

IV. SELECTED ISSUES

A. WORKER'S COMPENSATION AS A BAR TO AN UNINSURED MOTORIST CLAIM

1. Workers Compensation Exclusion Prior to Public Act 93-297

Prior to the enactment of Public Act 93-297, which amended §38a-336(f), an employee who had received, or was eligible to receive, worker's compensation benefits for injuries arising from an automobile accident while operating his or her employer's motor vehicle during the course of employment was barred by the exclusivity provisions of C.G.S. §31-284(a) from recovering uninsured motorist benefits from a self-insured employer¹ or from the employer's insurer.²

The court applied the exclusivity provisions of the Worker's Compensation Act to bar such an employee from an uninsured motorist claim, even though the employer is required by statute to maintain such coverage.³ The exclusive-remedy provision of the worker's compensation act barred an employee from maintaining not only common-law claims against an employer, but also claims based on statute.⁴ While uninsured motorist coverage is statutorily mandated, such coverage did not stand as an independent source of recovery for the insured,⁵ especially where the claimant had been otherwise protected by receiving worker's compensation benefits.⁶

However, C.G.S. Section 31-284a allowed an employee to contract with his or her employer for additional benefits, and employees who contracted for uninsured motorist benefits with their employer would conceivably be entitled to recover such benefits as an exception to the bar imposed by Bouley and Colman.⁷

The statutorily mandated uninsured motorist coverage was not an exception to the exclusivity of the Worker's Compensation Act, nor had it implicitly repealed the exclusivity of the act.⁸ The court reasoned that where the legislature intended to create an exception to the exclusivity of the Worker's Compensation Act, it had clearly done so.⁹ "The fact that an employee's suit was based on an uninsured motorist insurance policy issued by a commercial insurer did not warrant a departure from the exclusive remedy policy of our Worker's Compensation Act," since the insurer is the alter ego of the employer.¹⁰

Although an employee's uninsured motorist claim against a self-insured employer, or the employer's insurer, was barred in the above instance, the employee retained an uninsured motorist claim under his or her own personal uninsured motorist policy.

2. Worker's Compensation Exclusion After Public Act 93-297

Public Act 93-297 amended C.G.S. §38a-336 to add subsection (f), which provides, as follows:

"Notwithstanding subsection (a) of section 31-384, an employee of a named insured injured while occupying a covered motor vehicle in the course of

employment shall be covered by such insured's otherwise applicable uninsured and underinsured motorist coverage."

C.G.S. §38a-336 as amended by Public Act 93-297

This language legislatively overrules *Bouley*¹¹ and *CNA v. Colman*¹², by removing an uninsured motorist claim from the operation of the worker's compensation statute's exclusive remedy provisions. This amendment allows uninsured motorist claims against commercial insurers, as well as claims against self-insured employers.¹³ Significantly, an employee must be **occupying** the insured vehicle in order to make a claim under the statute.¹⁴ The statute provides a limited exception to the exclusivity provisions of C. G. S. Section 31-284(a) and as such is strictly construed.¹⁵ Such occupation requires that the claimant be in physical contact with the insured vehicle.¹⁶

C.G.S. §38a-336(f) (which codified P.A. 93-197(f)) applies only to claims for uninsured and underinsured motorist benefits. It does not allow a cause of action against the employer for liability for a motor vehicle collision.¹⁷

Despite P.A. 93-297, §29, which provided that C.G.S. §38a-336(f) applied only to accidents occurring after January 1, 1994, the Supreme Court stated in *Reliance v. American Casualty Co. of Reading, Pennsylvania*,¹⁸ that an examination of the legislative history revealed that "P.A. 93-297 was intended to be clarifying legislation and, as such, must be accepted as a declaration of the legislature's original intent pertaining to the interplay between the uninsured motorist provisions of General Statutes 38a-336 and the workers' compensation exclusivity provision of General Statutes 31-284" and held that, as such, an employee was not barred from recovering uninsured motorist benefits from his or her employer's insurer for a motor vehicle accident that occurred prior to the effective date of P.A. 93-197.¹⁹

In *Tirozzi v. Shelby Ins. Co.*²⁰, the Plaintiff, an employee injured in a motor vehicle collision in the course of his employment, brought an action for underinsured motorist coverage against his employer's underinsured motorist insurer, which action resulted in a judgment for the insurer on the basis of *CNA v. Colman*.²¹ After the enactment of C.G.S. §38a-336 (f) and the court's retroactive application of the statute in *Reliance*,²² the Plaintiff brought a second action against his employer's underinsured motorist insurer seeking the same damages as the first action. The insurer's motion for summary judgment based upon res judicata was granted and the Appellate Court affirmed refusing to recognize an exception to the doctrine of res judicata where a change in the law occurred by a clarifying act of the legislature.

An employee injured in an automobile accident during the course of his employment is not required to exhaust workers compensation benefits before recovering uninsured motorist benefits.²³

Governmental immunity, under C.G.S. §52-577n(b)(6), does not bar a municipal employee, injured in a collision with an uninsured motorist while operating a vehicle owned by his municipal employer, from recovering uninsured motorist benefits from a self-insured municipality.²⁴ However, a state police officer's claim for underinsured motorist benefits against the Department of Public Safety which was self insured, is barred by sovereign immunity.²⁵ Such a claim must first be presented to the claims commissioner, prior to commencing an action in Superior Court.²⁶

B. TRIAL DE NOVO

Any provision in an insurance contract that allows a party to the contract to demand a trial de novo when an arbitration award exceeds the state statutory minimum coverage limit for bodily injury coverage, but makes binding any award less than that amount, unfairly favors the insurer and is therefore unenforceable as against public policy.²⁷ The provision favors the insurer, which is more likely to be dissatisfied with an award above the statutory minimum coverage; the insured is more likely to be dissatisfied with an award below that amount, which could not be tried de novo.²⁸

C. STATUTE OF LIMITATIONS AND CONTRACTUAL TIME LIMITATIONS

1. Contractual Limitations Periods Prior to Enactment of Public Act 93-77

The predecessor to Conn. Gen. Stat. Sec. 38a-290 allowed, but did not require, an insurer to set a contractual two-year limitation within which an uninsured motorist arbitration or suit could be brought against it.²⁹ The limitation period ran from the date of the accident, not from the date of discovery of the tortfeasor's liability policy nor from the date of exhaustion of the tortfeasor's uninsured or underinsured status.³⁰ Such a two-year contractual time limitation contained in an uninsured motorist policy was not tolled until the claimant liquidated his or her claim against the underinsured tortfeasor.³¹ This limitation period applied to both uninsured and underinsured motorist claims.³²

Practically, these rulings required a claimant to join an underinsured motorist insurer in every action brought against the tortfeasor, or if the uninsured motorist policy contained an arbitration clause, to demand arbitration within the statutory period. However, such claim could be subject to summary disposition if the insured failed to satisfy the condition precedent of exhausting the liability coverage.³³

The accidental failure of suit statute, C.G.S. §52-592, applies only to actions that would be time barred by an otherwise applicable statute of limitations, not to actions barred by a contractual limitation period.³⁴

2. Contractual Limitation Periods After Public Act 93-77

In response to *McGlinchey v. Aetna Casualty and Surety Co.*³⁵ and *Hotkowski v. Aetna Casualty and Surety Co.*³⁶, the legislature enacted Public Act 93-77 which amended C.G.S. §38a-290 to exclude suits and uninsured/underinsured motorist arbitration claims from its operation.

"No insurance company doing business in this state shall limit the time within which any suit shall be brought against it or. . . any claim shall be submitted to arbitration . . . (d) all other policies to a period less than one year from the time when the loss against occurs. This section shall not apply to suits and arbitration claims under the uninsured or underinsured motorist provisions of a motor vehicle insurance policy."

C.G.S. Section 38a-290 as amended by Public Act 93-77 Section 2e

The act also amended C.G.S. Section 38a-336 as follows:

"(e) No insurance company doing business in this state may limit the time within which any suit may be brought against it or any demand for arbitration on a claim be made on the uninsured or underinsured motorist provisions of a motor vehicle policy to a period of less than three years from the date of accident, provided, in the case of an underinsured motorist claim the insured may toll any applicable limitation period (1) by notifying such insurer prior to the expiration of the applicable limitation period, in writing, of any claim which the insured may have for underinsured motorist benefits and (2) by commencing suit or demanding arbitration under the terms of the policy not more than one hundred eighty days from the date of exhaustion of the limits of liability under all automobile bodily injury liability bonds or automobile insurance policies applicable at the time of the accident by settlements or final judgments after any appeals."

C.G.S. Section 38a-336 (g)(1) as amended by Public Act 93-77 Section 2E

This amendment prohibits an insurer, doing business in the state, from contractually limiting suits or demands for arbitration on uninsured/underinsured motorist claims, to a period of less than three years from the date of accident. This statute applies to every insurance company doing business in Connecticut. Therefore, the statute applied to an action for uninsured motorist coverage brought by a Connecticut resident in Connecticut for injuries sustained in an accident in California on a policy issued in California which contained a one year limitation period permitted under California law, because the insurer was doing business in the State of Connecticut.³⁷

A policy issued prior to the effective date of the act, which contained a provision requiring actions to be brought within two years of an accident, was rendered inoperative, as of the effective date of the statute and any claims arising after that date were subject to the six year statute of limitations applicable to contract actions.³⁸

In the case of an underinsured motorist claim, the limitations period may be tolled; (1) if the insured notifies the insurer, **in writing**, of a potential claim, prior to the applicable limitation,³⁹ *and* (2) by commencing suit or demanding arbitration not more than one hundred eighty days from the date of exhaustion by settlement or final judgment after appeal.

The tolling provision of the statute applies only to underinsured motorist claims, not uninsured motorist claims.⁴⁰

Both requirements must be satisfied in order to toll the three-year limitation. The notice must be *in writing* and specifically reference a potential *underinsured motorist* claim.⁴¹ If the claimant has not complied with the either requirement, the action is time barred.⁴² The statutory phrase "final judgment" was intended by the legislature to mean the final conclusion of the action after any appeals.⁴³ This section does not have retrospective application to claims arising prior to its effective date.⁴⁴ The tolling provisions of Public Act '93-77, now C. G. S. Section 38a-336(g)(1), apply only to contractual limitations periods, not to statutes of limitation.⁴⁵

Public Act 93-77 Sec.3 also contained a saving clause which applies to uninsured or underinsured motorist claims or action pending on December 8, 1992 (the date that *McGlinchey*⁴⁶ and *Hotowski*⁴⁷ were decided), or brought after that date and prior to May 20, 1993, the effective date of Public Act 93-77.

Public Act 93-77 Sec.3 provides as follows:

"Sec. 3 (New) No uninsured or underinsured motorist claim or action pending on December 8, 1992, or brought after said date and prior to the effective date of this act, in which a settlement has not been reached or a final judgment has not been rendered prior to the effective date of this act, shall fail by reason of any contractual limitation in a motor vehicle insurance policy which limits the time within which such claim shall be submitted to arbitration or such action shall be commenced to a period of time less than that allowed under section 38a-336 of the general statutes, as amended by section 2 of this act."

This section was intended to provide relief to claimants who failed to file a claim for uninsured or underinsured motorist benefits within the two year contractual time limitation and who found their claims barred by the decisions in *McGlinchey v. Aetna Casualty & Surety Co.* and *Hotkowski v. Aetna Life & Casualty Co.*⁴⁸

This section retroactively applies to claims pending on December 8, 1992 or brought after that date and before the passage of the Public Act, i.e. May 20, 1993, if such claims have not already been settled or gone to final judgment.

Despite challenges to its validity under both the United States and Connecticut constitutions, P.A. 93-77 Section 3 is valid and can be applied retroactively.⁴⁹ The public act's retroactive modification of the terms of the insurance policy does not violate either the contract or due-process clauses of the United States or Connecticut constitutions.⁵⁰

For claims falling within the purview of Section 3 of P.A. 93-77, the insurer is precluded from enforcing the two-year contractual limitation period to bar the claimant's recovery of underinsured motorist benefits.⁵¹

However, note well that '2E of Public Act 93-77, (now codified as C.G.S. §38a-336(e)), does not apply retroactively and therefore does not invalidate all two year contractual limitations for claims brought after May 20, 1993, the effective date of Public Act 93-77. Therefore, claims not subject to the savings clause of '3 of Public Act 93-77 are still governed by a two year contractual time limitation, if the insurance policy contained such limitation.⁵²

In *Bilodeau*⁵³, the Plaintiff was injured in a car accident on January 12, 1991. At the time of the collision, the insurance contract required the Plaintiff to submit any underinsured motorist claim to arbitration within two years from the date of the accident. On October 24, 1993, the Plaintiff settled with the tortfeasor and on February 1, 1994, more than three years from the date of the accident, filed suit against the underinsured motorist insurer seeking underinsured motorist benefits. The Court held that since Section 93-77, Section 3 provided a window for uninsured or underinsured motorist claims pending between December 8, 1992, the date that *McGlinchey* and *Hotkowski* were decided, and May 20, 1993, the effective date of Public Act 93-77, Section 3, and the Plaintiff's claim was not pending within this time period, it was subject to the two year contractual time limitations period contained in the insurance policy.

Claims that arose out of collisions that occurred prior to the May 20, 1993 act's effective date and that were not brought against the insurer before that date, do not fall within the limited retroactive protection '3 sought to provide.⁵⁴ Such claims are barred by the two year time limitation set forth in the policy.⁵⁵ In *Rivera*,⁵⁶ the collision occurred in January 1989. At the time of the accident, the plaintiff had an automobile insurance contract with the defendant that contained a provision, then authorized by C.G.S. §38a-290(d), that required the plaintiff to submit an underinsured motorist claim within two years from the date of the accident. The plaintiff sent written notice of her intent to claim underinsured motorist benefits in June 1993. The plaintiff claimed that her case fell within the retroactive provision of P.A. 93-77 and was therefore subject to the six-year statute of limitations, because the statutory phrase "a claim or action pending" meant the "occurrence of an accident which could give rise to a cause of action." The court rejected the plaintiff's interpretation of the statute. The court concluded that in order for the plaintiff to take advantage of the retroactive provision of P.A. 93-77, an underinsured motorist action or claim must have been initiated by Dec. 8, 1992 (the date that *McGlinchey* and *Hotowski* were decided), or such claim must have been initiated after Dec. 8, 1992, and before May 20, 1993 (the effective date of P.A. 93-77). The court held that since the plaintiff neither had an underinsured motorist claim pending on Dec. 8, 1992, nor had initiated such claim until June 29, 1993, P.A. 93-77 Sec.3 did not apply to this claim.

A notice to an insurer that the tortfeasor's liability policy had been exhausted and that the insured was pursuing an underinsured motorist claim constitutes a "pending" claim for purposes of P.A. 93-77, Section 3.⁵⁷

The statutory phrase "final judgment" was intended by the legislature to mean the final conclusion of the action after any appeals.⁵⁸ If an appeal was pending on Dec. 8, 1992, the case had not been finally concluded, since a final judgment within the terms of the statute had been not yet been rendered.⁵⁹ In such a situation, P.A. 93-77 Sec.3 is applicable.⁶⁰

It is important to note that claims governed by Section 3 of P.A. 93-77 are subject to the six-year statute of limitations applicable to contract actions generally, i.e., C.G.S. Sec. 52-576, not to the three-year limitation period prescribed by Section 2 (e) of P.A. 93-77, (now codified as C.G.S. §38a-336(e)).⁶¹ Also note that since Sec.3 of P.A. 93-77 is special in nature--it has not been codified--while Sec.2 of P.A. 93-77 has been codified as C.G.S. Sec. 38a-336(e). The act is effective as of May 20, 1993.

A plaintiff's failure to bring an action within the time limitations required under the insurance policy cannot be excused by the absence of any prejudice to the insurer. A consideration of the insurer's prejudice or lack thereof is irrelevant to the defense of failure to satisfy a contractual time limitation contained in the insurance policy.⁶²

If an underinsured motorist claim was pending on Dec. 8, 1992, and therefore subject to Sec. 3 of P.A. 93-77, a malpractice claim against the attorneys who settled the underlying claim against the tortfeasor for failing to file suit against the underinsured motorist insurer can be maintained and the Plaintiff need not obtain a prior judicial determination that the statute of limitations has run as a condition precedent to his malpractice claim.⁶³

Public Act 98-109 '1 amended C.G.S. Sec.38a-336(g) to add subsection (2) which states as follows:

Notwithstanding the provisions of subsection (1) of this section, in the case of an uninsured motorist claim, if the motor vehicle of a tortfeasor is an uninsured motor vehicle because the automobile liability insurance company of such tortfeasor becomes insolvent or denies coverage, no insurance company doing business in this state may limit the time within which any suit may be brought against it or any demand for arbitration on a claim may be made on the uninsured motorist provision of an automobile liability insurance policy to a period less than one year from the date of receipt by the insured of written notice of such insolvency of, or denial of coverage by, such automobile liability insurance company.

C.G.S. Sec. 38a-336(g)(2)

This subsection prohibits an insurer, doing business in the state, from contractually limiting suits or demands for arbitration on uninsured motorist claims based on a liability insurer's insolvency or denial of coverage, to a period less than one year from the date of receipt by the insured of written notice of the insolvency or such denial.

3. Statute of Limitations in the Absence of a Contractual Time Limitation

If the insurance policy does not contain a contractual limitations period, the contract statute of limitations⁶⁴ applies to an action or arbitration against an insurer under the uninsured motorist coverage.⁶⁵ The contract statute of limitations provides that the action should be brought within six years after the right of action accrues.⁶⁶

The test for determining when the cause of action accrues is to ascertain at what time the plaintiff first could have successfully maintained an action.⁶⁷ In the case of an uninsured motorist claim, the cause of action accrues on the date that the claimant, in the exercise of reasonable diligence, discovers that the tortfeasor is uninsured.⁶⁸

Where the policy does not contain a contractual limitations period and states that the insurer is not obligated to pay an underinsured motorist claim until all underlying coverage is exhausted, the cause of action for underinsured motorist benefits accrues upon exhaustion, not on the date of the accident, and suit must be filed or arbitration demanded within that time.⁶⁹ If payment is made by uncertified check which is later honored, then "exhaustion by payment" occurs when the check is *received* by the attorney for the claimant.⁷⁰ The tolling provisions of Public Act 93-77 Sec. 2e (C.G.S. Sec. 38a336(g)(1)) only apply to contractual limitation periods, not to statutes of limitation.⁷¹

Under the terms of most insurance policies, the uninsured motorist insurer becomes obligated to pay uninsured motorist benefits when the tortfeasor's insurer becomes insolvent. In such a case, the statute of limitations on the uninsured motorist claim begins to run when the liability insurer becomes insolvent.⁷²

4. General Rules for Application of Statutes of Limitations

Due to the interplay between statutes and case law, the issue of which statute of limitations or contractual time limitation applies to uninsured or underinsured motorist claims is most confusing. The following general rules would seem to apply.

A. Claims Arising Prior to May 20, 1993:

1. If the claim is subject to a two year **contractual time limitation** set forth in the policy of insurance and does not fall within the savings clause of Public Act 93-77, Section 3, then the two year contractual time limitation clause is valid and suit must be filed or arbitration demanded within the two year contractual time limitation.⁷³

2. If the claim is subject to a two year **contractual limitation clause** set forth in the policy, but falls within the savings clause of Public Act 93-77, Section 3, then a six year statute of limitations applicable to contract actions generally, i.e. C.G.S. Sec. 52-576 would apply.⁷⁴

3. If the claim is not subject to any contractual time limitations clause, then the six year contract statute of limitations would apply.⁷⁵

In order to determine when the cause of action accrues, the policy must be closely scrutinized.

B. Claims Arising Post May 20, 1993:

1. For **uninsured motorist claims** subject to a **contractual limitation clause** contained in the policy, the limitations period would be as set forth in the policy but not less than three years from the date of the accident.⁷⁶ However, in certain circumstances, an insurer may be equitably estopped from enforcing such a contractual limitations period.⁷⁷

2. For **uninsured motorist claims** based upon the **insolvency of or denial of liability by a liability insurer subject to a contractual limitation clause** contained in the policy, the limitations period would be as set forth in the policy, but not less than one year from the receipt by the insured of written notice of such insolvency or denial of coverage.⁷⁸ The statute does not toll a three year contractual limitation if such notice is received earlier than one year before the expiration of the three year contractual limitation.⁷⁹ If such notice is received within one year of the expiration of the contractual time limitation, then the contractual limitation is extended until one year from receipt of the notice.⁸⁰

3. **Underinsured motorist claims subject to a three year contractual limitation clause** permitted by C.G.S. §38a-336(g)(1) may be tolled if⁸¹:

- a. the insured notifies the insured, **in writing**, of a potential underinsured claim prior to the expiration of the original three year contractual limitation period⁸²
and
- b. suit is commenced or arbitration is demanded not more than 180 days from the date of exhaustion by settlement or final judgment after appeal⁸³

4. If there is **no contractual limitation clause**, then the **statute of limitations** for both **uninsured and underinsured** motorist claims would be the statute of limitations generally applicable to contract actions, i.e. C.G.S. §52-576, would apply.⁸⁴ Such claim accrues when the insured knew or reasonably should have known that the tortfeasor was uninsured.⁸⁵ In the case of an underinsured claim, the claim accrues upon exhaustion of the underlying auto liability policy.⁸⁶

Note that, in order for the notice tolling a contractual limitation clause to be sufficient under the statute, the notice of the underinsured motorist claim must be **in writing** and must specifically advise the insurer of the claimant's intention to make an **underinsured** motorist claim.⁸⁷ Note that the tolling provision only applies to underinsured motorist claims and has no application to uninsured motorist claims.⁸⁸

D. DISCLAIMER OF COVERAGE BY TORTFEASOR'S LIABILITY CARRIER

When a bodily injury liability bond or insurance policy applicable to the tortfeasor's vehicle exists at the time of the accident, but the tortfeasor's carrier denies coverage, can this denial be the basis for maintaining an uninsured motorist claim?

C.G.S. Section 38a-336, titled "Uninsured Motorist Coverage," provides in pertinent part as follows:

"(a)(1) Uninsured and underinsured motorist coverage. (a)(1) Each automobile liability insurance policy shall provide insurance, herein called uninsured and underinsured motorist coverage, in accordance with the regulations adopted pursuant to section 38a-334, with limits for bodily injury or death not less than those specified in subsection (a) of section 14-112, for the protection of persons insured thereunder who are legally entitled to recover damages because of bodily injury, including death resulting therefrom, from owners or operators of uninsured motor vehicles and underinsured motor vehicles and insured motor vehicles, *the insurer of which becomes insolvent prior to payment of such damages. . . .*" **(Emphasis added.)**

The only definition of an uninsured motor vehicle set forth in the statute is in the case of a tortfeasor whose vehicle is insured, the insurer of which becomes insolvent before payment of damages to the claimant.⁸⁹ In that event, a claimant would clearly be able to maintain an uninsured motorist claim.⁹⁰ The insolvency of the tortfeasor's insurer commences the statute of limitations for pursuing a claim for uninsured motorist benefits against the uninsured motorist insurer.⁹¹ However, the statute does not define what constitutes an uninsured motor vehicle in any other situation.

A review of the regulations enacted in furtherance of the statute also reveals that the regulations do not define an uninsured motor vehicle, other than as provided in the statute. Regs. Conn. State Agencies, Section 38-334-6, titled "Minimum Provision for Protection Against Uninsured Motorists," provides in pertinent part as follows:

(a) Coverage. The insurer shall undertake to pay on behalf of the insured, all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle or motorcycle because of bodily injuries sustained by the insured caused by an accident involving the uninsured motor vehicle or motorcycle . . .

'Uninsured motor vehicle' includes a motor vehicle insured against liability by an insurer that is or becomes insolvent." Regs. Conn. State Agencies Section 38a-334-6(a)

The language of the regulation closely parallels that of the statute. Neither the statute nor the regulation provides for the maintenance of an uninsured motorist claim where the tortfeasor's insurer disclaims coverage to its insured.

Many policies, however, extend uninsured motorist coverage to situations in which a bodily injury liability bond or insurance policy applies at the time of the accident, but the company writing that bond or policy denies coverage thereunder. By this language the policy extends coverage to situations in which a tortfeasor's insurer disclaims coverage. While an insurer is powerless to restrict the statutory or regulatory uninsured motorist coverage, the policy can extend uninsured motorist coverage beyond that required by the statutes and regulations.⁹² Therefore, if the policy contains such an extension of coverage, the insured may maintain an uninsured motorist claim.

The next question that arises is whether the mere denial of coverage by the tortfeasor's insurer is enough to provide the insured with uninsured motorist coverage.

Generally, courts have held that a liability insurer's mere denial of coverage provides the claimant with coverage under the uninsured motorist endorsement.⁹³ Furthermore, in arbitration the claimant need neither prove the denial was correct nor challenge the denial as a condition precedent to an uninsured motorist claim.⁹⁴ These cases have based their result on the ability of the uninsured motorist carrier that has paid a claim to its insured under the uninsured motorist coverage subsequently to assert a right of subrogation against the tortfeasor and in that case to test the validity of the liability insurer's disclaimer.⁹⁵ In Connecticut, an **uninsured motorist carrier** now has a right of subrogation against an **uninsured motorist**.⁹⁶

The superior court cases that have addressed this issue are divided, the majority holding that the mere denial of coverage is sufficient to trigger an uninsured motorist claim.⁹⁷ Note that C.G.S. Section 38a-336(g)(2) allows an insurer doing business in this state to contractually limit the time within which to bring suit or demand arbitration on an uninsured motorist claim to one year from the date that the insured received written notice of the liability insurers insolvency or denial of coverage.

When an insurer makes an offer of settlement after disclaiming coverage, and the offer is accepted by the claimant, such acceptance may negate the previous denial of coverage and may prevent the claimant from maintaining an uninsured motorist claim.⁹⁸

An uninsured motorist insurer that has paid uninsured motorist benefits to its insured is not limited to the remedy provided by C.G.S. Section 38a-321 and may maintain an action for a declaratory judgment against the liability insurer of the alleged tortfeasor to determine whether that liability insurer is obligated to indemnify its insured.⁹⁹ In *Amica*, the defendant

Nationwide disclaimed its duty to indemnify its insured, an alleged tortfeasor involved in a motor vehicle collision with Amica's insured. Amica's insured, based upon this disclaimer, made an uninsured motorist claim under his policy with Amica and collected uninsured motorist benefits under said policy. Amica brought a declaratory judgment against Nationwide seeking to determine the validity of Nationwide's disclaimer. Nationwide moved to strike the declaratory judgment action upon the ground that Amica had a more appropriate statutory remedy to determine the defendant's liability, that is, an action based upon C.G.S. Section 38a-321. That statute provides, in pertinent part:

[An] insurance company which issues a policy to any person . . . insuring against loss or damage on account of bodily injury . . . by accident of any person, or damage to the property of any person, for which loss or damage such person . . . is legally liable, shall, wherever a loss occurs under such policy, become absolutely liable.

Nationwide argued that the more appropriate procedure was to require Amica to force its insured to litigate an action against the alleged tortfeasor, Nationwide's alleged insured, obtain a judgment against him, then sue Nationwide under the statute to determine Nationwide's liability to its insured. The court found that such a procedure was not as efficient as a declaratory judgment action to determine the rights and liabilities of the parties.

An uninsured motorist insurer has the right to intervene in an action for declaratory judgment brought by the liability insurer for the tortfeasor against the tortfeasor seeking a determination as to whether the liability insurer had a duty to defend or indemnify the tortfeasor.¹⁰⁰ In such a case, the uninsured motorist insurer has an interest in the resolution of the declaratory judgment action since if the liability insurer is not obligated to defend or indemnify the tortfeasor, the uninsured motorist insurer may be liable under its uninsured motorist coverage to the claimant.¹⁰¹

In *Westchester Fire Ins. Co. v. Allstate Ins. Co.*¹⁰²,

the Supreme Court held that an uninsured motorist insurer that had paid underinsured motorist benefits to its insured could bring a subrogation action against the tortfeasor's liability insurer, which, the uninsured motorist insurer contended, had wrongfully denied coverage of the insured's claim against the tortfeasor. In so holding, the court overruled the case of *Berlinski v. Ovellette*,¹⁰³ which held that an uninsured motorist carrier was not subrogated to its insured's claim against an uninsured tortfeasor. *Westchester*¹⁰⁴ was legislatively overruled, in part, by P.A. 97-58 (C. G. S. Section 38a-336b), which provides as follows:

“Subrogation against owner or operator of underinsured motor vehicle prohibited. No insurer providing underinsured motorist coverage as required under this title shall have any right of subrogation against the owner or operator of the underinsured motor vehicle for underinsured motorist benefits paid or payable by the insurer.”

Therefore, underinsured motorist insurers have no right of subrogation in **underinsured** motorist cases. However, the right of subrogation remains intact in **uninsured** motorist situations.

E. CAUSAL CONNECTION OF UNINSURED MOTOR VEHICLE WITH ACCIDENT/LEGALLY ENTITLED TO RECOVER

"(a) Coverage. The insurer shall undertake to pay on behalf of the insured all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by the insured caused by an accident involving the uninsured motor vehicle

. . ." (Emphasis added.)

Regs. Conn. State Agencies Sec. 38a-334-6(a)

The regulation and most policies require the insured to prove: a bodily injury; sustained by an insured; caused by an accident; and arising out of the ownership, maintenance, or use of an uninsured/underinsured motor vehicle.

1. Legally Entitled to Recover/Elements of Cause of Action and Defenses

The statute and the regulation¹⁰⁵ both state that the insurer is obligated to pay only when the insured is legally entitled to recover from the uninsured or underinsured tortfeasor. The uninsured motorist endorsement contains language similar to the statute and regulation.

The phrase "legally entitled to recover" requires more than simply proving that the uninsured motorist was at fault and that the claimant has sustained damages. To recover uninsured motorist benefits, a claimant must prove that under the insurance contract, as well as under the applicable statutes and regulations, he or she is "legally entitled to recover" damages from the uninsured motorist. "Legally entitled to recover" means that to recover uninsured motorist benefits under the policy, the claimant must prove the following: (1) that the claimant was, at the time of the collision, an insured as defined under our statutes, regulations and policy provisions; (2) that the policy against which claim is being made was in effect on the date of the collision; (3) that the tortfeasor was uninsured or underinsured; (4) that the other motorist was legally liable under applicable law; (5) that the injuries were causally related to the collision; and (6) the amount of damages sustained. The fourth element, whether the uninsured motorist is legally liable, involves a consideration of the substantive defenses available to the uninsured motorist.¹⁰⁶

The uninsured motorist carrier may raise any substantive defenses under applicable law that the uninsured motorist could have raised in any claim brought by the claimant. This would include the failure of the claimant to satisfy applicable no-fault thresholds.¹⁰⁷ It would also include a defense that the claimant was comparatively negligent in entering a car with knowledge that the driver was intoxicated.¹⁰⁸

The phrase 'legally entitled to recover damages' does not constitute a restricted submission to an arbitration panel and therefore does not require de novo appellate review of an arbitration award.¹⁰⁹

2. Definition of Accident/Intentional Conduct as an "Accident"

The regulation and policy language require that the bodily injury to the claimant arise out of an "accident" involving the uninsured motor vehicle.¹¹⁰ However, neither the regulations or at times the insurance policy define the term "accident." A dictionary definition

of "accident" generally defines it as an "unexpected and undesirable event or something that occurs unexpectedly or unintentionally". Since the public policy embodied in the uninsured motorist statutes favors indemnification for accident victims, and the courts have generally interpreted policy provisions based upon the reasonable expectations of the insured, an accident will be viewed from the perspective of the insured to determine if the insured was the victim of an "accident." From such a perspective, the reckless operation of a motor vehicle by an uninsured motorist can be said to be as "accidental" as negligent conduct, since the former conduct is just as unexpected from the viewpoint of the victim.¹¹¹ In addition, a claimant may be entitled to uninsured motorist coverage for injuries from an intentional assault by an uninsured driver.¹¹²

3. Arising out of the Ownership, Maintenance or Use of the Uninsured Motor vehicle.

For liability to arise out of the "use" of a motor vehicle, it need only be shown that the accident or injury "was connected with", "had its origins in," or "grew out of," "flowed from," or "was incident to" the use of the automobile, to meet the requirement that there be a causal relationship between the accident or injury and the use of the vehicle.¹¹³

The regulation requires that the "uninsured motor vehicle be causally connected to the loss for which the claimant seeks compensation."¹¹⁴ Most uninsured motorist policies incorporate the regulation and limit uninsured motorist coverage to liability for damages arising "out of the ownership, maintenance or use of the uninsured motor vehicle."¹¹⁵

The regulation mandates that the claimant's damages arise out of the operation of the uninsured motor vehicle. A motor vehicle not involved in the accident causing the claimant's injuries cannot be an "underinsured motor vehicle" as defined in the statute and regulation, since the claimant's damages did not arise out of the operation of that motor vehicle.¹¹⁶

In *Travelers Insurance Co. v. Kulla*, the claimant was killed while a passenger in a car driven by another. The collision was caused by the operator of the car in which the claimant was a passenger. The car occupied by the claimant, which was owned by his father, was one of four cars insured under the same policy issued by the Travelers. The Travelers policy provided both liability and uninsured motorist coverage in the amount of \$100,000 for each of the vehicles. The claimant was insured as a resident relative of his father. The driver of the vehicle was insured under her own automobile liability policy providing for \$100,000 in liability coverage. The Travelers paid the claimant's estate \$100,000 in liability coverage. The insurer for the driver paid the estate \$100,000 in liability coverage. The estate then made an underinsured motorist claim under the Travelers policy.

The claimant argued that the driver's own vehicle, not the vehicle in which the claimant was a passenger, was the underinsured vehicle. The court concluded that the regulation imposed an additional requirement to the definition of underinsured motor vehicle set forth in the statute. The claimant's damages must be caused by an accident involving the uninsured motor vehicle. The fact that the driver of the car in which the claimant was a passenger owned a car did not make the driver's car an underinsured motor vehicle, as that car had no connection or involvement with the accident.

A vehicle totally unrelated to the accident cannot be considered to meet the definition of an "underinsured motor vehicle" under the statute and regulation.¹¹⁷ "Implicit in the statutory

scheme of Section 38-175c [now Section 38a-336] and in the definition of an 'underinsured motor vehicle' in Section 38-175c(b)(2)[now Section 38a-336(d)], is the commonsensical requirement that the underinsured vehicle be causally connected to the loss for which the claimant seeks compensation."¹¹⁸

For an injury to arise out of the use of the uninsured vehicle, the vehicle must be used in such a manner that it was a necessary element in the infliction of the injury.¹¹⁹ For instance, injuries sustained by a claimant from an assault caused by an unidentified assailant who had followed the claimant's car home, exited his vehicle and assaulted the claimant in the claimant's driveway, did not arise out of the use of the uninsured vehicle.¹²⁰ A claimant injured by gunshots fired from an unidentified vehicle arose out of the use of an uninsured vehicle.¹²¹ A claimant injured by gunshot fired by an assailant who used an unidentified motor vehicle to conceal himself did not arise out of the use of an uninsured vehicle.¹²² A claimant injured by a pedestrian who had been conversing with an unknown driver immediately before throwing a bottle at the claimant's vehicle causing injury to the claimant did not arise out of the use of an uninsured motor vehicle.¹²³ Where the claimant was assaulted outside of his vehicle by carjackers who then attempted to steal the claimant's vehicle, such injuries did not arise out of the operation, maintenance or use of an uninsured motor vehicle within the meaning of the policy and the insured was precluded from maintaining an uninsured motorist claim.¹²⁴ However, injuries caused to the driver of a motor vehicle who swerved off the roadway and down an embankment to avoid a pedestrian were not the result of an uninsured motor vehicle and therefore did not allow him to make an uninsured motorist claim.¹²⁵ An accident caused by a bicyclist, does not arise out of the ownership, maintenance or use of an uninsured motor vehicle, since a bicycle is not defined as a motor vehicle under the policy.¹²⁶

F. STAYS OF ARBITRATION

An insured can compel the insurer to proceed to arbitration under the uninsured motorist provisions of the insured's policy when one of the two alleged joint tortfeasors is insured and the other is uninsured, even though the insured's suit against the insured tortfeasor is still pending.¹²⁷ A claimant, injured by joint tortfeasors, one insured and the other unidentified, may proceed with an uninsured motorist claim without exhausting the liability insurance coverage of the insured tortfeasor.¹²⁸ Furthermore, a court will not enjoin arbitration until a personal-injury claim filed by the uninsured motorist against the insured has been resolved.¹²⁹

G. INTEREST

"Except as provided in sections 37-3b and 52-192a, interest at the rate of ten per cent a year, and no more, may be recovered and allowed in civil actions or arbitration proceedings under chapter 909, including actions to recovery money loaned at a greater rate, as damages for the detention of money after it becomes payable. . ."

Conn. Gen. Stat. Section 37-37a

C.G.S. Section 37-37a allows a trial court, on a motion to confirm or vacate an arbitration award, to allow prejudgment interest from the date of the award.¹³⁰ The allowance of such interest is discretionary and depends upon whether the money was wrongfully retained and when it became due and payable.¹³¹ Note, however, *Maluszewski v. Allstate Insurance Co.*,¹³² which seems to disallow interest when the insurer makes "good faith arguments" in moving to vacate the arbitration award, implying that the detention of money prior to judgment by the insurer is not wrongful under such circumstances.

Interest under the offer of judgment statute, C.G.S. Section 52-192a, is not damages and therefore the addition of interest to the Plaintiff's damages can exceed the insurer's uninsured motorist policy limits.¹³³ However, where the policy provides that "damages include prejudgment interest", interest under the offer of judgment statute constitutes damages and as such cannot exceed the policy limits.¹³⁴

H. CHOICE OF LAW

In *Williams v. State Farm Mutual Automobile Insurance Co.*,¹³⁵ the Supreme Court applied New York substantive law in an underinsured motorist claim involving an accident that took place in New York, a plaintiff who was a Connecticut resident, and a tortfeasor who held a California license and drove a motor vehicle registered in New York.

In *Williams*¹³⁶, the Supreme Court conducted its choice-of-law analysis under both contract and tort choice-of-law principles and concluded that the appropriate law was that of New York under either analysis; therefore, it did not decide which analysis was appropriate for future cases.

In *Fiori, Executrix v. Oliver*,¹³⁷ the court, citing *Williams*, applied tort choice-of-law principles to a claim for alleged malpractice against an insurance agent for failure of the agent to obtain uninsured motorist coverage for the plaintiff's decedent. After a searching analysis of the Restatement (Second) Conflict of Laws Section 145, the court concluded that although the case had more contacts with Canada than Connecticut, the fundamental purpose of Connecticut tort law of providing full, fair and just compensation to victims injured by uninsured motorists far outweighed the interest of Canada in this case and required the application of Connecticut law.

Also see *Banks v. St. Paul Fire and Marine*,¹³⁸ where the court held that, absent other choice-of-law considerations, a Connecticut court should apply the substantive law of New York to determine a claim under an underinsured motorist's policy involving an accident occurring in New York. Both of these cases were decided before the decision in *Reichold Chemicals v. Hartford Accident & Indemnity Co.*,¹³⁹ which adopted the Restatement (Second) approach in contract cases.

In *Reichold Chemicals, Inc. v. Hartford Accident & Indemnity Co.*,¹⁴⁰ the Supreme Court abandoned the traditional rule of *Lex Loci contractus* in favor of the Restatement (Second) of conflict of laws approach to resolving choice of law questions in contract cases.

In *Bellavita v. Allstate Ins. Co.*,¹⁴¹ the court applied the Restatement (Second) Conflict of Laws, Contracts, Sections 88 and 193, approach adopted in *Reichold*¹⁴² and held that Florida law, which permitted stacking of uninsured motorist coverage, applied to a claim for uninsured

motorist coverage, made by a claimant who was a Connecticut resident and was a resident relative of an insured who lived half a year in Florida and half a year in Connecticut, where the policy was issued in Florida covering a motor vehicle which was garaged in Florida and where the claimant was injured in a motor vehicle collision in Massachusetts.

Connecticut law will be applied in the case of an uninsured motorist policy issued in Connecticut to a Connecticut resident involving a hit and run collision that occurred in New York.¹⁴³

A choice of law issue on the measure of damages a claimant is entitled to is not an issue of coverage subject to compulsory arbitration pursuant to the statute and therefore not subject to de novo review.¹⁴⁴

It is now established law that in a dispute between an insurance company and its insured regarding the insurer's obligation to pay underinsured motorist benefits the choice of law issue is properly resolved by applying the insurance and contract choice of law rules set forth in Sections 6, 188 and 193 of 1 Restatement (Second), Conflict of Laws.¹⁴⁵

I. CLAIM OR ISSUE PRECLUSION

In *Mazziotti vs. Allstate Insurance Company*,¹⁴⁶ the Plaintiff, who had been injured in a motor vehicle collision, brought an action for damages against the tortfeasor. The Plaintiff's motion for summary judgment on the issue of liability was granted. After a hearing in damages in the action against the tortfeasor, the Plaintiff obtained a judgment exceeding the tortfeasor's automobile liability insurance policy limits. The Plaintiff then sought to recover underinsured motorist benefits under an automobile liability policy issued to him by Allstate. The Plaintiff's motion for summary judgment as to the issue of Allstate's liability was granted absent Allstate's objection. A hearing in damages was scheduled. When the case came before the trial court for jury selection on the hearing in damages, the Plaintiff filed a "Motion for Judgment", claiming that the judgment he obtained in his action against the tortfeasor should serve as the measure of damages in this later filed underinsured motorist claim against Allstate. Allstate opposed the motion asserting that because it was not in privity with the tortfeasor, and because the Plaintiff had failed to obtain its consent to bring the action against the tortfeasor, the doctrine of collateral estoppel did not apply to bind them on the issue of damages. The trial court granted the Plaintiff's motion for judgment and held that Allstate was bound by the judgment previously rendered in the Plaintiff's action against the tortfeasor, concluding that the insurer and the tortfeasor were in privity.

On appeal, the Supreme Court held that the underinsured motorist insurer and the tortfeasor do not share the same legal right and therefore, they are not in privity such as to invoke the doctrine of collateral estoppel.

The Court stated that "the substance of the cause of action in the first trial was an action in tort; specifically, whether Ye (the tortfeasor) was liable to the Plaintiff for the negligent operation of his motor vehicle. An action to recover under an automobile insurance policy, on the other hand, is not an action in tort, but, rather, an action in contract . . . Payments made pursuant to an uninsured motorist policy are paid on behalf of the insured, and not on behalf of the financially irresponsible motorist who has caused the insured's injuries. The insurer is not the alter ego of the tortfeasor and, although its contractual liability is

premised in part on the contingency of the tortfeasor's liability, they do not share the same legal right. The commonality of interest in proving or disproving the same facts is not enough to establish privity. *Mazziotti*, p. 817 (citations omitted).

In *Mazziotti*, the Court placed significant emphasis on the basic requirement of privity—that the interest of the party to be precluded must have been sufficiently represented in the prior action so that the application of collateral estoppel is not inequitable. *Mazziotti*, p. 818. The Court felt that in the first case the tortfeasor's insurer had limited exposure due to a minimal automobile liability insurance policy and did not contest material issues of facts regarding the tortfeasor's liability. As a result of that limited exposure, there was a limited incentive for the liability insurer to litigate against a recovery in excess of the policy limit and even less incentive to appeal an award in excess of that amount. Allstate's risk was significantly greater in that it had greater policy limits and was in a different position with a far greater incentive to litigate.

The *Mazziotti* court, however, seems to have left the door open for the application of collateral estoppel in underinsured motorist cases. The Court stated at page 819 that “In deciding the issue of privity *under the circumstances of this case*, we conclude, therefore, that the relationship between the party to be estopped (Allstate) and the unsuccessful party in the prior litigation (Ye) is not sufficiently close so as to justify the application of the principles of preclusion.” It would seem that if the Court were faced with different facts, i.e., if the liability insurer's exposure were considerable and liability and damages were vigorously contested in the first action against the tortfeasor, the application of collateral estoppel against the underinsured motorist carrier may not be inequitable.¹⁴⁷

In *Tirozzi v. Shelby Ins. Co.*,¹⁴⁸ the Plaintiff, an employee injured in a motor vehicle collision in the course of his employment, brought an action for underinsured motorist coverage against his employer's underinsured motorist insurer, which action resulted in a judgment for the insurer on the basis of *CNA Ins. Co. v. Colman*.¹⁴⁹ After the enactment of C.G.S. §38a-336 (f) and the court's retroactive application of the statute in *Reliance*, supra, the Plaintiff brought a second action against his employer's underinsured motorist insurer seeking the same damages as the first action. The insurer's motion for summary judgment based upon res judicata was granted and the Appellate Court affirmed refusing to recognize an exception to the doctrine of res judicata where a change in the law occurred by a clarifying act of the legislature.

A claimant, found by an arbitration panel to be more than fifty percent comparatively responsible for his own injuries in an uninsured motorist claim against the primary uninsured motorist insurer, which finding was confirmed by the trial court, and affirmed by the Appellate Court, was collaterally estopped from relitigating the liability issue in a subsequent civil action against a secondary uninsured motorist carrier.¹⁵⁰

An arbitration panel's findings on the issues of liability and damages in an arbitration between the insured and the primary underinsured motorist insurer does not collaterally estop the excess underinsured motorist insurer in a subsequent action by the insured to enforce the excess coverage.¹⁵¹

A jury verdict on the amount of damages sustained by the plaintiff against the tortfeasor collaterally estopps the plaintiff from relitigating this issue in a subsequent action for underinsured motorist benefits against the plaintiff's underinsured motorist insurer.¹⁵² Whether an arbitration award on the amount of damages sustained by the plaintiff collaterally estops the

plaintiff from relitigating damages in a subsequent action against the plaintiff's underinsured motorist carrier has divided the courts.¹⁵³ It would seem that where the plaintiff had a full and fair opportunity to litigate the issue of damages before a fact finder, the fact finder's determination of damages should collaterally estop the claimant from relitigating the issue and allow the insurer to use collateral estoppels defensively.

A plaintiff who obtained a judgment against an uninsured motorist insurer is collaterally estopped from bringing a second action for CUIPA, CUTPA and bad faith against the insurer since the latter claims could have been asserted in the first action.¹⁵⁴

J. PREVENTION OF DOUBLE RECOVERY

C. G. S. Section 38a-335(c) codifies the common law rule that an injured party is entitled to full recovery only once for any harm suffered. An insured may not recover double payment of damages under overlapping insurance coverages.¹⁵⁵ When an injured party recovers just damages for injuries arising out of a motor vehicle collision with an uninsured motorist from their uninsured motorist insurer, the common law rule barring double recovery of damages precludes them from pursuing a medical malpractice claim against the physicians who treated the claimant for those injuries.¹⁵⁶ Similarly, in an underinsured case, when an injured party, after trial receives an amount of damages less than the amount previously received from the tortfeasor, they are not entitled to additional compensation from the undersured motorist carrier, since to allow such a recovery would result in an impermissible double recovery in violation of both public policy and C. G. S. Section 38a-335(c).¹⁵⁷

K. DEFINITION OF UNINSURED MOTOR VEHICLE

Most policies define an uninsured motor vehicle as "a land motor vehicle or trailer of any type: to which no bodily injury liability bond or policies applies at the time of the accident; or to which a bodily liability bond or policy applies...but the bonding or insuring company: denies coverage..." Although an all-terrain vehicle is not a motor vehicle as defined by C.G.S. Section 14-1 (47) since it is not suitable for operation on a highway, it is a motor vehicle as defined under the subject policies of insurance.¹⁵⁸

In *Norfolk*, the claimant was injured when his all-terrain vehicle collided with another all-terrain vehicle owned and operated by another, while both all-terrain vehicles were being operated on a public highway. Both all-terrain vehicles were uninsured. The claimant was a named insured under a policy issued by Liberty Mutual and covering his own private passenger motor vehicle. He was insured as a resident relative under a policy issued to his mother by Norfolk. The claimant made an uninsured motorist claim under both policies claiming that the other all-terrain vehicle was responsible for his injuries and constituted an uninsured motor vehicle as defined under the policy. The arbitration panel agreed. The insurers moved to vacate upon the grounds that because an all-terrain vehicle is excluded from the statutory definition of a motor vehicle, it cannot be an uninsured motor vehicle within the meaning of the policies. Both policies defined an uninsured motor vehicle as "a land motor vehicle of any type" to which no bodily injury liability bond or policy applies at the time of the accident, except any vehicle or equipment "designed mainly for use off public roads while not on public roads." Since the collision occurred on a public road, the policy language excluding all terrain

vehicles from the definition of an uninsured motor vehicle did not apply.¹⁵⁹

An accident, caused by a **bicyclist**, does not trigger uninsured motorist coverage, since a bicycle is not a motor vehicle as defined by the policy.¹⁶⁰ Similarly, a golf cart is not a motor vehicle as defined under the statute (C.G.S. Section 14-1(53)) or the subject policy and therefore cannot qualify as an uninsured motor vehicle under an uninsured motorist policy.¹⁶¹

A driver of a **rental vehicle** who violates the terms of the rental agreement, renders that vehicle an uninsured motor vehicle.¹⁶²

L. EVIDENCE AND DISCOVERY

C.G.S. Sec. 38a-336c. Claims for uninsured or underinsured motorist benefits provides as follows: “(a) An insured, when making a claim for uninsured or underinsured motorist benefits, shall make reasonable efforts to establish what liability coverage there is for the owner and operator of an alleged uninsured or underinsured vehicle.

(b) For any motor vehicle accident occurring on or after October 1, 2006, no insurer may require its insured, as a condition of eligibility for payment of uninsured motorist benefits, to provide affidavits or written statements from the owner or operator of the alleged uninsured vehicle attesting to the fact that the individual did not maintain any liability coverage at the time of the motor vehicle accident.

(c) For any motor vehicle accident occurring on or after October 1, 2006, no insurer may require its insured, as a condition of eligibility for payment of underinsured motorist benefits, to provide affidavits or written statements from the owner or operator of the alleged underinsured vehicle attesting to the lack of any additional bodily injury liability bonds or insurance applicable at the time of the motor vehicle accident.

(d) Nothing in this section shall relieve any person seeking to secure any coverage under an automobile insurance policy of any duty or obligation imposed by contract or law.”

Prior to the enactment of the statute, insurers often required the claimant to obtain affidavits of no insurance or affidavits that the tortfeasor had no other additional insurance before accepting an uninsured or underinsured motorist claim. The statute prohibits this practice. It also creates a standard of reasonableness regarding the insured’s efforts to establish the lack of any coverage or additional coverage for such claims.

Despite this statute, it is the better practice, if practicable, to obtain such statements or affidavits from the tortfeasor. This protects both the client and the attorney in the event that down the road, coverage materializes or additional coverage is found.

Once suit is filed in either an uninsured motorist claim or an underinsured motorist claim, the plaintiff may then obtain by discovery the existence and policy limits of any applicable policies. Additionally the plaintiff can inquire as to the insurer’s efforts to determine the existence of other policies which insure the tortfeasor. Most carriers as part of their claims process perform such searches. Once this information is obtained by discovery the prudent

practitioner should then file requests to admit requiring the insurer to admit the terms of the applicable coverage.

The phrase “local rules of law as to arbitration procedure and evidence will apply” contained in an uninsured motorist endorsement, does not require the arbitrators to apply the rules of evidence that apply in superior court, and does not create a restricted submission to arbitration for purposes of judicial review.¹⁶³

An insured may not introduce into evidence the fact that a liability insurer paid the full limits of the tortfeasor’s liability policy for the purpose of proving that the tortfeasor’s negligence caused the collision.¹⁶⁴ However, since one of the elements of a cause of action for underinsured motorist benefits is the exhaustion of the tortfeasor’s policy, it would seem that such an offer would be relevant and admissible on that issue; if not stipulated to by the underinsured motorist insurer.

An action for uninsured/underinsured motorist benefits is not a lawsuit based on “operation or ownership of a motor vehicle” and therefore a party need not request prior permission pursuant to Practice Book 1998 Section 13-6 to file non-standard interrogatories.¹⁶⁵

When an insurer’s policy contains a reduction for Social Security disability benefits, it is entitled to discovery of the amount of disability benefits received by the insured and to the Social Security Administrative law judge’s decision of the medical cause from which the disability award arises.¹⁶⁶

The courts are split as to whether a non-resident insurer defending a claim for benefits may be compelled to make a representative available for a deposition in Connecticut.¹⁶⁷

Where the policy provisions themselves are not in issue, and the issues for resolution are merely liability of the tortfeasor and damages, the policy terms, limits of coverage and the amount of recovery from the tortfeasor should not be introduced into evidence.¹⁶⁸ Such considerations should be applied by the court post verdict.¹⁶⁹ It is not error to allow the insurer to submit the insurance policy into evidence after accepting the jury’s verdict.¹⁷⁰

M. NEGLIGENCE ACTION AGAINST INSURANCE AGENT FOR FAILURE TO PROCURE ADEQUATE UM/UIM COVERAGE

An insurance agent’s failure to inquire into the economic situation of the insured or to advise of a sufficient level of uninsured/underinsured motorist coverage limits is actionable negligence.¹⁷¹ The agent owes the insured the duty to exercise reasonable skill, care and diligence to procure proper coverage for his client.¹⁷² An agent has the duty to advise the client about the kinds and limits of coverage and to choose the appropriate insurance for the insured.¹⁷³ The agent’s standard of care is not that of ordinary negligence, but the knowledge, skill and diligence of insurance agents in Connecticut.¹⁷⁴ An agent has the duty to explain um/uim coverage, the consequences of not having such coverage and to recommend and attempt to procure the proper amount and offer it to the client.¹⁷⁵

N. APPORTIONMENT OF LIABILITY IN MULTIPLE TORTFEASOR SITUATIONS

In the context of a **multiple tortfeasor** case, the claimant may make claim against their underinsured motorist insurer even though they have settled with **one tortfeasor** for an amount which is greater than the uninsured motorist coverage.¹⁷⁶ An action against an identified tortfeasor may be consolidated with an action against the uninsured motorist insurer based upon the negligence of the driver of an unidentified vehicle.¹⁷⁷ Similarly a claim for underinsured motorist benefits may be joined in an insured's personal injury action against the tortfeasor, even though the tortfeasor's liability coverage has not yet been exhausted.¹⁷⁸

Under C. G. S. Section 52-572h(n), each tortfeasor is liable to the claimant only for their proportionate share of the claimant's damages. In a multi-car collision, where the claimant has filed suit against the alleged tortfeasor and the claimant's underinsured motorist insurer alleging the negligence of a phantom vehicle, the underinsured motorist insurer is allowed to seek apportionment of liability under Conn. Gen. Stat. §52-572h from the tortfeasor against whom the claimant settled with before trial.¹⁷⁹ The fact finder is required to apportion damages and any setoff applies to the percentage of damages applicable to each party's negligence.¹⁸⁰

In such a situation, if the claimant settles with a potential tortfeasor, the claimant is allowed to retain the amount of the settlement, but the award against the remaining tortfeasor is diminished by the percentage of negligence attributable to the settling tortfeasor.¹⁸¹ So, if a claimant settles with one tortfeasor in an amount greater than the underinsured motorist policy and the fact finder finds that the percentage of negligence attributable to the settling defendant is an amount less than the underinsured motorist insurer's policy limit, the insurer is liable for the balance of the claimant's damages.¹⁸² In such a situation the uninsured motorist insurer is not entitled to a dollar for dollar reduction of the settlement payment against the jury's determination of the claimant's total damages, but rather the claimant's total damages are reduced by the percentage of negligence attributed by the jury to the insured tortfeasor.¹⁸³

In a multiple tortfeasor situation, involving a claim against an identified motorist and a claim against an uninsured motorist insurer based on an unidentified force and run vehicle, the claimant is not precluded as a matter of law from pursuing an uninsured motorist claim where she settled with the identified tortfeasor for the full amount of his liability policy and where such policy is greater than the policy limit of the uninsured motorist insurer against which she is making claim.¹⁸⁴ The fact finder is required to find the relative culpability of the tortfeasors and then apportion damages among them based on their relative degrees of fault.¹⁸⁵

Most lower court cases, in multi vehicle collisions involving identified and unidentified motorists, have limited apportionment on procedural grounds, permitting apportionment only in situations where the claimant has joined both the tortfeasor and the uninsured motorist insurer in one action. These cases prohibit apportionment by the alleged tortfeasor from the uninsured motorist insurer where the claimant does not bring suit against both the alleged tortfeasor and the uninsured motorist insurer (for the negligence of a phantom vehicle) in one action¹⁸⁶ and similarly, prohibit an underinsured motorist insurer from seeking apportionment from an alleged tortfeasor.¹⁸⁷ Such cases seem to be wrongly decided since C. G. S. Section 52-572h(n) and 52-102(b) allow apportionment complaints in these instances.¹⁸⁸

In fact, our Appellate Court, has permitted the uninsured motorist carrier to apportion

in a settling defendant who was not made a party to the original action where the claimant previously settled with that defendant.¹⁸⁹

In a multiple tortfeasor situation, where the claimant has received payments from all tortfeasors in an aggregate sum which sum is in excess of the policy's underinsured motorist policy limit, the claimant has no underinsured motorist claim.¹⁹⁰ In such a situation, the coverage is reduced by the total sum of the settlement payments, without regard to the tortfeasor's proportionate share of fault in causing the collision and if such aggregate is greater than the underinsured policy limit against which the claimant is making claim, there is no underinsured motorist claim available to the claimant.¹⁹¹

¹ *Bouley v. Norwich*, 222 Conn. 744 (1992).

² *CNA Insurance Co. v. Colman*, 222 Conn. 769 (1992); See also *P. Morello and Theodore Morris "The Misapplication of Workmen's Compensation Exclusivity to Uninsured Motorist Claims"*, 7 CTLA Forum No. 6, 1 (1989).

³ *Bouley v. Norwich*, 222 Conn. 744, 750-51 (1992).

⁴ *Bouley v. Norwich*, 222 Conn. 744, 754-56 (1992).

⁵ *Roy v. Centennial Insurance Co.*, 171 Conn. 463, 472 (1976).

⁶ *Bouley v. Norwich*, 222 Conn. 744, 757 (1992).

⁷ *Bouley v. Norwich*, 222 Conn. 744, 755 n.9 (1992); *CNA Insurance Co. v. Colman*, 222 Conn. 769 (1992); *Gambardella v. National Union Fire Insurance*, 10 Conn. L. Rptr. No. 9, 278 (1993).

⁸ *Bouley v. Norwich*, 222 Conn. 744, 757-58 (1992).

⁹ See Conn. Gen. Stat. Secs.31-293, 31-293a; *Bouley v. Norwich*, 222 Conn. 744, 758 (1992).

¹⁰ *CNA Insurance Co. v. Colman*, 222 Conn. 769, 773 (1992).

¹¹ *Bouley v. Norwich*, 222 Conn. 744 (1992);

¹² *CNA v. Colman*, 222 Conn. 769 (1992).

¹³ *Conzo v. Aetna Ins. Co.*, 243 Conn. 677 (1998); *Connecticut Union Ins. Co. v. Reis*, 243 Conn. 687 (1998); See also *Zak v. Watts, et al*, 19 Conn. L. Rptr. No. 20, 668 (1997); *Aurelia v. Town of Stratford*, 20 Conn. L. Rptr. No. 9, 319 (1997); *Pouncey v. Anastasio & Sons Trucking, Inc.*, 22 Conn. L. Rptr. No. 1, 62 (1998); *George v. Allstate ins. Co., et al*, 22 Conn. L. Rptr. No. 13, 450 (1998).

¹⁴ *Gomes v. Massachusetts Bay Ins. Co.*, 87 Conn. App. 416 (2005); impliedly overruling *Lemire v. Transcontinental Ins. Co.*, 31 Conn. L. Rptr. 648 (2002), which held that an insurer could not limit uninsured motorist coverage under an employer's liability policy to injuries while occupying an employer owned vehicle and required the employer's policy to provide um coverage to an employee injured while

- occupying their own vehicle during the course of their employment. See also *Ludemann v. Specialty National Ins. Co.*, 51 Conn. Sup. 326 (2008); *Ludemann v. Specialty National Ins. Co.* 51 Conn. Sup. 326 (2008), *aff'd* 117 Conn. App. 656 (2009)
- 15 *Gomes v. Massachusetts Bay Ins. Co.*, 87 Conn. App. 416 (2005) *Ludemann v. Specialty National Ins. Co.*, 51 Conn. Sup. 326 (2008), *aff'd* 117 Conn. App. 656 (2009).
- 16 *Gomes v. Massachusetts Bay Ins. Co.*, 87 Conn. App. 416 (2005); *Ludemann v. Specialty National Ins. Co.*, 51 Conn. Sup. 326 (2008), *aff'd* 117 Conn. App. 656 (2009); See also, Section I B 2.
- 17 *Gamache v. ITT Hartford Ins. Co.*, 9 CSCR 1210 (1994); *Carlo v. Regal, et al*, 13 Conn. L. Rptr. No. 12, 379 (1995).
- 18 *Reliance v. American Casualty Co. of Reading, Pennsylvania*, 238 Conn. 285 (1996).
- 19 See also *Stiles v. Hartford Casualty Insurance Co.*, 44 Conn. App. 1 (1996).
- 20 *Tirozzi v. Shelby Ins. Co.*, 50 Conn. App. 680 (1998).
- 21 *CNA v. Colman*, 222 Conn. 769 (1992).
- 22 *Reliance v. American Casualty Co. of Reading, Pennsylvania*, 238 Conn. 285 (1996).
- 23 *Bellucci v. City of New Haven*, 18 Conn. L. Rptr. No. 6, 218 (1997).
- 24 *Bellucci v. City of New Haven*, 25 Conn. L. Rptr. No. 6, 206 (1999).
- 25 *DePietro v. DPS*, 126 Conn. App. 414 (2011).
- 26 *DePietro v. DPS*, 126 Conn. App. 414 (2011).
- 27 *Mendes v. Automobile Insurance Co. of Hartford*, 212 Conn. 652 (1989); See also *Mrowka v. Aetna Casualty and Surety Co.*, 12 CLT No. 26 (1986); *Safeco Insurance Co. v. Midolo*, 15 CLT No. 35 p. 645 (1989).
- 28 *Mendes v. Automobile Insurance Co. of Hartford*, 212 Conn. 652, 656 (1989).
- 29 "No insurance company doing business in this state shall limit the time within which any suit shall be brought against it or, with respect to subdivision (d) of this section, any claim shall be submitted to arbitration on . . . (d) the uninsured motorist provisions of a motor vehicle insurance policy to a period less than two years from the date of the accident." (Emphasis added.) *Conn. Gen. Stat. Sec.38a-290*.
- 30 *McGlinchey v. Aetna Casualty and Surety Co.*, 224 Conn. 133 (1992).
- 31 *Hotkowski v. Aetna Life and Casualty Co.*, 224 Conn. 145 (1992); *McGlinchey v. Aetna Casualty and Surety Co.*, 224 Conn. 133 (1992).
- 32 *Hotkowski v. Aetna Life and Casualty Co.*, 224 Conn. 145, 150-52 (1992).
- 33 *McGlinchey v. Aetna Casualty and Surety Co.*, 224 Conn. 133, 142 (Berdon, dissenting) (1992).
- 34 *Bocchino v. Nationwide Mutual Fire Ins. Co.*, 246 Conn. 378 (1998); See also *Cherry v. Aetna Casualty*

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- and Surety Co.*, 8 Conn. L. Rptr. No. 13, 412 (1993), *Pagnano v. Allstate Insurance Co.*, 9 CSCR 775 (1994), *Leylegian v. Monarch Life Insurance Co.*, 12 Conn. L. Rptr. No. 5, 168 (1994).
- 35 *McGlinchey v. Aetna Casualty and Surety Co.*, 224 Conn. 133 (1992).
- 36 *Hotkowski v. Aetna Casualty and Surety Co.*, 224 Conn. 145 (1992).
- 37 *Antonios v. Farmers Insurance Exchange*, 21 Conn. L. Rptr. No. 17, 559 (1998).
- 38 *Gohel v. Allstate Ins. Co.*, 61 Conn. App. 806 (2001).
- 39 *Tracy v. Allstate Ins. Co.*, 76 Conn. App. 329 (2003), *aff'd* 268 Conn. 281 (2004); *Dorchinsky v. Windsor*, 90 Conn. App. 557 (2005); *Voris v. Middlesex Mutual Assurance Co.*, 297 Conn. 589 (2010).
- 40 *Romprey v. Safeco Ins. Co. of America*, 129 Conn. App. 481 (2011)
- 41 *Dorchinsky v. Windsor*, 90 Conn. App. 557 (2005).
- 42 *Dorchinsky v. Windsor*, 90 Conn. App. 557 (2005). *Romprey v. Safeco Ins. Co., of America*, 129 Conn. App. 481 (2011)
- 43 *Aetna Life & Casualty Co. v. Braccidiferro*, 34 Conn. App. 833, 841 (1994); *Stevens v. Aetna Life & Casualty Co.*, 233 Conn. 460 (1995).
- 44 *Bayusik v. Nationwide Mutual Ins. Co.*, 233 Conn. 474 (1995).
- 45 *Coelho v. ITT Hartford*, 251 Conn. 106 (1999).
- 46 *McGlinchey v. Aetna Casualty & Surety Co.*, 224 Conn. 133 (1992)
- 47 *Hotkowski v. Aetna Life and Casualty Co.*, 224 Conn. 145 (1992).
- 48 *Stevens v. Aetna Life & Casualty Co.*, 233 Conn. 460, 468 (1995).
- 49 *Aetna Life & Casualty Co. v. Braccidiferro*, 34 Conn. App. 844-51 (1994); *Serrano v. Aetna Insurance Co.*, 233 Conn. 437 (1995).
- 50 *Serrano v. Aetna Insurance Co.*, 233 Conn. 437 (1995).
- 51 *Bayusik v. Nationwide Mutual Insurance Co.*, 233 Conn. 474 (1995); *McMahon v. Aetna Life and Casualty Co.*, 42 Conn. App. 225 (1996).
- 52 *Bilodeau v. Aetna Casualty Co.*, 44 Conn. App. 698 (1997).
- 53 *Bilodeau v. Aetna Casualty Co.*, 44 Conn. App. 698 (1997).
- 54 *Rivera v. Allstate Insurance Co.*, 44 Conn. App. 47 (1996); *Settani v. Aetna Casualty & Surety Co.*, 15 Conn. L. Rptr. No. 20, 648 (1996); *Bilodeau v. The Aetna Casualty and Surety Co.*; 44 Conn. App. 698 (1997).
- 55 *Rivera v. Allstate Insurance Co.*, 44 Conn. App. 47 (1996); *Settani v. Aetna Casualty & Surety Co.*, 15 Conn. L. Rptr. No. 20, 648 (1996); *Bilodeau v. The Aetna Casualty and Surety Co.*; 44 Conn. App. 698 (1997).

- 56 *Rivera v. Allstate Insurance Co.*, 44 Conn. App. 47 (1996).
- 57 *McMahon v. Aetna Life and Casualty Co.*, 42 Conn. App. 225 (1996).
- 58 *Aetna Life & Casualty Co. v. Braccidiferro*, 34 Conn. App. 833, 841 (1994); *Stevens v. Aetna Life & Casualty Co.*, 233 Conn. 460 (1995).
- 59 *Aetna Life & Casualty Co. v. Braccidiferro*, 34 Conn. App. 833, 841 (1994); *Stevens v. Aetna Life & Casualty Co.*, 233 Conn. 460 (1995).
- 60 *Aetna Life & Casualty Co. v. Braccidiferro*, 34 Conn. App. 833, 841 (1994); *Stevens v. Aetna Life & Casualty Co.*, 233 Conn. 460 (1995).
- 61 *Bayusik v. Nationwide Mutual Insurance Co.*, 233 Conn. 474 (1995); *McMahon v. Aetna Life & Casualty Co.*, 42 Conn. App. 225 (1996). In *Prudential Property & Casualty Ins. Co. v. Perez-Henderson*, the court states it is important to note that in *Bayusik*, our Supreme Court did not have to decide the question of whether the statute of limitations period began to run on the date of the accident or on the date of the exhaustion of the insurance policy. First, the insurance contract provided that the statute of limitations period began to run on the date of the accident. Second, the Plaintiff filed her underinsured motorist claims within six years of both the date of the accident and the date of exhaustion of the insurance policy. @; *McMahon v. Aetna Life and Casualty Co.*, 42 Conn. App. 225 (1996); see also *Muller v. Aetna Casualty & Surety Co.*, 17 CLR 694 (1996).
- 62 *Bilodeau v. The Aetna Casualty and Surety Co.*, 16 CLR 261 (1996); Reversed on other grounds, 44 Conn. App. 698 (1997).
- 63 *Mayer v. Biafore, Florek & O'Neill*, 245 Conn. 88 (1998).
- 64 C.G.S. Sec. 52-576.
- 65 *Boscarino v. Metropolitan Property and Liability Insurance Co.*, 5 CLT No. 37 (1979); *Wynn v. Metropolitan Property and Casualty Insurance Co.*, 30 Conn. App. 803 (1993); *aff'd* 228 Conn. 436 (1994); *Estate of Nicolas J. Cirillo v. Nationwide Union Fire Ins. Co.*, 18 Conn. L. Rptr. No. 16, 566 (1997).
- 66 C.G.S. Sec. 52-576.
- 67 *Wynn v. Metropolitan Property and Casualty Insurance Co.*, 30 Conn. App. 803 (1993), *aff'd* 228 Conn. 436 (1994).
- 68 *Polizos v. Nationwide Mutual Ins. Co.*, 21 Conn. L. Rptr. No. 11, 363 (1998); *aff'd* 54 Conn. App. 724 (1999); *aff'd* 255 Conn. 601 (2001); *Davis v. Avis Rent A Car System, Inc.*, 25 Conn. L. Rptr. No. 6, 26 (1999).
- 69 *Wynn v. Metropolitan Property and Casualty Insurance Co.*, 30 Conn. App. 803 (1993) *aff'd* 228 Conn. 436 (1994); *Prudential Property & Casualty Ins. Co. v. Perez-Henderson*, 49 Conn. App. 653 (1998); *Coelho v. ITT Hartford*, 251 Conn. 106 (1999); *Consiglio v. Transamerica Ins. Group*, 22 Conn. L. Rptr. No. 15, 510 (1998); *aff'd* 55 Conn. App. 134 (1999).
- 70 *Scalise v. American Employer's Ins. Co.*, 67 Conn. App. 753 (2002).
- 71 *Coelho v. ITT Hartford*, 251 Conn. 106 (1999).
- 72 *Hamlet, et al v. Hartford Accident & Indemnity Co.*, a1, 18 Conn. L. Rptr. No. 20, 691 (1997); However

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- note C.G.S. §38a-336(g)(2).
- 73 *Bilodeau v. Aetna Casualty and Surety Co.*, 44 Conn. 698 (1997).
- 74 *Bayusik v. Nationwide Mutual Insurance Co.*, 233 Conn. 474 (1995).
- 75 *Wynn v. Metropolitan Property and Casualty Insurance Co.*, 30 Conn.App. 803 (1993), aff'd 228 Conn. 436 (1994).
- 76 C.G.S. Section 38a-336(e).
- 77 *Mascola v. Middlesex Mutual Assur. Co.*, 48 Conn. L. Rptr. No. 9, 295 (2009).
- 78 C.G.S. Section 38a(g)(2). *Martinez v. Raymond*, 39 Conn. L. Rptr. 23, 874 (2005).
- 79 *Martinez v. Raymond*, 39 Conn. L. Rptr. 23, 874 (2005).
- 80 *Didsbury v. Allstate Ins. Co.*, 38 Conn L. Rptr. No. 19, 718 (2005).
- 81 *Tracy v. Allstate Ins. Co.*, 76 Conn. App. 329 (2003), aff'd 268 Conn. 281 (2004); *Dorchinsky v. Windsor*, 90 Conn. App. 557 (2005); *Voris v. Middlesex Mutual Assurance Co.*, 297 Conn. 589 (2010); *Rompfrey v. Safeco Ins. Co., of America*, 129 Conn. App. 481 (2011)
- 82 *Voris v. Middlesex Mut. Assur. Co.*, 297 Conn. 589 (2010); *Stavola v. Middlesex Mut. Ins. Co.*, 43 Conn. L. Rptr. No. 3, 91 (2007).
- 83 C.G.S. Section 38a-336(g)(1); *Tracy v. Allstate Ins. Co.*, 76 Conn. App. 329 (2003), aff'd 268 Conn. 281 (2004); *Orsini v. Kemper Independence Ins. Co.*, 57 Conn. L. Rptr. No. 11, 421 (2014).
- 84 *Wynn v. Metropolitan Property and Casualty Insurance Co.*, 30 Conn. App. 803 (1993), aff'd 228 Conn. 436 (1994); *Prudential Property and Casualty Ins. Co. v. Perez-Henderson*, 49 Conn. App. 653 (1998); *Polizos v. Nationwide*, 255 Conn. 601 (2001).
- 85 *Polizos v. Nationwide*, 255 Conn. 601 (2001).
- 86 *Wynn v. Metropolitan Property and Casualty Insurance Co.*, 30 Conn. App. 803 (1993), aff'd 228 Conn. 436 (1994),
- 87 *Dorchinsky v. Windsor Ins. Co.*, 90 Conn. App. 557 (2005).
- 88 *Fernandez v. Safeco Ins. Co.*, 53 Conn. L. Rptr. No. 15, 588 (2012).
- 89 See Conn. Gen. Stat. Section 38a-336.
- 90 *Hamlet, et al v. Hartford Accident & Indemnity Co.*, 18 Conn. L. Rptr. No. 20, 691 (1997).
- 91 *Hamlet, et al v. Hartford Accident & Indemnity Co.*, 18 Conn. L. Rptr. No. 20, 691 (1997). See also C.G.S. Sec. 38a-336(g)(2).
- 92 See, e.g., *Rosnick v. Aetna Casualty and Surety Co.*, 172 Conn. 416 (1977); overruled *Streitweiser v. Middlesex Mutual Assurance Co.*, 219 Conn. 371 (1991).
- 93 *A. Widiss, "Uninsured and Underinsured Motorist Insurance" Second Edition, Sec.8.14.*

- 94 *A. Widiss, "Uninsured and Underinsured Motorist Insurance" Second Edition, Sec.8.14.*
- 95 *A. Widiss, "Uninsured and Underinsured Motorist Insurance" Second Edition, Sec. 8.14.*
- 96 See V A..I.infra.
- 97 *Jeffrey v. Colonial Penn Insurance Co.*, 7 CSCR 450 (1992); *Peerless Insurance Co. v. Benedetti*, 13 CLT No. 23 (1987); *Reliance Insurance Co. v. Simler*, 8 CLT No. 2, p. 16 (1982); contra; *Nationwide Insurance Co. v. Bergeron*, 8 CLT No. 12, p. 13 (1982).
- 98 See *Smith v. New Hampshire Insurance Co. Inc.*, 12 Conn. L. Rptr. No. 10, 330, 331 (1994).
- 99 *Amica Insurance Co. v. Nationwide Mutual Insurance Co.*, 1 Conn. Ops. 565 (1995). See also, *National Grange Mutual Insurance Co. v. Hartford Ins. Co.*, 1996 Ct. Sup. 5681 (1996); *Colonial Penn Insurance Co. v. Patriot General Insurance Co.*, 16 Conn. L. Rptr. No. 2, 73 (1996).
- 100 *AIU Insurance Company v. Brown*, 42 Conn. App. 363 (1996).
- 101 *AIU Insurance Company v. Brown*, 42 Conn. App. 363 (1996).
- 102 *Westchester Fire Ins. Co. v. Allstate Ins. Co.*, 236 Conn. 362 (1996).
- 103 *Berlinski v. Ovellette*, 164 Conn. 362 (1973).
- 104 *Westchester Fire Ins. Co. v. Allstate Ins. Co.*, 236 Conn. 362 (1996).
- 105 C.G.S. §38a-336(a)(1); Regs. Conn. State Agencies §38a-334a-6(a).
- 106 *Williams v. State Farm Mutual Insurance Co.*, 229 Conn. 359 (1994).
- 107 *Williams v. State Farm Mutual Automobile Insurance Co.*, 229 Conn. 359; See also *Insurance Co. of North America v. Gervasio*, 6 CLT No. 22, 18 (1980) and *Smernoff v. United States Fidelity and Guaranty Co.*, 31 Conn. Sup. 229 (1974).
- 108 *Benoit v. Travelers Insurance Company*, 1996 Ct. Sup. 2392 (1996).
- 109 *United States Fidelity & Guaranty Co. v. Hutchinson*, 244 Conn. 513 (1998).
- 110 Regs. Conn. State Agencies Section 38a-334-6(a).
- 111 See *Roberts v. Utica Mutual Insurance Co.*, 16 CLR 381 (1996); see also *Mills v. Colonial Penn Ins. Co.*, 47 Conn. Sup. 17 (2001), allowing a um claim for a drive by shooting arising out of the operation of a motor vehicle.
- 112 *Walsh v. Nationwide Mutual Ins. Co.*, 22 Conn. L. Rptr. No. 1, 10 (1998); *Jones v. Allstate Ins. Co.*, 37 Conn. L. Rptr. No.7, 268 (2004).
- 113 *Hogle v. Hogle*, 167 Conn. 572 (1975).
- 114 *Travelers Insurance Co. v. Kulla*, 216 Conn. 390, 398-99 (1990).
- 115 *Travelers Insurance Co. v. Kulla*, 216 Conn. 390-91, 394 (1990); *Lucas v. One Beacon Midwest Ins. Co.*, 53 Conn.

- L. Rptr. No. 24, 901 (2012), where a police officer's injuries incurred while helping an intoxicated driver out of the driver's vehicle were found to have arisen "out of the use of the underinsured tortfeasor's vehicle".
- 116 *Travelers Insurance Co. v. Kulla*, 216 Conn. 390, 395-96 (1990).
- 117 *Travelers Insurance Co. v. Kulla*, 216 Conn. 390, 398 (1990).
- 118 *Travelers Insurance Co. v. Kulla*, 216 Conn. 390, 398 (1990).
- 119 *Walsh v. Nationwide Mutual Ins. Co.*, 22 Conn. L. Rptr. No. 1, 10 (1998), holding that an intentional assault by an unidentified driver may constitute an "**accident**", however, the fact that the assault occurred after the unidentified driver had exited his own car, it did **not arise out of the use of the uninsured motor vehicle**. It is also useful for a detailed discussion of the cases dealing with the issue of whether an intentional assault arises out of the use of the uninsured motor vehicle so as to allow recovery under an uninsured motorist policy.
- 120 *Walsh v. Nationwide Mutual Ins. Co.*, 22 Conn. L. Rptr. No. 1, 10 (1998), holding that an intentional assault by an unidentified driver may constitute an "**accident**", however, the fact that the assault occurred after the unidentified driver had exited his own car, it did **not arise out of the use of the uninsured motor vehicle**. See also *Racine v. Galvin*, 46 Conn L. Rptr. No. 9, 323 (2008).
- 121 *Mills v. Colonial Penn Ins. Co.*, 47 Conn. Sup. 17, (2000), 28 Conn. L. Rptr. 471 (2000); See also *Padillo v. Allstate Ins. Co.*, 32 Conn. L. Rptr. 325 (2002).
- 122 *McCluskey v. Progressive Northern Ins. Co.*, 53 Conn. L. Rptr. No. 15, 582 (2012).
- 123 *Gildersleeve v. Travelers Home & Marine Ins. Co.*, 49 Conn. L. Rptr. 67 (2009)
- 124 *Crisci v. Allstate Ins. Co.*, 23 Conn. L. Rptr. No. 19 (1999).
- 125 *Gates v. Budget Rent A Car*, 8 Conn. Ops. 276 (2002).
- 126 *D'Andrea v. Allstate Ins. Co.*, 35 Conn. L. Rptr. No. 14, 529 (2003).
- 127 *Buell v. American Universal Insurance Co.*, 224 Conn. 766 (1993); *General Accident Insurance Co. v. Wheeler*, 221 Conn. 206 (1992); *Sowell v. Travelers Indemnity Insurance Co.*, 31 Conn. Sup. 413 (1974).
- 128 *Lukman v. Lumbermens Mutual Casualty Co.*, 8 CSCR 965, 544 (1993).
- 129 *Metropolitan Property and Liability Insurance Co. v. Wojteczko*, 6 CLT No. 8 p. 14 (1980).
- 130 *Middlesex Mutual Assurance Co. v. Walsh*, 218 Conn. 681 (1991); *Chmielewski v. Aetna Casualty & Surety Co.*, 218 Conn. 646 (1991).
- 131 *Middlesex Mutual Assurance Co. v. Walsh*, 218 Conn. 681 (1991); *Chmielewski v. Aetna Casualty & Surety Co.*, 218 Conn. 646 (1991).
- 132 *Maluszewski v. Allstate Insurance Co.*, 34 Conn. App. 27 (1994).
- 133 *Richardson v. Allstate Ins. Co.*, 22 Conn. L. Rptr. No. 13, 434 (1998); *Gomez v. Infinity Ins. Co.*, 27 Conn. L. Rptr. No. 8, 285 (2000).

- 134 *Rotella v. Head*, 5 Conn. Ops. 1234 (1999).
- 135 *Williams v. State Farm Mutual Automobile Insurance Co.*, 229 Conn. 359 (1994).
- 136 *Williams v. State Farm Mutual Automobile Insurance Co.*, 229 Conn. 359 (1994).
- 137 *Fiore, Executrix v. Oliver*, 13 Conn. L. Rptr. No. 3, 108 (1995).
- 138 *Banks v. St. Paul Fire and Marine*, 2 Conn. Ops 2 (1996).
- 139 *Reichold Chemicals, Inc. v. Hartford Accident & Indemnity Co.*, 243 Conn. 401 (1997); *Reichold Chemicals, Inc. v. Hartford Accident & Indemnity Co.*, 252 Conn. 774 (2000)
- 140 *Reichold Chemicals, Inc. v. Hartford Accident & Indemnity Co.*, 243 Conn. 401 (1997); *Reichold Chemicals, Inc. v. Hartford Accident & Indemnity Co.*, 252 Conn. 774 (2000)
- 141 *Bellavita v. Allstate Ins. Co.*, 25 Conn. L. Rptr. No. 7, 229 (1999).
- 142 *Reichold Chemicals, Inc. v. Hartford Accident & Indemnity Co.*, 243 Conn. 401 (1997); *Reichold Chemicals, Inc. v. Hartford Accident & Indemnity Co.*, 252 Conn. 774 (2000)
- 143 *Vitanza v. Amica Mutual Ins. Co.*, 31 Conn. L. Rptr. No. 14, 521 (2002).
- 144 *Quigley-Dodd, Admx. v. General Accident*, 256 Conn. 225 (2001).
- 145 *General Acc. Ins. Co. v. Mortara*, 141 Conn. App. 571 (2013); aff'd 314 Conn. 339 (2014).
- 146 *Mazziotti v. Allstate Insurance Company*, 240 Conn. 799 (1997).
- 147 In *Harnicar v. Nationwide Mutual Insurance Co.*, 14 Conn. L. Rptr. No. 17, 543 (1995), the court held that a judgment for money damages against the tortfeasor, entered after a default and a hearing in damages, was entitled to collateral estoppel effect against the uninsured motorist insurer on the issues of the legal liability of the tortfeasor and damages. The court held that the uninsured motorist insurer is in privity with the uninsured motorist, since both parties shared the same legal interests, i.e., liability and damages. A key factor in the court's holding was that the uninsured motorist policy required the insured to provide it with copies of any suit papers filed against the uninsured motorist and that the insured had complied with this policy provision. As a result of the insured's compliance, the court found that the uninsured motorist insurer had notice of the suit against the tortfeasor and an adequate opportunity to intervene in this action and present any defenses it felt appropriate in order to protect its interests; See also *Walker v. Richardson*, 17 CLR 18 (1996), where the plaintiff filed a two-count complaint: The first count alleged negligence against the tortfeasor and the second count alleged breach of contract against Nationwide for its alleged failure to pay uninsured motorist benefits. The tortfeasor was defaulted for failure to appear, and a default judgment in the amount of \$25,000 was entered against him. The plaintiff then filed a motion for summary judgment against Nationwide alleging she was entitled to judgment as a matter of law because her uninsured motorist policy required Nationwide to pay uninsured motorist benefits where the plaintiff had an unsatisfied judgment against a tortfeasor and that the default judgment collaterally estops Nationwide from relitigating the issue of the uninsured tortfeasor's negligence. The court, relying on *Harnicar*, held that the default judgment against the tortfeasor had collateral estoppel effect upon Nationwide and precluded it from relitigating the issue of the tortfeasor's negligence.
- 148 *Tirozzi v. Shelby Ins. Co.*, 50 Conn. App. 680 (1998).

- 149 *CNA Ins. Co. v. Colman*, 22 Conn. 769 (1992).
- 150 *Russo v. Allstate Ins. Co.*, 21 Conn. L.Rptr. No. 4, 140 (1998).
- 151 *Young v. Metropolitan Property and Casualty Co.*, 21 Conn. L. Rptr. No. 13, 447 (1998); aff'd 60 Conn. App. 107 (2000).
- 152 *Bertanza v. Fidelity and Guaranty Ins. Co.*, 43 Conn. L. Rptr. No. 21, 747 (2007)
- 153 *Marques v. Allstate Ins. Co.*, 53 Conn. L. Rptr. No. 3 100 (2012 aff'd 140 Conn. App. 335 (2013));
Murphy v. Metropolitan Property and Casualty Ins. Co., 48 Conn. L. Rptr. 179 (2009) ;*Siwek v. Metropolitan Prop. & Cas. Co.*, 53 Conn. L. Rptr. 501 (2012); *Zhuta v. Banita*, 59 Conn. L. Rptr. No., 13, 497 (2015) allowing estoppel; *Baris v. Conn. Interlocal Risk Management Agency*, 47 Conn. L. Rptr. 590 (2008) and *Atlas v. Middlesex Mutual Assurance Co.*, 48 Conn. L. Rptr. 622 (2010) prohibiting estoppel.
- 154 *Powell v. Infinity Ins. Co.*, 282 Conn. 594 (2007).
- 155 *Buell v. American Universal Ins. Co.*, 224 Conn. 766 (1993).
- 156 *Haynes v. Yale-New Haven Hospital*, 243 Conn. 17 (1997).
- 157 *Fahey v. Safeco Ins. Co. of America*, 49 Conn. App. 309 (1998); *Hunte v. Amica Mutual Ins. Co.*, 68 Conn. App. 534 (2002).
- 158 *Norfolk & Dedham Fire Ins. Co. v. Wysocki*, 45 Conn. Sup. 144 (1997); aff'd 243 Conn. 239 (1997).
- 159 *Norfolk & Dedham Fire Ins. Co. v. Wysocki*, 45 Conn. Sup. 144 (1997); aff'd 243 Conn. 239 (1997).
- 160 *D'Andrea v. Allstate Ins. Co.*, 35 Conn. L. Rptr. No. 14, 529 (2003); *Chamberland v. Main Street America Assur. Co.*, 53 Conn. L. Rptr. No. 4, 124 (2012).
- 161 *Andrade v. Tradition Golf Club of Wallingford*, 57 Conn. L. Rptr. No., 12, 463, (2014).
- 162 *Baran v. Fojtik*, 8 Conn. Ops. 1033 (2002).
- 163 *United States Fidelity and Guaranty Co. v. Hutchinson*, 244 Conn. 513 (1998).
- 164 *Van Wart v. Allstate Ins. Co.*, 19 Conn. L. Rptr. No. 4, 117 (1997).
- 165 *Caldwell v. Shelby Ins. Co.*, 23 Conn. L. Rptr. No. 9, 302 (1999); *Restuccia v. Allstate Ins. Co.* 29 Conn. L. No. 8, 309 (2001). *Lugo v. National Cas. Ins.*, 31 Conn. L. Rptr. 9, 322 (2002); *Perras v. Allstate ins. Co.*, 33 Conn. L. Rptr. No. 4, 145 (2002); *Strom v. Middlesex Mutl Assur. Co.*, 30 Conn. L. Rptr. No., 19, 725 (2001).
- 166 *Caldwell v. Shelby Ins. Co.*, 23 Conn. L. Rptr. No. 9, 302 (1999).
- 167 For cases allowing such a procedure, see *Torneiro v. Safeco Ins. Co.*, 25 Conn. L. Rptr. No. 5, 160 (1999); *Antonios v. Farmer's Ins.*, 16 Conn. L. Rptr. No. 6, 208 (1996); For cases disallowing such a procedure see *Strohecker v. Canadian Pacific Express*, 16 Conn. L. Rptr. No. 3, 97 (1996); *Fletcher v. Decker*, 12 Conn. L. Rptr. No. 19, 627 (1994).
- 168 *Bennett v. Automobile Ins. Co. of Hartford*, 230 Conn. 795 (1994); *Fahey v. Safeco Ins. Co. of America*, 49 Conn. App. 306 (1998).

- 169 *Bennett v. Automobile Ins. Co. of Hartford*, 230 Conn. 795 (1994); *Fahey v. Safeco Ins. Co. of America*, 49 Conn. App. 306 (1998).
- 170 *Fahey v. Safeco Ins. Co. of America*, 49 Conn. App. 306 (1998).
- 171 *Byrd v. Ortiz*, 136 Conn. App. 246 (2012).
- 172 *Byrd v. Ortiz*, 136 Conn. App. 246 (2012); *Dimeo v. Burns, et al*, 6 Conn. App. 241, cert. denied, 199 Conn. 805 (1986).
- 173 *Byrd v. Ortiz*, 136 Conn. App. 246 (2012); *Dimeo v. Burns, et al*, 6 Conn. App. 241, cert. denied, 199 Conn. 805 (1986).
- 174 *Byrd v. Ortiz*, 136 Conn. App. 246 (2012); *Dimeo v. Burns, et al*, 6 Conn. App. 241, cert. denied, 199 Conn. 805 (1986).
- 175 *Byrd v. Ortiz*, 136 Conn. App. 246 (2012); *Dimeo v. Burns, et al*, 6 Conn. App. 241, cert. denied, 199 Conn. 805 (1986).
- 176 *Garcia v. ITT Hartford Ins. Co.*, 72 Conn. App. 588 (2002).
- 177 *Bieler v. Continental Ins. Co.*, 36 Conn. L. Rptr. No. 7, 248 (2004).
- 178 *Bogen v. Bonanno*, 41 Conn L. Rptr. 219 (2006); *Palumbo v. Heffel*, 53 Conn. L. Rptr. No 23, 860 (2012).
- 179 *Collins v. Colonial Penn Ins. Co.*, 257 Conn. 718 (2001).
- 180 *Collins v. Colonial Penn Ins. Co.*, 257 Conn. 718 (2001).
- 181 *Collins v. Colonial Penn Ins. Co.*, 257 Conn. 718 (2001).
- 182 See *Collins v. Colonial Penn Ins. Co.*, 257 Conn. 718 (2001) and *Garcia v. ITT Hartford Ins. Co.*, 72 Conn. App. 588 (2002).
- 183 *Espinel v. AIU Ins. Co.*, 55 Conn. L. Rptr. No. 14, 517 (2013).
- 184 *Garcia v. ITT Hartford Ins. Co.*, 72 Conn. App. 588 (2002).
- 185 *Garcia v. ITT Hartford Ins. Co.*, 72 Conn. App. 588 (2002).
- 186 *Herman v. Fresenius*, 57 Conn. L. Rptr. No., 13, 498, 2014); *Massaro v. Craig*, 48 Conn. L. Rptr. 314, (2009); *Kirchoff v. Mescallum*, 56 Conn L. Rptr. 9 (2013); *Santos v. Jinete*, 52 Conn. L. Rptr. 11, (2011); *True v. Stratton*, 51 Conn. L. Rptr. 368 (2011); *Matthews v. Blauvelt*, 50 Conn. L. Rptr 181 (2010); *DiPaolo v. Rocco*, 49 Conn L. Rptr. 591 (2010); *Santana v. Tom*, 46 Conn. L. Rptr. 665 (2008); *Lugg v. Kalfaian*, 55 Conn. L. Rptr. 21 (2013); *Cotto v. Smith*, 57 Conn. L. Rptr. No. 14, 531 (2014); See also *Wheeler v. Wojtowicz* 48 Conn. L. Rptr. No. 16, 579 (2010), where the court denied the uim carrier's motion to strike an apportionment complaint brought by the original tortfeasor against the plaintiff's uim carrier after the plaintiff had filed an amended complaint against the uim carrier.
- 187 *McCabe v. Zurich American Ins. Co.*, 54 Conn. L. Rptr. 10, 373 (2012).
- 188 *Schaffer v. Mindell*, 54 Conn. L. Rptr. No. 24, 908 (2013); *Luciano v. Berlingo*, 45 Conn L. Rptr. 581 (2008), both allow apportionment in this situation.
- 189 *Garcia v. ITT Hartford Ins. Co.*, 72 Conn. App. 588 (2002).

¹⁹⁰ *Guarino v. Allstate Property and Cas. Ins. Co.*, 315 Conn. 249 (2015).

¹⁹¹ *Guarino v. Allstate Property and Cas. Ins. Co.*, 315 Conn. 249 (2015).