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OHIO TRIAL

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"Pay No Attention To The Man Behind The Curtain" – Trying Cases Against UM/UIM Carriers

"[A]ny direct claim against an insurer...necessarily involves the introduction of the insurance policy and its terms..."

I. INTRODUCTION

Like the Wizard behind the theatrical machinery of Oz, the insurance industry has long hidden "behind the curtain," in hopes that the jury will think that the tortfeasor, rather than his or her liability carrier, will have to pay any damages awarded to the plaintiff in a personal injury action: "The general rule is that in a personal injury or death action, evidence that the defendant carries insurance protecting him from liability to third persons on account of his negligence is inadmissible, and an improper subject of cross-examination."[1] The insurance industry is now also seeking to wrap itself in this cloak of invisibility in the uninsured/underinsured motorist coverage arena.

This article explores some of the issues that arise when the tortfeasor is uninsured or underinsured and is a named defendant along with the plaintiff's own UM/UIM carrier. Specifically, the questions posed are whether the UM/UIM carrier should be permitted to hide from the jury the fact that it is a party defendant, and whether the jury should be informed of the UM/UIM policy limits. If, on the other hand, the UM/UIM carrier is aware of an action against the tortfeasor, and elects not to participate in that action, then the issue addressed herein will not arise and the UM/UIM carrier will be "bound by any final judgment rendered as a result of such lawsuit that determines the liability of the underinsured motorist to the insured."[2] The issues addressed herein may arise in several situations, including the following:

1) The claim against the tortfeasor is not settled, and the UM/UIM carrier requires its insured to file a lawsuit against the tortfeasor to protect its subrogation rights, and the UM/UIM carrier is also a party;

2) The claim against the tortfeasor is settled (or the UM/UIM carrier does not require a lawsuit against the tortfeasor), such that the UM/UIM carrier is the sole named defendant.

II. A CLAIM FOR UM/UIM COVERAGE IS A CONTRACT CLAIM, SUCH THAT THE PLAINTIFF MUST PROVE THE EXISTENCE OF THE CONTRACT

The Ohio Supreme Court has long held that "the right to recover under an uninsured motorist policy is on the contract, not in tort." *Motorist Ins. Co. v. Tomanski* (1971), 27 Ohio St.2d 222, 223. The principle was reaffirmed in *Landis v. Grange Mutual Ins. Co.* (1998), 82 Ohio St.3d 339: "Insured's claim for underinsured motorist benefits was a contract claim, not a tort claim; thus, the insured could recover prejudgment interest under the statute governing interest on contracts...." A plaintiff, therefore, to prevail on a claim for UM/UIM coverage, must prove to the jury that he or she had a contract with the UM/UIM

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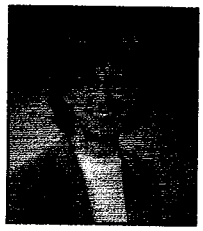

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carrier which obligated the UM/UIM carrier to pay damages to the plaintiff that he or she is legally entitled to recover from an uninsured or underinsured tortfeasor. If the plaintiff fails to do so, then the UM/UIM carrier will be entitled to a directed verdict.

In a UM/UIM policy, typical contract language provides as follows:

> We [the insurer] will pay those damages...because of bodily injury sustained by an insured person ...that the insured is legally entitled to recover from the owner or operator of the uninsured [underinsured] auto.

Because this contract language only obligates the UM/UIM carrier to pay damages which the insured is legally entitled to recover from an uninsured or underinsured motorist, the insured must also prove the elements of the claim against the tortfeasor.[3] These elements include negligence, proximate causation, and damages,[4] and the UM/UIM carrier, therefore, has a right to assert the same defenses that the tortfeasor could have asserted, *i.e.*, has the right to try to prove that the insured is not legally entitled to any damages from the tortfeasor.[5]

Thus, in UM/UIM claims, the existence of the UM/UIM carrier's contractual obligations, as well as the tortfeasor's negligence, must be proven by the plaintiff. Proof of the actual terms of the contract of insurance, therefore, is a critical aspect of the plaintiff's case. Specifically, the plaintiff must adduce evidence that the defendant UM/UIM carrier contracted with the plaintiff to provide UM/UIM coverage, and, therefore, the contract must be admitted into evidence.

The UM/UIM carrier, however, will typically seek to hide "behind the curtain," as it does in third-party claims, and will file a motion *in limine* to exclude any reference to, or evidence of, the contract of insurance, and will attempt to lead the court "down the yellow brick road" by contending that the evidence is (1) precluded by Rule 411, (2) irrelevant to the issues of the case, and (3) overly prejudicial. As will be discussed below, evidence of the UM/UIM policy is directly relevant to material elements of the plaintiff's claim for UM/UIM coverage, is not prohibited by Evidence Rule 411, and is not overly prejudicial.

III. THE RULES OF EVIDENCE ALLOW THE CONTRACT TO BE INTRODUCED AS EVIDENCE

UM/UIM carriers often cite to the decision in *Tucker v. McQuery*,[6] where the trial court was confronted with a motion *in limine* to exclude evidence of the contract of insurance and the existence of the UM/UIM coverage. The *Tucker* court allowed the plaintiff to disclose the name of the insurance company to the jury as the real party of interest, but held that providing more information than that would be inappropriate.[7] Similarly, the Seventh District Court of Appeals found that it was unclear how evidence of the UM/UIM policy was relevant to the issues of the case, and, therefore, limited the plaintiff to merely mentioning the fact that the insurance company was a party.[8] Anecdotally, trial judges have tended to follow this rationale, limiting the plaintiff's attorney to informing the jury that the insurance company has an "interest in the case," without explaining what that interest is. Obviously, this does not provide a true picture of the UM/UIM carrier's interest to the jury. Without some definition by the court, the jury will likely assume that the defendant-insurance company is the liability carrier for the tortfeasor, rather than the UM/UIM carrier for the plaintiff, when, as noted at the outset, it is improper to make any reference to the fact that the tortfeasor may or may not have liability insurance.

The position that evidence of the existence of the UM/UIM coverage is admissible is based on three primary arguments. First, Evidence Rules 411, 401, 402 and 403 allow evidence of the UM/UIM contract. Second, the Supreme Court has indicated that evidence of insurance should only be excluded when it is sought to be admitted to prove negligence, and should not be excluded when it is relevant to some other issue in the case. Third, there is persuasive authority from the highest courts of two other states that evidence of the existence of the UM/UIM coverage is admissible. Finally, Ohio case law supports this conclusion.

A. Evidence Rule 411 Does Not Exclude Evidence of UM/UIM Coverage

Evidence Rule 411 is the rule most often relied upon to exclude evidence of insurance coverage, and provides as follows:

> Evidence that a person was or was not insured against liability is not admissible upon the issue of whether he acted negligently or otherwise wrongfully. *This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose*, such as proof of agency, ownership or control, if controverted, or bias or prejudice of a witness. [Emphasis added.]

In the first place, this rule, by its express terms, only relates to evidence that a defendant was insured by liability coverage, and only excludes that evidence when its purpose is to show negligence. Thus, although evidence of liability insurance is generally not admissible to show that a defendant was negligent, it can be admitted to show something else. Importantly, then, Rule 411 has no application to the issue whether evidence of UM/UIM coverage is admissible, and, even if it did, it would not support its exclusion.

In UM/UIM claims, as discussed above, the plaintiff must prove not only that the tortfeasor was at fault, but also that the UM/UIM carrier is contractually obligated to pay any damages the plaintiff is entitled to recover from the tortfeasor.[9] Evidence of the UM/UIM coverage, therefore, is admissible in UM/UIM cases not to show negligence, *but to show that the plaintiff has a contractual right to recover monies from the UM/UIM carrier*. Accordingly, evidence of the UM/UIM coverage is admissible under Evid. Rule 411.

B. Evidence Rules 401 and 402 Allow Evidence of UM/UIM Coverage

Even if the evidence is proffered to show something other than negligence, it must, of course, still be relevant to some issue in the case to be admissible. To be relevant, Evid. R. 401 states that evidence must be probative of a fact that is of consequence to the action. Whether or not the plaintiff is contractually entitled to UM/UIM coverage is, of course, of consequence to a UM/UIM cause of action, because it is an essential element of a claim for UM/UIM coverage. Evidence of UM/UIM insurance, therefore, such as the policy, is probative of the fact that the plaintiff is contractually entitled to recover monies from the UM/UIM carrier, such that it is relevant. If coverage has been declared by a court, or the UM/UIM carrier is not disputing coverage, then this established or admitted fact, which is still an essential element of the plaintiff's claim, should be disclosed to the jury, just as the tortfeasor's admis-

sion of negligence would be, and should not be hidden "behind the curtain" like the Wizard of Oz.

C. Evidence Rule 403 Does Not Exclude Evidence of UM/UIM Coverage

Even though it is relevant, evidence of UM/UIM insurance must also pass the Evidence Rule 403(B) balancing test.[10] Under Rule 403(B), relevant evidence is admissible unless its probative value is substantially outweighed by "the dangers of unfair prejudice, of confusion of the issues, or of misleading of the jury."

In the first place, as shown above, the jury will be misled only if the evidence is excluded, not if it is admitted. Insurers, however, will claim prejudice, arguing that the juries are reckless when awarding damage verdicts against insurance companies.[11] If this argument is accepted, however, then all parties who fear that no jury can be fair to them, for whatever reason, should be able to hide behind a façade or straw man. This is not how America's judicial system operates. If a party is afraid of juror prejudice, it has the right to question the jurors under oath as to the existence of any such prejudice, and to remove any jurors who are prejudiced – it does not have the right, however, to mislead the jury into thinking that the case is really against someone else with whom the party thinks the jury will sympathize.

In fact, the Ohio Civil Rules recognize that a "target" defendant is not allowed to hide behind someone else. For example, if a lawsuit is filed against an employer, a large corporation, based on the negligence of an employee, the employer may, of course, bring the employee into the lawsuit and seek indemnification from him or her. The corporation may do this in the hope that sympathy for the employee will mitigate any prejudice towards it. Civ.R. 14(A), however, mandates that, in that event, the plaintiff is entitled to try the case against the corporate employer separately from the corporate employer's indemnification claim against the employee, as explained in the 1970 Staff Note to that Rule:

> Rule 14(A)...provide[s] that "If the third-party defendant is an employee...of the third-party plaintiff, the court shall order a separate trial...." The purpose of the language is to prevent a target defendant from impleading its impecunious agent....

Moreover, the UM/UIM carrier's claim of prejudice is negated by the Ohio Supreme Court's recognition that juries know full well that most automobile injury claims are paid by insurance companies, not the at-fault tortfeasor.[12]

Thus, evidence of the existence of the UM/UIM contract between the parties simply allows the jury to understand the case before it, and does not unfairly prejudice the UM/UIM carrier. In sum, because the Rule 403 dangers of misleading the jury by excluding the evidence is greater than the dangers inherent in admitting it, the evidence should be admissible under Rule 403(B).

IV. OHIO SUPREME COURT JURISPRUDENCE ALLOWS EVIDENCE OF UM/UIM COVERAGE

Even in the politically sensitive arena of medical malpractice, the Ohio Supreme Court has repeatedly held that evidence of insurance is admissible, even evidence that a defendant has liability insurance, when that evidence would clarify the issues for the jury.[13] "[C]ounsel's comments or suggestion that the defendant in a medical malpractice action is insured are proper under certain circumstances,"[14] including:

- Incidental to an admission of liability;
- To impeach or contradict a medical practitioner's testimony;
- To show bias of a witness;
- As part of the *voir dire* examination of jurors as to interest in or association with an insurance company;[15]
- When elicited or disclosed by defendant or his counsel.

Perhaps the best language from the Ohio Supreme Court in support of the admission of evidence of the UM/UIM contract is set forth in *Ede*, in which the Court stated as follows:

> Too often courts have a Pavlovian response to insurance testimony – immediately assuming prejudice...The second sentence of Evid.R. 411 exists for a reason – it recognizes that testimony regarding insurance is not always prejudicial...It is naive to believe that today's jurors...do not already assume in a malpractice case that the defendant doctor is covered by malpractice insurance...The legal charade of protecting juries from information they already know keeps hidden from them relevant information that could assist them in making their determinations...Our Rules of Evidence are designed with truth and fairness in mind; they do not require that courts should be blind to reality.[16]

This language should be included in every brief filed by a plaintiff's attorney who contends that the UM/UIM insurance company should be properly identified to the jury as the party defendant in the case.

It is also interesting to note that, in those jurisdictions where the physician's insurer is a proper co-defendant in a medical malpractice case, the jury may be apprised of the fact that the insurance carrier is a co-defendant even though this will undoubtedly inform the jurors that the physician medical practitioner in the case is insured.[17]

V. INSURANCE COMPANIES ARE NAMED PARTIES IN MANY TYPES OF CASES

Insurance companies are also often named parties to legal actions as subrogated carriers. In fact, in a recent Columbiana County case, the trial judge ruled that the jury was to be informed of not only the total amount of medical expenses incurred by the plaintiff, but also the amount paid by the intervening insurance company, Anthem Blue Cross, as well as the amount paid by Nationwide Insurance under plaintiff's automobile medical payments insurance, even though Nationwide was not a party to the action. Thus, jurors are routinely informed of the fact that an insurance company is a party to a legal action. It is interesting to note that, in this case, the defendant's liability carrier, Westfield Insurance, argued that the jury should be told of plaintiffs' insurance, while resisting any erosion of the rule that the jury should not be told of the existence of the defendant's liability insurance.[18]

VI. OTHER STATES ADMIT EVIDENCE OF UM/UIM INSURANCE

The highest courts of other states have ruled that evidence of the existence of the UM/UIM contract, and the UM/UIM policy limit, is relevant and admissible

in UM/UIM actions. The Iowa Supreme Court permitted evidence of the UM/UIM coverage limits of the plaintiff's own UM/UIM coverage.[19] The Court stated, common sensically, that "any direct claim against an insurer on a contract dispute necessarily involves the introduction of the insurance policy and its terms."

Similarly, the Supreme Court of Montana has also allowed the terms of a UM/UIM policy to be admitted for the purpose of showing that a plaintiff properly complied with the policy by settling with the tortfeasor's liability carrier before bringing the UM/UIM claim.[20] Thus, other jurisdictions have already concluded that a plaintiff has a right to admit into evidence the existence of the UM/UIM contract, and its terms and coverage limits.

Moreover, as will be shown below, at least one Ohio appellate court has held that evidence of the UM/UIM coverage is admissible.

VII. *REED V. STATE FARM*

In *Reed v. State Farm* (June 20, 1997), Case No. L-96-038, 1997 Ohio App. Lexis 2630, 97-LW-2388 (6th Dist. Ct. App., Lucas County), the trial court in a wrongful death action (1) bifurcated the claims against State Farm for UM/UIM coverage from the trial against the tortfeasor, (2) allowed State Farm to waive its subrogation rights against the tortfeasor (apparently in order to eliminate the appearance of conflict of interest), and (3) allowed State Farm to provide free legal representation to the tortfeasor at the trial. The *Reed* trial court also prohibited counsel from informing the jury:

- That plaintiff had a contract for uninsured motorist coverage with State Farm and that State Farm was a named party-defendant in the case;
- That State Farm's lawyer was defending the tortfeasor;
- That State Farm waived its right of subrogation against the tortfeasor.

The court of appeals in *Reed*, based upon the policy language, held that the trial court had erred in bifurcating the trial:

> By separating appellant's claims against State Farm and Crow [the tortfeasor], and allowing State Farm to agree to be bound by any jury verdict against Crow, the trial court effectively removed State Farm as a party in this lawsuit, a result which is in violation of the express terms of the parties' contract for uninsured motorist coverage....

With regard to the issue whether it was proper to allow State Farm to provide a defense for the tortfeasor, again the court of appeals referred to the terms of the policy, and held that this was permissible:

> In this case, appellant's uninsured motorist policy clearly states that if an uninsured driver is sued by its insured, State Farm has the right to "defend on the issues of the legal liability of and the damages owed by such owner or driver." The terms of the policy do not limit State Farm to providing a defense only for itself.... This court finds that State Farm is entitled by the terms of appellant's uninsured motorist policy to provide a defense for Crow, an uninsured driver....

The court of appeals also addressed the question of State Farm's alleged conflict of interest in representing the tortfeasor[21] (possession of "confidential information" concerning its insured, the plaintiff), by relying on "State Farm's open participation in the lawsuit [to] eliminate any possibility of a conflict of interest or hidden bias toward State Farm on the part of Crow:"

> The issue of possible prejudice due to the jury's knowledge of State Farm's involvement in the case is therefore rendered moot. State Farm's participation as a party defendant will reveal to the jury that State Farm and [the tortfeasor] share a continuing and present pecuniary interest in the outcome of this lawsuit, with or without cross-examination of [the tortfeasor] on the specific issue of bias.

Importantly, however, the court of appeals also held that "the trial court abused its discretion when it ordered appellant not to present any evidence of State Farm's involvement in the case to the jury." To summarize, the court of appeals in *Reed*:

1) Reversed the bifurcation of the claims against State Farm (uninsured motorist case), and required the tort and contract claims to be tried together;
2) Allowed State Farm to provide free legal representation to the tortfeasor at trial; and
3) Allowed the plaintiff to present evidence of State Farm's involvement in the case to the jury.

VIII. THE OHIO SUPREME COURT HAS ALREADY ENDORSED THE DISCLOSURE OF THE CONTRACT AND THE POLICY LIMITS TO THE JURY

In *Schaefer v. Allstate* (1996), 76 Ohio St.3d 553, 553, the trial court "instructed the jury that it could award Mrs. Schaefer up to $100,000 for her injuries as well as up to $100,000 to Mr. Schaefer for his loss of consortium claim" under the uninsured motorist provision of their contract. While the case is principally cited for the principle that a claim for loss of consortium was (for a limited period of time) subject to a separate per person policy limit of UM/UIM coverage, it has further import in its tacit approval of the disclosure to the jury of the existence and limits of the plaintiffs' UM/UIM motorist coverage.

In fact, UM/UIM carriers who resist such disclosure should take note of the fact that in *Reed, supra*, the court of appeals held that State Farm was liable for the entire $900,000 verdict (even though the UM/UIM policy limit was only $500,000), because it failed to disclose the policy limits to the jury, or to raise the policy limit as a defense in its pleadings or any pretrial motion. Thus, this holding may even prompt the UM/UIM carrier to seek to have its UM/UIM limits admitted not evidence.

IX. CONCLUSION

To recover on a claim for UM/UIM coverage, the plaintiff must prove the existence of a contractual right to recover monies from the UM/UIM carrier.

Evidence of the existence of the UM/UIM contract is, therefore, not merely relevant to the plaintiff's claim as that term is defined in Evidence Rule 402, it is an essential element of that claim. Moreover, Evidence Rule 411 does not exclude evidence of UM/UIM coverage because that evidence is not being offered to show negligence. Further, under Evidence Rule 403, the danger of misleading the jury is greater when evidence of UM/UIM coverage is excluded than when it is admitted, and any fears of jury prejudice are properly taken care of by appropriate *voir dire* and the use of juror challenges to remove any jurors who may be prejudiced. Finally, the Supreme Court has expressed a strong preference towards admitting evidence of insurance coverage when that evidence is relevant to some issue in the case, and has implicitly endorsed the disclosure of the existence and limits of the UM/UIM coverage to the jury.

Finally, it should be noted that the Ohio State Bar Association has recently formulated new jury instructions for UM/UIM cases, which instructions expressly inform the jury of the fact that the case is against the UM/UIM carrier, not the uninsured or underinsured tortfeasor:

> This case is known as an [uninsured, underinsured] motorist claim. [Defendant insurance company's name] provided [plaintiff's name] with [uninsured, underinsured] motorist coverage. Under this coverage, [plaintiff's name] is entitled to recover damages from [defendant insurance company's name] caused by the negligence of an [uninsured, underinsured] motorists.
>
> You will consider this case as if [plaintiff's name]'s claims were against the [driver, owner]of the other vehicles.

The Editor's Notes to this jury instruction cite both *Tucker*[22] *and Gaul*[23] as supportive authority, and also give explicit direction and commentary:

1. The judge should give this instruction at the beginning of the trial.
2. It is unsettled whether the judge should instruct the jury as to the payments/policy limits of the underinsured tortfeasor or the policy limits of the uninsured/underinsured policy.

Although the OSBA instructions are a step in the right direction, the following additional capitalized language would further clarify the issue for the jury, and keep the breach of contract as the primary focus of the case:

> This case is known as an [uninsured, underinsured] motorist claim. [Defendant insurance company's name] provided [plaintiff's name] with [uninsured, underinsured] motorist coverage. Under this coverage, [plaintiff's name] is entitled to recover damages from [defendant insurance company's name] caused by the negligence of an [uninsured, underinsured] motorists.
>
> [IN DETERMINING THE AMOUNT OF DAMAGES DUE UNDER THE INSURANCE CONTRACT BETWEEN PLAINTIFF AND HIS/ HER INSURANCE COMPANY,] You will consider this case as if [plaintiff's name]'s claims were against the [driver, owner] of the other vehicle.

Interrogatories to the jury should also be used to help clarify the issue.[24]

In conclusion, to answer the first question posed by this article, the jury should be made aware of the fact that the UM/UIM carrier is a named defendant, and is the "real party in interest." Given that insurance companies are quick to argue "real party in interest" when seeking to bring the plaintiff's subrogated medical carriers into a case, plaintiffs' attorneys should also use that argument to expose the man "behind the curtain." The second question, concerning whether to instruct the jury of the amount of the UM/UIM policy limits, is "unsettled," at least according to the Editor's Notes to the OSBA Jury Instructions, but, as shown above, the holdings in *Schaefer* and *Reed* both support the introduction of this evidence, and, in light of the holding in *Reed*, the UM/UIM carrier may itself want to inform the jury of those policy limits.

1. "Admissibility of Evidence That Defendant Carries Insurance," 4 ALR2d 761, §3 [citations omitted].

2. *Motorists Mut. Ins. Co. v. Handlovic* (1986), 23 Ohio St.3d 179, 492 N.E.2d 417. *See also* COUCH ON INSURANCE 3D, 124:26.

3. *Kurent v. Farmers Inc. of Columbus, Inc.* (1991), 62 Ohio St.3d 242, 245-246, 581 N.E.2d 533.

4. *Id.* at 245-246 (damages); *Gaul v. Westfield Nat'l Ins. Co.* (Aug. 20, 1999), Lake App. No. 97-L-278, unreported, 1999 WL 689942.

5. *Id.*, citing *State Farm Mut. Auto Ins. Co. v. Webb* (1990), 54 Ohio St.3d 61, 61-62, 562 N.E.2d 132, 133 n.2.

6. (1999), 107 Ohio Misc.2d 38, 736 N.E.2d 574.

7. *Id.* at 42.

8. *Deagan v. McLaughlin* (Nov. 30, 2001), Mahoning App. No. 99-C.A.-287, unreported, 2001 WL 1539342; *see also Gaul*, 1999 WL 689942 at *3 (Eleventh District Court of Appeals excluding evidence of UM/UIM coverage).

9. *Kurent, supra*, at 245-246.

10. See *Ede v. Atrium South OB-GYN, Inc.* (1994), 71 Ohio St.3d 124, syllabus, 642 N.E.2d 365.

11. Evidence of insurance has been said to make juries "'reckless in awarding damages' as they will be paid 'not by the defendant, but by a supposedly well-pursed and heartless insurance company that has been paid for taking the risk.'" *Tucker*, 107 Ohio Misc. at 42. Also, evidence that the defendant insurance company has actually taken premiums in exchange for providing UM/UIM insurance to the plaintiff may even further tip the jury in favor of the plaintiff.

12. *Ede*, supra, at 127.

13. *See Davis v. Immediate Medical Services, Inc.* (1997), 80 Ohio St.3d 10, 17, 684 N.E.2d 292, 297; *Ede*, 71 Ohio St.3d at 128 (both holding that an expert witness's commonality of malpractice insurance interest with the defendant is admissible to show bias on the part of the expert).

14. "Medical Malpractice Insurance," 71 ALR4th 1025, §2(a).

15. "Juror Connection with Insurer," 9 ALR5th 102 (1993).

16. *Ede*, supra at 127.

17. *See*, "Medical Malpractice Insurance," 71 ALR4th 1025, *citing Kelley v. Wiggins* (1987) 291 Ark 280, 724 SW2d 443, 71 ALR4th 1005 [medical malpractice case against physician and insurers of clinic and hospital]; *Peirce v. Smith* (1974), 301 So.2d 805, cert. den. 315 So.2d 193 (Florida) [jury may be apprised of existence of an insurance carrier as a real party in interest in medical malpractice actions].

18. *Sendling v. Peterson*, Case No. 00 CV 556 (Columbiana County Common Pleas).

19. *Leuchtenmacher v. Farm Bureau Mutual Insurance* (Iowa 1990), 461 NW.2d 291.

20. *Dill v. Montana* Thirteenth Judicial District Court (Mont. 1999), 979 P.2d 188.

21. *See also* COUCH ON INSURANCE 3D, 124:24, Defense by Insurer on Behalf of Tortfeasor, and 11 Am Jur. Trials § 76, Uninsured Motorist Claims.

22. *Supra* at footnote 13.

23. *Supra* at footnote 5.

24. Suggested Interrogatories to the Jury:

> 1. What amount of damages for bodily injury do you find were sustained by [Plaintiff] insured?
>
> 2. Do you find Plaintiff insured is legally entitled to recover damages from the owner or operator of the uninsured [underinsured] auto? OT