

## LEGAL DEVELOPMENTS AND SPECIAL ISSUES IN UM/UIM CASES

This Article addresses several specific issues that arise in UM/UIM cases.

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### ***A. Claims Involving Multiple Tortfeasors***

As a general matter, the UIM policy begins providing coverage after the limits of the underlying motor vehicle liability policy are exhausted. In most instances, the exposure of the UIM carrier is fairly clear. The UIM carrier is exposed to those damages of the insured between the aggregate of all insurance policies which cover the underinsured motorist (assuming that all such policies can be stacked), and the limit of liability under the particular UIM policy. (This analysis also excludes the presence of other UIM insurance, which is addressed elsewhere in this article.)

A complication is presented, however, where the insured has claims against two or more tortfeasors. In most such instances, the two tortfeasors will be two motorists. It is also possible, however, to have a tortfeasor who was not operating a motor vehicle. This could be, for example, a governmental entity which is responsible for a defect in the roadway, or a private owner of land for a defect or hazard in a parking lot.

The troubling issue that arises is whether the UIM carrier may deny coverage (i.e.

a duty to pay or even negotiate) until the limits of liability of both tortfeasors have been exhausted.

For example, if the insured submits a claim against the driver of the vehicle in which he is a passenger, and that driver's liability carrier exhausts its limits, and there is a second motorist who contributed to the accident, then it is not clear whether (a) the UIM carrier's exposure begins immediately for the first dollar of liability beyond the payment of the liability carrier which has exhausted its limits, or whether the insurer may disclaim a duty to pay until the liability policy of the second tortfeasor is exhausted, (b) whether the insured may demand arbitration, notwithstanding the failure of the second liability carrier to exhaust limits, and (c) whether the UIM carrier's exposure (whether viewed as limits or as a duty to pay) is offset by the limits of the second insurer.

This issue has been litigated more extensively in other states, with varying results. *General Acc. Ins. Co. v. Wheeler*, 221 Conn. 206, 213, 603 A.2d 385, 388 (1992) ("Likewise, other jurisdictions have held that under similar statutes, the insured was not required to exhaust the policies of all joint tortfeasors."); *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 439 -440 (Del. Super. 2005) ("The plain meaning of the provision is that UIM carriers are not obligated to pay their insureds until after the insureds exhaust all available liability insurance policies."; insured had received limits from one tort-feasor, and had also sued another tortfeasor "State Farm was not obligated to pay the Dunlaps [insureds] before the Dunlaps either received a policy limits settlement from DART [second tort-feasor] or obtained a judgment after trial.").

The FRA does not provide a clear answer to this issue. Some of the language of the UIM portions of the FRA suggest that the insured must exhaust all policies which may provide liability coverage, and other portions suggest that the focus is on all policies covering a particular vehicle (and not e.g. two vehicles). G.S. § 20-279.21(b)(4) ("an underinsured highway vehicle," [] means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle

involved in the accident and insured under the owner's policy"); *id.* ("Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted."); *id.* ("Underinsured motorist coverage is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy.").

In North Carolina, we have no case which squarely addresses this issue. One case addressed the UIM carrier's right to pursue a second underinsured motorist, and two cases involved the relationship between the UIM carrier and third-parties who are not motorists.

In *Johnson v. Hudson*, 122 N.C. App. 188, 468 S.E.2d 64 (1996), the insured-passenger sued a motorist, and his UIM carrier filed a third-party action for "contribution" against a second motorist who allegedly caused the automobile accident. The lower court dismissed the third-party claim. The Court of Appeals noted that N.C.G.S. § 20-279.21(b)(4) states that the UIM carrier "may participate in the suit as fully as if it were a party." The court wrote, "This statute allows the underinsured insurance carrier to assert all claims that could have been asserted by its insured, the plaintiff." *Id.* at 190, 468 S.E.2d at 66. The court then wrote, "Because Utica [UIM carrier] may assert all claims that the insured can under N.C.G.S. § 20-279.21(b)(4), we reverse the trial court's entry of summary judgment . . . ." *Id.* at 190, 468 S.E.2d at 66.

Although this case did not directly address whether the presence of a second tortfeasor affects the point at which the UIM carrier's liability is triggered, a fair implication of the opinion is that the UIM carrier's obligation to pay is triggered by the exhaustion of all policies covering one vehicle (and its driver), and the significance of other liability insurance is that the UIM carrier may pursue its insured's claim against the second tortfeasor. This opinion does not clearly address whether the UIM carrier's claim is one for contribution or subrogation. (The opinion states, "Utica is not a tort-feasor," but generally uses the term "contribution.") The opinion also does not address the

apportionment of any money recovered against the second motorist (i.e. whether that money is first paid to the insured to make him whole, or whether it is first paid to the UIM carrier, or whether it is pro-rated). (The FRA does provide for a pro-rata allocation of proceeds recovered against the underinsured motorist, where the insured is not made whole by insurance payments. G.S. § 20-279.21(b)(4) (“Upon the entry of judgment in a suit upon any such claim in which the underinsured motorist insurer and claimant are joined, payment upon the judgment, unless otherwise agreed to, shall be applied pro rata to the claimant's claim beyond payment by the insurer of the owner, operator or maintainer of the underinsured highway vehicle and the claim of the underinsured motorist insurer.”).

The other two cases did not arise in the context of two underinsured motorists; they each involved a second tortfeasor who was liable not by virtue of operating a motor vehicle, but rather for providing alcohol to a driver.

In *McCrary v. Byrd*, 148 N.C.App. 630, 559 S.E.2d 821 (2002), the insured was injured when she was struck by a motorist in the parking lot of Ham’s Restaurant in Chapel Hill. The driver’s liability carrier (Farm Bureau) paid \$100,000 to the insured. Ham’s then paid \$35,000 to the liability carrier to resolve a potential contribution or indemnification action by the driver against Ham’s (based on providing the driver with alcohol), resulting in a “net” payout by the liability carrier of only \$65,000. The insured then submitted a claim to her UIM carrier (Nationwide). “Nationwide argues there has been no exhaustion as Farm Bureau received reimbursement of \$35,000.00 from Ham's, thus, Farm Bureau's net payout was \$65,000.00. In determining exhaustion, the focus is not on Farm Bureau's net payout but whether Farm Bureau paid to Plaintiff the full dollar amount its policy set as the limits of liability.” *Id.* at 636, 559 S.E.2d at 826. The court therefore held that the “underinsured motorist coverage provisions had [] been triggered.”

The Court did not directly address the issue of whether the potential liability of Ham’s affected the UIM carrier’s duty to provide UIM coverage. Although the issue was not directly raised, a fair implication of the decision is, however, that the presence of a second potential tortfeasor (Ham’s), did not in any way reduce the duty of the UIM

carrier.

The second case is *Farm Bureau Ins. Co. of N.C., Inc. v. Blong*, 159 N.C. App. 365, 583 S.E.2d 307 (2003). In this case, the insured was injured in a motor vehicle accident caused by a drunk driver. The victim reached a settlement with the driver (consisting of policy limits) and from the bars which served alcohol to the intoxicated driver. The insured had previously reached a settlement with her UIM carrier, in which they agreed to subsequently resolve the issue of whether the UIM carrier received an offset for amounts paid by the bars. The court ruled in favor of the insurer, and held that the insurer was entitled to an offset for both the amount paid by the intoxicated motorist, and the amounts paid by the liability carriers for the bars. In its discussion of this issue, the court wrote, “Marvin's [drunk driver's] insurer paid out its entire liability coverage, thereby exhausting her coverage. According to the Act, this being the only applicable policy, UIM coverage was ‘deemed to apply.’” *Id.* at 370, 583 S.E.2d at 310.

It would therefore appear that the UIM carrier's obligation begins immediately upon the exhaustion of one tort-feasor's policy.

The UIM carrier probably is, however, probably subrogated to the insured's claim against other tortfeasors (motorists and otherwise). The Blong court dealt with this as follows:

In the event of payment to any person under the coverage required by this section and subject to the terms and conditions of coverage, the insurer making payment shall, to the extent thereof, be entitled to the proceeds of any settlement for judgment resulting from the exercise of any limits of recovery of that person against any person or organization legally responsible for the bodily injury for which the payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

N.C. Gen.Stat. § 20-279.21(b)(3) (2001) (emphasis added).

Defendants contend that this section of N.C. Gen.Stat. § 20-279.21(b)(3) only refers to the proceeds of the insured's action against the owner/operator of the motor vehicle involved in the collision, i.e., the suit against Marvin that was abandoned and which plaintiff waived its subrogation rights. Defendant argues that provision does not include all liability actions, including those maintained against persons wholly separate from the motor vehicle collision, i.e., the dram shops.

*Id.* at 371, 583 S.E.2d at 311. The court then noted that the UIM policy stated, “[a]ny amount otherwise payable for damages under this coverage shall be reduced by all sums paid because of the bodily injury or property damage by or on behalf of persons or organizations who may be legally responsible.’ This tracks the language in (b)(3).” *Id.* at 371-72, 583 S.E.2d at 311. The court concluded, “Plaintiff insurer, by the Act and the present policy, is subrogated to defendants' right to recover from any legally responsible party.” *Id.* at 372, 583 S.E.2d at 311. The court suggested that the UIM carrier can compel the insured to proceed against other tortfeasors, and that the UIM carrier can then recoup its payment, stating:

If there are parties that exist that may be made “legally responsible” through proper court channels, the UIM insurer may pursue them via their subrogation rights. . . . The fear of defendants that insureds will be kept hanging in limbo as they are forced to sue any and all possible persons or organizations for years before they could recover their UIM benefits are unfounded. Such actions on the part of UIM carriers would be in the realm of bad faith.

*Id.* at 373, 583 S.E.2d at 312.

Thus, the net effect of the *Blong* case is that the insured is not required to exhaust all other claims against other tortfeasors before triggering the UIM policy, but the UIM insurer (and not the insured) essentially receives the benefit of other sources of recovery.

The *Blong* case is therefore somewhat at odds with the *McCrary* case, in which the insured (and/or the liability carrier) receive the benefit of Ham’s contribution to the settlement, and the UIM carrier received no benefit from this contribution. (The UIM carrier actually presumably received a benefit of \$5,000, which Ham’s paid directly to the insured, because the insured should not make a double recovery in any event.) The only distinction between the two cases conceptually is that in *Blong*, the UIM carrier paid first and then the claim against other tort-feasors was settled; in *McCrary*, the insured settled the other claim first and then pursued his UIM claim.

In *McCrary*, the UIM insurer argued that the insured’s conduct (in settling with Ham’s) prejudiced the UIM insurer’s contribution claim against Ham’s, but the court rejected this, stating, “In this case, Nationwide, an underinsured motorist insurance

carrier, is not a tort-feasor and thus has no right of contribution against Ham's. Accordingly, the trial court erred in concluding Plaintiff's release of Ham's extinguished any claims Nationwide would have had for contribution against Ham's." *McCrary*, 148 N.C. App. at 638, 559 S.E.2d at 827. Therefore, the nature of the UIM insurer's claim is in subrogation, and not contribution. (In *McCrary*, the UIM carrier had expressly waived its subrogation claims against Ham's.)

When faced with multiple tortfeasors, the UIM carrier may want to object to any settlements with other tort-feasors, unless the UIM carrier believes that the offset it will receive (for this settlement amount) is outweighed by the value of the subrogation claim.

### ***B. Conflicts of Law***

If the UM/UIM policy was issued outside of North Carolina, then both parties should examine the law of the state where the policy was issued, to see if its law differs from that of North Carolina.

For example, in one case a family-member exclusion was held enforceable because the policy was issued in Tennessee, and North Carolina's connection to the case was merely casual, even though the automobile accident occurred in North Carolina. *Johns v. Automobile Club Ins. Co.*, 118 N.C. App. 424, 455 S.E.2d 466 (1995). The result would have been different under North Carolina law.

In another case, the insured's UIM claim was saved because the North Carolina law regarding the selection/rejection form applied. *Martin v. Continental Ins. Co.* 123 N.C. App. 650, 656, 474 S.E.2d 146, 149 (1996) (rejection form not in compliance with North Carolina Rate Bureau ineffective; insured "registered 1,479 vehicles in this state"; even though this was only 18 percent of the vehicles insured on the policy, the connection with North Carolina was sufficient to invoke North Carolina law).

The general rule is, of course, that the law of the state where the policy was issued governs the insurance dispute. *Sitzman v. Government Employees Ins. Co.*, 641 S.E.2d 838, 842 (N.C. App. 2007) ("We interpret this policy under Virginia law because the policy was issued in Virginia.").

The North Carolina statute states, however, that if the policy insures "lives,

property, or interests” in North Carolina, that North Carolina law applies. The interplay between the general rule and this more specific statute is not always clear. In one case, our Supreme Court held that North Carolina law governed, even though the policy was issued in California, based on the number of trucks the insured had in North Carolina. *Collins & Aikman v. Hartford Accident & Indemnity*, 335 N.C. 91, 95, 436 S.E.2d 243, 246 (1993).

It is possible that the tort action is governed by the law of another state, and the UIM policy is determined according to North Carolina law. For example, even though a motor vehicle accident occurred in South Carolina law, North Carolina’s rule which provides the UIM insurer with a right of subrogation (which rule is contrary to South Carolina law) was held to apply where the parties lived in North Carolina and the policy was issued in North Carolina. *Robinson v. Leach*, 133 N.C. App. 436, 437-438, 514 S.E.2d 567, 568 (1999) (“procedural rights are determined by the laws of North Carolina”; “We hold that South Carolina law does not prevent a North Carolina insurance company from being subrogated to the extent of its underinsured motorist payments to its North Carolina resident-insured.”).

### ***C. Stacking of Coverages and Excess Liability***

In recent years, there has been less litigation involving the stacking of UM or UIM policies. This is because the statute has been revised to attempt to address these issues, and our courts have already addressed the most commonly occurring stacking issues.

In both a UM and UIM claim, it is now fairly clear that the insured may not stack UM/UIM coverage for different vehicles insured under the same policy, but he may stack coverages on different policies. See G.S. § 20-279.21(b)(3) (“If a person who is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle is an insured under the uninsured motorist coverage of more than one policy, that person may combine the highest applicable uninsured motorist limit available under each policy to determine the total amount of uninsured motorist coverage available to that person.”). “[A]n insured party is only permitted to stack interpolicy underinsured motorist

coverages for non-fleet private passenger type vehicles. An insured may not stack underinsured motorist coverages pertaining to separate vehicles insured under a single policy of insurance.” *Iodice v. Jones*, 135 N.C. App. 740, 744, 522 S.E.2d 593, 595 (1999).

For an accident occurring before January 1, 2004, there are conflicting cases as to whether the insured may stack UM policies. *Hoover v. State Farm Mut. Ins. Co.*, 156 N.C. App. 418, 419-421, 576 S.E.2d 396, 397 - 398 (2003) (insured may not stack his and another UM policy); *Jones v. N.C. Ins. Guar. Ass'n*, 163 N.C. App. 105, 111-112, 592 S.E.2d 600, 604 (2004) (“The plain language of the statute prohibits intra- and inter-policy stacking of UM coverage only for the same owner or named insured.”).

#### ***D. Primary and Excess Policies***

When multiple UM or UIM policies are involved, our courts generally follow the rule that the insurance “follows the vehicle.”

The basic rule is that the insurance policy which is implicated because the plaintiff-insured is occupying a covered vehicle is deemed primary (and hence the insurance follows the vehicle), and a policy covering the plaintiff-insured regardless of the vehicle he is occupying (and instead because of his status as the named insured or a relative of a named insured) is secondary. Our courts sometimes use the term “Class I” insured for the named insured and his family members residing with him, and the courts use the term “Class II” for persons who are occupying a vehicle listed on the policy.

This general rule is the result of the standard “other insurance” language in most insurance policies. The typical language states that a given insurance policy is excess “with respect to a vehicle you do not own.” In the UM/UIM context, the courts therefore look to whether the vehicle in which the plaintiff/insured was traveling is owned by its named insured (“you”).

A Class I insured has UM/UIM coverage even if he or she is not occupying any vehicle. In such a case, it is not clear how to interpret the above policy language. A fairly recent case has, however, construed the language as referring to the vehicle which the insured was occupying at the time of the accident. In that particular case, the vehicle

was a bicycle, and because the insured owned his bicycle, his UIM policy was primary. *Sitzman v. Government Employees Ins. Co.*, 641 S.E.2d 838 (2007).

The Court of Appeals has held that where the plaintiff/insured is a “Class I” insured under both policies, that the policies share coverage on a *pro rata* basis. The court held that the policy language is repugnant, and that the UM/UIM coverage afforded to a Class I insured is not dependent on the vehicle he is occupying, and therefore that the “other clause” was unenforceable. *North Carolina Farm Bureau, Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 483 S.E.2d 452, *disc. review denied*, 347 N.C. 138, 492 S.E.2d 25 (1997).

Under a strict application of the policy language, however, the court could easily have concluded that the policies could be read harmoniously, because the named insured, the “you,” was different under each policy. In any event, this holding and the *pro rata* doctrine are now well-settled in North Carolina. *See Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 359 N.C. 421, 611 S.E.2d 832 (2005) (dismissing review as improvidently granted, after briefing and argument on this issue).

We typically assume that an insurer wants to be excess, but there is one instance in which an insurer prefers to be primary. If the insured has two or more UIM policies, then the UIM carriers may want to be primary to obtain the benefit of the underlying limits of liability. In some instances, the underlying liability insurance can effectively shield the UIM carrier from any further exposure, leaving the secondary UIM carrier entirely on the hook for the UIM liability. *Iodice v. Jones*, 133 N.C. App. 76, 514 S.E.2d 291 (1999) “Nationwide provides primary UIM coverage in this case. As such, Nationwide is entitled to set off the entire \$62,500.00 against any UIM amounts it owes Iodice, because ‘the primary provider of UIM coverage ... is entitled to the credit for the liability coverage.’”

#### **E. Can Failure to Pay Limits be Bad Faith?**

The law in North Carolina is somewhat varied as to whether the insured may assert a “bad faith” suit against his UM/UIM carrier based on either an inadequate offer, or based on other misconduct in the claims handling process.

Where the insured has already obtained a judgment, then he may have a bad faith claim for failure to pay the uninsured portion of the judgment. In one case, the insured obtained a judgment against the tort-feasor for \$85,000 and the insurer. There were two liability policies providing a total liability coverage of \$50,000, and a UIM policy with additional coverage. The UIM carrier refused to pay the interest on the judgment. (The tort verdict was appealed, and hence there were a couple of years of interest.) It was later determined by appellate decision that the UIM carrier owed the interest. The UIM carrier also withheld \$2,000 based on a claim that it could offset the med-pay payments (even after an appellate decision contrary to this position). The Court of Appeals held that the insured's claim for treble and punitive damages against the UIM insurer should have survived summary judgment. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 472 S.E.2d 358 (1996) (also noting that payment to Clerk of Court by UIM carrier and two liability carriers nearly two years after bad faith suit was filed did not negate Chapter 75 claim).

When the claim is that the insurer should have paid its UIM limits prior to a judgment, the law is somewhat varied. In *Braddy v. Nationwide Mut. Liability Ins. Co.*, 122 N.C. App. 402, 470 S.E.2d 820 (1996), the insured settled with the liability carrier for its limits of \$50,000 and filed suit against the underinsured motorist, and the UIM carrier appeared and defended the action. The plaintiff/insured also stated a claim for bad faith directly against the UM carrier, which was an "unnamed defendant." The opinion does not indicate the pre-suit negotiations, but does indicate that the insurer valued the claim at more than the underlying limits. The trial judge bifurcated the trial of compensatory damages from the trial of the bad faith action. The plaintiff recovered a verdict of \$70,000 (after receiving favorable findings on negligence and contributory negligence), and then appealed various issues. It is not clear from the opinion what happened to the bad faith claim, but it appears that the plaintiff/insured abandoned that claim at the trial level. In its discussion of the decision to bifurcate the trial, the Court of Appeals stated "Further, we note the resolution of Count IV [for UIM coverage], in fact,

obviated the need for a trial on Count V [“bad faith refusal to settle and punitive damages”].” *Id.* at 406, 470 S.E.2d at 822.

The opinion does not further elaborate on this issue, but this language could be interpreted to mean that the Court of Appeals was of the opinion that after the compensatory damages were set or determined by the jury, the insurer would presumably pay that amount and the insured does not have a bad faith action.

There are, however, some cases from the Court of Appeals which recognize an action for bad faith against the UM/UIM carrier.

In *Vazquez v. Allstate Ins. Co.*, 137 N.C. App. 741, 529 S.E.2d 480 (2000), the plaintiff (passenger) filed a wrongful death action against an uninsured driver following a head-on collision. He had two UM policies for \$25,000 each. He simultaneously asserted a bad faith claim against his UM carrier based on the failure to pay the claim and on conduct during the claims-handling process. The trial court first tried the liability claim, which resulted in a verdict of \$104,000. The UM carrier then offered its limits, and over its objection the trial court proceeded to the Chapter 75 claim. The jury found that “the defendant had refused to settle the plaintiff’s claim in bad faith. Furthermore, the jury determined that the defendant had failed to adjust the plaintiff’s loss fairly, follow its own standards, act reasonably in communications, conduct a reasonable investigation and to effect a fair settlement in good faith.” The trial court required the insured to elect between \$50,000 plus costs (i.e. policy limits) or \$29,160 for bad faith, or \$29,160 to be trebled with attorneys fees. The insured elected treble damages and attorneys fees. On appeal, the court held that the UM carrier’s offer to pay the verdict (following the verdict) did not vitiate the Chapter 75 claim, stating:

Had we accepted the defendant's argument, this punitive purpose would have suffered tremendously. The defendant's contention would encourage misconduct by insurance companies, rather than discourage it. Under the defendant's assertion, insurance companies would have no incentive to settle legitimate claims before a jury verdict. Rather, the defendant could simply take its chances with a jury and then avoid treble damages by stipulating to contractual liability should the jury find for the plaintiff. This method would eliminate the brunt of any damages that the plaintiff could recover under Chapter 75.

*Id.* at 745, 529 S.E.2d at 482.

In an unpublished opinion, the insured settled with the liability carrier for \$25,000 and submitted a UIM claim. The UIM carrier learned from the liability carrier that the medical expenses were \$4,000, and that the insured was permanently impaired. (Later at trial the insured offered evidence that his economic loss was roughly between \$100,000 and \$1,000,000.) The liability carrier had earlier felt that \$15,000 was a fair offer, and opined that the claim would settle within the \$25,000 limits. The UIM insurer offered only \$2,000 and the insured sued. The UIM carrier raised a liability issue at trial, but the insured recovered a \$75,000 verdict. The insured sued for his UIM carrier for bad faith in refusing to tender the UIM limits (which were \$75,000, but had previously been thought to be \$25,000). The court held that the UIM carrier was entitled to summary judgment, in part because it reasonably relied on the evaluation by the liability carrier. *Rivenbark v. N.C. Farm Bureau*, 2003 WL 138930 (Jan. 21, 2003) which also rejected arguments that insurer failed to explain UIM limit; and failed to notify him of potential witness on liability issue, whom insured knew to lack credibility.

Some cases may involve alleged bad faith consisting not of valuing the UM/UIM claim, but rather in the carrier taking an adverse position on coverage. In one case, the insured received \$50,000 from the liability carrier, and submitted a UIM claim. He had one UIM policy with \$100,000 in limits, and another policy for \$100,000 or \$200,000 depending on whether stacking was allowed. He provided the UIM carrier with \$98,000 in medical bills, and evidence that he had a severe and extensive permanent, disabling injury. He provided the UIM insurer with documentation that the claim was worth more than \$300,000, and two months later the UIM carrier paid \$150,000 in UIM coverage and the parties agreed to litigate the issue of whether the insured had another \$100,000 in UIM coverage. The insured alleged that the UIM carrier had a policy of denying stacking regardless of policy language. The Court of Appeals held that the insured's claim for bad faith for a refusal to pay was properly dismissed on a Rule 12(b)(6) motion. *Miller v. Nationwide Mut. Ins. Co.*, 112 N.C.App. 295, 435 S.E.2d 537 (1993).

Reading all of these cases together, it would appear that the UM/UIM carrier does

have a potential bad faith action against it for “low-balling” its insured. Such a claim is more viable where it is accompanied by other misconduct in the claims handling process. There is some authority that the insured is not required to comply with his duty to cooperate after he and his UIM carrier become adversarial, *McCrary ex rel. McCrary v. Byrd*, 148 N.C. App. 630, 638, 559 S.E.2d 821, 826 (2002) where the insured did not violate duty to attend examination under oath, in part because “Nationwide appeared to be assuming an adversarial role.” Yet the UIM insurer may still have a duty of “good faith” toward its insured.

North Carolina does not have any cases addressing whether the UM/UIM carrier’s trial conduct may constitute bad faith. Other jurisdictions have struggled with whether the UM carrier’s attorney’s conduct at trial can constitute bad faith. *Parsons v. Allstate Ins.*, 165 P.3d 908 (Colo. App. 2006) (attorney’s litigation conduct may be admitted against insurer if risk of unfair prejudice, confusion, delay are substantially outweighed by probative value; noting also that allowing such evidence deters zealous advocacy; affirming exclusion of evidence that counsel asserted groundless denials and defenses, refused to participate in discovery until a case management order was entered, would not make himself available for hearing, “forced an unnecessary jury trial to be held”).

***F. Issues that Arise relating to arbitration of UM/UIM claims.***

The typical UM/UIM policy in North Carolina states that the insured may demand arbitration. It is noteworthy that, unlike most agreements with an arbitration clause, the insurer cannot demand arbitration, but only the insured has the right to do so. The typical policy states “If we and an insured do not agree: 1. Whether that person is legally entitled to recover damages under this Part; or 2. As to the amount of the damages; the insured may make a written demand for arbitration.” North Carolina does not have many cases addressing the scope and application of this arbitration provision.

***1. The timing and form of demand***

The policy does not indicate the manner in which arbitration must be demanded. Typically, the insured’s attorney will send a letter to the insurer or its counsel demanding arbitration. The Arbitration Act states that the demand must be made by certified mail,

unless otherwise agreed. N.C.G.S.A. § 1-569.9(a) “A person initiates an arbitration proceeding by giving notice in a record to the other parties to the agreement to arbitrate in the agreed manner between the parties or, in the absence of agreement, by certified or registered mail, return receipt requested, and obtained, or by service as authorized for the commencement of a civil action. The notice shall describe the nature of the controversy and the remedy sought.” Most UM/UIM policies provide that the demand must simply be made in writing.

In a UM policy, it appears that the insured may demand arbitration at any time, unless that right has been waived, as discussed later. In a UIM policy, however, the insured cannot demand arbitration until the underlying liability policy is exhausted, and the claimant and carrier are unable to agree on the claimant’s entitlement or on the amount of damages. *Register v. White*, 160 N.C. App. 657, 662, 587 S.E.2d 95, 98 (2003) “We hold a UIM insured's right to demand arbitration arises when the liability insurer has offered a settlement exhausting its coverage, and only once this right has arisen may the time limitation for demanding arbitration commence.”; *See also Hackett v. Bonta*, 113 N.C. App. 89, 97, 437 S.E.2d 687, 692 (1993) “Accordingly, we conclude that the arbitration rights under plaintiff’s UIM policy were not triggered prior to State Farm's 17 February 1992 offer.”

There is secondary authority that the act of UIM carrier which tenders the limits of the liability policy serves to prevent the exhaustion of the liability policy, such that the UIM coverage is not triggered and the insured may not demand arbitration. Our appellate courts have not decided this issue.

The insured is not required to file a lawsuit prior to demanding arbitration. For the reasons stated below, however, the insured may want to initiate a lawsuit prior to demanding arbitration.

The UM/UIM claim is theoretically predicated upon a judgment against an uninsured or underinsured motorist. For that reason, the insured generally wants to file suit against the tortfeasor within the statute of limitations. It is not clear whether a demand for arbitration, made within three years of the accident, is sufficient to preserve

the UM/UIM claim, where the statute of limitations subsequently expires against the tortfeasor. Neither the insurance policy, nor the UM/UIM statute, specifically addresses this issue.

There is little authority on the issue of the time constraints imposed on the insured for demanding arbitration. It is not clear, for example, whether the insured must demand arbitration within the statute of limitations (which is typically three years in North Carolina). Even where the policy states that the demand for arbitration must be made within a given time period, the provision will not be enforced if it deprives the insured of his right to demand arbitration. *See Register v. White*, 160 N.C. App. 657, 661, 587 S.E.2d 95, 98 (2003) (where arbitration provision provides that plaintiff must demand arbitration of a UIM claim within the time limit for bodily injury claims (i.e. 3 years), but liability carrier does not tender within that time period, policy is ambiguous and insured may thereafter demand arbitration).

If the insurer denies coverage, then ideally it should first litigate the coverage issue to a conclusion, prior to engaging in arbitration. One case held that the insurer which participated in arbitration waived any right to contest UM/UIM coverage. In *Miller v. ROCA & Son, Inc.*, 167 N.C. App. 91, 93, 604 S.E.2d 318, 319 (2004), the parties “agreed that the case should be arbitrated and that an order staying this matter be entered until the completion of the arbitration.” Following the arbitration award, the insurer argued that the award should not have been confirmed because the tortfeasor’s vehicle was not uninsured. The holding: “We hold that Insurer has waived any right to object to the arbitration award based on a lack of coverage.”; “arbitration will only occur if there is ‘an uninsured motor vehicle.’”

In one case, the plaintiff-insured filed a tort action, moved for summary judgment on the UIM claim, prevailed, and demanded arbitration. The appellate court reversed the finding of coverage. *Smith v. Harris*, 640 S.E.2d 436, 437-38 (2007). Therefore, where the coverage issue is decided by the court prior to arbitration, the insurer has preserved the coverage issue. *Accord Darroch v. Lea*, 150 N.C. App. 156, 162, 563 S.E.2d 219, 223 (2002). There the insurer lost summary judgment argument on coverage, was

ordered to arbitrate claim, and argued “that a substantial right is affected because of the possibility that plaintiff could receive a binding arbitration award before the issue of coverage is determined.” The Court dismissed the appeal, presumably meaning that coverage issue can be raised later.

In other instances, it is not clear whether the arbitration should proceed first, or whether a given issue must be decided first by a court. If, for example, the UM/UIM carrier contends that the UIM claim is barred by the statute of limitations (and assuming that this issue is not subject to arbitration), then there is no clear authority on which proceeding should occur first; i.e., the motion in court for a determination on the statute of limitations, or the arbitration hearing.

## **2. Waiver of Arbitration**

Where the insured engages in extensive written discovery, pursuant to the Rules of Civil Procedure, prior to demanding arbitration, he may be found to have waived his right to arbitration. *Capps v. Virrey*, 645 S.E.2d 825 (2007) (insured waived arbitration of UM claim by serving interrogatories, a request for admissions, and three requests for production of documents, which exceeded the scope allowed by the Uniform Arbitration Act). *Compare Sullivan v. Bright*, 129 N.C. App. 84, 497 S.E.2d 118 (1998) (where insured deposed two witnesses and then sought to compel arbitration against UIM carrier, he did not waive arbitration); *McCrary v. Byrd*, 148 N.C. App. 630, 559 S.E.2d 821 (2002) (insured did not waive arbitration where UIM carrier incurred \$8,000 in legal expenses prior to demand for arbitration, and delay in demand did not cause loss of evidence).

## **3. Issues Subject to Arbitration**

There is sometimes a dispute as to which issues are subject to arbitration. The cases hold, of course, that the court must look to the scope of the parties’ written arbitration agreement. Further, many cases recognize a public policy preference that disputes be submitted to arbitration, and therefore any ambiguity in the scope of those matters to be submitted to arbitration is probably going to be resolved in favor of the party seeking arbitration.

North Carolina does not have much appellate authority addressing the scope of issues to be submitted to the UIM arbitration panel. At a minimum, the arbitration panel should decide the liability of the tortfeasor and damages. Liability encompasses issues such as negligence, contributory negligence, last clear chance, and any other issues or defenses. There is no clear authority on whether, for example, the arbitrators should rule upon a statute of limitations defense available to the tortfeasor. Because this defense would negate “liability,” the courts would presumably hold that this issue should be submitted to arbitration. All of the damages issues should also be submitted to the arbitrators, such as lost earnings and mitigation of damages.

The arbitration generally does not include coverage issues. North Carolina does not have any law on this point, but most jurisdictions have so held. *See, e.g., National Union Fire Ins. Co. v. Reynolds*, 77 Hawai'i 490, 494, 889 P.2d 67, 71 (App. 1995) (“we hold that under the standard arbitration clause in the underinsured motorist provision, arbitration on the question of whether the insured was ‘legally entitled to recover damages’ is limited to a determination of the offending motorist's fault and his or her resulting liability to the person covered under the policy, and does not include the ascertainment of whether underinsured coverage applies under any particular circumstance.” In that case, the policy stated, “If we and a covered person do not agree: 1. Whether that person is legally entitled to recover damages under this [underinsured motorist] endorsement; or 2. as to the amount of damages; either party may make a written demand for arbitration.” It was noted that this is majority rule.

#### **4. Recovery of “expenses” and attorneys fees in arbitration.**

The current Arbitration Act states:

- (b) An arbitrator may award reasonable expenses of arbitration if an award of expenses is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding. An arbitrator may award reasonable attorneys' fees if:
  - (1) The arbitration agreement provides for an award of attorneys' fees; and
  - (2) An award of attorneys' fees is authorized by law in a civil action involving the same claim.

N.C.G.S.A. § 1-569.21.

The Act therefore expressly allows for expenses and attorneys fees if those would be recoverable in court. The term “expenses” does not appear to include interest, but rather out-of-pocket expenses of arbitration, such as expert fees.

Defendant next claims that the trial court erred in confirming the amended award, which granted plaintiff prejudgment interest. Defendant contends that neither the arbitration agreement nor North Carolina law permit an arbitration panel to award prejudgment interest in this case. We disagree.

*Sprake v. Leche* 2008 WL 132050, \*2 (N.C.App.) (N.C.App.,2008) the provision granting the arbitration panel authority to address issues of “compensatory damages” was ambiguous as to whether prejudgment interest was available. As such, we resolve our doubt “against the insurance company and in favor of the policyholder

Whether employer was entitled to award of interest in dispute with former employee was a claim submitted to arbitration by agreement between employer and former employee, which agreement stated that the parties submitted “all claims” to arbitration, such that arbitration decision granting interest to employer did not exceed the authority expressly conferred on arbitrator, even though an award of interest was not expressly pled by employer or expressly authorized by the arbitration agreement; the submission of “all claims” incorporated all remedies requested in the filed pleadings, and employer's pleadings included a prayer for discretionary relief, and the agreement was governed by statutory schemes that permitted such remedy.

*Faison & Gillespie v. Lorant* 654 S.E.2d 47 (N.C.App.,2007)

##### ***5. Overturning Arbitration Award by Court***

A UM/UIM arbitration, pursuant to the standard policy provision, is governed by the North Carolina arbitration rules. Those rules state:

(a) Upon motion to the court by a party to an arbitration proceeding, the court shall vacate an award made in the arbitration proceeding if:

- (1) The award was procured by corruption, fraud, or other undue means;
- (2) There was:
  - a. Evident partiality by an arbitrator appointed as a neutral arbitrator;
  - b. Corruption by an arbitrator; or
  - c. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
- (3) An arbitrator refused to postpone the hearing . . . .

N.C.G.S.A. § 1-569.23.

The courts are reluctant to overturn an arbitration award.

#### **6. *Modifying Arbitration Award (including interest)***

It is generally likewise difficult to modify the arbitration award. The statute states that the arbitration award cannot be overturned or modified except in the following instances if:

- (1) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
- (2) The arbitrator has made an award on a claim not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the claims submitted; or
- (3) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

N.C.G.S.A. § 1-569.24.

This statute has been addressed in the context of an insured who seeks to have interest added to the award. Most cases have held that the insured may not recover costs of court following an arbitration award, because that would constitute a modification of the award. In *Eisinger v. Robinson*, 164 N.C. App. 572, 576, 596 S.E.2d 831, 833 (2004), the Court rejected “plaintiff’s argument that the arbitrator’s award should be treated like a jury verdict” (citation omitted). “An award of costs does not fit within the parameters of the trial court’s authority to modify an award. Accordingly, the trial court did not err in denying plaintiff’s motion for costs and this assignment of error is without

merit.” In *Sloop v. Tesfazghi*, 2006 WL 695677, (N.C. App. 2006), the Plaintiff “nonetheless argues that, because the amended arbitration award acknowledges plaintiff’s request for prejudgment interest and explicitly states that the award does not include prejudgment interest, the amended award thereby ‘provides for the addition of prejudgment interest.’” The court rejected this argument. *But see Walker v. Penn Nat. Sec. Ins. Co.*, 168 N.C. App. 555, 561, 608 S.E.2d 107, 111 (2005) (following arbitration award the insured went to court where the insurer insisted on an offset for workers compensation and liability payments).

The apt rule may be that the court may not modify the award as to an element of damage (or other calculation) which could and should have been done by the arbitrators (e.g. interest or attorneys fees), but that the court can modify the award to address an issue which was not subject to arbitration (e.g. offset for workers compensation payment).

In one case, the arbitration award specifically stated, “The determination whether prejudgment interest should be paid by defendant and if so in what amount, is expressly left to counsel for the parties and a Superior Court Judge in Richmond County to decide.” The appellate court held that the trial court was authorized to award interest. *Lovin v. Byrd*, 178 N.C. App. 381, 382, 631 S.E.2d 58, 59 (2006).

The plaintiff/insured therefore should either request that the arbitration award expressly reserve costs for the court, or seek to include costs in the arbitration award.

The parties are not required to have an agreement specifying the parameters and rules for the arbitration proceeding, but this is often a good idea. Such an agreement may expressly address those issues which are to be decided by the arbitrators, and may preserve (or attempt to preserve) those issues to be resolved later by a court.

#### **7. Filing Award as Judgment**

Following the rendering of an award, it is not entirely clear how the award ultimately becomes a judgment against the UM/UIM insurer. Arguably, the UM/UIM carrier has a duty to pay the amount of the arbitration award (less any credits or offsets), without requiring the insured to obtain a judgment against the UM/UIM carrier. Stated

otherwise, once the damages are determined by the arbitrators, as permitted by the insurance policy, the damages are fixed, and the insurer should probably pay the award regardless of whether a judgment is entered, unless it has a coverage defense (which has been preserved).

The Arbitration Act allows the insured to file the arbitration award as a judgment. The application of the Arbitration Act to a UM/UIM lawsuit against the tort-feasor is somewhat problematic because the UM/UIM carrier is not a typical defendant.

Pursuant to the FRA, a UM carrier is a “party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name.” G.S. 20-279.21(b)(3). A UIM carrier “shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party.” G.S. § 20-279.21(b)(4). Therefore, a UM carrier is technically a party to the tort action, and arguably the tort action can be used to obtain a judgment against the UM carrier as a party. Strictly speaking, however, a UIM carrier is not a party, and thus arguably the tort action is not a proper vehicle for obtaining a judgment against the UIM carrier.

The UM/UIM award is filed against the defendant/underinsured (or uninsured) motorist, or against the UM/UIM carrier in the same action, or whether instead the insured must file a separate action directly against the UM/UIM carrier only. The precise procedural vehicle used by the insured to file the award (or perhaps used by the carrier to challenge the award) may affect the rights of the parties to modify the award or obtain any offsets.

The arbitration award may also be entered as a judgment against the defendant/tortfeasor (uninsured or underinsured motorist). Although the tortfeasor was not a party to the arbitration agreement, he may nevertheless be bound by the arbitration award. *Burger v. Doe*, 143 N.C. App. 328, 546 S.E.2d 141 (2001) (where arbitrator ruled in favor of motorist against UM insurer and awarded \$19,000, and UM carrier then tried action against uninsured motorist and jury awarded \$7,000, award of \$19,000 was

binding against tort-feasor if “arbitration settlement” was reasonable and in good faith, and lower court erred in submitting independent damages issue to jury; note that in this case “The plaintiffs gave the defendants timely notice of the arbitration hearing. Defendants' counsel attended but did not participate in the arbitration proceeding.”).

#### 8. *Offsets*

If either party seeks to have the court adopt the arbitration award *in toto*, or to adopt portions of the award or to modify the award, then it is commonly understood that the UM/UIM carrier still has the right to take certain offsets or credits or reductions in its liability, pursuant to the insurance policy and the FRA.

Even though the court may not lightly modify an arbitration award, many cases recognize that the insurer may nevertheless receive these offsets or credits (such as med-pay, or the limit of the liability policy). These cases have not expressly addressed the potential conflict between the insurer’s right to certain offsets, and the general rule that an arbitration award should not be modified. The cases may be reconciled on the theory that the offsets are a matter of coverage (and not subject to arbitration), but that interest is a matter of damages and is to be awarded (if at all) by the arbitrators.

The cases clearly hold, for example, that the insurer may receive a reduction from the arbitration award in the amount of any payment made under the “med pay” coverage. *Espino v. Allstate Indem. Co.*, 159 N.C. App. 686, 687-688, 583 S.E.2d 376, 377 (2003) (where arbitrators awarded \$9,000, and UM carrier had already paid \$1,000, and insurer paid balance of \$8,000, and language in UM policy stated that coverage was in excess of and shall not duplicate med-pay payments, court holds that UM carrier is entitled to offset).

The cases also recognize that the UIM carrier is entitled to an offset for the amount of liability coverage payments. *Walker v. Penn Nat. Sec. Ins. Co.*, 168 N.C. App. 555, 561, 608 S.E.2d 107, 111 (2005) (following arbitration award parties went to court for guidance on various offsets; court found that UIM insurer was entitled to various offsets, stating “From this amount [plaintiff’s total loss as determined in arbitration] we subtract the amount of workers' compensation benefits, . . . and the amount plaintiff

received from the liability carrier (\$30,000).”; “Defendant first assigns error to the trial court's failure to credit defendant with the amount plaintiff received from the liability carrier. Defendant argues that by failing to credit defendant with this amount, plaintiff has received a windfall and a net recovery in excess of his actual damages. We agree.”).

The UIM carrier also effectively receives an offset for the workers compensation payments (which compensate the insured for his loss), but the workers compensation carrier is still liable for the workers compensation lien. Our courts have not addressed many issues which can arise with this offset. For example, can the UIM carrier seek to have the workers compensation lien reduced by the Superior Court? If so, then how is this accomplished following an arbitration award. It would appear that the UIM carrier can probably take the arbitration award to court and ask that its obligations be determined following the award, and in that process can also ask that the lien be reduced.

Also, how would the UIM carrier establish the negligence of the employer, in order to defeat the workers compensation lien? The employer's negligence is not subject to the arbitration proceeding. The statute states:

If the third party defending such proceeding, by answer duly served on the employer, sufficiently alleges that actionable negligence of the employer joined and concurred with the negligence of the third party in producing the injury or death, then an issue shall be submitted to the jury in such case as to whether actionable negligence of employer joined and concurred with the negligence of the third party in producing the injury or death. The employer shall have the right to appear, to be represented, to introduce evidence, to cross-examine adverse witnesses, and to argue to the jury as to this issue as fully as though he were a party although not named or joined as a party to the proceeding. Such issue shall be the last of the issues submitted to the jury.

N.C.G.S.A. § 97-10.2(e).

### **9. *Discovery Rights***

Discovery is generally very limited in arbitration proceedings. The Rules of Civil Procedure do not apply, and the parties therefore do not have a right to issue interrogatories or a request for documents or to take depositions. *Capps v. Virrey*, 645 S.E.2d 825, 829 (2007) (“The procedural and evidentiary rules governing judicial

proceedings do not apply to arbitrations absent plain and unambiguous language in the arbitration agreement that those rules apply.”).

The rules do provide, however, that the arbitrators may, in their discretion, order various forms of discovery. The rule states:

(a) An arbitrator may issue a subpoena for the attendance of a witness and for the production of records and other evidence at any hearing and may administer oaths. A subpoena shall be served in the manner for service of subpoenas in a civil action and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner for enforcement of subpoenas in a civil action.

(b) In order to make the proceedings fair, expeditious, and cost-effective, upon request of a party to or a witness in an arbitration proceeding, an arbitrator may permit a deposition of any witness to be taken for use as evidence at the hearing, including a witness who cannot be subpoenaed for or is unable to attend a hearing. The arbitrator shall determine the conditions under which the deposition is taken.

(c) An arbitrator may permit any discovery the arbitrator decides is appropriate under the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost-effective.

(d) If an arbitrator permits discovery under subsection (c) of this section, the arbitrator may order a party to the arbitration proceeding to comply with the arbitrator's discovery-related orders, issue subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and take action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this State.

(e) An arbitrator may issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this State.

(f) All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding as if the controversy were the subject of a civil action in this State.

(g) The court may enforce a subpoena or discovery-related order for the attendance of a witness within this State and for the protection of records and

other evidence issued by an arbitrator in connection with an arbitration proceeding in another state upon conditions determined by the court so as to make the arbitration proceeding fair, expeditious, and cost-effective. A subpoena or discovery-related order issued by an arbitrator in another state shall be served in the manner provided by law for service of subpoenas in a civil action in this State and, upon motion to the court by a party to the arbitration proceeding or the arbitrator, enforced in the manner provided by law for enforcement of subpoenas in a civil action in this State.

(h) An arbitrator shall not have the authority to hold a party in contempt of any order the arbitrator makes under this section. A court may hold parties in contempt for failure to obey an arbitrator's order, or an order made by the court, pursuant to this section, among other sanctions imposed by the arbitrator or the court.

G.S. § 1-569.17.

The UM/UIM carrier may effectively have some limited “discovery rights” by virtue of some of its policy provisions. The standard policy requires the insured to generally “cooperate” with the insurer in its investigation of the claim. These provisions are also binding on additional insureds, and the failure to comply with them can result in a loss of coverage. *Lockwood v. Porter*, 98 N.C. App. 410, 390 S.E.2d 742 (1990) (additional insured who submitted UM claim lost coverage by failing to attend medical examination).

The insured is also required to provide the insurer with a written medical release, to obtain the insured’s medical records. Finally, some policies may require that the insured submit to an “examination under oath,” which is similar to (but not the same as) a deposition under the Rules of Civil Procedure.

In North Carolina, it is not clear the extent to which the UM/UIM carrier may enforce these rights in an arbitration proceeding. One case suggests that if the insurer is not trying to settle the case, that it loses its right to an examination under oath. *McCrary ex rel. McCrary v. Byrd*, 148 N.C. App. 630, 638, 559 S.E.2d 821, 826 (2002) (where insured “refused to attend the scheduled deposition,” and “the provision in Nationwide's contract required that an insured submit to examinations under oath as cooperation to the defense, settlement, or investigation of a claim,” insured did not breach contract because

“[a]t the time Nationwide sought to depose Plaintiff, there was no indication Nationwide wished to settle with Plaintiff, rather, Nationwide appeared to be assuming an adversarial role.”). Cases from other jurisdictions similarly hold that after the parties become “adversarial,” the insured’s duty to cooperate ceases.

Another case, however, states that the insured is required to comply with a provision requiring an examination under oath. *Capps v. Virrey*, 645 S.E.2d 825, 829 (N.C. App. 2007) (“The deposition was of Plaintiff and was noticed by Nationwide. Under the terms of Plaintiff’s insurance policy, he was required to ‘[s]ubmit as often as [Nationwide] reasonably require[d] to examinations under oath and subscribe the same.’ Had Plaintiff not participated in his deposition, Nationwide could have considered Plaintiff in breach of the contract and not provided coverage for Plaintiff’s injuries. Therefore, Plaintiff was required to participate in this deposition.”).

The insured is in a risky position if he refuses to comply with the insurer’s requests that he comply with these policy provisions. The refusal of the insured to comply with a policy provision may result in a loss of his coverage. In one case, for example, the insured failed to appear for an appointment with a doctor hired by the UM/UIM carrier. The Court of Appeals affirmed a dismissal of the insured’s UM/UIM claim, on the basis that he failed to cooperate. *Lockwood v. Porter*, 98 N.C.App. 410, 411, 390 S.E.2d 742, 743 (1990) (“Aetna’s right to have plaintiff examined by its physician is a material part of the insurance contract, and plaintiff’s unjustified refusal to be so examined violated the cooperation clause of the policy and bars his action as a matter of law.”). (Of course, if our courts ultimately clearly hold that an insurer does not have these types of rights after the parties have become adversarial, then the insured may be able to avoid such provisions and possibly even argue that the insurer’s demand that the insured comply with these policy provisions constitutes “bad faith.”).

#### **10. Procedures in Arbitration**

In North Carolina, the UM/UIM arbitration is governed by the Revised Uniform Arbitration Act (except to the extent modified by the parties). In general, the insurer and the insured will each select one arbitrator. Those two arbitrators will then select a third,

or “neutral,” arbitrator. The neutral arbitrator may not have a substantial relationship with a party. N.C.G.S.A. § 1-569.11(b) (“An individual who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party shall not serve as an arbitrator required by an agreement to be neutral.”). The arbitrators then rule by majority vote. G.S. § 1-569.13 (“the powers of an arbitrator shall be exercised by a majority of the arbitrators, but all of them shall conduct the hearing”).

At the arbitration proceeding, the Rules of Evidence are generally relaxed. N.C.G.S.A. § 1-569.15(f) (“The rules of evidence shall not apply in arbitration proceedings, except as to matters of privilege or immunities.”). Hearsay is therefore more likely to be accepted into evidence, and medical and other records may not require a formal authentication. The parties may still object to evidence which is clearly irrelevant or inadmissible may be excluded, as well as evidence without a proper foundation, especially if it is otherwise suspect. The proceeding may be recorded if the parties agree. As noted earlier, however, there is no true “appeal” from the arbitration award. A party cannot, therefore, challenge the introduction of evidence, or the exclusion of evidence, in court.

The arbitration hearing generally follows the typical course of a jury trial. There may be opening statements, followed by the plaintiff’s presentation of evidence (with cross-examination), and the defendant’s presentation of evidence, followed by rebuttal evidence and closing arguments.

A decision by two arbitrators is binding. The dissenting arbitrator may prepare and sign a written dissent, but this appears to be of no great legal import.

The arbitrators are generally not informed of the insurance coverage available, nor of any special agreements which do not affect the actual arbitration proceeding, such as a “high-low” arrangement.

As noted earlier, following an arbitration award, either party may file the award with the court and obtain a judgment.