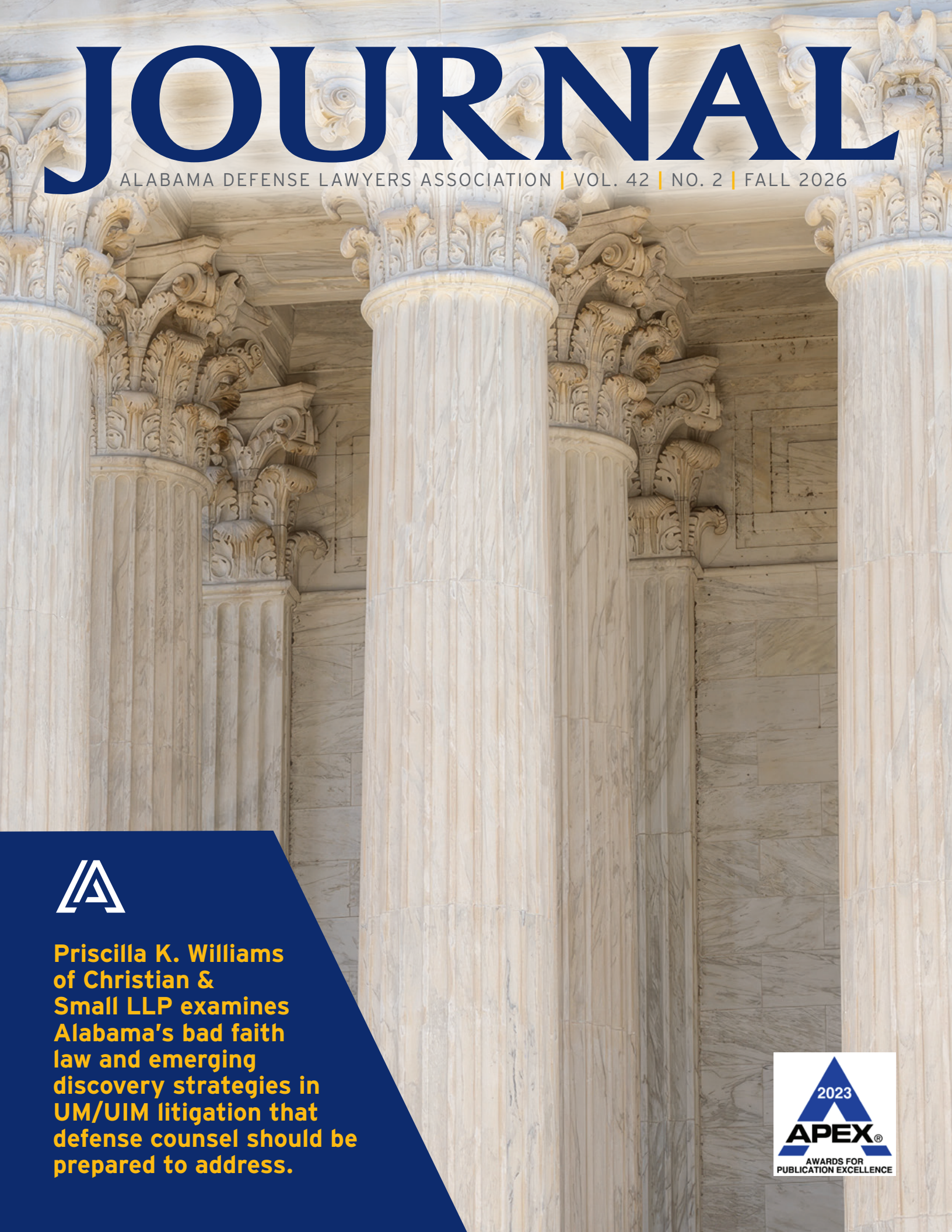
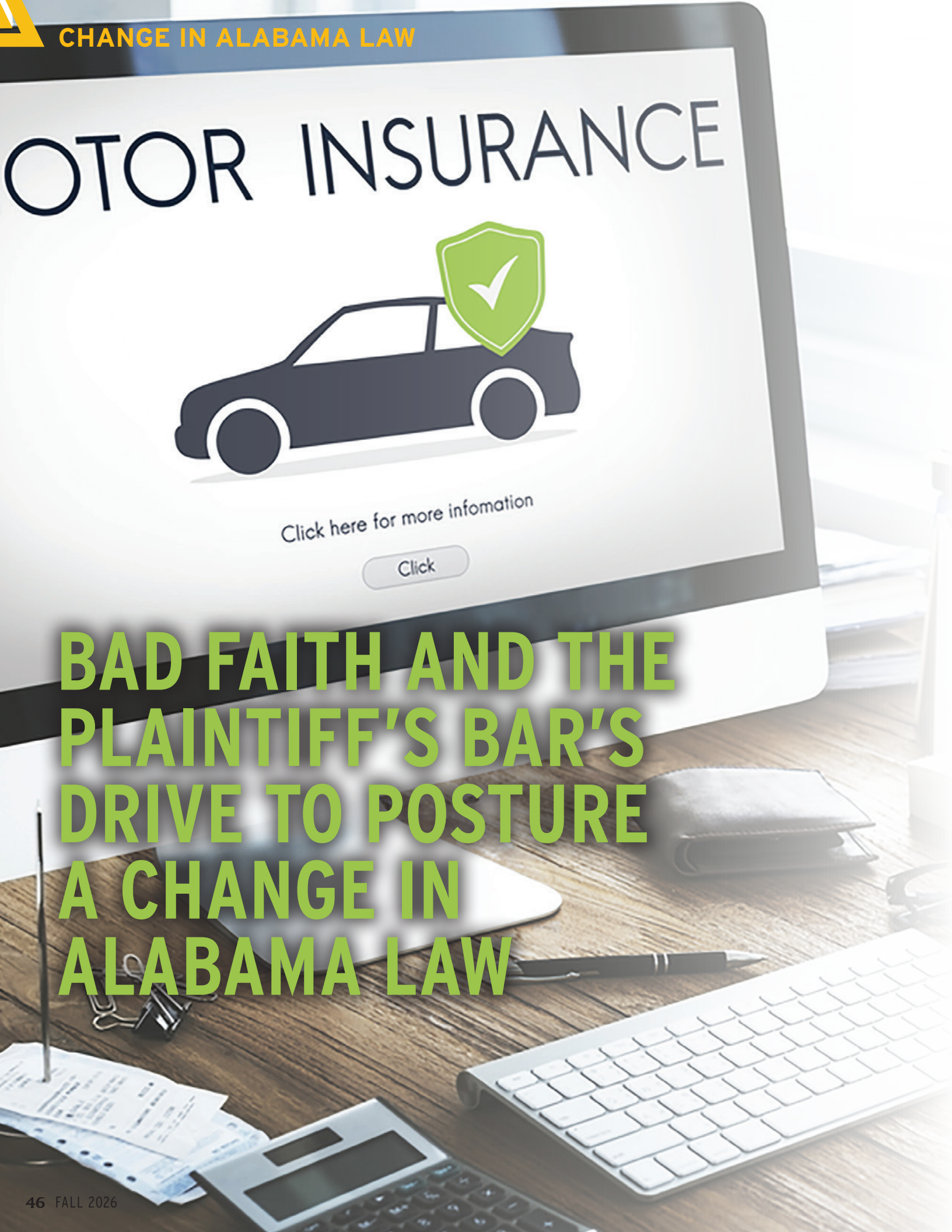
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Priscilla K. Williams of Christian & Small LLP examines Alabama's bad faith law and emerging discovery strategies in UM/UIM litigation that defense counsel should be prepared to address.

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BAD FAITH AND THE PLAINTIFF'S BAR'S DRIVE TO POSTURE A CHANGE IN ALABAMA LAW

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It is no secret that the Plaintiff's Bar detests the current state of Alabama Bad Faith law. In recent years, however, their distaste has gone from grumblings among colleagues to policy changes in discovery that have sent up alarm bells for observers among the Defense Bar. These constitute deliberate foundation-laying for bad faith in not just some cases, but in all cases in which Uninsured or Underinsured Motorist coverage is involved. Moreover, these discovery agitations do not commence at some point along the way when plaintiff's counsel determines that UM/UIM is going to be an obstacle to resolution. Rather, the bad faith build-up has grown into an agenda that some firms are pushing from day one. The first whispers began in discovery propounded to UM/UIM carriers by one firm in particular… But steadily, this discovery policy has expanded to other firms and solo practitioners as well.

This article is an effort to spread the word about a rising tide that the entire Defense Bar needs to be aware of and prepared to counter to ensure the law on Bad Faith does not change for the worse. To understand the significance of this possible paradigm shift, a little history is in order.

Legally entitled to recover

And necessarily, it begins with the statutory language.

Alabama Code § 32-7-23 reads in pertinent part:

No automobile liability policy or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state… unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death… for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom; provided,…[1]

Any policy that attempts to contravene or narrow the coverage provided by this statute is unenforceable. [2]

1983

Quick v. State Farm Mut. Auto. Ins.[3] saw plaintiffs who were passengers seeking UM coverage under their driver's policy. State Farm agreed coverage was owed but that the amount was not yet determined. Plaintiffs then alleged bad faith failure to pay and sought punitive damages. The trial court granted State Farm's Motion for Summary Judgment, holding that,

[T]here is an inherent difference in uninsured motorist coverage and first party insurance. The provisions of uninsured motorist coverage reorder the normal postures between an insured and an insurer. Thus, until liability of the uninsured motorist has been determined, the insurer and the insured occupy an adversary position toward each other.[4]

Therefore, a plaintiff must, as a prerequisite, be "legally entitled to recover as damages" from the defendant, which has been interpreted to mean that the insured must be able to establish fault on the part of the uninsured motorist, which gives rise to damages, and must be able to prove the extent of those damages. In a direct action by the insured against the insurer, the insured has the burden of proving in this regard that the other motorist was uninsured, legally liable for damage to the insured, and the amount of this liability. In affirming the summary judgment, the Court stated:

Thus, there can be no breach of an uninsured motorist contract, and therefore no bad faith, until the insured proves that he is legally entitled to recover. We opine that the trial court correctly ruled in favor of defendant State Farm on the bad faith claim, as the evidence proves that the amount of damages had not been determined. [5]

It became clear at this point that a complaint alleging a count for UIM benefits is NOT the same thing as a breach of contract. It may be easy to consider them the same cause of action, but they are in fact not. Plaintiff's burden of proof for a UIM claim is substantively and qualitatively different than breach of contract claim.

1991

The Alabama Supreme Court took a deeper dive in developing bad faith and UIM Law in 1991 as it took on "Duty to Pay".

LeFevre v. Westberry,[6] saw a plaintiff hit head-on by an uninsured motorist. State Farm ultimately offered policy limits, but only if Plaintiff signed a release. Plaintiff sued for breach of contract, bad faith refusal to pay, and intentional infliction of emotional distress.

In affirming the trial court's grant of State Farm's Motion for Summary Judgment, the Alabama Supreme Court quoted ***Quick,***

There is an inherent difference in uninsured motorist coverage and first party insurance. The provisions of uninsured motorist coverage reorder the normal postures between an insured and an insurer. Thus, until liability of the uninsured motorist has been determined, the insurer and the insured occupy an adversary position toward each other.[7]

and, clarifying, went on to observe:

Uninsured motorist coverage in Alabama is a hybrid in that it blends the features of both first-party and third-party coverage. The first-party aspect is evident in that the insured makes a claim under his own contract. At the same time, however, third-party liability principles also are operating in that the coverage requires the insured to be 'legally entitled' to collect–that is, the insured must be able to establish fault on the part of the uninsured motorist and must be able to prove the extent of the damages to which he or she would be entitled. The question arises: when is a carrier of uninsured motorist coverage under a duty to pay its insured's damages?[8]

This hybrid functionality was also a consideration the Court grappled with in L***ambert v. State Farm***[9]***,*** also coincidentally decided in 1991, in setting forth the mechanics for fronting or consenting to a tortfeasor's settlement offer with the Plaintiff. The ***LeFevre*** court continued:

There is no universally definitive answer to this question or to the question when an action alleging bad faith may be maintained for the improper handling of an uninsured or underinsured motorist claim; the answer is, of course, dependent upon the facts of each case. Clearly, there is a covenant of good faith and fair dealing between the insurer and the insured, as with direct insurance, but the insurer and the insured occupy adverse positions until the uninsured motorist's liability is fixed; therefore, there can be no action based on the tort of bad faith base on con-

duct arising prior to that time, only for subsequent bad faith conduct.[10]

The Court unequivocally states that until the alleged uninsured/underinsured motorist's liability is fixed, there can be no action based on the tort of bad faith prior to that time, only for subsequent bad faith. "The question, of course, is how must an insured establish his or her entitlement to recover?" [11]

The need is apparent, therefore, for some procedure that will allow the insurer to aggressively defend the claim and attempt to defeat the claim, or at least to minimize the size of the award, while concomitantly fulfilling the duties imposed on it by law and the obligations imposed on it by its contract with the insured.[12]

The procedure the court fashioned to govern this need is as follows:

An insurer must..

1. Diligently investigate the facts, fairly evaluate the claim, and act promptly and reasonably.
2. Conclude its investigation within a reasonable time and should notify its insured of the action it proposes.
3. Mere delay does not constitute vexatious or unreasonable delay in the investigation of a claim if there is a bona fide dispute on the issue of liability.
4. Mere delay in payment does not rise to the level of bad faith if there is a bona fide dispute on the issue of damages.
5. If the uninsured motorist carrier refuses to settle with its insured, its refusal to settle must be reasonable.

Number four is the most important for our purposes: delay in payment does not make bad faith if there is a bona fide dispute on the issue of damages. The court wrote:

For a period of approximately 15 months, State Farm received various conflicting reports on the extent of LeFevre's damages. The first report indicated that LeFevre had sustained a fracture to his right foot. Five months later, he had further surgery on the ankle. When he returned to the clinic three months after the surgery, the doctor reported that he seemed to be doing fairly well." Four months later the orthopaedic clinic report indicated that he had a 50% loss of function of the foot and that he continued to have complications that possibly would require amputation.[13]

As the Court observed, "Alabama has imposed a rather heavy burden on a bad faith claimant; a cause of action for bad faith arises only 'where the insurer has acted with an intent to injure.'"[14] ***Quoting King v. National Found. Life Ins. Co.***; ***Alfa Mut. Ins. Co. v. Smith***. The ***LeFevre*** court concluded that, in that case, the plaintiff had not presented sufficient evidence to prove that State Farm acted with an intent to injure him by delaying the offer of the entire policy limits until the damages were conclusively ascertained.

2005

In 2005, the Alabama supreme court commented on ripeness and subject matter jurisdiction.[15]

In ***Pontius v. State Farm Mut. Auto. Ins. Co.*** the Personal Representative filed suit against the minor driver of the other vehicle and her parents. State farm intervened, after which point she amended her complaint to seek UIM and bad faith failure to pay. The Defense filed a motion to dismiss. ***Pontius*** held that Plaintiff did not have to obtain a judgment against the Defendant before she added her carrier as a defendant in her claim for UIM benefits.

Safeway II held that because Safeway I relied on Pontius and sought dismissal under 12(b)(1) lack of subject matter jurisdiction/ripeness and NOT 12(b)(6), there was no error in the trial court's denying the motion to dismiss. Also notable is the fact that Plaintiff did not allege breach of contract in his complaint, just bad faith.

"Where a legitimate dispute exists as to liability, whether under primary coverage or uninsured motorist coverage, a tort action for bad faith refusal to pay a contractual claim will not lie." ***Bowers v. State Farm Mut. Auto. Ins. Co.***[16] Breach of an insurance contract is an element of a bad-faith-failure-to-pay claim. ***Ex part Alfa Mut. Ins. Co.***[17]. "There can be no breach of an insurance contract providing uninsured-motorist coverage until the insureds prove that they are legally entitled to recover." ***Ex parte State Farm Mut. Auto. Ins. Co.***[18] Given these authorities, the Court in ***Pontius*** held that the trial court properly dismissed the claims as not ripe for adjudication.

2008

Next comes the circuitous (and problematic) history of ***Safeway*** I and II. In the former, where a claim manager's affidavit showed that Plaintiff's damages were in dispute, i.e., needed medical records to establish the extent of damages, the trial court lacked subject matter jurisdiction for a breach of contract and bad faith due to ripeness.[19]

The latter ***Safeway*** Court disagreed that bad faith is jurisdictional but rather held that proving fault and damages is an evidentiary/elemental prerequisite to bad faith failure to pay.[20]

Safeway II **held that because** ***Safeway I*** **relied on Pontius and**

sought dismissal under 12(b)(1) lack of subject matter jurisdiction/ ripeness and NOT 12(b)(6), there was no error in the trial court's denying the motion to dismiss. Also notable is the fact that Plaintiff did not allege breach of contract in his complaint, just bad faith.

Considering this holding, how are practitioners supposed to consider ***Pontius*** in light of ***Safeway II***? Are ***Pontius*** and ***Safeway I*** outliers?

What about ***Quick*** and ***LeFevre***'s, "There can be no breach of an uninsured motorist contract, and therefore no bad faith, until the insured proves that he is legally entitled to recover?" [21]

Perhaps there's a distinction because those cases were decided on motions for summary judgment while ***Pontius*** and ***Safeway*** were decided on a Motions to Dismiss.

Perhaps the Court thought Safeway would file a motion for judgment on the pleadings in the trial court. After all, the ***Pontius*** Court went out of its way to explain that 12(b)(2) preserves the failure to state a claim defense and that argument can be made in a motion for judgment on the pleadings.

Back at the trial court, Safeway initially sought to sever and stay the bad faith claim and then subsequently filed a 12(b)(6) motion to dismiss… not a 12(c)(1) motion for judgment on the pleadings. Ultimately, the trial court severed and stayed the bad faith claim but denied both the original 12(b)(6) motion as well as a renewed 12(b)(6) motion.

In 2015, the UIM portion of the case went to trial and a Plaintiff's verdict was returned on the general verdict form found in APJI 15.52: "We, the jury, find in favor of the plaintiff, Tara Abner, Personal Representative of the Estate of Richard Thomas Kimbrough, deceased, and against the defendant, Safeway Insurance Company of Alabama, Inc. and assess the plaintiff's damages at one hundred six thousand eight hundred sixty-six & 36/100 ($106,866.36)."

A look to our sister state to the north offers a field guide as to how this might play out. Several years after the Tennessee Supreme Court decided ***Mullins v. Miller***, 683 S.W.2d 669 (Tenn. 1984), in which it construed the Tennessee statute providing UIM coverage to include coverage for punitive damages. Thereafter, the Tennessee legislature amended Tennessee's UIM statute to provide for the recovery of ***compensatory damages only. See Carr v. Ford***, 833 S.W. 2d 69 (Tenn. 1992). Similarly, the prerogative to make such a change in Alabama law is reposed in the Legislature and not in the Court.

After all, from a public policy standpoint, we want Plaintiffs to be made whole. Yet making someone whole inherently implies compensatory damages, not punitive damages. That begs the question: Is the public policy behind punitive damages to deter and punish truly being served by assessing punitive damages against an insurer?

At this point, the uninsured motorist's liability and Plaintiff's damages have been fixed. Thus, only now, at this point, can Safeway's conduct be evaluated for breach of contract or bad faith… correct? Because as the ***LeFevre*** court stated: the insurer and the insured occupy adverse positions until the uninsured motorist's liability is fixed; therefore, "***there can be no action based on the tort of bad faith based on conduct arising prior to that time, only for subsequent bad faith conduct.***"[22]

Let me say that again: **"there can be no action based on the tort of bad faith based on conduct arising prior to that time, only for subsequent bad faith conduct."**

But, what then was Safeway's bad faith conduct in Safeway? ***Initially denying the UIM claim, of course!***

After the UIM verdict, Safeway filed a Motion for Summary Judgment on the bad faith count. This is after a 30(b)(6) representative is deposed and other discovery on bad faith is conducted. The trial court denied the motion for summary judgment along with a subsequent motion to reconsider the denial, and the bad faith portion of the case was tried in 2022.

The Jury returned a plaintiff's verdict fixing the Plaintiff's compensatory damages at $200,000.00 and fixing punitive damages at $145,000.00.

As you would expect, following the verdict, post-judgment motion practice took place and ultimately Safeway filed its appeal from the final judgment raising three issues:

1. Whether it was entitled to judgment as a matter of law on bad faith since Plaintiff could not prove a breach of the UIM policy?
2. Whether it was entitled to judgment as a matter of law on bad faith because Plaintiff did not present evidence of bad faith conduct subsequent to the UIM verdict, i.e., liability and damages became fixed?
3. Whether the court will uphold its consistent refusal to recognize negligent/ wanton claims handling of insurance claims?

The Supreme Court affirmed, no opinion, the trial court's judgment. Safeway filed a petition for rehearing, which ADLA joined with an amicus brief. But the Court denied the petition for rehearing. So finally, in 2025, twelve years after ***Safeway*** I was decided, ***Safeway*** II is finally closed.

Thus, as things currently stand, there is no change in caselaw precedent that the uninsured/underinsured motorist's liability and extent of insured's damages are elemental requirements for a breach of contract/ bad faith claim against a UIM carrier; AND that the insured and insurers are adversaries until liability and damages are fixed; AND that any bad faith conduct has to occur after this point, not prior.

Nonetheless, the Plaintiff's bar remains undeterred, as we all know from recent trends in outset discovery.

Considering this history and the practice decisions/ramifications in ***Safeway*** II, where does this leave practitioners?

Relying on ***Pontius*** and ***Safeway I***, do you file a 12(b)(6) motion or under ***Quick*** and ***LeFevre,*** do you file a Motion for Summary Judgment? Or both? Remember for State Farm in Pontius, that decision seemingly made no difference because despite the title of the motion, the court considered its 12(b)(6) as a 12(h)(3), lack of subject matter jurisdiction.

Meanwhile, ***Pontius*** involved a known driver, while ***Safeway I and II*** involved an unknown/phantom driver. Should that distinction matter? If an insurer's obligation to pay UM/UIM is not triggered until Plaintiff proves he is legally entitled to recover, and we know that means establishing not only the fault of the other driver, but also the extent of Plaintiff's damages, what difference does it make if the other driver's identity is known or not?

In opacity is opportunity, and the Plaintiff's bar has not been idle. It seems they are actively looking for ways to either create a new cause of action for negligent claims handling to be recognized, or for what happened in *Safeway II* for breach of contract, bad faith, and UIM to be all tried, at best in the same action; and at worst, simultaneously.

This drive for a change in the law is an effort we on the Defense Bar have almost certainly collectively been slow to recognize and one against which we have been slower to coordinate our counter. This article seeks to toll the bells and light the beacon.

Proposed practice considerations:

Smith v. Nationwide Mut. Ins. Co.[23] is illustrative if not instructive.

"There can be no action based on the tort of bad faith based on conduct arising prior to that time, only for subsequent bad faith conduct."

1. Plaintiff Voss made a pre-suit demand of Nationwide's insured, Smith.
2. Nationwide offered Smith's policy limits but State Farm, Voss's insurer, fronted Nationwide's offer, and Voss then filed suit against Smith. State Farm did not pursue subrogation against Smith.
3. Jury returned a $1.9 million verdict for Voss.
4. Smith then sued Nationwide for, ***inter alia***, negligent/wanton bad faith failure to settle AND sued State Farm, ***inter alia***, for negligent/wanton abuse of process by fronting.
5. The District Court granted Nationwide's Motion to Dismiss and the 11th Circuit affirmed.

Both nationwide and State Farm filed 12(b)6) motions which the District Court granted.

1. The court assumed without deciding that fronting under ***Lambert*** is a judicial process
2. Not only must a defendant wrongfully use a judicial process but the wrongful use must occur after the process was initiated.

Doing nothing is, by definition, not an act in furtherance of an improper motive subsequent to the issuance of the process.

To establish a claim for abuse of process under Alabama law a plaintiff must show (1) malice, (2) an ulterior purpose and (3) a wrongful use of process.[24]

The Alabama Supreme Court has held that for an abuse of process not only must the defendant wrongfully use a judicial process but the wrongful use must also occur after the process was initiated.[25] That means Smith must show that State Farm committed, "some act in furtherance of the improper motive subsequent to the issuance of the process."[26]

In her Complaint, Smith claimed that the ***Lambert*** fronting procedure was the judicial act and that State Farm "had an ulterior purpose when it initiated the fronting process." And she unequivocally alleged that after State Farm initiated the process, it did nothing.

Meanwhile, Nationwide negotiated a settlement but was unsuccessful because state Farm Fronted.

Smith argued Nationwide should have conditioned any proposed settlement not only on payment of her $25k liability limits, but also on condition that Voss would not attempt to obtain a judgment exceeding $125k (combined liability and UIM limit).

In Alabama, an insurer can be held liable for refusing, negligently or in bad faith, to accept a proffered settlement.[27] The issue is that Smith's claim was refuted by the allegations of her complaint because she alleged Nationwide actually did negotiate a settlement. It offered to pay the $25,000.00 policy maximum to Voss and in return, Voss would completely release Smith from any future claims by him against her. The attempted settlement would have left Voss free to collect the $100,000.00 policy maximum of underinsured motorist coverage under his State Farm policy. The only reason Nationwide was unsuccessful in settling on those terms, is because State Farm fronted the settlement. By fronting, of course, State Farm could have subrogated its claims against Smith, the alleged underinsured motorist; but it chose not to pursue subrogation.

Smith attempted to salvage her claim against Nationwide by asserting that Alabama law required it to negotiate a settlement that would have left her liable for no more than $125,000.00. She argued Nationwide had to "condition any proposed settlement with [Voss] not only on the payment of [$25,000] in liability limits, but also on the condition that Voss would not attempt to obtain a judgment in excess of $125,000 or collect a judgment in that amount against Smith." That way, State Farm would have had no reason to object, because it would have retained its subrogation rights. And Smith would not have been at risk of a million-dollar judgment.

But Smith was not able to cite a single Alabama decision, or a decision from any state, creating such a duty. Nor did her complaint allege that if Nationwide had suggested such a settlement—a settlement that would have exposed her to $100,000.00 in liability instead of the $0 exposure in liability she faced under the settlement Nationwide did negotiate—she would have accepted it.

The Plaintiff's Bar's prosecution of this agenda is increasingly evident in discovery both at the outset and after a front/consent decision is made. The discovery example below was issued after the UIM carrier consented to the alleged underinsured motorist's settlement with the Plaintiff:

Practice Considerations

1. Admit that [redacted] was at fault for this wreck. (See [redacted] Depo at 35:12-14; attached as Ex. A).

2. Admit that [redacted] was driving under the influence at the time of the wreck. (See Ex. A at 16:4-7).

3. Admit that driving under the influence is reckless.

4. Admit that driving under the influence endangers other drivers.

5. Admit that Plaintiff was injured in the wreck. (See [redacted]).

6. Admit that Plaintiff is legally entitled to recover (as those terms are defined within the [redacted] policy) medical expenses from [redacted]

7. Admit that Plaintiff is legally entitled to recover (as those terms are defined within the [redacted] policy) a reasonable amount for pain and suffering from [redacted]

8. Admit that [redacted] current settlement offer to Plaintiff is [redacted]

9. Admit that [redacted] owes Plaintiff the duties to act in good faith and to deal fairly with Plaintiff.

10. Admit that [redacted] received notice of Plaintiff's underinsured motorist claim on July 26, 2021.

11. Admit that [redacted] is required to diligently investigate the facts of Plaintiff's claim in the ordinary course of its business as an insurance company.

12. Admit that [redacted] is required to evaluate Plaintiff's claim in the ordinary course of its business as an insurance company.

13. Admit that [redacted] is required to complete the investigation and evaluation referenced in Requests 18 and 19 within a reasonable time.

14. Admit that [redacted] must notify its insured of the action it proposes to take with regard to Plaintiff's underinsured motorist claim.

15. Admit that [redacted] performed no investigation into Plaintiff's underinsured motorist claim in its ordinary course of business as an insurance company.

1. Admit that Tortfeasor was at fault for this wreck. (see
2. Admit that Tortfeasor was driving under the influence at the time of the wreck.
3. Admit that driving under the influence is reckless.

4. Admit that driving under the influence endangers other drivers.
5. Admit that Plaintiff was injured in the wreck.
6. Admit that Plaintiff is legally entitled to recover (as those terms are defined within the _(carrier)___ policy) medical expenses from_____.
7. Admit that Plaintiff is legally entitled to recover (as those terms are defined within the ___(carrier)___ policy a reasonable amount for pain and suffering from _____.
8. Admit that _____ current settlement offer to Plaintiff is _____.
9. Admit that _____ owes Plaintiff the duties to act in good faith and to deal fairly with Plaintiff.
10. Admit that_____ received notice of Plaintiff's underinsured motorist claim on July 26, 2021.
11. Admit that _____ is required to evaluate Plaintiff's claim in the ordinary course of its business as an insurance company.
12. Admit that _____ is required to diligently investigate the facts of Plaintiff's claim in the ordinary course of its business as an insurance company.
13. Admit that _____ is required to complete the investigation and evaluation referenced in Requests 18 and 19 within a reasonable time.
14. Admit that _____ must notify its insured of the action it proposes to take with regard to Plaintiff's underinsured motorist claim.
15. Admit that _____ performed no investigation into Plaintiff's underinsured motorist claim in its ordinary course of business as an insurance company.

Let's wargame it.

Suit has been filed. Your client, the UIM carrier, and the tortfeasor, have both been named.

Hypothetical One: Tortfeasor has pleaded guilty to Driving Under the Influence related to the Accident that is the subject of the suit, which is a rear-end collision. The liability policy is a minimum limits policy of $25,000.00. If the Tortfeasor offers her limits, do you consent or advance?

1. Does it make a difference as to what Plaintiff's injuries are? Or can the decision be made just with knowledge of the DUI?
2. Assume there was an obvious acute injury like a broken bone. How does this change the analysis?
3. What if the injury was more the typical soft-tissue injuries like neck and back pain?
4. Do retail meds make a difference?

Hypothetical Two: The tortfeasor is still driving under the influence. As the UIM carrier, you have decided to consent to the tortfeasor's settlement for a soft tissue injury when treatment lasted 4-6 months and retail meds are $15,000. You are preparing for trial when the Plaintiff tells you he is dropping the negligence claim and just pursuing wantonness. After all, he has the guilty plea for the DUI off Alacourt and does not need the tortfeasor's testimony for wantonness... or does he?

How do you attempt to minimize Plaintiff's damages if compensatory damages are no longer on the table and it is just punitive damages? In other words, the type of injury, the amount of treatment, Plaintiff's pain and suffering, does not matter. So, do you seek to exclude that evidence in a ***motion in limine*** as no longer being relevant?

Would it be a mistrial argument for defense counsel to argue, we know we are on the hook for whatever damages you award, but the purpose behind punitive damages in this case would be to ***punish and deter*** driving under the influence. That purpose would not be fulfilled by awarding punitive damages against "ABC" insurance company.

Take Alabama Pattern Jury charge 15.52 is the charge in which the Carrier only is a party:

Plaintiff (name)says (he/she) (had a policy of insurance/was covered by a policy of insurance) with defendant (name of defendant), and the policy has what is commonly called underinsured motorist coverage. An underinsured motorist is a person who has liability insurance, but (name of plaintiff) says the amount of insurance is not enough to make (him/her) whole.

(Name of Plaintiff) says (name of other driver) (negligently/wantonly) drove a (car/truck/etc.) and caused (him/her) harm. (Name of plaintiff) says (name of other driver) was an underinsured motorist. Because (name of other driver) did not have enough liability insurance coverage, (name of plaintiff) says (he/she) can recover under (his/her) policy with (name of defendant).

To recover, (name of plaintiff) must prove to your reasonable satisfaction from the evidence all of the following:

1. That (name of plaintiff) (had an insurance policy/was covered by an insurance company) in effect with (name of defendant) and the policy

In opacity is opportunity, and the Plaintiff's bar has not been idle. It seems they are actively looking for ways to either create a new cause of action for negligent claims handling to be recognized, or for what happened in Safeway II for breach of contract, bad faith, and UIM to be all tried, at best in the same action; and at worst, simultaneously.

Nonetheless, the Plaintiff's bar remains undeterred, as we all know from recent trends in outset discovery.

had underinsured motorist coverage;

2. That (name of other driver) had liability insurance;
3. That (name of other driver) (negligently/wantonly) drove a (car/truck/etc.); and,
4. That (name of other driver)'s (negligent/wanton) conduct caused (name of plaintiff)'s harm.

If (name of plaintiff) proves these things you will find for him/her) unless (name of defendant) proved an affirmative defense. If (name of defendant) proved an affirmative defense, you must find for it.

If you find for (name of plaintiff), you must then determine what amount of money to award (him/her). When deciding how much. Money to award, the amount of (name of other driver)'s liability insurance and the amount of (name of plaintiff)'s underinsured motorist insurance are not important.

Another discovery feature employed by the Plaintiff's bar is **disguising requests for admission as interrogatories** (highlighted below):

1. State the name, job title and address of the person answering these interrogatories.
2. Is this Defendant's name correctly stated in the complaint on file in this case? If not, state the correct way this Defendant should be designated as a party defendant in an action at law;
    a. at the time of the occurrence made the basis of this lawsuit; and
    b. at the time these interrogatories are answered.
3. State whether or not this Defendant issued a policy of automobile liability insurance, including uninsured/underinsured motorist coverage, to the Plaintiff on the occasion made the basis of this lawsuit. If so:
    a. state whether such policy was in full force and effect at the time of the occurrence made the basis of this lawsuit; and
    b. state whether you had proper notice and information regarding the occurrence made the basis of this lawsuit.
4. With regard to the policy of insurance issued to the Plaintiff by this Defendant on or before the date of the occurrence made the basis of this lawsuit, state:
    a. the policy number;
    b. the effective dates of coverage;
    c. the name, address and job title of the employee or agent of the defendant who issued or wrote the policy;
    d. the scope and amount of coverage; and
    e. produce and attach to your answers and responses to this discovery a copy of such policy of insurance.
5. Subsequent to the issuance of original policy referred to in your answer to the preceding interrogatory, was the original policy amended, changed or otherwise modified? If so, for each change state:
    a. the substance thereof;
    b. the effective date; and
    c. the date the insured first became aware of such change.
6. Subsequent to the issuance of the original policy, was the policy renewed? If so, state:
    a. the date of such renewal; and
    b. the authority under which it was renewed.
7. State specifically and in detail every reason why this Defendant has refused to pay Plaintiff's claims under the policy of insurance issued by Defendant to the Plaintiff.
8. If any documents were used to prepare said answers to interrogatories or from which any information was gained to prepare said interrogatories, attach a true and correct copy of each document to your answer.
9. State whether med-pay coverage is available to the Plaintiff under any of the insurance policies issued by this Defendant. If so,
    a. state what payment have been made by this Defendant;
    b. state the amount and date of said payment and to whom said payment was made; and
    c. state the reason why this Defendant has not made payments under the med-pay provisions.
10. State the name, address and telephone number of each person whom you plan to call as an expert witness at the trial of this case, and state the subject matter upon which each said expert is expected to testify, the substance of the facts or opinion to which each said expert is expected to testify, a summary of the grounds for each such opinion, and the substance of the testimony which you would expect each such expert to give if called as a witness to this case.

Yet another is **putting more mass on requests for production**:

1. All non-privileged portions of the claim file pertaining to the incident.
2. All claim files pertaining to other claims that Plaintiff has made during the entire time that they have been insured by you (*note: this request does not seek information pertaining to the subject claim.)
3. All activity log notes pertaining to other claims that Plaintiff has made during the entire time that he has been insured by you (*note: this request does not seek information pertaining to the subject claim.)
4. All written communications to Plaintiff relating to the incident.
5. Surveillance video of Plaintiff.
6. Photographs of the incident and/or roadway.
7. Photographs of Plaintiff's vehicle.
8. Photographs of all other vehicles involved in the accident.
9. Photographs of Plaintiff.
10. All repair estimates pertaining to the vehicle being operated by Plaintiff at the time of the incident.

11. All repair invoices showing actual cost of repairs to the vehicle being operated by Plaintiff at the time of the incident.
12. All repair estimates pertaining to the vehicle being operated by any other drivers at the time of the incident.
13. All repair invoices showing actual cost of repairs to the vehicle being operated by any other drivers at the time of the incident.
14. Statements obtained from any and all drivers, persons, witnesses, etc. regarding the incident made the basis of this suit.
15. All policies of insurance which will, or may, provide underinsured/uninsured motorist coverage to Plaintiff in connection with the incident.
16. All declaration pages certifying the policy limits of all policies of insurance which will, or may, provide underinsured motorist coverage to Plaintiff in connection with the incident.
17. All applications for insurance signed by Plaintiff.
18. All reservation of rights letters to Plaintiff relating to the incident.
19. All denial letters to Plaintiff relating to the incident.
20. All materials received pursuant to the subpoena.
21. All of Plaintiff's medical records obtained pursuant to medical authorization, subpoena or otherwise.
22. All of Plaintiff's medical records reflecting treatment that occurred before the incident.
23. All expert reports prepared in connection with this case.
24. Entire file of all experts that you intend to call to testify at the trial of this case.
25. Current curriculum vitae of all experts that you intend to call to testify at the trial of this case.
26. A list of each case in which your expert has rendered an opinion or given testimony in the past (10) years.
27. All evidence that you intend to use at trial.
28. All PowerPoint or other similar computer-generated presentations that you intend to use at trial.
29. All PowerPoint or other similar computer-generated presentations that you intend to use at trial.
30. All digital animations that you intend to use at trial.

Finally, yet another tactic is making the requests for admission more precise.

1. Admit that the Plaintiff qualifies for uninsured/underinsured motorist coverage as defined by the policy issued to Plaintiff, _____, on the occasion that made the basis of this suit.
2. Admit that Plaintiff, _____, had paid all premiums on the policy which insured the vehicle on the occasion that made the basis of this suit.
3. Admit that Plaintiff, _____, had complied with all of the provisions in the policy issued by you on the motor vehicle Plaintiff occupied on the occasion that made the basis of this suit.

Clearly, these discovery are propounded with an intent to build the case toward bad faith.

Further still, I have recently learned of plaintiffs objecting to Motions for extensions of time to opt out, with court facilitation of subsequent motion practice thereon. Perhaps more troublingly, it is also becoming increasingly the norm for the Plaintiff's attorney to seek 30(b)(6) testimony from the UIM insurer. What used to be an easy motion to quash (at least when there is no dispute, the policy was in full force and effect on the date of loss), and an equally easy order granting said motion, is no longer the case. I am aware of at least two instances from different judicial circuits where the trial judge has denied motions to quash corporate representative testimony from an insurer in a UM/UIM case. And, because trial courts have wide latitude to control discovery, the availability of recourse by a petition for a writ of mandamus is unknown. Such testimony creates an easy path for the Plaintiff's bar to improperly shift focus away from the uninsured/underinsured motorist's conduct and instead onto the carrier, i.e., negligent/wanton claims handling – which is still not a cognizable cause of action in Alabama – and bad faith.

Members of the Defense Bar answering discovery and defending these cases through to trial should be aware of the Plaintiff's Bar's efforts, should wargame how responding to discovery, defending corporate representative depositions, and conducting motion practice could posture this case for a change in Alabama Bad Faith law per the Plaintiff's Bar's agenda. This topic should be the subject of close coordination among the Defense Bar in the next few years at both the strategic and tactical level. We neglect this matter at the peril of the status quo on which we and so many of our clients rely.

Endnotes

1 Ala. Code § 32-7-23(a).
2 *See Walker v. GuideOne Specialty Mut. Ins. Co.,* 834 So. 2d 769 (Ala. 2002).
3 *Quick v. State Farm Mut. Auto. Ins. Co.,* 429 So. 2d 1033 (Ala. 1983).
4 *Id.* at 1035.
5 *Id.*
6 *LeFevre v. Westberry*, 590 So. 2d 154 (Ala. 1991)
7 *Quick*, 429 So. 2d at 1033.
8 *Id.* at 159.
9 *Lambert v. State Farm*
10 *Id.* at 159.
11 *Id.* at 160.
12 *Id.*
13 *Id.* at 161.
14 *Quoting King v. National Found. Life Ins. Co.,* 541 So. 2d 502, 505 (Ala. 1989); *Alfa Mut. Ins. Co. v. Smith,* 540 So. 2d 691 (Ala. 1988).
15 *Pontius v. State Farm Mut. Auto. Ins. Co.,* 915 So. 2d 557 (Ala. 2005).
16 *Bowers v. State Farm Mut. Auto. Ins. Co.*, 460 So. 2d 1288, 1290 (Ala. 1984).
17 *Ex part Alfa Mut. Ins. Co.*, 799 So. 2d 957 (Ala. 2001
18 *Ex parte State Farm Mut. Auto. Ins. Co.*, 893 So. 2d 1111,1115 (Ala. 2004).
19 *Ex parte Safeway, Ins. Co.*, 990 So. 2d 344 (Ala. 2008).
20 *Ex parte Safeway Ins. Co. of Ala. Inc.*, 148 So. 3d 39 (Ala. 2013).
21 *LeFevre*, 590 So.2d at 158 (*quoting Quick v. State Farm Mut. Auto. Ins. Co.,* 429 So. 2d. 1033 1035 (Ala. 1983)).
22 *Id.* at 159.
23 *Smith v. Nationwide Mut. Ins. Co.*, 799 Fed. Appx. 768 (11th Cir. Feb. 4, 2020)
24 *Triple J Cattle, Inc. v. Chambers,* 621 So. 2d 1221, 1225 (Ala. 1993).
25 *C.C. & J., Inc. v. Hagood*, 711 So. 2d 947, 950 (Ala. 1998).
26 *Id.* at 951. (quoting 27 A.L.R. 3d 1202 (1207) (1969).
27 *Waters v. American Cas. Co.,*73 So. 2d 524, 528 (Ala. 1953).



Priscilla Williams *is a partner at Christian & Small, where her practice focuses on transportation, insurance, premises liability, and construction defect matters. A seasoned trial attorney, she previously served as a staff attorney and judicial assistant to the Honorable James "Jim" H. Roberts, Jr. Priscilla was recently named a Fellow of the American Bar Foundation, a peer-nominated honor limited to one percent of licensed attorneys in each jurisdiction.*