

January 20, 2006

**CLAIMANTS BEAR THE BURDEN OF PROVING LACK OF PREJUDICE TO UIM INSURERS
WHEN CLAIMANTS PROVIDE LATE NOTICE OF LAWSUIT OR SETTLEMENT**

In Kluball v. American Family Mut. Ins. Co., __ N.W.2d __ (File A05-436, December 20, 2005), the Minnesota Court of Appeals confirmed claimants bear the burden of proving the UIM insurer was not prejudiced by the insured's late notice of the underlying lawsuit or settlement.

In Kluball, the insured, Lori Kluball, was injured in a December 1994 automobile accident. The insured brought suit against the at-fault party in December 2000. Notice of this lawsuit, however, was not provided to the UIM insurer, American Family, until September 11, 2003, five days before a binding arbitration. Kluball considered this adequate notice of the lawsuit as required by Malmin v. Minn. Mut. Fire & Cas. Co., 552 N.W.2d 723 (Minn. 1996). The arbitrator determined Kluball's damages to be roughly \$120,000. The at-fault party's policy limits were \$50,000. Kluball then sought UIM benefits.

On October 3, 2003, Kluball provided American Family notice of the settlement of the underlying lawsuit through the arbitration, pursuant to Schmidt v. Clothier, 338 N.W.2d 256 (Minn. 1983). American Family declined to substitute its draft, so Kluball brought this lawsuit seeking UIM benefits. The District Court dismissed Kluball's claims on summary judgment, determining Kluball failed to provide sufficient notice to American Family. Kluball appealed, arguing American Family was not prejudiced by the late Malmin notice, and that she provided sufficient evidence rebutting the presumption of prejudice by the late Schmidt notice.

The Court of Appeals confirmed that UIM insurers lose the opportunity to protect their financial interests when insureds fail to provide proper Malmin notice. The burden is then shifted to the insured to demonstrate, by a preponderance of the evidence, that either the insurer had sufficient opportunity to intervene, despite the untimely notice, or the insurer's financial interests were not prejudiced by the resulting judgment. The Court of Appeals held that there was no evidence in this case to support the argument that American Family was not prejudiced by the late notice. Kluball failed to provide notice of the underlying claim until the eve of binding arbitration, despite having nearly three years to provide notice.

The Court also concluded Kluball failed to provide sufficient evidence to rebut the presumption of prejudice by the late Schmidt notice. The record confirms the Schmidt notice was not provided until after Kluball executed the release. According to Schmidt, if an insured fails to provide the UIM insurer with thirty days written notice of a pending settlement of the underlying suit, the insured creates a rebuttable presumption that the insurer has been prejudiced by its inability to protect its subrogation rights. The insureds must prove, by a preponderance of the evidence, the insurer was not prejudiced by the late notice.

Kluball attempted to submit an affidavit from her attorney as evidence that an investigation showed the at-fault driver had no meaningful assets for American Family to pursue for subrogation. The Court of Appeals held the attorney's affidavit alone was not enough evidence to rebut the prejudice created by the late Schmidt notice.

We will follow this case in the event of an appeal to the Minnesota Supreme Court. If you have any questions regarding this case or other automobile related issues, please contact any member of our Motor Vehicle Practice Group at (952) 831-6544. This letter, and other Minnesota Appellate Court opinion updates, are now available in .pdf form on the News and Resources page of our Firm's website: www.johnson-condon.com.

Sincerely,

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