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May v. National Union Fire Insurance Co.: Know Your Liability Limits

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NOTE

MAY v. NATIONAL UNION FIRE INSURANCE CO.: “KNOW YOUR LIABILITY LIMITS”

I. INTRODUCTION

Uninsured motorist (“UM”) coverage—what is it and what is its purpose? UM coverage is intended to protect the injured in the event he or she is involved in an accident with an uninsured driver. State legislatures addressed the problem of uninsured motorists by enacting statutes requiring insurers to offer insureds UM coverage. The Supreme Court of Oklahoma stated that “the intent of the uninsured motorist legislation is to afford to one insured under his own liability insurance policy the same protection in the event he is injured by an uninsured motorist as he would have had if the negligent motorist had carried liability insurance.”¹

The UM statute in Oklahoma is title 36, section 3636.² The statute ad-

1. May v. National Union Fire Ins. Co., 918 P.2d 43, 46 (Okla. 1996).

2. OKLA. STAT. tit. 36, § 3636 (Supp. 1996) states:

(A). No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be issued, delivered, renewed, or extended in this state with respect to a motor vehicle registered or principally garaged in this state unless the policy includes the coverage described in subsection B of this section. (B). The policy referred to in subsection A of this section shall provide coverage therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom. Coverage shall be not less than the amounts or limits prescribed for bodily injury or death for a policy meeting the requirements of Section 7-204 of Title 47 of the Oklahoma Statutes; . . . provided, however, that increased limits of liability shall be offered and purchased if desired, not to exceed the limits provided in the policy of bodily injury liability of the insured. The uninsured motorist coverage shall be upon a form approved by the Insurance Commissioner . . . (F). A named insured or applicant shall have the right to reject uninsured motorist coverage in writing, and except that unless a named insured or applicant requests such coverage in writing, such coverage need not be provided in or supplemental to any renewal, reinstatement, substitute, amended or replacement policy where a named insured or applicant had rejected the coverage in connection with a policy previously issued to him by the same insurer. (G). Notwithstanding the provisions of this section, the following are the only instances in which a new form affecting uninsured motorist coverage shall be required: 1. When an insurer is notified of a change in or an additional named insured; 2. When there is an additional vehicle that is not a replacement vehicle; provided, a new form shall not be required for the addition, substitution or deletion of a vehicle from a commercial automobile liability policy covering a fleet of five (5) or more vehicles; or 3. When the amount of bodily injury liability coverage is amended. Provided, any change in premium alone shall not require the issuance of a new form. . . . (H). The offer of the coverage required by subsection B of this section shall be in the following form which shall be filed with and approved by the Insurance Commissioner. The form shall be provided to the proposed insured in writing separately from the application and shall read as follows:

OKLAHOMA UNINSURED MOTORIST COVERAGE LAW

Oklahoma law gives you the right to buy Uninsured Motorist coverage in the same amount as your bodily injury liability coverage. THE LAW REQUIRES US TO ADVISE YOU OF THIS VALU-

dresses several issues relating to UM coverage. For example, section 3636(A) requires that UM coverage be offered with the issuance of each insurance policy.³ The statute does give the insured the right to, in writing, reject the UM coverage.⁴ However, the Supreme Court of Oklahoma stated:

In . . . § 3636(F), the Legislature has set forth a narrow pronouncement which relieves insurers from the burden of procuring a written rejection of uninsured motorist coverage whenever an existing policy is renewed. This pronouncement, however, must be viewed in the context of the explicitly announced legislative policy set forth at . . . § 3636(A) which is that uninsured motorist coverage *must* be offered with each policy of insurance. To give full effect to the overall policy of section 3636 the provision of subsection (F) must be viewed as strictly limited to true renewals of existing insurance policies, that is, situations where such renewals are made without effecting a material change or departure from the provisions of the original policy.⁵

Thus, the Supreme Court of Oklahoma held that an insurer's "failure to offer uninsured motorist coverage [when a new policy is issued or when there is a material change in an existing policy, along with a] failure to obtain a written rejection required by . . . § 3636(F), result[s] in the inclusion of uninsured motorist coverage as part of the policy by operation of law."⁶

Once it has been determined that UM coverage will be imputed into the policy, the question arises as to what the UM limits are. The Supreme Court of Oklahoma addressed this issue in *May v. National Union Fire Insurance Co.*⁷ Imputing the statutory minimum of liability coverage⁸ as the limit for the imputed UM policy coverage—as the court held in *May*—has positive implications. Moreover, it is logical and just according to the rationale behind UM coverage and the language of section 3636.

ABLE RIGHT FOR THE PROTECTION OF YOU, MEMBERS OF YOUR FAMILY, AND OTHER PEOPLE WHO MAY BE HURT WHILE RIDING IN YOUR INSURED VEHICLE. YOU SHOULD SERIOUSLY CONSIDER BUYING THIS COVERAGE IN THE SAME AMOUNT AS YOUR LIABILITY INSURANCE COVERAGE LIMIT THE COST OF THIS COVERAGE IS SMALL COMPARED WITH THE BENEFITS!

3. See *id.* § 3636(A).

4. See *id.* § 3636(F).

5. *Beauchamp v. Southwestern Nat'l Ins. Co.*, 746 P.2d 673, 676 (Okla. 1987).

6. *Id.*

7. 918 P.2d 43 (Okla. 1996). The United States Court of Appeals for the Tenth Circuit certified a question of state law to the Supreme Court of Oklahoma pursuant to the Oklahoma Uniform Certification of Questions of State Law Act, OKLA. STAT. tit. 20, §§ 1601-1611 (1991), asking the Court to address the issue. See *id.* at 43-44. The posed question was: "Given that uninsured motorist coverage is imputed to the policy at issue as a matter of law according to the facts presented below, what are the limits of the imputed coverage under Okla. Stat. tit. 36 § 3636 as amended September 1990?" *Id.* at 44.

8. Oklahoma law mandates that the minimum liability limit is \$10,000.00 per person and \$20,000.00 per occurrence. See OKLA. STAT. tit. 47, §7-204 (1991).

II. STATEMENT OF THE CASE

May v. National Union Fire Insurance Co. arose from a car accident that occurred in September of 1991.⁹ “[A]n automobile operated by an intoxicated driver¹⁰ struck an automobile occupied by Timothy May and Jesse Worsham, killing May and seriously injuring Worsham.”¹¹ May and Worsham were hit by the drunk driver while working for Gold Bond Building Products, acting within the scope of their employment, and driving a company car.¹² The supreme court stated that Gold Bond Building Products was legally the same entity as National Gypsum.¹³ Therefore, the insurance policy issued to National Gypsum is the policy at issue in the case.¹⁴

In January 1988, National Union Fire Insurance Company of Pittsburgh, Pennsylvania (“National Union”) issued a business automobile liability policy¹⁵ to National Gypsum, and in March of that year, a valid written rejection of UM coverage was signed by National Gypsum’s Director of Risk Insurance.¹⁶ The “rejection corresponded with National Gypsum’s and National Union’s intent throughout the time period relevant to this case that the policy not include UM coverage.”¹⁷

National Union renewed the policy yearly to National Gypsum.¹⁸ January 1, 1989, National Gypsum lowered their liability limits from \$5,000,000.00 to \$3,000,000.00 when the policy was reissued.¹⁹ The supreme court found this change to be a “material change in or departure from the provisions of the [original] policy.”²⁰ Once there is a material change in the original policy, the

9. See *May*, 918 P.2d at 44.

10. “The intoxicated driver carried liability insurance at the statutory minimum under Oklahoma Law—\$10,000.00 per person and \$20,000.00 per occurrence. The Worshams’ and Mays’ losses exceeded that coverage, and that policy is not at issue in this case.” *Id.* at 44 n.1.

11. *Id.* at 44.

12. See *id.*

13. See *id.*

14. According to the unpublished opinion of the United States Court of Appeals for the Tenth Circuit in *May v. National Union Fire Insurance Co.*,

[t]he policy limited payment under the uninsured motorist coverage as follows:

LIMITS OF PAYMENT

AMOUNTS PAYABLE OF UNINSURED MOTORISTS LOSSES

Our obligation to pay uninsured motorists losses is limited to the amounts per person and per occurrence stated in the attached Declarations. The following conditions apply to these limits: 1. Bodily injury limits shown for any one person, multiplied by the number of premiums shown, are for all legal damages, including care or loss of services, claimed by anyone for bodily injury to one person as a result of one occurrence. Subject to this limit for any one person, the total limit of our liability shown for each occurrence, multiplied by the number of premiums shown, is for all damages, including care or loss of services, due to bodily injury to two or more persons in any one occurrence.

May v. National Union Fire Ins. Co., No. 93-5220, 1994 WL 584577, at *1 (10th Cir. Oct. 25, 1994).

15. The liability policy’s coverage at this date was \$5,000,000.00. See *May*, 918 P.2d at 44.

16. See *id.*

17. *Id.*

18. See *id.*

19. *Id.* The policy’s liability coverage remained at \$3,000,000.00 through the date of the automobile accident involving May and Worsham. See *id.*

20. *Id.* See *Beauchamp v. Southwestern Nat’l Ins. Co.*, 746 P.2d 673, 676 (Okla. 1987); see also OKLA.

insurer must offer the insured a new form, regarding uninsured motorist coverage, to be signed. In Oklahoma a material change occurs when the amount of bodily injury liability coverage is amended.²¹ The relevant Oklahoma statute lists three instances, including a change in the amount of bodily injury coverage, where the insurer is required to offer the insured a new form.²² The supreme court stated that "National Union did not re-offer National Gypsum UM coverage, nor did it obtain a written rejection from National Gypsum declining such coverage. Therefore, by operation of Oklahoma law, UM coverage was imputed to the policy as of January 1, 1989."²³

The Mays and Worshams, as beneficiaries of the insurance policy, sued arguing that the amount of UM coverage imputed into the policy should equal the amount of the policy's liability limits, \$3,000,000.00.²⁴ National Union's position was that the imputed UM limits should equal the Oklahoma statutory minimum for UM coverage²⁵—\$10,000.00 per person and \$20,000.00 per accident.²⁶

III. LAW PRIOR TO THE CASE

A. Statutory Law

The Supreme Court of Oklahoma in *May* determined that the 1990 amended version of section 3636²⁷ applied in the case.²⁸ "In 1990, the Oklahoma

STAT. tit. 36, § 3636(G)(3) (Supp. 1996).

21. See OKLA. STAT. tit. 36, § 3636(G)(3) (Supp. 1996).

22. Section 3636(G) states:

Notwithstanding the provisions of this section, the following are the only instances in which a new form affecting uninsured motorist coverage shall be required: 1. When an insurer is notified of a change in or an addition of a named insured; 2. When there is an additional vehicle that is not a replacement vehicle; provided, a new form shall not be required for the addition, substitution or deletion of a vehicle from a commercial automobile liability policy covering a fleet of five (5) or more vehicles; or 3. When the amount of bodily injury liability coverage is amended. Provided, any change in premium alone shall not require the issuance of a new form.

Id.

23. See *May*, 918 P.2d at 44. "At no time after the January 1989 renewal and up through the 1991 accident did National Union offer National Gypsum UM coverage or obtain from National Gypsum a rejection of UM coverage. The policy was last renewed by National Gypsum on January 1, 1991." *Id.*

24. See *id.* at 45.

25. See *id.* "The district court ruled in favor of National Union. The case [was then appealed] to the United States Court of Appeals for the Tenth Circuit." *Id.*

26. See OKLA. STAT. tit. 47, § 7-204 (1991).

27. Prior to the 1990 changes, the Supreme Court of Oklahoma interpreted the statute as follows: [T]he intent of the uninsured motorist legislation is to afford to one insured under his own liability insurance policy the same protection in the event he is injured by an uninsured motorist as he would have had if the negligent motorist had carried liability insurance. In subsection (B) of section 3636, it is provided that the uninsured motorist coverage provided as a part of a liability policy shall not be less than that required under . . . § 7-204, with the insured to have the option to purchase increased limits of liability not to exceed the limits provided for bodily injury liability under the policy. Section 7-204 sets the minimum limits of liability coverage required to be carried by all owners of vehicles registered in the State of Oklahoma. The purpose of the uninsured motorist provision, when viewed in light of the requirement that it provide minimum standards of protection, is that it place the insured in the same position he would have been in if the negligent uninsured motorist had complied with Oklahoma laws concerning financial responsibility.

Moser v. Liberty Mut. Ins. Co., 731 P.2d 406, 408 (Okla. 1986) (footnotes omitted).

28. See *May*, 918 P.2d at 45. The Supreme Court of Oklahoma has held that "[r]ights of recovery under

Legislature amended [section 3636]. Neither the pre-1990 version nor the amended version of § 3636 prescrib[ed] how much coverage should be imputed in the event an insurer does not satisfy the statute's requirements."²⁹ The 1990 amendments to § 3636 added subsections (G), (H), and (I),³⁰ but subsection (H) is the relevant subsection in this case and is relied upon by the plaintiffs for their position.³¹ The relevant parts of subsection (H) state:

The offer of the coverage required by subsection B of this section shall be in the following form which shall be filed with and approved by the Insurance Commissioner. The form shall be provided to the proposed insured in writing separately from the application and shall read as follows:

OKLAHOMA UNINSURED MOTORIST COVERAGE LAW

Oklahoma law gives you the right to buy Uninsured Motorist coverage in the same amount as your bodily injury liability coverage. THE LAW REQUIRES US TO ADVISE YOU OF THIS VALUABLE RIGHT FOR THE PROTECTION OF YOU. . . YOU SHOULD SERIOUSLY CONSIDER BUYING THIS COVERAGE IN THE SAME AMOUNT AS YOUR LIABILITY INSURANCE COVERAGE LIMIT . . . THE COST OF THIS COVERAGE IS SMALL COMPARED WITH THE BENEFITS!³²

The language in subsection (H) is strong and mandates specific action on behalf of the insurer. The statute mandates the use of the form.

Prior to *May*, Oklahoma Statute title 47, § 7-204³³ established that the statutory minimum of liability coverage would equal \$10,000.00 per person and \$20,000.00 per accident.³⁴ Currently, this amount remains as the minimum liability coverage required by law.³⁵

the Uninsured Motorist Act are governed by the statute in effect on the date of issuance or last renewal of the policy against which an uninsured motorist claim is made." *Cofer v. Morton*, 784 P.2d 67, 70 (Okla. 1989). *Accord* *McSorley v. Hertz Corp.*, 885 P.2d 1343, 1344 n.1 (Okla. 1994); *Uptegraft v. Home Ins. Co.*, 662 P.2d 681, 684 n.2 (Okla. 1983). In the case at hand,

National Gypsum's policy was issued in 1988 and was renewed annually. The last renewal prior to the September 1991 accident occurred on January 1, 1991. [The new] § 3636, which embraced the 1990 amendments, took effect on September 1, 1990 . . . UM coverage was imputed to National Gypsum's policy before the 1990 changes to § 3636. However, the plaintiffs' rights of recovery are governed by the statute in effect on the date of the last renewal of that policy. The version of § 3636 in effect on the date of the policy's last renewal on January 1, 1991, was [the new] § 3636. Thus, the amount of UM benefits the plaintiffs may recover under the policy is governed by the amended version of the statute.

May, 918 P.2d at 45.

29. *Id.* (citation omitted); see Act of May 30, 1990, H.B. No. 2052, ch. 297, § 4, 1990 Okla. Sess. Law Serv. (West) (effective Sept. 1, 1990).

30. The amendments of 1990 to § 3636 also made minor adjustments to subsections (B) and (F), but those changes are not relevant to the issues in this case. See *id.* at 46.

31. See *id.*

32. OKLA. STAT. tit. 36, § 3636(H) (Supp. 1996).

33. OKLA. STAT. tit. 47, § 7-204(a) (1991) states that

[n]o policy or bond shall be effective under Section 7-203 of this title unless issued by an insurance company or surety company authorized to do business in this state, except as provided in subdivision (b) of this section, nor unless such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than Ten Thousand Dollars (\$10,000.00) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than Twenty Thousand Dollars (\$20,000.00) because of bodily injury to or death of two or more persons in any one accident . . .

34. See *id.*

35. OKLA. STAT. tit. 47, § 7-204 (1988).

B. Case Law

The Supreme Court of Oklahoma in a case decided in 1988, two years before the 1990 amendments to section 3636, held that when UM coverage is imputed into a policy it will be at the level of the statutory minimum rather than the highest available limits of the policy.³⁶ Thus, the Supreme Court of Oklahoma had addressed and decided the issue of the level of imputed UM coverage before section 3636 was amended in 1990.³⁷

The Court of Appeals of Oklahoma again addressed the issue regarding the level of UM coverage that will be imputed into a policy as a matter of law, a year and a half before the Supreme Court of Oklahoma decided *May*, but after the 1990 amendments to section 3636.³⁸ In *Perkins v. Hartford Underwriters Insurance Co.*, Edna Maxine Perkins was fatally injured in an automobile accident that occurred, as in *May*, in September of 1991.³⁹ The court of appeals held that UM coverage would be imputed into the Perkins' liability policy as a matter of law.⁴⁰ Next, the court of appeals addressed the issue of what level the UM coverage would be imputed into the policy.⁴¹ The court of appeals analyzed the issue with respect to the 1990 amendments to section 3636. The court stated that the statute "mandated insurance companies encourage their insureds to purchase UM coverage up to the limits of liability [and] required

36. See *Mann v. Farmers Ins. Co.*, 761 P.2d 460 (Okla. 1988). In *Mann*, the Supreme Court stated that [u]nder the construction adopted by the trial court, failure of the insurer to obtain a written rejection as to the highest available limits would result in those limits being written into the uninsured motorist provision of the insured's policy. This would result in the insured being placed in the position as though an uninsured motorist, with whom the insured was involved in an accident, had purchased the same liability policy as that purchased by the insured. As found in *Moser* this result goes beyond the mandate of . . . § 3636.

Id. at 464. *Mann*, like *May*, involved a commercial fleet liability policy. See *id.* at 461.

37. See *id.* at 460. Justice Alma Wilson dissented in the opinion. In her published dissent, she disagreed with the reasoning and result of the majority and stated she would "find that the appellees were covered by an uninsured motorist provision in the amount of the policy, \$250,000/\$500,000." *Id.* at 470 (Alma Wilson, J., dissenting).

38. See *Perkins v. Hartford Underwriters Ins. Co.*, 889 P.2d 1262 (Okla. Ct. App. 1994). *Perkins* was decided October 25, 1994 and certiorari to the Oklahoma Supreme Court was denied January 18, 1995. See *id.*

39. See *id.* at 1263.

40. See *id.*

Perkins and Decedent were the named insureds by Hartford under a policy for automobile insurance. This policy provided \$100,000.00 per person liability coverage on two motor vehicles and \$15,000.00 per person uninsured motorist coverage (UM). In February 1991, a third automobile was insured under the same policy and with the same limits of liability. In March 1991, one automobile was deleted from the policy At no time did Hartford tender an offer to Perkins for UM coverage equal to liability limits in the manner prescribed by . . . § 3636, effective September 1, 1990.

Id. at 1263. Hartford argued that

it was not required to tender an offer of the higher coverage and obtain a written rejection thereof until the expiration of the one-year phasing in period specified by the statute. However, . . . § 3636 (G)(2) [specifically provided that a new form regarding UM coverage will be required when] an additional vehicle that is not a replacement vehicle [is added to the policy.] The record reflects a third, or additional, vehicle was added to the policy in February 1991. We therefore hold Hartford was required but failed to tender the mandated statutory form affecting uninsured motorist coverage to Perkins and obtain a written rejection thereof no later than February 1991.

Id. at 1264.

41. See *id.* at 1263.

insurers to offer such coverage in a form specified by statute and to obtain a written rejection of such coverage.”⁴²

The court of appeals stated that

[t]he legislature is never presumed to have done a vain thing. It is the duty of the courts to supply, by appropriate pronouncement, whatever procedure may be necessary in order to implement a legislatively-designed remedy that is found procedurally incomplete or deficient. Hartford, in violation of . . . § 3636, failed to timely notify Perkins by the statutorily mandated form of the option to obtain uninsured motorist coverage at least equal to liability limits.⁴³

Because the insurer had not validly received Perkins’ rejection on the mandated form, the court of appeals further held “that the limits of uninsured motorist coverage in this case are defined by the maximum limits of the policy (liability limits) rather than the minimum limits prescribed by statute or the amount of [UM] coverage Perkins had previously obtained which was slightly in excess of the statutory minimum.”⁴⁴ Thus, Perkins received UM coverage in the amount of \$100,000.00, his policy’s liability limits, rather than \$10,000.00, the statutory minimum.⁴⁵

IV. DECISION OF THE CASE

In *May* the Supreme Court of Oklahoma overruled *Perkins* and held that “[t]he amount of the imputed coverage is dictated by . . . § 3636(B) and . . . § 7-204(a) and equals the statutory minimum of UM coverage prescribed by law for public liability protection: \$10,000.00 per person and \$20,000.00 per accident.”⁴⁶ The court stated that in interpreting the language of the relevant statutes it would follow the principle that “[t]he fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the Legislature as expressed in a statute,” while considering all relevant portions of a statute together as a whole.⁴⁷ The corner stone of the court’s decision lay in the determination by the court, when reviewing title 36, § 3636 as a whole, that the addition of subsection (H), upon which the plaintiffs relied, did not point to a change in the “legislative intent previously ascribed to the statute.”⁴⁸ The court specifically held that the “1990 amendments did not alter in any significant respect the basic components of the statute”⁴⁹

42. *Id.*

43. *Id.* at 1263-64 (footnote omitted).

44. *Id.* at 1264 (footnote omitted).

45. *See id.*

46. *May v. National Union Fire Ins. Co.*, 918 P.2d 43, 48-49 (Okla. 1996).

47. *Id.* at 47 (citing *Ledbetter v. Oklahoma Alcoholic Beverages Laws Enforcement Comm’n*, 764 P.2d 172, 179 (Okla. 1988)).

48. *Id.*

49. *Id.* The court further stated that the “statute continues to require that every liability insurance policy contain a provision for UM coverage, that UM coverage be offered in amounts between the statutory minimum and the liability limits of the policy, and that the insured has the right to reject UM coverage in writing.” *Id.*

The court reasoned that the addition of subsection (H) had two objectives.⁵⁰ The primary objective was to *mandate* the use of the standardized form by every insurer when offering UM coverage.⁵¹ This objective was the legislature's "response to the multitude of Oklahoma cases that addressed, under a pre-1990 version of § 3636, insurers' failure to offer UM coverage or obtain written rejection thereof."⁵² The second purpose of the addition according to the court was to *encourage* the insured, through the use of the form, to purchase UM coverage equal to the liability limits.⁵³ The court emphasized that the legislature intended to *mandate* the use of the form, but only to *encourage* the purchase of UM coverage at the policy's liability limits.⁵⁴ "Encouragement and mandate are two entirely different things. Neither the pre-1990 nor amended versions of § 3636 dictate the result plaintiffs seek here."⁵⁵

Since the court determined that the legislature did not intend to change the interpretation of section 3636 significantly, the court recited its interpretation of the statute prior to the 1990 amendments stating that its earlier interpretation still dictated today.⁵⁶ Justice Opala, the author of the previous opinion, reasoned that the Financial Responsibility Act, section 7-204,

*commands vehicle owners to maintain public liability protection, while . . . [Oklahoma Statute title 36 § 3636] directs that, absent the insured's written rejection, an automobile policy must include minimum UM coverage. The lone, though doubtless the most revealing, nexus between the two enactments is found in the mention made in § 3636(B) of the minimum amount of liability coverage that is mandated by the financial responsibility law. This reference plainly demonstrates a legislative intent to confine the public policy mandate for the statutory UM coverage level to no more than the minimum amount of insurance prescribed by law for public liability protection.*⁵⁷

Thus, the court held that

[w]here an insurer fails to offer in writing or obtain a written rejection of UM coverage such that UM coverage is imputed to an insured's policy as a matter of law, we hold that the mandate of § 3636 is satisfied by imputation of the minimum limits of UM coverage required by statute. To impute a higher amount of UM coverage of UM would go beyond the mandate of § 3636.⁵⁸

50. *See id.*

51. *See id.*

52. *Id.* (footnote omitted).

53. *See id.*

54. *See id.*

55. *Id.*

56. *See id.*

57. *Id.* at 47-48 (quoting *State Farm Mutual Automobile Ins. Co. v. Wendt*, 708 P.2d 581, 588 (Okla. 1985) (Opala, J., concurring in part and dissenting in part) (footnotes omitted)).

58. *Id.* at 48.

The court held that when UM coverage is imputed into a policy by operation of law, it must be at the statutorily prescribed minimum and not the bodily injury liability limits.⁵⁹

The court next addressed the contrary reasoning held by the Court of Appeals of Oklahoma in *Perkins*.⁶⁰ The supreme court stated that the court of appeals in *Perkins* "correctly noted that courts have a duty 'to supply, by appropriate pronouncement, whatever procedure may be necessary in order to implement a legislatively-designed remedy that is found procedurally incomplete or deficient.'"⁶¹ The Supreme Court of Oklahoma, however, noted that the flaw was in the court of appeals' reasoning that section 3636 contained a "legislatively-designed remedy."⁶² The only legislative mandate, as stated above, is for insurers to use the standardized form when offering insureds UM coverage.⁶³ In fact, the statute "has never prescribed the amount of UM coverage to be imputed to a policy when an insurer fails to satisfy the statute's requirements. The remedy of imputing UM coverage to an insurance policy where an insurer has transgressed § 3636 was *judicially crafted* in an effort to fulfill legislative intent."⁶⁴

Moreover, the Supreme Court of Oklahoma stated that the court of appeals did not even consider the underlying purpose or legislative intent of section 3636 when it made its decision.⁶⁵ Thus, the court of appeals went beyond the legislative mandate extended by section 3636.⁶⁶ Therefore, the Supreme Court of Oklahoma's decision in *May* expressly overruled the holding of *Perkins*.⁶⁷

V. ANALYSIS

A. Court's Use of Precedent and Policy

In *May*, the Supreme Court of Oklahoma first determined whether the legislative intent of section 3636 was changed by the 1990 amendments to the statute.⁶⁸ The court determined that the amendments did not change the legislative intent of the statute, but that the substance of the amendments did mandate the use of a standardized form when offering insureds UM coverage, and the

59. See *id.* at 48-49.

60. See *id.* *Perkins v. Hartford Underwriters Ins. Co.*, 889 P.2d 1262 (Okla. Ct. App. 1994), is the only other decision by an Oklahoma court that has addressed the issue since the 1990 amendments. *Id.*

61. *Id.* (quoting *Perkins*, 889 P.2d at 1262-63).

62. See *id.*

63. See *id.*

64. *Id.*

65. See *id.*

66. See *id.*

67. See *id.* The decision of the Supreme Court of Oklahoma in *May v. National Union Fire Ins. Co.*, 918 P.2d 43 (Okla. 1996), answering the certified question from the United States Court of Appeals for the Tenth Circuit, was written by Justice Watt. Justice Lavender, Justice Simms, Justice Hargrave, Justice Opala, and Justice Summers concurred. Justice Hodges concurred in the result. Vice Chief Justice Kauger concurred in part and dissented in part, and Chief Justice Wilson dissented. The only published opinion was Justice Watt's opinion. See *id.* at 49.

68. See *id.* at 47.

substance of the amendments encouraged insureds to *purchase* UM coverage equal to their liability limits.⁶⁹ Yet, the amendments did not amount to any legislatively-designed remedy, as the only mandate was to use the standardized form, and the statute still did not address at what level UM coverage would be imputed into a policy as a matter of law.⁷⁰ The Supreme Court of Oklahoma took a step-by-step approach to answering the question and carefully analyzed past precedent and legislative intent before making its ruling.

B. Implications of the Decision

The implication of the supreme court's decision will be far-reaching. The decision dictates that when UM coverage is imputed into a policy because of a failure by the insurer to follow the appropriate procedures in offering or obtaining a rejection for UM coverage, the imputed level of coverage will be the statutory minimum required in Oklahoma,⁷¹ \$10,000.00 per person and \$20,000.00 per accident. It is relevant at this point to note that this will only become an issue when one is involved in an accident where the person at fault does not have insurance,⁷² thus requiring the injured person to turn to his or her own policy for UM coverage. If one is involved in an accident and the person at fault does have the statutory minimum of insurance and this covers the injured person's damages, then the injured will receive the statutory minimum of liability insurance. Thus, the court's decision puts an injured person hit by an uninsured motorist and an injured person hit by a person insured at the statutory minimum, on even ground. This is both a logical and just result.

Moreover, if the court had allowed the UM coverage to be imputed into the policy at the liability limits it would afford an injured person hit by an uninsured motorist a windfall as compared to an injured person hit by a person insured at the statutory minimum. In both situations the injured person could have either intended to reject, and, in fact, rejected UM coverage, or the injured person could have purchased UM coverage at the statutory minimum, but later made some "material change"⁷³ to the policy, and because the insurer did not reaffirm their earlier intention, as a matter of law the UM coverage would be imputed into the policy. For example, in *Perkins* the injured thought he had purchased UM coverage for \$15,000.00.⁷⁴ Yet, because of the insurer's failure to acquire Perkins' reaffirmation of this intent with the standardized form, in February of 1991, when Perkins added a third car to the policy (a "material change") UM coverage was imputed into the policy. Thus, it can be argued that

69. *See id.*

70. *See id.* at 48.

71. OKLA. STAT. tit. 47, § 7-204 (1991).

72. This could also occur if the insurance of the person who hit the injured person does not cover the injured person's damages.

73. *See* *Beauchamp v. Southwestern Nat'l Ins. Co.*, 746 P.2d 673, 676 (Okla. 1987); *see also* OKLA. STAT. tit. 36, § 3636 (Supp. 1996).

74. *See Perkins v. Hartford Underwriters Ins. Co.*, 889 P.2d 1262, 1263 (Okla. Ct. App. 1994).

Perkins would receive a windfall if UM coverage was imputed into his policy equal to his liability limits, \$100,000.00.

A counterargument is that if UM coverage is imputed into the policy at the statutory minimum instead of the policy limits, then it is the insurance company that is receiving the windfall, and it is the insurance company rather than the injured insured who is better able to protect itself and bear the burden. The insurer can avoid any imputation of UM coverage simply by following the requirements of section 3636. This argument has validity, but it is not as strong in the situation, such as with Perkins, when the insured's clear intention is to reject UM coverage or purchase it at a level lower than the policy limits, yet because of error on the part of the insurer, this is not validly accomplished according to the procedure required by section 3636.

A positive effect of the Supreme Court of Oklahoma's decision in *May* is the "bright line" nature of the principle laid down in that decision. As a result of the decision, when UM coverage is imputed into a policy as a matter of law, it will be at the minimum level of coverage prescribed by statute rather than the policy's liability limits. Thus, this amount is the same for every insured who has UM coverage imputed into their policy. Since the minimum level is prescribed by the statute, the principle of *May* will undoubtedly reduce the number of lawsuits instituted by insureds, mainly declaratory judgment actions that seek to have a court determine both the level of their bodily injury policy limits and the level for UM coverage to be imputed into their policies.

Another positive effect of the decision in *May* is that insurance companies will have less liability if a court finds that UM coverage should be imputed into a policy as a matter of law because the UM coverage will be imputed into the policy at the statutory minimum level rather than the bodily injury liability limits. Therefore, insurers can pass the savings from lower risks of liability on to their insureds in the form of less expensive insurance.

C. How other States Have Addressed the Issue

1. Imputed UM⁷⁵ Coverage at Liability Limits Based on Statutory Mandate

A very recent case decided by the Court of Appeals of North Carolina⁷⁶

75. Some of the cases discussed concern underinsured motorist ("UIM") coverage rather than UM coverage. The cases involving UIM coverage are relevant to *May* because courts use the same analysis for both UM and UIM cases. Therefore, other than to note whether a case concerns UM or UIM coverage, no other distinction is made in the analysis of the case.

76. *Martin v. Continental Ins. Co.*, 474 S.E.2d 146 (N.C. Ct. App. 1996). This case, like *May*, involved an employee injured while driving a company car in the course of business and, therefore, also involved the company's insurance policy. *See id.* at 147.

At the moment of collision, plaintiff Martin was operating a vehicle owned by her employer, Carolina Telephone and Telegraph Company (Carolina Telephone). The Carolina Telephone automobile was insured for damages up to \$1,000,000.00 per accident under a policy issued by Continental Prior to trial, defendant, Continental moved for summary judgment on the issue of its potential liability to Martin for UIM and /or uninsured motorist (UM) coverage. At a pretrial hearing on defendant's motion, Judge W. Russel Duke, Jr., determined that Continental was not liable, and granted summary judgment in its favor on the issue The remaining issue, and the genesis of this appeal, is wheth-

held that when UM coverage is imputed into a policy, the imputed level is the policy limits for the bodily injury coverage.⁷⁷ This case can be distinguished from *May* because the applicable North Carolina statute⁷⁸ mandates this result. The North Carolina statute specifically states that "[i]f the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy."⁷⁹ By using "shall" in the statute, the legislature indicates that imputing coverage into a policy at the policy injury liabilities limits is required.⁸⁰ The Oklahoma legislature, on the contrary, has not stated that UM coverage must be imputed into a policy at the policy's bodily injury liability limits.⁸¹

Likewise, another recent decision by the Court of Appeals of Indiana held that the UM coverage to be imputed into the automobile insurance policy shall be equal to the policy's bodily injury liability limits.⁸² The Court of Appeals of Indiana in *Skrzypczak v. State Farm Mutual Automobile Insurance Co.* stated that since State Farm did not obtain a rejection of uninsured motorist ("UIM") coverage as required by statute when a new policy⁸³ was issued to the Skrzypczaks, "they were required to provide the Skrzypczaks with [UIM] . . . coverage equal to their bodily injury liability limits of \$100,000.00 per person and \$300,000.00 per accident for the accident of October 1, 1993."⁸⁴

er summary judgment was properly granted to Continental extricating it from UIM coverage liability on the judgment.

Id.

77. See *id.* at 152. "Defendant acknowledges that the rejection language used in the United Telecommunication policy was not 'on a form promulgated by the North Carolina Rate Bureau.'" *Id.* at 150. The court of appeals went on to state that in *Hendrickson v. Lee*, 459 S.E.2d 275, 279, 283 (N.C. Ct. App. 1995), that in order to reject UIM coverage it must be done "in writing . . . on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance, . . . [in an effort to] assure compensation of the innocent victims of uninsured or underinsured drivers" and that this requirement would be strictly enforced. *Martin*, 474 S.E.2d at 150.

78. N.C. GEN. STAT. § 20-279.21 (1995).

79. *Id.* § 20-279.21(b)(4).

80. See *id.*

81. OKLA. STAT. tit. 36, § 3636 (1996).

82. See *Skrzypczak v. State Farm Mutual Automobile Ins. Co.*, 668 N.E.2d 291, 295 (Ind. Ct. App. 1996).

On October 1, 1993, Ewa was driving, and Michal was a passenger, in their 1988 Mercury Tracer when they were involved in an accident. The driver of the other vehicle was at fault, and was underinsured thereby not fully compensating the Skrzypczaks for their damages. The Skrzypczaks had an automobile insurance policy with Mutual for the Tracer . . . On March 9, 1990, Ewa signed a reinsurance statement of insurance application through Casualty that indicated a selection was made for no underinsured motorist coverage for the Tracer. On November 9, 1990, State Farm replaced the Tracer's Casualty insurance policy with a Mutual insurance policy. This Mutual insurance policy was in effect at the time of the accident. Mutual does not have a rejection of underinsured motorist coverage specifically for the Tracer signed by either of the Skrzypczaks.

Id. at 292-93. Thus, since the insurer did not acquire a valid rejection of the UM coverage when the new policy was issued by Mutual, a material change, the UM coverage was imputed into the Skrzypczaks' policy. See *id.* at 295.

83. The court held that the policy issued to the Skrzypczaks on November 9, 1990, was not a "renewal" policy according to the statutory definition of renewal, from Indiana Code section 27-7-6-3, but "was a new policy within the meaning of Indiana Code section 27-7-5-2." See *id.* at 295.

84. *Id.*

The Indiana legislature, like the North Carolina legislature, has mandated that the UM coverage be equal to the bodily injury limits.⁸⁵ The applicable statute of Indiana provides that “[t]he uninsured and underinsured motorist coverage must be provided by insurers for either a single premium or for separate premiums, in limits at least equal to the limits of liability specified in the bodily injury liability provisions of an insured’s policy, unless such coverage have been rejected in writing by the insured.”⁸⁶ Therefore, Indiana mandates by statute, like North Carolina, that UM coverage must equal the bodily injury limits when it is imputed into a policy.

The Supreme Court of Louisiana also recently addressed the issue of the level of UM coverage to be imputed into a policy.⁸⁷ Following the Louisiana Revised Statutes, the Supreme Court of Louisiana quoted the relevant portion stating that the statute

requires that an insurance policy provide UM coverage “in not less than the limits of bodily injury liability provided by the policy . . . however, the coverage required under this Subsection shall not be applicable where any insured named in the policy shall reject in writing, as provided herein, the coverage or select lower limits.”⁸⁸

The Supreme Court of Louisiana further held that “[t]his statute mandates that, in the absence of a valid written rejection or selection of lower limits, UM coverage is equal to the amount of liability coverage.”⁸⁹ Therefore, the bodily injury liability limit is the level for imputed UM coverage as a result of the clear statutory mandate, because that is the norm according to the Louisiana statute.

In addition, the Supreme Court of Alaska in a recent case held that if UM coverage is imputed into a policy it will be equal to the policy’s bodily injury liability limits.⁹⁰ The court stated that “[n]o waivers were given in this case [and] [w]here required coverage is not waived it must be provided. If a policy does not provide the required coverage it will be reformed to conform with statutory requirements.”⁹¹ Alaska’s statute regarding UM coverage states that unless the coverage is properly waived by the insured, the UM coverage’s “policy limits [are] equal to the limits voluntarily purchased to cover the liability of the person insured for bodily injury or death.”⁹² Thus, the statute dictates that the UM coverage will equal the policy’s bodily injury limits.

85. IND. CODE § 27-7-5-2(2) (Michie 1994).

86. *Id.* The statute also provides that UM coverage, if not rejected, can not be less than \$50,000.00. Therefore, if the bodily injury limits are less than \$50,000.00 the UM coverage must still equal at a minimum \$50,000.00, unless the coverage is rejected in writing by the named insured of the policy. *Id.*

87. See *Martin v. Champion Ins. Co.*, 656 So. 2d 991 (La. 1995).

88. See *id.* at 994 (quoting LA. REV. STAT. ANN. § 22:1406(D)(1)(a)(i) (West 1995)).

89. See *id.* This conclusion in *Martin* has been upheld, even more recently, by the Court of Appeals of Louisiana in *Herman v. Rome*, 668 So. 2d 1202, 1207 (La. Ct. App. 1996).

90. *State Farm Mut. Auto. Ins. Co. v. Harrington*, 918 P.2d 1022, 1025 (Alaska 1996).

91. *Id.*

92. ALASKA STAT. § 21.89.020(c)(1) (Michie 1996).

Likewise, the Court of Appeals of Arizona held that UM coverage will be imputed into a policy at the bodily injury liability limits.⁹³ The court relied upon the language in Arizona's Revised Statutes Section 20-259.01 (A):

Every insurer writing automobile liability or motor vehicle liability policies shall make available to the named insured thereunder and by written notice offer the insured and at the request of the insured shall include within the policy uninsured motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy.⁹⁴

The Court of Appeals of Arizona held that there was an insufficient offer of UM coverage therefore, "the proper remedy for a legally insufficient offer is to include the coverage in the policy by operation of law."⁹⁵ The court further held that "the insured is entitled to coverage in the amount equal to the bodily injury liability limits of the policy."⁹⁶ Therefore, Arizona answers the question—as North Carolina, Indiana, Louisiana, and Alaska—relying upon clear statutory language and, thus, a legislative mandate.

The Court of Appeals of Washington held that UIM coverage imputed into a policy will be at the level of the policy's coverage limits.⁹⁷ The relevant UIM statute of Washington states that "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."⁹⁸ The statute explicitly mandates that UIM coverage equal the liability limits unless the insured rejects all or part of the coverage. Therefore, it logically follows that when UIM coverage is imputed into a policy as a matter of law it would also

93. See *Tallent v. Nat'l Gen. Ins. Co.*, 903 P.2d 612 (Ariz. Ct. App. 1995). The Supreme Court of Arizona vacated the opinion of the Court of Appeals of Arizona in *Tallent v. National General Insurance Co.*, 915 P.2d 665, 667 (Ariz. 1996), and remanded the case to the trial court. The Supreme Court of Arizona did not address the issue of the level of imputation of UM coverage since the court held that the offer of the insurer by the form was not deficient. See *id.* at 667. Therefore, there would be no reason to impute UM coverage into the policy. The Supreme Court of Arizona did not comment on the court of appeals' decision with regard to this issue. See *id.*

94. ARIZ. REV. STAT. ANN. § 20-259.01(A) (1996). The language quoted from the subsection is almost identical with the language quoted above for LA. REV. STAT. ANN. § 22:1406(D) (West 1995).

95. *Tallent*, 903 P.2d at 618.

96. *Id.*

97. See *Corley v. Hertz Corp.*, 887 P.2d 401, 405 (Wash. Ct. App. 1995).

In February 1991, Melvin Corley sustained serious injuries in an automobile accident which occurred in King County. Corley was driving an automobile he had rented in Spokane from H.A.S. Corporation, a licensee of Hertz Corporation. The automobile was registered and licensed in Washington. Corley was a resident of Colorado The rental agreement between Hertz and Corley contained the following provision: . . . "For bodily injury and property damage the limits of this protection, including owner's liability, are the same as the minimum limits required by the automobile financial responsibility law of the jurisdiction in which the accident occurred, This will conform to the basic requirements of any applicable 'No Fault' law BUT DOES NOT INCLUDE 'UNINSURED MOTORIST,' 'UNDERINSURED MOTORIST,' 'SUPPLEMENTARY NO FAULT' OR ANY OTHER OPTIONAL COVERAGE. TO THE EXTENT PERMITTED BY LAW HERTZ AND YOU HEREBY REJECT THE INCLUSION OF ANY SUCH COVERAGE. In the event that any such coverage is imposed by operation of law, then the limits of such coverage will be the minimum required by law of the jurisdiction in which the accident occurred."

Id. at 402-03. The insurance policy at issue had bodily injury limits of \$500,000.00. See *id.* at 403. Therefore, "Corley filed an action in Washington against Hertz seeking a declaratory judgment that he was entitled to UIM coverage of at least \$500,000 under the rental agreement." *Id.* at 401.

98. WASH. REV. CODE § 48.22.030(3) (1996).

be equal to the liability limits since it is imputed for lack of a valid rejection. Thus, the Washington Court of Appeals' decision, like the decisions from the courts in North Carolina, Indiana, Louisiana, Alaska, and Arizona, rationally follows the relevant statutory language holding contrary to the Supreme Court of Oklahoma's decision in *May*.

The Ohio Court of Appeals in *United States Fidelity and Guaranty Co. v. Kammeyer*,⁹⁹ held that "UM coverage in an amount equivalent to automobile liability coverage [is] the norm."¹⁰⁰ The applicable statute states:

No automobile liability or motor vehicle liability policy of insurance . . . shall be delivered or issued for delivery in this state . . . unless both of the following coverage are provided to persons insured under the policy for loss due to bodily injury or death suffered by such persons: (1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage¹⁰¹

The statute is clear and unambiguous. The insured may reject or receive optional lesser amounts of UM coverage according to subsection (C) of the statute.¹⁰² If the insured does not reject the coverage or opt for lower coverage, the statute mandates that UM coverage equal the liability limits of the policy.¹⁰³ Since, absent valid rejection or lowering of the coverage, the norm is for the UM coverage to equal the liability limits, it is logical for the UM coverage to equal the liability limits if the coverage arises by operation of law. Thus, the court of appeals' decision¹⁰⁴ to impute UM coverage into the policy in an amount equal to the liability limits is solidly based on the statute's mandate.

Cases from North Carolina, Indiana, Louisiana, Alaska, Arizona, Washington, and Ohio held that if UM coverage is imputed into a policy it must be at a level equal to the liability limits of the policy.¹⁰⁵ These conclusions, though, are all rationally based upon the clear mandate of each jurisdiction's applicable statute. Therefore, these courts followed a legislative requirement when they

99. 646 N.E.2d 244 (Ohio Ct. App. 1994). The facts of this case are as follows:

On April 3, 1990, David and Gene Kammeyer were returning from a job site in a truck owned by their employer, Mack Iron Works, Inc. ("Mack Iron"), when another vehicle crossed into their lane, striking them head-on. As a result of this collision, Gene Kammeyer was seriously injured; David Kammeyer was killed. Because the amount of liability insurance on the tortfeasor's vehicle proved to be insufficient to compensate them for their damages, appellants filed and underinsured claim with Mack Iron's insurer, appellee United States Fidelity and Guaranty Company ("USF&G"). Appellants also sought underinsured motorists ("UM") coverage for damages arising from David Kammeyer's death from their own insurer, appellee Nationwide Insurance Company ("Nationwide"). On June 19, 1992, appellee USF&G filed suit seeking a declaration that appellants were entitled to no more than \$25,000 pursuant to the terms of the policy it had issued to Mack Iron. On appellants' motion, appellee Nationwide was joined as a party defendant. Following discovery, all parties moved for summary judgment. The trial court denied appellants' motion, but it granted those motions filed by appellees. It is from these judgments that appellants bring this appeal."

Id. at 245 (footnote omitted).

100. *Id.* at 248.

101. OHIO REV. CODE ANN. § 3937.18(A) (Banks-Baldwin 1994).

102. *Id.* § 3937.18(C).

103. *See id.* § 3937.18(A)(1).

104. *See Kammeyer*, 646 N.E.2d at 248.

105. *See supra* notes 75-104 and accompanying text.

decided the issue. There is no statute in Oklahoma that is comparable to the statutes the courts used in these cases to base their decisions upon.

2. Imputed UM Coverage at Liability Limits Not Mandated By Statute

The Court of Appeals of South Carolina—like courts in North Carolina, Indiana, Louisiana, Alaska, Arizona, Washington, and Ohio—held in *Ackerman v. Travelers Indemnity Co.*¹⁰⁶ that when UIM coverage is imputed into an insurance policy, it will be imputed into the policy at the level of the bodily injury liability coverage.¹⁰⁷ The South Carolina decision is different, though, since there is no clear indication that South Carolina's applicable UIM statute mandates this action.¹⁰⁸ The applicable statute does state that "[a]utomobile insurance carriers shall offer, at the option of the insured, uninsured motorist coverage up to the limits of the insured's liability coverage"¹⁰⁹ The language requires the insurer to offer UIM coverage up to the insured's liability limits. This is very different from a mandate for the UIM coverage to be no less than the liability limits (as the statutes mandate in North Carolina, Indiana, Louisiana, Alaska, Arizona, Washington, and Ohio).¹¹⁰ Therefore, the court's decision in *Ackerman* to impute UIM coverage into the policy at the liability limits was not mandated by statute.

The Court Appeals of South Carolina did not give any particular line of reasoning for its holding, stating only that if the insurer fails to prove that there was an effective offer of UIM coverage to the insured, then there must be "reformation of the policy to include underinsured motorist coverage to the limits of liability."¹¹¹ Moreover, the court failed to provide any policy rationale for

106. 456 S.E.2d 408 (S.C. Ct. App. 1995).

107. See *id.* at 411. The facts of *Ackerman* are as follows:

Respondents, Norman D. Ackerman, Jr. and Jo Ann Ackerman (Ackermans), brought this suit for declaratory judgment and reformation of an automobile insurance policy against appellant, Travelers Indemnity Company (Travelers). The Ackermans asked the court to reform the policy to include underinsured motorist coverage up to the liability limits of the policy as a remedy for Travelers' alleged failure to comply with S.C. Code of Laws § 38-77-160 (1976 as amended). This statute requires automobile insurance carriers to offer their insureds optional underinsured motorist coverage up to the limits of liability coverage. . . . The trial court held the policy must be reformed to provide underinsured motorist coverage for the benefit of the Ackermans, and the amount of coverage should extend to the full \$500,000 liability limits.

Id. at 409. Travelers appealed, and the Court of Appeals of South Carolina affirmed the trial court's decision. See *id.*

108. S.C. CODE ANN. § 38-77-160 (Law Co-op. 1989).

109. *Id.*

110. Compare S.C. CODE ANN. § 38-77-160 (Law Co-op. 1989), with ALASKA STAT. § 21.89.020(c)(1-3) (Michie 1996), and ARIZ. REV. STAT. § 20-259.01(A) (1996), and IND. CODE § 27-7-6-3(2) (1994), and LA. REV. STAT. ANN. § 22:1406(D) (West 1995), and N.C. GEN. STAT. § 20-279.21(b)(4) (1995), and OHIO REV. CODE ANN. § 3937.18 (Banks-Baldwin 1994), and WASH. REV. CODE § 48.22.030(3) (1996).

111. *Ackerman v. Travelers Indemn. Co.*, 456 S.E.2d 408, 411 (S.C. Ct. App. 1995). The decision, though, is a bit confusing because the court of appeals later in the *Ackerman* opinion stated that "the Ackermans are therefore entitled to reformation of Exxon's policy to include underinsured motorist coverage up to \$500,000." See *id.* at 412 (emphasis added). The language used here indicates that UIM coverage must not necessarily be imputed at the policy limits, but only up to the limits. The language is contrary to the language used earlier in the opinion that indicated that UIM coverage would be imputed into the policy up to the limits of liability. However, the court of appeals did affirm the trial court's decision to award the Ackermans \$500,000.00, the full liability limits of the policy. See *id.*

its holding. Notwithstanding, the South Carolina Court of Appeals, without statutory mandate, reached the same conclusion as courts in North Carolina, Indiana, Louisiana, Alaska, Arizona, Washington, and Ohio, and imputed UIM coverage into the policy at the liability limits of the policy.

3. Imputed UM Coverage at the Statutory Minimum

The Supreme Court of Appeals of West Virginia took a contrary view to the North Carolina, Indiana, Louisiana, Alaska, Arizona, Washington, Ohio, and South Carolina courts, yet the same as Oklahoma, holding that when UM coverage is imputed into a policy, it will be at the statutory minimum level.¹¹² The applicable statute of West Virginia provides:

Nor shall any such policy or contract be so issued or delivered unless it shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of section two, article four, chapter seventeen-d of this code¹¹³ . . . [and] such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured [or underinsured motor vehicle] up to an amount . . . not less than limits of bodily injury liability insurance¹¹⁴

Thus, at a minimum, the statute mandates that UM coverage must be offered at the statutory minimum, and the insured must be given the option to purchase UM coverage up to the limits of the bodily injury liability insurance.¹¹⁵ The language of the West Virginia statute is similar to the language of Oklahoma Statute title 36, § 3636(B) because both require UM coverage to be provided at a level not less than the statutorily prescribed minimum while also giving insureds the option to purchase UM coverage in the same amount as their policies' liability limits.¹¹⁶

112. *Cox v. Amick*, 466 S.E.2d 459 (W.Va. 1995).

This action arose out of an automobile accident which occurred on March 27, 1992, on U.S. Route 21 in Kanawha County when a vehicle driven by Brian Amick crossed the center line of the highway and struck a vehicle driven by John Carl Cox head on. John Carl Cox was killed and his wife, Glenna Griffith Cox, who was a passenger in the car, was seriously injured The two insurance coverage issues relating to the car accident arose in a declaratory judgment action filed by the appellees in order to enforce uninsured and underinsured motorists coverage in a policy issued by Nationwide to John Carl Cox, the decedent.

Id. at 462.

113. This section of the code sets out a statutory minimum for liability coverage. This statute is titled the "Proof of financial responsibility" construed. W. VA. CODE § 17D-4-2 (1996).

114. W. VA. CODE § 33-6-31(b) (1996).

115. *See id.*

116. Compare W. VA. CODE § 33-6-31(b) (1996), with OKLA. STAT. tit. 36, § 3636(B), (H) (Supp. 1996). It can be argued that the language in the Oklahoma statute is much stronger in encouraging insureds to purchase UM coverage at the policy's liability limits as a result of the mandated form's language. Yet the language of the form still qualifies only as an *encouragement* to purchase UM coverage at the policy's liability limits, and not a mandate for such an action.

The West Virginia court interpreted the statute's language as mandating "that when an insurer fails to prove an effective offer and a knowing and intelligent waiver by the insured, the insurer must provide the minimum coverage required to be offered under the statute."¹¹⁷ Therefore, the Supreme Court of Appeals of West Virginia held the same as the Supreme Court of Oklahoma on the issue of the level of UM limits to be imputed into a policy as a matter of law, basing its decision upon similar statutory language.

The Supreme Court of Arkansas, like courts in West Virginia and Oklahoma, held that when UIM coverage is implied by law, it will be limited to the statutory minimum.¹¹⁸ Arkansas' applicable statute states in part that:

No private passenger automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicles in this state shall be delivered or issued in this state or issued as to any private passenger automobile principally garaged in this state unless the insured has the opportunity, which he may reject in writing, to purchase underinsured motorist coverage Underinsured motorist coverage shall be at least equal to the limits prescribed for bodily injury or death under § 27-19-605.¹¹⁹

The limits mentioned in § 27-19-605¹²⁰ require minimum liability limits of \$25,000 for bodily injury or death.¹²¹ The Supreme Court of Arkansas reasoned that "the insurer is not required to offer anything more than the limits listed in the statute, and to do otherwise would be to 'force upon the insurance

117. *Cox v. Amick*, 466 S.E.2d 459, 465 (W. Va. 1995). The court summarized the legislative intent behind the statute.

[T]he contents of the form described in this section which has been signed by any named insured shall create a presumption that all named insureds under the policy received such an effective offer of the optional coverage described in this section and that all such named insureds exercised a knowing and intelligent election or rejection, as the case may be, of such offer as specified in the form. Such election or rejection is binding on all persons insured under the policy.

Id. at 466.

118. See *Ross v. United Servs. Auto. Ass'n*, 899 S.W.2d 53, 55 (Ark. 1995). In this case, Carolyn Ross, appellant, was in a motor vehicle accident on March 24, 1992, involving another vehicle operated by Michael Ceola. Ceola was apparently at fault. Ceola was insured with Liberty Mutual Insurance which had a \$25,000 liability limit available to Ross for the accident. Ross was insured at the time by the United Services Automobile Association, appellee, under a single policy covering four family vehicles with liability limits of \$100,000 per person and uninsured motorist coverage of \$100,000 per person An informational form accompanying the policy and discussing underinsured motorist coverage provided that it was "optional but if ordered must equal your UM-BI limits, is available in limits of \$50,000/100,000 or above" There was no signed rejection for the coverage in this case so coverage was implied, and United does not dispute that matter. The point of contention is how much coverage Ross would receive.

Id. at 54.

119. ARK. CODE ANN. § 23-89-209(a)(1), (4) (Michie 1995).

120. *Id.* § 27-19-605(a) (Michie 1994) states in part:

No policy or bond shall be effective under § 27-19-604 unless issued by an insurance company or surety company authorized to do business in this state, except as provided in subsection (b) of this section, nor unless the policy or bond is subject, if the accident resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than twenty-five thousand dollars (\$25,000) because of bodily injury or death of one (1) person in any one (1) accident and subject to said limit for one (1) person, to a limit of not less than fifty thousand dollars (\$50,000) because of bodily injury or death of two (2) or more persons in any one (1) accident, and if the accident has resulted in injury to or destruction of property, to a limit of not less than fifteen thousand dollars (\$15,000) because of injury to or destruction of property of others in any one (1) accident.

Id.

121. See *Ross*, 899 S.W.2d at 55.

company something that is not present in the statute.”¹²² The court further reasoned that the Arkansas statute “clearly mandates that a minimum of \$25,000 underinsured coverage be offered and not an amount equal to the liability insurance purchased by the insured.”¹²³ Thus, Arkansas, West Virginia, and Oklahoma courts held that when UM coverage is imputed into a policy, it will be at the statutorily prescribed minimum level rather than the level of the policy’s bodily injury liability limits.

D. Oklahoma’s Approach as Compared with the Other Jurisdictions

Of the ten jurisdictions previously mentioned,¹²⁴ (other than Oklahoma) eight courts¹²⁵ held that when UM coverage is imputed into a policy by operation of law, it will be read into the policy at the bodily injury liability limits. Out of these eight, seven of the courts’ decisions¹²⁶ were based upon clear statutory language. Oklahoma’s applicable statute does not mandate that UM coverage, if imputed into a policy, must equal the liability limits. The language of the Oklahoma statute is similar to the language of the two jurisdictions¹²⁷ that held that when UM coverage is imputed into a policy, it should be at the statutory minimum.

The Oklahoma, Arkansas and West Virginia courts follow the applicable statutes, refusing to extend the limits beyond the legislative requirement.¹²⁸ The North Carolina, Indiana, Louisiana, Alaska, Arizona, Washington, and Ohio courts also follow the applicable statutes, yet have reached contrary results.¹²⁹ The South Carolina court is the only court that goes beyond the language of the applicable statute to determine the level of UIM coverage to be imputed into a policy.¹³⁰ Thus, South Carolina is the only court, out of those discussed above, that goes beyond the legislative mandate. All other state court’s decisions discussed, although some had contrary results, did not go beyond the legislative mandate of the statute to decide the issue.

Another question that arises as a result of this issue is whether insurance premiums are less expensive or more expensive in a jurisdiction depending on how the legislature or local court has answered the question of *May*. For exam-

122. See *id.* (quoting *Jablonski v. Mutual Serv. Cas. Ins. Co.*, 408 N.W.2d 854 (Minn. 1987)).

123. *Id.*

124. Alaska, Arizona, Arkansas, Indiana, Louisiana, North Carolina, Ohio, South Carolina, Washington, and West Virginia. See *supra* notes 75-123 and accompanying text.

125. Alaska, Arizona, Indiana, Louisiana, North Carolina, Ohio, South Carolina, and Washington. See *supra* notes 75-111 and accompanying text.

126. Alaska, Arizona, Indiana, Louisiana, North Carolina, Ohio, and Washington. See *supra* notes 75-105 and accompanying text.

127. Arkansas and West Virginia. See *supra* notes 114-25 and accompanying text.

128. See *May v. National Union Fire Ins. Co.*, 918 P.2d 43 (Okla. 1996); *Ross v. United Servs. Auto. Ass’n*, 899 S.W.2d 53 (Ark. 1995); *Cox v. Amick*, 466 S.E.2d 459 (W. Va. 1995).

129. See *Martin v. Continental Ins. Co.*, 474 S.E.2d 146 (Ct. App. N.C. 1996); *Skrzypczak v. State Farm Mut. Auto. Ins. Co.*, 668 N.E.2d 291 (Ind. Ct. App. 1996); *State Farm Mut. Auto. Ins. Co. v. Harrington*, 918 P.2d 1022 (Alaska 1996); *Martin v. Champion Ins. Co.*, 656 So. 2d 991 (La. 1995); *Tallent v. National Gen. Ins. Co.*, 915 P.2d 665 (Ariz. 1996); *Corley v. Hertz Corp.*, 887 P.2d 401 (Wash. Ct. App. 1995); *United States Fidelity and Guar. Co. v. Kammeyer*, 646 N.E.2d 244 (Ohio 1994).

130. See *Ackerman v. Travelers Indemn. Co.*, 456 S.E.2d 408 (S.C. Ct. App. 1995).

ple, in Oklahoma, Arkansas, and West Virginia, an insurance company will have less liability if it makes a mistake and does not validly acquire a rejection of UM coverage from its insured, causing the UM coverage to be imputed into the policy as a matter of law.¹³¹ In these three states, the imputed UM coverage will be equal to the statutory minimum rather than the policy's liability limits, which could be a difference of hundreds of thousands or even millions of dollars.

However, in North Carolina, Indiana, Louisiana, Alaska, Arizona, Washington, Ohio, and South Carolina, if the insurer makes a mistake and does not acquire a valid rejection of UM coverage, the UM coverage will be imputed into the policy at the policy's bodily injury liability limit.¹³² The difference in the insurer's liability may allow for a difference in the price of the insured's policy, because the insurer may pass the higher risk of liability, and thus the expense, on to the insured in the form of higher premiums. In short, insurers in these states have higher liability risks with regards to UM coverage than insurers in Oklahoma, Arkansas, and West Virginia.

VI. CONCLUSION

The Supreme Court of Oklahoma, in *May v. National Union Fire Insurance Co.*, methodically and conservatively looked at the precedent on the issue regarding the level of imputation of UM coverage. In addition, the court determined the legislative intent of the 1990 amendments to Oklahoma Statute title 36, section 3636. The court's decision puts an injured person who is hit by an uninsured motorist and an injured person who is hit by a motorist carrying Oklahoma's statutory minimum, on even ground. From a policy standpoint, this result is both logical and fair. Conversely, had the court imputed the UM coverage at the policy's liability limits, it would have afforded an injured person who is hit by an uninsured motorist with a windfall, as compared with an injured person who is hit by a motorist insured at Oklahoma's statutory liability limits.

The conclusion in *May* is favorable because it creates a "bright line" rule that dictates the UM limits implied into a policy by law. Since that level is the minimum prescribed by statute,¹³³ there will be few coverage disputes between insureds and insurers on the level of UM coverage that will be imputed into their policy as a matter of law. Therefore, this saves insureds both time and litigation expenses, while relieving the courts of unnecessary coverage disputes.

131. See *May v. National Union Fire Ins. Co.*, 918 P.2d 43 (Okla. 1996); *Ross v. United Servs. Auto. Ass'n*, 899 S.W.2d 53 (Ark. 1995); *Cox v. Amick*, 466 S.E.2d 459 (W. Va. 1995).

132. See *Martin v. Continental Ins. Co.*, 474 S.E.2d 146 (Ct. App. N.C. 1996); *Skrzypczak v. State Farm Mut. Auto. Ins. Co.*, 668 N.E.2d 291 (Ind. Ct. App. 1996); *State Farm Mut. Auto. Ins. Co. v. Harrington*, 918 P.2d 1022 (Alaska 1996); *Martin v. Champion Ins. Co.*, 656 So. 2d 991 (La. 1995); *Tallent v. National Gen. Ins. Co.*, 915 P.2d 665 (Ariz. 1996); *Corley v. Hertz Corp.*, 887 P.2d 401 (Wash. Ct. App. 1995); *Ackerman v. Travelers Indemn. Co.*, 456 S.E.2d 408 (S.C. Ct. App. 1995); *United States Fidelity and Guar. Co. v. Kammeyer*, 646 N.E.2d 244 (Ohio 1994).

133. See OKLA. STAT. tit. 47, § 7-204 (1991).

In the states that follow *May*, insurers will have less liability if UM coverage is imputed into the policy as a matter of law. In states that do not follow *May*, if the insurer passes the cost of this higher liability on to the insured, then insurance premiums will be higher. Thus, there is no reason, absent a legislative mandate, for a court to hold that if UM coverage is imputed into a policy, it should be at the policy's liability limits. The Supreme Court of Oklahoma's decision in *May v. National Union Fire Insurance Co.* is logical and just according to the rationale behind UM coverage and the language of section 3636.

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