

## Motorist may seek UM benefits despite settlement

Other carrier's policy limits not exhausted

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A driver injured in a car accident may seek underinsured motorist benefits from his insurance company, even where he had earlier settled with the insurance company of the other driver who caused the collision for less than that policy's limit, the Appeals Court has ruled.



ALFRED E. SAGGESE JR.  
Plaintiffs' lawyer:  
a case of first  
impression

See opinion digest  
for *Pritzky, et al. v. Safety Insurance Company* on  
page 26.

The injured driver's insurance company argued that by settling with the other driver's insurance company, the plaintiffs — the injured driver and his passengers — forfeited any claim they might have had for underinsured motorist coverage.

But the Appeals Court disagreed, reversing a trial judge's dismissal of the plaintiffs' application for an order directing the defendant to arbitrate the claim.

Judge Janet L. Sanders, writing for the court, ex-  
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# Motorist may seek UM benefits despite settlement

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plained that by settling with the insurance company of the driver responsible for the accident for \$2,000 less than the \$40,000 policy limit, "the plaintiffs have forfeited at most only that \$2,000. The settlement could not prejudice [the defendant], whose only concern was with damages in excess of \$40,000."

The five-page decision is *Pritzky, et al. v. Safety Insurance Company*, Lawyers Weekly No. 11-210-05. The full text of the ruling can be found on our website, www.masslawyersweekly.com.

### The issue is damages

Boston attorney Alfred E. Saggese Jr., who represented the plaintiffs, said he believes the decision represents a case of first impression.

"It's a victory for injured parties who have policies which they paid for and never get the opportunity to exercise," the attorney suggested.

"Saggese said that the general impression among lawyers in Massachusetts has been that an injured party has to exhaust the limits of an underlying policy before seeking to obtain benefits from an underinsured policy.

"Every lawyer told me I was going to lose, but I said the issue here is damages, and the only way to determine what they are is to go to arbitration," explained Saggese.

Darrell Mook of Boston represented the de-

fendant, but was unavailable for comment prior to deadline.

### Accident happens

The plaintiffs, Robert Pritzky, the insured driver, and his two passengers, Susan Capone and Robert Kenney, were injured when a col-

two plaintiffs settled with Dimeo's insurance company for \$38,000, even though Dimeo's policy limit was \$40,000.

Thereafter, Pritzky approached Safety seeking to arbitrate a claim for underinsured motorist benefits. His policy had a \$100,000 limit per person and a \$300,000 limit per accident.

**CASE:** *Pritzky, et al. v. Safety Insurance Company*, Lawyers Weekly No. 11-210-05

**COURT:** Appeals Court

**ISSUE:** Does accepting a settlement for less than the policy limit from the insurance company of a driver responsible for an accident preclude an injured driver from pursuing underinsured motorist benefits from his own insurance company?

**DECISION:** No, not if injuries exceed the settlement amount or where damages have not yet been established

lision occurred between Pritzky's car and one driven by Dennis Dimeo.

It was determined that Dimeo was at fault for the accident.

After seeking and receiving approval from his own insurance company — the defendant, Safety Insurance Co. — Pritzky and the other

Safety refused to do so, believing the plaintiffs had forfeited any claim for underinsured coverage by settling with the other driver's insurance company for less than the policy limit.

For support of its position, the defendant relied on the 1994 Supreme Judicial Court opinion in *Gleed v. Aetna*, where the court

held that an insurance company is not required to pay underinsured motorist benefits until the policy holder's damages exceed the policy limits of the person responsible for the injuries.

In light of *Gleed*, the trial judge dismissed the plaintiffs' application for an order directing the defendant to arbitrate the underinsured motorist claim, and the plaintiffs appealed.

### Distinguishing 'Gleed'

Sanders distinguished the facts in *Gleed* from those of the current case, and reversed the trial judge's ruling.

She explained that, in *Gleed*, the reason the plaintiff didn't have an underinsured motorist claim was because his bodily injury damages were more than fully covered by the policies of the driver responsible for the accident, "not because the settlement failed to exhaust the bodily injury liability limits of the responsible persons; policies."

And unlike *Gleed*, where an arbitrator had already determined the plaintiff's damages, "there has been no determination here of actual damages which, for purposes of decision, we must assume will exceed \$40,000," Sanders wrote.

As a result, Sanders vacated the previous judgment and entered a new one allowing the plaintiffs to proceed to arbitration. **MAV**