

WARNING – BEWARE OF A POTENTIAL UIM TRAP – PROCEED WITH CAUTION

By: Jay R. Vaughn, Esq.

In the May/June 2005 issue of *The Advocate*, I authored an article entitled, “*Update on Coots v. Allstate and KRS 411.188(2)*.” This article not only served as a refresher course on the *Coots* procedure, but also discussed the implications of this procedure in light of the decision in *True v. Raines*, 99 S.W.3d 439 (Ky. 2003). *True* clearly establishes that the physical act of mailing the *Coots* letter to the UIM carrier automatically creates an implied acceptance by the plaintiff of the tortfeasor's conditioned settlement - when a tortfeasor makes a limits offer, it is conditioned upon a release from any further liability to the plaintiff. *True* at 448.

The article focused on the effect of the *Coots* procedure as between the plaintiff and tortfeasor. However, what is the effect of this procedure as between the plaintiff and his or her UIM carrier? Well, there has been a new development which all plaintiff attorneys need to know about. Currently pending before the Kentucky Court of Appeals is a case styled *Bryant v. Hopkins and Grange Insurance*, 2008-CA-2099, which is being handled by both me and Bobby Rowe. In this case, the tortfeasor offered his limits and proper *Coots* notice was sent to the UIM carrier, who elected to advance those limits thereby substituting payment for the tortfeasor. Plaintiff accepted this advancement and disbursed the funds, all of which occurred pre-suit. The UIM adjustor sent numerous correspondence to plaintiff's counsel indicating that the claim was being evaluated for purposes of extending an offer on the UIM claim. The UIM carrier then decided that the plaintiff had already received the full value of her case and declined to make an offer.

Plaintiff then filed suit against the tortfeasor and UIM carrier within the statute of limitations. The UIM carrier filed an Answer admitting that there was UIM coverage for the plaintiff and asserted a Crossclaim against the tortfeasor protecting its subrogation rights for its substitution of payment and any potential UIM payment to the plaintiff. However, the UIM carrier then filed a Motion for Summary Judgment arguing that the plaintiff was not covered under its

policy of insurance. Without going into detail of the facts, basically the UIM policy was issued to the plaintiff's parents and at the time of the collision, the plaintiff was no longer a resident relative of the household. Plaintiff argued that the UIM carrier was estopped from asserting any coverage defense by virtue of it electing to substitute payment under *Coots*. Despite this argument, the Trial Court granted summary judgment.

Must a UIM carrier afford coverage based upon its own actions and representations when it chooses to interfere with a settlement between an injured party and tortfeasor? Is the substitution of payment by a UIM carrier under *Coots* and *True* an acknowledgment that the injured party has UIM coverage thereby estopping that UIM carrier from later revoking coverage? Inherent in the *Coots* and *True* procedure is an implied acknowledgment by the UIM carrier that the injured party has UIM coverage. Otherwise, for what reason would the UIM carrier substitute payment if it didn't have a subrogation right to protect? This procedure necessarily mandates a reciprocal agreement among all involved parties: (1) An injured party accepting a UIM carrier's substitution of payment releases the tortfeasor from any further liability, (2) A UIM carrier's substitution of payment preserves its subrogation rights against the tortfeasor, and (3) A UIM carrier's substitution of payment is an irrevocable acknowledgment to the injured party that there is UIM coverage. Without this reciprocity, an injured party is giving up his or her collection rights against the tortfeasor while the UIM carrier sacrifices nothing.

In theory, the law presumes that every tortfeasor is collectable beyond his or her liability limits. When a UIM carrier substitutes payment, an injured party relies on this substitution to his or her detriment by giving up rights against the tortfeasor in exchange for further insurance proceeds from the UIM carrier. Obviously, by substituting payment, the UIM carrier demonstrates its belief that the tortfeasor is collectible – otherwise it wouldn't have chosen to protect its subrogation rights – which thereby creates a true sacrifice by the injured party in giving up these rights. Therefore, a

UIM carrier should be estopped from asserting any coverage defense once it elects to substitute payment for the tortfeasor. If a UIM carrier questions whether there is coverage for the injured party, then it should waive its subrogation rights against the tortfeasor thereby consenting to the injured party's settlement with the tortfeasor. The injured party then has the ability to collect personally from the tortfeasor. The UIM carrier can then resolve the coverage question and litigate or settle as appropriate. The failure of the UIM carrier to exercise this option under *Coots* and *KRS 304.39-320* must prevent them from later revoking coverage after the injured party has moved to his or her detriment.

Who should bear the risk of loss in this situation? The Kentucky Supreme Court has already addressed the issue of who bears the risk of an unexpected outcome when a UIM carrier advances payment in *Nationwide Mut. Ins. Co. v. State Farm Automobile Ins. Co.*, 973 S.W.2d 56 (Ky. 1998). In that case, a UIM carrier substituted payment for the tortfeasor and the case proceeded to trial with the jury returning a verdict less than the UIM carrier's payment. The Court held that the UIM carrier was not entitled to any reimbursement or refund from the tortfeasor's liability carrier as it choose to interfere with the settlement between the injured party and the tortfeasor. In holding that a UIM carrier bears the risk of settlement thereby requiring it to make an informed decision, the Court in *Nationwide* stated, "*Since UIM benefits are payable only when the tortfeasor's liability exceeds policy limits, the UIM carrier must determine the value of the plaintiff's claim and the value of the potential subrogation claim when the liability carrier has offered the policy limits. The UIM carrier must determine, before it substitutes payment, the strength of the plaintiff's claim, the extent of the plaintiff's damages and the likelihood of being reimbursed by the tortfeasor for UIM benefits. It is appropriate that these matters be fully examined by the UIM carrier before it interferes with a settlement, and it should do so only when it finds those subrogation rights to be truly valuable.*"

Everyone handling automobile negligence cases needs to monitor this case closely as it will impact how future settlements are to be handled. Until *Bryant v. Hopkins and Grange* is decided, you may need to take some additional steps before even sending out a *Coots* letter. Before a *Coots* letter is sent, do you need to obtain a verification letter from a UIM carrier that the plaintiff is covered under the policy and that any contract defenses will be waived should it choose to substitute payment for the tortfeasor? Must you go a step further and either submit Request for Admission, whether you are in suit or not, or ask for an Affidavit from the UIM adjuster? We will have to wait and see, but in the meantime proceed with caution as you have been warned.