

# Permission to Pay? Consent Issues During Settlement

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#### UIM CONSENT AND SUBSTITUTION OF FUNDS

- UIM Consent:
  - Law:
    - UIM insurer gains a contingent subrogation interest when a loss occurs. That right is protected by consent to settlement clause. Kapadia v. Preferred Risk Mut. Ins. Co., 418 N.W.2d 848, 852 (Iowa 1988).
  - Sample Consent to Settlement Clause:

The *insured* must inform *us* of a settlement offer for the full amount of all available limits proposed by or on behalf of the owner or driver of the *underinsured motor vehicle*, and the *insured* must request *our* written consent to accept such settlement offer.

If *we*:

1. consent in writing, then the *insured* may accept such settlement offer.
  2. inform the *insured* in writing that *we* do not consent, then the *insured* may not accept such settlement offer and:
    - a. *we* will make payment to the *insured* in an amount equal to such settlement offer. This payment is considered a payment made by or on behalf of the owner or driver of the *underinsured motor vehicle*; and
    - b. any recovery from or on behalf of the owner or driver of the *underinsured motor vehicle* shall first be used to repay *us*.
- Purpose of Consent to Settlement: Obligated to notify the UIM insurer because the UIM insurer can take additional action to protect their subrogation interest before the settlement is completed.
    - 1. UIM insurer has the right to protect its contingent subrogation rights by tendering an amount equal to the tortfeasors' settlement offer and substitute its payment for the offer. Recker, 561 N.W.2d at 70
  - Problem arises when a Plaintiff decides to settle with a tortfeasor after the statute of limitations has expired. This is because an insurer's contingent subrogation claim is derivative of the Plaintiff's claim. See id. at 69 (discussing effect of statute of limitations on subrogation efforts). When a Plaintiff does not obtain consent to settle but proceeds to settle with and release a tortfeasor, the Plaintiff essentially takes away the UIM insurer's contingent settlement rights and ability to substitute funds in order to further protect its rights. Id at 70

- Failure to Obtain Consent:
  - Two Options:
    - 1. Argue no entitlement to UIM benefits
      - Sample Associated Exclusion:

**Exclusions**

THERE IS NO COVERAGE:

FOR AN **INSURED** WHO, WITHOUT **OUR** WRITTEN CONSENT, SETTLES WITH ANY **PERSON** OR ORGANIZATION WHO MAY BE LIABLE FOR THE **BODILY INJURY** AND THEREBY IMPAIRS **OUR** RIGHT TO RECOVER **OUR** PAYMENTS.

- Iowa Supreme Court in Kapadia v. Preferred Risk Mut. Ins. Co., 418 N.W.2d 848 (Iowa 1988) suggests a consent to settlement clause may be enforceable after a showing of actual prejudice
- Iowa Supreme Court in Hoth v. Iowa Mut. Ins. Co., 677 N.W.2d 390 (Iowa 1998) suggests proceeding under Option 2 but doesn't specifically address the effect of an exclusion for failure to obtain consent.
- 2. If a UIM insurer proves a breach of a consent to settlement clause prejudices the insurer's right to subrogation against the tortfeasor, "the covered person loses UIM coverage" if the insurer proves it could have collected from the tortfeasor absent the breach. Id. at 68. This includes establishing "a reasonable approximation of the dollar amount that might be collected" from the tortfeasor. Hoth v. Iowa Mut. Ins. Co., 577 N.W.2d 390, 393 (Iowa 1998); see Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 483 (Iowa 2005).
  - Steps:
    - Need to show could have collected
      - You must discover recoverable assets of the tortfeasor – either obtain an affidavit or take a deposition
    - File Motion for Summary Judgment to reduce amount owed by amount could have collected from tortfeasor
      - Iowa Supreme Court in Hoth suggests the reasonable amount that could have been collected acts as a pro tanto reduction of UIM liability above the tortfeasor limits
      - However, no appellate courts have determined how this works in practice.
- Substitution of Funds After Consent Obtained
  - How to substitute funds: Must look to policy language. Typically:
    - Refuse to consent to the insured's settlement with the tortfeasor.
    - UIM carrier makes payment to insured in amount equal to settlement offer from tortfeasor.

- Insured continues pursuit of claim against tortfeasor. Upon recovery, UIM is reimbursed money first.
  - Note: Not all policies have a provision for substitution of funds!
  - Sample Policy Language:
- 2. inform the **insured** in writing that **we** do not consent, then the **insured** may not accept such settlement offer and:
  - a. **we** will make payment to the **insured** in an amount equal to such settlement offer. This payment is considered a payment made by or on behalf of the owner or driver of the **underinsured motor vehicle**; and
  - b. any recovery from or on behalf of the owner or driver of the **underinsured motor vehicle** shall first be used to repay **us**.
- Why Substitute Funds:
  - Rich Tortfeasor who is underinsured:
  - Strategic decision? Theoretically, if large loss and seems likely much higher exposure if claim pursued directly against UIM, should UIM insurer consider substituting funds to keep claim against individual tortfeasor rather than UIM insurer?

## **INSURED CONSENT IN SETTLEMENT**

- Basics of the tri-partite relationship:
  - (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
    - (1) the client gives informed consent;
    - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
    - (3) information relating to representation of a client is protected as required by rule 32:1.6.

Iowa R. of Prof'l Conduct 32:1.8

Comments with 1.8

- [11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also rule 32:5.4(c) (prohibiting interference with a

lawyer's professional judgment by one who recommends, employs, or pays the lawyer to render legal services for another).

- [12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with rule 32:1.7. The lawyer must also conform to the requirements of rule 32:1.6 concerning confidentiality. Under rule 32:1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under rule 32:1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under rule 32:1.7(b), the informed consent must be confirmed in writing.

- Conflict arises:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer

Iowa R. of Prof'l Conduct 32:1.7

- Comments: [4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See rule 32:1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client.
- GENERAL EXAMPLES OF POLICY CLAUSES
  - Control / Settlement Clause: If suit is filed against any "insured" for legal damages covered under this policy, "we" will provide a defense using lawyers "we" choose. "We" may investigate and settle any claim or suit as "we" deem appropriate.

- General Defense Clause: “WE” WILL NOT DEFEND OR INDEMNIFY ANY “INSURED” IF “OUR” LIMIT OF LIABILITY HAS BEEN EXHAUSTED THROUGH PAYMENT OF A JUDGMENT OR SETTLEMENT, TENDER OF THE REMAINDER OF THE POLICY LIMIT TO THE CLERK OF COURT IN AN INTERPLEADER SUIT OR BY ORDER OF COURT, OR ANY COMBINATION OF THE ABOVE. NO LEGAL DEFENSE OR INDEMNIFICATION WILL BE FURNISHED TO ANY “INSURED” IF COVERAGE FOR THE “BODILY INJURY” OR “PROPERTY DAMAGE” DOES NOT EXIST UNDER THIS POLICY.
  
- Cooperation: Cooperate with “us” and assist “us” in any matter relating to a claim or suit;

### **SETTLEMENT ENFORCEMENT**

- Three Main Options:
  - Work with opposing counsel and give grace
  - Notify Court of settlement, then ask for compliance conference if not done automatically
  - Motion: Iowa law permits filing Motion to Enforce a Settlement Agreement
    - “The district court has authority to enforce settlement agreements made in a pending case.” Gilbride v. Trunnelle, 620 N.W.2d 244, 249 (Iowa 2000) (citing Wright v. Scott, 410 N.W.2d 247, 250 (Iowa 1987)).

### **Please feel free to contact us with any questions!**

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