

National Business Institute (NBI)

Advanced Issues in Uninsured Motorists Coverage

by Paul Kouri

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About the Speaker

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Introduction

Uninsured Motorist (UM) coverage law has developed rapidly since the first Oklahoma UM case was decided over 50 years ago (in 1960). Since then, Oklahoma UM law has developed at a bewildering pace. As an Oklahoma practitioner, you will be confronted with UM cases and problems.

Advanced Issues in Uninsured Motorists Coverage—NBI, May 12, 2014

I. Passenger Insured Under Driver's Policy on Uninvolved Car

Russell v. American States Ins. Co.,¹ suggests an unusual source for passenger UM coverage. In *Russell*, a passenger was killed in a wreck. The driver, unrelated to the deceased, was using someone else's car at the time of the wreck. The deceased collected liability money from the car policy and from the driver's policy, and collected UM as a Class I insured (named insured or resident relative) from his dad's policy (on a different car).

The owner of the car had UM, on the policy on the car, and the driver, had UM on his own, separate policy, and both of the policies were with American States. The declaratory action was to decide whether the deceased was entitled to UM under these two policies. We would normally expect the policy on the car to provide UM for the passenger as a Class II insured (insured by virtue of "occupying" the insured car). The District Court held (erroneously) that policy did not cover the passenger because the policy definition of an "uninsured vehicle" did not include an "insured highway vehicle." That would seem to negate the requirement of the UM statute that coverage extend to "underinsured" cars. Indeed, no big surprise, that is what the Court of Appeals decided.²

More interesting here, though, and why I thought this case held an "advanced UM nugget," is the UM on the driver's policy. Remember, the driver did not own the car and so his policy was on a noninvolved auto, such that the *passenger* would not be a typical class II "occupant" insured on that policy. That policy, though, had a provision that defined an "insured highway Vehicle" to include a car "being operated by the named insured . . . or a resident [relative]." Since the car "operated by" the named insured was thus an insured vehicle, the deceased passenger became a Class II insured by virtue of

¹ *Russell v. American States Ins. Co.*, 813 F.2d 306 (10th Cir. 1987).

² The District Court had applied a rule from *Heavner v. Farmers Ins. Co.*, 1983 OK 51, 663 P.2d 730, that predated the statutory addition of "underinsured motorists" coverage to our UM statute.

occupancy of an “insured vehicle.”³ From review of our office “specimen policy” bank, somewhere around half of the policies out there likely have this language.

II. *Bohannan, Bernal, and Leritz v. Yates* and the “Place of Performance”

*Bohannan v. Allstate Ins. Co.*⁴ has been the go-to case for deciding UM choice of law questions for more than 20 years. If our office has its way, that is soon to end.

Bohannan, you may recall, holds that the general rule, absent a public policy conflict, is that the law of the place where the insurance contract is made governs the choice of law determination as it relates to UM coverage. We have a case currently before the Court, *Leritz v. Yates*, which may change this rule. *Leritz* asks whether a Kansas citizen can stack his Kansas limits for a wreck in Oklahoma.

In *Bohannan*, the Court ruled as it did because of a choice of law statute directed at deciding contracts, 15 O.S. § 162:

A contract is to be interpreted according to the law and usage of the place where it is to be performed, or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

In *Bohannan*, the Court jumped right over the “place of performance,” to apply the law of the place where the contract was made. Almost universally, however, insurance policies have a provision that makes them apply to “accidents and losses which occur within the United States, its territories or possessions.” The lawyers in *Leritz*, very clever fellows, argue that provision thus defines the “place of performance” (the United States, its territories or possession), such that the statutory preference for the law of the place of performance trumps the law of the place where the policy “is made.” This interpretation appears to be the majority rule, at least in the few states to have adopted the particular choice of law provision, which is from the old Field Codes. In fairness to

³ Distinguishing *Babcock v. Adkins*, 1984 OK 84, 695 P.2d 1340 (Okla. 1985), which holds Class II insureds may not “stack” coverage from uninvolved cars *but are entitled to coverage from uninvolved cars as long as they qualify as “insureds” under the policy on the uninvolved car.*

⁴ *Bohannan v. Allstate Ins. Co.*, 1991 OK 64, 820 P.2d 787.

Bohannon and Bernal v. Charter Mut. Ins. Co.,⁵ this argument was not raised in those cases. Moral of the story—be watching for *Leritz v. Yates*.

III. Oklahoma Governmental Tort Claims Act and UM Coverage

I have heard several discussions lately about the interaction between UM and the Governmental Tort Claims Act. 51 O.S. § 151, *et seq.*

First, the easy one. The OGTCOA exempts governmental entities from “any loss to any person covered by any workers’ compensation act” 51 O.S. § 155(14). The exemption applies to both workers’ compensation claims by governmental employees as well as those by non-governmental employees.⁶ There is a silver lining, though, in an auto case. The OGTCOA exemption makes the governmental entity “uninsured” for purposes of UM.⁷

Now the trickier question: Is an OGTCOA entity entitled to a set-off for UM payments made? I’m told a lot of OGTCOA entities cite the exemption for “any claim based on the theory of indemnification or subrogation,” (51 O.S. § 155(28)) for this proposition. That provision seems clearly only to preclude a subrogated entity from *subrogating against* the OGTCOA entity. But apparently this bluff is working. I don’t know how they are still doing this in the face of *Salazar Roofing & Const. Co. v. City of OKC*,⁸ but apparently they are. See, e.g., *Moore v. Park View Hospital Trist Authority, et al.*⁹ A related argument is based upon a stilted reading of 51 O.S. § 158, which gives a governmental entity a setoff when *its own coverage* pays a claim. The OGTCOA entity claims Subparagraph E creates the setoff:

The state or a political subdivision shall not be liable for any costs, judgments or settlements paid through an applicable contract or policy of insurance but shall be entitled to set off those payments against liability arising from the same occurrence.

⁵ *Bohannon and Bernal v. Charter Mut. Ins. Co.*, 2009 OK 28, 209 P.3d 309.

⁶ *Smith v. State ex rel. DOT*, 1994 OK 61, 875 P.2d 1147.

⁷ *Karlson v. City of OKC*, 1985 OK 45, 711 P.2d 72.

⁸ *Salazar Roofing & Const. Co. v. City of OKC*, 2010 OK 34, 249 P.3d 950.

⁹ *Moore v. Park View Hospital Trist Authority, et al.*, S. Ct. Case No. 112,134 (Okla. Ct. App. 2014 (not for publication)).

This setoff provision should be read in context with the rest of the statute, which tells how OGTCAs settlements and verdicts may be negotiated and paid. Subparagraph E merely gives the OGTCAs entity credit for payments made under any insurance policy covering *that entity*. Nothing about that statute suggests the governmental entity is allowed to reach out and take credit *for the injured party's* insurance.

The final OGTCAs topic I thought worth mentioning concerns the “waiver” of immunity created by the purchase of liability insurance. We had a car wreck case against a county, with bad injuries. The county had a liability policy with limits equal to the \$125,000 OGTCAs limits applicable to the county. The driver of the car (personal car used on OGTCAs entity business) also had her own liability policy with \$50,000 limits. Though the driver was herself immune from suit under the OGTCAs, her policy had a provision required by the OGTCAs entity, that made the county an additional insured (a definition of “insured” included any organization for acts or omissions of an insured).

We argued the OGTCAs entity had waived immunity to the full extent of the available liability coverage, citing *Lamont Independent School Dist. v. Swanson*.¹⁰ The OGTCAs entity (well, NAICO, its insurance, really) claimed an offset for the \$50,000, citing a provision *in its liability policy* that said the liability coverage “does not waive” the OGTCAs limits. We argued the insurance company cannot, by such a provision, negate Oklahoma law with respect to such waivers of immunity. NAICO claimed it did not seek an “offset,” but that its policy only paid amounts the entity was “legally obligated to pay,” and that once the \$50,000 had been tendered, that reduced that “obligation” to \$75,000. The case settled before we could get it up on appeal, so we do not have an answer.

IV. UM and the Oklahoma Guarantee Fund

Another area of concern that seems to be heating up in these troubled times is the interplay between the Oklahoma Property and Casualty Insurance Guarantee fund (26 O.S. 2001 *et seq.*) and UM coverage. We have run across this with both Pride Insurance,

¹⁰ *Lamont Independent School Dist. v. Swanson*, 1976 OK 38, 548 P.2d 215.

and now Santa Fe, in receivership. Who pays in this situation? The injured party has recourse to the state Guarantee fund, which pays claims for insolvent insurance companies. But what about UM? The UM statute (subparagraphs D and E) defines a car with insolvent liability coverage as an “uninsured” car, so that the UM steps in for the insolvent coverage. Also, the Guarantee fund requires exhaustion of all other available coverage before the fund kicks in. Though UM was at one time excluded from the exhaustion requirement (and before that included), UM is currently not excluded by 36 O.S. § 2012. See *Welch v. Armer*.¹¹ The tortfeasor is also protected by the payment under the Fund, but only up to the limits of the insolvent policy.

An unresolved issue is whether the UM statute’s definition of insolvency as creating an “uninsured” car is limited to those insolvencies occurring within one-year of the wreck. While 36 O.S. § 3636(C) defines insolvency to create uninsured status, subsection D purports to limit “[a]n insurer’s insolvency protection” to insolvency occurring within one year of the accident.

Although I’m told I am crazy, I do not think this means that UM does not apply to insolvency that occurs more than one year after the wreck. I take comfort that a majority of our Supreme Court, *in dicta* at least, seems to agree (from *Burch v. Allstate Ins. Co.*¹²):

The dissent argues that in enacting § 3636 (D), the Legislature explicitly limited the use of UM coverage as a substitute for liability coverage to the situation in which the liability carrier becomes insolvent within one year after the date of the accident. The dissent is mistaken. Subsection (D) merely deals with an insolvent insurer as a special subclass of available UM insurance from indemnitors who become insolvent.

I think maybe Subsection (D) speaks to the right of the UM carrier to look to the Guarantee Fund for repayment after the UM pays a claim based on the liability carrier’s insolvency. That’s my story—until the Supreme Court confirms I really am crazy.

Another unresolved issue is whether the Fund gets a pass once UM pays, though the injuries exceed the UM. The Fund, I’m told, takes the position that the insolvent insurance company’s limits are “fully reduced” by the UM payment, apparently

¹¹ *Welch v. Armer*, 1989 OK 117, 776 P.2d 847.

¹² *Burch v. Allstate Ins. Co.*, 1998 OK 129, 977 P.2d 1057.

regardless the extent of damages. That seems to be a misreading of the exhaustion statute, which says in Subparagraph (A)(2):

Any amount payable on a covered claim under the Oklahoma Property and Casualty Insurance Guaranty Association Act shall be reduced by the full applicable limits stated in the insurance policy or by the amount of the recovery under the insurance policy as provided herein. The Association shall receive a full credit for the stated limits, unless the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the other insurance policy. If the claimant demonstrates that the claimant used reasonable efforts to exhaust all coverage and limits applicable under the insurance policy, or if there are no applicable stated limits under the policy, the Association shall receive a full credit for the total recovery.

If the Fund is right, the badly injured UM claimant loses any real benefit from the UM since that prevents payment by the Fund. If I were on the other side, I would argue, where injuries warrant, the exhaustion statute just reverses the priority of payment, making the UM pay first, with the Fund then kicking in after the UM. It seems that if the legislature intended by Subparagraph A2 to give the Fund a pass once another policy pays, it would have been much easier to say that than to create a “credit” that really negates any potential for coverage. I hear there is a case poised to address this question.

V. Is Imputed UM Stackable UM?

Though becoming rarer, it still sometimes happens that an insurance company is unable to produce a valid, signed, UM rejection. What happens when this is so with respect to a policy insuring multiple cars? Is the UM that is “imputed” by reason of the insurance company failure to produce a rejection stackable UM? This question was answered in *Mid-Continent Group v. Henry*¹³—imputed UM does stack. But *Henry* was then overruled by *Spears v. Glens Falls Ins. Co.*¹⁴ We argued in a case last year that *Henry* was overruled on other grounds and that *Spears* actually affirms the holding regarding imputed stacking—at least where the underlying policy has “Stacking” language:

¹³ *Mid-Continent Group v. Henry*, 2003 OK CIV APP 46, 69 P.3d 1216.

¹⁴ *Spears v. Glens Falls Ins. Co.*, 2005 OK 35, 114 P.3d 448.

[U]nder the facts presented, where the UM/UIM coverage form provided to the insured conforms with the requirements of 36 O.S. Supp.2004 § 3636, the policy is renewed annually over a ten-year period with the insured being provided coverage summaries at each renewal, a single premium is charged for multiple vehicles having UM/UIM coverage, and policy language provides that liability for UM/UIM coverage is limited to the maximum amount payable for all damages regardless of the number of vehicles insured, an insurance company need not provide insureds with pre-policy notice that stacking of UM/UIM coverage is prohibited. (emphasis added)

Taken together, *Henry* and *Spears* seem to say that imputed coverage will stack if policy language supports stacking, but will not stack if the policy is otherwise not a stackable policy. In our case, some good arguments were presented for both sides of this coin. The case settled before we got an answer, though.

VI. What is “Occupancy” for purposes of UM coverage?

It can be important to remember UM does not just cover us while we are behind the wheel. We probably all know this as it relates to Class I insureds—named insureds and resident family members (UM “follows” Class I insureds wherever they may be), but sometimes this may also be so with respect to Class II insureds—those insured solely by virtue of occupancy of an insured car.

This issue usually arises when an “occupant” steps out of the vehicle to do something. Is one still an “occupant” UM insured when fueling a car, changing a tire, or when getting into or out of the insured car? *Wickham v. Equity Fire Ins. & Cas. Co.*,¹⁵ says yes. In *Wickham*, the potential Class II insured was following another car that lost a wheel. Wickham stopped to help that other driver change a tire when he was injured by the UM/UIM driver. Though he was never even “on” or “in” the insured car, he was a Class II UM insured under the policy on the car that lost the wheel.

The COCA, in *Wickham*, cited the Supreme Court in *Willard v. Kelly*,¹⁶ which defined “occupancy” (itself usually defined in an insurance policy to be “in, on, getting in, or on, or getting out of, or off of”) broadly enough to provide coverage to a police

¹⁵ *Wickham v. Equity Fire Ins. & Cas. Co.*, 1994 OK CIV APP 148, 889 P.2d 1258.

¹⁶ *Willard v. Kelly*, 1990 OK 127, 803 P.2d 1124.

officer who was shot after he got out of his cruiser and was standing beside the cruiser when he was shot.

In *Wickham*, the COCA extends this reasoning even further. One need not have ever physically occupied the interior of the car, nor even have ever intended to. Without adopting a “bright line” test, the COCA reasoned that the term is broad enough to encompass someone who: (1) had looked through the trunk of the car for tools, (2) was performing repairs on the car when injured, and (3) was situated next to the car at the time.

Incidentally, the man who shot Officer Willard in that case was not driving his car when he hurt the officer, but had come to a stop. He was simply sitting in his car when he shot Officer Willard. That satisfied the “transportation use” requirement of the UM statute to qualify as injury arising from “ownership or operation” of a UM/UIM car. Moral: be creative about both sides of the UM coin—both who is a UM insured and what is injury caused by a UM/UIM driver. Beware, though, the cases on these questions are a bit all over the board.

VII. Subrogation Claims

I think 75% of what we do in our office is sort out subrogation claims of one kind or another, including claims against UM proceeds. Thankfully, Gregory James is up next discussing subrogation, so I will just briefly raise a couple of UM specific subrogation topics.

We all know by now, the UM carrier is subrogated to the insured’s claim against the tortfeasor (36 O.S. § 3636(F)):

In the event of payment to any person . . . the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person

If the insured then takes action to defeat that right (such as settling with the tortfeasor without getting the UM to waive subrogation), the insured forfeits the right to UM.¹⁷

What happens though, when the UM refuses to waive subrogation? May the UM force a trial that neither its insured nor the tortfeasor want? Yup. It must first “substitute” payment of the liability limit. Doing so, though, may well force a trial unless the insured gives up the right to payment above the liability limit.

We had to do just that a few years ago in a case against a driver who ran into our young client riding a horse. State Farm did its discovery and offered up its minimum limits policy, but the UM, which had big limits, refused to waive subro, instead substituting payment of the \$25,000. It did that because its reconstructionist put the horse on the roadway at the point of impact (we claimed the impact was on the shoulder). Though the UM may intervene (*Brown v. Patel*¹⁸), in our case it did not. We then had to try the case against the very charming lady who ran into this horse on her way home from church. Not a good result, though we did get to keep the substituted payment, we were zeroed by the jury and did not get to the big UM limits.

We all know by now we cannot accept tortfeasor limits without first obtaining a UM waiver.¹⁹ We are seeing a variation of this issue still, however, where the UM carrier waives subrogation—does that then allow the injured party to accept less than the liability limits and still look to the UM for payment? No. Don’t do that. The problem is once you accept less than liability limits, by definition you do not have an underinsured motorist and thus no UM “claim.” Enough said.

VIII. UM Priority, and is Umbrella Counted in Determining Liability Limits?

Is there priority among UM and is an Excess/Umbrella policy considered in determining tortfeasor coverage limits? We still hear from some adjusters that some other UM policy should pay before theirs. For instance, some still say, the UM on the car pays

¹⁷ *Porter v. MFA Mut. Ins. Co.*, 1982 OK 23, 643 P.2d 302.

¹⁸ *Brown v. Patel*, 2007 OK 16, 157 P.3d 117.

¹⁹ *Porter v. MFA Mut. Ins. Co.*, 1982 OK 23, 643 P.2d 302.

before the UM on the person. In fairness, these adjusters may be remembering *dicta* in *Keel v. MFA Ins. Co.*,²⁰ to that effect. Though there is such priority with respect to liability coverage, there is not with respect to UM. That is because UM is first party coverage for which the insured (or someone on their behalf) has paid a premium.

This is made clear in *Mustain v. United States Fid. & Guar. Co.*²¹ In *Mustain*, the injured party was defined as a UM insured under an employer's policy and under his own policy. When he settled the claim against the employer's UM for less than limits, his personal policy refused to pay, claiming he had to exhaust the employer's UM on the policy on the truck he was in at the time of the injury.

On certified question for the Western District of Oklahoma, the Supreme Court determined all UM, with respect at least to the UM insured, is "primary" and thus there is no UM "priority." *Mustain* makes clear, though, once the UM is paid, the insurance companies may still have a right to apportionment as to which ultimately bears the burden of the UM paid. *Burch v. Allstate Ins. Co.*,²² teaches since UM is primary, once the insured shows damages in excess of liability limits, the UM must pay the amount in excess of the liability, up to its limit, from "dollar one" without waiting for the insured to "exhaust" the liability coverage.

On a different, but sort of related matter, *Geico v. Northwestern Pacific Ind. Co.*,²³ holds that a UM insured need not count excess or umbrella liability coverage in determining whether injuries exceed liability limits. This is because the UM statute is intended to provide "minimum" protection when the primary *automobile* liability policy does not. The UM statute just does not "contemplate" the excess coverage found in a "comprehensive public liability policy."²⁴

²⁰ *Keel v. MFA Ins. Co.*, 1976 OK 86, 553 P.2d 153.

²¹ *Mustain v. United States Fid. & Guar. Co.*, 1996 OK 98, 925 P.2d 533.

²² *Burch v. Allstate Ins. Co.*, 1998 OK 129, 977 P.2d 1057.

²³ *Geico v. Northwestern Pacific Ind. Co.*, 2005 OK 40, 115 P.3d 856.

²⁴ *Moser v. Liberty Mut. Ins. Co.*, 1986 OK 78, 731 P.2d 406.

IX. *Morris and Connor*

For some 40 years, we have relied upon a mantra in Oklahoma: “While an insurance company is free to decide at the outset who is and is not a UM insured, once it defines someone as a UM insured, it is not free to limit coverage based upon the particular vehicle occupied at the time of injury.” And the corollary, “it is up to the legislature to carve out any exceptions to this rule.” The mantra comes from a trilogy of cases:

First, *Cothren v. Emcasco*²⁵ invalidated an “owned but uninsured vehicle” exclusion in a UM policy (that policy excluded coverage to an insured while occupying a vehicle owned by an insured, but not insured under the policy). That was not okay since it took UM coverage away from someone already defined as a UM insured.

In *Shepard v. Farmers Ins. Co.*,²⁶ by contrast, the Court upholds a policy definition of insured which said a resident relative who owned her own car was not a UM insured under the policy. That was okay since it did not take coverage away from a defined insured.

State Farm Mut. Auto. Ins. Co. v. Wendt,²⁷ then synthesizes the above two cases: Once one is defined as a UM insured (Class I, only—since Class II UM does not follow the person) “subsequent exclusions inserted by the insurer in the policy which dilute and impermissibly limit uninsured motorists coverage are void as violative of the public policy expressed by [the UM statute].”

In 2004 the legislature accepted the Court’s “challenge” and carved out an exception:

For purposes of this section, there is no coverage *for any insured* while occupying a motor vehicle owned by, or furnished or available for the regular use of the named insured, a resident spouse of the named insured, or a resident relative of the named insured, if such motor vehicle is not insured *by a motor vehicle insurance policy*. (emphasis added)

²⁵ *Cothren v. Emcasco*, 1976 OK 137, 555 P.2d 1037.

²⁶ *Shepard v. Farmers Ins. Co.*, 1976 OK 137, 555 P.2d 1037.

²⁷ *State Farm Mut. Auto. Ins. Co. v. Wendt*, 1985 OK 75, 708 P.2d 581.

The exception seems by its terms to apply only where the UM insured occupies a car that is not covered *for liability*. Apparently not.

In *Connor v. American Commerce Ins. Co.*,²⁸ a son who lived with his parents owned his own motorcycle, *which he insured for liability only* with AIG. His parents had a policy with American Commerce, which had UM that included a resident relative in the definition of UM insured. That policy then had *an exclusion* to the UM coverage when a resident relative occupied a car that was *not insured for UM*. This seems inconsistent with *Cothren/Shepard/Wendt*. So what about the only exception “carved out by the legislature?” Doesn’t the exception apply only when the occupied car is without *liability coverage*? COCA recites the amendment, and even notes it applies only where the occupied car is devoid of coverage, but then simply holds a policy exclusion that does not allow UM to extend to a vehicle Defendant insurance company does not insure and which is not otherwise covered for UM is “not inconsistent with” the UM statute.

We tried to get Supreme Court to overrule *Connor* in *Morris v. America First Ins. Co.*²⁹ Instead, the Court limited *Connor* to where the resident relative has no other UM (the *Morris* resident relative insured had liability *but not UM* on the occupied car (as in *Connor*), but also happened to have yet another policy (on his uninvolved tractor trailer, which did have UM). Since he had some UM of his own, he got the resident relative UM also. So, under these cases, if the resident relative has a separate policy that has UM, the resident relative is also entitled to the UM on the relative’s policy, but if the resident relative’s separate policies have no UM, then there is no UM under the relative’s policy either.

X. Selection/Rejection Concerns

Selection/Rejection issues still come up from time to time, so it is worth repeating: (1) rejection of UM by any named insured is rejection for all insureds. It used to be that “the named insured” had to reject UM. The Supreme Court interpreted that to

²⁸ *Connor v. American Commerce Ins. Co.*, 2009 OK CIV APP 61, 216 P.3d 850.

²⁹ *Morris v. America First Ins. Co.*, 2010 OK 35, 240 P.3d 661.

mean “each named insured.”³⁰ The statute (current subparagraph G) was changed in 2004 to say “a named insured” may reject.³¹ (2) Also, the UM carrier need no longer get a new rejection any time an additional (one that is not a replacement) car is added. This is as a result of a 2009 change which did away with that requirement.

XI. Hospital and Physician Liens

This is not really new “news,” but still worth repeating: both physician and hospital liens attach to UM. It used to be physician liens (42 O.S. § 46) attached to both liability and UM, but hospital liens (42 O.S. § 43) did not. The legislature “fixed” this problem in 2012. The two statutes now have similar language, making both kinds of liens attach both to “claims against another” and to “claims against an insurer” (this was missing from the hospital lien statute and catches UM). See, *Broadway Clinic v. Liberty Mutual Ins. Co.*³²

The physician lien statute was also broadened to include “any other professional who engages in the healing arts.” That would include physical therapists, MRI clinics, and many others.

Also, it used to be the provider had one-year from the filing of the lien to sue to enforce the lien (or renew the lien). That was changed in 1994. Now the providers have one year from the time they learn of settlement or verdict to enforce the lien. It is much harder now to extinguish an old lien.

XII. UM Statute of Limitation Runs from Breach, not from Injury

Most of us already know this, but it is still a good reminder, the Statute of Limitation on UM begins to run from the time the contract is “breached.” This still comes up in calls to our office, with the questioning attorney calling after finding out years after

³⁰ *Plaster v. State Farm Mut. Ins. Co.*, 1989 OK 167, 791 P.2d 813.

³¹ *Traders Ins. Co. v. Johnson*, 2010 OK CIV APP 37, 231 P.3d 790.

³² *Broadway Clinic v. Liberty Mutual Ins. Co.*, 2006 OK 29, 139 P.3d 873.

a loss that the client had UM at the time. *Willie v. Geico*³³ holds (citing *Uptegraft v. Home Ins. Co.*³⁴) the UM statute of limitations is the contract statute of limitations and it cannot start to run until there has been a “breach.” The wreck is not a breach.

In *Willie*, the wreck was in 1994 and later that year the insured notified Geico the liability was adequate and there would be no claim for UM. In 1998, though, Willie’s lawyer wrote to Geico saying there *would be a UM claim*. Geico requested documentation which was not provided, so Geico “denied” the claim and closed the file. Then, in 1999, Willie again demanded the UM. This time Geico cited the statute of limitations, claiming it ran earlier in 1999, five years from the date of the wreck.

The Court agreed with Willie that a claim has to “accrue” for the statute to run and that a UM claim cannot accrue until there has been a breach, such as the failure to pay, giving rise to suit. This is the majority position. Laches usually will not apply.

XIII. UM and Workers’ Compensation Subrogation

I suspect we all know by now that a workers’ compensation carrier is entitled to subrogate against liability, but not against UM. *Bill Hodges Truck Co. v. Humphrey*³⁵ (because the workers’ compensation statutes forbid penalizing a worker for taking steps to assure financial security). A provision in the new Workers’ Compensation Code (85A § 43(B(4))) may modify that rule with respect to an employee covered for UM under an employers’ policy:

An employer or carrier who is liable for compensation under this act on account of injury or death of an employee shall be entitled to maintain a third-party action against the employer's uninsured motorist coverage or underinsured motorist coverage.

³³ *Willie v. Geico*, 2000 OK 10, 2 P.3d 888.

³⁴ *Uptegraft v. Home Ins. Co.*, 1983 OK 41, 662 P.2d 681.

³⁵ *Bill Hodges Truck Co. v. Humphrey*, 1984 OK CIV APP 55, 704 P.2d 94 (approved by S. Ct.).

IVX. Conclusion

Thank you for attending today. I hope you have benefited from the program. For a more in-depth study of UM coverage, go to our website at travislawoffice.com where you will find links to Rex Travis' UM materials. Master those and you will have UM down.