

## UNINSURED AND UNDERINSURED MOTORIST COVERAGE - HISTORY

This memorandum reviews the law on uninsured and underinsured motorists, changes and attempted changes to the law, and selected case law.

The main provisions of law relating to uninsured and underinsured, sometimes designated as UM for uninsured and UIM for underinsured, are contained in seven sections of law codified as North Dakota Century Code (NDCC) Sections 26.1-40-15.1 through 26.1-40-15.7. These sections of law were enacted in 1989 and replaced previous provisions on uninsured and underinsured motorist coverage. The changes in 1989 were made in response to problems that had developed since the adoption of uninsured motorist coverage in 1973 and in response to the Legislative Assembly making underinsured motorist coverage mandatory in 1987. The bill in 1989, as introduced, was promoted as a model bill to provide uniformity among the states in the area of uninsured and underinsured. There has been only one substantive change to the law since 1989 and that change was relatively minor.

In general, uninsured motorist coverage is for bodily injury protection for the insured if the other party causing the injury does not have liability insurance. Underinsured motorist coverage is bodily injury protection for the insured if the other party causing the injury had liability coverage less than the amount of the insured person's underinsured motorist coverage.

### NORTH DAKOTA LAW

Uninsured and underinsured motorist coverages are mandatory. Under NDCC Section 39-08-20, an individual may not drive a motor vehicle in this state without liability insurance. The owner of the vehicle is responsible for acquiring liability insurance. Under Section 26.1-40-15.2, a liability insurance policy may not be issued unless uninsured motorist coverage is provided for an amount equal to or in excess of the limit stated in Section 39-16.1-11. Section 39-16.1-11 requires liability insurance in the amount of \$25,000 per person per accident subject to a limit of \$50,000 per accident. The insurer can limit uninsured coverage to \$100,000 per person and \$300,000 per accident and to usual combinations of limits normally used in the insurance business. Section 26.1-40-15.3 requires underinsured motorist coverage at the limits equal to the limits of uninsured motorist coverage.

Uninsured and underinsured motorist coverages are separate coverages. Under NDCC Section 26.1-40-15.1, an underinsured motor vehicle may not be construed to include an uninsured motor vehicle. However, the concepts are closely related. Under Section 26.1-40-15.7, an insurer may make

underinsured motorist coverage part of uninsured motorist coverage.

The first step for an insured to be covered under an uninsured motorist policy is if the insured suffers bodily injury or death caused by an uninsured vehicle. What is an uninsured motor vehicle? An uninsured motor vehicle does not have liability insurance or is a vehicle that has liability insurance that does not provide coverage. The first step for an insured to be covered under an underinsured motorist policy is if the insured suffers bodily injury or death caused by an underinsured vehicle. What is an underinsured vehicle? An underinsured vehicle has liability insurance in effect, but the limits of the liability insurance are less than the limits of the underinsured policy of the injured insured or less than the liability insurance after being reduced by payments to other persons.

To further define terms, the term "motor vehicle," as used in the term uninsured motor vehicle and underinsured motor vehicle, does not include a vehicle weighing more than 20,000 pounds and includes vehicles with two or more load-bearing wheels that are registered, designed primarily for highway operation, and are powered other than by muscular power. In addition, "motor vehicle" includes an attached trailer.

The reason the Transportation Committee is studying uninsured and underinsured motorist coverage is because the committee was assigned the study by 2003 Senate Bill No. 2262. The bill was introduced to exclude motorcycles from uninsured and underinsured motorist coverage unless the claim is made on a motorcycle that is described in the policy. Because the definition of motor vehicle includes a vehicle with two or more load-bearing wheels, an uninsured or underinsured motor vehicle may be a motorcycle. As such, an insured with an underinsured or uninsured motorist policy may recover if the insured suffers bodily injury or death caused by an uninsured or underinsured motorcycle. A fact situation in which this may occur is when a child covered under a parent's uninsured or underinsured motor vehicle policy is injured while riding a friend's uninsured or underinsured motorcycle. The result may be an insurer paying for bodily injury claims incurred on a motorcycle when the insurance company does not insure motorcycles.

Under NDCC Section 26.1-40-15.1(4) and Section 26.1-40-15.6, there are a number of situations in which a person is not covered under an uninsured or underinsured motorist policy. Section 26.1-40-15.1(4) excludes these vehicles from the definition of uninsured motor vehicle and underinsured motor vehicle:

1. A motor vehicle insured under the liability coverage of the same policy of which the uninsured motorist or underinsured motorist coverage is a part. This prevents an insured from recovering under both the liability coverage and the uninsured or underinsured motorist coverage of the same policy.
2. A motor vehicle owned by the government.
3. A motor vehicle located for use as a residence or premises.
4. A motor vehicle operated by any person who is specifically excluded from coverage in the policy.
5. With respect to uninsured motorist coverage, a self-insured motor vehicle is not an uninsured motor vehicle.

North Dakota Century Code Section 26.1-40-15.6 excludes these situations from uninsured and underinsured coverages:

1. If the vehicle is regularly used by the insured or family and is not described in the policy;
2. If operating the vehicle without permission of the owner;
3. For noneconomic loss that would have been covered if the owner or operator responsible for the loss had no-fault insurance;
4. For noncompensatory damages;
5. If the statute of limitations has run;
6. Until bodily injury liability policies have been exhausted;
7. If the insured makes an agreement that adversely affects the rights of the insurer without the insurer's prior knowledge and consent; or
8. If the insured failed to report the accident to law enforcement as soon as practicable.

In addition, a person operating a motor vehicle in which the individual is specifically excluded in the policy was added as an exclusion in 2001 as part of House Bill No. 1378.

If a person has a policy, has an accident with a motor vehicle defined as uninsured or underinsured, and has not been statutorily excluded from coverage, the maximum liability under both uninsured and underinsured motorist coverages is the lower of the amount of compensatory damages established but not recovered or the limits of policy.

There are three approaches to addressing when underinsured motorist coverages pay benefits when there is another source of recovery:

- The excess approach;
- The difference in limits approach; and
- The modified difference in limits approach.

This state has a difference in limits definitional trigger. If the definition is met, then coverage is on an excess basis, which is inclusive of the modified difference in limits approach.

The following discussion on these approaches is limited to underinsurance. Although the same

principles apply to underinsurance, the principles do not come into play in many uninsured fact circumstances. In addition, the limitation simplifies the discussion.

The excess approach has underinsured motorist benefits apply in addition to any other recovery up to the policy limits. The difference in limits approach has underinsured benefits apply to the extent of the difference between the policy limits and the amount recovered. Before 1989, this state used the difference in limits approach.

The third approach is the modified difference in limits approach. As introduced, 1989 House Bill No. 1155 included the modified difference in limits approach. The modified difference in limits approach has underinsured motorist benefits apply in the same manner as the difference in limits approach, except an insured with policy limits less than the policy limits of the underinsured motor vehicle can recover if several individuals are injured by the underinsured motor vehicle and the accident limits were reduced or exhausted below the insured's policy limits.

Under the excess approach, an insured with \$25,000 of underinsured motorist coverage in an accident with a person with \$25,000 in liability insurance would have up to \$50,000 in coverage from both policies--\$25,000 from each. If the insured had \$50,000 in underinsured coverage, the insured would have up to \$75,000 in coverage from both policies--\$25,000 from the liability policy and \$50,000 from the underinsured policy. Under the difference in limits approach, an insured with \$25,000 of underinsured coverage in an accident with a person with \$25,000 in liability insurance would have up to \$25,000 in coverage from the liability policy. The insured would receive no benefit from the underinsured motorist policy. If the insured had \$50,000 in underinsured coverage, the insured would have up to \$50,000 in coverage from both policies--\$25,000 from each. The modified difference in limits approach operates the same as the difference in limits approach; however, if an insured had \$25,000 in underinsured motorist coverage and was in an accident with an individual that had \$100,000 in liability insurance, but there were other people involved in the accident that exhausted the \$100,000 in liability coverage, the insured could use up to \$25,000 in underinsured benefits.

Since 1989, a number of bills have been introduced and failed to pass which relate to uninsured and underinsured motorist coverage. Most of these bills relate to the approach used to determine when benefits apply when there is an equal amount of liability insurance. Senate Bill Nos. 2368 (1995), 2386 (1997), and 2377 (1999) attempted to change this state's law to a true excess approach. The main argument against the excess approach in 1989 was that under the approach insurance companies are subject to a potential claim for underinsured motorist coverage in every accident. Because of this potential

coverage, the insurer will have to open a claim file, do an investigation, and make a determination as to the insurer's exposure for every accident. This is in contrast with the difference in limits approach, in which the insurer only has exposure for underinsured motorist coverage when liability limits are less than the underinsured motorist coverage.

In 2001, House Bill No. 1995 attempted to overrule a case to be discussed later, *Rask v. Nodak Mutual Insurance Company*, 626 N.W.2d 693 (2001). The bill failed to pass.

The rules governing the relationship between uninsured or underinsured motorist coverage and other forms of payment are addressed in NDCC Section 26.1-40-15.4. Both coverages are reduced by workers' compensation and no-fault insurance benefits. The limits of liability for both coverages may not be added to or stacked upon limits for the coverages applying to other vehicles to determine the amount of coverage available to an insured in an accident. If there are multiple coverages involved, the maximum amount that may be recovered by an insured is the highest limit provided for any one vehicle under any one policy. Multiple coverages often occur when the insured is injured while occupying a vehicle not owned by the insured or when the insured is injured as a pedestrian.

The policies apply in the following priority. The first priority is the policy of the motor vehicle occupied at the time of the accident. The second priority is the policy of a motor vehicle not in the accident under which the injured is the named insured. The third priority is the policy of a motor vehicle not in the accident under which the injured is covered in a capacity other than as the named insured. The coverage of a lower priority policy applies only to the extent it exceeds the higher priority policy.

North Dakota Century Code Section 26.1-40-15.5 provides rules of reimbursement and subrogation. Generally, the insurer may recover from the at-fault party if the insurer makes payment under an uninsured or underinsured motorist coverage. There are some exceptions. In particular, the insurer does not have the right of subrogation against an underinsured motorist if the insurer is notified in advance of a settlement between the insured and underinsured and the insurer fails to advance payment to the insured in the amount of the tentative settlement within 30 days.

North Dakota Century Code Section 26.1-40-15.7 provides some general provisions relating to policy limits, coverage, and arbitration. In particular, the section allows an insurer not to notify the insured of optional limits after the selection of policy limits. An insurer may offer better coverage than is required by law. The insurer does not have to provide uninsured or underinsured coverage under an umbrella if the umbrella does not include primary liability coverage on the motor vehicle. The insurer may provide that any question as to liability or damages be submitted

to binding arbitration if both parties agree. The policy may exclude coverage questions from arbitration.

## SELECTED CASES ON UNDERINSURED COVERAGE

The following cases review the application of underinsured motorist coverage to certain fact scenarios.

Under *Thompson v. Nodak Mutual Insurance Company*, 466 N.W.2d 115 (1991), the North Dakota Supreme Court reviewed the summary judgment dismissal of Thompson's case against Nodak Mutual. The facts underlying this case took place in 1986, before the mandatory insurance requirements of 1987.

Mark Thompson died as the result of a motor vehicle accident. His children and wife initiated an action to recover underinsured motorist benefits under a policy purchased from Nodak Mutual. The policy had \$100,000 per person and \$300,000 per occurrence limits. The Thompsons had already recovered \$500,000 from the insurer of the driver of the other vehicle. The Thompsons made a claim against Nodak for damages that exceeded this amount. The Thompsons argued that uninsured motorist benefits under the policy are available whenever damages incurred exceed the amount of insurance carried by the tort-feasor. Nodak argued that the underinsured motorist benefits only apply when the amount of insurance carried by the tort-feasor is less than the applicable limit of underinsurance coverage.

This case could have been decided easily if the 1987 law applied because that law defined an uninsured motor vehicle as "one of which the applicable limit of liability insurance is less than the applicable limit of underinsurance coverage." Because this provision was not in effect, the court found the vehicle to be an underinsured vehicle but reduced the coverage by the amount recovered, resulting in a negative \$400,000, and found for no recovery under the coverage for the Thompsons.

There are two principles that may be gleaned from this case. First, when reviewing underinsured motorist coverage, the first question is to ask whether the vehicle is an underinsured motor vehicle and the second question to ask is whether there is some limit in coverage or liability for the insurer. Second, the insurance policy may have provisions that affect coverage independent of the statutes.

Under *Score v. American Family Mutual Insurance Company*, 538 N.W.2d 206 (1995), the North Dakota Supreme Court affirmed the summary judgment dismissing Score's action against American Family.

In short, three justices thought the policy was unambiguous and reached the gap or difference in limits theory result and two justices thought the policy

was ambiguous and would have reached the excess theory in result.

The facts of the case were that Score was injured in a four-vehicle accident in 1988 and sued the driver of one of the vehicles in the accident, Hannah. Score secured a judgment against Hannah for approximately \$250,000. Hannah was insured by State Farm under a liability policy with limits of \$100,000. Score collected on that policy for \$100,000. Score was insured by American Family for underinsured motorist coverage with limits of \$100,000. Score sued American Family for \$100,000 of uninsured motor coverage.

The court found there was no evidence that the policy provided more coverage than was provided by the statute. Score argued that the excess approach applied under the policy and the court found that the statutory definition of underinsured motorist and the statutory liability requiring only difference in limits coverage applied under the policy.

Justice Meschke dissented and contended the insurance policy should have been construed in Score's favor. He argued the policy was ambiguous and any ambiguity should be interpreted in favor of the insured because an insurer whose policies are not written so that an ordinary layperson can clearly understand them must assume the consequences of the ambiguity.

This case shows that the policy may offer more than the statutory minimum. In addition, it shows that what a policy states is open to various interpretations.

In *DeCoteau v. Nodak Mutual Insurance Company*, 603 N.W.2d 906 (2000), DeCoteau appealed from a summary judgment dismissing his action against Nodak Mutual for underinsured motorist coverage. The court found a material issue of fact and reversed and remanded for further proceedings.

DeCoteau was a named insured under a policy with Nodak Mutual which provided underinsured coverage in the amount of \$25,000 per person. In 1994, DeCoteau was injured in an automobile accident with a tort-feasor who carried insurance with a liability limit of \$25,000 per person. DeCoteau received \$25,000 from the tort-feasor's policy and claimed damages in excess of that amount and sought underinsured coverage under his policy with Nodak Mutual. Nodak Mutual denied liability and moved for summary judgment. The trial court granted Nodak Mutual summary judgment and DeCoteau appealed.

The court reviewed the two types of underinsured motorist coverage--gap or difference in limits coverage and excess coverage. The gap or difference in limits coverage is "so-called because the coverage merely fills the "gap" between the tort-feasor's liability coverage and the injured party's underinsured motorist coverage. . . ." A driver is considered underinsured when the liability coverage

does not at least equal the underinsured coverage carried by the insured. Under excess coverage, the insured may recover underinsured motorist benefits until the policy limits are reached or the insured is fully compensated for damages, whichever comes first. The coverage is for the excess over and above the liability policy of the tort-feasor. A driver is considered underinsured when the liability coverage does not at least equal the damages suffered by the insured.

In 1987 the North Dakota Legislative Assembly enacted mandatory difference in limits underinsured coverage. In 1989 the Legislative Assembly amended the mandatory minimum requirements for underinsured coverage. As originally introduced in 1989, the bill mandated a modified difference in limits approach for underinsured coverage. The 1989 Legislative Assembly retained essentially the same definition of an underinsured motor vehicle as used in the 1987 law; however, language was enacted changing an insurer's maximum liability for underinsured coverage to the lowest of the compensatory damages established but not recovered or the insured's liability limit for underinsured coverage. The legislative history reflects the difference in limits language was deleted from the introduced version to make insureds "whole" by allowing them to recover underinsured benefits until their policy limits are reached or they are fully compensated for their injuries.

The court reviewed this legislative history as follows:

The 1989 legislative history reflects the legislature retained the definition of underinsured motor vehicle to alleviate concerns about requiring insurers to open a claim file whenever insureds' underinsured coverage was the same as a tort-feasor's liability coverage; the legislature deleted the difference in limits language in what became N.D.C.C. § 26.1-40-15.3(2) to try to make insureds "whole" by allowing them to receive their underinsured coverage limits in some situations; and the legislature adopted the language in N.D.C.C. § 26.1-40-15.4(1) to allow insurers to reduce damages paid to insureds only for amounts paid or payable under an insured's first-party motor vehicle policy and under workers' compensation law.

According to the court, under present law to trigger underinsured coverage a tort-feasor's motor vehicle must meet the statutory definition of underinsured vehicle. If that threshold definition is satisfied, the insurer's maximum liability is the lowest of the compensatory damages established but not recovered from the tort-feasor or the insured's liability limits for underinsured coverage. The insurer is allowed to reduce damages paid by amounts paid under workers' compensation law and the insured's first-party

motor vehicle coverage. These are the minimum statutory requirements for underinsured coverage, but an insurer may provide greater coverage.

The court reversed the summary judgment and remanded for further proceedings to determine if the policy provided greater underinsured coverage than was required by statute.

Under *Rask v. Nodak Mutual Insurance Company*, 626 N.W.2d 693 (2001), the North Dakota Supreme Court found that the district court correctly concluded that the vehicle involved in the action was an underinsured motor vehicle as a matter of law.

In 1998 there was a one-car accident that involved the driver and four passengers. Two of the passengers were killed and two were injured. The passengers sued the driver. The driver was driving, with permission, a car insured by the deceased passenger's father with State Farm for liability in the amount of \$100,000 for each person and \$300,000 for each accident. The driver also had liability coverage under a personal policy for \$100,000 per person and \$300,000 per accident. These two policies provided a total of \$200,000 per person and \$600,000 per accident in liability coverage. The \$600,000 went to the four passengers. Of the \$600,000, \$187,500 went to the mother and father of a passenger killed in the accident. The mother, Leslie Rask, had an underinsured policy for \$100,000 per person and \$300,000 per accident with Nodak Mutual. The mother and father of the accident victim, the Rasks, sued Nodak Mutual. The district court said the vehicle was

underinsured under the Rasks' policy and Nodak Mutual appealed.

The district court concluded that in determining whether a vehicle is underinsured, the only policy to consider is the policy insuring the motor vehicle involved in the accident, in this case the State Farm policy. Nodak Mutual asserted that the vehicle involved in the accident was not underinsured because the amounts the Rasks received through the State Farm policy insuring the vehicle and the policy insuring the driver totaled \$187,500 and exceeded the underinsurance coverage limit of \$100,000. The Supreme Court found that an underinsured motor vehicle, not an underinsured motor vehicle operator, must be involved in the accident. Being that the insured status of the vehicle is determinative, not the insured status of the operator, the \$93,750 paid to the Rasks under the State Farm policy is less than the \$100,000 underinsured limit of the Nodak Mutual policy.

In 2001, House Bill No. 1295 was introduced to address this case. This case shows one of the different rules that applies in multiple policy situations. Another application of the law in multiple policy situations is when there are multiple claims made against the same liability policy. The amount of coverage in the liability policy is lessened by all the claims; thereby, providing the insured more coverage than if there were only the tort-feasor and the insured involved in the accident.