

News Story

Are UIM Carriers Acting In Bad Faith On Auto Claims?

Plaintiffs' Lawyers Say Coverage Is 'Illusory'

By Eric T. Berkman

Underinsurance (UIM) carriers in Michigan are acting in bad faith by routinely denying policyholders permission to settle their underlying auto-tort claims — even when the plaintiffs have met all the conditions for settlement outlined in their policies, plaintiffs' lawyers told Lawyers Weekly.

Under Michigan law, if a plaintiff settles an underlying tort claim without the underinsurer's consent, the plaintiff loses the right to pursue UIM benefits.

According to plaintiffs' lawyers, insurers are basically providing illusory coverage because they're accepting premium payments with no intention of ever actually paying benefits out.

"What's happening, in reality, is that a lot of insurance companies are refusing — in every case — to grant permission to settle," said attorney Steven M. Gursten of Southfield. "In effect, they're forcing plaintiffs to go to trial and expend thousands of dollars in costs and face additional delay of two or three years to go to trial so they can then turn to their own underinsurance carriers to make a claim for what they'd paid premiums for from the beginning."

But lawyers who represent UIM carriers said this is nonsense. They say they're perfectly willing to authorize settlement of any underlying case where the plaintiffs have met the conditions of the policy, and that the whole controversy boils down to a simple disagreement between plaintiffs' counsel and the insurance companies as to whether the conditions have, in fact, been satisfied.

"[Plaintiffs' lawyers] are essentially claiming they're the absolute arbiter of what constitutes meeting the conditions precedent," said Edward B. Davison, a Flint attorney who has represented a number of underinsurance carriers, including Farm Bureau Insurance, Citizens Insurance, State Auto Mutual and Michigan Millers. "It comes down to a difference of opinion, and the plaintiffs' bar isn't giving the insurance industry the benefit of the doubt that they can, in good faith, disagree with the plaintiffs' lawyers."

Either way, plaintiffs' lawyers offered several tips for dealing with UIM carriers to assure the best possible chance of securing benefits for their clients, including:

- * reviewing the policy as quickly as possible with an eye for unusual deadlines, conditions, credits or setoffs;

- * keeping insurance adjusters constantly informed as to the plaintiff's injuries and medical expenses;

* being prepared to sue the UIM carrier very early in the case; and

* threatening to seek a court order compelling consent to settle the underlying claim.

"Keep [the underinsurer] informed," said Ann Arbor attorney Robert E. Logeman. "I give them enough so that if some bureaucrat is worried he'll be second-guessed because he authorized settlement, he can justify having done what I'm urging him to do."

Brewing Controversy

Many Michigan drivers carry UIM coverage in case they're injured in an accident caused by someone else's negligence. If the wrongdoer's liability coverage isn't enough to cover the extent of the injuries, the injured party can then turn to his or her UIM carrier to take care of the excess. But under Michigan law, injured parties cannot settle with the wrongdoer until they get permission from their own UIM carriers, who have subrogation rights. If they settle without the underinsurer's consent, they waive their right to UIM benefits.

However, in order to secure the UIM carrier's consent, the injured party must satisfy certain conditions set out in the policies, including showings of:

* less than 50 percent comparative negligence on the part of the policyholder;

* a "threshold injury," meaning either permanent disfigurement or serious impairment of a body function; and

* injuries in excess of the wrongdoer's policy limits with no reasonable likelihood of collecting the excess through the wrongdoer's personal assets.

Plaintiffs' lawyers claim the whole problem is that they're making these showings, yet UIM carriers have been increasingly denying permission to settle the underlying claims.

"In the last several years, as UIM coverage is becoming more and more popular and more insurance companies are offering it, these kinds of situations are becoming more frequent," said Gursten.

In fact, denying permission to settle is quickly becoming the rule among underinsurers, according to Kelly A. Kruse of Bloomfield Hills, who's currently embroiled in a settlement-authorization dispute with Farm Bureau Insurance. Kruse's client was 18 years old when she was allegedly struck by a drunk driver. Her car rolled and she fractured her hip. Meanwhile, said Kruse, she's made the necessary showings to secure authorization, including the threshold injury requirement. Kruse said her client's injury has affected her ability to walk and engage in normal activities. Nonetheless, said Kruse, Farm Bureau won't allow her to settle the underlying claim.

But Davison, who represents Farm Bureau in this case, said this is just another example of the plaintiffs' bar assuming their reading of the facts is the only correct one.

"[Kruse] and I have a basic disagreement on two or three issues, but for her to say that Farm Bureau is wrong in not authorizing settlement simply exalts her opinion over ours," he said. "At some point in time, a jury may decide which one is right. But that doesn't mean the one who's wrong is acting in bad faith."

But even assuming for the sake of argument that some underinsurers are acting in bad faith, plaintiffs have absolutely no recourse under Michigan law, Gursten pointed out. The key to the

law is to do what the contract says and enforce the contract. Under Michigan case law, though, the failure to pay a contractual obligation does not amount to willful behavior or bad faith.

"So there's really no mechanism to protect the insured," Gursten said. "You've got some good companies and some bad companies and the bad companies are doing a lot of things to really try and get out of paying these coverages that insureds pay good money for. What's really necessary are clear-cut rules and penalties for bad behavior."

Practice Pointers

Absent statutory penalties for bad behavior, like the insurance bad-faith statutes that many other states have, plaintiffs' lawyers said there's little they can do to force an underinsurer's hand short of going to trial on the underlying claim. But they did suggest a few practical tips that might help.

Gursten said the most important thing a plaintiff's lawyer can do is review the most current version of the policy as soon as it looks like there might be a situation involving UIM coverage. That's because the language of the policy controls how a claim will be handled. And lawyers who fail to catch unusual or unique policy terms — like, say, an unusually short statute of limitations period in which they can sue for UIM benefits — put their clients' rights at risk.

Similarly, failure to catch unique terms can deprive the client of unusual gains.

Logeman told of a situation where his client's UIM policy provided a credit for other *insurance* monies received from other tortfeasors. His client had received \$650,000 from the state in a negligent-highway-maintenance case. Since the state monies were not insurance, his client was still able to collect his full \$50,000 in UIM coverage. Had he not read the policy carefully, he might have assumed the \$650,000 payment wiped out the UIM benefits.

"Each policy has its own rules, and you've got to make sure you have the current rules," said Logeman. "If you do that, you'll have answers to notice requirements, statutes of limitation and all the procedural trip wires."

It's also crucial to keep adjusters informed as to the plaintiff's injuries and medical expenses, said Gursten. "If you keep them informed, hopefully — if you're dealing with a fair company — they'll be more likely to give you permission to settle the case once the defendant offers policy limits."

Kruse urged plaintiffs' lawyers to file a lawsuit right off the bat. That's because, with so many companies including a one-year statute of limitations in their policies, you can't risk overshooting the deadline.

"I file one lawsuit against both parties — the underinsured carrier and the at-fault party," she said. "If you find the unusual party with a million dollars in liability coverage, you probably won't need to do this because your UIM coverage will probably be less. But if your investigation reveals that the at-fault party doesn't have sufficient insurance to compensate your client, go ahead and file against both in the same suit."

She added that "the advantage of combining both claims into one suit is that it provides an opportunity to do discovery that may satisfy the collectibility requirements that the UIM carrier poses."

Gursten agreed. He acknowledged that filing suit against a UIM carrier before knowing whether there's a basis of coverage poses a risk of sanctions, but said that insurers leave few options.

"In too many instances, you do not have the defendant's insurance information to even know if there is going to be a UIM case when facing these one-year statutes of limitations," he explained. "For example, Detroit may take three to four months to send out a police UD-10, and then it can take additional months to get the insurance information since the Secretary of State does not provide it anymore. So if someone waits several months to go to a lawyer, then it is very easy to find yourself forced to immediately filing lawsuits without even knowing whether they will be necessary or not."

Finally, Logeman's favorite strategy for obtaining permission to settle is threatening to amend his complaint and ask for a declaratory judgment that the insurer is unreasonably withholding settlement. He says it's worked.

"When their lawyer has to be there and pay someone to babysit a clear excess verdict, suddenly the incentive [to withhold settlement] is no longer there," he said. "Plus, if there's a subsequent settlement conference, I can say I'm willing to settle and these people are being jerks. And the judicial wrath turns to them."

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