### Automobile Liability Coverage: The Insurance Agreement and Common Exclusions

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### I. The Importance of Liability Coverage.

Barring herculean effort and patience, judgments against many individual tortfeasors are simply not collectable in North Carolina. As a result, an important step in the investigation of any personal injury case involves the identification of possible sources of insurance coverage. Simply put, a client with a million dollars in damages does not have a million dollar case unless the individual tortfeasor is *extremely wealthy* or there is adequate insurance coverage available. Familiarity with the different types of bodily injury coverages, and the conditions under which those coverages apply, is critical to the competent representation of personal injury clients. This manuscript will address the most basic form of coverage available to clients injured in North Carolina motor vehicle wrecks, the liability coverage portion of the standard personal automobile insurance policy.

### II. The Financial Responsibility Act and Principles of Interpretation.

The overwhelming majority of motorists driving on North Carolina's roadways have purchased a personal automobile insurance policy issued and delivered in North Carolina. The terms of these personal automobile policies are standardized. This is in part because North Carolina's Financial Responsibility Act, N.C.G.S. § 20-279.21 (the "FRA"), mandates the essential requirements. The relevant portion of the current version of the FRA pertaining to liability coverage provides that an "owner's" liability insurance policy:

Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: thirty thousand dollars (\$30,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, sixty thousand dollars (\$60,000) because of bodily injury to or death of two or more persons in any one accident . . .

N.C.G.S. § 20-279.21(b)(2). There are several principles that guide a proper interpretation of the FRA and the policies issued subject to it. Among those are the following:

(1) The FRA is a "remedial" statute, meaning that it was crafted to remedy a problem, namely, the tremendous personal and financial harms and losses generated by automobile wrecks. To accomplish the purpose of the statute, it must be construed broadly in favor of coverage. <u>Bray</u>

v. North Carolina Farm Bur. Mut. Ins. Co., 341 N.C. 678, 684, 462 S.E.2d 650, 653 (1995) ("Financial Responsibility Act is a remedial statute to be liberally construed in order that the beneficial purpose intended by its enactment may be accomplished"); *see Silvers v. Horace* Mann Ins. Co., 324 N.C. 289, 296, 378 S.E.2d 21, 26 (1989); Nationwide Mut. Ins. Co. v. Mabe, 342 N.C. 482, 496, 467 S.E.2d 34, 42 (1996); Sutton v. Aetna Cas. & Sur. Co., 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989); Moore v. Hartford Fire Ins. Co. Group, 270 N.C. 532, 535, 155 S.E.2d 128, 130 (1967). As a necessary corollary of this rule, any exclusion attempting to limit coverage must be narrowly construed against the insurance company. State Capital Ins. Co. v. Nationwide Mut. Ins. Co., 78 N.C. App. 542, 337 S.E.2d 866 (1985);

- (2) The terms of the FRA are written into every personal automobile liability policy issued in North Carolina as a matter of law, and, if the terms of the policy conflict with the FRA, the FRA controls. <u>Nationwide Mut. Ins. Co. v. Chantos</u>, 293 N.C. 431, 238 S.E.2d 597 (1977);
- (3) Defined terms will be given the meaning set forth in the policy. <u>Mabe</u> at 492, 467 S.E.2d at 40;
- (4) Undefined non-ambiguous terms will be defined based on their ordinary usage. <u>Wachovia</u> <u>Bank & Trust Co. v. Westchester Fire Ins. Co.</u>, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970); and
- (5) Ambiguous terms, those fairly subject to the competing interpretations advanced by each party, will be construed against the drafter of the policy, the insurer. <u>Henderson v. U.S. Fidelity</u> & Guar. Co., 346 N.C. 742, 745, 488 S.E.2d 234, 237 (1997).

An attorney involved in a coverage dispute, whether it is a declaratory judgment action or simply a phone call or letter exchange with an adjuster or defense attorney, should remember these principles, particularly (1), (2), and (5). Many of North Carolina's most relied upon appellate opinions involving liability coverage emphasize the remedial nature of the FRA and that any ambiguity must be construed against the insurer. Our clients' fates frequently depend upon these principles.

### III. Covered Occurrence – "An Auto Accident."

The standard personal automobile policy purports to provide coverage for damages which "any **insured** becomes legally responsible because of an auto accident." The FRA is a bit more expansive, though, requiring that an "owner's" policy provide coverage for "liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle." N.C.G.S. § 20-279.21(b)(2). The North Carolina Supreme Court has summarized the interaction between the policy and statute as follows:

The policy language states that Nationwide will insure Anderson against liability for which he "becomes legally responsible because of an auto accident." The compulsory motor vehicle liability statute provides that any motor vehicle policy certified as proof of financial responsibility shall insure the named insured against loss from the liability imposed by law "for damages arising out of the ownership, maintenance or use of such motor vehicle...." N.C.G.S. § 20-279.21(b)(2) (1985). It is well established in North Carolina that as a matter of law the provisions of the Financial Responsibility Act are written into every automobile liability policy. <u>Nationwide Mutual Insurance Co. v.</u>

<u>Chantos</u>, 293 N.C. 431, 238 S.E.2d 597 (1977). Thus, the Nationwide automobile liability policy, when properly construed, provides coverage for damages "arising out of the ownership, maintenance or use" of the automobile.

<u>State Capital Ins. Co. v. Nationwide Mut. Ins. Co.</u>, 318 N.C. 534, 538-39, 350 S.E.2d 66, 69 (1986). The Court went on to say that: "[i]n short, the test for determining whether an automobile liability policy provides coverage for an accident is not whether the automobile was a proximate cause of the accident. Instead, the test is whether there is a causal connection between the use of the automobile and the accident." Id. (emphasis added).

There are an abundance of cases in North Carolina addressing the types of conduct that fall within the ambit of the phrase "ownership, maintenance or use." Many of these involve incidents where individuals were injured by discharge of a firearm. Firearm cases often hinge on whether the vehicle was regularly used to transport firearms. If so, and if the discharge was not specifically intended to injure the third-party, there is likely coverage. *See e.g.* <u>Reliance Ins. Co. v. Walker</u>, 33 N.C. App. 15, 234 S.E.2d 206 (1977); <u>Hartford Fire Ins. Co. v. Pierce</u>, 127 N.C. App. 123, 489 S.E.2d 179 (1997). If the conduct was more intentional, and the vehicle was not regularly used to transport firearms, the courts are not going to find that the conduct arose out of the "ownership, maintenance or use" of the vehicle. *See Scales v. State Farm Mut. Auto. Ins. Co.*, 119 N.C. App. 787, 460 S.E.2d 201 (1995); Nationwide Mut. Ins. co. v. Knight, 34 N.C. App. 96, 237 S.E.2d 341 (1977).

The case <u>Dutch v. Harleysville Mut. Ins. Co.</u>, 139 N.C.App. 602, 534 S.E.2d 262 (2000) serves as a clear example of "ownership, maintenance or use." Although <u>Dutch</u> is a UIM case, the same rules of interpretation apply. In the case, the plaintiff hooked one end of a chain to Vehicle 1 and crawled under Vehicle 2 to hook the other end. As he did so, a vehicle struck both of the vehicles, killing the plaintiff. The Court of Appeals correctly found that the loss arose out the "ownership, maintenance or use" of the vehicle.

<u>Nationwide Mut. Ins. Co. v. Davis</u>, 118 N.C.App. 494, 455 S.E.2d 892 (1995) also gives a good example of the broad application of "ownership, maintenance or use." The defendant in <u>Davis</u> was the grandmother of a small child. She had parked across from a store. As she was walking across the street toward the store, she told her granddaughter she could also cross the street to get ice cream. The granddaughter was then struck by a truck as she crossed the street. Because the conduct involved the "use" of the motor vehicle, the Court found liability coverage for the grandmother.

### IV. Covered Persons – Who is an "Insured"?

In order for the tortfeasor to have coverage under a specific policy, he or she must be an "insured." "Insured" is a defined term in every insurance policy. The standard personal automobile policy identifies the following categories of persons as "insured[s]" for purposes of liability coverage:

### a. "You or any family member while all named insureds reside in the same household, for the ownership, maintenance or use of any auto or trailer."

### i. "You"

The "[y]ou" referenced in the above clause includes not just the individual identified in the declarations page but also his or her spouse, "if a resident of the same household." *See e.g.* Nationwide

<u>Mut. Ins. Co. v. Allison</u>, 51 N.C.App. 654, 277 S.E.2d 473 (1981); <u>Marlowe v. Reliance Ins. Co.</u>, 15 N.C. App. 456, 190 S.E.2d 417 (1972) ("Resident' is a word with varying shades of meaning . . . In every case, however, it requires some kind of abode. In the instant case Jackie Lee Weaver had no abode whatsoever with Betty Farmer Weaver in the trailer home where she was living and had been living for at least two months before the accident in question. The plaintiffs failed to prove that Jackie Lee Weaver was an insured and had coverage under the terms of the insurance policy issued by the defendant."); and <u>Wilson v. State Farm Mut. Auto. Ins. Co.</u>, 327 N.C. 419, 394 S.E.2d 807 (1990). As a result of this definition, so long as a spouse is "a resident of the household" of the named insured, he or she is essentially insured in the same manner, and to the same extent, as the named insured. *See* Wilson.

### ii. "Any family member."

Barring an applicable exclusion, a tortfeasor is afforded liability coverage under an automobile insurance policy issued to a "family member." It must be understood, though, that "family member" is a defined and restricted term, meaning "**a person related to you by blood, marriage or adoption who is a resident of your household**. This includes a ward or foster child." (Emphasis added). A person may be a resident of more than one household. <u>Davis v. Maryland Casualty Company</u>, 76 N.C.App. 102, 331 S.E.2d 744 (1985).

### iii. Resident Relative

There are a multitude of reported North Carolina opinions addressing the phrase "resident of your household." <sup>1</sup> It is been found to be a "slippery" phrase that must be interpreted broadly. In a recent Court of Appeals case, Judge McGee explained that:

[T]he words "resident," "residence" and "residing" have no precise, technical and fixed meaning applicable to all cases. "Residence" has many shades of meaning, from mere temporary presence to the most permanent abode. It is difficult to give an exact or even satisfactory definition of the term "resident," as the term is flexible, elastic, slippery and somewhat ambiguous. Definitions of "residence" include "a place of abode for more than a temporary period of time" and "a permanent and established home" and the definitions range between these two extremes. This being the case, our courts have held that such terms should be given the broadest construction and that all who may be included, by any reasonable construction of such terms, within the coverage of an insurance policy using such terms, should be given its protection. Our courts have also found . . . that in determining whether a person in a particular case is a resident of a particular household, the intent of that person is material to the question.

North Carolina Farm Bureau Mut. Ins. Co. v. Paschal, 752 S.E.2d 775 (N.C. App. 2013) (Great American Ins. Co. v. Allstate Ins. Co., 78 N.C. App. 653, 656, 338 S.E.2d 145, 147 (1986)).

<sup>&</sup>lt;sup>1</sup> If you find yourself needing to review the residency case law, a great starting point is a CLE paper written by Mitchell Baker, III titled "Mandatory Liability Insurance." It can be accessed by any NCAJ member through <u>www.ncaj.com</u>.

Every deposition should include questions about who specifically lived with the tortfeasor and what the tortfeasor's relationship was to each such person. In two recent depositions, I was able to uncover clearly applicable liability policies that had not been identified in written discovery responses. In my experience, unless the policy is the named tortfeasor's own policy or the policy insuring the vehicle, it is usually not going to be identified in written discovery responses. One of the cases provides a good example. The tortfeasor was operating a friend's automobile when the collision occurred. The carrier providing insurance on the vehicle, Geico, was identified on the crash report and was providing a defense in the case. This was the only policy identified in written discovery responses. The defendant verified that there were no other policies held by individuals with whom she resided. During the deposition, the tortfeasor switched course and indicated that while she did not have her own automobile liability policy, she did live with her mother at the time of the crash, and that she knew her mother had a separate automobile policy. In this case, that additional policy provides secondary coverage.

### b. "Any person using your covered auto."

It is commonly known that an auto policy covers anyone operating the insured vehicle. However, the coverage provided by this section is more expansive than some folks realize. "Your covered auto" is defined in the policy to include:

- (1) "Any vehicle shown in the Declarations"
- (2) "Any newly acquired auto"
- (3) "Any trailer you own"
- (4) "Any auto or **trailer** not owned by you while used as a temporary substitute for any other vehicle described in this definition which is out of normal use because of its:
  - a. breakdown;
  - b. repair;
  - c. servicing;
  - d. loss; or
  - e. destruction."

Trailer and newly acquired auto are each defined terms in the policy. The expansiveness of this definition of "**your covered auto**" means, for example, that any person using a "temporary substitute" for the insured vehicle will have liability coverage. This can come up from time to time with rental or borrowed vehicles.

### i. Named Insured Pursuing Own Liability Coverage.

An interesting aspect of the standard policy is the named insured may sometimes recover from his or her own liability coverage. For example, our firm currently represents a young lady who allowed a friend to drive her vehicle while she rode in the passenger seat. The friend suddenly lost control of the vehicle and allowed it to cross the centerline and crash into a telephone pole. In this situation, the client's policy with Allstate provides the primary liability insurance.<sup>2</sup> If the driver had a liability policy, it would have been excess.

 $<sup>^{2}</sup>$  Note, however, that with respect to claims by/against drivers other than the driver of the insured's vehicle, negligence of the driver of the insured's vehicle can be imputed to the insured passenger.

## c. "For your covered auto, any person or organization, but only with respect to legal responsibility for acts or omissions of a person for whom coverage is afforded under this part."

The standard policy contains two clauses extending liability coverage to persons vicariously liable for the acts of a negligent automobile operator. The first clause is a vehicle-based coverage insuring "any person or organization" vicariously liable for **any individual** operating the "**covered auto**." The policy makes clear, though, that a condition precedent to this coverage is that the agent for whom the principal is being held vicariously liable must otherwise be covered by the policy. The situations where this clause may be applicable include those involving the family purpose doctrine, employer/employee agency, and the presumption of agency arising under N.C.G.S. § 20-71.1.

# d. "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. This provision applies only if the person or organization does not own or hire the auto or trailer."

The second vicarious liability clause in the standard automobile policy is a person-based coverage. Specifically, it insures any third-party who is held vicariously liable for negligent automobile operation by the policy's named insured, his or her spouse, or any resident relative. Again, though, coverage must otherwise be provided under the policy for the agent in order for the principal to have coverage (i.e. an exclusion must not apply).

### V. Liability Limits.

#### a. Per Person and Per Occurrence Limits.

The standard personal automobile policy states that: "[t]he limit of liability shown in the Declarations for each person for Bodily Injury Liability Coverage is our maximum limit of liability for all damages for bodily injury, including damages for care, loss of services or death, sustained by any one person in any one auto accident. **Subject to this limit for each person**, the limit of liability shown in the Declarations for each accident for Bodily Injury Liability Coverage is our maximum limit of liability shown in the Declarations for each accident for Bodily Injury Liability Coverage is our maximum limit of liability for all damages for bodily injury resulting from any one auto accident." (Emphasis added).

One aspect of liability limits that many new practitioners have to learn is the interaction between the minimum limit *per person* and the minimum limit *per occurrence*. As set forth in the policy, and the FRA, the *per occurrence* limit is still subject to the *per person* limit. As an example, assume the insured tortfeasor negligently injuries Plaintiff 1 and Plaintiff 2. Plaintiff 1's damages are \$40,000 and Plaintiff 2's damages are \$20,000. The policy is written for minimum limits only. Despite the higher *per occurrence* limit, the maximum that may be recovered by Plaintiff 1 is \$30,000, not \$40,000.

### b. Settlement of Bodily Injury Claims by Insurer in Multiple Claimant Occurrences.

One issue that comes up from time to time with respect to policy limits is whether an insurer may properly settle with and compensate one bodily injury claimant prior to settling with and compensating other claimants injured in a single occurrence, thereby reducing or even eliminating the available coverage to those other claimants. In general, the answer is yes, so long as the settlement is made in good faith. *See* N.C.G.S. § 20-279.21(f)(3) ("[t]he insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability . . . ").

As a practical matter, then, counsel must be cognizant and proactive when he or she represents a client involved in a multiple claimant automobile crash. This is particularly true if the client does not have available UIM coverage, as the liability coverage will likely be the only source of possible recovery for the client. If other claims are settled and paid quickly, this may leave very little or no available coverage for the client.

In multiple claimant situations where the client has no UIM coverage, counsel should consider reaching out to any attorneys representing other claimants. Those other claimants may have sufficient available UIM coverage and, therefore, may be willing to accept a smaller settlement from the liability carrier. This will mean a more significant recovery for the client. Counsel should also consider immediately filing suit in these situations. It is considerably more difficult for the liability insurer to ignore your client when a suit has been filed and is actively being litigated. At a bare minimum, information should be provided very early on to the liability carrier to establish the severity of the client's injuries. The liability carrier will usually attempt to resolve as many claims as possible within its insured's policy limits.

### c. Loss of Consortium Claims and Parent's Responsibility for Minor's Medical Expenses.

A frequent coverage question among plaintiff's attorneys is whether a loss of consortium claim may be used to recover additional liability funds for a client and his or her spouse. For example, assume a married female is the only person injured in an automobile crash and the liability carrier tenders the tortfeasor's minimum limits of \$30,000, may her husband then recover the remaining \$30,000 for his loss of consortium damages? The answer is no, as the husband's claim is derivative of the wife's claim and the policy specifically provides "[t]he limit of liability shown in the Declarations for 'each person' for Bodily Injury Liability is our maximum limit of liability for all damages **for bodily injury sustained by any one person in any one accident**." <u>South Carolina Ins. Co. v. White</u>, 100 N.C. App. 96, 345 S.E.2d 414 (1990) (emphasis added).

The same rationale applies in situations where a minor child is injured and the parent has a claim for the child's medical expenses. The maximum amount the liability insurer must pay for both claims is the single person bodily injury limit. <u>Howard v. Travelers Ins. Cos.</u>, 115 N.C. App. 458, 445 S.E.2d 66 (1994).

### VI. Damages and Costs Covered.

### a. Compensatory Damages.

The standard policy affords coverage for any damages for which any insured becomes legally liable as a result of an auto accident. This obviously covers any compensatory damages awarded as a result of an automobile negligence claim.

#### b. Punitive Damages.

The North Carolina Supreme Court has long "held that public policy does not preclude providing liability insurance coverage for punitive damages." <u>New South Ins. Co. v. Kidd</u>, 114 N.C. App. 749, 443 S.E.2d 85, 87 (1994) (citing <u>Mazza v. Medical Mut. Ins. Co.</u>, 311 N.C. 621, 319 S.E.2d 217 (1984)). An insurer may choose to exclude coverage for punitive damages, but its policy must be explicit. <u>Id.</u>, at 754-55, 443 S.E.2d at 88-89; *see also* <u>Lavender v. State Farm Mut. Auto. Ins. Co.</u>, 117 N.C.App. 135, 450 S.E.2d 34 (1994). For whatever reason, the standard personal automobile policy does not explicitly exclude punitive damages, so they are covered up to the limits of the insurance policy, assuming no other exclusion applies (e.g. Intentional Acts Exclusion discussed below).

### c. Interests and Costs.

**i. Prejudgment Interest:** "We will pay damages for bodily injury . . . for which any insured becomes legally responsible because of an auto accident. Damages include prejudgment interest awarded against the insured."

Most attorneys would accurately suspect that an automobile liability insurer is responsible for interest on any judgment entered against its insured. The more nuanced question is whether interest is to be included within the limits of liability. Our Supreme Court has made clear that at least with respect to prejudgment interest, it is. <u>Nationwide Mut. Ins. Co. v. Mabe</u>, 342 N.C. 482, 467 S.E.2d 34 (1996); *see also* <u>Watlington v. North Carolina Farm Bureau Mut. Ins. Co.</u>, 446 S.E.2d 614 (N.C.App. 1994) ("we find that the policy at issue is not ambiguous, and we hold that the terms of the policy, as written, specifically exclude prejudgment interest in excess of the policy limit"). The result of these holdings is that if adding prejudgment interest to the verdict amount increases the total beyond the policy limit, the insurer is only going to be responsible for that portion of the prejudgment interest within the limits of the liability coverage.

**ii. Postjudgment Interest and Costs:** "In addition to our limit of liability . . . [w]e will pay the following on behalf of an insured . . . [a]ll costs taxed against the insured and interest accruing after a judgment is entered in any suit we defend. Our duty to pay post-judgment interest ends when we offer to pay that part of the judgment which does not exceed our limit of liability for the coverage."

The "Supplementary Payments" section treats postjudgment interest and costs different than prejudgment interest. The insurer is responsible for these amounts irrespective of its policy limits. Attorneys' fees recovered pursuant to N.C.G.S. § 6-21.1 should also fall within the scope of this provision, as that statute specifically provides that attorneys' fees awarded to plaintiff's counsel shall "be taxed as part of the court costs."

Counsel seeking postjudgment interest should not ignore the last sentence of the above policy language. In <u>Sproles v. Greene</u>, 329 N.C. 603, 407 S.E.2d 497 (1991), the North Carolina Supreme Court concluded that "Integon's 'offer to pay' made on the same day that the verdict was returned was sufficient, under the terms of Integon's policy with Greene, to toll Integon's responsibility for postjudgment interest even though the actual payment was not made until thirteen days later."

### VII. Primary and Secondary Coverage.

### a. Multiple Policies May Provide Applicable Liability Coverage.

As plaintiff's counsel, one of the first inquiries we must make in evaluating a potential case is the amount of available liability insurance coverage. We have all had the unfortunate case where a client with serious to catastrophic injuries can only access a single minimum limits policy. Of course, most experienced practitioners know that liability insurance policies may be stacked. That is, multiple liability policies may combine to provide higher limits for a single occurrence. Therefore, diligent counsel should be sure to fully and completely investigate the existence of multiple applicable liability policies.

The most common situation where there are two applicable liability policies is when the tortfeasor is insured under his or her own automobile policy but is operating a motor vehicle owned by a third-party. In this situation, the "primary" coverage is provided by the policy of the owner of the vehicle, and the "excess" or "secondary" coverage is provided by the tortfeasor's own insurance. The standard policy specifically provides that "any insurance we provide for a vehicle you do not own shall be excess over any other collectible insurance." In practice, this means that the "primary" policy insuring the operated vehicle must be fully and completely tendered before the insurer providing the "secondary" coverage will offer to pay anything.

### b. Releasing Tortfeasor Upon Settlement with Primary Carrier Releases any Excess Carrier.

Covenants Not to Enforce Judgments (CNEJs) are regularly used when settling with a liability carrier to preserve a claim against the client's UIM coverage. It is critical that the practitioner understand this **must not be done** when the client intends to pursue an excess liability policy. A CNEJ is essentially a release of the tortfeasor, insofar as, after execution of the CNEJ, the tortfeasor is no longer responsible for any judgment entered. As the excess carrier must only pay damages for which the insured is "legally responsible," it has no exposure if a CNEJ has been executed. *See Lida* <u>Mfg. Co. v. U.S. Fire Ins. Co</u>, 116 N.C. App 592, 448 S.E.2d 854 (1994). Consequently, a plaintiff should not give a release or CNEJ to a primary liability carrier in exchange for a CNEJ, unless counsel is positive that there are no excess liability policies.

### VIII. Common Exclusions.

Plaintiff's counsel should always be mindful of the exclusions in the standard automobile policy. Failure to identify a possibly applicable exclusion may lead to pleadings and testimony which bar coverage that would otherwise apply. When evaluating any exclusion, keep in mind that "[i]n North Carolina, the general rule is that when an insured claims benefits under a policy, the burden is on him to prove coverage. But the burden of showing an exclusion or exception is on the insurer. A showing by an insured that he is covered establishes a prima facie case that shifts the burden to the insurer." <u>Reliance Ins. Co. v. Morrison</u>, 59 N.C.App. 524, 525-26, 297 S.E.2d 187, 188 (1982) (internal citations omitted). Moreover, exclusions are not favored by the Court, <u>Allstate Ins. Co. v. Shelby Mut.</u> <u>Ins. Co.</u>, 269 N.C. 341, 347, 152 S.E.2d 436, 440 (1967), and any ambiguity must be narrowly construed in favor of the coverage that would otherwise be provided, <u>Wachovia Bank & Trust Company v.</u> <u>Westchester Fire Ins. Co.</u>, 76 N.C. 348, 172 S.E.2d 518 (1970).

a. Intentional Acts Exclusion: "We do not provide Liability coverage for any insured .... [w]ho intentionally causes bodily injury or property damage. This exclusion applies only to the extent that the limit of liability of this policy exceeds the minimum limit required by the financial responsibility law of North Carolina."

The Intentional Acts Exclusion "by its terms and in recognition of case law, does not apply to minimum coverage which may be mandated by the [FRA]." <u>Newell v. Nationwide Mutual Insurance Company</u>, 334 N.C. 391, 432 S.E.2d 284 (1993) (internal citation omitted). In practice, this means that even if an act and injury were unquestionably intended by the insured, he or she will still have the state required minimum limits of liability coverage. However, if the policy was written with additional, voluntary liability coverage (i.e. \$50,000/\$100,000 or more), the injured plaintiff may not be able to obtain the benefit of that additional coverage.

As a practical matter, then, counsel should be careful when crafting pleadings and questions for deposition and trial so as to avoid any evidentiary admission that the tortfeasor intended to injure the plaintiff. Such an admission might help with obtaining a large punitive damages judgment but could simultaneously render all but \$30,000 of the judgment uncollectable. There are select situations, though, where such an admission would not be as harmful. Those situations includes (a) where the plaintiff's damages are clearly less than \$30,000, or (b) where plaintiff's counsel knows only minimum limits of coverage are available anyway and any excess verdict would be uncollectable.

The majority of reported North Carolina cases discussing intentional or expected injury exclusions involve homeowners policies. These cases have indicated that the critical inquiry is not simply whether the specific tortious act was intended, but, rather, whether both **the act and the injury** were intended. *See* North Carolina Farm Bur. Mut. Ins. Co. v. Stox, 330 N.C. 697, 412 S.E.2d 318 (1992); Nationwide Mut. Fire Ins. Co. v. Banks, 114 N.C.App. 760, 443 S.E.2d 93 (1994). The facts of Stox effectively illustrate the difference. As the Court described, the tortfeasor "got up, stepped toward Stox, placed his hands on her left shoulder and pushed her, while saying 'get away from here." Id. at 699-700, 412 S.E.2d at 320. Stox subsequently fell down and was injured, a result which the tortfeasor intended the act, because he did not intend to injure Stox, the exclusion did not bar coverage.<sup>3</sup>

It should be noted, though, that "[w]hile intent to injure is required, an intent to injure may be inferred where the act is substantially certain to result in injury." <u>State Auto Ins. Companies v.</u> <u>McClaroch</u>, 129 N.C.App. 214, 497 S.E.2d 439 (1998) (citing <u>Henderson v. U.S. Fidelity & Guar. Co.</u>, 124 N.C.App. 103, 110, 476 S.E.2d 459, 464 (1996), *review allowed*, 345 N.C. 342, 483 S.E.2d 167, *aff'd*, 346 N.C. 741, 488 S.E.2d 234 (1997)).

Nevertheless, conduct may meet the willful and wanton standard needed to obtain punitive damages without voiding liability coverage. *See New South Ins. Co. v. Kidd*, 114 N.C. App. 749, 443 S.E.2d 749 (1994) ("This cause of action arises from allegations that Mathis operated a vehicle under the influence of an impairing substance and carelessly and heedlessly. There were no allegations that Mathis' conduct was deliberate or intentional in nature. Therefore, based on the above instructions

<sup>&</sup>lt;sup>3</sup> The intentional acts exclusion in current standard homeowners' policies is more expansive than the exclusion in <u>Stox</u> or the standard language in a personal automobile policy. It may exclude certain occurrences that would not be excluded under a personal automobile policy.

and the facts of this case, we find that the jury's finding of willful and wanton conduct does not support a finding that the conduct in question was intentional.").

<u>Newell</u> also clarified that the Intentional Acts Exclusion applies to anyone insured under the policy, even the named insured(s). Notably, the FRA also provides that "[a]ny motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated to make under the terms of the policy except for the provisions of this Article." N.C.G.S. § 20-279.21(h). This clause can lead to litigation between the insurer and insured when the insurer is forced to make payment within minimum liability limits due to the intentional conduct of the insured. *See e.g.* Allstate Insurance Company v. Webb, 10 N.C. App. 672, 179 S.E.2d 803 (1971).

**b.** Employee Exclusion: "We do not provide Liability coverage for any insured ... [f]or bodily injury to an employee of that insured during the course of employment. This exclusion does not apply to a domestic employee unless workers' compensation benefits are required or available for that domestic employee."

The manifest purpose of the Employee Exclusion is to relieve the insurer of any obligation to indemnify or defend the insured if the insured injures an employee while that employee is in "the course of employment." In a general sense, it has been upheld as valid. <u>South Carolina Ins. Co. v.</u> <u>Smith</u>, 67 N.C.App. 632, 313 S.E.2d 856 (1984).

Be aware, though, that a *previous version* of N.C.G.S. § 20-279.21(e) expressly provided that auto policies "need not insure against loss from any liability for which benefits are in whole or in part either payable or required to be provided under any workmen's compensation law . . ." The <u>Smith</u> Court used the language of this earlier version of N.C.G.S. § 20-279.21(e) to limit the otherwise broad applicability of the Employee Exclusion to situations where workers' compensation benefits were available to the injured employee. N.C.G.S. § 20-279.21(e) has been amended for policies issued after October 1, 1999, and is now completely different, pertaining solely to UM and UIM coverage. *See* Nationwide Prop. & Cas. v. Brinley's Grading Serv., Inc., 737 S.E.2d 192 (N.C. App. 2013).

Nevertheless, since N.C.G.S. § 20-279.21(e) no longer expressly provides authority for the Employee Exclusion, if for some reason workers' compensation benefits are not available and the claim against the employer/tortfeasor/insured is not barred by the exclusivity of workers compensation (e.g. the employer has only two employees), the automobile policy arguably should still provide mandatory minimum limits of liability coverage for any tort action. Unless the employee is a "domestic employee," any voluntary coverage in excess of minimum limits may be voided as a consequence of the terms of the Employee Exclusion.

"Domestic employee" is not a defined term in the policy. However, the IRS provides has provided some examples: (1) babysitters, (2) caretakers, (3) house cleaning workers, (4) domestic workers, (5) drivers, (6) health aides, (7) housekeepers, (8) maids, (9) nannies, (10) private nurses, and (11) yard workers. *See* IRS Publication 926 (2016), Household Employer's Tax Guide. The advantage of having a client who is a "domestic employee" is obvious. The tortfeasor/insured will have full liability coverage up to the stated amount of the policy.

c. Business Use Exclusion: "We do not provide Liability coverage for any insured . . . [m]aintaining or using any vehicle while that insured is employed or otherwise engaged in any business (other than farming or ranching) not described in Exclusion 6. This exclusion does not apply to the maintenance or use of a: a. private passenger auto; b. pickup or van that: (1) You own; or (2) You do not own while used as a temporary substitute for your covered auto which is out of normal use because of its: (a) breakdown; (b) repair; (c) servicing; (d) loss, or (e) destruction; or c. trailer used with a vehicle described in a. or b. above."

<u>Seaford v. Nationwide Mutual Ins. Co.</u>, 253 N.C. 719, 117 S.E.2d 733 (1961) appears to provide an example of this exclusion in practice. There, the plaintiff insured was a textile worker who had been hired to operate a tractor-trailer for "one-trip only." Although the case does not expressly state so, we can assume that he injured a third-party while on this trip. Despite the fact that this was the only trip he would be taking for this potential employer, and was not his normal occupation, the Supreme Court still found that the "Business Use Exclusion" barred coverage.

Perhaps the most important thing to keep in mind with the Business Use Exclusion is that it does not apply to situations where the insured injures a plaintiff while operating his own vehicle or a replacement vehicle. It only applies if the insured is operating some other vehicle, such as the tractor-trailer in <u>Seaford</u>. Minimum limits should be available even if this coverage applies to bar any voluntary coverage in excess of minimum limits.

**d.** Entitlement Exclusion: "We do not provide Liability coverage for any insured . . . [u]sing a vehicle without a reasonable belief that that insured is entitled to do so."

Pursuant to the FRA, a tortfeasor in "lawful possession" of a motor vehicle is entitled to at least minimum limits of coverage from the policy insuring the vehicle. Being in "lawful possession" essentially means that the tortfeasor must not have stolen the vehicle or taken it without any sort of express or implied permission. If the tortfeasor did not have a "reasonable belief" that he or she was entitled to use the vehicle, and was not otherwise somehow in "lawful possession," the Entitlement Exclusion acts as a complete bar to liability coverage, even as to minimum limits. <u>Newell v. Nationwide Mut. Ins. Co.</u>, 334 N.C. 391, 432 S.E.2d 284 (1993) ("N.C.G.S. § 20-279.21(b)(2) provides that an 'owners policy of liability insurance: . . . (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, or any other persons in lawful possession . . ."). If the tortfeasor was in "lawful possession," but did not have "reasonable belief that [he or she was] entitled" to operate the motor vehicle, any voluntary coverage in excess of minimum limits may be barred.

It is important to understand that the currently utilized Entitlement clause is more expansive than previous Permissive Use clauses. The 11<sup>th</sup> Circuit has summarized the distinction as follows:

The clause at issue here is different from the old permissive use clauses. The permissive use clauses focused on the owner's perspective. Specifically, the inquiry centered on whether the owner had expressly or impliedly given permission to the user. The entitlement clause reverses the inquiry. It focuses on how the situation appeared to the user of the automobile. <u>Cooper v. State Farm Mut. Auto. Ins. Co.</u>, 849 F.2d 496 (11<sup>th</sup> Cir. 1998). Our own Court of Appeals explained that a policy written with such language "substantially broadens the coverage which it provides beyond those who use the covered vehicle with permission. **It now covers persons who have a subjective, reasonable belief that they are entitled to use the vehicle**." <u>Aetna Cas. & Sur.</u> <u>Co. v. Nationwide Mut. Ins. Co.</u>, 95 N.C.App. 178, 181, 381 S.E.2d 874, 875 (1989), *aff'd*, 326 N.C. 771, 392 S.E.2d 377 (1990) (emphasis added).

The practitioner reading <u>Newell</u> should be aware of a 2005 change to the Rate Bureau standard personal automobile policy. The result in that case would be wholly different under the current policy which now expressly provides that the Entitlement Exclusion "does not apply to a family member using your covered auto which is owned by you."<sup>4</sup> *See* Integon Nat. Ins. Co. v. Villafranco, 745 S.E.2d 922 (N.C.App. 2013). This is an important change. For example, assume a teenage boy who lives with his parents takes the insured vehicle after expressly being told not to do so. There would still be coverage under the parents' policy, whereas if an unrelated person did so, there would not be coverage.

e. Family-Owned Auto Exclusion: "We do not provide Liability Coverage for the ownership, maintenance or use of: (1) Any vehicle, other than your covered auto, which is: a. owned by you; or b. furnished for your regular use. (2) Any vehicle, other than your covered auto, which is: a. owned by any family member; or b. furnished for the regular use of any family member. However, this exclusion [(2)] does not apply to your maintenance or use of any vehicle which is: a. owned by a family member; or b. furnished for the regular use of any the provide the text of the regular use of any the text of any vehicle which is: a. owned by a family member; or b. furnished for the regular use of a family member."

The Family-Owned Auto Exclusion is perhaps the most frequently relied upon exclusion in the standard personal automobile policy. Because of the convoluted manner in which it is drafted, it can be difficult to understand. The basic rules are that:

- The insurer does not provide Liability Coverage for the ownership, maintenance, or use of any vehicle that is not a policy-defined "covered auto" (which includes, for example, replacement vehicles), that the named insured either (a) owns or (b) is furnished for regular use;
- (2) The insurer does not provide Liability Coverage for the ownership, maintenance, or use of any vehicle that is not a policy-defined "covered auto," that any family member either (a) owns or (b) is furnished for regular use; and
- (3) As an exception to (2), the policy **does provide liability coverage** for the named insured's, or his or her spouse's, maintenance or use of any vehicle (a) owned by a family member or (b) furnished for the regular use of any family member.

Some dispute can arise with respect to whether a vehicle was "furnished for the regular use" of an insured or his or her family member. "North Carolina cases interpreting the regular use exclusion in auto policies examine not whether the vehicle is 'furnished for regular use' but rather whether it is actually used frequently or regularly." <u>North Carolina Farm Bur. Mut. Ins. Co. v. Warren</u>, 94 N.C.App. 591, 380 S.E.2d 790 (1989). In <u>Warren</u>, the Court determined that the exclusion did not apply and

<sup>&</sup>lt;sup>4</sup> Remember that "family member" is defined in the policy as "a person related to you by blood, marriage or adoption who is a resident of your household," and "includes a ward or foster child."

specifically noted that terms like "available for regular use" are "interpreted to mean **actually used on an unlimited and unrestricted basis**." <u>Id.</u>, at 593, 380 S.E.2d at 791 (emphasis added). The facts of <u>Warren</u> provide some guidance and example:

In January 1985, Dr. Warren was on rotation at the Wayne Memorial Hospital. Eastern Area Health Education Agency (AHEC) furnished an automobile for her use in travelling between Greenville and Goldsboro. She obtained the keys to this car approximately three weeks before the accident complained of and expected to use the car for several more weeks. Hers was not an exclusive use as medical students drove the car from time to time and she only drove it to make her scheduled trips, at least five times each week to Goldsboro. Dr. Warren never drove the car for personal reason.

Id., at 592, 380 S.E.2d at 791. Dr. Warren injured a medical student riding as a passenger in the vehicle furnished by AHEC, but the Court of Appeals, based on the facts above, rejected Farm Bureau's argument that the vehicle had been made available for her "regular use." The <u>Warren</u> opinion also provides two summaries of other cases where the "regular use" language was in question:

In <u>Whaley v. Insurance Co.</u>, 259 N.C. 545, 131 S.E.2d 491 (1963), the manager of a store was furnished an automobile for business use only. Nevertheless, he used it on numerous occasions for both company and personal matters. The manager had an accident while on a personal fishing trip. Our Supreme Court held the vehicle was furnished for his regular use and coverage was excluded under his personal insurance policy.

In <u>Whisnant v. Insurance Co.</u>, 264 N.C. 195, 141 S.E.2d 268 (1965), the employer furnished its employee a vehicle for business purposes. The employee consistently used the vehicle only for business. In an emergency, the employee used the car only one time for personal reasons and was involved in an accident. Our Supreme Court found that the vehicle was not furnished for regular use and thus was not excluded from coverage under the employee's personal insurance policy. As in Whaley... the Court examined the availability for and frequency of use of the automobile.

Warren, at 593, 380 S.E.2d at 791 (internal citations omitted).

The <u>Whaley</u> opinion has provided a framework upon which many subsequent opinions have relied and also emphasizes that "[n]o absolute definition can be established for the term 'furnished for regular use.' Each case must be decided on its own facts and circumstances." <u>Whaley</u>, at 552, 131 S.E.2d at 497-98 (citations omitted). The <u>Whaley</u> analysis dictates that a court examining the applicability of the exclusion should first look at the availability of the automobile to the tortfeasor and then look at the frequency of its use. <u>Whaley</u>, at 554, 131 S.E.2d at 498. If the automobile is continually made available to the tortfeasor for some period of time for his or her varied use and is, in fact, frequently used, then the exclusion will apply.

A more recent opinion, <u>North Carolina Farm Bur. Ins. v. Morgan</u>, 675 S.E.2d 141 (N.C. App. 2009), has summarized two additional "regular use" cases:

In <u>Nationwide Mut. Ins. Co. v. Walters</u>, 142 N.C.App. 183, 541 S.E.2d 773 (2001), this Court found that the non-owner made "regular use" of the vehicle based on the test set forth in <u>Whaley</u>. In <u>Nationwide</u> the facts relied on by the Court were as follows: the non-owner kept the vehicle at his house; the non-owner drove the vehicle to the exclusion of all others daily for eight weeks; the non-owner used the vehicle to drive the owner to work and drive the owner's children to school; the non-owner was responsible for putting gasoline in the vehicle; and the non-owner did not have to give the car back to the owner during the eight weeks. We went on to note that although there was evidence the non-owner used the vehicle only with the permission of the owner and to the benefit of the owner, the facts did not negate the availability of the vehicle to the non-owner.

In <u>Nationwide Mut. Ins. Co. v. Bullock</u>, 21 N.C.App. 208, 203 S.E.2d 650 (1974), this Court, using the <u>Whaley</u> availability and frequency analysis, found that the non-owner made "regular use" of a vehicle where she used the vehicle to transport the owner to medical appointments and to run errands for the owner, used the vehicle to drive herself to and from work, usually received permission from the owner to use the vehicle for trips made for her personal benefit, kept the vehicle at her residence, and paid for gasoline and oil for the vehicle.

<u>Morgan</u>, at 142-143 (internal citations omitted). The <u>Morgan</u> Court went on to find that the Family-Owned Auto Exclusion did not apply under the circumstances presented there. The insured in Morgan was somewhat regularly driving the subject vehicle in an effort to assist a gentleman whose wife had recently passed away. She would drive the vehicle 3 to 4 times per week but usually only after the vehicle's owner came over to her house. She would drive the vehicle from her house to wherever the widower needed to go. Other than these trips, she never used the vehicle. The Court found that although these facts met the "frequency" standard in <u>Whaley</u>, they did not meet the other standard, that the vehicle be "regularly available" to the insured.

- **f. Racing Exclusion:** "We do not provide Liability Coverage for the ownership, maintenance or use of . . . [a]ny vehicle while participating in any prearranged, organized, or spontaneous: a. racing contest, speed contest, demolition, stunt activity, or competitive driving event, or in practice or preparation for any such contest or use of this type; or b. use of a vehicle at a facility designed for racing or high performance driving unless such use is for an activity other than high performance driving, high speed driving, and other than those activities listed in 3.a. above."
- **g. Livery Exclusion:** "We do not provide Liability Coverage for any insured . . . [f]or that insured's liability arising out of the ownership or operation of a vehicle while it is being used as a public or livery conveyance. This exclusion does not apply to a share-the-expense car pool."
- h. Auto Business Exclusion: "We do not provide Liability Coverage for any insured ... [w]hile employed or otherwise engaged in the business of: a. selling; b. repairing; c. servicing; d. storing; or e. parking; vehicles designed for use mainly on public highways. This includes road testing and delivery. This exclusion does not apply to the ownership, maintenance or use of your covered auto by: a. you; b. any family member; or c. any partner, agent or employee of you or any family member. This exclusion

applies only to the extent that the limit of liability of this policy exceeds the minimum limit required by the financial responsibility law of North Carolina."

### IX. Conformity Clause.

The standard Rate Bureau policy provides that:

"If an auto accident to which this policy applies occurs in any state or province other than the one in which your covered auto is principally garaged, we will interpret your policy for that accident as follows:

If the state or province has:

- 1. A financial responsibility or similar law specifying limits of liability for bodily injury or property damage higher than the limit shown in the Declarations, your policy will provide the higher specified limit.
- 2. A compulsory insurance or similar law requiring a nonresident to maintain insurance whenever the nonresident uses a vehicle in that state or province, your policy will provide at least the required minimum amounts and types of coverage."

This Conformity Clause means that if a North Carolina driver causes injury to someone out-of-state, including, for example, a North Carolina resident who is a passenger in the tortfeasor's vehicle, the available liability coverage could be higher than \$30,000.00/\$60,000.00. However, the states where the required minimum limits exceed North Carolina's are rare. Only Alaska, Wisconsin, Maine, Utah (multiple claimant only), and Wyoming (multiple claimant only) appear to have higher minimum limits than North Carolina. Nevertheless, counsel should be aware of this clause and its potential beneficial use.

It is more common to encounter non-residents who injure North Carolina inside our state's border. These folks often times have liability policies with liability limits of less than \$30,000/\$60,000. Counsel should be aware that these non-residents' policies may contain a similar Conformity Clause requiring their liability insurer to provide the higher minimum limits dictated by our FRA. A copy of the at-fault driver's policy should be obtained prior to accepting any tender of limits less than our state minimum.

### X. Miscellaneous

### a. Fraudulent Insurance Applications.

In <u>Odum v. Nationwide Mut. Ins. Co.</u>, 101 N.C. App. 627, 401 S.E.2d 87 (1991), the North Carolina Court of Appeals held that a fraudulent insurance application can be the basis of an insurer's defense to paying coverage in excess of minimum limits but cannot void the availability of minimum limits. In <u>Odum</u>, Robert McPhaul negligently crossed the centerline and hit an oncoming vehicle, killing the sole passenger in his vehicle, his wife Arnetta McPhaul, and the driver of the other vehicle. At the time of the crash, Ms. McPhaul owned a liability policy through Nationwide that insured the vehicle being driven by Mr. McPhaul. In her application, she intentionally misrepresented that she was divorced and did not identify Mr. McPhaul, who had a recent DUI conviction, as her spouse. After

the crash, Nationwide filed a declaratory judgment action attempting to void all coverage. The Court partially rejected Nationwide's attempt, finding that the FRA specifically provides that "the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs." Id. at 633, 401 S.E.2d at 91 (quoting N.C.G.S. § 20-279.21(f)) (emphasis in source). Therefore, if the policy applicant has limits in excess of the statutory minimum, the insurer may be able to avoid paying those limits if it can prove facts showing a fraudulent application.

### b. Duty to Cooperate and Default Judgments

Every automobile policy contains a "General Duties" section detailing the insured's duties in the event of a loss. Some of these "General Duties" are more likely to be involved in first-party claims, such as UM and UIM claims, while others are more relevant to third-party liability claims. Among the key third-party claim duties is that the insured must "[p]romptly send [the insurer] copies of any notices or legal papers received in connection with [an] accident or loss." The failure of an insured tortfeasor to cooperate and notify his or her liability insurer of service of complaint and summons, and the subsequent entry of default judgment, may void any available liability coverage *in excess of minimum limits. See Swain v. Nationwide Mut. Ins. Co.*, 253 N.C. 120, 116 S.E.2d 482 (1960). Consequently, counsel representing a plaintiff whose damages are less than \$30,000 may choose to obtain a default judgment of less than minimum limits and expect full payment from the liability carrier (except as set forth below). If a judgment in excess of \$30,000 is obtained, however, the insurer may challenge its obligation to pay any portion in excess of minimum limits. Id. Therefore, if the client's damages are in excess of \$30,000, the practitioner should serve the liability carrier a copy of the complaint and summons using a method authorized by Rule 4.

There is an important exception to the preceding guidance found at N.C.G.S. § 20-279.21(f)(1). The critical portion of that provision states that "[a]s to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a default judgment taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law, a copy of summons, complaint, or other pleadings, filed in the action." <u>Id.</u> The phrase "agents" is defined expansively. <u>Id.</u> The provision goes on to state that upon receipt of the complaint and summons, the liability insurer may move to intervene as a "named party defendant" and may file a responsive pleading within 30 days of service. <u>Id.</u> If insurer fails to do so and, if in fact, coverage is provided by the policy, it "shall be bound to the extent of its policy limits to the judgment taken by default against the insured, and noncooperation of the insured shall not be a defense." <u>Id.</u>

It is worth noting that the tortfeasor's duty to place the carrier on notice of the suit is fulfilled when the complaint and summons are forwarded – the failure to forward a motion for entry of default or default judgment will not allow the carrier to void coverage. <u>Aetna Cas. & Sur. Co. v. Welch</u>, 92 N.C.App. 211, 373 S.E.2d 887 (1988). The insured does, however, have the ongoing obligation to cooperate with the insurer in the defense of the action, including having a duty to attend trial and give evidence. <u>Connor v. State Farm Mut. Auto. Ins. Co.</u>, 265 N.C. 188, 143 S.E.2d 98 (1965) ("By express policy language, the insured is required to cooperate, attend hearings and trials and give evidence. He has a duty equal to that of the insurer to act diligently and in good faith. Hence when an insured fails, without justification, to attend the trial of his case in accordance with his promise, the insurer has the right to assert noncompliance with the cooperation provision of the policy.")

### XI. Conclusion.

Knowing when coverage is available to pay bodily injury damages is vital to representation of personal injury clients. This paper has addressed only the most basic type of insurance, the liability coverage provided by the standard personal automobile policy. Finding liability coverage through personal automobile policies is only the first step in the insurance coverage analysis. As will be explained by the remaining speakers today, the next step is looking for other possible sources of liability coverage, including rental car and business policies, and analyzing available UIM coverage. Ultimately, we each have a duty to our clients to be aware of and explain the potential parties responsible for paying any judgment. Failure to do so can result in significantly reduced results for our clients and money left on the table for insurers to spend on talking lizards, Aaron Rodgers, and spokeswomen with creepy smiles and excessive makeup.