Uninsured/Under-Insured Motorist's Coverage Dilemma

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Carrying a substantial policy limit on your own uninsured motorist's coverage may be the smartest decision you ever make. Estimates as to the numbers of uninsured motorists on the road in California range from 12% to 23% of all drivers. However, more importantly, many "insured" drivers may lack sufficient coverage to compensate you should you suffer serious injuries in an accident involving another vehicle.

Your uninsured motorist policy generally provides a secondary benefit of "underinsured" motorist's coverage. The way this coverage works is that, once you have "exhausted" the responsible parties' (tortfeasors') insurance coverage in a personal injury claim, you can seek additional benefits up to the amount of uninsured motorist's coverage you have purchased from your own insurer. You will not, however, ordinarily be entitled to recover gross settlement proceeds exceeding your own uninsured motorist's coverage.

If, for example, your personal injury claim is worth $250,000, the responsible driver has a $100,000 policy limit applicable to your claim, and you wisely pay premiums on your own $250,000 in uninsured motorist's insurance, then your own insurer will potentially be liable up to the difference of $150,000. If, however, the responsible driver had a $250,000 policy limit, then your uninsured motorist's carrier would likely never be involved in the claim.

An interesting scenario can arise in a multi-vehicle accident situation. Let's say you wisely purchased $250,000 in uninsured/underinsured motorist's coverage. You safely bring your vehicle to a stop behind a stalled vehicle on the highway, only to become a victim of a first impact from the vehicle immediately behind you failing to stop in time and then a victim of a second impact when the vehicle behind that vehicle also fails to stop in time, hitting the vehicle immediately behind you forcing it to impact your vehicle for a second time.

Let's say your injuries, incurred in being banged around twice in your vehicle in the course of this accident, support a demand for a $250,000 settlement or jury verdict (including your medical expenses, lost earnings and pain and suffering). Let's further suppose that the driver of the vehicle immediately behind you has a $100,000 insurance policy limit and that the driver immediately behind that driver has only a minimal $15,000 insurance policy limit.

In such case, your uninsured motorist's carrier's immediate reaction may be to tell you that it will not even consider your claim against it until you have completely exhausted the two underlying policies (i.e., obtained tenders of policy limits from the insurers of both responsible drivers). However, let us further suppose that the driver with $100,000 in coverage claims that his impact with your vehicle was minimal and that the primary cause of your injuries was the more substantial impact caused by the negligent driver who forced his vehicle into yours the second time.

If a jury were to accept such driver's argument, then it might allocate its potential

$250,000 judgment (presuming that is the full value of your claim) such that the driver with the $100,000 policy is deemed liable for something less than $100,000 and the driver with the $15,000 policy is deemed liable for the balance. For instance, if the jury allocated liability 20% to the driver with the $100,000 policy and 80% to the driver with the $15,000 policy, the driver with the $100,000 policy would be able to satisfy its share of the judgment by paying only $50,000 (i.e., 20% of $250,000). Under such circumstances, you would only receive $65,000 in insurance policy proceeds from the responsible drivers and be under-insured for $185,000.

Should your own insurance carrier refuse to participate in settlement negotiations or to open a claim until after it forces you to the expense and inconvenience of a jury trial against the two drivers in the situation described above, then it would arguably have failed in its duty to resolve your claim promptly in good faith. Even worse, under such scenario, there is a chance that your own insurance carrier would then take the position, after you tried your claim in an expensive and time consuming jury trial, and ended up with the result described above, that it did not owe you any further benefits because you failed to exhaust the underlying insurance policies.

Matthew Bender, in its discussion of California Uninsured Motorist Law (LexisNexis, Section 11.51, Exhaustion of Policy Limits), discusses this very situation. Such article points out the inherent inequity of giving the UIM carrier the power to deprive its insured of coverage for underinsured motorists benefits by requiring that he exhaust a tortfeasor's limits when it is a "practical impossibility to do so." In such article, the authors note that the California Supreme Court has commented on this scenario in Hartford Fire Ins. Co. V. Macri (1992) 4 Cal.4th 318, 327, as follows:

> If the consent requirement is deemed to apply to underinsured coverage, the insurer is given complete control over a prerequisite to that coverage–the prosecution and settlement of the action against the underinsured motorist. Allowing the insurer a power to thwart coverage at a threshold level by preventing fulfillment of a policy requirement would defeat the manifest intent of the statute to provide mandatory coverage where an insured suffers bodily injury from an underinsured motorist.

The authors go on to suggest that, as one remedy for such inequitable behavior by the UIM carrier, such carrier could be joined in the lawsuit against the tortfeasors (the other drivers), pursuant to Mercury Ins. Group v. Superior Court (1998) 19 Cal.4th 332. That Court held that a claim for underinsured motorist benefits may be joined with a suit against a tortfeasor in order to prevent conflicting rulings by the triers of fact where the insurer requires the insured to exhaust all policies. Such a lawsuit would allege a cause of action for breach of the UIM insurance contract by the carrier in wrongfully and tortiously refusing to permit its insured to accept a reasonable offer from a tortfeasor's insurer and thereby making the exhaustion requirement a basis for depriving the insured of underinsured benefits.

Because you have a first party insurer relation with your own insurer (and provider of uninsured/underinsured motorist's benefits), such insurer owes you a duty of good faith and fair

dealing in promptly and fully paying benefits due to you. For instance, in Neal vs. Farmers Insurance Exchange (1978) 21 Cal.3d 910, the California Supreme Court upheld a judgment of $750,000 for damages in a post-arbitration bad faith suit, which damages included emotional distress incurred by its insured and punitive damages, where the insurer had failed to promptly pay uninsured motorist's benefits clearly due to its insured and forced its insured to go through an arbitration procedure.

If you find yourself in a situation where you have questions regarding actions taken by your own uninsured motorist's carrier after you have been injured by the negligence of another person, please call the Trowbridge Law Office for a consultation.

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