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# Comments: Compensation for Victims of Uninsured Motorist Accidents

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# COMPENSATION FOR VICTIMS OF UNINSURED MOTORIST ACCIDENTS

*Uninsured motorist insurance permits innocent policyholders indemnification from their own companies when their automobile is struck by a negligent uninsured driver. Unfortunately, many consumers are unaware of the importance of carrying adequate amounts of coverage. All too often, consumers are caught with a minimum of coverage that indemnifies them for only a fraction of the cost of their injuries. In this article the author examines the law surrounding uninsured motorist insurance and suggests ways for states and insurance companies to help assure more complete compensation to these innocent victims.*

## I. INTRODUCTION

Since the first automobile liability policy was issued in 1898,<sup>1</sup> society has attempted to resolve the problems created by financially irresponsible motorists who have been unable to adequately compensate victims of their negligence.<sup>2</sup> As one of several solutions,<sup>3</sup> most states have enacted uninsured motorist (UM) statutes.<sup>4</sup> UM insurance, how-

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1. Plummer, *The Uncompensated Automobile Accident Victim*, 1956 INS. L.J. 459, 463 [hereinafter cited as Plummer].
  2. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 1.1, at 3-4 (1969) [hereinafter cited as WIDISS].
  3. WIDISS, *supra* note 2, § 1.1, at 4. Although two other solutions to the uninsured motorist (UM) problem, compulsory insurance laws and unsatisfied claim and judgment funds, are briefly discussed in the background section of this article, see *infra* notes 7-23 and accompanying text, this article will primarily focus on UM coverage. For a thorough discussion of compulsory insurance laws see 6B J.A. APPLEMAN & J. APPLEMAN, INSURANCE LAW AND PRACTICE §§ 4299-4301 (rev. Buckley ed. 1979) [hereinafter cited as APPLEMAN]; and for unsatisfied claim and judgment funds see 8D APPLEMAN, *supra*, §§ 5144-5144.95 (1981).
  4. States either require UM coverage to be included in all automobile liability policies or require UM coverage to be offered but allow the insured the option to reject it. ALA. CODE § 32-7-23 (1975) (optional); ALASKA STAT. § 28.20.440(3) (Supp. 1981) (optional); ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1982); ARK. STAT. ANN. § 66-4003 (1980) (optional); CAL. INS. CODE § 11580.2 (West Supp. 1982) (optional); COLO. REV. STAT. § 10-4-319 (1973) (optional); CONN. GEN. STAT. ANN. § 38-175(c) (West Supp. 1982); DEL. CODE ANN. tit. 18, § 3902 (Supp. 1980) (optional); FLA. STAT. ANN. § 627.727 (West Supp. 1982) (optional); GA. CODE ANN. § 33-7-11 (1982) (optional); HAWAII REV. STAT. § 431-448 (1976) (optional); IDAHO CODE § 41-2502 (1977) (optional); ILL. ANN. STAT. ch. 73, § 755a (Smith-Hurd Supp. 1982) (optional); IND. CODE ANN. § 27-7-5-2 (Burns Supp. 1982) (optional); IOWA CODE ANN. § 516A.1 (West Supp. 1982) (optional); KAN. STAT. ANN. § 40-284 (1981) (optional); KY. REV. STAT. ANN. § 304.20-020 (Baldwin 1981) (optional); LA. REV. STAT. ANN. § 22:1406(D) (West 1978 & Supp. 1983) (optional); ME. REV. STAT. ANN. tit. 24-A, § 2902 (1974 & Supp. 1982); MD. ANN. CODE art. 48A, § 541(c) (Supp. 1982); MASS. GEN. LAWS ANN. ch. 175, § 113L (West 1972 & Supp. 1982); MINN. STAT. ANN. § 65B.49(4) (West Supp. 1983); MISS. CODE ANN. § 83-11-101 (Supp. 1982) (optional); MO. ANN. STAT. § 379.203 (Vernon Supp. 1983); MONT. CODE ANN. § 33-23-201 (1981) (optional); NEB. REV. STAT. § 60-509.01 (1978) (optional); NEV. REV. STAT. § 690B.020 (1981) (optional); N.H. REV. STAT. ANN. § 268:15-a (1977); N.J. STAT. ANN.

ever, has not always provided sufficient protection. Insurance companies usually issue the coverage in the often insufficient<sup>5</sup> statutorily required minimum.<sup>6</sup> Additionally, insurance policies, some with state approval, normally prohibit the victim from stacking UM benefits under more than one applicable policy. This comment addresses the limitations on the effectiveness of UM insurance, discusses the issue of stacking, and suggests further refinements that may aid in providing adequate compensation to victims of automobile accidents caused by negligent uninsured motorists.

## II. BACKGROUND

### A. *In General*

States have enacted a wide variety of statutory remedies to correct the problem of inadequate compensation to victims of uninsured motorist accidents, providing for compulsory automobile insurance,<sup>7</sup> unsatisfied claim and judgment funds,<sup>8</sup> and UM coverage.<sup>9</sup> These remedial measures are intended to be complementary — when one is inapplicable another should compensate the injured party.<sup>10</sup>

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§ 17:28-1.1 (West 1970 & Supp. 1982); N.M. STAT. ANN. § 66-5-301 (1978) (optional); N.Y. INS. LAW § 1672-a (McKinney Supp. 1982); N.C. GEN. STAT. § 20-279.21(b)(3), (4) (Supp. 1979) (optional); N.D. CENT. CODE §§ 26-02-42 to -44 (1978); OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1983) (optional); OKLA. STAT. ANN. tit. 36, § 3636 (West Supp. 1982) (optional); OR. REV. STAT. §§ 743.789 to .792 (1981); PA. STAT. ANN. tit. 40, § 2000 (Purdon 1971); R.I. GEN. LAWS § 27-7-2.1 (Supp. 1982) (optional); S.C. CODE ANN. § 56-9-830 (Law. Cop. 1976); S.D. CODIFIED LAWS ANN. § 58-11-9 (Supp. 1982); TENN. CODE ANN. § 56-7-1201 (1980) (optional); TEX. INS. CODE ANN. § 5.06-1 (Vernon 1981) (optional); UTAH CODE ANN. § 41-12-21.1 (1981) (optional); VT. STAT. ANN. tit. 23, § 941 (Supp. 1982); VA. CODE § 38.1-381(b) (Supp. 1982) (optional); WASH. REV. CODE ANN. § 48.22.030 (Supp. 1982) (optional); W. VA. CODE § 33-6-31(b) (1982) (optional); WIS. STAT. ANN. § 632.32(4) (West 1980 & Supp. 1982); WYO. STAT. §§ 31-10-101 to -104 (1977) (optional). Michigan is the only state with no UM statute. It was repealed when that state enacted no-fault insurance laws. Similarly, Washington, D.C. has passed no-fault insurance laws, to become effective on or about Aug. 1, 1983.

5. Comment, *Twenty-Five Years of Uninsured Motorist Coverage: A Silver Anniversary Cloud with a Tarnished Lining*, 14 IND. L. REV. 671, 674-75 (1981) [hereinafter cited as Comment].

6. WIDISS, *supra* note 2, § 1.13 (Supp. 1981).

7. Plummer, *supra* note 1, at 460-61; *see, e.g.*, MD. TRANSP. CODE ANN. §§ 17-101 to -104 (1977 & Supp. 1982). Maryland requires a motorist to provide security in the form of a vehicle liability policy before a car can be registered. *Id.* § 17-104.

8. 2 I. SCHERMER, AUTO LIABILITY INSURANCE § 23.02, at 23-1 to -3 (1981). Several states have created unsatisfied claim and judgment funds. *See, e.g.*, MD. ANN. CODE art. 48A, § 243 (1979 & Supp. 1982); MICH. COMP. LAWS ANN. §§ 257.1101 to .1133 (1977); N.J. STAT. ANN. §§ 39:6-61 to -91 (West 1973 & Supp. 1982); N.Y. INS. LAW §§ 600-626 (McKinney 1966 & Supp. 1982); N.D. CENT. CODE §§ 39-17-01 to -10 (1980).

9. *See supra* note 4.

10. *See Note, Uninsured Motorist Coverage Laws: The Problem of the Underinsured Motorist*, 55 NOTRE DAME LAW. 541, 541-42 (1980) [hereinafter cited as Note].

Compulsory automobile insurance laws, requiring every vehicle registered in the state to carry liability insurance, now exist in almost half of the states<sup>11</sup> but are inadequate in several respects. First, the motorist may drive without registering his car and while he has no insurance.<sup>12</sup> Second, an irresponsible motorist may acquire insurance and then permit it to lapse.<sup>13</sup> Finally, a negligent driver may have insurance at the time of the accident, but the insurer may deny its liability due to limitations in the policy.<sup>14</sup>

Unsatisfied claim and judgment funds, originating in Canada,<sup>15</sup> are now employed by several states in this country.<sup>16</sup> States maintain the funds<sup>17</sup> and utilize them to reimburse those who have an unsatisfied claim against a negligent motorist.<sup>18</sup> However, recovery under these funds is limited.<sup>19</sup> For example, in Maryland the claim cannot be covered by any policy of motor vehicle liability insurance and notice of intent to make a claim against the fund must be filed within 180 days of the accident.<sup>20</sup> Also, depending on the type of accident from which the

11. 6B APPLEMAN, *supra* note 3, § 4299, at 300-01 (rev. Buckley ed. 1979).

12. Note, *supra* note 10, at 541-42.

13. *Id.* at 541. See MD. TRANSP. CODE ANN. § 17-106 (1977 & Supp. 1982) for procedure the insurance company and Motor Vehicle Administration must follow upon lapse of any liability insurance policy.

14. Note, *supra* note 10, at 541. For example, the policy may expressly require any summons, notice, demand or other process received by the insured to be forwarded immediately to the company. *Id.* at 541 n.5. Failure to do so would absolve the company of liability. *Id.*

Even if the negligent driver is insured, under the fault system of accident reparations small claimants are often overpaid while large claimants are underpaid. A United States Department of Transportation study in 1971 showed that about 45% of those seriously injured in auto accidents got absolutely nothing from automobile liability insurance. J. O'CONNELL, *THE INJURY INDUSTRY AND REMEDY OF NO-FAULT INSURANCE* 4 (1971) (citing UNITED STATES DEPARTMENT OF TRANSPORTATION, *MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* (March 1971)).

15. Plummer, *supra* note 1, at 462-63.

16. See *supra* note 8.

17. See 8D APPLEMAN, *supra* note 3, § 5144.15, at 290-93 (1981); see also *Allied American Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles*, 219 Md. 607, 611-12, 150 A.2d 421, 425 (1959).

In 1972 Maryland amended its Unsatisfied Claim and Judgment Fund statute, changing the fund's name to Maryland Automobile Insurance Fund (MAIF) and giving it the added function of insuring drivers unable to obtain private insurance. *Nationwide Mut. Ins. Co. v. Webb*, 291 Md. 721, 726 n.3, 436 A.2d 465, 468-69 n.3 (1981); see MD. ANN. CODE art. 48A, § 243 (1979 & Supp. 1982).

18. *E.g.*, MD. ANN. CODE art. 48A, § 243A (1979 & Supp. 1982); N.J. STAT. ANN. § 39:6-64 (West 1973); N.D. CENT. CODE § 39-17-03 (1980).

19. 8D APPLEMAN, *supra* note 3, § 5144.15, at 291-92 (1981). In Maryland, despite MAIF's limitations, recovery can be had for intentionally inflicted injuries arising from the use of a car. *Elliott v. Jamestown Mut. Ins. Co.*, 27 Md. App. 566, 571, 342 A.2d 319, 322 (1975) (citing *Frazier v. Unsatisfied Claim & Judgment Fund Bd.*, 262 Md. 115, 277 A.2d 57 (1971)).

20. MD. ANN. CODE art. 48A, § 243H(a), (c) (1979 & Supp. 1982). However, in lieu of notice a claimant may show he was physically incapable of giving notice, *id.* (c)(1); or that he gave notice within 30 days of receiving notice that an insurer had

claim arises, numerous other preconditions must be met.<sup>21</sup> Moreover, the financial instability of the fund may decrease its effectiveness.<sup>22</sup>

To compensate for the inadequacies of these remedial measures, states began to require that UM coverage be offered in every automobile insurance policy issued.<sup>23</sup> UM insurance is an agreement between the insured and his company that the latter will compensate him if he is injured as the result of an uninsured motorist's negligence.<sup>24</sup> Its purpose is to place the victim in as good a position as if he had been struck by a motorist insured at the minimum amount required by statute.<sup>25</sup>

UM endorsements, however, are not as widely effective at assuring compensation as one would expect. The coverage will only protect those responsible drivers who secure liability insurance and do not reject the offered UM coverage, if rejection is optional in their state. Additionally, it is often unclear in certain cases whether a vehicle is, in fact, uninsured so as to enable recovery under a UM policy.<sup>26</sup> Moreover, even when UM coverage is applicable, it is often insufficient to fully compensate the innocent party for his injuries.<sup>27</sup> Consequently, many victims of uninsured motorist accidents have attempted to stack the coverage on more than one applicable UM policy. Stacking enables the victim to receive the maximum coverage up to the amount of his damages under the several policies.<sup>28</sup> The question of whether stacking of coverages is permitted, however, has led to decisional inconsistencies<sup>29</sup> because of insurance companies that attempt to limit recovery on more than one policy and statutes that fail to provide for full indemnification.<sup>30</sup>

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disclaimed on a policy of insurance, *id.* (c)(2); or that he gave notice within 30 days of receiving notice that the defendant's insurer was insolvent. *Id.* (c)(3).

21. *Id.* § 243H (a)(1)-(3). For example, the victim cannot be operating an uninsured motor vehicle owned by him, *id.* (1)(i); or the claimant must show that he made all reasonable efforts to ascertain the identity of the hit and run vehicle that struck him. *Id.* (1)(iv).
22. *See* Motor Club of America Ins. Co. v. Phillips, 66 N.J. 277, 284, 330 A.2d 360, 364 (1974) (New Jersey's fund was approaching insolvency because of the growing gap between its income and the volume of claims upon it); *see also* Aetna Cas. & Sur. Co. v. Belcher, 83 Mich. App. 175, 180, 268 N.W.2d 335, 337 (1978), *rev'd on other grounds*, 409 Mich. 885, 295 N.W.2d 229 (1980).
23. WIDISS, *supra* note 2, § 1.11, at 15. *See supra* note 4 for a compilation of UM statutes.
24. Note, *supra* note 10, at 542.
25. *See* Porter v. Empire Fire & Marine Ins. Co., 106 Ariz. 274, 279, 475 P.2d 253, 263 (1970); M.F.A. Mut. Ins. Co. v. Wallace, 245 Ark. 230, 232, 431 S.W.2d 742, 744 (1968); Yarmuth v. Government Employees Ins. Co., 286 Md. 256, 265, 407 A.2d 315, 319 (1979).
26. Maldonado, *Requiring Underinsured Motorist Coverage in Ohio*, 6 OHIO N.U.L. REV. 534, 534-35 (1979).
27. *See* WIDISS, *supra* note 2, §§ 1.12, 3.7.
28. *See infra* notes 64-66 and accompanying text.
29. Comment, *supra* note 5, at 679-80.
30. WIDISS, *supra* note 2, §§ 1.12, 3.7.

### B. *Uninsured Motorist Insurance*

To understand UM insurance, it is necessary to collectively consider the typical governing statute and UM policy provisions. UM endorsements may provide for greater coverage than that mandated by statute but they cannot provide for less.<sup>31</sup> Therefore, if a conflict exists between a UM provision and the intent of the legislative enactment, courts will find that coverage exists to the extent provided by their interpretation of the statute.<sup>32</sup>

Most UM statutes share three basic elements.<sup>33</sup> First, they require that UM coverage be made available within the state.<sup>34</sup> Second, the statutes establish a minimum dollar amount of coverage that must be provided, usually equal to the minimum liability requirements of the financial responsibility laws.<sup>35</sup> Third, the statutes allow the insured, at his option, to reject UM protection.<sup>36</sup> In addition, most UM statutes are silent on the issue of stacking.<sup>37</sup>

UM policies have been standardized from their inception.<sup>38</sup> Included as part of the general liability policy, most UM provisions state that the insurance company agrees to "pay all sums which the insured<sup>39</sup> . . . shall be legally entitled to recover as damages from the owner or

31. See 8C APPLEMAN, *supra* note 3, § 5102.25, at 475 (1981); see also *Pennsylvania Nat'l Mut. v. Gartelman*, 288 Md. 151, 160-61, 416 A.2d 734, 739 (1980) (clause denying coverage to victim injured in a nonowned uninsured vehicle less than coverage provided by statute and was void).
32. See *Pennsylvania Nat'l Mut. v. Gartelman*, 288 Md. 151, 160-61, 416 A.2d 734, 739 (1980). Additionally, because UM statutes are remedial in nature Maryland courts feel they should be liberally construed to promote their purpose. *State Farm Mut. Auto Ins. Co. v. MAIF*, 277 Md. 602, 605, 356 A.2d 560, 562 (1976).
33. Note, *supra* note 10, at 543.
34. *Id.*; see, e.g., MD. ANN. CODE art. 48A, § 541(c)(2) (Supp. 1982); N.H. REV. STAT. ANN. § 268:15-a (1977).
35. Comment, *supra* note 5, at 674; see, e.g., CAL. INS. CODE § 11580.2(m) (West Supp. 1982); MD. ANN. CODE art. 48A, § 541(c)(2) (Supp. 1982). *Contra* LA. REV. STAT. ANN. § 22:1406 D(1)(a) (West 1978) (UM coverage cannot be less than the limits of bodily injury liability provided by the policy).
36. 8C APPLEMAN, *supra* note 3, § 5073 (1981); see, e.g., FLA. STAT. ANN. § 627.727(1) (West Supp. 1982); IOWA CODE ANN. § 516A.1 (West Supp. 1982). *Contra* MD. ANN. CODE art. 48A, § 541(c) (Supp. 1982) (Maryland does not give the insured the option to reject coverage). However, the Mass Transit Administration is exempt from carrying any UM coverage. *Harden v. Mass Transit Admin.*, 277 Md. 399, 408-10, 354 A.2d 817, 822-23 (1976); see MD. TRANSP. CODE ANN. § 7-703(c) (1977) (gives Mass Transit Administration discretion in deciding what type of insurance is necessary).
37. 3 R. LONG, *THE LAW OF LIABILITY INSURANCE* § 24.39[2], at 24-137 (1979). *But see* MD. ANN. CODE art. 48A, § 543(a) (1979) (UM coverage cannot be stacked); TENN. CODE ANN. § 56-7-1205 (1980) (same); WIS. STAT. ANN. § 631.43(1) (West 1980) (UM coverage can be stacked).
38. WIDISS, *supra* note 2, § 2.2, at 20. The 1966 STANDARD FORM will be used throughout this comment to illustrate standard UM policy provisions. For the full text of a UM policy see the 1966 STANDARD FORM, *reprinted in* WIDISS, *supra* note 2, app. A.1, at 291-98.
39. Courts have divided over whether to extend UM coverage to insureds who are not also named under the general liability part of the policy. See generally Comment,

operator of an uninsured highway vehicle, because of bodily injury<sup>40</sup> sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle."<sup>41</sup> In contrast to general liability insurance, which benefits any person injured by the negligent policyholder, UM coverage benefits the *innocent* policyholder who is injured by an uninsured motorist.<sup>42</sup> The UM policyholder recovers UM benefits directly from his own insurer, rather than from another's insurance company.<sup>43</sup> Passengers in the struck vehicle can also recover under the driver's UM coverage, without, as is required in the case of liability coverage, the necessity of establishing the insured driver's negligence.<sup>44</sup> In order to achieve full compensation some jurisdictions also allow passengers additional recovery under their own UM policies.<sup>45</sup>

Due to varying statutory and policy definitions of "uninsured," the scope of that term has been interpreted inconsistently from one jurisdiction to another.<sup>46</sup> In the ordinary sense, an uninsured vehicle would encompass only those automobiles with no insurance coverage or with worthless coverage because the company insuring the vehicle has become insolvent.<sup>47</sup> Today, however, because states require different minimum UM coverages some legislatures (including Maryland's<sup>48</sup>)

*supra* note 5, at 687-90 (discussion of which definition of insured should control, the liability or UM section).

Additionally, insurance policies refuse to extend UM coverage to policyholders injured by an uninsured motorist while in an owned but uninsured vehicle. 1966 STANDARD FORM, *reprinted in* WIDISS, *supra* note 2, app. A.1, at 292. This is to encourage owners to insure their cars. *Pennsylvania Nat'l Mut. v. Gartelman*, 288 Md. 151, 160, 416 A.2d 734, 739 (1980); *cf.* MD. ANN. CODE art. 48A, §§ 541(c)(2), 243 H(a)(1)(i) (1979 & Supp. 1982) (cannot recover UM benefits or from MAIF if injured in owned, uninsured vehicle). *Contra* State Farm Auto. Ins. Co. v. Reeves, 292 Ala. 218, 224, 292 So. 2d 95, 100 (1974).

40. Normally, UM coverage protects the victim for personal injuries only. Davis, *Uninsured Motorist Coverage: Some Significant Problems and Developments*, 42 MO. L. REV. 1, 3 (1977).

Several states do allow endorsements for property damage but impose deductibles. *See, e.g.*, GA. CODE ANN. § 33-7-11(a)(1)(A), (B) (1982); N.M. STAT. ANN. § 66-5-301(c) (Supp. 1982) (effective Jan. 1, 1984); N.C. GEN. STAT. § 20-279.21(b)(3) (Supp. 1979); S.C. CODE ANN. § 56-9-830 (Law. Co-op. 1976); TENN. CODE ANN. § 56-7-1201 (1980); VA. CODE § 38.1-381(b) (Supp. 1982); W. VA. CODE § 33-6-31(b) (1982).

41. 1966 STANDARD FORM, *reprinted in* WIDISS, *supra* note 2, app. A.1, at 292.  
 42. *See* Note, *An Examination of the Meaning and Scope of the Basis of the Uninsured Motorist Policy Endorsement*, 53 MARQ. L. REV. 320, 324-25 (1969-70).  
 43. Note, *supra* note 10, at 543.  
 44. Comment, *supra* note 5, at 677.  
 45. *See* 3 R. LONG, THE LAW OF LIABILITY INSURANCE § 24.38, at 24-128 (1979).  
 46. Maldonado, *Requiring Underinsured Motorist Coverage in Ohio*, 6 OHIO N.U.L. REV. 534, 534-35 (1979).  
 47. *See id.*; *see also* CAL. INS. CODE § 11580.2(b) (West Supp. 1982); OHIO REV. CODE ANN. § 3937.18(B) (Supp. 1983). The 1956 STANDARD FORM defined an uninsured vehicle in this way. 1956 STANDARD FORM, *reprinted in* WIDISS, *supra* note 2, app. A.2, at 300.  
 48. Due to 1981 amendments to its UM statute, Maryland now defines an uninsured

and most insurance policies define an uninsured vehicle as including any vehicle that has liability insurance, but less than the minimum amount of UM coverage required by the state in which the victim's car is registered or principally garaged.<sup>49</sup> This expansive definition prevents the victim from being in a better position if injured by a truly uninsured motorist rather than by a motorist insured below the statutory minimum.<sup>50</sup> It allows the victim to receive the limits of the negligent driver's liability policy and then resort to his own UM coverage to fully indemnify himself. Without such a definition, however, the victim is limited to recovery on the negligent driver's liability policy — which may not afford adequate compensation. Louisiana goes even further by also defining as uninsured any vehicle with liability limits insufficient to cover all damages.<sup>51</sup>

In compensating passengers in the innocent driver's car, when hit by an uninsured motorist, some jurisdictions consider the innocent driver to be insured even if his UM coverage is insufficient to compensate all his passengers.<sup>52</sup> Other jurisdictions, however, have expanded their definition of uninsured motorist to include these drivers, thereby allowing passengers to recover on their own UM policies.<sup>53</sup>

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vehicle as one whose ownership, maintenance or use has resulted in injury to an insured and for which the sum of the limits of liability under all collectible policies is less than the amount of UM coverage provided to the insured. MD. ANN. CODE art. 48A, § 541(c)(1) (Supp. 1982). *Contra* N.H. REV. STAT. ANN. § 268:15-a(V) (1977). The Maryland amendments limit the UM insurer's liability to the difference between the UM coverage provided and the liability coverage applicable to the insured. MD. ANN. CODE art. 48A, § 541(c)(3) (Supp. 1982).

49. WIDISS, *supra* note 2, § 2.35, at 71-73; *see, e.g.*, FLA. STAT. ANN. § 627.727(3)(b) (West Supp. 1982); S.D. CODIFIED LAWS ANN. § 58-11-9.5 (Supp. 1982); TENN. CODE ANN. § 56-7-1201 (1980); W. VA. CODE § 33-6-31(c) (1982). *Contra* State Farm Mut. Auto. Ins. Co. v. Hollowell, 426 A.2d 822, 827 (Del. 1981). In this case a tort-feasor insured at the statutory minimum was insured, precluding the victim from utilizing his higher UM limits. *Id.* The court invited the legislature to change the statute to prevent this anomaly. *Id.* at 827. The 1966 STANDARD FORM adopted this approach. 1966 STANDARD FORM, reprinted in WIDISS, *supra* note 2, app. A.1, at 295. *See generally* Widiss, *The Slow Evolution of a New Automobile Coverage*, Sept. 1977 TRIAL MAG. 45, 46-50 (discusses concept of underinsured motorist insurance as a spinoff from UM insurance).
50. Wilhelm v. Universal Underwriters Ins. Co., 60 Ill. App. 3d 894, 897-98, 377 N.E.2d 62, 67 (1978).
51. LA. REV. STAT. ANN. § 22:1406D(2)(b) (West 1978).
52. This view prevents passengers from recovering under their own UM coverage. *See* Interinsurance Exch. of the Auto. Club of S. Cal. v. Alcivar, 95 Cal. App. 3d 252, 266-67, 156 Cal. Rptr. 914, 921-22 (1979); Di Luzo v. Home Mut. Ins. Co., 289 N.W.2d 749, 753 (Minn. 1980); Gardner v. American Ins. Co., 95 Nev. 271, 274-75, 593 P.2d 465, 467 (1979); Strunk v. State Farm Mut. Auto. Ins. Co., 90 Wash. 2d 210, 212, 580 P.2d 622, 623 (1978).
53. Portor v. Empire Fund & Marine Ins. Co., 106 Ariz. 274, 279, 475 P.2d 258, 263, modified on other grounds, 106 Ariz. 345, 476 P.2d 155 (1970); Palisbo v. Hawaiian Ins. & Guar. Co., 57 Hawaii 10, 15, 547 P.2d 1350, 1354 (1976).



## III. THE STACKING ISSUE

The issue that has generated the most controversy since the mid-1960's is whether a victim can stack the coverage on more than one applicable UM policy.<sup>54</sup> Similar to liability coverage, UM endorsements attempt to preclude stacking by utilizing the "other insurance" clause,<sup>55</sup> normally including excess-escape<sup>56</sup> and pro-rata provisions.<sup>57</sup> The excess-escape provision, operating when the insured is injured in a nonowned vehicle, limits recovery on a second policy to the difference between the limits of the two applicable policies.<sup>58</sup> If the limits are the same the insured may recover only on the primary policy.<sup>59</sup> On the other hand, when a person is injured in an owned vehicle, the pro-rata provision apportions the insured's recovery among all available policies.<sup>60</sup>

54. 3 R. LONG, *THE LAW OF LIABILITY INSURANCE* § 24.38, at 24-125 (1979).

55. *Id.* § 24.39, at 24-129 to -130.

56. A typical excess-escape provision states:

With respect to bodily injury to an insured while occupying a highway vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

1966 STANDARD FORM, *reprinted in* WIDISS, *supra* note 2, app. A.1, at 296-97.

57. A typical pro-rata provision states:

Except as provided in the [excess-escape clause], if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

1966 STANDARD FORM, *reprinted in* WIDISS, *supra* note 2, app. A.1, at 297.

58. Thus, if the innocent driver has coverage of \$10,000 per person and the passenger has coverage of \$20,000, the passenger recovers a total of \$20,000—\$10,000 from each policy.

59. *See* P. PRETZEL, *UNINSURED MOTORISTS* § 25.5, at 82 (1972). In the past courts were confronted with the issue of which policy was primarily responsible for the damages — the driver's or the passenger's. *See* *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Or. 110, 341 P.2d 110, *reh'g denied*, 219 Or. 130, 346 P.2d 643 (1959). Today the general rule is that the driver's policy is primarily liable. WIDISS, *supra* note 2, § 2.60, at 210 (Supp. 1981).

60. P. PRETZEL, *UNINSURED MOTORISTS* § 25.5, at 82 (1972). For example, if the insured owns two separate policies, each with limits of \$10,000 per person, \$20,000 per accident (10/20), his total recovery is \$10,000 with each policy providing \$5,000.

Older insurance policies often contained a third paragraph in their other insurance clauses — the escape paragraph. It provided that the insurance obligation was null and void if any other valid and collectible insurance existed, even though the insured had paid premiums. This result was hardly what the insured had bargained for and more modern courts reject it. *J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE* § 5-9, at 203 (1980).

It is important to realize, in considering whether one can stack, that the policy terms were developed privately by the insurance industry.<sup>61</sup> A strict reading of the other insurance clauses normally limits, rather than expands, the insured's ability to obtain compensation. In addition, an almost uniform practice of insurance companies has been to issue coverage only in the statutory minimum.<sup>62</sup> Often, this amount is too low to provide adequate compensation.<sup>63</sup> Consequently, a myriad of judicial decisions have been rendered in determining whether insurance companies' attempts to prevent stacking can be reconciled with the legislative purpose behind the applicable UM statutes.

Three different factual situations arise in which parties seek to stack UM coverage. In one, passengers in a car struck by an uninsured motorist attempt to void the excess-escape provision and stack the coverage in their own policies when their damages exceed the amount of the innocent driver's UM insurance.<sup>64</sup> Additionally, drivers injured in one of several owned vehicles seek to increase their compensation by voiding the pro-rata provision and stacking coverage under the UM endorsements on separate policies.<sup>65</sup> The insureds in both these situations are attempting inter-policy stacking. In contrast, intra-policy stacking occurs when the victim has one insurance policy covering separate vehicles. In such cases an attempt is made to avoid the pro-rata provision and stack the coverage on each owned vehicle to increase recovery.<sup>66</sup> Courts have reacted differently to these attempts, a majority consistently allowing stacking, others approving stacking only in certain cases, and a minority totally prohibiting stacking UM policies in violation of the other insurance clause.

### A. States Prohibiting Stacking

A minority of jurisdictions hold that the other insurance clause is valid and forbid the stacking of UM coverages.<sup>67</sup> The reasoning relied on is that the purpose of the UM statute is to assure coverage in an amount not less than the limits described in the financial responsibility

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61. WIDISS, *supra* note 2, § 1.12.

62. *Id.* § 1.13 (Supp. 1981).

63. 8C APPLEMAN, *supra* note 3, § 5103, at 515 (1981); *see* 3 R. LONG, THE LAW OF LIABILITY INSURANCE § 24.38, at 24-127 (1979).

64. *See* 3 R. LONG, THE LAW OF LIABILITY INSURANCE § 24.38, at 24-125 (1979); *see, e.g.,* Darrah v. California State Auto. Ass'n, 259 Cal. App. 2d 243, 66 Cal. Rptr. 374 (1968); Yarmuth v. Government Employees Ins. Co., 286 Md. 256, 407 A.2d 315 (1979); Thurman v. Signal Ins. Co., 260 Or. 524, 491 P.2d 1002 (1971).

65. *E.g.,* Kozak v. Detroit Auto. Inter-Insurance Exch., 79 Mich. App. 777, 262 N.W.2d 904 (1977); Van Tassel v. Horace Mann Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973); Grange Mut. Cas. Co. v. Volkman, 54 Ohio St. 2d 58, 374 N.E.2d 1258 (1978).

66. *E.g.,* Curran v. Fireman's Fund Ins. Co., 393 F. Supp. 712 (D. Alaska 1975); Indiana Ins. Co. v. Ivers, 395 N.E.2d 820 (Ind. Ct. App. 1979); Westchester Fire Ins. Co. v. Tucker, 512 S.W.2d 679 (Tex. 1974).

67. *See* WIDISS, *supra* note 2, § 2.59, at 198-200 (Supp. 1981).

law.<sup>68</sup> Because UM coverage is only intended to place the insured in substantially the same position he would occupy if he were injured by a tort-feasor with the minimum statutory amount of coverage,<sup>69</sup> courts in these jurisdictions believe that allowing the victim to stack would provide him with more than the legislature intended.<sup>70</sup>

The anti-stacking view was first enunciated in *Burcham v. Farmer's Insurance Exchange*.<sup>71</sup> In that case, a passenger in a car struck by an uninsured motorist sought to stack the coverage in his father's separate policies with that in the primary<sup>72</sup> policy. The court denied the attempt, holding that the provisions of the other insurance clause should be given effect.<sup>73</sup> The court stated, "To disregard the provisions of both policies and to allow [the] plaintiff to collect to the extent of the policy limit of each policy . . . is . . . absurd in the face of positive policy limitations."<sup>74</sup>

In *Wilhelm v. Universal Underwriters Insurance Co.*,<sup>75</sup> decided after states began to pass mandatory UM statutes,<sup>76</sup> the Appellate Court of Illinois refused to allow inter-policy stacking. Since the primary policy provided the minimum coverage mandated by statute, stacking was precluded.<sup>77</sup> Moreover, the court believed that other insurance clauses operate to prevent stacking even if the victim is unable to recover the entire statutory minimum under a primary policy.<sup>78</sup>

The Court of Appeals of Maryland has also concluded that the legislature has prohibited stacking.<sup>79</sup> In *Yarmuth v. Government Em-*

68. *Transportation Ins. Co. v. Wade*, 106 Ariz. 269, 273, 475 P.2d 253, 257 (1970), cited with approval in *State Farm Mut. Auto. Ins. Co. v. Herron*, 123 Ariz. 315, 318, 599 P.2d 768, 770 (1979); *Interinsurance Exch. of the Auto. Club of S. Cal. v. Alcivar*, 95 Cal. App. 3d 252, 269, 156 Cal. Rptr. 914, 923 (1979); *State Farm Mut. Auto. Ins. Co. v. Hallowell*, 426 A.2d 822, 826 (Del. 1981); *Lyon v. Hartford Accident & Indem. Co.*, 25 Utah 2d 310, 315, 480 P.2d 739, 742 (1971) (quoting Annot., 28 A.L.R.3d 551, 554 (1969)).

69. See *Lyon v. Hartford Accident & Indem. Co.*, 25 Utah 2d 310, 315, 480 P.2d 739, 742 (1971) (quoting Annot., 28 A.L.R.3d 551, 554 (1969)).

70. See, e.g., *Interinsurance Exch. of the Auto. Club of S. Cal. v. Alcivar*, 95 Cal. App. 3d 252, 268, 156 Cal. Rptr. 914, 923 (1979).

71. 255 Iowa 69, 121 N.W.2d 500 (1963); see 3 R. LONG, *THE LAW OF LIABILITY INSURANCE* § 24.39[1], at 24-131 (1979).

72. See *supra* note 59.

73. *Burcham v. Farmer's Ins. Exch.*, 255 Iowa 69, 75-76, 121 N.W.2d 500, 503 (1963).

74. *Id.* The holding was consistent with most of the decisions rendered during this time. Courts generally upheld the validity of the other insurance clause due to the clear contractual language used in the policy. 3 R. LONG, *THE LAW OF LIABILITY INSURANCE* § 24.38, at 24-127 (1979). Today, many courts invalidate the clause relying on the public policy of adequate recovery for every wrong. *Id.*

75. 60 Ill. App. 3d 894, 377 N.E.2d 62 (1978).

76. Often, after a state adopted a UM statute courts would allow stacking when prior to adoption they would prohibit it. See WIDISS, *supra* note 2, § 2.59, at 107.

77. *Wilhelm v. Universal Underwriters Ins. Co.*, 60 Ill. App. 3d 894, 898-99, 377 N.E.2d 62, 65 (1978).

78. *Id.*

79. *Yarmuth v. Government Employees Ins. Co.*, 286 Md. 256, 407 A.2d 315 (1979). Some state statutes specifically allow insurance companies to include clauses in

*ployees Insurance Co.*,<sup>80</sup> the United States District Court for the District of Maryland certified to the State's court of appeals the question whether Maryland law prohibited stacking.<sup>81</sup> The facts disclose that an uninsured tractor trailer collided with a car owned by Motorola and driven by its employee, Starr.<sup>82</sup> As a result, three members of the Starr family were killed. In an attempt to stack the UM coverage in Starr's personal policy with that of the employer, the representatives of the decedents' estates argued that the other insurance clause in Starr's policy was void because it conflicted with the legislative intent behind Maryland's UM statute. The personal representatives believed that the intent required *every* policy to cover vehicles in the statutory minimum.<sup>83</sup> It was therefore asserted that enforcement of the clause would defeat the purpose of the statute by exempting certain companies from providing the required coverage.<sup>84</sup> Additionally, the personal representatives argued that since they were not seeking duplicative recovery, but merely indemnity for injuries sustained, Maryland's duplication of benefits statute<sup>85</sup> was inapplicable.<sup>86</sup>

In *Yarmuth*, the court of appeals held that other insurance clauses

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their policies that prevent stacking. *See, e.g.*, OHIO REV. CODE ANN. § 3937.18(E) (Page Supp. 1983); WASH. REV. CODE ANN. § 48.22.030(6) (Supp. 1982).

80. 286 Md. 256, 407 A.2d 315 (1979).

81. The certified questions were:

(1) May an insurance company, under Maryland law, include a provision in an automobile insurance policy which would prohibit the recovery of uninsured motorist benefits under that policy where the insured's claim admittedly exceeds \$40,000 and where the insured has already recovered the sum of \$40,000 under the uninsured motorist coverage provided by another insurance policy?

(2) Does § 543(a) of Art. 48A, Ann. Code of Md., prohibit the recovery by an insured of uninsured motorist benefits under one policy where the insured's claim admittedly exceeds \$40,000 and where the insured has already recovered the sum of \$40,000 under the uninsured motorist coverage of another insurance policy?

*Id.* at 257, 407 A.2d at 316.

82. *Id.* at 258-59, 407 A.2d at 316.

83. *Id.* at 260, 407 A.2d at 317.

84. *Id.* at 261, 407 A.2d at 317.

85. MD. ANN. CODE art. 48A, § 543 (1979) (prevents recovery of personal injury protection (PIP) benefits or UM benefits on either a duplicative or supplemental basis).

86. *Yarmuth v. Government Employees Ins. Co.*, 286 Md. 256, 261, 407 A.2d 315, 318 (1979). The representatives of the estates were relying on the Court of Special Appeals of Maryland's decision in *Langston v. Allstate Ins. Co.*, 40 Md. App. 414, 392 A.2d 561 (1978), *questioned in Yarmuth v. Government Employees Ins. Co.*, 286 Md. 256, 407 A.2d 315 (1979). In *Langston* the court allowed what was in effect inter-policy stacking by interpreting section 543(a) to prohibit payment in full, twice, for the same claim (duplicative) or securing payment beyond what the victim was legally entitled to recover (supplementary). *Langston v. Allstate Ins. Co.*, 40 Md. App. 414, 429-30, 392 A.2d 561, 569-70 (1978), *questioned in Yarmuth v. Government Employees Ins. Co.*, 286 Md. 256, 407 A.2d 315 (1979). Since the victim was "stacking" so as to recover full damages, the court of special appeals believed that it was not prohibited by section 543(a).

in UM endorsements are enforceable and that the legislative intent, as expressed in the applicable section of the Maryland Code<sup>87</sup> and as interpreted in a previous Maryland case,<sup>88</sup> precludes inter-policy stacking.<sup>89</sup> The court believed that the duplication of benefits statute is more than a device to prevent recovery in excess of total damages.<sup>90</sup> Rather, it concluded that the legislature had, by virtue of that statute, implicitly approved the use of other insurance clauses.<sup>91</sup>

### B. Jurisdictions that Distinguish Between Types of Stacking

#### 1. States Allowing Only Inter-Policy Stacking

A small number of jurisdictions distinguish between multi-vehicle and separate policies, only allowing the insured to stack coverage under separate policies.<sup>92</sup> The rationale relied on for precluding intra-

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87. See MD. ANN. CODE art. 48A, § 543(a) (1979). This section states: "Notwithstanding any other provision of this subtitle, no person shall recover benefits under the coverages required in §§ 539 [personal injury protection or PIP] and 541 [uninsured motorist coverage] of this article from more than one motor vehicle liability policy or insurer on either a duplicative or supplemental basis." *Id.*

88. *Travelers Ins. Co. v. Benton*, 278 Md. 542, 365 A.2d 1000 (1976). The *Benton* court denied the victim's attempt to stack personal injury protection (PIP) benefits, holding that § 543(a) specified that recovery shall be under one but not both policies. *Id.* at 545, 365 A.2d at 1003. The court of appeals felt that the legislature intended that the provisions of section 543(c), requiring payment of PIP by the victim's own insurer if the victim is injured in a vehicle that has no coverage (as mandated by section 539) would apply only when either the mandatory coverage did not exist or did not encompass the circumstances of a particular accident. *Id.* at 546, 365 A.2d at 1004. Since the mandated coverage did exist in the primary policy stacking was precluded. *Id.*

PIP affords minimum medical, hospital, disability, and loss of income benefits. It is payable without regard to fault, is mandatory, and requires coverage of at least \$2,500. *Id.* at 543, 365 A.2d at 1002; see MD. ANN. CODE art. 48A, § 539(a) (1979).

89. *Yarmuth v. Government Employees Ins. Co.*, 286 Md. 256, 263-64, 407 A.2d 315, 318-19 (1979).

90. *Id.* at 264, 407 A.2d at 319. In making its decision, the court of appeals relied on decisions in Iowa and Tennessee that interpreted statutes similar to section 543. Those states had examined their statutes and found them to prohibit stacking. See *Westhoff v. American Interinsurance Exch.*, 250 N.W.2d 404, 409 (Iowa 1977). However, the Iowa statute was amended in 1980 to allow stacking. IOWA CODE ANN. § 516A.2 (West Supp. 1982). The Tennessee decision was rendered in *State Auto. Mut. Ins. Co. v. Cummings*, 519 S.W.2d 773, 775 (Tenn. 1975). The Tennessee court did say that absent TENN. CODE ANN. § 56-1152 (codified today at § 56-7-1205 (1980)) the better rule would be to allow stacking.

91. *Yarmuth v. Government Employees Ins. Co.*, 286 Md. 256, 264-65, 407 A.2d 315, 319 (1979); see also *State Farm Mut. v. Insurance Comm'r*, 283 Md. 663, 392 A.2d 1114 (1978) (purpose of section 543(d) is to reduce benefits payable under PIP or UM by any amount received under workmen's compensation); *Oarr v. Government Employees Ins. Co.*, 39 Md. App. 122, 383 A.2d 1112 (1978) (precludes stacking of multi-vehicle liability coverage).

92. See 8C APPLEMAN, *supra* note 3, § 5106, at 517 (1981). Compare *Motor Club of America Ins. Co. v. Phillips*, 66 N.J. 277, 292-93, 330 A.2d 360, 369 (1974) (can stack separate policies) and *Grange Mut. Cas. Co. v. Volkman*, 54 Ohio St. 2d 58, 63, 374 N.E.2d 1258, 1261 (1978) (same) with *Allstate Ins. Co. v. McHugh*, 124

policy stacking is that the separate premiums paid do not create separate coverages for each car.<sup>93</sup> Rather, they are for the additional risks assumed by the insurance company.<sup>94</sup> Theoretically, all the vehicles could be on the road at the same time and involved in UM accidents and all would be covered.<sup>95</sup> This fact has been held to justify additional premiums and to defeat the argument they they amount to a windfall for the insurance company.<sup>96</sup>

For example, in *Indiana Insurance Co. v. Ivers*,<sup>97</sup> the Indiana court of appeals denied the insured's attempt at intra-policy stacking. Noting that authority exists in Indiana recognizing inter-policy stacking, the court felt that the situation was different when a single policy was involved.<sup>98</sup> The injured party argued that the limitation of liability clause<sup>99</sup> and the separability clause<sup>100</sup> contained in her policy were ambiguous and did not prevent her from stacking.<sup>101</sup> The court pointed out that the separability clause expressly exempted UM coverage and held that no ambiguity existed in the limitation of liability clause.<sup>102</sup> In addressing the victim's contention that it was unconscionable to allow the insurance company to charge separate premiums and not be required to provide coverage for each, the court stated that separate premiums were justified by the additional risk assumed by the insurer.<sup>103</sup>

Similarly, the Texas Supreme Court in *Westchester Fire Insurance Co. v. Tucker*<sup>104</sup> refused to allow an attempt at intra-policy stacking. The court found nothing within the policy to indicate that the additional premiums charged for the extra vehicles multiplied the basic

N.J. Super. 105, 113, 304 A.2d 777, 781 (1973) (cannot stack multi-vehicle policies) and *Weemhoff v. Cincinnati Ins. Co.*, 41 Ohio St. 2d 231, 235, 325 N.E.2d 239, 241 (1975) (same).

93. See *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 684 (Tex. 1974).

94. *Indiana Ins. Co. v. Ivers*, 395 N.E.2d 820, 824 (Ind. Ct. App. 1979).

95. *Id.*

96. *Id.* at 825.

97. 395 N.E.2d 820 (Ind. Ct. App. 1979).

98. *Id.* at 822-23.

99. See *infra* note 133.

100. A separability clause provides that when two or more automobiles are insured in one policy the terms of the policy apply to each, thus creating separate policies of insurance. *Liddy v. Companion Ins. Co.*, 390 N.E.2d 1022, 1032 (Ind. Ct. App. 1979).

101. The victim argued that the fact that the vehicles were listed separately in the policy and separate premiums were assigned to each car created separate contracts of insurance, while the insurance company argued that the limit of the liability clause clarified any ambiguity and limited recovery to coverage on one car since the UM provision did not contain a separability clause. *Indiana Ins. Co. v. Ivers*, 395 N.E.2d 820, 822 (Ind. Ct. App. 1979). Today, many insurance companies have removed the separability clause from their policies or have made it inapplicable to UM coverage to avoid potential conflicts. Comment, *supra* note 5, at 685-86.

102. *Indiana Ins. Co. v. Ivers*, 395 N.E.2d 820, 823 (Ind. Ct. App. 1979).

103. *Id.* at 825. For a critique of the court's reliance on the additional risk theory, see Comment, *supra* note 5, at 686-87.

104. 512 S.W.2d 679 (Tex. 1974).

coverage.<sup>105</sup> The court did state, however, that stacking could occur between separate policies.<sup>106</sup>

## 2. States Refusing to Allow Passengers to Stack Drivers' Multi-Vehicle Policies

UM policies usually make a distinction between classes of insureds.<sup>107</sup> The policyholder and any relative occupying the same household are in one class while passengers and those who use the car with permission<sup>108</sup> are in another.<sup>109</sup> Some courts, accepting this distinction, allow drivers to stack their own coverage in a multi-vehicle policy, while refusing to allow passengers and permissive users to also stack the driver's multi-vehicle coverage.<sup>110</sup> The rationale for this distinction is that the owner of the vehicle pays the premiums and is, therefore, the intended beneficiary of the policy.<sup>111</sup> Consequently, passengers and permissive users are limited to the coverage applicable to the vehicle in which they are injured.<sup>112</sup> If available, the passenger and permissive user, however, may stack their own coverage.<sup>113</sup>

## 3. Stacking When Primary Coverage Exhausted

By virtue of Louisiana's 1977 amendments to its UM statute, the state now prohibits both inter- and intra-policy stacking.<sup>114</sup> If the insured is injured in a nonowned vehicle and exhausts the primary coverage, however, stacking is allowed.<sup>115</sup> This is accomplished by defining an insured vehicle as uninsured when coverage on it is less than the amount of damages suffered by the insured and other passengers.<sup>116</sup>

Recent Louisiana decisions support this legislative distinction. In

105. *Id.* at 684.

106. *Id.* at 685.

107. See 1966 STANDARD FORM, reprinted in WIDISS, *supra* note 2, app. A.1, at 293.

108. If the vehicle is used without permission the victim cannot recover. 6C APPLEMAN, *supra* note 3, § 4364, at 167-69 (rev. Buckley ed. 1979); see *Bond v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, 289 Md. 379, 384-85, 424 A.2d 765, 768-69 (1981).

109. See 1966 STANDARD FORM, reprinted in WIDISS, *supra* note 2, app. A.1, at 293.

110. See, e.g., *Cunningham v. Insurance Co. of N. Am.*, 213 Va. 72, 189 S.E.2d 832 (1972). *Contra* *Estate of Calibuso v. Pacific Ins. Co.*, 62 Hawaii 424, 616 P.2d 1357 (1980).

UM statutes make no such distinction. See, e.g., CAL. INS. CODE § 11580.2 (West Supp. 1982); MD. ANN. CODE art. 48A, § 541(c) (Supp. 1982); OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1983).

111. See *Cunningham v. Insurance Co. of N. Am.*, 213 Va. 72, 76-77, 189 S.E.2d 832, 836 (1972).

112. *Id.*

113. *Id.* at 77, 189 S.E.2d at 836.

114. LA. REV. STAT. ANN. § 22:1406(D)(1)(c) (West 1978).

115. *Id.* (D)(1)(c)(i), (ii).

116. *Id.* (D)(2)(b); accord OKLA. STAT. ANN. tit. 36, § 3636(c) (West Supp. 1982); WASH. REV. CODE ANN. § 48.22.030(1) (Supp. 1982).

*Courville v. State Farm Mutual Automobile Insurance Co.*,<sup>117</sup> the court permitted the insured to stack separate policies since he was injured in a nonowned vehicle.<sup>118</sup> Two months later, in *Branch v. O'Brien*,<sup>119</sup> the victim's attempt to stack coverage was denied because he was injured in an owned vehicle.<sup>120</sup> Rather, the court allowed the victim to recover under the policy with the highest limits.<sup>121</sup>

### C. States Allowing Stacking

The majority of jurisdictions invalidate the other insurance clause in UM policies and allow stacking,<sup>122</sup> usually for three reasons. First, many courts believe that other insurance clauses violate the controlling statute, which usually requires all policies to include UM insurance and mentions a minimum but not a maximum amount of coverage.<sup>123</sup> Therefore, it is believed that any attempt, by use of other insurance clauses, to set a maximum recovery for UM benefits must fail.<sup>124</sup> Second, courts feel it is a violation of public policy not to assure adequate compensation, believing that the insurance contract should be liberally construed in light of the contracting parties' expectations and unequal bargaining power.<sup>125</sup> Finally, it is considered inequitable to allow an insurance company to collect premiums on separate policies and then deny the multiple coverage that was purchased.<sup>126</sup>

The landmark case allowing stacking is *Bryant v. State Farm Mutual Automobile Insurance Co.*<sup>127</sup> In that Virginia case, while driving a

117. 393 So. 2d 703 (La. 1981).

118. *Id.* at 705.

119. 396 So. 2d 1372 (La. Ct. App. 1981).

120. *Id.* at 1376.

121. *Id.* at 1376-77. The Louisiana statute allows the insured to contract for any amount of coverage as long as it is not less than the limits of bodily injury liability provided by the policy. LA. REV. STAT. ANN. § 22:1406(D)(1)(a) (West 1978).

122. WIDISS, *supra* note 2, § 2.59, at 198-200 (Supp. 1981).

123. *Safeco Ins. Co. of Am. v. Jones*, 286 Ala. 606, 614, 243 So. 2d 736, 742 (1970); *Courtemanche v. Lumbermens Mut. Ins. Cas. Co.*, 118 N.H. 168, 171-73, 385 A.2d 105, 107-08 (1978); *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389, 395-96, 241 A.2d 112, 115 (1968), *cited with approval in State Farm Mut. Auto. Ins. Co. v. Williams*, 481 Pa. 130, 140, 392 A.2d 281, 287 (1978).

124. *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389, 395-96, 241 A.2d 112, 115-16 (1968), *cited with approval in State Farm Mut. Auto. Ins. Co. v. Williams*, 481 Pa. 130, 140, 392 A.2d 281, 287 (1978).

125. *Curran v. Fireman's Fund Ins. Co.*, 393 F. Supp. 712, 715 (D. Alaska 1975); *Lambert v. Liberty Mut. Ins. Co.*, 331 So. 2d 260, 263 (Ala. 1976); *Bose v. American Family Mut. Ins. Co.*, 186 Neb. 209, 210-11, 181 N.W.2d 839, 840-41 (1970); *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 217, 181 N.W.2d 835, 837-38 (1970). *See Kozak v. Detroit Auto. Inter-Insurance Exch.*, 79 Mich. App. 777, 784-86, 262 N.W.2d 904, 907 (1977) (Kaufman, J., dissenting).

126. *See Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 792-93, 457 P.2d 34, 41-42 (1969); *Van Tassel v. Horace Mann Ins. Co.*, 296 Minn. 181, 187, 207 N.W.2d 348, 351-52 (1973); *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 212, 217, 181 N.W.2d 835, 837-38 (1970).

127. 205 Va. 897, 140 S.E.2d 817 (1965).



truck owned by his father, the insured was struck by an uninsured motorist. The victim sought to stack his own insurance and that covering the truck. The supreme court of that state held that the victim could recover under the UM provisions of both policies up to the extent of his damages.<sup>128</sup> The opinion cited a number of prior UM cases to establish the rule that the state's UM statute controls, and any provisions in an insurance policy that conflict with it are void.<sup>129</sup> The victim's policy provided that the insured would be paid only the amount by which its limits exceeded the limits in the primary policy. Since the statute required that the insured recover all sums he was legally entitled to, the court held that the policy provision was unenforceable.<sup>130</sup>

Similarly, the Kansas Supreme Court in *Davis v. Hughes*<sup>131</sup> allowed a victim to stack coverage on both cars included in her multi-vehicle policy and also that of a second policy owned by her son-in-law. The insurer, conceding that Kansas had generally allowed stacking when separate policies were involved, noted that no Kansas appellate court had yet decided whether stacking was permitted on a multi-vehicle policy.<sup>132</sup> The insurer relied on a limitation of liability clause<sup>133</sup> in the multi-vehicle policy to confine the UM coverage to that applicable to one car and prevent stacking. The court instead agreed with the Florida Supreme Court in *Tucker v. Government Employees Insurance Co.*,<sup>134</sup> which stated:

It is an anomaly to contend that if two automobiles are combined in the coverage of one . . . liability insurance policy, with uninsured motorist protection added that an exclusion

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128. *Id.* at 901-02, 140 S.E.2d at 820. The court expressed its disagreement with a prior federal court decision in *Travelers Indem. Co. v. Wells*, 316 F.2d 770, 773 (4th Cir. 1963) that, in interpreting Virginia law, refused to allow stacking. *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 902, 140 S.E.2d 817, 820 (1965).

129. *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 900, 140 S.E.2d 817, 819 (1965). The latest Virginia court to consider stacking held that an insured can be prevented from stacking by "clear and unambiguous language . . . on the face of the policy." *Goodville Mut. Cas. Co. v. Borrer*, 221 Va. 967, 970, 275 S.E.2d 625, 627 (1981).

130. *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 901, 140 S.E.2d 817, 820 (1965).

131. 229 Kan. 91, 622 P.2d 641 (1981).

132. *Id.* at 94, 622 P.2d at 644.

133. *Id.* The typical limit of liability clause states that:

The limit of liability for family protection coverage stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injuries sustained by one person as a result of any one accident and, subject to the above provision respecting each person; the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injuries sustained by two or more persons as a result of any one accident.

1966 STANDARD FORM, reprinted in WIDISS, *supra* note 2, app. A.1, at 293.

134. 288 So. 2d 238, 242 (Fla. 1973).

. . . may be validly inserted, but that if a separate policy covered each automobile such exclusion is invalid. The mere form of a policy — a combination coverage — should not be the predicate for an exclusion of additional coverage.<sup>135</sup>

Noting that it had repeatedly held that the UM statute was to be liberally construed,<sup>136</sup> the Kansas court stated that insurance policy provisions purporting to limit or dilute the state's broad, unqualified UM statute are unenforceable.<sup>137</sup> In view of the separate premium paid, the court concluded that whether coverage was in one or two policies should have no bearing on the issue.<sup>138</sup>

Some states have modified their previously anti-stacking legislation. For example, the Florida Supreme Court in *Kokay v. South Carolina Insurance Co.*<sup>139</sup> construed what was known as an anti-stacking statute<sup>140</sup> to allow inter-policy stacking when applicable policies covered different named insureds.<sup>141</sup> If the policy was a multi-vehicle one or if the insured had several separate policies in his name, he was limited to the coverage applicable to any one vehicle.<sup>142</sup> However, the statute was later amended so as to specifically exclude UM coverage from its anti-stacking provisions.<sup>143</sup> Consequently, it would appear that policies executed after the amendment will be subject to stacking whether issued to different named insureds or not.<sup>144</sup>

Similarly, amendments to the Wisconsin UM statute results in voiding other insurance clauses that operated to reduce liability below the actual amount of the victim's damages or the total indemnification promised by the policy, whichever is less.<sup>145</sup> Prior to 1975, the Wiscon-

135. *Davis v. Hughes*, 229 Kan. 91, 98, 622 P.2d 641, 647-48 (1981) (quoting *Tucker v. Government Employees Ins. Co.*, 288 So. 2d 238 (Fla. 1973)).

136. *Davis v. Hughes*, 229 Kan. 91, 96, 622 P.2d 641, 646 (1981).

137. *Id.* at 98, 622 P.2d at 646-47.

138. *Id.* at 98, 622 P.2d at 648. This rationale has not been followed in other jurisdictions. See *supra* notes 92-106 and accompanying text.

139. 380 So. 2d 489 (Fla. 1980), *aff'd*, 398 So. 2d 1355 (Fla. 1981).

140. See FLA. STAT. ANN. § 627.4132 (West 1977), now codified at FLA. STAT. ANN. § 627.4132 (West Supp. 1982).

141. *Kokay v. South Carolina Ins. Co.*, 380 So. 2d 489, 491-92 (Fla. 1980), *aff'd*, 398 So. 2d 1355 (Fla. 1981). The insured son was covered by separate policies issued to his mother and father and was allowed to stack. 380 So. 2d at 490.

142. 380 So. 2d at 491-92. The state's supreme court expressed its disagreement with the district court of appeals' decision in *McLellan v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 811, 812 (Fla. Dist. Ct. App. 1979), which interpreted Florida's UM statute to prevent all stacking. *Kokay v. South Carolina Ins. Co.*, 380 So. 2d 489, 491 (Fla. 1980), *aff'd*, 398 So. 2d 1355 (Fla. 1981).

143. FLA. STAT. ANN. § 627.4132 (West Supp. 1982).

144. The issue of whether amendments to a UM statute are applicable to policies issued before the amendment has been decided differently among the states. Compare *Thibodeaux v. Oliver*, 394 So. 2d 684, 686-87 (La. Ct. App. 1981) (law in force on date of accident controls as long as no change in terms and conditions of policy occurs) with *McKinley v. Prudential Prop. & Cas. Ins. Co.*, 619 P.2d 1269, 1270 (Okla. Ct. App. 1980) (law in force at time policy issued controls).

145. *Landvatter v. Globe Sec. Ins. Co.*, 100 Wis. 2d 21, 26, 300 N.W.2d 875, 878, *cert.*

sin Supreme Court had consistently enforced other insurance clauses.<sup>146</sup>

#### IV. SUGGESTIONS FOR ADEQUATE COMPENSATION

By providing for mandatory automobile insurance, unsatisfied claim and judgment funds, and uninsured motorist coverage, states have made great progress towards guaranteeing compensation to victims of uninsured motorist accidents. Regardless of these efforts, however, circumstances still exist that may decrease or eliminate the compensation that the injured party receives.<sup>147</sup> Therefore, many jurisdictions have gone even further by allowing a person insured under more than one UM policy to stack coverage when necessary.<sup>148</sup> Although the availability of stacking normally inflates the cost of policy premiums, due to the insurer's added risk of liability, the greater assurance of adequate compensation to a potential victim justifies these additional costs.

A distinction should be drawn, however, between stacking of multi-vehicle and separate policies. The better rule only allows inter-policy stacking because the insurance company is merely required to pay what each individual policy promises in return for separate premiums paid. The public policy behind UM insurance is defeated when the insurer is able to avoid liability merely because other policies cover the victim.<sup>149</sup> On the other hand, intra-policy stacking should be denied and coverage limited to that applicable to one vehicle, because that is all the policy promises.<sup>150</sup> To allow intra-policy stacking is unfair to the insurance company because liability would be increased and the company would be unable to clearly assess the risk so as to reflect it in the price of the premium.<sup>151</sup>

In jurisdictions that refuse to allow stacking, alternate steps could be taken to help assure more compensation. Legislatures could not only mandate that *all* liability policies contain UM provisions but also increase the minimum statutory amount for UM coverage.<sup>152</sup> This would increase compensation, because inflation in the last decade has

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*denied, id.* at 23 n.1, 300 N.W.2d at 876 n.1 (Wis. Ct. App. 1980). See WIS. STAT. ANN. § 631.43(1) (West 1980).

146. See, e.g., *Nelson v. Employers Mut. Cas. Co.*, 63 Wis. 2d 558, 567, 217 N.W.2d 670, 674 (1974).

147. See *supra* notes 7-30 and accompanying text.

148. WIDISS, *supra* note 2, § 2.59 at 198-201 (Supp. 1981).

149. 8C APPLEMAN, *supra* note 3, § 5101, at 451-52 (1981).

150. *Id.* at 451.

151. *Id.* at 499.

152. The reason for most UM litigation today is the failure of insurance companies and legislatures to require additional coverage. 3 R. LONG, THE LAW OF LIABILITY INSURANCE § 24.38, at 24-127 (1979). In addition, the practice of a majority of states in allowing insureds to reject UM coverage altogether defeats the purpose of such coverage. *Id.* § 24.11, at 24-27.

transformed small losses into large ones,<sup>153</sup> without adding too much to the price of the individual policy.<sup>154</sup> The need for a higher statutory minimum is clear when the practices of insurance companies are examined. When consumers go comparison shopping for insurance, few companies will quote a price that includes coverage beyond the statutory minimum or else risk losing business.<sup>155</sup> Often the policy price is spoken of in a lump sum total, possibly omitting the information that increased UM coverage is available since it will add to the policy's cost.<sup>156</sup> In addition, by precluding the insured's option to reject UM coverage, all drivers would be entitled to at least some indemnification.

Moreover, since the chances of being involved in an accident with an uninsured motorist are not remote,<sup>157</sup> both states and insurance companies have a responsibility to educate the public as to the nature of, and necessity for, increased UM coverage.<sup>158</sup> For example, the General Assembly of Maryland recently amended the state's UM statute to enable insureds to contract for coverage above the statutory minimum if the amount does not exceed the policy's liability coverage.<sup>159</sup> Increased UM coverage is optional, however, and the legislature's efforts to protect its citizens may be meaningless if the public is uninformed as to the importance of exercising that option.

State legislatures can aid in increasing compensation by mandating that insurance policy provisions be made more understandable. This can be done by giving specific examples of simplified language to be used in standard policy clauses.<sup>160</sup> Only when the policyholder is fully informed about the extent of the coverage, including exclusions

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153. Comment, *supra* note 5, at 675; see 8C APPLEMAN, *supra* note 3, § 5103, at 515 (1981).

154. For example, the price in Maryland for the minimum statutory amount (20/40) offered by Allstate is \$7.00 per car per six months. For 50/100 coverage the price is \$9.10 per car per six months. For 100/300 it is \$13.50 per car per six months. Telephone interview with John Lissau, Authorized Insurance Agent with Allstate Indemnity Co. (December 15, 1982).

155. *Id.*

156. *Id.* Of course this practice depends on the individual client. Often clients will want maximum protection for their families and increased UM coverage would be recommended. *Id.*

157. Only half of the states require automobile liability insurance. 6B APPLEMAN, *supra* note 3, § 4299, at 300-01 (rev. Buckley ed. 1979). In a 1977 report prepared for the Motor Vehicle Administration it was estimated that on any given day 2.8% of Maryland drivers are uninsured. S. Versace, *The Nature and Extent of the Uninsured Motorist Problem in Maryland* 32 (August 1977) (available from the Motor Vehicles Administration).

158. This responsibility is even more crucial in states that give the insured the option to reject coverage. For example, while West Virginia does make UM insurance optional, it requires the insured to sign a letter that states that the commissioner of motor vehicles has determined that UM insurance is important in light of the number of uninsured vehicles on state roads. W. VA. CODE § 33-6-31(b) (1982).

159. MD. ANN. CODE art. 48A, § 541(c) (Supp. 1982).

160. See, e.g., OR. REV. STAT. § 743.792 (1981) (gives suggestions for policy language, but does not mandate that language be utilized).

and limitations, will he be able to make an intelligent choice as to the amount of additional coverage that will sufficiently meet his needs. By utilizing complex and confusing policy language,<sup>161</sup> insurance companies make it virtually impossible for the average insured to know what his premiums buy.<sup>162</sup>

## V. CONCLUSION

Either by statute or judicial decision, every state has indicated an intent to provide compensation to victims of uninsured motorist accidents. By allowing stacking in various types of situations, the majority of states have made great strides towards securing adequate indemnification. A minority of jurisdictions, including Maryland, refuse to permit stacking. Rather, these states often allow the insured to contract for increased coverage and define as uninsured a motorist whose liability coverage is less than the victim's UM coverage. Further steps, however, can be taken. By increasing the statutory minimum amount of UM coverage, eliminating the option to reject coverage, educating the public as to the nature of UM benefits, and simplifying policy provisions, states and insurance companies can fulfill the purpose of UM insurance and assure more adequate compensation to innocent victims of uninsured motorist accidents.

*Donna M. Maag*

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161. Note, *Intra-Policy Stacking of Uninsured Motorist and Medical Payments Coverages: To Be or Not to Be*, 22 S.D.L. REV. 349, 357 (1977).

162. Comment, *supra* note 5, at 691-93. See OR. REV. STAT. § 743.792 (1981) for an example.