

TIMING IS EVERYTHING

THE INTERPLAY BETWEEN WORKERS' COMPENSATION AND UNINSURED MOTORIST INSURANCE IN MARYLAND

Interesting outcomes can result at the intersection of two insurance schemes under Maryland law: uninsured/underinsured motorists (UIM) and workers' compensation.

Automobile insurers are required to offer UIM coverage as part of any Maryland policy. UIM benefits are paid when the insured is injured in a collision caused by another driver who is uninsured or underinsured, or when the insured is injured in a hit-and-run accident. UIM coverage overlaps with workers' compensation benefits when one is injured at work in a collision with an uninsured motorist. When that happens, the employee can file a workers' compensation claim *and* seek benefits from the UIM carrier, even under a policy purchased by the employer. But the employee does not get a double recovery. Any UIM recovery is reduced by the amount of workers' compensation benefits received.¹

But what if the employee receives UIM benefits before recovering workers' compensation, can the UIM carrier take credit for future workers' compensation benefits payable for the injury? The Maryland Court of Special Appeals recently answered this question. In *Brethren Mut. Ins. Co. v. Suchoza*, 212 Md. App. 43 (May 29,

¹ Md. Code Ann., Ins. § 19-513. This reduction does not apply to the extent the workers' compensation insurer has been reimbursed by a third party tortfeasor.

2013), *cert. denied*, 2013 Md. LEXIS 631 (September 23, 2013), the Court held that the UIM carrier can only take credit for workers' compensation benefits that already have been paid.

Does that mean that the employee can collect double benefits by waiting to file a workers' compensation claim until after he has recovered UIM benefits? No, workers' compensation benefits are reduced by the amount the Claimant has recovered as damages from a third party.² The Court said this same rule applies when a claimant recovers uninsured motorist benefits.

As a result of the *Suchoza* decision, the liability of the respective insurers depends on the timing of payment. If workers' compensation benefits are paid first, the UIM carrier takes the credit. If UIM benefits are paid first, the workers' compensation carrier (or self-insured employer) takes the credit.

Generally, a workers' compensation insurer is entitled to claim subrogation from a third party tortfeasor who caused the claimant's injury.³ However, the Maryland Court of Appeals has held that the workers' compensation carrier cannot file a subrogation claim against the UIM carrier.⁴

² Section 9-903 of the Maryland Labor and Employment Code provides that workers' compensation benefits are reduced when a "covered employee ... receives an amount in an action."

³ Section 9-902(a) of the Maryland Labor and Employment Code provides that a workers' compensation insurer "may bring an action for damages against the third party who is liable for the injury or death of the covered employee."

⁴ *Erie Ins. Co. v. Curtis*, 330 Md. 160 (Md. 1993). The court explained that a UIM claim seeks recovery under a contract, and therefore is not an "action" within the meaning of the statute. Surprisingly, this means that the term "action" is defined differently in different parts of the Maryland Workers' Compensation Act. If an employee has already recovered UIM benefits before receiving workers' compensation benefits, the workers' compensation carrier can take a reduction because the UIM benefits

The following hypothetical examples demonstrate the interplay between workers' compensation and uninsured motorist insurance. Suppose Edward the employee is driving a vehicle in the course of his employment when his car collides with a vehicle driven by Tina the tortfeasor, who admits she is at fault. Tina is uninsured. Edward's vehicle is covered by an automobile insurance policy that provides UIM coverage. Edward stands to receive workers' compensation benefits totaling \$100,000. The uninsured motorist limits are \$50,000.

Example 1: Immediately after he is injured, Edward files suit against the UIM carrier, and recovers the policy limits of \$50,000. Edward then files a claim for workers' compensation benefits. How much can Edward recover from his workers' compensation carrier?

Answer: \$50,000. The workers' compensation recovery is reduced by the amount of UIM benefits that have already been paid.

Example 2: After the accident, Edward files a workers' compensation claim and recovers \$100,000 in benefits. He then seeks UIM benefits. How much can Edward recover from his UIM carrier?

Answer: Nothing. The UIM benefits are reduced to zero by the \$100,000 workers' compensation recovery.

Example 3: Same as Example 2, only the UIM claim is paid after \$25,000 in temporary total disability benefits has been recovered from the workers' compensation insurer. How much can Edward recover?

have been recovered in an "action." By contrast, the workers' compensation carrier cannot file a subrogation claim to recover UIM benefits because such a claim would not be an "action." This inconsistency could be used as the basis for challenging existing case law.

Answer: \$25,000 from the UIM carrier because the benefits are reduced by the \$25,000 workers' compensation benefits already paid. Thereafter, the workers' compensation carrier pays the \$50,000 balance.

Example 4: Can the workers' compensation carrier seek reimbursement on a subrogation claim against the UIM carrier?

Answer: Never. The workers' compensation carrier does not have a right to subrogation against a UIM carrier because benefits are considered to be contractual and not recovered as a result of an action.

Clients should be mindful of the interplay between workers' compensation and uninsured motorist insurance coverage in Maryland. Remember, the insurer entitled to the credit largely depends on the order in which benefits are paid. Accordingly, workers' compensation adjusters should consider whether a UIM claim could be asserted at the outset, and do what they can to facilitate a claim where warranted. Conversely, a UIM adjuster may consider pursuing all legitimate defenses as the workers' compensation claim proceeds to a permanent disability award. Both adjusters should determine whether the other benefit has been paid in order to take advantage of the allowable credit.

To discuss this article or the defense of any worker's compensation matter in Maryland or the District of Columbia, call Steve Schwinn, Esq. at 202-496-2806.

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