Campbell Law Review

Volume 17
Issue 1 *Winter 1995*

Article 7

January 1995

Underinsured Motorist Coverage: North Carolina's Multiple Claimant Wrinkle - Ray v. Atlantic Casualty Insurance Co.

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NOTE

UNDERINSURED MOTORIST COVERAGE: NORTH CAROLINA'S MULTIPLE CLAIMANT WRINKLE—*Ray v. Atlantic Casualty Insurance Co.*

I. INTRODUCTION

A car clearly out of control, barrelled through the grassy median and struck three vehicles head-on. The injuries sustained by you and the other drivers totalled thirty thousand dollars. The tortfeasor's liability coverage limit is only twenty-five thousand dollars. You soon learn that the tortfeasor's liability insurer settled with the other two drivers for twenty thousand dollars, leaving only five thousand dollars under the liability policy to pay for your ten thousand dollars worth of damages. Nonetheless, you are confident that you will be fully compensated because you have underinsured motorist[1] coverage with a policy limit of twenty-five thousand dollars. Unbeknownst to you, however, the recent North Carolina Court of Appeals opinion in *Ray v. Atlantic Casualty Insurance Co.*[2] precludes you from recovering any UIM benefits in this situation.

UIM coverage protects the insured from damages when a motorist meets the state requirements for liability insurance, but is inadequately insured to pay the losses he has caused;[3] the insured is protected, by his own company, for whatever amount of

1. Underinsured motorist is commonly abbreviated as UIM, and will be referred to as such throughout this Note. *See, e.g.*, Baxley v. Nationwide Mut. Ins. Co., 334 N.C. 1, 3, 430 S.E.2d 895, 896-97 (1993).

2. 112 N.C. App. 259, 435 S.E.2d 80, *review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993).

3. LEWIS E. DAVIDS, DICTIONARY OF INSURANCE 467 (7th rev. ed. 1990). *See also* North Carolina Farm Bureau Mut. Ins. Co. v. Hilliard, 90 N.C. App. 507, 509, 369 S.E.2d 386, 387 (1988) ("Underinsurance provides a type of insurance coverage that allows an insured to be indemnified by his own insurer, in whole or in part, for damages caused by a negligent motorist who is insured inadequately.").

UIM coverage he has obtained.[4] N.C.G.S. § 20-279.21(b)(4) of the North Carolina Motor Vehicle Safety and Financial Responsibility Act of 1953[5] defines an underinsured highway vehicle as "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 the owner's policy."[6] Under N.C.G.S. § 20-279.21(b)(4), UIM coverage applies when "all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted."[7]

In *Harris v. Nationwide Mutual Insurance Co.*,[8] the North Carolina Supreme Court stated that in determining whether the tortfeasor's vehicle is an underinsured highway vehicle, the proper comparison is between the tortfeasor's liability coverage and the insured's UIM coverage, rather than between the tortfeasor's liability coverage and the insured's liability coverage.[9] In addition, the court in *Harris* protected the insured by permitting stacking[10] of UIM coverages before comparing the aggregate UIM coverage with the tortfeasor's liability coverage to determine whether the tortfeasor's vehicle was underinsured.[11]

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4. *Id.*

5. N.C. GEN. STAT. §§ 20-279.1 to 20.279.39 (1993).

6. N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989). The current format of the section defines an underinsured highway vehicle as:

> [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 underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.

N.C. GEN. STAT. § 20-279.21(b)(4) (1993). Under 1991 N.C. Sess. Laws ch. 646, § 4, claims arising prior to the amendments are not affected, therefore, the earlier version of the statute will be used throughout this Note. *See* Bass v. North Carolina Farm Bureau Mut. Ins. Co., 332 N.C. 109, 112, 418 S.E.2d 221, 223 (1992).

7. N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989).

8. 332 N.C. 184, 420 S.E.2d 124 (1992).

9. *Id.* at 188, 420 S.E.2d at 127.

10. Stacking is the aggregation of insurance coverages when more than one coverage applies. 12A G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:628, at 77 (2d rev. ed. 1981).

11. *Harris*, 332 N.C. at 190, 420 S.E.2d at 128.

Ray v. Atlantic Casualty Insurance Co.[12] asked, for the first time, whether a tortfeasor's vehicle is underinsured where, at the time of the accident, the tortfeasor's liability coverage equals the injured victim's UIM coverage, but, as a result of multiple claimants, the amount subsequently available under the liability coverage falls below the victim's UIM coverage.[13] Echoing *Harris*, the court in *Ray* stated that "if the tortfeasor's liability coverage is less than the UIM coverage, the tortfeasor's vehicle is an underinsured vehicle."[14] The court held that "[u]nder the plain language of [N.C.G.S. §] 20-279.21(b)(4), the comparison between the tortfeasor's liability coverage and the UIM coverage is to be made 'at the time of the accident.'"[15] Thus, diverging from *Harris* which protected the insured by allowing pre-comparison stacking, the court in *Ray* concluded that the tortfeasor's vehicle is not an underinsured vehicle, despite any payments the liability company makes to other claimants, if the tortfeasor's liability coverage at the time of the accident is identical to the victim's UIM coverage.[16]

This Note traces the development of UIM coverage in North Carolina by examining the statutory and judicial history preceding *Ray v. Atlantic Casualty Insurance Co.* This Note then analyzes the rationale behind the court's holding in *Ray* and compares the decision to cases on point in other jurisdictions. Next, this Note examines the holdings in *Ray* and *Harris v. Nationwide Mutual Insurance Co.* in light of the legislative purpose behind the Motor Vehicle Safety and Financial Responsibility Act. And finally, this Note addresses the ramifications of *Ray*, including the effect of the decision and any remaining questions.

II. THE CASE

On September 16, 1988, Shanta' L. Ray was driving her 1986 Dodge in Johnston County, North Carolina, accompanied by her one-year-old son, George Stanley Royal, Jr., and Saudra Barbour.[17] At approximately 7:00 p.m., Ronnie Rufus Pollard, Jr.,

12. 112 N.C. App. 259, 435 S.E.2d 80, *review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993).

13. *Id.* at 261, 435 S.E.2d at 81.

14. *Id.* at 262, 435 S.E.2d at 81.

15. *Id.* (quoting N.C. GEN. STAT. § 20-279.21(b)(4)). *See supra* text accompanying note 6 (text of statute).

16. *Id. See supra* text accompanying notes 10 and 11.

17. *Id.* at 260, 435 S.E.2d at 80.

accompanied by Randy Hall, crossed the centerline in Mr. Pollard's 1976 Chevrolet Camaro and hit Ms. Ray's car head-on.[18]

At the time of the accident, Mr. Pollard carried automobile liability insurance through Aetna Insurance Co.[19] with limits of one hundred thousand dollars per person for bodily injury and three hundred thousand dollars per occurrence for bodily injury.[20] At the same time, Ms. Ray carried automobile liability insurance through Atlantic Casualty Insurance Co.[21] which provided UIM policy limits of one hundred thousand dollars per person for bodily injury and three hundred thousand dollars per accident for bodily injury.[22]

Aetna settled Mr. Hall's claim against Mr. Pollard by paying ninety-eight thousand dollars from the liability coverage provision in Mr. Pollard's policy.[23] Because Aetna settled Mr. Hall's claim first, only $202,000 of Mr. Pollard's per occurrence liability coverage was available to Ms. Ray, her son, and Ms. Barbour.[24] On September 5, 1991, Ms. Ray and her son, by guardian ad litem Richard M. Price, filed a complaint against Atlantic under the North Carolina Uniform Declaratory Judgment Act[25] seeking a judgment that Ms. Ray's policy with Atlantic provided for UIM coverage for her and her son in the amount of the ninety-eight

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18. *Id.*

19. Hereafter referred to as Aetna.

20. *Ray*, 112 N.C. App. at 260, 435 S.E.2d at 80.

21. Hereafter referred to as Atlantic.

22. *Ray*, 112 N.C. App. at 260-61, 435 S.E.2d at 80.

23. *Id.* at 261, 435 S.E.2d at 80-81. Mr. Hall received an additional thousand dollars from the medical payments provision of Mr. Pollard's policy with Aetna, resulting in a total settlement of ninety-nine thousand dollars. *Id.* at 260-61, 435 S.E.2d at 80.

24. *Id.* at 261, 435 S.E.2d at 81.

25. *See* N.C. GEN. STAT. §§ 1-253 to 1-267 (1983). The North Carolina Uniform Declaratory Judgment Act reads in the pertinent part:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. GEN. STAT. § 1-254 (1983). *See also* W & J Rives, Inc. v. Kemper Ins. Group, 92 N.C. App. 313, 374 S.E.2d 430 (1988) (Plaintiff's declaratory judgment action to have the rights, status or other legal relations between the insured and insurers clarified was proper under N.C. GEN. STAT. § 1-254.).

thousand dollars shortfall.[26] On February 13, 1992, Ms. Ray and her son filed an amended complaint which added Ms. Barbour as an additional plaintiff.[27]

On August 21, 1992, the North Carolina Superior Court of Johnston County granted Atlantic's motion for summary judgment on the grounds that "there is no underinsured motorist coverage as a matter of law."[28] Ms. Ray, her son, and Ms. Barbour filed an appeal to the North Carolina Court of Appeals,[29] arguing they were entitled to ninety-eight thousand dollars of the three hundred thousand dollars UIM policy because only $202,000 was available to them from Mr. Pollard's liability insurance.[30] Appellants, relying on *Harris*, where the North Carolina Supreme Court permitted stacking of UIM coverage prior to comparison with the tortfeasor's liability coverage,[31] maintained that Mr. Pollard's liability coverage should be reduced prior to its comparison with Ms. Ray's UIM coverage.[32]

The North Carolina Court of Appeals affirmed the decision of the superior court, holding that "[u]nder the plain language of [N.C.G.S. §] 20-279.21(b)(4), the comparison between the tortfeasor's liability coverage and the UIM coverage is to be made 'at the time of the accident.' "[33] The court stated that " 'at the time of the accident,' the tortfeasor's liability coverage was identical to Ray's UIM coverage . . . [and] [a]ny payments the liability company made to an injured party after the date of the accident and which reduced the liability insurance available to these plaintiffs is not relevant to our inquiry."[34] The court concluded that "by definition, the tortfeasor's vehicle was not an underinsured vehicle, and the trial court correctly entered summary judgment for Atlantic Casualty."[35]

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26. *Ray*, 112 N.C. App. at 261, 435 S.E.2d at 81.

27. *Id.*

28. *Id.* at 260, 435 S.E.2d at 80.

29. *Id.*

30. *Id.* at 262, 435 S.E.2d at 81.

31. *See supra* text accompanying notes 8-11.

32. Brief for Appellant at 7, Ray v. Atlantic Casualty Ins. Co., 112 N.C. App. 259, 435 S.E.2d 80 (1993) (No. 9211SC1013).

33. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81 (quoting N.C. GEN. STAT. § 20-279.21(b)(4)). *See also supra* text accompanying notes 5 and 6.

34. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81.

35. *Id.*

III. BACKGROUND

A. *Development of the North Carolina Underinsured Motorist Statute*

Prior to 1979, a motorist injured by a tortfeasor whose liability coverage was at least the statutory minimum, but, as a result of multiple claimants, fell below the victim's uninsured motorist[36] coverage, was unable to recover the difference under the UM coverage.[37] In response to this problem, the North Carolina General Assembly expanded the UM statute in 1979 to include the underinsured motorist within the statutory definition of the uninsured motorist.[38] The expanded statute, written by law into each liability policy,[39] provided that UIM coverage must be offered by the insurer,[40] although the coverage may be rejected[41] or changed[42] by

36. Uninsured motorist is commonly abbreviated as UM, and will be referred to as such throughout this Note. *See* Newell v. Nationwide Mut. Ins. Co., 334 N.C. 391, 393, 432 S.E.2d 284, 285 (1993). North Carolina's Motor Vehicle Safety and Financial Responsibility Act of 1953 defines an uninsured highway vehicle as "a motor vehicle as to which there is no bodily injury liability insurance" in at least the amount legally required, or where the insurer "denies coverage . . . or has become bankrupt." N.C. GEN. STAT. § 20-279.21(b)(3) (1993). *See also* Johnson v. North Carolina Farm Bureau Ins. Co., 112 N.C. App. 623, 625, 436 S.E.2d 265, 267 (1993) ("Uninsured coverage . . . is available when an insured plaintiff is injured by a motor vehicle with no liability insurance or with liability insurance in an amount less than our state's statutory minimum.").

37. Tucker v. Peerless Ins. Co., 41 N.C. App. 302, 254 S.E.2d 656 (1979) (Insured was denied recovery under his UM policy despite the amount available under the tortfeasor's liability coverage fell below the amount of the insured's damages due to settlements with multiple claimants.).

38. Act of May 29, 1979, ch. 679, § 1, 1979 N.C. Sess. Laws 720, 720-21 (codified at N.C. GEN. STAT. § 20-279.21(b)(4) (1993)). North Carolina's UIM coverage statute reads in the pertinent part: "An 'uninsured motor vehicle,' as described in subdivision (3) of this subsection, includes an 'underinsured highway vehicle . . . .'" N.C. GEN. STAT. § 20-279.21(b)(4) (1993).

39. Bowser v. Williams, 108 N.C. App. 8, 422 S.E.2d 355 (1992), *appeal dismissed*, 333 N.C. 789, 433 S.E.2d 171 (1993).

40. *See* N.C. GEN. STAT. § 20-279.21(b)(4) (1993). The North Carolina general statute reads in the pertinent part: "Such owner's policy of liability insurance . . . [s]hall . . . provide underinsured motorist coverage, to be used only with a policy that is written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection . . . ." *Id. See also* Proctor v. North Carolina Farm Bureau Mut. Ins. Co., 90 N.C. App. 746, 370 S.E.2d 258 (1988), *aff'd*, 324 N.C. 221, 376 S.E.2d 761 (1989) (requiring policyholder to specifically request UIM coverage, the insurer did not comply with N.C. GEN. STAT. § 20-279.21(b)(4)).

41. *See* N.C. GEN. STAT. § 20-279.21(b)(4) (1993). The North Carolina general statute reads in the pertinent part: "The coverage required under this

the insured. Where the UIM coverage is not rejected or changed by the insured, "the amount of underinsured motorist coverage shall be equal to the highest limit of bodily injury liability coverage for any one vehicle in the policy."[43] The policy's basic liability coverage, in turn, must exceed the minimum mandatory amount.[44]

Once a highway vehicle is determined to be underinsured,[45] "[u]nderinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted."[46]

In 1985, the general assembly, responding to differing statutory interpretations of UIM coverage limits applicable to claims, amended N.C.G.S. § 20-279.21(b)(4).[47] The language of the 1985

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subdivision shall not be applicable where any insured named in the policy rejects the coverage." *Id.*

42. *Id.* The North Carolina general statute reads in the pertinent part: "An insured named in the policy may select different coverage limits as provided in this subdivision." *Id.* The UIM coverage limits are required to be "in an amount not to be less than the financial responsibility amounts for bodily injury liability as set forth in [N.C.G.S. §] 20-279.5 nor greater than one million dollars ($1,000,000) as selected by the policy owner." *Id.*

43. *Id.*

44. *Id.* *See also* Sutton v. Aetna Casualty & Sur. Co., 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). The statutory minimum of basic liability coverage is governed by N.C. GEN. STAT. § 20-279.5, which reads in the pertinent part:

> [E]very such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and cost, of not less than twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident . . . .

N.C. GEN. STAT. § 20-279.5 (1993).

45. *See supra* text accompanying notes 5 and 6.

46. N.C. GEN. STAT. § 20-279.21(b)(4) (1993).

47. Act of July 10, 1985, ch. 666, § 74, 1985 N.C. Sess. Laws 862, 862-64 (codified at N.C. GEN. STAT. § 20-279.21(b)(4) (1989)). The statute, as amended, read in the pertinent part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist coverage provided in the owner's policies of insurance; it being the intent of this paragraph to

amendment clearly provided for interpolicy stacking,[48] but remained ambiguous regarding intrapolicy stacking[49] until the North Carolina Supreme Court decided *Sutton v. Aetna Casualty and Surety Co.*[50]

B. *Judicial Interpretation of the North Carolina Underinsured Motorist Statute*

In *Sutton*, the North Carolina Supreme Court held that "[i]nterpreting [N.C.G.S. § 20-279.21(b)(4)] to allow both interpolicy and intrapolicy stacking is consistent with the nature and purpose of the [Motor Vehicle Safety and Financial Responsibility] [A]ct, which as noted is to compensate innocent victims of financially irresponsible motorists."[51]

The North Carolina Supreme Court revisited the area of UIM law in *Harris v. Nationwide Mutual Insurance Co.*[52] In *Harris*, the court considered whether the tortfeasor's vehicle was an

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> provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies . . . .

Id. See generally John F. Buckley, Note, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C. L. REV. 1408 (1986) (examining the 1985 amendment). The current version of the statute reads in the pertinent part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted liability policy or policies and the limit of underinsured motorist coverage applicable to the motor vehicle involved in the accident. Furthermore, if a claimant is an insured under the underinsured motorist coverage on separate or additional policies, the limit of underinsured motorist coverage applicable to the claimant is the difference between the amount paid to the claimant under the exhausted liability policy or policies and the total limits of the claimant's underinsured motorist coverages as determined by combining the highest limit available under each policy . . . .

N.C. GEN. STAT. § 20-279.21(b)(4) (1993).

48. "Interpolicy stacking refers to the practice of aggregating coverages from more than one insurance policy." Joseph Nanney, Jr., Note, *Sutton v. Aetna Casualty & Surety Co.: The North Carolina Supreme Court Approves Stacking of Underinsured Motorist Coverage — Will Uninsured Coverage Follow?*, 68 N.C. L. REV. 1281, 1281 n.10 (1990).

49. "Intrapolicy stacking refers to the practice of aggregating coverages from two or more vehicles covered by a single policy." *Id.*

50. 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989).

51. *Id.* at 266, 382 S.E.2d at 764.

52. 332 N.C. 184, 420 S.E.2d 124 (1992).

underinsured highway vehicle, where the liability coverage on the vehicle was equal to the liability limit under the injured party's insurance policy.[53] At the time, it was unclear under the statutory definition of an underinsured highway vehicle[54] whether "the applicable limits of liability under the owner's policy"[55] referred to the limits under the underinsured coverage portion of the owner's policy or to the limits under the liability coverage portion of the owner's policy.[56] In addressing the statute's ambiguity, the court stated that the proper comparison in determining whether the tortfeasor's vehicle is an underinsured highway vehicle is between the tortfeasor's liability coverage and the insured's UIM coverage, rather than between the tortfeasor's liability coverage and the insured's liability coverage.[57]

The court then addressed the contention by the UIM insurer that "the comparison between the tortfeasor's liability limit and the [injured insured's] UIM limit must occur prior to the stacking of any UIM coverage."[58] The court rejected this contention[59] and concluded that in making the comparison "the language of N.C.G.S. § 20-279.21(b)(4) allows the stacking of an insured's UIM coverages in determining whether a tortfeasor's vehicle is an 'underinsured highway vehicle.' "[60] The court held, therefore, that the tortfeasor's vehicle was an "underinsured highway vehicle, since the [insured's] aggregate UIM coverages exceed[ed] the aggregate liability coverage of the tortfeasor."[61]

53. *Id.* at 186, 420 S.E.2d at 125. The court also examined whether intrapolicy stacking is permitted in determining an insurer's limit of liability when the injured party is the minor daughter of the named insured. *Id.*

54. *See supra* text accompanying notes 5 and 6 (text of statute).

55. *See* N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989).

56. *Harris*, 332 N.C. at 188, 420 S.E.2d at 127.

57. *Id. But see* Liberty Mut. Ins. Co. v. Balaran, 557 N.Y.S.2d 159 (N.Y. App. Div. 1990) (Whether vehicle is underinsured is determined by comparing tortfeasor's bodily injury liability limit with the injured claimant's bodily injury liability limit, rather than comparing tortfeasor's bodily injury liability limit with the injured claimant's UIM coverage limits.).

58. *Harris*, 332 N.C. at 190, 420 S.E.2d at 128.

59. *Id.*

60. *Id.* at 192, 420 S.E.2d at 129.

61. *Id.* at 195, 420 S.E.2d at 131.

IV. ANALYSIS

A. Ray v. Atlantic Casualty Insurance Company: *What the Court Said*

In *Ray v. Atlantic Casualty Insurance Co.*,[62] the North Carolina Court of Appeals examined the issue of whether a tortfeasor's vehicle was underinsured where, at the time of the accident, the tortfeasor's liability coverage equaled the injured insured's UIM coverage, but, as a result of multiple claimants, the amount subsequently available under the liability coverage fell below the insured's UIM coverage.[63] The court recognized that the inquiry required a determination of whether the tortfeasor's vehicle was an underinsured highway vehicle, and accordingly, examined the issue in light of both N.C.G.S. § 20-279.21(b)(4) and the recent North Carolina Supreme court holding in *Harris v. Nationwide Mutual Insurance Co.*[64]

The court in *Ray* began by stating that an underinsured highway vehicle is "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 the owner's policy."[65] The court then noted that the *Harris* court construed the ambiguous phrase "the applicable limits of liability under the owner's policy"[66] to refer to the victim's UIM coverage,[67] and therefore, reasoned that "if the tortfeasor's liability coverage is less than the UIM coverage, the tortfeasor's vehicle is an underinsured vehicle."[68] Holding that the plain language of N.C.G.S. § 20-279.21(b)(4) required that "the comparison between the tortfeasor's liability coverage and the UIM coverage is to be made 'at the time of the accident,' "[69] the

62. 112 N.C. App. 259, 435 S.E.2d 80 (1993).

63. *Id.* at 261, 435 S.E.2d at 81.

64. *Id.* at 261-62, 435 S.E.2d at 81.

65. *Ray*, 112 N.C. App. at 261, 435 S.E.2d at 81. (quoting N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989)). *See supra* text accompanying notes 5 and 6 (text of statute).

66. *See* N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989).

67. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81 (citing Harris v. Nationwide Mut. Ins. Co., 332 N.C. 184, 420 S.E.2d 124 (1992)). *See supra* text accompanying note 57.

68. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81.

69. *Id.* (quoting N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989)). *See supra* text accompanying notes 5 and 6 (text of the statute).

court noted that "[a]ny payments the liability company made to an injured party after the date of the accident . . . which reduced the liability insurance available to [the injured insured] is not relevant to our inquiry."[70] The court concluded that since the tortfeasor's liability coverage equaled the injured insured's UIM coverage at the time of the accident, the tortfeasor's vehicle was not, by definition, an underinsured highway vehicle.[71]

B. Ray: *What the Court Didn't Say*

The holding in *Ray* essentially says that a settlement by the tortfeasor's liability insurer with another claimant does not reduce the tortfeasor's liability policy when comparing the liability coverage with the victim's UIM coverage.[72] In its analysis, the court relied almost exclusively upon the plain language of the statute,[73] and only cited to the North Carolina Supreme Court for guidance on one occasion.[74] Noticeably absent from this short opinion is any discussion of cases on point in other jurisdictions, any examination of the purpose of the statute, or any evaluation of how the issue in *Ray* compares to the concept of stacking insurance coverages.

1. Status of the Law in Jurisdictions Other Than North Carolina

Although *Ray* is a case of first impression for North Carolina, many jurisdictions outside the state have examined cases which asked whether a tortfeasor's vehicle was underinsured[75] where, as a result of multiple claimants, the amount subsequently available

70. *Id.*
71. *Id.*
72. *Id.*
73. *Id. See supra* text accompanying notes 65-71.
74. *Id. See supra* text accompanying notes 66-68.
75. Some jurisdictions use the term "uninsured" to refer to both the situation where the tortfeasor's liability insurance limits are below those required by law (generally referred to as uninsured), and the situation where the tortfeasor's liability coverage satisfies the relevant legal requirements, but is insufficient to compensate the damages suffered by the injured party (generally referred to as underinsured). Cases involving the former situation have been excluded from this section of the Note, leaving only the cases generally referred to as underinsured; as such, this section will use the term "underinsured" to be consistent with the body of the Note, although in any one case the jurisdiction may have actually used the term "uninsured." *See* Lee R. Russ, J.D., Annotation, *Uninsured and Underinsured Motorist Coverage: Recoverability, Under Uninsured or Underinsured Motorist Coverage, of Deficiencies in Compensation*

to the injured party under the liability coverage is less than the injured insured's UIM coverage.[76] The holdings fall into three categories.[77] First, where the tortfeasor's liability limits satisfy the law's minimum requirements, but because of multiple claimants, the share of the proceeds available to the injured party is less than the amount required by law, some jurisdictions allow the injured party to recover the difference between the minimum amount required by law and the amount received from the tortfeasor's liability insurer.[78]

Second, where the tortfeasor's liability limits satisfy the law's minimum requirements, but because of multiple claimants, the share of the proceeds available to the injured party is less than the amount required by law, other jurisdictions permit recovery of the difference between the amount received from the tortfeasor's liability insurer and the limits of the underinsured motorist[79] coverage.[80]

Third, where the tortfeasor's liability limits satisfy the law's minimum requirements, but because of multiple claimants, the share of the proceeds available to the injured party is less than the amount required by law, other jurisdictions deny recovery under a theory that the tortfeasor is not underinsured.[81] If courts in their jurisdiction do not take into account the fact that existence of the statutory minimum requirement for liability coverage is satisfied, multiple claimants reduce the amount available to the injured party.[82] By denying recovery in *Ray*, the North Carolina Court of

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Afforded Injured Party by Tortfeasor's Liability Coverage, 24 A.L.R. 4th 13, 15 n.2 (1983).

76. Russ, *supra* note 75, at 17.

77. *Id.*

78. *See, e.g.*, Porter v. Empire Fire & Marine Ins. Co., 475 P.2d 258 (Ariz.), *modified on other grounds and reh'g denied*, 476 P.2d 155 (Ariz. 1970).

79. *See supra* note 75.

80. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Diem, 358 So.2d 39 (Fla. Dist. Ct. App. 1978); Palisbo v. Hawaiian Ins. & Guar. Co., 547 P.2d 1350 (Haw. 1976); Francis v. Travelers Ins. Co., 581 So.2d 1036 (La. Ct. App. 1991); Murphy v. Milbank Mut. Ins., 320 N.W.2d 423 (Minn. 1982); State Farm Mut. Auto. Ins. Co. v. Estate of Braun, 793 P.2d 253 (Mont. 1990); Goughan v. Rutgers Casualty Ins. Co., 570 A.2d 501 (N.J. Super. Ct. Law Div. 1989); American Gen. Fire & Casualty Co. v. Oestreich, 617 S.W.2d 833 (Tex. Civ. App. 1981).

81. *See supra* note 75.

82. *See, e.g.*, Criterion Ins. Co. v. Anderson, 347 So.2d 384 (Ala. 1977); Travelers Ins. Co. v. Bouzer, 114 Cal. Rptr. 651 (Cal. Ct. App. 1974); State Farm Mut. Auto. Ins. Co. v. Murphy, 348 N.E.2d 491 (Ill. App. Ct. 1976); Wren v. Ohio Casualty Ins. Co., 535 S.W.2d 849 (Ky. 1976); Brake v. MFA Mut. Ins. Co., 525

Appeals joined a significant number of states in this third category which have held that the tortfeasor, whose liability coverage has fallen below the injured's UIM coverage due to multiple claimants, cannot be considered underinsured.[83] Since the *Ray* court refrained from citing any outside authority, however, the actual impact this authority had on the court's decision remains unknown.[84]

2. The Purpose of the UIM Statute and How Ray *Compares to Stacking of Insurance Coverages*

In *Ray*, the North Carolina Court of Appeals did not discuss the legislative purpose behind the Motor Vehicle Safety and Financial Responsibility Act, relying instead on the plain language of the statute.[85] The North Carolina Supreme Court, in *Proctor v. North Carolina Farm Bureau Mutual Insurance Co.*,[86] stated that "[t]he purpose of this State's compulsory motor vehicle insurance laws, of which the underinsured motorist provisions are a part . . . is the protection of innocent victims who may be injured by financially irresponsible motorists."[87] Furthermore, in *Gurganious v. Integon General Insurance Corp.*,[88] the North Carolina Court of Appeals stated that the Motor Vehicle Safety and Finan-

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S.W.2d 109 (Mo. Ct. App.), *cert. denied*, 423 U.S. 894 (1975); Emery v. State Farm Mut. Auto. Ins. Co., 239 N.W.2d 798 (Neb. 1976); Gardner v. American Ins. Co., 593 P.2d 465 (Nev. 1979); Shelby Mut. Ins. Co. v. Smith, 341 N.E.2d 597 (Ohio 1976); Lund v. Mission Ins. Co., 528 P.2d 78 (Or. 1974); White v. Concord Mut. Ins. Co., 442 A.2d 713 (Pa. Super. Ct.), *aff'd*, 454 A.2d 982 (Pa. 1982); Ziegelmayer v. Allstate Ins. Co., 403 A.2d 653 (R.I. 1979); Rogers v. Tennessee Farmers Mut. Ins. Co., 620 S.W.2d 476 (Tenn. 1981); Tudor v. Allstate Ins. Co., 224 S.E.2d 156 (Va. 1976).

83. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81. The court noted that "by definition, the tortfeasor's vehicle was not an underinsured vehicle . . . ." *Id.*

84. The North Carolina Court of Appeals adopted a similar posture before the legislature expanded the UM statute to include the UIM provision. *See* Tucker v. Peerless Ins. Co., 41 N.C. App. 302, 254 S.E.2d 656 (1979) (The negligent motorist was not an uninsured motorist where the tortfeasor's liability coverage was reduced to eleven thousand dollars as a result of settlements with multiple claimants, and the injured party carried uninsured motorist coverage in the amount of fifteen thousand dollars and, after receiving the eleven thousand dollars available, the injured party sought to recover the remaining four thousand dollars from his insurer.).

85. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81. *See supra* text accompanying note 69.

86. 324 N.C. 221, 376 S.E.2d 761 (1989).

87. *Id.* at 224, 376 S.E.2d at 763.

88. 108 N.C. App. 163, 423 S.E.2d 317 (1992).

cial Responsibility Act is remedial in nature, and is "to be construed liberally to effectuate its purpose of providing coverage to motorists injured by underinsured motorists."[89]

With the legislative purpose in mind,[90] the North Carolina Supreme Court in *Harris* held that the language of the Motor Vehicle Safety and Financial Responsibility Act intended to permit both interpolicy and intrapolicy stacking of UIM coverages.[91] Since stacking allows the injured victim to aggregate all UIM coverages prior to comparison to the tortfeasor's liability coverage,[92] the likelihood that the victim's aggregate UIM coverage will exceed the tortfeasor's liability coverage is increased. Stacking protects the innocent victim by providing an additional source of recovery so the victim may be fully compensated for injuries, thus furthering the purpose of the statute.[93] The net effect of allowing the victim to stack UIM coverages prior to the comparison with the tortfeasor's liability coverage is the same as allowing the tortfeasor's liability coverage to be reduced by any settlements prior to the comparison: it increases the likelihood that the victim's UIM coverage will exceed the tortfeasor's liability coverage, thus triggering the victim's UIM benefits.

The court in *Ray*, relying on the plain language of the statute,[94] refused to reduce the tortfeasor's liability coverage by the settlements prior to comparing its amount to the victim's UIM

89. *Id.* at 168, 423 S.E.2d at 320. *See also* Sutton v. Aetna Casualty & Sur. Co., 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989) ("The avowed purpose of the Financial Responsibility Act, of which N.C.G.S. § 20-279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists . . . [and it] is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished.").

90. *Harris*, 332 N.C. at 191, 420 S.E.2d at 128. The court stated that "[w]hen interpreting a statute, the cardinal principle is to ensure that the purpose of the legislature is accomplished." *Id.*

91. *Id.* at 195, 420 S.E.2d at 130. *See supra* text accompanying notes 10 and 11. The court stated that "[t]o deny an insured access to the recovery approved in Sutton by prohibiting stacking of UIM coverages in determining whether the tortfeasor's vehicle is an 'underinsured highway vehicle' would be inconsistent with the rationale of Sutton and the purpose of the Financial Responsibility Act." *Id.* at 192, 420 S.E.2d at 129. *See supra* note 49 (N.C. GEN. STAT. § 20-279.21(b)(4) has been amended to expressly prohibit intrapolicy stacking.).

92. *See supra* text accompanying notes 10 and 11.

93. Smith v. Nationwide Mut. Ins. Co., 97 N.C. App. 363, 368, 388 S.E.2d 624, 627 (1990), *rev'd on other grounds*, 328 N.C. 139, 400 S.E.2d 44, *reh'g denied*, 328 N.C. 577, 403 S.E.2d 514 (1991).

94. *See supra* text accompanying note 69.

coverage.[95] As such, *Ray* did not protect the innocent victim by providing an additional source of recovery, and the holding failed to promote the purpose of the statute.[96]

C. Ray: *Ramifications and Unanswered Questions*

The court in *Harris* promoted the purpose of the Motor Vehicle Safety and Financial Responsibility Act by allowing stacking prior to comparison of coverages.[97] In contrast, the court in *Ray* frustrated the purpose of the Act by denying the reduction of the tortfeasor's liability coverage through settlements prior to comparison of coverages.[98] Since the court in *Ray* relied on the plain language of the statute,[99] it appears as though the legislature must now decide whether the *Ray* holding undermines the purpose of the statute. Although the North Carolina General Assembly has responded previously to statutory uncertainty by amending N.C.G.S. § 20-279.21(b)(4),[100] it is yet to be determined whether the legislature will amend the statute to extend to multiple claimants the same protections found in stacking.

Furthermore, should the legislature choose not to amend N.C.G.S. § 20-279.21(b)(4),[101] the court will, in all likelihood, be faced again with the issue of whether a tortfeasor's vehicle is underinsured where, at the time of the accident, the tortfeasor's liability coverage equals the victim's UIM coverage, but, as a result of multiple claimants, the amount subsequently available under the liability coverage falls below the victim's UIM coverage. At that time, the court will have to decide whether to limit the opinion to the plain language of the statute, or to go further and reconcile *Ray* with *Harris* in light of the purpose of the statute.

Lastly, the holding in *Ray* will likely result in multiple claimants racing to settle with the liability insurer, since any victims whose UIM coverage doesn't exceed the tortfeasor's liability coverage at the time of the accident are not entitled to their UIM benefits.[102] These settlements should result in a reduction in litigation, but whether this reduction is worth the cost of innocent

95. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81.
96. *See supra* text accompanying notes 86-89 (purpose of the statute).
97. *See supra* notes 91-93.
98. *See supra* notes 94-96.
99. *See supra* text accompanying note 69.
100. *See supra* text accompanying note 47.
101. *See supra* text accompanying note 100.
102. *See supra* text accompanying notes 69-71.

victims who may be uncompensated, or not fully compensated for their injuries, remains to be seen.

Although *Ray* may raise more questions than it answers, the court correctly interpreted the plain language of the statute which proclaims that a vehicle is underinsured if, "at the time of the accident,"[103] the "sum of the limits of liability under all bodily injury liability bonds and insurance policies"[104] is less than the victim's UIM coverage.[105] Whether the plain language of N.C.G.S. § 20-279.21(b)(4) is inconsistent with the purpose of the statute[106] is an issue which the courts appear reluctant to address, and for the time being, have left up to the legislature to decide. In any event, the holding in *Ray* sets an uneasy precedent whereby an innocent victim, whose UIM limits equal the tortfeasor's liability limits at the time of the accident, is forced to race multiple claimants to a settlement, rather than rely on benefits provided in the UIM policy.

V. CONCLUSION

Ray v. Atlantic Casualty Insurance Co. asked, for the first time, whether a settlement by the tortfeasor's liability insurer with another claimant should be permitted to reduce the liability policy before its comparison with the victim's UIM coverage in determining whether the vehicle is underinsured. N.C.G.S. § 20-279.21(b)(4) defines an underinsured vehicle as one where the sum of the tortfeasor's liability limits, at the time of the accident, is less than the victim's UIM limits. The court in *Ray* held that the plain language of N.C.G.S. § 20-279.21(b)(4) called for the comparison between the tortfeasor's liability coverage and the victim's UIM coverage to be made at the time of the accident. The court held that at the time of the accident, the tortfeasor's liability coverage was identical to the insured's UIM coverage, therefore, by definition, the tortfeasor's vehicle was not an underinsured

103. N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989).

104. *Id.*

105. N.C. GEN. STAT. § 20-279.21(b)(4) reads in the pertinent part: "less than the applicable limits of liability under the owner's policy." N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1989). The Harris court interpreted the quoted portion to refer to the victim's UIM coverage. *Ray*, 112 N.C. App. at 262, 435 S.E.2d at 81 (citing Harris v. Nationwide Mut. Ins. Co., 332 N.C. 184, 420 S.E.2d 124 (1992)). *See supra* text accompanying note 57.

106. *See supra* text accompanying notes 94-96.

vehicle, despite any payments the liability company made to an injured party subsequent to the accident.

The purpose of the Motor Vehicle Safety and Financial Responsibility Act, of which N.C.G.S. § 20-279.21(b)(4) is a part, is to protect the innocent victim and provide an additional source of recovery so that the victim may be fully compensated. With the purpose in mind, the North Carolina Supreme Court in *Harris v. Nationwide Mutual Insurance Co.* permitted the victim to stack UIM coverages prior to comparing the limit with the tortfeasor's liability limit. The current version of N.C.G.S. § 20-279.21(b)(4) expressly provides for interpolicy stacking. In contrast to the practice of stacking which affords the victim an additional source of recovery, the holding in *Ray* has the effect of denying the victim such opportunity. The effect of *Ray* is to leave the innocent victim vulnerable to a tortfeasor who is involved in an accident with multiple claimants.

The court in *Ray* limited its analysis to the plain language of the statute, and therefore, did not address whether the holding was inconsistent with the purpose of the statute. As a result, the legislature must now decide whether the Motor Vehicle Safety and Financial Responsibility Act was intended to place an innocent victim, whose UIM limits are equal to the tortfeasor's liability limits, in a position where the only source of recovery is to race multiple claimants to a settlement, and not to rely on the benefits found in the UIM policy.

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