

CHAPTER 1
AUTOMOBILE INSURANCE LAW

PRESENTED BY:

Theodore B. Smyth
Smyth & Cioffi, L.L.P.
3221 Blue Ridge Road, Suite 101
Raleigh, NC 27612
(919) 782-2000

I. GENERAL RULES OF AUTO INSURANCE LAW IN NORTH CAROLINA

A. Introduction

Generally there is a hierarchy of regulation concerning insurance coverage. First, federal and state laws specifically apply to certain elements of coverage, and any such regulations generally trump contrary policy provisions in a policy, to the extent of such legal requirements. Second, there are federal and state regulations that have been promulgated to implement federal and state law concerning insurance coverage. Once again, these regulations will trump and override contrary provisions in a policy used to certify compliance with federal or state insurance requirements. Third, and finally, there are a series of rules that have been adopted in North Carolina through court decisions which constitute common law North Carolina insurance law relating to construction of insurance policies. Thus, in any examination of a coverage issue involving automobile insurance, the hierarchy of examination would begin with applicable federal or state statutes, then a review of applicable federal or state regulations, and finally resort to rules of construction applicable to insurance contracts, to be applied to the specific language of the insurance policy or policies in question.

B. The Role of Statutes in N.C. Auto Insurance Law

1. North Carolina Laws

North Carolina insurance contracts are generally governed by Chapter 58 of the North Carolina General Statutes. However, there are a number of other statutory provisions which more specifically address certain types of liability insurance. For automobile liability insurance, the major source of regulation is found in Chapter 20 of the General Statutes. To the extent it conflicts with any provisions under Chapter 58, the North Carolina courts have generally held that the more specific provisions of Chapter 20 govern over the more general insurance provisions of Chapter 58. See, Odom v. Nationwide Mutual Ins. Co., 101 N.C. App. 627, 401 S.E.2d 87, review denied, 329 N.C. 499, 47 S.E.2d 539 (1991).

A non-exclusive list of North Carolina statutory provisions relating to the regulation of motor vehicle liability insurance policies includes:

- (a) North Carolina Financial Responsibility Act - N.C. Gen. Stat. § 20-279.1 *et sequa* (with

- particular attention to § 20-279.21)
- (b) Liability insurance for rental vehicles - N.C. Gen. Stat. § 20-281 through 284
- (c) Financial Responsibility of Tax Cab Operators - N.C. Gen. Stat. § 20-280
- (d) Liability insurance for commercial motor vehicles - N.C. Gen. Stat. § 20-309(a1)

Policy forms are regulated by the North Carolina Department of Insurance. Absent a specific exception, presumably any North Carolina liability policies should be approved as to their wording and content prior to issuance pursuant to N.C. Gen. Stat. § 58-41-50 *et sequa*. As to the personal auto policy, the contents are developed through the North Carolina Rate Bureau. *See*, N.C. Gen. Stat. § 58-36-1 *et sequa*.

The regulation of insurance in North Carolina is further undertaken by way of administrative regulations. Title 11 of the North Carolina Administrative Code is devoted to insurance regulation. The regulations of Title 11 provide some fine tuning to the statutes. One chapter of Title 11 that in particular may provide some regulatory input for liability policies is Chapter 4 which deals with consumer services and spends a lot of time on the adjustment of claims.

Generally, North Carolina regulates motor vehicles operating on the highways of the State of North Carolina. However, it excludes a large number of categories of vehicles from its regulation. The exceptions to the Financial Responsibility obligations in North Carolina include vehicles owned by, or persons in the course of their employment with: the Federal Government, the State of North Carolina, Counties, Municipalities, other Subdivisions of the State of North Carolina, and motor vehicles registered under N.C. Gen. Stat. § 20-382 (as for-hire motor carriers). *See*, N.C. Gen. Stat. § 20-279.32.

Financial responsibility legislation is generally regarded as being for the benefit of persons injured. One legal commentator has observed:

A financial responsibility statute is considered to have been passed largely for the benefit of persons injured. Policies issued pursuant thereto have the same purpose of public policy, although policy provisions not in conflict with such a statute will control, particularly where the motorist does not fall within the statutory requirements.

2 Holmes' Appleman on Insurance, 2D Section 9.1 at pages 502-503 (1996).

The North Carolina courts have embraced this purpose as well. Numerous decisions indicate that the primary purpose of the North Carolina Financial Responsibility Act is to protect innocent motorists from financially irresponsible motorists. *See*, Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1997); Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Ins. Co., 283 N.C. 87, 194 S.E.2d 834 (1973); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

Additionally, North Carolina courts have uniformly indicated that the compulsory Motor Vehicle Insurance Act is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment by the General Assembly may be accomplished. *See*, Harris ex rel Freedman v. Nationwide Mut. Ins. Co., 332 N.C. 184, 420 S.E.2d 124 (1992); Moore v. Hartford Fire Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967).

However, that statutory override of contrary policy language applies only to the minimum limits required under the Financial Responsibility Act, and above that the policy will be construed as written. *See, e.g.*, Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964). Thus, for example in Odom v. Nationwide Mut. Ins. Co. 101 N.C. App. 627, 401 S.E.2d 87, *review denied*, 329 N.C. 499, 47 S.E.2d 539 (1991), the Court of Appeals held that material misrepresentations on the application for insurance would not bar recovery for the minimum mandated coverage under the Financial Responsibility Act, but would void coverage above that amount for any excess voluntary liability

coverage to the extent that fraud was established.

The North Carolina Financial Responsibility Act mandates certain minimum liability limits generally for motor vehicles, consisting at the present of \$30,000.00 per person and \$60,000.00 per occurrence for bodily injury and \$25,000.00 per occurrence for property damage. See, N.C. Gen. Stat. § 20-279.21(b)(2). However, for commercial motor vehicles as defined in N.C. Gen. Stat. § 20-4.01(3d), North Carolina mandates a like limit to that required under federal law for so-called “for-hire carriers” which are transporting non-hazardous property in interstate or foreign commerce, as mandated in 49 C.F.R. § 387.9. That limit is currently \$750,000.00 per accident. See *discussion supra at § I.A.2*. In determining what is a “commercial motor vehicle” pursuant to N.C. Gen. Stat. § 20-309(a1), as defined in § 20-4.01(3d), one will need to know something about the gross vehicle weight of the unit and any towed unit, as the complicated definitions utilize configurations based on such measurements.

Motor vehicles under the jurisdiction of the North Carolina Rate Bureau are defined in N.C. Gen. Stat. § 58-40-10 as “non-fleet” “private passenger motor vehicles”. These definitions likewise utilize a combination of focus on usage and on gross vehicle weight of the vehicle. Occasionally, it is very important whether a vehicle is a non-fleet private passenger motor vehicle. It can mandate the use of Rate Bureau adopted language in the policy, and can also affect other coverage related issues such as the requirements for a selection/rejection form for uninsured/under insured motorist coverage. (See *discussion supra in § V*). There is a specific regulation in North Carolina finding that it is “unfair discrimination” to allow employees’ private autos to be insured through a premium discount on a fleet policy. See, 11 N.C.A.C. § 10.0305.

2. Federal Laws

While generally North Carolina law will be the primary source of regulation as to the content and construction of insurance contracts, depending on the type of vehicle, federal laws or regulations may also be relevant on certain types of liability coverage. For example, endorsements are often issued to commercial auto policies for motor carriers involved in interstate commerce. These policies contain endorsements (or should) which deal with federal insurance requirements.

Originally, federal regulation of interstate insurance requirements was done through the Interstate Commerce Commission, which mandated an endorsement to provide certain coverages quite comparable to the theme of North Carolina’s Financial Responsibility Act of protecting innocent motorists, but with much higher limits, and regulating a narrower set of motor vehicles. That endorsement is provided for at 49 C.F.R. § 387.15 and the nuances of its use are found at 49 C.F.R. Part 387.

The jurisdiction for implementing such coverage has been moved from the now defunct Interstate Commerce Commission to the Department of Transportation as per the ICC Termination Act of 1995, Pub.L.No. 104-88, 109 Stat. 803 (effective January 1, 1996). The law dictating minimum financial responsibility is located at 49 U.S.C. § 31139. Much of the case law construing the requirements of the minimum financial responsibility for transporting property under interstate commerce has referred to the endorsement as an “ICC” endorsement. For a time both the Interstate Commerce Commission and the Department of Transportation had developed their own form of the endorsement. There is a considerable body of case law among the Circuits construing these endorsements. See *generally, Nissenburg, The Law of Commercial Trucking § 14 (3rd Ed. 2003)*. The Federal Motor Carrier Act seems to have the same public policy of protecting innocent motorists as is articulated under the North Carolina Financial Responsibility Act. See, Hamm v. Canal Ins. Co., 10 F. Supp.2d 539 affirmed by unpublished decision, 178 F.3d 1283 (4th Cir. 1999).

C. Court Adopted Rules When Statutes Do Not Control an Issue

Numerous decisions have held that in contrast to the mandates of the Financial Responsibility Act, which are written into each automobile liability policy as a matter of law, coverage that is in addition to the mandatory minimum limits of the statute is voluntary, a matter of contract and not subject to the requirements of the Financial Responsibility Act. *See e.g., Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973); *Younts v. State Farm Mut. Auto Ins. Co.*, 281 N.C. 582, 189 S.E.2d 137 (1972); *Brown v. Truck Ins. Exchange*, 103 N.C. App. 59, 404 S.E.2d 172, *cert. denied*, 329 N.C. 786, 408 S.E.2d 515 (1991). *See also*, N.C. Gen. Stat. § 20-279.21(g) (“any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article.”).

The North Carolina Appellate courts have set forth a series of rules applicable to issues involving the construction of insurance policies. While football games are played on a level field, the same cannot be said of insurance litigation. The courts have indicated that since the policies are drafted by the insurer and there is little negotiation in the contents of the wording, ambiguities are construed against the drafter, the insurance company. A set of rules of thumb on the construction of insurance policies is set forth herein below, which gives an idea of the ground rules for litigation involving the construction of an insurance policy.

The well-established general rule of construction of insurance policies in North Carolina is that “the words used in the policy having been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company.” *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). Additionally, “[E]xclusions from , conditions upon and limitations of undertakings by the company, otherwise contained in the policy, are to be construed strictly so as to provide the coverage, which would otherwise be afforded by the policy.” *Wachovia*, 276 N.C. at 355-356, 172 S.E.2d at 522-523.

When a policy contains a definition of a term used in it, this is the meaning which must be given to that term whenever it appears in a policy, unless the context clearly requires otherwise. *See, Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522; *Kirk v. Nationwide Mut. Ins. Co.*, 254 N.C. 651, 655, 119 S.E.2d 645, 647 (1961). (“When the policy expressly defines such terms as ‘commercial automobile’ or ‘commercial use’ in reference to the coverage in question, the policy definitions must be accepted and applied.”) (citing numerous authorities). *See also, City of Greenville v. Haywood*, 130 N.C. App. 271, 274, 502 S.E.2d 430, 433 (1998) (“the Court is obliged to use definitions applied in the policy to determine the meaning of words contained in that policy.”); *Durham City Board of Education v. National Union Fire Ins. Co.*, 109 N.C. App. 152, 156, 426 S.E.2d 451, 453 (1993) (same). Further, “[o]riginally the same words and phrases used in different clauses of an insurance contract will be understood to have been used in the same sense.”; *Kirk*, 254 N.C. at 655, 119 S.E.2d at 647; *Eatman Leasing, Inc. v. Empire Fire & Marine Ins. Co.*, 145 N.C. App. 278, 285, 550 S.E.2d 271, 275 (2001), *petition denied*, 356 N.C. 298, 570 S.E.2d 503 (2002) (in a conflict between the printed policy form and an endorsement the Court will opt for the more favorable language in the endorsement, since those provisions most favorable to the insured are to control). *See generally*, 1 Windt, *Insurance Claims & Disputes*, § 6:2 at p. 611, fn. 42 (4th Ed. 2001) (the information set forth in a declarations page controls over conflicting policy language).

D. Auto Insurance with Connections to More Than One State

From time to time one will confront a policy that is issued to a regional or national corporation which does business in many states, or which is headquartered in another state but which has

operations or contact with North Carolina. Such a policy might be procured in another state and sent to the insured corporation in another state, but have some implications for a tort or other claim arising and pending in North Carolina. North Carolina has a statutory provision, N.C. Gen. Stat. § 58-3-1 which provides:

All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.

Thus according to this statute, while a liability insurance policy may provide that it was issued by an out-of-state insurer to an insured headquartered outside of North Carolina, North Carolina law may well nevertheless control the construction of the policy if it involves “property, lives, or interests in this State”. See Collins & Aikman Corp. v. Hartford Accident & Indemnity Co., 335 N.C. 91, 436 S.E.2d 243 (1993) (applying North Carolina law to the construction to an umbrella policy issued to an out-of-state insured by an out-of-state insurer for a North Carolina accident).

In fact, in the realm of motor vehicle liability insurance, the courts have on a number of occasions applied North Carolina statutory mandates to liability policies although the policy was issued to an out-of-state corporate insured. See Hendrickson v. Lee, 119 N.C. App. 444, 459 S.E.2d 275 (1995) (policy governed by North Carolina law where commercial vehicle was registered and principally garaged in North Carolina pursuant to N.C. Gen. Stat. § 20-309); Martin v. The Continental Insurance Company, 123 N.C. App. 650, 474 S.E.2d 146 (1996) (applying North Carolina requirements to commercial auto policy where North Carolina had a “close connection with the interest insured”). See also, N.C. Farm Bureau Mut. Ins. Co. v. Holt, 154 N.C. App. 156, 574 S.E.2d 60 (2002) *pet. denied*, 357 N.C. 63, 579 S.E.2d 391 (2003) (where Declaratory Judgment action filed in N.C. involving N.C. auto and auto policy, court had long arm jurisdiction over S.C. resident driver involved in S.C. accident).

On the other hand, if a policy is clearly issued to an out-of-state insured for an out-of-state risk, and the only connection with North Carolina is the situs of the accident, then in all likelihood North Carolina will apply the law of the state where the policy was issued or delivered. See *e.g.*, Fortune Ins. Co. v. Owens, 351 N.C. 424, 526 S.E.2d 463 (2000) (applying Florida law to auto policy issued in Florida to Florida insureds where accident occurred in North Carolina).

II. GENERAL TYPES OF AUTO INSURANCE

A. Personal Lines Insurance

Generally speaking, personal lines insurance involves vehicles owned by individuals for everyday use. If a vehicle is registered to an individual rather than a corporate entity, and is used accordingly, then there is a good chance it will be under the jurisdiction of the North Carolina Rate Bureau and its adopted forms. Generally speaking, in the arena of regulation, its primary focus is on the non-fleet private passenger motor vehicle, and it issues the standardized policy which all member companies writing personal lines business in North Carolina must follow, unless specifically exempted. The North Carolina Rate Bureau is a quasi governmental entity created pursuant to legislative mandates and is described in some detail at N.C. Gen. Stat. § 58-36-1 *et sequa*. One can contact the Rate Bureau as follows: North Carolina Rate Bureau, 5401 Six Forks Road, Raleigh, NC 27609. The telephone number is 919-783-9790. The Web page is located at www.ncrb.org.

The standard coding for this Personal Auto Rate Bureau policy is referenced to a form known as “NC 00 01”. There are four more digits associated with these forms and they are a code for the month and the year of the addition of the form. For example, the last comprehensive version of this policy

was referenced as NC 00 01 06 96. That version was the June 1996 version of the approved standard form. Between June of 1996 and 2005 that form has not changed, but a number of endorsements have been added to make interim changes to the contents of the policy that have been approved by the Rate Bureau since that standardized form was approved. Thus, prior to 2005 one would need to make sure both the specimen standard form, and all applicable endorsements were provided in order to assess the full contents of a policy.

As this paper goes to press, there is pending before the North Carolina Department of Insurance a new version of the standardized form which is proposed by the Rate Bureau as NC 00 01 06 05, and would seek to incorporate many additions to the policy that were enacted piecemeal since June of 1996. However, it is not known as of this writing whether the Department of Insurance will approve that form as proposed. If it is approved, then it will govern the policy language for the vast majority of private passenger motor vehicle policies issued in this State.

B. Commercial Lines Insurance

Commercial lines insurance does not have the same strict requirements as to policy forms that is found in personal lines coverage for policies governed by the North Carolina Rate Bureau. However, the insurance industry has generally created several insurance products that seem to inform most of the policies that are written, with some degree of standardization. The organization taking the laboring oar on such standardization (although by no means operating under the auspices of any governmental authority), is the Insurance Services Office or so-called "ISO". It promulgates and copyrights its own policy language which is often utilized wholly or in part by individual insurance companies.

Several forms of commercial auto coverage generally seen would be the business auto coverage form which bears the ISO standardized code number (usually found in the bottom left-hand corner of a policy form) of CA 00 01, followed by four digits reflecting the month and year of the edition of that form. For example, the December 1993 business auto coverage form issued by ISO is the form number CA 00 01 12 93. The CA 00 01 coverage form or one which substantially tracks its provisions is quite popular in the industry and often seen in litigation. Because there is some standardization, often even if there are no cases from North Carolina construing particular phraseology, cases from other jurisdictions can be found tracking substantially similar language.

A second frequently seen commercial form is a so-called "garage" coverage form. It is used by many garages, repair shops and dealerships. The Insurance Services Office has enacted a standardized form bearing form number CA 00 05. This product is slightly different from a commercial auto policy, in that in this situation there are numerous circumstances where a garage has access to and is using a vehicle not owned by the garage for purposes of test driving, bringing to or from the garage for repair, or otherwise being operated by a garage employee, or a customer.

A third and important category of commercial coverage is that associated with the trucking industry. The Insurance Services Office denominates this standardized form as CA 00 12, followed by four digits reflecting the month and year of the addition of this form. This truckers' coverage form is designed to meet the circumstances of a trucking operation where frequently one company will be leasing either a tractor or a trailer from a second company, or some combination of ownership, leasing or borrowing results in exposure for both owned and unowned tractors or trailers.

There is often a very important overlay to this type of coverage mandated by the Federal Government. If the trucking company or other commercial operation is hauling or carrying for hire on an interstate basis, or if certain types of materials are being transported (such as pollutants, radioactive materials, or other hazardous substances) or other listed commodities the government wants to make sure that there is a viable source for coverage in the event of an accident. In the federal context, standardized forms required to meet federal insurance requirements are found under federal

regulations at 49 C.F.R. 387.1 et sequa. Specifically there are forms promulgated for motor carriers of property at 49 C.F.R. 387.15, and for motor carriers of passengers at 49 C.F.R. 387.39. References to the MCS-90 form and to form MCS-90B are to forms promulgated by the Federal Government to regulate insurance for motor carriers of property and motor carriers of passengers respectively. The actual approved forms are found in the regulations. The limits required are affected by what is being transported.

III. NON-LIABILITY RELATED COVERAGE

A. Collision/Comprehensive Property Damage Coverage

The North Carolina Financial Responsibility Act does not regulate collision or comprehensive property damage coverage to ones' own insured motor vehicle. This is first-party property damage coverage that one buys to protect an auto which is damaged by various enumerated occurrences.

Collision coverage as the name denotes, is generally geared toward coverage property damage that arises out of a collision which is defined to be generally an impact with another vehicle or object in the North Carolina Rate Bureau approved personal auto form. Thus, if you hit another vehicle on the highway or if you forget to set your emergency brake on a hill and your car rolls down into a stone wall collision coverage would most likely be the implicated coverage. It is not based on a finding of fault or negligence, but rather is designed to protect someone against damage to their property even if they did not use good judgment in operating their vehicle. However, it is geared towards "accidental loss" and generally speaking, this type of coverage will not inure to the benefit of an insured who intentionally destroys his or her own property.

Many times vehicles are purchased through financing from a bank or other lending institution, and they are deemed to have a separate insurable interest in the property, and have rights to the coverage as well, to the extent of the lien. There is also an independent duty to notify the loss payee if the coverage is about to be canceled for any reason, so that they can make sure that there is coverage insuring their collateral on the loan.

A second type of coverage for damage to a vehicle is comprehensive coverage, which is designed to cover certain causes of loss to automobiles other than a collision. These are usually in the form of a list, and includes such things as falling objects, fire, theft, earthquakes, windstorms, hail, water or flood, vandalism, contact with a bird or animal (i.e., hitting a deer) or breakage of glass. There are a number of reasons for damage to a vehicle which are excluded, and there are also a number of restrictions on specific portions of vehicles that have particular requirements to make a claim, such as stereos and radar detecting equipment.

Such coverages can interact with liability coverages on claims involving property damage. For example, someone may make a collision claim for damage to their vehicle arising out of an automobile accident. Their insurance company would pay them for their property damage, subject to a deductible.

Thereafter, the insured may decide to sue the other driver as an alleged tortfeasor, and would be entitled to collect, if successful in the tort action, not only the deductible, but also any additional value that the finder of fact found in the property damage above and beyond what was paid by the collision insurer. On the other hand, the collision insurer would have subrogation rights to that portion of the claim that it has previously paid. Often, insurance companies will resolve their disputes about collision claims and subrogation rights through an informal arbitration process separate and apart from any tort litigation involving the insured and a third-party.

The rights of an insured in the context of collision/comprehensive coverage are very much policy language driven, and it would be difficult to give advice on such matters without having the applicable policy language in-hand to carefully review. It should be noted that the most recent proposed changes

to the standard Rate Bureau language in form number NC 00 01 if approved may have substantial changes to the collision and comprehensive coverages.

B. Medical Payments Coverage

Medical payments coverage is a voluntary coverage purchased to provide certain minimal protection to defined insureds who are injured in the course of an automobile accident. Medical payments coverage is not governed by the North Carolina Financial Responsibility Act and is a voluntary coverage in commercial policies as well. It is designed to provide reasonable protection up to a stated limit (unfortunately usually seen at a very low limit of \$500-\$5,000, although it can be purchased at very high limits). It is not based on fault, and the triggering requirements are governed strictly by policy language.

The policy defines the scope of the persons who would be insured through medical payments coverage. In the North Carolina Rate Bureau form the coverage is limited to medical services rendered within three years from the date of the accident and they must be reasonable. The insureds protected through the Rate Bureau language would be "you or any family member" while occupying a motor vehicle or as a pedestrian struck by a motor vehicle. It would further protect non-family members who are occupying the motor vehicle insured in the policy or other motor vehicles operated by family members of the insured purchasing the policy.

There are a number of restrictions and exclusions, including those for vehicles furnished for someone's regular use (such as a company auto), vehicles used in the selling, repairing, servicing, storing, or parking business, vehicles being used as public or delivery conveyances (i.e., taxis or shuttle services) and a number of other restrictions and limitations. Generally, on a personal auto policy in North Carolina one cannot add the medical payments coverage (so-called "stacking" of coverages) for each vehicle insured through one policy, although the possibility exists for multiple policy stacking with other policies not purchased by the family. For example, while riding with one's next door neighbor to the store, one might have recourse to medical payments coverage through the neighbor's policy, as well as through the family policy.

Medical payments coverage does not require a finding of fault or negligence on the part of a particular driver. While medical payments coverage is not specifically regulated through the North Carolina Financial Responsibility Act, it can indirectly be affected by the Act in circumstances such as where an insurer has a setoff against another type of coverage based on the amount of medical payments coverage paid. (*See discussion at V. B. 2b infra*).

IV. LIABILITY COVERAGE

A. Basic Rights to a Defense and to Indemnity Coverage

Generally, there are two distinct protections afforded through an automobile liability insurance policy, those being a duty to defend the insured assumed by the insurer in the insurance contract, and a duty by the insurer to provide indemnity against claims by third-parties against an insured within certain stated parameters of coverage. *See, Brown v. Lumbermans' Mutual Casualty Co., 326 N.C. 387, 390 S.E.2d 150 (1990).*

The duty to defend is not required by the Financial Responsibility Act, or by federally mandated insurance forms, and thus it is subject to the terms and conditions of the particular contract at issue. The point at which an insurance company may cutoff its defense of an insured is controlled by the language in the policy. *Brown, supra*. For example, depending on the policy language, an insurer may not be able to cutoff its right to defend without obtaining a release or litigating the case through to a

judgment, depending on applicable policy language. *Id.*

If a liability carrier tenders its policy limits, there is a statutory provision in the context of underinsured motorist claims for a presiding Superior Court Judge to grant the insurer the right to make the payment and be “released from further liability or obligation to participate in the defense of such proceeding”. See, N.C. Gen. Stat. § 20-279.21(b)(4). However, in such circumstances before allowing this application, the court “shall be persuaded that the owner, operator, or maintainer of the under insured highway vehicle against whom a claim has been made has been appraised 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.” *Id.* Many, but not all Superior Court judges have taken the position that such a release from the duty to defend by a liability carrier should not be permitted unless the underinsured motorist insurer has failed to advance a like sum to that tender by the liability insurer within 30 days, as required by statute to preserve its subrogation right, and the plaintiff is willing to sign a covenant not to enforce a judgment against the tort feisor, as also provided for by statute. The thinking may be that if the defendant is no longer in personal financial peril and the fight is over UIM benefits, the liability insurer should not be required to continue to defend the case.

The provision of a defense by an insurer is a very valuable right, and can cost a liability insurer almost as much as the indemnity coverage afforded through the policy. North Carolina broadly defines the duty to defend and a requirement that the claim eventually be covered through the policy is not a requirement for triggering a defense. See generally, Waste Management of the Carolinas v. Peerless Ins. Co., 315 N.C. 688, 340 S.E.2d 374, *rehearing denied*, 316 N.C. 386, 346 S.E.2d 134 (1986) (addressing the duty to defend in an analogous general liability policy); Duke University v. St. Paul Mercury Ins. Co., 95 N.C. App. 663, 384 S.E.2d 36 (1989) (same). The failure to provide a defense to an insured exposes an insurer to considerable painful remedies. See, Naddeo v. Allstate Ins. Co., 139 N.C. App. 311, 533 S.E.2d 501 (2000) (insurer liable for reasonable defense and indemnity costs incurred by insured after failure of insurer to appropriately step in and provide a defense).

B. Liability Indemnity Coverage

1. Who is an Insured and What Vehicles are Insured?

As to mandatory coverage, the scope of persons insured is defined by applicable state or federal law. North Carolina’s Financial Responsibility Act requires coverage for anyone in “lawful possession” who is involved in the “ownership, maintenance or use” of such motor vehicle. See, N.C. Gen. Stat. § 20-279.21(b)(2). Likewise, the federal regulations pertaining to coverage for motor carriers of property and motor carriers of passengers define respectively who is to be insured under those types of policies. See, Title 49 C.F.R. 387.15 and 387.39. Obviously there is a strong public policy at issue when the government is mandating the persons to be insured through such coverage. Moreover, this appears to be geared toward closing loopholes so that innocent claimants will have recourse to insurance coverage, rather than a desire to protect the tort feisor. See e.g., Moore v. Young, 263 N.C. 483, 139 S.E.2d 704 (1965) (North Carolina’s Financial Responsibility Act); Hamm v. Canal Ins. Co., 10 F. Supp.2d 539 (M.D.N.C. 1998) *affirmed by unpublished decision*, 178 F.3d 1283 (4th Cir. 1999) (construing public policy of Federal Motor Carrier Act).

Above the mandatory limits, North Carolina has indicated that the insurance company is free to regulate who is entitled to insurance protection on a more restrictive basis. See, N.C. Gen. Stat. § 20-279.21(g). See also, Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Co., 283 N.C. 87, 194 S.E.2d 834 (1973); Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285, 134 S.E.2d 654 (1964).

For purposes of liability coverage the vehicle that is listed on the policy is obviously within the scope of the coverage. Generally, when vehicles are required to be certified for insurance coverage, such as through the North Carolina Department of Motor Vehicles, a particular policy will be referenced

as the source of financial responsibility coverage for that vehicle. Moreover, in North Carolina this arrangement is specifically envisioned at N.C. Gen. Stat. § 20-279.21(b)(1) where an “owner’s” policy is described to include “by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted.” Similarly, for any entity operating under the auspices of federal regulations, the vehicular coverage will be mandated by the particular regulatory scheme for motor carriers for property or for motor carriers for passengers. *See*, 49 U.S.C. 31139.

Since North Carolina does allow a statutory exception to the mandates of coverage if a vehicle is not in the lawful possession of the operator at the time of the accident (for example when a vehicle is stolen), the courts have on a number of occasions addressed circumstances where the factual inquiry was the circumstance under which the operator obtained possession of the vehicle prior to the accident.

See, e.g., Nationwide Mut. Ins. Co. v. Land, 318 N.C. 551, 350 S.E.2d 500 (1986); Packer v. Travelers Ins. Co., 28 N.C. App. 365, 221 S.E.2d 707 (1976). It should also be noted that above the financial responsibility limits, the test under state law for coverage is not lawful possession but rather express or implied permission, giving rise to a reasonable belief that person is entitled to use the vehicle. *See, e.g.,* Aetna Casualty & Surety Co. v. Nationwide Mut. Ins. Co., 326 N.C. 771, 392 S.E.2d 377 (1990) (holding that a person without a driver’s license may nevertheless have a reasonable belief that they are entitled to operate the vehicle). The analysis of reasonable belief that someone has a right to use an automobile can become very complicated with amorphous factors such as the relationship between the owner and the person using the vehicle, whether there were several links in the chain of possession of the vehicle, the circumstances of the permission, and custom and prior usage.

2. Multiple Coverages

There are often circumstances where more than one insurance policy may provide liability coverage for a tortfeasor operating a motor vehicle. In these circumstances, generally the courts resort to an examination and comparison of the so-called “other insurance” clauses existing in each of the policies, sorting through their competing language with a hierarchy of winners and losers. Thus, one may confront a primary (pro rata or dollar-for-dollar), excess, or escape clauses, or newer hybrids such as a “super excess” or a “super escape” clause. Generally primary policies seek to have their coverage first in line, excess policies seek to have their coverage last in line, and escape clauses seek to provide that if there is other available coverage then they provide no coverage. The denomination of “super” (a term actually not found in the policy) indicates that it is superior to and overrides any other type of clause. The North Carolina courts have sorted through a wide variety of permutations of match-ups between competing other insurance clauses, and either finds them mutually repugnant because they are similar, or finds that one trumps the other. *See e.g.,* Fidelity & Casualty Co. of New York v. North Carolina Farm Bureau Mut. Ins. Co., 16 N.C. App. 194, 192 S.E.2d 113, *petition denied*, 282 N.C. 425, 192 S.E.2d 840 (1972) (excess beats primary clause); Horace Mann Ins. Co. v. Continental Ins. Co., 54 N.C. App. 551, 284 S.E.2d 211 (1981) (excess clause beats escape clause); Alliance Mut. Ins. Co. v. New York Central Ins. Co., 70 N.C. App. 140, 318 S.E.2d 524 (1984) (mutually repugnant excess clauses create pro rata coverage through both clauses). *See generally*, A. Windt, *Insurance Claims and Disputes Chapter 7* (4th Ed. 2001).

At the federal level, because there is language in the endorsement for motor carriers that may indicate that it is primary coverage, there is a lack of uniformity among the various circuits as to whether that automatically makes such coverage primary, even over other insurance policies which also purport to provide primary coverage. *See generally*, Nissenberg *The Law of Commercial Trucking* at § 14.07[11] at pages 800-801 (3rd Ed. 2003). The Fourth Circuit seemed to follow the majority view that the language making the endorsement primary did not apply to determining allocation of loss among several insurers. Canal Ins. Co. v. Distribution Services, Inc., 320 F.3d 488 (4th Cir. 2003).

3. Exclusions from Coverage

Generally, the Financial Responsibility Act does not allow exclusions from coverage for the minimum financial responsibility limits, with one obvious stated exception for persons operating a vehicle without being in “lawful possession”. See N.C. Gen. Stat. § 20-279.21(b)(2). However, above the minimum financial responsibility limits there are a number of exclusions provided for in the standard personal auto policy and in the standard ISO approved business auto policy form.

One commonly seen exclusion is that for intentionally caused bodily injury or property damage. The North Carolina Rate Bureau form for personal auto policies acknowledges that exclusion does not apply below the minimum limits required by the Financial Responsibility Act. Presumably the same rule would apply for a business auto policy to the extent it was governed by the Financial Responsibility Act. This is obviously a provision to discourage people from running over their enemies, and then having the indemnity available to cover the damages, while on the other hand providing at least minimum limits of coverage to the innocent person. It should be noted that an innocent motorist or pedestrian who only receives minimum limits from the tortfeasor’s carrier because of intentional acts, may nonetheless assert a claim for underinsured motorist coverage, since the liability limits may be inadequate under the circumstances.

Another common exclusion is for coverage for bodily injury to an employee injured in the course and scope of employment. That is found in both the personal auto policy and in the business auto policy, although the phraseology is somewhat different. For many years the North Carolina Legislature apparently would have authorized the use of such an exclusion for liability coverage pursuant to N.C. Gen. Stat. § 20-279.21(e) to the extent that there was otherwise workers’ compensation coverage available to a claimant. See, South Carolina Ins. Co. v. Smith, 67 N.C. App. 632, 313 S.E.2d 856 (1984). However, the provisions of N.C. Gen. Stat. § 20-279.21(e) have been changed by the Legislature in 1999 to substantially rewrite the mandates of that statute, and it does not appear to authorize such a setoff against liability coverage in its current wording. Thus, at least to the minimum financial responsibility limits, it does not appear that workers’ compensation should have any effect whatsoever on the liability obligation. Above the minimum financial responsibility limits it appears that the personal policy and the commercial policy focus on workers’ compensation available to an employee of the insured, and not to employees of any other employer that is not insured through the particular policy. Thus, this is most likely to be triggered in a situation where two employees of the same insured company are driving down the highway and the driver negligently injures the passenger.

There are exclusions for operating a vehicle while being in a “livery” business or in a business involving selling, repairing, servicing, storing or parking vehicles, or while engaged in any business other than farming or ranching. These exclusions should be tempered by the requirement for minimum limits coverage even if so used and by a number of exceptions to the general exclusions found in the policy. See, Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Co., 283 N.C. 87, 194 S.E.2d 834 (1973) (business use exclusion unenforceable as to minimum limits). The business policy standard exclusions obviously are worded somewhat differently on this point since it is designed to insure business activities of the insured.

Through exclusions in the personal auto policy and definitional provisions in the business auto policy they both seek to exclude use of vehicles not insured through that policy. The personal auto policy specifically seeks to exclude coverage for vehicles owned or provided for the regular use of family members which are not insured through that particular policy, and these appear to be enforceable lest an insured buys insurance coverage for only one vehicle in its family, knowing that all other vehicles would be similarly covered even without insurance on those vehicles. See, e.g., N.C. Farm Bureau Mut. Ins. Co. v. Warren, 326 N.C. 444, 390 S.E.2d 138 (1990); N. C. Farm Bureau Mut. Ins. Co. v. Welch, 118 N.C. App. 554, 455 S.E.2d 906 (1995). The business auto policy accomplishes the same thing by using a

code of “covered autos” that are insured through the policy. Many business auto policies cover only “owned autos” or “specifically described autos” so as to narrow coverage when autos not owned by the insured and insured through the policy are at issue. See, e.g., McLeod v. Nationwide Mut. Ins. Co., 115 N.C. App. 283, 444 S.E.2d 487, *petition denied*, 337 N.C. 694, 448 S.E.2d 528 (1994).

V. UNINSURED AND UNDER INSURED MOTORIST INSURANCE

A. Uninsured Motorist Coverage

1. Hit and Run Coverage

Generally, uninsured motorist coverage is designed to provide innocent motorists with coverage, even when the tortfeasor has not procured coverage to insure the damages and injuries caused by their own tortious conduct. One important area of uninsured motorist law is the circumstance where the tortfeasor the innocent motorist does not know the identity of the tortfeasor to be pursued in a civil action. The classic example of such a claim would be a so-called “hit and run” claim where the tortfeasor flees the scene of the accident.

This type of coverage, where the tortfeasor is not known, is heavily regulated by statute. N.C. Gen. Stat. § 20-279.21(b)(3)b. describes the requirements for making an uninsured motorist claim when “the identity of the operator or owner of the vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained...” There is potential for fraud in such claims with the frequently seen late night phantom vehicle, which one would wish to blame for falling asleep, inattentiveness, excess speed, or any other self-inflicted circumstance. The statute has several requirements to avoid abuse of this coverage.

First, there is a requirement that the insured “or someone acting on his behalf” shall report the accident to an appropriate law enforcement within 24 hours “or soon thereafter as may be practicable” to allow for an investigation of the accident. Thus, if there is a phantom vehicle, one needs to immediately call law enforcement to report it and hopefully allow them to possibly convert the claim from one where there is no known tortfeasor, to one where law enforcement successfully identifies the tortfeasor. See, e.g., Hoffman v. Great American Alliance Ins. Co., 166 N.C. App. 422, 601 S.E.2d 908 (2004) (upholding summary judgment when claimant failed to file police report even after insurance agent notified them to do so eleven days after the accident).

Second, the insured is also to give the uninsured motorist insurer notice of the claim “within a reasonable time”. While that time is not specified in the statute, it would certainly be advisable to notify the insurance company at the same time as law enforcement is notified. Thereafter the statute provides a process whereby the UM insurer is to mail forms within 15 days following receipt of notice of the hit and run claim for the insured.

A third requirement built into the statute and steadily enforced by the North Carolina courts is the requirement that the hit and run accident involve a “collision between motor vehicles”. This can be a problematic requirement, and once again appears to be geared toward the avoidance of fraudulent claims. Thus, in McNeil v. Hartford Accident & Indemnity Co., 84 N.C. App. 438, 352 S.E.2d 915 (1987), the court held that there must be a collision between motor vehicles. However, it could be established through an “unbroken chain collision” so long as the hit and run vehicle was one of the vehicles that traded paint in the sequence of events. See also, Petteway v. South Carolina Ins. Co., 93 N.C. App. 776, 379 S.E.2d 80, *petition denied*, 325 N.C. 273, 384 S.E.2d 518 (1989). When the phantom vehicle does not make contact with another vehicle, the courts have indicated that a UM claim would not be applicable. Anderson v. Baccus, 335 N.C. 526, 439 S.E.2d 136 (1994); McNeil v. Hicks, 119 N.C. App.

579, 459 S.E.2d 47 (1995).

2. Uninsured Motorist Coverage When the Tort Feasor is Known

Generally speaking in order to trigger an uninsured motorist coverage a claimant must establish that he or she is legally entitled to recover damages from the owner or operator of an uninsured vehicle because of bodily injury caused by an accident and arising out of the ownership, maintenance or use of the uninsured automobile. See, e.g., Williams v. Ins. Co., 269 N.C. 235, 152 S.E.2d 102 (1967).

The definition of what constitutes an uninsured motor vehicle (as well as an underinsured motor vehicle) is found in the statute at N.C. Gen. Stat. § 20-279.21(b)(3). This is an important aspect of the coverage. The list of vehicles which by definition cannot be an “uninsured motor vehicle” is as follows:

- 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.

The courts have strictly adhered to this list, and have not permitted UM claims where vehicles fall within one of these categories. See, e.g., Williams v. Holsclaw, 128 N.C. App. 205, 495 S.E.2d 166, *affirmed per curiam*, 349 N.C. 225, 504 S.E.2d 784 (1998) (city policy vehicle not a UM vehicle); Corbett v. Smith, 131 N.C. App. 327, 507 S.E.2d 303 (1998) (ATV designed for use off public roads not a UM vehicle); Autry v. Aetna Life & Casualty Ins. Co., 35 N.C. App. 628, 242 S.E.2d 172, *petition denied*, 295 N.C. 89, 244 S.E.2d 257 (1978) (three-wheeled vehicle not required to be registered with DMV and not operated on public highway was not an uninsured motor vehicle).

The persons to be insured through uninsured coverage are also mandated by statute, in a provision that also applies to underinsured motorist coverage. The statute provides at N.C. Gen. Stat. § 20-279.21(b)(3) the persons insured are “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”. There is considerable case law on whether someone is a resident of the household. See, e.g., Burton v. N.C. Farm Bureau Mut. Ins. Co., 127 N.C. App. 496, 490 S.E.2d 600 (1997) (adult son spending a lot of time at girlfriend’s residence); Great American Ins. Co. v. Allstate Ins. Co., 78 N.C. App. 653, 338 S.E.2d 145, *petition denied*, 316 N.C. 552, 344 S.E.2d 7 (1986) (sailor on leave).

It has often been said by the courts that this coverage is person oriented rather than vehicle oriented. See, e.g., Smith v. Nationwide Mut. Ins. Co., 328 N.C. 139, 400 S.E.2d 44, *rehearing denied*, 328 N.C. 577, 403 S.E.2d 514 (1991).

Generally, in a personal auto policy the named insured and the other members of his or her family related by blood or marriage would be provided uninsured and underinsured motorist coverage even when they are pedestrians, so long as they are struck by an uninsured or an underinsured highway vehicle. However, other persons in the household not related by blood or marriage would not fall

within this category of insureds. Additionally, when vehicles are insured through a policy listing as the name insured a corporation rather than an individual, the scope of the coverage is greatly curtailed and is vehicle oriented, since corporations are not individuals with families. (*See discussion at V. B. 1*).

Until a recent statutory provision amending UM coverage there was a different rule for stacking of UM coverage and UIM coverage, and the law appeared to allow inter-policy stacking of UIM but not UM coverage. As of January 1, 2004 UM coverage may be stacked among multiple policies of UM insurance. *See*, N.C. Gen. Stat. § 20-279.21(b)(3). However, as with underinsured motorist coverage, one cannot intra-policy stack coverages (*i.e.*, if a policy lists more than one vehicle the UM coverage cannot be stacked within a policy).

In determining when a vehicle is uninsured, the statute provides that a vehicle is deemed to be uninsured if there is an issue of whether there is liability coverage, but the liability insurance carrier has denied the existence of such coverage in writing. Thus, as a matter of public policy by statute, an innocent motorist can rely on the denial of coverage by a liability insurer for an alleged uninsured highway vehicle, and pursue a UM claim.

A vehicle is deemed to be an uninsured motor vehicle when there are liability limits at less than the minimum required in North Carolina, such as when an out-of-state liability policy is at issue. *See, Hamilton v. Travelers Indemnity Co.*, 77 N.C. App. 318, 335 S.E.2d 228, *petition denied*, 315 N.C. 587, 341 S.E.2d 25 (1986).

3. Bringing a UM Claim

Uninsured motorist claims are potentially treacherous. First, by statute at N.C. Gen. Stat. § 20-279.21(b)(3) one cannot bring a claim for uninsured motorist benefits until after 60 days notice to the UM insurer of the claim. On the other hand, one does not want to wait too long to bring such a claim either.

Thus, if the tortfeasor is known, then they should obviously be properly named and served with process within the statute of limitations. The failure to name and serve either the tortfeasor (if known) or the UM carrier can result in a loss of all claims. *See, e.g., Grimsley v. Nelson*, 342 N.C. 542, 467 S.E.2d 92 (1996) (holding that claim against UM carrier barred when uninsured tortfeasor not properly sued within tort statute of limitations); *Thomas v. Washington*, 136 N.C. App. 750, 525 S.E.2d 839, *petition denied*, 352 N.C. 598, 545 S.E.2d 223 (2000) (three year statute of limitations for bringing claim against UM insurer); *Eckard v. Smith*, 161 N.C. App. 177, 587 S.E.2d 510 (2003), *affirmed per curiam*, N.C. , S.E.2d (2005) (must file against UM insurer within two year Statute of Limitations for underlying wrongful death); *Polk v. Andrews*, 161 N.C. App. 177, 587 S.E.2d 510 (2003), *petition denied*, 358 N.C. 242, 594 S.E.2d 34 (2004) (same). In *Netherlands Ins. Co. v. Cockman*, 342 F.Supp2d 396 (M.D.N.C. 2004), the court in dicta suggested that in the circumstance where the alleged liability insurer waits until after the Statute of Limitations has run to proclaim for the first time that it does not provide coverage, the time frame for filing a UM claim should be extended. Cf., *Sawyers v. Farm Bureau Ins. Co.*, N.C. App. ,612 S.E.2d 184 (2005) (appeal to North Carolina Supreme Court pending) (holding that UM insurer bound by out-of-state final judgment against tortfeasor in out-of-state accident, where insurer on notice of out-of-state action).

Finally, because a UM insurer has subrogation rights against the uninsured tortfeasor, a plaintiff should not release any claims against the tortfeasor without the prior consent and permission of the UM carrier if there is a pending or potential UM claim.

B. Underinsured Motorist Coverage

1. Coverage of Persons, Vehicles and Injuries

The definition of who is an insured for purposes of uninsured and underinsured motorist coverage is in the first instance controlled by statute. N.C. Gen. Stat. § 20-279.21(b)(3). This definition, although found in subsection (b)(3) pertaining to uninsured motorist coverage, has been held to also apply to underinsured motorist coverage. Smith v. Nationwide Mut. Ins. Co., 328 N.C. 139, 400 S.E.2d 44 (1991). (See discussion at V. A. 2).

The definition basically breaks down into two subsets. These are commonly referred to as Class I and Class II insureds. Class I insureds are insured no matter what vehicle they are occupying (or even if they are occupying no vehicle at all as a pedestrian) while Class II insureds are only insured when they are occupying a vehicle for which underinsured motorist coverage is specifically provided. Harris ex rel Freedman v. Nationwide Mut. Ins. Co., 332 N.C. 184, 420 S.E.2d 124 (1992); Smith, supra.

There are several important distinctions to be made between personal auto policies and commercial auto policies which list a person as the named insured on the one hand, and commercial auto policies which list a corporation or other “non-human” entity as the named insured on the other. In the case of a policy where a human being is listed as the named insured (as opposed to a cooperation or the like) that named insured and their family members are provided underinsured motorist coverage regardless of what vehicle, if any they occupy at the time of the accident. In this regard, it has been observed that underinsured motorist coverage is “person oriented” rather than “vehicle oriented”. Since both the standard policy language and the statute defines the named insured and relatives “while residents of the same household”, coverage can often turn on whether a particular person is related to the named insured by blood or marriage, or whether they were literally living in the same “household” as the named insured. See, e.g., Erwin v. Tweed, 142 N.C. App. 643, 544 S.E.2d 803, review denied, 353 N.C. 724, 551 S.E.2d 437 (2001) (holding that a policy insuring that vehicles owned by a family farm trust are “individually owned” for purposes of establishing coverage for family members living on the farm); Stockton v. N.C. Farm Bureau, 139 N.C. App. 196, 532 S.E.2d 566, review denied, 352 N.C. 683, 545 S.E.2d 727 (2000) (holding that policy issued with the named insured listed as “Oak Farm” an unincorporated piece of land, should be deemed a personal auto policy providing coverage for the family living on the farm).

Additionally, there can be considerable dispute over whether even in the context of a Class II insured the particular person is “using” the vehicle at the time of the accident. For example, in Dutch v. Harleysville Mut. Ins. Co., 139 N.C. App. 602, 534 S.E.2d 262 (2000), the court held that a person was occupying a vehicle when he was crawled up underneath it to hook a chain to the vehicle for purposes of having it towed. Similarly, in Falls v. N.C. Farm Bureau Mut. Ins. Co., 114 N.C. App. 203, 441 S.E.2d 583, review denied, 337 N.C. 691, 448 S.E.2d 521 (1994), the court found that a person was using the vehicle, even though they were walking on the shoulder of the road in search of help after the vehicle became disabled.

Things become more complicated in the context of commercial policies where a corporate entity rather than a human being is listed as the named insured. There, even if it is a closely held corporation, the officer or owner of the company would not be an insured unless occupying a “covered auto” as defined under the commercial policy.

Thus, in Sproles v. Greene, 329 N.C. 603, 407 S.E.2d 497 (1991), employee claimants in the scope of their employment, but not occupying a company owned vehicle at the time of the accident were not permitted to recover under the company’s business automobile policy for underinsured benefits. The court noted that the coded “Schedule of Coverage and Covered Autos” indicated that the policy provided UIM coverage for “Owned Autos Only.” The court declined to extend coverage to these employees who were not the “insured” listed in the policy and who were not in a company owned vehicle at the time of the accident.

Similarly, in Busby v. Simmons, 102 N.C. App. 592, 406 S.E.2d 628 (1991), a majority shareholder

in a company insured through a business auto policy who ran a physical therapy business with her father was not permitted to recover underinsured motorist benefits for an injury when her bicycle was struck by an automobile. The company policy did not list any individuals, but rather a corporation as the “insured,” and since no covered auto under the policy was involved in the accident, coverage was not extended to this majority stockholder.

In Brown v. Truck Ins. Exchange, 103 N.C. App. 59, 404 S.E.2d 172, *petition denied*, 329 N.C. 786, 408 S.E.2d 515 (1991), the Court of Appeals held that an alleged employee could not avail himself of the underinsured motorist coverage in a commercial policy when he was not in a vehicle insured in that policy at the time of the accident, and when his connection with the named insured is that he was in an “independent contractor operating agreement” as a trucker. Since he was not “the named insured” and was not “occupying an insured motor vehicle,” he was denied coverage in that instance.

2. Calculating Setoffs Against Payments

a. Setoff for Liability Coverage

This section pertains to both uninsured and underinsured motorist coverage in determining how setoffs are measured and taken against uninsured or underinsured motorist coverage. While it would seem by definition there could not be a setoff against uninsured motorist coverage for amounts paid, actually the way the definition of an uninsured motor vehicle is set forth in N.C. Gen. Stat. § 20-279.21(b)(3), there can be liability coverage, but it would not be at or above the minimum financial responsibility limits set in North Carolina. For example, in Monti v. United States Auto Association, 108 N.C. App. 342, 423 S.E.2d 530 (1992), the court held that both an uninsured and underinsured motorist claim was presented when the tortfeasor was operating his vehicle with out-of-state minimum liability limits which were lower than those required in North Carolina.

The statute pertaining to setoffs for liability coverage paid is N.C. Gen. Stat. § 20-279.21(b)(4). It provides in pertinent part:

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 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. (Emphasis added)

The North Carolina legislature requires that there be a setoff against underinsured motorist coverage for amounts paid through liability insurance coverage.

If there is both liability and underinsured motorist coverage, and if there is in fact more than one policy of underinsured motorist coverage that is stackable, the question arises as to which UIM carrier is entitled to the setoff. It appears that if the UIM carriers are liable on a pro-rata basis, then they share a pro-rata in the setoff against the liability coverage, but if there is a primary UIM insurer, they are entitled

to the entire setoff in partial or complete satisfaction of their obligation and to the detriment of the excess UIM carrier. *See, e.g., Dutch v. Harleysville Mutual Ins. Co.*, 139 N.C. App. 602, 534 S.E.2d 262 (2000). In circumstances where there is a primary and an excess UIM carrier, the setoff works its way through the primary UIM coverage to the excess UIM coverage, whereas if the UIM carriers are obligated in a pro-rata fashion, they would share this setoff. *See, e.g., Onley v. Nationwide Mut. Ins. Co.*, 118 N.C. App. 686, 456 S.E.2d 882, *petition denied*, 341 N.C. 651, 462 S.E.2d 154 (1995).

Another question which arises in the issue of crediting setoffs for liability coverage from UIM exposure is the situation where there are multiple claimants under the UIM coverage, each of whom has not received even the minimum per person liability limits, although the liability policy has been exhausted. In *N.C. Farm Bureau Mutual Ins. Co. v. Gurley*, 139 N.C. App. 178, 532 S.E.2d 846 *review denied*, 352 N.C. 675, 545 S.E.2d 427 (2000), the North Carolina Court of Appeals addressed a situation where the underlying liability insurer's coverage was divided up such that two injured claimants received \$17,000.00 and a third one received \$16,000.00 out of a total of \$50,000.00 per person limits from the liability insurer. There was also a policy of insurance in force affording UIM coverage at limits of \$50,000.00 per person and \$100,000.00 per accident. The claimants argued that they should not be barred from recovering more than \$50,000.00 in UIM coverage, and that each of the two receiving \$17,000.00 should each receive an additional \$33,000.00 in UIM coverage while the person receiving \$16,000.00 should receive \$34,000.00 in UIM coverage for a total of \$100,000.00 in additional payout from the UIM coverage. The Court of Appeals rejected the analysis. Rather, the court found that under the applicable statute, N.C. Gen. Stat. § 20-279.21(b)(4) two factors should be considered: (1) the number of claimants seeking coverage under the UIM policy; and (2) whether the negligent driver's liability policy was exhausted pursuant to a per person or per occurrence cap. 532 S.E.2d at 848. The court found that in that instance, the per occurrence cap was exhausted in the liability coverage and subtracted the \$50,000.00 in total payout through the exhausted per occurrence limits of the underlying liability coverage from the UIM per occurrence limit of \$100,000.00, leaving an additional \$50,000.00 for distribution to the three claimants. The court noted that the claimants' interpretation would result in a total payout as between the liability insurer and UIM insurer of a grand total of \$150,000.00 which would give the claimants "a windfall" since the same result would not be achieved if there was a tortfeasor with a 50,000/100,000 liability insurance policy. The court further found that the policy language in the limit of liability section of the UIM policy supported this same result. *Id* at 850. Since 2003, the amendment to N.C. Gen. Stat. § 20-279.21(b)(4) in the test of whether a vehicle is underinsured is a comparison between the amount paid by liability insurance coverage to a claimant for the tortfeasor's acts and the amount of UIM coverage "applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the policy." There will surely be litigation over the meaning of this phrase. It appears to reverse the prior rule in *Onley v. Nationwide*, 118 N.C. App. 686, 456 S.E.2d 882 (1995) where the tortfeasor's limits were compared.

The 2003 amendment to 20-279.21(b)(4) appears to partially reverse the prior ruling in *State Farm v. Young*, 122, N.C. App. 505, 470 S.E.2d 361 (1996), *petition denied*, 345 N.C. 353, 483 S.E.2d 191 (1997), that previously the vehicle a claimant occupied could be an underinsured highway vehicle. Now with the new 2003 statutory language that appears to be the case only if the UIM limit is higher than the liability limit in the occupied vehicle.

There must be a selection/rejection of UM/UIM coverage, and for policies governed by the North Carolina Rate Bureau, it shall be accomplished on a form promulgated by the Rate Bureau and approved by the Department of Insurance. The failure to follow the form can lead to a defective selection/rejection. *See Stegenga v. Burney*, N.C. App., S.E.2d (Filed 10/18/05) (excellent discussion of selection/rejection cases).

b. Setoff for Medical Payments Coverage

The question of the interaction between so-called medical payments coverage contained in an auto policy, and uninsured and underinsured motorist benefits is one that is fairly controversial at present. For a long period of time the insurance industry relied on Tart v. Register, 257 N.C. App. 161, 125 S.E.2d 754 (1962) for the proposition that one should always get a setoff against any liability or uninsured/underinsured coverage for medical payments made through the same policy. That case specifically involved liability coverage and not uninsured/underinsured motorist coverage. Moreover, that decision is at best a difficult read, and the broader rule to be extracted from it is somewhat controversial.

In Aills v. Nationwide Mutual Ins. Co., 88 N.C. App. 595, 363 S.E.2d 880 (1988) the Court of Appeals held that a UIM carrier was not entitled to a setoff against its underinsured motorist coverage for amounts received in medical payments benefits. The court relied on the policy language found in that policy as a basis for finding that such a reduction was not appropriate. More recently, in the landmark case of Baxley v. Nationwide Mutual Ins. Co., 334 N.C. 1, 430 S.E.2d 895 (1993), the North Carolina Supreme Court held that there should not be a setoff against the underinsured motorist coverage for medical payments previously paid pursuant to the same policy. The court specifically rejected the insurance company's argument failure to implement the setoff would result in a double recovery. The court relied on the specific policy language found in that policy. *Cf.*, Muscatell v. Muscatell, 145 N.C. App. 198, 550 S.E.2d 836 (2001) (discussing application of med pay payment to collateral source rule and to setoff against a verdict).

Things however have become more interesting of late because the policy language has been changed in the standard North Carolina personal auto policy. The language added to the limit of liability section of the UM/UIM coverage section provides in pertinent part: "This coverage is excess over and should not duplicate any amount paid or payable under [the medical payments section]". Moreover, the standard medical payments provision has a section entitled "non-duplication". That section provides in pertinent part:

No person for whom medical expenses are payable under this coverage shall be paid more than once for the same medical expense under this or similar vehicle insurance, including any no-fault benefits required by law. (NC 01 06 96)

Based on the change in policy language the insurance industry by and large seems to be taking the position that they are entitled a setoff against UM/UIM coverage where the total value of the case (or judgment) is less than UM/UIM coverage. That is, there is enough money to cover the entire loss, including medical expenses. However, in the circumstance where the verdict or value of the case is in excess of the stated UM/UIM limits, and payment of both med pay and UM/UIM would not be a duplicate payment, then it may not be enforced. See, Espino v. Allstate Indemnity Co., 159 N.C. App. 686, 583 S.E.2d 376 (2003) (upholding setoff of Med Pay against Um/UIM for \$9,000 award since would be duplicate payment) There is no specific setoff provision contained in the Financial Responsibility Act authorizing subtraction from uninsured/underinsured coverage limits, of any amount paid for by med pay. The argument on the other side of the coin for insurers is that the Financial Responsibility Act does not say where the coverage needs to come from within the policy, so long as the UM/UIM limit is achieved, whether it be earmarked UM/UIM coverage or in some combination with med pay coverage. For it should be noted that the commercial auto UM/UIM endorsement (CA 21 16 03 03) has something of a similar provision. Subparagraph D, Limit of Insurance, provides at subparagraph 2:

No one will be entitled to receive duplicate payments for the same elements of "loss"

under this Coverage Form and any Liability Coverage Form or Medical Payments Coverage Endorsement attached to this Coverage Part.

This quoted language seems to raise the same issues presented in the personal auto policy setoff.

Several cases have involved a dispute as to whether a payment for UM/UIM coverage was also a settlement of the med pay claim. These were apparently precipitated by lack of clarity in conversation during the settlement process. See, e.g., Moore v. Beacon Ins. Co., 54 N.C. App. 669, 284 S.E.2d 136 (1981), review denied, 305 N.C. 301, 291 S.E.2d 150 (1982); Lindsey v. N.C. Farm Mutual Ins. Co., 103 N.C. App. 432, 405 S.E.2d 803 (1991).

Certainly claimants and insurers will welcome the certainty on this issue that will come with appellate review of this issue in light of the more current policy language. Obviously in evaluating this issue it is crucial to obtain the correct policy language from the applicable policy or policies.

c. Setoff for Workers' Compensation Benefits

Prior to 1999 North Carolina had an extensive body of case law examining the interaction among a claimant who also received workers' compensation benefits, a workers' compensation insurer with a right to subrogation, and a UM/UIM insurer which had a setoff against its coverage for workers' compensation benefits. This complicated area of the law was totally revamped by the Legislature in 1999, rendering most all of the prior precedent on this subject obsolete for future inquiry. The Legislature amended N.C. Gen. Stat. § 20-279.21(e) in 1999. The amendment is entitled "AN ACT TO CLARIFY THAT LIABILITY, UNINSURED, AND UNDERINSURED COVERAGE IS NOT REDUCED BY RECEIPT OF SUBROGATED WORKERS' COMPENSATION BENEFITS". This statutory change appears to tilt the advantage back to the claimant and the subrogated workers' compensation insurer and against the auto insurer. The statute as amended reads as follows:

(e) Such Uninsured or underinsured motorist coverage that is provided as part of a motor vehicle liability policy need not shall insure against that portion of a loss from any liability for which benefits are in whole or in part either payable or required to be provided under uncompensated by any workers' compensation law nor 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."

The statutory provision is interesting in its wording. Clearly it contemplates that an injured plaintiff/employee will receive any payout uncompensated by workers' compensation up to the policy limits (and presumably subject to other appropriate policy setoffs such as amounts paid by the liability insurer), but it is slightly more ambiguous on amounts paid by the workers' compensation insurer to the plaintiff/employee. The last part of the first sentence seems to allow no setoff to the extent that there is "an employer's lien determined pursuant to G.S. 97-10.2(h) or (j)." This would suggest that any lien from the workers' compensation insurer would be recoverable against the UM/UIM insurer. (Please note that it is not the literal payout by the employer but rather the "amount of an employer's lien", which is subject to reduction or even elimination by a trial court judge under certain stated statutory circumstances.) The confusion to this reader arises with the following sentence which provides that "[i]n no event shall this subsection . . . allow a recovery for damages already paid by workers'

compensation.” This seems to be at odds with the preceding sentence, since “damages already paid by workers’ compensation” are the very stuff that “an employer’s lien” is made of.

Several recent cases interpreting the new version of 20-279.21(e) set forth the equation to be applied in determining the amount of underinsured motorist coverage available where there is a workers’ compensation claim involved. It appears that they establish the equation to be that first the UIM subtracts the amount from its coverage that is received by the plaintiff from the liability carrier. This is subtracted from the UIM coverage limit. That establishes the total amount of UIM coverage potentially available. At or below that limit the UIM exposure is the total amount of the value of the claimants’ bodily injury claim minus any amounts previously paid by liability coverage. To the extent that the workers’ compensation insurer has waived part of its subrogated recovery of benefits as part of its workers’ compensation settlement with the claimant, that waived amount is not recoverable by either of the workers’ compensation insurer or the claimant from the UM/UIM carrier. See, Walker v. Penn National Security Ins. Co., 168 N.C. App. 555, 608 S.E.2d 107 (2005); Austin v. Midgett, 166 N.C. App. 740, 603 S.E.2d 855 (2004).

3. Stacking Underinsured Coverage

The underinsured motorist statute, N.C. Gen. Stat. § 20-279.21(b)(4), does not mandate stacking on an intrapolicy basis but does mandate stacking on an interpolicy basis, but with two statutory exceptions. That statute provides in pertinent part:

...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 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 policy shall not be combined with or added to the limits applicable to any other motor vehicle under that policy.

The two exceptions to a mandate for interpolicy stacking of UIM coverage are in certain circumstances where either a “fleet” policy is at issue, or where the only vehicles insured are non-“private-passenger” motor vehicles. Those two exceptions will be discussed *infra*.

While the Financial Responsibility Act only mandates stacking for underinsured motorist coverage, and only in that circumstance on an interpolicy basis and even then with two exceptions, nevertheless the Financial Responsibility Act does allow voluntary or additional coverage as may be provided in a policy. Thus, it is worth examining the specific policy language contained in the policy in question.

One unanswered question is whether it affects the right to stack UIM coverage if the vehicle the claimant occupies at the time of the accident is a fleet vehicle or not a private passenger motor vehicle, whereas the potentially stacked policy is for a non-fleet private passenger motor vehicle. It does not appear that stacking would be barred in that instance since the policy to be stacked is covered by the interpolicy stacking mandate contained in N.C. Gen. Stat. § 20-279.21(b)(4). Cf., Hlasnick v. Federated

Mutual, 136 N.C. App. 320, 524 S.E.2d 386 (2000), affirmed in part, discretionary review improvidently granted in part, 353 N.C. 240, 539 S.E.2d 274 (2000).

The statutory provision providing the definitions for “private passenger motor vehicle” and “non-fleet” is N.C. Gen. Stat. § 58-40-10. The first term to be addressed is the requirement that he policy is for a “non-fleet” vehicle. This statutory provision defines non-fleet as follows:

“Non-fleet” 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 fewer motor vehicles hired under a long-term contract or owned by the insured named in the policy.

N.C. Gen. Stat. § 58-40-10(2). It should be noted that the Legislature has given the Rate Bureau authority to define “fleet” differently. N.C. Gen. Stat. § 58-36-2.

Several cases have looked at whether a policy was a “fleet” policy. In construing the term “fleet”, the North Carolina Supreme Court indicated in Sutton v. Aetna Casualty & Surety Co., 325 N.C. 259, 382 S.E.2d 759, rehearing denied, 325 N.C. 437, 384 S.E.2d 546 (1989), that it is “a single policy designed to provide coverage for a multiple and changing number of motor vehicles used in an insured’s business”. *Id at 266*. Since Sutton indicated that it is a business-oriented policy, it would seem that a family that happened to own five or more vehicles would be able to nevertheless avoid designation as a “fleet” policy for purposes of stacking underinsured coverage.

Indeed, that was the result reached in McCaskill v. Pennsylvania National Mut. Casualty Ins. Co., 118 N.C. App. 320, 454 S.E.2d 842 (1995) where the court held that five vehicles owned and insured through a family policy would constitute a “non-fleet private passenger motor vehicle” policy. Similarly, in Harrington v. Stevens, 334 N.C. 586, 434 S.E.2d 212 (1993), while the UIM insurer originally contended that the six vehicles (apparently insured through a personal auto policy for a family) would not constitute a “fleet” policy as defined in N.C. Gen. Stat. § 20-279.21(b)(4) so as to prohibit stacking of coverage, the insurer made a concession that the policy itself was not a “fleet” policy but nevertheless sought to bar stacking because there was six vehicles listed on the policy. The Supreme Court held that under the circumstances stacking was permitted. 334 N.C. at 592.

An equally interesting inquiry can arise as to whether a particular policy insures a “private passenger motor vehicle”. The statute provides that a private passenger motor vehicle is defined as:

“Private passenger motor vehicle” means:

- a. A motor vehicle of the private passenger or station wagon type that is owned or hired under a long-term contract by the policy named insured and that is neither used as a public or livery conveyance for passengers nor rented to others without a driver; or
- b. A motor vehicle that is a pickup truck or van that is owned by an individual or by husband and wife or individuals who are residents of the same household if:
 1. Has a gross vehicle weight as specified by the manufacturer of less than 10,000 pounds; and
 2. Is not used for the delivery or transportation of goods or materials unless such use is (I) incidental to the insured’s business of installing,

maintaining, or repairing furnishings or equipment, or (ii) for farming or ranching.

Such vehicles owned by a family farm copartnership or a family farm corporation shall be considered owned by an individual for the purposes of this section; or

- c. A motorcycle, motorized scooter or other similar motorized vehicle not used for commercial purposes.

N.C. Gen. Stat. §58-40-10(1). The courts have had a number of occasions to review whether a particular vehicle constituted a “private passenger motor vehicle”. In Nationwide Mutual Ins. Co. v. Mabe, 342 N.C. 482, 467 S.E.2d 34 (1996), the North Carolina Supreme Court held that neither a Low-Boy trailer nor a Mack truck would meet the definition of a private passenger motor vehicle, allowing the policy insuring these vehicles to be stacked. In N.C. Farm Mutual Ins. Co. v. Stamper, 122 N.C. App. 254, 468 S.E.2d 584, *discretionary review denied*, 343 N.C. 513, 472 S.E.2d 17 (1996), the insurer did not dispute that a vehicle was outside the definition of a private passenger motor vehicle on appeal, and there the court upheld a ruling that the second policy, insuring this non-private passenger motor vehicle, would not be available for interpolicy stacking of underinsured motorist benefits.

In Aetna Casualty & Surety Co. v. Fields, 105 N.C. App. 563, 414 S.E.2d 69, *discretionary review denied*, 331 N.C. 383, 417 S.E.2d 788 (1992), the Court of Appeals held that four 15 passenger vans used to transport people from their residences to their place of work would not constitute private passenger motor vehicles. The court went into some detail in reviewing the purpose of the vehicles, finding them to be “commercial”. Moreover, the court found that the vehicles were best described and defined in N.C. Gen. Stat. §20-4.01(27)(b) as “for hire passenger vehicles”. After a lengthy analysis of the use of these vans, the court concluded that they would not be eligible for stacking. *See also, Erwin v. Tweed*, 142 N.C. App. 643, 544 S.E.2d 803, *rev. denied*, 353 N.C. 724, 551 S.E.2d 437 (2001) (weight of vehicle determines whether it is a “private passenger” motor vehicle).

Several other aspects of stacking are important. First, it appears that an exclusion for vehicles owned by the insured (but not covered in that policy) will be enforceable as a bar to recovery by passengers in the vehicle, but not enforceable as an impermissible anti-stacking provision for the family member insured through the policy. This is the result reached in N.C. Farm Bureau Mutual Ins. Co. v. Perkinson, 140 N.C. App. 140, 535 S.E.2d 405 (2000). It appears that the holding supports the proposition that Class II insureds cannot enforce a prohibition of an anti-stacking provision relating to policies issued to a Class I insured (other than the policy for the vehicle involved in the accident).

A second point tangentially relating to stacking is that it will not be utilized within a policy to double coverage where there is both a direct and a derivative claim from an injury. While these cases do not apply specifically to uninsured or underinsured coverage, it is likely that the court would not allow more than one per person limit to be triggered for UM or UIM coverage for a loss of consortium claim, consistent with the court’s ruling in South Carolina Ins. Co. v. White, 82 N.C. App. 122, 345 S.E.2d 414 (1986) (construing a liability policy). Similarly, it is unlikely that a court will allow stacking of two separate per person limitations when a parental claim and a minor child’s claim for the same injury to the child are at issue. *See, Holt v. Atlantic Casualty Ins. Co.*, 141 N.C. App. 139, 539 S.E.2d 345 (2000) (construing auto liability policy).

4. Interest and Court Costs

The insuring language in the standard UM/UIM commercial auto endorsement as well as the

insuring agreement in the personal auto policy (Forms CA 21 16 and NC 00 01, respectively) both provide as to the insuring agreement that the policy provides compensatory damages. The commercial policy says, "We will pay all sums the insured is legally entitled to recover as compensatory damages from the owner or driver . . ." Similarly, the personal auto policy provides that, "We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of . . ." Neither policy form contains an express agreement to pay interest or court costs. The question arises as to whether one may recover court costs or interest on a judgment against an uninsured or underinsured tort-feasor. As to prejudgment interest, the court have had a number of opportunities to address this issue in a context of UM/UIM coverage. Probably the landmark case in this regard is Baxley v. Nationwide Mutual Ins. Co., 334 N.C. 1, 430 S.E.2d 895 (1993). There the court held that prejudgment interest should be regarded as an element of "compensatory damages". The court utilized N.C. Gen. Stat. §24-5(b)(1991) to support its position that prejudgment interest should be deemed damages for purposes of coverage in the uninsured/underinsured section of an automobile policy.

A number of cases since the Supreme Court decision in Baxley have held that the payment of prejudgment interest does not go above the stated policy limit for compensatory damages. See, Bailey v. Nationwide Mutual Ins. Co., 112 N.C. App. 47, 434 S.E.2d 625 (1993); Cochran v. N.C. Farm Bureau Mutual Ins. Co., 113 N.C. 260, 437 S.E.2d 910, *petition denied*, 335 N.C. 765, 442 S.E.2d 513 (1994), United Services Automobile Association v. Gambino, 114 N.C. 701, 443 S.E.2d 368, *cert. denied*, 337 N.C. 698, 448 S.E.2d 539 (1994).

In Godwin v. Nationwide Mutual Ins. Co., 119 N.C. 303, 458 S.E.2d 442 (1995), *petition denied*, 342 N.C. 655, 467 S.E.2d 711 (1996), the court again confirmed that prejudgment interest would not be paid in excess of the stated policy limit, but seemed to indicate that postjudgment interest would accrue on that limit of coverage for uninsured motorist coverage. Compare, Bailey v. Nationwide Mutual Ins. Co., *supra*.

Another issue that arises is whether there is liability above policy limits for court costs. In Wiggins, *supra*, and Gambino, *supra*, the court indicated that a UIM insurer would be responsible up to its policy limits for all sums including costs.

It is interesting to note that in the event that a UM insurer (by necessity) or a UIM insurer (by choice) may trigger additional liabilities for costs and postjudgment interest in its capacity as a named or an unnamed party in an action. In Ansley v. Nationwide Mutual Ins. Co., 80 N.C. App. 512, 342 S.E.2d 567, *petition denied*, 318 N.C. 414, 349 S.E.2d 594 (1986), the Court of Appeals held that in a hit-and-run UM claim that under the circumstances the UM insurer would be liable for prejudgment interest and costs. Similarly, in Aills v. Nationwide Mutual Ins. Co., 88 N.C. App. 595, 363 S.E.2d 880 (1988) the Court of Appeals held that in a declaratory judgment action for breach of contract by a UIM insurer, the plaintiff would be entitled to prejudgment interest on the sum owed for underinsured motorist coverage from the date of breach, which was the date the insurer denied the plaintiff's demand for payment.

It should also be recalled that there may be specific provisions contained in the arbitration clauses of a standard personal auto and business auto policy relating to the costs of the arbitration which should be consulted in that instance. There is no clear case law as to whether a UM/UIM insurer is liable for arbitration costs when the arbitration award is implemented through a subsequent judgment of the court, but certainly in any arbitration the insured should specifically pray for prejudgment interest and costs or have a prior understanding before arbitration that the issue is reserved for the court or for a separate arbitration.

5. Arbitration of Dispute

An area of "legal limbo" where there is considerable uncertainty, is the increasingly popular arbitration of UM and UIM claims pursuant to policy provisions in the standard North Carolina

commercial auto policy and in the standard North Carolina personal auto policy. The North Carolina statutory provisions for arbitration are found at Article 45 of Chapter 1 of the General Statutes at N.C. Gen. Stat. §1-567.1 *et sequa*. It is referred to as the “Uniform Arbitration Act”. See N.C. Gen. Stat. §1-567.1.

The advantages and disadvantages of arbitration are freely identified by the North Carolina appellate courts. For example, in Sholar Business Associates, Inc. v. Davis, 138 N.C. App. 298, 531 S.E.2d 236 (2000), the Court observed:

In North Carolina, public policy favors arbitration as a method of resolving disputes. Miller v. Two State Construction Co., 118 N.C. App. 412, 416, 455 S.E.2d 678, 680 (1995).

The advantages of arbitration include reduction of court congestion, speed, economy, finality, and an opportunity for the parties to choose the judges who resolve their disputes. Crutchley v. Crutchley, 306 N.C. 518, 523, 293 S.E.2d 793, 796 (1982).

Our Supreme Court has recognized that arbitration also poses disadvantages in that parties to arbitration enjoy limited appellate review, and have no recourse when an arbitrator makes a mistake. Patton v. Garrett, 116 N.C. 847, 858, 21 S.E. 679, 682 (1895). Because an arbitrator is not bound by substantive law or rules of evidence, an award may not be vacated merely because the arbitrator erred as to law or fact. Crutchley, 306 N.C. at 523, 293 S.E.2d at 797. Where an arbitrator makes such a mistake, “it is the misfortune of the party.” Patton, 116 N.C. at 858, 21 S.E. at 682.

Appellate review of an arbitration award is limited. A court may only vacate such an award for the reason enumerated in North Carolina General Statutes section 1-567.13. Palmer v. Duke Power Co., 129 N.C. App. 488, 492, 499 S.E.2d 801, 804 (1998).

531 S.E.2d at 239.

There is little doubt that the courts will encourage the use of arbitration as an alternate dispute resolution procedure for the numerous UM and UIM cases that would otherwise be contributing to the burden on the judicial system. Thus, it is submitted that as a general proposition, the courts will be in favor of enforcing and upholding matters relating to such arbitration that make it relatively easy to opt for arbitration, and to make it relatively hard to undo an arbitration award once it is made, so as to encourage finality and closure. In fact, a number of appellate decisions seem to support these two basic propositions. See *e.g.*, Register v. White, 358 N.C. 691, 599 S.E.2d 549 (2004) (date liability carrier exhausts limits by tendering begins three year period to demand arbitration); Servomation Corp. v. Hickory Construction Co., 316 N.C. 543, 342 S.E.2d 853 (1986) (holding that defendant in construction dispute did not waive arbitration merely by filing an Answer and asking for arbitration at a summary judgment hearing); Howard v. Oakwood Homes Corp., 134 N.C. App. 166, 516 S.E.2d 879, U.S. *cert. denied*, 145 L.Ed.2d 1072 (1999) (there is a strong public policy favoring settlement of disputes by arbitration, and an order denying arbitration in an employment contract is immediately appealable as a substantial right); Hackett v. Bonta, 113 N.C. App. 89, 437 S.E.2d 68 (1993) (filing civil action does not waive arbitration of UIM dispute where both liability carrier and UIM carrier was same insurer); Sullivan v. Bright, 129 N.C. App. 84, 497 S.E.2d 118 (1998) (plaintiff entitled to UIM arbitration even after depositions taken in tort action after tender of auto liability carrier’s limits, UIM insurer was not prejudiced in delay in request to arbitrate); Russell v. State Farm Ins. Co., 136 N.C. App. 798, 526 S.E.2d 494 (2000) (order compelling UM arbitration is interlocutory and not immediately appealable by UM insurer). McCrary ex rel. McCrary v. Byrd, 148 N.C. App.

630, 559 S.E.2d 821 (2002), petition denied, 356 N.C. 674, 577 S.E.2d 625 (2003) (Insured could still arbitrate after UIM insurer spent \$60,000 in defense costs in lawsuit or where plaintiff declined deposition after arbitration elected). A great general summary of North Carolina arbitration law is found at Raspet v. Buck, 147 N.C. App.133, 554 S.E.2d 676 (2001).

It is acknowledged that the scope of discovery in arbitration is different from a lawsuit, and is at the discretion of the arbitrator. McCrary, supra, 559 S.E.2d at 826.

An area where this writer sees many problems and opportunities is the interaction with the UM or UIM insurer to frame the issues which will actually be arbitrated, and frame the remedies which actually will be available upon the conclusion of arbitration. In particular, the Court of Appeals' decision in Palmer v. Duke Power Co., 129 N.C. App. 488, 499 S.E.2d 801(1998) serves as a cautionary tale. There the plaintiff entered into an agreement with the defendant, apparently a self-insurer for purposes of auto liability coverage (not UM or UIM coverage apparently) and the parties "entered into a written arbitration agreement". The parties stated in that agreement that "the arbitrator's award would be final and binding and that any party could enforce the arbitration award pursuant to §1-567.15 of the North Carolina General Statutes." 129 N.C. App. at 489-90. In that case, no specific arrangements had been agreed upon as to the method of discovery or as to whether prejudgment interest would be calculated on top of the award. A retired Superior Court judge arbitrated the case and awarded a sum of money plus costs but not providing for prejudgment interest. The defendant appealed to challenge the amount of the award, and the plaintiff appealed to obtain prejudgment interest, which had not been included in the award. In that case, the Court held that while prejudgment interest on a arbitration award might be appropriate, and was not barred as a matter of law as a remedy in arbitration, since neither the arbitration agreement nor the arbitration award made provision for prejudgment interest, the trial court "was obligated to confirm the award as written, unless there was some mathematical error, error relating to form, or error resulting from the arbitrator exceeding his/her authority . . ." 129 N.C. App. at 498. See also, Howell v. Wilson, 136 N.C. App. 827, 526 S.E.2d 194, rev. denied, 352 N.C. 148, 544 S.E.2d 224 (2000) (upholding auto arbitration award after arbitration by oral agreement without written parameters, with informal presentation of evidence, Court declining to find the arbitrator exceeded his authority in ruling on a medical causation issue, since the arbitrator "could dispense with . . . [the personal injury claim] as he saw fit"); Scholar Business Associates v. Davis, 138 N.C. App. 298, 531 S.E.2d 236 (2000) (affirming trial court's denial of motion to set aside arbitration award in contract dispute, finding that it "is incumbent on the parties to delineate the form of the arbitration order" and declining to review an award that did not violate the A.A.A. rules agreed to by the parties).

It appears under the right circumstances a tort-feasor can be bound by the results of an arbitration between a plaintiff and its UM insurer. See, Berger v. Doe, 143 N.C. App. 328, 546 S.E.2d 141, rev. denied, 353 N.C. 67, 553 S.E.2d 36 (2001).

An additional issue that arises more frequently than one might expect is that of coverage. In the standard personal auto form there is some ambiguous indication that a coverage issue, such as how much UIM coverage is available for an adverse arbitration award, would also be subject to arbitration. In the standard commercial auto arbitration provision there is language that provides, "However, disputes concerning coverage under this endorsement may not be arbitrated." If there are going to be coverage issues that are voluntarily arbitrated, the issues should be carefully framed, and the appropriate proof should be available, such as the policies at issue, for the arbitrator to rule upon. The parties might seek a two-stage arbitration or the use of separate, independent arbitrations whereby first the value of the tort claim is resolved, and then as a second step the amount of coverage available is separately decided.

6. Exclusions from UIM Coverage

- a. Settling with the Tort-Feasor without Giving the UIM Carrier 30 days Prior Written Notice

Assuming that the settlement with the underlying liability insurer represents a full exhaustion of all available liability coverage for the alleged underinsured tort-feasor, then before any settlement documents should be executed, the underinsured motorist insurer needs to be placed on notice. The standard policy language in the 1996 edition of the Rate Bureau approved personal auto policy indicates that there will be no underinsured motorist coverage:

- A. 1. If that person or the legal representative settles the bodily injury or property damage claim without our written consent.

Rate Bureau Form NC 00 01 (Ed. 6-96) Moreover, the policy provides for written notice to the underinsured motorist insurer as part of the process of the underinsured motorist insurer deciding whether it wants to preserve subrogation rights. The policy provides in this regard in pertinent part:

We will pay for these damages only after the limits of liability under any applicable exhausted by payments of judgments or settlements, unless we:

1. Have been given written notice in advance of settlement between an insured and the owner or operator of the underinsured motor vehicle; and
2. Consent to advance payment to the insured in the amount equal the tentative settlement.

Rate Bureau Form NC 00 01 (Ed. 6-96) In addition to the policy requirements, the North Carolina Motor Vehicle Financial Responsibility Act specifically addresses the interaction among a claimant, the liability carrier, and the UIM carrier in circumstances where settlement is desired with the liability carrier. N.C. Gen. Stat. §20-279.21(b)(4) provides in pertinent part:

No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintained 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.

Thus, both the policy language and the statute envision that a UIM carrier will receive notice of the tender of liability limits by the carrier for the underinsured tort-feasor prior to accepting such a settlement. The notice of the tentative settlement needs to be in writing. Oral notice will not suffice! See, Williams v. Bowden, 128 N.C. App. 318, 494 S.E.2d 798, discretionary review denied, 348 N.C. 78, 505 S.E.2d 887 (1998). The statute does not provide from whom the notice must be received by the UIM carrier, and thus it appears that either the liability carrier or the claimant could provide this notice

to comply with the statute. In fact, in Daughtry v. Castleberry, 123 N.C. App. 671, 474 S.E.2d 137 (1996), *affirmed*, 346 N.C. 272, 485 S.E.2d 45 (1997), the Court observed:

Although the better practice would be for the insured to notify the UIM carrier when the insured has received an acceptable offer from the liability carrier, there is nothing in the statute which requires written notice to the UIM insurer be made directly by the insured.

The statute simply requires that written note be given to the UIM carrier before the 30 day period in which to preserve subrogation rights begins to run.

123 N.C. App. at 673-74. Do it yourself. The liability insurer has a lot less incentive than you to get notice to the UIM insurer.

Also, it should be noted that the requirements of the contents of a “settlement” are not specifically defined in the statute (that is whether there needs to be an agreement by the claimant to accept that sum, or merely an offer on the table to pay it), but it appears that the mere tender is sufficient to trigger the 30 day notice requirement. See, Daughtry v. Castleberry, 123 N.C. App. 671, 474 S.E.2d 137 (1996), *affirmed*, 346 N.C. 272, 485 S.E.2d 45 (1997) (seeming to indicate that a unilateral tender by the liability insurer is sufficient to trigger the existence of a proposed “settlement”). Also, there must be an “exhaustion” of the limits of the liability carrier in order to trigger UIM coverage. See, McCrary ex rel. McCrary v. Byrd, 148 N.C. App. 630, 559 S.E.2d 821 (2002) *petition denied*, 356 N.C. 674, 577 S.E.2d 625 (2003).

A use of a general release could lead to a denial of coverage by the UIM carrier. Statutory clarification added to 20-279.21(b)(4) in 1999, advocating the prior informal usage of a “Covenant Not to Enforce” will hopefully cure some of the prior uncertainty in this area. See, e.g., Wilmoth v. State Farm Mutual Automobile Ins. Co., 127 N.C. App. 260, 488 S.E.2d 628, *discretionary review denied*, 347 N.C. 410, 494 S.E.2d 601 (1997) (direct action allowed against UIM insurer after settling with liability insurer and tort-feasor, but reserving rights against UIM insurer); Gurganious v. Integon General Ins. Corp., 108 N.C. App. 163, 423 S.E.2d 317, *rev. denied*, 333 N.C. 538 429 S.E.2d 558 (1993) (holding that dismissal with prejudice of the alleged tort-feasor does not bar action against UIM insurer that has failed to advance within 30 days and preserve its rights pursuant to N.C. Gen. Stat. §20-279.21(b)(4)); Sellars v. North Carolina Farm Bureau Mutual Insurance Company, 108 N.C. App. 697, 424 S.E.2d 669 (1993) (holding that release of tort feaor does not bar claim against UIM insurer, but allows insurer to elect to defend action in name of released tort feaor); Braddy v. Nationwide Mutual Liability Insurance Co., 122 N.C. App. 432, 470 S.E.2d 820, *discretionary review denied*, 343 N.C. 749, 473 S.E.2d 610 (1996) (allowing insured to pursue action for UIM benefits directly against UIM insurer after dismissal of tort feaor from action, although allowing insurer to elect to defend in the name of the tort feaor); McCrary ex rel. McCrary v. Byrd, 148 N.C. App. 630, 559 S.E.2d 821 (2002) *petition denied*, 356 N.C. 674, 577 S.E.2d 625 (2003) (no violation of consent to settle clause after UIM insurer declines to advance to preserve subrogation); Spivey v. Lowery, 116 N.C. App. 124, 446 S.E.2d 835, *discretionary review denied*, 338 N.C. 312, 452 S.E.2d 312 (1994) (general release bars subsequent UIM claim); Sudds v. Gilliam, 152 N.C. App. 659, 568 S.E.2d 214 (2002).

Finally, the same issues and obligations that are at play with a UIM claim can also be triggered in the context of UM coverage where there is liability coverage, but it does not match the minimum limits of liability coverage mandated in North Carolina, such as a situation where an out-of-state tort-feasor is driving in this state with less than 30/60 in liability coverage. See, e.g., Monti v. United Services Auto Association, 108 N.C. App. 342, 423 S.E.2d 530 (1992) (holding that the same tort-feasor can be both uninsured and underinsured with lower out of state liability limits). In that instance, all the same precautions should be taken as would be used in a UIM claim.

b. Exclusions for Punitive Damages

Currently the standard personal auto policy provides as an exclusion that UM/UIM coverage will not be provided for “any punitive or exemplary damages, or legal costs related thereto.” (NC 00 01 Ed. 6-96) Similarly, the standard form UM/UIM commercial endorsement provides as an exclusion that the coverage does not apply to “punitive or exemplary damages.” (Form CA 21 16 10 97) However, particularly with out of state policies or commercial policies, great care should be taken to check the specific policy language of the policy to determine whether it has an exclusion for punitive damages for a claim arising out of an uninsured or underinsured motor vehicle.

c. Exclusion for use of Vehicle as a Public Livery or Conveyance

The personal auto policy contains a separate UIM exclusion for bodily injury to an insured while occupying the covered auto under the policy “while it is being used as a public or livery conveyance.” Thus, underinsured motorist coverage would not be available for either a driver or passenger of a vehicle insured through a personal auto policy when someone is in effect running a private taxi service. Note that there is an exception for people driving to work together. The exception provided, “This exclusion does not apply to a shared-the-expense car pool.”

d. The So-Called Family Owned Auto Exclusion

The personal auto policy for a number of years has contained a family owned auto exclusion to attempt to stop stacking of UIM coverage by way of an exclusion when a family has vehicles insured through more than one policy. The exclusion sought to block stacking of UIM coverage for other household policies not insuring the occupied vehicle. For example, standard language to this effect provides an exclusion:

While occupying, or when struck by, any motor vehicle owned by you or any family member which is not insured for this coverage under this policy. This includes a trailer of any type used with that vehicle.

However, this exclusion does not apply to you or any family member.

The courts determined that such an exclusion violated the Financial Responsibility Act as to the named insured and residents of the same household as there was no such limitation in N.C. Gen. Stat. §20-279.21(b)(4), rendering the exclusion void. *See, Bray v. N.C. Farm Bureau Mut. Ins. Co.*, 115 N.C. App. 438, 445 S.E.2d 79 (1994), *aff'd in relevant part*, 341 N.C. 678, 462 S.E.2d 650 (1995); *Honeycutt v. Walker*, 119 N.C. App. 220, 458 S.E.2d 23, *rev. denied*, 342 N.C. 192, 463 S.E.2d 236 (1995); *N.C. Farm Bureau Mut. Ins. Co. v. Stamper*, 122 N.C. App. 254, 468 S.E.2d 584, *rev. denied*, 343 N.C. 513, 472 S.E.2d 17 (1996). However, more recently the North Carolina Court of Appeals has declined to extend enforcement of that rule to so-called Class II insured, and has not allowed them to stack multiple policies of UIM coverage insuring a family household, of which they are not a part. *See, N.C. Farm Bureau Mut. Ins. Co. v. Perkinson*, 140 N.C. App. 140, 535 S.E.2d 405 (2000) (holding that claimants not meeting the definition of a “family member” were not entitled to obtain coverage from other policies of the family that operated the vehicle in which the claimants were occupants).

The standard commercial auto policy also seeks to limit access to coverage not only by a similar definition of who is a covered “family member” contained in its definition of “WHO IS AN INSURED”, but also by regulation of which vehicles are “covered autos” through the declarations portion of the policy. Often through a coding system, commercial policies will be limited to definitions such as “owed autos only” or “scheduled autos only”, or other limitations as to vehicles that will trigger UIM coverage.

e. Workers' Compensation Benefits Exclusion

The standard business auto policy has an exclusion such that the coverage does not apply to "The direct or indirect benefit of any insurer or self-insurer under any workers' compensation, disability benefits, or similar law". Similarly, the personal auto policy has a provision providing as an exclusion the following:

- D. This coverage shall not apply directly or indirectly to benefit any insurer or self-insurer under any of the following or any similar law:
 - a. workers' compensation law; or
 - b. disability benefits law.

These provisions would seem to act in tandem with "limit of liability" provisions which also provide for a setoff against coverage to the extent of workers' compensation benefits. (See discussion, *supra* at V. B. 2.c).

f. Using a Vehicle without Lawful Possession

Both the personal auto policy and the business auto policy have an exclusion from coverage for "anyone using a vehicle without a reasonable belief that the person is entitled to do so." Interestingly enough, this appears to be a more rigorous test for coverage than the Financial Responsibility Act would allow. The Financial Responsibility Act at N.C. Gen. Stat. §20-279.21(b)(3) provides in its definition of "persons insureds" the following phrase "or any other person or persons in lawful possession of such motor vehicle". (Emphasis added) Thus, it appears that the bare minimum requirement "of lawful possession" would establish coverage for an insured "using" a vehicle (presumably either as a driver or a nondriving occupant), rather than the seemingly higher standard of having a "reasonable belief" that one is entitled to be using the vehicle.

7. Statute of Limitations

Because of differences in the statutory treatment of procedural requirements for UM actions and UIM actions, the North Carolina Supreme Court has held that a failure to serve the UIM insurer with the tort pleading with the statute of limitations will not automatically bar a UIM claim, but rather the Court should apply a three-part test utilized in late notice insurance cases. Liberty Mut. Ins. Co. v Pennington, 356 N.C. 571, 573 S.E.2d 118 (2002).

VI. MISCELLANEOUS PROVISIONS

A. Cancellation

The requirements for canceling policies are mandated by statute. As to North Carolina policies the legislature has indicated a series of events that occur upon cancellation of coverage. At N.C. Gen. Stat. § 20-309 it is required that the termination of coverage be reported to DMV and it is also incumbent upon the owner of the now uninsured motor vehicle to surrender the registration certificate and plates, until such time as the coverage is repurchased. Effective February 1, 1995 the termination of coverage for non-fleet private passenger motor vehicles has been governed by N.C. Gen. Stat. §

58-36-85 which provides the strict requirements of termination. The contents of the notice and the process of sending it to the insured are all set forth in detail. The North Carolina Legislature that certain policy cancellations are prohibited as a matter of law before the expiration of a policy term subject to a number of statutory exceptions, such as nonpayment of premium. *See*, N.C. Gen. Stat. § 58-41-15. Even as to nonpayment of premium, there are requirements for timing and notice.

Additionally, many people utilize premium financing companies to pay for their insurance premiums. There are specific requirements for cancellation with policies financed in this fashion. *See*, N.C. Gen. Stat. § 58-35-85. Additionally, there are specific regulations in North Carolina through the Administrative Code as to the content and process for such cancellations. *See*, 11 N.C.A.C. 13.0318.

Likewise, as with state regulation, federal regulations pertaining to policies mandated under federal regulation have cancellation requirements as well. *See, e.g.*, 49 C.F.R. 387.15 and § 387.39.

One often sees the dispute over the proper cancellation of a liability policy being exercised by the UM insurer, wanting to establish that there is actually liability coverage available to the tortfeasor.

B. Late Notice

Virtually all insurance policies have requirements of giving notice to the insurer of a claim. The standard Rate Bureau language for a personal auto policy requires that the insurer “must be notified promptly of how, when and where the accident of loss happened.” The leading case in North Carolina in analyzing the rights and obligations of an insurer pertaining to late notice is Great American Ins. Co. v. C.G. Tate Construction Co., 303 N.C. 387, 279 S.E.2d 769 (1981), *on subsequent appeal*, 315 N.C. 714, 340 S.E.2d 743 (1986). In that case, the North Carolina Supreme Court established a three-step test to determine whether an insurer had been prejudiced by late notice of its insured. This test has been specifically applied in the context of underinsured motorist coverage, where the statute does not require actual service on the UIM carrier within the applicable underlying statute of limitations, and applying a prejudice to the insurer analysis of the right to bar coverage. *See*, Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573 S.E.2d 118 (2002). Similarly, this analysis has been applied to uninsured motorist coverage to also determine material prejudice to the insurer. *See*, Hoffman v. Great American Alliance Ins. Co., 166 N.C. App. 422, 601 S.E.2d 908 (2004). However, in the context of uninsured motorist coverage there are a number of specific obligations that might come into play, particularly with a so-called hit and run claim. (*See discussion supra at § V.A*).

C. Failure to Cooperate/Misrepresentations to the Insurer

Generally, insurance policies have provisions that require cooperation with the insurer in its investigation of an accident. However, as with many other portions of the Financial Responsibility Act, the North Carolina Legislature has indicated that it does not want to allow an insurer to avoid coverage for non-cooperation by an insured, at least up to the policy limits mandated by the Financial Responsibility Act. *See*, N.C. Gen. Stat. § 20-279.21(f)(1).

Additionally, an insurer may not void coverage, at least up to the minimum financial requirements for prior misrepresentations to the insurer, such as those which led to the issuance of the policy in the first place. *See, e.g.*, Odom v. Nationwide Mut. Ins. Co., 101 N.C. App. 627, 401 S.E.2d 87 (1991) (liability coverage); Hartford Underwriters Ins. Co. v. Becks, 123 N.C. App. 489, 473 S.E.2d 427 (1996) (underinsured motorist coverage). Such restrictions however apply only to the minimum mandated financial responsibility limits, and not to excess voluntary coverage. *See Odom supra*.

