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Insurance Law

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I. INTRODUCTION

Decisions concerning insurance have multiplied in recent years in New Mexico. Changes have occurred with regard to naming insurance companies as parties,[1] the stacking of insurance policies,[2] suing insurance companies directly,[3] and in many other ways.[4] In addition, a new insurance code became effective in New Mexico in January of this year.[5] Alterations in the code include a provision for a private cause of action for violations of the Unfair Insurance Practices Act,[6] something which did not previously exist.[7]

This is the first time the annual review issue has included an article on insurance law. Therefore, the author has chosen to include decisions from a broader time span than that ordinarily utilized. Also, certain aspects of the revised insurance code will be discussed where appropriate.[8]

II. TO BE OR NOT TO BE A PARTY

Both plaintiffs and defendants alike have grappled with the problem of when, and under what circumstances, an insurance company may be named as a party to a lawsuit. The question presents itself in numerous ways. For example, if an insurance company has been named as a party plaintiff because of subrogation rights, the defendant's insurer may be added as a party. Alternatively, the plaintiff may wish to sue the insurer directly for some alleged cause of action, such as for a bad faith failure to pay proceeds of the policy after a loss. Numerous cases have treated these various permutations in recent years.

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1. *See infra* text accompanying notes 9-26.
2. *See infra* text accompanying notes 62-81.
3. *See infra* text accompanying notes 27-56.
4. For example, automobile liability insurance is now mandatory in New Mexico. *See* N.M. Stat. Ann. §§ 66-5-201 to -239 (Repl. Pamp. 1984).
5. *See* N.M. Stat. Ann. §§ 59A-1-1 to 59A-53-17 (1984).
6. *Id.* § 59A-16-30.
7. *See infra* text accompanying notes 36-56.
8. *Id.*

A. Naming an Insurer Based Upon Subrogation

The New Mexico Supreme Court once again addressed the issue of when an insurance company should be named as a party and in what manner when subrogation rights are involved in *Safeco Insurance Co. of America v. United States Fidelity & Guaranty Co.*[9] The muddle of New Mexico decisions which the court had to untangle in that case began with *Sellman v. Haddock.*[10] *Sellman* held that an insurer which has paid any policy proceeds to its insured and which has become a subrogee thereby is deemed to be an indispensable party to an action by the insured against the person causing the injury.[11] Pursuant to this rule, however, a defendant's insurer remained a disinterested party because the liability of its insured had yet to be determined. *Sellman* thus created a situation whereby a plaintiff could be forced to name his own insurer as a party plaintiff and yet be unable to reveal either the fact of the defendant's insurance or the defendant's insurer to the jury.

The supreme court recognized the possible inequities of this scenario in *Maurer v. Thorpe*[12] and attempted to reach a different result. Reviewing the well-established premise that a jury may become prejudiced against a defendant by being made aware that the defendant has insurance, the court held that premise no longer applicable when a plaintiff is forced to join his insurer.[13] Instead, the court noted that the plaintiff could suffer prejudice because the jury might think that the defendant is uninsured or that the plaintiff has already been compensated and should recover no additional damages.[14] The *Maurer* court ruled that: "[A] plaintiff, who is compelled by law to join his insurer and is then denied the right to name the defendant's insurance carrier as a party-defendant, is prejudiced in presenting his case and that such practice is fundamentally unfair and violates concepts of due process of law."[15] It should be noted, however,

9. 101 N.M. 148, 679 P.2d 816 (1984).

10. 62 N.M. 391, 310 P.2d 1045 (1957).

11. *Id.* at 403, 310 P.2d at 1053. The court based its decision upon the fact that the insurer had become a real party in interest since it could release the defendant from any and all claims to the extent of the amount paid by it. *Id.* at 394, 310 P.2d at 1047.

12. 95 N.M. 286, 621 P.2d 503 (1980).

13. *Id.* at 287, 621 P.2d at 504. The attempts to prevent any evidence of insurance from being presented before the jury have continued for innumerable years and are based upon a perception that juries would tend to award more damages to a plaintiff if they knew an insurance company is to bear the loss. *See, e.g.*, Fort v. Neal, 79 N.M. 479, 444 P.2d 990 (1968); Falkner v. Martin, 74 N.M. 159, 391 P.2d 660 (1964).

With the onset of mandatory insurance, the soundness of this position is in question. The court in Safeco Ins. Co. of America v. United States Fidelity & Guar. Co., 101 N.M. 148, 152, 679 P.2d 816, 820 (1984), noted that "[c]ompulsory insurance may contribute to the modern juror's view that insured parties are not uncommon." The growing awareness of insurance may eventually force a reversal of the long-standing prejudice against evidence concerning insurance.

14. 95 N.M. at 287-88, 621 P.2d at 504-05.

15. *Id.* at 288, 621 P.2d at 505.

that the court specifically stated that it was not creating a direct action against the defendant's insurer.[16]

The ruling in *Maurer* was further solidified in *Campbell v. Benson.*[17] In that case, the defendant's insurance company tried to distinguish *Maurer* on the basis that the plaintiff had chosen to execute a subrogation agreement, rather than a loan receipt. Because of that choice, the company argued, the plaintiff had voluntarily injected the issue of insurance coverage into the litigation and should not be permitted to name the defendant's carrier. The court reviewed the case law which had ruled that a loan receipt varies from a right to subrogation in that the former does not render the insurance company an indispensable party.[18] The court noted that the selection between the two is often dictated by the insurance policy and held that the defendant's insurer should also be made a party to the action.[19]

In *Safeco Insurance Co. of America v. United States Fidelity & Guaranty Co.*,[20] the supreme court re-examined its earlier rulings concerning the inclusion of insurance companies as *pro forma* parties. In that case, United States Fidelity & Guaranty Co. brought a subrogation action against two defendants. The insured was included as an involuntary plaintiff to the extent of her deductible. One of the defendants was insured and his insurer was joined as a party. The other defendant, however, had no insurance.[21]

The court rejected its earlier attempts to lessen the possible prejudice which might arise as a result of the necessity to name an insurance company as a party and specifically overruled *Sellman v. Haddock*,[22] *Maurer v. Thorpe*,[23] and *Campbell v. Benson*.[24] The court outlined the new procedural course as follows:

> In future, when subrogated insurers are required by Civ. P.R. 17 to be joined as a party, and the case is to be tried to a jury, the fact of

16. *Id.* New Mexico has followed the general rule that, absent contractual or statutory authority, an injured party is precluded from bringing an action against his tortfeasor's insurer. *See, e.g.*, Roberts v. Sparks, 99 N.M. 152, 655 P.2d 539 (Ct. App.), *cert. denied*, 99 N.M. 148, 655 P.2d 160 (1982).

17. 97 N.M. 147, 637 P.2d 578 (Ct. App. 1981).

18. *Id.* at 149, 637 P.2d at 580. Many courts have held that a loan receipt does not give the insurance company a right of subrogation. The insurance company, therefore, is not an indispensable party. 8B J. Appleman, Insurance Law and Practice § 4946 (1982).

19. 97 N.M. at 150, 637 P.2d at 581. After *Campbell*, the court of appeals held that even when a worker's compensation carrier becomes a party plaintiff due to its right of reimbursement, the defendant's liability insurer need not be named. Schulte v. Bober Well Servicing Co., 98 N.M. 547, 650 P.2d 831 (Ct. App.), *cert. quashed*, 98 N.M. 478, 649 P.2d 1391 (1982).

20. 101 N.M. 148, 679 P.2d 816 (1984).

21. *Id.* at 149, 679 P.2d at 817.

22. 62 N.M. 391, 310 P.2d 1045 (1957).

23. 95 N.M. 286, 621 P.2d 503 (1980).

24. 97 N.M. 147, 637 P.2d 578 (Ct. App. 1981).

> the insurer's joinder is not to be disclosed to the jury. Instead, the insured party shall assert his claim for all damages recoverable from the one who allegedly caused the harm, including any amount for which his insurer would be entitled to subrogation against the defendant or counter-defendant. If it is the insured who has been joined . . . the requirement shall be the same. If the injured party or parties should recover damages, the insurer shall then be permitted to prove its subrogation claim to the trial court and, from the proceeds of any recovery, the court shall apportion the recovery between the insured and his insurer according to their respective entitlements.[25]

Thus, under *Safeco,* the fact of insurance once again becomes a taboo subject before the jury insofar as the insurer is a necessary party because of rights of subrogation.[26]

B. Direct Actions Against Insurance Companies

Perhaps one of the most active areas in insurance litigation in New Mexico in recent years involves the question of whether an insured or a third party may sue an insurer directly. The theories upon which parties base their claims against insurance companies vary. All are grounded, however, upon the fundamental proposition that an insurance company and its agents owe certain duties of good faith and fair dealing to the insured.

A common type of lawsuit against insurance companies and their agents arises from a failure to procure insurance. For example, in *Sanchez v. Martinez,*[27] the plaintiffs brought suit on the basis that the defendant insurance agent either breached a contractual duty to obtain a policy of fire insurance or negligently failed to obtain such a policy.[28] In discussing an agent's liability for failure to procure insurance, the court noted:

> An insurance agent or broker who undertakes to procure insurance for others and, through his fault or neglect, fails to do so, may be held liable for any damage resulting therefrom. Under such facts, liability may be predicated either upon the theory that defendant is the agent of the insured and has breached a contract to procure a policy of insurance, or that he owes a duty to his principal to exercise reasonable skill, care, and diligence in securing the insurance re-

25. 101 N.M. at 150, 679 P.2d at 818.

26. It should be noted, however, that the court also discussed the issue of evidence of insurance before the jury and noted that it is permissible in some instances. Because of this observation, the court withdrew N.M. U.J.I. Civil 2.8 (Repl. Pamp. 1980). 101 N.M. at 152, 679 P.2d at 820.

27. 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982).

28. As presented to the jury, the sole issue in the case was whether the defendant could be held liable on the basis of negligence. The court of appeals first addressed the issue of whether the statute of frauds should have been submitted to the jury as a defense. The court held that the statute of frauds did not constitute a defense to a negligence action. *Id.* at 69, 653 P.2d at 900.

> quested and negligently failed to do so. The defendant may be sued for breach of contract or negligent default in the performance of a duty imposed by contract or both.[29]

An insurance agent, therefore, can be held liable for failure to procure insurance under either a theory of contract or of negligence. The action under negligence may be founded upon a duty imposed by an implied contract which can be established by a course of conduct.[30]

The appropriate measure of damages for failure to procure insurance constituted the primary issue in *Topmiller v. Cain*.[31] In *Topmiller*, an agent had failed to obtain builder's risk coverage. There was a fire during construction, and the plaintiffs suffered a loss. The trial court awarded, in addition to the damages which resulted from the fire, the amount the plaintiffs were required to expend in order to obtain second interim financing. The parties agreed that the latter sum was a foreseeable result of the agent's negligence.[32] The defendant cited several earlier cases which had indicated that the proper amount of damages for a negligent failure to procure would be the sum which would have been due under the policy of insurance if it had been obtained.[33] After a discussion of these earlier decisions, the court found that the issue had not been resolved in New Mexico. It cited with approval the following language from an Oregon case:

> Normally, causation requirements will limit any recovery to that which the plaintiff would have received through the insurer if coverage had been provided. However, if the plaintiff is able to prove that additional consequential damages resulted from the agent's failure to obtain coverage, he will then be entitled to recover those consequential damages as well.[34]

The court could discern no reason for creating a special exception to normal liability concepts in the insurance context and, therefore, approved an award of consequential damages. The court did note that to recover consequential damages, the plaintiff must prove that the damages were

29. *Id.* at 69-70, 653 P.2d at 900-01.

30. *Id.* at 70, 653 P.2d at 901.

31. 99 N.M. 311, 657 P.2d 638 (Ct. App. 1983).

32. *Id.* at 313, 657 P.2d at 640.

33. *See, e.g.*, Jernigan v. New Amsterdam Casualty Co., 74 N.M. 37, 390 P.2d 278 (1964); Jernigan v. New Amsterdam Casualty Co., 69 N.M. 336, 367 P.2d 519 (1961); Brown v. Cooley, 56 N.M. 630, 247 P.2d 868 (1952). The *Topmiller* court distinguished these cases on the basis that "in each of these cases the damages discussed were recoverable under the policy if the policy had been issued." 99 N.M. at 314, 657 P.2d at 641. *See also* Sanchez v. Martinez, 99 N.M. 66, 653 P.2d 897 (Ct. App. 1982) (denied claim for food and travel expenses); Lanier v. Securities Acceptance Corp., 74 N.M. 755, 398 P.2d 980 (1965) (attorneys' fees not a proper item of damages).

34. 99 N.M. at 314, 657 P.2d at 641 (quoting Joseph Forest Prods., Inc. v. Pratt, 278 Or. 477, ___, 564 P.2d 1027, 1029 (1977)).

proximately caused by the defendant's negligence and that they were reasonably foreseeable at the time of the application for insurance.[35]

A recent issue which has appeared concerning direct actions against insurance companies and their agents is whether the New Mexico Unfair Insurance Practices Act[36] ("the Act") creates a private cause of action. The purpose of the Act is to regulate trade practices in the business of insurance.[37] It defines several practices which are designated as a violation of the Act, such as misrepresentations made in the issuance of the policy and unfair settlement practices.[38] Until January 1, 1985, the Act did not specifically provide a private cause of action to either the insured or a third-party beneficiary.[39] Rather, the Act invested all power of enforcement in the Superintendent of Insurance: he is in charge of investigation,[40] holding administrative hearings and making the determination of a violation,[41] and assessing administrative penalties.[42] Should he so choose, he can bring an action in the district court for either an injunction[43] or civil penalties.[44]

Until very recently, the court of appeals had addressed the issue of whether the Act creates a private cause of action only briefly. For example, in *Gonzales v. United States Fidelity & Guaranty Co.*,[45] the issue arose in a worker's compensation setting. The court of appeals stated that it did not need to reach a determination of whether a private cause of action was created by the Act because the New Mexico Workmen's Compensation Act[46] provided a remedy under the facts alleged.[47]

In *State Farm Fire and Casualty Co. v. Price*,[48] the Unfair Insurance Practices Act was addressed in the context of the New Mexico Unfair Practices Act.[49] The court assumed, but did not decide, that the Unfair Practices Act applies to insurance companies.[50] After finding no factual basis upon which to support a claim, the court stated the following with regard to the Unfair Insurance Practices Act:

35. 99 N.M. at 315, 657 P.2d at 642.
36. N.M. Stat. Ann. §§ 59-11-9 to -22 (1978).
37. *Id.* § 59-11-10.
38. *Id.* § 59-11-13.
39. *See infra* text accompanying note 56.
40. N.M. Stat. Ann. § 59-11-14 (1978).
41. *Id.* § 59-11-15.
42. *Id.* § 59-11-16.
43. *Id.* § 59-11-17.
44. *Id.* § 59-11-18.
45. 99 N.M. 432, 659 P.2d 318 (Ct. App. 1983).
46. N.M. Stat. Ann. §§ 52-1-1 to -69 (1978 and Cum. Supp. 1984).
47. 99 N.M. at 435, 659 P.2d at 321.
48. 101 N.M. 438, 684 P.2d 524 (Ct. App.), *cert. denied*, 101 N.M. 362, 683 P.2d 362 (1984).
49. N.M. Stat. Ann. §§ 57-12-1 to -16 (1978 and Cum. Supp. 1983).
50. 101 N.M. at 446, 684 P.2d at 532.

> The defendants have also raised an issue concerning the Unfair Insurance Practices Act, N.M. Stat. Ann. 1978, §§ 59-11-9 to -22. However, that Act does not provide a private cause of action, as defendants admit. The defendants argue that any violation of the Unfair Insurance Practices Act is a per se violation of the Unfair Practices Act. Having ruled that on retrial there is no issue concerning the Unfair Practices Act, we need not consider this argument.[51]

The court of appeals finally addressed the issue squarely in *Patterson v. Globe American Casualty Co.*[52] As noted by the court, when confronted with the question of whether similar acts create private causes of action, other jurisdictions have reached varying results.[53] After examining the purpose of the Act and the powers vested in the Superintendent of Insurance for purposes of enforcement, the court reiterated the general rule that "when a right is created which did not exist at common law and for that right a remedy is by statute prescribed, the whole matter of right and remedy is within the statute and no part of either otherwise exists."[54] Based upon the presumption that the legislature in enacting a statute is informed as to existing statutory and common law, the court found that the legislature did not intend to create a private remedy under the Act.[55]

The *Patterson* holding has been changed by amendments to the Act which went into effect on January 1, 1985. The Unfair Insurance Practices Act, as amended, now includes a private cause of action with regard to the insured.[56] This action, however, extends only to the insured, and not to third party beneficiaries. Whether this statutorily created cause of action actually broadens the existing common law causes of action against an insurance company and its agents for bad faith actions remains to be determined by the courts in interpreting the amended Act.

III. UNINSURED AND UNDERINSURED MOTORIST COVERAGE

A new area of insurance law which has generated a great deal of litigation involves the interpretation of uninsured and underinsured motorist coverage in automobile liability policies. Uninsured motorist coverage was developed to protect persons injured in automobile accidents from remaining uncompensated because of the tortfeasor's lack of liability

51. *Id.* at 447, 684 P.2d at 533.
52. 101 N.M. 541, 685 P.2d 396 (Ct. App. 1984).
53. *Id.* at 542, 685 P.2d at 397.
54. *Id.* at 544, 685 P.2d at 399.
55. *Id.* For an example of a case which did hold that a private cause of action existed, see Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 592 P.2d 329, 153 Cal. Rptr. 842 (1979). The statute under consideration in *Royal Globe*, however, was slightly different from that of New Mexico.
56. N.M. Stat. Ann. § 59A-16-30 (1984).

coverage.[57] As stated by the court in *Chavez v. State Farm Mutual Automobile Insurance Co.*: "In other words, the legislative purpose in creating compulsory uninsured motorist coverage was to place the injured policy-holder in the same position, with regard to the recovery of damages, that he would have been in if the tortfeasor had possessed liability insurance."[58] Initially, uninsured motorist coverage became operative only when the tortfeasor was totally uninsured. Because of this, an inequitable result began to appear when the tortfeasor carried liability insurance, but not in the amount of that carried by the insured. For example, suppose that "A" carries liability insurance in the amount of $15,000 per person and that "B" carries uninsured motorist coverage in the amount of $100,000. If "A" were to injure "B" in an automobile accident, then the maximum that "B" could recover under the insurance policies would be $15,000. In other words so long as "A" was insured, "B" could not look to his own insurance policy for additional coverage even though his damages might be more than the coverage provided by "A's" policy.[59] To remedy this problem, legislatures developed the concept of underinsured motorist coverage. Pursuant to New Mexico statute:

> "[U]nderinsured motorist" means an operator of a motor vehicle with respect to the ownership, maintenance or use of which the sum of the limits of liability under all bodily injury liability insurance applicable at the time of the accident is less than the limits of liability under the insured's uninsured motorist coverage.[60]

In other words, under the above scenario, "B" would be entitled to recovery up to a total of $100,000, if his damages were that severe. He could receive $15,000 from "A" and look to his own policy for additional coverage because "A" is underinsured within the meaning of the statute.[61]

57. *See* State Farm Auto. Ins. v. Kiehne, 97 N.M. 470, 471, 641 P.2d 501, 502 (1982). The New Mexico Supreme Court has already held that an insured may sue the insurer directly rather than first suing the tortfeasor in order to recover under the uninsured motorist coverage. Guess v. Gulf Ins. Co., 96 N.M. 27, 627 P.2d 869 (1981). The court of appeals also has recently ruled that payment under uninsured motorist coverage does not constitute a recovery from a third party within the meaning of the New Mexico Workmen's Compensation Act, N.M. Stat. Ann. § 52-1-56(C) (1978). Gantt v. L & G Air Conditioning, 101 N.M. 208, 680 P.2d 348 (Ct. App. 1983).

58. 87 N.M. 327, 329, 533 P.2d 100, 102 (1975) (quoting Bartlett v. Nationwide Mut. Ins. Co., 33 Ohio St.2d 50, 52, 294 N.E.2d 665, 666 (1973)).

59. As stated by the court in Nationwide Ins. Co. v. Gode, 187 Conn. 386, ___, 446 A.2d 1059, 1061 (1982), underinsured motorist coverage attempts "to remedy the 'anomalous situation' . . . where an injured party could find himself in a better position if the tortfeasor had no liability insurance than if he had only the statutory minimum amount." (Citations omitted.)

60. N.M. Stat. Ann. § 66-5-301(B) (Repl. Pamp. 1984).

61. This view of the correct definition of underinsurance is now on appeal in two cases in the New Mexico Supreme Court and the United States Court of Appeals for the Tenth Circuit. Martin v. State Farm Mut. Auto. Ins. Co., *appeal docketed*, No. 84-1879 (10th Cir. June 25, 1984); Schmick v. State Farm Mut. Auto. Ins. Co., *cert. granted*, No. 15459 (N.M. Sup. Ct. May 31, 1984). The plaintiffs in both cases have taken the position that uninsured motorist coverage acts as excess

One issue presented to the courts in recent years concerning uninsured motorist coverage is whether an insured may stack his policies. "Stacking" refers to the insured's attempt to recover under more than one policy of insurance by adding one policy to another until either his damages are satisfied or the limits of the policies are exhausted.[62] For example, assume that "A" has purchased two policies of automobile insurance for two separate cars, with uninsured limits of $25,000 each. Assume further that "A" suffers severe injuries in an accident with uninsured motorist "B." Query: Can "A" recover up to $25,000 or $50,000? A similar question is presented when "A" has two automobiles covered by one policy of insurance.

The latter fact pattern confronted the court in *Lopez v. Foundation Reserve Insurance Co.*[63] Specifically, in *Lopez*, the policy provided coverage in the amount of $15,000 per person or $30,000 per accident. Both Lopez and his passenger were killed in a collision with an uninsured motorist. Their personal representatives sought recovery of $60,000 on the basis that the $30,000 per accident coverage on each should be stacked.[64]

The court first considered the applicable policy language, specifically that referring to limits of liability: "[T]he company's limit of liability for all such damages arising out of bodily injury sustained by two or more persons in any one accident shall not exceed the amount specified by such financial responsibility law for bodily injury to two or more persons in any one accident."[65] The financial responsibility law to which this refers is the Financial Responsibility Act,[66] which at that time provided for minimum limits of $15,000 per person and $30,000 per accident. The court noted that the provision, on its face, appeared to limit the company's liability to $30,000 per accident. However, because the contract did not directly address the effect of multiple premiums paid under one policy insuring more than one vehicle, it was found to be ambiguous.[67] The court, therefore, proceeded to interpret the policy of insurance, invoking the cardinal rule that any ambiguities are construed against the insurance company which drafted the policy.[68]

insurance. This would lead to the result that, in the scenario presented, "A" might recover up to an additional $100,000, rather than the difference between $100,000 and $15,000, from his own underinsured motorist coverage. Some courts have endorsed this view under differently worded statutes. *See, e.g.*, Holman v. All Nation Ins. Co., 288 N.W.2d 244 (Minn. 1980); Whitten v. Empire Fire and Marine Ins. Co., 353 So. 2d 1071 (La. Ct. App. 1977).

62. *See, e.g.*, Lopez v. Foundation Reserve Ins. Co., 98 N.M. 166, 168-69, 646 P.2d 1230, 1232-33 (1982).

63. *Id.*

64. *Id.* at 167, 646 P.2d at 1231.

65. *Id.* at 168, 646 P.2d at 1232.

66. N.M. Stat. Ann. §§ 66-5-201 to -239 (Repl. Pamp. 1984).

67. 98 N.M. at 168, 646 P.2d at 1232.

68. *Id.*

Initially, the court referred to an earlier decision in *Sloan v. Dairyland Insurance Co.*[69] and stated that *Sloan* permitted inter-policy stacking.[70] In actuality, *Sloan* interpreted an "other insurance" clause. The issue presented was whether an insured's estate, which had recovered the uninsured motorist limits under the policy for the automobile in which she was a passenger, could recover under her uninsured motorist coverage on her own vehicle. In ruling that the estate was entitled to the proceeds under both policies, the court refused to give effect to the "other insurance" clause.[71]

In *Lopez,* the court directly addressed the issue of stacking in the inter-policy context; the policy in question provided coverage for two automobiles with separate premiums paid for each.[72] The first question which the court examined concerned the question of whether, in enacting the statute for uninsured motorist coverage,[73] the legislature intended that separate full uninsured motorist coverage be provided for each vehicle under one policy. The court declined to follow this interpretation of the statute and found that only each of several vehicles insured under a single policy be covered by one minimum coverage.[74] Such a result, however, would not preclude purchase of additional coverage beyond the statutory minimum.

The court further indicated that stacking in this instance fulfilled the reasonable expectations of the insured.[75] An important point, the court felt, was the payment of separate premiums:

> It would be inconsistent to permit stacking in *Sloan* cases and deny stacking in cases where all the vehicles are insured under one policy but the same additional premiums are charged as would be charged if the coverage were provided by multiple policies. . . . The crucial question, therefore, is not whether multiple vehicles are insured under one policy or several, but whether the insured has paid one premium or several for the particular uninsured motorist coverage sought to be stacked.[76]

The court did indicate, however, that multiple premiums may not always dictate a stacking situation if the company can establish that they were not charged for the same coverage.[77]

One final indication in *Lopez* merits comment. The court did not permit

69. 86 N.M. 65, 519 P.2d 301 (1974).
70. *Lopez,* 98 N.M. at 169, 646 P.2d at 1233 (citing *Sloan,* 86 N.M. at 68, 519 P.2d at 304).
71. 86 N.M. at 68, 519 P.2d at 304.
72. 98 N.M. at 167, 646 P.2d at 1231.
73. N.M. Stat. Ann. § 66-5-301 (Repl. Pamp. 1984).
74. 98 N.M. at 170, 646 P.2d at 1234.
75. *Id.*
76. *Id.* at 171, 646 P.2d at 1235 (citation omitted).
77. *Id.* at 171, 646 P.2d at 1235.

the coverage to be stacked as to the passenger because he was not a named insured under either policy.[78] In addition, it should be noted that a definitive answer has not been reached in New Mexico with regard to stacking of underinsurance coverage.[79]

In enacting legislation for uninsured motorist coverage, state legislatures have sought to ensure that a person could provide for his own compensation should he be injured by an uninsured driver. This concept grew to encompass the idea of underinsurance, so that the same person might guarantee himself coverage in excess of the minimum amount required by law. New Mexico at this time only mandates that each person carry insurance in the amounts of $25,000 per person and $50,000 per accident.[80] To state that almost any severe accident can cause damages far in excess of those amounts is to voice the obvious. Perhaps because of this, the courts have many times stretched to find the maximum amount of coverage possible. Stacking of policies provides a ready means to this end.[81]

However, in *March v. Mountain States Mutual Casualty Co.*,[82] the New Mexico Supreme Court balked at ignoring clear policy language to expand underinsurance coverage. In that case, the insured had purchased $50,000 in underinsured motorist coverage from Mountain States. The policy required that the insurer receive prompt notice of an accident and that no settlements be made with third parties without its consent. Further, Mountain States possessed a right of subrogation under the policy.[83]

The insured in this case suffered injuries as a result of an accident with a person having policy limits of $25,000. He settled for that amount without notice to Mountain States and then made demand for $50,000 under the underinsured coverage provided by Mountain States. Mountain States denied coverage and any liability under the policy.[84]

The *March* court confronted the issue of whether the insured's release and settlement with the alleged tortfeasor's insurance company without the consent or knowledge of Mountain States relieved the latter of its obligations to the insured. Initially, the court noted the insured's actions violated the provisions of the policy regardless of whether he had received payment from Mountain States.[85] Furthermore, pursuant to settled New

78. *Id.* at 172, 646 P.2d at 1236.

79. This issue is also on appeal in the cases noted *supra* note 61.

80. N.M. Stat. Ann. §66-5-215 (Repl. Pamp. 1984).

81. For an example of the multitude of cases which have permitted stacking of coverage, see Annot., 25 A.L.R.4th 6 (1983). As is evident from a perusal of those decisions, the courts have ruled in favor of stacking in almost every conceivable situation.

82. 101 N.M. 689, 687 P.2d 1040 (1984).

83. *Id.* at 690, 687 P.2d at 1041.

84. *Id.*

85. *Id.* at 692, 687 P.2d at 1043. *See, e.g.*, Jacobsen v. State Farm Mut. Auto. Ins. Co., 83 N.M. 280, 491 P.2d 168 (1971); Motto v. State Farm Mut. Auto Ins. Co., 81 N.M. 35, 462 P.2d 620 (1969).

Mexico law, his actions destroyed any rights of subrogation which the insurance company might have had.[86]

On this premise, the court addressed the question of whether the fact of underinsurance demanded a different result. It found that it did not. After an examination of the statutes in question, the court stated: "[W]e find that the well established contractual nature of subrogation rights in New Mexico logically justified the use of protective consent provisions, even though our uninsured motorist statutes do not expressly allow such rights or provisions."[87] The court, therefore, ruled in favor of Mountain States on the ground that the insured had violated the express provisions of the insurance contract.[88]

As these cases demonstrate, uninsured and underinsured motorist coverage can present new and different issues to the courts. Many questions remain to be decided concerning the interpretation of various clauses as they relate to these types of insurance in the context of the specific and well-defined public policy considerations.

Whether mandatory insurance in New Mexico[89] diminishes litigation in the area of insurance remains to be determined. Underinsured motorist coverage, however, which has essentially the same philosophy, presents a different outlook since anyone may choose to contract for more insurance than that required by statute.

IV. DUTIES OF THE INSURER

Virtually all insurance contracts contain two basic duties for the insurer: to defend and to pay. As the case law has evolved, the duty to defend has developed differently from the duty to pay under the policy. In other words, the insurance company might owe a duty to defend a claim, but it might still dispute its liability to pay it.

For example, in *Foundation Reserve Insurance Co. v. Mullenix*[90] the court confronted the following situation. The policy in question covered a tow truck. While towing a tractor-trailer rig, the tow truck was damaged in an accident. The owner of the rig sued the insured. The insurance company brought a separate declaratory judgment action, alleging that there was no coverage due to an exclusion in the policy for property being transported by or in charge of the insured.[91]

The court first noted the general rule concerning the duty to defend as stated in *American Employers' Insurance Co. v. Continental Casualty Co.*:

86. 101 N.M. at 692, 687 P.2d at 1043.
87. *Id.* at 693, 687 P.2d at 1044.
88. *Id.*
89. *See* N.M. Stat. Ann. § 66-5-215 (Repl. Pamp. 1984).
90. 97 N.M. 618, 642 P.2d 604 (1982).
91. *Id.* at 619, 642 P.2d at 605.

> If the allegations of the injured third party's complaint show that an accident or occurrence comes within the coverage of the policy, the insurer is obligated to defend, regardless of the ultimate liability of the insured. The question presented to the insurer in each case is whether the injured party's complaint states facts which bring the case within the coverage of the policy, not whether he can prove an action against the insured for damages. The insurer must also fulfill its promise to defend even though the complaint fails to state facts with sufficient clarity so that it may be determined from its face whether or not the action is within the coverage of the policy, provided the alleged facts tend to show an occurrence within the coverage.[92]

In this particular case, the complaint failed to allege with particularity the fact that the rig was being towed at the time of the accident. Because of this, the court found that the complaint tended to show an occurrence within the coverage of the policy. Therefore, it held there was in fact a duty to defend.[93]

What makes *Mullenix* of particular interest is the language concerning the appropriate procedural course an insurance company must follow to challenge its alleged duty to defend under a policy of insurance. The court indicated that an insurer cannot bring a separate declaratory action to determine whether there is coverage under the policy.[94]

The issue concerning the correct manner in which to bring a declaratory action, along with several others, appeared in *State Farm Fire and Casualty Co. v. Price*.[95] In that case, the insured was involved in an accident while driving his girlfriend's car. The primary carrier on her vehicle defended and tendered policy limits. State Farm carried the policy on the insured's vehicle and denied excess coverage on the basis that an exclusion applied. The insured settled with the injured parties and assigned any cause of action he might have against State Farm to the latter. State Farm then brought a declaratory judgment action to determine coverage.[96]

The opinion addressed several issues, but among the most important was the duty to defend. Neither the insured nor his personal attorney had ever made an express demand that State Farm join in the defense of the lawsuit. The court did find, however, that a question of fact existed as to whether a demand was made. The court in so ruling looked to certain correspondence which notified State Farm that litigation had ensued.[97]

The defendants argued that State Farm had waived its right to bring a

92. 84 N.M. 346, 348, 512 P.2d 674, 676 (1973).

93. 97 N.M. at 620, 642 P.2d at 606.

94. *Id.* An interesting question presented by this procedural comment is whether this would be binding upon the United States District Court in diversity actions.

95. 101 N.M. 438, 684 P.2d 524 (Ct. App.), *cert. denied*, 101 N.M. 362, 683 P.2d 44 (1984).

96. *Id.* at 441, 684 P.2d at 527.

97. *Id.* at 442-44, 684 P.2d at 528-30.

declaratory judgment action because it had not defended the primary lawsuit. The court distinguished *Mullenix*[98] on the basis that there was no clear demand to defend in this instance. Because the existence of the latter presented a question of fact for the jury, the court refused to hold as a matter of law that State Farm had waived its right to bring the action.[99]

Price reemphasized the distinction between the duty to defend and the duty to pay. The court found that coverage did not exist as a matter of law. However, because the allegations in the complaint failed to establish that fact clearly, the duty to defend did exist. Furthermore, the court noted that the active defense provided by the primary carrier did not relieve State Farm of this duty.[100]

State Farm also alleged that the insured had failed to cooperate and had entered into the stipulation of settlement without notifying it, which constituted a breach of the policy. Again, the court found that questions of fact existed on these issues. The court indicated that the first determination which should be made upon remand was whether the insured did demand a defense. If he did, then the obligation to defend arose pursuant to the policy.[101] The court next noted that the insurer, by failing to defend, could suffer serious consequences:

> These consequences include loss of the right to claim that the insured breached policy provisions, . . . including the policy provisions requiring the insured to forward suit papers. . . . The insurance company loses the right to claim that the insured did not cooperate . . . and the right to claim that the insured settled without its consent. . . . When an insurance company unjustifiably fails to defend it becomes liable for a judgment entered against the insured and for any settlement entered into by the insured in good faith. . . . The settlement must be reasonable. . . . On retrial jury issues may include Price's good faith in making the settlement and the reasonableness of its amount.[102]

The court further found that failure to defend, after being requested to do so, might amount to bad faith depending upon the circumstances.[103] Thus, *Price* clearly indicates that an insurer should always be cautious and err on the side of providing a defense, or be prepared to suffer the consequences.

Hendren v. Allstate Insurance Co.[104] focused on the duty of the insurer

98. 97 N.M. 618, 642 P.2d 604 (1982). *See supra* text accompanying notes 90-94.
99. 101 N.M. at 444, 684 P.2d at 530.
100. *Id.* at 442-43, 684 P.2d at 528-29.
101. *Id.* at 445, 684 P.2d at 531.
102. *Id.* (citations omitted).
103. *Id.* at 446, 684 P.2d at 532.
104. 100 N.M. 506, 672 P.2d 1137 (Ct. App. 1983).

to deal in good faith with an insured. In that case, the insured had been severely injured in a collision with an uninsured motorist. The policy covered either two or three vehicles, with limits of $15,000 per person. The adjuster who handled the claim advised the insured that Allstate would pay the maximum amount available, $15,000. Further, the insured received the impression that he could receive nothing additional even if counsel were obtained. Thus, a settlement was entered into for the sum of $15,000.[105]

In less than a year after the insured had released Allstate, the supreme court decided *Lopez v. Foundation Reserve Insurance Co.*,[106] which, as stated previously,[107] permitted intrapolicy stacking of uninsured motorist coverage. The insured then brought an action seeking to have the settlement voided because of misrepresentation.[108]

The court found that the adjuster's statement of maximum coverage constituted a material statement upon which he should have realized that the insured would rely. Thus, the issue arose as to whether the insured had a right to rely upon the statement. The court noted the dual role played by an adjuster with regard to uninsured motorist coverage: because the insurer sold the policy, he has an obligation to the insured; however, he must assume an adversarial role as to questions involving the uninsured motorist's negligence and any available defenses the uninsured motorist might have.[109]

The *Hendren* court cited with approval and adopted the view forwarded in *Craft v. Economy Fire & Casualty Co.*,[110] stating:

> [I]n spite of its adversary interest, an insurer continues to have a duty to deal fairly and in good faith with its insured in settling a claim under the uninsured motorist provisions of the automobile insurance contract. . . . The rule we adopt does not mean that the insurer is precluded from defending the uninsured motorist or from evaluating the claim any differently than it would have had it provided third party coverage. What it does mean, however, and particularly as applied to this case, is that the insurer must deal in good faith and fairly as to the terms of the policy and not overreach the insured, despite its adversary interest.[111]

Because of the prior ruling in *Sloan v. Dairyland Insurance Co.*[112] and the clear trend permitting stacking in other jurisdictions, the court held

105. *Id.* at 507-08, 672 P.2d at 1138-39.
106. 98 N.M. 166, 646 P.2d 1230 (1982). *See supra* text accompanying notes 63-79.
107. *See supra* text accompanying notes 69-79.
108. 100 N.M. at 508, 672 P.2d at 1139.
109. *Id.* at 509-10, 672 P.2d at 1140-41.
110. 572 F.2d 565 (7th Cir. 1978) (applying Indiana law).
111. 100 N.M. at 510, 672 P.2d at 1141 (citation omitted).
112. 86 N.M. 65, 519 P.2d 301 (1974). *See supra* text accompanying notes 69-71.

that the trier of fact could find that the insurer should have known that stacking might pertain to this policy. Had the adjuster told the insured his position, but that a different result might be obtained, he would have fulfilled his duties. Because he did not, the court remanded the case for a trial on the merits on the issue of misrepresentation.[113]

V. EXCLUSION AND TIME PROVISIONS

After an insured makes a demand under his policy for coverage, the insurance company determines whether coverage, in fact, exists. The correct interpretation of policy exclusions constitutes a particularly fertile ground for litigation. In addition, various obligations of the insured, and failure to comply therewith, may present a basis for denial of coverage.

For example, in *Security Mutual Casualty Co. v. O'Brien,*[114] the supreme court addressed the issue of whether there must be a causal connection between an exclusion and the loss in order for the exclusion to be given effect. The insured suffered a loss when his aircraft collided with another aircraft. The policy in question provided that it did not apply when the aircraft was in flight unless the aircraft's airworthiness certificate was in full force and effect. The parties stipulated, in effect, that no causal relationship existed between the failure to obtain a certificate and the cause of the crash. The insured claimed that without such a connection the exclusion did not apply.[115]

The court held that coverage did not exist and cited the court of appeals' decision in *Peterson v. Romero*[116] in support of its result. Further, it distinguished *Foundation Reserve Insurance Co. v. Esquibel,*[117] upon which plaintiff relied. *Esquibel* held that an insurer must demonstrate "substantial prejudice" before it can be relieved of its obligations under an insurance policy.[118] The court noted that *Esquibel* addressed a situation involving a condition subsequent rather than specific policy exclusions.[119] The breach of a condition subsequent "terminate[s] or suspend[s] the insurance, [whereas a policy exclusion] declare[s] that there never was insurance with respect to the excluded risk."[120] Based upon this distinction, the court found that substantial prejudice was irrelevant with regard to policy exclusions. Furthermore, the court ruled that a causal connection between an exclusion clause and an accident need not be established to

113. 100 N.M. at 511, 672 P.2d at 1142.
114. 99 N.M. 638, 662 P.2d 639 (1983).
115. *Id.* at 639, 662 P.2d 640.
116. 88 N.M. 483, 542 P.2d 434 (Ct. App. 1975).
117. 94 N.M. 132, 607 P.2d 1150 (1980).
118. *Id.* at 134, 607 P.2d at 1152.
119. 99 N.M. at 639, 662 P.2d at 640.
120. *Id.* at 640, 662 P.2d at 641 (quoting 7 Couch, Couch on Insurance 2d § 36.48 (1961)).

deny coverage. In essence, the court's rationale was that to hold otherwise would be to rewrite the insurance policy.[121]

Another exclusion issue arose in *State Farm Automobile Insurance Co. v. Kiehne*[122] with regard to uninsured motorist coverage. The insured's policy specifically excepted coverage as to a named individual. That individual, while driving an insured vehicle, was later involved in an accident which resulted in the death of a passenger. A claim was made under the uninsured motorist coverage. State Farm denied coverage on the basis of the exclusion.[123]

After finding that the clause was not ambiguous, the court addressed the issue of whether the clause violated the purposes and public policy of the uninsured motorist statute.[124] The court noted that the named insured had the right to reject uninsured coverage, and on that basis, stated that a failure to carry such coverage did not violate public policy. The court, therefore, upheld the exclusion.[125]

One additional ground upon which coverage may be denied under a policy of insurance includes the provisions governing the process of making claims. This encompasses the proof of loss, notice to the company, cooperation of the insured, and other such matters. One particularly important clause found in many policies is the time to sue provision. In *Young v. Seven Bar Flying Service, Inc.*,[126] the supreme court addressed the applicability of a time to sue provision to a loss payee. The owner of an aircraft had leased it to Seven Bar Flying Service. Seven Bar insured the plane under a master policy with National Union Fire Insurance Company. A loss occurred, but the owner failed to sue National within the time prescribed by the policy.[127]

The court first noted that time provisions in insurance policies which limit the period within which suit may be brought after damage occurs, if reasonable, are valid and enforceable in New Mexico.[128] The plaintiff, however, claimed that the insurance company had waived the limitation and, therefore, was estopped from asserting the defense. The plaintiff's claim was based primarily upon the fact that, as loss payee, he was not furnished with a copy of the policy.[129]

121. *Id.* at 640-41, 662 P.2d at 641-42. For an example of another exclusion provision in aircraft coverage, see Gelder v. Puritan Ins. Co., 100 N.M. 240, 668 P.2d 1117 (Ct. App. 1983), in which the court discussed and applied an exclusion as to losses occurring during a conversion.

122. 97 N.M. 470, 641 P.2d 501 (1982).

123. *Id.* at 470-71, 641 P.2d at 501-02.

124. N.M. Stat. Ann. § 66-5-301 (Repl. Pamp. 1984).

125. 97 N.M. at 471-72, 641 P.2d at 502-03.

126. 101 N.M. 545, 685 P.2d 953 (1984).

127. *Id.* at 546, 685 P.2d at 954.

128. *Id.* at 547, 685 P.2d at 955. *See, e.g.*, Sanchez v. Kemper Ins. Co., 96 N.M. 466, 632 P.2d 343 (1981).

129. 101 N.M. at 547, 685 P.2d at 955.

In the court's view, whether a waiver had occurred depended upon two primary factors: (1) what documents had been furnished to the insured; and (2) whether the insurer had given the impression that all of the material provisions could be found in them. In this particular instance, the plaintiff had received a certificate of insurance which specifically stated that the original policy must be consulted for details concerning coverage. The court, therefore, found no waiver or estoppel.[130]

Finally, the court also held that a time to sue provision also applied to the loss payee, as well as the named insured. The rights of the loss payee, the court reasoned, could not rise above those of the insured since a loss payee is not a party to the contract.[131]

130. *Id.* at 548, 685 P.2d at 956.
131. *Id.* at 548-49, 685 P.2d at 956-57.