

CHOICE OF LAW ISSUES FROM BOTH SIDES OF THE TABLE

by

Matthew J. Devoti

The litigation of uninsured and underinsured motorist cases requires knowledge of principles relating to both tort and contract law. Because of the unique nature of these cases, the practitioner must be informed about certain basic concepts and stay up-to-date on recent changes in the way courts deal with these matters. In this paper, we will discuss choice of law issues applicable to these claims, identify the one Missouri statute addressing underinsured motorist coverage, the applicable statute of limitation and appellate decisions issued in the past 18 months concerning issues pertinent to this litigation.

A. Which State's Law Applies?

As practitioners in a major metropolitan area located adjacent to a state border, we occasionally see claims involving motorists who are citizens of one state injured by the negligence of an uninsured motorist while traveling in a second state. Perhaps, a client resides in Belleville and suffers injury after being involved in a collision in downtown St. Louis. Maybe a client who lives in the City of St. Louis is injured in a crash while vacationing in California. State law may vary on issues like stacking, set-offs and statute of limitation. In such situations, counsel must determine which state's law governs his uninsured and underinsured motorist claims before prosecuting the claim.

In Missouri, the law of the state with the "most significant relationship" to the occurrence and the parties involved in the litigation governs the dispute involving parties to an insurance contract. Hartzler v. Am. Fam. Mut. Ins., 881 S.W.2d 653, 655 (Mo.App.W.D. 1994); See Kennedy v. Dixon, 439 S.W.2d 173, 184-185 (Mo.banc 1969). Missouri has adopted Section 188 and 193 of the Restatement (Second) of Conflict of Laws. Hartzler, 881 S.W.2d at 655. Section 188 provides that the "most significant relationship" determines the choice of law. Egnatic v. Nguyen, 113 S.W.3d

659, 665 (Mo.App.W.D. 2003); *See also Frost v. Liberty Mut. Ins. Co.*, 828 S.W.2d 915, 920 (Mo.App.W.D. 1992). In the context of an insurance contract, Section 193 directs that:

The principal location of the insured risk is given greater weight than any other single contact in determining the state of applicable law provided that the risk can be located in a particular state.

Egnatic, 113 S.W.3d at 665; Restatement (Second) of Conflict of Laws, Section 193.

In Hartzler, the Western District remarked that under Section 193, the applicable law should be the law of the state which the parties contemplated as the principal location of the insured risk. Hartzler, 881 S.W.2d at 655. The principal location of the insured risk is “the state where it will be during at least the major portion of the insurance period.” Id.; *See Egnatic*, 113 S.W.3d at 666. In the case of an automobile liability policy, the principal location is “where the vehicle will be garaged during most of the insurance period.” Egnatic, 113 S.W.3d at 666. As such, according to the Western District, the location of the insured risk will be given greater weight than any other single contact in determining the state of applicable law when an insured risk can be principally located in one particular state. Hartzler, 881 S.W.2d at 655. The rationale for the rule, the court remarked, is that:

the principal location of the risk has the ultimate bearing upon the nature and extent of the risk and constitutes a significant factor upon which the terms and conditions of the policy will depend.

Id.

Of course, exceptions to the general rules exist. Missouri courts have refused to apply choice of law principles where the analysis of underlying policy language reveals that the language is ambiguous. Bauer v. Farmers Ins. Co., 270 S.W.3d 491, 498

(Mo.App.W.D. 2008); Williams v. Silvola, 234 S.W.3d 396, 400 (Mo.App.W.D. 2007). In Silvola, Rebecca Jaynes brought suit against her uninsured motorist carrier. Silvola, 234 S.W.3d at 398. Jaynes suffered extensive injuries when the vehicle which she operated was struck from behind by an uninsured motorist. The collision occurred in Missouri. On the date of the crash, Jaynes lived in Kansas with her husband. Jaynes and her husband owned seven vehicles. Farmers insured all seven vehicles. Id.

Jaynes brought suit against the insurer after it refused to permit Jaynes to stack uninsured motorist coverage; the insurer asserted that choice of law principles dictated that Kansas law governed and Kansas law prohibited the stacking of insurance policies. Silvola, 234 S.W.3d at 399. Further, the insurer argued, each of the policies contained provisions expressly prohibiting the stacking of uninsured motorist coverage. Id. at 400. Jaynes disagreed, pointing to a language in the policy directing “[s]ubject to the law of the state of the occurrence”. *See* Id. at 398, 401. That language, Jaynes argued, contradicted the language relied upon the insurer thus creating an ambiguity. The Western District agreed, found the provisions to create uncertainty in the meaning of the words used in the policy, construed the ambiguity against the insurer, and permitted Jaynes to stack the coverages as permitted by Missouri law – “the law of the state” in which the collision occurred. Id. at 404.

Further, Missouri courts have refused to apply the law of another state that runs counter to public policy as established in Missouri. Farmers Ins. Co. v. McFarland, 976 S.W.2d 559, 563, 566 (Mo.App.W.D. 1998). For instance, in McFarland, the Western District refused the attempt of the insurer to seek reimbursement from a personal injury plaintiff for personal injury protection (PIP) benefits paid to the plaintiff as the result of injuries suffered in a collision which occurred in Missouri. McFarland, 976 S.W.2d at 566. The insurer paid David McFarland PIP benefits after he was injured in a collision involving a vehicle in which he was a passenger. The collision occurred in Missouri. The vehicle in which McFarland rode was licensed in Kansas and driven by a Kansas resident. Id. at 560. Recognizing Missouri’s public policy prohibiting the assignment of

personal injury claims, the court refused to apply Kansas law which permitted reimbursement and denied to enforce the insurer's lien. Id. at 566.

B. Which UIM Statute Applies?

Underinsured motorist coverage is not mandated by statute in Missouri. Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo., 992 S.W.2d 308, 313-314 (Mo.App.E.D. 1999). However, statute does establish that any limits of underinsured motorist coverage that are less than two times the limit for bodily injury or death pursuant to Section 303.020 are deemed to be excess of any "liability coverage". Section 379.204 R.S.Mo. (2004); *See Buehne v. State Farm Auto. Ins. Co.*, 232 S.W.3d 603, 607 (Mo.App.E.D. 2007). Section 379.204 provides:

Any underinsured motor vehicle coverage with limits of liability less than two times the limits for bodily injury or death pursuant to Section 303.020, RSMo, shall be construed to provide coverage in excess of the liability coverage of any underinsured motor vehicle involved in the accident.

Section 379.204.

C. Statute of Limitations

The timing of the bringing of suit against an insurer is an issue for counsel to be aware. Timing may play an important role in the litigation of an uninsured or underinsured motorist case as the statute of limitation for personal injury and contract cases is vastly different. Counsel should remember that actions for injury to the person, not arising out of contract, must be commenced within five years of the date of injury. Section 516.120 R.S.Mo. (2004). Alternatively, actions on a written contract for payment of money shall be commenced within ten years. Section 516.110 R.S.Mo. (2004).

Missouri courts have determined that an insured is not barred from proceeding against her uninsured motorist carrier merely because the five year statute of limitation governing tort claims had expired. Edwards v. State Farm Ins. Co., 574 S.W.2d 505, 506-507 (Mo.App.K.C. 1978). After all, an action on the insurance policy is an action in contract. Hill v. Seaboard Fire & Mar. Ins. Co., 374 S.W.2d 606, 610-611 (Mo.App.K.C. 1963). Accordingly, such claims are governed by the ten-year statute of limitation. Edwards, 574 S.W.2d at 506. Recognizing that an insured must not obtain a judgment against the uninsured motorist to collect under her own policy, the Court in Edwards held that the insured could proceed in a suit against her carrier so long as she could prove in that case that the uninsured motorist would have been liable to her had she pursued the claim. Id. at 506-507; *See also* Messner v. Am. Union Ins. Co., 119 S.W.3d 642, 645-646 (Mo.App.S.D. 2003).

This rule may result in a harsh consequence for the insurer. Should the insured fail to act before the passage of five years, the delay serves to foreclose the insurer from exercising its right to subrogation against the tortfeasor motorist. *See* Edwards, 574 S.W.2d at 508; *See also* Oates v. Safeco Ins. Co. of Am., 583 S.W.2d 713, 717 (Mo.banc 1979). For example, the Supreme Court directed in Oates:

The insured is not barred from his uninsured motorist claim even though the insured's conduct prevents the company from exercising its subrogation right.

Oates, 583 S.W.2d at 717.

1. The Decision Whether to Join the Uninsured Motorist and Carrier

One of the first questions presented to insured's counsel is against whom should the insured bring suit to collect uninsured motorist benefits under her insurance policy. Under Missouri law, the insured must not join the uninsured motorist in a case against her insurer when attempting to recover under an uninsured motorist policy. Oates, 583

S.W.2d at 715. In fact, an insured is not required to have an unsatisfied judgment against the uninsured motorist to recover under her uninsured motorist policy; she only must demonstrate that (1) the other motorist was uninsured, (2) the other motorist is legally liable to the insured, and (3) the amount of damages. Id.

As such, Missouri law provides multiple options to plaintiff's counsel:

- (a) First, file suit against the uninsured motorist only;
- (b) File suit against the uninsured motorist and her carrier; or
- (c) File suit against her uninsured motorist carrier only.

Counsel should keep in mind that the uninsured motorist carrier possesses the right to intervene in any case filed solely against the uninsured tortfeasor. Alsbach v. Bader, 616 S.W.2d 147, 150 (Mo.App.E.D. 1981); Rule 52.12. Indeed, as discussed in the preceding section, the insurer is estopped from relitigating issues necessarily decided in an action against the uninsured motorist where the insurer is provided notice of the suit and fails to intervene despite the opportunity to do so. Wells v. Preferred Risk Mut. Ins. Co., 459 S.W.2d 253, 259 (Mo.banc 1970). Accordingly, the insurer and its counsel should always be careful to protect the interest of the insurer by promptly intervening in an uninsured motorist action to which the carrier was not joined. Id. at 260.

2. The Decision Whether to Join the Underinsured Motorist Carrier

Suits against an underinsured motorist carrier differ in at least one significant aspect from suits against an uninsured motorist carrier – the insured cannot join the underinsured motorist carrier in a suit before exhausting all applicable policy limits or obtaining a judgment in excess of all applicable liability coverage. Such suits require the insured meet three conditions before the underinsured motorist insurer is required to pay damages: (1) the insured incurred bodily injury, (2) the injuries occurred as the result of a collision with an underinsured motorist and (3) the insured is “legally entitled” to collect from the owner of the underinsured vehicle. State ex rel. Shelton v. Mummert,

879 S.W.2d 525, 528 (Mo.banc 1994). Therefore, a plaintiff does not possess a viable cause of action against the underinsured motorist carrier until all of the above elements are satisfied. Id.

D. Current Developments and Case Law Update

This portion of the paper reviews opinions entered in the past 18 months addressing various matters at issue in uninsured and underinsured motorist cases. The cases fall within five general categories: coverage, stacking, set-off, procedure and discovery.

1. Coverage

Under Missouri law, an out-of-state motorist is deemed to be uninsured if the bodily injury liability limits of his insurance policy are below the statutory minimum, even when the motorist's insurer offers to pay the minimum of the Missouri financial responsibility insurance. Adams v. Shelter Mut. Ins. Co., No. SD 28783, 2008 WL 5006565, * at 3 (Mo.App.S.D. Nov. 26, 2008). David Adams and his children suffered injury as the result of a collision with a motorist from Louisiana. A motor vehicle liability policy covered the truck driven by the out-of-state motorist. However, the coverage provided by the policy was less than that required by the Missouri financial responsibility minimum insurance law. Id. at 2. Despite the offer of the liability insurer to voluntarily pay \$25,000 to resolve the liability claim, the Southern District found the out-of-state motorist to be uninsured and held that Adams and his family entitled to uninsured motorist benefits under their policy. Id. at 3.

A passenger injured in a collision caused by an uninsured motorist is not an "insured" under the owner's policy absent language providing uninsured motorist coverage to the occupant. Byers v. Shelter Mut. Ins. Co., 271 S.W.3d 39, 40 (Mo.App.W.D. 2008). Sherry Byers suffered injury as a passenger in a vehicle operated by an insured of Shelter. Id. at 39. The policy limited uninsured motorist coverage for

occupants to relatives living in the insured's home. Byers admitted that she was not a relative of the insured or living in the insured's home at the time of the collision. Id. at 40. Nevertheless, Byers argued, public policy mandated coverage. The Western District disagreed, holding that the public policy does not require a motor vehicle insurance policy to provide uninsured motorist coverage for occupants of vehicles owned and operated by their insureds. Id.

A motorcyclist who suffered injury after he intentionally separated from the motorcycle he had been riding in an attempt to avoid a collision "occupied" the motorcycle at the time of the injury. Loyd v. State Auto. Property & Cas. Co., 265 S.W.3d 901, 905 (Mo.App.W.D. 2008). An exclusion of coverage is an affirmative defense that must be plead and proved by the insurer. Id. at 903. In Loyd, a motorcyclist suffered injury when he "laid down" his motorcycle before colliding with a tractor trailer; Stephen Loyd made a claim for underinsured motorist coverage under a policy which did not cover the motorcycle. Id. at 902-903. The insurer denied liability for underinsured motorist benefits by pointing to a policy provision excluding coverage for injury sustained by an insured while occupying a motor vehicle not insured under the policy. Id. at 904. The Court concluded that Loyd occupied the motorcycle at the time he suffered injury. Id. at 905. In so doing, the Court cited, but did not adopt, a four part test utilized by non-Missouri courts to determine whether "occupancy" had terminated and a new activity begun:

- (1) there is a casual relation or connection between the injury and the use of the . . . vehicle;
- (2) the person asserting coverage must be in reasonably close geographic proximity to the vehicle, although the person need not be actually touching it;
- (3) the person must be vehicle-oriented rather than highway or sidewalk oriented at the time; and
- (4) the person must also be engaged in a transaction essential to the use of the vehicle.

Id.

An insurer may exclude from uninsured and underinsured motorist coverage a relative living in the insured's household who owns her own motor vehicle. Denny v. Am. Family Mut. Ins. Co., 254 S.W.3d 85, 87 (Mo.App.W.D. 2008)¹. Deanna Denny suffered injury while driving a vehicle she owned. At the time of the collision, Denny lived with her parents. Id. at 86. Prior to the crash, American Family issued an automobile policy to Denny's parents that provided uninsured and underinsured motorist coverage. The policy defined an insured person as "You or a relative" but excluded from the definition of "relative": "any person who. . . owns a motor vehicle other than an off-road motor vehicle". Id. at 86-87. Denny claimed that the policy failed to define "off-road vehicle" and, as such, was ambiguous as the vehicle which she owned could be considered as both an on-road and off-road vehicle. Noting that Denny was driving her vehicle on a public street at the time of her injury, the Court rejected her claim and found that the insurer validly concluded that Denny was not an insured. Id. at 87.

Minor children temporarily living in a relative's home at the time of an automobile collision are not entitled to recover against the uninsured motorist provisions of the relative's motor vehicle insurance policy where, as a matter of law, the children were not members of the relative's "household". Reed v. Am. Standard Ins. Co. of Wi., 231 S.W.3d 851, 854 (Mo.App.W.D. 2007). A one-car collision killed James Reed's two children. At the time of the collision, the children lived with their mother in the home of their aunt and uncle. The policy at issue provided coverage to "relatives" of an insured injured in a motor vehicle collision with an uninsured motorist. Id. at 852. The policy defined "relative" as "a person living your household, related to you by blood, marriage or adoption". The policy, however, did not define "household". The court construed "household" to require a claimant to be either: (1) integrated into the insured's family or

¹ An insurer relying upon a policy exclusion to deny coverage bears the burden of proving facts that make the exclusion applicable. Strader v. Progressive Ins., 230 S.W.3d 621, 624 (Mo.App.S.D. 2007).

(2) permanent in the insured's home. Id. at 853. Finding that the children were merely temporarily living in their uncle's home until their mother could afford her own apartment, the court concluded that Reed could not recover under the uninsured motorist provisions of uncle's policy. Id. at 854.

2. Stacking

Where there exists conflict between a policy's "excess coverage" clause and "anti-stacking" and "set-off" provisions, an insured is permitted to stack underinsured motorist coverage without set-off of benefits received from the tortfeasor. Chamness v. Am. Family Mut. Ins. Co., 226 S.W.3d 199, 208 (Mo.App.E.D. 2007). Catherine Chamness brought suit against her insurer seeking underinsured motorist coverage under two policies issued to her. Id. at 200-201. The policy contained language in the "other insurance clause" directing:

any insurance provided under this endorsement for an insured person while occupying a vehicle you do not own is excess over any other similar insurance.

Id. at 202-203. The policy also contained anti-stacking language and a set-off provision indicating that underinsured coverage was not provided under the circumstances of the case. Id. at 203. The court recognized the rule that an insurance policy is ambiguous where there exists "duplicity, indistinctness, or uncertainty in the meaning of the language used in the policy." Id. at 202. Finding the policy's language ambiguous, the court construed the language in favor of Chamness and permitted her to stack the underinsured motorist coverage while prohibiting the insurer from setting-off funds she received from the underinsured motorist. Id. at 208.

Where policy language referencing choice of law was ambiguous, an insured under a Kansas motor vehicle policy injured in a collision which occurred in Missouri could stack underinsured motorist coverage despite Kansas law prohibiting stacking of

coverage. Bauer v. Farmers Ins. Co., 270 S.W.3d 491 (Mo.App.W.D. 2008). In Bauer, a resident of Kansas was injured in a collision in Springfield. Robert Bauer and his wife possessed two Kansas automobile insurance policies issued by the insurer. Id. at 492. In addition to treating uninsured and underinsured coverage in the same section, the policies contained language limiting liability subject to “the law of the state of the occurrence”. Id. Missouri law allows “stacking” of uninsured motor vehicle coverage. Also, Missouri permits the stacking of underinsured motorist coverage where a policy treats uninsured and underinsured coverage the same. Id. at 494. Kansas law strictly prohibits stacking of uninsured and undersinured motorist coverages. Id. at 495. Finding the language in the policy ambiguous, the court construed the policy in favor of Bauer. Id. at 499.

An “occupant insured” is not entitled to stack uninsured motorist coverage. Kertz v. State Farm Mut. Auto. Ins. Co., 236 S.W.3d 39, 42 (Mo.App.E.D. 2007). In Kertz, a foster child of a “named insured” attempted to stack uninsured motorist coverage on policies purchased by her foster parents. The Eastern District rejected the request, refusing to extend public policy establishing the ability of the insured, his spouse, and their minor children to stack uninsured motorist coverage. Id. at 41-42. The court also held that the “reasonable expectations” doctrine shall not be applied absent an ambiguity in the policy language. The doctrine of reasonable expectations guarantees that the:

objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.

Id. at 42.

3. Set-off of “Other” Underinsured Motorist Coverage

Section 379.204 deems underinsured motorist coverage limits that are less than two times the limits for bodily injury or death to be excess only of any “liability

coverage”. Buehne v. State Farm Mutual Automobile Ins. Co., 232 S.W.3d 603, 607 (Mo.App.E.D. 2007). The statute does not create any similar requirement with respect to other available underinsured motorist coverage. Id. An insurer may set-off its own underinsured motorist limitation against underinsured motorist coverage provided by another insurance carrier. Id.

4. Procedure

An insurer may intervene in a suit against an uninsured motorist following the entry of a default judgment and successfully move to set aside the judgment upon demonstration of “good cause for not having timely answered the petition” or otherwise defended the case. Baker v. Lee, 252 S.W.3d 267, 271-272 (Mo.App.S.D. 2008). Michael Baker brought suit against an uninsured motorist. Insurer did not receive notice of the suit against the uninsured motorist until seven days before entry of the default judgment. In fact, prior to entry of the judgment, insurer had not received any copy of any pleading filed by Baker or notice of the specific time or division in which the hearing on the default motion would be heard. Id. at 272; *See also* Rule 74.05(d). The court noted the absolute right of an uninsured motorist carrier to intervene in an action brought by its insured alleging injury caused by the negligence of an uninsured motorist². Baker, 252 S.W.3d at 269-270.

The doctrine of claim preclusion does not prevent plaintiff from bringing an uninsured motorist case against its insurer after plaintiff previously dismissed the claim to appeal an adverse judgment on a related claim where the trial court expressly reserved plaintiff’s right to maintain the action. Kesterson v. State Farm Fire & Cas. Co., 242 S.W.3d 712, 717 (Mo.banc 2008). Claim preclusion prohibits a litigant from bringing, in a subsequent lawsuit, claims that should have been brought in a previous suit. Id. at 715. The doctrine applies to “every point properly belonging to the subject matter of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.” Id. at 716. Improper splitting of claims occurs when a party sues on a claim

² *See* Wells v. Preferred Risk Mut. Ins. Co., 459 S.W.2d 253, 259 (Mo.banc 1970).

which arises out of the same “act, contract or transaction” as a previously litigated claim. Id. A plaintiff may not bring the second action unless the court in the first action “expressly reserves” the plaintiff’s right to pursue the second case. Id. at 717. In Kesterson, the Supreme Court held that plaintiff could prosecute an uninsured motorist case against her carrier based upon the conduct of a “phantom motorist” where the trial court had previously granted plaintiff’s motion to dismiss the claim “without prejudice”. Id.

5. Discovery

Discovery served on an insurer in an uninsured motorist case alleging breach of contract must have reasonable temporal, geographic and subject matter limitations. State ex rel. Am. Standard Ins. Co. of Wi. v. Clark, 243 S.W.3d 526, 531 (Mo.App.W.D. 2008). Marianna Omazic brought suit against her insurer for damage caused by an uninsured motorist; the case included allegations of vexatious refusal to pay. During the course of discovery, Omazic’s counsel served a subpoena *duces tecum* seeking production of documents regarding ***all claims*** filed with the insurer over a four year period. Id. at 528. The subpoena demanded production of documents in 78 categories, many of which had numerous subcategories. Id. at 529. The insurer filed 1200 objections. The Western District held that the trial court’s order directing the insurer to comply with the discovery requests without setting “temporal, geographic, or subject matter limitations” constituted an abuse of discretion. Id. at 531.

RESEARCHING THE ISSUES OF COVERAGE

by

Matthew J. Devoti

The litigation of uninsured and underinsured motorist cases often involve analysis of issues unique to those matters. As such, counsel who represents parties in these cases must be cognizant of a number of different issues. This paper will address various topics which a lawyer handling uninsured and underinsured cases must be aware. Many of the issues involve review of the existence and scope of uninsured and underinsured motorist coverage provided for in the insurance agreement.

I. Sources of Coverage

Insurance is a contract under which an insurer agrees to assume a defined risk possessed by an insured. The insurer agrees to assume the risk for consideration and, upon the happening of the risk, pays the insured a sum of money. Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo., 992 S.W.2d 308, 313 (Mo.App.E.D. 1999).

Any discussion of uninsured and underinsured coverage must begin with a conversation addressing the nature of each type of coverage. ***Uninsured motorist coverage*** refers to coverage intended to provide a source of recovery for an insured who is legally entitled to recover damages for bodily injury caused by the negligent owner or operator of an uninsured motor vehicle. Niswonger, 992 S.W.2d at 313. ***Underinsured motorist coverage*** refers to coverage intended to provide a source of recovery for an insured who has been injured by a negligent motorist whose own liability coverage is insufficient to fully pay for actual damages suffered by the insured. Id.

Both uninsured and underinsured motorist coverage are “floating, *personal* accident insurance” rather than insurance on a particular vehicle. Niswonger, 992 S.W.2d at 313. As such, both coverages follow the insured individual wherever she goes. Id.

A. Uninsured Motorist Coverage

Statute requires all policies of motor vehicle insurance issued in Missouri include uninsured motorist coverage. Section 379.203 R.S.Mo. (2004); Niswonger, 992 S.W.2d at 313. In pertinent part, Section 379.203 provides:

No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto. . . in not less than the limits for bodily injury or death set forth in section 303.030, RSMo, for the protection of person insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicle because of bodily injury, sickness or disease, including death, resulting therefrom. . .

Section 379.203.1.

The General Assembly enacted the statute in 1967 to require automobile insurance policies to include a minimum level of uninsured motorist coverage. Dawson v. Denney-Parker, 967 S.W.2d 90, 92 (Mo.App.E.D. 1998). The purpose of the statute is to provide an insured with coverage parallel to that the insured would have possessed had the negligent operator of the uninsured motor vehicle had the requisite liability coverage. Rister v. State Farm Mut. Auto. Ins. Co., 668 S.W.2d 132, 137 (Mo.App.S.D. 1984). The statute affords coverage not only when the negligent operator of a motor vehicle is uninsured but also when the identity of the operator is not known. The statute provides that the:

entitlement exists although the identity of the owner or operator of the motor vehicle cannot be established because such owner or operator

and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification.

Section 379.203.1. Further, an insurer may not restrict uninsured motorist coverage to an insured legally entitled to recover damage from an uninsured motorist due to the absence of physical contact. The statute directs that uninsured motorist coverage:

exists whether or not physical contact was made between the uninsured motor vehicle and insured or the insured's motor vehicle.

Section 379.203.1; Dawson, 967 S.W.2d at 93.

Missouri courts have held that uninsured motorist coverage exists for injuries sustained by an insured while a pedestrian as well as while riding as a passenger in a vehicle owned by another. Hines v. Gov't Employees Ins. Co., 656 S.W.2d 262, 265 (Mo.banc 1983). Additionally, uninsured motorist coverage extends to injuries sustained by the spouse and minor children of the insured who suffer injury due to the negligence of an uninsured motorist. Husch v. Nationwide Mut. Fire Ins. Co., 772 S.W.2d 692, 694 (Mo.App.E.D. 1989). However, Missouri courts have refused to extend uninsured motorist coverage to permissive users or passengers who suffer injury as a pedestrian (and, therefore, while not using or occupying the vehicle). Ott v. Firemen's Fund Ins. Co., 936 S.W.2d 165, 166 (Mo.App.E.D. 1996); Martin v. Cameron Mut. Ins. Co., 763 S.W.2d 710 (Mo.App.S.D. 1989).

B. Underinsured Motorist Coverage

Underinsured motorist coverage provides a total amount of coverage to be paid to an insured if the negligent operator of a motor vehicle possesses liability limits less than those provided under the insured's underinsured motorist coverage; it is not excess

coverage.³ Rodriguez v. Gen. Accident Ins. Co. of Am., 808 S.W.2d 379, 383 (Mo.banc 1991).

Underinsured motorist coverage is not mandated by statute in Missouri. Niswonger, 992 S.W.2d at 313. As such, the existence and scope of coverage is determined by the terms of the contract agreed upon by the insurer and insured. Rodriguez, 808 S.W.2d at 383. Indeed, in the absence of public policy considerations, an insurer and its insured are free to define and limit coverage by their agreement. Noll v. Shelter Ins. Co., 774 S.W.2d 147, 151 (Mo.banc 1989). In Rodriguez, the Court stated:

No public policy mandating underinsured motorist coverage exists in Missouri and if an anti-stacking or set off provision is clear and unambiguous it will be given effect.

Rodriquez, 808 S.W.2d at 383.

Recall, however, that statute does establish that any limits of underinsured motorist coverage that are less than two times the limit for bodily injury or death pursuant to Section 303.020 are deemed to be excess of any “liability coverage”. Section 379.204 R.S.Mo. (2004); *See Buehne v. State Farm Auto. Ins. Co.*, 232 S.W.3d 603, 607 (Mo.App.E.D. 2007). Section 379.204 provides:

Any underinsured motor vehicle coverage with limits of liability less than two times the limits for bodily injury or death pursuant to Section 303.020, RSMo, shall be construed to provide coverage in excess of the liability coverage of any underinsured motor vehicle involved in the accident.

³ Unless there exists language in the policy that could be reasonably interpreted by the insured to provide coverage over the liability coverage possessed by the tortfeasor. Ware v. GEICO Gen. Ins. Co., 84 S.W.3d 99, 103 (Mo.App.E.D. 2002).

Section 379.204.

C. Triggering Uninsured Motorist Coverage

Plaintiff possesses the burden to demonstrate that the tortfeasor was operating an uninsured motor vehicle at the time of the collision. Pink v. Knoche, 103 S.W.3d 221, 226-227 (Mo.App.W.D. 2003). Indeed, the uninsured status of the negligent other driver is a jury issue. Id. at 227.

Yet, when the liability insurer has expressly denied coverage, the insured must not prove that the disclaimer was valid. Rister, 668 S.W.2d at 136. However, a legal right to recover under uninsured motorist and liability coverage cannot coexist. Id. at 137. As such, when the liability insurer offers settlement and the settlement is accepted, the insurer no longer denies coverage. Id. at 137; Pink, 103 S.W.3d at 227.

On the other hand, an insurer's reservation of right to contest coverage does not constitute a denial of coverage. Pink, 103 S.W.3d at 227-228. In Pink, the Western District acknowledged the ability of the insurer to "choose to undertake the defense of its insured and reserve its right to *later* disclaim coverage, provided it gives the insured notice of a reservation of rights." Id. at 228 (emphasis in original). As such, the reservation of right letter is a unilateral declaration by the insurer to its insured that the company accepts the defense of the tendered claim but reserves its right to later deny coverage on specified grounds. Id. Accordingly, in Pink, the Court held that a reservation of rights does not constitute a denial of coverage thereby triggering coverage under the injured insured's uninsured motorist coverage. Id.

II. Exhaustion

A cause of action against an insurer for underinsured motorist coverage does not exist until the insured has exhausted all available liability coverage of all liable parties. State ex rel. Shelton v. Mummert, 879 S.W.2d 525, 528-529 (Mo.banc 1994); Wendt v.

Gen. Accident Ins. Co., 895 S.W.2d 210, 217 (Mo.App.E.D. 1995); Kinney v. Schneider Nat'l Carriers, Inc., 213 S.W.3d 179, 183 (Mo.App.W.D. 2007).

III. The Limits of Available Coverage

The extent of coverage provided by the policy shall serve to limit the amount of the benefit an insured may collect under her uninsured and underinsured motorist coverage. Of course, in many cases, the insured suffers extensive injury due to the negligence of the other driver. In such cases, both parties' counsel must carefully review the policy to ensure payment consistent with the coverage limits.

A. Exemplar Language

Insurers attempt to limit coverage in a number of ways through the insertion of certain language into the policy. At the least, the policy will limit coverage to that shown on the declaration page. Typical language directs:

The amount of coverage is shown on the declarations page under
“Limits of Liability – U – Each Person, Each Accident”.

State Farm Mutual Automobile Insurance Company, Policy Form 9825.6 at 13. The provision may also read something like:

We will pay all sums the “insured” is legally entitled to recover as compensatory damages from the owner or driver of an “uninsured motor vehicle”. The damages must result from “bodily injury” sustained by the “insured” caused by an “accident”. The owner’s or driver’s liability for these damages must result from the ownership, maintenance or use of the “uninsured motor vehicle”.

Continental Western Insurance Company, Policy Form CA 21 04 04 01 at 1.

B. The Presence of Ambiguity

Occasionally, counsel's analysis of policy language and the facts of a particular collision suggest conflict as to exactly what coverage exists. The presence of duplicitous and conflicting language in the policy may have dramatic consequences on the limit (and extent) of coverage available.

Under Missouri law, the interpretation of the meaning of an insurance policy is a question of law. Seeck v. Geico Gen. Ins. Co., 212 S.W.2d 129, 132 (Mo.banc 2007); Am. Fam. Mut. Ins. Co. v. Turner, 824 S.W.2d 19, 21 (Mo.App.E.D. 1991). The court shall enforce an insurance contract as written unless the language of the policy is ambiguous. Seeck, 212 S.W.3d at 132; Hunt v. Everett, 181 S.W.3d 248, 250 (Mo.App.W.D. 2006). An ambiguity exists when contract language is duplicitous, indistinct or uncertain, leaving the provision open to differing reasonable constructions. Hunt, 181 S.W.3d at 250.

When interpreting an ambiguous provision, the court shall apply a meaning to the language that would ordinarily be understood by the layman who bought and paid for the policy. Krombach v. Mayflower Ins. Co., 827 S.W.2d 208, 210 (Mo.banc 1992); Hunt, 181 S.W.3d at 250. As such, the court shall construe ambiguous provision of insurance policy against the insurer. Krombach, 827 S.W.2d at 210; Gulf Ins. Co. v. Nobel Broadcast, 936 S.W.2d 810, 814 (Mo.banc 1997); *See also* Hunt, 181 S.W.3d at 250. Indeed, ambiguous provisions designed to cut down, restrict or limit coverage must be strictly construed against the insurer. Krombach, 827 S.W.2d at 210-211.

In Seeck, the Supreme Court held that the presence of an "other insurance" clause similar to that in the SAFECO policy would cause an ordinary insured to believe that excess coverage existed where the insured's injuries exceeded the coverage possessed by the tortfeasor. Seeck, 212 S.W.3d at 131. In that case, the "other insurance" clause provided:

When an insured is occupying a motor vehicle not owned by the insured. . . this insurance is excess over any other insurance available to the insured and the insurance which applies to the occupied motor vehicle is primary.

Id. at 132. According to the Court, a person of average understanding would interpret the provision to mean that once she recovered under the primary policy applicable to the occupied vehicle, she would be entitled to coverage under her own policy to the extent she suffered additional damage. Id. at 132. The Court concluded:

Where, as here, an other insurance clause appears to provide coverage but other clauses indicate that such coverage is not provided, then the policy is ambiguous, and the ambiguity will be resolved in favor of coverage for the insured.

Id. at 134. The Court interpreted the policy's language to extend coverage beyond that contemplated by the insurer.

IV. Stacking

In cases in which a client has suffered extensive injury due to the negligence of an uninsured or underinsured motorist, the injured person's counsel often wants to "stack" coverage purchased by the client on multiple vehicles to maximize his client's recovery. "Stacking" refers to:

an insured's ability to obtain multiple insurance coverage benefits for an injury either from more than one policy as where the insured has two or more separate vehicles under separate policies, or from multiple coverages provided for within a single policy, as when an insured has one policy which covers more than one vehicle.

Tresner v. State Farm Mut. Ins. Co., 957 S.W.2d 380, 382 (Mo.App.W.D. 1997).

A. Section 379.203 and Stacking Uninsured Motorist Coverage

Statutory law in Missouri mandates all motor vehicle insurance policies issued in this State include uninsured motorist coverage. Niswonger, 992 S.W.2d at 313. Missouri courts have interpreted Section 379.203 to prohibit an insurer from limiting an insured from recovering from only one of multiple uninsured motorist policies or coverages in certain situations. In pertinent part, that section provides:

1. No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto. . . in not less than the limits for bodily injury or death set forth in section 303.030, RSMo, for the protection of person insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

Section 379.203.

B. Public Policy and Stacking Uninsured Motorist Coverage

Missouri courts have read Section 379.203 to restrict an insurer from limiting an insured, his spouse and their minor children from collecting uninsured motorist coverage issued to the insured via multiple motor vehicle insurance policies. Galloway v. Farmers Ins. Co., Inc., 523 S.W.2d 339 (Mo.App.K.C. 1975); Cameron Mut. Ins. Co. v. Madden, 533 S.W.2d 538 (Mo.banc 1976); Husch, 772 S.W.2d at 692. In Missouri, an insured, his

spouse and their minor children may stack uninsured motorist coverage provided by multiple policies purchased by the insured. Husch, 772 S.W.2d at 695.

A Missouri appellate court first tackled the issue of whether an insurer could limit the ability of an insured to collect uninsured motorist coverage provided through multiple policies in Galloway. In that case, the Kansas City Court of Appeals held that Charles Galloway could stack uninsured motorist coverage afforded by two separate policies issued to plaintiff by Farmers Insurance Company. Galloway, 533 S.W.2d at 343-344. Galloway was involved in a collision with an uninsured motorist. Prior to the collision, Galloway purchased from Farmers two policies – one on the vehicle involved in the collision and another which covered a second vehicle Galloway owned. Id. at 340. The appellate court concluded that the insurer could not limit the coverage available to Galloway through a provision in the policies; plaintiff could make an uninsured motorist claim under both policies. Id. at 343. In so holding, the court identified a public policy mandated by the statute. That appellate court stated:

Public policy requires that coverage in the statutory amount under each of the policies stand undiminished by contractual limitation, regardless of whether the policies are issued by the same or different insurers.

Id.

One year later, the Supreme Court endorsed the public policy rationale identified by the Galloway court. *See* Cameron, 533 S.W.2d at 542-544. In Cameron, the Court held that an insured could stack uninsured motorist coverage provided by one policy written on multiple motor vehicles in case arising out of the death of his wife. Cameron, 533 S.W.2d at 544-545. In that case, the insurer brought a declaratory judgment action against its insured. Insured owned two automobiles, both of which were insured by Cameron Mutual Insurance Company under a single policy. Uninsured motorist coverage was listed for each vehicle. Insured's wife died as a result of injuries sustained

during a collision involving an uninsured motorist. Wife was driving one of the insured automobiles at the time of the crash. Id. at 539. In holding that the insurer could not limit the coverage afforded the insured's spouse, the Court concluded:

[W]e hold that the public policy expressed in s 379.203 prohibits the insurer from limiting an insured to only one of the uninsured motorist coverages provided by a policy and that in this case both of such coverages, written on the two automobiles, are available to [insured], provided, of course, that insured is limited to recovery of damages suffered.

Id. at 544-545.

In Husch, the Court of Appeals, Eastern District, further refined the scope of protection provided by the statute. In that case, the court held that a minor child of an insured was entitled to stack uninsured motorist coverage for each of two automobiles insured under a policy issued to her father by Nationwide Mutual Fire Insurance Company. Husch, 772 S.W.2d at 695. The child was struck by a hit and run driver. The insurer issued to her father a motor vehicle insurance policy under which she was covered. Id. at 694. Finding that the coverage on both of the automobiles was available to the child, the court remarked:

We believe that the public policy which prohibits the insurer from limiting an insured to only one of the uninsured motorist coverages provided by a policy under which two autos are insured also operates to prohibit such a limitation as to a spouse or minor children living in the insured home.

Id.

The court reached its holding after analyzing the expectations underlying a consumer's purchase of insurance coverage. The court acknowledged that a purchaser of a motor vehicle insurance policy is "primarily concerned with protecting themselves, their spouses, and their minor children, i.e. the natural family unit". Id. Recognizing that a minor child is unable to insure herself "and thus provide financial protection against disabling injuries", the court noted the obligations parents have to support their child during minority. As such, the court held, the capacity of a person to stack uninsured motorist coverage shall rest upon the reasonable expectation of the consumer when procuring the insurance policy. Id.; See Linderer v. Royal Globe Ins. Co., 597 S.W.2d 656, 661 (Mo.App.E.D. 1980)⁴. Finding "a policyholder would reasonably expect his minor children to be entitled to the same uninsured motorist coverage which he is", the court held that the child could stack the coverage. Husch, 772 S.W.2d at 694-695.

C. "Named Insured" Versus "Occupancy Insured"

A distinguishing line of cases which has allowed a bar on stacking is based on the concept of an "occupancy insured." Generally, an "occupancy insured" is a person who is an insured solely by reason of occupying an insured automobile as a driver or passenger. Hines v. Gov't Employees Ins. Co., 656 S.W.2d 262 (Mo.banc 1983). An "occupancy insured" is distinguishable from a "named insured," who is a person named in the policy, or a family member of such a person named in the policy.

The principle of an "occupancy insured" has been used to justify a bar to stacking in cases such as Linderer, where a person sought to stack uninsured motorist coverage arising from his occupancy of one of his employer's fleet of 1,420 insured vehicles. 597 S.W.2d 656. The Court in Linderer noted that the claimant "did not pay the premium for the coverage he seeks to enforce as did the claimant [in Cameron].... Linderer's eligibility for payment arises solely out of his occupancy of one of the insured

⁴ In Linderer, the Eastern District acknowledged: "It is obvious that an individual who applies for and receives a liability policy covering his two automobiles would expect to collect the coverage he paid for on both automobiles if anything happened to him or a member of his family." Linderer, 597 S.W.2d at 661.

automobiles.” Linderer, 597 S.W.2d at 661. The Court further distinguished the case from Cameron, stating that “[i]t is obvious that an individual who applies for and receives a liability policy covering his two automobiles would expect to collect the coverage he paid for on both automobiles if anything happened to him or a member of his family. On the contrary, it is not credible that a company or an employee of a company having a fleet of 1,420 vehicles would reasonably expect the coverage on the vehicle the employee happened to be occupying at the time of the collision with an uninsured motorist to be \$14,200,000, as it would be if stacking were to be permitted here.” Id.

Similarly, in Hartford Ins. Co. v. Kean, 866 S.W.2d 924 (Mo.App. E.D. 1993), the court did not allow an employee to stack the uninsured motorist coverages on a fleet of 4,000 insured vehicles owned by his employer. The court concluded that “as occupancy insureds, there is no requirement that appellants be furnished uninsured motorist coverage in excess of the limits of the vehicle they occupied at the time of the accident.” Kean, 866 S.W.2d at 926.

The “occupancy insured” principle also applied in Hines, where a named insured allowed an unrelated third party to borrow his car. Hines, 656 S.W.2d at 262. In that case, the Supreme Court acknowledged that in Cameron and its progeny, the courts prohibited limitations on stacking because of the public policy behind the statute, specifically to grant uninsured motorist coverage to the insured and those whom he reasonably expects will be covered. Id. at 265. However, allowing stacking to third parties who only had *temporary permission* to use a vehicle would not serve the statutory policy. Id. The Court refused to permit plaintiff to stack coverages.

D. Stacking Underinsured Motorist Coverage

Unlike uninsured motorist coverage, no Missouri statute requires an automobile insurance policy issued in Missouri to provide underinsured motorist coverage. As such, there exists no public policy requiring the stacking of underinsured motorist coverage. Niswonger, 992 S.W.2d at 314. Therefore, the terms of the contract entered into between

the insurer and the insured determine the existence of underinsured motorist coverage ***and its ability to be stacked***; in the absence of public policy, the court shall not permit a plaintiff to stack coverage if the pertinent policy language is unambiguous in prohibiting stacking. Id.; *See also Rodriguez*, 808 S.W.2d at 383.

Nevertheless, Missouri courts have recognized two situations in which an insured may stack underinsured motorist coverage despite the presence of anti-stacking language in the policy. First, the court shall construe the policy in favor of the insured and allow stacking when an ambiguity exists in the policy. Also, an insured may stack underinsured motorist coverage where the policy intertwines uninsured and underinsured motorist coverage. Niswonger, 992 S.W.2d at 314.

For instance, the Western District recently concluded that an insured was entitled to underinsured motorist coverage under two policies issued by the same insurer where the policy contained an “other insurance” provision similar to that contained in the SAFECO policy. American Family Mut. Ins. Co. v. Ragsdale, 213 S.W.3d 51 (Mo.App.W.D. 2006). In Ragsdale, the Western District permitted the insured to stack underinsured motorist coverage after finding the excess clause contained in the “other insurance” provision to be ambiguous. Id. at 56-57. That provision directed:

If there is other similar insurance on a loss covered by this endorsement, we will pay our share according to this policy’s proportion of the total limits of all similar insurance. But, any insurance provided under this endorsement for an insured person while occupying a vehicle you do not own is excess over any other similar insurance.

Id. at 54. The Court found the provision to be ambiguous after noting that the clause conflicted with the policy’s definition of underinsured motor vehicle. Id. at 56. Determining the clause to be ambiguous, the Court then permitted the insured to stack the coverage provided under both policies and prohibited the insurer from setting off money received by the insured from the tortfeasor’s liability policy. Id. at 57.

Review the following cases for examples of a court permitting the insured to stack underinsured motorist coverage due to an ambiguity in the policy:

- Chamness v. Am. Family Mut. Ins. Co., 226 S.W.3d 199 (Mo.App.E.D. 2007)
- American Family Ins. Co. v. Ragsdale, 213 S.W.3d 51 (Mo.App.W.D. 2006)
- Niswonger v. Farm Bureau Town & Country Ins. Co. of Mo., 992 S.W.2d 308 (Mo.App.E.D. 1999)

Review the following cases for examples of a court permitting the insured to stack underinsured motorist coverage because the policy impermissibly addressed uninsured and underinsured coverage in the same section or endorsement:

- Bauer v. Farmers Ins. Co., 270 S.W.3d 491 (Mo.App.W.D. 2008)
- American Economy Ins. Co. v. Cornejo, 866 S.W.2d 174 (Mo.App.E.D. 1993)
- Krombach v. Mayflower Ins. Co., Ltd., 827 S.W.2d 208 (MO.banc 1992)
- Tegtmeyer v. Snellen, 791 S.W.2d 727 (Mo.App.W.D. 1990)

V. Reducing Clauses

Recall that absent public policy considerations, an insured and an insurer are free to define and limit coverage by their insurance agreement. Rodriguez, 808 S.W.2d at 383. As such, all insurers put language in the uninsured and underinsured motorist provisions of their policies that attempt to reduce coverage by amounts recovered by the insured from other insurance. Most often, this “set-off” language will be found in the “Limit of Liability” section of the policy.

A. Exemplar Language

The following is an example of typical language inserted by an insurer to reduce or “set-off” its liability limit:

1. Any amount payable under this coverage shall be reduced by any amount paid or payable to or for the insured:
 - a. by or for any person or organization who is or may be held legally liable for the bodily injury to the insured; or
 - b. for bodily injury under the liability coverage.

State Farm Mutual Automobile Insurance Company, Policy Form 9825.6 at 13.

B. Uninsured Motorist Coverage

Section 279.203 requires the limit of uninsured motorist coverage be not less than the liability limit for bodily injury or death set forth in Section 303.030. Section 279.203.1. Under Section 303.030, a motorist must carry liability coverage of \$25,0000 per individual and \$50,000 per occurrence. Section 303.030.5 R.S.Mo. (2004). Missouri courts have recognized:

[U]nsured motorist coverage extends exactly to the same extent as would have been available, no more and no less, if the tortfeasor had complied with the minimum requirements of the motor vehicle safety responsibility law.

Harrison v. MFA. Mut. Ins. Co., 479 S.W.2d 148 (Mo.App.W.D. 1972). If the limits stated in the policy are more liberal, those provisions shall prevail. If the limits stated in a policy subject to the statute are less than the statutory minimum, the minimum limit required by statute applies. Id.

Any policy provision that attempts to reduce the coverage provided by the policy below that limit mandated by statute is invalid. Cano v. Travelers Ins. Co., 656 S.W.2d 266, 270 (Mo.banc 1983); *See* American Stand. Ins. Co. of Wi. v. Bracht, 103 S.W.3d 281, 293 (Mo.App.S.D. 2003). Accordingly, an insurer may not reduce uninsured

motorist coverage by the amount of Workers' Compensation benefits received by the insured. Douthet v. State Farm Mut. Auto. Inc. Co., 546 S.W.2d 156 (Mo.banc 1977); Cano, 656 S.W.2d at 270; Barker v. Palmarin, 799 S.W.2d 117, 119 (Mo.App.W.D. 1990). In Cano, the Court recognized:

In this case, the defendant did not create or pay for and was not the source of workmen's compensation payments received by plaintiff. If defendant company is allowed credit therefor, it receives a windfall in that its coverage is reduced in spite of the public policy of Missouri expressed in s.379.203.

Cano, 546 S.W.2d at 160. Further, the insurer may not reduce coverage below that required by statute by benefits received by the insured pursuant to the policy's medical payments provision. Webb v. State Farm Mut. Auto. Ins. Co., 479 S.W.2d 148, 152 (Mo.App. 1972).

However, at least one court has held that an insurer may reduce uninsured motorist coverage so long as the policy provides the minimum amount of coverage demanded by statute. See Bracht, 103 S.W.3d at 292-293. In Bracht, the Southern District remarked that an insurer could set-off uninsured motorist benefits so long as the remaining coverage amounted to at least the minimum required by statute. Id. at 293.

C. Underinsured Motorist Coverage

Unlike uninsured motorist coverage, underinsured motorist coverage is not mandated by statute. Green v. Federated Mut. Ins. Co., 13 S.W.3d 647, 650 (Mo.App.E.D. 1999). Recall, therefore, that the existence of coverage and its limits are determined by the contract entered into by the insured and the insurer. Accordingly, the court must permit the insurer to reduce its underinsured motorist coverage if the policy's set-off provision is clear and unambiguous. Rodriguez, 808 S.W.2d at 379; Hinshaw v. Farmers & Merchants Ins. Co., 912 S.W.2d 70, 72 (Mo.App.E.D. 1995). The diligent

practitioner must scrutinize the underinsured motorist endorsement for ambiguous language since the court will construe any ambiguity in favor of the insured.

For instance, in Bowan, plaintiff brought an equitable garnishment suit against a company and its insurer in an attempt to collect the balance of a \$2.8 million verdict under two insurance policies, including a business automobile policy and its underinsured motorist endorsement. Bowan v. Gen. Sec. Indem. Co. of Ariz., 174 S.W.3d 1 (Mo.App.E.D. 2005). Both policies contained a provision which the insurer argued prohibited plaintiff from recovering “duplicate payments”. The provision in the underinsured motorist endorsement directed:

[n]o one will be entitled to receive duplicate payments for the same elements of “loss” under this Coverage and this policy’s Liability Coverage. We will not make duplicate payment under this Coverage for any element of “loss” for which payment has been made by or for anyone who is legally responsible.

Id. at 7. The business automobile policy contained the same provision, notwithstanding a reference to the underinsured motorist coverage endorsement in place of the notation to the liability coverage. Id. The trial court found that both the business automobile policy and its underinsured motorist endorsement provided coverage and that there would be no “duplicate payment” until the entire judgment had been satisfied. Id. at 4. The Eastern District agreed, holding that the “duplicate payments” provision did not entitle the insurer to any set-off of its liability. Id. at 8. That Court recognized:

We find that the use of the term “duplicate payments” in [this policy] is ambiguous. It could mean that the insured cannot receive payments under both the business auto policy and its UIM endorsement or it could be interpreted to mean that the insured cannot, through collection under different policies or endorsements, receive more than the entire amount of the judgment to which he was entitled.

Interpreting the ambiguity in the manner most favorable to the insured requires us to find that Bowan would not receive duplicate payments if she recovered from both the business auto policy and its UIM endorsement. Bowan will not receive more than the full amount of damages she is entitled to under the trial court's judgment under any one policy. Therefore, she did not receive "duplicate payments" under the different policies.

Id.

Similarly, in Seeck, the Supreme Court interpreted the significance of a set-off provision in the context of a provision directing that the underinsured motorist coverage provided by the policy was "excess" over other available insurance. *See Seeck*, 212 S.W.3d at 129. Like the policies at issue in Rodriguez, the policy included a provision stating that "the limit of liability shall be reduced by all sums. . . paid. . . on behalf" of the tortfeasor. Id. at 133. The set-off language, however, was accompanied by an "other insurance" clause which the Court found would reasonably lead the insured to believe her policy would provide underinsured motorist coverage over and above the tortfeasor's liability coverage. Id. at 132-133. Noting that ambiguity exists where "a contract promises something at one point and takes it away at another," the Court found the conflict between the set-off provision and the "excess" clause rendered the policy ambiguous. Id. at 133. The Court recognized:

Where, as here, an other insurance clause appears to provide coverage but other clauses indicate that such coverage is not provided, then the policy is ambiguous, and the ambiguity will be resolved in favor of coverage for the insured.

Id. at 134.

Counsel must also consider the amount from which the set-off, if valid, shall be taken. In Hunt, the Western District held that, due to an ambiguity in the policy, the set-

off was deducted from the total damage sustained by the insured rather than the available coverage. Hunt v. Everett, 181 S.W.3d 248, 251 (Mo.App.W.D. 2006). As a result, Brian Hunt was permitted to recover the maximum amount of coverage available through three underinsured motorist policies issued to him by Shelter Insurance Company. Id.

VI. Exclusions

An exclusion provision excludes risk. Powell v. State Farm Mut. Auto. Ins. Co., 173 S.W.3d 685, 689 (Mo.App.W.D. 2005). Rather than endowing coverage, the exclusion limits the obligation of indemnity owed by the insurer. Id.

If an insurer seeks to escape coverage based on an exclusion provision in the policy, the insurer has the burden of proving facts that make the exclusion applicable. Powell, 173 S.W.3d at 689. In fact, an exclusion is an affirmative defense that must be pled and proved by the insurer. Loyd v. State Auto. Property & Cas. Co., 265 S.W.3d 901, 903 (Mo.App.W.D. 2008); Strader v. Progressive Ins., 230 S.W.3d 621, 624 (Mo.App.S.D. 2007). The rule runs contrary to the general rule that the party seeking to establish coverage under a policy possesses the burden of proving that the claim is within the coverage afforded by the policy. Powell, 173 S.W.3d at 689.

Further, an insurer may limit uninsured motorist coverage afforded an insured only so long as the exclusion does not violate Section 379.203 or the public policy underlying the statute. Indeed, exclusions of uninsured motorist coverage contrary to the public policy of the statute are invalid. Adams v. Julius, 719 S.W.2d 94, 96 (Mo.App.E.D. 1986); *See also* Shepherd v. Am. States Ins. Co., 671 S.W.2d 777, 780 (Mo.banc 1984).

Counsel for an injured party must keep in mind the insurer's right to subrogate in those instances in which the injured person wishes to resolve her claim against the uninsured motorist. A typical policy provision directs:

There is no coverage under [the uninsured motor vehicle coverage]:

1. For any insured who, without our written consent, settles with any person or organization who may be liable for the bodily injury and thereby impairs our right to recover our payments. . .

State Farm Mutual Automobile Insurance Company, Policy Form 9825.6 at 13-14.

Another typical provision directs:

C. Exclusions

1. Any claim settled without our consent, if the settlement or judgment prejudices our right to recover payment. . .

Continental Western Insurance Company, Policy Form CA 21 04 04 01 at 1.

In this context, counsel should not permit his client to settle with nor fully release a tortfeasor in such a manner as to foreclose the insurer's right to subrogation. When an insured acts without the insurer's knowledge or consent to resolve her claim with the tortfeasor so as to extinguish the insurer's subrogation right, the insured acts in contravention of her contract with the insurer thereby precluding her right of recovery under the policy. Roberts v. Progressive Northwestern Ins. Co., 151 S.W.3d 891, 900 (Mo.App.S.D. 2004); *See also* Lebs v. State Farm Mut. Auto. Ins. Co., 568 S.W.2d 592, 593 (Mo.App.K.C. 1978).

Of course, the insurer cannot unreasonably withhold its consent of a settlement between its insured and the tortfeasor. Rister, 668 S.W.2d at 136. And, there exists no prohibition against the tortfeasor settling with the insured for an amount over and above the amount the insurer has paid or may become obligated to pay in the future so long as

the tortfeasor is aware of the insurer's subrogation interest. Roberts, 151 S.W.3d at 900; *But see* Seeck, 212 S.W.3d at 129.

VII. Intentional Act

An insurer may not exclude uninsured motorist coverage for damages sustained by the insured caused by the intentional conduct of an uninsured motorist. Keeler v. Farmers & Merchants Ins. Co., 724 S.W.2d 307, 310 (Mo.App.S.D. 1987); Thornburg v. Farmers Ins. Co., 859 S.W.2d 847, 850 (Mo.App.W.D. 1993). Section 379.203 requires coverage when the uninsured motorist is legally liable to the insured. Keeler, 724 S.W.2d at 310. The statute does not distinguish between injuries caused by intentional rather than negligent acts. Id. at 311. As such, public policy requires the provision of uninsured motorist coverage. Id.

VIII. Personal Injury Protection (PIP)

Kansas has adopted a comprehensive insurance scheme in which insurers must provide personal injury protection (PIP) benefits to their insureds who suffer injury as the result of a motor vehicle collision. Gilmore v. Attebery, 899 S.W.2d 164, 166-167 (Mo.App.W.D. 1995); Farmers Ins. Co. v. McFarland, 976 S.W.2d 559, 563 (Mo.App.W.D. 1998). These benefits include payment of benefits associated with the cost of medical care and lost wage. Gilmore, 899 S.W.2d at 165. No such requirement exists in Missouri.