

AVOIDANCE OF POTHOLES ON THE ROAD TO UNINSURED MOTORIST INSURANCE RECOVERY

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The road to successful recovery of uninsured motorist benefits is filled with many potholes. Any one is sufficiently deep and wide to stop you dead still in the road and deny your client the U. M. benefits to which he or she would otherwise be entitled. Not only that, any one of the potholes may subject you to a malpractice claim. As an attorney, you are deemed to know the location of each of these potholes; failure to negotiate the road and avoid the potholes may leave you accountable for the U. M. benefits not recovered at the end of the road.

This article attempts to help you avoid these potholes; it identifies and discusses those common lapses which occur to the unwary plaintiff's counsel. Some of the potholes are well-known; but some are more obscure. Let this serve as your check list of potholes to avoid in any U. M. case that presents itself to your office.

I. NOTICE OF OCCURRENCE TO THE U. M. CARRIER:

It is common for a U. M. policy to include a provision requiring an insured to give written notice of the occurrence as soon as practicable. Often the policy additionally includes a requirement that a written proof of claim be provided as soon as practicable on a form furnished by the carrier. The courts have interpreted these notice provisions to require that the injured insured give written notice "as soon as practicable after discovery of the uninsured status."¹ "As soon as

practicable" means within a reasonable time. As to whether the time was reasonable, the courts consider all the circumstances including whether the insured was reasonably diligent in his or her efforts to learn of the insured status of the responsible party.²

If a finding is made that written notice was not given as soon as practicable, that may void U. M. coverage.

Generally, whether notice is given "as soon as practicable" is a question of fact to be determined by a jury.³ One thing is clear, though, lapse of time, even as long as approximately eleven months, does not itself establish non-compliance with the notice provision.⁴

Where there is non-compliance with a notice provision, the injured insured may overcome forfeiture of the policy coverage if there is an excuse. The courts will entertain evidence of the injured party's diligence in ascertaining whether the defendant's vehicle was insured or uninsured, and such diligence, considering all of the circumstances, may be offered as an excuse in failing to give otherwise timely notice.⁵

To avoid the notice of occurrence pothole, you should immediately send a certified letter to all U. M. carriers upon acceptance of the case. This letter should be sent regardless of whether the tort-feasor has liability insurance or not. By doing that, you have avoided, at least as to your own representation, any claim that you failed to give the appropriate notice to the U. M. carrier.

II. NOTICE OF HIT-AND-RUN TO THE U. M. CARRIER:

Many U. M. policies contain a special notice provision which requires the injured insured to notify the U. M. carrier within thirty days of a hit-and-run wreck. These notice provisions are valid, and are not deemed a violation of state public policy.¹ In hit-and-run, or "John Doe" actions, the U. M. carrier becomes the unidentified tort-feasor. The courts have found that it is incumbent that the carrier have an opportunity to investigate the circumstances giving rise to the claim. Absence of timely notice, according to the court, may prevent the insurer's prompt investigation.⁷

This thirty-day notice provision is not only applicable to the policyholder of the U. M. coverage, but is also applicable to any other additional insureds who are claiming a right to U. M. benefits under an insurance policy.⁸

You have satisfied your professional representation of your client if you give immediate notice upon your acceptance of the case as suggested in pothole #1 above. But the more difficult problem arises when the client first seeks your counsel more than thirty days after a hit-and-run wreck, and you are, thus, powerless to provide notice required under the policy. In such event, you might consider the excuse, based upon diligence of the insured, or other reasons, which would serve to excuse your client from having given the notice within the time required under the policy. As an example, a severely injured insured, hospitalized for a long period of time, may serve as a legally justifiable excuse for late notice.

III. REPORTING "JOHN DOE" COLLISIONS TO PUBLIC SAFETY:

Under the provisions of O.C.G.A. '33-7-11(c), an insured injured by an unknown "John Doe" driver must report the collision as required by O.C.G.A. '40-6-273 to recover U. M. benefits. Under this reporting statute, an insured is required to immediately report an accident to the local police department if it occurs within a municipality, or to the county sheriff or the nearest office of the state patrol if the accident occurs outside a municipality. Of course, so long as the accident is investigated by the local police and a report prepared, this reporting requirement is satisfied. But if the collision occurred, for example, on private property, rather than on a public highway, a report may not be completed by the local police. In that case, the report must be filed prior to filing a U. M. lawsuit.

The failure to comply with this statutory condition precedent does not necessarily preclude recovery of the U. M. benefits. The failure to file operates only to abate the right to file an action against the U. M. carrier.⁹ Thus, full compliance with the reporting requirements of this statute

may be satisfied by filing the report at any time, so long as it is filed prior to the time suit is commenced against the U. M. carrier.¹⁰

The danger in failing to file the report stems from the abatement of the action. Failure to file within the time of the statute of limitation against the U. M. carrier may operate to bar the claim against the carrier.¹¹

Upon presentation to you of a "John Doe" U. M. claim, you should immediately determine whether a policy report has been prepared and, if not, immediately report the collision to the appropriate authorities as required by the statute prior to filing an action against the U. M. carrier.

IV. SERVICE OF PROCESS UPON THE U. M. CARRIER:

The Uninsured Motorist Act sets out a statutory notice requirement which is a prerequisite to an injured insured's right to recover under the U. M. policy provisions.¹² This statutory notice requires service of process of the lawsuit upon the U. M. carrier. Under this statutory scheme, a U. M. carrier is served with summons, just as if the U. M. carrier were named as a defendant in the lawsuit. The statutory notice can be accomplished in no other way, and absence of a strict compliance by service of summons bars an action based on the U. M. coverage.¹³

In a claim arising out of an automobile collision where there is no liability coverage available to the injured insured, obviously service of summons upon the U. M. carrier is a necessary prerequisite to recover any insurance proceeds. But what about the claim where liability coverage exists in an amount at least equal to that of the U. M. coverage. Should service of process be made upon the U. M. carrier in this instance?

This question was answered in Bohannon v. Futrell,¹⁴ where the court expressly condoned the procedure of serving the injured insured's U. M. carrier in all motor vehicle collision cases, regardless of whether it appears that the tort-feasor is, or may possibly become, an uninsured

motorist. The Georgia Supreme Court affirmed this in Bohannon v. J. C. Penney Casualty Insurance Company.¹⁵ Under this rule, it ". . . is now judicially recognized as a responsibility of all plaintiffs to serve their uninsured motorist carriers in every action arising out of every motor vehicle accident."¹⁶ Service is necessary because the two-year statute of limitation applies to service of process upon the U. M. carrier, regardless of when an injured insured may be eligible to receive U. M. benefits.¹⁷ Even if liability coverage is available in an amount equal to or greater than the U. M. benefits, the liability coverage may later be denied to the injured insured for reason of insolvency of the liability carrier, or non-cooperation by the insured or other possible reasons. If liability coverage is denied, and service of process has not been perfected within two years of a collision, the injured insured is barred from recovering from the U. M. carrier.¹⁸

V. STATUTE OF LIMITATION AS TO ACTIONS AGAINST THE U. M. CARRIER

An action against the U. M. carrier is governed by the same statute of limitation which governs the underlying tort claim against the owner/operator of the uninsured motor vehicle.¹⁹ If, for example, the claim is for personal injuries, the action against the U. M. carrier must be instituted within two years of the date of the collision causing injury.²⁰ It is important to emphasize that the statute of limitation begins to run on the date the claim could first be brought. The true test is the time when the plaintiff could have first maintained an action to a successful result.²¹ That means the statute of limitation begins to run on the day of the collision causing injury. It is not tolled or delayed to the day that it is discovered that the tort-feasor was an uninsured motorist, or that the tort-feasor did not have sufficient insurance coverage.²²

Just as was discussed in Paragraph 4 above, it behooves you as plaintiff's counsel to serve process upon the U. M. carrier in every suit arising out of an automobile collision regardless of whether liability coverage is available or is in an amount equal to or greater than the U. M. coverage. Just as important is the requirement that suit against the U. M. carrier be filed within the

statute of limitation applicable to the underlying tort suit.

VI. TRIAL OF THE CASE: PROOF OF UNINSURED STATUS AND EXISTENCE OF UNINSURED MOTORIST COVERAGE:

In a "John Doe" action against an unknown motorist, it is presumed that the offending motorist was operating an uninsured motor vehicle at the time of the collision.²³ In such a case, no other proof as to the status of the liable motorist is necessary to assure the right of the injured insured to recover U. M. benefits. On the other hand, where the offending motorist is known, and subject to personal jurisdiction of the court, the court will not presume that the tort-feasor was an uninsured motorist.²⁴ Thus, it is essential that the injured insured offer proof by way of competent evidence in a trial of the case that the alleged tort-feasor was either not covered under a policy of liability insurance or that the applicable liability insurance coverage is less than the U. M. coverage available to the injured insured. Absent that proof, the injured insured may suffer directed verdict barring the right to recover U. M. benefits.

In addition to proving the uninsured motorist status of the tort-feasor, the injured insured must also prove the existence of a policy of U. M. coverage where the U. M. carrier has answered the lawsuit in its own name. Where the U. M. carrier is a named defendant by its own election, the injured insured may recover a judgment in the action against the U. M. carrier for the amount the injured insured would be entitled to recover from the alleged tort-feasor.²⁵ Obviously, such a judgment against the U. M. carrier would be subject to the policy limit of the U. M. coverage.

Diligent counsel should tender the policy contained in the U. M. coverage into evidence, but the limits of coverage should not be revealed to the jury.²⁶ This is because the jury is forbidden from knowing the limits of coverage under the U. M. policy for obvious reasons. In that instance, the trial court would have the option of making the U. M. policy a matter of record without presenting it to the jury, or providing the policy to the jury with the amount of coverage deleted.²⁷

VII. NECESSITY OF JUDGMENT AGAINST THE UNINSURED MOTORIST:

In order for the injured insured to recover from an uninsured motorist carrier, the insured must establish the legal liability of the owner or operator of the uninsured motor vehicle.²⁸ As the term "legal liability" is used in the uninsured motorist act, it means the securing of a judgment against the uninsured motorist.²⁹

Where timely service of process upon the U. M. carrier is made, but the U. M. carrier either does not answer the suit or answers in the name of the alleged tort-feasor, the insured must first obtain a judgment against the uninsured motorist before being entitled to proceed directly against the U. M. carrier.³⁰ Under these circumstances, the U. M. carrier would not be a party to the action and, thus, would not be bound by the judgment against the uninsured motorist, which may require a claim and suit against the U. M. carrier to recover the benefits. In most instances, however, the U. M. carrier, upon proof of U. M. coverage, is willing to pay based upon such a judgment.

Where, however, the U. M. carrier answers the tort suit against the uninsured motorist in its own name, the injured insured may recover a judgment in that action against the carrier for the amount that the injured insured would be legally entitled to recover from the tort-feasor subject only to the policy limits of U. M. coverage.³¹

Although the U. M. carrier files an answer to the tort suit in its own name, this does not eliminate the requirement that the injured insured obtain a judgment against the uninsured motorist.³² However, this condition precedent to recovery against the U. M. carrier may be waived by the U. M. carrier as, for example, where the carrier has led the injured insured to believe that payment will be made without necessity of bringing a lawsuit.³³

Where the uninsured motorist's whereabouts are unknown and, thus, in personam jurisdiction not obtainable, this does not bar recovery of the U. M. benefits from the U. M. carrier. The Uninsured Motorist Act provides that in such circumstances where the uninsured motorist

cannot be found, service by publication may be accomplished such that it allows the court to enter a nominal judgment against the uninsured motorist that satisfies the statutory condition precedent to recovery against the U. M. carrier.³⁴ So long as the U. M. carrier is served with process as required by law, the nominal judgment against the uninsured motorist whose whereabouts are unknown will satisfy the statutory requirement of legal liability of the uninsured motorist and entitles the injured insured to recovery from the U. M. carrier.³⁵

Although the U. M. carrier may waive the necessity of judgment against the uninsured motorist, plaintiff's counsel in all cases should remember that judgment against the uninsured motorist is necessary and, therefore, suit must be filed against the uninsured motorist and the U. M. carrier within the applicable statute of limitation. It is too risky to rely upon waiver of this statutory requirement and, thus, suit in all instances should be filed in a timely manner.

VIII. SETTLEMENT AND RELEASE OF THE UNINSURED OR UNDERINSURED MOTORIST:

Under the Uninsured Motorist Act, the U. M. carrier's legal obligation to pay its insured is fixed by that sum which the insured is "legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle. . . ."³⁶ Therefore, a condition precedent to recovery against the U. M. carrier is that suit be brought against the uninsured motorist and that a judgment in a fixed amount be obtained.³⁷

However, if the injured insured signed a general release of the uninsured motorist, this operates as a bar to a claim against the U. M. carrier. A general release bars the injured insured from obtaining a judgment against the uninsured motorist and thus there is no longer any basis of liability on which the U. M. carrier may be held responsible.³⁸ Therefore, a general release of the uninsured motorist operates as a general release of the U. M. carrier as well.³⁹ The injured insured is no longer "legally entitled to recover" damages from the tort-feasor. In addition, a general

release of the uninsured motorist deprives the U. M. carrier of its right of subrogation, thereby further providing a complete defense to an action on the U. M. policy.⁴⁰

Especially true where liability coverage exists but is less than the U. M. coverage available, there is often incentive to attempt settlement with the liability carrier without settling the claim against the U. M. carrier. But the temptation to settle with the liability carrier must be resisted, unless it is known and recognized by counsel and client alike that a claim against the U. M. carrier will be barred.

In 1994, the General Assembly enacted O.C.G.A. '33-24-41.1, the often called "Limited Release Statute," which authorizes, under certain circumstances, settlement and release with the liability carrier without barring the claim against the U. M. carrier. But the elements of that special release is beyond the scope of this article.⁴¹

CONCLUSION:

Avoid the many potholes along the road to U. M. coverage by giving immediate notice of the occurrence to the U. M. carrier, being sure that any hit-and-run collision is reported to the local police, filing suit against the tort-feasor and the U. M. carrier within the applicable statute of limitations, serving the U. M. carrier as if it were a party defendant to the action, proving that the tort-feasor is an uninsured motorist and the existence of the U. M. policy, obtaining a judgment against the uninsured motorist and avoiding settlement and release of the uninsured motorist except where no claim will be made against the U. M. carrier.

Keep these rules in mind, and you will maintain the highest professional representation for your client.

1. Gibson v. Dempsey, 167 Ga. App. 23, 25, 306 E.E.2d 32 (1983).
2. Gibson v. Dempsey, 167 Ga. App. at 25; Gregory v. Allstate Insurance Company, 134 Ga. App. 461, 214 S.E.2d 696 (1975).
3. Gibson v. Dempsey, 167 Ga. App. at 25; Gregory v. Allstate Insurance Company, 134 Ga. App. at 464.
4. Gibson v. Dempsey, 167 Ga. App. at 25; Gregory v. Allstate Insurance Company, 134 Ga. App. at 464.
5. Woods v. State Farm Mutual Automobile Insurance Company, 234 Ga. 782, 218 S.E.2d 65 (1975).
6. Flamm v. Doe, 167 Ga. App. 587, 307 S.E.2d 105 (1983).
7. Id.
8. Johnson v. Atlanta Casualty Company, 187 Ga. App. 306, 370 S.E.2d 157 (1988). See also Flamm v. Doe, 167 Ga. App. 587, 307 S.E.2d 105 (1983), where the 30-day notice provision was held to bar recovery by a plaintiff who was operating an automobile owned and insured by his employer.
9. Jones v. Doe, 143 Ga. App. 451, 238 S.E.2d 555 (1977).
10. Id.
11. Id.; See also Corbin v. Gulf Insurance Company, 125 Ga. App. 281, 187 S.E.2d 312 (1972).
12. O.C.G.A. '33-7-11(d).
13. Yarbrough v. Dickinson, 183 Ga. App. 489, 359 S.E.2d 235 (1987).
14. Bohannon v. Futrell, 189 Ga. App. 340, 375 S.E.2d 637 (1988), *aff'd*, Bohannon v. J. C. Penney Casualty Insurance Company, 259 Ga. 162, 377 S.E.2d 853 (1989).
15. Bohannon v. J. C. Penney Casualty Insurance Company, 259 Ga. 152, 377 S.E.2d 853 (1989).
16. Bohannon v. J. C. Penney Casualty Insurance Company, 259 Ga. 162, 377 S.E.2d 853 (1989)(Weltner, J., dissenting). In United States Fidelity & Guaranty Insurance Company v. Meyers, 214 Ga. App. 851, 449 S.E.2d 359 (1994), the plaintiffs first became aware of

the existence of a phantom driver's involvement in the accident during the deposition of a witness in the personal injury action filed against certain known defendants. This deposition was taken two and one-half years after the accident. The trial court allowed the plaintiff to add "John Doe" as a party defendant, and the plaintiffs' U. M. carrier was subsequently served with the complaint. The U. M. carrier filed a motion to dismiss. The trial court denied that motion, finding that the statute of limitation was tolled from the date the original complaint was filed until the date of the witness' deposition. On interlocutory appeal, the Georgia Court of Appeals reversed, holding that "the trial court erred in finding that the statute of limitation was tolled until the plaintiffs discovered the possible existence of a phantom driver.

17. Vaughn v. Collum, 236 Ga. 582, 224 S.E.2d 416 (1976).
18. One possible escape from the harsh statute of limitation rule is found in Reid v. United States Fidelity and Guaranty Company, ___ Ga. App. ___, ___ S.E.2d ___ (Case Nos. A96A1629, A96A1630, decided October 15, 1996). There the U. M. carrier was not served in a personal injury suit because liability coverage was in place. But after the two-year statute had run, the liability carrier was declared insolvent. The court reversed summary judgment for the U. M. carrier where the injured insured dismissed the tort suit and refiled within six months under the savings statute and then served the U. M. carrier with process. The court reasoned that the underlying action was voidable, but not void, and therefore its status was not a basis for granting summary judgment to the U. M. carrier on the ground that the two-year statute of limitation had expired. Note that a petition for writ of certiorari was filed with the Georgia Supreme Court, so don't rely on it as the final word on this subject.
19. Vaughn v. Collum, 236 Ga. 582, 224 S.E.2d 416 (1976); Kemp v. Cotton States Mutual Insurance Company, 177 Ga. App. 460, 340 S.E.2d 26 (1986); Commercial Union Insurance Company v. Wraggs, 159 Ga. App. 596, 284 S.E.2d 19 (1981); accord White v. Wright, 566 F. 2d 99 (5th Cir. 1978).
20. O.C.G.A. '9-3-33; Vaughn v. Collum, 236 Ga. 582, S.E.2d 416 (1976).
21. Yarbrough v. Dickinson, 183 Ga. App. 489, 359 S.E.2d 235 (1987).
22. Bohannon v. Futrell, 189 Ga. App. 340, 375 S.E.2d 637 (1988), aff'd, Bohannon v. J. C. Penney Casualty Insurance Company, 259 Ga. 162, 377 S.E.2d 853 (1989); Continental Insurance Company v. Echols, 145 Ga. App. 112, 243 S.E.2d 88 (1978); see Judge Beasley's special concurring opinion in Smith v. Allstate Insurance Company, 199 Ga. App. 264, 265-266, 404 S.E.2d 593 (1991); Clark v. Safeway Insurance Company, 198 Ga. App. 282, 401 S.E.2d 72 (1991).
23. O.C.G.A. '33-7-11(b)(2); Smith v. Commercial Union Insurance Company, 246 Ga. 50, 268

- S.E.2d 632 (1980); General Accident Insurance Company v. Straws, 220 Ga. App. 496, ---S.E.2d---(1996).
24. Hartford Accident & Indemnity Company v. Studebaker, 139 Ga. App. 386, 228 S.E.2d 322 (1976); accord Dewberry v. State Farm Mutual Automobile Insurance Company, 197 Ga. App. 248, 398 S.E.2d 266 (1990).
 25. Moss v. Cincinnati Insurance Company, 154 Ga. App. 165, 268 S.E.2d 676 (1980).
 26. Cf. Carolina Casualty Insurance Company v. Davalos, 246 Ga. 746, 272 S.E.2d 702 (1980).
 27. Id.
 28. O.C.G.A. '33-7-11(a)(1) In the direct action against the U. M. carrier, the judgment against the uninsured owner or operator is the highest and best evidence of its contents. Generally, the contents of the judgment cannot be proved by parol evidence. Peagler and Manley Insurance Agency v. Studebaker, 156 Ga. App. 786, 275 S.E.2d 385 (1980).
 29. Continental Insurance Company v. Echols, 145 Ga. App. 112, 243 S.E.2d 88 (1978).
 30. O.C.G.A. '33-7-11(j); Lewis v. Cherokee Insurance Company, 258 Ga. 839, 375 S.E.2d 850 (1989); State Farm Mutual Automobile Insurance Company v. Lorenz, 202 Ga. App. 123, 413 S.E.2d 782 (1991); McCrary v. Preferred Risk Mutual Insurance Company, 198 Ga. App. 727, 402, S.E.2d 519 (1987); Peagler and Manley Insurance Agency, Inc. v. Studebaker, 156 Ga. App. 786, 275 S.E.2d 385 (1980).
 31. Moss v. Cincinnati Insurance Company, 154 Ga. App. 165, 268 S.E.2d 676 (1980).
 32. Boles v. Hamrick, 194 Ga. App. 595, 391 S.E.2d 418 (1990); Jones v. Cotton States Mutual Insurance Company, 185 Ga. App. 66, 363 S.E.2d 303 (1987). See Cotton States Insurance Company v. Bogan, 194 Ga. App. 824, 392 S.E.2d 33 (1990).
 33. Jones v. Cotton States Mutual Insurance Company, 185 Ga. App. 66, 363 S.E.2d 303 (1987); Rosenberg v. Liberty Mutual Insurance Company, 163 Ga. App. 82, 293 S.E.2d 737 (1982); see and compare Beasley v. Parks, 204 Ga. App. 482, 420 S.E.2d 3 (1992).
 34. State Farm Mutual Automobile Insurance Company v. Noble, 208 Ga. App. 518, 430 S.E.2d 804 (1993); see Cotton States Mutual Insurance Company v. Bogan, 194 Ga. App. 824, 392 S.E.2d 33 (1990); Chitwood v. Southern General Insurance Company, 189 Ga. App. 697, 377 S.E.2d 210 (1988); Norman v. Daniels, 142 Ga. App. 456, 236 S.E.2d 121 (1977).
 35. Chitwood v. Southern General Insurance Company, 189 Ga. App. 697, 377 S.E.2d 210

(1988).

36. O.C.G.A. '33-7-11(a).
37. Williams v. Thomas, 187 Ga. App. 527, 370 S.E.2d 773 (1988), quoting Hartford Accident & Indemnity Company v. Studebaker, 139 Ga. App. 386, 228 S.E.2d 322 (1976).
38. Darby v. Mathis, 212 Ga. App. 444, 441 S.E.2d 905 (1994).
39. Id.; O.C.G.A. '33-24-41.1 provides for a limited release by which an injured insured may, under specified circumstances, settle a claim with a tort-feasor's liability carrier and yet preserve the claim against the U. M. carrier.
40. Darby v. Mathis, 212 Ga. App. 444, 441 S.E.2d 905 (1994).
41. See Jenkins & Miller, Georgia Automobile Insurance Law, Including Tort Law, 1996 Edition, The Harrison Company, Section 13-5.