

Opinion:

Is It Time to Statutorily Expand Kansas UIM Coverage?

by Arthur Rhodes

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I. INTRODUCTION

Kansas law requires that all drivers possess Uninsured/Underinsured Motorist (UM/UIM) coverage with minimum limits of \$25,000 per person/ \$50,000 per accident. In theory, this mitigates losses caused by drivers with no insurance or insufficient coverage. In practice, Kansas drivers often learn after an accident that the UIM coverage they purchased does not apply based on a strict “limits-to-limits” test, whereby UIM coverage is only available if the insured’s UIM limits are greater than the tortfeasor’s liability limits.¹ Subsection (b) of K.S.A. 40-284 states:

Any uninsured motorist coverage shall include an underinsured motorist provision which enables the insured or the insured’s legal representative to recover from the insurer the amount of damages for bodily injury or death to which the insured is legally entitled from the owner or operator of another motor vehicle **with coverage limits equal to the limits of the liability provided by such uninsured motorist coverage to the extent**

such coverage exceeds the limits of the bodily injury coverage carried by the owner or operator of the other motor vehicle.²

This provision has been interpreted to mean:

In those cases where the UIM coverage exceeds the limits of the bodily injury coverage carried by the owner or operator of the other motor vehicle, UIM coverage exists. However, in those cases, . . . where the UIM coverage equals or does not exceed the limits of the bodily injury coverage carried by the owner or operator of the other motor vehicle, there is no UIM coverage.³

This restrictive test places Kansas within a small minority of states with similar UIM statutes that thwart the purpose of UIM damages, which is to make the insured whole. Contrarily, the vast majority of states have adopted UIM schemes that enlarge coverage to fill the void resulting from a tortfeasor’s inadequate insurance. Notwithstanding, as our Kansas Supreme Court has stated, the wording of K.S.A. 40-284(b) unavoidably requires a restrictive interpretation of UIM coverage.⁴

II. PREDOMINANT UIM STATUTORY APPROACHES

States generally utilize three statutory schemes to determine when UIM benefits become available: (1) "add-on" UIM coverage, (2) "supplementation" UIM coverage (of proceeds actually received from the tortfeasor's liability carrier), and (3) "limits-to-limits" analysis.⁵ Under the "add-on" approach, the tortfeasor's liability insurance is automatically augmented by UIM coverage to the extent of the insured's UIM limit or total damages. If the tortfeasor's liability limits fully compensate the insured, UIM coverage is not triggered. If the insured's damages are greater than the tortfeasor's coverage, then the insured can recover UIM payments up to the lesser of his remaining damages or his UIM limit.

Under the "supplementation" approach, if the insured receives less than the tortfeasor's full liability limits (e.g., in cases involving multiple injured parties), then the amount that the insured actually receives may be supplemented by UIM payments up to the insured's UIM coverage limit, so long as the tortfeasor's policy has been exhausted.

Under the strict "limits-to-limits" method, the insured's UIM limits are compared to the tortfeasor's liability insurance limits. The insured's UIM limits must be greater than the tortfeasor's liability limits to trigger UIM coverage. For instance, if an insured with \$100,000 in damages has UIM limits of \$25,000/\$50,000 and the tortfeasor has liability limits of \$25,000/\$50,000, then UIM benefits are not available. Hence, the Kansas approach is counter-intuitive to the expectation that UIM coverage will "fill the gap" if the insured's damages exceed the tortfeasor's liability limits.⁶

Only four jurisdictions other than Kansas apply a strict limits-to-limits test: California, Mississippi, Massachusetts, and North Carolina.⁷ The remaining states use add-on, supplementation, or some combination thereof to enlarge coverage.⁸ Many of these statutes display the intent to endow the UIM insured with the greatest possible coverage by centering coverage on the liability proceeds "available" to the UIM insured. Additionally, some states (such as Connecticut) provide the insured with the option to purchase add-on coverage for an additional premium.⁹ In sum, Kansas is one of the few states with an arcane UIM statutory rubric that often prevents the insured from receiving additional insurance coverage when the tortfeasor is underinsured.

III. KANSAS LAW SHOULD BE UPDATED TO ACCOMPLISH THE PURPOSE OF UIM COVERAGE

The purpose in mandating UIM coverage is "to fill the gap inherent in motor vehicle financial responsibility legislation and compulsory insurance legislation."¹⁰ UIM damages, like all damages, are designed to make the injured party whole.¹¹ The *Cashman* Court directed that "K.S.A. 40-284(b) should

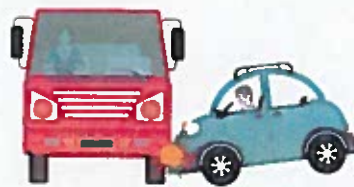
be liberally construed in light of the legislative intent to compensate innocent persons damaged by others without sufficient insurance."¹²

Unfortunately, even liberal construction of the limits-to-limits test does not shelter Kansas drivers from "aberrant results."¹³ "Surely no gaps are filled and innocent persons are not adequately compensated by a rule that provides for full compensation only if the tortfeasor is either completely uninsured or fully insured."¹⁴

The first court to interpret K.S.A. 40-284(b), in *State Farm Mut. Auto. Ins. Co. v. Cummings*, concluded that it was "harsh."¹⁵ By any standard, K.S.A. 40-284(b) "is a 'narrow coverage' UIM statute."¹⁶ Courts cannot change this, and they cannot impose liability on an insurer when the limits-to-limits test has not been met.¹⁷ Only the legislature can make the necessary changes.¹⁸

Since *Cummings*, however, the legislature has not amended the law to ameliorate the statute's harsh result.¹⁹ We must take this to mean that the legislature agrees with the court's interpretation.²⁰ We can, however, hope for legislative changes that will realign the application of K.S.A. 40-284(b) with its aim.

This statute, which was originally adopted in 1968, should be recalibrated to accomplish the purpose of UIM coverage.²¹ As a result of the limits-to-limits test, Kansas UIM policies often do not fill the gap or make the insured whole. Indeed, for some accident victims the limits-to-limits test extinguishes the possibility of being made whole. In short, the tortfeasor's liability coverage should never be used as a basis for denying UIM coverage.²² The insured's total damages should be compared with the amount of insurance proceeds available to the insured. This would conform to the national trend, accomplish the purpose of UIM insurance, and provide Kansas drivers with the coverage they intuitively expect.



About the Author



Arthur Rhodes is a partner at Smithyman & Zakoura, Chartered in Overland Park. He graduated from Washburn Law School in 1996. His practice consists primarily of business litigation and insurance defense.

1. K.S.A. 40-284(b).
2. K.S.A. 40-284(b)(1988)(Emphasis added.)
3. *Halsey v. Farm Bureau Mut. Ins. Co., Inc.*, 275 Kan. 129, Syl. ¶ 4 (2003).
4. *Id.*, at 142; *State Farm Mut. Auto. Ins. Co. v. Cummings*, 13 Kan. App. 2d. 630, 639 (1989).
5. While several jurisdictions (such as Connecticut and Ohio) employ schemes that don't fit comfortably into any of these three categories, those jurisdictions clearly do not employ the Kansas "limits-to-limits" method. *See*, C.G.S.A. § 38a-336; O.R.C. § 3937.18(C).
6. *O'Donoghue v. Farm Bureau Mut. Ins. Co.*, 275 Kan. 430, Syl. ¶ 4 (2003) ("*O'Donoghue II*").
7. Cal. Ins. Code § 11580.2; Miss. Code Ann. § 83-11-103; M.G.L.A. 175 § 113L; N.C.G.S.A. § 20-279.21(b)(4). The statutes in Massachusetts and North Carolina leave room for interpretation, but appear to base UIM coverage on a traditional limits-to-limits comparison.
8. Colorado, Delaware, and West Virginia provide examples of add-on schemes. Co. Stat. § 10-4-609(1)(c); 18 Del. C. § 3902(b)(2); W. Va. § 33-6-31(b). Supplementation examples can be found in Georgia, Indiana, Maine, Maryland, New Jersey, New Mexico, North Dakota, South Dakota, Tennessee, Vermont, and Virginia. O.C.G.A. § 33-7-11(b)(1)(D)(ii)(II); Ind. Code § 27-7-5-4(b); 24-A M.R.S.A. § 2902; Md. Ins. Code Ann. § 19-509(g); N.J.S.A. 17:28-1.1; N.M. Code § 66-5-301.B; NDCC 26.1-40-15.3; SDCL § 58-11-9.5; T.C.A. § 56-7-1201(d); 23 V.S.A. § 941(f); VA Code Ann. § 38.2-2206.
9. *See*, C.G.S.A. § 38a-336a(a).
10. *Cashman v. Cherry*, 270 Kan. 295, Syl. ¶ 2, 13 P.3d 1265 (1999).
11. *Fisher v. State Farm Mut. Auto. Ins. Co.*, 264 Kan. 111, 116 (1998).
12. *Id.*
13. *O'Donoghue v. Farm Bureau Mut. Ins. Co.*, 50 Kan. App. 2d. 626, 634 (2002) ("*O'Donoghue I*") ("Although the limits-to-limits rule is simple to apply, it creates aberrant results.")
14. *Id.*
15. *State Farm Mut. Auto. Ins. Co. v. Cummings*, 13 Kan. App. 2d 630, 639 (1989).
16. *Halsey*, at 142.
17. *See*, *Cummings*, 13 Kan. App. 2d. at 639 (explaining that where the minimum requirements of the limits-to-limits test have not been met, "to impose further liability would impose a risk upon the insurance carrier for which it has neither bargained nor been compensated.")
18. *See*, *Halsey*, at 142 (noting that the Court is not at liberty to rewrite the statute, as any changes "must be done by the legislature.")
19. *Halsey*, 275 Kan. at 136.
20. *Id.* ("When the legislature fails to modify a statute to avoid a standing judicial construction of that statute, the legislature is presumed to agree with the court's interpretation.") (Citation omitted.)
21. K.S.A. 40-284(b).
22. *See*, *O'Donoghue I*, at 634. ("It would also seem logical that the purpose of UIM coverage is to allow one to purchase certain limits, e.g. 100/300, to be available to compensate the purchaser's injuries, regardless of the bodily injury limits carried by any potential tortfeasor.") (Emphasis added.)



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