

AUTO AND TORT LAW: A PRIMER (2007)

Kansas, Missouri and Illinois

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Kansas Law

1. Responsive pleading date

In the district court, a defendant has 20 days after service of the Petition and Summons to serve a responsive pleading. **K.S.A. §60-212.** The courts allow for defense attorneys to obtain a 10-day Clerk's Extension upon written request.

2. Statute of Limitations

a. Bodily Injury:

The applicable statute of limitations for personal injury is two (2) years from the date of the accident unless the fact of injury is not reasonably ascertainable until some time after the initial act. In those cases, the period of limitations does not commence until the fact of injury becomes reasonably ascertainable by the injured party. However, in no event may an action for personal injury be commenced more than ten years beyond the time of the act giving rise to the cause of action for personal injury. **K.S.A. §60-513.**

b. Loss of Consortium: Two (2) years **K.S.A. §60-513.**

c. Loss of Services: Two (2) years **K.S.A. §60-513.**

d. Property Damage: Two (2) years **K.S.A. §60-513.**

e. Persons under legal disability:

When a person entitled to bring a cause of action is a minor (less than 18 years of age), an incapacitated person or is imprisoned for a term less than such person's natural life, the person may bring the action within one year after the person's disability is removed, except that the action may not be commenced by, or on behalf of, any person under the disability more than eight (8) years after the time of the act giving rise to the cause of action. **K.S.A. §60-515(a).**

f. Tolling of statute of limitations.

The running of the statute of limitations is tolled while the defendant is absent from the state. **K.S.A. §60-517.** However, it is not tolled as to a defendant whose whereabouts are known and upon whom service of summons can be effected. ***Id.***

3. General Rule of Negligence and Comparative Fault

Kansas has adopted modified comparative fault. **K.S.A. §60-258a**. Under this doctrine a plaintiff is entitled to recover from all persons whose conduct contributed to the plaintiff's injury to any degree, as long as the plaintiff's comparative fault is less than the combined fault of all other parties. If the plaintiff's fault is less than 50%, then the amount of her total recovery is reduced in proportion to the percentage which her own conduct is found to have contributed to her injuries. If plaintiff's fault is assessed at 50% or more, she takes nothing.

Thus, suppose "P" is injured and sues "A" and "B". The jury will consider the relative fault of "P", "A" and "B". Let's say the jury finds "P" 49% at fault, "A" 30% at fault and "B" 21% at fault, and fixes "P's" total damages at \$100,000.00. "P's" total damages of \$100,000.00 will be reduced in proportion to his fault (49% or \$49,000.00). Thus, "P" will get a judgment against "A" for \$30,000, and against "B" for \$21,000, thereby totaling \$51,000.00. Suppose, however, that "P" is assessed 50% of the fault, "A" is again assessed 30% of the fault, and "B" is found 20% at fault. "P" recovers nothing since 50% or more of the fault is assessed against him.

Joint and several liability no longer exists in Kansas in comparative fault actions. Separate individual judgments are rendered against each defendant. **Hayesville U.S.D. No. 261 v. G.A.F. Corp.**, 666 P.2d 192, 199 (Kan. 1983). Under the above example, "P" can collect no more than \$30,000.00 from "A" and no more than \$21,000.00 from "B" (i.e., "P" cannot simply collect all \$51,000.00 from a "deep pocket"). Additionally, under the Kansas law of comparative fault, a defendant has a right to have the fault of all participants in an occurrence measured in one action, irrespective of whether the other participants are joined as parties or are immune from liability. **K.S.A. §60-258a(d); Hefley v. Textron, Inc.**, 713 F.2d 1487, 1496 (10th Cir. 1983). Thus, formal joinder of all participants in an occurrence as parties is not a necessary prerequisite to comparing fault and the fault of non-parties to an action may be compared to the fault of the parties to the action. Those not joined as parties or for determination of fault escape liability. **Albertson v. Volkswagenwerk Aktiengesellschaft**, 634 P.2d 1127, 1132 (Kan. 1981). Thus, under a slight modification of the above example, if the fault breakdown is "P" – 49%, "A" – 20%, "B" – 21% and non-party "C" – 10%, then "P" can only collect \$20,000.00 from "A" and \$21,000.00 from "B", and the remaining \$10,000.00 attributable to "C" is uncollectible (i.e., neither "A," "B," nor "C" are liable to pay to "P" the amount attributable to "C").

4. Number of Jurors Required to Return Verdict

In a civil matter, as opposed to a criminal matter, at least ten of the twelve jurors must agree upon the verdict. However, the parties may stipulate to try a case to less than twelve jurors, in which case all jurors must agree to the verdict. **K.S.A. § 60-248.**

5. Itemized verdict in personal injury actions

In any action for damages for personal injury, the jury's itemized verdict form must refer only to those items of damage upon which there is evidence introduced at trial. In any personal injury action, if the jury finds for the plaintiff, the jury must itemize the verdict to reflect the amounts awarded for the following items of damage: (1) noneconomic injuries and losses (including pain and suffering, disability, disfigurement and any accompanying mental anguish); (2) reasonable expenses of necessary medical care, hospitalization and treatment received; and (3) other economic injuries and losses. The above amounts must be further itemized to reflect those amounts awarded for injuries and losses sustained to date and those awarded for injuries and losses reasonably expected to be sustained in the future. **K.S.A. §60-249a.**

6. Measure of Damages (bodily injury)

The standard for evaluating the amount of damages resulting from personal injury is the amount a reasonable person would estimate to be fair compensation for the injuries sustained. ***White v. Rapid Transit Lines*, 391 P.2d 148 (Kan. 1964); *Kerns By and Through Kerns vs G.A.C., Inc.*, 875 P.2d 949 (Kan. 1994).**

7. Caps on Personal Injury Claims

In order to recover in tort for non-pecuniary damages arising out of a motor vehicle accident, the plaintiff must show that the injuries sustained required medical treatment in an amount in excess of \$2,000.00 or that such person sustained injury consisting in whole or in part of permanent disfigurement, a specific type of fracture, loss of a body member, permanent loss of bodily function or death. **K.S.A. 40-3117.** In personal injury actions, Kansas law caps awards for non-economic loss at \$250,000.00. **K.S.A. 60-19a02; *Cott v. The Peppermint Twist Mgmt. Co., Inc.*, 856 P.2d 906 (Kan. 1993).** Recovery for pain and suffering is likewise capped at \$250,000.00. **K.S.A. 60-19a01.** Finally, in wrongful death cases, non-pecuniary damages are also capped at \$250,000.00. **K.S.A. 60-1903(a).**

8. Liens (requirements and legal effect)

In Kansas, hospitals have a lien for services up to a maximum of \$5,000.00 on any money payable by reason of personal injury to an injured person as a result of the negligence of another party which is not covered by the Workmen's Compensation Act. **K.S.A. §65-406.** In order for a hospital to perfect its lien, the hospital must provide notice by filing the lien with the Clerk of the District Court and serving notice on the party causing the injury. **K.S.A. § 65-407.** A lien exceeding \$5,000.00 will only be enforceable to the extent that its enforcement constitutes an equitable distribution of any settlement or judgment under the circumstances. **K.S.A. §65-406.**

Under the statute, if an insurance carrier settles with an injured patient, his attorney or heirs as compensation for the patient's injuries, without honoring the hospital's properly filed notice of lien (or that amount of the lien that can be satisfied out of the settlement proceeds), the carrier will remain liable to the hospital for the lien amount for one year following the date of the initial settlement payment to the injured patient. **K.S.A. §65-408.** The hospital can enforce its lien through a suit at law against the insurance carrier that made the payment to the injured person. *Id.*

9. Regions with Volatile Judgments

Wyandotte (Kansas City), Sedgwick (Wichita) and Shawnee (Topeka) Counties tend to produce higher and more volatile judgments. The other large county, Johnson (Overland Park), tends to produce lower than average verdicts.

10. Financial Responsibility Law

Kansas' motor vehicle financial responsibility law makes motor vehicle liability insurance coverage mandatory. **K.S.A. §40-3104.** The policy must contain the following stated limits of liability, exclusive of interest and costs, with respect to each vehicle for which coverage is granted:

Bodily Injury - Not less than \$25,000 because of bodily injury to, or death of, one person in any one accident and, subject to the limit for one person, to a limit of not less than \$50,000 because of bodily injury to, or death of, two or more persons in any one accident;

Property Damage - Not less than \$10,000 because of harm to or destruction of property of others in any one accident.

K.S.A. §40-3107(e). There are some limitations and exemptions which may need to be considered depending on the facts.

11. Uninsured/Underinsured Motorist Law

Kansas law makes uninsured and underinsured motorist coverage mandatory. **K.S.A. § 40-284.** However, the insured named in the policy has the right to reject, in writing, the uninsured motorist coverage required by **K.S.A. §40-284 (a) and (b)** which is in excess of the mandatory minimum limits for bodily injury or death. **K.S.A. §40-284(c).** If there is such a rejection by an insured named in the policy, it will be construed as a rejection on behalf of all of the parties insured by the policy. Additionally, unless the insured named in the policy requests such coverage in writing, such coverage need not be provided in any subsequent policy issued by the same insurer of motor vehicles owned by the named insured.

If a policy is issued for delivery in Kansas, it must comply with the Kansas statutory provisions. If no uninsured motorist coverage is mentioned or provided for in such policy, it is deemed to conform to the statutes and will be construed to provide uninsured motorist and underinsured motorist coverage to the extent of the minimum liability limits required by statute. *See, K.S.A. §40-3107(g); Universal Underwriters Ins. Co. v. Hill, 24 Kan. App. 2d 943 (1998).*

Physical contact of a phantom vehicle is not required. **K.S.A. §40-284(e)(3)** provides that an insurer may provide an exclusion or limitation of coverage when there is no evidence of physical contact with the uninsured motor vehicle and when there is no reliable competent evidence to prove the facts of the accident from a disinterested witness not making a claim under the policy.

12. Stacking Uninsured/Underinsured Motorist Coverage

Anti-stacking clauses in both uninsured and underinsured motorist policies are valid in Kansas. **K.S.A. 40-284(d)** provides:

Coverage under the policy shall be limited to the extent that the total limits available cannot exceed the highest limits of any single applicable policy, regardless of the number of policies involved, persons covered, claims made, vehicles or premiums shown on the policy or premiums paid or vehicles involved in an accident.

If multiple applicable policies contain such coverage, the claimant has the right to chose the applicable policy with the most coverage. *Eidemiller v. State Farm Mut.*

Auto Ins. Co., 261 Kan. 711 (1997); *Farmers Ins. Co., Inc. v. Gilbert*, 791 P.2d 742 (Kan. App. 1990).

13. Personal Injury Protection

Kansas makes personal injury protection benefits mandatory by statute. *See*, **K.S.A. § 40-3109**. "Personal injury protection benefits" mean disability benefits, funeral benefits, medical benefits, rehabilitation benefits, substitution benefits, and survivors' benefits which are required to be provided in motor vehicle liability insurance policies. *See*, **K.S.A. § 40-3103(q)**. An insured can contract to have higher personal protection injury (PIP) benefits than the statutory requirements, but by statute, an automobile liability insurance policy must meet the following statutory minimum PIP benefit limits:

- a. Disability benefits - An insured can obtain up to a limit of \$900.00 per month in disability benefits, not to exceed one year after the date the injured person becomes unable to engage in available and appropriate gainful activity.
- b. Funeral benefits - An insured can obtain allowances for funeral, burial or cremation expenses in an amount not to exceed \$2,000.00 per individual.
- c. Medical benefits - An insured can obtain reasonable expenses for medical care up to a limit of \$4,500.00 for necessary health care rendered by practitioners licensed by the board of healing arts or licensed psychologists and for surgical, x-ray, and dental services.
- d. Rehabilitation benefits - An insured can obtain rehabilitation benefits for all reasonable expenses up to a limit of \$4,500.00 for necessary psychiatric services, occupational therapy and such other occupational training and re-training as may be reasonably necessary to enable the injured person to obtain suitable employment.
- e. Substitution benefits - An insured can obtain appropriate and reasonable expenses incurred in obtaining other ordinary and necessary services in lieu of those that, but for the injury, the injured person would have performed for the benefit of such person or such person's family subject to a maximum of \$25.00 per day for not longer than 365 days after the date such expenses are incurred.

- f. Survivors' benefits - An insured can obtain survivors' benefits up to a maximum of not less than \$900.00 per month and also "substitution benefits" following an injured person's death. Survivors' benefits shall not be paid for more than one year after the injured person's death. *See, K.S.A. § 40-3107 (f); §40-3103.*

14. Measure of Damages (property damage/loss of use)

The general rule for recovery for automobile damage is that such recovery is limited to the cost of repair. Additional damages may be awarded for diminution in value because of the vehicle's involvement in the accident. *Boyd Motors, Inc. v. Employers Ins. of Wausau*, 670 F.Supp. 310, reversed 880 F.2d 270 (D. Kan. 1987); *see also, Dodson Aviation, Inc. v. Rollins Burdick, Hunter of Kansas, Inc.*, 15 Kan. App. 2d 314 (1991). However, this total amount may not exceed the value of the property before the damage was incurred. *Nolan v. Auto Transportation*, 597 P.2d 614 (Kan. 1979); *Kotapish v. Arganbright*, 1992 Kan. App. LEXIS 239. In other words, where the automobile cannot be restored to its former condition, the measure of damages is the difference between its fair market value immediately before and immediately after the collision. *Southwest Bus. Sys. v. Western KS XPress*, 878 P.2d 833 (Kan.App. 1994).

The amount recoverable for loss of use of an automobile is limited to the period reasonably necessary to complete repair of the vehicle but may not exceed the value of the vehicle before it was damaged. *See also, Dodson Aviation, Inc. v. Rollins Burdick, Hunter of Kansas, Inc.*, 15 Kan. App. 2d 314 (1991); *Venable v. Import Volkswagen, Inc.*, 519 P.2d 667 (Kan. 1974). The actual measure of damages for loss of use is the reasonable rental expense of temporarily replacing the vehicle for the period during which it was being repaired. *Nolan v. Auto Transporters*, 597 P.2d 614 (Kan. 1979).

15. Subrogation

An insurer can subrogate for payments made under comprehensive and collision coverage. The subrogation interest is vested upon payment, but the insurer has a contingent interest before payment. If the obligation of the insured is completely satisfied, the subrogation claim must be brought in the name of the insurer. For instance, if the insured did not pay a deductible, the subrogation claims must be brought in the name of the insurer since the insured was completely satisfied.

An insurer may subrogate with respect to payments made under uninsured/underinsured motorist coverage. **K.S.A. §§ 40-284; *Bartee v. R.T.C.***

Transp., Inc., 781 P.2d 1084 (Kan. 1989). If the injured insured settles for the policy limits of an underinsured tort-feasor, the insured must give notice of the settlement to its underinsured motorist carrier who may then substitute its payment for the settlement amount and become subrogated for that amount, if payment is made within 60 days from the date the insured settled the claim with the underinsured tort-feasor. **K.S.A. §§40-284 and 40-287**; *Dalke v. Allstate*, 935 P.2d 1067 (Kan. App. 1997).

A P.I.P. insurer's right to be reimbursed for benefits paid is limited to those damages recovered by the injured insured which are duplicative of the P.I.P. benefits. **K.S.A. § 40-3113a**; *State Farm v. Kroeker*, 676 P.2d 66 (Kan. 1984). Damages are duplicative when the failure to reimburse the P.I.P. carrier would result in a double recovery by the insured.

An insurer cannot subrogate with respect to medical payments coverage unless coverage is designated as personal injury protection (PIP). *Durrett v. Bryan*, 799 P.2d 110 (Kan. 1990).

16. Cancellation and Non-Renewal Procedures

To properly cancel or not renew a policy, an insurer must notify the insured at least thirty days before the effective date of cancellation. This notice must be mailed to the named insured's last known address by certified or registered mail or with a United States post office certificate of mailing. The time of the effective date and hour of termination stated in the notice shall become the end of the policy period. **K.S.A. § 40-3118(b)**. Every such notice of termination sent to the insured for any cause whatsoever shall include on the face of the notice a statement that financial security for every motor vehicle covered by the policy is required to be maintained continuously throughout the registration period, that the operation of any such motor vehicle without maintaining continuous financial security therefor is a class B misdemeanor, and that the registration for any such motor vehicle, for which continuous financial security is not provided, is subject to suspension, and the driver's license of the owner thereof is subject to suspension.

17. Loss of Consortium: "Per Occurrence" or "Per Person" Limit of Liability

By statute, a spouse has no separate cause of action for loss of consortium. **K.S.A. 23-205**. Rather, a cause of action to recover for loss of consortium vests in the party who filed the action for personal injuries and not the spouse or minor who actually suffered the loss of consortium. As a result, claims for loss of consortium are subject to the policy's "per person" rather than "per occurrence" limit. *Farmers Insurance Co. v. Rosen*, 839 P.2d 71, 75 (Kan. App. 1992).

18. Attorney Fees Taxed as Costs in Certain Actions Involving Negligent Motor Vehicle Operation

In actions brought for the recovery of property damages only of less than \$7,500.00 sustained and caused by the negligent operation of a motor vehicle, the prevailing party shall be allowed reasonable attorney fees which shall be taxed as part of the costs of the action unless: (1) The prevailing party recovers no damages; or (2) a tender equal to or in excess of the amount recovered was made by the adverse party before the commencement of the action in which judgment is rendered. **K.S.A. 60-2006.**

For the plaintiff to be awarded attorney fees for the prosecution of such action, a written demand for settlement of such claim containing all claimed elements of property damage and the total monetary amount demanded in the action shall have been made on the adverse party at such party's last known address not less than 30 days before the commencement of the action. **K.S.A. 60-2006 (b).** For the defendant to be awarded attorney fees, a written offer of settlement of such claim shall have been made to the plaintiff at such plaintiff's last known address not more than 30 days after the defendant filed the answer in the action. **K.S.A. 60-2006 (b).**

19. Who Can Bring Wrongful Death Suit

In Kansas, a wrongful death action is governed by statute. A claim may be made by any of the heirs at law of the deceased who has sustained a loss by reason of the death. **K.S.A. §60-1902.** Any heir who does not join as a party plaintiff in the original action but who claims to have been damaged by reason of death shall be permitted to intervene therein.

20. Legal Measure of Damages in Wrongful Death Suit

The court or jury may award such damages as are found to be fair and just under all the facts and circumstances. However, the damages for non-pecuniary loss sustained by an heir at law cannot exceed, in the aggregate, the sum of \$250,000.00 plus costs. **K.S.A. §60-1903.** Burial expenses and other such expenses are part of the elements of damage pursuant to the statute and are not derivative in nature. Also, the statute allows for expenses for the care of the deceased resulting from the wrongful act to be recovered by any of the heirs who paid or became liable for them.

The elements of damage that may be recovered include, but are not limited to, the following:

- a. Mental anguish, suffering or bereavement;
- b. Loss of society, companionship, comfort or protection;
- c. Loss of marital care, attention, advice or counsel;
- d. Loss of filial care or attention;
- e. Loss of parental care, training, guidance or education; and
- f. Reasonable funeral expenses for the deceased. **K.S.A. §60-1904.**

21. Discoverability of Insurer's Claim File

Once the insurance company retains counsel for the insured, the claim file is thereafter protected from discovery as work product. However, anything in the claim file before counsel is retained is discoverable. **K.S.A. §60-226(b)(3)**. Because those portions of an insurance company's claim file generated before the retention of counsel are discoverable in Kansas, we suggest counsel be retained immediately before any investigation is conducted by the company, particularly in matters with potentially large exposure.

22. Priority of Payments in Multiple Claims Situations

Where an insurer faces multiple claims which, in total, exceed policy limits, the carrier can in good faith settle some of the claims even though such settlements deplete or exhaust the policy limits and leave remaining claimants with little or no recourse against the insurer. *Castoreno v. Western Indem. Co. Inc.*, 515 P.2d 789 (Kan. 1973). The insurer may also initiate settlement proceedings with all potential claimants or, in good faith, promptly initiate an interpleader action. The former alternative is preferable as it avoids litigation. *See, e.g., Farmer Ins. Exchange v. Schropp*, 567 P.2d 1359 (Kan. 1977).

23. Duty to Defend after Policy Limits Exhausted

No Kansas court case has yet addressed an insurer's duty to defend after policy limits are exhausted. This question usually presents itself in one of two situations- (1) when the insurer exhausts the policy limits through the payment of settlements or judgments to other claimants while additional claimants remain and (2) when an insurer tenders its policy limits into the court because defense costs are likely to exceed the policy limits. Generally, Kansas courts follow the majority view in deciding insurance coverage questions. The majority view seems to be that in the first situation an insurer has no further duty to defend while in the second situation an insurer is not relieved of its duty to defend. In the first situation, the rationale is generally that an insurer's duty to defend presupposes some remote possibility of a duty to indemnify and that once

the limits are exhausted through the payment of judgments or settlements for the “occurrence”, there is no further duty to indemnify. Thus, the remote possibility of a duty to indemnify is removed and there should be no duty to defend further claims arising out of the same “occurrence”. In regard to the second situation, the rationale is that the tender does not constitute a payment of a judgment or settlement (i.e., if the claimant does not fully release the insured and instead continues with litigation against the insured) and thus the insurer’s obligations under the policy are not fulfilled and its duty to defend continues. However, in light of there being cases from other jurisdictions which have held that an insurer has no duty to defend after it tenders its policy limits, we believe the insurer should attempt to obtain an order from the district court declaring that it has no further duty to defend after it tenders in its policy limits, at least until the Kansas Supreme Court addresses the issue.

24. Bad Faith

Kansas does not recognize the tort of bad faith. *Spencer v. AETNA Life and Casualty Ins. Co.*, 611 P.2d 149, 158 (Kan. 1980), *Associated Wholesale Grocers v. Americold*, 934 P.2d 65 (Kan. 1997). However, *Spencer* may be interpreted to allow an insured to proceed against the insurer based on the tort of outrage. See also, *Kansas Farm Bureau Ins. Co. v. Miller*, 696 P.2d 961 (Kan. 1985). Because there is no tort of bad faith, there is no punitive damage exposure for failing to settle within the liability limits. *Glenn v. Fleming*, 247 Kan. 296, 799 P.2d 79, 90 (1990). However, Kansas does recognize that within every liability policy there is an implied duty on the carrier, if it assumes the defense of its insured, to act in good faith and without negligence in the handling of the defense, including settling a claim if in the exercise of care it can and should be settled within the liability limits. Thus, courts have held that within the contract of insurance, there is an implied contractual duty to settle if to do so would be the exercise of good faith and ordinary care under the circumstances. *Bollinger v. Nuss*, 202 Kan. 326, 449 P.2d 502 (1969). Such claims are limited to breach of contract remedies. *Glenn*, 799 P.2d at 89-90.

25. Liability of Insurer for Excess Judgments

In defending and settling claims against its insured, the insurer of a liability or indemnity policy owes to the insured a duty to act in good faith and without negligence. *George R. Winchell Inc. v. Norris*, 633 P.2d 1174, 1176 (Kan. Ct. App. 1981). The insurer's failure to do so will result in it being held liable for the full amount of the insured's resulting loss, even if that amount exceeds the policy limits. *Rector v. Husted*, 519 P.2d 634 (Kan. 1974). An insurer who wrongfully refuses to defend an action against its insured is liable for: 1) the amount of the judgment against the insured; 2) the expenses incurred by the insured in defending the suit; and 3) any

additional damages traceable to its refusal to defend. *Winchell*, 633 P.2d at 1176. Such liability arises from the insurer's contractual obligation to defend. *Glenn v. Fleming, Inc.*, 799 P.2d 79, 89 (Kan. 1990).

In *Bollinger v. Nuss*, 449 P.2d 502 (Kan. 1969) the Kansas Supreme Court delineated eight factors which might be taken into consideration in determining whether an insurer is liable for wrongful refusal to settle or defend. They are:

- a. the strength of the insured claimant's case on the issues of liability and damages;
- b. the attempts by the insurer to induce the insured to contribute to the settlement;
- c. the failure of the insurer to properly investigate the circumstances so as to ascertain the evidence against the insured;
- d. the insurer's rejection of advice of its own attorney or agent;
- e. the failure of the insurer to inform the insured of a compromise offer;
- f. the amount of financial risk to which each party is exposed in the event of a refusal to settle;
- g. the fault of the insured in inducing the insurer's rejection of a compromise offer by misleading it as to the facts; and
- h. any other factors tending to establish or negate bad faith on the part of the insurer.

An insured's breach of contract claim for wrongful refusal to settle or defend is assignable. *Glenn*, 799 at 90. Additionally, a covenant not to execute under which the insured assigns his wrongful refusal to settle or defend claim against the insurer in exchange for the personal injury plaintiff's agreement not to execute on the insured's property is valid and enforceable. *Id.* Accordingly, the judgment against the insured need not be satisfied before the judgment creditor can pursue the insurer for any excess judgment.

Damages for breach of contract are limited to pecuniary losses sustained and exemplary or punitive damages are not recoverable in the absence of an independent tort. *Guarantee Abstract*, 652 P.2d at 667. In such a case, the proof of the independent tort must indicate the presence of malice, fraud or wanton disregard for the rights of others. *Id.* In the absence of an independent tort, punitive damages may not be awarded against the insurer. *Id.*

Missouri Law

1. Responsive pleading date

In the circuit court, a defendant has 30 days after personal service of the Petition and Summons to serve a responsive pleading. **Mo.R.Civ.P. 55.25(a)**.

2. Statute of Limitations

a. Bodily Injury:

The applicable statute of limitation depends upon the cause of action asserted. For personal injuries arising out of an auto accident the period is five (5) years from the date of the accident or the date when the plaintiff's injuries and damages were reasonably ascertainable. **RSMo. §516.120**.

b. Loss of Consortium: Five (5) years. **RSMo. §516.120**.

c. Loss of Services: Five (5) years. **RSMo. §516.120**.

d. Property Damage: Five (5) years. **RSMo. §516.120**.

e. Persons under legal disability:

Where a person possessing a cause of action is a minor when the cause of action accrues, the statute of limitation does not begin to run until he reaches the age of 21; thus, such a person has a period of time set out above, after turning 21, in which to file suit. **RSMo. §516.170**. A similar rule is applied to persons suffering under other disabilities (mentally incapacitated, imprisoned on a criminal charge, serving a criminal sentence less than life imprisonment). After a disability is removed, such persons have the period of time described above in which to file suit. **RSMo. §516.170**.

f. Tolling of statute of limitations.

The running of the statute of limitations is tolled while the defendant is absent from the state. **RSMo. §516.200**.

3. Missouri Tort Reform

(1) **Prejudgment Interest Reform – Section R.S.Mo. § 408.040**

In tort actions, if the claimant (1) makes demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives, and to

such party's liability insurer if known to the claimant, (2) and the amount of the judgment or order exceeds the demand for payment or offer of settlement, then prejudgment interest shall be awarded, calculated from a date ninety days after the demand or offer was received, as shown by the certified mail return receipt, or from the date the demand or offer was rejected without counter offer, whichever is earlier.

What is required for a demand?

- (1) Be in writing and sent by certified mail return receipt requested; and
- (2) Be accompanied by an affidavit of the claimant describing the nature of the claim, the nature of any injuries claimed and a general computation of any category of damages sought by the claimant with supporting documentation, if any is reasonably available; and
- (3) For wrongful death, personal injury, and bodily injury claims, be accompanied by a list of the names and addresses of medical providers who have provided treatment to the claimant or decedent for such injuries, copies of all reasonably available medical bills, a list of employers if the claimant is seeking damages for loss of wages or earning, and written authorizations sufficient to allow the party, its representatives, and liability insurer if known to the claimant to obtain records from all employers and medical care providers; and
- (4) Reference this section and be left open for ninety days.

What is the rate of interest?

In tort actions, a judgment for prejudgment interest awarded pursuant to this subsection should bear interest at a per annum interest rate equal to the intended Federal Funds Rate, as established by the Federal Reserve Board, plus three percent. The judgment shall state the applicable interest rate, which shall not vary once entered.

(2) Venue Reform – R.S.Mo. § 508.010

- **Actions not involving tort claims**

In all actions in which there is no count alleging a tort, venue shall be determined as follows:

(1) When the defendant is a resident of the state, either in the county within which the defendant resides, or in the county within which the plaintiff resides, and the defendant may be found;

(2) When there are several defendants, and they reside in different counties, the suit may be brought in any such county;

(3) When there are several defendants, some residents and others nonresidents of the state, suit may be brought in any county in this state in which any defendant resides;

(4) When all the defendants are nonresidents of the state, suit may be brought in any county in this state

- **Actions involving tort claims**

(5) Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured in the state of Missouri, venue shall be in the county where the plaintiff was first injured by the wrongful acts or negligent conduct alleged in the action.

Notwithstanding any other provision of law, in all actions in which there is any count alleging a tort and in which the plaintiff was first injured outside the state of Missouri, venue shall be determined as follows:

(1) If the defendant is a corporation, then venue shall be in any county where a defendant corporation's registered agent is located or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county of the plaintiff's principal place of residence on the date the plaintiff was first injured;

(2) If the defendant is an individual, then venue shall be in any county of the individual defendant's principal place of residence in the state of Missouri or, if the plaintiff's principal place of residence was in the state of Missouri on the date the plaintiff was first injured, then venue may be in the county containing the plaintiff's principal place of residence on the date the plaintiff was first injured.

6. Any action, in which any county shall be a plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside, or in the county suing and where the defendants, or one of them, may be found.

7. In all actions, process shall be issued by the court in which the action is filed and process may be served in any county within the state.

8. In any action for defamation or for invasion of privacy, the plaintiff shall be considered first injured in the county in which the defamation or invasion was first published.

9. In all actions, venue shall be determined as of the date the plaintiff was first injured.

10. All motions to dismiss or to transfer based upon a claim of improper venue shall be deemed granted if not denied within ninety days of filing of the motion unless such time period is waived in writing by all parties.

11. In a wrongful death action, the plaintiff shall be considered first injured where the decedent was first injured by the wrongful acts or negligent conduct alleged in the action. In any spouse's claim for loss of consortium, the plaintiff claiming consortium shall be considered first injured where the other spouse was first injured by the wrongful acts or negligent conduct alleged in the action.

12. The provisions of this section shall apply irrespective of whether the defendant is a for-profit or a not-for-profit entity.

13. In any civil action, if all parties agree in writing to a change of venue, the court shall transfer venue to the county within the state unanimously chosen by the parties. If any parties are added to the cause of action after the date of said transfer who do not consent to said transfer then the cause of action shall be transferred to such county in which venue is appropriate under this section, based upon the amended pleadings.

14. A plaintiff is considered first injured where the trauma or exposure occurred rather than where symptoms are first manifested.

(3) Joint and Several Liability Reform – R.S.Mo. § 537.067

In all tort actions for damages, if a defendant is found to bear fifty-one percent or more of fault, then such defendant shall be jointly and severally liable for the amount of the judgment rendered against the defendants. If a defendant is found to bear less than fifty-one percent of fault, then the defendant shall only be responsible for the percentage of the judgment for which the defendant is determined to be responsible by the trier of fact; except that, a party is responsible for the fault of another defendant or for payment of the proportionate share of another defendant if any of the following applies:

(1) The other defendant was acting as an employee of the party;

(2) The party's liability for the fault of another person arises out of a duty created by the federal Employers' Liability Act, 45 U.S.C. Section 51.

The defendants shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact.

In all tort actions, no party may disclose to the trier of fact the impact of this section.

(4) Issues related to Punitive Damages

- Discovery of assets - R.S.Mo. § 510.263

Discovery as to a defendant's assets shall be allowed only after a finding by the trial court that it is more likely than not that the plaintiff will be able to present a submissible case to the trier of fact on the plaintiff's claim for punitive damages.

- Punitive damage caps - R.S.Mo. § 510.265

No award of punitive damages against any defendant shall exceed the greater of:

(1) Five hundred thousand dollars; or

(2) Five times the net amount of the judgment awarded to the plaintiff against the defendant.

Such limitations shall not apply if the state of Missouri is the plaintiff requesting the award of punitive damages, or the defendant pleads guilty to or is convicted of a felony arising out of the acts or omissions pled by the plaintiff.

(5) Wrongful Death – R.S.Mo. § 537.090

- Rebuttable presumption regarding average weekly wage and regarding minors pecuniary losses

In every action brought under Section 537.080, the trier of the facts may give to the party or parties entitled thereto such damages as the trier of the facts may deem fair and just for the death and loss thus occasioned, having regard to the pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship, comfort, instruction, guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death and without limiting such damages to those which would be sustained prior to attaining the age of majority by the deceased or by the person suffering any such loss. In addition, the trier of the facts may award such damages as the deceased may have suffered between the time of injury and the time of death and for the recovery of which the deceased might have maintained an action had death not ensued. The mitigating or aggravating circumstances attending the death may be considered by the trier of the facts, but damages for grief and bereavement by reason of the death shall not be recoverable. If the deceased was not employed full time and was at least fifty percent responsible for the care of one or more minors or disabled persons, or persons over sixty-five years of age, there shall be a rebuttable presumption that the value of the care provided, regardless of the number of persons cared for, is equal to one hundred and ten percent of the stated average weekly wage, as computed under Section 287.250, R.S.Mo. If the deceased is under the age of eighteen, there shall be a rebuttable presumption that the annual pecuniary losses suffered by reason of the death shall be calculated based on the annual income of the deceased's parents, provided that if the deceased has only one parent earning income, then the calculation shall be based on such income, but if the deceased had two parents earning income, then the calculation shall be based on the average of the two incomes.

(6) Service of Process

1. A corporation's registered agent is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the corporation.

2. If a corporation has no registered agent, or the agent cannot with reasonable diligence be served, the corporation may be served by registered or certified mail, return receipt requested, addressed to the secretary of the corporation at its principal office shown in the most recent annual report filed under Section 355.856. Service is perfected under this subsection on the earliest of:

(1) The date the corporation receives the mail;

(2) The date shown on the return receipt, if signed on behalf of the corporation; or

(3) Five days after its deposit in the United States mail, if mailed and correctly addressed with first-class postage affixed.

3. This section does not prescribe the only means, or necessarily the required means, of serving a corporation.

(7) Reasonable and Necessary Medical Bills

1. No evidence of collateral sources shall be admissible other than such evidence provided for in this section.

2. If prior to trial a defendant or his or her insurer or authorized representative, or any combination of them, pays all or any part of a plaintiff's special damages, the defendant may introduce evidence that some other person other than the plaintiff has paid those amounts. The evidence shall not identify any person having made such payments.

3. If a defendant introduces evidence described in subsection 2 of this section, such introduction shall constitute a waiver of any right to a credit against a judgment pursuant to Section 490.710.

4. This section does not require the exclusion of evidence admissible for another proper purpose.

5.(1) Parties may introduce evidence of the value of the medical treatment rendered to a party that was reasonable, necessary, and a proximate result of the negligence of any party.

(2) In determining the value of the medical treatment rendered, there shall be a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered. Upon motion of any party, the court may determine, outside the hearing of the jury, the value of the medical treatment rendered based upon additional evidence, including but not limited to:

- (a) The medical bills incurred by a party;
- (b) The amount actually paid for medical treatment rendered to a party;
- (c) The amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of a recovery.

Notwithstanding the foregoing, no evidence of collateral sources shall be made known to the jury in presenting the evidence of the value of the medical treatment rendered.

4. General Rule of Negligence and Comparative Fault

Missouri has adopted pure comparative fault. Under this doctrine, the plaintiff is entitled to recover from all persons whose conduct in any degree contributed to his injury; however, the amount of his total damages which plaintiff will recover will be reduced in the proportion to which his own conduct is found to have contributed to his injuries. Thus, suppose "P" is injured and sues "A" and "B". The jury will consider the relative fault of "P", "A" and "B". Let's say that the jury finds "P" 75% at fault, "A" 10% at fault, and "B" 15% at fault, and fixes "P's" total damages at \$100,000.00. "P" will get a judgment against "A" and "B" for \$25,000.00 (his total damages (\$100,000.00) reduced in proportion to his own fault (75%, or \$75,000.00). "A" and "B's" liability is joint and several; thus, "P" can satisfy his entire judgment from one, either, or both. (If "A" or "B" pays more than his proportionate share, he has a cause of action against the other for contribution.)

The only exception to the rules discussed above is when a plaintiff is found to be partly at fault for his own injuries, and where one or more defendants are insolvent or otherwise judgment proof. In such a case, any defendant may move to have the insolvent defendant's assessed portion of the fault redistributed among the other parties who were found to have been responsible. This will increase each solvent defendant's portion of the fault; however, it will also increase the portion of the fault attributed to the plaintiff. Thus, the net recovery possible by the plaintiff will decrease. **RSMo. §537.067.**

5. Number of Jurors Required to Return Verdict

In a civil matter, as opposed to a criminal matter, at least nine of the twelve jurors must agree upon the verdict.

6. No itemized verdict in personal injury actions

The verdict in a personal injury action is not generally itemized. Thus, the jury is asked to set forth a total sum which it feels is necessary to compensate a plaintiff for all pecuniary (medical specials, lost income, etc.) and non-pecuniary (pain and suffering, etc.) damages. Punitive damage awards are separately indicated.

7. Measure of Damages (personal/bodily injury)

The measure of damages for bodily injury in general terms is the amount commensurate with the personal injuries and other compensable losses sustained. *Smugala v. Compana*, 404 S.W.2d 713 (Mo. 1966); *Beste v. Tadlock*, 565 S.W.2d 789 (Mo. App. 1978). A personal injury plaintiff is entitled to a fair and reasonable compensation for his/her injuries. *Tennison v. State Farm Mut. Auto Ins. Co.*, 834 S.W.2d 846 (Mo.App. W.D. 1992). Factors to be considered are the plaintiff's age, nature and extent of injuries and losses, diminished working and earning capacity, changing economic factors (i.e. inflation), permanency and degree of injury, amount of pain and suffering, plaintiff's educational level and awards in cases involving similar injuries.

8. No caps on Personal Injury Claims

Outside of medical malpractice actions, there are no damage caps on personal injury claims in Missouri.

9. Liens (requirements and legal effect)

Under the provisions of **RSMo. §430.230**, every public hospitals or clinic, and every privately maintained hospital, clinic or other institution caring for the sick, which is supported in whole or in part by charity, shall have a lien upon any and all claims, counterclaims, demands, suits or rights of action of any person admitted to the institution. Under **Rs.MO §430.225's** definitions, a "clinic" is defined as a group practice of health practitioners or sole practice of a health practitioner who has incorporated his or her practice. Pursuant to **RsMo. §430.240**, to be valid, written notice of the lien is to be computed at reasonable rates not exceeding \$25.00 per day and

reasonable costs of necessary x-ray, laboratory, operating room and medication services rendered. To be valid written notice of the lien must be made containing the name and address of the injured person, the date of the accident, the name and location of the hospital and the name of the person or entity alleged to be liable to the injured party for the injury received. Further, said notice must be made by registered mail, return receipt requested, to the party alleged to be responsible for the injuries. *Id.*

RSMo. §430.250 provides that any person or entity, including an insurance company, making payment to the injured person as compensation for injuries sustained after proper notice of a lien has been made without paying the hospital the full amount of the lien or so much of the lien as can be satisfied out of 50% of the money due the patient under the settlement remains liable for the full amount of the lien for 1 year following the settlement and is subject to enforcement of the lien through suit.

Every person or facility expending labor, service or skill to repair a motor vehicle will have a lien on the vehicle for the maximum amount that was agreed upon for the service. **RSMo. §§430.080 and §430.082.** If the repaired vehicle is not claimed after three months after completion of the repairs, the repair agent may apply to the director of revenue for a certificate of ownership. With proper notice, the chattel may be sold to enforce the lien.

An individual may assign his or her insurable interest to another party. However, an individual may not assign a personal injury claim to another person. Therefore, an assignment of a personal injury claim to a provider would be of no legal effect.

10. Regions with Volatile Judgments

St. Louis City (Downtown St. Louis) and Jackson (Kansas City/Independence) Counties tend to produce higher and more volatile judgments.

11. Financial Responsibility Law

Missouri law requires minimum liability coverage in every automobile policy issued for vehicles registered or garaged in Missouri. § 379.230 RSMo. states:

No automobile liability insurance covering liability arising out of ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with regard to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto... in not less than the limits for bodily injury or death set forth in section 303.030 RSMo.... for the protection of persons insured

thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

Section 303.030(5) R.S.Mo. sets out the mandatory liability limits for automobile policies as "\$25,000.00 because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than \$50,000.00 because of bodily injury or death or two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than \$10,000 because of injury to or destruction of property of others in any one accident."

Exclusions relating to Mandatory Minimum Coverages:

1. Household Exclusion

The household exclusion is not enforceable up to the vehicle financial responsibility limits. This means that in a situation where a household exclusion would exclude coverage, the insurer owes \$25,000/\$50,000 coverage.

2. Fellow Employee Exclusion

In a commercial automobile policy a co-employee exclusion is enforceable.

3. Primary/Excess Coverage

Missouri follows the general rule that primary coverage follows the vehicle. If the other insurance or excess clauses are mutually repugnant, they are normally deemed to allow pro rata coverage pursuant to the limits.

Annotations

American Standard Insurance Company v. Hargrave, 34 S.W.3d 88 (Mo.banc 2000). A permissive user of an automobile was involved in an accident which resulted in injuries to her child, a passenger in the vehicle. The owner's insurer paid \$25,000 to the injured child in accordance with the Motor Vehicle Financial Responsibility Law. The driver was also an insured under a policy issued to her husband for a vehicle that he owned. The injured child claimed that he was also entitled to \$25,000 under that policy, according to the MVFRL, despite a "household" exclusion in the policy. The Supreme Court of Missouri held that the "household" exclusion invalid up to the statutory

minimum under the MVFRL, and in holding so overruled the case of *Shelton Mut. Ins. Co. v. Haney*, 824 S.W.2d 949 (Mo.App. S.D. 1992).

Baker v. Depew, 860 S.W.2d 318 (Mo. banc 1993). Plaintiff was riding in the back of a truck at the job site. A co-worker suddenly stopped the vehicle, and severely injuring the plaintiff. A fellow employee exclusion was found enforceable and did not violate the Motor Vehicle Financial Responsibility Law.

Distler v. Reuther Jeep Eagle v. State Farm Automobile Insurance Company. Slip Op. 75818 (Mo. App. E.D. 2000). The insureds dropped their vehicle off at the defendant dealership for car, repairs. While test driving the car, the mechanic was involved in an accident which resulted in personal injuries to the plaintiff. The court held that the "car business" exclusion in the owner's policy was partially invalidated by the MVFRL. The court further found that the owner's policy was primary because the policy maintained by the dealership contained an excess clause and the owner's only contained a pro-rata "other insurance" clause.

Ezell v. Columbia Ins. Co., 942 S.W.2d 913 (Mo.App. S.D. 1996). Plaintiff was riding with her husband on his uninsured motorcycle when she was injured. Her policy excluded from the definition of uninsured motor vehicle any vehicle owned by any family member. The exclusion was invalidated. The court found the husband's motorcycle was an uninsured motor vehicle as referred to in §379.203, therefore coverage existed up to the statutory minimum. The definitional exclusion was effective to preclude any recovery in excess of the statutory limits.

Halpin v. American Family Mutual Ins. Co., 823 S.W.2d 479 (Mo. banc 1992). The insured's two minor children brought suit for the injuries sustained while they were passengers in the insured's vehicle. Coverage was denied based on a household exclusion clause in the policy. The court invalidated the clause as against public policy, holding that the policy must provide the statutory minimums of \$25,000/\$50,000 mandated by the Motor Vehicle Financial Responsibility statutes. The household exclusion was enforceable to exclude any coverage in excess of the statutory limits.

Kellar v. American Family Mutual Insurance Co. Slip Op. No. ED 55762 (W.D. Mo. App., 1999). A passenger of a vehicle was entitled to recover the \$25,000 minimum required by the Missouri Financial Responsibility Law even though \$25,000 had already been recovered from the primary insurer. While an escape clause would allow the insurer to avoid liability, an excess insurance clause does not preclude recovery of the minimum required by MVFRL.

Magruder v. Shelter Insurance Co., 1998 Mo. App. Lexis 2253 (Mo. App. W.D. 1998). The insured only had coverage for one of two vehicles he owned when he bought an additional vehicle. The Motor Vehicle Financial Responsibility Law does not require the insurer to provide coverage for persons who purchase additional cars. Provisions that only provide coverage for non-replacement autos when the owner has all of his or her autos insured through the same company are valid.

Mercantile Bank of St. Louis v. Benny, 978 S.W.2d 840 (Mo. App. W.D. 1998). A driver exclusion endorsement is not void, but only invalid to the extent it excluded the minimum coverage required by MVFRL, no savings clause is required.

Rader v. Johnson, 910 S. W.2d 280 (Mo. App. W.D. 1995). A customer was driving a dealership's vehicle when he negligently collided with another vehicle. Two policies provided coverage, the dealership's garage policy and the customer's personal policy. Both policies contained other insurance clauses and purported to provide only excess coverage. The other insurance provisions in the policy were found to be mutually repugnant. Liability was apportioned between the insurers on a pro-rata basis.

Tinch v. State Farm Insurance Company, Slip Op. ED77168 (Mo. App. E.D. 2000). The plaintiff was driving his father's vehicle when he was involved in an accident with an uninsured motorist. The insurer denied coverage based upon a "Driver Exclusion Endorsement". Because the Motor Vehicle Financial Responsibility Law only requires that drivers carry liability insurance, it is not against public policy to exclude coverage for medical expense coverage.

USF&G v. Safeco Ins. Co., 522 S.W.2d 809 (Mo. banc 1975). A teenager operating his girlfriend's mother's car was involved in an accident injuring two friends riding in the back seat. Suit was brought against him and he claimed coverage under two policies: the mother's policy on the vehicle and the driver's father's policy which provided coverage under the non-owned automobile clause. In determining which coverage was primary, the court set forth the Missouri rule that primary liability rests with the insurer of the owner of the automobile rather than on the insurer of the driver.

Windsor Insurance Company v. Lucas, 24.W.3d 151 (Mo. App. E.D. 2000). A permissive driver of an automobile was involved in an accident, which resulted in several actions being filed against the driver for negligent operation of the vehicle. The owner's policy of insurance provided coverage in the amount of \$100,000 per person but contained a "step-down" provision that reduced the coverage to \$25,000 if a "non-relative" driver causes the injury. Because the Missouri statutes do not prohibit step-down provisions, they are not against public policy so the applicable limit was \$25,000.

12. Uninsured Motorist Law

Section 379.230 RSMo., in addition to providing for a statutory minimum of coverage, requires each policy to provide uninsured motorist coverage.

.. Such legal entitlement exists although the identity of the owner or operator cannot be established because such owner or operator and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification. It also exists whether or not physical contact was made between the uninsured motor vehicle and the insured or the insured's motor vehicle. For the purpose of this coverage, the term 'uninsured motor vehicle' shall, subject to the terms and conditions of such coverage, be deemed to 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 herein because of insolvency.

Missouri courts interpret all automobile policies so as to incorporate § 379.203 RSMo. as a part of the policy.

Minimum limits under RSMo. §§ 379.203.1 and 303.030.5 are as follows:

Bodily injury - \$25,000.00 per person
\$50,000.00 per accident

There is no statutory provision for uninsured motorist property damage coverage. In addition, There is apparently no mandatory deductible for this type of coverage.

Operation of Vehicle. Grabbing of the steering wheel by prisoner constituted "operation" of the police vehicle for purposes of uninsured coverage.

Arising Out of Use. If there is no "use" of the vehicle at the time of the bodily injury, then the uninsured motorist coverage is not applicable. For example, when the insured was beat up by assailants after his car was stopped, the court found that there was no uninsured motorist coverage. Additionally, injuries inflicted on the victim of a drive by shooting were not construed to arise out of the use of a motor vehicle even though the assailants were operating a motor vehicle.

Proof of Uninsured Status. Sections 379.230(5) and 303.040 RSMo. allow for a certification by the director of revenue that no motor vehicle accident report was filed to make a prima facie evidence of no insurance.

Exclusions.

Household Exclusion. The household exclusion is not enforceable up to the vehicle financial responsibility limits.

Governmental Use Exclusion. These types of exclusions have been held to be unenforceable and void as against public policy. The insurer may not exclude coverage for accidents involving government vehicles.

Escape/Excess Clauses. These are unenforceable in uninsured policies.

Annotations

Billings v. State Farm Mutual Auto Insurance Co., 741 S.W.2d 886 (Mo. App. E.D. 1987). AH existing and valid statutory provisions enter into and form a part of the insurance contracts to which they are pertinent as fully as if such provisions "were written into the policy. The statutory requirement for uninsured motorist coverage is such a provision for automobile policies.

Cameron Mutual Insurance Company v. Madden, 533 S.W.2d 538 (Mo. bane 1976). The insurer sought a declaratory judgment to determine whether it was liable to the insured under uninsured motorist and medical payments coverages on both insurance policies issued to the insured. One policy of insurance was issued on an automobile not involved in the accident and the second policy was on the automobile that was involved in the accident. The court held that each insurance policy must provide the statutory minimum coverage for uninsured motorist coverage. Each policy was a separate contract and the public policy expressed by statute prohibited the insurer from denying the stacking of the policies.

Central Transport. Inc. v. Blake, 980 S.W.2d 162 (Mo. App. E.D. 1998). The employee of the insured was involved in an accident after he avoided an uninsured motorist. The court found that the insured was not required to carry uninsured motorist coverage, because the common carrier exception to MVFRL is not void as against public policy. Also, even though the vehicle was to be used and garaged in Missouri, there is no requirement under Missouri law for the insured to obtain uninsured motorist coverage because the policy was issued to the insured in Michigan.

Esmond v. Bitumous Casualty Corporation, 23 S.W.3d 748 (Mo. App. W.D. 2000). When a phantom driver suddenly applied his brakes, the plaintiff took evasive maneuvers. Although the evasive maneuvers did not cause injury to the plaintiff, it did cause the load in the plaintiff's truck to shift. The plaintiff pulled over to the side of the road to reposition the load and was injured at that time. He then made a claim for uninsured motorist coverage under his employer's policy. The court held that the injury to the plaintiff was too remote. The repositioning of the load was not the natural and probable consequence of the uninsured vehicle's act.

Ezell v. Columbia Insurance Company, 942 S.W.2d 913 (Mo. App. S.D. 1996). The plaintiff was riding with her husband on his uninsured motorcycle when she was injured. Her policy excluded from the definition of uninsured motor vehicle any vehicle owned by any family member. The exclusion was invalidated. The court found the husband's motorcycle was an uninsured motor vehicle as referred to in §379.203, therefore coverage existed up to the statutory minimum. The definitional exclusion was effective to preclude any recovery in excess of the statutory limits.

Gibb v. National General Insurance Co., 938 S.W.2d 600 (Mo. App. S.D. 1997). A police officer was transporting a drunk driver to jail after arresting him, when the drunk driver grabbed the steering wheel and yanked it. The vehicle crashed into an embankment injuring the police officer. The officer sought coverage under his personal auto policy's uninsured motorist provision. Insurer denied coverage on the grounds that grabbing the wheel of the vehicle was not operating the vehicle. Construing operator broadly for purposes of the uninsured motorist provisions, the court found that grabbing the wheel of a motor vehicle did constitute operation of the vehicle.

Hartford Insurance Company v. Kean, 866 S.W.2d 924 (Mo. App. E.D. 1993). Employee was injured by an uninsured motorist. Employee sought to stack the coverage for all the vehicles that the employer had in its fleet, some 4000 vehicles. The court again distinguished between the named insured and an occupancy insured. Stacking of the policies was denied as the employee was an occupancy insured.

Hines v. Government Employees Insurance Company, 656 S.W.2d 262 (Mo. banc 1983). The injured party was an insured as a permissive user. Like Cameron, there were 2 insurance policies on two automobiles. The court distinguished Cameron, and found that although the insurer could not prohibit stacking by a named insured, the insurer could prohibit stacking by a permissive user. The rationale was that the uninsured motorist statute does not require uninsured motorist coverage for a permissive user. The insurer and the insured should not be prevented from the normal rule of freedom to contract when there is no superseding public policy.

Kroeker v. State Farm Mutual Automobile Insurance Company, 466 S.W.2d 105 (Mo. App. 1971). The plaintiffs sustained personal injuries when an uninsured motorist rear ended their automobile. Plaintiffs brought suit against the uninsured motorist and their insurer. The insurer eventually settled with the plaintiffs and instituted a cross-claim to recover the sums paid to the plaintiffs. The court found the insurer could not maintain an independent action against the uninsured motorist, but was entitled to subrogation rights up to the amount of the settlement agreement.

Lemmoris v. Prudential Property & Casualty Insurance Co., 876 S.W.2d 853 (Mo. App. E.D. 1994). The insured's car was hit from behind and then sideswiped by another vehicle causing no injury to the insured. Subsequently, both vehicles stopped and the insured stepped out of his car. The unidentified driver attacked the insured with his fists and a pipe. The Court adopted 3 rules to determine if uninsured motorists coverage was due: 1) The accident must have arisen out of the inherent nature of the automobile, as such; 2) The accident must have arisen within the natural territorial limits of an automobile and the actual use, loading or unloading must not have terminated; 3) The automobile must not merely contribute to cause the condition which produces the injury, but must, itself, produce the injury. On these facts coverage did not exist.

Marchand v. Safeco Insurance Company, 2 S.W.3d 826 (Mo. App. E.D. 1999). Insurer is not required to provide uninsured motorist coverage to a passenger. It does not violate the MVFRL or public policy to exclude UM coverage to passengers.

McKinney v. State Farm Mut. Ins., 123 S.W.3d 242 (Mo.App.W.D. 2003). Pre-judgment interest does not apply to uninsured motorist claim (1) under statute relating to tort claims, because those claims are contract actions, or (2) under statute relating to liquidated damages because amount at issue was not capable of reasonable determination. The Court of Appeals held that the uninsured motorist claim was unliquidated because it was not capable of reasonable determination. Therefore, prejudgment interest was not authorized on this claim, under § 408.020.

Nodaway Valley Bank v. E.L. Crawford Construction, Inc., 126 S.W.3d 820 (Mo.App.W.D. 2004). Bank's action against contractor for damages caused by contractor's work was a subrogation case under Missouri law, because insured retains the exclusive right to sue. In addition, the contract's waiver of subrogation clause trumped the contract's indemnity clause. However, the Missouri Court of Appeals for the Western District found that, under Missouri law, in subrogation, the insured retains the legal title to the claim. When the insurer pays the insured, the insurer has a right to subrogation. In this case, BancInsure would not have been an appropriate party to the lawsuit. And, the fact that it paid the bank's property damages created a subrogation right on the part of the bank. Therefore, this suit is a subrogation action.

Schmidt v. City of Gladstone, 913 S.W.2d 937 (Mo. App. W.D. 1996). A police officer was injured when a vehicle driven by an uninsured motorist collided with the officer's patrol car during a chase of the uninsured motorist. The officer brought suit against the City's insurer for uninsured motorist coverage. The City's insurer settled the claim within policy limits and sought contribution from the officer's personal auto policy on a pro-rata basis. The officer's policy contained an other insurance provision that made the uninsured motorist coverage excess. The court held that uninsured motorist coverage is not based on the vehicle the insured is operating or riding, but instead is personal coverage which follows the insured. Public policy prevented the enforceability of the limitation set forth in the other insurance clause.

Stafford v. Kite, 26 S.W.3d 277 (Mo. App. W.D. 2000). The defendant drove north in the southbound lanes of a road and struck the plaintiff's car causing injury to the plaintiff. The plaintiff notified her insurer that she had filed suit against the defendant, who was uninsured. The insurer moved to intervene but a consent judgment was entered the day after the insurer filed its motion to intervene. The appellate court held that the uninsured motorist carrier had an absolute right to intervene even though judgment was rendered between the time the motion was filed and the date the motion was to be heard.

State Farm Mutual Automobile Insurance Company v. Bridges, 1999 Mo. App. Lexis 2060 (Mo. App. S.D. 1999). Insured passenger sought coverage under the uninsured motorist portion of her policy because coverage was not afforded to her husband under the same policy as it was determined that the collision was intentional. Because her spouse was listed in the Declarations, he was not an uninsured motorist as defined by the policy and coverage was not afforded to the passenger under the uninsured motorist provision.

Strom v. Automobile Club Inter-Insurance Exchange, 952 S.W.2d 794 (Mo. App. S.D. 1997). Plaintiff pled that he was injured when an automobile he was driving was struck by an uninsured motor vehicle. To make that prima facie case, the plaintiff had to establish that the vehicle that hit him was uninsured. Plaintiff met his burden of production by submitting a certified affidavit from the Department of Revenue that no motor vehicle accident report was filed.

Teetmeyer v. Snellen, 791 S.W.2d 737 (Mo. App. W.D. 1990). The plaintiffs purchased three automobile policies. The definition of an uninsured motor vehicle in the policy issued to the insureds included as uninsured, underinsured vehicles. The court treated underinsured and uninsured as the same and coupled with prior case law prohibiting

stacking anti-stacking language deemed the coverage to be uninsured and held that all three policies may be stacked.

Ward v. International Indemnity Company, 897 S.W.2d 627 (Mo. App. 1995). Mother of a drive by shooting victim killed while he was driving his vehicle brought suit seeking to recover under the uninsured-motorist clause of the decedent's policy. Applying the same reasoning as in *Lemons v. Prudential*, the court found coverage did not exist.

Welch v. Automobile Club Inter-Insurance Exchange, 948 S.W.2d 718 (Mo. App. E.D. 1997). The plaintiff was injured when she was hit by a postal truck at the post office. The plaintiff's insurance policy excluded as an uninsured motor vehicle any vehicle owned by a governmental unit or agency. The court, following existing case law and found that the government exclusion was void as against public policy.

Williams v. Casualty Reciprocal Exchange, 929 S.W.2d 802 (Mo. App. W.D. 1996). The plaintiff was working as a delivery driver when he was hit by an uninsured motorist. He collected worker's compensation benefits totaling \$35,799.55. He then sued the uninsured motorist and joined his employer's motor vehicle insurer. The insurer argued that it was entitled to offset any judgment by the worker's compensation benefits. The court held that a full enforcement of the offset provision in the policy was contrary to public policy. It left open the question of whether a partial offset was enforceable above the statutory minimum of \$25,000.

13. Underinsured Motorist Law

Missouri has not enacted legislation that control underinsured (UIM) coverage. Therefore, interpretation of the policy language is unfettered by the public policy arguments that prevail in the interpretation of uninsured policy language. Generally, this means that set-off provisions for amounts previously received and anti-stacking clauses that are normally interpreted through the limits of liability provisions can be enforceable.

Coverage Definition of "Underinsured". When the definition of "underinsured" is combined with an "uninsured" definition, the underinsured definition is deemed ambiguous and underinsured coverage is found. The same is true when the underinsured definition is related to the damages incurred by the insured. Normally, when the underinsured definition is tied to the limit of liability for the tortfeasor, no ambiguity is construed.

Definition Related to the Limits of Policy of Tortfeasor Vehicle.

A typical definition reads:

"Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage.

This language is normally deemed unambiguous. When the tortfeasor's liability limits meet or exceed the underinsured limits, there is no coverage.

In *Hinsshaw v. Farmer's and Merchant's Insurance Company*, the tortfeasor's limits were the same as the limits of the underinsured limit and, therefore, there was no coverage. The insured did not receive the limit of liability from the tortfeasor because there were other injured parties who shared in the tortfeasor's limit. The court deemed this invitation to "fill the gap" between the amount received and the UIM limit.

In *Kendall v. American Fire & Casualty Company*, the court determined an ambiguity did not arise even when the caption of the underinsured coverage read: "Underinsured motorist coverage" and the body of the policy referred to underinsured motor vehicle coverage.

Definition Related to Damages sustained by Insured. Sometimes, the underinsured coverage refers to damage incurred by the insured. In *Buck v. American Family Mutual Insurance Company*, the UIM coverage was for \$50,000 per person. The tortfeasor's carrier had previously paid the plaintiff \$50,000. Therefore, the insurer argued that since there was a set-off provision, that this coverage limit had been reached. The court disagreed and indicated that the company must provide underinsured protection if the insured's damages exceeded \$50,000.

Set Off. Most set off language, if deemed unambiguous, is enforceable. In *State Farm Mutual Automobile Insurance Company v. Sommers*, the State Farm policy indicated that it was excess when an injury occurred in a vehicle not owned by its insured. The excess insurance clause stated that the coverage was excess only in "the amount by which it exceeds primary coverage." The court determined that State Farm was entitled to a set off for the \$50,000 underinsured coverage paid by another policy.

Workers compensation payments and amounts paid on behalf of the tortfeasor by its liability policy can be offset. However, set-off provisions have been held invalid due to ambiguity when the tortfeasor's total liability and the underinsured coverage are both referred to as "amounts payable" and the reduction or set-off clause does not say which "amount payable" is intended.

The ambiguity found in other cases was distinguished in the case of *Nolan v. American States Preferred Insurance Company*. In *Nolan* the language reads:

Any amounts otherwise payable for damages under this coverage will be reduced by all sums paid because of "bodily injury" by or on behalf of persons or organizations who may be legally responsible.

The *Nolan* court indicated that this language was not ambiguous because it did not refer to the total damages caused by the tortfeasor in the event the damages exceed the amount of underinsured motorist coverage.

Excess Insurance Clause. Sometimes, a policy provision that declares it excess over collectible insurance will cause an ambiguity and allow the court to find underinsured coverage where none was intended. In *Krenski v. Aubuchon*, the court construed: "Underinsured motor vehicle coverage shall be excess over all bodily injury bonds and insurance policies applicable at the time of the accident." The court determined that reading this clause in conjunction with the operative provisions of the limits of liability subsection created an ambiguity and found that coverage was afforded.

Other Insurance Clauses.

In *Jackson v. Safeco Insurance Company*, the policy contained the following language:

Any insurance we provide with respect to a vehicle you do not own shall be excess over any collectible insurance providing coverage on a primary basis.

The court felt this language could be reasonably interpreted to provide underinsured coverage in excess to amounts recovered from the tortfeasor. The court held that the insured could be entitled to the full amount of underinsured coverage.

Requirement of Consent to Settlement with Tortfeasor. These provisions can be enforceable. However, the underinsured carrier must show prejudice. Therefore, if the insured settles with the tortfeasor for the limit of the liability policy, the underinsured carrier cannot unreasonably withhold consent.

Annotations.

Addison v. State Farm Mut. Auto Ins. Co., 932 S.W.2d 788 (Mo. App. E.D. 1996). The plaintiff sued his insurer after he was seriously injured in a motor vehicle accident. The plaintiff obtained judgment against the negligent driver for \$400,000. The driver's insurer paid the policy limits of \$50,000 on the judgment. The plaintiff also received \$ 179,143.77 from his worker's compensation claim. The plaintiff's policy provided \$100,000 in underinsured motorist benefits. The plaintiff claimed that when

the amounts recovered \$229,143.77 were subtracted from the 400,000 he was still \$170,856.23 short and was entitled to the full \$100,000. The insurer defended on the grounds that the policy had a specific set-off provision for any worker's compensation benefits that were received. The court found the set-off provision enforceable and that no benefits were payable to the plaintiff.

But See Burns v. State Farm Mutual Automobile Insurance Company, 2003 WL 22992100 (E.D. Mo.). Following a car accident, the insurer of the driver at fault paid its policy limits of \$25,000. The injured motorist then collected \$50,000 from the underinsured motorist insurer of his employer. The injured motorist also received a worker's compensation award in the amount of almost \$41,000 as well as in excess of \$120,000 from his employer's worker's compensation insurer. He then made a claim for underinsured benefits under his auto policy, which his insurer denied, claiming that there was no coverage because the injured motorist had received in excess of the \$100,000 policy limits from other sources. The Court, in disagreeing with the *Addison* case, held that the language in the policy was not sufficient to serve as a coverage limit set-off. The Court noted that it is the insurer's job to make its coverage limitations clear in their policies.

American Economy Ins. Co. v. Cornejo, 866 S.W.2d 174 (Mo. App. E.D. 1993). The insurer filed a declaratory judgment action seeking a declaration that the vehicle the insured collided with was not an underinsured motorist. The insured had a single policy that provided coverage on 4 vehicles. As in *Hopkins*, the underinsured coverage was lumped together with uninsured coverage in the same policy section. The court stated the rule that public policy mandates stacking of the uninsured motorist provisions. When the coverages are lumped together and the establishment of the policy limits is by reference to the policy limits for uninsured motorist coverage, underinsured motorist coverages will be stacked.

Buck v. American Family Mut. Ins. Co., 921 S.W.2d 96 (Mo. App. E.D. 1996). The insured was a passenger in a vehicle that she did not own. The owner's policy limits were \$50,000, which were paid to the insured. The insured's policy limits were also \$50,000, however the policy defined an underinsured motor vehicle as a vehicle that had limits less than the damages suffered by the insured. The insured sustained in excess of \$100,000 in damages and made claim to the full amount. The insurer argued for a set-off of the payments received from the owner. Given the policy language the court found the parties specifically contracted for coverage on these facts.

Green v. Federated Mutual Insurance Company, Slip Op. 75830, MO. App. E.D. 1999). The insured sought coverage under his UIM policy after he recovered from the tortfeasor and his employer's workers compensation insurance carrier. The amounts received exceeded the limits of the insured's UIM coverage. The court concluded that the other insurance clause and the limit of insurance provision contained in the policy were not ambiguous, and that it is not against public policy to limit UIM coverage.

Hinshaw v. Farmers and Merchants Ins. Co., 912 S.W.2d 70 (Mo. App. E.D. 1995). The insured's daughter was injured in an accident while riding with a friend. The vehicle that the daughter was riding in carried liability limits of \$50,000. There were 3 others that were injured in the accident and the daughter received \$25,000 as part of a settlement with the friend's insurer. The insured's policy provided \$50,000 in underinsured motorist benefits and a claim was made seeking the full amount. The insurer denied coverage stating that the vehicle was not an underinsured vehicle, the policy limits were identical. The insurer's denial was sustained based on the policy's definition of underinsured.

Hopkins v. American Economy Ins. Co., 896 S.W.2d 933 (Mo. App. W.D. 1995). The insured was driving when he collided with another vehicle. The insured's wife, a passenger in his car was killed. The insured and his daughter brought suit to recover underinsured motorist payments. The insured had 3 vehicles that were insured with the insurer, all of which had \$ 100,000 liability limits. A jury returned a \$500,000 judgment for wrongful death against the other driver. The insured claimed he was entitled to \$300,000 under his policy, after receiving \$50,000 from the other driver. The insurer denied that the policies could be stacked. However, the policy lumped underinsured coverage in with uninsured coverage. The court applying existing Missouri policy that uninsured motorist coverage was to be stacked, allowed the stacking. The court went on to make clear that stacking of underinsured motorist coverage is up to the contracting parties. Anti-stacking provisions will be upheld but they must be clear, and simply putting anti-stacking language into the policy which lumped UM and UIM coverages together was not sufficient.

Jackson v. Safeco Ins. Co. of America., 949 S.W.2d 130 (Mo. App. S.D. 1997). The insured's daughter and 2 other passengers were killed when the automobile in which they were riding left the road and overturned. The vehicle involved had policy limits of \$50,000 per person and \$100,000 per accident. The insured had 4 vehicles insured under 1 policy providing \$50,000 per person in coverage. The insured's received \$33,333.33 as payment from the vehicle's insurer. The insured then sought recovery under his policy alleging that the vehicle was an underinsured motor vehicle. The court determined that the provision for other insurance was ambiguous and allowed recovery for \$50,000 in excess of what was received from the vehicle's insurer.

Keating v. Garilovici, 61 S.W.2d 205 (Mo. App. E.D. 1993). The plaintiff, a St. Louis police officer, was injured while he was on duty. His police car was hit by the defendant who ran a red light. The plaintiff filed suit against the defendant, and his insurer for medical payments and underinsured motorist payments. The defendant had liability coverage with \$25,000 limits. The plaintiff had a single policy for 2 vehicles with limits of \$25,000 for each vehicle. The plaintiff alleged \$170,000 in damages. The defendant settled for the \$25,000 limits. The court allowed the plaintiff to stack his coverage under the policy, but allowed a set-off against the amount recovered from the defendant. The policy was similar to that in *Nolan*.

Kendall v. American Fire & Gas. Co., 873 S.W.2d 301 (Mo. App. E.D. 1994); A father filed suit against the insurer seeking to recover underinsured benefits as a result of his son's death. The son was killed when the vehicle that he was riding in collided with another vehicle. Three insurance policies were in effect: the driver's liability policy which had \$100,00/\$300,00 limits; the owner's vehicle policy which had \$25,000/\$50,000 limits; and the father's policy which provided \$100,000 in underinsured motorist coverage. The father received \$95,000 from the driver's insurer and \$24,600 from the owner's insurer. The father argued that by the terms of the policy the only coverage that could be considered was the owner's, therefore \$75,000 in coverage existed. The court found that despite the fact that the caption said Underinsured Motorist Coverage, while the body of the policy referred to an "uninsured motor vehicle" the policy was not ambiguous.

Krenski v. Aubuchon, 841 S.W.2d 721 (Mo. App. E.D. 1992), The plaintiff was involved in a collision with the defendant. The plaintiff was insured by a policy purchased by her parents covering three vehicles. Each vehicle had uninsured/underinsured motorist coverage in the amount of \$25,000. The policy set forth separate language that did not incorporate the policy limits of the uninsured coverage, but specifically prohibited stacking. The court upheld the anti-stacking provision as unambiguous.

Krombach v. Mayflower Ins. Co. Ltd., 827 S.W.2d 208 (Mo. bane. 1992). Insured had 2 policies on a 2 vehicles. While driving in one of the insured vehicles with his wife, and a 14-year old passenger, a drunk driver struck the vehicle. The 14-year old passenger was killed and the insured was seriously injured. The drunk driver's insurer paid out \$100,000 to the insured, \$50,000 to his wife on a consortium claim, and \$100,000 to the family of the passenger. Claims were then filed by the insured, his wife and the family of the passenger against the insurer for underinsured motorist benefits. The policy provided that "Any amounts payable under Part 6 shall be reduced by all sums:" The policy did not define "any amounts payable. The insured claimed that the amount payable was the difference between the damages caused and that recovered. The court determined that the insured's construction was reasonable, the policy was ambiguous and construed the policy in favor of the insured.

Nolan v. American States Preferred Ins. Co., 851 S.W.2d 720 (Mo. App: S.D. 1993). The plaintiff was driving one of two automobiles she and her owned, when the automobile collided with a 1984 Jeep/The plaintiff sustained injuries as a result of the negligence of the Jeep's driver. Liability coverage on the Jeep was \$25,000/\$50,000. Both of the plaintiffs policies provided \$25,000 coverage, which she was allowed to stack, by the court. The insurer argued that any recovery should be set-off by the \$25,000 received from the driver's insurer. The policy provided that "amounts otherwise payable for damages under this coverage will be reduced by all sums paid..." The court found that the insertion of "under this coverage" clarified the "amounts otherwise payable" provision that was found to be ambiguous in *Krombach*. The set-off was allowed.

Rodriguez v. General Ace. Ins. Co. of America, 808 S.W.2d 379 (Mo. bane 1991). The insured was injured when her vehicle collided with that of another driver. She received \$50,000, the limits of the policy, from the second driver's insurer. She then attempted to collect the balance of her damages from her insurer under her underinsured motorist coverage. The

insured had two vehicles with \$50,000 of underinsured coverage on each. The policy defined underinsured as a motor vehicle that had limits that were less than the liability coverage of the policy. In an attempt to get around this the insured claimed that underinsured was inherently ambiguous and that the -underinsured coverage should be stacked. The court determined the policy clearly defined underinsured motorist, the term was not ambiguous, and coverage should not be stacked.

State Farm Mut. Auto Ins. Co. v. Sommers, 954 S.W.2d 18 (Mo. App. E.D. 1997). The insured was injured in a two car accident. She had received payments from both the insurer of the vehicle that she was riding in, as well as that of the second vehicle involved in the crash. Total payments from these two insurers was \$150,000. The plaintiff made a claim for the \$50,000 underinsured motorist coverage in her father's policy. The insurer filed a declaratory judgment action to declare that the father's policy provided that it was an excess policy, but only in the amount by which it exceeded the driver's policy, also \$50,000. The court looked to the policy which provided that it was an excess policy but only in that amount by which it exceed primary coverage, found no ambiguity in the policy, and agreed with the insurer that no claim could be made.

Tegtmeier v. Snellen, 791 S.W.2d 737 (Mo. App. W.D. 1990). Plaintiffs purchased three automobile policies. The definition of an uninsured motor vehicle included as uninsured, underinsured vehicles. The court treated underinsured and uninsured as the same and coupled with prior case law prohibiting stacking anti-stacking language deemed the coverage to be uninsured and held that all three policies may be stacked. The court did not address the enforceability of the consent clause in the policy requiring the insured to get the insurer's consent before settling with the uninsured defendant. The court found that no prejudice existed on these facts. The insured settled with the defendant for his policy limits. Before an insurer can escape liability under the consent clause there must be prejudice to the insurer. As no prejudice existed here, the consent clause was not a defense.

Thompson v. Schlechter, 2000 WL 1183069 (Mo. App. E.D.). Thompson, while driving his employer's vehicle, was injured when he was rear ended by another vehicle. The other vehicle, which was also owned by Thompson's employer, was being driven by a co-employee. Both drivers were acting within the course and scope of their employment at the time of the accident. The court held that a fellow employee exclusion in the employer's policy excluded underinsured motorist coverage. However, underinsured motorist coverage was afforded under the Thompson's personal automobile.

Amato v. State Farm Mut. Auto. Ins. Co., 213 S.W.3d 202 (Mo. App. E.D. 2007). Plaintiff Amato was involved in an accident with Sherwood. State Farm was the liability insurance carrier for Sherwood and was the underinsured motor vehicle carrier for Amato. Amato settled for Sherwood's policy limits and executed a release. As part of the release, Amato acknowledged that the release was not an admission of fault on the part of Sherwood, and the release specifically provided that it would have no effect on

any claim that Amato may have for the underinsured motorist coverage. Following the settlement with Sherwood, Amato filed suit against State Farm seeking underinsured motorist coverage. The jury returned a verdict in favor of State Farm. Amato appealed, arguing that because State Farm was both the liability insurer for Sherwood and Amato's underinsured motorist carrier, he did not have to prove Sherwood's negligence in order to prevail on their underinsured motorist claim. The Court of Appeals disagreed with Amato and found that Amato was required to prove negligence on the part of Sherwood. The settlement cannot prove Sherwood's liability when the release provided that it was not an admission of Sherwood's fault.

14. Stacking Uninsured/Underinsured Motorist Coverage

Public policy mandates stacking of uninsured motorists benefits when multiple vehicles are insured under a single policy, but there is no policy requiring stacking of underinsured motorist coverage. *Lang v. Nationwide Mutual Fire Ins. Co.*, 970 S.W.2d 828 (Mo.App. 1998). Stacking of uninsured motorist coverage is mandated only to the extent of the minimum coverage required by **RSMo. § 379.203**. *Ragsdale v. Armstrong*, 916 S.W.2d 783 (Mo.banc 1996).

Stacking of underinsured motorist benefits is allowed where policy language is ambiguous or if the policy treats underinsured motorist coverage the same as uninsured motorist coverage. *Niswonger v. Farm Bureau Town and Country Ins. Co. of Mo.*, 992 S.W. 2d 308 (Mo.App. 1999). Missouri courts will enforce unambiguous anti-stacking provisions in an underinsured motorist policy. *Farm Bureau Town & Country Ins. Co. of Missouri v. Barker*, 150 S.W.3d 103 (Mo. App. 2004).

Also, **RSMo. § 379.204**, which was enacted in 1999, provides that when the limits of underinsured motorist coverage are less than two times the limits of bodily injury or death coverage required by the Missouri automobile financial responsibility law (which are currently \$25,000.00 per person/\$50,000.00 per accident), then the underinsured motorist coverage shall be construed to provide coverage in excess of the liability coverage of the underinsured motorist vehicle involved in the accident.

Exceptions.

1. Medical Payments. There is no statutory mandate that an automobile liability policy provide Medical Payments coverage. *Hempen v. State Farm Mut. Auto. Ins. Co.*, 687 S.W.2d 894 (Mo.banc 1985). The payment of a separate premium for coverage on each automobile insured is a compelling reason for approving stacking of such coverage. Nonetheless, contractual provisions that unambiguously bar or limit stacking are valid. *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538 (Mo.banc 1976).

2. Passengers. There is no requirement that one who is only an occupancy insured as to liability be furnished uninsured motorist coverage in excess of the limits on the vehicle he occupies at the time of the accident. V.A.M.S. § 379.203. *Cano v. Travelers Ins. Co.*, 656 S.W.2d 266 (Mo. 1983). *Waltz v. Cameron Mutual Insurance Co.*, 526 S.W.2d 340 (Mo.App. 1975) (insurer and owner of automobile should not be disabled from entering into contract which confines uninsured motorist coverage available to occupant insured to that covering the vehicle in which he or she is riding at time of accident). See also, *Hines v. Government Employees Ins. Co.*, 656 S.W.2d 262, 265 (Mo.banc 1983); *Shepherd v. American States Ins. Co.*, 671 S.W.2d 777 (Mo.banc 1984); *Krombach v. Mayflower Ins. Co., Ltd.*, 827 S.W.2d 208 (Mo.banc 1992); *Hartford Ins. Co. v. Kean*, 866 S.W.2d 924 (Mo.App. E.D.1993).

3. Fleet Policies. An omnibus insured using a fleet vehicle as a permittee is not entitled to "stack" the medical payments coverage applicable to each fleet vehicle. *Hartford Ins. Co., v. Kean*, 866 S.W.2d 924 (Mo.App. E.D.1993). Also see *Linderer v. Royal Globe Ins. Co.*, 597 S.W.2d 656 (Mo.App.1980). However, one that falls within the definition of "insured" because of a relationship with the named insured, such as a spouse, has been accorded the status of a named insured in so far as stacking coverage is concerned. *Husch by Husch v. Nationwide Mut. Fire Ins. Co.*, 772 S.W.2d 692 (Mo.App.1989).

Annotations

American Family Mut. Ins. Co. v. Ragsdale, MLW No. 54374 (Mo.App.W.D. 2006). Where plaintiff was injured in an auto accident while driving his employer's vehicle, an "Other Insurance" clause in the plaintiff's policies was ambiguous and the trial court properly allowed the plaintiffs to stack their two policies and held that the insurer could not offset the amount received from the liability policy of the other driver as well as worker's compensation payments.

O'Driscoll v. Mutapic, 210 S.W.3d 368 (Mo. App. E.D. 2006). Insured sought recovery of underinsured motorist coverage against State Farm for injuries he sustained due to a motorcycle accident. There existed six policies of insurance issued by State Farm to the insured, but the motorcycle was listed on the declarations page of only one policy. All six policies contained the following clause:

THERE IS NO COVERAGE UNDER COVERAGE W FOR BODILY INJURY TO INSURED:

2. WHILE OCCUPYING A MOTOR VEHICLE OWNED OR LEASED BY YOU, YOUR SPOUSE OR ANY RELATIVE IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY.

Insured made a claim for the underinsured benefits under each of the six policies. The court determined that the State Farm coverage clauses in the Insured's policies do not permit stacking those five policies which do not list on their declaration pages the motorcycle the insured was riding when he was injured to cover bodily injury he sustained.

15. Personal Injury Protection

Missouri does not provide for Personal Injury Protection by statute.

16. Measure of Damages (property damage/loss of use)

The measure of damages for property damages must generally be limited to compensation unless punitive damages are allowable. *Pasquel v. Owen*, 186 F.2d 263 (8th Cir. 1951). The general rule for damages to real or personal property is the diminution in value test, the difference between fair market value before and after the event causing damage. *Sharaga v. Auto Owners Mut. Ins. Co.*, 831 S.W.2d 248 (Mo.App. W.D. 1992). An exception to the diminution in value measure of damages is the cost of repair test which may be used when property can be restored to its former condition at a cost less than its diminution in value. *Sheridan v. Sunset Pools of St. Louis, Inc.*, 750 S.W.2d 639 (Mo.App. E.D. 1988). The jury has a duty to assess and award reasonable damages. *Larabee v. City of Kansas City*, 697 S.W.2d 177 (Mo. App. 1985).

In situations dealing with total destruction of a motor vehicle or other property the measure of damage is the fair market value of the property at the time and place of destruction. *Stark Bro's Nurseries & Orchards Co. v. Wayne Daniel Truck, Inc.*, 718 S.W.2d 204 (Mo. App. 1986). This measure is essentially the same as diminution in value assuming the fair market value of the vehicle after it has been destroyed is zero. However, this measure is different than diminution in value where the destroyed vehicle has some salvage value. Where market value does not exist or is undeterminable, replacement cost is the appropriate measure of damages. *Culver-Stockton College v. Mo. Power and Light Co.*, 690 S.W.2d 168 (Mo. App. 1985).

Damages for loss of use are determined by the reasonable amount of time the claimant is deprived of his property, the time required by exercise of proper diligence to secure repair, and the reasonable rental value of the property during that period of time.

Johnson v. Linds, 618 S.W.2d 265 (Mo. App. 1981); *Gerst v. Flinn*, 615 S.W.2d 628 (Mo. App. 1981); *Stallman v. Hill*, 510 S.W.2d 796 (Mo. App. 1974); *Winter v. Elder*, 492 S.W.2d 146 (Mo. App. 1973).

17. Subrogation

An insurer cannot subrogate with respect to medical payments coverage. *Buatte v. Gencare Health Systems, Inc.*, 939 S.W.2d 440 (Mo.App. E.D. 1996); *Wayne v. Bankers Multiple Life Ins. Co.*, 796 S.W.2d 660 (Mo. App. 1990). An insurer cannot offset uninsured motorists payments by amounts paid under medical payments coverage. *Webb v. State Farm*, 479 S.W.2d 148 (Mo. App. 1972) and *Wegeng v. Flowers*, 753 S.W.2d 306 (Mo. App. 1988).

An insurer may subrogate with respect to payments made under uninsured motorist coverage by bringing a claim in the insured's name and if the insured cooperates. **RSMo. §379.203**; *Schreiner v. Omaha Indemnity Co.*, 854 S.W.2d 542 (Mo.App. E.D. 1993); *Kroeker v. State Farm Mut. Ins. Co.*, 466 S.W.2d 105 (Mo. App. 1971).

An insurer can subrogate for payments made under comprehensive and collision coverage. The subrogation interest is vested upon payment, but the insurer has a contingent interest before payment. *General Exchange Ins. Corp. v. Young*, 212 S.W.2d 396 (Mo. 1948). If the insured collects money after the insurer has made payments, the insured cannot keep the proceeds, but holds them in trust for the insurer. *Baker v. Fortney*, 299 S.W.2d 563 (Mo. App. 1957).

18. Cancellation and Non-Renewal Procedures

a. There are only two reasons for which an automobile insurance policy can be canceled: 1) non-payment of premium; and 2) suspension or revocation of the insured's driver's license. **RSMo. §379.114.1.**

Non-renewal can be for any reason, except those specifically prohibited by statute. *Shgeir v. Equifax, Inc.*, 636 S.W.2d 944 (Mo.banc 1982). The statutorily prohibited reasons for non-renewal are: age, residence, race, sex, color, creed, national origin, ancestry or lawful occupation, including the military service, or cancellation or non-renewal by another insurer. **RSMo. §379.114.3.**

Notice of cancellation or non-renewal must be given 30 days prior to the effective date of cancellation, and must be sent by certified mail. The notice must contain a description of the action to be taken, the effective date, the reason, stated in clear and

specific terms, and an explanation that the insured may be eligible for assigned risk insurance. **RSMo. §379.118.**

b. A premium finance company with power of attorney may cancel an insurance policy for failure to timely pay the premium by not less than ten days' written notice of its intent to cancel the policy unless the default is cured within the ten day period. After the ten day period has expired, the premium finance company may cancel the insurance contract by mailing a notice of cancellation to the insurer and to the insured at his last known address. **RSMo. §364.130.** Return of unearned premium within 60 days after the effective date of cancellation is required. **RSMo. §364.135.**

Annotations

Stone v. Farm Bureau Town & Country Ins. Co. of Mo., 2005 WL 3557431 (Mo.App.S.D. 2005). The insurer's cancellation provisions provided that insurance could be cancelled for non-payment of premium provided: (1) nonpayment of premium, (2) notice of cancellation sent, and (3) the passage of at least 10 days. After the insured failed to make payment, insurer mailed the insured a reminder notice, indicating the policy would expire on October 9, 2002, if the premium was not received. Payment was not received, and on October 10, 2002, insurer mailed the insured a cancellation notice, listing the date of cancellation as October 9, 2002. Insureds were subsequently involved in an auto accident. Court of Appeals noted that when an insurance company seeks to unilaterally cancel a policy, it must strictly comply with the terms of the policy. Policy provisions authorized insurer to cancel the policy for non-payment of premium, by mailing a cancellation with at least 10 days notice. Although the cancellation notice was mailed to the insured, and set out a date of cancellation *prior to* the date of mailing, the court of appeals held that – pursuant to the policy provisions – the cancellation notice was valid, and became effective 10 days after it was mailed.

19. Loss of Consortium: "Per Occurrence" or "Per Person" Limit of Liability

This issue cannot be addressed without specifically consulting the policy language applicable to each claim. A claim for loss of consortium does not automatically trigger the "per occurrence" limit of liability. Missouri law has consistently upheld limitations to derivative claims under "per person" restriction where the policy language is unambiguous.

The paramount Missouri case where the "per occurrence" limit was triggered in case of loss of consortium was *Cano v. Travelers Insurance Co.*, 656 S.W.2d 266 (Mo.banc.1983). In *Cano*, the language that the insurer relied upon in an attempt to limit the derivative claim to the "per person" limit was found to be "ambiguous" as the

language itself had a question of modifiers. *Id.* More specifically, the language read "all damages because of bodily injury sustained by any one person as a result of any one accident." *Id.* The question in this case was whether the word "damages" or "bodily injury" was caused the claim to be limited to the "per person" limit. The Court held that the language was ambiguous. *Id.* Therefore, ambiguous terms are strictly construed in favor of the insured. *Id.* Hence, the derivative plaintiff was entitled to recover beyond the per person limit.

However, subsequent cases analyzing this issue have made it clear that *Cano* turned on the ambiguous policy language, and was not intended to create a bright line rule that derivative actions automatically trigger the "per occurrence" limits. *Eaves v. Boswell*, 852 S.W.2d 353 (Mo.App.1993); *Peters v. Farmers Ins. Co., Inc.*, 726 S.W.2d 749 (Mo.banc1987); *Lair v. American Family Mutual Ins. Co.*, 789 S.W.2d 30 (Mo.banc1990); see also *United States Fidelity & Guaranty Co. v.* 522 S.W.2d 809 (Mo.banc1975).

20. No Attorney Fees Taxed as Costs in Certain Actions Involving Negligent Motor Vehicle Operation

Missouri has no statute allowing for attorney fees to be taxed as costs in typical car accident cases.

21. Who Can Bring Wrongful Death Suit

Under **RSMo. §537.080**, the proper plaintiffs in a wrongful death action are, in descending order:

- a. The decedent's spouse, children (whether natural, adopted, legitimate or illegitimate), or father or mother (whether natural or adopted);
- b. If no person satisfies the requirements in (a), then suit may be brought by the decedent's brother or sister or their decedents, if they can show damages;
- c. If there is no one to satisfy (a) or (b), then the court will appoint a "plaintiff ad litem," on the application of any person entitled to share in the proceeds of the action. However, **RSMo §537.021.1** limits the appointment of a plaintiff ad litem to actions involving loss chance of survival in medical malpractice claims.

22. Legal Measure of Damages in Wrongful Death Suit

In a wrongful death action, damages may be recovered for funeral expenses the reasonable value of services, consortium, companionship, comfort, instruction,

guidance, counsel, training and support, of which the plaintiff has been deprived; and the decedent's pain and suffering between injury and death. **RSMo. §537.090**. Missouri law does not place an upper limit on the amount of damages so recoverable.

23. Discoverability of Insurer's Claim File

Missouri law has no statute which expressly allows for the discoverability of an insurer's claim file. A liability insurer's file should always be considered "prepared in anticipation of litigation," and therefore within the limited work product immunity of **Missouri Supreme Court Rule 56.01**. *State ex rel. State Farm Mutual Auto Insurance Co. v. Keet*, 601 S.W.2d 669 (Mo. App. 1980). Under the work product doctrine, the file is not discoverable unless the seeking party can show substantial need and an inability to obtain the substantial equivalent without undue hardship.

Statements made by the insured to his liability insurer concerning a claim are also absolutely privileged under the insurer-insured privileged. *State ex rel. Cain v. Barker*, 540 S.W.2d 50 (Mo. 1976); *May Department Stores v. Ryan*, 699 S.W.2d 134 (Mo. App. 1985).

24. Priority of Payments in Multiple Claims Situations

This depends on the status of the case. If the claims of multiple plaintiffs have been reduced to judgments and their sums exceed the policy limits, the judge will make a pro rata allocation of the insurance proceeds based on the percentage of total judgment for actual damages awarded to each plaintiff. *Christlieb v. Luten*, 633 S.W.2d 139 (Mo. App. 1982).

Where the insurer is presented with multiple claims prior to suit and assuming liability and excess exposure, the company's best course is to initiate an interpleader action under **Missouri Supreme Court Rule 52.07**. Interpleader is proper where the insurer pleads facts showing two or more persons have a claim against it which could result in multiple liability. *Commercial Bank of St. Louis County v. James*, 658 S.W.2d 17 (Mo. banc 1978).

25. Duty to Defend after Policy Limits Exhausted

Missouri courts have declared that an insurance company's duty to defend its insureds terminates when the policy limits are exhausted pursuant to a good faith settlement on behalf of the insureds. *Millers Mut. Ins. Assoc. of Illinois v. Shell Oil*, 1997 Mo. App. Lexis 2021 (Nov. 25, 1997, Mo. App. E.D.). The *Shell Oil* case involved Shell's appeal from a judgment which determined that Millers Mutual

Insurance had no obligation to defend or indemnify Shell or the named insured, Dunn, in a tort action, in which Miller paid its liability policy limits to the tort claimants in settlement on behalf of Dunn.

The policy language in the *Shell Oil* case read as follows:

"[o]ur duty to defend or settle ends when the applicable Liability Coverage Limit of Insurance. . . has been exhausted by payment of judgments or settlements."

In accordance with this language, the court concluded that "[t]he policy has one limit of liability and when it is exhausted by payments of judgment or settlement, the duty to defend or settle ends."

An insurer may bring an interpleader action and pay the policy limits into court--even where the claims against the insured have not been reduced to judgments. *Protective Casualty Ins. Co. v. Cook*, 734 S.W.2d 898 (Mo. App. 1987). When utilizing the interpleader statute, the insurer should attempt to obtain an order from the court declaring it has no further duty to defend.

26. Bad Faith

An insured may obtain damages against the insurer for the insurer's bad faith in not effectuating settlement of a third party claim within policy limits. *Duncan v. Andrew County Mut. Ins. Co.*, 665 S.W.2d 13 (Mo. App. 1983); *Freeman v. Leader Nat. Ins. Co.*, 2001 WL 880666 (MoApp. 2001). Additionally, when an insurer wrongfully refuses to defend its insured, it is liable for all damages that flow from its refusal to defend including the insured's attorneys fees. *Fuller v. Lloyd*, 714 S.W.2d 698 (Mo. App. 1986); *Distler v. Reuther Jeep Eagle*, 14 S.W.3d 179 (Mo.App. 2000).

The basis for excess liability is the reservation by the insurer of exclusive control and management of the claim or litigation. *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750 (1950); *Craig v. Iowa Kemper Mut. Ins. Co.*, 565 S.W.2d 716 (Mo. App. 1978). The insurer's excess liability is based on the theory of bad faith. Elements of a bad faith claim are:

- a. the liability insurer assumed control over negotiation, settlement and legal proceedings brought against the insured;
- b. the insurer refused to settle the claim within the liability limit of the policy; and
- c. in so refusing, the insurer acted in bad faith.

H & S Motor Freight, Inc. v. Truck Ins. Exchange, 540 F. Supp. 766 (W.D.Mo. 1982); *Ganaway vs Shelter Mut. Ins. Co.*, 795 S.W.2d 554 (Mo.App. 1990).

There is also some authority that the insured must make demand upon the insurer to settle the claim in order to claim bad faith on the part of the insurer. *Dyer v. General American Life Co.*, 541 S.W.2d 702 (Mo. App. 1976); and *Bonner v. Automobile Club Inter-Insurance Exchange*, 899 S.W.2d 925, (Mo.App. 1995). However, the more recent cases have indicated that this is not necessary. "Some Missouri opinions have suggested that demand is not required if the insurer has failed to notify the insured of an offer of settlement." *Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554 (Mo.App. 1990)

Both compensatory damages and punitive damages may be awarded in excess liability cases. In order to support punitive damages there must be a showing that the insurer acted maliciously, wilfully, intentionally or recklessly. *Zumwalt v. Utilities Ins. Co.*, 228 S.W.2d 750 (1950). As to compensatory damages, the insured can recover the full amount of the judgement in excess of the policy limits but is not entitled to attorneys fees absent the insurer's refusal to provide a defense against the claims. *Landie v. Century Indemnity Co.*, 390 S.W.2d 558 (Mo. App. 1965).

Under Missouri law, there is no provision allowing a bad-faith claim to be assigned to a third party, where the third party would pursue the bad-faith claim against the insurer. *Quick v. National Auto Credit*, 65 F.3d 741 (8th Cir. 1995). although under **RSMo §537.020**, personal injury actions survive to the personal representative, they are not assignable. *Beall v. Farmers' Exch. Banl.* 76 S.W.2d 1098 (Mo. 1934); and *Property Exch. & Sales, Inc. v. Bozath*, 778 S.W.2d (Mo.App. 1989). However, if the insured is in bankruptcy, the trustee in bankruptcy can assign the bad faith claim to a creditor, i.e., the injured party.

27. Liability of Insurer for Excess Judgments

RSMo. §379.195.1 generally establishes that an insurance company has absolute liability to pay, under its policy, whenever a loss occurs on account of a casualty covered by its policy. Payment of such a loss is not dependent upon satisfaction of a final judgment against an insured.

Damages in addition to the claim are possible under the terms of Missouri's Vexatious Refusal Statute, **RSMo. §375.420**, if it appears that the insurance company has "vexatiously refused to pay" the loss. The court, upon a finding of vexatious refusal,

may allow the claimant damages not exceeding 20% of the first \$1,500.00 of the loss and 10% of the amount of the loss in excess of \$1,500.00 plus reasonable attorneys fees.

Damages for vexatious refusal to pay can be assessed if the insurer fails or refuses to make payment for a period of 30 days after due demand to make payment under the policy provisions and such a refusal was willful and without reasonable cause. **RSMo. §375.296.** Failure of an insurer to appear and defend any action, suit or other proceeding is deemed prima facie evidence that the insurer's failure to make payment was vexatious and without reasonable cause. **RSMo. §375.296.** However, where there is an open question of law or fact which affects the question of coverage, the insurer is entitled to a judicial determination of that question without suffering penalty for refusal to pay the claim. *Joachim Savings & Loan Assoc. v. State Farm Fire & Cas. Co.*, 764 S.W.2d 648 (Mo. App. 1988); *Oliver vs. Cameron Mutual Insurance Co.*, S.W.2d 865 (Mo.App. 1993); and *Mears vs Columbia Mutual Insurance Co.*, 855 S.W.2d 389 (Mo.App. 1993).

RSMo. §375.296 applies only to first party claims where performance under the policy flows directly from the insurer to the insured. *Craig v. Iowa Kemper Mut. Ins. Co.*, 565 S.W.2d 716 (Mo. App.1978). However, a statutory claim for vexatious refusal can be assigned. *Still v. Travelers Indem. Co.*, 374 S.W.2d 95 (Mo. 1964).

Prior adjudication of an uninsured motorist's legal liability for damages is not required for the insured to bring a claim for vexatious refusal to pay uninsured motorist benefits. *Thomas v. American Casualty Insurance Company*, 871 S.W.2d 640 (Mo. App. 1993), *Walker v. Commercial Union Ins. Co.*, 879 S.W.2d 596 (Mo. App. 1994), *Shafer v. Automobile Club Inter Insurance Exchange*, 778 S.W.2d 395 (Mo. App. 1989)

28. Offer of Judgment

Missouri Rule of Civil Procedure 77.04 provides as follows:

At any time more than thirty days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon judgment shall be entered. If the offer is not accepted within ten days it shall be deemed withdrawn and evidence thereof is not

admissible. If the adverse party fails to obtain a judgment more favorable than that offered, that party shall not recover costs in the circuit court from the time of the offer but shall pay costs from that time.

The purpose of Rule 77.04 is to allow a defendant to avoid court costs by making an offer of judgment which, if accepted, results in a consent judgment. *Fritzsche v. East Tex. Motor Freight Lines*, 405 S.W.2d 541 (Mo.App. E.D.1966). An offer of judgment does not constitute an admission of liability. Rather, it is intended to be an agreement between the parties as to the terms, amount or conditions of the consent judgment. *Katz Drug Co. v. Commercial Standard Ins. Co.*, 647 S.W.2d 831 (Mo.App. W.D.1983). A defendant who makes an offer of judgment more favorable than any judgment that the plaintiff may ultimately obtain, is only liable for costs incurred before the date of the offer. *Bishop v. Cummines*, 870 S.W.2d 922 (Mo.App. W.D.1994). The language of Rule 77.04 leaves no discretion with the trial court as to whether or not to enter judgment after an offer and acceptance of judgment. *State ex rel. Riggs v. Clark*, 14 S.W.3d 719 (Mo.App. W.D.2000). See also, R.S.Mo. §§ 514.230 to 514.250.

Illinois Law

1. Responsive pleading date

In Illinois state circuit courts, if the summons requires an appearance within 30 days of service, a defendant has 30 days after service of the Complaint and Summons to file a responsive pleading. S. Ct. Rule 181(a). In some instances, the summons will require an appearance on a specified date. In that instance, the defendant or his attorney may appear in court on the specified date, and the answer or responsive pleading will be due within 10 days of that appearance. S. Ct. Rule 181(b)(1). If the defendant will object to jurisdiction, counsel's first appearance should be a "special and limited" appearance solely for that purpose, or the jurisdictional argument is waived. 735 ILCS 5/2-301.

Illinois courts require answer fees, and jury demand fees, which vary from county to county. The fee for a jury of 6 must be half the fee required for a jury of 12. 735 ILCS 5/2-1105(b). Answer fees vary by county, and must be paid at the time the answer is filed.

2. Venue

In Illinois, the venue of a civil lawsuit is governed by statute. In general, every lawsuit must be commenced either (1) in the county of residence of any defendant who is joined in good faith, or (2) in the county in which the transaction or some part thereof occurred out of which the cause of action arose. 735 ILCS 5/2-101. For purposes of the statute, a corporation is a resident of any county in which it has a registered office, or other office, or is doing business. 735 ILCS 5/2-102(a).

A motion to transfer due to improper venue must be made on or before the date upon which the defendant is required to file responsive pleadings, or within any further time that may be granted the defendant to file response pleadings. 735 ILCS 5/2-104. However, if a defendant whose residence venue depends is dismissed, the remaining defendant may promptly move for transfer as though the dismissed defendant had not been a party. *Id.*

Transfer of venue may be warranted based on the common-law doctrine of *forum non conveniens*. *Forum non conveniens* is an equitable doctrine founded in considerations of fundamental fairness and sensible and effective judicial administration. *First Nat. Bank v. Guerine*, 764 N.E.2d 54 (1st Dist. 2002). The doctrine assumes that jurisdiction and venue are proper in more than one county, and allows a trial court to decline jurisdiction and direct the suit to an alternate forum with

jurisdiction when litigating in that forum would better serve the ends of justice. *Certain Underwriters at Lloyd's, London v. Illinois Cent. R. Co.*, 768 N.E.2d 779 (2d Dist. 2002).

In practice, forum non conveniens motions are infrequently granted. When considering such a motion, the trial court is to weigh both “private and public interest factors.” The private interest factors include (1) the convenience of the parties; (2) the relative ease of access to sources of testimonial, documentary, and real evidence; and (3) all other practical problems that make the trial of a case easy, expeditious, and inexpensive—for example, the availability of compulsory process to secure attendance of unwilling witnesses, the cost to obtain attendance of willing witnesses, and the ability to view the premises (if appropriate). The public interest factors include (1) the interest in deciding localized controversies locally; (2) the unfairness of imposing the expense of a trial and the burden of jury duty on residents of a county with little connection to the litigation; and (3) the administrative difficulties presented by adding further litigation to court dockets in already congested. *Certain Underwriters at Lloyd's, London v. Illinois Cent. R. Co.*, 768 N.E.2d 779 (2d Dist. 2002).

3. Statute of Limitations

Generally, statutes of limitations in Illinois are as follows:

- a. Personal injury, including emotional injury – 2 years. 735 ILCS 5/13-202.
- b. Loss of Consortium – 2 years. 735 ILCS 5/13-203; *Sharpenter v. Lynch*, 599 N.E.2d 464 (2d Dist. 1992)
- c. Wrongful death – 2 years from death. 740 ILCS 180/2(c).
- d. Survival action - 1 year of death, provided death occurred prior to the expiration of the limitations period on the decedent's cause of action. *O'Brien v. O'Donoghue*, 686 N.E.2d 688 (1st Dist. 1997).
- e. Damage to real or personal property – 5 years. 735 ILCS 5/13-205.

Under certain circumstances, a statute of limitations may be tolled. With respect to minors and other persons under legal disability entitled to bring an action, if the cause of action accrues before the age of 18, or during the period of disability, then he or she may bring the action within 2 years after the person reaches 18, or the disability is removed. 735 ILCS 5/13-211.

If a cause of action accrues against a person while he or she is out of the state, the statute of limitations is tolled while that person is out of the state. 735 ILCS 5/13-208.

4. Number of Jurors Required to Return Verdict

A party who wishes a trial by jury must file a jury demand along with the complaint or answer, or the party has waived the jury. 735 ILCS 5/2-1105(a). In all cases where the claim for damages is \$50,000 or less, the case will be tried to a jury of 6, unless either party demands a jury of 12. 735 ILCS 5/2-1105(b); S. Ct. Rule 285. Jury verdicts must be unanimous. *Chicago & N.W. R.R. Co. v. Dunleavy*, 22 N.E. 15 (Ill. 1889).

5. Liens (requirements and legal effect)

By statute in Illinois, every health care professional and health care provider that renders any service in the treatment, care, or maintenance of an injured person, (except services rendered under the provisions of the Workers' Compensation Act, or the Workers' Occupational Diseases Act), shall have a lien upon all claims and causes of action of the injured person for the amount of the health care professional's or health care provider's reasonable charges up to the date of payment of damages to the injured person. 770 ILCS 23/10(a). The total amount of all liens allowed under the statute shall not exceed 40% of any verdict, judgment, award, settlement, or compromise secured by plaintiff. (Id.)

Notice of the lien should be served on both the injured person and the party against whom the claim or right of action exists. The lien notice shall include a written notice containing the name and address of the injured person, the date of the injury, the name and address of the health care professional or health care provider, and the name of the party alleged to be liable to make compensation to the injured person for the injuries received. 770 ILCS 23/10(b). Service shall be made by registered or certified mail or in person. Payment in good faith to any person other than the healthcare professional asserting such lien, prior to the service of such notice of lien, shall to the extent of the payment so made, bar or prevent the creation of an enforceable lien. Id.

All health care professionals and health care providers holding liens share proportionate amounts up to 40% of the total verdict, judgment, award, settlement or compromise. 770 ILCS 23/10(c). No physician or provider may receive more than one-third of the verdict, judgment, award, settlement, or compromise. If the total amount of all liens under the statute meets or exceeds 40% of the verdict, judgment,

award, settlement, or compromise, then (1) the total liens of health care professionals is limited to 20% of the proceeds, and (2) the total liens of health care providers is limited to 20% of the proceeds. Any unused amounts are reallocated within the aggregate total limit of 40% for all health care service liens.

Payments under the liens shall be made directly to the health care professionals and health care providers. 770 ILCS 23/10. On petition filed by the injured person or the health care professional or health care provider and on the petitioner's written notice to all interested adverse parties, the circuit court shall adjudicate the rights of all interested parties and enforce their liens. 770 ILCS 23/30.

Attorneys have a lien upon all claims, demands and causes of action which may be placed in their hands by their clients for suit or collection, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee. If the total amount of all liens under the Health Care Services Lien Act meets or exceeds 40% of the sum paid or due the injured person, the total amount of all liens under the Attorney's Lien Act shall not exceed 30% of the sum paid or due the injured person. 770 ILCS 5/1. To enforce such lien, such attorneys shall serve notice in writing, with service made by registered or certified mail, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action. 770 ILCS 5/1.

6. General Rule of Negligence and Comparative Fault

In 1986, the Illinois legislature adopted a modified comparative fault regime. By statute, in all actions on account of bodily injury or death or physical damage to property, based on negligence, the plaintiff is barred from recovering damages if the trier of fact finds that the contributory fault on the part of the plaintiff is more than 50% of the total proximate cause of the injuries. If the fault attributable to plaintiff is not more than 50%, plaintiff's recovery is diminished in proportion to the amount of that fault. 735 ILCS 5/2-1116.

7. Seat Belt Defense

Illinois courts do not recognize the seat belt defense. The supreme court of Illinois has held that a plaintiff has no duty to anticipate and guard against a defendant's negligence, and evidence of failure to wear seat belt is not admissible in a personal injury action with respect to either the question of negligence or damages. *Clarkson v. Wright*, 483 N.E.2d 268 (Ill. 1985). The Clarkson decision reflects the prior trend of Illinois lower courts, which would generally hold that failure to wear seatbelts

would not constitute contributory negligence on the part of the plaintiff. *Old Second Nat'l Bank of Aurora v. Baumann*, 408 N.E.2d 224 (2nd Dist. 1980).

Although failure to use a seat belt may not be used to show contributory negligence, Illinois courts may allow that evidence to be introduced only on the issue of mitigation of damages. *Sewell v. Wofford*, 475 N.E.2d 575 (1st 1995).

8. Financial Responsibility Law

Section 7-601(a) of the Illinois Safety and Family Financial Responsibility Law (625 ILCS 5/7-101 et seq.) mandates liability insurance coverage for automobiles and other motor vehicles designed to be used on a public highway. Under the statute, no person is permitted to operate, register or maintain registration of such a motor vehicle unless the vehicle is covered by a liability insurance policy. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group*, 695 N.E.2d 848 (Ill. 1998). The basic provisions of the statute are the requirements of security deposits in the event of an accident and proof of financial responsibility for the future; and satisfaction of these requirements is enforced by the sanction of suspension of driver's license and vehicle registration.

The Illinois Safety Responsibility Law requires proof of future financial responsibility as a condition of the continuance of a driver's license or vehicle registration. Under the Safety Responsibility Law "proof of financial responsibility for the future" means proof of ability to respond in damages for any liability thereafter incurred resulting from the ownership, maintenance, use or operation of a motor vehicle, for bodily injury in the amount of \$20,000/\$40,000, and for property damage in the amount of \$15,000 resulting from any one accident. (625 ILCS 5/1-164.5.) This proof may be furnished by properly filing with the Secretary of State an acceptable certificate of motor vehicle liability insurance, a duly executed liability bond, or by depositing equivalent money or securities with the State Treasurer.

If the Illinois Secretary of State receives a report of an accident and finds that death, personal injury, or property damage in an amount greater than \$500 has been sustained, he must require an owner or operator within the Act to deposit security sufficient to satisfy any judgments for damages resulting from the accident, at penalty of suspension of his license and registrations. (625 ILCS 5/7-201.) The Safety Responsibility Law expressly excepts from its requirements a wide range of vehicle owners and operators who present no immediate threat of financial irresponsibility, including those with adequate existing insurance or bonding arrangements and those for whom there is no realistic contingency of liability resulting from the particular accident. (625 ILCS 5/7-202.)

9. Uninsured/Underinsured Motorist Law

All automobile insurance policies issued in the state of Illinois are required by statute to provide uninsured motorist or “hit-and-run” coverage. 215 ILCS 5/143a-2(1). Uninsured motorist coverage must be offered with every policy of auto insurance, in at least the statutory minimum limits of coverage, of \$20,000/\$40,000. Insurance companies issuing automobile insurance policies in the state of Illinois are also required to offer underinsured motorist coverage. 215 ILCS 5/143a-2(4). Underinsured motorist coverage be in an amount equal to the statutory minimum, or in an amount equal to the total amount of uninsured motorist coverage provided in that policy where such uninsured motorist coverage exceeds the statutory minimum. Id.

To satisfy the requirements of the insurance code, an offer of uninsured motorist coverage must (1) notify the insured in a commercially reasonable manner if the offer is not made in face-to-face negotiations; (2) specify the limits of the optional coverage without using general terms; (3) intelligibly advise the insured of the nature of the offer; and (4) advise the insured that the optional coverage is available for a relatively modest premium increase. 215 ILCS 5/143a-2(1). *Norris v. Union Fire Ins. Co. of Pittsburgh*, 760 N.E.2d 141 (1st Dist. 2001).

Any named insured or applicant may reject additional uninsured motorist coverage in excess of statutory limits, by making a written request for limits of uninsured motorist coverage which are less than bodily injury liability limits or a written rejection of limits in excess of those required by law. This election or rejection shall be binding on all persons insured under the policy. 215 ILCS 5/143a-2(2)

Uninsured and underinsured claims are governed by the same statutes of limitations as would apply had the claim been brought as a civil claim against the insured or underinsured motorist. *Hannagan v. Country Mut. Ins. Co.* (4th Dist.). Policy provisions excluding claims under both the uninsured/underinsured provisions of the policy, and the liability provisions of the same policy, are upheld in Illinois. *Mercury Indemnity Co. of Ill. V. Kim*, 358 Il.App.3d 1 (5th Dist. 2005).

The statutory provisions concerning uninsured and underinsured motorist coverage provide for arbitration under the provisions of the American Arbitration Association. However, the insurer may also arrange arbitration before a three-person panel, with one arbitrator being selected by each party, and where those arbitrators select a third – neutral – arbitrator. In this situation, the vote of any two arbitrators constitutes an award.

Annotations

Illinois Farmers' Insurance Co. v. Marchwiany, 856 N.E.2d 439 (Il. 2006).

The surviving wife and four adult children of a decedent, claimed underinsured benefits after settling with the at-fault drivers in a fatal collision. There were two policies applicable to the vehicle being driven by the decedent, and one of those insurers paid the difference between the limits of coverage under its policy, \$100,000, and the amount paid in settlement. The other insurer, Illinois Farmers, filed a declaratory judgment action, contending that it owed nothing, as the other insurer was primary, the limits of coverage under the “per person” provision in its policy were the same amount, and therefore no further recovery was available to the estate or survivors.

The survivors claimed that the higher, “per-occurrence” limits of \$300,000 were applicable. The trial court granted summary judgment to Farmers, and the appellate court affirmed. The Supreme Court resolved a split in the appellate district courts by affirming. The policy provisions at issue were

“Limitations of Coverage” “1. The uninsured motorist bodily injury limit for ‘each person’ is the maximum we will pay for all damages resulting from bodily injury sustained by one person in any one accident or occurrence. Included in this limit, but not as a separate claim or claims, are all the consequential damages sustained by other persons, such as loss of services, loss of support, loss of consortium, wrongful death, grief, sorrow and emotional distress.

2. The uninsured motorist bodily injury limit for ‘each occurrence’ is the maximum amount we will pay for two or more persons for bodily injury sustained in any one accident or occurrence.”

The survivors argued that these provisions, read together, created an ambiguity in the policy, which must be resolved in favor of coverage. The Court noted that all appellate courts construing these provisions, including the fifth district in the *Roth* decision, held that the “per-person” clause restricts recovery for consequential damages due to the fatal injuries to the \$100,000 limit. The *Roth* court went on, however, and the claimants argued in this case, that the “per-occurrence” clause was not explicitly subject to the provisions of the “per-person” clause, and the use of the word “for” rather than “to” in reference to “two or more persons” in the “per-occurrence” clause allowed for a reasonable interpretation that the higher coverage

available in that clause was applicable in the situation where multiple derivative claims are made. When two reasonable interpretations of policy language exist, the policy is ambiguous and must be given the interpretation that provides for broader coverage.

The Court held, however, that this was not a reasonable interpretation of the policy language. Where, as here, the “per-person” limit is clearly applicable, it is unreasonable to expand that coverage unless the language of the “per-occurrence” clause clearly required that result. It did not in this case. (Compare, *Roth v. Illinois Farmers’ Ins. Co.*, 324 Ill.App.3d 293.)

State Farm Mut. Auto Ins. Co. v. Coe, 855 N.E.2d 173, (Ill.App.1st Dist., 2006)

Holding: an insured is not entitled to recovery under underinsured motorist policy when he has already recovered workers’ compensation benefits in excess of policy’s coverage amount.

A police officer was directing traffic when he was struck by a motorist. As a result of the accident, Coe claimed special damages in excess of \$150,000. He recovered \$50,000 through tortfeasor’s automobile insurance, and received more than \$100,000 in workers’ compensation benefits. He then submitted a claim to State Farm under his underinsured motorist coverage. This coverage was subject to a \$100,000 limit and a policy exclusion providing that, “[a]ny amount paid or payable to or for the insured under any workers’ compensation, disability benefits, or similar law shall reduce the amount payable under this coverage,” as authorized by the setoff provision of Illinois’ underinsured motorist statute (215 ILCS 5/143a-2(4)). State Farm denied the claim and filed a declaratory judgment, arguing that its obligations under Coe’s policy had been completely offset by his workers’ compensation recovery.

On appeal following the trial court’s grant of summary judgment to State Farm, Coe’s primary argument on appeal was that the policy exclusion’s “amount payable under this coverage” language was ambiguous, and should be interpreted against State Farm. He cited precedent from Illinois and other states in which the phrase “amounts payable” as used in underinsured and uninsured motorist policies was found to mean the claimant’s total damages, not the limits of the claimant’s coverage under his policy. Therefore, the amount Coe could recover from State Farm should be determined by deducting his workers’ compensation recovery from the total amount of his injuries, not from the \$100,000 limit of his policy. The court held that, in contrast to cases cited by Coe, the policy language here gave the insured no reason to believe that the deductions from his recoverable amount would be taken from his total damages rather than from his policy limits. State Farm’s policy, unlike others, did not define an underinsured motorist as one whose insurance had “liability limits less than the

damages [the] insured person is legally entitled to recover,” but rather as one whose liability limits “are less than the limits you carry for underinsured motor vehicle coverage under this policy.” Nor did it purport to cover “all compensable damages.” Additionally, its policy exclusion referred to setoffs against the “limits of coverage” rather than the “limits of liability.” It the court’s view, these linguistic choices made clear that “amount payable under this coverage” referred to the policy’s \$100,000 limit, not to the insured’s total damages.

Coe also argued that the purpose of the setoff provision in the underinsured motorist statute was to prevent double recoveries, and to allow such a setoff here would go against that purpose. The court disagreed, finding that the prevention of double recovery was only a goal in cases with multiple tortfeasors. In all other cases, the statute’s purpose, and the purpose of Coe’s insurance policy, was to place him in the same situation as if the tortfeasor’s insurance had provided as much coverage as Coe’s underinsured motorist policy. Had Moorehouse’s insurance provided for \$100,000 of coverage, Coe’s total recovery would not have changed because he would have received \$50,000 less in workers’ compensation. Therefore, the court found that the setoff of the workers’ compensation recovery against Coe’s underinsured motorist policy placed him in the position that it was intended to, and was therefore in accordance with the purpose of the Illinois statute. The court affirmed summary judgment in favor of State Farm, holding that an insured is not entitled to recovery under underinsured motorist policy when he has already recovered workers’ compensation benefits in excess of policy’s coverage amount.

Jones v. Country Mutual Insurance Company, No. 1-05-1417 (1st Dist. 2007).

Trial court erred when it granted summary judgment to plaintiffs, holding that two underinsured motorist policies with same limits as liability policy of tortfeasor, could be stacked before offset of other coverage. The offset of each policy's limit by amount of liability coverage of tortfeasor must be made before any stacking of policies. Since each policy had \$100,000 limit, there is no underinsured coverage for the accident.

10. Stacking Uninsured/Underinsured Motorist Coverage

Where adequate uninsured motorist coverage is in place, policy provisions forbidding the stacking of uninsured motorist coverage will be enforced as written by Illinois courts, provided the provision is unambiguous and does not violate public policy on any other grounds. *Menke v. Country Mut. Ins. Co.*, 401 N.E.2d 539 (Ill. 1980). Likewise, provisions in automobile policies forbidding stacking of underinsured motorist coverage are not contrary to public policy, and are to be

enforced as written where they were not ambiguous. *Grzeszczak v. Illinois Farmers Ins. Co.*, 659 N.E.2d 952 (Ill. 1995).

Under the Insurance Code sections mandating uninsured motorist coverage, an insurer is not prohibited from including policy conditions which provide that if the insured has coverage available under the statute, under more than one policy or provision of coverage, any recovery or benefits may be equal to, but may not exceed, the higher of the applicable limits of the respective coverage, and that the limits of liability under the statute must not be increased because of multiple motor vehicles covered under the same policy of insurance. (215 ILCS 5/143a-2(5).) This provision has been interpreted to allow an insurer to limit stacking of coverages under multiple policies by different insurers. *Darwish v. Nationwide Mut. Ins. Co.*, 617 N.E.2d 72 (1st Dist. 1993).

Annotations

Prudential Property & Cas. Ins. Co. v. Kelly, 817 N.E.2d 1226 (3d Dist. 2004). Where the declarations page of automobile insurance policy stated "if a premium charge does not appear, that coverage is not provided," the court held there was no ambiguity as to whether underinsured motorist (UIM) coverage on four covered vehicles could be aggregated or "stacked," even though the insurance policy stated that there was a separate premium for each vehicle listed. Court reasoned that the language meant only that coverage was not provided if premium for coverage did not appear on declarations page, language did not explicitly state or imply that UIM coverage on all four vehicles could be stacked if one of vehicles was involved in accident, and any confusion with regard to stacking of coverage was clarified by antistacking provision in policy. Court also noted that ambiguity concerning whether stacking of UIM coverage is permitted under automobile insurance policy is not created by arrangement of declarations page so that UIM coverage limits are listed once, and separate premium for that coverage is listed for each vehicle.

Hobbs v. Hartford Ins. Co. of the Midwest, 823 N.E.2d 561 (2005). An antistacking clause in policy covering two vehicles unambiguously limited underinsured motorist coverage to single per person limit, even though the declarations page stated that coverage was provided only where a premium was shown for the auto and coverage. Court noted that (1) the clause stated that the limit of liability shown in the declarations was the maximum limit regardless of the number of vehicles or premiums shown on the declarations, (2) the declarations page listed the limit of liability only once although it separately listed the premiums for two vehicles, and (3) the notations that the premium for underinsured motorist coverage was included did not speak to stacking issue.

Profitt v. OneBeacon Insurance, 845 N.E.2d 715, 300 (Ill.App.5thDist., 2006)

Holding: the existence of two declaration pages attached to an automobile insurance policy did not permit stacking the limits of coverage.

David Profitt (now deceased), was injured in a car accident with Phyllis Johnson. He sought to stack the liability limits for the coverage afforded Johnson on the basis that two declarations pages had been issued. A declaratory judgment action was filed against OneBeacon Insurance (OneBeacon) to determine the extent of coverage afforded by the policy it had issued to its insured. Profitt contended that the existence of two declarations pages permits the stacking of policy limits. OneBeacon contended that the second declarations page was issued as a result of a vehicle substitution and that no ambiguity exists.

The issue before the court was whether the limits of liability for bodily injury coverage provided by a single policy may be stacked where the policy contains more than one declarations page. The court rejected the argument that the existence of two declarations pages makes the amount of coverage ambiguous because the limits of liability are listed once on each page. The court distinguished cases where an ambiguity was claimed because a policy directs the reader to the declarations and multiple limits of liability are found. For example, an ambiguity could be created where a declarations page lists separate liability limits for multiple vehicles. See, *Bruder v. Country Mutual Insurance Company*, 620 N.E.2d 355 (1993). However, the present case does not involve multiple listings of liability limits on a single declarations page, nor is there a claim that coverage should be stacked because more than one vehicle is insured under the policy. The court concluded that “the content of the subsequently issued declarations page reflects the clear intent of the parties to the insurance contract to remove a Ford Taurus from coverage under the policy and to add a Hyundai Elantra.”

11. Vehicle Operated with Owner’s Permission

The Illinois Vehicle Code provides that motor vehicle liability insurance policies shall insure the person named therein and any other person using or responsible for the use of the motor vehicle with the permission of the insured. 625 ILCS 5/7-317(b). Provisions in automobile insurance policies which extend liability coverage to persons who use the named insured’s vehicle with his or her permission are commonly referred to as “omnibus clauses.” The Illinois Supreme Court has held that the state legislature required that such an omnibus policy be read into every auto policy, and in combination with the Illinois Financial Responsibility Law, each auto

liability policy issued in Illinois to contain an omnibus clause, extending coverage – at least in the amount of \$20,000/\$40,000/\$15,000 – to any person using the insured vehicle with the named insured’s consent. *State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group*, 695 N.E.2d 848 (Ill. 1998)

To establish that the user of an automobile is an additional insured under an omnibus clause of an automobile liability policy, it must be shown that the car was driven with express or implied permission of one authorized to give the permission. *Country Mut. Ins. Co. v. Bowe*, 300 N.E.2d 274 (3d Dist. 1974). Implied permission may arise from a course of conduct and be shown by circumstantial evidence. Implied permission may also arise from the relationship between the parties

The Illinois Insurance Code provides that a provision in a policy of vehicle insurance excluding coverage for bodily injury to members of the family of the insured, shall not be applicable when any person not in the household was driving the vehicle of the insured involved in the accident who is the subject of the claim or lawsuit. 215 ILCS 5/143.01(b).

12. Measure of Damages, Property Damage

In Illinois, the general measure of damages for the total loss or destruction of personal property is the fair market value of the thing in question immediately prior to its destruction. *Harris v. Peters*, 653 N.E.2d 1274 (1st Dist. 1995). The measure of damages for repairable personal property is the lesser of two amounts (1) the reasonable expense of necessary repair of the property, plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after the property is repaired; (2) the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence. Illinois Pattern Instructions 30.10 (2006).

The proper measure of damage to automobile that can be repaired is the generally the cost of such repair. *Bouton v. Harrison*, 45 N.E.2d 510 (2d Dist. 1942). Although cost of repairs is usually the measure of damages to an automobile, where the cost of repairs exceeds fair market value of the personal property, the value of the property becomes ceiling on amount of damages which can be recovered, less the fair market value of the salvage. *Id*; *Wall v. Amoco Oil Co.*, 416 N.E.2d 705 (Ill.App. 1981). In addition, cost of repairs may not exceed the overall decrease in value to an automobile resulting from collision without repairs having been made. *Fairchild v. Keene*, 416 N.E.2d 748 (Ill.App. 1981).

One Illinois court held that in addition to the fair market value of automobile of the vehicle immediately before the accident, the plaintiff was not entitled to recover the amount due over term of contract on a leased vehicle. The court reasoned that if the driver of other vehicle was forced to pay off the lease, the lessee would be enriched to extent he rid himself of obligation which existed before accident to pay leasing company amount in excess of fair market value of automobile. *Harris v. Peters*, 653 N.E.2d 1274 (1st Dist. 1995).

13. Cancellation and Non-Renewal Procedures

Generally, an insurance policy may not be canceled by the insurer without giving notice to the insured, and the mortgage or lien holder. A notice of cancellation must conform to the applicable provisions in the insured person's insurance policy and cancellation can only be effected through strict compliance with those provisions. *Associated Physicians Ins. Co. v. Obasi*, 633 N.E.2d 752 (1st Dist. 1993). The notice of cancellation of an insurance policy must clearly show a present cancellation, to become effective at the expiration of the period of notice prescribed by the policy or otherwise. A notice of an intention to cancel a policy is not in itself a cancellation.

A notice of cancellation must be mailed at least 30 days prior to the effective date of cancellation. 215 ILCS 5/143.15. A notice of cancellation must be mailed to the named insured, and to any mortgagee or lien holder, if known, at the last mailing address known to the company. All notices of cancellation shall include a specific explanation of the reason or reasons for cancellation. However, where cancellation is for nonpayment of premium, the notice of cancellation must be mailed at least 10 days before the effective date of the cancellation.

In order to non-renew a policy, an insurance company must notify the name insured by mail of its intention not to renew, at least 30 days in advance of the policy period end date. 215 ILCS 5/143.17(a). The insurer must maintain proof of mailing of such notice on a recognized U.S. Post Office form, or a form acceptable to the U. S. Post Office or other commercial mail delivery service. An exact and unaltered copy of such notice shall also be sent to the insured's broker, if known, or the agent of record and to the mortgagee or lien holder at the last mailing address known by the company. However, where cancellation is for nonpayment of premium, the notice of cancellation must be mailed at least 10 days before the effective date of the cancellation.

14. Basis for a Wrongful Death Suit

In Illinois, a wrongful-death cause of action is created by statute under the Wrongful Death Act. 740 ILCS 180/0.01 et seq. A wrongful-death cause of action is based upon the wrongful act, not decedent's death. If the decedent had no cause of action at the time of injury, the personal representative has none.

The purpose of the Act is to provide designated survivors with the benefits they would have received from the decedent had he or she lived. It compensates the surviving spouse and next of kin for the pecuniary losses sustained due to the decedent's death, and it provides the eligible beneficiaries with the benefits that would have been received from the continued life of the decedent. Bass by *Lewis v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985); *Glenn v. Johnson*, 764 N.E.2d 47 (Ill. 2002); *Elliott v. Willis*, 442 N.E.2d 163 (Ill. 1982); *Johnson v. Provena St. Therese Medical Center*, 778 N.E.2d 298 (2d Dist. 2002); *Magna Trust Co. v. Illinois Cent. R. Co.*, 728 N.E.2d 797 (5th Dist. 2000).

The Wrongful Death Act therefore, is not a survival statute, but creates a right to sue in the interest of the decedent's next of kin for damages resulting to them from the accident. *Matter of Faught's Estate*, 445 N.E.2d 54 (5th Dist. 1983); *McDavid v. Fiscar*, 97 N.E.2d 587 (3d Dist. 1951). Although the action is brought in the name of the administrator, neither the administrator nor the estate has any interest in, or right to the benefit of, any judgment that may be recovered, but the real parties in interest are the next of kin. *Id.* Except insofar as the Act permits a recovery for hospital or medical services rendered in connection with the last illness of the deceased, and for the costs of administering the estate, where there is no spouse or next of kin there can be no recovery for the benefit of anyone. *Chicago & R.I.R. Co. v. Morris*, 26 Ill. 400, 1861 WL 4160 (1861); *McDavid v. Fiscar*, 342 Ill. App. 673, 97 N.E.2d 587 (3d Dist. 1951).

Annotations

Williams v. Manchester, No. 1-05-2126 (1st Dist. March 16, 2007).

Plaintiff suffered a fractured pelvis in automobile collision. Plaintiff made the decision to abort fetus in order to enable her to undergo immediate surgery to repair the fractures, and because of irradiation to which fetus would be exposed. First district court of appeals held that this decision is *not* a sufficient superceding cause to destroy legal, proximate cause between alleged negligence of driver of colliding car and death of unborn fetus. Therefore, trial court erred when it granted defendant driver's motion for summary judgment dismissing wrongful death count. However,

court did not err when it summarily dismissed her Survival Action count. This case is being appealed to the Supreme Court of Illinois.

15. Proof and Measure of Damages in Wrongful Death Suit

The essential elements for recovery under the Wrongful Death Act include a duty of defendant toward decedent, a breach of that duty, and pecuniary damages resulting therefrom to persons designated by the Act. *Flynn v. Vancil*, 242 N.E.2d 237 (Ill. 1968); *Stansell v. International Fellowship, Inc.*, 318 N.E.2d 149 (1st Dist. 1974).

Illinois' Wrongful Death Act previously set out damage caps. However, following its amendment in 1967, the act no longer includes any limits. The Act provides for the recovery of damages as the jury deems a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the surviving spouse and next of kin of such deceased person. "Pecuniary injuries" has been interpreted to include benefits of a pecuniary value, including money, goods and services received by the next of kin of the deceased. Where there are surviving children, it also includes the instruction, moral training, and superintendence of education that they would have received from the deceased parent. "Pecuniary injuries" has also been held to include the loss of consortium by the surviving spouse, *Elliott v. Willis*, 92 Ill.2d 530, 442 N.E.2d 163, 65 Ill.Dec. 852 (1982); the loss of a minor child's society by the parents, *Bullard v. Barnes*, 102 Ill.2d 505, 468 N.E.2d 1228, 82 Ill.Dec. 448 (1984); the loss of an unmarried adult child's society by the parents, *Prendergast v. Cox*, 128 Ill.App.3d 84, 470 N.E.2d 34, 83 Ill.Dec. 279 (1st Dist.1984); the loss of a parent's society by an adult child, *In re Estate of Keeling*, 133 Ill.App.3d 226, 478 N.E.2d 871, 88 Ill.Dec. 380 (3d Dist.1985); and the proven loss of a sibling's society, *In re Estate of Finley*, 151 Ill.2d 95, 601 N.E.2d 699, 176 Ill.Dec. 1 (1992).

The Wrongful Death Act allows the recovery of pecuniary injury, and any instruction that leaves the jury at liberty to include mental suffering and anguish as an element of damages is erroneous. *Chicago & A.R. Co. v. Becker*, 76 Ill. 25 (Ill. 1875); *Shields v. J.H. Dole Co.*, 168 Ill.App. 362 (2d Dist. 1912). Where the next of kin are collateral, and they did not routinely claim or receive pecuniary assistance from the decedent, there can be only a recovery of nominal damages. *Wilcox v. Bierd*, 162 N.E. 170 (Ill. 1928); *Rost v. F.H. Noble & Co.*, 147 N.E. 258 (Ill. 1925). Punitive or exemplary damages are not recoverable in an action for wrongful death under the statute. *Ballweg v. City of Springfield*, 499 N.E.2d 1373 (Ill. 1986).

16. Basis for a Survival Suit

In Illinois, a decedent's cause of action for personal injury survives his death, pursuant to the Survival Act, 755 ILCS 5/27-6. The Illinois Survival Act does not create a statutory cause of action but merely allows a representative of the decedent to maintain those actions the decedent might have brought while alive. *Ramirez v. City of Chicago*, 82 F.Supp.2d 836 (N.D.Ill. 1999). Only a personal representative of decedent, not the decedent's heirs or assigns, may properly bring suit, under Illinois law. *Holmes v. Silver Cross Hospital of Joliet*, 340 F.Supp. 125 (D.C.Ill. 1972). Thus, unlike a wrongful death suit which compensates a decedent's survivors for loss of pecuniary value, survival actions allow for recovery of damages for injuries sustained by deceased up to the time of death. *Ellig v. Debnor Community Hosp.*, 603 N.E.2d 1203; Illinois Pattern Instruction 31.10.

17. Measure of Damages in a Survival Action

In the context of wrongful death and survival claims, expenses for loss of earnings and conscious pain and suffering of decedent until his death should be apportioned to survival action, while any loss of benefits to survivor should be apportioned to wrongful death claim. *Muro v. Abel Freight Lines, Inc.*, 669 N.E.2d 1217 (1st Dist. 1996). The fact that a decedent has suffered for only a short period of time is not a bar to a claim for conscious pain and suffering. The duration of the pain and suffering affects the amount of damages to be awarded, not the right to recover damages. *Glover v. City of Chicago*, 436 N.E.2d 623 (1st Dist.1982).

Damages recoverable following a verdict on a survival action include damages for conscious pain and suffering, loss of earnings, medical expenses, physical disability, and property damage. *Murphy v. Martin Oil Co.*, 308 N.E.2d 583 (1974). Funeral expenses are not recoverable under either the Wrongful Death Act, or the Survival Act, although leave to amend the complaint is freely granted to a plaintiff, in order to add an additional count seeking those damages. *Rodgers v. Consolidated R.R. Corp.*, 482 N.E.2d 1080 (4th Dist. 1985). Punitive damages are not available under the Survival Act. *Froud v. Celotex Corp.*, 456 N.E.2d 131 (Ill. 1983).

18. Loss of Consortium Claims

Spouses may maintain a separate and distinct cause of action to recover damages for loss of services and consortium due to the negligent injury to their husband or wife. Although actions for personal injuries and actions for loss of consortium may derive from the same operative facts, they are legally distinct. *Mitchell v. White Motor Co.*, 317 N.E.2d 505 (Ill. 1974). Nevertheless, while an action for loss

of consortium is a separate and distinct cause of action, it is dependent on the liability of the tortfeasor for the spouse's injuries being established. *Kolar v. City of Chicago*, 299 N.E.2d 479 (1st Dist. 1973). Thus, in order to sustain an action for loss of consortium, all of the elements of the injured spouse's case must be proven, such as negligence on the part of the tortfeasor and the injured spouse's freedom from contributory negligence. "Consortium" in Illinois is comprised of not only material services, but also the elements of companionship, felicity, and sexual intercourse. *Dini v. Naiditch*, 170 N.E.2d 881 (Ill. 1960).

There is authority in Illinois that a release executed only by the injured spouse does not bind the other spouse, and thus does not bar the other spouse's cause of action for loss of consortium. *Brown v. Metzger*, 470 N.E.2d 302 (Ill. 1984).

19. Loss of Consortium: Coverage

In general, loss of consortium is recognized as a separate and distinct claim, capable of supporting separate and independent liability by an insurance company, if the insurance policy does not otherwise limit that liability. *Stearns v. Millers Mut. Ins. Ass'n of Illinois*, 663 N.E.2d 517 (5th Dist. 1996). However, that limitation must be unambiguous, or the ambiguity will be resolved in favor of coverage. *Id.*

For example, where an insurance policy defined "bodily injury" as "sickness, disease, death or loss of services," the plaintiff's loss of consortium claim was held a separate bodily injury worthy of coverage. *Giardino v. Fierke*, 513 N.E.2d 1168 (2d Dist. 1987). However, indemnification for loss of consortium has been denied in cases in which the policy language failed to define loss of consortium as a bodily injury. *Creamer v. State Farm Mut. Auto. Ins. Co.*, 514 N.E.2d 214 (3d Dist. 1987).

An automobile policy defining "bodily injury" as an "injury, sickness, disease or death" and limiting liability as the "maximum limit of liability for all damages for bodily injury sustained by one person in any one auto accident" was held to cover a loss of consortium claim by a spouse of the motorist who is injured in a collision with the insured. *Club Exchange Corp. v. Richter*, 581 N.E.2d 709 (5th Dist. 1991).

In at least one Illinois case, an automobile insurance policy provided coverage for a spouse's loss of consortium claim as compensable bodily injury separate from the other spouse's personal injury claim, and thus coverage provided a maximum \$100,000 "per-accident" coverage rather than \$50,000 "per-person" coverage. The loss of consortium claim was held independent of the primary claim to the extent that loss of consortium was a separate bodily injury under the policy. *General Cas. Co. of Illinois v. McCowan*, 581 N.E.2d 728 (5th Dist. 1991).

20. Discoverability of Insurance Information and Insurer's Claim File

There is very little Illinois law relating to the discoverability of insurance information and an insurer's claim file is somewhat unsettled.

A plaintiff is entitled to discover the existence and amount of a defendant's liability insurance policy. *Terry v. Fisher*, 145 N.E.2d 588 (Ill. 1957). Where the contents of an insurance policy is put into dispute, such as where plaintiffs are seeking a declaratory judgment that an insurer owes a duty to defend and indemnify, a plaintiff may be entitled to a complete copy of an insurance policy for inspection. *Schultz v. Continental Cas. Co.*, 398 N.E.2d 936 (1st Dist. 1979).

One Illinois case involved a declaratory judgment action filed by an auto liability insurer, that it owed no duty to settle with the underlying injured party, because the policy limits had been exhausted. The insured filed a cross claim for bad faith refusal to settle, and the injured party asserted affirmative defenses. Both the insured and the injured third party sought production of claim file materials, including coverage counsel analysis. Illinois' Fourth District Appellate Court held that both the insured, and the injured claimant were entitled to discovery of the claim file. *Western States Ins. Co. v. O'Hara*, 828 N.E.2d 842 (4th Dist. 2005).

21. Ex Parte Communication with Plaintiff's Treating Physician

In Illinois, defense counsel are strictly forbidden from ex parte communications with plaintiff's treating physicians. *Petrillo v. Syntex Laboratories, Inc.*, 499 N.E.2d 952, 971 (1st Dist. 1986). Under *Petrillo*, defense counsel may communicate with a plaintiff's treating physician only by means of formal discovery as outlined in Supreme Court Rules. There is authority suggesting that this prohibitions applies to the named defendant as well. *Hydraulics, Inc. v. Industrial Commission*, 768 N.E.2d 760 (2d Dist. 2002).

Where an ex parte communication has taken place between defense counsel and a plaintiff's treating physician, sanctions may be imposed upon the defendant, including reversal of the judgment in favor of the defendant and the award of a new trial. *Moss v. Amira*, 826 N.E.2d 1001 (1st Dist. 2005).

22. Duty to Defend and Primary vs. Excess Coverage

In Illinois, an insurer is obliged to defend claims and actions against the insured where the liability insurance policy so provides. *Cross v. Zurich General Acc. & Liability*

Ins. Co., 184 F.2d 609 (7th Cir. 1950). An insurer's duty to defend is determined by comparing the allegations in the underlying complaint to relevant provisions of the insurance policy. *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 655 N.E.2d 842 (Ill. 1995); *Dixon Distributing Co. v. Hanover Ins. Co.*, 641 N.E.2d 395 (Ill. 1994). If the facts alleged in the underlying complaint fall within or even potentially within policy coverage, the insurer has the duty to defend its insured against the complaint. *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 620 N.E.2d 1073 (Ill. 1993); *U.S. Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926 (Ill. 1991).

The obligation to defend an insured under a liability insurance policy is broader than the obligation to pay. *Crum and Forster Managers Corp. v. Resolution Trust Corp.*, 620 N.E.2d 1073 (Ill. 1993). The duty to indemnify arises only when an insured becomes legally obligated for a judgment in the underlying action, whereas the duty to defend an action against the insured is determined solely by reference to the allegations of the complaint. *Insurance Co. of Illinois v. Markogiannakis*, 544 N.E.2d 1082 (Ill.App.1st 1989).

Illinois courts follow the general rule that primary coverage follows the vehicle. Illinois courts have held that primary and excess policies do not cover the same risks, and therefore protections under excess liability policies do not begin until those of the primary liability policy end. *Home Indemnity Co. v. General Accident Ins. Co. of America*, 572 N.E.2d 962, 964 (Ill.App.1st 1991). Based upon this rationale, under Illinois law, a primary insurer has the primary duty to defend and pay defense costs. *Id.* However, primary insurance policies which become “excess” due to an insurance provision which indicates that such coverage is excess over another valid policy, are not liable to pay defense costs before the conclusion of the underlying suit. *American States Ins. Co. v. Liberty Mut. Ins. Co.*, 683 N.E.2d 510 (Ill.App.1st 1997).

Normally, the policy with the usual pro rata clause would alone afford primary coverage, as it insured an accident vehicle, and any policies insuring the driver would provide only excess coverage. *Bertini v. State Farm Mut. Auto. Ins. Co.*, 362 N.E.2d 1355 (Ill.App. 1977). Nevertheless, the policy language controls the relationships between the insurers, and, if the policies insuring the driver do not have excess clauses which apply to the accident involved, then its and the accident vehicle policy's pro rata clause would govern and coverages would be prorated. *Id.*

Annotations

Where a van – being towed behind a tow truck – broke free, crossed into oncoming traffic, and injured the driver and passenger of an oncoming vehicle, liability coverage provided by towing business' insurer for owner and driver of towed van was primary

to coverage provided by van owner's policy. Allowing coverage under the towing business' policy to become secondary coverage for its tow of the van would violate public policy reflected in statute mandating liability insurance for tow trucks. 625 ILCS 5/12-606(d). The court also noted that where two insurance policies each purport to offer only secondary coverage, the insurance of the vehicle's owner is primary while that of the driver is secondary.

23. Bad Faith

Illinois recognizes the tort of bad faith refusal to settle with a claimant against an insured under an auto liability policy. *Phelan by Phelan v. State Farm Mut. Auto Ins. Co.*, 448 N.E.2d 579 (1st 1983). Under Illinois law, bad faith lies in its failure to give at least equal consideration to the insured's interests when the insurer arrives at a decision on whether to settle the claim. Factors a jury may consider in determining whether an insurer has acted in bad faith include the advice of an insurer's own adjusters; the insurer's refusal to negotiate; the advice of defense counsel; communication with the insured to keep her fully aware of the claimant's willingness to settle for the amount of coverage; adequacy of a claims investigation; the prospect of an adverse verdict; and the potential for damages to exceed policy limits. *O'Neill v. Gallant Ins. Co.*, 769 N.E.2d 100 (5th Dist. 2002).

The plaintiff in the underlying action may collect the excess part of the judgment from the insured, leaving the insured to maintain the bad faith action against the insurer. More often, however, the insured will assign the bad faith action to the original injured plaintiff in exchange for a covenant not to enforce, and the plaintiff will then maintain the bad faith action as the insured's assignee. Such assignments are valid (*Bailey v. Prudence Mut. Cas. Co.*, 429 F.2d 1388 (7th Cir.1970)), and in fact may be ordered by the court. See, *Nicholson v. St. Anne Lanes, Inc.*, 512 N.E.2d 127, 128 (3d Dist.1987); *Phelan v. State Farm Mut. Auto. Ins. Co.*, 448 N.E.2d 579 (1st Dist.1983). As an assignee of the insured, the plaintiff stands in the insured's shoes, and therefore the plaintiff's bad faith action is subject to any defenses that would have been available against the insured. *Sanders v. Standard Mut. Ins. Co.*, 492 N.E.2d 917, 97 (4th Dist.1986). Absent an assignment from the insured, the injured plaintiff in the original action has no claim against the defendant's liability insurer. *Kennedy v. Kiss*, 412 N.E.2d 624, 629 (1st Dist.1980).

The measure of damages in a bad faith action includes at least the full amount of the judgment rendered against the insured, less any amount the plaintiff has been paid by the insurer, other tortfeasors, and any other allowable offsets. Because the insured's liability includes statutory post-judgment interest (735 ILCS 5/2-1303), this is also recoverable. *Mid-America Bank & Trust Co. v. Commercial Union Ins. Co.*, 587

N.E.2d 81, 85-86, (5th Dist.1992). There is a split in the districts regarding whether attorney's fees and punitive damages are recoverable in a bad faith case. However, in at least one Illinois district, punitive damages can be awarded for an insurance company's bad faith refusal to settle. *O'Neill v. Gallant*. In the *O'Neill* case, the jury was entitled to base its award of punitive damages for bad faith upon the net worth that the insurer reported to the Department of Insurance.

24. Vexatious Penalties in Under/Uninsured Arbitration Cases

Smith v. State Farm Insurance Companies, Inc., No. 1-06-0519 (1st Dist. 2006)

Holding: A binding arbitration agreement between an injured uninsured motorist claimant and her insurer did not bar her subsequent lawsuit alleging the insurer's unreasonable and vexatious delay in handling her claim.

In *Smith v. State Farm*, the appellate court reviewed the trial court's order of summary judgment in favor of State Farm and against the insured plaintiff Mary Smith. The circuit court granted summary judgment on the basis that the binding arbitration agreement barred the insured's bad faith action and that no evidence of bad faith by State Farm existed.

The plaintiff was injured in a collision with a hit and run driver. She was insured by State Farm for uninsured motorist coverage in the amount of \$100,000. State Farm initially offered to settle her claim for \$13,000. Ms. Smith rejected State Farm's offer and retained an attorney who demanded arbitration. State Farm then offered to settle Ms. Smith's claim for \$25,000 and tendered her that amount as an interim payment. Subsequent settlement efforts failed. The parties agreed to arbitration through A.D.R. Systems of America. The agreement contained high-low provisions. The agreement provided that the arbitration award would be "final and binding and not subject to appeal or motion for reconsideration by either party." The agreement further provided that "when the decision is rendered, the matter is resolved, any award arising from this agreement shall operate as a bar and complete defense to any action or proceeding in any court or tribunal that may arise from the same incident upon which the arbitration agreement is based."

The matter proceeded to an arbitration hearing. State Farm did not appear. The arbitrator awarded plaintiff \$124,823.99. State Farm paid her the award amount less the set-off for the interim payment. The plaintiff then filed a complaint against State Farm claiming damages under section 155 of the Illinois Insurance Code. The complaint alleged State Farm's willful and vexatious refusal to properly evaluate and settle her uninsured motorist claim. The complaint alleged that State Farm had years

to evaluate and settle her claim and that no bona fide dispute regarding coverage existed. The complaint sought a finding that State Farm's actions constituted a vexatious and unreasonable refusal to settle and requested damages pursuant to statute including fees, costs and penalties.

State Farm filed a motion to dismiss with prejudice asserting that the arbitration agreement operated as a complete bar to her lawsuit. Mary Smith countered that the arbitration agreement related only to the car crash and compensation for her injuries. She contended that the arbitration agreement did not bar a separate case relating to State Farm's handling of her claim. The trial court granted defendant's motion to dismiss which it treated as a motion for summary judgment. The trial court's order stated that "As there is no proof of a vexatious or unreasonable delay in settling (as both parties agreed to be bound to the finding of the arbitration agreement), plaintiff's claim cannot continue." The court cited the arbitration agreement.

On review, the appellate court stated that its goal was to construe the arbitration agreement and give effect to the parties' intent at the time they entered into the contract. The court cited the rule that the intent of the parties is to be determined from the language used and the circumstances of the transaction. The court quoted the arbitration agreement which provided that the arbitrator shall decide the issues of "liability, personal injury damages and causation only." The court stated: "We read that language to mean that the arbitration hearing was confined solely to those issues." The "matter" referred to in the agreement referred to the collision and plaintiff's damages. The court determined that the "matter" cannot be construed to refer to a section 155 claim.

The opinion noted that separate Insurance Code provisions address arbitration (§ 143a1) and vexatious handling of a claim (§ 155). The court cited supreme court precedent (*State Farm v. Yapejian*) for the rule that arbitration is limited to issues of liability and damages only and that coverage issues are for the court. The opinion further noted the purpose of § 155 in redressing policyholder grievances for insurer delay, and it cited numerous cases allowing insureds to recover under the section for losses due to insurer misconduct in claims handling. "This type of claim is only proper in court and not arbitration proceedings" as section 155 vest the court with discretion to determine the award.

25. Step-Down Provisions

There appears to be a split in authority developing on the issue of whether step-down provisions are valid and enforceable under Illinois law. Cases in the first

and third appellate districts have examined step-down provisions in the context of garage insurance policies issued to auto dealers. Those cases appear to have implicitly held that such provisions are valid, although any acts taken by the insurance company which appear to be inconsistent with an intention to rely upon the step-down provision – such as issuing the insured a certificate of insurance to be filed with the state – will operate as a waiver of the provision. *John Deere Ins. Co. v. Allstate Ins. Co.*, 698 N.E.2d 635 (Ill.App.1st 1998); *Country Mutual Ins. Co. v. Universal Underwriters Ins. Co.*, 735 N.E.2d 1032 (Ill.App.3d 2000); *Country Companies v. Universal Underwriters*, 796 N.E.2d 639 (Ill.App.3d 2003).

However, in *Browning v. Plumlee*, 737 N.E.2d 320 (Ill.App.5th 2000), the fifth district court of appeals – relying on the cases above – held a garage-policy step down provision invalid as a matter of law.

Annotations

State Farm v. Illinois Farmers Insurance, 858 N.E.2d 519 (Ill.App.1stDist. 2006)

This case presented the question as to whether defendant's "step-down" provisions, which provided for lower liability limits for drivers who are not named insured or family members of named insured, but who were nevertheless permissive users, violate public policy. The Illinois Court of Appeals, First District, held that such clauses are not contrary to public policy. The case is on appeal with the Illinois Supreme Court.

State Farm Mutual Insurance Company (State Farm) filed an action against Farmers Insurance Company (Farmers) seeking reimbursement for amounts it was required to pay as a result of a step down provision contained in Farmer's automobile insurance policies. State Farm also sought a declaratory judgment that the step-down clause is void as against public policy. The trial court found that the step-down provisions violate public policy. Farmers' step-down provisions reduce the policy liability limits to the minimum liability limits required under the Financial Responsibility Law (625 ILCS 5/7-317(b)(2) and (b)(3)), when the insured's vehicle is being operated by a permissive user who is neither a resident of the named insured's household (nonresident permissive user) nor a family member or a listed driver.

In determining the validity of the step-down provision, the court considered the Financial Responsibility Law and concluded that there is no requirement that an insurer provide the identical liability limits for the owner and permissive user of a vehicle. The court noted that "the language in the policies and in the declarations is

both clear and unambiguous. Additionally, because Farmers' policies do not attempt to reduce its liability coverage for permissive users below the statutory minimums, we find that Farmers' policies comply with section 7-317 of the Financial Responsibility Law." The court concluded that "the minimum liability limits of coverage for permissive drivers who cause bodily injuries is based on the amount contracted for in the vehicle owner's, in this case Farmers', policy. We believe that the responsibility for setting the liability limits for permissive drivers in insurance contracts is a matter within the exclusive province of the state legislature. Therefore, until there is a change in the law, we must enforce the contractual terms of the insurance policies and the Financial Responsibility Law as written."

26. Contact Rule for Uninsured Motorist Claims

Illinois law permits, but does not require, that an automobile policy require actual contract between insured's vehicle and "phantom vehicle" for insured to recover uninsured motorist (UM) benefits. *Grosbands v. Dairyland Ins. Co.*, 726 N.E.2d 138 (3d Dist. 2000); *Scanlan v. Maryland Cas. Ins. Co.*, 561 N.E.2d 301 (2d Dist. 1990).

However, Illinois courts may make great efforts to find that a physical contact has occurred. For example, an insured who was injured when his vehicle was struck by a lug nut flying off hit-and-run vehicle could recover for his injuries under the hit-and-run provisions of his uninsured motorist coverage, even though insured's vehicle was not struck by hit-and-run vehicle itself. *Ill. Nat. Ins. Co. v. Palmer*, 452 N.E.2d 707 (1st Dist. 1983).

27. Regions with Volatile Judgments

Madison (Edwardsville) and St. Clair (Belleville), Counties tend to produce higher and more volatile judgments. These counties have achieved national notoriety, including mention in various national bar publications. In addition, Cook County (Chicago) produces large verdicts.

28. Evidentiary Considerations: Violation of Motor Vehicle Code and Traffic Convictions

In Illinois, proof of a violation of the motor vehicle code does not constitute negligence per se, and the burden of proof still remains with the plaintiff. *Tabor v. Tazewell Serv. Co.*, 153 N.E.2d 98 (Ill.App. 1958). However, the motor vehicle code establishes the standard of care relating to the operation of a motor vehicle for purposes of a negligence action. *Cox v. Kroger*, 179 F.2d 382 (7th Cir. 1950). Illinois

courts have held that proof of such a statutory violation raises a presumption of negligence and constitutes prima facie evidence of negligence. *Fuggett v. Murray*, 35 N.E.2d 946 (Ill.App. 1941); *Carroll v. Krause*, 15 N.E.2d 323 (Ill.App. 1938).

A violation of the motor vehicle code is largely proven at trial through direct evidence obtained during discovery. See, *Thurmond v. Monroe*, 636 N.E.2d 544 (Ill. 1994); *Chu v. Bowers*, 656 N.E.2d 436 (Ill.App.3d 1995); *Hiscott v. Peters*, 754 N.E.2d 839 (Ill.App.2d 2001). Under Illinois law, traffic convictions are not admissible in later civil proceedings as proof of the facts that act as a basis for the conviction. *Thurmond v. Monroe*, 636 N.E.2d 544 (Ill. 1994). Many Illinois courts have held that guilty pleas to traffic offenses may be admitted in subsequent civil litigations. See for example, *Hengels v. Gilski*, 469 N.E.2d 708 (Ill.App.1st 1984); *Wright v. Stokes*, 522 N.E.2d 308 (Ill.App.5th 1988). Some Illinois courts have held that evidence of a guilty plea is admissible even if it leads to an order of supervision and the underlying charge is dismissed and expunged. *Batterton v. Thurman*, 434 N.E.2d 1174 (Ill.App.3d 1982).

29. Evidentiary Considerations: Police Reports

Under Illinois law, police reports are generally inadmissible into evidence, in part because they largely summarize from hearsay taken from persons not under oath, telling the police officer what they saw, and also because they include the officer's nonexpert opinion on such matters as the cause of the accident. *Steward v. Crissell*, 681 N.E.2d 1040 (Ill.App. 1997). If based upon the author's own investigation and knowledge, and made pursuant to a duty imposed by law, police and fire reports may sometimes be received in evidence as public records. *Id.* However, by rule, traffic accident reports prepared by police officers are specifically deemed inadmissible in Illinois. S.Ct.Rule 236. If a proper foundation is laid, police reports may be used to refresh the reporter's recollection. *People v. Connolly*, 751 N.E.2d 1219 (Ill.App. 2001)

30. Burden of Proof in Rear-End Collision Cases

A driver who is following another vehicle has a duty to follow at a sufficient speed and distance so that he can stop or slow down suddenly if necessary. *Black v. Laggren*, 728 N.E.2d 1208 (Ill.App.1st 2000). A driver must maintain a safe lookout for traffic ahead. *Id.* The fact that a rear-end collision occurs does not automatically establish the liability of the rear vehicle. *Kapsouris v. Rivera*, 747 N.E.2d 427 (Ill.App.2d 2001). However, while a rear-end collision does not establish per se a defendant motorist's negligence, it is certainly very strong evidence of negligence. *Wiker v. Pieprzyca-Berkes*, 732 N.E.2d 92 (Ill.App.1st 2000). In a rear-end collision automobile accident case, it is the responsibility of the trier of fact to determine whether the rear

driver was acting reasonably under the circumstances or that the accident was unavoidable. *Kapsouris*, 747 N.E.2d 427.

31. Bystander Tort Claims

A bystander who is in a “zone of physical danger” and who, because of defendant's negligence, has reasonable fear for his own safety has a right of action for physical injury or illness resulting from emotional distress. *Jarka v. Yellow Cab Co.*, 637 N.E.2d 1096 (1st 1994). A bystander can recover for negligent infliction of emotional distress if he establishes that: (1) he was in the zone of danger; (2) he had a reasonable fear for his own safety; and (3) he suffered physical injury or illness resulting from the alleged emotional distress. *Maness v. Santa Fe Park Enterprises, Inc.*, 700 N.E.2d 194 (1st 1998).

32. Punitive Damages against Insured

Where the actions of an insured, in driving the vehicle, are found to be willful, wanton or reckless, punitive damages are available against the insured at trial. *Hariss v. Elliott*, 565 N.E.2d 1040 (2d Dist. 1991). This includes instances where the insured is driving under the influence. *Ford v. Herman*, 737 N.E.2d 332 (5th Dist. 2000).

33. Admissibility of Medical Records at Trial

The collateral source rule is a common law doctrine, expressed by the Illinois Supreme Court as follows: “damages recovered by the plaintiff from the defendant are not decreased by the amount the plaintiff received from insurance proceeds, where the defendant did not contribute to the payment of the insurance premiums.” The rationale given for the rule is that someone who causes an injury should not benefit from the insurance premiums paid by the injured party, or take advantage of contracts that exist between injured parties and third persons.

However, Illinois has rejected the unconditional version of the collateral source rule. *Muranyi v. Turn Verein Frisch-Auf*, 308 Ill.App.3d 213, 216 (Ill. 1999). *See also*, 11 Ill. Jur. Personal Injury & Torts § 5:62 (2002); M. Pollelle & B. Ottley, Illinois Tort Law § 24.13 (3d ed.2000). This issue was considered by Illinois’ supreme court in *Peterson v. Lou Bachrodt Chevrolet Co.*, 392 N.E.2d 1 (Ill. 1979). In *Peterson*, the Illinois Supreme Court denied the plaintiff recovery for the value of medical services a charitable hospital had rendered to his son free of charge. In that case, the court reasoned that the policy behind the collateral source rule is not applicable “if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for

which he seeks compensation.” *Peterson*, 392 N.E.2d at 1. Reaching this conclusion, the court noted that:

“[w]e refuse to join those courts which, without consideration of the facts of each case, blindly adhere to ‘the collateral source rule, permitting the plaintiff to exceed compensatory limits in the interest of insuring an impact upon the defendant. ... [t]he view that a windfall, if any is to be enjoyed, should go to the plaintiff borders too closely on approval of unwarranted punitive damages, and it is a view not espoused by our cases.” *Peterson*, 392 N.E.2d at 1.

In *Arthur v. Catour*, 345 Ill.App.3d 804 (Ill.3d Dist. 2004), the Illinois Court of Appeals, Third District, considered the question of whether an injured plaintiff may recover the entire amount billed for medical services, or if he is limited to the discounted amount paid by his insurance carrier. In that case, plaintiff Joyce Arthur alleged that she fractured her leg after stepping in a hole on a farm owned by defendant Laurie Catour. During litigation, plaintiff produced \$19,355.25 in medical bills. Plaintiff had group medical insurance with Blue Cross/Blue Shield through her husband's employer. Because of the insurer's contractual agreements with the healthcare provider, only \$13,577.97 was required to pay off the medical bills. The appellate court ultimately held that the full amount of \$19,355.25 can be presented to a jury, because to allow admission of the lower amount would be a violation of the collateral source rule.

However, in the case of *Arthur v. Catour*, 833 N.E.2d 847 (Ill. 2005) ("*Arthur II*"). In *Arthur II*, the Supreme Court of Illinois took up the Third District Court of Appeals' opinion in *Arthur*. The *Arthur II* majority framed the question as:

“Whether the Plaintiff who was charged \$19,355.25 in medical bills for medical services related to her injuries can present that amount of bills as medical expenses in the case or, whether the Plaintiff shall be limited to presenting only \$13,577.97 in medical bills to the jury because that is the amount that was paid by the Plaintiff and Blue Cross/Blue Shield, who was an insurance carrier for the Plaintiff and who paid the Plaintiff's medical bills pursuant to insurance contracts at a substantially reduced rate with the medical providers and which the providers accepted as payment in full.”

On that issue, Illinois' Supreme Court affirmed the judgment of the Third District Court of Appeals. Illinois' highest court held that a plaintiff may present to the jury the amount that the plaintiff's health-care providers initially billed for services

rendered. Importantly, however, in reaching this conclusion, the Illinois Supreme Court reviewed the current status of the law relating to the admissibility of medical records.

Under Illinois law, in order to recover for medical expenses, the plaintiff must prove (1) that he has paid or become liable to pay a medical bill, (2) that he necessarily incurred the medical expenses because of injuries resulting from the defendant's negligence, and (3) that the charges were reasonable for services of that nature. *Arthur v. Catour*, 833 N.E.2d at 853. When evidence is admitted, through testimony or otherwise, that a medical bill was for treatment rendered and that the bill has been *paid*, the bill is prima facie reasonable. *Id.* A party seeking the admission into evidence of a bill that has *not been paid*, can establish reasonableness by introducing the testimony of a person having knowledge of the services rendered and the usual and customary charges for such services. *Id.*

Following that review of the law, the *Arthur II* court noted:

Applying these principles to the present case, plaintiff cannot make a prima facie case of reasonableness based on the bill alone, because she cannot truthfully testify that the total billed amount has been paid. Instead, she must establish the reasonable cost by other means—just as she would have to do if the services had not yet been rendered, e.g., in the case of required future surgery, or if the bill remained unpaid. Defendants, of course, are free to challenge plaintiff's proof on cross-examination and to offer their own evidence pertaining to the reasonableness of the charges. Therefore, we answer the certified question as follows. Plaintiff may present to the jury the amount that her health-care providers initially billed for services rendered."

Arthur v. Catour, 833 N.E.2d at 853.

Thus, under *Arthur II*, a plaintiff is entitled to submit the entire *charged* amount of a related medical bill to the jury. However, where the entire bill has not been paid, the plaintiff cannot make a prima facie case through the bill alone. Rather, the plaintiff is required to present evidence that the bill is reasonable. This is usually done through the testimony of the treating physician, or of an expert physician. Importantly, a defendant is then allowed to challenge plaintiff's evidence of reasonability on cross examination, or to present their own evidence of reasonableness of charges.

Taken together, the *Peterson* decision and the *Arthur II* decision appear to stand for the following proposition: although a plaintiff cannot recover for gratuitous, unbilled medical care, a plaintiff may submit charged but unpaid bills to a jury for consideration, and a defendant is free to present evidence to challenge the reasonableness of those bills. *Arthur II* left open the question of whether a defendant can present evidence of the negotiated amounts obtained by an insurance carrier. In *Arthur II*, a dissenting justice highlighted this failure on the part of the majority opinion, and noted that there was likely to be confusion following the decision.

Thus, under Illinois law, the question of whether negotiated amounts can be introduced into evidence remains unanswered to date. However, the Illinois legislature is currently considering a bill which addresses this issue. The proposed bill, MEDICAL RECORDS AT TRIAL - Senate Bill 747 (Harmon, D-Chicago) creates a rebuttable presumption in civil actions for bills for services rendered. The amount and reasonableness of the bill may be established by a copy of the bill that shows: (1) the original charges with evidence of payments made to or benefits conferred by redacted collateral sources; and (2) certified under the signature of the secretary, clerk, or other keeper of the bills.

34. Minor Settlements / Wrongful Death Settlements

In Illinois, court approval is required for settlement of a wrongful death action. 755 ILCS 5/19-8. Distribution is made to surviving spouse and next of kin in proportion, as determined by the court, “that the percentage of dependency of each such person upon the deceased person bears to the sum of the percentages of dependency of all such persons upon the deceased person.” 740 ILCS 180/2.

A parent has no right to settle a claim of a minor child without court approval. *Ott v. Little Co. of Mary Hosp.*, 652 N.E.2d 1051 (1st Dist. 1995). Neither a guardian nor a next friend has the power to settle a minor's cause of action without leave of court. *Wreglesworth ex rel. Wreglesworth v. Arctco, Inc.*, 738 N.E.2d 964 (1st Dist. 2000); *Burton by Burton v. Estrada*, 501 N.E.2d 254 (1st Dist. 1986). In a probate proceeding, any settlement of a minor's claim is unenforceable unless and until there has been approval of the settlement by the probate court. *Id.* The determination of whether a compromise is in the best interest of a minor must be made within the atmosphere of the adversarial process and within the rules of procedure and evidence. *A.P. v. M.E.E.*, 354 Ill. App. 3d 989, 290 Ill. Dec. 664, 821 N.E.2d 1238 (1st Dist. 2004).

35. Subrogation

In the case of an insurance contract, subrogation rights arise where (1) a third party has caused a loss and is primarily liable to the insured for the loss, (2) the insurer is secondarily liable to the insured due to an insurance policy, and (3) the insurer pays the insured under that policy, thereby extinguishing the debt owed by the third party. *State Farm General Insurance Co. v. Stewart*, 681 N.E.2d 625 (1997). When an insurance contract gives the insurer the right to subrogate to the extent of its payment, the contract will be enforced as written and the insurer will receive full subrogation, even if the insured's losses exceed the amount it recovers from the tortfeasor and the insurer. *Capitol Indemnity Corp. v. Strike Zone, S.S.B. & B. Corp.*, 646 N.E.2d 310 (1995) (rejecting claim that insured should be made whole first); *Eddy v. Sybert*, 783 N.E.2d 106 (2003) (insurer's right to subrogation did not depend on whether insured was made whole by settlement with tortfeasor).

Illinois statute provides that

(c) Any action hereafter brought by virtue of the subrogation provision of any contract or by virtue of subrogation by operation of law shall be brought either in the name or for the use of the subrogee; and the subrogee shall in his or her pleading on oath, or by his or her affidavit if pleading is not required, allege that he or she is the actual bona fide subrogee and set forth how and when he or she became subrogee.

(d) A judgment in an action brought and conducted by a subrogee by virtue of the subrogation provision of any contract or by virtue of any subrogation by operation of law, whether in the name of the subrogor or otherwise, is not a bar or a determination on the merits of the case or any aspect thereof in an action by the subrogor to recover upon any other cause of action arising out of the same transaction or series of transactions.

735 ILCS 5/2-403 (C), (D).

Under this statute, it has been held that an exception to the application of *res judicata* exists in insurance subrogation cases, such that an insurance carrier subrogated to the property claims of its insured may bring a suit for property damages sustained by its insured without regard to a prior lawsuit brought by the insured for personal injuries arising out of the same tort incident. *Zurich Ins. Co. v. Amcast Indus. Corp.*, 742 N.E.2d 347 (1st Dist. 2000).

Before an insurer may assert a right of subrogation it must satisfy in full the claim or debt for which it seeks reimbursement. *Banes v. Western States Ins. Co.*, 616 N.E.2d 1021 (2d Dist. 1993). Until this condition has been met, the insurer's right to subrogation is future, contingent, and uncertain. *Providence Washington Ins. Co. v. American Bridge Div. of U.S. Steel Corp.*, 558 N.E.2d 396 (1st Dist. 1990).

Special requirements for subrogation in the underinsured motorist context:

(6) Subrogation against underinsured motorists. No insurer shall exercise any right of subrogation under a policy providing additional uninsured motorist coverage against an underinsured motorist where the insurer has been provided with written notice in advance of a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured, in an amount equal to the tentative settlement, within 30 days following receipt of such notice.

215 ILCS 5/143a-2.

Illinois courts will also enforce a "Transfer of Rights" clause. For example, one court held that an automobile policy provision stating that, "[i]f any person to or for whom we make payment under this policy has rights of recovery from another, those rights are transferred to us," entitled insurer to recover from insured's settlement against a third party the money the insurer paid to the insured for his medical expenses; among the damages insured sought from the third party was reimbursement for "the costs of his medical bills and prescriptions." *Pearson v. Stedge*, 723 N.E.2d 773 (1st Dist. 1999).

Annotations

Dram Shop Act subrogation. Insurer of motorist, who was involved in collision with another intoxicated motorist, was entitled to be subrogated to rights of its insured against proprietor of tavern who had sold or given intoxicant to operator of other motor vehicle and to recover amount paid to insured. *Dworak for use of Allstate Ins. Co. v. Tempel*, 152 N.E.2d 197 (Ill.App.3rd 1958); *judgment affirmed by Dworak, for Use of Allstate Ins. Co. v. Tempel*, 161 N.E.2d 258 (Ill. 1959).

American Family Ins. Group v. Cleveland, 292 Ill. Dec. 961, 827 N.E.2d 490 (App. Ct. 4th Dist. 2005), reh'g denied, (May 18, 2005). Automobile insurer's contractual right to subrogation after paying medical expenses of passenger in named insured's car was enforceable against passenger, even though she was not a signatory to the

contract; she could not benefit from the contract without complying with its provisions.

Trogub v. Robinson, 853 N.E.2d 59 (Ill.App.1st Dist., 2006). The Trogubs settled their car collision suit against defendant Robinson, and then brought a motion to strike GEICO's subrogation lien. GEICO was seeking reimbursement of medical expenses paid under the medical payment portion of the Trogubs' policy. One point raised by the Trogubs was that GEICO was required to bring its own separate action against the defendant, or intervene in the suit, in order to preserve its subrogation rights. The Illinois Appellate Court held that "GEICO was not required by contract or statute to file a subrogation action or a petition to intervene, or otherwise give the Trogubs notice of its intent to pursue its subrogation rights."