

## TAKE THE LEAD IN SETTLEMENT AND MEDIATION

by

Matthew J. Devoti

Uninsured and underinsured motorist claims pose unique challenges to the practitioner. These claims often involve not only issues encountered in motor vehicle cases alleging the negligent operation of a vehicle, but also matters demanding the interpretation of various statutes and the implication of the law of contracts. Counsel must be familiar with various issues particular to these cases when attempting to value, evaluate, resolve and try to a jury uninsured and underinsured motorist claims.

### A. Avoid Surprise When Faced with Subrogation Issues

Any conversation about avoiding “surprise” must involve a discussion about the fundamental aspects of “subrogation”. So, what is “subrogation”?

Subrogation is a principle that permits one party to succeed to the rights of another in relation to a debt. Messner v. Am. Union Ins. Co., 119 S.W.3d 642, 648 (Mo.App.S.D. 2003). As such, a party who has, pursuant to a legal obligation, paid for a loss or injury resulting from a wrong or default of another succeeds to the rights of the damaged person in relation to her claim against the party who caused the wrong. Id. at 648-649.

Subrogation originated as a common law equitable doctrine; its intent was to prevent injustice and windfall in the event a wronged party obtained a recovery from multiple sources. Messner, 119 S.W.3d at 649; Keisker v. Farmer, 90 S.W.3d 71, 75 (Mo.banc 2002). However, the right to subrogate may also be established by contract. Messner, 119 S.W.3d at 649. When subrogation is established by an insurance policy, the insured retains legal title to the claim. Keisker, 90 S.W.3d at 74. By paying the

insured, the insurer obtains the right to subrogation. Id. The exclusive right to pursue the tortfeasor remains with the insured, which holds any proceeds recovered for the benefit of the insurer. Id.

## I. The Scope of Subrogation

Recall, however, that Missouri law prohibits the assignment of a cause of action for personal injury. Travelers Indem. Co. v. Chumbley, 394 S.W.2d 418, 424 (Mo.App.Spring. 1965). Accordingly, Missouri courts have long recognized the general rule that an insurer does not possess the ability to subrogate against an insured's claim for personal injury. Id. at 424-425. Therefore, in Chumbley, the Missouri Court of Appeals held that an insurer could not recover from its insured benefits paid under a medical payments policy after the insured settled his personal injury case. Id. at 425.

However, the General Assembly created an exception to the general rule for those insurers who provide uninsured motorist coverage. The exception was created in the statute mandating that insurers provide uninsured motorist coverage to an insured that purchases a motor vehicle liability policy. *See* Section 379.203 R.S.Mo. (2004). Section 379.203 requires all motor vehicle policies issued in the State of Missouri to contain a minimum amount of uninsured motorist coverage. Section 379.203.1.

That statute grants to the insurer a right of subrogation upon payment of uninsured motorist benefits to its insured. Section 379.203.4; *See* Schaeffer v. Am. Motorists Ins. Co., 973 S.W.2d 180, 182 (Mo.App.E.D. 1998); *See also* Roberts v. Progressive Northwestern Ins. Co., 151 S.W.3d 891, 899 (Mo.App.S.D. 2004). In pertinent part, Section 379.203.4 directs:

In the event of payment to any person under the coverage required by this section, and subject to the terms and conditions of such coverage,

the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any right of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including proceeds recoverable from the assets of the insolvent insurer. . .

#### Section 379.203.4.

Pursuant to the statute, the insurer does not require authorization from the insured to exercise its subrogation rights. Schaeffer, 973 S.W.2d at 182. Yet, the right to subrogate is not without limits. Missouri courts have held that an insurer's subrogation rights extend *only to claims by the insured against the uninsured motorist*. Id.; Waldrop v. Shelter Mut. Ins. Co., 221 S.W.3d 401 (Mo.App.W.D. 2006). As a result, the insurer is not entitled to insist that its insured execute a release that might be read to grant to the insurer more extensive subrogation rights than the law provides. Schaeffer, 973 S.W.2d at 182. Specifically, in Schaeffer, the Eastern District held that an uninsured motorist carrier is only entitled to a release that makes clear the insured will make no further claim against uninsured motorist coverage relating to the collision giving rise to the claim. Id. at 182-183.

## II. The Responsibility of the Insured

Counsel for an injured party must keep in mind the insurer's right to subrogate in those instances in which the injured person wishes to resolve her claim against the uninsured motorist. A typical policy provision directs:

There is no coverage under [the uninsured motor vehicle coverage]:

1. For any insured who, without our written consent, settles with any person or organization who may be liable for the bodily injury and thereby impairs our right to recover our payments. . .

State Farm Mutual Automobile Insurance Company, Policy Form 9825.6 at 13-14.

Another typical provision directs:

- C. Exclusions
  1. Any claim settled without our consent, if the settlement or judgment prejudices our right to recover payment. . .

Continental Western Insurance Company, Policy Form CA 21 04 04 01 at 1.

In this context, counsel should not permit his client to settle with nor fully release a tortfeasor in such a manner as to foreclose the insurer's right to subrogation. When an insured acts without the insurer's knowledge or consent to resolve her claim with the tortfeasor so as to extinguish the insurer's subrogation right, the insured acts in contravention of her contract with the insurer thereby precluding her right of recovery under the policy. Roberts, 151 S.W.3d at 900; *See also* Lebs v. State Farm Mut. Auto. Ins. Co., 568 S.W.2d 592, 593 (Mo.App.K.C. 1978). Of course, the insurer cannot unreasonably withhold its consent of a settlement between its insured and the tortfeasor. Rister v. State Farm Mut. Auto. Ins. Co., 668 S.W.2d 132, 136 (Mo.App.S.D. 1984). And, there exists no prohibition against the tortfeasor settling with the insured for an amount over and above the amount the insurer has paid or may become obligated to pay in the future so long as the tortfeasor is aware of the insurer's subrogation interest.

Roberts, 151 S.W.3d at 900; *But see* Seeck v. GEICO Gen. Ins. Co., 212 S.W.3d 129 (Mo.banc 2007).

### III. Subrogation of Uninsured & Underinsured Motorist Proceeds

Many uninsured and underinsured motorist claims occur while the injured person is operating a motor vehicle in the course of his employment. Of course, under that circumstance, the injured person may make a claim under Missouri's Workers' Compensation statutes. In a Workers' Compensation claim, the injured employee may receive multiple benefits – including the payment by the insurer of medical treatment charges, a replacement wage for time the employee is unable to work and a disability benefit.

The Workers' Compensation law provides to the employer the right of subrogation against any recovery made by the worker in her third party case. Section 287.150 R.S.Mo. (2004). In pertinent part, Section 287.150 states:

Where a *third person* is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such *third person*. . .

Section 287.150.1 (emphasis added).

However, the right of subrogation does not extend to a recovery made by the employee under uninsured motorist coverage. On multiple occasions, Missouri courts have refused to permit a Workers' Compensation employer and its insurer to recover money from an employee who successfully prosecuted an uninsured motorist case. Barker v. Palmarin, 799 S.W.2d 117, 119 (Mo.App.W.D. 1990); *See also* Barker v. H&J Trans., Inc., 837 S.W.2d 537, 540-541 (Mo.App.W.D. 1992); Yaakub v. Aetna Cas. &

Sur. Co., 882 S.W.2d 743, 745 (Mo.App.E.D. 1994). These holdings are based upon the determination that an uninsured motorist carrier is not a “third person” within the meaning of Section 287.150. Palmarin, 799 S.W.2d at 118-119; Yaakub, 882 S.W.2d at 745.

But, what about insurance proceeds obtained by an insured from his underinsured motorist carrier? Does the Workers’ Compensation carrier have the right to subrogate those funds?

In my opinion, no. An underinsured motorist carrier is no more a “third person” within the meaning of Section 287.150 than an uninsured motorist carrier. Be aware that my research has not found any case addressing the issue. And, at least one carrier with which my firm has worked has taken the position that it is a “third person”. In support, the carrier directed us to Tillman v. Cam’s Trucking, Inc., 20 S.W.3d 579 (Mo.App.S.D. 2000). However, a careful reading of that case seems to suggest no more than the employer and its insurer possess a subrogation interest against the recovery made by the employee from the tortfeasor motorist and his liability insurer. See Tillman, 20 S.W.3d at 587-588.

#### B. Eliminate the Threat of Bad Faith Claims

Disagreements between an insurer and its insured regarding the validity or value of an uninsured or underinsured motorist claim often exist. The mere existence of a dispute between the parties is not uncommon nor does it result in an action independent of the contract claim. Indeed, an insurance company has merely breached its contract with an insured when the insurer wrongfully refuses payment of the insured’s claim. Overcast v. Billings Mut. Ins. Co., 11 S.W.3d 62, 67 (Mo.banc 2000)

However, a remedy does exist for an insured when the insurer “has refused to pay a loss without reasonable cause or excuse.” *See* Section 375.420 R.S.Mo. (2004). Section 375.420 permits the insured to recover in such an extraordinary situation. That statute provides:

In any action against any insurance company to recover the amount of any loss under a policy of automobile. . . insurance. . . if it appears from the evidence that such company has refused to pay such loss without reasonable cause or excuse, the court or jury may, in addition to the amount thereof and interest, allow the plaintiff damages not to exceed twenty percent of the first fifteen hundred dollars of the loss, and ten percent of the amount of the loss in excess of fifteen hundred dollars and a reasonable attorney’s fee. . .

Section 375.420. The statute attempts to “make whole” the insured and place her in the position she would have been had the insurance company acted as the insurance contract demanded and had the insured not been forced to hire counsel and incur litigation expense. Overcast, 11 S.W.3d at 67.

To establish her claim for vexatious refusal, an insured must prove: (1) she had an insurance policy with the defendant insurance company, (2) the insurer refused to pay, and (3) the insurer’s refusal was without just cause or excuse. Dhyne v. State Farm Fire & Cas. Co., 188 S.W.3d 454, 457 (Mo.banc 2006). A vexatious refusal claim shall be submitted to the jury when there exists “evidence that an insurer’s bad faith efforts have hindered a legitimate insurance claim.” Id. at 458.

These claims often turn on whether the insurance company’s refusal to pay its insured was willful and without reasonable cause. Missouri courts have recognized

innumerable contexts in which vexatious refusal claims have arose. Dhyne, 188 S.W.3d at 458. Direct and specific evidence of vexatious refusal is not required and

the jury may find vexatious delay upon a general survey and a consideration of the whole testimony and all the facts and circumstances in connection with the case.

Id.

An insurance company may avoid these claims by squarely dealing with its insured once the insured reports a claim. The insurer should do the following:

- inform the insured as to pertinent policy provisions and requirements
- promptly and fully respond to inquiries made by the insured
- accurately advise the insured as to any consequences of pursuing a claim
- act in accord with applicable statutory and common law obligations
- when appropriate, re-evaluate and reconsider the insured's claim
- promptly pay claims when due

C. Write Demand Letters that Get Results

**12 Steps When Drafting a Demand Letter**

1. Request a “true and accurate” copy of the entire insurance contract
2. Read the entire insurance contract
3. Identify any potential issues of concern set forth in the policy (off-sets, notice requirements, exhaustion of other sources of recovery)
4. Verify uninsured or underinsured status of the tortfeasor motorist
5. Obtain a complete set of pertinent medical records

6. Read the complete set of pertinent medical records
7. Identify and document any source of lost wages or income
8. Meet, speak with, “statementize” and grade all potential witnesses
9. Address liability of uninsured/underinsured motorist
10. Address injury
11. Address consequence of injury
12. Make demand

D. Steps You Must Take Prior to a Demand for Arbitration

Beg, beg and beg if you want to arbitrate.

Under Missouri law, a contract cannot oust jurisdiction from the courts as to a determination of liability. State ex rel. State Farm Mut. Auto. Ins. Co. v. Craig, 364 S.W.2d 343 (Mo.App.Spring. 1963). *See also* Hill v. Seaboard Fire & Marine Ins. Co., 374 S.W.2d 606 (Mo.App.K.C. 1963).

E. Settle More Claims Outside of Court

Obviously, settlement of any claim prior to the expenditure of significant litigation expense is desirable. The fact that counsel represents a party to an uninsured or underinsured motorist claim does not change that reality. These claims, however, pose unique challenges due to their inherent complexity and compartmental nature. As such, counsel will want to consider several issues when resolving all – or portions – of these motor vehicle claims.

1. Consent Before Settlement

Earlier, this paper addressed the necessity of counsel to keep in mind the statutory subrogation interest of the uninsured carrier when resolving a claim against the uninsured motorist. The discussion involved a brief review of various contractual provisions reiterating the right of subrogation. Both provisions included “consent” language.

Insurance contracts typically require an insured provide written notice of intent to resolve a claim against a tortfeasor – particularly in those endorsements which provide underinsured motorist coverage. Absent the procurement of consent, the policies direct, coverage is excluded. The reason for “consent exclusion” provisions is to keep the insured from striking a settlement with the tortfeasor which would impair the insurer’s right to subrogation. Tegtmeyer v. Snellen, 791 S.W.2d 737, 739 (Mo.App.W.D. 1990). Again, Missouri courts will generally uphold such exclusion “unless consent is unreasonably withheld.” Id. at 740; Rister, 668 S.W.2d at 136.

A typical exclusion present in an underinsured motorist policy demanding notice directs:

We will pay under this [underinsured motorists]  
coverage only if a. or b. below applies:

\* \* \*

b. A tentative settlement has been made  
between an “insured” and the insurer of the “underinsured  
motor vehicle” and we:

(1) Have been given prompt written notice of  
such tentative settlement; and

(2) Advance payment to the insured in an  
amount equal to the tentative settlement within 30 days  
after receipt of notification.

Continental Western Insurance Company, Policy Form CA 31 04 04 01 at 1. Despite the presence of the provision, the insurance company cannot avoid liability merely because the insured fails to procure the insurer's consent; to successfully escape liability, the insurer must demonstrate that it suffered some prejudice. Tegtmeyer, 791 S.W.2d at 740.

## 2. The Execution of the Release

Once consent is obtained from the insurer, counsel must give care to the drafting of the settlement documents. Language in the release must be tailored to accurately reflect settlement only of the claim resolved. The release shall be titled correctly and must contain language specifically identifying: (1) the claim(s) settled, (2) the parties released, (3) the claim(s) remaining, and (4) the parties against whom such claims exist.

An exemplar of an acceptable release may direct as follows:

### **RELEASE OF CLAIMS AGAINST UNDERINSURED MOTORIST ONLY**

FOR THE SOLE CONSIDERATION OF One  
Hundred Thousand and 00/100 Dollars (\$100,000.00)  
receipt of which I acknowledge, I fully and forever release  
and discharge UNDERINSURED MOTORIST, his heirs,  
administrators, executors, successors and assigns, from  
claims for damages which I sustained as the result of an  
accident which occurred on or about February 2, 2005, at  
East Highway 50 and Monroe Street in Jefferson City,  
Missouri.

It is understood and agreed that this is a full and final release, in compromise settlement of all tort claims of every nature and kind whatsoever only against UNDERINSURED MOTORIST and his insurer, and release all tort claims whether known or unknown, suspected or unsuspected, against UNDERINSURED MOTORIST and his insurer only.

By executing this release, I intend and agree that this release applies to all my claims against UNDERINSURED MOTORIST arising from said accident, present and future, including, but not limited to, damage to or destruction of property; claims for known or unknown injuries, developments, consequences and permanency of those injuries; and there is no misunderstanding in this regard.

It is understood that the aforesaid One Hundred Thousand Dollars (\$100,000.00) represents the full applicable liability policy limits of UNDERINSURED MOTORIST through UNDERINSURED MOTORIST'S LIABILITY INSURER and does not necessarily represent the full value of the undersigned's claim against UNDERINSURED MOTORIST.

It is specifically understood by all parties hereto that this is a release of all tort claims against UNDERINSURED MOTORIST and his insurer only. This release, however, does not purport to be and does not

release any claim which the undersigned may have against UNDERINSURED MOTORIST INSURER under the provisions of its Policy No. XXXX which provides, among other things, underinsured motorist coverage in an amount in excess of UNDERINSURED MOTORIST's policy limits.

I acknowledge the sum paid shall not be construed as an admission of any liability by and of the parties released.

I agree that if more than one person has executed the release, the consideration paid shall apply jointly to all such persons. All other provisions shall apply separately to each such person. The word "person" as used in this paragraph includes natural persons, firms, associations, organizations and corporations.

I further agree that any claim of whatever kind or nature the above named parties might have or hereafter have growing out of the above accident, is hereby expressly reserved to them.

I understand this release contains the entire agreement between the parties. I have carefully read this Release, and know the contents, and I sign as my own free act.

All medical bills are to be paid from this settlement amount.

Signed and sealed at \_\_\_\_\_

In the Presence of Witnesses Signed Below:

\* \* \*

3. Estoppel by Virtue of Prior Adjudication

An insured possesses a significant hammer to use during negotiation of an uninsured or underinsured claim when she has obtained a judgment against the tortfeasor in an action about which the insurer knew but failed to join. This advantage exists because an insurer is entitled to intervene in an action between its insured and an uninsured or underinsured motorist. Rule 52.12(a); Oates v. Safeco Ins. Co. of Am., 583 S.W.2d 713, 718 (Mo.banc 1979); State ex rel. Shelton v. Mummert, 879 S.W.2d 525, 528 (Mo.banc 1994); *See also* Alsbach v. Bader, 616 S.W.2d 147, 150 (Mo.App.E.D. 1981).

Under the doctrine of collateral estoppel, an uninsured motorist carrier is estopped from relitigating issues decided in an action brought by its insured against an insured motorist if the carrier was provided notice and an opportunity to intervene and defend. Wells v. Preferred Risk Mut. Ins. Co., 459 S.W.2d 253, 259 (Mo.banc 1970). In Wells, the Supreme Court held that the right to intervene gave the insurance company a right to control the litigation sufficient to enable the insurer to protect its own interest. Id. at 260. Possessing the right to intervene, the Court found the insurer could not relitigate issues of liability or damage previously determined. Id. at 260.

Over twenty years later, the Supreme Court extended this principle to claims against underinsured motorist carriers. Shelton, 879 S.W.2d at 528. In Shelton, the Court concluded that the doctrine of collateral estoppel also would prevent an underinsured motorist carrier from relitigating issues necessarily decided in an action brought by its insured against an underinsured motorist. Id. Again, notice and the opportunity to intervene and defend the suit is a prerequisite to application of the doctrine. Id.

#### F. Tips for the Arbitration and Mediation of Coverage Disputes

Engaging in alternative dispute resolution proceedings with an insurer may be one of the most frustrating experiences for an insured and her counsel. Unlike a case pending against an individual or business, a case seeking to recover against an insurance contract involves no threat of exposing an insurer's insured to excess liability or accusations of "bad faith" negotiating. In this context, the insurer focuses on the bottom line – the extent of its financial liability. Yet, the insured and her counsel do possess one solid positive; the defendant is an insurance company to which few jurors will give any compassion or sympathy.

##### 1. Actions to Take Prior to Alternative Dispute Resolution

Cases which revolve around a coverage dispute often resolve in one of two extremes – judgment in favor of the insurer or judgment in favor of the insured for a significant portion of the policy's coverage. In this circumstance, counsel's job is to demonstrate to the insurance company the potential cost of litigating the case to a resolution favorable to the insured. Like any other case, counsel must engage in discovery to identify the strengths and weaknesses of his client's position.

However, unlike other motor vehicle cases, uninsured and underinsured motorist claims demand additional discovery. Counsel must identify the provision at issue under the policy, relevant facts that support his interpretation of coverage as well as pertinent law. Counsel may serve requests to admit that, when answered, assist him in narrowing the scope of the dispute. And, once obtained, those responses may be combined with other information learned through discovery to draft an appropriate motion for partial summary judgment. The motion for summary judgment should be aimed at obtaining direction from the trial court as to the dispute. Carefully drafted, the motion serves to put the insurer (or its insured) on notice as to the strengths and weaknesses of each case.

Find below Statement of Uncontroverted Material Facts recently filed in an underinsured motorist case pending in the Circuit Court of the City of St. Louis. The case involved the availability of underinsured motorist coverage to the family of a fire chief killed during the course of his employment. *See* Buehne v. State Farm Mut. Auto. Ins. Co., 232 S.W.3d 603 (Mo.App.E.D. 2007).

STATEMENT OF UNCONTROVERTED  
MATERIAL FACTS

1. Plaintiff LaDonna Buehne is the widow of Gerald J. Buehne. Exhibit 1 at 2-3.
2. Plaintiffs Timothy Buehne and Cynthia Siegel are the only children of Mr. Buehne. Exhibit 1 at 2-3.
3. On March 10, 2005, Mr. Buehne died as a result of injuries sustained in a motor vehicle collision. Exhibit 2.
4. At the time of the collision, Mr. Buehne operated a 2000 Ford Crown Victoria. Exhibit 3 at 1.

5. Claudex Simmons operated the motor vehicle that struck the motor vehicle operated by Mr. Buehne at the time of the collision. Exhibit 3.

6. Prior to March 10, 2005, Defendant State Farm Mutual Automobile Insurance Company (hereinafter “State Farm”) issued to Mr. Buehne a motor vehicle insurance policy, Policy No. 360 4060-E18-25C (hereinafter “Policy”). Exhibit 4, ¶ 5.

7. The Policy provides underinsured motorist coverage with limits of Twenty Five Thousand Dollars (\$25,000.00). Exhibit 4, ¶ 5.

8. The Policy was in full effect at the time of the collision. Exhibit 5; Exhibit 6.

9. That Plaintiffs are insureds as that term is used and defined in the Policy issued to Mr. Buehne. Exhibit 4, ¶ 2; Exhibit 6 at 12.

10. That the Policy uses and defines the term “Underinsured Motor Vehicles” as:

. . . a land motor vehicle:

1. the ownership, maintenance or use of which is insured or bonded for bodily injury liability at the time of the accident; and

2. whose limits of liability for bodily injury liability:

(a) are less than the amount of the *insured’s* damages; or

(b) have been reduced by payments to *persons* other than the *insured* to less than the amount of the *insured’s* damages.

Exhibit 6 at 12.

11. At the time of the collision, Claudex Simmons was covered under a liability insurance policy issued by American International Group, Inc. and National Union Fire Insurance Co. (hereinafter "AIG/NUFIC"). Exhibit 1 at 11-12; Exhibit 7.

12. The liability limit of the policy issued by AIG/NUFIC to Claudex Simmons is One Hundred Thousand Dollars (\$100,000.00). Exhibit 1 at 11-12; Exhibit 7 at 1.

13. AIG/NUFIC tendered to Plaintiffs the limits of such policy. Exhibit 1 at 11-12; Exhibit 7 at 1.

14. As a result of the collision, Mr. Buehne and Plaintiffs incurred damages in excess of One Hundred Thousand Dollars (\$100,000.00). Exhibit 1 at 6-7, 10, 12.

15. As a result of the collision, Mr. Buehne and Plaintiffs incurred damages in excess of One Hundred Fifty Thousand Dollars (\$150,000.00). Exhibit 1 at 6-7, 10, 12.

## 2. The Mediation Process

During mediation, counsel should talk to the insurer's representative about the strengths of his case. Counsel should be prepared to draw analogies between the provision at issue, his position and case law interpreting the same or similar provisions in other policies. Copies of pertinent cases should be available to provide to the insurer and its counsel, if asked. Counsel must be well versed, of course, in the fundamentals of basic contract law, insurance policy interpretation and in whose favor Missouri courts resolve ambiguities (generally, in favor of the insured and against the insurer).

Further, counsel must be prepared to talk about damages – the best (or worst) case scenario – in the event the fact-finder find in favor of one's client. Like any other personal injury action, counsel must know the insured's medical history, the injury sustained, the diagnosis of the injury made by the insured's physicians, the treatment provided to the insured, the prognosis for further treatment and recovery, the cost of past (and future) medical care and any subrogation claims or liens asserted against the matter.

## LITIGATE UM/UIM CLAIMS WITH CONFIDENCE

by

Matthew J. Devoti

### A. Adopt Discovery Tools and Techniques that Work

Again, the prosecution of uninsured and underinsured motorist cases demands litigation and investigation particular to these cases. Those tools counsel will use range from the informal to the formal. This section of the paper will discuss issues that counsel litigating an uninsured or underinsured motorist case need to consider in addition to those with which counsel may encounter in a traditional motor vehicle collision case.

#### 1. Locating the Phantom Motorist

First, do you want to find the “phantom motorist”? That is, do you want to find the motorist the insured described as operating his automobile the wrong way on a one-way street or that motorist who crossed the centerline forcing the insured to move her car to the right and off the shoulder? Your answer to the question may well depend upon the identity of your client.

Obviously, obtain a copy of any police report describing the collision. The report may contain the identity of witnesses. Those witnesses may have observed something about the “phantom motorist” that could lead you to him. Or, at the very least, a witnesses may be able to confirm (or dispute) the insured’s version of events thereby establishing (or contradicting) the involvement of another vehicle.

Next, canvass the area in which the collision occurred. Walk the scene yourself. Take photographs. Obtain measurements. Compare your observations to those of the insured, any witnesses and the investigating officer. Further, knock on doors. People

living in the area may have seen or heard something that might lead you to learning the identity of the other motorist involved in the occurrence. Those people may have also witnessed the incident.

## 2. Discovery of the Claim File

Once suit is filed, counsel should consider whether the insured possesses the right to review the insurance company's claim file. Whether the insured may obtain the file depends upon the matters at issue in the pleadings.

For instance, an insured is not generally entitled to discover the insurer's claim file in a suit to recover under the insurance contract. Whenever the insured makes a claim for loss under the insurance policy, the insurer and insured become adversaries. State ex rel. Safeco Nat. Ins. Co. of Am. v. Rauch, 849 S.W.2d 632, 634 (Mo.App.E.D. 1993). The uninsured or underinsured motorist provision places the insured in the posture of a member of the public seeking recovery for an injury resulting from negligence of a motorist whose liability is insured by the insurer; those provisions create an adversarial relationship in which the insured and insurer deal with wariness rather than trust. Id. at 634-635. Once an adversarial environment is created, the insured cannot discover any work product material absent a showing of substantial need and undue hardship. Id. at 635.

However, circumstances do exist when the insured is entitled to review her claim file. *See* Grewell v. State Farm Mut. Auto. Ins. Co., 102 S.W.3d 33, 37 (Mo.banc 2003); *See also* Grewell v. State Farm Mut. Auto. Ins. Co., 162 S.W.3d 503, 505 (Mo.App.W.D. 2005). In Grewell I, the Supreme Court held that a liability insurance claim file belongs to the insured rather than the insurer. Grewell, 102 S.W.3d at 37. As such, the Court concluded, the insurer should provide to its insured "free and open access" to the file during the course of a third-party case. Id.

Further, courts interpreting Missouri law have held that an insured is entitled to inspect her claim file when the underlying claim involves allegations of vexatious refusal. O'Boyle v. Life Ins. Co. of No. Am., 299 F.Supp. 704, 706 (W.D.Mo. 1969). In O'Boyle, the court determined that the insurer's claim of work product protection was overcome by the insured's substantial need for the materials in light of the vexatious refusal claim. According to the court, the likelihood that documents in the file would describe the thought and decision-making processes employed by the insurer in denying the insured's claim made the materials relevant. Id. Further, the court recognized, plaintiff was unable to otherwise obtain by other means the substantial equivalent of the materials possessed in the file. Id.; *See also* McConnell v. Farmers Ins. Co., Inc., 2008 WL 510392 (W.D.Mo. 2008).

B. Draft Pleadings that Get the Job Done: Sample Document Review

Counsel has been retained to represent one of the parties in a suit by the insured against her insurance company to collect under the insurance contract. The petition filed by the insured and the answer filed by the insurer will look remarkably similar to pleadings filed in the traditional motor vehicle injury case. Yet, once again, these cases present several twists that counsel must consider.

1. To Join or Not to Join the Uninsured Motorist Carrier?

One of the first questions presented to insured's counsel is against whom should the insured bring suit to collect uninsured motorist benefits under her insurance policy. Under Missouri law, the insured must not join the uninsured motorist in a case against her insurer when attempting to recover under an uninsured motorist policy. Oates v. Safeco Ins. Co. of Am., 583 S.W.2d 713, 715 (Mo.banc 1979). In fact, an insured is not required to have an unsatisfied judgment against the uninsured motorist to recover under her

uninsured motorist policy; she only must demonstrate that (1) the other motorist was uninsured, (2) the other motorist is legally liable to the insured, and (3) the amount of damages. Id.

As such, Missouri law provides multiple options to plaintiff's counsel:

- (a) First, file suit against the uninsured motorist only;
- (b) File suit against the uninsured motorist and her carrier; or
- (c) File suit against her uninsured motorist carrier only.

Counsel should keep in mind that the uninsured motorist carrier possesses the right to intervene in any case filed solely against the uninsured tortfeasor. Alsbach v. Bader, 616 S.W.2d 147, 150 (Mo.App.E.D. 1981); Rule 52.12. Indeed, as discussed in the preceding paper, the insurer is estopped from relitigating issues necessarily decided in an action against the uninsured motorist where the insurer is provided notice of the suit and fails to intervene despite the opportunity to do so. Wells v. Preferred Risk Mut. Ins. Co., 459 S.W.2d 253, 259 (Mo.banc 1970). Accordingly, the insurer and its counsel should always be careful to protect the interest of the insurer by promptly intervening in an uninsured motorist action to which the carrier was not joined. Id. at 260.

Of course, when pleading, insured's counsel should include certain language establishing the right to judgment against the uninsured motorist carrier. Such language should identify the insurer, state its relationship to the insured, allege the existence of a contract between the insured and the insurer, and suggest damage caused by the uninsured motorist. Such language may be stated as follows:

**FIRST AMENDED PETITION FOR**  
**DAMAGES**

COMES NOW PLAINTIFF and for her cause of action against DEFENDANTS, states:

1. PLAINTIFF is a resident and citizen of the State of Missouri.

2. DEFENDANT A is now and was at all times herein mentioned a resident and citizen of the State of Missouri.

3. DEFENDANT B is now and was at all times herein mentioned a resident and citizen of the State of Missouri.

4. DEFENDANT INSURER is now and was at all times herein mentioned a duly organized and existing Illinois corporation engaged in the business of issuing motor vehicle insurance policies to the public for consideration and was registered to do business in the State of Missouri.

5. That Battlefield Road, at or near its intersection with Stewart Avenue, is now and was at all times herein mentioned an open and public, and divided, street, highway, and thoroughfare located within the State of Missouri and County of Greene.

6. That on or about the 14<sup>th</sup> day of May, 2007, PLAINTIFF was operating a motor vehicle on southbound Stewart Avenue across the lanes of westbound Battlefield Road.

7. That at the aforesaid time and location, DEFENDANT B was operating a motor vehicle from

northbound Stewart Avenue in and onto the westbound lanes of Battlefield Road.

8. That at the aforesaid time and location, DEFENDANT A was operating a motor vehicle westwardly on Battlefield Road.

9. That at the aforesaid time and location, the motor vehicle being operated by DEFENDANT B was struck on the right front quarter panel by the motor vehicle being operated by DEFENDANT A in the left hand lane of westbound Battlefield Road; that the force of the impact between the motor vehicles operated by DEFENDANT B and A propelled the motor vehicle operated by DEFENDANT A into the right front quarter panel of the motor vehicle being operated by PLAINTIFF at the aforesaid time and location.

10. That as a direct result of the aforesaid occurrence, PLAINTIFF's left shoulder, neck, and head and all of the bones, joints, muscles, tendons, ligaments, nerves, skin, vessels, and intervertebral discs thereof were caused to be severe bruised, contused, lacerated, sprained, strained, herniated, dislocated, and rendered swollen and inflamed; PLAINTIFF has suffered, and will ever suffer in the future, severe pain and mental anguish as a result thereof; and the use, movement, and function of the aforesaid injured parts have been severely and permanently impaired and diminished.

11. That as a further direct result of the aforesaid occurrence and the resulting injuries and damages sustained by PLAINTIFF, PLAINTIFF has been caused to

undergo certain reasonable and necessary hospital and medical care and treatment, for which PLAINTIFF has been caused to incur or become indebted for an amount not now known, and PLAINTIFF will be caused to undergo further such care and treatment in the future and to incur or become indebted for further such large sums therefor.

12. That as a further direct result of the aforesaid occurrence and the resulting injuries and damages sustained by PLAINTIFF, PLAINTIFF's ability to work, labor, study, and to enjoy the ordinary pursuits of life have been severely and permanently impaired and diminished.

13. That at all times herein mentioned, PLAINTIFF was insured under the uninsured motorist provisions of a policy of motor vehicle liability insurance with DEFENDANT INSURER, Policy No. XXXX.

14. That at the time of the aforesaid motor vehicle collision, DEFENDANT B was an uninsured motorist as that term is used and defined in the aforesaid motor vehicle insurance policy; the aforesaid policy was in full force and effect at the time of said collision and PLAINTIFF was an insured person under said policy, thereby rendering DEFENDANT INSURER liable to Plaintiff for damages resulting from the negligence of the uninsured motorist.

15. That the aforesaid motor vehicle insurance policy, Policy No. XXXX, provides coverage such that DEFENDANT INSURER must pay insured persons all sums which they are legally entitled to recover for damages, injuries, and medical expenses incurred as a

result of the actions of the owner or operator of an uninsured motor vehicle arising out of the ownership, maintenance, or use of such motor vehicle.

16. PLAINTIFF is insured under the terms of the aforesaid policy and has complied with all of the conditions of said policy.

17. That the aforesaid collision and the resulting injuries and damages sustained by PLAINTIFF were directly and proximately caused by the negligence and carelessness of DEFENDANTS A and B in the following respects, to-wit:

(a) DEFENDANT A did immediately prior to and at the time of said occurrence drive and operate her motor vehicle at a rate of speed that was high, excessive, and dangerous under the circumstances and conditions then and there existing.

(b) DEFENDANT A failed and omitted to keep and maintain a constant, careful, and vigilant watch and lookout ahead and laterally so as to see and discover the presence and movement of other vehicles at or near the aforesaid location.

(c) DEFENDANT A failed and omitted to stop her motor vehicle, slacken the speed thereof, change the course thereof, swerve the same aside, or sound a warning of her approach and movement, when, in the exercise of the highest degree of care, she could and should have done so and thus and thereby have avoided the aforesaid occurrence and the resulting injuries sustained by PLAINTIFF.

(d) DEFENDANT B did immediately prior to and at the time of said occurrence drive and operate her motor vehicle at a rate of speed that was high, excessive, and dangerous under the circumstances and conditions then and there existing.

(e) DEFENDANT B failed and omitted to keep and maintain a constant, careful, and vigilant watch and lookout ahead and laterally so as to see and discover the presence and movement of other vehicles at or near the aforesaid location.

(f) DEFENDANT B failed and omitted to stop her motor vehicle, slacken the speed thereof, change the course thereof, swerve the same aside, or sound a warning of her approach and movement, when, in the exercise of the highest degree of care, she could and should have done so and thus and thereby have avoided the aforesaid occurrence and the resulting injuries sustained by PLAINTIFF.

WHEREFORE, PLAINTIFF states that she has been damaged, for which damage she prays judgment against DEFENDANTS, and each of them, in such sum as may be fair and reasonable in the premises, but in excess of Twenty-Five Thousand Dollars (\$25,000.00), together with prejudgment interest and her costs in this behalf expended.

\* \* \*

2. To Join or Not Join the Underinsured Motorist Carrier?

Suits against an underinsured motorist carrier differ in at least one significant aspect from suits against an uninsured motorist carrier – the insured cannot join the underinsured motorist carrier in a suit before exhausting all applicable policy limits or obtaining a judgment in excess of all applicable liability coverage. Such suits require the insured meet three conditions before the underinsured motorist insurer is required to pay damages: (1) the insured incurred bodily injury, (2) the injuries occurred as the result of a collision with an underinsured motorist and (3) the insured is “legally entitled” to collect from the owner of the underinsured vehicle. State ex rel. Shelton v. Mummert, 879 S.W.2d 525, 528 (Mo.banc 1994). Therefore, a plaintiff does not possess a viable cause of action against the underinsured motorist carrier until all of the above elements are satisfied. Id.

Once filed, the petition and its language will mirror in many respects the allegations asserted in the typical uninsured motorist pleading. Some differences do exist. An example of such language is listed below:

\* \* \*

12. That the aforesaid motor vehicle insurance policy, Policy No. XXXX provides coverage such that DEFENDANT INSURER must pay insured persons all sums which they are legally entitled to recover for damages, injuries, and medical expenses incurred as a result of the actions of the owner or operator of an underinsured motor vehicle arising out of the ownership, maintenance, or use of such motor vehicle.

13. That at the time of the aforesaid collision, UNDERINSURED MOTORIST was covered under a liability insurance policy in the amount of One Hundred Thousand Dollars (\$100,000.00) issued by LIABILITY INSURER; LIABILITY INSURER has tendered to PLAINTIFF the limits of such policy.

14. That at the time of the aforesaid collision, UNDERINSURED MOTORIST was an underinsured motorist as that term is used and defined in the motor vehicle insurance policy issued to PLAINTIFF by DEFENDANT INSURER; PLAINTIFF was an insured person under said policy thereby rendering DEFENDANT INSURER liable to PLAINTIFF for damages resulting from the negligence of the underinsured motorist.

15. That PLAINTIFF has complied with all conditions precedent for underinsured motorist coverage under the aforesaid motor vehicle insurance policy issued by DEFENDANT INSURER.

\* \* \*

### 3. The Timing of Initiating Suit Against the Uninsured or Underinsured Motorist Carrier

The timing of the bringing of suit is also an issue for counsel to be aware. Timing may play an important role in the litigation of an uninsured or underinsured motorist case as the statute of limitation for personal injury and contract cases is vastly different. Counsel should remember that actions for injury to the person, not arising out of contract, must be commenced within five years of the date of injury. Section 516.120 R.S.Mo.

(2004). Alternatively, actions on a written contract for payment of money shall be commenced within ten years. Section 516.110 R.S.Mo. (2004).

Missouri courts have determined that an insured is not barred from proceeding against her uninsured motorist carrier merely because the five year statute of limitation governing tort claims had expired. Edwards v. State Farm Ins. Co., 574 S.W.2d 505, 506-507 (Mo.App.K.C. 1978). After all, an action on the insurance policy is an action in contract. Hill v. Seaboard Fire & Mar. Ins. Co., 374 S.W.2d 606, 610-611 (Mo.App.K.C. 1963). Accordingly, such claims are governed by the ten-year statute of limitation. Edwards, 574 S.W.2d at 506. Recognizing that an insured must not obtain a judgment against the uninsured motorist to collect under her own policy, the Court in Edwards held that the insured could proceed in a suit against her carrier so long as she could prove in that case that the uninsured motorist would have been liable to her had she pursued the claim. Id. at 506-507; *See also* Messner v. Am. Union Ins. Co., 119 S.W.3d 642, 645-646 (Mo.App.S.D. 2003).

This rule may result in a harsh consequence for the insurer. Should the insured fail to act before the passage of five years, the delay serves to foreclose the insurer from exercising its right to subrogation against the tortfeasor motorist. *See* Edwards, 574 S.W.2d at 508; *See also* Oates, 583 S.W.2d at 717. For example, the Supreme Court directed in Oates:

The insured is not barred from his uninsured motorist claim even though the insured's conduct prevents the company from exercising its subrogation right.

Oates, 583 S.W.2d at 717.

4. Service on the Director

Once filed, the petition and summons may be served on the Director of Insurance. Section 375.906 R.S.Mo. (2004); Section 375.261 R.S.Mo. (2004). Once served, the Director shall mail to the defendant insurance company a copy of the summons and petition by registered or certified mail with return receipt signed by the addressee. Section 375.261; Rule 54.15; *See Grooms v. Grange Mut. Cas. Co.*, 32 S.W.3d 618, 621 (Mo.App.E.D. 2000).

The caption of the petition should direct:

Serve: )  
Director )  
Division of Insurance )  
301 West High Street )  
Jefferson City, Missouri 65101 )

5. Prejudgment Interest

Section 408.040.2 provides for prejudgment interest in certain specified circumstances in tort cases. Section 408.040.2 (R.S.Mo. 2005). However, counsel should recall that the right to recover on an uninsured and underinsured motorist claim is an action in contract – not tort. *See Hill*, 374 S.W.2d at 610-611. Therefore, Section 408.040.2 does not authorize a trial court to award prejudgment interest on uninsured or underinsured motorist claims. *See McKinney v. State Farm Mut. Ins.*, 123 S.W.3d 242, 250 (Mo.App.W.D. 2003).

Section 408.020 provides for prejudgment interest in contract cases. Section 408.020 R.S.Mo. (2004). Missouri courts have read the statute to only award

prejudgment interest on liquidated claims in the absence of an agreement to the contrary. McKinney, 123 S.W.3d at 250. A liquidated claim is “one which is fixed and determined or readily ascertainable by computation or a recognized standard.” Id. In McKinney, the Western District concluded:

The amount of personal injury damages to be awarded are primarily within the discretion of the jury. Personal injury damages are, thus, unclear. Prejudgment interest is not awarded when the amount of damages is unclear.

Id.

C. Choosing Experts and Evidence: Do Your Homework

In a typical uninsured or underinsured motorist case, the investigation and choice of experts and evidence to be used at trial varies little from the traditional motor vehicle collision case. Many of the same options and decisions present themselves to counsel in both cases. However, the practitioner will want to consider the use of several items particular to cases involving an insurance company.

First, utilize the policy of insurance. The policy is, of course, a contract – an agreement which binds the insured as well as the insurer. The policy must always be obtained from the insurer during the course of discovery. And, the trial lawyer should always show to the jury any terms or conditions of the policy at issue – as well as those not at issue. These provisions may include those defining:

- bodily injury
- uninsured motor vehicle
- underinsured motor vehicle

- insured
- the provision(s) directing what the insurer “will pay”
- exclusions
- any provision particular to the issues in your case

Second, utilize requests to admit to narrow the issues for the fact-finder. Identify issues in your case early in the litigation process. Serve discovery on opposing counsel aimed at establishing facts helpful to your case. Sample requests might demand:

1. All statements of Plaintiff, including any written, recorded, transcribed, videotaped, and/or photographed statements.

2. All damage repair estimates of the extent of damage to the underinsured motor vehicle.

3. All statements of any of the witnesses to the occurrence mentioned in the Petition.

4. All photographs, films, videotapes, and motion pictures of Plaintiff.

5. All photographs, films, videotapes, and motion pictures of the vehicles and/or objects involved in the collision or the scene of the occurrence.

6. All medical records and reports regarding the care, treatment, and/or treatment of Plaintiff.

7. All employment records regarding Plaintiff.

8. Copies of all summons, tickets, pleas of guilty, and/or documents regarding charges brought against Defendant and/or the owner and/or operator of the underinsured motor vehicle or their conviction for any

traffic tickets given as a result of the collision mentioned in the Petition.

9. Complete copy of any policy of insurance, including the declarations page, that provided coverage, including underinsured motorist coverage on the vehicle Plaintiff was operating on February 2, 2005.

10. All documents relating to any investigation conducted by this Defendant, its agents, servants, or employees, concerning the events mentioned in the Petition for Damages.

11. The file(s) of any adjuster involved in the processing, oversight, supervision, or other handling of the claims made by Plaintiff mentioned in the Petition for Damages.

12. This Defendant's file concerning Claim No. 10080304.

\* \* \*

Finally, enlist the assistance of a physician to aid your case. As in any personal injury case, the observations and opinions of the treating physician carry a great deal of weight. Contact the physician early – if possible, before the case is filed. Discuss with the doctor his observations of the insured, any inconsistencies noticed in your review of the medical records and statements made by the insured at deposition or during conference. Also, provide the doctor with any records not then in his possession and request that the doctor provide to you a brief written report setting forth opinions that he possesses.

If the doctor is not supportive of your case, retain the services of a physician to review the medical records. The review will assist you in your prosecution or defense of the case by providing incite into medical issues not noticed or completely understood or appreciated by you. Meet in person with the retained physician. Demand that the doctor examine the insured if you plan on requesting the doctor to testify at trial.

D. A Prosecutor's Blueprint for a Successful Trial

The blueprint for any successful trial begins with the opening of the file. Identify potential issues. Review any documents describing the preliminary investigation. Prepare a list of things to accomplish during discovery. Do those things. And, perhaps most importantly, draft your Verdict Director as soon as possible.

1. Pack Power into Opening Statements and Closing Arguments

The differentiating factor between trying these claims and a customary motor vehicle liability case is the fact that “insurance” and insurance coverage is mentioned, discussed and argued before the jury. That fact is crucial. Plaintiff’s counsel is not concerned about how reluctant a jury may be to award damage against a “regular guy” who may or may not possess sufficient coverage to cover the damage suffered by the plaintiff. Indeed, counsel should take every opportunity to remind the jury that he represents a human being in a contractual dispute with an insurer who has in the past accepted premiums without equivocation but is now disputing payment.

Of course, moderation is key. And, counsel must be prepared from *voir dire*, through opening statement, his case, and closing argument to put forward evidence justifying his presence and that of his client in court as well as the position conveyed during closing argument. Again, preparation coupled with knowledge of applicable law

and relevant facts and defenses is vital to any counsel's success – whether the lawyer is representing the insurer or its insured.

## 2. Gain Specific, Ready-to-Use Jury Instructions

As with any motor vehicle injury case, the Missouri Approved Instructions serves as the foundation for jury instructions. In an uninsured motorist case, the insured will want to prepare and submit the following base instructions:

- MAI 2.01 (Explanatory Instruction)
- MAI 2.03 (Order of Instructions)
- MAI 2.02 (Facts Not Assumed)
- MAI 3.01 (Burden of Proof)
- MAI 33.11 (Verdict Director) – in those cases where the insurer is the only defendant OR  
MAI 33.12 (Verdict Director) – in those cases where the insurer and the tortfeasor motorist are joined
- MAI 12.01 (Definition of Uninsured Motor Vehicle)
- MAI 11.03 (Definition of Negligence)
- MAI 4.11 (Damage in Suit against Uninsured Motor Vehicle Insurer only)
- MAI 2.04 (Return of Verdict)
- MAI 36.14 (Verdict Form) – in those case where the insurer is the only defendant OR  
MAI 36.13 (Verdict Form) – in those cases where the insurer and the tortfeasor motorist are joined

Attached to this paper you will find exemplar instructions for your consideration. These instructions were submitted in an uninsured motorist case pending against only the uninsured motorist carrier in the Circuit Court of the City of St. Louis. Counsel will want

to adapt the instructions submitted to fit your fact pattern and disputed issues present in your case. *See* MAI, “How to Use this Book” at XLVII-LIII.

The verdict director proposed by plaintiff in a vexatious refusal case will differ from that submitted in the straight-forward uninsured motorist case. Counsel should be aware that no MAI instruction exists in the vexatious refusal context. However, the Supreme Court approved the following instruction:

Your verdict must be for plaintiff if you believe that defendant State Farm Fire and Casualty refused to pay uninsured motorist benefits without reasonable cause or excuse.

Dhyne v. State Farm Fire & Cas. Co., 188 S.W.3d 454, 459 (Mo.banc 2006). In approving the instruction, the Court remarked that it is “generally sufficient to couch a verdict directing instruction substantially in the language of the statute.” Id.

**INSTRUCTION NO. \_\_\_\_**

Your verdict must be for Plaintiff Jackie Gegg if you believe:

First, Cecil B. Greene was the operator of an uninsured motor vehicle, and

Second, Cecil B. Greene's automobile came into collision with the rear of Plaintiff's automobile, and

Third, Cecil B. Greene was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause damage to Plaintiff.

The phrase "uninsured motor vehicle" as used in this instruction means a motor vehicle which has no bodily injury liability insurance applicable at the time of the collision.

The term "negligent" or "negligence" as used in this instruction means the failure to use the highest degree of care. The phrase "highest degree of care" means that degree of care that a very careful person would use under the same or similar circumstances.

M.A.I. No. 31.11 [1996 Revision]  
M.A.I. No. 12.01 I [1988 Revision]  
M.A.I. No. 17.16 [1973 Revision]  
M.A.I. No.11.03 [1996 Revision]  
M.A.I. No. 19.01 [1986 Revision]  
Offered by Plaintiff

## **INSTRUCTION NO. \_\_\_\_**

### **(1) GENERAL—JURY INSTRUCTIONS**

This instruction and other instructions that I will read to you near the end of this trial are in writing. All of the written instructions will be handed to you for guidance in your deliberation when you retire to the jury room. They will direct you concerning the legal rights and duties of the parties and how the law applies to the facts that you will be called upon to decide.

### **(2) OPENING STATEMENTS**

The trial may begin with opening statements by the lawyers as to what they expect the evidence to be. What is said in opening statements is not to be considered as proof of a fact. However, if a lawyer admits some fact on behalf of his client, the other party is relieved of the responsibility of proving that fact.

### **(3) EVIDENCE**

After the opening statements, the plaintiff will introduce evidence. The defendant may then introduce evidence. There may be rebuttal evidence after that. The evidence may include the testimony of witnesses who may not appear personally but whose testimony may be read or shown to you and exhibits, such as pictures, documents and other objects.

### **(4) OBJECTIONS**

There may be some questions asked or evidence offered by the parties to which objections may be made. If I overrule an objection, you may consider that evidence when you deliberate on the case. If I sustain an objection, then that matter and any matter I order to be stricken is excluded as evidence and must not be considered by you in your deliberations.

### **(5) RULINGS OF LAW AND BENCH CONFERENCES**

While the trial is in progress, I may be called upon to determine questions of law and to decide whether certain matters may be considered by you under the law. No ruling or remark that I make at any time during the trial will be intended or should be considered by you to indicate my opinion as to the facts. There may be times when the lawyers come up to talk to me out of your hearing. This will be done in order to permit me to decide questions of law. These conversations will be out of your hearing to prevent issues of law, which I must decide, from becoming mixed with issues of fact, which you must decide. We will not be trying to keep secrets from you.

#### (6) OPEN MINDS AND NO PRELIMINARY DISCUSSIONS

Justice requires that you keep an open mind about the case until the parties have had the opportunity to present their case to you. You must not make up your mind about the case until all evidence, and the closing arguments of the parties, have been seen or heard. You must not comment on or discuss with anyone, not even among yourselves, what you hear or learn in trial until the case is concluded and then only when all of you are present in the jury room for deliberation of the case under the final instructions I give to you.

#### (7) OUTSIDE INFLUENCES

During the trial you should not remain in the presence of anyone who is discussing the case when the court is not in session. Otherwise some outside influence or comment might influence a juror to make up his/her mind prematurely and be the cause of a possible injustice. For this reason, the lawyers and their clients are not permitted to talk with you until the trial is completed.

#### (8) JUROR RESEARCH PROHIBITED

Your decision must be based only on the evidence presented to you in the proceedings in this courtroom. You should not conduct your own research or investigation into any issues in this case. You should not visit the scene of any of the incidents described in this case. You should not conduct any independent research of any type by reference to textbooks, dictionaries, magazines, the use of the Internet or any other means.

#### (9) FINAL INSTRUCTIONS

After all of the evidence has been presented, you will receive my final instructions. They will guide your deliberations of the issues of fact you are to decide in arriving at your verdict.

#### (10) CLOSING ARGUMENTS

After you have received my final instructions, the lawyers may make closing arguments. In closing arguments, the lawyers have the opportunity to direct your attention to the significance of evidence and to suggest the conclusions that may be drawn from the evidence.

## (11) DELIBERATIONS

You will then retire to the jury room for your deliberations. It will be your duty to select a foreperson, to decide the facts and to arrive at a verdict. When you enter into your deliberations, you will be considering the testimony of witnesses as well as other evidence. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to any of the parties, the inclination of the witness to speak truthfully or untruthfully and the probability or improbability of the witness' statements. You may give any evidence or the testimony of any witness such weight and value as you believe that evidence or testimony is entitled to receive.

## (12) NOTETAKING

Each of you may take notes in this case, but you are not required to do so. I will give you notebooks. Any notes you take must be in those notebooks only. You may not take any notes out of the courtroom before the case is submitted to you for your deliberations. No one will read your notes while you are out of the courtroom. If you choose to take notes, remember that notetaking may interfere with your ability to observe the evidence and witnesses as they are presented.

Do not discuss or share your notes with anyone until you begin your deliberations. During the deliberations, if you choose to do so, you may use your notes and discuss them with other jurors. Notes taken during trial are not evidence. You should not assume that your notes, or those of other jurors, are more accurate than your own recollection or the recollection of other jurors.

After you reach your verdict your notes will be collected and destroyed. No one will be allowed to read them.

**INSTRUCTION NO. \_\_\_\_**

In returning your verdict you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

**INSTRUCTION NO. \_\_\_\_\_**

As you remember, the court gave you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be accorded their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

**INSTRUCTION NO. \_\_\_\_**

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

**INSTRUCTION NO. \_\_\_\_\_**

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

**INSTRUCTION NO. \_\_\_\_\_**

If you find in favor of plaintiff, then you must find plaintiff's damages in such sum as you believe will fairly and justly compensate plaintiff for any damages you believe she sustained and is reasonably certain to sustain in the future that the collision directly caused or directly contributed to cause.

**VERDICT**

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff Jackie Gegg for personal injuries against defendant State Farm Fire & Casualty Company, we, the undersigned jurors find in favor of:

\_\_\_\_\_ (Plaintiff Jackie Gegg) or (Defendant State Farm Fire & Casualty Company)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Jackie Gegg.

We, the undersigned jurors, find plaintiff was damaged in the sum of \$ \_\_\_\_\_ (*stating the amount*).

Note: All jurors who agree to the above findings must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____