MULTIPLE CARS, MULITPLE UM/UIM POLICIES – HOW TO RECOVER FROM BOTH

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A client comes into your office and has been in an accident. The tortfeasor has minimum liability limits. Your client has UIM on her car. Her husband has UIM on his car. Your client's injuries are worthy of recovery from all three policies.

Without much effort, you are able to collect the liability limits. You are also successful on collecting your client's UIM limits; but your case evaluation is that she is still not fully compensated for her injuries. The only remaining insurance available is her husband's UIM policy. However, her husband's carrier denies coverage. Why? Because your client was injured in a car not scheduled for coverage under her husband's policy.

What now?

If you have not already obtained a copy of Husband's policy, request a copy from his insurance company. Make sure to read the policy carefully, paying close attention to the "Insuring Agreement", definitions, exclusions and endorsements. Although many insurance policies contain similar language, it only takes one or two different wordings to create or eliminate coverage.

Second, you need to know the law. Many insurance companies deny coverage relying on an "owned but not scheduled for coverage" exclusion and many lawyers do not challenge this exclusion believing that it is valid.

So what is the current Kentucky law regarding the "owned but not scheduled for coverage" exclusion? In 1990 the Kentucky Supreme Court considered such an exclusion in an Uninsured Motorist (UM) policy which read:

> *"A. We do not provide Uninsured Motorist Coverage for bodily injury sustained by any person:*
>
> *1. While occupying, or when struck, by any motor vehicle owned by you or any family member which is not insured for this coverage under this policy."*

The Court held this exclusion void as contrary to public policy. see *Chaffin v. Kentucky Farm Bureau Insurance Companies*, 789 S.W.2d 754 (Ky. 1990). The *Chaffin* Court's rationale was that if the plaintiff had been injured by an uninsured motorist while riding in the vehicle of a friend or while crossing the street, then under the policy there would be coverage. It was more probable that the plaintiff would be injured while occupying her own vehicle and it is contrary to the underlying purpose of such coverage to allow recovery for an extraordinary situation and not for a more conventional circumstance. *Chaffin* at 757.

But you may be asking how this applies to your Underinsured Motorist (UIM) case because *Chaffin* was an Uninsured Motorist (UM) case? Kentucky recognizes no distinction

between UM and UIM with respect to reasonable expectations and public policy. *Allstate Insurance Company v. Dicke*, 862 S.W.2d 327 (Ky. 1993).

In line with the holding in *Chaffin* and *Dicke*, a similar exclusion for a UIM policy was litigated and also found to be unreasonable. *Hamilton Mutual Insurance Company v. United States Fidelity and Guarantee Company*, 926 S.W.2d 466 (Ky. App. 1996). In addition to reaffirming *Chafin*, the *Hamilton Mutual* Court reaffirmed the holdings in *Dicke* that UM and UIM are personal coverages to the insured and once provided, cannot be taken away through the use of anti-stacking provisions. *Hamilton Mutual* at 470.

Are there any cases or arguments to the contrary? A qualified yes. The UIM carrier will most likely deny coverage relying on a combination of *Motorist Mutual Insurance Company v. Glass*, 996 S.W.2d 437 (Ky. 1997), *Windham v Cunningham*, 902 S.W.2d 838 (Ky. App. 1995), *Snow v. West American*, 161 S.W.3d 338 (Ky. App. 2004), and *Baxter v. Safeco Insurance Company of America*, 46 S.W.3d 577 (Ky. App. 2001).

The plaintiff in *Glass* was a passenger in his own motor vehicle with a permissive user driving the vehicle. The driver lost control of the vehicle causing a one-car accident. Plaintiff brought suit against the driver and his own insurance company. The plaintiff was attempting to have his own vehicle declared to be an *"underinsured vehicle"*. The policy in *Glass* excluded from the definition of an underinsured vehicle, any vehicle *"owned by or furnished or available for the regular use of you or any family member,"* *Glass* at 450. Justice Cooper writing for the *Glass* Court stated, *"A vehicle owned by or furnished or available for the regular use of the named insured or a family member is not an "underinsured vehicle"*. Id. at 450. In essence, if you are injured in your own car you can't claim that your own vehicle is the "underinsured" vehicle.

The Supreme Court in *Glass* made it clear that the holding of *Glass* applied only to the factual situation where an insured is a passenger in his own car and is attempting to make recovery against both the liability and UIM coverages of the insured's policies. The Court then recognized the validity of the *Chaffin* holding:

> *"If this had been a two-vehicle accident with Shelburne (tortfeasor) operating his own vehicle, and if Shelbourne's liability insurance coverage had only $25,000.00, then Jeffrey (owner and insured) could have recovered $25,000.00 in UIM payments for each of the three vehicles to which UIM coverage applied." 996 S.W.2d at 450.*

Windham like *Glass* involved a single car accident. Again, the insured was a passenger in her own motor vehicle with a permissive user driving the vehicle. After collecting the liability limits on her own policy an attempt was made to stack UIM coverages. This attempt was denied by the Court. *"The purpose of UIM coverage is not to compensate the insured or his additional insureds from his own failure to purchase sufficient liability insurance." 902 S.W.2d at 841.*

The carrier may also throw in *Snow v. Wester American Insurance Company*, 161 S.W.3d 338 (Ky. App. 2004). This involved a death to a young girl while a passenger in her father's vehicle. The father had recently purchased his vehicle; but had yet to obtain liability coverage for it. However, at the time of the collision they were living with the decedent's grandfather who was insured with West American. Suit was filed against the father and driver of the other vehicle involved. Plaintiff's sought coverage for the father's liability with West American; but they denied that its liability coverage applied to decedent's father based

upon an exclusion for injuries arising out of the use of an unscheduled vehicle owned or available for the regular use of a family member (similar to the exclusion in *Glass*; however, *Glass* was a UIM exclusion and *Snow* dealt with a liability exclusion). This declaration of rights action ensued.

The *Snow* Court upheld this exclusion despite *Chaffin*. The Court did not feel that an insured should be exposed to liability for injuries arising out of an accident involving a vehicle owned and used by other family members for which coverage had not been obtained. *"Extending coverage in this case would provide benefits which were neither paid for nor reasonably contemplated by the named insured or the members of his family."* Lastly, the Court reasoned that *Chaffin* dealt with a person-oriented coverage rather than a vehicle-related coverage. In any event, Kentucky Courts treat liability coverage different than UM or UIM coverages.

Special rules may also apply when the injured party occupies a motorcycle at the time of the accident. In *Baxter v Safeco Insurance Company of America*, 46 S.W.3d 577 (Ky. App. 2001), decedent was killed while riding a motorcycle when it was struck by another vehicle. Decedent's estate settled for the tortfeasor's limits and collected UIM benefits from the policies covering both the decedent's motorcycle and truck. At the time of the collision, decedent was living with his parents who had their vehicles insured with Safeco. Based on the definitions in the policies, Bruce was both a family member and an "insured" under the policies. However, the Safeco policies specifically excluded from UIM coverage any bodily injury sustained by an insured while occupying or operating an owned motorcycle. In upholding this exclusion, the Court relied on a passage in *Preferred Risk Mutual Ins. Co. v. Oliver*, 551 S.W.2d 574 (Ky. 1977), which states:

> *"It is common knowledge that motorcycle riders, as a class, are among the highest risk groups conceivable. Motorcycles offer no protection whatsoever from the front, back, sides or top, and leave the rider exposed to every peril of highway travel. The exclusion of such a class from coverage is clearly reasonable where, as here, the assured has the option of avoiding the excluded peril. An assured has no choice in selecting those uninsured motorists who may injure him, but he certainly does elect to ride a motorcycle. This volitional act triggers the exclusion and he accepts the consequences."*

Based upon the Court's reasoning, it appears that *Baxter* has a very limited application – only to cases involving specific coverage exclusions for motorcycles. Beyond that, *Baxter* is a Court of Appeals decision which would be ineffective to overrule *Chaffin*.

Kentucky maintains a strong interest in upholding its public policies in the field of motor vehicle insurance. The Supreme Court has long recognized the difference between liability and underinsured motorist coverages. UIM has been found similar to personal accident insurance and follows the person not the car. These insurance policies are adhesion contracts and the Supreme Court is vigilant in its holdings to enforce a fair set of rules that meet the reasonable expectations of Kentucky citizens. In situations where the claimant has substantial loss he should be provided with coverage under each purchased policy.

The next time you are faced with an injured client whose spouse has a separate UM or UIM policy with a different insurance company, make sure to read the policies and seek recovery under both for your client. Until the Kentucky Supreme Court says otherwise, *Chaffin v. Kentucky Farm Bureau* and *Hamilton Mutual Insurance Company v. United States Fidelity*

and Guarantee Company are still controlling and the "owned but not scheduled for coverage" exclusions are invalid and against Kentucky's public policy.