Alabama Uninsured/Underinsured Motorist Law

With Multi-Jurisdictional Discussions

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The Statute and Exclusions

§ 1-1. The Statute

When uninsured motorist insurance was developed in the mid-1950s, one of the primary objectives was to introduce a new type of coverage that could be "provided by insurers that would obviate increasing support for the enactment of mandatory coverage statutes (requiring all owners of automobiles to purchase automobile liability insurance) by offering purchasers an alternate means of assuring indemnification when a tortfeasor was not insured." Consequently, within

a few years of uninsured motorist insurance being offered to purchasers of auto policies as optional coverage, "state legislatures throughout the United States enacted statutes providing that uninsured motorist insurance – with coverage limits at least equal to the minimum amounts required by the state's financial responsibility laws – either (1) had to be offered to all purchasers of motor vehicle liability insurance or, in a few states, (2) had to be included in all motor vehicle liability insurance policies."[1]

***Alabama Code 1975*, § 32-7-23**, is the statutory basis for uninsured/underinsured motorist coverage in Alabama:

> **(a) No automobile liability policy or motor vehicle liability 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 delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of section 32-7-6, under provisions approved by the commissioner or insurance for the protection of persons**

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[1] Alan I. Widiss, *Uninsured and Underinsured Motorist Insurance* § 31.1 (2d Ed. 1995).

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; provided, that the named insured shall have the right to reject such coverage; and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy wherein the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.

(b) The term "uninsured motor vehicle" shall include, but is not limited to, motor vehicles with respect to which:

(1) Neither the owner nor the operator carries bodily injury liability insurance;

(2) Any applicable policy liability limits for bodily injury are below the minimum required under section 32-7-6;

(3) The insurer becomes insolvent after the policy is issued so there is no insurance applicable to, or at the time of, the

accident; and

(4) The sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person after an accident is less than the damages which the injured person is legally entitled to recover.

(c) The recovery by an injured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverage as may be provided for additional vehicles, but not to exceed two additional coverages within such contract.

Until 1984, Alabama statutorily provided only for uninsured motorist coverage. Then, § 32-7-23 was amended to include a provision for underinsured motorist benefits effective January 1, 1985. Now, an insured who has not rejected uninsured/underinsured motorist coverage may recover for bodily injury from his or her insurer if the bodily injury results from an accident caused by either an uninsured or underinsured motorist, and the insured is "legally entitled" to recover damages from same.

§ 1-2. Exclusions in Derogation of the Statute

Alabama appellate courts have consistently refused any attempt to limit the reach of the statute. For example, in the early decision of *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Humphrey*, 308 So.2d 255, 258 (Ala.Civ.App. 1975), the Alabama Court of Civil Appeals stated, "[T]he uninsured motorist statute is to be construed so as to assure a person injured by an uninsured motorist that he will be able to recover from whatever source available, up to the total amount of his damages. **The insurer will not be permitted to insert any provision in its policy limiting such recovery by the insured**." (Emphasis added.)

See also, *Peachtree Cas. Ins. Co. v. Sharpton*, 768 So.2d 368, 370 (Ala. 2000) (quoting *Watts v. Preferred Risk Mut. Ins. Co.*, 423 So.2d 171, 175 (Ala. 1982)): "A policy exclusion that 'is more restrictive than the uninsured motorist statute . . . is void and unenforceable'"; *Insurance Co. of North America v. Thomas*, 337 So.2d 365, 369 (Ala.Civ.App. 1976): the uninsured motorist statute "lays down a rule of construction requiring courts to interpret all motor vehicle liability policies as providing the statutory coverage unless an agreement to reject on the part of the named insured is in evidence"; *Aetna Casualty & Surety Company v. Turner*, 662 So.2d 237, 239-240 (Ala. 1995): "The Uninsured Motorist Act does provide for the

recovery of damages for an insured person who is injured or killed by an uninsured or underinsured motorist. We find no reason not to extend the right of subrogation to wrongful death claims on the same basis as this Court has allowed subrogation for claims involving personal injury. In light of the principles behind subrogation, we hold that an insurer that pays underinsured motorist benefits to a party pursuant to a wrongful death claim is entitled to subrogation from the wrongdoer"; and *Continental Casualty Company v. Pinkston*, 941 So.2d 926, 929 (Ala. 2006): "When an exclusion in a policy is more restrictive than the uninsured/underinsured-motorist statute, the exclusion is void and unenforceable."[2]

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[2] **MULTI-JURISDICTIONAL**:

The following states have approximately the same language of the Alabama statute with minor alterations of negligible significance: Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin.

In Alabama, Colorado, and Hawaii, the statute is the only legislative provision which relates to the scope of the mandatory uninsured motorist coverage. According to *Widiss*, the very general phrasing of the statutory uninsured motorist insurance requirement in most states has created some problems: "For example, many cases have raised the issue of whether contract provisions that limit the coverage contravene the public policy of the state as established by the uninsured motorist statute. . . . The problem in such cases is to establish the extent of the coverage mandated by the statute. The issue is to determine the coverage terms required by the non-specific statutory mandate. In such cases, courts have often concluded that the coverage could be based on the contract provisions normally used by the insurance company involved."

Widiss, *Uninsured and Underinsured Motorist Insurance* § 2.2.

Likewise, the reach of the statute is not without limits. For example see, *Rich v. Colonial Insurance Company of California*, 709 So.2d 487, 489 (Ala. 1997), in which the insured's claim for UM benefits following an attempted car-jacking in which the insured was shot was denied: "The purpose of uninsured motorist coverage is to provide insurance coverage for those persons injured by the wrongful act of an uninsured motorist. Rich was not injured by an uninsured motorist. He was injured by two assailants who approached his vehicle on foot. Therefore, the uninsured motorist statute has no application to Rich's situation, and the judgment of the trial court denying Rich uninsured motorist benefits is in no way contrary to that statute or to the public policy of this state."

And the statute itself is deemed to be incorporated into every policy. See, *Progressive Specialty Ins. Co. v. Gore*, 1 So.3d 996 (Ala. 2008): the purposes of the UM statute are to assure that a person injured by an uninsured motorist will be able to recover the total amount of her damages and that the insurer will not be allowed to insert provisions in the policy limiting the insured's recovery; *Continental Nat. Indem. Co. v. Fields*, 926 So.2d 1033 (Ala. 2005): the UM statute and its provisions are "terms" of the insurance contract; *State Farm Mut. Auto. Ins. Co. v. Motley*, 909 So.2d 806 (Ala. 2005): A UM carrier cannot limit or restrict the

coverage mandated by the Uninsured Motorist Act for the purpose of protecting insured persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, and the statutory mandate of UM coverage must be read into every motor vehicle liability policy as fully as if stated in the policy itself; and *Nationwide Ins. Co. v. Nicholas*, 868 So.2d 457 (Ala.Civ.App. 2003): the UM statute lays down a rule of construction requiring courts to interpret all motor vehicle liability insurance policies as providing the statutory coverage unless an agreement to reject on the part of the named insured is in evidence.[3]

[3] The statute must be construed so as to assure a person injured by an uninsured motorist that he will be able to recover, from whatever source available, up to the maximum amount of his damages and that the insurer will not be allowed to insert provisions in its policy limiting or restricting recovery by the insured up to the limits of the policy. *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Clem*, 273 So.2d 218 (Ala.Civ.App. 1973); the purpose behind Alabama's UM act is to protect those financially and ethically responsible enough to obtain automobile liability insurance from injuries caused by those not so responsible. *State Farm Auto. Ins. Co. v. Baldwin*, 470 So.2d 1230 (Ala. 1985) and *Aetna Cas. & Sur. Co. v. Turner*, 662 So.2d 237 (Ala. 1995); action based on uninsured motorist provisions of liability policy is ex contractu in nature and one who claims recover under those provisions must show that an enforceable contractual obligation exists and that he is entitled to recovery under the terms of the policy. *Howard v. Alabama Farm Bureau Mut. Cas. Ins. Co.*, 373 So.2d 628 (Ala. 1979); provisions governing statutory uninsured motorist coverage approved by the insurance commissioner must be consistent with the statute. *Insurance Co. of North America v. Thomas*, 337 So.2d 365 (Ala.Civ.App. 1976); the scope of uninsured motorist coverage must be coextensive with liability coverage. *O'Hare v. State Farm Mut. Auto. Ins. Co.*, 432 So.2d 1294 (Ala.Civ.App. 1982); a plaintiff is not entitled to pre-judgment interest from a UIM carrier where there is no agreement as to the amount of the plaintiff's damages prior to entry of judgment, stipulation of the parties, or the entry of a default judgment as to liability against the underinsured motorist in a situation where the insured's actual out-of-pocket loss, caused solely by the tortious conduct of the underinsured motorist, equals or exceeds the amount of UIM coverage or equals or exceeds the limits of the underinsured motorist's liability coverage added to the UIM coverage. *State Farm Mut. Auto. Ins. Co. v. Wallace*, 743 So.2d 448 (Ala. 1999).

§ 1-3. Examples Impermissible Exclusions

Omni Ins. Co. v. Foreman, 802 So.2d 195 (Ala. 2001), *Peachtree Cas. Ins. Co. v. Sharpton*, 768 So.2d 368 (Ala. 2000): excluding from coverage vehicles with less than four wheels – motorcycles, primarily; *Hill v. Campbell*, 804 So.2d 1107 (Ala.Civ.App. 2001), *Lavender v. State Farm Mut. Auto. Ins. Co.*, 828 F.2d 1517 (11th Cir. 1987): exclusion of punitive damages from coverage; *Higgins v. Nationwide Ins. Co.*, 282 So.2d 301 (Ala. 1973): clause excluding automobiles owned by governmental entities from the definition of uninsured motor vehicles; *St. Paul Ins. Co. v. Henson*, 479 So.2d 1253 (Ala.Civ.App. 1985), *Gaston v. Integrity Ins. Co.*, 451 So.2d 360 (Ala.Civ.App. 1984): exclusion exempting coverage to an insured occupying a vehicle not listed not listed as an insured vehicle under the insured's liability policy; *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Humphrey*, 308 So.2d 255 (Ala.Civ.App. 1975): a liability-limiting clause restricting an insured from recovering actual damages suffered within the limits of the policy of uninsured motorist insurance – a settlement or recovery which could be set off against any sum due from the UM/UIM insurer because of damages caused by an uninsured joint tortfeasor, total damages of insured notwithstanding; *Walker v. GuideOne Specialty Mutual Insurance Co.*, 834 So.2d 769 (Ala. 2002): a corroboration requirement to

prove the facts of the accident in no-contact phantom vehicle accident; and, *Ala. Farm Bureau Mut. Cas. Ins. Co. v. Clem*, 273 So.2d 218 (Ala.Civ.App. 1973): a clause requiring the insurer's written approval before the insured's settlement with anyone liable for the accident other than the alleged uninsured motorist.

§ 1-4. Examples Permissible Exclusions

Broughton v. Allstate Ins. Co., 842 So.2d 681 (Ala.Civ.App. 2002), *Lamners v. State Farm Mut. Auto. Ins. Co.*, 261 So.2d 757 (Ala. 1972), *O'Hare v. State Farm Mut. Auto. Ins. Co.*, 432 So.2d 1294 (Ala.Civ.App. 1982), *Allstate Insurance Company v. Hardnett*, 763 So.2d 963 (Ala. 2000): clauses excluding from the definition of "uninsured auto" a vehicle insured under the liability coverage of the same policy or excluding an "insured motor vehicle" from the definition of an "uninsured motor vehicle," commonly known as the household exclusion; *Payne v. Ala. Farm Bureau Mut. Cas. Ins. Co.*, 441 So.2d 886 (Ala. 1983): exclusion differentiating between operation of farm equipment on and off "public" roads; and, *Illinois National Insurance Company v. Castro*, 887 So.2d 281 (Ala.Civ.App. 2003): a valid named-driver exclusion not limited to the policy's liability coverage, but applies to UM coverage as well.

§ 1-5. Interpreting Exclusions

When considering whether an exclusion may be more restrictive than the statute, it should appear that the reasoning of decisions interpreting exclusions tends to focus more on whether a named insured's right of recovery is restricted. The "rejection" cases discussed in later sections notwithstanding, courts have allowed policy provisions/requirements which exclude individuals from coverage entirely.

For example, in *Illinois National Insurance Company v. Castro*, 887 So.2d 281 (Ala.Civ.App. 2003), the court denied UIM coverage to both the insured and her husband/claimant when only the wife's name appeared on the policy application in the space provided to list household residents and other motor-vehicle operators. At the time the policy application was submitted, the insured also executed a form labeled "Named Driver Exclusion Agreement," on which the husband/claimant's name appeared. The underlying accident occurred while an insured vehicle was operated by the husband but with his wife as a passenger; in respect to subsequent UIM claims, the insured contended that the exclusion form applied only to the policy's liability coverage rather than all coverage afforded in the policy. The court disagreed: "In this case, the insured noted in her application

for automobile liability insurance coverage and uninsured-motorist insurance coverage that she wished to exclude her husband as an insured, and she expressly agreed that failure to disclose resident operators of the insured automobile could result in the denial of a future claim under the policy." Continuing, the court stated,

> **"Her signature on the exclusion form indicates a knowing assent to the exclusion of any coverage as to all claims 'arising out of an accident or loss' occurring while the [insured automobile] was being driven by [her husband/claimant], which precisely describes the nature of her claim for uninsured-motorist insurance benefits against the insurer.**
>
> **"We therefore conclude that the trial court, as a matter of law, erred in entering summary judgment in favor of the insured."**
>
> *Illinois National v. Castro*, 887 So.2d at 285.

In *McCullough v. Standard Fire Insurance Co.*, 404 So.2d 637 (Ala. 1981), the insured purchased auto liability coverage that also provided UM/UIM coverage; the policy contained a provision, however, that the insurer would not be liable for loss, damage, and/or liability caused while the auto described in the policy or any other auto to which the terms of the policy were extended "is being driven or operated

by" the insured's son, Robert Steele. While operating an auto covered under the policy, Steele was involved in an accident resulting in the death of his passenger; the estate of the passenger subsequently brought an action against the named insured's carrier for UM benefits. In affirming summary judgment in favor of the latter, the court stated,

> **"The insurance policy bought by Mrs. Steele *did not provide any coverage when her son, Robert Steele, was driving the car.* The coverage excluded Robert Steele entirely. The [administrator] contends the exclusion extended to the liability coverage only. This puts the [administrator] in the position, as noted by the trial judge, of using the exclusion to show Robert Steele was uninsured, yet claiming the exclusion only applied to the liability coverage. We cannot agree with this contention.**
>
> **"The language of the endorsement is clear. It states simply that *the insurance company is not liable if Robert Steele is operating or driving the vehicle involved in this accident*."**
>
> *McCollough*, 404 So.2d at 639 (emphasis added).[4]

[4] Note also, *Reed v. Farm Bureau Mut. Cas. Ins. Co.*, 549 So.2d 3, 5 (Ala. 1989): finding uninsured-motorist coverage where excluded driver was not driving an automobile listed in the declarations of an insurance policy; distinguishing *McCullough* because "[t]he exclusion [in *McCullough*] denied Robert Steele *any* coverage under the policy, both liability and uninsured motorist, *while he was driving the declared automobile*."

In *Medlock v. Safeway Insurance Company of Alabama*, 2009 WL 215304 (Ala. 2009), the insurer contended that it did not owe UIM benefits for injuries to a passenger and death of a driver who was not the listed driver on policies of insurance. Specifically, the deceased driver was not listed as an insured driver on the application or declarations of, and was not added by endorsement to, either policy. Safeway alleged that because it did not owe any benefits as the result of the underlying accident because

> **"its policies excluded from coverage an unlicensed operator of the insured vehicle; a driver 'using the vehicle without a reasonable belief that the person is entitled to do so'; a family member who is not listed on the application or declarations of the policy and/or was not added by endorsement; or a regular and frequent user of the insured vehicle who is not listed on the application or declarations of the policy and/or was not added by endorsement."**
>
> *Medlock,* supra.

On appeal from a judgment on the pleadings, the court indicates that it would have affirmed the judgment on the pleadings based on the policy provisions but for a failure of proof of the following:

> **"[T]he pleadings need to establish that [the driver] was a family member of the**

> **policyholder, as that term is defined by the policy, or otherwise a member of the household under the age of 25 who was not listed as a driver on the application or declarations and/or who was not added by endorsement for the policies; that he was a regular and frequent user of Medlock's vehicle who was not listed on the application or declarations and/or who was not added by endorsement to the policies; that he was using Medlock's vehicle without a reasonable belief that he was entitled to do so; or that he was an unlicensed driver or had his driving privileges suspended. They do not. Consequently, Safeway has not sustained its burden of establishing that [the driver] was a 'non-covered person,' as defined in the policies."**
>
> *Medlock*, supra.

An insurer retains the right to enter into a contract – a policy – for insurance with its policyholder and therefore to mutually agree to contract provisions which impose obligations both on the policyholder and the insurer, in addition to the obligations imposed by the statute on the latter by its incorporation in the insurance policy by implication. The statute should not be seen as excluding, however, the insurer's obligation (and in fact its right) to underwrite and rate a policy based on the information provided by the policyholder at the time of application or to require the policyholder to supplement or provide additional

information to it either during the policy period or at the time of renewal which would affect the policy's underwriting and rating. It should appear that courts are aware of the insurer's rights and obligations in these respects as they balance them against the mandates of the statute.

For example, requiring that a family member of the policyholder or a member of the policyholder's household under the age of 25 be listed on the application or added by endorsement as a driver or frequent user of an auto would arguably not be – with the understanding that other policy provisions may apply and affect the extension of coverage – in derogation of the statute (as indicated in *Medlock*, supra). A balance would have to be struck between the mandate of the statute and the insurer's right to know the identity of likely drivers of the insured auto so that the policy could be correctly underwritten: in other words, such a driver with a history of accidents or traffic violations would ostensibly be rated in a lower category than a good driver and at a higher premium both for liability and UM coverages.

It is also not in derogation of the statute for an insurer to exclude an individual who would otherwise be designated as a named insured under a policy if the policyholder specifically excludes the same at the time the contract is

executed. This result is seen in the above cases and is also logical in their interpretation in that parties to an insurance contract are free to negotiate and enter into the terms specified in the policy. If an individual is specifically excluded or even excluded by definition, the insurer would obviously have underwritten and rated the policy on this basis and should not logically therefore have any liability for UM coverage to the individual – keeping in mind that exclusions by definition are generally highly suspect and tested with skepticism against the mandates of the statute.[5]

§ 1-6. Review and Best Practices

- **When an exclusion in a policy is more "restrictive" than the statute, the exclusion is void and unenforceable.**

- **The statute and its provisions are "terms" of the insurance policy itself and the statutory mandates of UM coverage must be read into every motor vehicle liability policy as if fully set forth in the policy.**

[5] See further, *State Farm Fire & Cas. Co. v. Lambert*, 285 So.2d 917 (Ala. 1973): policy provisions more restrictive than uninsured motorist statute are invalid; *State Farm Mut. Auto. Ins. Co. v. Jackson*, 462 So.2d 346 (Ala. 1984): if person insured under liability coverage provision of motor vehicle policy and uninsured motorist coverage is not rejected, uninsured motorist coverage dictated by statute cannot be excluded from policy as to such an insured person; *Progressive Specialty Ins. Co. v. Gore*, 1 So.3d 996 (Ala. 2008): the uninsured motorist statute, absent rejection by the named insured, mandates UM coverage for the protection of persons insured under a motor vehicle liability policy; and *State Farm Mut. Auto. Ins. Co. v. Motley*, 909 So.2d 806 (Ala. 2005): an uninsured motorist carrier cannot limit or restrict the coverage mandated by the UM act for the purpose of protecting insured persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles.

- **The statute lays down a rule of construction requiring courts to interpret all motor vehicle liability insurance policies as providing the statutory coverage unless an agreement to reject is in evidence.**

- **The defined words and provisions of a policy are generally set out in the policy with quotation marks, in italics, or printed in bold type to alert the reader and must be given the meaning as defined in the policy.**

- **The undefined words and provisions of a policy should be given the same meaning that a person of ordinary intelligence would reasonably conclude.**

- **An insurer has the right to limit coverage when writing policies as long as it is not in abrogation of the UM/UIM statute. However, an insurer may not deny the benefits provided for the by the statute by inserting provisions restricting an insured's right of recovery.[6]**

- **As a general proposition, coverage may be limited by the failure of the policyholder to disclose information or facts relevant to the issuance of the policy (underwriting and rating) or by the policyholder's exclusion of a specific individual from the policy in its entirety.**

- **An "exclusion" of an individual otherwise defined as an insured in the policy calls into question the rejection requirement of the statute which is discussed in a later section.**

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6 Bibb Allen, *Alabama Liability Insurance Handbook*, §§ 3-5(b) and (c) and 21-6 (1996).

2.
Rejection

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§ 2-1. General

Widiss notes that UM legislation generally requires that insurers offer purchasers an opportunity to buy the coverage, and the insured/purchaser is permitted to decline the offer. The statutory requirements are phrased in a number of ways, but in Alabama the statute states, "**the named insured shall have the right to reject such coverage; and provided further, that unless the named**

insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy wherein the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer." The statutory requirement has produced disputes about a variety of issues including what is required for an insured to make an effective rejection of the coverage; who is authorized to reject the coverage on behalf of other persons who would otherwise be insured; and whether insurers are in fact to offer the coverage when the policy is renewed.

In states mandating that the coverage be offered to the insured/purchaser, including Alabama, the legislation requires – either implicitly or explicitly – an insurer to place the purchaser in a position to make an "informed rejection" of an offer to purchase the coverage. See, Widiss, *Uninsured and Underinsured Motorist Insurance* § 32.6 (2d Ed. 1995). "Although there is no uniform standard throughout the nation for what constitutes an effective offer of [UM/UIM] coverage to a purchaser, an approach that incorporates the following elements – which is derived from a list of steps approved by courts in several states almost certainly would be adequate in any state:

> **"1. Notification of the availability of [UM/UIM] motorist insurance as an optional coverage must be provided to the purchaser in a commercially reasonable manner.**
>
> **"2. The notification must explain the nature of the optional [UM/UIM] motorist insurance in readily comprehensive language (including the effect of coverage with lower limits).**
>
> **"3. The notification must specify the maximum amount(s) of [UM/UIM] insurance coverage (that is, the limits of liability) which may be selected by the purchaser.**
>
> **"4. The notification must explain that the purchaser may purchase coverage with lower limits of liability than the maximum level of coverage.**
>
> **"5. The notification must specify the additional cost for the various amounts of [UM/UIM] motorist insurance which may be selected by the purchaser."** [7]

"When there is legislation requiring [UM/UIM] motorist insurance to be offered to insurance purchasers, courts uniformly hold that an insurance company has the burden of proving that the requisite offer was made *and* that the purchaser rejected/waived the [UM/UIM] coverage to the purchaser. Typically this means the

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[7] Widiss, *Uninsured and Underinsured Motorist Insurance* § 32.6

insurer must show that there was an adequate presentation of information describing the coverage and that the purchaser was also provided with a clear description of the choices among possible coverage limits. Furthermore, courts have also held that the insurer has the burden of proof on the question of fact with regard to whether the insured made a knowledgeable rejection of the coverage *or* that the purchaser elected coverage with limits that are lower than the limits of liability selected for the motor vehicle/automobile liability insurance." Widiss, *Uninsured and Underinsured Motorist Insurance* § 32.6, *supra*.

§ 2-2. Specific Applications

State Farm Mut. Auto. Ins. Co. v. Martin, 289 So.2d 606 (Ala. 1974): as the statute requires uninsured motorist coverage to be provided to the "named insured" but further provides that the "named insured" shall have the right to reject such coverage, and as the insurance commissioner issued a directive to all insurers indicating that the proper procedure for handling the rejection of uninsured motorist coverage was to have such rejection in writing and signed by the named insured, the purported rejection of such coverage in the instant case was "legally insufficient" where the slip rejecting such coverage was signed only by the named insured's wife; *Progressive Cas. Ins. Co. v. Blythe*, 350 So.2d 1062

(Ala.Civ.App. 1977): where named insured does not sign section of insurance application rejecting uninsured motorist coverage, insurer is forced to pay under that portion of policy even if someone attempted to sign for applicant; and *Insurance Co. of North American v. Thomas*, 337 So.2d 365 (Ala.Civ.App. 1976): since the parol evidence rule would preclude inquiry into verbal agreements not incorporated within automobile policy, memorandum of the superintendent of insurance requiring rejection of uninsured motorist coverage to be in writing is consistent with the statute and thus valid – insured's purported verbal rejection, made prior to execution of automobile policy and not evidenced by writing, of uninsured motorist coverage was invalid.

See also, *Watkins v. U.S. Fidelity and Guar. Co.*, 665 So.2d 337 (Ala. 1994): unless named insured rejects uninsured motorist (UM) coverage under insurance policy, classification of an "insured" under UM coverage of that policy must be at least as broad as under bodily injury liability coverage provisions of same policy; *Funderburg v. Black's Ins. Agency*, 743 So.2d 472 (Ala.Civ.App. 1999): named driver exclusion that automobile insurance policy provided no coverage for the named insured's spouse was a valid rejection of uninsured motorist (UM) coverage as to the spouse; *Peachtree Cas. Ins. Co., Inc. v. Sharpton*, 768 So.2d 368 (Ala. 2000):

because underinsured motorist (UIM) coverage insures the person, not the vehicle, an insured has the right to reject UIM coverage in one policy, pay UIM premiums on another policy, and have the UIM coverage even when he is injured while riding in or on the vehicle as to which he rejected UIM coverage; and *Nationwide Ins. Co. v. Nicholas*, 868 So.2d 457 (Ala.Civ.App. 2003): rejection of uninsured-motorist (UM) coverage by one of the named insureds under a family policy was not effective as a rejection by other named insureds under the same policy – the UM statute allowing a named insured to reject coverage did not authorize one named insured to reject UM coverage on behalf of another named insured.

Also, *Progressive Specialty Ins. Co. v. Green*, 934 So.2d 364 (Ala. 2006): a deceased person's spouse, who was not a named insured on the deceased person's insurance policy, is not entitled to uninsured-motorist (UM) benefits if the deceased person, who was the sole named insured, expressly rejected UM benefits; and *Progressive Specialty Ins. Co. v. Narramore*, 950 So.2d 1138 (Ala. 2006): named insured's spouse was not a "named insured" under named insured's policy, even though they lived in the same household, and thus, spouse had no right to sign form rejecting UM/UIM coverage – the policy distinguished the named insured from the named insured's spouse in its definition of "you and your," and

the declarations page identified spouse as listed driver [signature of sole named insured was sufficient on rejection of UM/UlM coverage, and thus, those benefits were no longer available to spouse or child of named insured; the rejection form stated that the rejection bound all insureds, and the spouse could not recover UIM benefits on behalf of child, even though spouse did not sign rejection form].

In *Progressive Specialty Ins. Co. v. Gore*, 1 So.3d 996 (Ala. 2008), the court held that under the Uninsured Motorist (UM) Statute, any purported rejection or waiver of UM coverage by one who is not the named insured is invalid. Further, an uninsured motorist (UM) rejection in automobile insurance policy, signed by named insured's wife, in her own name, when she procured insurance for insured, was not effective to waive UM coverage; the rejection did not purport to be a waiver of UM coverage by named insured, as required by the statute, but rather purported to be a rejection of UM coverage by insured's wife.

In a corporate policy, see *Federated Mut. Ins. Co, Inc. v. Vaughn*, 961 So.2d 816 (Ala. 2007): named insured could reject uninsured-motorist (UM) coverage for insured employees while accepting it for directors, officers, partners, owners, and their family members – the named insured's decision to accept UM coverage for some additional insureds did not prevent it from rejecting UM coverage with

respect to other additional insureds; and *Rimas v. Progressive Insurance Company*, 2008 WL 4173838 (C.A. 11 Ala. 2008): plaintiff alleged entitled to UM benefits because he never rejected the coverage as a listed driver on the policy – summary judgment affirmed in favor of the carrier, however, because while plaintiff was an intended insured, he was not the named insured who, under Alabama law, has the authority to reject UM coverage, even for all other persons insured under the policy.

§ 2-3. Rejection and Electronic Applications

The American Law Institute has noted that "written applications or consent requirements could be problematic under many states' insurance laws" in light of industry practices of selling insurance products over the telephone, the Internet, or some other fashion whereby a policy is bound and premium dollars are immediately and automatically transferred from a policyholder's bank. State statutes are generally silent as to how the written notice requirement should be interpreted in light of the new modes of doing insurance business, such as those practices listed above.

In these respects, the following was noted by Steven Plitt in the May 2008 issue of *For The Defense*, a DRI publication:

THE IMPACT OF E-SIGN LEGISLATION

Congress acted in response to the dramatic changes affecting various business models, including the business of insurance.

Effective October 2000, Congress passed the Electronic Signatures in Global and National Commerce Act (E-SIGN), codified at 15 U.S.C. §§ 7001 - 7006:

"Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), with respect to any transaction in or affecting interstate or foreign commerce-

> "(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
>
> "(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

The term "electronic record" is defined as "a contract or other record created, generated, sent, communicated, received, or stored by electronic means."

Typically, the phone call made to the direct writer is electronically/digitally recorded. The insurance company representative will usually follow a basic script in discussing the availability of UM/UIM coverage. Pursuant to E-SIGN, the electronically recorded telephone call where UM/UIM coverage was offered and accepted or rejected arguably satisfies the statutory "written notice" requirements under E-SIGN.

The offer/rejection is valid even though the insurance company did not immediately provide the recorded transcript to the insured following the phone call. *Prudential Ins. Co. of America v. Prusky,* 413 F. Supp. 2d 489, 494 (E.D. Pa. 2005). *See also* William F. Savino & David S. Widenor, *2003-2004 Survey of New York Law: Commercial Law,* 55 SYRACUSE 1. REV. 761, 768 & n.23 (2005) ("With the proliferation of electronic records, the main purpose of these new laws is to encourage electronic commerce by making an electronic 'signature, contract, or other record relating to such transaction[s]' as binding as a handmade signature.").

If an offer of UM/UIM coverage was not valid until the insurer sent out a paper transcript of the phone call in which the insurance was offered, this would not only pile on unnecessary costs, but it would also eliminate the speed, convenience, and efficiency, which are the benefits of direct purchasing over the telephone. That is not what Congress intended to accomplish.

E-SIGN itself provides:

"(c)(3) Effect of failure to obtain electronic consent or confirmation of consent

> "The legal effectiveness, validity, or enforceability of any contr*act* executed by a consumer shall not be denied solely because of the failure to obtain electronic consent or confirmation of consent by that consumer in accordance with paragraph (1)(C)(ii)."

THE IMPACT OF THE SUPREMACY CLAUSE

The Supremacy Clause of the United States Constitution provides that where states and the federal government enact legislation on the same subject matter, the federal law is supreme, and the conflicting state law is rendered void. Therefore, E-SIGN preempts state "written notice" UM/UIM statutes to the extent that a

statute purports to invalidate an offer made or stored in electronic form. E-SIGN specifically relates to the business of insurance because it provides as follows:

"(i) Insurance

> "It is the specific intent of the Congress that this subchapter and subchapter II of this chapter apply to the business of insurance."

15 U.S.C. § 7001(i).

Congress could not have drafted a clearer expression of its intent to preempt state insurance laws to the extent they conflict with the provisions of the E-SIGN legislation.

CONCLUSION

In those situations where a direct writer is involved in the issuance of uninsured and under-underinsured motorist coverage, it is probable that the sale transaction occurred over the phone or through the Internet.

The phone conversation itself is oftentimes digitally recorded. If the insured makes an uninsured or underinsured motorist coverage selection for an amount of coverage less than the policy's liability coverages, or if UM/UIM coverage is rejected outright, the insurance company will send a form to the insured, documenting the offer and/or rejection.

However, most direct writers are not proficient at following up in the underwriting process to make sure that the offer/rejection form is received back from the insured fully executed. It is in those situations that the E-SIGN law, and its counterparts in the states, can make the difference in establishing the offer and/or rejection, notwithstanding the fact that the offer and/or rejection does not bear the signature of the insured.

§ 2-4. Electronic Transactions in Alabama

Alabama Code 1975, §§ 8-1A-1 to 8-1A-20, "Uniform Electronic Transactions Act," provides that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form or that an electronic record was used in its formation. If a law requires a record to be in writing, an electronic record will suffice as will an electronic signature if a signature is required.

The act further provides,

> "**if parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in**

> **writing to another person, the requirement is satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt.** An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record."
>
> *Alabama Code 1975*, § 8-1A-8(a).

§ 2-5. Review and Best Practices

- **All rejections must be in writing and signed by the named insured. Any purported rejection or waiver of UM coverage by one who is not the named insured is invalid.**

- **Electronic rejections are valid but care must be taken to ensure that a hard copy of same is mailed to the insured or the insured has the ability to print or otherwise store the same.**

- **A corporate insured can reject uninsured-motorist (UM) coverage for insured employees while accepting it for directors, officers, partners, owners, and their family members.**

- **Sample rejection forms follow on next pages.**

NEW MEXICO MOTOR VEHICLE INSURANCE PLAN

UNINSURED MOTORISTS COVERAGE REJECTION FORM

DO NOT SIGN UNTIL YOU READ

You have a legal right to purchase Uninsured Motorists Coverage with your automobile liability policy. Uninsured Motorists coverage protects you, your family and your passengers for bodily injury or death and for property damage caused by a negligent motorist who does not have liability coverage or enough liability coverage to pay for injuries or damage caused. For a more detailed explanation of this coverage, refer to your policy.

You have a right to purchase Uninsured Motorists coverage at limits of $25,000/50,000 bodily injury and $10,000 property damage, subject to a $250 deductible, or at higher limits up to your policy's liability limit; or, you may reject that coverage entirely.

To reject Uninsured Motorists coverage, you must sign and date this form and it must be made a part of your policy.

Without this form attached, your policy will provide— and you will be charged for— Uninsured Motorists coverage.

I do not wish to purchase Uninsured Motorists Coverage as part of my Automobile Insurance Policy.

I understand and agree that this rejection of coverage applies to future renewals or replacements of such policy unless I notify the company in writing that I have changed my option selection.

DO NOT SIGN UNTIL YOU READ

Signed_____ Date _____
(Named Insured)

Attached to policy with an effective date of _____

This rejection form must be endorsed, attached, stamped, or otherwise made a part of the policy to be effective.

AIP 1364 (7/98)

Texas
Uninsured/Underinsured Motorists Coverage And Personal Injury Protection Selection/Rejection Form

I. Uninsured/Underinsured Motorists Coverage

The Texas Insurance Code (Article 5.06-1) permits you, the insured named in the policy, to reject Uninsured/Underinsured Motorists Coverage or select a limit for such coverage higher than the minimum limit required by the Texas Motor Vehicle Responsibility Act but not higher than the policy's liability limit. Uninsured/Underinsured Motorists Coverage provides insurance for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles because of bodily injury, sickness or disease, including death, or property damage resulting therefrom.

In accordance with the Texas Insurance Code (Article 5.06-1), the undersigned Named Insured, on behalf of all insureds under the policy:

(Applicable item marked ☒)

☐ agrees that the Uninsured/Underinsured Motorist Coverage afforded in the policy is REJECTED in its entirety and is hereby removed and deleted from the policy. Uninsured/Underinsured Coverage will NOT be provided in or supplemental to a renewal policy issued by this Insurer or an affiliated Insurer unless the Named Insured requests such coverage in writing.

☐ agrees that the following higher limit of liability applies with respect to the Uninsured/Underinsured Motorists Coverage afforded in the policy:

(Enter if single limit of liability applies)

$ _____ each accident

(Enter if a separate limit of liability applies to Bodily Injury and Property Damage)

$ _____ each person Bodily Injury
$ _____ each accident Bodily Injury

$ _____ each accident Property Damage

I hereby warrant by my signature below, that I have specific authority by any Corporation or Other Party named as a Named Insured to select or reject Uninsured/Underinsured Motorists Coverage on behalf all insureds under the policy:

_____ _____
Signature of Named Insured and Title Date

II. Personal Injury Protection Coverage

The Texas Insurance Code (Article 5.06-3) permits you, the insured named in the policy, to reject Personal Injury Protection Coverage. Personal Injury Protection Coverage consists of provisions in a motor vehicle liability policy which provide for payment to the named insured in the motor vehicle liability policy and members of the insured's household, an authorized operator or passenger of the named insured's motor vehicle including a guest occupant, up to an amount of $2500 for each such person for payment of all reasonable expenses arising from the accident and incurred within three (3) years from the date thereof for necessary medical, surgical, X-ray and dental services and loss of income as the result of the accident. Personal Injury Protection benefits under Article 5.06-3 are payable without regard to the fault or non-fault of the named insured or the recipient in causing or contributing to the accident, and without regard to any collateral source of medical, hospital or wage continuation benefits.

In accordance with the Texas Insurance Code (Article 5.06-3), the undersigned Named Insured, on behalf of all insureds under the policy:

(Applicable item marked ☒)

☐ agrees that the Personal Injury Protection Coverage is SELECTED with limits of $ _____.

☐ agrees that the Personal Injury Protection Coverage is REJECTED. The Personal Injury Protection Coverage described above and offered by the Insurer is completely removed and deleted from the policy. Personal Injury Protection Coverage will NOT be provided in or supplemental to a renewal policy issued by this Insurer or an affiliated Insurer unless the Named Insured requests such coverage in writing.

I hereby warrant by my signature below, that I have specific authority by any Corporation or Other Party named as a Named Insured to select or reject this coverage in behalf of all insureds under the policy:

_____ _____
Signature of Named Insured and Title Date

00-AU 3591 TX (10-01)

ALABAMA
UNINSURED/UNDERINSURED MOTORISTS COVERAGE
REJECTION / SELECTION FORM

Named Insured:_____

Policy Number:_____

IMPORTANT NOTICE: I hereby warrant by signature(s) below, that I have specific authority by any corporation or other party named as a named insured to select or reject uninsured motorists and/or personal injury protection coverage in behalf of the corporation or other party for whom this selection is made. The rejection /selections indicated below shall apply to any policy which the Company may elect to issue pursuant to this application and all future renewals of such policy and all future endorsements issued to me by this Company because of change of vehicles or coverage, or because of an interruption or change of coverage, until I notify the Company in writing that thereafter my coverage requirements have changed. TO BE CERTAIN THAT YOUR QUOTATION, AND ANY SUBSEQUENT POLICY WHICH WE MAY ELECT TO PROVIDE IS ISSUED CORRECTLY, PLEASE INDICATE YOUR CHOICE OF THE OPTIONS AVAILABLE BELOW, THEN SIGN AND DATE THIS FORM AS ACKNOWLEDGEMENT OF YOUR CHOICE.

REJECTION OF UNINSURED MOTORISTS COVERAGE OR SELECTION OF LIMIT OF LIAIBLITY: The laws of your state permit the Insured named in the policy to reject Uninsured Motorists Coverage in its entirety or select a limit of liability for bodily injury of $25,000. each person, $50,000. each accident. Uninsured Motorists Coverage provides insurance for the protection of persons insured under the policy who are legally entitled to recover damages from the owners of operations of uninsured motor vehicles because of bodily injury.

1. ☐ I hereby reject Uninsured Motorists Coverage in its entirety.
2. ☐ I hereby select Uninsured Motorists Coverage with bodily injury limits of $25,000. each person / $50,000. each accident.

_____
Insured's Signature

_____
Date

AGA UM 2550

3.
Proof of UM/Ownership, Maintenance, Use

§ 3-1. Proving Uninsured Status

The first requirement in a direction action by the insured against the insurer is to prove that the adverse motorist was in fact uninsured, and the burden of proving no liability insurance is on the claimant. It shifts, however, to the carrier to prove the existence of insurance as soon as the claimant demonstrates reasonable diligence in attempting to determine the existence of insurance. In

other words, as soon as the claimant demonstrates reasonable diligence in determining the existence of liability coverage on the UM, the UM is assumed uninsured and it is up to the carrier to prove otherwise. "The appropriateness, however, of placing the burden of producing evidence and/or the burden of persuasion, on the claimant in this context ought to be evaluated carefully, because allocating this burden to the claimant may constitute an insurmountable obstacle to recovery in instances when there is essentially no information available about the status of the tortfeasor as an insured or uninsured motorist." Widiss, *Uninsured and Underinsured Motorist Insurance* § 8.26.

§ 3-2. Reasonable Diligence

What is reasonable diligence? It is generally defined as proof that "all reasonable efforts have been made to ascertain the existence of an applicable policy of insurance and these efforts have proven fruitless." What situations require an examination of reasonable diligence? First, the tortfeasor is known but cannot be found, and his status for liability insurance is unknown; second, the tortfeasor is known and can be found, but his status for liability insurance is unknown. See, *Ogle v. Long*, 551 So.2d 914 (Ala. 1989) and *Motors Ins. Corp. v. Williams*, 576 So.2d 218 (Ala. 1991): "The quantum of proof must be enough to

convince the trier of fact that all reasonable efforts have been made to ascertain the existence of an applicable policy and that those efforts have proven fruitless." This determination must be made upon the facts evident in each case. *Motors Ins. Corp. v. Williams*, supra.

In *Purcell v. Alfa Mutual Insurance Company*, 824 So.2d 763 (Ala. 2001), the insured-claimant was struck by a car at a racetrack while he watched the race from the pit area. The claimant testified that because of the injuries he suffered when struck by the car, he had no memory of the accident. The claimant's son testified that the race was stopped after his father was hit and that he saw the car described as a yellow Ford Mustang tangled in a fence but could only identify the driver of same as "T-bone." In concluding that Alfa was entitled to summary judgment on the ground that the claimant had not exercised "reasonable diligence" in investigating whether the vehicle and/or the driver that hit him were uninsured, the court stated,

> "**The record contains no evidence that [claimant law firm's investigator] investigated the information provided in [the son's] deposition, which provided at least a nickname for the driver of the car that struck Purcell," and "[t]he record also contains no discovery requests made by Purcell to the officials or employees of the**

> **Kennedy racetrack for information regarding the identity of the contestants or the cars in the race; moreover, the record does not indicate that such information was not available.**"
>
> *Purcell v. Alfa Mutual Insurance Company*, 824 So.2d at 765-766.[8]

Other jurisdictions reach a same or similar judgement in respect to reasonable diligence or "reasonable efforts," and it should be noted that in *Ogle*

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[8] **MULTI-JURISDICTIONAL**:

There are numerous states which require a claimant who seeks indemnification under the uninsured motorist coverage must sustain the burden of proof including Alabama, Arkansas, California, Georgia, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, and Virginia.

Widiss writes that when the identify of the tortfeasor was known, the allocation of the burden of proof on the question of whether same was uninsured could justifiably be placed on the insurance company since the company – through industry channels – was usually in a better position than the claimant to determine whether there was any applicable insurance. "Although no court has explicitly adopted this rationale, there are several cases which have essentially taken this approach. For example, in an Alabama case [*State Farm Mutual Automobile Insurance Co., Inc. v. Griffin*, 286 So.2d 302, 307 (Ala. 1973)] where the insurer, State Farm, argued that the claimant failed to prove the tortfeasor was uninsured, the court observed that 'the insurance adjuster for State Farm . . . testified that he investigated the accident and did not find a policy of liability insurance in force . . . .' The court then concluded 'that this testimony provided at the very least a scintilla of evidence to take the case to the jury.' Similarly, in a Texas case where the insurer argued that the claimants had failed to prove the tortfeasor was uninsured, the court concluded that in the absence of evidence to the contrary, statements made by the insurer's claims manager that the tortfeasor was uninsured were 'sufficient . . . to support the trial court's finding . . . .'"

Widiss, *Uninsured and Underinsured Motorist Insurance* § 8.26.

In respect to the State Farm case cited by *Widiss*, it should be noted that Alabama no longer adheres to the "scintilla" rule and that the claim investigation is only an additional component of proving the uninsured status.

Ultimately, it appears that the trial/appellate court will look for evidence that creates a conflict warranting jury consideration of same based on admissible evidence.

v. Long, supra, the word "diligence" appears in the same paragraph for persuasion as a citation to a Texas case[9] which uses the word "efforts" in respect to reasonableness. *Ogle v. Long*, 551 So.2d at 916. This may likely be a distinction with a difference, but use of the word "efforts" is far and away the most prevalent usage in multi-jurisdictional case law addressing the issue of proving uninsured status.[10]

"Another approach that should also be considered is to allocate the evidentiary burdens to the party with the best access to the necessary facts and information to make reasonable efforts to ascertain whether the tortfeasor was insured. In this context, once the identity of the driver and/or owner of the tortfeasor's vehicle is determined, the insurance company is in at least as good a position as the claimant, and often is in a better position than the claimant, to determine (a) whether the other motorist has any applicable insurance, or (b) if the

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9

State Farm Mutual Automobile Ins. Co. v. Matlock, 462 S.W.2d 277 (Tex. 1970).

10

See for example, *Merchants Mutual Insurance Co. v. Schmid*, 288 N.Y.Supp.2d 822, 825 (1968): "Since the absence of insurance upon the offending vehicle and its driver is a condition precedent to the applicability of the uninsured driver endorsement, we hold that the burden of proving such absence is upon the claimant. However, we must keep in mind that proving a negative is always difficult and frequently impossible and that, consequently, the quantum of proof must merely be such as will convince the trier of the facts that all reasonable efforts have been made to ascertain the existence of an applicable policy and that such efforts have proven fruitless.

tortfeasor's insurer has denied liability. The insurer can secure such information through industry channels completely unavailable to the claimant. Moreover, since the insurance company is assured the right to seek reimbursement for any sums which it pays to its insured, if the tortfeasor does prove to be insured, the company's position is protected." Widiss, *Uninsured and Underinsured Motorist* Insurance § 8.26. Note this approach was advocated by Justice Hornsby in his dissent to *Ogle v. Long*, but has not been revisited by majority opinion since the time of same.

§ 3-3. Use of Mandatory Liability Insurance Information

The State of Louisiana addressed the issue of the burden of proof of uninsured status by statute and codified that the following shall be admissible as prima facie evidence that the owner and operator of the vehicle involved did not have liability insurance in effect on the date of an accident: (a) sworn affidavits from the owner and operator of the alleged uninsured vehicle that they did not have liability insurance; (b) sworn affidavit from the Department of Public Safety to the effect that an inquiry has been made in respect to liability insurance and that neither owner nor operator responded within the time allowed or responded in the negative; (c) admissible evidence showing that the owner and operator were

nonresidents together with an affidavit from the Department of Public Safety to the effect that neither had liability insurance. In Louisiana, the effect of the prima facie evidence referred to in (a), (b) and (c) is to shift the burden of proof from the party alleging uninsured status to the UM carrier.

This procedure would seem to be workable whether codified by statute or not in those states that maintain a comprehensive insurance database; such a database does not exist in Alabama. Insurance information is available only from the motorist involved in an accident or from the SR-13 report filed with the Department of Public Safety. In Alabama, owners must sign a statement at the time of vehicle registration affirming that their motor vehicles are insured as required by Alabama law. Thereafter in respect to enforcement, insurance questionnaires are sent by the Alabama Department of Revenue to randomly selected owners throughout the year, and the responses are forwarded to insurance companies for verification of coverage.[11]

§ 3-4. Ownership, Maintenance or Use of Uninsured Vehicle

Most policies state in one form or another, "We will pay damages for bodily

[11] See, *Alabama Code 1975*, § 32-7A-4 (Liability Insurance Required) and § 32-7A-7 (Random Verification of Insurance)

injury, sickness, disease or death which a person insured is legally entitled to recover from the owner or operator of an uninsured auto. Injury must be caused by accident and arise out of the **ownership, maintenance or use** of an uninsured auto (the same language which appears in the Alabama statute)." The injury cannot be caused by a one-car accident with no other automobiles or drivers present: consequently, the injury is not a covered occurrence.

Alabama has historically recognized that an unknown driver or operator of a vehicle causing an accident with physical contact, commonly classified as a "hit and run" driver or "phantom" driver is defined as uninsured. *Wilbourn v. Allstate Ins. Co.*, 305 So.2d 372 (Ala. 1974). In addition, in 1992, the Alabama Supreme Court extended the requirement that the accident arise out of another's maintenance or use of a motor vehicle to cover a truck bench seat that found its way into the midst of Birmingham's lunch-hour freeway traffic: *Khirieh v. State Farm Mut. Auto. Ins. Co.*, 594 So.2d 1220 (Ala. 1992) was based on the plaintiff's argument that the "existence fo the truck seat on Interstate 20/ 59 in the midst of Birmingham's lunch hour traffic, is more substantial evidence that the injuries arose out of the use of a motor vehicle." How else, reasoned the court, does a truck bench seat find its way onto an interstate highway in heavy traffic other than

by falling off a moving vehicle. Thus, the plaintiff's injuries were defined as caused by a phantom motorist's use of a motor vehicle. Similarly, in *Franks v. Alfa Mutual Ins. Co.*, 669 So.2d 971 (Ala.Civ.App. 1995) and *Alfa Mut. Ins. Co. v. Beard*, 597 So.2d 664 (Ala. 1992), the appellate courts found it reasonable for a jury to conclude that gravel on a highway which caused a one-vehicle accident must have come from a motor vehicle, the owner or operator of which was unascertainable. And in *Jones v. Nationwide Mut. Ins. Co.*, 598 So.2d 837 (Ala. 1992), the court reversed a summary judgment in favor of the UM carrier where the accident was alleged to have been caused by an oil slick on the roadway as it could be inferred that same originated through the negligence of an unknown driver in the ownership, maintenance or use of a motor vehicle.

In respect to no physical contact with a phantom vehicle – a "miss and run" as opposed to a "hit and run" – the Alabama Supreme Court declined an opportunity in 1997 to answer the following question certified by U.S. 11th Circuit Court of Appeals: "This appeal presents a single issue for our consideration: whether a provision in an automobile insurance policy requiring proof of a hit-and-run accident from competent evidence other than the testimony of any insured, is in derogation of Alabama's Uninsured Motorist Statute . . . . The Alabama courts

have not answered this question; therefore, we certify it to the Alabama Supreme Court." *Moreno v. Nationwide Insurance Co.*, 105 F.3d 1358 (11th Cir. 1997). The Alabama court, however, declined certification and the 11th Circuit addressed the question of whether an insurer may require an insured to offer evidence beyond the insured's own testimony of a "hit and run" accident and held that a corroboration requirement in phantom vehicle cases was not contrary to public policy and was therefore enforceable.[12]

The 11th Circuit acknowledged that a "physical contact" requirement in a "hit and run" case had been held by the Alabama Supreme Court to be contrary to the goals of the uninsured motorist statute. *State Farm Fire & Cas. Co. v. Lambert*, 285 So.2d 917 (Ala. 1973). It determined, however, that *Lambert* did not address the issue of the quantum of proof necessary to establish that an accident was caused by an uninsured motorist and relying on *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Cain*, 421 So.2d 1281 (Ala.Civ.App. 1982), the court found support for its holding that a corroboration clause does not violate Alabama's public policy. "In the absence of statutory provisions to the contrary, insurance companies have the

[12] It should continue to be noted that although the 11th Circuit described a "hit and run" accident, it was essentially describing a "miss and run" based on the fact that there was no physical contact between the claimant and phantom vehicles.

same right as individuals to limit their liability or impose conditions upon coverage as long as such conditions are not inconsistent with public policy." *Cain*, 421 So. at 1283. Accordingly, the 11th Circuit held that a corroboration requirement in an automobile policy does not impermissibly limit uninsured motorist coverage, as the insured is still entitled to the protection of the statute if he or she can prove that a "hit and run," or more accurately a "miss and run," driver was uninsured.

Two years later, the Alabama Court of Civil Appeals found *Moreno* to be persuasive and concluded that a similar corroborative-evidence requirement in an automobile insurance policy was "not in derogation of the Alabama Uninsured Motorist Statute or the public policy of this state." *Hannon v. Scottsdale Ins. Co.*, 736 So.2d 616, 618 (Ala.Civ.App. 1999). But in 2002, the Alabama Supreme Court overruled *Hannon* and declined to follow *Moreno* in *Walker v. GuideOne Specialty Mutual Insurance Company*, 834 So.2d 769 (Ala. 2002): "The undeniable effect of GuideOne's corroborative-evidence requirement . . . is to exclude from coverage those who were involved in an accident as the result of a phantom vehicle, but who cannot present 'competent evidence other than the testimony of a person making [a] claim.' . . . GuideOne's corroborative-evidence requirement contractually raises the burden of proof for [the claimant] and others similarly situated to a burden

higher than the evidentiary burden required by law in Alabama. GuideOne's policy, therefore, excludes from coverage those who otherwise would be able to prove that they are 'legally entitled to recover damages' under § 32-7-23. Because GuideOne's corroborative-evidence requirement is more restrictive than the uninsured-motorist statute, it is void and unenforceable." *Walker v. GuideOne*, 834 So.2d at 773.

Consequently, corroborative-evidence requirements in "miss and run" accidents with phantom vehicles are in derogation of the statute in Alabama state courts; the *Moreno* opinion, however, remains the law of the 11th Circuit and Alabama Federal courts and it may be fairly argued that corroborative-evidence requirements are not in derogation of the statute in Federal cases in Alabama until such time as the 11th Circuit overrules itself in *Moreno* and abandons its reasoning in favor of *Walker v. GuideOne*.

§ 3-5. Additional Examples/Occupying Vehicle

Burt v. Shield Ins. Co., 902 So.2d 692 (Ala.Civ.App. 2004): automobile dealership's car was not an "uninsured motor vehicle" during a test drive by a customer who had no liability insurance and had limited protection under step-down provision of dealership's policy; statute defines "uninsured motor

vehicle" based on the difference between damages and the sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person after an accident, the limits of the dealership's liability coverage were available to the accident victim, and he failed to or was unable to exhaust those limits when settling with dealership for negligent entrustment of car to customer.

Broughton v. Allstate Ins. Co., 842 So.2d 681 (Ala.Civ.App. 2002): policy exclusion, from definition of uninsured auto, of "a motor vehicle which is insured under the Liability Insurance coverage of this policy," precluded insurance company's liability for underinsured motorist benefits in mother's action against company, which insured automobile in which daughter was killed, despite lack of evidence of fraud or collusion among family members.

Lambert v. Coregis Ins. Co., Inc., 950 So.2d 1156 (Ala. 2006): a vehicle swerved off the road and hit and dragged the claimant, who was standing beside the road between two parked vehicles owned by his employer and for whom he was in the course of employment at the time, for a short distance. The claimant sued his employer's UM carrier for damages in addition to the adverse driver and his employer for workers' compensation benefits. The UM policy covered persons

"occupying" a covered vehicle and defined "occupying" as "in, upon, getting in, on, out or off" a vehicle. No coverage for UM was found since the claimant was not "vehicle oriented" as he was not engaged in a transaction essential to the used of the insured vehicle but was merely standing beside it.

Cook v. Aetna Insurance Company, 661 So.2d 1169 (Ala. 1995): claimant was a work-release inmate who was allowed before being picked up by his employer to cross the street for coffee and then return across the street to get into the employer's truck (the insured vehicle). After getting his coffee and returning across the street, claimant was struck by an uninsured motorist when he was about a foot from the employer's truck. He had, however, left personal items inside the jail which he would have retrieved before getting into the insured truck. The Alabama Supreme Court held that no reasonable person could conclude that [the claimant] was "getting in" the insured truck; he was not approaching the vehicle to "get in" it, as he first would have entered the building to retrieve his personal items – his lunch box and coat – and only then returned to "get in" the vehicle.[13]

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[13] "The court considered cases from other jurisdictions and, though stating that Alabama should not adopt a rigid requirement of physical contact, the court agreed with cases from other states that the act of 'getting in' or entering a vehicle must be distinguished from approaching the vehicle, as well as from the act of repairing the vehicle. 'Getting into' is an affirmative act or movement to effect or entrance into an automobile." Roberts and Cusimano, *Alabama Tort Law*, § 4.03[1].

Across all jurisdictions, UM coverage is provided for persons injured while occupying an insured highway vehicle, same are generally identified as class two or clause (b) insureds [see discussion below at § 3-3]. Two questions often arise: when is a person "occupying" an insured vehicle for purpose of the coverage and what is an "insured vehicle." UM coverages typically specify that "occupying" means "in or upon or entering into or alighting from." A current ISO policy form states that occupying is "in, upon, getting in, on, out or off."

> "[W]hen coverage disputes involve the terms that define 'occupying,' judges usually examine the facts to determine (1) whether the injury occurred while the claimant was in a zone or area that was within reasonable proximity to the

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MULTI-JURISDICTIONAL:

As to "maintenance" of an uninsured auto, *Widiss* cites an example of an insurer attempting to avoid liability for injuries that resulted when an uninsured auto which the claimant was repairing fell off the blocks used to raise it and onto the claimant as the result of the uninsured owner's negligence, the court ultimately finding the coverage sufficiently broad to govern such a claim – *Williams v. Nationwide Mutual Insurance Co.*, 152 S.E.2d 102 (N.C. 1967). On the other hand, *Widiss* states that court have not interpreted the insurance terms to confer coverage for risks that are incidental to maintenance of an uninsured vehicle – *Bolin v. Safeco Insurance Companies*, 431 So.2d 71 (La. 1983).

In respect to "use" of an uninsured auto, *Widiss* states, "Obviously, uninsured motorist coverage claims [in questionable cases] represent an attempt to find a source of indemnification. To satisfy the coverage terms, a claimant must do more than present a story in which there happens to be the **passing presence** of an uninsured vehicle – that is, the **use of the uninsured vehicle must relate relatively directly to the accident** that caused the claimant's injury. Absent such a relationship, there is not the requisite 'use' of the vehicle for purposes of the uninsured motorist insurance.

Widiss, *Uninsured and Underinsured Motorist Insurance* § 11.4.

> insured vehicle, or (2) whether the claimant was injured while engaged in a task related to the operation, maintenance, or use of the vehicle. If either of these conditions is found to exist, judges usually conclude that claimants are entitled to coverage."[14]

Courts in multiple jurisdictions seem to define the coverage provisions "upon, "entering into," or "alighting from" in terms of a reasonable perimeter around an insured vehicle and so long as drivers or passengers are within an area reasonably close to an insured vehicle, they are likely to be covered. Moreover, some courts have viewed the reasonable scope of protection for an individual exiting an insured vehicle as extending to the point that the person attains a place of safety. As in Alabama with the "vehicle orientation" test, when a person – having engaged in some endeavor unrelated to the use of an insured vehicle – is moving from a position of safety toward an insured vehicle, "coverage generally is not extended to such a person as an occupant until the individual has actually begun the process of entering." And even though a claimant may be near or even touching an insured vehicle when the accident occurs, several courts have held that claimants who had not alighted from and who had no intent to enter into the

[14] Widiss, *Uninsured and Underinsured Motorist Insurance* § 5.2

insured vehicle were not "occupants."[15]

§ 3-6. Intentional Acts

Widiss identifies three situations involving uninsured motorist coverage likely to involve intention acts: (1) a tortfeasor intentionally driving an uninsured or unidentified vehicle in a manner designed to cause harm; (2) a tortfeasor commits an intentional act while occupying an uninsured or unidentified vehicle; and (3) a tortfeasor causes injuries in the course of a series of events – usually involving an altercation – following the use of an uninsured or unidentified vehicle. Widiss, *Uninsured and Underinsured Motorist Insurance* § 11.5.

In Alabama, there must be a "causal connection" between the use of a vehicle and the claimant's injury in order for UM coverage to attach. For example, in *Allstate Insurance Co. v. Skelton*, 675 So.2d 377 (Ala. 1996), the claimant was beaten with a pistol by a passenger in an alleged uninsured auto as he approached the passenger following an accident and made a claim for UM benefits alleging that his injuries arose our of the maintenance or use of an uninsured auto. The Alabama Supreme Court held, however, that the battery on the claimant was an **intervening act that broke the causal connection** between the "use" of the auto

[15] Widiss, *Uninsured and Underinsured Motorist Insurance* § 5.2

and the injury. The court stated that a criminal act necessarily breaks the causal chain because no "reasonable standard" would suggest that an insurer intended to insure against such acts. Moreover, in *Lee v. Burdette*, 715 So.2d 804 (Ala.Civ.App. 1998), claimants' son while operating an insured auto was fired upon by passengers in another vehicle. The Alabama Court of Civil Appeals held that the actions of the alleged uninsured motorist were not "within the contemplation of the insurer and insured" and therefore were not covered by the UM provision of the policy.[16]

This approach – a causal connection between the use of the auto and the injury – is generally applied in other jurisdictions:

> **"When intentional tortious acts are committed by the driver or occupant of an uninsured or unidentified vehicle, the relationship of the tort to the "use" of the vehicle may be evident – especially when the vehicle itself is the 'instrument' employed to commit the tort. Although courts are generally inclined to accord coverage terms such as 'arising out of the use' a broad scope, this does not mean the insurance is transformed into an unlimited protection.**

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[16] And in a 1997 case, injuries sustained as a victim of an attempted car-jacking were denied because they did not arise out of the "use" of the vehicle. *Rich v. Colonial Insurance Company of California*, 709 So.2d 487 (Ala. 1997).

"Courts typically examine the events to ascertain whether it is reasonable to conclude that there is a causal relationship between the use of the vehicle and the injuries sustained.

"[A]lthough it may be something less than proximate cause in the tort sense it must be something more than the vehicle being the mere situs of the injury.

"Injuries sometimes result as a consequence of intentional torts – such as firing a gun or throwing an object-by persons who are occupying an uninsured or an unidentified vehicle. Although there are not a large number of such cases, it appears clear that the involvement of an uninsured or unidentified vehicle has to be something more than site of a tortious act.

"When injuries result from criminal activities such as a kidnaping or a robbery, in several cases courts have concluded that the injuries were beyond the scope of protection afforded by uninsured motorist insurance because the injuries did not result from the 'use' of an uninsured motor vehicle-that is, incidental involvement of an uninsured vehicle did not provide a basis for extending the scope of coverage to such events.

"Insureds often have urged that courts should adopt a 'but for' analysis in regard to causation questions when injuries are sustained in an altercation which followed a 'use' of an

> **uninsured or unidentified motor vehicle (that is, a collision or other event) that led to the vehicles being stopped.**
>
> **"[But when] the injuries for which indemnification is sought are essentially unrelated to the operation of the uninsured or unidentified vehicle, several courts have concluded that such injuries do not result from the 'ownership, maintenance, or use' of an uninsured vehicle."**
>
> Widiss, *Uninsured and Underinsured Motorist Insurance* § 11.5

Coverage provisions in respect to the "use" of an uninsured motor vehicle require the court to consider the nature of the causal relationship between an activity and its consequences. Although courts generally adopt an expansive view or interpretation of coverage – contract rules of interpretation requiring them to do so – many cases in which coverage is rejected involve intentional torts. And when the "use" of the uninsured vehicle is reasonably viewed as "incidental," courts have frequently sustained the insurer's position. Widiss, *Uninsured and Underinsured Motorist Insurance* § 11.5.

§ 3-7. Review and Best Practices

- **If the tortfeasor is known but cannot be found, the following are generally insufficient to prove reasonable diligence**: service of

complaint returned unclaimed; service by publication; failure to answer to service by publication; and/or simple failure to appear at trial.

- **The following are generally <u>sufficient</u> to prove diligence:** attempt to locate by investigator; attempt to locate by process server; documented efforts to locate UM; investigative efforts to locate UM; and/or documented refusal of service if found.

- **If the tortfeasor is <u>known and found</u>, the following are generally <u>insufficient</u> to prove reasonable diligence:** simple failure to answer; and/or simple failure to appear at trial.

- **The following are generally <u>sufficient</u> to prove reasonable diligence:** admission of carrier by agent or claim department; proof of investigation by claim department; affidavit or deposition of owner or driver; affidavit or deposition from alleged insurer; and/or letter or affidavit from investigator or law enforcement officer.

- **There is no requirement of physical contact between an insured/claimant and the vehicle for UM coverage to attach. "Getting in" or "entering" are distinguished from "approaching" the vehicle.**

- **Corroborative evidence requirements in "miss and run" claims are in derogation of the statute and are disallowed. Claimant must nevertheless prove "legal entitlement" to recovery.**

- **The claimant must be "vehicle oriented" and engaged in a transaction essential to the use of the insured vehicle.**

- **The act of "getting in" or entering a vehicle is distinguished from "approaching" the vehicle – the former is an affirmative act or movement to enter the vehicle.**

- **There must be a "causal connection" between the use of a vehicle and the claimant's injury in order for UM coverage to attach; a criminal act may necessarily break the causal chain.**

- **Intentional acts must be scrutinized carefully and coverage may be rejected where the use of the insured auto was "incidental" to committing the intentional act.**

4.
Stacking and Primary/Secondary/Classes

§ 4-1. Stacking

Where a person is insured under more than one automobile liability insurance policy or is insured under an automobile liability insurance policy which provides coverages for more than one vehicle, issues arise as to whether the insured is entitled to stack the separate policies or the separate coverages afforded by the multi-vehicle policy. In accord with § 32-7-23(c), set out above, the Alabama

Supreme Court has addressed the issue of stacking under that provision in the following decisions (these stacking principles apply equally in both uninsured and underinsured motorist cases):

> *Travelers Insurance Company, Inc. v. Jones*, 529 So.2d 234 (Ala. 1988):
>
> **Passengers in one of the vehicles covered under a multi-vehicle policy were entitled to stack the coverage for up to two additional coverages within that policy. Prior to January 1, 1985, the effective date of § 32-7-23(c), such passengers would have been considered insureds of the second class and would not have been allowed to stack the coverages.**
>
> *State Farm Mutual Automobile Insurance Company v. Fox*, 541 So.2d 1070 (Ala. 1989):
>
> **The statutory limitation on stacking does not apply where the insurer issued separate single-vehicle policies rather than one multi-vehicle policy. The plaintiff was a resident relative of a State Farm insured and as such was an insured by definition under each of five separate single-vehicle policies. Her recovery under all five was affirmed.**
>
> *State Farm Mutual Automobile Insurance Company v. Faught*, 558 So.2d 921 (Ala. 1990):
>
> **The statute allowing stacking does not apply "to an attempt by a passenger in another person's**

> **insured vehicle to stack uninsured motorist coverages under separate single-vehicle insurance policies on vehicles not owned by him or occupied by him at the time of his injury." The Court again followed its single-policy analysis and emphasized that the passenger was an insured by definition only under the policy on the vehicle which he occupied at the time of the accident. The passenger may, however, stack on a multi-vehicle policy of one coverage up to two additional coverages.**
>
> *Canal Indemn. Co. v. Burns*, 682 So.2d 399 (1996).
>
> **The statute does not prevent stacking under two or more separate contracts of insurance by an insured. The statutory language clearly imposes a limitation only on the number of uninsured motorist coverages that can be stacked within one contract of insurance. The law does not prohibit the stacking of uninsured motorist coverages provided under separate multi-vehicle contracts; it only limits stacking to a total of three coverages under each separate contract of insurance. The language of § 32-7-23(c) cannot be interpreted to allow stacking only under one multi-vehicle insurance contract.**

A person insured under the uninsured motorist coverage of a company's "fleet" policy must exhaust the stacked coverage under that particular policy before asserting a claim to underinsured motorist benefits under the insured's own personal policy. *Isler v. Federated Guar. Mut. Ins. Co.*, 594 So.2d 37 (Ala. 1992).

See also, *Bright v. State Farm Insurance Company*, 767 So.2d 1111 (Ala. 2000): claimant Bright was injured in an accident while driving a vehicle owned by Ace Pest Control in the course of his employment with same and asserted that he was entitled to stack underinsured motorist benefits from four single vehicle policies and one fleet policy issued by State Farm to his employer. The appeals court agreed that employees are not named insureds when the corporation is the named insured with respect to the fleet policy, where there is no policy language that extends the named insured status to persons occupying borrowed vehicles. Further, "[b]ecause Bright is not a named insured on any of the policies issued to Ace and is not a member of any of the categories of insureds stated by the policy except category 4 for the occupants of the particular insured vehicle, he becomes an insured only by his use or occupancy of an insured vehicle." *Bright v. State Farm Insurance*, 767 So.2d at 1115.

See also, *Smith v. State Farm Mutual Automobile Insurance Company*, 952 So.2d 342 (Ala. 2006): if the insured's loss exceeds the coverage limits of one policy providing for UIM benefits, the insured can stack policies with UIM benefits to provide coverage to the full amount of the damages required to compensate for the injury or harm sustained; statute that limits recovery under UIM provisions of

any one contract to the primary coverage plus additional coverage on up to two additional vehicles, limits stacking in a single policy but does not prevent stacking of additional policies under two or more separate contracts; and liability-limiting clause in Florida policy which made UIM coverage inapplicable if other applicable coverage was selected could not prevent stacking of the UIM benefits of the Florida and Alabama policies.[17]

§ 4-2. Primary and Secondary Coverage

The *Widiss* treatise states that even though courts in most jurisdictions have concluded that an "excess" clause in an "other insurance" clause may not be used by an insurer to avoid liability, the excess provision has been applied to determine

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See also, *White v. Georgia Cas. and Sur. Ins. Co.*, 520 So.2d 1070 (Ala. 1987): employee. who was acting within the scope of his employment as driver of gas delivery truck when he was injured in collision between truck and vehicle driven by uninsured motorist, was insured under primary liability provisions of employers' fleet policy and therefore, employee was entitled to stack coverage on other vehicles insured under the fleet policy; *Nationwide Mut. Ins. Co. v. United Services Auto. Ass'n*, 359 So.2d 380 (Ala.Civ.App. 1977): even though employer had separate policies of insurance on each of several automobiles, where, at time of accident, employee was operating employer's automobile as a permissive user, uninsured motorist coverage of employer's policies could not be stacked; *Hines v. Home Ins. Co.*, 495 So.2d 682 (Ala.Civ.App. 1986): police officer employed by town, who was permissive user allowed to drive insured policy vehicle involved in an automobile accident, but who was not named insured in town vehicle policy and did not pay any premiums for that insurance, was not entitled to stack uninsured motorist coverage for eight vehicles for which separate premiums were paid, where policy provided there was $10,000 limitation on coverage available for anyone accident; *Continental Cas. Co. v. Pinkston*, 941 So.2d 926 (Ala. 2006): If an insured's loss exceeds the limits of one underinsured-motorist (UIM) policy, the insured may stack other coverages provided by that contract of insurance, but the stacking is limited to the primary coverage plus coverage for a maximum of two additional vehicles; and *Fassina v. Cincinnati Ins. Co.*, 582 So.2d 1111 (Ala. 1991): if an insured releases his insurance carrier, the release will ordinarily prevent the insured from later attempting to stack under other policies with the same carrier.

primary and secondary liability. "There are now several decisions holding that when a person is injured as an occupant, the uninsured motorist coverage applicable to that person as a passenger is primary, and must be exhausted before such an insured may seek indemnification under his or her own uninsured motorist coverage." Widiss, *Uninsured and Underinsured Motorist Insurance* § 13.7 (2d Ed. 1995).

In *Long v. United States Fidelity & Guaranty Co.*, 396 F.Supp. 966 (N.D. Ala. 1975), the district court concluded that under Alabama law, with respect to one who is insured by two uninsured-motorist insurance carriers, coverage inuring to the insured as a result of his or her occupancy of a particular non-owned vehicle is primary, whereas other uninsured-motorist coverage would be secondary. *Illinois National Insurance Company v. Kelley*, 764 So.2d 1283 (Ala.Civ.App. 2000), noted *Long* to be consistent with its decisions in *Almeida v. State Farm Mutual Insurance Co.*, 298 So.2d 260 (Ala.Civ.App. 1975), in which the court held that the policy provisions provided a reasonable beginning point for determining primary and secondary liability that was not contrary to legislative policy; and *Barnwell v. Allstate Insurance Co.*, 316 So.2d 696 (Ala.Civ.App. 1975), in which the court held that excess coverage was not available until the primary policy coverage was

exhausted – the claimant was foreclosed from proceeding against her own insurance company where she had settled with the primary insurer for less than the limits of UM/UIM coverage available where that policy had not been exhausted.[18]

Consequently, in *Illinois National Insurance Company v. Kelley*, the court applied the holding of *Long* and concluded that the "Cotton States coverage, which was applicable to the vehicle in which Kelley was a passenger, was primary, and the coverage of Illinois National (under whose policy Kelley was a named insured) was secondary; thus, only after the liability limits of the Cotton States policy were exhausted would Illinois National's duty to pay ripen."

See also, *Gaught v. Evans*, 361 So.2d 1027 (Ala. 1978): UM coverage in auto liability policy containing "excess" clause and providing coverage while riding in a "non-owned" auto, provided only excess coverage for claimants insured under policy while occupying a non-owned auto involved in accident with uninsured motorist – that is, UM insurer for non-owned vehicle in which claimants were riding was "primary" insurer and claimant's insurer was not liable on its policy until

[18] Although *Barnwell* did not address the question, when the primary coverage is divided among several claimants, a settlement for less than the coverage limit would not lead to the same result.

primary insurer's coverage was exhausted and did not violate to the UM statute since "secondary" coverage could be reached after exhaustion of primary coverage if damages exceeded policy limits of primary; *Barnwell v. Allstate Ins. Co.*, 316 So.2d 696 (Ala.Civ.App. 1974): where insured under auto policy providing UM coverage was injured by negligence of uninsured motorist while a passenger in an non-owned vehicle and settled claim with insurer of non-owned vehicle for less than the amount of UM coverage available from such insurer, the insured/claimant had not exhausted coverage from primary insurer and had no right of action against her own UM insurer whose policy provided that if insured was injured while a passenger in a non-owned auto the insurance applied only as excess coverage over other similar insurance available to the insured.

§ 4-3. Classes of Insureds

In 1976, Alabama recognized two different classes of insureds: those described as individuals of the first class were named insureds and any resident relative and were provided with UM coverage for injuries sustained while in an insured vehicle and wherever else an injury occurred because of an uninsured motorist. Stacking was allowed because the first class insured paid additional premium for each policy. Insureds of the second class were permissive users and

occupants and since they were not parties to the contract and paid no separate premiums, they had no expectation of stacking. *Lambert v. Liberty Mut. Ins. Co.*, 331 So.2d 260 (Ala. 1976).

On January 1, 1985, however, § 32-7-23(c) was amended to read, "**The recovery by an injured person under the uninsured provisions of any one contract of automobile insurance shall be limited to the primary coverage plus such additional coverages as may be provided for additional vehicles, but not to exceed two additional coverages within such contract**." Thereafter in *Travelers Ins. Co., Inc. v. Jones*, 529 So.2d 234 (Ala. 1988), the appellate court held that the plain meaning of the amendment extended "stacking" of UM coverage to **all insureds**, whether named or not, if there was additional coverage for another auto within the same contract. The court did not express an opinion on whether a passenger in a vehicle covered by one policy can stack coverage included in a separate policy. Then in *Allstate Ins. Co. v. Alfa Mut. Ins. Co.*, 565 So.2d 179 (Ala. 1990), the court held that a passenger can stack only if the coverages were within one policy. Consequently in Alabama for purposes of stacking, the importance of classes of insureds is essentially rendered a nullity by the amended statute and

subsequent case law.[19]

In respect to "classes" of insureds, see also *Boone v. Safeway Insurance Co. of Alabama*, 690 So.2d 404 (Ala.Civ.App. 1997): an unadopted stepchild was an "insured" because the definition of "family member" was ambiguous and subject to more than one meaning; *South United Fire Insurance Co. v. Willingham*, 739 So.2d 503 (Ala.Civ.App. 1999): "insured" was defined to be "your family member or a resident of your household while occupying or using an insured auto." Three minors were injured by an uninsured motorist while occupying other than an insured vehicle. Claimants contended that they were entitled to coverage even while occupying an uninsured auto because"family members" differed from

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Case law preceding the amendment should be considered, however, in situations not involving stacking. For example, *State Farm Auto. Ins. Co. v. Reaves*, 292 So.2d 95 (Ala. 1974): although the UM statute does not require every auto liability policy to include an "omnibus" clause, once such a policy is issued extending coverage to a certain class of insureds under such a clause, UM coverage must be offered to cover the same class of insureds; *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Pigott*, 393 So.2d 1379 (Ala. 1981): once automobile liability policy is issued extending coverage to certain class of insureds, UM coverage must be offered to cover same class of insureds. These cases should not now be read, however, to abridge the insurer's right to specifically **exclude** insureds from coverage. For example see, *O'Hare v. State Farm Mut. Auto. Ins. Co.*, 432 So.2d 1294 (Ala.Civ.App. 1982): exclusion of an insured motor vehicle from definition of an "uninsured motor vehicle" in UM provision of auto policy was not void and unenforceable as an attempt to restrict UM coverage and was available to insurer to deny coverage to named insured who was injured in a one-car accident while riding in the insured vehicle being driven by a permissive user as to whom there was a valid exclusion from liability coverage for bodily injury to any "insured."

See *Mathis v. Auto-Owners Insurance Company*, 387 So.2d 166 (Ala. 1980): the court noted that even though prior decisions had "invalidated policy provisions which limited benefits available to persons injured by uninsured motorists," the statute does not limit "the ability of insurers to define who is insured."

"residents." The appeals court affirmed the trial court's holding that a family member did not have to be occupying an insured auto to be entitled to benefits and that UM coverage inures to the person and not to the vehicle; and *Hall v. State Farm Mut. Auto. Ins. Co.*, 514 So.2d 853 (Ala. 1987): "[A]n individual who has liability coverage and uninsured motorist coverage denied to him under the policy covering the vehicle in which he was riding can press a claim for uninsured motorist coverage under another and different policy of insurance."

In looking at classes of insureds over other jurisdictions, the *Widiss* treatise divides the classes into the following clauses: (a) named insureds identified in the declarations of the policy, and while residents of the same household, the spouse and relatives of named insureds; (b) any other person occupying a covered or insured vehicle [see preceding § 2-5]; and (c) any person with respect to damages that person is entitled to recover because of bodily injury to which the coverage applies sustained by a clause (a) or (b) insured. "The conditions under which the coverage is provided for individuals in each of these three groups or classes of insureds are distinctly different. Therefore, when confronted with disputes about whether a claimant is an insured, it is essential to begin the analysis with a determination of the basis upon which the claimant seeks to be covered as an

insured." Widiss, *Uninsured and Underinsured Motorist Insurance* § 4.1.

In respect to **relatives or family members** of a named insured, "[g]iven the requirement – specified in most uninsured motorist insurance contracts – that the relative must be a resident of the named insured's household, it is probable that insurers will not question coverage for household members who have tenable claims to being relatives.

> "This, however is not to suggest that mere occupancy of a single household is sufficient to confer insured status when there is no basis for a claim to being a relative. In particular, a child of a cohabitant who does not qualify as a spouse is not generally classed as a 'relative' for purposes of the uninsured motorist coverage of an insured who is not actually the child's biological or adoptive parent."[20]

As to the **residency requirement and coverage for a spouse,** attention should be paid to whether the spouses were living apart at the time an accident occurred. Courts will usually examine the situation to determine whether a "viable marital community" existed at the time; if evidence tends to indicate that the spouses had permanently separated or if a divorce has been finalized, courts almost always affirm denials of coverage predicated on the failure to satisfy the

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[20] Widiss, *Uninsured and Underinsured Motorist Insurance* § 4.6

residency requirement.[21] In respect to the requirement and **coverage for relatives**, when a court is presented with evidence that relatives sometimes live together, coverage is almost always affirmed and the requirement may be satisfied by the intention of family members to live together. When there is no evidence that a claimant was living with the named insured, had lived with same at some point in time reasonably close to the accident date, or intended to maintain the insured's home as a residence while living elsewhere (college students, for example), courts generally affirm denials of coverage.[22]

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[21] Widiss, *Uninsured and Underinsured Motorist Insurance* § 4.8

[22] Widiss, *Uninsured and Underinsured Motorist Insurance* § 4.9.

Other examples –

Children away from home because of employment or military service: coverage is most likely if the child is a minor. Is the absence form the home temporary or permanent? Is the child who is of majority age temporarily residing away from the home? Typically, the resolution of coverage disputes about the residence of a child depends on whether the child has permanently left the parent's home.

Children not residing with the named insured because of separation or dissolution of marriage: if separate residences are established for the spouses, courts generally view the determination of whether a child is a resident of the same household as the named insured as a question of fact. Coverage may be affected by a determination of whether the marital or family community has been permanently disrupted. Denials of coverage are most likely when the dissolution or divorce has become final, or when there is no substantial relationship between the nonresident parent and the household in which the child resides. When the nonresident parent spends a substantial amount of time at the home or continues to provide support and assumes responsibility for the operation of the household where the child resides, courts have often concluded that coverage should not be denied.

§ 4-4. Review and Best Practices

- **Driver-insured under "fleet" policy** = one coverage plus two.

- **Driver-insured by definition and multiple policies** = no limitation.

- **Passenger under "fleet" policy** = one coverage plus two.

- **Passenger and multiple policies** = limitation to one policy.

- **When a person is injured as an occupant, the UM/UIM coverage applicable to that person as a passenger is primary – including stacked policies – and must be exhausted before such an insured may seek indemnification under his or her own uninsured motorist coverage.**

- **As noted in the immediately preceding footnote, when the primary UM/UIM coverage is divided among several claimants (a policy applicable in a bus accident, for example), a settlement for the coverage limit would not be required before seeking indemnification under the insured's own coverage.**

- **The coverage limit would have to be exhausted, however, across the spectrum of claimants.**

5.
Notice/Opting-Out and In/Subrogation

§ 5-1. Notice

When the plaintiff maintains a claim against the tortfeasor or wishes to settle his claim against the tortfeasor and give notice of same to his underinsured carrier, the procedure to do so was first set forth in *Lowe v. Nationwide Ins. Co.*, 521 So.2d 1309, 1310 (Ala. 1988): **"A plaintiff is allowed *either* to join as a party defendant his own liability insurer in a suit against the underinsured motorist *or***

merely to give it notice of the filing of the action against the motorist and of the possibility of a claim under the underinsured motorist coverage at the conclusion of trial."

The insurer can either then participate, opt-out, or intervene; but whether in or out, the insurer is bound by the fact finder's decisions on the issues of liability and damages if given proper and timely notice. The "opt-out" procedure in Alabama exists in most states in one form or another. If sued or put on notice of an underinsured claim, the liability carrier must make an immediate evaluation of its position in the matter and opt-out if appropriate in its judgment:

> **"Expressing concern that evidence of underinsured motorist insurance could have a corrupting influence on a jury in determining the liability of an underinsured motorist, this Court specifically recognized in *Lowe* that the liability insurer has the absolute right to elect not to participate in the trial of its insured's claim against an underinsured motorist, provided the election is timely. The Court also recognized that if the insurer is not joined, but merely is given notice of the filing of the action, it can decide either to intervene or stay out of the case. We wrote: 'The results of either [of these choices] parallel those . . . where the insurer *is* joined as a party defendant.' (Emphasis in *Lowe*.) Stated differently, if the insurer is joined as a defendant by its insured, it is afforded the**

> **option under *Lowe*, if it acts timely, of being dismissed as a party to the case. Consequently, the insurer's withdrawal from the case under *Lowe* terminates its right to participate in discovery. Rule 36, A.R.Civ.P."**
>
> *Ex Parte Edgar*, 543 So.2d 682, 684 (Ala. 1989).

§ 5-2. Opting-Out and Opting-In

At what point, however, can the insurer opt-out and what are its rights once it does? In *Edgar*, the trial court denied and the Supreme Court upheld the insurer's request to withdraw from the case since the insurer also conditioned its withdrawal on continued participation in discovery and a reservation of a right to intervene if it deemed necessary and to do so to protect its interest. The insurer, if it acts timely, can be dismissed as a party to the case by opting-out and, in doing so, terminates its right to participate in discovery. In *Edgar*, the insurer's motion to withdraw was denied, however, not because of its delay in filing, but because

> **"[t]he clear import of Alfa's motion, as amended, is that Alfa wanted out of the case, but only if it could monitor the progression of the case through the discovery process and then intervene if it deemed it necessary in order to protect its interest."**

Consequently, opting-out terminates all rights of the insurer in the suit,

except those rights arising under circumstances that would call for the insurer to "opt-in" to the suit. Whether the insurer's motion to withdraw is timely made is left to the discretion of the trial court, to be judged from the posture of the case. "Logically, the insurer would not want to withdraw from the case too early, before it could determine, through the discovery process, whether it would be in its best interest to do so. On the other hand, the insurer cannot delay, unnecessarily, in making its decision to withdraw. We believe that it would not be unreasonable for the insurer to participate in the case for a length of time sufficient to enable it to make a meaningful determination as to whether it would be in its best interest to withdraw." *Edgar*, 543 So.2d at 685.

But, after opting-out, at what point can the insurer opt-in and resume participation in the case? Although *Edgar* describes the opting-out procedure as dismissing the insurer as a party, *Southern Guar. Ins. Co. v. Welch*, 570 So.2d 654 (Ala. 1990), states without elaboration that an insurer can opt-in: **"[O]ur focus has been on whether an underinsured motorist insurance carrier has had adequate notice of potential settlements by its insured to bind it to subsequent judgments against it. We find from the record that Southern Guaranty had sufficient notice of the likelihood of a settlement between [the parties]. . . . Once it had notice of**

the possible settlement between [the parties], Southern Guaranty should have 'opted back in' to preserve its rights under the policy. Having decided not to participate in the trial, Southern Guaranty will not now be heard to complain of the judgment against it." *Southern Guaranty*, 570 So.2d at 657.

In *Ex parte Progressive Specialty Ins. Co.*, 985 So.2d 897 (Ala. 2007), the appellate court found that the excess UIM carrier was entitled to return to active participation in the insured's suit after the primary UIM carrier settled for less than the policy limits: no fact-finding occurred on the issues of liability and damages and the insurer's previous election to opt-out of the action in contemplation that any subsequent judgment would be based on a decision of a fact-finder, did not prevent it from reentering the action:

> This Court's holding in Lowe, establishing an "opt-out" procedure for insurers, expressly contemplated that the insurer, upon opting out of the litigation, would thereafter be bound "by the factfinder's decisions on the issues of liability and damages." Here, there has been a settlement between the plaintiff, Lowery, and the defendant's primary UIM carrier; therefore, there has been no fact-finding on the issues of liability and damages as underscored in Lowe. Under such circumstances, the premise of the choice recognized in *Lowe* does not exist, and Progressive should not be deprived of the right to

reenter the case.

This same result was reached by the Court of Civil Appeals in *Robinson v. State Farm Mutual Automobile Insurance Co.*, 813 So.2d 924 (Ala.Civ.App.2001).

In *Robinson*, the uninsured/underinsured carrier, after having opted out of the action, moved the trial court for a summary judgment, contending that it had no liability because the plaintiff had settled for an amount that did not exceed the amount available under the defendant's liability insurance and because the plaintiff had failed to notify it before settling his claim against the defendant. The trial court granted the summary-judgment motion. The plaintiff challenged the right of the insurer to file a summary-judgment motion after having opted out of the action. The Court of Civil Appeals rejected the plaintiff's argument, stating:

> "Also, the case on which [the plaintiff] relies, *Lowe v. Nationwide Insurance Co.*, stands for the proposition that an uninsured/underinsured-motorist insurance provider may opt out of litigation but is bound by the factfinder's decision. In this case, [the plaintiff] settled his claims against [the defendant]."

Thus, the decision by the Court of Civil Appeals allowing the insurer to file its summary-judgment motion after having opted out of the case pursuant to *Lowe* was based on the absence of a

> finding by the fact-finder on the issues of liability and damages.
>
> Likewise, because the claim against Lim Cu was settled for less than EPAC's policy limits, Progressive's previous election to opt out of the action, made in contemplation that any subsequent judgment would be based on a decision of a fact-finder, does not prevent it from reentering the action.
>
> *Ex parte Progressive*, 985 So.2d at 899-900.

The case of *Driver v. National Security Fire & Casualty Co.*, 658 So.2d 390 (Ala. 1995), addressed the question of whether an uninsured motorist carrier may opt-out of a case in which it is sued with the uninsured tortfeasor pursuant to the rules of *Lowe v. Nationwide* and then assume and take over the defense of the uninsured tortfeasor. The Alabama Supreme Court answered the question in the affirmative:

> **"The plaintiff cites *Edgar* and *Lowe* for the proposition that if an insurance company opts out of the trial in an uninsured motorist case, it cannot "participate" in the trial by hiring an attorney for the uninsured motorist defendant. We disagree.**
>
> **"Both *Lowe* and *Edgar* involved a situation where the defendant motorist was allegedly underinsured. In such a situation, where the**

defendant motorist has liability insurance but the limits may not be sufficient to fully satisfy the potential judgment against him, the defendant motorist has an attorney retained by the carrier to defend him. When the underinsured carrier is named as a defendant, and chooses to opt out of the trial of the case, there is an attorney defending the interest of the underinsured motorist. As this Court acknowledged in *Lowe*, the underinsured motorist carrier in opting out of the case, is essentially placing its fate in the hands of an attorney chosen by someone else. 321 So.2d at 1310.

"A different situation is created when the defendant motorist has no liability coverage. If the uninsured motorist carrier opts out of the trial of the case and there is no defense counsel already in place to represent the defendant motorist, then there is no mechanism to protect the interests of the insurer if the defendant motorist fails to, or chooses not to, defend his case. Understanding the need for the uninsured motorist carrier to protect its interests, we hold that once the carrier opts out of the trial under *Lowe*, it may, in its discretion, hire an attorney to represent the uninsured motorist defendant."

Driver, 658 So.2d at 394.

The probable outcome of such a procedure in uninsured motorist cases? The claimant-insured will probably sue the underinsured carrier only so that the

carrier remains in the case as an attractive target and the claimant-insured does not run the risk of the carrier opting-out of the matter, assuming the defense of the uninsured tortfeasor, and insisting that no mention of the underinsured carrier be made at trial as is the rule once the carrier opts out. The carrier assuming the defense of the uninsured motorist will also want to immediately drop or forego any right of subrogation against the uninsured. There is nothing to stop the claimant's attorney, however, from dismissing the uninsured motorist from the suit before the carrier can opt-out and thereby leaving the carrier as the sole defendant.

§ 5-3. Notice and Subrogation

Notice and subrogation are intimately intertwined in Alabama UIM cases. When the tortfeasor's liability insurer extends a full and final settlement offer, the insured must give his underinsured motorist carrier notice of this offered settlement and the underinsured carrier should consent to the settlement and forgo any right of subrogation for any underinsured motorist coverage it may subsequently pay, or else pay to its insured the amount offered by the tortfeasor and preserve its right of subrogation. In *Lambert v. State Farm*, 576 So.2d 160 (Ala. 1991), the Alabama Supreme Court set out the following rules to govern this procedure:

1. The insured should give notice to the underinsured carrier of a claim under the policy for underinsured motorist benefits as soon as it appears that the insured's damages may exceed the tortfeasor's limits of liability coverage.

2. If the tortfeasor's carrier and insured ultimately enter into a proposed settlement that would release the tortfeasor from all liability, the insured, before agreeing to the settlement, should immediately notify the underinsured carrier of the proposed settlement and the terms of any release.

3. At the time the insured so notifies the underinsured carrier, the insured should also inform the underinsured carrier whether he will seek underinsured motorist benefits in addition to the benefits payable under the settlement proposal, so that the carrier can determine whether it will refuse to consent to the settlement, will waive its right of subrogation against the tortfeasor, or will deny any obligation to pay underinsured motorist benefits. If the insured gives the carrier notice of the claim for UIM benefits, the UIM carrier should immediately begin investigating the claim, should conclude such investigation within a reasonable time, and should notify its insured of the action it proposes with regard to the claim for UIM benefits.

4. The insured should not settle with the tortfeasor without allowing the UIM carrier a reasonable time within which to investigate the

insured's claim and to notify its insured of its proposed action.

5. If the UIM carrier refuses to consent to a settlement between its insured with the tortfeasor, or if the carrier denies the claim of the insured without a good faith investigation into its merits, or if the carrier does not conduct its investigation within a reasonable time, the carrier would, by any of those actions, waive any right to subrogation against the tortfeasor or the tortfeasor's insurer.

6. If the UIM carrier wants to protect its subrogation rights, it must, within a reasonable time, and, in any event before the tortfeasor is released by the carrier's insured, advance to its insured an amount equal to the tortfeasor's settlement offer.

The "reasonable time" within which to conduct the investigation and decide whether to front the tortfeasor's limits or consent to the proposed settlement is generally considered to be 30 days, but each case depends on its own unique circumstances. The 30 day period, however, is suggested to be optimal and is most often the appropriate length of time.

In *Morgan v. Safeway Ins. Co. of Alabama, Inc.*, 2007 WL 1866768 (Ala.Civ.App. 2007), the insureds failed to give the insurer a reasonable time to investigate and act on their claim for UIM benefits before settling with and

releasing the tortfeasor from further liability, even though they claimed that forwarding their pleadings to insurer's counsel provided notice of the claim and they specifically provided notice of proposed settlement 10 days before executing the settlement and release. The appellate court found that the pleadings only demonstrated a possibility of a UIM claim and that 30 days was generally considered a "reasonable time" to conduct an investigation.

Thereafter, in *Ex parte Morgan*, 2009 WL 215308 (Ala. 2009), the Alabama Supreme Court addressed the decision of civil appeals and found that the insureds' notice to the UIM carrier that they intended to settle claims arising out of an accident with the tortfeasor and seek UIM benefits began the period for the insurer to determining whether it would consent or object to the settlement. The UIM carrier was not deemed to have waived its right to object to the proposed settlement between the insureds and tortfeasor where the insurer had only 10 days between the notification and the insureds' decision to accept the settlement; the notification to the UIM carrier did not request a response by any particular date; the insureds failed to contact the carrier to find out its decision as to settlement even though insureds knew insurer intended to make a decision "within a few days"; and medical records accompanying the notification and request for

UIM benefits raised for the first time issues about liability, amount of damages, and causation.

Before the case law cited herein was written on the payment of less than the tortfeasor's liability limits and the insured's ability to nevertheless maintain a claim for UIM benefits, it was *assumed and stated* that notice was given to the UIM carrier only when the tortfeasor's "liability insurer has offered to pay the maximum of its liability limits." See, for example, *Auto-Owners, Ins. Co. v. Hudson*, 547 So.2d 467, 469 (Ala. 1989). We now see that the underlying liability claim can be settled for less than the policy limit without endangering the insured's right to go after UIM money and regardless of whether the tortfeasor's offer is less than the liability policy limit.

> **Until and unless otherwise indicated by the Alabama courts, however, it is the better practice to adhere to the rule of *Lambert*, and the insured must give notice to the UIM carrier that she has a settlement offer from the tortfeasor so that the UIM carrier may investigate and decide whether to consent to the settlement and forego its right of subrogation or front the liability offer and preserve same regardless of whether the proposed settlement is for the maximum**

amount available under the liability limit.[23]

§ 5-4. Fronting Money

As stated above, when the tortfeasor's liability insurer extends a full and final settlement offer, the insured must give his underinsured motorist carrier notice of this offered settlement and the underinsured carrier should consent to the settlement and forgo any right of subrogation for any underinsured motorist coverage it may subsequently pay, or else pay to its insured the amount offered by the tortfeasor and preserve its right of subrogation. When is it best, however, to

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[23] See, *Auto-Owners Ins. Co. v. Hudson*, 547 So.2d 467 (Ala. 1989): insured did not forfeit his claim for uninsured motorist benefits by entering settlement agreement releasing tortfeasor, tortfeasor's employer, and tortfeasor's insurer in exchange for maximum limits of tortfeasor's liability coverage where insured's damages exceeded amount of tortfeasor's liability coverage and further exceeded amount of uninsured motorist coverage – insured gave his insurer notice of settlement offer and provided it with opportunity to pay applicable limits of tortfeasor's liability policy and underinsured motorist benefits provided by insured's policy, which would have subrogated it to that amount; *Allstate Ins. Co. v. Beavers*, 611 So.2d 348 (Ala. 1992): it is insured's notice to insurer of his intention to seek underinsured motorist insurance benefits at time insured informs insurer of tortfeasor's intent to settle that requires insurer to investigate claim in order to determine whether to protect its subrogation rights; *Overstreet v. Safeway Ins. Co. of Alabama*, 740 So.2d 1053 (Ala. 1999): insured's failure to provide adequate notice and obtain the carrier's consent to settlement of the tort case prejudiced the carrier and barred the claim for UIM benefits – the carrier never had the opportunity to advance the liability insurance limits and protect its subrogation rights, and nothing indicated that the nonresident tortfeasor was insolvent or that a suit against his estate was barred and Insured's correspondence notifying the UIM carrier of the claim under tortfeasor's liability policy and demanding UIM benefits provided inadequate notice of proposed settlement and the terms of the release in that nothing communicated the specifics of the proposed settlement of the tort case; *Robinson v. State Farm Mut. Auto. Ins. Co.*, 813 So.2d 924 (Ala.Civ.App. 2001): fFailure of insured under automobile policy to notify insurer, who had opted out of participation in action brought by insured to recover for injuries sustained in accident, of his intent to settle with tortfeasor, precluded recovery of underinsured motorist (UIM) benefits by insured; and *Faulk v. Motors Ins. Corp.*, 724 So.2d 1 (Ala.Civ.App. 1997): Prospective car buyer would not be precluded from coverage under automobile dealership's uninsured/underinsured motorist (UM/UIM) policy because of buyer's failure to notify insurer of his settlement with drunk driver in accordance with the six-step Lambert procedure where buyer had settled with a tortfeasor other than the uninsured motorist.

"front the money" and preserve subrogation or consent to the settlement and waive any right thereto?

First, **remember that a consent is to a release of the tortfeasor, and he or she is discharged from the lawsuit accordingly. The plaintiff must, however, try the case (if it gets to that point) from the beginning and must prove the "legal liability" of the tortfeasor just as if the tortfeasor remained in the matter as a party defendant.**

What is the reasoning in consenting to the settlement? Most obviously that the liability money is deemed sufficient recovery and if the underinsured claim is not negotiated and settled that the plaintiff's opportunities to win a verdict over and above the liability settlement are poor. It is important to remember in this regard that **the underinsured defendant decides whether to tell the jury the amount of money the plaintiff received from the tortfeasor (otherwise, all the jury knows is "[t]hat the plaintiff was injured by the operation of a vehicle by [the tortfeasor], who had some liability insurance")** AND **the jury is instructed to determine the plaintiff's damages without regard to the amount of liability insurance carried by the tortfeasor.**

In other words, the jury is told that they must decide the value of the case

without regard to the liability settlement and without regard to the amount of insurance afforded by the underinsured policy. After the verdict, the judge decides the set-off, if any, and enters any judgment accordingly. And note that if the underlying settlement is for less than the liability limit as is now allowed ($22,500.00 instead of $25,000.00), the underinsured carrier is entitled to a set-off based on the LIMIT, not the settlement. In this instance, $25,000.00.

Second, it is advisable to front the underlying limit **only if reasonably certain that the verdict will exceed the liability carrier's offer:** the underinsured carrier will save its cost of defense, and the liability carrier must, under its duty to defend, take the defense of the tortfeasor through verdict and judgment. If the money is fronted and the verdict is below the liability offer, the underinsured carrier gets back in subrogation the amount of the offer, but the rest belongs to the plaintiff and the underinsured carrier has not right to recover the remainder.

- For example, assume the following:

  State Farm as the liability carrier offers a settlement to the plaintiff of **$25,000.00** with a policy limit of **$25,000.00**. The underinsured carrier, Alfa, is properly placed on notice of same and determines to front the $25,000.00. State Farm defends the case to verdict and judgment.

- **Any verdict under $25,000.00 is paid to Alfa, but any difference**

between the verdict and the liability offer on which Alfa fronted its money is lost.

For example, a verdict of $15,000.00 means that State Farm pays Alfa $15,000.00, but the remainder paid by Alfa – $10,000.00– is lost and the plaintiff keeps it free and clear.

➢ **Any verdict above $25,000.00 starts to diminish the subrogation recovery by Alfa as the verdict amount increases. For example:**

Verdict of $25,000.00 is a wash. State Farm pays Alfa $25,000.00.

Verdict of $27,500.00. State Farm pays Plaintiff $2,500.00 and Alfa $22,500.00

(Alfa is now subrogating only to a portion of its fronted money. It is important to note at this point, that Alfa's risk remains the same as the verdict increases as if though it had consented and stepped in and defended the case. For example, if Alfa consented to the settlement of $25,000.00 and the verdict was $27,500.00, Alfa would only have to pay $2,500.00 which is the amount that it has lost in the scenario of fronting.

The benefit to is saving defense costs.

Verdict of $30,000.00. State Farm pays plaintiff $5,000.00 and Alfa $20,000.00.

Verdict of $40,000.00. State Farm pays plaintiff $15,000.00 and Alfa $10,000.00.

Verdict of $50,000.00. State Farm pays plaintiff $25,000.00 and Alfa $0. And Alfa has no subrogation coming back to it, just as if it had consented to the settlement and defended the case to a $50,000.00 verdict.

§ 5-5. Loss of Consortium

See, *Jenkins v. State Farm Mut. Auto. Ins. Co.*, 2008 WL 4531800 (Ala.Civ.App. 2008): Wife's claim against her automobile insurer to obtain reimbursement under the policy's UM/UIM provisions for her loss of consortium damages arising from husband's involvement in an automobile accident was not necessarily extinguished by dismissal of her husband's tort claim against the driver that caused the accident or by the settlement and possible release of the husband's claims; the wife was entitled to pursue her UIM claim where she did not assert a loss of consortium claim in her husband's action against the driver and the record did not contain a signed release containing language releasing the adverse driver from the same. In this respect, since the record did not reflect the wife's consortium claim to be settled at any point, she was not required to notify the insurer of the underlying settlement by the husband in order to preserve the insurer's subrogation rights.

§ 5-6. Review and Best Practices

- **The notice of an underlying settlement to the UIM carrier must include sufficient details of the proposed settlement and the terms of any release.**

- **On notice of the proposed settlement and UIM claim, the carrier**

must immediately begin investigating the claim and conclude the investigation within 30 days.

- **The carrier may waive its right of subrogation by not concluding its investigation within 30 days; failing to address value-driving factors involving liability and damages with the insured or requesting additional time; by denying the claim without an adequate investigation into the facts of the claim.**

- **Opting-out terminates the right of the UIM carrier to participate in discovery.**

- **As a practical matter if the carrier opts-out, counsel for the UIM carrier should reach agreement with counsel for the tortfeasor to periodically receive copies of documents and medical records of the insured that would enable the carrier to avoid any question of timeliness once put on notice of an underlying settlement.**

- **Allowing the UIM carrier to opt-in is not a discretionary act of the trial court; consequently, any action to opt-in is addressed by a notice of same to the trial court and not by motion. A motion is necessarily a pleading which calls for a decision: opting-in is not an action calling for any decision, it is a matter of right.**

6.
Bad Faith and UM/UIM

§ 6-1. General

The standard by which the conduct of insurers is judged arguably should be higher in regard to uninsured motorist claims than it is for other first party insurance coverages. The public interest in this coverage means that insurers should be obligated to exercise the greatest care and highest level of good faith and fair dealing.

Sanford v. Liberty Mut. Ins. Co., 536 So.2d 941 (Ala. 1988).

"Uninsured motorist coverage in Alabama is a hybrid in that it blends the features of both first-party and third-party coverage. The first-party aspect is evident in that the insured makes a claim under his own contract. At the same time, however, third-party liability principles also are operating in that the coverage requires the insured to be 'legally entitled' to collect-- that is, the insured must be able to establish fault on the part of the uninsured motorist and must be able to prove the extent of the damages to which he or she would be entitled. The question arises: when is a carrier of uninsured motorist coverage under a duty to pay its insured's damages?" *LeFevre v. Westberry*, 590 So.2d 154, 159 (Ala. 1991). With this case, recognize the issues triable to the UM carrier as set out in APJI 20.50 (Uninsured motorist coverage elements of plaintiff's case):

> **In order to recover, the plaintiff must prove, in summary: (1) a policy of insurance in existence; (2) that the alleged UM was uninsured; (3) that the UM is legally responsible for the injuries; and (4) the extent of the plaintiff's injuries and damages. Only if the plaintiff has proven the truth of each element is he entitled to recover against the carrier.**

"Legally entitled" is common policy language: in the State Farm policy at issue in *LeFevre*, the policy stated, "We will pay damages for bodily injury an

insured is legally entitled to collect from the owner or driver of an uninsured motor vehicle." The policy went on to address the "two questions [that] must be decided by agreement between the insured and us: 1. Is the insured legally entitled to collect damages from the owner or driver of the uninsured motor vehicle, and 2. If so, in what amount?" In *Quick v. State Farm Mut. Auto. Ins. Co.*, 429 So.2d 1033 (Ala. 1983), the Court noted that "legally entitled to recover as damages" has been interpreted to mean that "the insured must be able to establish fault on the part of the uninsured motorist, which gives rise to damages and must be able to prove the extent of those damages." *Quick*, 429 So.2d at 1035 (emphasis added.)

The competing interests debated in *LeFevre* concerned the application of the doctrine of bad faith to uninsured motorist coverage versus the recognition of the adversarial relationship created by the uninsured motorist contract and the unwillingness to turn the coverage "into something more like first-party coverage that what it was designed to be." Thus, the court designed the following procedures that an insurer must follow when its insured has notified it of a claim under the UM/ UIM provision of an automobile liability policy:

> **1. When a claim is filed, the carrier has an obligation to diligently investigate the facts, fairly evaluate the claim, and act promptly and**

reasonably;

2. the carrier should conclude its investigation within a reasonable time and notify its insured of the action it proposes;

3. mere delay does not constitute vexatious or unreasonable delay in the investigation of a claim if there is a bone fide dispute on the issue of liability;

4. mere delay in payment does not rise to the level of bad faith if there is a bona fide dispute on the issue of damages; and

5. if the UM carrier refuses to settle with its insured, its refusal to settle must be reasonable.

This procedure must, of course, take into consideration the facts and circumstances of each case.

LeFevre, 590 So.2d at 161.

In the case of *Ex parte Safeway Insurance Company of Alabama, Inc.*, 990 So.2d 344 (Ala. 2008), the Alabama Supreme Court held that the allegation of bad faith arising out of a claim for UM benefits was not ripe and due to be dismissed for lack of subject matter jurisdiction:

> "Safeway has established a clear legal right to a writ of mandamus because Safeway presented unrefuted evidence indicating that the damages

are in dispute and in accordance with *Pontius*, Galvin's (the claimant's) bad-faith claim, as a matter of law is not ripe; consequently, the trial court does not have subject-matter jurisdiction over the claim.

"**Safeway presented evidence to the trial court in the form of an affidavit from Mizell (an assistant claim manager) indicating that the damages were not fixed but were in controversy**. In the affidavit, Mizell explained that Safeway had been unable to determine from the documentation provided by Galvin 'what treatments and injuries were proximately caused by this accident.' Galvin did not present any evidence refuting Mizell's statement that she had not provided all the documents requested by Safeway or indicating that Safeway had not contested the extent of damages.

"**Therefore, she did not satisfy her burden of establishing factually that her bad-faith claim is ripe and that the trial court had jurisdiction to entertain her bad-faith claim against Safeway**

. . . .

Accordingly, Safeway has established a clear legal right to a dismissal without prejudice of Galvin's bad-faith claim because that claim is not ripe for adjudication, and, consequently, the trial court lacks subject-matter jurisdiction. '[T]here can be no bad-faith action on conduct arising before the uninsured motorist's liability is established and damages are fixed; therefore, ''there can be no

> action based on the tort of bad-faith based on conduct arising prior to that time, only for subsequent bad faith conduct.'""
>
> *Ex parte Safeway*, 990 So.2d 344, 352-353, citing *Pontius v. State Farm Mutual Automobile Insurance Co.*, 915 So.2d 557 (Ala. 2005), and *LeFevre*, 590 So.2d at 159.

See also, *Pontius, supra*: there can be no bad faith action based on conduct arising before the uninsured motorist's liability is established and damages are fixed; *Bowers v. State Farm Mut. Auto. Ins. Co.*, 460 So.2d 1288 (Ala. 1984): an uninsured motorist carrier is not liable to its insured until the tort liability of the uninsured motorist has been established and a UM carrier has the right to delay payment until such time and partial payments negate the existence of bad faith on the part of the insurer; *Ex parte Alfa Mut. Ins. Co.*, 799 So.2d 957 (Ala. 2001): breach of an insurance contract is an element of a bad faith failure-to-pay claim; and *Ex parte State Farm Mut. Auto. Ins. Co.*, 893 So.2d 1111 (Ala. 2004): there can be no breach of an uninsured contract providing UM coverage until the insureds prove they are legally entitled to recover.[24]

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[24] As to bad faith generally: The tort of bad faith is an intentional tort. From its inception in 1981, through the most recent decisions of the Supreme Court of Alabama, the bad faith cause of action has been recognized as an intentional tort, and the requisite intentional conduct has been carefully preserved. *Jones v. Alfa Mut. Ins. Co.*, 875 So. 2d 1189 (Ala. 2003); *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So. 2d 916, 924 (Ala. 1981); *State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 303 (Ala. 1999). As such, it cannot survive

Across all jurisdictions, the most prevalent issues in respect to bad faith are failure to explain the scope of the coverage to a claimant; a false response to a

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a motion for summary judgment absent proof tested against the "clear and convincing" standard of each of its elements: "[A] plaintiff, in order to go to the jury on a claim [alleging intentional tortious conduct], must make a stronger showing than that required by the "substantial evidence rule" as it applies to the establishment of jury issues in regard to tort claims generally. . . ." *ITT Speciality Risk Services, Inc. v. Barr*, 842 So.2d 638, 646 (Ala. 2002), citing *Hobbs v. Alabama Power Co*., 775 So.2d 783, 787 (Ala. 2000), quoting *Lowman v. Piedmont Executive Shirt Mfg. Co.*, 547 So.2d 90, 95 (Ala. 1989).

The basic elements of proof of a bad faith claim are: (a) the existence of an insurance contract between the parties and a breach of same; (b) an intentional refusal to pay the claim; (c) the absence of any reasonably legitimate or arguable reason for such refusal – the absence of a debatable reason; (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason. When the species of bad faith is asserted to be that of the "extraordinary" or "abnormal" kind, such as the intentional failure to determine the existence of a lawful basis to be relied upon – bad faith failure to investigate – plaintiff is also required to prove that: (e) the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim. *Nat. Sec. Fire & Cas. Ins. Co. v. Bowen*, 417 So.2d 179, 183 (Ala. 1979); *State Farm Fire & Cas. Ins. Co. v. Slade*, supra, at 303-307, 316-319; *Acceptance Insurance Co. v. Brown*, 832 So.2d 1, 16-17(Ala. 2001); *Employees' Benefit Association v. Grissett*, 732 So.2d 968, 975-976 (Ala. 1998).

The "directed verdict on the contract claim standard" was set forth in *National Savings Life Ins. Co. v. Dutton*, 419 So.2d 1357 (Ala. 1982). Recognizing the plaintiff's burden to be a heavy one, the court stated that in order to recover, the plaintiff must establish that he is entitled to a directed verdict on the contract claim, and thus entitled to recover on the contract a claim "as a matter of law." Ordinarily, if the evidence produced by either party created a fact issue on the contract claim, thus legitimating the carrier's denial of same, the tort claim fails and is not to be submitted to the jury. *Dutton*, supra. The *Dutton* court set forth the "directed verdict" test to be applied to "normal" or "ordinary" cases and observed the test was not to apply to every bad faith case; it is an objective standard to measure whether the plaintiff has met his burden.

Employee's Benefit Assoc. v. Grissett, supra, describes the "abnormal" bad faith claim: "The rule in 'abnormal' cases dispensed with the predicate of a preverdict JML for the plaintiff on the contract claim if the insurer had recklessly or intentionally failed to properly investigate a claim or to subject the results of its investigation to a cognitive evaluation. . . . A defendant's knowledge or reckless disregard of the fact that it had no legitimate or reasonable basis for denying a claim may be inferred and imputed to an insurer when it has shown a reckless indifference to facts or proof submitted by the insured." 732 So.2d at 976, citing *Blackburn v. Fidelity & Deposit Co. of Maryland*, 667 So.2d 661 (Ala. 1995); *Thomas v. Principal Financial Group*, 566 So.2d 735 (Ala. 1990); *Gulf Atlantic Life Ins. Co. v. Barnes*, supra, at 924. "So, a plaintiff has two methods by which to establish a bad-faith refusal to pay an insurance claim: he or she can prove the requirements necessary to establish a 'normal' case, or, failing that, can prove that the insurer's failure to investigate at the time of the claim presentation procedure was intentionally or recklessly omissive." 732 So.2d at 976.

claim; and undue delays:

> **"Many courts have now sustained the proposition that an insurer must apprise an insured of the scope of protection afforded by the uninsured motorist coverage.**
>
> **"For example, in 1978, the Tennessee Supreme Court concluded that the duty to deal with its insured fairly and in good faith required that the insureds be informed about the 'extent of the coverage afforded . . . before negotiating a settlement' especially when it is apparent that the insureds were not aware of the scope of protection and that the adjuster took advantage of their ignorance.**
>
> **"Similarly, in a 1979 decision the Alabama Supreme Court decided that the evidence was sufficient to support an award of punitive damages in a case where 'The jury could have concluded that the adjuster deliberately and intentionally suppressed the fact that there was coverage for pain and suffering, loss of services and consortium, and that under the particular circumstances, there was an intent to deceive.'**
>
> **"The Fifth Circuit Court of Appeals concluded in 1982 that a jury could be justified in making an award of punitive damages on the basis of the retention of an invalid limitation in the coverage provisions and the subsequent failure to implement a procedure that prevented erroneous denials of claims based on such unenforceable provisions.**

“Several courts have concluded that an insurer acts in bad faith by raising a defense it knew to be false in response to a valid claim. As the United States Court of Appeals for the Eighth Circuit observed, when an insurer knows a claim to be valid, an insurer's refusal to pay ‘deliberately misleads,’ deceives, or oppresses the insured by insisting the claim is nonrecoverable, thereby forcing the insured to sue in court for the amount of the policy coverage.

“An insurer is obligated to avoid undue delay in responding to a claim. Delay in reaching a settlement with a claimant may be advantageous to an insurer both in terms of the time value of money and as a means of inducing an insured to settle for something less than the full value of the claim. Courts have concluded that an insurer is required to diligently pursue the adjustment and settlement of uninsured motorist insurance claims.

“For example, the Supreme Court of Rhode Island observed that:

> ‘. . . insurers . . . are encouraged to delay payment of claims to their insured with an eye toward settling for a lesser amount than that due under the policy. The potential loss could never exceed the contract amount plus interest. Thus, when the legal rate of interest is lower than the commercial rate of interest, an unscrupulous insurer would be wise to

> delay payment for the maximum period of time.'
>
> **"Similarly, the California Supreme Court commented:**
>
> > 'That evidence . . . indicated that Farmers' refusal to accept Mr. Gergen's [the insured's attorney] offer of settlement and its submission of the matter to its attorney for opinion were all part of a conscious course of conduct, firmly grounded in established company policy, designed to utilize the lamentable circumstances in which Mrs. Neal [the insured] and her family found themselves, and the exigent financial situation resulting from it, as a lever to force a settlement more favorable to the company than the facts would otherwise have warranted.'"[25]

§ 6-2. Review and Best Practices

- **Fully investigate and document liability and damages.**
- **Use experts to substantiate your findings.**
- **Seek the advice of counsel regarding similar cases and your evaluation of the subject claim.**
- **Ensure that any delay is not occasioned by a "conscious course of conduct," but rather is the by-product of an effort to fully**

[25] Widiss, *Uninsured and Underinsured Motorist Insurance* § 20.4

investigate the claim in respect to liability and damages – inasmuch as the insured must be able to establish fault on the part of the uninsured motorist as well as damages arising therefrom.

- **The claim file should be well documented and reflect an ongoing process of evaluating the evidence available at the time and responding to such with a reasonable investigation plan. This process should continue from the start of the claim through trial.**

- **The claim file should not only document what is being done, but why. But care should be taken not to document random thought processes – this includes commentary on the veracity of the claimant's allegations or injuries.**

- **Tell the claimant or claimant's attorney what specific information is needed and why. Ensure when that information is received that it is promptly submitted to evaluation.**

7.
Legally Entitled to Recover

§ 7-1. General

In all jurisdictions, UM coverage is predicated on an insured's being "legally entitled to recover" damages from the owner or operator of the uninsured motor vehicle. It is clear that this coverage language is intended to mean that insurance only exists when injuries have been caused by a negligent uninsured motorist. In some jurisdictions, however, neither the law or statute nor the insurance contract address the allocation of the burden of proof in the event the negligence of an

uninsured motorist is a disputed issued between the claimant and insurance company. "It is, therefore, unclear whether the claimant bears the burden of proving that the uninsured motorist was negligent in order to recover, and, if so, what the claimant must do to discharge the burden; or, alternatively, whether the insurance company has the burden of proving that the insured is not legally entitled to recover from the uninsured motorist in order to avoid liability under the coverage." Widiss, *Uninsured and Underinsured Motorist Insurance* § 7.1.

In Alabama, the insured must be able to establish fault on the part of the uninsured motorist which gives rise to damages and must be able to prove the extent of those damages in order to show that insured is "legally entitled to recover" damages from owner or operator of uninsured motor vehicle. *State Farm Mut. Auto. Ins. Co. v. Bennett*, 974 So.2d 959 (Ala. 2007). It is not necessary, however, as a condition precedent to an insured's recovering in a direction action against his uninsured motorist carrier that he first secure judgment against the uninsured motorist – the insured need only prove that he is legally entitled to recover damages against the uninsured motorist. *State Farm Auto. Ins. Co. v. Baldwin*, 470 So.2d 1230 (Ala. 1985).

See also, *Harvey v. Mitchell*, 522 So.2d 771 (Ala. 1988): in action in which

uninsured motorist coverage is involved, plaintiff must show that he is legally entitled to recover damages against uninsured motorist, including establishing fault on part of uninsured motorist and proving extent of damages; *Ex parte State Farm Mut. Auto. Ins. Co.*, 893 So.2d 111 (Ala. 2004): there can be no breach of an insurance contract providing uninsured motorist coverage until the insureds prove that they are legally entitled to recover from the alleged tortfeasor, and being legally entitled to recover damages from owner or operator of uninsured motor vehicle requires insureds to establish the uninsured motorist's fault which gives rise to damages and to prove the extent of those damages [also, *Pontius v. State Farm Mut. Auto. Ins. Co.*, 915 So.2d 557 (Ala. 2005)].

Further see, *Olive v. State Farm Mut. Auto. Ins. Co.*, 456 So.2d 310 (Ala.Civ.App. 1984): success of suit filed by insured under uninsured motorist provision of her policy was dependent upon establishing legal liability of uninsured tortfeasor for injury and damages suffered; and *Walker v. GuideOne Specialty Mut. Ins. Co.*, 834 So.2d 769 (Ala. 2002): An insured is "legally entitled to recover damages" from an uninsured motorist, if the insured meets burden of presenting substantial evidence to survive a motion for a summary judgment or a judgment as a matter of law and the fact-finder is reasonably satisfied from the evidence that

the motorist should recover damages.

§ 7-2. General Defenses and Statute of Limitations

Continental Nat. Indem. Co. v. Fields, 926 So.2d 1033 (Ala. 2005): The UM statute carves out no exception for causes of action that may have been viable at one time, but that are barred by a defense at the time they are filed – an accident victim who filed to file a tort action prior to her death was not legally entitled to recover from uninsured motorist through her estate and thus the estate was not entitled to recover UM benefits [even though the victim's contractual cause of action for UM benefits survived her death, the failure of the victim's tort cause of action to survive her death provided a complete defense to the uninsured tortfeasor]:

> **"The fact that her cause of action survives does not, however, answer the ultimate question of whether her estate is 'legally entitled to recover' under the uninsured motorist statute. To satisfy this condition precedent to recovery, Fields, as Tamms's personal representative, must establish that the uninsured motorist, Coultas, is legally liable to the estate for damages. Fields cannot meet this burden. The failure of Tamms's tort cause of action to survive her death provides a complete defense for the uninsured motorist, Coultas, against an action filed by Tamms's estate after her death. As a**

> **result, the insured is not 'legally entitled to recover' from the uninsured motorist through her estate, and under the plain language of the uninsured motorist statute as interpreted in *Carlton*, Tamms's estate is not entitled to UM benefits under the Continental policy or the Progressive policy."**
>
> *Continental Nat. Indem. Co. v. Fields*, supra.

State Farm Mut. Auto. Ins. Co. v. Bennett, 974 So.2d 959 (Ala. 2007): insured's procedural default by failing to perfect service upon alleged tortfeasor did not preclude recovery of uninsured motorist benefits – the procedural default was not a substantive defense and a judgment against the tortfeasor was not a prerequisite to recovery of UM benefits.

Substantive law (including a substantive defense) is the statutory or written law that governs rights and obligations of those who are subject to it. Same defines the legal relationship of people with other people or between them and the state and stands in contrast to procedural law (and procedural defense), which comprises the rules by which a court hears and determines what happens in civil or criminal proceedings – procedural law deals with the method and means by which substantive law is made and administered. Another way of summarizing the difference between substantive and procedural is that substantive rules of law

define rights and duties, while procedural rules of law provide the machinery for enforcing those rights and duties.

Ex parte Mason, 982 So.2d 520 (Ala. 2007): only the uninsured motorist's substantive defenses are available to the uninsured motorist carrier to determine whether the insured is legally entitled to recover from the uninsured motorist. A true statute of limitations' defense is procedural and not substantive and it would be inconsistent to penalize the insured for actions taken in pursuing a claim against an uninsured motorist when Alabama law does not require that the insured obtain a judgment against the tortfeasor before recovery from the UM carrier. The tortfeasor's statute of limitations defense is procedural and is not available to the UM carrier.[26]

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[26] **MULTI-JURISIDICTIONAL**:

The issue of which statute of limitations applies to claims under the uninsured motorist coverage has been resolved by courts in many states. "The appellate courts almost uniformly hold that in the absence of any provision in the insurance policy coverage terms, the contract statute of limitations applies. There are, however, a few exceptions to the general rule that the contract statute of limitations determines whether an uninsured motorist claim is timely.

"First, at least one state supreme court – North Carolina – has indicated, in dicta, that the tort statute of limitations would apply under the uninsured motorist coverage. Second, the Georgia Supreme Court reasons that because the insured is required to file an action against the tortfeasor as a condition precedent to the right to recover under the uninsured motorist coverage in Georgia, the running of the tort statute of limitations precludes a subsequent coverage claim. A similar result is to be expected in those few states that have interpreted their uninsured motorist insurance statutes to require the initiation of an action against the uninsured tortfeasor prior to allowing compensation by the uninsured motorist coverage. The other states that have such a requirement are South Carolina, Virginia, and Tennessee.

Also see, *Oblander v. USAA Cas. Ins. Co.*, 792 So.2d 1103 (Ala.Civ.App. 2000): evidence of insured bicyclist's seizures was admissible in suit to recover UM benefits for injuries allegedly caused by phantom driver – the insured was on seizure medication and had suffered a seizure two weeks before the accident and she told her physician that a seizure may have precipitated same; *Lassie v. Progressive Ins. Co.*, 655 So.2d 952 (Ala. 1995): evidence concerning insured's prior work-related injuries was properly admitted in his action against UM insurer seeking UM benefits following auto accident as it was relevant to whether insured's back problems were attributable to the automobile accident or to accidents he had sustained at work, which insurer was apparently attempting to prove; *Harshaw v. Nationwide Mut. Ins. Co.*, 834 So.2d 762 (Ala. 2002): insured's unrefuted evidence that uninsured motorist hit insured's lawfully stopped vehicle and was under influence of alcohol and UM carrier's stipulation that the insured suffered injuries as a proximate result of same, established that the insured was legally entitled to recover damages from the tortfeasor and was entitled to UM benefits.

"Third, an increasing number of appellate cases have considered the enforceability of coverage terms that expressly provide for a shorter time limit. Fourth, when a claim involves rights stemming from a claim of wrongful death, several courts have decided that the contract statute of limitations does not apply."

Widiss, *Uninsured and Underinsured Motorist Insurance* § 7.6

§ 7-3. Tort Immunities

See, *Ex parte Carlton*, 867 So.2d 332 (Ala. 2003): employee, who was injured while a passenger in a vehicle driven by a co-employee, was not legally entitled to recover from owner or operator of uninsured vehicle, for purposes of uninsured-motorist statute, and, thus, employee was not entitled to uninsured-motorist (UM) benefits under his family's automobile liability insurance policy, where Workers' Compensation Act barred employee from suing co-employee based on negligence (overruling *Hogan v. State Farm Mutual Automobile Insurance Co.*, 730 So.2d 1157; *State Farm Mutual Automobile Insurance Co. v. Jeffers*, 686 So.2d 248; and *State Farm Mutual Automobile Insurance Co., v. Baldwin*, 470 So.2d 1230).

Further, *Phillips ex rel. Phillips v. United Services Auto. Ass'n*, 988 So.2d 464 (Ala. 2008): passenger was not entitled to UIM benefits for injuries caused by single vehicle accident after driver waived to friends and lost control, since driver did not engage in wanton misconduct and had no liability under guest statute; and *Dale v. Home Insurance Co.,* 479 So.2d 1290 (Ala.Civ.App. 1985): fireman injured in one-vehicle incident involving fire truck was not entitled to claim uninsured motorist benefits under policy covering the fire truck based on contention that

"fellow employee" exclusion contained in liability endorsement of fire truck policy made truck upon which he was riding at time of the accident "uninsured" as to him, as both the uninsured motorist statute and insurance policies written for uninsured coverage deal with motor vehicle which is uninsured rather than motorist, and thus, fact that liability coverage might not be available to a particular individual did not convert an insured vehicle into an uninsured vehicle for uninsured motorist coverage purposes.

See *Kendall v. USAA*, 2009 WL 1363536 (Ala. May 15, 2009): “legally entitled to recover” under the UIM statute “depends entirely on the merits of the insured’s claim against the tortfeasor” in Alabama. Consequently, since the claimant could recover no more than $100,000.00 in damage against the county [Alabama’s statutory cap on damages against a governmental entity is $100,000.00], and had recovered this amount from the county’s insurer, she was no longer legally entitled to recover damages from same and therefore could not recover UIM benefits from her insurer, USAA. In concurrence, Justice Cobb writes that the plain meaning of the statute mandated the outcome in the case, but “it also interferes with the contractual relationship between Kendall and her insurer in that it prohibits her from receiving the contractual benefits she would have received had the tortfeasor

not been acting within the line and scope of her employment with a governmental entity. I have reservations as to whether this was the legislature's attempt in adopting [the UM/UIM statute]. However, without a legislative history, we are limited to the plain language of the statute."

Widiss expresses the same viewpoint: **"**Courts and legislatures should analyze the public goals for each tort immunity in assessing its import for uninsured motorist insurance claims. In many, and probably most, situations, there is no compelling reason why the public interests which justify or support a tort immunity that forecloses a claim against a tortfeasor should also leave an innocent injured person with no right to recover uninsured motorist insurance benefits. Rather, implementing the very significant public interests that seek to assure indemnification for personal injuries and economic losses resulting from motor vehicle accidents – manifested by the uninsured motorist insurance statutes – should clearly mean that an insured is entitled to uninsured motorist insurance benefits even though a tort immunity would foreclose a claim against the tortfeasor.

> **"The effect of allowing insurers to predicate a denial of uninsured motorist benefits on a tort immunity is particularly disturbing when the**

result of such a decision is to deny an injured person compensation from first party uninsured motorist insurance, as well as from a tort claim against an alleged tortfeasor.

"In the absence of a clear articulation of legislative intent that tort immunities should have an import in regard to an otherwise applicable and statutorily mandated uninsured motorist insurance coverage, courts should implement the public interest underlying the uninsured motorist insurance legislation by interpreting the coverage term that the insured 'be legally entitled to recover as only requiring a determination of fault.

"The fact that the insured would not be permitted to pursue a tort claim against the particular tortfeasor should not lead to a denial of uninsured motorist coverage."[27]

27

Widiss, *Uninsured and Underinsured Motorist Insurance* § 7.14. See also, *Watkins v. United States*, 462 F.Supp. 980 (S.D. Georgia 1977): the widow of a serviceman sought indemnification as a consequence of an accident in which her husband was killed. The widow alleged that her husband died as a result of the negligent operation of a shuttle bus operated by a civilian employee who was acting within the scope of his employment and was therefore insulated from personal liability. The court held that although Federal law precluded recovery against the driver, it did not bar recovery from the UM carrier and concluded that whether the decedent was legally entitled to recover from the bus driver was not a controlling factor in regard to the UM coverage; *Hoglund v. State Farm Mut. Auto. Ins. Co.*, 592 N.E.2d 1031 (Ill. 1992): doctrine of interspousal immunity did not preclude a wife from recovering from her uninsured motorist insurance carrier for injuries sustained when she was a passenger in a car driven by her uninsured husband; and *Rose v. State Farm Mut. Auto. Ins. Co.*, 821 P.2d 1077 (Ok. 1991): "To make a successful claim against her UM coverage, Rose is not required to be entitled to maintain an action against her son. She need only establish his fault and the extent of resultant damages. The parent-child tort immunity doctrine is not applicable to this action." See however, *Medders v. United States Fidelity and Guaranty Company*, 623 So.2d 979 (Miss. 1993: the term "legally entitled to recover" limits uninsured motorist coverage to those instances in which an insured would be entitled to recover through a legal action and there is no statutory mandate to provide coverage when an alleged tortfeasor is immune from liability."

§ 7-4. Worker's Compensation

Ex parte Carlton, 867 So.2d 332 (Ala. 2003): "Pursuant to the Alabama Worker's Compensation Act, Carlton may not recover from his co-employee for the co-employee's negligent or wanton conduct. The worker's compensation benefits Carlton received are his only remedy against his employer. § 25-5-11, Ala. Code 1975. Therefore, Carlton is not 'legally entitled to recover damage from the owner or operator of an uninsured vehicle' as the plain language of § 32-7-23(a), Ala. Code 1975, or the clear and unambiguous provisions of his mother's State Farm policy require. Thus, he may not recover uninsured-motorist benefits under the policy."

But see, *Johnson v. Coregis Ins. Co.*, 888 So.2d 1231 (Ala. 2004): Workers' Compensation Act's exclusive remedy provision did not preclude employee, who was injured in automobile accident while in course and scope of his employment and who received workers' compensation benefits, from seeking underinsured-motorist benefits under automobile insurance policy issued to his employer, and, thus, employee stated claim against employer's insurer for benefits; and *Watts v. Sentry Ins.*, 876 So.2d 440 (Ala. 2003): an employee receiving workers' compensation benefits from his employer for injuries sustained in a motor vehicle

accident that occurred while driving employer's vehicle can recover underinsured-motorist benefits from employer's automobile insurer if the employee's injuries were proximately caused by the negligence or wantonness of an underinsured driver who was not a co-employee, subject to employer's right to reimbursement for workers' compensation to the extent of the employee's recovery of damages against the third-party tortfeasor.

When uninsured motorist insurance is claimed for injuries that are caused by a "fellow employee," the justification for sustaining one or another of the coverage limitations is persuasive. The workers' compensation plan precludes tort claims against a fellow employee and the employer – that is, the statutory provisions establishing the workers' compensation plan typically also specify that it is the exclusive "remedy" and eliminate tort claims. In such circumstances, coverage limitations that preclude uninsured motorist insurance claims harmonize with the legislative enactments. However, if the injuries are not caused by a fellow employee and a tort claim may be asserted against a tortfeasor, provisions in the uninsured motorist coverage terms that foreclose claims are obviously not fully consonant with the legislature's vision of the appropriate scope of limitations on tort suits. Thus, if the injured persons have not been completely indemnified,

there is no compelling public interest that supports a denial of uninsured motorist insurance benefits, and reductions or limitations on the scope of legislatively mandated uninsured motorist insurance benefits in such cases arguably conflict with the goal of maximizing indemnification. Especially in those jurisdictions in which the courts have interpreted the public policy underlying the uninsured motorist insurance statutes to favor maximizing indemnification for injured persons, the enforceability of various coverage limitations in this context is an open question.

§ 7-5. Excerpts of Alabama Jury Charges

APJI 20.50
Uninsured Motorist Coverage – Elements of Plaintiff's Case

This case is based on a policy of insurance in which the defendant insurance company issued to the plaintiff a policy of automobile liability insurance which contained a provision affording what is commonly known as uninsured motorist coverage. The plaintiffs complaint contains the following averments, namely:

(1) That the defendant insurance company issued a policy of automobile liability insurance coverage which afforded uninsured motorist coverage and that said policy was in full force and effect on the date of the alleged accident;

(2) That on said date the plaintiff was injured by the operation of the motor vehicle (owned) or (operated) by (alleged uninsured motorist);

(3) That the (alleged uninsured motorist) on the occasion of the accident had no liability insurance coverage;

(4) That the plaintiff is **legally entitled to recover damages** of the (alleged uninsured motorist). **The term "legally entitled to recover damages of the said " means: the plaintiff must establish fault on the part of the (uninsured motorist) which gives rise to damages and must prove the extent of those damages**.

[MORE OF THE CHARGE FOLLOWS]

APJI 20.54
A Case in which both the Uninsured Motorist and the Insurance Carrier are Parties Defendant

[MORE OF THE CHARGE PRECEDES]

If after considering all of the evidence you are not reasonably satisfied that the defendant uninsured motorist is liable to the plaintiff, you will not consider the claim against the Insurance Company.

In order for the plaintiff to recover against Insurance Company you must first be reasonably satisfied from the evidence that the **defendant uninsured motorist was legally responsible for the injuries and damages sustained by the plaintiff**.

In the event you find in favor of the plaintiff and against the defendant uninsured motorist and further find that the defendant was an uninsured motorist within the terms of the policy of insurance issued by Insurance Company, your verdict also should be against the Insurance Company.

APJI 20.59
Insurance – Underinsured Motorist Coverage – Elements of Plaintiff's Case

This case is based on a policy of insurance in which the defendant insurance company issued to the plaintiff a policy of automobile liability insurance which contained a provision affording what is commonly known as underinsured motorist coverage. The plaintiff's complaint contains the following averments, namely:

(1) That the defendant insurance company issued a policy of automobile liability insurance coverage which afforded underinsured motorist

coverage and that said policy was in full force and effect on the date of the alleged accident;

(2) That on said date the plaintiff was injured by the operation of the motor vehicle (owned)or (operated) by (alleged underinsured motorist);

(3) That the (alleged underinsured motorist) on the occasion of the accident had liability insurance coverage but the plaintiff claims that the amount of the liability insurance carried by the (same) was inadequate to fully compensate the plaintiff for his injuries and damages;

(4) That the plaintiff is legally entitled to recover damages of the (alleged underinsured motorist). **The term "legally entitled to recover damages of the same" means: the plaintiff must establish fault of the (underinsured motorist) which gives rise to damages and must prove the extent of those damages**.

[MORE CHARGE FOLLOWS]

In determining the amount of damages to be awarded, if you find in favor of the plaintiff, you are not to be concerned with the amount of liability insurance carried by (the alleged underinsured motorist) nor the amount of insurance afforded by defendant's policy.

APJI 20.60
Insurance – Cases where the UIM Motorist and the UIM Carrier both are Defendants and Participating in Trial

[MORE CHARGE PRECEDES]

If you find in favor of the plaintiff and against both defendants, you will determine the amount of his damages and render a verdict against both defendants for that amount. You should not attempt to apportion the amount between the parties. The apportionment must be left up to the Court.

You will not concern yourselves with the amount of liability insurance that was carried by (the underinsured motorist) nor the amount of insurance carried by the defendant insurance company.

See also, *Preferred Risk Mut. Ins. Co. v. Ryan*, 589 So.2d 165 (Ala. 1991): evidence of the limits of UM coverage is not usually relevant and admission of such evidence is error; *Harvey v. Mitchell*, 522 So.2d 771 (Ala. 1988): the amount of uninsured/underinsured coverage available is generally not relevant to any issue before the court – in a wrongful death case, the determination of liability and damages would be based upon the degree of the tortfeasor's wrong and not on the amount of insurance coverage; and *Guess v. Allstate Ins. Co.*, 717 So.2d 389 (Ala.Civ.App. 1998): although the UM statute does not provide for or preclude a "set-off" of any payment made by the tortfeasor's liability carrier, courts have held that it is appropriate to deduct from a verdict any amount received from the liability insurance carrier.

§ 7-6. Punitive Damages

Omni Ins. Co. v. Foreman, 802 So.2d 195 (Ala. 2001): punitive damages were an item that the insured was legally entitled to recover from the tortfeasor, and therefore, were within the UIM coverage; and *Hill v. Campbell*, 804 So.2d 1107 (Ala.Civ.App. 2001): exclusion of UM/UIM coverage for punitive or exemplary damages violated the statutory requirement of UM and UIM coverage for the protection of insureds legally entitled to recover damages from owners or

operators of uninsured motor vehicles, and therefore, was invalid in personal injury case.[28]

28

MULTI-JURISDICTIONAL:

"There are several reasons for concluding uninsured motorist coverage does not apply to punitive damages.

"First. there appears to be no justification for requiring an insurer providing uninsured motorist insurance to pay the punitive damages awarded against the uninsured or unidentified tortfeasor. The insurer has no relationship to the tortfeasor or the conduct which justifies the award. The prospect that allowing such a recovery will effect any 'punishment' or 'deterrence' on motorists – insured or uninsured – is essentially nonexistent.

"Second, in many states the courts have concluded that liability insurance does not provide coverage for punitive damages. The primary rationale articulated for this rule is that the purpose of punitive damages is to punish the wrongdoer or to deter similar conduct in the future by both the wrongdoer and others, and therefore to allow an insured to shift the responsibility for punitive damages to an insurer would thwart the public interests in attaining punishment and deterrence. In states which have adopted the view that tortfeasors should not be allowed to avoid liability for punitive damages by acquiring liability insurance, it seems probable that the courts will not be inclined to allow the uninsured motorist coverage to afford indirect protection for such tortfeasors.

"Third, in the states in which liability insurance does not provide coverage for punitive damages, allowing a recovery of punitive damages under uninsured motorist coverage would, in effect, place the insured in a better position than would exist if the tortfeasor had been insured. Thus, a sense of equity or "mutuality" warrants that the same rule apply to both liability and uninsured motorist coverages.

"Fourth, when the tortious conduct of an uninsured motorist that justifies an award is 'intentional,' coverage for both punitive and compensatory damages may not be within the scope of protection afforded by uninsured motorist insurance which is predicated on bodily injuries that result from 'accidents.' Nevertheless, because courts have frequently adopted the view that the assessment of whether the injuries are 'accidental' is to be made from the vantage point of the injured party, frequently the intentional conduct of an uninsured tortfeasor is of little, if any, import for the uninsured motorist coverage.

"Courts in at least ten states have concluded uninsured motorist coverage does not apply to punitive damages: California, Florida, Georgia, Illinois, Maine, Mississippi, Rhode Island, South Carolina, Virginia, and Wisconsin.

"When coverage for punitive damages is disputed, claimants have generally argued that since both the coverage terms and the uninsured motorist statutes provide that insurance is to be provided for all sums which the insured shall be legally entitled to recover, the term 'all sums' should be interpreted to include both compensatory and punitive damages.

§ 7-7. Review and Best Practices

- **"Legally entitled to recover" or "responsible" speaks to liability and damages.**

- **In order for the claimant to recover against the insurer, the uninsured motorist must first be proven to be legally responsible for the for the injuries and damages sustained by the claimant.**

- **In determining the amount of damages to be awarded in an underinsured case, the jury is instructed not to be concerned with the amount of liability insurance carried by (the alleged underinsured motorist) nor the amount of insurance afforded by defendant's policy**.

- **In Alabama, punitive damages are recoverable in that the insured claimant would be legally entitled to recover same from the tortfeasor.**

"Decisions sustaining an insurer's liability for punitive damages might also be premised, at least in part, on the proposition that when an insurance carrier broadly defines coverage – terms such as 'all sums' – an insured has reasonable expectations that the insurance includes any damage award. However, in most circumstances there is nothing to preclude insurance arrangements with restrictions or limitations on the coverage so long as the insurer takes steps to ensure that the policyholder is fully informed."

Widiss, *Uninsured and Underinsured Motorist Insurance* § 12.6

8.
Exhaustion, Off-Sets, and Liens

§ 8-1. General

In *State Farm Mutual Automobile Insurance Company v. Scott*, 707 So.2d 238 (Ala.Civ.App. 1997), cert. denied November 14, 1997, the trial court entered a judgment on a jury verdict for $50,000 in an action seeking UIM benefits. The judgment was affirmed even though the defendant asserted that the plaintiff accepted a settlement from the negligent party of less than that party's insurance coverage limits and was therefore precluded from UIM benefits. The policy provision at issue stated that coverage was not allowed for UIM until the liability limits had been used up by payments of judgments or settlements. However, the

Court concluded that the policy provision predicating UIM coverage upon receipt of payments and exhaustion from other liability carriers pursuant to a settlement or judgment contravened *Alabama Code 1975*, § 32-7-23 and was therefore void since it was more restrictive that the statute's reference to "available" limits of liability.

The policy at issue in *Scott* stated:

> **"THERE IS NO COVERAGE UNTIL THE LIMITS OF LIABILITY OF ALL BODILY INJURY LIABILITY BONDS AND POLICIES THAT APPLY HAVE BEEN USED UP BY PAYMENTS OF JUDGMENTS OR SETTLEMENTS."**

It remains important to remember that the Court of Civil Appeals construed the State Farm policy strictly in its decision and found the policy's requirement of "exhaustion" to be in derogation of the statute's requirement that the liability limits "available" to the injured party merely be less than the damages the party is legally entitled to without any reference to language of exhaustion or depletion.

Two additional cases are also important in this regard: In *Adkinson v. State Farm*, 856 F.Supp. 637 (M.D. Ala. 1994), the Federal District Court examined the issue of whether a claimant who settled with the tortfeasor for less than the liability policy limits could pursue an underinsured claim. The court held, under

Alabama law, that a claimant does not have to settle for policy limits, but that if he or she does, then the eligible recovery from the underinsured carrier will be the amount by which the claimant's damages exceed the liability limits of the tortfeasor. The tortfeasor in *Adkinson* had $100,000.00 in liability coverage; the claimant settled as to the tortfeasor for $75,000.00. Under *Adkinson*, the plaintiff is regarded to have settled for the liability limit of $100,000.00, and any verdict obtained against the underinsured carrier would have to exceed $100,000.00 even though the claimant received only $75,000.00.

And, in *Isler v. Federated Guar. Mut. Ins. Co.*, 594 So.2d 37 (Ala. 1991), the Alabama Supreme Court held that the plaintiff could collect from his underinsured motorist carrier even though he had not obtained the full amount of the liability limits of the tortfeasor's policy and that the underinsured carrier thereafter was bound to do only what it had contracted to do: provide benefits when the damages sustained by its insured exceeded the liability limits available from the tortfeasor.

See also, *State Farm Mut. Auto. Ins. Co. v. Motley*, 909 So.2d 806 (Ala. 2005): limits of commercial general liability (CGL) insurance policy issued to contractor that had loaded cargo onto logging truck did not entitle underinsured motorist

(UIM) carrier to setoff under statute and policy defining "uninsured motor vehicle" to include a vehicle with respect to which the sum of limits of liability under all bonds and policies that apply was less than the damages the insured was legally entitled to recover; the contractor did not own the truck and was not vicariously liable for its use, it allegedly was liable for loading the trailer with logs extending beyond the rear without lights or reflectors, and the CGL policy did not pertain to the vehicle or apply to its ownership, maintenance, or use.

Further, the term "bodily injury liability bonds and insurance policies," in statutory definition of "uninsured motor vehicle" as including motor vehicles with respect to which the sum of all bodily injury liability bonds and insurance policies available to an injured person I less than damages, refers only to such bonds and insurance policies as pertain to the uninsured/underinsured motor vehicle or vehicles. *State Farm v. Motley*, *supra*.

In *Burt v. Shield Ins. Co.*, 902 So.2d 692 (Ala.Civ.App. 2004), the appellate court held that an automobile dealership's car was not an "uninsured motor vehicle" during a test drive by a customer who had no liability insurance and had limited protection under step-down provision of dealership's policy; statute defines "uninsured motor vehicle" based on the difference between damages and the sum

of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person after an accident, the limits of the dealership's liability coverage were available to the accident victim, and he failed to or was unable to exhaust those limits when settling with dealership for negligent entrustment of car to customer.

And in *Knowles v. State Farm Mut. Auto. Ins. Co.*, 781 So.2d 211 (Ala. 2000), the court held that the insured's acceptance of a $32,500.00 pro tanto settlement of a claim under a $1 million commercial general liability (CGL) insurance policy precluded recovery of underinsured motorist (UIM) benefits for injuries caused by fall from a truck trailer; a statute defined an "underinsured motor vehicle" in terms of the sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person, and the policy provided no coverage until the limits of liability coverage were used up. See also, *Omni Ins. Co. v. Foreman*, 802 So.2d 195 (Ala. 2001): insured's acceptance of a settlement from the tortfeasor in an amount less than the limits of liability coverage did not prevent recovery of UIM benefits – her failure to exhaust the liability coverage did not forfeit the right to UIM benefits in excess of the liability limits.

Also see, *Guess v. Allstate Ins. Co.*, 717 So.2d 389 (Ala.Civ.App. 1998):

reduction clause stating that underinsured motorist (UIM) benefits will be reduced by liability insurance payments required offset – even though statute governing uninsured motorist (UM) and UIM benefits does not provide for setoff, it does not preclude it. Reduction clause stating that underinsured motorist (UIM) benefits will be reduced by liability insurance payments is consistent with public policy and statute governing uninsured motorist (UM) and UIM benefits and is valid; *Garnett v. Allstate Ins. Co.*, 567 So.2d 1265 (Ala. 1990): under Georgia law insured was entitled to uninsured motorist benefits equal to difference between stacked amounts from his insurer and rental car insurer and amount of tortfeasor's liability insurance, and therefore was not entitled to any uninsured motorist benefits from his insurer, where he had received from rental car insurer uninsured motorist benefits exceeding amount to which he was entitled; and *Illinois Nat. Ins. Co. v. Kelley*, 764 So.2d 1283 (Ala.Civ.App. 2000): insured's settlement of tort claim for less than the liability coverage limits entitled the underinsured motorist (UlM) carrier to set off the policy limits, rather than the amount of the settlement.

§ 8-2. Other Considerations

Underinsured motorist insurance coverages typically state that the limit of liability for the underinsured motorist insurance set forth on the Schedule (or

Declarations) page for the insurance policy providing the coverage "shall be reduced by all sums paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible." The effect of such Limit of Liability provisions has been one of the most litigated questions in regard to underinsured motorist insurance during the past decade. There are several different approaches that could be used for a reduction of an insurer's liability by amounts which are either (a) actually paid to an injured person, or (b) theoretically recoverable from the tortfeasor:

1. A reduction from the coverage limit of the UIM insurance by the amount of indemnification provided by tortfeasor's liability insurance that is actually received by the claimant.

2. A reduction from the damages the insured is legally entitled to recover by the amount of indemnification actually received.

3. A reduction from the coverage limit of the UIM insurance by the amount of the coverage limit of the tortfeasor's liability policy without regard to amount actually received.

4. Allowing the insured to recover up to the UIM coverage limits to the extent that the damages exceed the limits of the tortfeasor's liability insurance.

5. Allowing the insured to recover up to the UM coverage limits to the extent the damages are not actually indemnified by payments by or on behalf of the tortfeasor.

In assessing the setoff in the coverage terms for any amounts paid by or on behalf of a tortfeasor, as noted above consider the following questions in respect to particular jurisdictional statutes:

Has the state enacted legislation prescribing requirements for underinsured motorist insurance?

If the state has such legislation, does that statute – either in the definition of an underinsured motorist or in an explicit legislative provision on setoffs – provide guidance about the legislative objective in relation to such a setoff provision?

If the statute provides guidance, does the definition specify that the amount of coverage to be determined by:

(a) a reduction from the damages sustained by the insured in the amount of the indemnification received from the tortfeasor (or the tortfeasor's insurer)?

(b) a reduction from the limit of liability for the claimant's underinsured motorist insurance of the actual amount of liability insurance paid to the claimant by the

tortfeasor's insurer?

(c) a reduction from the limit of liability for the claimant's underinsured motorist insurance of the actual amount of liability insurance and any other payments made by the tortfeasor (or by other persons) to the claimant?

(d) a reduction from the limit of liability for the claimant's underinsured motorist insurance in the amount of the tortfeasor's liability insurance regardless of whether any portion of that liability insurance was actually available for payment or paid to the claimant?

(e) treating the claimant's underinsured motorist insurance as excess insurance which allows the insured to recover when the damages exceed the limits of the tortfeasor's insurance?[29]

§ 8-3. Med Pay

Alabama courts have addressed the situation where med pay payments are sought to be deducted from uninsured motorist benefits. These cases hold that med pay benefits cannot be deducted from uninsured motorist benefits if the policy does not contain a provision allowing deduction. *Employers National Insurance Co. v. Parker*, 236 So.2d 699 (Ala. 1970); *Russell v. Griffin*, 423 So.2d 901

[29] Widiss, *Uninsured and Underinsured Motorist Insurance* § 41.7

(Ala.Civ.App. 1982); and *Griffin v. Battles*, 656 So.2d 1221 (Ala.Civ.App. 1995). **The rationale is that the insured has paid separate premiums for both coverages, so absent a specific offset clause in the contract, the insured is entitled to full benefits under both coverages.** The Alabama Civil Court of Appeals suggests in dicta that if the policy does contain an offset provision, then med pay benefits may be offset from uninsured motorist benefits.

See further, *Safeway Ins. Co. of Alabama v. State Farm Mut. Auto. Ins. Co.*, 2007 WL 2405075 (Ala. Civ. App. 2007): a liability insurer making payment under medical payment coverage of a liability insurance policy may be subrogated to recovery by the insured from the tortfeasor's insurer if the contract so provides. An insurer who pays medical expenses of its injured insured also may assert a subrogation claim directly against the liability insurer of the tortfeasor if the liability insurer has notice of the subrogation claim and fails to satisfy the subrogation claim when settling with the insured.

§ 8-4. Hospital Liens

Alabama Code 1975, § 35-11-370, creates the right of a hospital lien and provides in part, "Any person, firm, hospital authority or corporation operating a hospital in this state **shall have a lien** for all **reasonable charges** for hospital care,

treatment and maintenance of an injured person who **entered such hospital within one week after receiving such injuries**, upon **any and all actions**, claims, counterclaims and demands accruing to the person to whom such care, treatment or maintenance was furnished . . . and upon **all judgments, settlements and settlement agreements** . . . on account of injuries giving rise to such actions, claims, counterclaims, demands, judgments, settlements or settlement agreements and which necessitated such hospital care, subject, however, to any attorney's lien."

Section 35-11-370 was intended to give a hospital an automatic lien for the reasonable value of its services **to induce it to receive a patient injured in an accident without first considering whether the patient will be able to pay the medical bills incurred**. *Ex parte University of South Alabama*, 761 So.2d 240, 244 (Ala. 1999) (citations omitted), states, "[T]he purpose of a hospital-lien statute is to lessen the burden imposed on a hospital by non-paying accident victims. The statute creates an incentive for a hospital to accept a patient who needs medical services but who may be either uninsured or unable to pay for such services." In accord with the stated public policy of the statute, it has been generally held and recognized that it should not be "technically applied" so as to defeat "just" hospital claims, and that such statutes "are to be liberally construed in this respect." See,

generally, *Guin v. Carraway Methodist Medical Center*, 583 So.2d 1317, 1319 (Ala. 1991).

Alabama Code 1975, § 35-11-371(a), governs perfection of the lien: "In order to perfect such lien the operator of such hospital, **before or within 10 days** after such person shall have been discharged therefrom shall file in the office of the judge of the county or counties in which such cause of action arose a verified statement setting forth the name and address of such patient . . . the amount claimed due to be due . . . to the best of claimant's knowledge, the names and addresses of all persons, firms or corporations claimed by such injured person, or the legal representative of such person, to be liable for damages arising from such injuries. . . . The **filing of such claim or lien shall be notice** thereof to all persons, firms or corporations liable for such damages whether or not they are named in such claim or lien."

Despite the mandatory language of § 35-11-371(a), however, filing the lien after 10 days following the patient's discharge does not affect its validity and is relevant only if there were other creditors claiming same or similar proceeds (the date a hospital perfects its lien would determine who had priority in claiming proceeds from settlement or judgment). Otherwise, "[I]t has generally been held

or recognized that such requirements should not be technically applied so as to defeat just hospital claims, and that such statutes are to be liberally construed in this respect." *Guin v. Carraway Methodist Medical Center*, 583 So.2d at 1319. This result is entirely consistent with the favor bestowed by the courts upon hospital liens, and technical failures or mistakes by the lienholder are largely overlooked.

Alabama Code 1975, § 35-11-372, addresses release and impairment of the lien: "During the period of time allowed by section 35-11-371 for perfecting the lien provided for by this division and also after the lien provided for by this division has been perfected . . . no release or satisfaction of any action, claim, counterclaim, demand, judgment, settlement or settlement agreement, or of any of them, shall be valid or effectual as against such lien unless such lienholder shall join therein or execute a release of such lien." Further, "[a]ny acceptance of a release or satisfaction of any such action, claim, counterclaim, demand or judgment and any settlement of any of the foregoing in the absence of a release or satisfaction of the lien referred to in this division shall prima facie constitute an impairment of such lien, and the lienholder shall be entitled to a civil action for damages on account of such impairment, and in such action may recover from the one accepting such release or satisfaction or making such settlement the reasonable cost of such

hospital care, treatment and maintenance."

§ 8-5. Medicare

The federal government has a statutory lien for medical benefits paid under the Medicare Act. 42 U.S.C. §1395y(b)(2)(B)(ii). The lien, sometimes called a "super lien," gives the government a right of recovery superior to that of all other persons and entities. *United States, Health Care Finance Administration, Medicare Intermediary Manual* §3418.6; *United States v. Geier*, 816 F. Supp. 1332, 1334 (W.D. Wis. 1993). The government has a direct-action right of recovery against benefit recipients, their attorneys, and third-party payers. This could include a settling defendant and, perhaps, a settling defendant's attorney if funds are disbursed from the attorney's trust account. If one is aware or "should be aware" of the lien, then it is perfected -- even when no notice of the lien is given. 42 C.F.R. §411.24(l)(2).

Settlement papers cannot avoid a Medicare lien by stating that money is being paid for such things as pain and suffering or loss of consortium -- as opposed to medical expenses. *United States, Health Care Finance Administration, Medicare Intermediary Manual* §3418.6. Medicare only recognizes allocation of a portion of a recovery to non-medical losses when the court or jury designates the amount of

the recovery as such. Id. Although a Medicare lien is superior to attorney fee claims, Medicare will reduce its recovery to allow for the cost of procuring a judgment or settlement. 42 C.F.R. §411.37.

§ 8-6. Medicaid

Unlike Medicaid, Medicare's right to reimbursement is not a subrogation right. It is a statutorily granted independent right of recovery against any person or entity that is responsible for paying or that has received payment for Medicare related services. See, 42 U.S.c. §1395 y(b)(2) and 42 C.F.R. §41 1.20 et. seq. Medicare's statutory reimbursement scheme does not contain an anti-lien provision similar to Medicaid nor limit recovery only from that portion of a settlement that is allocated to health care services. For these reasons, the reimbursement rights of Medicare is referred to as a "super lien" which is not subject to general equitable principles of subrogation. Medicare does allow a reduction of the amount of its reimbursement by a portion of the attorney's fees and expenses incurred by the claimant in obtaining the recovery. The amount is determined by a formula applied by the Medicare agency.

§ 8-7. Review and Best Practices

- **ALWAYS reach an agreement with claimant counsel regarding liens.**

- **Often the claimant's attorney wants the opportunity to negotiate with the lienholders in an effort to reduce the amount of the lien. A compromise on this issue is to draft a letter to the plaintiff's attorney advising that the settlement drafts are not be negotiated until all medical liens have been satisfied, and to have the plaintiff's attorney send written confirmation from each lienholder that the medical liens have been satisfied. It is not an "airtight" safeguard, but does offer some flexibility.**

- **Is the offset a reduction from the coverage limit of the UIM insurance by the amount of indemnification provided by tortfeasor's liability insurance that is actually received by the claimant?**

- **Is the offset a reduction from the damages the insured is legally entitled to recover by the amount of indemnification actually received?**

- **Is the offset a reduction from the coverage limit of the UIM insurance by the amount of the coverage limit of the tortfeasor's liability policy without regard to amount actually received?**

9.
Jurisdictional Synopsis

Alabama
Requires that both Uninsured Motorist and Underinsured Motorist (UM/UIM) be offered but can drivers can reject it in writing.

Alaska
Uninsured and underinsured motorists coverage may be rejected by the insured in writing; if the insured has rejected the coverage, the coverage shall not be included in any supplemental, renewal, or replacement policy unless the insured subsequently requests the coverage in writing.

Arizona
The AZ DOI notes that every insurer writing automobile liability or motor vehicle liability policies in Arizona must make available and offer, by written notice, Uninsured Motorist, and Underinsured Motorist coverage. A policyholder can reject it however state law requires that all motor vehicle liability policies provide Underinsured Motorist protection unless it is deleted or reduced by agreement between the insured and the company.

Arkansas

Here 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 or she may reject in writing, to purchase Underinsured Motorist coverage.

California

California requires that insurance companies must offer UM/UIM coverages with every auto insurance policy however policyholders can reject it and thus not place it on their policy. In CA, these coverages provide liability insurance when the party at fault does not have the state required minimum liability coverage, or the minimum liability coverage is insufficient to cover the injuries sustained in the accident. Likewise, Uninsured Motorist Property Damage covers possible reimbursement for damages your car sustains (BI and PD).

Colorado

Colorado law concerning insurance coverage for un-insured and under-insured motorists allows consumers to decide whether to purchase optional coverage. However, insurance providers must offer this option with any new or renewal car or motorcycle policy.

Effective January 1, 2008, Colorado has in place a new law will changes Colorado's UM coverage in two important ways:

Before the January 1, 2008 law change an insurance company could "offset" the amount paid by the at-fault driver's insurance company against the amount available under your own UM policy;
Before January 1, 2008, insurance companies were able to include "anti-stacking" language in their UM coverage's that prevented those who pay for multiple policies on multiple cars in the same household from adding the UM coverage's on each separate policy together in order to maximize coverage.

Colorado's new law makes the UM coverage you purchase "stack" on top of the total amount of insurance available from the "at-fault" driver. For example, since January 1, 2008, if you buy $50,000 of UM coverage to protect your family, the entire $50,000 will be available to you on top of the insurance available from the at-fault driver if you need it.

The law is directed at Underinsured Motorist coverage as well. This new Colorado law only applies to renewals of Underinsured Motorist coverage policies or new Underinsured Motorist policies issued after January 1, 2008. You have to find out when your policy renews. If your policy renews in July 2008, and you are in a collision in April 2008, the old law will govern. If you are not certain when your policy renews and would like to have this new law apply to your coverage, contact your agent, and see whether you can add this coverage before the renewal.

Connecticut

Connecticut General Statute's 38a-334 et seq. mandates that insurance policies provide Uninsured/Underinsured Motorist coverage protection for the innocent victims of "financially irresponsible" motorists.

In this state Uninsured Motorist coverage protects injured drivers in a situation where the at-fault driver

had no insurance, leaves the scene of the accident, and is never found. Underinsured Motorist coverage provides compensation for injured drivers when the at-fault driver does not have enough insurance coverage to compensate the injured party in full for his or her injuries.

Uninsured/Underinsured Motorist Bodily Injury coverage is required in this state with mandatory minimum limits of $20,000/$40,000. In addition, if you want to carry this coverage on multiple vehicles, the limits must be the same for each vehicle.

Delaware

The DE DOI states Uninsured/Underinsured Motorist coverage is not mandatory, but it is required that the coverage be offered to all policyholders. This coverage is designed to pay damages for injuries that could be received in accidents caused by drivers of uninsured and underinsured vehicles. This includes $10,000 Property Damage Coverage, which applies only to accidents with uninsured vehicles and is subject to a $250 deductible.

In Delaware Uninsured/Underinsured vehicle coverage is optional and available in limits up to the Bodily Injury Liability Limits or $100,000/300,000 whichever is less.

District of Columbia

DC requires UM bodily injury $25,000 per person / $50,000 per accident and UMPD of $5000 subject to a $200 deductible. This part of the US also offers Underinsured Motorist but does not require it to be part of the policy.

Florida

This state offers both uninsured and Underinsured Motorist coverages but they are not required by law. Companies must offer the stacked option, but may or may not offer an un-stacked option.

Georgia

GA offers Underinsured Motorist coverages. If you choose to have uninsured / Underinsured Motorist Bodily Injury on your Georgia policy and you want it to apply to multiple cars, you must select the same limit for each car. In addition, the limits you choose must be less than, or equal to, your bodily injury limits.

Hawaii

HI law (431:10c-301) states what is required in a motor vehicle policy. Here it states that an insurer may offer the Underinsured Motorist coverage in the same manner as Uninsured Motorist coverage; if they offer of both shall:

Be conspicuously displayed to be readily noticeable by the insured;

Set forth the premium for the coverage adjacent to the offer in a manner that the premium is clearly identifiable with the offer and may be easily subtracted from the total premium to determine the premium payment due in the event the insured elects not to purchase the option; and

Provide for written rejection of the coverage by requiring the insured to affix the insured's signature in a location adjacent to or directly below the offer.

The HI law gives information on the ability to stack UM/UIM coverages and notes that these coverages are not to have limits greater than the bodily injury liability coverage limits on the policy. The offers for UM/UIM are to be made when the motor vehicle insurance policy is first applied for or issued. Once an insured has been provided the opportunity to purchase or reject the coverages in writing no further offer be required to be included with renewal or replacement policy issued to the insured.

Idaho

Uninsured and Underinsured Motorist coverages are offered in ID. In February 2008, Idaho House passed legislation (HB 429) that requires auto insurance policies provide Underinsured Motorist coverage unless the policyholder signs a form specifically rejecting the coverage. HB 429 would mandate insurers provide underinsured motorists coverage matching the state's minimum limits for all policyholders who purchase auto liability coverage, unless the policyholder rejects or modifies the coverage. The policyholder would still have the ability to reject - or increase - either or both coverages. The consumer would have the opportunity to reject these coverages prior to the initial policy being issued or at the time of the first renewal or replacement of a policy for an existing policyholder. A standard statement explaining UM and UIM coverage, and forms for rejecting either or both would be developed by the Department of Insurance under the bill.

Illinois

In Illinois, you must have Uninsured/Underinsured Motorist Bodily Injury on your auto insurance policy and if you want it to apply to multiple cars, you must select the same limit for each car. In addition, the limits you choose must be less than, or equal to, your bodily injury limits. The minimum UM/UIM required in Illinois is $20,000/$40,000.

Indiana

You are offered both UM/UIM in Indiana. If you choose to have Uninsured/Underinsured Motorist Bodily Injury on your policy and you want it to apply to multiple cars, you must select the same limit for each car. In addition, the limits you choose must be less than, or equal to, your bodily injury limits.

Iowa

Iowa law (Code section 516A.1) requires that uninsured and Underinsured Motorist coverage of $20,000 be carried on all automobile insurance policies. However, the policyholder may reject such coverage on a written rejection form signed by the named insured.

Kansas

Kansas law requires that Uninsured Motorist and Underinsured Motorist be placed on your policy. Under K.S.A. 40-284(b), Uninsured Motorist coverage must include an Underinsured Motorist provision with coverage limits equal to the uninsured provision. Under K.S.A. 40-284(a), the policy limits of an Uninsured Motorist provision must be equal to the liability coverage in the insurance policy. Kansas law thus requires that Underinsured Motorist coverage in an automobile policy must have coverage limits equal to the liability coverage of the policy. However, K.S.A. 40-284(c) provides that the insured have the right to reject uninsured and Underinsured Motorist coverage in excess of the minimum required by law ($25,000 per person/$50,000 per accident). In order to properly reject Underinsured Motorist coverage in excess of the minimum required by law, the insured must provide a written rejection to its insurer.

In Kansas UM/UIM pays you or your passengers for medical, rehabilitation, and funeral costs. It also pays settlements of lawsuits resulting from an accident caused by an uninsured, underinsured, or hit-and-run

motorist. You and your family are covered as pedestrians or when riding your bike.

Kentucky
Uninsured and Underinsured Motorist are both offered in Kentucky. The limits for this coverage cannot exceed the limits on your bodily injury coverage. In addition, if you want to carry this coverage on multiple vehicles, the limits must be the same for each vehicle.

Louisiana
Uninsured/Underinsured Motorist Bodily Injury Coverages are both offered in Louisiana. As in many other states, the limits for these coverages cannot exceed the limits you select for your bodily injury coverage. In addition, if you want to carry these coverages on multiple vehicles, the limits must be the same for each vehicle.

Uninsured/Underinsured Motorist Property Damage coverages are also offered. If you choose to carry this coverage, you must also purchase Uninsured/Underinsured Motorist Bodily Injury coverage. This coverage cannot be carried on policies that have collision coverage. In addition, if you want to carry this coverage on multiple vehicles, the limits must be the same for each vehicle.

Maine
Maine's Underinsured Motorist statute requires coverage in every motor vehicle liability policy to protect persons insured pursuant to the policy from personal injury caused by an uninsured, underinsured, or hit-and-run motor vehicle operator. To help protect against damages caused to you and your passengers by an uninsured driver, Maine state law requires a minimum Uninsured/Underinsured Motorist coverage of $50,000 per person up to a total of $100,000 per accident for any bodily injury caused by the uninsured and/or underinsured driver.

Maryland
Uninsured Motorist Property Damage coverage is mandatory in the state of Maryland. Your limits for this coverage cannot exceed your property damage limits. UM/UIM of 20/40 is due plus 15 UMPD/UIMPD.

In Maryland, Uninsured Motorist (UM) coverage applies to situations where (1) the at-fault driver has no liability insurance (“uninsured”), and (2) where the at-fault driver has insufficient liability insurance limits (“underinsured”). The at-fault driver is considered underinsured if the at-fault driver’s insurance limits for bodily injury are lower than the limits of the UM coverage.

UM coverage must be offered by an insurer who offers automobile liability insurance policies in Maryland. Section 19-509 of the Insurance Article defines an uninsured motor vehicle, states the amount of coverage that is required to be offered to the policyholder, and states the limit of liability of an UM insurer.

By statute, you are entitled to purchase UM bodily injury coverage in the same amounts as the liability bodily injury coverage you have on your policy or you may choose to waive any amount of coverage in excess of the statutory minimums.

In Maryland, UM coverage also includes Underinsured Motorist coverage, which is known as UIM coverage. It provides you with bodily injury protection and property damage protection in the event you are involved in an accident where the at-fault driver has an insurance policy with liability limits that are less than your

UM limits and your injuries or property damage exceed the at-fault driver's available limits. You can then claim the difference under your own insurance policy.

Massachusetts

Uninsured Motorist is required in Massachusetts. The MA Department of Insurance terms this coverage to be Bodily Injury Caused by an Uninsured Auto. It has a mandatory limit of $20,000 per person and $40,000 per accident. Underinsured Motorist is an optional coverage in MA. The DOI calls it BI caused by an underinsured auto. This optional coverage pays if you are injured by a motorist with liability limits less than the amount of the damages you are entitled to recover. The other motorist's policy pays its limits first and then yours pays any remaining losses up to the amount purchased. This coverage will not pay for damage to property.

Michigan

Michigan offers both uninsured and Underinsured Motorist Bodily Injury as optional coverages that compensate you for excess wage loss and pain and suffering. UM coverage only applies if a hit-and-run vehicle or Uninsured Motorist strikes you. If you select UM coverage, the same coverage limits must be selected for all vehicles on the policy.

Underinsured Motorist coverage is an optional coverage that provides benefits for losses that a covered person be legally entitled to recover because of a bodily injury sustained by the covered person caused by an accident in excess of the amount available from the other person's insurance.

The Office of Financial and Insurance Services (OFIS) has took action in 2006 to protect consumers by ensuring that insurance policyholders have at least three years to file Underinsured Motorist benefit claims or lawsuits under new policy forms put into use in Michigan.

OFIS issued a prohibition order that specifically prohibits Michigan insurance companies, in new policy forms, from putting one-year limitations on claims or legal actions for Underinsured Motorist coverage.

Minnesota

Uninsured/Underinsured Motorist Bodily Injury coverage is required in this state with mandatory minimum limits of $25,000/$50,000. In addition, if you want to carry this coverage on multiple vehicles, the limits must be the same for each vehicle.

Mississippi

Uninsured and Underinsured Motorist coverages are offered and if the policyholder does not want the Uninsured Motorist Bodily Injury coverage then they must reject it in writing. If you choose to have Uninsured/Underinsured Motorist Bodily Injury on your policy and you want it to apply to multiple cars, you must select the same limit for each car. In addition, the limits you choose must be less than, or equal to, your bodily injury limits.

Missouri

Uninsured Motorist Bodily Injury coverage is mandatory in the state of Missouri. In addition, the limits you choose must be less than, or equal to, your bodily injury limits. The minimum limit you can purchase is $25,000/$50,000. Underinsured Motorist is optional. Protection covers the policyholder and family members if injured by a motorist who carries liability limits less than his/her proportionate share of the total

liability. Also provides coverage if the other driver's insurance be with a financially irresponsible insurer according to the MO insurance regulator.

UIM covers your bodily injuries and those of your passengers if you are hit by a car whose driver is at fault and does not have enough insurance to cover the expenses of the injuries, or if you are injured by a hit and run driver, and your Uninsured Motorist limits are exhausted. Underinsured Motorist coverage applies to bodily injury only.

Montana

Montana offers UM and UIM but neither coverage is required. Montana law requires that Uninsured Motorist coverage be offered, but it can be disclaimed (waived) by the person purchasing the insurance. Underinsured Motorist in MT insures you against injury by someone who has automobile insurance, but does not have enough to fully compensate you for your injuries and damages.

Nebraska

Nebraska offers Underinsured and Uninsured coverages however neither is required by state law. Each is supplemental or optional types of auto insurance in NE.

Nevada

In Nevada you are not required to carry medical payments or Uninsured/Underinsured Motorist coverage, but all insurance companies are required to offer you medical payments coverage of at least $1,000 and Uninsured/Underinsured Motorist coverage in an amount equal to your bodily injury coverage.

The Nevada Division of Insurance notes that Uninsured/Underinsured Motorist protects the named insured, the named insured's resident relatives and occupants in the insured vehicle, if they sustain bodily injury in an accident in which the owner or operator of another motor vehicle is legally liable and does not have insurance (uninsured) or does not have enough insurance (underinsured). This coverage must be offered pursuant to Nevada Revised Statute 687B.145(2), but does not have to be accepted by the insured.

If you choose to have Uninsured Motorist Bodily Injury on your Nevada policy and you want it to apply to multiple cars, you must select the same limit for each car. In addition, the limits you choose must be less than, or equal to, your bodily injury limits.

New Hampshire

In New Hampshire UM/UIM is offered but not required. The NH Insurance Department notes that when an insured elects to purchase liability insurance in an amount greater than the minimum coverage required by RSA 259:61, the insured's Uninsured Motorist coverage should automatically be equal to the liability coverage elected. (RSA 264:15).

Umbrella or excess policies that provide excess limits to policies described in RSA 259:61 shall also provide Uninsured Motorist coverage equal to the limits of liability purchased unless the named insured rejects such coverage in writing. RSA 264:15 I "Rejection of such coverage by a named insured shall constitute a rejection of coverage by all insureds, shall apply to all vehicles then or thereafter eligible to be covered under the policy, and shall remain in effect upon policy amendment or renewal, unless the insured requests such coverage in writing."

New Jersey

Uninsured/Underinsured Motorist coverage may be required depending upon the type of insurance policy you choose to have in New Jersey. There are two types of policies available in NJ, a standard policy or a basic policy. New Jersey insurance coverage can be confusing since a minimum amount of UM/UIM coverage is required if you choose to have a standard policy but not if you choose the basic policy, which has less coverages. With a standard policy, you can even purchase higher limits if you want more UM/UIM coverage.

In NJ UIM pays you for property damage or bodily injury if you are in an auto accident caused by a driver who is insured, but who has less coverage than your Underinsured Motorist coverage.

If you choose to have Uninsured/Underinsured Motorist Bodily Injury on your New Jersey policy and you want it to apply to multiple cars, you must select the same limit for each car. In addition, the limits you choose must be less than, or equal to, your bodily injury limits. If the limits are less than your bodily injury limits, you will need to sign a rejection form.

According to the NJ Department of Banking and Insurance (DOBI), a Standard Policy provides a number of different coverage options and the opportunity to buy additional protection. Most New Jersey drivers choose this policy. If you want a policy with a broad range of choices that I can adjust to meet my needs and offers the most protection but at a higher cost then the standard policy is for you.

New Mexico

In New Mexico a policyholder must be offered UM/UIM and if it is not wanted it then must be reject in writing. As the NM insurance commission notes the required coverages in New Mexico are Bodily Injury and Property Damage. The minimum required limits are $25,000 per person and $50,000 per accident for Bodily Injury and $10,000 per accident for Property Damage. It is also required that Uninsured Motorist Coverage is included in the policy but if you decide you do not want this coverage, you must reject it in writing.

New York

Uninsured/Underinsured Motorist Bodily Injury coverage is mandatory in this state. The limits for this coverage cannot exceed the limits you select for your bodily injury coverage. In addition, if you have multiple vehicles, the same limits are applied to all vehicles.

With UM in NYS all family members who reside in your household, and occupants of your car, are covered in the event you or they are injured as the result of negligent actions by an uninsured vehicle or hit-and-run motorist. This mandatory coverage applies only concerning bodily injury due to accidents occurring in New York State, and does not cover auto body damage to your car or damage to other property.

For New York accidents, the amount of uninsured motorists protection required to be provided is the same minimum bodily injury limits as required for liability insurance. For a small additional charge, this Uninsured Motorist coverage can be extended to provide coverage for out-of-state accidents by endorsement, so you should check with your agent, broker, or insurer if you want this extension of coverage.

For an additional premium, you can purchase higher coverage limits of Supplementary Uninsured/Underinsured Motorists (SUM) coverage of up to $250,000 per person per accident and $500,000 per accident, subject to the per person limit ($250,000/$500,000). Many insurers offer higher limits of SUM coverage. SUM coverage also provides coverage for accidents occurring out-of-state, which are not covered

under the basic required Uninsured Motorist coverage. However, the amount of SUM coverage may not exceed the bodily injury liability limits of your policy.

North Carolina
As of January 2009, Uninsured and Underinsured Motorist coverages are required in North Carolina.

North Dakota
In North Dakota UM/UIM coverages are mandated by ND laws to be part of an auto insurance policy. In ND, a motorist must have UM in the limits of $25,000 per person/ $50,000 per accident. Uninsured Motorist provides you coverage for a bodily injury claim you would have against another driver who does not have insurance. In ND, this coverage does not pay for physical damage to your vehicle, only your bodily injury.

Underinsured Motorist coverage must be equal to the Uninsured Motorist coverage. Underinsured Motorist provides you coverage for a bodily injury claim you would have against another driver whose liability coverage is less than your underinsured coverage.

To help protect against damages caused to you and your passengers by an uninsured driver, North Dakota state law requires a minimum Uninsured/Underinsured Motorist coverage of $25,000 per person up to a total of $50,000 per accident for any bodily injury caused by the uninsured and/or underinsured driver.

Ohio
Uninsured and Underinsured Motorist coverages are optional in Ohio. If you choose to have Uninsured/Underinsured Motorist Bodily Injury on your Ohio policy and you want it to apply to multiple cars, you must select the same limit for each car. In addition, the limits you choose must be less than, or equal to, your bodily injury limits. If UM/UIM is not wanted then it needs to be rejected in writing.

Oklahoma
Oklahoma auto insurers are required to offer UM/UIM to policyholders but it is not mandated and thus is optional coverage that a motorist can reject. In OK, UM coverage pays you, resident members of your family, and occupants of your car for personal injuries caused by an uninsured motorist, and Underinsured Motorist or a hit and run driver. As we mentioned while you are not required by law to carry this coverage, companies are required to offer it with every policy.

Oregon
Oregon state law requires a minimum Uninsured/Underinsured Motorist coverage of $25,000 per person up to a total of $50,000 per accident for any bodily injury caused by the uninsured and/or underinsured driver. UMBI coverage requires your insurance company to pay all expenses that would normally be paid by the other person's company if you are hurt by an uninsured motorist. Consider increasing this coverage on your policy, because an Uninsured Motorist probably cannot compensate you for your losses.

In 2005, Senate Bill 923 corrected a problem in the provisions of the Oregon Insurance Code governing Uninsured Motorist coverage in motor vehicle liability insurance policies. Uninsured Motorist coverage, including Underinsured Motorist coverage, allows an insured injured claimant to collect from his or her policy when the person who is at fault either has no coverage or has insufficient coverage to fully compensate the injured claimant. The amount paid under Uninsured Motorist coverage is supposed to be equal to the difference between the amount paid by the at-fault person's coverage and the lesser of the

amount of the claim or the payment limit of the Uninsured Motorist coverage. The problem under current law is that underinsured coverage works only when the injured claimant's coverage is greater than the amount of coverage provided by the at-fault person. This limitation sometimes causes a problem when there are multiple claimants against the at-fault person's coverage.

SB 923 required an insured's Uninsured Motorist coverage benefits and underinsurance coverage benefits to provide coverage for bodily injury or death when the limits for the insured's Uninsured Motorist coverage equal the limits of the liability policy of the person at fault and the amount of liability insurance recovered is less than the limits of the insured's Uninsured Motorist coverage.

Pennsylvania

Uninsured Motorist and Underinsured Motorist coverages are both optional in Pennsylvania. In 1990, PA laws changed so that Uninsured Motorist coverage and Underinsured Motorist coverage is no longer mandatory. Even with UM/UIM coverages being optional there must be a mandatory offer of such coverages. Stacking of UM or UIM coverage is allowed in PA. This coverage allows you to multiply the amount of uninsured or Underinsured Motorist coverage by the number of vehicles on your policy. It costs extra to stack uninsured or Underinsured Motorist coverage.

Rhode Island

According to the Rhode Island Insurance Division most automobile liability policies contain three major parts: liability for bodily injury (commonly called BI), liability for property damage (PD) and uninsured/underinsured motorists coverage (usually referred to as UM/UIM). Uninsured Motorist coverage protects you. It pays if you are injured by a hit-and-run driver or a driver who does not have auto insurance. This coverage, in effect, takes the place of what the other driver should have purchased but did not. Coverage is also provided for underinsured drivers, those who have insurance, but not enough to cover your claim. This coverage, too, has policy limits. It covers bodily injury and property damage (property damage is subject to a deductible of $200).

In Rhode Island, you may decline to purchase Uninsured/Underinsured Motorist coverage if you choose to buy only minimum limits of bodily injury and property damage liability as required by law. Bodily Injury, Property Damage Liability, and Uninsured/Underinsured Motorist coverage are the basic coverages contained in liability policies and are mandatory under the laws of Rhode Island (with the exception as mentioned for UM).

South Carolina

South Carolina requires Uninsured Motorist Bodily Injury and property damage. As of January 2007, the minimum automobile liability insurance limits that insurers are required to offer were increased to $25,000 if caused by bodily injury to one person in any one accident and, subject to the limit for one person; $50,000 because of bodily injury to two or more persons in any one accident; and $25,000 because of injury to or destruction of property of others in any one accident. UMPD comes with a $200 deductible.

The limits for this coverage cannot exceed the limits on your bodily injury coverage. In addition, if you want to carry this coverage on multiple vehicles, the limits must be the same for each vehicle.

Underinsured Motorist coverage is not required. In SC, a form that offers additional uninsured or optional Underinsured Motorist coverage, must be used by insurers for all newly issued automobile insurance

policies. The form must show that the insurance company gave a meaningful offer of these optional coverages.

South Dakota

In South Dakota Uninsured Motorist and Underinsured coverage is mandatory. According to the SD division of insurance, Uninsured Motorist coverage is required for all policies. It pays you, resident members of your family, and occupants of your auto for personal injuries caused by an Uninsured Motorist or a hit and run driver. No coverage for damage to your vehicle is provided.

As the SD DOI explains Underinsured Motorist coverage is very similar to Uninsured, except that the coverage is for personal injuries caused by a motorist with inadequate insurance. If a motorist has 25/50 coverage, and you have 100/300 of underinsured motorist, your insurance will cover you once the medical costs exceed $25,000 (for one person) up to a maximum of $100,000 minus $25,000 of the other person's liability, $75,000 of your Uninsured Motorist coverage.

These coverages are not "stackable," in that if the medical bills exceed $100,000 in the above example, you cannot add the liable party's $25,000 of liability coverage and your $100,000 of underinsured coverage.

SD Codified Law section 58-11-9.4 states that Underinsured Motorist coverage to be available with liability policies. No motor vehicle liability policy of insurance may be issued or delivered in this state with respect to any motor vehicle registered or principally garaged in this state, except for snowmobiles, unless Underinsured Motorist coverage is provided therein at a face amount equal to the bodily injury limits of the policy. However, the coverage required by this section may not exceed the limits of one hundred thousand dollars because of bodily injury to or death of one person in any one accident and, subject to the limit for one person, three hundred thousand dollars because of bodily injury to or death of two or more persons in any one accident, unless additional coverage is requested by the insured.

Tennessee

Uninsured and Underinsured Motorist are both optional in Tennessee. If you choose to have Uninsured/Underinsured Motorist Bodily Injury on your policy and you want it to apply to multiple cars, you must select the same limit for each car. In addition, the limits you choose must be less than, or equal to, your bodily injury limits.

TN law requires you to purchase UMBI with limits equal to your bodily injury liability coverage limit unless you reject in writing this coverage. The lowest UMBI coverage limit allowed by Tennessee law is $25,000 per person/$50,000 per accident. Uninsured Motorist Property Damage coverage is also available with coverage of $10,000 per accident with a $200 deductible.

Texas

Uninsured Motorist and Underinsured Motorist coverages are not required but rejection of coverages is required in writing. UM/UIM covers your expenses from an accident caused by an Uninsured Motorist or a motorist who did not have enough insurance to cover your bills, up to your policy’s dollar limits. Also pays for accidents caused by a hit-and-run driver if you reported the accident promptly to police.

Bodily injury UM/UIM pays without deductibles for medical bills, lost wages, pain and suffering, disfigurement, and permanent or partial disability.

Property damage UM/UIM pays for auto repairs, a rental car, and damage to items in your car. There is an automatic $250 deductible. This means you must pay the first $250 of the repairs yourself.

If you choose to have Uninsured/Underinsured Motorist Bodily Injury on your Texas policy and you want it to apply to multiple cars, you must select the same limit for each car. In addition, the limits you choose must be less than, or equal to, your bodily injury limits.

Utah

Utah insurance companies must explain and offer Uninsured Motorist and Underinsured Motorist coverages but the policyholder can waive in writing these optional coverage. Therefore, Utah law requires you to purchase Uninsured Motorist Bodily Injury Coverage with limits equal to the lesser of the limits of your Bodily Injury Liability Coverage unless you tell your insurer in writing that you want lower limits or you want to reject the coverage entirely.

Vermont

Vermont insurance laws require that you purchase uninsured and Underinsured Motorist Bodily Injury coverages of at least 50/100 and 10 for UM property damage. This is a total coverage of 50/100/10 that stands for: $50,000 for bodily injury or death per person UM/UIM, $100,000 for bodily injury or death per person UM/UIM and $10,000 for property damage per accident (subject to a $150 deductible) UMPD.

Virginia

If you decide to satisfy the requirements of the Virginia financial responsibility law by buying auto insurance, your policy must contain three major parts – (A) liability insurance for bodily injury, (B) liability insurance for property damage, and (C) Uninsured/Underinsured Motorist coverage.

Uninsured/Underinsured Motorist coverage is mandatory in the state of Virginia. This coverage pays for medical expenses, lost wages, and other general damages when policyholders, authorized drivers, or passengers are injured in an accident caused by a driver who has no insurance or insufficient coverage. Uninsured/Underinsured Motorist coverage may also pay for injuries sustained in hit-and-run accidents.

The minimum amount of UM/UIM coverage required by law is $25,000/$50,000 and then $20,000 of Uninsured Motorist Property Damage (UMPD). The $20,000 UMPD coverage is subject to a $200 deductible when a loss is caused by a hit-and-run driver who cannot be identified.

Washington

Uninsured and Underinsured Motorist coverages are optional in Washington State however; they must be offered by an insurance carrier and rejected in writing by the policyholder if they do not want these additional coverages.

In WA Underinsured Motorist Bodily Injury is an optional coverage that pays for medical expenses, lost wages, and other damages when policyholders, authorized drivers, or passengers are injured in an accident caused by a driver who has insufficient auto insurance coverage.

The Revised Code of Washington (RCW) 48.22.030 discusses Underinsured Motorist coverage. Here it states that no new policy or renewal of an existing policy insuring against loss resulting from liability imposed by law for bodily injury, death, or property damage, suffered by any person arising out of the ownership,

maintenance, or use of a motor vehicle shall be issued with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided…for the protection of persons insured who are legally entitled to recover damages from owners or operators of underinsured motor vehicles, hit-and-run motor vehicles, and phantom vehicles because of bodily injury, death, or property damage. Except as to property damage, underinsured coverage shall be in the same amount as the insured's third party liability coverage unless the insured rejects all or part of the coverage.

A named insured or spouse may reject, in writing, underinsured coverage for bodily injury or death, or property damage. If a named insured or spouse has rejected underinsured coverage, such coverage shall not be included in any supplemental or renewal policy unless a named insured or spouse subsequently requests such coverage in writing.

West Virginia

West Virginia offers Uninsured and Underinsured Motorist coverages. West Virginia law has an Uninsured/Underinsured Motorist coverage requirement in a person's auto insurance policy. The Uninsured/Underinsured Motorist coverage has to be for $20,000 for every person and $40,000 for every accident for any injuries that are caused by a driver who is not covered by car insurance. UMPD of $10,000 is offered but not required.

While the limits listed above are mandatory minimum requirements, WV laws require that all insurers offer higher optional limits of Uninsured Motorist coverage and provide the option to purchase Underinsured Motorist coverage. The mandatory optional offering of coverages are as follows:

Uninsured Motorist (maximum):
Property damage: $50,000
Bodily injury: $100,000/$300,000

Underinsured Motorist (minimum):
Property damage: $10,000
Bodily injury: $ 20,000/$ 40,000

Increased Underinsured Motorist coverage may be purchased up to the limits of liability coverage carried on the policy.

The state of West Virginia requires that you purchase Uninsured motor vehicle coverage with limits not less than $20,000 per person and $40,000 per accident for uninsured bodily injury losses and $10,000 for uninsured property loss under your basic automobile coverage. Insurers must also offer excess uninsured / underinsured limits. WV law requires that you as a policyholder be given the opportunity to purchase Uninsured Motorist coverage in an amount not less than the liability limit or limits selected on the excess or umbrella policy. In WV Uninsured Motorist protects you and passengers in your car if you are injured by a driver who was at fault or an unidentified driver who was at-fault but does not have insurance to pay for your damages.

The state of West Virginia does not require you to purchase Underinsured Motorist under your basic auto insurance policy however; the law does state that you must be given the opportunity to purchase this coverage in an amount not less than your liability coverage.

Wisconsin

Wisconsin requires Uninsured Motorist coverage but not underinsured motorist. The limits for Uninsured Motorist coverage in WI must be less than, or equal to, the limits you select for your bodily injury coverage. In addition, if you want to carry this coverage on multiple vehicles, the limits must be the same for each vehicle.

With Underinsured Motorist in WI, if you choose this type of coverage then the limits for this coverage cannot exceed the limits on your bodily injury coverage. In addition, if you want to carry this coverage on multiple vehicles, the limits must be the same for each vehicle.

Wyoming

Uninsured Motorist coverage will be included in an automobile liability policy delivered in Wyoming unless you reject the coverage in writing. This is done at the time you make application for a policy. If chosen as coverage on your auto insurance policy in WY the minimum Uninsured Motorist coverage is $25,000 for bodily injury coverage per person and $50,000 per accident. Wyoming does not require insurers to offer Underinsured Motorist coverage, just Uninsured Motorist coverage.