WHEN DOES THE CLOCK START TICKING? A PRIMER ON STATUTORY AND CONTRACTUAL TIME LIMITATION ISSUES INVOLVED IN UNINSURED AND UNDERINSURED MOTORIST CLAIMS

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I. INTRODUCTION

In the 1950s, automotive insurance policy holders began to demand additional coverage for situations where they were injured as a result of the negligence of an uninsured driver.[1] A number of insurance companies initially

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1. Martin J. Huelsmann & William G. Knoebel, *Underinsured Motorists: An Evolving Insurance Concern*, 17 N. KY. L. REV. 417, 417 (1990); Steven P. Means, Comment, *Underinsured Motorist Coverage in Iowa:* American States Insurance Co. v. Tollari, 71 IOWA L. REV. 1569, 1571

met this demand by voluntarily offering uninsured motorist (UM) coverage within the policies they issued.[2] Soon, however, state legislatures began pushing for universal UM coverage by making it a mandatory offering within all automobile insurance policies sold in their state.[3] By the 1970s, every state in the country required some form of UM coverage to be included in, or at least offered by, automobile insurance policies offered in that state.[4]

During the 1970s and 1980s, this legislation expanded to include a mandate for underinsured motorists (UIM) policies.[5] The growing expense of the average automobile accident had risen to such a level that the minimum liability insurance required by law was no longer sufficient to satisfy all the claims involved. Uninsured coverage was designed to cover the shortfall between the damages caused by the accident and the minimum coverage carried by the average driver.

Today, many statutes requiring the offer of UM/UIM coverage are basic in that they require a set amount of insurance to be provided with every policy.[6] Other statutes, however, are more complex—establishing not only minimum amounts of insurance required,[7] but also action accrual dates,[8] notice requirements,[9] and time limitation periods.[10] Today, almost thirty years after the first UM/UIM statute, these contractual provisions remain a source of voluminous litigation.[11]

(1986); 3 ALAN A. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 31.1 (2d ed. 1998).

2. Huelsmann & Knoebel, *supra* note 1, at 417; Means, *supra* note 1, at 1571; 3 WIDISS, *supra* note 1, § 31.2.

3. Huelsmann & Knoebel, *supra* note 1, at 417; Means, *supra* note 1, at 1571; 3 WIDISS, *supra* note 1, § 31.2; *see also* Jim Christoph, *Bringing the Uninsured and Underinsured Motorist Case*, COLO. LAW., Nov. 1997, at 111-13 (discussing the driving factors for instituting mandatory UM/UIM coverage in Colorado); Kristen P. Sonosky, *Reconciling North Carolina's Interpretation of "Legally Entitled to Recover" with the Spirit of the Uninsured Motorist Statute: The Lessons of* Grimsley v. Nelson, 73 N.C. L. REV. 2474, 2474 (1995).

4. 3 WIDISS, *supra* note 1, § 31.3.

5. 3 *id.* § 31.2; Christoph, *supra* note 3, at 112.

6. *See, e.g.*, IOWA CODE § 516A.1 (1999).

7. *See, e.g.*, CAL. INS. CODE § 11580.2(m)(1)-(2) (West 1998).

8. *See, e.g.*, *id.* § 11580.2(i)(1).

9. *See, e.g.*, N.Y. INS. LAW § 3420(d) (McKinney 1985) (requiring timely notice of denial of claim by insurance carrier).

10. *See* CAL. INS. CODE § 11580.2(i)(1).

11. *See generally* Jay M. Zitter, Annotation, *Validity, Construction, and Application of Exclusion of Government Vehicles from Uninsured-Motorist Provision*, 58 A.L.R.5th 511 (1998) (discussing case law finding the exclusion valid, invalid, or partially valid); Janet Boeth Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Single Policy Applicable to Different Vehicles of Individual Insured*, 23 A.L.R.4th 12 (1981) (discussing stacking of uninsured motorist on a single policy); William H. Danne, Jr., Annotation, *Construction of*

One of the chief sources of litigation in UM/UIM policies is the lack of guidance provided by the more basic statutes. The statutes have left a number of issues open to dispute, including the questions of when a valid claim for benefits accrues,[12] and which statutory limitation of action provision should be applied.[13] Many insurance companies have attempted to resolve these disputes by providing contractual terms to limit the time in which a claim can be brought. This, however, has only increased litigation by raising issues regarding contractual ambiguity, impracticability, and public policy concerns. This Article surveys how legislatures, courts, and insurance companies have addressed these time limitation issues in UM/UIM contracts.

II. NATURE OF THE CLAIM FOR DETERMINING THE APPLICABLE STATUTE OF LIMITATIONS

The statutory limitation of actions period applicable to UM/UIM motorist claims was once a highly litigated question. In recent years, however, the courts seem to have come to a consensus regarding which limitation period should apply.

The insurance industry argued forcefully that its role was one of indemnification of its insured for injuries suffered at the hands of an uninsured or underinsured tortfeasor, and, thus, the UM/UIM carrier stepped into the shoes of the tortfeasor's statutorily-required liability carrier. This would give the UM/UIM carrier the same defenses a liability insurance carrier would have, including the protection of the tort or bodily injury statute of limitations.

This reasoning was cited by one of the few courts which applied the tort statute of limitations to UM/UIM actions.[14] In *Brown v. Lumbermens Mutual Casualty Co.*,[15] the North Carolina Supreme Court stated:

> The purpose of the uninsured motorist endorsement is to put an insured (or his legal representative) who is the innocent victim of the negligence of an uninsured motorist, in the same position as one who has been injured by the negligence of an insured motorist. There is no reason why the insured should have a greater length of time to proceed against his insurance company than he had against the tort-feasor who injured him.[16]

Statutory Provisions Governing Rejection or Waiver of Uninsured Motorist Coverage, 55 A.L.R.3d 216 (1974) (discussing statutory refusal options for mandatory minimum jurisdictions).

12. *See infra* Part III.
13. *See infra* Part IV.
14. Brown v. Lumbermens Mut. Cas. Co., 204 S.E.2d 829, 832 (N.C. 1974).
15. Brown v. Lumbermens Mut. Cas. Co., 204 S.E.2d 829 (N.C. 1974).
16. *Id.* at 832.

This same logic has been used by the courts in Georgia as well,[17] but this position remains the minority. Almost all jurisdictions now hold that the statute of limitations for actions based on contract is the limitation period that is to apply to UM/UIM cases.[18] These jurisdictions have held that liability for benefits arises from a contractual agreement between the two parties—it is the breach of the agreement, not the underlying tort, that gives rise to the claim.[19]

Indeed, the Iowa Supreme Court held in *Lemrick v. Grinnell Mutual Reinsurance Co.*[20] that although the claimant must show a tort was committed by the uninsured driver to be eligible for benefits, the claim to these benefits nonetheless arose out of the insurance contract—therefore, the ten-year statute of limitations on actions based on written contracts must apply.[21] This rationale has been followed in virtually every jurisdiction except for Georgia and South Carolina, which still apply the statutory limitation period for tort claims,[22] and jurisdictions such as California, which have set specific statutory limitations on UM/UIM claims.[23]

III. ACCRUAL OF ACTIONS FOR UNINSURED AND UNDERINSURED BENEFITS

Although there now seems to be some consensus on which statutory limitation period applies, the issue of accrual remains hotly contested. The question often arises as to when the applicable limitation period commences. Unfortunately, the courts have been inconsistent in their determination of the accrual time.

For the insured, determining the correct accrual date is critical in determining when an action may first be brought, as well as the point at which the claim becomes time-barred. In recent years, this point has become even more crucial as courts have allowed insurance carriers to replace the rather lengthy limitation period for claims based on written contract with contractual provisions

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17. *See* Vaughn v. Collum, 224 S.E.2d 416, 416 (Ga. 1976) ("If there is no tort liability, there is no responsibility to pay the tort judgement as provided by the contract.").

18. *See infra* notes 69-105 and accompanying text.

19. *See* Allstate Ins. Co. v. Spinelli, 443 A.2d 1286, 1289-90 (Del. 1982); Burgo v. Illinois Farmers Ins. Co., 290 N.E.2d 371, 373 (Ill. App. Ct. 1972); Panos v. Perchez, 546 N.E.2d 1253, 1255 (Ind. Ct. App. 1989).

20. Lemrick v. Grinnell Mut. Reinsurance Co., 263 N.W.2d 714 (Iowa 1978).

21. *Id.* at 716-17.

22. It should be noted that the UM/UIM statutes of both Georgia and South Carolina now incorporate the statute of limitations on torts. *See* N.C. GEN. STAT. § 20-279.21(b)(3)(a) (1997); GA. CODE ANN. § 33-7-11(a)-(j) (1994) (recodified as GA. CODE ANN. § 56-407.1 (1998)) (requiring that the pleadings in the claim against the tortfeasor be served on the UM/UIM carrier if a "reasonable belief exists that the vehicle is an uninsured motor vehicle").

23. *See, e.g.*, CAL. INS. CODE § 11580.2(i)(1) (West 1998).

that shorten the time to bring claims to as short as two years.[24] In jurisdictions such as Iowa, these contractual provisions could shave up to eight years off the time in which an insured motorist could otherwise bring a UM/UIM claim.[25]

Generally, an action accrues for statute of limitation purposes when it becomes a recognizable claim in the eyes of the law.[26] Although this point seems easy enough to determine in theory, it has been a highly contentious issue in UM/UIM litigation. In deciding when a claim for UM/UIM benefits accrues, courts are divided into three different camps. A majority of courts, basing their decisions on contract theory, have held that the cause of action against the UM/UIM carrier accrues when the carrier denies its insured's claim for benefits. It is at this point that the UM/UIM carrier may be said to have breached the contract. A number of other jurisdictions, however, based their decision on the underlying tort claim. These courts have held that the insured should become aware of at least a potential cause of action against their UM/UIM carriers on the date the accident occurred, and, therefore, the limitation period begins to run on that date. Finally, a minority of courts have based their decisions on a form of the discovery rule used in tort cases. These courts held that the insurer has no way of knowing what liability, if any, the UM/UIM carrier will have until they have exhausted the liability coverage of the original tortfeasor by settlement or judgment. The action, therefore, does not accrue until the insured settles with, or receives a judgment against, the initial tortfeasor.

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24. *See* Hawkins v. Heritage Life Ins. Co., 973 S.W.2d 823, 826 (Ark. Ct. App. 1998) (holding that although a fraternal benefit society could have an applicable two-year statute of limitations, a five-year limitation applied to this insurance company); *see also* Ferguson v. United Commercial Travelers of Am., 821 S.W.2d 30, 32 (Ark. 1991) ("It has long been the rule in Arkansas that parties are free to contract for a limitation period which is shorter than that subscribed by the applicable statute of limitations, so long as the stipulated time is not unreasonably short and the agreement does not contravene some statutory requirement or rule based upon public policy."). *But see* Miller v. Progressive Cas. Ins. Co., 635 N.E.2d 317, 321 (Ohio 1994) (holding that a one-year limitation provision was void as against public policy in part because it was shorter than the applicable statute of limitations governing the underlying tort action).

25. *Compare* IOWA CODE § 614.1(5) (1999) (setting the limitation for an action on a contract at ten years), *with id.* § 614.1(2) (setting the limitation for a tort action at two years).

26. *See* Janssen v. Guaranty Land Title Co., 571 S.W.2d 702, 705 (Mo. Ct. App. 1978) (stating that "when an injury is complete as a legal injury, the period of limitations commences at once"); Neal v. Laclede Gas Co., 517 S.W.2d 716, 718 (Mo. Ct. App. 1974) ("[A] statute of limitations does not begin to run until the right to sue arises."); Hughes v. Eureka Flint & Spar Co., 26 A.2d 567, 568 (N.J. Mercer County Ct. 1939) ("While the statute of limitations is one of repose and security, it was never intended to defeat a remedy before the right existed."); Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983) ("[A]s soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations."). *But see* Brunea v. Gustin, 775 F. Supp. 844, 846 (W.D. Pa. 1991) (noting the statute begins to run "when the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress") (citations and internal quotation omitted).

One of the main problems with limitation periods has been determining the date on which the time period commences. Most often, this date is thought of as the accrual date, or the date at which time an action legally may be brought. Three major theories have evolved as to when the UM/UIM cause of action accrues: (1) the date the insurer breaches the contract; (2) the date the insured discovers he or she is underinsured by virtue of settlement, judgment, or insolvency of the tortfeasor's liability insurer; and (3) the date of the motor vehicle accident itself.

A. *Setting Date of Accrual on the Date of Breach*

The most commonly held rule in UM/UIM cases is that the cause of action, because it is contractual in nature, accrues on the date the contract is breached.[27] The Arizona Court of Appeals in *Blutreich v. Liberty Mutual Insurance Co.*[28] is one of the many courts to follow this rule. The court provided a thorough overview of the accrual issue and held that the statutory limitation period does not commence until the insurer breaches the contract.[29] Despite the insurer's plea for a more certain date, such as the date of the accident, the court noted, "For an action to accrue for limitation purposes, some event in the nature of a breach of contract must have occurred."[30] In this case, the court held that the "event" was the denial of the claim for benefits.[31]

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27. *Compare* Allstate Ins. Co. v. Spinelli, 443 A.2d 1286, 1292 (Del. 1982) (finding claim did not accrue until insurer denied claim for coverage benefits and informed insured), *and* Norfleet v. Safeway Ins. Co., 494 N.E.2d 720, 723 (Ill. App. Ct. 1986) (finding cause of action accrued when insurer denied arbitration demand), *and* Jacobs v. Detroit Auto. Inter-In-Surance Exch., 309 N.W.2d 627, 630 (Mich. Ct. App. 1981) (finding cause of action accrued when insurer refused to submit to arbitration), *and* Spira v. American Standard Ins. Co., 361 N.W.2d 454, 457 (Minn. Ct. App. 1985) (finding contract statute did not begin to run until plaintiff's "identifiable claim for uninsured benefits was rejected"), *with* O'Neill v. Illinois Farmers Ins. Co., 381 N.W.2d 439, 441 (Minn. 1986) (finding contract statute begins to run on date of accident). *See also* Allstate Ins. Co. v. Altman, 491 A.2d 59, 62 (N.J. Super. Ct. Ch. Div. 1984) (finding action for breach of contract accrued when insurer breached by denying claim); Alvarez v. American Gen. Fire & Cas. Co., 757 S.W.2d 156, 158 (Tex. Ct. App. 1988) (finding claim for UIM coverage accrued when insurer denied liability for claim); Safeco Ins. Co. v. Barcom, 773 P.2d 56, 60 (Wash. 1989) (finding statute of limitation begins to run against an insured on the date of the breach of the contract).

28. Bluteich v. Liberty Mut. Ins. Co., 826 P.2d 1167 (Ariz. Ct. App. 1991).

29. *Id.* at 1171.

30. *Id.* at 1170 (citing Western Cas. & Sur. Co. v. Evans, 636 P.2d 111, 114 (Ariz. Ct. App. 1981)). The court stated:

B. *Accrual Set on the Date the Insured Settles with the Tortfeasor*

The insurance industry has expressed concern that setting the accrual date on the date of coverage denial (the moment of breach) would subject it to numerous stale claims. As long as the insured failed to make a demand, the UM/UIM carrier would remain potentially liable for a future claim. Theoretically, an insured could pursue a claim against the UM/UIM carrier twenty years after the accident giving rise to the injuries as long as no previous claim and denial took place to commence the running of the statute of limitations. Further, by setting accrual on the date of denial, one could possibly eliminate a UM/UIM carrier's right to subrogation against the ultimate tortfeasor. Once the tort statute of limitation has run on the accident, giving rise to the UM/UIM benefits, the UM/UIM carrier would be barred from taking action against the tortfeasor. In many cases, the UM/UIM carrier could be barred from pursuing a subrogation claim before the claim giving rise to the right of subrogation even accrues.

Because of this risk of losing its subrogation interest, the insurance industry has argued repeatedly that the statute of limitations should be set on the date of the accident. Very few courts have been willing to set the accrual date on the date of the accident, but many have compromised by holding that the action accrues at the moment the insured settles or reaches judgment against the tortfeasor and thus becomes aware of an uncompensated loss.

This was the result reached in *North Carolina Insurance Guaranty Ass'n v. State Farm Mutual Automobile Insurance Co.*[32] In March of 1987, the insureds in this case brought suit against the tortfeasor for injuries suffered as a result of a motor vehicle accident.[33] The plaintiffs ultimately discovered that the tortfeasor's liability insurance company had been declared insolvent in April of 1990.[34] The insureds attempted to amend their petition in May of 1990 to include their UM carrier, State Farm, who immediately raised the statute of limitations defense.[35] The district court granted summary judgment, and the insureds

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> [The UM/UIM carrier] urges that use of the accident date as the starting point for the limitations period would achieve the laudable goals of "certainty and uniformity" for actions in which no time limit is provided by statute or contract. The fallacy in this argument is that the insurer is in a position to protect itself against uncertainty and variability by including appropriate time limitations in the insurance contract.

Id. at 1171.

31. *Id.* at 1170.

32. North Carolina Ins. Guar. Ass'n v. State Farm Mut. Auto. Ins. Co., 446 S.E.2d 364 (N.C. Ct. App. 1994).

33. *Id.* at 366.

34. *Id.*

35. *Id.*

appealed, arguing that the action did not accrue on the date of the accident, but rather at the moment the tortfeasor's liability insurer became insolvent—making it apparent to the insureds what liability coverage was available for the tortfeasor.[36] Reversing the trial court, the appellate court held that the cause of action accrued on the date the insureds became aware of a lack of sufficient coverage.[37] In this case, it was the date on which the tortfeasor's liability carrier became insolvent.[38]

In *Wheeler v. Nationwide Mutual Insurance Co.*,[39] the court, facing the issue of accrual, stated:

> The salient question is thus at what time [the insured's] claim accrued so as to begin the four year limitation period. As previously stated, [the insured's] action for underinsured motorist coverage is essentially an action to enforce contract. The right to bring such an action does not accrue until a party's rights are vested. . . . [T]hese rights have vested . . . when the following criterion are met: (1) the accident has occurred; (2) the plaintiff has been injured; (3) the plaintiff knows that the defendant was an uninsured motorist. . . . These criterion apply also to underinsured motorist cases.
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> I find that [the insured's] claim accrued . . . when [the insured] settled with the underinsured tortfeasor's insurance company for the full limits of that policy.[40]

Waiting until the point of settlement seems to balance the equities concerned by protecting insurance companies against stale claims, while satisfying the insurance carriers' desire to insure that all other avenues of recovery are exhausted before they become entangled in the issue. It also gives insureds a reasonable opportunity to assess their claim. Most courts, however, continue to apply traditional contract analysis to these claims and hold that no claim on the contract exists until the contract is breached.

C. *Accrual Set on the Date of the Accident*

The courts that have held a cause of action against the UM/UIM carrier accrues on the date of the accident have based these decisions on the tort claim which is the source of the UM/UIM carrier's liability. In *State Farm Mutual*

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36. *Id.*
37. *Id.* at 369.
38. *Id.*
39. Wheeler v. Nationwide Mut. Ins. Co., 749 F. Supp. 660 (E.D. Pa. 1990).
40. *Id.* at 662 (citing Boyle v. State Farm Mut. Auto. Ins. Co., 456 A.2d 156, 156, 162 (Pa. Super. Ct. 1983)).

Automobile Insurance Co. v. Kilbreath,[41] the court held that "[t]he cause of action for [a UM/UIM] claim arises on the date of the accident with [a UM/UIM] since the right of action stems from the plaintiff's right of action against the tortfeasor."[42]

Kilbreath, who was insured under a UM/UIM policy by State Farm, was injured in a motor vehicle accident by an uninsured motorist in June of 1972.[43] Pursuant to the terms of his UM/UIM policy, Kilbreath submitted his claim for arbitration with State Farm in April of 1976, and was denied recovery in May of the same year.[44] Kilbreath ultimately filed suit against State Farm in May of 1980.[45] The trial court, however, dismissed the suit, stating that the claim was barred by the five-year statute of limitations on contract claims.[46] Kilbreath appealed this decision arguing that the arbitration provision contained in his UM policy required that he submit to arbitration as a condition precedent to coverage, and, therefore, his claim did not accrue until State Farm ultimately denied the arbitration request.[47]

The court was not persuaded. It held that because the cause of action against the UM carrier "stemmed" from the cause of action against the tortfeasor, both the underlying tort claim and the UM claim accrued on the same date.[48] The conditions precedent did not affect the accrual date.[49]

The Supreme Court of Florida was given a chance to revisit this decision in *Woodall v. Travelers Indemnity Co.*[50] Woodall was injured in a car accident in 1987 and ultimately settled in 1993 with the tortfeasor driver for an amount that exhausted his liability insurance coverage.[51] Immediately after settling with the driver, Woodall pursued a UIM claim against his insurance carrier, Travelers, which subsequently denied the claim, reasoning it was barred by Florida's five-year statute of limitations on contract claims.[52] Woodall and his wife argued that their claim was not barred because it did not accrue until such time as Travelers refused to honor the claim, thus breaching the contract.[53] Once again, the court refused to follow this logic.[54] The court stated:

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41. State Farm Mut. Auto. Ins. Co. v. Kilbreath, 419 So. 2d 632 (Fla. 1982).
42. *Id.* at 633.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 634.
49. *Id.*
50. Woodall v. Travelers Indem. Co., 699 So. 2d 1361 (Fla. 1997).
51. *Id.* at 1362.
52. *Id.*
53. *Id.*
54. *Id.* at 1363.

> [U]nder the Woodalls' theory, if the tortfeasor's liability carrier refused to settle, a cause of action would never be "created." A statute should not be interpreted so as to lead to an absurd result. . . . Moreover, it is well established that an injured party may directly pursue a claim against its underinsured motorist carrier, without having to first resolve the claim against the tortfeasor's liability carrier. . . . Thus, even though the cause of action for an underinsured motorist claim accrues on the date of the accident, a claimant need not run the risk of having the statute of limitations run while waiting for the tortfeasor's liability carrier to respond. We therefore conclude that under *Kilbreath*, the Woodalls' underinsured motorist claim accrued on the date of the accident. [55]

Finally, in *O'Neill v. Illinois Farmers Insurance Co.*,[56] the Minnesota Supreme Court was asked to determine when an action for benefits under an implied UIM policy accrued.[57] The court held that the action for implied coverage accrued on the date of the accident, rather than the date of exhaustion or denial.[58] In support of its holding, the court cited policy concerns that gravitated against setting the accrual date at the point of exhaustion or denial in these cases, rather than the date of the accident, but ultimately decided the issue on different grounds.[59] The main concern the court expressed was that an insured might unreasonably delay the presentation of his or her UM/UIM claim.[60] The court cited approvingly *Weston v. Jones*,[61] which stated, "it is not the policy of the law to permit a party to postpone the operation of the statute [of limitations] indefinitely by failing to do an act within his power which is necessary to perfect his remedy."[62]

The rule espoused in *Kilbreath*, *Woodall*, and *O'Neill* has its advantages. Using the date of the accident gives the insured and the insurance carrier a clear point in time from which both can begin to assess their legal remedies.[63] However, clarity of the date is not the only issue at hand. In cases such as these, which are based in contract, any claim that is brought is in the nature of breach of

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55. *Id.* (citations omitted).

56. O'Neill v. Illinois Farmers Ins. Co., 381 N.W.2d 439 (Minn. 1986).

57. *Id.* at 439. Automobile insurance policies which lack coverage for injuries caused by an uninsured driver have implied language which is consistent with applicable UM/UIM statutes. *Id.* at 440 n.1.

58. *Id.* at 441.

59. *Id.* at 440-41.

60. *See id.* at 440.

61. Weston v. Jones, 199 N.W. 431 (Minn. 1924).

62. O'Neill v. Illinois Farmers Ins. Co., 381 N.W.2d at 440 (citing Weston v. Jones, 199 N.W. at 433).

63. *Id.* at 441 ("At the time of the accident the injured person surveys her legal remedies and decides how best in the next 6 years to proceed, but the fact that the damages are unknown or unpredictable does not stop the 6 years from running.").

contract.[64] Marking the accrual date on the date of the accident subjects the insured to the peril of being unable to settle or reach judgment against the tortfeasor within the amount of time proscribed by statute or contract. Bringing claims prior to reaching a settlement or judgment against the tortfeasor could result in the claim being dismissed for failure to state a claim for which relief can be granted—many contracts implicitly or explicitly require that the insured exhaust the tortfeasor's liability limits and make a demand for benefits before coverage applies.[65] Under these terms, the contract would not be breached until the conditions precedent were fulfilled by the insured.[66] A number of courts, however, have rendered decisions assuaging this fear. The Iowa Supreme Court held that statutory language requiring a showing of legal entitlement incorporated into the contract did not work to create a condition precedent.[67] The Florida Supreme Court in *Woodall* chose another method to prevent this harsh result, holding that action against the tortfeasor necessary to satisfy an exhaustion clause worked to toll the statute of limitations until a settlement or judgment was reached.[68] It is because of situations such as these that a majority of courts have opted for accrual dates that take place at the time of settlement, judgment, or some later point in time.

IV. ENFORCEABILITY OF CONTRACTUAL PROVISIONS LIMITING THE TIME WITHIN WHICH A CLAIM CAN BE BROUGHT

In light of the problematic nature of determining when the statute of limitations accrues on an action for UIM coverage, insurance companies may attempt to resolve the issue by including a time-barring provision in their policies. Typically, these provisions require an insured to submit a claim for arbitration or commence an action by some date that is determined from the terms of the policy. Aside from clarifying when the UIM claim becomes time-barred, use of time limitation provisions provide insurers with opportunities to more effectively manage their claims. In states with long statutory limitation periods, these types of provisions may be used to discourage an insured's excessive delay in presenting claims. Obviously, an insurance company may find it advantageous to contractually limit its exposure to these types of claims. These limitation provisions, however, are no panacea.

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64. *See supra* notes 24-31and accompanying text.

65. *See* Flatt v. Country Mut. Ins. Co., 682 N.E.2d 1228, 1233 (Ill. App. Ct. 1997) ("[W]e believe the court would have dismissed the action [for UM/UIM benefits] as premature or ruled that [the UM/UIM carrier] had no liability so long as the [liability] policy remained viable.").

66. *Id.* at 1232-33.

67. Leuchtenmacher v. Farm Bureau Mut. Ins. Co., 461 N.W.2d 291, 294 (Iowa 1990).

68. Woodall v. Travelers Indem. Co., 699 So. 2d 1361, 1364-65 (Fla. 1997).

Generally, courts will enforce contractual time limitation provisions when the provisions satisfy a two-pronged test: (1) the limitation period must be reasonable; and (2) the provision must be clear and unambiguous.[69]

A. *Reasonableness of the Limitation Provision*

Miller v. Progressive Casualty Insurance Co.[70] resolved a long-standing dispute in Ohio as to the reasonableness of contractual time limitation provisions.[71] Prior to *Miller*, the Ohio Supreme Court had held that a provision requiring an insured to commence an action for UM coverage within one year from the date of motor vehicle accident was reasonable.[72] Faced with the harsh consequences to insureds and seemingly inequitable application of the rule espoused in the *Colvin* decision, the Ohio courts sought to limit the full effect of the decision.[73]

The Ohio Supreme Court sidestepped the bright line rule in *Kraly v. Vannewkirk*.[74] The *Kraly* case, which was decided on the same day as *Miller*, involved review of a UM policy with a two-year time limitation provision.[75] The plaintiffs in *Kraly* commenced an action against the tortfeasor of a motor vehicle accident, and shortly after the suit was commenced, the tortfeasor's insurer declared insolvency.[76] Some two years after the date of the accident, the plaintiffs sought to amend their petition to join their UM insurer.[77] The district court held that the two-year limitation provision barred the plaintiffs' action against the insurer.[78]

The Ohio Supreme Court overruled the lower court and held that the plaintiff did not become uninsured until some time after the closing of the contractual time limitation period.[79] The court stated that "the validity of a contractual period of limitations" was contingent upon the accrual of the right to bring the

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69. Colvin v. Globe Am. Cas. Co., 432 N.E.2d 167, 169 (Ohio 1982); *see* B.H. Glenn, Annotation, *Validity of Contractual Time Period, Shorter Than Statute of Limitations, for Bringing Action*, 6 A.L.R.3d 1197, 1207-08 (1966).

70. Miller v. Progressive Cas. Ins. Co., 635 N.E.2d 317 (Ohio 1994).

71. *Id.* at 319-20.

72. Colvin v. Globe Am. Cas. Co., 432 N.E.2d at 169-70.

73. *See* Miller v. Progressive Cas. Ins. Co., 635 N.E.2d at 319-20 (citing Lapata v. Progressive Cas. Ins. Co., 606 N.E.2d 1015, 1018 (Ohio Ct. App. 1992); Medved v. Progressive Cos., No. 90-L-15-161, 1992 WL 40207, at *2 (Ohio Ct. App. Jan. 31, 1992); Worley v. Ohio Mut. Ins. Ass'n, 602 N.E.2d 416, 418-19 (Ohio Ct. App. 1991); Cook v. Ohio Mut. Ins. Ass'n, No. CA 89-09-081, 1990 WL 70931, at *1 (Ohio Ct. App. May 29, 1990)).

74. Kraly v. Vannewkirk, 635 N.E.2d 323 (Ohio 1993).

75. *Id.* at 325.

76. *Id.* at 325-26.

77. *Id.*

78. *Id.* at 326.

79. *Id.* at 328.

action.[80] The court held that a limitation provision was "*per se* unreasonable and violative of public policy" where it purports to extinguish a claim before the right accrues.[81]

Faced with lower court's aversion to the *Colvin* bright-line rule, and with its own strain to avoid *Colvin*'s impact,[82] the Ohio Supreme Court in *Miller* abandoned the *Colvin* rule, stating, "*Colvin* has been riddled with exceptions and distinguished to death. The time has come for its judicial burial."[83] The Ohio Supreme Court placed more emphasis on whether the purpose of the state's statute[84] requiring the availability of UIM coverage was thwarted by the limitation provision than the bright-line rule.[85] The court held that, in UM/UIM claims, contractual limitation provisions which purport to bar claims brought one year from the date of the motor vehicle accident obviate the public policy embodied in the statutory scheme.[86] The court noted, in dicta, that it did not altogether prohibit the use of contractual time limitation provisions, and stated that a two-year period would be a "reasonable and appropriate" period to limit UM/UIM claims.[87] However, this alternative bright-line rule may be subject to qualification. One Ohio court of appeals decision, *Snyder v. Nationwide Mutual Insurance Co.*,[88] held that a limitation provision which bars claims "'before or shortly after the *accrual* of a right of action for such coverage is per se unreasonable.'"[89]

Snyder may have helped blur the bright-line "two year from the date of the accident" limitation period noted in *Miller*. The question, as with cases without contractual guidance, is when the claim for UM/UIM coverage *accrues*. The Delaware Superior Court found itself in this quandary in *Flanagan v. Nationwide Insurance Co.*[90] *Flanagan* involved a two-year contractual limitation provision

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80. *Id.* at 329.

81. *Id.*

82. Miller v. Progressive Cas. Ins. Co., 635 N.E.2d 317, 320 (Ohio 1994). The Ohio Supreme Court noted in *Miller*, "we, too, have strained to avoid the impact of *Colvin* under circumstances where *Colvin* would seemingly compel a conclusion perceived by us to be unfair." *Id.*

83. *Id.*

84. *See* OHIO REV. CODE ANN. § 3937.18 (Anderson 1997).

85. Miller v. Progressive Cas. Ins. Co., 635 N.E.2d at 321.

86. *Id.*

87. *Id.* Justice Wright wrote a dissenting opinion in *Miller* in which he criticized the majority's abandonment of the *Colvin* decision. *Id.* at 322 (Wright, J., dissenting). Justice Wright objected to the majority's "absence of 'reasoning'" and foundation on fairness over principle. *Id.* He stated, "I suppose 'unfairness' lies in the eyes of the beholder, but it is worth noting that there is no hint of fraud or misrepresentation in this case." *Id.*

88. Snyder v. Nationwide Mut. Ins. Co., No. 94-CV-02197, 1995 WL 768592 (Ohio Ct. App. Dec. 4, 1995), *aff'd in part*, 667 N.E.2d 359 (Ohio 1996).

89. *Id.* at *2 (emphasis added) (quoting Kraly v. Vannewkirk, 635 N.E.2d 323, 329 (Ohio 1994)).

90. Flanagan v. Nationwide Ins. Co., 1989 WL 89537 (Del. Super. Ct. July 7, 1989).

for UIM claims as opposed to Delaware's three year contract statute of limitations.[91] The court found the limitation provision unenforceable, but did not base its decision on the fact that the provision diluted the statutory rights the insured otherwise would have had in light of the longer statutory limitation period.[92] Rather, the court reasoned that the contract was unreasonable because it attempted to time-bar a claim before it accrued.[93] The court noted that a cause of action for UIM coverage would not accrue until and unless the insurer denied the claim.[94] The theory, then, was that the limitation provision could not commence until after the insurer had denied the insured's claim. Of course, if the insured delayed presenting the underinsured claim, the purpose of the limitation provision would become substantially undermined.[95]

As with the Ohio courts, Illinois courts have held a one-year limitation provision for UM/UIM policies violates public policy.[96] The courts have held that limitation provisions shorter than the two-year statute of limitations for tort claims deprive insureds of the coverage required to be offered to them by Illinois's financial responsibility law.[97]

The Illinois courts, however, have upheld limitation provisions requiring an action for arbitration demand to be made within two years from the date of the motor vehicle accident.[98] The Illinois Appellate Court, in *Shelton v. Country Mutual Insurance Co.*,[99] held that limitation provisions that shortened the limitation period to two years were reasonable and not violative of public policy.[100] The court stated:

> Clearly, the legislature put the insurer in the boots of the tortfeasor, whether he be insured or under-insured; accordingly, the insured, in all fairness and justice, should not be conferred with rights any different from those inhering in the person whom the insured supplants. The fortuitous circumstances

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91. DEL. CODE ANN. tit. 10, § 8106 (1997).
92. Flanagan v. Nationwide Ins. Co., 1989 WL 89537, at *2.
93. *Id.*
94. *Id.*
95. *See infra* Part V.
96. *See* Shelton v. Country Mut. Ins. Co., 515 N.E.2d 235, 239 (Ill. App. Ct. 1987); Burgo v. Illinois Farmers Ins. Co., 290 N.E.2d 371, 374 (Ill. App. Ct. 1972).
97. Shelton v. Country Mut. Ins. Co., 515 N.E.2d at 239 (distinguishing its holding in *Burgo v. Illinois Farmers Insurance Co.*, 290 N.E.2d at 374-76 (holding that limitations clauses more restrictive than the statute of limitations were violative of public policy) from its later holding in *Coyne v. Country Mutual Insurance Co.*, 349 N.E.2d 485, 486 (Ill. App. Ct. 1976) (holding that a limitations clause equal in duration to the statute of limitations was not violative of the public policy expressed in Illinois's financial responsibility law, 95½ ILL. COMP. STAT. ANN. 7-101 to 7-503 (West 1971))).
98. Shelton v. Country Mut. Ins. Co., 515 N.E.2d at 239.
99. Shelton v. Country Mut. Ins. Co., 515 N.E.2d 235 (Ill. App. Ct. 1987).
100. *Id.* at 240.

> that the General Assembly obligates an insurer to offer certain benefits to its insured does not add to those rigors the inequitable requirement that it suffer a longer period of limitations than that which would have been applicable to the person whom it succeeds. Consequently, we hold that the limitations period of two years contained in the insurance policy does not violate public policy.[101]

The *Shelton* court refused the insured's request to apply the "discovery doctrine" to delay the commencement of the contractual limitation period.[102] The insured in *Shelton* argued that she did not know she was underinsured until she completed her settlement with the underlying tortfeasor, and the limitations period should not commence until after she had discovered the fact she was underinsured—the date of settlement.[103] The *Shelton* court refused to extend the discovery rule in this case, stating that, among other reasons, the insured settled with the tortfeasor eight and one half months before the running of the contractual time limitation period, but she failed to bring her claim within that period.[104] Here, the insured had a substantial window of opportunity to assess her damages in relation to the tortfeasor settlement and bring her UIM claim before the contractual limitation period expired.[105]

Because UIM coverage was meant to supplant the tortfeasor's insurance coverage, in regard to excess damages, most courts have held that the insured is not prejudiced by a contractual limitation provision equivalent to the statutory limitation period governing the underinsured's third-party tort claim. Of the few courts that have addressed the issue, most have enforced those provisions in which the limitation period is at least as long as the statutory period the injured plaintiff would have had to bring an action against the underlying tortfeasor.

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101. *Id.*

102. *Id.* at 240-41.

103. *Id.*

104. *Id.*; *see also* Hannigan v. Country Mut. Ins. Co., 636 N.E.2d 897, 901-02 (Ill. App. Ct. 1994). The Illinois Appellate Court refused to apply the discovery rule even though the insured did not discover the underlying tortfeasor's policy limits until after she received the tortfeasor's answers to interrogatories—some time after the limitation period expired. Hannigan v. Country Mut. Ins. Co., 636 N.E.2d at 902. The court bluntly held that the limitation provision was unambiguous in the fact that the UIM claim must be brought within two years from the date of the accident. *Id.* Thus, the court held, "there was no need to determine when plaintiff knew or should have known of the existence of the right to sue." *Id.*; *see also* Flatt v. Country Mut. Ins. Co., 682 N.E.2d 1228, 1232-33 (Ill. App. Ct. 1997). In *Flatt*, the insured learned of the tortfeasor's policy limits through discovery after the contractual time limitation period had expired. Flatt v. Country Mut. Ins. Co., 682 N.E.2d at 1231. The court held that because the injured insured had sustained extensive damages, he was on notice that he might need to make a claim for UIM coverage. *Id.* at 1232-33.

105. Shelton v. Country Mut. Ins. Co., 515 N.E.2d at 241.

B. *Clear and Unambiguous Language*

In order for contractual time limitations provisions to be enforceable, the provisions must also be clear and unambiguous.[106] General rules of contract interpretation dictate that where policy provisions are ambiguous, they must be interpreted against the insurer who drafted the policy and in favor of the insured.[107] Time limitation provisions are no exception. Courts have refused to enforce time limitation provisions where the provisions present ambiguities either on their face, or because they are ambiguous when read in conjunction with other contract provisions.

Some courts have rendered limitation provisions unenforceable where the policy does not specifically state the date in which commencement of the limitation period would begin.[108] Where the limitation provision is merely a reference to the statutory limitation period, the provision will likely be unenforceable. The Ohio Court of Appeals, in *Grange Mutual Casualty Co. v. Fodor*,[109] was faced with a limitation provision which was comprised of a single eighty-word sentence, lacking any punctuation marks.[110] The court found the limitation provision ambiguous, not because it lacked proper punctuation, but because of its lack of a concrete date on which to mark the commencement of the limitation provision.[111] The court stated: "No reasonably educated non-lawyer could be expected to understand the above-quoted language. Only by retaining the services of an attorney to research the matter could an insured discover what his rights and duties are under [the] limitation clause."[112] Because the limitation provision was not clear and "easily understood by a lay person," the court held it invalid and unenforceable.[113]

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106. Colvin v. Globe Am. Cas. Co., 432 N.E.2d 167, 169 (Ohio 1982).

107. *See* Grinnell Mut. Reinsurance Co. v. Voeltz, 431 N.W.2d 783, 785 (Iowa 1988); 2 COUCH ON INSURANCE § 22:14, at 22-31 (3d ed. 1995); BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 1.03, at 14 (9th ed. 1998).

108. Grange Mut. Cas. Co. v. Fodor, 487 N.E.2d 571, 575 (Ohio Ct. App. 1984).

109. Grange Mut. Cas. Co. v. Fodor, 487 N.E.2d 571 (Ohio Ct. App. 1984).

110. *Id.* at 572-73. The limitation provision in this case read:

> No suit or action whatsoever or any proceeding instituted or processed in arbitration shall be brought against the company for the recovery of any claim under this coverage unless as a condition precedent thereto the insured or his legal representative has fully complied with all of the terms of this policy and unless same is commenced within the time period allowed by the applicable statute of limitations for bodily injury or death actions in the state where the accident occurred.

Id.

111. *Id.* at 575.

112. *Id.*

113. *Id.*; *see also* Ragland v. Nationwide Mut. Ins. Co., 516 N.E.2d 254, 255-56 (Ohio, Clermont Co. Ct. C.P. 1986) (attempting to enforce an abbreviated form of the wordy limitation

Similar to *Grange*, the Illinois Appellate Court, in *Butler v. Economy Fire & Casualty Co.*,[114] found the lack of a date certain in a time limitation provision to have created an ambiguity.[115] The limitation period in *Butler* read:

> No suit, action, or arbitration proceedings for the recovery of any claim under Family Protection-Uninsured Motorists Coverage shall be sustainable in any court of law or equity unless the insured shall have fully complied with all of the terms of the policy, nor unless commenced within two years after the occurrence of the loss.[116]

The language of the time limitation provision marked the commencement of the limitation period from "the occurrence of the loss," and the court found that the term "loss" could be construed to mean either the date of the motor vehicle accident or the date on which the insured exhausted the other applicable coverage.[117] An interpretation in which the date of loss was marked by the date of the motor vehicle accident would render the contract ambiguous. The court stated:

> We believe that the question of whether the policy is ambiguous or confusing depends on the date upon which the two-year time period in the limitations clause is triggered. The policy merely states that the insured must initiate any "suit, action or arbitration proceedings . . . within two years after the occurrence of the loss." The defendant appears to assume that the phrase "occurrence of the loss" is synonymous with the date of the accident in which the plaintiff suffered injury. Were this so, then we would agree with the trial court that the limitations clause appears to conflict with the exhaustion clause.[118]

The court held a reasonable interpretation of the phrase "occurrence of the loss" could mean the date on which the insured settles with the third-party tortfeasor.[119]

The Ohio Court of Appeals used a similar analysis in *Heil v. United Ohio Insurance Co.*[120] In *Heil*, the insurance policy in question contained a time limi-

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provision in the *Grange Mutual Casualty Co. v. Fodor* case). Although the insurer represented that the policy provisions were clear and easily understandable, the limitation provision stated that any UIM claim must be brought within the time period statutorily set for bodily injury claims. Ragland v. Nationwide Mut. Ins. Co., 516 N.E.2d at 258. The policy stated, "Now—auto insurance protection you can count on in a policy you can understand." *Id.* at 259. The court held that the mere reference to the appropriate limitation period, combined with the representation about the understandable terms of its polices, rendered the provision ambiguous and unenforceable. *Id.*

114. Butler v. Economy Fire & Cas. Co., 557 N.E.2d 1281 (Ill. App. Ct. 1990).
115. *Id.* at 1283.
116. *Id.*
117. *Id.* at 1286.
118. *Id.*
119. *Id.*

tation provision requiring the insured to commence an action or request arbitration for UIM coverage within one year from the date of the motor vehicle accident.[121] The limitation provision read: "No suit or request for arbitration may be brought against the Company unless you have complied with all terms of the Policy and unless action is filed within twelve months (12) after the date of the accident."[122] The administrator for the deceased insured commenced an action against the underlying tortfeasor within twelve months from the date of the accident, but failed to commence an action or arbitration demand against the UIM carrier until after the twelve-month period as specified in the contract.[123] The administrator for the insured obtained summary judgment from the trial court on the basis that the provision cited above was unreasonable.[124]

The Ohio Court of Appeals affirmed the lower court's ruling reasoning that the limitation provision was ambiguous and, therefore, unenforceable.[125] The court stated that the limitation provision was ambiguous in that it did not specify against whom the action must be brought within the twelve-month period.[126] The court noted that the insurer could have added the words "against the Company" after the word "action" to clear up the ambiguity.[127] The court concluded that an insured reasonably could have interpreted the provision to require only that an action be brought against the third-party tortfeasor within the twelve-month period, and that the administrator had complied with that reasonable interpretation.[128]

The *Heil* court also found the limitation provision ambiguous when read in conjunction with a provision requiring the insured to exhaust any and all liability insurance coverage before the insurer would be required to pay UIM benefits.[129] The provision read:

> We will not be obligated to make any payment because of bodily injury for Uninsured Motorists Coverage and Underinsured Motorists Coverage until after the Limits of Liability under all bodily injury liability bonds or insur-

120. Heil v. United Ohio Ins. Co., 584 N.E.2d 19 (Ohio Ct. App. 1990).
121. *Id.* at 20. ***But see*** Miller v. Progressive Cas. Ins. Co., 635 N.E.2d 317, 321 (Ohio 1994) (holding one-year time limitation provision unenforceable as against public policy).
122. Heil v. United Ohio Ins. Co., 584 N.E.2d at 21.
123. *Id.* at 20.
124. *Id.* at 20-21.
125. *Id.* at 22.
126. *Id.*
127. *Id.*
128. *Id.* at 22-23.
129. *Id.* at 22.

> ance policies that are in force at the time of the accident have been exhausted by payment of judgments or settlements.[130]

The court stated that it was reasonable for the administrator to conclude that he needed to pursue the tortfeasor's liability coverage to conclusion before he could commence an action for UIM coverage or make a demand for arbitration.[131] The exhaustion provision and the limitation provision were, therefore, at odds with each other because of the impracticability of exhausting the tortfeasor's liability limits within one year from the date of the motor vehicle accident.[132] The court found that the strain between the two provisions created an ambiguity within the contract, and it interpreted the contract against the insurance company by refusing to enforce the limitation provision.[133]

One might question whether the holding in *Heil* was based more on perceived fairness of enforcing a one-year limitation provision rather than upon actual ambiguities in the contract. It might seem that the court of appeals, in this case, was attempting to limit the effect of the earlier *Colvin* decision which upheld the enforceability of a one-year limitation period, but was subsequently overruled in *Miller*.[134] However, at least one decision subsequent to *Miller* has followed the *Heil* analysis in finding that the strain between the exhaustion provision and the time limitation provision creates an ambiguity.[135]

Other courts have refused to find such ambiguities.[136] In *Shelton*, the exhaustion provision read: "We will pay only after all liability bonds or policies have been exhausted by judgments or payments."[137] The court held that the exhaustion requirement did not conflict with the policy's two-year limitation provision because the exhaustion provision stated only when the insurer would *pay* the claim.[138] The court reasoned that the two provisions should not be read to require suit or an arbitration demand to be made within the time period in order to "perfect" the claim, but held that such action was needed to preserve the claim.[139] The court stated:

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130. *Id.* at 21.
131. *Id.* at 23.
132. *Id.* at 22.
133. *Id.*
134. *See* Miller v. Progressive Cas. Ins. Co., 635 N.E.2d 317, 321 (Ohio 1994).
135. *See* Phillips v. State Farm Auto. Ins. Co., No. 95-BA-52, 1998 WL 157404, at *2 (Ohio Ct. App. Apr. 3, 1998).
136. *See* Flatt v. Country Mut. Ins. Co., 682 N.E.2d 1228, 1233 (Ill. App. Ct. 1997); Shelton v. Country Mut. Ins. Co., 515 N.E.2d 235, 237 (Ill. App. Ct. 1987).
137. Shelton v. Country Mut. Ins. Co., 515 N.E.2d at 236-37.
138. *Id.* at 238.
139. *Id.*

> The exhaustion clause in no way conditions when a suit can be filed against [the insurer], but instead qualifies only when it will pay a claim. In other words, the exhaustion clause establishes that the insurer agrees to pay the policy holder underinsured motorist benefits only after the third party's liability limits have been exhausted, but has no effect on when suit must be filed.[140]

It seems that the Illinois courts, then, would require the insured to commence the UIM action against the insurance company even before the insurer had breached the contract by denying the claim. The court in *Flatt v. Country Mutual Insurance Co.*[141] followed the *Shelton* holding that the exhaustion provision did not prohibit the insured from commencing an action within the contractual limitation period.[142] The court acknowledged, however, that at the time the suit was required by the limitation provision, the plaintiff was not yet underinsured.[143] The court stated that the lower court may have dismissed the UIM action as premature.[144]

It seems somewhat odd that a court would interpret contractual language to require commencement of an action before the action even accrued. Especially after the *Flatt* decision, it appears that the insured would be required to commence an action that would be subject to dismissal as a premature claim. It is unclear what theory or cause of action the insured would plead solely to preserve his or her right to make a subsequent claim for UIM coverage—perhaps the insured could plead anticipatory repudiation. Regardless, it appears that these courts would prefer form over substance, and the action would be filed solely to preserve the right to make an "actual" mature claim.

One practical way to avoid the necessity of commencing the premature action would be for the insured to request the insurer to waive the limitation provision before the limitation period expires. As one Illinois court stated:

> Insurance companies that utilize suit limitation provisions must expect to be subjected to lawsuits which allege the likelihood of liability under the [UIM] coverage. Of course, the insurance company can avoid the lawsuit by agreeing, with the insured, to put the [UIM coverage] issue on hold until the resolution of the action against the tortfeasor. As a practical matter, this

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140. *Id.*

141. Flatt v. Country Mut. Ins. Co., 682 N.E.2d 1228 (Ill. App. Ct. 1997).

142. *Id.* at 1233.

143. *Id.* at 1231. The tortfeasor in this case held two liability policies, but failed to timely notify the insurer on the larger policy. *Id.* After the plaintiff had commenced suit against the tortfeasor and after the plaintiff's underinsured limitation period had expired, the tortfeasor's unnotified insurer obtained a declaratory judgment that it was not obligated to extend liability coverage for the tortfeasor. *Id.*

144. *Id.* at 1233.

> is an insurance company's probable (and most reasonable) course of action.[145]

V. STATUTORY EFFORTS TO CREATE SPECIFIC LIMITATION PROVISIONS

Some states have implemented detailed statutes designed to alleviate the confusion concerning what applicable limitation period to apply and when to mark its commencement. The California legislature, for example, has enacted a considerably detailed and complex statute which specifically sets notice requirements, accrual dates, and a limitation period.[146]

One state has modified its existing UM/UIM statutes due to the harsh result of court decisions that enforced UIM policies' time limitation period. In *McGlinchey v. Aetna Casualty & Surety Co.*,[147] the Connecticut Supreme Court held that a provision requiring UIM claims to be brought within two years from the date of the accident did not violate public policy.[148] The court held that the limitation provision in the contract paralleled the Connecticut statute authorizing the use of such limitation provisions, and, therefore, the two-year limitation provision was not void as against public policy.[149]

The Connecticut legislature subsequently amended its statute to limit the use of such time limitation provisions.[150] The amended statute reads:

> No insurance company doing business in this state may limit the time within which any suit may be brought against it or any demand for arbitration on a claim be made on the uninsured or underinsured motorist provision of an automobile liability insurance policy to a period of less than three years from the date of the accident, provided, in the case of an underinsured motorist claim the insured may toll any applicable limitation period (1) by notifying such insurer prior to the expiration of the applicable limitation period, in writing, of any claim which the insured may have for underinsured motorist benefits and (2) by commencing suit or demanding arbitration under the terms of the policy not more than one hundred eighty days from the date of exhaustion of the limits of liability under all . . .

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145. Vansickle v. Country Mut. Ins. Co., 651 N.E.2d 706, 707 (Ill. App. Ct. 1995).

146. *See* CAL. INS. CODE § 11580.2 (West 1998). *See generally* Michael J. Brady & Marta B. Arriandiaga, *California's Uninsured and Underinsured Motorist Law: An Updated Review and Guide*, 36 SANTA CLARA L. REV. 717 (1996) (discussing the complexities of California's UM/UIM law).

147. McGlinchey v. Aetna Cas. & Sur. Co., 617 A.2d 445 (Conn. 1992).

148. *Id.* at 448-49.

149. *Id.*; *see also* Hotkowski v. Aetna Life & Cas. Co., 617 A.2d 451, 454 (Conn. 1992) (indicating argument that two-year time limit is void as against public policy should be made to the legislature and not the courts).

150. CONN. GEN. STAT. § 38a-336(g) (Supp. 1998).

> automobile insurance policies applicable at the time of the accident by settlements or final judgments after any appeals.[151]

Not only did the act mandate a longer minimum time period for such contractual time limitation provisions, but it also provided the insured with a vehicle to toll the limitation period while he or she brought the third-party tortfeasor claim to conclusion.[152] The purpose of the amendment was "to provide relief to insureds who, in good faith reliance on a complex, and apparently misleading statutory scheme had failed to file a claim for [UM/UIM] benefits within the two year contractual limitations period."[153] The goal of the statute was to disable the *McGlinchey* decision from preventing hardship to "plaintiffs who would otherwise have been compelled to proceed under the then-existing 'misleading statutory scheme.'"[154]

The Connecticut statute avoids the harsh results of enforcing a limitations provision which marks its commencement from the date of the motor vehicle accident by providing a tolling mechanism while the underlying tort claim is pending.[155] The effect of this tolling provision eliminates any ambiguity that may have been created by the existence of both an exhaustion requirement and a time limitation provision. Under the Connecticut statute, it is clear that the insured will be able to complete his or her tort claim in due course and then present a single, fully-formed UIM claim.[156] The statute also protects insurers' interest in preventing the presentment of stale UIM claims by allowing the insurers to contractually limit those actions to within 180 days from the insured's settlement with the tortfeasor.[157] Essentially, the Connecticut statute does what several courts have strained to do by finding an equitable and logical compromise that serves the interests of both the insurer and the insured.

VI. CONCLUSION

Since the enactment of UM/UIM statutes, both the courts and the legislatures have evolved generalized theories on when a claim becomes barred by the statute of limitations. The majority of states commence the running of the statute of limitations for UIM claims from the date the insured settles with the underlying tortfeasor. In these jurisdictions, insurers may find it beneficial to limit

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151. *Id.*
152. *Id.*
153. Stevens v. Aetna Life & Cas. Co., 659 A.2d 707, 711 (Conn. 1995).
154. Velez v. Estey, No. CV940463836S, 1996 WL 677443, at *5 (Conn. Super. Ct. Nov. 6, 1996) (quoting Stevens v. Aetna Life & Cas. Co., 659 A.2d at 711).
155. *See* CONN. GEN. STAT. § 38a-336(g).
156. *See id.*
157. *See id.*

contractually the time in which the insured may bring an action for coverage. The theories surrounding the enforceability of contractual limitation provisions, however, remain diverse and under-developed. The use of these provisions raises several enforceability questions and ultimately increases litigation to either challenge the limitation provisions themselves or simply to preserve a subsequent, perspective claim. Statutes or contracts that toll the limitation period while the insured's underlying tort action is pending would dramatically reduce the need for such litigation while, at the same time, continue to serve the insurer's interest in limiting stale claims. More widespread use of tolling mechanisms may be expected to clarify these troublesome issues and, of course, reduce the need for litigation.