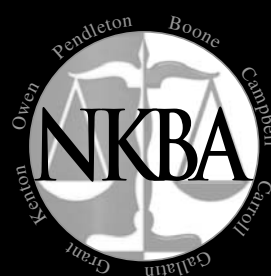


# LEX LOCI

FEBRUARY 2012

*Leadership is getting people  
to work for you when they  
are not obligated.*

Fred Smith



**Northern  
Kentucky  
Bar  
Association**

# THE INS AND OUTS OF UNDERINSURED AND UNINSURED MOTORIST COVERAGE INVOLVING MULTIPLE JURISDICTIONS

Lindsay Rump & Patricia Trombetta

Some attorneys practice their entire lives in one state, others practice in states that border their home practice state, while still others practice in multiple jurisdictions. Even if you practice in one state and never plan to step foot in a courtroom in another, you may still become involved in cases that require the application of the law of another state, especially if you practice personal injury or insurance law.

Uninsured and underinsured motorist coverage is not only interpreted pursuant to the language contained in the policy of insurance, but is also subject to statute. As a result, this is an area of law that may require you to become familiar with the law of another state, or to explain the coverage to your client. Practicing in Kentucky can mean you will need to be familiar with Ohio, Indiana, or even West Virginia law on the subject. Each of these states has distinctly different statutes interpreting uninsured and underinsured motorist coverage. The practical application of these statutes is confusing if you lack familiarity with them. Each case is unique and an analysis of the facts and law in each state is important.

## Kentucky Accident – Ohio Insurance Policy

Take for example a case where there is an automobile accident in Kentucky between an Ohio resident and a Kentucky resident and there is a dispute regarding liability. The Ohio resident is insured under a policy of insurance issued in Ohio, for a vehicle principally garaged in Ohio, from ABC Insurance Company, with the minimum Ohio financial responsibility coverage of \$12,500 per person, \$25,000 per accident. The Ohio resident also has three passengers in his car. The Kentucky resident is insured by the XYZ Insurance Company with the minimum Kentucky financial responsibility coverage of \$25,000 per person, \$50,000 per accident.

The Ohio passengers are all injured with medical bills in excess of \$25,000, as is the Ohio insured driver. The Ohio driver brings suit against the Kentucky driver and

against her own ABC Insurer, for underinsured motorist coverage. The first issue you must address is what state law will apply to the portion of the lawsuit involving the personal injury. Of course, it is Kentucky law, because the accident occurred in Kentucky. But, the answer for the portion of the lawsuit involving underinsured motorist coverage is not as easy. To analyze the underinsured motorist issues you must look to Restatement (Second) of Conflict of Laws § 188 as applied under Kentucky law. The state with the most significant contacts will be the applicable law for underinsured motorist coverage. Under this fact pattern, Ohio law will apply to determine whether there is any underinsured motorist coverage available under the ABC insurance policy and Kentucky Courts will recognize the foreign law and apply it.

In this scenario, by applying Ohio law, there would be no underinsured motorist coverage available to the Ohio insured under the ABC Insurance policy. Pursuant to the Ohio statute, underinsured motorist coverage is not and shall not be excess coverage to other applicable liability coverages, and shall only provide the insured an amount of protection not greater than that which would be available under the insured's motorist coverage if the person or persons liable to the insured were uninsured at the time of the accident. In our case, the policy limits of the ABC insurance policy are less than the bodily injury liability limits of the Kentucky resident with XYZ Insurance Company. By definition, there is no recovery for the Ohio insured beyond the bodily injury liability limits of the XYZ Insurance Company policy.

If the underinsured motorist policy limit of the Ohio insured under the ABC Insurance policy was \$100,000 per person, \$300,000 per accident the analysis would end differently. In that case there would be underinsured motorist coverage available to the Ohio Insured because the policy limits of the ABC Insurance policy are greater than the bodily injury liability limits under the XYZ policy of insurance for the Kentucky insured. The Ohio insured would have available \$75,000 Underinsured Motorist benefits for his injuries.

However, what if the policy limits for both the Kentucky insured and the Ohio insured were equal? Would there be any underinsured coverage available for the Ohio insured? The answer is maybe. The Ohio Supreme Court determined there is no direct set off of the bodily injury liability limits from the Underinsured Motorist liability limits, rather, the analysis is the amount of bodily injury liability

limits available for the insured compared to the Bodily Injury limits of the tortfeasor. In the instant fact pattern, should the Ohio insured driver receive less than the \$100,000 per person bodily injury limit of the XYZ insurance policy, due to the injuries to his passengers, the Ohio insured driver would be underinsured for the difference between the amount available to him under the bodily injury policy and the \$100,000 underinsured policy limit. For example, should the Ohio insured driver only receive \$50,000 for his injuries due to the fact the other three passengers received the remaining \$250,000 of the \$300,000 per accident bodily injury limits of the Kentucky policy, then the Ohio insured driver would be underinsured to the extent that \$50,000 he received was \$50,000 less than his own \$100,000 per person Underinsured Motorist coverage.

## Ohio Accident – Kentucky Insurance Policy

What if we change the fact pattern and make the accident in Ohio and the Kentucky insured is the one who is suing the Ohio driver as the tortfeasor in Ohio



and the XYZ Insurance Company for his Kentucky underinsured motorist coverage. How will the analysis be different? Ohio Courts also apply the Restatement (Second) of Conflict of Laws § 188 which results in Kentucky law being applied to determine whether there is any underinsured motorist coverage available to the Kentucky insured for the accident.

Kentucky defines uninsured motorist and underinsured motorists differently from Ohio. In Kentucky, if the tortfeasor is insured, but the limit of the bodily injury coverage for the tortfeasor is less than that required under the financial responsibility law of Kentucky, then the tortfeasor is statutorily considered uninsured, not underinsured. Unlike Ohio, in Kentucky, the uninsured motorist coverage and underinsured motorist coverage are separate coverages and both do not have to be purchased by the insured. If there is no uninsured motorist coverage purchased by the Kentucky insured then there would be no recovery beyond the bodily injury liability policy of the Ohio insured.

In this fact pattern, under Kentucky law, when we increase the underinsured motorist policy limits to \$100,000 per person and \$300,000 and make them equal to the bodily injury policy limits of the Ohio policy, even with only one person injured in the Kentucky insured vehicle, there may be recovery of underinsured motorist benefits under the Kentucky policy. In Kentucky, the set off for the bodily injury policy limits is not from the underinsured motorist coverage, nor is it an analysis of what is available for payment to the Kentucky insured under the bodily injury policy limits. There is a set off, but it is a set off of the bodily injury policy limits to the amount of damages the Kentucky insured sustained as a result of the accident.

### Stacking UM/UIM Policies

Adding one final change to the initial fact pattern, what if the Ohio insured and the Kentucky insured insures more than one vehicle either under one policy or multiple policies. Under Ohio law can the coverages and policies be stacked?

What about under Kentucky law? This is another distinction between the states, with Kentucky allowing stacking while stacking can be precluded under the Ohio statute. Under Kentucky law, where there are separate premiums paid for the uninsured or underinsured coverage or for separate policies, they are stackable. However, insurers in Kentucky can limit the stacking of uninsured or underinsured coverage by selling that coverage separately without tying it to one car or policy. Insurers are allowed to sell one uninsured or underinsured motorist coverage under a policy to an insured no matter how many cars are insured under that policy.

### In Your Practice

Practicing law in multiple jurisdictions can be confusing when it comes to insurance law. The key to avoiding the pitfalls in insurance law is to know both the statute and case law interpreting the statute in the right state. Remember the insurance policy is a contract, and although the underlying accident is a tort, when analyzing the coverage in an insurance policy, contract law applies. Almost every practitioner practicing tort law in the Northern Kentucky area will likely, at one time in their career, be confronted with issues related to underinsured or uninsured motorist coverage and need to apply the law from another state. Know where to find the statutes and read the policy.

---

#### About the Authors:

Patricia J. Trombetta has been with Smith, Rolfes & Skavdahl since 1997, joining as an associate and is now a partner. She has been involved with the insurance industry since her graduation from law school working first as an in house subrogation attorney and then a claims litigation attorney before entering private practice in the Cincinnati area in 1992. Pat has successfully defended a wide array of cases ranging from coverage issues to bad faith, including intentional torts, building risks, and significant personal injury cases, among others.

Lindsay A. Rump is an associate attorney in the Ft. Mitchell office and has been with Smith, Rolfes & Skavdahl since 2005. She has practiced in Kentucky since her graduation from law school. Lindsay focuses her practice on insurance litigation, bad faith, coverage and issues regarding the Motor Vehicle Reparations Act.

## KENTON COUNTY JUSTICE CENTER WI-FI ACCESS

The Kenton County Justice Center wi-fi access is up and running and is open to the public. There is no password; the name of the connection is Kenton County Law Library.

We welcome feedback from the members of the bar - if they have technical questions, and need more rapid response, we suggest they contact Brian Haney at 491-0600 or by e-mail to [brianhaney@KentonCoAtty.Com](mailto:brianhaney@KentonCoAtty.Com)

## LITIGATION ASSOCIATE

Medium-sized, AV-rated firm concentrating in general civil litigation in Cincinnati and Northern Kentucky seeking associates with 2 or more years of general litigation experience. Candidates must be highly motivated and willing to assume immediate responsibility for legal research and writing, assisting with trial preparation, taking and defending depositions, and all aspects of case development. Strong academic credentials and litigation experience preferred.

Send resume, recent writing sample and law school academic transcript to: Hiring Partner, FREUND, FREEZE & ARNOLD, 105 E. Fourth St., Suite 1400, Cincinnati, OH 45202.