

UIM, UM, AND PIP IN KENTUCKY



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UIM / UM CASES

Kentucky UIM and UM law can be confusing at best and frustrating at worst. The easiest way to make sense of it is to always remember a few building blocks that inform how a Court will interpret a policy provision or the relationship between a policy and the Insurance Code. Here are a few:



- UIM is optional while UM is mandatory unless rejected
- Both are essentially declaratory judgment actions
- Not actions for breach of contract
- Both only apply to bodily injury and death claims
- UM must be at least 25/50
- While UIM could be any amount
- Injured person's burden of proof on liability
- Must also prove that the tortfeasor's status.
- A judgment against the tortfeasor is not required
- Neither is suit against the tortfeasor
- Priority of coverage is: vehicle, driver, injured person
- Stacking is allowed if separate premiums are paid
- Stacking can be prohibited by language

UIM AND UM EXCLUSIONS AND CONDITIONS

Generally speaking, Courts will uphold any reasonable exclusion or condition that does not clearly contradict the UIM and UM statutes. Some common provisions that have been deemed valid and enforceable are:

- "Owned but not scheduled" is enforceable, but not as to the named insured
- "Regularly used" exclusion is enforceable
- 2 year statutory limitation for suit is enforceable
- Physical contact (with the offending car) for hit and run accidents is enforceable (because phantom cars are uninsured)
- No benefit to work comp is enforceable
- Motorcycle exclusions can be enforceable
- Anti-stacking provisions are enforceable to a second class insured, but not a first class insured if multiple premiums were paid
- Exclusions for intentional acts has been deemed reasonable
- Exclusions for punitive damages in both UIM and UM have been held valid
- Policy requirement to give notice to UM carrier of suit against tortfeasor is enforceable



UIM SUBROGATION

KRS 304.39-320(3) provides the current framework for UIM subrogation in Kentucky by attempting to balance a tortfeasor's right to obtain a release with the UIM carrier's right to seek subrogation.

If a Plaintiff wishes to settle with a tortfeasor they may do so, but if they want to maintain the UIM action, they must send a certified letter to the UIM carrier indicating their intention to accept the offer. The UIM carrier has 30 days to either advance the settlement amount or be deemed to have waived subrogation. If the letter (commonly called a *Coots* notice) is not sent, the Plaintiff may not proceed with their UIM claim. Whether advanced or not, the settlement proceeds become consideration for an implied release in favor of the tortfeasor by the Plaintiff.



There are a number of tactical reasons to advance or not advance, and the best way to visualize how these differences play out at trial is in the scenarios below involving a tortfeasor with 100K in limits and a UIM policy with 100K in limits.

TORTFEASOR DOES NOT SETTLE, SO NO ADVANCEMENT IS POSSIBLE

Participation	Final Judgment	Outcome
Tortfeasor only	100K	UIM pays nothing, so nothing to subrogate. Tortfeasor's carrier pays judgment.
Tortfeasor only	150K	UIM pays 50K and can subrogate against the tortfeasor directly for that 50K. Tortfeasor's carrier pays 100K of judgment, and tortfeasor is still personally liable.
Tortfeasor only	250K	Both policies exhaust. UIM carrier and Plaintiff can seek additional sums from tortfeasor via collection methods.

The effect is that if the tortfeasor never settles, the UIM carrier can be bound to the verdict without being identified at trial.

TORTFEASOR SETTLES, AND UIM DOES NOT ADVANCE

Settlement Amount	Effect on Tortfeasor	Final Judgment	Outcome (UIM tries the case and is identified)
100K	Released	100K	UIM pays nothing.
50K	Released	100K	UIM pays nothing, and Plaintiff cannot recover the additional 50K left on tortfeasor's policy.
50K	Released	200K	UIM policy exhausts, and UIM carrier cannot recover money spent.

By not advancing the money, the UIM is not out any money, and the floor to reach UIM coverage is the same. However, the UIM carrier defends the case as an identified carrier.

TORTFEASOR SETTLES, UIM ADVANCES OFFER

Settlement	Participation	Final Judgment	UIM Outcome
100K	Tortfeasor is released but participates at trial. UIM is identified and also participates.	100k	UIM pays nothing. UIM gets paid back the funds it advanced.
50K	Tortfeasor is released but participates at trial. UIM is identified and also participates.	100k	UIM pays nothing and gets its 50K back. Plaintiff cannot collect the additional 50K from tortfeasor.
50K	Tortfeasor is released but participates at trial. UIM is identified and also participates.	150k	UIM pays 50k because the floor was pierced to that extent. Plaintiff cannot collect cannot collect the additional 50K from tortfeasor. UIM gets the 50K it advanced back, and can pursue the tortfeasor for the remaining 50K left on that policy.
50k	Tortfeasor is released but participates at trial. UIM is identified and also participates.	200K	UIM pays 100K because the floor was pierced to that extent and because that is the limits of its coverage.

			<p>Plaintiff cannot collect the additional 50K on tortfeasor's policy.</p> <p>UIM gets the 50K it fronted back from the carrier and can recover another 50 of its 100 from the carrier because there is money left on that policy. It can recover the other 50 of new money from the tortfeasor directly.</p>
10k	Tortfeasor is released but participates at trial. UIM is identified and also participates.	150K	<p>UIM pays 50K because that's the extent the floor was pierced.</p> <p>Plaintiff cannot collect the additional 90k on tortfeasor's policy.</p> <p>UIM gets the 10K it fronted back, and it can recover the 50K it paid from tortfeasor's carrier.</p>

In essence, if the tortfeasor settles for an amount less than their limits, the difference becomes a cushion above the UIM floor which protects the UIM carrier from exposure. In the last example, the cushion was so big that the even though the UIM floor was pierced, there was not real exposure because the subrogation claim allowed the UIM carrier to get 90K of insurance proceeds to satisfy the subrogation claim.

UIM IDENTIFICATION AND TRIAL TACTICS

The Plaintiff's bar salivates at the chance to try a case against an identified insurance company. The theme of such a trial is the betrayal of a trusted advisor who promises to take care of the vulnerable person in need. Plaintiff's attorneys try to use the insurance policy as an exhibit, discuss premiums paid and the length of time the Plaintiff has been a customer, and even cross-examine the claims representative about how the claim was handled. Much to the chagrin of the Plaintiff's bar, none of that should be allowed.



The Kentucky Supreme Court held in *State Farm Mutual Automobile Insurance Company v. Riggs*, 484 S.W.3d 724, 730 fn. 25 (Ky. 2016) that the standard UIM claim is more akin to a declaratory judgment action than an action for breach of contract. In a breach action, the contractual terms have already been broken by one party before suit was filed. In a declaratory judgment action, the court is determining what is owed to whom under a contract. In the standard scenario where coverage is not being denied, the only real

issue is whether the Plaintiff can establish liability and damage over the available coverages to satisfy the terms and conditions of the UIM policy. As such, the handling of the claim is not relevant, and neither are the actual contractual terms. The fact that the tortfeasor settled is not admissible, the policy does not become an exhibit, and the focus stays on a Plaintiff proving a case as if a tortfeasor were present.

If there is a settlement with the tortfeasor, then the UIM carrier must be identified at trial. But how? The Court of Appeals held in *Progressive Max Ins. Co. v. Jamison*, 431 S.W.3d 452 (Ky. App. 2013) that the identification requirement is met by referring to the carrier by name or as “Defendant.” Referring to the carrier as “Plaintiff’s insurer” insinuates that the carrier owes something to Plaintiff already. Referring to the coverage as “underinsured” insinuates that there was some insurance, that it was not enough, and that the court believes both of those statements are accurate.



Another issue that arises when the UIM carrier has advanced funds is whether the tortfeasor should be prohibited from participating at trial. A clever Plaintiff’s attorney will note that since the tortfeasor has been implicitly released, and since the UIM subrogation statute provides that the subrogation rights of the UIM carrier can only be vindicated after the UIM exposure has been set by a jury verdict. They will argue that the subrogation claim may have no value ultimately since only an award for the Plaintiff will support a subrogation right.

The Plaintiff’s attorney making that argument misses the mark for three reasons. First, the UIM carrier is subrogated to the extent of the advanced funds, not just any UIM funds that might be later awarded by the jury. The subrogation claim is supported by the advancement in addition to any later awarded sum. Second, the tortfeasor in the scenario has an interest in participating at trial to attempt to lower the award to Plaintiff as doing so diminishes any uninsured liability he/she might have. Finally, allowing the tortfeasor to participate at trial furthers judicial efficiency by avoiding two trials.

In several Kentucky venues, representing an insurance company is not as scary as one might be led to believe. In more conservative counties, insurance represents a business run by a local agent the jurors know. It sometimes represents “the system” the Plaintiff is trying to “work.” A UIM carrier can prime the jury in jury selection to the idea that an insurance carrier should be given a fair trial without inappropriately suggesting that a verdict could cause rate hikes across the board. A clever defense attorney can also suggest a sum of money inside the UIM floor as a

fair verdict, and doing so risks nothing while making the insurance carrier look reasonable (and possibly even generous).

NO-FAULT

Benefits are payable for any injury occurring during the use or maintenance of a motor vehicle. There is a simple 3-step process to analyze whether PIP is payable under a policy.

Step 1: Is there use or maintenance of a motor vehicle?



A “motor vehicle” is defined as anything meant to carry persons or property on the public highways while being powered by a motor. Some examples of things that are not motor vehicles are: forklifts, golfcarts, mopeds, ATVs, and horse-drawn buggies. Something that can travel on the roadway but is temporarily anchored (like an RV or a concrete pumping truck) are not motor vehicles while anchored. Motorcycles can also be covered under No-Fault, but that is considered optional coverage.

“Use” or “Maintenance” of a motor vehicle requires that there be some connection between the injury and transportation. Someone who is assaulted while in a car is not eligible to receive benefits. “Entering, occupying, or alighting from a motor vehicle” is considered using it. Alighting from a motor vehicle includes all motions needed to finish using the vehicle. For example, a child crossing the street in front of a school bus who has not yet reached the side of the road is still “using” the school bus. Maintenance of a vehicle is not defined, but case law makes it clear that routine maintenance was not envisioned by the statute.

Special rules apply to loading and unloading a motor vehicle. Usually loading/unloading are not considered “use” of a motor vehicle, but they could be if a person was occupying the vehicle at the time. Simply standing on a flatbed trailer will not suffice, but loading the interior of a box truck would.



If a motor vehicle is present, No-Fault benefits are payable if the statute and policy are followed. A person who has rejected No-Fault benefits in writing is not eligible for benefits. A person who steals a vehicle is not entitled to PIP from that vehicle’s policy, but an unknowing passenger would be.

Step 2: Who is the primary payor?

The next step is to determine who pays. This is relatively simple as the primary insurance is on the vehicle. If the vehicle is uninsured, but the driver is, the driver's coverage becomes the coverage "on the vehicle." Third in line is the personal insurance of the injured person. Finally, a person who qualifies for none of those benefits can apply through KACP if they have not rejected No-Fault.



Step 3: How much is owed?

There are three basic benefits under No-Fault for injury: medical expenses, lost wages, and replacement services loss. Medical expenses are not subject to limitation or deduction, and they are presumed reasonable in their amount only. Historically, there was no presumption that treatment was related, but recent case law has challenged that. Wages are capped at \$200 per week unless the policy provides for more.

In cases of death, funeral expenses up to \$1,000 are allowed. A survivor can claim "survivor's economic loss" for money a survivor could have expected from the decedent. "Survivor's replacement services loss" is for money paid to cover expenses for household services performed by decedent. The "survivor" is the closest survivor as defined by Kentucky's Wrongful Death statute.

Once that analysis has been completed, determine if a deductible applies or if you are entitled to a work comp setoff. In work related car accidents, work comp is deemed to be primary to No-Fault if the Plaintiff claims comp benefits. If they do not, PIP is primary.



Kentucky law prohibits a direct assignment of benefits, but the No-Fault Act allows an injured party to direct benefits. Even if that occurs, an entity to whom benefits are directed cannot sue for unpaid benefits. If a written direction occurs, the carrier must honor that direction prospectively, and any benefits otherwise owed are not considered overdue until they are released. The Plaintiff can direct payments to a lienholder, a provider, or themselves if

they can provide proof that they have paid a bill directly. A Medicare beneficiary is required by the Medicare Secondary Payor Act to direct benefits from No-Fault to CMS.

Plaintiff may only file suit for unpaid benefits, so if benefits were reserved and never released, suit is not proper. If suit is filed for overdue benefits, it must be filed within 2 years of the last payment if PIP was paid. If PIP was not paid, it must be filed within the shorter of 2 years from the specific loss (medical expense or lost wage) or 4 years from the accident. In cases of death, the suit must be filed within 1 year of the death or 4 years of the accident (whichever is sooner), or 2 years from the date the last payment was made.

There are very few defenses to a No-Fault claim. Plaintiff is required to comply with the statute and the insurance policy, and those require submitting applications, medical reports, proof of loss statements, and directing benefits appropriately. A policy's requirement that a claimant sit for an EUO or an IME is not enforceable. Paper medical chart reviews are no longer allowed as the sole basis for denying a claim on relatedness. In the event there is a real question of causation, the carrier may hire counsel to petition the Court to order an IME.



A PIP carrier must pay within 30 days of receipt of reasonable proof of loss unless it chooses to accumulate records and bills for 31 days, in which case it must make payment within 15 additional days. A written explanation for non-payment is required, and best practice would be to highlight every known reason for denial. If benefits are not paid timely, they become overdue, and 12% interest is charged against the unpaid amount. If there is no reasonable foundation for non-payment, the interest rate becomes 18%, and attorney's fees are also collectible. There are no other bad faith remedies for non-payment of PIP.