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UM Subrogation and Self-Insured Governmental Entities in Florida

By Hal Houston and Alison Sausaman

Ambiguity continues to plague uninsured (or underinsured) motorist ("UM") law where a government-owned vehicle is involved in a motor vehicle accident. In 2000, the Florida Supreme Court held in *Young v. Progressive Southeastern Insurance Co.* that insurance provisions exempting self-insured vehicles from the definition of "uninsured motor vehicle" violated public policy.[1] While the case law has developed some since this decision, defense practitioners representing both governmental entities and UM carriers continue to struggle with the practical ramifications of *Young* and its progeny, given the lack of clear guidance from the courts.

Statutory Framework

Generally, section 627.727, Florida Statutes, regulates uninsured or underinsured motorist coverage by requiring that insurers make available certain coverage that is "over and above, but shall not duplicate, the benefits available" to the insured from various other sources,[2] including the owner or operator of the uninsured or underinsured motor vehicle. This coverage, generally referred to as UM coverage, is calculated as the difference between the sum of said benefits and the damages sustained, up to the policy limit.[3] It is also important to note the somewhat broad application of UM coverage. Under the statute, the term "uninsured motor vehicle" includes both *un*insured and *under*insured vehicles, as well as other situations such as an insolvent insurer or certain coverage exclusions.[4] Further, while policies may be allowed to contain restrictions and exclusions that do not violate the statute, the Florida Supreme Court has held a policy exclusion of self-insured motorists or vehicles was void because it violated the requirements of the statute.[5]

In the most straightforward application, where two individuals are involved in an accident without dispute of liability, the injured party seeks all available benefits for his or her damages first from all other sources listed in the statute, including from the tortfeasor's liability insurer. A UM claim arises when the injured party's damages exceed the sum of those available benefits. For example, if a judgment-proof driver without insurance negligently collides with and injures another

EDITOR'S NOTE: The uninsured or underinsured motorist statute promotes settlement and speedy payment of damages in clear-cut cases. In situations involving self-insured governmental entities, the application of the statute is less straightforward. This article examines related state and federal cases, and explains why this area is ripe for clarification.

driver who carries $10,000 in PIP coverage and $100,000 in UM coverage, causing $50,000 damage, the injured driver's UM policy would provide $40,000, or the difference between the available benefits and the driver's damages. However, few accidents are so clear-cut. As layers of complexity arise, whether in the form of questions regarding liability, causation, damages, or otherwise, the time and money required to litigate such issues can increase rapidly. To address this, the statute also includes a statutory setoff and subrogation process available in certain situations.

Statutory Subrogation Background

The UM coverage statute was first enacted in 1961 and has been amended 33 times,[6] most recently in 2015. The current version of the statutory subrogation framework is substantially similar to the original 1992 amendment.[7] Before the 1992 amendment, the Legislature had directed various disputes between UM and liability insurers to arbitration.[8] Under the prior framework, an injured party was required to present a proposed settlement to his or her UM carrier for approval. If the UM carrier approved, it would thus waive any subrogation rights and agree to arbitrate the UM claim.[9] The only consequences a UM carrier would face by withholding consent was a lawsuit by the injured party against the UM carrier and the tortfeasor's liability insurer to determine liabilities and damages, where the liability insurer's coverage had to first be exhausted before any award could be entered against the UM carrier. As is still typical today, the UM policies provided consistent enforcement mechanisms that were designed to preserve a UM carrier's subrogation rights[10] and to prevent an injured party from unilaterally extinguishing such a right.[11] This framework could be problematic, though, for injured persons that need payment quickly.

Thus, "to address the situation in which an injured party was denied immediate access to needed compensation from a tortfeasor's liability carrier because the injured party's uninsured motorist carrier refused to approve a settlement offer and waive its subrogation rights,"[12] in 1992 the Legislature amended the statute by shifting the financial burden from the injured party to the UM carrier and requiring the carrier to pay its insured the full amount of a tortfeasor's liability insurer's settlement offer, without the need for a determination of liability, in order to preserve its subrogation rights.[13]

Current Subrogation Framework

The goals of Florida's uninsured motorist coverage, and specifically the statutory subrogation process, is two-fold: (1) to encourage settlement; and (2) to provide payment for injured persons expeditiously.[14] To further this purpose, the Legislature has set forth a three-step statutory subrogation process in section 627.727(6). Additionally, policies still typically include language that sets forth a similar subrogation process, but analysis and application of such policy language is outside the scope of this article. Where an injured person agrees to settle a claim "with a liability insurer and its insured" that would *not* fully satisfy his or her claim for personal injuries[15] (thus creating a UM claim), the injured person must provide written notice of the proposed settlement to all underinsured motorist insurers.[16] A UM insurer can then either authorize[17] or refuse the proposed settlement within 30 days.

The injured person's UM insurer may analyze a variety of factors to determine how to respond including liability issues, the possible range of damages to the injured party, causation issues, the availability and limits of various insurance policies, and the possibility of collection from the underinsured motorist. If the UM insurer authorizes the settlement, the injured party may execute a release in favor of the "liability insurer and its insured" while still preserving his or her UM claim against any UM insurer.[18] If the UM insurer refuses the proposed settlement, it must pay the amount of the offer to the injured person and, by doing so, will preserve its subrogation rights against the underinsured motorist's liability insurer and its insured.[19]

This settlement process could prejudice the UM insurer if the injured person seeks to settle a claim with the underinsured motorist for less than policy limits because such a settlement would arbitrarily increase the corresponding UM claim such that a UM insurer would necessarily have to reject any such settlement. But, to preclude such a circumstance, a UM insurer is entitled to a credit of the limits of the underinsured motorist's liability policy against the "total damages" of the injured person.[20]

Application Where Governmental Entities Are Involved

Although the statutory framework is a bit convoluted, it provides some incentive for both expeditious payment to an injured party and settlement in a typical automobile accident between two individuals. However, application of this framework becomes less clear in more unique situations, such as accidents involving governmental entities that utilize less traditional liability insurance models.

Where a self-insured governmental entity is involved, it is important to determine at the outset whether the UM subrogation, or other subrogation principles, may apply. By way of example, in a case that directly addressed setoff in a judgment, *State Farm Mutual Automobile Insurance Co. v. Siergiej*,[21] the Second District analyzed in dicta whether the statutory subrogation process applied to a self-insured sheriff's office.[22] The Second District initially noted that the Florida Supreme Court had previously determined that a self-insured motorist is deemed statutorily uninsured, but not underinsured, because the statutory definition of underinsured required a motorist to have a liability insurer.[23] Based on this conclusion, the Second District determined that the statutory subrogation process did not apply to a self-insurer because the plain language of the statute only applied to underinsured motorists, *i.e.*, motorists with a liability insurer.[24] The Court noted the UM policy at issue provided a similar contractual setoff provision that could have applied to a self-insurer, but that provision had not been invoked.[25] The Court further dispensed of any estoppel arguments, although noting they may have had merit, because they had not been raised below.[26] Thus, in *Siergiej*, even though all the parties acted as if statutory setoff applied, the injured party's insurer was not able to apply a credit for the entire amount of self-insured liability funds available to the sheriff, and was instead limited to the actual settlement amount paid by the sheriff.[27]

This well-reasoned opinion highlights a gap in the statutory setoff framework that may only be addressed through legislative action (or possibly, as the *Siergiej* court noted, through a contractual process). By excluding self-insured governmental entities, the statute fails to encourage expeditious settlement and payment to an injured party. In this situation, the statute does not provide a UM insurer with the benefit of protecting its subrogation rights or setting off the full policy limits and thus does not encourage the insurer to consent to a settlement between the injured party and the self-insured government tortfeasor. Nor does it encourage expeditious payment to the injured party, either from the tortfeasor or the UM insurer. It is important for practitioners representing either UM insurers or self-insured governmental entities to review the details of the statute as well as the policy language prior to recommending any settlement strategy.

Practitioners representing either UM insurers or self-insured governmental entities should review the details of the statute carefully, as well as the policy language, prior to recommending any settlement strategy.

However, where a governmental entity has chosen to purchase liability insurance with a self-insured retention limit ("SIRL"), rather than rely upon self-insurance, the analysis may cut differently.[28] While there does not appear to be a case directly on point, it seems that the *Siegiej* court's analysis of the plain language of section 627.727(6) would apply to a proposed settlement because it would be one with a "liability insurer and its insured." Thus, the statute's three-step process described above would apply and affect any subrogation rights of a UM insurer.

Possible Application of Equitable or Contractual Subrogation

The *Siergiej* court's analysis leaves numerous questions for both the self-insured governmental entity and the UM insurer regarding settlement and subrogation, some of which may be controlled by specific policy language and/or common law equitable subrogation. First, does the UM insurer have a right of subrogation against the government insurer? If so, is the subrogation limited to sovereign immunity caps? What happens if the sovereign immunity cap is paid by the self-insured governmental entity? Does that cap liability of the governmental entity fully, including for subrogation purposes? What about a claims bill? Florida courts have provided some guidance in this area, but other questions still remain.

Generally, since subsection 6 doesn't apply, UM carriers and governmental entities are in a similar situation as that prior to the 1992 Amendment, other than the old arbitration requirements. In other words, there is no statutory requirement, incentive, or restriction to guide settlement of the parties. However, the principles of equitable and contractual subrogation still may come into play.

As a refresher, "[s]ubrogation is the substitution of one person in the place of another with reference to a lawful claim or right."[29] The subrogee is deemed to 'stand in the shoes' of the subrogor. Florida law recognizes two forms of subrogation. "Contractual" or "conventional" subrogation is founded on a contract between the parties that the party paying the debt will have the rights and remedies of the original creditor.[30] "Equitable" or "legal" subrogation arises not from contract, but from the legal consequences of the acts and relationships of the parties; whether a party qualifies as a subrogee depends on a weighing of the equities.[31] "Subrogation in equity is not available to a mere volunteer or stranger who, without any duty or obligation to intervene and without being so requested, pays the debt of another. The right of subrogation is not necessarily confined to those who are legally bound to make payments, but extends as well to persons who pay the debt in self-protection, since they might suffer loss if the obligation is not discharged."[32] Both forms of subrogation could be implicated where an injured person attempts to settle with a self-insured governmental entity either through express provisions in a UM policy or release.

For instance, UM policies often have clauses that restrict coverage if the insured has made a settlement or has been awarded a judgment without the UM insurer's prior written consent if such settlement prejudices the UM insurer's right to recover. UM policies also provide for contractual subrogation against a tortfeasor where a UM insurer pays under its policy. Thus, there are many situations where a UM insurer may have subrogation rights against a governmental entity. However, Florida's sovereign immunity waiver affects the contours and application of such subrogation. Currently, Florida's limited sovereign immunity waiver caps the liability of the state and its agencies and subdivisions to $200,000 for the claim or judgment by any one person, or a total of $300,000 arising out of the same incident or occurrence.[33] Any judgment that exceeds these amounts may only be paid in part or in whole "by further act of the Legislature" in a process referred to as a "special claims bill," except that the governmental entity may agree to settle a claim or judgment without a claims bill "within the limits of insurance coverage provided."[34] Florida courts have provided some analysis to various applications of the sovereign immunity caps to subrogation claims of a UM insurer.

In *Michigan Millers Mutual Insurance Co. v. Bourke*,[35] the Supreme Court answered a certified question that a UM carrier could not assert a government's sovereign immunity defense where there is no other source of indemnification for the injured party. In that case, the driver of a school board school bus negligently caused an accident with another vehicle that resulted in the death of two passengers and serious injury of two others in the other vehicle. The school board paid outs its policy limits, which were less than the injured parties' damages, but there was a dispute regarding UM coverage.[36] The UM insurer argued that it was not required to provide any benefits because UM coverage is limited to the amount the injured party is "legally entitled to recover" from the government, in essence that the UM insurer could raise

the government's sovereign immunity defense.[37] However, the Florida Supreme Court clarified that a UM carrier cannot raise government's sovereign immunity cap as a defense because the statute does not provide an absolute immunity as a claims bill may be sought.[38] Further, the court recognized that sovereign immunity is in fact discretionary as it can be increased through the provision of insurance.[39] Finally, the court recognized that the statute does in fact allow for the rendering of a judgment above the immunity cap.[40]

The important implication of this ruling was that UM carriers cannot raise a government tortfeasor's sovereign immunity defense and thus may be required to pay UM benefits over and above sovereign immunity caps. Although this case addressed the case of an insured governmental entity, it appears that its analysis would apply equally to a self-insured governmental entity or an insured government with a significant self-insured retention limit.

This may also raise the question of whether a government's insurer can be required to pay above the immunity caps, which was addressed in *Joynt v. Star Ins. Co.*[41] There, a Volusia County employee negligently ran over a vacationer on the beach causing severe injuries. A state law negligence action ensued resulting in a $2,000,000 judgment against the County. After the County paid the sovereign immunity limit, the injured party sued the County's insurer seeking recovery under the $5,000,000 insurance policy that included a $200,000 self-insured retention endorsement, contending that the insurer could not raise any sovereign immunity defense.[42] Initially, the court stayed the case to allow pursuit of a claims bill, which did not immediately pass.[43] Thereafter, the Court granted summary judgment in favor of the County's insurer because the insurer could not be liable for more than its insured and the County could not be compelled to pay more without further action from the legislature.[44] While this Court analyzed a claim brought directly by an injured party, it is likely that the same analysis would apply to a UM insurer with subrogation rights.

Finally, the Eleventh Circuit has discussed an issue of first impression, raising unanswered questions regarding whether and how a governmental entity may pay an SIR above the immunity cap, in *Hillsborough County v. Star Ins. Co.*[45] There, a dispute arose following a fatal accident caused by a county school bus, which was subject to a $2 million policy with a $350,000 SIR, a dispute arose. In the underlying wrongful death suit, the County attempted to settle its liability by making a $350,000 payment, subject to the Florida Legislature approving a special claims bill for the $150,000 "gap" above the sovereign immunity cap (in order to satisfy the SIR), and requiring its insurer to pay $2,000,000, notably without the insurer's consent. Based on the frustration of purpose doctrine, the district court held that the County had satisfied the SIR without the need for a claims bill and that, having satisfied the policy limitation, the County had statutory authority to settle the claim at its policy limits, but only with the consent of the insurer.[46] The Eleventh Circuit reversed the application of the frustration of purpose doctrine due to an insufficient record but affirmed that the County could settle claims above the immunity cap as long as the settlement was within the policy's limit and with the insurer's consent.[47] Recognizing unresolved issues, the court speculated that a $350,000 settlement (approved both by the County and the insurer) might be possible without a special claims bill under the statutory language but alternatively noted that the $150,000 "gap" amount might require a claims bill since it would have to be paid by the County and the statute does not appear to allow for this without a bill.[48] This case presents another iteration of the plethora of possible issues that must be considered in evaluating cases involving government entities, their insurers, or UM carriers.

Conclusion

Defense practitioners representing UM carriers and governmental entities will likely continue to grapple with the uncertainty of the intersection of UM law and section 768.28, as well as the ramifications for sovereign immunity, the damages cap, and the right of subrogation. One hopes the Florida Supreme Court will be presented with an opportunity to provide clear guidance on these issues in the near future.

1 *Young v. Progressive Southeastern Ins. Co.* 753 So. 2d 80 (Fla. 2000).
2 These sources include: "any workers' compensation law, personal injury protection benefits, disability benefits law, or similar law; under any automobile medical expense coverage; under any motor vehicle liability insurance coverage; or from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident." § 627.727(1), Fla. Stat.
3 *Id.*
4 § 627.727(3).
5 *Young,* 753 So. 2d 80.
6 This has been a litigious area for some time as courts have noted that the legislature's well-intentioned changes in the law have had the effect of roiling the waters instead of calming the seas of UM litigation. *See State Farm Mut. Auto. Ins. Co. v. Hassen*, 650 So. 2d 128, 133 n.6 (Fla. 2d DCA 1995) (citing *Allstate Ins. Co. v. Boynton*, 486 So. 2d 552, 559 (Fla. 1986)).
7 *See* Ch. 92-318, § 79, Laws of Fla.; *State Farm Mut. Auto. Ins. Co. v. Hassen*, 650 So. 2d 128, 132-33 (Fla. 2d DCA 1995) (noting that the 1992 amendment substantially revised the subrogation rights of a UM carrier by imposing a new prepayment obligation to address delays in payments to injured parties), *approved*, 674 So. 2d 106 (Fla. 1996).
8 § 627.727(6), Fla. Stat. (1991).
9 *Id.*
10 *Schwab v. Town of Davie*, 492 So. 2d 708 (Fla. 4th DCA 1986); *State v. De Witt C. Jones Co.*, 147 So. 230 (Fla. 1933); *Hough v. Huffman*, 555 So. 2d 942, 945 (Fla. 5th DCA), *approved*, 564 So. 2d 1081, 1082 (Fla. 1990).
11 *High v. Gen'l Am. Life Ins. Co.*, 619 So. 2d 459, 461 (Fla. 4th DCA), *rev. denied*, 629 So. 2d 133 (Fla. 1993).
12 *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 110 (Fla. 1996) (quoting 650 So. 2d 128).
13 *Id.*
14 *Hassen*, 674 So. 2d at 109-110.
15 This statutory subrogation process also applies similarly to a wrongful death claim brought by a personal representative of a decedent's estate. *Id.* However, to simplify the process, this article focuses solely on personal injury claims.
16 § 627.727(6)(a), Fla. Stat.
17 If a UM insurer fails to respond within 30 days, the injured party may then proceed as if the settlement were approved. *Id.*
18 *Id.*
19 § 627.727(6)(b).
20 § 627.727(6)(c).
21 116 So. 3d 523 (Fla. 2d DCA 2013).
22 *Id.* at 527-27.
23 *Young,* 753 So. 2d at 84-85.
24 *Id.* at 526-27.
25 *Id.* at 527.

[26] *Id.*
[27] *Id.* at 529.
[28] A self-insured retention limit is typically a dollar amount specified in a liability insurance policy that must be paid by the insured before the insurance policy will pay defense and/or indemnity costs of a claim.
[29] *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 646 (Fla. 1999).
[30] *Id.* at 647; *Phoenix Ins. Co. v. Florida Farm Bureau Mut. Ins. Co.*, 558 So. 2d 1048, 1050 (Fla. 2d DCA 1990).
[31] *See Dade County School Board*, 731 So. 2d at 646-47; *Dantzler Lumber & Export Co. v. Columbia Cas. Co.*, 156 So. 116, 120 (Fla. 1934).
[32] *Dade County School Board*, 731 So. 2d at 647 (internal citation omitted).
[33] § 768.28(5), Fla. Stat.
[34] *Id.*
[35] 607 So. 2d 418 (Fla. 1992).
[36] *Id.* at 419-20.
[37] *Id.* at 420-21.
[38] *Id.* at 421 (citing *Cauley v. City of Jacksonville*, 403 So. 2d 379, 386-87 (Fla. 1981)).
[39] *Id.*; § 768.28(5).
[40] *Bourke*, 607 So. 2d at 421-22 (citing *Gerard v. Dep't of Trans.*, 472 So. 2d 1170, 1172-73 (Fla. 1985)).
[41] 314 F. Supp. 3d 1233 (M.D. Fla. 2018).
[42] *Id.* at 1234-35.
[43] *Id.* at 1236.
[44] *Id.* at 1238-39. The decision relied on *Plancher v. UCF Athletics Ass'n, Inc.*, 175 So. 3d 724 (Fla. 2015) (allowing $10 million judgment but no collection above SI cap without claims bill) and *Stuyvesant Ins. Co. v. Bournazian*, 342 So. 2d 471, 472 n.3 (Fla. 1976) (holding insurance carriers cannot be responsible to pay amounts for which the insured would not have been liable).
[45] 847 F.3d 1296 (11th Cir. 2017).
[46] *Id.* at 1304-05.
[47] *Id.* at 1308-09.
[48] *Id.* at 1306-07.