The Time is Right for California Policy Holders to Fully Benefit from their Underinsured Motorist Coverage

By Barry P. Goldberg

California consumers buy uninsured motorist coverage with the mistaken belief that they are fully protected by the amount of insurance they buy if they are hit by another driver who is either uninsured or has inadequate liability insurance coverage. Under current law, the value of the insurance purchased is often eliminated or substantially reduced at no fault of the policy holder. The economic climate is right to change the law in order to ensure that a responsible consumer gets all the insurance benefits that has been bought and paid for. AB 1063 will allow policy holders to access the full benefit of their policies regardless of whether the "at fault" driver had equal or lesser coverage or whether there are multiple claimants.

Currently, the California Uninsured/Underinsured Motorist Statute, Insurance Code §11580.2, allows an insurer to deduct the amount of the liability insurance available to the at fault driver from the amount of uninsured motorist coverage in order to establish the amount of "underinsurance" available to the injured policy holder. This "credit" often has the undesirable effect of eliminating the underinsured insurance benefit all together, even if the value of the policy holder's injuries substantially exceeds the extent of the at fault driver's liability limits. Moreover, the statute as written and interpreted by the case law may create an unfair anomaly eliminating the uninsured insurance benefit based upon the happenstance of multiple non- at fault claimants. AB 1063 simply eliminates the "credit" and with it, all of the undesirable consequences.

The Background of UM/UIM Motorist Law

The basic purpose of the uninsured motorist statute was to minimize losses to the people who are involved in accidents with uninsured or financially irresponsible motorists. Under the statute, at

least some coverage was afforded an insured person with injuries caused by an uninsured or underinsured motorist. The effect of the statute was to guarantee to an insured motorist the minimum financial responsibility under his or her own policy for injuries resulting from a collision with another party who either has no automobile liability insurance or has insurance with insufficient limits.

Insurance Code section 11580.2 was enacted in 1959, repealed, and then re-enacted with some changes in 1961. The statute established as a matter of public policy that every motor vehicle liability policy that provided coverage for bodily injuries issued in California must provide UM/UIM motorist coverage. Unless the provisions of section 11580.2 are expressly deleted by an agreement in writing between the insurer and the insured, such provisions become a part of every policy issued in California that covers liability arising from the ownership, maintenance or use of any motor vehicle.

The goal of Insurance Code section 11580.2 was to ensure that those drivers injured by uninsured motorists were protected to the extent that they would have been had the driver at fault carried the statutory minimum of liability insurance.

As explained more fully below, a credible case can now be maintained that the "statutory minimum of liability insurance" established in 1974 is so antiquated and inadequate in 2011 that the purpose of the uninsured motorist statute has been completely undermined. Given the spiraling costs of medical care and property damage repair, and the unrealistic minimum limits, it makes sense to simply grant consumers the amount of coverage they had the foresight to purchase.

The Confusing Inequities of Underinsured Motorist Coverage

Uninsured motorist coverage is easy to explain. An uninsured vehicle is a vehicle which has no bodily injury liability insurance at the time of an accident. An uninsured operator is a driver who has no bodily injury liability insurance available to him from any source. On the other hand, an underinsured

motor vehicle is a vehicle that is insured, or an operator that is insured, but for an amount that is less than the uninsured motorist limits carried on the vehicle of the injured person.

Under the underinsurance provisions, all policies that include uninsured motorist coverage for bodily injury must also include underinsured motorist coverage. Underinsured motorist coverage must be offered with limits at least equivalent to the uninsured motorist coverage. Although the limits for underinsured motorist coverage can exceed the limits for uninsured motorist coverage, both uninsured and underinsured motorist coverage must be offered as a single coverage.

Insurance Code section 11580.2 specifically provides that underinsured motorist coverage does not apply to any bodily injury until the limits of all bodily injury liability policies have been exhausted by payment of judgments or settlements. Similarly, section 11580.2(p)(4) provides that the "maximum liability of the insurer providing underinsured motorist coverage may not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by or for any person or entity held legally liable for the injury."

This complicated language basically means that an insured cannot recover underinsured motorist benefits under his or her own policy until the liability limits of the policy insuring those parties responsible for the injuries have been exhausted. Nonetheless, an insurer who provides underinsured motorist benefits for bodily injury to its insured is entitled to a credit or reimbursement to the extent the insured has received payments from the owner of the underinsured vehicle. Proponents of the "credit" argued that this effectively precluded a so-called "double recovery" by the injured party.

The case law has reinforced the undesirable limit to recovery to amounts less than a policy holder might reasonably expect. In *Lopez v. Allstate Insurance Co.*, (1993) 14 Cal.App.4th 1835, both the insured and the person responsible for the insured's injuries had liability limits of $15,000 per person and $30,000 per occurrence. The court held that section 11580.2(p)(2) clearly restricts underinsured

motorist benefits to cases in which the responsible party's liability limits are less than the underinsurance limits of the injured person.

Thus, underinsured motorist coverage is ***not*** considered the equivalent of excess coverage. The insurer providing underinsured motorist coverage never pays the full amount of the coverage, but only pays the difference between its own insured's policy limits and amounts paid by or on behalf of the person liable to the insured.

Unless the responsible party's vehicle qualifies as an underinsured vehicle under the policy (i.e., uninsured motorist limits are less than or equal to the at-fault driver's liability limits), the insured's underinsurance coverage is never triggered. Thus, if the responsible party's vehicle has enough insurance to qualify as "insured," the insured cannot recover underinsured motorist benefits even though the limit of the responsible party's policy is inadequate to compensate the insured for all his or her injuries.

In *State Farm Mutual Automobile Insurance Co. v. Messinger* (1991) 232 Cal.App.3d 508, the court was confronted with a circumstance where the vehicle driven by the responsible party carried $300,000 single limits, and the claimant's vehicle, insured with State Farm, carried $100,000 per person/$300,000 per accident limits. The insured claimant argued that its ***damages*** should be determinative of the availability of underinsured motorist benefits. However, the court held that the responsible party's motor vehicle was not underinsured.

The court further held that underinsured motorist coverage is ***not*** triggered by the amount of the claimant's damages, but rather by a comparison of the limits of the responsible party's limits and the underinsured motorist limits of the claimant's policy. Finally, the court held that the fact that an insured claimant might be unable to collect the full value of its claim because of the existence of

multiple claimants was not a problem for the courts to resolve, but should be left to the legislature to resolve.

A responsible party's vehicle is not necessarily considered underinsured just because there are multiple claimants with claims that exceed the available coverage. In *Schwieterman v. Mercury Casualty Co.*, (1991) 2229 Cal.App.3d 1044, the court held that the responsible party was not an underinsured motorist simply because there were multiple claimants. These claimants had so depleted the available coverage that the funds actually available to pay any individual insured's claim were less than the underinsured motorist limits of coverage under the claimant's own policy.

For example, assume that a claimant's own policy provides him with $15,000 underinsured motorist benefits. If the responsible party's auto liability policy provides $30,000 per accident, and there are three claimants with equal injuries each totaling $15,000, the coverage available will be divided equally amongst them and each will receive $10,000. Consequently, the funds available to pay each injured person are less than the underinsured motorist limits of coverage of the insured's own policy. In this situation, the responsible party's vehicle will ***not*** be considered to be underinsured and the claimant's underinsured motorist coverage would ***not*** be triggered. The policy holders would not be getting what they paid for.

California's Compulsory Financial Responsibility Law Does Not Provide Adequate Minimum Protection Any Longer

California's Compulsory Financial Responsibility Law (Ins. Code §16056) requires every driver and owner of a motor vehicle to be financially responsible for their actions. The statutory minimum limits of liability insurance in California are for Bodily Injury: $15,000 for death or injury of any one

person, any one accident, and $30,000 for all persons in any one accident. For Property Damage: $5,000 for any one accident. Ownership liability follows form. (See, Vehicle Code § 17151)

That section and those limits were enacted in 1974. At that time, the average price of a new car was $3,750.00 and California motorists were relatively well-protected. Surprisingly, the statutory minimums have not been adjusted in over 35 years. Needless to say, the statutory minimums are grossly inadequate and California motorists who opt for the minimum are poorly protected. Almost any accident involving more than one other vehicle will exhaust the property damage limits. Almost any significant accident in which more than one not at fault person claims bodily injury is likely to exhaust the bodily injury limits. This circumstance is just as likely to render the not at fault claimant's underinsured motorist coverage valueless.

Given the state of the economy in 2011, the resolve to raise the statutory minimums are simply not present despite the lack of an adjustment in 35 years. In fact, given the poor economy, families are struggling just to maintain some automobile liability insurance and the uninsured rate of drivers in California is purported to exceed 20%. In lower economic neighborhoods, the uninsured figure is reported to be as high as 80%. Accordingly, uninsured and underinsured motorist coverage is more important than ever and it is critical that policy holders have a guaranteed value for the insurance they had the foresight to purchase.

The Time is Right for Policy Holders to Fully Benefit from their Underinsured Motorist Coverage

The combination of the poor economy and the dated minimum statutory limits makes the time right to readjust the intent of the uninsured/underinsured motorist law. The stated effect of the law, to guarantee to an insured motorist the minimum financial responsibility under his or her own policy for

injuries resulting from a collision with another party who either has no automobile liability insurance or has insurance with insufficient limits, is also outdated. The realistic and modern approach is to allow consumers the unrestricted right to protect themselves from a collision with another party who has insufficient limits notwithstanding the dated minimum statutory limits.

Passage of AB 1063 will accomplish this equitable approach by eliminating an insurer's right to claim an unnecessary credit. It will give California policy holders the insurance benefits they bought and paid for at a time when they need it the most---when the at-fault driver has insufficient liability coverage to compensate them for all the damage he or she has caused.

Author's Biography

Barry P. Goldberg is the principle of Barry P. Goldberg, A Professional Law Corporation, located in Woodland Hills, California. Mr. Goldberg has been in practice since 1984 and attended the University of California, Los Angeles undergraduate and obtained his law degree from Loyola Law School, Los Angeles. Mr. Goldberg is an experienced trial attorney and has extensive insurance coverage experience. He has handled hundreds of UM/UIM arbitrations and is a frequent author and lecturer on the subject.