Insurance Law Update 2020-2021

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North Carolina Supreme Court

N.C. Farm Bureau v. Martin (2020)

S.J in favor of NCFB upheld / (J. Mark Davis)
Residency Issue (J. Anita Earls, dissenting)

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- This case arises from a car accident that occurred in Virginia Beach, Virginia, involving defendants Jean Martin and Marina Martin.
- Marina is the teenage daughter of Jean and David Martin.
- On 6 January 2014, Jean was driving her 1994 Ford automobile with Marina in the passenger seat.
- Jean was crossing a four-way intersection when a vehicle driven by a third party struck her car. Jean and Marina were both injured in the collision.
- Mary Martin the grandmother of Marina and mother-in-law of Jean had a policy with NCFB.

NCFB v. Martin

- Mary was the sole owner of the Martin Farm, a 76-acre property .
- Mary lived in the “main house” on the farm.
- Jean and Marina lived in a separate “guest house” on the farm.
- Shared a single driveway but were both stand-alone structures located approximately 100 feet from one another.
- 3-5 minutes to walk between them.
- Different street addresses.
- Separate post office boxes for the receipt of mail

NCFB v. Martin
(J. Mark Davis)

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- Packages for Jean/David and Mary were delivered to Mary's house.
- With the exception of occasional overnight stays (such as when a power outage occurred at one of the two houses), defendants and Mary lived separately in their respective homes at all relevant time periods.
- Jean/Marina visited with Mary almost every day, ate meals together, and performed chores for each other.
- Keys and unlimited access to enter either's residence.

NCFB v. Martin
(J. Mark Davis)

- David and Jean worked on the Martin Farm, managing the crops and the winery.
- David and Jean, in turn, received a weekly salary—contingent upon there being sufficient funds available in the farm's bank account after all farm-related bills were paid.
- Approximately a year before the accident—Mary began staying for extended periods of time with her son Wayne in Virginia Beach while she received medical treatment for cancer.

NCFB v. Martin – DEFINITIONS
(J. Mark Davis)

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UIM defines "insured" as … You **or any family member.**

"**Family member**" means a person **related to you** by blood, marriage, or adoption who is a **resident of your household**. This includes a ward or foster child. (Emphasis added).

Throughout this policy, "you" and "your" refer to:
1. The "named insured" shown in the Declarations; and
2. The spouse if a resident of the same household

NCFB v. Martin
(J. Mark Davis)

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Since "**resident**" is not a defined term in the policy:

> "the definition of 'resident' in the standard, nonlegal dictionaries may be a more reliable guide to the construction of an insurance contract than definitions found in law dictionaries."

NCFB v. Martin (Dictionary definitions)
(J. Mark Davis)

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- The Merriam-Webster Collegiate dictionary defines "**resident**" as "[o]ne who resides in a place. "Reside" is defined, in turn, as "**[t]o dwell permanently or continuously**."
- A "**household**" is defined as "[t]hose who **dwell under the same roof** and compose a family" or, alternatively, "**a social unit composed of those living together in the same dwelling.**"
- These definitions are largely mirrored by the American Heritage Dictionary, which defines "reside" as "[t]o live in a place permanently or for an extended period" and defines "household" as "[a] person or group of people occupying **a single dwelling**."

NCFB v. Martin (Common/Single Roof) Strict Rule?
(J. Mark Davis)

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The majority seems to create a **bright line rule**:

> Although there is no requirement that members of a family must have *continuously* resided **under a common roof**—without interruption—to be deemed residents of the same household, they must have done so for some meaningful length of time. The record must also reflect an intent to form a common household. But **no matter how close or integrated the family relationship, family members who have never actually lived together in the same dwelling cannot be considered to be residents of a single household.**

NCFB v. Martin (Justice Earl's Dissent)

The majority imposes an **unduly restrictive frame of reference** that ignores the realities of rural life and fails to account for the full context of the lives the Martin's led on Mary's 76-acre farm …

Although we have looked to dictionaries in evaluating the meaning of a term used in an insurance contract, we have never held that the dictionary definition is dispositive. Instead, we have considered numerous factors relevant in ascertaining the meaning of the term as utilized in a particular contract, including the intent of the individuals claiming residence in a single household, the financial and familial relationships between them, and the "touchstone … **that the phrase 'resident of the same household' has no absolute or precise meaning, and, if doubt exists as to the extent or fact of coverage, the language used in an insurance policy will be understood in its most inclusive sense."**

NCFB v. Martin (J. Earl's Dissent) – hypotheticals.

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- Justice Earls aptly points out the problem with the "single roof / common roof" rule with the following hypotheticals:

1. If Jean and Marina lived in a semi-detached garage apartment on Mary's property, would they still be part of Mary's household?

2. What if they lived separately in both units of a duplex?

3. Or what if Mary occupied an in-law suite complete with a kitchen, bath, and a separate living room, but which was physically contained within the same structure?

Majority Missed the Boat in *Martin*

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A single / common roof should be just one factor, not a requirement to qualify as a "resident." Such a rule is inflexible and likely will preclude insurance coverage in the future when folks are "residents" of the same household by the facts specific to their case.

It was also clearly unnecessary to create such a rule to reach a result in this case. I suspect the majority would have reached the same conclusion just considering the "single / common roof" as one factor.

Walker v. K&W Cafeterias

(Justice Robin Hudson) (Justice Paul Newby, dissenting)

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Single Issue:

Did North Carolina or South Carolina law apply to WC's subrogation right to the South Carolina UIM policy proceeds (even if the policy was issued and delivered in NC).

It appears Liberty Mutual provided both the WC and UIM coverage for K&W.

NC WC.

Defendants were ordered to pay $333,763 in WC benefits.

SC WD - Settled.

1. $50,000 in liability.
2. $12,500 in personal UIM.
3. $900,000 in UIM from commercial policy (K&W's LM policy).

The Numbers

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For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in South Carolina, this endorsement modifies insurance provided under the following:

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

A. Coverage
1. We will pay in accordance with the South Carolina Underinsured Motorists Law all sums the "insured" is legally entitled to recover as damages from the owner or driver of an "underinsured motor vehicle."

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.
SOUTH CAROLINA UNDERINSURED MOTORISTS COVERAGE

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Walker v. K&W Cafeterias

Walker v. K&W Cafeterias
(Justice Robin Hudson)

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Unlike North Carolina, South Carolina bars all subrogation of UIM benefits. The COA of appeals based its decision on "choice of laws." However the Supreme Court stated:

> legal principles related to choice of law, we need **not—and do not—go beyond the contract as modified by its endorsement; by the explicit terms of that contract,** the UIM proceeds are paid and governed by South Carolina law.

Justice Hudson noted the UIM vehicle at the time of the accident was registered, garaged and driven in SC so the SC endorsement, including the conformity clause in the endorsement, **meant SC, not NC law applied to the WC lien claim against the commercial UIM policy of K&W**.

Walker v. K&W Cafeterias (J. Newby Dissent)

Under the General Assembly's carefully crafted statutory scheme [*interestingly* sounds a lot our argument in *Hairston* as to FRA], when a plaintiff chooses to file for benefits under the Act, the plaintiff also accepts the accompanying provisions regarding subrogation. **Plaintiff had the option to proceed under either North Carolina or South Carolina's workers' compensation acts; plaintiff chose the more generous North Carolina Act.** …..

Having availed herself of the benefits under the Act, she is also bound by the terms of North Carolina's remedial laws, including those allowing an employer to subrogate recoveries from third-parties which ***prevent double recoveries***. Because plaintiff received a separate third-party recovery after defendants had provided benefit under the Act, defendants are entitled to proceed under the Act to seek subrogation of those proceeds.

Walker v. K&W Cafeterias (J. Newby Dissent)

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Interestingly Justice Newby disregards the plain terms of the insurance contract and writes:

> the majority essentially rewrites the North Carolina Workers' Compensation Act by deleting the comprehensive nature of its provisions. The majority ultimately concludes that so long as there is a rider to the insurance policy applying a state's law that prohibits subrogation, a plaintiff who has an accident outside of North Carolina but files for benefits in North Carolina may be eligible for double recovery.

Liberty Mutual Contracted away its Right of Subrogation.

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Conservatives are generally big on the right to contract is a fundamental right?

- Subrogation is a benefit to an insurer.
- Subrogation is a right which can be waived by contract. See *Hairston v. Harward*.
- The "freedom of the right to contract has been universally considered as *guaranteed to every citizen*." Alford v. Textile Ins. Co., 248 N.C. 224(1958).
- "Since the contractual provision is, as related to the facts of this case, a valid one, the parties are entitled to have it enforced as written. We cannot ignore any part of the contract." Allstate Ins. Co. v. Shelby Mut. Ins. Co., 269 N.C. 341.

Ha v. Nationwide Gen. Ins. Co. (2020)

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- **Homeowners Insurance Cancellation Issue:** On appeal from the COA, Nationwide and the amicus of the North Carolina Rate Bureau raised an issue of whether the trial court and the COA had applied the correct statute to the case.
- Despite that well established rule that "that a litigant must be heard here on the theory of the trial below and he will not be permitted to switch horses on his appeal" the Court remanded to the COA "to determine whether Article 41, Article 36 or other statutes govern in this matter. Graham v. Wall, 220 N.C. 84, 94, 16 S.E.2d 691, 697 (1941).
- COA may remand this matter to the trial court for further proceedings if necessary."
- The S.C. did the right thing in this instance.

U.S. Court of Appeals: Fourth Circuit

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Vincent v. AMCO Ins. Co.

Judge Diaz wrote opinion; Judge Motz and Judge Rushing joined (Unpublished).

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- David Vincent was riding a motorcycle he owned and was garaged at his home when he was severely injured by an UIM motorist.
- After exhausting other insurance ($50,000), the parties agreed he was entitled to additional damages of $950,000 if the AMCO UIM policy applied.
- AMCO issued a policy to a company David owned with his wife in the name of TSPC, LLC which provided $1,000,000 in UIM.
- The policy had five vehicles on it when issued all registered to TPSC.
- The policy provided UIM coverage to "**anyone occupying a 'covered auto.**"
- But it had a **"Drive Other Car Coverage – Broadened Coverage for Named Individuals"** (the "Endorsement").

Vincent v. AMCO Ins. Co.

Judge Diaz wrote opinion; Judge Motz and Judge Rushing joined (Unpublished).

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The Vincents were identified as "insureds" in the DOC endorsement.

C. Changes In Auto Medical Payments And Uninsured And Underinsured Motorists Coverages

The following is added to **Who Is An Insured**:

Any individual named in the Schedule and his or her "family members" are "insureds" while "occupying" or while a pedestrian when being struck by any "auto" you don't own *except*:

Any "auto" owned by that individual or by any "family member[.]"
[Owned- Vehicle Exclusion]

Vincent v. AMCO Ins. Co.

Judge Diaz wrote opinion; Judge Motz and Judge Rushing joined (Unpublished).

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- AMCO made two arguments of which winning either there would not be UIM coverage for the loss:

- **(1)** the Act's requirements don't apply to its policy because the policy is "applicable solely to fleet vehicles," and
- **(2)** even if the Act applies, it doesn't require coverage for the Vincents because they're not class one insureds.

1) SOLELY TO FLEET VEHICLES ISSUE

Vincent v. AMCO Ins. Co.

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- The seven vehicles listed in the AMCO policy are fleet vehicles because they are each used in TSPC's business. But, via the Endorsement, the policy *also* applies to many other vehicles, including any vehicle that the Vincents borrow from a friend for personal use. Such a vehicle isn't a "fleet vehicle" because it's not used in any insured's business. …

- **Because the AMCO policy covers both fleet and nonfleet vehicles, it isn't "applicable solely to fleet vehicles**," and isn't exempt from the Act, as the district court correctly held. AMCO's **contrary interpretation would read the word "solely" out of the fleet exemption.**

SHOUT OUT TO THE NCAJ AMICUS

Vincent v. AMCO Ins. Co.

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AMCO also relies on the Act's statement that "[w]hen determining whether a policy is applicable solely to fleet vehicles, the insurer may rely upon the number of vehicles reported by the insured at the time of the issuance of the policy for the policy term in question." N.C. Gen. Stat. § 20-279.21(b)(4). This, AMCO insists**, means that we should look only to whether a policy covers at least five vehicles in assessing whether it falls within the exemption.**

SHOUT OUT TO THE NCAJ AMICUS

Vincent v. AMCO Ins. Co.

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- But we find more plausible the **Advocates'** explanation for why the North Carolina legislature added this provision one year after enacting the fleet exemption. In their view, this language was only meant to clarify that changes to the number of vehicles covered by a policy after its issuance don't affect its status.
- In other words, if a policy falls within the fleet exemption when it's issued, but vehicles are later removed from the policy—taking the total number of insured vehicles below five—the policy remains within the exemption's scope. For support, the **Advocates** point to the provision's emphasis on "the time of the issuance of the policy," and to a December 2008 letter from the North Carolina Reinsurance Facility (an entity through which auto insurers pool risks) expressing concern that a policy's status could change if an insured "add[ed] or delete[d] vehicles on a policy midterm."

SHOUT OUT TO THE NCAJ AMICUS

Vincent v. AMCO Ins. Co.

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- the **Advocates**' reading comports better with the fleet exemption's inclusion of the word "solely." When interpreting a North Carolina statute, we must "give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 675 S.E.2d 641, 649 (2009).
- Had the legislature wanted to exempt any policy covering more than four vehicles from the Act's requirements, the exemption would say "applicable to fleet vehicles," not "applicable solely to fleet vehicles."
- And to the extent that there is any ambiguity here, we must construe the Act liberally, in favor of coverage. See Pennington, 573 S.E.2d at 120.

2) CLASS I v. CLASS II ISSUE

Vincent v. AMCO Ins. Co.

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- the policy is ambiguous as to whether the Vincents are named insureds because it never defines that term or refers to class one or class two, and because it gives the Vincents broad coverage.
- class two insureds include persons who use vehicles "with the consent, express or implied, of the named insured.
- So, the Vincents have broader UIM coverage than a class two insured.
- Supreme Court of North Carolina has suggested that each person covered by the Act must fall into one of the two classes. **So they are Class I insureds.**

2) CLASS I v. CLASS II ISSUE

Vincent v. AMCO Ins. Co.

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- We must construe any ambiguity in the Act or the policy in the Vincents' favor.
- Therefore, we conclude that the Vincents are class one insureds, and specifically named insureds.
- Importantly, the court noted the actual intent of AMCO was not at relevant:
  - We come to this result even as we acknowledge that AMCO allegedly didn't view the Vincents as named insureds when it drafted the policy. Regardless, AMCO had notice of the definition of class two insured. Yet it gave the Vincents broader UIM coverage than a class two insured enjoys.

North Carolina Court of Appeals (Published)

Erie v. Smith (2021)

Judge Hampson, Judge Tyson, and Judge Murphy concurring

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- 30 April 2016, Pinto went to [Valley Auto World (Valley)] for the purpose of trading in his 2004 Saturn and purchasing another vehicle. Settled on a VW Beetle which was to be financed.
- However, while Pinto remained on the [Valley] premises, [Valley] received a fax from VW Credit containing VW Credit's approval of $510 less than requested;
- Thus a $510 gap remained between the amount of financing approved by VW Credit and the total purchase price of the vehicle that had been agreed upon.
- Despite this shortfall, the business manager of [Valley], believed that he would ultimately be able to secure the full financing amount by resubmitting Pinto's credit application to VW Credit the following Monday.
- For this reason, he proceeded to assist Pinto in completing the necessary paperwork memorializing the sale.

Erie v. Smith (2021)

Judge Hampson, Judge Tyson, and Judge Murphy concurring

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- 30 April 2016 was a Conditional Delivery Agreement ("CDA").
- The CDA stated, as follows: DEALER'S obligations to sell the SUBJECT VEHICLE to PURCHASER and execute and deliver the manufacturer's certificate of origin or certificate of title to SUBJECT VEHICLE **are expressly conditioned on FINANCE SOURCE'S approval of PURCHASER'S application for credit as submitted AND dealer being paid in full by FINANCE SOURCE.**
- **Upon signing the documents provided to him by Carrington, Pinto drove the Beetle off the [Valley] lot that afternoon.**
- **Later that evening, Pinto was driving the Beetle when he was involved in a head-on collision** with another vehicle being driven by Edward Smith. Smith's son, Archie, was a passenger in his vehicle
- . Pinto was killed in the collision, and both Edward Smith and Archie Smith were seriously injured.
- 2 May 2016. Unaware of Pinto's death, Valley resubmitted his credit application to VW Credit and VW Credit faxed [Valley] its approval for the full amount requested initially.

Erie provided the liability insurance to Pinto on the Saturn he traded in.

Universal provided insurance coverage for the Valley

The **trial court** determined that the Universal policy ($500,000) and Universal excess policy ($10,000,000) provided primary coverage and that the Erie policy ($100,000 per person / $300,000 accident) provided excess liability coverage.

Coverages / Trial Court

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Erie v. Smith (2021)

Judge Hampson, Judge Tyson, and Judge Murphy concurring

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The dispositive issues in this appeal are:

(I) whether Valley's sale and delivery of the Beetle to Pinto was a conditional delivery under N.C. Gen. Stat. § 20-75.1 such that Universal, as the dealer's insurer, was obligated to provide insurance coverage at the time of the accident; and if so,

(II) whether such insurance coverage by Universal operated as the primary or excess insurance coverage;

(III) what coverage limits are applicable under Universal's liability insurance policy with the dealer;

(IV) whether Universal is obligated to provide additional coverage for the accident under its umbrella insurance policy covering the dealer; and

(V) whether this Court has appellate jurisdiction to review Erie's separate challenge to the trial court's Order concluding Erie is obligated to provide excess insurance coverage for liability arising from the accident.

Liability, collision, and comprehensive insurance on a vehicle **sold and delivered <u>conditioned on the purchaser obtaining financing</u> for the purchaser of the vehicle shall be covered by the dealer's insurance policy until such financing is finally approved and execution of the manufacturer's certificate of origin or execution of the certificate of title.** Upon final approval and execution of the manufacturer's certificate of origin or the certificate of title, and upon the purchaser having liability insurance on another vehicle, the delivered vehicle shall be covered by the purchaser's insurance policy beginning at the time of final financial approval and execution of the manufacturer's certificate of origin or the certificate of title.

Issue I: Section 20-75.1 – <u>Clear & Unambiguous</u>

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Erie v. Smith

Section 20-75.1 "the vehicle ***shall be covered by the dealer's insurance policy***" and as such, Universal's policy issued to Valley in the present case applies. N.C. Gen. Stat. § 20-75.1 (emphasis added). Although Universal's policy provides, "[w]hen there is other insurance applicable, WE will pay only the amount required to comply with such minimum limits after such other insurance has been exhausted[,]" Section 20-75.1 expressly states, "the purchaser of the vehicle shall be covered by the dealer's insurance policy" where a vehicle is "sold and delivered conditioned on the purchaser obtaining financing[.]" *Id.* **Universal points to no other insurance policy issued to or covering the dealer in this case under Section 20-75.1.** Because Section 20-75.1 applies to the underlying transaction and **requires liability coverage by Universal as Valley's insurer, we also conclude Universal's coverage is primary.**

Issue II: Universal Policy - Primary.

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Since Section 20-75.1 only requires that the vehicle on a condition sale "shall be covered by the dealer's insurance policy" the terms of the policy control above the minimum limits.

The policy "limits payments for individuals covered by operation of law to 'that portion of such limits required to comply with the minimum limits provision law in the jurisdiction where the OCCURRENCE took place.'"

Issue III: Universal Policy – Only Provides Min. Limits.

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Erie v. Smith

Pinto qualified for coverage under the underlying policy under subsection A.4. The policy language stated:

Who is an Insured

"A. YOU; B. If a resident of YOUR household: 1. YOUR spouse; 2. a relative or ward of YOURS; 3. any other person under the age of 21 in the care of any of the foregoing." Meanwhile Commercial Umbrella limits "*Who Is An Insured*" to:

1. YOU; ...

2. YOUR directors, executive officers or stockholders.

5. any other person or organization:

a. named in the UNDERLYING INSURANCE (provided to the Named Insured of this coverage part);

b. granted INSURED status under:

(1) Parts A.5 or A.6 of the Who Is An Insured condition in Coverage Part 500 - Garage; or

(2) Parts A.7 or A.8 of the Who Is An Insured condition in Coverage Part 660 - General Liability;

Issue IV: Universal Policy - Umbrella policy provides no coverage for Pinto.

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Erie v. Smith

Rule 28(c) of the Rules of Appellate procedure permits a party to:

> **Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.**

However Erie's argument did not quality:

> **Erie's argument is directed at the trial court's conclusion Erie's policy provided Pinto excess liability coverage. This is not an alternative basis in law for supporting entry of the Order; Erie's argument is that "an altogether different kind of [order] should have been entered"—an order granting their motion for summary judgment in full. Id. Thus, "this alleged error should have been separately preserved and made the basis of a separate cross-appeal."**

Issue V: Erie Failed to Preserve the Issue on Appeal.

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Erie v. Smith (2021)

Judge Hampson, Judge Tyson, and Judge Murphy concurring

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Bad day at the Court of Appeals - The end result was:

- Universal Underwriters policy provided $30,000 / $60,000 in coverage (not $500,000).
- Universal Underwriters umbrella policy provided no coverage (not $10,000,000).
- The Erie policy provided excess liability coverage of $100,000 / $300,000.

N.C. Farm Bureau v. Lunsford (2020)

(Judge Chris Brook, Judge Stroud concurring in result, Judge Murphy dissenting)

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- At first note there is not a majority opinion, but only a majority result.
- This matter has been appealed to the Supreme Court as a matter of right based on the dissent. Oral arguments occurred in May 2021. Supreme Court arguments are now available on YouTube. https://www.youtube.com/watch?v=zaoGvAnol8c
- Unusual fact specific cases make matters more difficult for the COA and create the potential for bad law. The decision is poorly written and thus has potential unintended consequences potentially impacting *Benton v. Hanford* which is not even discussed in the "majority" decision.
- Judge Stroud authored the COA's 3-0 decision in *Benton*. Clearly she would not intend to reverse herself.
- **The COA should not have published this case.**

N.C. Farm Bureau v. Lunsford (2020)

(Judge Chris Brook, Judge Stroud concurring in result, Judge Murphy dissenting)

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- 22 May 2017, Judy Lunsford was a passenger in her sister's car when her sister lost control of the vehicle, traveled over a median and collided with a tractor-trailer **in Alabama**. Lunsford sustained serious injuries as a result.
- **Lunsford was a resident of North Carolina** and carried automobile insurance issued in North Carolina by North Carolina Farm Bureau. This NCFB policy afforded UM/UIM insurance coverage with a limit of $50,000 per person per occurrence.
- Nationwide insured the Silverado through a policy issued in Tennessee. This policy afforded liability coverage for BI with a limit of $50,000 per person per occurrence, and UM/UIM coverage also with limits of $50,000 per person.
- Tennessee law differs ***substantially*** from North Carolina law with respect to UM/UIM vehicles. A UIM vehicle does not include a motor vehicle "[i]nsured under the liability coverage of the same policy of which the un[der]insured motor vehicle coverage is a part."
- One cannot obtain liability and UIM coverage under the same policy in Tennessee.
- Just the opposite is true in North Carolina.

N.C. Farm Bureau v. Lunsford (2020)

(Judge Chris Brook, Judge Stroud concurring in result, Judge Murphy dissenting)

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Judge Brook wrote:

- While Defendant's policy issued by Plaintiff is an insurance contract entered into by a North Carolina insurer and a North Carolina insured, and concerning the interests of a North Carolina citizen, and **North Carolina law therefore applies to its construction and application**, the policy does not cover her injuries from the May 2017 accident.
- The limits of the policy issued by Plaintiff are $50,000 per person and $100,000 per accident, which are the same as the limits of the personal injury coverage under her sister's policy with Nationwide.
- **Because these are the only two policies at issue, and the limits of Defendant's underinsured motorist coverage and her sister's personal injury coverage are equal, in this case "the sum of the limits of liability under [the] bodily injury liability ... policies applicable" is not less "than the applicable limits of underinsured motorist coverage[.]" N.C. Gen. Stat. § 20-279.21(b)(4) (2019).**
- Defendant's sister's vehicle therefore was not underinsured as that term is defined by North Carolina law.

N.C. Farm Bureau v. Lunsford (2020)

(Judge Chris Brook, Judge Stroud concurring in result, Judge Murphy dissenting)

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To further muddy the water Judge Brooks interjects Class I v. Class II insureds in the mix.

- Judge Brook wrongly stated that under North Carolina law Lunsford could only recover UIM benefits under the Silverado's Nationwide policy if she were a member of her sister's household (i.e., a Class I insured). By so holding, the Court's opinion implies that an occupant of the insured vehicle (i.e., a Class II insured) is not entitled to stack UIM coverage on the insured vehicle for purposes of determining whether UIM coverage applies. This is wrong. Class I and Class II status is irrelevant.
- The opinion wrongly concludes North Carolina law precludes Lunsford from UIM benefits under the Nationwide policy because she was not a member of the same household (e.g., a Class I insured) as her sister. In so doing, the opinion's author's rationale misapprehends and misapplies the axiom that "[i]n North Carolina, insurance coverage for damages caused by uninsured and underinsured motorists 'follows the person, not the vehicle[.]"
- the opinion ignores this that "UIM coverage available to 'Class II' insureds is **tied to the vehicle occupied by the injured person at the time of the accident.**"

N.C. Farm Bureau v. Lunsford (2020) Dissenting Opinion, Judge Murphy

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Citing the "**conformity clause**" in the NW policy Judge Murphy wrote:

- Chapman's Nationwide policy incorporates our FRA's definitions in certain circumstances, stating, "We will adjust this policy to comply ... [w]ith the financial responsibility law of any state or province which requires higher liability limits than those provided by this policy."
- We have held that where an out-of-state policy includes a conformity clause, "which, by its very terms, requires us to examine North Carolina law to determine" whether a certain kind of coverage is available, we will apply our laws in interpreting the out-of-state policy.
- **In following our precedent from *Cartner* here, Chapman's Nationwide policy must be adjusted to comport with our FRA's definition of an underinsured motor vehicle and the accompanying caselaw.**

[**Comment**: even though the only connection to NC is the passenger Lunsford is an NC resident seeking UIM coverage]

N.C. Farm Bureau v. Lunsford (2020)

(Judge Chris Brook, Judge Stroud concurring in result, Judge Murphy dissenting)

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- As the dissent notes, the *Benton* court held a passenger in a tortfeasor's insured vehicle, who was not a member of the named insured's household (Class II insured), was entitled to stack the UIM coverage on the insured vehicle with the passenger's own available UIM coverage.
- The only difference between *Benton* and the underlying facts of this matter is that the vehicle in which Lunsford was a passenger was insured by an out-of-state policy, while the insured vehicle in *Benton* had a North Carolina policy of insurance.
- The opinion makes no pretense of basing its decision on this fact, or otherwise differentiating *Benton* on this basis. Thus, the opinion below **violates the canon that one COA panel is bound by prior decisions of another panel with respect to the same issue.**

At oral argument before the Supreme Court NCFB did not argue that *Benton* was wrongly decided, but that it was correctly decided by the COA.

Buchanan v. N.C. Farm Bureau (2020)

Judge Tyson; Judge McGee and Judge Young concurring

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Homeowner's insurance claim. *Nothing novel* ***Detailed timeline is in the manuscript.***

The court noted:

> Plaintiff argues the trial court erred in granting Defendant's motion to stay the trial and compelling an appraisal of the Home. Defendant argued, and the trial court agreed, such appraisal was compelled by the terms of the Policy and this Court's precedent. See Patel v. Scottsdale Ins. Co. (interpreting **insurance policy language as requiring appraisal process as condition precedent to filing suit against insurer.)**

In holding *Patel* controls it stated:

> The Policy before us expressly provides: "No action can be brought against us unless there has been full compliance with all of the terms under Section I of this policy." Section I of the Policy includes an appraisal clause: **"If you and we fail to agree on the value or amount of any item or loss, either may demand an appraisal of such item or loss."**

Buchanan v. N.C. Farm Bureau (2020)

Judge Tyson; Judge McGee and Judge Young concurring

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Unfair and Deceptive Claims Handling Issue:

The crux of the claims were NCFB:

1. made a very brief examination of the premises and offered about half of the replacement cost of the Home and personal property [decision makes not comment of the amount of the appraisal award];
2. forced Plaintiff to obtain at his own expense documentation of the damages;
3. ignored Plaintiff's submitted valuation; and,
4. only requested an appraisal two and a half years after the fire.

The court stated:

While Plaintiff clearly suffered from the fire and loss, he was advanced multiple payments and tenders due for his losses and has failed to forecast evidence Defendant engaged in any of the alleged unfair and deceptive trade practices he asserts as grounds to show the trial court erred in granting Defendant's motion for summary judgment.

Barnard v. Johnston Health Services (2020)

Judge Bryant; Judge Tyson and Judge Brook concurring

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Issue: Where the clauses for assignment of benefits (contained in a form the MPC insured signed at the hospital) properly applied to plaintiff's MedPay benefits, we affirm the trial court's judgment on the pleadings in favor of defendants.

Attempted Class Action: Against ACI billing practices at Johnson Health Services.

ACI: "regularly assisted Johnston Health with account management for emergency patients involved in motor vehicle accidents. Once a patient is determined to have an automobile liability policy that contains medical payments coverage, Johnston Health assigns the patient account to ACI for collection of benefits."

Barnard v. Johnston Health Services (2020)

Judge Bryant; Judge Tyson and Judge Brook concurring

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- So What Happened:
  - Barnard Insured with State Health Plan (BCBS).
  - Barnard Insured State Farm MPC of $2000.
  - ER bill of $4,332.00. Signed Assignment.
  - ACI (for JHSC) Billed State Farm $4,332.00 for the ER Bill.
  - State Farm Paid $2,000 to ACI.
  - ACI billed $4,332.00 to State Health Plan (BCBS) (max hospital could get on the bill for a SHP/BCBS insured was the adjusted rate of $2,208.90).
  - SHP/BCBS paid $694.63 to ACI/JHSC.
  - ACI/JHSC held the $485.73 overpayment for 10 months then gave it to SHP/BCBS.

Barnard v. Johnston Health Services (2020)

Judge Bryant; Judge Tyson and Judge Brook concurring

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- Assignment Involved:
  - I request that payment of authorized benefits be made to the appropriate UNC Health Care affiliate[, Johnston Health,] on my behalf. I authorize [Johnston Health] to bill directly and assign the right to ***all health and liability insurance benefits*** otherwise payable to me, and I authorize direct payment to [Johnston Health].

  - N.C. Gen. Stat. § 135-48.37. **The Plan [SEHP]** shall have the right of subrogation upon all of the Plan member's right to recover **from** a **liable third party** for payment made under the Plan, for all medical expenses. including provider, hospital, surgical, or prescription drug expenses, to the extent those payments are related to an injury **caused by a liable third party**. The Plan member shall do nothing to prejudice these rights. The Plan has the right to first recovery on any amounts so recovered, whether by the Plan or the Plan member, and whether recovered by litigation, arbitration, mediation, settlement, or otherwise.

Barnard v. Johnston Health Services (2020)

Judge Bryant; Judge Tyson and Judge Brook concurring

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- According to the COA this is OK.
  - "The purpose of MedPay in the State Farm policy is to afford financial assistance to the insured for medical services and treatment sought as a result of a car accident. By these terms, it **is reasonable that a person, insured with State Farm, should interpret Med Pay as providing additional health insurance benefits**. Therefore, it was not error for the trial court to determine that MedPay benefits constitute--at least in part--health benefits and that plaintiff's assignment of benefits included those MedPay benefits."
- In allowing the money to be paid to the SHP/BCBS the COA allowed the SHP/BCBS to do indirectly what it could not accomplish directly – subrogate against its insured's first party MPC benefits.

Barnard v. Johnston Health Services (2020)

Judge Bryant; Judge Tyson and Judge Brook concurring

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- It's also another example of how the COA does not understand insurance or the *real world* that most of our clients live in.
  - ("[I]f the insurer has made payments to the insured for the loss covered by the policy and the insured thereafter recovers for such loss from the tortfeasor [or an insurance company], the insurer can recover from the insured the amount it had paid the insured, on the theory that otherwise the insured would be **unjustly enriched by having been paid twice for the same loss."**) **[what the heck!]**
- The only folks unjustly enriched by the decision are health insurers / plans and the medical providers (in many cases collect more in MPC that would be allowed under their K's with the health insurers/plans.)
- For some reason it seems **okay** at the COA to "**unjustly enrich" corporate entities (but not injured individuals who actually paid for the coverage**).

Barnard v. Johnston Health Services (2020)

Judge Bryant; Judge Tyson and Judge Brook concurring

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- Judge Bryant wrote "The purpose of MedPay in the State Farm policy is to afford financial assistance to the insured for medical services and treatment sought as a result of a car accident."

- IT IS! BUT the insured did not purchase MPC to:
  - 1. Permit a medical provider to charge her more than the rate which the medical provider contracted with her health insurer/plan to accept as the rate of medical charges for services rendered to her.
  - 2. To allow her health insurance to pay less on a medical bill that it otherwise owed.
- She could use MPC to pay co-pays, deductibles which are very large.
- **Remember**: Barnard paid premiums for both coverages which are both *voluntary* coverages.

Barnard v. Johnston Health Services (2020)

Judge Bryant; Judge Tyson and Judge Brook concurring

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- The *Barnard*, decision robs the insured of the benefit of the bargain her health insurance obtained with the medical provider (a reduction of the standard charged rate) and the benefit of the purchase of MPC.
- The *Barnard* decision runs counter to the Supreme Court's decision in *Hairston v. Harward* which involved voluntary purchase of UIM coverage not MPC:
  - In other words, there is no escaping the fact that one party to this case or the other will receive what could be fairly characterized as a "windfall" as a result of our decision in this case. In light of that fact, we believe that the better option is to allow plaintiff to retain the "windfall" that results from his foresight in voluntarily electing to purchase underinsured motorist coverage rather than allowing defendant, who failed to purchase enough liability coverage to adequately compensate plaintiff for his injuries, to be the ultimate beneficiary of plaintiff's decision to procure additional insurance coverage. 371 N.C. 647, 662 (2018)

D.C. Custom Freight v. Tammy Ross Assoc., Inc. Judge

Inman, Judge Stroud, and Judge Collins concurring

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- The primary question in this case is whether a claim for unfair and deceptive trade practices against an insurance agent, based on the agent's misrepresentation to a third party of the terms of a policy, can be maintained absent evidence that the plaintiff ***actually*** relied on the misrepresentation.

- We hold that North Carolina Supreme Court precedent **precludes such a claim absent evidence** that the plaintiff's **actual** and **reasonable** **reliance on a misrepresentation caused the claimed damages**.

D.C. Custom Freight v. Tammy Ross Assoc., Inc. Judge

Inman, Judge Stroud, and Judge Collins concurring

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- In 2016 Plaintiff engaged Defendant to procure commercial automobile insurance coverage, providing Defendant with a list of Plaintiff's equipment.
- and a copy of its former insurance policy to use as a "go-by."
- Through Defendant, Plaintiff purchased a policy from Wesco Insurance Company.
- Plaintiff used rented vehicles in its business, including trucks rented from Rush Enterprises, Inc. ("Rush"), some via long-term leases and some via short-term rentals. The long-term leased trucks were individually listed in the policy and covered for physical damage.
- **Trucks rented on a short-term basis were not individually enumerated and were not covered by the policy**.

D.C. Custom Freight v. Tammy Ross Assoc., Inc. Judge Inman, Judge Stroud, and Judge Collins concurring

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- Rush required Plaintiff to carry collision coverage on the vehicles it leased.
- On three occasions the agent sent certificates of insurance coverage to Rush (or its insurer).
- The first COI referenced liability coverage only and was sent to Rush's insurer and Plaintiff.
- The second and third times the COI's send to Rush's insurer mentioned "Specified Perils/Collision Deductibles."
- **Neither of these COI's (2 or 3) were sent to the Plaintiff**.
- A collision loss occurred on one of the trucks Plaintiff secured as a short-term basis from Rush.
- Plaintiff's carrier denied coverage.

D.C. Custom Freight v. Tammy Ross Assoc., Inc. Judge

Inman, Judge Stroud, and Judge Collins concurring

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Failure to Procure Claim against the Agent

- absent a special relationship an agent only has a duty to procure only the coverage an insured requested and no duty to recommend additional coverage.
- although agents hold themselves out to be professionals with special knowledge N.C. law does not hold them to the standard of real professionals (probably because a surprising number are only salesmen with little knowledge of what the sell).
- no evidence the plaintiff requested the agent provide coverage for short-term rentals.
- prior policy it provided as a "go-by" did not provide such coverage.
- plaintiff told the agent that it used short-term rentals was not sufficient.

D.C. Custom Freight v. Tammy Ross Assoc., Inc. Judge *Inman, Judge Stroud, and Judge Collins concurring*

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More concerning, the Court stated:

> Our legislature has prohibited the issuance of COIs that "contain[ ] any false or misleading information concerning the policy of insurance to which the certificate of insurance makes reference." N.C. Gen. Stat. § 58-3-150(f)(2) (2019).
>
> We simply hold that a COI, sent to a third party and never communicated to the insured, without any additional consideration, does not create additional contractual duties owed to the insured.

D.C. Custom Freight v. Tammy Ross Assoc., Inc. Judge Inman, Judge Stroud, and Judge Collins concurring

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The problem with above: COIs are intended to be sent to 3rd parties!

That is the PURPOSE of a COI!

What if a copy of the COIs had been sent to the Plaintiff?

Presumably if the agent had not "misrepresented" the coverage to Rush's insurer, with Rush and/or its insurer appearing to be a third party beneficiary of the policy, Rush or its insurer would have required Plaintiff to get additional coverage.

D.C. Custom Freight v. Tammy Ross Assoc., Inc. Judge

Inman, Judge Stroud, and Judge Collins concurring

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- **<u>Unfair and Deceptive Trade Practices Issue</u>**
- Defendant contends that Plaintiff cannot show reliance because the revised December and March COIs were never seen by Defendant prior to the accident giving rise to this case. We agree.
- In *Cullen v. Valley Forge* the COA "held that a showing of reliance was not required to prove causation." It has <u>not</u> been overruled.
- Despite that the COA citing a NCSC case (*Bumpers*) held there must be a showing of **1) actual reliance** and **2) the reliance must be reasonable.**
- **Didn't help that no rep of Plf had ever read the policy!**

N.C. Farm Bureau v. Dana (2020)

Judge Murphy, Judge Dillon, and Judge Hampson concurring

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- Pamela Marguerite Dana drove with her husband William Thomas Dana, Jr., as passenger when a vehicle operated by Matthew Taylor Bronson crossed left a center hitting the Dana vehicle head-on.
- Jessica Jones was a passenger in the Bronson vehicle.
- Debris from the Dana/Bronson collision struck a third vehicle purportedly caused injury to its driver Joshua Jeffries.
- Bronson and Jones died at the scene.
- Pamela Dana succumbed to her injuries several days later.
- William Dana suffered serious injuries.

N.C. Farm Bureau v. Dana (2020)

Judge Murphy, Judge Dillon, and Judge Hampson concurring

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Integon insured the Bronson vehicle with BI liability coverage in the amounts of $50,000 per-person / $100,000 per-accident.

The Integon per accident limits were exhausted as follows:

William Dana	$ 32,000
Estate of Pamela Dana	$ 43,750
Estate of Jessica Jones	$ 23,500
Joshua Jeffries	$ 750
Total:	$100,000

N.C. Farm Bureau v. Dana (2020)

Judge Murphy, Judge Dillon, and Judge Hampson concurring

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Farm Bureau made the following offers of UIM coverage to the Dana, which Farm Bureau contends is the maximum amount of UIM coverage available to the Danas:

William Dana

$100,000 per-person limit - $32,000 liability coverage = $ 68,000

Estate of Pamela Dana

$100,000 per-person limit - $43,750 liability coverage = $ 56,250

Total: $124,250

N.C. Farm Bureau v. Dana (2020)

Judge Murphy, Judge Dillon, and Judge Hampson concurring

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- The Danas contend since the liability policy limits of Integon were exhausted on a per-accident basis, they are entitled to an additional $75,750 of UIM coverage calculated as follows:

$300,000	(UIM coverage - Farm Bureau per-accident limit)
- $100,000	(The liability policy per-accident limit of the Estate
$200,000	of Matthew Bronson afforded through Integon, which was exhausted on a per-accident basis)
- $124,250	(the total UIM money paid to the Danas by NCFB)
$75,750	(owed by Farm Bureau to Defendants-Appellees)

N.C. Farm Bureau v. Dana (2020)

Judge Murphy, Judge Dillon, and Judge Hampson concurring

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- Citing Gurley as precedent the COA wrote:

"(1) the number of claimants seeking coverage under the UIM policy; and (2) whether the negligent driver's liability policy was exhausted pursuant to a per-person or per-accident cap."

[W]hen more than one claimant is seeking UIM coverage, as is the case here, how the liability policy was exhausted will determine the applicable UIM limit. In particular, when the negligent driver's liability policy was exhausted pursuant to the per-person cap, the UIM policy's per-person cap will be the applicable limit. However, when the liability policy was exhausted pursuant to the per-accident cap, the applicable UIM limit will be the UIM policy's per-accident limit.

N.C. Farm Bureau v. Dana (2020)

Judge Murphy, Judge Dillon, and Judge Hampson concurring

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- Unfortunately the NCSC granted NCGB's PDR.
- **Oral arguments were heard May 2021.**
- **It can be viewed at: https://www.youtube.com/watch?v=ruprhxyxgM4.**