

UIM: It's not in dispute, so pay up!

The obligation of insurers to pay the undisputed amount of underinsured and uninsured motorists' claims

By Charles M. Miller

When an insurer determines how much it owes under an insurance policy, does that insurer have to pay that amount even if the payment (1) is less than what the insured is demanding or (2) does not represent the full amount that the insurer will be ultimately obligated to pay under the policy?

Many insurers have adopted the practice, despite some case law to the contrary, of paying the amount the insurer has determined it owes, called the "undisputed amount," in first-party property claims. But does the insurer owe the undisputed amount in Uninsured Motorist ("UM") or Underinsured Motorist ("UIM") claims? In this article, I explain that, even though there is no California law requiring this result, the general principles that govern first-party claims dictate that an insurer does owe the undisputed amount in UM or UIM cases.

An insurer's obligation to pay the undisputed amount in UM and UIM claims is grounded in the relationship between the insured and insurer. Here, unlike liability claims, the insurer has a direct contractual relationship with the insured. UM and UIM claims are first-party claims. This relationship imposes on the insurer an obligation to its insured to not only pay all claims due and owing but to pay them timely. In order to fulfill its contractual duties to the insured, the insurer must conduct timely and thorough investigations and then make an objective and as equally timely determination of the amount of the loss. Once that determination is made, the insurer, pursuant to its obligations to its insured, must then pay the undisputed amount of the loss.

An insurer's obligation to pay the undisputed amount of the loss is also grounded in the insurer's duty of good faith and fair dealing to its insured. The duty of good faith imposes on the insurer the duty not to interfere with the insured's right of recovery of policy benefits, which are owed to the insured. Accordingly, when the insurer determines

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the amount owed under the policy – the undisputed amount – the insurer must pay that amount in order to fulfill its good-faith duty.

This article will review the case law that has developed regarding an insurer's duty to pay the undisputed amount of the loss, first in the first-party property context, and then in the context of UM and UIM claims. In doing so, the article will discuss the unique first-party relationship between insurer and insured that gives rise to the insurer's obligation to pay first-party claims, including UM and UIM claims. (*Neal v. Farmers Ins. Exch.* (1978) 21 Cal.3d 910, 920,148 CR 389, 384, [explaining that first-party coverages are those in which the insurer's duty is to compensate its own insured for his or her losses].) The article concludes with a discussion of steps the practitioner may want to consider taking in seeking payment of the undisputed amount of a UM or UIM claim.

The undisputed amount in first-party property cases

Several courts in other jurisdictions have upheld the insurer's obligation to pay the undisputed amount of a claim in first-party property claims. (See e.g., *Borland v. Safeco Insurance Company of Arizona* (Ariz. App. 1985) 709 P.2d 552, 557 [Where coverage is not contested but the amount of the loss is disputed, the insurer is under a duty to pay any undisputed portion of the claim promptly]; *Dupre v. LaFayette Insurance Company* (La. 2010) 51 So.3d 673-698 ["[A]n insurer must pay any undisputed amount over which reasonable minds could not differ"]; *Chester v. State Farm Insurance Company* (Idaho App. 1990) 789 P.2d 534 [Insurer acted in bad faith in delaying payment on undisputed amount]; and *Travelers Indemnity Company v. W. Wetherbee* (Miss. 1979) 368 So. 2d 829, 833 [rejecting insurer's policy of only paying claim upon acceptance by insured of Travelers' offer on entire claim].) These decisions are commonly grounded in the contractual relationship between the insured and insurer. The insured has paid a premium in exchange for the insurer's agreement to accept the risk of loss of real or personal property. That acceptance can only be fulfilled if the insurer, upon the occurrence of a loss, timely investigates and pays the loss.

It has long been the practice in the insurance industry to pay the undisputed amount of first-party property claims as well as UM and UIM claims. The International Risk Management Institute ("IRMI"), an insurance industry resource for insurance policy interpretation and application, has pointed out that "[a]ny undisputed amounts should be paid by the insurer immediately" (IRMI, "Loss Payment," p. 1). Insurers themselves sometimes require the payment of the undisputed amount of a claim. For example, in Farmers' "Liability Training Text Uninsured/Underinsured Motorist Insurance," Farmers writes, "*never* withhold the undisputed portion as this would be to the detriment of the policyholder" (*Id.*, p. 18; emphasis in the original, and see Farmers' "Branch Claims Office Procedure Manual, p. III-11, "Undisputed amount should be paid as soon as determined").

Likewise, State Farm's "First Party Coverage Seminar" manual, which has been used to train State Farm claims employees on the handling of UM and UIM claims, provides that the amount of the first offer will be paid: "When dealing with first-party claims, it is the Company's philosophy to advance pay the amount of our initial offer when an agreement on the entire amount of payment has not been reached and is not imminent" (*Id.*, p. 14, and see *Castellano v. State Farm Mutual Automobile Insurance Company* (Ill App. 2013) 2013 WL 5519596, p. 2 ["It's our [State Farm] policy to pay the amount of the first offer"].

In making payments in first-party losses insurers will frequently pay over a period of time components or parts of a loss and not wait until the entire amount of the loss is determined before making a payment. This is done either in the form of advance payments or in payment of the undisputed amount of the loss. Indeed, many insurers have adopted policies and procedures for the issuance of advance payments. (See State Farm Operation Guide 75-01, "First Party Claims Guidelines & Requirements, p. 6, "In certain loss situations, consideration should be given to making an advance payment," and GEICO "Claims Manual," p. II-6, "In many cases, we advance money to an injured party so innocent victims can provide for themselves and their families during their period of incapacity," and Popow, Donna J. [Ed.], Property Claim Practices (The Institutes, 1st ed., 2011), §§ 3.35, 5.9; "Advance payments are usually made during the first few days after a loss before the insurer can fully investigate the cause of loss and before the insured has fully complied with policy conditions").

Some courts have held, however, that an insurer does not have an obligation to pay the undisputed amount of the loss in first-party property claims. (See *Southwest Nursing Home Inc. v. St Paul Fire and Marine Ins. Co.* (11th Cir. 1985) 750 F.2d 1531, 1539.)

The undisputed amount in other types of first-party claims

The widespread practice of paying the undisputed amount in first-party property claims has been extended to other types of first-party claims. (See *Ireland v. Standard Mutual Association of Cassville* (Mo. App. 1964) 379 S.W.2d 815, 821 [holding that the insurer has duty to pay the undisputed amount of a life insurance claim]; *Central Armature Works, Inc. v. American Motorists Insurance Company, et al.* (D.C.1980) 520 F.Supp. 283, 294 [holding that insurer was obligated to pay undisputed amount of attorneys' fees].)

There appears to be little reason to deny payment of the undisputed amount of claims to UM or UIM insureds, while granting it to other first-party insureds. Alan Windt, in his treatise on insurance, writes that the duty to pay the undisputed amount is not circumscribed by the type

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of first-party insurance involved; rather, it is an overriding duty.

> When there is no dispute as to the existence of coverage for a portion of the insured's claim, the carrier should pay that amount. It should not withhold payment on the ground that there is a dispute as to the remainder of the claim. The only exception to that payment rule is when the undisputed portion is insignificant in comparison with the total amount that is claimed.

(*1 Insurance Claims and Disputes* § 2:22 (6th ed.).)

Insurer's obligation to pay the undisputed amount in UM and UIM claims

Some courts have held that an insurer may have a duty to pay the undisputed amount of a UM or UIM claim. (See *Castellano v. State Farm Mutual Automobile Insurance Company*, *supra*, 2013 WL 5519596 at *4 [Plaintiff's allegations that insurer refused to tender the undisputed amount of underinsured benefits was sufficient to state claim against insurer]; *Weinstein v. Prudential Property and Casualty Insurance Company*, (Idaho 2010) 233 P.3d 1221 [rejecting Liberty Mutual's position that UM policy benefits would only be paid in a lump sum].)

Few California courts have addressed the issue of an insurer's duty to pay the undisputed amount of UM or UIM claims. In one case, the court observed in dicta in a decision that was only partially published that "[a]n insurer may establish that it acted reasonably by promptly paying undisputed amounts due under a policy while investigating the remainder of the claim."(*Perkins v. State Farm Mutual Automobile Insurance Company* (Cal.App. 2003) 2003 WL 21465105). The Court in *Perkins* did not address the issue of whether State Farm had a duty to pay the undisputed amount of the insured's UM claim.

In *Aronson v. State Farm Insurance Company* (C.D. CA, May 11, 2000) 2000 WL 667285, the district court held that the insurer did not have a duty to pay the undisputed amount of a UM claim. In its Conclusions of Law the Court wrote: "An insurer's failure to pay the "undisputed amount" of the claim is not bad faith. (citations omitted)." (*Id*. at * 9). In reaching its Conclusions of Law on the insurer's duty to pay the undisputed amount the court did not cite any California law. Rather, the Court relied solely on out-of-state decisions. Further, the Court apparently ignored any out-of-state decisions that would have supported an insurer's duty to pay the undisputed amount.

Although the Court did cite California law in other regards, the Court also ignored that California law which would appear to support an insurer's duty to pay the undisputed amount of a claim. (See *Jordan v. Allstate Ins. Co*. (2007) 148 CA4th 1062, 1072-1073, 56 CR3d 312, 319, and *Major v. Western Home Ins. Co*. (2009) 169 CA4th 1197, 1210, 87 CR3d 556, 568.)

In *Waller v. Truck Ins. Exch., Inc.* (1995) 11 Cal.4th 1, 36, 44 CR2d 370, 390, the Supreme Court stated, "Delayed payment based on inadequate or tardy investigations, oppressive conduct by claims adjusters seeking to reduce the amounts legitimately payable and numerous other tactics may breach the implied covenant because they frustrate the insured's right to receive the benefits of the contract in prompt compensation for losses."

Indeed, where an insurer has determined that a UM or UIM claim has a certain value, the failure to disclose that information to the insured, let alone make payment based on the evaluation, may be a violation of the California Unfair Claims Settlement Practices Regulations, which require in pertinent part that:

> Every insurer shall disclose to a first party claimant or beneficiary, all benefits, coverage, time limits or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the claimant. When additional benefits might reasonably be payable under an insured's policy upon receipt of additional proofs of claim, the insurer shall immediately communicate this fact to the insured and cooperate with and assist the insured in determining the extent of the insurer's additional liability.

(10 CCR § 2695.4).

The *Aronson* court found that because the entire amount of the claim was in dispute there was no undisputed amount. The undisputed amount is, however, only that portion of the insured's claim which is offered by the insurer and accepted, at least implicitly, by the insured. It is not the full amount of the insured's claim. It is evident that State Farm believed that Aronson's claim had some value – State Farm offered $40,000. State Farm, however, made no payment based on its evaluation, despite its policy of paying its first offer in UM and UIM claims. The Court dismissed the offer as "simply a proposal to compromise and resolve the claim," and not as an admission by the insurer that it owed that amount. The issue, however, is not whether it is a compromise offer, but rather, is it at the same time a recognition by the insurer that certain benefits are owed under the policy? Clearly that is the case here, otherwise State Farm would not have made the offer.

The *Aronson* court also contended that "[n]othing in the policy requires State Farm to advance policy benefits where there is a bona fide dispute as to the value of the claim. In fact, the Policy expressly contemplates that such disputes will be resolved by UM arbitration." It is, however, well recognized that an insurer's duties are not limited to what is stated in the policy. Rather, the insurer must comply with the duty of good faith, which imposes on the insurer duties not set forth in the policy, such as the duty to conduct a timely and thorough investigation and to not withhold timely payment of claims.

It is apparent that the *Aronson* decision has not resolved the issue of whether an insurer is obligated to pay the undisputed amount of a UM or UIM claim in California.

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Insurance industry defenses

In defense of their position that an insurer is not obligated to pay the undisputed amount in UM/UIM cases, insurers have argued that a claims representative's evaluation of the claim is not a determination of the undisputed amount because the evaluation of personal injury claims is inherently uncertain. For example, in *Voland v. Farmers Insurance Company of Arizona* (Ariz. App. 1997) 943 P.2d 808, 812, the court stated that, "[u]ntil a partial final assessment is made or requested, there is a reasonable basis for failing to make [an] offer of partial settlement: namely, it is unclear what the separate injuries are worth, or what the plaintiff would have been legally entitled to recover for bodily injury if the uninsured motorist had had coverage."

Simply because UM or UIM claim values may be difficult to determine should not preclude an insurer from paying the undisputed amount. Insurance claims handlers are trained to evaluate such claims throughout their handling of the claim and to make settlement offers based on those evaluations, while not waiting for the conclusion of the claim. For example, in Farmers' "Liability Claims Strategies & File Documentation Standards," p. 4, the claims handlers are required to prepare "[a] current evaluation of the claim [that] should be outlined along with any assumptions that are made in the evaluation." Likewise, State Farm's Auto Claim Manual provides:

> The claim representative must constantly evaluate a claim with the ultimate goal of concluding that claim in a fair and reasonable manner. Current value is an established range of values for a file based upon all relevant information available to date. It focuses our claim handling on proper resolution of the claim....
>
> Settlement should be attempted as soon as current value is established and necessary investigation complete.

(State Farm Auto Claims Manual, pp. 9, 11)

Indeed, in the matter of *Kirchoff v. American Casualty Company, of Reading, Pennsylvania* (8th Cir. 1993) 997 F.2d 401,405, the court noted that the insurer's claim valuation was "relevant to the issue of [whether] CNA's settlement offers were made in good faith."

Insurers have also contended that reserve amounts cannot be used to show the insurers determined the undisputed amount of the claim. In *Beltran v. Allstate Insurance Company* (S.D. CA June 25, 2001) 2001 WL 741806, held that Allstate's reserve amount was not an admission of Allstate's liability for the insured's UIM claim. Even though it might not be an admission of liability it must be recognized that in the insurance industry reserves are "an estimation of the money that will eventually be paid for the costs associated with a claim," and the "reserves should represent what the insurer estimates the final settlement will be." (Markham, James J. [Ed.], et al., *The Claims Environment* [Insurance Institute of America, 1st ed., 1993], pp. 54 & 255.) Accordingly, the amount of the reserve does reflect the insurer's evaluation of the claim, and should, at the least, be evidence of what the insurer believed it owed on the claim.

Finally, insurers have contended that they only have to pay the UM or UIM claims after all of the insured's damages have been determined or the insurer and insured have agreed on the amount of damages. This argument was rejected by the court in an unpublished opinion in *Fisher v. State Farm Mutual Automobile Insurance Company* (Co. App. May 7, 2015) 2015 WL 2198515, in which the court observed that "State Farm has not pointed to anything in its policy that required Fisher to establish *all* of the damages he had incurred from the accident before State Farm had an obligation to pay *any* of them." (*Id.* at p. 7; emphasis in original). The Court also addressed State Farm's argument that it was not obligated to pay the insured's claim piecemeal by noting that State Farm had not established "that it was somehow incapable of paying a claim in pieces, rather, a State Farm representative testified at trial that a provision in State Farm's Automobile Claims Manual (its guide for how to handle its automobile claims) allowed it to make separate payments on a claim." (*Ibid.*)

Conclusion and recommendations

Policyholder counsel do not yet have the benefit of published California decisions in which the issue of whether an insurer is obligated to pay the undisputed amount of a UM or UIM claim until it has been resolved. Nonetheless, there remain several strong arguments that a practitioner can make in support of a claim for payment of the undisputed amount. Accordingly, it is recommended that policyholder counsel consider taking a number of steps to encourage, if not demand, the payment of the undisputed amount of a UM or UIM claim. These include:

- Before making a demand, make sure that the insurer has sufficient evidence to evaluate the claim. This would include all medical records and billings related to the injury, as well, where appropriate, medical records regarding the client's pre-accident medical condition to address the insurer's likely claim that they can complete an evaluation until they know the medical history.
- In the demand letter for the undisputed amount (assuming no offers have yet been made), point out that the insurer has now had sufficient time, and has been provided with sufficient information, to evaluate the claim and that demand is made for what the insurer believes is the undisputed amount of the claim without prejudice to the insured to seek amounts above the undisputed amount.
- If the insurer makes a settlement offer before there is a demand for the undisputed amount, respond by demanding payment of the amount of the offer with-

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Miller

out prejudice to make additional claims, and, if appropriate, reiterate the prior demand or make a new demand, both which will be in excess of the undisputed amount.

Charles Miller is a licensed attorney in California. Since 1990, his practice has been devoted to insurance law. Prior to 1990, Mr. Miller was employed in the insurance industry for 18 years, where he worked as an insurance claims representative and claims manager. Mr. Miller has been retained in more than 15 states and territories, including Canada, as an expert on insurance industry practices and standards, as well as on various insurance policy coverage issues. He can be reached at cmiller.ilc@earthlink.net.

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