YOUNG v. PROGRESSIVE SOUTHEASTERN INSURANCE COMPANY: THE FLORIDA SUPREME COURT FURTHER EXPANDS MANDATED UNINSURED-MOTORIST COVERAGE

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In *Young v. Progressive Southeastern Insurance Company*,[1] the Florida Supreme Court held that insurance provisions excepting self-insured vehicles from the definition of "uninsured motor vehicle" violated Florida public policy.[2] The *Young* decision was a significant change in insurance law, and it may raise more questions than it answers in the complicated field of uninsured-motorist coverage.

This "Last Word" first reviews the basic principles and history of uninsured-motorist law in Florida, then discusses the specific facts and holding of the *Young* case, and finally suggests how the *Young* decision may impact some of the basic principles of insurance law well beyond the original parameters of the case.

I. GENERAL PRINCIPLES OF UNINSURED-MOTORIST LAW: THE UNINSURED-MOTORIST STATUTE, FLORIDA STATUTES SECTION 627.727

As a general rule, parties to insurance contracts, like other contracting parties, are free to agree upon whatever terms they choose.[3] However, the Florida courts and the Florida Legislature

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1. 753 S.2d 80 (Fla. 2000).

2. *Id.* at 81.

3. *See Blue Cross & Blue Shield of Fla., Inc. v. Cassady*, 496 S.2d 875, 877 (Fla. Dist. App. 4th 1986) (noting that courts should not rewrite insurance contracts in a manner that will result in an outcome contrary to the parties' intent).

have identified public policies mandating certain types of coverages.[4] Among these is uninsured-motorist (UM) coverage.[5] Mandated UM coverage is a creature of statute, and courts historically have held that the public policy of the State of Florida with respect to UM coverage is defined in Florida Statutes Section 627.727 (the UM statute).[6] The scope of the UM statute is defined in Subsection (1) of Section 627.727.[7]

The threshold issue in any UM analysis is whether Florida Statutes Section 627.727 applies.[8] Subsection (1) of the UM statute controls an insurer's duties with respect to policies providing primary bodily-injury-liability coverage, if the policy includes coverage for liability arising out of the ownership, maintenance, or use of a specifically insured or identified motor vehicle.[9] Therefore, a policy that does not provide primary coverage, specifically insure a motor vehicle, or provide bodily-injury-automobile-liability coverage may not be subject to the

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4. Fla. Stat. § 627.727 (2000); *Young*, 753 S.2d at 83; *Mullis v. State Farm Mut. Automobile Ins. Co.*, 252 S.2d 229, 234–238 (Fla. 1971).

5. *Young*, 753 S.2d at 83; *Mullis*, 252 S.2d at 234–239.

6. *Salas v. Liberty Mut. Fire Ins. Co.*, 272 S.2d 1, 5 (Fla. 1972).

7. Subsection (1) in its current form provides as follows:

> No motor vehicle liability insurance policy which provides bodily injury liability coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom.

Fla. Stat. § 627.727(1).

It is essential in analyzing any UM question that the correct version of the statute be addressed. The UM statute has been amended numerous times, and the case law addressing one version of the statute may not apply to an earlier or later version of the statute. *Quirk v. Anthony*, 563 S.2d 710, 713 (Fla. Dist. App. 2d 1990), *approved*, *Travelers Ins. Co. v. Quirk*, 583 S.2d 1026 (Fla. 1991). Generally, the parties' rights and obligations are controlled by the version of the statute in effect at the time of the last renewal. *Adams v. Aetna Cas. & Surety Co.*, 574 S.2d 1142, 1148 (Fla. Dist. App. 1st 1991); *May v. State Farm Mut. Ins. Co.*, 430 S.2d 999, 1001 (Fla. Dist. App. 4th 1983); *Metro. Prop. & Liab. Ins. Co. v. Gray*, 446 S.2d 216, 218 (Fla. Dist. App. 5th 1984). An exception to this rule applies when a mid-policy term endorsement to the policy results in a premium change. *Fireman's Fund Ins. Co. v. Pohlman*, 485 S.2d 418, 420 (Fla. 1986). In that event, the date of the endorsement and premium change controls which version of the statute applies. *Id*.

8. Fla. Stat. § 627.727(1)–(2).

9. *See Wiener v. Avis Rent A Car*, 318 S.2d 565, 566 (Fla. Dist. App. 4th 1975) (holding that Section 627.727 applies only to policies of automobile-liability insurance).

requirements and public-policy limitations of Subsection (1).[10]

The UM statute dictates only the minimum required coverage.[11] In addition to these baseline statutory requirements, the particular policy also must be carefully reviewed because a policy may grant (or be construed to grant) broader coverage than that mandated by statute.[12] It also is important to note that the UM statute does not mandate that UM coverage be in place. It simply requires that the carrier take certain procedural steps before issuing a policy without UM coverage or with reduced or limited UM coverage.[13] The carrier's duties in issuing a policy without UM coverage depend in part on the type of policy.[14] These may include obtaining a written rejection or selection from the named insured and providing annual notice of UM options.[15]

II. THE LEGAL NATURE AND ELEMENTS OF AN UM CLAIM

Generally, UM coverage is intended to provide the insured with the right to recover from his or her own insurance carrier damages that he or she would otherwise be legally entitled to recover from an uninsured or underinsured tortfeasor.[16] Therefore, UM claims have several distinct legal elements: the "insured"[17] must be "legally entitled to recover"[18] damages due to

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10. *Dauksis v. State Farm Mut. Auto. Ins. Co.*, 623 S.2d 455, 457 (Fla. 1993); *Universal Underwriters Ins. Co. v. Morrison*, 574 S.2d 1063, 1065 (Fla. 1990).

11. *Id*.

12. Fla. Stat. § 677.727.

13. *Id*. § 627.727(1).

14. Subsection (1) of the UM statute controls a carrier's duties with respect to policies providing primary automobile-liability coverage. *Id*. A carrier issuing an excess or umbrella policy is required to comply with the lesser mandates of Subsection (2) in issuing such a policy without UM coverage. *Quirk*, 583 S.2d at 1029.

15. Fla. Stat. § 627.727(1).

16. *E.g. Universal Underwriters Ins. Co.*, 574 S.2d at 1065; *Ellsworth v. Ins. Co. of N. Am*., 508 S.2d 395, 399 (Fla. Dist. App. 1st 1987); *Decker v. Great Am. Ins. Co.*, 392 S.2d 965, 968 (Fla. Dist. App. 2d 1980); *Automobile Ins. Co. v. Beem*, 469 S.2d 138, 139–140 (Fla. Dist. App. 3d 1985).

17. Only persons "insured" for UM coverage under a particular policy are entitled to receive UM benefits under that policy. *Quirk*, 583 S.2d at 1028; *Mullis*, 252 S.2d at 232–238. The Florida Supreme Court has determined that the UM statute requires two "classes" of persons to be insured for UM coverage under a given policy. *Id*. The first "class," called "Class I insureds," refers to the named insured and his or her resident relatives. *Id*. The second "class," referred to as "Class II insureds," is comprised of any permissive users or occupants of the insured vehicle. *Id*. Numerous questions have arisen regarding whether a given person qualifies as a "relative" of the named insured or a "resident" of the named insured's household. *See e.g. Patterson v. Cincinnati Ins. Co.*, 564 S.2d 1149, 1150–1151 (Fla. Dist. App. 1st 1990) (finding that a trier of fact should resolve

residency disputes); *Row v. U.S. Automobile Assn.*, 474 S.2d 348, 351–352 (Fla. Dist. App. 1st 1985) (finding residency requirement was met although the insured's son did not physically reside with the insured); *Gen. Guar. Ins. Co. v. Broxsie*, 239 S.2d 595, 597 (Fla. Dist. App. 1st 1970) (quoting *Kiplinger v. Kiplinger*, 2 S.2d 870, 873–874 (Fla. 1941), for the definition of "residency"); *Trezza v. State Farm Mut. Automobile Ins. Co.*, 519 S.2d 649, 652 (Fla. Dist. App. 2d 1988) (finding that military service does not change the insured's residence unless there is a manifest intention to change); *Alava v. Allstate Ins. Co.*, 497 S.2d at 1286, 1287–1288 (Fla. Dist. App. 3d 1986) (resolving residency issue in favor of the insured, who was a resident of two households); *Allstate Ins. Co. v. Hilsenrad*, 462 S.2d 1202, 1203–1204 (Fla. Dist. App. 3d 1985) (finding that an adult appellee, who was not a relative by blood or marriage, did not fit within the definition of a "relative"); *State Farm Mut. Automobile Ins. Co. v. Johnson*, 536 S.2d 1089, 1091–1092 (Fla. Dist. App. 4th 1988) (recognizing that residency issues should be resolved in favor of the uninsured); *Doe v. MacNitt*, 668 S.2d 1118, 1119 (Fla. Dist. App. 5th 1996) (finding that girlfriend living with insured was a Class I or Class II insured); *Taylor v. United Serv. Automobile Assn.*, 684 S.2d 890, 891 (Fla. Dist. App. 5th 1996) (en banc) (resolving issue of whether a "'kids in the military exception" to residency applies to a UM provision that covered residents); *State Farm Fire & Cas. Co. v. Blasband*, 534 S.2d 901, 901 (Fla. Dist. App. 5th 1988) (finding that a residency question is a mixed issue of fact and law and was properly submitted to the jury).

18. The insured seeking UM benefits must prove as one element of the insuring agreement that he is "legally entitled to recover" damages from the uninsured tortfeasor. *Allstate Ins. Co. v. Boynton*, 486 S.2d 552, 554 (Fla. 1986). This requires that the insured prove that he would have the substantive right to recover against the tortfeasor the damages he seeks under his own UM coverage. *Id*. at 556. Therefore, the nature of a UM claim is that the insured's own carrier steps into the shoes of the tortfeasor. *Id*. at 557. As such, UM carriers are subrogated to any *substantive* defense that the tortfeasor may have been able to assert against the insured. *See id*. at 558–559 (no UM coverage where UM was immune from liability under the Workers' Compensation Law); *Simon v. Allstate Ins. Co.*, 496 S.2d 878, 879 (Fla. Dist. App. 4th 1986) (passenger-wife not entitled to UM coverage under husband's policy because the insurer was subrogated to the husband's substantive defense of interspousal immunity).

However, at least some courts have held that a "procedural" defense between the insured and UM does not inure to the benefit of the insurer. *Lewis v. Allstate Ins. Co.*, 667 S.2d 261, 263 (Fla. Dist. App. 1st 1995) (holding that statute of limitations bar to claim against tortfeasors did not bar claim for UM benefits); *Robinson v. Auto Owners Ins. Co.*, 718 S.2d 1283, 1285 (Fla. Dist. App. 2d 1998) (finding that statute of limitations bar to claim against tortfeasors did not bar claim for UM benefits); *Jones v. Integral Ins. Co.*, 631 S.2d 1132, 1134 (Fla. Dist. App. 3d 1994) (holding that *Boynton* decision allows only UM carriers to assert substantive defenses of the tortfeasor). For example, if the insured's claim would be barred by the statute of limitations, it appears that UM coverage still may be available based on the rationale that the insured was "legally entitled to recover" from the UM *at the time of the accident*. *Lewis*, 667 S.2d at 262; *Jones*, 631 S.2d at 1134. The First District certified the question to the Florida Supreme Court in *Lewis*, recognizing that its holding impacted the insurer's subrogation rights. *Lewis*, 667 S.2d at 263. However, the parties never took the case to the Florida Supreme Court. *See generally JFK Med. Ctr. v. Price*, 647 S.2d 833, 834 (Fla. 1994) (settlement agreement followed by dismissal with prejudice of active tortfeasor was not an adjudication on the merits against the vicarious tortfeasor so as to render the insured legally unentitled to recover); *Hurley v. Govt. Employees Ins. Co.*, 619 S.2d 477, 478–479 (Fla. Dist. App. 2d 1993) (permanent injury tort threshold may apply to UM claims).

the tortfeasor's "ownership, maintenance, or use"[19] of an "uninsured motor vehicle."[20] The requirement that the damages be caused by an "uninsured motor vehicle" was the element at issue in *Young*.[21]

The general definition of the term "uninsured motor vehicle" has changed significantly in the relatively short history of UM law in Florida.[22] The original statute provided that a tortfeasor would be considered *underinsured* if the liability limits were less than the UM limits.[23] Instead of comparing the liability limits to the UM limits, courts now compare the claimant's injuries to the tortfeasor's liability limits.[24] If the injuries exceed the limits of coverage, the tortfeasor is considered *uninsured*.[25]

However, the claimant's actual ability to recover the tortfeasor's policy limits is not relevant to the analysis.[26] The fact that a liability policy is not available to a particular insured does

19. The basic rule for determining whether a loss arises out of the "ownership, maintenance, or use" of an uninsured motor vehicle is (1) whether the accident arose from the inherent nature of an automobile; (2) whether it arose within the territorial limits of the vehicle, and actual use, operation, or maintenance had not terminated; and (3) whether the vehicle actually produced the injury, rather than merely contributing to the condition which caused the injury. *Race v. Nationwide Mut. Fire Ins. Co.*, 542 S.2d 347, 349 (Fla. 1989) (adopting the test pronounced by John Alan Appleman & Jean Appleman, *Insurance Law and Practice With Forms* vol. 6B, § 4317, 367–369 (Richard B. Buckley, ed., rev. ed., West 1979)). The test for whether a loss arises out of the ownership, maintenance, or use of a vehicle is much more narrow for purposes of UM coverage than it is for purposes of personal injury protection ("PIP") coverage. *Id*. at 349; *cf. Govt. Employees Ins. Co. v. Novak*, 453 S.2d 1116, 1119 (Fla. 1984) (finding that PIP benefits apply even to criminal assault in a vehicle). Thus, PIP cases have reduced significance in the UM context.

20. In a collision involving more than one vehicle, it is important to analyze whether each vehicle is an "uninsured motor vehicle." In *Woodard v. Pennsylvania National Mutual Insurance Company*, 534 S.2d 716, 721 (Fla. Dist. App. 1st 1988), the court held that a passenger in one motor vehicle, who has exhausted the liability coverage available to the driver of the vehicle in which he was riding, can collect UM benefits under the same policy based on the uninsured status of the driver of the *other* vehicle. Care must be taken to analyze separately the status of each potentially at-fault vehicle.

21. *Young*, 753 S.2d at 81.

22. 1989 Fla. Laws ch. 243, § 1; 1973 Fla. Laws ch. 180, §§ 3–4.

23. 1973 Fla. Laws at 180.

24. 1989 Fla. Laws at 243.

25. *Id*.

26. *See Reid v. State Farm Fire & Cas. Co.*, 352 S.2d 1172, 1173 (Fla. 1977) (holding that a vehicle was not rendered uninsured simply because the liability coverage was unavailable to the family member claimant); *Centennial Ins. Co. v. Wallace*, 330 S.2d 815, 817 (Fla. Dist. App. 3d 1976) (holding that a vehicle was not rendered uninsured by the fact that the liability limits were not available to the employee of the vehicle owner).

not render the tortfeasor uninsured.[27] Similarly, exhaustion of liability limits by payment to multiple claimants does not render the vehicle uninsured with respect to the remaining claimants.[28]

III. THE YOUNG DECISION

Although many UM cases involve the issue of whether the elements of the claim have been established, a significant portion of the UM case law in Florida addresses an alternative argument made by claimants — that the policy does not by its terms provide UM coverage, but that the public policy of the State of Florida mandates that coverage be afforded, such that the contract should be rewritten in the particular case.[29] This was the argument made by the Youngs and ultimately accepted by the Florida Supreme Court.[30]

In *Young*, the claimant was struck from behind by a vehicle owned by the Hillsborough County Sheriff's Office.[31] The Sheriff's Office was self-insured for $100,000 per person and $200,000 per accident.[32] The Youngs claimed that their damages exceeded these self-insurance limits, and they therefore filed a claim for UM benefits against their own carrier, Progressive Southeastern Insurance Company (Progressive).[33]

To trigger the insuring agreement for UM coverage, the Youngs needed to demonstrate that they were injured as a result of the ownership, maintenance, or use of an "uninsured motor vehicle."[34] The policy specifically provided that self-insured vehicles could not qualify as "uninsured motor vehicles." The Court quoted from the policy,

> "[A]n uninsured motor vehicle does not include any vehicle:
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> . . .
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> d. *Owned or operated by a self-insurer* as contemplated by any financial responsibility law, motor carrier law, or similar law."[35]

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27. *Id.*
28. *Gophin v. Home Indem. Co.*, 284 S.2d 442, 444 (Fla. Dist. App. 1st 1973).
29. *Young*, 753 S.2d at 83; *Salas*, 272 S.2d at 5; *Mullis*, 252 S.2d at 238.
30. *Young*, 753 S.2d at 81–88.
31. *Id.* at 82.
32. *Id.*
33. *Id.*
34. *Supra* n. 9 and accompanying text.
35. *Young*, 753 S.2d at 82 (emphasis in original).

Based on this provision and prior case law upholding similar exceptions,[36] the trial court entered summary judgment in favor of Progressive.[37] The Second District Court of Appeal affirmed the summary judgment,[38] but the court also certified to the Florida Supreme Court as a question of great public importance the issue of whether a policy provision excluding self-insured vehicles from the definition of "uninsured motor vehicle" is permissible under Florida law and public policy.[39]

The Florida Supreme Court accepted jurisdiction and first reviewed Florida Statutes Section 627.727(3), which provides statutory requirements for the definition of "uninsured motor vehicle."[40] The court determined that Subsection (3) does not place any requirements on the status of self-insured vehicles.[41] The basis for this holding is that a self-insurer does not qualify as an "insurer."[42] Because Subsection (3) defines the requirements in

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36. *Comesanas v. Auto-owners Ins. Co.*, 700 S.2d 118, 119 (Fla. Dist. App. 2d 1997); *Amica Mut. Ins. Co. v. Amato*, 667 S.2d 802, 803 (Fla. Dist. App. 4th 1995); *see Boynton*, 486 S.2d at 558 (tortfeasor is uninsured "if he is without insurance *or has not complied with the self-insurance provisions of the statutes*" (emphasis added)); *Gabriel v. Travelers Indem. Co.*, 515 S.2d 1322, 1324 (Fla. Dist. App. 3d 1987) (city which maintained a self-insurance program was not "uninsured").

37. *Young*, 753 S.2d at 82.

38. *Young v. Progressive S.E. Ins. Co.*, 712 S.2d 460, 461 (Fla. Dist. App. 2d 1998) (citing *Amica*, 667 S.2d at 802, and *Comesanas*, 700 S.2d at 118), *rev'd*, 753 S.2d 80 (Fla. 2000).

39. *Young*, 712 S.2d at 461. The specific certified question read as follows:

> IS A POLICY PROVISION WHICH EXCLUDES A VEHICLE OWNED OR OPERATED BY A SELF-INSURER FROM THE DEFINITION OF 'UNINSURED MOTOR VEHICLE' FOR PURPOSES OF UNINSURED/UNDERINSURED MOTORIST COVERAGE PERMISSIBLE UNDER FLORIDA LAW AND PUBLIC POLICY?

Id.

40. Subsection (3) provides as follows:

> For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, be deemed to include an insured motor vehicle *when the liability insurer thereof*:
>
> (a) Is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency;
>
> (b) Has provided limits of bodily injury liability for its insured which are less than the total damages sustained by the person legally entitled to recover damages; or
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> (c) Excludes liability coverage to a nonfamily member whose operation of an insured vehicle results in injuries to the named insured or to a relative of the named insured who is a member of the named insured's household.

Fla. Stat. § 627.727(3) (emphasis added).

41. *Young*, 753 S.2d at 84.

42. *Id*. (citing *Diversified Servs., Inc. v. Avila*, 606 S.2d 364 (Fla. 1992), and *Govt. Employees Ins. Co. v. Wilder*, 546 S.2d 12, 13 (Fla. Dist. App. 3d 1989)).

terms of the "liability insurer" of the vehicle, and because self-insured vehicles have no "insurer," the court held that the statute did not apply.[43]

Nevertheless, the court determined that Subsection (3) places requirements only on the definition of "underinsured motor vehicles."[44] The court then held that it must next determine whether the vehicle was "uninsured."[45] The court concluded that, because there is no "liability insurer" as that term is used in defining underinsured vehicles in Subsection (3), the vehicle necessarily must be "statutorily uninsured."[46] The court thereby created a new definition of "uninsured," defining that term as "a motorist without a 'liability insurer,'"[47] and finding that, "[p]ursuant to Florida's uninsured motorist statutory scheme, motorists are considered uninsured when they lack liability insurance or possess liability insurance with limits of liability lower than the damages sustained by the policy-holder."[48] The court also stated, "[O]ur statute does not predicate the ability of the injured persons to claim uninsured or underinsured motorist coverage from their own carrier on a showing that the tortfeasor lacks the financial resources to respond to the claim."[49]

The court therefore held that the self-insured-vehicle exception violated Florida public policy and concluded that the policy would be deemed to provide UM coverage despite the exception.[50]

IV. IMPACT OF THE YOUNG DECISION BEYOND SELF-INSURED-VEHICLE CASES

The direct result of *Young* is that self-insured-vehicle exceptions are now void in UM policies issued and delivered in Florida. The effects of the case, however, are much broader. The decision validly can be seen as an expansion not only of mandated UM coverage, but also of the Florida courts' authority to issue such mandates.

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43. *Young*, 753 S.2d at 84.
44. *Id.*
45. *Id.*
46. *Id.* at 85.
47. *Id.*
48. *Id.* at 87.
49. *Id.* at 86.
50. *Id.* at 87–88.

A. Uninsured v. Underinsured

The first legal principle changed by the *Young* court is the resurrection of the dichotomy between uninsured and underinsured vehicles. Early Florida UM law made this distinction but, after the 1971 amendments to the UM statute, no legal difference existed between uninsured vehicles and underinsured vehicles.[51] The majority's decision in *Young* apparently resurrects the distinction between "uninsured" and "underinsured" vehicles, despite the Legislature's amendment deeming the terms indistinguishable.

In fact, Section 627.727(3) does not even use the term "underinsured." It refers only to the definition of "uninsured" motor vehicles.[52] Because the majority agreed that the statute does not allow a finding that a self-insured vehicle is underinsured, it is interesting that the court found that the vehicle was uninsured, as the statute does not distinguish between those terms.

The analysis used by the court to reach this result will have an immediate impact on Florida-insurance law. The court was able to find that self-insured vehicles are necessarily uninsured because of the lack of a "liability insurer" as that term is used in Subsection (3).[53] However, "liability insurance" is only one of several methods available for complying with the Financial Responsibility Act and other provisions of the Insurance Code.[54] Apparently, the lack of a technical "liability insurer" will now render every other such vehicle statutorily uninsured. This could result in a significant broadening of the types of accidents in which UM coverage will be available, even if the policy does not provide coverage by its terms.

B. Triggering of UM Claims and Subrogation Issues

The *Young* holding potentially can cause significant confu-

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51. 1971 Fla. Laws ch. 88, § 1; *see Ivey v. Chi. Ins. Co.*, 410 S.2d 494, 497 (Fla. 1982) ("[W]e do not believe that when the legislature amended the law, broadening the definition of uninsured motorist to include those who are underinsured, it intended that distinctions be made between recoveries for injuries received from uninsured motorists and recoveries for injuries received from underinsured motorists."); *Williams v. Hartford Accident & Indem. Co.*, 382 S.2d 1216, 1218–1220 (Fla. 1980) (explaining the historical distinction and its abrogation in 1971).

52. Fla. Stat. § 627.727(3).

53. *Young*, 753 S.2d at 85.

54. Fla. Stat. § 324.031 (2001).

sion regarding the effect of the self-insured certificate and its limits. After *Young*, it is unclear whether a claimant injured by a self-insured tortfeasor is required to exhaust the self-insured limits, or even make a claim for such limits, prior to seeking UM coverage under his or her own policy.

As Justice Charles T. Wells noted in his dissent, this confusion could particularly damage the UM carrier's subrogation rights.[55] Significantly, the statute of limitations is four years for tort claims and five years for contract claims.[56] Therefore, the insured could make a UM claim after the statute of limitations has expired on the tort claim, leaving the UM carrier without a subrogation remedy.

This result may be inconsistent with Subsection (6) of the UM statute. That provision, added in 1992,[57] requires that the UM carrier pay to the injured party the amount of the tortfeasor's written offer if the carrier refuses to approve the settlement and chooses to preserve its subrogation rights.[58] Although the constitutionality of this requirement is questionable,[59] it shows clear

55. *Young*, 753 S.2d at 90 (Wells, J., dissenting).

56. Fla. Stat. § 95.11(2)–(3).

57. 1992 Fla. Laws ch. 318 (taking effect on October 1, 1992).

58. Fla. Stat. § 627.727(6)(b).

59. The Second District Court of Appeal held that this prepayment obligation could not validly be applied to a UM policy that was executed prior to the effective date. *State Farm Mut. Automobile Ins. Co. v. Hassen*, 650 S.2d 128, 134 (Fla. Dist. App. 2d 1995) (holding "that the application of section 627.727(6), Florida Statutes (Supp. 1992), to a pending claim brought under the uninsured motorists provisions of an automobile insurance policy executed prior to its effective date would unconstitutionally impair the obligation of that contract in violation of article I, section 10, of the Florida Constitution."). Furthermore, the *Hassen* court stated that, even if the prepayment obligation imposed by Subsection (6) could be applied to pending claims based upon events predating the 1992 change, the court would still hold the requirement unconstitutional as a violation of the UM carrier's right to due process of law and as a violation of the UM carrier's right to access to the courts. *Id*. at 139. The Second District certified the question to the Florida Supreme Court. *Id*. at 141–142.

The Florida Supreme Court approved the result in *Hassen*, but declined to answer the certified question and address the constitutional issues. *Hassen v. State Farm Mut. Automobile Ins. Co.*, 674 S.2d 106, 107–108 (Fla. 1996). The court stated that its resolution of the case was based on its determination that the amendment to Florida Statutes Section 627.727(6) was substantive, and therefore, relying upon the laws of statutory construction, must be applied prospectively in the absence of legislative intent to the contrary. *Id*. at 108. Having interpreted the statute to only apply prospectively, the court was no longer required to address the constitutional issues, and it chose not to do so. *Id*.; *see Fla. Farm Bureau Mut. Ins. Co. v. Zarahn*, 666 S.2d 1034, 1035 (Fla. Dist. App. 1st 1996) (approving the Second District's holding in *Hassen* and concluding that the statute cannot be applied to existing contracts because it is substantive, denies due process, and

legislative intent to allow the UM carrier to pursue subrogation claims against the tortfeasor.

Likewise, there may be confusion regarding whether the UM carrier pays from the "first dollar" regardless of the self-insured limits, instead of the UM coverage being "over and above" other available sums as specifically provided in Florida Statutes Section 627.727(1). The statute states as follows:

> The coverage described under this section shall be over and above, but shall not duplicate, the benefits available to an insured . . . from the owner or operator of the uninsured motor vehicle or any other person or organization jointly or severally liable together with such owner or operator for the accident . . . .[60]

Statutory self-insurance appears clearly to qualify as "benefits available . . . from the owner or operator of the uninsured motor vehicle." In fact, statutory self-insurance and the other methods of complying with the Financial Responsibility Act are all subject to requirements as to the dollar amount to be made available to satisfy the driver's liability in the event of a judgment.[61] Additionally, some of the other methods expressly require that excess insurance be obtained,[62] and statutory self-insureds can also have excess insurance.[63] Before *Young*, each amount presumably would have been considered in determining when UM coverage, which is supposed to be "over and above" other amounts available from the tortfeasor, is triggered. Now, the triggering level is unclear, despite prior case law enforcing the "over and above" provisions of the statute.[64]

In fact, the *Young* decision is arguably inconsistent with and will potentially undermine the rule that an insured's damages must exceed the tortfeasor's insurance coverage before a UM

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denies access to courts).

60. Fla. Stat. § 627.727(1).

61. *Id*. § 324.021(7) (general limits required); *id*. § 324.161 (surety bond and deposit requirements); *id*. § 324.171 (self-insurance requirements).

62. *Id*. § 324.031.

63. *Id*. § 324.171(1)(b)(2).

64. The Fifth District invalidated a policy provision that effectively set off the amount paid under UM coverage against the amount due under the same policy to the same person for liability coverage. *Beebe v. Am. Ambassador Cas. Co.*, 659 S.2d 701, 704 (Fla. Dist. App. 5th 1995). The court noted that the provision's effect was to make UM coverage primary and found this effect violated the UM statute, which expressly states that UM coverage is excess over and above any liability coverage. *Id*. at 703.

claim is viable.[65] Under the majority's decision, an insured arguably can seek UM coverage for his or her injuries, even if his or her damages do not exceed the tortfeasor's self-insured limits.

In addition to impacting the level at which UM coverage is triggered, these issues also may affect the procedure used to determine both tort claims and UM claims. Due to a recent change in the law, the jury is now made aware that an underinsured-motorist carrier that "is properly sued and joined in an action against a tortfeasor" is a party to the case.[66] The questions that *Young* raises about the proper triggering of a UM claim may vastly expand the circumstances under which the UM carrier may be joined in the tort case, even when it appears clear that the tort claim will not exceed the self-insurance limits. The injection of insurance into the tort case could increase verdicts rendered against self-insured and other "statutorily uninsured" entities.

C. Statutory Construction and Authority to Establish Public Policy

The *Young* case at least impliedly indicates that the introductory language of Subsection (3) should be disregarded. Subsection (3) is the only part of the UM statute that is expressly made "subject to the terms and conditions" of the policy.[67] There is no case authority interpreting this language but, prior to *Young*, many carriers believed that, for this limiting language to be given effect, Subsection (3) of the statute could not be held to override contrary language in the contract.

There is no question that the terms and conditions of the contract in *Young* did not provide UM coverage for the claimed accident. Nevertheless, the court held that coverage was required, apparently due to the operation of Subsection (3). *Young* therefore indicates that courts will treat Subsection (3) provisions as mandatory, despite the "subject to" language included in that part of the statute.

Perhaps the broadest effect of the *Young* case is its potential impact on the courts' authority to establish Florida public policy

65. *State Farm Automobile Ins. Co. v. Moher*, 734 S.2d 1088, 1088 (Fla. Dist. App. 2d 1999).

66. *Govt. Employees Ins. Co. v. Krawzak*, 675 S.2d 115, 116 (Fla. 1996); *see Brush v. Palm Beach County*, 679 S.2d 814, 816 (Fla. Dist. App. 4th 1996) (following *Krawzak* to hold that the failure to disclose the status of UM carriers was improper).

67. Fla. Stat. § 627.727(3).

in the UM context. Courts historically have looked to the statute to determine the state's policy with respect to mandated UM coverage.[68] Although the *Young* court supports its decision with an interpretation of legislative intent, the majority's opinion deems a contract provision invalid without a direct finding that the relevant part of the statute mandated coverage in this case. *Young*, therefore, can reasonably be argued as authority for the proposition that, in the name of public policy, the courts can expand the scope of mandated UM coverage beyond that which the statute requires.

D. Subsection (9) of the UM Statute: Exclusive List of Limitations?

A particularly significant effect of *Young* is its analysis of the legislative intent regarding the permissible limitations on UM coverage. In 1987, the Florida Legislature added Subsection (9) to the UM statute.[69] That Subsection provides a mechanism by which insurers can issue policies with certain limitations in UM coverage.[70] These limitations include non-stacked coverage and coverage with "uninsured vehicle" exclusions.[71] To validate such

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68. *Adams v. Aetna Cas. & Sur. Co.*, 574 S.2d 1142, 1146–1147 (Fla. Dist. App. 1st 1991); *Armstrong v. Allstate Ins. Co.*, 712 S.2d 788, 790 (Fla. Dist. App. 2d 1998).

69. 1987 Fla. Laws ch. 213, § 1.

70. Fla. Stat. § 627.727(9).

71. Subsection (9) provides as follows:

> Insurers may offer policies of uninsured motorist coverage containing policy provisions, in language approved by the department, establishing that if the insured accepts this offer:
>
> (a) The coverage provided as to two or more motor vehicles shall not be added together to determine the limit of insurance coverage available to an injured person for any one accident, except as provided in paragraph (c).
>
> (b) If at the time of the accident the injured person is occupying a motor vehicle, the uninsured motorist coverage available to her or him is the coverage available as to that motor vehicle.
>
> (c) If the injured person is occupying a motor vehicle which is not owned by her or him or by a family member residing with her or him, the injured person is entitled to the highest limits of uninsured motorist coverage afforded for any one vehicle as to which she or he is a named insured or insured family member. Such coverage shall be excess over the coverage on the vehicle the injured person is occupying.
>
> (d) The uninsured motorist coverage provided by the policy does not apply to the named insured or family members residing in her or his household who are injured while occupying any vehicle owned by such insureds for which uninsured motorist coverage was not purchased.
>
> (e) If, at the time of the accident the injured person is not occupying a motor vehicle, she or he is entitled to select any one limit of uninsured motorist coverage

limited coverage in policies that are subject to Subsection (9), an insurer must comply with certain procedural requirements of that Subsection.[72]

In invalidating the self-insured-vehicle exception, the court in *Young* reasoned that the Legislature's failure to include the exception in the "list of authorized policy exclusions" provided in Subsection (9) indicated a legislative intent not to permit such exceptions.[73] Although it was not the first case in which a court has indicated that the mention of certain permitted exclusions in Subsection (9) may imply that no other exclusions are valid,[74] *Young* is the first case directly finding that Subsection (9) constitutes an exhaustive list of UM limitations.[75] It is also the first case applying that analysis to an exception as opposed to an exclusion. Traditionally, stricter rules are applied to exclusions than to other parts of the policy.[76] For example, the insured has the burden of proving that an insuring agreement is triggered, and the insurer has the burden of proving that an exclusion applies.[77] After *Young*, it is possible that the only valid exceptions, exclusions, or limitations on UM coverage, no matter what form they take, are those stated in Subsection (9).

This outcome could be significant because many policies

> for any one vehicle afforded by a policy under which she or he is insured as a named insured or as an insured resident of the named insured's household.

Id.

72. Subsection (9) requires an insurer issuing one of the enumerated limited coverage forms to obtain a signed selection of limited coverage from the named insured. *Id*.; *compare Johnson v. Stanley White Ins.*, 684 S.2d 248, 250 (Fla. Dist. App. 2d 1996) (holding that there was a material issue of fact regarding whether the insureds had rejected stacked UM coverage, even though the insurer had a rejection form with the insured's signatures), *with Teacher's Ins. Co. v. Bollman*, 617 S.2d 817, 818 (Fla. Dist. App. 2d 1993) (holding that the insured's memorandum to her agent directing him to change her policies from stacked coverage to unstacked coverage as per their earlier conversation complied with the procedural requirements of Subsection (9)). A carrier issuing a Subsection (9) policy must also reduce its premiums according to a formula stated in the statute. Fla. Stat. § 627.727(9). An insurer relying on a nonstacked form or a Subsection (9) exclusion must affirmatively plead and prove compliance with Subsection (9). *Schutt v. Atlanta Cas. Cos.*, 682 S.2d 685, 685 (Fla. Dist. App. 5th 1996).

73. *Young*, 753 S.2d at 85.

74. *See Govt. Employees Ins. Co. v. Douglas*, 654 S.2d 118, 120–121 (Fla. 1995) (stating that if a policy exclusion was upheld as valid despite not complying with Subsection (9), then the Subsection would be rendered meaningless).

75. *Young*, 753 S.2d at 85.

76. *Hudson v. Prudential Prop. & Cas. Ins. Co.*, 450 S.2d 565, 568 (Fla. Dist. App. 2d 1984).

77. *Id*.; *see Boynton*, 486 S.2d 552, 558 (Fla. 1986) (insured has burden of proving that an "uninsured motor vehicle" was involved).

contain various other limitations, including other exceptions from the definition of an "uninsured motor vehicle." The self-insured-vehicle exception is not the only such exception. A common such exception provides that the term "uninsured motor vehicle" does not include any vehicle "owned by or furnished or available for the regular use of" the named insured or any family member. These "family car exclusions" or "your car" exceptions[78] to the definition of "uninsured motor vehicle" historically have been upheld by the Florida courts.[79] In fact, in *Travelers Insurance Company v. Warren*,[80] the Florida Supreme Court recently reaffirmed the validity of the "your car" exception.[81] Interestingly, the court in *Warren* made clear that the validity of these exceptions did not depend on whether liability coverage was provided under the policy; in other words, it was irrelevant whether the vehicle was uninsured or underinsured. [82]

It is difficult to reconcile *Warren* with the language in *Young*

78. Although these provisions typically are referred to as "family car exclusions," they are actually *exceptions* to the definition of "uninsured motor vehicle," like the self-insured vehicle exception at issue in *Young*. Therefore, the stringent rules of construction and burdens of proof applicable to exclusions are arguably inapplicable to these family car exceptions.

79. *See Smith v. Valley Forge Ins. Co.*, 591 S.2d 926, 927 (Fla. 1992) (insured was a passenger in her own scheduled auto); *Brixius v. Allstate Ins. Co.*, 589 S.2d 236, 237–238 (Fla. 1991); *Reid v. State Farm Fire & Cas. Co.*, 352 S.2d 1172, 1173 (Fla. 1977); *Allstate Ins. Co. v. Croakman*, 591 S.2d 297, 298 (Fla. Dist. App. 1st 1991); *Hartland v. Allstate Ins. Co.*, 575 S.2d 290, 291 (Fla. Dist. App. 1st 1991), *approved*, 592 S.2d 677 (Fla. 1992); *Nationwide Mut. Fire Ins. Co. v. Olah*, 662 S.2d 980, 982–983 (Fla. Dist. App. 2d 1995); *Harrison v. Metro. Prop. & Liab. Ins. Co.*, 475 S.2d 1370, 1371 (Fla. Dist. App. 2d 1985); *State Farm Mut. Automobile Ins. Co. v. Palacino*, 562 S.2d 837, 838 (Fla. Dist. App. 4th 1990) (en banc), *approved*, 589 S.2d 239 (Fla. 1991); *Allstate Ins. Co. v. Baker*, 543 S.2d 847, 849–850 (Fla. Dist. App. 4th 1989); *Barlow v. Auto-owners Ins. Co.*, 358 S.2d 1128, 1129 (Fla. Dist. App. 4th 1978). The analysis used to uphold these exceptions is based on the logical premise that a vehicle cannot be insured and uninsured under the same policy for the same accident. *Nicholas v. Nationwide Mut. Fire Ins. Co.*, 503 S.2d 993, 993–994 (Fla. Dist. App. 1st 1987); *State Farm Mut. Auto. Ins. Co. v. McClure*, 501 S.2d 141, 143–144 (Fla. Dist. App. 2d 1987), *corrected*, 512 S.2d 296 (Fla. Dist. App. 2d 1987); *cf. Travelers Ins. Cos. v. Chandler*, 569 S.2d 1337, 1338 (Fla. Dist. App. 1st 1990) (invalidating such a definition without analysis), *overruled, Travelers Ins. Co. v. Warren*, 678 S.2d 324 (Fla. 1996).

80. 678 S.2d 324 (Fla. 1996).

81. *Id.* at 328–329; *see Bulone v. United Servs. Automobile Assn.*, 660 S.2d 399, 402–405 (Fla. Dist. App. 2d 1995) (disagreeing with the First District's decision in *Warren* and outlining an analysis similar to that later adopted by the Florida Supreme Court in *Warren*), *approved*, 679 S.2d 1185 (Fla. 1996).

82. *Warren*, 678 S.2d at 327. Other cases have approved family car exceptions in cases in which the claimant had recovered some liability benefits under the same policy. *Nicholas*, 503 S.2d at 993–994; *McClure*, 501 S.2d at 143–144.

to the effect that Subsection (9) provides the only valid limitations on UM coverage.[83] However, *Young* potentially opens the door to arguments that any limitation not expressly listed in Subsection (9) is invalid.

This possible expansion of mandated UM coverage is further indicated by the following language from the *Young* opinion:

> [T]he critical question in determining whether a motorist is uninsured or underinsured is whether the tortfeasor possesses insurance that will make the injured party whole. . . . If a self-insured tortfeasor is considered neither uninsured nor underinsured, the policy of the uninsured motorist statute of protecting injured persons from deficiencies in the tortfeasor's insurance coverage is frustrated.[84]

The court's references to making the claimant "whole" and protecting against "deficiencies" in the tort coverage may potentially indicate a shift toward using UM coverage to fill in any gaps in the tortfeasor's liability insurance. Subject to the specific exception for family exclusions found in Subsection (3)(c),[85] a vehicle generally is not considered uninsured when there is liability coverage in place, but the coverage is unavailable to the particular claimant.[86] This result would appear, however, to be inconsistent with the now-stated policy of using UM coverage to compensate, not only for the absence of liability insurance, but also for "deficiencies" therein.

In fact, in one prior case rejecting the argument that a self-insured tortfeasor was "uninsured," the Third District noted that

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83. While the "your car" exception is similar to the limitation authorized by Subsection (9)(d), it is not the same. The limitation in Subsection (9)(d) allows a carrier to wholly preclude UM coverage when the insured is occupying an owned but uninsured vehicle, regardless of which vehicle is at fault in the accident. The "your car" exception states only that an owned or regularly available car, whether insured under the policy or not, cannot qualify as the "uninsured motor vehicle" required to trigger coverage. *Warren*, 678 S.2d at 326.

84. *Young*, 753 S.2d at 86–87 (citation omitted).

85. Fla. Stat. § 627.727(3)(c). Subsection (3)(c), added to the statute in 1992, arguably may convert a vehicle that is insured under a given policy into a statutory "uninsured motor vehicle" under the same policy, in the limited case in which the accident involves a nonfamily driver and a family member passenger-claimant. 1992 Fla. Laws ch. 318, § 79.

86. *Reid*, 352 S.2d at 1173 (holding that a vehicle was not rendered uninsured simply because the liability coverage was unavailable to the family member claimant); *Centennial Ins. Co. v. Wallace*, 330 S.2d 815, 817 (Fla. Dist. App. 3d 1976) (holding that a vehicle was not rendered uninsured by the fact that the liability limits were not available to the employee of the vehicle owner).

"[t]he supreme court has consistently held that '[t]he purpose of the uninsured motorist statute is to protect persons who are injured or damaged by other motorists who in turn are not insured and cannot make whole the injured party.'"[87] The Third District found that a self-insurance program, sufficient to comply with the Financial Responsibility Law, was enough assurance that the claimant would be made whole, and concluded that UM coverage did not need to be expanded to fill that need.[88] The *Young* case now indicates that the only method by which a claimant can be "made whole," and therefore, not entitled to UM coverage as a matter of public policy, is if the tortfeasor actually has liability coverage from a commercial insurer.[89]

Likewise, the court's discussion of the sovereign-immunity issues may indicate the same strict limitation on UM policy drafting. The court held that Progressive's self-insured-vehicle exception conflicted with a prior Florida Supreme Court decision.[90] In *Michigan Millers Mutual Insurance Company v. Bourke*,[91] the court held that an UM carrier was not permitted to invoke a governmental tortfeasor's sovereign-immunity defense.[92] The *Bourke* case previously was seen as addressing only the "legally entitled to recover" element of the UM claim,[93] which would not affect the carrier's right to include a specific exception in its policy. Historically, carriers often have responded to cases such as *Bourke* by adding specific exclusions and exceptions to their policies to clarify the intended scope of coverage for future claims. Such case decisions were not seen as public-policy mandates requiring the coverage, just a rejection of the argument that the provisions at issue in a given case applied to bar coverage. After *Young*, however, it appears that the court has restricted an insurer's ability to limit its coverage even by admittedly

87. *Gabriel v. Travelers Indem. Co.*, 515 S.2d 1322, 1324 (Fla. Dist. App. 3d 1987) (citations omitted).

88. *Id.* at 1323–1324.

89. This result is somewhat unusual because of the minimal liability insurance limits required by the financial responsibility law. A tortfeasor with a $10,000.00 policy is now treated as having a better ability to "make whole" an injured claimant than a city with a $250,000.00 self-insurance certificate. How this is possible is one of the many questions left unanswered by the *Young* decision.

90. *Young*, 753 S.2d at 87.

91. 607 S.2d 418 (Fla.1992).

92. *Bourke*, 607 S.2d at 422.

93. *See supra* n. 18 and accompanying text (discussing the legally entitled to recover element of UM claim).

unambiguous policy provisions. Broadly reading *Young*, it can be argued that the case eliminates the carrier's ability to include any coverage limitations not specifically authorized in the statute.

E. Financial Responsibility Law

Florida law has long held that UM coverage is intended to provide the reciprocal of liability coverage as defined in Florida's Financial Responsibility Law.[94] Justice Wells's dissent notes that, consistent with this principle, "[i]t is whether a vehicle meets the requirements of the Financial Responsibility Law which is determinative of whether the vehicle is 'uninsured.'"[95] Justice Wells also explained that it would have been consistent with established case law to hold that any vehicle that does not comply with the requirements of the Financial Responsibility Law is "statutorily uninsured."[96] However, because statutory self-insurance by definition meets the requirements of the Financial Responsibility Law, the *Young* majority's holding that a self-insured vehicle is "statutorily uninsured" arguably conflicts with the principle that UM coverage should parallel the financial-responsibility requirements.

At least one court has questioned whether changes in the UM statute mean that UM coverage is no longer required to parallel the Financial Responsibility Law.[97] However, that court concluded that UM coverage could be narrower than the financial-responsibility requirements.[98] Other decisions, including decisions from the supreme court, have continued to look to the Financial Responsibility Law to determine the proper scope and validity of UM coverage, despite the statutory amendments.[99] Nevertheless, the majority's decision in *Young* may indicate that a UM policy provision can no longer be upheld on the basis that it does not result in coverage less than financial-responsibility requirements.

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94. *Grant v. State Farm Fire & Cas. Co.*, 638 S.2d 936, 937 (Fla. 1994); *Mullis*, 252 S.2d at 232.

95. *Young*, 753 S.2d at 88 (Wells, J., dissenting).

96. *Id.* at 89.

97. *Martin v. St. Paul Fire & Marine Ins. Co.*, 670 S.2d 997, 1001 (Fla. Dist. App. 2d 1996) ("Section 627.727 no longer mandates that the uninsured motorist coverage provide a level of protection equivalent to the protection that would exist if the tortfeasor had a policy complying with financial responsibility.").

98. *Id.*

99. *E.g. Grant*, 638 S.2d at 937 (holding that UM coverage is intended to provide the reciprocal of liability coverage, and that the undefined terms of a UM policy may therefore be interpreted by referring to Florida's Financial Responsibility Act).

V. CONCLUSION

Young represents a shift in insurance law beyond the court's invalidation of the self-insured-vehicle exception. It may affect not only the scope of UM coverage, but also the legal tests used to determine such coverage. The court seems to have expanded the already broad public policy in favor of UM coverage. Policy limitations of all types, except those specifically authorized in Subsection (9) of the statute, are potentially subject to question following the *Young* decision.