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No. 63198-5-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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EDWARD S. JOHNSON,  
Appellant,  
vs.

METROPOLITAN PROPERTY AND CASUALTY  
INSURANCE COMPANY,  
Respondent.

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REPLY BRIEF OF APPELLANT

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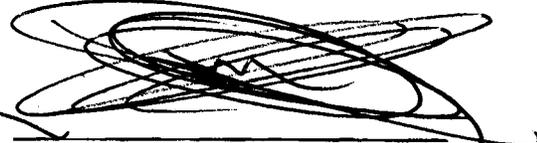
Signed at Quilcene, Washington,  
this 6th day of August, 2009.

Signed at Bellevue, Washington,  
this 6th day of August, 2009.



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GARY WILLIAMS,  
WSBA No. 9580  
Attorney for Appellant  
252 Blueberry Hill Drive  
Quilcene, WA 98376  
360.765.0729



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MARC L. SILVERMAN  
WSBA No. 12830  
Attorney for Appellant  
1621 114<sup>th</sup> Ave. SE. Ste 29  
Bellevue, WA 98004  
425.455.1570

## TABLE OF CONTENTS

|  |           |
|--|-----------|
| <b>I. INTRODUCTION</b>   | <b>5</b>  |
| <b>II. ARGUMENT</b>  | <b>5</b>  |
| <b>A. Undisputed Facts.</b>  | <b>5</b>  |
| <b>B. Rules of Insurance Policy Construction.</b>  | <b>6</b>  |
| <b>C. RCW 48.22.005(9) Mandates Coverage Because It Defines “Named Insured” as Anyone Named in the Declarations of the Policy.</b> | <b>8</b>  |
| <b>D. RCW 48.22.030(2) Requires Insurers to Provide UIM Coverage to “Persons Insured” in the Policy.</b>                           | <b>10</b> |
| <b>E. Ambiguities Should be Resolved Against Metlife</b>   | <b>15</b> |
| <b>F. Metlife’s Interpretation of Its Policy Violates RCW 48.30.300</b>  | <b>17</b> |
| <b>III. CONCLUSION</b>   | <b>18</b> |
| <b>IV. APPENDIX – RCW 48.22.030</b>  | <b>19</b> |

## TABLE OF AUTHORITIES

### Washington Cases

|   |    |
|---|----|
| <i>Britton v. Safeco</i> , 104 Wn.2d 518, 707 P.2d 125 (1985)   | 14 |
| <i>Butzberger v. Foster</i> , 151 Wn.2d 396, 89 P.3d 689 (2004)   | 14 |
| <i>Clements v. Travelers Indem. Co.</i> , 121 Wn.2d 243, 251<br>850 P.2d 1298 (1993)                                | 12 |
| <i>Diaz v. Nat'l Car Rental Sys., Inc.</i> , 143 Wn.2d 57, 61,<br>17 P.3d 603 (2001)                                | 8  |
| <i>Holthe v. Iskovitz</i> , 31 Wn.2d 533, 197 P.2d 999 (1948)   | 9  |
| <i>Farmers Insurance Co. v. Miller</i> , 87 Wn.2d 70, 549<br>P.2d 9 (1976)  | 13 |
| <i>Federated Am. Ins. Co. v. Raynes</i> , 88 Wn.2d 439, 444,<br>563 P.2d 815 (1977)                                 | 14 |
| <i>Finney v. Farmers Ins. Co.</i> , 92 Wn.2d 748, 752,<br>600 P.2d 1272 (1979)                                      | 14 |
| <i>Kyrkos v. State Farm</i> , 121 Wn.2d 669, 674,<br>852 P.2d 1078 (1993)   | 12 |
| <i>Nautilus, Inc. v. Transamerica Title Ins. Co.</i> , 13 Wn. App. 345,<br>534 P.2d 1388 (1975).                    | 7  |
| <i>Odessa v. Insurance Co. Of America</i> , 57 Wn. App. 893, 897,<br>791 P.2d 237, rev. den. 115 Wn. 2d 1007 (1990) | 6  |

|  |    |
|--|----|
| <i>Phil Schroeder, Inc. v. Royal Globe</i> , 99 Wn.2d 65, 68,<br>659 P.2d 509 (1983) | 7  |
| <i>State Farm v. Ruiz</i> , 134 Wn. 2d 713, 718, 952 P.2d 157 (1998)                 | 6  |
| <i>State Farm Gen. Ins. Co. v. Emerson</i> , 102 Wn.2d 477,<br>687 P.2d 1139 (1984)  | 18 |
| <i>Touchette v. Northwestern Mut. Ins.</i> , 80 Wn.2d 327,<br>494 P.2d 479 (1972).   | 7  |

#### **Other Jurisdictions**

|  |   |
|--|---|
| <i>Lehrhoff v. Aetna Casualty &amp; Surety Co.</i> , 638 A.2d 889<br>(N. J. App. 1994) | 8 |
| <i>Mallane v. Holyoke Mutual Ins. Co. in Salem</i> , 658 A.2d 18 736<br>(R.I. 1995)    | 8 |
| <i>Roelle v. Coffman</i> , 1997 WL 722775 (Ohio. App. 1997)                            | 8 |

#### **Statutes**

|                  |        |
|------------------|--------|
| RCW 48.22.005(9) | 8, 9   |
| RCW 48.22.030(2) | 10, 15 |
| RCW 48.30.300    | 17     |

## **I. INTRODUCTION**

Appellant Johnson submits this brief in reply to several arguments presented in Brief of Respondent Metlife. Some issues are not addressed here, not because we agree with Respondent, but because no reply arguments appear necessary.

## **II. ARGUMENT**

### **A. Undisputed Facts**

Very few facts are in dispute here. The parties don't dispute that Mr. Johnson was named on the policy before the accident. Although adding him cost less than buying him a separate policy, Metlife did charge additional premium to add Mr. Johnson to the policy. There is no dispute that Ms. Collins told Metlife she wanted Johnson insured with the same coverage she had, and that both Ms. Collins and Mr. Johnson were named on written communications from Metlife. Mr. Johnson was named on proof of insurance forms. The policy contained Underinsured Motorist ("UIM") coverage. There was no signed waiver or rejection of UIM coverage. CP 72.

After the accident, Mr. Johnson made Personal Injury Protection

(“PIP”) and UIM claims to Metlife. Metlife paid the PIP claim and denied the UIM claim. Metlife now claims, without evidence, that it paid the PIP claim in error. *Brief of Respondent 21*. In fact, Metlife denied Mr. Johnson’s UIM claim on April 7, 2006, CP 122, and concluded the PIP claim one year later, well after denying the UIM claim. CP 124. Not one piece of paper on file even suggests the PIP claim was paid by accident. No evidence suggests that Mr. Johnson was not covered for PIP. Instead, Metlife paid the Johnson PIP claim because the PIP adjuster apparently considered him a named insured on the policy. Metlife provided Mr. Johnson with proof of insurance forms because it covered him for liability. No other inferences make sense.

**B. Rules of Insurance Policy Construction.**

The parties disagree on one important aspect of policy construction. Metlife says policy language which grants coverage is not subject to the heightened judicial scrutiny applied to exclusions. That is not the law in Washington. Inclusionary clauses, which grant or expand coverage, must be liberally construed to grant coverage wherever possible. *Odessa v. Insurance Co. Of America*, 57 Wn. App. 893, 897, 791 P.2d 237, *rev. den.* 115 Wn. 2d 1007 (1990); *State Farm v. Ruiz*, 134 Wn. 2d

713, 718, 952 P.2d 157 (1998). This is true because “.. the purpose of insurance is to insure, and that construction should be taken which will render the contract operative, rather than inoperative...” *Phil Schroeder, Inc. v. Royal Globe*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983). In *Phil Schroeder*, the Court construed the word “insured” narrowly, because doing so led to coverage. When the opposite is true – when a broad construction of “insured” favors coverage – that, too, would be proper. The purpose of insurance is to insure.

One court said, “A construction which contradicts the general purpose of the contract or results in a hardship or absurdity is presumed to be unintended by the parties.” *Nautilus, Inc. v. Transamerica Title Ins. Co.*, 13 Wn. App. 345, 534 P.2d 1388 (1975). Here, the parties intended Mr. Johnson to have the same coverage as Ms. Collins. He was added, named on the policy. Now Metlife won’t pay, saying Mr. Johnson has no more coverage than a neighbor.

These rules of construction apply to all kinds of insurance, but have special force in the UIM arena, because UIM is statutory, a reflection of the public policy of Washington. The UIM statute becomes a part of and is read into the insurance policy. *Touchette v. Northwestern Mut. Ins.*, 80

Wn.2d 327, 494 P.2d 479 (1972). Any policy term or clause which contradicts the statute is void. The UIM statute (and thus the UIM policy) is "... liberally construed in order to provide broad protection against financially irresponsible motorists." *Diaz v. Nat'l Car Rental Sys., Inc.*, 143 Wn.2d 57, 61, 17 P.3d 603 (2001).

**C. RCW 48.22.005(9) Mandates Coverage Because It Defines "Named Insured" as Anyone Named in the Declarations of the Policy.**

If Mr. Johnson is a named insured, he is covered. There is no dispute about that. Metlife cites cases from many jurisdictions (none from Washington) which conclude that persons in similar situations were not considered named insureds. Many of these cases find no ambiguity in the term "named insured" despite the lack of a definition in the policy.<sup>1</sup> These cases (on both sides of the issue) are no help – they are based on differing policy language, and, more importantly, upon differing state law.

Washington law clearly defines "named insured" so foreign cases are not persuasive authority. States vary in their approaches to insurance policy interpretation and construction. This is particularly true in UIM

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1. Cases holding for coverage include *Mallane v. Holyoke Mutual Ins. Co. in Salem*, 658 A.2d 18 736 (R.I. 1995); *Roelle v. Coffman*, 1997 WL 722775 (Ohio. App. 1997); *Lehrhoff v. Aetna Casualty & Surety Co.*, 1. 271 N.J. Super. 340, 638 A.2d 889 (App. Div. 1994).

coverage which is typically based on statute rather than the state common law of contracts. Cases from other states are no help<sup>2</sup>.

The out of state cases cited by Metlife don't address Washington law, and they do not reference a statute which defines "named insured."

That is a crucial distinction because in Washington,

(9) "Named insured" means the individual named in the declarations of the policy and includes his or her spouse if a resident of the same household.

RCW 48.22.005(9). This statute is decisive. We do not need to search through dictionaries or debate semantics to define "named insured." A named insured is named in the declarations. Period. Since Mr. Johnson is named in the declarations, he is a named insured. Because he's a named insured, he has UIM coverage.

Metlife argues that the statute does not expressly say that insurers may not ignore it. *Brief of Respondent* 19. This argument refutes itself. What does Metlife want, a statement by the legislature that they really mean it?

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2. Cases decided before UIM coverage existed add little. See irrelevant discussion of *Holthe v. Iskowitz*, 31 Wn.2d 533, 197 P.2d 999 (1948), *Brief of Respondent* 16.

**D. RCW 48.22.030(2) Requires Insurers to Provide UIM Coverage to “Persons Insured” Under the Policy.**

Indeed, Mr. Johnson need not be a named insured to find UIM coverage. According to RCW 48.22.030(2), he must only be a person insured under the policy. The statute is clear, but Metlife tries to escape coverage by essentially changing the language of the statute from “persons insured” to “policyholder.” *Brief of Respondent 23*. That is not what the statute says.

(2) No ... policy insuring against loss resulting from liability ... shall be issued ... unless coverage is provided ... for the protection of **persons insured thereunder** who are legally entitled to recover damages from owners or operators of underinsured motor vehicles...

RCW 48.22.030(2). (Emphasis added). The complete statute is attached as Appendix A.

If the statute said “policyholder” we could argue about the meaning of “policyholder.” It does not. It says “persons insured thereunder.” If Mr. Johnson is a person insured under the Metlife policy, he has UIM coverage unless it was rejected in writing. It is undisputed that nobody rejected it. *Brief of Respondent 24*.

Notice how the Metlife policy fails to measure up to the requirements of the statute. The UIM insuring agreement says,

We will pay damages for *bodily injury* sustained by:

1. **you** or a **relative**...
2. Any other person, ... while **occupying a covered automobile**...

CP 106, Policy, UIM Endorsement p, 2 of 4. The statute says “persons insured thereunder” must have UIM coverage. Metlife may not change the statutory requirement by drafting its policy to read “...you or a relative...any other person ... while occupying a covered automobile.”

Metlife argues that its policy interpretation does not violate public policy (the UIM statute) because insured persons are defined the same in the primary liability and UIM sections of the policy. *Brief of Respondent* 25. Carrying that argument one step further means Metlife can avoid the UIM statute altogether by drafting away liability coverage. Not only that, but the insuring agreements do differ between UIM and Liability coverage..

Under Liability we find:

**We will pay damages for *bodily injury* and *property damage* to others for which the law holds an *insured* responsible because of an accident which results from ... use of a ... *non-owned automobile*. “**

CP 84, Policy, p. 3 of 24<sup>3</sup>. So, “an **insured**” is covered for liability. Now

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3. Metlife then includes a definition of “insured” which impermissibly takes us right back to “**you**.” The only way to align this policy with the statute is

see the insuring agreement in the UIM endorsement, bearing in mind that RCW 48.22.030 requires the UIM coverage to be equal to the liability coverage:

**We will pay damages for *bodily injury* sustained by:**

1. **you** or a **relative**...
2. Any other person, ... while **occupying a covered automobile**...

CP 106, Policy, UIM Endorsement p, 2 of 4. So “an **insured**” is covered for liability, but only “**you**” is covered for UIM, unless “**occupying a covered automobile.**” This violates the UIM statute because the coverage there is less than under liability unless the policy is construed to include Mr. Johnson as “**you.**”

Next, Metlife argues it did provide UIM coverage to Mr. Johnson, just not while driving a rental car. Only Ms. Collins gets that coverage. *Brief of Respondent* 24. This argument misses the fact that UIM coverage is statutory, and the coverage must comply with the statute. Washington has a strong public policy to protect people injured by underinsured motorists. *Kyrkos v. State Farm*, 121 Wn.2d 669, 674, 852 P.2d 1078 (1993). In *Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 251 850 P.2d

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to include Mr. Johnson in “**you.**”

1298 (1993), the Court said:

. . . This interpretation of the legislative purpose has generally resulted in this court's voiding any provision in an insurance policy which is inconsistent with the statute, which is not authorized by the statute, or which thwarts the broad purpose of the statute . . .

Nothing in the UIM statute authorizes Metlife to provide partial coverage to Mr. Johnson and full coverage to Ms. Collins. Metlife cites *Farmers Insurance Co. v. Miller*, 87 Wn.2d 70, 549 P.2d 9 (1976), as a limitation on the reach of the statute. *Brief of Respondent 25*. That case, however, did not change the rule that the UIM coverage must be as broad as the liability coverage.

Although Metlife now says Mr. Johnson was covered for UIM -- he was just not covered for driving a rental car -- Metlife earlier claimed Mr. Johnson had no coverage at all. CP 187. So, we learn that Metlife will say anything to avoid paying a claim. Johnson has coverage; Johnson doesn't have coverage; PIP is covered; PIP is not covered.

Fortunately we have simple facts. Mr. Johnson was added to the policy and became a "person insured thereunder." That much is obvious. Once he had that status, he is absolutely required to have UIM coverage as broad as the liability coverage. As our Court said,

We have held that once a person is determined to be an "insured" under the insurance policy, that person cannot be excluded from UIM coverage. *Federated Am. Ins. Co. v. Raynes*, 88 Wn.2d 439, 444, 563 P.2d 815 (1977). *Butzberger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004).

*Britton v. Safeco*, 104 Wn.2d 518, 707 P.2d 125 (1985). Edward Johnson was an insured under the Metlife policy; he cannot be excluded from UIM coverage. The statute does not contemplate a piecemeal whittling away of liability for injuries caused by uninsured motorists. *Finney v. Farmers Ins. Co.*, 92 Wn.2d 748, 752, 600 P.2d 1272 (1979).

Metlife now argues that Mr. Johnson did receive UIM coverage but only when occupying a "covered auto." *Brief of Respondent 7*. This is ludicrous. *Anyone* driving a "covered auto" with permission has coverage. Metlife is saying that it can take premium dollars, name Johnson on the policy, issue proof of insurance cards with his name on them, and provide no coverage. That is just not possible.

The UIM statute allows few UIM exclusions or exceptions. Driving a rental car is not one of them. Insurers must provide UIM coverage to persons insured

. . . except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and

which is not insured under the liability coverage of the policy.

RCW 48.22.030(2). The legislature knows how to spell rental car, and certainly could have inserted an exception for driving a rental car if it intended to do so. Nothing in RCW 48.22.030 authorizes the limitation imposed by Metlife in this case.

**E. Ambiguities Should be Resolved Against Metlife.**

Metlife says, “[T]he word “listed” is not used in the policy in any relevant provision,” so it may not be considered ambiguous. *Brief of Respondent 21*. This is a little difficult to follow, given that the word “listed” appears on page 2 of the declarations immediately under Mr. Johnson’s name. CP 78 (Metlife included page 1, but not page 2 in its brief.) That, presumably, is why Metlife used the word listed in its denial letter, saying Mr. Johnson was listed rather than named, and thus had no coverage. The ambiguity, of course, comes from the similarity of the two words and where they are used. Perhaps Metlife is correct. Perhaps listed and named have different meanings here. Or perhaps they do not. Either meaning is reasonable.

If the declaration page said “named above” instead of “listed

above” would it be clear that Johnson was a named insured, and thus covered? Let’s return to that question after looking closely at another ambiguity.

Metlife argues that capitalization has no effect on meaning in this policy. *Brief of Respondent* 19. Metlife says “Named Insured” has the same meaning as “named insured.” Johnson says the meanings are different, that “Named Insured” is Carol Collins and “named insured” is Carol Collins and Edward Johnson. Either meaning is reasonable.<sup>4</sup>

Because these terms have two reasonable meanings, the Court should first look at the extrinsic evidence. The only extrinsic evidence on this issue is that Collins ordered coverage which was the same for both insureds. She communicated that to Metlife before deciding to add him to the policy. The parties, therefore, must have intended equal coverage for Johnson. The ambiguity is thus resolved in Johnson’s favor.

If extrinsic evidence doesn’t resolve the ambiguity, we choose the reasonable meaning which most favors coverage. Doing so makes Johnson a “named insured” and gives him full UIM coverage. The same analysis works for the “named” and “listed” ambiguity.

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4. Whether one meaning is more reasonable than the other is not a factor.

This policy absolutely fails to give anyone notice of what is a “Household Driver.” Would not a reasonable person see his name on the declarations page of this policy and conclude he was covered? The term “Household Driver” is not defined in the policy; the policy provides no warning of limited coverage. The term “household driver” is ambiguous. It could mean someone who has coverage or someone who does not.

Finally, the fact that Metlife paid the PIP claim, even after denying the UIM claim, indicates that someone at Metlife concluded that Mr. Johnson was “you.” Why did this happen? It happened because the policy is ambiguous. If a Metlife PIP adjuster thinks Mr. Johnson is covered, why should Mr. Johnson and Carol Collins understand the policy any differently?

**F. Metlife’s Interpretation of Its Policy Violates RCW 48.30.300 Because It Discriminates Against Unmarried Persons**

Metlife argues that its interpretation of the UIM insuring agreement is not discriminatory against unmarried persons because it discriminates instead against anyone who is not a resident relative. *Brief of Respondent* 30. That is really not the point.

The policy (as interpreted by Metlife) discriminates against Mr. Johnson because he is single, and for no other reason. It also discriminates against a whole world of individuals and entities who are not covered by the policy. It discriminates against Mr. Silverman, Mr. Williams, our colleagues and friends. We are not covered by this policy, but for lawful reasons. It is permissible to discriminate in some cases, but not in others.

Discrimination on the basis of marital status is unlawful, unless the insurance company can show bona fide statistical differences in risk and exposure. Single persons are a protected class under RCW 48.30.300.

In *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984), a family exclusion was not found to be discriminatory, even though the spouse was one of those excluded. Here, the definition of “you,” says Metlife, does not apply to Mr. Johnson simply because he and Ms. Collins were not married, and for no other reason. Discrimination solely for that reason is unlawful.

### **III. CONCLUSION**

This Court should reverse the trial court’s order on cross motions for summary judgment, should declare coverage, and remand the case back to the trial court for resolution of the remaining issues.

## APPENDIX – THE UIM STATUTE

*48.22.030 Underinsured, hit-and-run, phantom vehicle coverage to be provided -- Purpose--Definitions -- Exceptions -- Conditions -- Deductibles -- Information on motorcycle or motor-driven cycle coverage -- Intended victims.*

(1) "Underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance, or use of which either no bodily injury or property damage liability bond or insurance policy applies at the time of an accident, or with respect to which the sum of the limits of liability under all bodily injury or property damage liability bonds and insurance policies applicable to a covered person after an accident is less than the applicable damages which the covered person is legally entitled to recover.

(2) No new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage, resulting therefrom, except while operating or occupying a motorcycle or motor-driven cycle, and except while operating or occupying a motor vehicle owned or available for the regular use by the named insured or any family member, and which is not insured under the liability coverage of the policy. The coverage required to be offered under this chapter is not applicable to general liability policies, commonly known as umbrella policies, or other policies which apply only as excess to the insurance directly applicable to the vehicle insured.

(3) Except as to property damage, coverage required under subsection (2) of this section shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage as

provided in subsection (4) of this section. Coverage for property damage need only be issued in conjunction with coverage for bodily injury or death. Property damage coverage required under subsection (2) of this section shall mean physical damage to the insured motor vehicle unless the policy specifically provides coverage for the contents thereof or other forms of property damage.

(4) A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage, and the requirements of subsections (2) and (3) of this section shall not apply. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing. The requirement of a written rejection under this subsection shall apply only to the original issuance of policies issued after July 24, 1983, and not to any renewal or replacement policy. When a named insured or spouse chooses a property damage coverage that is less than the insured's third party liability coverage for property damage, a written rejection is not required.

(5) The limit of liability under the policy coverage may be defined as the maximum limits of liability for all damages resulting from any one accident regardless of the number of covered persons, claims made, or vehicles or premiums shown on the policy, or premiums paid, or vehicles involved in an accident.

(6) The policy may provide that if an injured person has other similar insurance available to him under other policies, the total limits of liability of all coverages shall not exceed the higher of the applicable limits of the respective coverages.

(7)(a) The policy may provide for a deductible of not more than three hundred dollars for payment for property damage when the damage is caused by a hit-and-run driver or a phantom vehicle.

(b) In all other cases of underinsured property damage coverage, the policy may provide for a deductible of not more than one hundred dollars.

(8) For the purposes of this chapter, a "phantom vehicle" shall mean a motor vehicle which causes bodily injury, death, or property damage to an insured and has no physical contact with the insured or the vehicle which the insured is occupying at the time of the accident if:

(a) The facts of the accident can be corroborated by competent evidence other than the testimony of the insured or any person having an underinsured motorist claim resulting from the accident; and

(b) The accident has been reported to the appropriate law enforcement agency within seventy-two hours of the accident.

(9) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide information to prospective insureds about the coverage.

(10) An insurer who elects to write motorcycle or motor-driven cycle insurance in this state must provide an opportunity for named insureds, who have purchased liability coverage for a motorcycle or motor-driven cycle, to reject underinsured coverage for that motorcycle or motor-driven cycle in writing.

(11) If the covered person seeking underinsured motorist coverage under this section was the intended victim of the tortfeasor, the incident must be reported to the appropriate law enforcement agency and the covered person must cooperate with any related law enforcement investigation.

(12) The purpose of this section is to protect innocent victims of motorists of underinsured motor vehicles. Covered persons are entitled to

coverage without regard to whether an incident was intentionally caused. A person is not entitled to coverage if the insurer can demonstrate that the covered person intended to cause the damage for which underinsured motorists' coverage is sought. As used in this section, and in the section of policies providing the underinsured motorist coverage described in this section, "accident" means an occurrence that is unexpected and unintended from the standpoint of the covered person.

(13) "Underinsured coverage," for the purposes of this section, means coverage for "underinsured motor vehicles," as defined in subsection (1) of this section.

[2006 c 187 § 1; 2006 c 110 § 1; 2006 c 25 § 17; 2004 c 90 § 1; 1985 c 328 § 1; 1983 c 182 § 1; 1981 c 150 § 1; 1980 c 117 § 1; 1967 c 150 § 27.]