

CURRENT UIM/UM ISSUES A Jurisdictional Comparison

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Regardless of the nearly ubiquitous nature of compulsory motor vehicle insurance laws in the United States, USA Today has reported that as of September 2011, approximately one in seven drivers nationwide are uninsured.¹ Even more shockingly, the percentage of uninsured drivers in some states reaches as high as twenty-eight percent. With this dangerously high number of uninsured drivers riddling our nation's roadways, many states have mandated that insurers provide drivers that have properly acquired the requisite liability insurance with additional protection in the form of uninsured motorist coverage, underinsured motorist coverage, or both.

Due to the state-by-state nature of these insurance mandates, each state's statutory scheme will have its own nuances and points of interest. Some of the main discrepancies regarding the application of UM/UIM coverage in various states include: the prerequisites for recovering UM or UIM benefits, a UIM insurer's right to subrogation and the process of substituting benefits for a proposed settlement, and the insured's ability to "stack" multiple UM/UIM coverages to increase their policy limits. The goal of this paper is to take on discuss each of these issues providing an overview of the abovementioned topics in a state-by-state manner.

Kentucky

Uninsured motorist coverage is mandated in Kentucky by KRS § 304.20-020. Insurers are required to provide this additional coverage in all motor vehicle liability policies in an amount equal to the liability policy's limits, unless the named insured rejects such coverage in writing. KY. REV. STAT. ANN. § 304.20-020(1). In order for a UM insured to collect benefits under their uninsured motorist coverage, they need not obtain a judgment, or even file suit, against the uninsured tortfeasor. *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895, 898 (Ky. 1993) (citing *Puckett v. Liberty Mut. Ins. Co.*, 477 S.W.2d 811 (Ky. 1971)). However, in a suit or negotiations with the UM insurers, the insured will be required to prove that the alleged tortfeasor was indeed uninsured, as well as the extent of the uninsured's liability in order to collect benefits. *Id.*

The underinsured motorist coverage scheme in Kentucky is slightly different than the UM coverage scheme. Insurers in Kentucky need only provide underinsured motorist coverage to insureds upon request. KY. REV. STAT. ANN § 304.39-320. Similarly to UM coverage, however, it is not necessary for insureds seeking UIM benefits to obtain a

¹ Larry Copeland, *One in Seven Drivers Have No Insurance*, USA TODAY (Sept. 12, 2011), <http://usatoday30.usatoday.com/news/nation/story/2011-09-11/uninsured-drivers/50363390/1>.

judgment or reach a settlement with the underinsured motorist prior to submitting a claim with their UIM carrier. When claiming UIM benefits, it is important for insureds to note that the UIM insurer's liability is reduced by the limit of the underinsured's liability policy. KY. REV. STAT. ANN § 304.39-320(5). This remains true even if the insured settles with the underinsured's liability insurer for less than policy limits. *Id.*

The Kentucky Supreme Court has held that anti-stacking provisions are void with respect to UIM coverage. *Allstate Ins. Co. v. Dicke*, 862 S.W.2d 327 (Ky. 1993). This ban on anti-stacking provisions is grounded in the reasonable expectations doctrine, which holds that when an insured has paid separate premiums on separate vehicles he may reasonably expect to be able to stack those coverages. *Id.* Notwithstanding this general ban on anti-stacking provisions, only "insureds of the first class" are able to stack UIM coverage in Kentucky. *James v. James*, 25 S.W.3d 110, 113-14 (Ky. 2000). An insured of the first class only includes the named insured and the members of their family residing in the same household. *Id.* Anyone that is entitled to benefits under the UIM policy, but falls outside definition of insured or the first class is an "insured of the second class." *Id.* These second class insureds are unable to stack coverages because, based on the reasonable expectations doctrine, only first class insureds have an expectation regarding the benefits for which they are entitled to under the policy covering them. *Id.*

In order to maintain the validity of their UIM claim after settling with an underinsured and his liability insurer, the UIM insured must provide their insurer with written notice of the proposed settlement. KY. REV. STAT. ANN § 304.39-320(3) Upon receipt of this notice an insurer has thirty days to either consent to the settlement, allowing the insured to release the tortfeasor from all claims, including a claim for subrogation by the insurer, or deny consent to settle and protect its subrogation right. *Id.*; *Coots*, 853 S.W.2d at 902-03. If the insurer decides to protect his right to subrogation by refusing to give the insured consent to settle, then the insurer must follow the procedure outlined by the Kentucky Supreme Court in *Coots*, and later codified in KRS § 304.39-320(4).

Under the *Coots* procedure, after having denied consent to settle, the UIM insurer must provide their insured with benefits equal to the amount of the proposed settlement. *Coots*, 853 S.W. 2d at 902; KY. REV. STAT. ANN § 304.39-320(4). When this *Coots* settlement takes place, the tortfeasor is no longer liable to the UIM insured but instead may only be liable to indemnify the UIM insurer. *Id.* Importantly, once the tortfeasor is no longer liable to the insured, the UIM insurer becomes real party in interest as a result of their direct liability to the insured. *Earle v. Cobb*, 156 S.W.3d 257, 261 (Ky. 2006). Accordingly, failing to name the UIM insurer as the real party defendant in a suit determining the damages caused by the underinsured tortfeasor is reversible error. *Id.*

In the absence of a *Coots* settlement, however, it is inappropriate for any reference to be made to a UIM insurer if a claim against the tortfeasor proceeds to trial. *Mattingly v. Stinson*, 281 S.W.3d 796 (Ky. 2009). In this instance, the UIM insurer is not the true real party in interest because the tortfeasor remains directly liable to the plaintiff. *Id.*

Minnesota

Minnesota law mandates that insurers provide uninsured and underinsured motorist coverage along with every motor vehicle liability policy. MINN. STAT. § 65B.49(3a)(1). Unlike in Kentucky where an insured can reject UM/UIM coverage, persons owning vehicles that are registered or principally garaged in Minnesota are required to maintain both uninsured and underinsured motorist coverage. *Id.* at §65B.49(3a)(2).

In order to collect UM benefits in Minnesota, the only condition precedent is showing that the tortfeasor was uninsured. *Oganov v. Am. Family Ins. Co.*, 767 N.W.2d 21, 24 (Minn. 2009). Importantly, an insured is not required to first make a claim against the uninsured motorist in order to recover against his UM insurer. *Id.* However, an inherent aspect of showing that the tortfeasor was uninsured includes the requirement that the insured also prove that he is otherwise entitled to recover from the alleged tortfeasor as a result of the accident.

Insureds seeking UIM benefits may take one of two paths in seeking their recovery. *Employers Mut. Cos. v. Nordstrom*, 495 N.W.2d 855, 857 (Minn. 1993). Under the first path, the insured may pursue a tort action against the underinsured tortfeasor to judgment, and if the judgment exceeds the liability limit of the tortfeasor the insured can pursue UIM benefits to the limits of his policy. *Id.* The second option is to reach the best settlement possible with the tortfeasor and his insurer. *Id.* If the settlement is for less than the underinsured's policy limits, the UIM insurer must also provide benefits to cover the gap between the below-limit settlement amount and the tortfeasor's liability limit. *Dohney v. Allstate Ins. Co.*, 632 N.W.2d 598 (Minn. 2001). When following this option, the UIM insured must provide their insurer with proper notice of the proposed settlement in order to maintain a viable claim for UIM benefits. *Nordstrom*, 495 N.W.2d at 857. In *Nordstrom*, the Minnesota Supreme Court was quick to reject the possibility of an insured making a UIM claim directly against their insurer without first proceeding against the tortfeasor, holding that "the fairest solution . . . is to continue to require an injured claimant to recover first from the tortfeasor's liability insurance before proceeding to arbitrate an underinsured benefits claim." *Id.* at 858.

When posed with the issue of whether or not the stacking of UIM coverage is permissible under Minnesota law, the *Templin* court recognized a conflict between § 65B.49(3a)(6), stating that "in no event shall" coverage limits be stacked, and § 65B.49(7), allowing insurers to provide additional coverage benefits. *Austin Mut. Ins. Co. v. Templin*, 435 N.W.2d 584, 587 (Minn. 1989). The court interpreted these separate provisions as allowing insurance contracts to allow contractual provisions that provide for stacking, but prohibited judicially stacking coverage limits when such stacking is not expressly permitted in the terms of the insurance contract. *Id.* The court did slightly expand this rule in *Rusthoven v. Commercial Standard Insurance Co.*, 387 N.W.2d 642 (Minn. 1986), holding that if provisions in an insurance contract are ambiguous regarding

the stacking of coverages the contract will be construed in favor of the insured to allow stacking.

The process for a UIM insured to settle with an underinsured tortfeasor's liability insurer and substitute his UIM insurer for the tortfeasor at trial, is the same in Minnesota as it is in Kentucky. In *Schmidt v. Clothier*, 338 N.W.2d 256 (Minn. 1983), the court held that once the UIM insurer receives notice of a proposed settlement between their insured and the tortfeasor, the insurer must provide their insured with underinsurance benefits in order to protect their subrogation right against the tortfeasor. *Id.* Once these benefits have been provided and the tortfeasor is released from any liability to the insured, the UIM insurer becomes the rightful party in interest. *Washington v. Milbank Ins. Co.*, 562 N.W.2d 801, 804 (Minn. 1997).

California

In California, in order for an insured to collect on a uninsured motorist claim, the insured must, within two years after the date of the accident, file an action against the uninsured motorist, demand arbitration with his UM insurer, or reach a settlement with his UM insurer. *See* CAL. INS. CODE § 11580.2(i). If the insured fails to take any of the proscribed actions within the appropriate timeframe then his UM claim is forfeited. *Id.*

The only potential respites to the mandatory two-year rule are contained in California Insurance Code § 11580.2(i)(3). This section states that the “[t]he doctrines of estoppel, waiver, impossibility, impracticality, and futility apply to excuse a party’s noncompliance with the statutory timeframe.” CAL. INS. CODE § 11580.2(i)(3). In *Blankenship*, however, the court abided by the statutory construction maxim *expressio unius est exclusio alterius* in holding that only the specifically enumerated exceptions contained in § 11580.2(i)(3) will excuse a party’s failure to take the necessary action within two years of the accident. *Blankenship v. Allstate Ins. Co.*, 186 Cal. App. 4th 87, 94 (Cal. App. 2010). More specifically, the *Blankenship* court held that because a claimant’s minority is not listed as one of the express exemptions in § 11580.2(i)(3), the claimant’s age cannot excuse her from compliance with the two year mandate. *Id.*

However, when seeking to recover on an underinsured motorist claim, the two year requirement for a demand for arbitration does not apply. The California Supreme Court in *Quintano v Mercury Cas. Co.*, 11 Cal.4th 1049 (Cal. 1995), held that the right to underinsured motorist coverage under CAL. INS. CODE § 11580.2(p)(3) does not accrue until (1) a tortfeasor’s limits of coverage have been exhausted by payment of a judgment or settlement, and (2) proof of payment is submitted to the insurer providing underinsured motorist coverage. California has chosen a “narrow coverage” view in enacting its underinsurance provisions. Coverage is not triggered by the amount of the insured person’s damages or by the proceeds available to each injured person, but by a comparison of the tortfeasor’s bodily injury liability limits with the injured person’s underinsurance limits. *State Farm Mut. Auto Ins. Co. v. Messinger* 232 Cal. App. 3d 508 (1991). The plain language of CAL. INS. CODE § 11580.2(p)(3) requires actual payment of

the underinsured's policy limits before underinsurance coverage can be invoked. *Farmers Ins. Exch. v. Hurley* 76 Cal.App.4th 797, 807 (1999).

In another important distinction between uninsured motorist coverage and underinsured motorist coverage in California, the California Supreme Court held that UIM insurers have no right to subrogation from a tortfeasor. *Hartford Fire Ins. Co. v. Macri*, 4 Cal. 4th 318 (Cal. 1992). The court's decision was based on CAL. INS. CODE § 11580.2, which states that insureds have no claim for UIM benefits until the tortfeasor has paid their policy limits in a settlement or as a result of a judgment. The court further relied on the statutory reimbursement rights granted to UIM insurers by § 11580.2(p), which does not include a right of subrogation, to hold that that the legislature did not intend to grant UIM insurers with a right of subrogation because they were provided sufficient protection by the statutory set-offs. *Id.* at 329.

The plain language of California Insurance Code § 11580.2(q) explicitly prohibits the stacking of coverage limits, stating that “in no event shall the limit of liability for two or more motor vehicles or two or more policies be added together, combined, or stacked to determine the limit of insurance coverage.” CAL. INS. CODE § 11580.2(q).

Wisconsin

In Wisconsin, it is not necessary for a UIM insured to obtain a judgment against an underinsured motorist in order to pursue a contract claim against her UIM insurer. *See State Farm Mut. Auto. Ins. Co. v. Gillette*, 641 N.W.2d 662 (Wis. 2002). Instead, the insured must simply show that they are “legally entitled to collect” from the underinsured motorist. *Id.* at 673. Typically, the insured's legal entitlement to UIM benefits is determined by whether or not the underinsured's negligence was such that would allow the insured to recover, however, an insured's entitlement must be determined on a case-by-case basis when issues such as the tortfeasor's immunity or statutory limitations on damages arise. *Id.*

Similarly to the recovery of UIM benefits, insureds seeking uninsured motorist benefits do not need to obtain a judgment against an uninsured motorist prior to seeking benefits from their UM insurer. *Sahloff v. Western Cas. & Sur. Co.*, 171 N.W.2d 914, 917 (Wis. 1969). In a direct suit against a UM carrier, an insured must show that they are “legally entitled to recover” damages by proving the negligence of the uninsured tortfeasor. *See Theis v. Midwest Sec. Ins. Co.*, 606 N.W.2d 162, 169 (Wis. 2000).

Interestingly, in both the UM and UIM context, Wisconsin law provides insurers with great leeway in drafting policy terms that reduce their liability through “set-offs” for any amounts that the insured received from collateral sources. *See* WIS. STAT. § 632.32(5)(i). Underinsured motorist insurers also have the ability to include provisions requiring the complete exhaustion of the underinsured's policy limit, either by settlement or judgment, prior to the UIM insurer incurring any liability. *Danbeck v. Am. Family Mut. Ins. Co.*, 629 N.W.2d 150, 156 (Wis. 2001). Along with these liability limiters, anti-stacking provisions are also valid in Wisconsin. *Schroeder v. State Farm Mut. Auto. Ins.*

Co., 640 N.W. 2d 215, 218-19 (Wis. App. 2001). Of course, the interpretation and application of these liability limiting provisions in insurance contracts are issues of law to be decided by the court, and ambiguous provisions are construed in favor of coverage. *Danbeck*, 629 N.W.2d at 153-54.

Like Kentucky, the Wisconsin Supreme Court has adopted the reasoning of *Schmidt v. Clothier* regarding an insurer's ability to protect their right to subrogation through an insured's settlement with an underinsured. *Vogt v. Schroeder*, 383 N.W.2d 876 (Wis. 1986). Although insurers are forced to provide insureds with UIM benefits prior to the release of the underinsured tortfeasor, the Wisconsin Supreme Court held that a UIM insurer is unable to move a court to adjudicate their insured's damages in order to aid the insurer in determining whether or not preserve their right to subrogation in the manner described in *Vogt*. *Pitts v. Revocable Trust of Kneppel*, 698 N.W.2d 761, 772 (Wis. 2005). The court reasoned that the UIM insurer could not use the court as a mechanism for allocating the risk that is inherent in the settlement/subrogation decision that an insurer must make under *Vogt*. *Id.* at 775.

Colorado

In 2007, the Colorado legislature amended Colorado Revised Statutes § 10-4-609 which made fairly drastic changes to the state's UIM scheme. Prior to the 2007 amendments, UIM insureds in Colorado were required to recover from an underinsured tortfeasor as a prerequisite to recover UIM benefits because the insured's entitlement to benefits was determined with relation to the amount recovered from the underinsured. *See Freeman v. State Farm Mut. Auto. Ins. Co.*, 946 P.2d 584 (Colo. 1997). After the statutory amendment, the relevant inquiry became the gap between the tortfeasor's policy limit and the damages sustained by the insured, which obviates the need for the insured to recover from the underinsured tortfeasor prior to seeking benefits from their UIM insurer. *See Vignola v. Gilman*, 2013 U.S. Dist. LEXIS 17428 at *12-13 (D. Nev. 2012). The 2007 amendments also removed the insurer's right to a set-off in the amount of the underinsured's policy limit. Therefore, if an insured has \$100,000 in UIM coverage, the UIM insurer may be liable for up to \$100,000 regardless of the amount of coverage held by the underinsured tortfeasor. *Jordan v. Safeco Ins. Co. of Am.*, 2013 COA 47 at *7 (Colo. App. 2013)

Recovery under a UM policy was unaffected by Colorado's 2007 amendments, and only requires the insured to show that she is "legally entitled" to recover from the uninsured motorist and the extent of her damages. *Peterman v. State Farm Mut. Auto. Ins. Co.*, 961 P.2d 487, 493 (Colo. 1998). This burden can be met in a proceeding directly against the UM insurer, in a proceeding against the uninsured motorist, or in arbitration. *Id.* Only after the insured has shown her legal entitlement to damages is the UM insurer contractually obligated to pay the insured up to policy limits. *Id.*

The 2007 amendments also prohibited the inclusion of anti-stacking provisions in UM/UIM insurance contracts. *Snell v. Progressive Preferred Ins. Co.*, 260 P.3d 37, 38

(Colo. App. 2010). In fact, the revised § 10-4-609(1)(c) expressly prohibits offsetting recovery under a UIM policy based on recovery under other UM/UIM policies. *Id.*

Amidst all of the changes to § 10-4-609 that took place as a result of the 2007 amendments, those changes did not include an express grant of a right of subrogation to UM/UIM insurers. *See* COLO. REV. STAT. § 10-4-609; *see also Granite State Ins. Co v. Dundas*, 34 Colo. App. 382 (Colo. App. 1974). Notwithstanding the lack of a statutory right to subrogation, parties can contractually agree to subrogate an insurance carrier to the rights of the insured. *Granite State Ins. Co.*, 34 Colo. App. at 386. The Colorado Supreme Court has limited this right of subrogation only to amounts received from the underinsured party, not from other tortfeasors that may be liable to the insured. *Kral v. American Hardware Mut. Ins. Co.*, 784 P.2d 759 (Colo. 1989).

Virginia

When a UIM insured is injured by an underinsured motorist in Virginia, the insured is entitled to recover “all sums that he is legally entitled to recover as damages from” the underinsured motorist, to the extent that the motorist is underinsured. VA. CODE ANN. § 38.2-2206(A). A motorist is only considered to be underinsured to the extent that UIM insured’s coverage exceeds the tortfeasor’s liability policy limit. *Id.* at § 38.2-2206(B). Therefore, UIM insureds are only able to recover to the extent that their coverage is greater than the underinsured’s policy limit. *Id.*

Comparably, insureds are able to collect from their UM insurer “all sums the he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits.” *Id.* at § 38.2-2206(A).

Further, before pursuing UM or UIM benefits, an insured must obtain a judgment against the underinsured motorist because “[j]udgment is the event that determines legal entitlement to recovery.” *State Farm Mut. Auto. Ins. Co. v. Kelly*, 380 S.E.2d 654, 656 (Va. 1989) (internal citations omitted). Due to the importance of obtaining a judgment under Virginia UM/UIM law, § 38.2-2206(F) requires that when an insured files suit against an uninsured or underinsured tortfeasor, and plans to collect UM or UIM benefits, the insured must serve their UM/UIM insurer with process as if they were a party to the suit. VA. CODE ANN. § 38.2-2206(F), (G). This service allows the insurer to file pleadings and take other allowable action either in its own name, or the name of the defendant. *Id.*

Also of interest is the expansive manner in which Virginia courts have determined whether a party is a “user” of an insured vehicle, and thus a UM/UIM insured under that vehicle’s policy. *Id.* at § 38.2-2206(B). The Virginia Supreme Court has held that a party does not have to occupy, or immediately intend to occupy a vehicle in order for him to be considered a user of this vehicle as contemplated by the statute; however the court did not outline a definitive test for determining whether or not a party is a “user”. *Slagle v. Hartford Ins. Co. of the Midwest*, 594 S.E.2d 582 (Va. 2004) (holding that a construction worker using hand signals to help guide a large piece of equipment into place was a user within the definition of the UM/UIM statute).

The process by which a settlement takes place between a UIM insurer and an underinsured's liability insurer is governed by Virginia Code § 38.2-2206(L). Once the underinsured's insurer sends an irrevocable written offer to pay the total amount of liability coverage available to the UIM insurer, the underinsured's insurer is relieved of the cost of defending the underinsured owner or operator, although the insurer retains the duty to defend its insured. *Id.* The UIM insurer shall reimburse the underinsured's insurer for the costs of defense up until the tender of the offer, and is responsible for the costs of defense thereafter. *Id.* The written offer may be contingent upon waiver of subrogation. *Id.*

The default rule in Virginia is that the stacking of UM/UIM coverage is permitted. *See Va. Farm Bureau Mut. Ins. Co. v. Williams*, 677 S.E.2d 299, 302 (Va. 2009). However, this default rule will yield where "clear and unambiguous language exists on the face of the policy to prevent such multiple coverage. *Id.* "Any ambiguity regarding the stacking of coverage within a policy will be construed against the insurer." *Id.*

Oklahoma

Oklahoma's statutory definition of an uninsured motorist is broad enough to include underinsured motorists, with § 3636(C) expressly stating that a vehicle that has a liability policy limit "less than the amount of the claim of the person or persons making such claim" is considered to be uninsured for purposes of UM insurance. OK. STAT. § 3636(C). As a result of this broad definition of uninsured motorist, there is no distinction made between UM and UIM claims in Oklahoma, both are treated as a UM claim. *See Id.*

To recover UM benefits, the claimant must show that (1) he is covered under the UM policy; (2) the injury was the result of an accident; (3) the injury arose out of the ownership, maintenance, or use of a motor vehicle; and (4) that the claimant is "legally entitled to recover damages from the owner or operator of the uninsured motor vehicle." *Ply v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 81 P.3d 643, 647 (Ok. 2003). An insured is "legally entitled to recover damages" from an uninsured motorist when he can establish the negligence of the tortfeasor and the extent of the damages caused thereby, but this legal entitlement need not be established prior to an insured proceeding directly against his UM insurer. *Lamfu v. GuideOne Ins. Co.*, 131 P.3d 712, 715 (Ok. App. 2005).

The subrogation right of UM/UIM insurers is granted and protected by § 3636(F). Under this section, when a UM/UIM insured is offered a settlement by the liability insurer of an underinsured motorist, the insured is required to provide their UIM insurer with written notice of the settlement offer to provide the insurer with the opportunity to protect its subrogation right. OK. STAT. § 3636(F). This notice must include documentation of the losses incurred by the insured, including medical bills, as well as signed authorizations or releases allowing the UIM insurer to obtain records from employers and medical providers. *Id.* Upon receipt of this notice, an insurer has sixty days to either substitute their payment of benefits to the insured, or consent to the settlement and lose their right to subrogation. *Id. See generally Strong v. Hannover Ins. Co.*, 106 P.3d 604, 609 (Ok. App. 2004).

Regarding the stacking of UM/UIM coverages, Oklahoma utilizes a reasonable expectations approach. *See Max True Plastering Co v. U.S. Fidelity & Guaranty Co.*, 912 P.2d 861 (Ok. 1996). The Oklahoma Supreme Court has upheld anti-stacking provisions only where the insured paid one premium for coverage for UM/UIM coverage on multiple vehicles. *Spears v. Glens Falls Ins. Co.*, 114 P.3d 448, 454 (Okla. 2005). In so holding, the *Spears* court seemingly reaffirmed their reliance on a reasonable expectations theory in *Max True Plastering Co.* which allowed for stacking of UM/UIM coverage when the insured paid separate premiums for coverage on a series of vehicles under the same policy, because it would be the reasonable expectation of the insured that he would be able to stack those coverages. *Id.* at 453-54.

Illinois

An insured in Illinois is only able to collect from his UIM insurer in the event that the tortfeasor's liability limit is exceeded by the insured's UIM coverage. 215 ILL. COMP. STAT. 5/143A-2(4). Once it is determined that the tortfeasor is in fact underinsured, the UIM insurer is only liable for the difference between the underinsured's policy limit and the insured's UIM policy limit—similarly to UIM recovery in Virginia. *Id.*; *see also* VA. CODE ANN. § 38.2-2206(B). However, Illinois law also permits insurers to include “exhaustion” provisions that require insureds to recover from the underinsured tortfeasor prior to seeking UIM benefits. 215 ILL. COMP. STAT. 5/143a-2(7). If an insured settles with an underinsured's liability insurer for less than policy limits, thus failing to “exhaust” the underinsured's policy in the literal sense, an insured is not barred from recovering UIM benefits, but is only able to recover the difference between the underinsured's policy limit and the UIM policy limit. *Id.*

If the insured and his UIM carrier enter into an agreement regarding the amount of UIM benefits that the insured is entitled to, such an agreement shall be binding regardless of any subsequent judgment or settlement between the insured and underinsured motorist. *Id.* Such a settlement may only be entered into if the insured has complied with the terms of the insurance contract, and the insured has filed suit against, or properly settled with, the underinsured prior to the execution of the settlement agreement between the insured and the UIM carrier. *Id.*

In order for an insured to properly settle with an underinsured motorist's liability carrier, he must properly grant his UIM insurer the ability to protect its subrogation right. In order to preserve this subrogation right, a UIM insurer must provide its insured with underinsured motorist benefits in the amount of a proposed settlement within thirty days of receiving written notice of a proposed settlement. 215 ILL. COMP. STAT. 5/143a-2(6). While insureds are not statutorily required to provide their UIM insurer with written notice of a proposed settlement, if an insured settles with the underinsured's insurer without the consent of their UIM insurer they may be denied UIM benefits, unless the insurer was not prejudiced. *See Kenny v. Assurance Co. of Am.*, 325 Ill. App. 3d 904 (Ill. App. 2001).

Illinois also expressly allows insurers to include anti-stacking provisions in UM/UIM insurance contracts. 215 ILL. COMP. STAT. 5/143a-2(5). Anti-stacking provisions must be applied by their terms if they are clear and unambiguous, but if a provision is ambiguous it will be construed in favor of the insured. *Grzeszczak v. Ill. Farmers Ins. Co.*, 168 Ill.2d 216, 223 (Ill. 1995); *Menke v. Country Mut. Ins. Co.*, 78 Ill. 2d 420, 424 (Ill. 1980).

Wyoming

Unlike most states, Wyoming does not mandate that insurers provide, or even offer, UIM coverage as part of their automobile liability policies. *Winegeart v. Am Alt. Ins. Corp.*, 224 Fed. Appx. 807, 809-10 (10th Cir. 2007); *see also* WYO. STAT. ANN. § 31-10-101. As a result, Wyoming has no precise regulations regarding the manner in which UIM coverage must apply, or the conditions precedent to recovery under such policies. *See Winegeart*, 224 Fed. Appx. at 809. Therefore, insurers are permitted to “offer underinsured motorist coverage on whatever terms that they see fit.” *Id.* This broad discretion is not boundless, however, as only terms that are not contrary to law or public policy will be enforced *Id.* at 810.

The lack of a statutory framework for UIM coverage also results in there being no statutory right to subrogation, or any mode of protecting of that right. *Id.* This yields the conclusion that matters of subrogation are to be dealt with contractually in the UIM insurance policy. *See id.* However, if the statutory subrogation provision relating to UM coverage is any guide, a UIM insurer will have to provide their insured with benefits in order to protect any contractually bargained for subrogation right. *See* WYO. STAT. ANN. § 31-10-104.

Under Wyoming’s more regulated uninsured motorist insurance scheme, an insured is not required to obtain a judgment against the uninsured tortfeasor prior to seeking UM benefits from her carrier. *State Farm Mut. Auto Ins. Co. v. Schrader*, 882 P.2d 813, 821-22 (Wyo. 1994). The insured may bring a direct action against the UM insurer so long as she is able to show that she is “legally entitled to collect from the owner or driver of an uninsured motor vehicle.” *Id.* at 822

Consistent with Wyoming’s generally laissez-faire statutory scheme regarding UM/UIM insurance, there is no Wyoming statute that speaks to the issue of stacking UM/UIM coverages. *See Aaron v. State Farm Mut. Auto. Ins. Co.*, 34 P.3d 929 (Wyo. 2001). The Wyoming Supreme Court has held that there is no public policy reason to prohibit or mandate the stacking of UM/UIM insurance coverages. *Id.* at 932. Consequently, insurers are able to include anti-stacking provisions in their insurance contracts in Wyoming so long as it is done in such an unambiguous manner that a “lay-insured of ordinary intelligence could easily comprehend” the provision. *Id.* Of course, any ambiguous language will be construed against the insurer. *Id.* at 933.

Florida

In Florida, UIM insureds are not required to reduce their damages to a judgment prior to seeking benefits from their UIM insurer, and contractual provisions including such a judgment as a prerequisite to the insurer's liability have routinely been held to be void as against public policy. *See Woodall v. Travelers Indem. Co.*, 699 So. 2d 1361, 1364 (Fla. 1997). In a bit of a reprieve for UIM insurers, when considering the insurer's liability on a UIM claim, it is entitled to a set-off in the amount of the underinsured motorist's liability policy. FLA. STAT. § 627.727(6)(c). The caveat to this set-off is that it is only applied to prevent the UIM benefits from duplicating any benefit that has already been received from the tortfeasor's liability insurer. *Somoaz v. Allstate Indem. Co.*, 929 So. 2d 702, 704 (Fla. Dist. Ct. App. 2006). The application of this credit typically turns on the classification of damages as economic or non-economic. *See id.*

Insureds seeking to recover UM benefits are not required to obtain a judgment against the uninsured tortfeasor prior to seeking benefits, but may proceed in that manner if they wish. *Allstate Ins. Co. v. Boynton*, 486 So. 2d 552, 557 (Fla. 1986). If an insured decides to proceed directly against his UM carrier, he must show that he is "legally entitled to recover" amounts that "could be reduced to judgment [against the tortfeasor] in a court of law." *Id.* at 555. Additionally, if the insured brings suit directly against his insurer, he must also prove that the tortfeasor was uninsured in order to establish his entitlement to UM benefits. *Id.* at 557.

Florida also provides a statutory mechanism for protecting the subrogation rights of UIM insurers. *See* FLA. STAT. § 627.727(6). Section 627.727(6)(a) requires that a UIM insured provide her insurer with written notice of a proposed settlement with an underinsured motorist. Once the insurer receives this notice, it has thirty days to consent to the settlement, thus losing their subrogation right, or to provide UIM benefits to their insured in the amount of the proposed settlement. *Id.* at § 627.727(6)(a), (b). If the insurer decides to substitute their payment for the amount of the proposed settlement its subrogation right is protected, but it is not permitted to seek subrogation until final resolution of the UIM claim. *Id.* at § 627.727(6)(c); *see also Metropolitan Can. Ins. Co. v. Tepper*, 2 So. 3d 209, 215 (Fla. 2009). The language in § 627.727(6)(c) that "suspends" the insurer's right to subrogation until final resolution effectively bars the UIM insurer from substituting into the underlying suit as a real party in interest. *Tepper*, 2 So. 3d at 215.

Florida law deals with the issue of stacking UM.UIM coverages with statutory requirements that must be met in order for an anti-stacking provision to be enforceable. FLA. STAT. § 627.727(9). "Specifically, the insurer must satisfy the statutory requirements of notice to the insured, knowing acceptance by the insured, and filing of revised premium rates in order for an anti-stacking provision to be valid. *Rando v. Gov't Employees Ins. Co.*, 556 F.3d 1173, 1180 (11th Cir. 2009) (citing *Gov't Employees Ins. Co. v. Douglas*, 654 So. 2d 118, 120-21 (Fla. 1995)).

Texas

Like in most states, UIM insureds are not entitled to any benefits until the liability of the underinsured motorist and the amount of damages suffered by the insured are determined. *In re Reynolds*, 369 S.W.3d 638, 652 (Tex. App. 2012). This determination need not be made in a suit against the tortfeasor prior to the insured seeking UIM benefits. *See Henson v. S. Farm Bureau Cas. Ins. Co.*, 17 S.W.3d 652, 654 (Tex. 2000). The UIM insurer's liability is reduced by the amount recovered or recoverable from the underinsured tortfeasor. *In re Reynolds*, 369 S.W.3d at 652; *see also* TEX. INS. CODE ANN. § 1952.106.

An insured seeking UM benefits also does not need to pursue a claim against the tortfeasor to judgment prior to proceeding against his UM carrier. *United Services Auto. Ass'n v. Blakemore*, 782 S.W.2d 277 (Tex. App. 1989). To recover, the insured must comply with the policy conditions as well as show that he is "legally entitled to recover" UM benefits. *Id.* To show this entitlement, the insured need only show that the uninsured motorist was at fault in the accident and the extent of the injuries caused thereby. *Id.*

Texas law provides a statutory right to subrogation, but does not provide a mechanism for allowing insurers to protect that right. TEX. INS. CODE ANN. § 1952.108. In order to allow UIM insurers to protect this right, Texas courts have consistently held consent-to-settle provisions to be enforceable. *See Dairyland County Mut. Ins. Co. v. Roman*, 498 S.W.2d 154, 159 (Tex. 1973). Courts have also held that penalties for insurers acting in bad faith are an adequate constraint on an insurer's discretion in determining whether to consent to a settlement or not. *Id.* Notwithstanding the viability of consent-to-settle provisions, § 1952.108's requirement that an insurer pay the insured benefits prior to obtaining a right to subrogation leaves open the door to allow an insurer to substitute payment in the amount of the proposed settlement. *See* TEX. INS. CODE ANN. § 1952.108.

Under Texas law, UM/UIM insureds are able to stack the benefits of multiple *separate* policies, but are not able to stack the coverage of multiple vehicles within the same policy. *Stracener v. United Services Auto Ass'n*, 777 S.W.2d 378, 379-80 (Tex. 1989); *see also Monroe v. Gov't Employees Ins. Co.*, 845 S.W.2d 394 (Tex. App. 1992).