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# The Uninsured Motorist Report

By Ed Rowan, Esquire

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## UM/UIM Bad Faith takes a hit in the latest Alabama Supreme Court Decision

On February 29, 2008, the Alabama Supreme Court dealt a blow to Bad Faith in the UM/UIM context. In *Ex parte Safeway Ins. Comp. of Ala.*, No. 1061613, 2008 WL 542039 (Ala. Sup. Ct. Feb 29, 2008) the facts were as follows:

- Drunk driver;
- \$15,000 in medical expenses;
- \$10,000 offer by Safeway.

The Plaintiff filed a UM action and added a count of Bad Faith failure to pay insurance and Bad Faith in Safeway's duty of fair dealing. Safeway filed a Motion to Dismiss alleging lack of subject matter jurisdiction, and filed an affidavit disputing the allegations of drunk driving, and disputing the extent and causation of Plaintiff's injuries. The Plaintiff filed a response and an affidavit of the Plaintiff's attorney stating facts that supported the allegations of Bad Faith.

The trial court denied Safeway's motion, and in an unusual procedural move, Safeway petitioned the Court for a Writ of Mandamus. The Supreme Court granted the writ and held in favor of Safeway. The Court stated that Safeway presented evidence that the damages were in dispute. Hence, the claim was not **RIPE**, and thus the trial court lacked

### SUBJECT-MATTER JURISDICTION.

The Court cited their earlier opinion, *Pontius v. State Farm Mut. Auto. Ins. Comp.*, **915 So. 2d 557 (Ala. 2005)**, where a similar holding was first opined:

"Without a **determination of** whether **liability** exists on the part of the underinsured motorist and the **extent of the plaintiff's damages**, a claim of bad-faith failure to pay or breach of contract is premature." *Pontius*, at 563-64.

The *Safeway* Court reasoned that the damages "were not fixed," which precluded any action for Bad Faith. In his concurring opinion, Justice Murdock disagreed that the doctrine of **Ripeness** was the correct predicate for the dismissal of such an action: "I believe that we unnecessarily confuse our jurisprudence that may have unforeseen consequence in future cases." *Safeway* at \*9.

In their holding, the Ala. Supreme Court almost seems to have cut off any action for Bad Faith **until a judgment has been obtained** against the uninsured motorist and/or the UM/UIM carrier. However, the Court left open their ability to modify this decision, by stating that these cases shall be analyzed on a case-by-case basis.

### GENERAL RULES OF STACKING UM/UIM COVERAGES:

- Driver-insured by definition under "multi-vehicle" policy=**UP TO THREE COVERAGES**
- Driver-insured and separate single-vehicle policies = **NO LIMITATION**
- Passenger under "multi-vehicle" policy = **UP TO THREE COVERAGES.**
- Passenger and separate single-vehicle policies = **no stacking--ONE COVERAGE**

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### **WHAT MUST THE PLAINTIFF DO TO ESTABLISH BAD FAITH IN A UM/UIM CONTEXT:**

1. **Establish clear liability**--Full documentation (accident report; recorded statements of witnesses; affidavits of witnesses)
2. **Establish uncontroverted medical bills and medical causation**—immediate treatment; a clear diagnosis from the MD; no pre-existing medical problems (Obtain an Affidavit from the treating MD)
3. **Document everything and put the burden on the UM Carrier**—after providing all of the above, require the UM Carrier to state to you in writing if liability or damages are contested, and if so, to please explain their reasoning.
4. **Don't forget about the *National Insurance Association v. Sockwell*, 829 So.2d 111 (Ala. 2002) decision**—Abnormal Bad Faith—if the UM/UIM carrier denies the claim con-

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