A Brief History Of Ohio Uninsured/Underinsured Motorist Laws

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(Thanks to the late Henry A. "Hank" Hentemann for the concept and for much of the history).

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Before 1954: No UM/UDM coverage

There was no uninsured ("UM") or underinsured ("UDM") motorist coverage. The coverage did not exist in Ohio.

1954 to 1965: No Ohio statute on UM/UDM coverage

In 1954, the insurance industry introduced uninsured motorist coverage as an option for automobile liability insurance policies. There was no statutory requirement or restriction in Ohio.

1965 to 1975: Mandatory offer of UM (not UDM) coverage in Ohio

In 1965, Ohio enacted its first uninsured motorist coverage statute. R.C. 3937.18 originally required any insurance company, offering motor vehicle liability coverage in any amount, to offer uninsured motorist coverage in the amount of $12,500.00 per person and $25,000.00 per accident. At the time this was the minimum limit of liability insurance coverage under Ohio's financial responsibility law.

The insurer was allowed to charge an additional premium for the coverage. If the policyholder chose not to purchase the coverage, the insurance company was required to prove that the policyholder had made an express rejection. Nonpayment of premium was not a defense. *Abate v. Pioneer Mut. Cas. Co.*, 22 Ohio St.2d 161, 258 N.E.2d 429 (1970).

As a result of *Abate*, the insurance industry in Ohio began to use written rejections.

1975 to 1982: Insurer must offer UM (not UDM) limits equal to liability limits

In 1975, the Ohio General Assembly amended R.C. 3937.18 to require insurers to offer uninsured motorist coverage with limits equal to the liability limits. Previously, the insurer had been required to offer coverage equal to the minimum liability insurance limits. The amendment caused the insurance industry to take on more risk if the limits of liability coverage were much higher.

There was still no requirement to offer underinsured motorist coverage.

1980 to 2001: Mandatory offer of UM/UDM motorist coverage equal to liability limits

In 1980, Ohio enacted its first underinsured motorist coverage statute. This was R.C. 3937.181. In its original form, UDM coverage was a "gap" coverage, not an "excess" coverage. For a gap coverage, the limits of underinsured motorist coverage would be reduced by any recovery from persons legally liable to the insured. For an excess coverage, the underinsured motorist limits would be stacked on top of the liability coverage available to the liable party.

R.C. 3937.18, the uninsured motorist statute, also permitted insurers to include antistacking provisions.

In 1982, R.C. 3937.18 was amended to incorporate both uninsured and underinsured motorist coverages. R.C. 3937.181 was repealed.

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1993 to 2001: Battle between Ohio General Assembly and Ohio Supreme Court

In this era, the law of uninsured/underinsured motorist coverage changed rapidly, sometimes annually. Most of these changes fit a pattern. First, a slim 4-3 majority of the Supreme Court of Ohio would "amend" the statute by judicial fiat in order to expand coverage. The General Assembly would then react to the decision by amending the statute.

The first example of this was *Savoie v. Grange Mut. Ins. Co.*, 67 Ohio St.3d 500, 1993-Ohio-134, 620 N.E.2d 809. *Savoie* greatly expanded coverage (for a while) in several ways: by making UDM coverage into an excess coverage instead of a gap coverage (so UDM limits were stacked on top of the tortfeasor's liability limits); by prohibiting contract language purporting to limit all claims arising out of bodily injury or death to a single person to the single per-person limit of coverage (think multiple consortium or wrongful death claimants; each of them now got their own limit); by prohibiting contract language purporting to restrict stacking of policies (although intrafamily restrictions within the household remained permissible).

In 1994, the General Assembly enacted S.B. 20 expressly to supersede *Savoie*. S.B. 20 was mostly, but not entirely, insurance-friendly. S.B. 20 reversed most of *Savoie*'s changes. S.B. 20 did prohibit an insurer from denying uninsured motorist coverage on the ground that the tortfeasor was immune (for a while).

This kind of thing happened several more times over the next several years. The battle even intensified.

In 1996, the Supreme Court of Ohio judicially amended R.C. 3937.18 by requiring that the offer be in writing. *Gyori v. Johnston Coca-Cola Bottling Group, Inc.*, 76 Ohio St.3d 565, 568, 1996-Ohio-358, 669 N.E.2d 824. Where there was no written offer of uninsured/underinsured motorist coverage from the insurer, coverage was held to arise by operation of law. *Id.* At first, *Gyori* simply appeared to "codify" the existing industry practice following *Abate*.

The Supreme Court later set forth the requirements of a valid offer:

> *Indemnity's alleged offer is complete only in its incompleteness. It does not describe the coverage, does not list the premium costs of UM/UIM coverage, and does not expressly state the coverage limits. We find that an offer must include those three elements. The Indemnity rejection form, lacking in that required information, thus could not be termed a written offer that would allow an insured to make an express, knowing rejection of the coverage.*

Linko v. Indemn. Ins. Co. of N. Am., 90 Ohio St.3d 445, 449, 2000-Ohio-92, 739 N.E.2d 338.

In *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292, 710 N.E.2d 1116, a bitterly divided Supreme Court of Ohio noted that a corporation could not suffer bodily injury. Thus, the standard ISO form which defined the policyholder as "you" was held to refer to any employee. This definition did not restrict "you" to the employee's course and scope of employment, and the Supreme Court declined to do so.

Coverage was soon extended to family members of off-duty employees. *Ezawa v. Yasuda Fire & Marine Ins. Co. of Am.*, 86 Ohio St.3d 557, 1999-Ohio-124, 715 N.E.2d 1142. "Now a corporate policy must afford UIM coverage to an employee's minor son who was injured by a non-employee while riding in a non-covered vehicle and whose injuries had nothing to do with the corporation's business." *Id.* at 558 (Stratton., J., dissenting).

Justice Stratton's statement was accurate at the time, but things became even worse. Under *Linko*, *Scott-Pontzer* and its progeny would come to apply to nearly every corporate or governmental insurance policy in Ohio, even if the insured had never asked for this coverage, had never paid any premium to the insurer, and had explicitly rejected the coverage in writing. UM/UDM coverage was found to exist in policies where it had never even been contemplated, such as commercial general liability policies and yes, even homeowner policies. Collectively, these cases amounted to a massive wealth transfer from the insurance industry to the plaintiffs' bar. Several leading commercial insurers

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withdrew from the Ohio insurance market in response to this judicial chaos.

Following a retirement and an election in 2003, the Supreme Court of Ohio limited *Scott-Pontzer* to "an employee of the corporation only if the loss occurs within the course and scope of employment." *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph two of the syllabus. *Ezawa* was expressly overruled. See *Galatis*, at paragraph three of the syllabus. As limited by *Galatis*, *Scott-Pontzer* remains good law today except where the insurance policy contains "specific language to the contrary." *Galatis*, at paragraph two of the syllabus.

2001 to 2013: No coverage by operation of law

Effective October 31, 2001, S.B. 97 amended R.C. 3937.18 to remove the requirement for an insurance company to offer uninsured/underinsured motorist coverage in Ohio. The coverage now became optional. This ended the possibility of coverage by operation of law. In the statute, the General Assembly expressly stated its intent to supersede *Linko* and *Gyori*. S.B. 97, Section 3(E).

"The General Assembly expressly stated that its intention was to eliminate the mandatory offering of uninsured and underinsured motorist coverage and the imposition of such coverage implied as a matter of law." *Snyder v. Am. Fam. Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574, ¶14, citing S.B. 97, Sections 3(B)(1), (2), and (4). Because an insurer no longer has a duty to offer uninsured or underinsured motorist coverage, there cannot be any such coverage by operation of law. *Advent v. Allstate Ins. Co.*, 118 Ohio St.3d 248, 2008-Ohio-2333, 888 N.E.2d 398, ¶10.

2013 to Present: The beginning of the return of coverage by operation of law?

Since 2013, H.B. 278 has prohibited an insurance company from enforcing an intrafamily exclusion in the liability insurance coverage against a wrongful death claimant, unless the insurance policy at issue contains uninsured/underinsured motorist coverage, and that uninsured/underinsured motorist coverage does not contain an intrafamily exclusion. R.C. 3937.46.

Traditionally, insurance companies have attempted to preclude coverage for bodily injury claims by one family member against another. This is generally referred to as an intrafamily exclusion. The rationale is that these types of claims are subject to a high risk of collusion or even fraud. For a wrongful death claim, this appears to be less of an issue. The apparent intent of R.C. 3937.46 is to require an insurance company to allow such a claim, either under the liability insurance coverage, or the uninsured motorist coverage.

It would appear that coverage by operation of law has returned in this limited instance. Many insurance policies expressly exclude both liability insurance coverage and uninsured/underinsured motorist insurance coverage for bodily injury or death caused by the negligence of a family member.

H.B. 278 also amended the financial responsibility statute, R.C. 4509.01, to increase the minimum bodily injury liability limits from $12,500 per person and $25,000 per accident to $25,000 per person and $50,000 per accident. That limit has remained ever since.

Current Law: Immunity

An insured can make an uninsured motorist claim if the tortfeasor has diplomatic immunity or political subdivision immunity under R.C. Chapter 2744. R.C. 3937.18(B). Political subdivision immunity does not generally apply to the operation of motor vehicles.

Generally speaking, "political subdivisions [of the State of Ohio] are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees when the employees are engaged within the scope of their employment and authority." R.C. 2744.02(B)(1).

The employee driver is personally immune from liability for negligence if the employee was acting within the scope of the employee's employment and authority. R.C. 2744.03(A)(6)(a). See, also *Rogers v. Dayton*, 118 Ohio St.3d 299, 2008-Ohio-2336, 888 N.E.2d 1081, ¶28. The

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Supreme Court of Ohio noted that because the employee is always immune, the word "operator" used in former R.C. 3937.18(K)(2) must have been intended to refer to the employer as well.

In *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, the court reached the opposite result, based on language in the Erie policy that explicitly defined "uninsured motor vehicle" to include this situation. In doing so, the court distinguished *Snyder v. Am. Fam. Ins. Co.*, 114 Ohio St.3d 239, 2007-Ohio-4004, 871 N.E.2d 574, which had allowed an insurer to ignore the language of the statute in order to exclude UM coverage when the tortfeasor was immune.

Current Law: the Difference between Uninsured and Underinsured

If an insurance policy contains underinsured motorist coverage, that coverage is subject to the following limitation: "The policy limits of the underinsured motorist coverage shall be reduced by those amounts *available for payment* under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured." R.C. 3937.18(C). (Emphasis added.).

For the purpose of setoff, the "amount available for payment" language in [former] R.C. 3937.18(A)(2) [recodified at R.C. 3937.18(C)] means the amounts actually accessible to and recoverable by an underinsured motorist claimant from all bodily injury liability bonds and insurance policies (including from the tortfeasor's liability carrier). *Littrell v. Wigglesworth*, 91 Ohio St.3d 425, 2001-Ohio-87, 746 N.E.2d 1077, syllabus, applying *Clark v. Scarpelli*, 91 Ohio St.3d 271, 2001-Ohio-39, 744 N.E.2d 719.

Littrell rejected "a strict limits-to-limits approach, wherein the limits of the tortfeasor's liability policy are compared to the limits of the underinsured motorist claimant's automobile policy[.]" *Littrell* at 431-432. The Supreme Court noted that "underinsured motorist coverage is 'provided only to afford an insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage' had the tortfeasor been uninsured at the time of the accident." *Id.* at 433, quoting former R.C. 3937.18(A)(2).

Current Law: Stacking and Offsets

In *Berrios v. State Farm Ins. Co.*, 98 Ohio St.3d 109, 2002-Ohio-7115, 781 N.E.2d 149, the Supreme Court of Ohio held that an insurer could not reduce the statutorily required underinsured motorist coverage by setting off or subrogating the medical payments coverage. The key words in *Berrios* were "statutorily required." *Berrios* involved an accident that occurred before the 2001 amendment to the statute.

In *State Farm Mut. Auto. Ins. Co. v. Grace*, 123 Ohio St. 3d 471, 2009-Ohio-5934, 918 N.E.2d 135, the Supreme Court of Ohio confirmed that the change in the statute changed the result. "R.C. 3937.18(I), as amended by S.B. 97, permits an insurer to limit coverage so as to preclude payment pursuant to UM/UIM coverage for medical expenses that have previously been paid, or are payable under the medical payment coverage in the same policy." *Id*. at ¶2. This is the current state of the law.

Current Law: What is a Motor Vehicle?

In *McDonald v. Motorists Mut. Ins. Co.*, 8th Dist. Cuyahoga No. 86625, 2006-Ohio-1843, the Eighth District invalidated a "covered auto" exclusion in the uninsured motorist coverage because the insured was riding a bicycle, and not operating a motor vehicle, at the time of loss. (The exclusion applied only when the insured was operating an automobile not listed in the policy, and a bicycle is not an automobile.) A helicopter is not a motor vehicle. *Delli Bovi v. Pacific Indemn. Co.*, 85 Ohio St.3d 343, 708 N.E.2d 693 (1999). A horse-drawn carriage is not a motor vehicle. *State Auto Mut. Ins. Co., v. Cleveland Carriage Co.*, 98 Ohio App.3d 361, 364, 648 N.E.2d 590 (8th Dist. 1994). A drilling rig on the back of a truck is not a motor vehicle while it is not on a public road. *Ameduri v. Machine Technology & Field Serv.,* 7th Dist. Mahoning No. 21 MA 0102, 2022-Ohio-3423 (Sept. 19, 2022).

Current Law: Who is an Insured?

In *Wohl v. Swinney*, 118 Ohio St. 3d 277, 2008-Ohio-2334, 888 N.E.2d 1062, the insurer defined an "insured" as the policyholder, the policyholder's resident relatives, and "[a]ny other person **occupying your covered auto** who

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is not a named insured or an insured **family member** for uninsured motorists coverage under another policy." *Id*. at ¶9. (Emphasis sic). Six out of seven justices found that this definition was clear and unambiguous. *Id*. at ¶23.

The trend since *Wohl* appears to be for insurers to provide uninsured/underinsured motorist coverage to their own policyholders and to resident relatives of those policyholders, but not to unrelated permissive users or passengers, if they have their own insurance.

Sometimes the insurance on the vehicle will provide uninsured/underinsured motorist coverage if the personal uninsured/underinsured motorist coverage available to the permissive user is not enough. This depends on what the policy actually says. See *Natl. Mut. Ins. Co. v Gano*, 12th Dist. Madison No. CA2013-04-016, 2013-Ohio-3408, ¶19-22, applying *Bond v. Caudy*, 10th Dist. Franklin No. 06AP-242, 2006-Ohio-6898, ¶20.

Very often, the insurer of the vehicle will not provide any uninsured/underinsured motorist coverage at all to a permissive user who has his or her own coverage, even if the results seem unfair. See *Johns v. Hopkins*, 8th Dist. No. 99218, 2013-Ohio-2099. Johns was injured by an alleged drunk driver who had state minimum liability limits of $12,500.00 per person with GEICO. Johns had identical limits of uninsured/underinsured motorist coverage with State Auto. However, Johns was driving a vehicle which State Farm had insured for $100,000.00 per person in uninsured/underinsured motorist coverage. *Johns* at ¶2-8. Although Johns technically had his own uninsured/underinsured motorist coverage, the amount of coverage available for payment under his own State Auto policy was zero. He argued that he was entitled to coverage from State Farm, despite a definition of insured that did not include a permissive user with his own insurance. Mr. Johns was unsuccessful.

The Eighth District held that the policy was clear. Under the wording of the State Farm policy, it did not matter whether Mr. Johns could actually recover under his own policy. *Johns* at ¶36. The perceived unfairness of this situation drew sharp comment from the two nonwriting judges. The dissenting judge thought that the result was "unconscionable." *Johns* at ¶43 (Gallagher, J., dissenting). The concurring judge accepted the legal reasoning of the majority opinion's author, but shared the dissenter's sentiment, noting "dura lex sed lex[.]" *Johns* at ¶42. (Rocco, J., concurring). (This translates literally as "hard law, but law.")

Recently, the Eleventh District invalidated such a definition on the grounds that it was an escape clause prohibited by *State Farm Mut. Auto. Ins. Co. v. Home Indemn. Ins. Co.,* 23 Ohio St.2d 45, 261 N.E.2d 128 (1970) and the case was accepted for review by the Ohio Supreme Court on September 27, 2022. *Acuity, Mut. Ins. Co. v. Progressive Specialty Ins. Co.*, 11th Dist. Portage No. 2021-P-0001, 2022-Ohio-1816 (May 31, 2022), appeal accepted for review, No. 2022-0863 (Donnelly, Stewart, and Brunner dissenting).

Acuity exemplifies the current trend. Many of the coverage battles now occur among competing insurers, and not against the plaintiffs' bar. This has also been the author's recent experience, although the author is not involved in this particular case.

Final Note

The elimination of the mandatory offer of UM/UDM coverage in 2001 means that lawyers should use care before citing a twentieth century coverage case. Many of those older disputes involved interpretations of R.C. 3937.18 or other questions of public policy. Generally speaking, an Ohio court today is likely to enforce clear and unambiguous policy language, even in the dura lex sed lex situation.

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