

## **INSURANCE CONSUMER COUNSEL'S COLUMN**

### **Who Is An “Insured” Under Uninsured Motorist, Underinsured Motorist, and Medical Pay Coverages of a Corporate Auto Policy?**

by Professor Greg Munro<sup>1</sup>

#### **A. Introduction**

The standard of care for counsel representing a claimant injured in an auto accident is to identify every applicable policy of insurance under which the claimant may be an insured. The more serious the injury and damages, the more critical this investigation becomes. In Montana, many individuals conduct their business, be it ranching, farming, retail sales or construction through a closely-held or family corporation. Sometimes an individual or a married couple are the sole shareholders. The family members will also likely be the officers and directors of the corporation.

Commonly, the family will insure its personal autos separately under individual auto policies, while insuring those identified with the business or owned by the corporation under a corporate auto policy. One reason for this arrangement is the tax deductibility of the premiums for those vehicles used in the business as a business expense. The shareholders may not deduct as a corporate business expense those premiums for the vehicles they own and use personally. The insurer, however, does not want the risk associated with auto insurance to be covered under more than one of the company's policies.

The corporation is normally designated as the “named insured” on the corporate auto policy. However, that policy will likely contain coverages such as Uninsured Motorist, Underinsured Motorist and Medical Pay each of which makes reference to and provides benefits for “bodily injury” and “damages for bodily injury and death.” It is logical to assume that the sole shareholders, employees, officers, and directors of a company will be covered under the policy. In fact, virtually everyone who is injured while occupying the vehicles owned and insured by the corporation will be considered “insureds” for purposes of the policy benefits. Provisions of those policies include the precondition that the insured be “occupying” a vehicle to recover benefits as an insured.

However, coverages such as Uninsured Motorist, Underinsured Motorist, and Medical Pay are traditionally thought of, and, at least in the cases of UM and UIM, treated by the Courts as personal and portable coverages which attach to the insured persons to provide them benefits even when they are not in the insured vehicle described on the declarations page.

It is axiomatic that, in cases involving catastrophic injury and large damages, counsel will analyze any auto policy issued to closely-held or family corporations in which the claimant is a shareholder, officer or director to determine whether any benefit could be obtained under that policy. The starting point, after ascertaining the facts of the accident, is to secure a copy of the corporate auto policy and the Declarations page. The critical question for analysis is whether the claimant is an “insured” under the appropriate UM, UIM or Med Pay coverage.

Montana State and Federal courts have decided several cases involving attempts to secure coverage for an injured individual under a corporate auto policy. This article will review those cases to reveal the arguments used to invoke coverage and the rulings the courts have made.

#### **B. Corporate Coverage and the Injured Pedestrian**

## 1. Hager v. American West (1989)

In what appears to be the seminal Montana case, Federal Judge Hatfield found coverage for an individual shareholder under a corporate auto policy in *Hager v. American West Ins. Co.*, 732 F.Supp. 1072 (D. Mont. 1989). Colleen Hager was a shareholder in a closely held family corporation, Hager's, Inc. She was struck as a pedestrian by a hit-and-run auto in a parking lot in Bozeman. She sought to recover under the Uninsured Motorist coverage on the auto policy issued to Hagers, Inc. by American West.

Hager's, Inc. was the only "named insured" on the policy. Judge Hatfield pointed out that the determinative issue was whether Colleen Hager was an "insured" within the meaning of the policy. The UM coverage of the American West policy defined an insured as:

1. *You or any family member.*
2. *Anyone else occupying a covered auto or a temporary substitute for a covered auto.*

American West argued, and Colleen Hager conceded, that Hagers, Inc. was the "named insured" under the policy. American West asserted that a corporate named insured could not have any "family member." Hager contended that, as a minority shareholder in a closely-held family corporation, she was an additional insured under the policy so as to be "*You or any family member*," a class of persons who did not need to be "occupying" a covered auto to be an insured. (Recall, as Judge Hatfield pointed out, that *Jacobsen v. Implement Dealers Mutual*<sup>2</sup> declared it against the public policy of the UM statute, MCA § 33-23-201, to condition UM benefits on the insured occupying the auto.)

Judge Hatfield found the policy ambiguous and held that Hager was an insured saying, "The ambiguity in the subject policy is created by utilization of the term "family member" in a policy issued to a closely held family corporation." Hatfield found that his construction was "consistent with the remedial nature of uninsured motorist statutes" and consistent with "the generally accepted principle that the uninsured motorist coverage of an insurance policy may not limit the class of persons covered under the endorsement to a group smaller than that covered under the liability provisions of the same policy." The case is authority for the situation where, in Judge Hatfield's words, "a corporate entity is the named insured under an automobile liability policy providing uninsured motorist coverage."

## 2. Hanson v. Employers Mutual Casualty Company (2004)

Federal Judge Molloy awarded a pedestrian underinsured motorist benefits under a corporate policy on the basis of ambiguity in *Hanson v. Employers Mutual Casualty Company*<sup>3</sup>. There, Gary Hanson was struck by an underinsured motor vehicle while jogging in Spokane. The tortfeasor's insurer paid Hanson the \$100,000 limit of its Bodily Injury coverage.

Hanson and his wife were sole shareholders of a closely held family corporation, P.H. Moller Co., Inc., which was the sole named insured on an auto policy covering three vehicles with Employers Mutual Casualty Company. The policy provided Uninsured Motorist coverage which included an underinsured motorist definition. The employer refused Hanson's demand for UM/UIM benefits under the policy on the ground that he wasn't an "insured" under the policy.

The UM coverage definition of "insured" construed by the court read as follows:<sup>4</sup>

## B. Who Is An Insured

1. You.
2. If you are an individual, any “family member.”
3. Anyone else “occupying” a covered “auto” or temporary substitute for a covered “auto.” The covered “auto” must be out of service because of its breakdown, repair, servicing, loss or destruction.
4. Anyone for damages he or she is entitled to recover because of “bodily injury” sustained by another “insured.”

This definition is from the Insurance Services Office 1997 commercial auto form CA 21 10 97.<sup>5</sup> Most important to the court was the fact that the Medical Pay coverage in part defined an “insured” differently as follows:

1. You while “occupying” or, while a pedestrian, when struck by any “auto.”
2. If you are an individual, any “family member” while occupying or, while a pedestrian, when struck by any “auto” \* \* \*

Note that, to construe “you” in sub 1 to refer to the corporation requires that the corporation be able to “occupy” a vehicle and be a “pedestrian.” Faced with this definition in its Medical Pay coverage, the insurer had already paid three \$5,000 limits of Med Pay coverage for Hanson’s medical bills, one for each vehicle insured.

Though Judge Molloy ultimately found coverage in *Hanson*, he did not follow *Hager*, because he found the definition of “insured” in *Hanson* differed from that in *Hager* and also rejected the reasonable expectations argument. He noted that the policy in *Hager* defined “insured” as “You or any family member.” In *Hanson*, “insured” was defined as “1. You. 2. If you are an individual, any family member.” *Hager’s* ambiguity, Molloy asserted, arose from the fact that “it included family members regardless of whether the named insured was a corporation or an individual.” Molloy read the definition in *Hanson* to unambiguously require that anyone other than a corporation must be occupying a vehicle owned by the corporation at the time of injury.

Honoring the insured’s “reasonable expectations” can be a logical and viable argument where a corporate entity is the named insured on an auto policy providing UM/UIM benefits. The doctrine provides that the objectively reasonable expectations of insurance purchasers about the terms of their policies should be honored even if a painstaking study of the policy would negate those expectations.<sup>6</sup> The Hansons argued that, as sole corporate shareholders, they expected that “bodily injury” in the policy referred to their bodily injury. At the least, they argued, the provision creates ambiguity that must be resolved in favor of the insured. Moreover, Judge Molloy conceded that, if the Hansons paid premiums through their corporation for the coverage, then they were entitled to coverage. He cited *Ruckdaschel v. State Farm Mut. Auto. Ins. Co.*, (1997)<sup>7</sup> and *Bennett v. State Farm Mut. Auto Ins.*, (1993)<sup>8</sup> for the twin principles that “an insurer may not place in an insurance policy a provision that defeats coverage for which the insurer has received valuable consideration,” and “an insurer is not allowed to deny coverage for which it has received valuable consideration.” Nevertheless, Judge Molloy reasoned that valuable coverage was provided only if Hanson occupied a corporate vehicle at the time of injury. He asserted that it was Hanson’s status as a pedestrian that took him out of the coverage.

The critical question then became whether it is legal to limit the class of people who can

recover UM/UIM benefits under a corporate auto policy to those who occupy corporate autos. Recall that it is against public policy to require that the named insured under an individual auto policy must occupy the insured vehicle to recover UM benefits. *Jacobsen v. Implement Dealers Mutual* (1982)<sup>9</sup> However, under *Chilberg v. Rose* (1995)<sup>10</sup>, it is not against public policy to require that passengers other than named insureds and their family members be occupying the vehicle insured on the declarations page to obtain UM benefits. In *Hanson*, Judge Molloy held it legal to limit UM/UIM coverage to those occupying the corporate vehicles. He reasoned that, though UM/UIM coverage is personal and portable, and though “Montana public policy supports a broad interpretation of uninsured motorist coverage,” there is no requirement that “such coverage be sold irrespective of an auto insurance policy.” He said, “I think, therefore, that as long as it is legal for an insurer to sell an automobile liability policy to a corporation, which is the named insured, it is legal for the insurer to limit the class of covered individuals to those who are occupying covered vehicles at the time they are injured.” At that point in the Court’s decision, it appeared Hanson had lost.

However, the conflict in definition of the insured in the Medical Pay coverage was Hanson’s salvation. Employers Mutual used a completely different definition of insured in the Medical Pay coverage where it defined an insured as:

1. You while “occupying” or, while a pedestrian, when struck by any “auto.”

Since a corporation could not occupy an auto or be a pedestrian, the definition, and its conflicting counterpart in the UM coverage produced ambiguity. Recall that the insurer resolved the Med Pay definition by stacking Medical Pay coverage for Hanson for all three autos owned by the corporation. That placed the insurer in the position of arguing that it could interpret “you” in the Med Pay definition to include Hanson individually while interpreting “you” in the UM definition to mean only the corporation.

Judge Molloy said that construction of terms and phrases in the policy must reconcile all parts of the contract. Faced with the ambiguity of the two definitions, he resolved it in favor of the insured holding that, by itself, the UM definition of insured was not ambiguous. It legitimately excluded coverage of individuals not occupying corporate vehicles. Nevertheless, the implicit recognition of “you” as an individual in the Med Pay coverage meant that the policy taken as a whole was ambiguous regarding who was an insured requiring coverage for Hanson.

## **C. Corporate Coverage and the Injured Driver**

### **1. Lierboe v. State Farm (2004)**

*Lierboe v. State Farm Mut. Auto Ins. Co.* (2004)<sup>11</sup> also involved an attempt by a shareholder of a closely-held corporation to obtain benefits under a policy issued to the corporation. Kristine Lierboe was injured in an auto collision while driving a Jeep Cherokee insured under her personal auto policy with State Farm. The policy had Medical Payments coverage limits of \$5,000. She was also a shareholder in a corporation, Shining Mountain Design and Construction, and that company had two auto insurance policies issued by State Farm covering a 1991 Dodge Dakota pickup truck and a 1970 IHC flatbed truck. The Dodge had Med Pay limits of \$5,000, while the IHC had no Med Pay coverage.

Subsequent to the accident, the Montana Supreme Court, in *Ruckdaschel v. State Farm Mut. Auto Ins. Co.*, (1997), upheld the stacking of Medical Pay coverage. When Lierboe's medical expense exhausted the Med Pay limits on her Jeep, she sought the Med Pay limit on the corporation's Dodge Dakota which State Farm refused. She sued State Farm in Federal court, and Judge Molloy certified to the Montana Supreme Court two issues: (1) Is a shareholder or relative of a shareholder of a closely-held corporation covered by an automobile liability policy issued to the closely-held corporation when the terms of the policy include coverage reference to "relatives"? (2) Given the facts of this case, if Kristine Lierboe is covered under the Shining Mountain Design and Construction, Inc., policy, does the anti-stacking holding in *Ruckdaschel* apply under the terms of these policies?

Unfortunately for our purposes, the Montana Supreme Court did not address the first issue, because it found the second dispositive, holding that there was no coverage on the Dodge because it contained an owned auto exclusion limiting coverage if Lierboe was not occupying the vehicle "insured under this coverage." The court ruled that "this coverage" referred to the policy on the Dodge so that there was no coverage for injury in any other vehicle.

Of significance to our discussion is the Court's statement that "The distinction between named insureds and those who qualify as insureds only by virtue of their occupancy in the vehicle was pointed out in *Chilberg v. Rose* (1995), 273 Mont. 414, 903 P.2d 1377." Chilberg was a passenger who was not a named insured. The Chilberg Court said, "Chilberg was a passenger who neither had 'reasonable expectations' of coverage under the policy nor did he qualify as an insured spouse or family member under more than one policy."<sup>12</sup> Hence, the court in *Lierboe* said that Kristine Lierboe had no reasonable expectation of coverage because she didn't qualify as an insured.

Note that *Lierboe* was in part overruled in *State Farm Mut. Auto Ins. Co. v. Gibson* (2007).<sup>13</sup> In *Gibson*, the Montana Supreme Court held that, where those injured are named insureds, the occupancy requirement in Medical Pay coverage acts as an anti-stacking device. Such a provision is against the public policy that a provision that permits an insurer to receive valuable consideration for coverage that is not provided violates Montana public policy.

## **2. The Short Life of *Progressive Cas. Ins. Co. v. Owen* (2004)**

The federal case of *Progressive Cas. Ins. Co. v. Owen*<sup>14</sup> again involved a closely-held family corporation. Arlene Owen and her husband, Curtis, were the sole shareholders of Bennett Owen Trucking for which Arlene was the vice president, secretary, and a director of the corporation. Bennett Owen Trucking was the named insured on a commercial auto policy with Progressive which insured twelve dump trucks, tractors and dump trailers. The declarations page listed ten drivers which list did not include Arlene whose name appeared nowhere on the policy or declarations page.

In 2003, Arlene obtained a commercial learner's permit from the State of Montana to begin driving commercial vehicles for the business. In February of 2004, she drove a truck tractor and flatbed trailer belonging to a man named Cornell to a ranch site where she and Cornell loaded hay. During loading, the load shifted and a heavy bale fell on her causing severe disabling injury.

She recovered \$862,000 from the insurance on Cornell's truck and \$100,000 UIM coverage limits from her individual auto policy. She then sought the UIM benefits under Progressive's policy with Bennett Owen Trucking. Progressive refused and filed a federal

declaratory action that the policy did not provide coverage.

The policy defined an insured as follows:

2. “**Insured**” means:

a. If the named insured is a person:

i. **You** or a **relative**.

ii. Any other person **occupying your insured auto**.

\* \* \*

b. If the named insured is a corporation, partnership, organization, or any other entity that is not a living person:

i. Any person **occupying your insured auto**.

\* \* \*

In addition, the policy defined “your insured auto” as follows:

10. “**Your insured auto**” means:

c. Any **auto** not owned by **you** while **you** are temporarily driving it as a substitute for any other **auto** described in this definition because of its withdrawal from normal use due to breakdown, repair, servicing, **loss**, or destruction. . . .

Magistrate Judge Anderson declared the policy ambiguous at the outset noting first that it was issued to a corporation as the only named insured while making “no explicit provision for the owners, directors, or officers of the company.” After noting the premiums on the dec page for Medical Pay and Underinsured Motorist coverage, Judge Anderson said, “A corporation cannot suffer bodily injury ; it cannot obtain medical treatment; it cannot incur medical bills. Yet these are conditions precedent to the collection of benefits under the UIM and medical coverages.” He said:

Thus it would be reasonable to expect that a commercial policy that purports to provide uniquely human benefits must have intended to extend those benefits to some person or persons. The question is who?

Judge Anderson reasoned that Progressive could not charge premiums for Med Pay and UIM coverage and then deny the owners, officer and directors of the corporation benefits on the ground that the only named insured was the corporation. The insured’s reasonable expectations could not be “defeated by this poorly drafted and nonsensical insurance contract.” Accordingly, he declared that the policy provided UIM and medical benefits for Arlene for the injuries sustained in February 2006.

### **3. *Progressive Cas. Ins. Co. v. Owen* overruled at the Ninth Circuit**

On appeal, the Ninth Circuit disagreed and held it error for the district court to have reformed the policy to cover Arlene Owen.<sup>15</sup> The Ninth Circuit found it clear that the “uniquely human benefits” were provided only to “any person occupying your insured auto.” The court ruled that the policy unambiguously provided benefits to any person who was injured while occupying one of Bennett Owen Trucking’s vehicles. The Ninth Circuit found its ruling to be

consistent with Judge Molloy's statement from *Hanson v. Employers Mut. Cas. Co.* in 2004:

As long as it is legal for an insurer to sell an automobile liability policy to a corporation which is the named insured, it is legal for the insurer to limit the class of covered individuals to those who are occupying covered vehicles at the time they are injured.

The question remaining was whether Arlene was occupying a temporary substitute for a Bennett Owen Trucking vehicle so that she would be in "your (the corporation's) insured auto." The court granted Progressive summary judgment on the ground that Arlene had produced no evidence that such was the case.

#### **4. *Lee v. Great Divide Insurance Company* 2008)**

In *Lee v. Great Divide Insurance Company*,<sup>16</sup> Lee was injured in Helena while driving his 2000 Ford pickup which was insured by American States Insurance. He was hit by Peters who was driving inebriated without insurance, and on the wrong side of the road. Lee had a company called "Lee's Mobile Home Service" which insured two trailers and a 1993 Ford pickup with Great Divide Insurance. Lee sued tortfeasor Peters and Lee's own UM insurer, American States, and settled with American States on the UM coverage. He then dismissed American States and continued the action against Peters. After filing a Second Amended Complaint against Peters alone, Lee sent a copy to Great Divide with a letter inviting that carrier to "Please take whatever action you deem necessary to protect the insured's interests regarding this matter." He secured a \$1.1 million default judgment after a hearing on the default of which Great Divide had no notice. He then filed a separate action against Great Divide for declaratory relief, breach of contract, bad faith, and punitive damages. After hearing, the District Court denied Lee's motion for summary judgment and sua sponte granted Great Divide summary judgment on the ground that its policy did not cover Lee for the accident and that Lee did not give proper notice of the claim to Great Divide.

The issue pertinent to our discussion is whether a corporate policy that makes reference to "you" and "insured" in the "Who is an insured" section is ambiguous so that it should cover persons affiliated with the corporation such as owners, officers and directors. The Montana Supreme Court held that the corporate policy limited coverage to those occupying vehicles listed in the policy. The court reasoned that the term "you" in the policy referred to the corporation. Lee had the opportunity under the corporate policy to elect one of nine different ways to insure vehicles.<sup>17</sup> He chose the "specifically described 'autos'" option defined as listed autos only and did not list his 2000 Ford Pickup truck. As a result, Lee did not have coverage under the Great Divide policy, which was consistent with his intentions of removing his name from the policy and only covering his corporate vehicles.

The Court said that *Chilberg* (1995) supports limiting coverage to the reasonable expectations of insureds occupying vehicles listed in the policy at the time of the accident. *Lierboe* (2003) upheld denial of coverage where an injured passenger was in a vehicle that was not identified in the corporate policy. The Court said, "We have not expanded coverage to injured persons involved in the corporation who are not occupying vehicles covered under the policy at the time of the accident" and cited *Lierboe* and *Chilberg*.

## **Conclusion**

Assuming an injured claimant is not a “named insured” on a corporate auto policy, determination of whether that individual is otherwise an “insured” invariably leads to analysis of the definition of “insured” or the “who is insured” section of a coverage. The definition should be read critically to see whether it is subject to more than one reasonable interpretation making it ambiguous.<sup>18</sup> If it is ambiguous, it must be construed in favor of the insured.<sup>19</sup> Moreover, it is important to compare the definition of insured in each of the coverage sections, which are likely different and may, as in *Hanson*, produce ambiguity because they are different.

If the insured recently changed the definition of insured in a corporate auto policy so that it clearly excludes the individual shareholder, officer or director where it arguably included them before, then that may be a renewal “on less favorable terms” requiring a 45 day written notice from the insurer to be effective.<sup>20</sup>

Even if the policy is not ambiguous, given the fact that a closely-held family corporation is involved, the client may truly have had a reasonable expectation that he or she was covered under the corporate policy for UM, UIM or Med Pay. Counsel can investigate why some autos were covered under a corporate policy and others under individual policies. Was this a ranch or farm business where vehicles are used for both personal and business purposes? Is there some angle where the insured had a reasonable expectation of coverage regardless of lack of ambiguity in the policy or declarations?<sup>21</sup>

Finally, checking the case annotations to particular definition(s) of “insured” under the coverages in Miller’s Standard Insurance Policies Annotated, will reveal if courts in other jurisdictions have found your particular provision ambiguous, in violation of reasonable expectations, or void as against public policy.

1. The author thanks MTLA Editorial Board member Pat Sheehy and research assistant, Chris Orman, for their review and editing.
2. 196 Mont. 542, 640 P.2d 908 (1982).
3. 336 F.Supp. 1070, 32 M.F.R. 490 (D.Mont. 2004).
4. An amended and clearer definition of “insured” from a renewal policy did not figure in to the Court’s decision, because issues about whether the insurer gave adequate notice of the amendment caused the insurer to concede to the earlier definition above.
5. Miller’s Standard Insurance Policies Annotated, Vol. I. p. 303.
6. *Citing*, Transamerica Ins. Co. v. Royle, 656 P.2d 820, 824 (1986); American Family Mut. Ins. Co. v. Livengood, 970 P.2d 1054, `1059 (1998).
7. 948 P.2d 700, 702.
8. 862 P.2d 1146 (1993).
9. 196 Mont. 542, 640 P.2d 908 (1982).
10. 273 Mont. 414, 903 P.2d 1377.

11. 2003 MT 174.
12. *Chilberg*, 273 Mont. at 418, 903 P.2d at 380.
13. 2007 MT 153.
14. 456 F.Supp.2d 1205 (D.Mont. 2006).
15. *Progressive Cas. Ins. Co. v. Owen*, 519 F.3d 1035 (9<sup>th</sup> Cir. 2007).
16. 2008 MT 80, 342 Mont. 147, 182 P.3d 41.
17. *See*, Miller's Standard Insurance Policies Annotated, Vol. I, p. 259 for the nine possible descriptions of covered autos.
18. *Owen*, 519 F.3d at 1207.
19. *Id.*
20. MCA § 33-15-1106 (2007); *and see*, *Thomas v. Northwestern National Ins. Co.*, 242 Mont. 357, 973 P.2d 804 (1998).
21. *See*, Munro "The Reasonable Expectations Doctrine in Montana," Trial Trends 32-43, Summer 2008.