

REDEFINING UNDERINSURED MOTORIST COVERAGE IN OHIO

I. INTRODUCTION

Ohio has recently joined the increasing number of jurisdictions that require insurance companies to offer some form of underinsured motorist coverage to their insureds. “Underinsured motorist coverage” is a term of art referring to coverage meant to protect an insured against negligent drivers who purchase insufficient liability insurance. The term, however, because of differing perceptions of what constitutes insufficient liability coverage, embraces many variations. Within the varying perceptions of when a negligent driver should be deemed underinsured, two views predominate; insufficient liability coverage can be triggered when the amount of the negligent driver’s liability insurance is less than the amount of damages the victim has sustained, or, alternatively, when the former amount is less than the amount of underinsured motorist coverage purchased by the victim.

This Comment will describe the goals of underinsured motorist coverage and examine the extent to which each of the two types of underinsured motorist coverage identified above meets these goals. It will then categorize the version of underinsured motorist coverage that exists in Ohio and assess the extent to which this particular version achieves the ends that it was intended to serve.

II. RESPONSES TO THE NEED FOR UNDERINSURED MOTORIST COVERAGE

A. *General Response*

In the early 1900s the increasing use of the automobile for transportation began to bring greater mobility to the American population. Unfortunately, however, this engendered a concomitant rise in the number of personal injuries resulting from the negligent operation of the automobile. It soon became apparent that persons who were injured by and had subsequently obtained valid judgments against negligent drivers were frequently unable to execute those judgments because the tortfeasor “neither purchased [liability] insurance nor possessed sufficient personal financial resources to enable [the tortfeasor] to respond to . . . damage claims”¹

To remedy this inequity many states began to require drivers to obtain insurance. Massachusetts, in 1927, became the first state to institute a mandatory insurance program.² Of course, this did not aid plaintiffs injured by negligent drivers who had

1. A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* § 1.1 (1969).

2. *See* I I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE* § 1.01 (rev. ed. 1979). Although Massachusetts was the first state to require liability coverage and remained for thirty years the only state to do so, Connecticut passed its Financial Responsibility Act in 1925, which required the defendant to prove his or her ability to satisfy any claim up to at least ten thousand dollars. If the motorist could not meet the financial responsibility requirement the State Commissioner of Motor Vehicles could revoke the registration of and refuse to register any motor vehicle owned by the defendant. Despite its drawbacks (it was not triggered until after the defendant had been involved in an accident, and it required the injured party to initiate the action), this statute served as a model for statutes in twenty-seven states in the next decade. *See* A. WIDISS, *supra* note 1, at § 1.3.

nevertheless failed to purchase the required coverage. To remedy this problem, many states recently began to require that insurers offer uninsured motorist coverage. This coverage is designed to provide an alternate source of compensation to the injured insured when the tortfeasor lacks liability coverage.³ Today, statutes in all fifty states⁴ require that this coverage be provided or at least offered to insureds.⁵

As commendable as uninsured motorist coverage is, however, it fails to deal with the serious problem of underinsured drivers.⁶ This problem arises when the amount of the injured insured's damages exceeds the amount of liability insurance coverage available from the tortfeasor,⁷ and occurs in two situations: first, when the limit of the tortfeasor's liability coverage is less than the injured insured's damages and, second, when the limits of the liability coverage would be enough to provide full compensation but the injured insured is able to recover only a portion thereof because of the presence of other claimants.⁸ In both cases, although the tortfeasor possessed at

3. See generally A. WIDISS, *supra* note 1, at §§ 1.1-1.12.

4. Note, Oris v. Claudio: *Validity of the Owned-But-Uninsured Vehicle Exclusion Under Uninsured Motorist Coverage*, 10 CAP. U.L. REV. 415, 415 (1980).

5. See A. WIDISS, *supra* note 1, at § 8.3, where this distinction is labeled "mandatory offering vs. mandatory coverage." In both situations the insurer must offer the coverage, but in the former the insured can reject the coverage, while in the latter he or she cannot.

6. It has been estimated that in Ohio there is only a one in ten chance of being involved in an accident with an uninsured motorist, while there is a one in four chance of being involved in an accident with a motorist carrying at least the minimum amount of liability insurance. See Note, *Shelby Mutual Insurance Company v. Smith and Amended Senate Bill No. 25: Re-evaluating Public Policy and Uninsured Motorist Coverage—Why "Underinsured" Protection is Necessary*, 3 OHIO N.U.L. REV. 1355, 1363 (1976) (citing Letter from John T. Dublin, Customer Relations Office of Nationwide Insurance, to Marie E. Peck (February 18, 1976)). Clearly, as Professor Maldonado points out, "underinsurance is a real problem . . ." Maldonado, *Requiring Underinsured Motorist Coverage in Ohio*, 6 OHIO N.U.L. REV. 534, 536-37 (1979).

7. The Ohio Supreme Court has rejected the argument that an underinsured tortfeasor is "uninsured" to the extent of his or her underinsurance (*i.e.*, to the extent of the injured insured's uncompensated damages). *Shelby Mutual Ins. Co. v. Smith*, 45 Ohio St. 2d 66, 341 N.E.2d 597 (1976). Many jurisdictions have reached the same conclusion. Some have done so even when the actual amount recoverable from the tortfeasor is reduced below the statutory minimum or depleted entirely due to the presence of multiple claimants. See, *e.g.*, *Chafin v. Aetna Ins. Co.*, 550 F.2d 575 (10th Cir. 1976) (interpreting New Mexico law); *Criterion Ins. Co. v. Anderson*, 347 So. 2d 384 (Ala. 1977); *Cotton States Mut. Ins. Co. v. Austin*, 143 Ga. App. 309, 238 S.E.2d 253 (1977); *Ripley Resin Engineering Co., Inc. v. Great Am. Ins. Co.*, 388 N.E.2d 1258 (Ill. App. Ct. 1979); *Richard v. Zurich Ins. Co.*, 318 So. 2d 83 (La. Ct. App. 1975) (implicitly overruled by statutory amendment, see *Whitten v. Empire Fire and Marine Ins. Co.*; 353 So. 2d 1071 (La. Ct. App. 1977)); *Saari v. State Farm Mut. Auto Ins. Co.*, 72 Mich. App. 278, 249 N.W.2d 390 (1976); *Gardner v. Am. Ins. Co.*, 95 Nev. 291, 593 P.2d 465 (1979); *Allstate Ins. Co. v. O'Shaughnessy*, 118 N.H. 66, 384 A.2d 486 (1978); *Gorton v. Reliance Ins. Co.*, 77 N.J. 563, 391 A.2d 1219 (1978); *Tucker v. Peerless Ins. Co., Inc.*, 41 N.C. App. 302, 254 S.E.2d 656 (1979); *McKinley v. Prudential Property and Casualty Ins. Co.*, 619 P.2d 1269 (Okla. Ct. App. 1980); *Strunk v. State Farm Mut. Auto. Ins. Co.*, 90 Wash. 2d 210, 580 P.2d 622 (1978). Some courts, however, have held an underinsured motorist "uninsured" to the extent of his or her underinsurance. See, *e.g.*, *Williams v. Hartford Accident and Indem. Co.*, 382 So. 2d 1216 (Fla. 1980).

8. As Professor Maldonado observed:

Underinsurance is a real problem which has left many injured motorists insufficiently compensated and which has allowed many defendants to escape liability because they have complied with the minimum statutory requirements. . . .

[C]laims [for underinsured motorist coverage] have been asserted in two different situations. One situation occurs where the insured's injuries exceed the total amount of indemnification provided by the tortfeasor's liability insurance. . . .

Another situation occurs where an insured [is not fully compensated] . . . because the tortfeasor's insurance was distributed to several claimants thereby reducing the amount that individual claimants could receive

Maldonado, *Requiring Underinsured Motorist Coverage in Ohio*, 6 OHIO N.U.L. REV. 534, 536-37 (1979).

least the statutory minimum amount of liability coverage,⁹ that amount was insufficient, either because the injured insured's injuries were severe, or because there were multiple injured persons. Uninsured motorist coverage does not deal with either situation, since the tortfeasor was *underinsured*, and not *uninsured*.

Underinsured motorist coverage is designed to provide an additional source of compensation (unlike uninsured motorist coverage, which provides an *alternate* source) when the tortfeasor possesses liability coverage but the amount thereof is not sufficient to fully compensate the injured insured. As of early 1980, twenty-one states had enacted statutes requiring some type of underinsured motorist coverage.¹⁰ The remaining states have left to the insurers' discretion the decision whether to offer such coverage.¹¹

The effectiveness of underinsured motorist coverage is a function of its definition. As noted above, existing statutes define an underinsured motorist in one of two ways. Statutes focus on either the relative amounts of the tortfeasor's liability coverage and the injured insured's underinsured motorist coverage, or solely on the amount of the injured insured's damages.¹² Once underinsured motorist coverage is triggered by the involvement of an underinsured motorist, the amount that the insured victim may recover also varies according to the definition of underinsured motorist coverage. Statutes requiring that the amount of the injured insured's underinsured motorist coverage exceed the amount of the tortfeasor's liability coverage before the former is triggered restrict the injured insured's recovery to the extent of that excess. Statutes that merely require the presence of uncompensated damages before the underinsured motorist coverage is triggered allow the injured insured to seek compensation, up to the stated policy limits of his or her underinsured motorist coverage, to the extent necessary to provide full, or at least more complete, compensation.¹³

Thus, the degree to which underinsured motorist coverage meets its goal of providing an additional source of compensation to insureds who are injured by underinsured motorists is dependent upon its definition. The definition that focuses on the relative amounts of the tortfeasor's liability coverage and the injured insured's underinsured motorist coverage renders the availability of underinsured motorist

9. An Ohio appellate court held that if the limits of the tortfeasor's liability coverage are less than the statutory minimum (OHIO REV. CODE ANN. § 4509.20 (Page 1982)) then the tortfeasor is "uninsured" since this constitutes a denial of coverage. *Wolverton v. Vigilant Ins. Co.*, 52 Ohio App. 2d 20, 367 N.E.2d 1197 (1976). See also *State Farm Mut. Auto. Ins. Co. v. Hollowell*, 426 A.2d 822 (Del. 1980); *Oleson v. Farmers Ins. Group*, 605 P.2d 166 (Mont. 1980).

10. I I. SCHERMER, *supra* note 2, at § 35.02.

11. In Ohio, prior to the statutory requirement that insurers offer underinsured motorist coverage, eight of the insurance companies responding to a survey indicated that they voluntarily offered underinsured motorist coverage. See Note, *Shelby Mutual Insurance Company v. Smith and Amended Senate Bill No. 25: Re-evaluating Public Policy and Uninsured Motorist Coverage—Why "Underinsured" Protection is Necessary*, 3 OHIO N.U.L. REV. 1355, 1363 n.40 (1976).

12. "There are two types of statutory definitions of underinsured motorists—those that focus on the policy limits of the tortfeasor and those . . . that focus on the extent of the damages suffered by the insured victim." Comment, *Washington's Underinsured Motorist Statute: Balancing the Interests of Insurers and Insureds*, 55 WASH. L. REV. 819, 821 (1980) (footnotes omitted). For a further breakdown of underinsured motorist statutes see I I. SCHERMER, *supra* note 2, at § 35.02.

13. See I I. SCHERMER, *supra* note 2, at § 35.04.

coverage dependent on the fortuitous relationship between those amounts, thereby ignoring the plaintiff's uncompensated damages, as a few examples can illustrate.

Example 1. Facts: The injured insured sustains one hundred thousand dollars in damages, and possesses fifty thousand dollars in underinsured motorist coverage. The tortfeasor has fifty thousand dollars in liability coverage. Result: The injured insured's underinsured motorist coverage is not available; the tortfeasor is not an underinsured motorist as defined by the statute since the amount of underinsured motorist coverage does not exceed the amount of the tortfeasor's liability coverage.¹⁴

Example 2. Facts: The injured insured has one hundred thousand dollars in damages and fifty thousand dollars in underinsured motorist coverage. The tortfeasor has fifty thousand dollars in liability coverage. Additionally, suppose that another person injured in the same accident is entitled to a portion of the tortfeasor's liability coverage, thus preventing the injured insured from recovering the full amount of the tortfeasor's liability coverage. Result: The injured insured's underinsured motorist coverage is not available; because the amount thereof does not exceed the amount of the tortfeasor's liability coverage, the tortfeasor is not an underinsured motorist as defined by the statute.¹⁵

In each of the above examples the injured insured was unable to draw upon his or her underinsured motorist coverage despite the existence of uncompensated damages. In those jurisdictions that require only uncompensated damages to trigger underinsured motorist coverage, however, the injured insured in each example would have been able to collect the full fifty thousand dollars since he or she had uncompensated damages in at least that amount.¹⁶

Even after the injured insured's underinsured motorist coverage is triggered, the amount that he or she may recover still depends on the statutory definition that is applied. The definition that focuses upon the fortuitous relationship between the amounts of the tortfeasor's liability coverage and the injured insured's underinsured motorist coverage requires that the injured insured's recovery always be reduced by any amount received from the tortfeasor.

14. *See, e.g.*, *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1081 (Fla. 1978); *Fontenot v. Guillory*, 327 So. 2d 578, 583 n.3 (La. Ct. App. 1976); *Lick v. Dairyland Ins. Co.*, 258 N.W.2d 791 (Minn. 1977) (implicitly overruled by statutory amendment, *see Holman v. All Nation Ins. Co.*, 288 N.W.2d 244, 250 (Minn. 1980)); *Muller v. Allstate Ins. Co.*, 627 S.W.2d 775 (Tex. Ct. App. 1981). These cases refused to find underinsured motorist coverage applicable, since the injured insured's underinsured motorist coverage limit did not exceed the limit of the tortfeasor's liability coverage.

15. *See, e.g.*, *Thiry v. Horace Mann Mut. Ins. Co.*, 269 N.W.2d 66 (Minn. 1978) (implicitly overruled by statutory amendment, *see Holman v. All Nation Ins. Co.*, 288 N.W.2d 244, 250 (Minn. 1980)); *Rogers v. Tennessee Mut. Ins. Co.*, 620 S.W.2d 476 (Tenn. 1981). In both cases, because the injured insured's underinsured coverage did not exceed the amount of the tortfeasor's liability coverage, the injured insured was precluded from seeking compensation through his or her underinsured coverage, despite his or her recovery of only a small portion of that liability coverage because of the presence of multiple claims. *But see American Gen. Fire & Casualty Ins. Co. v. Oestreich*, 617 S.W.2d 833 (Tex. Civ. App. 1981). Even though the policy amount of the injured insured's underinsured motorist coverage did not exceed the policy amount of the tortfeasor's liability coverage, this case allowed the injured insured to seek recovery, since the injured insured was unable to draw upon the full policy amount of the tortfeasor's liability coverage because of the presence of multiple claims. Of course, the court allowed recovery only to the extent of the difference between the injured insured's coverage and the amount recovered from the tortfeasor.

16. *See, e.g.*, *Holman v. All Nation Ins. Co.*, 288 N.W.2d 244 (Minn. 1980); *Whitten v. Empire Fire & Marine Ins. Co.*, 353 So. 2d 1071 (La. Ct. App. 1977). In each of these cases the existence of uncompensated damages was sufficient to trigger the injured insured's underinsured motorist coverage.

Example 3. Facts: The injured insured sustained one hundred thousand dollars in damages and possesses fifty thousand dollars in underinsured motorist coverage. The tortfeasor has forty-five thousand dollars in liability coverage. Result: The injured insured may draw upon his or her underinsured motorist coverage since the amount thereof exceeds the amount of the tortfeasor's liability coverage and the tortfeasor is thus an underinsured motorist as defined in the statute. The injured insured, however, may recover only to the extent of that excess (*i.e.*, five thousand dollars) since, according to the above definition, that is the extent to which the tortfeasor was underinsured.¹⁷

Example 4. Facts: The injured insured has one hundred thousand dollars damages and fifty thousand dollars in underinsured motorist coverage. The tortfeasor has forty-five thousand dollars in liability coverage. Additionally, another person injured in the same accident is entitled to ten thousand dollars of the tortfeasor's liability coverage. Result: The injured insured may draw upon his or her underinsured motorist coverage since the amount thereof exceeds the amount of the tortfeasor's liability coverage and the tortfeasor is thus underinsured as defined in the statute. In some jurisdictions the injured insured may only recover the excess (*i.e.*, five thousand dollars) since, according to the above definition, that is the degree to which the tortfeasor was underinsured. In other jurisdictions, however, the injured insured may recover fifteen thousand dollars — the difference between the fifty thousand dollars in underinsured motorist coverage and the thirty-five thousand dollars recovered from the tortfeasor.¹⁸

In each of the last two examples, the injured insured was able to draw upon only a part of his or her underinsured coverage despite the existence of additional uncompensated damages. Again, however, in both examples, if the jurisdiction required only uncompensated damages to trigger underinsured motorist coverage, the injured insured would have been able to recover the entire fifty thousand dollars since he or she would have had uncompensated damages in at least that amount.¹⁹

17. See, *e.g.*, *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1081 (Fla. 1978); *Fontenot v. Guillory*, 327 So. 2d 578, 583 n.3 (La. Ct. App. 1976); *Lick v. Dairyland Ins. Co.*, 258 N.W.2d 791 (Minn. 1977) (implicitly overruled by statutory amendment, see *Holman v. All Nation Ins. Co.*, 288 N.W.2d 244, 250 (Minn. 1980)); *Muller v. Allstate Ins. Co.*, 627 S.W.2d 775 (Tex. Ct. App. 1981). These cases held that once underinsured motorist coverage is triggered the injured insured's recovery is limited to the difference between the amount thereof and the amount of the tortfeasor's liability coverage.

18. Although no cases with this specific fact pattern were found, courts would presumably reach this conclusion under most statutes that adopt the definition of an underinsured motorist focusing on the fortuitous relation between the amounts of the injured insured's underinsured motorist coverage and the tortfeasor's liability coverage, because the comparison is of the policy amounts whereas the set-off required is of any amounts actually recovered. The Illinois statute, for example, states that an "'underinsured motor vehicle' means a motor vehicle . . . for which the sum of the *limits* of liability . . . is less than the *limits* for underinsured motorist coverage" but then provides that "the limits of liability for an insurer providing underinsured coverage shall be the limits of such coverage, less those amounts *actually recovered* [rather than the *limits* of the tortfeasor's liability coverage] under the applicable . . . insurance policies." ILL. REV. STAT. ch. 175, § 143a-2(3) (Supp. 1982) (emphasis added). For similar statutory language see KY. REV. STAT. ANN. § 304.39-320 (Bobbs-Merrill 1981) and TEX. INS. CODE ANN. art. 5.06-1 (Vernon 1982-83). The revised version of the Ohio statutory provision for underinsured motorist coverage also mandates a comparison of policy limits, but provides a set-off equal to the amount actually recovered from the tortfeasor rather than the amount of the policy limit. OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1982).

19. See, *e.g.*, *Holman v. All Nation Ins. Co.*, 288 N.W.2d 244 (Minn. 1980); *Whitten v. Empire Fire & Marine Ins. Co.*, 353 So. 2d 1071 (La. Ct. App. 1977). In these cases the injured insureds were able to collect the full amount of their underinsured motorist coverage without allowing the insurer to deduct the amounts actually recovered from the tortfeasor.

Of course, neither definition guarantees total compensation under all circumstances. Had the injured insured's damages exceeded one hundred thousand dollars, complete compensation would not have been achieved in any of the four examples. The different definitions, however, would have resulted in different amounts of uncompensated damages, with the definition that requires only the existence of uncompensated damages always providing a greater degree of compensation.²⁰

Clearly, those statutes that require the mere presence of uncompensated damages more nearly attain the goal of full compensation for the innocent victims of negligent drivers. Under these statutes the injured insured will always be able to draw upon the full amount of his or her underinsured motorist coverage to the extent that his or her damages exceed the amount recovered from the tortfeasor. In contrast, the injured insured's ability to draw upon his or her underinsured motorist coverage to cover his or her uncompensated damages under those statutes that focus on the relation between the tortfeasor's liability coverage and the injured insured's underinsured motorist coverage depends upon the fortuitous relationship between those amounts. Thus, it would not be enough merely to have damages in excess of the amount recovered from the tortfeasor, even though the goal of underinsured motorist coverage is to provide compensation in such situations; the injured insured must also have an amount of underinsured motorist coverage that exceeds the amount of the tortfeasor's liability coverage.

B. Ohio's Response

The Ohio General Assembly responded to the need for protection against negligent drivers with insufficient liability coverage by mandating that underinsured motorist coverage be offered by insurance companies as optional coverage, beginning June 25, 1980.²¹ Because this statute was so recent, the courts had little opportunity to interpret its exact meaning.²² Nonetheless, the Ohio General Assembly, apparently dissatisfied with the original version of the underinsured motorist statute,²³ has already repealed it. The statute's provisions were amended²⁴ and incorporated into Ohio's uninsured motorist statute.²⁵

20. In *Muller v. Allstate Ins. Co.*, 627 S.W.2d 775 (Tex. Ct. App. 1981), the insured had damages in excess of two hundred and seventy-five thousand dollars with ten thousand dollars in underinsured coverage. The tortfeasor had ten thousand dollars in liability coverage, which was recovered by the injured insured. The court held that the insured could not collect the underinsured coverage because the tortfeasor was not "underinsured." However, even in a jurisdiction that would have allowed recovery of the ten thousand dollars in underinsured coverage, the total compensation would have amounted to only twenty thousand dollars, which is less than ten percent of the injured insured's actual damages (although double the amount actually recovered).

21. OHIO REV. CODE ANN. § 3937.181 (Page Supp. 1981). This statute provides, in part, that "[e]ach automobile liability . . . insurance company . . . shall offer underinsured motorist coverage as optional protection . . ." *Id.* at § 3937.181(B).

22. This problem is encountered with nearly all of the underinsured motorist statutes now in effect, because of the unavoidable delay between the enactment of a statute and its interpretation by the judiciary.

23. OHIO REV. CODE ANN. § 3937.181 (Page Supp. 1981).

24. See OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1982). The Ohio General Assembly repealed OHIO REV. CODE ANN. § 3937.181 (Page Supp. 1981) and amended OHIO REV. CODE ANN. § 3937.18(A) (Page Supp. 1982) to state that "[n]o . . . policy of insurance . . . shall be delivered . . . unless . . . the following [is] . . . provided: . . . Underinsured motorist coverage . . . The named insured may only reject or accept [this] . . . coverage . . ." Thus, the action of the Ohio General Assembly did not change the requirement that underinsured motorist coverage still be offered as optional coverage. Hence, the insured can still reject the coverage even though it must be offered.

25. OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1982).

This Comment will examine the changes thus made in underinsured motorist coverage in light of the goals of such coverage and will assess the degree to which the revised Ohio statute meets these goals. It will be argued that because the revised statute focuses upon the fortuitous relation between the amounts of the injured insured's underinsured motorist coverage and the tortfeasor's liability coverage, it does not effectively attain the goals of underinsured motorist coverage.²⁶ Two other problems will then be identified and discussed. First, the statute precludes insureds who choose to purchase the minimum amount of liability coverage²⁷ from obtaining effective underinsured motorist coverage.²⁸ Second, Ohio's approach mandates inherently deceptive insurance contracts since the amount of underinsured motorist coverage purchased will always be at least twelve thousand five hundred dollars²⁹ less than the amount stated in the policy.

III. OHIO LAW

A. *The History of Ohio's Original Underinsured Motorist Statute*

Ohio's recently repealed underinsured motorist statute, as originally enacted in 1980, provided that "underinsured motorist coverage means coverage . . . protecting an insured against loss . . . where the limits of coverage available for payment to the insured . . . are insufficient to pay the loss up to the insured's uninsured [which the underinsured limits must be equal to] motorist coverage limits."³⁰ This language does not make clear which of the two competing definitions of underinsured motorist coverage the Ohio General Assembly intended to adopt. If attention is focused on the words "insufficient to pay the loss,"³¹ it seems to imply a definition that requires only uncompensated damages. However, that phrase is followed by the words "up to the insured's uninsured motorist coverage limits,"³² which may indicate an intent to adopt the definition that focuses on the fortuitous relation between the amount of the tortfeasor's liability coverage and the amount of the injured insured's underinsured motorist coverage. This reading, by limiting total recovery to the amount of the injured insured's underinsured motorist coverage, would require that any amounts actually recovered from the tortfeasor be deducted from the amount that the injured insured could recover from his or her underinsured motorist coverage. In that way the total amount of the injured insured's recovery will not exceed the total amount of underinsured motorist coverage he or she has purchased. Of course, that language can be viewed merely as a simple assertion that underinsured motorist coverage does not guarantee full compensation³³ and that the injured insured may not recover through underinsured motorist coverage in excess of its limits even though he

26. See *infra* text accompanying notes 76-90.

27. OHIO REV. CODE ANN. § 4509.20 (Page 1982). Under this statute an insurance policy must provide liability coverage of at least twelve thousand five hundred dollars per person, and twenty-five thousand dollars per occurrence.

28. See *infra* text accompanying notes 91-100.

29. This is the minimum statutory amount of liability coverage available in Ohio. OHIO REV. CODE ANN. § 4509.20 (Page 1982). See also *infra* text accompanying notes 98-100.

30. OHIO REV. CODE ANN. § 3937.181 (Page Supp. 1981).

31. *Id.*

32. *Id.*

33. See *supra* note 20.

or she may have additional uncompensated damages. This ambiguity therefore renders the definition capable of supporting various conclusions.³⁴

B. *Judicial Interpretations of the Original Statute*

The original version of the Ohio underinsured motorist statute has been interpreted by two cases: *Shaneck v. Buckeye Union Insurance Co.*³⁵ and *Buckeye Union Insurance Co. v. Wallace*.³⁶ Because of the ambiguity inherent in the statutory definition, these two cases reached opposite conclusions even though they were decided less than one month apart and in the same county. Moreover, although *Shaneck* was decided by the Court of Common Pleas of Lucas County, Ohio, on February 27, 1981, and *Wallace* was decided by the Court of Appeals of Lucas County on March 27, 1981, the later opinion made no mention of the earlier one.

1. *Shaneck v. Buckeye Union Insurance Co.*

In *Shaneck* the injured insured possessed underinsured motorist coverage in the amount of twenty-five thousand dollars per person and fifty thousand dollars per occurrence.³⁷ The negligent driver possessed liability insurance with limits of fifteen thousand dollars per person and thirty thousand dollars per occurrence.³⁸ The injured insured exhausted the tortfeasor's liability coverage through a settlement for the entire fifteen thousand dollars.³⁹ The court stated:

This action presents . . . [the] issue . . . whether plaintiff [injured insured] is entitled to \$25,000 in coverage based on the underinsured endorsement on defendant's [insurer's] policy. Plaintiff contends that he is entitled to the entire \$25,000 coverage subject to his proving damages up to that amount. Defendant contends that its liability must be reduced by the \$15,000 which plaintiff has recovered [from the negligent driver].⁴⁰

Because the injured insured's underinsured motorist coverage exceeded the tortfeasor's liability coverage, the question whether the tortfeasor was an underinsured motorist never arose. The sole issue was the extent of the tortfeasor's underinsurance.

34. Schermer classified this version of the Ohio underinsured motorist statute as one "which require[s] . . . only that the insured's damages exceed the tortfeasor's liability limits." 1 I. SCHERMER, *supra* note 2, at § 35.02[2]. The Ohio Department of Insurance, however, reached the opposite conclusion:

"Underinsured motorist coverage" means coverage in [a] . . . policy . . . where the limits of coverage available . . . under all . . . insurance policies covering persons liable to the insured are insufficient to pay the loss up to the insured's uninsured motorist coverage limits. *This coverage is the difference of the insured's own limit of underinsured coverage and the limits available from . . . any persons liable to the insured.*

OHIO ADMIN. CODE § 3901-1-39 (1981) (emphasis added).

Although Schermer did not explicitly state that the Ohio statute would allow the injured insured to seek recovery of the full amount of his or her underinsured motorist coverage, this conclusion necessarily follows from his classification of the Ohio statute as one which requires only uncompensated damages to trigger underinsured motorist coverage. Similarly, although the Department of Insurance did not explicitly state that underinsured motorist coverage is triggered only when it exceeds the amount of the tortfeasor's liability coverage, this conclusion necessarily follows from their finding that an injured insured may recover under underinsured motorist coverage only to the extent of the excess.

35. 20 Ohio Op. 3d 115 (C.P. Lucas County 1981).

36. No. 80-146 (Ohio Ct. App. March 27, 1981).

37. 20 Ohio Op. 3d 115, 116 (C.P. Lucas County 1981).

38. *Id.*

39. *Id.*

40. *Id.*

In deciding this issue the court first pointed out that, strictly speaking, the underinsured motorist statute⁴¹ was not controlling, since it became effective on September 1, 1980, and the accident occurred almost two years earlier, on September 7, 1978.⁴² The court then noted the absence of any Ohio cases dealing with underinsured motorist coverage.⁴³ The court, however, reasoned that the interpretation of underinsured motorist coverage should be carried out in light of the cases involving uninsured coverage,⁴⁴ since the underinsured motorist statute explicitly provided that “[t]he benefits provided under underinsured motorist coverage shall be subject to the same provisions as to denial of coverage, insolvency, subrogation, or off-set as provided in uninsured motorist coverage”⁴⁵

The court thus identified the policy behind underinsured motorist coverage by relying on the uninsured motorist coverage cases: “Ohio courts dealing with uninsured motorist protection have consistently applied a liberal construction of R.C. § 3937.18 in order to effectuate the legislative purpose that *coverage be provided to persons injured* through the acts of uninsured [and underinsured] motorists”⁴⁶ Basing its opinion upon this goal of underinsured motorist coverage, the court concluded that the injured insured could recover under his underinsured motorist coverage the entire twenty-five thousand dollars because this would result in more complete compensation.⁴⁷

Thus, *Shaneck* focused solely on the existence of uncompensated damages and did not allow the insurer to reduce its liability by the amount recovered from the tortfeasor. This more effectively promotes the goal of underinsured motorist coverage, which is the provision of an additional source of compensation to persons injured by negligent drivers. Of course, the court did not allow recovery in excess of the damages sustained. The injured insured must still show damages, to “avoid any duplication or excess recovery of benefits.”⁴⁸

2. Buckeye Union Insurance Co. v. Wallace

In *Wallace* the injured insured possessed underinsured motorist coverage in the amount of fifteen thousand dollars per person and thirty thousand dollars per occurrence.⁴⁹ The tortfeasor possessed liability insurance with limits of fifteen thousand dollars per person and thirty thousand dollars per occurrence.⁵⁰ The court was thus forced to determine whether the injured insured’s underinsured motorist coverage was triggered, or, in other words, whether the tortfeasor was an underinsured motorist, and, if so, the amount of underinsured motorist coverage that

41. OHIO REV. CODE ANN. § 3937.181 (Page Supp. 1981).

42. 20 Ohio Op. 3d 115, 116 (C.P. Lucas County 1981).

43. *Id.*

44. *Id.*

45. OHIO REV. CODE ANN. § 3937.181(C) (Page Supp. 1981).

46. 20 Ohio Op. 3d 115, 117 (C.P. Lucas County 1981) (emphasis added).

47. *Id.* at 119.

48. *Id.*

49. Buckeye Union Ins. Co. v. Wallace, No. 80-146, slip op. at 2 (Ohio Ct. App. March 27, 1981).

50. *Id.*

was available to the injured insured. Depending on which definition the court adopted, the injured insured would either have an additional fund of fifteen thousand dollars (the entire stated policy amount of underinsured motorist coverage) to provide added compensation for his injuries, or nothing (the difference between his underinsured motorist coverage and the tortfeasor's liability coverage). The former would result under the definition which focuses simply on the existence of uncompensated damages, whereas the latter would result under the definition that focuses on the fortuitous relation between the amount of the injured insured's underinsured motorist coverage and the amount of the tortfeasor's liability coverage. The Court in *Wallace* found that the tortfeasor was not an underinsured motorist: "[T]he appellant [injured insured] may not recover under the policy for the tortfeasor's underinsurance, because, although the tortfeasor may be underinsured in relation to the appellant's damages, he is not underinsured for the purpose of the statute and policy endorsement."⁵¹

This conclusion, however, was based upon a nonexistent statute. The court believed that the language of the underinsured motorist endorsement in the insurance policy was identical to the language of the statute:

The clause in question is the definition of underinsured highway vehicle as defined in R.C. 3937.18.1 and quoted verbatim in the appellant's automobile endorsement No. 4919. The clause states: "Underinsured highway vehicle means a highway vehicle with respect to the ownership, maintenance or use of which the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under this insurance. . . ."⁵²

This language defines an underinsured motorist as one who has liability insurance in an amount less than the injured insured's liability insurance (which, in *Wallace*, was an amount equal to the injured insured's underinsured motorist coverage). Although the above quoted language may have been included in the insurance policy before the court, it was not identical to the language of the underinsured motorist statute in force at the time of the decision.⁵³ This discrepancy severely weakens the validity of the *Wallace* holding because the court explicitly based its holding on the language of what it believed was the Ohio underinsured motorist statute.

The conflicting conclusions of these two cases left Ohio law unsettled with respect to the correct definition of an underinsured motorist. Had the Ohio General Assembly remained silent, it is likely that the *Shanack* holding would have ultimately prevailed. Several considerations lead to this conclusion. First, the decisions of the Ohio Supreme Court regarding uninsured motorist coverage evince a strong desire to protect the innocent victims of negligent drivers and to ensure that they will be compensated adequately.⁵⁴ This attitude presumably would have carried over into the

51. *Id.* at 5.

52. *Id.* at 4 (emphasis in original).

53. That language, however, is very similar to the recently revised provisions for underinsured motorist coverage. OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1982).

54. See, e.g., *Ady v. West American Ins. Co.*, 69 Ohio St. 2d 593, 433 N.E.2d 547 (1982) (overruling *Orris v. Claudio*, 63 Ohio St. 2d 140, 406 N.E.2d 1381 (1980)) (insurer may not avoid liability under uninsured motorist coverage through "other owned but uninsured vehicle" exclusion); *Sexton v. State Farm Mut. Auto. Ins. Co.*, 69 Ohio St. 2d 431,

underinsured motorist coverage cases. Second, as noted earlier, *Wallace* was based upon a nonexistent statute. Last, *Shaneck* purported to interpret legislative intent,⁵⁵ and the Ohio Supreme Court has stated repeatedly that “[p]rivate parties are without power to insert enforceable provisions in their contracts of insurance which would restrict coverage in a manner contrary to the intent of the statute.”⁵⁶ The General Assembly, however, did not remain silent.

C. The Recent Action of the Ohio General Assembly

1. Redefining “Underinsured Motorist”

Ohio’s underinsured motorist statute⁵⁷ was repealed and underinsured motorist coverage was incorporated into the uninsured motorist statute,⁵⁸ effective with regard to policies issued or renewed on or after October 1, 1982.⁵⁹ The revised statute provides, in relevant part, that:

Underinsured motorist coverage . . . shall provide protection for an insured against loss . . . where the limits of coverage available for payment to the insured under all . . . insurance policies covering persons liable to the insured are less than the limits for the insured’s uninsured motorist coverage [which must be equal to the limits of the insured’s underinsured motorist coverage] at the time of the accident.⁶⁰

This definition of underinsured motorist coverage, unlike its predecessor, does not focus on the scenario arising when the “insurance policies covering persons liable to the insured are insufficient to pay the loss.”⁶¹ Instead it focuses on the relation between the amount of the tortfeasor’s coverage and the amount of the injured insured’s underinsured motorist coverage. Therefore, the injured insured’s underinsured motorist coverage is triggered only when the amount thereof exceeds the amount of the tortfeasor’s liability coverage; uncompensated damages alone will not suffice.

Assuming that *Shaneck*, for the reasons detailed above, would have prevailed over *Wallace* absent action by the General Assembly, Ohio has changed from a

433 N.E.2d 555 (1982) (father, as “insured,” is entitled to recover from uninsured motorist coverage expenses he was legally obligated to pay for child who was not an “insured” under the policy); *Grange Mut. Casualty Co. v. Volkman*, 54 Ohio St. 2d 58, 374 N.E.2d 1258 (1978) (insurer may not avoid liability under uninsured motorist coverage through “other owned but uninsured vehicle” exclusion); *Shearer v. Motorists Mut. Ins. Co.*, 53 Ohio St. 2d 1, 371 N.E.2d 210 (1978) (amount recoverable under uninsured motorist coverage cannot be reduced by amounts recovered under medical payments provision of another policy); *Bartlett v. Nationwide Mut. Ins. Co.*, 33 Ohio St. 2d 50, 294 N.E.2d 665 (1973) (amount recoverable under uninsured motorist coverage cannot be reduced by amounts received from workmen’s compensation); *Motorists Mut. Ins. Co. v. Tomanski*, 27 Ohio St. 2d 222, 271 N.E.2d 924 (1971) (right to recover under uninsured motorist coverage not destroyed by presence of insured vehicle in multi-vehicle accident); *Curran v. State Auto Mut. Ins. Co.*, 25 Ohio St. 2d 33, 266 N.E.2d 566 (1971) (“other insurance” clause, which would relieve insurer of liability if other uninsured motorist coverage was available to insured, void as contrary to public policy); *Abate v. Pioneer Mut. Casualty Co.*, 22 Ohio St. 2d 161, 258 N.E.2d 429 (1970) (policy of insurance includes uninsured coverage unless such coverage has been expressly rejected by the insured).

55. 20 Ohio Op. 3d 115, 118–19 (C.P. Lucas County 1981).

56. *Bartlett v. Nationwide Mut. Ins. Co.*, 33 Ohio St. 2d 50, 53, 294 N.E.2d 665, 667 (1973).

57. OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1982).

58. OHIO REV. CODE ANN. § 3937.181 (Page Supp. 1981).

59. OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1982).

60. *Id.* at § 3937.18(A)(2).

61. OHIO REV. CODE ANN. § 3937.181 (Page Supp. 1981).

jurisdiction that would have required only uncompensated damages to one that requires the injured insured's underinsured motorist coverage to exceed the tortfeasor's liability coverage. It is interesting to note that in at least two other jurisdictions, Louisiana and Minnesota, the change was in the opposite direction.

In 1972 the Louisiana uninsured motorist statute was amended to "include a vehicle with liability coverage less than the UM [uninsured motorist] coverage carried by the insured, thus allowing the insured to recover the difference between the underinsured tortfeasor's liability limits and his own injuries up to his UM limits."⁶² In 1974, however, the Louisiana statute⁶³ was again amended⁶⁴ to define underinsured motorist in terms of uncompensated damages rather than in terms of the relative amounts of the tortfeasor's liability coverage and the insured's underinsured coverage. A Louisiana Court of Appeals observed:

The only logical conclusion to draw from the language of the 1974 amendment, redefining "uninsured motor vehicle" as one on which the liability insurance coverage was less than the damages sustained by the innocent party, is that it was designed to . . . permit full recovery of damages in appropriate cases. . . . In substance . . . [the innocent party's] UM [underinsured motorist] coverage because [sic] "excess" after his settlement with the tortfeasor's liability carrier. . . . [If the insurer's] stated position . . . is carried to its logical conclusion, *i.e.*, that the UM carrier is entitled to credit for settlement proceeds received by the plaintiff, the UM coverage never becomes "excess". In effect, therefore, the 1974 amendment [would] become meaningless⁶⁵

Louisiana, therefore, enlarged rather than restricted the class of tortfeasors who can be deemed underinsured.⁶⁶

Similarly, although in *Lick v. Dairyland Insurance Co.*,⁶⁷ the Minnesota Supreme Court held that under the underinsured statute⁶⁸ a tortfeasor is underinsured only to the extent that his or her liability coverage is less than the underinsured motorist coverage possessed by the injured insured,⁶⁹ the statute was amended in 1977⁷⁰ and all the language upon which *Lick* relied was removed.⁷¹ On this basis, the Minnesota Supreme Court subsequently concluded that recoveries through underinsured motorist policies are "in addition to bodily injury liability benefits [recovered from the tortfeasor] to the extent of [the insured's] damages."⁷² Under this definition only uncompensated damages are needed to trigger underinsured motorist coverage and the insurer may not reduce the injured insured's recovery by any amounts received from the tortfeasor. Thus, Minnesota, like Louisiana, moved from

62. *Uninsured Motorist Protection*, 35 LA. L. REV. 616, 617 (1975) (citing LA. R. S. 22: 1406(D)(2) (Supp. 1962), amended by La. Acts 1972, No. 137 § 1 (as it appeared before Act 154 of 1974)).

63. LA. REV. STAT. ANN. § 1406 (West Supp. 1962) (amended by 1972 La. Acts 137).

64. 1974 La. Acts 154.

65. *Whitten v. Empire Fire and Marine Ins. Co.*, 353 So. 2d 1071, 1075 (La. Ct. App. 1977).

66. "The change in the definition of 'uninsured motor vehicle' is important because all the insured must now establish is that the damages he has suffered are greater than the liability limits of the tortfeasor." *Uninsured Motorist Protection*, 35 LA. L. REV. 616, 618 (1975) (emphasis in original).

67. 258 N.W.2d 791 (Minn. 1977).

68. MINN. STAT. § 65B.26 (1971).

69. *Lick v. Dairyland Ins. Co.*, 258 N.W.2d 791, 793 (Minn. 1977).

70. 1977 Minn. Laws. 266.

71. See *Holman v. All Nation Ins. Co.*, 288 N.W.2d 244 (Minn. 1980).

72. *Id.* at 251.

a definition that focused on the fortuitous relation between the amounts of the injured insured's underinsured motorist coverage and the tortfeasor's liability coverage, to one that focuses solely on the existence of uncompensated damages.

Ohio, however, is being legislatively propelled in the opposite direction, restricting or refusing to expand sources of compensation rather than providing additional sources of compensation to the innocent victims of another's wrongdoing. By redefining the term "underinsured motorist" to make uncompensated damages insufficient to trigger underinsured motorist coverage, Ohio's legislature has made the availability of coverage entirely dependent upon the fortuitous relationship between the amounts of the tortfeasor's liability coverage and the injured insured's underinsured coverage, regardless of the amount of underinsured motorist coverage purchased (in absolute terms) and the amount of damages sustained.⁷³

2. Reducing the Amount of Recovery When Underinsured Motorist Coverage is Fortuitously Triggered

Ohio's underinsured motorist statute, as revised in 1982 by the Ohio General Assembly and incorporated into Ohio's uninsured motorist statute, in addition to redefining the term "uninsured motorist," provides that "[t]he limits of liability for an insurer providing underinsured motorist coverage shall be the limits of such coverage, less those amounts actually recovered under all applicable . . . insurance policies covering persons liable to the insured."⁷⁴ This legislative action not only changes⁷⁵ the definition of an underinsured motorist in Ohio so that the statute explicitly states that a tortfeasor is underinsured only if his or her liability coverage is less than the injured insured's underinsured coverage, but also provides that underinsured motorist coverage is available only to the extent of the difference between those amounts. Thus, not only will underinsured motorist coverage be triggered in a haphazard and unpredictable manner, but even after it is triggered, the amount that an injured insured may recover will be diminished by any amounts recovered from the tortfeasor. This result, of course, is the natural by-product of the definition adopted by the General Assembly in the revised statute.

3. Assessing the Effectiveness of Underinsured Motorist Coverage in Ohio

The definition of underinsured motorist coverage recently adopted by the Ohio General Assembly does not effectively meet the goal of providing an additional source of compensation to the innocent victims of negligent drivers. As noted above,

73. Even if the injured insured had purchased two hundred thousand dollars worth of underinsured motorist coverage, he or she could not be assured that its protection would be available when it was needed. Assuming that the injured insured sustained four hundred thousand dollars in damages, the claimant would still be unable to seek compensation through the underinsured motorist coverage if the tortfeasor possessed liability insurance in an equal or greater amount. Thus, no amount of underinsured motorist coverage can absolutely be counted on to be available when needed.

74. OHIO REV. CODE ANN. § 3937.18(A)(2) (Page Supp. 1982).

75. The Ohio General Assembly, however, stated that the purpose of its 1982 action was to "clarify," not "change," the Ohio definition of an "underinsured motorist." This is evidenced by the title of the act, which stated that its purpose was "to clarify the definition of underinsured motorist coverage." OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1982).

whether the injured insured will be able to draw on his or her underinsured motorist coverage is entirely dependent upon the relative amounts of the tortfeasor's liability coverage and the insured's underinsured motorist coverage, regardless of the existence of uncompensated damages.

The ineffectiveness of underinsured motorist coverage defined in this manner is most vividly demonstrated in those cases in which the injured insured is unable to draw upon his or her underinsured motorist coverage even though nothing was recovered from the tortfeasor.⁷⁶ This results when the tortfeasor is not underinsured, since the limits of his or her liability coverage are not less than the injured insured's underinsured motorist coverage, but the injured insured is unable to recover through the tortfeasor's liability coverage because it has been depleted by other injured persons. Thus, the tortfeasor is not underinsured according to the statutory definition even though the injured insured has not recovered anything. This can happen in Ohio, since underinsured motorist coverage is triggered when "the *limits* of [liability] coverage available for payment to the insured under all . . . insurance policies covering persons liable to the insured are less than the *limits* for the insured's uninsured motorist coverage at the time of the accident."⁷⁷ This mandates a comparison of the injured insured's underinsured motorist limits with the limits of the tortfeasor's liability coverage, and not with the amount actually recovered from the tortfeasor. In other words, the liability coverage need only be "available" and not "actually recovered."⁷⁸

On the other hand, it would be possible for an Ohio court to construe this language to mean that the injured insured's underinsured coverage limits should be compared to the actual amounts recovered, rather than the amounts theoretically available, on the ground that these are the only amounts actually "available" to the insured.⁷⁹ This conclusion has been reached in at least two other jurisdictions, Louisiana and Florida.

Louisiana courts have held that "[t]he [underinsured] statute should be construed to mean the *effective* [amount of] liability coverage."⁸⁰ Thus the injured insured is able to recover under his or her underinsured motorist coverage even though the stated policy limits were lower than the policy limits of the tortfeasor's liability coverage. Because of "the multiple claims filed . . . and the court's apportionment of the policy proceeds, the effective liability coverage [but not the stated policy limits] was less than the uninsured motorist coverage [which, in Louisiana, is also underinsured coverage] carried by the plaintiff."⁸¹ The court thus mandated a comparison to the amount actually recovered from the tortfeasor. In Louisiana, therefore, the amount of the injured insured's underinsured motorist

76. See *supra* note 15.

77. OHIO REV. CODE ANN. § 3937.18(A)(2) (Page Supp. 1982) (emphasis added).

78. This position finds support in the appearance of the words "actually recovered" later in the statute to require a reduction in the injured insured's underinsured motorist recovery by any amounts "actually recovered" from the tortfeasor. *Id.*

79. See generally 1 I. SCHERMER, *supra* note 2, at § 35.06.

80. *Butler v. MFA Mut. Ins. Co.*, 356 So. 2d 1129, 1133 (La. Ct. App. 1978) (emphasis in original).

81. *Id.*

coverage need only exceed the amount actually recovered from the tortfeasor, rather than the amount theoretically available under the policy. The court found this result to be "in keeping with the intent and purpose of the uninsured motorist statute."⁸² Of course, the injured insured may still recover only the difference between the amount of underinsured motorist coverage possessed and the amount recovered from the tortfeasor. Florida courts have reached the same conclusion.⁸³

Similarly, the language of the Ohio statute could be construed to require a comparison of the effective, and not the stated, policy limits of the tortfeasor's liability coverage, with the amount of the insured's underinsured motorist coverage.⁸⁴ Such a holding would increase the degree to which Ohio's underinsured motorist statute attains the goal of underinsured motorist coverage, the provision of an additional source of recovery to persons injured by another's wrongdoing.

A related issue not specifically addressed by Ohio's underinsured motorist statute is whether, for purposes of the comparison of the relative amounts of the tortfeasor's liability coverage and the insured's underinsured motorist coverage, the insured may "stack" the policy limits of more than one policy.⁸⁵ This would operate to the benefit of the insured in a manner similar to the comparison of the effective, rather than the stated, policy limits of the tortfeasor's liability coverage with the amount of the insured's underinsured motorist coverage. Although at least two jurisdictions⁸⁶ allow stacking, generally it will not be possible in Ohio. The Ohio underinsured⁸⁷ and uninsured⁸⁸ motorist statutes both allowed antistacking provisions within the insurance contract.⁸⁹ Given that the tenor of the recent legislative action on

82. *Id.* at 1132.

83. *Jones v. Travelers Indem. Co. of Rhode Island*, 368 So. 2d 1289 (Fla. 1979). However, a more recent Florida appellate case, *Holt v. State Auto. Mut. Ins. Co.*, 385 So. 2d 1058, 1060 (Fla. Dist. Ct. App. 1980), added a twist to this holding—when the multiple claimants are all claiming under the same underinsured policy there can be no recovery, even though the effective limit of liability insurance was less than the amount of underinsured motorist coverage, since they "obtained the same recovery which would have been available . . . had the tortfeasor been insured to the same extent as the insured." The dissent, however, stated that "this case cannot be distinguished from the case of *Jones v. Travelers Indem. Co. of Rhode Island* . . ." *Id.* at 1060 (Anstead, J., dissenting). The *Holt* rationale would have precluded recovery in *Jones* because in *Jones* both the insured and the tortfeasor had per person limits of fifteen thousand dollars. Thus, "the tortfeasor [was] . . . insured to the same extent as the insured." *Id.* at 1060. *Holt*, therefore, does not withstand scrutiny. Nonetheless, the petition for review to the Supreme Court of Florida was denied. *Holt v. State Auto Mut. Ins. Co.*, 394 So. 2d 1152 (Fla. 1981).

84. Hentemann, in his recent article, notes that some policies may specifically provide that underinsured motorist coverage is triggered when the effective limits of the tortfeasor's liability coverage are less than the limits of the injured insured's underinsured motorist coverage:

An underinsured motor vehicle is defined in the standard policy to mean a vehicle . . . insured . . . for liability according to the law, but the limits of which: "(a) Are less than the limits you carry for uninsured motor vehicle coverage under this policy; or (b) have been reduced by payments to persons other than an insured to an amount less than the limits you carry for uninsured motor vehicle coverage under the policy."

Hentemann, *Underinsured Motorist Coverage: A New Coverage With New Problems*, 56 OHIO ST. B. ASS'N. REP. 122, 124 (1983) (citing State Farm Mutual Car Policy, Endorsement 6275 R.R.).

85. See generally 1 I. SCHERMER, *supra* note 2, at § 35.02.

86. See *St. Arnaud v. Allstate Ins. Co.*, 501 F. Supp. 192 (S.D. Miss. 1980); *Cox v. State Farm Mut. Auto Ins. Co.*, 378 So. 2d 330 (Fla. Dist. Ct. App. 1980). However, the Florida rule allowing stacking is riddled with exceptions. See, e.g., *Liberty Mut. Ins. Co. v. Searle*, 379 So. 2d 131 (Fla. Dist. Ct. App. 1979); *Yaden v. Hanover Ins. Co.*, 375 So. 2d 5 (Fla. Dist. Ct. App. 1979).

87. OHIO REV. CODE ANN. § 3937.181(E) (Page Supp. 1980).

88. *Id.* § 3937.18(E) (Page Supp. 1980).

89. The original version of the Ohio uninsured motorist statute did not preclude stacking. It was not until 1980 that it was so amended. See *infra* note 120.

underinsured coverage in Ohio was to further protect the insurer, and not the insured, it is not surprising that the antistacking provisions were not changed by the Ohio General Assembly.⁹⁰ Thus, even if the potential for stacking exists, undoubtedly in practice insureds will normally be denied this benefit.

In sum, the net result of the recent action of the Ohio General Assembly is a redefinition of the term "underinsured motorist." A tortfeasor is now deemed underinsured when the policy limits (or perhaps, the effective limits) of the tortfeasor's liability coverage are lower than the policy limits of the injured insured's underinsured motorist coverage. Once it is established that this fortuitous relationship exists between the relative amounts of these policies, the injured insured may draw upon his or her underinsured coverage only to the extent to which that coverage exceeds the tortfeasor's liability coverage.

4. *Denial of Underinsured Coverage to Insureds Purchasing the Minimum Amount of Liability Insurance Required by Law*

Aside from depriving underinsured coverage of much of its efficacy and purpose, Ohio's statutory scheme leads inescapably to two further anomalies. The first stems from the fact that in Ohio the minimum amount of liability insurance that may be purchased is twelve thousand five hundred dollars per person and twenty-five thousand dollars per occurrence.⁹¹ The uninsured-underinsured motorist statute, as revised by the Ohio General Assembly in 1982, requires that a policy's "underinsured motorist coverage . . . shall be an amount of coverage equivalent to the automobile liability . . . coverage"⁹² Thus, insureds who purchase the minimum amount of liability coverage may only purchase uninsured and underinsured coverage equivalent to that amount. Consequently, if the injured insured has only purchased the minimum statutory amount of liability coverage, no tortfeasor could ever⁹³ be deemed underinsured, since the amount of the injured insured's underinsured motorist coverage could never exceed the amount of the tortfeasor's liability coverage, which must be in an amount at least equal to the minimum statutory amount. Thus, insureds purchasing the minimum amount of liability insurance are currently unable to purchase meaningful underinsured motorist coverage.

A similar observation disturbed the Minnesota Supreme Court when it considered the definition of an underinsured motorist. In *Lick v. Dairyland Insurance Co.*⁹⁴

90. OHIO REV. CODE ANN. § 3937.18(G) (Page Supp. 1982).

91. OHIO REV. CODE ANN. § 4509.20 (Page Supp. 1982).

92. OHIO REV. CODE ANN. § 3937.18(A)(2) (Page Supp. 1982). *But see infra* text accompanying note 108.

93. If the tortfeasor has liability insurance, it must be at least equal to the minimum statutory amount; if he has none, or less than the statutory minimum, then he is "uninsured," not "underinsured." Thus, if the victim has chosen the minimum coverage, then the underinsured motorist coverage will never be triggered since no tortfeasor will ever be underinsured compared to that injured insured. This conclusion assumes that the amount of liability insurance to be compared with the insured's underinsured coverage is the stated, not the effective, limit of liability coverage. However, even if the effective limits of coverage are used in the comparison, minimum underinsured liability coverage will still tend to prove worthless, since in most cases there is only a single claimant for the tortfeasor's liability coverage and it is only when there are multiple claimants that the effective limits and the policy limits of the tortfeasor's liability coverage will differ.

94. 258 N.W.2d 791, 794 (Minn. 1977). *See also supra* text accompanying notes 67-69.

the court held that under the then extant state statute,⁹⁵ underinsured motorist coverage was triggered only when the tortfeasor had a smaller amount of liability coverage than did the injured insured. The court recognized that its holding would preclude insureds with the minimum amount of liability coverage from purchasing effective underinsured motorist coverage, but relied on the knowledge that the defendant insurance company had advised the commissioner of insurance that no premium would be charged for underinsured motorist coverage when purchased in an amount equal to the minimum amount of liability coverage required in that state.⁹⁶ It is not known whether similar action will be taken by insurance companies in Ohio, although the revised statute specifically allows insurers to sell underinsured motorist coverage in an amount equal to the statutory minimum amount of liability coverage.⁹⁷ Nevertheless, it is certain that in Ohio, insureds currently purchasing the minimum amount of liability insurance are precluded from purchasing effective underinsured motorist coverage.

5. The Recent Action of the Ohio General Assembly Mandates Inherently Deceptive Insurance Contracts

A second anomaly that arises from the redefinition of the term "underinsured motorist" in Ohio is that the actual amount of underinsured coverage purchased by an insured will nearly always be less than the amount stated in the policy. This is because any amounts recovered from the tortfeasor must be deducted from the policy limits.⁹⁸ Only rarely will an insured be able to collect the full amount of the policy limits, since he or she normally will have recovered something from the tortfeasor.⁹⁹ If the insured has recovered nothing, then the tortfeasor is uninsured, and not underinsured. Therefore, prospective insureds will be purchasing a specified amount of coverage which in fact is always worth less than that amount. In fact, in many cases, depending upon the relative amounts of the underinsured motorist and liability coverages involved, the underinsured coverage will provide no compensation to the insured, even though he or she has uncompensated damages.¹⁰⁰

95. Minnesota has since abandoned the definition of the term "underinsured motorist" that focuses on the fortuitous relationship between the amount of the tortfeasor's liability insurance and the amount of the insured's underinsured motorist coverage. At present, Minnesota requires only that there be uncompensated damages. See *supra* text accompanying notes 67-72.

96. *Lick v. Dairyland Ins. Co.*, 258 N.W.2d 791, 794 n.3 (Minn. 1977). The court stated:

It is true that the [underinsured] coverage [when in an amount equal to the minimum amount of liability coverage] would never be applicable in an accident with an insured Minnesota motorist, but only where decedents have been injured by a tortfeasor from a jurisdiction with lower minimums . . . [T]he record includes a letter sent by defendant to the commissioner of insurance soon after Minn. St. 1971, § 65B.26(d), was enacted. In the letter defendant advised the commissioner that defendant would charge no premium for the newly required supplemental [underinsured] coverage.

Id.

97. See *infra* note 108.

98. See OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1982).

99. In a rare case the entire amount of an underinsured tortfeasor's liability coverage may be depleted by other claimants. Because the tortfeasor had liability insurance, he is underinsured and not uninsured. In such a case, assuming that the insured's underinsured motorist coverage is triggered, the insured may be able to recover the full policy limits of his underinsured coverage since he or she recovered nothing from the underinsured tortfeasor.

100. See *supra* text accompanying notes 76-78.

IV. A POTENTIAL, ALBEIT IMPERFECT, RATIONALE FOR OHIO'S REVISED STATUTE

This Comment has examined the efficacy of Ohio's recent redefinition of underinsured motorist coverage in furthering the goals of such coverage, namely, to aid the innocent victims of negligent drivers who possess insufficient liability coverage to fully indemnify the victim for his or her damages.¹⁰¹ It has been demonstrated that because the newly adopted Ohio version of underinsured motorist coverage requires more than the mere presence of uncompensated damages it does not adequately meet this goal.¹⁰² It may be, however, that the Ohio General Assembly has rejected this goal (which it arguably embraced in its initial reaction to the problem of the underinsured motorist)¹⁰³ and is pursuing instead a much more limited objective.

Other jurisdictions have noted that under some statutory schemes it may be better for the injured insured to have been injured by an uninsured rather than an insured motorist. The Florida Supreme Court observed:

Suppose that accident victims under a policy with \$50,000 "uninsured vehicle coverage" in the form prescribed by the statute suffered damages in that amount. If the tortfeasor was uninsured, his victims would have full compensation. But if the tortfeasor carried, say \$10,000 of liability insurance, then the uninsured vehicle coverage would not apply. Instead the tortfeasor's victims would have an insured recovery of only the \$10,000 available from the tortfeasor's insurer, substantially less than their damages and their apparent \$50,000 worth of protection from the negligence and financial irresponsibility of other motorists. Ironically, the accident victims would have been better off if the tortfeasor had violated the financial responsibility law by not carrying insurance.¹⁰⁴

101. See *supra* text accompanying notes 1-11.

102. See *supra* text accompanying notes 57-61.

103. See *supra* text accompanying notes 37-48, 54-56.

104. *Williams v. Hartford Accident and Indem. Co.*, 382 So. 2d 1216, 1218 (Fla. 1980). A Texas Supreme Court case illustrates that this is a valid criticism of uninsured motorist coverage. In *Kemp v. Fidelity and Casualty Co. of New York*, 512 S.W.2d 688 (Tex. 1974), the amount of the tortfeasor's liability insurance and the amount of the injured insured's uninsured motorist coverage were both ten thousand dollars. *Id.* at 689. However, because of the presence of multiple claims, the injured insured recovered less than five thousand dollars from the tortfeasor and was unable to draw on his uninsured coverage since the tortfeasor did have some insurance. *Id.* at 690. The court noted that "this result creates the anomalous situation that these petitioners . . . would have been financially better off had Smith [the tortfeasor] had no insurance at all since each petitioner then could have recovered up to the \$10,000 per person limit of his own uninsured motorist coverage." *Id.* In a later case, a Texas court discussed this anomaly, noting that: "Following *Kemp*, the legislature amended Article 5.06-1 to include 'underinsured,' in addition to 'uninsured,' motorist coverage." *American Gen. Fire & Casualty Ins. Co. v. Oestreich*, 617 S.W.2d 833, 834 (Tex. Civ. App. 1981). Therefore, in this later case, although just as in *Kemp* the limits of the tortfeasor's liability coverage and the victim's coverage both equalled ten thousand dollars, because the victim recovered only nine thousand seven hundred and fifty dollars from the tortfeasor, he was able to collect another two hundred and fifty dollars from his underinsured motorist coverage. *Id.* This clearly illustrates that the goal is to remedy the anomaly observed in uninsured coverage and not protect against underinsured drivers since, in *Oestreich*, the injured insured had damages in excess of twenty thousand dollars, but was unable to draw upon the entire ten thousand dollars of underinsured motorist coverage that he had purchased. *Id.*

The Minnesota Supreme Court also believed that the goal of underinsured motorist protection was to avoid "the problem, faced by numerous other jurisdictions, of having to define 'uninsured' motorist to include [more than those] . . . without any insurance." *Lick v. Dairyland Ins. Co.*, 258 N.W.2d 791, 794 (Minn. 1977) (emphasis in original). Therefore, in Minnesota, at that time, the goal of underinsured motorist protection was merely to preclude the anomalous situation that frequently it was better to be injured by an uninsured rather than an insured motorist. Minnesota has since adopted the goal of dealing with underinsured motorists rather than merely supplementing uninsured motorist coverage, and thus now requires only uncompensated damages before underinsured motorist protection is triggered. See *supra* text accompanying notes 67-72.

Underinsured motorist coverage, then, may be a mere reaction to a perceived anomaly in uninsured motorist coverage, rather than an attempt to deal effectively with underinsured motorists. Regardless of whether this limited goal is the intended one, it is clear that this is the effect of underinsured motorist coverage defined in terms of the relative amounts of the tortfeasor's liability coverage and the injured insured's underinsured motorist coverage.

The conclusion that this is the goal in Ohio is supported by the fact that underinsured motorist coverage in Ohio can now only be purchased in conjunction with uninsured motorist coverage.¹⁰⁵ Thus, the former is merely meant to supplement the latter; it is not designed to fully deal with motorists who are underinsured in relation to the injured insured's damages. The incorporation of the two types of coverage into a single statute is also indicative of the General Assembly's belief that these are not separate types of coverage but rather constitute a single category of protection. The net effect of this coverage is "to allow the insured the same recovery which would have been available to him had the tort-feasor [sic] been insured to the same extent as the insured himself."¹⁰⁶ This is clearly the goal behind the recent revision of the Ohio underinsured motorist provision.¹⁰⁷ At the present time, not only can underinsured motorist protection be purchased only in conjunction with uninsured motorist protection, but both coverages also must be offered in an amount equal to the amount of liability coverage purchased, although the insured may elect to purchase a smaller amount of coverage.¹⁰⁸ This allows insureds to protect themselves against the negligence of others only to the same extent that they protect others against their own negligence.¹⁰⁹ This scheme thus allows an insured to protect himself to a lesser extent

105. OHIO REV. CODE ANN. § 3937.18(A) (Page Supp. 1982).

106. *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1081 (Fla. 1978).

107. Hentemann also believes that the purpose of the revision of underinsured motorist coverage is to allow an insured to protect herself only to the same extent that she protects others:

[T]he purpose clause in the new statute mandating an offering of underinsured motorist coverage seems to indicate a legislative intent to guarantee compensation only up to the limits of the injured insured's own uninsured motorist coverage limits, which would normally be the amount of liability protection the insurer affords the public should the insured cause an injury.

Hentemann, *Underinsured Motorist Coverage: A New Coverage With New Problems*, 56 OHIO ST. B. ASS'N. REP. 122, 129 (1983).

108. OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1982). A recent writer noted that the "limits of this new [underinsured] coverage must be equal to the uninsured motorist coverage limits which can be no less than the limits required by the Ohio Financial Responsibility Act; no more than the policyholder's liability coverage limits; or, upon request by the insured, anywhere in between." Hentemann, *Underinsured Motorist Coverage: A New Coverage with New Problems*, 56 OHIO ST. B. ASS'N. REP. 122, 123 (1983) (footnote omitted) (emphasis in original).

109. New York had adopted this policy rationale explicitly by providing that "uninsured motorists insurance shall provide coverage . . . if the limits of liability under all . . . insurance policies of another vehicle liable for damages are in a lesser amount than the . . . liability limits of coverage provided by [this] . . . policy." N.Y. INS. LAW § 167-2-9 (Consol. Supp. 1982-1983). This makes it clear that uninsured motorist protection is meant to ensure that insurance equal to the amount of liability coverage purchased by the insured to protect others will be available to the insured when he or she is injured by the negligence of another. See also *supra* note 107.

Other jurisdictions have sought to allow persons to guarantee that insurance be available only in an amount equal to the minimum required by law, rather than in an amount equal to the amount of liability insurance purchased by the insured: "[Uninsured and underinsured coverage is designed] to ensure that should he [the insured] be injured by one who carries liability insurance in an amount less than the minimum required by the Safety Responsibility Act, he will nonetheless have available to him that full minimum amount." *Lick v. Dairyland Ins. Co.*, 258 N.W.2d 791, 793-94 (Minn. 1977). Therefore, Minnesota, at that time, allowed such coverage to be purchased only in an amount equal to the minimum amount of liability insurance required. Minnesota has since rejected this approach and instead now requires only uncompensated damages for underinsured motorist coverage to be available. See *supra* text accompanying notes 67-72.

than to which he protects others by choosing a smaller amount of coverage but not to protect himself to a greater extent by purchasing a larger amount of underinsured and uninsured coverage.

The Ohio statutory scheme generally places an insured in the same position whether he or she is injured by an uninsured or an insured motorist,¹¹⁰ and thus avoids the anomalous situation in which it can be better to have been injured by an uninsured rather than an insured motorist. The anomaly did not exist under Ohio's original version of underinsured motorist coverage, however, and, therefore, it needed no remedy. Under the original version of underinsured motorist coverage an insured was in a *better* position if injured by an insured rather than an uninsured motorist. Assuming equal amounts of uninsured and underinsured motorist coverage, as required by the statute, if the insured was injured by a tortfeasor who possessed no liability coverage, the maximum amount the injured insured could recover would be the amount of his or her uninsured coverage. But, if the tortfeasor did possess liability insurance, the insured could recover the full amount of his or her own underinsured coverage in addition to the tortfeasor's liability coverage. For example, if the injured insured had fifty thousand dollars of uninsured and underinsured motorist coverage and damages of one hundred thousand dollars, and the tortfeasor had no liability insurance, then the maximum amount the injured insured could collect would be fifty thousand dollars. If the tortfeasor had liability insurance, however, then the injured insured could collect under his or her underinsured coverage in addition to the amount recovered from the tortfeasor. Thus, an injured insured would have preferred to have been injured by an insured rather than an uninsured motorist.

Assuming the availability of uninsured motorist coverage, then, a legislature could choose to: (1) require no form of underinsured motorist coverage (although this option would lead to the anomalous result that in certain situations it would be better to be injured by an uninsured rather than an insured motorist); (2) require underinsured motorist coverage that seeks only to remedy the anomaly observed in (1) (the insured would be in the same position whether injured by an insured or an uninsured motorist); or (3) require underinsured motorist coverage that focuses on uncompensated damages (under this option it would be preferable to be injured by an insured rather than an uninsured motorist). Thus, the form of underinsured coverage adopted determines whether it will be less, equally, or more preferable to have been injured by an insured as opposed to an uninsured driver. The relationship resulting from the use of the third approach seems, for a number of reasons, more desirable than the other two.

First, prior to the existence of underinsured and uninsured motorist coverage, the victim of an insured driver was in a better position than the victim of an uninsured driver. The emergence of underinsured and uninsured motorist coverage in the form adopted by the Ohio revised statute has altered this relationship by reducing the

110. This is not always true, however. If the tortfeasor had liability insurance in excess of the injured insured's uninsured motorist coverage, then it is obviously more advantageous to be injured by that insured tortfeasor.

amount recoverable by the victim of an insured driver. This benefits no one (except the insurer) and is not a desirable option.

Second, the victim of an insured driver has access to two sources of compensation, namely, the tortfeasor's liability insurance and his or her own underinsured motorist coverage. In contrast, the victim of an uninsured driver has access to only one source of compensation, her own uninsured motorist coverage. A victim of an insured driver, because she has access to two sources of compensation, should therefore be able to recover a greater amount than the victim of an uninsured driver with access to only one source of compensation.

Third, and most important, adoption of the form of underinsured motorist coverage that requires only uncompensated damages goes beyond mere supplementation of uninsured motorist coverage, and moves toward the goal of full compensation for the innocent victims of negligent drivers. It should not matter how much liability insurance the injured insured purchased to protect others—which is made the critical factor under the revised statute—for the simple reason that the injured insured has not injured anyone. The injured insured has sustained damages as the result of another's tortious conduct, and the overriding goal in such a situation should be to indemnify, as completely as possible, the innocent victim for his or her injuries, which, in many cases, are severe, incapacitating, and permanent.

In sum, the recent action of the Ohio General Assembly can be rationalized, when viewed in isolation, as an attempt to remedy an anomaly inherent in uninsured motorist coverage. When viewed in context, however, its irrationality becomes apparent. First, the anomaly referred to did not previously exist in Ohio. Second, instead of adjusting the relationship between injury by an insured or by an uninsured tortfeasor so that it is not worse to be injured by an insured as opposed to an uninsured tortfeasor, the General Assembly has adjusted the relationship so that it is no better to be injured by an insured as opposed to an uninsured tortfeasor. The General Assembly has not remedied an anomaly; it has created one. Last, and most important, underinsured motorist coverage under the revised Ohio Statute no longer effectively deals with the problem of uncompensated damages that arise when the innocent victims of negligent drivers are damaged beyond the ability of the tortfeasor's liability coverage to provide indemnification.

V. POSSIBLE COURSES OF ACTION

The most effective way to require insurance companies to offer underinsured motorist coverage that protects against uncompensated damages would be for the General Assembly to simply negate their recent action and reinstate the original version of underinsured motorist coverage.

Unfortunately, it is not clear that this Comment and the criticisms contained herein will generate legislative activity of this kind, since normally it is effective lobbying, and not legal argument, that prompts legislative action.¹¹¹ It is also un-

111. One writer has observed:

The legislative process is not a rationale enterprise in the sense of a conclave of solons deciding issues of public policy through pure ratiocination. A legislature is not self-consciously rational like a court; it does not ground its

likely that an effective lobbying effort could be launched to reinstate the original version of the underinsured motorist statute. This is because, as the Honorable Abner J. Mikva observed:

In the starkest terms, our system of interest representation favors the rich, the well-educated and the well-organized, at the expense of the poor, the uneducated and the unorganized.

The reasons for this bias are not hard to discover. Effective interest representation requires organization. And organization, in turn, requires time, money and information.¹¹²

Mikva's observation is particularly appropriate in the instant context. Insurance companies, who obviously benefited from the revision in the law, are wealthy, intelligent and organized. The insureds, on the other hand, when viewed in relation to the insurance industry, are poor, uneducated, and unorganized. Mikva recognized that similar remarks could be made regarding any issue that pits consumer against producer—the unorganized against the organized.¹¹³ It may be unduly pessimistic, however, to conclude that there is no possibility of legislative action to deal with the problem of incompletely compensated victims of negligent drivers; examples of legislative action taken to resolve similar inequities can be found.¹¹⁴

Furthermore, it is possible that insureds will be able to contract independently for protection against uncompensated damages. It must be noted that the recent action of the Ohio General Assembly does not prohibit such insurance; it simply does not require it.¹¹⁵ As the Ohio Supreme Court has recognized, however, insurance policies cannot realistically be treated as contracts in the traditional sense.¹¹⁶ Because of

decisions on logic and precedent. Its members are interested in more than just legal arguments. This might seem obvious, but it is difficult for many lawyers to alter their approach when engaging in legislative activity. As an example, during the 1976 New York State Constitutional Convention, the paid representative of one of the bar associations, a lawyer, told this writer that the criticism he planned against a provision of the judiciary article of the proposed constitution was a "devastating law review article." This is not the kind of approach that achieves attention in the legislature.

Prendergast, *A Professional Approach to Advocacy in a Legislature*, 34 ALB. L. REV. 69, 69-70 (1969).

112. Mikva, *Interest Representation in Congress: The Social Responsibilities of the Washington Lawyer*, 38 GEO. WASH. L. REV. 651, 663 (1970).

113. "The disparity in interest representation under the present rules of the game is even clearer . . . in the case of consumers." *Id.* at 665.

114. The Ohio General Assembly recently has taken at least two measures that expand the ability of tort victims to seek adequate compensation. The Wrongful Death Act was recently amended to allow recovery of nonpecuniary as well as pecuniary damages. OHIO REV. CODE ANN. § 2125.02(B) (Page Supp. 1982). Contributory negligence was recently replaced by a statutory scheme of comparative negligence. OHIO REV. CODE ANN. § 2513.19 (Page 1981). Therefore, it may be that tort victims do have a successful advocate in the Ohio General Assembly capable of spurring action to ameliorate the present inequities in Ohio's approach to underinsured motorist coverage.

115. Hentemann, in his recent article, believes that some insurers will voluntarily offer protection against uncompensated damages even though not required to do so by the statute:

In the Limits of Liability section of that underinsured motorist coverage, it is usually stated that the limits of liability shall be: (1) the difference between the *limits* of the underinsured motorist coverage and the sum of the limits of all liability policies applicable to the tortfeasor [citing State Farm Mutual Car Policy, Endorsement 6275 R.R.], or (2) the difference between the insured's *damages* and such liability limits available up to the uninsured limits [citing Allstate Automobile Insurance Company Policy, Endorsement AU1150].

Hentemann, *Underinsured Motorist Coverage: A New Coverage With New Problems*, 56 OHIO ST. B. ASS'N. REP. 122, 128 (1983) (emphasis in original). This, of course, does not mean that insureds will be able to bargain successfully for protection against uncompensated damages from insurers who do not wish to provide it voluntarily.

116. The Ohio Supreme Court has recognized this fact in the following comments on insurance contracts:
[I]t is important to realize the nature of the parties involved . . . [I]nsurance companies are in a much stronger bargaining position *vis-a-vis* their customers when insurance is sold

unequal bargaining power between the insured and his or her insurer, few insureds will be able to bargain successfully for coverage in excess of that required by law. Moreover, even assuming *arguendo* that insureds have the power to bargain for additional coverage, they generally would not be sufficiently informed to know what type of coverage for which to bargain. As the Florida Supreme Court has noted: "Few automobile owners [are] . . . aware of the difference between 'uninsured vehicle coverage' and 'underinsured vehicle coverage,' and too many learn of the difference only in the context of an automobile accident."¹¹⁷

The only remaining possibility is recourse to the Ohio judiciary. The Ohio Supreme Court has vividly and concretely evinced a desire to soften the harshness of other actions of the Ohio General Assembly¹¹⁸ and, in particular, to provide a source of compensation to the victims of uninsured motorists.¹¹⁹ However, this was possible in the uninsured motorist context only because of the court's finding that the various contractual limitations on uninsured coverage were in conflict with the intent of the uninsured motorist statute.¹²⁰ This approach, of course, would not be effective with

Insurance companies write the policies and present the pre-printed forms to customers, most of whom are unfamiliar with the terminology found in the multi-page policies. Most customers accept the policies *in toto* and do not question, let alone actively negotiate to change or omit, any of the provisions in the pre-printed forms. *Ady v. West American Ins. Co.*, 69 Ohio St. 2d 593, 597, 433 N.E.2d 547, 549 (1982).

117. *Williams v. Hartford Accident and Indem. Co.*, 382 So. 2d 1216, 1218 (Fla. 1980). See also *supra* note 116.

118. The resistance of the Ohio Supreme Court to legislative restrictions on the ability of tort victims to seek compensation is vividly illustrated by its reaction to the one year statute of limitations recently imposed by the Ohio General Assembly on medical malpractice claims. OHIO REV. CODE ANN. § 2305.11(A) (Page 1981). See, e.g., *Lombard v. Good Samaritan Medical Center*, 69 Ohio St. 2d 471, 433 N.E.2d 162 (1982) (one year statute of limitations for medical malpractice claims contained in OHIO REV. CODE ANN. § 2305.11(A) (Page 1981), does not apply to claims for negligence of hospital employees whose conduct does not fall within the common-law definition of malpractice); *Koler v. Saint Joseph Hosp.*, 69 Ohio St. 2d 477, 432 N.E.2d 821 (1982) (action for wrongful death arising out of medical malpractice governed by two year statute of limitations contained in OHIO REV. CODE ANN. § 2125.02 (Page Supp. 1981), rather than the one year statute of limitations for medical malpractice claims); *Whitt v. Columbus Coop. Enter.*, 64 Ohio St. 2d 355, 415 N.E.2d 985 (1980) (action for loss of consortium, services and medical expenses, arising from medical malpractice on wife, governed by the four year statute of limitations contained in OHIO REV. CODE ANN. § 2305.09(D) (Page 1981), rather than the one year statute of limitation for medical malpractice claims); *Melnyk v. Cleveland Clinic*, 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972) (when foreign object left inside patient's body, statute of limitations tolled until patient discovers or should have discovered the medical malpractice); *Wylar v. Tripi*, 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971) (cause of action for medical malpractice accrues when patient-client relationship terminated, rather than when the malpractice occurred). In each of these cases the court attempted to mitigate the harshness of the short one year statute of limitations for medical malpractice claims imposed by the Ohio General Assembly.

The Ohio Supreme Court's efforts extend beyond resisting legislatively imposed restrictions upon the ability of innocent victims to seek compensation for their damages. The court has also made inroads on common-law restrictions. In *Prem v. Cox*, 2 Ohio St. 3d 149, 443 N.E.2d 511 (1983), the court held that a surviving spouse may not assert the common-law inter-spousal immunity as a defense in an action by the estate of the deceased spouse for wrongful death occasioned by the negligence of the surviving spouse. Similarly, in *Haverlack v. Portage Homes*, 2 Ohio St. 3d 26, 442 N.E.2d 749 (1982), the court held that municipalities no longer possess common-law immunity against claims for negligence.

119. See *supra* note 54. To date, the Ohio Supreme Court has not had occasion to address the underinsured motorist provision, either in its original or revised form. ◊

120. See *supra* note 54. However, the Ohio General Assembly, in accord with its history of protecting insurance companies, has, in effect, overruled the keystone decision in the uninsured motorist context, thereby depriving many of the other cases of their utility. In *Curran v. State Auto. Mut. Ins. Co.*, 25 Ohio St. 2d 33, 266 N.E.2d 566 (1971), the court held that "other insurance" exclusionary clauses were invalid, which meant that insureds were able to "stack" the uninsured motorist coverage of several policies to provide a greater amount of coverage. Most other decisions of the court simply treated a person as an "insured" under more than one policy, which permitted the insured to stack the coverages of those policies. *Curran* held that a contract of insurance cannot preclude stacking on the ground that this would violate the intent of the uninsured motorist statute. *Id.* at 38, 266 N.E.2d 566 at 569. The Ohio General Assembly, however, amended the uninsured motorist statute to provide, effective June 25, 1980, that any "policy of insurance that includes

regard to underinsured coverage since the statute itself allows the limitation on coverage. Therefore, for the Ohio judiciary to hold that underinsured motorist coverage is triggered by the mere existence of uncompensated damages, it must do so on the basis of statutory construction.

The Ohio Supreme Court, in *Prem v. Cox*,¹²¹ has recently reiterated the principle of statutory construction that:

[T]he General Assembly will not be presumed to have intended to enact a law producing unreasonable or absurd consequences. It is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, so to construe the statute as to avoid such a result.¹²²

In *Prem* the court found it necessary to ignore certain language within the Ohio Wrongful Death Act¹²³ in order to implement the goal "fundamental to our [Ohio's] legal system that one may seek redress for a substantial wrong."¹²⁴ The Wrongful Death Act allows recovery "[w]hen death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued."¹²⁵ In *Prem* the court was confronted with a claim by the estate of a deceased spouse against the surviving spouse for wrongful death allegedly resulting from the negligence of the surviving spouse. Although the Wrongful Death Act is explicitly inapplicable unless the deceased party would have been able to recover damages had death not ensued, the court refused to abide by this stricture. The court recognized¹²⁶ that the deceased spouse in *Prem* could not have recovered damages had death not ensued (due to the existence of the common law inter-spousal immunity), but allowed recovery under the statute on the ground that otherwise the Wrongful Death Act would give rise to unreasonable or absurd results.¹²⁷

Similarly, the Ohio courts could, if necessary, override language in the revised version of the underinsured motorist statute. The revised provision provides for:

Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and *shall provide protection for an insured against loss from bodily injury, sickness, or disease, including death*, where the limits of coverage available for payment to the insured under all . . . insurance policies covering persons liable to the insured are less than the limits for the insured's

uninsured motorist coverage may include terms and conditions that preclude stacking of uninsured vehicle coverages." OHIO REV. CODE ANN. § 3937.18(G) (Page Supp. 1981). This action not only overrules *Curran* but robs the other cases of their utility since, if the insured cannot stack the coverages of multiple policies, it is useless to be an insured under more than one policy.

121. 2 Ohio St. 3d 149, 443 N.E.2d 511 (1983).

122. *Id.* at 152, 443 N.E.2d at 514.

123. OHIO REV. CODE ANN. § 2125.01 (Page Supp. 1982).

124. *Prem v. Cox*, 2 Ohio St. 3d 149, 151-52, 443 N.E.2d 511, 514 (1983).

125. OHIO REV. CODE ANN. § 2125.01 (Page Supp. 1982).

126. "[I]nterspousal immunity [could have been] . . . asserted in the case *sub judice* to protect the husband from liability in a suit by his injured wife [had she survived] . . ." *Prem v. Cox*, 2 Ohio St. 3d 149, 151, 443 N.E.2d 511, 514 (1983) (citing *Bonkowsky v. Bonkowsky*, 69 Ohio St. 2d 152, 431 N.E.2d 998 (1982)).

127. *Prem v. Cox*, 2 Ohio St. 3d 149, 152, 443 N.E.2d 511, 514 (1983) (citing *Canton v. Imperial Bowling Lanes*, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968)). See also *supra* text accompanying notes 113-14.

uninsured motorist coverage at the time of the accident. The limits of liability for an insurer providing underinsured motorist coverage shall be the limits of such coverage, less those amounts actually recovered¹²⁸

If the court can be convinced to focus on the goal expressed in the italicized portion of the statutory language, it may be further convinced to deem the language following the italicized language inconsistent with that goal, thereby further protecting the insured against loss. In other words, the court would be asked to conclude that to give effect to the subsequent language would produce an unreasonable and absurd result, since that language significantly lessens the degree to which the goal of protecting insureds against loss will be attained. It might be countered, of course, that the clear language of the statute precludes such a conclusion. In *Prem*, however, the restrictive language was also clear, but the court, to achieve the fundamental goal of providing compensation to the victims of another's tortious conduct, refused to give effect to the language.

Admittedly, this argument is a slim reed upon which to anchor any hope of ameliorating the harshness of the recent action of the Ohio General Assembly. But, given the improbability that any relief will be forthcoming from the General Assembly¹²⁹ and that insureds will be able to bargain successfully for more extensive coverage,¹³⁰ any amelioration of the harsh effect of the General Assembly's recent action must be the result of such judicial construction of Ohio's revised version of underinsured motorist coverage.

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128. OHIO REV. CODE ANN. § 3937.18(A)(2) (Page Supp. 1982) (emphasis added).

129. See *supra* text accompanying notes 111-14.

130. See *supra* text accompanying notes 116-17.

