

Delaware

By Melissa L. Rhoads

Uninsured Coverages

Is UM coverage mandatory or discretionary?

Discretionary.

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

18 Del. Code Ann. §3902 governs UM and UIM coverage. Delaware law mandates that the insurer make a “meaningful offer” of UM/UIM coverage to the insured. 18 Del. Code Ann. §3902(b) provides: “Every insurer shall offer to the insured the option to purchase additional coverage for personal injury or death up to a limit of \$100,000 per person and \$300,000 per accident or \$300,000 single limit, but not to exceed the limits for bodily injury liability set forth in the basic policy.” The elements of a “meaningful offer” are: (1) an explanation of the cost of the coverage; and, (2) a communication that clearly offers the specific coverage in the same manner and with the same emphasis as was on the insured’s other coverage.” *Mason v. United Servs. Auto. Ass’n*, 697 A.2d 388, 393 (Del. 1997).

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. Pursuant to 18 Del. Code Ann. §3902(a)(1), the insured must reject UM/UIM coverage in writing on a form furnished by the insurer that describes the coverage being rejected, unless renewing or modifying the existing policy. If the form is filled out, but does not sufficiently inform the insured so that he or she can make an informed decision, the policy will be reformed to cover the losses. *Banaszak v. Progressive Direct Ins. Co.*, 3 A.3d 1089 (Del. 2010).

Is UIM coverage mandatory or discretionary?

Discretionary. *See* answer to “***Is UM coverage mandatory or discretionary?***,” *supra*.

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

See answer to “***Is UM coverage mandatory or discretionary?***,” *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 “***Is UM coverage mandatory or discretionary?***,” *supra*.

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

Discretionary.

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

Delaware treats both UM and UMPD as “uninsured vehicle coverage.” In *Home Ins. Co. v. Maldonado*, 515 A.2d 690 (Del. 1986), the court held that UIM is simply a form of UM and is thus subject to the same statutory scheme. By extension, the same statutory scheme for UM/UIM coverage applies to UMPD coverage.

Must the insured reject UMPD 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 motorists “economic only” 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 UEO coverage 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/UIM limits?

No, UM or UIM limits need not match the bodily injury liability limits. However, UM/UIM coverage may not exceed bodily injury liability limits in the basic policy. 18 Del. Code Ann. §3902(b). Yes, there are minimum UM/UIM limits. The UM/UIM coverage provided must not be less than the minimum state bodily injury limits, which are \$15,000 per

person and \$30,000 per accident. 18 Del. Code Ann. §3902(a)(2); 21 Del. Code Ann. §2118(b).

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

No, UMPD limits need not match the property damage liability limits. 18 Del. Code Ann. §3902(b). Yes, there are minimum UMPD limits. The UMPD provided must not be less than the minimum state property damage limits, which are \$10,000 per accident 18 Del. Code Ann. §3902(a)(2); 21 Del. Code Ann. §2118(a)(3).

Are there minimum limits for UEO coverage?

Not applicable.

Are there minimum limits for other uninsured coverages that are mandatory or discretionary in the 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 where: the vehicle has no auto liability bond, insurance, or other security available at the time of the accident in at least the amounts required by the financial responsibility law where the auto is principally garaged or registered; one for which the insuring company denies coverage or becomes insolvent; or where a hit-and-run motor vehicle that causes an accident results in bodily injury or property damage to the property of the insured. In the case of a hit-and-run, the bodily injury or property damage must be caused by contact with the hit-and-run vehicle, or by non-contact where the identity of both the driver and the owner of the vehicle is unknown. 18 Del. Code Ann. §3902.

In the case of a hit-and-run, the accident must be reported to the police or proper governmental authority. The insured must also notify his or her

insurer within 30 days, or as soon as practicable thereafter, that the insured has a legal action arising from the incident. In order for an insurer to assert a failure of notice defense, it must show both that the policy was breached, and that it was prejudiced by the lack of notice. *Nationwide Mut. Ins. Co. v. Starr*, 575 A.2d 1083, 1088 (Del. 1990).

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

To collect on a UIM policy, a claimant must be able to show that he or she was injured by an underinsured vehicle within the meaning of the UIM statute. *Shuba v. United Servs. Auto. Ass'n*, 77 A.3d 945 (Del. 2013). UIM coverage is personal to the insured, not vehicle-specific. *Jones v. Horace Mann Ins. Co.*, 723 A.2d 390 (Del. 1998). An underinsured vehicle is one for which there may be bodily liability coverage in effect, but the limits of such coverage at the time of the accident are less than the damages sustained by the insured. The insurer is not obligated to pay claims under the UIM coverage until after the limits of liability under all other avenues available to the insured at the time of the accident are exhausted by payment or settlement of judgments. However, when the limits of the claimant's UIM coverage and the limits of the tortfeasor's bodily injury coverage are identical, the tortfeasor is not an underinsured motorist. *White v. Liberty Ins. Corp.*, 975 A.2d 786 (Del. 2009).

If an insured fails to exhaust all other avenues of insurance compensation, such as all bodily injury bonds and other insurance policies, UIM benefits will not be triggered. *Sivakoff v. Nationwide Mut. Ins. Co.*, 2011 WL 1877610, 21 A.3d 597 (Del. 2011) (unpublished table disposition). In *Sivakoff*, the insured signed a release of the tortfeasor prior to discovering that the tortfeasor was also covered under her mother's insurance. The tortfeasor was granted a dismissal of the subsequent claim against her pursuant to the release, and the decision was not appealed. Because the insured did not pursue the coverage under the tortfeasor's mother's policy, she did not exhaust all avenues of compensation available to her.

If the tortfeasor is not considered to be underinsured, the UIM policyholder will not be able to recover. *Nationwide Mut. Ins. Co. v. Williams*, 695 A.2d 1124 (Del. 1997). In *Nationwide v. Williams*, the tortfeasor's liability limits were identical in amount to the insured's UIM limits. Thus, the court found that the tortfeasor was not underinsured, and the insured was not entitled to recover under her UIM policy.

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

See responses to "Under what circumstances is UIM coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?" and "Under what circumstances is UIM coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?," *supra*, for uninsured and underinsured coverage.

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?

Although the statute does not specifically provide for arbitration in UM cases, it is allowed. Delaware law holds that, where a written agreement contains an arbitration clause, it is enforceable unless grounds

exist at law or in equity for the revocation of the contract. 10 Del. Code Ann. §5701. This statute also applies in UM cases, since Delaware public policy “favors the resolution of disputes through arbitration.” *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 911 (Del. 1989) (citation omitted). The procedures that govern in UM cases are found in the Delaware Uniform Arbitration Act, codified in 10 Del. Code Ann. §§5701–5725.

What requirements must an insured claimant satisfy in order to file suit against, and serve, an insurer for UM coverage?

There are no special requirements in Delaware.

Final Amounts Awarded or Paid

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

No. The Delaware Supreme Court invalidated policy provisions allowing uninsured coverage reductions based on payments from third parties in *Hurst v. Nationwide Mut. Ins. Co.*, 652 A.2d 10 (Del. 1995), and underinsured coverage reductions in *Nationwide Mut. Auto. Ins. Co. v. Peebles*, 688 A.2d 1374 (Del. 1997). Third-party payments from any source, however, will be reduced from the total value of the insured’s damages to determine the amount of accessible UM/UIM coverage under the policy.

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

Not applicable.

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

Not applicable.

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

Liens may be asserted where the insured was entitled to workers’ compensation benefits. *Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 881, 887 (Del. 2007). Such a lien against plaintiff’s UM recovery is provided for in 19 Del. Code Ann. §2363. *Lane v. Home Ins. Co.*, 1988 WL 40013, *1 (Del. Super. Ct. 1988).

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

Stacking different policies is not prohibited by statute. 18 Del. C. §3902(c) clearly and unambiguously allows insurers to write anti-stacking provisions into policies. *Bromstad-Deturk v. State Farm Mut. Auto. Ins. Co.*, 2009 WL 1525948, 974 A.2d 857 (Del. 2009) (unpublished table disposition).

Delaware courts have likewise held that different polices cannot be stacked in order to trigger UIM coverage. However, in order to fully compensate claimants for damages inflicted by tortfeasors, stacking is permitted once the statutory threshold for UIM coverage has been satisfied by any one policy. *Deptula v. Horace Mann Ins. Co.*, 842 A.2d 1235 (Del. 2004).

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)?

No. Under 18 Del. Code Ann. §3902(b)(3), the insurer has no obligation to make any payment under its UIM coverage until the limits of the tortfeasor’s available liability insurance policies have been exhausted. Thus, the insurer’s subrogation right is rendered moot before it makes payments to its insured. *Bryant v. Federal Kemper Ins. Co.*, 542 A.2d 347 (Del. 1988).

The right of subrogation is granted, but also limited, by 18 Del. Code Ann. §3902(a)(4), which courts have extended to cover underinsured, in addition to uninsured, vehicles. *Home Ins. Co. v. Maldonado*,

515 A.2d 690 (Del. 1986). 18 Del. Code Ann. §3902 (a)(4) states that “the insurer shall be entitled to the proceeds of any settlement recovery from any person legally responsible for the bodily injury or property damage as to which payment was made... provided, that this right of subrogation is limited to the amount of coverage required by the financial responsibility law.”

Bad Faith

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

Yes. “Where an insurer fails to investigate or process a claim or delays payment in bad faith, it is in breach of the implied obligations of good faith and fair dealing underlying all contractual obligations.... A lack

of good faith, or the presence of bad faith, is actionable where the insured can show that the insurer’s denial of benefits was “clearly without any, reasonable justification.” *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 440 (Del. 2005) (quoting *Tackett v. State Farm Fire & Cas. Ins. Co.*, 653 A.2d 254, 264 (Del. 1995)).

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

No.

AUTHOR

Melissa L. Rhoads | Tighe & Cottrell, P.A. |
302.658.6400 x22 | m.rhoads@tighecottrell.com