Alabama Uninsured/Underinsured Motorist Law

With Multi-Jurisdictional Discussions

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1.
The Statute and Exclusions

§ 1-1. The Statute

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

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

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

> **(a) No automobile liability policy or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in subsection (c) of section 32-7-6, under provisions approved by the commissioner or insurance for the protection of persons**

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

insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided, that the named insured shall have the right to reject such coverage; and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy wherein the named insured had rejected the coverage in connection with the policy previously issued to him by the same insurer.

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

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

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

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

accident; and

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

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

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

§ 1-2. Exclusions in Derogation of the Statute

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

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

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

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[2] **MULTI-JURISDICTIONAL**:

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

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

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

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

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

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

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

§ 1-3. Examples Impermissible Exclusions

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

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

§ 1-4. Examples Permissible Exclusions

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

§ 1-5. Interpreting Exclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 1-6. Review and Best Practices

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

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

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

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

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

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

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

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

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

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

2.
Rejection

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§ 2-1. General

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

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

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

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

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

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

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

§ 2-2. Specific Applications

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

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

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

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

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

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

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

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

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

§ 2-3. Rejection and Electronic Applications

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

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

THE IMPACT OF E-SIGN LEGISLATION

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

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

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

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

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

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

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

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

E-SIGN itself provides:

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

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

THE IMPACT OF THE SUPREMACY CLAUSE

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

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

"(i) Insurance

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

15 U.S.C. § 7001(i).

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

CONCLUSION

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

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

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

§ 2-4. Electronic Transactions in Alabama

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

The act further provides,

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

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

§ 2-5. Review and Best Practices

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

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

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

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

NEW MEXICO MOTOR VEHICLE INSURANCE PLAN

UNINSURED MOTORISTS COVERAGE REJECTION FORM

DO NOT SIGN UNTIL YOU READ

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

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

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

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

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

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

DO NOT SIGN UNTIL YOU READ

Signed_____ Date _____
(Named Insured)

Attached to policy with an effective date of _____

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

AIP 1364 (7/98)

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

I. Uninsured/Underinsured Motorists Coverage

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

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

(Applicable item marked ☒)

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

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

(Enter if single limit of liability applies)

$ _____ each accident

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

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

$ _____ each accident Property Damage

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

_____ _____
Signature of Named Insured and Title Date

II. Personal Injury Protection Coverage

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

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

(Applicable item marked ☒)

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

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

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

_____ _____
Signature of Named Insured and Title Date

00-AU 3591 TX (10-01)

ALABAMA
UNINSURED/UNDERINSURED MOTORISTS COVERAGE
REJECTION / SELECTION FORM

Named Insured:_____

Policy Number:_____

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

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

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

_____
Insured's Signature

_____
Date

AGA UM 2550

3.
Proof of UM/Ownership, Maintenance, Use

§ 3-1. Proving Uninsured Status

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

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

§ 3-2. Reasonable Diligence

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

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

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

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

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

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

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[8] **MULTI-JURISDICTIONAL**:

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

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

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

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

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

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

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

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9

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

10

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

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

§ 3-3. Use of Mandatory Liability Insurance Information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 3-5. Additional Examples/Occupying Vehicle

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

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

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

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

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

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

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

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

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

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MULTI-JURISDICTIONAL:

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

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

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

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

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

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

insured vehicle were not "occupants."[15]

§ 3-6. Intentional Acts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 3-7. Review and Best Practices

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

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

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

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

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

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

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

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

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

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

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