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Client Advisory

INDIANA SUPREME COURT RULES AGAINST UIM CARRIER ON INTERPRETATION OF SET-OFF AND ANTI-STACKING PROVISIONS

by Partner James Milstone

On September 3, 2009, the Indiana Supreme Court refused to limit coverage in an underinsured motorist coverage dispute in *Wagner v. Yates*, No. 22S01-0808-CV-475, SUPREME COURT OF INDIANA, 2009 Ind. LEXIS 892, (September 3, 2009).

Wagner sued Yates for injuries she received in an automobile collision while she was driving a vehicle owned by her employer. After exhausting the tortfeasors coverage (\$50,000), she sought recovery against her employer's underinsured motorist coverage (\$100,000) as well as her own personal underinsured motorist coverage (\$100,000). (The employer's insurance, which was on the vehicle, was primary under Indiana law).

Her personal insurer, American Family, moved for summary judgment, arguing that it had no exposure on the grounds that: (1) the employer's UIM coverage should be set-off against its policy limits, and (2) the policies could not be stacked under its anti-stacking provisions of the policy. The trial Court agreed, and granted summary judgment. The Indiana Court of Appeals ruled that American Family could set off payments made by the employer's carrier and affirmed the trial court's decision. (The Court of Appeals did not reach the issue of the anti-stacking issue.)

On transfer to the Indiana Supreme Court, the Court of Appeals' decision was reversed. The Court focused on the specific language of the American Family policy. The set-off provision reads "coverage will be reduced by the payment **made or amount payable by or on behalf of any person or organization which may be legally liable**, were under **any collectible auto liability insurance**, for loss caused by an underinsured motorist vehicle." (Emphasis added). While the amount paid through the tortfeasors carrier was clearly within the set-off provisions, the funds payable by the employer's uninsured motorist carrier were not made by a party who "may be legally liable" for "loss caused by an uninsured motorist vehicle". The Court felt that the other uninsured motorist's carrier did not effectively stand in the shoes of the tortfeasor.

The Court also rejected the claim that the payment was "under any collectible auto liability insurance". The Court then concluded that this term was ambiguous, as the policy did not define the term "auto liability insurance". As the UIM coverage is first party loss insurance not third party liability insurance, it is not clearly within the provision. Ambiguous terms under insurance policies are strictly construed against the insurer.

Turning to the anti-stacking argument, the Court affirmed the general enforceability of anti-stacking provisions, noting that anti-stacking is codified in Indiana by statute at Ind. Code 27 -7-5-5(a).



In this case, the Court rejected American Family's interpretation of the anti-stacking provision in the policy. American Family maintained that the anti-stacking provision excluded coverage where another UIM carrier's policy was in effect. The Court held that the provision did not clearly refer to insurance other than that provided by the insurance policy; with the result being that the insured was not on fair notice that anti-stacking would occur. The Court noted that American Family's policy did not mirror that statutory language. The purported "anti-stacking provision" was ineffective because it did not specifically refer to a separate insurance policy, but rather appeared to refer to coverage within the American Family policy itself.

UIM carriers should carefully review their set-off and anti-stacking provisions in light of this ruling. The ruling provides for enforcement of unambiguous language to the effect that other UIM coverages will reduce coverage and to prohibit stacking of UIM coverages with UIM coverages from other policies. The language, however, must not be ambiguous. ❖

**For more information on the details of this advisory contact
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