



A Law Corporation

**An Overview of Louisiana's
Uninsured / Underinsured
Motorist's Statute**

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Program Overview: A comprehensive summary of Louisiana’s Uninsured / Underinsured coverage and related issues, including proper rejection of UM, and adjusting of UM claims.

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I. Uninsured Motorist Coverage – The Basics

The Why, What, and How

Louisiana drivers are statutorily required to obtain a minimum amount (\$15,000 per person / \$30,000 per accident) of “**liability**” coverage to pay for damages they cause *to others*. This liability coverage is **mandatory** for all vehicles registered in Louisiana. *La. R.S. 32:861*.

However, because some drivers fail to obtain liability coverage, or do not obtain enough, one can purchase additional coverage to protect himself against those uninsured / underinsured motorists on the road. This additional protection is called **UM** coverage, and it is **optional** in Louisiana. *La. R.S. 22:1295*.

Although optional, Louisiana has a **strong public policy** to recognize the most amount of coverage for innocent victims injured. Therefore, Louisiana’s insurance code is written in a manner that **presumes** UM coverage in every policy **unless** the insured specifically **rejects / selects** otherwise. *La. R.S. 22:1295(1)(a)(i)*.

Amount of UM coverage available

Minimum: Unless rejected entirely, insurance policies, by default, must provide UM limits **matching** the amount of liability coverage. However, to save money on premiums, drivers are allowed to **select a lower amount** of UM limits. This can be done by selecting a lower amount of bodily injury UM coverage (at a minimum of \$15,000), or “**economic only**” protection (i.e. reimbursement for medical expenses, lost wages). *La. R.S. 22:1295(1)(a)(i)*.

Maximum: This is debatable. In 1988, the UM statute [22:680(1)(b), now 22:1295(1)(b)] was amended to **restrict** the insured's right to additional coverage to “any available limit **up to the bodily injury liability coverage limits** afforded under the policy”. The current statute still has this restrictive language. So, it would appear that one is still restricted in how much UM he/she can buy. However, in unique situations, courts have found ways of affording more UM coverage than liability coverage (which will be discussed in more detail later). In doing so, and despite the restrictive statutory language described above, one Louisiana Appellate Court has stated, “there is **no statutory or public policy prohibition against providing more UM coverage than liability coverage.**” See *Elliot v. Holmes*, (La. App. 5 Cir. 11/19/15), 179 So. 3d 831, 838, *reh'g denied* (Dec. 4, 2015), *writ denied*, (La. 3/24/16), 190 So. 3d 1195.

II. Rejection / Selection of lower UM limits

Requirements of Rejecting / Selecting UM coverage

Since UM is presumed, nothing must be done if an insured wishes to have UM coverage matching liability limits. But, if the insured wishes to reject, or select lower UM, **strict requirements** must be met. If not, the presumption that UM is provided remains.

According to the UM statute, the rejection / selection of lower limits **must** be made on a **form** by the **Louisiana Commissioner of Insurance**, a current copy of which is shown below:

STATE OF LOUISIANA

This form may not be altered or modified

UNINSURED/UNDERINSURED MOTORIST BODILY INJURY COVERAGE FORM

Uninsured/Underinsured Motorists Bodily Injury Coverage, referred to as "UMBI" in this form, is insurance that pays persons insured by your policy who are injured in an accident caused by an owner or operator of an uninsured or underinsured motor vehicle. Depending on the coverage purchased, UMBI Coverage can provide compensation for both economic and non-economic losses.

Economic losses are those that can be measured in specific monetary terms including but not limited to medical costs, funeral expenses, lost wages, and out of pocket expenses.

Non-economic losses are losses other than economic losses and include but are not limited to pain, suffering, inconvenience, mental anguish and other non-economic damages otherwise recoverable under the laws of this state.

By law, your policy will include UMBI Coverage at the same limits as your Bodily Injury Liability Coverage unless you request otherwise. If you wish to reject UMBI Coverage, select lower limits of UMBI Coverage, or select Economic-Only UMBI Coverage, you must complete this form and return it to your insurance agent or insurance company. (Economic-Only UMBI Coverage may not be available from your insurance company. In this case, your company will have marked options 2 and 3 below as "Not Available" or "NA.")

UNINSURED/UNDERINSURED MOTORIST BODILY INJURY COVERAGE

You may select one of the following UMBI Coverage options (initial only one option):

1. _____
Initials **I select UMBI Coverage** which provides compensation for economic and non-economic losses **with limits lower** than the Bodily Injury Liability Coverage limits indicated on the policy:
\$ _____ each person | **OR** \$ _____ each accident/occurrence
\$ _____ each accident/occurrence
2. _____
Initials **I select Economic-Only UMBI Coverage**, which provides compensation for economic losses **with the same limits** as the Bodily Injury Liability Coverage indicated on the policy.
3. _____
Initials **I select Economic-Only UMBI Coverage**, which provides compensation for economic losses **with limits lower** than the Bodily Injury Liability Coverage limits indicated on the policy:
\$ _____ each person | **OR** \$ _____ each accident/occurrence
\$ _____ each accident/occurrence
4. _____
Initials **I do not want UMBI Coverage.** I understand that **I will not be compensated through UMBI coverage** for losses arising from an accident caused by an uninsured/underinsured motorist

SIGNATURE

The choice indicated and initialed on this form will apply to all persons and/or entities insured under this policy. This choice shall apply to the motor vehicles described in this policy and to any replacement vehicles, to all renewals of this policy, and to all reinstatement, substitute or amended policies until a written request is made for a change to the Bodily Injury Liability Limits, the UMBI limits or UMBI Coverage.

Signature of Named Insured or Legal Representative

Print Name

Date

<Optional Information for Policy
Identification Purposes Only>

<Individual Company Name; Group Name and/or Logo>

The form must be **provided by** the insurer, and **signed** by the named insured or his legal representative. If so, a properly **completed** and **signed** form creates a **rebuttable presumption** that the insured knowingly rejected, or selected less UM coverage. *La. R.S. 22:1295(1)(a)(ii)*.

***Duncan* requirements for rejection/selection**

In addition to the statutory instructions described above, the Louisiana Supreme Court, in *Duncan v. USAA*, 950 So.2d at 544, (La. 11/29/06) enumerated **5 - 6 tasks** to be completed for a UM rejection / selection form to be considered valid. The tasks are listed as follows:

- (1) **Initialing** the selection or rejection of coverage chosen;
- (2) *If limits lower* than the policy limits are chosen (available in options 2 and 4), then **filling in the amount** of coverage selected;
- (3) **Printing** the name of the named **insured** *or* **legal representative**;
- (4) **Signing** the name of the named insured *or* legal representative;
- (5) Identifying the **policy number**; and
- (6) **Date** the form is signed.

Possible changes – see dissent in *Hayes v. De Barton*, 211 So.3d 1275 (La. App. 3 Cir. 2/15/17)

Although Louisiana’s Supreme Court declined to apply a hyper-technical interpretation of the above requirements [*Scarborough v. Randle*, 2012-1061 (La. App. 3 Cir. 2/6/13), 109 So. 3d 961, 966, citing *Banquer v. Guidroz*, (La. 5/15/09), 8 So. 3d 559], courts have strictly looked to the satisfaction of these tasks before validating any rejection form.

Part of Policy & When effective

Once the UM rejection form is signed by the insured, it is **part** of the policy, **even if not physically attached**. And, the rejection is effective **when** the policy is issued. *La. R.S. 22:1295(1)(a)(ii)*.

Duration & Carry Over – Generally

A valid UM rejection / selection form is enforceable throughout the **life of that policy**. It also applies to **subsequent renewals** or **substitute policies** as long as: (1) the **limits** are the same, (2) the **insurer** is the same, (3) the **insured** is the same, and (4) the **policy** itself is *not* new. In this context, a new policy means an **original** contract of insurance, or when an insured is *required* to complete another **application**. Thus, if the limits change, a new UM rejection form must be completed. Or, if a new application is required (even for the same coverage), a new UM rejection form must be completed. *La. R.S. 22:1295(1)(a)(ii)*; *Guillory v. Progressive Ins. Co.*, 117 So.3d 318 (La. App. 3rd Cir. 2013); *Draayer v. Allen*, 195 So.3d 78 (La. App. 1st Cir. 2016).

Change in Rejection / Selection Decision

An insured **may** change the original UM selection or rejection **at any time** during the life of the policy. He/she can do so **by submitting a new UM selection form** to the insurer. *La. R.S. 22:1295(1)(a)(ii)*. Just like the original form, the subsequent form must be properly completed to have any effect. If not properly completed, and if the latter form was not otherwise required, the original rejection/selection decisions remains. *Hughes v. Zurich Am. Ins. Co.*, (La. App. 1 Cir. 8/20/14), 153 So. 3d 477, 480, *reh'g denied* (Sept. 26, 2014), *writ denied*, 2014-2220 (La. 1/9/15), 157 So. 3d 1107. And, if **increasing** UM coverage, the requested increase must also be in **writing**. *La. R.S. 22:1295(1)(b)*. Some courts suggest that a submission of a subsequent rejection form is not a “written request” needed to add or increase UM coverage. *McElroy v. Continental Cas. Co.*, 15 So.3d 377 (La. App. 2 Cir. 6/24/09).

Irregularities that may affect the validation of UM rejection Forms

Since *Duncan* in 2006, many nuances have created debate about whether a particular UM rejection / selection form is complete or enforceable. Below are a handful of the more significant issues.

Incomplete Rejection form that is later completed by another: In *Gray v American National Property & Casualty Co.*, 977 So.2d 839, (La. 2/26/08), a school board insurance policy was at issue. A UM selection form selecting lower limits was deemed ***invalid*** because it was completed by an insurance agency employee *after* it was signed by the school board superintendent. Although the subsequently completed form reflected the application and agreement of the parties to select lower limits of UM coverage, a majority of Louisiana’s Supreme Court decided the form must be **completed before the UM selection form is signed by the insured** such that the signature of the insured (or representative) signifies acceptance of and agreement with all of the information contained in the form. "Allowing a person other than the insured to complete the form after it has been initialed and signed by the insured or insured's representative would not only provide **potential for abuse, confusion, and uncertainty**, but would also violate the well-settled principles governing the proper completion of UM selection forms." (Weimer, J, concurs in the result; Victory and Traylor, JJ, dissent)

Incomplete Rejection form that is later completed by the Insured: The rejection of a UM coverage is ***valid*** where the insured fails to initial the selection on the form rejecting UM coverage prior to signing it, but **later initials the form prior to the accident** at issue. *Morrison v USAA Casualty Insurance Co.*, 106 So.3d 95 (La. 1/11/12). A UM rejection is valid although **executed a week after the policy was issued**; “(t)here is no provision in the UM statute that mandates the selection/rejection of UM coverage **by an insured** only at the application for or issuance of a policy”. *Bordelon v Western Heritage Ins. Co.*, 48 So.3d 421, (La. 1st Cir. 10/29/10).

Printed Named – Insured or Agent: In some cases, UM rejection forms contained only the printed name of the legal representative signing the form, *or* only the insured name, but not both. Citing language from the UM statute, courts recognized that the named insured ***OR*** the insured’s legal representative’s name must be printed in the waiver form, not both. In other words, courts

found **no requirement** that **both** the legal representative's name and the insured's name be printed on the form at the same time. *Guthrie v Breaux*, 8 So.3d 643 (La. App. 5th Cir. 2009).

For example, a rejection form that did not have a typed name of person who signed rejection (on behalf of corporate named insured), but did have the typed name of the insured (a corporation), was still **valid**. *Banquer v. Guidroz*, (La. 5/15/09), 8 So. 3d 559. Even when considering the *Duncan* tasks, courts found that the printing of the name of the insured **or** legal representative satisfied task #3 (Printing the name of the named insured or legal representative) **when there is no question as to which policy was involved**. *National Interstate Ins. Co. v Collins*, 21 So.3d 316 (La. 2009); *Duke v. Evans*, 104 So.3d 464 (La. App. 2nd Cir. 2012), *writ denied*, 102 So.3d 37 (La. 2012). In doing so, courts have followed the Louisiana Supreme Court in declining to apply a hyper-technical interpretation of the requirements. *Scarborough v. Randle*, (La. App. 3 Cir. 2/6/13), 109 So. 3d 961, 965.

Cursive, Handwritten, Electronic Signature: The insured's signature does *not* have to be in cursive or handwritten because the UM statute does not prescribe a method of affixing a signature. So, it **can** be written by hand, printed, stamped, typewritten, engraved, or by various other means *provided that the signature was authorized* and intended to constitute the signature. *Reno v. Travelers Home and Marine Ins. Co.*, (La. App. 1 Cir. 11/7/03), 867 So.2d 751); *Fleming v. JE Merit Constructors, Inc.*, (La. Ct. App. 1 Cir. 3/29/08), 985 So.2d 141, 147; *Rainey v. Entergy Gulf States, Inc.* 35 So.3d 215, 225-226, 2009-572 (La. 3/16/10). Accordingly, courts have recognized that an **electronic signature** on a UM waiver form is **valid** under the Uniform Electronic Signature Act (La. R.S. 9:2606, *et. seq.*), unless evidence otherwise (such as affidavit from insured refuting signature) *Bonck v. White*, 115 So.3d 651 (La. App. 4th Cir. 2013).

Date: A UM rejection form is not valid unless it is **dated** by the insured **at the time** of signature. *Gullatt v Allstate Ins Co.*, Fifth (La.) Circuit, No.10-CA-448 (2/15/11)

Policy Number: A policy number is required on the rejection with **one exception**. If there is no policy number at the time the UM rejection form is signed, a **binder** number will suffice. *Kurz v Milano*, 6 so.2d 916, (La. App. 4 Cir. 2/18/09).

Insurer's name: Courts have held that a waiver may be valid although the insurer's name does not appear on the form. *Gingles v Dardenne*, 4 So.3d 799 (La. 2009). *However*, there is some question if this *still* applies. *Gingles* dealt with a UM rejection forms that predated changes to the form in 2008. The pre-2008 form/bulletin contained optional language for the insured name that was not repeated in the post-2008 form/bulletin. In the new form/bulletin, the **name of the individual company, the group name, or the insurer's logo is required**.

Change to Insured Name: Where the owner remains the same, but simply changes the insured's **business name** as named insured under the policy (Cancienne Plumbing, Inc., to Cancienne Plum Tuning to Cancienne Plumbing), a new rejection form is **not required**. *Munsch v Liberty Mutual Ins. Co.*, 928 So.2d 608, (La. 1st Cir. 2006); *Rodriguez v Direct General Ins. Co.* 86 So.3d 651, (La. 5th Cir. 1/24/12).

Form modification: Courts have found that the modification of the "header" in the commissioner's form did **not invalidate** the waiver. Where a UM form is otherwise identical to

that of the insurance commissioner, except the header (language advising of the prohibition against altering or modifying the form was absent), and there is **no material discrepancy** as to the named insured on the policy and the UM form, the form is valid. *Scarborough v. Randle*, 109 So.3d 961 (La. App. 3rd Cir. 2013).

Understanding / Language Barrier: Courts have held that in the absence of fraud, duress or misconduct, the insured is **presumed to know and understand** what he/she is signing. This is so even if the insured's native or primary language is not English.

In *Garza v. Argueta*, 113 So.3d 384 (La. App. 5th Cir. 2013), a Plaintiff executed a waiver of UM coverage, but later argued it was invalid because English was not his first language and he did not understand what he was signing when he signed the form. The court rejected his argument because the plaintiff had lived in an English speaking country for a number of years, held in English speaking job, and filled out other applications and English. In *Garay-Lara v Cornerstone National Insurance Co.*, 145 So.3d 423, (La. 1 Cir. 5/2/14), a court held that a UM rejection coverage was valid where insured claimed he did not fully understand what he was doing, but agent communicated with him entirely in Spanish, insured's primary language, and obtained his choice and desire to reject UM coverage in Spanish, and at no time did insured state he did not understand the explanation he was given regarding the availability of that coverage.

Authority of another to Execute UM Waiver: A UM rejection form can be signed by an agent / legal representative of the insured as long as there is authority to do so. And, although authorization *can be in writing*, if is not required as verbal authority is sufficient. *Terrell v Fontenot*, 96 So.3d 658 (La. App. 4th Circuit 2012).

In *Terrell, supra*, an employee of a company was able to sign the UM rejection form on behalf of the company, even though such authority was verbal. In another case, a husband was able to sign his wife's name because it was with her permission. *Villalobos v. U.S. Agencies Casualty Ins. Co.*, 112 So.3d 398 (La. App. 4th Cir. 2013) Conversely, if there is no clear authority, the signature may not be valid, such as when an insurance agent does not discuss with the insured the limit of lower coverage but unilaterally fills in the amount of the limit. *Ware v Gemini Ins. Co.*, 51 So.3d 179, (La. 3 Cir. 11/24/10).

Changed Policy Number in Subsequence: The changing of a number in the policy number sequence to reflect that the insured had qualified for a group discount **does not render invalid** the UM rejection/selection form validly executed at the inception of the policy. *Denofrio v Greer*, 999 So.2d 1235 (La. App. 2 Cir. 1/14/09).

III. Additional Points concerning UM

Punitive damages of Tortfeasor – Can be excluded

An insurance company can exclude, from UM coverage, **punitive or exemplary damages** of a tortfeasor, as long as the exclusion is specifically set forth in the policy. In other words, an insurer can avoid paying any punitive damages (such as with an intoxicated driver) if the policy language

specifically omits coverage for same. *La. R.S. 22:1295(1)(a)(i); Fortier v. Hamblin* 610 So.2d 897 (La. App. 1 Cir. 1992).

Stacking of UM coverage

Normally, Louisiana **does not** allow the stacking of multiple UM policies. Under its anti-stacking statute, an insured is prohibited from combining or stacking UM benefits either inter-policy or intra-policy to increase coverage. Therefore, if several UM policies are available to him, the insured may recover under one and only one of the policies. He may **select** which policy from which to recover. **There is one exception.** A second policy may be stacked if: (1) the injured party is occupying an automobile not owned by him; (2) the UM coverage on the vehicle in which the injured party was an occupant is primary; and (3) the primary UM coverage is exhausted due to the extent of damages. In that case, **one** other UM policy can be stacked and that coverage is considered as excess. *La. R.S. 22:1295(c); Irvin v. State Farm*, 867 So.2d 777 (La. App. 3 Cir.12/10/03).

UM extended to Passengers

Only recently has UM coverage been definitively extended to **passengers**. In *Bernard v Ellis*, 111 So.3d 995, (La. 2012), a majority of the Louisiana Supreme Court concluded that a person who is a passenger in an automobile is a permissive “**user**” of the vehicle. As such, the passenger is entitled to the same UM coverage under a policy which provides UM coverage to any “user” of the vehicle.

UM extended to other “Users”

The definition of “user” of a vehicle has even been extended to those **physically outside** of the vehicle. In *Tyler v. Dejean*, 121 So.3d 204 (La. App. 3rd Cir. 2013), UM coverage was extended to 3 employees who were **trimming weeds, picking up refuse, and placing refuse bags on employer’s insured truck**. An uninsured motorist lost control and struck the employees. A UM claim was made by the employees on the UM policy for the employer’s truck. The primary policy provided UM coverage to persons “occupying” a covered auto. Since UM coverage is mandated with liability coverage, however, the court concluded that the real test was whether the employees were afforded liability coverage because they were “using” the insured auto. The majority found such use.

No UM - Owned / Unlisted vehicle

UM coverage **does not apply** to ... an insured, **while occupying** a motor **vehicle owned** by the insured **if such motor vehicle is not described** in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy. Notably, this exclusion is **limited**. It **only applies if** the policy is one **that describes specific motor vehicles**. *La. R.S. 22:1295(e)*. **Ownership** by key – if the claimant does not own the vehicle, this provision does not apply. In *Salvaggio v Allstate Ins. Co.*, 997 So.2d 845, (La. 3 Cir. 11/5/08), a husband and wife were in the process of obtaining a divorce when their children were injured in

an accident while riding in husband's vehicle. Because the husband and children were residing with husband's mother (mother-in-law), UM claims were made on the mother-in-law's UM policy, which did not list the father's truck on its policy. The insurance company cited 22:1295(e) to deny the claims. In its decision, the court first distinguished the UM claim made by the father from UM claims by the children. Then, insofar as the children, the court found UM coverage because they were occupying a vehicle which they **did not own**.

Self-Insurer – No UM rejection required

La. R.S. 22:1295(3) provides that **any party** possessing a certificate of **self-insurance** as provided under the Louisiana Motor Vehicle Safety Responsibility Law, **shall be an “insurer” within the meaning of uninsured motorist coverage** provided under the provisions of this Section. This provision **shall not** be construed to **require** that a party possessing a certificate of self-insurance **provide UM coverage** or that such coverage is provided by any party possessing such a certificate. And, provisions in a UM policy containing an **exclusion for self-insurers** does **not violate Louisiana's public policy** regarding UM coverage because it does not in any way thwart the legislature's objective of providing for UM coverage in situations where an alleged tortfeasor is uninsured or inadequately insured. *Chauncy v. Allen*, 15-CA-0874 (La. App. 1 Cir. 2/26/16),

Excluded driver – no UM

In *Filipski v. Imperial Fire & Cas. Ins. Co.* 2 So.3d 742, (La., 2009), a motorist was expressly excluded as a driver from a policy's liability coverage, yet made a UM claim under the same policy from which he was excluded. Louisiana's Supreme Court found that *because he was not an insured for “liability” purposes*, he was **also precluded from recovering under the policy's UM coverage**. However, in *Green v. Johnson*, (La.10/15/14); 149 So.3d 766, the Supreme Court **narrowed** this statement of law (*no UM if not liability insured*) by stating it **applies only** where parties **contractually exclude all coverage** (i.e. due to the exclusion) and the UM claimant is seeking **statutory** (i.e. presumed) UM coverage.

UM can exist for a person not covered by liability

In some circumstances, one may **still be considered a UM insured** even though he is properly **excluded under liability** coverage. Such could happen if a policy has separate exclusions for its liability and UM sections, and the exclusions **differ**. This may also lead to **more UM coverage** than liability coverage mentioned earlier.

In *Green v. Johnson*, (La.10/15/14); 149 So.3d 766, a driver of a motorcycle was not considered an insured *under the liability section* of the policy due to specific liability exclusions. However, the **UM section** of the policy **had its own exclusions** with **different language** that did not exclude the motorcyclist from UM. Therefore, the court found that he was still considered a UM insured even though he was properly excluded under liability.

In *Elliott v Holmes*, (La. App. 5 Cir. 11/19/15), 179 So. 3d 831, 838, *reh'g denied* (Dec. 4, 2015), a plaintiff worked for car dealership and was driving a customer's car to the shop for service when he was rear-ended. The plaintiff filed suit against the customer's UM carrier. The customer's

policy provided liability and UM coverage with limits of \$500,000 per person, but had an exclusion limiting liability coverage to minimum limits (\$15,000) for anyone while servicing the vehicle. Because the **UM section of the policy had its own exclusions**, which **differed** from the liability section by not having the same exclusion language, the **reduction did not apply**.

So, the statement of law in *Filipski* (no UM if not liability insured) still applies, but only if the same means of exclusion apply to the entire policy, including liability and UM sections.

UM Exclusions – Must be Clear

For any UM exclusion to be **enforceable**, the exclusion language must be **clear**. If not, UM coverage will be provided under the statutory presumption. In *Mistich v. Weeks*, 107 So.3d 1 (La. App. 3rd Cir. 2012), *writ denied*, 100 So.3d 838 (La. 2013), a UM claim was made under a “Comprehensive Automobile Policy” purchased by the claimant who was injured while driving a company vehicle provided to him for regular use. The UM claim was denied because the policy excluded coverage for any vehicle not showed on its Declarations. However, the court noted that the declarations page listed no automobiles and allotted no spaces for which to do so. Thus, the court found the policy exclusion was **ambiguous**, thus **unenforceable**, and **UM was provided** under Louisiana’s statutory presumption.

UM Exclusions – Must be Specific to UM section

As seen in *Green v. Johnson*, and *Elliott v. Holmes* discussed above, for any exclusion to be applicable to UM, there can be no question that the Exclusion applies to the UM section. If a policy has separate definitions and/or exclusions for sections of its policy (i.e. Liability and UM sections), one should **look to the UM section** to determine if there is UM coverage, especially if the sections differ in language.

UM Credits – WC / Med Pay

UM insurers may receive a credit from any **workers compensation** paid to its insured for the same accident. The reasons are (1) the UM carrier and the WC provider are **solidary obligors** such that payment by one extinguishes the obligation of the other to the extent of the payment, and (2) evidence of the credit is not kept out at trial by the “collateral source rule”. *Cutsinger v Redfern*, No. 2008-C-2607 (5/22/09) (Victory, J concurs in the result) [confirms *Bellard v. American Century Insurance Company* 987 So.2d 654 (La. 4/18/08)]

Another UM credit can be taken from any payments the UM insurer made to its insured under the **medical payments coverage** for the same accident. However, the credit is conditional. First, the credit must be specifically set forth in the UM policy. Secondly, the insured must be **made whole before** the credit can apply. In other words, if the insured’s total damages exceed the UM policy limits, the credit does not apply. *Barnes v. Allstate Insurance Co.*, 608 So.2d 1045 (La.App. 1st Cir.1992); *White v. Patterson*, 409 So.2d 290 (La.App. 1st Cir.1981), *writ denied*, 412 So.2d 1110 (La.1982); *Boudreaux v. Colonial Lloyd's Ins. Co.*, 633 So. 2d 682, 686 (La. Ct. App. 1993).

Subrogation by UM carrier

If a UM insurer makes payment, it **receives the right** to recover that amount from the tortfeasor. However, it **acquires no greater rights** than those by the insured, and is subject to all limitations applicable to the original claim. *Blazer v. Honda Motor Company*, 872 So.2d 534 (La. App. 3 Cir. 3/33/04). **Timing** is also important. Subrogation can only occur as long as the insured still has right of recovery. In other words, if the insured already settled with or released the tortfeasor before UM payment, there is no subrogation. *Bosch v. Cummings*, 520 So.2d 721 (La.1988).

Conflict / Choice of Law

Louisiana's UM statute provides that its UM law shall apply to any **accident** which occurs **in Louisiana** and involves a **Louisiana resident**. *La. R.S. 22:1406(D)(1)(a)(iii)*. Although this means that Louisiana's UM law can be applied to foreign insurance policies in *most* cases (where the accident occurred in Louisiana and involved a Louisiana resident), such is **not** automatically applied. Instead, courts are **instructed** to conduct a **choice-of-law analysis** pursuant to La. Civil Code Arts 3515 – 3537 to determine which law should apply. The objective is to identify **the state whose policies will be most seriously impaired** if its law is not applied to the particular issue involved in the lawsuit. In an insurance coverage context, such may be based on: (1) relationship of each state to parties and accident, (2) pertinent contacts of each state to the policy in question, including the place of negotiation, formation, performance, object of contract, and place of domicile, residency, business of the parties, and (3) purpose of the contract. *Champagne v. Ward*, (La. 1/19/05), 893 So. 2d 773, 775; *Jones v Government Employees Insurance Co.*, (La. App. 4 Cir. 12/16/15), 183 So. 3d 636, *writ denied*, (La. 3/4/16), 188 So. 3d 1059.

In *Champagne v. Ward*, *supra*, an accident occurred in Louisiana between a Mississippi driver and Louisiana driver. The Mississippi driver made a UM claim under his policy arguing that Louisiana law should apply. However, the court found that the law of Mississippi applied. Mississippi is where the policy was issued, the claimant resided, and the insured's vehicle was garaged. Thus, Mississippi had more substantial interest in the application of its laws governing UM coverage and Mississippi's policies would be most seriously impaired if its law were not applied to the policy.

In *Jones v Government Employees Insurance Co.*, *supra*, there was a question of whether Georgia or Louisiana law applied to a UM claim. The subject accident occurred in Louisiana, the insured vehicle was registered in Louisiana, the claimant voted in Louisiana, and had a Louisiana license. However, the claimant lived in Georgia at the time the UM policy was issued to him, in Georgia, with a Georgia address. The court decided that Louisiana law applied.

Prescription – UM claim – 2 years

La. R.S. 9:5629 provides: Actions for the recovery of damages sustained in motor vehicle accidents brought pursuant to UM provisions in motor vehicle insurance policies are prescribed by two years reckoning from the date of the accident in which the damage was sustained. Prescription is interrupted by the filing of a suit in a court of competent jurisdiction. *La. C.C.P. 3462*. The interruption of prescription against one solidary obligor is effective against all solidary obligors. *La. C.C.P Art. 1799 / 3503*.

IV. Burden of Proof

UM Plaintiff's burden of proof

When making a UM claim, the claimant has the initial **burden of proof**. To satisfy this burden, he must produce "sufficient facts" to the UM insurer that:

1. The adverse driver in the accident was uninsured or underinsured;
2. The un/underinsured driver was at fault;
3. Such fault gave rise to damages; and
4. Extent of damages.

Reed v. State Farm (La. 10/21/03), 857 So.2d 1012, citing *McDill v. Utica Mut. Ins. Co.*, 475 So. 2d 1085, 1088 (La. 1985). Insofar as the first item (adverse driver uninsured or underinsured), such can be done by an **affidavit / sworn testimony** by the adverse driver, or Department of Public Safety and Corrections. *La. R.S. 22:1295(6)(a)-(c)*.

Once the above information is provided to the insurance company, a *prima facie* case is established, and the burden **shifts** to the insurer. *La. R.S. 22:1295(6)(d)*.

“Miss and Run” – Burden increased

In a situation where damages may be suffered by UM claimant when there was **no physical contact** (i.e. run off roadway) with a **phantom** adverse driver (i.e. driver ran off), the above burden is *heightened*. The UM claimant must now show, by **an independent and disinterested witness**, that the **injury was the result** of the actions of the driver of another vehicle whose identity is unknown or who is uninsured or underinsured. *La. R.S. 22:1295(f)*. And, it is **not necessary** that the witness actually **see** the accident. In *Wheat v. Wheat*, 868 So.2d 83, (La. App. 1 Cir. 11/7/03), a “miss and run” UM claim was established by the testimony of the investigating state trooper who stated that his investigation revealed that a transmission was left in the roadway that caused the subject accident involving insured's vehicle. The trooper further stated that he did not get this information from insured, that he did not stand to benefit from the statement, and that he viewed scene soon after accident.

V. Adjusting UM Claims - Duties / Penalties

Payment of UM claim - Unconditional Tender

If the insured has carried his burden (elements 1-4 above), and if the UM insurer does not refute any part of the claim, it **must pay** the claimant in the amount presented.

If, however, the UM claimant is unable to fully prove the last element of the claim (i.e. exact extent of his general damages), or if the UM insurer disagrees with same, the UM insurer simply cannot do nothing. It **must tender** a **reasonable amount** as a sign of its good faith to comply with its contractual duties under the insurance policy. *McDill v. Utica Mut. Ins. Co.*, 475 So.2d 1085 (La.1985). The tender **amount** should “be a figure over which reasonable minds could not differ.” Further, the tender must be **unconditional** since it is contractually owed. *Id.* at 1091–92; *Guidry v. State Farm Fire & Cas. Co.*, 2011-262 (La. App. 3 Cir. 10/5/11), 74 So. 3d 1276, 1285, *writ denied*, 2011-2470 (La. 2/10/12), 80 So. 3d 472.

Since it is “unconditional”, an unconditional tender is **not recoverable**. However, it also is **not a waiver of a right to litigate** coverage. *State Farm Mutual Automobile Insurance Company v. Azhar*, 620 So.2d 1158, 1159 (La.1993). The **qualitative effect** of a UM unconditional tender is that it protects a UM insurer – for the amount tendered - from **penalties** and **attorney's fees** should it be found after trial that some or more UM payment was due. *Clark v. State Farm Mutual Automobile Insurance*, p. 21 (La.5/15/01), 785 So.2d 779, 792 (issue before the court was abandonment, and not specifically the viability of coverage, but the statement speaks to the purpose and operation of the statute).

If after suit - Judicial interest included

By operation of La. R.S. 13:4203, once suit on a UM is filed, the claim necessarily increases to take into account **accrued interest** from the date of judicial demand (date suit is filed). Therefore, if an unconditional tender is made **after suit has been filed**, it must include both a **principal component** and an **interest component**. *Ridenour v. Wausau Ins. Co.*, 627 So. 2d 141, 143 (La. 1993). In other words, when making a post-suit unconditional tender, a UM insurer must include judicial interest if it wishes to absolve itself of obligations under the policy.

Duties of Adjusting UM claim

UM claims are considered “**1st party**” claims because they are based on insurance contracts to which the claimant is a party. Thus, obligations owed are **contractual** (versus 3rd party claims that are based on delictual obligations of reasonableness). Since a UM claim is a 1st party claim, the duties of a UM insurer in adjusting claims can be found in pertinent parts of La. R.S. 22:1892, and R.S. 22:1973 that relate to 1st party claims.

22:1892 – Duties / Penalties – UM claim

Under La. R.S. 22:1892(A)¹ the UM insurer **shall pay, or tender**, the amount due to the insured **within 30 days** after **receipt of satisfactory proof of loss**. *La. R.S. 22:1892(A)(1),(4)*.

If the UM insurer fails to pay or tender a UM claim after 30 days of proof of loss, it **shall be penalized** only if such failure is **arbitrary, capricious, or without probable cause**. If so, the penalty will be - in **addition** to the underlying UM claim - the *greater* of: (a) **50% damages** on the amount found to be due, or (b) **\$1000**. If partial payment or tender was made, then the penalty is 50% of the difference between the amount paid / tendered and the amount found to be due. Finally, the insurer will also have to pay **reasonable attorney fees and costs**. *La. R.S. 22:1892(B)*

22:1793 – Duties / Penalties – UM claim

In addition, under La. R.S. 22:1793(A), the UM insurer also owes the insured the duty of good faith / fair dealing. Thus it must adjust claims fairly / promptly, and make a reasonable effort to settle claims with the insured. Per 22:1793(B), this means that an insurer cannot **knowingly**:

1. **Misrepresent** pertinent **facts** or insurance **policy** provisions.
2. **Fail to pay** a **written** settlement agreement within **30 days**
3. **Deny coverage** or **attempt to settle** a claim pursuant to an application which the insurer knows was **altered** without notice or consent of the insured.
4. **Mislead** a claimant as to the applicable **prescriptive** period.
5. **Fail to pay** the amount of **any claim** to an insured **within 60 days** after **receipt of satisfactory proof** of loss when such failure is arbitrary, capricious, or without probable cause.

If a UM insurer **knowingly** breaches 1793 duties, it **shall** be liable for any **new damages** (general or special) sustained as a result of the breach. The payment of these new damages is **mandatory**. *La. R.S. 22:1793(A)*. In **addition**, the claimant **may** be awarded **penalties** (on top of new damages sustained), the amount of which will be the *greater* of: (a) **up to 2 x new damages** sustained, (b) or **\$5000**. These penalties are **optional**. *La. R.S. 22:1793(C)*

Penalties – Defenses

Although penalties greatly help a UM insurer consider its contractual and good faith duties when adjusting claims, penalties should not scare the insurer from **reasonably** evaluating each UM claim, and **disputing** anything that is not sufficiently proven. If the denial is justifiable, penalties should not be owed.

¹ This statute was renumbered from La. R.S. 22:658 by Acts 2008, No. 415, § 1, effective January 1, 2009.

Recall that statutes 22:1892 and 22:1793 both require “**clear**” proof that the insurer was “**arbitrary, capricious, or without probable cause,**” a phrase that courts have found is **synonymous with “vexatious refusal to pay,” or unjustified action without reasonable or probable cause or excuse.** *Reed*, 857 So.2d at 1020-21; *Sher v. Lafayette Ins. Co.* 988 So.2d 186, 206-207, 2007-2441 (La. 4/8/08). If, however, “there are **substantial, reasonable and legitimate questions** as to the extent of an insurer's liability or an insured's loss, failure to pay within the statutory time period is **not** arbitrary, capricious or without probable cause.” *Louisiana Bag*, at p. 7, 999 So.2d at 1110. *Yount v. Lafayette Ins. Co.* 4 So.3d 162, 172, 2008-0380 , 16 (La. App. 4 Cir.,2009). Such depends on the facts known to the insurer at the time of its action ... *Reed*, 857 So.2d at 1020-21; *Sher v. Lafayette Ins. Co.* 988 So.2d 186, 206-207, 2007-2441 (La. 4/8/08). For instance, if a plaintiff possessing information that would suffice as satisfactory proof of a loss, but **does not relay that information** to the insurer, penalties are not owed (not arbitrary or capricious). *Reed*, 857 So.2d at 1020-21; *Sher v. Lafayette Ins. Co.* 988 So.2d 186, 206-207, 2007-2441 (La. 4/8/08)

Appendix A – La. R.S. 22:1295

Below is La. R.S. 22:1295 (formally 22:680), which is the statute establishing UM coverage, with headings and emphasis inserted by the author for easier navigation:

[UM Established - Automatic]

(1)(a)(i) **No automobile liability insurance covering liability** arising out of the ownership, maintenance, or use of any motor vehicle **shall be delivered or issued** for delivery in this state with respect to any motor vehicle designed for use on public highways and required to be registered in this state or as provided in this Section **unless coverage is provided therein** or supplemental thereto, **in not less than the limits of bodily injury liability** provided by the policy, under provisions filed with and approved by the commissioner of insurance, **for the protection of persons insured** thereunder **who are legally entitled to recover** nonpunitive damages **from owners or operators of uninsured or underinsured motor vehicles** because of bodily injury, sickness, or disease, including death resulting therefrom;

[Rejection of UM / Selection of lower limits]

however, the coverage required under this Section is **not applicable when** any insured named in the policy either **rejects coverage**, **selects lower limits**, or **selects economic-only coverage**, in the manner provided in Item (1)(a)(ii) of this Section.

[Amount of UM coverage – at least Minimum Limits, unless UMEO]

In no event shall the policy limits of an uninsured motorist policy be less than the minimum liability limits required under R.S. 32:900 [now \$15k/\$30k], unless economic-only coverage is selected as authorized herein.

[Rejection carries over to Renewals 1]

Such coverage **need not be provided** in or supplemental to a **renewal**, reinstatement, or substitute policy **when the named insured has rejected** the coverage or selected lower limits in connection with a **policy previously issued** to him by the **same insurer** or any of its affiliates.

[May exclude punitive / exemplary damages]

The coverage provided under this Section **may exclude coverage for punitive or exemplary damages** by the terms of the policy or contract.

[“Economic only” – may reject only general damages from UM]

Insurers **may also make available**, at a **reduced premium**, the coverage provided under this Section with **an exclusion for all noneconomic loss**. This coverage shall be known as **“economic-only”** uninsured motorist coverage. Noneconomic loss means any loss other than economic loss

and includes but is not limited to pain, suffering, inconvenience, mental anguish, and other noneconomic damages otherwise recoverable under the laws of this state.

[Requirements - Valid Rejection of UM]

(ii) Such **rejection**, selection of lower limits, or selection of economic-only coverage **shall be made only on a form prescribed** by the **commissioner** of insurance. The prescribed form **shall be provided by the insurer and signed by the named insured or his legal representative.**

[Rejection - Part of Policy]

The form signed by the named insured or his legal representative which initially rejects such coverage, selects lower limits, or selects economic-only coverage **shall be conclusively presumed to become a part of the policy** or contract when issued and delivered, **irrespective** of whether **physically** attached thereto.

[Completed Form - Presumption]

A **properly completed and signed form creates a rebuttable presumption** that the insured knowingly rejected coverage, selected a lower limit, or selected economic-only coverage.

[Rejection carries over to Renewals 2 – Exceptions*]

The form signed by the insured or his legal representative which initially rejects coverage, selects lower limits, or selects economic-only coverage **shall remain valid** for the **life** of the **policy** and **shall not require** the completion of a **new selection form** when a **renewal**, reinstatement, substitute, or amended policy **is** issued to the **same named insured** by the **same insurer** or any of its affiliates.

[Insured can change UM selection – With New Form]

An insured may change the original uninsured motorist selection or rejection on a policy **at any time** during the life of the policy **by submitting a new** uninsured motorist selection **form** to the insurer on the form prescribed by the commissioner of insurance.

[Changes to Limits or a New Policy – Requires New Form]

Any changes to an existing policy, regardless of whether these changes create new coverage, **except changes in the limits of liability**, do not create a new policy and do not require the completion of new uninsured motorist selection forms. For the purpose of this Section, a new policy shall mean an original contract of insurance which an insured enters into through the completion of an application on the form required by the insurer.

[Conflict of Laws – More Below]

(iii) This Subparagraph and its requirement for uninsured motorist coverage shall apply to any liability insurance covering any accident **which occurs in this state and involves a resident of this state.**

[School Bus]

(iv) Notwithstanding any contrary provision of this Section and R.S. 22:1406 [Repealed], an automobile liability policy written to provide coverage for a **school bus may limit the scope** of uninsured motorist liability to only provide liability coverage for damages incurred by reason of an **accident** or incident **involving the school bus, or a temporary substitute vehicle**, and such limitation shall limit the uninsured motorist coverage of a named insured in the policy to only **damages incurred by reason of such accident or incident.**

[Insured can increase UM limits – with Written Request]

(b) Any insurer delivering or issuing an automobile liability insurance policy referred to herein shall also **permit the insured**, at his written request, **to increase the coverage applicable to uninsured motor vehicles** provided for herein to any available limit **up to the bodily injury liability coverage limits** afforded under the policy.

[Anti-stacking – Exception if in Non-Owned vehicle, Primary, and only Once]

(c)(i) **If the insured has any limits of uninsured motorist coverage in a policy of automobile liability insurance, in accordance with the terms of Subparagraph (1)(a) of this Section, then such limits of liability shall not be increased because of multiple motor vehicles covered under said policy of insurance, and such limits of uninsured motorist coverage shall not be increased when the insured has insurance available to him under more than one uninsured motorist coverage provision or policy; however, with respect to other insurance available, the policy of insurance or endorsement shall provide the following:**

(ii) With respect to **bodily injury to an injured party while occupying an automobile not owned by said injured party**, resident spouse, or resident relative, the following priorities of recovery under uninsured motorist coverage shall apply:

(aa) The **uninsured motorist coverage on the vehicle in which the injured party was an occupant is primary**;

(bb) Should that primary uninsured motorist coverage be exhausted due to the extent of damages, **then the injured occupant may recover as excess from other uninsured motorist coverage available to him. In no instance shall more than one** coverage from more than one uninsured motorist policy be available as excess over and above the primary coverage available to the injured occupant.

[UM - when no collision coverage]

(d) **Unless** the named insured has **rejected** uninsured motorist coverage, the insurer issuing an automobile liability **policy that does not afford collision coverage** for a vehicle insured thereunder **shall**, at the **written request** of a named insured, **provide coverage in the amount of the actual cash value of such motor vehicle described in the policy** or the **minimum amount** of property damage liability insurance required by the motor vehicle safety responsibility law, R.S. 32:851 et seq., **[now \$25,000]**, **whichever is less**, for the protection of persons insured thereunder who are legally entitled to recover damages from the owner or operator of an uninsured motor vehicle because of property damage to the motor vehicle described in the policy arising out of the operation, maintenance, or use of the uninsured motor vehicle. The coverage provided under this Section **shall be subject to a deductible in an amount of two hundred fifty dollars for any one accident**. The coverage provided under this Section **shall not provide protection for any of the following**:

(i) Damage where there is **no actual physical contact** between the covered motor vehicle and an uninsured motor vehicle, **unless** the injured party can show, by an **independent and disinterested witness**, that the injury was the result of the actions of the driver of another vehicle whose identity is unknown or who is uninsured or underinsured.

(ii) **Loss of use** of a motor vehicle.

(iii) Damages which are paid or payable under **any other** property insurance.

[Restriction – Owned / Non-described vehicles]

(e) The uninsured motorist **coverage does not apply to bodily injury**, sickness, or disease, including death of an insured resulting therefrom, **while occupying** a motor **vehicle owned by the insured** if such motor vehicle is **not described in the policy** under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy. **This provision shall not apply to uninsured motorist coverage provided in a policy that does not describe specific motor vehicles.**

[Phantom - No physical contact – Burden of Proof]

(f) Uninsured motorist coverage **shall include coverage** for bodily injury arising out of a motor vehicle accident **caused by an automobile** which has **no physical contact** with the injured party or with a vehicle which the injured party is occupying at the time of the accident, **provided** that the injured party bears the burden of proving, by an **independent and disinterested witness**, that the **injury was the result of the actions** of the driver of another vehicle whose identity is unknown or who is uninsured or underinsured.

[Definitions of UM vehicle]

(2)(a) For the purpose of this coverage, the terms **“uninsured motor vehicle”** shall, subject to the terms and conditions of such coverage, be deemed to **include an insured motor vehicle where**

the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein **because of insolvency.**

(b) For the purposes of this coverage the **term uninsured motor vehicle** shall, subject to the terms and conditions of such coverage, **also be deemed to include an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the amount of damages suffered** by an insured and/or the passengers in the insured's vehicle at the time of an accident, as agreed to by the parties and their insurers or as determined by final adjudication.

[Self-Insurers – Considered Insurer]

(3) **Any party** possessing a certificate of **self-insurance** as provided under the Louisiana Motor Vehicle Safety Responsibility Law, **shall be an “insurer” within the meaning of uninsured motorist coverage** provided under the provisions of this Section. This provision shall not be construed to require that a party possessing a certificate of self-insurance provide uninsured motorist coverage or that such coverage is provided by any party possessing such a certificate.

[Subrogation]

(4) In the event of payment to any person under the coverage required by this Section and subject to the terms and conditions of such coverage, **the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made,** including the proceeds recoverable from the assets of the insolvent insurer.

[Arbitration]

(5) The coverage required under this Section **may include** provisions for the submission of claims by the assured to **arbitration**; provided, however, that the submission to arbitration shall be **optional** with the assured, shall not deprive the assured of his right to bring action against the insurer to recover any sums due him under the terms of the policy, and shall not purport to deprive the courts of this state of jurisdiction of actions against the insurer.

[Burden of proof - Prima Facie Evidence of Loss]

(6) **In any action to enforce a claim under the uninsured motorist provisions** of an automobile liability policy **the following shall be admissible as prima facie proof** that the owner and operator of the vehicle involved did not have automobile liability insurance in effect on the date of the accident in question:

(a) The introduction of **sworn notarized affidavits** from the owner and the operator of the alleged uninsured vehicle attesting to their current addresses and **declaring that they did not have automobile liability insurance** in effect covering the vehicle in question on the date of the accident in question. When the owner and the operator of the vehicle in question are the same person, this fact shall be attested to in a single affidavit.

(b) A sworn notarized **affidavit by an official of the Department of Public Safety and Corrections** to the effect that inquiry has been made pursuant to R.S. 32:871 by depositing the inquiry with the United States mail, postage prepaid, to the address of the owner and operator as shown on the accident report, and that neither the owner nor the operator has responded within thirty days of the inquiry, or that the owner or operator, or both, have responded negatively as to the required security, or a sworn notarized affidavit by an official of the Department of Public Safety and Corrections that said department has not or cannot make an inquiry regarding insurance. This affidavit shall be served by certified mail upon all parties fifteen days prior to introduction into evidence.

(c) Any **admissible evidence showing** that the **owner** and operator of the alleged uninsured vehicle was a **nonresident** or not a citizen of Louisiana on the date of the accident in question, or that the residency and citizenship of the owner or operator of the alleged uninsured vehicle is **unknown**, together **with a sworn notarized affidavit by an official of the Department of Public Safety and Corrections** to the effect that on the date of the accident in question, neither the owner nor the operator had in effect a policy of automobile liability insurance.

(d) The **effect** of the prima facie evidence referred to in (a), (b) and (c) above is to **shift the burden of proof** from the party or parties alleging the uninsured status of the vehicle in question to their uninsured motorist insurer.