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Oversight Hearing

Does Uninsured/Underinsured Motorist Insurance Meet Consumer's Needs?

Senate Committee on Insurance
March 25, 2015
State Capitol, Room 112

Policymakers are in a constant struggle to balance the needs of victims in automobile collisions against the affordability and availability of appropriate insurance coverage. California law requires that most drivers and vehicle owners carry a minimum level of liability insurance intended to protect accident victims, but not every driver complies with the law and the minimum coverage only covers the costs of minor injuries. To address that problem, California law also requires insurers to provide consumers with optional coverage that covers injuries caused by uninsured and underinsured motorist. In order to keep the coverage affordable and to discourage fraud, the law imposes limitations and establishes procedural hurdles that might also exclude valid claims. Additionally, the complexity of the law makes coverage very hard to understand for the average consumer. This hearing will examine whether this coverage, known as uninsured and underinsured motorist coverage, meets the needs of consumers in protecting themselves against those with little to no liability insurance.

I. THE UNINSURED AND UNDERINSURED MOTORIST

The victim of a typical accident involving serious, nonlife-threatening injuries suffers approximately $234,000 in injuries, including medical costs, and the loss of market and household productivity (but not including noneconomic damages). When the victim's survival is uncertain due to life-threatening injuries, the average cost reaches to almost $1 million. The

average economic impact of a wrongful death easily exceeds $1.3 million.[1] Unfortunately, these accidents occur all too frequently. Data from the Statewide Integrated Traffic Records System indicates that there were 226,544 people injured and 2,995 people killed in motor vehicle traffic collisions in 2012.[2]

When the at-fault party lacks the proper insurance coverage, the injured parties, health insurers (and premium payers), social safety net programs, etc., end up holding the bag. In order to discourage cost-shifting to innocent parties, California law imposes financial responsibility requirements on drivers and motor vehicle owners, typically satisfied through the purchase of liability insurance with bodily injury coverage of up to $15,000 per person up to $30,000 per accident and $5,000 in property damage coverage (also referred to as 15/30/5).[3] Liability coverage pays for damages that the insured causes, as well as legal defense costs if necessary. Unfortunately, the minimum liability coverage of 15/30/5 hardly pays for anything but minor injuries and many drivers still lack insurance altogether despite the financial responsibility requirements. A study released last year by the Consumer Federation of America indicates that California's uninsured driver rate hovered around 15% in 2009.[4]

To counteract the presence drivers with little or no liability coverage, California law requires insurers to offer a product known as "uninsured and underinsured motorist coverage" ("UM/UIM" coverage) intended to protect the consumer from bodily injury-related damages caused by uninsured and underinsured motorists. The law to provide UM/UIM was designed to keep premiums low, limit perverse incentives and fraudulent activity, and encourage greater financial responsibility on the part of insured; however, critics argue that some of these provisions are confusing, severely restrictive, and lead to unjust results.

II. THE MECHANICS OF UM/UIM COVERAGE

UM/UIM coverage consists elements that protect the insured against bodily injury damages arising out of an automobile accident when the at-fault party lacks sufficient insurance. Those damages include damages for pain and suffering, loss of wages, and treatment. Recoverable damages do not include property damage (which is covered under a specific type UM coverage described by Ins. Code § 11580.26) and punitive damages recoverable against the uninsured motorist.

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[1] Blincoe, L. J., Miller, T. R., Zaloshnja, E., & Lawrence, B. A. *The Economic and Societal Impact of Motor Vehicle Crashes, 2010* (National Highway Traffic Safety Administration, May 2014), Table 1-2, page 12, available at http://www-nrd.nhtsa.dot.gov/Pubs/812013.pdf. Dollar figures adjusted according to the Consumer Price Index available at http://www.bls.gov/data/inflation_calculator.htm.

[2] *2012 Annual Report of Fatal and Injury Motor Vehicle Traffic Collisions* (California Highway Patrol, 2012), available at http://www.chp.ca.gov/switrs/switrs_2012.html.

[3] Split limits are often described in shorthand as: *per person/ per accident/ property damage.* When only two limits are discussed; the first and second limits are per person and per accident, respectively.

[4] Stephen Brobeck, Michael Best, and Tom Feltner, *Uninsured Drivers: a Societal Dilemma in Need of a Solution* (Consumer Federation of America, March 2014), available at http://www.consumerfed.org/pdfs/140310_uninsureddriversasocialdilemma_cfa.pdf.

California law requires the insurer to offer UM/UIM coverage at minimum levels, but does not required a driver or vehicle owner to carry it at any level. The statute provides a specific method that allows a consumer to waive the coverage or request lower limits.

In addition to vehicle owners, drivers, and named insureds (covered persons specifically named on the declarations page of the auto policy), UM/UIM covers passengers, the spouse of a named insured, and relatives of the named insured while residents of the same household, as well as anyone entitled to recover damages directly from the owner or operator of the insured vehicle. Covered individuals do not have to be in the vehicle; coverage may apply when an uninsured or underinsured motorist hits an insured crossing the street or riding in someone else's vehicle.

Uninsured Motorist (UM) coverage pays for losses caused by an at-fault uninsured driver up to selected limits. The insurer must offer UM coverage in an amount at least equal to the limits for liability coverage for bodily injury, except that an insurer is not required to offer coverage beyond $30,000 for death or injury of one person, or up to $60,000 per accident.

Underinsured Motorist (UIM) coverage pays for losses, up to the selected limit, related to bodily injury caused by an at-fault driver, less any contributions by the at-fault party's insurer, any other liable person, and other sources specified in statute. Insurers must offer UIM at the same level as UM coverage, but may offer higher limits. UIM coverage does not make the injured party "whole" but gives the consumer an opportunity to protect him or herself against other drivers with low levels of coverage.

A. Legislative History

Since 1959, California has required insurers to include uninsured motorist (UM) insurance with policies of liability insurance. AB 3984 (Connelly) Chapter 1493, Statutes of 1984, expanded the definition of UM insurance to include UIM coverage. The statute requires insurers to include the coverage with all liability policies, and spells out the coverage terms in detail and the means by which a consumer can waive coverage.

Sponsored by the California Trial Lawyers Association, AB 3984 originally proposed that the insurer offer UIM coverage at a minimum of 30/60. (Since most liability policies at the time had limits of 15/30, this level of UIM coverage would provide coverage for most underinsured motor vehicle accidents.) Several insurers and trade associations initially opposed the bill, as did the Department of Insurance (CDI), until significant amendments were made. The reasoning behind that opposition helps to explain why UIM is the way it is today; historical documents indicate that the bill represented a compromise among the stakeholders.

In its September 19, 1984 enrolled bill report, CDI recommends that the bill be signed in part because of UIM coverage availability. The report also warns that the bill was poorly drafted and will likely result in lawsuits, but that participating legislators and stakeholders have "agreed to clean up the problems with this bill next year by urgency statutes." The next year, SB 839 (Deddeh), Chapter 792, Statutes of 1985, made some amendments, but probably not the sort that addressed CDI's concerns.

B. Rules of the Road for UM/UIM

UM/UIM coverage involves many peculiarities and complexities intended to keep costs low and limit fraud, but at the same time those devices make the coverage hard to understand and potentially block otherwise valid claims. These peculiarities may be better understood through illustrations. For the purpose of the following discussion, we will follow the unfortunate adventures of Uma V. (aka Uninsured Motorist Accident Victim), Rex (or "Wrecks"), who never carries insurance, and Les, who carries the minimum liability insurance of 15/30.

No Stacking. The limits of liability for two or more motor vehicles may not be combined or "stacked" to determine the limit of coverage available to injured parties. Without that provision a policyholder might be able to recover the full amount of the sum of all vehicles with applicable coverage.

- Uma V. lived with her parents who had separate policies issued by the same insurer on two vehicles with UM coverage of 15/30 on each vehicle. The UIM coverage only $4.50. Uma was riding as a passenger with Rex on his motorcycle when they were struck by an uninsured driver, causing damages well over $15,000. Uma's parents' insurer offered $15,000, the limit on one policy. Uma sued demanding the combined policy limits of both policies of $30,000 (she tried to "stack" the policies). The California Supreme Court ruled against her because, in part, without the anti-stacking provisions her parents would have been unable to purchase UM coverage for $4.50. (Wagner v. State Farm Mut. Auto. Co. (1985) 40 Cal.3d 460.) Uma should not have been surprised since she had a similar incident years earlier but her parents had policies issued by different insurers, one at $10,000 and one at $25,000; while she covered at the higher limit, a $10,000 payment by one insurer was used to offset the $25,000 policy by the other. (Mid-Century Ins. V. Koch (1970) 11 Cal.App.3d 1019.)

Coverage Offset by Other Policies. Recovery from the insurer may also be offset by amounts paid by other types of insurance benefits including payments made for medical insurance benefits (Ins. Code § 11580.2(e)), or certain benefits from a workers' compensation policy

- After she left her parent's house, Uma got her own insurance with 50/100 UM/UIM coverage, and a job. Shortly thereafter, Les's vehicle struck Uma while she was working. His insurer settled with Uma for his limit of $15,000. Uma also received $35,000 in workers' compensation benefits. Given the $15,000 offset, Uma claimed $35,000 from her UIM insurer. Her claim was denied since her benefits were exhausted given the offset for the workers' compensation benefits and the $15,000 payment. (Rudd v. California Casualty Gen. Ins. Co. (1990) 219 Cal.App.3d 948.) Years later she purchased a different policy that separately compensated her for lost wages. This time, when she was injured in an accident caused by Rex, her insurer was not permitted to offset payments made to her for loss of income because that offset was not specifically authorized in statute. (Preferred Risk Mut. Ins. Co. v. Harrison (1981) 118 Cal.App.3d 561.)

Mandatory Arbitration. The statute requires arbitration with the UM/UIM insurer when controversies exist as to whether the insured is entitled to recovery under the policy and how much.

B. Rules for UM Coverage Only

In order to mitigate losses, the right of the insured to sue the at-fault party transfers to the insurer. This is called "subrogation" and allows the insurer to mitigate the losses paid to claimants (and keep premiums lower). UM involves rules designed to preserve the insurer's ability to collect from an at-fault party. Additional limitations were designed to discourage fraud involving "phantom cars."

Preserve the Claim. Statute imposes obligations on the insured to preserve the UM insurer's subrogation rights. These steps or duties may include obtaining the insurer's consent to settle any claim against the at-fault party, preserving the subrogation rights of the insurer, submitting the claim to arbitration or sue the at-fault party within two-years, etc.

The Phantom Driver. Whenever the uninsured driver or vehicle cannot be identified, the UIM insured or someone on the insured's behalf must file a report with the police, sheriff, or California Highway Patrol within 24 hours and a statement filed under oath with the insurer within 30 days. Also, covered injuries or death must arise out of physical contact with the uninsured vehicle. So accidents caused by a negligent or reckless driver are not covered unless the at-fault vehicle strikes the insured or the vehicle occupied by the insured.

- Uma swerved to avoid vehicle that made a sudden left turn directly in front of her and she struck a parked vehicle. The vehicle did not stop and neither it nor the driver was ever identified. She never made physical contact with the reckless vehicle, but three witnesses substantiated her story. Nonetheless, her claim was lawfully denied because there was no physical contact with the unidentified uninsured vehicle. (Boyd v. Interinsurance Exchange (1982) 136 Cal.App.3d 761.)

C. Rules for UIM Coverage Only

UIM coverage also involves special rules intended to encourage higher liability coverage, discourage risky behavior, keep costs down, and avoid overcompensation or double-recovery.

The Coverage Trigger. In everyday use, the term "underinsurance" means that the insured does not have enough coverage to compensate for potential losses, such as when an insured only carries $200,000 on a home that will require $250,000 to replace. UIM coverage treats the concept differently by specifically defining "underinsured motor vehicle" to mean "a motor vehicle that is an insured motor vehicle but insured for an amount that is less than the uninsured motorist limits carried on the motor vehicle of the injured person."

In practice, this means that regardless of the severity of the injuries the insured receives from the at-fault party, the UIM coverage is not triggered unless the at-fault party's liability coverage is less than the UIM limits. Some commentators have referred to this definition as the "limit-to-limit" approach.

- Les causes an accident injuring Uma. He has 15/30 liability. Uma had 15/30 UIM and files a claim. Since Les's liability coverage equaled Uma's UIM coverage, Les's vehicle did not qualify as an "underinsured motor vehicle" and her UIM coverage did not apply at all. (Fagundes v. American Internat. Adjustment Co. (1992) 2 Cal.App.4th 1310.)

- Uma wakes up realizing that it was a dream, but what actually happened was that Les caused an accident involving her and 10 other victims. Les has 15/30 liability coverage. After settling with the other claimants only $10,000 of his limits was available for Uma, which he paid to her. Uma had 15/30 UIM and filed a $5,000 claim with UIM Insurer for the remainder of her limit, but her claim was still lawfully denied. (Schwieterman v. Mercury Casualty Co. (1991) 229 Cal.App.3d 1044.)

The Setoff. California is a "setoff" state meaning that the UIM benefit will be reduced by the liability limits of the at-fault driver and any contributions of any amount paid to the insured by or for any person or organization that may be held liable for the injury.

- Uma was in her vehicle when her husband was struck and killed while he was outside the car. The driver had been drinking at work and was going home. Uma filed suit against the driver and employer (since Les had been drinking on the job), the matter was settled and the driver's insurance paid $15,000 and the employer's insurance paid $250,000. Uma carried $100,000 in UIM and submitted a claim based on the wrongful death of her husband for $85,000 recognizing her $100,000 will be set off by the drivers $15,000. The insurer lawfully denied the claim by taking credit for the $250,000 paid on behalf of the employer thus exhausting her $100,000 limit as permitted by the statute. (Elliott v. Geico Indem. Co. (2014) 231 Cal.App.4th 789.)

The Exhaustion Rule. Unlike other types of personal lines insurance coverage to which most consumers are accustomed, simply suffering a covered loss and filing a claim will not trigger UIM coverage. Rather, the UIM insured must pursue recovery from the at-fault party's automobile insurer and obtain payment up to the limits of the coverage.

- UIM Insurer issued an auto policy to Uma including UIM coverage in the amount of $250,000 per person. She was in an accident in May caused by Les who was driving a rented vehicle from Unterversichert Car Rentals ("Unter"). Uma sued Les and Unter. She obtained a default judgment against Les, but he had no assets or insurance. Uma and Unter agreed to a judgment in her favor of $15,000, Unter's liability coverage limit. However, the stipulation provided that if Unter paid $5,000 within two months, the judgment would be fully satisfied; which it did. Uma tried to collect under her own UIM policy, but was lawfully denied since she failed to exhaust Unter's liability limits. (Farmers Ins. Exchange v. Hurley (1999) 90 Cal.App.4th 797.)

III. BLOWOUTS, POTHOLES AND ROADBLOCKS OF UM/UIM COVERAGE

In part, the controversies related to UM/UIM reflect two different models of coverage. California chose an approach that would, *at least*, place the insured in the same position he or she would be if the at-fault party had coverage equal to the insured's UIM limits. Other states have adopted an entirely different approach, sometimes referred to as the "broad" or "make

whole" variety, that is designed to cover the difference between the at-fault parties' contribution and the *actual damages* suffered by the insured up to the UM/UIM limits.

Current law is intended to allow a consumer to protect themselves from at-fault motorists that only maintain minimum coverage. The final product involves so many twists and turns, however, that on balance, it might not provide the protection that consumers need. Scholars and activists have raised several objections to existing law, and there may be other public policies at play.

Restricted Coverage. Perhaps the most frequently recited and forceful argument against California's current system is that the restricted coverage has no bearing on the actual damages likely to occur in an accident. Advocates for reform have argued that California's minimalist approach is nonsensical and repeatedly results in unjust results.

- For insureds carrying the statewide minimum liability coverage of 15/30/5, this definition of underinsured vehicle precludes UIM coverage for almost every other driver on the road (with perhaps a few exceptions including drivers covered under the California Low Cost Automobile Program with a 10/20/3 coverage). Several commentators argue that UIM coverage is illusory to motorists with minimum liability coverage. At least one court has ruled that because an insurer must offer this level of coverage it cannot be illusory as a matter of law. (Fagundes v. American Internat. Adjustment Co. (1992) 2 Cal.App.4th 1310.)

Some also argue that the bill sets standards in dollars that are over 30 years old. While the insurer must offer UM coverage in an amount at least equal to the limits for liability coverage for bodily injury, it is not required to offer coverage beyond $30,000 for death or injury of one person up to $60,000 per accident; adjusted for inflation, these requirements would be at least $67,500 and $135,000. (Ins. Code § 11580.2(m).)

Additionally, insurers limit recovery as a matter of practice when they cap the UM and UIM coverage at the limits set for liability coverage carried by the UM/UIM insured, even though they may offer higher coverage under the law. Some insurers set an absolute cap regardless of the liability limit (an insurer does not have to offer UIM coverage greater than 30/60).

Just Plain Hard to Understand. Many of the mechanisms of UM/UIM do not follow those of a typical insurance and is complex, confusing, and discombobulating. The unusual provisions are likely to be inconsistent with the reasonable expectations of the consumer and may contain provisions that the consumer would have never agreed to if it was understood at the time of purchase.

Statutory Coverage Giveth and Taketh Away. Because UM/UIM standards are set in statute, UM/UIM policies that follow the statute are interpreted according to legislative intent rather than under the normal rules of insurance contract interpretation. The courts, bound by legislative intent, have less wiggle room to find coverage and avoid what they might view as unjust or unfair interpretations.

- For example, the reasonable expectations doctrine permits the court to favor interpretation of a policy against the insurer based on the reasonable expectations of the consumer, however, it only applies when there is an ambiguity in the contract. One court found that since a policy provision tracked the statute, it could not be ambiguous and the reasonable expectation doctrine did not apply. (Elliott v. Geico Indem. Co. (2014) 231 Cal.App.4th 789.)

Moreover, placing a minimum standard in statute, when there was little market pressure to offer richer coverage, may have also instigated a rush to the bottom. The statute may even require nonsetoff policies when the insurer might offer broader coverage. Many provisions of the UM/UIM statute provide that the insurer "may" offer narrower coverage; the setoff provision provides that the maximum liability of a UIM insurer "shall not" exceed the UIM limits less the setoff).

Statements related to AB 3984 in 1984 indicate that "excess" policies were available prior to its enactment. Excess policies do not provide coverage from the first dollar of damages, but are triggered once a certain threshold is met. Once triggered, the ultimate benefit is not based on setoffs or credits. Excess policies are available in some other states, such as Georgia.

Litigation. One of the great benefits of insurance is the greater probability of receiving compensation for injuries without needless litigation. Insurers are highly regulated and subject to administrative sanctions if they breach their duty to attempt in good faith to effectuate prompt, fair, and equitable settlement when liability is reasonably clear. (Code § 790.03(h)(5).) Insurers may also be subject to punitive damages in civil cases for delaying the settlement of a claim as a breach of the implied covenant of good faith and fair dealing. Litigants bear no such duties or concerns. Unlike other first-party coverages (life insurance, accidental death benefits, disability coverage, etc.), UM/UIM forces claimants to litigate or settle the underlying claim up to the liability limit of the at-fault party. This approach contravenes that of other types of coverage.

IV. REFORMING UM/UIM COVERAGE

Any reforms of UM/UIM coverage must recognize the principles of the underlying law in order to avoid a cure worse than the disease. Several options have been offered through the years, but they operate on different priorities and assumptions. Notably, UM has been around since 1959 and has caused little controversy. Most efforts have focused on reforming UIM.

A. Factors Driving Public Policy

Purpose of UIM. AB 3984 took an approach that might be described as providing a stand-in or substitute for the at-fault party's liability coverage. In part, this probably occurred because the coverage was simply plugged into an existing UM scheme. It may also have occurred because of the nature of the coverage itself.

For one, UM/UIM coverage is liability coverage turned inside-out. UIM covers the same damages as liability coverage, but the processes for resolving claims is far different. For instance, the insurer only receives the benefits that go along with litigation (the discovery process, confrontation of witnesses, etc.) if the at-fault party chooses to exercise it. But if the at-

fault party is ready and willing to sign-off on a settlement at his or her liability limits, with no further risk to his or her own personal assets, the defendant has little motivation to defend against his or her own negligence. (Insurers have no subrogation rights under UIM coverage.)

As discussed above, this approach limits double-recovery and overcompensation which is critical in insurance in order to distinguish it from gambling. Insurance is not a vehicle for the insured to seek gain, but only to avoid a possible future loss. Some argue that the potential for overcompensation invites any number of perverse incentives, including fraud and reckless behavior. In order to avoid overcompensation, an insurer must accurately identify ahead of time a reasonable measure for potential losses. For example, liability limits are often chosen according to the insured's assets; a renter on a small fixed income usually does not need much liability coverage. Tying the insured's UM/UIM coverage to the liability coverage provides some loosely objective measure to fix limits and also indirectly links the coverage to some sort of karma. Professor Robert Peterson refers to this guidance as "insure unto others as you would have them then insure unto you.

The connection between UIM and liability limits might also serve the public policy of encouraging higher liability insurance limits and offer a very limited substitute for raising the personal financial responsibility requirements.

Keep Premiums Low. Generally speaking, the cost of insurance remains one of the primary considerations when fashioning insurance-related public policy. Furthermore, the UM/UIM discussion is only one element of a greater conversation that involves personal responsibility and minimum insurance requirements. By raising the price of one form of coverage, you may be discouraging the insured from purchasing other coverage.

Insurance is a group activity. Through statistical crystal balls operated by actuaries insurers will estimate likely losses based on past experience and divvy up those losses among its insureds along with other expenses of providing coverage, including legal costs, commissions, overhead, as well as a margin of profit permitted by the Insurance Commissioner. Under Proposition 103 (adopted after AB 3984), insurer's must offer rates tied to real data showing a probability of losses with relatively high confidence in order to receive approval from the Insurance Commissioner to issue policies subject to those rates. Even though most individual policyholders might not file a claim, the policyholders as a group should get what they pay for (although they might not get what they expected), especially after the adoption of Prop 103. By expanding coverage, premiums should rise accordingly.

The Insurer's Conflict of Interest. With liability coverage, the insurer has a duty to defend third-party allegations that the insured is at-fault and liable for injuries from an accident. Under UM/UIM coverage, the insurer seeking to deny coverage must demonstrate that its own insured is at-fault, uninjured, or both.

At least two commentators believe this position creates a conflict-of-interest in the insurer that "explains many of the seemingly anomalies of the statute." They argue that "the arbitration of various major issues, the exclusion of coverage for stipulated judgments between the insured and third party, and the requirement of 'physical contact' and immediate reporting in

hit-and-run cases all underscore the fact that the injured insured is making a claim against his or her own insurer to recover UM/UIM benefits." [5]

In its May 1, 1984 letter of opposition to AB 3984, the Association of California Insurance Companies (ACIC) explained that determining who is at fault "can place the insurer in a difficult position as it tries to defend its insured against a claim of the other, partly at fault, driver while their own insured is asserting a claim against the insurer under the underinsured motorist provisions of the policy."

- One insurer attempted to prove that an underinsured party against whom its insured filed a lawsuit was not negligent in order to avoid liability under the UM/UIM coverage. The court viewed such an act as a violation of the insurer's duty of good faith and fair dealing. (See Safeco Ins. Co. v. Tholen (1981) 117 Cal.App.3d 685, 699.)

When limits are relatively low, the insurer's awkward position might not play such an important role. Economic damages are easy to prove by submitting medical bills and paystubs and usually eat up UIM coverage quickly. But high-limits coverage may invite demands for the types of damages that are harder to document, such as "pain and suffering" or "loss of services," that may also accompany other complications, like determining who qualifies as an injured insured.

- After getting her job, and moving out of her parents' house, Uma married Frank. Several years later Rex, who has no insurance, accidently injures her in a car accident. Frank carried UM coverage of 10/20 (that covers Uma as a spouse of the insured) and filed a demand for arbitration against UM Insurer; Uma claimed $10,000 for bodily injuries and Frank claimed $5,000 for loss of his wife's services. The court held that since only Uma suffered bodily injury, the $10,000 limit applied and Frank's claim exceeded the coverage. (Campbell v. Farmers (1968) 260 Cal.App.2d 105). If the policy had been subject to combined single limit, say $20,000 per accident regardless of the number of people involved, Uma and Frank could have been able to exhaust the limits and, if Frank witnessed the accident, he may have been able to claim damages for emotional distress. (See Malone v. Nationwide Mutual Ins. Co. (1989) 215 Cal.App.3d 275.)

Discouraging Fraud. Fraud remains a constant threat to both insurance companies and insurance consumers. Ultimately, the consumer pays for fraudulent claims through higher premiums. According to its 2014 Annual Report, in Fiscal Year 2012-13, CDI's Fraud Division received 17,981 suspected fraudulent claims with potential losses up to $120,079,146.[6] CDI works with local district attorneys and oversees a special program focused on organized automobile fraud activity operating in major urban centers that frequently involve the staging of collisions organized by legal or medical professionals or their associates.

- Last year, a sweep of suspected fraud cases from around the state resulted in more than 200 felony counts and multiple misdemeanor charges. Local district attorneys filed

[5] Michael J. Brady and Marta B. Arriandiaga, *California's Uninsured and Underinsured Motorist Law: An Updated Review and Guide*, 36 Santa Clara L.Rev. 717, 720 (1996).
[6] http://www.insurance.ca.gov/0300-fraud/0100-fraud-division-overview/10-anti-fraud-prog/Automobile.cfm

charges against 195 people alleging involvement in auto insurance fraud schemes. In most of those cases, the allegations involve claims against UM/UIM coverage purchased after a collision or damage to the vehicle. Some of the cases involved a claims adjuster, a pedestrian fatality, and a staged collision.[7]

Concern over fraud may have been the fundamental reason for California rejecting the "make whole" approach. In an April 3, 1984 letter, CDI insisted that "the underinsured motorist coverage should be tied to the same limits as the uninsured motorist coverage on the underlying policy." (Emphasis in the original.) CDI presented concerns that the bill would permit excessive coverage that would, in all probability, promote the possibility of fraudulent claims "since this coverage will include the usual 'pain and suffering' damages."

Provisions designed to discourage fraud, however, should be considered and balanced against their effectiveness and unintended results. For example, if many fraudulent schemes involve adding UM coverage after an accident, how does the physical impact rule actually help to avoid fraud?

B. Proposals for Reform: Classic and Newer Models

Reforms have been offered over the years, but have failed to gain any real traction. The following discusses recent and not-so-recent proposals.

The Mandatory "Make Whole" Approach: AB 1063 (Bradford, 2011). AB 1063 would have redefined "underinsured motor vehicle" to compare the UIM limit to damages and repealed the setoff and insurer's credit (the proposal was heard by the Assembly Insurance Committee "as proposed to be amended" but the amendments were never adopted or put into print). The analysis by the Assembly Committee on Insurance describes the controversy surrounding the cost impact of the proposal:

> [T]he Department of Insurance (DOI) provided a rough estimate that, on average, the bill would result in a 10% increase in underinsured motorist insurance costs. Some insurers have argued that this is a low estimate, and that the variation among insurers can be significant. For example, it has been argued, with substantial logic, that an insurer with mostly minimum limits policies would face much steeper cost increases, because they would experience increases from $0 payouts for this coverage to up to $15,000 payouts, whereas an insurer with mostly high limit policyholders would experience a smaller percentage increase (for example, from $85,000 to up to $100,000.) [...] DOI also notes that for "good drivers" underinsured motorist coverage costs $25 or $35, and even a 50% increase is minor for a valuable coverage.

The analysis further explains that some insurers estimated that the cost of UIM coverage would just about double and that ACIC presented data suggesting a 9+%

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[7] *California auto insurance fraud investigation nets 54 Bay Area arrests*, Contra Costa Times News (Nov. 13, 2014), http://www.contracostatimes.com/news/ci_26929524/california-auto-insurance-fraud-investigation-nets-54-bay

increase in overall automobile liability premiums. "Ultimately," the analysis notes, "there is very little certainty about how much costs will increase, and which policyholders will experience greater or lesser impacts."

The "Make Whole" Option: AB 862 (Wieckowski, 2013). The most recent reform proposed would have authorized an automobile insurer the option to offer a "nonsetoff" version of the coverage.

According to the Assembly Committee on Insurance Analysis on AB 862, insurers and brokers expressed concerns that the option to purchase insurance will lead to an insured suing or filing complaints against an agent or broker due to buyer's remorse after they select the cheapest coverage at purchase but need the better coverage after a coverage accident. Brokers also expressed concerned that the administrative burdens and increased liability associated with the fact that some, but not all, of the companies they represent may offer this coverage will simply not be worth the additional coverage that only a small number of policyholders will purchase. Both agents and insurers have argued that there is no consumer demand for enhanced underinsured motorist coverage.

Excess Coverage for Economic Damages Only. In its May 1, 1984 letter of opposition to AB 3984, ACIC suggests that the insured would be better off with an excess policy covering only wage loss and medical expenses. ACIC, in part, grounds the basic suggestion on the impact of litigation costs on the premium ("litigation expenses eat up about fifty percent"). For the insured, this would mean that their medical costs and lost wages would be compensated, but not for the physical and emotional distress caused by the injury. This option does not appear to have been seriously explored.

No Fault Insurance. The committee analysis for the Finance and Insurance Committee of AB 3984 suggests that "no-fault" insurance would be the ideal solution and that the proposal is probably more expensive for the benefits received. No fault would have required drivers to procure coverage against their own and their passengers' injuries. Two initiatives would have established no-fault insurance in California as well as limited "pain and suffering" damages in some way, Proposition 104 in 1988, and Proposition 200 in 1996. Both failed with less than 35% voter support.

Alternative Forms of Insurance. UM/UIM coverage is not the only form of insurance that can compensate consumers for losses related to accidents caused by uninsured or underinsured drivers. Different forms of insurance, not anchored on liability and without regard to whether the at-fault party has insurance, provide coverage for different types of losses. Health insurance already covers medical treatment, as does "medical payments" coverage purchased with many auto liability policies. Disability policies and workers' compensation insurance may provide benefits for certain losses resulting from a covered accident, including lost income benefits and additional lump sums for accidental death.

V. CONCLUSION

UM/UIM coverage is one tool deployed to address concerns about whether consumers will be compensated for the serious injuries that frequently occur while on California roads. As

long as adequate insurance remains out-of reach to some drivers, the Legislature will consider ways to provide for those that have been injured by the uninsured and underinsured motorist. As the committee examines whether UM/UIM coverage meets the needs of consumers, it should consider the needs of the individual consumer who suffers uncompensated injuries and the impact of any reform proposal on consumers-at-large.