Oklahoma Association for Justice

2019 Insurance, Tort & Workers' Compensation Update

2019 OKLAHOMA UNINSURED MOTORIST COVERAGE

By

Rex Travis and Margaret Travis

Thursday, November 7, 2019: Cox Convention Center, Oklahoma City, OK

Thursday, December 5, 2019: Renaissance Tulsa Hotel, Tulsa, OK

ABOUT THE SPEAKERS

Rex Travis is a graduate of the University of Oklahoma College of Law (1962). He limits his practice in Oklahoma City to plaintiffs' insurance and personal injury claims. He has done this practice more than 57 years.

He writes articles for the Oklahoma County Bar Association Briefcase, frequently writes briefs for the Oklahoma Association for Justice (OAJ) *amicus curiae* program, writes a regular insurance law column for the OAJ Advocate, and has taught Insurance Law at the University of Oklahoma College of Law and Oklahoma City University School of Law and frequently teaches CLE programs. He has published chapters in Matthew Bender Company's Law of Liability Insurance. He is a past president of the Oklahoma Association for Justice and the Oklahoma County Bar Association (OCBA) and serves on the Legal Ethics Committee of the Oklahoma Bar Association (OBA). He has received the Earl Sneed Award for CLE from the OBA, the Journal Record award from the OCBA and the Tommy D. Frazier Award from the OAJ, both for lifetime achievement. He is a retired Lt. Col. from the U.S. Air Force Reserve.

Margaret Travis has practiced in the areas of bankruptcy, insurance law, and personal injury since she was admitted to the Oklahoma Bar in 1991. Margaret has served Travis Law Office's insurance and injury clients for many years, including making court appearances and presenting clients for depositions. For the past fifteen years, Margaret has also practiced in the area of bankruptcy law and has developed a successful bankruptcy practice handling both Chapter 13 and Chapter 7 bankruptcies. She has recently taken on a more active role at Travis Law Office and brought her well established bankruptcy practice under the Travis Law Office roof.

INTRODUCTION

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

Following the text is a chronology of all Oklahoma UM cases, together with an alphabetical list of citations for all of the Oklahoma UM cases decided. We will refer to these for citations during the presentation. Following this is a summary of all current UM cases decided under Oklahoma law to date. Finally, there are sample UM petitions and a complaint.

OKLAHOMA UM COVERAGE

UNINSURED MOTORIST COVERAGE

I. HISTORY AND BACKGROUND

In the infancy of automobiles in our society, the financially irresponsible motorist was not a big problem. Those who could afford a car usually had the foresight to buy automobile insurance or the financial resources to pay damages if they injured someone.

When Henry Ford introduced mass production and made the automobile affordable, people who could afford neither insurance nor damages commenced to own cars. Particularly beginning at the end of World War II, the number of cars (many of which were uninsured) sky-rocketed. The number of people injured by financially irresponsible motorists increased more than proportionately. Various solutions to the problem emerged.

1. Most states (including Oklahoma) adopted "financial responsibility" laws. These required liability insurance only after the motorist had an accident and did not have insurance. By analogy to the "dog bite" cases, these laws were called "first bite" laws. The motorist might lose his driver's license and car registration but there had to be a claim without insurance to trigger that result.

2. Mandatory liability insurance began in Massachusetts in 1925. Most states now have such laws, including us (47 O.S. § 7-601).

a. Mandatory insurance laws did not assure that everyone would have insurance. Most such laws (including Oklahoma's) attempt to enforce the insurance requirement by requiring an insurance certificate to buy a car tag. Motorists evade this by buying a used vehicle which already has a tag on it and selling or trading the vehicle before the tag expires or they buy coverage, making a minimum down payment and let the policy lapse. They still have the tag, but the vehicle has no insurance.

3. As early as 1925, insurance companies began to offer "unsatisfied judgment coverage." If the insured was injured in an accident and got a judgment which he could not collect, the insurance paid. Because the uninsured motorist often did not hire a lawyer to defend the case, large judgments and losses resulted and the coverage proved not to be feasible.

4. A number of states (beginning with North Dakota in 1947) set up "unsatisfied claim funds." The state added to each motor vehicle registration a small charge or tax. This went into a fund, administered by the state, against which motorists injured by an uninsured motorist could file claims. The bureaucratic nature of state management of these funds inhibited their success.

5. Beginning in the mid-1950's, insurance companies began to offer what was thought to be the solution to the problem: uninsured motorist coverage. The concept was to put the insured injured by an uninsured motorist in the position he would have been had the uninsured motorist complied with the financial responsibility law. The policy agreed that the:

> . . . company will pay [up to the limit] all sums . . . the insured shall be legally entitled to recover as damages from [the uninsured motorist] because of bodily injury sustained by the insured, caused by accident . . . .

6. The cost of the coverage would be low for several reasons: the limits would be low - equal to the financial responsibility limits (in Oklahoma then, $5,000/$10,000). Coverage applied only to bodily injury, not property damage. Claim expense, particularly legal defense costs, would be low. The policy required arbitration in the event the insurance company and the insured could not agree on liability and damages. A "trust agreement" similar to subrogation would enable the company to recoup some of its losses. The insured was forbidden to sue the uninsured motorist without the company's consent and no action could be brought against the insurance company.

7. Most of these cost saving features failed. In *Boughton v. Farmers,*[1] the Oklahoma Supreme Court (1) invalidated the arbitration clause as contrary to public policy, (2) held the "consent to sue" and "no action" policy provisions void as contrary to public policy, and (3) held that the insurance company was bound by the judgment against the uninsured motorist, if the insured had notified the insurance company of the suit.

8. The financial responsibility minimum limits proved to be inadequate. The legislature enacted statutes which required the offering of uninsured motorist limits equal to the liability limits and provided various "underinsured" features, all of which greatly increased payments under the coverage and, therefore, the cost of the coverage. We will discuss these statutory developments now.

II. THE UNINSURED MOTORIST STATUTES

In 1968, Oklahoma adopted its first uninsured motorist statutes, title 36 O.S. Supp. §§3635, 3636, 3637, and 3638. Only §3636 has been amended.

Section 3635 defines a "motor vehicle" under the UM statutes:

> The term "motor vehicle" as used in this Act means and includes a self-propelled land motor vehicle designed for use principally upon public roads and streets.

[1] *Boughton v. Farmers,* 1960 OK 159, 354 P.2d 1085.

Section 3637 excepted from the Act policies on "motor trucks operated by a motor carrier" whose employees are covered by workers' compensation. This statute has been held to apply where the insured company carries both its own goods and goods of others.[2] Section 3638 provided the effective date of the statute.

The "guts" of the statute are found in §3636. With various amendments through the years, §3636 has become a much litigated statute.

Subsection A provides that no auto liability policy can be issued unless it includes the coverage provided in subsection B. Subsection B required coverage "for the protection of persons insured thereunder" who are legally entitled to recover damages from uninsured or hit-and-run motorists. In its original (1968) version, the coverage could not be for less than the financial responsibility minimum limits (then $5,000/$10,000), but could be offered in a greater amount. Subsection C requires that "uninsured" include an insured whose insurance company became insolvent. Subsection D permits the insurance company to limit this "insolvency" coverage to insolvencies occurring within 1 year of the date of an injury.

Subsection E provides that, upon payment under UM coverage, the insurance company became entitled, to the extent of the payment, to any recovery the injured person makes against any person legally responsible for the injury. Subsection F let the named insured reject the coverage in writing. Once coverage was rejected, policy renewal did not require a new offer and rejection.

The statute attempted to reverse the *Boughton* case's invalidation of the arbitration clause by specifying that the policy could permit arbitration, but that "if agreement by arbitration is not reached within three (3) months from date of demand, the insured may sue the tort-feasor."

No appellate case has yet explored what this arbitration provision of the statute means. Arbitration demanded by the insurance companies has never been much used in Oklahoma, in part because of the statute's ambiguity. Insurance companies also found they were not doing very well in arbitration and stopped putting the arbitration provision in their policies.

The terms of the statute's arbitration provision are themselves nonsensical. One can have "agreement **to** arbitration" or an award **in** arbitration, but there is no such thing as "agreement **by** arbitration."

---

[2] *Merrill v. Northern Ins. Co. Of N.Y.*, 747 F.Supp. 1415 (W.D.Okla. 1990).

With amendments to the statute, which we will discuss shortly, §3636 remains the law. It has been a much litigated as well as a much amended statute.

The difficulty which first caused amendment to the statute arose in 2 cases, *Lund v. State Farm*,[3] and *Simmons v. Hartford*.[4] In each of these cases, the person causing the accident and injury (called a "tort-feasor") had the required $5,000/$10,000 liability policy, but multiple claims against the $10,000 aggregate liability limit reduced the available coverage below $5,000.for each person injured In each case, the court held that the statute required only "uninsured" (not underinsured) coverage. Even if multiple claims against the tort-feasor's minimum coverage caused the insured to get little or no money, there was no recovery against the UM policy.

In response to *Simmons*, the 1976 legislature amended subsection C (the insolvency provision) to include in the definition of "uninsured motor vehicle" any vehicle:

> **whose liability insurer for any reason either cannot or is not legally required to accord** liability limits equal to the injured party's UM coverage. This converted "uninsured" coverage into "underinsured" coverage.

In 1979, the Oklahoma Supreme Court decided *Mid-Continent Casualty Co. v. Theus*.[5] That case held there could be no UM recovery if the UM limits was the same as the adverse vehicle's liability limits. Of course, this is precisely what the 1976 version of the statute said. The legislature immediately responded with another amendment to subsection C. This defined **"uninsured motor vehicle"** as one **"the liability limits of which are less than the amount of the claim . . . regardless of the amount of coverage of either of the parties in relation to each other."**

The legislature also amended subsection E (the subrogation provision) to provide:

> **any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage.**

Another 1976 provision (still in the present statute) had a tremendous effect. Subsection B was amended to require:

---

[3] *Lund v. State Farm*, 342 F.Supp. 917 (W.D.Okla. 1972).
[4] *Simmons v. Hartford*, 1975 OK 155, 543 P.2d 1384.
[5] *Mid-Continent Casualty Co. v. Theus*, 1979 OK 23, 592 P.2d 519.

that increased limits of liability shall be offered and purchased if desired, not to exceed [the liability] limits.

These amendments increased potential UM recoveries and increased the cost of the coverage. Yet another effect of the statute (unstated in the statute): since UM coverage is required by statute, every UM policy was deemed amended to conform to the statute. A policy provision not permitted by the statute is not valid. While the Supreme Court has weakened its rulings on this point, this principle dramatically affects UM law, as we shall see.

The 1989 Legislature amended the subrogation provision of §3636 to solve a long-standing problem. The problem arose when the tort-feasor's insurance company offered its limit and the injured insured wanted to take the limit. The UM insurance company could refuse to waive subrogation. The case had to be tried, even though both plaintiff and defendant want to settle it. The result was an uncollectible, excess judgment against the tort-feasor, to which the UM insurance company is subrogated.

The 1989 statute amends §3636F to provide the insured may give the UM insurance company written notice by certified mail of a proposed liability limit settlement. Certain information necessary for the UM insurance company to evaluate the case must be provided. The UM insurance company has 60 days in which to either pay the amount the liability insurance company has tendered (and be subrogated for that amount) or waive subrogation.

The 1990 amendment brought to the coverage a requirement that the insurance company make a highly explanatory offer of UM coverage, provides that <u>any</u> (not <u>all</u>) named insureds must reject UM coverage, if it is not written, and provides that a new offer of UM coverage is not required when a replacement vehicle is added to the policy. A 1994 amendment exempts fleet policies of 5 or more vehicles from re-offering the coverage. Subsequent amendments make clear that no reoffers of the coverage are required once the insured has made a selection or rejection of coverage unless the insured requests it.

Changes over the years have increased the minimum amount of UM coverage the insurance company is required to offer. Those limits have increased from the original $5,000/10,000 to $10,000/$20,000 and then to the $25,000/$50,000 presently required.

A devastating (to the insured) change is to the new subsection E, which now says UM coverage is not available to an insured while riding in a vehicle they (or a resident spouse or resident relative of the named insured) own (or which is furnished or available for the regular use

of the insured, resident spouse or resident relative of the named insured) **but that is not insured**. This language does away with *Cothren v. Emcasco*[6] that invalidated a policy provision that excluded UM coverage to an insured injured in a vehicle they owned but that was not insured. Even more unfortunately, the courts have mistakenly read that provision to authorize a provision that coverage will not be available if the vehicle does not have UM coverage.

A 2014 amendment to §. 3636 does away with stacking, except in a limited number of cases. The amendment adds to Sub-Section B: "Policies issued, renewed or reinstated after November 1, 2014, shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier." The draconian effect of this amendment has been lessened somewhat by the fact that most companies had stopped issuing policies which could be stacked (as we shall see).

Finally, the 2014 Legislature adds 85 O.S. §. 43(B)(4) to provide that the employer which provides UM can recover on that UM for payments made under Workers' Compensation.

III. UNINSURED MOTORIST LAW ISSUES

A. What Statute Applies?

1. Which State's Law Applies?

You will sometimes be confronted with claims arising from an Oklahoma accident, but where the UM policy was issued to an out-of-state insured. The question arises whether Oklahoma law or the law of the other state applies. This can become crucial because UM law varies greatly from state to state.

This law remains difficult, even though the Supreme Court has addressed the issue. Until recently, it was even more confused.

Rhody v. State Farm[7] holds that an insurance policy issued to a named insured in Texas, but covering a car garaged in Oklahoma and where the accident occurred in Oklahoma, will be interpreted under Texas, not Oklahoma law. On the other hand, *Pate v. MFA*[8] reached a different result with regard to a medical payments coverage claim.

---

[6] *Cothren v. Emcasco*, 1976 OK 137, 555 P.2d 1037.
[7] *Rhody v. State Farm*, 771 F.2d 1416 (10th Cir. 1985).
[8] *Pate v. MFA*, 1982 OK CIV APP 36, 649 P.2d 809.

In *Pate*, an Arkansas family, on vacation in Oklahoma, was injured in an accident. Oklahoma law would permit recovery; Arkansas law would not. The Oklahoma Court of Civil Appeals applied Oklahoma law, finding such a strong public policy interest in Oklahoma's med-pay statutes that Oklahoma law should apply, instead of the law of Arkansas, where the policy was issued.

Bohannan v. Allstate[9] resolved the apparent conflict between *Rhody* and *Pate*. Mrs. Bohannan, insured under a California policy, was injured while riding in her sister's car on a visit to Oklahoma. She got $25,000 from the liability coverage of the car that hit her sister's car and $10,000 from the UM coverage on her sister's car. Allstate claimed it owed her nothing more because, under California law, Allstate could credit the liability and UM payments she had received against its UM limit. The Oklahoma statute would not permit such a credit.

The federal district court ruled for Allstate, based on *Rhody*. The Tenth Circuit Court of Appeals certified to the Oklahoma Supreme Court whether Oklahoma or California law should be applied, in light of the apparent conflict between *Pate* and *Rhody*.

The Oklahoma Supreme Court held that the law of the state where the policy is issued (California, in *Bohannan*) would normally apply. However, where application of the out-of-state law would conflict with Oklahoma public policy, or where Oklahoma had a greater interest in having its law applied, Oklahoma law will apply.

Crediting the UM payment under the sister's policy against Mrs. Bohannan's own UM policy would violate public policy. Therefore, that payment could not be credited. However, crediting the liability payment would not violate public policy, because the compulsory insurance law, under which the other car's liability policy was issued, does not forbid such a credit. If the policy provided for credit, Allstate could credit the liability payment.

The fact that such credit would be contrary to the Oklahoma UM statute (36 O.S. §3636) was not important. That statute, by its terms, applies only to a policy issued in the state. This distinguishes *Bohannan* from *Pate*. Title 36 O.S. §6092, which, in *Pate*, prevented subrogating med-pay, applied to all policies covering vehicles in the state, whether issued in the state or not.

Leritz v. Farmers Ins. Co., Inc.[10] holds that a Kansas insured injured in an Oklahoma wreck could stack his Kansas coverage, despite a Kansas anti-stacking statute and a policy

[9] *Bohannan v. Allstate*, 1991 OK 64, 820 P.2d 787.
[10] *Leritz v. Farmers Ins. Co., Inc.*, 2016 OK 79, 385 P.3d 991.

provision to that effect, due to a liberalization provision in the policy. The provision was that subject to the law of the place of the occurrence, the most the insured could recover, regardless of the number of vehicles insured, was the amount stated on the declarations page. The Court held this was a "choice of law" clause requiring application of the law of the place of the occurrence.

Burgess v. State Farm Mutual Automobile Insurance Company[11] upholds the anti-stacking and setoff clauses in a Kansas policy. The facts are similar to *Bohannan* in that the insured is a Kansas resident who was injured while riding in her daughter's car in Oklahoma. State Farm was permitted to set off the tortfeasor's $100,000 liability limit against Burgess' $100,000 UM, with a net result of $0 to Burgess.

Rush v. Travelers Indem. Co.,[12] the Tenth Circuit Court of Appeals applied Oklahoma UM law to an Arkansas accident, involving an Oklahoma insured and a policy issued in Oklahoma. Consistent with that holding, the Oklahoma Supreme Court held in *Herren v. Farm Bureau Mut. Ins. Co., Inc.*[13] that the law of the state where the insured lived and the policy was issued will apply, even where the insured moved to another state before the policy renewed and the wreck occurred in the new state.

Roby v. Bailey[14] holds Arkansas law, which does not require *uninsured* motorist coverage to provide *underinsured* coverage does not violate Oklahoma public policy and can be applied in Oklahoma. The Supreme Court recently resolved the apparent conflict among the Court of Civil Appeals' rulings following *Bohannan*. *Bernal v. Charter County Mut. Ins. Co.*[15] approved the line of cases applying the law of other states (i.e. *Roby v. Bailey*, *Herren v. Farm Bureau* and *Burgess v. State Farm*) and disapproves *Lewis v. State Farm Mut. Auto. Ins. Co.*[16] *Lewis v. State Farm Mut. Auto. Ins. Co.* had invalidated an Arkansas policy provision excluding the insured vehicle from the definition of "uninsured vehicle," so that the UM coverage would not apply to a

[11] *Burgess v. State Farm Mutual Automobile Insurance Company*, 2003 OK CIV APP 85, 77 P.3d 612.
[12] *Rush v. Travelers Indem. Co.*, 891 F.2d 267 (10th Cir. 1989).
[13] *Herren v. Farm Bureau Mut. Ins. Co., Inc.*, 2001 OK CIV APP 82, 26 P.3d 120.
[14] *Roby v. Bailey*, 1993 OK CIV APP 93, 856 P.2d 1013.
[15] *Bernal v. Charter County Mut. Ins. Co.*, 2009 OK 28, 209 P.3d 309.
[16] *Lewis v. State Farm Mut. Auto. Ins. Co.*, 1992 OK CIV APP 106, 838 P.2d 535.

one-vehicle accident. The Court of Civil Appeals held the provision would violate Oklahoma public policy.

However, Oklahoma public policy will not permit application of Oklahoma law if there is already a judgment on the coverage issue in the state where the policy was written. *Smith v. Shelter Mut. Ins. Co.*[17] holds that the U.S. Constitution's Full Faith and Credit Clause requires an Oklahoma court to follow a foreign court's judgment, even if that result violates Oklahoma public policy. Thus, UM could be denied, pursuant to an Arkansas judgment, even if that denial would offend Oklahoma public policy. The "take home" message of this case is "sue early and often." Don't let the insurance company beat you to the punch with a declaratory judgment action in the issuing state. That state's courts will not be bound to follow Oklahoma law and public policy but rather will follow their own law. Then Oklahoma will have to honor that declaratory judgment.

Martin v. Gray[18] holds the court should apply the tort, rather than the contract, choice of law rule to determine the law to be applied in a UM bad faith case. The Supreme Court says the court should apply the law of the state which has the most significant relationship with the handling of the claim, rather than the law of the state where the policy was issued. The result of this will normally be that the law of the state where the claim is being handled or litigated will apply.

Leader National Ins. Co. v. Shaw[19] addresses the second exception to *Bohannan's* "general rule" that the law of the place the policy is issued controls, that another state may have a greater connection with the transaction. *Leader National* holds that Oklahoma, not Kansas, law applies to the case of an Oklahoma service man, assigned in Kansas, who was killed in a wreck in Oklahoma, causing claims by Oklahoma citizens against his Kansas policy. The Court concluded Oklahoma had greater contact with the entire transaction (the policy and the accident) and therefore had a greater interest in having its law applied than did Kansas, under the test prescribed in *Bohannan*.

[17] *Smith v. Shelter Mut. Ins. Co.*, 1994 OK 2, 867 P.2d 1260.
[18] 2016 OK 114, 385 P.3d 64.
[19] *Leader Nat'l Ins. Co. v. Shaw*, 901 F.Supp. 316 (W.D.Okla. 1995).

2. Which UM Statute Applies?

As we noted above, it is necessary to look at the statute to interpret any UM policy provision. Which statute is to be applied becomes important. As noted above, several legislatures have amended the statute, raising this question.

The rule is that the statute to be applied is the statute in force when the policy was issued or last renewed before the accident. *MFA v. Hankins*[20] held the "underinsured" provisions of the 1976 statute did not apply to a claim before the 1976 statute. *McKinley v. Prudential*[21] held the 1976 amendment inapplicable to a claim after the 1976 amendment, where the policy had not been renewed after the 1976 amendment. *Cofer v. Morton*[22] says:

> Rights of recovery under the Uninsured Motorist Act are governed by the statute in effect on the date of issuance or last renewal of the policy against which an uninsured motorist claim is made.

B. Offer and Rejection Issues

As noted above, §3636A requires an offer of UM coverage. Subsection G provides for a written rejection. Before 1990, there was no requirement for a written offer. Now there is.

A great deal of litigation has taken place over the requirement for an offer and a written rejection. A significant question existed whether, when the UM insurance company wrote UM limits less than the liability limits (which the UM insurance company was required to offer), the UM insurance company had to take a written rejection of the higher UM limit. The Supreme Court resolved this question favorably to the insurance company in *Mann v. Farmers Insurance Co., Inc.*[23] That case held that the only time a written rejection was required was when the policy afforded no UM coverage. Under the 1990 statute, a written selection or rejection of coverage is required. As noted above, this provision has been amended in the 1990 and 1994 and 2005 versions of the statute.

An earlier Oklahoma case (*Hicks v. State Farm*[24]) indicated the UM insurance company must make a sufficiently explanatory offer of UM coverage that the insured could make a

---

[20] *MFA v. Hankins*, 1980 OK 66, 610 P.2d 785.
[21] *McKinley v. Prudential*, 1980 OK CIV APP 29, 619 P.2d 1269.
[22] *Cofer v. Morton*, 1989 OK 159, 784 P.2d 67.
[23] *Mann v. Farmers Insurance Co., Inc.*, 1988 OK 58, 761 P.2d 460.
[24] *Hicks v. State Farm*, 1977 OK 150, 568 P.2d 629.

knowing or intelligent decision to accept or reject the coverage. However, *Silver v. Slusher*[25] held that the insurance company had no duty to make an explanatory offer of UM coverage.

Silver is legislatively overruled by the 1990 amendment. Under the 1990 amendment, effective September 1, 1990, the insurer must make an explanatory offer, in statutory form. *Fields v. Farmers Ins. Co., Inc.*[26] holds that the explanatory offer need not be made with any renewal within the first year after the effective date of the 1990 statute, but only with renewals after the first year, when a vehicle is added to the policy (as opposed to substituted or exchanging one vehicle for another under the policy), when the named insured changes or when the amount of the coverage changes[27] except the increase in limits required by the 2005 statutory amendment. But the agent has no duty to advise the insured regarding the availability of higher UM limits.[28]

The other holding in *Hicks* has, likewise, been overruled. *Beauchamp v. Southwestern Insurance Co.*[29] holds that adding a new vehicle to the policy constituted the making of a new policy (rather than a renewal), requiring a new UM coverage offer. Having failed to make such an offer, Beauchamp had UM coverage as a matter of law. Since *Beauchamp* changed prior law, it applies only to claims arising after the mandate issued in that case, December 10, 1987. *Beauchamp* was changed by the 1990 statute. Under that amendment, (until another amendment in 2009) an additional vehicle added to the policy will require a new offer, but a replacement vehicle will not.

The 2009 Legislature enacted an amendment effective with policies issued or last renewed before the loss after November 1, 2009 which dramatically changes the offer and rejection rules:

> The form signed by the insured or applicant which initially rejects coverage or selects lower limits shall remain valid for the life of the policy and the completion of a new selection form shall not be required when a renewal, reinstatement, substitute, replacement, or amended policy is issued to the same-named insured by the same insurer or any of its affiliates. Any changes to an existing policy,

---

[25] *Silver v. Slusher*, 1988 OK 53, 770 P.2d 878.
[26] *Fields v. Farmers*, 847 F.Supp. 160 (W.D.Okla. 1993), aff'd, 18 F.3d 831 (10th Cir. 1994).
[27] *May v. Nat. Union Fire Ins. Co. of Pittsburg, Pa., 84 F.3d 1342 (10th Cir. 1996).*
[28] *Mueggenborg v. Ellis*, 2002 OK CIV APP 88, 55 P.3d 452.
[29] *Beauchamp v. Southwestern Ins. Co.*, 1987 OK 111, 746 P.2d 673.

> regardless of whether these changes create new coverage, do not create a new policy and do not require the completion of a new form.[30]

Failure to make the required offer will result in UM limits equal only to minimum financial responsibility limits, not liability limits.[31] This is so, even as to a single limit policy with a per policy premium.[32] That rule may, however, be different when there is evidence that higher limits would have been purchased had they been properly offered.

Moon v. Guarantee Insurance Co.[33] held that a car renter must be given the opportunity to buy or reject UM coverage. A rejection by the car rental company was not enough. The rental company was the agent for the insurance company, not the insured, in the transaction. *Moon* is probably overruled by the 1990 amendment to § 3636, referred to in the next paragraph. A self-insuring car rental company is not required to offer its customers UM.[34]

Plaster v. State Farm[35] held each named insured must execute a UM rejection for the rejection to be valid as to that insured. A rejection signed by the husband, but not the wife, was not effective to bar claims for the parties' son's death. This case was legislatively reversed by the 1990 amendment to 36 O.S. §3636. Under that amendment, *any* named insured may reject UM coverage. Under the pre-1990 law, failure to offer did not result in UM limits equal to liability limits where some coverage was written, but in a lesser amount than the liability limit.[36]

Moser v. Liberty Mutual[37] holds no UM offer is required on an umbrella policy. These policies provide excess coverage for automobile liability, along with general liability, in excess of basic underlying required limits. The court holds these policies do not come within the description in Subsection A of a policy insuring against loss from liability imposed by law" and do not trigger a requirement for a UM offer.

---

[30] 36 O.S. 2009 Supp. § 3636(G).
[31] *May v. Nat. Union Fire Ins. Co. of Pittsburg, Pa.*, 1996 OK 52, 918 P.2d 43 (opinion following certification) 84 F.3d 1342 (10th Cir. 1996); *May* reverses *Perkins v. Hartford Underwriters Insurance Company*, 1994 OK CIV APP 151, 889 P.2d 1262; *Boerstler v. Donald Hoover Truck Insurance Exchange Co.*, 1997 OK 106, 943 P.2d 614.
[32] *Mid-Continent Group v. Henry*, 2003 OK CIV APP 46, 69 P.3d 1216.
[33] *Moon v. Guarantee Insurance Co.*, 1988 OK 85, 764 P.2d 1331.
[34] *McSorley v. The Hertz Corp.*, 1994 OK 120, 885 P.2d 1343.
[35] *Plaster v. State Farm*, 1989 OK 167, 791 P.2d 813.
[36] *Burwell v. Oklahoma Farm Bur. Mut. Ins. Co.*, 1995 OK CIV APP 50, 896 P.2d 1195.
[37] *Moser v. Liberty Mutual*, 1986 OK 78, 731 P.2d 406.

Cofer v. Morton[38] holds no offer of UM limits equal to the liability limit was required even when one of the named insureds was aware of that right from some other source.

An improper offer of UM coverage may justify reformation. In *Gay v. Hartford Underwriters Ins. Co.*,[39] the court reformed the policy where the insured asked to have the coverage increased, but the agent did not do so, even though the insured failed to read the policy to discover the omission before the accident. However, use of a form for offer and rejection or selection under the 2004 statute was not rendered invalid by the insurance company's having a slight deviation from the statutory form approved by the Insurance Commissioner where the form substantially complied with the statute.[40]

Skinner v. John Deere Ins. Co.[41] held that the $20,000 UM limit stated in the policy controls, where there was no rejection of UM limits equal to the higher amount of liability coverage, $500,000. This case was in the trial court when the Oklahoma Supreme Court decided *May v. National Mutual Ins. Co.*,[42] which overruled *Perkins v. Hartford*[43] (failure to take a written rejection of UM equal to liability limits results in UM limits being imputed in an amount equal to liability limits) and held that an insurance company's failure to obtain a written rejection of UM coverage equal to the liability limit resulted in an imputed UM limit at the statutory $10,000/$20,000 minimum.

A fact question may preclude summary judgment for the insurance company where there is a question whether the person, other than the named insured, who actually applied for the policy and signed the rejection had apparent authority to reject the coverage.[44] A 2000 statute not contained in the insurance code suggests that an "electronic signature" will suffice to reject or select UM coverage.[45]

As noted above (in the discussion of statutes) a subsequent amendment now provides that no reoffer of UM coverage will be required after an offer and a selection are made.

---

[38] *Cofer v. Morton*, 1989 OK 159, 784 P.2d 67.
[39] *Gay v. Hartford Underwriters Ins. Co.*, 1995 OK 97, 904 P.2d 83.
[40] *Gay v. Hartford Underwriters Ins. Co.*, 1995 OK 97, 904 P.2d 83.
[41] *Skinner v. John Deere Ins. Co.*, 2000 OK 18, 998 P.2d 1219.
[42] *May v. National Mutual Ins. Co.*, 1996 OK 52, 918 P.2d 43.
[43] *Perkins v. Hartford*, 1994 OK CIV APP 151, 889 P.2d 1262.
[44] *Traders Ins. Co. v. Johnson*, 2010 OK CIV APP 37, 231 P.3d 790.
[45] 12A O.S. § 15-101 adopts the "Uniform Electronic Transactions Act."

C. Who Is Insured Under the UM Policy?

Title 36 O.S. §3636B requires UM coverage "for the protection of persons insured thereunder." A logical reading of the statutes leads the reader to believe "persons insured thereunder" refers to those insured under the liability coverage. While a lot of cases have involved the extent of the coverage available to particular types of insureds, relatively few cases have dealt with the question of who is insured and entitled to protection under the UM policy.

The policies are generally written in such a way as to cover: (1) the named insured, and the named insured's family members residing in his or her household (they are covered if they were injured by an uninsured vehicle).[46] and (2) other persons while occupying an insured vehicle.

Historically, the named insured and resident family members or resident relatives were covered regardless of whether the vehicle they were riding in was insured. *Cothren v. Emcasco*[47] illustrated this point by quoting the Louisiana Court of Appeals in *Elledge v. Warren*:[48]

> The uninsured motorist protection covers the insured and the family members while riding in uninsured vehicles, while riding in commercial vehicles, while pedestrians or while rocking on the front porch.

The latest amendment to 36 O.S. Sec. 3636 now permits insurance companies to exclude from UM coverage injuries occurring while the insured was driving or riding in a car owned by or made available for the regular use of the insured, resident spouse, or resident relative, but that was not insured.[49] In at least one case,[50] the Court of Civil Appeals has misread that statute to permit a policy exclusion which excludes coverage for an insured who was occupying a vehicle he owned but which was not covered by UM coverage.

The Supreme Court had a chance to correct the Court of Civil Appeals' error in *Morris v. America First Ins. Co.*[51] but chose rather to distinguish the cases holding that, under the same policy language, an owned vehicle not itself covered by UM coverage qualified the

---

[46] *Ameen v. Prudential Property and Casualty Ins. Co.*, 2005 OK CIV APP 23, 110 P.3d 86.
[47] *Cothren v. Emcasco*, 1976 OK 137, 555 P.2d 1037.
[48] *Elledge v. Warren*, 263 So.2d 912 (La. App. 1972).
[49] Title 36 O.S. Sec. 3636E.
[50] *Conner v. American Commerce Insurance*, 2009 OK CIV APP 61, 216 P.3d 850.
[51] *Morris v. America First Ins. Co.*, 2010 OK 35, 240 P.3d 661.

insured driver for coverage since the driver had UM coverage on another vehicle and that coverage attached to the vehicle which the insured was driving.

Shepard v. Farmers[52] holds that insurance companies will be permitted to exclude from "insured family member" status those who own their own cars. Farmers wrote a policy which defined "family member" as one who did not own his or her own car.

The Supreme Court held this definition valid to exclude from coverage of the family car the named insured's daughter who owned her own car. The Court reasoned that the household resident who owns her own car has the opportunity to buy her own UM coverage.

While the *Shepard* opinion does not reflect that fact, the standard Farmers policy being interpreted also excluded from the liability coverage a household member owning his own car. This would exclude that family member from the liability coverage and could have formed the basis for the *Shepard* ruling.

Shepard is bad law. The Court states that the Oklahoma statute does not say who must be insured under the UM policy. This is simply incorrect. Section 3636B specifies that the UM coverage must be provided "for the protection of persons insured thereunder," meaning the persons insured under the liability coverage. Further, it seems incongruous to permit an exclusion hidden in the definitions, while denying exclusions clearly labeled as exclusions.

Yet, the Supreme Court relied on *Shepard* in deciding *Graham v. Travelers Ins. Co.*,[53] which holds that an employee covered under his employer's liability coverage is not covered under the employer's UM coverage when injured on the job while driving his own car. The Supreme Court permitted a policy provision restricting UM coverage to vehicles the employer owned.

Graham involved a hired and non-owned auto policy issued to Graham's employer. This coverage protects the insured-employer and sometimes the employee with the employer's liability policy if the employee is operating a car not owned by the employer (usually the employee's car) on an errand for the employer. The employer had a $1 million UM liability coverage on the hired and non-owned policy.

The employee (Graham) was injured by an uninsured motorist while using the employee's car on an errand for the employer. A reading of the statute that the UM coverage had

---

[52] *Shepard v. Farmers*, 1983 OK 103, 678 P.2d 250.
[53] *Graham v. Travelers Ins. Co.*, 2002 OK 95, 61 P.3d 225.

to attach to anyone insured under the liability policy would have reached the result that the employee was covered for UM. But the policy provided otherwise. The Supreme court upheld the insurance company's position.

The Court of Civil Appeals in *National American Ins. Co. v. Vallion*[54] followed *Graham* and *Shepard* to hold an insurance company can exclude from UM coverage an occupant of a vehicle who owns his or her own car which qualifies under the compulsory insurance law. Vallion worked for a school district which had UM coverage on its vehicles. While occupying a school vehicle, he was injured by an uninsured motorist.

The school district's insurance policy had a provision that anyone injured while occupying an insured vehicle was excluded from the coverage if that person had a vehicle insured for UM. Since Vallion had his personal car insured for UM, the company declined coverage. The Court of Civil Appeals approved the exclusion.

Step-children are almost universally held to be covered "relatives." A step-brother is a relative, covered under his step-brother's UM policy.[55]

An unusual case in the Tenth Circuit Court of Appeals extends "household member" coverage even further. In *Houston v. National General*,[56] the unmarried mother of the named insured's grandchild lived with the named insured. The policy included a "ward" (defined by statute as one for whom a guardian has been appointed) as an insured. The federal court held that the strict, legal definition of "ward" was not applicable. Rather, the generally accepted, common sense, use of the word should be applied. This created a fact question as to whether the young woman in question was a household member.

The Oklahoma Supreme Court adopted and followed in *Serra v. Estate of Broughton*.[57] There, the Court held a foreign exchange student living in the named insured's home was covered as a "resident relative" under the policy provision including a "ward" within the definition The Court noted the term "ward" was not defined in the policy and gave it a non-technical definition which resulted in a finding the term was ambiguous.

---

[54] *National American Ins. Co. v. Vallion*, 2008 OK CIV APP 41, 183 P.3d 175.
[55] *Flitton v. Equity Fire and Cas. Co.*, 1992 OK 2, 824 P.2d 1132.
[56] *Houston v. National General*, 817 F.2d 83 (10th Cir. 1987).
[57] *Serra v. Estate of Broughton*, 2015 OK 82, 364 P.3d 637.

Farmers v. Thomas[58] holds that a policy affords no UM coverage where the named insured had no insurable interest in the car. The divorced former wife of the named insured got the car in a divorce, but left the insurance coverage in the husband's name. Her friend, riding in the car, was not entitled to UM coverage. See the case summary in the UM Case Summaries section for an analysis and criticism of this case.

Title 36 O.S. § 3636B requires that the coverage protect insureds "legally entitled to recover damages . . . because of bodily injury . . . ." The statute contains no requirement that the bodily injury (as opposed to the damage) be to the insured. However, the Court of Civil Appeals approved a policy provision requiring that the bodily injury giving rise to the claim be to an insured, in *London v. Farmers Ins. Co., Inc.*[59] Young Derrick London lived with his grandmother, and was an insured under her policy when his father, living elsewhere, was killed in a motorcycle wreck. The Supreme Court denied *certiorari*.

Questions arise with regard to children who may be residents of an insured household without being physically present there at all times: those whose parents are divorced or divorcing, or who are away at college, or children in the military.

Oklahoma has not yet addressed such a case. Many courts have and generally hold that a child may be a resident of the household of both the mother and the father where split custody or liberal visitation exists. Similarly, unmarried children away at college or in the military are often held to remain residents of their parents' household for coverage purposes, until they marry or otherwise establish a home other than with the parents. See Widiss' *Uninsured and Underinsured Motorist Insurance*, Sections 4.10-4.13.

Children of business owners are not covered as Class 1 insureds under the UM coverage of a policy issued to the business owner that lists only the corporation as the named insured.[60] A business is considered a corporate entity that has no family members. Business owners need to get themselves listed as additional named insureds in order to get themselves and their family members covered under policies issued to a business.[61]

---

[58] *Farmers v. Thomas*, 1987 OK 84, 743 P.2d 1080.
[59] *London v. Farmers Ins. Co., Inc.*, 2003 OK CIV APP 10, 63 P.3d 552.
[60] *American Economy Insurance Company v. Bogdahn*, 2004 OK 9, 89 P.3d 1051.
[61] See, also, *Haberman v. The Hartford Ins. Group*, 443 F.3d 1257 (10th Cir. 2006).

We have had some success in getting polices reformed to name the principal owner as an additional named insured. We argue that the agent knew or should have known that the insured business owner was insuring cars used for family use under the business policy and that the insured and family member would not have UM coverage under the policy. We ask the court to reform the policy under a "constructive fraud" theory. Our argument is that the agent ought to right the coverage in such a way as to protect the owner and his family and it would be inequitable to permit the company to profit from its agent's error. We cite in support of that argument *Gentry v. American Motorist Ins. Co.*[62] and *Security Ins. Co. of New Haven v. Greer*[63]

Some cases deal with whether a prospective insured is "occupying" an "insured motor vehicle." *Argonaut Ins. Co. v. Earnest*[64] reaches this issue with regard to a road construction employee occupying a piece of road construction equipment called a "chip spreader."

This machine was attached to a dump truck which was backing up and, through a rod between the back of the dump truck and the chip spreader, was moving the chip spreader while rock chips were dumped from the truck into the spreader. The spreader collided with an oiler truck which was putting oil on the road and pinned the worker between the oiler truck and the chip spreader. The federal district court held the worker was "occupying" the dump truck so as to be covered under the UM coverage on the truck.

Oklahoma has addressed the problem of who will be considered an insured by reason of occupying the insured vehicle when actually outside the vehicle. Oklahoma chose to avoid a "bright line" test, in holding a man helping to change the tire of an insured vehicle was "occupying" the vehicle, so as to be insured under the policy.[65] This was so even though he was not getting in the car.

D. Stacking — How Many Limits Can the Insured Collect?

With regard to a claim arising under a policy last issued or renewed on or before November 1, 2014, we need to talk about stacking. After that, the 2014 amendment to 36 O.S. §.

---

[62] 1994 OK 4, 867 P.2d 468 (constructive fraud justified reforming policy where agent wrote coverage he thought would cover the risk the insured wanted covered but did not due to an exclusion.)

[63] 1968 OK 3, 437 P.2d 243 (insurance company estopped to deny coverage of hay in a barn based on exclusion which was put in policy without the agent's knowledge so that agent thought the policy would cover.)

[64] *Argonaut Ins. Co. v. Earnest*, 861 F.Supp.2d 1313 (N.D. Okla. 2012).

[65] *Wickham v. Equity Fire and Casualty Co.*, 1994 OK CIV APP, 889 P.2d 1258.

3636(B) eliminates stacking in all but a very few cases. What follows immediately will be applicable to those claims under policies issued or last renewed before November 1, 2014.

A person may become entitled to multiple UM coverages several ways. If he is injured while riding in someone else's car, he will have the coverage of the car he is in, as well as his own policy. Subject to the definition of a household member (discussed above in *Shepard v. Farmers,*[66] in the "insured status" section above), he may also be able to recover under policies in his household. A third type of stacking occurs when the insured owns several cars insured under separate policies or the car he is occupying is one of several insured under a single policy. In that event, he may be entitled to coverage equal to the UM limit multiplied by the number of cars insured or premiums paid. He will not, however, be able to recover more than the damages he incurred.[67]

The named insured or household member (a "Class 1 insured") may stack the coverage of vehicles in the household, whether those vehicles are insured under separate policies (*Keel v. MFA*)[68] or multiple vehicles are insured under a single policy (*Richardson v. Allstate,*[69] *Lake v. Wright,*[70] *Aetna v. Craig*[71]). This is true where the company charged a separate premium for each vehicle insured.

Stacking will apply to a commercial, fleet policy, if the injured claimant is a class 1 insured. This is the holding of *Aetna Casualty and Surety Co. v. Craig*.[72] An employee may not stack his employer's UM coverage.[73]

Many companies charge a single "per policy" premium, as opposed to a "per vehicle" premium. *Scott v. Cimarron Insurance Co., Inc.*[74] holds that the insurance company may deny stacking under such policies. Even before the 2014 statute, this decision had virtually eliminated

[66] *Shepard v. Farmers*, 1983 OK 103, 678 P.2d 250.
[67] *Reeder v. American Economy Ins. Co.*, 88 F.3d 892 (10th Cir. 1996).
[68] *Keel v. MFA*, 1976 OK 86, 553 P.2d 153.
[69] *Richardson v. Allstate*, 1980 OK 157, 619 P.2d 594.
[70] *Lake v. Wright*, 1982 OK 98, 657 P.2d 643.
[71] *Aetna v. Craig*, 1989 OK 43, 771 P.2d 212.
[72] *Id.*, 1989 OK 43, 771 P.2d 212.
[73] *Widmann v. Acceptance Ins. Co.*, 2002 OK CIV APP 118, 63 P.3d 23.
[74] *Scott v. Cimarron Ins. Co., Inc.*, 1989 OK 26, 774 P.2d 546.

stacking. While *Scott* appeared to say that the insurance company which would deny stacking must offer coverage which could be stacked, subsequent cases say that is not so.[75]

The insurance company is not required to advise the insured that it will deny stacking by charging a single, per policy premium. The Courts of Appeal appeared to have held there must be evidence the insurance company notified the insureds so the insureds had the option to buy coverage elsewhere which could be stacked.[76] The Supreme Court reversed that ruling and held that an insurer can deny stacking under a per-policy UM premium policy without having made any pre-policy explanation or warning to the insured that they were buying coverage that does not stack.[77]

Where UM coverage was imputed, by reason of a vehicle being added to a single limit policy (per policy premium) and the insurance company failed to offer UM, the UM coverage stacked.[78] However, the insurance company was permitted to write additional vehicles on an "overflow" policy, assign a separate policy number and declarations page, but call the two policies one policy for purposes of stacking.[79] In this instance, the "overflow" policy stated the UM coverage for the second policy was paid for under the first policy; therefore, Allstate only had to stack the coverage under the first policy. However, the requirement to make a new offer and take a rejection with a vehicle added to the policy was eliminated, even before the 2014 "anti-stacking" statute.

Davis v. Equity Fire & Cas. Co.[80] appeared to hold that, if the stacked UM limit will exceed the unstacked liability limit, there can be no stacking. The case has not been followed.

---

[75] *Breakfield v. Oklahoma Farmers Union Mut. Ins. Co.*, 1995 OK 139, 910 P.2d 991; and *Kinder v. Oklahoma Farmers Union Mut. Ins. Co.*, 1997 OK 104, 943 P.2d 617; *Spears v. Glens Falls Insurance Company*, 2005 OK 35, 114 P.3d 448.

[76] *Davis v. Choate*, 1989 OK CIV APP 29, 787 P.2d 465; *Kinder v. Okla. Farmers Union Mut. Ins. Co.*, 1991 OK CIV APP 53, 813 P.2d 546.

[77] *Spears v. Glens Falls Insurance Company*, 2005 OK 35, 114 P.3d 448; overruling *Mid-Continent Group v. Henry*, 2003 OK CIV APP 46, 69 P.3d 1216, and *Kinder v. Okla. Farmers Union Mut. Ins. Co.*, 1991 OK CIV APP 53, 813 P.2d 546.

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

[79] *Dodd v. Allstate Insurance Company*, 2004 OK CIV APP 82, 99 P.3d 1219; overruling the language in *Mid-Continent Group v. Henry* that states the insurance company must advise that the UM coverage does not stack.

[80] *Davis v. Equity Fire & Cas. Co.*, 1992 OK CIV APP 171, 852 P.2d 780.

At least one company, Allstate, charged a premium which purported to be a single, per policy premium and, on that basis, tried to defeat stacking. The per policy premium was calculated by charging a UM premium per policy but then adding a multiple vehicle surcharge if more than one vehicle was insured under the policy. The effort failed.[81] Where the premium for three cars was approximately twice that for a single car, Allstate was required to stack two coverages.[82]

Persons insured only by reason of occupying an insured vehicle (called Class 2 insureds) may not stack UM coverage. This is true whether the owner's vehicles are insured under separate policies (*Babcock v. Adkins*[83]) or the vehicle being occupied is one of several vehicles insured under a single policy (*Rogers v. Goad*,[84] *Stanton v. American Mutual*[85]).

Likewise, an employee injured on the job could not stack his employer's UM coverage where the policy limits UM coverage to "owned vehicles," even though the employee is using his own vehicle, the vehicle is listed on the employer's policy, the employee is listed as an additional insured, and the employee pays the employer a weekly tariff to cover a proportionate share of the insurance premiums *Widmann v. Acceptance Insurance Co*.[86]

These cases proceed on the assumption the named insured buys the coverage with the expectation he and his family members will be entitled to stack coverage, but non-family members occupying the car will not.

As noted above, the 2014 amendment simply does away with stacking except where the policy specifically provides for it. So far as I know, only two companies, USAA and AAA (CSAA), offer a policy which specifically provides for stacking, in return for an extra premium.

E. Who is "Legally Entitled to Recover?"

Section 3636B requires UM coverage for the protection of insureds "legally entitled to recover" from an uninsured motorist. A number of cases deal with who is "legally entitled to recover."

---

[81] *Wilson v. Allstate Ins. Co.*, 1996 OK 22, 912 P.2d 345.
[82] *Kramer v. Allstate Ins. Co.*, 1994 OK CIV APP 146, 909 P.2d 128.
[83] *Babcock v. Adkins*, 1984 OK 84, 695 P.2d 1340.
[84] *Rogers v. Goad*, 1987 OK 59, 739 P.2d 519.
[85] *Stanton v. American Mutual*, 1987 OK 118, 747 P.2d 945.
[86] *Widmann v. Acceptance Insurance Co.*, 2002 OK CIV APP 118, 63 P.3d 23.

Uptegraft v. Home[87] holds an insured may recover UM benefits even though the statute of limitations has run on his claim against the tort-feasor. The UM claim is covered by a 5-year statute of limitation applicable to a contract action. The 2-year negligence statute of limitation is a defense to the tort-feasor, but not a condition of the insured being "legally entitled to recover."

Similarly, *Karlson v. City of Oklahoma City*[88] holds a city vehicle "underinsured" to the extent that the city's liability is limited under a tort claim statute and the insured's claim exceeds that limitation. Even though the insured is barred by governmental immunity from recovery in excess of Tort Claims Act limits, the insured is still entitled to recover UM limits for damages above the Tort Claim Act limits. However, the insured is not entitled to recover UM limits for damages within the Tort Claim Act limits just because the statute of limitations ran on the tort claim.[89] Further, a city vehicle covered by the Tort Claims Act is not "uninsured" to the extent of Tort Claim Act limits.[90]

Barfield v. Barfield and *Torres v. Kansas City Fire and Marine Ins. Co.*[91] hold that one whose claim against the tort-feasor is barred by the exclusive remedy of the Workers' Compensation Act can nevertheless recover UM benefits. These cases would seem to indicate Oklahoma adopts a very liberal interpretation of the "legally entitled to recover" clause.

Only the Federal Tenth Circuit Court of Appeals has held to the contrary, in *Markham v. State Farm*.[92] In that case, decided before the above Oklahoma cases (in 1972), the Federal Court held there could be no recovery under a UM policy on the claim of a mother against her minor daughter. Under then Oklahoma law, the parent could not recover against a minor child (or vice versa). Thus, the Federal Court reasoned, the mother was not "legally entitled to recover" damages and had no UM claim.

Markham will almost certainly not be followed in light of the above cases and *Unah v. Martin*,[93] holding that a child may sue a parent, to the extent of available insurance coverage.

---

[87] *Uptegraft v. Home Ins. Co.*, 1983 OK 41, 662 P.2d 681.
[88] *Karlson v. City of Oklahoma City*, 1985 OK 45, 711 P.2d 72.
[89] *Carlos v. State Farm Mutual Auto. Ins. Co.*, 1996 OK CIV APP 158, 935 P.2d 1182.
[90] *Newberry v. Allstate Ins. Co.*, 1998 OK CIV APP 139, 963 P.2d 632.
[91] *Barfield v. Barfield*, 1987 OK 72, 742 P.2d 1107 / *Torres v. Kansas City Fire and Marine Ins. Co.*, 1993 OK 32, 849 P.2d 407.
[92] *Markham v. State Farm*, 464 F.2d 703 (10th Cir. 1972).
[93] *Unah v. Martin*, 1984 OK 2, 676 P.2d 1366.

Further, *Markham* proceeded on the stated assumption that parent/child immunity in Oklahoma existed because there was no cause of action by a parent against a child and vice versa. *Unah* held, to the contrary, that the immunity resulted in a defense, which was personal to the dependent child or the parent. If the defense is a personal one, the insurance company probably cannot assert it.

Rose v. State Farm[94] takes a position contrary to *Markham*, without citing *Markham*. *Rose* holds that a mother, injured by the negligence of her son, was legally entitled to recover, so as to be entitled to recover UM. Neither *Rose* nor *Markham* are binding authority. *Rose* is a Court of Appeals case and *Markham* is a federal case. The Oklahoma Supreme Court needs to resolve this question. It should follow *Rose* and disapprove *Markham*.

There must, however, be *fault* on the part of another person who is the operator of a vehicle for there to be UM liability. The happening of an accident involving a vehicle is not enough.[95]

F. What Exclusions from UM Coverage Are Permitted?

The rule in Oklahoma for many years was that, since UM coverage is prescribed by statute, exclusions or offsets against the coverage not specifically allowed by the statute are not valid and will not be enforced. With the exception of *Shepard v. Farmers*[96] (discussed under Section C) and *O'Brien v. Dorrough and Equity Fire and Cas. Co.,*[97] all the early Oklahoma cases invalidated policy exclusions. However, that rule appears to be eroding.

Cothren v. Emcasco,[98] overruled by statute in 2005,[99] held the insured's son was covered while riding an uninsured motorcycle. A provision excluding coverage where an insured was occupying a vehicle owned by the insured, but not insured under the policy, was invalid.

---

[94] *Rose v. State Farm Mut. Auto. Ins. Co.*, 1991 OK CIV APP 124, 821 P.2d 1077.
[95] *Martin v. Hartford Underwriters Ins. Co.*, 1996 OK 55, 918 P.2d 49 (no UM liability where a child, too young to be negligent, put car in gear and ran over insured); *Great West Casualty Company v. Boroughs*, 505 F.Supp.2d 1072 (N.D. Okla. 2007) (No UM liability where driver was injured due to his own negligence with no negligence on owner or operator of motor vehicle).
[96] *Shepard v. Farmers*, 1983 OK 103, 678 P.2d 250.
[97] *O'Brien v. Dorrough and Equity Fire and Cas. Co.*, 1996 OK CIV APP 25, 928 P.2d 322.
[98] *Cothren v. Emcasco*, 1976 OK 137, 555 P.2d 1037; overruled by 2005 amendment to 36 O.S. sec. 3636E.
[99] Title 36 O.S. Sec. 3636E, effective September 1, 2005.

Keel v. MFA[100] invalidated an "other insurance" clause. This clause said that where multiple policies were issued to the insured, there would be coverage under only one policy. That provision was invalid. Similarly, *Lake v. Wright*[101] held invalid a "limit of liability" provision, which purported to prohibit "stacking."[102] Those rulings have been done away with by the anti-stacking amendment to §. 3636B.

Biggs v. State Farm[103] invalidated the "actual physical contact" requirement for there to be "hit-and-run" coverage. The court reasoned the term "hit-and-run" did not necessarily mean "hit," but should also be applied where a vehicle runs the insured off the road and then leaves the scene. A provision requiring that there be "actual physical contact" with the hit-and-run vehicle was invalid.

Aetna v. State Board[104] invalidates a provision permitting an offset of medical payments coverage against UM benefits. Such a credit or offset will be permitted where the claimant is insured only by reason of being an occupant, but will not be permitted where the claimant is the named insured or member of the household. This case also invalidates subrogation as to medical bills paid under UM. It should be noted that *Aetna* is based in large part, not on UM statutes, but on the med-pay statute, 36 O.S. §6092.

Chambers v. Walker[105] prohibits offset or credit against the insured's own UM policy for workers' compensation benefits, despite a policy provision to that effect. *Bill Hodges Truck Company v. Humphrey*[106] prohibited the converse: an offset of UM benefits paid under the worker's own policy against a workers' compensation recovery. *Torres v. Kansas City Fire and Marine Ins. Co.*[107] and *Dennis v. Harding Glass Co.*[108] prohibit an employer and workers' compensation carrier from offsetting against workers' compensation benefits UM coverage payable under the employer's car policy. Those rulings have been reversed by amendment of the

---

[100] *Keel v. MFA*, 1976 OK 86, 553 P.2d 153.
[101] *Lake v. Wright*, 1982 OK 98, 657 P.2d 643.
[102] See Section D "stacking."
[103] *Biggs v. State Farm*, 1977 OK 135, 569 P.2d 430.
[104] *Aetna v. State Board*, 1981 OK 153, 637 P.2d 1251.
[105] *Chambers v. Walker*, 1982 OK 128, 653 P.2d 931.
[106] *Bill Hodges Truck Co. V. Humphrey, 1984 OK CIV APP 55*, 704 P.2d 94 (Published by Supreme Court order).
[107] *Torres v. Kansas City Fire and Marine Ins. Co.*, 1993 OK 32, 849 P.2d 407.
[108] *Dennis v. Harding Glass Co.*, 1996 OK CIV APP 105, 929 P.2d 301.

Worker' Compensation statute (85a O.S. §. 43). *Thrasher v. Act-Fast Labor Pool, Inc.*[109] holds there is no subrogation of Workers' Compensation against UM and that suit against the UM carrier does not require filing election in Workers' Compensation Court.

Uptegraft v. Home[110] (discussed above under Section E) holds invalid a policy provision barring recovery where the statute of limitation has run against the tort-feasor. The UM statute does not permit such an exclusion.

Three cases invalidate a provision excluding from the definition of "uninsured motor vehicle" the insured vehicle itself: *Heavner v. Farmers,*[111] *State Farm v. Wendt,*[112] and *Russell v. American States.*[113] Such definition is contrary to the definition of "uninsured motor vehicle" contained in §3636C which (in the current version) defines "uninsured motor vehicle" to include an insured motor vehicle, the liability limits of which are less than the claim. *State Farm v. Wendt*[114] also invalidates an exclusion for vehicles "regularly furnished for the insured's use."

These three cases give rise to the phenomenon sometimes known as "double dipping." That arises when an accident caused by the driver's fault injures a passenger in that car. To the extent that the passenger's claim exceeds the liability coverage, he may recover both the liability and the UM coverage.

Yet another potential source of coverage is suggested in *Russell v. American States Ins. Co.*[115] Some policies provide that the definition of "insured motor vehicle" under the UM coverage includes a vehicle driven by the named insured. Under such a provision, a passenger in a car not owned by the driver will be entitled to UM coverage under the driver's policy. This is so because the policy will also provide that persons occupying an insured vehicle are insured under the policy.

State Farm Automobile Insurance Co. v. Greer[116] invalidates a policy definition of uninsured motor vehicle which excludes government owned vehicles. Such provision is contrary to the statute's definition and is void.

---

[109] *Thrasher v. Act-Fast Labor Pool, Inc.*, 1991 OK 12, 806 P.2d 640.
[110] *Uptegraft v. Home*, 1983 OK 41, 662 P.2d 681.
[111] *Heavner v. Farmers*, 1983 OK 51, 663 P.2d 730.
[112] *State Farm v. Wendt*, 1985 OK 75, 708 P.2d 581.
[113] *Russell v. American States*, 813 F.2d 306 (10th Cir. 1987).
[114] *State Farm v. Wendt*, 1985 OK 75, 708 P.2d 581.
[115] *Russell v. American States Ins. Co.*, 813 F.2d 306 (10th Cir. 1987).
[116] *State Farm v. Greer*, 1989 OK 110, 777 P.2d 941.

O'Brien v. Dorrough and Equity Fire and Cas. Co.[117] hold that a named driver exclusion is valid to exclude UM coverage. Obviously, however, it is necessary to examine carefully the exact terms of the purported exclusion. More recently, *Alternative Med. of Tulsa v. Cates*[118] holds to the contrary, at least to the extent the named driver exclusion deprives a passenger of coverage (UM or liability) in an amount equal to the minimum compulsory liability insurance law limits.

Ball v. Wilshire Ins. Co.[119] holds an exclusion for use of a loaned vehicle will not be valid to avoid UM coverage.

Something which resembles an exclusion from coverage is a "step-down" provision. Where a step-down in liability coverage causes liability coverage to be reduced to financial responsibility minimum limits when the vehicle is driven by a permissive user insured, the UM also steps down, due to the statutory provision that the insurance company is not required to offer UM coverage in excess of the liability limit. The Supreme Court reads this as a restriction on the voluntary writing of higher UM coverage.[120]

More recent cases have cast into doubt the long-standing Oklahoma rule that exclusions which dilute the statutorily required coverage are invalid. That line of cases starts with *Shepard v. Farmers*[121] and continues with *Graham v. Travelers Ins. Co.*,[122] and *National American Ins. Co. v. Vallion*.[123] Even more recently, *Conner v. American Commerce Insurance*[124] holds a policy provision excluding from uninsured motorist (UM) coverage a named insured who is injured while occupying a vehicle he owns but which is not covered by UM coverage is a valid exclusion. This holding is directly contrary not only to the long line of earlier cases not permitting dilution of UM coverage by exclusions not permitted by the statute but also by the terms of the statute itself. The 2004 legislature added Sub-Section E to 36 O.S. § 3636 specifically providing when occupancy of a vehicle owned by the insured but not insured will be

---

[117] *O'Brien v. Dorrough and Equity Fire and Cas. Co.*, 1996 OK CIV APP 25, 928 P.2d 322.
[118] 2006 OK CIV APP 65, 136 P.3d 716.
[119] *Ball v. Wilshire Ins. Co.*, 2009 OK 38, 221 P.3d 717.
[120] *Gray v. Midland Risk Insurance Co.*, 1996 OK 111, 925 P.2d 560.
[121] *Shepard v. Farmers*, 1983 OK 103, 678 P.2d 250.
[122] *Graham v. Travelers Ins. Co.*, 2002 OK 95, 61 P.3d 225.
[123] *National American Ins. Co. v. Vallion*, 2008 OK CIV APP 41, 183 P.3d 175 (discussed in §C).
[124] *Conner v. American Commerce Insurance*,2009 OK CIV APP 61, 216 P.3d 850.

permissible: "if such motor vehicle is **not insured by a motor vehicle insurance policy**." *Conner v. American Commerce* appears to extend that statutory exclusion by authorizing an exclusion when the vehicle the insured owns has UM coverage, a ruling with no statutory support.

The Supreme Court denied *certiorari* in *Conner*. The Court ameliorates only slightly its ruling in *Conner* with the ruling in *Morris v. America First Ins. Co.*[125] *Morris* holds a policy provision excluding UM coverage where the insured is occupying a vehicle which he owns but which is not covered by UM coverage does not apply if the insured is covered by UM on a policy on another vehicle which he owns. The result of this is that, if you already have some UM coverage, an exclusion like that in *Conner* does not hurt you so much because you already have some UM coverage. However, if you have no other UM coverage you get no UM coverage at all.

G. What is an Uninsured Motor Vehicle?

An uninsured motor vehicle is a motor vehicle designed for use principally on public roads and streets[126] that is not covered by a liability policy, or one that is covered by a liability policy but the coverage is insufficient to cover the injured party's damages.[127] An uninsured motor vehicle includes an insured motor vehicle where the liability insurer is unable to make payment because of insolvency[128] where the insolvency occurs within one year of the accident.[129]

As noted above, a self-insured entity is not considered uninsured just because there is no separate insurance policy covering its vehicles. *Newberry v. Allstate Ins. Co.*[130] holds a city-owned vehicle is not an uninsured motor vehicle within the meaning of § 3636 where the city is self-insured for Governmental Tort Claim Act liability.

Further, excess liability coverage is not considered when determining whether a vehicle is uninsured for purposes of §3636.[131]

---

[125] *Morris v. America First Ins. Co.*, 2010 OK 35, 240 P.3d 661.
[126] 36 O.S. 1991 § 3635.
[127] 36 O.S. Supp. 1994 § 3636C; also, *Lamfu v. GuideOne Ins. Co.*, 2006 OK CIV APP 19, 131 P.3d 712 (where Plaintiff stipulates to damages in amount less than tortfeasor's liability limits– vehicle not "uninsured").
[128] *Id*.
[129] 36 O.S. Supp. 1994 § 3636D.
[130] *Newberry v. Allstate Ins. Co.*, 1998 OK CIV APP 139, 963 P.2d 632.
[131] *GEICO General Insurance Company v. NPIC*, 2005 OK 40, 115 P.3d 856.

H. What Triggers UM Coverage?

1. Loss Resulting from Ownership, Maintenance or Use

Uninsured motorist coverage is available to those legally entitled to recover when bodily injury or death results from an owner or operator's ownership, maintenance, or use of an uninsured motor vehicle. *Ply v. National Union Fire Insurance Company of Pittsburgh, PA*,[132] holds that a supervisor's instructions regarding use of a truck constitutes use for purposes of UM coverage. Furthermore, an employer's non-contemporaneous negligent maintenance of a truck entitled an injured employee to UM coverage where the negligent maintenance caused the injury.

Ply was working alone with a bucket truck that had a faulty hydraulic system. While up in the bucket, Ply's tool belt came in contact with an electrical line, injuring him. The employer owned the truck and was responsible for seeing that the truck was properly maintained. The Court held it was not necessary that there be another person physically present operating the truck at the time of the injury. The UM statute requires an "owner or operator's . . . maintenance" to trigger coverage. *Ply* holds that the omission or commission of maintenance need not be contemporaneous with the injury.[133]

Negligent operation, maintenance, or use of an uninsured motor vehicle triggers UM except where the operator is a child and incapable of legal negligence.[134] In *Martin v. Hartford Underwriters Ins. Co.*,[135] Mrs. Martin was getting into her car when a three-year-old child in the car moved the gear shift lever out of park, causing the car to roll backward. This knocked Mrs. Martin down and the car rolled over her. The Court held the three-year-old incapable of legal negligence, therefore, Mrs. Martin could not establish fault on the part of an uninsured motorist.

2. Are Injuries from Intentional Acts and Punitive Damages Covered?

Injuries caused by intentional acts are covered under UM, provided the injuries meet certain criteria. Punitive damages assessed against an insured motorist are not covered under an uninsured motorist policy, even if the policy specifically provides for such coverage. *Aetna v. Craig*[136] says such coverage would be contrary to public policy. The court reasons that the

---

[132] *Ply v. National Union Fire Insurance Company of Pittsburgh, PA*, 2003 OK 97, 81 P.3d 643.
[133] *Ply v. National Union Fire Insurance Company of Pittsburgh, PA*, 2003 OK 97, 81 P.3d 643.
[134] *Martin v. Hartford Underwriters Insurance Company*, 1996 OK 55, 918 P.2d 49.
[135] *Id.*
[136] *Aetna v. Craig*, 1989 OK 43, 771 P.2d 212.

purpose of punitive damages (to punish and deter future such conduct) would not be furthered by permitting punitive damages to be paid under UM coverage. Further, the effect of such coverage would be to cause all insureds to pay a part of the punitive damages through increased premiums.

Willard v. Kelley[137] holds that the question whether the injury is intentional or accidental must be determined from the viewpoint of the insured, not the tort-feasor. Intentionally inflicted injuries may be covered, if they are causally connected to the use of the car for transportation purposes. *Safeco Ins. Co. v. Sanders*[138] holds that, in addition to the injury arising out of the use of the vehicle, the use of the vehicle out of which the injury arises must be a transportation use and that the intentional act inflicting the injury must not constitute an independent, supervening cause.

In *Willard,* the insured police officer, chased an armed robber in the insured's police car. The suspect stopped, after a collision, and the insured started to get out of the police car to arrest him. The suspect, sitting in the "getaway" car, shot the insured.

The Supreme Court held that whether the injury is "accidental," is determined from the viewpoint of the insured, not the assailant. However, a fact question existed whether the circumstances were so certain as to result in injury to the officer that it was intentional, from the officer's point of view. The injury resulted from a "transportation use" of the robber's car. He was using the car for a transportation purpose (i.e., to get away).

Safeco v. Sanders reaches a different result through a similar analysis. There, the insureds were kidnapped and brutally murdered in their car. The kidnappers put them in the trunk of the insured car, cut the car's gas lines, and burned them to death in the car.

While the murders arose out of the use of the vehicle and had a causal connection to the use of the vehicle, the deaths were not covered, since the kidnappers were not using the car for a transportation purpose.

Williams v. Preferred Risk[139] follows *Safeco* to hold that the murder of the driver by a passenger was not covered. Similarly, *Walker v. Farmers*[140] finds no UM coverage where the

---

[137] *Willard v. Kelley,* 1990 OK 129, 803 P.2d 1124.
[138] *Safeco Ins. Co. v. Sanders*, 1990 OK 129, 803 P.2d 688. See also *Whitmire v. Mid-Continent Cas. Co.*, 1996 OK CIV APP 115, 928 P.2d 959 (similar facts - same result).
[139] *Williams v. Preferred Risk Group Ins. Co.,* 1993 OK CIV APP 193, 867 P.2d 485.
[140] *Walker v. Farmers Ins. Co., Inc.*, 83 F.3d 349 (10th Cir. 1996).

assailant shot the insured outside the car. *State Farm Mutual Auto. Ins. Co. v. Narvaez*[141] holds that beating a person in a parking lot with intent to take the victim's car does not trigger UM coverage because the car was not being used for a transportation purpose at the time of the injury.

Two cases hold, on the same rationale, that the Oklahoma Murrah Building bombing deaths and injuries were not covered. They did not result from a transportation use of the truck and the detonation of the bomb was a supervening cause.[142]

Byus v. Mid-Century Ins. Co.[143] finds a jury question exists whether there is coverage for a drive-by shooting. While the facts were not disputed, differing inferences from the agreed facts prevented summary judgment. Among other things, the case holds that a passenger in the car who actually fired the shots may be the "operator," if he exercised sufficient control over the driver.

Hulsey v. Mid-America Preferred[144] holds hit-and-run coverage may apply to a random shooting from a motor vehicle.

IV. SUBROGATION ISSUES

Several cases deal with pitfalls which must be avoided in attempting to make partial settlements of claims involving UM. Section 3636F entitled the insurance company to subrogation or the insured's right of recovery against the tort-feasor.

Porter v. MFA[145] holds the insured who settles with the tort-feasor and releases him destroys his UM claim. This is so because the insurance company has been deprived of its subrogation right against the tort-feasor.

A covenant not to sue had the same result in *Frey v. Independence Fire & Casualty Co.*[146] The insured entered into a "covenant not to sue," reserving his rights against the UM insurance company, but not the tort-feasor. The result was the same because the insurance company's subrogation right against the tort-feasor was destroyed.

---

[141] *State Farm Mutual Auto. Ins. Co. v. Narvaez*, 975 F.Supp. 1435 (W.D.Okla. 1997).
[142] *Mayer v. State Farm Auto. Ins. Co.*, 1997 OK 67, 944 P.2d 288; *Nichols v. Nationwide Mutual Ins. Co.*, 948 F.Supp. 988 (W.D.Okla. 1996).
[143] *Byus v. Mid-Century Ins. Co.*, 1996 OK 25, 912 P.2d 845.
[144] *Hulsey v. Mid-America Preferred*, 1989 OK 107, 777 P.2d 932.
[145] *Porter v. MFA*, 1982 OK 23, ¶14, 643 P.2d 302.
[146] *Frey v. Independence Fire & Cas. Co.*, 1985 OK 25, 698 P.2d 17.

Neither *Porter* nor *Frey* discuss whether the UM insurance company asserting the insured's release of the tort-feasor as a defense must prove prejudice. The argument should be made that if the lost subrogation right was uncollectible, there was no prejudice and the release is no defense. This argument was made in the federal court case of *Phillips v. New Hampshire Ins. Co.*[147] The Tenth Circuit Court of Appeals predicted that the Oklahoma Supreme Court would hold that a UM carrier cannot deny coverage and then after the insured settles with the tort-feasor, assert that coverage is precluded because the insured settled with the tort-feasor without giving the UM carrier notice, absent a showing of actual prejudice. The UM carrier must show that it was actually prejudiced by the insured's actions and that the insured knew of and intended to waive its right to UM coverage.

Porter v. MFA suggests the use of a partial release (now called a "Porter Release") to avoid this problem. The insured releases all of his rights against the tort-feasor, but reserves the subrogated rights of the UM insurance company against the tort-feasor. Such releases have never come into use in Oklahoma.

Under §3636[F], the insured may force the UM insurance company to either waive subrogation or substitute its payment for the tort-feasor's tendered liability limits. The effect of a substitution is that the insured remains entitled to the total of the tort-feasor's liability limits and the insured's UM limits, if his damages are that great.[148] An argument can be made that there is no subrogation right in a case against an *underinsured* (as opposed to an *uninsured*) motorist. The 1979 Amendment to §3636E provided that "any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage." The argument can be made that any attempt by the UM carrier to take credit for amounts paid by or on behalf of the insured tort-feasor contravenes that provision.

The UM carrier cannot subrogate against the liability coverage and deny the insured full recovery. The common law "make whole" rule would prohibit that.[149] *Equity Fire and Cas. Co. v. Youngblood*[150] holds the "make whole" rule precludes subrogation of ERISA benefits against UM where the effect would be to cause the insured to be less than fully compensated or made

---

[147] *Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215 (10th Cir. 2001).
[148] *Barnes v. Okla. Farm Bur. Mut. Ins. Co.*, 1993 OK CIV APP 168, 869 P.2d 852 [*Barnes* I].
[149] *Equity Fire and Cas. Co. v. Youngblood*, 1996 OK 123, 927 P.2d 572.
[150] *Youngblood*, 1996 OK 123, 927 P.2d 572.

whole. That case disapproves *Fields v. Farmers Ins. Co., Inc.*[151] Some question exists whether this equitable rule is applicable to contractual subrogation, such as that proceeding from a specific subrogation provision in an insurance policy.

Other cases afford yet another opportunity to escape the clutches of *Porter v. MFA*. *Robertson v. USF&G*[152] holds that a UM insurance company waives subrogation and cannot object to a settlement where the insurance company fails to properly offer and take a rejection of UM coverage. This led the insured to think he had no UM coverage, so he settled with the tort-feasor.

Sexton v. Continental Cas. Co.[153] holds the insurance company may waive or be estopped to assert subrogation and its right to complain of the insured's settlement by denying coverage. Similarly, a refusal to pay without a legitimate reason will waive subrogation and enable the insured to settle.[154] *Phillips v. New Hampshire Ins. Co.*[155]holds an insurance company estopped to raise subrogation where it failed to tell the occupant insured it had UM coverage.

Several cases deal with what sorts of claims create subrogation or credit for or against UM coverage. A number of these deal with the relationship of UM coverage and Workers' Compensation benefits. *Thrasher v. Act-Fast Labor Pool, Inc.*[156] holds there is no subrogation by the Workers' Compensation carrier against the UM carrier. Therefore, filing suit against the UM carrier, without the notice in the Workers' Compensation Court which the Workers' Compensation Act requires for a third-party suit, did not destroy a Workers' Compensation claim. As noted above, *Bill Hodges Truck Co., Inc. v. Humphrey*[157] holds the employer and Workers' Comp carrier was not entitled to offset the employee's own UM coverage against the Workers' Compensation benefits it owed. *Wise v. Wollery*[158] holds there is no subrogation of Workers' Compensation against UM, even when the UM is from the employer's policy. This is, of course now changed by amendment to the Workers' Compensation statutes.

---

[151] *Fields v. Farmers*, 847 F.Supp. 160 (W.D.Okla. 1993), aff'd, 18 F.3d 831 (10th Cir. 1994).
[152] *Robertson v. United States Fid. & Guar. Co.*, 1992 OK 113, 836 P.2d 1294.
[153] *Sexton v. Continental Cas. Co.*, 1991 OK 84, ¶1-2, 816 P.2d 1135.
[154] *Buzzard v. Farmers Ins. Co., Inc.*, 1991 OK 127, 824 P.2d 1105.
[155] *Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215 (10th Cir. 2001).
[156] *Thrasher v. Act-Fast Labor Pool, Inc.*, 1991 OK 12, 806 P.2d 640.
[157] *Bill Hodges Truck Co. v. Humphrey*, 1984 OK CIV APP 55, 704 P.2d 94.
[158] *Wise v. Wollery*, 1995 OK CIV APP 69, 904 P.2d 151.

Provident Life & Accid. Ins. Co. v. Ridenour[159] holds a health insurer had no right of subrogation against a UM claim. A health insurance policy provision that the health insurance company was entitled to recovery from a negligent third party did not authorize subrogation against the UM benefits. The UM did not, for this purpose, stand in the shoes of the tort-feasor.

However, *Reeds v. the Honorable Thomas S. Walker*[160], holds UM proceeds are subject to subrogation by an ERISA plan which provided for subrogation against the insured's own coverage.

Phillips v. State Farm Mut. Auto. Ins. Co.[161] holds a subrogated UM carrier must bear its proportionate share of collection costs (attorney fees and expenses) when its insured recovers subrogation which benefits the UM carrier.

Farmers Ins. Co., Inc. v. Stark[162] holds the subrogated insurance company has only the same time (two years from the date of the accident) in which to sue the tort-feasor for subrogation. The court rejected arguments that the time should be the longer statute of limitation for an action on a liability created by statute or that the statute of limitation on the subrogation claim did not begin to run until the UM claim was paid.

Hartford Insurance Company of the Midwest v. Dyer,[163] holds a UM carrier cannot seek subrogation from the tort-feasor for amounts the insurance company paid on a bad faith claim.

The insurance company must protect its subrogation rights, however. It cannot fail to participate in its insured's mediation and then deny coverage when the insured settles with and releases the tort-feasor.[164] In *Strong v. Hanover Ins. Co.*,[165] the insured sent Hanover a copy of the Petition and summons he served on the tort-feasor and notified Hanover of the scheduled mediation with the tort-feasor. Hanover failed to attend the mediation and then denied coverage based on Strong's failure to get Hanover's permission to settle. The Court of Appeals held Hanover had sufficient notice to protect its subrogation rights and failed to do so; therefore it was estopped to deny coverage.

---

[159] *Provident Life & Accid. Ins. Co. v. Ridenour*, 1992 OK CIV APP 93, 838 P.2d 530.
[160] *Provident Life & Accid. Ins. Co. v. Ridenour*, 1992 OK CIV APP 93, 838 P.2d 530.
[161] *Phillips v. State Farm*, 73 F.3d 1535 (10th Cir. 1996).
[162] *Farmers v. Stark*, 1996 OK CIV APP 53, 924 P.2d 987.
[163] *Hartford Insurance Company of the Midwest v. Dyer*, 2002 OK CIV APP 126, 61 P.3d 912.
[164] *Strong v. Hanover Insurance Company*, 2005 OK CIV APP 9, 106 P.3d 604.
[165] *Id.*

Raymond v. Taylor[166]holds there is no UM subrogation against an underinsured motorist's assets, including the proceeds of an underinsured motorist's excess or umbrella liability policy. The effect of the holding in this case was to free up some money for the badly injured insured. The Court reaches that result by treating the proceeds of an umbrella liability policy as part of the assets of the underinsured motorist.

I. Procedural Questions

1. How Do You Go About Collecting UM

A number of cases decide procedural issues relating to UM. The lead case in this regard is *Keel v. MFA*.[167] That case holds the insured has the option to: (1) sue the UM insurance company, (2) join in the same suit the tort-feasor and the insurance company, or (3) sue the tort-feasor and put the UM carrier on notice. The UM carrier may then choose to intervene but will, in any event, be bound by the judgment against the tort-feasor. A UM carrier has no right to intervene just to protect its subrogation, but may seek permissive intervention to assert its defenses in the insured's suit against the tort-feasor.[168] A theoretical fourth option is to sue the tort-feasor, but not notify the UM insurance company. No thinking lawyer does that intentionally, because the insurance company will not be bound by the judgment. A fifth option is arbitration (discussed above). However, many companies have removed the arbitration provision from their policies.

The 10th Circuit Court of Appeals reinforced the ruling that the insured need not first sue the tort-feasor or join the tort-feasor in the suit against the UM insurer. *Everaard v. Hartford*[169] holds the insurance company's insistence on that position constituted bad faith. The Oklahoma Court of Appeals reinforced this position as well in *Roberts v. Mid-Continent Cas. Co.*[170] That case holds the insured need not sue the tort-feasor, but may just sue the UM insurer. The UM insurer is not entitled to credit for the tort-feasor's liability coverage. Rather, it must subrogate to recover those limits, after it pays.

---

[166] *Raymond v. Taylor*, 2017 OK 80, 412 P.3d 1141.
[167] *Keel v. MFA*, 1976 OK 86, 553 P.2d 153.
[168] *Brown v. Patel, et al.*, 2007 OK 16, 157 P.3d 117.
[169] *Everaard v. Hartford*, 842 F.2d 1186 (10th Cir. 1988).
[170] *Roberts v. Mid-Continent Cas. Co.*, 1989 OK CIV APP 92, 790 P.2d 1121.

Burch v. Allstate[171] holds a UM carrier owes all of a claim where the insured's damages exceed the tort-feasor's liability coverage, up to the UM limit and must use subrogation to recover back the part of the claim which represents the tort-feasor's liability coverage. This case reverses *Buzzard v. Farmers*[172] which, in *dictum*, had said the UM carrier owed only the part of the insured's damages which exceeded the tort-feasor's liability limits. The Court of Civil Appeals had adopted the *Buzzard dictum* in *Smith v. American Fidelity Insurance Companies*.[173] There, the plaintiff had not yet taken the tort-feasor's $10,000 liability limit, but had instead looked to her UM carrier for her $12,000 in damages. The Court of Civil Appeals held that the UM carrier was liable only for the amount the UM coverage exceeds tort-feasor's coverage as long as it is still available. The Court reasoned that even though *Buzzard* involved a different issue, it post-dated *Roberts v. Mid-Continent*,[174] and considered *Roberts* only persuasive. *Smith* is overruled by the effect of *Burch* as well.

Burch v. Allstate[175] requires that the UM carrier evaluate the claim and, if the evaluation exceeds the tort-feasor's liability limit, offer to pay the whole claim up to its UM limit. There was a question whether *Burch* required the UM carrier to pay the "uncontested amount" at which it evaluated the claim without a release or simply offer the insured the amount of its evaluation, in return for a release. *GEICO v. Quine*[176] holds the UM carrier need not pay the amount of its evaluation of a UM claim without a release so long as the insured has been paid the insured's special damages. *Garnett v. GEICO*[177] had previously addressed the question but did not answer it by holding that, under the circumstances of that case, the carrier's evaluation was not an "uncontested amount." *Quine* resolves the issue.

Falcone v. Liberty Mutual Insurance Co.,[178] puts a bit of a new twist on "uncontested amount." That case holds an insurance company could be held in bad faith for failing to pay its $100,000 UM limit where there were $67,098.23 in medical bills but the insurance company questioned the reasonableness of the bills. The Supreme Court held the policy language required

---

[171] *Burch v. Allstate*, 1998 OK 129, 977 P.2d 1057.
[172] *Buzzard v. Farmers Ins. Co., Inc.*, 1991 OK 127, 824 P.2d 1105.
[173] *Smith v. American Fidelity Insurance Companies*, 1998 OK CIV APP 70, 963 P.2d 16.
[174] 1989 OK CIV APP 92, 790 P.2d 1121.
[175] *Burch v. Allstate*, 1998 OK 129, 977 P.2d 1057.
[176] 2011 OK 88,264 P.3d 1245.
[177] 2008 OK 43, 186 P.3d 935.
[178] 2017 OK 11, 391 P.3d 105

it to pay based on bills incurred and did not permit the UM carrier to question the reasonableness of the bills.

Gates v. Eller[179] answered another question left open in *Burch*. Gates let the 2-year tort statute of limitation run against the tort-feasor and then tried to collect his UM. A unanimous Supreme Court held the UM coverage did not apply, even though the tort-feasor's liability limit was no longer available, because the insured's damages did not exceed the tort-feasor's liability limit. The insured tort-feasor never met the required definition of "underinsured motorist" for purposes of triggering UM coverage.

In *Mustain v. USF&G*,[180] the Tenth Circuit Court of Appeals certified to the Oklahoma Supreme Court whether the holding in *Hibbs v. Farmers*[181] (that an insured who settles with a primary UM carrier for less than the limits is precluded from recovering from an excess UM carrier) remained valid in light of the *Buzzard dictum,* since reversed by *Burch*. The Supreme Court "recast" the certified question to ask if UM coverage is primary. It then held it is primary and reversed *Hibbs.*

Porter v. State Farm Mut. Auto. Ins. Co.[182] holds an insured who settles with the tort-feasor for less than the tort-feasor's liability limit cannot recover UM. The release of the tort-feasor causes the insured to be no longer "legally entitled to recover" against the tort-feasor. Further, the settlement with the tort-feasor for less than liability limits determines the value of the claim to have been less than the liability limit, so there is no "uninsured motorist."

Porter v. State Farm has come under heavy fire and the ruling in that case may be about to change. *Nsien v. Country Mut. Ins. Co.*[183] casts doubt on the holding. *Madrid v. State Farm Mut. Automobile Ins. Co.*[184] has another division of the Court of Civil Appeals holding directly to the contrary of *Porter.* As this is written, *Madrid* is pending on Petition for *Certiorari* and looks likely to be granted to resolve the conflict.

---

[179] 2001 OK 38, 22 P.3d 1215.
[180] *Mustain v. USF&G*, 1996 OK 98, 925 P.2d 533.
[181] *Hibbs*, 725 P.2d 1232 (Okla. 1985).
[182] *Porter v. State Farm Mut. Auto. Ins. Co.*, 2010 OK CIV APP 8, 231 P. 3d 691.
[183] 2019 WL 573424 (N.D. Okla. Feb. 12, 2019).
[184] 2019 OK CIV APP __, __ P.3d__

The Court of Appeals in *Assalone v. Hartford.*[185] held Assalone could collect the full extent of her damages from her UM carrier without first suing the tort-feasor. The court cites and relies on *Roberts v. Mid-Continent Cas. Co.*[186] *Roberts* held an insured who has plenty of UM coverage can avoid suing the tort-feasor and sue directly the UM carrier for all his damages. The UM carrier, says *Roberts (*as the Supreme Court later held in *Burch*), must pay all the insured's damages, up to its limits, and subrogate back against the tort-feasor and his liability coverage.

Assalone's UM carrier's subrogation claim was finally concluded in *Hartford Insurance Company of the Midwest v. Dyer.*[187] There, the court held a UM carrier cannot assert subrogation for amounts paid by a Workers' Comp carrier, and cannot seek subrogation from the tort-feasor for amounts the UM carrier paid on a bad faith claim.

Kavanaugh v. Maryland Ins. Co.[188] holds an insured can recover from the UM carrier where the statute of limitation has run on the tort claim and the damages exceed the tort-feasor's liability limit. *Kavanaugh* proceeds on the theory the limits of the tort-feasor then are not available, due to the statute having run. This must be contrasted with *Boyer v. Oklahoma Farm Bureau Mut. Ins. Co.*[189] which holds the running of the statute of limitations on the claim against the tort-feasor did not trigger a UM claim, where the damages did not exceed the tort-feasor's liability limit.

Carlos v. State Farm Mutual Automobile Ins. Co.[190] and *Newberry v. Allstate*[191] hold there is no UM recovery where the damages are within the Governmental Tort Claim Act limits and money has been appropriated to pay the claim.

Vincent v. Tri-State[192] holds an insured who settled with an alleged, adequately-insured, tort-feasor could not recover from a UM carrier on the theory there existed a fact question whether the alleged tort-feasor or a hit-and-run motorist caused the wreck. The facts were clear the insured tort-feasor caused the wreck.

---

[185] *Assalone*, 1994 OK CIV APP 64, 908 P.2d 812.
[186] *Roberts*, 1989 OK CIV APP 92, 790 P.2d 1121.
[187] *Hartford Insurance Company of the Midwest v. Dyer*, 2002 OK CIV APP 126, 61 P.3d 912.
[188] *Kavanaugh v. Maryland Ins. Co.*, 1997 OK CIV APP 41, 943 P.2d 629.
[189] *Boyer v. Oklahoma Farm Bureau Mut. Ins. Co.*, 1995 OK CIV APP 102, 902 P.2d 83.
[190] *Carlos v. State Farm Mutual Automobile Ins. Co.*, 1996 OK CIV APP 158, 935 P.2d 1182.
[191] *Newberry v. Allstate Ins. Co.*, 1998 OK CIV APP 139, 963 P.2d 632.
[192] *Vincent v. Tri-State Ins. Co.*, 1994 OK CIV APP 24, 874 P.2d 65.

Brown v. USAA[193] resolves a number of procedural problems. It holds hit-and-run coverage applies where the owner, but not the driver, of a vehicle which leaves the scene is identified. This is because the owner may or may not be liable for the driver's action so liability coverage may not be available. It further holds the insured has no duty to ascertain the identity of the hit-and-run driver. Once the insured proves a hit-and-run situation, the insurance company has the duty of identifying the driver, if it can.

If the driver is identified, the insured has the burden of proving the driver was uninsured. The insured may, however, do this by negative proof, such as showing attempts to ascertain coverage on the tort-feasor have been unsuccessful.

Calhoun v. Calhoun[194] presents and resolves an interesting federal court procedural problem. A claim against a non-resident may be removed from state to federal court (assuming the claim is for more than $75,000), if the claim against the non-resident is "separate and independent" from the claim asserted against a state resident.[195] *Calhoun* holds a UM claim against a non-resident insurance company is not "separate and independent" from the claim against the resident so as to be removable to federal court.

Irvin v. Allstate[196] holds that suit against one's own insurance company to recover UM coverage is not a "direct action" within the meaning of 28 U.S.C. §1332©. Section 1332© provides that in a direct action against the insurer, where the insured is not made a party-defendant, the insurance company is deemed to be a citizen of the state in which the insured is a citizen. Mr. Irvin, injured due to his wife's negligence, sued Allstate in state court to recover UM benefits. Allstate removed the case to federal court. The federal court for the Western District of Oklahoma denied the husband's request for remand to state court, finding that §1332(c) did not render Allstate, an Illinois corporation, an Oklahoma corporation.

Welch v. Armer[197] holds that, as to an accident occurring before the 1986 Amendment to 36 O.S. §2012, an injured claimant must exhaust his own UM coverage, before presenting a claim to the Oklahoma Insurance Guaranty Association (Guaranty Association), representing an insurance company. The 1986 Amendment to §2012 provided that the "exhaustion of claims"

---

[193] *Brown v. USAA*, 1984 OK 55, 684 P.2d 1195.
[194] *Calhoun v. Calhoun*, 482 F.Supp. 347 (E.D.Okla. 1978).
[195] 28 U.S.C. §1441(c).
[196] *Irvin v. Allstate*, 436 F.Supp. 575 (W.D.Okla. 1977).
[197] *Welch v. Armer*, 1989 OK 117, 776 P.2d 847.

subsection of the statute (requiring claims against other insurance be exhausted before proceeding against the Guaranty Fund) was not applicable to UM claims. The court declined to apply the statute retrospectively.

Further, *Welch* holds the insolvent liability insurance company's insured is protected against a UM subrogation claim, by the provisions of 36 O.S. 1981 §3636E, but only to the extent of his liability coverage with the insolvent insurer. This leaves the insured in no better and no worse position than he would have been had his insurance company not become insolvent.

Niemeyer v. United States Fid. and Guar. Co.[198] holds the UM carrier and the liability carrier have no legal relationship, so that furnishing claim information from the liability carrier to the UM carrier created no privilege. The question arises in the context of a UM insured's suit against the liability carrier for tortious interference with contract by furnishing false claim information.

2. Joinder

Older UM cases (reflected in the UM Case Chronology) dealt with whether joining the tort-feasor and the insurance company in the same suit unduly prejudiced either. On this basis, *Holt v. Bell*[199] prohibited such joinder. *Keel v. MFA*[200] reversed that decision.

3. Standing to Bring UM Claim

Ouellette v. State Farm Mut. Auto. Ins. Co.[201] holds an insured who is not the decedent's next-of-kin may not sue the UM carrier for wrongful death. The opinion proceeds on the assumption the wrongful death statute[202] requiring such a suit to be brought by the personal representative or next of kin applies to a suit for UM benefits. While the opinion seems clearly to be a wrong interpretation of the wrongful death statute, the Supreme Court overruled a Petition for Rehearing pointing that out.

---

[198] *Niemeyer v. U.S. Fid. & Guar. Co.*, 1990 OK 32, 789 P.2d 1318.
[199] *Holt v. Bell*, 1964 OK 84, 392 P.2d 361.
[200] *Keel v. MFA*, 1976 OK 86, 553 P.2d 153.
[201] *Ouellette*, 1994 OK 79, 918 P.2d 1363.
[202] 12 O.S. 1991 §1054.

4. When to Sue

The time frame within which to sue on a UM claim, and when the time begins to run differs from that for a tort claim. *Uptegraft v. Home*[203] holds the 5-year contract statute of limitation, not the 2-year tort statute of limitation, applies to a UM claim. An action against the UM carrier is considered an action on a written contract and is controlled by 12 O.S. § 95(1), which mandates a 5-year statute of limitation. However, *Uptegraft* does not say what will happen if the insurer asks the insured within the 2 years to sue the tort-feasor to protect its subrogation..

Wille v. GEICO Casualty Co.[204] holds the 5-year statute of limitation on a UM claim begins to run when the breach of contract occurs, not the date of the collision giving rise to the claim.

This is not true of a UM subrogation claim. *Employers Mutual Casualty Co. v. Mosby et al.* holds the statute of limitation on a UM subrogation claim is the usual two-year tort limitation and it runs from the date of the accident, not the date of the UM payment.[205]

5. Who Pays First?

Pentz v. Davis, et al.,[206] holds the "other insurance clause" in a UM policy does not establish the priority of payment among multiple UM carriers as to an insured's claim. Thus, where there are multiple UM policies applicable, the UM carriers cannot make the insured wait until they resolve their argument as to who is primary and who is excess. Rather, the insurance companies must pay the claim and resolve among themselves by subrogation claims who is primary and who is excess.

Mustain v. United States Fidelity and Guaranty Company, et al.[207] addresses the "who pays first" question. Under the standard UM policy, the coverage on the vehicle being occupied is primary; the insured's own UM policy is excess. *Mustain* holds that, as between the insured and its UM carrier, UM insurance is primary, and that a UM insurer's responsibility to its insured cannot be conditioned on the payment of other coverage.

---

[203] *Uptegraft v. Home Ins. Co.,* 1983 OK 41, 662 P.2d 681.
[204] *Wille v. GEICO Casualty Co.,*2000 OK 10, ¶2, 2 P.3d 888.
[205] *Employers Mutual Casualty Co. v. Mosby et al.*, 1997 OK 93, 943 P.2d 593.
[206] *Pentz*, 1996 OK 89, 927 P.2d 538.
[207] 1996 OK 98, 925 P.2d 533.

Title 36 O.S. §3636 provides that UM insurance is first-party coverage that follows the person. The statute imposes a responsibility upon the UM carrier to deal fairly and in good faith with its insured which prohibits the insurance company from withholding payment from its insured on the sole basis that some other insurance has not been exhausted. Section 3636 is silent regarding priority of payments among multiple UM carriers, but does create subrogation rights. These subrogation rights are to be sorted out among the multiple insurers in ancillary, post-payment proceedings.

Mustain overrules *Hibbs v. Farmers*[208] in this regard. In *Hibbs*, the insured settled with the primary UM carrier for less than its coverage and then tried to sue on his own, excess, UM coverage. The court held the settlement with the primary UM carrier for less than the limit voided the excess UM coverage.

J. Miscellaneous Questions

1. Attorney Fees

Oklahoma follows the American Rule that attorney fees are not recoverable absent a statute or contract allowing them. However, in 1996, that appeared to change in relation to a bad faith allegation on a UM claim. *Brashier v. Farmers*[209] held an insured who recovers in a UM bad-faith claim may recover attorney fees, costs, and prejudgment interest. The *Brashier* court held the exclusion from statutory attorney fees of 36 O.S. 1991 §3636(B) did not alter that rule.

That is no longer the law. *Barnes v. Oklahoma Farm Bureau*[210] overruled *Brashier*, holding an insured is not entitled to an attorney fee as prevailing party on a UM claim.

Barnes will be a much discussed and controversial case. It is a bad faith UM case but will be most cited for reversing *Brashier* and holding attorney fees may not be awarded by the court in a bad faith action arising out of a UM case. It may or may not also hold that attorney fees are not recoverable from the jury in a UM bad faith case, as an item of damage.

---

[208] *Hibbs v. Farmers*, 1985 OK 77, 725 P.2d 1232.
[209] *Brashier v. Farmers*, 1996 OK 86, 925 P.2d 20.
[210] *Barnes v. Oklahoma Farm Bureau Mutual Ins. Co.*, 2000 OK 55,11 P.3d 162 [*Barnes* II]; 2004 OK 25, 94 P.3d 25 [Barnes III].

2. Bifurcation

Tidmore v. Fullman[211] deals with the prejudice problem resulting from mentioning insurance coverage to a jury. It holds that, where the UM carrier agrees to be bound by the judgment and not participate in the trial, it may bifurcate out of the case and permit the case to go to trial only as between the insured and the tort-feasor. This makes you want to avoid joinder of the tort-feasor and the UM insurance company wherever possible.

Buzzard v. McDanel[212] holds that where the insured sued the UM carrier directly on a UM claim coupled with a bad faith claim, the trial court could not bifurcate and try first the issue of whether the uninsured motorist was liable, reserving for later trial the bad faith issue. *Phillips v. Oklahoma Farmers Union*[213] holds it was not error to deny leave to join a bad faith claim with a UM suit and then bifurcate the UM and bad faith claims where the attempt to add the bad faith clam was untimely, under the pretrial order and came after the court had ordered the bifurcation.

3. Collateral Source Rule

Weatherly v. Flourney[214] holds the collateral source rule applies to a UM payment. The effect of this is that the tort-feasor is not entitled to credit for a UM payment, even if the UM carrier has waived subrogation.

4. Derivative Claims

White v. Equity, *Littlefield v. State Farm*, and *Hardin v. Prudential*[215] hold that all survivors of a deceased person in a death action must share a single "per person" limit. The fact that multiple people incur damage from a single death does not cause multiple per person limits to be triggered.

5. Duty of Good Faith and Fair Dealing

Townsend v. State Farm[216] holds an insurance company owes one who is insured as a permissive occupant of a vehicle the same duty to deal fairly and in good faith as the insurance

---

[211] *Tidmore v. Fullman*, 1982 OK 73, 646 P.2d 1278.
[212] *Buzzard v. McDanel*, 1987 OK 28, 736 P.2d 157.
[213] *Phillips v. Oklahoma Farmers Union Mut. Ins. Co.*, 1993 OK CIV APP 199, 867 P.2d 1361.
[214] *Weatherly v. Flourney*, 1996 OK CIV APP 109, 929 P.2d 296.
[215] *White v. Equity Fire and Cas. Co.*, 1991 OK CIV APP 171, 823 P.2d 953; *Littlefield v. State Farm Fire and Cas. Co.*, 1993 OK 102, ¶1, 857 P.2d 65; and *Hardin v. Prudential Prop. and Cas. Co.*, 1992 OK CIV APP 42, 839 P.2d 206.
[216] *Townsend v. State Farm*, 1993 OK 119, 860 P.2d 236.

company owes to a named insured. The Supreme Court rejects the insurance company's contention its duty to deal fairly and in good faith ran only to a named insured.

Newport v. USAA[217] holds the insurance company cannot in good faith offer its own insured less than the insurance company's evaluation of the claim. USAA evaluated Newport's claim at between $750,000 and $900,000. However, it "low-balled" the insured, offering structured settlements worth $500,000, then $600,000 $700,000 and finally, a "once and for all" offer of $750,000. A jury ultimately found the damages caused by the uninsured motorist to be $6 million.

Price v. Mid-Continent Casualty Company[218] holds it is not bad faith to disagree with the insured on policy interpretation.

Martin v. Gray[219] holds the court should apply the tort, rather than the contract, choice of law rule to determine the law to be applied in a UM bad faith case. The Supreme Court says the court should apply the law of the state which has the most significant relationship with the handling of the claim, rather than the law of the state where the policy was issued. The result of this will normally be that the law of the state where the claim is being handled or litigated will apply.

A recurring problem in federal court bad faith cases is how to plead so as to get around a Federal Rule 12(b)(6) motion to dismiss in light of enhanced pleading requirements in federal court. *Massachusetts Bay Ins. Co*.[220] is a case illustrating what at least one federal judge found a sufficient pleading of bad faith for the UM carrier's failure to properly investigate and pay a claim.

Harco Natl. Ins. Co. v. Roe[221] raises, but does not yet resolve, the question whether a UM carrier owes a duty to apportion or allocate a UM policy limit among multiple, competing insured entitled to UM benefits. There, the UM carrier exhausted the limits paying one badly injured claimant. Years later, a minor also injured in the crash made claim and that suit raises the issue whether the carrier should have allocated the policy limit so as to not exclude and injured insured. That case remains pending as this is written.

---

[217] *Newport v. USAA*, 2000 OK 59, 11 P.3d 190.
[218] *Price v. Mid-Continent Casualty Company*, 2002 OK CIV APP 16, 41 P.3d 1019.
[219] 2016 OK 114, 385 P.3d 64.
[220] 2017 WL 3586862 (N.D. Okla. Aug. 18, 2017).
[221] 2016 WL 8674625 (N.D. Okla. Sept. 30, 2016).

McKinney v. Progressive Direct Ins. Co.[222] holds that a trial court can evaluate a UIM claim, decide offer was reasonable and grant UIM carrier summary judgment. This decision is on appeal in the 10th Circuit, as this is written.

6. Liens

Due to the wording of the medical lien statutes, *Kratz v. Kratz*[223] held a hospital lien did not attach to a UM recovery. However, a 2012 amendment to 42 O.S. §. 43 made hospital liens attach to UM. *Broadway Clinic v. Liberty Mutual Ins. Co.*[224] held a physician's lien attaches to UM proceeds (overruling *Fugate v. Mooney*[225]). The result is that, contrary to earlier law, medical liens of all sort now attach to UM coverage as well as liability coverage.

Dallas v. Geico Insurance Co.[226] holds that, due to the peculiar wording of the medical lien statutes, an attorney's lien against a UM recovery is not superior to a medical lien but rather stands on equal ground with the medical lien[227], so they share equally.

7. Prejudgment Interest

Carney v. State Farm Mut. Auto. Ins. Co.[228] holds the UM insurer must pay prejudgment interest on the amount of the insured's damages, but only up to the UM policy limits. It follows and upholds *Mellenberger v. Sweeney*,[229] and *Torres v. Kansas City Fire and Marine Ins. Co.*[230] and overrules *Phillips v. State Farm Mut. Auto. Ins. Co.*[231] It leaves unclear the effect on *Nunn v. Stewart*[232] which held a UM insurance company may be required to pay interest, in excess of its policy limit, but only from the date liability is established. *Carney* denies recovery of interest in excess of policy limits but does not specifically overrule *Nunn v. Stewart*. Pre-judgment interest will be calculated at the rate in effect for each year the suit was pending.[233] *Gregg v. Le Mars*

---

[222] 2019 WL 2092578 (W.D. Okla. May 13, 2019).
[223] *Kratz v. Kratz*, 1995 OK 63, 905 P.2d 753.
[224] *Broadway Clinic v. Liberty Mutual Ins. Co.*, 2006 OK 29, 139 P.3d 873.
[225] *Fugate v. Mooney*, 1998 OK CIV APP 48, 139 P.3d 873.
[226] 2019 OK CIV APP 41, __ P.3d _.
[227] 42 O.S.§46.
[228] *Carney v. State Farm*, 1984 OK 72, 877 P.2d 1113.
[229] *Mellenberger v. Sweeney*, 1990 OK CIV APP 85, 800 P.2d 747.
[230] *Torres v. Kansas City F & M*, 1993 OK 32, 849 P.2d 407.
[231] *Phillips v. State Farm*, 1993 OK CIV APP 27, 848 P.2d 70.
[232] *Nunn v. Stewart*, 1988 OK 51, 756 P.2d 6.
[233] *Burwell v. Oklahoma Farm Bur. Mut. Ins. Co.*, 1995 OK CIV APP 50, 896 P.2d 1195.

Ins. Co.[234] holds the event which triggered prejudgment interest under *Nunn v. Stewart* was the insurance company paying an uncontested amount, not the earlier time the insurance company waived subrogation.

8. What Claims Survive the Death of the Insured?

Clements v. ITT Hartford[235] holds an emotional distress claim caused by the insurance company's bad faith conduct is an injury to the person which survives the insured's death.

9. When a Parent Buys Car Insurance for an Adult Child

A common problem is when a parent buys insurance intending to cover an adult son or daughter. Despite the insurance company's liability, two potential claims arise against the agency that sold the insurance: a breach of contract claim for not providing the policy as requested (listing the adult son or daughter as the named insured) and a negligence claim for failing to exercise reasonable care, skill, and diligence in providing the requested insurance. The agent can be held liable for the insured's loss if the coverage is not provided as promised. This situation arose in *Swickey v. Silvey Companies*.[236] The Court of Civil Appeals held that whether the agent breached a contract with the insured, negligently failed to list the insured's son as a named insured on the policy and advise the insured the car she bought had to be titled in the adult son's name are questions for the jury.

10. Who Recovers Wrongful Death Damages?

Despite a policy provision that damages payable after the death of the insured go to the surviving spouse, wrongful death damages for the death of the insured go to those survivors designated in 12 O.S. § 1053.[237]

11. Mend the Hold Doctrine

While not peculiar to UM cases, *Genzer v. James River Ins. Co.*[238] holds that federal courts follow quite different law in applying the "mend the hold" doctrine as is followed in state courts. The Tenth Circuit says that the mend the hold doctrine (that an insurance company can't

---

[234] *Gregg v. Le Mars Ins. Co.*, 2009 OK CIV APP 93, 227 P.3d 1107.
[235] *Clements v. ITT Hartford*, 1999 OK CIV APP 6, 973 P.2d 902.
[236] *Swickey v. Silvey Companies*, 1999 OK CIV APP 48, 979 P.2d 266.
[237] *Forbes v. Shelter Mut. Ins. Co.*, 1995 OK CIV APP 113, 904 P.2d 159.
[238] 2019 WL 3926934 (10th Cir. Aug. 20, 2019.

deny a claim on one ground and then rely on another ground once the case gets in litigation) applies only when there is a bad faith claim. Oklahoma Supreme Court has adopted that doctrine without making that requirement. In light of this, it's probably a good idea to try to join someone to defeat diversity and keep the case in state court or allege bad faith, whether you think you can make that bad faith case or not.

V. CONCLUSION

We have covered a lot of material. Take the time to follow up and read the thumbnail sketches of each case cited in the Chronology that follows. As to cases particularly important to you, read the summary of the case in the UM case summaries. Keep the alphabetical citation list handy as a reference. And, good luck!

(Updated November 3, 2019)

IV. ALPHABETICAL LISTING OF CASES WITH CITATIONS

Aetna Cas. and Sur. Co. v. Craig, 1989 OK 43, 771 P.2d 212.
Aetna Cas. and Sur. Co. v. State Board of Prop. & Cas. Rates, 1981 OK 153, 637 P.2d 1251.
Alternative Med. Of Tulsa v. Cates v. Progressive Preferred Ins. Co. Inc., 2006 OK CIV APP 65, 136 P.3d 716.
Ameen v. Prudential Prop. and Cas. Ins. Co., 2005 OK CIV APP 23, 110 P.3d 86.
American Economy Insurance Company v. Bogdahn, 2004 OK 9, 89 P.3d 1051.
Argonaut Ins. Co. v. Earnest, 861 F.Supp.2d 1313 (N.D. Okla. 2012).
Assalone v. Hartford Acc. & Indemn. Co., 1994 OK CIV APP 64, 908 P.2d 812.
Associated IndemnityCorp. v. Cannon, 1975 OK 87, 536 P.2d 920.
Babcock v. Adkins, 1984 OK 84, 695 P.2d 1340.
Ball v. Wilshire Ins. Co., 2009 OK 38, 221 P.3d 717.
Barfield v. Barfield, 1987 OK 72, 742 P.2d 1107.
Barnes v. Okla. Farm Bureau Mut. Ins. Co., (*Barnes I*) 1993 OK CIV APP 168, 869 P.2d 852.
Barnes v. Okla. Farm Bureau Mutual Ins. Co., (*Barnes II*) 2000 OK 55, 11 P.3d 162.
Barnes v. Okla. Farm Bureau Mutual Ins. Co., (Barnes III)2004 OK 25, 94 P.3d 25.
Beers v. Hillory, 2010 OK CIV APP 99, 242 P.3d 285.
Beauchamp v. Southwestern Nat. Ins. Co., 1987 OK 111, 746 P.2d 673.
Bernal v. Charter County Mut. Ins. Co., 2009 OK 28, 209 P.3d 309.
Biggs v. State Farm Mut. Auto. Ins. Co., 1977 OK 135, 569 P.2d 430.
Bill Hodges Truck Company v. Humphrey, 1984 OK CIV APP 55, 704 P.2d 94.
Boerstler v. Donald Hoover Truck Insurance Exchange Co., 1997 OK 106, 943 P.2d 614.
Bohannan v. Allstate Ins. Co., 1991 OK 64, 820 P.2d 787.
Boughton v. Farmers Ins. Exch., 1960 OK 159, 354 P.2d 1085.
Boyer v. Oklahoma Farm Bureau Mut. Ins. Co., 1995 OK CIV APP 102, 902 P.2d 83.
Brashier v. Farmers Ins. Co., Inc., 1996 OK 86, 925 P.2d 20.
Breakfield v. Oklahoma Farmers Union Mut. Ins. Co., 1995 OK 139, 910 P.2d 991.
Beers v. Hillory, 2010 OK CIV APP 99, 241 P.3d 285.
Broadway Clinic v. Liberty Mutual Insurance Co., 2006 OK 29, 139 P.3d 873.
Brown v. Patel, et al., 2007 OK 16, 157 P.3d 117.
Brown v. USAA, 1984 OK 55, 684 P.2d 1195.
Burch v. Allstate Ins. Co., 1998 OK 129, 977 P.2d 1057.
Burgess v. State Farm Mut. Auto. Ins. Company, 2003 OK CIV APP 85, 77 P.3d 612.
Burwell v. Oklahoma Farm Bur. Mut. Ins. Co., 1995 OK CIV APP 50, 896 P.2d 1195.
Buzzard v. Farmers Ins. Co., Inc., 1991 OK 127, 824 P.2d 1105.
Buzzard v. McDanel, 1987 OK 28, 736 P.2d 157.
Byus v. Mid-Century Ins. Co., 1996 OK 25, 912 P.2d 845.
Calhoun v. Calhoun, 482 F.Supp. 347 (E.D.Okla. 1978).
Carlos v. State Farm Mutual Auto. Ins. Co., 1996 OK CIV APP 158, 935 P.2d 1182.
Carney v. State Farm Mut. Auto. Ins. Co., 1994 OK 72, 877 P.2d 1113.
Chambers v. Walker, 1982 OK 128, 653 P.2d 931.
Clements v. ITT Hartford, 1999 OK CIV APP 6, 973 P.2d 902.
Cofer v. Morton, 1989 OK 159, 784 P.2d 67.
Coker v. Allstate Ins. Co., 1994 OK CIV APP 62, 877 P.2d 1175.
Conner v. American Commerce Ins. Co., 2009 OK CIV APP 61, 216 P.3d 850.

Cothren v. Emcasco Ins. Co., 1976 OK 137, 555 P.2d 1037.
Dallas v. Geico Insurance Co., 2019 OK CIV APP 41, __ P.3d __.
Davis v. Choate, 1989 OK CIV APP 29, 787 P.2d 465.
Davis v. Equity Fire & Cas. Co., 1992 OK CIV APP 171, 852 P.2d 780.
Davis v. Progressive Northern Ins. Co., 2012 OK CIV APP 98, 288 P.3d 270
Dennis v. Harding Glass Co., 1996 OK CIV APP 105; 929 P.2d 301.
Dodd v. Allstate Insurance Company, 2004 OK CIV APP 82, 99 P.3d 1219.
Economy Fire & Cas. Co. v. Faulkner, 790 F.Supp. 1082 (W.D.Okla. 1991); aff'd w/o opinion 951 F.2d 1258 (10th Cir. 1991).
Employers Mutual Casualty Co. V. Mosby, et al., 1997 OK 93, 943 P.2d 593.
Equity Fire and Cas. Co. v. Youngblood, 1996 OK 123, 927 P.2d 572.
Everaard v. Hartford Accid. and Ind. Co., 842 F.2d 1186 (10th Cir. 1988).
Falcone v. Liberty Mutual Insurance Co., 2017 OK 11, 391 P.3d 105.
Farmers Ins. Co. v. Thomas, 1987 OK 84, 743 P.2d 1080.
Farmers Ins. Co., Inc. v. Stark, 1996 OK CIV APP 53, 924 P.2d 798.
Fields v. Farmers Ins. Co., Inc., 847 F.Supp. 160 (W.D.Okla. 1993), aff'd, 18 F.3d 831 (10th Cir. 1994).
Flitton v. Equity Fire and Cas. Co., 1992 OK 2, 824 P.2d 1132.
Forbes v. Shelter Mut. Ins. Co., 1995 OK CIV APP 113, 904 P.2d 159.
Ford v. Gary, 2015 OK CIV APP 63, 353 P.3d 553.
Frey v. Independence Fire & Casualty, 1985 OK 25, 698 P.2d 17.
Fugate v. Mooney and Shelter Ins. Co., 1998 OK CIV APP 48, 958 P.2d 818.
Garnett v. Government Employees Insurance Company, 2008 OK 43, 186 P.3d 935.
Gates v. Eller, 2001 OK 38, 22 P.3d 1215.
Gay v. Hartford Underwriters Ins. Co., 1995 OK 97, 904 P.2d 83.
GEICO Gen. Ins. Co. v. NPIC, 2005 OK 40, 115 P.3d 856.
Genzer v. James River Ins. Co., 2019 WL 3926934 (10th Cir. Aug. 20, 2019).
Government Employees Ins. Co. v. Quine, 2011 OK 88, 264 P.3d 1245.
Graham v. Travelers Ins. Co., 2002 OK 95, 61 P.3d 225.
Gray v. Midland Risk Insurance Co., 1996 OK 111, 925 P.2d 560.
Great West Casualty Company v. Boroughs, 505 F.Supp.2d 1072 (N.D. Okla. 2007).
Gregg v. Le Mars Ins. Co., 2009 OK CIV APP 93, 227 P.3d 1107.
Haberman v. The Hartford Ins. Group, 443 F.3d 1257 (10th Cir. 2006).
Harco Natl. Ins. Co. v. Roe, 2016 WL 8674625 (N.D. Okla. Sept. 30, 2016).
Hardin v. Prudential Prop. and Cas. Co., 1992 OK CIV APP 42, 839 P.2d 206.
Heavner v. Farmers Ins. Co., 1983 OK 51, 663 P.2d 730.
Herren v. Farm Bureau Mut. Ins. Co., Inc., 2001 OK CIV APP 82, 26 P.3d 120.
Hibbs v. Farmers Ins. Co., Inc., 1985 OK 77, 725 P.2d 1232.
Hicks v. State Farm Mut. Ins. Co., 1977 OK 150, 568 P.2d 629.
High v. Southwestern Ins. Co., 1974 OK 35, 520 P.2d 662.
Holt v. Bell, 1964 OK 84, 392 P.2d 361.
Houston v. National General Ins. Co., 817 F.2d 83 (10th Cir. 1987).
Hulsey v. Mid-America Preferred Ins. Co., 1989 OK 107, 777 P.2d 932.
Irvin v. Allstate, 436 F.Supp. 575 (W.D.Okla. 1977).
Johnson v. USAA, 1969 OK 200, 462 P.2d 664.
Karlson v. City of Oklahoma City, 1985 OK 45, 711 P.2d 72.

Kavanaugh v. Maryland Ins. Co., 1997 OK CIV APP 41, 943 P.2d 629.
Keel v. M FA Insurance Co., 1976 OK 86, 553 P.2d 153.
Kinder v. Okla. Farmers Union Mut. Ins. Co., 1991 OK CIV APP 53, 813 P.2d 546.
Kinder v. Oklahoma Farmers Union Mut. Ins. Co., 1997 OK 104, 943 P.2d 617.
Kramer v. Allstate Ins. Co., 1994 OK CIV APP 146, 909 P.2d 128.
Kratz v. Kratz and Prudential General Ins. Co., 1995 OK 63, 905 P.2d 753.
Lake v. Wright, 1982 OK 98, 657 P.2d 643.
Lamfu v. GuideOne Ins. Co., 2006 OK CIV APP 19, 131 P.3d 712.
Leritz v. Farmers Ins. Co., Inc., 2016 OK 79, 385 P.3d 991.
Leader Nat. Ins. Co. v. Shaw, 901 F.Supp. 316 (W.D.Okla. 1995).
Lewis v. State Farm Mut. Auto. Ins. Co., 1992 OK CIV APP 106, 838 P.2d 535.
Littlefield v. State Farm Fire and Cas. Co., 1993 OK 102, 857 P.2d 65.
London v. Farmers Ins. Co., Inc., 2003 OK CIV APP 10, 63 P.3d 552.
Lund v. State Farm Mut. Auto. Ins. Co., 342 F.Supp. 917 (W.D.Okla. 1972).
Madrid v. State Farm Mut. Automobile Ins. Co., 2019 OK CIV APP __, __ P.3d__.
Mann v. Farmers Ins. Co., Inc., 1988 OK 58, 761 P.2d 460.
Mariani v. State ex rel. Oklahoma State University, 2015 OK 13, 348 P.3d 194.
Markham v. State Farm Mut. Auto. Ins. Co., 464 F.2d 703 (10th Cir. 1972).
Marshall v. Allstate Ins. Co., 1990 OK CIV APP 100, 805 P.2d 689.
Martin v. Hartford Underwriters Ins. Co., 1996 OK 55, 918 P.2d 49.
Martin v. Gray, 2016 OK 114, 385 P.3d 64.
Massachusetts Bay Ins. Co. 2017 WL 3586862 (N.D. Okla. Aug. 18, 2017).
May v. Nat. Union Fire Ins. Co. of Pittsburg, Pa., 1996 OK 52, 918 P.2d 43, (opinion following certification) 84 F.3d 1342 (10th Cir. 1996).
Mayer v. State Farm Auto. Ins. Co., 1997 OK 67, 944 P.2d 288.
McKinley v. Prudential, 1980 OK CIV App 29, 619 P.2d 1269.
McKinney v. Progressive Direct Ins. Co., 2019 WL 2092578 (W.D. Okla. May 13, 2019).
McSorley v. The Hertz Corp., 1994 OK 120, 885 P.2d 1343.
Mellenberger v. Sweeney, 1990 OK CIV APP 85, 800 P.2d 747.
Merrill v. Northern Ins. Co. of New York, 747 F.Supp. 1415 (W.D. Okla.1990).
MFA Ins. Co. v. Hankins, 1980 OK 66, 610 P.2d 785.
Mid-Continent Group v. Henry, 2003 OK CIV APP 46, 69 P.3d 1216.
Mid-Continent Cas. Co. v. Theus, 1979 OK 23, 592 P.2d 519.
Moon v. Guarantee Insurance Co., 1988 OK 85, 764 P.2d 1331.
Morris v. America First Ins. Co., 2010 OK 35, 240 P.3d 661.
Moser v. Liberty Mut. Ins. Co., 1986 OK 78, 731 P.2d 406.
Mueggenborg v.Ellis 2002 OK CIV APP 88, 55 P.3d 452.
Murchison v. Progressive Northern Ins. Co., 572 F.Supp.2d 1281 (E.D. OK 2008).
Mustain v. United States Fidelity and Guaranty Co., et al., 1996 OK 98, 925 P.2d 533.
Narvaez v. State Farm Mut. Auto. Ins. Co., 1999 OK CIV APP 92, 989 P.2d 1051.
Newberry v. Allstate Ins. Co., 1998 OK CIV APP 139, 963 P.2d 632.
National American Ins. Co. v.Vallion, 2009 OK CIV APP 41, 183 P.3d 175.
Newport v. USAA, 2000 OK 59, 11 P.3d 190.
Nichols v. Nationwide Mutual Ins. Co., 948 F.Supp. 988 (W.D.Okla. 1996).
Niemeyer v. USF & G, 1990 OK 32, 789 P.2d 1318.
Nsien v. Country Mut. Ins. Co., 2019 WL 573424 (N.D. Okla. Feb. 12, 2019).

Nunn v. Stewart, 1988 OK 51, 756 P.2d 6.
O'Brien v. Dorrough and Equity Fire and Cas. Co., 1996 OK CIV APP 25, 928 P.2d 322.
O'Farrell v. State Farm Mut. Auto. Ins. Co., 2013 WL 3820082 (N.D. Okla. July 24, 2013).
Ouellette v. State Farm Mut. Auto. Ins. Co., 1994 OK 79, 918 P.2d 1363.
Pearson v.St. Paul Fire and Marine Ins. Co., 393 F.Supp.2d 1238 (W.D. Okla. 2005).
Pentz v. Davis, et al., 1996 OK 89, 927 P.2d 538.
Perkins v. Hartford Underwriters Ins. Co., 1994 OK CIV APP 151, 889 P.2d 1262.
Phillips v. New Hampshire Ins. Co., 263 F.3d 1215 (10th Cir. 2001).
Phillips v. Oklahoma Farmers Union Mut. Ins. Co., 1993 OK CIV APP 199, 867 P.2d 1361.
Phillips v. State Farm Mut. Auto. Ins. Co., 1993 OK CIV APP 27, 848 P.2d 70.
Phillips v. State Farm Mut. Auto. Ins. Co., 73 F.3d 1535 (10th Cir. 1996).
Plaster v. State Farm, 1989 OK 167, 791 P.2d 813.
Ply v. National Union Fire Insurance Company of Pittsburgh, PA, 2003 OK 97, 81 P.3d 643.
Porter v. MFA Mut. Ins. Co., 1982 OK 23, 643 P.2d 302.
Porter v. State Farm Mut. Auto. Ins. Co., 2010 OK CIV APP 8, 231 P. 3d 691.
Price v. Mid-Continent Casualty Company, 2002 OK CIV APP 16, 41 P.3d 1019.
Prideaux v. Allstate Ins. Co., 1987 OK CIV APP 72, 753 P.2d 935.
Progressive N. Ins. Co. v. Pippin, 725 F. App'x 717 (10th Cir. 2018).
Provident Life & Accid. Ins. Co. v. Ridenour, 1992 OK CIV APP 93, 838 P.2d 530.
Raymond v. Taylor, 2017 OK 80, 389 P.3d 1117.
Reeder v. American Economy Ins. Co., 88 F.3d 892 (10th Cir. 1996).
Reeds v. Walker, 2006 OK 43, 157 P.3d 100.
Rhody v. State Farm Mut. Ins. Co., 771 F.2d 1416 (10th Cir. 1985).
Richardson v. Allstate, 1980 OK 157, 619 P.2d 594.
Roberts v. Mid-Continent Casualty Co., 1989 OK CIV APP 92, 790 P.2d 1121.
Robertson v. USF & G, 1992 OK 113, 836 P.2d 1294.
Roby v. Bailey, 1993 OK CIV APP 93, 856 P.2d 1013.
Rogers v. Goad, 1987 OK 59, 739 P.2d 519.
Rose v. State Farm Mut. Auto. Ins. Co., 1991 OK CIV APP 124, 821 P.2d 1077.
Rush v. Travelers Indem. Co., 891 F.2d 267 (10th Cir.1989).
Russell v. American States Ins. Co., 813 F.2d 306 (10th Cir.1987).
Safeco v. Sanders, 1990 OK 129, 803 P.2d 688.
Scott v. Cimarron Insurance Co., Inc., 1989 OK 26, 774 P.2d 456.
Semler v. Geico Gen. Ins. Co., 2013 WL 2179357 (W.D. Okla.)
Serra v. Estate of Broughton, 2015 OK 82, 364 P.3d 637.
Sexton v. Continental Cas. Co., 1991 OK 84, 816 P.2d 1135.
Shepard v. Farmers Ins. Co., Inc., 1983 OK 103, 678 P.2d 250.
Silver v. Slusher, 1988 OK 53, 770 P.2d 878.
Simmons v. Hartford, 1975 OK 155, 543 P.2d 1384.
Skinner v. John Deere Ins. Co., 2000 OK 18, 998 P.2d 1219.
Smith v. American Fidelity Insurance Companies, 1998 OK CIV APP 70, 963 P.2d 16.
Smith v. Shelter Mut. Ins. Co., 1994 OK 5, 867 P.2d 1260.
Spears v. Glens Falls Ins. Co., 2005 OK 35, 114 P.3d 448.
Stanton v. American Mutual, 1987 OK 118, 747 P.2d 945.
State Farm v. Greer, 1989 OK 110, 777 P.2d 941.
State Farm Mut. Auto. Ins. Co. v. Narvaez, 975 F.Supp. 1435 (W.D.Okla. 1997).

State Farm Mut. Auto. Ins. Co. v. Wendt, 1985 OK 75, 708 P.2d 581.
Strong v. Hanover Insurance Company, 2005 OK CIV APP 9, 106 P.3d 604.
Stucky v. Long, 1989 OK CIV APP 75, 783 P.2d 500.
Swickey v. Silvey Companies, 1999 OK CIV APP 48, 979 P.2d 266.
Thrasher v. Act-Fast Labor Pool, Inc., 1991 OK 12, 806 P.2d 640.
Tidmore v. Fullman, 1982 OK 73, 646 P.2d 1278.
Torres v. Kansas City Fire and Marine Ins. Co., 1993 OK 32, 849 P.2d 407.
Townsend v. State Farm Mut. Auto. Ins. Co., 1993 OK 119, 860 P.2d 236.
Traders Ins. Co. v. Johnson, 2010 OK CIV APP 37, 231 P.3d 790.
Uptegraft v. Home Insurance Co, 1983 OK 41, 662 P.2d 681.
Vincent v. Tri-State Ins. Co., 1994 OK CIV APP 24, 874 P.2d 65.
Vickers v. Progressive N. Ins. Co., 353 F. Supp. 3d 1153 (N.D. Okla. 2018).
Walker v. Farmers Ins. Co., Inc., 83 F.3d 349 (10th Cir.1996).
Weatherly v. Flourney, 1996 OK CIV APP 109, 929 P.2d 296.
Welch v. Armer, 1989 OK 117, 776 P.2d 847.
White v. Equity Fire & Cas. Co., 1991 OK CIV APP 131, 823 P.2d 953.
Whitmire v. Mid-Continent Cas. Co., 1996 OK CIV APP 115, 928 P.2d 959.
Wickham v. Equity Fire and Cas. Co., 1994 OK CIV APP 148, 889 P.2d 1258.
Widmann v. Acceptance Insurance Co., 2002 OK CIV APP 118, 63 P.3d 23.
Willard v. Kelley, 1990 OK 127, 803 P.2d 1124.
Wille v. GEICO Casualty Co., 2000 OK 10, 2 P.3d 888.
Williams v. Preferred Risk Group Ins. Co., 1993 OK CIV APP 193, 867 P.2d 485.
Wilson v. Allstate Ins. Co., 1996 OK 22, 912 P.2d 345.
Wise v. Wollery, 1995 OK CIV APP 69, 904 P.2d 151.
Withrow v. Pickard, 1995 OK 120, 905 P.2d 800.
Woods v. Baptist Medical Center of Oklahoma, Inc., 1995 OK CIV APP 13, 890 P.2d 1367.

(Updated October 24, 2019)

V. UNINSURED MOTORIST CASE CHRONOLOGY

UM = Uninsured Motorist. ORS = Overruled by statute. ORC = Overruled by case law. C = Current. H = Historical interest only.

1960 H *Boughton v. Farmers*, 1960 OK 159, 354 P.2d 1085: "Arbitration", "no action" clause invalid; judgment against UM binds insurer.

1964 H *Holt v. Bell*, 1964 OK 392392 P.2d 361: Can't join UM and insurer. ORC

1969 H *Johnson v. USAA*, 1969 OK 200, 462 P.2d 664: Insurer not bound by judgment against UM where policy so provided and permitted action against company. ORC

1972 H *Lund v. State Farm*, 342 F.Supp. 917 (W.D.Okla.): No recovery under UM where tort-feasor had required minimum limits (5/10), but aggregate limit was divided among five claimants thus reducing recovery to $2,000. ORS

C *Markham v. State Farm*, 464 F.2d 703 (10th Cir.): No recovery under UM on claim of mother against unemancipated daughter - "not legally entitled to recover." (Doubtful as present authority due to *Unah v. Martin*, 1984 OK 2, 676 P.2d 1366, and *Karlson v. City of Oklahoma City*, 1985 OK 45, 711 P.2d 72.)

1974 H *High v. Southwestern*, 1974 OK 35, 520 P.2d 662: Default judgment against hit and run "John Doe" not binding on insurer. Direct action against insurer permitted.

1975 H *Associated Indemnity v. Cannon*, 1975 OK 87, 536 P.2d 920: Permits direct action against insurer; partially overruled Holt.

1976 ORS *Cothren v. Emcasco*, 1976 OK 137, 555 P.2d 1037: "Occupying owned but uninsured car" clause invalid.

C *Keel v. MFA Insurance Co.*, 1976 OK 86, 553 P.2d 153: UM "stacking," liability, and damages determination by: (1) direct action against insurer; (2) joinder of insurer and UM; and (3) action against UM with notice to insurer permitted.

H *Simmons v. Hartford*, 1975 OK 155, 543 P.2d 1384: Follows *Lund v. State Farm*. No UM recovery where tort-feasor had required 5/10 liability policy but multiple claims against aggregate limits reduced insured's recovery below $5,000. ORS

1977 C *Biggs v. State Farm Mut. Auto. Ins. Co.*, 1977 OK 135, 569 P.2d 430: Invalidates "physical contact" requirement for "hit and run" coverage.

H *Hicks v. State Farm*, 1977 OK 150, 568 P.2d 629: Insured knowingly waived UM coverage where insurer sent notice explaining coverage. ORC

	C	*Irvin v. Allstate*, 436 F.Supp. 575 (W.D.Okla. 1977): suit against one's own insurance company to recover UM coverage is not a "direct action" within the meaning of 28 U.S.C. §1332(c).
1978	C	*Calhoun v. Calhoun*, 482 F.Supp. 347 (E.D.Okla.): UM claim not "separate and independent" from claim against resident UM carrier so as to be removable to federal court.
1979	H	*Mid-Continent v. Theus*, 1979 OK 23, 592 P.2d 519: No UM recovery if UM limits same as adverse vehicle's liability limits. ORS
1980	C	*MFA v. Hankins*, 1980 OK 66, 610 P.2d 785: Where accident occurred before the 1976 amendment, underinsured provisions of 1976 statute do not apply to affect coverage where policy was not issued or renewed after effective date of 1976 amendment.
	C	*McKinley v. Prudential*, 1980 OK 29, 619 P.2d 1269: Where the accident happened after the 1976 amendment, but the policy had not been issued or renewed after 1976 amendment, that amendment did not apply to provide underinsured coverage.
	C	*Richardson v. Allstate*, 1980 OK 157, 619 P.2d 594: "Stacking" permitted where multiple vehicles are insured under one policy.
1981	C	*Aetna v. State Board of Prop. & Cas. Rates*, 1981 OK 153, 637 P.2d 1251: Med pay offset against UM invalid. No subrogation for medical bills paid under UM.
1982	C	*Chambers v. Walker*, 1982 OK 128, 653 P.2d 931: Insurer may not offset workers' comp against UM.
	C	*Lake v. Wright*, 1982 OK 98, 657 P.2d 643: "Limit of liability" clause unenforceable and void as against public policy.
	C	*Porter v. MFA Mut. Ins. Co.*, 1982 OK 23, 643 P.2d 302: Settlement with (and release of) the tort-feasor voids UM coverage.
	C	*Tidmore v. Fullman*, 1982 OK 73, 646 P.2d 1278: Where plaintiff sues the tort-feasor and his own UM carrier, case should be submitted to jury against only tort-feasor, not UM carrier.
1983	C	*Heavner v. Farmers*, 1983 OK 51, 663 P.2d 730: Passenger may collect owner's liability and UM limits.
	C	*Shepard v. Farmers*, 1983 OK 103, 678 P.2d 250: Policy definition of "insured" which excludes resident relative who owns own car not void as against public policy.

C *Uptegraft v. Home Insurance*, 1983 OK 41, 662 P.2d 681: Failure to sue tort-feasor within two years does not bar UM suit within five years.

1984 C *Brown v. USAA*, 1984 OK 55, 684 P.2d 1195: Hit and run coverage applies where owner, but not driver, of vehicle which leaves scene is identified; insured has no duty to ascertain identity of hit and run driver; insured has burden of proving a known driver was uninsured, but may do so by negative proof.

C *Babcock v. Adkins*, 1984 OK 84, 695 P.2d 1340: Occupants of one of several vehicles not entitled to stack coverage on other vehicles covered under separate policies.

C *Bill Hodges Truck Company v. Humphrey*, 1984 OK CIV APP 55, 704 P.2d 94: no UM offset against workers' compensation recovery.

1985 C *Frey v. Independence Fire & Casualty*, 1985 OK 25, 698 P.2d 17: Covenant not to sue tort-feasor barred UM recovery.

H *Hibbs v. Farmers*, 1985 OK 77, 725 P.2d 1232: Settlement with primary UM carrier for less than limits bars recovery against excess UM carrier. ORC

C *Karlson v. City of Oklahoma City*, 1985 OK 45, 711 P.2d 72: UM pays damages above Governmental Tort Claims Act limits.

C *Rhody v. State Farm*, 771 F.2d 1416: Texas law applied to UM stacking where policy issued in Texas on car garaged in and accident occurred in Oklahoma.

C *State Farm v. Wendt*, 1985 OK 75, 708 P.2d 581: Policy excluding from definition of "uninsured motor vehicle" a vehicle defined in the policy as an insured motor vehicle was void where liability coverage was excluded by a "named insured" exclusion.

1986 C *Moser v. Liberty Mut. Ins. Co.*, 1986 OK 78, 731 P.2d 406: UM offer not required on umbrella liability policy.

1987 C *Barfield v. Barfield*, 1987 OK 72, 742 P.2d 1107: Insured injured by negligence of fellow employee driver could recover his own UM.

H *Beauchamp v. Southwestern*, 1987 OK 96, 746 P.2d 673: Adding vehicle to policy constituted new policy requiring new UM offer, reversing in part, *Hicks v. State Farm* (1977). ORS

C *Buzzard v. McDanel*, 1987 OK 28, 736 P.2d 157: Improper to bifurcate from bad faith case question of UM tort-feasor's liability and damages.

C *Farmers v. Thomas*, 1987 OK 84, 743 P.2d 1080: Divorced husband who was named insured had no insurable interest in car awarded wife in divorce so passenger had no UM claim against husband's policy.

C *Houston v. National General Ins. Co.*, 817 F.2d 83 (10th Cir. 1987): Fact question existed whether mother of insured's grandchild was covered as a "ward."

C *Prideaux v. Allstate*, 1987 OK CIV APP 72, 753 P.2d 935: no passenger UM stacking; UM offer adequate; no written rejection of UM required where UM written, but for less than liability limits.

C *Rogers v. Goad*, 1987 OK 59, 739 P.2d 519: Employee occupying employer's vehicle could not stack under employer's policy.

C *Russell v. American States*, 813 F.2d 306: UM vehicle includes insured vehicle being occupied; passenger covered under non-owner driver's UM policy which insures vehicle driven by insured.

C *Stanton v. American Mutual*, 1987 OK 118, 747 P.2d 945: Employee occupying employer's vehicle could not stack under employer's fleet policy.

1988 C *Everaard v. Hartford*, 842 F.2d 1186: The insured need not join or sue the tort-feasor in order to recover UM. The insurer's insistence upon this constituted bad faith.

C *Mann v. Farmers*, 1988 OK 58, 761 P.2d 460: A UM rejection is required only where the policy affords no UM coverage - not where UM limits are written but in an amount less than liability limits; a *Shepard v. Farmers* clause excluding an insured who owns a vehicle from the definition of insured family member was inapplicable where the separately owned vehicle was insured under the policy in question.

C *Moon v. Guarantee Insurance Co.*, 1988 OK 85, 764 P.2d 1331: A car renter is the insured who must accept or reject UM coverage on a rental car's liability policy; a rejection by the car rental company is inadequate, since the rental company's employees are the insurance company's agents.

C *Nunn v. Stewart*, 1988 OK 51, 756 P.2d 6: The insured could recover interest on a UM award in excess of policy limits, but only from the date liability became fixed.

H *Silver v. Slusher*, 1988 OK 53, 770 P.2d 878: The insurance company has no duty to make an explanatory offer of UM coverage. (Legislatively reversed by the 1990 amendment to §3636.)

1989 C *Aetna v. Craig*, 1989 OK 43, 771 P.2d 212: A class 1 insured may stack UM coverage under a commercial, fleet policy; punitive damage coverage under UM contravenes public policy.

C *Cofer v. Morton*, 1989 OK 159, 784 P.2d 67: The controlling UM statute is the one in effect at the last policy renewal before the accident; under the 1976 underinsured statute, the tort-feasor's liability limits are to be compared to the stacked UM limits, to determine underinsured status; if one of the named insureds is aware of the right to buy UM equal to the liability limits, failure to offer increased limits does not affect coverage.

C *Davis v. Choate*, 1989 OK CIV APP 29, 787 P.2d 465: Summary judgment for insurance company was inappropriate where the insurance company charged a "per policy" premium but the record did not show that the insured had a choice and elected to take coverage which could not be stacked. ORC

C *Hulsey v. Mid-America Preferred*, 1989 OK 107, 777 P.2d 932: Hit-and-run coverage may apply to random shooting from a motor vehicle.

H *Plaster v. State Farm*, 1989 OK 167, 791 P.2d 813: Each named insured must reject UM coverage; rejection by wife did not bar claim for child's death. ORS (Legislatively reversed by the 1990 amendment to §3636.)

C *Roberts v. Mid-Continent Casualty Co.*, 1989 OK CIV APP 92, 790 P.2d 1121: An insured may sue his UM insurer without suing the tort-feasor; the UM carrier is not entitled to credit for the tort-feasor's liability limit, but must seek subrogation against the tort-feasor.

C *Rush v. Travelers Indem. Co.*, 891 F.2d 267 (10th Cir.): An Oklahoma insured, involved in an Arkansas accident was entitled to stack, under Oklahoma law, but was entitled to the higher Arkansas minimum limits, pursuant to a policy provision to that effect.

C *Scott v. Cimarron*, 1989 OK 26, 774 P.2d 456: An insurance company which charges a "per policy" UM premium may deny stacking, where it clearly advised the insured of that result and gave the insured the option to select other coverage.

C *State Farm v. Greer*, 1989 OK 110, 777 P.2d 941: A policy provision excluding from the definition of "uninsured motor vehicle" a government vehicle was void.

C *Stucky v. Long*, 1989 OK CIV APP 75, 783 P.2d 500: Whether an injury is accidental or intentional is to be viewed from the insured's viewpoint, not the assailant's; a beating administered after a traffic confrontation did not arise from the use of the vehicle and was not covered by UM.

C *Welch v. Armer*, 1989 OK 117, 776 P.2d 847: As to an accident before the 1986 Amendment to 36 O.S. §2012, a claimant must first exhaust his UM coverage before claiming against the Guaranty Fund; an insolvent liability company's insured is protected against a UM subrogation claim, but only to the extent of his liability coverage with the insolvent insurer.

1990 C *Marshall v. Allstate*, 1990 OK CIV APP 100, 805 P.2d 689: Beauchamp v. Southwestern (requiring a new offer of UM coverage with addition of a vehicle to a policy) will not be applied retroactively; one not a named insured under a UM policy may sue to reform the policy to be named a named insured.

C *Mellenberger v. Sweeney*, 1990 OK CIV APP 85, 800 P.2d 747: A UM insurer is liable for pre-judgment interest, but only on the part of the judgment exceeding the liability coverage.

C *Merrill v. Northern Ins. Co. of New York*, 747 F.Supp. 1415 (W.D. Okla.): Section 3637, exempting from UM requirements motor carriers, whose employees are covered by Workers' Compensation, applied to a carrier which carried its own goods, as well as those of others.

C *Niemeyer v. USF & G*, 1990 OK 32, 789 P.2d 1318: Liability insurer owed no duty to UM insurance company and had no privilege claim in the insured's suit for tortious interference with contract, based on supplying false derogatory information in claim file.

C *Safeco v. Sanders*, 1990 OK 129, 803 P.2d 688: Insureds' murders by being burned to death in car arose out of the use of the car and had a causal connection to the use of the car, but were not covered, since the killers' act of burning the car was not a transportation use of the car.

C *Willard v. Kelley*, 1990 OK 129, 803 P.2d 1124: Summary judgment precluded where differing inferences can be drawn from undisputed facts; whether an injury is accidental is viewed from the eyes of the injured party; and "occupying" a vehicle includes alighting from and entering into the vehicle.

1991 C *Bohannan v. Allstate Ins. Co.*, 1991 OK 64, 820 P.2d 787: Out-of-state policy will be interpreted under law of place where made, unless foreign provisions are contrary to Oklahoma public policy or other state has more significant relationship with the subject matter or the parties.

C, ORC *Buzzard v. Farmers*, 1991 OK 127, 824 P.2d 1105: UM insurer may not insist liability limits be exhausted before it must pay; UM carrier owes only the amount of the insured's damages over the liability limits (this dictum was overruled in 1998 by *Burch v. Allstate*, 1998 OK 129, 977 P.2d 1057); the UM insurer's failure to pay a claim will waive subrogation.

C *Economy Fire & Cas. Co. v. Faulkner*, 790 F.Supp. 1082 (W.D.Okla.), aff'd w/o opinion 951 F.2d 1258 (10th Cir. 1991): Existence of multiple claimants with claims arising out of a single wrongful death, do not trigger multiple "per person" liability and UM insurance limits but rather the limit applicable is a single, per-person limit.

H *Kinder v. Okla. Farmers Union Mut. Ins. Co.*, 1991 OK CIV APP 53, 813 P.2d 546: Fact question existed whether insured could stack where the insureds disputed whether they had been given the option to pay extra for UM coverage which could be stacked. ORC

C *Rose v. State Farm Mut. Auto. Ins. Co.*, 1991 OK CIV APP 124, 821 P.2d 1077: A mother could recover UM benefits based on the negligence of her unemancipated minor child, even though she could not have recovered against him, due to parent-child immunity.

C *Sexton v. Continental Cas. Co.*, 1991 OK 84, 816 P.2d 1135: An insurer waives its right to UM subrogation by denying coverage and cannot complain of the insured's liability settlement.

C *Thrasher v. Act-Fast Labor Pool, Inc.*, 1991 OK 12, 806 P.2d 640: No subrogation of Workers' Compensation against UM; suit against UM carrier does not require filing election in Workers' Compensation Court.

C *White v. Equity Fire & Cas. Co.*, 1991 OK CIV APP 131, 823 P.2d 953: All survivors in a death action had to share the "per person" UM limit and were not each entitled to a per person limit up to the aggregate limit for all persons injured.

1992 C *Davis v. Equity Fire & Cas. Co.*, 1992 OK CIV APP 171, 852 P.2d 780: UM limits could not be stacked where doing so would cause the stacked UM limits to exceed the unstacked liability limits.

C *Flitton v. Equity Fire and Cas. Co.*, 1992 OK 2, 824 P.2d 1132: UM coverage for a "family member," defined as a household resident related to the insured "by blood, marriage or adoption" included the named insured's step-brother.

C *Hardin v. Prudential Prop. and Cas. Co.*, 1992 OK CIV APP 42, 839 P.2d 206: A single death gives rise to only one "per person" limit, no matter how many survivors suffer damage.

H *Lewis v. State Farm Mut. Auto. Ins. Co.*, 1992 OK CIV APP 106, 838 P.2d 535: An Arkansas policy defining "uninsured" car to exclude the insured car violated Oklahoma public policy so Oklahoma law applied; disapproved by *Bernal v. Charter County Mut. Ins. Co.*, 2009 OK 28, 209 P.3d 309.

C *Provident Life & Accid. Ins. Co. v. Ridenour*, 1992 OK CIV APP 93, 838 P.2d 530: Health insurance company not entitled to subrogation against UM. Distinguished by *Reeds v. Honorable Thomas S. Walker/NAICO v. Reeds*, 2006 OK 43, 157 P.3d 100.

C *Robertson v. USF & G*, 1992 OK 113, 836 P.2d 1294: Insurers waived their objection to settlement with the tort-feasor by failing to take an adequate rejection of UM coverage and leaving UM coverage out of the policy.

1993 C *Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.*, 1993 OK CIV APP 168, 869 P.2d 852: Substitution of limits does not entitle the insurer to a credit against UM limits and subrogation against liability coverage.

C *Littlefield v. State Farm Fire and Cas. Co.*, 1993 OK 102, 857 P.2d 65: Derivative claims trigger only a single UM limit.

H *Phillips v. State Farm Mut. Auto. Ins. Co.*, 1993 OK CIV APP 27, 848 P.2d 70: UM policy pays pre-judgment interest over limits but only from date liability is established. [Reversed in *Carney v. State Farm Mut. Auto. Ins. Co.*, 877 P.2d 1113 (Okla. 1994).]

C *Phillips v. Oklahoma Farmers Union Mut. Ins. Co.*, 1993 OK CIV APP 199, 867 P.2d 1361: No error where court denied insured leave to amend to add a bad faith claim after the time permitted for amendment in pretrial order and after court had ordered UM claim and liability claim bifurcated pursuant to *Tidmore v. Fullman*.

C *Roby v. Bailey*, 1993 OK CIV APP 93, 856 P.2d 1013: Oklahoma public policy did not require an Arkansas policy to afford underinsured motorist coverage where the policy did not afford that coverage under Arkansas law.

C *Torres v. Kansas City Fire and Marine Ins. Co.*, 1993 OK 32, 849 P.2d 407: Employee occupying employer's vehicle entitled to UM coverage under employer's vehicle policy, even where accident due to negligence of a fellow employee; the UM insurer is obligated to pay pre-judgment interest.

C *Townsend v. State Farm Mut. Auto. Ins. Co.*, 1993 OK 119, 860 P.2d 236: Class 2 insured has standing to bring a bad faith action against the UM carrier.

C *Williams v. Preferred Risk Group Ins. Co.*, 1993 OK CIV APP 193, 867 P.2d 485: A murder committed by a passenger on the driver of a car was not covered by UM.

1994 C *Assalone v. Hartford Acc. & Indemn. Co.*, 1994 OK CIV APP 64, 908 P.2d 812: UM carrier may not condition payment on insured honoring request to sue tort-feasor.

C *Carney v. State Farm Mut. Auto. Ins. Co.*, 1994 OK 72, 877 P.2d 1113: Interest is recoverable from time of filing a UM suit, but only up to the UM policy limit, overruling *Phillips v. State Farm*.

H *Coker v. Allstate Ins. Co.*, 1994 OK CIV APP 62, 877 P.2d 1175: Allstate could deny stacking by charging a "per policy" premium. Reversed: *Kramer* and *Wilson v. Allstate*.

H *Fields v. Farmers Ins. Co., Inc.*, 847 F.Supp. 160 (W.D.Okla. 1993), aff'd, 18 F.3d 831 (10th Cir.): Insurance company was not required to make statutory UM offer with first renewal after the 1990 amendment to 36 O.S. §3636H but could wait until after a "phase-in" period; the equitable rule that an insurer may not get subrogation from its insured's recovery until the insured had been fully compensated does not apply to contractual subrogation. Reversed, as to the subrogation issue by *Equity Fire and Cas. Co. v. Youngblood*, 1996 OK 123, 927 P.2d 572.

C *Kramer v. Allstate Ins. Co.*, 1994 OK CIV APP 146, 909 P.2d 128: A premium-pricing scheme which charged about twice as much for a policy insuring two or more cars than for a single car resulted in a multiple premium and stacking two limits.

C *McSorley v. The Hertz Corp.*, 1994 OK 120, 885 P.2d 1343: A self-insured car rental company need not offer its customers UM.

C *Ouellette v. State Farm Mut. Auto. Ins. Co.*, 1994 OK 79, 918 P.2d 1363: An insured who is not the next-of-kin may not pursue a claim for wrongful death against his UM carrier.

H *Perkins v. Hartford Underwriters Ins. Co.*, 1994 OK CIV APP 151, 889 P.2d 1262: Failure of the insurance company to make a statutory form offer of UM equal to the liability coverage results in UM limits equal to liability limits. ORC [Overruled by *May v. Nat. Union Fire Ins. Co. Of Pittsburg, Pa.*, 1996 OK 52, 918 P.2d 43.]

C *Smith v. Shelter Mut. Ins. Co.*, 1994 OK 5, 867 P.2d 1260: The U.S. Constitution's full faith and credit clause required Oklahoma to follow an Arkansas state court declaratory judgment applying Oklahoma law, even where the result would violate Oklahoma public policy.

C *Vincent v. Tri-State Ins. Co.*, 1994 OK CIV APP 24, 874 P.2d 65: Insured who settled with claimed tort-feasor could not recover from UM carrier on theory there existed a fact question whether the claimed tort-feasor or a hit-and-run motorist caused the wreck.

C *Wickham v. Equity Fire and Casualty Company*, 1994 OK CIV APP 148, 889 P.2d 1258. holds that a person fixing a flat is considered "occupying" the vehicle for UM purposes.

1995 C *Boyer v. Oklahoma Farm Bureau Mut. Ins. Co.*, 1995 OK CIV APP 102, 902 P.2d 83: Running of statute of limitations on claim against tort-feasor did not trigger UM claim, where damages did not exceed tort-feasor's liability limit.

C *Breakfield v. Oklahoma Farmers Union Mut. Ins. Co.*, 1995 OK 139, 910 P.2d 991: Cannot stack UM where only one premium paid.

C *Burwell v. Oklahoma Farm Bur. Mut. Ins. Co.*, 1995 OK CIV APP 50, 896 P.2d 1195: An offer to one of two spouses named as insured under a UM policy is sufficient to support rejection of higher-than-minimum UM limits; an uninsured motorist carrier owed pre-judgment interest that is calculated by totaling simple interest on the ultimate recovery at the rate applicable for each year the suit is pending.

C *Forbes v. Shelter Mut. Ins. Co.*, 1995 OK CIV APP 113, 904 P.2d 159: In a wrongful death situation, UM benefits are to be distributed to those legally entitled to recover as defined by the wrongful death statute in accordance with each claimant's loss, despite conflicting UM policy provisions to the contrary.

C *Gay v. Hartford Underwriters Ins. Co.*, 1995 OK 97, 904 P.2d 83: Evidence warranted reformation to make UM limits the same as liability limits, where evidence was that the insured had asked for increased UM limits.

C *Kratz v. Kratz and Prudential General ins. Co.*, 1995 OK 63, 905 P.2d 753: Hospital lien does not attach to UM proceeds paid by the patient's own insurer. OR by statute effective 11/1/2012 per 42 O.S. §. 43.

C *Leader Nat. Ins. Co. v. Shaw*, 901 F.Supp. 316 (W.D.Okla.): Oklahoma choice of laws rules would apply Oklahoma law to a policy issued in Kansas to Oklahoma citizen, resident in Kansas, where wreck occurred in Oklahoma.

H *Wise v. Wollery*, 1995 OK CIV APP 69, 904 P.2d 151: Workers' compensation insurer had no subrogation right against UM, even though it was the employer's UM. ORS 85A O.S. 2013: Effective February 1, 2014, comp may subrogate against employer's UM.

C *Withrow v. Pickard*, 1995 OK 120, 905 P.2d 800: UM carrier is not required to offer coverage which can be stacked.

H *Woods v. Baptist Medical Center of Oklahoma, Inc.*, 1995 OK CIV APP 13, 890 P.2d 1367: Hospital lien attaches to UM benefits. [Overruled by *Kratz v. Kratz*.]

1996 H *Brashier v. Farmers Ins. Co., Inc.*, 1996 OK 86, 925 P.2d 20: Insured who prevails in UM bad faith case may recover attorney fees. Overruled by *Barnes v. Oklahoma Farm Bureau*.

C *Byus v. Mid-Century Ins. Co.*, 1996 OK 25, 912 P.2d 845: Summary judgment improper where conflicting inferences exist as to whether drive-by shooting arose from use of car, and was supervening cause, and death was caused by car's operator.

C *Carlos v. State Farm Mutual Automobile Ins. Co.*, 1996 OK CIV APP 158, 935 P.2d 1182: An insurance company is not obligated to pay UM benefits where the insured let the time run on a Governmental Tort Claims Act (GTCA) claim with damages less than the liability limits imposed by the GTCA.

C *Dennis v. Harding Glass Co.*, 1996 OK CIV APP 105; 929 P.2d 301: Workers' compensation carrier not entitled to set-off of employer-provided UM against workers' comp.

C *Equity Fire and Cas. Co. v. Youngblood*, 1996 OK 123, 927 P.2d 572: The "make whole" rule precludes subrogation of ERISA benefits against UM where the effect would be to cause the insured to be less than fully compensated or made whole.

C *Farmers Ins. Co., Inc. v. Stark*, 1996 OK CIV APP 53, 924 P.2d 798: Subrogated UM carrier stands in insured's shoes and has two years to file subrogation suit against tort-feasor.

C *Gray v. Midland Risk Insurance Co.*, 1996 OK 111, 925 P.2d 560: Reduced liability coverage for non-designated driver, also reduces UM.

C *Martin v. Hartford Underwriters Ins. Co.*, 1996 OK 55, 918 P.2d 49: No UM recovery where no legal negligence. (Child puts car in gear).

C *May v. Nat. Union Fire Ins. Co. of Pittsburg, Pa.*, 1996 OK 52, 918 P.2d 43, (opinion following certification) 84 F.3d 1342 (10th Cir. 1996): Effect of insurance company's failure to offer UM limits equal to liability limits is coverage in amount of the $10,000 minimum compulsory insurance law limits, not the liability limits. [Overrules *Perkins v. Hartford Underwriters Ins. Co.*, 1994 OK CIV APP 151, 889 P.2d 1262.]

C *Mustain v. United States Fidelity and Guaranty Co., et al.*, 1996 OK 98, 925 P.2d 533: UM insurance is primary as between the insured and UM insurer; UM insurer's responsibility to insured cannot be conditioned on amount of other UM coverage.

C *Nichols v. Nationwide Mutual Ins. Co.*, 948 F.Supp. 988 (W.D.Okla. 1996): Murrah Building bombing victims are not entitled to UM.

C *O'Brien v. Dorrough and Equity Fire and Cas. Co.*, 1996 OK CIV APP 25, 928 P.2d 322: A named driver exclusion excludes UM coverage.

C *Pentz v. Davis, et al.*, 1996 OK 89, 927 P.2d 538: An "other insurance" clause does not permit an insurance company to delay payment until another insurance company pays.

C *Phillips v. State Farm Mut. Auto. Ins. Co.*, 73 F.3d 1535 (10th Cir.): UM carrier required to pay part of insured's attorney fees and expenses for recovering subrogation.

C *Reeder v. American Economy Ins. Co.*, 88 F.3d 892 (10th Cir.1996): Stacking not permitted to recover more than insured's damages.

C *Walker v. Farmers Ins. Co., Inc.*, 83 F.3d 349 (10th Cir.1996): No UM coverage where insured shot outside car while fleeing car.

C *Weatherly v. Flourney*, 1996 OK CIV APP 109, 929 P.2d 296: A tort-feasor may not set-off damages owed the injured party by any amount the injured party receives from his/her own UM policy; even where the UM carrier pays its UM limit and waives subrogation.

C *Whitmire v. Mid-Continent Cas. Co.*, 1996 OK CIV APP 115, 928 P.2d 959: UM coverage does not apply when an insured is abducted, restrained in her car, then set on fire and burned in the car.

C *Wilson v. Allstate Ins. Co.*, 1996 OK 22, 912 P.2d 345: A policy for which a premium approximately twice that for a single vehicle is charged when multiple vehicles are insured is able to stack the coverage twice.

1997 C *Boerstler v. Donald Hoover Truck Insurance Exchange Co.*, 1997 OK 106, 943 P.2d 614: Failure to make a written rejection of UM coverage results in UM coverage at the statutory minimum of $10,000.

C *Employers Mutual Casualty Co. v. Mosby, et al.*, 1997 OK 93, 943 P.2d 593: The statute of limitation on an insurance company's subrogation interest is the same as its insured's SOL against the tort-feasor and begins to run on the date of the injury.

C *Kavanaugh v. Maryland Ins. Co.*, 1997 OK CIV APP 41, 943 P.2d 629: Insured can recover damages from UM carrier where SOL has run on tort claim and damages exceed tort-feasor's liability limit. (Overruled by *Burch v. Allstate*.)

C *Kinder v. Oklahoma Farmers Union Mut. Ins. Co.*, 1997 OK 104, 943 P.2d 617: Insurance company is not required to offer UM coverage which can be stacked.

C *Mayer v. State Farm Auto. Ins. Co.*, 1997 OK 67, 944 P.2d 288: Murrah building bombing victims are not entitled to UM.

C *State Farm Mut. Auto. Ins. Co. v. Narvaez*, 975 F.Supp. 1435 (W.D.Okla. 1997): Beating in motel parking lot, where no car is being used, does not trigger UM coverage.

1998 C *Burch v. Allstate*, 1998 OK 129, 977 P.2d 1057: UM carrier is liable for first dollar coverage, not only amount over tort-feasor's liability coverage.

C *Fugate v. Mooney and Shelter Ins. Co.*, 1998 OK CIV APP 48, 958 P.2d 818: Attorney's lien is senior and is to be paid first out of UM proceeds, balance goes to insured; all other lienholders are paid proportionately out of liability proceeds; and unsecured creditors get none of first $50,000 of personal bodily injury recovery but attorney must "marshall assets" and take all fee out of UM to free up liability to pay lienholders.

C *Newberry v. Allstate Ins. Co.*, 1998 OK CIV APP 139, 963 P.2d 632: city-owned vehicle is not an uninsured motor vehicle within meaning of § 3636 where city is self-insured.

ORC *Smith v. American Fidelity Insurance Companies*, 1998 OK CIV APP 70, 963 P.2d 16.: UM carrier liable only for amount UM coverage exceeds tort-feasor's available coverage. (Overruled by *Burch v. Allstate*.)

1999 C *Clements v. ITT Hartford*, 1999 OK CIV APP 6, 973 P.2d 902: Bad faith claim survives death of insured.

C *Swickey v. Silvey Companies*, 1999 OK CIV APP 48, 979 P.2d 266: insured's breach of contract claim and intended insured's negligence claim against agent are jury questions.

2000 C *Barnes v. Oklahoma Farm Bureau Mutual Ins. Co.* (*Barnes II*), 2000 OK 55, 11 P.3d 162: no attorney fee award on UM claim absent exception to American rule; overrules *Brashier v. Farmers Ins. Co., Inc.*, 1996 OK 86, 925 P.2d 20.

C *Narvaez v. State Farm Mutual Automobile Ins. Co.*, 1999 OK CIV APP 92, 989 P.2d 1051: Assault in parking lot before assailant steals car is not injury arising out of transportation use of car.

C *Newport v. USAA*, 2000 OK 59, 11 P.3d 190. Low-ball offers and failure to pay funeral and medical bills constituted bad faith warranting punitive damages.

C *Skinner v. John Deere Ins. Co.*, 2000 OK 18, 998 P.2d 1219: UM limits are those stated in policy where no rejection taken of UM limits equal to higher liability limits.

C *Wille v. GEICO Casualty Co.*, 2000 OK 10, 2 P.3d 888: 5-year SOL on UM claim begins to run when breach of contract occurs.

2001 C *Gates v. Eller*, 2001 OK 38, 22 P.3d 1215: Tort-feasor is not considered uninsured when 2-year tort SOL runs and damages do not exceed tort-feasor's liability limit.

C *Herren v. Farm Bureau Mut. Ins. Co., Inc.*, 2001 OK CIV APP 82, 26 P.3d 120: law of state where insured lived and policy issued applies.

C *Phillips v. New Hampshire Ins. Co.*, 263 F.3d 1215 (10th Cir. 2001): UM carrier cannot deny coverage and then assert Porter defense; release of tort-feasor does not destroy UM claim unless UM carrier is prejudiced & insured knows of UM coverage.

2002 C *Graham v. Travelers Ins. Co.*, 2002 OK 95, 61 P.3d 225: Employee covered under hired and non-owned coverage does not have to be covered under UM.

C *Mueggenborg v.Ellis* 2002 OK CIV APP 88, 55 P.3d 452: Agent has no duty to advise of higher UM limits.

C *Price v. Mid-Continent Casualty Company*, 2002 OK CIV APP 16, 41 P.3d 1019: Not bad faith for the insurance company to disagree with the insured on policy interpretation.

C *Widmann v. Acceptance Insurance Co.*, 2002 OK CIV APP 118, 63 P.3d 23: Employee may not stack employer's UM coverage.

2003 C *Burgess v. State Farm Mutual Automobile Insurance Company*, 2003 OK CIV APP 85, 77 P.3d 612: Anti-stacking and setoff clauses in Kansas policies upheld.

C *London v. Farmers Ins. Co., Inc.*, 2003 OK CIV APP 10, 63 P.3d 552: Bodily injury must be to an insured.

ORC *Mid-Continent Group v. Henry*, 2003 OK CIV APP 46, 69 P.3d 1216: Insurance company may not deny stacking where it charges single, per policy premium, without notice to insured that coverage does not stack, even where the coverage is imputed.

2004 C *American Economy Insurance Company v. Bogdahn*, 2004 OK 9, 89 P.3d 1051: No UM to corporation owner's son where corporation is the named insured.

C *Barnes v. Oklahoma Farm Bureau Mutual Insurance Company*, 2004 OK 25, 94 P.3d 25: No attorney fee on UM claim; no applicable exception to American Rule.

C *Ply v. National Union Fire Insurance Company of Pittsburgh, PA*, 2003 OK 97, 81 P.3d 643: Supervisor's bad instructions constitute use and employer's non-contemporaneous negligent maintenance of truck trigger UM coverage for employee.

C *Dodd v. Allstate Insurance Company*, 2004 OK CIV APP 82, 99 P.3d 1219: when insurance company collects the equivalent of two UM premiums under one policy with stackable coverage and second policy says UM coverage was paid for under first policy, only the two UM limits under the first policy stack.

2005 C *Ameen v. Prudential Property and Casualty Ins. Co*., 2005 OK CIV APP 23, 110 P.3d 86: (1) insurance company may not define "insured" under UM policy based on type of vehicle insured was occupying; and (2) a legitimate dispute as to validity of the provision precluded bad faith claim.

C *GEICO General Insurance Company v. Northwestern Pacific Indemnity Company*, 2005 OK 40, 115 P.3d 856: both primary liability and UM coverages must be paid before an excess liability carrier is obligated under umbrella policy.

C *Spears v. Glens Falls Insurance Company*, 2005 OK 35, 114 P.3d 448: expressly overrules *Mid-Continent Group v. Henry*, 2003 OK CIV APP 46, 69 P.3d 1216; insurer does not have to explain or warn insured that UM coverage does not stack.

C *Strong v. Hanover Insurance Company*, 2005 OK CIV APP 9, 106 P.3d 604: insurance company cannot fail to protect its subrogation rights and then deny coverage when insured settles with and releases tort-feasor.

2006 C *Alternative Med. of Tulsa, Inc. v. Cates*, 2006 OK CIV APP 65, 136 P.3d 716: "Named-driver" exclusion void if it leaves innocent insured without minimum limits UM.

C *Broadway Clinic v. Liberty Mutual Insurance Company*, 2006 OK 29, 139 P.3d 873: 42 O.S. §46 physician's lien attached to UM proceeds.

C *Haberman v. The Hartford In, Group*, 443 F.3d 1257 (10th Cir. 2006): named persons endorsement to policy on single shareholder corporation naming shareholder as insured extends coverage for all purposes.

C *Lamfu v. GuideOne Ins. Co.*, 2006 OK CIV APP 19, 131 P.3d 712: UM claimant must prove damages in excess of tortfeasor's liability limit to get UM coverage.

C *Pearson v. St. Paul Fire and Marine Ins. Co.*, 393 F.Supp.2d 1238 (W.D. Okla. 2005): UM policy did not provide greater grant of coverage than UM statute; no causal connection between injury and transportation mode of bucket truck.

C *Reeds v. Honorable Thomas S. Walker/NAICO v. Reeds,* 2006 OK 43, 157 P.3d 100: ERISA health plan has right of subrogation in UM proceeds.

2007 C *Brown v. Patel, et al.,*2007 OK 16, 157 P.3d 117: UM carrier may not intervene to protect subrogation until it pays but may move for permissive intervention to protect its liability position; Defendant's verdict against tort-feasor doesn't protect UM carrier from bad faith; Jury question precludes bad faith summary judgment.

C *Great West Casualty Company v. Boroughs,* 505 F.Supp.2d 1072 (N.D. Okla. 2007): Employer's UM Carrier not liable for injury to truck driver because employer was not negligent and liable for injury.

2008 C *Garnett v. Government Employees Insurance Company,* 2008 OK 43, 186 P.3d 935: Facts didn't support failure to pay uncontested amount of UM as bad faith.

C *Murchison v. Progressive Northern Ins. Co.*, 572 F.Supp.2d 1281 (E.D. OK 2008): No bad faith claim where insurance company paid claim, albeit late but fact question precluded summary judgment whether insurance company owed interest.

C *National American Ins. Co. v. Vallion*, 2008 OK CIV APP 41, 183 P.3d 175: Insurance company may exclude from coverage an occupant who owns a car.

2009 C *Ball v. Wilshire Ins. Co*., 2009 OK 38, 221 P.3d 717: holds that a loaned vehicle exclusion in a commercial liability policy issued to a garage business violates Oklahoma public policy and is void but that the insurance company has no duty to defend where coverage exists solely because of the compulsory insurance law and that the insurance company was not in bad faith for relying on the exclusion to delay payment of UM benefits.

C *Bernal v. Charter County Mut. Ins. Co*., 2009 OK 28, 209 P.3d 309: holds that Texas law will be applied to interpret policy provisions denying UM benefits from an accident and death in Oklahoma and disapproves *Lewis v. State Farm Mut. Auto. Ins. Co*., 1992 OK CIV APP 106, 838 P.2d 535.

C *Conner v. American Commerce Insurance*, 2009 OK CIV APP 61, 216 P.3d 850: holds that a policy provision excluding from uninsured motorist (UM) coverage a named insured who is injured while occupying a vehicle he owns but which is not covered by UM coverage is a valid exclusion.

C *Gregg v. Le Mars Ins. Co.,* 2009 OK CIV APP 93, 227 P.3d 1107: holds that prejudgment interest on an uninsured motorist (UM) claim ran from the time the insurance company paid an uncontested amount, not the time it waived subrogation.

2010 C *Beers v. Hillory*, 2010 OK CIV APP 99, 241 P.3d 285: holds that an insurance company can demand a release of a UM claim upon paying UM limits and that a

delay by the insurance company in paying UM limits was not unreasonable but that its inclusion of a requirement for indemnification language in the release to be signed by the insured and the insured's counsel created a fact question whether the insurance company acted in good faith.

C *Porter v. State Farm Mut. Auto. Ins. Co.*, 2010 OK CIV APP 8, 231 P. 3d 691: holds that the insured who settles with the tort-feasor for less than the tort-feasor's liability insurance limit cannot recover UM coverage.

C *Morris v. America First Ins. Co.*, 2010 OK 35, 240 P.3d 661: holds that a policy provision as in *Conner v. Amer. Commerce* excluding a named insured who is injured while occupying a vehicle he owns but which is not insured for UM is invalid if the insured has other coverage which attaches when he is in the vehicle.

C *Traders Ins. Co. v. Johnson*, 2010 OK CIV APP 37, 231 P.3d 790 holds that a fact question whether the named insureds' daughter had apparent authority to reject UM coverage precluded summary judgment for the insureds and against the insurance company on a claim of imputed UM coverage.

2011 C *Government Employees Ins. Co. v. Quine* 264 P.3d 1245, 2011 OK 88 holds that a UM carrier need not pay the amount of its evaluation of a UM claim without a release so long as the insured has been paid the insured's special damages.

2012 C *Argonaut Ins. Co. v. Earnest*, 861 F.Supp.2d 1313 (N.D. Okla. 2012). A road construction employee was "occupying" an insured dump truck where the dump truck was backing up and pushing a "chip spreader" on which the employee was actually riding when the spreader hit an oiler truck ahead of the rig, due to a policy provision covering special equipment being pulled or transported by the insured vehicle.

C *Davis v. Progressive Northern Ins. Co.*, 2012 OK CIV APP 98, 288 P.3d 270: Use of an offer/rejection form which had not been did not been approved by the Insurance Commissioner did not invalidate a UM rejection.

2015 C *Ford v. Gary*, 2015 OK CIV APP 63, 353 P.3d 553: Workers' comp recoupment right takes precedence over UM subrogation right; Settlement did not qualify as a compromise settlement so as to avoid Prettyman formula so injured comp claimant gets nothing from settlement.

C *Mariani v. State ex rel. Oklahoma State University*, 2015 OK 13, 348 P.3d 194: Governmental Tort Claim Act insurance and subrogation provisions don't do away with Collateral Source Rule and allow state credit for UM or med pay.

C *Serra v. Estate of Broughton*, 2015 OK 82, 364 P.3d 637: Foreign exchange student was "ward" of named insured so as to be covered under host family's UM coverage.

2016

C *Falcone v. Liberty Mutual Insurance Co.*, 2017 OK 11, 391 P.3d 105: UM carrier was in bad faith for declining to pay medical expenses as an uncontested amount based on the carrier questioning reasonableness of medical bills, where policy did not provide it paid only reasonable charges.

C *Harco Natl. Ins. Co. v. Roe,* 2016 WL 8674625 (N.D. Okla. Sept. 30, 2016): Raises but does not resolve the issue whether the UM carrier owes a duty to apportion policy limits among conflicting claims of multiple insureds. Case still pending.

C *Leritz v. Farmers Ins. Co., Inc*., 2016 OK 79, 385 P.3d 991: Kansas insured could stack UM despite a Kansas anti-stacking statute where the policy contained a provision that the most the insurance company would pay was the stated amount was "subject to the law of the state of the occurrence."

C *Martin v. Gray,* 2016 OK 114, 385 P.3d 64: Court should apply the tort, rather than the contract, choice of law rule in a bad faith UM case and so apply the law of the state having the most significant relationship to the handling of the claim.

2017 C *Massachusetts Bay Ins. Co*. 2017 WL 3586862 (N.D. Okla. Aug. 18, 2017): Counterclaim in declaratory judgment action not subject to Rule 12(b)(6) dismissal where alleged that the insurance company did no investigation before denying the claim.

C *Raymond v. Taylor*, 2017 OK 80, 412 P.3d 1141: No UM subrogation against the underinsured motorist's assets, including the proceeds of an underinsured motorist's excess or umbrella liability policy.

2018 C *Progressive N. Ins. Co. v. Pippin*, 725 F. App'x 717 (10th Cir. 2018): UM policy issued on golf cart is not subject to UM law.

2018 C *Vickers v. Progressive N. Ins. Co.*, 353 F. Supp. 3d 1153 (N.D. Okla. 2018): UM exclusion for occupying a vehicle owned by or regularly furnished for the insured's use violates public policy as applied to an insured who had no opportunity to buy UM; not bad faith for UM carrier to have such an exclusion due to reasonable basis for believing it was valid.

2019 C *Nsien v. Country Mut. Ins. Co.*, 2019 WL 573424 (N.D. Okla. Feb. 12, 2019): Premium payment question bars summary judgment whether policy lapsed; court questions *Porter v. State Farm* as authority; summary judgment inappropriate as to punitive damages in bad faith case.

2019 C *McKinney v. Progressive Direct Ins. Co.*, 2019 WL 2092578 (W.D. Okla. May 13, 2019): Trial court can evaluate UIM claim, decide offer was reasonable and grant UIM carrier summary judgment.

2019 C *Dallas v. Geico Insurance Co.,* 2019 OK CIV APP 41, __ P.3d __: Attorney's lien against UM claim not superior to medical lien when there is not enough money to pay both.

2019 C *Madrid v. State Farm Mut. Automobile Ins. Co.,* 2019 OK CIV APP __, __ P.3d__: Summary judgment on whether a UM claim is barred not appropriate where insured took the tort-feasor's smaller than limits offer for a reason other than that damages were paid by the lower offer.

2019 C *Genzer v. James River Ins. Co.,* 2019 WL 3926934 (10th Cir. Aug. 20, 2019): Tenth Circuit adopts different version of "mend the hold" doctrine than Oklahoma; provision extending coverage to a point "including, but not limited to" does not create ambiguity.

(Updated October 24, 2019)

VI. UM CASE SUMMARIES

CLASS 1 INSURED MAY STACK COMMERCIAL, FLEET UM COVERAGE; PUBLIC POLICY PRECLUDES COVERING PUNITIVE DAMAGES UNDER UM

Aetna Casualty & Surety Co. v. Craig[1] holds a Class 1 insured may stack commercial, fleet UM coverage and that public policy precludes covering punitive damages under a UM policy, even where the policy specifically purports to provide such coverage.

Craig was injured while occupying a vehicle which was one of 268 vehicles insured under his employer's commercial, fleet policy. Craig secured judgment against the tort-feasor for $5,000,000 actual and $5,000,000 punitive damages. The policy specifically purported to cover punitive damages, because it was written in South Caroline which, by statute, requires UM to cover punitive damages.

In Aetna's declaratory judgment action against Craig, the federal court found Craig to be a Class 1 insured (due to a policy ambiguity) and certified to the Oklahoma Supreme Court two questions: (1) whether a Class 1 insured may stack commercial, fleet UM coverage, and (2) whether punitive damage coverage under UM contravenes Oklahoma public policy. A plurality opinion answers the first question "yes," while a 5 to 4 opinion answers the second question "no."

The thrust of the majority opinion is that *only* a Class 1 insured may stack. Multiple concurring and dissenting opinions make clear that a majority of the court felt the federal court erred in determining Craig to be a Class 1 insured. The Court recognizes, however, that that issue, not having been certified, is not before the Court.

As to the punitive damage coverage issue, the Court finds that the purpose of awarding punitive damages (to punish and deter) would not be furthered by allowing punitive damages to be covered under UM. Further, all insureds would share in the punishment, through increased premiums.

[**Editor's note**: Oklahoma is the only state to hold punitive damage coverage contravenes public policy, where the policy specifically purports to cover them. A slight majority of states hold punitive damages covered under UM where the policy is silent with regard to punitive damage coverage.]

STATE AGENCIES MUST FOLLOW ATTORNEY GENERAL'S OPINIONS UNTIL REVERSED BY COURT; SUBROGATION OR OFFSET OF AUTOMOBILE MEDICAL PAYMENTS INSURANCE NOT PERMITTED AS TO NAMED INSURED OR HOUSEHOLD MEMBER; MED-PAY STACKING PERMITTED BUT ONLY UP TO AMOUNT OF ACTUAL LOSS

Aetna Casualty & Surety Co., et al. v. The State Board for Property and Casualty Rates[2] holds a state agency is obligated to follow Attorney General's opinions until reversed by court,

[1] 1989 OK 43, 771 P.2d 212.
[2] 1981 OK 153, 637 P.2d 1251.

subrogation or offset of automobile medical payments insurance is not permitted as to the named insured or member of the insured's household and stacking of medical payments limits is permitted but not to exceed the insured's total medical expense.

The State Board for Property and Casualty Rates denied insurance companies' policy forms relating to subrogation, offset, and stacking of automobile medical payments insurance pursuant to Attorney General's opinions interpreting 36 O.S. 1971 §6092, which provided:

> No *provision* in an automobile liability policy or endorsement for such coverage effective in this state issued by an insurer on and after the effective date of this Act *which grants the insurer the right of subrogation for payment of benefits under the expenses for the* medical *services coverage portion of the policy, to a named insured under the policy, or to any relative of the named insured who is a member of the named insured's household shall be valid and enforceable*; provided, that such policy or endorsement may provide for said insurer's rights of subrogation and setoff upon such payments to any person who is not a named insured under the policy or a relative of the named insured who is a member of the named insured's household.

The insurance companies appealed contending the Board erred in concluding it was bound to follow the Attorney General's legal interpretation, that §6092 prohibits any policy provision which makes medical coverage afforded the named insured or resident of the insured's household subject to subrogation, set-off, excess coverage or other condition which reduce recovery by the existence of other benefits and that §6092 prohibits uninsured motorist (UM) policy provisions which make medical coverage to the named insured or a resident of the insured's household subject to excess clauses, set-offs, or subrogation rights.

The Supreme Court, in an opinion by Justice Simms, reversed in part and affirmed in part, holding the Board was obligated to follow the Attorney General's opinion until the courts ruled otherwise, that §6092 prohibits subrogation or set-off of medical payments, under either medical payments or UM coverage, and that medical payments coverage may be "stacked" so as to require payment of an insured's total medical expenses up to the total stacked medical payments coverage, but that medical payments excess clauses will be permitted to prevent the insured making a double recovery for the same damages.

The Court rejects the insurance companies' contention the Attorney General's opinion in question need not be followed since (1) the State Senator requesting the opinions had no official interest in the answer but rather was attempting to assist a personal client and (2) there was not "well-founded doubt or uncertainty" giving rise to the necessity for the Attorney General's opinions.

The Court finds the real question on the appeal is not the correctness of the Attorney General's opinions but rather the correctness of the Board's order pursuant to those opinions. Therefore, the Court declines to question the correctness of the Attorney General or his motives in rendering the opinions.

The Court then rejects the insurance companies' contention that reference in the first part of

§6092 only to subrogation and not to set-off (in a provision prohibiting subrogation) expresses a legislative intent to permit set-off. The rule that "mention of one thing implies exclusion of another" must give way to the rule that interpretation of a statutory text may be had by reference to the title. The title by which §6092 was enacted refers to limiting both subrogation and set-off. Thus, the Court concludes the legislative purpose was to prohibit both subrogation and set-off.

Further, the Court considers whether §6092 prohibits subrogation of UM payments made for medical expense. While §3636E permits subrogation (subject to certain limitations), the Court concludes §6092, read in conjunction with §3636 prohibits subrogation of such payments.

The Court addresses the medical payments stacking question in a backward manner; the Court finds no statutory prohibition upon the "excess" clause (providing the coverage shall be excess to other similar coverage) and that such clause is valid. However, the Court finds the excess clause is subject to the rule of *Keel v. MFA Insurance Co.*,[3] which forbids an insurer to avoid liability under excess or other insurance clauses to preclude the insured from receiving coverage for which he paid a premium.

Therefore: ". . .excess clauses will not be used to prevent the insured from stacking, i.e., recovering the actual amount of his damages which are within the limits of the policies. . ."

The "excess" or "other insurance" clauses will, however, prevent a double recovery by the insured for the same damages.

[**Editor's Note**: To the extent this case holds med-pay can be stacked, it has been overruled in *Frank v. Allstate*.[4]]

NAMED-DRIVER EXCLUSION INVALIDATED TO EXTENT PASSENGER DEPRIVED OF UM COVERAGE IN AMOUNT EQUAL TO COMPULSORY LIABILITY INSURANCE LAW MINIMUMS

Alternative Med. of Tulsa, Inc. v. Cates v. Progressive Preferred Ins. Co.,[5] relies upon *Hartline v. Hartline*[6] in holding that to the extent a "named-driver" exclusion operates to leave innocent passenger without UM coverage in the amount of the minimum limits of our mandatory insurance laws, the exclusion is void as against Oklahoma public policy.

Miranda Cates and her children were injured while riding in a truck driven by Chris Hale, the son of Linda Hale, the owner of the truck and the named insured on the truck's insurance policy. A "named-driver exclusion" in the policy purported to negate coverage, including the policy's UM provisions, when Chris Hale drove the truck. After treatment for her injuries Cates was sued in small claims court by the Tulsa clinic to recover costs of her medical treatment. Cates in turn filed a third-party petition against Progressive for payment under Linda Hale's UM coverage. The case was transferred to the District Court which granted summary judgment for Progressive.

[3] 1976 OK 86, 553 P.2d 153.
[4] 727 P.2d 577 (Okla. 1986).
[5] 2006 OK CIV APP 65, 136 P.3d 716.
[6] 2001 OK 15, 39 P.3d 765.

Judge Robert Bell, writing the opinion for the Court of Civil Appeals, found *Hartline* dispositive. In *Hartline* our Supreme Court invalidated an exclusion that would have left an injured woman without UM coverage where her husband alone had rejected UM coverage. In voiding the exclusion in *Hartline* our Supreme Court noted the "teaching" of Oklahoma jurisprudence, that policy clauses which leave an innocent third-party victim of the insured's negligence without any insurance protection violate public policy and are void. In *Cates,* the COCA recognized that the Supreme Court upholds a named-driver exclusion in *Pierce v. Oklahoma Property and Cas. Ins. Co.*[7] Nonetheless, said COCA, "under the facts" of *Cates,* where the exclusion left an innocent insured without insurance coverage, it was void as contrary to *Hartline*. The decision of the District Court was reversed and the matter remanded for trial.

Judge Joplin concurred; Judge Hansen concurred specially, stating that she concurred with the majority based upon the reasoning found in *McElmurry v. Garbow*.[8] Certiorari was denied by the Oklahoma Supreme Court.

UM CARRIER CANNOT DEFINE "INSURED" BASED ON VEHICLE OCCUPIED; DISPUTE AS TO POLICY PROVISION VALIDITY BARS BAD FAITH CLAIM

Ameen v. Prudential Property and Casualty Ins. Co.[9] holds (1) that an insurance company may not define "insured" under an UM policy based on the type of vehicle the insured was occupying at the time of a loss, and (2) that a legitimate dispute as to the validity of the provision precluded a bad faith claim.

Ryan Ameen was named as a driver under his parents' auto policy with Prudential. He was occupying a non-owned motorcycle when he was injured in a wreck. Prudential's policy defined "WHO IS INSURED" under the UM coverage differently depending upon whether they were occupying a car or a motorcycle. The effect of the provision was to deny UM coverage where the insured was occupying a motorcycle.

Ameen argued the provision was invalid as taking away coverage based on the insured's location at the time of the wreck, in violation of both *Cothren v. Emcasco Ins. Co*.,[10] which invalidated the "owned but uninsured vehicle" exclusion, and *State Farm Mut. Auto. Ins. Co. v. Wendt*[11] which prohibited excluding from the definition of "uninsured motor vehicle" the insured vehicle. Prudential argued that under *Shepard v. Farmers Ins. Co., Inc*.[12] the exclusionary definition was valid. *Shepard* permitted the insurance company to define "insured family member" to exclude a relative resident of the household who owned his or her own vehicle. The insured also claimed Prudential's coverage denial was bad faith.

The trial court (Judge Ronald Shaffer, in Tulsa County) granted Prudential summary judgment. The Court of Civil Appeals (COCA) reversed, in an opinion by Judge Carol Hansen. The COCA

[7] 1995 OK 78, 901 P.2d 819.
[8] 2005 OK CIV APP 38, 116 P.3d 198.
[9] 2005 OK CIV APP 23, 110 P.3d 86, 2005 WL 768760.
[10] 1976 OK 137, 555 P.2d 1037.
[11] 1985 OK 75, 708 P.2d 581.
[12] 1983 OK 103, 678 P.2d 250.

held that once Ameen became an insured under the policy, he could not lose insured status under the UM coverage because he occupied the wrong kind of vehicle. This is because the UM statute, 36 O.S. § 3636 requires an offer of UM coverage whenever a company writes liability coverage and provides that the UM coverage must be "for the protection of persons insured thereunder." There has long been a dispute whether the language "persons insured thereunder" means "under the liability coverage" or "under the UM coverage." This case holds it means "under the liability coverage."

The court went on to hold, citing *Skinner v. John Deere*,[13] that a legitimate dispute as to contract interpretation entitled Prudential to judgment on the bad faith claim as a matter of law.

Judge Hansen was joined in her opinion by Judge Joplin, who concurred, and by Judge Mitchell, who concurred in result.

NO UM TO BUSINESS OWNER'S SON WHERE BUSINESS IS NAMED INSURED

American Economy Insurance Company v. Bogdahn[14] holds that where a UM policy defines who is an insured as "You" (the named insured), and lists only a corporate entity as the named insured, the shareholder's family members are not Class 1 insureds under the policy.

Mr. Bogdahn owned Hillcrest Pharmacy which had a UM policy with American Economy Insurance Company. Mr. Bogdahn made a claim under that UM policy when his son was injured while riding a friend's uninsured all terrain vehicle (ATV). American Economy denied the claim, asserting that the ATV was not a covered vehicle under Bogdahn's policy and that Bogdahn's son was not an insured under the UM endorsement.

American Economy brought a diversity suit in federal court, the Western District of Oklahoma, seeking a declaration that there was no UM coverage. The Bogdahns counterclaimed, seeking reformation of the policy to provide coverage in compliance with their reasonable expectations, and for negligence because of American Economy's failure to provide coverage as requested and reasonably expected by the Bogdahns and Hillcrest Pharmacy.

The policy language in dispute is the definition of who is an insured. The policy lists the named insured as Hillcrest Pharmacy, Inc., and defines who is an insured as

1. You.
2. If you are an individual, any "family member."
3. Anyone else occupying a covered "auto" . . . .
4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured."

The policy defines "family member" as "a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child."

The Bogdahns argue that the court must find the policy language ambiguous for two reasons.

[13] 2000 OK 18, 998 P.2d 1219.
[14] 2004 OK 9, 89 P.3d 1051.

First, to be consistent with the Oklahoma Supreme Court's holding in *Aetna Cas. & Sur. Co. v. Craig*, 1989 OK 43, 771 P.2d 212. Bogdahn argues that the Oklahoma Supreme Court held in *Aetna* that when the named insured is a corporation, the corporation's shareholders are substituted as Class 1 insureds and the employees are Class 2 insureds. Therefore, the court must be consistent and hold Mr. Bogdahn, the sole shareholder of Hillcrest Pharmacy, as a Class 1 insured. This would render Bogdahn's son as an insured "family member."

Second, the court must find the policy language to be ambiguous because some jurisdictions find it ambiguous and some don't. Therefore, the language is susceptible of more than one interpretation.

The district court granted American Economy summary judgment, concluding Bogdahn's son was not an insured under the UM endorsement. It also determined there was no basis for reforming the policy.

On the Bogdahns' appeal, the Tenth Circuit Court of Appeals certified a question to the Oklahoma Supreme Court, which rephrased it into two as follows:

> 1. Is the definition of an insured in the UM endorsement of the American Economy policy issued to Hillcrest Pharmacy, Inc. ambiguous, such that the doctrine of reasonable expectations can be applied to define Blake Bogdahn as an insured?
>
> 2. If so, does the statutorily mandated UM selection/rejection form create a reasonable expectation of coverage for Blake Bogdahn, such that the policy must be reformed to provide such coverage?

The Supreme Court held that the definition of an insured was not ambiguous, so that the reasonable expectations doctrine does not apply, rendering the second question moot.

The Court explained that the only "who is an insured" definition that applies is the one that reads "1. You." Hillcrest Pharmacy is not an individual, so the language defining family members of an individual as insureds does not apply. Hillcrest Pharmacy is a Class 1 insured. If it were an individual and had family members, they, too, would be Class 1 insureds.

The Court explained that it did not hold in *Aetna v. Craig* that shareholders are substituted as Class 1 insureds where only a corporate entity is listed as the named insured. Furthermore, the policy language is not considered ambiguous merely because there is disagreement among other jurisdictions.

Justice Opala concurred in the result, by separate opinion. Justice Hargrave dissented. Chief Justice Hodges and Justices Lavender, Kauger, Boudreau, Winchester, and Edmondson concurred.

PIECE OF CONSTRUCTION EQUIPMENT BEING PUSHED BY DUMP TRUCK WAS COVERED BY UM SO OCCUPANT OF EQUIPMENT WAS AN INSURED; POLICY STATING A /$1 MILLION "PER ACCIDENT" POLICY LIMIT BUT $125,000 PER PERSON LIMIT FOR LIABILITY PROVIDED ONLY $125,000 UM

Argonaut Ins. Co. v. Earnest[15] holds that a piece of construction equipment being pushed by an insured dump truck in reverse was insured under the truck's motor vehicle policy so that an employee occupying the equipment was insured under the truck's UM policy but that the UM coverage applicable was the $125,000 per person liability limit, not the $1 million "per accident" limit stated for the UM coverage on the declarations page.

Earnest was an employee of a road construction company riding on a "chip sealer." The chip sealer was following an oiler truck which was laying down oil onto which the chip sealer would spread rock chips dumped into the sealer by a dump truck moving in reverse with the dump bed elevated and pushing the sealer by a metal bar attaching the sealer to the dump truck.

The oiler truck got a plugged nozzle and had to stop to clear it. The dump truck driver could not see that the oiler truck had stopped because of the raised bed. The chip spreader on which Earnest was riding hit the rear of the oiler truck and pinned Earnest's leg between the two vehicles.

The equipment all belonged to Creek County, which had the dump truck insured with Argonaut. The policy was apparently intended to provide coverage for Governmental Tort Claim Act liability. It provided liability limits of $125,000 per person injured and $1 million for all persons injured in any one accident. The UM limit was stated to be $1 million per accident with no per person limit stated.

Earnest claimed that he was an insured under the policy as a person occupying an insured vehicle because of a provision that mobile equipment (not otherwise covered under the policy) was covered if it was being "carried or towed" by a covered auto. He claimed that the UM coverage was $1 million because no other limit was mentioned for UM.

The insurance company brought a declaratory judgment arguing the chip sealer was not a covered auto and so Earnest was not an insured, and that, if he was, the UM limit was $125,000 and not $1 million. The U.S. District Court for the Northern District, Judge Claire Egan, held that Earnest was a covered insured but that the coverage was $125,000 and not $1 million.

The Court found little case law on whether a piece of construction equipment being pushed by a covered vehicle was covered under a provision that such equipment was covered if it was being "towed or carried" by the insured vehicle. It found no Oklahoma authority.

The Court went to the dictionary definitions of "carried" or "towed" and concluded that the chip sealer was being "carried or towed" when it was being pushed by the dump truck in reverse. The Court reasoned that it would be clear the coverage applied if the truck were moving forward and pulling the chip spreader and that it would be improper to say the vehicles were covered when

[15] 861 F.Supp.2d 1313 (N.D. Okla. 2012).

moving one way but not the other just because the vehicle was in a different gear.

The Court held the policy limit was $125,000 instead of $1 million because *Gray v. Midland Risk Insurance Co.*[16] restricts the amount of UM coverage to an amount "not to exceed the liability limit" pursuant to 36 O.S. § 3636. This "steps down" the otherwise apparent $1 million UM limit.

NOT NECESSARY TO SUE TORT-FEASOR TO RECOVER UM; UM CARRIER MAY BRING THIRD-PARTY CLAIM AGAINST TORT-FEASOR TO RECOVER SUBROGATION BEFORE PAYING CLAIM

Assalone v. Hartford Acc. & Indemn. Co.[17] holds an insured need not sue the tort-feasor to recover from the UM carrier and that the UM carrier may assert a third-party subrogation claim against the tort-feasor before paying the claim.

Ms. Assalone (insured) was hurt in a wreck while on the job, due to the fault of a driver working for another company. She collected Workers' Compensation and then made claim against her employer's car insurance company, Hartford. Presumably in order to avoid the Work Comp subrogation against the tort-feasor's coverage, she told Hartford she would not sue the tort-feasor. Hartford refused to pay unless she did so, arguing that otherwise Hartford's subrogation rights would be impaired.

She sued Hartford, which third-parties in the tort-feasor and his employer, seeking subrogation. Hartford moved for summary judgment against the insured; the tort-feasor moved for summary judgment against Hartford, claiming Hartford had no subrogation right to assert until it paid the claim. The trial court gave the tort-feasor summary judgment against Hartford and Hartford summary judgment against the insured. Both appealed. The Court of appeals reversed both rulings, in an opinion by Judge Garrett.

The ruling that the insured does not have to sue the tort-feasor but may proceed directly against the UM carrier is supported by *Keel v. MFA*, [18] *Uptegraft v. Home Ins. Co.*,[19] and *Buzzard v. Farmers Ins. Co., Inc.*[20] *Uptegraft* held the insured could sue the UM carrier, even if the statute has run against the tort-feasor. However, it left open the question here: whether, when the UM carrier demands the insured protect its subrogation, the insured must sue the tort-feasor.[21]

The other part of the ruling, that the UM carrier may seek subrogation before it pays the claim is,

[16] 1996 OK 111, 925 P.2d 560.
[17] 1994 OK CIV APP 64, 908 P.2d 812.
[18] 1976 OK 86, 553 P.2d 153.
[19] 1983 OK 41, 662 P.2d 681.
[20] 1991 OK 127, 824 P.2d 1105.
[21] 662 P.2d at 687, N. 12: "We leave unsettled whether the same result [insured recovers] would be reached if . . . the insured refused to heed the insurer's demand — made within the two-year tort period — to protect its subrogation rights by filing a lawsuit against the uninsured tort-feasor; . . ."

on its face contrary to *Ohio Cas. Co. v. First Nat. Bank of Nicholasville*.[22] The rule in that case, that the insurer must pay the claim before it may sue for subrogation, is contrary to the general third-party practice. The Court here does not refer to *Ohio Cas. Co.* nor give any indication it is aware of the conflict in the rulings.

The first ruling, that the insured may sue the UM carrier and not sue the tort-feasor doesn't answer the real question: how much may the insured recover from the UM carrier. Under *Buzzard*'s dictum, she may recover only damages in excess of the liability limits of the tort-feasor and the tort-feasor's employer.

PASSENGER MAY NOT STACK COVERAGE OF VEHICLES INSURED UNDER SEPARATE POLICIES

Babcock v. Adkins[23] holds that one insured solely by reason of occupying one of several vehicles owned by the same person but insured under separate policies may not stack the UM coverage of the separate policies covering vehicles not involved in the collision.

The owner of a vehicle which collided with an uninsured motorist owned four cars, each insured under a separate policy. The trial court permitted passengers in the vehicle, who were not named insureds or household members, to stack the UM coverage of separate policies covering all four vehicles. The Supreme Court reversed.

Persons insured only by reason of occupying an insured vehicle may not stack the UM coverage of other vehicles insured under separate policies. If, however, the passengers are also insured by reason of being named insureds or household members under the separate policies, they may stack. (The same rule has since been adopted with regard to passengers in one of several vehicles insured under a single policy. See *Rogers v. Goad*.[24])

GARAGE POLICY'S "LOANED VEHICLE" EXCLUSION INVALID TO THE EXTENT OF COMPULSORY INSURANCE LAW LIMITS; INSURANCE COMPANY HAS NO DUTY TO DEFEND WHEN COVERAGE EXISTS ONLY BECAUSE OF COMPULSORY INSURANCE LAW; INSURANCE COMPANY NOT IN BAD FAITH TO RELY ON EXCLUSION AND DELAY PAYMENT OF UM ON THAT BASIS

Ball v. Wilshire Ins. Co.[25] holds that a loaned vehicle exclusion in a commercial liability policy issued to a garage business violates Oklahoma public policy and is void but that the insurance company has no duty to defend where coverage exists solely because of the compulsory insurance law and that the insurance company was not in bad faith for relying on the exclusion to delay payment of UM benefits.

Ms. Ball used a "loaner" car belonging to the garage where her car was being repaired. She had a

[22] 425 P.2d 934, 935, 941 (Okla. 1967) (a person must have paid a debt due a third party before he can be subrogated to that party's rights and maintain an action against one primarily liable. Syll. 4 by the Court).
[23] 1984 OK 84, 695 P.2d 1340.
[24] 739 P.2d 519 (Okla. 1987) (discussed below).
[25] 2009 OK 38, 221 P.3d 717.

wreck in the loaner. People in each of the two cars involved, including Ms. Ball, were badly injured and one died. This resulted in liability claims against Ms. Ball and an uninsured motorist (UM) claim on her behalf against Wilshire Insurance Co. She had no insurance coverage of her own.

Wilshire denied her UM claim and refused to defend the liability coverage, resulting in judgments in excess of $20 million against her. After she sued Wilshire for bad faith, Wilshire paid the UM coverage, although it maintained it did not have to do so.

The federal district court ruled for the insurance company. On appeal, the Tenth Circuit Court of Appeals certified questions to the Oklahoma Supreme Court, resulting in the above holdings, in an opinion by Justice Opala.

Justice Opala followed a long line of Oklahoma cases in holding that exclusions from coverage permitted in other forms of insurance will not be permitted in the case of motor vehicle policies issued to comply with the compulsory insurance law.[26] The rationale behind these holding is that the purpose of compulsory insurance is not to protect the insured but rather to protect injured members of the general public, to the extent of the required coverage under the compulsory insurance law (presently $25,000 per person and $50,000 for all persons injured in one wreck).

Permitting exclusions such as the loaned vehicle exclusion would violate public policy, so the exclusion is void as violative of Oklahoma public policy. However, the Court also answered a question posed by the federal court that the insurance company which owes coverage only because of the Compulsory Insurance Law does not owe a duty of defense to the insured. Rather, the duty to defend under the liability policy is a contractual one and, as between the insured and the insurance company, there is no contractual duty. Based on this reasoning, the insurance company had no duty to defend Ms. Ball and is not in bad faith for having failed to do so.

The Court also held that it was not bad faith for the insurance company to rely on the invalid exclusion to deny or delay payment of UM benefits. There was, at the time the company denied the UM claim, no controlling legal authority on that point.

Editor's Note: There is a major flaw in this opinion. The opinion says the record is clear that Ms. Ball had no coverage of her own. The policy contained an exclusion purporting to exclude vehicles loaned to customers but also specifically provided:

> The following are 'insureds' for covered autos: . . . .
>
> (d) Your customers, if your business is shown in the Declarations as an 'auto' dealership. However, if a customer of yours:
>
> (i) has no other available insurance (whether primary, excess or contingent) they are an 'insured' only up to the compulsory or financial responsibility law limits where the covered 'auto' is principally garaged.

It seems clear from this language that Ms. Ball was an insured under the policy to the extent of

[26] 47 O.S. § 7-600 *et seq*.

compulsory insurance law limits, not because of the provisions of the compulsory insurance law but reason of the policy language. At best from the insurance company's point-of-view, the policy would be ambiguous. The ambiguity would be construed in favor of coverage. Since she was covered by the terms of the policy, the insurance company owed a defense and could be liable for the whole judgment for having breached its contract to defend. Similarly, the insurance company owed the UM coverage without consideration of the legal authority whether the exclusion was valid. Failure to promptly pay the UM was bad faith.

The Court alludes to this problem in a footnote.[27] It says that policy defines "insured" to include customers such as Ball. But, it says the exclusion applies to exclude coverage of customers with minimal liability coverage of their own. It then says that the certification order doesn't tell us whether Ball had her own liability coverage or not. However, it says the record indicates she did not and that both Ball and Wilshire indicate she did not. The note then says " . . . the court does not presume facts outside those offered by the certification order, but we may consider uncontested facts supported by the record." The Court just doesn't seem to recognize that this fact makes their decision wrong.

WORKERS' COMP EXCLUSIVE REMEDY DOES NOT BAR UM RECOVERY

Barfield v. Barfield, et al.[28] holds that an employee, injured by the negligence of a co-employee, may recover from the employee's own UM insurer, even though he could not sue the co-employee due to the exclusive remedy of Workers' Compensation.

Truck driver, Robert Barfield, was teaching his brother, Vern, routes and procedures of their common employer. Both were killed in a one-vehicle accident. After the survivors of both obtained Workers' Comp death benefits, Vern's widow sued Robert's estate and Vern's UM carrier.

The trial court sustained summary judgments as to both, based on the exclusive remedy of the Workers' Compensation Act.

Plaintiff appealed, contending: (1) the two drivers were independent contractors, not co-employees, so the Workers' Compensation Act did not bar recovery and (2) the exclusive remedy of the Workers' Compensation Act did not bar recovery against the dead passenger's UM carrier. The Supreme Court affirmed as to the driver's liability but reversed as to the UM carrier. The uncontroverted evidence indicated both Barfields were employees, not independent contractors.

However, the exclusive remedy of the Workers' Compensation Act did not prevent the passenger's estate from being "legally entitled to recover" against the UM carrier. Justice Wilson authored the majority opinion in which Justices Doolan, Simms, and Summers concurred. Justice Kauger concurred by reason of *stare decisis*, without separate opinion. Justices Hargrave, Hodges, and Lavender concurred in a dissenting opinion by Justice Opala. The dissent argued that the Workers' Comp exclusive remedy precluded the driver's estate from being "legally

[27] Footnote 26 in the opinion.
[28] 1987 OK 72, 742 P.2d 1107.

entitled" to damages and so barred a UM recovery.

The later case of *Torres v. Kansas City Fire and Marine Ins. Co.*[29] resolved the question whether the employee could recover under the employer's UM coverage. It held he could.

UM INSURER NOT ENTITLED TO CREDIT AND SUBROGATION FOR SUBSTITUTED PAYMENT

Barnes v. Oklahoma Farm Bureau Mut. Ins. Co.[30] (Barnes I) holds that a UM insurance company is not entitled to take credit against its UM limits and take subrogation against the liability limits, when it substitutes payment for tendered liability limits, pursuant to the 1989 amendment to 36 O.S. 1991 §3636E.

Ms. Barnes was insured by Farm Bureau with $15,000 UM limits, which was primary UM. She had an excess UM policy with State Farm for $25,000. She was injured due to the negligence of a tort-feasor with a $10,000 liability limit.

The tort-feasor's liability carrier tendered its $10,000. Farm Bureau offered to substitute $10,000, pursuant to the above statute, but insisted upon a release providing that Farm Bureau was released to the extent of the $10,000 payment and entitled to subrogation against the liability coverage. Ms. Barnes lawyers rejected the substitution, because of this language.

The trial court granted Ms. Barnes partial summary judgment, holding that Farm Bureau had waived its subrogation by reason of not having made a proper offer to substitute. The trial court certified that there was no just reason to delay final entry of judgment, pursuant to 12 O.S. 1991 §1006.

The Court of Appeals affirmed, in an opinion by Judge Hansen. The effect of the release upon which Farm Bureau insisted would have been that Farm Bureau would have paid $10,000 in substitution, ultimately gotten that money back from the liability carrier and been out only its remaining $5,000 of UM coverage.

The effect of this on the insured would have been that she would have had only $40,000 in benefits (State Farm's $25,000 excess UM, the tort-feasor's $10,000, and $5,000 UM from Farm Bureau) instead of the $50,000 to which she was entitled ($10,000 from the tort-feasor, $15,000 UM from Farm Bureau, and $25,000 excess UM from State Farm). The provision in 36 O.S. 1991 §3636E that any payment made by the insured tort-feasor should not reduce or be a credit against the UM limits prohibits that result.

This case clears up a troublesome question. The UM carrier can keep the insured from taking the tort-feasor's money and suing the UM carrier directly, by substituting its money. It cannot, however, force the insured to take less than the full liability and UM coverage, if the insured's damages are that great.

[29] 1993 OK 32, 849 P.2d 407.
[30] 1993 OK CIV APP 168, 869 P.2d 852.

NO ATTORNEY FEE AWARD ON UM CLAIM ABSENT EXCEPTION TO AMERICAN RULE

Barnes v. Oklahoma Farm Bureau Mutual Ins. Co.[31] (Barnes II) holds insured is not entitled to an attorney fee award on a UM claim absent an exception to the American Rule; and overrules *Brashier v. Farmers Ins. Co., Inc.*[32]

Barnes v. Oklahoma Farm Bureau will be a much discussed and controversial case. It is a bad faith uninsured motorist (UM) case but will be most cited for reversing *Brashier v. Farmers Ins. Co., Inc*. and holding that attorney fees may not be awarded by the court in a bad faith action arising out of a UM case. It may or may not also hold that attorney fees are not recoverable from the jury in a UM bad faith case, as an item of damage.

The bad faith part of the case is not particularly remarkable. However, it may add a case to cite in those cases in which the insurance company claims it was not in bad faith, even though wrong, in denying coverage because the legal issue was an unsettled one.

Ms. Barnes was injured in a head-on collision which was clearly the fault of the adverse driver, who had a $10,000 liability policy. She was covered by two UM policies, one with State Farm for $25,000 and one with Farm Bureau for $15,000. She was badly hurt, with $15,000 in medical bills alone. State Farm paid its $25,000 UM policy and the tort-feasor's liability carrier tendered its $10,000 limit.

Farm Bureau, on the advice of its lawyer, took the position that, if it substituted its $10,000 for the tendered liability limits, under 36 O.S. § 3636(E), it would be entitled to credit for that payment against the UM limits and would be entitled to subrogation against the tort-feasor's liability limit. The insured insisted the substitution by Farm Bureau was separate from its UM limits and that Farm Bureau would not be entitled to subrogation if the insured's damages were as great as the total of the coverage of all three policies ($50,000).

Because of this dispute, the insured did not get the benefit of either the $10,000 in liability money or Farm Bureau's $15,000 in UM until more than two years after the accident, when the Court of Appeals upheld the insured's position in what now becomes *Barnes I*.[33] The bad faith part of the case then went to trial, resulting in the present appeal and opinion.

The trial court (Judge Bryan Dixon, in Oklahoma County) lifted the cap on punitive damages. The jury awarded $10,000 actual damages on the bad faith claim and $1.5 million in punitive damages. The trial court separately awarded $300,000 in attorney fees. The Court of Civil Appeals affirmed. The Supreme Court affirmed all but the attorney fee award but reversed that part of the case, in an opinion by Justice Lavender.

As to the bad faith claim, the Court held that the advice of counsel upon which Farm Bureau relied was patently unreasonable. The insurance company could not in good faith have relied on

[31] 2000 OK 55, 11 P.3d 162.
[32] 1996 OK 86, 925 P.2d 20.
[33] 1993 OK CIV APP 168, 869 P.2d 852.

the advice in taking the position it did.

The attorney fee issue is a little more involved. The "American Rule" is that the winner of a lawsuit may not recover attorney fees absent a statute or contract providing for them or an "equitable exception to the American Rule." The California cases, upon which Oklahoma relied in adopting its first party bad faith cause of action in *Christian v. American Home Assurance Co*.[34] reasoned that when the insurance company refuses to pay a claim and forces the insured to hire an attorney, the attorney fees become an element of the insured's damages arising from the bad faith denial. *Christian* noted that the insured sued in the bad faith case for, among other things, attorney fees.

However, *Christian* did not directly decide the attorney fee issue. Because the prior law had been that there was no first party bad faith cause of action (*Christian* established one), the *Christian* court just reversed a summary judgment for the insurance company and remanded the case for further proceedings.

With regard to the attorney fee claim, the *Christian* court noted:

> "Ordinarily, attorney fees may not be recovered in the absence of an agreement or statutory authority . . . . One exception to this rule is that where a litigant has acted in bad faith, wantonly or for an oppressive reason, the trial court, in exercise of its equitable power, may award attorney fees."

The *Christian* court cited in support of that *dictum City National Bank & Trust Co. v. Owens*.[35] Perhaps significantly, both *Christian* and *Owens* involved litigation, as opposed to pre-litigation, bad conduct. In *Owens*, an attorney tried a case all the way to submitting it to a verdict and then dismissed without prejudice. The Supreme Court held the trial court had inherent equitable jurisdiction to make the plaintiff pay the opposing party's attorney fee for the needless trial.

In *Christian*, a disability insurance company denied benefits, claiming a defense the invalidity of which did not become apparent until the trial of that case. The *Christian* case which reached the Supreme Court was a second suit for bad faith, based on the handling of the claim involved in the first case. Thus, the *Christian* court's citation to *Owens* makes it appear the attorney fee it was saying Mr. Christian might recover was one for the litigation conduct of the insurance company in the first case. This is the argument Justice Lavender advances in discussing and distinguishing *Christian*.

Brashier, which *Barnes* overrules, resolved the problem, at least until now. In *Brashier*, Justice Opala held that the prevailing plaintiff in a bad faith UM case could recover attorney fees, in a post-judgment proceeding with the fee being set by the court. The problem only arises in UM cases because 36 O.S. § 3629(B), enacted since *Christian*, provides for attorney fees to the prevailing party in a suit on an insurance policy. However, § 3629(B) excludes from its operation suits on UM policies.

As noted, *Barnes* reverses the award of a $300,000 attorney fee to plaintiff's attorney, by

[34] 1977 OK 141, 577 P.2d 899.
[35] 1977 OK 86, 565 P.2d 4.

reversing *Brashier*. All Justices concur except Hargrave, who disqualified, and Opala, who bitterly dissents to the overruling of his *Brashier* decision.

The scope of the Barnes ruling is not clear. Justice Lavender's majority opinion says:

> ". . .because Barnes did not have the benefit of our ruling in this case when fashioning her attorney fee quest in the trial court, we remand to the trial court to give her an opportunity to apply for fees under a recognized exception to the American Rule. As both *Christian* and *Owens* recognized, one such exception is, where an opponent engages in bad faith, wanton or oppressive litigation misconduct, a trial court, in the exercise of its inherent equitable power, may award attorney fees. Whether Barnes can prove herself entitled to such fees under the Owens exception will be a question for the trial court upon proper presentation of pleadings and proof."

While both Justice Lavender's majority opinion and Justice Opala's dissent discuss *Owens*, neither give a clue that they realize it has been overruled, at least in cases like *Barnes* and *Christian*.

Gorst v. Wagner[36] holds that 23 O.S. § 103, which permits an award of attorney fees up to $10,000 for asserting a claim or defense "not well grounded in fact" or unwarranted by existing law, "pre-empted" the common law rule embodied in *Owens*, so that a $34,000+ attorney fee was error. That statute applied to "any action for injury to personal rights," which would seem to include *Owens*, *Brashier* and *Christian*.

Further, it is not totally clear whether, in future cases, *Barnes* will preclude including attorney fees as an element of damage in the case going to the jury. *Barnes* seems susceptible to that interpretation but never says so directly. The *Barnes* opinion says:

> Although in *Christian* the attorney fees expended in prosecuting the Garvin County action were sought by the insured as part of the damages purportedly caused by the insurer's bad faith refusal to pay his disability claim, this Court did not approve their recovery as an element of damage caused by the refusal to pay the disability claim. What *Christian* held was that the attorney fees the insured expended in prosecuting the Garvin County action were potentially recoverable from the insurance company — as a recognized equitable exception to the American Rule — if the trial court in the second action brought on a tort theory of recovery found the insurance company had engaged in litigation misconduct in the Garvin County action.

However, in concluding the opinion, Justice Lavender says:

> In that we have decided to no longer follow *Brashier* because it represents an incorrect exposition of Oklahoma law as to the recovery of attorney fees in this type of case and *Brashier* does support insurer's claim that error occurred by virtue of the trial judge deciding the attorney fee question, rather than submitting the issue

[36] 1993 OK 50, 865 P.2d 1227.

> to the jury as a recoverable item of damage under insured's claim for bad faith, we must reverse the attorney fee award of the trial judge.

So, can you still recover attorney fees as an element of damage in a bad faith case? Maybe *Barnes* is the "tort and insurance lawyers' full employment act of 2000." It should also be noted that *Barnes* does not purport to overrule *Brashier* in its entirety. In addition to holding an insured may recover attorney fees in a UM bad faith case, *Brashier* also holds the insured may recover pre-judgment interest (currently 8.73%) pursuant to 12 O.S. § 727(A)(2) as a recovery by reason of injury to personal rights. This is important because the proviso which makes 36 O.S. § 3629(B) inapplicable to UM claims applies to interest as well as attorney fees. *Barnes* does not purport to disturb that part of the *Brashier* holding.

There is another important implication from *Barnes*. While Oklahoma's state courts have not yet ruled on the issue, *Timberlake Construction Co. v. U.S. Fidelity and Guaranty Co*.[37] predicts that Oklahoma law will not permit "litigation bad faith" or evidence of litigation conduct in a bad faith case. With the Oklahoma Supreme Court saying in *Barnes* that the basis of an attorney fee award in a bad faith case may be litigation conduct, under *Owens*, that prediction can hardly be true.

NO ATTORNEY FEE ON UM CLAIM

Barnes v. Oklahoma Farm Bureau Mutual Insurance Company[38] holds there is no attorney fee entitlement on an uninsured motorist claim. There is no applicable exception to the American Rule and 36 O.S. § 3636 specifically prohibits an attorney fee award, overriding other statutes regarding attorney fee awards.

This case has been bouncing around the courts since 2000. It involves the issue whether an attorney fee award applies to a UM claim. Originally, Judge Bryan Dixon, Oklahoma County, granted Barnes an attorney fee. The Court of Civil Appeals (COCA) affirmed, but reduced the $300,000 attorney fee award to $10,000 under 23 O.S. § 103. However, the Supreme Court reversed the attorney fee award and remanded the case to the district court for a determination whether there was an applicable exception to the American Rule. So far, (including today's discussion) Barnes has been unable to provide the court with an exception to the American Rule that each party pays their own attorney fees unless otherwise provided for by contract or statute.

In this latest appeal, Barnes argued she is entitled to an attorney fee under (1) 36 O.S. 2001 § 1219, which grants an attorney fee award in cases involving accident and health policies, arguing that UM coverage is considered accident and health insurance; (2) common law exception for bad faith litigation conduct under *City National Bank & Trust Co. v. Owens*, 1977 OK 86, 565 P.2d 4; and (3) common law exception for conferring a benefit on a class of persons/private attorney general rationale. (The Court did not consider the third rationale because it was not raised on appeal.)

Judge Bryan Dixon denied Barnes' renewed application for an attorney fee. The COCA reversed

[37] 71 F.3d 335 (10th Cir.1995).
[38] 2004 OK 25, 94 P.3d 25.

and remanded, holding that Barnes was entitled to attorney fees under the *City National Bank* bad faith litigation conduct exception, but again limited the award to $10,000 under 23 O.S. § 103.

The Supreme Court reversed the COCA and affirmed the trial court; Barnes is not entitled to an attorney fee award on a UM bad faith claim. The Court held that a UM policy is defined by 36 O.S. § 3636, which specifically prohibits an attorney fee award on UM claims. A UM policy is not an accident and health policy as defined by 36 O.S. 2001 § 1219. Therefore, § 1219 does not apply and does not entitle Barnes to an attorney fee award.

The Court rejects Barnes argument she is entitled to an attorney fee award under *City National Bank* because the conduct giving rise to the bad faith claim is Farm Bureau's conduct prior to filing the lawsuit. Therefore, it is not considered litigation conduct, and *City National Bank* does not apply.

Finally, the Court refused to consider Barnes' entitlement under 23 O.S. § 103, which allows up to $10,000 costs and attorney fees to the prevailing party damages claims involving personal injury or injury to personal rights, where the non-prevailing party acted in bad faith. Barnes did not seek entitlement under § 103; she merely argued that the limitation to $10,000 was unconstitutional.

Justice Hargrave wrote for the majority, concurrences by Chief Justice Hodges, Justices Watt, Kauger, Boudreau, Winchester, and Edmondson. Justice Lavender concurred in part and dissented in part. Justice Opala dissented, referring to his dissenting opinion in the first *Barnes* opinion, 2000 OK 55, 11 P.3d 162, 183-190.

ADDING CAR TO POLICY CONSTITUTES NEW POLICY (NOT A RENEWAL) REQUIRING NEW UM OFFER AND REJECTION

Beauchamp v. Southwestern National Insurance Company[39] holds that the addition of a car to an automobile insurance policy constitutes issuance of a new policy (not a renewal) so that a new offer and rejection of uninsured motorist coverage was required, failing which uninsured motorist existed, as a matter of law.

The insured rejected uninsured motorist coverage on a policy covering two vehicles. Later, he added a third vehicle to the policy. No offer or written rejection of UM coverage accompanied addition of the third car. The insured was injured in a wreck and made a UM claim. The trial court held addition of the third car constituted a new (rather than a renewal) policy so that 36 O.S. 1981 §3636A required a new UM coverage offer and §3636F required a written rejection. Since no such offer or rejection existed, UM coverage existed, as a matter of law. The trial court certified an interlocutory appeal.

The Supreme Court granted certiorari and affirmed the trial court. The provision in 36 O.S. 1981 §3636F that no new UM offer and rejection was required on a renewal policy did not apply. Here a new vehicle (not a replacement vehicle) was being insured under the policy. This constituted a

[39] 1987 OK 96, 746 P.2d 673.

new policy.

Because this decision reverses a contrary result in *Hicks v. State Farm*,[40] the decision will be given prospective effect only. It will be effective with claims arising after December 12, 1987, the date of the mandate in *Beauchamp*.

TEXAS LAW APPLIES TO INTERPRET POLICY ISSUED IN TEXAS BUT INVOLVING AN ACCIDENT AND DEATH IN OKLAHOMA

Bernal v. Charter County Mut. Ins. Co.[41] holds that Texas law will be applied to interpret policy provisions denying UM benefits from an accident and death in Oklahoma and disapproves *Lewis v. State Farm Mut. Auto. Ins. Co*.[42]

Billy Bernal, an Oklahoma resident, was killed in a one-car crash in Oklahoma while a passenger in a pickup truck insured in Texas. Under Oklahoma law, Bernal's estate could recover both the liability and UM coverage of the vehicle.[43] Under Texas law, a policy provision precluding coverage would be valid. The trial court, Judge Bill Hetherington, in Cleveland County, held Texas law applied and denied UM coverage. The Court of Civil Appeals affirmed. The Supreme Court granted certiorari to resolve a conflict within the Courts of Civil Appeal but also affirmed, in a unanimous opinion by Justice Opala.

The Court noted the confusion which has followed its decision in *Bohannan v. Allstate Ins. Co.*[44] (The Court calls the progress of Oklahoma conflicts law following *Bohannan* "a progression of mutations.") *Bohannan* laid down the rule that an insurance policy would be interpreted by the law of the place where the policy was written unless (1) application of the other state's law would violate Oklahoma public policy or (2) another state had a more important relationship to the transaction.

Since that time, the Courts of Civil Appeals and the federal courts have reached conflicting results in interpreting that holding. The Court resolved that conflict by "disapproving" *Lewis v. State Farm Mut. Auto. Ins. Co*.[45] That case had applied Oklahoma law where the vehicle was insured in Arkansas but was involved in a wreck in Oklahoma. Oklahoma law would permit a UM recovery while Arkansas law would not. The Court applied Oklahoma law.

The Court instead approves a line of Court of Civil Appeals cases which apply exclusions valid in other states but not valid in Oklahoma involving wrecks in Oklahoma.[46]

The Court declined to consider the thrust of Bernal's arguments: (1) that *Bohannan* and the

---

[40] 1977 OK 150, 568 P.2d 629.
[41] 2009 OK 28, 209 P.3d 309.
[42] 1992 OK CIV APP 106, 838 P.2d 535.
[43] *Heavner v. Farmers*, 1983 OK 51, 663 P.2d 730.
[44] 1991 OK 64, 820 P.2d 787.
[45] 1992 OK CIV APP 106, 838 P.2d 535.
[46] *Roby v. Bailey*, 1993 OK CIV APP 93, 856 P.2d 1013; *Herren v. Farm Bureau Mut. Ins. Co., Inc.*, 2001 OK CIV APP 82, 26 P.3d 120; *Burgess v. State Farm Mut. Auto. Ins. Company*, 2003 OK CIV APP 85, 77 P.3d 612.

Court of Civil Appeals cases following it look too narrowly at "public policy" in deciding whether the exclusions violate public policy (looking only to statutes) and (2) that the Court should revisit whether applying the place where the policy was written violates the Oklahoma statute requiring we apply the law of the place where the contract is to be performed,[47] in the case of a motor vehicle policy applicable anywhere in the United States.

As to the argument dealing with the scope of public policy, the Court says the issue before the Court does not require a conflicts analysis. Rather, the Court says the UM statute[48] requires the Court to apply the law of the foreign state. It reaches this result by saying the UM statute by its terms applies only to policies issued in Oklahoma on vehicles principally garaged in Oklahoma.

As to the argument that *Bohannan* does not properly apply 15 O.S. § 162, the Court says the Plaintiff did not argue that in the trial court. Of course, the trial court could not overrule or change *Bohannan*.

This latter argument needs to be presented to the Court in the future. Apparently, it will be necessary to do so by saying to the trial court: "I'm not talking to you now, I am writing this for the Supreme Court." The argument is that a policy provision that the policy applies anywhere in the United States a claim arises designates a place of performance, as contemplated by the statute. Interestingly, only four states have that form of statute and two of them have adopted that interpretation and none other than Oklahoma have adopted a contrary interpretation.

"ACTUAL PHYSICAL CONTACT" HIT AND RUN REQUIREMENT IN UM POLICY VOID

Biggs v. State Farm[49] holds invalid an uninsured motorist policy requirement that there be "actual physical contact" for hit and run coverage to apply under an underinsured motorist policy.

Mrs. Biggs claimed an unidentified motorist ran her off the highway. She claimed there was contact with the unidentified vehicle. The insurance company claimed (and the jury found) there was not. The trial court rendered judgment for the plaintiff.

The Supreme Court affirmed, in an opinion by Justice Barnes. The insurance company's policy provision requiring "actual physical contact" for hit and run coverage to apply is an impermissible deviation from 36 O.S. 1971 §3636.

The term "hit and run" does not necessarily imply physical contact. The "no contact" hit and run motorist's involvement is sufficient, without physical contact.

[47] 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."
[48] 36 O.S. § 3636.
[49] 1977 OK 135, 569 P.2d 430.

NO WORKERS' COMP OFFSET AGAINST WORKER'S OWN UM

Bill Hodges Truck Company v. Humphrey[50] holds a Workers' Compensation insurer is not entitled to set off amounts the injured worker receives under his own UM coverage against his Workers' Comp award. This case is the converse of *Chambers v. Walker*[51] holding the UM carrier cannot offset against the UM recovery Workers' Comp payments. *Torres v. Kansas City Fire and Marine Ins. Co.*[52] extends this holding. It holds the employee is entitled to collect the UM on his employer's vehicle being occupied at the time of the injury.

UM LIMITS IMPUTED BY LAW EQUAL MINIMUM FINANCIAL RESPONSIBILITY AMOUNT OF $10,000 WHERE NO OFFER MADE OR WRITTEN REJECTION TAKEN

Boerstler v. Donald Hoover Truck Insurance Exchange Co.[53] holds that a failure to make a written rejection of UM coverage results in UM coverage at the statutory minimum of $10,000.

Boerstler was injured while driving his employer's truck due to an uninsured motorist's negligence. At trial, a jury awarded Boerstler $65,000 against the uninsured motorist. Boerstler then made a claim with his employer's insurance carrier, Farmers and Merchants Insurance Co. (Farmers) for UM benefits. The employer's car liability policy provided $500,000 liability limits and $20,000 UM limits, which Farmers paid Boerstler. Boerstler contended that the UM limit should be $500,000, equal to the liability limit. Farmers contended that the UM limit should be $10,000, the statutorily mandated limit.

When Farmers offered the employer UM coverage, it sent the UM offer form required by 36 O.S. §3636 and a letter advising the employer that a failure to elect a higher UM limit would be deemed an acceptance of UM limits equal to the statutory minimum combined single limit of $20,000. The employer did not sign the form; Farmers wrote UM coverage of $20,000 and charged the employer a premium.

Boerstler sued his employer and Farmers to reform the policy to provide the higher UM limit of $500,000. The trial court granted Farmers' summary judgment. The Court of Civil Appeals reversed, holding that 36 O.S. §3636 would imply UM limits equal to the $500,000 liability limit because the employer did not sign the statutorily required UM offer form.

The Oklahoma Supreme Court granted certiorari. In an opinion by Justice Hargrave, the court affirmed the portion of the Court of Civil Appeals opinion regarding jury instruction and inadequacy of damages (because they were not raised on appeal), and reversed the ruling regarding the amount of UM coverage imputed by law. The court held that the employer's failure to make a written rejection of UM coverage resulted in UM coverage at the statutory minimum of $10,000. The court previously addressed this same issue in *May v. Nat. Union Fire Ins. Co. of*

[50] 1984 OK CIV APP 55, 704 P.2d 94.
[51] 1982 OK 128, 653 P.2d 931.
[52] 1993 OK 32, 849 P.2d 407.
[53] 1997 OK 106, 943 P.2d 614.

Pittsburg, Pa.[54]

LAW WHERE POLICY WRITTEN CONTROLS, ABSENT PUBLIC POLICY OR MORE SIGNIFICANT CONTACT

Bohannan v. Allstate Ins. Co.[55] holds that the law of the place where an uninsured motorist policy is written will control, unless another jurisdiction has a more significant relationship to the transaction or the Oklahoma public policy compels application of Oklahoma law.

Mrs. Bohannan, who lived in California, was injured while a passenger in her sister's car in Oklahoma, while she was on a visit to her sister, who lived in Oklahoma. The driver who rear-ended them had a $25,000 policy, which his insurance company paid. The sister had a $10,000 UM policy, which her insurer paid. The parties stipulated that her damages exceeded $65,000, the total of those policies and Mrs. Bohannan's $30,000 Allstate UM policy, issued in California.

Under Oklahoma law, Allstate would not be entitled to credit for the tort-feasor's liability payment and the sister's primary UM payment, and Mrs. Bohannan would be entitled to recover her full, $30,000 limit. Under California law, however, Allstate contended, it was entitled to credit for the $25,000 liability payment and the $10,000 UM payment, so that it owed nothing.

A clash of conflicting laws arose between *Rhody v. State Farm Mut. Ins. Co.*[56] and an Oklahoma Court of Appeals case, *Pate v. MFA Mut. Ins. Co.*[57] The Tenth Circuit Court of Appeals certified *Bohannan* to the Supreme Court, to resolve the conflict.

Pate had applied a rule much like that the Supreme court adopts above. *Pate* held Oklahoma law would be applied to determine the validity of a med-pay provision permitting subrogation.

The Pate family, on vacation in Oklahoma, was involved in a bad accident. They settled with the tort-feasor for the tort-feasor's liability limits. Under Arkansas law, where the Pates lived, their insured car was principally garaged, and the policy was issued, they could not recover med-pay after having settled with the tort-feasor. This was so under Arkansas law like *Porter v. MFA Mut. Ins. Co.*,[58] that release of the tort-feasor destroys subrogation rights and precludes recovery under a policy.

Under an Oklahoma statute, on the other hand, the Pate's med-pay would not be subject to subrogation. Title 36 O.S. 1981 §6092 forbids subrogation of med-pay paid on behalf of a named insured or household member. *Pate* recognized (as does the present Supreme Court ruling) the rule that a contract (including an insurance policy) will be interpreted according to the law of its place of performance or, if no place of performance is provided, the place where it is issued.

Pate found an exception, however, for circumstances in which the other state's law (Arkansas', in *Pate*) would violate the Oklahoma public policy. Section 6092 represented a public policy

---

[54] 1996 OK 52, 918 P.2d 43, (opinion following certification) 84 F.3d 1342 (10th Cir. 1996).
[55] 1991 OK 64, 820 P.2d 787.
[56] 771 F.2d 1416 (10th Cir. 1985).
[57] 1982 OK CIV APP 36, 649 P.2d 809.
[58] 1982 OK 23, 643 P.2d 302.

against subrogating med-pay paid to the named insured (who paid the premium) or members of his household. Thus, Oklahoma law would apply. *Bohannan* follows *Pate*, almost exactly.

Hard to disagree with enlightened law like that, right? To paraphrase Johnny Carson to Ed McMahon, not so fast, conflicts breath! The Court decides it need not disapprove of either *Pate* or *Rhody*. It does so by determining (at least implicitly) that only a statute may determine public policy.

The parties in *Bohannan* had stipulated that only the choice of laws rule need be decided in federal court. They stipulated that, if Oklahoma law were to be applied, Mrs. Bohannan would be able to recover her full limit. The Oklahoma Supreme Court, however, disagreed.

Looking only to the statutes to determine public policy, the Supreme Court found a stronger public policy with regard to med-pay coverage in *Pate* than with regard to UM coverage in *Rhody*. It did so on the basis of different wording of the statutes involved.

The med-pay statute, 36 O.S. 1981 §6092, commences:

> No provision in an automobile liability policy or endorsement for such coverage *effective in this state* (emphasis added)

shall permit subrogation, as to a named insured or household member. By contrast, the UM statute, 36 O.S. 1990 Supp. §3636 begins:

> No policy . . . shall be issued, delivered, renewed, or extended in this state, with regard to a motor vehicle registered or principally garaged in this state unless the policy includes [UM] coverage . . . .

Thus, the Court holds, *Pate* correctly holds the Arkansas insurance policy provision permitting subrogation violates Oklahoma public policy because §6092 is intended to apply to *any* policy effective in Oklahoma, even one on a car just passing through. On the other hand, the Texas insurance policy prohibiting stacking UM did not violate Oklahoma public policy, because §3636 is intended to apply only to vehicles registered or principally garaged in Oklahoma.

Perhaps significantly, these issues were not briefed to the Oklahoma Supreme Court, because the parties stipulated that, if Oklahoma law applied, Mrs. Bohannan could recover. Had the issue been before the Court and, therefore, briefed, the Court would have known that a statute may enunciate public policy, without purporting by its terms to be applicable to an out-of-state insurance policy.

The specific result in *Bohannan* is that Allstate may take credit for the $25,000 liability payment by the tort-feasor's insurance company. This is so because the compulsory liability insurance law, pursuant to which the liability policy was issued, does not prohibit such a credit or offset.

On the other hand, Allstate may not take credit for the $10,000 UM payment made under her sister's Oklahoma UM policy. This is so because Mrs. Bohannan is an insured under her sister's Oklahoma UM policy and §3636 does not permit such a credit.

The bottom line to Mrs. Bohannan is that she gets $5,000 (her $30,000 UM limit, less the $25,000 liability limit). In a broader sense, the result of *Bohannan* is quite narrow.

Because public policy can (according to the Court) be enunciated only by statute, the only public policy which would cause Oklahoma law to be applied to an out-of-state policy will be that contained in a statute which the legislature accidentally makes applicable to an out-of-state policy. That won't happen often. Specifically, with regard to UM coverage, the statute will apply only in the narrow context of *Bohannan* itself (where the primary UM happens to be an Oklahoma policy).

Bohannan fails to recognize that many insurance issues (such as the stacking issue in *Rhody*) do not arise from a statute. Thus, the Oklahoma cases prohibit "anti-stacking" provisions in UM policies although the statute does not deal with stacking.

Rather, the stacking cases rest on the proposition that it is unfair (regardless of the statute) to charge multiple premiums and yet deny stacking. The Oklahoma Supreme Court held that as recently as *Scott v. Cimarron Ins. Co.*[59] That case held a policy issued under the UM statute could deny stacking, so long as multiple premiums were not charged. The Court reasoned there that it was the charging of multiple premiums, not the statute, which permitted stacking.

UM COVERAGE NOT TRIGGERED BY LETTING STATUTE RUN ON TORT-FEASOR

Boyer v. Oklahoma Farm Bureau Mut. Ins. Co.[60] holds that insureds who allowed the two-year tort statute of limitations to run on their claim against a tort-feasor were not able to recover UM absent proof that their damages exceeded the tort-feasor liability insurance coverage.

The Boyers were injured in a car wreck and sustained $31,536.14 in damages. The tort-feasor had liability insurance in excess of $290,000. The Boyers failed to sue the tort-feasor within the two-year tort statute of limitations but instead sought UM benefits from their automobile insurer, Oklahoma Farm Bureau Mutual Insurance Company (OFB). OFB denied the claim and the Boyers sued. OFB filed its motion for summary judgment alleging that the Boyers were not entitled to UM benefits because they were not injured by an uninsured motor vehicle as 36 O.S. 1981 §3636C defines that term. Title 36 O.S. 1981 §3636C requires the Boyers to prove that on the date of the wreck, their damages exceeded the tort-feasor liability limits. Obviously, the Boyers could not meet this burden of proof. The trial court (Judge Ricks, Oklahoma County) sustained OFB's motion for summary judgment and the Boyers appealed. The Oklahoma Court of Appeals affirmed, in an opinion by Judge Goodman.

UM BAD FAITH CASE ALLOWS ATTORNEY FEES, PREJUDGMENT INTEREST AND COSTS

Brashier v. Farmers Ins. Co., Inc.,[61] holds that an insured who recovers in a UM bad-faith claim

[59] 1989 OK 26, 774 P.2d 456.
[60] 1995 OK CIV APP 102, 902 P.2d 83.
[61] 1996 OK 86, 925 P.2d 20.

may recover attorney fees, costs, and prejudgment interest.

Brashier was injured by a tort-feasor who had $100,000 liability limits. Brashier had $10,000 UM coverage with Farmers. The tort-feasor's insurance company tendered its liability limit. Farmers waived subrogation, but refused to pay Brashier his UM limit because it believed Brashier's claim did not exceed the $100,000 liability limit. Brashier sued Farmers for bad faith. The jury awarded him $25,000 compensatory damages and $25,000 punitive damages. The trial court awarded attorney fees, prejudgment interest and costs. Both Brashier and Farmers appealed. The Court of Appeals affirmed the jury verdict but reversed as to the award of attorney fees, prejudgment interest, and costs.

The Supreme Court, in an opinion by Justice Opala, vacated the Court of Appeals opinion and reversed in part the trial court's judgment. The court remanded the case back to the trial court to reassess the prejudgment interest under 12 O.S. 1991 §727. The trial court erroneously calculated the prejudgment interest using 36 O.S. 1991 §3629B, which specifically states that it does not apply to UM coverage. This does not preclude awarding attorney fees as damages on a bad faith claim. Prejudgment interest and costs are allowable under 12 O.S. 1991 §727, as a personal injury award.

INSURED CANNOT STACK UM IF ONLY ONE PREMIUM PAID

Breakfield v. Oklahoma Farmers Union Mut. Ins. Co.[62] holds an insured cannot stack UM coverage where only one premium was paid for the coverage, despite the insurance company's failure to offer UM coverage that could be stacked.

Breakfield (insured) bought liability and UM coverage on four cars from Oklahoma Farmers Union (OFU) and paid only one premium for the UM coverage. An "Auto Change Endorsement" form the Breakfields signed specified they were being charged only one premium per policy for UM coverage. The form acknowledged that, because they were being charged only one premium, they were entitled to only one UM limit for the whole policy. OFU did not offer UM coverage that could be stacked. The insureds were involved in a wreck and tried to stack their UM limits. OFU refused to stack.

The Breakfields argued that they were entitled to stack because they should have been given the option to pay an additional premium for UM coverage that could be stacked. The trial court granted OFU summary judgment.

The Court of Appeals reversed, holding there was a fact question whether the Breakfields understood that their coverage was limited to a single UM limit. The Supreme Court granted *certiorari*, reversed the Court of Appeals and affirmed the trial court, in an opinion by Justice Summers. The Supreme Court reiterated its earlier holding in *Withrow v. Pickard*[63] that 36 O.S. 1991 §3636 does not require UM coverage that can be stacked. The Court did not discuss its earlier statement in *Scott v. Cimarron*[64] that the insured must be given the opportunity to buy

[62] 1995 OK 139, 910 P.2d 991.
[63] 1995 OK 120, 905 P.2d 800.
[64] 1989 OK 26, 774 P.2d 456.

stacked coverage, else the coverage can be stacked. This was also true in *Withrow*. Apparently, the Supreme Court is determined not to adhere to that statement but does not plan to specifically disavow it.

NOT BAD FAITH FOR UM CARRIER TO DEMAND RELEASE UPON PAYMENT OF UM LIMIT BUT PRESENTATION OF RELEASE WITH INDEMNIFICATION PROVISIONS FOR SIGNATURE BY INSURED AND LAWYER PRESENT JURY QUESTION WHETHER INSURANCE COMPANY IS IN GOOD FAITH

Beers v. Hillory[65] holds that an insurance company can demand a release of a UM claim upon paying UM limits and that a delay by the insurance company in paying UM limits was not unreasonable but that its inclusion of a requirement for indemnification language in the release to be signed by the insured and the insured's counsel created a fact question whether the insurance company acted in good faith.

Beers was injured in a wreck March 6, 2006 and later had back surgery. His attorney notified the insurance company (Northland) of the claim and sent Northland medical bills April 13, 2006. Northland almost immediately paid its med-pay limit (on April 17). However, it delayed until May 11 assigning the UM claim to an adjuster.

On October 31, 2006, Beers' lawyer notified Northland that the liability carrier for the tort-feasor (Hillory) had tendered its $50,000 limit. At that point, Northland's UM adjuster had only about $10,000 in bills, although ultimately the insured had over $100,000 in bills. The adjuster asked Beers' lawyer for a copy of the tort-feasor's declarations page showing the limit and repeated an earlier request for a medical authorization and a complete list of medical providers. All of these except the medical authorization were went to Northland by December 20, 2006 when Northland agreed to waive subrogation, rather than substitute its payment for the tendered limits.

On January 31, 2007, Beers' lawyer wrote a letter saying medical bills in excess of $100,000 had been forwarded and asking for an update on valuing the claim and tendering UM limits. Letters followed from Beers' lawyer to Northland's adjuster dated March 7 and April 16, 2007 asking Northland to pay the claim. On March 9, 2007, the adjuster decided to pay Beers' $50,000 UM limit but, on May 18, 2007 demanded an indemnifying release signed by Beers and the attorney. The adjuster later explained the delay in offering the limit from March 9 to May 18 by saying she wanted to seek advice of an Oklahoma law about the lien claims, since the adjuster was from out-of-state.

Beers' lawyer refused to sign the release and, after further delay, on August 8, 2007, filed suit, including a claim for bad faith. Beers' settled with the tort-feasor. Northland moved for summary judgment. At oral argument on the summary judgment motion, Beers' lawyer "conceded" that Northland's actions up to March 9, 2007 did not constitute bad faith. For this reason, after the trial court, Judge Duane Woodliff, in Okmulgee County, granted Northland summary judgment, the Court of Civil Appeals considered the bad faith delay claim only from March 9 until Northland interpleaded its limit in the bad faith case.

[65] 2010 OK CIV APP 99, 241 P.3d 285.

The Court of Civil Appeals affirmed in part and reversed in part, in an opinion by Presiding Judge Fischer. The Court first held that the delay occasioned by the out-of-state adjuster was not unreasonable because it was reasonable for her to seek advice of counsel to avoid possible liability for not properly protecting the liens. For this reason, the delay was not unreasonable and summary judgment on that ground was correct.

It was not unreasonable for Northland to require a release signed by the insured. However, Northland's request for an indemnifying release executed by the insured and the attorney created a fact question whether the insurance company was acting reasonably. The insurance company could adequately protect itself from lien claims by checking the lien filings as provided in the lien statutes.

As to the substantive UM law, this case moves us a step closer to resolution of the question whether a UM carrier can insist on a release from the insured upon payment of UM limits. The Court held that there was no fact question whether Northland worded its release in such a way that the release would have precluded a bad faith case arising out of the UM claim. Inclusion of the requirement for an indemnifying release signed by the lawyer constituted a violation of the prohibition on in the Unfair Claim Settlement Practices Act (UCSPA) by requiring an insured "to sign a release that extends beyond the subject matter that gave rise to the claim payment." The Court notes that violation of the UCSPA does not give rise to a private right of action. However, violation of a statute may give rise to a bad faith claim.

The issue whether a UM carrier may require a release remains pending in the Supreme Court on a certified question from the Western District federal court. Because no Petition for Certiorari was filed in this case, the Supreme Court did not get a chance to consider the issue in this case.

STATUTORY PHYSICIAN'S LIEN ATTACHES TO FIRST-PARTY UM PROCEEDS

Broadway Clinic v. Liberty Mutual Insurance Co.,[66] holds that the statutory physician's lien created under 42 O.S. 2001 §46(B) attaches to an injured party's first-party UM proceeds.

Tijuana Johnson was injured in an auto accident and received accident-related treatment at Broadway Clinic. The clinic filed a physician's lien with the Oklahoma County Clerk. Later Tijuana sought payment under both the Medpay and UM provisions of her policy with Liberty Mutual. Liberty Mutual paid the clinic its $1000.00 Medpay coverage, leaving a balance of $902.00 owed to the clinic. Liberty Mutual then issued its $4000.00 UM check directly to Tijuana without listing the clinic on that check. Broadway Clinic filed a small claims action in Oklahoma County, asserting the lien, and seeking a declaration that the lien attached to the UM proceeds. On stipulated facts, Judge Roma McElwee ruled that the lien did not attach to the UM check. The Supreme Court retained the clinic's appeal and, in an Opinion written by Justice Opala, reversed the trial court.

The Supreme Court compared the language of the physician's lien statute with that of the hospital lien statute, which, according to *Kratz v. Kratz,*[67] does not attach to UM. The Supreme

[66] 2006 OK 29, 139 P.3d 873.
[67] *Kratz v. Kratz,* 1995 OK 63, 905 P.2d 753.

Court noted that the hospital lien attaches solely to ". . . proceeds that result from a 'claim against another for damages.'" In *Kratz* the Court determined that UM proceeds do not result from a such a "claim against another" and that the hospital lien did not, therefore, attach to UM.

Language similar to that in the hospital line statute is also found in the physician's lien statute in 43 O.S. §46(A). However, as pointed out by the Court, 43 O.S. §46(B) grants, "in addition to" the subsection A lien, a lien right to a physician against proceeds from a patient's "claim against an insurer." Said the Court, while subsection B may not delineate the outer bounds of the lien it creates, it does nonetheless, in unambiguous language, provide for a lien against UM proceeds. The court also rejected the insurance company's argument that the UM proceeds were shielded from the physician's lien by the personal injury claim exemption found in the Homestead Act.[68]

Vice-Chief Justice Winchester, Justices Lavendar, Hargrave, and Taylor concurred in Justice Opala's opinion. Justice Kauger concurred in part and dissented in part. Chief Justice Watt and Justice Colbert joined Justice Edmondson's in dissent saying the basic premise was incorrect–the physician's lien does not attach to UM–but more fundamentally, said the dissent, the small claims court was without subject matter jurisdiction over the dispute and the lien was never properly perfected.

UM CARRIER MAY NOT INTERVENE TO PROTECT SUBROGATION UNTIL IT PAYS BUT MAY MOVE FOR PERMISSIVE INTERVENTION TO PROTECT ITS LIABILITY POSITION; DEFENDANT'S VERDICT AGAINST TORT-FEASOR DOESN'T PROTECT UM CARRIER FROM BAD FAITH; JURY QUESTIONS PRECLUDE BAD FAITH MOTION FOR SUMMARY JUDGMENT

Brown v. Patel, et al.[69] holds that an uninsured motorist (UM) carrier cannot intervene to protect its subrogation rights until it has paid but may move for permissive intervention to protect itself from liability to the insured, a verdict for the tort-feasor does not preclude a bad faith suit against the UM carrier and that summary judgment for the UM carrier on the bad faith claim was improper due to differing inferences to be drawn from the evidence.

Brown was insured by Commercial Union Insurance Company which, while the case was pending, became One Beacon Insurance Group. He was injured in a wreck with Patel, who had a $300,000 liability policy. One Beacon (which also had Workers' Compensation coverage on Brown claimed to have paid $2,800 in medical bills, which Brown denied.

One Beacon filed two petitions to intervene in Brown's suit against Patel, one to assert its $2,800 Workers' Comp. subrogation and its UM subrogation and the other to join with Patel's liability carrier in defending itself from a UM exposure. One Beacon's claim manager testified that One Beacon filed the intervention "so we could find out what his injuries were and we could evaluate his claim to determine whether now we have a UM claim." (Brown argued this indicated One Beacon had not done an adequate job of timely evaluating the claim, since the intervention was

[68] 31 O.S. 2001 §1.A.21 protects up to $50,000.00 of a person's interest in a claim for personal bodily injury.
[69] 2007 OK 16, 157 P.3d 117.

two years after the loss.)

Brown counter-claimed against One Beacon for bad faith, claiming in addition to the failure to timely evaluate, that One Beacon was in bad faith for having taken the inconsistent positions that it was entitled to subrogation and that it did not owe the claim. The trial court, Judge Worthington, in Payne County, allowed the intervention and granted One Beacon summary judgment on the bad faith claim. A jury found in favor of the tort-feasor, although the tort-feasor admitted liability.

Brown appealed. The Supreme Court retained jurisdiction and reversed the grant of summary judgment, in an opinion by Justice Edmondson. Chief Justice Winchester concurred in part and dissented in part. Justice Kauger concurred in result. Justices Hargrave and Taylor Dissented in part and concurred in part, all without separate opinion.

The Court agreed with Brown that the UM carrier has no right to intervene to assert a subrogation claim until it pays the claim. However, the Court held, the UM carrier does have the right to apply for permissive intervention, under 12 O.S. § 2024 (A)(2). In order to be able to intervene, however, the UM carrier has to show that its position will not be adequately protected by the defense of the action on behalf of the tort-feasor. This latter conclusion seems somewhat inconsistent with *Keel v. MFA Ins. Co.*,[70] which gives the insured the option to sue only the tort-feasor and notify the UM carrier, so that the UM carrier can protect its interests by, among other things, intervention. This opinion seems to give the trial court discretion to permit or deny intervention, depending on whether the court perceives the tort-feasor's defense will adequately protect the UM carrier's position. The Court makes clear that it sees nothing wrong with the fact that the UM carrier comes into the lawsuit taking a position adverse to its insured. That is, says the Court, the right of the insurance company to resist payment, if it believes it did not owe the claim.

As to the bad faith claim, however, the Court held that the insurance company here had not shown an absence of facts to indicate bad faith. The Court noted that for two years after the wreck, the UM carrier had not denied or paid the claim and had never, before its intervention in the case, taken the position there was a question as to the causation of Brown's damages. These factors preclude summary judgment for the UM carrier. That ruling was reversed.

Two aspects of this holding stand out: (1) the Court makes clear that its use of the term "bad faith" is actually shorthand for an absence of good faith and that no actual bad faith is required. (2) the opinion clearly rejects the contention fostered by federal cases purporting to apply Oklahoma law that there is no such thing as a claim for "litigation bad faith.": "An insurer may engage in certain litigation conduct pursuant to a procedural right and yet by that act violate its duty to an insured."[71]

[70] 1976 OK 86, 553 P.2d 153.
[71] 2007 OK 16, 157 P.3d 117, 127, ¶ 32.

HIT-AND-RUN COVERAGE UNDER UM POLICIES

Brown v. USAA[72] comprehensively answers certified questions from federal court concerning UM coverage of hit-and-run cases.

Plaintiff was a passenger in a car struck by a hit-and-run vehicle. The owner, but not the driver, of the hit-and-run car was identified. The federal court certified three questions to the Oklahoma Supreme Court: (1) Whether the vehicle whose owner, but not the driver, was later identified, ceased to be a hit-and-run vehicle? (2) What duty the injured claimant has to identify the hit-and-run vehicle? (3) Whether, when the insurance company learns the name of the hit-and-run vehicle's owner and furnishes claimant the name, the burden shifts to the claimant to prove the vehicle was uninsured?

The Supreme Court answered: (1) The hit-and-run vehicle whose owner, but not the driver, is identified remains a hit-and-run vehicle so UM coverage applies. (2) The injured claimant has no duty to identify the hit-and-run owner or driver. (3) If the *driver* of the hit-and-run vehicle were identified, then the claimant has the duty of proving that driver's uninsured status. However, the claimant may prove uninsured status by negative proof: "Proof of a futile search for insurance covering the other vehicle will raise a presumption that the other vehicle was uninsured."

UM CARRIER IS LIABLE FOR FIRST DOLLAR COVERAGE, NOT AMOUNT IN EXCESS OF TORT-FEASOR'S LIABILITY COVERAGE

Burch v. Allstate,[73] holds that an uninsured motorist insurance company owes all of a claim which exceeds the tort-feasor's liability coverage, up to the UM limit and must use subrogation to recover back the part of the claim it pays that is within the tort-feasor's liability coverage.

This decision reverses as *dictum* a contrary statement of the law in *Buzzard v. Farmers Ins. Co.*, 1991 OK 127, 824 P.2d 1105. In *Buzzard*, Justice Summers ruled that a UM carrier is liable only for the amount of the insured's claim which exceeds the tort-feasor's liability coverage. In *Burch*, Justice Opala holds that the ruling to that effect in *Buzzard* "was pure obiter dictum."

The question before the Court in *Burch* had a long and twisted history. For many years before *Buzzard*, courts assumed that the UM carrier owed the whole claim, provided the insured's damages exceeded the tort-feasor's liability coverage. *Roberts v. Mid-Continent Cas. Co.*[74] held that. In *Roberts*, the insured had damages which the court ultimately found to equal $60,000. The tort-feasor had only $10,000 in liability coverage. The insurance company claimed it was entitled to a credit or reduction of the $60,000 in damages for the tort-feasor's $10,000 liability coverage. The Court of Appeals held no credit was appropriate so the UM carrier had to pay the whole $60,000 and could seek subrogation to collect the tort-feasor's $10,000 liability coverage.

Buzzard changed that. While the issue was not before the Court in *Buzzard*, Justice Summers wrote very clearly that the UM carrier owed only the amount of the claim which exceeded the tort-feasor's liability coverage. The issue was not before the *Buzzard* court because the liability

[72] 1984 OK 55, 684 P.2d 1195.
[73] 1998 OK 129, 977 P.2d 1057.
[74] 1989 OK CIV APP 92, 790 P.2d 1121.

coverage had all been paid in that case.

The Buzzard family presented a claim to Farmers for its $10,000 in UM coverage for the death of their son in a wreck with a city vehicle insured for the required $50,000 tort claim limits. Farmers refused to pay the UM until the liability coverage was exhausted. Buzzard then took the city's $50,000 limit and released the city. Then Farmers claimed it did not have to pay the UM because Buzzard had released the tort-feasor. *Buzzard v. Farmers* was a suit for that bad faith on Farmers' part.

In response to *Buzzard*, the courts of civil appeal held that the UM carrier owed only the amount of its insured's damages which exceed the tort-feasor's liability coverage. *Kavanaugh v. Maryland Ins. Co., Inc.*[75] and *Smith v. American Fid. Ins. Cos.*,[76] to that effect, are specifically disapproved in *Burch*.

Mustain v. United States Fid. & Guaranty Co.[77] held that, as between the UM carrier and the insured, UM coverage is primary. However, it did not specifically address the question whether the UM carrier would be entitled to reduce its payment by the amount of uncollected liability coverage and, in effect, force the insured to pursue the tort-feasor to collect that part of the coverage.

The fact situation in *Burch* is strange. Mrs. Burch was a passenger in her own car when her husband rear-ended another car. Allstate had a liability step-down provision which reduced the $100,000/300,000 to $10,000/20,000 coverage when the injury is to a household member.

Mrs. Burch saw fit not to sue Mr. Burch but rather, on the day the two-year tort statute of limitation ran, sued Allstate instead. The parties stipulated that Mrs. Burch's damages were $60,000. The question before the federal court was whether Allstate owed the whole $60,000 (the result under *Roberts v. Mid-Continent*) or $50,000 (the result under the *Buzzard dictum*). The federal district court held *Buzzard* controlled and that Allstate owed only $50,000 (the $60,000 less the $10,000 liability coverage). The Tenth Circuit certified a question to the Oklahoma Supreme Court, which resulted in the *Burch* decision.

The Burch decision had a five to four count. Justices Kauger, Wilson, Watt and Judge Chapel (of the Court of Criminal Appeals, sitting by designation instead of Justice Simms, who disqualified) joined Justice Opala in the majority. Justices Hodges, Lavender and Hargrave joined Justice Summers, who defended his *Buzzard* ruling in a lengthy dissent.

OTLA filed an *amicus curiae* brief in *Burch*, as it has in the other cases since *Buzzard*, seeking to reverse the *Buzzard* dictum. Both opinions refer extensively to the OTLA *amicus* briefs. The majority substantially adopts the position OTLA took.

This decision will have an important impact on the tactics of handling a UM claim. In cases in which there is clearly more UM coverage than the damages and where the damages clearly exceed the tort-feasor's liability coverage, the injured insured may well want to ignore the claim

[75] 1997 OK CIV APP 41, 943 P.2d 629.
[76] 1998 OK CIV APP 70, 963 P.2d 16.
[77] 1996 OK 98, 925 P.2d 533.

against the tort-feasor and proceed directly against the UM carrier. This will result in either a quick and inexpensive arbitration against the UM carrier rather than an expensive and perhaps lengthy litigation process against the tort-feasor or a direct action by the insured against the UM carrier.

ANTI-STACKING AND SETOFF CLAUSES IN KANSAS POLICIES UPHELD

Burgess v. State Farm Mutual Automobile Insurance Company,[78] holds that anti-stacking and setoff clauses in two Kansas car policies do not violate Oklahoma's public policy and are enforceable.

Burgess, a Kansas resident, was injured in Oklahoma while a passenger in her daughter's car. The daughter and the tort-feasor are Oklahoma residents. Burgess had uninsured motorist (UM) coverage with State Farm under two separate policies, $100,000 each, issued in Kansas on cars garaged in Kansas. Burgess' damages were not fully determined but exceeded the $100,000 she collected from the tort-feasor's liability policy plus the $10,000 UM she collected from her daughter's policy.

Burgess then sued State Farm in Oklahoma to recover her own UM coverage, a total of $200,000. The parties stipulated the State Farm policies could not be stacked. Additionally, the State Farm policies provided that the UM coverage would be offset by the amount the tort-feasor paid. The net result of which is $0 to Burgess.

The trial court (Honorable Michael Gassett, Tulsa County) granted State Farm Summary judgment, rejecting Burgess' argument that the anti-stacking and set-off clauses were against Oklahoma public policy.

The Court of Civil Appeals (COCA) affirmed. The parties cited *Bohannan v. Allstate*.[79] In *Bohannan*, Mrs. Bohannan was a California resident injured in Oklahoma while a passenger in a car driven by an Oklahoma resident, involved in a wreck caused by another Oklahoma resident. Mrs. Bohannan had UM coverage under a California policy that had anti-stacking and set-off clauses. The Supreme Court held that the validity, interpretation, application and effect of a car insurance contract should be determined in accordance with the laws of the state where the parties entered the contract, unless those laws violate Oklahoma public policy or the facts demonstrate another jurisdiction has the most significant relationship with the subject matter and the parties. This is known as the *Lex loci contractus* rule - the law of the place where the contract is made.

The COCA held *Bohannan* inapplicable because Burgess is not being deprived of any Oklahoma UM benefits; therefore, no violation of Oklahoma public policy.

[78] 2003 OK CIV APP 85, 77 P.3d 612.
[79] 1991 OK 64, 820 P.2d 787.

OFFER TO EITHER SPOUSE SUPPORTS REJECTION OF PRE-1990 UM COVERAGE; PREJUDGMENT INTEREST RATE CHANGES EACH YEAR WHILE SUIT IS PENDING

Burwell v. Oklahoma Farm Bur. Mut. Ins. Co.[80] holds that an offer to one of two spouses named as insureds under an uninsured motorist policy is sufficient to support rejection of higher-than-minimum UM limits and that an uninsured motorist carrier owes prejudgment interest which is calculated by totaling simple interest on the ultimate recovery at the rate applicable for each year the suit is pending.

Mr. and Mrs. Burwell's son was killed in a car wreck. They had five vehicles insured with Farm Bureau for $100,000 per person liability but only $25,000 per person UM limits. The jury found Farm Bureau had offered Mr. Burwell, but not Mrs. Burwell, UM limits equal to the liability limits, as the UM statute[81] required. The jury fixed damages in excess of $500,000.

The trial court held that Farm Bureau's failure to offer higher UM limits, equal to the liability limit, to Mrs. Burwell, as well as Mr. Burwell, resulted as a matter of law in $500,000 limits ($100,000 limits per vehicle stacked to equal $500,000) and granted judgment in that amount. The trial court also allowed prejudgment interest at the 12.35% rate in effect when the suit was filed.[82]

The Court of Appeals modified and affirmed as modified, in an opinion by Judge Stubblefield. The Court of Appeals noted that *Plaster v. State Farm Mut. Auto. Ins. Co.*,[83] also decided under the pre-1990 version of the statute, required a rejection from both spouses who are named insureds under a policy. That opinion specifically held that one spouse could not reject the coverage for the other. *Moon v. Guarantee Insurance Co.*,[84] which the Court of Appeals does not cite, also held that a car rental company could not reject UM coverage on behalf of a car renter, who was also insured under the policy.

The Court of Appeals distinguishes *Plaster*, on the ground that it involved a complete rejection of UM coverage, while the present case involves a failure to offer UM coverage equal to the liability limits. While the Court of Appeals does not cite it, *Mann v. Farmers Ins. Co.*[85] would seem to support its holding. That case held that a written rejection was required where an insured totally rejected UM coverage, but not where the insured selected UM limits smaller than the liability limits, which the statute requires be offered.

This part of the *Burwell* opinion, while not unimportant, will be of limited effect. The 1990 amendment to 36 O.S. §3636 does away with the *Plaster* requirement that all named insured's must reject UM coverage. Under the present statute, it is clear that one insured may reject or select limits for all insureds. The other part of the *Burwell* opinion will have a longer lasting

[80] 1995 OK CIV APP 50, 896 P.2d 1195.
[81] 36 O.S. 1981 §3636B.
[82] Pursuant to 12 O.S. 1991 §727(A)(2).
[83] 1989 OK 167, 791 P.2d 813.
[84] 1988 OK 85, 764 P.2d 1331.
[85] 1988 OK 58, 761 P.2d 460.

effect.

The Court of Appeals holds that prejudgment interest is recoverable on a UM claim, even though the insurance company was justified in litigating the claim. That part of the opinion is no surprise. The method of calculating the interest is. Under this opinion, we will now calculate prejudgment interest on a UM recovery (and presumably on any personal injury recovery) by applying the prescribed percentage rate for each year the suit was pending to the ultimate recovery, adding up the interest for each year and adding that to the verdict.

In *Burwell*, the suit was filed in 1990 and the verdict returned in 1994. The Court calculated interest on the verdict amount from the date the suit was filed through the end of 1990 at the 12.35% rate in effect that year [pursuant to 12 O.S. §927(A)(2)], all of 1991 at that year's rate, 11.71%, 1992 at 9.58%, 1993 at 7.42%, and 1994, up to the judgment, at 6.99%. This is radically different than the prior method which would apply the rate in effect on the date of the judgment, pursuant to *Fleming v. Baptist General Convention of Oklahoma*.[86]

That case held that, where the statute providing for prejudgment interest (12 O.S. §727) was amended after the suit was filed and before judgment, interest should be calculated at the rate in force when the judgment is rendered. The *Burwell* court notes that the Supreme Court reached that conclusion in *Fleming* based on an amendment to the statute and not on the basis of a statute providing the rate changes each year in response to changes in economic conditions. The present system of basing judgment interest on the T-bill rate is best implemented by changing the rate with each year the suit is pending.

The Court of Appeals makes a cautionary point which it would be easy to overlook. The Court notes that Farm Bureau does not appeal from the award of prejudgment interest in excess of the policy limits and cites *Carney v. State Farm Mut. Auto. Ins. Co.*[87] *Carney* holds that, until the time that the uninsured motorist's liability is determined, the UM plaintiff is entitled to prejudgment interest only up to the UM policy limit. Amounts of prejudgment interest above that are a liability of the tort-feasor, but not the UM insurance company.

Carney makes clear, however, that, if the liability of the uninsured motorist becomes established before the judgment, prejudgment interest will be allowed from that point to the date of judgment, pursuant to *Nunn v. Stewart*.[88]

The tactical lesson of all of these UM prejudgment interest cases is pretty clear: If you have access to more UM coverage than you have damages, you should get your UM suit filed as soon as possible. Particularly is this so if you have a coverage question which may cause resolution of the entire case to be protracted. By tacking on prejudgment interest, you may max out UM coverage which you would not otherwise get.

The teaching of *Nunn v. Stewart* remains viable: if you have a coverage or damages problem which may cause the litigation to be protracted, and you don't have enough UM coverage to

[86] 1987 OK 54, 742 P.2d 1087, 1096.
[87] 1994 OK 72, 877 P.2d 1113.
[88] 1988 OK 51, 756 P.2d 6.

exceed your damages, consider a Motion for Partial Summary Judgment, as to the uninsured motorist's liability, to start the clock running on your prejudgment interest against the UM carrier.

UM INSURER MAY NOT REQUIRE LIABILITY LIMITS BE PAID BEFORE UM IS DUE; UM CARRIER OWES ONLY THE AMOUNT OF THE INSURED'S DAMAGES OVER THE LIABILITY LIMIT; UM CARRIER'S FAILURE TO PAY CLAIM WILL WAIVE SUBROGATION

Buzzard v. Farmers[89] holds that a UM insurer may not require that the tort-feasor's liability limits be paid before its UM coverage is due; [dictum - overruled in 1998 case of *Burch v. Allstate*[90]] the UM carrier owes only the part of the insured's damages in excess of the tort-feasor's liability limits; and the UM carrier's failure to pay a claim will waive subrogation.

The insureds' son was killed in a crash with a city vehicle. Farmers had a $10,000 UM policy on the family car he was driving. The limit of the City's liability and coverage (in 1982, when the crash occurred) was $50,000. The insureds' son was burned to death. The damages clearly exceeded all the available coverage.

Farmers took the position that it did not have to pay its UM limit until the City's liability coverage was exhausted. Then, when the insured exhausted the liability limits by settling with the City, Farmers continued to refuse to pay, saying the settlement with the release of the City had destroyed its subrogation rights.

Under *Porter v. MFA Mut. Ins. Co.*,[91] Farmers contended that release relieved Farmers of liability. The Court here correctly holds that it does not and that Farmers may not insist that the liability limits be exhausted before it will pay and then, when the limits are exhausted, contend that the exhaustion it demanded keeps it from being liable. Farmers is estopped.

The simple answer to the question before the Supreme Court was that exhaustion of the policy limits is not necessary to trigger the UM. The Court held that. But it did not stop there.

The Court added dictum to the effect that, while the insured is not required to exhaust the tort-feasor's liability limit, the UM insurance company is liable only for the part of the insured's damages which exceed the tort-feasor's liability coverage. This radical departure from the statute and the prior law was not before the Court, was not necessary to its opinion, and is, therefore, *dictum*. It is, however, *dictum* which will come back to trouble us.

The Court did not carefully read the statute. The Court says:

> Our statute makes it clear that the UM insurer is responsible only for the amount of the claim which exceeds that available from the liability carrier.

That language simply does not appear in the statute, 36 O.S. 1990 Supp. §3636. The Court

[89] 1991 OK 127, 824 P.2d 1105.
[90] 1998 OK 129, 977 P.2d 1057.
[91] 1982 OK 23, 643 P.2d 302.

adopts that holding from *Schmidt v. Clothier*.[92] That case is based on a quite different statutory scheme which, unlike Oklahoma's, adopts *underinsured motorist* coverage as a separate coverage from *uninsured motorist* coverage. Oklahoma departed from the norm in declining to adopt *underinsured* coverage. Rather, the Oklahoma statute defined *uninsured* motor vehicle to include a vehicle:

> the liability limits of which are less than the amount of the claim of the person or persons making such claim . . . .

Thus, the Oklahoma statute does not provide *underinsured* coverage. The adverse vehicle is either *insured* (meaning it has enough limits to pay the claim) or it is *uninsured* (it does not have enough coverage to pay the claim).

Other courts have recognized this. The Tenth Circuit Court of Appeals labeled an insurer's description of Oklahoma UM coverage as "underinsured motorist coverage" an "obfuscating characterization" in *Everaard v. Hartford Accid. and Indem. Co.*[93] The Oklahoma Court in this case seems to disapprove of that case, despite its more accurate reading of the statute.

Justice Opala had previously recognized the nature of Oklahoma UM coverage in *Tidmore v. Fullman*:[94]

> With the passage of the 1979 amendment, the §3636 coverage became transformed from protection against uninsured or underinsured persons into a veritable first-party automobile personal injury protection from loss occasioned by a motorist with liability limit of less than the asserted claim . . . . That exposure no longer is dependent on a comparison of respective policy limits. nor may it be diminished by the insurance protection available to the adverse vehicle. The new indemnity of the §3636 carrier is not *partial* but *total*. Whenever the coverage applies, the insured gets it all from the carrier.[95]

Under the statutory scheme in place since the 1979 amendment, to which Justice Opala refers, the UM carrier has been required to pay its limits, once the insured's damages exceed the adverse motorist's liability limits, and get the benefit of the liability coverage later through subrogation. Under the *dictum* in the present opinion by Justice Summers, that will no longer be so.

There are even broader practical problems to this *dictum*. Justice Summers relies upon the estoppel theory referred to above to hold that the settlement with the tort-feasor did not destroy the UM claim. He then suggests that the insured will be free to take the adverse liability limits, or even compromise those limits, if the UM carrier unreasonably refuses to pay.

This, Justice Summers perceives, will protect the insured and enable him to get prompt payment by taking the liability limits, if the UM carrier has not settled. This ignores the existence of

---

[92] 338 N.W.2d 256 (Minn. 1983).
[93] 842 F.2d 1186 (10th Cir. 1988).
[94] 1982 OK 73, 646 P.2d 1278.
[95] Mr. Justice Opala, dissenting, 646 P.2d at 1284.

Porter v. MFA, with its ever-present threat that such a settlement will be held to have destroyed the UM claim.

The *dictum* in *Buzzard* forces the insured to guess, whether a court will later hold that the UM insurance company's position in refusing a UM settlement has been unreasonable. This circumstance differentiates the Minnesota case upon which the Court relies.

That case, *Schmidt v. Clothier*, holds that an insured may take less than the liability coverage of the tort-feasor and will be penalized only by a holding that the credit which the Minnesota *underinsured* motorist statute provides will be in the amount of the full liability limit, not the amount the insured actually recovered. In Oklahoma, by contrast, unless the insured can later prove an unreasonable refusal to pay on the UM carrier's part, the penalty against the insured is that he loses his UM coverage.

As a practical matter, the effect of this *dictum*, if it is followed, is that the insured will have to litigate the claim against the tort-feasor before he can get any money, without taking an unacceptable risk. That seems an unreasonable burden on the insured's who buy and pay for the coverage in order to get prompt and sure payment. It certainly is not consistent with the statute.

Note: The dictum was overruled in 1998 in *Burch v. Allstate*,[96] which holds that the UM carrier owes all of a claim which exceeds the tort-feasor's liability coverage, up to the UM limit and must use subrogation to recover back the part of the claim it pays that is within the tort-feasor's liability coverage.

IMPROPER TO BIFURCATE UM LIABILITY AND DAMAGES FROM BAD FAITH CASE; BAD FAITH MUST BE MEASURED BY FACTS INSURER KNOWS WHEN CLAIM DENIED

Buzzard v. McDanel[97] prohibited the granting of separate trials on the issues of the underlying liability of an underinsured tort-feasor and the uninsured motorist insurance company's bad faith refusal to pay.

The insured's son was killed in a collision with a City vehicle. Farmers took the position (in resisting a subrogated workers' compensation claim by the City's workers' compensation insurer) that the accident was primarily the fault of the City's driver. Farmers declined, however, to pay underinsured motorist benefits.

Plaintiff's then attorney (not the one who finally handled the case) settled with the City for the City's liability insurance limit. Farmers then refused to pay the claim on the ground that the settlement had destroyed Farmers' subrogation claim. The insured's new lawyer argued that Farmers had waived its right to object to the settlement by refusing to negotiate and sued Farmers for underinsured motorist benefits and bad faith.

The trial court ordered bifurcated trials, proposing to first try the issue of the City's liability to the insured and then, if plaintiff prevailed, the bad faith issue. The Supreme Court granted

[96] 1998 OK 129, 977 P.2d 1057.
[97] 1987 OK 28, 736 P.2d 157.

prohibition and ordered the issues tried together.

The opinion by Justice Lavender holds that the question of the insureds' entitlement to recovery from the tort-feasor "is not a separate or controlling issue" in the bad faith action. The issue whether the insureds were entitled to recover from the City "is not separable from the question of whether Farmers had a good faith belief, *at the time its performance was requested*, that it had a justifiable reason for withholding payment under the policy."

Justice Kauger did not participate. Justice Opala, in a separate opinion concurring in result, in which Justice Hodges joined, drew an interesting analogy. Under *Manis v. Hartford Fire Ins. Co.*,[98] the fact that the insurance company defends and loses a suit on the policy does not determine that the insurance company is in bad faith. Conversely, a verdict finding that the uninsured or underinsured tort-feasor was not at fault does not indicate that the insurer was in good faith in its handling of the claim. This issue must be determined by *all* the facts known to the insurer at the time it denied the claim.

An interesting footnote to this case is the subsequent result in the trial court. Clifton Naifeh obtained a $2.2 million verdict.

JURY QUESTION WHETHER DRIVE-BY SHOOTING COVERED BY UM

Byus v. Mid-Century Ins. Co.[99] holds summary judgment improper where conflicting inferences exist as to whether a drive-by shooting arose from the use of a car, whether the shooting was an independent, supervening cause, and whether the insured's death was caused by an operator of the car.

The teen-age Byus boy was driving his car when a car drove by in the opposite direction, occupied by members of a rival gang. A passenger in that car flashed a gang sign. A passenger in the Byus car responded with an obscene gesture. The driver of the other car turned the car around and followed until he came alongside the Byus car. The passengers of both cars argued with each other. The passengers in the other car fired at the Byus car. One of the shots hit Byus, who later died.

Byus' estate sued the adverse driver for negligent driving, the passenger for negligently firing a gun, and the Byus family's UM carrier for the liability of each. The insurance company and the Administratrix filed cross-motions for summary judgment on the UM coverage issue. The trial court granted the estate summary judgment.

The Court of Appeals reversed, with directions to grant the insurance company's summary judgment, holding that the injury did not arise out of the use of a car. On *certiorari*, the Supreme Court reversed the Court of Appeals but found that differing inferences from the facts precluded summary judgment for either, in an opinion by Justice Hodges.

Whether the shooting and resulting death had a causal relationship to the use of a motor vehicle involved differing inferences from the uncontroverted evidence, which precluded summary

[98] 681 P.2d 760 (Okla. 1984).
[99] 1996 OK 25, 912 P.2d 845.

judgment. Similarly, whether the firing of the gun from the car was an independent, supervening cause presents conflicting inferences. The Supreme Court compared this case to its two closest, prior precedents: *Willard v. Kelley*[100] and *Safeco Ins. Co. of Am. v. Sanders*.[101] In *Willard*, the Supreme Court found conflicting inferences precluded summary judgment where a fleeing felon shot the insured police officer, in an attempt to escape arrest. *Sanders* upheld summary judgment for the insurance company where the insureds were kidnapped in a car, placed in the trunk, and burned to death when the kidnappers cut the fuel lines of the car in which they were locked, and burned the car. The use of the car as a vehicle was not the cause of the insureds' deaths in *Sanders*. The Supreme Court concludes the *Byus* case looks more like *Willard* than *Sanders*, so that summary judgment for either side is inappropriate.

UM CLAIM NOT "SEPARATE AND INDEPENDENT" SO AS TO BE REMOVABLE TO FEDERAL COURT

Calhoun v. Calhoun[102] holds that an uninsured motorist claim against a non-resident uninsured motorist insurance company is not "separate and independent" from a claim arising from the same accident against a resident uninsured motorist insurer so as to render the case removable to federal court under 28 U.S.C. § 1441(c).

Plaintiff (an Oklahoma citizen) was involved in a hit and run accident in Oklahoma. he sued in state court two uninsured motorist insurance comanies, one a resident and the other a non-resident. The non-resident removed the case to federal court, contending the claim against it was "separate and independent" and, therefore, removable under 28 U.S.C.A. § 1441(c).

The District Court, in an opinion by Judge Daugherty, remanded. Both claims arose out of the same accident and were not, therefore, "separate and independent" so as to be removable.

NO UM RECOVERY WHERE SOL RUNS ON GOVERNMENTAL TORT CLAIM AND DAMAGES DO NOT EXCEED GOVERNMENTAL TORT CLAIMS ACT LIMIT OF LIABILITY

Carlos v. State Farm Mutual Automobile Ins. Co.[103] holds that an insurance company is not obligated to pay UM benefits where the insured let the time run on a Governmental Tort Claims Act (GTCA) claim with damages less than the liability limits imposed by the GTCA.

Carlos was injured in a car wreck with an Oklahoma Department of Transportation (ODOT) truck. Carlos filed a claim with ODOT, which was denied. Carlos did not file an action against ODOT within the 180 days following the denial as required by the GTCA, but instead sued her car insurance carrier, State Farm, for UM benefits. The parties stipulated that Carlos' damages were less than $100,000. State Farm filed a motion for summary judgment, contending that its UM exposure was limited to the amount Carlos' claim exceeded ODOT's $100,000 liability under the GTCA. Carlos alleged that the ODOT driver was an uninsured motorist, and that her

[100] 803 P.2d 1124 (Okla. 1990).
[101] 1990 OK 129, 803 P.2d 688.
[102] 482 F.Supp. 347 (E.D.Okla. 1978).
[103] 1996 OK CIV APP 158, 935 P.2d 1182.

damages exceeded her $25,000 UM coverage, and that she was not required to first sue an uninsured tort-feasor before claiming UM benefits, citing *Uptegraft v. Home Insurance*[104] and

Roberts v. Mid-Continent Casualty Co.[105] The trial court (Honorable James A. Hogue, Sr., Tulsa County) sustained State Farm's motion for summary judgment. Carlos appealed.

The Court of Appeals (Division 4) affirmed the trial court, holding that Carlos was not entitled to UM benefits because she did not meet her burden of proving that the ODOT driver was an uninsured motorist. The court cites *Buzzard v. Farmers Ins. Co.*,[106] *Karlson v. City of Oklahoma City*,[107] and *Boyer v. Oklahoma Farm Bureau Mut. Ins. Co.*[108] in discussing the interpretation of the statutory phrases, "legally entitled to recover from owners or operators of uninsured motor vehicles"[109] and "uninsured motorist."[110] The court held that Carlos was not legally entitled to recover because her claim was against the state, which waived its sovereign immunity, her claim was less than the state's statutorily mandated liability limit, and because she let the statutory time run on her claim against the state. The facts of *Uptegraft* and *Roberts* are distinguishable from Carlos' facts in that the tort-feasor in *Uptegraft* had no liability insurance, and the plaintiff's damages in *Roberts* exceeded the tort-feasor's liability limit.

PREJUDGMENT INTEREST RECOVERABLE UP TO UM LIMIT

Carney v. State Farm Mut. Auto. Ins. Co.[111] holds that interest is recoverable on a UM claim from the time of filing the UM suit, but only up to the UM policy limit. It overrules *Phillips v. State Farm Mut. Auto. Ins. Co.*[112]

The insured was injured by an uninsured motorist. He sued both the uninsured motorist and the insured's own insurance company, for his $200,000 UM coverage. He got judgment against the uninsured motorist for $130,000. He asked for an additional $73,545.88 in prejudgment interest from the date he filed suit, pursuant to 12 O.S. 1991 § 727. The trial court and the Court of Appeals each denied him prejudgment interest. The Supreme Court reversed, in an opinion by Justice Alma Wilson.

The Court noted that the uninsured motorist (UM) coverage is to pay for the liability of the uninsured motorist, but, absent, bad faith, only up to the policy limit. Thus, to the extent that the full prejudgment interest would cause the award to exceed the $200,000 UM policy limit, the Court disallowed the interest.

The Court noted that it was following the lead of the Oklahoma Court of Appeals in

---

[104]1983 OK 41, 662 P.2d 681.
[105]1989 OK CIV APP 92, 790 P.2d 1121.
[106]1991 OK 127, 824 P.2d 1105.
[107]1985 OK 45, 711 P.2d 72.
[108]1995 OK CIV APP 102, 902 P.2d 83.
[109]36 O.S. § 3636(B).
[110]36 O.S. § 3636(C).
[111]1994 OK 72, 877 P.2d 1113.
[112] 1993 OK CIV APP 27, 848 P.2d 70.

Mellenberger v. Sweeney.[113] The Supreme Court had previously approved *Mellenberger* in *Torres v. Kansas City Fire and Marine Ins. Co.*[114] However, that case did not involve whether prejudgment interest could be recovered in excess of policy limits. The coverage in *Torres* had been sufficient to cover the principal and prejudgment interest from the date of filing. The Supreme Court specifically overruled *Phillips* by name.

The Court does not discuss the effect of this decision on *Nunn v. Stewart*.[115] *Nunn* holds that the insured may recover interest in excess of UM limits from the date liability is established in the case. Presumably, the Supreme Court did not mean to change the *Nunn* rule or it would have overruled *Nunn* as it did *Phillips*. If this is so, then the rule is that the insured may recover prejudgment interest as the rate 12 O.S. 1991 § 727 calls for (T-bill rate plus 4%), up to the UM policy limit from the date suit is filed until judgment and may recover interest without regard to the policy limits from the date liability is established.

WORKERS' COMP OFFSET AGAINST UNINSURED MOTORIST COVERAGE VOID

Chambers v. Walker and MFA Ins. Co.[116] holds a policy provision permitting an insurer to offset Workers' Compensation benefits against UM coverage is void.

Plaintiff was injured while driving his employer's vehicle on business. Plaintiff recovered Workers' Comp greater than the UM limits. The UM policy permitted the insurer to offset amounts received under Workers' Comp against the UM coverage. The trial court granted the insurer summary judgment, based on the policy provision.

The Supreme Court reversed, in an opinion by Justice Wilson.

The insurer contended that, if the uninsured motorist had carried a liability policy with minimum financial responsibility limits, the insured would not have been allowed to keep the tort-feasor's liability policy limits and his Workers' Comp benefits due to Workers' Comp subrogation.

Therefore, the insurer should be able to deduct from its UM coverage any amount the insured would have lost through Workers' Comp subrogation because the insured would get the same "net recovery." The Court rejected the "net recovery" theory because the Workers' Comp carrier's subrogation rights exist against the tort-feasor and not the insured. Also, the insurer is statutorily required to offer UM coverage and any offset against the UM coverage would be a windfall to the insurer.

Noting Oklahoma's "mandatory offering" UM statute (36 O.S. 1981 § 3636), the Court said:

> We regard policy provisions such as the one under examination herein as a subterfuge to get around minimum statutory requirements of coverage established by the legislature . . . . [Citations omitted]

[113] 1990 OK CIV APP 85, 800 P.2d 747.
[114] 1993 OK 32, 849 P.2d 407.
[115] 1988 OK 51, 756 P.2d 6.
[116] 1982 OK 128, 653 P.2d 931.

> In *Porter v. MFA*, 643 P.2d 302, 304, we held a consent-to-sue clause void recognizing that its effect could be to "chill settlements and otherwise *dilute the mandatory uninsured motorist statute*." (653 P.2d 931, 934, emphasis by the court)

The fact that the State Board of Property and Casualty Rates had approved the provision did not help the insurer. The legality of the provision approved by the Board is preliminary and subject to judicial control.

Justice Irwin dissented without opinion and Justice Opala concurred in part and dissented in part, also without separate opinion.

BAD FAITH CLAIM SURVIVES DEATH OF INSURED

Clements v. ITT Hartford[117] holds an emotional distress claim caused by insurance company's bad faith conduct is an injury to the person which survives the insured's death.

Clements died after his lawyer demanded payment of UM benefits, but before suit was filed. ITT Hartford, the UM carrier, refused to pay, alleging the bad faith claim died with Clements. The trial court (Honorable James Blevins, Oklahoma County) granted ITT summary judgment. On appeal, the Court of Civil Appeals (Reif, Stubblefield, and Rapp) reversed and remanded.

Oklahoma's Survival Statute, 12 O.S. 1991 § 1051, provides for survival of certain causes of action, including causes for injury to the person or personal estate, as well as causes that survive at common law. To ascertain whether a claim survives the claimant's death, you determine whether the cause of action survives under common law (survival statute preserves common law survival). If it is questionable under common law, you determine whether the cause of action is one of those provided for in the survival statute.

Here, bad faith in delaying payment of insurance benefits is a common law tort cause of action based in contract. The emotional distress claim caused by the bad faith conduct is considered an injury to the person, which survives the insured's death. The attorney fees and any other loss the insured incurs to enforce the insurance contract is considered injury to the personal estate. Therefore, those damages also survive the insured's death.

UM STATUTE IN EFFECT ON LAST POLICY CONTROLS; UNDER 1976 STATUTE, UNDERINSURED STATUS IS DETERMINED BY STACKED UM LIMITS; NO OFFER OF UM REQUIRED WHEN INSURED IS ALREADY FAMILIAR WITH UM

Cofer v. Morton[118] holds that the UM statute in effect when a UM policy was issued or last renewed before an accident controls interpretation of the policy; under the 1976 version of 36 O.S. § 3636, the determination whether the adverse motorist is underinsured is made by comparing the tort-feasor's liability insurance limits with the insured's stacked UM limits, not the insured per vehicle limit; and that the insurer's failure to offer UM limits equal to the insured's liability limit had no effect when the insured already knew of his right to buy UM

[117] 1999 OK CIV APP 6, 973 P.2d 902.
[118] 1989 OK 159, 784 P.2d 67.

equal to the liability limit.

The insured had $5,000 UM limits and $250,000 liability limits on 12 cars. On April 15, 1979 (before the 1979 amendment became effective May 16, 1979), the insured's step-son was injured by a tort-feasor with a $10,000 liability limit. The federal district court certified questions, which the Supreme Court answered, in an opinion by Justice Hodges.

The controlling statute was the 1976, not the later enacted, 1979, version. Under the 1976 statute, the adverse vehicle is "uninsured" if its liability limits are less than the insured's UM limit. To make this determination, the UM limits are stacked and then compared with the tort-feasor's liability limit.

The insurance company's failure to offer UM limits equal to the liability limit did not result in the UM limit being equal to the liability limit as a matter of law. The insured was already aware of his rights so no further offer was required.

POLICY EXCLUDING UM COVERAGE FOR INSURED OCCUPYING A VEHICLE OWNED BY THE INSURED BUT NOT COVERED BY UNINSURED MOTORIST COVERAGE IS VALID

Conner v. American Commerce Insurance[119] holds that a policy provision excluding from uninsured motorist (UM) coverage a named insured who is injured while occupying a vehicle he owns but which is not covered by UM coverage is a valid exclusion.

Conner owned a car and a motorcycle. He insured the car for both liability and UM coverage but insured the motorcycle only for liability coverage. He was hurt by an underinsured motorist while riding the motorcycle.

American Commerce denied him UM coverage on the basis of a policy provision that there was no UM coverage for an insured injured while occupying a vehicle owned by that person but not covered by UM. The trial court, Judge Cunningham, in Canadian County, granted the insurance company summary judgment.

The Court of Civil Appeals affirmed, in an opinion by Judge Hansen, in which Judges Joplin and Mitchell concurred. The Court reasoned that the parties were free to contract for whatever exclusions they wished.

This decision is simply wrong. *Cothren v. Emcasco*[120] invalidates the "owned but not insured" exclusion. It has not been overruled. The legislature did modify the UM statute to provide:

> . . . 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

[119] 2009 OK CIV APP 61, 216 P.3d 850.
[120] 1976 OK 137, 555 P.2d 1037.

motor vehicle is not insured by a motor vehicle insurance policy.[121]

This statute simply authorizes a provision that there will be no coverage when the other owned vehicle is totally uninsured. Here, the vehicle was insured. It just did not have UM coverage.

The Court relied on two prior cases. *Shepard v. Farmers*[122] approved a policy provision which defined "insured household member" to exclude one who owned his or her own vehicle. Here, of course, Conner was an insured under the policy. *National American Ins. Co. v.Vallion*[123] likewise approved excluding from the category of "insured" a passenger who owns a vehicle subject to motor vehicle registration. Under that case, the passenger never becomes an insured.

The Supreme Court has modified Conner somewhat. Judge Robin Cauthron, in the Western District of Oklahoma, noted the apparent conflict between *Cothren v. Emcasco* and *Conner v. American Commerce* and certified to the Oklahoma Supreme Court the question whether the correct Oklahoma law is reflected in *Cothren* or *Conner*. The Supreme Court responded in *Morris v. America First Ins. Co.*[124] by holding Conner is disapproved but only where the insured in question is covered by other UM coverage (on another vehicle) which provided the insured coverage while occupying the vehicle which had no UM coverage.

UM POLICY EXCLUDING COVERAGE WHILE OCCUPYING UNINSURED VEHICLE VOID

Cothren v. Emcasco[125] holds invalid an uninsured motorist policy exclusion where the insured is occupying a vehicle owned by the insured but not covered by the policy.

The insured's son was injured by an uninsured motorist while riding an uninsured motorcycle owned by his parents. Defendant's UM policy excluded injury to an insured while occupying a vehicle owned by the insured but not covered by insurance. The trial court upheld the exclusion and rendered summary judgment for the defendant. The Supreme Court reversed, in an opinion by Justice Barnes. The exclusion is not one permitted by 36 O.S. 1971 § 3636. Because the statute does not permit the exclusion, it is invalid.

UM coverage attaches to the insured whether occupying an insured vehicle, an uninsured vehicle or while not occupying any vehicle.

ATTORNEY'S LIEN AGAINST UM CLAIM NOT SUPERIOR TO MEDICAL LIEN WHEN THERE IS NOT ENOUGH MONEY TO PAY BOTH

Dallas v. Geico Insurance Co.[126] holds that an attorney's lien against a UM claim is not superior to a medical lien but rather stands on the same footing as the medical lien when there is not

---

[121] 36 O.S. § 3636(E).
[122] 1983 OK 103, 678 P.2d 250.
[123] 2008 OK CIV APP 41, 183 P.3d 175.
[124] *Morris v. America First Ins. Co.*, 2010 OK 35, 240 P.3d 661.
[125] 1976 OK 137, 555 P.2d 1037.
[126] 2019 OK CIV APP 41, 445 P.3d 873.

enough money to pay both the medical lien and the attorney lien.

This is kind of a strange case. Mr. Dallas was injured while a passenger in a car driven by his wife who took evasive action to avoid a car which left the scene and was never identified. This circumstance resulted in an uninsured motorist (UM) claim against GEICO which was settled without a lawsuit for $60,614.78. This amount was not enough to pay a 50% attorney fee and pay the medical liens.

After the settlement was entered into without a lawsuit, Dallas filed an interpleader action, asking the trial court to adjudicate the medical liens and claims to apportion the settlement fund. The attorney endorsed "attorney lien claimed" on the interpleader petition.

The trial court, Judge Ogden, in Oklahoma County, conducted a hearing and took evidence. Two lien claimants did not appear and assert their claims. Two others accepted the trial court's allocation to them and did not join in the appeal. However, Pain Management Solution (Pain Management) participated in the trial and lodged this appeal.

The trial court gave the 50% attorney fee priority and ordered that paid and allocated the remaining settlement funds to the lien claimants who had appeared. Pain Management appealed, claiming the attorney had no lien because no suit was filed to recover the settlement before the interpleader, that the 50% attorney fee was unreasonable and that the trial court erred in excluding what it claimed was evidence there had been a $52,000 offer before the ultimate settlement. The Court of Civil Appeals, in a unanimous opinion by Judge Keith Rapp, affirmed in part and reversed in part.

Judge Rapp rejected the evidentiary grounds, finding that there was no error in rejecting an offer of a letter Pain Management claimed reflected that there had been an offer of $52,000 before the lawyer was retained. The Court did not make clear whether the rejection was based on hearsay or that it was an offer of settlement. However, the Court noted that the "letter" was actually a hand-written message from Mr. Dallas asking Pain Management to accept $52,000 without saying the UM carrier had offered that.

The Court also rejected an argument that the trial court should have required introduction of the 50% fee contract instead of taking the lawyer's word for it that there was such a written contract. This was within the trial court's discretion.

The principal thrust of the opinion is that the attorney's lien had no priority over the medical liens so that the attorney's lien shared equally with the medical lien claimants in the settlement proceeds. This result flows from the applicable medical lien statute, 42 O.S.§46:

> A. Every physician who performs medical services or any other professional person who engages in the healing arts, within their scope of practice pursuant to Title 59 of the Oklahoma Statutes for any person injured as a result of the negligence or act of another, shall, if the injured person asserts or maintains a claim against such other person for damages on account of such injuries, have a lien for the amount due for such medical or healing arts services upon that part going or belonging to the injured person of any recovery or sum had or collected or to be collected by the injured person, or by the heirs, personal representative, or next of kin of the injured

> person in the event of his death, whether by judgment, settlement, or compromise. Such lien shall be inferior to any lien or claim of any attorney handling the claim for or on behalf of the injured person. The lien shall not be applied or considered valid against any claim for amounts due pursuant to the provisions of Title 85A of the Oklahoma Statutes.
>
> B. In addition to the lien provided for in subsection A of this section, every physician or professional person licensed under Title 59 of the Oklahoma Statutes who performs medical or healing arts within their scope of practice for any person injured as a result of the negligence or act of another, shall have, if the injured person asserts or maintains a claim against an insurer, a lien for the amount due for such medical or healing arts services upon any monies payable by the insurer to the injured person.

The Court notes that §46A deals with tort claims for the negligence of "another" on behalf of the injured party. On the other hand, §45B deals with and gives a medical lien for contract claims against the injured party's own insurance. The Court says Subsection A is not involved since that is not the claim involved in the case. Rather, the claim was a contract claim against Dallas's insurance company.

Subsection A provides that the medical lien is inferior to an attorney's lien. Subsection B does not have that provision. For that reason, the attorney's lien in this case did not get priority but rather the attorney lien and medical liens were coequal and shared equally.

The result was that the two medical lien claimants who did not participate and make claim got nothing. The two medical lien claimants who accepted the judgment got what they accepted since they did not appeal and the attorney and Pain Management shared the remainder equally.

There's an historical reason for 42 O.S.§46 being worded the way it is. Originally, the statute consisted only of what is now Subsection A. The Legislature added Subsection B in 2012 to reverse the case of *Kratz v. Kratz*,[127] which held that medical liens did not attach to the insured's own coverage, such as med pay and UM. The Legislature simply added Subsection B which provided a lien against the insured's own coverage but did not contain the language now found in Subsection A giving attorneys' liens priority.

The Court seems not very troubled about Pain Management's argument that the 50% attorney fee was unreasonable. Just sort of reading between the lines might make one suspicious that the 50% fee might have been expected to be split between the lawyer and the client after the litigation was over. But, the Court doesn't address that.

This case, while undoubtedly correct, is a difficult one for lawyers with claims against UM or med pay. However, it's going to take a change in the legislation to change it. One might wish "good luck" on the idea of getting this legislature to enact an amendment favoring lawyers over doctors and other health care providers!

---

[127] 1995 OK 63, 905 P.2d 753.

SUMMARY JUDGMENT FOR INSURER DENYING STACKING INAPPROPRIATE WHERE RECORD DOES NOT SHOW INSURED WAS ADVISED A "PER POLICY" PREMIUM WOULD RESULT IN STACKING DENIAL AND THAT INSURED WAS GIVEN THE OPTION TO PURCHASE OTHER COVERAGE

Davis v. Choate and Equity Fire & Cas. Co.[128] holds that summary judgment for the uninsured motorist insurance company denying stacking based on the insurance company's "per policy" premium was premature where the record did not show the insured was advised that the per policy premium would result in denial of stacking and the insured was not offered the option to procure greater coverage.

David, injured in a collision with two underinsured motorists, had UM coverage for which Equity Fire charged a "per policy," rather than a "per vehicle," premium. Equity Fire paid one policy limit but refused to stack the multiple vehicles insured under the policy.

The trial court granted Equity Fire summary judgment, holding that stacking was only appropriate where multiple, per vehicle, premiums were charged.

After the trial court decision but before this Court of Appeals' decision, the Supreme Court decided *Scott v. Cimarron*.[129] *Scott* held charging a per policy premium would defeat stacking, but only if the insureds were advised that charging a per policy premium would result in a denial of stacking and gave the insured the option to choose higher coverage. Since the record in the instant case did not show what notice the insurance company gave the insured, nor whether the insured had the option and selected the lower, unstacked coverage, summary judgment was premature.

NO UM STACKING WHERE STACKED LIMITS WOULD EXCEED LIABILITY LIMITS

Davis v. Equity Fire & Cas. Co.[130] holds that there can be no UM stacking when the effect of the stacking would be that the stacked UM limits exceed the liability limit.

Davis had multiple vehicles insured under a policy which provided $10,000/20,000 liability and UM limits. The insurance company charged only a single, per-policy UM premium and denied stacking. In an earlier opinion,[131] the Court of Appeals reversed a trial court summary judgment for the insurance company, based on *Scott v. Cimarron*.[132]

That case held that an insurance company could deny stacking by charging a per-policy premium but must offer the insured a choice to buy stacked coverage. The earlier *Davis* case reversed and remanded for a determination whether such an offer was made.

The trial court found no such choice was offered, but denied stacking anyway. In the present

---

[128] 989 OK CIV APP 29, 787 P.2d 465.
[129] 1989 OK 26, 774 P.2d 456.
[130] 1992 OK CIV APP 171, 852 P.2d 780.
[131] *Davis v. Choate,* 1989 OK CIV APP 29, 787 P.2d 465.
[132] 1989 OK 26, 774 P.2d 456.

opinion, the Court of Appeals declined to follow *Scott* and held that there could be no stacking where the effect would be greater stacked UM limits than the unstacked liability limit.

The court based its decision on the provision of the UM statute[133] that UM limits be offered "not to exceed" the liability limit. The court treated this as a prohibition, not a restriction on the offer requirement.

USE OF UNAPPROVED FORM FOR UM REJECTION DOESN'T VOID UM REJECTION WHERE CHANGE SIMPLY ADDED INSTRUCTIONS ON HOW TO SELECT OR REJECT COVERAGE

Davis v. Progressive Northern Ins. Co.[134] holds that an insurance company's use of a form for selection or rejection of uninsured motorist (UM) coverage which included instructions for how to select or reject the coverage did not have approval of the Insurance Commissioner's office did not invalidate the rejection so there was no UM coverage.

Davis was injured while a passenger in a car owned by McWilliams and insured by Progressive. McWilliams rejected UM coverage but Progressive used a non-standard form for the selection/rejection of UM. The only difference in the statutorily required form and the form used was that it added language to instruct the insured how to use the form: "[Please indicate below what Uninsured Motorist coverage you want:]."

Progressive paid Davis $25,000 liability coverage but declined to pay UM coverage, based on the rejection form. Davis sued Progressive. A judge not named sustained Davis's motion for partial summary judgment that the rejection was invalid so there was UM coverage. A successor judge, Judge Phillip Ross, in Kay County, sustained a motion to reconsider and held the rejection was effective. The Court of Civil Appeals affirmed, in an opinion by Judge Larry Joplin.

The Courts held that the non-standard rejection form substantially complied with the requirement of 36 O.S. § 3636(J) and (K) that a form could deviate from the language required by the statute but only if the form was approved by the insurance commissioner. The Court of Appeals relied on a different statute, 36 O.S. § 3620, provides that policy provisions which differ from the insurance code will not be rendered invalid but rather should be construed in accordance with the provisions as they would have been had the form been in full compliance with the code. It seems rather clear the form substantially complied with the statute.

NO WORK COMP OFFSET FOR EMPLOYER'S UM COVERAGE PAYMENT

Dennis v. Harding Glass Co.[135] holds that the employer and workers' compensation carrier is not entitled to an offset against workers' compensation benefits for UM coverage paid under the employer's vehicle policy.

Dennis was injured while occupying his employer's vehicle when it was hit by an uninsured motorist. He recovered his employer's UM on the vehicle he was occupying. The employer

[133] 36 O.S. 1991 § 3636B.
[134] 2012 OK CIV APP 98, 288 P.3d 270.
[135] 1996 OK CIV APP 105; 929 P.2d 301.

sought to offset those UM benefits against his workers' compensation award. The trial court denied the offset. A three-judge appellate Workers' Compensation Court panel allowed the offset. The Court of Appeals reversed, in an opinion by Presiding Judge Hansen.

Bill Hodges Truck Company v. Humphrey[136] held that the employer and workers' comp carrier was not entitled to offset the employee's own UM coverage against the workers' compensation benefits it owed. *Thrasher v. Act-Fast Labor Pool, Inc.*[137] held that the employee's failure to notify the comp carrier of her assertion of a UM claim against a fellow employee's coverage did not afford the comp carrier a defense in the comp case, because the employer had no subrogation rights against that UM coverage.

Further, *Crane Carrier v. Ray*[138] and *Dayton Tire & Rubber Co. v. Vires*[139] had refused to reduce workers' comp benefits by retirement benefits (in *Crane Carrier*) and union bargained-for sick pay benefits (in *Dayton Tire*). By analogy, the employer's UM coverage benefits, bought for the benefit of employees occupying company vehicles, ought not to reduce workers' comp benefits.

Judge Buettner specially concurred, based on *Wise v. Wollery*.[140] *Wise* held that the workers' comp carrier was not subrogated against the employee's recovery from the employer's UM benefits, made after the workers' comp award. Except for that case, it appears Judge Buettner would have permitted the offset, to avoid a double recovery by the employee.

INSURED CAN ONLY STACK STACKABLE UM COVERAGE PAID FOR

Dodd v. Allstate Insurance Company,[141] holds that when Allstate Insurance Company (Allstate) collects the equivalent of two UM coverage premiums under one policy that has stackable coverage and states in a second policy that the UM coverage for the second policy was paid for under the first policy, Allstate only has to stack the two UM limits under the first policy.

Dodd had a number of cars insured with Allstate over a number of years. Allstate lists no more than four cars on any one policy, so when more than four cars are insured, a second declarations sheet with a second policy number is issued. Allstate took the position that it issued only one policy, regardless of the fact it issued two declaration sheets under two separate policy numbers. It claimed to have merely issued an "overflow" policy for Dodd's fifth car.

Dodd filed a claim for UM benefits when she was injured in a car wreck involving an uninsured motorist. At the time of Dodd's wreck, there were only three cars insured under policy number ...781 (Policy 781) and one car insured under policy number ...180 (Policy 180), an "overflow" policy. Each policy provided $10,000/$20,000 liability limits. Policy 781 provided two stackable limits of $10,000/$20,000 UM. The charge for UM was a multiple car premium equal to two UM premiums. Policy 180 stated that a multiple car discount applied, that the UM premium for

[136] 1984 OK CIV APP 55, 704 P.2d 94.
[137] 1991 OK 12, 806 P.2d 640.
[138] 1993 OK CIV APP 120, 847 P.2d 826.
[139] 1975 OK 100, 538 P.2d 194.
[140] 1995 OK CIV APP 69, 904 P.2d 151.
[141] 2004 OK CIV APP 82, 99 P.3d 1219.

Policy 180 was charged under Policy 781, and that there would be no stacking. Allstate asserts that this results in no UM premium being charged for the "overflow" Policy 180.

In response to Dodd's claim, Allstate paid Dodd $20,000, the stacked UM limits under Policy 781. It paid nothing under Policy 180. Dodd sued Allstate, arguing she is entitled to an additional $10,000 UM under Policy 180.

The parties tried the case to the court on stipulations of fact. The pertinent stipulations were: (1) Allstate's computer system requires that when more than four vehicles are insured, an additional declarations page is issued with an additional policy number; and (2) Dodd had more than four cars insured at the time the policy 180 declarations page was issued.

The trial court (Honorable William C. Hetherington, Jr., Cleveland County) held that Allstate owed nothing more. Judge Hetherington explained that Dodd paid only two premiums and was entitled to only two UM limits. The second document constituting Policy 180 was necessary to accommodate Allstate's computer limitations.

Dodd argued that she was issued two policies based on the following facts: (1) each declarations page stated "this policy covers only the vehicles shown on this . . . Declarations; and (2) Policy 178 and Policy 180 contained different endorsements and listed different drivers. Dodd argued further that she requested UM coverage on all her cars, and that she did not sign a rejection of UM coverage on the second policy. Allstate countered that there was only one policy, and even if there were two, Dodd did not pay a UM premium under Policy 180.

The Court of Civil Appeals (COCA) affirmed, holding that Allstate complied with Oklahoma law as set out in *Withrow v. Pickard*.[142] *Withrow* holds that when a new vehicle is added to a policy, it constitutes a new policy and the insurance company is required to offer UM coverage. But the coverage does not have to be stackable. Withrow added a car to his policy, which provided UM for the new car, but he did not pay an additional premium. Coverage can be stacked only where separate premiums were paid for each vehicle, or where there are separate policies and separate premiums paid for each policy.[143]

Presiding Judge Buettner wrote the opinion in which Judges Jones and Adams concurred.

SOL ON SUBROGATED UM CLAIM IS THE SAME AS INSURED'S SOL ON THE TORT CLAIM AGAINST THE TORT-FEASOR

Employers Mutual Casualty Co. V. Mosby, et al.[144] holds that the SOL on an insurance company's subrogation interest is the same as its insured's SOL on the claim against the tort-feasor and begins to run on the date of the injury.

On May 16, 1992, Janette Embry was hurt in a car wreck with James Mosby driving a car owned by Dennis Childers. Embry notified her UM carrier, Employers Mutual Cas. Co. (Employers

[142] 1995 OK 120, 905 P.2d 800.
[143] Citing *Kinder v. Oklahoma Farmers Union Mut. Ins. Co.*, 1991 OK CIV APP 53, 813 P.2d 546, 548.
[144] 1997 OK 93, 943 P.2d 593.

Mutual), and Childers' liability carrier, Country Companies Ins. Group (Country Co.). Employers Mutual paid Embry $12,000 UM benefits. Just before the two-year tort SOL ran, Country Co. offered to settle Employers Mutual's subrogation claim for Childers' $10,000 liability limit. Three months after the SOL on the tort claim ran, Employers Mutual accepted Country Co.'s settlement offer. Not surprisingly, Country Co. refused to pay because the tort SOL had run. Employers Mutual sued Country Co. for breach of contract based on the pre-SOL offer and post-SOL acceptance, alleging that the pertinent SOL began to run when it paid Embry UM benefits and acquired its subrogation rights.

The trial court granted Childers' and Country Co.'s motion to dismiss holding that the claim was time-barred, and sustained Employers Mutual's motion to reconsider, but again held the claim was time-barred. The court found that Employers Mutual's post-SOL acceptance letter was a counter-offer because it contained terms and conditions different from Country Co.'s pre-SOL offer. Employers Mutual appealed, arguing that the three-year SOL for breach of an oral contract applied to its dealings with Country Co. The Court of Civil Appeals affirmed the trial court holding that the underlying cause of action, the car wreck, determines the appropriate SOL.

The Oklahoma Supreme Court granted certiorari and pointed out that the Court of Civil Appeals holding is consistent with a previously published Court of Civil Appeals opinion,[145] but inconsistent with a non-published Court of Civil Appeals opinion.[146] The Supreme Court specifically overruled *Northland*,[147] stating that a subrogee steps into the plaintiff's shoes and is subject to the tort-feasor's equitable and legal defenses. A subrogation claim is not subject to the normal cause of action rule of accrual. The date of accrual is the date the insured's claim arose - the date of the wreck.

UM INSURED NOT REQUIRED TO FIRST PURSUE OR JOIN CLAIM AGAINST TORT-FEASOR IN SUIT AGAINST UM INSURER; INSURER WHICH DENIED A CLAIM ON THAT BASIS WAS IN BAD FAITH

Everaard v. Hartford Acc. and Indem. Co.[148] holds that a UM insured need not first pursue a claim against the tort-feasor or join the tort-feasor in his suit against the UM insurance company and that the insurance company's assertion of that position constituted bad faith.

Everaard's decedent was killed in a three-car collision in Texas. Two of the three motorists involved were insured; a third was totally uninsured. After Everaard was unsuccessful in getting Hartford to pay his claim, he sued in federal court in Oklahoma for bad faith.

Hartford insisted that Everaard must either first pursue claims against the tort-feasors and exhaust their liability limit or join the tort-feasors in his suit against Hartford, which could only be done in Texas.

The trial court, in a non-jury trial, rejected Hartford's contentions and rendered judgment for the

---

[145] *Farmers Ins. Co., Inc. v. Stark*, 1996 OK CIV APP 53, 924 P.2d 798, cert denied.
[146] *Northland Ins. Co. v. Vance*, No. 83,084, April 12, 1994.
[147] 1997 OK 93, 943 P.2d 593, 594.
[148] 842 F.2d 1186 (10th Cir. 1988).

$600,000 policy limit, $165,000 compensatory damages, and $900,000 exemplary damages. The Court of Appeals affirmed, but remanded for new findings of fact.

Hartford's position ran counter to established Oklahoma law that UM coverage is *not* excess to liability coverage but is primary, if it is applicable. Hartford's "other insurance" clause, which purported to make its UM coverage excess to the adverse liability limits, was invalid, as contrary to the Oklahoma UM statute. *Keel v. MFA Ins. Co.*[149] had established that the insured could sue the UM insurance company directly, without joining the tort-feasor. Hartford's insistence to the contrary was bad faith.

The Court of Appeals noted that the trial court had adopted, verbatim, plaintiff's proposed findings of fact. The Court of Appeals criticized this procedure and remanded with instructions for the trial court to make its own findings of fact.

UM CARRIER WAS IN BAD FAITH FOR SUBMITTING MEDICAL BILLS TO MEDICAL REVIEW FOR REASONABLENESS AND REFUSING TO PAY THE BILLS AS AN UNCONTESTED AMOUNT

Falcone v. Liberty Mutual Insurance Co.[150] holds a UM carrier is in bad faith when it challenges reasonableness of medical bills and submits the bills to medical review and them refusing to pay the bills as an uncontested amount to settle the claim.

Ms. Falcone was injured while a passenger in her Mother's car, insured by Liberty Mutual for $100,000 UM and $1,000 med-pay. She was taken by ambulance to the OU Medical Center ER. The doctors there ordered CT scans of her neck vertebrae and transferred her to the Level 2 trauma center (L2). She was discharged less than 4 hours later with a total bill of $47,203, of which $24,420.25 was treatment in the L2 trauma center. She had later treatment, including facet joint injections. Her total medical bills incurred were $67,098.23.

Liberty refused to pay its $100,000 UM limit. It paid the $1,000 med-pay and offered $37,855.23. Falcone sued on the policy and for bad faith. Liberty increased its evaluation to $52,677.98. Liberty argued that it had submitted the medical bills to a medical "utilization reviewers," out-of-state medical doctors who were of the opinion the ER doctors erred in ordering CT scans when plain x-rays would have been sufficient and in referring Ms. Falcone to the L2 trauma center.

Finally, Liberty paid its $100,000 limit (less the $1,000 med-pay) and Falcone dismissed without prejudice her policy claim and proceeded with her bad faith claim. The trial court, Judge Prince, in Oklahoma County, held that, as a matter of law, Liberty was not in bad faith for refusing to pay its limits and submitting the bills to the medical review. The Supreme Court reversed, in a unanimous decision by Justice Watt. All but two of the Justices reversed and remanded "for further proceedings in accordance with the views expressed in this opinion." Justices Gurich and Reif concur that Liberty has been in bad faith but on remand would submit to the jury only the question of the amount of bad faith damages.

[149] 1976 OK 86, 553 P.2d 153.
[150] 2017 OK 11, 391 P.3d 105.

The opinion notes that the med-pay portion of the policy has a provision that it agrees to pay "reasonable expenses incurred for necessary medical treatment" caused by an accident and contrasts that with the UM language "pay compensatory damages which an 'insured' is legally entitled to recover" from the uninsured motorist. The opinion says the med-pay language "might arguably allow" Liberty to submit the bills to medical review but the UM language does not.

SUBROGATED INSURANCE COMPANY HAS THE SAME TIME TO SUE TORT-FEASOR AS ITS INSURED HAD

Farmers Ins. Co., Inc. v. Stark[151] holds that a subrogated insurance company steps into the shoes of its insured and has two years in which to sue the tort-feasor for subrogation.

April Skibsted (Skibsted) and Cecil Stark (Stark) had a car wreck on August 14, 1992. Slkibsted had UM coverage with Farmers. Stark was insured with Shelter. Shelter send Skibsted a Release and offered her its $25,000 liability limit to settle her claim against Stark. Farmers substituted $25,000 to Skibsted and reserved its subrogation interest. Shelter refused Farmers subrogation demand and, more than two years after the wreck, Farmers sued Stark and Shelter for $25,000. By this time Stark had died from injuries not related to the wreck, so Stark's estate was substituted for Stark. Stark's estate raised the two-year tort SOL as a defense. Farmers argued that its lawsuit was created by statute, 36 O.S. 1991 § 3636(E)(2), so that a three-year SOL applied. Farmers also argued that its cause of action did not accrue until September 17, 1993. when the substituted payment was made, so that it had three years from that date, or until September 17, 1996, to sue Shelter and Stark.

Stark's estate sought summary judgment based on its SOL defense. The trial court granted Farmers summary judgment, relying on an unpublished opinion, *Northland Ins. Co. v. Vance*.[152] The *Northland* court reasoned that a UM insurer's obligation to pay policy proceeds arises out of contract and is not dependent upon the insured's right to sue the tort-feasor. Therefore, the UM insurer has a three-year SOL on a liability arising from statute.

The Oklahoma Court of Appeals reversed, in an opinion by Judge Stubblefield. The court disagreed with *Northland*, stating that court overlooked the fact that the tort-feasor was not a party to the insurance contract. Therefore, the insured's rights against the tort-feasor, or those gained by the insurer through subrogation, are not based in contract. A subrogated insurance company steps into the shoes of the insured and acquires no greater rights than the insured has against the tort-feasor. Farmers had two years from the date of the wreck within which to sue Starks' estate. It failed to do so.

The court stated that the *Northland* court was in error regarding 36 O.S. 1991 § 3636 creating a cause of action so that a three-year SOL for "an action upon a liability created by statute" applies. Title 36 O.S. 1991 § 3636 governs the relationship between a UM insurer and its insured. It has nothing to do with the insured's claim against a tort-feasor. The Court of Appeals reversed the trial court and remanded with instructions to dismiss Farmers' action.

---

[151] 1996 OK CIV APP 53, 924 P.2d 798.
[152] No. 83,084, April 12, 1994.

INSURABLE INTEREST REQUIRED FOR UNINSURED MOTORIST COVERAGE

Farmers v. Thomas[153] holds that an insurable interest is required for there to be UM coverage.

Plaintiff was injured while occupying a car awarded her friend in a divorce. The owner's ex-husband had insured the car with a policy including UM. The policy was still in the ex-husband's name following the award of the car to the ex-wife.

The Supreme Court, in a memorandum opinion by Justice Summers (from which Justices Hodges and Wilson dissent, without opinion) held that the ex-husband's insurable interest in the car ceased with the award of the car to the ex-wife so that plaintiff, a passenger in that car, had no UM coverage available to her.

The decision cites *Agee v. Travelers*.[154] That case held that the ex-spouse ceased to be a named insured upon divorce. More closely in point, the court cites *Allstate v. Smith*[155] holding an ex-spouse, not awarded the car, had no insurable interest and, therefore, there was no liability coverage. The third case relied upon, *Worchester v. State Farm*[156] does not reach the insurable interest issue at all. Rather, it holds that where a vehicle is sold, the insurance company which insured the seller does not become obligated to afford coverage to the purchaser.

The present case and *Allstate v. Smith, supra*, applying the insurable interest doctrine to deny coverage following a divorce are probably bad law. The public policy behind the insurable interest doctrine is two-fold: (1) to avoid gambling type transactions in which one buys insurance so that he may profit from another's misfortune, and (2) to avoid a situation where profit will come to the insured without any offsetting loss to the insured from destruction of the property or loss of life, thus encouraging intentional losses. Because the insured, ex-spouse, will derive no benefit from either a liability or a UM claim, the insurable interest doctrine simply does not apply.

NO STATUTORY FORM OFFER REQUIRED WITH FIRST RENEWAL AFTER STATUTE'S EFFECTIVE DATE; SUBROGATION PERMITTED, EVEN WHERE INSURED NOT MADE WHOLE

Fields v. Farmers Ins. Co., Inc.[157] holds that a UM insurer was not required to make a written offer of UM coverage equal to liability limits until the first renewal after a one-year "phase-in" period, following the September 1, 1990, effective date of the amendment to 36 O.S. § 3636(I) and that the equitable rule that an insurer may not take subrogation from its insured's recovery until the insured has been fully compensated does not apply to contractual subrogation.

Mr. Fields was badly injured in a collision with an underinsured motorist. The tort-feasor had only $50,000 in liability coverage, while Fields' UM policy showed only $30,000. He contended that he was entitled to UM limits equal to his liability coverage because Farmers had failed to

---

[153] 1987 OK 84, 743 P.2d 1080.
[154] 396 F.2d 57 (10th Cir. 1968).
[155] 442 F.Supp. 89 (E.D.Okla. 1977).
[156] 473 P.2d 711 (Colo. 1970).
[157] 847 F.Supp. 160 (W.D.Okla. 1993), aff'd, 18 F.3d 831 (10th Cir. 1994).

make him a new, written offer of UM coverage equal to his liability limit with the first renewal of his policy after the effective date of the statute and before the wreck. The statute provided for a one-year "phase-in" period, during which the insurance company could use a deviated form, rather than the statutorily prescribed form.

Fields also contended his health insurer, which had paid more than $100,000 in medical bills could not take subrogation out of his recovery, because to do so would leave him less fully compensated or made whole. The federal district court, Judge Leonard, held for the insurance companies and against Mr. Fields on both points. The Tenth Circuit Court of Appeals affirmed, in an opinion by Judge Anderson.

The courts did not deal with the requirement for an offer on a deviated form during the first year. Rather, they held that there was no requirement for *any* offer until one year after the effective date of the statute, by which time the wreck had occurred.

The courts also found that Oklahoma would not apply the "make whole" rule (that there can be no subrogation until the insured is fully compensated or made whole) to contractual subrogation. The doctrine is, the courts said, an equitable doctrine and does not apply to contractual subrogation, such as that involved in an insurance policy providing for subrogation. There, the parties may contract for whatever terms they want. The insurance company can take premiums and then subrogate, leaving the insured uncompensated.

UM COVERAGE OF "FAMILY MEMBER" AS INSURED INCLUDES A STEP-BROTHER

Flitton v. Equity Fire and Cas. Co.[158] holds that the insured's step-brother, who lives in the same household, is a member of the insured's household, so as to be covered under the insured's uninsured motorist policy.

The decedent's father married the insured's mother. The policy defined "insured" to include a "family member," defined as:

a person related to [the insured] by blood, marriage or adoption who is a resident of [the insured's] household. This includes a ward or foster child.

The father sued the UM insurer, claiming his son, the step-brother of the decedent, was insured under this clause. The trial court granted the father summary judgment. The Court of Appeals affirmed. The Supreme Court granted *certiorari* and likewise affirmed, in an opinion by Justice Summers.

The insurance company argued that step-children are related to parents by "affinity" but that the legal term "affinity" does not extend to the relationship of step-children to one another. The Supreme Court rejects that technical argument, noting that the policy did not use the term "affinity." Therefore, the technical meaning of that term was not controlling.

Rather, the Court adopts a "plain, ordinary, and popular sense" use of the words. Since most non-

[158] 1992 OK 2, 824 P.2d 1132.

lawyers would consider step-children "related," that interpretation will prevail.

UM BENEFITS FOR INSURED'S WRONGFUL DEATH ARE DISTRIBUTED TO THOSE LEGALLY ENTITLED TO RECOVER AS DEFINED BY WRONGFUL DEATH STATUTE IN ACCORDANCE WITH EACH CLAIMANT'S LOSS, REGARDLESS OF POLICY PROVISION TO THE CONTRARY

Forbes v. Shelter Mut. Ins. Co.[159] holds that in a wrongful death situation, UM benefits are to be distributed to those legally entitled to recover as defined by the wrongful death statute in accordance with each claimant's loss, despite conflicting UM policy provisions to the contrary.

Gilbert Forbes, killed in a car wreck in Missouri by an uninsured driver, was survived by his wife and an adult daughter from a previous marriage. Forbes had two separate car insurance policies with Shelter Mutual Ins. Co. (Shelter), each containing UM coverage that totaled $100,000. Wife and daughter filed separate claims for the UM benefits, neither of which Shelter paid.

Wife sued Shelter for breach of contract and bad faith. Shelter joined the daughter and interpled the $100,000, admitting it owed the policy limits, asking the court to decide who gets what. Wife moved for summary judgment, arguing that she was a named insured and owner of the policy and that the policies directed that all amounts be paid to her as surviving spouse.

Daughter also moved for summary judgment, arguing that the policy did not control who was entitled to the policy proceeds, the proceeds should be allocated among all those entitled to recover, Missouri law should control how the proceeds were distributed, and that Missouri law requires an equal distribution among the surviving spouse and children. The daughter argued that UM proceeds paid because of wrongful death should be distributed to those statutorily entitled to recover in a wrongful death action. The trial court granted the wife summary judgment, denying the adult daughter summary judgment, and ordered that all the interpled proceeds be paid to the wife. The daughter appealed.

The Court of Civil Appeals reversed the trial court, holding that where UM benefits represent damages for wrongful death caused by an uninsured negligent driver, those legally entitled to recover the policy proceeds will be defined by the wrongful death statute, regardless of what the policy provides. The daughter may be legally entitled to the UM benefits; therefore, the case was remanded for additional proceedings.

The problem in this case is that the Shelter policy has two conflicting provisions. The "Payment of Loss By Us" provision mandates payment to the surviving spouse of a deceased insured. However, the "Additional Definitions" section defines "Insured" as "Any person, with respect to damages he or she is entitled to recover because of bodily injury . . . sustained by an insured defined in (a) ['you and any relative'] and (b) ['any other person while occupying an insured auto'] above. By the Shelter policy's definition of an "Insured," the daughter is an insured because she is "entitled to recover" pursuant to the wrongful death statute.[160] Title 36 O.S. §

[159] 1995 OK CIV APP 113, 904 P.2d 159.
[160] 12 O.S. Supp. 1993 § 1053(B).

3636B mandates the payment of damages for which a negligent uninsured motorist is legally responsible. The wrongful death statute determines surviving spouses and children as persons legally entitled to recover damages from the tort-feasor. The court determined that Shelter, likewise, should be liable to the surviving spouse and children.

The court disagreed with the daughter that the proceeds should be distributed equally between daughter and wife according to Missouri law. The trial court is to distribute the recovery according to each claimant's loss as provided by the wrongful death statute.

WORKERS' COMP RECOUPMENT RIGHT TAKES PRECEDENCE OVER UM SUBROGATION RIGHT; SETTLEMENT DID NOT QUALIFY AS A COMPROMISE SETTLEMENT SO AS TO AVOID PRETTYMAN FORMULA SO INJURED COMP CLAIMANT GETS NOTHING FROM SETTLEMENT

Ford v. Gary[161] holds that the workers' comp recoupment right takes precedence over an uninsured motorist (UM) subrogation right; a settlement of claims paid by comp and UM coverage cannot be added together to compare with the liability settlement so that a settlement was not a compromise settlement authorizing the District Court to equitably apportion a liability settlement, with the result that the injured employee got no part of the liability recovery.

Plaintiff was a City of Tulsa motorcycle police officer. He was badly injured in a car crash with Gary. The City of Tulsa paid him total comp benefits of $200,534. He also collected $250,000 in underinsured motorist benefits from Farmers. He then settled his third- party liability claim against Gary for $250,000.

Plaintiff argued that, to determine whether his settlement was a "compromise settlement" so as to give the District Court power to exercise discretion in dividing the third-party recovery between and among plaintiff and the comp carrier and the UM carrier (for its subrogation) he could add the amounts he got from work comp ($200,534) and from the liability claim ($250,000) to conclude his "third-party recovery" was a total of $450,534. Since this was greater than the work comp subrogation ($200,534), he argued the district court could apportion the $250,000 liability settlement between and among plaintiff, the comp subrogation and the UM subrogation. Both the trial court (Judge Kuehn, in Tulsa County) and the Court of Civil Appeals in this opinion disagreed.

They both held that the proper comparison was the comp subrogation ($200,534) and the liability settlement ($250,000) so the settlement was for more than the comp subrogation and *Prettyman v. Halliburton Co.*[162] applied. The Courts both held that this was the result of the language of the comp subrogation statute, 85 O.S. §44(a), which provided: "'compromise settlement' . . . mean[s] a compromise reached by the injured worker against a third party for less than the amount of the workers' compensation award."

The trial court held, and the Court of Civil Appeals affirmed, that the comp subrogation took priority over the UM subrogation so it split the proceeds after payment of attorney fees and costs

[161] 2015 OK CIV APP 63, 353 P.3d 553.
[162] 1992 OK 63, 841 P.2d 573.

80% to the comp subrogation and 20% to the UM subrogation, leaving nothing for the injured Plaintiff.

COVENANT NOT TO SUE TORT-FEASOR BARS UM RECOVERY; FAILURE TO RESPOND TO MOTION FOR SUMMARY JUDGMENT FATAL ON APPEAL

Frey v. Independence Fire & Casualty[163] holds that a covenant not to sue the tort-feasor (like a release) bars a UM policy recovery. The injured insured settled with thte tort-feasor's liability carrier and gave a covenant not to sue the tort-feasor which purported to reserve the *insured's* rights against the UM carrier but not the *UM carrier's* rights against the tort-feasor. The insurance company filed a motion for summary judgment to which the insured did not respond. The trial court granted summary judgment, holding the covenant not to sue was the equivalent of a release and barred a UM recovery under *Porter v. MFA.*[164]

The rationale of both *Frey* and *Porter* is that the release or covenant not to sue destroys the subrogation rights of the UM insurer against the tort-feasor. The insured tried, for the first time on appeal, to claim that the UM carrier was estopped to object to the settlement, by refusing to participate in settlement negotiations. The Supreme Court held the issue could not be raised for the first time on appeal but must be raised in response to motion for summary judgment.

ATTORNEY'S LIEN IS SENIOR AND IS PAID OUT OF UM PROCEEDS WITH BALANCE GOING TO INSURED; ALL OTHER LIEN HOLDERS ARE PAID OUT OF LIABILITY PROCEEDS; UNSECURED CREDITORS GET NONE OF FIRST $50,000 PERSONAL BODILY INJURY RECOVERY

Fugate v. Mooney and Shelter Ins. Co.[165] holds that an attorney's lien is senior to that of physicians and hospitals, the attorney's lien is to be paid first out of UM proceeds, the balance of which goes to the insured, all other lienholders are to be paid proportionately out of liability proceeds, and unsecured creditors get none of the first $50,000 of a personal bodily injury recovery.

Mooney's car struck Fugate, injuring him, when Fugate stopped to help put out a roadside fire. Fugate's medical bills totaled $180,000. Fugate sued Mooney for negligence and Shelter for UM benefits. Mooney's insurance company paid its $25,000 liability limit and Shelter paid its $35,000 UM limit. Fugate's contract with his lawyer provided for a 35% attorney fee. Fugate moved the trial court to distribute the settlement proceeds because his medical bills exceeded the $60,000 available.

The trial court held that the physician's and hospital liens cannot attach to UM, the attorney's lien had priority and was to be paid from UM benefits, all other liens would be paid from the liability benefits, and the balance would be proportionately distributed to creditors. Fugate appealed, arguing that the ruling subordinated the attorney's lien, allows the healthcare providers' liens to attach to UM benefits, and violates his right to exempt the first $50,000 of his

[163] 1985 OK 25, 698 P.2d 17.
[164] 1982 OK 23, 643 P.2d 302.
[165] 1998 OK CIV APP 48, 958 P.2d 818.

personal bodily injury claim proceeds from creditors' claims. Fugate contended that the attorney's lien should be deducted from the combined total of the liability and UM limits and that the remainder of the UM benefits should be paid to Fugate. Fugate argued that the remainder of the liability proceeds should go to the medical lien holders. The medical lien holders appealed, arguing that the ruling distributed proceeds to unsecured creditors.

In an opinion authored by Judge Carol Hansen, the Court of Appeals held that the attorney's lien is a senior lien and attached to the entire settlement. However, under the doctrine of marshaling assets,[166] senior lien holders must satisfy their claims from the fund in which junior lien holders have no interest. The healthcare providers had no interest in Fugate's UM benefits. Furthermore, Oklahoma law exempts a person's personal bodily injury, death, or workers' comp claim not in excess of $50,000 from attachment for payment of debts. The trial court erred in ruling the balance of liability proceeds were to be distributed to creditors. The Court of Appeals reversed that holding and affirmed in all other respects.

FACTS DIDN'T SUPPORT FAILURE TO PAY UNCONTESTED AMOUNT OF UM AS BAD FAITH

Garnett v. Government Employees Insurance Company[167] holds that, under the particular facts of the case, an offer made by the uninsured motorist (UM) carrier on a UM claim was not an "uncontested amount so as to make the carrier's failure to pay the uncontested amount bad faith and that a good faith dispute as to value precluded a bad faith claim for "low balling."

Garnett was a passenger in a truck driven by Hargrove. Both the Hargrove truck and the rear-ending vehicle were insured by Government Employees Insurance Company (GEICO). GEICO paid the $10,000 liability coverage on the rear-ending vehicle but offered only $3,000 of the $15,000 UM limit on the truck in which Garnett was riding. GEICO explained that it evaluated the claim at between $11,000 and $13,000.

Garnett's lawyer demanded that GEICO pay the $3,000 it offered as an uncontested amount. GEICO declined.

Trial of the case resulted in a verdict of $15,000. The trial court (Judge Lucas, in Cleveland County) sustained GEICO's Partial Motion for Summary Judgment holding there was no evidence of bad faith because the $3,000 offer did not necessarily represent an uncontested amount and the insurance company had a good faith belief to support its $3,000 offer, in light of the verdict.

In a side matter, Judge Lucas also sanctioned both lawyers. He sanctioned GEICO's lawyer for causing a mistrial by his "inflamatory statements" in his opening statement. (He argued Plaintiff's treating physician "churned fees" and "agreed to testify as part of the deal.") For reasons not clear in the opinion, the cases went before Judge Hetherington, who sanctioned Garnett's attorney (but not Garnett) $2500 for revealing in his application for the mistrial sanctions matters that took place during a mediation. The $15,000 verdict came on a retrial after

[166] 24 O.S. 1991 § 4, and *In re Martin*, 1994 OK 48, 875 P.2d 417, 420.
[167] 2008 OK 43, 186 P.3d 935.

the trial which ended in a mistrial. Garnett appealed both the partial Motion for Summary Judgment and the sanctions

The Court of Civil Appeals (COCA) affirmed, in an opinion by Judge Joplin. For reasons not totally clear from the opinion, COCA held that the evaluation of $11,000 to $13,000 did not constitute an uncontested amount so as to trigger a bad faith claim for failure to pay it. (One suspects there was an argument that the $3,000 offer included defense costs but this would hardly explain GEICO's testimony about its evaluation.) Further, says the COCA, GEICO was not in bad faith for its evaluation of $11,000 to $13,000 as compared with a $15,000 verdict.

The COCA also affirmed the sanctions award against Plaintiff's lawyer. The Court wrote extensively about the importance of keeping confidential the proceedings at mediation. It is likely this latter rulingis what got the otherwise unremarkable opinion ordered published.

There is a little something for everyone in this opinion. While there is the puzzling question why GEICO's "evaluation" of the case did not result in an "uncontested amount." However, the opinion makes clear that failure to offer an uncontested amount is bad faith. It appears a clean appellate court ruling on this issue will await another case.

LETTING STATUTE RUN DOES NOT TRIGGER UM

Gates v. Eller[168] holds that letting the statute of limitation run on the claim against an insured tort-feasor who has sufficient coverage to pay the claim does not render the tort-feasor uninsured, so as to trigger the injured party's uninsured motorist coverage.

Four days after the tort statute of limitation ran, Gates sued Eller, (the tort-feasor) and Gates' uninsured motorist (UM) insurance carrier. The trial court held the statute of limitation barred the suit against the tort-feasor and that, because the damages did not exceed the tort-feasor's liability limit, there was no UM claim. The trial court, Judge Niles Jackson, in Oklahoma County, granted a motion to dismiss in favor of the tort-feasor and summary judgment for the UM carrier.

The Court of Civil Appeals reversed, holding that the running of the statute of limitation as to the tort-feasor rendered the tort-feasor's liability coverage unavailable to the insured, making the tort-feasor an uninsured motorist. The Supreme Court reversed, in a unanimous opinion by Justice Boudreau.

The Supreme Court reasoned that the insured had the burden of showing not just that the tort-feasor's limits were unavailable but that they were less than the damages. The insured still has the burden of showing the uninsured (which is to say, underinsured) status of the tort-feasor before we ever reach the question in *Burch v. Allstate*, 1998 OK 129, 977 P.2d 1057.

In *Burch*, the Plaintiff had let the statute run on the claim against the tort-feasor. However, damages in *Burch* exceeded the available liability coverage. Burch holds that the UM carrier owes all of the damages, up to its policy limit but not, according to *Gates*, that letting the statute

[168] 2001 OK 38, 22 P.3d 1215.

of limitation run on the tort claim makes the tort-feasor uninsured.

Gates also by implication concludes a contention some have made that *Burch* stands for the proposition that, whether or not the statute has run, the UM carrier has an obligation to pay even where the damages do not exceed the tort-feasor's liability limit. Obviously, if that were so, *Gates* would not have needed to worry about the effect of the statute of limitation running.

MUTUAL MISTAKE WARRANTS CONTRACT REFORMATION

Gay v. Hartford Underwriters Ins. Co.[169] holds that mutual mistake warrants reformation of a UM policy.

Gay applied for liability coverage on three cars with $100/300 liability limits and accepted Hartford's UM offer by checking the box on the applications marked "minimum amount available." He thought that meant UM equal to the liability. He did not read the policy except to see that it listed all three cars.

Gay later asked Hartford for a quote for coverage on his motor home. While talking with the agent, he learned that the UM coverage on his cars was only $10,000/$20,000, and requested that the UM be changed to equal the 100/300 liability limit. The agent said he would take care of it and gave Gay another number to call about his motor home. Gay decided to insure the motor home with Hartford and during the conversation to purchase the coverage, learned that he still had only 10/20 UM on his three cars. Gay again requested the UM limit be increased to equal his liability limit and, again, the agent said she would take care of it.

Gay got an amended policy that insured his cars and motor home. Again, he did not read it other than to confirm that the cars and motor home were listed. The liability limits were $100/300 but the UM limits were still only $10/20.

Gay discovered the error after filing a claim for injuries he sustained in a car wreck. Hartford denied his claim for higher UM limits. He sued to reform the policy alleging mutual mistake.

The trial court granted Hartford's demurrer at the close of Gay's evidence. The Court of Appeals reversed and remanded, finding that the trial court acted against the clear weight of the evidence, and that the evidence was sufficient to show mutual mistake warranting reformation of the policy. On retrial, the trial court again held in favor of Hartford, finding that the policy contained the UM limits Gay requested on the application, and that Gay had ample time to change his limits and failed to do so. Again, Gay appealed. The Court of Appeals affirmed. The Supreme Court reversed.

The Supreme Court held the policy should be reformed, stating that the Court of Appeals ruling on Gay's first appeal became the settled-law-of-the-case, thereby controlling all subsequent proceedings. The law-of-the-case doctrine applies when the facts and issues in both appeals are materially and substantially identical. On the first appeal, the Court of Appeals held the evidence supported reformation. In the second trial, Hartford failed to meet its burden to show Gay didn't

[169] 1995 OK 97, 904 P.2d 83.

request a limits change and that it did not agree to change it.

EXCESS LIABILITY COVERAGE NOT CALCULATED IN DETERMINING WHETHER VEHICLE IS "UNINSURED" FOR PURPOSES OF UM STATUTE

In *GEICO General Insurance Company v. Northwestern Pacific Indemnity Company,*[170] the Oklahoma Supreme Court holds that both primary liability coverage and UM coverage must be paid before an excess liability carrier is obligated under an umbrella policy.

The estate of a passenger killed in an auto accident sued the estate of the driver for wrongful death. The wrongful death claim was settled in mediation for $800,000.

GEICO carried the driver's automobile liability and UM under a family policy issued to the driver's mother. Both the liability and UM coverages had $300,000 limits. The family also had a $2,000,000 excess liability policy issued by Northwestern Pacific Indemnity Company (NPIC). GEICO paid its limits under both the liability and UM coverages; NPIC paid the remaining $200,000 under the umbrella policy. GEICO then sued NPIC on an "equitable subrogation" theory in the U.S. District Court for the Western District of Oklahoma. GEICO claimed that the accident vehicle was not "uninsured" as defined under the UM statute and that it should not, therefore, have to pay its $300,000 UM limits. Accordingly, said GEICO, NPIC's share of the settlement obligation was $800,000 rather than the $200,000 paid.

The companies agreed that (1) the driver was an insured under both the auto liability and the excess liability coverages; (2) the passenger was an insured under the UM; and, (3) the GEICO policy was primary and NPIC's excess.

GEICO cited the definition of "uninsured motor vehicle" in 36 O.S. § 3636(C), which includes "an insured motor vehicle, the liability limits of which are less than the amount of the claim . . . ." GEICO argued the term "liability" in the statute encompassed both the GEICO primary and the NPIC excess liability coverages; thus both would be tapped before the GEICO UM.

The Oklahoma Supreme Court was called upon by the federal Court to answer the following certified question:

> Is an excess/umbrella policy included in determining the liability limits of an uninsured motor vehicle under 36 O.S. § 3636(C)?

The Court answered in the negative, for two reasons, one based upon policy language and the other based upon legal precedent. Justice Watt wrote the opinion.

First, the Court determined that a clause in the NPIC policy required not only underlying liability coverage, but UM as well. Thus the UM was integral to the primary coverage and must be exhausted before the excess coverage is triggered.

Moreover, said the Court, even without the controlling contract provision, Oklahoma law requires exhaustion of both the primary liability and the UM before tapping the umbrella. This

[170] 2005 OK 40, 115 P.3d 856.

result flows from *Moser v. Liberty Mut. Ins. Co*.[171] *Moser* holds that the statutory requirement that UM be rejected in writing does not apply to umbrella policies, "because such policies are 'at most tangentially related to automobile liability'" In *GEICO,* the Court found *Moser* "instructive" and, extending its rule, determined that excess liability policies are also not contemplated in determining the 'liability limits' of an "insured motor vehicle."

Justices Winchester, Opala, Kauger, Edmondson, Taylor and Colbert concurred, while Justices Lavender and Hargrave concurred in the result.

TENTH CIRCUIT ADOPTS DIFFERENT VERSION OF "MEND THE HOLD" DOCTRINE THAN OKLAHOMA; PROVISION EXTENDING COVERAGE TO A POINT "INCLUDING, BUT NOT LIMITED TO" DOES NOT CREATE AMBIGUITY

Genzer v. James River Insurance Company[172] holds that the Tenth Circuit when applying Oklahoma law will adopt a different version of the "make whole" rule than do Oklahoma courts and that a policy provision extending UM coverage to a ride-share driver delivering a passenger to the trip's "final destination, including but not limited to, dropping-off of passenger(s)" is not ambiguous with regard to whether the driver's return trip from an out-of-town destination is part of the trip.

Ms. Genzer was an Uber driver in Oklahoma City. She accepted an assignment to deliver a passenger from Oklahoma City's Will Rogers Airport to Woodward, Oklahoma, a distance of some 139 miles. She delivered the passenger in Woodward and, according to her testimony, still logged into the Uber app so as to be available for another passenger taking the reverse trip, returned to Oklahoma City.

Near Watonga, Oklahoma, she was meeting an oil field truck with a load of pipe. A piece of metal departed the truck's load of pipe, penetrated her windshield and buried itself into her head. She was covered by an uninsured (UM) policy provided by Uber through James River Insurance Company for $1 million. The parties agreed that the truck, whose owner and driver were unknown, was an uninsured motor vehicle.

James River denied UM coverage for the stated reason that she was "offline at the time of the accident" and not logged into her Uber app. Genzer replied that she was logged into the app. James River responded that, whether "available or offline, there isn't coverage." The driver sued.

James River took the position in the lawsuit that there were two different policies (neither of which was available to the driver before the lawsuit) and that the policy under which it denied the claim did not apply and that the other policy terminated when she dropped off the passenger.

Genzer took the position that James River could not assert a coverage defense other than the one stated in its denial letter because of the "mend the hold" doctrine adopted in Oklahoma by *Morrison v. Atkinson*[173] and by the Tenth Circuit in *Haberman v. The Hartford Ins. Group.*[174]

---

[171] 1986 OK 78, 731 P.2d 406.
[172] 2019 WL 3926934 (10th Cir. Aug. 20, 2019).
[173] 1906 OK 25, 85 P. 472, 473.
[174] 443 F.3d 1257, 1270-1271 (10th Circuit 2006).

The term was a wrestling term in which a wrestler may turn loose his opponent in order to get a better grip on him some other way.

Genzer also claimed that the policy provided coverage by its terms because it applied to the trip to deliver a passenger to the trip's "final destination, including but not limited to, dropping-off of passenger(s)." This provision, she claimed, was at the strongest, from the insurance company's viewpoint, ambiguous because her interpretation (that the return trip) was part of the trip during which coverage was provided was plausible as was the insurance company's interpretation and, when two or more interpretations of a policy are plausible, the policy is ambiguous and should be interpreted in favor of the insured and coverage.

The trial court, Judge Scott Paulk, in the Western District, granted James River summary judgment. The Tenth Circuit affirmed, in this opinion by Judge Phillips.

The Court expressed doubt that Oklahoma law adopted the mend the hold doctrine, based largely on an unpublished opinion by Judge White, *Fry v. American Home Assur. Co.*,[175] in which he said "It does not appear Oklahoma has adopted this doctrine, although it was mentioned in passing in *Morrison v. Atkinson*, 85 P. 472 (Okla.1906)." The Tenth Circuit affirmed *Fry*.[176]

In the present opinion, the Tenth Circuit states two grounds for failing to apply the mend the hold rule: (1) it says *Morrison* actually involves the rule that a party is bound on appeal by a position it took in the lower court and (2) that *Haberman* and *Buzzard v. Farmers Ins. Co., Inc.*[177] apply the rule only when the parties allege bad faith.

The Tenth Circuit's conclusion with regard to *Morrison* seems not supported by the opinion itself. It relies on the rule set forth and named by the United States Supreme Court in *Ohio & Mississippi Railway Company v. McCarthy*:[178] The *Morrison* Court says:

> Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold.

Despite this language, the Tenth Circuit suggests that the mend the hold rule in Oklahoma does not apply to a position taken by the party pre-litigation. So that will apparently be the rule in federal courts for the time being, until the Oklahoma Supreme Court addresses the issue. The Plaintiff in the present case asked the Tenth Circuit to certify the question of applicability of the mend the hold rule in Oklahoma after the trial court questioned the existence of the rule. The Tenth Circuit refused to certify the question.

This leaves us with the unfortunate situation that a case involving the mend the hold rule will likely reach a different result depending on whether it ends up being decided in state or federal court. It is very difficult to change a Court of Appeals ruling because one panel of that Court

---

[175] 2015 WL 519706.
[176] *Fry v. American Home Assur. Co.*, 636 Fed.Appx 764 (10th Cir. Okla.).
[177] 1991 OK 127, 824 P.2d 1105, 1109.
[178] 96 U.S. 258 (1877).

cannot change a ruling by another panel.

Moving on from the mend the hold question, the Court of Appeals determined that the policy was not ambiguous as to when the trip on which coverage was provided applied. The Court did not appear to be troubled by the question: what is the meaning of the language "including but not limited to" if not that some remainder of the trip necessary to get the Uber driver home from an out-of-town trip might be contemplated. The Court says it might, instead, refer to intermediate stops along the way before the passenger is dropped-off.

This is a bad case which we will regret. Plaintiff's attorneys will try very hard to keep the case in state court to take advantage of the favorable law there. They will also assert bad faith, even where it is probably not going to be successful as a bad faith case, to take advantage of the suggestion that the mend the hold rule applies to bad faith claims but not to other coverage claims.

For example, in the present case, bad faith was an unlikely outcome because almost certainly the insurance company could claim a good faith belief in its coverage defense. Yet the Court seems to be saying if Plaintiff had asserted a bad faith claim, *Haberman* and *Buzzard* would have required application of the mend the hold rule.

In the interest of full disclosure, this was my case and I lost it.

UM CARRIER NOT REQUIRED TO PAY UNCONTESTED AMOUNTS IN EXCESS OF SPECIAL DAMAGES TO AVOID BAD FAITH

Government Employees Ins. Co. v. Quine[179] holds that an uninsured motorist insurance (UM) carrier need not pay the amount of its evaluation of a UM claim without a release so long as the insured has been paid the insured's special damages.

Ms. Watkins, a passenger in Ms. Quine's car, insured by GEICO, was injured in a car wreck with an underinsured motorist. Because of multiple claims against the liability coverage, Watkins got only $13,890. Her medical bills (her only special or economic damages) were $9,904.05. GEICO evaluated the claim at between $6,014.05 and $11,014.05. It started with an offer of its low range number and finally came up to its top figure. When they were unable to agree on a figure, Watkins' counsel demanded GEICO pay their "uncontested amount" (which he did not know because he didn't know GEICO's evaluation) without a release. GEICO refused.

GEICO sued Watkins in federal court for declaration it had no duty to pay the amount of its evaluation without a release but rather could decline to make any payment unless and until either Watkins agreed to accept GEICO's offer or there was a judgment determining the amount GEICO owed. Judge Cauthron, in the Western District Court, certified a question to the Supreme Court:

> If an uninsured/underinsured ("UM/UIM") insurer and its insured are unable to agree upon an overall settlement of the insured's UM/UIM claim and the insured demands payment of any undisputed benefits, does Oklahoma law require the

[179] 2011 OK 88, 259 P.3d 864.

> UM/UIM insurer to promptly evaluate and unconditionally (i.e. without requiring a full and complete release) pay its insured any "undisputed amount" it determines it owes?

The Supreme Court didn't seem comfortable with the term "uncontested amount." In a move foreshadowing its decision, it "reformulated" the certified question to read:

> Does an insurer's refusal to unconditionally tender partial payment of UIM benefits amount to a breach of the obligation to act in good faith and deal fairly when (1) the insured's economic/special damages have been fully recovered through tortfeasor's liability insurance; (2) the insurer promptly investigates and places a value on the claim; (3) there is a legitimate dispute regarding insured's noneconomic/general damages; and (4) benefits due have not been firmly established?

The Supreme Court then answers the reformulated, certified question in the negative, in an opinion by Justice Noma Gurich. The Court perceives that it already answered the question in *Garnett v. Government Employees Insurance Company.*[180] Actually, the Court did not answer in *Garnett* the question whether the insurance company must pay an uncontested amount without a release. Rather, it simply found that factually, GEICO's evaluation was not an "uncontested amount." In the present opinion, the Court appears to explain that GEICO's evaluation was not an "uncontested amount" because it was at least theoretically possible for a verdict and judgment to result at or above the amount of the uncontested special damages.

There was a question after *Garnett* whether the reason the evaluation was not an "uncontested amount" was that it might include defense costs. This case makes clear that GEICO's evaluation was only for injuries and did not include defense costs and holds the insurance company can withhold payment of amounts of UM which its evaluation shows it owes, in an effort to get the insured to take that amount rather than attempting to recover the amount the insured believes is a proper amount. The UM carrier may withhold benefits so long as it does not withhold a sufficient amount that the insured's special damages are unpaid. Justices Reif and Combs dissented, without separate opinion.

EMPLOYEE COVERED UNDER HIRED AND NON-OWNED COVERAGE DOES NOT HAVE TO BE COVERED UNDER UM

Graham v. Travelers Ins. Co.[181] holds that an employee insured under the hired and non-owned liability coverage of an employer's policy does not have to be insured under the UM coverage.

Graham was a manager for a chain restaurant (Carl's Junior). He was driving his own car on an errand for the restaurant chain when he was badly hurt in a wreck due to the negligence of an underinsured motorist.

Graham's employer had a liability policy which included "hired and non-owned" liability coverage for $1 million. This protects the employer and, under this policy, the employee, from

[180] 2008 OK 43, 186 P.3d 935.
[181] 2002 OK 95, 61 P.3d 225.

liability the employer may incur for the use of any auto the employer does not own. An endorsement listed the employee as an additional insured.

The policy also provided $1 million UM coverage but coding on the policy indicated that coverage applied only to "owned vehicles." Graham claimed that the policy was ambiguous in that regard so that he was an insured under the UM policy as well as the liability policy. The trial court found the policy not to be ambiguous.

Graham also argued that the UM statute[182] required that a policy providing liability coverage also provide UM coverage for the benefit of "persons insured thereunder." All states which have ruled on the question (except Oklahoma) say that the "insured thereunder" language means "insured under the liability coverage." If it means "insured under the UM coverage," then the provision becomes meaningless because the insurance company can just define the policy in such a way that no one becomes an insured. Based on this reasoning, Graham argued he was covered under the liability coverage and that the statute required that he be covered under the UM coverage.

The trial court (Judge Nancy Coats, in Oklahoma County) ruled for the insurance company. As noted, she held the policy was not ambiguous. The Court of Civil Appeals reversed, holding, as had the trial court, that the policy was not ambiguous. However, it held that the statutory language required all persons insured under the liability coverage to be insured under the UM coverage.

The Supreme Court reversed, in a seven to two decision, with Justices Boudreaux and Kauger dissenting. The opinion seems based on the proposition that the phrase "persons insured thereunder," means "persons insured under the UM coverage, not persons insured under the liability coverage." They base this on *Shepard v. Farmers*[183] which upheld a definition of "family member" that excluded one who owned his or her own vehicle.

Editor's Note: This holding, in both *Shepard* and *Graham*, leaves the insured to the mercy of the insurance companies which can simply define insured as narrowly as they wish and cover nobody at all. The insurance companies' response to this is that the Insurance Commissioner must approve policy forms. If this is meant to imply he will protect consumers, this case proves that is not so. He filed an *amicus curiae* brief in opposition to the insured's position and in favor of the insurance industry position in the Supreme Court. He no longer even makes a pretense of protecting insurance consumers.

STEP DOWN PROVISION REDUCING LIABILITY LIMIT AS TO NON-DESIGNATED DRIVER ALSO REDUCES UM COVERAGE

Gray v. Midland Risk Insurance Co.,[184] holds that a policy provision reducing liability coverage for a non-designated driver, also reduces the uninsured motorist coverage available so that the UM does not exceed the reduced liability limit.

---

[182] 36 O.S. § 3636.
[183] 1983 OK 103, 678 P.2d 250.
[184] 1996 OK 111, 925 P.2d 560.

The Robbins insured a truck and trailer rig with Midland Risk Insurance Company (Midland) under a policy that provided liability and uninsured motorist (UM) limits of $50,000 for drivers not listed in the endorsement, the liability and property damage coverage would be reduced to the statutory $10,000. A passenger (Gray) fell under the truck and was injured while a non-designated driver was driving the truck. Gray sued Midland for UM benefits of $50,000. Midland asserted in its cross-motion for summary judgment that Gray was not an insured for the purposes of UM coverage, and if he were an insured, the UM coverage should be $10,000 because the UM limit could not exceed the reduced $10,000 liability limit. The trial court granted summary judgment for Gray, holding that Gray was entitled to $50,000 UM coverage because the policy did not specifically provide for reduced UM benefits. The Court of Appeals affirmed the trial court, finding Gray an insured under Midland's policy. Midland petitioned for certiorari, which the Oklahoma Supreme Court granted, raising on the issue of the amount of UM coverage.

The Supreme Court reversed, in an opinion by Justice Hargrave. The court held that the UM coverage available to Gray was $10,000. Title 36 O.S. §1991 3636 requires insurers to offer UM coverage in an amount not to exceed the liability coverage. The Court reads this as a prohibition on the amount of UM coverage which the policy can afford, as opposed to a limit on which the insurance company is required to offer, citing *Withrow v. Pickard*.[185]

The court says that the legislative intent of §3636 is that every car liability policy issued in Oklahoma must have a statutory minimum of UM coverage unless that coverage is rejected in writing. Once the statute's mandate is satisfied, the freedom-of-contract principles control.

The basis for this opinion is the erroneous reading of §3636 to require only an offer of UM limits equal to financial responsibility limits and not the higher liability limits. Once the court assumes that the statute requires an offer of only minimum financial responsibility limits, some really weird results obtain. This is one of them.

The effect of this opinion is that nobody gets the benefit of UM coverage which the insured bought and paid for. Apparently, legislative action will be required to correct that.

EMPLOYER'S UM CARRIER NOT LIABLE FOR INJURY TO TRUCK DRIVER BECAUSE EMPLOYER WAS NOT NEGLIGENT AND LIABLE FOR INJURY

Great West Casualty Company v. Boroughs[186] holds that an employer's uninsured motorist (UM) carrier is not liable for an injury to the employee because there was no negligence on the part of the employer and, thus, no "uninsured motorist" to whom to attach liability.

Boroughs, a truck driver for a truck line, was injured when a hose he was using to pneumatically four from a railroad car to his tank truck hit him on the shoulder after he unhooked it while the hose was still pressurized. His employer's truck was covered by UM.

Great West sued for declaratory judgment that there was no UM exposure or, alternatively, that there was a reasonable basis for its UM denial. The Northern District federal court granted Great

[185] 1995 OK 120, 905 P.2d 800.
[186] 505 F.Supp.2d 1072 (N.D. Okla. 2007).

West summary judgment, in an opinion by Judge Claire Egan.

Boroughs claimed the injury was caused by an "uninsured motorist" because the employer was negligent in having failed to adequately train him. The injury occurred because another driver was voluntarily helping Boroughs load the truck and Boroughs thought (incorrectly) the other employee had depressurized hose before Boroughs tried to unhook it.

Judge Egan found there was no evidence of negligence on the part of anybody but Boroughs and, therefore, there was no liability on the part of the owner or operator of an uninsured motor vehicle to which the UM liability could attach.

There is no new law here. *Ply v. National Union Fire Ins. Co. of Pittsburgh*[187] held the employer's UM carrier could be liable where the injury was caused by faulty maintenance of the employer's truck. However, *Martin v. Hartford Underwriters Ins. Co.*[188] held there could be no UM recovery where the injury was caused by a 3 year-old child putting a car in gear because the child was legally incapable of negligence. This case tracks *Martin* exactly.

PREJUDGMENT INTEREST ON UM CLAIM RAN FROM TIME OF PAYMENT OF UNCONTESTED AMOUNT, NOT WAIVER OF SUBROGATION

Gregg v. Le Mars Ins. Co.[189] holds that prejudgment interest on an uninsured motorist (UM) claim ran from the time the insurance company paid an uncontested amount, not the time it waived subrogation.

Gregg, an officer of the Oklahoma Department of the American Legion, was badly injured while on business for the American Legion. He recovered the $20,000 liability policy limit of the motorist who injured him. He then got his own personal uninsured/underinsured motorist policy of $100,000. This suit arose over a $300,000 UM policy Le Mars issued to the American Legion.

Gregg and Le Mars were unable to agree on the amount of his damage. Le Mars waived subrogation to permit him to take the liability policy. It ultimately paid him $80,000 as an uncontested amount on his UM policy.

An arbitration resulted in an award of an additional $65,000 in UM benefits. Gregg and Le Mars were then unable to agree on when the prejudgment interest commenced on the UM payment. Gregg contended Le Mars conceded liability when it agreed to waive subrogation, in December 2005 so that the prejudgment interest began then. Le Mars contended prejudgment interest commenced only when the arbitration award determined liability.

The trial court, Judge Deborah Shallcross, in Tulsa County, held that prejudgment interest ran from early January 2007, when the arbitration statement Le Mars submitted admitted liability. The Court of Civil Appeals reversed, in an opinion by Judge Goodman, held prejudgment interest ran from October, 2006 when Le Mars conceded liability by paying the $80,000

[187] 2003 OK 97, 81 P.3d 643.
[188] 1996 OK 55, 918 P.2d 49.
[189] 2009 OK CIV APP 93, 227 P.3d 1107.

uncontested amount.

Nunn v. Stewart[190] originally established that a UM carrier is liable for prejudgment interest pursuant to 12 O.S. § 727.1, but only from the date the liability of the uninsured motorist became fixed. This ruling resulted from 23 O.S. § 22 that "where the obligation is to pay money, and that obligation is fixed, and the only thing to be determined is the amount, interest will attach from the time the obligation arises . . . ."

Torres v. Kansas City Fire and Marine Ins. Co.[191] held prejudgment interest on UM ran from the time suit was filed. However, that case resulted in a verdict, while this one was resolved by arbitration. *Mellenberger v. Sweeney*[192] held, like *Nunn v. Stewart*, that prejudgment interest on UM recoveries ran from the date the liability was determined. This case just deals with peculiar circumstances to determine when liability was determined.

NAMED PERSONS ENDORSEMENT TO SINGLE SHAREHOLDER CORPORATION NAMING SHAREHOLDER AS INSURED EXTENDS COVERAGE FOR ALL PURPOSES

Haberman v. The Hartford Ins. Group[193] holds that a named person endorsement in a business auto policy makes named shareholder an insured for all purposes entitled to collect and stack UM coverage.

Joann Haberman was the sole shareholder of Breast Cancer Screening, a professional corporation. The business's two autos were insured under a commercial auto policy from the Hartford. The corporation paid separate premiums on the two vehicles for UM coverage. On August 20, 2000, Haberman was riding as a passenger in a Mercury SUV driven by a friend Tamara Moomey. The two were on their way home to Oklahoma City from a pleasure trip to Dallas. Near Davis, Oklahoma Moomey lost control of the SUV and spun off the highway. Moomey was killed and Haberman got a fractured pelvis.

Moomey's insurance company, GEICO Direct paid Haberman the $50, 000 liability limits and matching UM limits. Harford denied Haberman's claim under the commercial policy.

Haberman's state court action was removed to the Western District federal court. There, both parties filed motions for summary judgment. Hartford said that since Haberman was not driving a listed auto she was not an insured for UM purposes at the time of the wreck. Hartford relied upon a definition in the commercial policy under "who is an insured" that made the "you" insured under the policy the named insured–the corporation rather than the individual, Joann Haberman. Thus, Haberman was only an insured when she occupied a listed vehicle. Haberman relied upon a "Named Persons" endorsement and claimed she was a UM insured:

> This endorsement modifies insurance provided under the following: BUSINESS AUTO COVERAGE FORM, GARAGE COVERAGE FORM, TRUCKERS

[190] 1988 OK 51, 756 P.2d 6.
[191] 993 OK 32, 849 P.2d 407.
[192] 1990 OK CIV APP 85, 800 P.2d 747.
[193] 443 F.3d 1257 (10th Circ. 2006).

> COVERAGE FORM
>
> Named Person(s) or Organizations(s): JOANN HABERMAN, AN INDIVIDUAL
>
> Each person or organization listed above is an "insured" for LIABILITY COVERAGE, but only to the extent that person or organization qualifies as an 'insured' under the WHO IS INSURED provision of SECTION II-LIABILITY COVERAGE.

Judge Ralph Thompson sustained Haberman's motion for summary judgment on the coverage issue, holding the endorsement granted coverage to Haberman "for all purposes"; The jury then returned a verdict in Haberman's favor for $548,000 on the contract claim, $5000 for actual damages on the bad faith claim and $100,000 for punitive damages. Hartford appealed, claiming a host of errors.

As to the contract claim the Tenth Circuit agreed with Judge Thompson, the endorsement extended coverage for all purposes, including UM. Hartford's claim that the endorsement applied only to liability coverage was rejected. The endorsement unambiguously extends coverage to various policy forms including the "Business Auto Coverage Form." That form included liability, UM and Medpay coverage. At best, the language limiting coverage to liability made the policy conflicting and ambiguous, said the court.

The court also held that the Hartford policy did not and could not, per Oklahoma law, tie UM coverage to listed vehicles with respect to Haberman, a named insured. The court distinguished *Graham v, Travelers Ins. Co.,*[194] The policy at issue in that case tied UM coverage to vehicles only with respect to employees who drove their own vehicles on work related outings. The *Graham* policy did not attempt to tie UM to listed vehicles with respect to a named insured such as Haberman in this case.

Next the court held that the UM was stackable. As a named insured, Haberman was a "Class 1" insured entitled to UM whether in a listed auto or not. As such, since the policy charged two premiums for UM coverage, Haberman was entitled to stack two UM limits.

Finally the court affirmed the bad faith verdict. Though an insurance company is entitled to litigate legitimate disputes, here the evidence was that the Hartford "ignored the provisions of its own policy and ignored Oklahoma law"–it did not evaluate Haberman's claim until the third day of trial, did not offer her anything on her UM claim and did not check to see if Oklahoma law would permit tying UM for an individually named insured to specific vehicles.

Before Briscoe, Holloway and Seymour, Circuit Judges, by Holloway.

[194] 2002 OK 95, 61 P.3d 225.

COURT WILL EXERCISE DISCRETION IN FAVOR OF DECLINING TO HEAR A DECLARATORY JUDGMENT IN FAVOR OF LETTING THE ISSUES BE RESOLVED IN A SUIT BY THE INSURED AGAINST THE INSURANCE COMPANY

Harco Natl. Ins. Co. v. Roe[195] holds that a court can and will sometimes exercise its discretion in favor of declining to hear a declaratory judgment action in favor of letting the same issues be determined in a suit by the insured against the insurance company.

In 2009, Timothy Roe was test-driving a commercial truck, accompanied by his minor daughter, Shelby Roe when they were hit by an uninsured or underinsured motorist. The truck dealer had $500,000 UM coverage on the vehicle with Harco National Insurance Company. Harco paid the whole $500,000 single limit policy to Timothy Roe for his injuries.

In 2014, Shelby Roe, now of age, made claim for her injuries. She claimed $31,000 in medical bills. Harco took the position it need not pay her anything, since it exhausted its policy limit paying her father's claim. But, it didn't tell her. Instead, Harco filed this declaratory judgment action in the Northern District, seeking a declaration it did not have any obligation to her. She almost immediately responded by filing her own action in Rogers County and moved to dismiss the declaratory action.

The Court Judge Payne in the Northern District, noted that the courts have discretion to decline to enter a declaratory judgment if the issues will be decided in another action. Harco objected that its case, filed before Ms. Roe's, should the surviving case. Judge Payne apparently heeded her lawyer's argument that he couldn't have filed sooner because Harco never denied her claim until it filed the declaratory action.

This part of the litigation may be "much ado about nothing." Harco has removed the Rogers County case to the Northern District, where it is assigned to Judge Payne. So, the issues will be tried in the same court by the same judge.

What will be exciting is the outcome of the merits of the case. Does a UM carrier have a duty to attempt to apportion limited policy proceeds among multiple injured claimants? Is it bad faith for the UM carrier to fail to do so? Stay tuned to this station!

SINGLE DEATH GIVES RISE TO ONLY ONE "PER PERSON" LIMIT, NO MATTER HOW MANY SURVIVORS SUFFER DAMAGE

Hardin v. Prudential Prop. and Cas. Co.,[196] holds that a single death gives rise to only one "per person" limit, no matter how many survivors suffer damage.

The insured was killed by an underinsured motorist. The uninsured motorist (UM) insurer paid its "per person" limit. The insured's widow claimed that each of the insured's survivors was entitled to a separate "per person" limit, due to having suffered damage from the insured's death.

The trial court granted the UM carrier summary judgment. The Court of Appeals affirmed, in a

[195] 2016 WL 8674625 (N.D. Okla. Sept. 30, 2016).
[196] 1992 OK CIV APP 42, 839 P.2d 206.

two to one opinion by Judge Hunter. The policy provided:

> [t]he limit stated under Uninsured Motorists--Each Accident on declarations is the limit of our liability for all damages, including damages for care or loss of services, arising out of bodily injury as a result of any one accident.

This language restricts damages from a single injury, such as a death, to a single, per person limit. Judge Jones, joined in Judge Hunter's opinion. Judge Hansen dissented, without separate opinion.

This opinion is consistent with the Supreme Court's later opinion in *Littlefield v. State Farm Fire and Cas. Co.*[197] It is also consistent with the law in the country generally.

PASSENGER IN NEGLIGENT DRIVER'S VEHICLE MAY STACK DRIVER'S LIABILITY AND UM COVERAGES; RELEASE OF JUDGMENT ON LIABILITY POLICY DOES NOT BAR SUBSEQUENT SUIT ON UM POLICY; PASSENGER CAN COLLECT THE DIFFERENCE BETWEEN THE DRIVER'S LIABILITY COVERAGE APPLICABLE TO THE PASSENGER AND THE PASSENGER'S OWN UM COVERAGE

Heavner v. Farmers Insurance Company[198] holds a passenger in a vehicle who is injured by the negligence of the driver may "stack" the liability coverage of the driver's policy and the uninsured motorist coverage up to an amount equal to the per person liability coverage of the driver's policy, the passenger's release of the insurer on a judgment on the liability policy does not bar the passenger's claim on the uninsured motorist policy and the passenger can collect the difference between the amount paid under the driver's liability policy and the limits of his own uninsured motorist policy from his uninsured motorist carrier.

The passenger was injured by the negligence of the driver of the vehicle he was riding in. Several other people in another car were also injured by the driver's negligence. The driver's liability carrier admitted liability and filed an interpleader action naming the passenger and the other injured parties as defendants. The passenger got $4,500 of the insurer's $20,000 liability coverage and released the insurance company. The passenger then sued the insurer on the driver's uninsured motorist (UM) coverage and against his own UM carrier. Both defendants filed motions for summary judgment, which the trial court granted.

The Supreme Court reversed, in a unanimous opinion by Chief Justice Barnes. The Court applied 36 O.S. Supp. 1976 §3636 because the accident occurred before the 1979 amendment to §3636. The driver's insurer argued that the policy definition of uninsured motor vehicle (which excluded an "insured motor vehicle") precluded recovery. The Court noted that §3636(C) provides:

> (C) For the purposes of this coverage the term "uninsured motor vehicle," shall include an insured motor vehicle where the liability insurer thereof...is not legally required to accord at least the per person coverage limits with respect to the legal liability of its insured, applicable to any injured party under any uninsured motorist

[197] 1993 OK 102, 857 P.2d 65.
[198] 1983 OK 51, 663 P.2d 730.

coverage covering such injured party. (Emphasis by the Court)

A vehicle is a "uninsured" if the liability insurer did not have to pay the insured (the passenger) at least $10,000. Since the liability insurer had only paid $4,500, the passenger was entitled to receive $5,500 on the uninsured motorist coverage.

The insurer contended the release barred the passenger from claiming on the UM coverage. The release provided:

> Comes now the defendant..., and hereby shows the Court that they have received the sum of $4,680 in full satisfaction in the judgment rendered in the matter...; and hereby release the plaintiff from any further liability thereon...

The Court held the release was sufficiently narrow to bar only a further claim on the liability policy. Moreover, the release related only to the judgment.

The insurer contended the passenger should not be allowed to claim under the UM policy because he had paid no premiums for it and would be receiving a "windfall." The Court noted, however, that the passenger's medical bills alone were over $15,000.

Citing *Mid-Continent Casualty Co. v. Theus*,[199] the Court held the passenger was entitled to recover $500 from his own UM carrier because only $4,500 of the driver's liability coverage was available to the passenger and the passenger's UM limits were $5,000.

Since plaintiff had also moved for summary judgment at the trial court level, the Court entered summary judgment for the passenger.

LAW OF STATE WHERE INSURED LIVED AND POLICY ISSUED APPLIES

Herren v. Farm Bureau Mut. Ins. Co., Inc.[200] holds that the law of the state where the insured lived and the policy was issued will apply, even where the insured moved to another state before the policy renewed.

Joyce Herren was injured in a car wreck, with damages exceeding $150,000 (the amount of all liability and UM coverages combined). The tort-feasor's carrier paid its $25,000 liability policy limit.

Herren had 5 car insurance policies available to her; one with American Family Ins. Group (issued to her in Missouri while she was living there) and 4 with Farm Bureau (issued to her husband in Kansas while he was living there). Before the 5 car policies renewed, the Herrens moved to Oklahoma and the car wreck occurred. Both insurance companies denied the Herrens' claims.

American Family argued Missouri law applied to the Missouri policy, which holds that UM coverage is available only if the tort-feasor has no liability coverage or coverage in an amount

[199] 1979 OK 23, 592 P.2d 519.
[200] 2001 OK CIV APP 82, 26 P.3d 120.

less than the minimum required by Kansas law. Farm Bureau argued Kansas law applied which holds that UM coverage applies only where the third party's liability coverage is less than the claimant's UM, and when applied, UM coverage does not stack. Here, the tort-feasor's liability limit equaled the UM coverage on each of the 4 Kansas policies and met the minimum required by Missouri law.

The Herrens sued. Farm Bureau's motion for summary judgment on jurisdictional grounds was denied. Farm Bureau then petitioned the Oklahoma Supreme Court for a writ of prohibition, which the Supreme Court denied. On the parties' cross motions for summary judgment on the choice of law and coverage issues, the trial court (Honorable Daniel Owens, Oklahoma County) granted both insurance companies summary judgment.

On the Herrens' appeal, the Court of Civil Appeals affirmed the trial court, relying on the Oklahoma Supreme Court's holding in *Bohannan v. Allstate Ins. Co.,*[201] and the Tenth Circuit Court of Appeals' decision in *Rhody v. State Farm Mut. Ins. Co.,*[202] that the law of the state where the policies were issued applies. Applying the greatest significance test, the reasoned that the greatest significance is given to the place of contracting and the location of the insured risk — where the insured vehicle is garaged most of the insured period.

Recall, that in *Bohannan*, Mrs. Bohannan was a California resident with a California UM policy who was involved in a car wreck in Oklahoma while visiting a relative who was an Oklahoma resident. The Supreme Court held that no Oklahoma public policy was violated by holding that as to a California resident with a California policy, California law would apply and allowed Mrs. Bohannan's UM carrier an offset for the tort-feasor's liability coverage Mrs. Bohannan received, and did not permit stacking of the California UM policy.

Rhody involved an Oklahoma resident injured in a car wreck in Oklahoma, but who had a UM policy covering three vehicles, that was issued in Texas while he was a Texas resident. The Tenth Circuit concluded that to apply Texas law which prohibited stacking did not violate Oklahoma public policy. The Oklahoma Supreme Court adopted this holding in *Bohannan*.

Bottom line, the law of the state where the insured lived and the policy was issued will apply, even where the insured moves to another state before the policy renews.

SETTLEMENT WITH PRIMARY UM CARRIER VOIDS EXCESS UM COVERAGE

Hibbs v. Farmers Ins. Co., Inc.,[203] holds that settlement with a primary uninsured motorist (UM) carrier for less than the policy limits of the primary policy relieves the excess UM carrier of liability.

Hibbs was involved in a "no-contact" hit-and-run accident while occupying his employer's vehicle, insured by Fireman's Fund with $30,000 UM coverage. His personal automobile coverage with Farmers included $10,000.00 UM coverage.

---

[201] 1991 OK 64, 820 P.2d 787.
[202] 771 F.2d 1416 (10th Cir. 1985).
[203] 725 P.2d 1232 (Okla. 1985).

Hibbs settled with Fireman's Fund for $17,250 of the $30,000 UM coverage and attempted to recover more from Farmers. The trial court granted Farmers summary judgment. The Supreme Court, in a unanimous opinion by Justice Doolin, affirmed.

The Court relied on a liability case, *Smith v. Government Emp. Ins. Co.*[204] which, in turn, relied upon *Keel v. MFA Insurance Company*[205] [a UM case] in holding that "excess insurance" provisions of a UM policy *will* be given effect in determining order or priority of payment. Thus, settlement with the primary UM carrier (usually the carrier for the vehicle being occupied) for less than policy limits destroys a claim against the excess UM carrier.

This case, together with *Porter v. MFA Mut. Ins. Co.*[206] and *Frey v. Independence Fire and Cas. Co.*[207] means that: (1) One may not settle with a liability carrier without the consent of the UM carrier or (2) settle with the primary UM carrier for less than the full policy limits. If either of these rules are violated, the coverage under the excess UM policy will be lost.

UM OFFER ADEQUATE; SUBSEQUENT POLICY CONSTITUTES RENEWAL, AS TO WHICH NO NEW UM OFFER IS REQUIRED

Hicks v. State Farm[208] holds adequate an offer of uninsured motorist coverage and that subsequent changes to the policy constituted a renewal and not a new policy so that a new offer and rejection of uninsured motorist coverage was not required.

The insured rejected UM coverage in conjunction with his application for a liability policy. He later traded the car insured under that policy for a newer car and added comprehensive and collision coverage to the policy, with no new offer and rejection of UM coverage. The insured's son was killed by an uninsured motorist. The trial court granted the UM insurance company summary judgment.

The Supreme Court affirmed, in an opinion by Justice Barnes. The written offer of uninsured motorist coverage was adequate. It advised the insured of the nature of the coverage and of its cost and urged him to take the coverage.

The subsequent policy changes (insuring a replacement vehicle and adding additional coverages) constituted a renewal, not a new policy. 36 O.S. 1971 §3636(F) does not require a new offer and rejection as to a renewal policy.

[**Editor's Note**: As to the second point (that the policy changes were a renewal, not a new policy) this case has subsequently been reversed in *Beauchamp v. Southwestern National Insurance Company.*[209] The remainder of *Hicks* has been substantially reversed in *Silver v. Slusher*.[210] However, *Silver* was, in turn, reversed legislatively by the 1990 amendment to 36

[204] 558 P.2d 1160 (Okla. 1976).
[205] 553 P.2d 153 (Okla. 1976).
[206] 1982 OK 23, 643 P.2d 302.
[207] 1985 OK 25, 698 P.2d 17.
[208] 1977 OK 150, 568 P.2d 629.
[209] 1987 OK 96, 746 P.2d 673.
[210] 1988 OK 53, 770 P.2d 878.

O.S. §3636. Under that statute, an explanatory offer must be made in a form specified in the statute.]

"WARD OR FOSTER CHILD" AS HOUSEHOLD MEMBER UNDER UM PRESENTS FACT QUESTION

In *Houston v. National General Insurance Company*,[211] the Tenth Circuit Court of Appeals held an unrelated person living in the insured's household and partially dependent on the insured can be a "family member" under a policy defining "family member" to include "a ward or foster child." The facts are somewhat complicated. The insured's son was married, but had a child by another woman. That woman moved in with the insured and lived with the insured and his son. The insured partially supported the woman and her child.

The woman was involved in an accident while occupying an uninsured vehicle owned by someone other than the insured. She made a claim under the insured's policy. The trial court granted the insurance company summary judgment, rejecting the woman's contention that she was a "ward," within the meaning of the policy. The trial court held the term "ward" was a technical term defined by 30 O.S. 1981 §2 as "a person over whom a guardian is appointed by a court."

The Court of Appeals reversed. The term "ward" is ambiguous and should not be restricted to the legal definition. A fact question was presented as to whether plaintiff was a "ward" within the meaning of the policy.

HIT-AND-RUN UM MAY COVER RANDOM GUNSHOT FROM PASSING CAR

Hulsey v. Mid-America Preferred Insurance Co.[212] holds that a death resulting from a random shooting by an unknown person from a motor vehicle, may be covered under the UM policy's hit-and-run coverage.

The insured was killed by a gunshot from another, unidentified vehicle. The trial court granted the insurer's summary judgment, on the theory that the shooting was intentional.

The Court of Appeals reversed, holding that whether the injury was intentional must be determined from the point of view of the insured. Since the insured did not intend to be injured, the shooting was accidental, and covered by the UM policy. The Supreme Court granted certiorari, but also reversed the trial court, in an opinion by Justice Opala. The summary judgment motion did not incorporate deposition testimony. All that was in the record and before the Court was the pleadings.

It was possible that the facts could reveal that the shooting was, indeed, accidental. The Court carefully did not determine whether an accident injury is required. This is a somewhat narrowly based opinion, predicated upon the procedural circumstance that there was insufficient evidence to support summary judgment. It does *not* stand for the proposition that an intentional injury is

[211] 817 F.2d 83 (10th Cir. 1987).
[212] 1989 OK 107, 777 P.2d 932.

covered by a UM policy.

POLITICAL SUBDIVISION "UNDERINSURED" TO EXTENT OF DAMAGES ABOVE STATUTORY AMOUNT LIMITATIONS

Karlson v. City of Oklahoma City[213] holds that an uninsured motorist insurance company is liable to its insured for damages incurred in excess of the liability limits of the Political Subdivision Tort-Claims Act (PSTCA).

The insureds were injured in a collision with a police car. Their damages exceeded the then $50,000/$300,000 PSTCA limits. The trial court held no underinsured motorist claim arose because the insured was not "legally entitled to recover" from the City in excess of the PSTCA liability limit.

The Supreme Court reversed, following *Uptegraft v. Home Insurance* Co.[214] to hold that the term "legally entitled to recover" means only there is fault on the part of the uninsured motorist. The court found the matter one of contract interpretation and held it made no difference why the tort-feasor was unable to pay (whether for insufficient insurance or the statutory limit) — the policy was intended to pay.

INSURED CAN RECOVER DAMAGES FROM UM CARRIER WHERE SOL HAS RUN ON TORT CLAIM AND DAMAGES EXCEED TORT-FEASOR'S LIABILITY LIMIT

A bit of history is required to fully appreciate the impact of the next case, *Kavanaugh v. Maryland Ins. Co.*[215] It presents yet another chapter in the long saga of whether UM carriers owe all of a claim, the amount which exceeds the tort-feasor's liability limit, or whether the UM carrier owes only the amount of the claim which exceeds the tort-feasor's liability coverage. Before *Buzzard v. Farmers Ins. Co., Inc.*,[216] it was clear that once the value of the claim exceeded the tort-feasor's liability limit, the UM carrier owed the whole claim. It could then subrogate against the liability carrier to recover the tort-feasor's liability limits.

This was so because the Oklahoma UM statute, 36 O.S. §3636, does not provide a separate underinsured motorist coverage. Rather, the legislature amended the basic UM statute to redefine "uninsured motor vehicle" to include a vehicle with liability limits less than the insured's claim. *Roberts v. Mid-Continent Casualty Co.*[217] and *Everaard v. Hartford Accid. and Indem. Co.*[218] specifically held that the UM carrier must pay all of the claim (up to the UM limit) and recover back through subrogation against the liability coverage.

Some unfortunate *dictum* in *Buzzard v. Farmers* apparently changes that result. In *Buzzard*, the issue of whether the UM carrier owed the whole claim, including amounts within the tort-feasor's liability coverage was not before the Court. The liability limits had been exhausted. The

---

[213] 1985 OK 45, 711 P.2d 72.
[214] 1983 OK 41, 662 P.2d 681.
[215] 1997 OK CIV APP 41, 943 P.2d 629.
[216] 1991 OK 127, 824 P.2d 1105.
[217] 1989 OK CIV APP 92, 790 P.2d 1121.
[218] 842 F.2d 1186 (10th Cir. 1988).

problem in *Buzzard* was whether the release of the tort-feasor, in exchange for those limits, destroyed the UM claim. The Supreme Court held that it did not, because Farmers had failed to pay its UM limit when it should have and was thus estopped to assert the loss of its subrogation from the liability settlement. The Supreme Court held that the UM carrier could not insist that the insured exhaust the tort-feasor's liability limits before the UM carrier would pay its limits.

However, Justice Summers went further then he needed to (and further than the parties had briefed the issues). He wrote that the insured could even take less than the liability limit (presumably once the UM carrier was estopped to assert its subrogation) and not destroy the UM claim. Rather, the effect of this would be, said Justice Summers, that the UM carrier would not be liable for the resulting "gap" between the amount actually paid and the liability limit *because the UM carrier was only liable for the amount by which the value of the claim exceeded the adverse liability limits*. Just to be sure the *dictum* did not appear to the lawyers to be inadvertent, he repeated it a couple of times.

Ever since then, we have struggled with that *dictum*. Insurance companies have not known whether, when confronted with a claim worth $25,000 and $10,000 in liability coverage, it owes $15,000 or $25,000. Insureds who would once have sued or arbitrated against their UM carrier for their full $25,000 in damages, and let the two insurance companies work out the question of who owed the first $10,000, through subrogation, have had to sue both the tort-feasor and the UM carrier.

Meanwhile, other courts were puzzled. In *Mustain v. United States Fidelity and Guaranty Co., et al.*,[219] the Tenth Circuit Court of Appeals asked the Supreme Court to address the *dictum*. It certified to the Supreme Court the question: "Are the decisions in *Hibbs v. Farmers Insurance Co.*, 725 P.2d 1232 (Okla. 1985) and *Smith v. Government Employers Insurance Co.*, 558 P.2d 1160 (Okla. 1976) that when an insurance company must be exhausted before the secondary insurer is liable, still good law in light of *Buzzard*...." The Supreme Court "recast" the question to make it ask: "(1) Based on this Court's ruling in *Buzzard*...and *State Farm Mutual Insurance Company v. Wendt*, 708 P.2d 581 (Okla. 1985) and pursuant to 36 O.S. 1991 Sec. 3636, should uninsured motorist coverage be treated as primary coverage? (2) If uninsured motorist insurance must be declared primary coverage in Oklahoma, should the ruling be prospective?"

Those of us who track such things were sure we knew what the Supreme Court would do: Disavow the *Buzzard dictum* and go back to the way the statute reads, that UM coverage is not "excess" to liability coverage, but is, as between the insured and his insurance company primary coverage. As to existing claims, where people may have settled for less than liability coverage, the Court would declare the ruling prospective only, to protect those who had relied on the *Buzzard dictum*. We were wrong. Rather, the Court in *Mustain* did not disavow the *Buzzard dictum*. Rather, it held that, as between the insured and the insurance company, there is no such thing as primary or excess coverage. All coverage is primary. Thus, when two UM carriers are involved, one purporting to be primary and the other excess, both are primary. One or the other must pay and subrogate against the other, if there is disagreement among the insurance companies as to which is primary.

[219] 1996 OK 98, 925 P.2d 533.

The reason for the result in *Mustain* is the facts in *Mustain*. Mr. Mustain was working in a crane truck when the crane fell and injured him. There was a lot of UM coverage on the truck but a lot of question whether the use of the truck as a hoist constituted a "transportation use" of the truck so as to make the UM applicable. For this reason, he took less than the UM limit on the truck and sued his own UM carrier. *Hibbs v. Farmers* had held that taking less than the primary UM destroyed a claim against excess UM coverage. *Smith* held the same as to liability coverage. In *Mustain*, unlike in *Buzzard*, the Court saw fit only to address the facts before it. This left the issue of the effect of the *Buzzard dictum* up in the air.

The Court of Civil Appeals did the best it could in *Assalone v. Hartford Acc. & Indem. Co.*[220] *Assalone* cites and relies on *Roberts v. Mid-Continent Cas Co.* To hold that the insured need not sue the tort-feasor and may sue the UM carrier directly without joining the tort-feasor. *Assalone* leaves open the threshold question whether the insured recovers all of his damages or only those in excess of the liability limit.

Kavanaugh v. Maryland Ins. Co.[221] is the latest case to approach the problem; it reaches a subset of the problem. It holds that where the statute of limitations has run on the claim against the tort-feasor, but the damages exceed the tort-feasor's liability limit, the insured may recover all her damages from the UM carrier.[222]

Kavanaugh leaves open a question first raised but left unanswered by the Supreme Court in *Uptegraft v. Home Insurance Co.*[223] That is, whether the insured may recover from the UM carrier where the statute has run on the claim against the tort-feasor and the UM carrier has demanded that the insured timely sue the tort-feasor. That did not happen in *Uptegraft* and it did not happen in *Kavanaugh*.

In *Kavanaugh*, the insured first sued and then dismissed the tort-feasor, instead suing the UM carrier directly. The UM carrier then sought indemnification from the tort-feasor, bringing the tort-feasor in as a third-party-defendant.

However, the insured did not sue the tort-feasor again so the statute of limitations ran on the insured's claim against the tort-feasor. The tort-feasor had a $20,000 liability policy. The parties stipulated the insured's claim had a value of $25,000. The trial court (Honorable Bryan Dixon, Oklahoma County) granted Kavanaugh summary judgment in the amount of $5,000, the difference between Kavanaugh's $25,000 UM limit and the tort-feasor's $20,000 liability limit. Kavanaugh appealed.

The Court of Civil Appeals, in an opinion by Judge Joplin, held that Kavanaugh was entitled to recover the full $25,000 UM limit, reversed the trial court, and remanded the case with

---

[220] 1994 OK CIV APP 64, 908 P.2d 812.
[221] 1997 OK CIV APP 41, 943 P.2d 629.
[222] *Boyer v. Okla. Farm Bureau Mut. Ins. Co.*, 1995 OK CIV APP 102, 902 P.2d 83 holds that the running of the statute of limitations alone does not trigger UM coverage where the damages do not exceed the tort-feasor's liability limit. The statute still requires that the damages exceed the liability coverage before UM coverage will be triggered.
[223] 1983 OK 41, 662 P.2d 681.

instructions to enter judgment for Kavanaugh. The court noted that if the UM carrier's liability were limited to $5,000 (as the trial court held, following *Buzzard*), the UM carrier would pay the $5,000 recover that from the tort-feasor on its third-party claim, and be out no money at all. The insured would get only $5,000 of her damages and the tort-feasor's damages would be limited to $5,000. With the result here, the insured will recover her full $25,000 in damages. The UM carrier will pay that and recover back $20,000 from the tort-feasor's liability coverage. The loss will have been paid exactly as the coverages available seem to contemplate. Unfortunately, the decision leaves open the basic question of the *Buzzard dictum*. That is a necessary result here, since the Court of Civil Appeals can hardly correct the Supreme Court's error.

The Supreme Court will have its chance. It has before it on a certified question *Burch v. Allstate* which presents a question almost identical to *Kavanaugh*. There, the insured husband had a $10,000 liability policy on which the wife let the statute of limitations run. The question certified is whether the UM carrier will be liable for the entire damage, including the first $10,000 or only for the amount of damage exceeding the $10,000 in liability coverage. Hopefully, the Supreme Court, having denied *certiorari* here, will seize the opportunity to do away with the *Buzzard dictum* completely.[224]

UM INSURED MAY STACK SEPARATE POLICY COVERAGE; "OTHER INSURANCE" CLAUSE VOID; INSURED HAS OPTION TO SUE TORT-FEASOR, INSURANCE COMPANY, OR BOTH

Keel v. MFA[225] holds an insured may stack the uninsured motorist coverage applicable to separate vehicles because the "other insurance clause is contrary to public policy and void and that the insured has the option to sue the insurance company, the tort-feasor, or both.

Mrs. Keel was injured by an uninsured motorist while insured with two (UM) policies. She sued the tort-feasor and obtained judgment and then sued MFA. The trial court granted judgment, stacking the coverage and holding MFA bound by the judgment against the tort-feasor, since it had notice of the action.

The Supreme Court affirmed in part but reversed and remanded for a new trial. The court held plaintiff could stack the coverage of the separate policies, upon which separate premiums had been paid. Further, MFA should be bound by the judgment. The insured has the option to: (1) sue the insurance company directly; (2) join the uninsured motorist and the insurance company; (3) sue the tort-feasor alone but notify the insurance company, in which case the insurance company will be bound by the judgment; or (4) sue the tort-feasor without notice to the insurance company, in which case the insurance company will not be bound.

Since this decision reverses prior authority,[226] the decision holding the insurance company bound will be given prospective effect only. For that reason, the case is reversed for a new trial. While this case does not overrule it by name, it effectively overrules *Johnson v. USAA*, 1969 OK 200,

[224] Portions reprinted by permission from the Oklahoma Trial Lawyer's *Advocate*.
[225] 1976 OK 86, 553 P.2d 153.
[226] 392 P.2d 361 (Okla. 1964).

462 P.2d 664, which had held the UM carrier not bound by the verdict against the tort-feasor.

INSURANCE COMPANY NOT REQUIRED TO OFFER STACKABLE UM COVERAGE WHEN A VEHICLE IS ADDED TO AN EXISTING SINGLE PREMIUM POLICY COVERING MULTIPLE VEHICLES

Kinder v. Oklahoma Farmers Union Mut. Ins. Co.,[227] holds that when cars are added to a policy, UM coverage must be offered and a written rejection taken if UM coverage is rejected, but stackable UM coverage is not required to be offered on a single premium policy that covers multiple cars.

Shawn Kinder (Shawn) lived at home with his parents and was covered under a car policy with Oklahoma Farmers Union Mut. Ins. Co. (OFU) insuring three cars that provided 10,000/20,000 UM and had a limitation clause limiting UM coverage to only one limit. The Kinders added three more cars to their policy and OFU, of its own accord, increased the UM limit to 25,000/50,000. OFU did not offer or take a written rejection of higher or stackable UM limits on the additional cars. Shawn was hurt in a car wreck and OFU paid him $25,000 UM benefits. Shawn contended that he should be able to stack the UM coverage because OFU did not offer stackable UM coverage when the three cars were added.

The trial court granted Kinder summary judgment. The Court of Civil Appeals reversed, holding summary judgment improper because it was unclear whether the Kinders understood that UM coverage would be limited to $25,000/50,000 when the additional cars were added to the policy. On remand, the trial court again entered judgment for Kinder, holding that operation of law automatically insured the Kinders with stackable UM coverage because OFU did not offer nor take a written rejection of additional UM coverage when the cars were added. The Court of Civil Appeals again reversed the trial court, stating that the trial court misunderstood the original reversal opinion. Both parties petitioned for certiorari, which was granted.

In an opinion by Justice Hargrave, the Oklahoma Supreme Court vacated the Court of Civil Appeals opinion and remanded the case to the trial court to enter judgment for OFU. The Court held that Oklahoma law does not require an insurance company to offer stackable UM coverage when a vehicle is added to an existing single premium policy covering multiple vehicles. The fact that the Kinders did not reject OFU's voluntarily increased UM limits coupled with the policy language that the amount of UM coverage was not based on the number of cars insured indicates that the Kinders were on notice that they had nonstackable 25,000/50,000 UM coverage.

STATUTORY HOSPITAL LIEN WILL NOT ATTACH TO UM PROCEEDS PAID BY PATIENT'S OWN INSURANCE COMPANY

Kratz v. Kratz[228] holds that a hospital lien (per 42 O.S. § 43) will not attach to UM proceeds paid by the patient's own insurance company. In so holding, *Kratz* overrules *Woods v. Baptist*

[227] 1997 OK 104, 943 P.2d 617.
[228] 1995 OK 63, 905 P.2d 753.

Medical Center of Oklahoma, Inc.,[229] from our Court of Civil Appeals.

Dollie Kratz was hurt while riding as a passenger in a car driven by her husband James Kratz. Dollie was treated at Jane Phillips Memorial Medical Center, which filed a lien under the hospital lien statute. Dollie's attempt to collect under her and her husband's liability coverage was denied under a "household exclusion clause," but Prudential tendered its limits under her UM coverage. The medical center then sought to enforce its lien against that UM settlement.

The trial court ruled for the hospital that the lien impressed against the UM; the Court of Civil Appeal affirmed over what the Supreme Court later called "a vigorous and well-reasoned dissent." Although the trial court and the COCA found the statutory language "clear and unambiguous" and to encompass funds received by an injured party from any source other than the injured person, "even her own insurer," the Supreme Court disagreed.

According to the Court, in an opinion by Justice Simms, it is not clear a UM payment qualifies as "proceeds . . . from a claim asserted 'against another for damages,'" as embraced by the lien statute. Instead, UM represents a "direct promise" by the insurance carrier, based upon a contract, to pay for the insured's loss; by contrast, payment under a liability policy represents "a promise [by the insurance carrier] to its insured to pay a third-party." Accordingly, the two are not synonymous, and are at times afforded different treatment.

In the end, the Court tempered the "cardinal rule" of statutory construction, "ascertaining the intent of the legislature," in the case of the lien statute, "to encourage hospitals to care for accident victims who might otherwise be non-paying," with the conflicting rule that there is no basis for a hospital lien in the absence of statutory authority. Thus, the Court was not free to "read in" inclusion of funds not fairly embraced by the terms of the statute; rather, statutes creating liens are strictly construed.

In this regard, said the Court, the title of the act was itself instructive–since Oklahoma's Constitution requires that the title of each statute clearly state the "subject" of the enactment.[230] Thus, said the Court, the title selected by the legislature "has the effect of limiting the text of [the] act. In the case of the hospital lien statute, the title restricts its operation to "proceeds recovered in a *personal injury* action from a tortfeasor or his insurer," and not to payments under first-party insurance coverage based solely on principles of contract law.

Finally, the Court supported its interpretation with the "notice requirements" of section 44 of the hospital lien statute. That provision requires that hospitals notify the tortfeasor and any insurance companies known to insure the tortfeasor of its liens, but the section says nothing of sending notice to the injured person's own insurance carriers.

The Court overruled *Woods v. Baptist Medical Center of Oklahoma* and another, unpublished decision of the Court of Civil Appeals, and held that the hospital lien statute did not attach to UM funds paid by the injured person's own insurance company.

Justices Wilson, Kauger, Simms, Hargrave, Summers, and Watt, concurred; Justices Hodges and

[229] 1995 OK CIV APP 69, 904 P.2d 1367.
[230] Art. 5, § 57, Okl. Const.

Lavender joined Justice Opala in a dissent in which he said he believed UM proceeds "stand as a *substituted res,* for any 'recovery' the patient would have received from the uninsured or underinsured tortfeasor" and are thus subject to the lien statute.

Kratz is overruled by an amendment to 42 O.S. §. 43 effective 11/1/12.

"LIMIT OF LIABILITY" CLAUSE UNENFORCEABLE TO PREVENT UNINSURED MOTORIST STACKING

Lake v. Wright, et al.[231] holds a "limit of liability" clause in an uninsured motorist policy (which purports to preclude stacking) is contrary to public policy and unenforceable so as to prevent stacking where separate premiums are paid for insuring multiple vehicles.

Western Casualty and Surety Company issued a single automobile liability policy covering six vehicles, for each of which a separate policy premium was charged. The policy contained a "limit of liability" clause:

> Regardless of the number of covered auto, insureds, claims made, or vehicles involved in the accident, the most we will pay for all damages resulting from any one accident is the limit of Uninsured Motorist Insurance shown in the declarations.

The injured insureds attempted to stack the $10,000/$20,000 limits on which of the six vehicles insured under the policy to arrive at $60,000/$120,000 limits.

The U.S. District Court for the Western District certified two questions to the Oklahoma Supreme Court:

> (1) May the uninsured motorist coverage of $10,000 for each person injured in an accident not to exceed $20,000 in any one accident, provided under a single automobile insurance policy, covering six vehicles, be "stacked" or aggregated to provide the limits of $60,000 and $120,000 respectively?
>
> (2) If the "Our Limit of Liability" clause in the policy herein is found to prevent the "stacking" of the uninsured motorist coverages under the insurance policy, are such clauses enforceable under Oklahoma law?

The Supreme Court, in an opinion by Justice Barnes, answers both questions "no." The result is that, while the "limit of liability" clause precludes stacking, the clause is unenforceable under Oklahoma law so that stacking is permitted.

The Court first finds the "limit of liability" clause clear and unambiguous and 36 O.S. 1981 §3636 does not require stacking. Therefore, the Court holds the questioned clause precludes stacking.

However, the Court then considers the second certified question and determines that the "limit of

[231] 1982 OK 98, 657 P.2d 643.

liability" clause, like the "other insurance clause" in *Keel v. MFA*[232] is contrary to public policy and unenforceable.

[**Editor's Note**: This is a strangely written opinion. It reads like two opinions put together. The Court first concludes that the "limit of liability" clause is clear and unambiguous and not violative of §3636. In fact, the Court notes the 1976 amendment to the statute which requires the offer of uninsured motorist limits "not to exceed the [liability] limits" and says:

> "stacking" where a policy clearly provides to the contrary, as here, would render the "not to exceed" provision of §3636(B), supra, of the uninsured motorist statute, totally meaningless.

The Court then clearly, however, proceeds to hold the "limit of liability" clause unenforceable.

While the Court apparently does not recognize it, both the problem and solution in this case are rooted in *Richardson v. Allstate*.[233] The Court in the present opinion treats the question of "limit of liability" clause as a case of first impressions. Actually, *Richardson* involved a "limit of liability" clause and the *Richardson* court permitted stacking. (The "limit of liability" clause is specifically referred to at 619 P.2d 594, 596.) The *Richardson* court quotes with approval from *Federated American Insurance Co. V. Raynes*[234] to the effect that "limit of liability" clause "conflicts with the statutory policy of providing uninsured motorist coverage.

Unfortunately, the *Richardson* court also quotes with approval from *Sturdy v. Allied Mutual*[235] to the effect that the insurance company may preclude stacking by an unambiguous provision to that effect. The present stacking decision is to the contrary.]

BARE ALLEGATION THAT DAMAGES EXCEED TORTFEASOR LIABILITY LIMIT DOES NOT TRIGGER ENTITLEMENT TO UM; ALSO STIPULATION TO DAMAGE AMOUNT LESS THAN LIMITS PRECLUDES UM CLAIM

Lamfu v. GuideOne Ins. Co.[236] holds that a UM claimant must prove, not merely allege, damages in excess of tortfeasor's liability limits in order to show entitlement to UM.

Humphrey Lamfu was injured in an auto accident caused by Michelle Cato; Lamfu incurred $4202.40 in medical expenses. Cato had $10,000 of liability coverage. Lamfu submitted a claim for $10,000 in UM proceeds under his policy with Guidone, claiming he sustained $25,000 in damages and providing a "damage summary" and a summary of his medical bills. Guidone valued Lamfu's claim at $8209.40, but invited Lamfu to submit additional information. Guideone twice requested Lamfu sign and return wage verification and medical authorization forms. Lamfu provided no further documentation but did give a recorded statement. Guideone's evaluation did not change. Lamfu told Guideone he would not pursue a claim against Cato, but

---

[232] 1976 OK 86, 553 P.2d 153.
[233] 1980 OK 157, 619 P.2d 594.
[234] 563 P.2d 815, 820 (Wash. 1977).
[235] 457 P.2d 34 (Kan. 1976).
[236] 2006 OK CIV APP 19, 131 P.3d 712.

would instead, under *Burch v. Allstate,*[237] proceed solely against the UM carrier.

Then Lamfu told Guideone he accepted its "offer" of $8209.40–Guideone refused to pay, the statute of limitations ran on Cato and Lamfu filed suit in Tulsa County. During litigation Lamfu stipulated that Guideones' assessment was accurate and that he would present no further evidence of damages. Guideone's motion for summary judgment was granted by Judge Doris Fransein. Lamfu appealed.

In the Court of Civil Appeals (COCA) Lamfu argued that since he submitted a "claim" greater than liability limits Guideone was required to pay the undisputed amount. Guidone argued that Lamfu had not shown his entitlement to UM proceeds–specifically he had failed to establish the tortfeasor's uninsured (or underinsured) status.

The COCA examined the UM statute (36 O.S. § 3636) and held that the insured has an obligation to prove as part of a *prima facie* case for entitlement to UM that his damages exceed the tortfeasor's liability limits–that the tortfeasor's vehicle was "uninsured." Said COCA, Guideone's assessment of Lamfu's damages was not an offer to pay that amount but was instead the basis for Guideone's denial of Lamfu's UM claim. In failing to dispute that amount and stipulating to its correctness, Lamfu conceded that his damages were less than Cato's liability limits and that he was not entitled to UM money. The COCA affirmed.

OKLAHOMA LAW APPLIES TO KANSAS POLICY WHERE OKLAHOMA HAS MORE CONTACTS WITH TRANSACTION

Leader National Ins. Co. v. Shaw[238] holds that Oklahoma law governs an uninsured motorist coverage dispute where Oklahoma has greater contacts to the case, even though the policy was issued in Kansas to Kansas residents.

Shaw and his wife and child were Kansas residents, but not domiciliaries.[239] They took out an insurance policy in Kansas and then were killed in a car wreck in Oklahoma. Under Oklahoma law, the occupants of the car, to whom Shaw was liable, would be able to recover both the liability and the UM coverage on the car. Under Kansas law, they could not recover UM, because they could not get both liability and the UM coverage on the same car.

Judge Alley held that Oklahoma and not Kansas law applied, so that both liability and UM coverage applied. *Bohannan v. Allstate Ins. Co.*[240] is controlling. It holds that, under Oklahoma conflicts law, the law of the place where the policy was issued controls, except where applying

---

[237] 1998 OK 129, 977 P.2d 1057 ("[UM] coverage is primary, meaning that an uninsured motorist carrier is liable for the entire amount of its insured's loss from the first dollar up to the UM policy limits without regard to the presence of any other insurance").
[238] 901 F.Supp. 316 (W.D.Okla. 1995).
[239] Shaw was a Texas domiciliary. Mrs. Shaw had either a Texas or an Oklahoma domicile. While the opinion does not show it, the reason for this peculiarity is that the Shaws were in the military in Kansas, he from Oklahoma and she from Texas when they married and had their child in Kansas.
[240] 1991 OK 64, 820 P.2d 787.

that law would violate Oklahoma public policy or where another state has a greater interest in having its law applied.

Oklahoma has a greater interest in having its law applied because it has greater contacts with the transaction.

KANSAS INSURED MAY STACK UM BENEFITS UNDER KANSAS POLICIES FOR MOTORCYCLE ACCIDENT IN OKLAHOMA, DUE TO POLICY'S LIBERALIZATION PROVISION

Leritz v. Farmers Insurance Company, Inc.[241] holds that a Kansas insured may stack uninsured motorist (UM) limits under a policy issued in Kansas, due to a liberalization provision in the policy.

Leritz lived in Kansas and had a motorcycle and two cars insured under a policy issued in Kansas which provided $100,000 UM benefits. Farmers charged separate premiums for each vehicle but denied stacking under the policy, due to a Kansas anti-stacking statute. At the time of Leritz' wreck on the motorcycle in Oklahoma, Oklahoma law permitted stacking where separate premiums were charged for each of multiple vehicles insured under the policy. The controlling Oklahoma UM cases at the time required an Oklahoma court to apply the law of the place where the policy was written.[242]

Leritz had serious injuries. Farmers paid $100,000, much less than his medical expenses alone. Leritz sued Farmers in Delaware County, Oklahoma, arguing that the earlier Oklahoma cases were wrong and that Oklahoma law should apply since 15 O.S. § 162 requires the court to apply the law of the place where a contract is to be performed and provides for the application of the law of the place where the policy is written where the contract does not specify where the policy is to be performed. Leritz argued that the provision in Lertiz' policy that the policy applied anywhere in the United States or Canada where an accident occurs specified that the contract (the policy) was to be performed where the accident occurred.

The trial court, of course, had to follow the existing Oklahoma law and granted Farmers summary judgment. The Court of Civil Appeals affirmed and the Supreme Court granted certiorari and reversed, in a six to three decision by Justice Colbert.

The Supreme Court based its decision on an argument different from the one Leritz presented. The Court noted that the policy contained a liberalization provision that when the insured traveled outside the state where the policy was issued, "We will interpret this policy to provide any broader coverage required by those laws, . . ."[243] Further and "most importantly" the policy provided that "Subject to the law of the state of occurrence, we will pay no more than these maximums [policy limits] regardless of the number of vehicles insured, insured persons, claims,

---

[241] *Leritz v. Farmers Insurance Company, Inc.*, 2016 OK 79, __ P.3d __.
[242] *Bohannan v. Allstate Ins. Co.*, 1991 OK 64, 820 P.2d 787 and *Bernal v. Charter County Mut. Ins. Co.*, 2009 OK 28, 209 P.3d 309.
[243] ¶3 (emphasis by the Court).

claimants, policies, or vehicles involved in the occurrence."[244] The majority found these provisions to be "choice of law" provisions, which make it unnecessary to address the propriety of the Court's earlier rulings on which state's statute should be applied.

Justices Winchester and Taylor joined in a separate dissent by Justice Gurich. The dissent argues that Oklahoma has no involvement in the case "other than being the location" of the accident. The dissent takes no position as to whether the Court should address the statutory choice of law rule.

POLICY DEFINITION OF "UNINSURED MOTOR VEHICLE" IN ARKANSAS POLICY VIOLATES OKLAHOMA PUBLIC POLICY; THE INSURED VEHICLE MAY BE "AN UNINSURED MOTOR VEHICLE, SO THAT BOTH LIABILITY AND UM COVERAGES ARE PAYABLE

Lewis v. State Farm Mut. Auto. Ins. Co.[245] holds that an Arkansas UM policy provision, which excludes from the definition of an "uninsured motor vehicle," the insured vehicle is invalid, as contrary to Oklahoma public policy, so that both the liability and UM coverage may be payable under the policy, in a one-vehicle accident.

The plaintiffs were injured in a one-vehicle accident in Oklahoma, while riding in a car insured and garaged in Arkansas and insured under an Arkansas policy. The insurance company paid its liability limit, but refused to pay its UM coverage, since the policy defined "uninsured motor vehicle" to exclude "the uninsured vehicle." This provision, valid under Arkansas law, is invalid under Oklahoma law, as interpreted in *State Farm Mut. Auto. Ins. Co. v. Wendt*.[246]

The parties agreed there was no fact question and submitted the case on cross-motions for summary judgment. The trial court granted plaintiffs' motions for summary judgment, holding that enforcement of the provision would violate Oklahoma public policy.

The Court of Appeals affirmed, in an opinion by Judge Hansen. While normally the law of the place where the insured vehicle was principally garaged (Arkansas, here) would apply, the Oklahoma court will refuse to apply the foreign state's law if that law would violate Oklahoma public policy.

The questioned policy provision would violate public policy, so it will not be applied in the Oklahoma court. This result is, the trial court concluded, mandated by *Bohannan v. Allstate Ins. Co.*[247] The Court of Appeals, with little discussion, adopted and ordered published the trial court's conclusions of law, to that effect.

The result is that both the liability and the UM coverage of the insured vehicle become exposed. The insured vehicle becomes an "uninsured motor vehicle."

---

[244] *Id*. (emphasis by the Court).
[245] 1992 OK CIV APP 106, 838 P.2d 535.
[246] 1985 OK 75, 708 P.2d 581.
[247] 1991 OK 64, 820 P.2d 787.

DERIVATIVE CLAIMS DO NOT TRIGGER SEPARATE UM LIMIT

Littlefield v. State Farm Fire and Casualty Co.[248] holds that derivative claims for damage to more than one person flowing from injury to only one person do not trigger the "per accident" limit of an uninsured motorist policy. Rather, the "per person" limit applies, no matter how many people have claims resulting from the bodily injury to one person.

Ms. Littlefield was killed by an underinsured motorist. She had a State Farm policy providing uninsured motorist (UM) coverage of $10,000 per person and $20,000 per accident, covering two vehicles. Thus, the available, stacked limit was $20,000 per person and $40,000 per accident.

Mr. Littlefield claimed that his claims as her supervisor, for grief and loss of consortium, triggered a separate "per person" limit, so that a total of $40,000 was due. State Farm contended that, since only Mrs. Littlefield sustained bodily injury, only one set of "per person" limits were involved, and its liability was limited to $20,000, which it paid.

The trial court found the policy ambiguous and agreed with Mr. Littlefield that two sets of limits, totalling $40,000, was due. The Court of Appeals affirmed. The Supreme Court reversed, in a seven to one decision by Justice Kauger.

The policy provided the "each person" limit was for "all damages due to bodily injury to one person." The "each accident" limit was for "bodily injury to two or more persons in the same accident."

While more than one person (Mr. and Mrs. Littlefield) sustained damages due to Mrs. Littlefield's death, only Mrs. Littlefield sustained bodily injury. Thus, by the unambiguous policy language, there was only one "bodily injury" and only one per person limit triggered.

The Supreme Court relied on *White v. Equity Fire & Cas. Co.*[249] for the proposition that the term "bodily injury" is not ambiguous. While the term "bodily injury" includes loss of consortium damages, a consortium claim does not constitute a separate bodily injury claim.

The Supreme Court found *Hardin v. Prudential Property and Cas. Co.*[250] not to be helpful. That case involved a policy which specifically provided that "all

damages [include] damages for care or loss of services" were included. Thus, that case does not reach the ambiguity question involved here and in *White v. Equity Fire*.

Justice Wilson dissented, without separate opinion. Justice Opala did not participate. This decision is consistent with the great weight of national authority. Some cases have found the term "bodily injury," without further policy definition, such as that found in *Hardin v. Prudential*, to be ambiguous. Almost none hold multiple "per person" limits are triggered by a single bodily injury.

---

[248] 1993 OK 102, 857 P.2d 65.
[249] 1991 OK CIV APP 131, 823 P.2d 953.
[250] 1992 OK CIV APP 42, 839 P.2d 206.

BODILY INJURY MUST BE TO AN INSURED

London v. Farmers Ins. Co., Inc.[251] holds that an insurance company can limit coverage to require bodily injury be to an insured under the policy.

Young Derrick London lived with his grandmother, a Farmers insured. His father, who did not live with them, was killed in a motorcycle collision.

The UM statute[252] requires the UM policy to provide coverage for "persons insured thereunder" who sustain damage due to bodily injury, including death, as a result of the negligence of an uninsured motorist. The grandmother's Farmers' policy, by contrast, required that the bodily injury giving rise to the damage be to an insured. Since the little boy's Father was not a resident of the household and, therefore, not an insured, the policy purported not to provide the coverage which the statute requires. London argued that the policy cannot create a more restrictive requirement for the coverage to apply than the statute requires, so the policy language must give way to the requirement of the statute.

The trial court, (Judge Dan Owens in Oklahoma County), disagreed and granted Farmers summary judgment. The Court of Civil Appeals affirmed, in an opinion by Judge Mitchell. The Supreme Court denied certiorari in a 7 to 2 decision, with Justices Watt and Summers dissenting.

ARBITRATORS, AND NOT COURT, MAY ADD COSTS AND PREJUDGMENT INTEREST TO AWARD

Lopez v. National American Ins. Co.[253] holds that the court cannot add costs and prejudgment interest to an arbitration award.

Lopez involved the question whether the court or arbitrators assess court costs and prejudgment interest when a case in litigation is ordered to arbitration. Lopez rolled his employer's truck, but was struck and killed by a passing motorist while he was crawling out of the truck. National American had the insurance policy on the employer's truck which provided $1 million in UM coverage. National American denied coverage because the employer asserted he sold the truck to Lopez, which would terminate the coverage.

Lopez won the coverage issue and demanded arbitration on the issue of the liability of the underinsured tort-feasor and the amount of damages. Lopez won the arbitration and asked the court to enter judgment on the arbitration award, including costs and prejudgment interest. The trial court (Judge Blalock in McClain County) refused to add the costs and interests, holding that would impermissibly alter the arbitration award. The Court of Civil Appeals affirmed, in a 2001 opinion by Judge Buettner. The Supreme Court granted certiorari petition, but more than a year later, issued an order withdrawing the earlier grant of certiorari as "improvidently granted." The Supreme Court then withdrew the Court of Civil Appeals opinion from publication.

Editor's Note: This leaves us with no published guidance whether the court should award costs

[251] 2003 OK CIV APP 10, 63 P.3d 552.
[252] 36 O.S. § 3636.
[253] Court of Civil Appeals Case No. 96,159 Opinion of October 12, 2001(unpublished).

and prejudgment interest (as the statutes provide) or whether that should be done by the arbitrators (as the trial court and Court of Civil Appeals appear to have held). In the face of that, the safest procedure is probably to submit the costs and prejudgment interest to the arbitrators. However, we need yet to have a test case to resolve the issue in the appellate courts by published opinion. It appears to me the better result for plaintiffs would be to have the court add the costs and interest to the arbitration award. Otherwise, I think the arbitrators will simply give a gross award, including interest and costs which will be no greater than the award without them.

SUMMARY JUDGMENT ON WHETHER A UM CLAIM IS BARRED IS NOT APPROPRIATE WHERE THE INSURED TOOK THE TORT-FEASOR'S SMALLER THAN LIMITS OFFER FOR A REASON OTHER THAN THAT DAMAGES WERE PAID BY THE LOWER OFFER

Madrid v. State Farm Mut. Automobile Ins. Co.[254] holds summary judgment is inappropriate on the issue whether the insured taking a liability coverage offer less than the liability limit bars the insured's recovery of uninsured motorist (UM) limits where the evidence is such that the insured may have taken the smaller offer for a reason other than that the insured's damages were less than the liability limit.

Ms. Madrid lived with her parents in Oklahoma but went to college in Texas. Her parents had a car insurance policy with State Farm which provided $200,000 UM coverage. While in Texas, she was badly hurt by a Texas tort-feasor with a $100,000 liability limit. She hired a Texas lawyer who settled the case for $90,000. He later explained that he figured it would cost him more than the $10,000 he was giving up to pay doctors for depositions to try the case. Under the Texas procedure, with which he was familiar, such a settlement would not bar recovery of the UM.

However, Oklahoma has a Court of Civil Appeals case, *Porter v. State Farm Mut. Auto. Ins. Co.*,[255] which held that taking less than the tort-feasor's liability limit has the effect of barring a UM recovery, even if there are arguably reasons why it makes sense to do so.

Madrid sued in Oklahoma. The trial court, Judge Don Andrews, followed *Porter v. State Farm* and sustained State Farm's Motion for Summary Judgment. The current decision declines to follow *Porter v. State Farm* and reversed, in an opinion by Chief Judge Bryan Jack Goree, in the Oklahoma City Division of the Court of Civil Appeals. Judge Joplin concurred while Judge Buettner dissented, saying he would follow *Porter v. State Farm*.

Madrid argued that treating proof of the settlement for less than the liability policy as establishing conclusively that the value of the claim was less than the liability limit without regard to what other reasons existed for the settlement constituted establishing an irrebuttable presumption in violation of due process under *Vlandis v. Kline*.[256]

The *Madrid* Court noted that argument on Ms. Madrid's part but overruled the trial court's

[254] 2019 OK CIV APP __, __ P.3d __ (Case No. 117,274, Aug. 30, 2019).
[255] 2010 OK CIV APP 8, 231 P.3d 691.
[256] 412 U.S. 441 (1973).

sustention of the summary judgment on the basis that there existed a fact question whether the basis for taking less than the liability limit was that the claim's value was not greater than the liability limit or, as Madrid's Texas lawyer explained, the cost of pursuing the claim against the tort-feasor.

This decision, in Division I of the Court of Civil Appeals, puts that division in conflict with *Porter v. State Farm,* in Division III of that Court. This would seem to set up the basis for the Supreme Court to grant *certiorari* to resolve the conflict.[257] This case serves as a cautionary tale for why lawyers ought to be very careful about handling cases involving other state's law without co-counsel from that state or some very careful legal research of the law of the other state.

Full disclosure: This was my case. I represented Madrid.

UM INSURANCE COMPANY WHICH WRITES UM LESS THAN LIABILITY LIMIT NEED NOT TAKE WRITTEN REJECTION; *SHEPARD V. FARMERS'* PROVISION EXCLUDING INSURED FAMILY MEMBER WHO OWNS CAR DOES NOT APPLY WHERE THAT CAR IS INSURED UNDER THE POLICY IN QUESTION

Mann v. Farmers Insurance Co., Inc.[258] holds that an insurance company which writes UM coverage in an amount less than the liability limit is not required to take a written rejection of a higher UM limit and that a policy provision excluding from the definition of insured family member one who owns his own vehicle does not apply to preclude stacking where the owned vehicle is insured under the policy sued on.

Mann's father owned numerous vehicles, insured with Farmers under a fleet policy. Mann also owned a vehicle insured under that policy.

When Mann was injured while occupying a non-owned vehicle, he sued Farmers claiming: (1) since his father had not executed a rejection of UM coverage equal to the liability limit (which Farmers was statutorily obligated to offer in UM coverage), the policy afforded UM limits equal to the higher liability limit and (2) he could stack the coverage, since he was a member of his father's household. Farmers responded that Mann was precluded from stacking since he owned his own vehicle, he was not an insured family member, which Farmers defined as a relative not owning his or her own vehicle.

The trial court held that the higher UM limit, equal to the liability limit applied but that Mann could not stack, due to the family member definition. The Supreme Court reversed.

The requirement of 36 O.S. §3636 that the insured may reject "such coverage" means that a rejection is required only where no UM coverage is written. The coverage which must be rejected is not the higher coverage, equal to the liability limit, which the statute requires be

[257] Oklahoma Supreme Court Rule 1.178(a)(3): Reasons for granting certiorari include: "Where a division of the Court of Civil Appeals has rendered a decision in conflict with the decision of another division of that court."
[258] 1988 OK 58, 761 P.2d 460.

offered.

The provision restricting insured family members to those who do not own their own vehicle is inapplicable where the vehicle which the family member owns is one insured under the policy. This distinguishes *Shepard v. Farmers*[259] which upheld such a clause. In that case, the vehicle which the family member owned was insured under a separate policy.

GOVERNMENTAL TORT CLAIM ACT INSURANCE AND SUBROGATION PROVISIONS DON'T DO AWAY WITH COLLATERAL SOURCE RULE AND ALLOW STATE CREDIT FOR UM OR MED PAY

Mariani v State ex rel. Oklahoma State University[260] holds the provisions of the Governmental Tort Claim Act (GTCA) dealing with insurance and subrogation do not do away with the collateral source rule so as to entitle the state to credit against its liability for amounts paid by uninsured motorist (UM) or med pay coverage.

Mariani was injured in a collision with a state vehicle and had a GTCA claim. She recovered $100,000 from her UM and $25,000 from her med-pay coverage. In her GTCA suit, the State tried to set off these payments from its $175,000 statutory liability, reducing the state's liability to $50,000. The trial court, Judge Parrish, in Oklahoma County, denied the set off and entered judgment for Mariani for $175,000. The Supreme Court affirmed, in an opinion by Justice Combs, which was unanimous except that Justice Taylor did not participate.

The State claimed a number of sections of the GTCA had the effect of abolishing the collateral source rule in suits against governmental entities. It claimed that effect for 51 O.S. Sec. 158E:

> 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.

And for 51 O.S. Sec. 162(D):

> [t]he state or a political subdivision shall not, under any circumstances, be responsible to pay or indemnify any employee for any punitive or exemplary damages rendered against the employee, nor to pay for any defense, judgment, settlement, costs, or fees which are paid or covered by any applicable policy or contract of insurance.

However, read in context, those statutes refer to insurance which may benefit the state in paying a GTCA claim and not a policy bought and paid for by the citizen who is injured by the state. The Court notes that the collateral source rule has long been a staple of state law in Oklahoma and believes these provisions in the GTCA are not intended to impair or do away with it.

The State also argued that the exemption in the GTCA for subrogation claims contained in 51 O.S. Sec. 155(28) "The state or a political subdivision shall not be liable if a loss or claim results

[259] 1983 OK 103, 678 P.2d 250.
[260] 2015 OK 13, 348 P.3d 194

from . . . .(28) Any claim or action based on the theory of indemnification or subrogation;" gave the State credit for the insurance payments. The Supreme Court rejects that argument, as well.

The result here will be a great benefit to the badly injured plaintiff (her medical bills alone were in excess of $136,000). The Supreme Court notes that the UM carrier had waived subrogation.

The Supreme Court cites with approval and follows its earlier opinion in *Salazar Roofing & Const., Inc. v. City of Oklahoma City*.[261] There the City of Oklahoma City tried to limit its liability to the collision deductible of the owner whose vehicle was damaged by a city truck. The Court held there that the exclusion of subrogation in Sec. 155(28) did not relieve the governmental agency of liability.

MOTHER WITH CLAIM AGAINST UNEMANCIPATED CHILD HAS NO UM CLAIM

Markham v. State Farm[262] holds that a mother injured by the negligence of her unemancipated daughter was not "legally entitled to recover damages" from her daughter and was, therefore, not entitled to uninsured motorist benefits.

Mrs. Markham was injured, allegedly due to her 17-year-old daughter's negligence. Liability coverage was apparently excluded by a "household" exclusion. Mrs. Markham sued State Farm under her uninsured motorist (UM) coverage. The District Court found coverage.

The Tenth Circuit Court of Appeals reversed. Since, under Oklahoma law, the mother could not sue her unemancipated daughter, she was not "legally entitled to recover damages" as required by 36 O.S. 1871 §3636(B). Under Oklahoma law, parent-child immunity is not a defense but negatives existence of the cause of action.

[**Editor's Note**: This decision is undoubtedly wrong and will not be followed. Oklahoma has since ruled to the contrary as to nonexistence of the cause of action between parent and child, to the extent of insurance coverage, in *Unah v. Martin.*[263] Further, *Karlson v. City of Oklahoma City*[264] and *Barfield v. Barfield*[265] hold that governmental immunity and Workers' Compensation exclusive remedy (respectively) do not preclude a UM recovery. The Oklahoma Court of Appeals has held directly to the contrary of this case in *Rose v. State Farm Mut. Auto. Ins. Co.*[266]

[261] 2010 OK 34, 249 P.3d 95.
[262] 464 F.2d 703 (10th Cir. 1972).
[263] 1984 OK 2, 676 P.2d 1366.
[264] 1985 OK 45, 711 P.2d 72.
[265] 1987 OK 72, 742 P.2d 1107.
[266] 1991 OK CIV APP 124, 821 P.2d 1077.

PROPER CONFLICT OF LAWS RULE FOR A BAD FAITH CASE IS THE TORT RULE, NOT THE CONTRACT RULE, SO IT WAS IMPROPER TO APPLY KANSAS LAW. AS THE LAW OF THE STATE IN WHICH THE POLICY WAS WRITTEN WHERE THE LOSS OCCURRED IN OKLAHOMA AND THE CLAIM WAS ADJUSTED IN OKLAHOMA

Martin v. Gray[267] holds a tort choice of law rule, rather than a contract one should be used to determine which state's law is to be applied in a bad faith case, so it was error for the trial court to apply Kansas law to a case in which a UM policy was written in Kansas but the loss occurred in Oklahoma and the claim was adjusted primarily in Oklahoma.

Ms. Martin had her car insured on her parent's policy in Kansas when she lived with them. She moved to Oklahoma and her parents told the agent she had moved and the car would now be principally garaged in Oklahoma, not Kansas. She was hurt in a wreck in Oklahoma by an apparent uninsured motorist and incurred $27,000 in medical bills with future medical bills projected to be in excess of $100,000.

The insurance company, Goodville Mutual Insurance Company, a Pennsylvania company, handled the claim out of Pennsylvania. It offered $27,000 in Kansas no fault benefits and $10,000 in UM coverage. Martin sued Goodville in Oklahoma for UM on the contract and for bad faith.

Thetrial court, Judge Dixon, in Oklahoma County, applied Kansas law as the law of the state where the contract was entered into. Finding that Kansas does not recognize a bad faith cause of action, he dismissed the bad faith. He also certified the choice of law issue for interlocutory appeal. The Supreme Court granted *certiorari* and held the trial court should instead have applied the tort choice of law test and looked to which state had the most significant relationship to the transaction.

With the insurance company adjusting the claim from Pennsylvania but the claim having arisen in Oklahoma, it would seem Oklahoma would have the most significant relationship. The Court says it would normally have remanded for a determination which state had the most significant relationship but said the parties settled the case in the meantime.

Normally, that would have resulted in a dismissal of the appeal. Here, however, the Court applies a rule that the Court will retain the appeal and decide the issue when it is important to settle an issue of law because of the "public interest or likelihood of recurrence." The Court noted here the uncertainty by the bench and bar as to the proper rule to be applied in such cases.

INSURED MUST BE ABLE TO ESTABLISH FAULT ON AN UNINSURED DRIVER TO RECOVER UM

Martin v. Hartford Underwriters Ins. Co.[268] holds that an insured could not recover UM benefits for injuries caused when a three-year-old passenger put the car in gear and ran over the insured,

[267] 2016 OK 114, 385 P.3d 64.
[268] 1996 OK 55, 918 P.2d 49.

because the child was legally incapable of negligence.

Ms. Martin was getting into her car when a three-year-old child in the car moved the gear shift lever out of park, causing the car to roll backwards, knocking Martin down and rolling over her. She sued Hartford for UM. The trial court granted Hartford summary judgment. The Court of Appeals reversed. The Supreme Court on *certiorari* reversed the Court of Appeals and affirmed the trial court, in an opinion by Justice Watt.

Because the three-year-old was legally incapable of negligence, Martin could not establish fault on the part of an uninsured operator of the car, so as to be entitled to recover UM. *Uptegraft v. Home Insurance*[269] and *Barfield v. Barfield*[270] establish that the statutory language "legally entitled to recover"[271] means that the insured must be able to establish fault on the part of the uninsured motorist, although not necessarily get a judgment against that driver. Because the infant could not be legally at fault, there is no UM coverage.

MOTION TO DISMISS BAD FAITH COUNTERCLAIM NO GOOD WHERE INSURED ALLEGED INSURANCE COMPANY DENIED CLAIM WITHOUT INVESTIGATION BY FILING THE DEC ACTION

Massachusetts Bay Ins. Co. v. Langager[272] holds a counterclaim for bad faith is not subject to a motion to dismiss where the insured alleges the insurance company denied his UM claim with no investigation and no basis for denial by instead filing the declaratory judgment action.

Langager was the driver of a delivery truck insured by Massachusetts Bay for UM coverage. He says he was injured in a wreck while occupying the truck. He sued for bad faith, saying the insurance company did not respond to his claim other than by filing the declaratory judgment action. The insurance company moved to dismiss the bad faith counterclaim.

The Court Judge Dowdell in the Northern District denied the motion. He said the factual allegations were sufficient to defeat a motion to dismiss.

UM COVERAGE IMPUTED AS A MATTER OF LAW WILL BE EQUAL TO THE STATUTORY MINIMUM LIMIT, NOT THE LIABILITY LIMIT WHICH THE STATUTE REQUIRES THE INSURANCE COMPANY TO OFFER

May v. Nat. Union Fire Ins. Co. of Pittsburg, Pa.[273] holds that where a car insurer fails to make the statutorily required offer of UM limits equal to the liability limits, the statutorily imputed UM coverage is the minimum financial responsibility limits ($10,000/20,000), not the higher liability limits.

The corporate insured had a $5 million liability policy on which it had rejected UM. It reduced the liability limit to $3 million and did not make a new offer or take a new rejection of coverage,

---

[269] 1983 OK 41, 662 P.2d 681.
[270] 1987 OK 72, 742 P.2d 1107.
[271] 36 O.S. §3636(B).
[272] 2017 WL 3586862 (N.D. Okla. Aug. 18, 2017).
[273] 1996 OK 52, 918 P.2d 43, (opinion following certification) 84 F.3d 1342 (10th Cir. 1996).

as required by 36 O.S. §3636. The plaintiffs, an injured employee of the insured and the estate of an employee killed by an underinsured motorist, claimed that the reduced policy limit created a new, rather than a renewal policy, so that a new offer and rejection of UM coverage was required and that the effect of failure to make such an offer was that the policy afforded UM limits equal to the $3 million liability limit. The insurance company claimed no new offer and rejection was required, because the policy was a renewal and not a new policy that, even if a new offer and rejection were required, the resulting coverage would be minimum financial responsibility limits coverage of $10,000 per person and $20,000 per accident, not the $3 million liability limits.

The Federal District Court (Judge Brett) held that the policy was a new one, requiring a new offer and rejection but that the resulting statutorily imputed coverage was for minimum limits.

The Tenth Circuit Court of Appeals agree that the policy was a new one, requiring a new offer and that it afforded statutorily imputed UM coverage. However, the Court certified to the Oklahoma Supreme Court whether the statutorily imputed coverage would equal the liability limits, which the statute requires the insurance company to offer, or the financial responsibility minimum (10/20) limits. The Supreme Court, in an opinion by Justice Watt, held that only minimum limits were required.

The basis for the Court's decision is an earlier error in *Cofer v. Morton*[274] saying that:

> The intent of the legislature as mandated in §3636(F) is to have a statutory minimum of uninsured motorist coverage in all automobile liability insurance policies unless these minimum amounts are rejected in writing. . . .

Minimum financial responsibility limits were all that was required under the original statute. However, in 1976, the legislature amended 36 O.S. §3636 to require an offer of UM limits equal to the insured's liability limits.[275] This is the amendment which the Supreme Court seems to have overlooked in *Cofer* in 1989 and again now. This case overrules a Court of Appeals case which *did* recognize the amendment.[276]

What will happen where the policy, on its face, affords UM limits, but in less than the liability limits and there is no offer or rejection of the higher limits? If the same *rule* applies, the insurer would benefit by not following the law.

NO UM COVERAGE WHERE VEHICLE IS USED FOR A PURPOSE OTHER THAN TRANSPORTATION

Mayer v. State Farm Auto. Ins. Co.,[277] holds that the deaths and injuries in the Murrah Building

bombing will not be covered by UM coverage because the truck was not being used for a transportation purpose when the concealed explosives were detonated.

---

[274] 1989 OK 159, 784 P.2d 67.
[275] Laws 1986, c.28, §1, eff. March 16, 1976.
[276] *Perkins v. Hartford*, 1994 OK CIV APP 151, 889 P.2d 1262.
[277] 1997 OK 67, 944 P.2d 288.

This is one of the two bombing cases that came down during 1997. I took this one through the state court system, to the Supreme Court. The other one, *Nichols v. Nationwide Mutual Insurance Company*[278] (discussed elsewhere in this material) went through the federal court system. The results were the same; no UM coverage for bombing victims.

Stanley Mayer worked for the State Historical Society, in the Journal Record Building. He was badly injured in the bombing. Further, he lived in Cleveland County, which is blessed with pretty good judges. His UM coverage was only $25,000, low enough that his insurance company, State Farm, could not remove the case to federal court.

The trial court (Judge Hetherington, Cleveland County) ruled against me on cross summary judgments, based on stipulated facts. The trial court held there was a transportation use of the truck; however, the detonation of the bomb was an intervening cause which precluded coverage under the UM policy. I appealed to the Supreme Court and filed a Motion to Retain the case in the Supreme Court, instead of assigning it to the Court of Civil Appeals. The Supreme Court sustained the motion, assuring me of a definitive ruling.

The Supreme Court agreed with the trial court's result but not the reasoning. Justice Opala wrote the opinion, holding that there was not a transportation use of the truck because it was being used as a truck bomb, rather than as a means of transportation. Therefore, no UM coverage. All of the other Justices, except Summers and Watt, concurred. Vice Chief Summers concurred in Judgment, while Justice Watt concurred by reason of *stare decisis*.

The cases already decided in the Supreme Court dealing with injuries intentionally inflicted by use of a motor vehicle spell out the elements the insured is required to establish. The injury must have been caused by an accident. However, the question of what is an accident is decided from the point of view of the insured, not the assailant. Certainly, the Murrah building victims did not intend to be injured, so that was not a problem.

Next, is that the injury must have arisen out of the transportation use of a vehicle. The two cases best illustrating this requirement are *Willard v. Kelley*[279] and *Safeco Ins. Co. of Am. v. Sanders.*[280]

---

[278] 948 F.Supp. 988 (W.D.Okla. 1996).

[279] 1990 OK 129, 803 P.2d 1124. *Willard* involved a police officer chasing a fleeing criminal. The criminal, sitting in a car, shot the officer while trying to escape. The Supreme Court held that there was a transportation use of the car by the criminal. It reasoned the use of the car as an escape vehicle was a transportation use of the car. The Supreme Court held there could be coverage.

[280] 1990 OK 129, 803 P.2d 688. *Safeco v. Sanders* found no coverage, as a matter of law. Criminals kidnapped the insureds and burned them to death in the trunk of their car, by draining gasoline from the car and setting it afire. The Court reasoned the use of the car to burn the insureds to death was not a transportation use. Further, the act of setting them afire was an independent intervening cause.

UM STATUTE AMENDMENT NOT APPLICABLE TO POLICY ISSUED BEFORE AMENDMENT'S EFFECTIVE DATE

McKinley v. Prudential Property and Casualty Insurance Co.[281] holds that the 1976 amendment to 36 O.S. §3636(C) does not apply to an accident occurring after the effective date of the statute where the policy had not been written or renewed since the statute's effective date.

Plaintiff had a UM policy with effective dates from February 20, 1976 through August 20, 1976. By amendment effective March 16, 1976, 36 O.S. §3636(C) was changed to afford underinsured, as well as uninsured, motorist coverage.

On July 21, 1976, plaintiff was injured in an accident with an underinsured motorist. The trial court declined to apply the new statute and afford plaintiff underinsured motorist coverage.

The Court of Appeals affirmed, in an opinion by Judge Reynolds. The statutory amendment was substantive and does not indicate in any way that it was meant to alter existing policies.

TRIAL COURT CAN EVALUATE UIM CLAIM, DECIDE OFFER WAS REASONABLE AND GRANT UIM CARRIER SUMMARY JUDGMENT

McKinney v. Progressive Direct Insurance Company[282] holds that the trial court can evaluate a UIM claim, decide the UIM carrier's offer was reasonable and grant the UIM carrier summary judgment on the bad faith claim.

Ms. McKinney was a passenger in her young friend's parents' car which her friend was driving. The friend lost control and hit a tree, badly injuring Ms. McKinney. Progressive had liability and UM on the car and paid a $100,000 liability limit. It evaluated her claim for UIM purposes at a range from $108,482.88 to $118,482.88 and offered $8,482.88 but later increased the range to $133,888.04 and increased the offer to $33,888.04. She had incurred medical of $147,134.14, which she submitted to Progressive but did not seek in the suit because the paid amount was only $33,685.39.

McKinney sued on the policy and for bad faith arguing Progressive made "low ball" offers, as forbidden by the Oklahoma Supreme Court in *Newport v. USAA*.[283] Progressive moved for partial summary judgment as to bad faith. The Court, Chief Judge Heaton, in the Western District, sustained the Motion, without citing or referring to *Newport*!

This is an interesting result. If the jury in the suit on the policy comes back with some verdict close to Progressive's evaluation, maybe the decision will have been proven correct. But suppose the jury brings back a much larger verdict. Do we then back up and have a new ruling on the *Newport* bad faith issue? In case you can't tell, this is my case.

---

[281] 1980 OK 29, 619 P.2d 1269.
[282] 2019 WL 2092578 (W.D. Okla. May 13, 2019).
[283] 2000 OK 59, 11 P.3d 190.

SELF-INSURED CAR RENTAL COMPANY NOT REQUIRED TO OFFER UM COVERAGE

McSorley v. The Hertz Corp.[284] holds that a self-insured car rental company need not offer UM coverage to its customers.

Ms. McSorley rented a car from Hertz, which is self-insuring. She was injured, due to the negligence of an underinsured motorist.

She sued Hertz, claiming that Hertz, as a self-insurer, had a duty to offer UM coverage to its customers who rent cars from it. The trial court, Judge Leamon Freeman, in Oklahoma County, sustained Hertz's Motion for Summary Judgment. The Court of Appeals reversed. The Supreme Court granted certiorari and affirmed the trial court, in an opinion by Justice Kauger.

The UM statute[285] speaks in terms of offering UM in conjunction with a "policy" of liability insurance. The self-insured company issues no "policy" to which UM coverage would attach.

UM INSURER LIABLE FOR PRE-JUDGMENT INTEREST, BUT ONLY ON EXCESS OVER TORT-FEASOR'S LIABILITY

Mellenberger v. Sweeney[286] holds that a UM insurer is liable for pre-judgment interest, up to its policy limit, but only on the part of the judgment in excess of the adverse liability limits.

The insured got a verdict for $12,500 against a tort-feasor with a $10,000 liability limit. Pre-judgment interest brought the judgment to $4,484.70. The trial court ordered the liability carrier to pay its $10,000 and the UM carrier to pay the rest.

The Court of Appeals reversed, and ordered the UM carrier to pay pre-judgment interest only on the amount of the verdict over the $10,000 liability limit, in an opinion by Judge Bailey. The record did not contain the liability policy, nor was the liability insurer a party. The Court found, however, that 47 O.S. 1981 §7-601 (requiring liability policies to cover $10,000 in damages "exclusive of interest and costs") required the liability carrier to pay pre-judgment interest on the part of the judgment within its limits.

Neither the majority nor the dissent (Judge Hansen) found applicable *Nunn v. Stewart*.[287] That case found a UM carrier liable for pre-judgment interest, *in excess of its policy limits*, but only *that accruing after liability was established*. The dissent would hold that pre-judgment interest is an element of the insured's damages, payable under UM.

While the opinion does not articulate it clearly, this case is consistent with *Nunn*. This case deals with payment of pre-judgment interest *within* UM policy limits. *Nunn* deals with payment of pre-judgment interest *in excess* of policy limits. It would seem the dissent has the better logic. If pre-judgment interest is payable, it should be payable on the entire amount. If it is covered under the

---

[284] 1994 OK 120, 885 P.2d 1343.
[285] 36 O.S. 1991 §3636.
[286] 1990 OK CIV APP 85, 800 P.2d 747.
[287] 1988 OK 51, 756 P.2d 6.

liability, the UM carrier can recover it under subrogation. The majority's statement that pre-judgment interest is covered under liability is dictum, and perhaps shaky dictum. Historically, pre-judgment interest in excess of liability limits has not been recoverable.

UM STATUTE AMENDMENT NOT RETROACTIVE

MFA v. Hankins[288] holds that an amendment to 36 O.S. §3636(C) which expands uninsured motorist coverage is not retroactive and does not apply to an accident occurring before the statute's effective date.

The insured was injured in an accident in 1974. The uninsured motorist (UM) statute in effect at the time of the accident provided uninsured, but not underinsured, motorist coverage. After 36 O.S. 1976 §3636(C) became effective and provided underinsured motorist coverage, plaintiff sued. The trial court held the statute was retroactive but certified on interlocutory appeal to the Supreme Court.

The Supreme Court granted certiorari and reversed the trial court. The amendment was substantive, not procedural, and could not be applied retroactively.

CAR RENTER MUST REJECT UM COVERAGE; RENTAL COMPANY'S REJECTION INSUFFICIENT

Moon v. Guarantee Insurance Co.[289] holds that a car rental company's customer who rents a car must reject UM coverage under the car rental company's liability coverage or he will be entitled to UM coverage and that the rental company's rejection of UM coverage is not sufficient to bar the customer's claim.

Moon rented a car. He was not required to execute a UM rejection in conjunction with the liability coverage afforded him under the car rental contract. He was injured by an uninsured motorist. The car rental company had executed a rejection of UM coverage in conjunction with its liability policy affording coverage to the customer.

The federal court certified to the Supreme Court several questions, the thrust of which was whether the car rental company's rejection was sufficient to bar the car renter's claim and whether the car rental company was acting as the insurance company's agent with regard to the insurance transaction. The Supreme Court held that the car renter, and not the car rental company, must execute the rejection. The car rental company was the insurance company's agent under the "deeming" statute, 36 O.S. 1981 §1422(3), to the effect that any person who solicits an insurance policy shall be deemed the company's agent.

[288] 1980 OK 66, 610 P.2d 785.
[289] 1988 OK 85, 764 P.2d 1331.

UM EXCLUSION FOR OCCUPYING A VEHICLE WHICH THE INSURED OWNS BUT ON WHICH HE HAS NO COVERAGE DOES NOT APPLY WHEN THE INSURED IS COVERED FOR UM BY A POLICY ON ANOTHER VEHICLE

Morris v. America First Ins. Co.[290] holds that a policy provision excluding UM coverage where the insured is occupying a vehicle which he owns but which is not covered by UM coverage does not apply if the insured is covered by UM on policy on another vehicle which he owns.

Morris was a long-haul trucker who owned his own rig. The truck was insured for liability but not for UM. He also owned two personal vehicles which had 25/50 UM limits. He was also a resident of his Mother's home. She had UM coverage with America First for $100,000, under which he was an insured. Morris was badly injured in a truck wreck in Washington state, due to the negligence of a motorist who had smaller liability limits than his damages.

America First denied the claim because of the exclusion. The suit ended up before Judge Robin

Cauthron. She noted that *Cothren v. Emcasco*[291] would invalidate the exclusion while the Court of Civil Appeals opinion in *Conner v. American Commerce Insurance*[292] would uphold it. She certified to the Oklahoma Supreme Court which opinion was controlling.

The Supreme Court answered "Uh, neither exactly." The Court, in an opinion by Justice Winchester, held that excluding coverage because the vehicle occupied did not have UM coverage would be to attach the UM coverage to the vehicle, not the insured. This would violate a long line of Oklahoma Cases, including Cothren and *State Farm Mut. Auto. Ins. Co. v. Wendt*.[293]

For this reason, the provision is invalid as applied to a case where the insured is covered by UM on other vehicles, such as Morris' other vehicles.

America First moved for rehearing. It argued the exclusion was proper. Morris argued (as he had originally) that the Court should reverse the holding in Conner upholding the basic exception. The Court denied rehearing, without further opinion.

The result of all this is that if the insured is occupying a vehicle he owns but which has no coverage and he does not have other coverage, he will be completely without UM coverage. On the other hand, if he has other UM coverage, he will get yet more UM coverage on the policy containing the exclusion. This makes little sense.

UM OFFER NOT REQUIRED ON EXCESS OR UMBRELLA POLICY

Moser v. Liberty Mut. Ins. Co.[294] holds no offer of uninsured motorist coverage is required by an

---

[290] 2010 OK 35, 240 P.3d 661.
[291] 1976 OK 137, 555 P.2d 1037.
[292] 2009 OK CIV APP 61, 216 P.3d 850.
[293] 1985 OK 75, 708 P.2d 581.
[294] 1986 OK 78, 731 P.2d 406.

umbrella liability policy.

The U.S. District Court for the Western District of Oklahoma certified to the Supreme Court two questions: (1) whether an umbrella liability policy requires the mandatory offer of uninsured motorist coverage under 36 O.S. 1981 §3636 and (2), if so, whether the umbrella policy must provide coverage beneath its excess limit where coverage has been rejected on the underlying policy. The Supreme Court answered the first question "no," obviating the necessity to answer the second question.

The decedent was occupying a company car when an underinsured motorist came across the center median and killed him.

The company vehicle was insured under a primary liability policy in the amount of $1,000,000 and an excess or umbrella policy providing liability from $1,000,000 up to $25,000,000. The umbrella policy covered both automobile and general liability. The primary policy included a UM rejection.

Plaintiff claimed the language of §3636(A):

> No policy insuring against loss resulting from liability imposed by law for bodily injury or death...arising out of the ownership, maintenance or use of a motor vehicle shall be issued [without UM coverage]

required an offer of UM equal to the $25,000,000 liability limit. Plaintiff's position was supported by an unpublished Tenth Circuit opinion in *Crawford v. General Assurance Services Ltd*.[295] which held an offer was required, absent such an offer coverage was written, and that the coverage applied to plaintiff's damages below the excess policy's threshold where coverage had been rejected on the primary policy.

The Oklahoma Supreme Court declined to follow the Tenth Circuit. In an 8 to 1 decision by Justice Lavender, with Justice Wilson dissenting, the Court held the "no policy" language incorporated the definition of a motor vehicle liability policy, as defined in 47 O.S. 1981 §7-204. An excess or umbrella policy, the Court holds, is not such a policy and does not require equal UM limits be offered.

Justice Wilson's dissent is simplicity itself: The statutory language "no policy" means no policy. That seems logical.

AGENT HAS NO DUTY TO INFORM INSURED OF HIGHER UM LIMITS

Mueggenborg v.Ellis[296] holds that an agent has no duty to inform an insured of the availability of higher UM limits.

The Mueggenborgs (Plaintiffs) did insurance business for several years with Ellis and Payne County Farm Bureau (Farm Bureau). Plaintiffs explained to Ellis that they wanted to be

[295] 10th Cir., March 17, 1986.
[296] 2002 OK CIV APP 88, 55 P.3d 452.

adequately insured to protect their children and other children that would be riding with them. Ellis explained that Plaintiffs could carry $25,000 UM on one car and that coverage would roll from that car to the other six cars the Plaintiffs had insured with Farm Bureau, and sold them that policy.

The Plaintiffs' 16-year-old son was injured in a car wreck. The other driver had liability limits of $25,000, which Plaintiffs contend was insufficient to cover the son's injuries. The Plaintiffs sued Ellis, Farm Bureau, and Oklahoma Farm Bureau Mutual Insurance Company, alleging a negligent breach of professional duty. The Plaintiffs contend Ellis should have advised them they could buy higher UM limits.

The trial court (Honorable Donald Worthington, Payne County) granted the defendants' motion to dismiss for failure to state a claim. Plaintiffs appealed.

The Court of Civil Appeals affirmed, holding that an insurance agent has no duty to advise an insured regarding coverage. The court explained that all insureds ask for "adequate coverage" and allege they have a special relationship with their agent. To hold that an agent or insurance company has a duty to properly advise an insured regarding coverage takes away from the insured the responsibility to take care of his own financial needs.

INSURANCE CARRIER OWES NO DUTY TO EXERCISE ORDINARY CARE; POTENTIAL FACT ISSUE PRECLUDES SUMMARY JUDGMENT ON UM POLICY CLAIM

Murchison v. Progressive Northern Ins. Co., holds that there is no duty on the part of an insurance company to exercise ordinary care in the handling of a claim so that no negligence claim can exist for failure to pay a claim but that the potential for a fact question precludes summary judgment for the insurance company on the contract claim.

Plaintiff had a motor vehicle collision while insured by Progressive for uninsured motorist (UM) coverage. Apparently by error, Progressive told her she had no UM coverage. Six months later, Progressive paid its policy limit.

Plaintiff sued Progressive for negligence, breach of contract and bad faith. Progressive removed the case to federal court and moved to dismiss on the claims for negligence and breach of contract, leaving the bad faith claim for a motion for summary judgment to be filed later. The Eastern District federal court, Judge Ronald White, granted the motion to dismiss as to the negligence claim and denied the motion as to the contract claim. He also refused to grant leave to amend or do further discovery.

AS BETWEEN THE INSURED AND THE INSURER, UM INSURANCE IS PRIMARY; A UM INSURER'S RESPONSIBILITY TO ITS INSURED CANNOT BE CONDITIONED ON THE AMOUNT OF OTHER COVERAGE

Mustain v. United States Fidelity and Guaranty Company, et al.,[297] holds that, as between the insured and its uninsured motorist (UM) insurer, UM insurance is primary, and that a UM

[297] 1996 OK 98, 925 P.2d 533.

insurer's responsibility to its insured cannot be conditioned on the amount of other coverage.

Mr. Mustain was injured while occupying a crane truck and working on a sign. Mr. and Mrs. Mustain sued the crane truck's insurer, USF&G, and their own UM carrier, American Employer's Insurance Company (American), in federal district court. While suit was pending, the Mustains settled their UM claim with USF&G for less than the policy limits and sought to recover UM benefits under their own policy with American. The trial court granted American's motion for summary judgment, concluding that the excess coverage clause required exhaustion of the crane truck's UM benefits.[298] The Mustains appealed. The Tenth Circuit Court of Appeals certified the following question to the Oklahoma Supreme Court:

> Are the decisions in *Hibbs v. Farmers Insurance Co*., 725 P.2d 1232 (Okla. 1985) and *Smith v. Government Employers Insurance Co.*, 558 P.2d 1160 (Okla. 1976) that when an insurance policy contains an excess insurance clause, primary coverage must be exhausted before the secondary insurer is liable, still good law in light of *Buzzard v. Farmers Insurance Co.*, 824 P.2d 1105 (Okla. 1991)?

The Oklahoma Supreme Court recast the question as follows:

> (1) Based on this Court's rulings in *Buzzard v. Farmers Insurance Co.*, 824 P.2d 1105 (Okla. 1991) and *State Farm Mutual Insurance Co. v. Wendt*, 708 P.2d 581 (Okla. 1985) and pursuant to 36 O.S. 1991, §3636, should uninsured motorist insurance be treated as primary coverage?
>
> (2) If uninsured motorist insurance must be declared primary coverage in Oklahoma, should the ruling be prospective?

That "recasting" of the certified question seemed certain to indicate the Supreme Court would revisit and clarify the *dictum* in *Buzzard* that the UM carrier is liable only for the amount of the insured's damage which exceeds the tort-feasor's liability coverage. Of course, that is contrary to the UM statute. Unfortunately, this opinion does not directly rescind the *dictum*.

In an opinion by Justice Alma Wilson, the Oklahoma Supreme Court answers the first question "yes". Title 36 O.S. 1991 §3636 provides that UM insurance is first-party coverage that follows the person. The statute imposes a responsibility upon the UM carrier to deal fairly and in good faith with its insured which prohibits the insurer from withholding payment from its insured on the sole basis that some other insurance has not been exhausted. Section 3636 is silent regarding priority of payments among multiple UM carriers, but does create subrogation rights. These subrogation rights are to be sorted out among the multiple insurers in ancillary, post-judgment proceedings.

The Court answered the second question "no". The 1979 amendments to 36 O.S. §3636(C), not this case, establish the UM carrier's responsibility toward its insured.

---

[298] *Hibbs v. Farmers Insurance Co.,*1985 OK 77, 725 P.2d 1232 held that failure to exhaust primary UM coverage precludes recovering excess UM coverage.

Justice Summers,[299] joined by Justices Lavender and Simms dissented, stating he disagrees with the majority's reasoning that all UM coverage must be primary, but agrees that a UM insurer should not be permitted to escape liability through the use of an "other insurance" clause.

Mustain leaves us with the dilemma we have had ever since *Buzzard*: Can we sue only the UM carrier and forgo suing the tort-feasor without losing the part of the claim within the tort-feasor's liability limit? The "yes" answer to the question whether UM coverage is primary would seem to indicate that we can. However, the Court's failure to specifically disavow the *Buzzard dictum* leaves the issue in doubt.

There is further confusion based on a Court of Appeals opinion, *Assalone v. Hartford Acc. & Indemn. Co.*[300] That case holds that the insured may sue the UM carrier directly and need not sue the tort-feasor. It does not, however, deal with whether the insured can recover all of his damages. *Assalone* cites and relies on *Roberts v. Mid-Continent Casualty Co.*[301] which says you recover all damages from the first dollar. The *Assalone* court at least does not think the *Buzzard dictum* overrules *Roberts*. If it does not, then the answer to the real question is that the UM carrier does owe the whole claim (once there is a UM claim) and must subrogate against the tort-feasor and the liability coverage. This question will require more development.

ASSAULT IN PARKING LOT BEFORE ASSAILANT STEALS CAR IS NOT INJURY ARISING OUT OF TRANSPORTATION USE OF CAR

Narvaez v. State Farm Mutual Automobile Ins. Co.[302] holds that beating a person to gain access to the victim's car does not constitute an injury arising out of the transportation use of the vehicle for UM purposes. There is no causal connection between the use of the vehicle and the injury if the vehicle was not being used for a transportation purpose at the time of the injury.

Narvaez was using a pay phone in or near a hotel parking lot when an assailant beat him and then stole his car. State Farm denied Narvaez' UM claim and filed a declaratory judgment action in federal court in 1996[303] seeking a declaration there was no UM coverage. State Farm argued that Narvaez' injuries did not arise out of the ownership, maintenance, or use of an uninsured motor vehicle as the policy and the UM statute requires. The Western District of Oklahoma granted State Farm summary judgment, concluding Narvaez was not entitled to UM benefits. The Tenth Circuit Court of Appeals reversed, concluding the amount in controversy was insufficient to trigger federal court jurisdiction.

Narvaez then filed suit in Oklahoma County District Court, asserting only a UM claim. The trial court (Judge Blevins) granted State Farm summary judgment. The Court of Civil Appeals affirmed.

UM coverage is triggered when the uninsured vehicle is in use as a motor vehicle at the time of

[299] Who wrote the troublesome *Buzzard dictum*.
[300] 1994 OK CIV APP 64, 908 P.2d 812.
[301] 1989 OK CIV APP 92, 790 P.2d 1121.
[302] 1999 OK CIV APP 92, 989 P.2d 1051.
[303] *State Farm Mut. Auto. Ins. Co. v. Narvaez*, 975 F.Supp. 1435 (W.D.Okla. 1997).

injury. There was no evidence the assailant operated Narvaez' car at the time Narvaez was injured. Narvaez was injured before the assailant used Narvaez' car.

UM INSURANCE COMPANY MAY EXCLUDE FROM COVERAGE AN OCCUPANT WHO OWNS A CAR

National American Ins. Co. v.Vallion[304] holds that an insurance company may exclude from its uninsured motorist coverage an occupant of an insured vehicle who owns his or her own car subject to the compulsory motor vehicle liability law.

Vallion was an employee of a school district. He was injured while occupying a school district-owned vehicle insured by National American. He made an uninsured motorist (UM) claim, which National American denied, claiming he was not covered under the UM coverage.

The policy had provisions in it purporting to exclude coverage when the person insured as an occupant of the vehicle owned his or her own vehicle either covered by UM coverage or subject to being covered because of the compulsory insurance law.

The trial court, Judge Dan Owens in Oklahoma County, sustained National American's summary judgment. The Court of Civil Appeals affirmed, in an opinion by Judge Bell, in which Judges Buetnner and Hansen concurred.

CITY-OWNED VEHICLE IS NOT AN UNINSURED MOTOR VEHICLE WITHIN MEANING OF § 3636 WHERE CITY IS SELF-INSURED

Newberry v. Allstate Ins. Co.[305] holds that the injured party's UM coverage is not triggered where the damages are less than the tort-feasor's statutory liability limit; and that a government entity is not uninsured for purposes of UM merely because it is self-insured.

Newberry was involved in a car wreck with a city-owned vehicle and incurred $15,000 in damages. The city waived its sovereign immunity up to the $100,000 bodily injury limit imposed by the Governmental Tort Claims Act (GTCA).[306] His representative recovered property damage from the city and then sued Newberry's UM carrier, Allstate, for UM benefits, arguing that because the city was self-insured and had no insurance policy, its vehicle was an uninsured motor vehicle. The parties filed cross-motions for summary judgment. The trial court granted Allstate summary judgment, ruling that the city's vehicle was not an uninsured motor vehicle.

The Court of Civil Appeals[307] affirmed the trial court, holding that the city's vehicle was not uninsured because Newberry's damages did not exceed the city's $100,000 tort liability. The court went further and held that a sovereign's vehicles are not uninsured merely because the sovereign is self-insured. The GTCA authorized self-insurance and provides a method of paying

[304] 2008 OK CIV APP 41, 183 P.3d 175.
[305] 1998 OK CIV APP 139, 963 P.2d 632.
[306] 51 O.S.Supp.1994 § 154(A)(2).
[307] Division 1; Vice-Chief Judge Carl B. Jones.

judgment imposed against a sovereign.[308]

LOW-BALL OFFERS AND FAILURE TO PAY FUNERAL AND MEDICAL BILLS CONSTITUTED BAD FAITH WARRANTING PUNITIVE DAMAGES

Newport v. USAA[4309] holds the insurance company cannot in good faith offer its own insured less than the insurance company's evaluation of the claim.

Newport v. USAA affirms but sharply reduces, on a procedural ground, a UM bad faith award. Decided the same day as *Barnes*, discussed above, Newport affirms a bad faith verdict which the Court of Civil Appeals had reversed, but reduces the judgment from $16.5 million to $4.5 million.

Mr. Newport, insured by $1.5 million in stacked UM coverage by USAA, was badly hurt in an accident on an icy road. He lived 39 days with partial to complete paralysis from a neck injury and then died. USAA evaluated the case at between $750,000 and $900,000. However, it "low-balled" the insured, offering structured settlements worth $500,000, then $600,000 $700,000 and finally, a "once and for all" offer of $750,000. The jury ultimately found the damages caused by the uninsured motorist to be $6 million.

The jury first came back with a verdict for that amount on the negligence claim and $1.5 million actual and $7.5 million punitive damages on the bad faith claim. Because the amount recoverable on the UM policy could not exceed the $1.5 million limit and the punitive damages could not exceed the actual damages on the bad faith claim, the trial court (Judge Thomas Landrith, in Pontotoc County) rejected the verdict and sent the jury out to deliberate further. The jury evidently figured out the problem and came back with a new verdict for $1.5 million on the policy and $7.5 million each for actual and punitive damages on the bad faith claim.

The Court of Civil Appeals affirmed the policy damages but reversed the bad faith claim, holding there was no bad faith as a matter of law, because the insurance company made offers and negotiated. The Supreme Court reversed that holding, with the concurrence of all the Justices except Winchester, who would have agreed with the Court of Civil Appeals.

On the merits of the bad faith case, the Supreme Court held the "low-balling" (offering less than the insurance company's own evaluation) presented a case of first impression, as to which there is little authority nationally. The Court held the insurance company cannot in good faith offer its own insured less than the insurance company's evaluation. USAA had also first promised to pay medical bills as they were incurred but then failed to do so, for no apparent reason other than to put pressure on the widow to settle. This created a jury question whether USAA was acting in good faith.

The procedural point as to the handling of the verdict also presented a first impression issue. The Supreme Court held that, because the error in the original verdict could be corrected as a matter of law, the trial court should have done so instead of rejecting the verdict and sending the jury out to deliberate further. The Supreme Court ordered the trial court on remand to reduce the $6

[308] 51 O.S. 1991 §§ 159(C) and 167(B).
[309] 2000 OK 59, 11 P.3d 190.

million policy award to the $1.5 million policy limit and reduce the $7.5 million punitive damage award on the bad faith claim to the $1.5 million actual damage award on the bad faith claim.

The trial court had also awarded a $428,000+ attorney fee, pursuant to *Brashier v. Farmers*. Because, as discussed above, *Barnes v. Oklahoma Farm Bureau* reversed *Brashier*, the *Newport* court also reversed this attorney fee award with instructions like those in *Barnes*. Justice Opala dissented from this part of the decision, as he had in *Barnes*.

NO UM COVERAGE WHERE VEHICLE IS USED FOR A PURPOSE OTHER THAN TRANSPORTATION

Nichols v. Nationwide Mutual Insurance Company[310] is the second Murrah Federal Building bombing case to come down in 1997. It went through the federal court system. *Nichols* holds that no UM coverage is triggered where the use of the truck was not related to transportation; detonation of the concealed explosives in the truck was an intervening cause; the unidentified motorist who drove the truck was not operating the truck when the explosives detonated; and Nationwide's refusal to pay the UM claim was not bad faith.

Richard and Bertha Nichols and Chad Kilgore were in or near the Nichols' car parked one and one-half blocks from the Murrah Building when the truck bomb was detonated in front of the Murrah Building. The axle of the Ryder truck housing the bomb hit the hood of the Nichols' car. The Nichols sought UM benefits under their car policy with Nationwide Mut. Ins. Co.; Nationwide denied the claim. The Nichols sued and both parties filed cross motions for summary judgment. Judge Robin Cauthron determined that the Nichols' facts were most closely analogous to *Safeco Ins. Co. of Am. v. Sanders*[311] and held that the detonation of the bomb that caused the injury was not a transportation use; therefore, no UM coverage applied.

LIABILITY INSURER OWES NO DUTY TO UM INSURER SO NO PRIVILEGE ATTACHES FOR COMMUNICATING FALSE INFORMATION IN CLAIM FILE

Niemeyer v. United States Fidelity and Guaranty Company[312] holds that a liability insurer owes no duty to an uninsured motorist (UM) insurer, so that the liability insurer had no claim to privilege in the UM insured's suit for tortious interference with contract, based on furnishing the UM insurer false information in a claim file.

Niemeyer's daughter was killed by an underinsured tort-feasor. The liability insurer paid its limit but furnished Niemeyer's UM insurer a claim file containing false, defamatory information. The UM insurer refused to pay its limit. Upon the false information being corrected, the UM carrier paid its limit. Niemeyer sued the liability insurer for tortious interference with contract. The trial court granted a motion to dismiss, holding the liability coverage was primary to the UM coverage, which was excess, so that the liability carrier owed a duty to the UM carrier to furnish it claim information. Therefore, the trial court held, the information was privileged and Niemeyer had not pleaded that the claim information was not privileged.

---

[310] 948 F.Supp. 988 (W.D.Okla. 1996).
[311] 1990 OK 129, 803 P.2d 688.
[312] 1990 OK 32, 789 P.2d 1318.

The Court of Appeals affirmed. The Supreme Court reversed, in an opinion by Justice Kauger. Niemeyer did not have to plead that the information was not privileged, under the Pleading Code. Generally pleading tortious interference was sufficient.

The liability insurer owed no duty to the UM insurer. Rather, the UM insurer stood in relation to the liability insurer in the same relationship as the UM's insurer's insured. Since, under *Allstate Ins. Co. v. Amick*[313] the UM insured could not have sued the liability insured for bad faith, neither could the UM insurer. Therefore, the liability insurer owed no duty to the UM insurer and the liability insurer's communication to the UM insurer was not privileged.

Justices Hodges and Simms dissented. Justice Simms would hold that the UM insured (Niemeyer) suffered no damage from the interference, since the claim was ultimately paid.

PREMIUM PAYMENT QUESTION BARS SUMMARY JUDGMENT WHETHER POLICY LAPSED; COURT QUESTIONS PORTER V. STATE FARM AS AUTHORITY; SUMMARY JUDGMENT INAPPROPRIATE AS TO PUNITIVE DAMAGES IN BAD FAITH CASE

Nsien v. Country Mutual Insurance Company[314] holds questions about premium payments barred summary judgment on issue whether a policy lapsed, the Court declines to follow the Oklahoma Court of Civil Appeals' decision in *Porter v. State Farm* that settling for less than liability limits bars a UM recovery and that summary judgment was inappropriate as to whether Plaintiffs could recover for bad faith and seek punitive damages for bad faith.

Probably because the Plaintiffs were *pro se*, this opinion is a little choppy. Mr. and Mrs. Nsien bought from Country Mutual a car policy with per person limits of $100,000 for UM and $10,000 med-pay. Country Mutual sent a premium notice that they owed $1,970 in premium, which had to be paid by February 14, 2016 on the car policy and an umbrella policy, and that, if they failed to pay by that date, the policy would terminate on that date. On February 23, 2016, Country Mutual sent a cancellation notice saying the policy would terminate March 6, if they didn't pay the $1,970.

The insured's complained that several payments they had made were not reflected in the $1,970 amount claimed due and paid $448.17. Country Mutual thanked them for the payment but said it was unable to reinstate the coverage and sent them a premium notice for $574.97. On March 21, the insureds were injured in a wreck with a motorist with minimum (25/50) coverage. On May 3, 2016, Country Mutual send the insureds a letter saying their policy had been issued effective 11/19/15 and terminated effective 05/03/2016. Country Mutual later claimed that letter was written for the benefit of the insurance company which was going to write their new policy.

The insureds settled with the tortfeasor in their wreck for $30,000, allocated $20,000 to Mr. Nsien and $10,000 to Mrs. Nsien and sued on the UM and for bad faith including punitive damages. This opinion rules on Country Mutual's summary judgment motion on all issues. The Court, Judge Dowdell, in the Northern District, overruled the summary judgment motion in its

[313] 1984 OK 15, 680 P.2d 362.
[314] 2019 WL 573424 (N.D. Okla. Feb. 1, 2019).

entirety.

He held that there was sufficient uncertainty about whether the policy had lapsed that summary judgment on that issue was inappropriate. A list submitted by Country Mutual seemed to confirm some of the payments not shown on accounting documents had, in fact, been paid.

Most interestingly, Judge Dowdell refused to grant summary judgment on the basis that the acceptance of less than the liability limit on the tortfeasor's policy barred a UM recovery, as the Oklahoma Court of Civil Appeals held in *Porter v. State Farm*.[315] He notes that, by statute, a Court of Civil Appeals case not approved by the Supreme Court is not precedential. He notes that the Oklahoma Supreme Court considered whether accepting less than liability limits precludes recovering UM but declined to rule that way.[316] He also cited *Phillips v. New Hampshire Ins. Co.*,[317] in which the 10th Circuit held the UM carrier is estopped to claim destruction of its subrogation where the insured did not know there was a need to protect UM subrogation because the policy was the insured's employer's and the insured did not know about it.

Finally, Judge Dowdell found enough unanswered questions to deny summary judgment on the bad faith claim and the punitive damage claim. This may be an interesting case to watch.

INSURED ENTITLED TO INTEREST IN EXCESS OF UM LIMIT, BUT ONLY FROM DATE LIABILITY ESTABLISHED

Nunn v. Stewart and Farmers Insurance Co.[318] holds that a UM insured gets interest above UM policy limits, but only from the date that the uninsured motorist's liability is established.

Mrs. Nunn was injured by an underinsured motorist. After a lengthy dispute over the amount of her UM coverage, Farmers stipulated to the tort-feasor's liability and Mrs. Nunn's damages. The trial court ruled adversely to Mrs. Nunn on the question of the amount of her coverage and denied her interest during the lengthy period taken to resolve the coverage issue. The Court of Appeals reversed as to the amount of the coverage but refused to award Mrs. Nunn interest in excess of the policy limit. The Supreme Court reversed the Court of Appeals on the interest issue, but limited interest to that accruing after the stipulation established the uninsured motorist's liability.

The Supreme Court rejected the contention that interest should be paid from a reasonable time after the accident, when the claim should have been paid. The obligation to pay interest on the policy did not accrue until the liability was established.

NAMED DRIVER EXCLUSION APPLIES TO UM COVERAGE

O'Brien v. Dorrough and Equity Fire and Cas. Co.[319] holds that a named driver exclusion is

---

[315] 2010 OK CIV APP 8, 231 P.3d 691,694.
[316] Citing *Sexton v. Continental Cas. Co.*, 1991 OK 84, 816 P.2d 1135.
[317] 263 F.2d 1215, 1223 (10th Cir. 2001).
[318] 1988 OK 51, 756 P.2d 6.
[319] 1996 OK CIV APP 25, 928 P.2d 322.

enforceable as to uninsured motorist (UM) coverage.

O'Brien and Dorrough were involved in a wreck when the cars they were driving collided. The trial court found that Dorrough was negligent, that he was an uninsured motorist, and awarded O'Brien judgment of $50,000. O'Brien then joined Equity in the lawsuit seeking UM coverage under her father's policy. O'Brien was driving her father's car at the time of the wreck. O'Brien's father, Lively, had liability and uninsured motorist coverage with Equity Fire and Cas. Co. (Equity). The policy had a named driver exclusion excluding O'Brien from coverage and no premium was paid for liability insurance coverage. The parties disagree as to whether the premium Lively paid would extend UM coverage to O'Brien. The parties filed joint stipulations of fact and cross-motions for summary judgment. O'Brien argued that excluding UM coverage under the named driver exclusion would violate public policy, and that the exclusion is an impermissible method of rejecting UM coverage. The trial court granted judgment to Equity. O'Brien appealed.

The Oklahoma Supreme Court has previously held that a named driver exclusion as to compulsory liability insurance does not violate public policy,[320] but has not yet addressed whether it violates public policy as to UM coverage. The court held that the named driver exclusion is enforceable as to UM coverage because the policy provision excluded all insurance coverage afforded by the policy for any loss while O'Brien was "operating or in the care, custody or control of the vehicle."[321]

NEXT-OF-KIN MUST PURSUE UM DEATH CLAIM

Ouellette v. State Farm Mut. Auto. Ins. Co.[322] holds that a claim for an insured's wrongful death damages under a UM policy must be pursued by the decedent's next-of-kin or personal representative and not by the insured.

The insureds' adult son was killed. His widow concluded a wrongful death action against the tort-feasor and the son's UM carrier. In a post-judgment proceeding to distribute the proceeds of that recovery, the parents were excluded from that recovery. The order found a "lack of legal interest."

The parents sued on their own UM policy for grief and loss of companionship. The trial court denied recovery. The Court of Appeals reversed. The Supreme Court reversed the Appeals Court and affirmed the trial court, in an opinion by Justice Opala.

The Supreme Court holds that parents have no standing to sue their own UM carrier, since the wrongful death statute (12 O.S. 1991 §1054) requires such suit be brought by the personal representative or next-of-kin. The parents are not next-of-kin since the son left a surviving wife and children. Further, the parents' exclusion from the distribution of the earlier recovery, based on "lack of legal interest," bars recovery in this action.

The opinion contains language which indicates Opala thinks 12 O.S. §1053 requires that parents

[320] *Pierce v. Oklahoma Property and Cas. Ins. Co.*, 1995 OK 78, 901 P.2d 819.
[321] 67 OBJ at 3576.
[322] 1994 OK 79, 918 P.2d 1363.

be next-of-kin before they will be held to have suffered a recoverable loss. If this is what he meant to say, he is clearly wrong. The statute doesn't say that.

UM POLICY DID NOT PROVIDE GREATER GRANT OF COVERAGE THAN UM STATUTE–NO CAUSAL CONNECTION BETWEEN INJURY AND TRANSPORTATION MODE OF BUCKET TRUCK

Pearson v. St. Paul Fire and Marine Ins. Co.[323] holds, without elaboration that the St. Paul UM policy did not provide greater coverage than required by UM statute and that there was no causal relationship between plaintiff's injury and the transportation mode of a bucket truck.

Judge Heaton addressed this issue on the parties' supplemental briefs after granting partial summary adjudication to St. Paul on the question of whether *the UM statute*, 36 O.S. § 3636 mandated coverage of Pearson's injuries (it did not). Pearson claimed the particular policy provided UM coverage greater than that mandated by the statute and that his injury was related to the transportation mode of a bucket truck and covered.

Judge Heaton simply said the policy language "result from" or "aris[e] out of" the ownership, maintenance or use of the uninsured vehicle "parallels" the UM statute[324] such that the policy grant is the same as that mandated by statute. There was no causal relationship between the injury and the transportation mode and no coverage.

"OTHER INSURANCE CLAUSE" IN A UM POLICY DOES NOT ESTABLISH PRIORITY OF PAYMENT AMONG MULTIPLE UM CARRIERS

Pentz v. Davis, et al.,[325] holds that the "other insurance clause" in a UM policy does not establish the priority of payment among multiple UM carriers as to an insured's claim.

Pentz was traveling on ministry business along with his pastor, Frye, and another man, Green. Green was driving his mother's car; Pentz and Frye were passengers. Green was stopped in a construction zone when the car was rear-ended by Davis, injuring Pentz. Davis had liability coverage with Farm Bureau in the amount of $10,000/$20,000. The car in which Pentz was a passenger was insured with American Western Home Ins. Co. (American) with liability and UM limits of $10,000/$20,000. Pentz had two car liability policies with UM coverage. One policy was with Allstate and the other with Farm Bureau. The church for whom Pentz was working at the time of the wreck had a liability policy issued by Church Mutual Ins. Co. (Church Mutual). The church policy did not have UM coverage. Church Mutual asserted that it was not required to offer UM coverage and that Pentz was not an insured under its policy.

Pentz sued Allstate, Farm Bureau, and Church Mutual for UM benefits; Davis was voluntarily dismissed. The trial court sustained the three insurance companies' demurrers to Pentz's case-in-chief. The trial court determined, among other things, that Pentz failed to prove he had exhausted the UM coverage on the car in which he was riding, and that he was an insured under Church

[323] 393 F.Supp.2d 1238 (W.D. Okla. 2005).
[324] UM coverage is triggered by injury "arising out of" the transportation mode; the statute does not also say "resulting from" as did the St. Paul policy.
[325] 1996 OK 89, 927 P.2d 538.

Mutual's policy. The Court of Appeals reversed.

The Supreme Court, in an opinion by Justice Alma Wilson, vacated the Court of Appeals opinion; affirmed the trial court as to Church Mutual because Pentz failed to prove lack of an offer of UM coverage or that he was an insured under Church Mutual's policy; reversed the trial court as to Allstate and Farm Bureau because Pentz provided the evidence necessary to withstand the demurrers; and remanded the case back to the trial court.

On appeal, Allstate and Farm Bureau allege that, under the "other insurance" clauses in their policies, they can withhold UM benefits under Pentz recovers the UM coverage on the car in which he was riding. The court states that insurance is excess when the policy provides that the insurance company must pay the amount of the loss that exceeds the exhausted primary insurance coverage. Such provisions in a car liability policy are unenforceable if they would allow the insurance company to escape liability.[326] The court stated that Allstate and Farm Bureau erroneously assert *Keel v. MFA Ins. Co.*[327] holds that the UM coverage on the car is primary and must be exhausted before the other UM carriers can be held liable. *Keel* holds that an insurance company cannot avoid UM liability by inserting a provision in its policy that conditions UM coverage on exhaustion of other available insurance. "Other insurance clauses" apply to priority of payment among multiple UM coverages issued by the same insurance company to the named insured.[328] In the present case, we have multiple insurance companies with policies covering an insured.

The court stated that 36 O.S. 1991 §3636 protects the injured person's right to swift recovery from an insurance company. Likewise, the statute provides for subrogation which protects insurance companies from bearing the full burden of the loss when multiple insurance companies are involved. The trial court prematurely apportioned the burden of loss among the UM carriers. Pentz's damages were not yet determined so as to establish which policies would apply. On remand, the trial court can determine Allstate's and Farm Bureau's subrogation and apportionment interests once Pentz's is paid. Allstate and Farm Bureau should also be permitted to add Davis and his UM carrier as necessary parties.

UM CARRIER CANNOT DENY COVERAGE AND THEN ASSERT PORTER DEFENSE WHEN INSURED SETTLES WITH TORT-FEASOR

Phillips v. New Hampshire Ins. Co.[329] holds that a UM carrier cannot deny coverage and then after the insured settles with the tort-feasor, assert that coverage is precluded because the insured settled with the tort-feasor without giving the UM carrier notice, and absent the UM carrier's showing of actual prejudice.

Phillips was injured in a car wreck while on her job. She filed a workers comp claim and sued

---

[326] 67 OBJ 2316, citing *Equity Mutual Ins. Co. v. Spring Valley Wholesale, Nursery*, 1987 OK 121, 747 P.2d 947; and *Brown v. State Farm Mut. Auto. Ins. Co.*, 163 Ariz. 323, 788 P.2d 56, 59 (1989).
[327] 1976 OK 86, 553 P.2d 153.
[328] *Keel*, 553 P.2d at 156.
[329] 263 F.3d 1215 (10th Cir. 2001).

the tort-feasor. Her damages exceeded the tort-feasor's liability limit. As part of the workers comp action, Phillips requested information about her employer's UM policy. Her employer had a commercial auto liability and UM policy with New Hampshire Ins. Co. (NHIC), but refused to answer discovery requests revealing this information and did not produce a copy of the policy until after the workers comp case was concluded.

Before the workers comp case was concluded, Phillips settled with the tort-feasor. She did not notify NHIC because she did not know her employer had a policy with NHIC and that it may provide UM coverage. Upon Phillips' further inquiry, NHIC refused Phillips' UM claim because, it asserted, UM coverage existed only for cars listed in the employer's policy, and Phillips' car was not listed. Phillips then sued NHIC in state court; NHIC removed the action to federal court (Western District of Oklahoma, the Honorable Judge Vicki Miles-LaGrange).

The trial court granted NHIC summary judgment, relying on *Porter v. MFA Mutual Ins. Co.*[330] and 36 O.S. § 3636(E). The trial court also held NHIC did not commit bad faith because, under the policy, Phillip's failure to notify NHIC of the tort-feasor's settlement offer was a reasonable basis for denying her UM claim.

On appeal, the Tenth Circuit reversed the trial court, holding that it erred in holding that *Porter* applied absolutely in cases where the alleged insured was not aware of the existence of a policy or its terms at the time the insured settled with the tort-feasor.

The Tenth Circuit pointed out that the pivotal issues in *Porter* are whether the insured waived her right to the UM benefits, and whether the insurance company was prejudiced by the insured's settlement with the tort-feasor. With regard to waiver, the primary consideration is whether the insured knew what she was doing when she signed the release — whether she voluntarily and intentionally relinquished a known right. Here, Phillips did not know that a UM policy existed at the time she settled with the tort-feasor, let alone that she had a right to the coverage. Therefore, releasing the tort-feasor was not a voluntary and intentional relinquishment of her right to UM coverage. *Porter* does not apply here to bar Phillips' UM claim.

The Tenth Circuit went further and held that when the insurance company denies a UM claim on the basis that a contractual relationship does not exist, it is estopped from later arguing that the alleged insured is not entitled to coverage because she destroyed the insurance company's subrogation right against the tort-feasor. This is because the insurance company cannot argue that a contractual relationship does not exist for the purpose of providing coverage but does exist for the purpose of providing a defense to coverage.

Prejudice is the second issue involved in *Porter* and is important for a number of reasons. There is the potential for the tort-feasor to use up assets available to satisfy the UM carrier's subrogation claim, and, because of the passage of time, memories fade and witnesses disappear or become unavailable. The Tenth Circuit predicted that the Oklahoma Supreme Court would hold that *Porter* would not bar Phillips' UM claim absent NHIC's showing of actual prejudice because of its lack of notice of Phillips' settlement with the tort-feasor.

[330] 1982 OK 23, 643 P.2d 302.

The Tenth Circuit's ruling is supported by Oklahoma case law: *Torres v. Kan. City Fire & Marine Ins. Co.*, 1993 OK 32, 849 P.2d 407, 413; *Robertson v. USF&G*, 1992 OK 113, 836 P.2d 1294, 1297; *Barfield v. Barfield*, 1987 OK 72, 742 P.2d 1107, 1112; and *Uptegraft v. Home Ins. Co.*, 1983 OK 41, 662 P.2d 681, 685-86 (all holding that the UM carrier must pay the insured even where the UM carrier is barred from exercising its subrogation rights unless payment would be unfair in light of the insured's knowing, affirmative, and prejudicial conduct).

NOT ERROR TO DENY LEAVE TO AMEND TO ASSERT BAD FAITH CLAIM ALONG WITH UM CLAIM AFTER TIME PERMITTED BY PRETRIAL AND AFTER COURT HAD ALREADY ORDERED BIFURCATION

Phillips v. Oklahoma Farmers Union Mut. Ins. Co.[331] holds that it was not error to deny the insured leave to amend to add a bad faith claim to his UM claim after the time for amendment in the pretrial order and after the court had already ordered bifurcation.

The insureds sued the tort-feasor and the UM carrier in the same action. Four months after the pretrial conference-established date to amend pleadings and after the trial court had ordered bifurcation pursuant to *Tidmore v. Fullman*,[332] the insureds sought leave to amend to assert a bad faith claim and object to the birfurcation. The court denied leave to amend and overruled the objection to the bifurcation. The insureds then dismissed without prejudice their claim against the tort-feasor. The insurance company brought the tort-feasor back into the lawsuit on a third-party petition and moved to have the parties realigned to their original configuration and again moved for bifurcation. The court realigned the parties and granted bifurcation.

Trial resulted in a verdict for less than the liability limit. The insured's appealed, arguing the bifurcation was error, under *Buzzard v. McDanel*.[333] The Court of Appeals affirmed, in an opinion by Judge Bailey.

Both amendment and bifurcation are matters addressed to the trial court's discretion. The fact that the verdict ultimately was for less than the liability limit reinforced the court's opinion that denying leave to assert the bad faith case was not error. This situation sort of left the insured's attorney arguing that he was entitled to the prejudicial effect of the joinder which might have resulted in a higher verdict on the contract claim.

SUBROGATED UM CARRIER MUST PAY PRO RATA SHARE OF THE INSURED'S ATTORNEY FEE AND EXPENSES INCURRED IN COLLECTING SUBROGATION

Phillips v. State Farm Mut. Auto. Ins. Co.,[334] holds that a UM carrier is required to pay a reasonable part of the insured's attorney fees and expenses for recovering subrogation if there was an implied contract that the insured's attorney would recover the subrogation and if the attorney performed more than incidental services.

Robert Gregson (Gregson) wrecked a car in which Wendell Phillips was a passenger, injuring

[331] 1993 OK CIV APP 199, 867 P.2d 1361.
[332] 1982 OK 73, 646 P.2d 1278.
[333] 1987 OK 28, 736 P.2d 157.
[334] 73 F.3d 1535 (10th Cir. 1996).

Phillips. Phillips assumed that Gregson did not have liability insurance and sued their insurer, State Farm, for uninsured motorist (UM) coverage. Phillips settled his claim with State Farm for $200,000 and executed a Release and Trust Agreement agreeing to hold in trust for State Farm's benefit all his rights of recovery. Phillips claimed a right to pro rata reimbursement from State Farm for attorney fees and costs he would incur in pursuit of the injury claim. State Farm denied Phillips had such a right. The Release and Trust Agreement reserved this dispute for later resolution. Phillips then sued Gregson and settled for $400,000. Phillips owed a 1/3rd attorney fee and expenses.

State Farm moved for summary judgment claiming it was entitled to $200,000 of the $400,000 settlement without reduction for attorney fees or expenses. The district court granted State Farm summary judgment.

The 10th Circuit Court of Appeals reversed, in an opinion by Judge Brorby. The trial court must determine whether there was an implied contract that State Farm would pay its share of fees and expenses. If one existed, then the trial court must order State Farm to pay a reasonable attorney fee.

In determining a reasonable attorney fee, the court is to consider the sum recovered for State Farm, the difference between the fee State Farm is obligated to pay its attorney and what State Farm would have had to pay its attorney, or another competent attorney, to effectuate the settlement between Phillips and Gregson.

Because there was no Oklahoma Supreme Court decision on point, the court looked to analogous Oklahoma Supreme Court decisions and to decisions of lower Oklahoma courts and other federal courts. The court relied on *Carter v. Wooley*[335] for its authority, finding the case virtually indistinguishable from the case before it.

Carter held that the Workers' Compensation carrier, before the Workers' Comp statute was amended to require the comp carrier to pay attorney fees, was obligated to pay a reasonable attorney fee to the lawyer who recovered its subrogation. It did so on the basis of an implied contract, holding that whether there was an implied contract was a question for the trier of fact.

UM POLICY ISSUED ON GOLF CART IS NOT SUBJECT TO UM

Progressive N. Ins. Co. v. Pippin[336] holds that a UM policy issued on a golf cart is not subject to UM law so that exclusions not permitted in UM policies are valid.

Mr. Pippin bought a golf cart for use at a lake home. His Progressive agent wrote a policy on the golf cart without being instructed by Mr. Pippin to which she included $500,000 in "uninsured motorist" coverage. When he asked the agent about the UM coverage on the golf cart, she told him "You can never have too much UM coverage."

Three years later, Mr. Pippin was badly injured in a car wreck. He was driving a vehicle which was titled in the name of one of his companies and which he normally used for both business and

[335] 1974 OK 45, 521 P.2d 793.
[336] 725 F. App'x 717 (10th Cir. 2018).

personal use. The at fault driver had a $50,000 liability policy, which was paid. While the vehicle Mr. Pippin was driving had no UM coverage, another vehicle, which his wife drove, had a $100,000 UM policy, which was also paid.

Progressive denied payment of its $500,000 UM policy, based on an exclusion applicable when the insured was occupying a vehicle available for his regular use. This exclusion would not have been permitted to exclude UM coverage under Oklahoma UM law, due to *Cothren v. Emcasco Ins. Co.*[337] and *Morris v. America First Ins. Co.*[338] Progressive sued Pippin in the Western District for a declaratory judgment that the UM coverage did not apply or, alternatively, that it applied only to the extent of minimum compulsory insurance law limits.

Chief Judge Heaton declined to certify the questions to the Oklahoma Supreme Court and granted Progressive summary judgment. The Tenth Circuit affirmed, in an opinion by Judge Kelly, in which Judge Bacharach joined. The Court en banc declined to grant rehearing.

Chief Judge Heaton and the majority in the Tenth Circuit held that Progressive could write whatever policy it chose and not be subject to the Oklahoma UM statute because the policy was written on a golf cart, which did not qualify as a "motor vehicle" within the meaning of the UM law.

Pippin argued that the policy should be reformed on a theory of constructive fraud because the mistake on the part of Progressive's agent in writing a motor vehicle policy on a non-motor vehicle should not be permitted to benefit Progressive by enabling it to take UM premiums while writing something other than a UM policy.[339] The dissenting judge in the Tenth Circuit, Judge Briscoe, substantially adopted Pippin's argument and dissented from the *en banc* opinion declining to grant rehearing. The Tenth Circuit also declined to certify the coverage issue to the Oklahoma Supreme Court.

In the interest of full disclosure, this was my case. I lost it.

ALL NAMED INSUREDS MUST REJECT UM

Plaster v. State Farm Mut. Auto. Ins. Co.[340] holds that <u>all</u> insureds named on the face of the policy must execute a rejection of UM coverage for that rejection to be binding as to an insured, other than the insured signing the rejection.

Mr. and Mrs. Plaster had a liability policy with State Farm, which named both as insureds. Mr.

---

[337] 1976 OK 137, 555 P.2d 1037.

[338] 2010 OK 35, 240 P.3d 661. *Cothren* held such an exclusion invalid. A later amendment to the UM statute permitted such an exclusion but only if the vehicle being occupied was totally uninsured. *Conner v. American Commerce Ins. Co.*, 2009 OK CIV APP 61, 216 P.3d 850 erroneously permitted the exclusion where the vehicle had no UM coverage. *Morris* held *Conner* did not apply where coverage was available to the insured on another vehicle. This was the case with *Pippin*.

[339] *Gentry v. American Motorist Ins. Co.*, 1994 OK 4, 867 P.2d 468 applies constructive fraud in this context.

[340] 1989 OK 167, 791 P.2d 813

Plaster, but not Mrs. Plaster, executed a written rejection of UM coverage.

The Plasters' son was killed. They sued State Farm in federal court. The federal court certified to the Supreme Court whether the rejection by one, but not all, named insureds, was valid. The Supreme Court held it was not, in an opinion by Justice Wilson.

The ruling may be narrower than it appears at first glance. The Court says:

> We therefore hold that where an automobile insurance policy lists more than one individual as a "named insured", a written rejection of uninsured motorist coverage by less than all named insureds is not a complete rejection of that coverage within the four corners of the policy. However, such partial rejection does operate to estop an individual named insured who signs the rejection form asserting the uninsured motorist provisions of the policy.

This language creates some doubt about the requirement for a written rejection to be signed by both husband and wife in policies which name one spouse and include the other spouse as a named insured by definition. *Looney v. Farmers Ins. Group*[341] treats such a "definitional" named insured as a named insured for purposes of excluding her from liability coverage under an exclusion for injury to the named insured. It would seem, however, that the Court rather carefully limited its holding to one "listed" on the policy.

Justice Opala concurred in part and dissented in part, while Justice Simms dissented, each without separate opinion.

The effect of this opinion will be somewhat short-lived. It is legislatively overruled by the 1990 amendment to 36 O.S. §3636, which specifies <u>any</u> named insured may reject. Thus, *Plaster* will be of concern only as to policies issued before the effective date of the amendment, September 1, 1990.

SUPERVISOR'S BAD INSTRUCTIONS CONSTITUTE USE AND EMPLOYER'S NON-CONTEMPORANEOUS NEGLIGENT MAINTENANCE OF TRUCK TRIGGER UM COVERAGE FOR EMPLOYEE

Ply v. National Union Fire Insurance Company of Pittsburgh, PA,[342] holds that a supervisor's instructions regarding use of truck constitutes use for purposes of UM coverage and an employer's non-contemporaneous negligent maintenance of the truck entitled injured employee to UM coverage where negligent maintenance caused the injury.

Dale Ply was working in the raised bucket of his employer's truck when he came in contact with an energized electrical line, electrocuting him. Ply's legs were amputated as a result of his injury. Ply's employer, Elliot Company, owned and maintained the bucket truck. National Union Fire Ins. Co. (National) carried the UM coverage on Elliot Company's trucks.

At the time of Ply's injury, he was working alone with the bucket truck, as instructed by his

[341] 1980 OK 111, 616 P.2d 1138.
[342] 2003 OK 97, 81 P.3d 643.

supervisor, a fellow employee, even though Elliot Company's Safety Handbook required that aerial bucket equipment should only be operated with two people present to operate the hydraulic controls. While up in the bucket, a tool belt hanging outside the bucket came in contact with an energized electrical line running just below the bucket. Ply alleged the contact resulted from a hydraulic leak in the truck's hydraulic boom causing the bucket to sag.

Ply collected workers' compensation benefits, then sued National in federal court for Elliot Company's UM benefits and Safeco Ins. Co. Of America for his mother's UM benefits. Ply lived with his mother at the time of his injury. Ply alleged his injury arose out of Elliot Company's negligent use and maintenance of the truck. National moved for summary judgment, arguing that UM was not triggered because Ply's injury was not caused by another's use of the bucket truck, and that Ply's injury was not caused by negligent maintenance.[343]

The district court (Honorable Sven Erik Holmes, Northern District), having found no controlling authority, certified the following questions to the Oklahoma Supreme Court:

> 1. Whether an employer's or supervisor's instructions or directions to its employee regarding work to be performed by that employee, which involved the use of a company-owned vehicle, can constitute "use" of the vehicle by the employer or supervisor so as to give rise to potential liability under Oklahoma's uninsured motorist laws; and
>
> 2. Whether allegations of an employer's non-contemporaneous negligent maintenance of an employer-owned vehicle, if proven, are sufficient to establish an employee's potential entitlement to uninsured motorist benefits.

The Supreme Court reformulated the first question as follows:

> 1 Whether a supervisor, acting on behalf of the employer, provides faulty or negligent instructions or directions to an employee relating to the use of an employer-owned vehicle and the employee is injured while following the instructions, can the employer be considered at fault within the meaning of the phrase legally entitled to recover from the owner or operator" in § 3636 of title 36 of the Oklahoma Statutes.

and answered yes to both, in an opinion by Justice Boudreau, with five justices concurring and three dissenting (Vice Chief Justice Opala, and Justices Winchester and Hargrave) and one (Justice Kauger concurring specially.

The Supreme Court reformulated the first question because it considered the issue to be one of fault, not use. The Court explained that the first question to answer is whether a person is legally entitled to recover, which it says Ply is. Then the Court looked to whether the allegedly negligent party is an owner or operator of an uninsured/underinsured motor vehicle. The Court explained that the owner does not have to be operating the vehicle, ownership is enough. The Court declined to address the merits of Ply's claim of negligent instruction.

---

[343] Safeco was dismissed from the lawsuit before the summary judgment hearing.

The second certified question relates to Elliot Company's negligent maintenance of its vehicle; specifically, whether negligent maintenance, done some time before Ply's use of the truck, could trigger UM. The Court agreed with other jurisdictions' broad meaning of "maintenance" and held the language "arising out of . . . maintenance" to mean that the maintenance does not have to be contemporaneous with the claimant's injury. Maintenance includes acts of omission as well as commission relative to the external and mechanical condition of a vehicle. Here, whether Elliot Company omitted needed maintenance on the hydraulic system fits within the statutory scheme "bodily injury . . .arising out of . . . maintenance." Again, the Court did not discuss the merits of Ply's negligence claim.

Justice Kauger specially concurred by separate opinion. Justice Kauger explains that an employer's supervisor's instructions can be so clear and straightforward on the faulty or negligent operation of a vehicle as to leave the employee with the understanding that the operation is appropriate. In that situation, the employer may be considered responsible for the vehicle's personal physical management.

Justice Winchester's dissent, with which Vice Chief Justice Opala and Justice Hargrave join, states that the Court's legal reasoning became so convoluted that the end result bears no resemblance to § 3636's intent. The purpose of § 3636 is to protect innocent parties from the negligence of an uninsured motorist. Who is that uninsured motorist? the dissent asks.

SETTLEMENT WITH TORT-FEASOR BARS UNINSURED MOTORIST RECOVERY

Porter v. MFA Mutual Insurance Co.[344] holds an insured's settlement with the tort-feasor bars recovery of uninsured motorist coverage.

Plaintiff was injured in an accident with a tort-feasor who had only $5,000 liability insurance limits. Plaintiff settled and gave a release to the "underinsured" tort-feasor and then attempted to proceed against his uninsured motorist (UM) insurer, MFA. The trial court granted MFA summary judgment, holding plaintiff's settlement had destroyed MFA's subrogation rights under its UM policy. The Supreme Court affirmed, in an opinion by Justice Barnes.

The Court declined to base its ruling on the "consent to settle" policy provision which purports to exclude coverage as to any claim which the insured has settled without the insurance company's consent. The "consent to settle" clause is void.

However, by giving a release to the tort-feasor, plaintiff destroyed MFA's "subrogation" rights under the Trust Agreement provided in the policy and sanctioned by the statute. The legal effect of releasing the tort-feasor was to preclude plaintiff from bringing an action on the uninsured motorist policy.

[**Editor's Note**: This decision is correct but may contain some overly broad dictum. The case arose under the 1976 version of the statute (36 O.S. 1976 Supp. §3636). That statute specifically provides that the insurance company shall be entitled to the proceeds of any settlement or judgment against the tort-feasor. The Court quotes the 1976 statute and says: "This statute was

[344] 1982 OK 23, 643 P.2d 302.

subsequently amended on May 16, 1979, but the above quoted provision remains the same."

Actually, the 1979 amendment adds a provision to subparagraph (E):

> Provided further that any payment made by the insured tort feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage.

Thus, the 1979 amendment *does* alter the effect of the statute as to the *underinsured* claim. Under the 1979 statute, the insured *should* be permitted to settle with the underinsured tort feasor and still proceed against the underinsured motorist insurance company since the insurance company is probably not entitled to subrogation.]

SETTLEMENT WITH TORT-FEASOR FOR LESS THAN LIABILITY LIMIT BARS UM RECOVERY

Porter v. State Farm Mut. Auto. Ins. Co.[345] holds that the insured who settles with the tort-feasor for less than the tort-feasor's liability insurance limit cannot recover UM coverage.

Porter was involved in a "double insured" case while riding with another State Farm insured who was at fault. The tort-feasor had $100,000 liability limits. Porter had UM coverage with State Farm.

State Farm was willing to pay only $85,000 of its $100,000 limit. Porter took the $85,000 in liability limits and sued State Farm under her own UM coverage. State Farm took the position that the settlement with and release of its liability insured precluded Porter from recovering her own UM.

The trial court, Judge Cunningham, in Canadian County, sustained State Farm's Motion for Summary Judgment. The Court of Civil Appeals (COCA) affirmed, in a unanimous opinion by Chief Judge Mitchell.

The COCA reasoned that the release of the tort-feasor caused Porter to no longer be legally entitled to recover from the tort-feasor, and so precluded the UM recovery. Further, the Court held, the settlement for less than the tort-feasor's liability limit established that the value of the claim was less than the tort-feasor's liability limit so that this requirement for UM coverage could not be established.

The COCA rejected Porter's argument that she should be able to recover despite the release since State Farm could not subrogate against its own insured. The COCA seemed unaware of the rule that an insurance company cannot subrogate against its own insured.[346] The COCA noted that Porter made that assertion "without citing legal authority." The COCA likewise rejected without discussion Porter's argument that the amount of the liability settlement did not establish the

---

[345] 2010 OK CIV APP 8, 231 P. 3d 691.

[346] *Sutton v. Jondahl*, 1975 OK CIV APP 2, 532 P.2d 478; *Travelers Ins. Co. v. Dickey*, 1990 OK 109, 799 P.2d 625.

value of the claim because it was a compromise settlement.

The "take away" message is: Don't take less than the liability limit and try to pursue UM.

NOT BAD FAITH FOR INSURER TO DISAGREE WITH INSURED ON POLICY INTERPRETATION

Price v. Mid-Continent Casualty Company[347] holds that it is not bad faith for the insurance company to disagree with the insured on policy interpretation.

Mrs. Price's son, who was under age 25, a college student, and lived with her, was killed in a car wreck while driving his own car. A wrongful death trial resulted in a $750,000 verdict in favor of Mr. and Mrs. Price. Mrs. Price had a car insurance policy with Mid-Continent that provided $250,000 uninsured motorist (UM) limit. The son had a $10,000 UM policy limit under his own policy with Mid-Continent. Mrs. Price accepted the $10,000 UM limit under the son's policy but refused to accept Mid-Continent's offer of $10,000 UM under her own policy. Mid-Continent contended the $10,000 UM limit under Mrs. Price policy applied because of the policy provision which reduced the UM coverage to $10,000/$20,000 when a wreck involves a person under 25. Mrs. Price filed a bad faith claim.

The trial court granted Mrs. Price summary judgment. On Mid-Continent's appeal, the Court of Civil Appeals held the under-25 provision invalid and Mid-Continent tendered the $250,000 limit plus interest.

At the trial on the bad faith claim, the jury found for Mrs. Price and awarded her $60,000 actual damages and $500,000 punitive damages. Mid-Continent appealed.

The Court of Civil Appeals (COCA) reversed the trial court (opinion by Presiding Judge Kenneth Buettner), holding that an insurance company's request for judicial interpretation of the insurance contract is not bad faith absent a showing the request was frivolous, dilatory, or motivated by bad intent.

Chief Judge Carol Hansen dissented with opinion. Chief Judge Hansen criticizes the COCA for hearing an appeal that was not well preserved. Mid-Continent's appeal did not provide specific allegations of error in the jury instructions or trial court ruling as a basis for its appeal. Chief Judge Hansen believes the COCA, lacking specific allegations of error, took upon itself to find error and used the trial court's instructions to the jury to frame the issues it deemed relevant.

Chief Judge Hansen would affirm the trial court and hold the evidence before the trial court sufficient to support the jury finding that Mid-Continent's policy dispute was not legitimate. The evidence was that not all members of Mid-Continent's executive review committee agreed it had a reasonable argument to deny the higher UM limit. This was indicated by markings on the loss notice that marked through the $10,000/$20,000 limits and handwrote in the $250,000/$500,000 figure. Also in evidence was testimony that someone at Mid-Continent made a preliminary decision early on that the policy limits were not limited by the under-age provision.

[347] 2002 OK CIV APP 16, 41 P.3d 1019.

UM PASSENGER STACKING DENIED; UM OFFER SUFFICIENT; NO WRITTEN REJECTION REQUIRED WHERE UM WRITTEN, BUT FOR LESS THAN LIABILITY LIMITS

Prideaux v. Allstate Insurance Company[348] holds: (1) one insured solely as a passenger may not stack the owner's UM coverage, (2) the uncontroverted facts show a legally sufficient offer of UM coverage equal to the liability limit, and (3) no rejection is required where UM coverage is written, but in an amount less than the liability coverage.

Plaintiff was a passenger in a friend's car which was struck by an underinsured motorist. The friend's car had $50,000/$100,000 liability limits, but only $10,000/$20,000 UM limits and insured 4 vehicles. The trial court granted summary judgment, holding plaintiff could not stack the UM limits and that the UM limits were only $10,000/$20,000. The Court of Appeals affirmed, in an opinion by Judge Garrett.

The Court's decision denying stacking comes as no surprise. It follows *Babcock v. Adkins*[349] denying stacking where multiple vehicles are insured under multiple policies and *Rogers v. Goad*[350] which denies stacking where multiple vehicles are insured under a single policy.

The brief opinion does not contain much guidance as to the precise nature of the offer of UM coverage, noting only deposition testimony to the effect that the insured owner discussed higher UM limits, but did not feel the need to take them. The Court does not discuss the testimony with regard to an adequate explanation of the characteristics of the coverage.

The decision that no written rejection is required where UM is written, but in an amount less than liability limits is consistent with the Supreme Court's later decision to the same effect in *Mann v. Farmers*.[351]

NO SUBROGATION OF HEALTH INSURER AGAINST UM

Provident Life & Accident Ins. Co. v. Ridenour[352] holds that a health insurance company may not subrogate against uninsured motorist benefits pursuant to a policy provision granting subrogation for claims against third parties.

The health insurance policy provided for subrogation for claims against third persons, who cause an injury. The health insurance company claimed it was entitled to reimbursement from uninsured motorist benefits, since the UM benefits were intended to take the place of the third party's liability coverage.

The trial court denied the health insurer a recovery. The Court of Appeals affirmed, in an opinion by Judge Bailey.

---

348 1987 OK CIV APP 72, 753 P.2d 935.
349 1984 OK 84, 695 P.2d 1340.
350 1987 OK 59, 739 P.2d 519.
351 1988 OK 58, 761 P.2d 460.
352 1992 OK CIV APP 93, 838 P.2d 530.

The UM coverage does not stand in the shoes of the liability carrier or the tort-feasor. The UM coverage is coverage the insured bought and paid for.

The case leaves open the question whether a health policy can be written with a subrogation provision sufficiently broad to reach UM coverage. That question was answered in the affirmative by *Reeds v. Judge Walker/NAICO v. Reeds,* below.

NO UM SUBROGATION AGAINST THE UNDERINSURED MOTORIST'S ASSETS, INCLUDING THE PROCEEDS OF AN UNDERINSURED MOTORIST'S EXCESS OR UMBRELLA LIABILITY POLICY

Raymond v. Taylor[353] holds there is no UM subrogation against an underinsured motorist's assets, including an excess or umbrella policy on the underinsured motorist.

Raymond and Taylor worked for Guy's Seed Company. Both occupied a company vehicle which American Mercury insured with a single limit UM policy. They were in a bad wreck with a vehicle belonging to Blue Knight Energy Partners, which had a $1 million primary liability policy and a $40 million excess liability policy. There was an explosion. Taylor was killed and Raymond was badly hurt.

American Mercury promptly tendered its $1 million UM limit, paying $500,000 each to Taylor's estate and to Raymond's guardian. Raymond sued Blue Knight and its driver in Woodward County. Taylor's estate intervened to assert its claim and American Mercury intervened to seek recovery of its UM payments.

Blue Knight's liability carrier settled both cases for an undisclosed amount greater than the $1 million primary liability coverage but less than the $41 million total of its primary and excess liability coverage. Part of the terms of the settlement were that money be held in trust out of the settlement to pay American Mercury's subrogation if the outcome of the controversy was that American Mercury had subrogation. American Mercury filed a motion to have its subrogation right against the settlement.

The trial court held that American Mercury had subrogation against the entire recovery. The Court of Appeals, Division III, affirmed. The Supreme Court reversed, in this five to four decision by Justice Watt. Justices Kauger, Edmondson, Colbert and Reif joined the majority opinion. Justice Combs wrote a dissent, joined by Justices Gurich, Winchester and Wyrick.

The basis for the majority's decision that the UM carrier has no subrogation against assets of the underinsured motorist in excess of the primary liability coverage, including an excess policy, is the second sentence of 36 O.S. Sec. 3636(F):

> Provided, however, with respect to payments made by reason of the coverage described in subsection C of this section, *the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor* in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor.

[353] 2017 OK 80, __P.3d __

This somewhat strange opinion culminates a string of earlier Supreme Court opinions dealing with the relationship between the insured's UM coverage and an excess or umbrella liability policy. *Moser v. Liberty Mut. Ins. Co.,* 1986 OK 78, 731 P.2d 406 held that no offer of UM coverage was required in conjunction with the writing of an excess or umbrella liability policy. Rather, the "liability policy" requiring a UM offer referred only to a primary liability policy.

Moser was followed by *GEICO Gen. Ins. Co. v. NPIC,* 2005 OK 40, 115 P.3d 856. *GEICO* held that where there is an excess or umbrella policy on the tortfeasor, the UM carrier's exposure is triggered when the insured's damages exceed the primary coverage. *GEICO General* has the effect of making the order of payment when there is an umbrella or excess liability policy the primary liability policy, then plaintiff's UM and then the excess or umbrella policy. *Raymond v. Taylor* is just the logical next step in that line of cases.

The majority ties its decision directly to 3636(F) and from that to 3636(C) by saying:

> ¶15 As Title 36, Section 3636(F) specifically refers to subsection (C), it is clear that the insurer referred to is the same primary insurer who is either insolvent or with whom the tort-feasor is under-insured. There is no language in Section 3636(C) or (F) to indicate that the legislature contemplated UM carriers recovering from excess insurance policies of the tort-feasor. Instead, the legislature gave explicit instructions that UM carriers are *not entitled to any right of recovery against the tort-feasor* in excess of recovery from the insurer of the tort-feasor.

The majority refutes the argument by American Mercury and the dissent that the language of paragraph C refers only to the case where the tortfeasor's liability carrier becomes insolvent by saying:

> ¶17 While Section 3636(C), was originally enacted with only language referring to insolvency, 1968 Okla. Sess. Laws 163-64, it was amended in 1979 to also include under-insured vehicles,1979 Okla. Sess. Laws 452-53. Then Subsection (E), now (F), was later amended in 1989 to clarify the reference to subsection (C),[11] but did not limit the reference to any specific part of subsection (C), showing a legislative intent[12] for this sentence, in what is now subsection (F), to apply to the entirety of subsection (C). 1989 Okla. Sess. Laws 211-12. Resolving the apparent conflict by having the reference in subsection (F) apply to the entirety of subsection (C) promotes the Legislature's intent and is consistent with this Court's tendency to protect the insured's right to collect from the UM carrier.

The majority makes clear its intended outcome and rationale when it says:

> We hold that under Section 3636(F), Mercury was limited to subrogation from the primary insurer and is not entitled to subrogation from any assets of the tort-feasor, including the excess liability policy.

The dissent argues that Subsection C, by its very terms applies only to the case of the insolvent liability carrier. It explains the logic of its decision:

> ¶8 . . . . Simply put, a tortfeasor's liability insurer being unable to pay due to

> insolvency is not the tortfeasor's fault. In that context, it makes sense to limit subrogation to only the assets of the insolvent insurer of the tortfeasor, which is precisely what the second sentence of 36 O.S. 2011 § 3636(F) does. On the other hand, failure to carry sufficient liability insurance to meet a claim can easily be said to be a result of the tortfeasor's own poor planning and bad judgment. In that situation, allowing subrogation of other assets of the tortfeasor directly, such as an excess insurance policy, by the underinsured motorist carrier makes sense given the principles of equitable subrogation.

INSURED CAN STACK BUT NOT RECOVER MORE THAN ACTUAL, INCURRED DAMAGES; NO BAD FAITH FOUND

Reeder v. American Economy Ins. Co.[354] holds that payment of separate premiums for UM coverage permits stacking, but does not permit the insured to recover more than actual damages and that an insurance company's offer made less than four months after the trial court's determination it had coverage is not bad faith.

In 1989, Reeder was hurt in a car wreck with an uninsured motorist. Reeder had three cars insured under a policy with American Economy Ins. Co. (American) that provided $500,000 UM coverage and for which separate premiums were paid. In 1993, Reeder's lawyer first presented Reeder's claim for UM coverage to American. Later in 1993, American filed a declaratory judgment action to determine its coverage. Reeder counter-claimed to recover under the policy and for bad faith. Both moved for summary judgment. The trial court ruled that Reeder was entitled to UM coverage but that American was not in bad faith. About four months later, American offered $1,000,000 to settle Reeder's claim, which Reeder refused. The jury determined Reeder's damages to be $612,000. Reeder appealed, claiming she was entitled to recover the $612,000 from each coverage. The Court of Appeals affirmed, in an opinion by Judge Kelly. Stacking does not pay more than actual damages. The insurance company made an offer soon after its coverage was determined.

UM PROCEEDS SUBJECT TO ERISA PLAN SUBROGATION

Reeds v. The Honorable Thomas S. Walker, Judge of the District Court, Carter County. NAICO v. Reeds[355] holds that the words "monies recovered from a third-party" in an ERISA plan's subrogation clause includes payments made under an injured insured's UM policy.

Phillip Reeds was badly injured in an auto accident. NAICO, Phillip's father's health insurance carrier, paid over $400,000 in medical benefits under an ERISA health plan (the plan). After the family settled with their UM carrier the plan sought reimbursement. Both sides moved for summary judgment–Judge Walker granted NAICO's motion ordering the Reeds to reimburse the plan and pay nearly $150,000 in interest. The Reeds appealed, and while the appeal was pending filed an application with the Oklahoma Supreme Court invoking the Court's original cognizance to direct the trial court not to enforce the judgment, and to dismiss the action for lack of subject matter jurisdiction. The Court agreed to assume original jurisdiction, withdrew its assignment to

[354] 88 F.3d 892 (10th Cir. 1996).
[355] 2006 OK 43, 157 P.3d 100.

the Court of Civil Appeals and consolidated the separate proceedings for disposition by a single opinion. After first determining that the District Court's subject matter jurisdiction was not preempted by ERISA, the Court turned to the language of the subrogation clause.

The plan required reimbursement from "any monies recovered [from] a third party as a result of a judgment or settlement with or otherwise paid by the third party." The clause applies whenever the plan pays benefits and it is later determined that the third party is liable "for the same expense." The Court determined that the clause reached the UM proceeds, saying: "A UM carrier's 'first-party' status *vis a vis* its insured does not alter its third party status *vis a vis* the health insurance carrier." Also, said the Court, the UM carrier's indemnity payment is "for the same expense." Thus, the plain language of the policy encompassed the UM proceeds and nothing in the laws of Oklahoma protects those proceeds from the plan's reach. The Court still remanded, however, holding that the plan did not clearly override the make-whole rule; further proceedings were needed to determine whether Reed had been fully compensated for his injuries.

This case answers the question left open by *Provident Life & Accident Ins. Co. v. Ridenour*.[356]

LAW OF STATE WHERE POLICY ISSUED (NOT WHERE ACCIDENT OCCURS) GOVERNS UM COVERAGE

Rhody v. State Farm Mut. Ins. Co.[357] holds that an insurance policy issued in Texas but covering a car garaged in Oklahoma and where the accident occurs in Oklahoma, will be interpreted by Texas, not Oklahoma law. Under these facts, Oklahoma would permit stacking. Texas would not. The Court held Oklahoma had adopted the "most significant contact" rule only with regard to tort - not contract - cases, so Texas law applied.

Arguably, this case is contrary to *Pate v. MFA Mut. Ins. Co.*[358] There, an Arkansas family, on vacation in Oklahoma, suffered serious injuries in an accident. They settled with the tort-feasor and then attempted to recover their med pay coverage. Under Arkansas (but not Oklahoma) law, their insurer would be entitled to subrogation so that the settlement with the tort-feasor barred the med-pay recovery. The Oklahoma Court found such a strong public policy interest in enforcing Oklahoma's prohibition on subrogation and pay claims of a named insured that it applied Oklahoma, not Arkansas, law. The *Rhody* court does not cite nor distinguish *Pate*.

MULTIPLE VEHICLE UM COVERAGE UNDER A SINGLE POLICY MAY BE STACKED

Richardson v. Allstate[359] holds UM coverage on multiple vehicles insured under a single policy may be stacked, where a separate premium is paid for each vehicle.

The Richardsons insured 3 vehicles under a single policy. Each had $25,000/$50,000 uninsured (UM) coverage. It was stipulated the damages exceeded $150,000. Allstate paid one limit but

---

[356] *Provident*, 1992 OK CIV APP 93, 838 P.2d 530, was distinguished on the basis of differences in policy language.
[357] 771 F.2d 1416 (10th Cir. 1985).
[358] 1982 OK CIV APP 36, 649 P.2d 809.
[359] 1980 OK 157, 619 P.2d 594.

declined to stack the remaining UM coverages. The U.S. District Court for the Western District certified the question whether the coverage could be stacked. The Supreme Court answered that it could, in an opinion by Justice Irwin.

Keel v. MFA[360] held that coverage could be stacked where multiple vehicles are insured under multiple policies. Writing all of the vehicles on one policy should not alter that result.

INSURED MAY SUE UM INSURER WITHOUT SUING TORT-FEASOR; UM INSURER NOT ENTITLED TO CREDIT FOR UNUSED TORT-FEASOR'S LIABILITY

Roberts v. Mid-Continent Casualty Co.[361] holds that an insured may sue his uninsured motorist insurer without suing the tort-feasor and that, in such a case, the insurer is not entitled to a credit for the tort-feasor's liability limits but must seek subrogation.

The insured chose to sue his uninsured motorist insurer directly, without suing the tort-feasor, who had only a $10,000 liability policy. The trial court entered judgment for the whole amount of the insured's damages ($60,000) and refused to give the UM carrier credit for the tort-feasor's $10,000 limit.

The Court of Appeals affirmed, in an opinion by Judge MacGuigan. *Keel v. MFA*[362] gives the insured the right to sue the UM insurer directly, without joining the tort-feasor. *Uptegraft v. Home Ins. Co.*[363] holds that the insured may still recover from the UM carrier, even if the statute of limitation has run against the tort-feasor. The burden of pursuing the tort-feasor and his liability limits is on the insurer.

UM CARRIER WAIVES SUBROGATION BY FAILING TO OFFER UM AND TAKE A UM REJECTION

Robertson v. United States Fid. & Guar. Co. And The Western Cas. & Sur. Co.[364] holds that an insurance company which does not properly offer UM coverage and take a rejection of it is estopped to raise as a defense to a UM claim a release executed by the insured.

Each of two companies were claimed to have either failed to properly offer or take a rejection of UM coverage. The insured was badly injured in an accident. He took the policies to a lawyer and sought the lawyer's advice before releasing the tort-feasor. The lawyer, discovering the policies contained no UM coverage, advised the insured to release the tort-feasor.

Later, the insured consulted another lawyer who found coverage may not have been properly offered or rejected. The trial court granted summary judgment, based on the release.

The Court of Appeals reversed, holding that the insurance companies had waived their right to object to the release, by failing to properly offer and take a rejection of UM coverage, thus

---

360 1976 OK 86, 553 P.2d 153.
361 1989 OK CIV APP 92, 790 P.2d 1121.
362 1976 OK 86, 553 P.2d 153.
363 1983 OK 41, 662 P.2d 681.
364 1992 OK 113, 836 P.2d 1294.

leading the insured to believe that he had no UM coverage and should release the tort-feasor.

The Supreme Court granted Certiorari and likewise reversed the trial court, in a unanimous opinion by Justice Lavender. This case rounds out the rule of a waiver of subrogation rights.

Porter v. MFA Mut. Ins. Co.[365] held that an insured who releases the tort-feasor, without a subrogation waiver from the insured's UM insurer, forfeits his UM coverage, since he has destroyed the UM insurer's subrogation rights. *Frey v. Independence Fire and Cas. Co.*[366] extends that same ruling to a case where the insured executed a covenant not to sue the tort-feasor. The effect was the same: the insured had destroyed the UM carrier's subrogation right.

Sexton v. Continental Cas. Co.[367] held the UM insurer gave up the right to object to the insured's release of the tort-feasor by denying coverage. *Buzzard v. Farmers Ins. Co., Inc.*[368] held that the insurance company forfeited its right to object to settlement by refusing to pay the claim. This case finds yet another basis for loss of the insurance company's right to object to a settlement with the tort-feasor. It seems an imminently sensible direction.

ARKANSAS POLICY NEED NOT AFFORD UNDERINSURED MOTORIST COVERAGE

Roby v. Bailey[369] holds that Oklahoma public policy does not require a policy written in Arkansas to afford underinsured motorist (UIM) coverage for an Oklahoma accident, where the policy would not afford UIM under Arkansas law.

Plaintiff, an Arkansas resident, was injured in an Oklahoma accident by an underinsured motorist. Under Oklahoma law, she would have had UIM coverage as part of her uninsured motorist (UM) coverage. Under Arkansas law, she would not, because Arkansas law provides for UIM as a separate coverage which must be elected. The trial court held for the insurance company. The Court of Appeals affirmed, in an opinion by Judge Adams.

Since the policy was written in Arkansas, Arkansas law applies unless application of Arkansas law would violate Oklahoma public policy, under *Bohannan v. Allstate Ins. Co.*[370] Not every conflict of law results in a violation of public policy. Only where application of the foreign law would violate an Oklahoma statute made applicable to any policy in Oklahoma, will there be a finding of violation of Oklahoma public policy so as to require application of Oklahoma law.

PASSENGER UM STACKING DENIED

Rogers v. Goad, et al.[371] denies stacking of uninsured motorist coverage to a "Class 2" insured (one insured solely by reason of occupying an insured vehicle). This decision is an extension of

---

365 1982 OK 23, 643 P.2d 302.
366 1985 OK 25, 698 P.2d 17.
367 1991 OK 84, 816 P.2d 1135.
368 1991 OK 127, 824 P.2d 1105.
369 1993 OK CIV APP 93, 856 P.2d 1013.
370 1991 OK 64, 820 P.2d 787.
371 1987 OK 59, 739 P.2d 519.

the ruling in *Babcock v. Adkins*[372] which reached the same result where the claimants were occupants of one of several cars insured under separate policies. *Rogers* applies *Babcock* where the claimant, not a named insured or member of the household, occupies one of several cars insured under a single policy.

Rogers was occupying his employer's vehicle when an underinsured motorist crossed the center line and hit the vehicle. Rogers recovered a $49,500 judgment. The adverse driver had only $10,000 in liability coverage.

Rogers tried to get $5,000 UM limits each on 18 vehicles insured under his employer's policy. The trial court let him stack.

The Supreme Court reversed, in a unanimous opinion by Justice Kauger. Stacking is limited to Class 1 insureds, named insureds and resident relatives of the named insureds' household. Class 2 insureds, permissive occupants of the vehicle, may not stack.

The court couches its holding in terms of rejecting coverage to a permissive user under a commercial fleet policy. However, *Babcock*, upon which *Rogers* relies, involved a family policy, rather than a commercial policy. It would seem difficult to argue that *Rogers* should be restricted to commercial policies and not applied to family policies.

MOTHER "LEGALLY ENTITLED TO RECOVER" FOR UM PURPOSES, EVEN WHERE PARENT-CHILD IMMUNITY BARS RECOVERY AGAINST CHILD

Rose v. State Farm Mut. Auto. Ins. Co.[373] holds that a parent injured by the negligence of the parent's minor child may recover UM benefits, even if an action against the child would be barred by parent-child immunity.

Mrs. Rose was injured in a collision caused by the negligence of her minor son, who was driving the car in which she was riding. State Farm contended she could not recover under the UM coverage, since her claim against the son would be barred by the rule of parent-child immunity. The insurance company contended Mrs. Rose was not "legally entitled to recover," as the UM policy and statute required. The trial court agreed and granted the insurer summary judgment.

Since decisions of both the Oklahoma Court of Appeals and the federal courts, interpreting Oklahoma law, are only persuasive, and not precedential, we will need a Supreme Court opinion on this issue. It will undoubtedly be consistent with *Rose*.

OKLAHOMA UM LAW APPLIES TO OUT-OF-STATE ACCIDENT INVOLVING OKLAHOMA INSURED; POLICY PROVISION MAY CAUSE OTHER STATE'S HIGHER LIMIT TO APPLY

Rush v. Travelers Indem. Co.[374] holds that Oklahoma UM law applies to an out-of-state accident involving a policy issued in Oklahoma and that a policy provision increasing the policy limit to

[372] 1984 OK 84, 695 P.2d 1340.
[373] 1991 OK CIV APP 124, 821 P.2d 1077.
[374] 891 F.2d 267 (10th Cir.1989).

the other state's minimum may apply, without incorporating the other state's stacking law.

The Oklahoma insured, with a $10,000 UM limit, and two vehicles insured, was injured in an accident in Arkansas, which has $25,000 UM limits, but prohibits stacking. The policy contained a policy provision increasing the limits to the financial responsibility limits of the state where the accident occurred but had an endorsement providing the policy provided coverage under the Oklahoma UM statute. The insured claimed $50,000 UM limits (the Arkansas $25,000 limit X 2 vehicles, stacked under Oklahoma law). The insurance company claimed there was only a $10,000 limit, since the endorsement incorporated Oklahoma law, requiring only $10,000 coverage, and required Arkansas law, forbidding stacking, be applied to the policy. The District Court allowed $25,000 coverage, applying the Arkansas minimum limit and denying stacking, under Arkansas law.

The Court of Appeals held there was $50,000 coverage. The policy provision required Arkansas minimum limits but did not require application of Arkansas law to the policy. The endorsement did not require that the limits be the same as the Oklahoma minimum and, thus, did not conflict with the provision in the body of the policy requiring the limits of the state where the accident occurred. *Rhody v. State Farm Mut. Ins. Co.*[375] required the law of the state where the policy was issued control policy interpretation.

PASSENGER COLLECTS BOTH LIABILITY AND UM AND NON-OWNER DRIVER'S UM

Russell v. American States Ins. Co.[376] holds a passenger injured by the negligence of the driver of the car he is occupying may recover both the liability and the UM motorist coverage on that vehicle and that the passenger could recover under the non-owner driver's uninsured motorist coverage.

Russell was killed while occupying a vehicle insured by American States and driven by a driver with a separate policy with American States. American States paid its liability coverage under both the owner's and the driver's policies, but declined to pay its uninsured motorist coverage. The district court sustained the insurance company's position in the insured's declaratory judgment action. The Court of Appeals reversed.

The Court rejected the insurer's argument there could be no UM recovery where the liability and UM coverage on the vehicle being occupied was the same. The trial court's ruling to that effect was predicated on *Heavner v. Farmers Ins. Co.*[377] There, an injured passenger in the Farmers' insured vehicle recovered only $4,500 of the driver's $10,000 policy limit, due to multiple claims against Farmers' $20,000 aggregate or per accident liability limit. The Oklahoma Court held invalid Farmers' policy provision that the term "uninsured motor vehicle" did not include "the insured vehicle." This provision was contrary to the definition under the 1976 version of 36 O.S. §3636 that the term "uninsured motor vehicle" included a motor vehicle having available liability limits less than the UM coverage. However, due to the 1976 statute's provision

[375] 771 F.2d 1416 (10th Cir.1985).
[376] 813 F.2d 306 (10th Cir.1987).
[377] 1983 OK 51, 663 P.2d 730.

permitting such offset, Heavner was permitted to recover only the difference between the $4,500 paid under the liability coverage and the $10,000 UM limit, or $4,500.

The latter result of *Heavner* was inapplicable since the 1979 amendment to §3636 defines "uninsured motor vehicle" as a vehicle having liability limits less than the injured party's claim. Under the 1979 statute (unlike the 1976 statute), the liability coverage does not credit against the UM coverage.

The passenger (Russell) was entitled to UM coverage under the driver's policy since the UM portion of the policy included as an "insured highway vehicle" a vehicle being operated by the named insured. Since the vehicle was an insured vehicle Russell was occupying an insured vehicle, he was an insured under the UM provisions of the driver's policy.

Babcock v. Adkins[378] did not preclude coverage. It held that one insured only because he occupied the insured vehicle may not stack under *separate* policies on vehicles the named insured owns. Russell qualified as an insured under the policy sued on.

Heavner v. Farmers, supra, and *State Farm v. Wendt*[379] invalidate policy definitions which excludes the definition of "uninsured motor vehicle," the insured vehicle. The occupant of the insured vehicle injured by the driver's negligence may recover both liability and UM coverage on that vehicle.

INJURY MUST ARISE FROM "TRANSPORTATION" USE OF VEHICLE TO BE COVERED UNDER UM

Safeco Ins. Co. of Am. v. Sanders[380] holds that an intentional killing in a car is not covered, where the killer is not using the car for a transportation purpose at the time of the killing.

The case arises from a particularly brutal crime. The killers abducted a couple sitting in a car in a shopping center parking lot. They drove them to the country, put them in the trunk and cut the gas lines of the car. They then set the car afire and left the couple to burn to death.

The couples' survivors made UM claims. The insurers sued in federal court for a declaration that the claims were not covered.

The federal court (Judge Ellison, in Tulsa) submitted certified questions to the Oklahoma Supreme Court. The Supreme Court answered them, in a complex opinion by Justice Wilson.

First, the federal court asked whether the murders arose "out of the use of a motor vehicle." The opinion answers that it does. An injury which results from a chain of events which start with the use of a motor vehicle, arises out of the use of the vehicle. Second, the federal court asked whether there was a causal connection between the use of the vehicle and the deaths. The opinion concludes there was. The Court adopts a two-pronged test: (1) is a use of the vehicle connected to the injury, and (2) is the use related to the *transportation* use of the vehicle. The

[378] [8]1984 OK 84, 695 P.2d 1340.
[379] 1985 OK 75, 708 P.2d 581.
[380] 1990 OK 129, 803 P.2d 688.

Court rejects the insurance companies' claim the vehicle was the "mere situs" of the injury. Rather, the vehicle was the cause of the deaths.

Third, the federal court asked whether the killers' act in cutting the gas lines and burning the car constituted such an intervening act as to sever any causal use of the car for a transportation use.

The opinion holds that it did. The act of cutting the fuel lines and burning the car were "so contrary to its transportation nature of the vehicle that, as a matter of law, these events are not related to its transportation nature" and injury from it is not covered by UM.

Fourth, the federal court asked whether the killers were "operators of an uninsured motor vehicle" when they set the car on fire. They were not. The act of setting fire to the car did not involve the transportation nature of the car.

Justices Opala, Hodges, Doolin, and Kauger concurred with Justice Wilson's opinion. Justices Hargrave, Lavender, Simms and Summers concurred in result (denying recovery). Justices Lavender and Simms joined in an opinion by Justice Summers. That opinion takes the position that the vehicle was the mere situs of the injury and no legal causal connection existed between the use of the vehicle and the deaths.

Each of these opinions constitute a virtual encyclopedia of cases from other jurisdictions dealing with what constitutes "use" or "occupying" a vehicle, for various insurance purposes, not just UM. The "bottom line" is that most med-pay claims from intentional assaults upon the insured in a vehicle. Many such assaults will be covered under UM.

Both opinions can be cited as significantly expanding the scope of automobile med-pay or automobile accident death or injury policies. Anyone litigating coverage questions in this area would be well advised to read these opinions (including the extensive footnotes) carefully.

PER POLICY PREMIUM WILL DEFEAT STACKING, WITH PROPER ADVICE AND GIVING INSURED OPTION TO BUY INCREASED COVERAGE

Scott v. Cimarron Insurance Co., Inc.[381] holds that an insurance company may deny UM stacking, where it charges a per policy, rather than a per vehicle, premium, provided the insurance company has clearly advised the insured that the per policy premium will result in a denial of stacking and offered the insured the opportunity to buy increased limits.

Scott insured four vehicles with Cimarron. Cimarron charged a single premium per policy, not a separate premium per vehicle insured. Cimarron sent Scott an explanatory brochure which clearly revealed this.

Scott was killed by an uninsured motorist. His widow sued to stack the coverage. The federal court certified to the Oklahoma Supreme Court whether, under these circumstances, Scott could stack the coverage. The Supreme Court answered that he could not.

The basis for stacking is the charging of multiple premiums. Since a single premium was

[381] 1989 OK 26, 774 P.2d 456.

charged, stacking was not required.

The Court notes (in footnotes 2 and 3) that it is important that Scott was clearly advised that the effect of the single premium would be to deny stacking and that he was given the option of selecting coverage which could have been stacked.

FOREIGN EXCHANGE STUDENT QUALIFIES AS A "WARD" SO AS TO BE COVERED AS A "FAMILY MEMBER" INSURED UNDER UM

Serra v. Estate of Broughton[382] holds that a foreign exchange student living with the named insureds qualified as a family member insured as a "ward" of the named insured.

Ms. Serra was an 18-year old foreign exchange high school student from Spain, living with the named insured and his family in Oklahoma when she was injured by an uninsured motorcyclist, who was killed in the crash. She sought UM coverage under the State Farm family auto policy covering her host family.

The trial Court entered summary judgment for State Farm, holding she was not a "ward" or "foster child" and was not, therefore, a family member insured. The Court of Civil Appeals affirmed. The Supreme Court reversed, in this 7 to 2 opinion by Justice Watt, with Justices Winchester and Taylor dissenting.

The Supreme Court relied on its earlier decision in *Flitton v. Equity Fire and Cas. Co.*[383],

holding a step-brother was a resident relative and the Tenth Circuit's decision in *Houston v. National General*[384], that an unrelated child living in the insured home qualified as a "ward."

The decision in *Flitton* is pretty straight-forward. *Houston* is a little more complicated. In *Houston*, a girl lived with her boyfriend and his grandfather, after she and the boyfriend had a child and her parents presumably put her out of their home. The Tenth Circuit held that this put her in the position of being a "ward" of the grandfather/insured, although there had been no guardianship.

In this case, there was a complicating factor in that the foreign exchange student, unlike the children in *Flitton* and *Houston*, was 18-years old and, therefore, an adult. The Supreme Court suggested the Court of Civil Appeals had declined to adopt a "non-technical" definition of the term "ward" while the Supreme Court does so.

UM CARRIER WAIVES OBJECTION TO SETTLEMENT BY DENYING COVERAGE

Sexton v. Continental Cas. Co.[385] holds that a car insurance company waives its right to deny uninsured motorist (UM) coverage by denying UM coverage.

---

[382] 2015 OK 82, __P.3d __.
[383] 1992 OK 2, 824 P.2d 1132.
[384] **Error! Main Document Only.**817 F.2d 83 (10th Cir. 1987).
[385] 1991 OK 84, 816 P.2d 1135.

A group of people rented a car from Avis. Continental wrote $100,000/300,000 liability limits on the car. The rental occurred before *Moon v. Guarantee Insurance Co.*,[386] which held the car renter (not the rental company) must reject UM coverage, else the policy will provide UM. The car rental company had rejected coverage, but the renters were not offered the coverage.

One of the permitted drivers had an accident (which was apparently her fault), injuring some of the other renters, a passenger in the car. The injured passengers agreed among themselves to a distribution of the policy proceeds from both the liability and UM coverage on the vehicle.

Continental denied UM coverage, but paid one of the passengers, Sexton, $97,250 liability coverage. Sexton then sued Continental in federal court for the UM. Continental defended on the ground that Sexton had given up any right to UM coverage by releasing the driver and Avis and taking the liability payment. This would be the result under *Porter v. MFA Mut. Ins. Co.*[387] Under that case, the insured who executed a release has destroyed the UM insurer's subrogation and may not recover UM.

However, Sexton contended Continental was estopped to rely on the release and destruction of subrogation, since it had denied coverage. The federal court (Judge Brett, in the Northern District), certified to the Oklahoma Supreme Court the question:

> Whether an insurer's prior denial of the insured's uninsured motorist coverage claim operates to estop that insurer from later invoking the *Porter* doctrine's protection against the destruction of its subrogation rights.

The Oklahoma Supreme Court, in a virtually unanimous opinion by Justice Summers, answered that the insurer is estopped. The Court noted that it would be particularly inappropriate for Continental, whose lawyer, acting on behalf of Continental's insured, Avis, secured the release, to be able to assert that the release protected Continental from liability. However, the Court carefully did not base its decision on that narrow fact circumstance. The Court said:

> The fact. . .that the UM carrier and the liability carrier were one and the same company here is not dispositive. Neither is the fact that the UM carrier's attorney prepared the release. The certified question is broader, and in our opinion, is deserving of an answer.

The Court noted that it had twice previously declined to answer this precise question, finding it not properly presented by the record. *Uptegraft v. Home Ins. Co.*[388] was another question certified from federal court. The federal court did not certify that question.

In *Frey v. Independence Fire & Cas Co.*[389] the trial court record did not include any material to support a contention that the insurer had denied coverage. The Supreme Court noted the question, but declined to decide it.

---

386 1988 OK 85, 764 P.2d 1331.
387 1988 OK 85, 764 P.2d 1331.
388 1983 OK 41, 662 P.2d 681.
389 1985 OK 25, 698 P.2d 17.

The Supreme Court answers the question here straightforwardly:

> An insurer may not complain of its lack of consent to settlement and the attendant loss of subrogation rights when the settlement comes after the insurer denied coverage under the policy.

Under this decision, it is clear that a settlement with the tort-feasor will not bar a UM recovery when the insurer has completely denied *coverage*. The effect is less clear when the insurer has not denied coverage, but has refused to pay, based on a claim the tort-feasor is not liable or that the liability payment adequately compensates the insured.

Even less clear is whether the Court will find waiver when the UM insurer has made an offer, but the offer is adequate: It says:

> . . . when an insurer *completely denies* a claim for uninsured motorist (UM) coverage by its insured the insurer is estopped from later invoking the defense of loss of subrogation rights. (emphasis supplied)

This language would seem to indicate a complete denial will give rise to the estoppel. An inadequate offer may not. All the Justices except Opala and Simmons concurred. Those two concurred in result, without separate opinion.

UM POLICY DEFINITION EXCLUDING RELATIVE WHO OWNS CAR FROM COVERAGE IS VALID

Shepard v. Farmers[390] holds that a definition of an insured household member to exclude one who owns an automobile is valid and does not violate public policy under 36 O.S. 1981 §3636.

Few facts are given in this opinion. The United States District Court for the Western District of Oklahoma certified to the Supreme Court this question:

> Is a clause in a contract of automobile insurance which denies coverage for a relative of the insured living in the same household if such relative or his/her spouse owns an automobile void as unconscionable or against the public policy expressed in Oklahoma's Uninsured Motorist Act, 36 O.S. 1981 §3636?

The Oklahoma Supreme Court holds, in an opinion by Justice Barnes, that such a provision is valid and does not violate public policy. Section 3636 does not specify who must be "insured" under the policy. This is a matter of contract between the parties.

Further, the Court assumes that one owning his own car will have access to uninsured motorist coverage on that car.

[390] 1983 OK 103, 678 P.2d 250.

INSURANCE COMPANY HAS NO DUTY TO MAKE EXPLANATORY UM COVERAGE OFFER

Silver v. Slusher and Farmers & Merchants Insurance Co.[391] holds that an insurance company has no obligation to make a sufficiently explanatory offer of UM coverage to enable the insured to make a knowing decision to accept or reject the coverage.

Silver rejected uninsured motorist coverage. He testified his agent erroneously informed him the UM coverage would only cover property damage. When Silver's daughter was killed by an uninsured motorist, he sued Farmers and Merchants. The trial court sustained the insurance company's Motion for Summary Judgment. The Supreme Court affirmed.

The insurance company has no duty to make an explanatory offer of UM coverage, in order to obtain a valid rejection. Even a false explanation will not invalidate the rejection.

[**Editor's note**: This is a strange case. While the opinion insists it does not reverse *Hicks v. State Farm*,[392] it does. *Hicks* had held (as do all other cases addressing the issue under similar statutes in the country) that the insurance company has the duty to make an offer sufficient to enable the insured to make a knowing or intelligent decision to accept or reject the coverage. The Court of Appeals in the present case relied on *Hicks* in reversing the trial court.

The Petition for Rehearing in the present case pointed out that the only cases cited in support of the Court's holding had been reversed or held the opposite of the holding in the present case. On rehearing, the Supreme Court took out the overruled cases but retained the same holding. *Silver* is legislatively overruled by the 1990 amendment to 36 O.S. §3636, which requires an explanatory offer, on a form specified in the statute.]

UM LIMITS ARE THOSE STATED IN POLICY WHERE NO REJECTION TAKEN OF UM LIMITS EQUAL TO HIGHER LIABILITY LIMITS

Skinner v. John Deere Ins. Co.[393] holds that the UM limits stated in the policy control where no rejection was taken of UM limits in the amount of the higher liability limits; and that the portions of the claim file compiled after the petition is filed are not discoverable.

John Deere Insurance Company (John Deere) issued an automobile liability policy to Larry Spencer Chevrolet, a dealership. The policy had stated UM limits of $20,000 and a $500,000 liability limit. In December, 1993, Larry Spencer's wife, Debbie Spencer, was driving a vehicle owned by the dealership when a collision occurred, injuring Debbie Spencer and her three passengers. Kristie Skinner, one of the passengers, and pregnant at the time, was severely injured.

John Deere was uncertain as to the amount of UM coverage because no written rejection was taken. In 1994, it sought a legal opinion on that issue and was advised that the higher $500,000 limit would be imputed to the policy. The UM claims exceeded $500,000 and the claimants

[391] 1988 OK 53, 770 P.2d 878.
[392] 1977 OK 150, 568 P.2d 629.
[393] 2000 OK 18, 998 P.2d 1219.

could not agree on how to split the proceeds. Sometime before November 1994, John Deere offered to settle all the claims for $500,000 in exchange for a general waiver of liability. The claimants still could not agree on how to divide the money and Skinner refused to sign a general waiver.

On November 14, 1994, Skinner filed a bad faith action against John Deere for unreasonable delay in paying the UM claim. The next day, John Deere filed a declaratory judgment and interpleader action in federal court. All the claimants except Skinner settled their claims for $100,000 and agreed on how to divide the settlement.

The federal court ruled that $500,000 UM coverage would be imputed to the policy because John Deere failed to take a written rejection of UM in the amount of the liability, relying on *Perkins v. Hartford*.[394] Skinner settled for $400,000 ($500,000 less the $100,000 paid to the other claimants) pending the appeal of the federal court decision, reserving the bad faith claim.

Shortly after Skinner settled the federal court claims, the Oklahoma Supreme Court decided *May v. National Mutual Ins. Co.*,[395] which overruled *Perkins* and held that an insurance company's failure to obtain a written rejection of UM coverage equal to the liability limit results in an imputed UM limit at the statutory $10,000/$20,000 minimum.

John Deere filed a motion for summary judgment, which the trial court ultimately granted. In the interim, Skinner and John Deere argued over which documents in John Deere's file were discoverable. The trial court ruled that none of the documents Skinner requested that were generated after filing the petition were relevant to the bad faith claim and were, therefore, not discoverable. Skinner sought a writ of mandamus. Skinner responded to John Deere's motion for summary judgment. The Supreme Court ordered the trial court to conduct an in camera hearing. This was done and the trial court determined that the requested documents were privileged and not discoverable. Based on the Supreme Court's ruling on the writ, Skinner moved to supplement his response to John Deere's motion for summary judgment; the trial court denied leave to supplement. The trial court granted summary judgment to John Deere. Skinner moved for a new trial, which the trial court denied. Skinner appealed.

Skinner claimed the trial court erred in many respects: (1) granting John Deere summary judgment; (2) denying Skinner's motion for new trial; (3) refusing to obey the Supreme Court's order on the writ of mandamus; and (4) ruling that certain John Deere documents were privileged. Additionally, Skinner argued John Deere was obligated to follow the Court of Civil Appeals' decision in *Perkins v. Hartford*,[396] that failure to obtain a written rejection of UM limits equal to higher liability limits resulted in UM limits equal to the higher liability limits.

The Court of Civil Appeals held summary judgment was not proper because factual issues existed on whether John Deere acted reasonably. On John Deere's petition for certiorari, the Supreme Court vacated the Court of Civil Appeals opinion and affirmed the trial court. The Supreme Court stated the trial court complied with the writ, did not err in granting summary

[394] 1994 OK CIV APP 151, 889 P.2d 1262.
[395] 1996 OK 52, 918 P.2d 43.
[396] 1994 OK CIV APP 151, 889 P.2d 1262.

judgment and denying Skinner's motion for new trial. Furthermore, John Deere was not obligated to follow the *Perkins* decision because it was a Court of Civil Appeals decision and only persuasive, not precedential.

UM CARRIER LIABLE ONLY FOR AMOUNT UM COVERAGE EXCEEDS TORT-FEASOR'S AVAILABLE COVERAGE

Smith v. American Fidelity Insurance Companies,[397] holds that where the tort-feasor's liability insurance is still available to the plaintiff, the plaintiff's UM carrier is liable only for the amount of UM coverage exceeding the tort-feasor's available coverage.

Smith was injured in a car wreck with Brown. Brown had a $10,000 liability insurance policy. Smith had a car policy with American Fidelity providing $50,000 UM coverage. Smith's stipulated damages were $12,000, which she demanded that American Fidelity pay under her UM policy. American Fidelity offered only $2,000, instructing Smith to get the remaining $10,000 from Brown. Smith sued American Fidelity for the full $12,000 in damages and moved for summary judgment. The trial court denied Smith summary judgment, concluded that the denial disposed of all the issues before it, and granted American Fidelity summary judgment, holding it liable only for $2,000.

Smith appealed. The Court of Civil Appeals affirmed, holding that where the tort-feasor's liability insurance is still available to the plaintiff, the plaintiff's UM carrier is liable only for the amount of UM coverage exceeding the tort-feasor's available coverage. The Court relied on the Justice Summers' dictum in *Buzzard v. Farmers*,[398] that states a UM carrier is liable only for the amount of damages that exceed the tort-feasor's available coverage.

The Oklahoma Supreme Court denied petition for *certiorari*. OTLA filed an *amicus curiae* brief urging the Court to grant *certiorari*. The bad law set out in *Buzzard* continues.

FULL FAITH AND CREDIT REQUIRE OKLAHOMA FOLLOW FOREIGN JUDGMENT EVEN IF IT VIOLATES OKLAHOMA PUBLIC POLICY

Smith v. Shelter Mut. Ins. Co.[399] holds that the United States Constitution's Full Faith and Credit Clause requires that an Oklahoma court follow a foreign court's judgment, even if that result violates Oklahoma public policy.

The Arkansas decedent was killed in Oklahoma, while riding with another Arkansas motorist, when the Arkansas vehicle collided with an Oklahoma driver's car. Oklahoma law would permit decedent's estate to recover the decedent's UM coverage; Arkansas law would not.

The decedent's insurance company filed a declaratory judgment action in an Arkansas state court. While that action was pending, the estate filed suit against the insurance company in Oklahoma. The Arkansas case was concluded first, with the Arkansas court holding Arkansas

[397] 1998 OK CIV APP 70, 963 P.2d 16.
[398] 1991 OK 127, 824 P.2d 1105.
[399] 1994 OK 5, 867 P.2d 1260.

law applied and the estate could not recover UM benefits.

The Oklahoma trial court entered summary judgment for the insurance company, based on the Arkansas judgment. The Oklahoma Supreme Court affirmed, in an opinion by Justice Kauger.

The existence of the Arkansas judgment distinguishes this case from *Bohannan v. Allstate Ins. Co.*,[400] *Lewis v. State Farm Mut. Auto. Ins. Co.*[401] and *Pate v. MFA Mut. Ins. Co.*,[402] on which the estate relied. Those cases stand for the proposition that the Oklahoma court need not follow foreign law if that law violates Oklahoma public policy. However, that provision does not apply where a judgment has been rendered in another state. The Full Faith and Credit clause requires Oklahoma courts to honor that judgment.

COMPANY NEED NOT TELL INSURED BASIS FOR UM PREMIUM OR THAT UM DOES NOT STACK

Spears v. Glens Falls Insurance Company[403] expressly overrules two Court of Civil Appeals decisions, *Mid-Continent Group v. Henry*[404] and *Kinder v. Oklahoma Farmers Union Mut. Ins. Co.*,[405] while holding that an insurance company may deny UM stacking under a policy charging a per-policy UM premium without making any pre-policy explanation or warning to the insured that they are buying coverage that does not stack.

Nathan Spears was hit and severely injured by an uninsured motorist while riding his motorcycle. Nathan was insured under his parents' auto policy which listed three vehicles in the declarations and had a $100,000 UM limit. His parents, Pam and Dennis Spears, submitted a claim under the UM coverage, demanding "stacked" limits totaling $300,000.

Unknown to the Spears, however, Glens Falls charged a "single"[406] UM premium and the policy had an "anti-stacking" provision limiting the UM to one $100,000 limit "regardless of the number of: ... Vehicles insured by this or any other policy . . . ." Glens Falls tendered the $100,000, but refused to stack the UM.

Nathan's parents filed suit in Cleveland County. Glens Falls removed the case to federal court (Western District of Oklahoma) and countered for a declaration that it had fulfilled its policy obligations. Both parties moved for summary judgment on stipulated facts; the insurance company also moved to certify the legal question to the Oklahoma Supreme Court. Over the Spears' objection, Judge Thompson certified the following question of Oklahoma law:

> Is an insurer required to give its insured pre-policy notice that the subsequently issued insurance policy will limit UM/UIM coverage to a single policy limit (*i.e.*, UM/UIM coverage will not stack) where: 1) prior to the issuance of the policy, the

[400] 1991 OK 64, 820 P.2d 787.
[401] 1992 OK CIV APP 106, 838 P.2d 535.
[402] 1982 OK CIV APP 36, 649 P.2d 809.
[403] 2005 OK 35, 114 P.3d 448.
[404] 2003 OK CIV APP 46, 69 P.3d 1216.
[405] 1991 OK CIV APP 53, 813 P.2d 546.
[406] Calculated without regard to the number of vehicles insured under the policy.

> insured is given the statutory election form and elects coverage equal to the insured's bodily injury liability limits (the maximum amount permitted by law); 2) the insured pays a single premium for UM/UIM coverage; 3) more than one vehicle is insured under the subsequently issued policy; and 4) the language of the subsequently issued policy limits UM/UIM coverage to a single policy limit regardless of the number of vehicles insured?

The Spears cited *Mid-Continent Group v. Henry*[407] in which the Court of Civil Appeals held that an insurance company wishing to deny stacking when issuing a multiple vehicle policy must inform its insured, *before issuing the policy*, that it charges but a "single" premium and that the UM will not stack. *Kinder v. Oklahoma Farmers Union Mut. Ins. Co*.,[408] also relied upon by the Spears, reflects a similar understanding of Oklahoma law. There, the Court of Civil Appeals remanded for a determination of whether an insured had been *properly informed* that the UM was based on a single premium and thus did not stack.

The Spears observed that both *Mid-Continent* and *Kinder* relied on *Withrow v. Pickard*,[409] in which our Supreme Court said, in *orbiter dictum*:

> We think that a clause limiting the liability of an insurer to single uninsured motorist coverage would be void and unenforceable as against public policy if the contract did not clearly show that it was the *insured's intent* to agree to such a limitation.

Mid-Continent interpreted the above language to mean that the insured's "intent" is not gleaned from the anti-stacking language in the policy, but rather, revealed by the insured's acceptance of the policy after having been informed that the UM would not stack.

Glens Falls, by contrast, relied on *Silver v. Slusher*[410] and *Cofer v. Morton.*[411] *Silver* holds that an insurance company need not explain the benefits of UM *in order to obtain a valid UM rejection. Cofer* holds that when an insured is already aware that UM may be purchased with limits equal to liability limits but chooses minimum limits instead, failure on the part of the insurance company to inform the insured of the availability of the higher limits, as required under the UM statute, does not result in imputation of the higher limit by law. According to these cases, and *Withrow* and *Scott*, said Glens Falls, intent to buy non-stacked coverage is shown by the signed UM form, even if the form does not mention stacking.

In *Withrow*, the "insured's intent" was revealed by an endorsement, signed by the insured, that acknowledged the insured's awareness that a single premium was charged and that the UM did not stack. In *Scott*, similar evidence of the "insured's intent" to accept non-stackable UM was found in the particular UM form used which went beyond the form found in 36 O.S. § 3636 by also explaining the single-premium basis and the resulting effect on stacking. In the Spears' case,

---

[407] 2003 OK CIV APP 46, 69 P.3d 1216.
[408] 1991 OK CIV APP 53, 813 P.2d 546.
[409] 1995 OK 120, 905 P.2d 800.
[410] 1988 OK 53, 770 P.2d 878, *cert. denied,* 493 U.S. 817, 110 S.Ct. 70 (1989).
[411] 1989 OK 159, 784 P.2d 67.

although never told of the single premium basis or that the UM would not stack, the Spears had signed the statutory UM form selecting UM limits matching their liability limits.

In an opinion by Justice Kauger, in which all the justices concurred, the Court rejected the Spears' reliance on *Withrow* and *Scott,* saying "neither of [those] opinions strengthen [their] position." The Court then agreed with Glens Falls that *Silver* and *Cofer* were dispositive.

The Court said *Withrow* "specifically" determined that an insurance company need not offer stackable UM; thus, by providing the statutory UM form, Glens Falls "had done all the law required." *Scott*, said the Court, teaches that "without exception," the issue of stackable coverage turns on whether a single or separate premium is charged for multiple vehicle coverage. Further, *Silver* holds that an insurance company has no affirmative duty to explain UM coverage in order to validate an insured's UM rejection. *Cofer* teaches that an insurance company has no obligation to explain the terms of its tender or to list the advantages and disadvantages of UM coverage. Accordingly, the Court held that, "under the facts presented,"[412] an insurance company need not give pre-policy notice that the UM does not stack.

The *Spears* Court made it clear that the pre-policy notice in *Withrow* and *Scott*, while "the better practice," was not mandated by law. By providing the UM form, albeit one that does not mention stacking, Glens Falls satisfied its UM notification duties.

PASSENGER UM STACKING DENIED

Stanton v. American Mutual Liability Insurance Co.[413] denies stacking of uninsured motorist coverage to a "Class 2" insured (one insured solely by reason of occupying an insured vehicle). This decision is based upon and follows *Rogers v. Goad, et al.*[414]

Stanton was occupying one of 379 vehicles belonging to his employer and insured by a fleet policy. The federal court certified the question whether he could stack coverage. Based on *Rogers v. Goad, supra,* the Supreme Court held he could not.

POLICY DEFINITION OF UM VEHICLE EXCLUDING GOVERNMENT VEHICLE VOID

State Farm Mut. Auto. Ins. Co. v. Greer[415] holds that a policy definition of "uninsured motor vehicle" which excludes a government owned vehicle is void, as contrary to the UM statute.

The United States District Court for the Northern District of Oklahoma certified to the Oklahoma Supreme Court a question whether a definition of uninsured motor vehicle that excludes a vehicle owned by any government or any of its political subdivisions or agencies is void. The

---

[412] In addition to the statutory UM form the Spears signed, they had received policy renewal notices over a ten-year period, along with copies of the policy, "including a coverage summary and all endorsements."
[413] 1987 OK 118, 747 P.2d 945.
[414] 1987 OK 59, 739 P.2d 519.
[415] 1989 OK 110, 777 P.2d 941.

Oklahoma Supreme Court responded that it was, in an opinion by Justice Hodges.

The Oklahoma UM Statute, 36 O.S. §3636, defines uninsured motor vehicle. Any policy definition which deviates from this statutory definition is invalid.

BEATING IN MOTEL PARKING LOT, WHERE NO CAR IS BEING USED, DOES NOT TRIGGER UM COVERAGE

State Farm Mutual Auto. Ins. Co. v. Narvaez[416] holds that beating a person with intent to use victim's car may constitute an injury arising out of the use of a motor vehicle, but there is no causal connection between the use of the vehicle and the injury if the vehicle was not being used for a transportation purpose at the time of the injury.

Narvaez was using a pay phone in or near a hotel parking lot when an assailant beat him and stole his car. State Farm denied Narvaez' UM claim and filed a declaratory judgment action seeking a declaration there was no UM coverage. State Farm filed a motion for summary judgment arguing that Narvaez' injuries did not arise out of the ownership, maintenance, or use of an uninsured motor vehicle as the policy and the UM statute require.

Narvaez moved to amend his Complaint to add a bad faith claim because his UM claim was denied. Narvaez argued that the inquiry into the chain of events leading up to his injury should begin with the assailant's intent to use his car, not the actual use of his car, citing *Safeco v. Sanders*[417] for the proposition that whether one is an operator is determined by acts indicating an intent to operate the car.

The federal district court applied the four-part test the Oklahoma Supreme Court articulated in *Safeco v. Sanders* and *Byus v. Mid-Century Ins. Co.*,[418] determined the injury was not caused by the transportation use of the vehicle, and granted State Farm summary judgment. The Court explained that beating Narvaez with intent to steal his car constituted an injury arising out of the use of a motor vehicle (the first part of the test), but there was no causal connection between the use of the car and the injury because the injury did not occur while the car was being used for a transportation purpose (the second part of the test). If the claim cannot pass all four parts of the test, UM coverage is not triggered. The court denied Narvaez' motion to amend his complaint to allege bad faith, finding there was no bad faith because there was a legitimate coverage dispute. The case remains pending on appeal. It was argued recently in the Tenth Circuit Court of Appeals.

POLICY EXCLUDING "THE INSURED MOTOR VEHICLE" FROM DEFINITION OF "UNINSURED MOTOR VEHICLE" VOID; UM APPLIES WHERE LIABILITY COVERAGE EXCLUDED BY "NAMED INSURED" EXCLUSION; "VEHICLE FURNISHED FOR REGULAR USE" CLAUSE VOID

State Farm Mut. Auto. Ins. Co. v. Wendt[419] holds that a policy excluding from the definition of

[416] 975 F.Supp. 1435 (W.D.Okla. 1997).
[417] 1990 OK 129, 803 P.2d 688.
[418] 1990 OK 129, 803 P.2d 688; 1996 OK 25, 912 P.2d 845.
[419] 1985 OK 75, 708 P.2d 581.

"uninsured motor vehicle" the vehicle insured under the policy is void, UM coverage applied as to the driver's negligence where liability coverage was excluded as to the injured owner-passenger by a "named insured" exclusion and that a policy provision excluding coverage while occupying a vehicle furnished for the regular use of the insured was void.

Wendt, a passenger in his own vehicle driven by his friend with no insurance, was hurt in a one-vehicle accident. He made claim under the policy covering his vehicle and his parents' policies with State Farm, since he was a member of their household.

State Farm denied his claims contending his vehicle coverage did not apply since that policy (as to which liability coverage was excluded by "named insured" exclusion) excluded from the definition of "uninsured motor vehicle" a vehicle defined in the policy as "an insured motor vehicle." State Farm denied coverage under his parents' policies since his vehicle (which he was occupying) was a vehicle furnished for his regular use.

The Supreme Court held (in response to certified questions from federal court) that he was covered under his and his parents' policies. The exclusion from the definition of "uninsured motor vehicle" of an insured vehicle was contrary to the definition of "uninsured motor vehicle" in 36 O.S. 1981 §3636. Since his liability coverage was excluded by the "named insured" exclusion, he was entitled to UM coverage on that vehicle.

The "vehicle furnished for regular use" clause was void as to UM coverage, since it was an exclusion not permitted by §3636.

BURDEN IS ON INSURER TO PROTECT ITS SUBROGATION RIGHT

Strong v. Hanover Insurance Company,[420] holds that an insurer may not fail to protect its subrogation rights and then deny coverage when its insured settles with and releases the tort-feasor.

Strong's car was rear-ended by an uninsured motorist when Strong stopped at a traffic light. The collision injured Strong and his wife.

Strong was the sole named insured on a car insurance policy with Hanover Insurance Company (Hanover) that provided $5,000 medical payments coverage and $250,000/$500,000 uninsured motorist coverage. The tort-feasor had a $100,000 liability policy limit.

Strong notified Hanover of the collision and received a series of medical payments checks that ultimately exhausted the $5,000 medical payments coverage.

Strong sued the tort-feasor for negligence in September 1998, and his attorney notified Hanover in writing in October 1998 of the lawsuit, attaching a copy of the Petition and Summons, and asserted a UM claim. Strong settled with the tort-feasor at mediation for the $100,000 liability limit and released the tort-feasor and vehicle owner. Hanover was notified beforehand of the mediation but failed to participate. Strong dismissed his lawsuit against the tort-feasor, with

[420] 2005 OK CIV APP 9, 106 P.3d 604.

prejudice, in February 1999.

In November, 2000, Strong's attorney sent Hanover a representation letter again asserting an uninsured motorist claim, stating that Strong had undergone surgery and had a pain management device implanted. Hanover requested an affidavit from the owner of the tort-feasor's car indicating liability policy limits; names and addresses of all insurance companies involved; copies of medical reports and bills; statements from those associated with the collision; and enclosed authorizations forms for medical and wage loss information for Strong's signature.

Strong sued Hanover when it did not pay the UM claim. Hanover answered asserting as affirmative defenses that Strong was barred from recovery because he had settled with, dismissed with prejudice, and released the tort-feasor, all of which prejudiced Hanover's right to subrogation. Hanover moved for summary judgment alleging that its first notice of Strong's claim was by his attorney's November 2000 representation letter. Hanover relied on *Porter v. MFA Mutual Insurance Company*[421] which holds that settlement with (and release of) the tort-feasor voids UM coverage.

Strong responded that he asserted his UM claim when he notified Hanover's agent of the wreck and later notified Hanover of both the lawsuit against the tort-feasor and the mediation. The trial court (Honorable J. Michael Gassett, Tulsa County) denied Hanover summary judgment.

Upon completing discovery, Hanover renewed its motion for summary judgment, raising the issue of whether Strong had requested and was granted permission to settle with the tort-feasor. This time, the trial court granted Hanover summary judgment.

On Strong's appeal, the Court of Civil Appeals reversed and remanded, holding that providing Hanover with a copy of the Petition and Summons and notice of the mediation schedule was ample opportunity for Hanover protect its subrogation rights against the tort-feasor.

The Court of Civil Appeals discussed the possibility of Hanover being estopped from demanding subrogation before payment of UM because of the insurance agent's conduct. Apparently the agent urged Strong to settle with the tort-feasor for "a couple of thousand dollars and move on." The agent had several conversations with Strong about a UM claim, one of which was heated. Strong's testified that the agent was "quite anxious" that Strong settle with the tort-feasor.

Finally, 36 O.S. § 3636(E) provides that an insured must send written notice of a tentative settlement agreement, including documentation of pecuniary losses, copies of medical bills, and authorizations permitting the insurance company to obtain medical and wage information. The notice must be made by certified mail. The insurance company then has 60 days from receipt of the notice to substitute its payment for the tentative settlement amount. Failure to substitute payment results in the insurance company's waiver of its subrogation right.

The COCA held that Strong complied with section 3636(E), although not strictly. Requiring strict compliance would result in a hurdle to recovery which is not the purpose of section 3636(E). The purpose of 3636(E) is to provide a speedy payment mechanism and to enable the

[421] 1982 OK 23, 643 P.2d 302.

insurance company to protect its subrogation rights.

Judge Ronald J. Stubblefield wrote the opinion, Judges Goodman and Reif (sitting by designation) concurred.

"ACCIDENTAL" VS. "INTENTIONAL" DETERMINED FROM INSURED'S VIEWPOINT; ASSAULT FOLLOWING TRAFFIC INCIDENT NOT COVERED

Stucky v. Long[422] holds that whether an injury is accidental or intentional is to be determined from the viewpoint of the injured insured, not the assailant and that injuries from an assault following a traffic incident do not arise from the use of an insured vehicle. So as to be covered under UM.

The insured claimed another motorist tried to run him off the road and then chased him. The insured saw a police car and, thinking he would be protected, pulled up next to the police car and got out. The chasing motorist stopped, got out of his car and beat the insured. The UM insurer denied coverage, claiming the injury was not accidental, as the policy required, and that the injuries did not arise from the operation of the uninsured vehicle. The trial court granted the insured summary judgment.

The Court of Appeals affirmed, in an opinion by Presiding Judge Garrett. The injury was accidental, since that determination must be made from the viewpoint of the injured person, who certainly did not intend to be injured. The Court relies for this holding on the dictionary definition of "accident," not the life insurance cases, holding to the same effect. However, the injuries were not covered, since the injuries did not arise out of the operation of the UM vehicle. There must be a causal connection between the use of the vehicle and the injury. The fact that the dispute arose out of a driving incident was not enough. The Court relies for the latter holding on *Race v. Nationwide Mut. Fire Ins. Co.*[423]

INSURED'S BREACH OF CONTRACT CLAIM AND INTENDED INSURED'S NEGLIGENCE CLAIM AGAINST AGENT ARE JURY QUESTIONS

Swickey v. Silvey Companies[424] holds that whether the insurance company's agent breached a contract with the insured and whether the agent negligently failed to list the insured's son as a named insured are questions for the jury.

Mrs. Nelson (Nelson) bought a car liability and UM policy from Silvey Companies (Silvey) through the Insurance Resources Agency, Inc. (Agency). Nelson requested full coverage and that her son Michael Swickey be listed as a named insured because the insurance was to cover the car Nelson bought for Swickey. The car was titled in Nelson's name; Swickey was never added to the title.

The declarations page listed only Nelson as the named insured. UM coverage applies to the named insured and any family member. The policy defined family member as a person related to

[422] 1989 OK CIV APP 75, 783 P.2d 500.
[423] 542 So.2d 347 (Fla. 1989).
[424] 1999 OK CIV APP 48, 979 P.2d 266.

the named insured by blood, marriage or adoption who is also a resident of the named insured's household. At the time Nelson bought the policy, Swickey lived with Nelson. Swickey noticed on an amended declaration form that he was not shown as the named insured and called the Agency to make sure he was "'the insured of the vehicle' [sic]." The same agent that sold Nelson the policy assured Swickey he was an insured.

After Swickey moved out of Nelson's home, Swickey's son was struck and killed by an uninsured motorist. Swickey and Nelson sued Silvey and the Agency, asserting a claim under the UM coverage, alleging breach of contract, negligence, and fraud. Silvey denied the UM claim because neither Swickey nor his son were insureds under the policy, but ultimately settled with Nelson and Swickey for a fraction of the UM limits.

The trial court (Honorable Niles Jackson, Oklahoma County) granted Agency summary judgment. Nelson and Swickey appealed. The Court of Civil Appeals affirmed as to the fraud claim, holding there was no proof of actionable misrepresentation by the agency; reversed as to the breach of contract claim, but held the breach was as to Nelson, not Swickey, because there was no contract between Swickey and Agency; and reversed as to the negligence claim because the evidence supported an inference that Agency was negligent in failing to procure insurance listing Swickey as the named insured and failing to advise Nelson that the car she bought for Swickey had to be titled in Swickey's name for him to be a named insured on the policy. The case was remanded to the trial court to proceed with the breach of contract and negligence claims.

Note: There was no evidence of actual fraud in *Swickey*. There may have been constructive fraud, however, pursuant to *Gentry v. American Motorist Ins. Co.*[425] There, the insured asked for theft coverage. The agent wrote theft coverage but on a policy form that excluded embezzlement by a trustee. The agent did not tell the insured embezzlement would be excluded.

NO WORKERS' COMP SUBROGATION AGAINST UM; SUIT AGAINST UM CARRIER DOES NOT REQUIRE FILING ELECTION IN WORKERS' COMP COURT

Thrasher v. Act-Fast Labor Pool, Inc.[426] holds that workers' compensation does not attach to a UM claim and that filing suit against the UM carrier does not require the filing of an election in Workers' Compensation Court.

The claimant was injured while riding with a fellow employee and on business. She filed a workers' compensation claim against her employer, a suit against the uninsured tort-feasor and her fellow employee's UM carrier. She never served the uninsured tort-feasor.

She settled the UM claim for the policy limit, executed a release releasing the UM insurance company "and all other persons," and dismissed the case with prejudice. After the workers' comp carrier contended she had destroyed her workers' comp claim by suing without filing the "election" required by 85 O.S. 1981 §44, she got an order *nunc pro tunc* to show she was dismissing with prejudice only the UM carrier.

---

[425] 1994 OK 4, 867 P.2d 468.
[426] 1991 OK 12, 806 P.2d 640.

The Workers' Compensation Court trial judge held for the claimant. The Court *en banc* vacated and held she had destroyed her workers' comp claim. The Court of Appeals affirmed. The Supreme Court reversed, in an unanimous opinion by Justice Hodges.

The workers' compensation carrier had no subrogation claim against the UM coverage. The purpose of the requirement to file an election is to enable the employer and workers' compensation carrier to protect its subrogation. She did not collect anything from the tort-feasor.

INSURER AND POLICY LIMITS SHOULD NOT BE SUBMITTED TO JURY IN UNINSURED/UNDERINSURED MOTORIST CASE

Tidmore and State Farm v. Fullman[427] holds that, while an underinsured motorist insurance company is a proper party to a suit between an insured and the tort-feasor, the existence and names of the liability and uninsured motorist carriers and the policy limits should not be submitted to the jury.

Plaintiff/insured sued defendant and plaintiff's UM carrier. The parties stipulated that plaintiff had UM limits greater than defendant's liability coverage [which under the 1976 statute, rendered defendant an "uninsured"].

At pretrial, the trial court ruled that the name of the UM insurance company together with defendant's liability limits and plaintiff's UM limits would be submitted to the jury. The trial court then certified for interlocutory appeal the question whether the defendant's liability limits or the UM insurance company should be submitted to the jury. The Supreme Court, in an opinion by Justice Lavender reversed.

Such evidence of insurance coverage could only serve to prejudice the jury by advising that all or part of the judgment would be paid by insurance companies. While the UM insurance company may be joined in the suit under *Keel v. MFA*,[428] the proper procedure is to submit the case to the jury in the name of the insured/plaintiff against the individual defendant. Following a liability and damages finding, the court may then enter judgment against the UM insurance company.

Justice Barnes concurred in part and dissented in part, without separate opinion. Justice Hodges dissented without separate opinion. Justice Doolin joined in a dissenting opinion by Justice Opala, who takes the position that certiorari should not have been granted. First, 12 O.S. 1981 §953(3) authorizes review of a certified interlocutory order only when it "affects a *substantial part of the merits* of the controversy." [Emphasis by Justice Opala] This appeal deals not with the merits but with a subsidiary, evidentiary ruling. Further since this case arises under the now repealed 1976 version of the statute, the ruling will be of limited practical value since, under the expanded coverage benefits of the present (1979) version of the statute, relatively few suits will involve joinder of the underinsured motorist and the insurance company. Thus, the Court should devote their time and attention to other matters.

Justice Opala's dissent does not disagree with the substance of the majority's opinion but only with the correctness and wisdom of granting certiorari for the certified interlocutory appeal.

[427] 1982 OK 73, 646 P.2d 1278.
[428] 1976 OK 86, 553 P.2d 153.

Thus, none of the justices are on record as opposing the holding.

EMPLOYEE ENTITLED TO UM ON EMPLOYER'S POLICY WHEN OCCUPYING EMPLOYER'S VEHICLE; UM CARRIER LIABLE FOR PRE-JUDGMENT INTEREST

Torres v. Kansas City Fire and Marine Ins. Co.[429] holds that an employee's death while occupying the employer's vehicle gives rise to an uninsured motorist claim against the employer's vehicle insurer and that the UM insurer must pay pre-judgment interest.

The insured's employee was killed while occupying a company vehicle, on which defendant insurance company had UM coverage. The trial court held the employee's personal representative was entitled to UM coverage for the $350,000 verdict, plus $35,000 in pre-judgment interest.

The Court of Appeals affirmed and the Supreme Court affirmed the Court of Appeals. The policy provided coverage to "anyone occupying a covered auto." The fact that the employer, not the employee, had nothing to do with whether the employee was covered. Neither did the fact that the UM insurer was precluded from subrogation against the decedent's fellow employee, whose negligence caused the death preclude coverage.

The estate was entitled to pre-judgment interest, as an element of the damages due the estate against the tort-feasor. In this regard, this case is consistent with

Mellenberger v. Sweeney,[430] issued by another division of the Court of Appeals.

UM INSURED OWES GOOD FAITH DUTY TO PERMISSIVE OCCUPANT

Townsend v. State Farm Mutual Automobile Insurance Company[431] holds that a UM insurer owes the same duty to deal fairly and in good faith with one insured as a permissive occupant of a vehicle as it owes to the named insured.

Townsend, insured while occupying a vehicle insured by State Farm made claim against the tort-feasor and State Farm, under his UM coverage. Contending State Farm had unreasonably refused to cooperate in reaching settlement with the tort-feasor's liability insurer, Townsend sued State Farm on the UM policy and for bad faith.

The trial court dismissed the bad faith action, concluding State Farm had no duty to Townsend to deal fairly and in good faith with him, since he was not State Farm's named insured, but was insured only by reason of occupying an insured vehicle. The Court of Appeals reversed, in an opinion by Judge Reif.

Under *Christian v. American Home Assurance Co.*,[432] the UM insurance company had a duty to deal fairly and in good faith with all of its insureds, including permissive occupants. The court

---

[429] 1993 OK 32, 849 P.2d 407.
[430] 1990 OK CIV APP 85, 800 P.2d 747.
[431] 1993 OK 119, 860 P.2d 236.
[432] 1977 OK 141, 577 P.2d 899.

distinguished *Allstate Insurance Co. V. Amick.*[433] That case held that a liability insurer had no contractual relationship with nor duty toward third-party claimants.

The court also distinguished *Babcock v. Adkins.*[434] That case recognized a distinction between named insureds and permissive occupants. However, that distinction was only that permissive occupants were insured only under the policy covering the vehicle which they were occupying. The permissive occupant is an insured under the policy covering the vehicle which he is occupying. The insurer owes the permissive occupant the same duty it owes any insured.

FACT QUESTION WHETHER DAUGHTER HAD APPARENT AUTHORITY TO REJECT UM PRECLUDES SUMMARY JUDGMENT

Traders Ins. Co. v. Johnson[435] holds that a fact question whether the named insureds' daughter had apparent authority to reject UM coverage precluded summary judgment for the insureds and against the insurance company on a claim of imputed UM coverage.

Mr. and Mrs. Johnson had liability coverage on their vehicles and had rejected UM coverage on them. They acquired and added a vehicle. As had happened before, they sent their daughter, Amber Brown, to pay the premium and add the vehicle. She was a named insured on the earlier policies but not on the new policy they added. She signed a rejection of UM coverage, at the direction of the agent.

Mrs. Johnson was injured in a wreck, due to the fault of an uninsured motorist. The Johnsons sued their insurance company, Traders, claiming imputed UM coverage due to the failure to take a proper, written rejection. Traders moved for summary judgment, claiming the daughter had apparent authority to sign the rejection for her parents.

The trial court, Judge Tom Lucas, in Cleveland County, granted the Johnsons summary judgment, holding that the daughter had no authority to reject the coverage for them. The Court of Civil Appeals reversed, holding that there was a fact question as to whether the daughter had apparent authority and that this precluded summary judgment.

Under the version of the UM statute (36 O.S. § 3636G) which existed at the time of the added coverage, the UM carrier had the obligation to make a new offer of UM coverage and obtain a rejection or selection of coverage limits with the addition of a vehicle to the policy. (The 2009 Legislature changed that requirement so that now a new offer and rejection is not required with the addition of a vehicle to the policy.) This statutory change will make this decision less important than it might otherwise have been.

UM CLAIM SUBJECT TO FIVE-YEAR CONTRACT (NOT TORT) STATUTE OF LIMITATIONS; POLICY PROVISION SHORTENING TIME VOID

Uptegraft v. The Home Insurance Company, et al.[436] holds that an uninsured motorist claim is

[433] 1984 OK 15, 680 P.2d 362.
[434] 1984 OK 84, 695 P.2d 1340.
[435] 2010 OK CIV APP 37, 231 P.3d 790.
[436] 1983 OK 41, 662 P.2d 681.

subject to a five-year contract statute of limitation and not the two-year tort statute of limitation and that a policy provision purporting to avoid uninsured motorist coverage where the insured's action against the tort-feasor is barred by limitation is void.

Plaintiff, insured under two UM policies, was injured in a collision. The two-year statute of limitation ran on the claim against the tort-feasor, following which the present federal court action was filed against the two UM carriers.

The Federal court certified to the Oklahoma Supreme Court the question:

> Does an injured person, by failing to commence an action against an uninsured motorist tortfeasor within the time established by 12 O.S. 1981 §95 Third, thereby discharge the injured person's insurer from liability upon its uninsured motorist insurance policy?

The Supreme Court answered "no," in an opinion by Justice Opala. Further, the Court held as void a provision in one of the insurance policies:

> The Company shall not be obligated to pay under this insurance if an action against the uninsured motorist is barred by the Statute of Limitations.

The language of the UM statute and policy that the insured must be "legally entitled to recover" does not preclude recovery under the UM policy where the tort-feasor is no longer liable because of the running of the two-year statute. The action on the UM policy is a *contract* action, covered by the five-year statute of limitation.

The policy provision purporting to preclude recovery where limitations have run against the tort-feasor is an impermissible restriction on recovery, contrary to 15 O.S. 1981 §216[437] and the Oklahoma Constitution, Article 23, §9.[438]

The Court distinguishes *Porter v. MFA.*[439] That case holds that the insured's affirmative act of settling with the tort-feasor destroys subrogation rights and, therefore, bars recovery. The insurance company has a right under the standard UM policy to demand that the insured sue the tort-feasor within the limitations period.

NO FACT QUESTION BUT WHAT INSURED, RATHER THAN HIT-AND-RUN MOTORIST CAUSED WRECK SO INSURED NOT ENTITLED TO UM

Vincent v. Tri-State Ins. Co.[440] holds that no fact question existed whether an identified, adequately insured motorist or a hit-and-run motorist caused a wreck, so that the insured could

---

[437] Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his right under the contract by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void.
[438] 1982 OK 23, 643 P.2d 302.
[439] 1988 OK 85, 764 P.2d 1331.
[440] 1994 OK CIV APP 24, 874 P.2d 65.

not recover UM benefits.

The insured, driving his employer's truck, was run off the road by a blue car. He identified the particular car as one stopped at the scene when he was extricated from the wreck and sued the company which owned that car. However, during trial preparation, an eyewitness gave a statement that the car which the insured had identified as the responsible car was not at the scene until after the wreck. All agreed that the blue car which the insured identified had sufficient insurance.

In light of the statement from the eyewitness, the insured settled with the company he had sued and filed another suit against the employer's UM carrier. The trial court granted the UM carrier summary judgment, holding as a matter of law that the uncontroverted evidence was that the insured vehicle, not the hit-and-run vehicle, had caused the wreck. The Court of Appeals affirmed, in an opinion by Judge Adams.

Judge Hansen concurred in result. She would hold that, having settled with the insured, claimed tort-feasor was estopped to claim the hit-and-run was the true tort-feasor.

This is a very fact-specific opinion. It has less to do with uninsured motorist law than with the procedural issue of how much evidence must there be before a judge may grant summary judgment.

UM EXCLUSION FOR OCCUPYING A VEHICLE OWNED BY OR REGULARLY FURNISHED FOR THE INSURED'S USE VIOLATES PUBLIC POLICY AS APPLIED TO AN INSURED WHO HAD NO OPPORTUNITY TO BUY UM; NOT BAD FAITH FOR UM CARRIER TO HAVE SUCH AN EXCLUSION DUE TO REASONABLE BASIS FOR BELIEVING IT WAS VALID

Vickers v. Progressive Northern Insurance Company[441] holds a UM exclusion providing there will be no coverage when the insured is occupying a vehicle owned by or furnished for the regular use of the insured is void as violative of public policy as applied to an insured who had no opportunity to buy UM coverage but that a UM carrier was not in bad faith for having such a provision in its policy and denying a claim on the basis of the exclusion because the UM carrier had a good faith basis for believing the exclusion was valid.

Vickers' father's company (an LLC) owned a vehicle he was driving when he was injured by a motorist who had minimum (25/50) limits. The vehicle being occupied was insured by Hanover for liability but not for UM. Vickers' father, with whom Vickers lived, also had personal vehicles insured by Progressive for $100,000/300,000 UM. The Progressive policy had an exclusion recommended to Progressive by Progressive's counsel in the case which purported to limit UM coverage to minimum compulsory insurance law limits (25/50) for an insured injured while occupying a vehicle owned by or furnished for the regular use of the insured but not covered by UM. Progressive denied coverage in excess of $25,000 on the basis of that exclusion.

Vickers sued on the policy and for bad faith. The parties filed Cross-motions for summary judgment. The Court, Judge Terry Kern, in the Northern District, overruled Progressive's motion

[441] 353 F. Supp. 3d 1153 (N.D. Okla. 2018).

for summary judgment that there was no coverage and sustained Vickers' motion that there was coverage but granted Progressive summary judgment that it was not in bad faith.

The exclusion for occupying a vehicle owed by the insured was declared invalid in *Cothren v. Emcasco*.[442] The Oklahoma Legislature in 2004 responded with an amendment now found in 36 O.S. Sec.3636E providing that there is no coverage when the insured is occupying a vehicle owned by or regularly furnished for the use of the insured but only "if such motor vehicle is not insured by a motor vehicle insurance policy." The Oklahoma Court of Civil Appeals appears to have misread the amendment in *Conner v. Am. Commerce Ins. Co*.[443] to say it applies even where the vehicle being occupied has insurance but no UM. It approved denying coverage to an insured who was occupying a motorcycle which had liability but no UM. This is the decision on which Judge Kern seems to have relied.

However, he also cites *Morris v. Am. First Ins Co*.[444] There, the insured had liability coverage on his commercial truck he was occupying but no UM. He was, however, covered for UM because he was a member of his mother's household and she had UM. The Oklahoma Supreme Court held this satisfied the *Conner* requirement that the vehicle have UM so the UM on his car policy, which had the exclusion like the present one, provided coverage. The present opinion says *Morris* "held that the phrase 'motor vehicle insurance policy' meant "uninsured motorist coverage." That's just not what *Morris* held!

The closest *Morris* gets to addressing the general issue is:

> ¶15 Subsection (E) of § 3636 provides that "there is no coverage for any insured while occupying a motor vehicle owned by . . . a resident relative of the named insured, if such vehicle is not insured by a motor vehicle insurance policy." Although subsection (E) does not specifically mention uninsured motorist coverage, the holding of the *Conner* court is consistent with the reasoning in *Shepard [v. Farmers]*.
>
> ¶16 In the *Shepard* case the United States District Court for the Western District of Oklahoma submitted a certified question that asked whether a clause in an insurance contract was unconscionable or against public policy as expressed in Oklahoma's Uninsured Motorist Act, which denied coverage for a relative of the insured living in the same household because that relative or the relative's spouse owned an automobile. The Court observed that "Since uninsured motorist coverage is mandatory unless waived, the presumption exists that one who owns an automobile has recourse to some uninsured motorist benefits" and held that "the exclusionary language [is] consistent with sound principles of contract and insurance law and valid as measured by the relevant statutory mandates of the Oklahoma Uninsured Motorist Act." *Shepard*, 1983 OK 103, ¶ 9, 678 P.2d at 253.
>
> ¶17 The *Conner* case holds that where a resident relative of a named insured insures

[442] 1976 OK 137, 555 P.2d 1037.
[443] 2009 OK CIV APP 61, 216 P.3d 850,851.
[444] 2010 OK 35, 240 P.3d 661, 664.

> his vehicle with liability insurance, but rejects uninsured motorist coverage, then an insurance company, with the proper exclusion, may preclude UM coverage from extending to such a vehicle.

While the Court did not get there in a correct way, it certainly reached the correct result that the exclusion is invalid as applied. It is just that his reasoning makes the case a less broad ruling than it should be.

As to the bad faith claim, the Court not surprisingly held that the insurance company had a basis for a good faith belief its exclusion was a valid one, so he granted Progressive summary judgment on the bad faith claim.

UM, MED-PAY COVERAGE NOT APPLICABLE TO SHOOTING OUTSIDE CAR

Walker v. Farmers Ins. Co., Inc.[445] holds that UM coverage does not apply when the tort-feasor vehicle is not sufficiently connected to the insured's injury, and that med-pay coverage does not apply when the insured is shot outside his car.

Barry Walker and Wayne Enloe were neighbors harboring animosity toward each other because of a property dispute. Walker took his daughter to church and had parked in front of the church when his van was struck broadside by a pickup truck driven by Mr. Enloe's son, Perry. The son had been following Mr. Enloe. Mr. Enloe stopped, got out of his truck, went to his son's truck, got a gun, and shot into Walker's van. Walker got out of his van and started running down the street. Enloe chased Walker, firing several rounds, until he hit Walker, taking him to his hands and knees. Enloe then walked to within ten feet of Walker and shot him in the head, killing him. Enloe was charged with first degree murder, but found not guilty by reason of insanity.

Enloe had no insurance. Walker had UM and med-pay coverage with Farmers. Farmers denied the coverage. The trial court granted Farmers summary judgment. The 10th Circuit Court of Appeals affirmed, in an opinion by Judge Tacha. The Court of Appeals held that UM coverage did not apply to Enloe's actions because at the time of the shooting, Wayne Enloe was not using his car for a transportation purpose and because Enloe's actions were a supervening cause that severed any causal connection between Enloe's use of his truck and Walker's death.

Walker's medical payments coverage did not apply because Mr. Walker was not occupying his van at the time of his injury.

The Court applied the Oklahoma Supreme Court's four-part "*Safeco* test"[446] for determining whether uninsured motorist coverage applied to Mr. Walker's injury.

> 1. Does the injury arise out of the use of the motor vehicle as contemplated by 36 O.S.A. §3636?
>
> 2. If the injury arose out of the use of the motor vehicle, was there a causal

[445] 83 F.3d 349 (10th Cir.1996).
[446] 83 F.3d 349 (10th Cir.1996).

connection between the use of the vehicle and the injury?

a. Is the use of the vehicle connected to the injury, and

b. Is that use related to the transportation nature of the vehicle?

3. If the causal connection existed, did an intervening force sever the causal connection?

4. Was the insured an owner or operator of the vehicle during the commission of the wrongful act?[447]

If the facts establish that a car or any part of a car is the dangerous instrument that begins the chain of events leading to the injury, then the injury arises out of the use of the car. The court held that broadly applied, Wayne and Perry Enloe's use of their trucks could have started the chain of events.

Therefore, the first step of the four-part test is met. The next step requires a connection between the transportation use of the car and the insured's injury. Mr. Walker was shot while running down the street. Enloe was running down the street when he shot Walker. Here is where the causal connection between Enloe's actions and Walker's injury is broken. However, Perry Enloe was driving his truck at the time he ran into Mr. Walker's van. According to Wayne Enloe, the wreck is the reason he shot Walker. The court could not say as a matter of law, that there was no connection between Perry Enloe's transportation use of his truck and Walker's injury. The third step of the test is to determine whether an intervening force severed the causal connection between Perry Enloe's use of his truck and Mr. Walker's injury. The court held that Wayne Enloe's actions were an intervening force that severed Perry Enloe's connection to Mr. Walker's injury. Wayne Enloe's actions were (1) independent of Perry Enloe's actions, (2) adequate alone to result in Mr. Walker's injury, and (3) not reasonably foreseeable to Perry Enloe (in spite of the ongoing feud between Mr. Walker and Wayne Enloe.).[448]

COLLATERAL SOURCE RULE APPLIES TO UM COVERAGE TO PREVENT TORT-FEASOR'S SETOFF AGAINST INSURED'S UM BENEFITS

Weatherly v. Flourney[449] holds that a tort-feasor may not set-off damages owed the injured party by any amount the injured party receives from his/her own UM policy; even where the UM carrier pays its UM limit and waives subrogation, the insured is the real party in interest in suit against tort-feasor unless the insurance company pays its insured's entire loss and retains its subrogation interest; and the injured party did not make a double recovery where he collected UM benefits in addition to the judgment against tort-feasor.

Weatherly's wife was killed because of Flourney's negligence. Weatherly sued Flourney. A jury awarded Weatherly $203,000 in damages. Flourney filed a post-trial motion to stay execution

---

[447] 1990 OK 129, 803 P.2d 688, citing *Safeco Ins. Co. of Am. v. Sanders*, 1990 OK 129, 803 P.2d 688; and *Byus v. Mid-Century Ins. Co.*, 1996 OK 25, 912 P.2d 845.
[448] 83 F.3d 349 (10th Cir.1996), citing *Byus v. Mid-Century Ins. Co.*, 1996 OK 25, 912 P.2d 845.
[449] 1996 OK CIV APP 109, 929 P.2d 296.

and to settle the journal entry, arguing that the judgment should be reduced by the $200,000 UM benefits Weatherly received from his UM carrier. The trial court (the Honorable Jane P. Wiseman, Tulsa County) denied Flourney's motion because Flourney failed to post the required bond, and denied Flourney a credit against the judgment. Flourney appealed, arguing that the collateral source rule does not apply to UM coverage, that Weatherly was not the real party in interest (his UM carrier was), and that Weatherly received double compensation for the same tort. The Court of Appeals, Division I, affirmed the trial court.

BEFORE 1986, UM PRIMARY TO GUARANTY FUND; TORT-FEASOR PROTECTED ONLY TO LIABILITY LIMIT

Welch v. Armer[450] holds that, before the 1986 Amendment to 36 O.S. §2012, an injured insured must first exhaust his own UM coverage, before recovering against the Oklahoma Property and Casualty Insurance Guaranty Fund (Guaranty Fund) and that the insolvent liability insurance company's insured is protected against a UM subrogation claim, but only to the extent of his liability coverage with the insolvent insurer.

The tort-feasor's liability insurer became insolvent. His UM insurer contended the Guaranty Fund must pay first, on behalf of the insolvent liability insurer. The Guaranty Fund contended 36 O.S. 1981 §2012 required that the claimant exhaust his UM coverage, before presenting the claim against the Guaranty Fund. The tort-feasor contended he was protected from a subrogation claim on the part of the UM carrier by 36 O.S. §3636E, providing that the UM insurer had no subrogation rights against the insolvent insurer's insured, in excess of the proceeds of the insolvent liability insurer's assets.

After the accident, 36 O.S. §2012 (an exhaustion of claims provision) was amended to provide that the subsection requiring exhaustion of claims against other coverage, before presenting claims to the Guaranty Fund, did not apply to UM coverage.

The trial court held that the Guaranty Fund's coverage was primary and that the UM insurer had no subrogation rights against the tort-feasor. The Supreme Court affirmed in part, and reversed in part, in an opinion by Justice Doolin.

The Amendment to §2012 excluding UM coverage from the exhaustion of claims provision could not be applied retrospectively. Therefore, the injured claimant's UM coverage must be exhausted before proceeding against the Guaranty Fund.

The insolvent insurer's insured was protected from a UM subrogation claim, but only to the extent of his liability coverage with the insolvent insurer. This leaves the insured in no better and no worse condition than he would have been in had his insurer not become insolvent.

This case leaves unanswered the question whether another provision of §2012 that "the amount payable on a covered claim under this act shall be reduced by the amount of any recovery under such other insurance policy" gives the Guaranty Fund a credit or deduction from the total amount of the claim, the liability policy limit, or the statutory limit of the Guaranty Fund's liability.

[450] 1989 OK 117, 776 P.2d 847.

DEATH CLAIM GIVES RISE TO ONLY ONE "PER PERSON" LIMIT, NO MATTER HOW MANY PEOPLE SUSTAIN DAMAGE FROM THE DEATH

White v. Equity Fire & Cas. Co.[451] holds that only one "per person limit is triggered by a single death, no matter how many people sustain damage from the death.

An insured under a UM policy died, due to the negligence of an uninsured motorist. Her children and her parents survived her. Under 12 O.S. 1981 §1053, each had a right to recover damages.

The insured's survivors contended this entitled them to the "per accident" limits ($20,000 on a $10,000/20,000 policy). The insurance company contended only the "per person" limit ($10,000) was triggered, since only the one person sustained "bodily injury." The trial court agreed and granted the insurance company summary judgment.

The Court of Appeals affirmed, in an opinion by Judge Garrett. The insured's reliance on *Gleason v. City of Oklahoma City*[452] was misplaced. That case, holding that multiple claims arising from a single death triggered multiple Political Subdivision Tort Claim Act limits involved different statutory language.

Here, the pertinent statute, 36 O.S. 1981 §3636, did not provide for a recovery by the survivors separate from that of the dead person. Under 12 O.S. 1981 §3636, did not provide for a recovery by the survivors separate from that of the dead person. Under 12 O.S. 1981 §1053, the survivors have only such claim as the deceased would have had if he had survived.

The policy provided that the "per person" limit applied to "all damages for bodily injury sustained by one person in any one accident." Only one person (the decedent) sustained bodily injury, although both her parents and children sustained damage.

UM COVERAGE FOR INTENTIONAL ACTS ALLOWED

Willard v. Kelley[453] holds that an injury intentionally inflicted on an insured by an uninsured motorist may be covered under UM and med-pay coverage.

The case involved the shooting of the insured, a police officer. The officer spotted Kelley, a suspected armed robber, and gave chase in his patrol car. He cornered Kelley, drew his pistol, and exited his police car to confront and apprehend him.

Kelley, seated in his car, with the engine running and the car in gear, opened fire on the officer. He shot the officer several times, then pushed the police car out of the way with his car and fled.

Willard sought to recover his personal automobile policy's UM and medical payments coverage with Prudential. The insurer declined to pay, contending: (1) the injuries were not "accidental," as the policy required, and (2) the injuries did not arise out of the use of the vehicle, but rather arose out of the use of the gun. Prudential argued the assault with the gun constituted an

---

[451] 1991 OK CIV APP 131, 823 P.2d 953.
[452] 1983 OK CIV APP 16, 666 P.2d 786.
[453] 1990 OK 129, 803 P.2d 1124.

intervening cause, precluding the vehicle's involvement from being the cause of the injury.

The trial court granted the insured summary judgment. The Court of Appeals affirmed. The Supreme Court reversed, but remanded the case for further proceedings, in an opinion by Justice Opala.

The substantial difference between this opinion and the earlier one is that this opinion holds the question whether the injury is accidental or intentional must be addressed from the viewpoint of the insured, not the assailant. The earlier opinion did not address that issue. Rather, it concluded the injury could not be covered, since it was intentional. The earlier opinion evidently approached the question from the assailant's point of view.

One basis for the remand for trial, despite the parties' stipulation that the facts were undisputed, its the question of the insured's intent. The Court notes summary judgment is not justified unless both the facts *and* the inferences arising from the facts are undisputed. The jury could find the likelihood of injury to the officer so great that the officer's action in confronting the criminal was equal to an intentional act.

Neither this nor the original opinion address the question whether the UM statute requires an intentional act be covered. The policy in this case (as is usual) requires that the injury inflicted by the uninsured motorist be accidental. The statute (36 O.S. 1990 Supp. §3636) does not.

Arguably, the policies' requirement that the injury be accidental is an unpermitted deviation from the coverage the statute requires. The Court implies that argument would not have been successful, had it been made. The opinion refers to the public policy considerations against indemnifying an insured for the insured's intentional act, in the liability policy context.

This would have certainly been an excellent case in which to advance the argument. The officer's attempt to apprehend the criminal, even if fraught with a high likelihood of injury, may have been intentional, but it was not wrongful. It would seem the wrongful nature of the intentional act is what bars insureds from coverage for their own intentional acts.

Moving to the question whether the injury arose out of the use of the robber's vehicle, the Court adopted a causation test somewhat different from the negligence test, and an easier test to meet. The test is more thoroughly developed in the next case to be discussed. In this case, however, the Court concludes that a jury could infer the robber was using the car for transportation (to effect a getaway) and that the use of the gun was intended to effectuate that "locomotion" use of the car.

With regard to the med-pay coverage, the Court held that the officer was still "occupying" the police car when he was shot, even if he had physically left it, since the policy's definition of "occupying" included "alighting" from the vehicle. This was exactly what the officer was doing.

CAR'S USE AS AN INCINERATOR IS A SUPERVENING CAUSE AND SEVERS THE TRANSPORTATION USE FOR PURPOSES OF UM COVERAGE

Whitmire v. Mid-Continent Cas. Co.,[454] holds that UM coverage does not apply when an insured

[454] 1996 OK CIV APP 115, 928 P.2d 959.

is abducted, restrained in her car, then set on fire and burned in the car.

Whitmire's husband's former wife, Harris, entered Whitmire's home and, at gunpoint, bound Whitmire's feet and hands with tape and gagged her. Harris then forced Whitmire to get into the backseat floorboard of Whitmire's car. Harris drove Whitmire's car until she came to a bridge crossing. There, she got out of the car, put it in gear and caused it to roll down an embankment and into a tree. Harris then moved Whitmire into the driver's seat, poured gasoline over Whitmire and the car, and ignited the gasoline. Whitmire managed to get herself out of the car, but not without suffering burns over 90% of her body.

Whitmire sued Harris and got a judgment for $87,500. Whitmire then made claim for UM benefits, which Mid-Continent denied. Whitmire sued Mid-Continent for bad-faith refusal to pay UM benefits. The trial court (Honorable Bill Ed Rogers, Sequoyah County) overruled Mid-Continent's first motion for summary judgment but sustained a second one. Whitmire appealed.

The Court of Civil Appeals held that UM benefits did not apply where a car is used to incinerate the owner and not used for a transportation purpose. Any causal connection between the transportation use of the car and Whitmire's injuries was severed when Harris poured gasoline over Whitmire and her car and struck the match. The court applied the rationale of *Safeco Ins. Co. of Am. v. Sanders*[455] in reaching its decision: (1) The chain of events relating to Whitmire's injuries started in her home where she was robbed and abducted, not in the car as required by *Sanders*; (2) the car was the situs of the injuries, not the cause; (3) kidnaping Whitmire from her home and setting fire to her and her car were contrary to the transportation use of the car and severed any causal connection; and (4) Harris was not the operator of Whitmire's car when she poured gasoline over Whitmire and her car and ignited it. Judge Hansen wrote a dissenting opinion, stating that whether Harris was the operator of Whitmire's car, whether the transportation use of the car was the heart of Harris' plan to injure Whitmire, and whether Harris' transportation use of the car before she ignited it were fact questions.

PERSON FIXING A FLAT IS CONSIDERED "OCCUPYING" THE VEHICLE FOR UM PURPOSES

Wickham v. Equity Fire and Casualty Company[456] holds that "occupying" is broad enough to include a person who had searched the truck for tools, who was performing repairs to the car, and who was tightening a lugnut on a wheel.

Wickham stopped to help a driver, McClain, reattach a lost wheel to McClain's car. The two men had searched McClain's trunk for tools; Wickham had his knees on McClain's bumper to better see into the trunk. While Wickham was knelt beside the car tightening a lugnut, a car driven by Wade struck Wickham, injuring him.

Wickham and his wife sued McClain's insurer, Equity Fire and Casualty Company (Equity), asserting they were entitled to uninsured motorist coverage under McClain's policy with Equity. The trial court (Judge Donald C. Lane, Tulsa County) granted Equity's motion for summary

[455] 1990 OK 129, 803 P.2d 688.
[456] 1994 OK CIV APP 148, 889 P.2d 1258.

judgment and denied Wickham's motion to reconsider. The Court of Appeals reversed and remanded, in an opinion by Judge Carl B. Jones.

The Equity policy extended uninsured motorist coverage to "anyone occupying, with your permission, a car we insure...." The policy defined "occupying" as "in, on, getting in or on, or getting off or out of." The court referred to *Willard v. Kelley*[457] in its discussion of the interpretation of "occupying." In *Willard*, a Tulsa policeman chased a robbery suspect, exited his car, then exchanged shots with the suspect. Willard claimed med pay coverage under his automobile insurance policy that defined "occupying" as both "alighting from" and "entering into" the car. There, the Oklahoma Supreme Court held the term "occupying" broad enough to include Willard's conduct. In the case at bar, Equity argued that physical occupancy, or intent to do so, is required to occupy a vehicle. The parties stipulated that Wickham never physically occupied the interior of the vehicle, nor did he ever intend to. Wickham argued that Equity's interpretation is too narrow and that the court should adopt a "physical contact" test used by other courts. The court declined to adopt a "bright-line" test to determine occupancy, stating that such determination should be left to a case-by-case analysis based on "the circumstances of the accident, the use of the vehicle, the relevant terms of the coverage at issue, and any underlying public policy considerations." The court concluded that "occupying" was broad enough to include Wickham's conduct, stating that a broad interpretation is consistent with the public policy underpinnings of the uninsured motorist statute. The court cited cases from other jurisdictions in support of its holding, which had considered similar situations and applied similar policy provisions.[458]

EMPLOYEE MAY NOT STACK EMPLOYER'S UM COVERAGE

Widmann v. Acceptance Insurance Co.[459] holds that an employee may not stack his employer's UM coverage, even where employee owns the vehicle involved in the collision, the vehicle is insured under the employer's policy, and the employee pays for the coverage on his vehicle.

Widmann worked under a contract with Airport Express, Inc., under which he used his own van to shuttle people to and from the airport. The van was covered under a fleet policy Acceptance Insurance Co. (Acceptance) issued to Airport Express, Inc. and Express Shuttle, the named insureds. Widmann was listed as an additional insured. There were 25 vehicles, including Widmann's, listed on the policy. In exchange, Widmann paid Airport Express a weekly tariff.

---

[457] 1990 OK 129, 803 P.2d 1124.

[458] *Tata v. Nichols*, 848 S.W.2d 649 (Tenn. 1993) (plaintiff who was under the hood of another's car attaching jumper cables was "upon" the car for purposes of uninsured motorist coverage extended to persons "occupying" the car); *Martinez v. Great American Ins. Co.*, 499 So.2d 364 (La.App. 1986), rev'd in part on other grounds, 503 So.2d 1005 (La. 1987) (wrecker driver who had hooked up disabled truck to his wrecker and was standing between them to operate lift mechanism was "occupying" truck for purposes of uninsured motorist coverage); and *Pope v. Stolts*, 712 S.W.2d 434 (Mo.App. 1986) (plaintiff leaning over engine compartment of neighbor's car reaching to attach jumper cables, with stomach and knees touching the car, was "upon" the car and therefore "occupying" it for purposes of uninsured motorist coverage).

[459] 2002 OK CIV APP 118, 63 P.3d 23.

Plaintiff was injured while driving the van, in a collision with an uninsured motorist, and incurred $200,000 in medical expenses. Acceptance paid Widmann $45,000 uninsured motorist (UM) coverage in exchange for a release. Acceptance told Widmann there was only $50,000 UM available; $5,000 was paid to Widmann's passenger.

Widmann sued Acceptance alleging it falsely represented there was only $50,000 available, alleging bad faith, and seeking damages, as well as punitive damages. Widmann sought partial summary judgment that Widmann signed the release based on Acceptance's representations that only $50,000 UM was available to him.

The trial court (the Honorable Niles Jackson, Oklahoma County) overruled Widmann's motion and granted Acceptance judgment. On appeal, the Oklahoma Court of Civil Appeals (opinion by Presiding Judge Carol M. Hansen) affirmed.

Widmann was an insured under the policy because he was listed as an additional insured and because he was occupying a covered auto, as specified by the "who is an insured" policy provision. The coverage available to him, however, was that specified in the policy's Limit of Insurance provision, which limits coverage to the injured insured's pro rata share of the limits shown in the schedule or declarations applicable to the vehicle the insured was occupying at the time of the collision.

Widmann argued he was entitled to stack the UM coverage times the 25 vehicles insured because other language in the Limit of Insurance section of the policy provides the coverage will stack if bodily injury is sustained by "you or any family member." The COCA disagreed with Widmann, stating that he is not the named insured or a family member of the named insured; therefore, he is entitled only to the coverage available to those who are not named insureds but who were occupying an insured vehicle.

The COCA relied on two earlier Supreme Court decisions. *Babcock v. Adkins*,[460] which holds that a passenger in an insured vehicle who is entitled to UM coverage solely because of his passenger status, cannot stack the car owner's UM coverage. *Keel v. MFA Insurance Co.*,[461] which limits stacking to a named insured as determined by the policy. The rationale behind these holdings is that the person paying the premiums for the policies on multiple cars has a contractual relationship with the insurance company and has a legitimate expectation of benefitting from all the policies. A person entitled to coverage but who is not a named insured and who has not paid the premiums on all the policies, cannot reasonably expect the same benefit as the named insured.

Here, however, Widmann argues that he owned the vehicle, is an insured and, although he did not make payment directly to Acceptance, he did pay a premium by way of a tariff to Airport Express. Therefore, he should be a Class I insured (named insured and relative in the household). Again the COCA disagrees, stating that Widmann did not pay the premium on all 25 vehicles, and to hold that he is a named insured would be rewriting the policy, which the court will not do.

---

[460] 1984 OK 84, 695 P.2d 1340.
[461] 1976 OK 86, 553 P.2d 153.

The COCA did not address Widmann's bad faith claim because Widmann got all he was entitled only to: $45,000 of the $50,000 UM limit.

5-YEAR SOL ON UM CLAIM BEGINS TO RUN WHEN BREACH OF CONTRACT OCCURS

Wille v. GEICO Casualty Co.[462] holds that the statute of limitations on a UM claim is five years and begins to run when the breach of contract occurs, not the date of the collision.

Wille had a car wreck on May 19, 1994, caused by Bryan Rampey's negligence. Wille told GEICO on May 31, 1994, he would not file a UM claim because Rampey had adequate insurance.

In November, 1998, Wille made a UM claim under his policy with GEICO. After attempting unsuccessfully to get documentation from Wille to support his UM claim, GEICO denied the claim and closed its file. Wille contends that on March 30, 1999, he sent a detailed letter outlining his UM claim to GEICO's claims adjuster, which GEICO denied receiving.

On May 21, 1999, Wille learned for the first time the amount of Rampey's liability policy limits when Rampey offered to settle for those limits. Wille again demanded payment of his UM limit on May 24, 1999. GEICO denied the claim asserting the SOL ran May 19, 1999, five years from the date of the wreck.

Wille amended the Petition he filed against Rampey to include breach of contract and bad faith claims against GEICO. Wille then settled with Rampey for his policy limit and dismissed Rampey from the lawsuit. GEICO removed the action to federal court and moved to dismiss the lawsuit, arguing the SOL had run on the claim.

The federal district court (Honorable Frank Seay, Eastern District) certified to the Oklahoma Supreme Court the following question: "When does the five-year statute of limitations begin to run on an action by an insured against his insurer on a claim for the recovery of benefits under an uninsured/underinsured motorist insurance policy?"

The Oklahoma Supreme Court answered that the action accrues and the SOL begins to run when a breach of the insurance contract occurs, not the date of the accident. The court explained that its earlier decision in *Uptegraft v. Home Ins. Co.*[463] established that the 5-year-SOL applicable to contracts applies to UM claims. A valid UM claim and the insurance company's refusal to pay its insured constitutes a breach of contract. *Uptegraft* did not, however, establish when the SOL on a contract action begins to run.

The Supreme Court joined the majority of jurisdictions which hold that until there is a breach, there is no basis for the insured to sue on the contract. It is logical that the claim accrues and the SOL begins to run with the breach, rather than the date of the wreck.

Justice Kauger wrote for the majority, joined by Chief Justice Summers and Justices Hodges,

[462] 2000 OK 10, 2 P.3d 888.
[463] 1983 OK 41, 662 P.2d 681.

Watt, and Boudreau. Justice Opala wrote a dissent, joined by Justices Hargrave and Lavender. Justice Opala believes the SOL should begin to run on the date of the wreck. That is the point at which the UM carrier's duty of indemnity accrues.

MURDER IN CAR NOT COVERED UNDER UM

Williams v. Preferred Risk Group Ins. Co.[464] holds that a murder of the insured driver of a car by a passenger in the car was not covered by UM.

A front seat passenger committed an assault and battery on the insured driver and killed him. (Very little of the facts are given in the opinion.) The trial court held neither the uninsured motorist (UM) nor the medical payments coverage applied and granted summary judgment for the insurance company. The Court of Appeals affirmed as to the UM but reversed as to medical payments coverage, in an opinion by Judge Hunter.

The Court of Appeals followed the analysis of the Supreme Court in *Safeco Ins. Co. of Am. v.*

Sanders.[465] There was no causal connection between the use of the car for a transportation purpose and the insured's death.

Apparently, the Court concluded that the medical payments coverage was payable so long as the insured was injured in the car. The Court remanded for a factual determination as to the amount due under the med pay.

INSURED CAN STACK UM WHERE PREMIUM PAID ON MULTICAR POLICY WAS THE EQUIVALENT OF SEPARATE PREMIUMS; INSURER NOT REQUIRED TO OFFER STACKING ON MULTICAR POLICIES

Wilson v. Allstate Ins. Co.[466] holds that where an insurance company charges the equivalent of separate premiums for UM coverage under a multicar policy, it is required to stack the UM coverage but is not required to offer UM which could be stacked.

Allstate issued what it called a single premium policy, covering two cars. However, Allstate had a "two-tier" premium scheme, under which it cost more to insure two or more cars than to insure only one car. Wilson claimed this, along with the fact that Allstate did not offer UM coverage which could be stacked, entitled her to stack the coverage. The trial court ordered the coverage stacked, granting summary judgment for the insured.

The Supreme Court, in an opinion by Justice Watt, reversed. The Court rejected the argument that Allstate must stack because Allstate failed to offer UM coverage that could be stacked, as

[464] 1993 OK CIV APP 193, 867 P.2d 485.
[465] 1990 OK 129, 803 P.2d 688.
[466] 1996 OK 22, 912 P.2d 345.

required by *Scott v. Cimarron Ins. Co.*[467] The Court did not overrule *Scott*. It just did not follow it.

However, the Court did hold that charging a larger premium for insuring multiple vehicles than for insuring a single vehicle constituted charging a multiple premium, which required stacking.

NO UM SUBROGATION AGAINST UM, EVEN IF UM IS EMPLOYER'S

Wise v. Wollery holds a Workers' Compensation insurer had no subrogation right against a workers' UM claim, even though the claim was against the employer's UM.

Wise was injured on the job, while driving his employer's car. He recovered Workers' Compensation and then sued the adverse driver and his employer's car insurance company, for UM. He settled that claim. The UM carrier (the State Insurance Fund) moved for apportionment, claiming it was entitled to subrogation for what it paid in Workers' Compensation against the UM claim.

The trial court (Judge Niles Jackson, in Oklahoma County) held there was subrogation. The Court of Appeals reversed, in an opinion by Chief Judge Garrett.

Judge Jackson refused to follow *Thrasher v. Act-Fast Labor Pool, Inc.,* in which the Supreme Court held there was no Workers' Compensation subrogation against UM coverage. He distinguished *Thrasher* because there the claim was against a co-employee's UM coverage while here, it was against the employer's UM. The Court of Appeals refused to follow that distinction, holding that *Thrasher* compelled a finding there was no Workers' Compensation subrogation against UM coverage, no matter whose it was.

WHEN A NEW VEHICLE IS ADDED TO A POLICY, IT CONSTITUTES A NEW POLICY AND THE INSURANCE COMPANY IS REQUIRED TO OFFER UM COVERAGE, BUT THE COVERAGE DOES NOT HAVE TO BE STACKABLE

In *Withrow v. Pickard,*[468] Withrow added a car to his policy, which provided UM for the new car, but he did not pay an additional premium. Coverage can be stacked only where separate premiums were paid for each vehicle, or where there are separate policies and separate premiums paid for each policy.[469] The Oklahoma Supreme Court again held that the UM statute does not require stackable coverage. However, again, the insured was given pre-contract notification of both his options with respect to UM coverage and a clear pre-contract statement by the company that: (1) the company charged only a single premium for UM coverage regardless of the number of cars covered under the policy; and (2) the company therefore limited its coverage on a per

[467] 1989 OK 26, 774 P.2d 456. It is significant that the insured did have the option of increasing coverage under the "limit of liability" clause . . . .we think that a clause limiting the liability of an insurer to single uninsured motorist coverage when multiple automobiles are insured would be void and unenforceable as against public policy if the contract did not clearly show that it was the insured's intent to agree to such a limitation."

[468] 1995 OK 120, 905 P.2d 800.

[469] Citing *Kinder v. Oklahoma Farmers Union Mut. Ins. Co.*, 1991 OK CIV APP 53, 813, P.2d 546, 548.

policy basis. In Withrow, the pre-contract notification took the form of a notice in the insurance application, signed by the insured, declaring that the insured:

> selected the desired UM coverage: ... with the full understanding that, regardless of the number of vehicles described in this policy, only one premium is charged for Uninsured Motorist Coverage and therefore only one limit of protection applies to any claim arising out of any one accident to which this coverage is applicable.[470]

Later, that insured added a third car to the coverage. While the company failed to obtain a new signed statutory UM acceptance/rejection form from the insured, it did obtain a signed "endorsement form" from its insured that contained language explaining Oklahoma's UM options. The Withrow insured argued that the addition of a third car resulted in a new policy being written for which the company should have offered stackable coverage–the failure to offer or obtain rejection of such coverage imputed stackable coverage by law. The Court disagreed, saying the "rationale underlying [its] decisions regarding stacking of UM coverage" was clarified in *Scott:*

> "[t]here, ... [t]he *application form* clearly apprised the insured that he would be charged only one premium for UM coverage regardless of the number of vehicles insured under the policy and that the insurer intended that there be only one UM limit entitlement."[471]

Withrow backed off *Scott's* intimation that every insurance company offering auto coverage in Oklahoma must offer stackable UM. *Withrow* did not, however, retreat from *Scott's* rule that the limit of liability clause relied upon by Defendant here "would be void as against public policy if the contract did not clearly show that it was the *insured's intent* to agree to such a limitation."[472] The *Withrow* Court called this statement the "cautionary declaration" found in *Scott*.[473] The policy at issue in *Withrow* only succeeded in precluding stacking because it did not raise that "public policy concern." This was so because in both *Scott* and *Withrow,* the insurance contract was *preceded* by a statement from the insurance company clearly expressing its intent to limit coverage on a per policy basis. That statement was acknowledged by the insured's signature, pre-contract, indicating the insured understood the limiting language that would later be found in the policy and acknowledging that the insured intended to accept that limitation.

HOSPITAL LIEN ATTACHES TO UM RECOVERY

Woods v. Baptist Medical Center of Oklahoma, Inc.[474] held that a hospital lien attaches to a UM

---

[470] *Id.* at 801.
[471] *Id.* at 804(emphasis added).
[472] *Scott v. Cimarron Ins. Co.*, 1989 OK 26, 774 P.2d 456, FN3(emphasis in original).
[473] *Withrow* actually discussed two "cautionary declarations" found in *Scott*. The first, the "choice factor," is considered problematic because the opinion did not disclose the liability limits offered to the insured, it may have been that the limits offered gave the insured the option of a limit equivalent to the total of the individual limits on each of the four vehicles covered added together.
[474] 1995 OK CIV APP 13, 890 P.2d 1367.

recovery. Reversed by *Kratz v. Kratz*.[475]

[475] 1995 OK 63, 905 P.2d 753.

VII. SAMPLE UNINSURED MOTORIST PLEADINGS AND UM STATUTE

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

CANDACE LANCOUR AND MANDI K. LANCOUR, Minors, by their Mother and Next Friend, CANDACE LANCOUR,	)	[This Petition is single-spaced for convenience. The Rules of Civil Procedure require a Petition to be double-spaced.]
Plaintiffs,	)	
vs.	)	No. CJ-
EMMETT LEE STRATTON, EDWARD LOUIS LANCOUR, and THE AETNA CASUALTY & SURETY COMPANY,	)	
Defendants.	)	

PETITION

Plaintiffs, for claim against defendants, state:

1. On October 19, 1985, Plaintiffs were passengers in a vehicle driven by Defendant, Edward Lancour (Defendant Lancour), which collided with a vehicle driven by Defendant, Emmett Lee Stratton (Defendant Stratton) on N.E. 23rd Street near Trosper Road in Midwest City. The collision was caused by the combined negligence of Defendants Stratton and Lancour and the driver of an unknown vehicle.

2. The Aetna Casualty & Surety Company (Defendant Aetna) insured with uninsured motorist coverage the vehicle owned and driven by Defendant Lancour. Plaintiffs were insured by reason of occupying that vehicle and by reason of being residents of Defendant, Lancour's household. Defendants Lancour and Stratton were uninsured motorists and the unknown driver was a no-contact hit-and-run motorist.

3. Plaintiffs were injured, suffered, and will suffer, pain, incurred, and will incur, medical expenses, and were permanently disabled.

Wherefore, Plaintiffs pray judgment against the Defendants for an amount in excess of the amount required for diversity jurisdiction pursuant to Section 1332 of Title 28 of the United States Code.

_____

Rex Travis, OBA#9081
500 Colcord Drive
Oklahoma City, OK 73102-2279
Telephone: (405) 236-5400
Attorney for Plaintiffs

ATTORNEY'S LIEN CLAIMED

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

DALE COPE and KAY COPE,	)	[This document is single-spaced for
	)	convenience. The Rules require a
Plaintiffs,	)	Petition to be double-spaced.]
	)	
vs.	)	No. CJ-
	)	
OKLAHOMA FARM BUREAU MUTUAL	)	
INSURANCE CO. and AG SECURITY	)	
INSURANCE COMPANY,	)	
	)	
Defendants.	)	

PETITION

1. On June 14, 1987, plaintiffs' son, David Cope, was a passenger in a vehicle driven by James Wollard, which collided head-on with a vehicle driven by Steven Ray Poor on North Church Street, in Eakly, OK. As a result of both drivers' negligence in causing the collision, plaintiffs' son died and plaintiffs suffered damages, including medical and burial expense, loss of services and support, loss of companionship and love of their son, destruction of the parent-child relationship, and loss of monies expended by plaintiffs in their son's support, maintenance and education.

2. Plaintiffs were insured by defendant, Oklahoma Farm Bureau, under an automobile insurance policy, providing $50,000 per person liability coverage on four vehicles with only $10,000 per person uninsured motorist coverage.

3. Plaintiff, Dale Cope, and his business partner, Bobby Cope, were insured by defendant, AG Security Insurance Company, under an automobile liability insurance policy, providing $30,000 per occurrence liability insurance and no stated uninsured motorist coverage and covering four vehicles. Due to defendants' failure to offer plaintiffs uninsured motorist coverage equal to their liability limits, defendants have written uninsured motorist limits equal to plaintiffs liability limits on all plaintiffs' vehicles as a matter of law. The two drivers whose negligence caused the collision and the death of plaintiffs' son were uninsured.

Wherefore, plaintiffs demand judgment against defendant Oklahoma Farm Bureau Mutual Insurance Company for $200,000 and against Defendant AG Security Insurance Company for $120,000.

_____

Rex K. Travis, OBA#9081
500 Colcord Drive
Oklahoma City, OK 73102-2279
Telephone: (405) 236-5400
Attorney for Plaintiffs

ATTORNEY'S LIEN CLAIMED

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

TENNIE CALDWELL, as Personal Representative of the Estate of JACKIE B. CALDWELL, Deceased,	)	[This document is single-spaced for convenience. The FRCP requires a Complaint to be double-spaced.]
Plaintiff,	)	
vs.	)	No. CIV-
AMERICAN STATES INSURANCE CO.	)	
Defendant .	)	

COMPLAINT

Plaintiff, for cause of action against defendant, states:

1. Plaintiff is a citizen of Oklahoma, as was her decedent. Defendant is an Indiana Corporation, with its principal place of business in Indiana. The amount in controversy exceeds $75,000.

2. On September 16, 1996, Jackie Caldwell, deceased, was a passenger in an automobile driven by Jimmy R. Nunley. At the time of the accident, Jimmy R. Nunley was an underinsured motorist. At the time of the accident, Caldwell was covered by defendant's insurance policy, No. 01-35-554882-1, affording $100,000 uninsured motorist coverage. Jackie B. Caldwell, deceased, was killed in a collision which was caused by Jimmy R. Nunley's negligence.

3. Caldwell left surviving him minor children, who sustained loss of love and affection, support and parental care and guidance, and suffered grief.

Wherefore, plaintiff prays judgment against defendant for $100,000.

_____

Rex K. Travis, OBA#9081
500 Colcord Drive
Oklahoma City, OK 73102-2279
Telephone: (405) 236-5400
Attorney for Plaintiff

JURY TRIAL DEMANDED
ATTORNEY'S LIEN CLAIMED

OKLAHOMA STATUTES ANNOTATED
TITLE 36. INSURANCE
CHAPTER 1. INSURANCE CODE
ARTICLE 36. THE INSURANCE CONTRACT IN GENERAL

§ 3636. Uninsured motorist coverage

A. No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection B of this section.

B. The policy referred to in subsection A of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall be not less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47 of the Oklahoma Statutes, as the same may be hereafter amended; provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured. Policies issued, renewed or reinstated after November 1, 2014, shall not be subject to stacking or aggregation of limits unless expressly provided for by an insurance carrier. The uninsured motorist coverage shall be upon a form approved by the Insurance Commissioner as otherwise provided in the Insurance Code and may provide that the parties to the contract shall, upon demand of either, submit their differences to arbitration; provided, that if agreement by arbitration is not reached within three (3) months from date of demand, the insured may sue the tort-feasor.

C. For the purposes of this coverage the term "uninsured motor vehicle" shall include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency. For the purposes of this coverage the term "uninsured motor vehicle" shall also include an insured motor vehicle, the liability limits of which are less than the amount of the claim of the person or persons making such claim, regardless of the amount of coverage of either of the parties in relation to each other.

D. An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within one (1) year after such an accident. Nothing herein contained shall be construed to prevent any insurer from according insolvency protection under terms and conditions more favorable to its insured than is provided hereunder.

E. 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.

F. In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of such coverage, 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 against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer. Provided, however, with respect to payments made by reason of the coverage described in subsection C of this section, the insurer making such payment shall not be entitled to any right of recovery against such tort-feasor in excess of the proceeds recovered from the assets of the insolvent insurer of said tort-feasor. Provided further, that any payment made by the insured tort-feasor shall not reduce or be a credit against the total liability limits as provided in the insured's own uninsured motorist coverage. Provided further, that if a tentative agreement to settle for liability limits has been reached with an insured tort-feasor, written notice shall be given by certified mail to the uninsured motorist coverage insurer by its insured. Such written notice shall include:

1. Written documentation of pecuniary losses incurred, including copies of all medical bills; and

2. Written authorization or a court order to obtain reports from all employers and medical providers. Within sixty (60) days of receipt of this written notice, the uninsured motorist coverage insurer may substitute its payment to the insured for the tentative settlement amount. The uninsured motorist coverage insurer shall then be entitled to the insured's right of recovery to the extent of such payment and any settlement under the uninsured motorist coverage. If the uninsured motorist coverage insurer fails to pay the insured the amount of the tentative tort settlement within sixty (60) days, the uninsured motorist coverage insurer has no right to the proceeds of any settlement or judgment, as provided herein, for any amount paid under the uninsured motorist coverage.

G. A named insured or applicant shall have the right to reject uninsured motorist coverage in writing. The form signed by the insured or applicant which initially rejects coverage or selects lower limits shall remain valid for the life of the policy and the completion of a new selection form shall not be required when a renewal, reinstatement, substitute, replacement, or amended policy is issued to the same-named insured by the same insurer or any of its affiliates. Any changes to an existing policy, regardless of whether these changes create new coverage, do not create a new policy and do not require the completion of a new form.

After selection of limits, rejection, or exercise of the option not to purchase uninsured motorist coverage by a named insured or applicant for insurance, the insurer shall not be required to notify any insured in any renewal, reinstatement, substitute, amended or replacement policy as to the availability of such uninsured motorist coverage or such optional limits. Such selection, rejection, or exercise of the option not to purchase uninsured motorist coverage by a named insured or an applicant shall be valid for all insureds under the policy and shall continue until a named insured

requests in writing that the uninsured motorist coverage be added to an existing or future policy of insurance.

H. The following are effective on forms required on or after April 1, 2005. The offer of the coverage required by subsection B of this section shall be in the following form which shall be filed with and approved by the Insurance Commissioner. The form shall be provided to the proposed insured in writing separately from the application and shall read substantially as follows:

OKLAHOMA UNINSURED MOTORIST COVERAGE LAW

Oklahoma law gives you the right to buy Uninsured Motorist coverage in the same amount as your bodily injury liability coverage. THE LAW REQUIRES US TO ADVISE YOU OF THIS VALUABLE RIGHT FOR THE PROTECTION OF YOU, MEMBERS OF YOUR FAMILY, AND OTHER PEOPLE WHO MAY BE HURT WHILE RIDING IN YOUR INSURED VEHICLE. YOU SHOULD SERIOUSLY CONSIDER BUYING THIS COVERAGE IN THE SAME AMOUNT AS YOUR LIABILITY INSURANCE COVERAGE LIMIT.

Uninsured Motorist coverage, unless otherwise provided in your policy, pays for bodily injury damages to you, members of your family who live with you, and other people riding in your car who are injured by: (1) an uninsured motorist, (2) a hit-and-run motorist, or (3) an insured motorist who does not have enough liability insurance to pay for bodily injury damages to any insured person. Uninsured Motorist coverage, unless otherwise provided in your policy, protects you and family members who live with you while riding in any vehicle or while a pedestrian. THE COST OF THIS COVERAGE IS SMALL COMPARED WITH THE BENEFITS!

You may make one of four choices about Uninsured Motorist Coverage by indicating below what Uninsured Motorist coverage you want:

_____ I want the same amount of Uninsured Motorist coverage as my bodily injury liability coverage.

_____ I want minimum Uninsured Motorist coverage $ 25,000.00 per person/ $ 50,000.00 per occurrence.

_____ I want Uninsured Motorist coverage in the following amount:

$_____ per person/$_____ per occurrence.

_____ I want to reject Uninsured Motorist coverage.

THIS FORM IS NOT A PART OF YOUR POLICY AND DOES NOT PROVIDE COVERAGE.
I. The Insurance Commissioner shall approve a deviation from the form described in subsection H of this section if the form includes substantially the same information.

J. A change in the bodily injury liability coverage due to a change in the amount or limits prescribed for bodily injury or death by a policy meeting the requirements of Section 7-204 of

Title 47 of the Oklahoma Statutes shall not be considered an amendment of the bodily injury liability coverage and shall not require the completion of a new form.

K. On the first renewal on or after April 1, 2005, the insurer shall change the Uninsured Motorist coverage limits to $ 25,000.00 per person/$ 50,000.00 per occurrence and charge the corresponding premium for existing policyholders who have selected Uninsured Motorist coverage limits less than $ 25,000.00 per person/$ 50,000.00 per occurrence. At the first renewal on or after April 1, 2005, the insurer shall provide existing policyholders who have selected Uninsured Motorist coverage limits less than $ 25,000.00 per person/$ 50,000.00 per occurrence a notice of the change of their Uninsured Motorist coverage limits and that notice shall state how such policyholders may reject Uninsured Motorist coverage limits or select Uninsured Motorist coverage with limits higher than $ 25,000.00 per person/$ 50,000.00 per occurrence. No notice shall be required to existing policyholders who have rejected Uninsured Motorist coverage or have selected Uninsured Motorist coverage limits equal to or greater than $ 25,000.00 per person/$ 50,000.00 per occurrence. For purposes of this subsection an existing policyholder is a policyholder who purchased a policy from the insurer before April 1, 2005, and such policy renews on or after April 1, 2005.