III. SPECIAL ISSUES IN UM AND UIM LAW

A. Federal Legislative Changes Looming:

The Uninsured/Underinsured Motorist Statute is found at §32-7-2, Code of Alabama, (1975). This Code provision is essentially unchanged since enactment in 1984. However, there is a great deal of case law analyzing and interpreting the language contained in the statute. The statute reads in pertinent part:

> (a) No automobile liability 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 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 subjection (c) of Section 32-7-6,. Under provisions approved by the Commissioner of Insurance for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; 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 where 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.

(Acts 1965, No. 866, p.1614; Acts 1984,, No. 84-301, p. 672, § 4.)

In October 2004, Senator Cornyn (R-Texas) introduced Senate Bill 2931, the "Auto Choice Reform Act of 2004." It is expected that this bill will not pass in the current Congress but will be reintroduced next term. This bill mandates that the states provide insurance consumers an option to purchase a no-fault type insurance providing personal injury protection benefits. If the consumer chooses the no-fault insurance, they waive the right to bright a tort claim, which would include the right to sue for UM benefits for non-economic damages. If this bill passes, it will change the existing auto tort system throughout the country in drastic ways.

B. Recent Case Law Involving UM and UIM Coverage:

Alabama appellate courts have released several opinions in 2003 and 2004 which have made a significant impact on the handling of UM/UIM claims. Opinions issued in 2004 are summarized below. In addition, some 2003 statutory immunity cases and cases involving the interplay of UM and workers' compensation law will also be referenced.

1. Venue Like a Tort: Ex parte: State Farm Mutual Automobile Insurance Company, 2004 WL1233969, ____ So.2d ____ (Ala., opinion issued June 4, 2004). In an important case addressing appropriate venue of a UM claim, the Alabama Supreme Court distinguished a UM claim from a breach of contract claim. In Ex parte: State Farm, automobile accident victims sued the tortfeasor and their UIM carrier, State Farm, in the Bessemer Division of Jefferson County Circuit Court. Both the plaintiffs and the tortfeasor were residents of Bibb County and there was a factual dispute as to whether the accident happened in Bibb County or Tuscaloosa County. The only connection the case had with the Bessemer

Division was the fact that the policy had been purchased in Bessemer. The tortfeasor and State Farm both moved to transfer venue to Bibb County. After the trial court denied the motion to transfer venue, the defendants filed a petition for a writ of mandamus.

The Alabama Supreme Court granted the petition and noted that even though the policy had been issued in Bessemer, the wrongful acts or omissions that were relevant occurred elsewhere:

> Because, in order to recover benefits from State Farm, the Robinsons must prove that they are "legally entitled to recover" damages stemming from the accident, it is our opinion that the "omission" or "wrongful act" underlying this action occurred at the place of the accident. Thus, this action arose where the accident occurred, which is not in the Bessemer Division of the Jefferson Circuit Court.

The State Farm court noted that Bibb County was a proper venue because the defendant tortfeasor was a resident of this county, making venue proper pursuant to Ala. Code (1975) §6-3-2(a)(3) (all other personal actions, if the defendant . . . has within the state a permanent residence, may be commenced in the county of such residence.") The court noted that State Farm's principal office in Alabama was located within the territorial boundary of the Birmingham Division of the Jefferson Circuit Court and the State Farm court implied, without so stating, that the Birmingham Division may have been

a proper venue. Because Bibb County was a proper venue for the individual tortfeasor, it was also a proper venue to bring the UM claim against State Farm under the doctrine of pendent venue. Because the Bessemer Division of Jefferson County is distinct from the Birmingham Division venue was appropriate in Bessemer, even though the policy was issued there.

2. UM Claim Without a Home - Lack of Personal Jurisdiction and Minimum Contacts in a Non-Arbitration Context: In Ex parte: Georgia Farm Bureau Mutual Automobile Insurance Co., 2004 WL596101 (Ala., opinion issued March 26, 2004), the Alabama Supreme Court held that there was insufficient minimum contacts to permit Georgia Farm Bureau to be haled into an Alabama court in a UM claim. In Georgia Farm Bureau, the plaintiff, a resident of Carrol County, Georgia, was injured while riding as a guest passenger in a car owned and operated by an Alabama resident in a one car accident in Randolph County, Alabama. Although the owner/operator's liability insurance covered him for the accident, the owner/operator's insurer denied the plaintiff's claim on the basis of the application of the Alabama guest passenger statute.

Johnson then made a UM claim against Georgia Farm Bureau, which denied his claim on the ground that Georgia law conditions a party's recovery of uninsured benefits on that party first obtaining a judgment against the tortfeasor. The plaintiffs then brought suit against Georgia Farm Bureau in

Randolph County, Alabama, Circuit Court. Georgia Farm Bureau moved to dismiss the lawsuit for lack of *in personam* jurisdiction, on the basis that Georgia Farm Bureau was a Georgia corporation, it did not employ agents in Alabama, did not solicit business in Alabama, and did not sell insurance to residents of Alabama. In response to the sufficient contacts argument, the plaintiffs argued that Georgia Farm Bureau sells policies in each Georgia county, seventeen of which abut the Alabama-Georgia border and that these policies follow their insured from Georgia and contiguous states such as Alabama. Surely, travel from Georgia into a contiguous Alabama county would be a future consequence contemplated by the policy.

In addition, the plaintiffs argued that they should be allowed to sue Georgia Farm Bureau in Alabama courts because they were without a remedy in the Georgia courts. Because Georgia procedural law conditioned recovery of UM benefits on a judgment against the tortfeasor, and because Georgia courts could not exercise *in personam* jurisdiction over the Alabama owner/operator and because Alabama substantive law, i.e., the guest passenger statute, precluded the plaintiffs from first obtaining a judgment, the Georgia courts afforded the plaintiffs no remedy for the recovery of their UM benefits from Georgia Farm Bureau. Because Alabama procedural law did not condition recovery of UM benefits on a judgment against the tortfeasor, the Alabama courts afforded the plaintiffs their only remedy for the recovery of

such benefits. The Alabama Supreme Court disagreed finding a lack of minimum contacts and left the plaintiffs without a remedy.

3. UM and Workers' Compensation Exclusivity: Johnson v. Coregis, 2004 WL541827 (Ala., opinion issued March 19, 2004). The Coregis opinion is the most recent in a series of decisions which address the interplay between workers' compensation law and UM law. The plaintiff in Coregis was seriously injured in an automobile accident involving a third party driver occurring while the plaintiff was acting within the line and scope of his employment. At the time of the accident, the employer had an automobile insurance policy with Coregis which provided UM coverage. The plaintiff filed suit against Coregis and Coregis filed a motion to dismiss on the basis that the plaintiff's sole remedy was a claim for workers' compensation benefits and thus receipt of workers' compensation and UIM benefits would allow double recovery for the plaintiff. The Alabama Supreme Court rejected this argument and found that nothing in the Alabama Workers' Compensation Act prevented the plaintiff/employee from suing a negligent third party.

The Coregis court reviewed several recent Alabama Supreme Court cases, including Ex parte: Carlton, [MS. 1001781, April 11, 2003] ____So.2d ____ (Ala. 2003), Watts v. Sentry Ins., [MS. 1020995, September 5, 2003] ____ So.2d____ (Ala. 2003) and Frazier v. St. Paul Insurance Co., [MS. 1020505, October 10, 2003] ____So.2d____ (Ala.

2003). In Carlton, the plaintiff/employee was injured while a passenger in a car driven by a co-employee. The Alabama Supreme Court in Carlton overruled the statutory immunity line of cases which held that an alleged tortfeasor who was immune from suit, such as a co-employee or a governmental employee entitled to statutory immunity, would be considered uninsured for the purposes of the UM statute. The Carlton court held that because the co-employee provisions of the Alabama Workers' Compensation Act prohibited the plaintiff's recovery of damages from his co-employee, the plaintiff could not prove that he was legally entitled to recover damages and thus, was not entitled to recover UM benefits under the policy. In Coregis, the Alabama Supreme Court clarified the decision in Carlton and stated as follows:

> Ex parte: Carlton does not stand for the proposition that all injured employees receiving workers' compensation benefits are barred from recovering other compensation or benefits. Indeed, since we decided Ex parte: Carlton, we have held that the Act specifically provides that an injured employee who is recovering workers' compensation benefits can sue certain third parties whose negligence or wantonness proximately caused the injuries for which the employee is receiving workers' compensation benefits. See Watts v. Sentry and Frazier v. St. Paul

Insurance Co.

Similarly, Frazier and Watts also rejected claims made by UM carriers that an injured plaintiff receiving worker compensation benefits was precluded from making a UM claim.

4. Exhaustion of Available Coverages - Be Careful Who You Sue: Burt v. Shield Insurance Co., 2004 WL 870457 (Ala.Civ.App., opinion issued April 23, 2004). In Burt, the Alabama Court of Civil Appeals released an opinion with potentially drastic implication in cases wherein there are multiple tortfeasors. In Burt, a Montgomery area car dealer, Capitol Chevrolet, allowed a potential customer to test drive an automobile it owned. On the test drive, the customer had a motor vehicle accident resulting in serious injury to the plaintiff. The plaintiff brought suit against the tortfeasor, who had $25,000.00 in coverage by virtue of the fact he was driving an automobile owned by Capitol Chevrolet and against Capitol Chevrolet, who had least $2,000,000.00 in liability insurance coverage. The initial complaint alleged a negligent and wanton entrustment count against Capitol Chevrolet and also alleged that Capitol Chevrolet negligently or wantonly failed to confirm that the tortfeasor had liability insurance before permitting him to drive that vehicle. The plaintiff later amended the complaint to include a UIM claim and to delete claims against Capitol Chevrolet. The record on appeal indicated that the plaintiff had entered into a *pro tanto* settlement

with Capitol Chevrolet in which Capitol Chevrolet paid $225,000.00 to settle the claims against it. The Burt trial court granted summary judgment in favor of the UIM carrier on the basis that the plaintiff could not present evidence that he suffered damages in excess of the policy limits of $2,000,000.00 which were available to him through the liability insurance coverage of Capitol Chevrolet. On appeal, the plaintiff in Burt argued that he did not need to exhaust the liability insurance covering a joint tortfeasor, Capitol Chevrolet, whose liability is based on its own tortious conduct, i.e., entrustment, before he can reach UIM benefits based on the tortious conduct of the underinsured driver. The UIM carrier argued on appeal that the determinative issue was whether the policy limits under a policy of insurance insuring the owner of a vehicle are available within the meaning of the UM statute. In ruling for the UIM carrier, the Alabama Court of Civil Appeals held that UIM coverage is for the protection of persons who are ". . . legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury." Because Capitol Chevrolet owned the vehicle that the tortfeasor was driving and because the plaintiff sued Capitol Chevrolet, the Alabama Court of Civil Appeals held that the $2,000,000.00 liability limits available to Capitol Chevrolet must first be exhausted before the plaintiff could reach the UM coverage.

The Burt decision has tremendous ramifications and

it dictates great care must be used prior to filing suit in a UM claim. If a plaintiff has claims against other tortfeasors with significant coverage, no matter how small or insignificant the claims may be legally and factually, the chance remains that this liability coverage may have to be exhausted before UM benefits could be reached. The Burt plaintiff filed a writ of certiorari to the Alabama Supreme Court which is still under review as of November 16, 2004.

C. Handling Conflicts of Law With Other States:

In general, Alabama continues to use the traditional First Restatement of Conflict of Laws approach, known as the "*lex loci*" rules. The Alabama conflict of laws analysis applies the substantive law of the state where the tort occurred, or *lex loci delicto*, to questions concerning applicable tort law. The "*lex loci contractu*" analysis used by Alabama courts dictates that the substantive law of the state where the contract occurred is the applicable substantive law for contractual interpretation. In a UM case, an Alabama court will apply Alabama law regarding claims against the tortfeasor and the law of the place where the contract was entered into regarding substantive questions of UM contract interpretation, such as stacking.

Issues may arise as to the particular state where the UM contract was issued. The Alabama UM statute addresses conflict of law issues as follows:

. . .

> (a) No automobile liability 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. . .
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> Ala. Code (1975) Section 32-7-23(a), emphasis supplied

D. Actual Physical Contact Requirement:

Automobile policies delivered or issued for delivery in Alabama must contain uninsured motorist coverage provisions unless explicitly waived. The UM coverages subject to the Alabama statute must not be more restrictive than the provisions of the statute itself. In Walker v. Guide One Specialty Mut. Ins. Co., 834 So.2d 765 (Ala. 2002), the court held void the corroborative evidence requirement as violative of the statute. Significantly, Walker court overruled Hannon v. Scottsdale Ins. Co., 736 So.2d 616 (Ala. 1999) where the court found a corroborative evidence requirement acceptable.

In Walker, *supra*, the insured alleged that a phantom vehicle came into her lane, causing her to swerve and hit a tree. The Guide One policy required that "if there is no physical contact with a hit and run vehicle the facts of the accident must be proved. We [Guide One] will only accept competent evidence other than the testimony of a person making [a] claim under this or similar coverage." 831 So.2d 770. The court found that Guide One's policy was too restrictive and contrary to the UM statute. See also, State Farm Fire & Cas. Co. v. Lambert, 2914 Ala. 645, 285 So.2d 917 (1973)

(holding a UM physical contact requirement void).

E. Claims Involving Multiple Tortfeasors:

In a claim involving more than one at fault party, the plaintiff must establish that she is legally entitled to recover damages from owners or operators of uninsured motor vehicles and that her damages exceed "the sum of the limits of liability under all bodily injury liability bonds and insurance policies available to an injured person after an accident. . . " § 32-7-23(b)(4) Code of Alabama (1975). Under current Alabama law, a UM carrier will not have any liability until it is established that the plaintiff's damages exceed the applicable limits. A key issue is whether insurance policies available to an injured person include policies of a joint tortfeasor, as opposed only to policies providing insurance based on the wrongdoing of the UM motorist.

The Burt v. Shield Insurance Co., *supra*, case illustrates the dangers occurring in a situation where there are multiple tortfeasors who may be sued under multiple theories of recovery. In Burt, the plaintiff sued the tortfeasor who at the time of the accident was test driving an automobile dealership's vehicle. In addition, the plaintiff sued the automobile dealership under theories of negligent entrustment and negligent failure to confirm that the tortfeasor had liability insurance. The claims made against the automobile dealership were either factually or legally weaker than claims arising out of the operation of the vehicle. The Burt court held that the plaintiff could not present a UM claim because he could not prove that his damages exceeded the two million dollars in liability insurance coverage available to the

automobile dealership and that these limits were available pursuant to the UM statute.

The Burt case is now on a petition for writ of certiorari before the Alabama Supreme Court. The plaintiff in the Burt opinion could have chosen to not bring claims against the automobile dealership and instead, could have simply sued the tortfeasor. Under these circumstances, it is unlikely that the Burt plaintiff would have needed to exhaust the coverages available to the automobile dealership before receiving UM benefits.

Knowles v. State Farm Mut. Auto Ins. Co., 781 So.2d 211 (Ala. 2000), suggests that unless the "bodily injury liability insurance policies" are those that may be reached on the basis of *respondeat superior*, or some other vicarious liability theory arising out of the wrongdoing of the underinsured motorist, the liability policy is not "available" to the injured party. That is, the liability policy of a joint tortfeasor, rather than that which applies as a result of the wrongdoing of the underinsured motorist, is not "available" to the injured party, and need not be exhausted before an injured party can reach his UIM benefits.

After first noting that all available bodily injury coverage must be exhausted before a plaintiff could reach uninsured motorist benefits, the Knowles court stated:

> It follows that **if** Dodd was an agent of Woodmen, and Knowles accepted $32,500 from Woodmen's liability - insurance carrier, $32,500 out of $1 million in available insurance proceeds, then State Farm would have had no obligation to pay uninsured - or underinsured - motorist benefits. (emphasis added)

In holding that plaintiff was not entitled to UIM benefits, the Knowles court expressly noted, and relied upon,

the *respondeat superior* relationship that caused the defendant's employer's insurance to be "available" for the defendant's wrongdoing. Arguably, the ruling would have been different had the plaintiff made a recovery against a joint tortfeasor, whose liability depended upon its own negligence, rather than upon the negligence of the underinsured motorist.

This conclusion makes sense because depending on facts related to liability, an injured party may well choose not to sue a joint tortfeasor. Logically, whether a policy is statutorily "available" cannot depend on whether the injured party decides to name a particular person as a defendant. More importantly, for purposes of reaching UIM benefits, there is a fundamental difference between a settlement with the underinsured motorist or, for example, his employer, and a settlement with a joint tortfeasor.

F. Comparative Negligence Issues in UM/UIM Claims:

Alabama is contributory negligence state, which bars an insured's recovery in an auto accident if the plaintiff is one percent negligent. It is an affirmative defense which must be pled. Comparative negligence is only an issue if you are applying the substantive tort law of another jurisdiction. If another jurisdiction's tort law is applicable, then one must determine which type of negligence applies, i.e., pure comparative, modified comparative or contributory negligence.

G. Who Pays When There are Multiple Policies:

Each policy of insurance will have a coordination of benefits clause which generally provides that the insurance provided by the subject policy shall be over and above any other valid, collectible insurance. In Barnwell v. Allstate Insurance Co., 316 So.2d 696 (Ala.Civ.App. 1975), the court reviewed a fact situation where a UM insured was injured in an

accident while a passenger in a non-owned vehicle. The passenger had a UM policy which provided that UM coverage from the non-owned vehicle's insurer would be primary. The Barnwell court approved this language in the passenger's policy and stated as follows:

> We therefore conclude that the insured is bound by the provision in his policy which provides that if the insured is injured by an uninsured motorist while in an automobile other than the owned automobile and such automobile has uninsured motorist insurance available to the insured, such coverage shall be primary and coverage provided to the named insured shall be secondary and only as excess over the first. Thus, the insured's first right of recovery is against the insurer of the non-owned automobile.
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> Barnwell, 316 So.2d at 449.

Typically, the excess, co-insurance or other insurance, omnibus, or coordination of benefits language in a UM policy limits UM coverage. The court in Safeco Ins. Co. v. Jones, 243 So.2d 746 (Ala. 1970), found the excess insurance clause to be unenforceable because it limited the amount of coverage to which the insured was entitled. The court held that "our statute sets a minimum for recovery, but it does not place a limit on the total amount of recovery so long as that amount does not exceed the amount of actual loss; that where the loss exceeds the limits of one policy, the insured may proceed under other available policies; that where the premiums have been paid for uninsured motorist coverage, we cannot permit an insured to avoid a statutorily imposed liability by its insertion into the policy via liability limiting clause which restricts the insured from receiving that coverage for which

the premium has been paid." Id at 614. The offending portion of the policy language in the Safeco v. Jones case was the part limiting the damages of the insured.

IV. ETHICAL CONSIDERATIONS

A. Conflicts of Interest:

The Alabama Rules of Professional Conduct set out the general rule regarding conflicts of interest as follows:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
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> (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
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> (2) each client consents after consultation;
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> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest, unless:
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> (1) The lawyer reasonably believes the representation will not be adversely affected; and
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> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of

the common representation and the advantages and risks involved.

Rule 1.7, Rules of Professional Conduct

From a defense standpoint, the greatest potential for a conflict of interest exists where a UM carrier has a subrogation interest against the person for whom it is providing a defense in a suit by its own insured. In this situation, there is not even a policy which specifies how the lawyer defending the uninsured tortfeasor will be chosen. The analysis in this fact situation appears most similar to the situation where an insurer defends under a reservation of rights.

In L & S Roofing v. St. Paul Fire & Marine, 521 So.2d 1298 (Ala. 1987), the court set forth the requirements of an enhanced duty of good faith for both the insurer and defense counsel. The enhanced obligation of good faith is fulfilled by meeting four tests: (1) a thorough investigation of the insured's accident including the nature and severity of the damages and injury; (2) the retention of competent defense counsel for the [uninsured tortfeasor/at fault party] with the understanding that counsel represents only that person; (3) the insurance company fully informs the insured of the reservation of rights defense and all developments relative to his policy coverage and the progress of the lawsuit[1]; and (4) the company refrains from engaging in any conduct that would demonstrate a greater concern for the insurers monetary interest than for the financial risk of the uninsured motorist.

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1 In the Uninsured setting this would require that the information regarding the progress of the lawsuit be conveyed to the at fault party.

The court discussed the selection of independent counsel for the tortfeasor in Ex parte: State Farm v. Tate, 674 So.2d 75 (Ala. 1995). In Tate, a UM carrier sought trial court approval to appoint legal counsel to defend the UM driver in a suit by its insured. State Farm also chose to opt out of the litigation pursuant to the Lowe v. Nationwide Insurance Co., 521 So.2d 1309 (Ala. 1988). After opting out, State Farm sought to retain counsel for the UM driver in reliance upon Driver v. National Security Fire & Casualty Co., 658 So.2d 390 (Ala. 1995). The trial court denied State Farm's motion and State Farm filed a petition for writ of mandamus, which was granted. The court in Tate stated the issue as follows:

> The single issue presented by this petition is whether an uninsured motorist insurance carrier, in this case State Farm, has the right under Alabama law to hire additional counsel to help assist an uninsured motorist defendant like Tate at trial in order to protect its interests in the fair and just adjudication of the underlying tort claim.

The Tate court reiterated its analysis in the case of Driver v. National Security Fire & Casualty Co., *supra*, stating the following:

> [T]his court recognized that liability insurance carriers facing the uninsured motorist situation are placed in a much more precarious position than are liability insurance carriers faced with the underinsured motorist situation. Recognizing this more precarious position, this court held in Driver that

> insurance carriers in the uninsured situation should be allowed to opt out of the underlying tort case and still be given the opportunity to elect to hire an attorney to help represent the uninsured motorist.[2]
>
> [W]here 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 [his] 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 [and consequently the interests of the underinsured coverage carrier as well.] A different situation is created when the defendant motorist has no liability coverage.

Tate, 674 So.2d at 76-77, quoting Driver, 658 So.2d at 394-395.

The Tate court opined further:

> Even when an uninsured motorist can afford to hire a defense attorney, the interests of the insurance company

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In Driver, *supra*, the attorney representing the estate of the UM driver was representing the UM driver in the pending auto litigation before asking for the carrier to retain legal counsel to assist him in litigation.

> providing uninsured motorist benefits may not always be adequately represented at trial by that attorney, because the uninsured motorist's interests may not always be squarely aligned with those of the insurance carrier. Obviously, there are also potential collusion problems. "Understanding the need for the *uninsured motorist insurance carrier* to protect *its* interests," we held in Driver, *supra*, "that once the carrier opts out of the trial under Lowe, it may, in its discretion, hire an [additional] attorney to represent the uninsured motorist defendant." 658 So.2d at 395 (emphasis added).

Tate, 674 So.2d at 76-77, quoting Driver, 658 So.2d at 394-395.

Therefore, the selection of independent counsel may be made by the UM carrier to assist in the defense and represent the UM driver. The fact that the uninsured motorist can hire an attorney does not obviate the right of the UM carrier to select independent counsel and bear the cost for same. The court has noted that one purpose for this is to avoid collusion. However, there remains the chance for collusion between the tortfeasor and the UM carrier. The UM carrier may agree to waive its subrogation interest if the tortfeasor cooperates with the defense. In this case, there is a sham defendant, the tortfeasor, and the UM carrier would be guilty of champerty.

The most common conflict of interest from a plaintiff's perspective in the UM context occurs when the liability limits

have to be split among several claimants. Assume a car full of people is struck by an uninsured motorist and that applicable UM limits are $25,000 per person, $50,000 per accident. There may be five people fighting for the same $50,000 in coverage, which creates an obvious conflict of interest. A similar conflict occurs when there is an argument that the driver of the vehicle may have some fault when the driver and one or all of the passengers share a lawyer.

All claimants can be represented by the same lawyer if they all consent after full disclosure and the lawyer reasonably believes that the representation of none of the clients will suffer.

B. Guarding Against Malpractice:

In any automobile accident UM coverage must be considered. If there is any chance that the tortfeasor may be uninsured, or underinsured given the amount of your client's damages, immediate notice should be provided to the UM carrier. If your client was a passenger, the UM statute provides that the coverage for the non-owned vehicle is primary. Consider all insurance coverages held by members of the same household with your client. In addition, the UM statute allows for stacking under one policy for up to three vehicles. Finally, remember that UM coverage inures to a person, not a vehicle and thus your client could be covered even when they are injured as a pedestrian, or passenger.

The biggest malpractice pitfall occurs when a UM carrier is not put on notice of a proposed settlement with the tortfeasor. The carrier must be given notice and an opportunity to "buyout" the settlement and if this does not occur, your client may waive their right to receive UIM benefits. Become intimately familiar with State Farm v. Lambert, which is discussed *infra*.

V. SETTLEMENT AND SUBROGATION

A. Subrogation and Settling the Claim:

The preservation of a UM carrier's right to subrogation against the tortfeasor is closely connected to the settlement of the underlying claim against the tortfeasor. As soon as you realize that there is a potential for a UM claim, you should put your client's UM/UIM carrier on notice of the potential claim. Remember that in negotiations with the tortfeasor's carrier, the plaintiff has the option of accepting less than the tortfeasor's policy limits without extinguishing the plaintiff's rights to uninsured/underinsured benefits. Scott v. State Farm Mut. Auto. Ins. Co., 707 So.2d 238 (Ala.Civ.App. 1997). Once the tortfeasor's carrier tenders its limits or makes a final settlement offer which the plaintiff wants to accept, the plaintiff must give his UIM carrier notice of this offer. At this point the UIM carrier can consent to the settlement and give up its right of subrogation against the tortfeasor for any amount it subsequently pays, or it can advance the plaintiff the amount offered by the tortfeasor and preserve its right of subrogation. You should be aware of the Alabama Supreme Court's directions in Lambert v. State Farm, 576 So.2d 160 (Ala. 1991). In Lambert, the court laid out the following 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 the insured's damages may exceed the tortfeasor's limits of liability and coverage.
2. If the tortfeasor's carrier and an 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 uninsured 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 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 any reasonable time, and should notify its insured of the action it proposed 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 any reasonable time, the carrier would, by any of those actions, waive any right of

subrogation against the tortfeasor with the tortfeasor's insurer.

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

What is a "reasonable time" within which to conduct an investigation? While each case depends on its unique facts, the rule of thumb is that the uninsured carrier should conduct its investigation within thirty days, subject to good faith complications which would prevent that.

The UIM carrier will look closely at the value of the claim when determining whether it will waive its right of subrogation. If the UIM carrier sees little or no exposure, it will likely consent to the settlement. If the UIM carrier sees significant UIM exposure and there is a sympathetic tortfeasor, it will likely advance the settlement cost. If the underlying case involves egregious facts or an unsympathetic tortfeasor, the UIM carrier will likely consent to release of the tortfeasor.

UIM carriers have recently indicated a willingness to explore the merits of an underlying claim before making its decision on the tortfeasor release. In these instances, the UIM carrier will take pre-suit discovery pursuant to Rule 27 ARCP, such as a doctor's deposition, which information the UIM carrier will use in valuing the underlying claim. At times it makes sense to cooperate with the UIM carrier by engaging in the pre-suit discovery.

Subrogation from collateral sources must also be considered when settling the UM claim. Notice should be given

to any health insurance carrier asserting a lien. In Ex parte: State Farm, 764 So.2d 543 (Ala. 2000), the Alabama Supreme Court rejected the "made whole" doctrine which held that an insurer is not entitled to subrogation unless and until the insured has been made whole for his loss. Thus, the issue of a health insurance carrier's lien should be resolved from the settlement proceeds.

Pursuant to the common fund doctrine, an insurance carrier asserting a subrogation lien would still have to pay a *pro rata* share of the cost of litigation, including attorney fees and costs. An unusual situation where this doctrine would apply in a UM case occurs when the UIM carrier advances the cost of a settlement and a case proceeds against a tortfeasor, with the UIM carrier not participating in the litigation. In Alston v. State Farm, 660 So.2d 1314 (Ala.Civ.App. 1995), the tortfeasor's carrier offered to settle for its $20,000 policy limits and the UIM carrier, State Farm, advanced this amount to preserve its subrogation rights. The jury returned a verdict for the plaintiff in the amount of $26,574. The Court of Civil Appeals held that State Farm was required to pay its *pro rata* share of the cost of litigation under the "special equity" exception to the general rule that an attorney fee is not recoverable unless the attorney's efforts have created a common fund. The court held State Farm liable on the basis that it did not expend substantial litigation costs, nor did it participate in the litigation.

In Eiland v. Meherin, [MS 1001219, June 14, 2002] (Ala.Civ.App. 2002), the court made a similar holding. In Eiland, the tortfeasor's liability carrier tendered its limits of $100,000 and State Farm advanced this amount and then opted out of the trial proceedings. After trial, a jury returned a

verdict for $50,000. The Alabama Court of Civil Appeals, describing the case as in "insurance subrogation case," State Farm was required to pay one hundred percent of the plaintiff's attorney fee in order to recover the $50,000 it had advanced.

Finally, a worker compensation carrier has no right of subrogation against uninsured motorist benefits. A long line of cases has held that the employer's statutory right of subrogation applies only to tortfeasors and not contractual uninsured motorist coverage benefits. H & H Wood v. Monticello Ins. Co., 668 So.2d 38 (Ala.Civ.App. 1995); State Farm v. Cahoon, 252 So.2d 619 (Ala. 1971); River Gas Corp. v. Sutton, 701 So.2d 35 (Ala.Civ.App. 1997).

B. Bad Faith:

Alabama recognizes the tort of bad faith in UM cases. Sanford v. Liberty Mutual Ins. Co., 536 So.2d 941 (Ala. 1988). In Lefevm v. Westberry, 590 So.2d 154 (Ala. 1991), the court discussed bad faith in the UM context at length:

> (1) When a claim is filed by its insured, the UM motorist carrier has an obligation to diligently investigate the facts, fairly evaluate the claim, and act promptly and reasonably.
>
> (2) The UM carrier should conclude its investigation within a reasonable time and should notify its insured of the action it proposes with regard to the claim for UM benefits.
>
> (3) Mere delay does not constitute vexatious or unreasonable delay in the investigation of a claim if there is a bona fide dispute on the issue of liability.
>
> (4) Likewise, 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.

(5) If the UM carrier refuses to settle with its insureds, its refusal to settle must be reasonable.

Because it is explicitly recognized that the interests of the UM carrier are adverse to its insured, the Alabama Supreme Court has recognized very few instances where a bad faith claim could go to a jury in the UM context. One such recent case is National Insurance Association v. Sockwell, 829 So.2d 111 (Ala. 2002). The Sockwell opinion included a lengthy discussion about the adjustment of this particular UM claim.

C. Arbitration/Mediation of Coverage Disputes:

Some carriers have arbitration provisions in insurance contracts with insureds, which would include arbitration of UM coverage disputes and claims. To date, UM carriers have not sought to enforce these provisions. The bottom line is that arbitration is here in the UM/UIM context, even if the arbitration agreement is not contained in the application that the plaintiff executed. Southern United Fire v. Howard, 2000 WL1006955 (Ala. July 21, 2000); Spurlock v. Life Insurance Co. of Va., 2000 WL1785300 (N.D. Ala. October 31, 2000).