

**INSURANCE COVERAGE RESEARCH
AND NEGOTIATIONS WITH THE
CLAIMS REPRESENTATIVES**

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I. Auto Insurance Policies: Interpretation, Issues and Hidden Treasures

A. Auto Liability Coverage

1. Primary Coverage with the Car

In North Carolina, automobile liability insurance is required by law in two ways. First, every car registered in the State of North Carolina is required to have an owner with liability insurance. Unfortunately, the minimum liability coverage required by North Carolina is \$30,000.00 for each person injured or killed in any one accident subject to an overall limit for all injury/death claims of \$60,000.00 per accident as well as \$25,000.00 total for property damage per accident. See NCGS 20-279.21. Second, the terms and mandates of NCGS 20-279.21 (“Motor Vehicle Liability Policy’ Defined”) are written into every automobile insurance policy issued in the State of North Carolina. If an insurance policy conflicts with NCGS 20-279.21, then the provisions in the statute control. Any attorney that practices personal injury law should be familiar with NCGS 20-279.21.

In addition to knowing the statutory provisions written into every automobile policy, you should always review the actual policy issued by the insurance company providing insurance to a particular vehicle. If you cannot track down the actual insurance policy, try looking at the Standard Personal Auto Policy promulgated by the North Carolina Rate Bureau:

a) Who is covered?

The Standard Policy lists the persons insured by an automobile's insurance policy as: 1) you or any family member; 2) any person using your covered auto; 3) for your covered auto, any person or organization but only for acts or omissions of a person for whom coverage is afforded under this Part; and 4) for any auto or trailer, other than your covered auto, any person or organization but only with respect to legal responsibility for acts or omissions of you or any family member for whom coverage is afforded under this Part [only if the person or organization does not own or hire the auto or trailer].

b) What is covered?

The Standard Policy states that “[w]e will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident.” Bodily Injury is defined as “bodily harm, sickness or disease, including death that results.” So if a plaintiff sustained bodily harm or death from an auto accident, then the defendants would be covered, unless there is an applicable exclusion.

c) What exclusions may apply?

Like most insurance policies, the Standard Auto Policy gives a broad statement of coverage, only to then list a myriad of exclusions to that coverage. Some of the more common exclusions are:

(1) Intentional Acts

For coverage over the minimum coverage required by North Carolina (30/60/25 – see above), policies generally do not cover intentional acts. For instance, if a driver tried to run over somebody on purpose, then there would only be minimum coverage (30/60/25).

(2) Owned Auto

This exclusion is part of auto policies to prevent an owner from just insuring one of his cars and being able to get coverage for all of his cars. The Standard Auto Policy insures “you or any family member for the ownership, maintenance or use of any auto or trailer.” Without this exclusion, a family could insure the wife’s car and get coverage for the husband’s car and each of the three children’s cars.

(3) Business Use

For amounts above the minimum required by North Carolina (30/60/25), this exclusion takes coverage away from using some vehicles while a person is employed in any business UNLESS he or she is driving private passenger autos, pick up trucks or vans that he or she owns.

(4) Unauthorized Use

The Standard Auto Policy states an exclusion for “[u]sing a vehicle without a reasonable belief that that insured is entitled to do so.” In my experience, insurance companies will usually cover drivers who did not steal the car. In other words, if there is prior authorized use of the car, if the keys were given to the driver by the owner, if the keys were left out on the counter and the driver reasonably believed she could drive, then there will probably be coverage. Of course, if there is good Uninsured Motorist coverage (discussed below), then a plaintiff may not want coverage for the driver.

2. Secondary Coverage with the Driver

If your damages exceed the coverage available for the vehicle driven by a driver, then the insurance policy of the driver kicks in. The driver’s policy stacks on top of the vehicle’s policy. Suppose you had one person injured by a driver of a vehicle owned by another person. The owner (vehicle) had \$100,000 per person bodily injury coverage and the driver had \$30,000 per person of bodily injury

coverage. Then the injured person would have \$130,000.00 of available insurance coverage to pursue his claims against.

3. Agency

Auto insurance may cover the acts of agents of an insured for auto accidents, whether or not the agents are driving the insured's vehicle. When you get a case with substantial damages (which may exceed the policy limits), you should make sure to investigate whether the driver was doing something on behalf of someone else (who may have better coverage that can be stacked onto the driver's coverage).

4. Multiple Cars Involved

In North Carolina, the general rule is if there are multiple parties that have negligently caused an injury, then each of them may ultimately be jointly and severally liable to the injured party. What this means is that each negligent driver (or each negligent party) is liable for all of the damages sustained by the injured party. So the injured party can seek full damages from each potential defendant. An injured party's attorney should evaluate the liability insurance coverage of (as well as the assets of) each of the potential defendants. The total liability insurance coverage for an accident (at least initially) should be the sum of the liability insurance of all the potential defendants.

5. Getting the coverage limits

Until recently, unless the insurance company volunteered the limits (really the best I ever got were hints), it was nearly impossible to know the insurance coverage and limits without filing a lawsuit. Now there is a way to find out the limits of insurance without filing a lawsuit. NCGS 58-3-33 provides a method for injured parties to obtain the policy limits of potential defendants in accident claims. Essentially, the injured party must: 1) submit a medical release to the insurer for their medical records for the three years prior to the date on which the claim arose (as well as for the medical records that pertain to the injuries from the accident); 2)

consent to pre-lawsuit mediation with the insurer; and 3) provide an accident report to the insurer. Within thirty days of the injured party providing the information to the insurer, the injured party should receive the policy limits information.

I have very rarely used NCGS 58-3-33. If the damages are likely less than the minimum limits, then it is a waste of time. If the damages are more than minimum limits, then I would be looking for either a tender of the limits or litigation (any offers by the insurance company indicate coverage up to the next 'level' of insurance limits). Insurance companies never have a problem telling you if they are tendering the limits.

B. UM/UIM

1. What is UM and UIM Coverage?

Uninsured Motorist Coverage (UM) pays for damages that are caused by a negligent driver that has no insurance or has insurance at the level of North Carolina's minimum policy limits (a driver from out of state, for instance). UM Coverage also pays for damage from an unidentified negligent driver that was part of a "hit and run" collision. You should note that for UM Coverage to apply, there must be some contact between the unidentified vehicle (driver) and the vehicle occupied by the injured party.

Underinsured Motorist Coverage (UIM) pays for damages caused by a negligent driver that has insufficient insurance coverage to cover all of the injured party's damages. UIM Coverage, however, only pays up to the difference between the amount of UIM Coverage and the amount of liability coverage for an underinsured vehicle (of course, the UIM Coverage does not pay for amounts that exceed an injured party's damages).

2. Where can one find UM and UIM Coverage?

An injured party should look for all insurance policies where the injured party would be classified as an “insured.” The most likely places to find UM/UIM coverage would be the injured party’s insurance policies as well as the insurance policies for the vehicle occupied by the injured party. Other places to look for UM/UIM coverage are: 1) any policies of the driver of the vehicle occupied by the injured party; 2) the insurance policies of any of the injured party’s family members (persons related by blood, marriage, or adoption that is a resident of the injured party’s household) and/or 3) any commercial policies that may insure the injured party.

3. How much UM/UIM coverage is available (Stacking Rules)

What if there are multiple UM/UIM policies that may provide coverage? The short answer is that an injured party may be able to add together (or “stack”) the limits of each UM or UIM policy to find how much total coverage there is for an injured party. North Carolina does not allow stacking intrapolicy (stacking the UM/UIM limits for multiple cars which are insured by the same policy), but does allow for interpolicy stacking (stacking two or more separate insurance policies).

Say an injured party has \$100,000 of UIM coverage for each of his three cars on one policy. The injured party’s daughter (who lives with him) has an insurance policy with \$500,000 of UIM coverage on her vehicle. The injured party is NOT able to stack the UIM coverage for his three vehicles for \$300,000 of UIM coverage because that would be intrapolicy stacking. The injured party IS able to stack his \$100,000 of UIM coverage onto his daughter’s \$500,000 of UIM coverage, bringing his total available UIM coverage to \$600,000.

4. Are there any ways to get more UM/UIM coverage?

There was a change in the UM/UIM laws in North Carolina for policies issued after January 1, 2009. Prior to the change, if an insurer did not offer an insured notice of the option of UM/UIM coverage, then the insurer may be liable to provide

\$1,000,000 of UM/UIM coverage (the particulars of this wrinkle in UM/UIM law are outside the scope of this seminar). Also prior to the change, there was a procedure where the insurance company was required to have a Selection/Rejection Form signed by the owner of the insurance policy or the UM/UIM coverage was equal to the liability limits on the policy. The new law got rid of the Selection/Rejection Form, but for policies issued prior to January 1, 2009, an attorney for an injured party should be mindful of the previous law.

5. UM/UIM COVERAGE PITFALLS

Do not let an injured party's claims against a negligent driver lapse. UM/UIM claims are derivative claims. The viability of the UM/UIM claim depends on the viability of the underlying liability claim. If the statute of limitations runs on the underlying case, then an injured party has lost the ability to collect UM/UIM benefits. If an injured party signs a general release of claims against the negligent driver, then he/she no longer has a viable claim against the negligent driver and, therefore, no available UM/UIM coverage.

The proper way to settle a claim with the liability carrier and the negligent driver while preserving the UM/UIM claim is to give notice to UM/UIM carrier of the tender of the liability limits of the negligent driver thirty days before accepting the limits of the liability policy. This gives the UM/UIM carrier the opportunity to advance the limits itself while preserving the UM/UIM carrier's rights to seek a subrogation claim against the personal assets of the negligent driver. Instead of a signing a release, an injured party should execute a "covenant not to execute judgment" with the negligent driver that preserves the right to sue the driver (and thereby preserving the UM/UIM claims).

C. Med Pay

Medical Payments Insurance Coverage is typically an optional coverage in North Carolina whereby an insured can purchase no-fault insurance in addition to his or her other coverage. When the injured party is in an accident, the Medical

Payments Coverage will pay for all reasonable medical expenses for injuries caused by the wreck (irrespective of who was negligent). This coverage is usually fairly low (\$500 to \$5,000) and is in addition to any potential recovery from a negligent driver's liability policy.

II. Demand Packages

With small and medium size cases, I came full circle on how I viewed demand packages . . . then I changed again. When I first started practicing law in the early 1990s, I thought everything had to be perfect and complete before I sent it to an adjuster. Gobs of material sat in the file waiting for that last medical bill to come from the ambulance service. I would get calls from the adjuster asking what was going on. My clients thought nothing was being done on their files.

Cases took longer to resolve than they should have. At some point, a very nice adjuster said to me: "Bill, why are you wasting your time with these pretty packages when all I [the adjuster] will do is tear them up and put them together the way I [the adjuster] want." This was an epiphany to me. I was set free. I just sent the adjuster what I had when my office received it. Cases started moving faster, but the end results were not improving. I started looking closely at what I was sending and decided that it was too piecemeal to develop and tell my clients' stories. I also became concerned that things were going out without the proper context. For instance, if one medical record gave the wrong impression about my client about an issue (or if it seemed on first glance to contradict other records) and I sent it to the adjuster without anything else, then the adjuster and insurance company tended to fixate on that issue. I also missed the opportunity to spend a fixed time while organizing the file and my thoughts. When I made time to put together the demand package, I could sit down and think about the best way to present my clients' stories.

So now, I try to spend some time with the file and help put together a demand package after most of the information has been gathered. I do not wait

until every last document has come into my office, but most of the time, the vast majority of the documents are ready. I also take some time to make sure that what is sent to the adjuster is organized and presented in a professional manner. For small and medium sized cases, that DOES NOT mean that I do everything in color, on special paper, or on video.

In addition to providing the usual information that plays to your case's strengths (medical records, causation statements from treating doctors, medical bills, wage affidavits, expert reports, possibly day in the life video, etc.), it is critical to properly evaluate your case weaknesses prior to submitting your demand package. This is useful both to evaluate the case's settlement worth, as well as to know what you need to focus on in the demand package. I try to hit my cases' weaknesses with a sledgehammer early and often. Try to present evidence to combat problems in your case. For instance, I had a case where a professional client could no longer do major parts of his job. Unfortunately, one of his medical records from nine months after the accident stated that he was back at his job and performing the very duties he said he could not do. I went to his practice and had partners of his give testimony (affidavits, video or otherwise) about their first hand observations of my client's difficulties in the office. I followed that with testimony of co-workers (both who worked for and worked with my client) who also observed my client. This can be done initially with affidavits or videos, then followed up at trial with live testimony.

III. Negotiating With the Adjuster

Negotiating should begin from the very start of a case. Educate the adjuster from the outset why your client is different (and why her case is more valuable) than all of the other files the adjuster has. Help the adjuster have what he or she needs to properly set the reserves (I feel cases settle easier if they are properly reserved from the start). The adjuster will look favorably upon you if you help the

adjuster do his or her job from the start. It is important to build a good relationship with an adjuster (or at least not a bad one). Always be honest. Cases settle quicker and better if you have built trust (both ways) with an adjuster. In some cases, the adjuster can be your friend. In others, you can at least make sure you are not enemies.

It is very important to understand what kind of relationship works best with a particular adjuster. Part of this depends on the company where he or she works. If you have not worked with a particular adjuster or company, then call up other attorneys (both plaintiff and defense) and find out as much information as you can (what their personality is like, how they deal with different issues, their response time, their attitudes toward plaintiffs and their attorneys, what types of information drives them to make higher offers, etc.).

Separate the people from the problem. Adjusters are people first. Try and control your emotions while allowing the adjuster to vent. Defuse situations rather than escalate. If there is intractable disagreement, then agree to disagree. Always be pleasant, but firm (do not get so chummy that you lose sight of your duties to your client). Try to communicate well and correct misunderstandings. Listening is more important than talking (read between the lines --you might hear clues from the adjuster that he or she cannot overtly tell you). Nothing is gained by being overtly aggressive with an adjuster. Trying to prove how smart or "right" you are to an adjuster by talking down to them NEVER helps. You can be pleasant and be strong.

You need to try to step into an adjuster's shoes and try to understand what makes adjusters tick. For most adjusters, the most valuable asset is TIME. Adjusters may have hundreds of files that stack up exponentially if they do not settle or otherwise dispose of them (meaning pass to another adjuster). They typically do not have a whole lot of time to spend with you. Help them do their job. Ask them what information they need to justify paying more. Make sure you give them the information for them to be able to pay your client top dollar. Once they have their

information, if they will not give an acceptable offer (or any offer), then make sure you are persistent. If you have given the adjuster the back-up for them to settle the case and you are persistently taking up his or her time trying to settle the case, then the adjuster will want to give you the money to close the file. Threatening litigation sometimes works and other times backfires. For some adjusters, when you file a lawsuit, the file transfers to a litigation adjuster.

For most insurance companies and adjusters, I find it best to try to collaborate with an adjuster before negotiating. Both you and the adjuster want to settle the case as quickly as possible for a value in each of your acceptable ranges. Work together to document the file with information that can justify the adjuster paying your client an amount that is acceptable. Once you have collaborated as much as you can, then you negotiate and advocate your client's position.

Sometimes you will run into insurance companies where the adjuster you are dealing with has very little authority. If you try to deal with these adjusters with the typical horse trading offer, counter, second offer negotiation, then you will get stuck real quick (if the adjuster only has a few hundred dollars of wiggle room on a \$50,000 case, then there is not much room for negotiations). It is especially important to work with these adjusters to try to find ways to document their file in a way to empower the adjuster to get more authority from the start. Of course, there are a few insurance companies that take a "take it or leave it" approach. They do not want their adjusters to talk or negotiate. The adjusters do everything their way and then give you a number. With these companies (we all know who they are), I tell my clients from the start the futility of negotiations and prepare the clients for trial from the get-go.

Basic negotiation preparation strategy is similar in any negotiation, mediation or otherwise. Please refer to Section IV of the "Mediation Preparation Tips and Strategies" part of this seminar for a discussion of how to prepare for the negotiation and for the negotiation process.