

Indiana

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Uninsured Coverages

Is UM coverage mandatory or discretionary?

UM and UIM coverage is mandatory absent an express waiver. Ind. Code §27-7-5-2(a); *United Nat'l Ins. Co. v. DePrizio*, 705 N.E.2d 455 (Ind. 1999).

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

Yes, UM/UIM coverage is governed by Ind. Code §27-7-5-2. UM/UIM coverage limits must at least equal the limits of liability specified in the bodily injury liability provisions of an insured's policy, unless such coverage has been rejected in writing.

The leading case interpreting Indiana UM/UIM statutes is *United Nat'l Ins. Co. v. DePrizio*, 705 N.E.2d 455, 456 (Ind. 1999). In *DePrizio*, the plaintiff's husband was killed on the job as the result of a traffic accident with an underinsured motorist. Plaintiff collected the policy limits of the automobile insurance provided by her husband's employer, and sought to collect additional excess damages from defendant, the employer's commercial umbrella liability insurer. The umbrella insurer refused payment on the basis that the policy did not provide UIM coverage, and plaintiff filed suit in federal court, which certified a question to the state supreme court, inquiring if the umbrella policy, the terms of which did not provide for UM or UIM coverage, was an automobile or motor vehicle liability policy for purposes of the UM statute. The Indiana Supreme Court ruled that the umbrella policy was an automobile or motor vehicle liability policy for purposes of Ind. Code §27-7-5-2(a). That statute requires an umbrella policy which covers excess automobile liability claims, such as defendant's policy, to also cover excess UM claims, regardless of the language

of the policy. The *DePrizio* decision also contains a thorough discussion of the history, purpose, and meaning of the Indiana UM/UIM statutes.

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

Yes, insureds have the right to reject UM/UIM coverage in writing unless one of the specific enumerated exceptions in Ind. Code §27-7-5-2 applies. An amendment to an existing policy does not constitute a newly issued policy, and the insurer is not required to again offer UM/UIM coverage to be rejected in writing. A valid rejection must specify whether the insured is rejecting UM coverage, UIM coverage, or both, and the date the rejection is effective. Ind. Code §27-7-5-2. If coverage is not rejected in writing, coverage will be found in limits equal to liability limits.

Is UIM coverage mandatory or discretionary?

See answer to "***Is UM coverage mandatory or discretionary?***" *supra*.

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

UM and UIM coverage are governed by the same statutory scheme. See answer to "***Is UM coverage governed by a statutory scheme? Are there any landmark cases?***" *supra*.

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

See answer to “**Must the insured reject UM coverage in writing? What happens if the insured has not rejected coverage in writing, but later seeks such coverage?**,” *supra*.

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

It is mandatory absent an express waiver.

Is UMPD coverage governed by a statutory scheme? Are there any landmark cases?

Yes. Ind. Code §27-7-5-3. An insured cannot have UMPD coverage, unless he or she also has UMBI coverage.

UMPD is governed by statute as follows:

Insurers shall additionally offer to provide uninsured motorist property damage coverage without any deductible amount and may offer uninsured motorist property damage coverage with a deductible of not more than the first three hundred dollars (\$300.00) of property damage caused by collision. However, any such deductible amount for property damage shall be waived for damage resulting from collision if the insured motor vehicle is legally parked and unoccupied when involved in a motor vehicle accident for which the insured is legally entitled to recover damages from an uninsured motorist.

Ind. Code §27-7-5-3(a).

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

Yes. If coverage was not rejected in writing, coverage will be read into the policy. Ind. Code §27-7-5-3; see *United Nat’l Ins. Co. v. DePrizio*, 705 N.E.2d 455, 458 & n.5 (Ind. 1999).

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

Not applicable.

Is UEO coverage governed by a statutory scheme? Are there any landmark cases?

Not applicable.

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

Not applicable.

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

Not applicable.

Are such coverages governed by a statutory scheme? Are there any landmark cases?

Not applicable.

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

Not applicable.

Limits

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

Yes, unless there is a written rejection of limits equal to liability limits and lower limits are elected. Ind. Code §27-7-5-2(a); *United Nat’l Ins. Co. v. DePrizio*, 705 N.E.2d 455, 458 (Ind. 1999). The minimum limits are \$25,000 for bodily injury or death of one person, and \$50,000 for bodily injury or death of two or more people. Ind. Code §§27-7-5-2(a)(1), 27-7-5-5, 9-25-4-5(1), (2).

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

Yes. The minimum UMPD limits are \$10,000. Ind. Code §§27-7-5-3, 27-7-5-5, 9-25-4-5(3).

Are there minimum limits for UEO coverage?

Not applicable.

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

Not applicable.

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 available when an insured suffers bodily injury, sickness or disease, including death, and the person liable to the insured does not have liability coverage at the time of the accident or the liability coverage is less than that required by the Indiana Financial Responsibility Act. Ind. Code §27-7-5-4(a).

In order to recover UM coverage, an insured “must establish that the tortfeasor was answerable in negligence to him.” *Sullivan v. Am. Cas. Co. of Reading, Pa.*, 605 N.E.2d 134, 139 (Ind. 1992). As a condition precedent to UM coverage, the insured must establish that the tortfeasor was uninsured, or the tortfeasor’s insurer was insolvent. Ind. Code §27-7-5-4(a).

As a condition precedent to UM coverage, an insured must comply with notice and consent-to-settle provisions in the insurance policy, which obligate the insured to protect the insurer’s subrogation rights. *See Cincinnati Ins. Co. v. Adkins*, 935 N.E.2d 190 (Ind. Ct. App. 2010); Ind. Code §27-7-5-6. If an insured breaches a notice or consent-to-settle provision and impairs the insurer’s subrogation rights, the insurer is discharged from its obligation to provide UM/UIIM coverage. *Adkins*, 935 N.E.2d 190.

An uninsured motor vehicle does not include an unidentified vehicle. *Indiana Ins. Co. v. Allis*, 628 N.E.2d 1251 (Ind. Ct. App. 1994).

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

UIM coverage is available when an insured suffers bodily injury, sickness or disease, including death, and the limits of coverage available for payment to the insured under all bodily injury liability policies covering persons liable to the insured are less than the limits for the insured’s UIM coverage at the time of the accident. Ind. Code §27-7-5-4(b).

In order to recover UIM coverage, an insured “must establish that the tortfeasor was answerable in negligence to him.” *Sullivan v. Am. Cas. Co. of Reading, Pa.*, 605 N.E.2d 134, 139 (Ind. 1992). As a condition precedent to UIM coverage, the insured must establish that the amount received from the tortfeasor’s policy is less than the per-person limits for the insured’s UIM coverage. *Lakes v. Grange Mut. Cas. Co.*, 964 N.E.2d 796, 805 (Ind. 2012).

As a condition precedent to UM/UIIM coverage, an insured must comply with notice and consent-to-settle provisions in the insurance policy, which obligate the insured to protect the insurer’s subrogation rights. *See Cincinnati Ins. Co. v. Adkins*, 935 N.E.2d 190 (Ind. Ct. App. 2010); Ind. Code §27-7-5-6. If an insured breaches a notice or consent-to-settle provision and impairs the insurer’s subrogation rights, the insurer is discharged from its obligation to provide UM/UIIM coverage. *Adkins*, 935 N.E.2d 190.

Indiana law expressly permits insurers to use “anti-stacking” clauses to prevent stacking or double recovery of UIM benefits by limiting UIM coverage (subject to statutory minimums) when such coverage is currently available under another policy. *See* Ind. Code §27-7-5-5(a). In any case, the maximum amount of UIM coverage benefits that an insured may recover is the lesser of: (1) the difference between the amount already recovered by the insured less the per-person limit of UIM coverage in the insured’s policy; or (2) the difference between

the total amount of damages incurred by the insured and the amount already recovered by the insured. Ind. Code §27-7-5-5(c).

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

UMPD coverage is for the insured who is “legally entitled to recover damages from owners or operators of uninsured motor vehicles for injury to or destruction of property resulting therefrom.” Ind. Code §27-7-5-2(a)(1).

As a condition precedent to UMPD coverage, the insured must establish that there is no insurance policy covering the tortfeasor or motor vehicle. See *Michael v. Wolfe*, 737 N.E.2d 820, 822 (Ind. Ct. App. 2000).

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

Not applicable.

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

Not applicable.

Arbitrating and Litigating Disputes

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

Under Indiana law, arbitration of UM, UIM, and UMPD claims is permitted if set forth in the insurance policy. However, the right to enforce an arbitration provision may be waived by conduct that is inconsistent with an intent to enforce that right. See *McNall v. Farmers Ins. Group*, 181 Ind. App. 501, 392 N.E.2d 520 (1979) (insurer waived its right to enforce

arbitration provision where it denied coverage and did not attempt to pursue arbitration until after lawsuit was filed). Arbitration clauses may be unlimited or limited to specified disputes under the policy. See *Libby v. Companion Ins. Co.*, 181 Ind. App. 16, 25, 390 N.E.2d 1022, 1028 (1979) (holding that arbitration clause in auto policy did not apply to coverage issues, but instead was “limited to the issues of the liability of the uninsured motorist to the insured and the amount thereof”).

Arbitration is a matter of contract and is authorized pursuant to Ind. Code §34-57-2-1(a), which states:

A written agreement to submit to arbitration is valid, and enforceable, an existing controversy or a controversy thereafter arising is valid and enforceable, except upon such grounds as exist a law or in equity for the revocation of any contract. If the parties to such an agreement stipulate in writing, the agreement may be enforced by designated third persons, who shall in such instances have the same rights as a party under this chapter. This chapter also applies to arbitration agreements between employers and employees or between their respective representatives (unless otherwise provided in the agreement).

If arbitration is allowed what procedures govern in arbitration?

Procedures applicable to arbitration of UM, UIM and UMPD claims are set forth in Indiana’s Uniform Arbitration Act, codified at Ind. Code §34-57-2-1, *et seq.* The Uniform Arbitration Act addresses how to initiate arbitration, how to appoint an arbitrator if not specified in the insurance policy or otherwise agreed to by the parties, the powers and duties of the arbitrator, the procedure of the arbitration hearing, the requirement that the award must be in writing and signed by the arbitrator, the authority of and the procedure for the court to vacate, modify, or correct such an award and the appeal process. See Ind. Code §§34-57-2-1 to 34-57-2-19.

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?

No Indiana court has addressed this precise issue.

Because an arbitrator generally is not bound by principles of substantive law, the fact that the arbitrator did not “follow the law” is not sufficient grounds for judicial review, unless the arbitration agreement specifically limits the arbitrator’s authority. *See School City of E. Chicago, Ind. v. E. Chicago Fed’n of Teachers, Local #511*, 422 N.E.2d 656, 662 (Ind. Ct. App. 1981). The parties to an arbitration agreement are free to limit what issues may be arbitrated, what remedies the arbitrator may order, and the extent to which an award must conform to the general principles of law. *Id.* For example, an insurer may include an “escape clause” in the insurance policy in order to “limit the ability of an insured to enforce a favorable arbitration award.” *National General Ins. Co. v. Riddell*, 705 N.E.2d 465, 468 (Ind. Ct. App. 1998) (allowing insurer to invoke “escape clause” to demand retrial of UM damages where arbitrators awarded insured \$220,000).

An Indiana court may refuse to void an award if enforcing it would violate public policy. *School City of East Chicago*, 422 N.E.2d at 662 (holding that arbitrator’s award of punitive damages against governmental entity was void on public policy grounds). While Ind. Code §27-7-5-5 establishes the maximum amount an insured may recover for UM/UIM coverage, it is unclear whether the enforcement of an arbitrator’s award in excess of that amount would violate public policy. *See, e.g., Marion Cmty. Sch. Corp. v. Marion Teachers Ass’n*, 873 N.E.2d 605, 609–10 (Ind. Ct. App. 2007) (holding that arbitrator’s award of attorneys’ fees did not violate public policy, because award was compensatory in nature, not punitive).

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?

An insured may sue the uninsured or underinsured tortfeasor, or proceed directly against the tortfeasor’s insurer, “but in either case must establish that the tortfeasor was answerable in negligence to him.” *Sullivan v. Am. Cas. Co. of Reading, Pa.*, 605 N.E.2d 134, 139 (Ind. 1992).

Do any unique procedures govern such coverage litigation?

Indiana law allows insurers to shorten the statute of limitations for UM/UIM claims, so long as it is unambiguously stated in the insurance policy and is not less than two years, which is the statute of limitations for the underlying torts—bodily injury and property damage. *See Clevenger v. Progressive Nw. Ins. Co.*, 838 N.E.2d 1111, 1115 (Ind. App. Ct. 2005); Ind. Code §§34-11-2-4(a)(1), (a)(2).

If an insured claim 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. In the absence of bad faith, an insured cannot recover damages that exceed the UM/UIM/UMPD limits provided for in the insurance policy. *See Allstate Ins. Co. v. Hammond*, 759 N.E.2d 1162, 1167 (Ind. Ct. App. 2001) (reducing jury verdict from \$151,000 to policy’s UM limit of \$51,000).

Final Amounts Paid or Awarded

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

Yes. Ind. Code §27-7-5-5 establishes the minimum and maximum amount an insured may recover for UM/UIM. *See Kinslow v. GEICO Ins. Co.*, 858 N.E.2d 109, 114 (Ind. Ct. App. 2006). However, the method for calculating setoffs that fall within the permissible range of recovery will depend upon the language of the policy’s setoff provision.

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

It depends upon the policy language at issue. Indiana courts have held that when policies contain ambiguous language regarding reductions, the amounts paid by other sources shall be subtracted from the total damages. When the language regarding reductions is unambiguous, the amounts paid by other sources shall be subtracted from policy limits. *Castillo v. Prudential Prop. & Cas. Ins. Co.*, 834 N.E.2d 204, 206–07 (Ind. Ct. App. 2005).

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

Yes, insurers can take offsets for workers' compensation payments and medical payments in Indiana. *Beam v. Wausau Ins. Co.*, 765 N.E.2d 524, 533 (Ind. 2002) ("Insurance companies are permitted to offset coverage by monies the insured receives for worker's compensation."); *Wineinger v. Ellis*, 855 N.E.2d 614, 622 (Ind. Ct. App. 2006) ("to deny a setoff [for medical payments made pursuant to insured's policy] would be to permit [insured] to receive a double recovery of her medical expenses."). Ind. Code §27-7-5-5(c) also provides that all amounts received from a tortfeasor's insurer should be set off from the UM or UIM limits.

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

Liens that can be asserted against an insured claimant's recovery of UM and UIM benefits in Indiana include workers' compensation liens, *Ansert Mech. Contractors, Inc. v. Ansert*, 690 N.E.2d 305, 309 (Ind. Ct. App. 1997); Medicare liens, *see* 42 U.S.C. §1395y(b); 42 C.F.R. §411.50(c); and hospital liens. Ind. Code §32-33-4-1. Furthermore, Indiana has a lien reduction statute which, when applicable, works to reduce a subrogation claim or other lien that arises out of the payment of medical expenses or other benefits resulting from a personal injury or wrongful death claim. When the claimant's recovery is reduced

by comparative fault or by the fact that the full value of the claim cannot be recovered, the statute requires the lien to be reduced in the same proportion as the claimant's recovery. Ind. Code §34-51-2-19.

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

Indiana law allows limits to be stacked, but Indiana law also allows an insurer to prohibit stacking. *See* Ind. Code §27-7-5-5. "Stacking" of insurance policies occurs when more than one policy applies to a loss, allowing an insured to recover under all policies applicable to the loss up to the total amount of damages. *Wagner v. Yates*, 912 N.E.2d 805, 812 (Ind. 2009). But because the purpose of insurance is to indemnify, Indiana prohibits double recovery by an insured even when multiple policies apply to a loss. *Id.* In order to preclude stacking, an insurer must include in a policy unambiguous language prohibiting the same. *Id.* The common thread in anti-stacking provisions that have been approved by Indiana appellate courts is that the policies clearly refer to insurance other than that provided by the insured's own policy. *Id.* at 813. Some phrases in anti-stacking provisions that Indiana courts have approved include "other applicable similar insurance," "any other policy providing similar insurance," or "other uninsured motorist coverage available." *Id.*

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. Ind. Code §27-7-5-6 states that when an insurer makes payment to any person of sums as damages under the UIM coverage, the payment shall operate to subrogate the insurer to any cause of action in tort which such person may have against any other person or organization legally responsible for the bodily injury or death, or property damage to the extent of such payment. However, an insurer providing UIM coverage has no right of subrogation against an

underinsured motorist if the insurer has been provided written notice that the underinsured motorist has extended a bona fide settlement offer to the insured, which includes a certification of the liability coverage limits of the underinsured motorist, and the insurer fails to advance payment to the insured in an amount equal to the amount provided for in the settlement offer within thirty (30) days after receiving notice of the offer. If the insurer advances payment to the insured in an amount equal to the settlement offer, the insurer has full rights of subrogation as provided in its policy.

Bad Faith

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

Yes. Indiana law has long recognized that there is a legal duty implied in all insurance contracts that the insurer deal in good faith with its insured. See *Allstate Ins. Co. v. Fields*, 885 N.E.2d 728, 732 (Ind. Ct. App. 2008).

The obligation of good faith and fair dealing with respect to the discharge of the insurer's contractual obligation includes the obligation to refrain from (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of his claim.

Id. (quoting *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515, 519 (Ind. 1993)). A good faith dispute over the value or a claim or whether the claim is valid does not amount to bad faith. *Hickman*, 622 N.E.2d at 520. Furthermore, poor judgment or negligence do not amount to bad faith; the additional factor of conscious wrongdoing also must be present. *Lum-*

bermans Mut. Cas. Co. v. Combs, 873 N.E.2d 692, 714 (Ind. Ct. App. 2007), *disapproved on other grounds*, *Kosarko v. Padula*, 979 N.E.2d 144 (Ind. 2012).

Other

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

Indiana courts have held that pursuant to Ind. Code §27-7-5-4, a vehicle is not “uninsured” when there is insurance for the vehicle, even if coverage is denied for the driver. *Greenfield v. Allstate Pers. Prop. & Cas.*, 806 N.E.2d 856 (Ind. Ct. App. 2004).

In terms of priority between a vehicle owner's insurance policy and a person driving the vehicle with permission, Ind. Code §27-8-9-7 provides that the owner's coverage is considered primary if the vehicle, at the time damage occurred, was operated with the permission of the owner of the motor vehicle and the use was within the scope of the permission granted. Under these circumstances, the permittee may not recover under any other motor vehicle insurance coverage available to the permittee until the limit of all coverage provided by the owner's policy is first exhausted.

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