UNINSURED AND UNDERINSURED MOTORIST UPDATE

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
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I. DRIVER BEWARE

According to the 2007 Illinois Crash Facts and Statistics, there were a total of 422,778 traffic crashes in Illinois in 2007. More than 90 percent of those crashes were vehicle vs. vehicle. That results in approximately 380,000 vehicles v. vehicle crashes. The total estimated cost of crashes in Illinois in 2007 was $11.5 billion dollars. Fatal accidents were estimated to cost $1.2 million dollars per accident. Non-fatal incapacitating injuries had an average estimated cost of $64,400 while non-incapacitating injuries had an average estimated cost of $20,900.

In a 2008 study by the Insurance Research Council, the estimated percentage of uninsured motorists in Illinois in 2007 was 15 percent. Using the vehicle v. vehicle statistics noted above, that would result in an estimated 57,000 vehicle v. vehicle crashes where an uninsured motorist was involved. Due to the current state of the economy, that percentage is expected to rise.

II. A BRIEF HISTORY OF ILLINOIS UM/UIM LEGISLATION

Statistics such as these underscore the need for responsible motorists to carry insurance. In 1970, the General Assembly passed the Illinois Safety and Family Financial Responsibility Law. 625 ILCS 5/7-201 et seq. It requires Illinois motorists to maintain minimum liability limits in the amount of $20,000 for bodily injury or death of a person per accident, and $40,000 total per accident. It also requires minimum limits of $15,000 for property damage. Regardless of the penalties and risks involved, a significant number of Illinois motorists remain uninsured. In recognition of this risk, the Insurance Code requires insurers to offer their insured customers coverage against uninsured drivers (UM coverage) in the same minimum amounts as dictated by the Illinois Safety and Family Financial Responsibility Law. 215 ILCS 5/143a(1). Further, the Illinois Insurance Code also requires insurers to offer underinsured motorist coverage (UIM) as well as uninsured motorist coverage in the same amount as the insurance purchaser shows for their liability coverage. 215 ILCS 5/143a-2(1). For instance, if a customer chose $100,000 per person, $500,000 per accident primary coverage, the insurer would have to offer those same limits for UM and UIM coverage. This coverage must be offered, but does not have to be accepted by the insurance purchaser. In the event the customer does not wish to purchase UM or UIM coverage, the Insurance Code requires that they must do so in writing. 215 ILCS 143a-2(2).

If an insured driver with $100,000/$500,000 UM and UIM coverage has an accident with an uninsured at-fault driver, the insured driver submits claims to his/her own insurance for reimbursement under his/her uninsured motorist coverage. If, however, the at-fault driver carried the minimum $20,000/$40,000 policy, and the non-fault driver had injuries in excess of $20,000, he/she would then make a claim under his/her UIM coverage. Amounts paid by the at-fault driver would be set-off against any claim under the UIM coverage. 215 ILCS 5/143a-2(4).
Any dispute between the insured and the insurer must be submitted to arbitration. 215 ILCS 5/143a(1).

III. RECENT CASES DEALING WITH UM/UIM CLAIMS

A. Set-Off: Workers’ Compensation Benefits in Connection with Uninsured Motorist Coverage – the Illinois Supreme Court Speaks

Taylor v. Pekin Ins. Co., 231 Ill. 2d 390, 899 N.E.2d 251, 326 Ill. Dec. 34 (2008) – This case was discussed at last year’s conference by Keith Fruehling in his Uninsured/Underinsured Motorist Update. The case came to the Illinois Supreme Court from the Fifth District Court of Appeals. Here, the Supreme Court reversed the Fifth District and affirmed the Madison County Court’s decision.

Mr. Taylor was an employee of Herr Funeral Home. Herr had insured its business’ vehicles with Pekin Insurance Company and also procured from Pekin its workers’ compensation insurance. Mr. Taylor was driving a Herr vehicle in the scope of his employment, when he was struck by an uninsured motorist. As a result of the accident, Taylor was awarded workers’ compensation benefits totaling $162,588.33. Taylor then pursued an uninsured motorist claim under Herr’s vehicle insurance. An arbitration award of $250,000 was obtained by Taylor. Pekin tendered a check in the amount of $87,412 claiming a full credit for the workers’ compensation benefits. Taylor cried foul and filed a complaint for declaratory judgment alleging he was entitled to statutory attorney’s fees for recovery of the workers’ compensation lien. Pekin responded with a motion to dismiss, which was granted. Taylor appealed, seeking to be compensated for attorney’s fees pursuant to section 5(b) of the Illinois Workers’ Compensation Act. 820 ILCS 305/5(b). Section 5(b) requires an employer or its carrier to pay an attorney 25 percent of the gross amount recovered pursuant to the workers’ compensation lien.

On appeal to the Fifth District, Taylor argued that the trial court incorrectly interpreted the language of the insurance contract, overlooked public policy and contradicted the intent of the Illinois Insurance Code in granting the motion to dismiss. Pekin countered by arguing that section 5(b) of the Workers’ Compensation Act should not be applicable because “it applies only where there is recovery from a third-party tortfeasor, not the first party uninsured motorist claim herein at issue.” Taylor v. Pekin Ins. Co., 376 Ill. App. 3d 834, 837, 876 N.E.2d 1048, 315 Ill. Dec. 458 (5th Dist. 2007).

In deciding in favor of Taylor, the Appellate Court quoted section 5(b) of the Illinois Workers’ Compensation Act at length. The Appellate Court addressed the defendant’s assertion that section 5(b) applied only in cases involving recovery from a third-party tortfeasor, not pursuant to a first-party uninsured motorist claim. The Court explained that the policy identified “Workers’ Compensation Law” as a statutory basis for calculating the available set-off. The Court further noted that “Workers’ Compensation Law” includes section 5(b) of the Workers’ Compensation Act, “which sets forth the terms and conditions for calculating the workers’ compensation lien
and requires a 25 percent reduction for the payment of the attorneys fees.” The Court concluded that “defendants should not be allowed to pick and choose which portions of the policy are applicable.” Id. at 841.

It is noteworthy that Justice Donovan of the Fifth District dissented, arguing that plaintiff was not entitled to the attorney fee because section 5(b) by its terms, was inapplicable to the facts of the case. The Illinois Supreme Court agreed. It noted that Taylor obtained recovery for his injury through his employer’s uninsured motorist coverage. No legal proceedings were undertaken against a third party responsible for the injuries. Therefore, there was no “Third party claim, action or suit” under the express language of section 5(b). The court determined “As Justice Donovan correctly noted in his dissent: ‘No monies were paid back to the workers’ compensation carrier or employer. There simply was no recovery or reimbursement triggering the reduction for 25 percent attorney’s fees under section 5(b) of the Act.’” Taylor at 231 Ill. 2d 396.

In addition, the Illinois Supreme Court determined that the Fifth District misconstrued the way the section 5(b) attorney’s fees operate. Under the Fifth District’s holding, the plaintiff would receive the additional sum of $40,467 which reflected the 25 percent paid to plaintiff’s attorney in the workers’ compensation case. This would distort the statute for two reasons. First, plaintiff is not entitled to the reimbursement for any attorney’s fees he may have incurred in his workers’ compensation case. The 25 percent fee in section 5(b) is payable to plaintiff’s attorney, based on the attorney’s services in obtaining a recovery against a third-party tortfeasor in his tort claim. Second, under the plain language of the statute, the 25 percent fee is payable to the attorney, not to the plaintiff. The second paragraph of section 5(b) contemplates a single recovery against a third party with the employee’s share of the attorney’s fees to be paid or to be based on the part he recovers and the employer share of the fee to be based on the part he recovers. While the employee’s counsel is entitled to a part of his fee from the employee and a part from the employer, the total fee is in essence a single fee based on the single recovery from the third party. Therefore, under the auto policy, Pekin was entitled to a set-off of the full amount of workers’ compensation benefits paid to plaintiff, without deducting 25 percent for attorney’s fees.

B. Does Renewal or Reinstatement of a Prior Policy Require the Insurer to Make a New Offer of Increased Underinsured Coverage Pursuant to 215 ILCS 5/143A-2?

Chatlas v. Allstate Ins. Co., 383 Ill. App. 3d 565, 892 N.E.2d 106, 322 Ill. Dec. 859 (1st Dist. 2008) – From 1980 to March 4, 2002, Ms. Chatlas maintained automobile insurance through Allstate, which was renewed on six-month intervals. During this period, Allstate offered Ms. Chatlas the opportunity to increase her underinsured coverage from $20,000 to an amount equal to her policy’s bodily injury liability limit of $250,000 as required by 215 ILCS 5/143a-2; however, Ms. Chatlas rejected all four offers. On March 4, 2002, Ms. Chatlas contacted Allstate and cancelled her policy; however, she called Allstate back two days later and requested to be insured by Allstate again. Consequently, Allstate re-issued a policy that had the same coverage limits,
vehicles and ratings as the cancelled policy, and was also at the same premium. The policy expired on the same six-month expiration date as Ms. Chatlas’ cancelled policy and did not start a new six-month period. Additionally, Ms. Chatlas was not required to complete a new application. The only difference between the March 6, 2002 policy and the cancelled policy was that it had a different policy number.

On April 15, 2003, Ms. Chatlas was involved in an automobile accident with Ms. Foster in which Ms. Chatlas incurred $13,527.85 in medical bills. Ms. Chatlas brought suit against Ms. Foster and settled the matter for $20,000 (Ms. Foster’s policy limit). Thereafter, Ms. Chatlas submitted an underinsured claim with Allstate. However, Allstate denied coverage arguing that Ms. Chatlas only had underinsured coverage for $20,000 and it would be offset by the settlement. Ms. Chatlas then filed a declaratory judgment action against Allstate seeking a declaration that she was entitled to $250,000 in underinsured coverage because the policy instituted on March 6, 2002 was a new policy and Allstate failed to offer her underinsured coverage equal to her bodily injury limits as required by 735 ILCS 5/143a-2. Allstate argued that the March 6, 2002 policy was merely a renewal or reinstatement of the prior policy and thus Allstate was not required under section 143a-2 to make a new offer of increased underinsured coverage in light of Ms. Chatlas’ previous rejections.

Both the trial court and the Appellate Court agreed that under the circumstances of this case the March 6, 2002 policy did not amount to a new policy, but was instead a renewal or reinstatement of the prior policy. Consequently, the Court held that Allstate was not obligated to contact Ms. Chatlas regarding rejection of additional underinsured coverage equal to her bodily injury limits, as set out in 735 ILCS 5/143a-2. Therefore, the Appellate Court affirmed the trial court’s granting of Allstate’s Motion for Summary Judgment and denial of Ms. Chatlas’ similar motion.

**Insurer Beware:** The court emphasized that under the facts of this case there was a renewal or reinstatement due, in part, to the two-day time span. A different set of facts could well lead to a different result.

**C. Is Your Live-In Fiancé’s Son a “Family Member” Such That He Is Entitled to UM Coverage?**

*Clayton v. Millers First Ins. Cos.*, 384 Ill. App. 3d 429, 892 N.E.2d 613, 322 Ill. Dec. 976 (5th Dist. 2008) – Steven Clayton, a minor, was a passenger in a car that was involved in a one-car accident. The driver was also a minor. Steven filed suit against the minor driver and the owner of the vehicle, the minor’s father. The driver’s father subsequently filed for bankruptcy, and Steven filed an amended complaint naming the minor’s mother as a defendant. She subsequently filed for bankruptcy. The car was uninsured.

On the date of the accident, Steven lived with his mother, Carol Clayton, and her then fiancé, Nick Gregory. Mr. Gregory submitted an affidavit claiming that Steven had lived at his residence since 1998 and that he had “nurtured, cared for, and provided for the support and upbringing of
Steven." Mr. Gregory stated his relationship with plaintiff was of a “parental nature” and that it was his understanding that plaintiff was covered by his insurance policy. Mr. Gregory had automobile insurance with uninsured motorist coverage through Millers First.

Steven notified Millers First that he was seeking compensation under the uninsured motorist coverage of the policy issued to Gregory. Millers First responded that Steven was not insured under the policy.

Millers First filed for summary judgment on its subsequent declaratory judgment action. Steven filed a response and a cross motion for summary judgment. The Bond County Court granted summary judgment to Millers First, and this appeal followed. In examining the case, the Fifth District determined that the pertinent question in the underlined declaratory judgment action was whether Steven qualified as “family member” under the terms of the Gregory policy. Under the definitions portion of the policy, it provided:

‘Family member’ means a person related to you by blood, marriage, or adoption, who was a resident of your household. This includes a ward or foster child.

Steven contended that the terms “ward” and “foster child” had several different meanings.

Many definitions of “ward” were presented to the court. The Fifth District noted that no Illinois court had directly addressed the issue of what constitutes a ward for purposes of an insurance policy held by an individual. Clayton, 384 Ill. App. 3d at 436. The court distinguished cases that previously defined the term “ward” as applied to a corporation (a nursing home resident, hit by an uninsured driver, could not make a claim under the nursing home’s uninsured motorist policy because a corporation could not have family members, but could have “wards”), or cases defining “wards of the court” (requiring a special statutory proceeding). Instead, the court turned to federal court decisions interpreting insurance policies and the definition of ward. Those cases concluded that the term ward was ambiguous. It could not be restricted to a technical, legal definition including only a person on behalf of whom a legal guardian had been appointed. Id. at 437.

The Fifth District determined that Steven had sufficiently supported a claim that he was a family member under the policy as a ward of Gregory.

**Insurer beware:** Steven had also sought sanctions under 215 ILCS 5/155 claiming that Millers First had acted vexatiously and in bad faith. The court noted that although the terms of the policy were ambiguous, Millers First had presented a bonafide dispute regarding coverage. Disputes as to whether a live-in’s children are covered under uninsured or underinsured coverages may not obtain similar results.
D. Can a Definition of an “Insured” Under UIM Coverage Be Different Than “Insured” Under the UM Coverage

_Schultz v. Illinois Farmers Ins. Co._, 387 Ill. App. 3d 622, 901 N.E.2d 957, 327 Ill. Dec. 224 (1st Dist. 2009) – This was a case of consolidated appeals involving the definition of an “insured” for purposes of both uninsured (UM) and underinsured (UIM) motorist coverage in automobile insurance policies issued by Illinois Farmers Insurance Company.

1. _Schultz v. Farmers_

Patricia Smetana was a passenger in an automobile that was being driven by Kathleen O’Connor. The automobile was owned by the Hummelbergs. The vehicle was struck by another vehicle being driven by Fotopoulos. Ms. Smetana died of her injuries. Schultz was appointed independent administrator of Smetana’s estate. Both vehicles were insured by Farmers. The Fotopoulos’ policy had liability limits of $100,000 per person and $300,000 per accident. Farmers settled with both the O’Connor and Smetana estates for $100,000 each. The Hummelberger policy had bodily injury liability, UM and UIM limits of $250,000 per person and $500,000 per accident. Farmers recognized the claim submitted by the O’Connor’s estate for UIM coverage, but denied the claim submitted by Smetana’s estate on the grounds that Smetana did not fit the definition of an insured for purposes of UIM coverage.

The Farmers’ policy defined “insured person” to include an occupant of the vehicle for purposes of UM coverage but restricted the definition in the UIM coverage to the policy holder or a family member. The trial court held that the more restrictive definition under the UIM coverage in the policy did not violate public policy or the Illinois Insurance Code and awarded summary judgment to Farmers.

2. _Farmers v. Weglarz_

In this case, Weglarz was a passenger in an automobile that was owned by her son, Krzysztof Majchrowicz (Krzysztof) and was being driven by Jolanta Majchrowicz (Jolanta). The vehicle was struck by an uninsured motorist, Kovalyz, and Weglarz was injured. The Kovalyz’s vehicle was insured by Allstate and provided UIM coverage in the amount of $25,000. The Majchrowicz vehicle was insured by Farmers and provided $50,000/$100,000 in UM and UIM coverage.

Weglarz filed a claim for UIM coverage with Farmers. It was denied on the grounds that Weglarz was not an insured as defined by the UIM endorsement to the policy. Although Weglarz was the mother of Krzysztof, the policy further defined “family member” as a resident of the household. Weglarz did not reside with Krzysztof.

Farmers filed a declaratory complaint asking for a court order confirming that it had no duty to provide UIM coverage to Weglarz. Weglarz argued that the language in the policy was ambiguous. In the UIM endorsement, the first paragraph stated that all the terms and conditions of UM coverage applied to UIM coverage. However, the final paragraph stated that the UIM
endorsement suppresses and controls anything to the contrary in the policy. The trial court agreed with Weglarz.

In finding an ambiguity in the policy, the Appellate Court referred to the language of the Illinois Insurance Code and noted that the Illinois Supreme Court had construed subsection 4 of section 143a-2 to provide that UIM coverage was mandatorily set at the amount of UM coverage that was selected and has acknowledged that the true coverages are inextricably linked in the statute. Farmers argued that the statutory provision applied only to insurance limits and not to the definition of who qualified as an insured for coverage.

The First District Appellate Court disagreed and determined that the Farmers’ policy violated Illinois law. It noted that the Illinois Supreme Court has construed subsection 4 of section 143a-2 to provide that UIM coverage is mandatorily set at the amount of UM coverage that is selected and has acknowledged that the two coverages are in inextricably linked in the statute. Farmers argued that the statutory provision applied only to insurance limits and not to the definition of who qualified as an insured for coverage. Once again the Court disagreed. It cited to Heritage Ins. Co. of American v. Phelan, 59 Ill. 2d 389, 321 N.E.2d 357 (1974), for the proposition that section 143a does not restrict the parties to an insurance contract from determining initially who will be insured under the policy, but once that determination has been made, section 143 mandates that UM coverage be extended to anyone who is an insured for purposes of liability coverage. Here, the parties had already designated who was to be an “insured” under the automobile liability policy, thus the question was whether section 143a-2(4) prohibited Farmers from denying UIM coverage. The Court found that once the parties determined who was to be an insured for purposes of UM coverage, section 143a-2(4) prohibits an insurance company from either directly or indirectly denying UIM coverage to an insured. The Court concluded that section 143a-2(4) required UM and UIM provisions are to be interpreted coextensively regarding the definition of an insured.

E. Be Careful Who You Release

Farmers Auto. Ins. Ass’n v. Wroblewski, 382 Ill. App. 3d 688, 887 N.E.2d 916, 320 Ill. Dec. 772 (1st Dist. 2008) – Mrs. Wroblewski was involved in an automobile accident with a vehicle driven by Ms. Drolet who was insured by Gallant Insurance Company at the time. Ms. Drolet died as a result of the accident. Mrs. Wroblewski initiated a personal injury against Ms. Drolet’s estate, as well as Walgreens Company given that Ms. Drolet was an employee of Walgreens and was driving in her capacity as an employee at the time of the accident.

The personal injury action resulted in a $1.25 million settlement with Walgreens and a $10,000 settlement with Ms. Drolet’s estate. Mrs. Wroblewski’s settlement involved the execution of a release, which expressly included Walgreens, as well as its “agents” and “employees.” Mrs. Wroblewski received payment from Walgreens; however, she was unable to collect the $10,000 from Gallant Insurance Company because Gallant subsequently became insolvent. Consequently, Mrs. Wroblewski filed a claim with Farmers seeking uninsured motorist coverage under her policy, which had a limit of $100,000.
Farmers filed a Complaint seeking a declaratory judgment that Mrs. Wroblewski was not entitled to uninsured motorist coverage. Farmers asserted essentially two arguments: (1) that Mrs. Wroblewski’s Walgreens release included Ms. Drolet because she was a Walgreens’ employee, and thus, Farmers was absolved of coverage; and (2) that the $100,000 uninsured policy limit had been completely offset by the $1.25 million settlement received by Mrs. Wroblewski from Walgreens. The trial court disagreed with the first argument and held that Mrs. Wroblewski’s damages would have to be adjudicated before argument number two could be addressed. An arbitration panel subsequently found in favor of Mrs. Wroblewski and assessed damages in the amount of $1.85 million. The trial court confirmed the arbitration award and entered judgment against Farmers for $100,000. Farmers appealed.

The Appellate Court found in Farmers’ favor and held that the plain and unambiguous language of Mrs. Wroblewski’s Walgreens release included a release of the claims against Ms. Drolet, an employee of Walgreens at the time of the accident. Consequently, the Appellate Court vacated the arbitration award, reversed the trial court’s decision and remanded the case for entry of judgment in Farmers favor. The Court did not address Farmers’ second argument because it was rendered moot.

F. Choice of Law Equitable Estoppel and Out of State Policy Exclusions

*United Farm Family Mut. Ins. Co. v. Frye*, 381 Ill. App. 3d 960, 887 N.E.2d 783, 320 Ill. Dec. 639 (4th Dist. 2008) – A married couple (Mr. and Mrs. Frye), Indiana residents, were traveling in Pike County, Illinois in their Indiana registered and licensed automobile, which was insured under an Indiana policy. The insurance policy contained a “household” exclusion, under which liability coverage was excluded for claims between, amongst others, insured spouses, as well as an “owned-vehicle” exclusion, under which uninsured and underinsured coverage was excluded for vehicles that were insured under the policy. In Pike County, the Frye’s were involved in an automobile accident that occurred while Mrs. Frye was driving and which resulted in both Mr. and Mrs. Frye’s death.

Over $62,000 was paid under the policy’s medical-expense and physical-damage coverage for medical expenses, death benefits and property damage; however, Mr. Frye’s estate demanded the policy limits for the liability and uninsured coverages in the policy and subsequently filed a wrongful death claim against Mrs. Frye’s estate in an attempt to secure the policy limits for liability. United Farm Family Mutual Insurance Company (Farm Bureau) filed a complaint for declaratory judgment in response, arguing that the Farm Bureau had no duty to defend or indemnify Mrs. Frye’s estate under the liability coverage due to the “household” exclusion and that the Farm Bureau did not have a duty to defend or indemnify Mrs. Frye’s estate under the uninsured coverage due to the “owned-vehicle” exclusion. Applying Indiana law pursuant to a conflict-of-law analysis using Illinois choice-of-law principles, the trial court agreed with the Farm Bureau and granted summary judgment in its favor. Mr. Frye’s estate appealed. The Appellate Court affirmed the trial court’s decision finding that Indiana law did apply to the case and that under Indiana law, unlike Illinois, owned-vehicle exclusions are legal and enforceable.
In denying Mr. Frye’s estate’s assertion that the doctrine of equitable estoppel prohibited the Farm Bureau from denying coverage in the case because the Farm Bureau undertook the defense of Mrs. Frye’s estate without a reservation of rights and failed to seek a declaratory judgment until after the estate’s initial motion to dismiss was denied, the Court explained the requirements for the application of the doctrine of equitable estoppel to prevent a denial of coverage. A court will apply the doctrine if it is later found that the insurer wrongfully denied coverage and the insurer failed to either: (1) defend the lawsuit under a reservation of rights; or (2) failed to seek a declaratory judgment that no coverage existed. The insured does not have to prove prejudice under these circumstances. However, under the circumstances where the insurer initially undertakes the defense without a reservation of rights, but later reserves the rights or files a declaratory judgment action, the insured must show he or she was prejudiced in order for the doctrine to apply. Mr. Frye’s estate failed to show prejudice, thus the doctrine was inapplicable.

G. To Stack or Not to Stack: That Is the Question

Collins v. St. Paul Mercury Ins. Co., 381 Ill. App. 3d 41, 886 N.E.2d 1035, 319 Ill. Dec. 911 (1st Dist. 2008) – Mr. Collins was an employee of Cummins-Allison Corp. and was a passenger in a Cummins’ fleet vehicle that was being driven in Illinois by another Cummins’ employee during a trip to a job related training session being held in Illinois. The Cummins’ vehicle Mr. Collins was a passenger in was registered and garaged in Illinois. While traveling to the training session in Illinois, the vehicle was struck by an underinsured motor vehicle and Mr. Collins was killed.

St. Paul Mercury Insurance Company issued a general commercial liability policy to Cummins, which included fleet auto coverage for all vehicles owned by Cummins (approximately 268). The St. Paul policy provided $1,000,000 in underinsured coverage; however, the policy contained separate underinsured endorsements for each state in which Cummins had vehicles registered, and each state’s underinsured endorsement clearly stated that it applied to vehicles which were registered and garaged within the state. Illinois’ underinsured endorsement did not provide for stacking, but Mississippi’s did.

Notwithstanding that the Cummins vehicle Mr. Collins was traveling in at the time of the accident was registered and garaged in Illinois, Mr. Collins’ estate filed a claim for underinsured benefits under the St. Paul policy and filed a complaint for declaratory judgment seeking a declaration that the Mississippi underinsured endorsement applied rather than Illinois. Part of plaintiff’s argument relied on the fact that Mr. Collins drove a company car insured under the St. Paul policy that was registered and garaged in Mississippi. Both the trial court and the Appellate Court found this irrelevant and denied the relief sought by Mr. Collins’ estate, holding that the Illinois’ underinsured endorsement applied based on the unambiguous language of the policy and the fact that the Cummins’ vehicle involved in the accident was registered and garaged in Illinois.
H. The Common Fund Doctrine

*Stephens v. Country Mutual Ins. Co.*, No. 4-08-0216, 2008 WL 5473299 (4th Dist. Dec. 31, 2008) – Stephens, a Country Mutual insured, suffered injuries caused by an automobile accident with another motorist, Heather Phares, a State Farm insured. Stephens’ attorney notified State Farm that he was representing Stephens’ interest, sought the limits of liability and was asserting an attorney’s lien on any proceeds.

Stephens had medical expenses in excess of $150,000. To partially defray those costs, he received $20,420.60 from Country under his medical pay coverage. The policy provisions entitled Country to later recover what it paid to Stephens. Country informed State Farm that it asserted a subrogation lien for the amount of their medical payments. Stephens’ attorney and Country conferred regarding the status of settlement negotiations with State Farm. In a letter confirming one such conversation, he stated: (1) Country does not intend to pursue an action against Phares; (2) Country authorized him to accept State Farm’s $50,000 settlement offer, which represented Phares’ maximum liability coverage; and (3) Stephens intended to file a claim for $50,000 under the terms of his $100,000 underinsured motorist coverage with Country. The attorney also requested that Country waive its subrogation lien for medical benefits payments.

Country acknowledged the UIM demand but refused to waive its subrogation lien. Country calculated that it owed $29,579.40 under the UIM claim. A calculation of this amount is as follows:

\[
\text{Policy limit: } 100,000 \text{ less } 50,000 \text{ paid by State Farm, less } 20,420.60 \text{ paid under the med-paid provisions.}
\]

State Farm issued its check for $50,000 naming Stephens, his attorney, and Country as payees. Country refused to endorse the check based on its subrogation claim. Stephens filed suit to adjudicate the lien. Stephens argued that under the common fund doctrine, Country was entitled to receive only 2/3 or $13,613.72, of its $20,420.60 subrogation lien. Stephens contended he was entitled to an additional $6,806.88. Country argued that Stephens was not entitled to any additional funds suggesting that it did not receive any benefit from the common fund and that the medical payment it made to Stephens was being recovered under the terms of its UIM coverage.

The Fourth District disagreed. The common fund doctrine, it reasoned, allows the attorney who creates, preserves, or increases the value of a fund in which others have ownership interest to be reimbursed from that fund for litigation expenses incurred, including attorney’s fees. The Court noted these undisputed facts:

1. Stephens sustained injuries resulting from an automobile collision with Phares;
2. Country paid $20,420.60 to Stephens under the terms of its medical payments policy;

3. Thereafter, Stephens’ attorney pursued Phares’ insurance company for damages on Stephens behalf;

4. The attorney created a $50,000 common fund as a result of his legal services; and

5. Country did not participate in the creation of that common fund.

This was not a unanimous decision. Justice Appleton dissented stating that he did not find that the common fund doctrine applied to either the medical payment or underinsured motorist benefits paid by Country. Justice Appleton reasoned that Country was not seeking reimbursement from the State Farm check, rather, it was deducting its subrogation lien from the proceeds of its own underinsured obligations to Stephens. Thus, the repayment of the $20,420.60 to Country was not from the proceeds of the settlement with the tortfeasor, but, rather, was a deduction from the underinsured motorist coverage payment fully controlled by Country and paid to plaintiff pursuant to the insurance contract. Plaintiff’s counsel, said the dissent, did nothing to create that “fund.”

Consider: If, as the dissent argues, Country was only withholding funds from its own underinsured motorist payments, why did Country refuse to endorse the $50,000 State Farm payment to Stephens.

Note: At the time these materials were prepared, this opinion had not been released for publication in the permanent law reports. Until released, it is subject to revision or withdraw.
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Doug joined the Edwardsville office of Heyl Royster in 2004. His practice includes general civil litigation including municipal, civil rights and employment litigation in both state and federal courts. With over 25 years of litigation experience, Doug has defended a broad range of clients from individuals involved in a car accident to major corporations in products liability claims.

Significant Cases

- *Longstreet v. Cottrell*, 374 Ill. App. 3d 549 (5th Dist. 2007) The estate of a deceased party cannot introduce the discovery deposition of the deceased party at trial as an exception to the hearsay rule.
- *Steelman v. City of Collinsville*, 319 Ill. App. 3d 1131 (5th Dist. 2001) The IRS’s seizure of funds being held by a municipal police department did not constitute a conversion of those funds by the department.
- *T.H.E. Insurance v. City of Alton*, 277 F.3d 802 (7th Cir. Ill. 2000) Whether a certificate of insurance can modify the language contained in the policy of insurance.
- *City of East St. Louis v. Circuit Court for the 20th Judicial Circuit, St. Clair County, IL*, 986 F.2d 1142 (7th Cir. Ill. 1998) The Federal District Court properly entered Rule 11 sanctions against Plaintiff's counsel for bringing suit against a judicial circuit.

Public Speaking

- “Casualty and Property Seminar - Premises Liability Update”
  Heyl Royster 2008
- “Current Issue in Illinois Law”
  United States Arbitration and Mediation, Midwest, Inc. 2007
- “Claims Against Governmental Agencies / Tort Immunity”
  Illinois State Bar Association 2006

Professional Associations

- Illinois State Bar Association
- St. Clair County Bar Association
- Bar Association for the Central and Southern Federal Districts of Illinois
- East St. Louis Bar Association

Court Admissions

- State Courts of Illinois
- United States District Court, Southern and Central Districts of Illinois (Trial Bar)
- United States Court of Appeals, Seventh Circuit
- United States Supreme Court

Education

- Juris Doctor, John Marshall Law School, 1983
- Bachelor of Science-Political Science, Eastern Illinois University, 1980

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