Unraveling the Underinsured Motorist Web: Ohio Underinsured Motorist coverage

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UNRAVELING THE UNDERINSURED MOTORIST WEB: OHIO UNDERINSURED MOTORIST COVERAGE

Understanding how to access underinsured motorist benefits involves a myriad of complex issues. This comment shall focus on two threshold areas of underinsured motorist coverage: the statutory definition of an underinsured motorist and contractual condition precedents enumerated in the insurance policy. If the tortfeasor meets the definition of an underinsured motorist, as defined in the statute, the insured must still comply with three provisions in the contract; the exhaustion clause, the subrogation clause and the consent to settle clause. An insured must first procure the consent of his insurer before he settles with the tortfeasor. However, the insurer will withhold his consent if the insured has not exhausted all applicable bodily injury bonds and policies by judgment or settlement. The insured, in the process of exhausting all other policies must not destroy the insurer's subrogation rights. Today courts, legislatures and the public struggle with these issues in an effort to formulate a viable compensation scheme for those who are injured by drivers who possess inadequate insurance. When analyzing the activation of underinsured motorist coverage, close attention should be paid to the state statutes, insurance policies and case law. While Ohio law will be emphasized, other state law will constantly be referred to throughout the entirety of this comment. The goal of this comment is twofold, to present a multifacit approach to understanding the threshold issues involved and to provide practical solutions to these issues.

HISTORICAL BACKGROUND

Underinsured motorist coverage evolved from the anomalous situation created when liability coverage was prefaced upon the financial responsibility laws of the state. Originally a state's financial responsibility laws were set in the range of $5,000 per victim and $10,000 per accident or $10,000 per victim and $20,000 per accident. Although the states set a low minimum insurance requirement, accidents occurred where the tortfeasor possessed no insurance or insurance below that required by the state. Out of this egregious phenomenon sprang the concept of uninsured motorist coverage. This type of coverage was formulated to compensate the insured who was injured by a driver who should have at least procured liability coverage equivalent to that

1A recent law review article has been published which addresses the consent to settle clause and the exhaustion clause. This case note purports to go a step beyond that which has already been written by creating a method of activating underinsured coverage while still upholding the interests of all the parties. See, Comment, Ohio Underinsured Motorist Coverage: Reconciling The Consent-To-Settle and Exhaustion Clauses, 12 Ohio N.U.L. Rev. 17 (1985).
3I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE, § 3501 (1986).
4Id.
5Note, Uninsured Motorist Coverage Laws: The Problem of the Underinsured Motorist, 55 NOTRE DAME LAW 141, 143 (1980).
state's financial liability law. However, uninsured motorist coverage did not provide a solution to the situation which occurred when a negligent driver complied with the financial liability laws of his state but the law prescribed limits so low that the negligent driver's insurance did not compensate the injured driver for the damages he sustained. Thus, where a driver could acquire insurance coverage far in excess of the state's financial liability laws, there was no comparable protection under his uninsured policy provision which provided coverage equivalent to the financial liability limits set by the state.

Case law is replete with examples illustrating the predicament which arose when a victim of a car accident incurred serious injuries as a result of the negligence of the tortfeasor who only had limits equal to that specified by the financial responsibility law of the state. Courts usually precluded the victim from activating his uninsured motorist benefits despite his serious injuries when the tortfeasor had obtained the requisite policy limits required by the state. For example, in State Farm Mutual Automobile Insurance Company v. Eden, the plaintiff recovered the statutory minimum limits from the tortfeasor's liability insurer. The plaintiff then brought suit against her own insurance company asserting the right to recover uninsured benefits because she sustained injuries above that compensated by the tortfeasor. In its opinion, the court discussed the fact that Arizona first required automobile insurance companies to offer uninsured motorist coverage equal to the minimum amount of liability coverage specified under the Motor Vehicle Safety Responsibility Act. Later, the legislature mandated that the insurer must offer uninsured motorist coverage in an amount three times greater than the minimum amount provided for by the Act. The plaintiff claimed that because the legislature increased the offered uninsured coverage three fold, it must have changed the concept of an uninsured motorist to be defined as one who does not fully compensate an injured party for his damages instead of one who does not.
not have at least the insurance limits required by the law. The plaintiff argued the legislature must have intended this result because otherwise a victim would be better off injured by one who had no insurance than by one who had insurance in the minimum statutory amount. While the Arizona Supreme Court recognized the truth to the plaintiff's contention, it nonetheless ruled that a motorist is only uninsured when he has liability insurance limits less than that prescribed by law.

Another unfair incident of uninsured motorist coverage resulted when the tortfeasor's policy was exhausted by other claimants but before exhaustion, it was equal to the limits of insurance statutorily set. In *Lotoszinski v. State Farm Mutual Automobile Insurance Company,* the Michigan Supreme Court ruled that the plaintiff could not recover any monies from her uninsured motorist provision because although she received no payment from the tortfeasor's exhausted policy, the tortfeasor was not uninsured for he originally possessed a minimum level of insurance prescribed by the statute.

While some uninsured statutes required that coverage be provided for bodily injury or death in amounts set forth in the financial responsibility laws, other statutes provided that coverage shall be at least in the amount required by the financial responsibility laws. With the latter phrasing, insurance companies had the option of providing more extensive coverage. Ohio went one step further and effective November 25, 1975, the Ohio General Assembly amended Ohio's uninsured motorist coverage to mandate that uninsured coverage must be offered in an amount equal to the insured's liability limits. Soon after this amendment, many insurers included underinsured motorist coverage either as part of their uninsured coverage or as a separate endorsement. Consistent with the treatment of similar facts by other state courts, the Ohio Supreme Court stated that an underinsured motorist is not an uninsured motorist. In order to rectify the apparent gulf in the uninsured motorist coverage, the Ohio Legislature enacted § 3937.181 of the Ohio Revised Code.
This provision required insurance companies to offer underinsured motorist coverage when the tortfeasor's policy limits were insufficient to pay the loss up to the insured's uninsured motorist coverage limits. The Ohio Legislature while trying to straddle the fence on defining underinsured motorist coverage between either the difference in limits or the amount of damages, created a convoluted statute which was quickly repealed on June 23, 1982.

The uninsured motorist statute was subsequently amended to include underinsured motorist coverage.

THE STATUTORY DEFINITION OF AN UNDERINSURED MOTORIST

Whether one who carries underinsured motorist coverage can collect from that coverage often depends on whether the tortfeasor is an underinsured motorist as defined in the applicable statute. Moreover, whether a tortfeasor can be defined as an underinsured motorist depends on what theory of underinsured motorist coverage is embodied in the statute.

The Floating Layer Theory of Underinsured Motorist Coverage

If a statute incorporates the floating layer theory of underinsured motorist coverage, this coverage will be triggered when the amount of the injured insured's damages exceed the tortfeasor's liability limits. Washington's uninsured/underinsured motorist statute exemplifies this type of coverage. In § 3937.181(A) of the Ohio Revised Code offered underinsured motorist coverage when: "The limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are insufficient to pay the loss up to the insured's uninsured motorist coverage limits."

Hentemann, supra note 23, at 2. See also Comment, Redefining Underinsured Motorist Coverage in Ohio, 44 OHIO ST. L.J. 771, 773 (1983). Ohio has adopted the decreasing layer theory of underinsured motorist coverage where the emphasis is on the difference in liability limits between the insured's policy and the tortfeasor's policy. Under the floating layer theory, the focus is on the damages the insured is legally entitled to recover and the tortfeasor's policy limits. See, e.g., Yarnell v. Farmers Ins. Co. of Washington, 44 Wash. App. 75, 720 P.2d 862 (1986).

Under this theory an insured's underinsured motorist coverage "floats" on top of any recovery from other sources up to the total value of the insured's injuries. If the injured insured collects from the tortfeasor's insurer sufficient funds to adequately compensate him for his injuries, the underinsurance carrier must pay the difference between its insured's damages and the tortfeasor's liability limits up to the underinsurance policy limits. Elovich v. Nationwide Ins. Co., 104 Wash. 2d 543, 707 P.2d 1319, 1323 (1985).

Underinsured motor vehicles means... a motor vehicle with respect to which the sums of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover. [emphasis added]
Yarnell v. Farmers Insurance Company, the Washington Court of Appeals applied the statutory definition of underinsured motorist coverage to an alleged underinsured motorist claim to determine whether the underinsured motorist provisions of the insurance contract validly restricted the insured's recovery. The plaintiff's underinsured policy defined an underinsured motorist as one whose limits are less than the limits of the underinsured motorist coverage stated in the insurance policy. The court ruled that the policy provisions clearly contradicted the statutory language defining an underinsured motorist. According to the court, because of a strong public policy in protecting innocent victims of automobile accidents, the legislature has specifically rejected the insurer's definition of an underinsured motor vehicle and has instead enacted a statute which shifts the focus from the liability limits of the insured's policy to the limits of damages which a covered person is legally entitled to recover.

The Decreasing Layer Theory of Underinsured Motorist Coverage

Under the decreasing layer theory of underinsured motorist coverage, an insured can recover underinsured benefits when the tortfeasor's policy limits are less than his own liability coverage. Ohio's statutory definition of an underinsured motorist adopts the decreasing layer theory of underinsured motorist coverage. Although case law interpreting the relatively new statutory definition of an underinsured motorist is scarce, there has been case law interpreting the ambiguous provisions of the now repealed underinsured statute. In Hagan v. J.C. Penney Casualty Insurance Co., the Cuyahoga County Court of Appeals found that the insurance policy's definition of an
underinsured motorist did not conflict with the statutory definition. The insurance contract defined an underinsured motor vehicle in the same manner as did the insurance contract in issue in Yarnell. The court held that because in Ohio an underinsured vehicle is one which is covered by a policy with limits less than the insured’s uninsured policy, the insured in the instant case could not activate his coverage for his insurance limits equaled the tortfeasor’s insurance limits.

Two unreported cases, Knudson v. Grange Mutual Companies and Roeser v. Westfield Companies, construe the underinsurance statutory language of the new amended uninsured statute. In Knudson, the plaintiffs claim that they were entitled to recover under the underinsured motorist provision of their insurance policy because as set forth in the Ohio statute, the limits of the tortfeasor’s policy available for payment to the plaintiffs were less than the limits of the plaintiffs’ own underinsured motorist coverage. At the time of the accident the tortfeasor’s policy limits equaled the plaintiffs’ underinsured coverage limits. However, five separate claims were filed against the tortfeasor depleting his coverage to a level below that of the plaintiffs. The court found that the insurance policy contradicted the statutory intent of the underinsured motorist statute. The insurance policy allowed underinsured benefits when the sum of all liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the limits of liability under the insured’s policy. The Knudson court emphasized the phrase in the statute, “limits of coverage available for payment to the insured” and determined that because the amounts payable to the plaintiffs are reduced by multiple claims, the alleged tortfeasor’s coverage is less than the

41 Id.
42 The insurance contract defined an underinsured motor vehicle as, “a land motor vehicle or trailer of any type to which a bodily injury liability bond or policy applies at the time of the accident but its limits for bodily injury liability is less than the limits of liability for this coverage.” Id. at 220, 475 N.E.2d at 178. See Yarnell, 44 Wash. App. at 1, 720 P.2d at 863 n. 1.
47 Id., No. 85-298, slip op. at 169.
48 A tortfeasor struck two young boys with his car. Both boys incurred serious injuries and one later died. At the time of the accident, the tortfeasor had in effect a liability policy of insurance with limits in the amount of $50,000/$100,000. The father of the deceased also had in effect at the time of the accident an underinsured policy with $50,000/$100,000 policy limits. Five separate claims were filed against the tortfeasor. Id. at 168-169.
49 Id. at 171.
50 Id. at 170.
51 OHIO REV. CODE ANN. § 3937.18(A)(2).
insured’s underinsurance limits. 52

The *Knudson* decision ignores the wording of the underinsured motorist provision in the statute. 53 The statute not only defines underinsured coverage in terms of the limits of the tortfeasor’s coverage and the injured insured’s uninsured coverage, but focuses on the limits of the two policies *at the time of the accident*. 54 Thus, the *Knudson* court mistakenly looked to the time when the tortfeasor’s policy was partially depleted in order to decide if the plaintiffs qualified for underinsured motorist benefits instead of looking to the time of the accident as so stated in the statute. Until the Ohio Legislature changes the focus of Ohio’s underinsured motorist statute from policy limits to the insured’s uncompensated damages, the courts should uphold a common sense reading of statute. 55

*Roeser v. Westfield Companies* 56 properly interprets Ohio’s underinsured statute. In *Roeser*, both the tortfeasor and the injured insureds possessed the same limits on their liability insurance and underinsured coverage respectively. 57 One insured, the husband, received $100,000 of a $100,000/$300,000 liability policy while the other insured, the wife, received considerably less. 58 The wife filed an underinsured motorist claim which was denied by her insurer because the tortfeasor possessed the same liability limits as her underinsured or uninsured coverage. 59 The appellate court relied on *Hagan v. J.C. Penney Casualty Insurance Co.*, 60 and affirmed the trial court’s ruling in the insurer’s favor. 61 *Roeser*, therefore stands for the proposition that an insured is precluded from recovering underinsured benefits when the limits of the insured’s uninsured/underinsured coverage is identical to the limits of the tortfeasor’s policy even if the insured claims uncompensated damages. *Roeser*’s rationale and interpretation of the statute adhers to the decisions of

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52 *Knudson*, No. 85-298, slip op. at 173.
53 Henry A. Hentemann, an authority on underinsured motorist coverage, states that the underinsured coverage becomes applicable according to the wording of the statute, when the tortfeasor’s policy limits are less than the victim’s policy limits *at the time of the accident* [emphasis added]. See Hentemann, *Underinsured Motorist Coverage; A New Coverage with New Problems*, 50 INS. COUNS. J. 365, 367 (1983).
54 Id.
55 See Comment, supra note 28, at 783-795. The author suggests that the legislature should reinstate the repealed version of the underinsured motorist statute. The author believes this statute emphasized the insured’s uncompensated damages instead of the difference in the tortfeasor’s limits and the insured’s underinsured coverage. A further reading of the repealed statute and case law construing the statute, however, renders the author’s opinion suspect.
57 *Roeser*, No. 50661, slip op. at 3. The tortfeasor had $100,000/$300,000 liability limits and the insureds had the same amount in underinsured coverage.
58 Id. The wife received only $1,489.70 from the tortfeasor’s policy.
59 Id. at 3-4.
61 *Roeser*, No. 50661, slip op. at 5-8.
other courts construing similar statutes.\textsuperscript{62}

Accessing underinsured motorist coverage not only depends on how that coverage is defined in the statute, but depends also on the insurer's rights, including those statutorily permitted and those contractually created. The following section will discuss various policy provisions that must be complied with and statutory rights of insurers which must be honored by the insured before he may receive underinsured motorist benefits.

**Contractual Condition Precedents in an Underinsured Motorist Policy: Protecting the Insurer's Subrogation Rights**

*The Insurance Clauses: The Exhaustion Clause, the Consent-to-Settlement Clause, the Subrogation Clause and the Arbitration Clause*

Most insurance policies contain a provision which requires the insured to thoroughly deplete all available limits of all other applicable policies by either settlement or judgment before he is entitled to his underinsured motorist benefits. This type of provision usually referred to as the exhaustion clause typically reads as follows: "We will pay under this coverage only after the limits of liability under any applicable bodily injury liability bonds or policies have been exhausted by payment of judgments or settlements."\textsuperscript{63} A second provision found in the insurance contract is the consent-to-settle clause. This clause prescribes the penalty of loss benefits if the insured settles with any person who may be liable without written consent from his insurer. The following is a standard consent-to-settle clause: "There is no coverage for any insured who without written consent of his insurer settles with any person or organization who may be liable for the bodily injury."\textsuperscript{64} The subrogation provision in the insurance policy provides that once payment is made, the insurer shall have the right to be reimbursed by anyone primarily liable. The clause states, "Our right to recover payment: If we make a payment under this policy and the person to or for whom payment is made has a right to recover damages from another, we shall be subrogated to that right."\textsuperscript{65} The last clause to be discussed is the arbitration clause which permits the insured to submit her underinsured motorist claim to arbitration when there is a disagreement on the amount of damages between herself and her insurer or whether there is a

\textsuperscript{62}See In re Hanover Ins. Co., 119 A.D.2d 529, 501 N.Y.S.2d 347 (N.Y. App. Div. 1986) (The court ruled that the statute which authorized car owners to supplement the uninsured motorist coverage prejudged an insured from recovering under their uninsured provisions because the tortfeasor's liability limits equaled the insured's limits). See also Davidson v. United States Fidelity and Guar. Co., 78 N.C. App. 140, 336 S.E.2d 709 (1985) aff'd, 316 N.C. 551, 342 S.E.2d 523 (N.C. 1986). (Court construed the uninsured statute to preclude recovery when the driver who had $25,000 underinsured motorist liability limit settled with the tortfeasor for $25,000, the policy limit on tortfeasor's liability coverage).

\textsuperscript{63}Miller v. United States Fidelity and Guaranty Co., No. 84-1568 (C.P. Lucas County, Ohio March 1, 1985).


disagreement on whether she is entitled to recover from an underinsured. The arbitration provisions provide: "If we and a covered person disagree whether that person is legally entitled to recover damages from the owners or operator of an underinsured motor vehicle or do not agree as to the amount of damages, either party may select an arbitrator." All the foregoing clauses interact together and against each other when the injured party seeks to qualify for underinsured motorist protection.


The exhaustion clause, consent-to-settle clause and the subrogation clause or Trust Agreement all spring from the insurer's right to be reimbursed from any person liable to the insured. Thus the exhaustion clause serves the purpose of prohibiting the insured from settling with the tortfeasor who is collectible and may be sued personally by the insurer in order to recover some of the proceeds paid to its insured. Likewise, the consent-to-settle clause protects the insurer's rights of subrogation because the insurer will never grant its consent for its insured to settle with a collectible tortfeasor. If the insured did settle and signed a release, usually required by the tortfeasor's insurer, the underinsurance carrier's rights of subrogation would be effectively extinguished. The right to arbitrate a claim for underinsured coverage according to the insurer, becomes activated if the insured exhausts all other sources of coverage but in the process does not nullify the insurer's reimbursement rights. While the insurer has recognized interests embodied in the various contractual prerequisites, the insured also has the right to be immediately compensated for her injuries. Moreover, depending on the statutory definition of underinsurance, if the tortfeasor's limits are below that of her underinsured or uninsured policy

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4Hentemann, supra note 64. An insurer's subrogation right is statutorily protected in Ohio. OHIO REV. CODE ANN. § 3937.18(E) (Anderson Supp. 1985) states: In the event of payment to any person under the coverages required by this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury or death for which such payment is made.

5Smith, No. 5092, slip op. at 42.

6A. WIDS, Uninsured and Underinsured Motorist Insurance, § 19.3 at 83 (1985).


8See Hentemann, supra note 53, at 368-69.

9The tortfeasor's insurer has a good faith duty to fully represent its insured. Therefore, the insurer will not settle with the injured insured without procuring a release which precludes any future actions arising from the accident against the tortfeasor. Id.

10The typical argument expoused by the insurer is that the insured should not be permitted to arbitrate her claim until she has resolved her bodily injury claim against the tortfeasor by way of settlement or judgment. Intervening plaintiff American States Insurance Company's brief in support of summary judgment, Smith v. Cerny, No. 5092 (Ct. App. Eighth Dist. Ohio Oct. 9, 1986).

11Hentemann, supra note 23, at 2.
limits or her damages exceed the tortfeasor's policy limits, she should receive
the underinsured benefits she has bargained and paid for.74

An unreported common pleas decision in Ohio articulately sets forth the
conflict which erupts when an insured seeks to qualify for underinsured
benefits. In Grosjean v. Auto-Owners Insurance Company,75 a passenger on a
motorcycle was injured by a tortfeasor who had $25,000 policy limits.76 The
full limits were offered in settlement.77 The settlement, however, was condi-
tioned upon the insured, Grosjean, executing a full and final release of any
claims against the tortfeasor.78 Grosjean carried $250,000 underinsured
motorist coverage.79 She subsequently filed an underinsured motorist claim and
was awarded, after arbitration, $90,000 in damages.80 After the arbitration
award was rendered, none of the parties could decide the best way to disburse
the award.81 A declaratory judgment was commenced to determine the follow-
ing: (1) Does the underinsured carrier have valid subrogation rights? (2) May
the insured obtain the $25,000 from the tortfeasor without executing a release?
(3) Does the release impair the underinsured's carrier's subrogation rights?82
The court recognized that the tortfeasor's insurer must require the release
because of its duty to protect its insured from any potential judgments
rendered in excess of his insurance policy.83 The court also found that the
underinsured carrier had a right of subrogation which would be destroyed if
the insured, Grosjean, executed a release.84 The court while acknowledging the
rights of insurers and tortfeasor, stated that Grosjean contracted to receive full
compensation if injured and as the innocent victim should be promptly com-
pensated.85 The court weighing the various contentions concluded that:

(1) The underinsured motorist claim must first be arbitrated as done so in
the instant case;
(2) Upon obtaining the arbitration award, the underinsurance carrier must
pay its insured the full amount of the award;
(3) The insured then assigns and subrogates her claim against the tort-
feasor;

75 Grosjean v. Auto-owners Insurance Co., No. 81-1818, slip op. at 1 (C.P. Lucas County, Ohio April 20,
1982).
76 Id.
77 Id. at 2.
78 Id.
79 Id.
80 Id.
81 Id.
82 Id. at 2-3.
83 Id. at 3.
84 Id. at 4.
85 Id.
(4) It then becomes the responsibility of the insurer to settle with the tortfeasor or litigate the suit. The court felt by following the foregoing steps each party's rights would be upheld. The plaintiff would receive prompt compensation for her injuries. The tortfeasor's insurer will be able to use its best efforts to settle or defend. Also, the underinsurer's subrogation rights are preserved and it will now have total control of the litigation against the tortfeasor and will therefore pursue its claim vigorously. The \textit{Grosjean} case presents the competing interests of the parties involved in an underinsurance dispute. The \textit{Grosjean} decision shall serve as the backdrop for three conflict situations which are not so easily resolved.

\textbf{Three Conflict Situations: Assessing Underinsured Benefits}

\textbf{Conflict Scenario Number One}

The courts are struggling with the dilemma which arises when the insured settles with the alleged tortfeasor for the full policy limits without procuring or receiving the consent of his insured. The issue whether an insured has a right to his underinsured benefits have been addressed by Ohio courts in three unreported decisions: \textit{Ruffing v. Nationwide Mutual Insurance Co.}, \textit{Barnes v. Nationwide Insurance Co.}, and \textit{Davis v. Erie Insurance Group}. In \textit{Ruffing}, the court prohibited the injured insured from recovering underinsured benefits stressing the trust agreement in the insured's insurance contract. The court viewed the agreement as a subrogation provision and held it required the insured to protect the rights of the insurer as a condition precedent to payment under the underinsured motorist endorsement of the policy. The court found that by settling for the full policy limits and executing a release, the insured had violated the trust agreement and therefore waived any claim he might have had of underinsured benefits.

The appellate court in \textit{Barnes} took a different view of a similar situation and ruled that settlement with the tortfeasor without the underinsured carrier's consent, did not cause the insured to forfeit his right to underinsured

\textit{Id.} at 8-10.

\textit{Id.} at 8.

\textit{Id.}

\textit{Id.} at 9.


\cite{Barnes v. Nationwide Ins. Co., No. 82-086 (Ct. App. Sixth Dist. Ohio July 9, 1982).


\cite{Ruffing}, No. 81AP-241, slip op. at 3222.

\cite{Id.} at 3223.

\cite{Id.} The \textit{Ruffing} case was decided before the enactment of § 3937.181 of the Ohio Revised Code which was later repealed.
motorist coverage. In so ruling, the court found that the consent-to-settle clause conflicted with the exhaustion clause. The court stated where the insurer predicated coverage upon exhaustion of all other available policies, it could not then prejudice the insured's rights by claiming the insured had exhausted the tortfeasor's limits without the insurer's consent. The Barnes court completely ignored the insurer's valid subrogation rights which were destroyed when the insured settled with the tortfeasor and released him from any further claims arising out of the accident.

In Davis v. Erie Insurance Group, the plaintiff while keeping its insurer abreast of settlement negotiations with the tortfeasor, settled with the tortfeasor for his full liability limits. During the settlement process, the plaintiff's insurer refused to participate. The court found the insurer arbitrarily refused its consent to settle with the tortfeasor despite the fact the plaintiff had procured an affidavit from the tortfeasor verifying the tortfeasor's uncollectibility. The court upheld the general rationale in Ruffing, but found that in the instant case the insurer waived its subrogation rights by not taking part in the settlement negotiations when its rights against the tortfeasor were nonexistent.

The Ruffing rationale has been upheld by other jurisdictions. For example, in March v. Mountain States Mutual Casualty Company, the New Mexico Supreme Court ruled that despite public policy favoring underinsured motorist protection, an insured can not recover his underinsured motorist benefits when without his insurer's consent, he settles with the tortfeasor for the full automobile policy limits. The New Mexico uninsured statutes do not provide for an express right of subrogation, however, the court decided that a subrogation right contractually created was valid. The insured argued that his insurer's subrogation rights did not arise until the insurer had made payments under the underinsured motorist coverage. The court refuted this contention and stated that while a true subrogation right does not arise until after

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*Barnes, No. 82-086, slip op. at 6.
97 Id.
98 Id.
99 Hentemann, supra note 73, at 7-8.
100 Davis, supra note 92, at 233.
101 Id. at 236.
102 Id.
103 Id. at 237-238. See also, Bazinet v. Concord General Mut. Ins. Co., 513 A.2d 279 (Me. 1986) (Court ruled when the insurer's subrogation rights are unaffected by the settlement, courts may not permit such clauses [consent to settle clause] to defeat the claims of insureds).
105 Id. at 693, 687 P.2d at 1044.
106 Id. at 692, 687 P.2d at 1043.
107 Id. at 691, 687 P.2d at 1042.
payment is made, a contingent subrogation right arises when the loss occurs. The court found that construing an insurance contract accurately and giving effect to its unambiguous language is not an ipso facto breach of public policy merely because it disappoints the insured.

In *Vogt v. Schroeder*, the Wisconsin Supreme Court was confronted with the conflict scenario dealt with in the *March* case. The court stressed the equitable nature of subrogation when it held that an insured if he accepts a settlement offer from the tortfeasor’s insurer, precludes himself from recovering any further compensation from his underinsurance carrier. The *Vogt* court relying on *Schmidt v. Clothier*, found that the plaintiff’s insurer possessed a subrogation right to the extent that the insurer has paid benefits to the insured prior to release of the tortfeasor. Therefore, the insurer must first make payment to its own insured in the sum offered by the tortfeasor’s insurance company but not exceeding the limits of the insured’s underinsured motorist coverage. Upon payment by the underinsurance carrier of the tortfeasor’s full policy limits, arbitration would commence.

The foregoing cases present the various conflicts between the parties to an underinsured motorist claim. While the *Ruffing* and *March* decisions recognize the insurer’s subrogation right, they ignore the insured’s right to compensation. The *Vogt* decision, conversely, dilutes the insurer’s subrogation rights. By incorporating the ideas presented by the preceding cases, into a four step method, an equitable solution to the factual conflict presented in this first scenario may be ascertained.

**Step One:** The tortfeasor’s liability carrier makes a written commitment to pay the limits of the policy.

**Step Two:** Upon tendering of the written commitment, the injured insured’s underinsured motorist claim is arbitrated.

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108 *Id.* at 692, 687 P.2d at 1042-1043.
109 *Id.* at 693, 687 P.2d at 1044.
110 129 Wis. 2d 3, 383 N.W.2d 876 (1986).
111 *Id.* at 5, 383 N.W.2d at 878.
112 338 N.W.2d 256 (Minn. 1983). While the *Vogt* court relied on the reasoning in *Schmidt*, the case’s applicability to Ohio’s situation is questionable. The *Schmidt* case construes a no fault statute with limited reimbursement rights. *Schmidt*, 338 N.W.2d at 261-262. Furthermore Minnesota’s no-fault statute defines underinsured motorist coverage as the difference in the insured’s damages and the tortfeasor’s liability coverage. *Id.* at 261. Ohio defines underinsured motorist coverage as the difference in the insured’s policy limits and the tortfeasor’s policy limits. See *Ohio Rev. Code Ann.* § 3937.18(A)(2) (Anderson Supp. 1985). Also the purpose of no-fault insurance is to avoid litigation which is still the foundation of Ohio’s fault-based negligence system. *Schmidt*, 338 N.W.2d at 260. See also, *State Farm Mut. Auto. Ins. Co. v. Galloway*, 354 N.W.2d 527 (Minn. Ct. App. 1984) aff’d, 373 N.W.2d 301 (Minn. 1985). *Numi v. Foremost Ins. Co.*, 376 N.W.2d 293 (Minn. Ct. App. 1985).
113 *Vogt* at __, 383 N.W.2d at 882.
114 *Id.* at __, 383 N.W.2d at 883.
115 *Id.* at __, 383 N.W.2d at 884.
Step Three: If the arbitration award is in excess of the tortfeasor's liability limits, the underinsurer pays the award up to the limits prescribed by the underinsured motorist provision.

Step Four: The underinsurer either commences negotiations with the tortfeasor or commences suit to recover the monies paid to its insured.116

This process provides compensation to the insured without submitting the insured to the expense of a long court battle. Secondly, the tortfeasor’s insurer by merely tendering a commitment of the limits, fully represents its insured’s interests. Lastly, the insurer’s subrogation rights are preserved.

Conflict Scenario Number Two

Although the steps enumerated above resolve the situation when the tortfeasor’s insurer offers the full policy limits, it does not address how to resolve the situation when the insured settles for less than the tortfeasor’s liability limits. Various questions arise from this factual setting. Has the injured insured exhausted the tortfeasor’s liability limits so as to meet the condition precedent of the exhaustion clause in his underinsured motorist coverage? What should his insurer pay him from his underinsured coverage? Only one Ohio court has addressed this situation in an unreported case, Bogan v. Progressive Casualty Insurance Company.117

In Bogan, the tortfeasor’s insurer offered $21,000 of a policy which had a $25,000 limit.118 The injured insured sought approval and consent from his own underinsurance carrier to either accept the settlement or the insurer could tender its check in the amount of the proposed settlement.119 The insurer refused to consent to the settlement because it was less than the tortfeasor’s liability limits even though the injured insured stated that the claim would only be for excess of the tortfeasor’s coverage.120 Upon receiving the insurer’s refusal, the insured elected to proceed with the settlement.121 When suit was brought to recover underinsured benefits, the underinsurance carrier argued that the exhaustion clause, consent-to-settle clause and the subrogation clause supported its denial of benefits.122 The Bogan court found that the exhaustion clause did not contradict Ohio’s underinsured statutory provisions because it did not change the amount of liability but merely changed the time when the

116Hentemann, supra note 53, at 369.
118Bogan, No. 86AP-26, slip op. at 2.
119Id.
120Id. at 3.
121Id.
122Id. at 3-4.
insurer is required to make payment.\textsuperscript{123} The court, however, defined exhaust to mean to consume and applying the definition to the facts of the case, the court concluded that the tortfeasor’s insurance policy was exhausted when the insured accepted less than the policy limits.\textsuperscript{124} Bearing in mind the statutory definition of an underinsured motorist, the court ruled that the full limits of the tortfeasor’s policy and not the settlement amount should be deducted from the underinsurance policy limits.\textsuperscript{125}

A Florida appellate case dealing with the same facts presented in \textit{Bogan} ruled in favor of the insured. In \textit{United States Fidelity and Guaranty Co. v. Gordon},\textsuperscript{126} the insured settled with the tortfeasor for $400 less than the limits of the tortfeasor’s insurance policy.\textsuperscript{127} The insurer claimed that when the insured settled for less than the tortfeasor’s limits, he waived his right to collect from his underinsured motorist coverage.\textsuperscript{128} The court ruled that the insured in good faith settled for less than the policy limits because he believed that the cost of litigation exceeded the $400 he might recover.\textsuperscript{129}

While a release and insurer’s subrogation rights were not in issue in the foregoing case, they were in \textit{Lopez v. Fidelity and Casualty Company}.\textsuperscript{130} In \textit{Lopez}, the plaintiff settled her automobile claim with the tortfeasor for $3,600 of the $10,000 liability limits without permission from her uninsured motorist carrier.\textsuperscript{131} The court decided that the release issued upon receipt of the $3,600, and without consent of her insurer, destroyed the insurer’s subrogation rights.\textsuperscript{132} As a result the plaintiff could not qualify for any recovery from her underinsured coverage.\textsuperscript{133}

The Florida decision in \textit{Lopez} appears harsh in light of the fact that settlements are encouraged and are entered into for reasons not involving an assessment of the insured’s actual damages. The most viable solution to the problem presented in this scenario is found in \textit{Bogan v. Progressive Casualty Insurance Company}.\textsuperscript{134} The court in \textit{Bogan} stated that the tortfeasor’s liability

\textsuperscript{123}\textsuperscript{123}Id. at 10.
\textsuperscript{124}\textsuperscript{124}Id. at 13.
\textsuperscript{125}\textsuperscript{125}Id.
\textsuperscript{126}\textsuperscript{126}359 So. 2d 480 (Fla. Dist. Ct. App. 1978).
\textsuperscript{127}\textsuperscript{127}The plaintiff accepted $9,600 of a $10,000 liability policy. Id. at 481.
\textsuperscript{128}\textsuperscript{128}Id. at 482.
\textsuperscript{129}\textsuperscript{129}Id. See also Colonial Penn. Ins. Co. v. Salti, 84 A.D.2d 350, 446 N.Y.S.2d 77 (1982) (Settling for less than the tortfeasor’s policy limits does not determine the amount of damages the insured actually sustained).
\textsuperscript{130}\textsuperscript{130}412 So. 2d 394 (Fla. Dist. Ct. App. 1982).
\textsuperscript{131}\textsuperscript{131}Id. at 394.
\textsuperscript{132}\textsuperscript{132}Id. at 394-395. Subrogation rights are provided statutorily in Florida.
\textsuperscript{133}\textsuperscript{133}Id. at 394. See also, Sena v. State Farm Mut. Auto. Ins. Co., 305 So. 2d 243 (Fla. Dist. Ct. App. 1974) (An insured is not entitled to uninsured motorist benefits when he settles and releases the tortfeasor from any further claims in violation of the insurer’s right of subrogation).
limits are exhausted when the insured and tortfeasor settles for an amount less than the tortfeasor's policy limits. The insured, however, is only compensated by her underinsurance carrier for that amount in excess of the tortfeasor's limits and not in excess of the settlement amounts.

Conflict Scenario Number Three

When the tortfeasor's carrier makes an offer to settle for the complete policy limits, usually arbitration should be allowed to commence immediately. Should, however, immediate arbitration be allowed when the insured can only show that he possess greater uninsured motorist limits than the tortfeasor's liability limits? The most recent litigation involving this aspect of underinsured motorist coverage has occurred in this area. Ohio has contributed to this recent development in three unreported cases: Erie Insurance Group v. Tulley, Miller v. United States Fidelity and Guaranty Co., and Smith v. Cerny.

In Erie, the injured insured possessed $100,000 in underinsured motorist coverage and the tortfeasor had $50,000 in liability coverage. Before receiving an offer from the tortfeasor's insured, the insured demanded arbitration pursuant to the arbitration clause in his underinsured motorist coverage. The trial court held that underinsured motorist coverage was excess coverage and thus could only be invoked when the insured can establish he has settled with the tortfeasor or has procured a judgment against him. The appellate court reversed, ruling that because an exhaustion clause was not found in the insurance contract, the insured needed only to show the difference in limits between his own underinsured coverage and the tortfeasor's liability coverage.

In Miller v. United States Fidelity and Guaranty Co., Miller was involved in an automobile accident with the alleged tortfeasor who carried liability limits of $12,500. Plaintiff filed suit against the alleged tortfeasor and while

135 Bogan, No. 86AP-26, slip op. at 13.
136 Id.
137 When the wrongdoer's insurer offers the full policy limits, the tortfeasor's policy is in a sense exhausted. However, when the insured seeks to arbitrate his claim before an offer has been made or during the pendency of a trial, he has not met the requirement of exhausting all other available sources of recovery. In Ohio, the exhaustion clause is merely a contractual creation. There are, however, states who have incorporated the exhaustion clause into their statutory scheme of uninsured/underinsured coverage. See, Davidson v. United States Fidelity and Guar. Co., 78 N.C. App. 140, 336 S.E.2d 709 (1985) aff'd, 342 S.E.2d 523 (N.C. 1986); Aetna Casualty and Sur. Co. v. Lighty, 3 Conn. App. 697, 491 A.2d 1118 (1985).
141 Erie, No. CA-6063, slip op. at 5-6.
142 Id. at 4.
143 Id. at 6.
144 Miller, No. 84-1568, at 1 (C.P. Lucas County, Ohio March 1, 1985).
the suit was still pending, she sought arbitration for her underinsurance claim pursuant to $25,000 uninsured/underinsured endorsement. Upon refusal of her insurance company to allow arbitration, Miller filed suit against it, seeking an order compelling arbitration. The insurer defended by arguing that Miller must comply with the exhaustion clause of her policy which required her to exhaust the tortfeasor's liability limits by judgment or settlement. The plaintiff claimed the exhaustion clause should be stricken as against public policy. The trial court found that the exhaustion clause did violate public policy because the clause restricted the mandatory offering of underinsured coverage. The court reasoned by requiring the plaintiff to litigate, she will have to wait months before receiving any compensation. The appellate court agreed with the trial court and held that the exhaustion clause was a contractual restriction and did not comply with the statutory purpose of underinsured motorist coverage.

The court noted that the exhaustion clause also increased the burden of litigation by discouraging settlements of claims. Furthermore, the statute does not impose an additional criteria of a settlement or judgment against the tortfeasor before the insured can recover from her underinsurance carrier. The court further stressed that the arbitration process is designed to determine whether the insured's damages exceed the tortfeasor's liability limits. The appellate court fails to address some very persuasive arguments made by the underinsurance carrier. The insurer argued that in order, to fairly decide the extent of the plaintiff's damages, a jury should be the fact-finding body. The insurer asserted what is to prevent any plaintiff, no matter how small her damages may be, from arbitrarily alleging her case exceeds the limits of primary coverage and therefore must be arbitrated.

Another unreported Ohio appellate decision addressed the same facts found in Miller, but returned a different result. In Smith v. Cerny, the plaintiff had underinsured coverage in the amount of $50,000 while the tortfeasor...

146 Id.
147 Id. at 2.
148 Id. at 3.
149 Id.
150 Id. at 5 (Ct. App. Sixth Dist. June 30, 1986).
151 Id. at 7-8.
152 Id. at 8.
153 Id.
154 Id.
156 The insurer notes that an arbitration panel is composed of at least one arbitrator who is hand-picked by the insured. Moreover, the insured is not bound by the arbitration award and if dissatisfied may file suit against the tortfeasor. Appellee and Cross Appellant's Reply Brief, Miller v. United States Fidelity and Guaranty Co., No. L-85-219, No. L-85-224 (Ct. App. Sixth Dist. Ohio June 30, 1986).
157 Smith v. Cerny, No. 4184 (C.P. Cuyahoga County, Ohio June 1983).
had liability coverage in the amount of $35,000. The plaintiff sues the defendant and alleges $75,000 in damages. During the pendency of the trial, the plaintiff asserts an underinsured claim in the amount of $50,000 against the insurance company, American States. The trial court ruled that the exhaustion clause plainly and unambiguously mandated that the underinsurer will not pay under the coverage until the limits of liability under the tortfeasor’s policy was exhausted. The trial court disagreed with the Miller case which stated the exhaustion clause hampers the prompt disbursement of funds to the insured. The court noted that generally an insured who arbitrates his underinsured claim prior to trial or settlement with the tortfeasor is not entitled to disbursement of the arbitration award until the insurer has litigated or settled its subrogated cause of action against the tortfeasor. The appellate court adopted the reasoning of the trial court. The appellate court stated that the exhaustion clause is not inconsistent with Ohio’s statutory underinsured motorist coverage because even with the exhaustion clause, the injured party will be able to obtain a full recovery upon a proper showing of damages. The court basing this observation on Motorists Mutual Insurance Co. v. Handlovic, reasoned that once the insured obtains judgment against the insured, he need not re-establish his damages in arbitration.

A New Jersey case, Longworth v. Ohio Casualty Group, adheres to the Miller decision but for a different reason. In Longworth, the plaintiff alleged damages in excess of the tortfeasor’s liability policy and submitted a claim for arbitration. Pursuant to the exhaustion clause her insurer contended that it was not obligated to pay her underinsured motorist claim until the underlying tort action was resolved. The court decided in favor of the insured based on the purpose of the New Jersey Automobile Reparation statute which was to provide prompt compensation without regard to fault. The court struck

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158 Id. at 1-2.
159 Id.
160 Id. at 3-4.
161 Id. at 5-6.
162 Id.
164 Smith, No. 50926, slip op. at 43-44.
165 3 Ohio St. 3d 179, 492 N.E.2d 417 (1986) (An insured who obtains a valid judgment against an underinsured motorist cannot avoid the limits of that judgment when seeking payment under the terms of his underinsured motorist coverage).
166 Smith, No. 50926, slip op. at 45.
168 Id. at ___, 516 A.2d at 289.
169 Id.
down the consent-to-settle clause and the subrogation clause in the process.\textsuperscript{172}

It is the opinion of this comment that an injured party in Ohio must first sue the tortfeasor or settle with him before seeking benefits from his underinsurance coverage. This is especially so when the tortfeasor's insurer has not tendered any reasonable offer of settlement. In Ohio, a fault-based system provides the vehicle by which an injured party's damages are ascertained. Once the damages are established, they are binding on the underinsurance carrier.\textsuperscript{173}

If the courts allow an insurer to step immediately into the arbitration process, all interested parties must be joined and are bound by the arbitration award.

\textbf{CONCLUSION}

Whether representing the insurer or the insured, the practitioner should be conversant in the type of underinsurance coverage embodied in the applicable statute. Depending on whether the state legislature adopted the floating layer theory of underinsurance, where the insured's damages exceed the tortfeasor's liability limits or the decreasing layer theory, where the insured's uninsured coverage exceeds the tortfeasor's liability limits, will determine whether the insured may trigger his underinsured benefits. The practitioner must also be aware of the clauses in the insurance contract which must be substantially complied with in order for the insured to qualify for underinsurance benefits.

The criticisms that have been presented in this article were meant to ferret out the valid interests of all the parties including the underinsurance carrier who, the courts sometimes ignore in their quest to vigorously protect the rights of the injured party. The foregoing proposed methods of solving many of the conflict situations which arise when an insured attempts to access his underinsurance coverage have been offered as alternatives to many of the inequitable remedies espoused by the courts.

\textbf{AMY J. MCKEE}

\textsuperscript{172}Id. at _, 516 A.2d at 298. While the facts are not clear, it appears that the tortfeasor's insurer deposited the full policy limits with the court. This situation is distinguishable from Miller and Smith, where the tortfeasor's insurer made no offer to the insured. See also, Fryer v. National Union Fire Ins. Co., 365 N.W.2d 249 (Minn. 1985).
