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Eliminating Social Security Benefits Setoffs under Standard Uninsured Motorist Coverage in Illinois

The Honorable George J. Schaller

ELIMINATING SOCIAL SECURITY BENEFITS SETOFFS UNDER STANDARD UNINSURED MOTORIST COVERAGE IN ILLINOIS

*The Honorable George J. Schaller**

Uninsured motorist coverage (UMC) was developed by the insurance industry in response to the increase in automobile accidents after World War II.[1] With UMC, an accident victim need not bear the financial burden of injuries caused by an uninsured motorist. In effect, then, UMC is insurance against a tortfeasor's lack of insurance.

In 1963, the Illinois legislature enacted an uninsured motorists statute requiring that all automobile liability insurance policies contain a UMC provision.[2] This law implements a public policy favoring compensation of innocent accident victims regardless of whether the tortfeasor has insurance coverage.[3] Accordingly, the statute requires a minimum UMC equal to the minimum liability for death or bodily injury caused by an insured motorist.[4]

The statute, however, does not prescribe the parameters of UMC provisions. Consequently, in an effort to reduce their liability, almost all insurance companies operating in Illinois have taken steps to restrict the scope of UMC.[5] One such restriction is a setoff provision,[6] under which the amount payable pursuant to the policy is reduced by any amounts received by the insured under any "workmen's compensation law, disability benefits law, or any similar law."[7] Thus, if compensation from one of these collateral sources[8]

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1. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 3-4 (1969) [hereinafter cited as WIDISS].

2. ILL. REV. STAT. ch. 73, § 755a (1963). As originally enacted, the statute made it mandatory for insurers to offer UMC provisions. The insured, however, did not have to accept the coverage. In 1967, the statute was amended to prohibit the insured from refusing to accept UMC. ILL. REV. STAT. ch. 73, § 755a (1967).

3. *See, e.g.*, Glidden v. Farmers Auto Ins. Ass'n, 57 Ill. 2d 330, 335, 312 N.E.2d 247, 250 (1974); Morelock v. Miller's Mut. Ins. Ass'n, 49 Ill. 2d 234, 238-39, 274 N.E.2d 1, 3 (1971); Putnam v. New Amsterdam Casualty Co., 48 Ill. 2d 71, 89, 269 N.E.2d 97, 106 (1970).

4. ILL. REV. STAT. ch. 73, § 755a (1967). The statutory minimum liability is currently $15,000. ILL. REV. STAT. ch. 95½, § 7-203 (1981).

5. *See* 1966 STANDARD FORM UNINSURED MOTORIST ENDORSEMENT, *reprinted in* WIDISS, *supra* note 1, at 291 app.

6. Other common restrictions limit the persons covered by the UMC provision and exclude certain vehicles based on ownership or insurance status. *Id.*

7. *Id.*

8. A collateral source is any person who compensates a victim of personal injuries other than the person legally liable for such injuries. *See* D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.6, at 181-86 (1973).

equals or exceeds the UMC minimum, the uninsured motorist carrier will not be liable to its insured under the UMC provision.

There is some question as to whether these standard UMC setoff provisions operate to exclude disability benefits paid by the federal government under the Social Security Act.[9] This commentary will address the issue of whether allowing UMC carriers to deduct such disability payments is consistent with the public policy underlying the uninsured motorists legislation. First, the commentary will examine the rationale supporting the setoff of worker's compensation benefits. Next, it will discuss briefly the disability benefits program of the Social Security Act. Finally, it will conclude that social security disability benefits should not operate to offset UMC liability. Most importantly, this commentary will demonstrate that to permit insurance companies to reduce UMC liability by the amount of social security disability benefits received by the accident victim is clearly contrary to the public policy underlying UMC legislation.

PUBLIC POLICY AND THE WORKER'S COMPENSATION SETOFF

Illinois courts repeatedly have stated that UMC legislation serves the public policy of placing a victim injured by an uninsured motorist in the same financial position he would have occupied had he been injured by an insured motorist.[10] Logically, if the victim of an insured motorist would be entitled to payments from a collateral source in addition to payments from the tortfeasor's insurance company, then the victim of an uninsured motorist also should be entitled to such payments to place him in the same financial position as the insured motorist's victim. Conversely, if the victim of an uninsured motorist would receive a windfall that the victim of an insured motorist would not receive, then payments from the collateral source should be applied to reduce the insurer's UMC liability. Thus, in determining whether a setoff provision should be enforced with respect to a particular payment made to the victim of an uninsured motorist, courts should look to whether the victim of an insured motorist would be entitled to the same payment. If the answer is affirmative, then enforcing the setoff provision would be contrary to public policy.

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9. 42 U.S.C. § 301 (Supp. IV 1980). The standard form setoff clause does not refer specifically to social security disability benefits. Instead, it refers to "any workmen's compensation law, disability benefits law, or any similar law." 1966 STANDARD UNINSURED MOTORIST ENDORSEMENT, *reprinted in* WIDISS, *supra* note 1, at 291 app. The common sense meaning of "disability benefits law," however, would appear to include social security disability benefits. *See* Flemming v. Nestor, 363 U.S. 603, 609-10 (1960) (social security system is a form of social insurance). *But see* Atkins v. Allstate Ins. Co., 382 So. 2d 1276, 1279 (Fla. Dist. Ct. App. 1980) (medicare benefits are not disability benefits subject to setoff). *See generally* Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 841 (1976).

10. *See, e.g.*, Stryker v. State Farm Mut. Auto. Ins. Co., 74 Ill. 2d 507, 512, 386 N.E.2d 36, 37 (1978); Squire v. Economy Fire & Casualty Co., 69 Ill. 2d 167, 176, 370 N.E.2d 1044, 1048 (1977); Barnes v. Powell, 49 Ill. 2d 449, 452-53, 275 N.E.2d 377, 379 (1971); Putnam v. New Amsterdam Casualty Co., 48 Ill. 2d 71, 87, 269 N.E.2d 97, 105 (1970).

The Illinois Supreme Court applied this analysis in *Ullman v. Wolverine Insurance Co.*[11] In *Ullman*, plaintiff's decedent was killed in an automobile accident by an uninsured motorist. Because the accident occurred while Ullman was acting within the scope of his employment, his widow was entitled to, and received, worker's compensation benefits in the amount of $14,000 from her husband's employer.[12] Plaintiff then sought to recover $10,000 from her husband's insurance company pursuant to the UMC provision of his policy. The insurer denied liability, based on a provision authorizing setoff of "amounts payable on account of such bodily injury under any workmen's compensation law. . . ."[13] Plaintiff sued, arguing that the setoff provision contravened public policy.[14]

In rejecting plaintiff's contention, the court looked to the subrogation provision of the Illinois Worker's Compensation Act.[15] Under that provision, an employer who pays worker's compensation benefits is entitled to reimbursement out of any amounts received by the employee from the person legally liable for the injury. Thus, if Ullman had been killed by an insured motorist whose insurance company paid plaintiff, plaintiff would have been required to turn the insurance award over to Ullman's employer. The supreme court noted that the practical effect of reducing insurance liability under UMC was to put plaintiff in exactly the same financial position she would have occupied had the driver of the other car been insured; in either case plaintiff would have been entitled to retain only amounts over the amount of worker's compensation paid.[16] Consequently, the *Ullman* court held that the setoff provision for worker's compensation benefits was consistent with public policy.[17]

THE SETOFF CLAUSE AND SOCIAL SECURITY DISABILITY BENEFITS

The purpose of the Social Security Act,[18] at first glance, appears to be analogous to that of the Illinois Worker's Compensation Act; both are de-

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11. 48 Ill. 2d 1, 269 N.E.2d 295 (1970).

12. ILL. REV. STAT. ch. 48, § 138.1 to .28 (1969).

13. 48 Ill. 2d at 6, 269 N.E.2d at 298.

14. *Id.* at 3, 269 N.E.2d at 296. The plaintiff argued that the purpose of UMC was to provide for insurer liability in the event that the insured was the victim of an uninsured motorist's negligence. The setoff was contrary to public policy, according to the plaintiff, because it absolved the insurer of any liability if the worker's compensation benefits exceeded UMC liability, as was the case in *Ullman*. *Id.*

15. ILL. REV. STAT. ch. 48, § 138.5(b) (1969) provides:

> [I]f the action against [some person other than the employer] is brought by the injured employee or his personal representative and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, then from the amount received by such employee there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee or personal representative. . . .

16. *Ullman*, 48 Ill. 2d at 7, 269 N.E.2d at 298.

17. *Id.* at 7-8, 269 N.E.2d at 298.

18. 42 U.S.C. § 301 (Supp. IV 1980).

signed to compensate injured employees. Specifically, the legislative objective for establishing the social security disability benefits program was to provide disabled workers with sufficient compensation to enable them to meet their ordinary and necessary living expenses.[19]

To qualify for social security disability benefits, an applicant must satisfy stringent criteria. The claimant has the burden of proving (1) a "medically determinable physical or mental impairment" that is expected to be fatal or to last at least twelve months; (2) an "inability to engage in any substantial gainful activity"; and (3) a causal connection between such inability and the physical or mental impairment.[20] If the claimant meets these criteria, then the burden shifts to the government to prove that there is some work the claimant is able to perform.[21] A claimant is entitled to disability benefits only if he meets his burden of proof and the government fails to prove that the claimant remains able to work.

As the eligibility requirements demonstrate, the purpose of providing social security disability benefits is somewhat different from the purpose of providing worker's compensation benefits. The former focuses on the nature and extent of the employee's impairment, while the latter focuses on whether the impairment occurred while the employee was acting within the scope of his employment. In other words, social security disability benefits are designed to compensate the injured employee irrespective of the source or setting of the injury, whereas worker's compensation benefits are available only when the employee's injury arose out of and in the course of his employment.

In spite of these differences, both worker's compensation benefits and social security disability benefits are encompassed within the uninsured motorists setoff provisions.[22] To justify similar treatment of both types of benefits it must be shown that allowing an insurer to reduce its UMC liability by the amount of social security disability benefits would not put the victim of an uninsured motorist in a worse financial position than the victim of an insured motorist.

There are three reasons why social security disability benefits should not be deducted from UMC liability. First, as noted above, the rationale behind allowing the setoff of worker's compensation benefits from an insurer's UMC liability is that the employer has a right of subrogation with respect to such payments. The federal government, on the other hand, has no corresponding right to recoup social security disability benefits in the event the

19. 20 C.F.R. § 404.508 (1982).

20. 42 U.S.C. § 423(d)(1)(A) (Supp. IV 1980).

21. Corbin v. Califano, 481 F. Supp. 699, 701 (W.D. Mo. 1979). It should be noted that inability to perform any substantial gainful activity by virtue of a lengthy medical impairment is only one of three statutory types of disability under the Social Security Act. The other two are blindness, 42 U.S.C. § 416(i) (1976), and disability for widows, widowers, and surviving divorced wives, 42 U.S.C. § 423(d)(2) (1976).

22. *See supra* note 9.

beneficiary of such payments receives insurance proceeds from the party who is legally liable for the disability.[23] Consequently, the victim of an insured motorist is entitled to keep social security disability benefits in addition to any amounts received from the tortfeasor's insurance company. Permitting the insurer of a victim of an uninsured motorist to set off social security

23. There is specific statutory authority for the government to recoup payments made to beneficiaries of social welfare programs, but none of these statutes deals with social security disability benefits. First, the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653 (1976), accords the United States government the right to recover from a third party tortfeasor the reasonable value of "hospital, medical, surgical, or dental" care that the federal government furnishes to a tort victim. 42 U.S.C. § 2651. The Act confers an *independent* right of recovery upon the federal government; hence, the government technically is not subrogated to the victim's claim. *See* United States v. Greene, 266 F. Supp. 976, 978-80 (N.D. Ill. 1967). The Act empowers the government to recover from an uninsured motorist carrier the cost of medical care furnished to an injured party. *See* United States v. United Serv. Auto. Ass'n, 312 F. Supp. 1314 (D. Conn. 1970); United States v. Commercial Union Ins. Group, 294 F. Supp. 768, 771 (S.D.N.Y. 1969). The statute, however, appears to have no application to social security disability benefits because it is limited to "hospital, medical, surgical, or dental care and treatment." For a good discussion of the Medical Care Recovery Act, see Annot., 7 A.L.R. FED. 289 (1971).

Second, the government may recover overpaid social security disability benefits and old-age retirement benefits under certain circumstances. 42 U.S.C. § 404(a)(1) (Supp. IV 1980). *See generally* H. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES § 531 (2d ed. 1978). The overpayment of benefits may be recovered only if it is determined that the recipient was at fault, 42 U.S.C. § 404(b) (1976), or that the recovery would not defeat the legislative purpose of the Federal Old-Age, Survivors, and Disability Insurance Benefits program, *id.*, or that the recovery would not violate good conscience and equity, *id.* Although § 404 permits the Secretary to recover any overpayment, the section has been applied primarily to recover overpayments that resulted from errors in the computation of past wages and self-employment income. *See, e.g.*, Rebak v. Mathews, 438 F. Supp. 668 (S.D.N.Y. 1977). This section does not address the setting off of disability benefits received from a third party, nor does it grant any right of subrogation to the government to recover from a liable third party. Thus, this section of the Social Security Act also has no effect on the payment of liability insurance benefits arising from an automobile accident.

Finally, under the Medicare and Medicaid Amendments of 1980, 42 U.S.C. § 1395y(b) (Supp. IV 1980), items and services that are covered by an automobile or liability insurance policy or plan are excluded from Medicare coverage. Similarly, medical items and services that are covered by uninsured motorist insurance also would be excluded from Medicare coverage. *See* 4 MEDICARE & MEDICAID GUIDE (CCH) ¶ 24,391.31. The Amendments further provide that if the Secretary has made Medicare benefit payments that subsequently are duplicated by a private insurance carrier, the government is entitled to seek reimbursement for those benefits. *See id.* (citing H.R. REP. No. 1167, 96th Cong., 2d Sess. 5526 (1980)). Nevertheless, the government's right to recoup Medicare benefits does not appear to extend to social security disability benefits. Section 1395y(b)(1) is expressly limited to Subchapter XVIII of the Social Security Act, relating to health insurance for the aged and disabled. 42 U.S.C. § 1395y(b) (Supp. IV 1980). The legislative intent in enacting this health insurance program was to provide "basic protection against the costs of hospital and related posthospital services." 42 U.S.C. § 1395c (Supp. IV 1980). The social security disability program, on the other hand, was not created merely to provide for medical coverage. Essentially, the disability benefits program was enacted to provide the recipient with sufficient income to meet ordinary and necessary living expenses. 20 C.F.R. § 404.508 (1982). Thus, the government's right of subrogation under § 1395y(b)(1) is limited to Medicare payments, and does not apply to disability benefits.

disability benefits paid to the victim, then, would place the victim of an uninsured motorist in a worse financial position than the victim of an insured motorist. Because the subrogation argument sanctioned in *Ullman* is inapplicable to social security disability benefits, enforcement of a setoff provision for social security disability benefits would be contrary to public policy.

A recent decision by the Illinois appellate court supports the foregoing analysis. In *Pearson v. State Farm Mutual Automobile Insurance Co.*,[24] the insurer asserted the UMC setoff clause in an attempt to reduce its obligation to its policyholder, a Chicago policeman injured by an uninsured motorist. The police officer had received his usual salary for the period he was unable to work—a disability benefit specifically authorized by local ordinance. The ordinance, however, did not grant the city of Chicago the right to recoup the disability benefits in the event the disabled policeman recovered damages from the tortfeasor.

The trial court ruled that the insurer could not set off the disability benefits. On appeal, the Illinois appellate court noted that the purpose of the UMC statute was to place UMC policyholders in substantially the same position they would have occupied had the negligent driver complied with minimum liability insurance requirements.[25] The *Pearson* court correctly pointed out that the policeman would have been entitled to receive his disability benefits under the Chicago ordinance had he been injured by an insured motorist. Following the Illinois Supreme Court's reasoning in *Ullman*,[26] the appellate court observed that if the insurer was permitted to deduct the disability payments, then the policeman "would not be in substantially the same position he would have occupied if the tortfeasor had been insured."[27] The court therefore held that the setoff clause was invalid as applied to the policeman's disability benefits.

Although the *Pearson* decision involved disability benefits under a local ordinance, the reasoning of the opinion can, and should, be applied to disability benefits under the Social Security Act. Under both disability laws, the government is not permitted to recoup its disability payments if the victim recovers in a suit against the tortfeasor. Similarly, in a case involving either disability law, allowing a setoff would mean that the total recovery by the accident victim would differ depending upon whether or not the wrongful driver was insured. Such an arbitrary result, of course, is prohibited by the Illinois Supreme Court's decision in *Ullman*.

Public policy concerns beyond those underlying the uninsured motorist legislation also support the argument that UMC benefits should be payable without deduction of social security disability benefits. First, the two types of benefits are not duplicative. Uninsured motorist insurance benefits generally are designed to indemnify vehicular accident victims, and are recoverable

24. 109 Ill. App. 3d 649, 440 N.E.2d 1070 (1st Dist. 1982).
25. *Id.* at 651, 440 N.E.2d at 1070-71.
26. *Id.* at 652-53, 440 N.E.2d at 1072.
27. *Id.* at 652, 440 N.E.2d at 1072.

irrespective of an individual's ability to engage in gainful employment. Social security disability benefits, on the other hand, are designed to provide a degree of economic security for disabled workers and their dependents, and are recoverable irrespective of whether the cause of the disability was an uninsured motorist.[28] Thus, the different purposes underlying these two types of benefits militate against enforcement of the setoff clause.

The second public policy reason for not enforcing the disability benefit setoff clause is that the injured victim who had paid uninsured motorist premiums plus social security taxes deserves to have his legitimate expectations protected. Under the doctrine of reasonable expectations, courts must interpret an insurance contract so as to provide coverage that an insured can reasonably expect after reading the policy.[29] Because insurance policies frequently are contracts of adhesion, "[a]mbiguous policy language . . . is to be construed liberally in favor of the insured."[30] A person who simultaneously expends funds for uninsured motorist coverage and for social security disability benefits obviously expects to receive payments from both sources.

CONCLUSION

The primary consideration in uninsured motorist law should be adequate indemnification of the injured victim. From the victim's viewpoint, the right to receive both uninsured motorist benefits and social security disability benefits should not be dependent upon the insured or uninsured status of the tortfeasor. Because an insured motorist's victim would be entitled to retain social security disability payments in addition to any other recovery resulting from an accident, the uninsured motorist's victim should also receive social security disability benefits along with any other recovery. Hence, the uninsured motorist provision authorizing setoff of social security disability benefits should be held unenforceable.

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28. *See* Harvey v. Clyde Park, 32 Ill. 2d 60, 203 N.E.2d 573 (1964).

29. Note, *A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts*, 13 U. MICH. J.L. REF. 603, 604-8 (1980) (the doctrine of reasonable expectations requires that insurance contracts provide the coverage that the insured reasonably could expect on reading the policy).

30. 7 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 900 (3d ed. 1963).