HANDLING UNINSURED MOTORIST CLAIMS

Recent Developments and Pitfalls for the Unwary

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Handling an Uninsured Motorist Claim (UM Claims is a common occurrence for the Plaintiff's lawyer who handles personal injury cases. There are, however, a number of procedural pitfalls and recent developments in this area of the law. The goals of this paper are first to discuss the cases of *Thurman v. State Farm*, *Toomer v. Allstate*, and *Allstate v. Thompson* and how they should affect your practice. Then, I wish to cover a few of the other potential pitfalls for the unwary in handling UM claims.

Generally Speaking, O.C.G.A. §33-7-11(b)(1)(D)(ii) allows an insurance company to take an offset against any UM claim the amount of liability insurance available to compensate the Plaintiff. Thus, if the Plaintiff has $25k in UM benefits and the Defendant has a $25k policy, then you ordinarily do not get to access the UM coverage. This is true under the code section unless the liability coverage is reduced "**by reason of payment of other claims or otherwise**" to an amount less than the amount of UM coverage available. Payment of other claims means other claimants from the same incident. What was not known until *Thurman* and its progeny is what the "or otherwise" meant, if anything.

Thurman, et al. v. State Farm Mutual Insurance Company 278 Ga. 162, 598 S.E. 2d 448 (2004) is a case that every Plaintiff's lawyer should know. In that case, Thurman was a federal postal carrier whose medical bills and lost wages had been paid by her federal worker's compensation carrier under the Federal Employees Compensation Act (FECA) and from the post office's heath benefits provider under the Federal Employees Health Benefits Act (FEHBA). They had a strong lien on any recovery under 5 U.S.C.A. § 8132. Significantly, this lien preempts State law and thus is not subject to any reduction under the Georgia statute and Public Policy favoring complete compensation. There was a $100,000 liability policy and $75,000 in UM benefits from State Farm. However, since Thurman had to pay the liens and only netted $60,887.87 from the

liability coverage, Thurman alleged that the liability coverage was "otherwise" reduced to a level less than the UM coverage available to her. Therefore, she argued she should get the $14,112.13 difference between what she recovered and the $75,0000 UM coverage available. The trial court granted summary judgment to State Farm and the Court of Appeals affirmed. However, the Supreme Court granted cert. and reversed holding that since the federal lien was not subject to the Georgia public policy which favors complete compensation, that Georgia law should try to mitigate the damage caused by the application of the mandatory nature of this lien. Therefore, they decided that this situation fit within the "or otherwise" language of O.C.G.A. §33-7-11(b)(1)(D)(ii) and Thurman was able to collect the $14k from State Farm.

Obviously, *Thurman* has the potential to change everything with respect to handling any sort of serious personal injury claims with UM coverage and inadequate liability limits. The question is: how broad an effect will the *Thurman* holding have? This was partially answered by *Toomer.*

Toomer v. Allstate Insurance Company, 2008 WL 2440039 (Ga. App.) was decided on June 18, 2008. In this case, Allstate filed a Motion to dismiss Toomer's case since the available liability coverage was equal to the amount of Toomer's UM coverage and thus, under O.C.G.A. §33-7-11(b)(1)(D)(ii) there should be no UM exposure. The trial court granted Allstate's Motion to Dismiss and Toomer appealed. The Court of Appeals reversed. The Court of Appeals held that because Toomer's medical bills were paid by Medicare, and since Medicare has a federal lien on the proceeds not subject to Georgia's complete compensation rule, that the liability coverage was "otherwise" reduced by whatever amount Toomer had to repay Medicare holding that the *Thurman* case controlled. Allstate argued that Toomer's situation was different since it was Medicare and not FEHBA and since Toomer was not a federal employee as Thurman was. The Court decided that these were distinctions that did not make any difference. Also, Allstate argued that there was no

proof that Toomer had to pay Medicare as there was in *Thurman* where FEHBA was paid directly out of settlement. The Court stated that since it was a Motion to dismiss, that the amount of payment was one to be determined by a trier of fact. Thus, in its first opportunity to address the *Thurman* holding, the Court of Appeals broadened its application to Medicare and repeated the justification that it was a lien not subject to the Complete Compensation rule.

From the *Toomer* expansion of *Thurman,* it seems that this principal may have broad effect and all Plaintiff's attorneys should consider whether it may apply in cases involving other liens on the recovery. It seems a certainty that Medicaid liens will similarly be held to "otherwise" reduce the available liability coverage. Also, hospital and medical provider liens may well fall under this principle as some trial courts have already held. This is true because despite being liens based in state law, they are not subject to the complete compensation rule. ERISA liens present a closer question, to me, as they are heavily plan language dependant and the default rule in the 11th Circuit is that the complete compensation rule does apply unless specifically addressed to the contrary in the plan language. Still, under the right plan language and facts, pursuing *Thurman* applicability may be a fruitful endeavor. Worker's Compensation liens will certainly not fall under *Thurman* as they are State liens subject to the complete compensation rule by statute. Also, if the Plaintiff has been "completely compensated" by the liability coverage, then there can be no valid UM claim for obvious reasons.

There is a change to the Georgia UM legislation about to go into effect that will change the nature of UM coverage. Starting on January 1, 2009, UM Coverage may stack on top of liability coverage. However, the stacking element of the coverage may be declined by the insured. Thus, if the UM coverage is stacking, the *Thurman* case becomes moot. What may also happen is that if this area of the law is still unsettled, there may be available to the defense the argument that the Plaintiff

chose to not have staking UM coverage and thus why should Plaintiff get benefit of stacking when Plaintiff rejected that coverage?

Another recent case of which Plaintiff's lawyers must be aware is that of *Allstate Insurance Company v. Thompson, et al.*, 291 Ga.App. 465, 662 S.E.2d 164 (2008). *Thompson* presents a pitfall for the unwary practitioner.

The facts are that Mr. and Mrs. Thompson were rear ended. Mr. Thompson was seriously injured and Mrs. Thompson was very modestly injured to the point that her attorney indicated that her claims were "not worth pursuing." However, they sued the tortfeasor for their injuries and for Mrs. Thompson's loss of consortium. The tortfeasor had $100,000 in liability limits and the Thompsons had $175,000 in UM applicable to the collision. The liability insurer tendered its $100,000 ostensibly for the injuries of Mr. Thompson and the Thompsons signed a limited liability release. Significantly, Mrs. Thompson signed the release "individually and as wife of" Mr. Thompson.

Allstate then filed a Motion for summary judgment contending that since wife signed the release, some portion of the money must have gone for wife's claim. Thus, the liability limits were not exhausted which is a condition precedent to obtaining coverage for the UM coverage. Thus, since some of the money must have gone to wife, husband could not make a claim against his UM carrier, Allstate. The attorney for the Thompsons submitted an affidavit explaining to the trial court that the wife's injury claim was nominal and not worth pursuing and that the money was paid for husband's claim. Trial court denied Allstate's Motion, but the Court of Appeals reversed.

The Court of Appeals said the attorney's affidavit was parole evidence and could not be considered and thus, since some of the money must have gone for wife's claims, husband was estopped from pursuing his UM claim. While I understand that this case may be headed to the

Georgia Supreme Court, it presents a cautionary tale. Be very careful about limited liability release language–especially with married clients. Be sure that the liability limits are expressly exhausted for any client for whom you wish to get underinsured motorist (UIM) benefits. I recently received a limited liability release where the $25,000 limits was paid to husband and then there was a separate release for wife and a separate check for $1. If you are inclined to resolve the loss of consortium for a nominal sum as most liability insurers request, this seems an appropriate solution. It is an open question whether this case would have been decided differently had wife not had a bodily injury claim (no matter how small) and only was signing for purposes of the loss of consortium. While it seems unlikely that a loss of consortium claim alone would render the limits not exhausted, why take the risk?

While on the topic of releases, never, ever, have your client execute a general release if you want to pursue UIM coverage. O.C.G.A. §33-7-11(a) states that UM insurers are only obligated to pay money Plaintiff is legally entitled to recover from the Defendant. See, *Darby v. Mathis*, 212 Ga.App. 444, 441 S.E. 2d 905 (1994). Always use a limited liability release under O.C.G.A. §33-24-41.1. Of course, there are pitfalls here too as exemplified by *Thompson*. However, be careful of the language. I recently had a lawyer send me a limited liability release which stated that my client was to indemnify the defendant from any and every claim that might ever be asserted against the Defendant by reason of the collision including subrogation claims by my client's UM insurer! As I was not in favor of my client having to return the money the liability carrier was paying, I objected to this language and the other attorney agreed. Always, always, read release language carefully before agreeing to it. You do not want to earn the highly undesirable title of "Defendant."

Another potential pitfall are contractual notice requirements contained in many UM policies. Always, always, do your best to obtain all UM coverage as soon as you can and put the carriers on

notice of the potential claim. For an instructive case, see *Manzi v. Cotton States Mutual Insurance Company,* 243 Ga.App. 277, 531 S.E.2d 164 (2000). There the Court of Appeals upheld a sixty (60) day notice provision where the contract called for the insured to provide notice of the incident with particulars within sixty days as a condition of coverage. Thus, even though they did not know that the liable party was uninsured until much later, the failure to provide the contractual notice was fatal to the UM claim. Similarly, a thirty (30) day notice provision on John Doe hit and run case was upheld in *Flamm v. Doe*, 167 Ga.App. 587, 307 S.E.2d 105 (1983). This will apply not only to the named insured under UM coverage, but to anyone in the vehicle who claims UM coverage.

Counsel should find ALL potential UM policies as soon as possible for several obvious reasons. These short time limits on notice provisions creates a pitfall that must be avoided. (It also provides a good reason why folks ought to seek counsel sooner rather than later.) However, it also puts counsel on notice to act quickly to find ALL potential UM coverage and provide notice of the claim as soon as possible. This also makes practical sense. UM coverages are usually stacking. You can add the policies together and see if the combined limits exceed the amount of liability coverage available. *Horace Mann Ins. Corp. v. Mercer*, 257 Ga. App. 278, 570 S.E. 2d 589 (2002). Therefore, if you have multiple insurance policies your client can access, you want to get them all as soon as you can both to put them on notice and to determine what limits you have to work with.

Another pitfall for the unwary is serving the known uninsured Defendant. If your Defendant cannot be found, you can serve the Defendant by publication. However, under O.C.G.A. §33-7-11(e), the Plaintiff still "shall have a continuing duty to exercise diligence in attempting to locate the owner or driver against whom the claim exists, but such obligation of diligence shall not extend beyond a period of 12 months following service upon the owner or driver by publication...." Ain't that grand! Naturally, no one knows (nor wants to find out) what the exact nature of the diligence

that needs to be demonstrated is. Is it sufficient to demonstrate that the Defendant has left the Country? Does asking a skip tracer to do a quick search once per month suffice? No one knows for sure, but this certainly makes me think that if the Defendant is ever found that one may wish to dismiss and refile and then perfect service quickly in order to avoid any issues under this code section (assuming you still have a dismissal available).

The last UM pitfalls I want to mention are elementary for sure. However, some Defense attorneys love to lie in the weeds on these issues. The Plaintiff has the obligation to prove that the Defendant is uninsured or under insured in order to prevail at trial. Also if the UM carrier answers in its own name, the Plaintiff must prove the UM policy at trial. Now, if the Defendant is John Doe, the lack of insurance is presumed and does not need to be proven. If not, you need to prove these issues. I find it most expedient to handle these matters via request for admissions. Normally, this will suffice or at least the Defense attorney will agree to not raise these issues once they know you know. I once had a Sharon Ware attorney respond to my Request for Admission that State Farm had "insufficient information to admit or deny" the admission regarding the existence of UM coverage with State Farm. I called him up and pointedly asked if State Farm did not know who did? He hemmed and hawed until I told him I knew I had to prove the policy and would notice some depositions of State Farm folks if I needed to. He said that since I knew I had to prove the policy, he would admit the matter. In other words, he wanted to lie in the weeds even in the face of the RFA as that was apparently his favorite way of winning at trial. Stay on top of such tactics.

Lastly, if, for any reason, you do not have a copy of Jenkins and Miller's fine book, Georgia Automobile Insurance Law published by Thomson West in your library. Buy it immediately. It will answer 99.9% of any questions you have about this technical area of the law. I find it invaluable.