

# Pennsylvania

By Joel Max Eads and Katharine J. Thompson

## Uninsured Coverages

### *Is UM coverage mandatory or discretionary?*

An auto insurance carrier must offer it, but the insured has the choice of purchasing it. *See Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 628 A.2d 847, 850 (Pa. Super. 1993) (UM and UIM coverage are optional, meaning not required), *rev'd on other grounds*, 664 A.2d 84 (Pa. 1995), 75 Pa. C.S. §1731(a). Insurers must offer UM coverage equal to the coverage level for third-party bodily injury. 75 Pa. C.S. §1791(6). A policy holder may elect lesser or no coverage in writing pursuant to 75 Pa. C.S. §1734.

### **Is UM coverage governed by a statutory scheme? Are there any landmark cases?**

UM coverage is governed by the MVFRL, codified at 75 Pa. C.S. §§1701–1799.7, originally enacted 1984. Subchapter C of the MVFRL deals with UM and UIM coverage.

### **Must the insured reject UM coverage in writing? What happens if the insured has not rejected coverage in writing, but later seeks such coverage?**

An insured must reject UM coverage via writing. 75 Pa. C.S. §1731(b). The MVFRL provides that any “rejection form that does not specifically comply with [the language set forth in §1731(c)] is void.” 75 Pa. C.S. §1731(c.1). The MVFRL does not define the phrase “specifically comply”; however, Pennsylvania courts have generally interpreted this language to require waiver forms to track exactly the language set forth in the statute.

A rejection of UM/UIM coverage is binding upon all persons claiming under the policy. *General Accident Ins. Co. of America v. Parker*, 665 A.2d 502,

504 (Pa. Super. 1995), *appeal denied*, 675 A.2d 1249 (Pa. 1996).

Although Section 1731(c.1) requires reminder notices on policy renewals where UM/UIM coverage has been rejected, the lack of such notices is unlikely to void the rejection as courts have been unwilling to build such a remedy into the MVFRL. *See Salazar v. Allstate Ins. Co.*, 702 A.2d 1038, 1044 (Pa. 1997) (finding that where the insured has rejected UM and UIM coverages, but the insurer’s renewal notices failed to comply with the requirements of §1791.1, the insurer is not required to provide UM/UIM coverage because the statute provides no remedy for an insurer’s failure to comply with the notice requirements of §1791.1.).

### *Is UIM coverage mandatory or discretionary?*

Discretionary. Insurers must offer UIM coverage where (1) the policy is delivered or issued for delivery in the Commonwealth and (2) the motor vehicle is registered or principally garaged in the Commonwealth. 75 Pa. C.S. §1731(a); *English*, 628 A.2d at 850 (UM and UIM coverage are optional, meaning not required).

### **Is UIM coverage governed by a statutory scheme? Are there any landmark cases?**

UIM coverage is governed by the MVFRL, codified at 75 Pa. C.S. §§1701–1799.7, originally enacted 1984. Subchapter C of the MVFRL deals with UM and UIM coverage. *Wolgemuth v. Harleysville Mutual Insurance Co.* is widely cited in defining UIM coverage: “An underinsured motor vehicle, must, by definition be an insured vehicle. Thus the statute contemplates one policy applicable to the vehicle which is at fault in causing the injury to the claimant and which is the source of liability coverage (which is ultimately insufficient to fully compensate the vic-

tim), and a second policy, under which the injured claimant is either an insured or a covered person.” 535 A.2d 1145, 1149 (Pa. Super. 1988), *appeal denied*, 551 A.2d 216 (Pa. 1988).

**Must the insured reject UIM coverage in writing? What happens if the insured has not rejected coverage in writing, but later seeks such coverage?**

An insured must reject UIM coverage in writing. The MVFRL provides that any “rejection form that does not specifically comply with [the language set forth in §1731(c)] is void.” 75 Pa C.S. §1731(c.1).

The MVFRL does not define the phrase “specifically comply.” Courts have generally rejected forms that omit statutory language. *American Int’l. Ins. Co. v. Vaxmonsky*, 916 A.2d 1106, 1109 (Pa. Super. 2006) (finding that omission of the word “all” made the form ambiguous and voided the rejection of UIM coverage). Pennsylvania state courts have similarly rejected additions to the statutory language, although some federal courts have allowed additional language and held it does not void the insured’s rejection of coverage. *Compare Unitrin Auto & Home Ins. Co. v. Heister*, No. 4:CV-04CV2100, 2005 WL 2314372, at \*3–5 (M.D. Pa. Sept. 22, 2005) (holding that a UIM rejection form that added a sentence to the end of the statutory text nonetheless complied with §1731 because it used the exact language required by §1731 and “§1731(c.1) nowhere indicates that additional clarifying language vitiates an otherwise valid UIM rejection waiver form”), *with Jones v. Unitrin Auto and Home Ins. Co.*, 40 A.3d 125,131 (Pa. Super. 2012) (examining the same additional sentence at issue in *Heister* and holding “that additions to the prescribed language, and deviation from the proximal relationship of the components, of the UIM rejection form required by... §1731 fail to specifically comply with the statute and is consequently void”), *appeal dismissed and remanded*, 65 A.3d 912 (Pa. 2013).

As with UM coverage, the insurer’s failure to comply with renewal notice provisions in the MVFRL will *not* void the insured’s prior rejections of UIM coverage. *See Salazar v. Allstate Ins. Co.*, 702 A.2d 1038, 1044 (Pa. 1997). And, as with UM coverage, a rejection of UIM coverage is binding upon all persons

claiming under the policy. *General Accident Ins. Co. of America v. Parker*, 665 A.2d 502, 504 (Pa. Super. 1995), *appeal denied*, 675 A.2d 1249 (Pa. 1996).

***Is uninsured motorist property damage (“UMPD”) coverage mandatory or discretionary?***

Pennsylvania requires insurers to offer UIM and UM coverage “for persons who suffer injury.” The MVFRL does not require any other underinsured coverage options in Pennsylvania. 75 Pa. C.S. §§1701–1799.7.

***Is uninsured motorists “economic only” (“UEO”) coverage mandatory or discretionary?***

Pennsylvania requires insurers to offer UIM and UM coverage “for persons who suffer injury.” The MVFRL does not require any other underinsured coverage options in Pennsylvania. 75 Pa. C.S. §§1701–1799.7.

***Does the state have any other uninsured coverages that are mandatory or discretionary?***

Pennsylvania requires insurers to offer UIM and UM coverage “for persons who suffer injury.” The MVFRL does not require any other underinsured coverage options in Pennsylvania. 75 Pa. C.S. §§1701–1799.7.

**Limits**

***Must the UM or UIM limits match the liability limits for “bodily injury”? Are there minimum UM or UIM limits?***

Yes and no; insurers must offer UM coverage equal to the coverage level for third-party bodily injury. 75 Pa. C.S. §1791(6). But an insured may elect lesser or no coverage in writing pursuant to 75 Pa. C.S. §1734. *Lewis v. Erie Ins. Co.*, 793 A.2d 143 (Pa. 2002).

***Must the UMPD limits match the liability limits for “property damage”? Are there minimum UMPD limits?***

N/A to Pennsylvania.

### **Are there minimum limits for UEO coverage?**

N/A to Pennsylvania.

### **Are there minimum limits for other uninsured coverages that are mandatory or discretionary in this state?**

N/A to Pennsylvania.

## **When Is Coverage Available?**

### **Under what circumstances is UM coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?**

UM coverage is triggered by an uninsured tortfeasor. See *Maney v. Lloyd*, 634 A.2d 1139 (Pa. Super. 1993). UM and UIM coverage assume an absence or insufficiency of coverage; if a claimant has already been fully compensated they cannot recover any additional damages. *AAA Mid-Atl. Ins. Co. v. Ryan*, 84 A.3d 626, 634 (Pa. 2014). The MVFRL states that UM coverage is for “persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of uninsured motor vehicles.” 75 Pa. C.S. §1731(b). The statute also defines “uninsured motor vehicle” as:

- (1) A motor vehicle for which there is no liability insurance or self-insurance applicable at the time of the accident.
- (2) A motor vehicle for which the insurance company denies coverage or the insurance company is or becomes involved in insolvency proceedings in any jurisdiction.
- (3) An unidentified motor vehicle that causes an accident resulting in injury provided the accident is reported to the police or proper governmental authority and the claimant notifies his insurer within 30 days, or as soon as practicable thereafter, that the claimant or his legal representative has a legal action arising out of the accident.

75 Pa. C.S. §1702.

The UM insurer may defend against coverage by arguing that the claimant is not an insured under the policy, 75 Pa. C.S. §1702 or where the claimant was

not occupying the vehicle at the time of the accident, *Utica Mut. Ins. Co. v. Contrisciane*, 473 A.2d 1005 (Pa. 1984). Payment of a first-party benefit does not preclude a UM/UIM carrier from disputing causation of injuries in the UM/UIM proceeding. See, e.g., *Pantelis v. Erie Ins. Exchange*, 890 A.2d 1063 (Pa. Super. 2006). The carrier is entitled, and has a responsibility, to investigate the UIM claim—taking a statement under oath, obtaining an IME and/or a vocation exam—and may base any offer of UM coverage on the findings of that investigation. See *Vanderhoff v. Harleysville Ins. Co.*, 78 A.3d 1060 (Pa. 2013).

### **Under what circumstances is UIM coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?**

UIM coverage is triggered by insufficient coverage on the tortfeasor and necessarily implies that there will be two policies involved—the allegedly insufficient tortfeasor policy and the claimant’s UIM policy. *Wolgemuth*, 535 A.2d at 1149. The MVFRL states that UIM coverage is for “persons who suffer injury arising out of the maintenance or use of a motor vehicle and are legally entitled to recover damages therefor from owners or operators of underinsured motor vehicles.” 75 Pa. C.S. §1731(c).

If the UIM claimant can demonstrate that his/her losses exceed the tortfeasor’s policy, actual exhaustion of the tortfeasor’s policy is not required in order for a claimant to make a UIM claim. However, the UIM carrier will be entitled to take a credit against the claim for the full limits of the tortfeasor’s policy—i.e., if the case settles for \$80,000 but the policy is for \$100,000, then the UIM carrier has a \$100,000 credit against any UIM payment it makes. *Boyle v. Erie Ins. Co.*, 656 A.2d 941 (Pa. Super. 1995) (holding UIM policy’s exhaustion clause is a “threshold requirement” not a “barrier to underinsured motorist coverage”), *appeal denied*, 668 A.2d 1120 (Pa. 1995). Additionally, the insurer may substitute its own payment for the tortfeasor’s settlement offer, and may then obtain the UIM claimant’s rights against the tortfeasor. *Daley-Sand v. West American Ins. Co.*, 564 A.2d 965, 971–972 (Pa. 1989).

A UIM carrier may defend a UIM claim by arguing that the claimant does not qualify under the policy, that a policy exclusion precludes coverage or that the value of the claimant's alleged injuries do not exceed the available tortfeasor coverage. The UIM carrier's payment of a first party benefit does not remove its right to investigate the causation of injuries. The insurer has a responsibility to investigate the claim and may make an offer based on this investigation.

***Under what circumstances is UMPD coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?***

N/A to Pennsylvania.

***Under what circumstances is UEO coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?***

N/A to Pennsylvania.

***Under what circumstances is coverage available under other uninsured coverages? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?***

N/A to Pennsylvania.

## **Arbitrating and Litigating Disputes**

***Is arbitration of UM claims allowed, or specifically prohibited? UIM? UMPD? UEO? Other uninsured coverages?***

Prior to 2005, arbitration of UM/UIM claims was mandatory. In 2005, the Pennsylvania Supreme Court ruled that the Insurance Commissioner does not have the power to require mandatory binding arbitration clauses in UM/UIM policies. *Insurance Federation of Pennsylvania, Inc. v. Commonwealth of PA., Dept. of Ins.*, 889 A.2d 550 (Pa. 2005).

**If arbitration is allowed, what procedures govern in arbitration?**

In general, the policy's terms will control the parameters of any arbitration, and there is considerable variation in arbitration clauses in terms of the scope of issues subject to arbitration and the extent to which the arbitration result is subject to judicial review. Most UM/UIM arbitration clauses allow either party to demand arbitration and to appoint an arbitrator. The other party likewise selects an arbitrator, and the two party arbitrators select a neutral third arbitrator to complete the panel.

**If an insured claimant obtains an arbitration award in excess of the UM, UIM, UMPD, UEO or other uninsured coverage limits, can the insurer obtain a reduction of the award to match the limits?**

Yes. The arbitration award can be reduced to match the limits if an award in excess of the policy limits is given. See *Boyce v. St. Paul Property and Liability Ins. Co.*, 618 A.2d 962, 966 (Pa. Super. 1992).

***What requirements must an insured claimant satisfy in order to file suit against, and serve, an insurer for UM coverage? UIM? UMPD? UEO? Other uninsured coverage?***

Since arbitration is no longer mandatory, the terms of the policy will likely control. Where arbitration is required by the policy, the terms of the policy, the parties' contract, will be enforced unless one party can demonstrate a valid defense to such enforcement (fraud, duress, unconscionability, etc.). See *Salley v. Option One Mortgage Corp.*, 925 A.2d 115, 118 (Pa. 2007). Where arbitration is not required by the policy, or the insured can successfully argue that the arbitration clause does not encompass disputes related to UM/UIM coverage, the insured may bring suit.

**Do any unique procedures govern such coverage litigation?**

In the wake of *Insurance Federation of Pennsylvania, Inc. v. Commonwealth of PA., Dept. of Insurance*, courts have been divided on whether the claimant's

tort action against the tortfeasor and the UIM claim may be consolidated into a single proceeding. See *Bingham v. Poswistilo*, No. 10 CV 6026, 2011 WL 8809426, at \*5, 14 (Pa. Com. Pl. Apr. 8, 2011) (discussing the different views among the counties in Pennsylvania and ultimately allowing joinder of the claims, but refusing to declare them joint tortfeasors under Pa. R.C.P. 1006 and thus finding that venue in this case was not proper against both defendants).

**If an insured claimant obtains a verdict in excess of the UM, UIM, UMPD, UEO or other uninsured coverage limits, can the insurer obtain a reduction of the award to match the limits?**

Yes, if a verdict is awarded in excess of coverage limits it will be molded to reflect the legally recoverable policy limits. See *Marlette v. State Farm Mut. Auto Ins. Co.*, 57 A.3d 1224, 1225 (Pa. Super. 2012). Additionally, any delay damages awarded will be based on the policy limits, not the higher amount awarded. *Id.*

**Final Amounts Paid or Awarded**

**Can offsets against the UM, UIM, UMPD, UEO or other uninsured coverage limits be taken?**

Generally yes, policy provisions that require that the amount of damages payable under UM or UIM coverages be reduced by payments made under the liability coverage are valid and enforceable. *Pennsylvania National Mut. Cas. Co. v. Black*, 916 A.2d 569 (Pa. 2007); *Pempkowski v. State Farm Mut. Ins. Co.*, 678 A.2d 398 (Pa. Super. 1996). Where a setoff provision is ambiguous, or prohibits any recovery of UM/UIM benefits where there was any recovery of liability, limits will not be enforced. *Bateman v. Motorists Mut. Ins. Co.*, 590 A.2d 281 (1991).

**Are offsets taken from the UM, UIM, UMPD, UEO or other uninsured coverage limit—or from total damages?**

Because UM/UIM coverage in Pennsylvania is excess coverage, not gap coverage, any offset must be taken from total damages. *Allwein v. Donegal Mutual*, 671 A.2d 744 (Pa. Super. 1996).

**Can the insurer take offsets for medical payments, workers' compensation or no-fault insurance? Are any other offsets allowed in the state?**

A claimant may not typically recover amounts covered by any first party benefits or other health/disability benefits paid or payable. 75 Pa. C.S. §1722. There are exceptions to this general rule. See, e.g., *Wirth v. Aetna US Healthcare*, 904 A.2d 858 (Pa. 2006) (claimant may recover amounts paid by HMO). Also, a claimant may recover damages paid by its workers' compensation insurer in its UM/UIM claim—unless the workers' compensation insurer and the UM/UIM insurer are the same and the claimant has already settled his or her workers' compensation claim. See *Burke v. Erie Ins. Exch.*, 940 A.2d 472, 476 (Pa. Super. 2007).

**What liens, if any, can be asserted against the insured claimant's recovery of UM? UIM? UMPD? UEO? Other uninsured coverages?**

In general, liens may be asserted against the UIM/UIM recovery if the party has a legal right to do so (medical liens, attorney liens, etc.). A worker's compensation insurer may assert a lien against UM/UIM recovery provided the UM/UIM policy was not purchased by the worker. *American Red Cross v. W.C.A.B.*, 745 A.2d 78 (Pa. Cmwlth. 2000) (holding workers' compensation insurer has no right of subrogation against UM benefits paid under employee's own policy paid for exclusively by the employee), *aff'd per curiam*, 766 A.2d 328 (2001); *City of Meadville v. W.C.A.B.*, 810 A.2d 703 (Pa. Cmwlth. 2002) (holding workers' compensation insurer may subrogate against UM/UIM benefits the employee obtains from a policy paid for by the employer).

**Can different limits be stacked? If yes, which limits? Does a specific procedure apply?**

An insured may stack UM or UIM claims based on the sum of the limits of coverage on vehicles on applicable policies. 75 Pa. C.S. §1738. "Stacking" allows an insured to add the limits of the coverages available from different vehicles or policies, but it does not allow stacking based on the number

of vehicles in the household where such vehicles are insured under unrelated policies. *McGovern v. Erie Ins. Group*, 796 A.2d 343 (Pa. Super. 2002), *appeal denied*, 809 A.2d 904 (2002). Stacking may be waived, in writing, employing the statutory language. 75 Pa. C.S. §1738(b). Such waiver is required to result in a lower premium. 75 Pa. C.S. §1738(c).

***In UIM claims, can the UIM insurer substitute its settlement payment for the insured's settlement with the other vehicle's/underinsured driver's liability insurer? What is the applicable procedure? What rights does the UIM insurer then have (for example, subrogation)?***

Yes. Once the insured seeks permission from the insurer to settle with the tortfeasor, the insurer has two options, which it must exercise within a reasonable time. The carrier may: consent to the settlement and release (and thus waive its subrogation rights) or pay the amount offered by the tortfeasor and pursue its subrogation rights against the tortfeasor. *Daley-Sand*, 564 A.2d at 965. An insurer who fails to follow this procedure may not raise lack of consent to settle as a defense to UIM/UM claims. *Baith v. CNA Ins. Co.*, 593 A.2d 881 (1991).

## **Bad Faith**

***Does the State recognize a cause of action for bad faith in the UM context? UIM? UMPD? UEO? Other uninsured coverages?***

Yes. Although the Pennsylvania Supreme Court rejected the opportunity to create a bad faith cause of action in *D'Ambrosio v. Pennsylvania National Mutual Casualty Insurance Company*, 431 A.2d 966 (Pa. 1981), the legislature responded in 1990 and created statutory bad faith at 42 Pa. C.S. §8371. In “an action arising under an insurance policy,” where the court finds bad faith, it may award attorneys’ fees, court costs, interest and punitive damages. 42 Pa. C.S. §8371.

## **Other**

***Are there any particular issues in UM, UIM, UMPD, UEO, or other uninsured coverages that are unique or specific to the state?***

A claimant who is a passenger in an insured vehicle that is involved in an accident with an uninsured vehicle (both of which are allegedly at fault) cannot collect both UIM and UM benefits under another policy applicable to him. *Erie Ins. Exchange v. Danielson*, 621 A.2d 656 (Pa. 1993).

The priority of recovery if more than one UM/ UIM policy could provide coverage is set out in 75 Pa. C.S. §1733:

- (a) **General rule.**—Where multiple policies apply, payment shall be made in the following order of priority:
  - (1) A policy covering a motor vehicle occupied by the injured person at the time of the accident.
  - (2) A policy covering a motor vehicle not involved in the accident with respect to which the injured person is an insured.
- (b) **Multiple sources of equal priority.**—The insurer against whom a claim is asserted first under the priorities set forth in subsection (a) shall process and pay the claim as if wholly responsible. The insurer is thereafter entitled to recover contribution pro rata from any other insurer for the benefits paid and the costs of processing the claim.

75 Pa. C.S. §1733.

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### **AUTHORS**

**Joel Max Eads** | Trenk DiPasquale Della Fera & Sodono, P.C. | 973.323.8674 | [jeads@trenklawfirm.com](mailto:jeads@trenklawfirm.com)

**Katharine J. Thompson** | Gordon Rees Scully Mansukhani, LLP | 215.561.2300 | [kthompson@gordonrees.com](mailto:kthompson@gordonrees.com)