

## 17 UNINSURED AND UNDERINSURED MOTORIST COVERAGES

Alaska's Motor Vehicle Safety Responsibility Act<sup>1</sup> requires proof of financial responsibility in the amount of \$50,000 for bodily injury or death in one accident, \$100,000 for bodily injury or death to two or more people, and \$25,000 for property damage in one accident.<sup>2</sup> However, actual proof of insurance must be submitted only if a person has been in an accident, or where a person or entity is self-insured.<sup>3</sup>

Alaska requires that uninsured/underinsured motorist coverage be offered by insurers subject to the limits of the Financial Responsibility Act, and further requires insurers to offer their insureds the option to purchase uninsured/underinsured coverage limits **at least** equal to the liability policy limits. The insured may opt to purchase uninsured/underinsured limits of up to \$1 million for one person and \$2 million for 2 or more persons.

An insured may reject UM/UIM coverage in writing.<sup>4</sup> Once rejected, the coverage shall not be included in any supplemental, renewal, or replacement policy unless the insured subsequently requests the coverage in writing.<sup>5</sup> A written waiver by a named insured or applicant shall be valid for all insureds under the policy.<sup>6</sup> A written waiver is not, however, required where the insured selects UM/UIM coverage in an amount which is less than the amount of his/her liability coverage.<sup>7</sup>

AS 21.89.020(c) requires insurance companies to offer UM/UIM coverage with minimum limits of \$50,000 per person, \$100,000 per accident. In addition, carriers must offer optional higher limits up to \$1,000,000 per person, \$2,000,000 per accident, irrespective of the limits of liability coverage.<sup>8</sup> An insured who wishes to waive UM/UIM coverage, in whole or in part, must do so in writing, but there is no requirement that the

<sup>1</sup> AS 28.20.010 *et seq.*

<sup>2</sup> AS 28.20.440.

<sup>3</sup> *Werley v. United Servs. Auto. Ass'n*, 498 P.2d 112 (Alaska 1972).

<sup>4</sup> AS 28.20.445(e)(3); *see also* AS 28.22.201(a)(3).

<sup>5</sup> AS 28.20.445(e)(3).

<sup>6</sup> AS 21.89.020 (h).

<sup>7</sup> *Ayres v. United Services Auto Ass'n*, 160 P.3d 128, 134 (Alaska 2007).

<sup>8</sup> AS 21.89.020(c)(2).

various optional limits have to be offered or rejected in writing.<sup>9</sup> The Alaska Supreme Court has begun to enunciate some guidelines relating to the procedures for offering UM/UIM motorist coverage.<sup>10</sup> Relying on the plain language of AS 21.89.020(c), the common sense meaning of the word "offer," and the legislative history of the statute, the court has found that an insurer need only "make available and give notice of availability" of the various levels of UM/UIM coverage provided by statute.<sup>11</sup> Accordingly, an insurer need not include the price for each level of UM/UIM coverage when advising the prospective customer of the availability of such coverage.<sup>12</sup> However, if the prospective customer requests premium information, the insurer must provide that information in order to make a valid offer.<sup>13</sup>

A trial court has held that when a policy temporarily lapses for nonpayment of premium, but coverage is automatically reinstated upon receipt of the late premium, the policy is not a renewal, supplemental, or replacement policy for purposes of AS 28.20.445(e)(3); AS 28.22.201(a)(3). Rather, it is a "reinstatement" policy requiring a new waiver of UM/UIM coverage.<sup>14</sup> The case was not appealed, so the issue remains undecided by Alaska's highest court.

AS 28.20.445 sets forth the key features of Alaska's uninsured/underinsured motorist coverage. For policies written after July 1, 1997 coverage is triggered whenever the insured's actual damages for bodily injury or property damage exceed the available liability coverage for such damages. The legislature mandated this result in 1997 by repealing the definition of "underinsured motor vehicle" which was previously found at AS 28.20.445(h), and adopting a new definition at AS 28.40.100(22) which defines "underinsured motor vehicle" as one "for which there is a bodily injury or property damage liability policy or a bond applicable at the time of the accident and the amount of insurance or bond is less than the amount the insured person is entitled to recover for bodily injury or property damage from the owner or operator of the underinsured motor vehicle." The Alaska Supreme Court found the same to be true for cases under the law as it existed prior to July 1, 1997. The Alaska Supreme Court found that the 1990 legislative enactments which adopted an "excess" as opposed to a "reduction" scheme of UM/UIM benefits impliedly repealed the definition of

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<sup>9</sup> AS 21.89.020(e); *Peter v. Schumacher Enter.*, 22 P.3d 481 (Alaska 2001).

<sup>10</sup> *Gov't Employees Ins. Co. v. Graham-Gonzalez*, 107 P.3d 279 (Alaska 2005).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 284.

<sup>13</sup> *Id.*

<sup>14</sup> *Progressive Cas. Ins. Co. v. Banzhaf*, Super. Ct. Case No. 3AN-96-1006 Civil (Dec. 9, 1997).

"underinsured motor vehicle" found in AS 28.20.445(h).<sup>15</sup> UIM coverage has been expanded so that an insured may recover up to the full limits of his UIM coverage whenever his damages exceed the amount available from the tortfeasor's insurer. For all policies of insurance issued after July 1, 1997, the legislature has resolved any ambiguity in favor of this expanded UIM coverage by the express repeal of AS 28.20.445(h) and the adoption of AS 28.40.100(a)(22).

Under Alaska law, it is established that automobile liability insurers providing UM/UIM coverage are obligated to pay prejudgment interest, costs and attorney's fees **in addition** to the facial limits of UM/UIM coverage where the liability coverages under the policy provide coverage for prejudgment interest, costs, and attorney's fees in addition to facial policy limits.<sup>16</sup> This is sometimes referred to as "the mirror rule," because it holds that insureds are entitled to the same benefits under the UM/UIM coverages as third-parties are entitled to receive under the liability coverage. In the UM/UIM context, the UM/UIM insurer is not obligated to pay Civil Rule 82 attorney's fees on an arbitration award when the insured receives less than full policy limits.<sup>17</sup>

Automobile policies must include coverage for prejudgment interest on the minimum policy limits established by statute.<sup>18</sup> Therefore, when an insurer offers "policy limits" with respect to a policy providing minimum limits of coverage, the insurer must offer prejudgment interest on those limits as well. As discussed under Tab 14 (Attorney's Fees), and as discussed above, attorney's fees under Civil Rule 82 are an additional item of coverage under the policy and must be offered as part of any "policy limits offer" in cases where the claimant is represented<sup>19</sup> This suggests that liability insurers in Alaska should consider making changes to their policies to ensure that their obligation to pay Rule 82 attorney's fees in UM/UIM cases is limited to attorney's fees calculated on the face limits of the policy, as opposed to the claimant's **actual** damages.

As discussed above, in Tab 11, the Alaska Supreme Court has held that a UM/UIM insurer is obligated to pay the award of punitive damages against an uninsured or underinsured driver where the insured's liability coverage contains no exclusion for punitive damages, based on the "mirror-rule" announced in *Harrington*.<sup>20</sup> Consequently,

<sup>15</sup> *Progressive Ins. Co. v. Simmons*, 953 P.2d 510 (Alaska 1998).

<sup>16</sup> *State Farm Mut. Auto. Ins. Co. v. Harrington*, 918 P.2d 1022 (Alaska 1996).

<sup>17</sup> *Wing v. GEICO Ins. Co.*, 17 P.3d 783 (Alaska 2001).

<sup>18</sup> *Hughes v. Harrelson*, 844 P.2d 1106 (Alaska 1993).

<sup>19</sup> *Schultz v. Travelers Indem. Co.*, 754 P.2d 265 (Alaska 1988). For a discussion about whether the general coverage "policy limits" attorney's fees applies to unrepresented claimants, see Tab 14.

<sup>20</sup> *State Farm Mut. Ins. Co. v. Lawrence*, 26 P.3d 1074, 1079-81 (Alaska 2001).

insurers are well-advised to include punitive damage exclusions in both the liability and UM/UIM portions of their policies.

When two or more UM/UIM policies have been issued by the same insurer and are applicable to the same accident, the maximum amount payable is the highest limit of any one of the policies involved. However, if the claimant is entitled to uninsured motorist coverage under two or more policies covering different cars and different named insureds, "stacking" is permitted.<sup>21</sup> In this latter situation, the statute specifies the order of priority in which the coverage will be applied.<sup>22</sup>

In 2001, the Alaska Supreme Court announced that when a personal umbrella policy provides automobile liability insurance, UM/UIM coverage also must be included under the "mirror rule" requiring equal liability and UIM coverages.<sup>23</sup> In response to this decision, several insurers either withdrew from the Alaska market or ceased writing umbrella policies. To avert an insurance crisis, the Alaska legislature amended AS 21.89.020 to specify that "automobile liability insurance" does not include coverage provided on an excess or umbrella basis. AS 21.89.020(i). The revision became effective October 24, 2004.

There are two statutory exclusions for uninsured/underinsured coverage in Alaska: (1) when the insured is occupying an uninsured vehicle he or his spouse or his resident relative owns, or (2) where the insured is struck by a vehicle he or his resident spouse or resident relative owns.<sup>24</sup> It is unclear whether other uninsured/underinsured motorist coverage exclusions would be upheld. The Alaska Supreme Court invalidated an underinsured motorist exclusion as contrary to statute.<sup>25</sup> The policy in question specifically provided that uninsured/underinsured motor vehicles did not include motor vehicles "insured under the liability coverage of the policy."<sup>26</sup> Although the Alaska statutes provide that uninsured/underinsured coverage does not protect an insured while occupying an uninsured vehicle owned by the insured, a clear implication is that if an insured is occupying an insured vehicle owned by him, he is protected by his UIM

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<sup>21</sup> AS 28.20.445(c).

<sup>22</sup> AS 28.20.445(c)(i)-(8).

<sup>23</sup> *Holderness v. State Farm Fire & Cas. Co.*, 24 P.3d 1235 (Alaska 2001).

<sup>24</sup> AS 28.20.445(d); see also *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248 (Alaska 1988).

<sup>25</sup> *Burton v. State Farm Fire & Cas. Co.*, 796 P.2d 1361, 1364 (Alaska 1990).

<sup>26</sup> *Id.* at 1362.

coverage.<sup>27</sup> However, the *Burton* court left open the possibility that other policy exclusions will not conflict with case law and statutory law.<sup>28</sup>

In one case, the Alaska Supreme Court allowed recovery under a third-party's UM/UIM policy for a claim of negligent infliction of emotional distress ("NIED").<sup>29</sup> In *Teel*, plaintiff sought to recover damages for NIED under the UM/UIM policy of the driver. Plaintiff was not a passenger in the vehicle or a relative of the named insured. However, her son was a passenger and had died as a result of the accident. The court found that, if plaintiff were able to prove the elements of her NIED claim, she would qualify as an "insured person" under the policy's UM/UIM coverage. "Insured person" was defined in that policy to include:

Any other person who is legally entitled to recover because of bodily injury to [the insured], a resident relative, or an occupant of [the insured's] auto with [the insured's] permission.<sup>30</sup>

It is important to note that the court's conclusion hinged on the language of the policy -- in particular that it provided coverage for "any other person who is legally entitled to recover because of bodily injury to an occupant of the insured vehicle."<sup>31</sup> This suggests that, had the policy contained different language, the outcome would have been different.

In a case in which this firm represented the automobile insurer, the Alaska Supreme Court has held that a claim for underinsured motorist benefits cannot be successfully pursued unless and until the claimant has completely exhausted the tortfeasor's liability limits.<sup>32</sup> In *Curran*, the Alaska Supreme Court held that, under AS 28.20.445, underinsured motorist coverage does not apply to bodily injury or death of an insured until the limits of liability of all bodily injury liability policies that apply have been used up by payments, judgments or settlements. The claimant argued that, rather than requiring that the claimant fully exhaust the tortfeasor's liability policy, the first-party insurer should be given a "credit" for the amount of the tortfeasor's liability limits -- in order to achieve constructive exhaustion. The court held that this argument stretched

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<sup>27</sup> *Id.* at 1363.

<sup>28</sup> *Id.*

<sup>29</sup> *Allstate Ins. Co. v. Teel*, 100 P.3d 2 (Alaska 2004).

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 5.

<sup>32</sup> *Curran v. Progressive Northwestern Ins. Co.*, 29 P.3d 829 (Alaska 2001).

the statute's plain meaning too far and that a UIM claimant cannot unilaterally invoke a credit. Otherwise, a UIM claimant could bypass the liability insurer altogether and effectively utilize UIM coverage as primary insurance – contrary to the design of UIM insurance.

In *Wold v. Progressive*,<sup>33</sup> the Alaska Supreme Court revisited the issue of when a claimant has completely exhausted the tortfeasor's liability limits. In *Wold*, a single-vehicle accident occurred when a driver swerved to avoid a collision with an unknown driver, and his 16-year-old passenger was killed. The passenger's estate sued the driver of the car she was riding in, and her parent sued for loss of consortium. The court held that the estate could not collect uninsured motorist benefits from the parent's policy because AS 28.20.445(f) requires physical contact with the "hit and run" vehicle. The court also held, however, that the passenger's parent (individually, for loss of consortium, and as representative of the passenger's estate), could collect underinsured coverage from the parent's policy. The estate had exhausted the limits of the tortfeasor's<sup>34</sup> liability policy and the parent's claim was derivative of the estate's claim.

Ultimately, the Alaska Supreme Court held that, for purposes of exhaustion of the tortfeasor's limits, the insured need only receive the full facial limits of the tortfeasor's liability policy (which can include any amount of liens the tortfeasor's insurer assumes), and need not obtain prejudgment interest and/or attorney's fees above and beyond those facial limits.<sup>35</sup> However, in *Sidney v. Allstate Ins. Co.*, the Alaska Supreme Court clarified that if the insured only obtained facial limits from the tortfeasor's liability policy, he or she would not be entitled to recover those add-ons from the UIM carrier because he or she was not "underinsured" as to those amounts.<sup>36</sup>

<sup>33</sup> *Wold v. Progressive Preferred Ins. Co.*, 52 P.3d 155 (Alaska 2002).

<sup>34</sup> A reference to the driver of the vehicle in which plaintiff's decedent was a passenger -- and the assumption that, by swerving to avoid the unknown vehicle, he was negligent.

<sup>35</sup> *Coughlin v. Government Employees Ins. Co.*, 69 P.3d 986 (Alaska 2003).

<sup>36</sup> 187 P.3d 443, 453 (Alaska 2008). The court did find that the insured was entitled to a pro rata award of attorney's fees and costs from the UIM carrier for work incurred pursuing the underlying policy.

Appendices:

- AS 21.89.020
- AS 28.20.010
- AS 28.20.440 - 445
- AS 28.22.201

**Sec. 21.89.020. Required motor vehicle coverage.** (a) An automobile liability policy that insures an owner or operator of a motor vehicle against loss resulting from liability for bodily injury or death, or for property injury or destruction, or both, that is sold in the state, must contain limits in at least the amount prescribed for a motor vehicle liability policy in AS 28.20.440 or AS 28.22.101.

(b) This section may not be construed to apply only to automobile liability policies obtained to satisfy a requirement of AS 28.20.

(c) An insurance company offering automobile liability insurance in this state for bodily injury or death shall, initially and at each renewal, offer coverage prescribed in AS 28.20.440 and 28.20.445 or AS 28.22 for the protection of the persons insured under the policy who are legally entitled to recover damages for bodily injury or death from owners or operators of uninsured or underinsured motor vehicles. The limit written may not be less than the limit in AS 28.20.440 or AS 28.22.101. Coverage required to be offered under this section must include the following options:

(1) policy limits equal to the limits voluntarily purchased to cover the liability of the person insured for bodily injury or death;

(2) except when the coverage consists of motorcycle liability insurance, and except for a named insured required to file proof of financial responsibility under AS 28.20 or an applicant required to file proof of financial responsibility under AS 28.20, policy limits in the following amounts when these limits are greater than those offered under (1) of this subsection:

(A) \$100,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, \$300,000 because of bodily injury to or death of two or more persons in one accident;

(B) \$300,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, \$500,000 because of bodily injury to or death of two or more persons in one accident;

(C) \$500,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, \$500,000 because of bodily injury to or death of two or more persons in one accident;

(D) \$500,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, \$1,000,000 because of bodily injury to or death of two or more persons in one accident;

(E) \$1,000,000 because of bodily injury to or death of one person in one accident, and, subject to the same limit for one person, \$2,000,000 because of bodily injury to or death of two or more persons in one accident;

(3) other policy limits at the option of the insurer.

(d) An insurance company offering automobile liability insurance in this state for injury to or destruction of property shall offer coverage prescribed in AS 28.20.440 and 28.20.445, or AS 28.22, with limits not less than those prescribed in AS 28.20.440 or AS 28.22.101, to cover the insured person's liability for injury to or destruction of property, for the protection of the persons insured under the policy who are legally entitled to recover damages for injury to or destruction of the covered motor vehicle from owners or operators of uninsured or underinsured motor vehicles.

(e) The coverage required under (c) and (d) of this section may be waived in writing by the insured in whole or in part. After selection of the limits by the insured or the exercise of the option to waive the coverage in whole or in part, the insurer is not required to notify any policy holder in any renewal, supplemental, or replacement policy, as to the availability of the coverage or optional limits, and the waived coverage may not be included in any renewal, supplemental, or replacement policy. The insured may, at any time, make a written request for additional coverage or coverage more extensive than that provided on a prior policy.

(f) An automobile liability insurance policy must provide

(1) that all expenses and fees, not including counsel fees or adjuster fees, incurred because of arbitration or mediation shall be paid as determined by the arbitrator;

(2) liability coverage in the amount set out in AS 28.22.101(d) for motor vehicles rented in the United States or Canada by a person insured under the policy;

(3) physical damage coverage for motor vehicles rented in the United States or Canada, if the policy provides physical damage coverage; if the insured declines physical damage coverage, the insurer shall offer physical damage coverage for rented vehicles;

(4) that payments from applicable coverage provided under (2) and (3) of this subsection will be made in the following order of priority:

(A) from a policy or coverage purchased by the operator from the person who has the vehicle available for rent;

(B) from a policy or coverage covering the operator of a rented vehicle but not purchased from the person who has the vehicle available for rent; and

(C) from a policy or coverage of the person who has the vehicle available for rent.

(g) An insurance company offering automobile liability insurance in this state shall offer a short term policy valid for no more than seven days. The coverage available for the short term policy must be comparable to coverage available for longer term policies. The provisions of AS 21.36.210 — 21.36.310 do not apply to short term policies issued under this subsection.

(h) The selection, rejection, or exercise of the option not to purchase, by a named insured or an applicant, shall be valid for all insureds under the policy. (§ 1 ch 105 SLA 1968; am §§ 2, 3, 18 — 20 ch 70 SLA 1984; am §§ 3, 5, 7, 9, 10 ch 108 SLA 1989; am §§ 1, 2 ch 78 SLA 1990; am § 1 ch 26 SLA 1992; am § 216 ch 67 SLA 1992; am § 1 ch 84 SLA 1992; am §§ 109, 110 ch 81 SLA 1997)

**Sec. 28.20.010. Declaration of purpose.** The legislature is concerned over the rising toll of motor vehicle accidents and the suffering and loss inflicted by them. The legislature determines that it is a matter of grave concern that motorists be financially responsible for their negligent acts so that innocent victims of motor vehicle accidents may be recompensed for the injury and financial loss inflicted upon them. The legislature finds and declares that the public interest can best be served by the requirements that the operator of a motor vehicle involved in an accident respond for damages and show proof of financial ability to respond for damages in future accidents as a prerequisite to the person's exercise of the privilege of operating a motor vehicle in the state. (§ 2 ch 163 SLA 1959)

#### NOTES TO DECISIONS

**Relation to Mandatory Automobile Insurance Act.** — The Motor Vehicle Safety Responsibility Act and the Mandatory Automobile Insurance Act coexist as components of the Alaska Uniform Vehicle Code and the latter supplements, but does not supplant, the former. *Progressive Ins. Co. v. Simmons*, 953 P.2d 510 (Alaska 1998).

The language of AS 21.89.020(c), pertaining to uninsured or underinsured motorist coverage, means that all policies in the state must conform to the content requirements of the Motor Vehicle Safety Responsibility Act, and that if the content requirements of the Mandatory Automobile Insurance Act are broader than those of the former, those requirements must also be complied with as to persons covered by the latter. *Progressive Ins. Co. v. Simmons*, 953 P.2d 510 (Alaska 1998).

The internal structure of the Motor Vehicle Safety Responsibility Act was examined in considerable detail in *Hart v. National Indem. Co.*, 422 P.2d 1015 (Alaska 1967); *Paulson v. National Indem. Co.*, 498 P.2d 731 (Alaska 1972).

**Problem areas in the Motor Vehicle Safety Responsibility Act and suggested amendments.** — See *Paulson v. National Indem. Co.*, 498 P.2d 731 (Alaska 1972).

**Liberal construction of omnibus clause.** — An omnibus clause in an automobile insurance policy should be liberally construed so as to effectuate its basic intent, which is to protect the public from damages caused by vehicles operated by persons other than the named insured. *Johnson v. United States Fid. & Guar. Co.*, 601 P.2d 260 (Alaska 1979).

**Legality of standard cancellation clause.** — The standard cancellation clause in a motor vehicle insurance policy does not contravene the Alaska Motor Vehicle Safety Responsibility Act and is not against public policy. *Hartsfield v. Carolina Cas. Ins. Co.*, 411 P.2d 396 (Alaska 1966).

**Direct action by tortfeasor against liability insurer.** — No direct action may be maintained by a tortfeasor against a liability insurer merely because the legislature has changed Alaska's automobile insurance law from a system which encourages the acquisition of liability insurance to one which requires such insurance. *Evron v. Gilo*, 777 P.2d 182 (Alaska 1989).

Applied in *Hughes v. Harrelson*, 844 P.2d 1106 (Alaska 1993).

Quoted in *Hart v. National Indem. Co.*, 422 P.2d 1015 (Alaska 1967).

Cited in *Bohna v. Hughes, Thorsness, Gantz, Powell & Brundin*, 828 P.2d 745 (Alaska 1992).

**Sec. 28.20.440. Motor vehicle liability policy defined; required provisions.**

(a) In this chapter, "motor vehicle liability policy" means an "owner policy" or an "operator's policy" containing an agreement or endorsement as provided in this section, or certified as provided in AS 28.20.410 or 28.20.420 as proof of financial responsibility for the future, and issued, except as otherwise provided in AS 28.20.420, by an insurance carrier authorized to transact business in this state, to or for the benefit of the person named as insured.

(b) The owner's policy of liability insurance must

(1) designate by description or appropriate reference all vehicles that it covers;

(2) insure the person named and every other person using the vehicle with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of the vehicle within the United States or Canada, subject to limits exclusive of interest and costs, with respect to each vehicle, as follows: \$50,000 because of bodily injury to or death of one person in any one accident, and, subject to the same limit for one person, \$100,000 because of bodily injury to or death of two or more persons in any one accident, and \$25,000 because of injury to or destruction of property of others in any one accident;

(3) contain coverage in not less than the amounts set out in (2) of this subsection for the protection of the persons insured under the policy who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury or death, or damage to or destruction of property arising out of the ownership, maintenance or use of the uninsured or underinsured motor vehicle; this coverage must comply with the provisions of AS 28.20.445.

(c) The operator's policy of liability insurance must insure the person named as insured against loss from the liability imposed upon the person by law for damages arising out of the use by the person of any motor vehicle not owned by the person, within the same territorial limits and subject to the same limits of liability as are required for an owner's policy of liability insurance.

(d) The motor vehicle liability policy must state the name and address of the named insured, the coverage, the premium charges, the policy period and the limits of liability, and must contain an agreement or an endorsement that insurance is provided in accordance with the coverage defined in this chapter for bodily injury and death or property damage, or both, and is subject to all the provisions of AS 28.20.010 — 28.20.640.

(e) The motor vehicle liability policy need not insure liability under a workers' compensation law nor liability for damage to property owned by, rented to, in charge of or transported by the insured.

(f) Every motor vehicle liability policy is subject to the following provisions but these provisions need not be contained in the policy.

(1) The liability of the insurance carrier becomes absolute whenever injury or damage covered by the policy occurs; the policy may not be cancelled or annulled as to this liability after the occurrence of the injury or damage; no statement made by the insured or on behalf of the insured and no violation of the policy defeats or voids the policy.

(2) The satisfaction by the insured of a judgment for injury or damages is not a condition precedent to the right or duty of the insurance carrier to make payment on account of injury or damage.

(3) The insurance carrier may settle a claim covered by the policy, and if settlement is made in good faith, the amount of settlement is deductible from the limits of liability specified in (b) of this section.

(4) The policy, the written application for the policy, if any, and every rider or endorsement that does not conflict with the provisions of this chapter constitute the entire contract between the parties.

(g) A policy that grants the coverage required for a motor vehicle liability policy may also grant lawful coverage in excess of or in addition to the coverage specified for a policy and the excess or additional coverage is not subject to the provisions of this chapter. With respect to a policy that grants excess or additional coverage the term "motor vehicle liability policy" applies only to that part of the coverage that is required by this section.

(h) A motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this chapter.

(i) A motor vehicle liability policy may provide for proration of the insurance with other valid and collectible insurance.

(j) The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers that together meet the requirements.

(k) A binder issued pending the issuance of a motor vehicle liability policy fulfills the requirements for a policy.

(l) Notwithstanding any other provisions of law, a person who resides in the same household as the person named as insured or a person who is a relative of the person named as insured shall be excluded from coverage under a motor vehicle liability policy if the person named as insured requests that that person be excluded from coverage. (§ 46 ch 163 SLA 1959; am § 2 ch 146 SLA 1966; am § 4 ch 202 SLA 1975; am § 11 ch 70 SLA 1984; am § 113 ch 81 SLA 1997)

**Revisor's notes.** — In 1980, pursuant to § 60, ch. 94, SLA 1980, the term "workers' compensation" was substituted for "workmen's compensation."

**Effect of amendments.** — The 1997 amendment, effective July 1, 1997, added subsection (l).

#### NOTES TO DECISIONS

**When section mandatory.** — The provisions of this section are mandatory only if a policy is certified as proof of financial responsibility or is required by law due to a person's previously having been in an accident. *Werley v. United Servs. Auto. Ass'n*, 498 P.2d 112 (Alaska 1972).

The absolute liability provisions of subsection (f)(1) are limited by subsection (a), which provides that such absolute liability provisions are made part of only those motor vehicle liability policies which are certified or required as proof of financial responsibility for the future. *Hart v. National Indem. Co.*, 422 P.2d 1015 (Alaska 1967).

The fact that a liability policy contains a condition relating to financial responsibility laws does not automatically result in the incorporation of subsection (f)(1)'s absolute liability provisions into the policy. *Hart v. National Indem. Co.*, 422 P.2d 1015 (Alaska 1967).

**Prejudgment interest liability.** — An insurer is liable for prejudgment interest, which should not be taken into account when calculating the mandated minimum policy limit for bodily injury or death. *Hughes v. Harrelson*, 844 P.2d 1106 (Alaska 1993).

**Liberal construction of omnibus clause.** — An omnibus clause in an automobile insurance policy should be liberally construed so as to effectuate its basic intent, which is to protect the public from damages caused by vehicles operated by persons other than the named insured. *Johnson v. United States Fid. & Guar. Co.*, 601 P.2d 260 (Alaska 1979).

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contemplates two types of motor vehicle liability policies, namely, an owner's policy and an operator's policy. *Paulson v. National Indem. Co.*, 498 P.2d 731 (Alaska 1972).

**All vehicles owned by insured need not be covered.** — Alaska's Motor Vehicle Safety Responsibility Act does not require that an owner's policy, certified as proof of financial responsibility for the future, cover all vehicles owned by the insured. *Paulson v. National Indem. Co.*, 498 P.2d 731 (Alaska 1972).

**In an action for wrongful death of a minor child, a parent, who may only maintain an action in a representative capacity with the potential recovery to be distributed as the decedent's personal property, was not insured in his capacity as personal representative or potential beneficiary under his uninsured motorist coverage.** *State Farm Mut. Ins. Co. v. Wainscott*, 439 F. Supp. 840 (D. Alaska 1977).

**Untimely notice of accident to insurer.** — In a case of untimely notice of an accident to an insurer, the insurer must prove that it has actually been prejudiced by the delay before its liability is extinguished. *Weaver Bros. v. Chappel*, 684 P.2d 123 (Alaska 1984).

**Applied in** *Stordahl v. GEICO*, 564 P.2d 63 (Alaska 1977); *King v. Jordan*, 601 P.2d 273 (Alaska 1979); *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248 (Alaska 1988).

**Stated in** *Kackman v. Continental Ins. Co.*, 319 F. Supp. 540 (D. Alaska 1970).

**Collateral references.** — Operator's liability policy issued in compliance with financial responsibility statute, 88 ALR2d 995.

**Policy provision extending coverage to comply with financial responsibility act as applicable to insured's first accident,** 8 ALR3d 388.

**Sec. 28.20.445. Uninsured and underinsured motorists coverage.** (a) The maximum liability of the insurance carrier under the uninsured and underinsured motorists coverage required to be offered under AS 28.20.440 shall be the lesser of

(1) the difference between the amount of the covered person's damages for bodily injury and property damage and the amount paid to the covered person by or for a person who is or may be held legally liable for the damages; and

(2) the applicable limit of liability of the uninsured and underinsured motorist coverage.

(b) An amount payable under the uninsured and underinsured motorist coverage shall be excess to an amount payable under automobile bodily injury, death, or medical payments coverage, or as workers' compensation benefits and may not duplicate amounts paid or payable under valid and collectible automobile bodily injury, death, or medical payments coverage, or as workers' compensation benefits.

(c) If a person is entitled to uninsured or underinsured motorists coverage under more than one coverage when two or more vehicles are insured under one policy, the maximum amount payable may not exceed the highest limit of any one coverage under the policy. If a person is entitled as a named insured to uninsured or underinsured motorist coverage under more than one motor vehicle policy issued by the same insurer, the maximum amount payable may be limited to the highest limit of any one coverage under the policies. If a person is entitled to uninsured or underinsured motorist coverage under more than one policy providing motor vehicle liability coverage, payments will be made in the following order of priority, subject to the limit of liability of each applicable policy or coverage:

(1) a policy or coverage covering a motor vehicle occupied by the injured person or a policy or coverage covering a pedestrian as a named insured;

(2) a policy or coverage covering a motor vehicle occupied by the injured person as an insured other than as a named insured;

(3) a policy or coverage not covering a motor vehicle occupied by the injured person but covering the injured person as a named insured;

(4) a policy or coverage not covering a motor vehicle occupied by the injured person but covering the injured person as an insured other than as a named insured;

(5) a policy or coverage covering, as excess, umbrella, or similar insurance, a motor vehicle occupied by the injured person or a policy or coverage covering, as excess, umbrella, or similar insurance, a pedestrian as a named insured;

(6) a policy or coverage covering, as excess, umbrella, or similar insurance, a motor vehicle occupied by the injured person or a policy or coverage covering, as excess, umbrella, or similar insurance, a pedestrian as an insured other than as a named insured;

(7) a policy or coverage not covering a motor vehicle occupied by the injured person but covering, as excess, umbrella, or similar insurance, the injured person as a named insured;

(8) a policy or coverage not covering a motor vehicle occupied by the injured person but covering, as excess, umbrella, or similar insurance, the injured person as an insured other than as a named insured.

(d) Uninsured and underinsured motorists coverage does not apply to bodily injury or death or damage to or destruction of property of an insured

(1) while occupying a motor vehicle owned by, but not insured by, the named insured or the insured's spouse or relative residing in the same household; or

(2) through being struck by a vehicle owned by the named insured or the insured's spouse or relative residing in the same household.

(e) Uninsured and underinsured motorists coverage

(1) may not apply to bodily injury, sickness, disease, or death of an insured or damage to or destruction of property of an insured until the limits of liability of all bodily injury and property damage liability bonds and policies that apply have been used up by payments, judgments or settlements;

(2) shall be a single combined coverage; and

(3) may be rejected by the insured in writing; if the insured has rejected the coverage, the coverage shall not be included in any supplemental, renewal, or replacement policy unless the insured subsequently requests the coverage in writing.

(f) If both the owner and operator of the uninsured vehicle are unknown, payment under the uninsured and underinsured motorists coverage shall be made only where direct physical contact between the insured and uninsured or underinsured motor vehicles has occurred. A vehicle that has left the scene of the accident with an insured vehicle is presumed to be uninsured if the person insured reports the accident to the appropriate authorities within 24 hours.

(g) The uninsured and underinsured motorists coverage for damage to or destruction of property is subject to a deductible of \$250 in any one accident, but the insurer may offer a deductible other than \$250. This coverage shall be limited to damage to or destruction of the insured motor vehicle. It may not include loss of use of the vehicle.

(h) [Repealed, § 115 ch 81 SLA 1997.] (§ 12 ch 70 SLA 1984; am §§ 3 — 5 ch 78 SLA 1990; am § 115 ch 81 SLA 1997)

**Effect of amendments.** — The 1990 amendment rewrote subsections (a)-(c).

The 1997 amendment, effective July 1, 1997, repealed subsection (h).

**Editor's notes.** — Section 7, ch. 78, SLA 1990 provides that the 1990 amendments to this section by ch. 78, SLA 1990 apply to "contracts of insurance entered into on or after January 1, 1991."

#### NOTES TO DECISIONS

**Construction of subsections (b) and (h).** — The language defining the term underinsured vehicle, subsection (h), determining whether or not UIM coverage is triggered, and the language setting forth the nature of the coverage, subsection (b), determining the amount of UIM coverage the insured is entitled to collect if UIM coverage is triggered, can reasonably be read together and the former was not impliedly repealed by the latter. *Colonial Ins. Co. v. Tumbleson*, 889 F. Supp. 1136 (D. Alaska 1995).

**Subsections (b) and (h) not inconsistent.** — The 1990 amendment changed the law to afford greater recovery for underinsured motorist insureds. It did not, however, change the triggering criteria. Accordingly, subsections (b) and (h) of this section are not inconsistent. *Colonial Ins. Co. v. Tumbleson*, 873 F. Supp. 310 (D. Alaska 1995).

Subsection (h) determines when underinsured motorist (UIM) coverage is available and subsection (b) determines how much compensation the UIM insured will receive. *Colonial Ins. Co. v. Tumbleson*, 873 F. Supp. 310 (D. Alaska 1995).

The intent of Alaska's legislature does not conclusively demonstrate that, after adding subsection (b), it intended to remove subsection (h) or somehow make it defer to subsection (b). *Colonial Ins. Co. v. Tumbleson*, 873 F. Supp. 310 (D. Alaska 1995).

**Exhaustion.** — This is an exhaustion statute, and it does not violate Alaska's public policy. *Curran v. Progressive N.W. Ins. Co.*, 29 P.3d 829 (Alaska 2001).

Insureds did not exhaust underlying liability policy limits, and offers of credit were not equivalent to exhaustion of limits; thus they were not entitled to recover from the underinsured motorist insurer. *Curran v. Progressive N.W. Ins. Co.*, 29 P.3d 829 (Alaska 2001).

**Triggering mechanism in paragraph (h)(1).** — Under paragraph (h)(1), UIM coverage is triggered if the tortfeasor's liability policy limits are less than the claimant's UIM policy limits; coverage is not dependent upon a comparison between the settlement amount and UIM policy limits. *Colonial Ins. Co. v.*

*Tumbleson*, 889 F. Supp. 1136 (D. Alaska 1995).

**Proper application of paragraph (h)(1) denied the triggering of underinsured motorist coverage where insureds received more under the larger tortfeasor policy than they would have under the underinsured policy alone.** *Colonial Ins. Co. v. Tumbleson*, 873 F. Supp. 310 (D. Alaska 1995).

**Meaning of "an insured" in paragraph (h)(2).** — In the phrase "reduced by payments to persons other than an insured" in paragraph (h)(2), the term "an insured" means any person insured under the policy; thus, payments made by a tortfeasor's policy limit to the point that UIM coverage was triggered. *Colonial Ins. Co. v. Tumbleson*, 889 F. Supp. 1136 (D. Alaska 1995).

**Meaning of "underinsured motor vehicle".** — The 1990 amendment of subsections (a) and (b) impliedly repealed the definition of "underinsured motor vehicle" in former subsection (h). *Progressive Ins. Co. v. Simmons*, 953 P.2d 510 (Alaska 1998).

**Content requirements of Mandatory Automobile Insurance Act.** — The language of AS 21.89.020(c), pertaining to uninsured or underinsured motorist coverage, means that all policies in the state must conform to the content requirements of the Motor Vehicle Safety Responsibility Act, and that if the content requirements of the Mandatory Automobile Insurance Act are broader than those of the former, those requirements must also be complied with as to persons covered by the latter. *Progressive Ins. Co. v. Simmons*, 953 P.2d 510 (Alaska 1998).

**Paragraph (h)(2) exception inapplicable.** — Where the tortfeasor was insured with liability limits at \$100,000/\$300,000, and the insurance company paid \$300,000 to the plaintiffs, who were insureds, the paragraph (h)(2) exception was inapplicable and did not trigger underinsured coverage. *Colonial Ins. Co. v. Tumbleson*, 873 F. Supp. 310 (D. Alaska 1995).

Quoted in *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248 (Alaska 1988).

Cited in *Holderness v. State Farm Fire & Cas. Co.*, 24 P.3d 1235 (2001).

**Sec. 28.22.201. General policy provisions.** (a) The uninsured and underinsured motorists coverage required under this chapter

(1) does not apply to bodily injury, sickness, disease, or death of an insured or damage to or destruction of property of an insured until the limits of liability bonds and policies that apply have been used up by payments or judgments or settlements;

(2) must be a single combined coverage; and

(3) may be rejected by the insured in writing; if the insured has rejected uninsured or underinsured coverage, the coverage may not be included in a supplemental, renewal or replacement policy unless the insured subsequently requests uninsured or underinsured coverage in writing.

(b) If both the owner and operator of a vehicle are unknown, payment under the uninsured and underinsured motorists coverage may be made only where direct contact between the motor vehicles has occurred. A vehicle and operator that have left the scene of an accident with another vehicle are presumed to be uninsured if the insured person reports the accident to the appropriate authorities within 24 hours.

(c) The uninsured and underinsured motorists coverage for damage to or destruction of property is subject to a deductible of \$250 in any one accident, but the insurer may offer a deductible other than \$250. This coverage shall be limited to damage to or destruction of the covered motor vehicle. It may not include loss of use of such vehicle. (§ 1 ch 108 SLA 1989)

#### NOTES TO DECISIONS

Cited in *Progressive Ins. Co. v. Simmons*, 953 P.2d 510 (Alaska 1998).

**Collateral references.** — Uninsured motorist indemnification: construction and application of requirement that there be "physical contact" with unidentified or hit-and-run vehicle; "hit-and-run" cases. 79 ALR5th 289.