage that must be provided in R.C.W. § 48.22.030(2). The statute indicates that the coverage is "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles. . . ." *Id.*

45. *Breaux v. Gov't Employees Ins. Co.*, 369 So. 2d 1335, 1338 (La. 1979).

46. *See Annot.*, 25 A.L.R.3d 1275, 1279 (1969).

47. *Id.* at 1283.

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requires invalidation to prevent a forfeiture of uninsured motorist coverage. An appropriate analysis for the underinsured motorist cases would balance the interests of insureds and insurers, thereby reaching a more equitable result.

In the settlement process the insurer is interested in protecting subrogation rights against the tortfeasor and his insurer.⁴⁸ In the uninsured motorist context, these rights are of little consequence because the uninsured motorist is frequently insolvent. In underinsured motorist cases, however, it cannot be presumed that all or even most of the underinsured motorists are insolvent. Many factors go into a person's decision to carry less than adequate liability coverage. Insureds are frequently underinsured because they believe that they are careful drivers who will never be responsible for a serious accident. These insureds view higher liability limits as a waste of money since such limits will probably never be needed. Thus, many solvent drivers purchase minimum liability coverage even though they could afford additional protection. A second factor distinguishing claims involving an uninsured motorist from those involving an underinsured motorist is the existence of the tortfeasor's insurer.⁴⁹ A settlement with the tortfeasor may be negotiated by the tortfeasor's insurer, in which case it would include a release of all claims against the insurer as well as the tortfeasor. Consequently, a settlement in the underinsured motorist context will be more likely to harm the underinsured motorist carrier financially by releasing valuable subrogation rights.⁵⁰

The insured, on the other hand, is concerned about not being prevented from settling his claim with the tortfeasor by an arbitrary refusal on the part of his insurer to consent to the settlement.⁵¹ The better view on this issue, supported by the majority of the uninsured motorist cases,⁵² protects the insured's interest by invalidating this exclusion only in those cases where the insurer has arbitrarily refused its consent to the settlement. In this way, the insurer's interest is also protected since it is able to enforce the provision in those cases where the insured has released the insurer's rights against the tortfeasor either without its knowledge or without its consent.

48. Comment, *Uninsured Motorist Coverage in Louisiana*, 24 LOY. L. REV. 85, 99 (1978).

49. The existence of a tortfeasor's insurer may not be unique to underinsured motorist coverage in multiple tortfeasor situations. Frequently, one of the parties liable for the insured's injuries has liability insurance. The Washington court interpreting the *uninsured* motorist statute concluded that the uninsured motorist's coverage applies in this situation. *Hawaiian Ins. & Guar. Co. v. Mead*, 14 Wn. App. 43, 538 P.2d 865 (1975).

50. *But see* *Niemann v. Travelers Ins. Co.*, 368 So. 2d 1003 (La. 1979).

51. As a practical matter an insurer will normally not refuse its consent to the settlement unless it believes its rights are not being adequately protected, since settlement with the tortfeasor may negate the need to make any underinsured motorist payment.

52. *See generally* Annot., 25 A.L.R.3d 1275 (1969).

2. *Settlement for Less than Available Liability Limits*

The second area of concern in the context of settling underinsured motorist cases involves those situations where the injured party settles with the tortfeasor and his insurer for an amount less than the amount of the available liability limits. A settlement for less than the full limits could be taken as evidence that the insured's damages were less than the applicable liability limits. Therefore, the argument goes, the injured party was not injured by an "underinsured motor vehicle" as defined by the statute.⁵³ Hence, underinsured motorist coverage should not apply.

The argument against this position is that the statute seems to require full compensation of the insured whenever possible.⁵⁴ In addition, factors other than adequate recovery may motivate the insured to settle. For example, the insured may have settled before the full extent of the injuries were known. The insured may also settle because of mounting economic pressure or because his case on the issue of liability may be questionable.

The insurer's interest in this case is in avoiding claims from insureds who become greedy or dissatisfied with the amount of recovery obtained from the tortfeasor. The injured insured, however, clearly has an interest in being fully compensated for the claim. If he has not been fully compensated, he wants his coverage to apply.

The best solution to this issue would accommodate the interests of both parties by allowing the underinsured motorist carrier to credit the full amount of the tortfeasor's liability coverage against the damages.⁵⁵ This would protect the insurer's rights because the insurer would have to pay only the amount above what the insured could have received had the claim been fully prosecuted. The insured in this case forfeits only that which by his own actions he could have preserved. This credit works as follows. Assume the tortfeasor has \$50,000 in liability coverage and the injured party has \$50,000 underinsured motorist protection. If the insured sustains \$50,000 in injuries but settles for only \$45,000, he would be barred from making an underinsured motorist claim because his losses are

53. See notes 15-16 and accompanying text *supra* for the Washington definition of underinsured motor vehicle.

54. Support for this position is gained from an examination of the definition of underinsured motor vehicle. See note 16 and accompanying text *supra*.

55. This credit should be distinguished from the uninsured motorist coverage reduction discussed at note 30 and accompanying text *supra*. The coverage reduction credits the tortfeasor's liability coverage against the underinsured motorist coverage in order to reduce the total amount of underinsured motorist coverage that must be paid. This credit serves only to reduce the amount of damages that the insured is entitled to recover because he has failed to prosecute the claim fully.

equal to the tortfeasor's liability limits.⁵⁶ If the insured has \$75,000 in injuries and settles for \$45,000, he collects only \$70,000 because the full \$50,000 liability limits are applied against the total damages. In this case, the recovery is \$45,000 from the tortfeasor and \$25,000 from his own insurer. The remaining \$5,000 of potential recovery is forfeited because of his failure to prosecute the claim fully.

D. Suit as a Condition Precedent to Recovery

The final question addressed by this comment is whether an injured insured must successfully sue the tortfeasor prior to recovery on the underinsured motorist coverage. This position was almost uniformly rejected in the uninsured motorist context.⁵⁷ Yet, the arguments for enforcing a provision that makes successful litigation against the tortfeasor a condition precedent to underinsured motorist recovery are more reasonable in the underinsured motorist situation.⁵⁸

The resolution of this issue should consider the following arguments. First, the insurer's duty to provide underinsured motorist coverage does not arise until it has been determined that the tortfeasor's liability limits are inadequate. This frequently requires litigation of the damage issue before a determination of insufficiency can be made.⁵⁹ Second, forcing the insured to judgment can be more judicially efficient. If the insurer agrees to be bound by the results of the first action, subsequent litigation of the issues of negligence and damages will be unnecessary. Even without consent, some courts have held that an insurer waives its right to object to being bound by the judgment if it has notice of the action.⁶⁰ Were the insured to be allowed to proceed first against the insurer in an arbitration proceeding, it would be impossible to hold the tortfeasor or his insurer to the outcome of that action.⁶¹ Consequently, the issues would have to be relitigated in any subsequent subrogation action against the tortfeasor.

56. See notes 15-16 and accompanying text *supra* for definition of underinsured motor vehicle. This definition would clearly preclude coverage.

57. See A. WIDISS, *supra* note 5, at 123 (Supp. 1980).

58. *Id.*

59. In a case such as one where the tortfeasor has minimum liability limits and causes an accident and the injured party is a 30-year-old, well-paid parent of four with substantial permanent disability, this will not be a problem because the damages will surely exceed the policy limit. But many other cases will arise where it is not clear that the tortfeasor is underinsured.

60. See A. WIDISS, *supra* note 5, at 313-15 (Supp. 1980).

61. In some cases, the underinsured motorist carrier would prefer not to be bound by an arbitration award. In *Great Am. Ins. v. Pappas*, the insured proceeded to arbitration where she was awarded \$216,000. The underinsured tortfeasor had liability limits of \$100,000. The insured then proceeded to litigation against the tortfeasor. Her judgment against him, however, was only \$80,595. The un-

A fair compromise in this situation would be to arrange a trade off of interests. In return for not having to tender underinsured motorist coverage to the insured until after the conclusion of the litigation, the insurer should be held to have agreed to be bound by that judgment. This solution has the advantage of protecting not only the interests of the parties involved but also that of the judicial system⁶² by avoiding duplicative litigation.

III. CONCLUSION

The 1980 amendments to Washington's uninsured motorist statute now provide for underinsured motorist coverage. Although the new statute is more specific than its predecessor, it leaves much room for interpretation and invites future litigation. Specific areas of concern include such issues as whether the statute will allow uninsured motorist coverage reduction by the amount of liability payments, whether exclusions for host vehicles will be honored, whether the insured must sue the tortfeasor prior to recovery from the underinsured motorist carrier, and whether provisions purporting to restrict the insured's settlement with the tortfeasor are valid. In dealing with these new issues and others that will arise from the statute, the courts should recognize the balancing of interests inherent in the 1980 amendments and seek to maintain that balance.

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derinsured motorist carrier was held to the original \$216,000 arbitration award because it had refused to join in the suit against the tortfeasor, but had instead insisted upon the arbitration hearing. 345 So. 2d 823 (Fla. Dist. Ct. App. 1977).

62. *But see* Liberty Mut. Ins. v. Reyer, 362 So. 2d 390 (Fla. Dist. Ct. App. 1978)(court ruled without consideration of the judicial economy argument that the underinsured motorist did not have to proceed first against the tortfeasor).