

I. UNDERSTAND WHAT THE INSURER IS - AND ISN'T - RESPONSIBLE FOR

A. Examine the Details of Offering/Purchasing Coverage, Waiving Coverage and Selecting Limits

In North Carolina, the selection of UM/UIM coverage and limits typically occurs in a communication between the insured and the insurance agent. Probably the most common opportunity to select UM/UIM coverage and limits is where the insured (i.e. “named insured” or “policyholder”) purchases liability insurance, which is of course required to operate a motor vehicle in this state. The insured may have little or no specific discussion with the agent about UM/UIM coverage.

Pursuant to the current Financial Responsibility Act, N.C.G.S. § 20-279.21(b)(3) and (b)(4).”), the insured can select any level of UM and/or UM/UIM coverage which is offered by the insurer from the FRA minimum limits to \$1,000,000 or may reject UM/UIM coverage.

The statute has recently been amended effective January 1, 2009, regarding the selection and rejection of UM/UIM coverage. These changes overturn Williams v. Nationwide Mut. Ins. Co., 174 N.C. App. 601, 603, 621 S.E.2d 644 (2005). The specific statutory changes are discussed later. A copy of the new statute (showing the amendments) is attached to this manuscript. Cases arising under pre-2009 policies will still be handled under the current law. Much of the current statutory and case law will continue in effect.

These mandatory UM/UIM requirements apply only to a “motor vehicle policy” of liability insurance which is “certified as provided in G.S. 20-279.19 or 20-279.20 as

proof of financial responsibility.” It has been held, therefore, that an “umbrella” policy is not required to provide UM/UIM coverage, even though such a policy may provide automobile liability coverage. Progressive American Ins. Co. v. Vasquez, 350 N.C. 386, 394-395, 515 S.E.2d 8, 13 (1999) (“We do not find that N.C.G.S. § 20-279.21, Isenhour, or public policy requires that an excess liability policy offer separate UM/UIM coverage in addition to what is provided by the underlying policy where there are two separate policies: an underlying, primary policy required by law under the Financial Responsibility Act and an excess liability policy voluntarily purchased by the insured to provide further protection from liability for the insured.”; “the excess liability policy in question does not meet that requirement [certified as proof of financial responsibility] and, therefore, is not required to offer the insured UM and UIM coverage pursuant to N.C.G.S. § 20-279.21(b)(3) and (b)(4).”).

The policy language and the FRA will of course determine the policy limits. Several cases address the manner in which to construe the limits in the policy. In a fairly recent case, the insurer issued a policy and a “multiple record policy” to the insured, purportedly because the insurer could not put all of the vehicles on one policy due to its computer system. The insured argued that he should have two limits of UIM coverage, based on both policies, but the UIM insurer successfully argued that the policies were really one policy. Allstate Ins. Co. v. Stilwell, 639 S.E.2d 107, 109 (N.C. App. 2007) (noting also that UIM insurer sent explanatory letters and billed under one number with the same renewal periods).

In one case, the insured paid a premium for UIM limits of \$25,000. The insured was injured in an accident and received \$25,000 from the liability carrier. He then

submitted a UIM claim, and the UIM carrier successfully argued that there was no UIM provided. Davidson v. United States Fidelity & Guaranty Co., 78 N.C. App. 140, 143, 336 S.E.2d 709, 711 (1985), aff'd, 316 N.C. 551, 342 S.E.2d 523 (1986) (“we noted plaintiff’s contention that ‘there are no circumstances under which he can collect on his underinsured coverage [of \$25,000] and he has paid his premium for this coverage in exchange for nothing.’ It appears that the plaintiff is correct in this argument but it does not justify our rewriting the policy.”).

It is interesting to note that in this case, the policy stated that the UIM limits were “\$25,000-\$50,000.” The dissenting judge opined that this meant that “the uninsured motorist coverage protects plaintiff up to \$25,000 in damages, and the underinsured motorist coverage protects him when his damages are from ‘\$25,000-\$50,000.’” *Id.* at 144, 336 S.E.2d at 712 (Cozort, J., dissenting).

1. Selection/Rejection of UM/UIM under Current Statute

In general, under the current statute, the insurer was required to offer \$1,000,000 in limits and the insured could reject even the presumptive level of UM/UIM coverage (i.e. the liability limits). The Williams opinion in 2005 held that the failure to offer the insured the \$1,000,000 UM/UIM limits resulted in the insured obtaining those limits (even if he did not pay for them and even if the declarations did not reflect such coverage). Williams v. Nationwide Mut. Ins. Co., 174 N.C. App. 601, 603, 621 S.E.2d 644, 645 - 646 (2005) held that: “A total failure on the part of the insurer to provide an opportunity to reject UIM coverage or select different UIM policy limits violates the requirement that these choices be made by the policy owner. Such a failure should not invoke the minimum UIM coverage limits established in N.C.G.S. § 20-279.21(b)(4) and

shield the insurer from additional liability”; even though liability limits were \$50,000, he insured was entitled to \$1,000,000 in UIM limits.

A 1991 amendment to the statute had provided for an option for the insured to obtain greater coverage than the liability limits, up to \$1 Million. In the Court of Appeals opinion in Maryland Casualty Co. v. Smith, 117 N.C. App. 593, 452 S.E.2d 318 (1995), the Court held that a pre-amendment rejection did not continue in effect after the 1991 amendment. State Farm’s idea of a selection/ rejection form was a statement inviting contact with an agent. The Court held that a new form must be acted upon when the statute and policy options change. NCGS §20-279.21(b)(4) does however provide that once the UIM coverage has been properly selected or rejected, the burden is on the insured to request a change.

We are now even seeing cases alleging that the UM/UIM carrier forged the form. Hammond v. Wray, 2008 WL 2582400, 2 (N.C.App. 2008) (where the named insured’s signature on the selection/rejection form was not his real signature (as found by handwriting expert), and the named insured later stated that he authorized the agent or others to sign the form for him, but the actual insurance agent said that he typically would have the insured sign the form, there were material issues of fact regarding whether the selection/rejection form was valid.); Piles v. Allstate Ins. Co., 653 S.E.2d 181, 185 -186 (N.C.App. 2007) (claim for fraud, bad faith etc. is not barred by statute of limitations; insured argued that Allstate forged her name to the Selection/Rejection Form, per handwriting expert; claims for bad faith accrued when she was denied UIM coverage, and not the date of the MVA).

Under a recent federal case, where the UM/UIM insurer cannot find the selection/rejection form, then it is required to provide \$1,000,000 in UIM limits (in a policy requiring UIM coverage), and it cannot argue that the insured rejected this coverage based on the general business practices of the insurer. In Progressive Southeastern Ins. Co. v. Greene, 2008 WL 4170058, 2 (M.D.N.C. 2008), the policy declarations expressly stated that the insured rejected UIM coverage and selected only UM coverage of \$50,000. The insurer never charged the insured for UIM coverage. The insurer could not find the Selection/Rejection form that was allegedly executed by the insured. The insured “does not remember whether she signed the Selection/Rejection form for UIM coverage.” The insurer’s position was stated as follows:

According to the affidavits, Mrs. Greene would have been required to sign a policy application and the requisite N.C. Form 0185 Selection/Rejection Form expressing the desired type and amounts of UM and UIM coverage in the amounts she selected on the policy before the application was submitted electronically to Progressive Southeastern Progressive Southeastern contends that this evidence of its routine business practices constitutes “affirmative proof” that Mrs. Greene was provided an opportunity to reject, and did reject, UIM coverage under the policy at the time of its initial purchase in July 2000, and that she executed the approved N.C. Form 0185, in which she specifically rejected UIM coverage. Progressive Southeastern contends that it is therefore not required to provide UIM coverage for bodily injuries sustained by Jody Greene in the accident occurring on July 1, 2006.

The federal court took a rather cynical view, stating, “[A]n insurer that obtained a signature rejecting UIM coverage on a form that did not comply with the N.C. Rate Bureau form could subsequently conveniently ‘lose’ the form and then later contend that the form was in compliance. This federal court should not create such a loophole around the North Carolina statute.” “[T]he failure of Progressive Southeastern to produce the requisite form in this case is treated as if Mrs. Greene were never offered the requisite

form to either accept or reject. Therefore, rather than being entitled to the coverage limits under the policy, Mr. Greene is entitled to the maximum amount recoverable by statute, which is \$1 million.”

A subsequent section addresses issues of stacking UIM coverage on different policies, and inter-policy stacking.

Under the current version of the FRA, in order for the insured to effectively reject the statutory UM/UIM coverage, he must reject this coverage in a very specific manner. In particular, he must execute a “selection/rejection” form promulgated by the Rate Bureau. G.S. § 20-279.21(b)(4) states:

The coverage required under this subdivision [i.e. UIM coverage] shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy. . . .

The older FRA also stated, “Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.” Id.

Many cases have held that a selection/rejection form which does not strictly comply with the form of the Rate Bureau is insufficient to reject the mandatory coverage, generally resulting in more favorable UM/UIM coverage available to the insured. For example, where the form is written with a font which is too small, the form is ineffective. Erie Ins. Exchange v. Miller, 160 N.C. App. 217, 223, 584 S.E.2d 857, 861 (2003) (“Erie offered no evidence that the Rate Bureau or the Commissioner of Insurance has

authorized it to include the rejection/selection form in its application or to print it in tiny type. As Erie has failed to show that its modification of the Rate Bureau form was authorized or approved, it has failed to establish that the Millers validly rejected UIM coverage.”). Accord State Farm Mut. Auto. Ins. Co. v. Fortin, 350 N.C. 264, 269, 513 S.E.2d 782, 784 (1999) (“We note first that the State Farm version of renewal form NC0186 that Bruce Fortin executed in January 1992 was not the ‘form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance.’ We note further that the statute specifically provides that rejection ‘shall be made in writing’ on the approved form. The State Farm renewal form required that the rejection be made, not ‘in writing’ on the form, but by contacting the State Farm agent. Thus, the rejection was not in accord with the statute.”). A copy of the Rate Bureau form is attached to this manuscript.

There are many intricate twists in determining whether a particular policy provides UM/UIM coverage, probably including scenarios not addressed in this manuscript. For example, where the policy is a “fleet” policy (defined as insuring four or more vehicles), then the insurer is not required to use the Rate Bureau form. “An insured’s rejection of the coverage can be inferred from the insured’s failure to select such coverage.” Hlasnick v. Federated Mut. Ins. Co., 136 N.C. App. 320, 323-325, 524 S.E.2d 386, 390, aff’d, 353 N.C. 240, 539 S.E.2d 274 (2000). In Hlasnick, the court held that the insured’s selection of different limits for liability coverage and for UM/UIM coverage was permissible, and that the insured thereby rejected additional UM/UIM coverage. See also id. at 325, 524 S.E.2d at 389 (finding that insured rejected additional

UM/UIM coverage even though “the form used here contained no written notice to the insured of the option to reject underinsured coverage and consequently is deficient.”).

In a recent case, the employee argued that the policy provided liability coverage of \$1,000,000 in liability limits, that the employer did not sufficiently reject UIM coverage, and that he was therefore an insured and was entitled to \$1,000,000 in UIM limits. The court agreed with the employee. Great American Ins. Co. v. Freeman, 665 S.E.2d 536 (2008). The case turned heavily on the application for coverage, and the form of the policy.

In Omega Development's completed application, there were no marks indicating that any of the options had been offered to Omega Development, and the spaces for signatures next to the options being selected were all left blank. In addition, on the application's first page, where the applicant could place an “X” beside the type of coverage selected and the types of motor vehicles that would be “covered autos” for each type of coverage, Omega Development did not indicate that it was selecting UM or UIM coverage or designate the type of vehicles that would be “covered autos” for UM/UIM coverage. Thus, in this case, the insured had the option to either select UIM coverage or reject UIM coverage, and it did neither. The insured had the option of selecting a different definition of “covered autos” than it did for its liability coverage, but it did not do so. We cannot, therefore, draw from these facts any inference that Omega Development intended to select a different type of coverage for UIM than for liability. Such an inference on these facts would amount to mere speculation.

The insurer had argued that the policy was a fleet policy, and hence that the insurer did not have to use the Rate Bureau selection/rejection form. The court held that the insurer still had to give the insured the opportunity to reject the greater UM/UIM limits. The insurer also relied heavily on the former Hlasnick case, which had held that the insured rejected greater UM/UIM coverage by affirmatively selecting lesser coverage. The court in this case held that the documents did not show a rejection as clearly as was done in Hlasnick.

The opinion is somewhat unclear regarding the reason that the policy was required to provide liability coverage to the employee. The court noted that the policy provided liability coverage for “any auto,” but the court seemed to focus on the coverage provided for non-owned autos. “In Omega Development's policy with Great American, the highest limit of bodily injury liability coverage for purposes of § 20-279.21(b)(4) is \$1,000,000.00 for “any ‘auto.’ ” The Omega Development policy defines an “auto” as “a land motor vehicle, ‘trailer’ or semitrailer designed for travel on public roads but does not include ‘mobile equipment.’” Its definition of “any ‘auto’ ” encompasses “nonowned ‘autos,’” which includes “those ‘autos’ you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes ‘autos’ owned by your ‘employees’ ... but only while used in your business or your personal affairs.” The court reasoned, “Because Freeman, an employee of Omega Development, was using his motorcycle in Omega Development's business, it falls within the policy's definition of “any ‘auto’” and is a “covered auto” under Great American's policy.”

3. Selection/Rejection under the January 1, 2009 Statute

Under the new statute, effective for policies issued after January 1, 2009, the insurer is required to notify the insured of a right to purchase \$1,000,000 in UM/UIM limits, but must provide UM/UIM limits equal to the liability limits. The new statute does not appear to allow the insured to reject UM/UIM coverage.

Under the new statute, the failure to offer the higher limits probably does not result in higher coverage. G.S. § 20-279.21(n) (“Nothing in this section shall be construed to provide greater amounts of uninsured or underinsured motorist coverage in a liability policy than the insured has purchased from the insurer under this section.”).

4. Commercial Policies Under new FRA

Under the new FRA, policies covering commercial vehicles and fleet vehicles are not required to provide UM/UIM coverage. Policies covering these types of vehicles and other vehicles also are required to provide some UM/UIM coverage. The statute states:

Notwithstanding the provisions of this subsection, no policy of motor vehicle liability insurance applicable solely to commercial motor vehicles as defined in G.S. 20-4.01(3d) or applicable solely to fleet vehicles shall be required to provide uninsured motorist coverage. Any motor vehicle liability policy that insures both commercial motor vehicles as defined in G.S. 20- 4.01(3d) and noncommercial motor vehicles shall provide uninsured motorist coverage in accordance with the provisions of this subsection in amounts equal to the highest limits of bodily injury and property damage liability coverage for any one noncommercial motor vehicle insured under the policy, subject to the right of the insured to purchase higher uninsured motorist bodily injury liability coverage limits as set forth in this subsection. For the purpose of the immediately preceding sentence, noncommercial motor vehicle shall mean any motor vehicle that is not a commercial motor vehicle as defined in G.S. 20-4.01(3d), but that is otherwise subject to the requirements of this subsection.

A commercial motor vehicle is defined as “Any of the following motor vehicles that are designed or used to transport passengers or property:”

- a. A Class A motor vehicle¹ that has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
- b. A Class B motor vehicle.²
- c. A Class C motor vehicle³ that meets either of the following descriptions:

¹ This is defined as “A combination of **motor vehicles** that meets either of the following descriptions: a. Has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds. b. Has a combined GVWR of less than 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.”

² This is defined as “A single **motor vehicle** that has a GVWR of at least 26,001 pounds” or “A combination of **motor vehicles** that includes as part of the combination a towing unit that has a GVWR of at least 26,001 pounds and a towed unit that has a GVWR of less than 10,001 pounds.”

³ This is defined as “A single motor vehicle not included in Class B” or “A combination of motor vehicles not included in Class A or Class B.”

1. Is designed to transport 16 or more passengers, including the driver.
2. Is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. Part 172, Subpart F.

G.S. § 20-4.01(3d).

A fleet policy is simply a policy that covers five or more vehicles, which presumably means that the policy lists five or more vehicles in the schedule of vehicles. Hlasnick v. Federated Mut. Ins. Co., 136 N.C. App. 320, 324, 524 S.E.2d 386, 389 (2000) (“A ‘nonfleet’ motor vehicle ‘means a motor vehicle not eligible for classification as a fleet vehicle for the reason that the motor vehicle is one of four or less motor vehicles owned or hired under a long-term contract by the policy named insured.’ N.C. Gen.Stat. § 58-40-10(2) (1994). There is no dispute that Federated Mutual's policy insured more than four vehicles; therefore, the policy is a fleet policy.”).

Therefore, with respect to these commercial and fleet vehicles, the FRA does not require any UM or UIM coverage, and such coverage will be determined solely by the terms of the policy (and not the FRA).

5. Hit and Run coverage

A person who is hit by a “hit and run” driver is entitled to UM coverage. In order to invoke this coverage, there must be a collision between vehicles.

A driver who strikes a log in the road does not have UIM coverage under the “hit and run” provisions of the FRA. Moore v. Nationwide Mut. Ins. Co., 664 S.E.2d 326 (N.C.App. 2008) (“plaintiff's complaint alleged he had “struck a pine tree log that had fallen off a truck and was lying in the middle of the interstate.” No evidence shows from what vehicle, truck or trailer, if any, the pine tree log fell from, when it fell, or how

long it had been lying on the interstate prior to impact.”; insured failed to satisfy physical-contact element of statute providing; insured must prove physical contact occurred between insured's vehicle and hit-and-run driver's vehicle).

In another case, decided previously by a federal court, coverage was found under similar circumstances. Where a rock fell off a truck and struck the claimant in his vehicle, the claimant had UM coverage under the hit-and-run provisions. “If it is ultimately found to be true, as defendant alleges, that the rock that crashed through Ana Larson's windshield fell and escaped directly from an unidentified dump truck that was hauling the rock in the course of its business, then there has been an “an unbroken ‘chain collision’ which involves the hit-and-run vehicle.... [and] the physical contact requirement has been satisfied, albeit intermediate and indirect.” Geico Insurance Co. v. Larson, 542 F.Supp.2d 441 (E.D.N.C. 2008). The Moore opinion largely disavowed Larson.

B. Determine the Nature and Extent of UM and UIM Coverages

UM/UIM coverage essentially provides the insured with an additional or alternative means of recovery against a tortfeasor who is liable for his injuries. The UM/UIM provisions of the FRA “evinced[] a public policy to place the insured in the position that would have existed if the tortfeasor had carried liability insurance limits equal to the liability coverage carried by the insured.” Silvers v. Horace Mann Ins. Co., 90 N.C. App. 1, 5, 367 S.E.2d 372, 374 - 375 (1988). In order to receive these benefits, the insurer ultimately must establish several elements.

The person claiming coverage must of course establish that he is an “insured” under the insurance policy. UM/UIM coverage is generally afforded to the named

insured and his relatives who reside with him, regardless of whether they are in or occupying a motor vehicle (which is frequently described as a Class I insured). It is also provided to all persons occupying “a motor vehicle to which the policy applies.”

N.C.G.S. § 20-279.21(b)(3). This presumably means the vehicles listed in the policy, and these persons are “Class II” insureds.

With regard to the first class of insureds, it is noteworthy that they have UM/UIM coverage for their bodily injury arising from a motor vehicle accident, regardless of whether they are even in a vehicle. Therefore, a pedestrian who is struck by a motor vehicle may be a Class I insured. Nationwide Mut. Ins. Co. v. Mabe, 342 N.C. 482, 496, 467 S.E.2d 34, 42 (1996) (“Members of the first class are ‘persons insured’ for the purposes of UIM coverage where the insured vehicle is not involved in the insured's injuries.”).

There are many North Carolina cases addressing whether a given person is a “relative” of the named insured and whether “resides with” the named insured. These cases tend to be very fact-specific.

In a recent case, the driver ran a stop sign, resulting in two deaths (to a mother and minor daughter) and serious bodily injury to a passenger (second child) in her car. Allstate and GMAC paid under liability policies, and the victims asserted a UIM claim against GEICO, who issued a policy to Ms. Forrest. The issue was whether the claimants resided with Ms. Forrest. The facts regarding the residence of the claimants was complicated, but the children were at Ms. Forrest’s home most of the time, and they had furnished rooms there. The court rejected the insurer’s argument that the claimants were not “residents” of Ms. Forrest’s house, and that they did not have UIM coverage. “A

person may be a resident of more than one household for insurance purposes,” and a person may be a resident of a family member's household where a “continuing and substantially integrated family relationship” exists between them. Randel ex rel. Forrest v. Beacham (N.C.App. 2008).

Whether the named insured is a corporation, there are generally no Class I insureds with bodily injury coverage. A corporation generally would not have bodily injury, and therefore it could not be a Class I insured. Also, a corporation does not have “relatives” or “family,” and therefore no other persons qualify for this type of coverage. Our courts have consistently rejected attempts by persons attempting to claim Class I coverage under a policy issued to a corporation. Busby v. Simmons, 103 N.C. App. 592, 596, 406 S.E.2d 628, 630 (1991) (“named insured” refers to corporate named insured, and not to officers, directors, or stockholders; person who owned two-thirds of stock in and worked for corporation which was named insured was not entitled to UIM benefits because insured-corporation was distinct from owner); Sproles v. Greene, 329 N.C. 603, 609, 407 S.E.2d 497, 500 (1991) (“Since a corporation is a legal entity distinct from its employees and thus cannot have a ‘spouse or other relatives,’ and since Lakeview the corporation is the named insured in the Aetna policy, we conclude that the plaintiffs as employees of the corporation Lakeview are not named insureds by the terms of the Aetna policy and therefore are not class one insureds under the statute for the purposes of UIM coverage.”).

The only exception is a case in which the policy was issued to “Oak Farm.” “Oak Farm is the name of a parcel of land operated as a farm in Cleveland County and belonging to Mr. Stockton's mother.” “Oak Farm has no legally independent existence-it

has no tax identification number, does not exist as a corporation, partnership, or any other commercial or legal entity and may be classified as neither a commercial nor any other type of existing entity.” “At no time was Oak Farm anything but a bucolic designation for rural property.” The court concluded that the policy was ambiguous and that a relative of the Stocktons was entitled to Class I coverage. Stockton v. North Carolina Farm Bureau Mut. Ins. Co., Inc., 139 N.C. App. 196, 198-199, 532 S.E.2d 566, 567 - 568 (2000).

In order to establish his condition as an “insured,” the person seeking coverage must also of course establish the existence of a valid policy. The claimant will have no coverage if the policy was not properly renewed, or if the policy is voidable based on a material misrepresentation by the named insured in the application for the policy (except to the extent required by the FRA).

The insured must also establish that his injuries “arose out of the use of a motor vehicle.” There are again many cases addressing this legal standard, in a variety of contexts within insurance coverage. In general, this phrase is construed very broadly. As long as the insured’s injuries have a reasonable causal connection with his injuries, then he is afforded coverage. For example, where the insured was laying in the roadway with a chain attempting to attach the chain to a vehicle to assist a stranded motorist, and another vehicle approached this scene and collided with the insured, it was held that his injuries arose out of his use of the disabled vehicle and also out of the use of the tow truck. Dutch v. Harleysville Mut. Ins. Co., 139 N.C. App. 602, 606, 534 S.E.2d 262, 265 (2000).

This court also summarized several previous holdings:

Thus a person “uses” a vehicle under the Act when (1) loading or unloading the vehicle; (2) pushing a disabled vehicle onto the shoulder of the road; (3) helping the vehicle owner change a flat tire; and, (4) walking on the shoulder of the road in search of help for a disabled vehicle. Further, a police officer who leaves his vehicle with the engine running, the warning lights activated, and the police radio engaged, in order to direct traffic at the location of a malfunctioning traffic signal, is also “using” his vehicle for purposes of the Act.

Id. at 607, 534 S.E.2d 262, 265 - 266 (2000) (citations omitted).

On the other hand, where the insured-police officer stopped a motorist, the motorist fled, the officer chased the suspect and broke his ankle during the pursuit, his injuries did not arise out of use of an underinsured motor vehicle. The injury was not a natural and reasonable consequence of the use of the vehicle. Smith v. Harris, 640 S.E.2d 436 (N.C. App. 2007).

A person is a class II insured if he is using a covered vehicle. This too can present tricky issues. In one case, even though a vehicle was listed on the policy, the named insured did not own the vehicle, and thus occupants of the vehicle did not have UIM coverage, where the policy indicated that UM/UIM coverage was provided only for vehicles owned by the named insured. Pennsylvania Nat. Mut. Ins. Co. v. Strickland, 178 N.C.App. 547, 631 S.E.2d 845 (2006).

In a more recent case, an employee was deemed to have \$1,000,000 in UIM coverage under his employer’s policy for an accident which occurred while he was operating his motorcycle in the course of his employment, even though the policy ostensibly limited UIM coverage to listed vehicles only (which did not include the motorcycle). The court reasoned that the insurer provided \$1,000,000 in liability limits for the motorcycle (because it was a covered vehicle under a provision covering non-owned vehicles used in connection with the business), and the insurer did not effectively

reject UIM limits in this amount. Great American Ins. Co. v. Freeman, 665 S.E.2d 536, 538 (N.C. App. 2008).

In addition to establishing that he is an insured under a valid policy, the insured must generally prove his claim and obtain a judgment against the uninsured or underinsured motorist. “[T]he [UM] insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law.” G.S. § 2-79.21(b)(3)a. The UIM carrier is likewise bound by the judgment.

The basic thrust of the UM/UIM scheme is generally that the UM/UIM claim is derivative and dependent upon the claim against the tortfeasor. “[S]imply, the right to recover under a UIM endorsement is ‘derivative and conditional’ and, consequently, any defense available to the alleged tortfeasor is also available to the insurer.” Braddy v. Nationwide Mut. Liability Ins. Co., 122 N.C. App. 402, 406, 470 S.E.2d 820, 822 (1996).

After the insured-plaintiff obtains a judgment against the tortfeasor, the UM/UIM carrier is liable to the insured for the amount of the judgment covered by its UM/UIM policy. (This obligation is of course subject to any obligation of the insured to notify the insurer of the lawsuit, which is addressed subsequently in this article.) In addition, under a typical UM/UIM policy, the insured may demand arbitration, and the insurer’s duty to pay is probably invoked upon the rendering of an arbitration award. (The specifics of arbitration are addressed subsequently in this article. As noted in that discussion, the insured may also file the arbitration award with the court for a judgment, and the insurer

may be entitled to various offsets.)

Where the insured has followed the procedure for settling with the liability carrier, however, he may later sue the UIM carrier directly. “In sum, an insured who has settled with a tortfeasor prior to initiating litigation, while reserving the right to seek UIM coverage from the insured's carrier, may initiate an action for such coverage directly against the carrier when the latter has received notice of the settlement in compliance with G.S. § 20-279.21(b)(4) and has waived its rights to approve the settlement.”

Wilmoth v. State Farm Mut. Auto. Ins. Co., Inc., 127 N.C. App. 260, 265, 488 S.E.2d 628, 632 (1997).

Therefore, as a general matter, the insured must at least preserve his claim against the uninsured or underinsured motorist. Where, for example, the statute of limitations has expired against the tortfeasor, the UM/UIM claim is defeated. In Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974), the plaintiff's intestate died as a result of an accident involving an uninsured motorist. The plaintiff did not file a cause of action against the tortfeasor (the uninsured motorist) within the two-year statute of limitations for wrongful death actions. Within three years of the accident, the plaintiff filed suit against his intestate's UM carrier to recover damages for wrongful death. The plaintiff claimed that the three-year limitations period for contract actions controlled the UM claim. The Supreme Court disagreed, stating that the “[p]laintiff's right to recover against his intestate's insurer under the uninsured motorist endorsement is derivative and conditional.” Id. at 319, 204 S.E.2d at 834. “[D]espite the contractual relation between plaintiff insured and defendant insurer, this action is actually one for the tort allegedly committed by the uninsured motorist.” Id.

For this same reason, the insured may not release the tortfeasor. In such event, the UM/UIM carrier essentially obtains the benefit of this release, unless the insured has complied with the statutory procedures for the insurer's waiver of subrogation. (This subrogation issue is addressed in a subsequent section.) Spivey v. Lowery, 116 N.C. App. 124, 446 S.E.2d 835 (1994) (insured could not recover from UIM carrier where she settled with defendant with knowledge and consent of UIM carrier, where plaintiff signed general release, discharging all claims between parties). But see Silvers v. Horace Mann Ins. Co., 90 N.C. App. 1, 10, 367 S.E.2d 372, 377 (1988) (insured entered consent judgment with tort-feasor which exhausted claim against tortfeasor, and expressly purported to preserve UIM claim, and insured then sued UIM carrier; "Therefore, we reject Horace Mann's proposition that because plaintiff is no longer 'legally entitled to recover' additional damages from the underinsured tortfeasor, she may not recover UIM benefits from Horace Mann."; "It is hereby further ordered that this consent judgment shall not release nor relinquish any rights that the Plaintiff's intestate has or might have against Horace Mann Company under any underinsured liability coverage").

The insurer will generally not be liable for the amount of the insured's settlement reached without the UIM carrier's consent. But see Jones v. N.C. Ins. Guar. Ass'n, 163 N.C. App. 105, 110, 592 S.E.2d 600, 603 - 604 (2004) (where liability carrier became insolvent following settlement, UIM carriers were liable for settlement amount "The amount of the settlement represented, in essence, the 'damages' agreed upon by the parties and a release of liability. We do not believe plaintiff was required to file suit and prove liability and damages, in light of this agreement. Prior to its insolvency, Credit General clearly had the 'legal liability' to make payment accordingly.>").

Because the insured's claim is dependent upon his claim against the uninsured or underinsured motorist, the UM/UIM claim is essentially subject to all the issues and defenses which would be raised in that lawsuit against the tortfeasor. The insured must therefore essentially be able to establish the negligence of the other motorist. Also, the insured's contributory negligence will bar his claim. As stated by our Supreme Court:

Plaintiff's right to recover against his intestate's insurer under the uninsured motorist endorsement is derivative and conditional. Unless he is 'legally entitled to recover damages' for the wrongful death of his intestate from the uninsured motorist the contract upon which he sues precludes him from recovering against defendant. It is manifest, therefore, that despite the contractual relation between plaintiff insured and defendant insurer, this action is actually one for the tort allegedly committed by the uninsured motorist. Any defense available to the uninsured tort-feasor should be available to the insurer. The argument that a plea of the statute of limitations is personal to the tort-feasor and not available to the insurance company flies in the face of the policy.

Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 319-320, 204 S.E.2d 829, 834 (1974).

The UM/UIM carrier therefore generally has all of the defenses available to the defendant-motorist. In one interesting case, however, the Court of Appeals held that the UM/UIM carrier does not get the benefit of the insured-driver's immunity. Williams v. Holsclaw, 128 N.C. App. 205, 212, 495 S.E.2d 166, 170 (1998) (court finding conflict between statutory language regarding "legally entitled to recover" and definition of "uninsured motor vehicle" in G.S. § 20-279.21(b)(3) which excludes "[a] motor vehicle that is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof)."; "In other words, vehicles owned by political subdivisions, including the City, are expressly excepted from the statutory exclusion.").

The insured must therefore generally prosecute his claim against the tortfeasor, and would be entitled to all damages recoverable under North Carolina law. These would include medical bills, lost earnings, and “pain and suffering.”

UM/UIM coverage is also afforded for property damage. These claims are fairly rare, and therefore this article does not address them thoroughly. The practitioner should be cautious, however, to review the policy language and statutory provisions. There are some fine distinctions between property damage and bodily injury coverage. For example, the insured’s limits for an underinsured motorist claim for property damage is not required to equal the liability limits for property damage. The insured’s claim for property damage against an uninsured motorist is, however, covered up to the extent of liability coverage for property damage. (This particular distinction between UM property damage and UIM property damage is probably an oversight in the statute; there appears to be no logical reason for this distinction in limits between a UM claim and a UIM claim.)

C. Interpret Exclusions and Limitations on Coverage

Any limitations or exclusions on UM/UIM coverage would of course generally be construed against the insurer, and in favor of the insured.

More importantly, however, any exclusions which are inconsistent with the Financial Responsibility Act are invalid and unenforceable. For example, an exclusion for vehicles owned by a family member of the named insured are not enforceable, because the FRA generally requires coverage for Class I insureds, regardless of the vehicle in which they are riding. Bray v. N.C. Farm Bureau Mut. Ins. Co., 115 N.C. App. 438, 444, 445 S.E.2d 79, 82 (1994), aff’d in relevant part, 341 N.C. 678, 462 S.E.2d 650

(1995) (“family member/household-owned vehicle exclusion for UM coverage is repugnant to the purpose of UM and UIM coverage and is therefore invalid”); Honeycutt v. Walker, 119 N.C. App. 220, 458 S.E.2d 23, disc. review denied, 342 N.C. 192, 463 S.E.2d 236 (1995). See also Beddard v. McDaniel, 645 S.E.2d 153, 154 (2007) (court again rejected an exclusion for a vehicle owned by a family-member, when the insured was a “class 1” insured; named insured was a business, but the policy had an endorsement which specifically listed three individuals as having UM/UIM coverage; “The three ‘Designated Individuals’ named on the Elective Options Form for UIM coverage are Roosevelt and Evelyn Beddard and Chris Davis Beddard.” The court referred to these people as “named insureds.”).

It is not clear whether any UM/UIM coverage is “voluntary.” Some authorities state that UM/UIM coverage is never “voluntary,” and is mandatory. In the Bray case, the Court of Appeals held that the family-member exclusion was voluntary, but concluded that the policy provided only \$25,000 UM coverage to the insured because such coverage was limited to the statutory minimum of \$25,000 per person/\$50,000 per accident, even though the policy generally provided UM limits of \$300,000. The Supreme Court rejected this approach, stating:

In the present case, the liability limits of the business automobile policy were \$300,000, and the parties have stipulated that there was no written rejection of UM coverage by the Brays. Under N.C.G.S. § 20-279.21(b)(3), the insured is entitled to purchase UM coverage in an amount equal to general liability coverage. Unless the insured rejects in writing UM coverage, the policy is deemed to provide UM coverage equal to the general liability coverage. N.C.G.S. § 20-279.21(b)(3). To the extent that UM coverage is offered in this case, it is offered pursuant to the requirements of N.C.G.S. § 20-279.21(b)(3), and in that sense, it is mandatory, not voluntary, coverage. Accordingly, N.C.G.S. § 20-279.21(g), which relates to voluntary coverage, does not apply. Thus, Mrs. Bray was entitled to \$300,000 of UM coverage, an amount equal to

the liability limits of the policy.

Bray v. North Carolina Farm Bureau Mut. Ins. Co., 341 N.C. 678, 685-686, 462 S.E.2d 650, 654 (1995).

There are, however, some twists on this issue. Where the liability limits are reduced to the statutory minimum due to the insured's violation of the policy, rendering the policy void, the UM/UIM coverage in excess of the minimum limits of liability coverage (currently \$30,000) are voluntary, and may be lost. The net result is that the UM/UIM limits are likewise reduced to the minimum liability limits. Hartford Underwriters Ins. Co. v. Becks, 123 N.C.App. 489, 492, 473 S.E.2d 427, 429 (1996) (coverage reduced due to "insured's fraudulent and intentional misrepresentations in obtaining the liability insurance policy."). See also Hlasnick, 353 N.C. at 243, 539 S.E.2d at 276 (citing the statutory minimum liability limits at the time (\$25,000 per person), and then stating, "Thus, automobile insurance policies subject to the Financial Responsibility Act must provide a minimal 'floor' of UIM coverage.").

If the UM/UIM coverage is deemed "voluntary," then the insurer may rely on any exclusions, which as noted above, would be construed against the insurer.

In one case, the policy provided one level of UM/UIM coverage for officers and directors of the corporation, and provided a lesser limit for employees. An employee sought the higher limit of liability, and contended that the split limits were contrary to the Financial Responsibility Act. The Supreme Court affirmed this UM/UIM policy, concluding that the FRA did not prohibit such split limits, and that the insurer was not required to use a particular selection/projection form to effectuate these split limits.

Hlasnick v. Federated Mut. Ins. Co., 136 N.C. App. 320, 326, 524 S.E.2d 386, 390 (2000)

("As long as the statutory requirements are met, we can see no reason either in the Act or in public policy to prevent an insured from obtaining underinsured motorist coverage in excess of the statutory minimum for employees it considers particularly valuable.").

It is not entirely clear whether the insured's non-cooperation is a defense to UM/UIM coverage. The insured could argue that the FRA requires the UM/UIM coverage regardless of his "cooperation," and that therefore the cooperation clause is inconsistent with the FRA. On the other hand, one case held that the insured lost his UIM benefits by failing to participate in a medical examination. 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). This case did not, however, specifically address the FRA.

One case suggests that where the insurer has an absolute defense to the UM/UIM claim, and the FRA requires coverage, that the UM/UIM limits collapse to the "minimum" required by statute (i.e. minimum liability limits). In that case, the policy was void due to a misrepresentation in the application. The court wrote, "It therefore follows that because 'any [liability] coverage in excess of the statutory minimum [\$25,000/\$50,000],' was void ab initio in consequence of the jury's determination of fraud on the part of Mr. and Mrs. Lucas, no UIM coverage in the policy was required or mandated by G.S. § 20-279.21(b)(4). As a result, the UIM provisions contained in the policy . . . constituted 'coverage in excess of the statutory minimum, [and thus] [plaintiff] [was] not precluded by statute or public policy from asserting the defense of fraud.'" Hartford Underwriters Ins. Co. v. Becks, 123 N.C. App. 489, 494, 473 S.E.2d 427, 430 (1996). See also Odum v. Nationwide Mut. Ins. Co., 101 N.C. App. 627, 635,

401 S.E.2d 87, 92, disc. review denied, 329 N.C. 499, 407 S.E.2d 539 (1991) (“We therefore hold that as to any coverage in excess of the statutory minimum, the insurer is not precluded by statute or public policy from asserting the defense of fraud.”).

D. How to Proceed With Injury Claims Due to Vehicle Operation, Maintenance or Use

As noted earlier, an insured with a UM/UIM claim must preserve his claim against the uninsured or underinsured motorist. The rules regarding the statutes of limitations are addressed subsequently in this topic.

In addition, the insured should notify the insurer of the incident and of the potential claim. Most policies require an insured to timely notify the insurer of an incident, so that it may begin its investigation. Such notification is not required in a typical third-party claim (i.e. notifying the tortfeasor’s liability carrier), but a UM/UIM claim is essentially a first-party claim, and the insured must comply with the policy provisions.

In the context of a UM claim, the insured will of course begin negotiating directly with the UM carrier. In a UIM claim, the insured would typically begin negotiations with the liability carrier, until the policy is exhausted, at which time he would begin negotiating with the UIM carrier. (Even in a UIM claim, the insured should probably notify the UIM carrier of the potential claim as soon as possible.)

The logistics of a lawsuit and of an arbitration proceeding are discussed elsewhere in this topic.

E. Answer Questions Related to Offsets and Reimbursements

A UM/UIM insurer may be entitled to several offsets or credits or other reductions in its ultimate liability to the insured.

An offset must of course comply with the Financial Responsibility Act (assuming that the UM/UIM coverage is “mandatory”). The FRA expressly provides for a few offsets.

In a UIM claim, the UIM carrier receives an offset or credit for the liability payments made to the insured. Therefore, if the UIM insurer has limits of one million dollars, and the insured’s injuries are \$70,000, and the liability policy has limits of \$30,000, then the UIM carrier’s net obligation to the insured is \$40,000 (\$70,000 minus \$30,000). Iodice v. Jones, 133 N.C. App. 76, 78, 514 S.E.2d 291, 293 (1999) (“UIM carriers are entitled to set off the amount received by a claimant from the tortfeasor's liability carrier against any UIM amounts owed.”).

A recent case, however, may raise a twist on this analysis. In North Carolina Counties Liability and Property Joint Risk Management Agency v. Curry, 662 S.E.2d 678 (N.C.App. 2008), the court seemingly held that the UIM carrier’s limits are not reduced by either (a) payments made under the liability policy or (b) payments made by the workers compensation carrier. The case was not governed by the FRA (because it involved a county vehicle), but the policy language was standard.

In this case, the insured was in a MVA and sustained significant damages, which were stipulated to be \$300,000. He recovered \$30,000 from the liability carrier, and \$144,000 from worker’s compensation. The policy covering the vehicle he occupied had UIM limits of \$100,000. The policy stated “b. Any amount payable under Section III, E. Uninsured/Underinsured Motorist Coverage shall be reduced by: (1) all sums paid or payable under any workers' compensation, disability benefits, or similar law exclusive of non-occupational disability benefits; (2) all sums paid by or for anyone who is legally

responsible, including all sums paid under the Contract's liability coverage;” The court stated the policy stated that “‘any amount payable’ under the provision shall be reduced, but did not indicate whether that amount payable referred to the obligation to ‘pay all sums the Covered Person is legally entitled to recover as damages’ or to the limit that would be paid for all damages.” North Carolina Counties Liability and Property Joint Risk Management Agency v. Curry, 662 S.E.2d 678 (N.C.App. 2008).

The UIM carrier, using current standard policy language, may also generally take an offset for any amounts paid under “medical payments” 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). A recent decision held that the UIM carrier may take an offset for the amount of its med-pay payments, even where the insured’s loss exceeds the UIM limits. Kessler v. Shimp, 640 S.E.2d 822 (App. 2007) (where liability carrier paid \$20,000, and UIM carrier paid \$78,000 on under its \$100,000 UIM policy and paid \$2,000 under med-pay policy, UIM carrier provided no further UIM coverage).

The presence of worker’s compensation payments raises several complicated issues of offset, which have not been clearly addressed under North Carolina law. Prior to 1999, there were several cases which addressed the issue of the UM/UIM carrier’s offset for worker’s compensation payments. The typical UM/UIM policy allowed for such an offset. The general thrust of these cases was that the UM/UIM insurer received the benefit of the worker’s compensation payments, by virtue of an offset in the amount

of those payments. McMillian v. North Carolina Farm Bureau Mut. Ins. Co., 347 N.C. 560, 565, 495 S.E.2d 352, 354 - 355 (1998) (“We hold that under the clear wording of N.C.G.S. § 20-279.21(e), the limit of liability provision in defendants' policies at issue in this action is authorized and defendant UM carriers are entitled to reduce coverage to Mr. McMillian by the amount of workers' compensation he has already received.”). In one particular case, the UIM insurer received an offset for the amount of the worker’s compensation payments, and in addition, the insured was obligated to repay the worker’s compensation lien to the worker’s compensation carrier. As a result, the insured essentially received a “double hit.” Hieb v. Lowery, 134 N.C. App. 1, 13, 516 S.E.2d 621, 629 (1999) (“St. Paul [comp carrier] is entitled to a workers' compensation lien in the amount of the total workers' compensation “paid or to be paid to the Plaintiff” [by UIM carrier].”).

Probably for this reason, in 1999 the Legislature amended the FRA which now specifically states:

Uninsured or underinsured motorist coverage that is provided as part of a motor vehicle liability policy shall insure that portion of a loss uncompensated by any workers' compensation law and the amount of an employer's lien determined pursuant to G.S. 97-10.2(h) or (j). In no event shall this subsection be construed to require that coverage exceed the applicable uninsured or underinsured coverage limits of the motor vehicle policy or allow a recovery for damages already paid by workers' compensation. The policy need not insure a loss from any liability for damage to property owned by, rented to, in charge of or transported by the insured. G.S. § 20-279.21(e).

Under a straight-forward reading of this new statute, the UM/UIM carrier is obligated to make two payments: (1) the insured’s total loss (medical expenses, lost wages, pain-and-suffering) minus the worker’s compensation payments (which compensated the insured for part of his loss), and (2) the amount of the worker’s

compensation lien. The application of this statute raises several questions.

The issue was briefed in the Court of Appeals in one case which was settled while up on appeal, and finally determined in Austin v. Midgett, 166 N.C. App. 740, 741-742, 603 S.E.2d 855, 856 (2004), (called Austin II” since it was before the Court on a Petition for re-hearing) and Walker v. Penn Nat. Sec. Ins. Co., 168 N.C. App. 555, 561, 608 S.E.2d 107, 111 (2005).

In Austin, the Court of Appeals wrote:

First, we must determine the “limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident.” N.C. Gen.Stat. § 20-279.21(b)(4). This is determined by taking Integon's policy limits for underinsured motorist coverage of \$100,000.00 and subtracting the portion of the credit for the Farm Bureau policy to which Integon is entitled of \$25,000.00. This leaves a total of \$75,000.00 of underinsured motorist coverage available to plaintiff under Integon's policy. This is the limit of Integon's exposure in this case.

...

The total amount of the loss shall be reduced by the amount of workers' compensation payments received by plaintiff of \$100,278.98. To this amount, there shall be added the amount of the workers' compensation lien of \$33,426.00. (Under the provisions of N.C. Gen.Stat. § 20-279.21(e) the uninsured and underinsured motorist carriers are liable for the amount of this lien.) This sum shall then be reduced by the \$50,000.00 payment made by the primary carrier, Farm Bureau. The figure determined shall then be divided in half because Integon and State Farm each had a \$100,000.00 UIM policy. Integon shall be liable for that amount, plus any prejudgment interest applicable under the provisions of Chapter 24 of the North Carolina General Statutes, up to the limit of its underinsured motorist coverage of \$75,000.00, as computed above.

Austin v. Midgett, 166 N.C. App. 740, 743, 603 S.E.2d 855, 857 (2004).

In Walker v. Penn Nat. Sec. Ins. Co., 168 N.C. App. 555, 561, 608 S.E.2d 107, 111 (2005), the Court held:

Having determined the foregoing, we proceed to the two-step inquiry outlined in Austin II to calculate the amount payable to plaintiff by

defendant. We first subtract the amount paid to plaintiff by the liability carrier (\$30,000) from the UIM policy limit (\$1,000,000) and find that the UIM coverage limit is \$970,000. We next determine the amount plaintiff is entitled to recover from the UIM carrier. Plaintiff's total loss was valued at \$126,874 [in arbitration]. From this amount we subtract the amount of workers' compensation benefits, not including the amount of the workers' compensation lien, (\$40,749.42) and the amount plaintiff received from the liability carrier (\$30,000). The resulting figure representing the total amount of plaintiff's uncompensated loss is \$56,789.68. Thus, we hold that the amount payable by the UIM carrier to plaintiff is \$56,789.68, plus interest.

The court explained that the workers' compensation benefits less the lien was computed as follows: "This figure was reached by subtracting the amount paid to Hoover Rehabilitation (\$6,198.95) and the amount of the worker's compensation lien (\$35,000) from the total amount paid by the workers' compensation carrier (\$81,948.37)." Id. The actual arithmetic of the opinion is off by \$665.10, which appears to be an oversight.

With regard to the worker's compensation lien, there are two ways in which the lien could be eliminated or reduced. If the employer was negligent in causing the insured-employee's injuries, then the lien is nullified. This determination would generally be made at a trial against the uninsured motorist. The UIM insurer may therefore have an incentive to establish the negligence of the employer, to reduce the UIM carrier's liability. It is not clear, however, how this will always be effectuated. For example, where the insured demands arbitration of his claim (and not a jury trial), then it is not clear whether and how the UIM carrier can litigate the issue of the employer's negligence.

The worker's compensation lien may also be eliminated by the Court, in the discretion of the judge. Where the UIM carrier has the real interest in eliminating the lien, it is not clear whether the UIM carrier has standing to petition the Court for a reduction of the lien.

Where the insured has a workers compensation claim, and the comp carrier has a lien, then a settlement between the employee and the UM carrier, without the consent of the comp carrier, is not binding. The comp carrier has a lien on any proceeds recovered by the employee from his UM carrier. Richardson v. Maxim Healthcare/Allegis Group, 2007 N.C. App. LEXIS 2112 (App. 2007).

Many UM/UIM policies also contain other offset provisions, which have not been tested in North Carolina. For example, many such policies contain an offset for amounts received under disability laws. It would appear that these offsets or reductions should be invalid, because they are contrary to the obligations under the FRA.

The “amount not compensated by workers compensation” is not necessarily all of the payments by the workers compensation carrier in connection with the claim. Where the workers compensation carrier expends funds which are not for the employee’s treatment, then it is not a part of its lien, and the UIM carrier’s obligation to pay the insured’s loss is not affected by such payments. Walker v. Penn Nat. Sec. Ins. Co., 168 N.C. App. 555, 561, 608 S.E.2d 107, 111 (2005) (“Contrary to defendant's [UIM carrier’s] contention, . . . rehabilitation services are not a benefit to a plaintiff as a matter of law, but rather must be subject to a fact-specific determination as to whether the services conferred a benefit to a plaintiff. We hold that the trial court did not err in excluding the cost of Hoover Rehabilitation's services when it computed the amount of workers' compensation benefits received by plaintiff.”).

Our courts have not addressed the contours of the language of the FRA which require the UIM carrier to “insure that portion of a loss uncompensated by any workers' compensation law.” For example, does this refer only to amounts actually paid by the

workers compensation carrier? Or does it include future payments by the comp carrier? If the insured chose to not submit a workers compensation claim, then could the UIM carrier argue that the loss was generally “compensated” by workers compensation law, even though the insured forsook that remedy? In the absence of the FRA, this argument has been accepted by some courts. Dwight v. Tennessee Farmers Mutual Insurance Co., 701 S.W.2d 621 (Tenn. Ct. App.), appeal denied (Tenn. 1985) (where the policy allowed a setoff for benefits “payable,” the uninsured motorist carrier was entitled to set off the amount of workers' compensation benefits available to the plaintiff, even though the plaintiff waived the benefits). See also Progressive American Ins. Co. v. Vasquez, 350 N.C. 386, 397, 515 S.E.2d 8, 14 - 15 (1999) (“We also hold that the Court of Appeals did not err in concluding that ‘[t]he policy is clear and unambiguous that any amount payable under the BAP is reduced by all worker's compensation benefits paid or payable for the accident and by the amount paid by the tortfeasor's liability carrier.’”; decided under prior version of G.S. § 20-279.21(e)).

F. Does the Insurer Have Subrogation Rights to UM Benefits?

The UM/UIM insurer is generally subrogated to the claim of its insured against the underinsured motorist. The FRA addresses the right to subrogation in a few specific instances (such as where the UIM carrier pays prior to exhaustion of the liability policy).

A UM carrier has a statutory right to subrogation, 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 [sic] 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).

The general source of the UIM carrier's right is not clear. Interestingly, there is not much authority on the right of the UIM carrier to subrogation. See Silvers v. Horace Mann Ins. Co., 90 N.C. App. 1, 11, 367 S.E.2d 372, 378 (1988) ("The right of an insurer to be subrogated may come about by contract, equity or statute."; finding that policy language waived right to subrogation).

It is generally understood, however, that such a right exists. If, for example, the insured/plaintiff receives a verdict of \$100,000, and the liability carrier pays \$30,000, and the UIM carrier pays the remaining \$70,000, then the UIM carrier is subrogated to the insured's claim against the tort-feasor for the \$70,000. See generally Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 109 N.C. App. 281, 284, 426 S.E.2d 298, 300 (1993) ("By advancing the primary insurance limits to Reavis, Nationwide became subrogated to the rights of Reavis and stepped into her shoes."). The procedural mechanics of the subrogation claim are not clearly set forth in the FRA. The insurer may need to assert a crossclaim, or institute an independent action to obtain its judgment against the underinsured motorist. The UIM carrier or the insured must institute an action against the tortfeasor within the statute of limitations. Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., supra (where UIM carrier advanced to preserve subrogation rights, but neither insured nor UIM carrier sued within three years of MVA, claim by UIM carrier was barred).

In one case, the Court held that the insured's dismissal with prejudice of its lawsuit against the tort-feasor did not bar the UIM carrier's subrogation action, "because the claim against the defendant had already passed to State Farm by operation of law." State Farm Mut. Auto. Ins. Co. v. Blackwelder, 332 N.C. 135, 139, 418 S.E.2d 229, 231

(1992).

In a UM claim, the insurer probably always has its subrogation claim against the tortfeasor; i.e., there is no statutory provision for waiving this claim.

In a UIM claim, the UIM carrier's right of subrogation may be terminated by the procedures set forth in the statute pertaining to a proposed settlement by the liability carrier. The statutory language is:

No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice

Pursuant to this statute, where the liability carrier agrees to pay its limits to the claimant, and reaches a "tentative" or "proposed" settlement, and where the UIM carrier is notified of this proposed settlement, the UIM carrier loses its subrogation rights against the tortfeasor unless it "advances" the amount of the proposed settlement within thirty days.

The courts have generally been fairly liberal with this provision, ruling that it operates to extinguish the subrogation claim. For example, in one case, the precise terms of the settlement (e.g., the language of the release) had not been agreed upon, but the court held that there was a sufficient tentative or proposed settlement to invoke the provisions of the statute, requiring the UIM carrier to advance the amount of the proposed settlement or otherwise to lose its subrogation claim. Daughtry v. Castleberry, 123 N.C. App. 671, 474 S.E.2d 137 (1996) (written notice to UIM carrier of settlement offer by UIM insurer need not be made by the insured, settlement does not have to be

completed, and settlement is valid even if UIM carrier did not have notice of its insured's acceptance of settlement offer; UIM carrier also argued that settlement letter “contained different structured settlement options and was conditioned upon the plaintiffs signing a release”).

The statute does not define or explain the term “advance.” It appears, however, to mean that the UIM carrier must pay the insured-claimant the amount of the proposed settlement with the liability carrier, which should be the availability limits under the liability policy. The nature of the advancing carrier’s claim for reimbursement was presented to the Court of Appeals in Nationwide v. State Farm Mut. Automobile Ins. Co., 109 N.C. App. 281, 426 S.E.2d 298 (1993). State Farm tendered its \$25,000.

Nationwide advanced its \$25,000, and settled the case for \$40,000 total. The plaintiff agreed to assist Nationwide and attempted to recover the \$25,000 from State Farm. State Farm refused to reimburse Nationwide, which sued State Farm on a subrogation theory, arguing that NCGS §20-279.21(b)(4) presumes reimbursement by the liability carrier.

The Court held that the statute mentions only assignment and subrogation, that Nationwide “became subrogated to the rights of” its insured, and that it missed the three-year statute of limitations which the injured person, in whose shoes it stood, would have had in which to file suit.

Although the statute and the case law does not indicate whether the plaintiff may actually spend this money (and whether the plaintiff’s attorney may disburse this money), it appears that the “advance” by the UIM carrier is a payment which may be fully spent by the insured. The insured is probably not required to hold the advance in trust pending a resolution of the tort claim. If the verdict is less than the amount of the advance (e.g.

advance of \$30,000 and verdict of \$20,000), then the insured probably retains the entire \$30,000 advance. The UIM carrier is of course subrogated to the verdict of \$20,000 and may recoup this amount, but it is not clear whether it may recover the additional amount of its advance.

The UIM carrier's subrogation rights extend not only to claims against the underinsured motorist, but also extends to other persons. In one case, the insured sued a drunk driver and also asserted a claim against the bar which provided the alcohol to the driver. The Court of Appeals held that the UIM insurer was entitled to subrogation against the money received in settlement from the bar. Farm Bureau Ins. Co. of N.C., Inc. v. Blong, 159 N.C. App. 365, 583 S.E.2d 307 (2003).

G. How the Statute of Limitations Applies

The insured must be careful to preserve its UM/UIM claim against the defense of the statute of limitations.

In general, the insured must file a lawsuit against the tortfeasor within the three-year statute of limitations. The failure to do so will result in an absolute defense to the motorist, and the UIM carrier will therefore likewise be absolved of any liability. Brown v. Lumbermens Mut. Cas. Co., 285 N.C. 313, 204 S.E.2d 829 (1974).

In addition, the insured must timely notify and/or serve the UM/UIM carrier with the lawsuit. As with most first-party claims, the insured generally has a duty to notify the insurer of the loss and the potential claim. Whether the failure to notify the insurer bars coverage depends upon the length of the delay, whether the delay was in bad faith, and whether the insurer was prejudiced. Liberty Mut. Ins. Co. v. Pennington, 141 N.C. App. 495, 499, 541 S.E.2d 503, 507 (2000) (where insured did not notify UIM carrier of

lawsuit until about 16 months later, and they acknowledge that this was not prompt notification, insured does not necessarily lose coverage). (As noted earlier, it is not clear whether a policy provision requiring the insured to notify the insurer will operate to void coverage, where coverage is based on the FRA.)

In addition, in a UM claim, the insured is required to formally serve the insurer pursuant to Rule 4 of the Rules of Civil Procedure. A failure to timely and properly serve the UM carrier will negate the claim. Reese v. Barbee, 129 N.C. App. 823, 501 S.E.2d 698 (1998) (where insured did not serve UM insurer until after 3 years elapsed, UM claim was barred). Accord Cline v. Owens, 2008 WL 2415930, 3 (N.C.App. 2008) (“plaintiff issued a summons to ‘Safeco Insurance Company’ on 18 September 2006, and to ‘General Insurance Company of America, a subsidiary of Safeco Insurance Company’ on 28 February 2007. The statute of limitations on plaintiff’s claim expired on 31 October 2006. *See* N.C. Gen.Stat. § 1-52(16) (2007). Since General Insurance and Safeco are separate and distinct corporate entities, had the process served on General Insurance been valid, it would have effectively added a new party to the lawsuit. Plaintiff seeks not to correct any mistakes or misnomers in the service of process, but to add General Insurance as a party, an impermissible action under Rule 15(c).”).

It is not clear whether the insured must prepare a summons to the defendant only, or also a summons to the UM carrier. The insured should therefore prepare a summons to both the tortfeasor and the UM carrier as a precaution.

In a UIM claim, the statute requires the insured to give “notice” of the suit to the UIM carrier. The insured is not required to formally serve the UIM carrier pursuant to Rule 4. Darroch v. Lea, 150 N.C. App. 156, 160-161, 563 S.E.2d 219,222 - 223 (2002)

(“[T]he formal service of process requirement of our Rules of Civil Procedure do not apply to § 20-279.21(b)(4). We further hold that plaintiff was not required to notify Farm Bureau within the three-year statute of limitations for negligence.”); Liberty Mut. Ins. Co. v. Pennington, 141 N.C. App. 495, 498, 541 S.E.2d 503, 506 (2000) (“[T]his provision does not provide a specific time within which an insured must notify her insurer, nor does it dictate how the insured must notify her carrier about the claim. We discern no hint from the statute that an underinsured motorist carrier must be notified within the statute of limitations governing the tortfeasor.”).

Many of the issues which can arise in a UM/UIM context involving the statute of limitations have not been addressed in North Carolina. For example, where the insured demands arbitration within the three-year statute of limitations, but does not institute a civil action against the tortfeasor/motorist, then it is not clear whether the insured has preserved his claim. The UM/UIM policy states that the insured may demand arbitration where the parties do not agree on liability or damages, but neither the policy nor the statute indicates whether the insured must comply with all other requirements to preserve a UM/UIM claim (including the ability to obtain a judgment against the tortfeasor).

Where the insured demands arbitration after the statute of limitations has expired, and has not sued the tortfeasor, his claim is probably barred, but there is no authority on this point.

In one case, the insured reached a settlement with the liability carrier for \$290,000. The liability carrier later became insolvent, and the Guaranty Association assumed the claim. It then accepted coverage only for \$90,000, and took the position that the insured was required to exhaust his two UIM policies with limits of \$100,000. The

insured never filed suit within the statute of limitations, because he was relying on the settlement with the liability carrier (which provided for a stream of payments). The UIM carriers argued that the claim was barred against them based on the statute of limitations. The Court of Appeals held, however, that the relevant date was not the motor vehicle accident, but rather the insolvency of the liability carrier. The Court concluded that the UIM claims were therefore not barred. Jones v. N.C. Ins. Guar. Ass'n, 163 N.C. App. 105, 110, 592 S.E.2d 600, 603 - 604 (2004) (“Credit General's insolvency was the event triggering the liability of the UM insurers, . . .”).

These changes “become[] effective January 1, 2009, and appl[y] to policies issued or renewed on or after that date.”

(a) A "motor vehicle liability policy" as said term is used in this Article shall mean an owner's or an operator's policy of liability insurance, certified as provided in G.S. 20-279.19 or 20-279.20 as proof of financial responsibility, and issued, except as otherwise provided in G.S. 20-279.20, by an insurance carrier duly authorized to transact business in this State, to or for the benefit of the person named therein as insured.

(b) Such owner's policy of liability insurance:

- (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;
- (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: thirty thousand dollars (\$30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars (\$60,000) because of bodily injury to or death of two or more persons in any one accident, and twenty-five thousand dollars (\$25,000) because of injury to or destruction of property of others in any one accident; and

(b) Such owner's policy of liability insurance:

- (3) No policy of bodily injury liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle, shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is provided therein or supplemental thereto, under provisions filed with and approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom, ~~in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars (\$1,000,000), as selected by the policy owner.~~ **with limits equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy. The named insured may purchase uninsured motorist bodily injury coverage with greater limits, subject to the limitation that in no event shall uninsured motorist bodily injury coverage limits exceed one million dollars (\$1,000,000) per person and one million dollars (\$1,000,000) per accident. The insurer shall notify the named insured of his or her right to purchase uninsured motorist bodily injury coverage with greater limits, when the policy is issued and renewed, as provided in subsection (m) of this section.** The provisions shall include coverage for the protection of persons insured thereunder who are legally entitled to

recover damages from owners or operators of uninsured motor vehicles because of injury to or destruction of the property of such insured, with a limit in the aggregate for all insureds in any one accident ~~of up to~~ **equal to the highest** limits of property damage liability **coverage for any one vehicle insured** in the owner's policy of liability insurance, and subject, for each insured, to an exclusion of the first one hundred dollars (\$100.00) of such damages. The provision shall further provide that a written statement by the liability insurer, whose name appears on the certification of financial responsibility made by the owner of any vehicle involved in an accident with the insured, that the other motor vehicle was not covered by insurance at the time of the accident with the insured shall operate as a prima facie presumption that the operator of the other motor vehicle was uninsured at the time of the accident with the insured for the purposes of recovery under this provision of the insured's liability insurance policy. ~~The coverage required under this subdivision is not applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured in the policy does not reject uninsured motorist coverage and does not select different coverage limits, the amount of uninsured motorist coverage shall be equal to the highest limit of bodily injury and property damage liability coverage for any one vehicle in the policy. Once the option to reject the uninsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless the named insured makes a written request to exercise a different option. The selection or rejection of uninsured motorist coverage or the failure to select or reject by a named insured is valid and binding on all insureds and vehicles under the policy. Rejection of or selection of different coverage limits for uninsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by a named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.~~

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 a policy that insures more than one motor vehicle, that person shall not be permitted to combine the uninsured motorist limit applicable to any one motor vehicle with the uninsured motorist limit applicable to any other motor vehicle to determine the total amount of uninsured motorist coverage available to that person. 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. The previous sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-10(1) and (2).

In addition to the above requirements relating to uninsured motorist insurance, every policy of bodily injury liability insurance covering liability arising out of the ownership, maintenance or use of any motor vehicle, which policy is delivered or issued for delivery in this State, shall be subject to the following provisions which need not be contained therein.

a. A provision that the insurer shall be bound by a final judgment taken by the insured

against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer, upon being served as herein provided, shall be 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. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether the pleading is verified or not) to the summons, complaint or other process served upon it. The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists. No default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law. The failure to post notice to the insurer 60 days in advance of the initiation of suit shall not be grounds for dismissal of the action, but shall automatically extend the time for the filing of an answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer.

b. Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as the result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer: Provided, in that event, the insured, or someone in his behalf, shall report the accident within 24 hours or as soon thereafter as may be practicable, to a police officer, peace officer, other judicial officer, or to the Commissioner of Motor Vehicles. The insured shall also within a reasonable time give notice to the insurer of his injury, the extent thereof, and shall set forth in the notice the time, date and place of the injury. Thereafter, on forms to be mailed by the insurer within 15 days following receipt of the notice of the accident to the insurer, the insured shall furnish to insurer any further reasonable information concerning the accident and the injury that the insurer requests. If the forms are not furnished within 15 days, the insured is deemed to have complied with the requirements for furnishing information to the insurer. Suit may not be instituted against the insurer in less than 60 days from the posting of the first notice of the injury or accident to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent. The failure to post notice to the insurer 60 days before the initiation of the suit shall not be grounds for dismissal of the action, but shall automatically extend the time for filing of an answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer. Provided under this section the term "uninsured motor vehicle" shall include, but not be limited to, an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability within the limits specified therein because of insolvency.

An insurer's insolvency protection shall be applicable only to accidents occurring during

a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within three years after such an accident. Nothing herein shall be construed to prevent any insurer from affording insolvency protection under terms and conditions more favorable to the insured than is provided herein.

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.

For the purpose of this section, an "uninsured motor vehicle" shall be a motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is that insurance but the insurance company writing the insurance denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. 20-279.24 or 20-279.25 in lieu of the bodily injury and property damage liability insurance, or the owner of the motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act; but the term "uninsured motor vehicle" shall not include:

- a. A motor vehicle owned by the named insured;
- b. A motor vehicle that is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
- c. A motor vehicle that is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);
- d. A land motor vehicle or trailer, if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle; or
- e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

For purposes of this section "persons insured" means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of the motor vehicle.

Notwithstanding the provisions of this subsection, no policy of motor vehicle liability insurance applicable solely to commercial motor vehicles as defined in G.S. 20-4.01(3d)⁴ or applicable solely to fleet vehicles shall be required to provide uninsured

⁴ (3d) Commercial Motor Vehicle. --Any of the following motor vehicles that are designed or used to transport passengers or property:

motorist coverage. Any motor vehicle liability policy that insures both commercial motor vehicles as defined in G.S. 20- 4.01(3d) and noncommercial motor vehicles shall provide uninsured motorist coverage in accordance with the provisions of this subsection in amounts equal to the highest limits of bodily injury and property damage liability coverage for any one noncommercial motor vehicle insured under the policy, subject to the right of the insured to purchase higher uninsured motorist bodily injury liability coverage limits as set forth in this subsection. For the purpose of the immediately preceding sentence, noncommercial motor vehicle shall mean any motor vehicle that is not a commercial motor vehicle as defined in G.S. 20-4.01(3d), but that is otherwise subject to the requirements of this subsection.

(4) Shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this ~~section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars (\$1,000,000) as selected by the policy owner.~~ **section, with limits equal to the highest limits of bodily injury liability coverage for any one vehicle insured under the policy. The named insured may purchase underinsured motorist coverage with greater limits, subject to the limitation that in no event shall the underinsured motorist coverage limits exceed one million dollars (\$1,000,000) per person and one million dollars (\$1,000,000) per accident. The insurer shall notify the named insured of his or her right to purchase underinsured motorist coverage with greater limits, when the policy is issued and renewed, as provided in subsection (m) of this section. An "uninsured motor vehicle," as described in subdivision (3) of this subsection, includes an "underinsured highway vehicle," which 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. For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person 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. Notwithstanding the immediately preceding sentence, a**

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- a. A Class A motor vehicle that has a combined GVWR of at least 26,001 pounds and includes as part of the combination a towed unit that has a GVWR of at least 10,001 pounds.
 - b. A Class B motor vehicle.
 - c. A Class C motor vehicle that meets either of the following descriptions:
 1. Is designed to transport 16 or more passengers, including the driver.
 2. Is transporting hazardous materials and is required to be placarded in accordance with 49 C.F.R. Part 172, Subpart F.

highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle ~~if~~ **unless** the owner's policy insuring that vehicle provides underinsured motorist coverage with limits that are ~~less than or equal to~~ **greater than** that policy's bodily injury liability limits. For the purposes of this subdivision, the term "highway vehicle" means a land motor vehicle or trailer other than (i) a farm-type tractor or other vehicle designed for use principally off public roads and while not upon public roads, (ii) a vehicle operated on rails or crawler-treads, or (iii) a vehicle while located for use as a residence or premises. The provisions of subdivision (3) of this subsection shall apply to the coverage required by this subdivision. 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. Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. 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 any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy; provided that this sentence shall apply only to insurance on nonfleet private passenger motor vehicles as described in G.S. 58-40-15(9) and (10). The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days

following receipt of that notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be denominated as a party in its own name except upon its own election.

Assignment or subrogation as provided in this subdivision shall not, absent contrary agreement, operate to defeat the claimant's right to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for damages beyond those paid by the underinsured motorist insurer. The claimant and the underinsured motorist insurer may join their claims in a single suit without requiring that the insurer be named as a party. Any claimant who intends to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for moneys beyond those paid by the underinsured motorist insurer shall before doing so give notice to the insurer and give the insurer, at its expense, the opportunity to participate in the prosecution of the claim. 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.

A party injured by the operation of an underinsured highway vehicle who institutes a suit for the recovery of moneys for those injuries and in such an amount that, if recovered, would support a claim under underinsured motorist coverage shall give notice of the initiation of the suit to the underinsured motorist insurer as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. Upon receipt of notice, the underinsured motorist insurer 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. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and present therein a claim against other parties; provided that application is made to and approved by a presiding superior court judge, in any such suit, any insurer providing primary liability insurance on the underinsured highway vehicle may upon payment of all of its applicable limits of liability be released from further liability or obligation to participate in the defense of such proceeding. However, before approving any such application, the court shall be persuaded that the owner, operator, or maintainer of the underinsured highway vehicle against whom a claim has been made has been apprised of the nature of the proceeding and given his right to select counsel of his own choice to appear in the action on his separate behalf. If an underinsured motorist insurer, following the approval of the application, pays in settlement or partial or total satisfaction of judgment moneys to the claimant, the insurer shall be subrogated to or entitled to an assignment of the claimant's rights against the owner, operator, or maintainer of the underinsured highway vehicle and, provided that adequate notice of right of independent representation was given to the owner, operator, or maintainer, a finding of liability or the award of damages shall be res judicata between the underinsured motorist insurer and the owner, operator, or maintainer of underinsured highway vehicle.

As consideration for payment of policy limits by a liability insurer on behalf of the owner, operator, or maintainer of an underinsured motor vehicle, a party injured by an underinsured motor vehicle may execute a contractual covenant not to enforce against the owner, operator, or maintainer of the vehicle any judgment that exceeds the policy limits.

A covenant not to enforce judgment shall not preclude the injured party from pursuing available underinsured motorist benefits, unless the terms of the covenant expressly provide otherwise, and shall not preclude an insurer providing underinsured motorist coverage from pursuing any right of subrogation.

~~The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. If the named insured does not reject underinsured motorist coverage and does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy. Once the option to reject underinsured motorist coverage or to select different coverage limits is offered by the insurer, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless a named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a named insured or the failure to select or reject is valid and binding on all insureds and vehicles under the policy.~~

~~Rejection of or selection of different coverage limits for underinsured motorist coverage for policies under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the Bureau and approved by the Commissioner of Insurance.~~

Notwithstanding the provisions of this subsection, no policy of motor vehicle liability insurance applicable solely to commercial motor vehicles as defined in G.S. 20-4.01(3d) or applicable solely to fleet vehicles shall be required to provide underinsured motorist coverage. Any motor vehicle liability policy that insures both commercial motor vehicles as defined in G.S. 20-4.01(3d) and noncommercial motor vehicles shall provide underinsured motorist coverage in accordance with the provisions of this subsection in an amount equal to the highest limits of bodily injury liability coverage for any one noncommercial motor vehicle insured under the policy, subject to the right of the insured to purchase higher underinsured motorist bodily injury liability coverage limits as set forth in this subsection. For the purpose of the immediately preceding sentence, noncommercial motor vehicle shall mean any motor vehicle that is not a commercial motor vehicle as defined in G.S. 20-4.01(3d), but that is otherwise subject to the requirements of this subsection.

SECTION 1.2. G.S. 20-279.21 is amended by adding the following new subsections to read:

<< NC ST § 20-279.21 >>

(m) Every insurer that sells motor vehicle liability policies subject to the requirements of subdivisions (b)(3) and (b)(4) of this section shall give reasonable notice to the named insured, when the policy is issued and renewed, that the named insured may purchase uninsured motorist bodily injury coverage and, if applicable, underinsured motorist coverage with limits up to one million dollars (\$1,000,000) per person and one million dollars (\$1,000,000) per accident. An insurer shall be deemed to have given reasonable notice if it includes the following or substantially similar language on the policy's original and renewal declarations pages or in a separate notice accompanying the original and renewal declarations pages in at least

10 point type:

"NOTICE: YOU MAY PURCHASE UNINSURED MOTORIST BODILY INJURY COVERAGE AND, IF APPLICABLE, UNDERINSURED MOTORIST COVERAGE WITH LIMITS UP TO ONE MILLION DOLLARS (\$1,000,000) PER PERSON AND ONE MILLION DOLLARS (\$1,000,000) PER ACCIDENT. THIS INSURANCE PROTECTS YOU AND YOUR FAMILY AGAINST INJURIES CAUSED BY THE NEGLIGENCE OF OTHER DRIVERS WHO MAY HAVE LIMITED OR ONLY MINIMUM COVERAGE OR EVEN NO LIABILITY INSURANCE. YOU SHOULD CONTACT YOUR INSURANCE COMPANY OR AGENT TO DISCUSS YOUR OPTIONS FOR OBTAINING THIS ADDITIONAL COVERAGE. YOU SHOULD ALSO READ YOUR ENTIRE POLICY TO UNDERSTAND WHAT IS COVERED UNDER UNINSURED AND UNDERINSURED MOTORIST COVERAGES."

(n) Nothing in this section shall be construed to provide greater amounts of uninsured or underinsured motorist coverage in a liability policy than the insured has purchased from the insurer under this section.

(o) An insurer that fails to comply with subsection (m) of this section is subject to a civil penalty under G.S. 58-2-70.