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From UM/UIM

PBI Course #7034

Published April 2012

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Chapter Five

UM/UIM Update

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ANNUAL OVERVIEW AND UPDATE ON UM AND UIM ISSUES

I. ELEMENTS OF UM/UIM CLAIMS

A. What Qualifies as an Uninsured or Underinsured Motor Vehicle?

1. An off-road vehicle is generally not a UM or UIM

An exclusion for injury sustained while occupying a vehicle “designed for use mainly off public roads except while on public roads” is enforceable. *Nationwide Mut. Ins. Co. v. Yungwirth*, 940 A.2d 523 (Pa. Super. 2008)(*en banc*), *appeal denied* 599 Pa. 683; 960 A.2d 456 (2008). In *Yungwirth*, Nationwide’s insured was a passenger on an uninsured ATV that was in an accident off-road, although it had been on public roads before and after the accident. Nationwide’s above exclusion was enforced because it did not impermissibly narrow the required scope of coverage under the MVFRL. First, the MVFRL does not define “motor vehicle,” and although the broader vehicle code defines motor vehicle in a way that arguably includes ATVs, the Legislature provided a specific definition of an ATV within the SATVL (Snowmobile All-Terrain Vehicle Law): an ATV is a recreational vehicle not intended for highway use. The Legislature also set forth specific requirements applicable only to snowmobiles and ATVs, including express limits on when an ATV may be lawfully operated on a public road, and those limitations supersede the general definition of “motor vehicle” contained in the MVFRL. Therefore, Nationwide’s exclusion did not impermissibly narrow the definition of “underinsured motor vehicle” under the MVFRL.

However, an exclusion from UM coverage for *any* collision involving a motor vehicle designed mainly for use off of public roads is not enforceable because it does impermissibly narrow the definition of “uninsured motor vehicle.” *Burdick v. Erie Ins. Co.*, 946 A.2d 1106 (Pa. Super. 2008)(*en banc*). In *Burdick*, the insureds were injured when a “dirt bike” left a private driveway and struck the insureds’ vehicle on a public roadway. The Superior Court held that Erie’s exclusion The MVFRL defines “uninsured” vehicle as a motor vehicle for which there was no applicable liability insurance or self-insurance, and the broader Vehicle Code defined “motor vehicle” as “a vehicle which is self-propelled except for [certain types not applicable here].” 75 Pa. C.S.A. §102. The dirt bike met that definition, and thus §1731 of the MVFRL mandated that UM coverage apply to it. The Court also noted that the legislature had not enacted any specialized legislation directed to dirt bikes, as it had with snowmobiles and ATVs. **[Note that the exclusion in *Burdick* did not make an exception for an off-road vehicle that is being used on public roads at the time of the accident.]**

2. A “fully insured” vehicle is generally not a UIM

If the tortfeasor is fully insured for all damages recoverable under the law applicable to the accident, the tortfeasor's vehicle is not an "underinsured" motor vehicle even though the claimant would have been entitled to more or different damages under Pennsylvania law. *Zenker v. Allstate Ins. Co.*, 1993 WL 300132 (E.D. Pa. 1993), *aff'd* 22 F.3d 305 (3d Cir.1994)); *State Farm Mut. Auto. Ins. Co. v. Krewson*, 764 F.Supp. 1012 (E.D. Pa. 1991), *aff'd* 953 F.2d 1381 (3d Cir. 1992). The damages recoverable under UM/UIM coverage are governed by the law applicable to the accident, not the law of the jurisdiction where the contract was entered. If the tortfeasor is fully insured for those damages, there is no "underinsured" vehicle, and the claimant is not entitled to underinsured motorist recovery. *See also, e.g., Willett v. Allstate Ins. Co.*, 359 Fed. Appx. 349 (3d Cir. 2009)(Pennsylvania claimant who recovered all economic losses and maximum allowable non-economic losses under applicable Maine law could not recover UIM benefits under Pennsylvania policy; claimant had already obtained all damages she was legally entitled to receive under the law applicable to the accident.)

3. Immunity from suit does not render a vehicle “underinsured”

The fact that a claimant is precluded by the workmen's compensation statute from recovering against a co-employee/tortfeasor does not render the tortfeasor “uninsured” or “underinsured.” *Erie Ins. Exchange v. Conley*, 29 A.3d 389 (PA Super. 2011). In *Conley*, the insured was injured in the scope of his employment, when he was struck by a truck operated by his employer. The insured’s personal Erie policy provided coverage for damages that “the law entitles” the insured “to recover from the owner or operator of an “underinsured motor vehicle.” The insured argued that even though he could not sue his employer, he should be entitled to recover UM/UIM benefits where he could establish a prima facie case of negligence against the driver. The Superior Court rejected this argument: the law did not entitle the insured to recover damages from his employer, the driver, because of the Workers’ Compensation Act immunity. Thus, under the plain language of the policy, Erie was not required to provide UM or UIM coverage. *See also Federal Kemper Ins. Co. v. Wales*, 430 Pa. Super. 208, 633 A.2d 1212 (1993) (“As with underinsurance situations, the inability to recover does not convert the insured tortfeasor into an uninsured motorist.”)

A claimant who is barred by the New Jersey “verbal threshold” (NJSA §39:6A-8(a)) from recovering against a New Jersey tortfeasor is not entitled to make a UM claim against his Pennsylvania policy. *State Farm Mut. Auto. Ins. Co. v. Cahill*, 1996 WL 50614 (E.D. Pa. 1996). *See also, e.g., Zampirri v. Hartford Ins. Co.*, 1993 WL 516415 (E.D. Pa.1993), *aff'd* 31 F.3d 1175 (3d Cir. 1994)(UM claim properly denied because claimant was not legally entitled to recover from the New Jersey tortfeasor due to application of the verbal threshold; Hartford’s interpretation and application of the MVFRL did not violate due process or equal protection rights and Hartford did not violate 42 Pa. C.S. §8371 in not telling plaintiff that New Jersey law could affect plaintiff’s coverage, citing *Krewson* and *Zenker*); *Treski v. Kemper Nat’l Ins. Cos.*, 449 Pa. Super. 620, 674 A.2d 1106 (1996)(carriers have no duty to explain possible application and effect of New Jersey “deemer” statute to insureds).

4. A government vehicle may be “underinsured”

A “government vehicle” exclusion, which excludes motor vehicles owned by a governmental unit or agency from the definition of underinsured motor vehicles, is not enforceable. *Kmonk-Sullivan v. State Farm Mut. Ins. Co.*, 567 Pa.514, 788 A.2d 955 (2001). In *Kmonk-Sullivan*, the tortfeasor vehicles were owned by municipalities, their maximum statutory liability coverage had been paid, and the claimants turned to their own UIM carriers. The carriers argued that the claims were not “underinsured” claims: there was not “insufficient” insurance; rather, there was a statutory cap on the municipalities’ liability. The Supreme Court rejected that argument. Although the cap on liability was the reason for the “insufficiency”, the vehicles were still vehicles as to which the limits of self-insurance were insufficient within the meaning of the MVFRL. The MVFRL generally applies to Commonwealth agency vehicles; the only types of vehicles excepted from general application of the MVFRL are vehicles owned by the federal government. *See* 75 Pa. C.S.A. §1703. The government vehicle exclusion was unenforceable because the carriers were withdrawing coverage the legislature required them to offer.

5. Household vehicles are not “underinsured”

Exclusions that prevent household vehicles from qualifying as “underinsured” vehicles are enforceable because the insureds would effectively be converting inexpensive UIM coverage into extra liability coverage for a household vehicle. *Paylor v. The Hartford Ins. Co.*, 536 Pa. 583, 640 A.2d 1234 (1994). In *Paylor*, a husband and wife were named insureds on four policies; they were killed in a single-vehicle accident in which the husband was driving. The wife's estate obtained the liability coverage on the vehicle involved, but the "family vehicle" exclusion prevented her from recovering UIM coverage from the other three policies as to which the husband and wife were insureds: their own vehicle could not be “underinsured.”

Likewise, in *Ridley v. State Farm Mut. Auto. Ins. Co.*, 745 A. 2d 7 (Pa. Super. 1999), *appeal denied*, 572 Pa.708, 813 A.2d 843 (2002), Miraena Ridley and her father Norman were injured in a vehicle owned and operated by Miraena’s mother, Frances Rocereto. Miraena and Norman collected Frances’ liability limits but were not entitled to collect UIM benefits under a separate policy covering a different vehicle owned by Frances and Norman. Under that policy, an “underinsured motor vehicle” did not include any vehicle furnished for the regular use of the insured, the insured’s spouse or any resident relative. The exclusion did not violate public policy; although Frances and Norman were not married, they were inferred to have acted as one in purchasing the coverage for the vehicle they owned together, and Frances voluntarily chose the amount of liability coverage on the other vehicle owned by her and in which she was transporting her child and her child’s father. “[T]o allow the Ridleys to turn to the underinsured motorist coverage purchased for the [other household vehicle], in effect, would permit the pair consisting of Rocereto and Norman Ridley to convert inexpensively purchased underinsured motorist coverage into liability coverage for the [Rocereto vehicle].”

In *First Liberty Ins. Corp. v. Budow*, 2007 U.S. Dist. LEXIS 52049 (E.D. Pa. 2007), *aff’d* 2009 U.S.App. LEXIS 303 (3d Cir. 2009), the court upheld the “family vehicle exclusion” where the insured’s daughter was injured in a family vehicle driven by a hired driver. The driver’s own liability coverage applied as excess to the liability coverage on the family vehicle,

but was still insufficient to compensate for the daughter's damages, and the insureds sought UIM benefits under their own policy on the theory that the driver was an "underinsured" motorist (which meant daughter could collect both the primary liability coverage and the underinsured motorist coverage from the family policy).

The district court rejected this argument. The driver's own vehicle was unrelated to the accident and thus the driver's liability did not arise out of the "ownership, maintenance or use of" his own allegedly "underinsured" vehicle. Pennsylvania courts have "consistently prohibited" the conversion of inexpensive UIM coverage to liability coverage, of which this case was a "classic example," since the insured could either have purchased greater liability insurance to cover the permissive driver, or required the driver to purchase it. The Third Circuit affirmed, adopting the district court's opinion.

See also Progressive Direct Ins. Co. v. Galloway, 2009 WL 772832 (W.D. Pa. 2009)(exclusion upheld where one son was operating a family vehicle and the other son was a passenger and was killed; decedent's estate collected liability coverage from occupied vehicle, but exclusion prohibited recovery of UIM coverage from other household policy covering four other vehicles); *Fleeger v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 690681 (W.D. Pa. March 16, 2009)(where Fleeger was injured while a passenger in a van owned and used only by her live-in boyfriend, and where both she and boyfriend were named insureds on a separate policy, the separate policy's UIM coverage did not apply because that policy excluded any vehicle regularly used by either of them from the definition of "underinsured vehicle"); *State Farm Mut. Auto. Ins. Co. v. Coviello*, 220 F.Supp. 2d 401 (M.D. Pa. 2002)(exclusion upheld where wife/passenger was injured by her husband's negligence, recovered the liability coverage on that vehicle, but then sought UIM coverage from her resident daughter's policy. The court applied the three-pronged *Eichelman* analysis and concluded that the exclusion did not violate public policy); *State Farm Mut. Auto. Ins. Co. v. Wisniewski*, 2006 WL 401800 (M.D. Pa. 2006)(one household vehicle did not qualify as an "underinsured motor vehicle" under a second household policy: "The purpose of underinsured motorist insurance is to protect the insured from a third party tortfeasor's failure to obtain enough liability insurance, not to protect the insure from his own insufficient coverage...Here, Wisniewski's father maintained both policies in question, and had he desired more liability insurance, he should have purchased it"); *State Farm Mut. Auto. Ins. Co. v. Filipe*, 2000 U.S. Dist. LEXIS 3828 (E.D. Pa. 2000)(estate of wife/passenger, which obtained husband's liability coverage, was not entitled to UIM benefits under second household policy that contained the same exclusion as in *Ridley*, above; the language was clear and unambiguous, and strong public policy considerations favored its enforcement. UIM coverage "is purchased to protect oneself from other drivers whose liability purchasing decisions are beyond one's control. If [decedent] wanted greater protection while riding as a passenger in a family car, she should have increased the liability insurance."); *Nationwide Mut. Ins. Co. v. Reidler*, 2000 WL 424286 (E.D. Pa. 2000), *aff'd* 261 F.3d 492 (3d Cir. 2001)(father injured while passenger in vehicle he owned, and who received the liability limits, could not then recover UIM benefits under his other household policies, because those policies excluded any vehicle furnished for the regular use of the insured or a relative from the definition of underinsured motor vehicle); *Sherwood v. Bankers Standard Ins. Co.*, 538 Pa. 397, 648 A.2d 1171 (1994) (the "family vehicle" exclusion barred claimant, who was injured as a passenger in his own vehicle on which he selected the liability limits, from recovering UIM benefits under other

household policies on the theory that his own vehicle was underinsured; the Superior Court had found the exclusion invalid, but the Supreme Court reversed in light of *Paylor*);¹ *Steinetz v. Allstate Prop. & Cas. Ins. Co.* (C.P. Lackawanna December 23, 2009)(son who resided with father and was injured while a passenger in father's car, and who recovered father's liability limits, could not collect UIM benefits under son's own policy, because father's household vehicle was not an "underinsured" vehicle); *Wartella v. Erie Ins. Exch.*, No. 04-02095 (C.P. Lycoming October 24, 2005)(where husband and wife owned different vehicles insured with different carriers, the husband's vehicle did not qualify as an underinsured vehicle under the wife's policy, even though the wife's carrier was aware of the other vehicle).

6. An unidentified vehicle can be "uninsured" if §1702's reporting requirement is satisfied

The reporting requirement of §1702 of the MVFRL defines uninsured motorist to include an unidentified (or "phantom") vehicle as "provided that the accident is reported to the police or proper governmental authority and the claimant notifies his insurance carrier within 30 days, or as soon as practicable thereafter, that the claimant or his legal representative has a legal action arising out of the accident." 75 Pa.C.S.A. §1702(3).

(a) Report to carrier but not police

Where the accident is timely reported to the carrier, but is not reported to the police or governmental authority within 30 days, the claim is barred by statute and no showing of prejudice is required. *State Farm Mut. Auto. Ins. Co. v. Foster*, 585 Pa. 529, 889 A.2d 78 (2005). The insured in *Foster* reported her claim involving an unidentified vehicle to her UM carrier, State Farm, but never reported it to the police. The Supreme Court held that State Farm did not owe UM benefits to *Foster* because she had not complied with the requirement in both the policy and §1702(3) that the accident must be reported to the police or other governmental authority. The prejudice requirement of *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193 (1977)² did not apply, because §1702 and *Brakeman* involved different purposes. The purpose in *Brakeman* was protection of the insurer's own interest in conducting timely investigation of claims. The notification provision of §1702 advances the MVFRL's interest in

¹ In one earlier case where the policy under which the claimant sought UIM coverage was separate from the policy under which liability limits were paid, the "family vehicle" exclusion was not upheld. *Marroquin v. Mutual Benefit Ins. Co.*, 404 Pa. Super. 444, 591 A.2d 290 (1991) (after obtaining the liability limits of his brother's car, the claimant was permitted to seek UIM benefits under their parents' policy, even though both brothers resided with their parents and the brother's car therefore fell within the "family vehicle" exclusion; there was no evidence from which the court could conclude that the insureds were acting together). *Marroquin* appears to be of doubtful precedential value in light of the subsequent treatment of such exclusions by the Supreme and Superior Courts.

² The issue in *Brakeman* was whether the carrier had a duty to defend the insured in a liability case despite late notice to the carrier. The Supreme Court held in *Brakeman* that a policy provision requiring the insured to provide notice of an accident to the insurer "as soon as practicable" would not be enforced unless the insurer demonstrated that it was prejudiced by the late notice.

cost-containment by minimizing fraudulent claims in cases where accidents were alleged to have been caused by phantom vehicles, and that interest was not served by reporting an accident to employers, etc.. In light of these differing purposes, the “prejudice” requirement in *Brakeman* did not apply to the notice requirement of §1702. See also *Owens v. The Travelers Ins. Co.*, 450 Pa. Super. 242, 675 A.2d 751 (1996)(notice to plaintiff’s employer about accident with unidentified motor vehicle did not satisfy the reporting requirement of §1702(3), even though the employer reported the accident to the Pennsylvania Department of Labor and Industry (DOLI). The employer was not a governmental agency, and DOLI, although a governmental agency, was not a proper governmental agency for such reporting within the meaning of the §1702(3) reporting requirement. A report to DOLI was second-hand, non-contemporaneous and “simply does not act to prevent fraud in the reporting of identified motor vehicle accidents as effectively as a report to the police”); *Blazquez v. Pennsylvania Responsibility Assigned Claims Plan*, 757 A.2d 384 (Pa. Super. 2000) (a PennDOT Traffic Accident Report, filled out by the claimant and timely (i.e., within one month) submitted to PennDOT, is not sufficient to satisfy §1702, because such a report would not play any meaningful role in eliminating the threat of fraud); *Prudential Prop. and Cas. Ins. Co. v. Babe*, PICS #99-1980 (C.P. Montgomery 1999) *aff’d* 758 A.2d 731 (Pa. Super. 2000), *appeal denied* 567 Pa. 715, 785 A.2d 90 (2000) (report to insurance company but not police is not sufficient for uninsured motorist claim arising out of accident with unidentified vehicle); *but see Gunter v. Constitution State Service Co.*, 432 Pa. Super. 295, 638 A.2d 233 (1994), *appeal denied*, 539 Pa. 678, 652 A.2d 1324 (1994)(where claimant reported her accident with a hit-and-run motorist to the fire rescue squad that came to the scene and transported her to the hospital, and the fire rescue squad member said he "would take care of it.").

(b) Report to police but not carrier

Where the factfinder held that the insured did report the accident to the police as soon as practicable, a failure to provide proper notice to his carrier did not bar his UM claim unless the carrier demonstrated prejudice. *Vanderhoff v. Harleysville Ins. Co.*, 606 Pa. 272, 997 A.2d 328 (2010) (applying *Brakeman*, rather than *Foster*). Harleysville asserted that Claimant never mentioned a phantom vehicle until eight (8) months after the accident. Claimant testified that he assumed the police report mentioned the phantom, and when he learned it did not, he asked for a correction, eleven (11) months after the accident. The trial court (former Luzerne County Judge Conahan) found the claimant credible, accepted the testimony that claimant had verbally notified the police and the carrier about the phantom, and found the notification requirement satisfied. The Superior Court reversed (by memorandum) on the basis that the earliest possible notice was four (4) months after the accident, that this was not “as soon as practicable” and that the carrier was not required to show prejudice.

The Supreme Court reversed again, holding that *Brakeman’s* prejudice requirement remained controlling, because §1702 was enacted with *Brakeman* as controlling precedent, and §1702 was silent on the subject of prejudice. The Court distinguished *Foster* on the basis that “*Foster* involved the dictates of a statute and a directive related to law enforcement” whereas in *Brakeman*, “the purpose of the notification requirement...was protection of the insurer’s private interest.” The Court concluded that the *Vanderhoff* situation likewise involved the insurer’s private interest, so the prejudice rule applied.

The case was remanded to the trial court for a hearing on whether the carrier had been prejudiced. The Luzerne County trial court determined that the carrier had not been prejudiced because the carrier did not show that the result would have been different if there had been timely notice of the phantom vehicle.

On further appeal, the Superior Court reversed. *Vanderhoff v. Harleysville Ins. Co.*, 40 A.3d 744 (Pa. Super. 2012). The Superior Court stated that the trial court’s “1 ½ page decision” did not provide any “distinct, explicit rationale for its finding” and that the trial court’s apparent adoption of claimant’s position “does not comport with reason” and constituted a clear abuse of discretion: “It is nearly axiomatic that the insurer cannot know what evidence it might discover in such an investigation. In fact, if the insurer could establish with certainty what evidence it would have discovered, it would, by definition, not be prejudiced by the lack of timely notice.” A petition for allocatur is pending, 375 MAL 2012.

7. The definition of UM/UIM cannot narrow the statute

“Non-car” exclusions, that is, language that excludes coverage if the insured is occupying any vehicle other than a “car” has been held unenforceable. *Richmond v. Prudential Prop. and Cas. Ins. Co.*, 856 A.2d 1260 (Pa. Super. 2004) (*en banc*), appeal denied 583 Pa. 664, 875 A.2d 1076 (2005). Prudential’s definition of “insured” limited coverage to an insured who was occupying a “car” as defined in the policy (which did not include motorcycles); the insured was injured while a passenger on a non-owned motorcycle. Prudential’s limitation on the definition of “insured” was void because it conflicted with the language of the MVFRL. The policy also did not contain a clear “motorcycle” exclusion, but even if it did, the policy would not be enforceable if it applied a more restrictive definition of “underinsured motor vehicle” than that found in the statute. *See also Prudential Prop. and Cas. Ins. Co. v. Ziatyk*, 793 A.2d 965 (Pa. Super. 2002) appeal denied 572 Pa. 708, 813 A.2d 843 (2002) (exclusion not enforceable to bar coverage to insured injured in a rented U-Haul truck; the language is void because it attempted to restrict the mandatory offering of UIM coverage that the legislature required carriers to offer. Under §1731, UIM coverage was to protect against “injury arising out of the maintenance or use of a motor vehicle”; the legislature did not limit the coverage to “private passenger motor vehicles” as it had in other areas of the statute); *Prudential Prop. and Cas. Ins. Co. v. McAninley*, 571 Pa. 490, 812 A.2d 1164 (2002) (Superior Court invalidated two of Prudential’s provisions, one of which (as in *Ziatyk*) stated that no UIM coverage would apply if the insured was occupying a vehicle other than a “car” as defined in the policy. The insured was occupying a diesel pick-up truck with a load capacity too large to meet the policy’s definition of “car.” The second invalidated exclusion was a regularly-used non-owned car exclusion. The Supreme Court reversed “on the basis of *Burstein v. Prudential Prop. & Cas. Ins. Co.*, 570 Pa. 177, 809 A.2d 204 (2002).” Since *Burstein* upheld a regularly-used non-owned car exclusion, the reversal would appear to relate only to that exclusion, and the “non-car” limitation would still be invalid).

8. The accident must arise from “use” of UM/UIM vehicle as a vehicle

A one-vehicle accident caused after insured swerved to avoid cardboard box left on highway was caused by an “uninsured vehicle” within the meaning of the policy. *Allstate Property and Cas. Ins. Co. v. Squires*, 667 F.3d 388 (3d Cir. 2012). The parties in *Squires* stipulated that an unidentified vehicle dropped the box. The district court held that the accident was not caused by an uninsured vehicle: “Whether or not the box in the case at hand was deposited on the road from an uninsured motor vehicle or by the driver of an uninsured motor vehicle is irrelevant. The determinative fact is that the instrumentality causing the Underlying Accident was a box—not a vehicle. At best, the uninsured motor vehicle was incidental to the Underlying Accident.”)

The Third Circuit reversed, predicting that the Pennsylvania Supreme Court would find causation under these facts. Pennsylvania interprets “arising out of” as requiring only “but for” causation. Moreover, there was no intervening intentional conduct by a third party as was the case in *Smith v. USAA*, 392 Pa. Super. 248, 572 A.2d 785 (1990) (where boy threw hay from wagon into bicycle rider’s face, rider’s accident was not caused by a motor vehicle, but by the intentional act of the third party throwing hay). The Third Circuit assumed that the unidentified vehicle involved in the accident was transporting the box as cargo, a common use of many vehicles on the roadway, and concluded that there was sufficient causal connection to conclude that the accident “arose out of” the use of that unidentified vehicle.

Compare *American National Prop. & Cas. Co. v. Terwillinger*, 2007 U.S. Dist. LEXIS 9018 (E. D. Pa. 2007) (claimant injured when his motorcycle skidded on loose gravel, which he alleged was left by a PennDOT vehicle following a negligent road repair or was “kicked up” by an unidentified vehicle did not state a UM claim; the policy covered bodily injury caused by accident resulting from “the ownership, maintenance or use of the [underinsured] vehicle” and under the “plain and unambiguous” policy language, “The vehicle must be more than merely incidental to the injury – it must be the instrumentality that caused the injury”); *State Farm Mut. Auto. Ins. Co. v. Adragna*, No. 291-2009-Civil (C.P. Pike 2010)(one-vehicle accident after insured encountered bundles of insulation blocking the highway was not caused by use of an uninsured vehicle as a vehicle (as the policy required); applying *Terwillinger*, above, the court concluded that the bundles of insulation that caused the accident were a source external to the motor vehicle that had allegedly dispersed them).

B. Who is an Eligible Claimant?

Section 1733, discussed further below, sets forth the order of priority for recovering UM/UIM benefits: (1) A policy covering a motor vehicle occupied by the injured person at the time of the accident, and (2) A policy covering a motor vehicle not involved in the accident with respect to which the injured person is an insured. 75 Pa.C.S.A. §1733. Under §1702, an “Insured” is “Any of the following: (1) An individual identified by name as an insured in a policy of motor vehicle liability insurance. (2) If *residing in* the household of the named insured: (i) a spouse or other relative of the named insured; or (ii) a minor in the custody of either the named insured or relative of the named insured. 75 Pa.C.S. §1702 (emphasis supplied).

Thus, UM/UIM claims often require resolving whether a claimant is “occupying”³ a given vehicle or resides with a given insured.

1. When is a claimant "occupying" an insured vehicle?

The Supreme Court has identified four criteria for “occupying” a vehicle:

- (1) a causal connection between the injury and the use of the insured vehicle;
- (2) claimant must be in reasonably close geographic proximity to the insured vehicle, although he need not be actually touching it;
- (3) claimant must be vehicle oriented rather than highway or sidewalk oriented at the time; and
- (4) claimant must be engaged in a transaction essential to the use of the vehicle.

Utica Mut. Ins. Co. v. Contrisciane, 504 Pa. 328, 473 A.2d 1005 (1984).

a. Cases where “occupying” test was satisfied

The "occupying" test has generally been interpreted broadly. *See, e.g., Fisher v. Harleysville Ins. Co.*, 423 Pa. Super. 362, 621 A.2d 158 (1993), *appeal denied* 536 Pa. 624, 637 A.2d 285 (1993)(hunter struck by underinsured vehicle while standing in front of a truck unloading his rifle is an "occupant" of the truck because he was in close proximity to it, he was "truck-oriented" because he was unloading his rifle in preparation for entering the truck lawfully and carefully, and under the circumstances there was a causal connection between his injuries and the use of the truck); *Frain v. Keystone Ins. Co.*, 433 Pa. Super. 462, 640 A.2d 1352 (1994)(person who is about to re-enter one vehicle, but is injured when she falls while running to avoid being hit by a second vehicle, is an "occupant" of the first vehicle); *Fox v. Liberty Mut. Ins. Co.*, PICS No. 00-1859 (C.P. Dauphin 2000)(photojournalist struck by underinsured car, after he parked his employer's car and walked approximately 100 yards down the road to film an accident scene, was not “occupying” the employer's car: he was not in the process of entering the vehicle, he was not outside of the vehicle to comply with any statutory duty relating to its operation, and he had ceased to be “vehicle-oriented” and had become “highway-oriented”); *Walker v. Pennsylvania Financial Responsibility Assigned Claims Plan*, 43 D.& C.4th 1 (C.P. Phila. 1999)(passenger who got off of trolley and was injured by a hit-and-run motorist while crossing the street to board a bus was an “occupant” of the bus so that SEPTA was responsible for the claimant's first-party/UM benefits).

An insured was “in, on, getting into or out of” a household vehicle (a motorcycle) at the time of an accident even though the insured's injuries did not occur until he was thrown from the motorcycle (due to colliding the tortfeasor's vehicle) and struck the windshield of the tortfeasor's vehicle and then the pavement. Accordingly, the insured's claim for UIM benefits under another

³ In *Generette v. Donegal Mut. Ins. Co.*, 598 Pa. 505, 957 A.2d 1180 (2008), discussed later herein, the Supreme Court held that guest passengers are not “insureds” as defined in §1702 under the policy applicable to the host vehicle. If insurance policies are modified in accordance with that holding, a determination of “occupying” would no longer be necessary as to guest passengers.

household policy was barred by the household vehicle exclusion. *Allstate Fire and Cas. Ins. Co. v. Hymes*, 2011 PA Super. 200, 29 A.3d 1169 (Pa. Super. 2011), *allocatur denied* __Pa.__, 46 A.3d 715 (2012).

For federal cases applying Contrisicane, see, e.g., Lynn v. Westport Ins. Corp., 258 Fed. Appx. 438 (3d Cir. 2007)(tow truck driver who arrived at disabled vehicle, moved his tow truck to allow a flat bed truck closer access to the disabled vehicle, and was struck by a passing vehicle while walking past the flat bed truck to assist its driver, was “occupying” his tow truck and could collect UIM benefits under the tow truck policy. His job as a tow truck driver was to respond to stranded motorists, including exiting his truck to aid disabled vehicles, and thus he remained vehicle-oriented and engaged in transactions essential to the continued use of the tow truck); *St. Paul Fire & Marine Ins. Co. v. Rhein*, 2008 WL 2928671 (E.D. Pa. 2008)(police officer who exited patrol car, leaving engine running and lights flashing, to obtain information from driver of vehicle he had stopped, and was struck when that vehicle moved backwards, was still vehicle-oriented to his patrol car: he necessarily had to exit his vehicle to obtain the offending driver’s paperwork, but intended to return to his patrol car to review the information, run the necessary background checks and prepare the required paperwork); *Travelers Indemnity Company v. McGann and Chester, LLC*, 2011 WL 673917 (W.D. Pa. February 17, 2011) (“citations management” worker, who was struck while attempting to “boot” vehicle, was “occupying” the truck he had been patrolling in. His job required him to ride in the truck to patrol for vehicles delinquent in paying traffic tickets, identify the delinquent vehicles, verify the amount owed, exit the truck to verify the license plate and affix a sticker to the driver’s side window, and either attach paperwork to the vehicle’s windshield or hand it to the vehicle’s driver); *Stonington Ins. Co. v. Dardas*, 2010 U.S. Dist. LEXIS 2010 (E.D. Pa. 2010) (where engine of insured’s tow truck caught fire, and insured was trying to open the door of the vehicle he had been towing to try to save it from fire damage when he was injured by the negligence of a third party, the insured was “occupying” the tow truck: he was in reasonably close geographic proximity, his duties as a tow truck driver included loading and unloading operations, he was vehicle-oriented at the time of his injury, and he was engaged in an activity (unloading) that was essential to the tow truck’s operations; *Merchants Mut. Ins. Co. v. Benchoff*, 2010 U.S. Dist. LEXIS 53341 (W.D. Pa. 2010), adopted and summary judgment granted, 2010 U.S. Dist. LEXIS 53505 (W.D. Pa. 2010) (where insured was injured while standing on the shoulder of the highway, in front of his work van, after getting out of the van and moving to better hear the directions he was being given, he was “occupying” his work van: there was a causal connection between use of the van and the injury where the insured had gotten back into the van after assisting in changing another vehicle’s flat tire, had turned on the van’s engine and headlights, and was preparing to drive away when he briefly got out for directions; he was in reasonably close geographic proximity; he was vehicle-oriented rather than highway-oriented where he was engaged in an activity normally associated with or essential to the use of the van and had not intended to sever all connections with it; and in obtaining directions he was engaged in a transaction essential to his use of the van, regardless of whether the destination had anything to do with the work van; a finding of “occupancy” for claimants who were outside of their vehicles was not limited to claimants whose jobs required them to exit their vehicles and be upon or near the roadway, such as police, emergency workers and tow-truck drivers); *Property and Cas. Ins. Co. of Hartford v. Caparella*, 2004 WL 1551739 (E.D. Pa. 2004)(police officer who exited patrol car, leaving engine running and lights flashing, to assist in pedestrian stop, and was struck while attempting

to return to car to avoid traffic, was “occupying” patrol car – he was still vehicle-oriented and was engaged in a transaction essential to the use of his vehicle where he was still using the flashers and where his position as a police officer required him to frequently enter and exit vehicle); *Selective Ins. Co. of America v. Jaskoloka*, 292 F. Supp. 2d 624 (M.D. Pa. 2003)(township employee who had been clearing brush alongside the road and loading it into her truck when she was struck and killed by another vehicle was “occupying” the truck where she was leaning into the back of it when she was struck, and was actually crushed against it, and where the weight of evidence was that the vehicle was running and that the decedent was repeatedly re-entering the truck to drive it forward as brush was cleared).

(c) Cases where “occupying” test was not satisfied

A passenger who got off of one bus, and was injured by a hit-and-run motorist while crossing the street to catch another bus, was not “occupying” a SEPTA bus so as to make SEPTA responsible for the claimant's first-party/UM benefits. *Jones-Molina v. Southeastern Pennsylvania Transp. Authority*, 29 A.3d 73 (Pa. Cmwlth. 2011), expressly overruling *Adeyard v. SEPTA*, 167 Pa. Cmwlth. 450, 648 A.2d 589 (1994). The Commonwealth Court held that the policy of strictly construing all departures from the immunity doctrine applicable to Commonwealth agencies suggests that the legislative intent would have been to place the burden of covering losses such as Jones–Molina’s on the Assigned Claims Plan (which is funded from private entities (insurers), rather than from the Commonwealth’s public purse).

See also Curry v. Huron Ins. Co., 781 A.2d 1255 (Pa. Super. 2001) *appeal denied* 568 Pa. 720, 797 A.2d 913 (2002)(claimant did not meet the “occupying” test where he was crouched on the runway surface performing a test for an airport runway-paving project, approximately 20 feet from his employer-issued vehicle, and was struck by another construction vehicle; the fact that the employer’s vehicle was equipped with a beacon to mark the claimant’s position on the runway, as required by federal regulation, did not make claimant “vehicle oriented” where the claimant’s position outside the vehicle was unrelated to the use of the vehicle; the third and fourth prongs of the *Contrisciane* test also were not met); *Petika v. Transcontinental Ins. Co.*, 855 A.2d 85 (Pa. Super. 2004) (claimant was not “occupying” employer’s vehicle where he moved 100-120 feet away from it and was attempting to slow down traffic as other workers attempted to clean up material spilled from the vehicle; he “became ‘highway oriented’ when he left his vehicle for the purpose of trying to slow and manage oncoming highway traffic. Although he might have intended to return to his vehicle at some later time, his purpose for being outside of his vehicle when the accident occurred is what controls when assessing whether he was ‘vehicle oriented’ under *Utica*. Thus he did not meet the third prong of the *Utica* test”); *Richardson v. Selective Ins. Co. of Amer.*, 2011 WL 2135609 (E.D. Pa. 2011) (claimant was not “occupying” his employer’s vehicle, where he had driven the vehicle to a conference, checked in at his hotel, and later that evening was struck by an underinsured vehicle while attempting to cross the street to visit the next day’s conference location: there was no causal relation or connection between the accident and the use of the insured vehicle, he was not in a reasonably close geographic proximity to the insured vehicle, he was highway oriented and not vehicle oriented, and he was not engaged in a “transaction essential to the use of the vehicle at the time of the accident). *Sona v. State Farm Mut. Auto. Ins. Co.*, __ F.Supp.2d__ (2011 WL 1151626) (M.D. Pa. 2011) (father was not “occupying” son’s dirt bike for purposes of exclusions in UIM

coverage for one “occupying” an uninsured household vehicle; at the time another car backed into him, father “was simply moving his son’s dirt bike into place for an oil change, the engine was not turned on, [father] did not have a key for the bike, and was not even sitting atop the bike. The dirt bike, while technically a motor vehicle, was more akin to any other inanimate object, e.g. a piece of furniture, which [father] was moving at the time of the accident. The Utica test was meant to broaden the parameters of “occupancy” in order ensure insurance coverage where the use of a vehicle had for some compelling reason been momentarily interrupted or stalled.”); ***Barnes v. Keller*, 2012 Phila. Ct. Com. Pl. LEXIS 25 (C.P. Phila. 2012) (claimant did not meet the “occupying” test with respect to employer’s vehicle, where he was using a “jetter” he had towed to the work site, which was not self-propelled, and was hit by another vehicle; there was a causal relationship between the accident and the use of the insured vehicle, but he was not in reasonably close geographic distance to the insured vehicle, was not “vehicle-oriented,” and was not engaged in a transaction essential to the use of the vehicle).**

2. When is a claimant a "resident relative" of an insured?

Determining whether a claimant is a “relative” of the named insured so as to qualify for coverage under the named insureds’ policies is a fact-sensitive determination that gives considerable weight to the claimant’s physical presence.

The issue was discussed by the Supreme Court in a liability case that applies to the same issue in UM/UIM cases. In *Amica Mut. Ins. Co. v. Donegal Mut. Ins. Co.*, 376 Pa. Super. 109, 545 A.2d 343 (1988), the daughter of divorced parents sought liability coverage under her father’s policy; she actually lived with her mother but kept “numerous personal items” at her father’s house and allegedly intended to live there again. The Superior Court held that “residence” means “a factual place of abode... requiring only physical presence” and rejected the claimant’s argument that intention alone would satisfy the residency requirement. The *Amica* court also rejected the argument that keeping the personal items at her father’s house meant she was a resident there.

In *Nationwide Mut. Ins. Co. v. Budd-Baldwin*, 947 F.2d 1098 (3d Cir. 1991), the Third Circuit applied *Amica* in holding that whether someone “regularly lives” in a household meant physical presence and a “sense of belonging ... Temporary visits, however, frequent or regular, are simply insufficient to establish residency.” Thus the insured’s brother, who stayed with the insured almost every weekend so that he could visit his fiancée, did not “regularly live” with his sister, “however frequent or welcome his visits may have been,” and was not entitled to first-party or UIM benefits under her policy.

In *Nationwide Mut. Ins. Co. v. Kuentzler*, 2007 U.S. Dist. LEXIS 43236 (E. D. Pa. 2007), the insureds’ son was listed a driver on one of their policies, had a room at his parents’ house in York, Pennsylvania, received certain mail there, and lived with them there from 1991 to 1996. In 1996, he moved to North Carolina, and then lived in Ohio from 1997 to 2002. He next stayed in his parents’ house in York for two months, then lived with his fiancée and their children at a different address in York until November 2004. They moved to Ohio, and son was killed in an accident there in April 2005. Son’s estate argued that a “relative” under the policy included a relative living temporarily elsewhere, and that the son’s intent with respect to his residence was therefore crucial. There was testimony that son considered York his home, and

that he intended to return to York to live with his parents until he could find a permanent residence for his family. The district court rejected this argument, relying on *Amica* and *Budd-Baldwin*. Although the son in *Kuentzler* allegedly returned to his parents' house once a month, those contacts were visits and did not establish residency. Likewise, receiving mail at the insured residence was not relevant to whether the person lived there. *Id.*, citing *St. Paul Fire & Marine Ins. Co. v. Lewis*, 935 F.2d 1428, 1433 (3d Cir. 1991). Finally, the *Kuentzler* court rejected the argument that the decedent's intent should be relevant. In *Nationwide Mut. Ins. Co. v. White*, No. 93-962 (E.D. Pa. 1993), the court stated that determining whether a claimant regularly lives in or resides in another person's household requires determining the claimant's degree of physical presence in the household together with the claimant's general intention; the *Kuentzler* court dismissed this as a "stray remark" and concluded that intention may be relevant to determining that a "relative" was only "temporarily" living elsewhere, and thus did not lose coverage, but was not part of the "regularly living" analysis.

In *O'Neill v. Geico*, 2012 U.S. Dist. LEXIS 124245 (E.D. Pa. 2012), the plaintiff was not a resident of her son's household where the house had two residential units, one occupied by plaintiff and the other occupied by her son, his wife and his daughter. Her son owned the house, which had one mailing address, and the tax bills and homeowners' insurance bills were not divided, and plaintiff did not pay rent. The utility bills were separate, plaintiff generally prepared and ate her meals separately, and medical records contemporaneous to the accident stated that plaintiff "lives alone." The court cited *Budd-Baldwin*: "The essential inquiry is whether the family members operate as a single social unit and whether the claimant is "treated as one would expect a member of the household to be treated." The court concluded that plaintiff and her son "do not function as a single social unit" and that she and her son operate "separate domestic establishments."

In *Allstate Prop. & Cas. Ins. Co. v. Jaffe*, 2008 U.S. Dist. LEXIS 64666 (E.D. Pa. 2008), the insured's 46-year old unmarried daughter, who had been living and working full-time as a physician in Arizona for four years at the time of the accident, was not a resident relative of her mother's home in suburban Philadelphia. The policy defined "resident relative" as "a person who physically resides in your household with the intention of continuing residence there. Your unmarried dependent children temporarily living away from home will be considered residents if they intend to resume residing in your household." The insured argued that the term "dependent" was ambiguous because it could include her daughter being "emotionally dependent" upon her, and even if the term was limited to financial dependence, she and her daughter had shared bank accounts. The court held that the term was not ambiguous and that no reasonable juror could conclude that the decedent was her mother's "resident relative" under the Allstate policy.

In *Hugendubler v. State Farm Ins. Co.*, 2007 U.S. Dist. LEXIS 50835 (E.D. Pa. 2007), the court held that the claimant was not a resident relative under her brother and sister-in-law's policy. The claimant's mother owned the entire building, and the first floor was divided into two apartments, one occupied by claimant and her mother, and the other by claimant's brother and sister-in-law. There was an interior door connecting the two apartments, and often one apartment's bathroom was used because of a plumbing problem in the other. Each apartment had its own mailbox, electricity meter, and entrance; the brother and sister-in-law paid their own utility bills, phone service, and carried renters' insurance listing their apartment. The court held

as a matter of law that these were two separate households. Thus the claimant could not benefit from her brother and sister-in-law's State Farm policies because she did not live in their household.

The Pennsylvania appellate courts have not determined whether a child of parents who are separated but have joint custody can be a resident of both parents households. In *Erie Ins. Exchange v. Weryha*, 931 A.2d 739 (Pa. Super. 2007), the deceased child had lived with his mother, and his estate recovered UIM benefits from her Erie policy. His father had another Erie policy but had moved in with his own parents some 60 miles away. The Erie policy defined "relative" as "a resident of your household" related to you [the insured] by blood, marriage or adoption, and defined "resident" as "a person who physically lives with you in your household."

The claimants argued that the terms "relative" and "resident" were ambiguous under the circumstances because they did not spell out whether a child of separated or divorced parents may be a resident of both parents' households. The court noted that determination of "physically lives with" is a "factually intensive inquiry" requiring the court to "look at a host of factors in reaching a common-sense judgment." The question of whether a child living under a joint custody order can be deemed a resident of both parents' households as a matter of law is "unsettled in this Commonwealth," but the Court found that the trial court's conclusion that the decedent did not live with his father prior to his death was strongly supported by the evidence. The decedent did not have a room at his father's residence, and did not receive mail there, eat regular meals there, have a key, attend school nearby, or spend the night there on a regular basis. The fact that the father's economic circumstances prevented him from living closer to his children did not alter the lack of actual residency. "[T]he issue is whether [son] physically lived with his father; the issue is *not* why it was impossible for [son] to physically live with his father."

The Supreme Court granted allocatur to consider the question of whether, in a joint custody situation, the child is *per se* a resident of both households for purposes of UIM coverage. However, the case was voluntarily discontinued prior to oral argument. Thus, the issue has not yet been addressed by the Supreme Court.

See also, e.g., Travelers Personal Ins. Co. v. Parzych, 675 F. Supp. 2d 505 (E.D. Pa. 2009)(decedent's son did *not* have sufficient contact with mother's home to establish a second residency there. Son's driver's license and income tax return showed parents' address, he received certain mail there and had a room there, kept toiletries and other personal belongings there, and stayed overnight at least once a week; however, he had lived with his girlfriend and their son in an apartment for over a year before his death, his credit card and cell phone bills and bank statements were sent there, and when he slept at his parents' house it was generally a matter of convenience and did not mean he resided there); *Schultz v. Encompass Ins.*, 2004 WL 2075114 (E.D. Pa. 2004)(claimant was *not* a resident of his grandparents' household where evidence did not support a finding of "actual physical presence" there; neither keeping personal belongings there nor an "intention" to reside there were sufficient); *Nationwide Mut. Ins. Co. v. Ortiz*, 2001 WL 1076583 (M.D. Pa. 2001)(insureds' son was covered under parents' policy as a relative "temporarily living" outside the household; he had been living in Tennessee for four months when he was involved in an accident there, but had taken only limited belongings, had not intended his trip to Tennessee to be permanent, and although he had no specific date of return

or immediate intention to return, he had always planned to return to his parents' home); *Nationwide Mut. Ins. Co. v. Krause*, 2000 WL 255987 (E.D. Pa. 2000) (a child of divorced parents who lived with her mother and only sporadically stayed with her father was not regularly living with him and did not qualify as a relative for purposes of obtaining excess liability coverage under his policy).

The insured's girlfriend does not qualify as a resident relative of the insured, even though she is listed as a driver on his policy. *Erie Ins. Exchange v. Bazdar*, No. 06-5381 (C.P. Cumberland 2009) (girlfriend injured on a motorcycle owned by a third party was not entitled to UIM coverage under her boyfriend's policy; she lived with her boyfriend part of the time, and was listed as a driver on his vehicles, but was not a named insured or a resident relative).

3. A claimant must be a permissive "user" of the insured vehicle

Merely occupying a non-owned vehicle does not constitute "use" of that vehicle within the meaning of a non-permissive use exclusion. *Erie Ins. Exchange v. E.L. by and through Lowry*, 941 A.2d 1270 (Pa. Super. 2008). The claimant in *Lowry* was an 11-year-old girl who was a passenger in a vehicle driven by her brother and owned by her mother; her father had a separate policy with Erie. Erie denied coverage because its policy contained an exclusion if the injury arose out of the use of a regularly-used non-owned vehicle. The claimant argued that as a passenger, she was not "using" the vehicle at the time of her accident, pointing out that the policy did not define "using" but did define "occupying," and that these terms were not interchangeable. Erie argued that in *Burstein*, coverage had been excluded for the passenger under the same language. The Superior Court found that the terms "occupying" and "using" were not interchangeable, and that the "use" issue had not been before the Supreme Court in *Burstein*. The Superior Court considered the decisions in *Erie Ins. Exchange v. Transamerica Ins. Co.*, 516 Pa. 574, 533 A.2d 1363 (1987)(3 ½ year old child who set a parked vehicle in motion was not "using" the vehicle within the meaning of the vehicle's liability policy), *Belser v. Rockwood Cas. Ins. Co.*, 791 A.2d 1216 (Pa. Super. 2002)(an employee who negligently directed a truck driver was not "using" the truck within the meaning of the truck's liability policy), and *Nationwide Mut. Ins. Co. v. Cummings*, 438 Pa. Super. 586, 652 A.2d 1338 (1994), *appeal denied* 540 Pa. 650, 659 A.2d 988 (2008)(passenger was not entitled to UM coverage from the host vehicle because the vehicle was stolen and he was unknowingly "using" it without the owner's permission).

Because both parties in *Lowry* presented reasonable and compelling constructions of the policy, the court deemed "use" to be ambiguous and construed it against Erie, which had chosen the ambiguous term "using" and had not defined it. The court found its interpretation to be consistent with the language of the insuring agreement. Thus, the claimant was entitled to UIM coverage under the Erie policy.

If the use of the insured vehicle is outside the scope of the owner's permission (for example, a stolen vehicle), an occupier, even if innocent, will not be entitled to UM coverage under the policy applicable to the vehicle. *Nationwide Mut. Ins. Co. v. Cummings*, 438 Pa. Super. 586, 652 A.2d 1338 (1994), *appeal denied*, 540 Pa. 650, 659 A.2d 988 (1995)(non-permissive use exclusion did not violate the legislative intent behind the MVFRL). *Cf. Gift v.*

Nationwide Ins. Co., No. 97-6934 (E.D. Pa. 1998) (policy exclusion which was not limited to “knowing” non-permissive use did not violate public policy even where it prevented estate of innocent passenger from recovering from the decedent’s own household UM coverage); *Allstate Ins. Co. v. Davis*, 977 F.Supp. 705 (E.D. Pa. 1997) (where record did not reflect evidence of sufficient nexus between owner and driver to support a finding of implied permission, non-permissive use exclusion was applicable, and owner’s carrier was not obligated to provide UM coverage to passenger); **but see *Donegal Mut. Ins. Co. v. Smith*, 2012 Pa. D. & C. LEXIS 68 (C.P. Westmoreland 2012) (occupant of vehicle being used without owner’s consent was nevertheless entitled to his own household UM coverage; he was not physically operating the vehicle and therefore should not be considered a “user” of the vehicle. Policy did not define “use” or “using” and did not equate “using” with “occupying” (which was a defined term); therefore the language was ambiguous and the ambiguity was resolved in favor of the claimant).**

A vehicle owner struck and injured by his own stolen vehicle while trying to stop the theft cannot recover UM benefits from his own policy. *Progressive Northern Ins. Co. v. Gondi*, 165 Fed. Appx. 217 (3d Cir. 2006) (a clear and unambiguous policy provision must be enforced unless to do so would be contrary to a clearly expressed public policy; “We cannot read Pennsylvania generic public policy as requiring that Gondi’s last minute heroics be rewarded when they were only necessitated by his own carelessness. Gondi was hit by his own car during the course of a theft that he effectively facilitated. We do not think that the public policy of Pennsylvania mandates that Gondi’s insurance cover such a situation.”).

4. Defining “insured” under business policies

Where the only actual named insured is a partnership, the two partners who were trading as the partnership were also necessarily named insureds when they were acting in the capacity of partners. *Continental Cas. Co. v. Pro Machine*, 916 A.2d 1111 (Pa. Super. 2007). The court opined that “The policy as a whole and the UIM provisions in particular indicate that the parties intended to protect individuals who, acting on behalf of [the partnership], are involved in an automobile accident with an underinsured motorist while occupying a covered vehicle.” Under the policy definitions, vehicles owned by the partners would also be covered under those circumstances (which would make the policy’s household vehicle exclusion inapplicable). There was a genuine issue of fact as to whether the partner in question was working on behalf of the partnership at the time of the accident, so the case was remanded for further proceedings.

An employee injured in the course of her employment, but while operating a friend’s vehicle rather than the vehicle provided by her employer, does not qualify as an insured entitled to UIM benefits under the employer’s policy. *Caron v. Reliance Ins. Co.*, 703 A.2d 63 (Pa. Super. 1997) *appeal denied* 556 Pa. 669, 727 A.2d 126 (1998). The employee in *Caron* was not listed as an insured on the business policy but had been listed on the proposal for insurance submitted to the carrier; the named insured was the employer (a corporation). The definition of “insured” was limited to the named insured, “family members” if the insured is an individual, and those occupying the covered auto or a temporary substitute. The Superior Court held that merely being listed on an insurance policy did not transform an individual into a class-one insured, and that the policy’s restriction to insureds as defined did not violate the MVFRL.

Likewise, a policy issued to a corporation does not provide UM/UIM coverage to the wife of a corporate officer where she was not occupying one of the corporation's vehicles at the time of her injury. *Northern Ins. Co. of New York v. Resinski*, 827 A.2d 1240 (Pa. Super. 2003). The policy in *Resinski* was issued to DA-Tech Corporation as the only named insured, although listed drivers were identified. Claimant's husband was a principal shareholder, director and secretary of DA-Tech. Since the only named insured was the corporation, the claimant was neither a named insured or a "family member" of the named insured, and she was not occupying a covered auto. Therefore, "[O]n its face the policy provides no coverage for claimant. . . ." The court also affirmed that the issue was not arbitrable under the stipulated facts and the arbitration language of Great Northern's policy. See also *O'Connor-Kohler v. State Farm Ins. Co.*, 113 Fed. Appx. 472 (3d Cir. 2004)(guest passenger in corporate vehicle could not stack corporate coverage); *American Economy Ins. Co. v. Pizzino*, 2003 WL 23162383 (E. D. Pa. 2003)(husband and wife injured in friend's vehicle were not entitled to UIM benefits under policy issued to corporation of which husband was vice president and minority shareholder); *State Farm Ins. Co. v. Taylor*, 293 F. Supp. 2d 530 (E.D. Pa. 2003), *aff'd* 116 Fed. Appx. 350 (3d Cir. 2004)(husband and wife not entitled to UIM benefits under policies issued to closely held corporations; change of named insured was either requested or ratified by claimants, and change in scope of coverage was easily ascertainable from policies); *U.S.F.&G. Co. v. Tierney Associates, Inc.*, 213 F.Supp.2d 468 (M.D. Pa. 2002)(rejecting the argument that the corporate secretary should be regarded as a "class I" beneficiary under a corporate policy); *Nationwide Mut. Fire Ins. Co. v. Salkin*, 163 F.Supp.2d 512 (E.D. Pa. 2001)(where business auto policy was issued in the name of the corporation, even though the name of the corporation was listed incorrectly, business owner's son was not covered under the policy as a "family member;" the parties had clearly intended to insure the corporation, and "it would strain a court's imagination" to find that the son was a "family member" of the insured business entity); *Hunyady v. Aetna Life & Cas. Co.*, 396 Pa. Super. 476, 578 A. 2d 1312 (1990), *aff'd* 530 Pa. 25, 606 A.2d 897 (1992).

A decedent committed to a juvenile residential rehabilitation facility was not a "family member" of that facility and therefore his estate was not entitled to collect UIM benefits under a policy issued to that facility. *The Insurance Co. of Evanston v. Bowers*, 758 A.2d 213 (Pa. Super. 2000). The decedent was killed by an underinsured motorist while on a biking trip sponsored by the facility. The court held that the policy only extended UIM coverage to the named insured's family members if the named insured was an *individual*. This language was unambiguous and was consistent with §1702, which also refers to minors in the custody of an individual. In this case the named insured was a corporation and therefore the decedent could not be covered as a "family member." Although the decedent had been made a ward of the state by operation of law through the delinquency proceedings, and had subsequently been made a ward of the named insured facility, he was not a "family member" of the facility, or a "minor in the custody of ...the named insured" within the meaning of §1702.

A former foster child who returned to stay with his foster family shortly before an accident was deemed a ward of the foster family and thus entitled to coverage, including UIM benefits, under the foster family's policy. *Donegal Mut. Ins. Co. v. Raymond*, 899 A.2d 357 (Pa. Super. 2006). The child stayed with the foster family from August 1997 until June 1998.

Several months later his natural mother was evicted and asked the foster family if the child could again stay with them. They took him to their home; later that day he was in an accident in a friend's vehicle. Although no actual placement order was in effect, the child was nevertheless a "ward" of the foster family, and that their insurance policy, which defined "family member" as including "a ward or foster child," provided coverage. The foster child also fell within the definition in §1702 of an "insured" as including "a minor in custody of the named insured."

5. Pedestrians are not insureds who can recover UM/UIM benefits from vehicles involved in accidents with the pedestrians

The MVFRL permits pedestrians to recover first-party benefits from any motor vehicle involved in the accident. 75 Pa. C.S.A. §1713(a)(4)(person who is not the occupant of a motor vehicle and does not have a higher-priority source of benefits may recover first party benefits from any motor vehicle involved in the accident). However, the MVFRL contains no such provision regarding UM/UIM benefits for pedestrians. See 75 Pa. C.S.A. §1733. Thus, a pedestrian struck by a stolen vehicle may not recover UM benefits from the stolen vehicle's carrier. *Frazier v. State Farm Mut. Auto. Ins. Co.*, 445 Pa. Super. 218, 665 A.2d 1 (1995)(declining to follow *Ector v. Motorists Ins. Cos.*, 391 Pa. Super. 458, 571 A.2d 457 (1990), which permitted such recovery). The *Frazier* court found that *Ector* had been "limited" and was not dispositive, and that the No-Fault Act theory of "maximum feasible restoration" upon which *Ector* had been based by analogy "no longer exists in Pennsylvania jurisprudence." See also *USAA v. Shears*, 692 A.2d 161 (Pa. Super. 1997)(Virginia policy on stolen vehicle, which did not provide UM coverage to injured pedestrian, did not violate the MVFRL).

6. Ownership of an uninsured vehicle doesn't preclude recovery if that vehicle isn't involved in the accident

The owner of a registered, uninsured motor vehicle is not barred on public policy grounds from obtaining UM benefits under another policy as to which she is an insured, where she was not operating or a passenger in her uninsured vehicle at the time of the accident. *Henrich v. Harleysville Ins. Co.*, 533 Pa. 181, 620 A.2d 1122 (1993). The Harleysville policy did not have an exclusion prohibiting the recovery sought. The Supreme Court expressly left unanswered the question of whether the claimant would be barred if her uninsured vehicle had been involved in the accident, and recognized that the deterrent purpose of §1714 might be served if coverage were precluded under those circumstances.

However, if the claimant is occupying his/her own uninsured vehicle, the other household policies under which the claimant might be "insured" would likely contain exclusions intended to bar recovery under these circumstances. "Household" and "owned but not insured" vehicle exclusions are common examples that could apply and are discussed later in these materials.

C. Claims Arising in the Course of Employment

The exclusivity provisions of the workers' compensation statute do not preclude a claimant injured in his employer's vehicle from recovering both UM/UIM benefits from the policy covering that vehicle and also workers' compensation benefits. *Warner v.*

Continental/CNA Ins. Cos., 455 Pa. Super. 295, 688 A.2d 177 (1996), *appeal denied*, 548 Pa. 660, 698 A.2d 68 (1997). The *Warner* court found no legislative intention to preclude an employer from purchasing optional UM/UIM coverages for the benefit of his or her employees. Also, permitting the employee to recover UM/UIM benefits from the employer's motor vehicle carrier would "create a fund against which the employer's workmen's compensation carrier can exert its subrogation lien." *Id.*, 688 A.2d at 185. See also *Travelers Indemnity Co. of Ill. v. DiBartolo*, 131 F.3d 343 (3d Cir. 1997) (reversing, in light of *Warner*, the district court's order which had granted summary judgment in favor of the employer's UM carrier).

Likewise, an employee injured in a co-employee's vehicle due to the negligence of a third party is entitled to recover not only workers' compensation, but also UM benefits from the co-employee's policy. *Gardner v. Erie Ins. Co.*, 555 Pa. 59, 722 A.2d 1041 (1999). Such claims are not seeking damages as against the co-employee, but rather, constitute contractual recovery premised upon wrongful third-party conduct. Moreover, the workers' compensation carrier would have a right to subrogation against such recovery: following the enactment of Act 44, "[S]ection 1720 no longer impedes the rights of subrogation on the part of workers' compensation carriers."

However, the claimant cannot recover from his own UM/UIM carrier for injuries resulting from his employer's negligence. *Erie Ins. Exchange v. Conley*, 29 A.3d 389 (Pa. Super. 2011). In *Conley*, the claimant was injured in the scope of his employment, when he was struck by a truck operated by his employer. The claimant's Erie policy provided coverage for damages that "the law entitles" the insured "to recover from the owner or operator of an "underinsured motor vehicle." Although the claimant could establish a prima facie case of negligence against the driver, he could not collect UM/UIM benefits: the law did not entitle claimant to recover damages from his employer, the driver, because of the Workers' Compensation Act immunity.

See also *Nationwide Ins. Co. v. Chiao*, 186 Fed. Appx. 181 (3d Cir. 2006), *revs'g* 374 F. Supp. 2d 432 (M.D. Pa. 2005) (employee who was a passenger in a vehicle driven by a co-employee on a business trip, and who collected the driver's liability coverage and also workers' compensation benefits, could not collect UIM benefits from her own carrier, Nationwide, because the UIM policy covered payment "due by law" from the owner or driver of an underinsured vehicle, and no payment was "due by law" from the co-employee. The term "due by law" is not ambiguous, and any misunderstanding by the insured of the meaning of the term could not be used to circumvent the principle that clear and unambiguous policy language must be given its effect. Rather, "due by law" equated to the MVFRL's term "legally entitled to recover." Under the Workers' Compensation Act, an employee is not "legally entitled to recover" from a negligent co-employee, and thus damages for such injuries are not "due by law" and are not within the coverage of the policy. Cf. *Shaw v. State Farm Ins. Co.*, 331 Fed. Appx. 946 (3d Cir. 2009) (claimant injured in truck driven negligently by co-worker is not entitled to UM/UIM benefits under his own policy where he is not "legally entitled to collect" damages from his co-worker); *Petrochko v. Nationwide Mut. Ins. Co.*, No. 07-CV-7113 (C.P. Lackawanna 2010) (employee struck by co-worker's vehicle while in the course and scope of employment was not entitled to recover UIM benefits from her own insurer; although workers' compensation benefits paid did not include compensation for employee's "pain and suffering",

employee was not “legally entitled to recover” those damages from the co-employee), *aff’d mem.* __A.3d__ (Pa. Super. 2011).

Where an employer purchases UM/UIM coverage on the employer’s vehicle used by the employee, an exclusion preventing the employee from collecting UM/UIM benefits if he/she is entitled to workers compensation is invalid. *Heller v. Pennsylvania League of Cities and Municipalities*, __Pa.__, 32 A.3d 1213 (2011) (exclusion for “Any claim by anyone eligible for workers compensation benefits that are the statutory obligation of the [employer] is invalid). The Court observed in *Heller* that the cost containment rationale “has limits,” and that where almost no vehicle occupant would benefit from the purchased coverage, the coverage was converted to a “sham offering” and the carrier impermissibly received a windfall. Once the coverage is purchased, it must comply with the statute and public policy. *Heller* is discussed further in the exclusion section, below.

II. REJECTIONS OF UM/UIM COVERAGE

1. Validity of Signature

Where a signature appears on a UIM rejection form purporting to be that of the first named insured, the insurer had complied with its burden and the form is facially valid. If an insured challenges the signature, the insured bears the burden of proving that the signature is a forgery, placed there without the insured’s knowledge or consent, and that the insured did not willingly waive the coverage. *Toth v. Donegal Companies*, 964 A.2d 413 (Pa. Super. 2009), *appeal denied* 602 Pa. 679, 981 A.2d 220 (2009). The Donegal policy purchased by the insureds, Darla and John Toth, included UIM coverage until April 1997. At that time, their teenaged son became a driver, and John Toth talked to their agent about ways to reduce their premium. John Toth subsequently signed both Darla’s and his name to various coverage selection forms, including the rejection of UIM coverage, and returned them by mail. The Toths’ premiums were reduced as a result, revised declarations notices were issued, and renewal notices reflecting the rejection were sent every six months for six years before Darla was involved in an accident with an underinsured motorist in January 2001.

Darla argued that the UIM rejection was invalid because her husband had signed her name. The trial court agreed, concluding that even if Darla had given her husband permission to sign her name, §1731(c) and (c.1) mandated that the form “must be signed by the first named insured.” The Superior Court reversed. The Superior Court agreed that Pennsylvania courts have strictly construed the technical requirements of the MVFRL, and that plain words of a statute should not be ignored under the pretext of pursuing its spirit or an unstated legislative intent. However, the court found that the statutory signature requirement was met when the insurer produced a rejection form bearing the purported signature of the insured; the insured, Darla Toth, then bore the burden of proving that the signature was a forgery, placed there without her knowledge or consent, and that she insured did not willingly waive the coverage. Holding the form void as a matter of law would “entirely too great a burden on the insurer.” The court distinguished cases like *Vaxmonskey*, where the forms were invalid due to language or format when they left the insurer’s control, from this situation, where “there is no practical way,

once the form is in the insured's hands" to verify whether the purported signature is in fact the insured's.

The Superior Court in *Toth* found the case of *Jackson v. Allstate Ins. Co.*, 441 F.Supp.2d 728 (E.D. Pa. 2006) instructive. In *Jackson*, the court held that nothing in the MVFRL altered the common-law rule that the party asserting forgery has the burden of proving the facts upon which the forgery is based; the burden of proof does not shift to the insurer to disprove forgery. Thus, where the insured in *Jackson* could only testify that she did not remember signing the form, her expert could not offer an opinion on whether the signature was hers, and the defense expert stated that the signature was pictorially similar to other signatures of the insured, there was no genuine issue of material fact and the carrier was entitled to judgment as a matter of law.

2. All claimants are bound by a valid rejection

A rejection of UM/UIM coverage is binding upon all persons claiming under the policy. *General Accident Ins. Co. of America v. Parker*, 445 Pa. Super. 300, 665 A.2d 502 (1995), *appeal denied* 544 Pa. 631, 675 A.2d 1249 (1996). The *Parker* court expressly rejected claimant's argument that the named insured's waiver was not binding on her because she was not a resident relative of the insured. The court held that claimant is a third-party beneficiary to the insured's contract and her rights to recover are subject to the same limitations applicable to the insured. *See also Blakney v. Gay*, 441 Pa. Super. 547, 657 A. 2d 1302 (1995), *appeal denied* 542 Pa. 655, 668 A.2d 1119 (1995)(corporate lessor of vehicle was a named insured entitled to reject UM coverage, and the rejection is binding upon the pedestrian/claimant; the MVFRL contains no requirement that the insurer provide UM benefits for all third persons who may be injured by an insured vehicle).

One named insured's rejection of UM coverage under the policy is binding upon another named insured. *Hartford Ins. Co. of the Mid-West v. Doerr*, 2001 WL 43785 (E.D. Pa. 2001). *See also Donohue v. State Farm Ins. Co.*, 2005 Phila. Ct. Com. Pl. LEXIS 389 (C.P. Phila. 2005). Likewise, a corporation may validly waive UM coverage for its employees under a company insurance policy. *Travelers Indemnity Co. v. DiBartolo*, 171 F.3d 168 (3d Cir. 1999). The fact that the waiver required by §1731(b) uses the language "I", "myself", etc., does not mean the legislature intended that such waivers would apply only to personal auto policies, or that all employees would have to join on such waivers. *Cf. Universal Underwriters Group v. Tusay*, 2004 WL 902372 (E.D. Pa. 2004).

A rejection of UM/UIM coverage executed by the husband as first named insured was binding on his wife, even though the wife originally met with the agent and understood that she was to be the first named insured. *Jones v. Prudential Prop. and Cas. Ins. Co.*, 856 A.2d 838 (Pa. Super. 2004), *appeal denied* 583 Pa. 673, 876 A.2d 396 (2005). The wife was estopped from asserting a defense of mistake where she signed an application showing husband as the principal driver, the policy was issued showing husband as first named insured, and Prudential sent mailings listing husband first as "named insured", including a mailing explaining that the rejection of UM/UIM coverage had to be signed by the first named insured. Where the wife had not read the policies and mailings, she could not charge Prudential with failure to insert a requested provision. There also was no "clear and convincing" evidence of mutual mistake

about who was to be the first named insured where wife was unable to recall the conversation with the agent, or even the agent's name. Wife's status as the "applicant" for the policy did not render her the "first named insured" under the statute. Finally, even if the §1791 "Important Notice" was defective in form, the statute provided no remedy for this technical error.

3. When is a new rejection required?

Where UM/UIM coverage is rejected at the policy's inception, no new rejection was required when the insured later increased the liability coverage limits. *Smith v. The Hartford Ins. Co.*, 849 A.2d 277 (Pa. Super. 2004), *appeal denied* 581 Pa. 708, 867 A.2d 524 (2005). The trial court held that whenever the insured made something more than a "cosmetic change" to a policy, it constitutes a new policy as a matter of law and a new rejection form is required to assure an informed choice of coverage. The Superior Court reversed: "There is no statutory authority for such a rule, nor can such a rule be discerned in any prior case law." On the contrary, §1791 states that once that notice has been given, "no other notice or rejection shall be required." The Court also found §1705 to be analogous in that "[O]nce an affirmative election [of tort option] is made, that election is presumed to be in effect throughout the lifetime of the policy." Likewise, in the case of a rejection of UM/UIM coverage, once that election is made, the decision "carries forward until affirmatively changed."

The court reached the same result in *Glazer v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 69140 (M.D. Pa. 2012), concluding that a new waiver was not required when vehicles were "added, exchanged and subtracted" from the policy over the years. The *Sackett* decisions regarding waivers of stacking were not applicable; instead, the court looked to *Smith v. Hartford*, above, which dealt with the waiver of UM/UIM coverage entirely, and which concluded that "once UIM benefits are rejected, that decision carries forward until affirmatively changed." Thus, the initial waiver at issue in *Glazer* remained valid.

4. Combined selection/rejection form

In *Yocum v. Federated Mut. Ins. Co.*, 2007 U.S. Dist. LEXIS 68865 (W.D. Pa. 2007), the insured, a corporation, made different UIM coverage choices for different classes of insureds. The Federated form permitted the corporate representative to select "limit options" from one column for directors, officers, partners or owners of the insured (and their family members), from a second column for any other insureds (including an option to reject UIM coverage for this group) or from a third column option rejecting all UIM coverage. The corporation selected limits of \$500,000 for the group in column A, and no coverage for the group in column B. After an employee (column B) was injured, he sought UIM coverage of \$1,000,000 (equal to the limit of liability coverage) on the basis that there was no valid rejection of coverage for this group. The district court agreed, holding that the form did not constitute a valid class-based limitation on coverage. The form was not valid as a rejection of coverage because it did not satisfy the requirements of §1731, and it was not a request for lower limits under §1734. Accordingly, the district court agreed that the Federated UIM limits were \$1,000,000 for the employee's claim.

5. Excess or supplemental policies

Excess liability or “umbrella” policies are not motor vehicle liability insurance policies as defined by the MVFRL and are not required to provide UM and UIM coverage. *Electric Ins. Co. v. Rubin*, 32 F.3d 814 (3d Cir. 1994); *Kromer v. Reliance Ins. Co.*, 450 Pa. Super. 631, 677 A.2d 1224 (1996), *aff'd* 548 Pa. 209, 696 A.2d 152 (1997). *See also Stoumen v. Public Service Mut. Ins. Co.*, 834 F. Supp. 140 (E.D. Pa. 1993), *aff'd* 30 F.3d 1488 (3d Cir. 1994) (“umbrella” policies are not automobile policies within the meaning of the MVFRL, and thus the carrier is not required to obtain written waivers pursuant to §§1731 and 1734. The liability limits in *Stoumen* were \$1,000,000; the court upheld UIM limits of \$35,000.

Likewise, the UIM provisions of the MVFRL are inapplicable to a policy that provided only comprehensive coverage; thus, the policy does not provide UIM coverage even though no waiver was ever signed. *Nationwide Ins. Co. v. Calhoun*, 430 Pa. Super. 612, 635 A.2d 643 (1993).

Optional supplemental insurance provided in conjunction with a rental car agreement, and which did not include UM/UIM coverage, is “excess” coverage and is not governed by the requirements of the MVFRL. Thus, §1731 did not apply and the carrier did not have to provide UM/UIM benefits even though no offer of UM/UIM coverage had been made to the renter and the renter had not signed any waiver forms. The actual named insured, Budget, validly waived the coverage prior to renting the vehicle and its waiver was binding upon the renter. *Been v. Empire Fire and Marine Ins. Co.*, 751 A.2d 238 (Pa. Super. 2000), *appeal denied* 564 Pa.700, 764 A.2d 1063 (2000).

6. Form of rejections

Section 1731 sets forth very specific requirements for forms rejecting UM or UIM coverage. *See* §1731(b),(b.1), (c) and (c.1). Section 1731(c.1) provides that “any rejection form that does not specifically comply with this section is void”, and that, “If the insurer fails to produce a valid rejection form, uninsured or underinsured coverage, or both, as the case may be, under that policy shall be equal to the bodily injury limits.”

Where a UIM rejection form did not include the exact language required by §§1731(c) and (c.1), the rejection was ineffective. *American Int’l Ins. Co. v. Vaxmonsky*, 916 A.2d 1106 (Pa. Super. 2006). The rejection in *Vaxmonsky* was missing the word “all” from the portion of the form that defined UIM coverage, so that the form stated “Underinsured coverage protects me and relatives living in my household from losses and damages suffered....” instead of “all losses and damages suffered....” The form had been signed by the first named insured in 1993, and the insured did not pay for UIM coverage then or through any renewals up to the date of the accident in 2001. The carrier argued that the specific compliance required by §1731(c.1) applied only to the requirements that the forms be properly signed and dated by the first named insured. The Superior Court disagreed: by deleting the word “all,” the carrier limited the coverage, imposed an ambiguity, and failed to specifically comply with §1731(c.1). The form also failed to comply with 31 Pa. Code §68.103(a) and the forms appended thereto. The insured did not claim to be unaware of the rejection, and it was undisputed that he had never paid a

premium for the coverage, but “we cannot create our own remedy, despite what equity may dictate.”

In *Jones v. Unitrin Auto and Home Ins. Co.*, 40 A.3d 125 (Pa. Super. 2012), a divided Superior Court panel held that Unitrin’s rejection form was invalid. The *Unitrin* form contained the mandatory § 1731(c) rejection language, but after that language, added the following sentence: “By rejecting this coverage, I am also signing the waiver on P. 13 rejecting stacked limits of underinsured motorist coverage.” The majority of the Panel held that the added sentence rendered the form invalid under *Vaxmonskey*, because although all of the required statutory language was on the form, “[S]ection 1731(c) also prescribes the proximal relationship between the required language and the required signature and date lines following the language.” Because Unitrin’s form “interposes a sentence” that is “not directly related to rejection of UIM coverage, between the required language and the signature line” it does not “specifically comply” with § 1731(c) as required by § 1731(c.1).

The dissenting Panel member agreed with the trial court that the controlling decision was the Pennsylvania Supreme Court’s decision in *Winslow-Quattlebaum v. Maryland Ins. Group*, 561 Pa. 629, 752 A.2d 878 (2000), wherein the Supreme Court held that a rejection of UIM coverage could appear on the same page as the rejection of stacking UIM benefits without violating §1731(c.1), because a UIM rejection need not stand alone on a page with no other writing. The dissent also observed that the insured “seeks to gain a benefit for which she did not, in any way, bargain or pay.”

Reargument *en Banc* was denied; a Petition for Allocatur is pending.

See also Robinson v. Travelers Indem. Co., 2012 U.S. Dist. LEXIS 26671 (E.D. Pa. 2012) (addition of the word “motorists,” so that the waiver referred to “Uninsured Motorists Coverage” instead of the statutory language of “Uninsured Coverage,” rendered the waiver void, citing *Jones v. Unitrin*); *Douglas v. Discover Prop. & Cas. Ins. Co.*, 2011 WL 3584759 (M.D. Pa. 2011) (corporations may waive UIM coverage under a fleet policy, but must follow 1731(c) to do so; Discover’s waiver deviated from the statutory language by describing what is covered by “Underinsured Motorists,” rather than “Underinsured Coverage,” and thus the waiver was void); *Grassetti v. Property & Cas. Ins. Co. of Hartford*, 2011 WL 1522326 (M.D. Pa. 2011) (Hartford’s waiver void where it referred to “Uninsured Motorists Coverage” rather than “Uninsured Coverage”); *State Farm Mut. Auto. Ins. Co. v. Avis Rent-a-Car Systems, LLC*, 2007 Phila. C.P. LEXIS 197 (C.P. Phila. 2007) (UM rejection form used by rental car company that was not captioned “REJECTION OF UNINSURED MOTORIST PROTECTION” as required by §1731(b.1) was invalid, even though the remainder of the form tracked the language of the statute; State Farm, which provided second-level UM coverage and paid the claim after Avis denied it, was therefore entitled to recoup from Avis the amount of benefits State Farm had been required to pay).

A rejection of UIM benefits does not have to be on a separate page from any other provision to be valid; a rejection of UIM benefits that was on the same page as the rejection of stacked UIM benefits is valid and enforceable. *Winslow-Quattlebaum v. Maryland Cas. Co.*, 561 Pa. 629, 752 A.2d 878 (2000). The language of §1731(c.1) merely requires that the rejection

of UM coverage be on a separate page from the rejection of UIM coverage; moreover, §1738 does not require that stacking waivers be separate from any other provision. Section 1731(c.1) mandates that the UM and UIM waivers appear “in prominent type and location”, a requirement that would be meaningless if each waiver was required to be alone on a separate sheet. Finally, the waiver forms were the exact forms mandated by the Insurance Department; the Department’s interpretation was entitled to great deference and would not be disturbed absent fraud, bad faith, abuse of discretion or clearly arbitrary action. *See also Sallada v. Nationwide Mut. Ins. Co.*, 95 F.Supp. 2d 250 (M.D. Pa. 2000)(predicting, and reaching, the result reached by the Supreme Court in *Winslow-Quattlebaum*); *Nationwide Mut. Ins. Co. v. Monteith*, No. 96-7907 (E.D. Pa. 1997)(waiver of UM coverage may not be on same sheet of paper as waiver of UIM coverage, but does not need to be on a separate sheet from any other waivers; therefore, UM waiver which appears on same sheet of paper as other UM forms is valid); *Estate of Franks v. Allstate Ins. Co.*, 895 F. Supp. 77 (M.D. Pa. 1995)(same).

See also Rowan v. State Farm Mut. Auto. Ins. Co., 2012 U.S. Dist. LEXIS 86494 (E.D. Pa. 2012). The court in *Rowan* upheld a waiver form that included an additional provision referred to in the opinion as the “in futuro” clause. The waiver complied with § 1731 and was properly signed. However, below the signature line was an additional paragraph stating that the waiver would apply “on all replacement policies and on all renewals either of this policy or any replacement policy, unless I request in writing a different selection for such coverage.” The insured argued that this “in futuro” clause impermissibly altered the statutorily-required language as in *Jones v. Unitrin* and *Robinson v. Travelers* (discussed above). The *Rowan* court disagreed, noting that both *Jones* and *Robinson* involved added language above where the insured signed. In *Rowan*, “although admittedly unrelated to the uninsured motorist waiver, the in futuro clause is a distinct and separate clause, albeit on the same page as the uninsured motorist waiver.” The *Rowan* court concluded that the added language on the same page as the waiver was permissible under the Supreme Court’s analysis in *Winslow-Quattlebaum* (above). The *Rowan* court also rejected the insured’s argument that the in futuro language was invalid because it did not require a signature; the carrier argued that the provision was “merely administrative” and no signature was required.

See also Unitrin Auto & Home Ins. Co. v. Heister, 2005 WL 2314372 (M.D. Pa. 2005) (same added language as in *Jones* did not invalidate waiver; the forms had been approved by the Insurance Commissioner, whose decision was entitled to substantial deference, and as in the Superior Court’s decisions in *Seelye* and *Vosk* (discussed below), invalidating the waiver because of a “clarifying sentence” would be elevating form over substance).

If the insured executed a specific Pennsylvania rejection form, that form controls over a general coverage provision in a multi-state policy. *Meehan v. American Guar. and Liab. Ins. Co.*, 2005 U.S. Dist. LEXIS 7067(E.D. Pa. 2005).

If the rejection forms are invalid, the insured will be entitled to UM/UIM coverage equal to the liability limits. *Lucas v. Progressive Cas. Ins. Co.*, 451 Pa. Super. 492, 680 A.2d 873 (1996), *appeal denied* 548 Pa. 619, 693 A.2d 589 (1997)(where UM and UIM rejection forms were printed on the same sheet of paper in violation of §1731(c.1), the insured was entitled to

UM/UIM limits equal to the bodily injury liability limits); *National Union Fire Ins. Co. v. Irex Corp.*, 713 A.2d 1145 (Pa. Super. 1998) (where waiver forms were not the forms required by §1731, appeared on a single sheet of paper, and did not contain the language required by §1731, UM coverage would be deemed to exist in amounts equal to the liability limits).

If the UIM rejection forms are invalid, the insureds will also be entitled to stacked limits of that coverage. *TICO Ins. Co. v. Kephart*, 1999 WL 1038347 (W.D. Pa. 1999); *Northwestern Nat'l Cas. Co. v. Robson*, 42 D. & C. 4th 353 (C.P. Westmoreland 1999). In both cases, the UIM waiver forms did not comply with §1731(c.1) (in *Kephart*, the UIM waiver form contained different language from that required by §1731(c.1); in *Robson*, the UM and UIM waiver forms were on a single sheet of paper). Both courts concluded that §§1731 and 1738 must be read together and that if coverage was deemed to exist by virtue of a violation of §1731, it must also be deemed to stack by virtue of §1738. This result is supported by the Supreme Court's decision in *Sackett*, discussed below.

7. Notice requirements

Section 1731(c.1) requires reminder notices on renewal of policies wherein UM/UIM coverage has been rejected. Sections 1791 and 1791.1 likewise require that certain notices be given upon original application and upon every renewal. However, even when the notices were not provided as required, the policy will not be reformed to include the rejected coverage, because the statute does not provide that remedy. *Salazar v. Allstate Ins. Co.*, 549 Pa. 658, 702 A.2d 1038 (1997). In *Salazar*, the insured rejected UM and UIM coverages, but Allstate's renewal notices failed to comply with the requirements of §1791.1. Despite this, Allstate did not have to provide UM/UIM coverage equal to the liability limits of the policy, because the statute provides no remedy for an insurer's failure to comply with the notice requirements of §1791.1. See also *Foremost Ins. Co. v. Lynch*, 155 F.Supp. 2d 398 (E.D. Pa. 2001) (despite carrier's "two fold failure" in that the "important notice" form did not contain all the language required by §1791 and the renewals did not contain the notice in prominent type required by §1731(c.1), the legislature did not provide a remedy for the failure to follow the technical requirements of the statute); *Olender v. National Cas. Co.*, 2012 U.S. Dist. LEXIS 117731 (E.D. Pa. 2012) (no remedy for failure to provide "important notice" form, citing *Lynch*); *Travelers Indemnity Co. v. DiBartolo*, 171 F. 3d 168 (3d Cir. 1999) (policy was really a renewal and therefore §1791 notice was not required; moreover, to the extent Travelers did not comply with §1791, the MVFRL does not provide a remedy); *Maksymiuk v. Maryland Cas. Ins. Co.*, 946 F.Supp. 379 (E.D. Pa. 1996) (no remedy for insurer's failure to comply with renewal notice requirements of §1731(c.1)); *Estate of Franks v. Allstate Ins. Co.*, 895 F.Supp. 77 (M.D. Pa. 1995) (same).

An insured's rejection of UM coverage is enforceable even though the carrier could not produce a §1791 Important Notice form, because §1791 does not provide a remedy for failure to comply with its directives. *Allstate Ins. Co. v. DeMichele*, 888 A.2d 834 (Pa. Super. 2005). The Court relied on the above cases relating to §1731 rejections and on the analogous case law relating to §1734 waive-downs. See also *Hugendubler v. State Farm Ins. Co.*, 2007 U.S. Dist. LEXIS 50835 (E.D. Pa. 2007) (a modification of the policy on renewal, changing the tort options and liability coverage limits, did not implicate the notice requirements of §§1791 or 1791.1, and there is no private remedy for failing to provide such notices in any event).

III. UM/UIM STACKING AND REJECTIONS OF STACKING

Section 1738 of the MVFRL deals with the stacking of UM/UIM benefits and the option to waive such stacking.

1. Claimants entitled to stack

So-called "class one"⁴ insureds may stack UM/UIM coverages in excess of the liability limits of the policy. *West American Ins. Co. v. Park*, 933 F.2d 1236 (3d Cir. 1991); *Erie Indemnity Co. v. McGaughey*, 409 Pa. Super. 177, 597 A.2d 718 (1991); *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Stabryla*, 410 Pa. Super. 47, 598 A.2d 1319 (1991); "class two" insureds are not entitled to stack. *Utica Mut. Ins. Co. v. Contrisciane*, 504 Pa. 328, 473 A.2d 1005 (1984). Cf. *Guyer v. Pennsylvania Nat. Mut. Cas. Co.*, No. GD-08-013279 (C.P. Allegheny 2009), *aff'd* mem. Pa. Super. August 27, 2010, appeal denied 643 WAL 2010 (March 9, 2011) (son killed while operating father's truck, but who did not reside with father, was not entitled to stack coverage on father's policy)(application for reargument pending in the Superior Court as of the date of this writing); *State Farm Auto. Ins. Cos. v. Swentko*, No. 2559 of 2005 (C.P. Fayette 2006) (passenger who did not live with insured was not entitled to stack UIM coverage from a second vehicle on the same policy covering the occupied vehicle, or the UIM coverage from a second policy covering two other vehicles owned by the driver).

If a policy provides "stacking" coverage and does not distinguish between classes of insureds entitled to stack, a class two insured may obtain "stacked" benefits: "While it is clear that "class two" insureds both prior to and following the adoption of Section 1738 have no "right" to stack underinsurance benefits, there is no public policy rationale expressed either in case law or the statute that prohibits an insurance company from providing such a benefit." *State Farm Mut. Auto. Ins. Co. v. Kramer*, C.P. Erie No. 12321-2002 (2003), *aff'd* 849 A.2d 618 (Pa. Super. 2004).

However, where the policy language unambiguously states that a covered person, other than a named insured or family member, may only recover the coverage applicable to the vehicle the covered person was occupying at the time, the language is enforceable and the passenger is entitled to only one limit of coverage. *O'Connor-Kohler v. USAA*, 883 A.2d 673 (Pa. Super. 2005)(*en banc*), appeal denied 587 Pa. 697, 897 A.2d 459 (2006). The claimant was in a "temporary substitute vehicle" for one of the vehicles insured on a corporate policy, and thus claimant could recover under that policy. However, the policy language limiting claimant to one policy limit was unambiguous, and so the trial court's order confirming an arbitration award of \$1,000,000 (\$500,000 per vehicle stacked on two vehicles) was remanded for entry of judgment in the amount of \$500,000 (the coverage on one vehicle). Cf. *Progressive Northern Ins. Co. v. Gushanas*, 2007 WL 3053301 (M.D. Pa. 2007)(upholding policy language that limited stacking

⁴ The categorization scheme for "classes" of insureds is set forth in *Utica Mut. Ins. Co. v. Contrisciane*, 504 Pa. 328, 473 A.2d 1005 (1984).

to the named insured and the named insured's relatives and concluding that occupants of insured vehicle who were not relatives of the named insured were not entitled to stack).

"Stacking" means adding the limits of the coverages available from different vehicles or policies, not multiplying each policy limit by the numbers of household cars insured under different policies. *McGovern v. Erie Ins. Group*, 796 A.2d 343 (Pa. Super. 2002), *appeal denied* 570 Pa. 699, 809 A.2d 904 (2002). The claimant in *McGovern* sought UIM coverage on his mother's policy with Erie, but sought to have the limits of the policy "stacked" so as to provide "coverage" not only on his mother's vehicle but also on his own car and motorcycle (which were insured with other carriers). The Superior Court rejected this argument as "ludicrous": "In effect, McGovern is not seeking the sum of the applicable limits, as provided by statute, but rather is seeking the product of the limits, improperly multiplying the limits of the Erie policy by the total number of vehicles in the household." *Id.* at 345 (emphasis in original).

Even before "stacking" was addressed by §1738, courts held that coverages under a fleet policy could not be stacked. *Thompson v. Royal Ins.*, 361 Pa. Super. 78, 521 A.2d 936 (1988), *appeal denied* 520 Pa. 590, 551 A.2d 216 (1988); *Miller v. Royal Ins.*, 354 Pa. Super. 20, 510 A.2d 1257 (1986), *aff'd* 517 Pa. 306, 535 A.2d 1049 (1988). *See also Hunyady v. Aetna Life and Cas. Co.*, 396 Pa. Super. 476, 578 A.2d 1312 (1990) *aff'd* 530 Pa. 25, 606 A.2d 897 (1992) (wife not entitled to stack UIM benefits under the fleet policy of the corporation of which her husband was an officer). However, several cases recognized an exception where some of the "fleet" vehicles were for personal use, in which case the coverages of the personal vehicles could be stacked. *Lastooka v. Aetna Ins. Co.*, 380 Pa. Super. 408, 552 A.2d 254 (1988). *See also Werkman v. Erie Ins. Exchange*, 427 Pa. Super. 621, 629 A.2d 1042 (1993) (permitting stacking under a "commercial" policy of the UM coverage for two personal vehicles and a "commercial" dump truck used for both business and personal purposes).

In *Transguard Ins. Co. of America, Inc. v. Hinchey*, 433 F. Supp. 2d 450 (M.D. Pa. 2006), the court found that the above case law had not definitely answered the question of when corporate officers could stack UIM coverages; rather, it appeared that the courts looked to the facts of each case. The corporate officer in *Hinchey* was occupying a corporate vehicle and the parties stipulated that eight corporate vehicles were for "personal use." Also, the Hinchey's were named on a "broadened first party benefits" endorsement. The court accordingly concluded that the Hinchey's were entitled to stack eight vehicles' coverage.

Section 1738 does not mandate the stacking of UM/UIM coverage under a commercial fleet policy. *Everhart v. The PMA Group*, 595 Pa. 172, 938 A.2d 301 (2007). The policy in *Everhart* was a commercial fleet policy issued to a corporation and covering 323 vehicles; it provided \$1,000,000 in liability coverage and \$35,000 in UM/UIM coverage. No stacking rejection was signed; however, the policy was designated as a non-stacking policy because the carrier, PMA, did not offer stacked coverage on commercial policies. The estate of the claimant, a corporate officer, argued that in the absence of a stacking rejection, the policy had to be deemed to be stacking under §1738. The officer was not a named insured on the declarations page of the policy, but was named on two endorsements providing broadened coverage for named individuals (although the corporation had not purchased broadened UM/UIM coverage). The Superior Court held that stacking did not apply, referencing that court's prior decision in

Miller v. Royal Ins. Co., 510 A.2d 1257 (Pa. Super. 1986), *aff'd*, 517 Pa. 306, 535 A.2d 1049 (1988)(in *Miller*, the court found that mandatory stacking in fleet policies would “make premium costs prohibitively expensive and would not be within the reasonable expectation of the insurer and the employer-policyholder...”).

The Supreme Court affirmed. The Court observed that §1738 is silent as to whether stacking is mandated, but the language of that section regarding rejecting stacking for “myself and members of my family” indicated that the Legislature didn’t intend for mandatory stacking under fleet policies.

Accordingly, Court looked at other considerations to ascertain the intent of the General Assembly. With respect to the occasion and necessity of the statute and the object to be attained, the primary purpose was to control costs, so a finding that §1738 mandates stacking coverage would undercut the primary purpose of the statute. With respect to the consequences of particular interpretations of the statute, stacking would be inconsistent with the reasonable intent of the contracting parties – insurer and insured. With respect to considering the prior law, §1738 was added to the MVFRL in 1990, and at that time there was already a body of decisional law holding that stacking didn’t apply to commercial fleet policies. Statutes are not presumed to change existing law beyond what they expressly declare, and the Court presumed the Legislature was aware of this. §1738 is therefore to be read in conjunction with - and not in contradiction to - pre-existing common law. In light of these considerations, the Supreme Court held that the General Assembly did not intend to mandate stacking under commercial fleet policies.

See also *Erie Ins. Exchange v. Holt*, No. 08-07699 (C.P. Chester 2009)(“dealer tags” policy, covering plates that can be moved from car to car rather than covering specific vehicles, did not provide “stacking” coverage even though no rejection of stacking had been signed; policy was akin to the commercial policy at issue in *Everhart* and was exempt from §1738 “stacking” requirements).

2. Form of stacking rejections

Section 1738(e) states that the forms set forth in the statute (§1738(d)) must be signed by the first named insured and dated to be valid. The fact that a waiver was dated by the agent does not make it invalid. *State Farm Fire and Cas. Co. v. Rey*, 1995 WL 241493 (E.D. Pa. April 21, 1995). Section 1738 further states, “Any rejection form that does not comply with this section is void.” Section 1738 does not contain an express self-enforcement clause like that in §1731(c.1), but the Supreme Court has held in *Sackett* (discussed below) that the “default” position is stacking coverage.

A minor deviation from the statutory language, adding three clarifying words, does not make a UM rejection invalid. *Allstate Ins. Co. v. Seelye*, 846 A.2d 1286 (Pa. Super. 2004), *appeal denied* 581 Pa. 695, 846 A.2d 1202 (2004). The trial court had held that Allstate’s stacking rejection form captioned “REJECTION OF STACKED UNINSURED COVERAGE LIMITS” rather than merely “UNINSURED COVERAGE LIMITS” was a deviation from the language of §1738 and therefore void, and that the insured claimant was therefore entitled to stacking coverage. (C.P. Fayette 2003). The Superior Court reversed: the form was identical to

the wording of the statute except for the addition of three words, “and those three words actually make clearer that the named insured is rejecting stacked benefits by executing the form...There is nothing in the statute that prohibits the form from containing three additional words that further clarify the meaning of the form.” The Insurance Department had approved the form, and the Department’s interpretation was entitled to deference in the absence of fraud, bad faith, clearly arbitrary action or abuse of discretion. The Department’s approval of the form with three additional clarifying words did not meet this standard.

A similar addition to the title of a UIM rejection form did not make that form void. *Vosk v. Encompass Ins. Co.*, 851 A.2d 162 (Pa. Super. 2004), *appeal denied* 581 Pa. 708, 867 A.2d 524 (2005). The UIM rejection form in *Vosk* was titled “Rejection of ‘Stacked Limits’ for Underinsured Motorist Coverage” rather than “UNDERINSURED COVERAGE LIMITS” as specified in §1738(d)(2). The Superior Court, citing *Seelye* and *Winslow-Quattlebaum*, held that the title differed “only slightly” from the statute, and the text was identical. The Court also pointed out that the second sentence of §1738(e), stating that a non-complying form was void, only refers to a rejection form that does not comply with “this section”, *i.e.*, §1738(e), the first sentence of which requires forms to be signed and dated. Since the rejection in question was signed and dated, and the text of the form was identical to the statute, the rejection form “is not rendered void by a minor, clarifying deviation in the form’s title...”

3. When is a new rejection needed?

a. Change of insured:

New stacking waivers have not been required where the first named insured changed; as long as the waiver was signed by the person who was the first named insured at the policy’s inception, it is valid and enforceable against the “current” first named insured. *Rupert v. Liberty Mut. Ins. Co.*, 291 F.3d 243 (3d Cir. 2002). The Third Circuit had to predict how the Supreme Court “would” resolve the issue because the Supreme Court split 3-3 on it. *Rupert v. Liberty Mut. Ins. Co.*, 566 Pa. 387, 781 A.2d 132 (2001). In *Rupert*, the named insured properly rejected UM coverage on a policy that listed her boyfriend as a driver. They later married, and after her death he became the first named insured. He was in an accident and sought stacked coverage, arguing that the stacking waiver was not enforceable because he had not signed it. The Third Circuit certified to the Supreme Court the question of whether the stacking waiver was enforceable. The Supreme Court granted certification, but then divided evenly on the issue, issuing two opinions. Three justices (Zappala, Flaherty and Castille), found that the signature of the first named insured on a valid waiver at the inception of the policy was sufficient for purposes of §1738. The other three (Cappy, Newman and Saylor) found that it was of “paramount importance” that any new first named insured receive the notice prescribed by §1738, because otherwise subsequent insureds would not be even minimally afforded constructive knowledge of the option to reject stacked coverage.

The Third Circuit, in a 2-1 decision, adopted Justice Zappala’s interpretation, noting that §1738 does not expressly require that the “current” first named insured sign the waiver, that §1738(c) refers to a named insured “purchasing” coverage (thus suggesting that the insurer’s obligation regarding the waiver exists only at the time coverage is initially purchased), and that

§§1738(d) and (e) adopt a fiction of “constructive knowledge” to other insureds that would appear to apply regardless of whether the first named insured changes. Finally, allowing the new named insured to reap the benefits of stacked coverage without having paid for stacked coverage could compromise the legislature’s goal of reducing the cost of insurance.

b. Addition of vehicle to policy:

A new stacking waiver is required under some circumstances when a vehicle is added to a policy. *Sackett v. Nationwide Mut. Ins. Co.*, 591 Pa. 416, 919 A.2d 194 (2007) (*Sackett I*) and 596 Pa. 11, 940 A.2d 329 (2007)(*Sackett II*). When the insureds in *Sackett* first purchased coverage with Nationwide, they rejected stacking on their two vehicles. They later added a third vehicle to the policy and did not execute another stacking waiver. After an accident, they argued that they should be entitled to \$300,000 in stacked UIM limits, or in the alternative, \$200,000 (representing the unstacked limits on the first two cars but stacked limits on the third). The trial court ruled in favor of Nationwide, finding that the logic of *Rupert* applied to newly-added vehicles and that the initial waiver of stacked coverage continued to apply, and the Superior Court affirmed.

The Supreme Court reversed (*Sackett I*), holding that when a new car is added to an existing policy and UM/UIM coverage is purchased, insurers must provide a new §1738 stacking waiver to permit the insured to waive the increased amount of available stacked coverage. The addition of a vehicle was a “purchase of coverage” for purposes of stacking, and waivers of stacking, under §1738(c).

The Supreme Court granted a reargument request supported by the Insurance Department⁵ and issued a second decision (*Sackett II*). The Court “clarified” that *Sackett I* does not preclude “the enforcement of an initial waiver of stacked UM/UIM relative to coverage extended under after-acquired-vehicle provisions of an existing multi-vehicle policy.” Case law from other jurisdictions reflected two types of after-acquired-vehicle provisions: (1) those that afford closed-term coverage solely during the reporting period, such as *Bird v. State Farm Mutual Automobile Insurance Company*, 165 P.3d 343 (N.M. 2007)(coverage for new vehicles applied only until the 31st day after acquisition, after which the insureds had to apply for a new policy), and (2) those that contemplate continuing coverage such as *Satterfield v. Erie Insurance Property and Casualty*, 217 W.Va. 474, 618 S.E.2d 483 (W. Va. 2005) (clause provided continuing coverage as long as policyholder notified insurer about the newly-acquired car within 30 days of its purchase and paid an additional premium).

⁵ The Department stated that *Sackett I* “conflicts with the Department’s longstanding implementation and interpretation of Act 6” under which adding a new vehicle to an existing multi-vehicle policy is not a new purchase of coverage, but merely potential additional coverage, and that *Sackett I* raised concerns about the Department’s ability to execute its statutory mandate to effectively regulate the insurance industry, because *Sackett I* (1) invalidated thousands of stacking waivers and exposed the insureds to increased rates for coverage they had rejected, (2) raised the potential for market disruption because of the substantially increased exposure without payment of corresponding premiums, (3) prospectively deprived policyholders of the benefit of the “newly acquired vehicle” clauses that were uniformly present in Pennsylvania policies, and which allowed insureds to extend existing coverage to an add-on vehicle before the insurer was notified, with the types and limits of coverage certain, thereby complying with the mandates of the MVFRL. The Court in *Sackett II* accorded the Commissioner’s position “substantial force.”

Under *Sackett II*, a new stacking waiver is not required if a policy contains the second type of clause, where a vehicle is added to a policy and the coverage continues in effect throughout the existing policy period, subject only to conditions subsequent such as notice and the payment of premiums, because such an added vehicle would not constitute a “purchase” of coverage under section 1738. However, under the first type of clause (as in *Bird*), where coverage for an after-acquired-vehicle is for a finite term, *Sackett I* requires that a new stacking waiver be executed when the automatic coverage expires.

On remand, the trial court ruled in favor of the Sacketts, and the Superior Court affirmed. *Sackett v. Nationwide Mut. Ins. Co.*, 4 A.3d 637 (Pa. Super. 2010) (*Sackett III*). The after-acquired vehicle clause in the Sacketts’ policy was a “default measure” that applied only where the Sacketts had no other “collectible insurance.” That clause “was rendered inapplicable” because the Sacketts added the third vehicle by endorsement, after which that vehicle “was covered under the general terms of the policy and not its after-acquired vehicle clause.” Under the clause in *Satterfield v. Erie*, the Sacketts’ “after-acquired vehicle” clause was not open-ended, but rather, provided coverage only for the first 30 days the insured owned the vehicle. *Id.*

Nationwide’s petition for allocatur was denied. __Pa.__, __A.3d__ (December 2, 2011).

In *Shipp v. Phoenix Ins. Co.*, 2012 PA Super. 167, __ A.3d __ (August 14, 2012), the Superior Court held that the *Sackett* decisions did not require a new stacking waiver where the insureds made several substitutions of covered vehicles, but the number of vehicles on the policy, and the amount of UM/UIM coverage, remained constant. The after-acquired vehicle clause in *Shipp* was the *Satterfield* type, *i.e.*, it stated that the policy would continue to provide the existing coverage for the new vehicle as long as the insured notified the carrier about the new vehicle within 30 days of purchase.

The after-acquired clause in *Shipp* only required the insured to “ask us to insure a replacement vehicle” if the insured wished to “add or continue Damage to Your Auto Coverages.” The insureds argued that by adding collision coverage on one of the replacement vehicles, they made a “new purchase of coverage” within the meaning of *Sackett II* and therefore a new waiver was required. The Superior Court disagreed, looking to *Smith v. Hartford Ins. Co.*, 849 A.2d 277 (Pa. Super. 2004), in which the court held that an increase in liability coverage did not require a new waiver of UM/UIM coverage under § 1731. The *Shipp* opinion explained that “[t]he matter of importance in all these cases, as well as in section 1738, pertains only to the UM/UIM policy coverage, whether it has changed, and whether a new waiver of stacked coverage is required.” In *Shipp*, the total coverage remained the same, and therefore, “We find the addition of collision coverage to be irrelevant to the issue of stacking under section 1738.” Likewise, the fact that the new vehicles were replacement vehicles, rather than additional vehicles, “militates against” requiring a new waiver. The Superior Court therefore reversed the trial court, which had permitted recovery of stacked limits.

In *Nationwide Mut. Ins. Co. v. Zerr*, 2011 WL 3156860 (E.D. Pa. 2011), the district court discussed *Sackett* in predicting that where an insured executed a stacking waiver, then dropped UIM coverage entirely, and later re-purchased UIM coverage, the Supreme Court would require the carrier to obtain a new stacking waiver. By adding UIM coverage again, the insured completed a “new purchase of coverage” within the meaning of the MVFRL for which a new waiver of stacking was required.

The Supreme Court in *Sackett II* explicitly did not decide the issue of whether a whether a stacking waiver executed when there was one vehicle on the policy will remain effective to waive stacking if new vehicles are subsequently added to the non-stacking policy. However, the Third Circuit has addressed that issue and has predicted that the Supreme Court would *not* require a new waiver under those circumstances. *State Auto Property & Cas. Ins. Co. v. Pro Design*, 566 F.3d 86 (3d Cir. 2009). When the insured in that case purchased its original, single-vehicle policy from State Auto, the insured’s representative signed a waiver of stacked UIM coverage. Several years later, the insured added a second and then a third vehicle to the policy. State Auto did not provide a new stacking waiver when the second and third vehicles were added. The State Auto policy included an after-acquired vehicle clause that allowed the insured to add vehicles to the policy and continue the coverage as long as the insured notified State Auto within 30 days after acquiring the vehicle. The district court had held that the original stacking waiver was invalid because new vehicles had been added to the policy, and granted summary judgment in favor of the claimant.

The Third Circuit reversed. The Court first reviewed *Sackett I*, noting that “Had *Sackett I*’s holding been left undisturbed, we would undoubtedly affirm the District Court.” The Third Circuit went on, however, to review *Sackett II*, “clari[fy]ing” that *Sackett I* does not preclude the enforcement of an initial waiver of stacked UM/UIM benefits where coverage of an existing multi-vehicle policy was extended to new vehicles through an after-acquired vehicle clause that continued for more than a finite period. However, *Sackett II* did not address the situation where the original policy was single-vehicle, and “paradoxically” did not construe an after-acquired clause because it was not part of the record, so that any rule based on specific language was arguably *dictum*. Because of this ambiguity, the court had to predict how the Supreme Court would rule.

The Third Circuit looked to the meaning of the term “purchase” as explained by the Insurance Commissioner’s submission in *Sackett II*, which the Supreme Court had relied upon; the Third Circuit noted that the Insurance Commissioner did not distinguish between single- and multi-vehicle policies when defining “purchase” and had consistently maintained that §1738 permits single-vehicle stacking as well as waiver of that coverage. The Third Circuit accordingly predicted that the Supreme Court would extend *Sackett II* to the *Pro Machine* situation, and would hold that adding a vehicle to a pre-existing policy would not be a “purchase” requiring a new waiver. Rather, the original stacking waiver remained valid.

4. Rejecting stacking on single-vehicle policies

Stacking of UM/UIM benefits may be waived on a single-vehicle policy. *State Farm Fire and Cas. Co. v. Craley*, 586 Pa. 484, 895 A.2d 530 (2006). The deceased claimant,

Jayneann Craley, had been operating a vehicle she owned and was struck by an uninsured motorist. Her Estate collected UM benefits under her own State Farm policy, but she and her passengers, all resident relatives, also sought UM benefits under her husband's separate State Farm policy. Both Jayneann and her husband waived stacking. The Supreme Court analyzed the statutory language and provided a detailed history of the *Stacking Litigation* case, including the language in the Superior Court's opinion suggesting that single-vehicle owners could not waive stacking. The Court noted that the author of the *Stacking Litigation* opinion had written a then-recent opinion calling that language *obiter dictum* and calling the analysis of other Superior Court opinions adopting it "stacking of stacking dicta." *Generette v. Donegal Mut. Ins. Co.*, 2005 PA Super. 314, 884 A.2d 266 (2005), *reversed* 598 Pa. 505, 957 A.2d 1180 (2008)(discussed below).

The Court recognized that §1738 did not specifically address whether or how inter-policy stacking could be waived on single-vehicle policies, and so the Court looked to the general stacking (1738(a)) and waiver of stacking (1738(b)) provisions, and to the legislative purposes underlying the MVFRL. The Court noted the "increasingly significant" cost containment aspects of the MVFRL: "Thus, we resolve any ambiguity present in subsection (b) in favor of allowing consumers the choice to waive the coverage and thereby reduce their premiums." The specific method set forth for waivers in multiple-vehicle policies did not mean single-vehicle (*i.e.*, inter-policy) stacking could not be waived.

The Court then considered how inter-policy stacking could be waived. Randall signed the form set forth in §1738(d). The Court felt this form did not clearly address an inter-policy stacking waiver, and thus went on to consider whether under the circumstances of this case the form notified Randall that he was waiving inter-policy stacking. The Court found that it did:

Randall signed the form stating, "I understand that my premiums will be reduced if I reject this coverage." Randall could not have thought he was receiving a reduced premium for waiving intra-policy stacking because there could be no intra-policy stacking with one vehicle on "the policy." Absent the applicability of intra-policy waiver, the only interpretation fairly available to Randall was that his premium-reducing waiver applied to inter-policy stacking. Therefore, we conclude that the waiver is valid and enforceable under the facts of this case.

However, the Court noted that questions could be raised as to whether this language was sufficient in other circumstances, such as multiple vehicles on each of several policies, and "urge[d] the legislature or the Commissioner to clarify whether and how insurers may secure a valid waiver in such a case." (fn. 18).

Chief Justice Cappy concurred in the interpretation of §1738 as allowing both inter-and intra-policy stacking and waivers. He agreed that Randall's waiver was enforceable in this case but expressed concern that the standard §1738(b) waiver could be interpreted as speaking only to intra-policy and not inter-policy stacking. He suggested an amendment to §1738(d) to ensure clarity in this regard.

Finally, Justice Eakin concurred in the conclusion that §1738 permits waivers of both inter-policy and intra-policy stacking and wrote separately to point out that the household vehicle exclusion also precluded the Craleys' recovery of UM coverage under Randall's policy.⁶

In *Haspel v. State Farm Mut. Auto. Ins. Co.*, 2007 U.S. App. LEXIS 17074 (3d Cir. 2007), the Third Circuit considered one of the situations referenced by Chief Justice Cappy in *Craley*: the enforceability of an inter-policy stacking waiver where the policy on which stacking had been waived was a multi-vehicle policy. The district court in *Haspel* had deferred the matter pending the *Craley* decision; following *Craley*, the district court dismissed the complaint based on the waiver of stacking and also on a household vehicle exclusion. The Third Circuit affirmed based on the household vehicle exclusion, and did not decide the inter-policy stacking waiver question. See also *State Farm Mut. Auto. Ins. Co. v. Bish*, 2006 U.S. Dist. LEXIS 68554 (W.D. Pa. 2006).

IV. REQUESTS FOR LOWER LIMITS OF UM/UIM COVERAGE

1. Requests bind all claimants, including other insureds

A proper request for limits of UM/UIM coverage lower than the liability limits will be binding on a new named insured to whom the policy has been transferred. *State Farm Mut. Auto. Ins. Co. v. Lightner*, 2005 U.S. Dist. LEXIS 28973 (M.D. Pa. 2005). In *Lightner*, a father applied for a policy in 1988, with liability limits of \$100,000/300,000 and a proper waive-down for UM/UIM limits of \$15,000/30,000. In 1989, the father requested a change in the policy that resulted in his daughter becoming the sole named insured. She was never asked to sign a waive-down form and never requested lower UM/UIM limits. After an accident in 2003, she requested UIM benefits of \$100,000 rather than the \$15,000 reflected on the policy, arguing that where the named insured changes, the insurer should be obligated to automatically increase the UM/UIM limits to meet the liability limits unless a new §1734 request was executed; the carrier argued that the original named insured's request is binding unless higher UM/UIM limits are requested. The district court held that the statute did not require a new waive-down, and thus the daughter was bound by the original named insured's election.

The court in *Lightner* looked to cases in which a written request signed by the original named insured was held binding upon a person subsequently added to the policy as a named insured. *Kimball v. Cigna Ins. Co.*, 443 Pa. Super. 143, 660 A.2d 1386 (1995). See also *Nationwide Mut. Ins. Co. v. Buffetta*, 230 F.3d 634 (3d Cir. 2000). In *Buffetta*, the original named insured executed the waive-down, but after he and his wife divorced, he sold the car to her and she became the named insured. No new election forms were obtained. She continued to receive billings with the coverages listed and to pay the premiums; the policy was renewed at least three times and she did not request any changes. After an accident, she sought reformation of the limits, arguing that the carrier should have obtained new waive-down forms.

⁶ The Supreme Court's holding in *Craley* overrules the Superior Court's holding in *State Farm Mut. Auto. Ins. Co. v. Rizzo*, 835 A.2d 359 (Pa. Super. 2003), appeal denied 578 Pa. 710, 853 A.2d 363 (2004), wherein the Superior Court had held that only insureds with more than one vehicle on a policy could waive stacking coverage, i.e., only "intra-policy" stacking could be waived.

The *Buffetta* trial court concluded that no new waiver was required under the circumstances, noting that she had taken no steps to change the policy in the three years after becoming the named insured and therefore “acquiesced in the coverage that had been selected.” The Third Circuit affirmed, holding that there was no violation of §1734 in light of the unique facts presented and the absence of any statutory language requiring a new written authorization under the circumstances. *See also State Farm Mut. Auto. Ins. Co. v. Flubacher*, PICS No. 02-1027 (E.D. Pa. 2002), *aff’d* 69 Fed. Appx. 528 (3d Cir. 2003)(where husband, a named insured, had signed the waive-down forms, and after his death wife continued to be named insured and did not sign any new election forms, she was bound by his election of lower limits).

2. Requirements for a §1734 request

The “form” requirements of §1731 are not incorporated into §1734. *Lewis v. Erie Ins. Exchange*, 568 Pa. 105, 793 A. 2d 143 (2002). Thus, the Supreme Court in *Lewis* held that requests for lower limits of UM and UIM coverages can be on the same sheet of paper (unlike rejections, which must be on separate sheets). *See also Duncan v. St. Paul Fire & Marine Ins. Co.*, 129 F. Supp. 2d 736 (M.D. Pa. 2001)(same); *Leymeister v. State Farm Mut. Auto. Ins. Co.*, 100 F. Supp. 2d 269 (M.D. Pa. 2000)(same; moreover, the waive-down forms did not need to be signed by the first named insured).

An application signed by the insured, and setting forth lower UM/UIM limits, is itself sufficient to satisfy §1734. *Orsag v. Farmers New Century Ins. Co.*, 609 Pa. 388, 15 A.3d 896 (2011). In *Orsag*, the insured signed an application that requested BI limits of \$100,000 per person and UM/UIM limits of \$15,000 each for two vehicles. The insureds argued the two-page insurance application was not a writing for § 1734’s purposes, because it did not inform them that the carrier was obligated to offer UM/UIM coverage at the same level as BI coverage, and it did not include any language demonstrating it was the insured’s intent to select a lower limit of coverage.

The Supreme Court rejected this argument: “the most effective manner in which to “expressly designate” the amount of coverage requested is by electing a specific dollar amount on an insurance application... There may be a more detailed way of satisfying the ‘writing’ requirement, but it is unnecessary given the simple language of §1734 and the manner in which insurance coverage amounts are selected.”

The majority of federal courts considering the issue have found §1734 to be satisfied under similar circumstances. *See State Farm Mut. Auto. Ins. Co. v. Ciccarella*, 2002 WL 827138 (E.D. Pa. 2002) (“written request” requirement met where a named insured initials a designated portion of the policy application form; the court noted that initials are recognized as the equivalent of a signature in “circumstances of equal or greater import.”); *Employers Fire Ins. Co. v. Alvarado*, 2005 WL 182717 (E.D. Pa. 2005) (application itself showing the lower limits of coverage is a sufficient written request for those limits, and no separate or additional writing is required; the court also noted that the insured had paid for the requested benefits every 6 months from 1995 to 2001); *State Farm Mut. Auto. Ins. Co. v. Majer*, No. 3:CV-01-1958 (M.D. Pa. 2003)(in case involving the same type of application form as in *Ciccarella*, the court held that the insured’s initials had been forged but that the application, which showed the lower

UM/UIM limits and was signed by the insured, was itself a request in writing for lower limits of coverage within the meaning of §1734); *Cohick v. One Beacon Ins. Group*, No. 05-01094 (C.P. Lycoming, 2005)(signed application itself is a sufficient request for lower limits of UM/UIM coverage). *But see Bretheren Mut. Ins. Co. v. Triboski-Gray*, 2008 WL 2705539 (M.D. Pa. 2008)(holding that insured's signature on application showing lower limits was not a sufficient request for those lower limits under §1734).

Where the Coverage Selection form used by the carrier provided several options, was signed by the insured, and stated that the "minimum amount available" of \$15,000/30,000 was selected as to both UM and UIM coverages, the form complied with §1734. *The Hartford Ins. Co. v. O'Mara*, 907 A.2d 589 (Pa. Super. 2006)(*en banc*). The Superior Court held that an arbitration panel had erred in finding that §1734 required "specific and unambiguous" language in the "writing" evidencing an intent to purchase UM/UIM coverages in amounts lower than the liability coverage. The Supreme Court has imposed two technical requirements for §1734 "writings:" the insured must sign the "writing," and the "writing" must include an express designation of the amount of UM and UIM coverage requested. The arbitrators had improperly imposed additional requirements by finding that the form could have contained "more specific language as to reduction which might have served as affirmation of the selection" or more "evidence that the insured chose to 'reduce her coverage' knowingly and intelligently." *See also Gillam v. State Farm Mut. Auto. Ins. Co.*, 202 Fed. Appx. 566 (3d Cir. 2006)(rejecting claimants' arguments that their request for reduced UIM coverage was neither knowing nor intelligent, and/or that there was a genuine issue of fact as to fraud that would overcome the presumption of knowledge created by §1791).

However, where the insured signed an insurance application reflecting UM/UIM limits lower than the BI limits, and also signed a §1791 Important Notice form, but the carrier at that time also used a separate type of UM and UIM selection form and did not have one signed in this case, the Superior Court held, relying on *Emig* (discussed below) that the documents did not satisfy §1734. *Erie Ins. Exchange v. Larrimore*, 987 A.2d 732 (PA Super. 2009). The court found the fact that Erie had created a separate form to be used in requesting lower limits to be illustrative of the fact that something beyond the application and §1791 form was required. The court did not reach the issue of whether there was a remedy for such a §1734 violation because that issue had not been preserved.

Similarly, where the insured made inconsistent designations as to amounts of coverage, the form was ambiguous and was construed against the insurer. *Olender v. National Cas. Co.*, 2012 U.S. Dist. LEXIS 117731 (E.D. Pa. 2012) (insured selected two options, one requesting UIM coverage equal to the liability limits of \$100,000, and the other requesting reduced UIM limits of \$35,000; "the selection form, taken as a whole, cannot be said to manifest a knowing and intentional desire to purchase reduced UIM coverage").

In *Motorists Ins. Cos. v. Emig*, 444 Pa. Super. 524, 664 A.2d 559 (1995), a coverage change form signed by the insured and reflecting new lower UM/UIM limits (as well as other policy changes), was not an effective reduction under §1734. The agent incorrectly used a form titled "ADD COVERAGE SAME AS ON POLICY" rather than the form titled "UM/UIM REJECTION OR REDUCTION"; moreover, the insured testified that at the close of her meeting

with the agent she believed that her prior UM/UIM limits were unchanged and equal to her liability limits. Because there was no request in writing to satisfy §1734, the UM/UIM limits were deemed equal to the bodily injury liability limits.

In *State Farm Mut. Auto. Ins. Co. v. Hughes*, 438 F. Supp. 2d 526 (E.D. Pa. 2006) the insured raised two arguments challenging her lower UM/UIM limits. In 1987, the insured signed applications on her two policies showing liability limits of \$50,000/100,000 and UM/UIM limits of \$25,000/50,000. She also signed an “acknowledgment of coverage” form which acknowledged that lower limits of UM/UIM coverage were being selected. However, the actual limits were left blank. In 1990, however, the insured executed and returned to State Farm forms stating that she wanted to retain her current stacking \$25,000/\$50,000 UM and UIM limits. In 1997, the insured increased her liability insurance limits to \$100,000/300,000 and did not execute any forms regarding selection of UM/UIM coverage limits. The policies were renewed every 6 months until an accident in 2001.

The court held that the 1987 applications constituted requests in writing for the lower limits. Although the application form and the acknowledgment form might represent an “incongruity”, there was no indication the acknowledgment form was more reliable regarding the insured’s intent or was necessary to effectuate a “request in writing.” The 1990 forms would also constitute requests in writing. Finally, the request for higher liability limits did not trigger an obligation on State Farm to increase her already-reduced UIM coverage. *See also Lee v. Progressive Cas. Ins. Co.*, 2007 U.S. Dist. LEXIS 12707 (E. D. Pa. 2007) (where the insured signed a writing requesting UM and UIM coverages lower than the liability coverage, and where the lower amounts did not appear on that writing, but did appear on the application, §1734 was satisfied, citing *Hughes*).

The “writing” requirement is also met by returning a check for the specified premium for the reduced limits in response to a notice advising that the limits would otherwise be automatically increased to match the liability limits. *State Farm Mut. Auto. Ins. Co. v. Gillespie*, 342 F. Supp. 2d 317 (E.D. Pa. 2004), *aff’d* 152 Fed. Appx. 201 (3d Cir. 2005); *State Farm Mut. Auto. Ins. Co. v. Vollrath*, 2004 U.S. Dist. LEXIS 12077 (E.D. Pa. 2004), *aff’d* 132 Fed. Appx. 414 (3d Cir. 2005)(same); *Klink v. State Farm Mut. Auto. Ins. Co.*, C.P. Montgomery 2004, *aff’d* 875 A.2d 398 (Pa. Super. 2005) (same); *Dang v. State Farm Mut. Auto. Ins. Co.*, 1996 WL 421942 (E.D. Pa. 1996), *aff’d* 111 F.3d 126 (3d Cir. 1996)(same).

In *Jiongo v. Nationwide Ins. Co.*, 1998 WL 381706 (E.D. Pa. 1998), *aff’d* 203 F.3d 817 (3d Cir.1999) changes made by the insured, an attorney, to the coverages listed on the declarations pages, including crossing out the listed UM/UIM amounts in red pen and writing in different (lower) amounts, together with a cover letter to his agent referencing the need to reduce his premiums, constituted a sufficient request in writing under §1734 to lower the UM/UIM limits, even though the cover letter mentioned only liability coverage. The insured received declarations pages and premium notices every six months for several years and never notified Nationwide that the coverages were incorrect.

However, where the original request for lower limits was signed by the agent, the fact that the insured later signed a “premium reduction option” indicating he wished to continue his

“current” UIM coverage was *not* binding where that form did not show the “current” limits. *Hayes v. Harleysville Mut. Ins. Co.*, 841 A.2d 121 (Pa. Super. 2003), *appeal denied* 582 Pa. 686, 870 A.2d 322 (2005)(distinguishing *Dang*).

Similarly, where an insurance broker sent an e-mail to the carrier asking for changes to the insured corporation’s policy, including requesting limits of UIM coverage of \$500,000 per vehicle, which were less than the liability limits of \$1,000,000 per vehicle, and requesting a quote so that the insured could be billed, the e-mail did not constitute a request in writing by the named insured, even though the court agreed that the broker was acting as the agent of the insured. To satisfy §1734, there had to be a written request to the broker from a corporate officer or other designated employee of the insured. *Transguard Ins. Co. of America, Inc. v. Hinchey*, 464 F. Supp. 2d 425 (M.D. Pa. 2006).

Where the insurance proposal and the binders are for “statutory” UM/UIM coverage, and no written requests for specific lower limits of UM/UIM coverage were executed until after the accidents in question, the claimants were entitled to UM/UIM coverages equal to the liability coverage rather than the lower limits. *Peele v. Atlantic Exp. Transp. Group, Inc.*, 840 A.2d 1008 (Pa. Super. 2003). The written requests were not retroactive, and the term “statutory” in the proposal and binders was interpreted as referring to §1731, requiring UM/UIM limits to equal liability limits. The court rejected the carrier’s argument that the parties had intended only “minimum” statutory limits, noting that there were no minimum limits in Pennsylvania, and that if there were, any ambiguity it would have to be construed against the carrier. *See also Fire & Cas. Co. of Connecticut v. Cook*, 2004 WL 945138 (E.D. Pa. 2004), *aff’d* 155 Fed. Appx. 587 (3d Cir. 2005) (where insurance proposal requested “statutory” UM coverage and where insured signed a request for lower UIM limits but did not sign a request for lower UM limits, there was no sufficient “express designation of the amount of coverage requested,” and the UM limits were equal to the liability limits); *Fire & Cas. Ins. Co. of Conn. v. Ligon*, 86 Fed. Appx. 517 (3d Cir. 2004).

In *Travelers Indemnity Co. v. Pauline*, 2008 WL 1447034 (W.D. Pa. 2008), however, the district court distinguished *Peele*, *Cook* and *Ligon* and enforced UIM coverage of \$35,000 on a commercial policy with liability limits of \$1,000,000. In *Pauline*, the owner of the company signed a form requesting “UIM coverage at minimum limits of \$35,000 each accident.” The claimant argued that there were no minimum limits in Pennsylvania when the form was signed, and thus the form was void. The claimant argued alternatively that a term suggesting “statutory minimum” coverage in Pennsylvania “unambiguously means equal to the liability limits.” The court disagreed, opining that reading the form as a whole, the introductory language referring to statutory minimum limits did not create an ambiguity sufficient to reject the specific election made by the owner of the company.

A written request signed by the named insured's spouse *will* be binding if the spouse was acting as the named insured's agent. *State Farm Mut. Auto. Ins. Co. v. Gilroy*, 1994 WL 719628 (E.D. Pa. 1994). Moreover, the request in writing may be made by any named insured; §1734 does not require that it be made by the first named insured. *Leymeister, supra*. However, a verbal request by the husband of the named insured to lower the UM/UIM limits is insufficient

for a valid waiver, even coupled with the subsequent payment of premiums over a period of years. *Nationwide Ins. Co. v. Resseguie*, 980 F.2d 226 (3d Cir. 1992).

In *Bren v. Nationwide Mut. Ins. Co.*, 2008 U.S. Dist. LEXIS 762 (M.D. Pa. 2008), the insureds challenged the limits selection form used by Nationwide. The form offered a range of limits, with \$15,000/\$30,000 indicated as the “minimum limit”; the insureds argued that the form was ambiguous and misleading because it misstated Pennsylvania law in that there is no “minimum” limit and because the form reflected that the UIM limits could not be less than the liability limits. The court rejected these arguments. The 15,000/\$30,000 limits were in fact the minimum limits that could be purchased, and the argument that this somehow prevented the insureds from purchasing coverage above the minimum amount was “self-contradictory” and not reasonable. The court also noted that the insureds had signed two of the selection forms and had renewed their six-month policy five times before the accident.

In *Loughney v. Encompass Ins.*, 2007 WL 2907938 (M.D. Pa. 2007), the district court held that the form used by the carrier for selections of lower UM/UIM limits did not violate §1734. The claimants argued that they had not validly requested lower limits of coverage because the form was so “confusing” that it did not constitute a sufficient written request. The form required the insured to sign a rejection of UM/UIM coverage; below that rejection, the insured could initial a choice of lower limits of UM/UIM coverage. The insured had done so, selecting \$35,000 per person limits in 1991, at the same time he purchased liability limits of \$300,000. He was involved in an accident in 2005 and sought UIM limits of \$600,000 (stacked coverage on two vehicles) rather than \$70,000. The court held that the form was valid: “The law requires only that plaintiff express his desire for reduced UM/UIM limits and the amount that the policy will cover. The writing in question meets those standards.”

In *Leitzel v. Merchants Ins. Co. of New Hampshire, Inc.*, 2006 WL 266128 (M.D. Pa. 2006), the district court held that a form that included provisions for rejection of UM or UIM coverage, rejection of stacking coverage, and requests for lower limits of coverage did not violate the MVFRL and thus the insured’s request for limits of \$15,000/30,000 coverage was binding. Although more than one coverage option was addressed per form, there were separate forms for UM and UIM coverage, and moreover, under *Lewis*, reductions of coverage were not governed by the technical requirements applicable to §1731 rejections.

In *Nationwide Mut. Ins. Co. v. Catalini*, 18 A.3d 1206 (Pa. Super. 2011), the insured made a valid selection of lower UM/UIM limits. The insured’s original policy limits in January 2002 were BI \$100,000/300,000 with UM/UIM \$15,000/30,000. In late 2004, the insured changed those limits to BI \$25,000/50,000 and UM/UIM \$25,000/50,000. In October 2006, the insured changed the limits again in accordance with required coverage for leasing a new car. The form the Nationwide agency sent to him for this latter change said “Please replace 01 PORS with O7 Audi Vin # Change BI limits to 100/300. Leave all other coverages the same and add lease holder as requested.” The insured signed and returned this form. After the accident, the Nationwide agency sent a standard Nationwide form used for electing UM/UIM limits lower than BI limits, which the insured did not sign. The Superior Court concluded that the statute does not require a new written request for lower limits of coverage when BI coverage is raised under an existing policy. Accordingly, the Court did not need to reach the question of whether

the insured's signed statement to "leave other coverages the same" was a sufficient request for lower limits of UIM coverage.

3. Section 1791 "Important Notice" forms

There is no remedy for a violation of §1791 in a "waive down" case. *Nationwide Mut. Ins. Co. v. Heintz*, 804 A.2d 1209 (Pa. Super. 2002), *appeal denied*, 572 Pa. 758, 818 A.2d 505 (2003). The claimant in *Heintz* signed waive-downs of the UM/UIM limits but denied ever receiving §1791 "Important Notice" forms. He therefore argued that he had not knowingly and intelligently reduced the limits and sought reformation of the UIM limits to match the liability limits. The arbitrators agreed and the trial court affirmed the award, but the Superior Court reversed.

The court held that the prior "totality of circumstances" test for determining whether a waiver was knowing and voluntary in the absence of a 1791 notice (used in earlier Superior Court cases such as *Tukovits v. Prudential Ins. Co. of America*, 448 Pa. Super. 540, 672 A.2d 786 (1996), *appeal denied* 546 Pa. 668, 685 A.2d 547 (1996), and *Botsko v. Donegal Mut. Ins. Co.*, 423 Pa. Super. 41, 620 A.2d 30 (1993), *appeal denied* 536 Pa. 624, 637 A.2d 284 (1993)), had been effectively overruled by the Supreme Court in *Salazar v. Allstate Ins. Co.*, 549 Pa. 658, 702 A.2d 1038 (1997) and *Donnelly v. Bauer*, 553 Pa. 596, 720 A.2d 447 (1998). The relevant inquiry was whether the insured had a remedy under the MVFRL. The court in *Heintz* concluded that there was no express remedy under the statute for a violation of §1791 and that the claimants were therefore not entitled to reformation. The court noted that the claimants had for many years paid reduced premiums, that reformation would contravene the cost-containment policy underlying the MVFRL, and that there was no question that a written request for lower limits had been made. *See also Nationwide Mut. Ins. Co. v. Murphy*, Nos. 98-1692 and 98-1884 (E.D. Pa. 1998)(even if the insurer did not provide notice in accordance with §1791, the policy will not be reformed to increase the \$15,000/\$30,000 UIM benefits to match the liability limits of \$100,000/\$300,000).

In *Kline v. Old Guard Ins. Co.*, 820 A.2d 783 (Pa. Super. 2003), the parties stipulated that the §1791 "Important Notice" form was on reverse side of the coverage selection form, that the insureds signed the coverage selection form without knowing the "Important Notice" was on the reverse and without reading it, and that the insureds did not know or understand what UIM coverage was. The insureds' signatures were placed directly under a statement that read "YOUR SIGNATURE ACKNOWLEDGES THAT YOU HAVE READ AND UNDERSTAND THE TERMS AND CONDITIONS OF THE IMPORTANT NOTICE FOUND ON THE REVERSE SIDE HEREOF." The insureds also signed a rejection of UIM coverage. They renewed their policy four times before the accident. The trial court concluded that there was no knowing and intelligent waiver and that because the insureds had not signed "on" the Important Notice the statutory presumption of §1791 did not apply. The trial court therefore reformed the insureds' policy to add stacked UIM coverage of \$300,000 (\$100,000 on each of three vehicles).

The Superior Court reversed, holding first that there was no requirement under §1791 that the insureds sign "on" the notice. The court further held that any "knowing and intelligent" waiver requirement had been abandoned, *citing Salazar* and *Heintz*. The court emphasized that

in *Heintz*, “We refused to reform the insurance contract to provide UIM coverage to insureds who had rejected such coverage and who had, as a result, paid lower premiums for lesser benefits.” This result furthered one of the main policy goals of the MVFRL: to lower the cost of motor vehicle insurance in Pennsylvania. The Superior Court reversed and remanded with instructions to enter summary judgment in favor of the carrier.

4. When is a new waiver required?

No new requests for lower UM/UIM limits are required where the insureds decrease their liability coverage. *Blood v. Old Guard Ins. Co.*, 594 Pa. 151, 934 A.2d 1218 (2007). In *Blood*, the insureds had originally purchased liability limits of \$500,000 and UM/UIM limits of \$35,000. They later asked to *decrease* their liability limits to \$300,000 in an effort to reduce their premium payments. They did not make any new UM/UIM election on the coverage selection form. The insureds’ son was injured in an accident and sought \$900,000 in UIM benefits (\$300,000 stacked on 3 vehicles) instead of the \$105,000 limits (\$35,000 stacked on 3 vehicles). Old Guard paid the \$105,000 and argued that no new waive-down was required where there was already a written request for UM/UIM limits lower than the liability limits.

The Superior Court held (894 A.2d 795 (Pa. Super. 2006)) that where the insureds executed a Pennsylvania Auto Insurance Coverage Selection Form selecting lower liability limits, which form explicitly included several different lower UM and UIM coverage options, and the insured did not select any of the UM/UIM options, the form had no effect on the UM/UIM limits and the UM/UIM coverage was presumed to be the same as the liability coverage. The court opined that Old Guard could have drafted the forms differently to protect itself from misunderstandings.

The Supreme Court reversed. *Blood v. Old Guard Ins. Co.*, 594 Pa. 151, 934 A.2d 1218 (2007). The Court agreed with the Third Circuit’s analysis in *Resseguie* that §§1731 and 1734 were plain and simple provisions, without ambiguity, and “the resolution of the instant appeal is straightforward.” The Court determined that there was simply no provision in the MVFRL that requires an insurer to re-comply with the relevant provisions of the MVFRL under facts such as the ones in this case. The Court also found no facts in the record to indicate that the insureds ever desired to alter their original UM/UIM election.

The Supreme Court also found that there was no remedy in the statute for violations of §1734: “Even if we were persuaded by Appellee’s argument that Old Guard failed in its statutorily-mandated duties, we further agree with Old Guard that no remedy exists and that the judiciary is not to create one.” (citing *Salazar*). The Court found no support for the claimants’ position that their change of liability coverage had an effect on their otherwise valid Section 1734 reduction. In conclusion, “This Court is without authority to write new requirements into the MVFRL where the statutory language is without ambiguity.”

See also *Nationwide Mut. Ins. Co. v. Merdjanian*, 2005 U.S. Dist. LEXIS 3493 (E.D. Pa. 2005), *aff’d* 195 Fed. Appx. 78 (3d Cir. 2006). In *Merdjanian*, the insured originally purchased liability coverage of \$25,000/\$50,000 and UM/UIM coverage of \$15,000/\$30,000. He later increased the liability limits to \$100,000/\$300,000. After his wife was killed in an

accident, he sought UIM benefits of \$300,000 (\$100,000 stacked on three vehicles); Nationwide maintained that the \$15,000/\$30,000 selection applied. The Third Circuit held that §1734 did not require a new UM/UIM election when the liability limits changed. *Nationwide Mut. Ins. Co. v. Merdjanian*, 2006 U.S. App. LEXIS 23902 (3d Cir. 2006). The court found further support in §1731, which refers to the delivery or issuance of a liability insurance policy as the triggering event for MVFRL requirements (as opposed to alteration of the policy's liability limits) and §1791, which requires a notice to the applicant at the time of application for original coverage.

5. No remedy for violations of §1734

The Supreme Court stated in *Blood* that there is no remedy if a waive-down does not comply with §1734. Even before *Blood*, some court had declined to impose any such remedy because none exists in the MVFRL. See, e.g., *Nationwide v. Merdjanian*, *supra*; *Nationwide Mut. Ins. Co. v. Buffetta*, *supra* (§1734 did not provide a remedy of reforming the policy, because under the 1990 amendments to the MVFRL, which made UM/UIM coverages optional, the “automatic default provision” previously contained in §1734 had been transferred to §1731(c.1) (relating to waivers of coverage); the Third Circuit in *Buffetta* agreed that no new waive-down was required under the facts of that case and accordingly did not reach the issue of whether reformation was available under the MVFRL); *Clifford v. Prudential Prop. and Cas. Ins. Co.*, 2001 WL 1076582 (M.D. Pa. 2001)(where insured signed written request for lower limits but denied receiving the “Important Notice”, and carrier did not have a signed copy of the form but introduced evidence of its procedures for providing the forms, the carrier had satisfactorily established its compliance with §1791, the waive-down forms were valid under §1734 and thus it was unnecessary to reach the issue of whether the waiver was “knowing and intelligent”, and finally, even if the “knowing and intelligent” analysis were applicable, the remedy of reformation was not available); *Nationwide Mut. Ins. Co. v. Murphy*, *supra*. Compare

The *Blood* decision appears to clarify several earlier cases that presumed reformation was available. See *Motorists Ins. Cos. v. Emig*, *supra*; *Cebula v. Royal & Sunalliance Ins. Co.*, 158 F.Supp. 2d 455 (M.D. Pa. 2001)(insureds' original UM/UIM limits were the same as their liability limits; they later asked to increase their liability limits and there was no request for lower UM/UIM limits. The insureds also denied receiving the “Important Notice” form and the carrier introduced no evidence that it had been provided. The court concluded that §§1791 and 1734 had been violated and that the remedy of reforming the UIM limits to match the liability limits was available). See also *Erie Ins. Exchange v. Larrimore*, 987 A.2d 732 (Pa. Super. 2009)(court found that “no remedy” argument had been waived, and reformed UM/UIM limits to match BI limits after finding that Erie's documents did not satisfy §1734).

V. REQUIREMENTS FOR SELF-INSUREDS

Self-insured entities are required to provide UM benefits in the amounts set forth in 75 Pa.C.S. §1774. See 75 Pa.C.S. §1787(a)(3).

A self-insured transportation authority is required to provide UM benefits to bus passengers in accordance with §1787. The fact that the authority itself was not negligent does

not render it immune under the doctrine of sovereign immunity. *Lowery v. Port Authority of Allegheny County*, 914 A.2d 953 (Pa. Commw. 2006); *Paravati v. Port Authority of Allegheny County*, 914 A.2d 946 (Pa. Cmwlth. 2006). The fact that the bus passenger had a personal source of benefits did not affect the authority's obligation to pay; the occupied bus was the first source of priority under §1733(a). See *Parvati*.

However, if the “government” vehicle is stopped, it is not in “operation,” and a passenger is barred by governmental immunity from collecting UM benefits from the government entity. *Wright v. Denny*, 33 A.3d 687 (Pa. Cmwlth. 2011), *appeal denied* 2012 Pa. LEXIS 2074 (September 4, 2012). The Commonwealth Court held that where a SEPTA bus was stopped and was rear-ended by an uninsured motorist, SEPTA was not required to provide UM benefits to passengers; the court distinguished *Lowery* and *Paravati* on the basis that the buses in those cases were moving at the time of the accident. The Vehicle Liability Exception to sovereign immunity exempts “the operation of a motor vehicle” and does not apply if the vehicle is stopped. See also *Strobel v. School Dist. of Phila.*, 2012 Phila. Ct. Com. Pl. LEXIS 195 (C.P. Phila. 2012) (same result where phantom vehicle rear-ended stopped Philadelphia school bus); pending on appeal at 1193 CD 2012.

A self-insured employer is not required to provide UM benefits to employees. *Safe Auto Ins. Co. v. School District of Philadelphia*, 872 A.2d 247 (Pa. Commw. 2005). In *Safe Auto*, a school district employee was operating a School District vehicle at the time of her accident with an uninsured motorist. The School District, which was self-insured, paid workers' compensation benefits but denied any obligation to pay UM benefits. Claimant turned to her husband's policy with Safe Auto; Safe Auto argued that the School District should be required to provide the benefits under §1787. The Commonwealth Court affirmed judgment in favor of the School District. If the employer had purchased a policy of insurance for the employees' benefit, the employee could have recovered both workers' comp and UM/UIM benefits (*citing City of Meadville v. WCAB (Kightlinger)*, 810 A.2d 703 (Pa. Cmwlth. 2002), *appeal denied* 578 Pa. 702, 852 A.2d 313 (2004)). However, where the employer was self-insured, workers' compensation remains the exclusive remedy. The court found that *Hackenberg v. SEPTA*, 526 Pa. 358, 586 A.2d 879 (1991) remained controlling: nothing in the amendments to the MVFRL post-*Hackenberg* demonstrated a clear legislative intent to elevate §1787 over the workers' comp exclusivity provision.

Self-insured entities are not bound by the notice requirements applicable to insurers. *Saunders v. Jenkins*, 717 A.2d 561 (Pa. Super. 1998). In *Saunders*, a renter declined the additional liability and UIM coverage package offered by Hertz, which was self-insured; the plaintiffs argued that by offering such optional coverage Hertz had subjected itself to the notice provisions found at §§1791 and 1791.1. The Superior Court disagreed, holding that Hertz was not liable for the excess liability coverage.

Likewise, in *Ingalls v. Hertz Corp.*, 453 Pa. Super. 415, 683 A.2d 1252 (1996), the Superior Court rejected the argument that Hertz became subject to the offering/rejection requirements of §1731 when it offered optional UIM coverage. Self-insureds are not bound by the statutory requirements of §1731, and the renter's waiver of the optional UIM coverage was therefore valid even though it did not comply with §1731. Both the *Saunders* and *Ingalls* courts

cited *Gutman v. Worldwide Ins. Co.*, 428 Pa. Super. 309, 630 A.2d 1263 (1993) for the proposition that the requirements of §1731 do not apply to self-insurers.

Section 1731 has been amended to permit renters/lessees to reject UM coverage under a policy of insurance or self-insurance issued under a rental or lease agreement. *Smith v. Enterprise Leasing Co. of Philadelphia*, 833 A.2d 751 (Pa. Super. 2003). In *Smith*, the claimants rejected UM benefits when they rented a car from Enterprise, which was self-insured. They were injured by an uninsured motorist and sought UM coverage, arguing that under §1787(a), Enterprise as a self-insured entity must offer UM coverage and that said coverage may not be rejected. Enterprise argued that §1731(b.1) controlled instead and had been amended in 1995 to include language that would permit rejection of UM benefits under a policy of insurance or self-insurance issued under a rental agreement. The trial court relied upon *Saunders* and *Ingalls* in concluding that §1787, rather than 1731(b.1), controlled the obligations of self-insurers, and that Enterprise was therefore required to provide UM benefits to the renters. The Superior Court reversed: “Both the *Ingalls* and *Saunders* courts relied on the fact that section 1787 had been the only statute in the MVFRL that related to self-insureds, and that the provisions of Section 1731 thus did not apply to self-insureds...However, since the enactment of section 1731(b.1), which does refer specifically to ‘self-insurance’ and rental agencies, the MVFRL does allow the customers of self-insured rental agencies to reject UM coverage, if the proper waiver language is signed.”

VI. SPECIALTY POLICIES

A provision in an antique automobile insurance policy that prohibits coverage except for injuries sustained while actually operating the antique automobile (effectively an anti-stacking provision) is valid. *St. Paul Mercury Ins. Co. v. Corbett*, 428 Pa. Super. 54, 630 A.2d 28 (1993), *appeal dismissed* 535 Pa. 658, 634 A.2d 221 (1993). The court distinguished a specialty or limited use policy such as the antique automobile policy from an "ordinary" policy covering a personal use automobile, emphasized the substantially lower premiums paid for the specialty coverage, and concluded that the insured could not reasonably have expected coverage under this policy. The court further found that the provision was not contrary to public policy or to the intent of the MVFRL, and that it in fact furthered the MVFRL's goal of controlling spiraling insurance costs. *See also Benner v. Foremost Ins. Group*, 2008 WL 3984162 (E.D. Pa. 2008)(where claimant was a family member of the insured, but was not occupying one of the vehicles listed on the insured's antique auto policy at the time of the accident, the coverage of that policy did not apply; the court interpreted the language of the policy as requiring even family members to be occupying a covered auto to recover benefits); *But see Quinney v. American Modern Home Ins. Co.*, 145 F. Supp. 2d 603 (M. D. Pa. 2001); *Zurich Ins. Co. v. Lobach*, 1997 WL 535185 (E.D. Pa. 1997)(disagreeing with *Corbett's* interpretation of who qualifies as an insured under the policy and reaching the contrary result under almost identical policy language).

In *St. Paul Mercury Ins. Co. v. Perry*, 227 F. Supp. 2d 430 (E.D. Pa. 2002), a more specific version of the exclusion in the above cases was upheld. The antique auto policy in *Perry* included an endorsement that limited the definition of “insured” for UM benefits to those actually occupying the insured vehicle. As in *Corbett*, the policy was specifically designed to

cover only limited usage of the vehicle in exchange for dramatically lower premiums. The court distinguished *Quinney* and *Lobach* because neither case involved the clear and unambiguous limiting language found in *Perry*. Finally, the court reviewed the cases upholding “family vehicle” and “regularly-used non-owned car” exclusions and concluded that the limitation in *Perry* was consistent with Pennsylvania public policy and was not contrary to §1733 of the MVFRL. *See also St. Paul Mercury Ins. Co. v. Mittan*, 2002 WL 31928446 (E.D. Pa. 2002).

VII. COMMON EXCLUSIONS AND LIMITATIONS ON RECOVERY

1. One “per person” limits applies to all claims for injury to one person, but not to an independent “emotional distress” claim

A “per person” limitation that applies to all damages arising out of bodily injury to one person in one accident, including derivative claims, is enforceable. Therefore, one “per person” limit applies to all wrongful death claims and to the decedent’s survival claim. However, the negligent infliction of emotional distress claim by decedent’s son, who witnessed his mother’s death, is a separate non-derivative claim and a separate per person limit applies to that claim. *Erie Ins. Group v. Shue*, 741 A.2d 803 (Pa. Super. 999), *appeal denied* 563 Pa. 645, 758 A.2d 1199 (2000). The court cited its decision in *Anthem Cas. Ins. Co. v. Miller*, 729 A.2d 1227 (Pa. Super. 1999), *appeal denied* 561 Pa. 665, 749 A.2d 464 (1999)(separate per person limit of liability coverage applied to negligent infliction of emotional distress claim of wife who observed husband being struck by tortfeasor’s car).

2. Tort options apply to UM/UIM claims

The tort option selected by a named insured applies to all named insureds, and to all other insureds under the policy who are not named insureds under another such policy. 75 Pa. C.S.A. §§1705(a)(2), (b)(2). This tort option applies to UM/UIM as well as third party claims. 75 Pa. C.S.A. §1731(d)(2).

A claimant who has elected or is otherwise deemed bound by the limited tort option, but who would be deemed “full tort” by virtue of 1705(d)(1)(i-iv) if actually suing the tortfeasor, is nevertheless bound by limited tort in a UM claim. *Rump v. Aetna Cas. And Sur. Co.*, 551 Pa. 339, 710 A.2d 1093 (1998). In *Rump*, the claimant elected limited tort, was involved in an accident with an uninsured motor vehicle registered in Minnesota, and argued that he should be deemed a “full tort” claimant by virtue of §1705(d)(1)(ii). The Supreme Court held that the proviso of §1705(d)(1)(iv)⁷ applied to all of the limited tort exceptions in §1705 (d)(1). Claimant was therefore bound by §1731(d)(2) to the limited tort option on claims for non-

⁷ Section 1705(d)(1) lists specific exceptions to the application of limited tort. Section 1705(d)(1)(i) relates to a tortfeasor convicted of DUI; (d)(1)(ii) to operation of vehicles registered in another state; (d)(1)(iii) to intentional tortfeasors, and (d)(1)(iv) to tortfeasors who have not maintained financial responsibility as required by this chapter, provided that nothing in this paragraph shall affect the limitation of section 1731(d)(2) (relating to availability, scope and amount of coverage).” Section 1731(d)(2) provides “A person precluded from maintaining an action for non-economic damages under Section 1705(relating to election of tort options) may not recover from uninsured motorist coverage or underinsured motorist coverage for non-economic damages”.

economic losses in his UM claim, even though the accident was caused by an uninsured motorist whose vehicle was registered in a state other than Pennsylvania. The Supreme Court explained that by limiting claimant's right to recover such damages in his UM proceeding, claimant was merely being held to his voluntary choice of limiting his ability to recover such damages in return for a reduced insurance premium.

3. Household vehicle exclusions

A policy exclusion prohibiting a claimant from recovering UM/UIM benefits if the claimant is injured while occupying a vehicle owned by the claimant (or by a resident relative) and not insured under the same policy⁸ is valid and enforceable. *Windrim v. Nationwide Ins. Co.*, 537 Pa. 129, 641 A.2d 1154 (1994). Windrim was operating his own uninsured vehicle when he was injured by a hit-and-run driver. He resided with his mother and sought UM benefits under her Nationwide policy; Nationwide denied his claim based upon the above exclusion. The Supreme Court held that the exclusion was valid and enforceable, and was consistent with the legislative intent behind the MVFRL.

In *Hart v. Nationwide Ins. Co.*, 541 Pa. 419, 663 A.2d 682 (1995), the Supreme Court, in a *per curiam* reversal, upheld the same exclusion where the claimant was driving his own car which was insured but as to which he had waived UM/UIM coverage. The above exclusion was enforced in preventing the claimant from recovering under his resident-relative daughter's policy.

The *Hart* result was reaffirmed by the Supreme Court in *Eichelman v. Nationwide Ins. Co.*, 551 Pa. 558, 711 A.2d 1006 (1998). The claimant in *Eichelman* was injured while riding his motorcycle, as to which he had waived UIM coverage. He sought UIM coverage under two household policies which contained an exclusion that prohibited UIM coverage from applying if the injury occurred while the claimant was occupying another vehicle owned by the insured or a resident relative and not covered under the policy. The Supreme Court held that the exclusion was not contrary to public policy. The Court noted "It is only when a given policy is so obviously against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring [that the contract is against public policy]." *Id.* at 1008, quoting *Mamlin v. Genoe*, 340 Pa. 320, 325, 17 A.2d 407, 409 (1941). The Court first reviewed its other recent "household exclusion" cases, including *Windrim* and *Hart*, and found no unanimity of opinion against enforcing such exclusions. Second, the Court found the language was not contrary to the public health, safety, morals or welfare of the people. Finally, the Court found that the exclusion was not contrary to the legislative intent behind the MVFRL, and in fact, was consistent with the MVFRL's intent to stop the spiraling cost of auto insurance. The Court noted that otherwise, an entire family living in a household with numerous automobiles could obtain underinsured motorist coverage through a single policy on one vehicle, ultimately resulting in higher premiums because of the expanded coverage cost.

In *Steele v. Nationwide Mut. Ins. Co.*, 830 A.2d 1028 (Pa. Super. 2003), *appeal denied* 577 Pa. 695, 845 A.2d 819 (2004), the Superior Court reached the same result. As in

⁸ This is one of several types of exclusions sometimes referred to as "family vehicle" exclusions; another type is discussed in subsection (2).

Eichelman, the claimant in *Stelea* was injured while operating his motorcycle, as to which he had waived UIM coverage. He and his wife then sought UIM coverage under a policy on another vehicle they owned, which was insured with Nationwide. Nationwide denied coverage based on a household vehicle exclusion. The arbitration panel found in favor of Nationwide, the trial court denied a petition to vacate, and the Superior Court affirmed. *See also Pennland Ins. Co. v. Thomas*, 34 Phila. 398 (C.P. 1997)(claimant injured on his motorcycle, on which he had waived UIM coverage, was barred from obtaining UIM coverage under his other two policies because they contained household vehicle exclusions).

Household vehicle exclusions are also enforceable where the vehicle occupied at the time of the accident *did* carry UM/UIM coverage, but the claimant is seeking additional UM/UIM coverage from another family policy that has a household vehicle exclusion. *Prudential v. Colbert*, 572 Pa. 82, 813 A.2d 747 (2002); *Rudloff v. Nationwide Mut. Ins. Co.*, 806 A.2d 1270 (Pa. Super. 2002)(*en banc*), *appeal denied* 572 Pa. 758, 818 A.2d 505 (2003); *Old Guard Ins. Co. v. Houck*, 801 A.2d 559 (Pa. Super. 2002), *appeal denied* 572 Pa. 758, 818 A.2d 505 (2003).

In *Prudential v. Colbert*, claimant Adam Colbert was operating his own vehicle when he was involved in an accident with an underinsured motorist. He collected that motorist's liability coverage, his own UIM coverage, and then sought additional UIM coverage under his parents' policies – which contained household vehicle exclusions. The Supreme Court, citing its own opinions in *Eichelman* and *Burstein* regarding the heavy burden that must be met to invalidate an exclusion on the basis of “public policy”, upheld the exclusion as “consistent with the underlying public policy of the MVFRL” because the insured, Adam, “received the UIM coverage for which he paid.”(emphasis in original). Because neither Adam nor his parents paid Prudential to insure Adam's car, the Court refused to require Prudential to underwrite that unknown and uncompensated risk. The policy also defined “insured” in a way that excluded Adam, but which the Court found unenforceable.

The household vehicle exclusion is enforceable where the insured did not waive stacking. *Erie Ins. Exchange v. Baker*, 601 Pa.355, 972 A.2d 507 (2009). Baker had an accident on his motorcycle, which was insured with Universal. He had stacking UIM coverage with Erie covering his three other household vehicles; Erie's stacking policy contained a household vehicle exclusion. The trial court and Superior Court upheld the exclusion, and the Supreme Court granted allocatur to consider whether application of the household vehicle exclusion violated Section 1738(a) of the MVFRL by precluding inter-policy stacking of UIM benefits when the insured had not waived stacking.

Three justices (Justice Greenspan, joined by Chief Justice Castille and Justice Eakin) joined in an opinion announcing the judgment of the Court. The opinion rejected Baker's argument that the exclusion was a “disguised waiver” that did not comply with the waiver requirements of section 1738. Instead, the Court concluded, this situation did not involve stacking at all; rather, the exclusion is a “valid and unambiguous preclusion of unknown risk.” Because the Erie policy precluded UIM coverage, “there was no UIM coverage to stack.” The Court recognized that motorcyclists often cannot purchase adequate insurance to compensate them for their injuries, but noted that this “clearly recognizes the higher risks and dangers of motorcycles.” The Court suggested that addressing the situation of inadequate insurance for

motorcyclists should be left to the Legislature, which had structured alternative insurance programs in other special risk situations. The Court concluded that its prior decisions in *Colbert* and *Eichelman* required upholding the exclusion in *Baker*.

Justice Saylor concurred in the result only. In his separate opinion, Justice Saylor found *Colbert* and *Eichelman* distinguishable, because they had been decided upon general public policy considerations rather than upon an analysis of §1738. However, Justice Saylor concluded that the §1738 amendments to the MVFRL do not invalidate “long-standing policy exclusions” rooted in the collection of reasonable premiums. Such exclusions go to the scope of coverage in the first instance, before stacking questions are reached.

The dissent (Justice Baer, joined by Justices Todd and McCaffery) concluded that the exclusion operates as a waiver of stacking in violation of the specific methodologies in the statute meant to prevent inadvertent waiver of stacking, which is the default coverage under section 1738, and the language of the exclusion does not satisfy the requirement for a valid waiver under 1738(d) - there is no requirement that the insured even be aware of the exclusion. The dissent found this to be a situation where insured had received coverage that differed from the coverage he had requested, rather than a situation where the exclusion was a usual incident to the type of coverage requested.

An evenly divided Supreme Court affirmed another Superior Court case upholding household vehicle exclusions in *GEICO v. Ayers*, 955 A.2d 1025 (Pa. Super. 2008), *aff'd* 610 Pa. 205, 18 A.3d 1093 (April 28, 2011). The claimant in *Ayers* owned two motorcycles that were insured under one stacking GEICO policy, and two trucks that were insured under a second stacking GEICO policy. He was injured on one of his motorcycles, but could not stack the limits of the truck policy, because that policy contained a household vehicle exclusion. The Superior Court upheld the exclusion, ruling that it is not a “de facto, unknowing waiver of inter-policy stacking,” but merely excludes from coverage accidents that happen under limited circumstances, and is not contrary to the MVFRL or to any other public policy). In his opinion in support of affirmance, Justice Saylor stated that he would “disapprove the utilization by an insurer of separate policies pertaining to multiple vehicles within the same household solely to subvert intra-policy stacking without any risk-based justification” but was persuaded that “the writing of separate policies, and enforcement of the household exclusion, is justified relative to motorcycle insurance coverage.”

See also Rudloff, supra (claimant who was occupying her own vehicle, as to which she purchased UIM coverage, when she was involved in an accident with an underinsured motorist, was not entitled to UIM benefits under her resident father’s policy with Nationwide); *Old Guard Ins. Co. v. Houck*, supra (husband and wife who were struck by an underinsured motorist while on their motorcycle, and who collected the Guide One UIM coverage on the motorcycle, were not entitled to additional UIM coverage from the Old Guard policy covering their three other household vehicles, because that policy contained a household vehicle exclusion); *Demutis v. Erie Ins. Exchange*, 851 A.2d 172 (Pa. Super. 2004)(estate of claimant who was killed while occupying his resident father’s vehicle, and who collected his father’s UIM coverage, was not entitled to UIM coverage under decedent’s own policy, which contained a household vehicle exclusion); *State Farm Fire & Cas. Co. v. Craley*, 844 A.2d 573 (Pa. Super. 2004), *aff'd on*

other grounds 586 Pa. 484, 895 A.2d 530 (2006)(estate of decedent who was occupying a vehicle she owned was barred from recovering additional UIM coverage under another household policy with a household vehicle exclusion: “Whatever the rules relating to stacking, the household vehicle exclusion clause is valid and enforceable, and does not violate public policy.” The Supreme Court affirmed on the basis of the insured’s waiver of the right to “stack” UM/UIM coverages, but one justice wrote separately to note that the household vehicle exclusion provided a separate basis to bar the claim); ***Nationwide Mut. Ins. Co. v. Harris***, 826 A.2d 880 (Pa. Super. 2003), *appeal denied* 577 Pa. 723, 847 A.2d 1287 (2004)(claimant collected UIM coverage under her own policy and her resident brother’s policy, but was precluded from collecting UIM coverage from her mother’s policy with Nationwide, because that policy included a household vehicle exclusion); ***Alderston v. Nationwide Mut. Ins. Co.***, 884 A.2d 288 (Pa. Super. 2005), *appeal denied* 589 Pa. 717, 907 A.2d 1100 (2006)(trial court erred in refusing to modify or correct arbitration award and in confirming the award, because the arbitrator’s refusal to uphold a household vehicle exclusion was an error of law); ***Gunnet v. Nationwide Mut. Ins. Co., No. 2005-SU-1525-Y01*** (C.P. York 2005)(upholding family vehicle exclusion); ***Prudential Prop. and Cas. Ins. Co. v. Garlin***, PICS #03-1195 (C.P. Lancaster 2003)(upholding a family vehicle exclusion in a case where all the household policies had been issued by the same carrier; although the risk Prudential was being asked to underwrite may not have been “unknown” because Prudential insured all the household vehicles, Prudential would not be required to provide coverage that had not been paid for).

Numerous cases in the federal courts have upheld the exclusions as well. *See Reichert v. State Farm Ins. Co.*, 2012 U.S. App. LEXIS (3d Cir. 2012) (woman injured by an underinsured motorist while operating her own vehicle could not recover UIM coverage from her resident parents’ “stacking” UIM policy, because that policy contained a household exclusion); ***Ginther v. Farmers New Century Ins. Co.***, 2009 U.S. App. LEXIS 8592 (3d Cir. 2009)(upholding household vehicle exclusion where the two household vehicles were insured under separate non-stacking single-vehicle Farmers policies; the Third Circuit declined to consider whether Ginther had knowingly waived inter-policy stacking, because the household exclusion was clear and unambiguous, had been consistently upheld and provided a sufficient basis to affirm); ***Nationwide Mut. Ins. Co. v. Roth***, 252 Fed.Appx. 505 (3d Cir. 2007)(husband injured on his Nationwide-insured motorcycle was not entitled to UIM coverage under a separate policy issued by Nationwide covering three other vehicles; household vehicle exclusion in that separate policy was enforceable under Pennsylvania law and was a valid way for the carrier to limit its exposure; the court also specifically rejected the argument that the household exclusion was a de facto of inter-policy stacking, calling it a “red herring” and noting that the insured was able to stack in all other situations; the court also rejected the argument that the exclusion had to comply with §1738); ***Nationwide Mut. Ins. Co. v. Brown***, 226 Fed. Appx. 153 (3d Cir. 2007)(upholding household vehicle exclusion that precluded wife, who was passenger on household motorcycle, from recovering UM or UIM benefits under two other household policies issued by Nationwide); ***Nationwide Mut. Ins. Co. v. Dunn***, 151 Fed. Appx. 117 (3d Cir. 2005); ***Nationwide Mut. Ins. Co. v. Riley***, 352 F.3d 804 (3d Cir. 2003)(daughter who was occupying her own vehicle and collected UIM coverage under the Nationwide policy covering that vehicle was barred from recovering additional UIM benefits under her father’s Nationwide policy; the Third Circuit noted that the case was “strikingly similar” to *Colbert* and that the household vehicle exclusion clause “has been upheld in nearly all of the cases in which it has been

considered”); *Liberty Mut. Fire Ins. Co. v. Tallman*, 2010 U.S. Dist. LEXIS 22249 (M.D. Pa. March 10, 2010)(upholding exclusion under auto policy where husband was killed and wife injured while riding separately-insured motorcycle, citing *Erie v. Baker*); *Smith v. Liberty Mut. Fire Ins. Co.*, 2008 WL 2096828 (E.D. Pa. 2008) (upholding household vehicle exclusion that precluded husband, who was occupying his motorcycle, from recovering UM or UIM benefits under the household policy issued to him and his wife by Liberty Mutual for their two other household vehicles); *Selective Ins. Co. of America v. Carroll*, 2005 U.S. Dist. LEXIS 39458 (M.D. Pa. 2005)(wife injured while driving her own vehicle insured with Penn National was barred by the household vehicle exclusion from recovering excess UIM benefits under her husband’s policy with Selective); *Prudential Gen. Ins. Co. v. Azar*, 2005 U.S. Dist. LEXIS 21735 (E.D. Pa. 2005); *DeMizio v. GEICO General Ins. Co.*, 2005 U.S. Dist. LEXIS 14567 (E.D. Pa. 2005)(household vehicle exclusion in Maryland policy was enforceable under both Maryland and Pennsylvania law); *Nationwide Mut. Ins. Co. v. Straitwell*, 323 F.Supp. 2d 654 (W.D. Pa. 2004)(claimant injured in household vehicle insured with Nationwide barred by exclusion from recovering additional UIM benefits from two other Nationwide policies); *Westfield Ins. Co. v. Roberts*, 2004 WL 1058169 (E.D. Pa. 2004)(claimant injured on his motorcycle barred from recovering additional UIM benefits from other household vehicles; exclusion does not violate §1733 of the MVFRL); *Nationwide Mut. Auto. Ins. Co. v. Quinn*, 2004 WL 817048 (E.D. Pa. 2004), *aff’d* 2005 U.S. App. LEXIS 10501 (3rd Cir 2005)(decendent occupying his Allstate vehicle barred from additional UM recovery from Nationwide policy covering two other household vehicles due to household vehicle exclusion in the Nationwide policy); *State Farm Mut. Auto. Ins. Co. v. Harrison*, 2004 WL 339654 (E.D. Pa. 2004), *aff’d* 124 Fed. Appx. 83 (3d Cir. 2005) (claimant injured on his motorcycle insured with Universal was barred from obtaining UIM coverage from resident relative’s State Farm policy); *Nationwide Mut. Ins. Co. v. Schmidt*, 307 F. Supp. 2d 674 (W.D. Pa. 2004) (claimant injured on husband’s motorcycle was barred by household vehicle exclusion from obtaining UIM coverage from Nationwide policy covering the couple’s other three vehicles); *Prudential Prop. and Cas. Ins. Co. v. Dormer*, 2004 WL 350911 (E.D. Pa. 2004), *aff’d* 125 Fed. Appx. 420 (3d Cir. 2005)(woman injured in daughter’s household vehicle was barred by household vehicle exclusion from obtaining additional UIM coverage from resident father’s Prudential policy); *Blue Ridge Ins. Co. v. Cosmos*, 2003 WL 22429045 (E.D. Pa. 2003)(claimant injured on own motorcycle barred by household vehicle exclusions from recovering under his other policies; also, because one of the policies was issued to the corporation of which he was CEO, but he was not occupying the corporate vehicle, he would not be an insured under that policy in any event); *Continental Ins. Co. v. Stoccardo*, 2003 WL 22316773 (E.D. Pa. 2003)(husband and wife injured on motorcycle owned by husband were barred by household vehicle exclusion from recovering under other household policy); *State Farm Mut. Auto. Ins. Co. v. Nabit*, 01-CV-6072 and *State Farm Mut. Auto Ins. Co. v. Carter*, 02-CV-8739, 287 F. Supp. 2d 587 (E.D. Pa. 2003)(both cases involving household vehicle exclusions with all household policies written by State Farm); *The Royal Ins. Co. of America v. Beauchamp*, 2002 WL 734344 (E.D. Pa. 2002) (claimant injured by underinsured motorist while operating his motorcycle, and who collected the UIM coverage under the motorcycle policy, was prohibited by the household exclusion in the policy covering resident relatives’ vehicles from recovering UIM benefits under their policy); *Prudential Prop. and Cas. Ins. Co. v. Jefferson*, 185 F. Supp. 2d 495 (E.D. Pa. 2002)(same); *Shelby Cas. Ins. Co. v. Statham*, 158 F. Supp. 2d 610 (E.D. Pa. 2001)(same except that the other household polices were in the name of the same insured); *Liberty Mut. Ins. Co. v. Wark*, 2000

WL 1539083 (E.D. Pa. 2000)(same); *Nationwide Mut. Ins. Co. v. Ridder*, 105 F. Supp. 2d 434 (E.D. Pa. 2000)(same, except involving UM coverage); *State Farm Mut. Auto. Ins. Co. v. Scheidler*, 78 F. Supp. 2d 374 (E.D. Pa. 1999)(household exclusion in father's policy barred son injured in his own car, and who collected UM benefits under his own policy, from recovering UM benefits under father's policy); *Troebs v. Nationwide*, 1995 WL 546078 (E.D. Pa. 1999)(same); *Nationwide Mut. Ins. Co. v. Riley*, 2000 U.S. Dist. LEXIS 7300 (E.D. Pa. 2000) (same result involving UIM coverage). See also *Keyes v. Viking Ins. Co. of Wisconsin*, 55 D. & C. 4th 129 (C.P. Monroe 2001)(UM coverage).

A household vehicle exclusion does not apply if a person is living in the house but not a member of the same "household." In *Prudential Prop. & Cas. Ins. Co. v. Epstein*, 2005 U.S. Dist. LEXIS 4533 (E.D. Pa. 2005), the insured's son was injured in a vehicle owned by his girlfriend, who lived in the house with the insured and the insured's son. He sought UM/UIM benefits under his and his mother's auto insurance policies, but those policies contained "household vehicle" exclusions that applied to insureds occupying vehicles owned by the insured or a "household resident" (defined in the policy as "someone who lives in your household"). The parties agreed that the girlfriend lived in the same house but disputed whether she was part of the same household. The evidence demonstrated that the girlfriend paid regular, fixed rent, purchased her own food, prepared her own meals, followed her own schedule, and drove her own car, which the insured's son did not drive unless he was performing maintenance on it. There was no evidence that the son and his girlfriend managed their finances jointly. The court noted that two households could share a single-family home, because "household means a domestic establishment under a single head or management, not simply under a single roof." *Id.*, quoting *Hoff v. Hoff*, 132 Pa. Super. 431, 1 A.2d 506 (1938). Under these facts, the policy definition of "household resident" did not include the girlfriend, so her vehicle was not a household vehicle and the household exclusions did not bar the son from recovering under his and his mother's policies.

4. Exclusion precluding vehicle insured under same policy from qualifying as "underinsured"

A passenger cannot recover the liability coverage of a host vehicle and then argue that that same car was "underinsured" so as to recover UIM coverage under the same policy. *Wohlgemuth vs. Harleysville Mut. Ins. Co.*, 370 Pa. Super. 51, 535 A.2d 1145 (1988), *appeal denied* 520 Pa. 590, 551 A.2d 216 (1988). This is true even if the claimant is a "class one" insured. *Newkirk v. USAA*, 388 Pa. Super. 54, 564 A.2d 1263 (1989), *appeal denied* 528 Pa. 624, 597 A.2d 1153 (1990). Policies typically exclude vehicles owned by, or available for the regular use of, family members from the definition of "underinsured motor vehicle" any.⁹ UIM coverage requires the existence of two policies of insurance: the liability coverage applicable to the car and a separate policy as to which the claimant is an "insured" for UIM coverage. Otherwise, inexpensive UIM coverage is effectively converted into more expensive liability coverage. Thus, if only one policy is involved, the "family vehicle" exclusion will be upheld

⁹ Such exclusions are sometimes referred to as "family" or "household" vehicle exclusions. However, in at least one case it was held that a claimant cannot recover both liability and UIM under the same policy even if there is no exclusionary language in the policy. *Sturkie v. Erie Ins. Group*, 407 Pa. Super. 117, 595 A.2d 152 (1991).

even if more than one vehicle is insured under the policy. *Cooperstein v. Liberty Mut. Fire. Ins. Co.*, 416 Pa. Super. 488, 611 A.2d 721 (1992), *appeal dismissed* 538 Pa. 483, 649 A.2d 434 (1994); *Kelly v. Nationwide Ins. Co.*, 414 Pa. Super. 6, 606 A.2d 470 (1992) (rejecting wife's argument that the policy was really two policies, one applicable to her and one applicable to her husband; wife was therefore not entitled to collect the UIM coverage under "her" policy after obtaining the liability limits on her husband's vehicle). *Cf. Pitts v. State Farm Auto. Ins. Co.*, No. 1893 of 2005 (C.P. Fayette 2006)(claimant was not entitled to UIM coverage of her parents' policy after the liability coverage was exhausted). *See also O'Hare v. Allstate Ins. Co.*, 2000 WL 1022981 (E.D. Pa. 2000) (passenger who recovered driver's liability coverage could not recover UIM coverage under a policy issued to driver's resident relative: the passenger was not an insured person under the driver's household policy, the driver could not assign any rights he had because such assignments are prohibited by the contract and contrary to Pennsylvania law, and the other household policy contained a family car exclusion which excluded a car owned by a resident relative (*i.e.*, the driver)from the definition of "underinsured motor vehicle").

In *Allstate Ins. Co. v. Leiter*, 306 F. Supp. 2d 488 (M.D. Pa. 2004), the district court upheld the same clause (which it referred to as a "dual recovery exclusion.") The policy covered four vehicles. Claimant had obtained recovery under the liability coverage of the policy but sought UIM benefits applicable to the three other vehicles. The court held that the exclusion was clear and unambiguous and did not violate the public policy underlying the MVFRL.

5. Regularly-used non-owned vehicle exclusions

An exclusion that prohibits UM/UIM coverage from applying if the insured is injured while occupying a "regularly used non-owned car" is valid and enforceable. *Burstein v. Prudential Prop. and Cas. Ins.*, 570 Pa. 177, 809 A.2d 204 (2002). In *Burstein*, a husband and wife were injured by an underinsured motorist while occupying a vehicle provided by wife's employer. She was not aware of, and was not given any options regarding, the type of insurance coverage on the vehicle, and learned after making a claim that the policy did not include UIM coverage. The claimants sought UIM coverage under their household policy; however, that policy excluded injury that occurred while occupying a "regularly used non-owned car." The Supreme Court upheld the exclusion. The Court emphasized the limited circumstances under which "public policy" could invalidate a contract, and further stated that cost containment was the "dominant and overarching public policy" underlying the MVFRL. This purpose would be frustrated if the carrier was compelled to underwrite risks it has not been compensated to insure: "[I]f this Court were to void the exclusion, insureds would be empowered to regularly drive an infinite number of non-owned vehicles, and receive gratis UIM coverage on all of those vehicles if they merely purchase UIM coverage on one owned vehicle." This would consequently increase the cost of insurance. Thus, the Court rejected the argument that UIM coverage would always "follow the person." *See also Prudential Prop. and Cas. Ins. Co. v. Gisler*, 569 Pa. 573, 806 A. 2d 854 (2002) (*per curiam* reversal, *citing Burstein*; the Superior Court had held that the "regularly used non-owned car" exclusion was not enforceable against a police officer who was occupying a police car owned by his employer when he was injured).

The "regular use" exclusion is valid in the case of a police officer injured while driving a police vehicle, and who could not have obtained UIM coverage for that vehicle. *Williams v.*

GEICO, __Pa.__, 32 A.3d 1195 (2011). The Supreme Court reaffirmed *Burstein* and rejected the argument that the “regular use” exclusion should not apply to “first responders” who receive favored treatment under other provisions. However, the several of the four opinions issued strongly questioned the rationale of cost-containment.

See also *Brink v. Erie Ins. Group*, 940 A.2d 528 (Pa. Super. 2008) (upholding exclusion in the case of a police officer who was involved in an accident in his police vehicle). The *Brink* court held that the “regular use” exclusion is not ambiguous (citing *Crum & Forster Personal Ins. Co. v. Travelers Corp.*, 428 Pa. Super. 557, 631 A.2d 671 (1993), which dealt with a “family ownership” exclusion). The “regular” use did not have to be of the same vehicle; rather, it must only appear that the employer-owned vehicles were available for his regular use, and in this case the record reflected that he was provided access to police vehicles to perform his job. The exclusion did not violate any “reasonable expectation” of coverage, because even if Erie was aware that claimant was a police officer, there was no evidence that Erie accepted the risk of insuring him while operating police vehicles. Thus, the exclusion was not against public policy and the court would not force Erie to subsidize an uncompensated risk. See also *Erie Ins. Exchange v. Soroka*, 2011 WL 2516797 (C.P. Lackawanna June 8, 2011)(co-owner of used car dealership, who was injured while operating an “inventory vehicle” belonging to the dealership, was not entitled to UIM coverage under his household policy with Erie or his wife’s commercial policy with Erie; both policies excluded UIM coverage for “bodily injury to you or a resident using a non-owned motor vehicle or a non-owned miscellaneous vehicle which is regularly used by you or a resident, but not insured for Uninsured or Underinsured Motorist coverage under this policy.” The dealership typically owned 40-60 inventory vehicles, they were available for use by the insured owner and his partner, and the insured acknowledged driving one every day. The fact that this was not one of two vehicles officially designated as personal use vehicles was not determinative of whether the vehicle was available for the regular use of the insured), *aff’d mem. March 8, 2012*; *Costello v. GEICO*, 2010 U.S. Dist. LEXIS 28511 (M.D. Pa. March 25, 2010)(employee of Pennsylvania Auditor General’s office involved in accident while driving car assigned to him by employer was barred by regular use exclusion in his personal policy from recovering under that policy; the court noted that term “regular use” has been found unambiguous and requires that the use be regular or habitual as opposed to occasional or incidental. “Regular use” does not consider how often the a vehicle or fleet of vehicles was *actually* used, but whether they were regularly *available* for use. Employee’s use was regular and habitual - he used the vehicle almost 95% of the days he worked; however, the court could not determine as a matter of law whether his “reasonable expectations” as to coverage, in light of course of dealings with the carrier, had been violated and further factual development was needed); *Adamitis v. Erie Ins. Exchange*, 2010 Phila. Ct. Com. Pl. LEXIS 292 (C.P. Phila. November 24, 2009)(bus driver involved in accident with underinsured motorist was barred by regularly-used non-owned vehicle exclusion from recovering UIM benefits under his personal policy).

In *Dixon v. GEICO*, 1 A.3d 921 (Pa. Super. 2010), the Superior Court vacated the trial court’s judgment in favor of GEICO and against a UPS employee based upon this exclusion, and remanded for further proceedings. The Superior Court held that a genuine issue of material fact was presented as to whether the UPS truck the employee was operating at the time was “regularly used” within the meaning of the policy exclusion where the employee argued that his

use of the vehicle (“ferrying” it either to or from a contractor for repairs) was an incidental or casual use and not a “principal” use, a distinction the Superior Court had drawn in the *Crum & Forster* case, above. The claimant’s evidence was sufficient to present a jury question as to whether the vehicle in question was presented to him for his regular use where claimant had a variety of job duties, many if not most of which did not involve the use of a vehicle, he did not have regular or recurring access to any of the vehicles in the fleet, and even the vehicle in question was not provided to him for his use, but rather, was a one-time transport of the vehicle to a location where someone else would put it to regular use.

But see Erie Ins. Exchange v. E.L. by and through Lowry, 941 A.2d 1270 (Pa. Super. 2008)(discussed under “use” earlier herein). The Superior Court held that the mere occupying of a non-owned vehicle by an 11-year old did not constitute “use” of that vehicle within the meaning of the regularly-used non-owned vehicle exclusion. *See also Decker v. Nationwide Ins. Co.*, 2007 WL 4698041 (C.P. Lackawanna 2007)(finding that regularly-used non-owned vehicle exclusion added to policy on renewal, and also summarized in a change notice along with other changes, violated the statute, was contrary to public policy, contract law, the insured’s expectations, and was unconscionable).

The federal courts have upheld regular use exclusions. *See, e.g., Allstate Ins. Co. v. McGovern*, 2008 WL 2120722 (E.D. Pa. 2008)(postal service employee who had been working for the postal service for eight years, and was injured driving his postal vehicle, was not entitled to coverage under his household policy because of the regularly-used non-owned vehicle exclusion in the policy; the fact that his insurance agent knew claimant drove postal vehicles and assured him he had “full coverage” did not mean he had a reasonable expectation of coverage where there was an unambiguous exclusion in the policy); *Liberty Mut. Ins. Group v. Johnson*, 2007 U.S. Dist. LEXIS 43278 (W.D. Pa. 2007) (where claimant occupied a PennDOT vehicle every day for most of his shift, the fact that his use of the particular vehicle involved in the accident was less frequent was irrelevant; the vehicles were provided by PennDOT for the systematic and repeated use of claimant’s work crew in the performance of their duties, and no reasonable jury could conclude that the use was casual, occasional or incidental); *Calhoun v. Prudential Gen. Ins. Co.*, 2005 U.S. Dist. LEXIS 44302 (M.D. Pa. 2005)(even though a police officer drove any one of a fleet of vehicles and had not driven the specific vehicle involved in the accident before that night, the regular use exclusion still applied to bar coverage, because police vehicles were regularly available for the insured’s use); *Prudential Prop. & Cas. Ins. Co. v. Armstrong*, 2004 WL 603416 (E.D. Pa. 2004)(claimant injured in Fairmount Park Commission vehicle was barred from recovering UIM benefits under his father’s policy; although claimant had just begun working for the Park Commission, could not drive the vehicle, and his “use” was only as a passenger, “The record is clear that the regular use of a Park Commission vehicle was part of the job requirements for all Park rangersAccordingly, reasonable minds cannot differ as to the conclusion that Defendant should reasonably have expected that his job responsibilities would include the regular use of a Park Commission vehicle”); *Prudential Prop. and Cas. Ins. Co. v. Hinson*, 277 F. Supp. 2d 468 (E.D. Pa. 2003)(policy that provided UIM coverage to insureds using a non-owned vehicle in a business or job, but excluded such coverage for regularly-used non-owned vehicles, was not ambiguous: coverage was available for non-owned vehicles as long as they were not regularly used. Claimant’s use of one of two township-owned police vehicles twenty to forty hours per month for six years constituted “regular use”, and

enforcing the exclusion did not violate “reasonable expectations” of insured where such expectation would be contrary to the clear language of the policy).

But see Liberty Mut. Ins. Co. v. Sweeney, 689 F.3d 288 (3d Cir. 2012). The Third Circuit held that a “regular use” exclusion in insured’s own UIM policy did not bar coverage to the insured (Sweeney), who was in an accident while operating a car that he had picked up from a rental company and was intending to deliver the next day to a customer of Sweeney’s auto repair business to use as a replacement vehicle. The rental company provided such cars for Sweeney’s customers when they needed replacement vehicles, but Sweeney did not always pick up and deliver the vehicles, and he did not have “unfettered access” to them. The Third Circuit concluded that the exclusion did not apply because the rental/loaner vehicle was not “furnished or made available for regular use” by Sweeney.

6. Exclusion for vehicle carrying persons for a fee

An exclusion that applies to vehicles used to carry persons or property for a fee is also enforceable, and applies whether or not a paying passenger is occupying the vehicle in question. *Nationwide Assurance Co. v. Easley*, 960 A.2d 843 (Pa. Super. 2008), *appeal denied* 602 Pa. 668; 980 A.2d 609 (2009). The claimant in *Easley* was operating a taxi when he was in an accident with an underinsured motorist; he did not have a passenger at the time and was on his way to his home. Claimant leased taxis daily from the same company, although he did not have any control over which taxi he received. He sought UIM benefits under his household policy with Nationwide. That policy had an exclusion for a regularly-used non-owned vehicle (as discussed above) and also an exclusion if the vehicle was used to carry persons for a charge. The Superior Court disagreed that the exclusion violated the statutory mandate to offer UIM. Rather, the court read the Supreme Court’s prior decisions in cases such as *Colbert* and *Burstein* to endorse exclusion clauses “provided they advance the MVFRL’s objective of containing insurance costs, which is being achieved here with the denial of Appellant’s UIM claim filed under his automobile insurance policy containing ‘regularly used, nonowned vehicle’ and ‘use for hire’ exclusions.” The Superior Court opined that the claimant would otherwise receive a windfall for coverage not paid for by the higher premiums that otherwise would have applied in the case of a vehicle for hire.

See also Nationwide Mut. Ins. Co. v. Brophy, 371 Fed. Appx. 302 (3d Cir. 2010)(mail carrier who was operating postal vehicle at time of accident was barred by the “carry persons or property for a fee” exclusion from recovering UIM benefits under her personal Nationwide policy; the court in *Brophy* looked to Pennsylvania cases upholding the exclusion in cases involving requests for third party liability coverage and for other types of first-party benefits).

7. Exclusion for claimant using a vehicle in an “auto business”

The case of *Liberty Mut. Ins. Co. v. Sweeney*, 689 F.3d 288, 2012 U.S. App. LEXIS 16006 (3d Cir. 2012), discussed above regarding “regular use” exclusions, also involved an exclusion that related to use of a vehicle in an “auto business.” The original exclusion in the policy had been modified by endorsement; the modified version stated that the insurer

“will not pay for bodily injury sustained while using a non-owned motor vehicle in any auto business. Examples of auto business are: selling, repairing, servicing, storing or parking motor vehicles.” *Id.* at *7. The insured (Sweeney) was obtained possession of the vehicle for a purpose related to Sweeney’s auto repair business (he picked up the car from a rental company and was intending to deliver it the next day to a customer as a replacement vehicle for one Sweeney was repairing). However, at the time of the accident, Sweeney was using the vehicle to run a personal errand. The Third Circuit determined that the exclusion was a “temporal restriction,” and was only triggered for “the time during which” Sweeney was using the non-owned vehicle in any kind of auto business. The exclusion did not apply while Sweeney was running a personal errand.

8. “Intended Use” Exclusion

The policy at issue in *Liberty Mut. Ins. Co. v. Sweeney* included another exclusion of interest: it covered the insured (Sweeney’s) use of non-owned vehicles, but the non-owned vehicle “must be used in a way intended by the owner.” 2012 U.S. App. LEXIS 16006 at *4. The owner of the rental car had testified that using such vehicles for personal errands “was not intended, although not forbidden.” However, the owner also testified that he was aware that Sweeney used the vehicles on personal errands and that he encouraged this use by Sweeney to get Sweeney’s opinion regarding the condition of the vehicles. Thus, the evidence did not show that Sweeney’s use for personal errands was beyond what the owner intended, and the exclusion did not apply.

9. A claimant cannot recover UM and UIM payments under the same policy

A claimant who is a passenger in an insured vehicle which is involved in an accident with an uninsured vehicle (both of which are allegedly at fault) cannot collect both UIM and UM benefits under another policy applicable to him. *Erie Ins. Exchange v. Danielson*, 423 Pa. Super. 524, 621 A.2d 656 (1993) (policy provision precluding a claimant from receiving UIM recovery if he had already received UM recovery was clear, unambiguous, and consistent with §1731 of the MVFRL); *Cf. State Farm Mut. Auto. Ins. Co. v. Kosick*, 2006 WL 931708 (W.D. Pa. 2006)(§1731(d) precludes claimant from recovering UM benefits after having recovered UIM benefits; the provision prohibits recovery of both UM and UIM benefits for the same accident regardless of the order in which the benefits are requested. The fact that the policy did not contain a specific provision to this effect did not mandate any different result, because the policy did state that “The amount we will pay for damages is subject to the limitation of Title 75 of the Pennsylvania Consolidated Statutes;” §1731(d) states that “A person who recovers damages under uninsured motorist’s coverages cannot recover damages under underinsured motorist’s coverage or coverages for the same accident.”)

However, the claimant can choose whether to proceed with a UM claim or a UIM claim if two other vehicles meeting those definitions were involved in the accident. *Travelers Personal Ins. Co. v. Monico*, 2008 WL 2853258 (E.D. Pa. 2008) (claimant stopped to avoid a vehicle that cut him off and then left the scene; the claimant was subsequently rear-ended by an insured vehicle, collected \$45,000 of the rear-ending vehicle’s \$250,000 limits, and made a UM claim

based on the negligence of the “phantom” vehicle. Claimant agreed that the UM carrier would be entitled to offset the \$45,000 already received. The carrier argued that the claimant was limited to a UIM claim, for which the carrier would be entitled to credit for the full underlying liability limits of \$250,000. The court agreed with the claimant: the hit-and-run vehicle clearly fell within the policy’s definition of uninsured motor vehicle.

10. Territorial exclusions

A territorial exclusion which limits the territory covered by the UM/UIM coverage to the United States, its territories and possessions, Puerto Rico and Canada is valid and enforceable. *Hall v. Amica Mut. Ins. Co.*, 538 Pa. 337, 648 A.2d 755 (1994)(policy did not provide UM coverage for accident with phantom vehicle which occurred in Barbados).

11. Punitive damages exclusions

A policy exclusion that excludes punitive or exemplary damages from the definition of damages recoverable under the UIM coverage is enforceable. *Robson v. EMC Ins. Cos.*, 785 A.2d 507 (Pa. Super. 2001), *appeal denied* 568 Pa. 703, 796 A.2d 984 (2002). The claimant in *Robson* was injured by a drunk driver, recovered that driver’s liability coverage, and then sought both compensatory and punitive damages under the applicable UIM coverage. The trial court ruled that under the MVFRL and the contract of insurance, the UIM carrier was not required to provide coverage for punitive damages. The Superior Court affirmed, holding that the policy exclusion was not contrary to the MVFRL. Although the legislature did not expressly exclude punitive damages from UM/UIM coverage, the waiver language prescribed by the statute for waiver of such coverage described UIM benefits as applying to damages arising out of the negligence of an underinsured motorist.

12. Named driver exclusions

In *Progressive Northern Ins. Co. v. Schneck*, 572 Pa. 216, 813 A.2d 828 (2002), the Supreme Court upheld a named-driver exclusion where the result was to deny UIM benefits to the minor children of the named insured. In *Schneck*, the named insured/wife obtained coverage with Progressive Northern but named her husband as an excluded driver because he had a suspended license. Ten days later the husband was operating the vehicle with their two minor children as passengers, and was involved in an accident with an underinsured motorist which resulted in injuries to the minor children. The Supreme Court held that the named driver exclusion was clear and unambiguous and did not violate public policy. “As the practical effect of the named driver exclusion was to provide [husband] with no liability coverage, then pursuant to §§ 1731 and 1734, UM/UIM coverage was also zero.” There is no statutory requirement mandating UIM coverage, and “Given the indirect costs associated with obtaining UM/UIM coverage and the ability to reject such coverage, there is no clear legislative pronouncement of requiring public policy UM/UIM coverage for a named driver exclusion.”

See also State Farm Mut. Auto. Ins. Co. v. Henning, 795 A.2d 994, 997 (fn. 2) (Pa. Super. 2002), *appeal denied*, 570 Pa. 687, 808 A.2d 572 (2002); *State Farm Fire & Cas. Co. v. Keenan*, 953 F.Supp. 103 (E.D. Pa. 1997); *Selective Way Ins. Co. v. Gingrich*, 2009 WL

1586577 (M.D. Pa. 2009)(named driver exclusion applies to prevent any policy coverages, including liability and UM/UIM, from applying to any claim arising from operation of the vehicle by the excluded driver, and thus carrier had no obligation to defend or indemnify against claim by injured party).

13. Exclusion if claimant is eligible for workers' comp

Where an employer purchases UM/UIM coverage on the employer's vehicle used by the employee, an exclusion preventing the employee from collecting UM/UIM benefits is he/she is entitled to workers compensation is invalid. *Heller v. Pennsylvania League of Cities and Municipalities*, __Pa.__, 32 A.3d 1213 (2011). The claimant in *Heller* was in an accident in his employer's vehicle during the course of his employment. He collected the tortfeasor's liability limits, and notified both his employer's carrier and his personal carrier that he intended to pursue UIM benefits. The employer's coverage contained an exclusion stating that the coverage did not apply to "Any claim by anyone eligible for workers compensation benefits that are the statutory obligation of the [employer]."

The claimant argued that this exclusion violated public policy, and the Supreme Court agreed, observing that the cost containment rationale "has limits," and that where almost no vehicle occupant would benefit from the purchased coverage, the coverage was converted to a "sham offering" and the carrier impermissibly received a windfall. Once the coverage is purchased, it must to comply with statute and public policy.

VIII. PRIORITY OF RECOVERY/EXHAUSTION/SET-OFFS

1. Priority of recovery follows §1733

The priority of recovery in UM/UIM claims is set forth at 75 Pa. C.S.A. §1733. Thus, where the claimant was the driver of an insured school bus, and was also insured under her own policy, §1733 required that the UIM coverage applicable to the bus must be exhausted before the claimant could recover under her own UIM coverage. *Utica Mut. Ins. Co. v. Yantorn*, 1993 WL 489208 (E.D. Pa. 1993), *affirmed* 30 F.3d 1489 (3d. Cir. 1994). *See also State Farm Ins. Co. v. Ridenour*, above. The Political Subdivision Tort Claims Act did not alter this statutory order of priority (although that Act did authorize a setoff, *see* 42 Pa. C.S.A. §8553(d)).

If a claimant has recovered from a carrier at a lower level of priority, the claimant is not precluded from seeking recovery from a higher-level source. *Gavaghan v. Replacement Rent-A-Car, Inc.*, 811 F.Supp. 1077 (E.D. Pa. 1992) (fact that claimant already received UM recovery from her own carrier's policy does not preclude her from seeking UM recovery from the carrier for the vehicle she was occupying).

Where the carriers are of equal priority, the carrier that paid the claim is entitled to contribution from the other carrier on a pro rata basis. *Travelers Prop. Cas. Ins. Co. of America v. State Auto. Mut. Ins. Co.*, 2008 WL 686905 (W.D. Pa. 2008). The claimant in *Travelers* was in an accident in a rental vehicle in the course of her employment. Her employer had a policy with Travelers, and she had her own policy with State Auto. Travelers paid the claim and then

filed a declaratory judgment action against State Auto, seeking a declaration that the two companies were at the same level of priority and that Travelers was entitled to pro rata contribution. The Travelers policy did not cover non-owned autos (the rental was, obviously, non-owned). An endorsement did define "insured" as the occupant of a temporary substitute for a covered auto. A further endorsement to the Travelers policy included an "other insurance" clause which defined the order of priority if other UIM coverage applied. The first priority was coverage applicable to the occupied vehicle, and the second priority was coverage applicable to the insured person. The court held that the Travelers policy did not cover the rental vehicle, but rather, covered the insured, and thus both the Travelers and the State Auto policy were at the same order of priority. Travelers was entitled to recover from State Auto based on the ratio of the available limits of insurance on the two policies. Because there had been two claimants under the Travelers policy, the available amount for this claimant was determined by subtracting the payment to the other claimant; that number was then compared to the total available coverage through State Auto.

2. All underlying liability coverage applicable to the tortfeasor vehicles must be exhausted or credited

Actual exhaustion of underlying coverage is not required to make a UIM claim, but the UIM carrier is entitled to a credit for the full underlying limits. In *Boyle v. Erie Ins. Co.*, 441 Pa. Super. 103, 656 A.2d 941 (1995), *appeal denied* 542 Pa. 655, 668 A.2d 1120 (1995) the court upheld an exhaustion clause as a "threshold requirement and not a barrier to underinsured motorist insurance coverage." The insureds are entitled to UIM recovery if their damages exceed the total liability coverages available, and the carrier will be entitled to credit the full amounts of such coverages against the insureds' damages. *See also Krakower v. Nationwide Mut. Ins. Co.*, 790 A.2d 1039 (Pa. Super 2001), *appeal denied* 805 A.2d 524 (Pa. 2002)(arbitrators did not err in proceeding with UIM arbitration, giving full credit for the underlying limits, prior to the outcome of the third-party case); *Sorber v. American Motorists Ins. Co.*, 451 Pa. Super. 507, 680 A.2d 881 (1996) (proposed settlement of \$40,000 on policy limits of \$50,000, with the UIM carrier to get credit for full \$50,000, required UIM carrier to either consent to the settlement or tender its own draft in the amount of \$40,000; moreover, two months was sufficient time for UIM carrier to consider such an offer); *Chambers v. Aetna*, 442 Pa. Super. 155, 658 A.2d 1346 (1995), *appeal denied* 543 Pa. 707, 672 A.2d 303 (1996) (claimant entitled to make UIM claim even though present value of structured settlement with tortfeasor was less than tortfeasor's liability limits); *Kelly v. State Farm Ins. Co.*, 447 Pa. Super. 214, 668 A.2d 1154 (1995)(claimant entitled to make UIM claim where motor vehicle tortfeasor's portion of settlement amounted to \$12,500 out of an available \$50,000).

Where there are multiple tortfeasors, the UIM carrier will be entitled to a credit for the full underlying limits of all of them. *Allstate Prop. and Cas. Ins. Co. v. Banks*, 2010 U.S. Dist. LEXIS 80048 (W.D. Pa. 2010)(where claimant settled with the driver of his own vehicle for the \$50,000 policy limits, and with the driver of the other vehicle for \$115,000 of that vehicle's liability limits of \$1,500,000, the UIM carrier is entitled to set off the full total policy limits of \$1,550,000, not merely the \$165,000 amount actually paid); *Standard Fire Ins. Co. v. Wagner*, 2006 WL 1787580 (M.D. Pa. 2006); *Chudyk-Heishman v. Liberty Mut. Ins. Co.*, 2006 WL 860316 (M.D. Pa. 2006); *Bremer v. Prudential Prop. & Cas. Ins. Co.*, 2004 WL 1920708 (M.D.

Pa. 2004). In *Chudyk-Heishman*, claimant settled with one of two joint tortfeasors for less than that tortfeasor's liability limits. Claimant sought to limit the UIM carrier's credit to only that tortfeasor's pro rata share of liability rather than that tortfeasor's full liability limits. The arbitrators determined that the carrier was entitled to credit for both tortfeasors' full liability limits. The court agreed: although the claimant was not required to actually exhaust the policy limits to preserve a UIM claim, the UIM carrier also had to be protected against a demand by an insured to "fill the gap" after a weak claim was settled for an unreasonably small amount. Thus, the exhaustion clause of the policy would be construed as a threshold requirement and the insured would not be allowed to recover UIM benefits unless their damages exceeded the maximum liability coverages provided by the tortfeasors' carriers.

The claimant in *Standard Fire* settled for \$34,000 of a possible \$100,000 from the other driver's carrier, and \$6,000 of a possible total of \$6,000,000 in primary and excess liability coverage that would be available if the other driver was determined to have been working at the time. The district court noted the "interesting question" presented in requiring full credit for all liability policies in situations where there was "a real question of liability." Despite this concern, the court found that the case was controlled by *Bremer* and *Boyle*: the UIM carrier was entitled to credit for the full liability limits of the tortfeasors against whom the claimant had pursued claims and received recoveries.

Similarly, the claimant in *Bremer* sued two other drivers. He settled for one tortfeasor's \$50,000 limits and \$15,000 of a second tortfeasor's \$100,000 limits, and then sought UIM benefits. The arbitrators assessed the damages at \$200,000 but applied a credit of \$150,000, for a net award of \$50,000. Claimant argued that the credit should be only \$65,000. Chief Judge Vanaskie, citing and quoting *Boyle v. Erie Ins. Co.*, 441 Pa. Super. 103, 656 A.2d 941 (1995), *appeal denied* 542 Pa. 655, 668 A.2d 1120 (1995), held that the UIM carrier is entitled to credit for the total liability limits of the responsible motor vehicles. Judge Vanaskie distinguished *Overfield v. Ohio Cas. Ins. Co.*, 39 Pa. D.&C. 4th 548 (C.P. Lackawanna 1998), because in that case the full underlying liability limits were divided among multiple claimants and thus the claimants had to give credit only for the amounts they were actually paid. Finally, Judge Vanaskie rejected the argument that the second motorist was not really "responsible": "Plaintiff, however, cannot undo the decisions to bring an action against [second motorist].... *Boyle* requires that, in these circumstances, the underinsured carrier receives credit for the liability limits of the tortfeasors against whom the claimant pursued claims and received recoveries."

A UIM carrier is entitled to credit for the limits of the tortfeasor's excess liability policy, as well as for the tortfeasor's auto liability policy. *D'Adamo v. Erie Ins. Exchange*, 4 A.3d 1090 (Pa. Super. 2010), *allocatur denied* __Pa.__, __A.3d__ (2011). In *D'Adamo*, the two claimants (in the same vehicle) were involved in an accident with a third party. While the third-party claim was pending, the claimants made UIM claims that proceeded to arbitration. The arbitrators awarded each claimant \$850,000, reduced to \$100,000 per claimant because of credits of \$750,000 per claimant. The credits were based upon the tortfeasor's auto liability limits of \$250,000 per claimant and excess liability limits of \$500,000 per claimant. The claimants filed Petitions to Modify or Correct the awards, arguing that the panel erred in applying a credit for the excess policy. The trial court denied the Petitions, and the Superior Court affirmed. The Superior Court held that Erie's UIM policy, which required exhaustion of all applicable bodily

injury coverage, did not narrow the definition of an underinsured vehicle in §1702 of the MVFRL, did not conflict with the definition in the policy, and did not violate public policy. Such clauses “help to prevent UIM claimants from manipulating the payment of their awards.” Erie’s provision was in accordance with public policy and prior cases because it did not require exhaustion of policies beyond those applicable to the owners/operators of vehicles.

A claimant who failed to exhaust the primary UIM policy is not barred from making a UIM claim against a secondary UIM policy. *Nationwide Ins. Co. v. Schneider*, 599 Pa. 131, 960 A.2d 442 (2008). The claimant in *Schneider* settled for the tortfeasor’s limits of \$15,000 and then settled with the primary UIM carrier for \$750,000 out of a \$1,000,000 policy. After settling, the claimant notified Nationwide, the secondary UIM carrier, seeking UIM benefits under that policy as well, with a credit for the full \$1,015,000 in underlying liability and UIM limits. Nationwide asserted that this violated both the exhaustion and the consent-to-settle clauses of the Nationwide policy. The trial court granted summary judgment in favor of Nationwide, and a Superior Court panel affirmed. However, the Superior Court granted rehearing *en banc* and reversed. *See* 2006 PA Super. 219, 906 A.2d 586 (2006). The court *en banc* found that the claimant had pursued the coverages in the proper order of priority, and that §1733 of the MVFRL, setting forth the priority of recovery, did not require exhaustion of limits before making a claim at the next level of recovery. Moreover, the consent-to-settle clause had not been violated by claimant’s settlement with the primary UIM carrier, because Nationwide had to establish that its interests had been prejudiced, and had not met this burden.¹⁰

The Supreme Court granted allocatur limited to two questions: first, whether the Superior Court properly applied the exhaustion rule of “primary liability coverage-UIM litigation” to the “primary UIM-excess UIM claim” context, and second, whether the Superior Court properly applied the consent to settle rule of UIM litigation in the less-than-policy-limits-settlement context. The Supreme Court affirmed on both bases.

With respect to the exhaustion argument, the Court disagreed that §1733’s priority provision should be construed as requiring exhaustion at each level. The Court recognized that “traditional excess insurance coverage generally is subject to an exhaustion requirement” but distinguished UM/UIM coverage as it has evolved in Pennsylvania as “not traditional insurance.” The Court then considered the impact of a specific exhaustion requirement in the policy, and concluded that the requirement was satisfied by the Superior Court’s “credit-for-limits” approach: “The approach maintains a meaningful role for the relevant policy provisions, while at the same time balancing the cost-containment and remedial objectives of the MVFRL and advancing the strong public policy favoring settlements.”

With respect to the consent-to-settle clause, Nationwide did not dispute the requirement of showing prejudice, but argued that prejudice was shown by the fact that the excess UIM carrier could not recoup the “gap” in coverage left by failing to exhaust the primary coverage (which the primary UIM carrier can do with respect to a tortfeasor by using the *Daley-Sand*

¹⁰ The Superior Court *en banc* also rejected Nationwide’s “late notice” argument, because the “late” notice (more than two years after the accident) must preclude Nationwide’s ability to subrogate against liable parties, and no such right existed with respect to the primary UIM coverage. Finally, the court found that enforcing Nationwide’s exhaustion clause would violate *Boyle*; as in *Boyle*, above, and *Ridenour*, below, exhaustion is a threshold requirement that is met by extending credit for the full limits of the primary UIM policy.

process - tendering the amount of UIM primary limits offered and taking an assignment of the rights against the tortfeasor). The Supreme Court found these arguments to be different from the ones made to the Superior Court, and to be insufficient to establish prejudice in this case.

See also *State Farm Ins. Co. v. Ridenour*, 435 Pa. Super. 463, 646 A.2d 1188 (1994), *appeal denied* 540 Pa. 585, 655 A.2d 516 (1994). The court in *Ridenour* held that exhaustion of underlying UIM coverage is not required to collect from the secondary UIM carrier. To the extent the claim exceeded the amount of the primary UIM coverage, the claimant could recover from the secondary policy, even though the claimant was barred from making any recovery against the primary UIM carrier because he failed to obtain that carrier's consent to settle with the tortfeasor.

However, the claimant need not exhaust claims against non-motor vehicle tortfeasors before making a UIM claim. *Kester v. Erie Ins. Exchange*, 399 Pa. Super. 206, 582 A.2d 17 (1990), *appeal denied* 527 Pa. 624, 592 A.2d 45 (1991). However, the UM/UIM carrier will be entitled to subrogate against even non-motor vehicle tortfeasors. *Travelers/Aetna Prop. Cas. Corp. v. Snell*, 1997 WL 88908 (E.D. Pa. 1997) (Aetna's assertion of subrogation rights against product liability and warranty claims as well as against motor vehicle tortfeasor was consistent with both the policy language and common law principles of subrogation and did not violate the MVFRL).

3. "Gap" provisions are not enforceable

A provision in a UIM policy that reduces the amount of available UIM coverage by the amount of liability coverage received is unenforceable, because it in effect converts UIM coverage to "gap" rather than "excess" coverage. *Allwein v. Donegal Mut. Ins. Co.*, 448 Pa. Super. 364, 671 A.2d 744 (1996), *appeal denied* 546 Pa. 660, 685 A.2d 541 (1996).

A provision in a non-stacking excess UIM policy that reduces the amount of excess UIM coverage by the amount of primary UIM coverage has also been found unenforceable on the basis that it also created "gap" coverage. *Generette v. Donegal Mut. Ins. Co.*, 598 Pa. 505, 957 A.2d 1180 (2008). In *Generette*, the claimant received \$50,000 in UIM benefits from the first level UIM policy and then sought an additional \$35,000 from her own non-stacking policy with Donegal. The Donegal policy contained an "other insurance" clause providing that if the claimant had already recovered UIM from a higher-priority policy, the claimant could still recover from the non-stacking policy, but only by the amount the non-stacking excess policy exceeded the amount collected from the source of first priority. The trial court ruled in favor of Donegal. A Superior Court panel initially ruled 2-1 to reverse, but on *en banc* reargument, the Superior Court affirmed the trial court 5-4. See 884 A.2d 266 (Pa. Super. 2005).

The Superior Court noted that only the Insurance Commissioner had directly dealt with the question, and had held that "Stacking coverage may be waived by the named insured, whether under a multiple or single vehicle policy." The majority found that both inter- and intra-policy stacking existed and could be waived, and that the waiver was implemented through the "other insurance" clause. The dissent argued that claimants such as Generette were not "insureds" as defined in §1702 of the statute, because the §1702 definition of "insured" did not

include guest passengers in non-owned vehicles. Therefore the concept of “stacking” or waiver thereof did not apply to them, and the “other insurance” clause, which reduced UIM recovery by the amount of prior UIM recovery, was akin to the “gap” provision invalidated in *Allwein*.

The Supreme Court majority (Justice Baer, joined by Chief Justice Castille, and Justices Todd and McCaffrey) adopted the approach of the Superior Court dissent. First, the Supreme Court agreed with claimant that the §1702 definition of “insured” was controlling: “While we defer in many respects to the views of the Insurance Commissioner in interpreting the MVFRL, we are bound to interpret the stacking waiver in Section 1738 to apply only to ‘insureds’ as defined by Section 1702, which does not include guest passengers.” Because guest passengers are not “insureds” under the host vehicle’s policy, they are not “stacking” coverage when going from the host policy to their own, and thus could not waive the right to “stack” their own coverage with the host vehicle’s policy. The Court acknowledged in a footnote that “Section 1733 suggests that guest passengers are covered by most insurance policies” but “we leave amendment of the MFVRL to the legislature to clarify what is required of insurers concerning guest passengers.”

The Court next considered whether the admittedly unambiguous “Other Insurance” clause prohibited claimant from recovering under the Donegal policy. Claimant argued that the clause violated the public policy requiring “excess” (as opposed to “gap”) UIM coverage as stated in *Allwein* (invalidating a clause that set off the amount of liability coverage from the amount of UIM coverage). The Court agreed that *Allwein* was not directly applicable because it did not involve two UIM policies, but held that the same reasoning should apply here because §1733 did not include language creating “gap” coverage. The Court disagreed that *Black* (discussed below, upholding a clause that set off the amount of liability coverage from the amount of UIM coverage under the same policy) was persuasive, because that case did not involve two UIM policies and thus did not implicate §1733. The Court further concluded that invalidating the “other insurance” clause would not violate the cost containment purpose of the MVFRL because it would only be implicated in cases where the claimant’s injuries exceeded both the tortfeasor’s liability coverage and the first priority UIM limits.

Justice Saylor wrote a concurring and dissenting opinion, joining in the majority’s holding concerning stacking, which he opined had limited application in light of the common use of household vehicle exclusions. With respect to the “other insurance” clause, Justice Saylor dissented. He opined that *Allwein* does not extend to the coordination of first- and second-priority UIM coverage. He next noted that in *Burstein*, the Court explained that §1733 does not extend UM/UIM coverage where it has been specifically excluded. He next stated that the courts do not have the ability to assess the cost impact of voiding the “other insurance” clause. Finally, he disagreed with the majority’s statement that the carrier would otherwise receive a “windfall,” since there was no evidence that Donegal’s premiums were not calculated based on its exposure with the “other insurance” clause in its policy.

Justice Eakin dissented, stating that claimant had a right to waive stacking of coverage from the policies, and as a class-one named insured, had waived that right under her policy. Justice Eakin noted that the Court in *Craley* had recognized the benefit of stacking for even single-vehicle insureds, and the right to waive that stacking. He also would not find the “other

insurance” clause void as against public policy. In *Black*, the Court had observed that it was “unclear” whether the MVFRL mandated offering UIM coverage to guest passengers. Thus, a violation of an expressed public policy was not apparent here. Moreover, the provision enabled Donegal to offer reduced premiums and furthered the cost-containment policy underlying the MVFRL.

4. Set-offs for liability and UM/UIM payments under the same policy are enforceable unless they prohibit any “dual recovery” of liability and UM/UIM

Provisions that require that the amount of damages payable under UM or UIM coverages be reduced (or "set off") by payments made under the liability coverage are valid and enforceable. *Pennsylvania National Mut. Cas. Co. v. Black*, 591 Pa. 221, 916 A.2d 569 (2007). Black was a passenger in a vehicle insured by Penn National, which was involved in an accident with a second vehicle. Black’s estate asserted that both drivers had been negligent, and sought the full \$100,000 limits of both liability and UIM coverage under the Penn National policy (for his own driver’s negligence and for the other driver’s negligence, for which the other driver had only \$15,000 in insurance), for a total of \$200,000 from Penn National.

Penn National filed a declaratory judgment action, asserting that its exposure for all claims arising out of Black’s death was limited to \$100,000 by virtue of a “setoff” clause in Penn National’s policy that reduced the limits of coverage “by any amount paid to the same person for the same accident under Part A [Liability Coverage] or Part C [Underinsured Motorist Coverage].” The Supreme Court held that the setoff provision did not violate public policy. The setoff clause was not contrary to the language of the MVFRL: §1731(a) mandated only the offer of UIM coverage, Penn National had complied with that requirement, the Blacks had not cited any statutory provision either establishing a minimum level of coverage the policy had to provide, or forbidding a setoff provision, and a similar clause, setting off UM coverage payments from liability coverage, had been part of the original standard UM coverage form issued by the Insurance Department, 31 Pa. Code §63.2.

The setoff clause also did not violate the “cost containment” public policy underlying the MVFRL. The clause was not an exclusion, but rather, an unambiguous cap on the limit of total recovery available, and enforcing it avoided “gratis coverage” and allowed customers to “weigh the benefits of increased coverage against the related premium increases.”

The Court distinguished *Cosenza* (discussed below), because the “dual recovery” provision that was rejected in *Cosenza* (a provision that prohibited any UIM recovery if the insured received even one dollar under the liability provision, was “readily distinguishable” from the setoff provision in *Black*, which “guarantees up to \$100,000 of coverage from whatever source to an insured injured in an accident regardless of the identity of number of negligent parties. If the [Penn National insureds] had desired \$200,000 of total coverage, they could have purchased that amount of bodily injury liability coverage and the commensurate amount of underinsured motorist coverage for a higher premium. They did not, however, and we will not rewrite the policy.”). See also *Nationwide Mut. Ins. Co. v. Brown*, 226 Fed.Appx. 153 (3d Cir. 2007)(the Third Circuit reached the same result in a memorandum opinion).

A similar set-off provision was upheld where the claimant was a “class one” insured. *Pempkowski v. State Farm Mut. Auto. Ins. Co.*, 451 Pa. Super. 61, 678 A.2d 398 (1996), *aff’d per curiam* 548 Pa. 23, 693 A.2d 201 (1997).

In *Bowersox v. Progressive Cas. Ins. Co.*, 781 A.2d 1236 (Pa. Super. 2001), *appeal denied* 569 Pa.714, 806 A.2d 857 (2002), a setoff provision was enforced where the host vehicle was insured under the same policy as one of the tortfeasor vehicles. The claimant in *Bowersox* was killed while occupying a vehicle operated by Heather Lyons; the accident was caused by the joint negligence of two *other* drivers, one of whom was Heather’s brother Joel, whose car was insured under the same policy as Heather’s car. Both tortfeasors’ liability limits were paid and the claimant/decendent sought UIM coverage under Heather’s policy. However, the policy contained an offset clause which reduced the available UIM coverage by the amount of liability payments (thus reducing the UIM coverage to zero). In upholding the setoff clause, the Superior Court rejected claims that the Lyons policy should be treated as two separate policies where two covered vehicles were involved, and held that the policy was not ambiguous and the result did not violate the public policy principles underlying the MVFRL. *See also Continental Ins. Co. v. Kubek*, 86 F. Supp. 2d 503 (E.D.Pa. 2000); *Jeffrey v. Erie Ins. Exchange*, 423 Pa. Super. 483, 621 A.2d 635 (1993) *appeal denied* 537 Pa. 651, 644 A.2d 736 (1994); *State Farm Mut. Auto. Ins. Co. v. Broughton*, 423 Pa. Super. 519, 621 A.2d 654 (1993), *appeal granted* 535 Pa. 638, 631 A.2d 1009 (1993). Thus, in a two-vehicle accident where both cars are allegedly at fault, a claimant who receives a liability payment under the host vehicle's policy will have to subtract that payment from any potential UM or UIM recovery under the same policy arising from the other vehicle's negligence. In *Pempkowski*, *Jeffrey* and *Broughton*, the host vehicle's liability limits were paid to the claimant-passenger, and therefore no "U" recovery was permitted. However, in *Kubek*, the carrier for the host vehicle (which was the insured claimant’s own vehicle in which he was a passenger) had made a relatively small liability payment to the claimant, and even after setting off that amount (which the claimant agreed was proper) there was ample UIM coverage available. Moreover, the car that was allegedly “underinsured” was not the car occupied by claimant, but rather, was the other car involved in the accident, and therefore the “family vehicle” exclusion which the carrier was relying upon was inapplicable.

A broader set-off provision (sometimes referred to as a “dual recovery” provision) that purported to prohibit *any* recovery of UIM benefits under the policy if the claimant made *any* recovery of liability benefits under that policy is invalid and unenforceable as contrary to the public policy underlying the MVFRL. *Nationwide Mut. Ins. Co. v. Cosenza*, 258 F.3d 197 (3d Cir. 2001). The claimants in *Cosenza* received some payment under the liability coverage of the car they occupied, but had not exhausted that coverage (the policy had high limits). The Third Circuit reasoned that upholding the “dual recovery” provision in a multiple-tortfeasor, multiple-policy situation would defeat the reasonable expectations of the insureds, would not serve to encourage the purchase of liability coverage (since this was not a situation where inexpensive UIM coverage was being converted into more expensive liability coverage), and would promote the goals of the MVFRL.

In *Bateman v. Motorists Mut. Ins. Co.*, 527 Pa. 241, 590 A.2d 281 (1991), a set-off provision was found to be ambiguous and therefore unenforceable. However, the provision in

that case purported to reduce amounts "otherwise" payable as UM/UIM recovery "by all sums paid...on behalf of persons or organizations who may be responsible." The court found that it was unclear whether the set-off was to be from the UIM limits or from total damages.

5. UIM carrier may set-off duplicative benefits received

The amounts of other benefits paid to the insured as damages arising out of the same injury may be set off against UIM recovery. *Tannenbaum v. Nationwide Ins. Co.*, 605 Pa. 859, 992 A.2d 859 (2010). The claimant in *Tannenbaum* was a physician who was rendered permanently disabled as the result of an automobile accident. He received a "substantial monetary settlement" from the tortfeasor. He also received Social Security disability benefits, income-loss benefits under a group plan provided by his hospital, and benefits under two personal disability policies. He sought further income-loss benefits under his UIM coverage with Nationwide; Nationwide argued that it was entitled under §1722 to set off the amount of disability benefits claimant received under the hospital and personal policies. The arbitrators agreed with Nationwide's position and offset the \$1.9 million award by nearly \$1 million in disability benefits paid under the hospital and personal policies. The trial court reversed, and the Superior Court affirmed the trial court.

The Supreme Court reversed. First, the disability benefits received by the claimant fell with the classification of a "program, group contract or other arrangement for payment of benefits" under §1722. The Court accordingly concluded that such benefits were subject to §1722's statutory offset. The Supreme Court distinguished its decision in *Panichelli v. Liberty Mut. Ins. Group*, 543 Pa. 114, 669 A.2d 930 (1996) (in which the Court held that social security and sick pay received by an insured claimant could not be deducted from the income loss benefits to be paid under §1712(2)), explaining that *Panichelli* was not a UM/UIM case and did not involve §1722, and expressly disapproving subsequent cases to the extent they had extended *Panichelli* contrary to the plain terms of §1722. The Court recognized the "very difficult policy questions posed" in attempting to reconcile the competing interests.

IX. SUBROGATION

1. Generally, duty exists to protect subrogation rights

A claimant's failure to file suit to protect the UM/UIM carrier's subrogation rights has been held to bar the claimant from making a claim for UM/UIM benefits. *Zourelis v. Erie Ins. Group*, 456 Pa. Super. 775, 691 A.2d 963 (1997), *appeal denied* 550 Pa. 721, 706 A.2d 1214 (1998). In *Zourelis*, the claimant's attorney failed to file a timely savings action against the tortfeasor. The claimant filed a malpractice action against his attorney and obtained a judgment in the amount of \$100,000. He then filed a declaratory judgment action against Erie seeking UM/UIM benefits. The Superior Court affirmed judgment in favor of Erie. The failure to timely sue the tortfeasor had destroyed Erie's subrogation rights and barred any UM/UIM claim against Erie. The fact that the claimant obtained a judgment against the attorney did not alter this result, because Erie's policy provided that it would be bound by a judgment against an uninsured or underinsured motorist only if that judgment was obtained with Erie's written consent. The

judgment against the attorney was obtained without Erie's written consent and therefore was not binding upon Erie.

A claimant is not obligated to file suit against any and all potential tortfeasors to preserve the right to make a UM claim. *Hagans v. Constitution State Service Co.*, 455 Pa. Super. 231, 687 A.2d 1145 (1997). In *Hagans*, the claimant sued both vehicle operators but did not sue the owner of the uninsured vehicle; the Assigned Claims Plan insurer denied that it owed benefits because claimant had not protected the Plan's subrogation rights under 75 Pa.C.S.A. §1756. The trial court granted the Plan's motion for summary judgment, but the Superior Court reversed. The court found under the circumstances that the claimant was not required to sue the owner of the uninsured vehicle to sustain her burden of proof under §1752 (relating to eligible claimants); moreover, it was the Plan/carrier's burden to show that evidence existed to support the owner's liability. The case was remanded to allow the parties to present facts proving or disproving the owner's potential liability.

Similarly, a claimant who has made a good faith effort to protect the Plan's subrogation rights is not barred from recovering UM benefits from the Plan. *Kiker v. Pennsylvania Financial Responsibility Assigned Claims Plan*, 742 A.2d 1082 (Pa. Super. 1999)(bike rider who was assisted after accident by unidentified tortfeasor motorist, who believed the tortfeasor would come to the hospital as requested, and who reported the accident to the police and described tortfeasor while at hospital, made good faith effort to protect Plan's subrogation rights); *McGee v. Pennsylvania Financial Responsibility Assigned Claims Plan*, 725 A.2d 1239 (Pa. Super. 1999)(where claimant notified Plan of proposed settlement with insured tortfeasor two months before execution of release, and Plan declined to take any action because of its position that claimant was not an eligible claimant for other reasons, claimant was not barred from obtaining UM benefits from the Plan).

2. Duty to obtain consent to settle in UIM situation exists but is subject to showing of prejudice

A claimant who settles the third-party claim without the UIM carrier's consent will still be entitled to pursue a UIM claim unless the carrier can demonstrate that its interests were prejudiced by the settlement. *Nationwide Mut. Ins. Co. v. Lehman*, 743 A.2d 933 (Pa. Super. 1999), *appeal dismissed* 565 Pa. 173, 772 A.2d 413 (2001). In *Lehman*, one tortfeasor's carrier offered its coverage limit two business days before trial; the claimant notified Nationwide of the offer the next day and requested Nationwide's consent. Nationwide advised that it needed to review its file, which was closed and in storage. The claimant settled without Nationwide's consent, released the tortfeasor, and sought UIM benefits. Nationwide filed a declaratory judgment action seeking a declaration that the UIM claim was barred. Nationwide argued that its failure to consent was justified because it had had insufficient time to evaluate its subrogation rights against the tortfeasor, and that the claim was barred by the violation of the policy's consent to settle clause. The trial court ruled against Nationwide, and the Superior Court affirmed. The Superior Court rejected Nationwide's argument that under *Daley-Sand* it was entitled to thirty days to evaluate the request to waive subrogation. The court in *Daley-Sand* affirmed the trial court's equitable thirty-day remedy but never adopted that period as a test to be used in every case. In this case, Nationwide had been aware of the potential for a UIM claim for

over a year before its consent was requested, and had done nothing to investigate the assets of the tortfeasor.¹¹

The Superior Court in *Lehman* further held that to deny UIM coverage based upon a violation of the consent to settle clause, the carrier must show that its interests were prejudiced. The court relied upon cases from other jurisdictions and upon a Pennsylvania case involving liability coverage, *Brakeman v. Potomac Ins. Co.*, 472 Pa. 66, 371 A.2d 193 (1977)(insurer not permitted to deny liability coverage despite late notice of accident where insurer could not demonstrate that it had been prejudiced by the late notice). In *Lehman*, Nationwide failed to show any genuine fact issue as to whether the settlement prejudiced it under the facts of that case.

Similarly, in *Cerankowski v. State Farm Mut. Auto. Ins. Co.*, 783 A.2d 343 (Pa. Super. 2001), *appeal denied* 568 Pa. 692, 796 A.2d 977 (2002), the Superior Court held that the carrier could not deny coverage based upon a violation of a consent-to-settle clause where the carrier did not demonstrate prejudice. In *Cerankowski*, the claimant made a UIM claim after exhausting the tortfeasor's liability coverage (\$250,000). The claimant also filed a product liability claim against a surgical equipment manufacturer and settled that claim for \$45,000. State Farm argued that this settlement violated the consent-to-settle clause of the policy, destroying its subrogation rights against the manufacturer. An arbitration panel ruled in favor of State Farm, but the trial court granted claimant's petition to vacate the arbitration award. The Superior Court affirmed, relying upon *Lehman* and rejecting the argument that *Lehman* applied only where there had been a settlement for the limits of available insurance.

One trial court has held that the *Lehman* requirement of showing prejudice applies only when the insurance carrier is aware of the claim and/or possible settlement. *Weichey v. Doerr*, PICS No. 01-0402 (C.P. Butler 2001). The claimant in *Weichey* sued her attorneys for malpractice because they settled her third-party claim without the consent of the UIM carrier and the UIM carrier then denied her claim. The attorneys defended on the basis of *Lehman*, arguing that the UIM carrier should not have denied because it had not demonstrated that its interests were prejudiced. The trial court denied the attorneys' motion for summary judgment, noting that

¹¹ Under prior law, if a claimant settled with and released the tortfeasor without the knowledge and consent of the UIM carrier, the claimant was barred from making a UIM claim. *Archer v. State Farm Ins. Co.*, 419 Pa. Super. 558, 615 A.2d 779 (1992), *appeal denied* 535 Pa. 612, 629 A.2d 1375 (1993); *State Farm Ins. Co. v. Ridenour*, 435 Pa. Super. 463, 646 A.2d 1188 (1994), *appeal denied* 540 Pa. 585, 655 A.2d 516 (1994). No showing of prejudice to the carrier was required. *Fisher v. USAA Cas. Ins. Co.*, 973 F.2d 1103 (3d Cir. 1992). A claimant who received a settlement offer from the tortfeasor's carrier was required to notify his UIM carrier, which then must either consent to the settlement and release (i.e., waive its subrogation rights) or else must itself pay the amount offered by the tortfeasor. *Daley-Sand v. West American Ins. Co.*, 387 Pa. Super. 630, 564 A.2d 965 (1989). A carrier that failed to follow this procedure could not later raise lack of consent to settle as a defense to the UIM claim. *Baith v. CNA Ins. Co.*, 406 Pa. Super. 84, 593 A.2d 881 (1991). Likewise, if the UIM carrier denied coverage or delayed "unduly" in responding to such a settlement request, it could not later rely on the consent to settle clause. *Fisher v. USAA*, supra; *Boyle v. Erie Ins. Co.*, 441 Pa. Super. 103, 656 A.2d 941 (1995), *appeal denied* 542 Pa. 655, 668 A.2d 1120 (1995) (company which failed to act for ten months after being asked to consent to settlement cannot raise consent clause as a defense to the UIM claim). See also *Sorber v. American Motorists Ins. Co.*, 451 Pa. Super. 507, 680 A.2d 881 (1996)(two months was sufficient time to respond to proposed settlement).

the UIM carrier had no knowledge of the claim or of a request to settle or waiver of subrogation, and therefore *Lehman* was not binding in the professional malpractice case.

3. Workers' comp carrier generally entitled to subrogate

General Rule: Subrogation is now authorized. The MVFRL as originally enacted, and as amended in 1990, prohibited recovery of, or subrogation against a claimant's tort recovery for, benefits paid or payable under workers' compensation law. 75 Pa. C.S.A. §§1720, 1722. However, these provisions were repealed as to workers' compensation claims effective August 31, 1993 ("Act 44"). The changes in §§1720 and 1722 apply only to accidents occurring after the effective date of the amendments. *Byard F. Brogan, Inc. v. W.C.A.B. (Morrissey)*, 161 Pa. Cmwlth. 453, 637 A.2d 689 (1994)(amendment to §1720 is a change to substantive rights and therefore must be applied prospectively); *Schroeder v. Schrader*, 453 Pa. Super. 59, 682 A.2d 1305 (1996) (amendment to §1722 is likewise substantive, not procedural, and therefore not retroactive). Even if the recovery was made after the date Act 44 became effective, the workers' compensation carrier is not entitled to subrogation if the accident happened before that date. *DePaul Concrete v. W.C.A.B.(White)*, 734 A.2d 481 (Pa. Cmwlth. 1999), *appeal denied* 753 A.2d 821 (Pa. 2000). *But see Updike v. W.C.A.B.(Yeager Supply, Inc.)*, 740 A.2d 1193 (Pa. Cmwlth. 1999) (subrogation permitted for pre-Act 44 forklift accident because forklift is not a "motor vehicle").

The Workers' comp carrier can subrogate against an employer or co-employee's policy, but not against a policy paid for by the employee:

The workers' compensation carrier is entitled to subrogate against UM/UIM benefits the employee obtains from a policy paid for by the employer. *City of Meadville v. W.C.A.B.(Kightlinger)*, 810 A.2d 703 (Pa. Cmwlth. 2002). The court quoted from *Gardner and Warner*, and concluded that it would be illogical to allow a claimant who recovered UM/UIM benefits from the employer's policy to be in a better position than the claimant who recovers directly from the third-party tortfeasor. However, where the workers' comp carrier (which was also the UIM carrier) had waived its lien as part of the compromise and release agreement ending the workers' comp claim, the employee/claimant was not entitled to introduce evidence of, or recover, the amount of the workers' compensation benefits. *Burke v. Erie Ins. Exchange*, 940 A.2d 472 (Pa. Super. 2007).

The workers' compensation carrier is also entitled to subrogate against recovery from another UM/UIM policy that was not paid for by either the employer or the employee. *Hannigan v. WCAB (O'Brien Ultra Service Station)*, 860 A.2d 632 (Pa.Cmwlth. 2004), *appeal denied* 582 Pa. 712, 872 A.2d 174 (2005). The employee in *Hannigan* was a mechanic injured while driving a customer's car. He received total disability benefits and also recovered UM benefits from the customer's policy. The Commonwealth Court affirmed that his workers' compensation carrier was allowed to subrogate against the UM recovery.

However, the workers' compensation carrier does not have a right to subrogate against UM/UIM recovery from a policy paid for by the employee. *American Red Cross v. W.C.A.B. (Romano)*, 745 A.2d 78 (Pa. Cmwlth. 2000), *aff'd per curiam* 564 Pa. 192, 766 A.2d 328

(2001)(no right of subrogation against UM benefits paid under employee's own policy paid for exclusively by the employee); *Entertainment Partners v. W.C.A.B.(Caparelli)*, 749 A.2d 551 (Pa. Cmwlth. 2000) *appeal denied* 566 Pa. 669, 782 A.2d 549 (2001) (same result regarding UIM benefits); *see also Standish v. American Mfrs. Ins. Co.*, 698 A.2d 599 (Pa. Super. 1997)(same result as *American Red Cross*, above; nothing in the 1993 revisions to the MVFRL had so broadened the scope of workers' compensation subrogation as to change the prior rule prohibiting subrogation against accident insurance purchased for the benefit of the insured rather than the tortfeasor, *citing Rhodes v. Automotive Ignition Co.*, 218 Pa. Super. 281, 275 A.2d 846 (1971)).

The employee may introduce and recover the amount of the comp benefits:

An employee may "plead, prove and recover" amounts paid by the workers' compensation carrier in a UM arbitration against his own carrier, even though the carrier is not entitled to subrogation and therefore the claimant does not have to pay the comp carrier back. *Ricks v. Nationwide Ins. Co.*, 879 A.2d 796 (Pa. Super. 2005), *appeal denied* 587 Pa. 698, 897 A.2d 459 (2006). Although the comp carrier did not have subrogation rights against recovery under an employee's personal policy despite the language of §1720 (*citing Standish and Red Cross*, above), the lack of subrogation did not alter the language of amended §1722, which allowed the recovery of the benefits in the UM/UIM proceeding. Because the arbitrators refused to allow this evidence and thus "refused to hear evidence material to the controversy," the Superior Court reversed and remanded with instructions to vacate the award pursuant to 42 Pa.C.S. §7314(a)(iv), and have a new panel convened to hear the case *de novo*.

Heart and Lung benefits are not entitled to the same treatment as workers' comp benefits.

The repeal of the MVFRL subrogation provisions does not apply to benefits paid under the Heart and Lung Act ("HLA"). *Oliver v. City of Pittsburgh*, 608 Pa. 386, 11 A.3d 960 (2011). The HLA provides lost wages and medical benefits to certain public employees, such as police and firefighters, who face significant risks in the ordinary course of their professions. The claimant in *Oliver* was a Pittsburgh police officer who was injured in a work-related motor vehicle accident. The City paid HLA benefits, and sought to recover those benefits through subrogation against the claimant's third-party recovery. The Commonwealth Court held that subrogation was permitted in accordance with the 1993 changes to the MVFRL, expressly reaffirming its prior decision in *Brown v. Rosenberger*, 723 A.2d 745 (Pa. Cmwlth. 1999)(equating HLA benefits with workers comp benefits for purposes of subrogation and pleading under 1720 and 1722, and accordingly permitting subrogation for benefits paid to state trooper). The Supreme Court reversed, holding that Section 25(b) of Act 44 reinstated an employer's right of subrogation with respect to workers' compensation benefits in motor vehicle accident cases, but did not reinstate a subrogation right for HLA benefits in such cases despite having made many other "specific refinements" to the MVFRL. Other aspects of the HLA's treatment of public-safety employees who are temporarily disabled is more favorable than workers compensation, which "suggests against treating an overlap [between WC and HLA] as

an equivalency.” Thus, the anti-subrogation mandates as to HLA benefits remain in effect, and the City was not entitled to subrogate against the claimant’s third-party recovery.¹²

4. Other subrogation rights may exist

There are two other circumstances where subrogation may be permitted despite the language of §1720 (as amended). First, federal preemption may apply. Section 1720 is preempted by ERISA with respect to payments made pursuant to self-funded ERISA plans. *FMC Corp. v. Holliday*, 498 U.S. 52 (1990). Accordingly, such a plan is entitled to "subrogation" reimbursement for benefits paid. Section 1722 is likewise preempted by ERISA, so that the bills in question can be recovered from the tortfeasor. *Travitz v. Northeast Dept. ILGWU Health and Welfare Fund*, 13 F.3d 704 (3d Cir. 1994). Thus, the claimant in *Travitz* was required to reimburse her ERISA plan for medical benefits paid to her even though she argued that she had never recovered those bills from the tortfeasor, but had merely received a settlement for her pain and suffering.

Second, another jurisdiction's law permitting subrogation may be applicable. *See, e.g., Davish v. Gidley*, 417 Pa. Super. 145, 611 A.2d 1307 (1992) (employee of New Jersey company collected New Jersey compensation benefits after Pennsylvania accident; at the time of the accident, Pennsylvania law prohibited subrogation in workers’ compensation cases but New Jersey permitted it; after conflicts analysis, Superior Court held that New Jersey law permitting subrogation should apply). Again, if subrogation is permitted despite §1720, recovery of the benefits in question should also be permitted despite §1722. *See Davish*, 611 A.2d at 1310; *Cf. Travitz, supra*.

X. STATUTES OF LIMITATIONS

1. UM

A UM or UIM claim is a contract action and the contract statute of limitations governs. *Boyle v. State Farm Mut. Ins. Co.*, 310 Pa. Super. 10, 456 A.2d 156 (1983); 42 Pa. C.S.A. §5525 (four year statute of limitations for contract actions). The limitations period begins to run when (1) the insured is in a motor vehicle accident; (2) the insured sustains bodily injury as a result of the accident; and (3) the insured knows of the uninsured status of the other owner or operator. *Boyle, supra*. Knowledge of uninsured status is measured by an objective standard, *i.e.*, the statute begins to run when the individual knows, or reasonably should have known, of the tortfeasor’s uninsured status. *Seay v. Prudential Prop. & Cas. Ins. Co.*, 375 Pa. Super. 37, 543 A.2d 1166 (1988); *Clark v. State Farm*, 410 Pa. Super. 300, 599 A.2d 1001 (1991) (where UM claim was made four years and eighteen days after the accident, Superior Court remanded for a determination of when claimant knew or should have known of the tortfeasor’s uninsured

¹² The Third Circuit enforced subrogation in *In re: Cole*, 323 Fed. Appx. 109 (3d Cir. 2009). The claimant in *Cole* was a City of Wilkes-Barre police officer who collected HLA benefits for nine years after a work-related car accident. The third-party claim settled for \$495,000; the City sought subrogation for the nearly \$426,000 in HLA benefits it had paid Cole. The Third Circuit held that HLA benefits were equivalent to workers’ compensation benefits for purposes of the 1993 amendments to §§ 1720 and 1722, so Cole was allowed to recover the amounts paid as HLA benefits in his third-party case, and the city could assert a right of equitable subrogation against that recovery. The Third Circuit relied on *Brown v. Rosenberger* and thus is no longer persuasive.

status; trial court found that eighteen days was not an unreasonable period of time under the circumstances, so the UM claim was timely. *Clark*, C.P. Phila. January Term, 1990, No. 4461 (Opinion of Lehrer, J., September 24, 1992). See also *Walker v. Providence Ins. Co.*, 1998 WL 54401 (E.D. Pa. 1998)(discussed further below).

2. UIM

The Third Circuit, predicting how the Pennsylvania Supreme Court would rule, held that the UIM statute of limitations does not begin to run until the insured settles with, or obtains an award from, the adverse driver for less than the value of his damages. *State Farm Mut. Auto. Ins. Co. v. Rosenthal*, 484 F. 3d 251 (3d Cir. 2007). The accident in *Rosenthal* occurred on June 6, 1998. The claim against the tortfeasor was settled in July 2003, and claimant advised State Farm of his intention to pursue a UIM claim. State Farm consented to the settlement, and correspondence was exchanged between claimant and carrier until July 22, 2004, when claimant demanded arbitration. The carrier responded by filing a declaratory judgment complaint in March 2005, seeking a declaration that the action was barred by the four-year statute of limitations on contract actions.

The district court granted claimant's motion to dismiss, holding that the cause of action accrued in March 2005 with the filing of the declaratory judgment complaint, and thus the statute of limitations had not expired. The court noted that this holding would not allow an insured to unreasonably delay a claim and allow it to become "stale", because the insurer could compel arbitration and could deny UIM coverage if it was prejudiced by the late notice.

On appeal, the Third Circuit affirmed, but on a different basis. The Third Circuit noted that no Pennsylvania state court had ruled on this issue, but that Pennsylvania decisions on the UM statute of limitations held that the four-year statute begins to run when the right to payment of a benefit accrues (citing *Clark*, *Seay* and *Boyle*, above). The Third Circuit further cited the district courts' opinions in *Wheeler v. Nationwide Mut. Ins. Co.*, 749 F.Supp. 660 (E.D. Pa. 1990) (applying the UM criteria to a UIM situation and concluding that the statute of limitations did not begin to run until the UIM claimant settled with or obtained a judgment against the underinsured driver) and *Motorist Mutual Ins. Co. v. Durney*, 2005 U.S. Dist. LEXIS 33752 (E.D. Pa. 2005)(statute of limitations for UIM claim did not accrue until the contract was breached when the insurer denied the UIM claim, which in that case was when the carrier filed a declaratory judgment action).

The Third Circuit also reviewed the Superior Court's decisions in *Harper v. Providence Washington Ins. Co.*, 753 A.2d 282 (Pa. Super. 2000)(allowing UIM claim to proceed prior to conclusion of third-party claim) and *Krakower v. Nationwide Mut. Ins. Co.*, 790 A.2d 1039 (Pa. Super. 2001) (upholding UIM arbitration award even though claimant subsequently lost third-party case). These cases held that the insured *may* pursue the UIM claim immediately after the accident, as the right to the benefit had "vested," but did not hold that the claimant *must* pursue the claim at that time.

The Third Circuit accepted the claimant's argument that the statute begins to run when the insured with settles his claim with, or obtains an award from, the underinsured driver. The

court found that this approach was supported by Pennsylvania UM case law, would “harmonize” the approach to UM and UIM claims, was “practical” in giving the insured time to assess his damages and learn the tortfeasor’s policy limits, and would eliminate the need to prematurely file UIM claims to protect the insured’s rights.

3. Excess UM

Another district court analogized to *Wheeler* in applying the “knew or should have known” standard to an excess UM claim. In *Boyce v. St. Paul Fire & Marine Ins. Co.*, 1993 WL 175371 (E.D. Pa. 1993), the accident occurred on February 3, 1986. A petition seeking to appoint arbitrators on an alleged excess UM policy was filed on October 13, 1992, after receiving the policy limits in arbitrations on two different underlying policies (the most recent of which concluded August 14, 1992). The court held that the four year statute would not begin to run until the claimants knew or should have known that the primary UM coverage would not fully cover their claims. The court could not tell from the record when this would have occurred, but speculated that it would have been no earlier than the date of the first arbitration (December 20, 1990).

4. Protecting the statute

Practice note: The below cases were governed by pre-Koken law, with policies that included arbitration provisions.

In policies with UM/UIM arbitration provisions, the claimant must file a timely petition to compel arbitration to protect the statute of limitations. Written notice to the carrier is not sufficient (absent agreement from the carrier).

In *Liberty Mut. Ins. Co. v. Weisbaum*, 2011 U.S. Dist. LEXIS 114825 (E.D. Pa. October 5, 2011) (claimant’s letter putting carrier on notice of possible UM/UIM claim did not toll statute; even though claimant and carrier appointed arbitrators, claimant “never filed a petition to compel appointment of arbitrators or other legal proceeding against Liberty Mutual” and appointment of arbitrators did not give rise to an inference of making a demand for arbitration, citing *Walker*); *Walker v. Providence Ins. Co.*, 1998 WL 54401 and 1998 WL 195652 (E.D. Pa. January 30, 1998 and April 2, 1998), *aff’d* 173 F.3d 422 (table)(3d Cir. 1998) (letter to carrier appointing arbitrator and asking carrier to appoint arbitrator, sent within four years of accident with phantom vehicle, did not toll statute, and petition filed several months later was untimely. Carrier had no record of alleged conversation advising Plaintiff’s counsel advising that a defense arbitrator would be appointed and the matter forwarded to counsel, and such conversation would not be sufficient to estop the carrier from raising the statute of limitations defense); *Buhl v. Allstate*, No. 98-08114 (C.P. Chester 2000) (petition filed four and one-half years after settlement of the underlying tort claim was untimely; statute was not tolled by carrier’s consent to settlement with tortfeasor, by settlement offer from carrier, or by claimant’s subsequent submission of medical bills. The four year statute began to run when the underlying claim was settled, and the communication and settlement negotiations did not toll the statute of limitations despite claimants’ argument that they had been misled into believing that settlement negotiations were ongoing).

XI. ARBITRABILITY

1. Arbitration not mandated

The Insurance Commissioner does not have the power to require mandatory binding arbitration clauses in UM/UIM policies. *Insurance Federation of Pennsylvania, Inc. v. Commonwealth of PA., Dept. of Ins. (Koken)*, 585 Pa. 630, 889 A.2d 550 (2005). The *Koken* case arose out of a proposed policy change by Liberty Mutual in 1996 that would have eliminated the arbitration provision in its policy. The Insurance Department rejected the change on the basis that it would have violated 31 Pa. Code §63.2 as to UM coverage. Section 63.2(c) of that regulation included a sample UM policy form with mandatory arbitration language.

The Insurance Federation of Pennsylvania then filed a petition for declaratory judgment with the Insurance Department, seeking a declaration that the Insurance Department did not have the authority to require mandatory arbitration of UM/UIM claims. In July 2001, the Commissioner issued a declaratory opinion and order that the Department did have that authority. The Department appealed to the Commonwealth Court, which affirmed based on its 1986 decision in *Prudential Prop. and Cas. Ins. Co. v. Muir*, 513 A.2d 1129 (Pa. Cmwlth. 1986)(upholding the Department's refusal to approve Prudential's "voluntary" arbitration language).

The Supreme Court granted allowance of appeal and reversed. The Court noted the *Muir* court's reference to the interest in providing speedy recovery to innocent victims, but "[T]he public policy underlying the enactment of the MVFRL does not create an implied legislative mandate allowing the Insurance Department to change the normal course of judicial proceedings simply because arbitration is less costly and less time-consuming than traditional litigation."

The Court noted that a government official or administrative agency may be given authority as to rules and regulations regarding details for implementation of a statute, but could not be delegated the power to create substantive provisions, *i.e.*, make law. Because the MVFRL and UM Act did not contain substantive provisions requiring mandatory binding arbitration, the Insurance Department did not have the authority to require it. *See also Amber-Messick v. Progressive Ins.*, 2005 U.S. Dist. LEXIS 13100 (E.D. Pa. 2005)(upholding Progressive's policy provision that required arbitration only if both parties agreed to it; the Insurance Department "may" disapprove automobile insurance policies that do not require arbitration of UIM disputes, but it was not required to do so. Progressive's policy had been approved by the Insurance Department and was enforceable).

2. Arbitration clauses vary significantly

Practice note: The below cases predated the Koken case, discussed below. Their continued applicability must be determined on a case-by-case basis in light of the post-Koken language of particular policies.

Arbitration is a matter of contract. In general, under Pennsylvania law, arbitration agreements are to be strictly construed and not extended by implication; however, when the parties have a clear agreement to arbitrate, arbitration will be favored unless the dispute in question clearly does not fall within the arbitration clause. *Midomo Co. Inc. v. Presbyterian Housing Development Co.*, 739 A.2d 180 (Pa. Super. 1999). A court faced with a request to compel arbitration is limited to two inquiries: (1) whether the parties entered into an agreement to arbitrate, and (2) whether the dispute at issue falls under the agreement. *Nationwide Ins. Co. v. Patterson*, 953 F.2d 44 (3d. Cir. 1991); *Flightways Corp. v. Keystone Helicopter Corp.*, 459 Pa. 660, 331 A.2d 184 (1975). See 42 Pa. C.S.A. §7304(a),(e)(statutory arbitration); 42 Pa. C.S.A. §7342(a)(making certain statutory arbitration provisions, including §7304, applicable to common law arbitration).

Thus, where an arbitration clause is included in the contract, the issue will be whether the arbitration language of the particular policy mandates arbitration of the particular dispute in question. See *Borgia v. Prudential Ins. Co.*, 561 Pa. 434, 750 A.2d 843 (2000) (where Prudential's arbitration clause stated merely "if [Prudential] and a covered person disagree on policy coverages or amounts payable, either party may make a written demand for arbitration," determination of "covered person" status was subject to arbitration; Prudential's language was ambiguous in this regard and was interpreted against Prudential); *Nationwide Mut. Ins. Co. v. Wisniewski*, 2006 U.S. Dist. LEXIS 54669 (M.D. Pa. 2006)(although the Nationwide policy language at issue excluded coverage issues from arbitration, the question of whether the tortfeasor's vehicle constituted an "underinsured vehicle" under the policy was subject to arbitration, because it was a question of whether there was a legal right to recover damages from the owner or driver of an underinsured vehicle beyond what had already been obtained in a third-party arbitration); *Hartford Ins. Co. of the Midwest v. Altomare*, 220 F. Supp. 2d 410 (E.D. Pa. 2002)(issue of whether UIM claim was premature was arbitrable where policy did not contain limiting language of the type found in *Coviello* (discussed below)); *York Ins. Co. v. Hill*, 2001 WL 793236 (E.D. Pa. 2001)(issue of whether claimants were occupants of insured vehicle so as to qualify for coverage was arbitrable where policy did not contain limiting language of the type found in *Coviello*); *Old Guard Ins. Co. v. Urbano*, PICS # 030161 (C.P. Lancaster 2003) (arbitration clause did not contain the type of limiting language found in *Coviello* or *Henning*, and therefore a claim for increased limits of UIM coverage was arbitrable).

Conversely, where the arbitration clause provides for arbitration only of "fault" and "amount", questions of policy coverage are not arbitrable. *State Farm Mut. Auto. Ins. Co. v. Coviello*, 233 F. 3d 710 (3d Cir. 2000); *Henning v. State Farm Mut. Auto. Ins. Co.*, 795 A.2d 994 (Pa. Super. 2002), *appeal denied*, 570 Pa. 687, 808 A.2d 572 (2002). The Third Circuit found State Farm's clause to be in "stark contrast" to the clause in *Brennan*, which placed no limits on the jurisdiction of the arbitrators. Accordingly, State Farm was not required to arbitrate the issue of whether a family vehicle exclusion in its policy was valid and enforceable. The Superior Court reached the same conclusion regarding State Farm's policy language in *Henning*. The issue in *Henning* was the validity of a "named driver exclusion" in State Farm's policy. The Superior Court quoted with approval from *Coviello* and concluded, "We have no hesitation in concluding that the arbitration clause is limited to the two issues expressly set forth under the terms of the policy and thus is inapplicable to the present dispute between the parties." *Cf. St. Paul Fire & Marine Ins. Co. v. Rhein*, 484 F. Supp. 2d 354 (E.D. Pa. April 25, 2007)(policy's

arbitration language applied only to “fault” and “amount” and did not apply to disputes regarding whether a claim was covered under the policy); *State Farm Mut. Auto. Ins. Co. v. Hughes*, 2005 U.S. Dist. LEXIS 37546 (E.D. Pa. 2005)(determination of amount of coverage available under the policy was not subject to arbitration under State Farm’s “fault and amount” language); *State Farm Mut. Auto. Ins. Co. v. Walko*, 263 F.3d 160 (3d Cir. 2001)(reversing 103 F. Supp. 2d 826 (M.D. Pa. 2000), in which the district court granted a motion to dismiss a declaratory judgment action in a case involving the validity of UM/UIM coverage selection forms); *State Farm Ins. Co. v. Baumert*, 2001 WL 964150 (E.D. Pa. 2001)(denying motion to dismiss declaratory judgment action involving issue relating to UM/UIM coverage selection forms); *Johnson v. Allstate Ins. Co.*, 2011 Phila. Ct. Com. Pl. LEXIS 138 (C.P. Phila. 2011) (Petition to compel appointment of arbitrators denied where the issue was whether coverage had been properly rejected; the UIM provision stated that arbitrators would be selected if the parties did not agree on the insured person’s right to receive damages or the amount of damages, but also stated that “The arbitrators will not have the power to decide any dispute regarding the nature or amount of coverage provided by the policy”); *GMAC Ins. Cos. v. Whitmore*, 2005 Phila. Ct. Com. Pl. LEXIS 64 (C.P. Phila. 2005)(overruling claimants’ preliminary objections to declaratory judgment action, because policy limited arbitration to questions of fault and amount and did not require arbitration of disputes over coverage); *Prudential Prop. and Cas. Ins. Co. v. Hasson*, 50 Pa. D. & C.4th 435 (C.P. Delaware 2001) (arbitration clause clearly reserved for the court questions of coverage and eligibility to make a claim).

If an issue falls within an arbitration agreement, the court may not exercise jurisdiction over it even if it appears clear that the claim will ultimately fail. *Messa v. State Farm Ins. Co.*, 433 Pa. Super. 594, 641 A.2d 1167 (1994). In *Messa*, the trial court denied claimant's petition to compel arbitration because the claim was barred by the statute of limitations. The Superior Court reversed, holding that the statute of limitations issue fell within the scope of the parties' arbitration agreement and therefore had to be submitted to the arbitrators. See also 42 Pa. C.S.A. §7304(e)(providing that a court ruling upon a petition to compel or stay arbitration is not to examine the merits of the claim).

Any ambiguity in the arbitration agreement is resolved against the drafter, *i.e.*, the insurance carrier. Once it is determined that a substantive dispute is arbitrable, the arbitrators normally have the authority, unless restricted by the submission, to decide all matters necessary to dispose of the claim. *Brennan v. General Accident Fire and Life Assur. Corp., Ltd.*, 524 Pa. 542, 574 A.2d 580 (1990)(common law arbitration). A policy provision requiring "insureds" to submit to arbitration is binding upon all persons claiming under the policy, whether or not the claimant is a party to the insurance contract. *Johnson v. Pennsylvania National Ins. Cos.*, 527 Pa. 504, 594 A.2d 296 (1991) (passenger in insured taxicab is bound by arbitration provision).

Conversely, if the policy as written does not contain an arbitration clause, the court will not compel arbitration. *McFarley v. American Indep. Ins. Co.*, 444 Pa. Super. 191, 663 A.2d 738 (1995) (passenger and driver of insured taxicab, the owner of which had waived UM coverage, were not entitled to arbitrate their claims). See also, *e.g.*, *United Services Auto Ass'n v. Shears*, 692 A.2d 161 (Pa. Super. 1997) (Virginia policy contained no arbitration clause and did not cover plaintiff-pedestrian as an insured for UM coverage in any event. *But see Windsor*

Group v. Bocci, No. 99-CV-4092 (E.D. Pa. 2000)(claimants permitted to arbitrate UM claims despite carrier's assertion that the insured had waived UM coverage).

In *Neuhard v. Travelers Ins. Co.*, 831 A.2d 602 (Pa. Super. 2003), the policy contained an arbitration provision for UM claims, but did not contain any arbitration provision relating to UIM claims. The Superior Court reversed the trial court's order granting claimant's petition to compel arbitration. The trial court relied upon a Declaratory Opinion and Order from the Insurance Commissioner dated July 16, 2001, in which the Insurance Commissioner ruled that binding UM and UIM provisions were required in all insurance policies. However, the accident in question occurred on December 19, 1999. The Superior Court explained, "A regulation promulgated by an administrative agency shall not be construed to have a retroactive effect unless it was clearly and manifestly intended to be so applied." *Id.*, slip op at 8. The Insurance Commissioner's ruling did not state that it was to be applied retroactively, and thus, Travelers was not compelled to arbitrate Neuhard's UIM claim. *Cf. Popelas v. Travelers Ins. Co.*, PICS # 03-0947 (C.P. Fayette, June 6, 2003) (same).

3. Exceptions to arbitration clauses

a. Enforceability of policy provisions

Where the issue is whether a particular policy provision is enforceable, *i.e.*, whether it is contrary to a constitutional legislative or administrative mandate or "public policy," many cases have held directly or indirectly that the issue is properly for the courts and not arbitrators, despite the presence of an arbitration agreement. Such declaratory judgment actions have been approved whether filed by the carrier directly (*see, e.g., Erie Ins. Exchange v. Danielson*, 423 Pa. Super. 524, 621 A.2d 656 (1993)), or by the carrier in response to attempts to compel arbitration (*see, e.g., Warner v. Continental/CNA Ins. Cos.*, 455 Pa. Super. 295, 688 A.2d 177 (1996), *appeal denied* 548 Pa. 660, 698 A.2d 68 (1997), *Windrim v. Nationwide Ins. Co.*, 537 Pa. 129, 641 A.2d 1154 (1994); *Jeffrey v. Erie Ins. Exchange*, 423 Pa. Super. 483, 621 A.2d 635 (1993) (*en banc*), *appeal denied* 537 Pa. 651, 644 A.2d 736 (1994); *Clark v. State Farm Auto Ins. Co.*, 410 Pa. Super. 300, 599 A.2d 1001 (1991)), or by the claimants (*see, e.g., Kester v. Erie Ins. Exchange*, 399 Pa. Super. 206, 582 A.2d 17 (1990), *appeal denied* 527 Pa. 624, 592 A.2d 45 (1991))

b. No issues to be arbitrated

The trial court should exercise jurisdiction over a declaratory judgment action where there are no issues to be arbitrated. *Federal Kemper Ins. Co. v. Wales*, 430 Pa. Super. 208, 633 A.2d 1212 (1993). The claimant in *Kemper* was barred by the exclusivity provision of the workmen's compensation law from suing her co-employee; she then claimed that the co-employee was "uninsured" because she could not recover from him. The trial court dismissed Kemper's declaratory judgment action on the basis that the issue was arbitrable. The Superior Court reversed, holding that where it was undisputed that the tortfeasor had insurance, and there was no ambiguity in the policy to be interpreted, "there is no issue to submit to arbitration." The trial court was directed to reach a conclusion on the merits of the declaratory judgment action. *See also United Services Auto Ass'n v. Shears*, *supra* (Superior Court reversed the trial court's

Order compelling USAA to arbitrate a pedestrian's UM claim, because the Virginia policy clearly did not provide coverage to the pedestrian).

c. Waiver of arbitration

A party may be deemed to have waived the requirement that a claim be arbitrated. Such a waiver may be express or by implication; waiver by implication requires conduct inconsistent with an intention to exercise a right to arbitration. Compare *Globe Indemnity Co. v. Derevjanik*, 1997 WL 397483 (E.D. Pa. 1997)(no implied waiver) with *State Farm Mut. Auto. Ins. Co. v. Gilroy*, 1994 WL 719628 (E.D. Pa. 1994) (right to arbitrate deemed waived). Where the claimants waited until the summary judgment stage of a declaratory judgment action to assert that the claim should be arbitrated, they had waived that right. *St. Paul Mercury Ins. Co. v. Perry*, 227 F.Supp. 2d 430 (E.D. Pa. 2002).

4. Related coverage, third-party or bad faith claims

a. A related declaratory judgment proceeding may not stay arbitration

The fact that a declaratory judgment action is already pending does not necessarily prevent arbitration from proceeding. *Bottomer v. Progressive Cas. Ins. Co.*, 816 A.2d 1172 (Pa. Super. 2003), *appeal dismissed as moot* 580 Pa. 114, 859 A.2d 1282 (2004). In *Bottomer*, the carrier filed a declaratory judgment action, seeking a declaration enforcing the family vehicle exclusion in its policy. The claimant then filed a petition to compel arbitration; the trial court granted the carrier's preliminary objections to the petition on the theory that the declaratory judgment action was a "prior pending action". The Superior Court reversed, holding that a declaratory judgment action could proceed simultaneously with an arbitration proceeding where the agreement provided for arbitration under the Act of 1927. The court reasoned that this would actually expedite the resolution of the case, because legal issues decided at arbitration would always, under Act of 1927 arbitration, be subject to review by the court. Also, the result of the declaratory judgment action would not necessarily decide the arbitration issues. Moreover, the trial court's dismissal of the arbitration proceeding, even though it was without prejudice, could have created statute of limitations problems if arbitration were ultimately needed. The Supreme Court granted Progressive's petition for allowance of appeal, but then dismissed the appeal as moot because the declaratory judgment proceeding had by that time been resolved in favor of Progressive.

However, where the federal declaratory judgment proceeding has progressed farther than the state court proceeding, and where the issues were legal issues which under the policy had to be decided as a matter of law in any event, the state court UIM proceeding would be stayed. *Motorists Mut. Ins. Co. v. Musto*, 2006 WL 335408 (M.D. Pa. 2006).

b. The UIM case may proceed before the third-party case

The UIM claim can proceed before the underlying liability claim settles or proceeds to trial. As long as the UIM carrier is given credit for the full underlying limits, the carrier cannot

prevent the UIM claim from proceeding even though the underlying claim is still pending. Moreover, the arbitration award will not be vacated even if it is inconsistent with the actual result of the third-party claim. *Krakower v. Nationwide Mut. Ins. Co.*, 790 A.2d 1039 (Pa. Super. 2001), *appeal denied* 805 A.2d 524 (Pa. 2002).

In *Krakower*, the claimant demanded UIM arbitration while the suit against the tortfeasor was pending. The hearing proceeding over the carrier's objection, and the arbitrators entered an award, allowing credit for the tortfeasor's underlying limits. The award provided that Nationwide had no obligation to make any payment until the claim against the tortfeasor was resolved and concluded by payment of any settlement or judgment. The trial against the tortfeasor resulted in a defense verdict. Nationwide then petitioned to vacate the arbitration award on several bases, one of which was that the arbitrators erred in permitting the UIM claim to proceed before resolution of the tort action. The trial court granted Nationwide's motion, holding that the UIM claim had been premature and that allowing it to proceed "merely gave rise to inconsistent results." The Superior Court reversed, holding that the arbitrators had not committed an error of law in allowing the arbitration to proceed, and that postponing arbitrations until the third-party action was concluded "would be contrary to the social policy behind arbitration, which is to provide quick dispute resolution and prompt compensation for injured claimants." The Superior Court did direct the trial court to consider Nationwide's other arguments (the trial court had not reached those arguments in light of its ruling on the "premature" argument.) *See also Harper v. Providence Washington Ins. Co.*, 753 A.2d 282 (Pa. Super. 2000) (where the UIM carrier was credited with the full amount of the tortfeasor's liability limits, carrier was not prejudiced by the arbitration panel's refusal to postpone the arbitration until the third-party action was concluded).

Moreover, in the post-*Koken* era, the claims against the tortfeasor and the UIM carrier have in some cases been joined. *See* Section XV, below.

c. UIM Recovery may reduce third-party recovery

Following the *Krakower* decision (discussed above), UIM claims have frequently proceeded to resolution prior to resolution of the underlying third-party claim. The Superior Court has very recently reversed an earlier case that required the third-party recovery to be reduced by the UIM recovery.

In *Pusl v. Means*, 982 A.2d 550 (Pa. Super. 2009), *appeal denied* 991 A.2d 313 (Pa. 2010), the Superior Court held that a jury verdict against the third-party tortfeasor was properly molded to *decrease* the judgment against the tortfeasor by the amount the claimant had already received from his UIM carrier. The UIM limits in *Pusl* were \$75,000, and Pusl settled his UIM claim in exchange for payment of those limits while his third-party claim was still pending. The third-party case proceeded to trial and result in a jury verdict of \$100,000 (the jury was not aware of the UIM payment). The tortfeasor filed a post-trial motion to amend his new matter to raise the right to an offset, and to mold the verdict to \$25,000 (*i.e.*, subtracting the \$75,000 in UIM recovery), which was granted by the trial court.

The Superior Court affirmed, discussing "two public policies regarding awards for damages": the policy against a person recovering twice for the same injury, and the policy that a

tortfeasor should be liable for the damages he caused. With respect to the first policy, the court cited §1722 for the proposition that the legislature intended to prevent the recovery of “first party” benefits in a “third party” action; the Court stated that UIM benefits were “first party” benefits within the purview of §1722 because they were paid from her personal insurance policy with State Farm. With respect to the second policy, “Courts may exercise their equitable powers by reducing a verdict to reflect the difference between a jury's verdict and excess insurance benefits already paid to a plaintiff” (citing *Johnson v. Beane*, 541 Pa. 449, 664 A.2d 96 (1995) and *Shankweiler v. Regan*, 60 Pa. D. & C. 4th (C.P. Delaware 2002)). The record did not reflect any attempt by State Farm to pursue subrogation, but the Superior Court noted that “[Tortfeasors] are still liable for the additional \$75,000, but instead of being directly liable to [Pusl], [tortfeasors] would be liable to the subrogee State Farm for its payment of UIM benefits by way of a subrogation claim for the amount it paid to [Pusl].”

The Superior Court sitting *en Banc* has now reached the opposite result. *Smith v. Rohrbaugh*, 2012 PA Super 208, __A.3d__ (September 28, 2012). In *Smith*, the claimant settled his UIM claim for \$75,000 and proceeded to trial against the tortfeasor. The jury awarded a total of \$50,036. The tortfeasor filed post-trial motions asking the trial court to mold the verdict to zero in accordance with *Pusl*, and the trial court agreed.

The Superior Court *en Banc* panel reversed, overruling *Pusl*. The Court held that *Pusl* was “wrongly decided.” The *Pusl* decision incorrectly equated UIM benefits with the type of first-party benefits as to which §1722 prohibits double recovery. In fact, UIM benefits are not “required benefits” within the meaning of §1722, and adding UIM benefits to the list of benefits specifically designated by the legislature “would usurp the legislature’s power and improperly rewrite the statute.” UIM benefits are found in Subchapter “C” of the MVFRL; §1722 is found in Subchapter “B” and §1722’s references to coverages available “under this subchapter” cannot rationally include coverage found in Subchapter “C.” In a concurring opinion, Judge Wecht opined that the trial court’s interpretation of §1722 “would lead to the absurd, and indeed incoherent, result that UIM benefits must be used to offset UIM claims.” Judge Wecht concluded: “We cannot interpret a statute in such a way that it eats its own tail.”

5. Venue (arbitration case)

A petition to appoint arbitrators and compel arbitration is properly filed in the county where the claimant resides, even if the named insured resides elsewhere. *Conway v. United States Fidelity and Guaranty Company*, 447 Pa. Super. 236, 668 A.2d 1165 (1995). In *Conway*, the named insured resided in Perry County; the injured claimant, who had been driving the insured vehicle, resided in Philadelphia and sought to compel UIM arbitration there. The Philadelphia Court of Common Pleas granted the carrier’s preliminary objections based on improper venue, but the Superior Court reversed. The agreement provided for arbitration in the county in which the “insured” resided, the claimant fell within the policy’s definition of “insured” for purposes of UIM coverage, and the carrier could have restricted arbitration to the “named insured’s” county of residence but did not do so. Accordingly, arbitration could be compelled in Philadelphia County, where the claimant resided.

Even where the agreement provides for arbitration in another state, if the court finds that an agreement to arbitrate existed, it should compel arbitration and leave to the arbitrators questions of interpretation of the agreement, including the location of the arbitration. *Santiago v. State Farm Ins. Co.*, 453 Pa. Super. 343, 683 A.2d 1216 (1996). If the arbitrators exceed the power and authority granted to them in conducting a hearing or making an award, the error can be construed by the trial court on a subsequent motion to vacate or confirm the arbitration award. In *Santiago*, the trial court denied the petition to compel; the Superior Court reversed and remanded in accordance with the above language. Not raised or addressed by the Superior Court was the potential jurisdictional issue pursuant to 42 Pa. C.S.A. §7318.

6. Venue (suit against carrier for UM/UIM benefits)

A forum selection clause in UIM coverage that required any suit seeking UIM benefits to be brought in the county and state of the insured's legal domicile at the time of the accident is valid and enforceable. *O'Hara v. First Liberty Ins. Group*, 984 A.2d 938 (Pa. Super. 2009), *appeal denied* 606 Pa. 666, 995 A.2d 354 (2010)(affirming trial court order granting carrier's preliminary objections and transferring case from Philadelphia County to Delaware County; the clause was clear and unambiguous, and was not contrary to public policy). *See also Thomas-Brady v. Liberty Mut. Fire Ins. Co.*, 2011 U.S. Dist. LEXIS 142388 (E.D. Pa. 2011) (District court was not proper venue under same forum selection clause as in *O'Hara*; even though the county of domicile was within the boundaries of the Eastern District, the forum selection clause was clear and unambiguous and required suit to be brought "in the county" of the insured's domicile).

XII. ARBITRATORS

The fact that an agreed-upon neutral arbitrator once represented the carrier does not disqualify him from serving as an arbitrator. *Sheehan v. Nationwide Ins. Co.*, 779 A.2d 582 (Pa. Super. 2001), *appeal denied* 568 Pa. 619, 792 A.2d 1254 (2001). The neutral arbitrator in *Sheehan* had done work for Nationwide as an associate in a law firm 23 years earlier. The claimant learned of this after the hearing, and asked the neutral to vacate the award and voluntarily withdraw. The neutral declined, and the trial court denied a petition to vacate the award. The Superior Court affirmed. The policy language required the arbitrators to be "competent;" such prior representation did not render that arbitrator incompetent. The court distinguished *Bole v. Nationwide Ins. Co.*, 475 Pa. 187, 379 A.2d 1346 (1977), in which the Supreme Court vacated an arbitration award because the arbitrator had provided legal representation to the insurer in the past, explaining that in *Bole* the policy required that the arbitrators be "disinterested." The *Sheehan* court explained that, as with recusal of a judge, a party seeking recusal of an arbitrator bears the burden of establishing substantial doubt about the arbitrator's ability to preside impartially. The prior contact in *Sheehan* did not constitute evidence of partiality or corruption which would justify vacating the award. *Compare Donegal Ins. Co. v. Longo*, 415 Pa. Super. 628, 610 A.2d 466 (1992)(an ongoing and undisclosed attorney-client relationship in a related matter with the claimant justified vacating the award at the request of the insurer because it creates "too great a likelihood that the arbitrator will be incapable of rendering a fair judgment and thus conflicts with basic standards of due process").

The court has the power to compel payment of the fees of an arbitrator appointed by the court. *Stewart v. State Farm Fire & Cas. Co.*, 2001 WL 209915 (E.D. Pa. 2001). The court rejected the claimant's argument that the arbitrator need not be paid unless an arbitration was completed. Thus, the claimant was required to pay its share of the arbitrator's fees incurred prior to the settlement of the case.

XIII. OTHER ARBITRATION/CLAIM ISSUES

1. No offers of "undisputed" amounts

There is generally no duty on the part of a UM/UIM carrier to tender an "undisputed" amount of coverage while other issues are being challenged. *Keefe v. Prudential Prop. and Cas. Ins. Co.*, 203 F. 3d 218 (3d Cir. 2000); *Williams v. Nationwide Mut. Ins. Co.*, 750 A. 2d 881 (Pa. Super. 2000).

In *Keefe*, the UM claimant initially reported two injuries (knee and shoulder) related to the accident, but later reported an additional injury to her wrist, which was an aggravation of a pre-existing condition and which required surgery. There was a delay in providing the records regarding Keefe's preexisting condition; after those records were provided, the case settled for the limits of coverage. Keefe then brought a bad faith suit against Prudential, arguing that Prudential should have compensated her for the knee and shoulder injuries while it was awaiting information about the wrist injury. Prudential asserted that there was no duty to make such a partial payment, because the pain and suffering component of separate injuries could not be so easily divided. The Third Circuit found no Pennsylvania appellate decisions on the subject, and predicted that Pennsylvania law would require such a partial payment only if two conditions were satisfied: first, that the insurer conducted, or the insured requested but was denied, a separate assessment of part of the claim (so that there was an undisputed amount), and second, that the insured make a request for partial payment. In *Keefe*, the insured never requested partial payment, and therefore, the Third Circuit reversed for entry of summary judgment in favor of Prudential.

Shortly after *Keefe* was decided, the Superior Court held in *Williams* that there was no duty to make such partial payments unless the *Keefe* factors were satisfied and unless both parties agreed that an "undisputed amount" existed. *Williams* was a class action asserting breach of contract and bad faith. The claimants asserted that their carriers had placed valuations, reserves and/or settlement figures on their claims, and that these figures represented "undisputed amounts" that should have been paid while the cases proceeded to arbitration. The carriers' preliminary objections were granted, and the Superior Court affirmed. On the breach of contract claims, the Court found nothing in the policy language that would require the unconditional tender of "undisputed amounts," and further found that the language was not ambiguous. Likewise, the failure to tender "undisputed amounts" was not in violation of the reasonable expectations of the insureds because the insureds could have no "reasonable expectations" inconsistent with such clear policy language. As to the bad faith claims, the court concluded that settlement offers and reserves were not "undisputed amounts" which the carriers were required to offer. The court quoted at length from *Keefe*, and clarified that not only would the claimants have to allege that partial valuations were requested or conducted, but also, they would have to

plead that both parties agreed that the partial valuation represented an undisputed amount of benefits due. Without such agreement, there could be no “undisputed amounts.”

2. Causation can be challenged in UM/UIM proceedings where first party benefits were paid

Payment by an insurance carrier of first-party benefits does not preclude the carrier from disputing causation in a UM/UIM proceeding. *Pantelis v. Erie Ins. Exchange*, 890 A.2d 1063 (Pa. Super. 2006). In *Pantelis*, the claimant was involved in two accidents, three months apart. She filed a claim seeking first party medical benefits for treatment of a herniated disc allegedly caused by the second accident. Erie paid the first party medical benefit limits of \$10,000, but later denied her claim for UM benefits under the policy. At the arbitration hearing, the panel awarded a total of \$8500.

Claimant sought to have the award set aside, arguing *inter alia* that Erie should not have been allowed to defend on causation where they had previously paid the first party benefits, and that claimant should have been allowed to introduce evidence of the payment to counter Erie’s causation defense. The trial court held that Erie’s payment of first party benefits did not preclude Erie from later disputing UM/UIM benefits in connection with the same action unless that refusal is for “frivolous or unfounded reasons.”

The Superior Court affirmed. The court first noted that the case relied upon by the claimant, *Hollock v. Erie Ins. Exch.*, 842 A.2d 409 (Pa. Super. 2004)(*en banc*) did not decide this issue. In *Hollock*, the trial court provided 50 pages of fact findings with details of a wide range of conduct that constituted bad faith; one example was accepting a causal relationship in the first party claim and then allegedly arbitrarily refusing to accept causation in the UIM case. The *Pantelis* court explained,

[O]ur Court did not hold that this one factor constitutes *per se* bad faith. Nor did we hold that an insurer’s payment of a first party claim precludes the insurer from disputing causation in a third party under-insured motorist claim. Rather, we simply held that based on the record before us, the insurer’s argument failed.

Id., 890 A.2d at 1066. The *Pantelis* court then analyzed and compared §1716 (regarding payment of first party benefits 30 after receipt of “reasonable proof”) and §1731(b) (regarding payment of UM benefits to persons “legally entitled to recover damages”). The court held that different standards and duties apply with respect to these two coverages and that “an insurer’s payment of first party benefits does not, without more, constitute a binding admission of causation under either the statute or case law.” Thus, it was not prejudicial error for the panel to refuse to admit evidence of the first party payments. Because Erie had not admitted causation in making the payments, Erie was not precluded from denying causation in the UM/UIM claim.

3. Extra-contractual damages (delay damages, interest and bad faith damages)

An arbitration panel may not award delay damages under Pa. R.C.P. 238 in UM/UIM proceedings. *Ginther v. U.S. Fidelity and Guar. Co.*, 429 Pa. Super. 255, 632 A.2d 333 (1993), *appeal denied* 538 Pa. 612, 645 A.2d 1316 (1994). The only type of arbitration wherein delay damages may be assessed under Rule 238 is judicial arbitration pursuant to Subchapter C of Chapter 73 of the Judicial Code (42 Pa. C.S. §7361). Statutory and common law arbitrations appear at Subchapters A and B, respectively, of Chapter 73, and the delay damages provision does not apply to them. The *Ginther* court noted, however, that there are "other statutory provisions providing remedies" in the event of bad faith conduct by an insurer. *Id.*, 632 A.2d at 335. The court did not address whether any bad faith claim would lie in *Ginther* (insurer had offered \$45,000 out of an available \$105,000 in UIM coverage, claimant had demanded \$75,000, and the arbitrators awarded \$65,000).

However, the Superior Court has held that a court may award delay damages on a verdict obtained in a suit against the UIM carrier and tortfeasor. *Marlette v. State Farm Mut. Auto. Ins. Co.*, 10 A.3d 347 (Pa. Super. 2010). Moreover, the Superior Court held that the delay damages should be calculated on the entire verdict, not the verdict as molded to reflect the lower UIM limits). The Supreme Court granted appeal limited on the issue of whether the Superior Court erred, "in conflict with *Allen v. Mellinger*, that plaintiffs may recover delay damages based on the full amount of the jury verdict rather than on the legally recoverable molded verdict, which was reduced to reflect the insurance policy limits that plaintiffs were permitted to receive?" The case was argued in April 2012.

Likewise, arbitrators do not have jurisdiction to address statutory bad faith claims under 42 Pa. C.S.A. §8371. *Nealy v. State Farm Mut. Auto. Ins. Co.*, 695 A.2d 790 (Pa. Super. 1997), *appeal denied* 553 Pa. 690, 717 A.2d 1028 (1998). The *Nealy* court concluded "[O]riginal jurisdiction to decide issues of section 8371 bad faith is vested in our trial courts." *Id.* at 793. In so holding, the court found its prior opinion in *Terletsky v. Prudential Prop. & Cas. Inc. Co.*, 437 Pa. Super. 108, 649 A.2d 680 (1994), *appeal denied* 540 Pa. 641, 659 A.2d 560 (1995) not controlling, because although the arbitrators in *Terletsky* made an award pursuant to §8371, that threshold jurisdictional issue had not been presented to, nor passed upon by, the Superior Court.

Arbitrators also do not have the power to award interest, but the court in affirming an arbitration award can award interest running from the date of the award. *Scott v. Erie Ins. Group*, 706 A.2d 357 (Pa. Super. 1998); *Cotterman v. Allstate Ins. Co.*, 446 Pa. Super. 202, 666 A.2d 695 (1995); 42 Pa. C.S.A. §8101. Such "post-judgment" interest can be awarded even where it is in excess of the policy limits. *Browne v. Nationwide Mut. Ins. Co.*, 713 A.2d 663 (Pa. Super. 1998)(even though the arbitration award itself exhausted carrier's policy limits, carrier is still responsible for interest from date of arbitration award). The *Browne* court expressly noted that it was declining to follow the "mooted holding" of *Hall v. Amica Mut. Ins. Co.*, 425 Pa. Super. 548, 625 A.2d 1232 (1993), *revs'd* on other grounds 538 Pa. 337, 648 A.2d 755 (1994).

The court cannot modify an arbitration award to include pre-award interest. *Younkin v. Nationwide Ins. Co.*, 807 A. 2d 275 (Pa. Super. 2002), *appeal denied* 573 Pa. 699, 825 A.2d 1262 (2003). The policy of insurance did not include provisions for pre-award interest and there was no statute or rule authorizing same. Thus the arbitrators would not have had the power to award interest and the court could not “modify” the award to add it.

XIV. REVIEW/APPEAL OF ARBITRATION AWARDS

1. Orders compelling or denying arbitration

The Superior Court has reached inconsistent results on whether an order granting a petition to compel arbitration is appealable. In *Rosy v. National Grange Mut. Ins. Co.*, 771 A.2d 60 (Pa. Super. 2001), the court disagreed with the result reached by a majority of the Superior Court panel in *United States Auto. Association v. Shears*, 692 A.2d 161 (Pa. Super. 1997), and concluded that an order compelling arbitration was not an appealable collateral order under Rule 313 of the Pennsylvania Rules of Appellate Procedure. An order denying a petition to compel arbitration, on the other hand, is appealable. *Midomo Co. Inc. v. Presbyterian Housing Development Co.*, 739 A.2d 180 (Pa. Super. 1999).

2. Award

The award of arbitrators in a statutory arbitration proceeding must be in writing and must be signed by all arbitrators joining in the award. 42 Pa. C.S.A. §7310(a). *Goeller v. Liberty Mut. Ins. Co.*, 523 Pa. 541, 568 A.2d 176 (1990); *Jackson v. GEICO*, 417 Pa. Super. 543, 612 A.2d 1071 (1992), *appeal denied* 535 Pa. 675, 636 A.2d 634 (1993). If one arbitrator is denied the opportunity to deliberate (*i.e.*, two arbitrators reach a decision without consulting the third), the award is a nullity and a new hearing is required. *Goeller, supra*.

3. Review by arbitrators

After a statutory arbitration award is issued, the arbitrators may still modify or correct the award on application by a party, or an application by a court (discussed further below). 42 Pa. C.S.A. §7311(a). An application by a party must be made within ten days after the award is delivered to the party; the application must also advise all other parties that they have ten days to serve any objections. 42 Pa. C.S.A. §7311(b). The arbitrators’ authority to modify or correct their award is limited to correcting an evident miscalculation of figures or an evident mistake in describing any person, thing or property referred to in the award, or where the arbitrators awarded on a matter not submitted to them and the award may be corrected without affecting the decision on the issues submitted. 42 Pa. C.S.A. §§ 7311(a); 7315(a)(1),(2).

A common law arbitrator could properly enter a “clarified award” where the initial award contained a clear error that was apparent on the face of the award. *Stack v. Karavan Trailers, Inc.*, 864 A.2d 551(Pa. Super. 2004), *appeal denied* 583 Pa. 690, 878 A.2d 863 (2005). After the award in *Stack* was prepared and forwarded, the arbitrator determined that percentages of liability had been transposed and that the initial award did not reflect the arbitrator’s actual findings. The arbitrator issued a “Corrected and Clarified Arbitration Award.” A petition to

vacate was filed and depositions taken. The trial court granted the petition to vacate and reinstated the original award, on the theory that the “functus officio” doctrine prevented the arbitrator from reexamining a final decision. The Superior Court reversed: one of the exceptions to the doctrine is correction of a mistake apparent on the face of the award, which here was due to a clerical error and which was apparent when the percentages of liability and the calculation of the amount awarded were compared.

There is no statutory provision governing correction or modification of the award by the arbitrators in common law arbitration.

4. Review by the court

The availability of and scope of review of arbitration awards by the court varies depending upon whether the arbitration is common law, statutory pursuant to the Act of 1927, or statutory pursuant to the Act of 1980, and also depends upon the nature of the issue to be reviewed.

Any agreement to arbitrate is conclusively presumed to require common law arbitration unless the agreement is in writing and expressly refers to the Uniform Arbitration Act or a similar statute. 42 Pa. C.S.A. §7302(a); *Prudential Prop. and Cas. Ins. Co. v. Stein*, 453 Pa. Super. 227, 683 A.2d 683 (1996); *Dearry v. Aetna Life & Cas. Ins. Co.*, 415 Pa. Super. 634, 610 A.2d 469 (1992). If the arbitration is common law, the award may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that there was fraud, misconduct, corruption or other irregularity which caused the rendition of an unjust, inequitable or unconscionable award. 42 Pa. C.S.A. §7341. See *Zak v. Prudential Prop. & Cas. Ins. Co.*, 713 A.2d 681 (Pa. Super. 1998)(arbitrators’ failure to consider testimony of plaintiffs’ vocational expert constituted the denial of a fair hearing under this standard and therefore the case was remanded for a new arbitration hearing). The award is not reviewable for errors of law. 42 Pa. C.S.A. §7342(b). **An attempt to challenge a common law arbitration award must be made by the filing of a timely petition to vacate or modify the award in the court of common pleas; failure to file such a petition waives any challenge to the award.** *Bullock v. Hartford Ins. Co.*, 2012 Phila. Ct. Com. Pl. LEXIS 12 (C.P. Phila. 2012) (plaintiff’s attempted *pro se* appeal to Superior Court **did not** preserve her challenge to the award of learned arbitrator Bock, because there are no alternative procedures to a motion to vacate), appeal dismissed 3321 EDA 2011 (Feb. 23, 2012).

However, where the arbitrators’ UIM award stated that it was “a valuation of the damages of \$100,000.00 for all damages” that “has not been molded by the arbitrators and does not reflect what may have happened in the third-party action,” the carrier’s failure to file a petition to mold the award to give the carrier credit for the tortfeasor’s \$300,000 liability limits (reducing the UIM award to zero) did not mean the claimant was entitled to collect \$100,000 in UIM benefits. *Sabella v. Nationwide Mut. Ins. Co.*, 2012 U.S. Dist. LEXIS 114110 (M.D. Pa. 2012). The court found this to be “an issue of first impression” but concluded that the award was not “irregular” so as to require the filing of a petition to vacate or modify within 30 days, and that permitting recovery of UM benefits under these

circumstances would be inconsistent with Pennsylvania's public policy against recovering twice for the same injury.

The scope of review of awards under statutory arbitration varies in that Act of 1927 awards are reviewable for errors of law, while Act of 1980 awards are reviewable for errors of law only under limited circumstances. See 42 Pa. C.S.A. §7302(d), and historical note to §7302. The general rule is that statutory arbitration awards under the Act of 1980 are not reviewable for errors of law. *Sherman v. Amica Mut. Ins. Co.*, 782 A.2d 1006 (Pa. Super. 2001) *appeal denied* 568 Pa. 739, 798 A.2d 1291 (2002); *Hough v. State Farm Ins. Co.*, 51 Pa. D.& C. 4th 64 (C.P. Westmoreland 2001), *aff'd* 792 A.2d 1292 (Pa. Super. 2001), *appeal denied* 571 Pa. 707, 812 A.2d 1230 (2002). Where a policy provided that arbitration would be governed by both Acts, the provision was ambiguous and was construed against the insurer, and the more limited scope of review under the Act of 1980 was applied. *Cotterman v. Allstate Ins. Co.*, 446 Pa. Super. 202, 666 A.2d 695 (1995); *Allstate Ins. Co. v. Clymer*, No. 93-0348 (E.D. Pa. 1993). Likewise, where the policy refers to the Pennsylvania Uniform Arbitration Act without specifying whether the 1927 Act or the 1980 Act applies, the court will apply the standard applicable to the 1980 Act. *Sherman*, above; *MGA Ins. Co. v. Bakos*, 699 A.2d 751 (Pa. Super. 1997).

However, the court may review an arbitration award if a claimant is challenging a policy provision as void as against public policy, *see, e.g., Zak v. Prudential, supra*; or if the arbitrators held a policy provision to be void as against public policy and the insurer seeks to defend the challenged provision. See *Hall v. Amica Mut. Ins. Co.*, 538 Pa. 337, 648 A.2d 755 (1994); *Caron v. Reliance Ins. Co.*, 703 A.2d 63 (Pa. Super. 1997), *appeal denied* 556 Pa. 667, 727 A.2d 126 (1998). Such review is appropriate as to both common law (*Zak v. Prudential, supra*) and statutory arbitrations (*Caron, supra*). The Court's standard of review is plenary. *Hall, supra*; *Caron, supra*.

In *The Hartford Ins. Co. v. O'Mara*, 907 A.2d 589 (Pa. Super. 2006), the Superior Court *en banc* applied this test and concluded that the trial court erred in finding it did not have authority to review the arbitrators' determination of whether the form used to request lower limits of UM/UIM coverage complied with §1734 of the MVFRL. The arbitrators had determined that the contractual language (the form) did not comply with a legislative or statutory mandate. Thus, the trial court should have reviewed the arbitrators' decision.

5. Vacating or modifying award

On application of a party, a statutory arbitration award is to be confirmed by the court unless a timely application to vacate, modify or correct the award has been filed. 42 Pa. C.S.A. §7313 (*but see McIntosh v. State Farm*, discussed below). An application to vacate, modify or correct the award must be made within thirty days after a copy of the award was delivered to the applicant (or, in the case of a motion to vacate predicated upon corruption, fraud, misconduct, *etc.*, within thirty days after those grounds are known or should have been known). 42 Pa. C.S.A. §§7314, 7315; *DeStefano v. Infinity Ins. Co.*, 2004 WL 2034086 (Super. Ct. Memorandum Aug. 9, 2004) (carrier's failure to file petition to vacate arbitration awards within thirty days meant that any challenge to the awards totaling \$800,000 on \$15,000/\$30,000 policy was waived.) An arbitration provision that expands the time available to challenge an arbitration

award (to 60 days rather than the 30 days set forth in §7342) has been held unenforceable. *Miller v. Allstate Ins. Co.*, 763 A.2d 401 (Pa. Super. 2000). The policy stated that local law would govern the arbitration procedure. Even though the policy had been issued in New Jersey, the arbitration was held in Pennsylvania, and Pennsylvania procedure therefore applied. The court held that the arbitration clause could not prevail over Pennsylvania procedure or expand the jurisdiction of the court.

The grounds for vacating an award are set forth in §7314; *see also MGA Ins. Co. v. Bakos, supra* (question of whether carrier was deprived of a fair hearing due to arbitrators' failure to view expert witness videotapes must be reviewed under statutory, not common law, standard, and therefore case was remanded to trial court for further proceedings). The grounds for modifying or correcting an award are set forth in §7315.

The grounds for vacating or modifying a common law arbitration award are found at 42 Pa. C.S.A. §7341. Confirmation of a common law award by the court is governed by §7342(b).

Where the arbitrators in a statutory arbitration proceeding made an error of law in applying Ohio's law to the dispute, the trial court should not have vacated the entire award as contrary to law, but rather, should have modified the portion of the award that was incorrect. *Racicot v. Erie Ins. Exchange*, 837 A.2d 496 (Pa. Super. 2003). On remand, the trial court determined that Pennsylvania law should apply, and therefore reduced the amounts awarded by the arbitrators that duplicated the first-party benefits paid by Erie. *Racicot v. Erie Ins. Exchange*, 70 Pa. D.&C.4th 560 (C.P. Lawrence 2004). On further appeal from that decision, the Superior Court affirmed. *Racicot v. Erie Ins. Exchange*, 881 A.2d 871 (Pa. Super. 2005), *appeal denied*, 586 Pa. 751, 892 A.2d 824 (2005). *See also Erie Ins. Co. v. Williams*, 2004 PA Super. 247, 885 A.2d 59 (2004), *appeal denied* 584 Pa. 677, 880 A.2d 1239 (2005)(appeal from trial court's decision denying petition to modify or correct arbitration award pursuant to Act of 1927).

A petition to vacate an arbitration award is not an "initial pleading" that can be removed to federal court. *West v. Zurich American Ins. Co.*, 2002 WL 1397465 (E.D. Pa. 2002). Even though the petition to vacate was based on different legal grounds and sought different relief from the petition to compel arbitration that the carrier had originally filed in state court, the court held that the arbitration proceedings were "unitary proceedings" with the initial petition being the functional equivalent of a complaint; therefore, the attempted removal was untimely. "Zurich cannot at one stage in the arbitration proceedings invoke the jurisdiction of a state court, and then, at a later stage, and for presumably strategic purposes, decide to have the proceedings resolved in federal court."

In a common law arbitration case, the carrier was required to pay an arbitration award in excess of the \$25,000 UM policy limits, because no challenge was made to the award within thirty days. *Hall v. Nationwide Mut. Ins. Co.*, 427 Pa. Super. 449, 629 A.2d 954 (1993), *appeal denied* 537 Pa. 623, 641 A.2d 588 (1994). After issuing their award, the arbitrators wrote a letter stating that their decision had been made without regard to any policy limits or liability caps, and represented the gross award before an agreed-upon liability split. The carrier paid its \$25,000 policy limits and did not challenge the award. The trial court granted the claimant's subsequent

petition to confirm the award and enter judgment of \$12,500 (the difference between the \$25,000 paid and the \$75,000 award reduced by fifty percent). The Superior Court affirmed, noting that under 42 Pa. C.S.A. §7342(b), the trial court must affirm an award not challenged within thirty days.

In statutory arbitration, a trial court faced with a petition to confirm may resubmit the award to the arbitrators if, in the court's discretion, clarification is required, even if neither party sought clarification from the arbitrators within ten days of the hearing. *McIntosh v. State Farm Fire and Cas. Co.*, 425 Pa. Super. 311, 625 A.2d 63 (1993); 42 Pa. C.S.A. §7311. The trial court erred in concluding it could not resubmit the award, and its order confirming the award was therefore vacated and the matter remanded to the trial court.

A court order confirming, modifying or correcting an arbitration award is not immediately appealable. The order must be reduced to judgment before the time period for taking an appeal begins to run. *Seay v. Prudential Prop. and Cas. Co.*, 375 Pa. Super. 37, 543 A.2d 1166 (1988); 42 Pa. C.S.A. §§7316, 7320. Likewise, neither an award of arbitrators nor a court order confirming, modifying or correcting such an award may be executed upon. The order must first be reduced to judgment. 42 Pa. C.S.A. §7316.

6. “Right to appeal” clauses

A clause permitting appeal of arbitration awards in excess of a certain stated amount is void as against public policy. *Zak v. Prudential Prop. & Cas. Ins. Co.*, 713 A.2d 681 (Pa. Super. 1998). The clause in *Zak* stated that awards between zero and \$15,000 were binding, but that larger awards could be appealed by either party. The Superior Court held that the clause unreasonably favored the insurer and was void as against public policy. However, this did not invalidate the portion of the clause requiring arbitration. The case was remanded for further arbitration proceedings, because the arbitrators' exclusion of certain expert testimony amounted to the denial of a full and fair hearing). *See also Horst v. Prudential Prop. & Cas. Ins. Co.*, 425 Pa. Super. 143, 624 A.2d 187 (1993).

Practice Note: Again, these decisions predated the Supreme Court's *Koken* decision that UM/UIM arbitration is not required under the MVFRL.

XV. POST-KOKEN SUITS

Since the Supreme Court's decision in *Insurance Federation of Pennsylvania, Inc. v. Commonwealth of PA., Dept. of Ins. (Koken)*, 585 Pa. 630, 889 A.2d 550 (2005), many carriers have modified their policies to remove or limit arbitration procedures, add provisions for appeals, and/or require joinder of such first-party type claims with the third-party claims.

Where a claimant joins a suit against the tortfeasor with a suit against the UIM carrier, the tortfeasor is not “jointly and severally liable” with the UIM carrier so as to make venue against both proper under Pa.R.C.P. 1006(c)(1) in any county where the carrier can be sued; rather, the Superior Court has held that such a case must be transferred to a county where venue

is proper against the tortfeasor. *Sehl v. Neff*, 26 A.3d 1130 (Pa. Super. 2011). *See also Wissinger v. Brady*, 18 Pa. D. & C.5th 40 (C.P. Luzerne 2010) (fact that carrier did business in Luzerne County did not provide a basis for venue there; accident happened in Northumberland County, Defendants were from Montour County and there were no basis for venue against them in Luzerne County; accordingly, action would be transferred to Northumberland County. *But see Bingham v. Poswistilo*, 2011 WL 2262483 (C.P. Lackawanna, April 8, 2011), holding that the causes of action against the tortfeasor and the UIM carrier were not misjoined, but that because venue in Lackawanna County was improper against the tortfeasor, the claims would be severed and the claim against the tortfeasor transferred to Lehigh County, where the accident occurred).

In *Richner v. McCance*, 13 A.3d 950 (Pa. Super. 2011), the Superior Court held that a declaratory judgment claim to determine a coverage issue was not properly joined with the third-party liability claim against the tortfeasor:

The case law cited by the trial court deals with the joinder of third party liability claims with plaintiffs' claims against UIM insurance carriers for benefits. In these cases, the trial courts concluded that Pa.R.C.P. 2229(b) was satisfied because the third party claims and the underinsured motorist claims arose out of the same occurrence, i.e., the motor vehicle accident, and involved the same factual questions of liability and damages. The analysis of this joinder issue is inapposite to the one we decide in this case. We emphasize that we are not here deciding the propriety of the joinder of third party liability claims with post-Koken UIM benefit claims.

Richner, 13 A.3d at 960, n.4.

Daniel E. Cummins, Esquire, of Foley, Cogneetti, Comerford, Cimini & Cummins in Scranton, maintains a blog, www.torttalk.com, which includes a "Post-Koken Scorecard" with an exhaustive list of cases dealing with post-Koken issues, including joinder and venue.

1. Joinder of third-party and UIM claims

Cases allowing joinder

Stepanovich v. McGraw and State Farm Ins. Co., (C.P. Allegheny, July 31, 2012) (trial court did not sever third-party and UIM claims and allowed the claims to proceed to a combined trial based upon parties' agreement that insurance would not be mentioned. The jury returned a defense verdict and thus the carrier received a directed verdict on the UIM claim. Plaintiff moved for a new trial because both "defense" counsel were allowed to participate fully in the trial, although the carrier's counsel was not identified as such, resulting in prejudice to plaintiff. The trial court agreed and granted a new trial. Appeals were taken by both McGraw and State Farm, and are now pending in the Superior Court (consolidated by order of September 5, 2012);

Firoozifard v. Krome and State Farm Fire and Cas. Co., 2010 Pa. Dist. & Cty. LEXIS 164 (C.P. Northampton June 21, 2010)(denying tortfeasor defendant's preliminary objections, treated as a motion to sever to third-party claims from the UIM claims);

Bradish-Klein v. Kennedy and State Farm Ins. Co., No. 11548 of 2009 (C.P. Beaver December 3, 2009)(granting plaintiffs' motion, over State Farm's opposition, to add State Farm, the UIM carrier, to the third-party action);

Glushefski v. Sadowski and Erie Ins. Exchange, 1189-Civil-2009 (C.P. Luzerne July 24, 2009)(Burke, J.)(overruling the third party tortfeasor's preliminary objections to plaintiff's joinder of the third party claim and the UIM claim in one action);

Six v. Phillips and Nationwide Ins. Co., 2009 WL 2418861 (C.P. Beaver June 30, 2009) (Kwidis, J.)(same; court also rules that evidence of insurance may come into evidence at trial for limited purposes);

Serulneck v. Kilian and Allstate, 2008-Civil-2859 (C.P. Lehigh April 7, 2009) (McGinley, J.)(denying motion of tortfeasor defendant to sever third-party claims against him from UIM claim);

Jannone v. McCooey and State Farm, 2009 WL 2418862 (C.P. Pike April 2, 2009)(Chelak, J.)(overruling preliminary objections of tortfeasor to joinder of third party claim and UIM claim; the court also ruled that evidence of insurance may come into evidence at trial for limited purposes);

Moyer v. Harrigan and Erie Ins. Exchange, 2008-Civil-1684 (C.P. Lackawanna, October 24, 2008) (Thomson, J., visiting judge)(order permitting consolidation of third party claim and UIM claim);

Collins v. Zeiler and State Farm, GD08-Civil-014817 (C.P. Allegheny October 22, 2008)(Strassburger, J.)(overruling preliminary objections seeking to sever third party and UIM claims);

Richard Hess v. Cosgrove, July Term 2008, No. 3708, and ***Kelly Hess v. Dickel***, October Term 2008, No. 3220 (C.P. Phila. March 3, 2009)(Rizzo, J.). The UIM policy in these cases required an insured suing for UIM benefits to sue the tortfeasor and the UIM carrier in the same lawsuit. The two such suits arising from this accident were filed in Philadelphia county; the third-party tortfeasors sought to sever the claims against them from the UIM claims, and to transfer the third party claims to Bucks County, where they resided and the accident occurred. The tortfeasors argued that there was irreparable prejudice to them in having an insurer in the same trial. Preliminary objections and motions to sever were denied and the consolidated cases retained in Philadelphia County.

Fuhrman v. Frye and State Farm, (C.P. Dauphin), 2008 CV 17687.

Sellers v. Hindes and State Farm, (C.P. Dauphin), 2009 CV 1989.

Cases refusing joinder

Henry v. Amin and Westfield Ins. Co., No. 11-4881 Civil (C.P. Cumberland Sept. 1, 2011 Ebert, J.), the Plaintiff had combined a negligence claim against the tortfeasor with a breach of contract claim against the UIM carrier. There was no bad faith claim presented. Judge Ebert granted the tortfeasor's preliminary objections to the Complaint and Ordered that the claims be severed. The court specifically directed the Plaintiff to file a separate Complaint for the UIM claim. In his Order, Judge Ebert also directed that the Complaint against the tortfeasor for negligence would be tried first followed by a trial on the Complaint against the UIM carrier for UIM benefits.

Grove v. Uffelman and Progressive Ins. Co., No. 2009-SU-2878-01 (C.P. York November 9, 2009)(Chronister, J.)(granting tortfeasor's motion to sever the third-party claim from the UIM claim)

Baptiste v. Strobel, No. 09-11444 (C.P. Butler November 5, 2009)

Weichey v. Martin, No. 09-10116 (C.P. Butler June 11, 2009)

2. Joinder of UM/UIM and "bad faith" claims

Gunn v. Auto. Ins. Co. of Hartford, CT, 2008 WL 6653070 (C.P. Allegheny July 28, 2008) (Wettick, J.), interlocutory appeal **quashed** 2009 WL 1001029 (Pa. Super. April 15, 2009). In *Gunn*, plaintiff filed a two-count complaint, Count I alleging a breach of contract claim for UIM benefits, and Count II alleging a bad faith claim. Hartford sought to stay any discovery relevant only to the bad faith claim until after the resolution of the UIM claim, and in conjunction with that request, sought to sever and stay the bad faith proceedings; plaintiff argued that the bad faith trial should proceed immediately after the UIM trial and thus discovery on both aspects should be permitted.

Augustine v. Erie Ins. Exchange, No. 2006 Civil 416 (C.P. Lackawanna 2008)(denying carrier's motion to sever bad faith claim from UIM claim);

Decker v. Nationwide Ins. Co., No. 2005-Civil-1863 and 2006-Civil-2119 (C.P. Lackawanna March 4, 2008)(consolidating declaratory judgment action seeking coverage and bad faith claim).

SAMPLE