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.**
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> *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.**
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> *State Farm Mutual Automobile Insurance Company v. Faught*, 558 So.2d 921 (Ala. 1990):
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> **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.**
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> *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.
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> *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.**