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California's Uninsured and Underinsured Motorist Law: An Updated Review and Guide

Michael J. Brady

Marta B. Arriandiaga

CALIFORNIA'S UNINSURED AND UNDERINSURED MOTORIST LAW: AN UPDATED REVIEW AND GUIDE

Michael J. Brady* and Marta B. Arriandiaga†

I. INTRODUCTION

Insurance Code section 11580.2[1] mandates the inclusion of uninsured and underinsured motorist coverage in nearly every motor vehicle insurance policy issued in the state of California.[2] Thus, almost all Californians are directly af-

* Partner, Ropers, Majeski, Kohn & Bentley; Past-President of the Northern California Association of Defense Counsel; B.A. 1964, Stanford University; J.D. 1967, Harvard University.

† Associate, Ropers, Majeski, Kohn & Bentley; B.A. 1975, University of Delaware; J.D. 1985, University of San Francisco.

1. CAL. INS. CODE § 11580.2(a)(1) (West 1988 & Supp. 1996).

2. *Id.* The statute provides in pertinent part:

> No policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle, except for policies which provide insurance in the Republic of Mexico issued or delivered in this state by non-admitted Mexican insurers, shall be issued or delivered in this state to the owner or operator of a motor vehicle, or shall be issued or delivered by any insurer licensed in this state, upon any motor vehicle then principally used or principally garaged in this state, unless the policy contains, or has added to it by endorsement, a provision with coverage limits at least equal to the limits specified in subdivision (m) and in no case less than the financial responsibility requirements specified in section 16056 of the Vehicle Code insuring the insured, the insured's heirs or legal representative for all sums within such limits which he, she, or they, as the case may be, shall be legally entitled to recover as damages for bodily injury or wrongful death from the owner or operator of an uninsured motor vehicle. . . . A policy shall be excluded from the application of this section if the automobile liability coverage is provided only on an excess or umbrella basis. Nothing in this section shall be construed to require that uninsured motorist coverage shall be offered or provided in any homeowner policy, personal and residents' liability policy, comprehensive personal liability policy, manufacturers' and contractors' policy, premises liability policy, special multi-peril policy, or any other policy or endorsement where automobile liability coverage is offered as incidental to some other basic coverage, notwithstanding that the policy may provide automobile or motor vehicle liability coverage on insured premises or the ways immediately adjoining.

Id. Section 11580.2(m) provides:

fected by its provisions. Unfortunately, for such a commonplace body of law, these code sections are considered difficult to interpret and understand. The result is that this frequently litigated area of law is unclear even for those practitioners who work in this area.

This article attempts to clarify three separate, but interrelated areas of this law: its fundamental nature and purpose, judicial interpretations of its provisions, and the legal tension caused by the co-existence of uninsured and underinsured motorist benefits laws.

The following sections will discuss and analyze the various provisions of section 11580.2 which have been the subject of published decisions issued in California. The examination of these decisions is intended to facilitate a better understanding of the basics of uninsured and underinsured (hereinafter "UM/UIM") motorist coverage law, and to act as a guide to the practitioner.

II. THE BACKGROUND OF UM/UIM MOTORIST LAW

A. *Purpose*

The basic purpose of the uninsured motorist statute is to minimize losses to the people of California who are involved in accidents with uninsured or financially irresponsible motorists. Under the statute, at least some coverage is afforded an insured person with injuries caused by an uninsured or underinsured motorist.[3] The effect of this statute is to guarantee to an insured motorist the minimum financial responsibility under his or her own policy for injuries resulting from a

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> Coverage provided under uninsured motorist endorsement or coverage shall be offered with coverage limits equal to the limits of liability for bodily injury in the underlying policy of insurance, but shall not be required to be offered with limits in excess of the following amounts:
>
> (1) a limit of thirty thousand ($30,000) because of bodily injury to or death of one (1) person in any one accident.
>
> (2) subject to the limit for one person set forth in paragraph one, a limit of sixty thousand ($60,000) because of bodily injury to or death of two or more persons in any one accident.

CAL. INS. CODE § 11580.2(m) (West 1988 & Supp. 1996).

3. Sections 11580.2(m)(1) and (2) provide for "[a] limit of thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident" and "a limit of sixty thousand dollars ($60,000) because of bodily injury or death of two or more persons in any one accident." *Id.* § 11580.2(m)(1)-(2).

collision with another party who either has no automobile liability insurance or has insurance with insufficient limits.

Insurance Code section 11580.2 was enacted in 1959, repealed, and then re-enacted with some changes in 1961.[4] The statute establishes as a matter of public policy that every motor vehicle liability policy that provides coverage for bodily injuries issued in California must provide UM/UIM motorist coverage.[5] Unless the provisions of section 11580.2 are expressly deleted by an agreement in writing between the insurer and the insured, such provisions become a part of every policy issued in California that covers liability arising from the ownership, maintenance or use of any motor vehicle.[6] The statute dictates the appropriate wording for such a waiver.[7]

Insurance Code section 11580.2 does not make all drivers whole for injuries resulting from accidents with uninsured or underinsured motorists. Instead, it ensures that those drivers injured by such motorists are protected to the extent that they would have been had the driver at fault carried the statutory minimum of liability insurance.[8]

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4. *Id.* § 11580.2.

5. *Id.* § 11580(a)(1).

6. Section 11580.2(a)(1) provides that "[t]he insurer and any named insured, prior to or subsequent to the issuance or renewal of a policy, may, by agreement in writing, in the form specified in paragraph (2), delete the provision covering damage caused by an uninsured motor vehicle . . . ." *Id.*

7. Section 11580.2(a)(2) provides the following specific language:

> The California Insurance Code requires an insurer to provide uninsured motorists coverage in each bodily injury liability insurance policy it issues covering liability arising out of the ownership, maintenance, or use of a motor vehicle. Such section also permits the insurer and the applicant to delete such coverage when a motor vehicle is operated by a natural person or persons designate by name. . . . Uninsured motorists coverage insures the insured, his or her heirs, or legal representatives for all sums with the limits established by law, which such person or persons are legally entitled to recover as damages for bodily injury, including any resulting sickness, disease, or death, to him or her from the owner or operator of an uninsured motor vehicle not owned or operated by the insured or a resident of the same household. An uninsured motor vehicle includes an underinsured motor vehicle as defined in subdivision (p) of Section 11580.2 of the Insurance Code.

Id. § 11580.2(a)(2).

8. *See id.* § 11580.2(1)-(2).

B. *The Relationship Between the Insured and the Insurer*

The focus of uninsured motorist law is on the relationship between the injured insured and his or her auto liability insurer. This frequently results in conflicts of interest for the insurer. The party defending the claim for UM/UIM motorist benefits is actually the insurer of the injured party. Thus, an insurer seeking to deny coverage has the burden of arguing that its own insured claimant, and not the UM/UIM motorist, was actually responsible for the accident, or that the responsible motorist was not, in fact, an UM/UIM motorist, or that its own insured was comparatively negligent.

Therefore, a serious conflict of interest arises between an insurer denying coverage and an insured who is making a claim for UM/UIM motorist benefits regarding the issue of who was at fault. On the one hand, the insurer wants to prove that its own insured was at fault in order to defeat the insured's claim for UM/UIM motorist benefits. On the other hand, the insurer is concurrently interested in proving that the insured was *not* at fault in order to defeat any claim the UM/UIM driver might have against the insured under the liability portion of the insured's auto policy.

This focus on insured and insurer explains many of the seeming anomalies of the statute. For example, the provision that requires the arbitration of various major issues,[9] the exclusion of coverage for stipulated judgments between the insured and the third party,[10] and the requirement of "physical contact"[11] and immediate reporting in hit-and-run cases[12] all underscore the fact that the injured insured is making a claim against his or her own insurer to recover UM/UIM benefits. These provisions seek to economize this process and avoid fraud and conflicts of interest.

Since the focal point in an UM/UIM case is the relationship between the insurer and the injured insured, owners of motor vehicles who qualify as self-insurers need not provide UM/UIM motorist coverage.[13] Any person who has registered

9. *Id.* § 11580.2(f).
10. *Id.* § 11580.2(c)(3).
11. *Id.* § 11580.2(b)(1).
12. *Id.* § 11580.2(b)(2).
13. *See* CAL. VEH. CODE § 16053 (West Supp. 1996).

more than twenty-five motor vehicles can qualify as a self-insurer by obtaining a Certificate of Self-Insurance.[14]

III. JUDICIAL INTERPRETATION OF SECTION 11580.2

A. *Omission, Waiver or Deletion of Coverage*

According to Insurance Code sections 11580.2(a)(1) and (2), written waivers in the form set forth in the statute delete uninsured motorist coverage.[15] These waivers are binding

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14. *Id.*

15. CAL. INS. CODE § 11580(a)(1)-(2) (West 1988 & Supp. 1996). The following definitions are brief but essential in providing a framework for further discussion of section 11580.2. These definitions will be discussed in more detail as they arise in the analysis of the case law:

1. "[B]odily injury" includes sickness or disease, including death, resulting therefrom; . . .

2. "[N]amed insured [as an individual]" . . . means the named insured and the spouse of the named insured and, while residents of the same household, relatives of either, while occupants of a motor vehicle or otherwise, heirs and any other person while in or upon or entering into or alighting from an insured motor vehicle and any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily injury to which the policy provisions or endorsements apply;

3. "[N]amed insured" [as] an entity other than an individual, . . . means any person while in or upon or entering into or alighting from an insured motor vehicle and any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily injury to which the policy provisions or endorsement apply. . . .

4. "[I]nsured motor vehicle" means the motor vehicle described in the underlying insured policy of which the uninsured motorist endorsement or coverage is a part, a temporary substitute automobile for which liability coverage is provided in the policy or a newly acquired automobile for which liability coverage is provided in the policy if the motor vehicle is used by the named insured or with his or her permission or consent, express or implied, and any other automobile not owned by or furnished for the regular use of the named insured or any resident of the same household, or by a natural person or persons from whom coverage has been deleted . . . .

5. "[U]ninsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance or use of which there is no bodily injury liability insurance or bond applicable at the time of the accident, or there is the applicable insurance or bond but the company writing the insurance . . . denies coverage thereunder or refuses to admit coverage thereunder except conditionally or with reservation, or an "underinsured motor vehicle," . . . or a motor vehicle used without the permission of the owner thereof if there is no bodily injury liability insurance applicable at the time of the accident with respect to the owner or operator thereof, or the owner or operator thereof be unknown . . . .

Id. § 11580.2(b) (form altered from original).

6. "Underinsured motor vehicle" means a motor vehicle that is an insured motor vehicle but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person.

Id. § 11580.2(p)(2) (form altered from original).

not only to continuations and renewals of the policy, but also apply to any other policy that "extends, changes, supersedes, or replaces the policy originally issued to the named insured by the same insurer."[16]

The uninsured motorist coverage or endorsement offered by the insurer must provide the same liability limits of the underlying policy of insurance, but need not exceed $30,000 for death or bodily injury to one person, or $60,000 for death or bodily injury to two or more people.[17]

In *Enterprise Insurance Co. v. Mulleague*,[18] the appellate court concluded that when uninsured motorist coverage is omitted from a policy, and the insurer fails to obtain a written waiver of uninsured motorist coverage, the policy is construed by law to provide uninsured benefits equal to the bodily injury liability limits of the policy, but that such benefits will not exceed $30,000 per person and $60,000 per accident.[19]

The policy in *Enterprise* regarding underinsured motorist benefits provided a limit of $600,000 per person and $600,000 per accident for a commercial vehicle.[20] Although the policy provided coverage for commercial vehicles with a load capacity over 1500 pounds, it did not expressly provide uninsured motorist coverage for such vehicles.[21] The court ruled that, absent a valid written waiver of coverage, the policy did include uninsured motorist coverage for these vehicles.[22]

However, the court rejected the insured's contention that the limit for such coverage was $600,000.[23] Rather, the court applied Insurance Code section 11580.2(m) to hold that the maximum limits afforded for such coverage was $30,000 per person.[24] According to the court's interpretation, Insurance Code section 11580.2(m) stands for the proposition that uninsured motorist coverage must equal the limits of liability of the underlying policy if those limits exceed the $15,000/

16. *Id.* § 11580(a)(1).
17. *Id.* § 11580.2(m)(1)(2).
18. 241 Cal. Rptr. 846 (Ct. App. 1987).
19. *Enterprise Ins. Co.*, 241 Cal. Rptr. at 849.
20. *Id.* at 847.
21. *Id.*
22. *Id.* at 851.
23. *Id.* at 850.
24. *Enterprise Ins. Co.*, 241 Cal. Rptr. at 850.

$30,000 minimum required under the financial liability statute, but only up to a maximum of $30,000 per person or $60,000 per accident.[25] Thus, *Enterprise* stands for the proposition that the mere absence of UM/UIM coverage is ineffective as a waiver.

However, any named insured can still affirmatively delete uninsured motorist coverage for all named insureds under the policy.[26] Under Insurance Code section 11580.2(a), the waiver remains in effect with respect to any other policy that extends, changes, supersedes, or replaces the policy issued to the named insured by the same insurer. In other words, the waiver continues to have a binding effect on the subsequent policy.

Interpreting this subsection, the court in *Craft v. State Farm Mutual Automobile Insurance Co.*[27] held that a grandfather's rejection of uninsured motorist coverage on a policy issued to himself and his granddaughter also applied to a replacement policy later issued to the granddaughter only.[28]

An effective deletion of coverage was also found in *Hartman v. Progressive Casualty Insurance Co.*[29] The court held that even where there is failure to recite the specific waiver language in section 11580.2(a)(2), an agreement that did not conform to the statutory waiver did not establish as a matter of law that the insured had not waived uninsured motorist coverage.[30]

The court explained that even if an agreement to waive the coverage is insufficient because it does not contain the prescribed statutory language, the insufficiency is only prima facia evidence of an ineffective waiver of coverage.[31] The resulting presumption is subject to rebuttal by evidence of an intentional relinquishment of a known right after knowledge of the facts.[32] In *Hartman*, the trial court properly considered extrinsic evidence of waiver in determining that the

25. *Id.*
26. *Id.* at 851.
27. 18 Cal. Rptr. 2d 293 (Ct. App. 1993).
28. *Craft*, 18 Cal. Rptr. 2d at 299.
29. 251 Cal. Rptr. 714 (Ct. App. 1988).
30. *Hartman*, 251 Cal. Rptr. at 714-19.
31. *Id.*
32. *Id.*

agreement signed by plaintiff's decedent was a knowing and voluntary waiver and therefore enforceable.[33]

However, in *Kincer v. Reserve Insurance Co.*,[34] an insufficient waiver of coverage was found where the waiver was in the preamble to the policy. In *Kincer*, there was nothing in the body of the policy to indicate that uninsured motorist coverage was not being furnished.[35] Further, there were no endorsements attached to the policy explaining the effect of a waiver of uninsured motorist protection.[36]

An insufficient waiver was also found in *Dufresne v. Elite Insurance Co.*[37] In *Dufresne*, the insured bought a motorcycle and telephoned his broker to obtain liability insurance coverage before he drove away from the dealer's lot.[38] On learning that there was an extra premium for this coverage, the insured requested the broker to sign the insured's name to a waiver.[39] The insurer did so.[40] Six weeks later, the insured was killed in a collision with an uninsured motorist.[41] The court held that the waiver was ineffective because it failed to meet the requirement of written authority to authorize an agent to enter into a contract required to be in writing.[42] The statutory purpose requiring that deletion of coverage be in writing was to avoid this kind of dispute.[43] The court further held that the purported waiver lacked the necessary clarity and specificity.[44]

As demonstrated by the cases cited, section 11580.2 allows for changes and deletions to be made in UM/UIM coverage. If the statutory language for waiver is not used, this does not necessarily mean that there has been an ineffective waiver of UM/UIM coverage as a matter of law. Instead, it only creates prima facia evidence of an ineffective waiver of coverage that can be rebutted.

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33. *Id.*
34. 90 Cal. Rptr. 94 (Ct. App. 1970).
35. *Kincer*, 90 Cal. Rptr. at 97.
36. *Id.*
37. 103 Cal. Rptr. 347 (Ct. App. 1972).
38. *Dufresne*, 103 Cal. Rptr. at 349.
39. *Id.*
40. *Id.*
41. *Id.* at 350.
42. *Id.*
43. *Dufresne*, 103 Cal. Rptr. at 352.
44. *Id.*

It seems clear that the courts will look to the insured's actual knowledge of waiver rather than require strict statutory compliance. In essence, the courts properly seek to enforce the intent of the statute. The cases above demonstrate that usage of the statutory waiver language is preferable, but that courts will also heed clear evidence of the insured's knowing waiver of UM/UIM coverage.

B. *Persons Covered Under Insurance Code Section 11580.2*

According to Insurance Code section 11580.2(b), there are three primary groups entitled to uninsured coverage. The first group includes the named insured, his or her spouse, and his or her relatives while residents of the same household.[45] This category is afforded the broadest coverage. The statute provides that persons in this category are protected while they are occupants of a motor vehicle or otherwise.[46]

The second group entitled to uninsured coverage consists of any person in or upon or entering into or alighting from an *insured* motor vehicle.[47] Consequently, whether any member of this group is entitled to uninsured motorist coverage depends upon the determination of whether the vehicle was insured.

The third group entitled to uninsured benefits is relatively small. It consists of any person with respect to damages he or she is entitled to recover for care or loss of services because of bodily injury to which the policy provisions or endorsement apply.[48]

Persons in the first category are given the broadest coverage. They are not even required to be occupants of the insured vehicle at the time of the accident.[49] For example, a spouse or resident relative of the named insured may be a passenger of an uninsured common carrier, such as a bus or cab, or in an uninsured non-owned automobile, and nonetheless be entitled to the required uninsured motorist coverage under the policy issued to the named insured.[50] In fact, the

45. CAL. INS. CODE § 11580.2(b) (West 1988 & Supp. 1996).
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* § 11580.2(p)(4) (noting that the named insured may be in the vehicle "or otherwise").

named insured and the insured's family need not be occupants of *any* motor vehicle in order to be protected for injuries inflicted by an uninsured motorist.[51] The words "or otherwise" in the statute indicate that these people may be occupants of a streetcar or even pedestrians and still be entitled to UM/UIM coverage. Therefore coverage for this group extends to any situation imaginable where there is contact between an insured of the above category and a vehicle driven by an uninsured motorist.

The majority of litigation has involved the second category of insureds, that is, "any other person while occupying an insured motor vehicle."[52] That litigation has generally centered on defining what "an insured motor vehicle" is, because whether the vehicle is considered to be insured depends on the status of the vehicle and not the driver.

An insured motor vehicle is defined as (1) the vehicle described in the policy; (2) a temporary substitute vehicle; (3) a newly acquired vehicle, if it is used by the named insured or with his or her permission or consent; or (4) any other non-owned vehicle operated by the named insured or his or her spouse.[53]

Because of the limited scope of what an "insured motor vehicle" is when obtaining uninsured motorist coverage, there are relatively few cases defining the term in the uninsured motorist context. However, the issue of whether a vehicle is an insured motor vehicle frequently arises in the context of whether there is liability coverage afforded to the insured, rather than in the context of uninsured motorist coverage.

The description of an insured motor vehicle is generally found in the definition section of the policy. The following description is typical, though not exclusive:

> 1. Any vehicle shown in the Declarations.
> 2. Any of the following types of vehicles on the date the insured became the owner:
> a. A private passenger auto; or
> b. A pickup, panel truck or van, not used in any business. This provision applies only if you; (a) acquire the vehicle during the policy period; and (b) ask to insure

51. *Id.* § 11580.2(b).
52. *Id.*
53. *Id.*

> it within 30 days after you became the owner. If the vehicle you acquire replaces one shown in the Declarations, it will have the same coverage as the vehicle it replaced.
> 3. Any trailer you own.
> 4. Any auto or trailer you do not own while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its breakdown, repair, servicing, loss, or destruction.

The above definitions of an insured motor vehicle help to determine whether the second group of insured individuals, consisting of "any other person," is entitled to uninsured coverage.

As noted above, the third group of insured persons includes "any person with respect to damages who is entitled to recover for care or loss of services because of a bodily injury to which the policy provisions or endorsement apply."[54]

In *Tara v. California State Automobile Ass'n*,[55] the court held that this third category does not create a new and independent cause of action against insurance companies.[56] Under the clause, a person can recover UM/UIM benefits from an insurer "if and only if that person would be legally entitled to recover those damages in tort directly from the owner or operator of the uninsured vehicle."[57]

In *Tara*, a daughter provided housekeeping services to her mother while her mother was recuperating from injuries resulting from a car accident with an uninsured motorist.[58] The daughter brought suit against the insurer to recover the value of her services.[59] The court determined that the daughter was not entitled to recover the value of those services from her mother's insurer because the uninsured motorist owed no duty to the daughter and the motorist's actions were not the proximate cause of the daughter's damages.[60] The court further explained that the daughter's performance of housekeeping services for her mother was too remote from the conduct of the uninsured motorist to give rise to a cause

54. *Id.*
55. 155 Cal. Rptr. 497 (Ct. App. 1979).
56. *Tara*, 155 Cal. Rptr. at 498.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*

of action by the daughter against the motorist for the value of her services.[61]

In sum, to determine whether uninsured coverage is available depends upon the classification of the individual who has been injured. Clearly, the first step in processing an uninsured claim is to determine the individual's category.

Coverage for the first group (the named insured, his spouse, and resident members of his family) extends to virtually any situation where there is injury caused by a non-owned, uninsured vehicle. The insured under the first category has the benefit of UM/UIM protection as an occupant of an insured vehicle, of a non-owned vehicle, or even as a pedestrian.

The determination of cases discussing the second category of insureds (any other person while occupying an uninsured motor vehicle) turns on the definition of an "insured motor vehicle."

The third group is relatively narrow. This category of persons is only allowed to recover uninsured motorist benefits from an insurer if they would be legally entitled to recover those damages in tort directly from the owner or operator of the uninsured vehicle.

C. *Physical Contact Requirement*

This section provides that bodily injuries resulting from a hit-and-run accident must arise out of physical contact with the uninsured automobile.[62] There must be physical contact between an automobile, the owner or operator of which is unknown, and the insured or an automobile the insured is occupying.[63] If there is no physical contact, the claimant is not entitled to recover uninsured or underinsured motorist benefits.

The purpose of the "physical contact" requirement is to curb fraud, collusion, and other abuses arising from claims caused by "phantom cars." Often these accidents have resulted solely from the carelessness of the insured. For example, a driver who falls asleep and hits a telephone pole might claim he had swerved off the road to avoid being hit by an unidentified vehicle.

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61. *Tara*, 155 Cal. Rptr. at 499.
62. CAL. INS. CODE § 11580.2(b)(1) (West 1988 & Supp. 1996).
63. *Id.*

Cases involving physical contact fall into a variety of factual situations. However, they can be generalized to include the following: (1) direct contact between the unidentified vehicle and the insured's vehicle; (2) the unidentified vehicle strikes a third vehicle which, in turn, contacts the insured's vehicle; (3) some part of the unidentified vehicle or something being carried by the unidentified vehicle strikes the insured or the insured's vehicle; (4) the unidentified vehicle strikes an object on the road which, in turn, contacts the insured or the insured's vehicle; or (5) an occupant of the unidentified vehicle intentionally or negligently propels or throws an object that contacts the insured's vehicle.

In *Boyd v. Interinsurance Exchange,*[64] the court held that the physical contact between the uninsured vehicle and the insured motorist or the vehicle occupied by the insured motorist was an absolute condition precedent to recovery and that there were no exceptions to this rule.[65]

In *Boyd*, the injured party crashed into a building after swerving to avoid being hit by an uninsured motor vehicle.[66] Although the uninsured motor vehicle made no physical contact with the insured or her vehicle, the accident was witnessed and substantiated by three witnesses.[67] The matter was submitted to arbitration and the insured's claim against the insurer was denied on the ground that there had been no physical contact.[68] The court re-emphasized that the right to recover for the negligence of an unknown motorist is determined, under the plain terms of the statute, by whether or not the bodily injury was caused by physical contact.[69] Thus, the court found that uninsured motorist benefits had been correctly denied in spite of the fact that the insured's version of the causative events had been substantiated.[70]

In *Barnes v. Nationwide Mutual Insurance Co.,*[71] the court held that coverage requires a direct application of force from an uninsured motor vehicle.[72] In *Barnes*, the insured

64. 186 Cal. Rptr. 443 (Ct. App. 1982).
65. *Boyd*, 186 Cal. Rptr. at 445.
66. *Id.* at 444.
67. *Id.*
68. *Id.*
69. *Id.* at 445.
70. *Boyd*, 186 Cal. Rptr. at 444-45.
71. 230 Cal. Rptr. 800 (Ct. App. 1986).
72. *Barnes*, 230 Cal. Rptr. at 801.

was injured after her car collided with a box of chairs lying on the freeway.[73] The court explained that Insurance Code section 11580.2(b) requires physical contact between the plaintiff's car and the unknown vehicle from which plaintiff claimed the box fell in order to recover.[74]

In *Barnes,* there was no such physical contact; there was no direct application of force from the unknown vehicle, and the box that had caused the accident had not fallen from the unknown vehicle onto plaintiff's car, but was lying in the road when she hit it.[75] However, the court did imply that recovery would have been allowed if the insured's vehicle had been struck by the box as it fell from the unidentified vehicle.[76]

By comparison, the requisite physical contact was found in *Pham v. Allstate Insurance Co.*[77] In *Pham*, a rock fell from an unidentified dump truck, bounced on the highway, penetrated the windshield, and injured the occupant of an insured vehicle.[78] The court emphasized that the collision resulted from an uninterrupted chain of events.[79] There had not been an intervening force to break the chain of causation, and the rock had not first come to rest before colliding with the car.[80] Thus, *Pham* is distinguishable from *Barnes* because there was no break in the causal chain.

No physical contact, and thus no UM/UIM coverage, was found in *State Farm Mutual Automobile Insurance Co. v. Yang.*[81] There, an insured was shot by an unknown occupant of a car while he was standing in a parking lot.[82] The court held that the insured was not covered by uninsured motor vehicle coverage, because his injuries had not been caused by physical contact of an uninsured motor vehicle with the insured.[83] Instead, his injury arose out of the physical contact

73. *Id.*
74. *Id.* at 800.
75. *Id.* at 801.
76. *See id.*
77. 254 Cal. Rptr. 152 (Ct. App. 1988).
78. *Pham*, 254 Cal. Rptr. at 152.
79. *Id.* at 154.
80. *Id.*
81. 41 Cal. Rptr. 2d 210 (Ct. App. 1995).
82. *State Farm Mut. Auto. Ins. Co.*, 41 Cal. Rptr. 2d at 211.
83. *Id.* at 212.

with the bullet which struck him, which was not set in motion or propelled by the car.[84]

Litigation arising from the "physical contact" requirement under Insurance Code section 11580.2(b) stems primarily from the unlimited factual situations that occur. Again, the focus of the courts considering this requirement has been an affirmation of the clear statutory requirement.

D. *Accrual of Cause of Action*

Insurance Code section 11580.2(i) specifies three alternative methods through which an insured can preserve a cause of action under the uninsured motorist provisions of the policy. Within one year the insured must either: (1) file suit for bodily injury against the uninsured motorist in a court of competent jurisdiction;[85] or (2) conclude an agreement as to the amount due;[86] or (3) notify the insurer, by certified mail, of the institution of arbitration proceedings.[87]

If the insured fulfills any of the Code requirements mentioned above, his cause of action against the insured will be preserved. If he does not, he cannot make a claim for uninsured motorist benefits.

Insurance Code section 11580.2 creates a condition for the preservation of a potential cause of action for uninsured motorist benefits under the policy of insurance.[88] However, this code section does not fix the time for instituting a civil suit against the insurer after a cause of action has accrued.[89] Instead, these actions are an absolute condition precedent to claims.[90]

The provisions of Insurance Code section 11580.2(i) create an absolute prerequisite to the accrual of any cause of action against the insurer for UM/UIM benefits under the statute. The Ninth Circuit affirmed this interpretation of section 11580.2(i) in *United States v. Hartford Accident & Indemnity Co.*[91] Because the provision did not create a conventional statute of limitations, but rather an absolute prerequisite to

84. *Id.* at 217.
85. CAL. INS. CODE § 11580.2(i)(1)(A) (West 1988 & Supp. 1996).
86. *Id.* § 11580.2(i)(1)(B).
87. *Id.* § 11580.2(i)(1)(C).
88. *Id.* § 11580.2(i).
89. *See id.*
90. *See id.*
91. 460 F.2d 17, 19 (9th Cir. 1972).

the accrual of any cause of action under the statute, the immunity of the United States to state statutes of limitations did not apply.[92] The failure of the federal government, as an insured, to bring an action within one year barred its recovery.[93]

The rationale behind Insurance Code section 11580.2(i) is that the insurer must be able to recover the benefits paid to its insured by suing the uninsured driver who is liable for the injuries to the insured. This recovery is only possible when the insured has preserved that right by complying with section 11580.2(i). The insurer is entitled to assert a cause of action against the uninsured motorist responsible for the insured's injuries. If the insured has failed to protect the statutory time, the insurer has no obligation to pay uninsured motorist benefits.

In *Kortmeyer v. California Insurance Guarantee Ass'n,*[94] the court held that compliance with Insurance Code section 11580.2(i) was an absolute condition precedent to maintaining a cause of action under the policy for UM benefits, irrespective of the insurer's insolvency.[95] In *Kortmeyer*, a woman whose uninsured motorist claim was denied by the liquidator of her automobile insurer brought a declaratory relief action against the Insurance Commissioner, as liquidator, and the California Insurance Guarantee Association (hereinafter CIGA) seeking allowance of her claim and a judgment declaring her right to recover uninsured motorist benefits from CIGA.[96]

The parties in *Kortmeyer* stipulated that plaintiff had not filed a lawsuit against the uninsured motorist or made a demand for arbitration against the insolvent insurer and that no agreement was ever reached as to the amount due under the policy.[97] The court found that, absent Kortmeyer's compliance with section 11580.2(i), she had no right to claim uninsured motorist benefits against either the insolvent Coastal Insurance Company or CIGA.[98] The court emphasized that the insured's cause of action against her insurer only accrues

92. *Hartford Accident & Indem. Co.*, 460 F.2d at 19.
93. *Id.*
94. 12 Cal. Rptr. 2d 71 (Ct. App. 1992).
95. *Kortmeyer*, 12 Cal. Rptr. 2d at 74.
96. *Id.* at 72.
97. *Id.* at 75.
98. *Id.*

when the insured has preserved the cause of action against the uninsured motorist tortfeasor.[99]

In *California State Automobile Ass'n v. Cohen,*[100] the court discussed the difference between when a statute of limitations begins to run and when a cause of action accrues to make a claim for uninsured motorist benefits.[101] The court explained that a cause of action accrues to an insured under an uninsured motorist policy on the date the insured files suit against the uninsured motorist pursuant to Insurance Code section 11580.2(i), not on the date that the accident took place.[102]

In *Spear v. California State Automobile Ass'n,*[103] the court held that an insured's cause of action against an insurer, and his right to compel arbitration of his uninsured motorist benefit claim, did not accrue, and the statute of limitations did not run, until the insurer refused to arbitrate, and not when the insured meets one of the three statutory conditions set forth in section 11580.2(i).[104]

The court in *Spear* noted that *Cohen*, as well as numerous other cases, had correctly held that the one year period in which the insured must act to preserve his or her cause of action cannot be extended or tolled.[105] The court also noted that these cases do not state that accrual occurs, and the statute of limitations begins to run, when one of the preconditions of Insurance Code section 11580.2(i) is met.[106]

Note that although courts are in agreement that the provisions in section 11580.2(i) serve as an absolute precondition to recovery under the uninsured motorist law, they are unclear as to whether this provision applies to individuals who are making a claim to recover underinsured motorist benefits.[107] This issue will be addressed in more detail in the sec-

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99. *Id.*
100. 118 Cal. Rptr. 890 (Ct. App. 1975).
101. *Cohen*, 118 Cal. Rptr. at 894-95.
102. *Id.* at 895.
103. 831 P.2d 821 (Cal. 1992).
104. *Spear*, 831 P.2d at 822.
105. *Id.* at 824.
106. *Id.*
107. *Compare* Arrasmith v. State Farm Ins. Co., 29 Cal. Rptr. 2d 53 (Ct. App. 1994) (holding that section 11580.2(i) applies to underinsured motorist claims) *with* Quintano v. Mercury Casualty Co., 36 Cal. App. 4th 104, 106 (Ct. App. 1994) (holding that section 11580.2 does *not* apply to underinsured motorist claims), *reh'g granted*, 884 P.2d 985 (Cal. 1995).

tion regarding the co-existence of uninsured and underinsured claims.

E. *Requirement to Provide Notice of Limitation of Action*

Where the insured is not being represented by counsel, an insurer can only rely on the insured's failure to comply with the one-year statute of limitations if it has notified the insured in writing of the limitations period.[108] Failure to do so tolls the statute.[109] In other words, an insurer whose nonrepresented insured has a pending claim under the uninsured motorist coverage is required to notify its insured in writing of the applicable statute of limitations at least thirty days before its expiration.[110]

Failure by the insurer to provide the notification tolls the statute for a period of thirty days from the date the written notice is actually given.[111] However, under section 11580.2(k), the notice is not required if the insurer has received notice that the insured is represented by an attorney.[112]

In *Pugh v. State Farm Insurance Co.*,[113] the court held that notification of attorney representation must be in writing in order to negate the insurer's obligation to give the insured notice.[114] In *Pugh*, the trial court granted an insured's petition to compel her insurer to arbitrate her uninsured motorist claim, even though it was filed beyond the applicable one-year statute of limitations under 11580.2(i).[115]

In *Pugh*, the trial court entered a judgment confirming the arbitration award given in favor of the insured.[116] The appellate court affirmed and explained that the insured's petition to compel arbitration was not barred by the one-year statute of limitations, because the statute was tolled by the insurer's failure to notify the insured in writing of the statutory time limitations as required by section 11580.2(k).[117]

108. CAL. INS. CODE § 11580.2(k) (West 1988 & Supp. 1996).
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. 278 Cal. Rptr. 149 (Ct. App. 1991).
114. *Pugh*, 278 Cal. Rptr. at 153.
115. *Id.* at 149-50.
116. *Id.* at 150.
117. *Id.* at 151, 153.

The court also held that the insured, who had not made any statements or done anything that would lead State Farm to believe that she was represented by counsel, was not estopped from claiming lack of notice.[118]

In *State Farm Mutual Automobile Insurance Co. v. Lykouresis*,[119] the court held that the thirty-day notice must be in plain and understandable language, and be sufficient to apprise the insured of the statute's expiration and how to prevent it.[120] In this case, the insured was Greek and knew little English.[121] The first notice sent by the insurer indicated that the insured had to file a lawsuit before the date of expiration.[122] The second notice corrected the statement to say that a demand for arbitration would be sufficient, and a lawsuit was not necessary.[123] The court ruled that the second notice was deficient because it did not state the date by which the demand had to be filed and that, because a lawsuit would have tolled the statute of limitations, the notice had been misleading.[124] Thus, the statutory time period was tolled.[125]

In *Davis v. Blue Cross*,[126] not itself an uninsured motorist case, the California Supreme Court held that the insurer had waived its right to compel arbitration when it had breached its covenant of good faith and fair dealing by failing to apprise the insured of her right to arbitration.[127] The insurer had tried to pursue arbitration after the insured filed suit.[128] The court noted that if arbitration is to be a meaningful remedy under the uninsured motorist statute, the insurer must provide specific advice to the insured about its availability.[129]

There may exist circumstances where an insurer is not required to provide the thirty-day notice. For instance, if the insured does not present the claim to the insurer until just prior to the one-year period, it is impossible for the insurer to

118. *Id.*
119. 139 Cal. Rptr. 827 (Ct. App. 1977).
120. *Lykouresis*, 139 Cal. Rptr. at 830.
121. *Id.* at 829.
122. *Id.*
123. *Id.*
124. *Id.* at 830.
125. *Lykouresis*, 139 Cal. Rptr. at 830.
126. 600 P.2d 1060 (Cal. 1979).
127. *Davis*, 600 P.2d at 1061.
128. *Id.*
129. *Id.* at 1067.

give the requisite thirty-day notice of Insurance Code section 11580.2(k). In this case, the failure to provide the requisite thirty days notice would not be the fault of the insurer. Nevertheless, the insurer should provide whatever notice it can under the circumstances. For example, if the claim is first presented twenty days before the statute expires, the insurer can only provide notice that the statute will expire in twenty days.

F. *Arbitration*

Insurance Code section 11580.2(f) provides for arbitration as follows:

> The policy or an endorsement added thereto shall provide that the determination as to whether the insured shall be legally entitled to recover damages, and if so entitled, the amount thereof, shall be made by agreement between the insured and the insurer or, in the event of disagreement, by arbitration.[130]

Thus, only two matters can and must be submitted to arbitration in the event of disagreement between the insurer and the insured: (1) whether the insured is legally entitled to recover damages; and (2) if the insured is legally entitled to recover damages, then to what amount.[131] The damages referred to are the damages the insured is legally entitled to recover from the uninsured motorist, rather than the amount of money the insurance company must pay the insured.[132]

The statutory requirement that these two issues be arbitrated cannot be reduced or limited by the policy.[133] Any attempt to do so will be considered void.[134] Regardless of the issues decided, the arbitration award, or a judgment confirming such an award, is not conclusive on any party in any subsequent proceeding between the insured, his insurer, his legal representative, or his heirs, and the uninsured motorist.[135]

In *Orpustan v. State Farm Mutual Automobile Insurance Co.*,[136] the court addressed the issue of whether a finding of

130. CAL. INS. CODE § 11580.2(f) (West 1988 & Supp. 1996).
131. *See id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* § 11580.2(f).
136. 500 P.2d 1119 (Cal. 1972).

physical contact could be made by an arbitrator.[137] In *Orpustan*, a motorist who had been injured when he drove off the road to avoid a collision with an unidentified vehicle sued his own insurer to compel arbitration under the uninsured motorist provisions of his policy.[138] He wanted to arbitrate the insurer's denial of coverage based on a lack of physical contact with the unknown vehicle.[139]

The trial court in *Orpustan* found that there was no physical contact and therefore ruled that State Farm was not obligated to pay uninsured motorist benefits.[140] The California Supreme Court reversed.[141] It held that where the arbitration provisions regarding uninsured motorist coverage in an insurance policy are sufficiently comprehensive to include the question of whether the vehicle which caused the accident was an uninsured vehicle, it is for the arbitrator and not the court to make that determination.[142] The court further explained that "the parties contemplated expeditious resolution of disputes between them arising under the uninsured motorist coverage through the medium of arbitration, and that all such disputes should be so decided."[143]

In *Mayflower Insurance Co. v. Pellegrino*,[144] the court held that the arbitration provisions of Insurance Code section 11580.2(f) relate only to disputes between the insured and insurer.[145] *Pellegrino* involved an interpleader action in which the insured driver was involved in an automobile accident caused by an uninsured driver.[146] The insured's passenger was killed as a result of the collision.[147] The insurer, uncertain as to who was entitled to the proceeds of the uninsured motorist policy, deposited the funds with the court.[148] The insured driver sought to compel arbitration under the arbitration clause of his policy.[149]

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137. *Orpustan*, 500 P.2d at 1119.
138. *Id.* at 1120.
139. *Id.*
140. *Id.*
141. *Id.* at 1123.
142. *Orpustan*, 500 P.2d at 1121.
143. *Id.*
144. 261 Cal. Rptr. 224 (Ct. App. 1989).
145. *Pellegrino*, 261 Cal. Rptr. at 228.
146. *Id.* at 225.
147. *Id.*
148. *Id.* at 226.
149. *Id.*

In *Pellegrino*, the court recognized a strong public policy favoring arbitration as an expeditious and economical means of dispute resolution.[150] However, the court noted that there is no public policy requiring arbitration of disputes when the parties have not agreed to arbitrate or when no statute had made the dispute arbitrable.[151]

The court further explained that Insurance Code section 11580.2(f) indicated a legislative intent to require arbitration only of disputes between insureds and insurers.[152] Consequently, arbitration is mandated only for insurer/insured disagreements.

The injured insured is entitled to recover uninsured motorist benefits only if he or she is legally entitled to recover from the uninsured motorist.[153] The issue of the uninsured motorist's liability must first be determined.[154] Insurance Code section 11580.2(f) requires only that the determination of both the right to recover and the amount of recovery be by agreement between the insured and the insurer or, in the event of disagreement, by arbitration.[155]

G. *Subrogation*

The subrogation section of section 11580.2 provides that the insurer paying a claim under uninsured motorist coverage is subrogated to the rights of the insured to whom such claim was paid and against any person legally liable for that injury or death, to the limits that the payment made.[156] This section does nothing more than transfer an insured's negligence claim to the insurer.

In addition to statutory provisions providing for the insured's subrogation rights under section 11580.2(g), policies include a provision that the insurer's right to subrogation include payments made by the insurer under the uninsured motorist coverage.[157] Policies are now frequently written in simplified English rather than the sometimes difficult to un-

150. *Pellegrino*, 261 Cal. Rptr. at 228.
151. *Id.* at 229.
152. *Id.*
153. CAL. INS. CODE § 11580.2(f) (West 1988 & Supp. 1996).
154. *Id.*
155. *Id.*
156. *Id.* § 11580.2(g).
157. *Id.*

derstand "legalese" formerly used. For example, a typical subrogation clause may include the following:

> If we (the insurer) make a payment under the uninsured motor vehicle coverage, we have the right to recover the amount of our payment from any person legally responsible for the loss. You (the insured) must transfer all rights to recover to us, execute all legal papers we need, and not harm our rights to recover from the responsible party.

In *West American Insurance Co. v. Chalk*,[158] the court held that under the subrogation section, which provides that an insurer can bring an action against an uninsured motorist within three years from the date it paid uninsured motorist benefits to its insured, the insurer was entitled to assert a claim against the uninsured motorist.[159] The court allowed this even though the insured was barred from doing so because of the insured's shorter one-year statute of limitations.[160]

In *Chalk*, the court explained that the special period of limitations applicable solely to the subrogation claims of an insurer take precedence over a statute of limitations applicable to personal injury claims.[161] In their decision, the court emphasized that the three-year statute of limitations is not an unconstitutional denial of equal protection, because the classification bears a rational relationship to a conceivable state purpose.[162] This purpose is to permit insurers, who are required to write insurance based on the risk of their insureds being injured by uninsured drivers, to seek reimbursement from those drivers and protect the insurer's subrogation rights from being barred.[163]

The purpose of the extended limitation period provided in section 11580.2(g) is to protect the subrogation rights of the insurer, which under certain circumstances could be barred even before the right has accrued.[164]

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158. 261 Cal. Rptr. 837 (Ct. App. 1989).
159. *Chalk*, 261 Cal. Rptr. at 840.
160. *Id.*
161. *Id.*
162. *Id.* at 841.
163. *Id.*
164. *Chalk*, 261 Cal. Rptr. at 841.

H. *The Effect of Settlement or Judgment With the Person Liable Without the Insurer's Consent*

The uninsured motorist coverage provided in Insurance Code section 11580.2 does not apply to "bodily injury of the insured with respect to which the insured or his representative shall, without the written consent of the insurer, make any settlement with or prosecute to judgment any action against any person who may be legally liable therefor."[165]

The purpose of this provision is to protect the insurer's general subrogation rights and to prevent double recovery by the insured. However, the exemption from coverage does not apply if the insurer arbitrarily withholds its consent to a judgment or settlement.[166] The burden is on the insured to prove that consent was arbitrarily withheld. Furthermore, the exception does not apply if the insurer commits an anticipatory breach of the policy by denying coverage without justification.[167]

In *Terzian v. California Casualty Indemnity Exchange,*[168] an insurer's conduct was held to prevent application of the "unconsented judgment" exclusion.[169] In this case, the insurer's repeated failures to respond to the insured's demands for arbitration were held tantamount to a denial of liability under the policy and constituted a breach thereof.[170]

The insurer's intervention in the insured's litigation against the person liable can also defeat the insurer's right to invoke the "unconsented judgment" exclusion. In *Safeco Insurance Co. v. Folen,*[171] Safeco's insureds brought suit in federal district court against two other drivers after being injured in a three-car accident in Alabama.[172] One of the adverse drivers was insured, the other was not.[173]

Safeco intervened in that action and sought a determination of its liability against the uninsured driver.[174] It argued that its own insureds, instead of the uninsured motorist, had

165. CAL. INS. CODE § 11580.2(c)(3) (West 1988 & Supp. 1996).
166. *Id.* § 790.03(h) (West 1993).
167. *Id.*
168. 117 Cal. Rptr. 284 (Ct. App. 1974).
169. *Terzian*, 117 Cal. Rptr. at 290.
170. *Id.*
171. 173 Cal. Rptr. 23 (Ct. App. 1981).
172. *Safeco Ins. Co.*, 173 Cal. Rptr. at 23.
173. *Id.* at 27.
174. *Id.*

been negligent.[175] The federal court rejected all of Safeco's arguments.[176] After Safeco's insureds recovered both from the insured driver and from Safeco under the uninsured motorist provision of the policy, Safeco sued its own insureds in California, arguing that the insureds had breached their contract with Safeco by not protecting its subrogation rights against the two tortfeasors responsible for the Alabama accident.[177]

The court held that Safeco was entitled to intervene in Alabama as a matter of right in order to defeat its insured's claims for uninsured motorist benefits.[178] However, all of Safeco's claims against its insureds were barred by res judicata because such rights had merged in the judgment against it issuing from the Alabama court.[179] Therefore, Safeco could not later seek relief in the California action against its insureds.[180]

In collecting $30,000 from the insured driver, *and* from Safeco under the uninsured motorist provision, the insureds were simply exercising a right conferred by the judgment.[181] By intervening in the Alabama action, the insurer waived its right to rely on policy provisions that would have otherwise barred the insureds from proceeding to judgment.[182] In addition, the court held that by attempting to re-litigate the issues, the insurer had breached the covenant of good faith and fair dealing under the policy.[183]

Recently, there has been an increase in litigation regarding the unconsented judgment exclusion itself, and also its application to underinsured motorist claims. As it stands today, the "consent to settle" requirement set forth in section 11580.2(c)(3) is not applicable to individuals seeking underinsured motorist benefits. This issue will be discussed in further detail in the next section.

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175. *Id.* at 28.
176. *Id.*
177. *Safeco Ins. Co.*, 173 Cal. Rptr. at 29.
178. *Id.* at 30.
179. *Id.* at 32.
180. *Id.* at 30.
181. *Id.* at 29.
182. *Safeco Ins. Co.*, 173 Cal. Rptr. at 29.
183. *Id.* at 30.

IV. THE CO-EXISTENCE OF UNINSURANCE AND UNDERINSURANCE

A. *Underinsurance Explained*

As stated above, an uninsured motor vehicle is a vehicle which has no bodily injury liability insurance at the time of an accident.[184] On the other hand, an underinsured motor vehicle is a vehicle that is insured, but for an amount that is less than the uninsured motorist limits carried on the vehicle of the injured person.[185]

Under the underinsurance provisions,[186] all policies that include uninsured motorist coverage for bodily injury must also include underinsured motorist coverage.[187] Underinsured motorist coverage must be offered with limits at least equivalent to the uninsured motorist coverage.[188] Although the limits for underinsured motorist coverage can exceed the limits for uninsured motorist coverage, both uninsured and underinsured motorist coverage must be offered as a single coverage.[189]

Insurance Code section 11580.2 specifically provides that underinsured motorist coverage does not apply to any bodily injury until the limits of all bodily injury liability policies have been exhausted by payment of judgments or settlements.[190] Similarly, section 11580.2(p)(4) provides that the "maximum liability of the insurer providing underinsured motorist coverage may not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by or for any person or entity held legally liable for the injury."[191]

This complicated language basically means that an insured cannot recover underinsured motorist benefits under his or her own policy until the liability limits of the policy insuring those parties responsible for the injuries have been exhausted. Nonetheless, an insurer who provides underinsured motorist benefits for bodily injury to its insured is enti-

184. *See* discussion *supra* part I.
185. CAL. INS. CODE § 11580.2(p)(2) (West 1988 & Supp. 1996).
186. *Id.* § 11580.2(p).
187. *Id.* § 11580.2(p)(7).
188. *Id.* § 11580.2(n).
189. *Id.*
190. *Id.* § 11580.2(p)(3).
191. *Id.* § 11580.2(p)(4).

tled to a credit or reimbursement to the extent the insured has received payments from the owner of the underinsured vehicle.[192] This effectively precludes double recovery by the injured party.

B. *Statutory Provision and Judicial Development in Conflicts in Uninsurance and Underinsurance Provisions*

Insurance Code section 11580.2(p) explicitly provides that "[i]f the provisions of this subdivision conflict with subdivisions (a) through (o), the provisions of this subdivision shall prevail."[193]

Subdivision (p) deals specifically with underinsurance.[194] Subdivisions (a) through (o) address uninsurance.[195] The majority of litigation in this area arises in determining (1) when a conflict arises between the subdivisions; and (2) if a real conflict exists, can the subdivisions co-exist.

In *Lopez v. Allstate Insurance Co.*,[196] both the insured and the person responsible for the insured's injuries had liability limits of $15,000 per person and $30,000 per occurrence.[197] The court held that section 11580.2(p)(2) clearly restricts underinsured motorist benefits to cases in which the tortfeasor's liability limits are less than the underinsurance limits of the injured person.[198]

Thus, underinsured motorist coverage is not the equivalent of excess coverage.[199] The insurer providing underinsured motorist coverage never pays the full amount of the coverage, but only pays the difference between its own insured's policy limits and amounts paid by or on behalf of the person liable to the insured.[200]

It is irrelevant whether the insured is made whole by the sum of those payments.[201] In *Malone v. Nationwide Mutual*

192. *Id.* § 11580.2(p)(5).
193. *Id.* § 11580.2(p).
194. *Id.*
195. *See id.* § 11580.2(a)-(o).
196. 18 Cal. Rptr. 2d 463 (Ct. App. 1993).
197. *Lopez*, 18 Cal. Rptr. 2d at 464.
198. *Id.* at 466.
199. *See* Malone v. Nationwide Mut. Ins. Co., 263 Cal. Rptr. 499 (Ct. App. 1989).
200. *Id.* at 500.
201. *Id.*

Insurance Co.,[202] the court ruled that the first party insurer, which had already paid its insured's underinsured motorist benefits, was entitled to reimbursement for all amounts that the insured's spouse had recovered from the responsible party's insurer.[203] These amounts included those which she received as widow of the deceased, as an heir, and an additional amount she received for her own mental damages from the same source.[204]

Unless the tortfeasor's vehicle qualifies as an underinsured vehicle under the policy, the insured's underinsurance coverage is never triggered.[205] Thus, if the tortfeasor's vehicle has enough insurance to qualify as "insured," the insured cannot recover underinsured motorist benefits even though the limit of the tortfeasor's policy is inadequate to compensate the insured for all his or her injuries.[206] Because the tortfeasor's policy in *Elwood* had limits equal to the insured's own policy, the vehicle driven by the responsible party was not considered "underinsured."[207] The claimant was not entitled to recover underinsured motorist benefits.[208]

In *State Farm Mutual Automobile Insurance Co. v. Messinger*,[209] the court dealt with a situation where the vehicle driven by the responsible party carried $300,000 single limits, and the claimant's vehicle, insured with State Farm, carried $100,000 per person/$300,000 per accident limits.[210] The insured claimant argued that its damages should be determinative of the availability of underinsured motorist benefits.[211] However, the court held that the responsible party's motor vehicle was not underinsured.[212]

The court further held that underinsured motorist coverage is not triggered by the amount of the claimant's damages, but rather by a comparison of the limits of the responsible party's limits and the underinsured motorist limits of the

202. 263 Cal. Rptr. 499 (Ct. App. 1989).
203. *Malone*, 263 Cal. Rptr. at 501.
204. *Id.* at 502.
205. Elwood v. AID Ins. Co., 880 F.2d 204, 206 (9th Cir. 1989).
206. *Id.* at 209.
207. *Id.* at 206.
208. *Id.*
209. 283 Cal. Rptr. 493 (Ct. App. 1991).
210. *Messinger*, 283 Cal. Rptr. at 495.
211. *Id.* at 499.
212. *Id.* at 501.

claimant's policy.[213] Finally, the court held that the fact that an insured claimant might be unable to collect the full value of its claim because of the existence of multiple claimants was not a problem for the courts to resolve, but should be left to the legislature.[214]

A tortfeasor's vehicle is not necessarily considered underinsured just because there are multiple claimants with claims that exceed the available coverage. In *Schwieterman v. Mercury Casualty Co.*,[215] the court held that the responsible party was not an underinsured motorist simply because there were multiple claimants.[216] These claimants had so depleted the available coverage that the funds actually available to pay any individual insured's claim were less than the underinsured motorist limits of coverage under the claimant's own policy.[217]

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

Underinsured motorist benefits may not be available when the insured is the sole person at fault. In *Royal Insurance Co. v. Cole*,[218] the court held that an injured passenger, in an accident where the driver of the vehicle was solely responsible, could not recover from the underinsured motorist policy provisions of the driver's policy.[219] The insured vehicle was not an underinsured motor vehicle within the meaning of section 11580.2(p)(2).[220]

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213. *Id.*
214. *Id.*
215. 280 Cal. Rptr. 804 (Ct. App. 1991).
216. *Schwieterman*, 280 Cal. Rptr. at 805.
217. *Id.* at 806.
218. 16 Cal. Rptr. 2d 660 (Ct. App. 1993).
219. *Royal Ins. Co.*, 16 Cal. Rptr. 2d at 667.
220. *Id.* at 666.

The court explained that the statute clearly assumes that there is another negligent vehicle involved in the accident with liability insurance less than the uninsured motorist limits carried on the vehicle of the injured person.[221]

C. *Highly Litigated Provisions*

The following three provisions under Insurance Code section 11580.2 have resulted in litigation because they tend to conflict with subdivision (p) regarding underinsurance motorist coverage: (1) the consent to settle exclusion in section 11580.2(c)(3); (2) the subrogation rights of the insurer in section 11580.2(g); and (3) the determination for the accrual of a cause of action under section 11580.2(i).

In *Hartford Fire Insurance Co. v. Macri*,[222] the court held that although Insurance Code section 11580.2(g) grants an automobile insurer subrogation rights to an insured who has paid uninsured motorist benefits, an insurer has no subrogation rights in the context of underinsured motorist coverage.[223]

The court in *Macri* explained that when faced with an uninsured claim, the insurer must be made aware of any potential judgment or settlement in order to protect its subrogation rights and to prevent double recovery.[224] However, there is no need for such protection in the underinsured motorist context.[225] This is because the underinsured carrier is not required to pay UIM benefits to its insured until the insured has exhausted the limits of the tortfeasor's liability policies by either settling the claim, or obtaining a judgment against the person at fault and submitting proof of payment to the insurer.[226] Under these circumstances, there is no danger of double recovery.[227]

In *Macri*, the California Supreme Court addressed the issue of whether the requirement of the insurer's consent under Insurance Code section 11580.2(c)(3) was applicable to underinsured motorist claims.[228] The court held that section

221. *Id.* at 663.
222. 842 P.2d 112 (Cal. 1992).
223. *Macri*, 842 P.2d at 118.
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 119.
228. *Macri*, 842 P.2d at 119.

11580.2(c)(3), requiring an insured to obtain the consent of the insurer before settling with an uninsured motorist, was inapplicable to underinsured motorist claims.[229] The court reasoned that the purpose of the consent to settle requirement of section 11580.2(c)(3) was to protect the insurer's subrogation rights.[230] Since the court concluded that an insurer that provides underinsured motorist benefits has no subrogation rights against the underinsured motorist, section 11580.2(c)(3) does not apply to underinsured motorist coverage.[231]

In a more recent case, *Arrasmith v. State Farm Insurance Co.*,[232] the court addressed the issue of whether the accrual provisions of Insurance Code section 11580.2(i) should be applied to an underinsurance claim.[233] The court held that section 11580.2(i) does not conflict with section 11580.2(p) and may therefore be applied in the context of an underinsured motorist claim.[234] Section 11580.2(i) provides that an uninsured motorist claim does not accrue unless, within one year from the date of accident, suit for bodily injury has been filed against an uninsured motorist, agreement as to the amount due under the policy has been concluded, or the insured has formally instituted arbitration proceedings.[235]

The court in *Arrasmith* explained that although section 11580.2(p)(3) bars underinsured motorist coverage until settlement or judgment and payment from all other insurance policies, it does not preclude perfection of an underinsured motorist claim.[236] Since personal injury actions must be filed within one year of injury, or within one year of the accident, the insured must either settle any claims against the responsible party or file suit against him.[237] The filing of suit is itself sufficient to protect the insured's right to underinsured benefits.[238]

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229. *Id.*
230. *Id.* at 119-20.
231. *Id.* at 120.
232. 29 Cal. Rptr. 2d 53 (Ct. App. 1994).
233. *Arrasmith*, 29 Cal. Rptr. 2d at 56.
234. *Id.*
235. CAL. INS. CODE § 11580.2(i) (West 1988 & Supp. 1996).
236. *Arrasmith*, 29 Cal. Rptr. 2d at 56.
237. *Id.* at 57.
238. *Id.*

The ruling in *Arrasmith* was challenged in *Quintano v. Mercury Casualty Co.*[239] *Quintano* held that section 11580.2(i) was not intended to apply to underinsured motorist provisions.[240] In this case, the court explained that section 11580.2(p) requires that the insurance policy of the at-fault-party be exhausted by payment of judgments or settlements first, and that there be proof of payment to the insurer in order for underinsured motorist coverage to apply.[241] That requirement is the only condition precedent to underinsurance coverage contemplated by the legislature.[242]

The court in *Quintano* further explained that since underinsured motorist coverage is inapplicable until the person at fault has paid the insured, none of the preconditions to a claim would have been met under section 11580.2(i) except the filing of suit against the person at fault.[243] However, since the claimant had settled with the person at fault, the filing of suit was only a formality which should not have been required.[244] Thus, the insured's action against its insurer had accrued upon the insurer's refusal to process the claim, the last element essential to the cause of action.[245]

As *Quintano* is currently under review by the California Supreme Court, it is not binding. Therefore, the ruling in *Arrasmith*, which holds that section 11580.2(i) applies to underinsured motorist claims, remains the legal precedent on this issue.

V. CONCLUSION

California's uninsured and underinsured motorist law is the product of a dense and complex statute. It is indeed unfortunate that a statute that is so frequently referenced is so infrequently understood. However, given the purpose of the law, and the need for effective protections against fraud, it is probably as well crafted as one could hope.

What remains then is the need for the practitioner to fully familiarize him or herself with its provisions and subse-

239. 31 Cal. Rptr. 2d 900 (Ct. App.), *reh'g granted*, 884 P.2d 985 (Cal. 1994).
240. *Quintano*, 31 Cal. Rptr. 2d at 905.
241. *Id.* at 904.
242. *Id.*
243. *Id.* at 905, 906.
244. *Id.* at 905.
245. *Quintano*, 31 Cal. Rptr. 2d at 905.

quent interpretations. Particularly, one must be sure that all the elements necessary to perfect the right to recovery are in place. With proper attention, section 11580.2 serves its purpose extremely effectively. Handled sloppily, it can trap the unwary practitioner and bar recovery.