

HOW TO TREAT IDENTICAL MUTUALLY EXCLUSIVE (REPUGNANT) EXCESS INSURANCE CLAUSES IN UNDERINSURED MOTORIST INSURANCE POLICIES WHEN THE INSURED HAS COVERAGE UNDER MULTIPLE UIM POLICIES

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Underinsured motorist insurance is distinct from liability insurance in that you buy liability insurance to protect yourself from claims of others that they were injured by your negligent conduct, usually in the operation of a motor vehicle. You buy underinsured motorist insurance yourself to protect yourself, that is, to pay for your own personal injury damages caused by the negligent operation of a motor vehicle by someone else who does not have adequate liability insurance to pay for your personal injury damages, even if (perhaps especially if) that person has mandatory minimum liability insurance coverage. If you own more than one motor vehicle with UIM coverage, or live in a residence with a relative who has a vehicle with UIM coverage, there would be more than one UIM policy that affords coverage for you.

Underinsured motorist insurance has as its underlying purpose to “provide the innocent victim with the fullest possible protection . . . from the negligent acts of an underinsured motorist.” *Proctor v. N. C. Farm Bureau Mut. Ins. Co.*, 324 N.C. 221, 224 (1989). But what if there is normally coverage under any of two or more UIM policies but each policy states that its coverage is excess (secondary) coverage for the insured because of the other UIM coverage?

LET’S LOOK AT THE FUNDAMENTALS OF MOTOR VEHICLE INSURANCE

BASIC LIABILITY INSURANCE COVERAGE

Mandatory liability Insurance Coverage in North Carolina:

The Financial Responsibility Act, FRA, requires “proof of financial responsibility” to respond to damages for liability on account of accidents arising out of the ownership, maintenance or use of a motor vehicle in the amount of:

\$30,000 because of **bodily injury or death of one person in one accident;**

\$60,000 because of **bodily injury or death of two or more persons in any one accident**, subject to the above limit for one person;

\$25,000 because of **injury to or destruction of property of others in any one accident.**

N.C. Gen. Stat. §20-279.1(11)

N.C. Gen. Stat. §20-271.21(b)(2)

MANDATORY UNINSURED MOTOR VEHICLE INSURANCE IN NORTH CAROLINA:

LIMITS:

For uninsured bodily injury coverage
Shall be equal to
The highest limits of bodily injury liability coverage
for any one vehicle insured under the policy
Provided, however

That (i) the limits shall not exceed \$1,000,000 per person
and \$1,000,000 per accident

And

(ii) the limits shall not be less than the 30/60 statutorily
required bodily injury liability limits

WHAT ABOUT PROPERTY DAMAGE BY UNINSURED MOTORISTS?

LIMITS:

Equal to the highest limits of property damage liability coverage
for any one vehicle insured under the policy

but

(i) Not exceed \$1,000,000 per accident

(ii) Not less than \$25,000

N.B. These numbers can be subject to an exclusion (deductible) of the
first \$100 of such property damages.

N.C. Gen. Stat. § 20-279.21(b)(3)

NUGGET

Are commercial vehicles with liability insurance required to have uninsured motorist
coverage?

NO.

N. C. Gen. Stat. § 20-271.21(b)(3)b

NOW BACK TO UNDERINSURED MOTORIST COVERAGE IN NORTH CAROLINA WHEN THERE IS MORE THAN ONE UIM POLICY BUT THE POLICIES CONTAIN IDENTICAL MUTUALLY EXCLUSIVE (REPUGNANT) EXCESS INSURANCE CLAUSES.

The following examines the ruling in *Nationwide Mutual Insurance Company, Inc. v. Integon National Insurance Company and State National Insurance Company*, ___ N.C. App. ___ (January 21, 2014).

This declaratory judgment action arose out of an insurance coverage question allocating the proceeds of three separate UIM policies to pay a wrongful death claim.

THE FACTS:

There was a three vehicle accident on 23 August 2011.

B, the tortfeasor, ran a red light and struck C who was driving a motorcycle.

C died.

A ran over C as he lay on the roadway. A was found not liable.

B admitted liability to C's estate and B's liability carrier paid \$50,000, the policy limit.

C was insured for UIM coverage under three policies:

Integon policy named C as the named insured covering the motorcycle that C was driving at the time of the accident in the amount of \$100,000 per person;

State National policy named C as the named insured in the amount of \$50,000 per person; and

Nationwide policy named C's parents as the insureds and C was a resident in their household at the time of the accident. The Nationwide policy provided UM/UIM limits of \$50,000 per person/\$100,000 per accident

THE POLICY LANGUAGE:

The Nationwide policy: Named insured: C's parents

"If this policy and any other auto insurance policy apply to the same accident, the maximum amount payable under all applicable policies for all injuries caused by an uninsured or underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each policy.

In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance."

The Integon policy: Named insured: C

"If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum amount payable under all applicable policies for all injuries caused by an underinsured motor vehicle under all policies shall not exceed the highest applicable limit of liability under any one policy.

If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum amount payable for injuries to you or a family member caused by an underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each such policy.

In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our loss is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance."

The State National policy: Named insured: C

"Other insurance

If this policy and any other auto insurance policy apply to the same accident, the maximum amount payable under all applicable policies for all injuries to an insured

caused by an uninsured or underinsured motor vehicle shall be the sum of the highest limit of liability for this coverage under each policy.

In addition, if there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.”

ANALYSIS

THE NECESSARY INQUIRY BY THE TRIAL COURT:

1. Is the language in the excess clauses of the policies identical? The language used in the excess clause must be identical between the excess clauses of the respective UIM policies, or “**mutually repugnant.**”
If the excess clauses are not identical, the policies are not mutually repugnant and the trial court may apply the facial policy language to determine distribution.
2. Are the respective UIM carriers in the same class? If so, the trial court must apportion liabilities and credits on a pro rata basis. *North Carolina Farm Bureau v. Bost*, 126 N.C. App. 42 (1997).
3. If separate “classes” exist, a primary/excess distinction may be drawn despite identical language in excess clauses. Such identical clauses may allow a finding of nonrepugnancy after applying the policy definitions, specifically relating to ownership identified in the policy.

WHAT DO THE TERMS “CLASS I AND CLASS II INSURED” REALLY MEAN?

Generally speaking, the first class of “persons insured” are the named insured in the policy and, while resident of the same household, the spouse of any named insured and relatives of either, **while in a motor vehicle or otherwise.** All persons in the first class are treated the same for insurance purposes. When “excess” clauses in several policies are identical, the clauses are deemed mutually repugnant and neither excess clause will be given effect, leaving the insured’s claim to be pro rated between the separate policies according to their respective limits.

The second class of “persons insured” is a non relative passenger in a vehicle.

WHAT IS THE LESSON OF NATIONWIDE v. INTEGON AND STATE NATIONAL?

Because the “excess” clauses of the three insurance policies are identical they are mutually repugnant and nullify each other. The claimant was a Class I insured in all three policies. Therefore, the credit paid by C’s insurer, \$50,000, must be distributed pro rata to the three UIM insurers.