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BULLETIN NO. 2010-04

TO: Insurers writing automobile insurance in Alabama

FROM: Jim L. Ridling
Commissioner of Insurance 

DATE: April 20, 2010

RE: Uninsured/underinsured motorist coverage - enforceability of policy "setoff" provisions

This Bulletin addresses provisions in automobile insurance policies which allow an insurer to set off against uninsured/underinsured ("UM") benefits amounts otherwise paid or payable under the policy's medical payments coverage, other coverage types, or the workers compensation laws. Such provisions and their application must account for two Alabama Supreme Court decisions handed down on the same date - *McKinney v. Nationwide Mutual Fire Ins. Co.*, ___So.3d___, 2009 WL 3152230 (Ala. Sept. 30, 2009), and *Nationwide Mutual Fire Ins. Co. v. Austin*, ___So.3d___, 2009 WL 3152387 (Ala. Sept. 30, 2009).

1. The *McKinney* case involved a policy providing for the statutory minimum in UM benefits (\$20,000 at the time). The Supreme Court held

"where an insured has contracted only for the statutory minimum UM coverage and the total damages the insured [is] legally entitled to recover exceed the total of any payment by the tortfeasor's insurer, the insured's UM coverage, and any medical also paid by the liability insurer to the insured, a policy provision allowing the insurer to set off any medical-benefit payments against the UM coverage is unenforceable as a matter of public policy."

2009 WL 3152230 at *11. In the *Austin* case, the amount of UM coverage greatly exceeded the statutory minimum. The Court distinguished *McKinney* and found that, "under the particular circumstances presented in the present case, giving effect to the contractually agreed upon setoff provision would not contravene the public policy of requiring certain minimum amounts of UM coverage to be provided in every automobile liability policy." 2009 WL 3152387 at *7 [footnote omitted]. Those "particular

circumstances" appeared to be that "[e]ven accounting for the medical-payments setoff, the Austins' recovery under the UM provision in their policy will still be well above the required statutory minimum provided in § 32-7-23(a) . . ." *Id.*

2. The Department believes these cases must be read together and reconciled to the extent possible. **As the Department interprets the decisions, they stand for the proposition that application of a policy UM "setoff" provision violates public policy if, under the particular circumstances, the effect is to reduce the amount of UM benefits paid to the insured below the statutory minimum, which is now \$25,000.00 per person.** This applies whether the UM coverage in the first instance is for the statutory minimum or some greater amount. In the Department's view, the "public policy" being advanced in these decisions is that an insured realize not less than the statutory minimum in UM benefits in those instances where the insured's damages exceed the total of payments by the tortfeasor's insurer, the insured's UM coverage, and medical or other payments made to the insured and within the scope of a policy "setoff" provision.

3. All admitted insurers writing automobile policies in Alabama are requested to review their approved policy forms for consistency with the effect of these court decisions, to expeditiously file appropriate revisions for approval by the Department if and as necessary, and to otherwise conform their claims payment practices to the public policy requirements expressed in *McKinney* and *Austin*.

JLR/JFM/bc