ADVANCED UNINSURED/UNDERINSURED MOTORIST LAW

by

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I. DETERMINING COVERAGES & VALUING DAMAGES IN UM/UIM CASES

A. Identify All Available Coverages

As an initial step you must identify all available UM coverages. The focus on available UM coverages will maximize a potential recovery. In addition, it will clarify the priority of coverages which may play a role in exhaustion and other threshold issues which are of crucial importance.

1. What Rejection?

Even if the declarations page shows no UM coverage, and even if a rejection has been signed in connection with the issuance of a policy, there still may be applicable UM coverage. In Nationwide Ins. Co. v. Nicholas, 868 So.2d 457 (Ala. Civ. App. 2003), the Court held that each named insured under a policy must sign a written rejection, otherwise said named insured is entitled to uninsured motorist coverage. Thus, if there are several named insureds on a policy and all named insureds have not signed rejections, there will be available UM coverage. Furthermore, a policy may name a single person as a "named insured" yet have several persons listed as being insured. The Nationwide v. Nicholas decision arguably supports the position that all persons named as insureds should have

uninsured motorist coverage under the policy unless there is a written rejection form signed by the specific insured.

There are several recent decisions which take a restrictive view of who qualifies as a named insured under a policy. In Progressive Ins. Co. v. Green, __ So.2d __ (Ala. 2006), the sole named insured signed a rejection and then was killed in a motor vehicle accident. The named insured's spouse in Green unsuccessfully sought to obtain insurance coverage by arguing that she had been the named insured within the meaning of the policy.

The Green policy had the following definition of an insured which was not deemed sufficient to create named insured status:

> "You" and "Your" meaning a person shown as a named insured on the declaration page, and that person's spouse if residing in the same household.

In Progressive Ins. Co. v. Naramore, ___ So.2d ___ (Ala. 2006), the Court considered similar language and held that a spouse was not considered named insured by virtue of being a spouse of the named insured in the same household. The spouse in the Naramore case was also a listed driver.

2. Resident Relatives

You should thoroughly investigate all uninsured motorist policies available to persons who arguably "live" or "reside" in the same household as your client.

In the more distant past, Alabama appellate courts have taken a broad view of who qualifies as an insured resident under an omnibus insured clause. In Davis v. State Farm, 583 So.2d 225 (Ala. 1991), the Alabama Supreme Court reviewed a policy which defined

an insured under an uninsured motorist coverage as the named insured, his spouse, and "their relatives." "Relatives" is defined as a person related to you or your spouse by blood, marriage, or adoption who "lives with you." The Davis court found that the insureds' divorced adult son, who kept a separate apartment but spent nights with his parents, lived with his father, even though the son received his mail at the apartment.

In Crossett v. St. Louis Fire & Marine Ins. Co., 269 So.2d 869 (Ala. 1972), the Alabama Supreme Court held that the word "reside" was ambiguous. In Crossett, the Court construed the omnibus insured clause of a liability policy and found that a child attending college at Auburn who came home most weekends was a "resident" of the household on the day of the accident.

Recent case law is more restrictive. In BDB v. State Farm, 814 So.2d 877(Ala. Civ. App. 2001), the Alabama Court of Civil Appeals held that a daughter was not a relative entitled to UM coverage under her father's policy. In the BDB case, the daughter was injured in a motor vehicle accident while she was visiting her father. The subject policy defined a relative as a "person related to you by blood, marriage or adoption who lives primarily with you." The BDB court found that the mother had primary custody of the child and thus, the child could not be considered as living primarily with the father, thereby negating any uninsured motorist coverage.

B. The Common Fund Doctrine - Fronting Has Its Costs

Routinely, an uninsured motorist carrier in Alabama who is put on notice of a proposed settlement will "front" the settlement, thereby preserving subrogation rights

against the tortfeasor. The primary reason this is done is to enhance the litigation posture so that the insured is proceeding against the individual tortfeasor, rather than his own insurance company. The UM carriers argue that fronting also saves defense costs, which is not necessarily true.

In Eiland v. Meherin, 854 So.2d 1134 (Ala. Civ. App. 2002), the uninsured motorist carrier, State Farm, tendered $100,000.00 policy limits to its insured in order to protect its potential subrogation interest against the tortfeasor. The UIM carrier then opted out of the proceedings and allowed the case to go to trial against the tortfeasor, resulting in a $50,000.00 judgment. Based on the equitable common fund doctrine, the Alabama Supreme Court held that the carrier was the only beneficiary of the $50,000.00 judgment, which created a common fund. The Alabama Supreme Court further held in Eiland that State Farm's pro rata share of the attorneys' fees and expenses was 100% since it was the only beneficiary of the fund. Thus, State Farm incurred no UIM liability as a result of the judgment but nonetheless incurred significant cost by fronting the $100,000.00. First, State Farm was only entitled to subrogate against $50,000.00 and thus it lost $50,000.00 from fronting the liability limits. Second, State Farm bore the entire cost of the insured's attorney fee. In return, State Farm saved its own defense costs and "escaped" UIM coverage.

Be aware that UIM carriers are sending lengthy fronting agreements with their payments. Do not allow your clients to sign these agreements as they may affect the application of the common fund doctrine and have other implications.

C. Should the Amount of Collateral Source Payments Be Admitted Into Evidence?

The following is an excerpt from a brief recently filed in the Mobile County Circuit Court arguing that the jury should be precluded from learning of the specific amount of collateral source payments (i.e., the Blue Cross lien):

. . .

The Plaintiff admits that some or all of her medical expenses have been paid by her private health insurance carrier, Blue Cross and Blue Shield of Alabama ("Blue Cross"). Furthermore, Plaintiff agrees that this fact is admissible into evidence at the trial of this matter. However, the amount paid by the health insurance carrier towards the medical bills and hence the amount of their subrogation lien should not be admitted into evidence. The Plaintiff argues that the amount paid by the collateral source should be excluded for two reasons. First, allowing the amount paid by Blue Cross into evidence is contradictory to the jury instruction on recoverable damages for medical expenses (APJI 11.09).[1] Second, and most important, allowing the amount paid by the collateral source into evidence creates a multiple standard for the recovery of damages for the same or similar injuries. While the Alabama Supreme Court has addressed the constitutionality of the statutes which modify the collateral source rule in several cases, it has not addressed

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[1] **APJI 11.09 Personal Injury - Medical Expenses.** The measure of damages for medical expenses is all reasonable expense necessarily incurred for doctors' and medical bills which the plaintiff has paid or become obligated to pay [and the amount of the reasonable expenses of medical care, treatment and services reasonably certain to be required in the future]. The reasonableness of, and the necessity for, such expenses are matters for your determination from the evidence.

whether these statutes are intended to be "Evidentiary Rules," "Rules for Damages" or some weird amalgamation of both. By excluding evidence of the amount of the lien the legislative intent of the statute in question is adhered to while simultaneously preserving the purpose of the collateral source rule.

The relevant statute provides as follows:

> **§12-21-45. Evidence that medical or hospital expenses to be paid or reimbursed admissible as competent evidence.**
>
> (a) In all civil actions where damages for any medical or hospital expenses are claimed and are legally recoverable for personal injury or death, evidence that the plaintiff's medical or hospital expenses have been or will be paid or reimbursed shall be admissible as competent evidence. In such actions upon admission of evidence respecting reimbursement or payment of medical or hospital expenses, the plaintiff shall be entitled to introduce evidence of the cost of obtaining reimbursement or payment of medical or hospital expenses.
>
> (b) In such civil actions, information respecting such reimbursement or payment obtained or such reimbursement or payment which may be obtained by the plaintiff for medical or hospital expenses shall be subject to discovery.
>
> (c) Upon proof by the plaintiff to the court that the plaintiff is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed, evidence relating to such reimbursement or payment shall be admissible.
>
> (d) This section shall not apply to any civil action pending on June 11, 1987.
>
> (*Acts 1987, No. 87-187, p. 258, §§1-3, 6).*

. . .

The plaintiff would also note that the language of §12-21-45 does not specifically

abolish the collateral source rule of Alabama common law. See, Ex parte Barnett, 2007 WL 2216911 (Ala. 2007)(Holding that uninsured motorist benefits are a collateral source that may not be used to diminish an award in favor of a plaintiff). Since it does not specifically abolish the collateral source rule, it must be deemed to be a modification of the collateral source rule. As such the statute must be interpreted in a manner that gives effect to the language of the statute and the recognized purpose and intent of the collateral source rule: ***The wrongdoer cannot take advantage of the contracts or other relation that may exist between the insured person and third persons.***

. . .

The right of a defendant to admit the lien amount should be challenged. Hopefully, we will soon have guidance from an appellate court on this issue.

D. Claims Involving Multiple Tortfeasors – Be Careful Who You Sue

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 insuring the owner or operator of the tortfeasor's vehicle .

The Burt v. Shield Insurance Co., *supra*, case illustrates the dangers inherent when multiple tortfeasors are sued under multiple theories of recovery. In Burt, the plaintiff sued the tortfeasor, who had $25,000.00 in liability limits, who at the time of the accident was test driving an automobile dealership's vehicle. In addition, the plaintiff sued the automobile dealership who had $2,000,000.00 in liability insurance, 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 plaintiff settled both claims for $225,000.00 and then sought to recover against the UIM carrier. 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.

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 his employer, and a settlement with a joint tortfeasor not connected with the operation of the vehicle.

The Alabama Supreme Court recently recognized that policy limits available to joint tortfeasors are not "available" for setoff purposes to a UIM carrier. See, State Farm v. Motley, 909 So.2d 806 (Ala. 2005)(holding that UIM carrier is not entitled to a setoff for the limits of a CGL policy held by a joint tortfeasor). In Motley, a wrongful death claim arose out of a collision between a motorist and a log truck. The estate of the motorist

settled for the liability limits available to the owner and operator of the log truck and then settled for $225,000.00 of $2,000,000.00 in limits of a CGL policy available to a contractor responsible for loading logs on the trailer. The Motley plaintiff alleged that the longs had been improperly loaded, thereby proximately causing the wreck. The Motley court allowed the plaintiff to pursue a UIM claim and not suffer a setoff of $2,000,000.00 for the CGL policy limits:

> Mindful that the purpose of the Act is to provide protection for persons "legally entitled to recover damages from owners or operators of uninsured motor vehicle," and given that the phrase constituting subsubparagraph (4) "relates back" to subparagraph (b), so as to define an "uninsured motor vehicle," we conclude that the descriptive language "all bodily injury liability bonds and insurance policies available to an injured person" refers only to such bonds and insurance policies as pertain to the uninsured/underinsured motor vehicle or vehicles and, more specifically in this case, given the language in the State Farm policy, only those policies that apply to insure or bond for bodily injury "the ownership, maintenance, or use" of the uninsured/underinsured motor vehicle.
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> 909 So.2d at 821.

Notwithstanding the Motley decision, take great care in crafting the allegations and defendants named in the complaint.

E. 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.
>
> 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.

Extreme caution must be paid in making sure that the policy limits available under the primary UIM coverage are exhausted. After the primary coverage is exhausted, the secondary insurers pay a pro rata share of the total damages. However, failure to exhaust the primary UIM coverage will forfeit the right to proceeds against secondary coverage. In Gaught v. Evans, 361 So.2d 1027, 1030 (Ala. 1978), the Court stated as follows:

> Secondary coverage may be reached after the exhaustion of primary coverage if the damages exceed the policy limits of the primary coverage. This construction gives effect to the contract provision, the primary-secondary coverage doctrine and does no violence to the Uninsured Motorist Statute.

Thus, the primary UIM coverage must be exhausted before the secondary carrier has any liability.

F. UIM Representation of the Uninsured Motorist

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[2]; 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.

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.

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

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.[3]
> [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 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,"

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[3] 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.

> 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.

II. 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? Absent some compelling circumstances, thirty days is a reasonable period of time. Morgan v. Safeway Ins. Co., 2007 WL1866768 (Ala. Civ. App. 2007).

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.

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, 854 So.2d 1134 (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. Medicaid - The Ahlborn Decision

In Ahlborn v. Arkansas Dept. of Health & Human Services, 126 S.Ct. 1752 (2006), the United States Supreme Court held that an Arkansas statute automatically imposing a Medicaid lien on the entire amount of the tort settlement proceeds was not authorized by federal Medicaid law. The Ahlborn court further held that the anti-lien provision of federal Medicaid law pre-empted and otherwise precluded the Arkansas statutes encumbrance or attachment of proceeds related to damages other than medical costs. In Ahlborn, a plaintiff in a tort action sustained a severe injury, including brain damage as the result of a car accident. The Ahlborn plaintiff became eligible for Medicaid and Medicaid paid medical providers $215,645.30 on her behalf. The case against the tortfeasor later settled for $550,000.00, which was not allocated between categories of damages. The Arkansas Medicaid Agency sought to assert a lien against the settlement proceeds for the full amount it had paid.

Ahlborn filed a declaratory judgment action in federal court seeking a declaration

that the State's Medicaid lien violated federal law insofar as its satisfaction would require depletion of compensation for her other injuries other than past medical expenses. The parties stipulated that the settlement amounted to approximately 1/6 of the reasonable value of Ahlborn's claim and thus ADHS would be entitled to only the portion of the settlement ($215,645.30 x 1/6 = $35,581.47) that constituted reimbursement for medical payments made. The Supreme Court held that "non medical costs, such as pain and suffering, was not medical cost and therefore not subject to a subrogation lien." Accordingly, the ADHS would be entitled to $35,581.47, the portion of the settlement that constituted reimbursement for medical payments.

The Ahlborn case has significant implications for any future settlement involving a Medicaid lien. It is mandated that Medicaid be put on notice of any claim and that equitable principles will apply to the lien. See, Smith v. Alabama Medicaid Agency, 461 So.2d 817 (Ala. Civ. App. 1984)(the court held that federal statute does not require or even suggest 100% recovery and whether "equitable principles be applied to determine Medicaid's right of recovery and such would depend on the facts of the each case"). It has been further suggested that you should move to add Medicaid as an indispensible party and continue to otherwise notify Medicaid that you will be asking the court to perform an Ahlborn calculation. Once the judge has been made fully aware that Medicaid is on notice, you should ask the Judge to set the reasonable value of the claim and determine the percentage the Medicaid lien represents toward the total value. Once this has been determined, Medicaid must accept only the portion of the settlement that represents the

proportional value of the lien towards the total settlement.

The Ahlborn decision is only binding on a State Medicaid Agency. However, there is similar language in the federal Medicare lien statute and the Ahlborn decision should be equally applicable to a Medicare lien.

In Alabama, all health care providers require a Medicaid waiver before they release any information. Thus, Medicaid should be aware of the claim. The Alabama Medicaid Agency will routinely allow a 15% reduction in its lien.