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## Interpreting The Recently Enacted California Underinsurance Provisions Of The Uninsured Motorist Statute

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## California Practicum

*The California Practicum is a series of articles dealing with subjects of significance to California attorneys. The purpose of the Practicum is to inform the reader of practical problems on the cutting edge of California law in both the state and federal forums, and to act as an initial resource for finding solutions to those problems.*

### Interpreting The Recently Enacted California Underinsurance Provisions Of The Uninsured Motorist Statute

*Suppose driver A hits driver B, causing driver B to sustain \$100,000 in personal injury damages. Driver A is insured for the minimum required amount of \$15,000 and has no personal assets. California's new underinsurance provision may aid driver B in recovering the remaining \$85,000 in uncompensated damages.*

#### I. INTRODUCTION

The recently enacted underinsurance provisions<sup>1</sup> of the California

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1. CAL. INS. CODE § 11580.2(n), (p), (q) (West Supp. 1987). The relevant portions of the statute provide:

(n) Underinsured motorist coverage shall be offered with limits equal to the limits of liability for the insured's uninsured motorist limits in the underlying policy, and may be offered with limits in excess of such uninsured motorist coverage. For the purposes of this section, uninsured and underinsured motorist coverage shall be offered as a single coverage. However, an insurer may offer coverage for damages for bodily injury or wrongful death from the owner or operator of an underinsured motor vehicle at greater limits than an uninsured motor vehicle.

(p) This subdivision applies only when bodily injury, as defined in subdivision (b), is caused by an underinsured motor vehicle. If the provisions of this subdivision conflict with subdivisions (a) through (o) [the uninsured motorist provisions], the provisions of this subdivision shall prevail.

(1) As used in this subdivision, "an insured motor vehicle" is one that is insured under a motor vehicle liability policy, or automobile liability insurance policy, self-insured, or for which a cash deposit or bond has been posted to satisfy a financial responsibility law.

(2) "Underinsured motor vehicle" means a motor vehicle that is an insured motor vehicle but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person.

(3) This coverage does not apply to any bodily injury until the limits of bodily

Insurance Code went into effect on July 1, 1985.<sup>2</sup> Underinsurance is designed to compensate injured drivers whose damages are greater than the tortfeasor's automobile liability coverage. The Insurance Code now requires that underinsurance be offered as part of the insured's uninsured motorist policy.<sup>3</sup> California insurance companies must provide underinsurance and uninsured in equal amounts, although insurers may elect to issue policies containing greater underinsurance coverage.<sup>4</sup> Underinsurance is applicable only to damages resulting from bodily injury or death.<sup>5</sup>

Problems of interpretation arise with any newly enacted statutory provision. However, underinsurance has been adopted and litigated in nearly all other states.<sup>6</sup> This article analyzes the new California

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injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of such is submitted to the insurer providing the underinsured motorist coverage.

(4) When bodily injury is caused by one or more motor vehicles, whether insured, underinsured, or uninsured, the maximum liability of the insurer providing the underinsured motorist coverage shall not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury.

(5) The insurer paying a claim under this subdivision shall, to the extent of such payment, be entitled to reimbursement or credit in the amount received by the insured from the owner or operator of the underinsured motor vehicle or the insurer of such owner or operator.

(6) If the insured brings an action against the owner or operator of an underinsured motor vehicle, he or she shall forthwith give to the insurer providing the underinsured motorist coverage a copy of the complaint by personal service or certified mail. All pleadings and depositions shall be made available for copying or copies furnished the insurer, at the insurer's expense, within a reasonable time.

(7) Underinsured motorist coverage shall be included in all policies of bodily injury liability insurance providing uninsured motorist coverage issued or renewed on or after July 1, 1985. Notwithstanding this section, an agreement to delete uninsured motorist coverage completely, or with respect to a person or persons designated by name, executed prior to July 1, 1985, shall remain in full force and effect.

(q) Regardless of the number of vehicles involved whether insured or not, persons covered, claims made, premiums paid or the number of premiums shown on the policy, in no event shall the limit of liability for two or more motor vehicles or two or more policies be added together, combined, or stacked to determine the limit of insurance coverage available to injured persons.

*Id.*

2. *Id.* § 11580.2(p)(7).

3. *Id.* § 11580.2(n), (p)(7).

4. *Id.* § 11580.2(n).

5. *Id.* §§ 11580.2(p), (b).

6. The following is a list of all of the state statutes containing underinsurance provisions: ALA. CODE § 32-7-23 (Supp. 1986); ALASKA STAT. § 28.22.100-130 (1984); ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1986); CAL. INS. CODE § 11580.2 (West Supp. 1987); COLO. REV. STAT. § 10-4-609 (Supp. 1984); CONN. GEN. STAT. ANN. § 38-175(c) (West Supp. 1986); DEL. CODE ANN. tit. 18, § 3902 (Supp. 1986); FLA. STAT. ANN. § 627.727 (West Supp. 1987); GA. CODE ANN. § 33-7-11 (Supp. 1986); HAW. REV. STAT. §§ 431-448 (1985); ILL. ANN. STAT. ch. 73, para. 755(a) (Smith-Hurd Supp. 1986); IOWA

underinsurance provisions of the uninsured motorist statute by examining the language of the underinsurance provisions, and by comparing it to the law in other states having similar statutes and case law interpretation on the subject.

## II. THE AVAILABILITY OF UNDERINSURANCE

The layperson who first hears of underinsurance coverage will probably expect that the coverage is available whenever his or her damages exceed the amount of the tortfeasor's automobile liability policy. The states of Alabama,<sup>7</sup> Massachusetts,<sup>8</sup> and Washington,<sup>9</sup> for example, have adopted underinsurance to cover situations where uncompensated damages exist. However, the California Insurance Code defines an underinsured motor vehicle as "a motor vehicle that is an

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CODE ANN. § 516A.1-2 (West Supp. 1987); KAN. STAT. ANN. §§ 40-284 to 40-287 (1981); KY. REV. STAT. ANN. §§ 304.39-320 (Michie/Bobbs-Merrill 1981); LA. REV. STAT. ANN. § 22:1406 (West 1978 & Supp. 1987); ME. REV. STAT. ANN. tit. 24-A, § 2902 (Supp. 1986); MD. ANN. CODE art. 48A, § 541 (Supp. 1985); MASS. GEN. LAWS ANN. ch. 175, § 113(L) (West Supp. 1986); MINN. STAT. ANN. § 65B.49 (West 1986); MISS. CODE ANN. § 83-11-101 (Supp. 1986); NEV. REV. STAT. § 687B.145 (1985); N.H. REV. STAT. ANN. §§ 259:117, 264:15 (1982); N.J. STAT. ANN. § 17:28-1.1 (West 1984); N.M. STAT. ANN. § 66-5-301 (1984); N.Y. INS. LAW § 3420 (McKinney 1985); N.C. GEN. STAT. § 20-279.21 (Supp. 1985); OHIO REV. CODE ANN. § 3937.18 (Anderson Supp. 1985); OKLA. STAT. ANN. tit. 36, § 3636 (West Supp. 1987); OR. REV. STAT. §§ 743.776-792 (1985); S.D. CODIFIED LAWS ANN. §§ 58-11-9 to 9.9 (1978 & Supp. 1986); TENN. CODE ANN. §§ 56-7-1201 to 1202 (Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 5.06-1 (Vernon 1981); VT. STAT. ANN. tit. T.23, § 941 (Supp. 1986); VA. CODE ANN. § 38.2-2206 (1986); WASH. REV. CODE ANN. § 48.22.030 (Supp. 1986); W. VA. CODE § 33-6-31 (Supp. 1986).

7. ALA. CODE § 32-7-23(b)(4) (Supp. 1986). The statute provides:

(b) The term "uninsured motor vehicle" shall include, but is not limited to, motor vehicles with respect to which:

(4) the sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an insured person after an accident is less than the damages which the injured person is legally entitled to recover.

*Id.*

8. MASS. GEN. LAWS ANN. ch. 175, § 113L(1) (West Supp. 1986). The Massachusetts provision states that insurance policies issued in the state must provide underinsurance "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of insured motor vehicles . . . whose policies or bonds are insufficient in limits of liability to satisfy said damages, to the extent that said damages exceed said limits of liability . . ." *Id.*

9. WASH. REV. CODE ANN. § 48.22.030(1) (Supp. 1987). The code provides:

"Underinsured motor vehicle" means a motor vehicle with respect to ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum 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.

*Id.*

insured motor vehicle [insured in an amount that satisfies the financial responsibility law<sup>10</sup>] but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person."<sup>11</sup> Thus, even if a driver is injured in an amount of \$100,000 and carries uninsured/underinsured motorist coverage of \$30,000, the driver can only invoke his or her underinsurance if the tortfeasor's automobile liability policy is less than \$30,000.

Other examples will clarify the point. Assume that driver A collides with driver B, causing driver B to sustain \$100,000 in personal injury damages, and that driver B carries an uninsured/underinsured motorist policy in the amount of \$30,000.

1) If driver A's automobile liability policy is in the amount of \$15,000, underinsurance is available to driver B in California, Alabama, Massachusetts, and Washington.

2) If, however, driver A's automobile policy is in an amount equal to or greater than \$30,000, underinsurance is *not* available to the California driver,<sup>12</sup> but is available to the Alabama, Massachusetts, and Washington drivers.

The California underinsurance scheme focuses on the amount of

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10. CAL. INS. CODE § 11580.2(p)(1) (West Supp. 1987). The financial responsibility requirements are set forth in the vehicle code, which provides:

No policy or bond shall be effective . . . unless issued by an insurance company or surety company authorized to do business in this state . . . nor unless the policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interests and costs, of not less than fifteen thousand dollars (\$15,000) because of bodily injury to or death of one person in any one accident and, subject to such limit for one person, to a limit of not less than thirty thousand dollars (\$30,000) because of bodily injury to or death of two or more persons in any one accident, and if the accident has resulted in injury to, or destruction of property, to a limit of not less than five thousand dollars (\$5,000) because of injury to or destruction of property of others in any one accident.

CAL. VEH. CODE § 16056(a) (West Supp. 1987).

11. CAL. INS. CODE § 11580.2(p)(2) (West Supp. 1987).

12. In this situation, underinsurance would also be available to drivers in states such as New Mexico and Tennessee. The New Mexico statute defines an underinsured motor vehicle in much the same way as the California statute. The New Mexico provision states: "'underinsured motorist' means an operator of a motor vehicle with respect to the ownership, maintenance or use of which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured's uninsured motorist coverage." N.M. STAT. ANN. § 66-5-301(B) (1984). The Tennessee statute includes underinsurance within the definition of uninsured motor vehicle which is defined as follows:

the term "uninsured motor vehicle" means a motor vehicle whose ownership, maintenance, or use has resulted in the bodily injury, death, or damage to property of an insured and for which the sum of the limits of liability available to the insured under all valid and collectible insurance policies, bonds, and securities applicable to the bodily injury, death, or damage to property is less than the applicable limits of uninsured motorist coverage provided to the insured under the policy against which the claim is made.

TENN. CODE ANN. § 56-7-1202 (Supp. 1986).

the tortfeasor's automobile liability policy.<sup>13</sup> Conversely, Alabama, Massachusetts, and Washington's statutes concentrate on the amount of the injured driver's damages.<sup>14</sup> This focus on the tortfeasor's liability restricts the availability of underinsurance coverage even where the injured driver suffers uncompensated damages.<sup>15</sup> Unless the tortfeasor's liability policy is in an amount less than the uninsured motorist policy of the injured driver, underinsurance is not available.<sup>16</sup>

### III. THE AMOUNT OF UNDERINSURANCE AVAILABLE ONCE THE UNDERINSURANCE PROVISION IS INVOKED

Returning to example 1, in which underinsurance is available to driver B, the question arises, what amount can driver B recover: \$15,000, the difference between the uninsured motorist policy and driver A's liability coverage, or \$30,000, the full underinsurance policy limits? Stated another way, will the payment of the tortfeasor's liability limits be offset against the injured driver's underinsurance coverage? Under the Alabama, Massachusetts, and Washington schemes, driver B will be entitled to recover all available underinsurance since those statutes are specifically designed to alleviate all uncompensated damages. However, the California statute is clearly contrasting. It states that "the maximum liability of the insurer providing the underinsured motorist coverage shall not exceed the insured's underinsured motorist coverage limits, less the amount paid to the insured by or for any person or organization that may be held legally liable for the injury."<sup>17</sup> Thus, an offset is required and, in the example, driver B would be entitled to collect only \$15,000 of the \$30,000 underinsurance policy.

The Mississippi underinsurance statute is similar to California's in that it focuses on the amount of the tortfeasor's automobile liability policy rather than the amount of uncompensated damages.<sup>18</sup> How-

13. CAL. INS. CODE § 11580.2(p)(2) (West Supp. 1987).

14. ALA. CODE § 32-7-23(b)(4) (Supp. 1986); MASS. GEN. LAWS ANN. ch. 175, § 1132(L)(1) (West Supp. 1986); WASH. REV. CODE ANN. § 48.22.030(1) (Supp. 1987).

15. CAL. INS. CODE § 11580.2(p)(2) (West Supp. 1987).

16. *Id.*

17. *Id.* § 11580.2(p)(4) (emphasis added).

18. MISS. CODE ANN. § 83-11-103(c)(iii) (Supp. 1986). The statute includes, within the definition of uninsured motor vehicle, "[a]n insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage . . . ." *Id.*

ever, the Mississippi Supreme Court interpreted the language of the state's uninsured motorist statute as not requiring an offset.<sup>19</sup> The court focused on the provision which stated that an uninsured motorist policy (underinsurance is included within the meaning of uninsured) must undertake "to pay the insured *all* sums which he shall be legally entitled to recover as damages."<sup>20</sup> Furthermore, there was no statutory language requiring an offset.<sup>21</sup> Although Mississippi has taken this approach, it is unlikely that the California courts would ignore the plain language of the statute requiring an offset and force the underinsurer to pay the full underinsurance limits, even if the insured suffers uncompensated damages.<sup>22</sup> In sum, when an underinsurance provision is invoked, the underinsurer is entitled to offset any amounts paid to the underinsured in compensation for his or her injuries.

#### IV. THE INSURER'S RIGHTS

Payment by insurance companies is always coupled with an obligation on the part of the person receiving the payment to sign a release. If the injured insured intends to sign such a release to obtain compensation, must the consent of the underinsurance carrier be obtained before signing in order to protect the underinsurer's rights? The answer, according to the statute, seems to be no. The provision states: "This coverage does not apply to any bodily injury until the limits of bodily injury liability policies applicable to all insured motor vehicles causing the injury have been exhausted by payment of judgments or settlements, and proof of such is submitted to the insurer providing the underinsured motorist coverage."<sup>23</sup> Since the code requires the injured party to submit proof of judgments or settlements to the underinsurer, prior insurer consent is not mandated by statute.

The lack of a prior insurer consent provision appears inconsistent with the uninsured motorist portion of the statute. Prior consent is required by the underinsurance provision.<sup>24</sup> In fact, failure of the insured to obtain consent has been held to preclude uninsured motorist

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19. *Dunnam v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 668, 671 (Miss. 1979). The *Dunnam* case involved the refusal of an underinsurer to pay the \$10,000 policy limits to the underinsured because the underinsured was anticipating a \$20,000 judgment entered in a civil suit against the negligent uninsured driver.

20. MISS. CODE ANN. § 83-11-101(1) (Supp. 1986) (emphasis added).

21. *Dunnam*, 366 So. 2d at 671.

22. CAL. INS. CODE § 11580.2(p)(4) (West Supp. 1987).

23. *Id.* § 11580.2(p)(3). The underinsurance portion of the statute does, however, require that if the insured brings an action against the underinsured vehicle's owner or operator, the insured must notify the insurer of said action. *Id.* § 11580.2(p)(6).

24. *Id.* § 11580.2(c)(3). This section states:

The insurance coverage provided for in this section does not apply either as primary or as excess coverage to: (3) To bodily injury of the insured with respect to which the insured or his or her representative shall, without the writ-

coverage, even where the insurer could not show prejudice to the subrogation rights resulting from the unauthorized settlement.<sup>25</sup> It is important to note, however, that in order to invoke this exclusion of uninsured motorist coverage, the insurance policy itself must contain a "consent to settle" clause.<sup>26</sup> Moreover, California case law upholds the validity of uninsured motorist's policies which contain "consent" clauses with forfeiture of benefits for failure to comply.<sup>27</sup>

Thus, one could conclude that if an uninsured motorist policy may contain a valid consent requirement, so may an underinsurance policy. Two sections of the underinsurance provision, however, are distinguishable from those sections of the uninsured motorist provision which address the same topic. The first distinction, as previously noted, is that the underinsurance section requires proof of judgments or settlements to be presented to the underinsurer upon making an underinsurance claim.<sup>28</sup> In contrast, the uninsured motorist provision mandates written insurer consent<sup>29</sup> as upheld by case law.<sup>30</sup> The second distinction lies with the wording of the statute regarding the subrogation/reimbursement rights of the insurer. The underin-

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ten consent of the insurer, make any settlement with or prosecute to judgment any action against any person who may be legally liable therefor.

*Id.*

25. *Travelers Indem. Co. v. Kowalski*, 233 Cal. App. 2d 607, 610, 43 Cal. Rptr. 843, 845-46 (1965). The court stated:

While it is true that insurance contracts are commonly given a liberal interpretation in favor of the insured, and that courts are strongly inclined against forfeitures, it is equally true that language used in an insurance contract must be given its plain and ordinary meaning, and when it is unambiguous it must be given effect.

*Id.* (citing *Carabelli v. Mountain States Life Ins. Co.*, 8 Cal. App. 2d 115, 117, 46 P.2d 1004, 1006 (1935)).

26. *Lumberman's Mut. Casualty Co. v. Wyman*, 64 Cal. App. 3d 252, 134 Cal. Rptr. 318 (1976). The court held that since the insurance policy itself did not contain a consent clause, ambiguity existed. Ambiguities are to be resolved in favor of the insured. The court pronounced: "In the absence of a specific provision in the policy prohibiting the insured from prosecuting to judgment any action without the written consent of the insurer, [the insurance company] is not entitled to rely on [the statutory provisions]." *Id.* at 259-60, 134 Cal. Rptr. at 322.

27. *See Durand v. Wilshire Ins. Co.*, 270 Cal. App. 2d 58, 63-64, 75 Cal. Rptr. 415, 418-19 (1969) (arbitrator's decision to disallow recovery affirmed where insured failed to comply with the insurance policy requirement of written insurer consent); *Kowalski*, 233 Cal. App. 2d at 610, 43 Cal. Rptr. at 845-46; *Mills v. Farmers Ins. Exch.*, 231 Cal. App. 2d 124, 129, 41 Cal. Rptr. 650, 653 (1964) (the court found that the statute mandated a complete exemption unless the insurer consented).

28. CAL. INS. CODE § 11580.2(p)(3) (West Supp. 1987).

29. *Id.* § 11580.2(c)(3). For the text of this section, see *supra* note 24.

30. *Travelers Indem. Co. v. Kowalski*, 233 Cal. App. 2d 607, 43 Cal. Rptr. 843 (1965).

insurance portion does not provide subrogation rights to the underinsurer against the tortfeasor, but allows the insurer to be reimbursed by its insured.<sup>31</sup> This section states: "The insurer paying a claim under this subdivision shall, to the extent of such payment, be entitled to reimbursement or credit in the amount received by the insured from the owner or operator of the underinsured motor vehicle or the insurer of such owner or operator."<sup>32</sup> On the other hand, the uninsured motorist portion of the statute entitles the insurer paying an uninsured motorist claim to subrogation rights.<sup>33</sup> This subsection provides: "The insurer paying a claim under an uninsured motorist endorsement or coverage shall be entitled to be subrogated to the rights of the insured to whom such claim was paid . . . ."<sup>34</sup>

This exclusion of a "consent to settle" requirement and a right of subrogation against the tortfeasor in the underinsurance portion of the statute, together with the requirement to subsequently submit proof of settlement<sup>35</sup> and an allowance for reimbursement from the injured insured,<sup>36</sup> suggests that consent clauses may not be valid when underinsurance coverage is in question. In addition, the underinsurance provision of the statute asserts that when the uninsured subdivisions are in conflict with the underinsurance subdivision, the underinsurance subdivision will prevail when underinsurance coverage is at issue.<sup>37</sup>

A system that allows valid uninsured motorist "consent" clauses, while denying validity to underinsured "consent" clauses may appear irrational; however, the circumstances surrounding recovery in the underinsurance and uninsured settings are distinguishable. The uninsured motorist provision's mandate of subrogation rights,<sup>38</sup> as compared to the underinsurance provision's setoff<sup>39</sup> and reimbursement<sup>40</sup> clauses, makes clear that the underinsurer is not entitled to subrogation rights. The appellate court of Louisiana, in reviewing the validity of a consent clause in the underinsurance setting, reasoned that "[i]n substance, where the tortfeasor had liability coverage which was less than the damages suffered by the innocent party, the latter's [underinsurance] coverage [became] 'excess' after his settlement with the tortfeasor's liability carrier,"<sup>41</sup> and therefore subroga-

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31. CAL. INS. CODE § 11580.2(p)(5) (West Supp. 1987).

32. *Id.*

33. *Id.* § 11580.2(g).

34. *Id.*

35. *Id.* § 11580.2(p)(3).

36. *Id.* § 11580.2(p)(5).

37. *Id.* § 11580.2(p).

38. *Id.* § 11580.2(g).

39. *Id.* § 11580.2(p)(4).

40. *Id.* § 11580.2(p)(5).

41. *Whitten v. Empire Fire & Marine Ins. Co.*, 353 So. 2d 1071, 1075 (La. Ct. App.

tion rights were not involved. Underinsurance may be viewed, as the Louisiana Court did, as excess coverage, while uninsured motorist coverage is almost always the only source of compensatory funds for the injured person.<sup>42</sup>

Allowing the underinsurer to insert a "consent to settle" clause would place the insured and the tortfeasor's insurer in a "Catch-22" situation.<sup>43</sup> The tortfeasor's insurer has a duty to its insured (the tortfeasor) to obtain a release. However, the underinsurer possessing "consent" rights will not permit a release to be signed until the underinsurance claim is resolved and all possible avenues to obtain funds from the tortfeasor have been exhausted.<sup>44</sup> The underinsurer has an apparent interest in seeing that the monies due to the injured party come from somebody else's pocket. The Louisiana Supreme Court recognized these concerns by noting that giving the underinsurer the ability to withhold consent would allow the underinsurer to interfere with the insured's right to settle and would serve to bar the injured from recovering sums mandated by the statute.<sup>45</sup>

Although the statutory language of the California underinsurance provision tends to show that "consent to settle" clauses are impermissible, and in view of the fact that there is no prohibitory language, a case may be made for upholding the validity of such clauses. First and foremost, California has taken a firm stand on upholding the validity of such clauses in the uninsured motorist setting.<sup>46</sup> In addition, the states of Florida,<sup>47</sup> Oklahoma,<sup>48</sup> and New Mexico<sup>49</sup> have sus-

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1977). In this case, Whitten settled with the negligent driver for \$5,000 and then attempted to obtain his underinsurance policy limits of \$5,000 from his underinsurer. The underinsurer pled the defense of set-off.

42. Stott, *Underinsured Motorist Coverage: Working Out the Bugs*, 36 FED'N OF INS. & CORP. COUNS. Q., 121, 130 (1986).

43. *Id.*

44. Hentemann, *Underinsured Motorist Coverage: A New Coverage With New Problems*, 50 INS. COUNS. J. 365, 371 (1983).

45. *Niemann v. Travelers Ins. Co.*, 368 So. 2d 1003, 1008 (La. 1979). In *Niemann*, the defendant insurer claimed subrogation rights on the basis of the policy terms. However, the Louisiana statute, like that of California, provided for insurer reimbursement rights. LA. REV. STAT. ANN. § 22.1406(D)(4) (West 1978). Thus, the court held, "It is our ultimate conclusion that the statute neither explicitly nor implicitly sanctions a clause such as consent to settle, which in operation serves to block the statutorily mandated [uninsured/underinsured] coverage." *Niemann*, 368 So. 2d at 1006.

46. See *supra* notes 25 through 27.

47. *Travelers Ins. Co. v. Gray*, 360 So. 2d 16, 18 (Fla. Dist. Ct. App. 1978). The Florida uninsured/underinsurance statute, however, specifically mentions that the insurer has subrogation rights. FLA. STAT. ANN. § 627.727(6) (West 1984).

48. *Porter v. MFA Mut. Ins. Co.*, 643 P.2d 302 (Okla. 1982). In *Porter*, the underinsurer claimed that certain ambiguous language in the statute, OKLA. STAT. ANN. tit. 36,

tained "consent" clauses in underinsured motorist cases. Their decisions were based on the contractual nature of an insurance policy and the protection of insurer's rights.

## V. CONCLUSION

California's recently enacted underinsurance provisions may provide additional compensation for the drivers of the state. The wise motorist seeking an uninsured/underinsured policy will opt for underinsurance coverage in an amount greater than his or her uninsured coverage to take advantage of the limited application of the underinsured motorist coverage. It is clear that insurance companies are given the benefit of an offset when the injured insured recovers from either the tortfeasor or the tortfeasor's insurance company. It is, however, unclear whether "consent to settle" clauses will be valid. Whereas such clauses are not mandated by the statutory provisions and the insurer is not granted subrogation rights, concerns for public policy may be enough to invalidate "consent" clauses in the underinsurance setting. The wise motorist will ignore this possibility and obtain consent from his or her underinsurer to avoid litigation.

LINDA M. SCHMIDT

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§ 3636(E) (West 1976), provided for subrogation rights. The court held for the insurer, finding that if an insured settles, thereby destroying the insurer's right to subrogation, forfeiture clauses would be enforced. Note, however, that the consent clause in this case was found void. *Porter*, 643 P.2d at 305.

49. *March v. Mountain States Casualty Ins. Co.*, 101 N.M. 689, 687 P.2d 1040 (1984). The *March* court held that, although the underinsurance portion of the New Mexico statute did not expressly provide for underinsurer subrogation rights, the subrogation and consent provisions of the underinsurance policy in question were valid contractual rights.