

# Carnahan & Perry, PLC

Arizona Law Update

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## Arizona supreme court rejects offset of worker's compensation benefits from underinsured motorist proceeds

On January 10, 2008, the Arizona Supreme Court unanimously ruled that an insurance company may not offset worker's compensation benefits from an underinsured motorist ("UIM") policy. *Cundiff v. State Farm Mutual Automobile Ins. Co.*, 2008 WL 89938 (Ariz. Jan 10, 2008) (No. CV-07-0057-PR).

Plaintiff Jean Cundiff had \$25,000.00 in underinsured motorist coverage on a State Farm auto policy. Ms. Cundiff had an automobile accident while acting in the course of her employment. Cundiff sued the at-fault driver and received a policy limits settlement of \$15,000.00. Ms. Cundiff also received worker's compensation benefits of \$18,695.48 for medical expenses and \$11,109.35 for lost wages.

Ms. Cundiff made a UIM claim which State Farm denied. The parties submitted their dispute to an arbitrator who determined Ms. Cundiff's damages totaled \$40,000.00. State Farm's policy included the following offset provision:

Any amount payable under [UIM] coverage shall be reduced by any amount paid or payable to or for the insured under any worker[s]' compensation, disability benefits, or similar law. This does not reduce the limits of liability required by law for this coverage.

State Farm asserted Cundiff's worker's compensation benefits reduced the UIM coverage available through the policy. Cundiff disagreed and filed suit seeking a declaration that the worker's compensation offset provision was unenforceable per se. The trial court ruled the offset provision was enforceable so long as it did not deprive the insured's right to receive full compensation for her loss. Cundiff appealed. The Court of Appeals, relying primarily on *Terry v. Auto-Owners Ins. Co.*, 184 Ariz. 246, 908 P.2d 60 (Ct. App. 1995), upheld the offset provision.

The Arizona Supreme Court unanimously reversed. A.R.S. §20-259.01.G defines the "total applicable liability limits" as the only amount that may be deducted from the insured's total damages when calculating UIM coverage. The Court reasoned that worker's compensation benefits may be subtracted from UIM coverage only if those benefits constitute

"liability insurance under the underinsured motorist act". Because worker's compensation does not provide coverage based on fault, the Court ruled worker's compensation is not "liability insurance" and therefore such benefits may not be offset from UIM coverage.

In reaching its decision, the Court distinguished the holding in *Terry v. Auto-Owners*, *supra*. In *Terry*, the Court of Appeals, Division 1, upheld the offset of worker's compensation benefits from uninsured (UM) benefits. The Court observed that the statutory definition of UM and UIM coverage differ. The subsection defining UM coverage states such coverage is "subject to the terms and conditions of that coverage", A.R.S. §20-259.01(E). The provision defining UIM coverage does not provide a similar limitation. See A.R.S. §20-259.01(G). Because the statutory provision for UIM coverage does not contain the phrase "subject to the terms and conditions of that coverage", the Court found *Terry* inapplicable.

The Arizona Supreme Court's ruling in *Cundiff* is surprising as *Terry* was thought to be equally applicable in the UIM context. As things currently stand, workers compensation benefits may not be offset from UIM payments only. In future cases, it is likely Arizona courts may deem unenforceable all offset provisions in UIM policies except that reducing coverage based on the underlying liability insurance. The Supreme Court's decision in *Cundiff* applies both prospectively and retroactively. Thus, any currently pending UIM claims are subject to this ruling.

## RULE REGARDING APPEAL FROM ARBITRATION UNDERGOES CHANGE EFFECTIVE JANUARY 1, 2008.

Rule 77(a) of the Arizona Rules of Civil Procedure allows a party who participates in good faith in the arbitration proceeds to appeal. Previously, the appellant was subject to sanctions (payment of opposing party's reasonable attorney's fees and costs incurred on appeal) absent obtaining a judgment at least 25% more favorable than the arbitration result. Effective immediately, that percentage has now been reduced to 23%.

In addition, **Maricopa County has increased the jurisdictional limit for arbitration from \$50,000.00 to \$65,000.00.**

### ATTORNEYS:

Michael R. Perry  
Michael W. Carnahan  
Christopher M. Hanlon  
Gary L. Hudson, Jr.  
Chandler W. Travis  
Edward P. Wallace  
Karen MacMillan Perry

### PARALEGALS:

Donna J. Jennings, CLA

### REACH US:

333 East Osborn Road  
Suite 315  
Phoenix, AZ 85012

### Telephone:

(602) 266-0392

### Facsimile:

(602) 266-0691

### Email:

MRPerry@carnahanperry.com  
MCarnahan@carnahanperry.com  
CMHanlon@carnahanperry.com  
GLHudson@carnahanperry.com  
CWTravis@carnahanperry.com  
EPWallace@carnahanperry.com