7.
Legally Entitled to Recover

§ 7-1. General

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

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

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

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

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

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

the motorist should recover damages.

§ 7-2. General Defenses and Statute of Limitations

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

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

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

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

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

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

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

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[26] **MULTI-JURISIDICTIONAL**:

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

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

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

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

Widiss, *Uninsured and Underinsured Motorist Insurance* § 7.6

§ 7-3. Tort Immunities

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

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

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

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

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

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

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

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

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

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

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

§ 7-4. Worker's Compensation

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

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

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

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

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

§ 7-5. Excerpts of Alabama Jury Charges

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

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

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

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

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

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

[MORE OF THE CHARGE FOLLOWS]

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

[MORE OF THE CHARGE PRECEDES]

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

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

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

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

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

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

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

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

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

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

[MORE CHARGE FOLLOWS]

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

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

[MORE CHARGE PRECEDES]

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

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

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

§ 7-6. Punitive Damages

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

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

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MULTI-JURISDICTIONAL:

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

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

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

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

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

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

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

§ 7-7. Review and Best Practices

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

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

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

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

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

Widiss, *Uninsured and Underinsured Motorist Insurance* § 12.6

8.
Exhaustion, Off-Sets, and Liens

§ 8-1. General

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

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

The policy at issue in *Scott* stated:

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 8-2. Other Considerations

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

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

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

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

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

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

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

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

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

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

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

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

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

tortfeasor's insurer?

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

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

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

§ 8-3. Med Pay

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

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

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

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

§ 8-4. Hospital Liens

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

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

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

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

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

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

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

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

hospital care, treatment and maintenance."

§ 8-5. Medicare

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

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

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

§ 8-6. Medicaid

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

§ 8-7. Review and Best Practices

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

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

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

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

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