

Fall, 2020

RIDESHARING AND INSURANCE, OH THE ISSUES THIS CREATES

*[Ref: Law of Automobile Insurance: UM And UIM, Paras. 1.01 and 3.07;
Law of Automobile Insurance: First Party Property Damage, Para 4.02]*

Many people now earn or supplement their living by driving for a ridesharing company such as Uber or Lyft. These companies are referred to as transportation network companies (TNCs). TNCs pair drivers with individuals who seek transportation through on-line service or smart phone app. While this seems harmless enough, it raises a host of issues when it comes to auto insurance coverage. Many people are unaware that they have no coverage under their personal auto policy (PAP) for this vehicle use because of a public or livery conveyance exclusion. This exclusion eliminates liability and first party coverage under a PAP, and can be endorsed to a business auto policy (BAP) as well.

So is there insurance coverage available to cover this risk? The majority of states require that ridesharing drivers have liability coverage, either under the driver's own policy or through the TNC's commercial auto policy. Not all states, however, require first party coverage for damages – either bodily injury or property damage – sustained by a rideshare driver.

Statutes that require liability coverage typically address two stages of ridesharing operations:

- 1) A driver is logged into the network and awaiting assignment of a passenger. Statutes typically require minimum liability coverage in the amount of \$50,000 per person, \$100,000 per accident, and \$25,000 for property damage (50/100/25) during this stage.
- 2) A driver has accepted a passenger assignment and is en route to pick up the passenger or the passenger is occupying the driver's vehicle. The required minimum coverage during this stage is typically \$1,000,000.

In some states a TNC's coverage only applies after a driver's insurer denies coverage, while other states don't require a denial of coverage before a TNC's coverage is exposed, making the policies co-primary. Some statutes also require UM/UIM, med pay, or no-fault coverage, with some limiting the availability of this coverage to drivers involved in a second stage activity. Others make first party coverage for TNC drivers optional.

UNINSURED/UNDERINSURED MOTORIST COVERAGE

In *Maxwell v. James River Ins. Co.*, 401 F. Supp. 3d 1183 (D. Colo. 2019), Ilona Maxwell was injured in a car accident with a third party. The third party was found to be at fault, but was underinsured. At the time of the accident Ilona was logged on to the Uber app as a driver. She was available to accept passengers but had not yet been assigned a passenger. Ilona recovered the third party's liability policy limit but claimed additional damages and made uninsured motorist (UM) and underinsured motorist (UIM) claims against two insurers with which she had policies. The first claim was against Twin City Fire Insurance Company with whom she had a personal auto policy on the vehicle she was driving at the time of the accident. The second claim was against James River Insurance Company, the insurer for the TNC responsible for providing certain automobile insurance for Uber drivers as required by Colorado law. The insurers denied the claims and Ilona sued.

Twin City denied Ilona's claim based on an exclusion that stated:

- (B) We do not provide Uninsured Motorist Coverage for bodily injury sustained by any insured:
 - 2. While occupying your covered auto when it is being used as a public or livery conveyance. This includes but is not limited to any period of time your covered auto is being used by any insured who is logged into a transportation network platform as a driver, whether or not a passenger is occupying the vehicle.

This exclusion (2.) Does not apply:

- (a) to a share-the-expense car pool; or
- (b) if a specific premium charge is shown in the Declaration page for Transportation Network Driver coverage with respect to the vehicle described in the Declarations.

While the exclusion referred to uninsured motorist coverage, the policy used "uninsured" to refer to both uninsured and underinsured motorists. The policy also contained similar exclusions under its liability, UM property damage, and medical payments coverage. Ilona argued that the policy was ambiguous when it stated that coverage did not apply while the covered auto was "being used as a public or livery conveyance." The court disagreed because the exclusion clearly stated it applied "whether or not a passenger is occupying the vehicle," as long as the insured was occupying the covered vehicle and was logged into a TNC platform as a driver. It made no difference that she had not yet accepted a fare. Ilona was occupying the vehicle as an Uber driver logged into the Uber platform at the time of the accident. The court found that Twin City had not breached its contract by denying Ilona's claim.

The court then addressed Ilona's allegation that the exclusion was void as against public policy. She argued that the exclusion violated the statutory mandate that all auto liability policies provide UM/UIM coverage. This argument was incorrect, however, because when a policy lawfully excludes liability coverage under a specific circumstance, an insurer is under no obligation to provide UM/UIM coverage for that same circumstance. Under Colorado law a private auto insurer is allowed to exclude liability coverage for the time period when its insured was logged into a TNC's digital network. The exclusion was not against public policy. Nor was the exclusion unconscionable. In addition to having a ridesharing exclusion in four coverage parts, the policy included an advisory notice to policyholders about ridesharing that stated the policy contained exclusions that applied to the use of a covered auto in a ridesharing application. The court also rejected Ilona's argument that she reasonably believed she had coverage. Twin Cities was granted summary judgment.

The TNC had two policies with James River. The JR 100 policy provided liability and UM/UIM

coverage for drivers who were connected with an active fare, meaning the driver had accepted a fare and was either en route to pick up the fare or was transporting the fare to his place of final destination. The JR 100 policy did not cover drivers who were simply logged into the platform and available to accept fares. As such, the JR 100 policy did not provide coverage to Ilona.

The JR 200 policy covered drivers who were logged into the Uber platform and available to accept fares. While Ilona qualified for coverage under the JR 200 policy, that policy provided only liability coverage, and James River denied the UM/UIM claim.

Ilona argued that the JR 200 policy violated a state law that required TNCs to maintain primary auto insurance for drivers logged into its application, but without an active fare, with a minimum of 50/100 coverage. The statute did not specify the type of insurance that was required, and Ilona argued James River was required to provide more than just liability coverage under the JR 200 policy. The court found that the statute on which Ilona based her argument merely established a financial responsibility of TNCs, which were then free to satisfy its requirements by being self-insured, offering a rider to a driver's personal auto insurance, or obtaining a commercial policy. James River was not obligated to provide any specific type of insurance under the statute and, therefore, the court held that the insurer did not violate the statute by not providing UM/UIM coverage.

Ilona claimed that James River violated the UM/UIM statute by excluding that coverage from the JR 200 policy. She argued that James River was required to offer her UM/UIM coverage unless she opted out in writing. The court found her argument to lack validity. The law required an insurer to provide UM/UIM coverage that paralleled the policy's liability coverage, unless the named insured rejected UM/UIM coverage in writing. The court agreed with James River because the TNC, as the named insured, was the "sole entity entitled to accept or reject UM/UIM coverage" and its rejection relieved James River of the obligation to provide UM/UIM coverage under the JR 200 policy. The court also held that James River was under no obligation to provide additional insureds, such as Ilona, with notice of the availability of UM/UIM coverage. The named insured's rejection of that coverage was binding on all insureds. The court granted James River's motion for summary judgment.

Martin v. James River Ins. Co., 366 F. Supp. 3d 1186 (D. Nev. 2019), involved substantially similar facts as those in *Maxwell*. James River filed a motion to dismiss the action against it, which involved its denial of an Uber driver's UIM claim for injuries sustained while he was logged into the Uber app and available to accept fares, but had not yet been assigned a fare. UM/UIM coverage had been waived by the named insured, James River, as was the case in *Maxwell*. Applying Nevada law the court in *Martin* concluded that the named insured's – the TNC's – rejection of UM/UIM coverage applied to all insureds. Under Nevada law a TNC's insurance policy "may, but does not have to, include UIM coverage." The motion to dismiss was granted.

COLLISION COVERAGE AND A LOSS PAYEE

A personal auto insurance policy, as noted previously, excludes coverage for damage to a vehicle that occurs while it is being used for TNC purposes. When a vehicle's purchase is financed through a bank or other lender, the lender is added to the auto policy as a loss payee. While an insurer can deny a collision claim presented by its insured based on livery use of the vehicle, can the insurer also deny the claim of a loss payee? This will depend on the language of the policy's loss payable clause. Under some policies the loss payee's rights are no greater than those of the insured and the loss payee may recover only if the insured is entitled to recover under the policy. When a policy has this form of loss payable clause an insurer can deny a loss payee's claim. Other policies have a loss payable clause that grants a loss payee rights that are separate from those of the named insured. Under this type of loss payable clause the named insured's use of the vehicle for an excluded purpose

does not bar coverage for the loss payee's claim. The insurer would then be liable to the loss payee for the damage to the vehicle up to the amount of the lender's security interest in the vehicle, subject to the policy limits.

In *Commerce Ins. Co. v. First Help Financial, LLC*, 2019 Mass. Super. LEXIS 47 (Mass. Super. 2019), Commerce Insurance Company brought a declaratory judgment action against a loss payee and its insured. Commerce provided a personal auto insurance policy to Rodrigues-Pessoa on a 2015 Ford that included collision coverage and listed First Help as a "secured lender." The insurer agreed to pay collision damage limited to no more than the actual cash value of the vehicle, subject to a \$500 deductible. The collision coverage was subject to a "vehicle sharing and public or livery conveyance exclusion" that stated the insurer would not pay damages while the covered auto was:

Available for use as a public or livery conveyance, including use of your auto for hire through a ride sharing arrangement, or a Transportation Network Company (TNC) which operates under an agreement for compensation. This includes but is not limited to any period of time a vehicle is being used by you or any household member who is logged into a TNC as a driver, whether or not a passenger is occupying the vehicle.

The policy's secured lenders (loss payee) provision stated:

When your Coverage Selections Page shows that a lender has a secured interest in your auto, Commerce will make payments under Collision, Limited Collision and Comprehensive (Parts 7, 8 and 9) according to the legal interests of each party.

The secured lender's right of repayment will not be invalidated by your acts or neglect except that we will not pay if the loss of or damage to your auto is the result of conversion, embezzlement, or secretion by you or any household member. Also, we will not pay the secured lender if the loss of or damage to your auto is the result of arson, theft or any other means of disposal committed by you or at your direction.

The covered auto was damaged when it rear-ended another vehicle while being driven in California by a friend of the insured. The covered auto was a total loss. The friend was driving the covered auto while transporting passengers for Uber under the named insured's Uber driver account. The evidence showed that the friend regularly drove the covered auto to transport passengers using the insured's Uber account. At the time of the accident the loan balance on the vehicle exceeded its actual cash value.

The named insured didn't present a collision claim, but First Help did. The insurer took the position that it did not owe coverage on the lender's claim based on the public conveyance exclusion. It argued that, under Massachusetts law, it was legally entitled to exclude "any and all coverage ... for any loss or injury" that occurred while the driver of the covered auto was providing TNC services. The problem with this argument was that the policy's secured lender provision stated the lender's right of recovery would not be invalidated by the named insured's acts or neglect. Allowing the covered auto to be used to provide Uber services at the time of the collision was an act by the named insured that the court held could not invalidate coverage for First Help's claim. And none of the exceptions to coverage for a secured lender applied to First Help's claim. The policy did not exclude a lender's claim when the financed vehicle was used as a public conveyance. The court held that coverage for a lender when the vehicle was damaged while in use as part of a transportation network was "permitted by and consistent with the statutory scheme." Judgment was entered for First Help.

CONCLUSION

A determination of coverage under a personal auto insurance policy when an insured is operating his vehicle as part of a transportation network will depend on whether the policy has been endorsed to provide transportation network driver coverage. ISO offers a variety of endorsements to a PAP, some that add coverage and some that re-write the public or livery conveyance exclusion to specifically apply to a covered auto's TNC use. Business auto policy endorsements are also available that exclude coverage for TNC use.

Absent an endorsement, a personal auto insurer should be within its rights to deny coverage to an insured based on a public or livery conveyance exclusion. Determining coverage under a BAP can be more complicated, depending on what auto coverage symbols an insured has selected for each of the policy's coverage parts and whether the TNC use comports with the policy definitions of covered auto and who is an insured.

When a loss payee is named on a policy, whether the insurer can deny its claim will depend not just on the policy exclusion but on a determination of whether its loss payable clause creates separate rights for the loss payee. Care must be taken to review coverage under personal and business auto policies. Also, keep in mind that the endorsements that add or remove coverage from the respective policies are relatively new and have yet to be fully tested in the courts.