UNINSURED AND UNDERINSURED MOTORIST COVERAGE OVERVIEW WITH EMPHASIS ON SELECTION/REJECTION FORM ISSUES:

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I. Overview

a. Scope of Materials

The purpose of these materials is to provide a basic outline of topics and issues that may arise for entry-level uninsured and underinsured motorist coverage questions. There are a number of materials from the North Carolina Academy of Trial Lawyers and other organizations on these issues that are far more detailed. We are not trying to undertake to have a detailed discussion of all of these issues, rather, this presentation is meant to be an overview of and introduction to Uninsured and Underinsured Motorists Coverage. A major focus of this presentation will address selection/rejection form issues and the recent decision of Williams v. Nationwide Mut. Ins. Co. in which our law firm was involved with, as well as where we currently see the status of the law regarding selection/rejection form issues.

II. The Policy

a. Standard Auto Policy (attached)

b. N.C. Gen. Stat. § 20-279.21 (attached)

c. Polestar Principles Applicable to Financial Responsibility Act

The provisions of the Financial Responsibility Act are written into every automobile policy as a matter of law and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail. Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 441 (1977), appeal after remand, 298 N.C. 246 (1979). Where a "statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written in it." Lichtenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 272 (1970).

Provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage whenever possible by liberal construction. State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 318 N.C. 534, 538 (1986). See also Metropolitan Property & Cas. Ins. Co. v. Caviness, 124 N.C. App. 674 (1996), rev. denied, 345 N.C. 642 (1997) ("Any ambiguity in the Financial Responsibility Act, which includes section 20-279.21(b)(4), must be liberally construed to effectuate the Act's remedial purpose -- protecting innocent victims of automobile accidents from financially irresponsible motorists.") In addition, any ambiguities that have been created by the insurer must be strictly construed against the insurance company. See Gould Morris Elec. Co. v. Atlantic Fire Ins. Co., 229 N.C. 518 (1948).

These principles are in accord with the overriding principle of legislative intent of N.C.G.S. ' 20-279.21, which is "to provide the innocent victim with the fullest possible protection." Proctor v. N.C. Farm Bureau Mut. Ins. Co., 324 N.C. 221, 225 (1989) (emphasis added); see also Caviness, 124 N.C. App. at 764 (stating that "underlying purpose of the [Financial Responsibility] Act, which remains unchanged even today, 'is best served when [every

provision of the Act] is interpreted to provide the innocent victim with the fullest possible protection.'").

II. UM/UIM Basics

a. What is a UM claim?

i. Uninsured Motor Vehicle Defined/When Does UM Coverage Apply?

N.C. Gen. Stat. § 20-279.21(b)(3) states:

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

a. A motor vehicle owned by the named insured;

b. A motor vehicle that is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;

c. A motor vehicle that is owned by the United States of America, Canada, a state, or any agency of any of the foregoing (excluding, however, political subdivisions thereof);

d. A land motor vehicle or trailer, if operated on rails or

crawler-treads or while located for use as a residence or premises and not as a vehicle; or

e. A farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

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

b. What is a UIM Claim?

i. Underinsured Motor Vehicle Defined

For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an "underinsured highway vehicle" if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an "underinsured motor vehicle" for purposes of an underinsured motorist claim under an owner's policy insuring that vehicle if the owner's policy insuring that vehicle provides

underinsured motorist coverage with limits that are less than or equal to that policy's bodily injury liability limits. For the purposes of this subdivision, the term "highway vehicle" means a land motor vehicle or trailer other than (i) a farm-type tractor or other vehicle designed for use principally off public roads and while not upon public roads, (ii) a vehicle operated on rails or crawler-treads, or (iii) a vehicle while located for use as a residence or premises. The provisions of subdivision (3) of this subsection shall apply to the coverage required by this subdivision.

ii. When Does Underinsured Motorist Coverage Apply?

Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid. Underinsured motorist coverage is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy.

b. Do I have a UM/UIM claim?

i. Elements of a UM claim

For an innocent party to recover under the uninsured motorist coverage, one must prove that he/she is:

(a) legally entitled to recover damages;

(b) from the owner or operator of an uninsured automobile;

(c) because of bodily injury;

(d) caused by accident; and

(e) arising out of the ownership, maintenance or use of the uninsured automobile.

Williams v. Nationwide Mut. Ins. Co., 269 N.C. 235 (1967); see also McNeil v. Hartford Accident and Indemnity Co., 84 N.C. App. 438 (1987).

ii. Elements of a UIM claim

For UIM purposes, the statute reads that "the provisions of subdivision (3) of this subsection shall apply to the coverage required by this subdivision". Accordingly, for purposes of a UIM claim, one would argue that the requirements for a legally enforceable UM claim (see Williams and McNeil) would be equally applicable to a UIM claim, except that in order for a UIM claim to apply, there is an additional requirement that the liability limits of the tortfeasor are exhausted before the UIM coverage would be available. (See "When Does Underinsured Coverage Apply", above). For example, if there are liability limits of 100/300 and UIM limits of 100/300, no UIM coverage is available. On the other hand, if there are liability limits of 100/300 and UIM limits of 250/500, then UIM coverage is available to the extent of an additional 150/200 after liability limits have been exhausted.

iii. Other Areas of Interest

a. Phantom Vehicle/Collision Requirement (UM only)

When the insured sustains bodily injury as the result of an incident in which the identify of the operator or owner of the tortfeasor vehicle cannot be ascertained or identified, then the vehicle is referred to as a "phantom vehicle" and there is a requirement that a collision occur. See N.C. Gen. Stat. § 20-279.21(b). A "collision" requires physical contact between the insured's vehicle and the unidentified driver's vehicle. See Anderson v. Baccus, 109 N.C. App. 16, aff'd in part and rev'd in part, 335 N.C. 526 (1994).

Petteway v. South Carolina Ins. Co., 93 N.C. App. 775 (1989) is the seminal case in this area. In Petteway, the insured's vehicle was forced off of the road by the phantom vehicle. A witness in fact verified this information to the police. Nevertheless, the Court held that in this situation, a vehicle collision is essential for uninsured motorist coverage to apply.

It is important to note that, in Petteway, had the tortfeasor's vehicle been identifiable, UM coverage would have applied.

b. Aggregate Limits Cases/Stacking

If a person who is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle is an insured under the uninsured motorist coverage of a policy that insures more than one motor vehicle, that person shall not be permitted to combine the uninsured motorist limit applicable to any one motor vehicle with the uninsured motorist limit applicable to any other motor vehicle to determine the total amount of uninsured motorist coverage available to that person. See N.C. Gen. Stat. § 20-279.21(b)(3).

The underinsured motorist limits applicable to any one motor vehicle under a policy shall not be combined with or added to the

limits applicable to any other motor vehicle under that policy. See N.C. Gen. Stat. § 20-279.21(b)(4).

The current version of N.C. Gen. Stat. § 20-279.21 prohibits intrapolicy stacking for uninsured and underinsured motorists claim.

On the other hand, interpolicy stacking (under two or more insurance policies) is permitted for both UM and UIM claims for nonfleet private passenger motor vehicles.

When there is a possibility of a UM or UIM claim, inspection of all available insurance policies is key to determining coverage. This includes not only policies in which the plaintiff is the named insured, but all policies in which the Plaintiff may qualify as a 'Class 1' or 'Class 2' insured.

A 'Class 1' insured is: the named insured and, while resident of the same household, the spouse of the named insured and relatives of either;

A 'Class 2' insured is: any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle. Members of the first **class** are "persons insured" for the purposes of underinsured motorists (UIM) coverage where the insured vehicle is not involved in the insured's injuries. Members of the second **class** are "persons insured" for the purposes of UIM coverage only when the insured vehicle is involved in the insured's injuries.

To determine available coverage in a UM situation in which more than one policy provides UM coverage for nonfleet private

passenger motor vehicles, one must only add up all available UM limits under each policy.

To determine available coverage in a UIM situation in which more than one policy provides UIM coverage for nonfleet private passenger motor vehicles, one must add up all available UIM limits under each policy. UIM coverage is available to the extent that the aggregate of all UIM limits exceeds the sum of all available liability coverage. However, there is presently a coverage issue which has been litigated at the trial court level, but which has not yet been addressed by our appellate courts with regard to stacking of UIM coverage.

This issue deals with determining available UIM coverage in a situation in which the injured plaintiff is a passenger in the tortfeasor's vehicle. It was thought that the State Farm Mut. Auto Ins. Co. v. Young, 115 N.C. App. 68, vacated, remanded 342 N.C. 647 (1996), reaffirmed on remand, 122 N.C. App. 505, rev. den., 345 N.C. 353 (1997), had forever foreclosed this issue. In Young, the plaintiff was injured while riding as a passenger in her father's vehicle. The father was a Class 1 insured under a policy that provided liability and UIM coverage with stated limits of 100/300 and that insured two vehicles, including the vehicle involved in the wreck. Therefore, the liability limits that applied to the plaintiff was $100,000 and the issue in the case was how much UIM coverage was available to the plaintiff. Under the version of the statute in place at that time, the plaintiff would have $200,000 in UIM coverage, if there was any UIM coverage at all. (Note – It is critical to the outcome of the Young case that the version of the statute in place at that time permitted intrapolicy stacking for the multiple vehicles insured under the one policy).

State Farm argued in Young that the term “underinsured highway vehicle” does not include a vehicle owned by the named insured and that, while the plaintiff was entitled to the liability limits, there was no UIM claim. The Court of Appeals held that since the UM statute’s exclusion of vehicles owned by the named insured does not apply for UIM purposes, and there was no similar exclusion for UIM vehicles under the statute, the father’s vehicle was in fact an “underinsured highway vehicle”. The plaintiff was allowed to recover under the liability coverage and the UIM coverage of the same policy.

The issue that the defense bar has raised is whether the logic of the Young decision still applies under the present version of the statute. Particularly, what is at issue is the effect of the following statutory language under the 2003 amendments:

For purposes of an underinsured motorist claim asserted by a person injured in an accident where more than one person is injured, a highway vehicle will also be an underinsured highway vehicle if the total amount actually paid to that person under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner’s policy. Notwithstanding the immediately preceding sentence, a highway vehicle shall not be an “underinsured motor vehicle” for purposes of an underinsured motorist claim under an owner’s policy insuring that vehicle if the owner’s policy insuring that vehicle provides underinsured motorist coverage with limits that are less than or equal to that policy’s bodily injury liability limits.

So, for instance, take the situation of a single vehicle wreck where the liability and UIM limits of the tortfeasor are both 100/300, and the injured passenger(s) have available UIM coverage under two other policies, 100/300 and 250/500. Under the Young rationale, with these coverages, the injured passenger would have an additional 350/800 available after exhausting the tortfeasor's liability limits. Under the position that the defense bar has recently raised, with these coverages, the injured passenger would have only an additional 250/500 after exhausting the tortfeasor's liability limits, since they take the position that the UIM coverage on the tortfeasor's vehicle could not be stacked because the liability and UIM limits on the tortfeasor's vehicle are equal.

While the appellate courts have not yet ruled on this issue, it would seem that the Young rationale is still solid.

Indeed, the first sentence of the 2003 amendments was designed to remedy the outcome of Ray v. Atlantic Cas. Ins. Co., 112 N.C. App. 259 (1993). The version of the statute in effect in Ray stated that an underinsured highway vehicle was "a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable **at the time of the accident** is less than the applicable limits of liability under the owner's policy." Based on this language, the Court of Appeals held that UIM coverage was determined at the time of the accident and that "any payments the liability company made to an injured party after the date of the accident and which reduced the liability insurance available to these plaintiffs is not relevant to our inquiry." See Ray.

The second sentence provides that, for purposes of a UIM claim asserted under a policy insuring the tortfeasor's vehicle itself, that vehicle will not be underinsured as to an injured passenger if the UIM limits do not exceed the liability limits of that policy, regardless of what was actually received by the injured person. This seems to indicate that the Young rationale still holds, meaning that there would be no available UIM coverage for a passenger in the tortfeasor's vehicle when the liability limits and the UIM limits are equal. We do not believe this sentence means that you ignore the UIM limits of the tortfeasor's policy for stacking purposes and determining the total available UIM coverage to the passenger when there is additional UIM coverage available under other policies. However, this issue will be finally settled by the appellate courts in the near future.

iii. How Can I Be Sure of the Applicable Limits if I haven't filed suit?

a. N.C. Gen. Stat. 58-3-3 (attached)

This statute provides, in summary, that a person having a claim subject to a policy of nonfleet private passenger automobile insurance may request by certified mail that the carrier provide information regarding the policy's limits of coverage under the applicable policy. Upon receipt of the request (which must include the policyholder's name and policy number, if available), the carrier must notify the person within 15 business days that the insurer is required to provide the information prior to litigation if the following conditions are met:

(a) Submission to the insurer of the person's written consent to all of the person's medical providers to release to the

insurer the person's medical records for 3 years preceding the claim, as well as all medical records pertaining to the claimed injury;

(b) Written consent by the person to participate in pre-suit mediation;

(c) Submission to the insurer of a copy of the accident report and a description of the events at issue with sufficient particularity to permit the insurer to make an initial determination of the potential liability of its insured.

Within 30 days of receiving the written documents described above, the insurer shall provide the policy limits.

b. Representation from Carrier and Tortfeasor

(See attached example)

d. How Do I Present My Claim?

i. Notice and Service Requirements

a. UM Pre-Suit Notice

The consent of the insurer shall not be required for the initiation of suit by the insured against the uninsured motorist: Provided, however, no action shall be initiated by the insured until 60 days following the posting of notice to the insurer at the address shown on the policy or after personal delivery of the notice to the insurer or its agent setting forth the belief of the insured that the prospective defendant or defendants are uninsured motorists. No default judgment shall be entered when the insurer has timely filed an answer or other pleading as required by law. The failure to post notice to the insurer 60 days in advance of

the initiation of suit shall not be grounds for dismissal of the action, but shall automatically extend the time for the filing of an answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer. N.C. Gen. Stat. § 20-279.21(b)(3)(a).

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

answer or other pleadings to 60 days after the time of service of the summons, complaint, or other process on the insurer. N.C. Gen. Stat. § 20-279.21(b)(3)(b)

b. What am I required to do when I file suit?

i. UM –Service of Process/Statute of Limitations

The [UM] insurer shall be bound by a final judgment taken by the insured against an uninsured motorist if the insurer has been served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law; provided however, that the determination of whether a motorist is uninsured may be decided only by an action against the insurer alone. The insurer, upon being served as herein provided, shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name. The insurer, upon being served with copy of summons, complaint or other pleading, shall have the time allowed by statute in which to answer, demur or otherwise plead (whether the pleading is verified or not) to the summons, complaint or other process served upon it. N.C. Gen. Stat. § 20-279.21(b)(3)(a).

This means Rule 4 Service of Process. As a result, the statute of limitations for the tort action applies to a UM claim.

ii. UIM – "Notice"/Statute of Limitations

Any claimant who intends to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for moneys beyond those paid by the underinsured motorist insurer shall before doing so give notice to the insurer and give the insurer, at its expense, the opportunity to participate in the prosecution of the claim. Upon the entry of judgment in a suit upon any such claim in which the underinsured motorist insurer and claimant are joined, payment upon the judgment, unless otherwise agreed to, shall be applied pro rata to the claimant's claim beyond payment by the insurer of the owner, operator or maintainer of the underinsured highway vehicle and the claim of the underinsured motorist insurer.

The Supreme Court has held, however, that an insured is not barred from asserting a UIM claim if they fail to put the carrier on notice of the claim or the tort action within the three year statute of limitations for the tort claim. Particularly:

The language of the statute is clear, and nothing therein suggests that the notification requirement is subject to a statute of limitations. To the contrary, the statute merely directs the insured to "give *notice of* the initiation of the suit to the underinsured motorist insurer." N. C.G.S. § 20-279.21(b)(4), para. 4 (emphasis added). The statute does not prescribe the type of notice, the content of the notice, or the method by which it is to be executed. The statute is similarly devoid of any particulars as to the time within which notice to the insurer must be provided. Given the lack of direction and specificity of N.C.G.S. § 20-279.21(b)(4) regarding the notification requirement, we cannot conclude that the failure to provide such notice within the statute of limitations applicable to the underlying tort action operates to bar recovery of UIM benefits.

Plaintiff notes, nonetheless, that under N. C.G.S. § 20-279.21(b)(4), the UIM carrier shall, upon receiving notice, have "the right to appear in defense of the claim" and to "participate in the suit as fully as if it were a party." *Id.* Plaintiff argues that "full" participation is impossible without prompt notice of the suit; therefore, the legislature must have intended to require that notice be given within the limitations period for the underlying action. Again, we do not believe that such a construction follows from a plain reading of N.C.G.S. § 20-279.21(b)(4). The statute simply affords the insurer the right to choose to fully participate in the underlying action at such time as the insurer receives notice of the suit. Contrary to plaintiff's contention, we find nothing in the aforementioned language to suggest that the insured is obligated to notify the UIM carrier of a claim within the statute of limitations applicable to the underlying action.

See Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571 (2002). However, Pennington goes on to say that there is a three-step test to determine whether notice was timely given:

When faced with a claim that notice was not timely given, the trier of fact must first decide whether the notice was given as soon as practicable. If not, the trier of fact must decide whether the insured has shown that he acted in good faith, *e.g.*, that he had no actual knowledge that a claim might be filed against him. If the good faith test is met the burden then shifts to the insurer to show that its ability to investigate and defend was materially prejudiced by the delay.

Notwithstanding the technical requirements set forth above, the best practice is to serve the UIM carrier as an unnamed defendant

pursuant to Rule 4 at the time of initiation of the civil action, just as one would serve a UM carrier.

e. How Do I Collect the Money for my client?

i. Releases

A complete release of the tortfeasor is a complete release of the claimant's right to recover UIM coverage.

Sudds v. Gillian, 152 N.C. App. 659 (2002):

A release is a 'formal written statement reciting that the obligor's duty is immediately discharged.' " Best v. Ford Motor Co., 148 N.C. App. 42, 45, 557 S.E.2d 163, 165 (2001) (quoting E. Allan Farnsworth, Contracts § 4.24 (2d ed. 1990)), aff'd, 355 N.C. 486, 562 S.E.2d 419 (2002) (citation omitted). A release against the principal tortfeasor (negligent driver) also acts to release the UIM insurance carrier, as the liability of a UIM insurance carrier is derivative of the principle tortfeasors' liability. Grimsley v. Nelson, 342 N.C. 542, 548, 467 S.E.2d 92, 96 (1996) (signing of release against tortfeasor releases UIM carrier as a matter of law due to "derivative nature of the insurance company's liability"); Spivey v. Lowery, 116 N.C. App. 124, 127, 446 S.E.2d 835, 838, disc. review denied, 338 N.C. 312, 452 S.E.2d 312 (1994) ("whether or not plaintiff intended to release the UIM carrier is irrelevant. . . [if] plaintiff intended to release the tortfeasor, the UIM carrier is released as well").

ii. Covenants

The 1997 amendments to N.C. Gen. Stat. § 20-279.21(b)(4) permit a claimant to execute a covenant not to enforce judgment, as opposed to a release, the effect of which will preserve the claimant’s UIM claims and safeguard the tortfeasor from collection of a judgment in excess of the liability policy limits. In effect, it serves as a quasi-release of the tortfeasor and his carrier, but preserves a claimant’s rights to recover UIM coverage.

The current language of the UIM statute permitting such a Covenant provides as follows:

As consideration for payment of policy limits by a liability insurer on behalf of the owner, operator, or maintainer of an underinsured motor vehicle, a party injured by an underinsured motor vehicle may execute a contractual covenant not to enforce against the owner, operator, or maintainer of the vehicle any judgment that exceeds the policy limits. A covenant not to enforce judgment shall not preclude the injured party from pursuing available underinsured motorist benefits, unless the terms of the covenant expressly provide otherwise, and shall not preclude an insurer providing underinsured motorist coverage from pursuing any right of subrogation. N.C. Gen. Stat. § 20-279.21(b)(4).

A sample Covenant Not to Enforce Judgment is attached.

iv. Right of Insurer to Advance UIM (Subrogation)

An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the

underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer. No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be denominated as a party in its own name except upon its own election. Assignment or subrogation as provided in this subdivision shall not, absent contrary agreement, operate to defeat the claimant's right to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for damages beyond those paid by the underinsured motorist insurer. The claimant and the underinsured motorist insurer may join their claims in a single suit without requiring that the insurer be named as a party. Any claimant who intends to pursue recovery against the owner, operator, or maintainer of the underinsured highway vehicle for moneys beyond those paid by the underinsured motorist insurer shall before doing so give notice to the insurer and give the insurer, at its expense, the opportunity to participate in the prosecution of the

claim. Upon the entry of judgment in a suit upon any such claim in which the underinsured motorist insurer and claimant are joined, payment upon the judgment, unless otherwise agreed to, shall be applied pro rata to the claimant's claim beyond payment by the insurer of the owner, operator or maintainer of the underinsured highway vehicle and the claim of the underinsured motorist insurer. N.C. Gen. Stat. § 20-279.21(b)(4).

In State Farm Mut. Auto Ins. Co. v. Blackwelder, 332 N.C. 135 (1992), the liability carrier tendered its policy limits to the insured during the pendency of the civil action. Shortly thereafter, the UIM insurer properly advanced its UIM coverage, and then tendered the remainder of its UIM coverage. The liability insurer later reimbursed the UIM carrier for the tender. The UIM insurer then sued the tortfeasor, and the Supreme Court held that the UIM carrier had complied with the statute and had preserved its right of subrogation, notwithstanding the fact that the insured had dismissed the civil action, based upon the reasoning that it was the claim of the UIM carrier, which had already accrued, and not the insured.

In Farm Bureau Ins. Co. of N.C., Inc. v. Blong, 159 N.C. App. 365 (2003), an intoxicated driver was responsible for killing four teenagers and injuring one other. The driver's liability carrier tendered its policy limits. The UIM policy for the vehicle in which the teenagers were riding did not preserve its subrogation rights by advancing, thus waiving its right of subrogation against the driver. The teenagers then pursued Dram Shop actions, and, while these actions were pending, the UIM carrier paid its UIM limits. The Dram Shop actions then settled for a sum greater than the UIM coverage paid. The UIM carrier then filed a declaratory

judgment action to determine whether it was subrogated to the claimants' recovery in the Dram Shop actions. After a lengthy analsis, the Court of Appeals held that: (1) the UIM carrier was subrogated to the claimant's recovery in the Dram Shop action, and (2) the "common fund doctrine" applied, such that the UIM carrier's recovery was to be reduced for by its proportionate share of the attorneys' fees incurred in recovery of the Dram Shop actions.

v. Arbitration

A Class 1 or Class 2 insured has the right to choose to arbitrate any UM or UIM claim they may have.

For policies issued or renewed on or after May 15, 1994, the following provisions apply, by virtue of the North Carolina Rate Bureau's amendatory endorsement NC 00 09 (Ed. 5-94):

If we and an insured do not agree:

1. Whether that person is legally entitled to recover compensatory damages from the owner or driver of an [uninsured or underinsured] motor vehicle; or
2. As to the amount of such damages;

the insured may demand to settle the dispute by arbitration. The following procedures will be used:

1. Each party will select a competent arbitrator. The two so selected will select a third.

2. If the third arbitrator is not selected within 30 days, the insured or we may request a judge of a court of record to name on. The court must be in the county and state in which arbitration is pending.

3. Each party will pay its chosen arbitrator. Each will pay half of all other expense of arbitration. Fees to lawyers and expert witnesses are not considered arbitration expenses and are to be paid by the party hiring these persons.

4. Unless the insured and we agree otherwise, arbitration will take place in the county and state in which the insured lives. Arbitration will be subject to the usual rules of procedure and evidence in such county and state. The arbitrators will resolve the issues. A written decision on which two arbitrators agree will be binding on the insured and us.

5. Any arbitration action against the company must begin within the time limit allowed for bodily injury or death actions in the state where the accident occurred.

6. Judgment upon award may be entered in any proper court.

7. As an alternative, the insured and we may agree to arbitrate by rules other than stated above.

See also Register v. White, 358 N.C. 691 (2004), wherein the Supreme Court held that, in the UIM context, arbitration did not have to begin within the statute of limitations for the tort action, as:

(1) the plaintiff had no right to UIM coverage until the liability coverage had been exhausted by settlement or payment of a judgment by the liability carrier;

(2) 'exhaustion' of liability limits occurred when the liability insurer had tendered its policy limits by way of a settlement offer or in satisfaction of a judgment;

(3) an insured has no right to demand arbitration until the liability coverage has been 'exhausted';

(4) the plaintiff's right to demand arbitration did not accrue prior to the liability insurer's tender; and

(5) the plaintiff's demand for arbitration was timely made six weeks after the liability carrier's tender.

f. Selection/Rejection Form Issues

i. Statutory portions dealing with selection/rejection forms:

N.C. Gen. Stat. § 20-279.21(b)(4) governs the issuance of UIM coverage. The version in effect at the time of this accident, provided in pertinent part, as follows:

> Such owner's policy of liability insurance […] [s]hall […] provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, <u>in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($ 1,000,000) as selected by the policy owner.</u>
>
> […]

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

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

N.C. Gen. Stat. § 20-279.21(b)(4) (2001) (emphasis added).

Status of the law prior to Williams (significant cases):

A. Significant Statutory changes to consider:

Prior to 1991, the applicable Financial Responsible Act only allowed the insured the option to select UIM coverage equal to the liability limits on the policy or to reject the coverage altogether. A standard North Carolina auto policy covers between one and four cars. See N.C. Gen. Stat. 58-40-10(1996). Subsequent to this Court's decision in Sutton v. Aetna, 325 N.C. 259, 382 S.E.2d 759 (1989), which allowed both inter-policy and intra-policy stacking, the premiums charged for underinsured skyrocketed due to insurance companies' increased exposure. The increased rates, particularly due to intra-policy stacking, resulted in numerous complaints to the Insurance Commissioner, legislators, agents, and carriers. Unfortunately, under the statute in effect at the time, insureds were "forced" to carry underinsured motorist coverage on each car equal to the liability coverage or reject it entirely. For example, if an insured owned three cars and carried $100,000.00 in liability coverage, the insured would also have underinsured motorist coverage limits of $100,000.00. Due to intra-policy stacking, the insured would have $300,000.00 in underinsured motorist coverage (3 cars x $100,000.00). If she could not afford the higher premium due to stacking, she had to either: (i) reject UIM coverage, (ii) reduce her liability coverage or (iii) sell the car. None of the options meet the purpose of the Financial Responsibility Act, to fully compensate the innocent victims of financially irresponsible motorists. American Tours, Inc. v. Liberty Mutual Ins. Co., 315 N.C. 341, 346, 338 S.E.2d 92, 96 (1986), Liberty Mut. Ins. Co. v. Pennington, 356 N.C. 571, 573-4, 573 S.E.2d 118, 120 (2002).

In July 1991, due to the unintended consequences of Sutton, the legislature enacted "An Act to Prohibit the Stacking of

Uninsured and Underinsured Motorist Coverage." 1991 N.C. Sess. Laws 837. The paragraphs of the bill relevant to the present issue are:

Sec. 2. G.S. 20-279.21(b)(4) reads as rewritten:

> (4) Shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorist coverage, to be used only with ~~policies~~ a policy that ~~are~~ is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, in an amount ~~equal to the policy limits for~~ not to be less than the financial responsibility amounts for bodily injury liability as set forth in G.S. 20-279.5 nor greater than one million dollars ($1,000,000) as selected by the policy owner. ~~automobile bodily injury liability as specified in the owner's policy.~~ …
>
> …The coverage required under this subdivision shall not be applicable where any insured named in the policy rejects the coverage. An insured named in the policy may select different coverage limits as provided in this subdivision. Once the named insured exercises this option, the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless the named insured makes a written request to exercise a different option. The selection or rejection of underinsured motorist coverage by a

> <u>named insured is valid and binding on all insureds and vehicles under the policy…</u>
>
> …Sec. 3. Within 60 days after the ratification of this act the North Carolina Rate Bureau shall make appropriate rate and policy form filings with the Commissioner of Insurance to reflect the provisions of this act.

While the bill prohibited intra-policy stacking of UIM coverage, it also expanded the UIM coverage available to North Carolina motorists. An insured could now determine specifically how much UIM coverage she desired and could afford, and specifically select UIM coverage up to one million dollars.

A significant problem arose when large numbers of insureds failed to return the forms to their insurance carriers. The carriers which had diligently sought to comply with the requirements of the statute to offer the options to their insureds, were now in limbo due to their insureds' failure to return the form, or returned the forms incorrectly completed. If the insured failed to return the form, how much UIM coverage would the insured have? Or more importantly to the carriers, how much coverage would they be required to provide? The statute was silent.

The legislature sought to remedy this situation where insurance carriers followed the dictates of the law and provided selection / rejection forms to their insureds, but the insureds failed to return the forms or completed the forms inaccurately. In July 1992, the legislature passed House Bill 846, entitled "An Act to Amend and Make Technical Corrections to Various Insurance Laws and to Clarify the Uninsured and Underinsured Motorist Law." The relevant portions of the bill are the following:

Sec. 9. G.S. 20-279.21(b) reads as rewritten:

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

~~If the named insured rejects the coverage required under this subdivision, the insurer shall not be required to offer the coverage in any renewal, reinstatement, substitute, amended, altered, modified, transfer or replacement policy unless the named insured makes a written request for the coverage.~~ Rejection of ~~this coverage~~ or selection of different coverage limits for underinsured motorist coverage for policies ~~issued after~~

> ~~October 1, 1986,~~ under the jurisdiction of the North Carolina Rate Bureau shall be made in writing by the named insured on a form promulgated by the ~~North Carolina Rate~~ Bureau and approved by the Commissioner of Insurance."

1991 N.C. Sess. Laws 846.

B. Significant Cases:

1. State Farm Mut. Auto Ins. v. Fortin, 350 N.C. 264 (1999)

In Fortin, the named insured executed a Rate Bureau selection/rejection form several months before the effective date of the 1991 amendments to N.C. Gen. Stat. § 20-279.21(b)(4), rejecting combined UM/UIM coverage and selecting only UM coverage. When the policy was renewed in January, 1992, the insurer again sent the named insured its version of the newly approved Rate Bureau Form, which was executed by the named insured. UIM coverage was again rejected. The insurer's version of this second form simply contained an additional two sentences not present on the approved Rate Bureau form, which stated "If you wish to make a change or select other limits contact your State Farm Agent. YOUR CURRENT U LIMITS ARE $100,000/$300,000".

The North Carolina Supreme Court held in Fortin that the named insured's rejection of UM/UIM coverage before the effective date of the statutory amendments was no longer valid after that date, and that, because of the two additional sentences present on the second form, the second form was not a "form promulgated by the Rate Bureau and approved by the Commissioner of Insurance" as required by the statute. The Court, in making this determination, found that there was not a valid rejection of UIM coverage under

the facts of that case. In short, the Court had to first conclude that the insured was provided the option; otherwise, the rejection could not have been held to have been invalid.

Outlining the issue that was before the Court in Fortin, the opinion stated:

> In a case of first impression before this Court, we must decide whether there was a valid rejection of underinsured motorist (UIM) coverage for a renewal of a personal auto policy issued subsequent to the effective date of the 1991 amendments to N.C.G.S. § 20-279.21(b)(4), the UIM provision of the Motor Vehicle Safety and Financial Responsibility Act (the Act).

Fortin at 265 (emphasis added).

> The issue before this Court, whether the State Farm policy provides UIM coverage to defendants, is dependent upon whether there was a valid rejection of UIM coverage by Bruce Fortin for a renewal of the policy subsequent to 5 November 1991, the effective date of the 1991 amendments to N.C.G.S. § 20-279.21(b)(4). Absent a valid rejection, a policy that includes UM coverage and contains bodily injury liability limits exceeding the statutory minimums must provide UIM coverage. […] We conclude that there was no valid rejection of UIM coverage in this case.

Id. at 267 (emphasis added).

In Fortin, State Farm provided Mr. Fortin with the option to select or to reject UM and UIM coverage, not once, but twice. Fortin does not stand for the proposition that an improper form

leading to an invalid rejection is the same as no offer leading to no opportunity to select or to reject UIM coverage.

The point of Fortin is that if an insurer provides to its insured an option to select or reject UIM coverage, although flawed in some manner, and the insured rejects coverage, it follows that the rejection is invalid and UIM coverage is deemed to be equal to the highest bodily injury liability limits available under the policy. In Fortin, there was a clear indication, as evidenced by the completed form, that the named insured intended to reject UIM coverage altogether. Despite this, the Court held that the insured was entitled to UIM coverage equal to the highest limit of bodily injury liability coverage available under the policy (e.g.($100,000.00)), which furthered the principles of the Financial Responsibility Act. Fortin, therefore, sets a statutory "floor" for coverage when an improper form is offered to an insured and when the rejection is invalid. On the other hand, Fortin does not set the "ceiling" when the insurer makes no effort to fulfill its statutorily mandated obligation to provide the insured with the options for UIM coverage.

2. Metropolitan Property and Casualty Ins. Co. v. Caviness, 124 N.C. App. 760 (1996) (Pre-curser to Williams)

In Caviness, as in this case, no option was ever given to the named insured to select or reject his UIM coverage limits. The Caviness court held that the insured was entitled to the maximum amount of UIM insurance available by law, which was $1,000,000 per person $1,000,000 per accident, under the 1991 version of the UIM statute. Indeed, the Court stated "[a]s codified… the 1991 statute is inherently ambiguous regarding the amount of UIM coverage to accord an insured absent a selection or rejection of such coverage. Put simply, when, as here, an insured fails to

select or reject UIM coverage, the 1991 statute provides no more than a range of possible coverage limits—not less than liability coverage but no more than one million dollars."

The Caviness decision did not deal with the 1992 amendment to the statute, but it clearly provides the framework, which is in accord with the pole-star insurance principles outlined above, that ambiguities with regard to coverage are to be construed in favor of fullest possible protection to innocent victims of automobile accidents.

C. Williams v. Nationwide

1. How did we get to where we were?(Facts):

On July 17, 2001, Ashley Nicole Williams was a passenger in a 1992 Dodge automobile registered to and owned by David Canady and being driven with his permission by his minor son and a member of his household, Jeremy Canady. Plaintiffs alleged that Jeremy Canady was negligent in his operation of the vehicle and his negligence was the sole proximate cause of the single-vehicle automobile accident in which Ashley Williams sustained extensive injuries.

On July 17, 2001, Nationwide had in force and effect its personal automobile liability policy number 6132 H 833437 issued to David Canady ("Canady Policy"). The Canady Policy insured the Canady Vehicle and provided (a) bodily injury liability coverage with limits of $50,000 per person and $100,000 per accident and (b) underinsured motorist ("UIM") coverage with stated (but disputed) limits of $50,000 per person and $100,000 per accident.

The Canady Policy was initially issued in 1984, and, except for periods of time when the policy was cancelled due to the Canadys' failure to timely pay the premium, it remained in effect through July 17, 2001, and was in effect on July 17, 2001, either through reinstated or renewal policies. The Canady Policy was

last renewed prior to the July 17, 2001 accident on June 12, 2001 for the policy period from June 12, 2001 to December 12, 2001. Neither David Canady nor his wife were ever offered by Nationwide or its authorized agents an opportunity to select or to reject underinsured motorist coverage in an amount greater than their liability limits at any time prior to the accident. As a result, neither Mr. Canady nor his wife signed a North Carolina Rate Bureau UM/UIM selection/rejection form for the Canady Policy at any time prior to July 17, 2001. Plaintiffs learned this information after putting Nationwide on notice of the potential UIM claim and requesting the selection/rejection form from Nationwide. **See letter attached as Exhibit ____.**

On July 17, 2001, the date of the accident and injuries, Nationwide also had in force and effect its personal automobile liability policy number 6132 K 066829 issued to Debbie Williams and her husband as the named insureds, which policy provided UIM coverage with limits of $100,000 per person and $300,000 per accident. These UIM limits were not disputed.

Ashley Williams was an insured for purposes of the Canady Policy's UIM coverage as well as the Williams policy's UIM coverage, and the Canady Vehicle was an underinsured highway vehicle within the meaning of N.C. Gen. Stat. § 20-279.21(b)(4).

Nationwide tendered to Ashley Williams, in settlement of any and all claims that they may have as a result of the July 17, 2001 accident, the undisputed $50,000 per person bodily injury liability coverage limit of the Canady Policy and the undisputed $100,000 per person UIM limit of the Williams policy.

Written notice of Nationwide's tender of the Canady Policy's $50,000 per person bodily injury liability limit was given to Nationwide in its capacity as UIM insurer pursuant to N.C. Gen. Stat. § 20-279.21(b)(4). Nationwide, in its capacity as UIM insurer elected not to advance to Plaintiffs within 30 days an

amount equal to the Canady Policy's $50,000 per person bodily injury liability limit and therefore waived its subrogation rights and its right to approve any settlement between Plaintiffs and David Canady and Jeremy Canady).

We declined to accept Nationwide's tender of $150,000 in settlement of the claims, as it was our position that their damages exceed $150,000, that the Canady Policy provided UIM coverage with the statutory limits of $1,000,000 per accident, and that Plaintiffs could recover from David Canady and Jeremy Canady personally.

Nationwide denied the position of Plaintiffs and contended instead that the Canady Policy provided UIM coverage with limits equal to the policy's $50,000 per person and $100,000 per accident bodily injury liability limits.

Plaintiffs instituted the Liability Action against David Canady and Jeremy Canady to recover damages for personal injuries sustained as a result of the July 17, 2001 motor vehicle accident. After institution of the Liability Action, Plaintiffs and David Canady and Jeremy Canady, and their insurer, Nationwide, entered into a Partial Settlement Agreement in which the parties agreed, among other things, that the settlement and the payments would be without prejudice to the right of any party to file a declaratory judgment action to resolve the dispute concerning the applicable UIM limits of the Canady Policy. The parties stipulated that the Plaintiffs' damages exceed the payments already received pursuant to the Partial Settlement Agreement.

On _________, we filed a declaratory judgment action alleging that the Canady Policy provided 1 million in UIM coverage. See attached Exhibit _____.

On May 14, 2004, plaintiffs and defendant served cross-motions for summary judgment. The Trial Court granted Plaintiffs' motion for summary judgment and ordered that the Canady Policy

provided plaintiffs with UIM coverage limits of $1,000,000 per person and $1,000,000 per accident.

On 15 November 2005, the Court of Appeals issued a unanimous opinion affirming the decision of the trial court. See attached Exhibit ___.

2. Williams Decision.

It was Nationwide's contention that no ambiguity existed in the UIM coverage available in the case and that the following language added by the 1992 amendments to N.C. Gen. Stat. § 20-279.21(b)(4) clearly dictated the amount of UIM coverage available under a motor vehicle policy of insurance when the insurer makes no effort to fulfill its statutory obligations:

> If the named insured does not reject underinsured motorist coverage and [the named insured] does not select different coverage limits, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy.

N.C. Gen. Stat. § 20-279.21 (b)(4)(2001). The problem for Nationwide, however, was the very sentence that Nationwide relied upon begins with the phrase, "if the named insured does not reject … and does not select …" which clearly means that (i) the <u>insured must act or fail to act and (ii) that insured must be given the opportunity to act or fail to act initially</u>. The plain statutory language does not contemplate or otherwise permit the insurance coverage available to an insured under the Financial Responsibility Act to be dictated by the insurer by its failure to fulfill its statutory obligations. Such an interpretation is repugnant to the statutory language and the intent behind the

statute (<u>allowing the insured to make the choice of coverage</u>). It was our position that Nationwide's interpretation is contrary to a plain reading of the statute and effectively amends it to read as follows:

> If the named insured does not reject underinsured motorist coverage and [the named insured] does not select different coverage limits, <u>or if the insurer never offers the named insured the opportunity to reject underinsured motorist coverage or select different coverage limits</u>, the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy.

Indeed, the most compelling point to refute this position was the argument that the Financial Responsibility Act requires that we maintain certain minimal limits to protect others. On the other hand, the Financial Responsibility Act contemplates that the insured's get to choose the limits of insurance that we want to protect ourselves.

Nationwide also relied on <u>Fortin</u> in support of its position that the UIM coverage available under the policy is equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy.

The problem with this position for Nationwide was Unlike this case, in <u>Fortin,</u> State Farm provided Mr. Fortin with the option to select or to reject UM and UIM coverage, <u>not once, but twice</u>. Nationwide has stipulated in this case that it did not provide the insured any option to select or reject UIM coverage in this case. <u>Fortin</u> cannot stand for the proposition that an improper form

leading to an invalid rejection is the same as no offer leading to no opportunity to select or to reject UIM coverage.

There was no ambiguity in Fortin, as here. The point of Fortin is that if an insurer provides to its insured an option to select or reject UIM coverage, although flawed in some manner, and the insured rejects coverage, it follows that the rejection is invalid and UIM coverage is deemed to be equal to the highest bodily injury liability limits available under the policy.

The Court of Appeals ultimately decided that Nationwide's failure to offer to the insured the opportunity to select or to reject the coverage and to record that opportunity on an approved Rate Bureau Form, was a complete failure by the insured and therefore there was an ambiguity with regard to the coverage that has to be viewed in favor of extending coverage.

The relevant portions of the Court of Appeals opinion are set forth below:

statutory limits of N.C. Gen. Stat. § 20-279.21(b)(4) apply. In *Fortin*, the insured had initially rejected underinsured motorist (UIM) coverage and the policy was later renewed with the continuing rejection of UIM coverage. *Fortin*, at 266, 513 S.E.2d at 783. However, the forms provided to the insured at renewal merely contemplated a renewal of a previously selected coverage and did not offer the insured a fresh choice to reject UIM coverage or select different coverage limits as required by recent amendments to N.C.G.S. § 20-279.21(b)(4). *Fortin*, at 270-71, 513 S.E.2d at 785. The failure of the forms to provide for a new choice to reject or select different UIM coverage was interpreted by our Supreme Court to result in an invalid rejection of UIM coverage. *Id.* "Therefore, because there was neither a valid rejection of UIM coverage nor a selection of different UIM coverage limits," the statutory coverage limits established in N.C.G.S. § 20-279.21(b)(4) applied. *Fortin*, at 271-72, 513 S.E.2d at 786. However, a lack of a fresh choice concerning the selection of UIM coverage in a renewal form, as occurred in *Fortin*, is not equivalent to the situation at hand where there has been a total failure to provide the insured with an opportunity to select UIM coverage.

"Underinsured coverage is mandatory unless rejected by the insured in accordance with the provisions of N.C. Gen. Stat. § 20-279.21." *Maryland Cas. Co. v. Smith*, 117 N.C. App. 593, 598, 452 S.E.2d 318, 320 (1995). The statutory limitations for UIM coverage established in N.C.G.S. § 20-279.21(b)(4) take effect if the named insured does not reject UIM coverage or does not select

(citing *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 352, 152 S.E.2d 436, 444 (1967)). In *Caviness*, this Court held the statute as written prior to the 1992 amendments was ambiguous as to the amount of UIM coverage available to an insured who failed to select or reject UIM coverage, and, in order to protect innocent victims, the insured was entitled to the highest available limit of UIM coverage of $1,000,000. *Caviness*, at 763-65, 478 S.E.2d at 667-68.

A total failure on the part of the insurer to provide an opportunity to reject UIM coverage or select different UIM policy limits violates the requirement that these choices be made by the policy owner. Such a failure should not invoke the minimum UIM coverage limits established in N.C.G.S. § 20-279.21(b)(4) and shield the insurer from additional liability. So doing would violate the purpose of the statute to protect the insured and allow them to choose their policy benefits. Accordingly, we find no error committed by the trial court and affirm its order granting plaintiffs' motion for summary judgment.

See attached Exhibit _____.

3. Status of the selection/rejection law Post-Williams:

It is our position that the status of law post-Williams, generally falls into these categories:

a. If the insurer provides the insured with an opportunity to select or to reject UM/UIM coverage with an approved Rate

Bureau Form, and the insured fails to select or to reject coverage, then the UM/UIM coverage will equal the limits of liability coverage under the policy, by virtue of the Fortin and the language of the statute.

b. If the insurer fails to provide the insured with any opportunity to select or to reject UM/UIM coverage with an approved Rate Bureau Form, the there is 1 million dollars with UM/UIM coverage, by virtue of Williams.

c. If the insurer provides the insured with the opportunity to select or to reject UM/UIM coverage with a non-approved Rate Bureau Form, then at a minimum there is UM/UIm coverage equal to the limits of liability coverage under the policy, by virtue of Fortin, including those situations where the insured rejected the coverage altogether.

d. Query: Insurer's providing the insured an opportunity to select or to reject UM/UIM coverage with a form that is "so deficient" that it does not provide the insured with a "meaningful" opportunity to select or to reject coverage—

Query: Other procedural issues in the application process that affect the insured's opportunity to select or to reject coverage---.

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