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# STACKING OF UNINSURED\* AND UNDERINSURED MOTOR VEHICLE COVERAGES

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## I. INTRODUCTION

Often, the first question asked by a plaintiff's attorney in evaluating a serious automobile accident case is, "How much insurance coverage is available?" That same question can pose perplexing issues for defense attorneys or insurance counsel in assessing a client's exposure to liability. In Virginia, these questions often require the attorney to consider the application of Virginia's Uninsured Motorist statutes and the import of "stacking" of coverage.

The term "stacking" is broadly applied to the concept of adding (or multiplying) uninsured or underinsured motorist coverage available to an accident victim from multiple sources. The sources may consist of several different insurance policies or several different coverages available under a single policy.

For example, consider the case of a victim ("V"), who is insured under a policy with an Insurer ("I"), which has a statutory minimum uninsured motorist limit of \$25,000 per person. V's policy insures three automobiles and he pays separate premiums for each. V drives one of his cars to work and is struck by the vehicle operated by Tortfeasor ("T"), who is uninsured. V's damages amount to \$1 million.

Is the case closed if I tenders \$25,000, its apparent policy limits? Under principles of "stacking" established in Virginia, the answer is no. Unless V's policy explicitly excludes "stacking," V can multi-

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ply or "stack" the uninsured motorist coverages available to him from each of his three insured vehicles for a total of \$75,000. As a result, *I* pays \$75,000.

Virginia cases address the stacking of both uninsured and underinsured motorist coverage. The issue arises in cases of multiple policies or where multiple vehicles are insured under a victim's single policy. A related problem, though not typically defined as "stacking," arises in determining the scope of coverage available to a victim injured by multiple tortfeasors, one or more of whom is uninsured or underinsured.

This article begins with a brief introduction to Virginia's uninsured motorist statute. The article then addresses the stacking of uninsured and underinsured motorist coverage and the problem of multiple tortfeasors. It also addresses the priority among insurers, where several uninsured motorist insurance carriers may be held liable for a single injury. The article closes with a summary of the most recent legislative and judicial pronouncements on the subject. A review of Virginia cases demonstrates that the result in almost any stacking problem is best determined by reference to a very simple rule: *Read the Statute and Read the Policy!*

## II. APPLICABLE STATUTES

### A. *The Statute Governs All*

The fundamental premise governing uninsured and underinsured motorist insurance is that such insurance is a creature of statute. Virginia law compels any insurer offering coverage on automobiles principally garaged in the Commonwealth to provide certain types of coverage, including uninsured motorist coverage.<sup>1</sup> Policy provisions which attempt to narrow or restrict coverage to anything less than that required by the statute are void.<sup>2</sup>

### B. *Uninsured Motorist Coverage Statute*

Section 38.2-2206 of the Code of Virginia provides in part:

[N]o policy or contract of bodily injury or property damage liability insurance . . . shall be issued . . . unless it contains an endorsement or provisions undertaking to pay the insured *all sums that he is*

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1. VA. CODE ANN. § 38.2-2206 (Repl. Vol. 1986 & Cum. Supp. 1989).

2. *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 900, 140 S.E.2d 817, 819 (1965).

*legally entitled to recover* as damages from the owner or operator of an uninsured motor vehicle, within limits not less than . . . [\$25,000/\$50,000].<sup>3</sup>

The statute further provides that the uninsured motorist policy limits shall equal but not exceed the liability insurance limits under the policy.<sup>4</sup> Accordingly, where the insured buys additional liability coverage he will automatically be provided, and must pay for, the higher uninsured motorist coverage, unless he elects in writing to maintain a lower limit of uninsured motorist coverage.

### C. *Underinsured Motorist Coverage Statute*

#### 1. 1974 SCC Policy Form

Prior to 1974, Virginia law did not provide for underinsured motorist coverage. By Administrative Order 6840, March 19, 1974, the State Corporation Commission authorized an endorsement which provided that the definition of "uninsured motor vehicle" be broadened to include "underinsured motor vehicle."<sup>5</sup>

The authorized endorsement defined "underinsured motor vehicle:"

When used in reference to this insurance (including this and other endorsements forming a part of the policy): "underinsured motor vehicle" means a motor vehicle with respect to the ownership, maintenance or use of which, as respects damages because of bodily injury or property damage or both, the sum of the limits of liability under all bodily injury and property damage liability bonds and insurance policies respectively applicable to bodily injury or property damage at the time of the accident is less than the applicable limits of liability under this insurance.<sup>6</sup>

#### 2. Underinsured Motorist Coverage Added by Statute

In 1982, Virginia amended its uninsured motorist statute to include a provision for underinsured motorist coverage.<sup>7</sup> The statute

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3. VA. CODE ANN. § 38.2-2206 (Repl. Vol 1986 & Cum. Supp. 1989) (emphasis added).

4. *Id.*

5. S.C.C. Order No. 6840 (1974).

6. *Id.*

7. 1982 Va. Acts 638, 642 (codified at VA. CODE ANN. § 38.2-2206 (Repl. Vol. 1986 & Cum. Supp. 1989)).

was amended in 1988, resulting in the following language currently in effect:

*Where the insured contracts for higher limits [than the statutory minimum of \$25,000/\$50,000], the endorsement or provisions for those limits shall obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured, as defined in Subsection B of this section.*

B.

. . .

A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage, including all bonds or deposits of money or securities made pursuant to Article 6 (Section 46.1-467, et seq.) of Chapter 6 of Title 46.1, is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.

"Available for payment" means the amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence.<sup>8</sup>

Note that the language, "available for payment," and the definition of that term were added by the 1988 amendment.<sup>9</sup> The difference may make a difference!<sup>10</sup>

### 3. Is Underinsured Coverage Always Mandated by Statute?

Note that the statute does not say that an insurer must always include underinsured motorist coverage. It requires the insurer to do so only "where the insured contracts for higher limits" than the statutory minimum.<sup>11</sup> The language of the statute, therefore, ap-

8. VA. CODE ANN. § 38.2-2206 (Cum. Supp. 1989) (emphasis added).

9. *Id.*

10. See *infra* notes 60-71 and accompanying text; see also *National Union Fire Ins. Co. v. Johnson*, 709 F. Supp. 676 (E.D. Va. 1989) (noting difference between underinsurance pre-July 1, 1987 and post-July 1, 1988 due to statutory amendments). Compare *Billings v. State Farm Mut. Auto. Ins. Co.*, 680 F. Supp. 778, 783 (E.D. Va. 1988) with VA. CODE ANN. § 38.2-2206 (Cum. Supp. 1989).

11. VA. CODE ANN. § 38.2-2206 (Cum. Supp. 1989).

pears to permit an insurer who provides minimum coverage to use policy language more restrictive than that provided by the statute for insureds who purchase more than the minimum. The distinction is important where stacking multiplies otherwise minimum coverage.<sup>12</sup>

#### D. *Rules of Construction*

Applying typical contract principles, the Supreme Court of Virginia construes ambiguous insurance policy language against the insurer.<sup>13</sup> The court also appears to pursue a policy of interpreting the uninsured motorist statute broadly to protect "the innocent victims of negligent uninsured motorists."<sup>14</sup>

#### E. *Which Statute Applies*

As statutory language is critical to any uninsured/underinsured motorist issue, the proper version of the statute must be applied. Note that section 38.2-2206 was amended in 1988, adding the language "available for payment" to the definition of underinsured motorist coverage. The amendment went into effect on July 1, 1988.<sup>15</sup>

The new language applies only to insurance policies "issued or delivered" after July 1, 1988. A policy issued or delivered before that date would be valid if it contained the prior version of the statutory language, and would still govern claims arising after July 1, 1988, during the term of the policy.<sup>16</sup>

### III. STACKING OF UNINSURED MOTORIST COVERAGE

#### A. *Allowance of Stacking*

The Supreme Court of Virginia has explicitly approved stacking of uninsured motorist coverage in two contexts. First, stacking is allowed where the victim has uninsured motorist coverage availa-

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12. See *Hamblen v. Valley Forge Ins. Co.*, Law No. 2211 (Cir. Ct. Louisa County 1987); *infra* notes 55-59 and accompanying text; see also *Bray v. Insurance Co. of Pa.*, 705 F. Supp. 1145 (E.D. Va. 1989).

13. *E.g.*, *Lipscombe v. Security Ins. Co.*, 213 Va. 81, 84, 189 S.E.2d 320, 323 (1972).

14. *Id.* at 83, 189 S.E.2d at 323; accord *Nationwide Mut. Ins. Co. v. Scott*, 234 Va. 573, 363 S.E.2d 703 (1988).

15. VA. CODE ANN. § 38.2-2206 (Cum. Supp. 1989).

16. *Id.*

ble from two or more separate policies of insurance.<sup>17</sup> Second, stacking is allowed where the victim has two or more vehicles insured under a single policy and pays separate premiums for each car.<sup>18</sup> Stacking may be limited, however, at least in "single policy" cases, based upon explicit restrictions in the insurance policy.<sup>19</sup> Further, stacking is available only to certain classes of insureds.<sup>20</sup>

### 1. Stacking Coverage from Multiple Policies

In *Bryant v. State Farm Mutual Automobile Insurance Co.*,<sup>21</sup> the Supreme Court of Virginia permitted an accident victim to collect under each of two separate insurance policies with uninsured motorist coverage available to the insured, where his damages would not be fully compensated by a single policy (or, as in Bryant's case, even by the two policies combined). Bryant was driving his father's car when he was struck by an uninsured motorist.<sup>22</sup> Bryant obtained a judgment for \$85,000 and sought to collect. State Farm had two policies with uninsured motorist coverage which applied. One was the father's policy on the vehicle, the other was Bryant's own policy.<sup>23</sup> Each policy had a statutory minimum of \$10,000 per person injured. State Farm paid under the primary coverage on the vehicle from the father's policy.<sup>24</sup> State Farm claimed that the second policy was not applicable because it contained an "other insurance" clause which made it only excess coverage to the extent its limits exceeded the other policy's limits.<sup>25</sup>

The supreme court held that Bryant was allowed to collect under both policies for a total of \$20,000.<sup>26</sup> The rationale used by the court is simple. Section 38.1-381(a) and (b) (now section 38.2-2206) of the Code of Virginia<sup>27</sup> provides that *all* policies must require the insurer to pay "all sums which [the insured] shall be legally entitled to recover as damages" from the uninsured

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17. *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965).

18. *Cunningham v. Insurance Co. of North America*, 213 Va. 72, 189 S.E.2d 832 (1972).

19. *Goodville Mut. Cas. Co. v. Borrer*, 221 Va. 967, 275 S.E.2d 625 (1981).

20. *Cunningham*, 213 Va. at 75-76, 189 S.E.2d at 834-36.

21. 205 Va. 897, 140 S.E.2d 817 (1965).

22. *Id.* at 898, 140 S.E.2d at 817-18.

23. *Id.* at 898, 140 S.E.2d at 818.

24. *Id.*

25. *Id.*

26. *Id.* at 902, 140 S.E.2d at 820.

27. VA. CODE ANN. § 38.2-2206 (Cum. Supp. 1989) (formerly VA. CODE ANN. § 38.1-381(a), (b) (1950)).

tortfeasor.<sup>28</sup> The "excess insurance" provision in the policy attempted to restrict the insurer's liability to something less than "all sums." Accordingly, the restriction was invalid.<sup>29</sup>

## 2. Stacking Coverage for Multiple Vehicles Under a Single Policy

In *Cunningham v. Insurance Co. of North America*,<sup>30</sup> the court permitted an insured to stack uninsured motorist coverage available on each of his three vehicles, insured under a single policy, even though his three vehicles were not involved in the accident.<sup>31</sup> Cunningham, a state employee, was a passenger in a state vehicle which collided with an uninsured driver. Cunningham's personal auto insurance with Insurance Company of North America ("INA") covered his three personal autos, each with \$15,000/\$30,000 uninsured motorist limits. Cunningham paid separate, equal premiums for each of the three vehicles.<sup>32</sup>

The court "stacked" the INA coverages and held that a "named insured" has available uninsured motorist coverage both while in his insured vehicle and "wherever else he may happen to be when he suffers bodily injury due to an uninsured motorist."<sup>33</sup> Further, the court held that where the insured pays separate premiums for coverage on separate cars, he is entitled to multiple coverages, even if the coverages are contained in a single insurance policy.<sup>34</sup>

### B. Limitations on Stacking Uninsured Motorist Coverage

#### 1. Two "Classes" of Insureds

While *Cunningham* approved stacking of coverage where a single policy covered multiple vehicles, it also limited such stacking to a class of "named insureds." The issue arose when Cunningham tried to stack the coverage available upon the state-owned vehicle in which he was a passenger. The state's policy, with Maryland

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28. *Bryant*, 205 Va. at 901, 140 S.E.2d at 820.

29. *Id.* The *Bryant* decision explicitly rejected the Fourth Circuit's decision in *Travelers Indem. Co. v. Wells*, 316 F.2d 770 (4th Cir. 1963). *Id.*

30. 213 Va. 72, 189 S.E.2d 832 (1972).

31. *Id.* at 79, 189 S.E.2d at 837.

32. *Id.* at 73, 189 S.E.2d at 833.

33. *Id.* at 76, 189 S.E.2d at 835 (quoting *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 791, 463 P.2d 38, 40 (1969)).

34. *Id.* at 79, 189 S.E.2d at 837; see also *Central Surety & Ins. Corp. v. Elder*, 204 Va. 192, 129 S.E.2d 651 (1963); *Virginia Farm Bureau Mut. Ins. Co. v. Wolf*, 212 Va. 162, 183 S.E.2d 145 (1971) (both cases cover stacking of medical payments coverage).



Casualty, covered 4,368 state vehicles, each with separate premiums.<sup>35</sup>

The supreme court did not permit such stacking where Cunningham was not a "named insured" under the state's policy (i.e., a person named in the policy or a relative or member of household).<sup>36</sup> The rationale was twofold. First, the statute (then section 38.1-381(a)) defined "insured" in two classes. A "named insured" (the "first class") was covered whether in the insured car or not.<sup>37</sup> Other persons (the "second class") were covered only when using the car.<sup>38</sup> Therefore, the only uninsured motorist coverage available to Cunningham under the state's insurance policy was the coverage on the single car he was in. Coverage on the other cars was not available to him and thus could not be stacked.<sup>39</sup>

## 2. Exclusion of Stacking in Policy Language—Single Policy

Where a single policy insures multiple vehicles, the policy may effectively exclude stacking without violating Virginia's statute, but only if the exclusionary language is clear and explicit.<sup>40</sup>

The supreme court in *Goodville Mutual Casualty Co. v. Borrer*,<sup>41</sup> found the following language sufficient to exclude stacking.

### *Limits of Liability*

Regardless of the number of . . . motor vehicles to which this insurance applies:

(a) the limit of liability for bodily injury stated in the schedule as applicable to "each person" is the limit of the company's liability for all damages because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting "each person", the limits of liability stated in the schedule as applicable to "each accident" is the total limit of the company's

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35. *Cunningham*, 213 Va. at 74, 189 S.E.2d at 834. Note that if stacking had been allowed on all 4,368 state owned vehicles, it would have resulted in a \$65 million policy limit for each state car. *See id.*

36. *Id.* at 77, 189 S.E.2d at 835.

37. *Id.*; *see also supra* notes 30-34 and accompanying text (discussing the *Cunningham* case).

38. *Cunningham*, 213 Va. at 77, 189 S.E.2d at 835-36.

39. *Id.* at 77, 189 S.E.2d at 835. For cases defining who is "using" an automobile to be entitled to uninsured or underinsured coverage compare, *Insurance Co. of North America v. Perry*, 204 Va. 833, 134 S.E.2d 418 (1964) with *Great Am. Ins. Co. v. Cassell*, 15 Va. Cir. 214 (1988). The *Cassell* case is presently on appeal to the Supreme Court of Virginia.

40. *Goodville Mut. Cas. Ins. Co. v. Borrer*, 221 Va. 967, 275 S.E.2d 625 (1981).

41. *Id.*

liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident.<sup>42</sup>

Most Virginia policies now contain such language. Less specific language may be insufficient to preclude stacking.<sup>43</sup>

### 3. Exclusion of Stacking Between Multiple Policies

*Bryant v. State Farm Mutual Automobile Insurance Co.*<sup>44</sup> prohibits language that would permit one insurer to exclude uninsured motorist coverage where other coverage is available.<sup>45</sup> After *Bryant*, it is difficult to conceive of policy language that could lawfully exclude stacking in cases of multiple policies.

## IV. STACKING OF UNDERINSURED MOTORIST COVERAGE

The principles applied to issues of stacking underinsured motorist coverage are no different than those applied to uninsured motorist coverage. However, the underinsurance debate is marked by a "chicken and egg" problem that does not arise with the uninsured motorist. Do you compare policy limits first and then stack coverage? Or, do you stack coverage first and then compare policy limits?

Consider the following example. Tortfeasor ("T") has a policy with a \$25,000 limit. Victim ("V"), who has sustained damages exceeding \$1 million, has a policy with a \$25,000 limit on each of three cars, under a single policy that does not explicitly exclude stacking. If policy limits are considered first, T is not "underinsured," because T's limits are the same as V's. Therefore, even if you "stack" the coverage, V gets nothing, since three times nothing is still nothing. If stacking of coverage is considered first, however, V has \$75,000 coverage and T is therefore "underinsured" to the extent of \$50,000. V collects \$50,000 from his uninsured motorist carrier.

The answer to the riddle lies in the language of the policy and of the statute. Because of amendments to the statute, however, it is critical to know which version of the statute should be applied.

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42. *Id.* at 970, 275 S.E.2d at 627.

43. See *Lipscombe v. Security Ins. Co.*, 213 Va. 81, 189 S.E.2d 320 (1972).

44. 205 Va. 897, 140 S.E.2d 817 (1965).

45. See *supra* text accompanying notes 24-29.

A. *Mitchell and the 1974 SCC Endorsement—Compare First and Stack Later*

*Mitchell v. State Farm Mutual Automobile Insurance Co.*<sup>46</sup> posed the “chicken and egg” problem in determining underinsurance coverage under the 1974 SCC standard endorsement.<sup>47</sup> The Tortfeasor (“T”) had \$50,000 liability limits. Mitchell’s husband insured three cars under three separate policies, each with \$25,000 limits. Plaintiff sought to stack the three coverages for \$75,000 total coverage, then to compare her coverage to T’s \$50,000 in order to conclude the T was underinsured by \$25,000 (i.e., stack first, compare later).<sup>48</sup> Instead, the supreme court compared Mitchell’s \$25,000 limit on each policy to T’s \$50,000 limit and found that, with respect to each of Mitchell’s policies, T was not underinsured.<sup>49</sup>

The result turned on the language of the 1974 endorsement which defined “underinsured motor vehicle” as one where “the sum of the limits of liability . . . applicable to bodily injury . . . is less than the applicable limits of liability *under this insurance*.”<sup>50</sup> The supreme court found “this insurance” to mean the coverage provided by the policy to which the endorsement was attached. The court stated that “[i]t follows that each of the Mitchell’s policies must be considered independently to determine whether [Tortfeasor] was underinsured.”<sup>51</sup> In somewhat broader language, the court added that “[f]or a plaintiff with minimum coverage, therefore, the underinsured motorist endorsement is worthless.”<sup>52</sup>

Note that it is unclear whether the result in *Mitchell* would have been different if Mitchell insured all three cars under one policy. Would the court define “this insurance” as the whole policy (i.e., three coverages of \$25,000, totalling \$75,000), or would “this insurance” be construed to mean the specific coverage for each vehicle?

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46. 227 Va. 452, 318 S.E.2d 288 (1984).

47. See *supra* note 6 and accompanying text.

48. *Mitchell*, 227 Va. at 453, 318 S.E.2d at 288.

49. *Id.* at 459, 318 S.E.2d at 292.

50. *Id.* at 458-59, 318 S.E.2d at 291-92 (emphasis added).

51. *Id.* at 459, 318 S.E.2d at 292.

52. *Id.*

### B. *Finding and Stacking Underinsured Motorist Coverage Under the Virginia Statute*

The 1982 amendments to Virginia's uninsured motorist statute would change the result in *Mitchell*, if *Mitchell* had been insured under a policy containing language required by the statute. The statute now provides that a vehicle is underinsured "when, and to the extent that, the total amount of bodily injury . . . coverage applicable to the . . . use of the motor vehicle and available for payment . . . is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation . . . [of such] vehicle."<sup>53</sup> Instead of comparing the tortfeasor's coverage separately to each coverage available to the victim, the statute compares the tortfeasor's coverage to the "total amount" of uninsured motorist coverage available to the victim. In other words, stack first, compare later.

### C. *Circuit Court Rulings*

The Supreme Court of Virginia has not considered stacking of underinsured motorist coverage since the statute was amended to define "underinsured motorist" in 1982. Three Circuit Court of Virginia decisions, however, have applied the statute by stacking coverages available to a victim from separate policies and then comparing that total coverage to the tortfeasor's in order to determine the extent of underinsurance.<sup>54</sup>

### D. *Nonmandatory Application of Statutory Definition of "Underinsured"*

The Virginia statute only obligates an insurer to provide underinsured motorist coverage, as defined in section 38.2-2206, in cases "[w]here the insured contracts for higher limits" than the minimum.<sup>55</sup> Accordingly, where the insured buys only the minimum, the statute apparently does not require his policy to include under-

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53. VA. CODE ANN. § 38.2-2206(B) (Cum. Supp 1989) (emphasis added) (the language "available for payment" was added in the 1988 amendments to the act).

54. *State Farm Mut. Auto. Ins. Co. v. Miller*, 12 Va. Cir. 360 (1988); *Herbecq v. Virginia Farm Bureau Ins. Co.*, 12 Va. Cir. 88 (1987); *Integrity Ins. Co. v. Turnage*, No. 85C1208 (Cir. Ct. Henrico County, Va. Apr. 11, 1986). A good discussion of the *Herbecq* and the *Turnage* case can be found in *Billings v. State Farm Mut. Auto. Ins. Co.*, 680 F. Supp. 778, 780 (E.D. Va. 1988).

55. VA. CODE ANN. § 38.2-2206(A) (Cum. Supp 1989).

insured motorist coverage.

Since most policies are standard forms, regardless of the limits, and since most forms track the statute, the issue may seldom arise. The issue did arise in *Hamblen v. Valley Forge Insurance Co.*<sup>56</sup> where the insured had minimum limits under a policy which still used the 1974 State Corporation Commission endorsement definition of "underinsured motorist." The insured argued that the endorsement was void since it was more restrictive than the statute.<sup>57</sup> The court ruled that the statutory definition of "underinsured motorist" only applied "where the insured contracts for higher limits."<sup>58</sup> The *Mitchell* analysis (i.e., compare limits first, then stack) therefore applied, and the court found no underinsurance.<sup>59</sup>

### E. Underinsurance Where the Tortfeasor Pays Other Claims—Problems of Multiple Victims

#### 1. Before 1988 Amendment

An underinsured motorist issue arises where a tortfeasor's coverage is depleted by payment to one of several victims. In *Billings v. State Farm Mutual Automobile Insurance Co.*,<sup>60</sup> for example, the tortfeasor's \$25,000 coverage was depleted by payment of \$2,250 to another victim. The court determined that, despite this depletion, the amount of coverage applicable to the tortfeasor's vehicle was \$25,000.<sup>61</sup> The court then compared that \$25,000 to the coverage available to the victim in order to determine the amount of underinsurance.<sup>62</sup>

Note that an additional problem can arise under the pre-1988 statute. For example, tortfeasor ("T") has "split level" (\$25,000/\$50,000) coverage and there are two victims, A and B, each with \$100,000 uninsured motorist coverage available to him. If A compares his available coverage to "the total amount of bodily injury

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56. Law No. 2211 (Cir. Ct. Louisa County 1987).

57. *Id.*

58. *Id.*

59. *Id.*; see also *Bray v. Insurance Co. of Pa.*, 705 F. Supp. 1145 (E.D. Va. 1989) (stacking of underinsured motorist coverage precluded where there was a single policy covering more than one vehicle and the policy contained language limiting the liability of the insurer).

60. 680 F. Supp. 778 (E.D. Va. 1988).

61. *Id.* at 784. The court relied upon *Tudor v. Allstate Ins. Co.*, 216 Va. 918, 224 S.E.2d 156 (1976) for its holding. See also *National Union Fire Ins. Co. v. Johnson*, 709 F. Supp. 676 (E.D. Va. 1989).

62. *Billings*, 680 F. Supp. at 784.

. . . applicable to the operation or use of [the tortfeasor's] motor vehicle,"<sup>63</sup> as provided by statute, then you would compare \$100,000 to \$50,000 (total coverage available per accident in case of multiple victims), and find *T* underinsured to the extent of \$50,000. If *A* compares his \$100,000 to *T*'s coverage *available to A*, he gets \$75,000 in underinsured motorist coverage. The literal language of the pre-1988 statute supports the \$50,000 result.<sup>64</sup>

## 2. After 1988 Amendment—Compare Tortfeasor's Coverage "Available for Payment"

The 1988 amendment adds the phrase, "available for payment" to the statute.<sup>65</sup> Now, the victim compares his coverage only to that portion of the tortfeasor's coverage that is "available for payment" to him. "Available for payment" is defined as "[t]he amount of liability insurance coverage applicable to the claim of the injured person for bodily injury or property damage reduced by the payment of any other claims arising out of the same occurrence."<sup>66</sup>

The new statute changes the result in *Billings*.<sup>67</sup> Now, the victim compares his coverage to the tortfeasor only after reducing the tortfeasor's coverage by any amount paid to other claimants. Under the new statute, the *Billings* tortfeasor, whose insurer paid \$2,250 on a \$25,000 policy, would be underinsured to the extent of \$27,250 (i.e., \$50,000 minus \$22,750).<sup>68</sup>

The new statute also addresses the "split level" problem posed above.<sup>69</sup> The new statute compares the victims' coverage only to the portion of the tortfeasor's coverage that is "applicable to the claim of the injured person." Each victim in the example in Part E-1 above, therefore, would be uninsured to the extent of \$75,000.

The "available for payment" language in the 1988 statute eliminates another problem which existed because of the treatment of "property damage" coverage under a literal reading of the 1982 statute. The 1982 version of the statute stated that a motor vehicle was underinsured:

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63. See VA. CODE ANN. § 32.2-2206(B) (Repl. Vol. 1986) (prior to July 1, 1988 amendment).

64. See *id.*

65. *Id.* (Cum. Supp. 1989).

66. *Id.*

67. See *supra* text accompanying notes 60-62.

68. See *Billings v. State Farm Mut. Auto. Ins. Co.*, 680 F. Supp. 778 (E.D. Va. 1988).

69. See *supra* text accompanying notes 63-64.

[W]hen, and to the extent that the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle . . . is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.<sup>70</sup>

One commentator has put forth the following scenario:

[A]ssume liability coverage of a defendant of \$25,000 per person and \$50,000 per accident for bodily injury, and \$10,000 per accident for property damage. Further, assume uninsured motorist coverage of a plaintiff of \$100,000 per person and \$300,000 per accident for bodily injury, and \$25,000 for property damage per accident . . . .

The total amount of uninsured motorist coverage afforded *any person* injured as a result of the operation or use of the vehicle” is \$100,000. The “total amount of bodily injury *and property damage* coverage applicable to the operation or use of the motor vehicle” is \$60,000—the *per accident* limits for bodily injury and property damage.

Therefore, to the extent that \$100,000 exceeds \$60,000, the motor vehicle involved is underinsured. The underinsured coverage is \$40,000.<sup>71</sup>

The 1988 amendments clarify this situation and mandate underinsurance of \$75,000 (\$100,000 minus the \$25,000 “available for payment”).

#### F. *Policy Language Excluding Stacking*

Policy language explicitly excluding stacking is applicable in underinsured motorist cases, just as in uninsured motorist cases. *Billings* applied the reasoning of *Goodville Mutual Casualty Co. v. Borrer*, in the underinsured motorist context.<sup>72</sup> Note that *Billings*, like *Goodville*, deals with exclusionary language in a single policy covering several vehicles. *Bryant v. State Farm Mutual Automobile Insurance Co.*,<sup>73</sup> would prohibit such exclusions in cases of

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70. VA. CODE ANN. § 38.2-2206(B) (Repl. Vol. 1986).

71. West, *Calculating Underinsurance Coverage Limits*, 1 J. CIV. LIT. 17 (1989) (emphasis added).

72. *Billings*, 680 F. Supp. at 781 (construing *Goodville Mut. Cas. Co. v. Borrer*, 221 Va. 967, 275 S.E.2d 625 (1981)).

73. 205 Va. 897, 140 S.E.2d at 817 (1965).

multiple policies.

## V. PROBLEMS OF MULTIPLE TORTFEASORS

The amount of underinsured motorist coverage available to an accident victim can change where multiple tortfeasors in separate vehicles are jointly liable for the injury. Total uninsured or underinsured motorist coverage, however, will not exceed the victim's policy limits, regardless of the number of underinsured vehicles.<sup>74</sup>

### A. *Calculating Underinsurance Coverage with Multiple Tortfeasors*

In cases involving two or more underinsured defendants in separate vehicles, courts must calculate underinsurance coverage by comparing the victim's coverage to that of *each underinsured vehicle*, then aggregate such coverage, not to exceed the victim's uninsured motorist coverage limits.<sup>75</sup>

In *Nationwide Mutual Insurance Co. v. Scott*,<sup>76</sup> the plaintiff had \$100,000 in uninsured motorist coverage with Nationwide. Defendant *A* had \$25,000 liability coverage. Defendant *B* had \$50,000 coverage. Plaintiff obtained a \$1 million judgment and collected \$25,000 from *A* and \$50,000 from *B*. The court found *A* underinsured in the amount of \$75,000, and *B* in the amount of \$50,000, for a total of \$125,000.<sup>77</sup> Nationwide therefore was required to pay \$100,000, the amount of its limits.<sup>78</sup> The court held that Nationwide was not entitled to "set off" the \$75,000 collected by plaintiff from defendants' insurers.<sup>79</sup>

The decision stems from the language of the statute, which requires an insurer to pay all damages caused by an underinsured motor vehicle to the full extent "such vehicle" is underinsured.<sup>80</sup>

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74. See *Drewry v. State Farm Mut. Auto. Ins. Co.*, 204 Va. 231, 129 S.E.2d 681 (1963).

75. See *Nationwide Mut. Ins. Co. v. Scott*, 234 Va. 573, 363 S.E.2d 703 (1988).

76. *Id.*

77. *Id.* at 575, 363 S.E.2d at 704.

78. *Id.* at 576, 363 S.E.2d at 705.

79. *Id.* at 577, 363 S.E.2d at 705.

80. *Id.*



### B. *One Insured Defendant and One Uninsured or Underinsured*

The "no set off" principle which *Scott* applies with respect to two underinsured vehicles applies as well to cases where one tortfeasor's vehicle is insured and the other tortfeasor's is uninsured or underinsured. If the victim collects the available coverage from the insured tortfeasor and his judgment is still unsatisfied, he may collect his uninsured motorist or underinsured motorist coverage from his insurer, up to his policy limit or until his judgment is satisfied.<sup>81</sup>

### C. *Policy Limits Not Increased by Multiple Tortfeasors*

The victim's recovery from his uninsured motorist carrier is subject to the limit set forth in his policy (adjusted for stacking, in the case of multiple policies or multiple vehicles). The fact that multiple uninsured vehicles may have inflicted his injury will not affect his policy limits.<sup>82</sup> The purpose of uninsured motorist coverage is to provide the insured protection up to his chosen (and paid for) policy limits. The purpose is not to provide coverage to uninsured motorists.<sup>83</sup>

## VI. PRIORITY BETWEEN INSURANCES WHERE COVERAGE AVAILABLE FROM MULTIPLE SOURCES

### A. *Insured Defendant's Limits Sufficient to Pay Judgment Against Both the Insured Defendant and Uninsured Defendant*

Where an insured defendant's liability limits are sufficient to pay the judgment, and the injured party collects judgment from that carrier, there is no right of contribution in favor of the liability carrier against the uninsured motorist carrier.<sup>84</sup> The rationale is that the uninsured motorist statute does not create insurance for the uninsured motorist, but instead insures the victim against inadequate compensation.<sup>85</sup>

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81. *Scott*, 273 Va. at 573, 363 S.E.2d at 703; *Martin v. State Farm Mut. Auto. Ins. Co.*, 375 F.2d 720, 722 n.2 (4th Cir. 1967) (citing *White v. Nationwide Mut. Ins. Co.*, 361 F.2d 785 (4th Cir. 1966)).

82. *Drewry v. State Farm Mut. Auto. Ins. Co.*, 204 Va. 231, 129 S.E.2d 681 (1963).

83. *Id.* at 238, 129 S.E.2d at 685-86.

84. *Southern Lumberman's Mut. Cas. Co.*, 236 F. Supp. 370 (W.D. Va. 1964); *Hobbs v. Buckeye Union Cas. Co.*, 212 F. Supp. 349 (W.D. Va. 1962).

85. See *Southern*, 236 F. Supp. at 372.

A plaintiff can, however, choose the insurance company from which he desires to collect the judgment.<sup>86</sup> In one recent case, the Fourth Circuit Court of Appeals concluded that the plaintiff can seek satisfaction from his own insurance carrier under the uninsured motorist coverage before exhausting the tortfeasor's liability insurance.<sup>87</sup> His insurer, however, would have a right of subrogation against the tortfeasor and could collect from the tortfeasor's insurer.

*B. One Insured Defendant and One Uninsured, Where Judgment Exceeds Liability Coverage of Defendant*<sup>88</sup>

This was the case in *Martin v. State Farm Mutual Automobile Insurance Co.*<sup>89</sup> The insured can collect from both the tortfeasor and his own insurer, up to the total amount of the judgment, without set-off, but subject to the victim's uninsured motorist limit of liability.<sup>90</sup> The victim's insurer would have a right of subrogation against the tortfeasor, but only *after* the victim received full compensation.<sup>91</sup>

*C. Multiple Uninsured Motorist Coverages Applicable to Single Injury*

The court in *State Farm Mutual Automobile Insurance Co. v. United Service Automobile Association*<sup>92</sup> held that the uninsured motorist coverage on a vehicle occupied by the victim is primary to the other applicable uninsured motorist coverages. In *State Farm*, both policies had a clause mandating that the insurance on the vehicle was primary and other coverage was secondary. The court found the policy provisions valid under the Virginia statute.<sup>93</sup>

This result is now mandated by statute in underinsurance cases. The 1988 amendment provides:

If an injured person is entitled to underinsured motorist coverage under more than one policy, the following order of priority of poli-

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86. *Harleysville Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 789 F.2d 272 (4th Cir. 1986).

87. *Id.* at 273.

88. *Id.* at 274.

89. 375 F.2d 720 (4th Cir. 1967). *See supra* text accompanying note 81.

90. *Id.* at 722 n.2.

91. *White v. Nationwide Mut. Ins. Co.*, 361 F.2d 785, 787 (4th Cir. 1966).

92. 211 Va. 133, 176 S.E.2d 327 (1970).

93. *Id.* at 138, 176 S.E.2d at 331.

cies applies and any amount available for payment shall be credited against such policies in the following order of priority:

1. The policy covering a motor vehicle occupied by the injured person at the time of the accident;
2. The policy covering a motor vehicle not involved in the accident under which the injured person is the named insured;
3. The policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than a named insured.

Where there is more than one insurer providing coverage under one of the payment priorities set forth, their liability shall be proportioned as to their respective underinsured motorist coverages.<sup>94</sup>

## VII. RECENT DEVELOPMENTS

### A. *Legislative Action*

The General Assembly in the 1989 session considered an amendment to section 38.2-2206(A) of the Code of Virginia which would have mandated stacking under one policy insuring multiple vehicles.<sup>95</sup> The bill would have added the following paragraph to the end of section 38.2-2206(A):

In any such policy of motor vehicle insurance in which the insured has purchased uninsured coverage pursuant to this section, every insurer providing such uninsured motorist coverage arising from the ownership, maintenance or use of not more than four motor vehicles shall be liable to pay up to the maximum policy limit available on every motor vehicle insured under such coverage, where all sums that the insured is legally entitled to recover as damages from the owner or operator of an insured or underinsured motor vehicle exceed the limits of coverage for any one motor vehicle so insured.<sup>96</sup>

The proposed amendment would have invalidated policy language such as that approved in *Goodville Mutual Casualty Co. v. Borrer*,<sup>97</sup> which excluded stacking of coverage within a single policy. The bill passed the House of Delegates, but was defeated when

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94. VA. CODE ANN. § 38.2-2206(B) (Cum. Supp. 1989).

95. See H.B. 1733, Va. Gen. Assembly, 1989 Session (1989).

96. *Id.*

97. 221 Va. 967, 275 S.E.2d 625 (1981).

it came out of the Senate Committee on Commerce and Labor on February 15, 1989 with a negative recommendation.<sup>98</sup>

### B. *Federal Decisions*

Two decisions from the Norfolk division of the United States District Court for the Eastern District of Virginia in early 1989 addressed stacking of uninsured and underinsured law motorist coverage. In *Bray v. Insurance Co. of Pennsylvania*,<sup>99</sup> the victim was a truck driver who owned his tractor and leased it to a trucking firm. The trucking firm maintained a \$1 million insurance policy on the tractor and trailer, as mandated by federal ICC regulations.<sup>100</sup> The victim had personal coverage on three automobiles on one policy, 25/50 on the first vehicle, 100/300 on the second vehicle and 25/50 on the third vehicle. That policy contained exclusionary language which prohibited intra-policy stacking.<sup>101</sup> The victim was involved in an accident with a vehicle covered by a total of \$50,000 for the accident.<sup>102</sup> The victim sought to gain underinsurance coverage from the \$1 million policy and sought to stack his personal policy coverage.<sup>103</sup>

The court first decided that the \$1 million policy on the tractor did not cover the victim.<sup>104</sup> The policy provided that uninsured coverage only applied to "owned vehicles" which did not include vehicles leased to the trucking firm.<sup>105</sup> The court then stated that uninsured motorist coverage of a policy was not mandated by statute because the statute only mandates coverage for the *owner* of the vehicle and his permissive users. The statute did not mandate such coverage for leased vehicles and the permissive user of leased vehicles.<sup>106</sup>

The court then examined whether the \$1 million policy on the *trailer* owned by the trucking firm applied to cover the incident. The court found it did not, rejecting plaintiff's argument that he

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98. See *Insurance Stacking Suffers Defeats in Court, Legislature*, Va. Law. Weekly, Feb. 20, 1989, at 1, col. 4.

99. 705 F. Supp. 1145 (E.D. Va. 1989).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1151, 1154.

104. *Id.* at 1149-50.

105. *Id.*

106. *Id.* at 1150. The *Bray* case underscores the necessity of reading not only the statute, but also the policy.

was underinsured as to the \$1 million policy.<sup>107</sup> Underinsurance only applies where: one, the named insured purchases greater liability coverage than required by law, and two, the named insured has not rejected uninsured/underinsured coverage.<sup>108</sup> Since federal law under the ICC regulations requires higher limits than Virginia law, the trucking firm was purchasing the coverage "required by law" (i.e., \$1 million) and no more.<sup>109</sup> Therefore, the statutory language triggering underinsurance was not met.

Finally, the court noted that the victim could not stack his personal coverage. The policy contained the *Goodville* exclusion and the victim was allowed only to calculate underinsurance by the largest amount of coverage he had on one vehicle, the \$100,000 coverage.<sup>110</sup>

In *National Union Fire Insurance Co. of Pittsburgh v. Johnson*,<sup>111</sup> decided by Judge Clarke, the liability carrier paid other claims before the victim's, depleting the \$100,000 in insurance to just over \$3,000.<sup>112</sup> National Union, the victim's uninsured/underinsured motorist carrier, argued that the victim would have to obtain a judgment over \$100,000 to tap any underinsurance coverage.<sup>113</sup> The court agreed, but noted that the outcome would be different under the post-July 1, 1988 amendments.<sup>114</sup>

The court's analysis is subject to question, since it appears to confuse the issue of coverage with the issue of collection. The automobile of the tortfeasor, Johnson, clearly was "underinsured," as defined by the 1982 statute. The coverage "applicable to the operation" of Johnson's vehicle (\$100,000) was less than the "total amount of uninsured motorist coverage afforded" the victim, Manning (\$500,000). Accordingly, under the 1982 statutory definition, Johnson's car was "underinsured" to the extent of \$400,000.<sup>115</sup> The court apparently agreed with that conclusion,<sup>116</sup> but nevertheless

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107. *Id.* at 1151-54.

108. *Id.* at 1153.

109. *Id.* at 1153-54. This is the first reported decision upholding Judge Harkrader's views expressed in *Hamblen*, discussed in text accompanying notes 56-59.

110. *Bray*, 705 F. Supp. at 1154.

111. 709 F. Supp. 676 (E.D. Va. 1989).

112. *Id.* at 677.

113. *Id.*

114. *Id.* at 680.

115. Under the 1988 statute, it would have been underinsured to the extent of \$497,000.

116. *See* 709 F. Supp. at 679 ("Mr. Manning clearly meets the statutory definition of 'underinsured' . . .").

found that Manning must obtain judgment in excess of \$100,000 "before he may look to the [uninsured motorist coverage]." The result would leave Manning with no coverage for the portion of his claim above \$3,000 but below \$100,000.

Contrary to the court's opinion, a literal reading of the statute does not mandate this result. Pursuant to the statute, whenever the tortfeasor's vehicle is "underinsured," as Johnson's was, the uninsured motorist policy must "obligate the insurer to make payments for bodily injury . . . caused by the operation or use of an underinsured motor vehicle to the extent the vehicle is underinsured . . . ."<sup>117</sup> The statute does not require that the victim look solely to the tortfeasor's liability insurer for any recovery up to that insurer's amount of liability.

### C. State Farm v. Pessar: *Reaffirmation of the Goodville Rule*

In *Pessar v. State Farm Fire & Casualty*,<sup>118</sup> the victim (Pessar) obtained a verdict of \$500,000 against an uninsured motorist. Pessar was driving a car which had \$100,000 of uninsured motorist coverage. He also owned four motorcycles insured under a separate policy. The uninsured motorist coverage applicable to each motorcycle under the second policy was \$100,000. The policy had the same language preventing intra-policy stacking that was found in the *Goodville* case. The plaintiff paid a separate premium for each uninsured motorist coverage on each motorcycle.<sup>119</sup>

The plaintiff successfully argued to the circuit court that the payment of separate premiums created an ambiguity and therefore the *Goodville* limitation clause was "not clear and unambiguous."<sup>120</sup> In an unpublished summary order, the supreme court reversed the circuit court's decision.<sup>121</sup> The court noted that the policy language in *Pessar* was identical to that found in *Goodville* and accordingly, there could be no stacking.<sup>122</sup> The court's analysis accords with language in the *Goodville* decision which states that payments of separate premiums would not undermine clear and

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117. VA. CODE ANN. § 38.2-2206 (Repl. Vol. 1986).

118. No. CL 87-1931 (Va. Beach Cir. Ct. 1988).

119. *Id.* at \_\_\_\_.

120. See Brief of Appellant in *State Farm Fire & Casualty Co. v. Pessar*, No. 880462 (Va. 1989).

121. Va. Law. Weekly, Nov. 27, 1989, at 1, col. 1.

122. *Id.*

unambiguous language preventing intra-policy stacking.<sup>123</sup>

### VIII. CONCLUSION

The supreme court's action in *Pessar*, coupled with the defeat of legislation proposed in 1989, leave intact an insurer's ability to exclude stacking of coverage within a single policy. Not surprisingly, the exclusive language approved in *Goodville* now appears verbatim in most policies issued in Virginia.

Stacking in cases of multiple policies, however, continues to give rise to complex issues regarding the extent of available coverage. The possibilities are limited only by the "happenstance" of automobile accidents. Regardless of the issue, however, the uninsured motorist statute remains the focus of all analysis. There is simply no substitute for a careful and precise reading of the statute.

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123. *Goodville*, 221 Va. at 971, 275 S.E.2d at 628. See also *Lipscombe v. Security Ins. Co.*, 213 Va. 81, 89 S.E. 2d 320 (1972), and *Cunningham v. Insurance Co. of North America*, 213 Va. 72, 189 S.E.2d 832 (1972), where the court never considered that payment of separate premiums would obviate clear and unambiguous language excluding stacking.