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UNDERINSURED MOTORIST COVERAGE IN MISSISSIPPI

*Richard T. Phillips**

INTRODUCTION

Effective January 1, 1980, the Mississippi Uninsured Motorist Act was amended by the addition of the "underinsured" concept of uninsured motorist coverage.[1] This amendment is the most significant modification of the Mississippi uninsured motorist statute by the legislature since the Act's adoption in 1966.[2] Inclusion of the "underinsured" feature in the mandatory provisions of the Mississippi uninsured motorist statutes greatly expands the potential for protection afforded Mississippi motorists by the Act. Uninsured motorist coverage has provided a beneficial means of protection for Mississippi motorists for the past fifteen years. The addition of the "underinsured" concept will make the Mississippi Uninsured Motorist Act relevant to even more Mississippians in the 1980s and beyond.

Injuries resulting from automobile accidents are one of the most frequent, and often most catastrophic, misfortunes faced in today's society.[3] Over the past sixty years many diverse groups have worked to afford protection from such injuries and recompense to those who suffer them.[4] The development of automobile liability insurance was the foremost step towards providing a sound means of financial compensation to those suffering such injuries. When problems arose with liability insurance coverage, for example, the absence of such coverage or the existence of policy exclusions, the concept of uninsured motorist insurance was developed to "fill the gap."[5]

In the past the amount of automobile insurance protection pro-

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1. Act of March 23, 1979, ch. 429, 1979 Miss. Laws 758 (codified at MISS. CODE ANN. §§ 83-11-101 to -111 (Supp. 1982)).

2. Uninsured Motorist Act ch. 524., 1966 Miss. Laws 978 (codified as amended at MISS. CODE ANN. §§ 83-11-101 to -111 (1972 & Supp. 1982)).

3. There were 32,712 motor vehicle accidents, 11,383 injuries, and 697 fatalities on Mississippi highways during 1980. There were 7,521 reported injury accidents, 606 fatal accidents, and 24,855 reported property damage accidents in that year. The total economic loss in Mississippi from accidents in 1980 was estimated in excess of $473 million. *Summary of All Reported Motor Vehicle Traffic Accidents and Activities of All Field Personnel*, MISSISSIPPI: ANNUAL SURVEY 1980, MISS. HIGHWAY SAFETY PATROL, DRIVER SERVICES DIVISION, STATISTICAL BUREAU.

4. *See infra* notes 11-33 and accompanying text.

5. For a discussion of the history of uninsured motorist insurance, see Phillips, *A Guide to Uninsured Motorist Insurance Law In Mississippi*, 52 MISS. L.J. 255, 256-59 (1982).

vided to an injured Mississippi motorist was outside the control of the injured party. Beyond the minimum protection afforded by the Mississippi Safety Responsibility Act the amount of coverage was, from the point of view of the person injured, a matter of chance.[6] The amount of automobile insurance applicable was determined by the tortfeasor or the owner of the tortfeasor's vehicle, rather than the injured party or his family. A major effect of underinsured motorist insurance is the reversal of this situation. With underinsured motorist coverage each Mississippi motorist may determine the amount of automobile personal injury insurance protection he desires for himself and his own family.[7]

Although the underinsured motorist concept adds a new dimension to the protection afforded by uninsured motorist insurance, it is important to note that in Mississippi underinsured motorist coverage is not a separate insurance entity. Underinsured motorist coverage in this state is an amendment of, and an addition to, the existing Mississippi Uninsured Motorist Act.[8] The rich legislative and judicial history of the Mississippi Uninsured Motorist Act applies with full force to underinsured coverage. The guidelines laid down by the Mississippi Supreme Court through more than fifteen years of interpretation and application of uninsured motorist insurance apply equally to underinsured coverage. Underinsured motorist coverage must always be interpreted and applied in the spirit and under the guidelines established by the court and the legislature for uninsured motorist insurance in general.[9]

The addition of the underinsured concept will give rise to new questions of both substance and procedure under the Mississippi Uninsured Motorist Act. Because of the increased applicability of uninsured motorist insurance resulting from the underinsured feature, these questions are of immediate importance to Mississippi motorists and their attorneys. In addressing these issues the Mississippi Supreme Court, no doubt, will apply principles already established in its interpretation of uninsured motorist coverage.

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6. The Mississippi Motor Vehicle Safety Responsibility Law, MISS. CODE ANN. § 63-15-11 (Supp. 1982), now requires minimum liability coverage of $10,000 per person injured and an aggregate limitation of $20,000 per accident. Many insured drivers carry liability coverage substantially in excess of the minimum amount. The decision as to how much coverage in excess of the minimum a driver carries, however, is determined by that driver's own desire and ability to pay for the excess coverage.

7. *See infra* notes 31-33 and accompanying text.

8. *See infra* note 11.

9. *See infra* notes 49-63.

The court will look to previous Mississippi uninsured motorist cases for precedent and for guidance as to purpose and application of both uninsured and underinsured motorist coverage. With regard to issues not previously addressed, the court will continue to look to decisions from other states for direction.[10]

It is the purpose of this article to examine the new underinsured motorist aspect of the Mississippi Uninsured Motorist Act. The development of the underinsured motorist concept is traced and its practical application examined. Previous decisions under the Mississippi Act are studied for pronouncements with regard to the general construction of the Act. The underinsured motorist statutes of other states are surveyed as are decisions under those statutes with regard to questions likely to arise in Mississippi. Also discussed are specific questions unique to the underinsured aspect of Mississippi uninsured motorist coverage. It is hoped that this examination of the Mississippi statute, its legislative and judicial history, as well as the statutes and decisions of other states will be of assistance in the interpretation and application of underinsured motorist coverage in Mississippi.

DEVELOPMENT OF THE UNDERINSURED MOTORIST CONCEPT

Underinsured motorist coverage is an outgrowth from and development of uninsured motorist insurance. In Mississippi, as in most states,[11] underinsured motorist coverage is not a separate form of insurance. Rather, it is a concept logically engrafted into the state's uninsured motorist statute.

Uninsured motorist insurance applies when the person legally responsible for an automobile accident is without liability insurance coverage. When the uninsured motorist coverage requirements are met, the insured may collect from his own insurer all sums he is legally entitled to recover as damages from the owner or operator of the uninsured vehicle.[12] Underinsured coverage differs in that it allows the insured to recover when the tortfeasor has insurance but in an amount insufficient to compensate the injured party for his full damages.

The roots of underinsured motorist coverage lie in the

10. *See, e.g.* Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1380-81 (Miss. 1977)(relying on Alabama decision in construing limits of liability clause in policy); Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 433 (Miss. 1973)(citing a Virginia case regarding the notice requirement of an uninsured motorist statute).

11. The statutes of Iowa, New Mexico, North Carolina, Ohio and South Dakota, for example, all engraft underinsured coverage into the uninsured motorist statute. *See infra* note 37.

12. Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 461-62 (Miss. 1971).

development of automobile insurance itself. In the early part of this century the horseless carriage was a rare novelty. It soon became apparent, however, that the automobile afforded a revolutionary new means of transportation. During the first half of the twentieth century a phenomenal increase in the number of automobiles was witnessed, and by 1950 the automobile had become an integral part of American life. With the increase in the number of motor vehicles as well as their increased speed and mobility came a corresponding increase in the number of accidents and injuries suffered by persons using the highways.[13] Traditional tort principles of negligence and liability provided a legal means for resolving disputes between the drivers of automobiles and persons injured by their vehicles.[14] Unfortunately, not all persons against whom judgments were rendered as a result of such disputes had sufficient financial means of compensating the victims of their negligence. Automobile liability insurance arose as a means of protecting motorists from unbearable liability and of providing a source of compensation to the innocent victims of motorists' negligence. Motor vehicle liability insurance guaranteed a solvent fund from which innocent victims could be compensated. Many automobile accidents, however, involved motorists who had no liability insurance and were otherwise financially irresponsible. This problem was addressed by the enactment of financial responsibility laws. The first financial responsibility law was adopted in Connecticut in 1925,[15] and Mississippi enacted its financial responsibility law in 1952.[16]

As do most current financial responsibility laws, the Mississippi Motor Vehicle Safety Responsibility Act requires a motorist to produce evidence of financial responsibility after an accident has occurred.[17] For most motorists acquisition of insurance in advance of an accident is the most practical way to comply with the requirements of the financial responsibility laws. The law, therefore, has induced most motorists to secure and maintain at least minimum amounts of liability insurance coverage. The prob-

13. According to Andrew Tobias there were four automobiles in the United States in 1896. Two were in St. Louis. They collided. Both drivers were hurt, one seriously. A. TOBIAS, THE INVISIBLE BANKERS, EVERYTHING THE INSURANCE INDUSTRY NEVER WANTED YOU TO KNOW 303 (1982).

14. *See e.g.*, Ulmer v. Pistole, 115 Miss. 485, 495, 76 So. 522, 524 (1917).

15. Financial Responsibility Law, ch. 183, 1925 Conn. Pub. Acts 3956 (repealed 1927)(current version at CONN. GEN. STAT. § 14-112(1977)).

16. Motor Vehicle Safety Responsibility Act, ch. 359, 1952 Miss. Laws 512 (codified as amended at MISS. CODE ANN. §§ 63-15-1 to -75 (1972 & Supp. 1982)).

17. MISS. CODE ANN. § 63-15-11 (Supp. 1982).

lem with the Mississippi Act, as with most financial responsibility laws, is two-fold: first, it does not operate until after an accident has occurred; second, the minimum amounts of insurance coverage required by the Act are often insufficient to adequately compensate the injured victim. The problem of "one free accident" gave rise to uninsured motorist insurance.[18] The problem of inadequate coverage, in turn, gave rise to the underinsured motorist concept.[19]

Financial responsibility laws requiring proof of insurance only after the first collision do serve as an incentive to encourage the purchase of liability insurance. They do not, however, provide any relief for the innocent victim of the first accident. No coverage for the victim exists, for instance, where the negligent motorist violates the law by having no policy of liability insurance or where coverage is denied under policy exclusions. In response to these problems a number of states adopted state-supported "unsatisfied judgment funds."[20] The concept of uninsured motorist insurance was developed by the private insurance industry as an alternative to such publicly administered judgment funds and compulsory insurance programs.[21]

Automobile owners recognized the need to protect themselves and their families from injury by financially irresponsible motorists, and the insurance industry found a demand for the new uninsured motorist insurance. In 1957 New Hampshire enacted legislation requiring insurance carriers to offer the uninsured motorist coverage as a supplement to every automobile liability policy issued in the state.[22] In 1958 a standard uninsured motorist endorsement was drafted which could be incorporated into the standard automobile liability policy issued by the insurance industry.[23] Since that date every state has enacted some type of legislation requiring uninsured motorist coverage as either a mandatory or optional endorsement to automobile liability policies.[24]

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18. Phillips, *supra* note 5, at 257-58.

19. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.37a (Supp. 1981).

20. *See, e.g.* Act of April 26, 1972, ch. 73 § 1, Md. Laws 281 (codified as amended at MD. ANN. CODE art. 48A, §§ 243-243L (1957 & Supp. 1982) (creating a state automobile insurance fund); Unsatisfied Claim and Judgment Fund Law, ch. 174, 1952 N.J. Laws 570 (codified as amended at N.J. STAT. ANN. § 39:6-61 to -91 (West 1973 & Supp. 1982)) (same).

21. Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 432 (Miss. 1973).

22. Act of August 2, 1957, ch. 305, § 305:8, 1957 N.H. Laws 386 (codified at N. H. REV. STAT. ANN. § 264:14-15 (1982).

23. A.WIDISS, *supra* note 19, § 1.10.

24. *See* Note, *Insurer Intervention in Uninsured Motorist Cases, 55* IND. L.J. 717, 717 n. 1 (1980)(recent compilation of state uninsured motorist statutes).

Uninsured motorist coverage provided a source of at least minimum compensation for the victim of the "one free accident." It offered no help, however, as to the problem of inadequate compensation. From the mid-1950s until the 1970s insurance companies throughout the United States wrote uninsured motorist coverage in only the minimum amounts required by each state's financial responsibility law.[25] It was clear that the financial risks of property damage and personal injury resulting from automobile accidents were far greater than the minimum amounts of insurance mandated by financial responsibility laws. Many prudent motorists purchased liability insurance with limits substantially greater than the minimum amounts required by the statutes. Many felt it unreasonable for insurance companies to preclude their customers who purchased insurance in higher limits for liability protection from buying uninsured or "underinsured" coverage in equal amounts for themselves or their own families. Insurance companies, however, generally refuse to write the more extensive uninsured motorist coverage.[26]

The problem of inadequate uninsured motorist coverage frequently arose in cases of multiple claims. Even where the tortfeasor's limits of liability insurance conformed with the requirements of the statute, the effect of such coverage was often dissipated by the claims of multiple persons injured in the same accident. Few jurisdictions were willing to hold that the depletion or exhaustion of conforming limits demoted the tortfeasor to the status of an uninsured motorist.[27]

Another inequity with uninsured motorist coverage was manifest when the injured party had coverage on several vehicles. The injured victim in such a situation was better off financially if the tortfeasor had no insurance than if he carried liability insurance in the minimum required amount. The Mississippi case of *McMinn v. New Hampshire Insurance Co.*[28] is an illustration of this situation. In *McMinn* the negligent tortfeasor carried liability insurance in the amount of $5,000, the minimum amount then required by statute. The plaintiff's damages greatly exceeded this amount. The plaintiff was covered by uninsured motorist insurance

25. A. WIDISS, *supra* note 19, § 2.37a (Supp. 1981).

26. *Id.*

27. *See infra* notes 168-78 and accompanying text.

28. 276 So. 2d 682 (Miss. 1973). The author of this article argued both *McMinn* and Chrestman v. State Farm Mut. Auto. Ins. Co., 276 So. 2d 685 (Miss. 1973) before the Mississippi Supreme Court in 1973. In a memorandum opinion the court stated that *Chrestman* was controlled by *McMinn.* Id. at 685. The two cases presented similar factual situations.

on two vehicles. By "stacking" the uninsured motorist policies,[29] the plaintiff would recover $10,000 if the tortfeasor had no liability insurance. Because the tortfeasor carried the minimum liability coverage, however, plaintiff's recovery was limited to the $5,000 amount carried by the negligent motorist.

In *McMinn* the Mississippi Supreme Court joined the majority of states in refusing to judicially include the "underinsured" motorist in the definition of uninsured motorist. Because the tortfeasor carried liability insurance in the minimum amounts required by law, the court ruled he was not an uninsured motorist within the meaning of the Act as it then read. The uninsured motorist coverage of the plaintiff's policies, therefore, was inapplicable.[30]

In 1979 the Mississippi Legislature responded to the problem of inadequate coverage by amending the Mississippi Uninsured Motorist Act. The legislature amended the statutory definition of "uninsured motorist" to specifically include the "underinsured" motorist.[31] The amended statute, effective January 1, 1980, provides that the uninsured motorist limits of a policy may be increased to any amounts not to exceed the limits for bodily injury liability insurance.[32] Included in the statutory definition of an "uninsured motor vehicle" is: "An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage . . . ."[33]

Effective for the 1980s and beyond, the Mississippi law of uninsured motorist insurance includes by legislative requirement the underinsured motorist concept.

COMPARISON OF STATUTES

During the 1970s legislation was enacted in several states requiring insurers to make higher limits of uninsured and underinsured motorist coverage available. By 1980 twenty-one states had enacted legislation which enabled an injured person to recover through underinsured motorist coverage.[34]

In most states, as in Mississippi, the underinsured feature is

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29. *See infra* notes 64-106 and accompanying text.

30. 276 So. 2d at 683-85.

31. Act of March 23, 1979, ch. 429, § 1, 1979 Miss. Laws 758 (codified at MISS. CODE ANN. § 83-11-103 (c)(iii)(Supp. 1982)).

32. MISS. CODE ANN. § 83-11-101 (1)(Supp. 1982).

33. MISS. CODE ANN. § 83-11-103 (c) (iii)(Supp. 1982).

34. *See generally* 3 R. LONG, THE LAW OF LIABILITY INSURANCE 24-205 App. A (1982) (comparison of state uninsured motorist statutes).

incorporated into the existing uninsured motorist law.[35] A number of these states by legislative mandate include the underinsured motorist in the statutory definition of an uninsured motorist.[36] The legislation of some states, while engrafting underinsured motorist coverage into the uninsured motorist requirements, defines underinsured coverage as a separate form of coverage.[37] Under the Mississippi statute, it is clear that existing rules of uninsured motorist construction continue to apply with equal force to the underinsured motorist.

The statutes of various states differ in their manner of defining an underinsured motorist. The various statutes have utilized four different approaches. In eight states, including Mississippi, the tortfeasor's vehicle is deemed underinsured when its bodily injury liability limits are less than the insured's uninsured motorist limits.[38] In three states, where underinsured motorist coverage is a separate or independent coverage, the tortfeasor's vehicle is deemed underinsured when its bodily injury limits are less than the insured's underinsured motorist limits.[39] In nine states the tortfeasor's vehicle is deemed underinsured when its bodily injury limits are inadequate to compensate the insured for his damages.[40] In one state, New York, underinsured motorist coverage is ap-

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35. *See, e.g.*, CONN. GEN. STAT. § 38-175c (1981); FLA. STAT. ANN. § 627.727 (West Supp. 1974-1982); LA. REV. STAT. ANN. § 22-1406D (West 1978 & Supp. 1982); ME. REV. STAT. ANN. tit. 24-A, § 2902 (1964 & Supp. 1982-1983); MISS. CODE ANN. §§ 83-11-101 to -111 (1972 & Supp. 1982); N.H. REV. STAT. ANN. §§ 259:117, 264:15 (1982); OKLA. STAT. ANN. tit. 36, § 3636 (West 1976 & Supp. 1982-1983); TEX. INS. CODE ANN. art. 5.06-1 (Vernon 1981); VT. STAT. ANN. tit. 23, § 941 (1978 & Supp. 1982).

36. *See, e.g.*, FLA. STAT. ANN. § 627.727 (3)(b)(West Supp. 1974-1982); LA. REV. STAT. ANN. § 22-1406 D (2)(b) (West 1978); MISS. CODE ANN. § 83-11-103 (c)(iii) (Supp. 1982); N.H. REV. STAT. ANN. § 259:117 (1982); OKLA. STAT. ANN. tit. 36, § 3636 (c) (West Supp. 1982-1983).

37. *See, e.g.*, IOWA CODE ANN. § 516 A.1 (West Supp. 1982-1983); N.M. STAT. ANN. § 65-5-301 (1978 & Supp. 1982); N.C. GEN. STAT. § 20-279.21 (b)(4)(Supp. 1981); OHIO REV. CODE ANN. § 3937.81.1 (Page Supp. 1981); S.D. CODIFIED LAWS ANN. § 58-11-9 (1978 & Supp. 1982).

38. CONN. GEN. STAT. § 38-175c (b)(2) (1981); FLA. STAT. ANN. § 627.727 (3)(b)(West Supp. 1974-1982); GA. CODE ANN. § 56-407.1 (D)(ii) (Supp. 1982); ME. REV. STAT. ANN. tit. 24-A, § 2902.1 (Supp. 1982-1983); MISS. CODE ANN. § 83-11-103 (c) (iii) (Supp. 1982); N.M. STAT. ANN. § 66-5-301B (Supp. 1982); TENN. CODE ANN. § 56-7-1201 (1980 & Supp. 1982); VT. STAT. ANN. tit. 23, § 941 (f) (Supp. 1982).

39. ILL. ANN. STAT. ch. 73, § 755a-2 (Smith-Hurd Supp. 1982-1983); N.C. GEN. STAT. § 20-279.21 (b)(4) (Supp. 1981); TEX. INS. CODE ANN. art. 5.06-1 (2)(b) (Vernon 1981).

40. KY. REV. STAT. § 304.39-320 (1981); LA. REV. STAT. ANN. § 22-1406 D (2)(b) (West Supp. 1982); MASS. ANN. LAWS, ch. 175, § 113 L (1) (Michie/Law. Co-op. Supp. 1982); OHIO REV. CODE ANN. § 3937.181 (A) (Page Supp. 1981); OKLA. STAT. ANN. tit. 36, § 3636 (c) (West Supp. 1982-83); S.C. CODE ANN. § 56-9-831 (Law. Co-op. Supp. 1982); S.D. COMP. LAWS ANN. § 58-11-9 (Supp. 1982); WASH. REV. CODE ANN. § 48.22.030 (1) (Supp. 1982). In Iowa, Declaratory Ruling 1980-1 of the Iowa Insurance Department responded to an inquiry of the Iowa Insurance Institute that the term "underinsured motor vehicle coverage" is "a word of art among insurers" which means "insurance which protects one against the risk that another driver . . . may not have sufficient insurance to cover the full extent of liability . . . ."

plicable when the tortfeasor's liability limits are less than the insured's own liability limits.[41]

The obligation of the insurer under the statute to provide underinsured motorist coverage takes one of three basic forms: (A) In some states the insurer is obligated to provide underinsured motorist coverage on a mandatory basis;[42] (B) in other states it must be offered by the insurance company as an option;[43] (C) in still other states the burden is placed on the insured to request the coverage.[44] In Mississippi, as in most states, the coverage is automatic unless affirmatively rejected in writing by the insured.[45]

The similarities and differences between the Mississippi statute and those of other states are relevant when addressing specific issues of underinsured motorist interpretation. For example, with regard to "stacking" of underinsured motorist limits for coverage purposes,[46] enforceability of limits exhaustion requirements,[47] or provisions regarding offsets for payments by the tortfeasor's liability carrier,[48] the presence or absence of specific statutory requirements is relevant and often controlling. Each of these issues is addressed in the following portions of this article.

INTERPRETATION OF UNDERINSURED MOTORIST COVERAGE

The cardinal rule of interpretation in underinsured motorist cases in Mississippi is as follows: Since the Mississippi statute includes the underinsured motorist in the definition of uninsured motorist, the statutory requirements and established rules of construction for uninsured motorist insurance apply also to underinsured motorist coverage.

Three general rules of construction of uninsured motorist coverage in Mississippi apply also in underinsured cases.[49] First, enactment of the Mississippi Uninsured Motorist Act indicates the legislative public policy of protecting motorists and providing for them a means of collecting all sums to which they are entitled

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41. N.Y. INS. LAW § 167 (2-a) (McKinney Supp. 1982-1983).

42. *See, e.g.*, ME. REV. STAT. ANN. tit. 24-A, § 2902(2) (Supp. 1982-1983); VT. STAT. ANN. tit. 23, § 941 (a) & (c) (Supp. 1982).

43. *See, e.g.*, MASS. ANN. LAWS, ch. 175, § 113L (Michie/Law. Co-op. 1977 & Supp. 1982); N.Y. INS. LAW § 167 (2-a) (McKinney Supp. 1982-1983); S.D. COMP. LAWS ANN. § 58-11-9.4 (Supp. 1982); TENN. CODE ANN. § 56-7-1201 (Supp. 1982).

44. *See, e.g.*, KY. REV. STAT. § 304.39-320 (1981); N. C. GEN. STAT. § 20-279.21 (b)(3) (Supp. 1979).

45. Parker v. Cotton Belt Ins. Co., 314 So. 2d 342 (Miss. 1975).

46. *See infra* notes 64-106 and accompanying text.

47. *See infra* notes 168-78 and accompanying text.

48. *See infra* notes 117-31 and accompanying text.

49. Phillips, *supra* note 5, at 259-60.

as a result of injury by irresponsible drivers.[50] Because the Act is remedial in nature, its provisions are to be liberally construed to accomplish its purpose of providing adequate recompense to the injured party.[51]

Second, following the established rule of construction in insurance law, where a policy contains provisions which are ambiguous, such provisions are construed against the insurer who prepared them and in favor of the insured for whose benefit the coverage is required.[52]

Finally, while the policy of insurance may expand the coverage required by the statute, it cannot reduce such coverage. Any policy provisions in conflict with the statute and purporting to reduce the coverage required by the statute are void.[53]

With underinsured motorist coverage as with uninsured motorist insurance in general, the provisions of the policy must always be examined in light of the above three rules. As with all uninsured motorist insurance, coverage may be provided by the law even if expressly excluded by the policy. On the other hand, the policy may provide coverage more broad than the minimum requirements of the Act. Both the policy and the statutory requirements must be examined in each case. In determining whether coverage exists, ambiguous policy provisions must be construed in favor of the insured. Additionally, the requirements of the statute must be liberally construed to accomplish the purpose of providing protection to the injured party.

Most underinsured motorist questions will be answered by existing uninsured motorist law. Coverage, for instance, is still predicated upon the existence of an "insured."[54] There remain two classes of "insureds" under the Mississippi Act.[55] the first class,

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50. Parker v. Cotton Belt Ins. Co., 314 So. 2d 342, 344 (Miss. 1975).

51. *See, e.g.*, Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 437 (N.D. Miss. 1976) (liberal construction maximizes humanitarian purpose), *aff'd* mem. per curiam, 539 F.2d 574 (5th Cir. 1976); Parker v. Cotton Belt Ins. Co., 314 So. 2d 342, 344 (Miss. 1975) (remedial nature of statute compels broad interpretation).

52. *See, e.g.*, St. Arnaud v. Allstate Ins. Co., 501 F. Supp. 192, 194 (S.D. Miss. 1980) (ambiguous limits of liability clause allowed stacking of uninsured motorist coverge); State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So. 2d 805, 810 (Miss. 1970) (where policy provisions subject to two equally reasonable interpretations, the one allowing greater indemnity prevails; *See also* Pearthree Hartford Accident & Indem. Co., 373 So. 2d 267, 270-71 (Miss. 1977); Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381-82 (Miss. 1977).

53. *See, e.g.*, Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 769, 777-78 (Miss. 1973) (policy provision excluding injured party from coverage held violative of policy of uninsured motorist statute); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 459 (Miss. 1971) (policy provision may not restrict source of funds to which insured is legally entitled by requiring written consent before settlement by insured).

54. MISS.CODE ANN. § 83-11-101 (1) (Supp. 1982).

55. *See* Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 771-77 (Miss. 1973).

for which broad coverage is provided, consists of "the named insured and, while residents of the same household, the spouse of any such named insured and relatives of either."[56] The second class of insureds includes "any person who uses, with the consent, expressed or implied of the named insured, the motor vehicle to which the policy applies, and a guest in such motor vehicles."[57] Coverage is afforded to the second class of insureds only while they are occupying or using the vehicle for which the uninsured motorist policy was issued.[58]

Although broadened by the addition of the underinsured feature, the term "uninsured motor vehicle" retains its previous definitions as well. As specifically defined by statute, the term now includes: (1) a motor vehicle as to which there is no liability insurance covering bodily injury; (2) a motor vehicle as to which the insurer has denied coverage or is insolvent; (3) a motor vehicle the liability insurance on which is in limits less than the limits applicable under the injured person's uninsured motorist coverage; (4) a motor vehicle as to which the bond or deposit in lieu of liability insurance is less than the legal liability of the injuring party; and (5) a motor vehicle the owner or operator of which is unknown.[59]

Traditional uninsured motorist rules govern as to matters of evidence,[60] direct actions against the insurer,[61] damages,[62] and the burden of proof.[63] For all its similarities to previous uninsured motorist practice, however, underinsured motorist coverage gives rise to new questions of interpretation and procedure. Several such questions are next addressed.

STACKING

One of the most litigated issues in uninsured motorist insurance law is the issue of "stacking." "Stacking" is the aggregation of coverages under different policies or on different vehicles to afford the insured recovery up to the full amount of his damages. The right of an injured party to "stack" uninsured motorist coverage

56. MISS. CODE ANN. § 83-11-103 (b) (Supp. 1982).
57. *Id.*
58. Stevens v. United States Fidelity Guar. Co., 345 So. 2d 1041, 1043 (Miss. 1977).
59. MISS. CODE ANN. § 83-11-103 (c)(i)-(v) (Supp. 1982).
60. Phillips, *supra* note 5 at 306-11.
61. *See infra* notes 193-99 and accompanying text.
62. Phillips, *supra* note 5 at 313-16.
63. Phillips, *supra* note 5 at 306-11.

is well established under Mississippi law.[64] With underinsured motorist insurance the "stacking" concept takes on an additional significance. In underinsured cases there are two stacking issues: (1) the traditional issue of stacking for recovery purposes, and (2) the new issue of stacking for coverage purposes.

The first issue, that of stacking underinsured coverage for the purpose of obtaining a full recovery, is governed by existing Mississippi uninsured motorist law.[65] The Mississippi Uninsured Motorist Act requires that the insurance company offer coverage "to pay the insured *all sums* which he shall be legally entitled to to recover."[66] Under the rule of *Harthcock v. State Farm Mutual Automobile Insurance Co.*[67] and cases subsequently decided by the Mississippi Supreme Court, this statutory requirement assures the right of an injured party to stack the coverages of his policies to provide a full recovery for his damages.[68]

In 1980 in *St. Arnaud v. Allstate Insurance Co.*[69] Judge Russell of the United States District Court for the Southern District of Mississippi rendered the first reported decision from Mississippi allowing stacking of underinsured motorist coverage. Allstate's policy of automobile insurance voluntarily incorporated the underinsured feature in its definitions prior to the effective date of the amended Mississippi statute.[70] The Allstate policy covered three different vehicles owned by the named insured, John L. St. Arnaud, and provided uninsured motorist coverage in the amount

64. *See* St. Arnaud v. Allstate Ins. Co., 501 F. Supp. 192, 193 (S.D. Miss. 1980); Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381-82 (Miss. 1977); State Farm Mut. Auto Ins. Co. v. Bishop, 329 So. 2d 670, 672 (Miss. 1976); Harthcock v State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 461-62 (Miss. 1971).

65. Phillips, *supra* note 5 at 284-94.

66. MISS. CODE ANN. § 83-11-101 (2) (Supp. 1982).

67. 248 So. 2d 456 (Miss. 1971).

68. *Id.* The stacking question arises in uninsured motorist cases in three frequently reoccurring factual situations. In the first situation the plaintiff is injured while riding as a passenger in a vehicle he does not own. He is covered by the insurance policy on the occupied vehicle, as well as by his own policy, and he seeks to stack the uninsured motorist coverge of the occupied vehicle with that of his own policy. In the second situation, the plaintiff is injured while in his own vehicle. He is an insured under the provisions of the policy on that vehicle, and he is also covered under a separate policy on another vehicle. In the third situation the plaintiff has paid multiple premiums for the multiple vehicles he owns, but all are covered under one policy. All three situations have been litigated under the Mississippi Act, and all three have been decided favorably to the injured plaintiff. Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 270 (Miss. 1979) (allowing aggregation of coverage from multiple premiums under one policy); Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536, 539 (Miss. 1975) (allowing aggregation of coverage from three separate uninsured motorist policies on three separate automobiles owned by insured); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 461-62 (Miss. 1971) (allowing aggregation of coverage of occupied vehicle with that of plaintiff's own vehicle).

69. 501 F. Supp. 192 (S.D. Miss. 1980).

70. *Id.* at 193.

of $10,000 per person per vehicle. A separate premium was charged with respect to each automobile. In August of 1976 Michael St. Arnaud, the minor son of the named insured, was struck and severely injured by a car driven by Mitchell Ashmore. The limits of the liability insurance carried on the Ashmore vehicle were $10,000 for each person injured and $20,000 for each occurrence. Since two other persons were injured in the same accident, Ashmore's insurance paid St. Arnaud $6,666.67, one-third of the $20,000 coverage limit. Because of the multiple claims situation, the Ashmore vehicle was clearly underinsured from the point of view of the injured party.[71]

St. Arnaud filed his claim against Allstate under the underinsured motorist provisions of his policy. St. Arnaud contended that the coverage of the policy should be stacked and that the policy provided coverage in the aggregate amounts of $30,000/$60,000. Allstate moved for partial summary judgment, contending that stacking of the uninsured motorist coveages for multiple vehicles was prohibited by a "Limits of Liability" provisions of the policy. The court found the anti-stacking provisions of the Allstate policy ambiguous and void. Under Mississippi uninsured motorist law the policy provisions were ineffective to prohibit stacking of the coverages applicable to multiple vehicles in a single policy.[72] Tracing the history of stacking decisions from the Mississippi Supreme Court, Judge Russell stated: "The ability to stack uninsured motorist coverage is well-established in Mississippi."[73] The language of the Allstate policy clearly included the underinsured motorist within its definition of an uninsured motorist.[74] As Judge Russell pointed out, although Allstate had voluntarily included the underinsured concept in its policy definition prior to the effective date of the amended statute requiring underinsured motorist coverage, "the issues encountered [in *St. Arnaud*] are similar to those that would be raised pursuant to [the amended] statute."[75]

The holding in *St. Arnaud* confirms that the stacking of underinsured motorist coverage for recovery purposes is governed by existing Mississippi stacking rules. Where there are multiple

71. It has been consistently held that the status of the tortfeasor's vehicle as an uninsured motorist must be determined from the perspective of the injured party. Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 438-39 (N.D. Miss. 1976), aff'd per curiam, 539 F. 2d 574 (5th Cir. 1976); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 458 (Miss. 1971); Hodges v. Canal Ins. Co., 223 So. 2d 630, 634 (Miss. 1969).

72. 501 F. Supp. at 194-95.

73. *Id.* at 194.

74. *Id.*

75. *Id.* at 193, n.1.

policies[76] or ambiguity in a policy covering multiple vehicles,[77] stacking is proper for the purpose of determining the full amount of the insured's recovery.

The new issue raised in underinsured motorist cases is stacking for coverage purposes. Before a policy issued under the Mississippi Uninsured Motorist Statute comes into play there must be an "uninsured motor vehicle" as defined in the statute.[78] Under the amended statute an uninsured motor vehicle includes an insured vehicle when the bodily injury liability limits for the vehicle are less than the uninsured motorist limits applicable to the injured person.[79] An essential condition for operation of underinsured motorist coverage, therefore, is the existence of uninsured motorist limits in excess of the tortfeasor's liability limits. Assume that a tortfeasor's liability limits are $10,000 and the injured person's underinsured motorist limits are also $10,000. Since the liability limits in such a case equal the uninsured motorist limits, no "uninsured motor vehicle" would exist under the statute. The issue raised, however, is this: May the injured person "stack" the limits of uninsured motorist insurance applicable to him under other policies or on other vehicles for the purpose of limits qualification? Under Mississippi uninsured motorist law and the statute as amended by the legislature, it appears that stacking of the injured person's limits should be allowed for the purpose of qualifying the tortfeasor as an underinsured motorist.

The Mississippi statutory definition of uninsured motor vehicle, as amended to incorporate the underinsured concept, compares the limits of the tortfeasor's liability coverage to "the limits *applicable to the injured person* provided under his underinsured motorist coverage."[80] Whether the uninsured motorist coverage of various policies or vehicles is "applicable to the injured person" is determined by established Mississippi uninsured motorist law. If the injured person is an insured in more than one policy of uninsured motorist insurance, the limits of each such policy are "applicable" to him.[81] If he is a passenger in a vehicle struck by an uninsured motorist, the uninsured motorist coverage of the vehicle in which he is riding, in addition to that of his own vehicles, is "applicable to the injured person."[82] Where the injured party

76. Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536, 539 (Miss. 1975).
77. Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 270 (Miss. 1979).
78. McMinn v. New Hampshire Ins. Co., 276 So. 2d 682, 684 (Miss. 1973).
79. MISS. CODE ANN. § 83-11-103 (c)(iii)(Supp. 1982).
80. *Id.* (emphasis added).
81. Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971).
82. Southern Farm Bureau Casualty Ins. Co. v. Roberts, 323 So. 2d 536 (Miss. 1975).

is the named insured in a single policy covering multiple vehicles, the coverage as to each vehicle is "applicable to the injured party" unless the policy excludes such coverage in clear and unambiguous language.[83] In each case the applicability of the limits qualification amount is established by existing uninsured motorist law.

Florida appears to be the only jurisdiction where the issue of stacking for coverage purposes has been litigated on an extensive basis. Florida's First District Court of Appeals originally prohibited stacking of uninsured motorist limits for underinsured coverge purposes. In *Government Employees Insurance Co. v. Taylor*[84] the injured party, Taylor, had $10,000 uninsured motorist coverage under his own policy. He was driving a car belonging to Jones, who had $50,000 coverage. The tortfeasor's liability coverage was $10,000. The court would not allow Taylor to add Jones' $50,000 coverage to his own $10,000 so the aggregate would exceed the tortfeasor's liability limits. The language of the Florida statute interpreted in *Taylor* was similar to that of the Mississippi statute. The statutory definition of an "uninsured motor vehicle" included a vehicle with liability limits "less than the limits applicable to the injured person provided under *his* uninsured motorist's coverage."[85] In *Taylor* the court construed this statutory provision to mean that the injured party's personal insurance coverage, rather than coverage available from other policies, had to exceed the liability limits of the tortfeasor.[86]

The courts of other Florida districts refused to follow the *Taylor* interpretation. In *Cox v. State Farm Mutual Automobile Insurance Co.*[87] the Second District Court said:

> We do not believe [the legislature] intended for the words 'his uninsured motorist coverage' to be construed in a manner which would make the rules for recovery of underinsured coverge different from those of uninsured coverage. Thus, we hold that these words simply refer to any uninsured motorist coverage which is otherwise available to the injured party.[88]

In *Cox* the permissive user of a motor vehicle was permitted to stack the owner's uninsured motorist coverage with her own to achieve the qualifying limits.

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83. St. Arnaud v. Allstate Ins. Co., 501 F. Supp. 192, 194-95.

84. 342 So. 2d 547 (Fla. Dist. Ct. App. 1977).

85. *Compare* FLA. STAT. § 627.727 (2)(b) (1975) (emphasis added) (quoted at 342 So. 2d 547, 548), *with* MISS. CODE ANN. § 83-11-103 (c)(iii) (Supp. 1982).

86. 342 So. 2d at 548-49.

87. 378 So. 2d 330 (Fla. Dist. Ct. App. 1980).

88. *Id.* at 332.

Similarly, stacking for coverage purposes has been allowed by the Florida Third and Fourth District Courts. In *Lezeanco v. Leatherby Insurance Co.*[89] an injured passenger was allowed to stack his host's policy with his own to achieve the necessary qualifying underinsured motorist limits. In *United States Fidelity and Guaranty Co. v. Curry*[90] the operator of a vehicle leased by his employer was permitted to stack the vehicle's uninsured motorist limits with his own to bring the underinsured motorist coverge into effect. In *Liberty Mutual Insurance Co. v. Searle,*[91] both the plaintiff and his host driver were the owners of multiple automobiles each of which had uninsured motorist coverage. The injured passenger was permitted to stack the uninsured motorist coverage applicable to the vehicle in which he was riding with the multiple coverages applicable to him as a resident relative. As in Mississippi, he could not add the coverages of other vehicles owned by his host. Coverage under the host's policy resulted only from his occupying the insured vehicle and the plaintiff was not a "class one" insured under the host's policy. No qualifying relationship existed between the plaintiff and the vehicles owned by the host other than the one he was occupying.[92]

The First District Court subsequently modified its decision in *Taylor* in the case of *Main Insurance Co. v. Wiggins.*[93] In *Wiggins* the injured party had no policy of his own. He was, however, a resident relative insured under two policies, one insuring his son and the other his daughter. The uninsured motorist coverage of neither of the two policies alone exceeded the tortfeasor's liability limits. The court receded from the language of its *Taylor* decision, stating: "Upon reconsideration of this entire matter, we have determined that the construction which we placed upon the words 'his uninsured motorist's coverage' [in the *Taylor* case] was more restrictive than the legislature intended by the use of such term."[94] Wiggins was allowed to stack the coverages of the two policies to bring the underinsured motorist coverage into operation. Still the First District remained more restrictive than the other district courts in allowing stacking for coverage.[95]

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89. 372 So. 2d 214 (Fla. Dist. Ct. App. 1979).
90. 371 So. 2d 677 (Fla. Dist. Ct. App. 1979).
91. 379 So. 2d 131 (Fla. Dist. Ct. App. 1979).
92. *Id.* at 133. *See also* State Farm Fire & Casualty Co. v. Wightwick, 320 So. 2d 373, 374-75 (Miss. 1975); Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 771-73 (Miss. 1974); Saint Paul Fire & Marine Ins. Co. v. Arnold, 254 So. 2d 872, 874 (Miss. 1971).
93. 349 So. 2d 638 (Fla. Dist. Ct. App. 1977).
94. *Id.* at 641.
95. *Id.* at 642.

In 1981 the issue was finally addressed by the Florida Supreme Court. Finding conflict with *Taylor* and the decisions from the other districts, the supreme court granted certiorari in *United States Fidelity and Guaranty Co. v. Curry.*[96] After tracing the history of cases on the issue, the court held that stacking for coverage purposes is proper in Florida underinsured motorist cases. The court approved the decisions of the Second, Third, and Fourth Districts allowing such stacking, and stated:

> In summary, we believe the legislature intended to allow this type of stacking. To construe the statute as set forth in the *Taylor-Wiggins* dichotomy produces inequitable results clearly not intended. We approve the decision of the Third District in the instant case and disapprove *Taylor*, as modified by *Wiggins.*[97]

The Florida statutes, themselves, underwent several modifications throughout the period of this litigation. The uninsured motorist statute was first amended in 1973 to include the underinsured concept.[98] Shortly after the *Taylor* decision, and probably in response to it, the legislature amended the language of the statute to conform with the Third District's interpretation allowing stacking.[99] In 1976 the legislature adopted an "anti-stacking" statute,[100] however, uninsured motorist coverage was eliminated from this statute in 1980.[101]

In states where the legislature desires to prohibit stacking for coverage purposes it has expressly done so by statute. The Louisiana statute, for instance, expressly prohibits stacking as follows: "[L]imits of uninsured motorist coverage shall not be increased when the insured has insurance available to him under more than one uninsured motorist coverage provision or policy . . . ."[102]

The Ohio[103] and Illinois[104] statutes allow the insurance companies to prohibit stacking if they so desire. The Ohio statute states: "An automobile liability policy or motor vehicle liability policy of insurance that includes underinsured motorist coverage . . . may include terms and conditions that preclude stacking of [underinsured motor vehicle coverage]."[105]

The underinsured motorist statutes of most states do not pro-

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96. 395 So. 2d 530 (Fla. 1981).
97. *Id.* at 532.
98. FLA. STAT. ANN. § 627.727 (2) (West Supp. 1974-1982).
99. 395 So. 2d at 531.
100. 1976 Fla. Laws ch. 76-266, § 10.
101. 1980 Fla. Laws ch. 80-364, § 1.
102. LA. REV. STAT. ANN. § 22-1406 D (1)(c) (Supp. 1982).
103. OHIO REV. CODE ANN. § 3937.18 (G) (Page Supp. 1982).
104. ILL. ANN. STAT. ch. 73, § 755 a-2(5) (Smith-Hurd Supp. 1980).
105. OHIO REV. CODE ANN. § 3937.18 (G) (Page Supp. 1982).

hibit stacking for coverage purposes. In these states the issue is determined by the legislative intent of the statute as interpreted by prior decisions. When the Mississippi statute was amended in 1979 to add the underinsured motorist feature, the Mississippi rules allowing stacking were well established.[106] It is significant that the legislators made no change in existing "stacking" rules when incorporating the underinsured motorist feature into the statute. The absence of any language modifying the existing stacking rules or otherwise prohibiting their application to the underinsured feature is persuasive authority for allowing stacking for both coverage and recovery purposes under the Mississippi statute.

MULTIPLE CLAIMS REDUCTION

For underinsured motorist coverage to become operative under the Mississippi statute, the liability limits of the tortfeasor must be *less* than the uninsured motorist coverage applicable to the insured.[107] If they are the same, the underinsured coverge does not operate.[108] However, where the tortfeasor's liability limits and the injured person's uninsured motorist coverage were the same originally, reduction of the tortfeasor's effective limits as a result of multiple claimants does create an operative underinsured situation.

In *Jones v. Travelers Indemnity Co. of Rhode Island,*[109] the Florida Supreme Court held that the statutory underinsured mandate contemplates effective liability limits. The court held that the effective liability limits in a multiple claim situation are the collectible limits available to the particular claimant. Similarly, in Louisiana it has been held that the appropriate liability limits of the tortfeasor's coverage for comparison with the claimant's uninsured motorist limits are the limits actually available to the particular injured party. Disbursement of the actual limits to competing claimants reduces such available coverage and renders the tortfeasor underinsured. In *Butler v. M.F.A. Insurance Co.,*[110]

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106. Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379 (Miss. 1977); Southern Farm Bureau Casualty Co. v. Roberts, 323 So. 2d 536 (Miss. 1975); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (1971).

107. MISS. CODE ANN. § 83-11-103 (c)(iii)(Supp. 1982) provides: "The term 'uninsured motor vehicle' shall mean: . . . (iii) An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are *less than* the limits applicable to the injured person provided under his uninsured motorist coverage . . . ." [Emphasis added].

108. Mid-Continent Casualty Co. v. Theus, 592 P.2d 519 (Okla. 1979).

109. 368 So. 2d 1289 (Fla. 1979).

110. 356 So. 2d 1129 (La. Ct. App. 1978), *cert. denied* 358 So. 2d 641 (La. 1978).

where the pro rata share of the tortfeasor's limits received by the insured was less than his uninsured motorist limits, underinsured motorist coverage was applicable.

Mississippi uninsured motorist law provides a similar result. The Mississippi Supreme Court has repeatedly held that uninsured motorist coverage "must be construed from the perspective of the injured insured."[111] Construction of the coverage from such a perspective renders the tortfeasor's vehicle underinsured in multiple claims situations.

In *St. Arnaud v. Allstate Insurance Co.*[112] the effective coverage of the tortfeasor's liability limits was reduced by the amounts paid to other claimants in a multiple claims situation. The court applied for comparison purposes the reduced amount of liability coverage effectively available to the plaintiff.[113] This application is consistent with the rulings of the Mississippi Supreme Court in *Hodges v. Canal Insurance Co.*[114] and *Harthcock v. State Farm Mutual Automobile Insurance Co.*[115] In *Hodges* the Mississippi Supreme Court stated that construction of the limits of uninsured motorist coverage must be made from the perspective of the injured insured.[116] From the perspective of the victim in multiple claims situations, the tortfeasor is underinsured when the amount of liability coverage recovered by the individual victim is less than the underinsured motorist coverage applicable to him.

OFFSET OF LIABILITY LIMITS

Once the tortfeasor is established as an underinsured motorist, whether by the multiple claims situation, stacking of the coverage available to the injured party, or simple comparison of the limits of the two parties' coverages, there remains in question the amount of recovery to which the injured insured is entitled. It is axiomatic that the purpose of uninsured motorist coverage in Mississippi is to provide the injured party a means of collecting "*all sums* which he shall be legally entitled to recover as damages for bodily injury or death."[117] With underinsured motorist coverage a new

111. Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 439 (N.D. Miss. 1976), *aff'd per curiam*, 539 F. 2d 574 (5th Cir. 1976); Harthock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 458 (Miss. 1970); and Hodges v. Canal Ins. Co., 223 So. 2d 630, 634 (Miss. 1969).

112. 501 F. Supp. 192 (S.D. Miss. 1980). *See supra* text accompanying notes 69-75 for summary of facts.

113. 501 F. Supp. at 193.

114. 223 So. 2d 630 (Miss. 1969).

115. 248 So. 2d 456 (Miss. 1971).

116. 223 So. 2d at 634.

117. MISS. CODE ANN. § 83-11-101 (Supp. 1982). Emphasis added.

question arises: May the insurance carrier require in its policy that the amount of underinsured motorist coverage be reduced by the amount paid by the tortfeasor's liability insurance? Under the Mississippi statute, as amended in 1979, policy provisions requiring such offsets are probably in violation of the statutory requirements and, therefore, void and unenforceable.

Assume that the insured has $50,000 in uninsured motorist limits, and his actual damages are in excess of $100,000. Assume also that the tortfeasor has $25,000 liability limits. The insured recovers from the tortfeasor the full liability insurance limits of $25,000. He then makes claim upon his uninsured motorist carrier for the $50,000 uninsured motorist coverage. His total recovery of $75,000 would still not exceed his actual damages. The insurer may claim, however, that it is to offset the recovery from the tortfeasor's liability carrier and pay only $25,000 uninsured motorist rather than the full $50,000. The Mississippi Statute does not require such an offset.[118]

Two concepts are at war in the issue. One, espoused by insurers, declares that the purpose of uninsured motorist coverage is solely to put the insured in the same position he would have occupied had the tortfeasor carried minimum liability insurance coverage or the same coverage as the insured. Proponents of this view contend that the payment by the tortfeasor's liability carrier should be deducted from the amount of the injured party's underinsured motorist coverge. The opposing concept, adopted by the Mississippi Supreme Court and legislature, views the purpose of uninsured motorist coverage to provide a means of payment of all sums the injured party is entitled to recover as damages. Under this view the tortfeasor's payment is deducted from the total damages sustained by the insured rather than from his uninsured motorist limits.[119]

In Mississippi, as in a number of states, the problem is solved by the statute and prior case law. The Mississippi statute includes the underinsured motor vehicle in the definition of "uninsured motor vehicle."[120] The coverage which must be afforded for injury by such a vehicle is mandatory under the statute.[121] The statute requires each policy to contain an uninsured motorist endorsement undertaking to pay the insured "all sums" to which he

118. *See infra* note 130 and accompanying text.

119. Dunnam v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 668, 671-72 (Miss. 1979) (insurer not entitled to subrogation until insured obtains recovery of full damages).

120. MISS. CODE ANN. § 83-11-103 (c)(iii) (Supp. 1982).

121. Dunnam v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 668, 671 (Miss. 1979); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971).

is entitled as damages.[122] Any policy provision which purports to diminish the mandatory coverage is void and unenforceable.[123] Offset clauses which seek to reduce the full amount of uninsured motorist coverage for amounts paid by other insurers or other coverages are in conflict with the requirements of the statute, and void.[124]

The underinsured motorist statutes of some states do provide for offset of underinsured motorist benefits by the amount paid by the tortfeasor's liability insurance. Where such a result is desired it is expressly stated in the statute itself. The South Dakota statute, for example, provides: "Coverage shall be limited to the difference of the policy limits on the vehicle of the party recovering or such smaller limits as he may select *less the amount paid by the liability insurer of the party recovered against.*"[125]

The Texas statute also provides for offset as follows:

> The underinsured motorist coverage shall provide for payment to the insured of all sums which he shall be legally entitled to recover as damages from owners or operators of underinsured motor vehicles because of bodily injury or property damage in an amount up to the limit specified in the policy, reduced by the amount recovered or recoverable from the insurer of the underinsured motor vehicle.[126]

Similar provisions appear in the underinsured motorist statute of Illinois,[127] and Connecticut.[128] Vermont's statute provides that the motor vehicle is underinsured "*to the extent* that its personal injury limits of liability at the time of an accident are less than the limits of uninsured motorist coverage."[129]

The Mississippi statute contains no language authorizing offset of the uninsured motorist coverage by the amount of the tortfeasor's liability payment. In fact, the 1979 amendment incorporating the underinsured feature specifically deleted the statutory language

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122. *Id.*
123. *Id.*
124. Missouri Gen. Ins. Co. v. Youngblood, 515 F.2d 1254, 1257 (5th Cir. 1975); Adams v. State Farm Mut. Auto. Ins. Co., 313 F. Supp. 1349, 1353 (N.D. Miss. 1970); Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 703 (Miss. 1974).
125. S. D. COMP. LAWS ANN. § 58-11-9.5 (Supp. 1982).
126. TEX. INS. CODE ANN. art. 5.06-1(5) (Vernon Replacement vol. 1981).
127. ILL. ANN. STAT. ch. 73, § 755 a-2(3) (Smith-Hurd Supp. 1980).
128. CONN. GEN. STAT. ANN. § 38-175c(b)(1) (West Supp. 1982).
129. VT. STAT. ANN. tit. 23 § 941 (f) (Supp. 1982).

that would call for such an offset.[130] It is this deletion by the legislature in adopting the 1979 amendment which clearly indicates that no offset is to be allowed under the Mississippi statute, and confirms the intent of the new statute to provide victims of uninsured and underinsured motorists a means of recovering *all sums* to which they are entitled as damages. Any policy provisions purporting to reduce or offset the underinsured motorist coverage by the amounts paid on behalf of the tortfeasor should be invalid and unenforceable under the Mississippi statute.[131]

SECTION 83-11-111

An enigmatic section of the Mississippi Uninsured Motorist Act is Section 83-11-111.[132] Some insurers have sought to interpret this section to negate the Mississippi stacking and exclusions rules as to the underinsured aspect of the Mississippi statute. Such an interpretation would defeat to a large extent the purpose of underinsured motorist coverage. The Mississippi Supreme Court has not had the opportunity to address Section 83-11-111 as it relates to underinsured coverage, and the absence of a reported decision as authority has caused some confusion at the trial level.

The Mississippi Safety Responsibility Act contains an "Excess Insurance Coverage" section in language almost identical to Section 83-11-111.[133] In financial responsibility acts such clauses allow insurers to contract freely with regard to liability insurance in excess of the minimum amounts required by law.[134] Where a

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130. MISS. CODE ANN. § 83-11-103 (Supp. 1982). Prior to the 1979 amendment, the statutory definition of an "uninsured motor vehicle" included a vehicle "as to which there is (1) no bodily injury liability unsurance with limits less than the amounts specified in Section 83-11-101, *but it will be considered uninsured only for that amount between the limit carried and the limit required in Section 83-11-101.*" MISS. CODE ANN. § 82-11-103 (1972) (amended March 23, 1979). When the legislature adopted the underinsured concept in the 1979 amendment, the above italicized language limiting the uninsured status of the vehicle was deleted from the statute. 1979 MISS. LAWS 758.

131. Missouri Gen. Ins. Co. v. Youngblood, 515 F.2d 1254, 1257 (5th Cir. 1975); Dunnam v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 668, 671 (Miss. 1979); Talbot v. State Farm Mut. Auto Ins. Co., 291 So. 2d 699, 703 (Miss. 1974); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971).

132. MISS. CODE ANN. § 83-11-111 (Supp. 1982) provides as follows:

> Excess Insurance Coverage.
>
> Any policy which grants the coverage required for motor vehicle liability insurance may also grant any lawful coverage in excess of, or in addition to, the coverage specified for a motor vehicle liability policy, and the excess or additional coverage shall not be subject to the provisions of this article, except as otherwise provided in this article. With respect to a policy which grants this excess or additional coverage, the term "motor vehicle liability policy" as used herein shall apply only to that part of the coverage which is required by this article.
>
> Any binder issued pending the issuance of a motor vehicle liability policy shall be considered as fulfilling the requirements for such policy.

133. MISS. CODE ANN. §§ 63-15-43 (7) and (11) (Supp. 1982).

134. Travelers Indemnity Co. v. Chappel, 246 So. 2d 498 (Miss. 1971); 7 AM. JUR. 2d *Automobile Insurance* § 29; 12A COUCH ON INSURANCE 2d § 45:702 (1981).

liability policy is for an amount in excess of the minimum required by the compulsory law, exceptions in the policy may be invalid as to the compulsory coverage, but valid as to the excess coverage.[135]

In *Travelers Indemnity Co. v. Chappell*[136] the Mississippi Supreme Court, interpreting the "Excess Insurance Coverage" clause of the Safety Responsibility Act, stated:

> The Mississippi Legislature, by enactment of the Mississippi Motor Vehicle Safety Responsibility Act, has indicated a public policy requiring persons operating motor vehicles on public highways under the conditions and to the limited extent set out in the statute, to make themselves financially able to respond in damages for injuries resulting from their negligence. The limits prescribed in the act are $5,000/$10,000. Above those limits, the amount of automobile liability insurance carried by an owner of a motor vehicle becomes a matter of personal choice, limited by his ability to obtain the insurance and to pay for it.[137]

In 1982 the "Excess Insurance Coverage" clause of the Safety Responsibility Law as it relates to liability insurance was addressed in *Universal Underwriters Insurance Co. v. American Motorists Insurance Co.*[138] *Universal* was a diversity action seeking a declaratory judgment regarding coverage under a liability policy issued under the Mississippi Financial Responsibility Act. American Motorist Insurance Company had issued a policy of liability insurance with limits of $100,000/$300,000. The policy contained a "garage exclusion" clause found to be in conflict with the statutory omnibus coverage requirements of the Mississippi Safety Responsibility Act. The exclusion was held to be void and ineffective as to the $10,000/$20,000 statutory liability insurance requirements. As to liability coverage in excess of that required by the statute, however, the garage exclusion was valid under the "Excess Damage Coverage" section of the Financial Responsibility Statute.[139]

The ruling in *Universal Underwriters* is in accord with the decisions of most states interpreting "Excess Insurance Coverage"

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135. 12 COUCH ON INSURANCE 2d § 45:548 (1981).
136. 246 So. 2d 498 (Miss. 1971).
137. 246 So. 2d at 509.
138. 541 F. Supp. 755 (N.D. Miss. 1982).
139. The Court stated:

> Although exclusion (g) of American's policy [the "Garage Exclusion"] is rendered ineffective as to the statutory $10,000/$20,000 limits, this does not affect the enforceability of the exclusion of Poe from American's excess coverage ($90,000/$280,000). Subsection 7 [of MISS. CODE ANN. § 63-15-43 (Supp. 1981)] expressly exempts such excess or additional coverage from the provisions of the state's Financial Responsibility Act. It is manifestly clear that the legislature intended to leave an insurer free to make such reasonable contractual provisions as it might wish in writing an automobile liability policy for more than the statutory limits.

sections as they relate to liability insurance.[140] Some insurers, however, seek to apply the *Chappel* and *Universal* rational to uninsured motorist insurance and Section 83-11-111 of the Uninsured Motorist Act. Because of the different purposes of the Safety Responsibility Act and the Uninsured Motorist Act, the attempted transposition is inaccurate.

The purpose of the Mississippi Safety Responsibility Law, and all similar financial responsibility laws, is to require maintenance of liability insurance in at least the *minimum* amounts set by statute. A minority of states hold that the purpose of uninsured motorist insurance is also to provide the injured party coverage only to the limited extent of the minimum financial responsibility limits.[141] In Mississippi, and the majority of states, the purpose of uninsured motorist insurance is to provide the injured party a means of collecting *all sums* he is legally entitled to recover as damages, not just the minimum limits.[142]

The only Mississippi case construing Section 83-11-111 was decided prior to the addition of underinsured motorist coverage to the Mississippi Act. In *Talbot v. State Farm Mutual Automobile Insurance Co.*[143] a "limits of liability" clause was held to validly prohibit the stacking of multiple coverages within a single policy. Citing Section 83-11-111, the court stated:

> [T]he parties to this suit were free to contract as to the uninsured motorist coverage in any respect so long as the required coverage is not cut down by the policy provisions. [Citing *Harthcock*] If State Farm and Insured could contract free of statutory restraint as to excess coverage, they could also contract to limit the coverage to that required by statute.[144]

The application of Section 83-11-111 in *Talbot* to uninsured motorist coverage was modified by the legislative adoption of underinsured motorist coverage.[145] The sole problem addressed by *under*insured motorist coverage, as opposed to uninsured motorist coverage, is the problem of inadequate coverage. If ex-

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541 F. Supp. at 761.

140. 7 AM. JUR. 2d *Automobile Insurance* § 29; 12A COUCH ON INSURANCE 2d, § 45:702 (1981).

141. For example, Transp. Ins. Co. v. Wade, 106 Ariz. 269, 273, 475 P.2d 253, 257 (1970); Glidden v. Farmers Auto. Ins. Ass'n., 57 Ill. 2d 330, 335, 312 N.E.2d 247, 250 (1974); In such jurisdictions "other insurance clauses" may be valid and stacking prohibited. ANNOT., 53 A.L.R.3d 551 (1969). This position was rejected in Mississippi in Harthcock v. State Farm Mut. Auto Ins. Co., 248 So. 2d 456 (Miss. 1971).

142. Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971).

143. 291 So. 2d at 699 (Miss. 1974).

144. 291 So. 2d at 701.

145. Act of March 23, 1979, ch. 429, 1979 MISS. LAWS 758 (codified at MISS. CODE ANN. § 83-11-111 (Supp. 1982)).

clusions which are invalid as to uninsured motorist insurance are construed as valid to amounts over the minimum limits of the financial responsibility act, the underinsured feature is to a large extent emasculated. Such a result clearly was not intended by the legislature.

When the legislature adopted the underinsured motorist concept in 1979, Section 83-11-111 was amended.[146] Prior to the addition of the underinsured motorist feature, the statute provided that excess insurance coverage in a policy "shall not be subject to the provisions of this article."[147] The 1979 amendment added to Section 83-11-111 the phrase "except as otherwise provided in this article."[148] Amendment of the section indicates the intent that Section 83-11-111 not defeat the concept of underinsured motorist coverage.

Under the amended statute each policy of automobile liability insurance must provide both uninsured and underinsured motorist coverage in limits chosen by the insured.[149] Coverage is mandatory as to both uninsured and underinsured motorists. Section 83-11-111 allows insurers to contract with regard to excess coverage so long as the Mississippi rules regarding exclusions and stacking are not violated. Provisions which purport to violate such rules, however, or reduce the coverage required by the statute, remain void as to both uninsured and underinsured coverage.

PROCEDURE IN UNDERINSURED MOTORIST CLAIMS

The procedure for handling an underinsured motorist claim is, in many respects, similar to that of the traditional uninsured motorist claim. The same rules apply, for instance, with regard to notice to the insurer.[150] The handling of a claim for underinsured motorist coverage, however, gives rise to several questions of procedure not previously faced with uninsured motorist insurance: Must the tortfeasor's liability limits be totally exhausted before the insured claims his underinsured motorist coverage?[151]

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146. The amendment added the following italicized language:

> Any policy which grants the coverage required for motor vehicle liability insurance may also grant any lawful coverage in excess of, or in addition to the coverage specified for a motor vehicle liability policy, and the excess of additional coverage shall not be subject to the provisions of this article, *except as otherwise provided in this article* . . . .

1979 MISS. LAWS 758.

147. MISS. CODE ANN. § 83-11-111 (1972) (amended 1979).

148. MISS. CODE ANN. § 83-11-111 (Supp. 1982).

149. MISS. CODE ANN. § 83-11-101(1)(Supp. 1982).

150. *See infra* notes 154-67 and accompanying text.

151. *See infra* notes 168-78 and accompanying text.

May the underinsured motorist carrier condition the insured's settlement with the tortfeasor on the carrier's consent?[152] How is settlement with the tortfeasor and his liability insurer effected without prejudicing the underinsured carrier's subrogation rights?[153]

Notice To The Insurer

Notice to the insurance carrier has always been a requirement under the Mississippi Uninsured Motorist Act.[154] The Act requires that in any suit against the owner or operator of an uninsured vehicle the clerk of the court must serve by registered mail a copy of the process on the uninsured motorist carrier.[155] The purpose of the notice requirement is to enable the carrier to join in the defense of the claim or to otherwise protect its rights of subrogation.[156] The notice requirement of the Mississippi statute applies only in cases by the named insured.[157] The statute requires notice by the circuit clerk, not by the party, and the requirement is not binding on the clerk of a foreign court.[158] The clerk's failure to comply with the notice requirement is said to bar the injured party's claim "only when substantial prejudice to the rights of the insurer would result."[159]

In addition to the statutory notice requirement, most policies require that a claimant give his carrier notice of a claim as "soon as practical."[160] In the context of uninsured motorist coverage, pro-

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152. *See infra* notes 179-86 and accompanying text.

153. *See infra* notes 187-92 and accompanying text.

154. MISS. CODE ANN. § 83-11-105 (1972) provides in part:

In the event the owner or operator of the uninsured vehicle causing injury or death is known and action is brought against said owner or operator by the named insured as defined by said policy, then a copy of the process served by the circuit clerk mailing, registered mail, a copy of the process to the insurance company issuing the policy providing the uninsured motorist coverage as prescribed by law.

155. *Id.*

156. *See* A. WIDISS, *supra* note 19, §§ 7.14-7.15 (1969) (insurer may intervene to present defenses on behalf of uninsured motorist or to join in defense; although absent from litigation, insurer's subrogation rights may be affected).

157. State Farm Fire & Cas. Co. v. Wightwick, 320 So. 2d 373, 374 (Miss. 1975).

158. Rampy v. State Farm Mut. Auto Ins. Co., 278 So. 2d 428, 433 (Miss. 1973).

159. In Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 433 (Miss. 1973), argued by this author in the Mississippi Supreme Court in 1973, it was held that the burden rested on the insurer to show prejudice as a result of the failure to notify the insurance company of the direct action against the tortfeasor. The test is one of substantial prejudice and imposes a stringent burden on the insurance company. In *Rampy*, the uninsured motorist had been convicted of manslaughter in Tennessee as a result of the wreck. In view of the tortfeasor's indigent status, the court found unrealistic the insurance company's argument that it had lost a valuable right of subrogation. Describing an uninsured tortfeasor in such a case as "an impecunious derelect, someone who is mere flotsam and jetsam floating on the sea of economic irresponsibility," the court found that the insurance company was not prejudiced by the loss of subrogation rights as to such a tortfeasor.

160. The standard uninsured motorist endorsement provides that the persons making claim shall give to the company written "proof of claim" as soon as practical. 1966 Stan-

viding the insurance company notice of a claim involves two different aspects: First, notice that an accident has occurred, and second, notice that the injured party will present a claim under the uninsured motorist coverage. Until the insured learns that the tortfeasor is uninsured, he has no reason to give notice to his uninsured motorist carrier.[161] In the case of underinsured coverage the problem is compounded. Determining whether the insured's underinsured motorist coverage will come into operation requires an assessment of (1) the limits of the tortfeasor's liability coverage, (2) the limits of underinsured motorist coverage "applicable to the insured," and (3) the amount of the injured party's damages. The total extent of the injury and damages is often not known until long after the accident. Whether the damages will exceed the tortfeasor's liability coverage may not be obvious immediately after the accident. As in the case of the uninsured tortfeasor, the injured party cannot be expected to notify his carrier until he has reason to believe that his underinsured coverage may be called upon.

Where the insurance status of the tortfeasor was unknown at the time of the accident, a South Carolina court stated that the requirement of notice "should be interpreted as if it read 'as soon as practicable after discovery of the uninsured status' and means within a reasonable time under all the circumstances if the insured was reasonably diligent in his efforts to determine the insurance status of his adversary."[162] In Louisiana, the court concluded that the insureds had given notice as "soon as practical" even though it took claimants several months to ascertain that the tortfeasor had no liability insurance.[163] In Washington, it was held that "the notice requirements for uninsured motorist coverage do not become operative until an insured reasonably believes he has an

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dard Form, Part VI: Additional Conditions—B. Proof of Claim. The same paragraph in the endorsement also includes a reference to "notice of claim," as follows: "Proof of claim shall be made upon forms furnished by the company unless the company shall have failed to furnish forms within 15 days after receiving *notice of claim.*" 1966 Standard Form, Part VI: Additional Conditions—B. Proof of Claim. *(Emphasis added).* There is no requirement, however, in the uninsured motorist endorsement itself that the claimant must provide the insurer with "notice of claim." This reference to notice of claim is apparently intended to be read in connection with a provision in the separate section of the automobile policy denoted General Conditions which provides that "written notice" containing particulars on the accident (including information on the time, place, circumstances, identity of those insured and witnesses) shall be given to the company as soon as practical. 1966 Standard Provisions for General-Automobile Liability Policies: Conditions: Insured's Duties in the Event of Occurrence, Claim or Suit. *See* A. WIDISS, *supra* note 19, § 4.2 (1969 and Supp. 1981).

161. Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 433 (Miss. 1973).

162. Squires v. Nat. Grange Ins. Co., 247 S.C. 58, 68, 145 S.E.2d 673, 678 (1965)(citation omitted).

163. Davis v. Allstate Ins. Co., 272 So. 2d 458 (La. Ct. App. 1973).

uninsured motorist claim."[164] Whether the insured has reason to believe that his underinsured motorist coverage will be called upon may present a question of fact. Where the status of the tortfeasor as an uninsured motorist is unclear following the accident, the question of whether notice is given "as soon as practical" may be a question of fact for the jury.[165]

The adverse effects of delay in notice may be abrogated by decisions requiring the insurer to show actual prejudice as a result of the delay.[166] Also the company's right to object to the delay can be waived.[167] It is clear, however, that prudent practice requires the injured party or his attorney to give the underinsured motorist carrier notice of the potential claim as soon as possible. Every case involving serious injury is a potential underinsured motorist claim. Whenever in such a case the aggregate uninsured motorist coverage applicable to the injured party exceeds the tortfeasor's liability limits, the uninsured motorist carrier should be notified. Such a practice prevents the rise of problems resulting from the failure to comply with the policy's notice requirements.

EXHAUSTION OF THE TORTFEASOR'S LIMITS

Must an insured exhaust the tortfeasor's liability limits as a condition to recovery of benefits under his underinsured motorist coverage, or is it sufficient that his damages simply exceed the tortfeasor's liability limits?

The statutes of several states explicitly condition resort to underinsured motorist coverage upon the insured's prior exhaustion of the tortfeasor's policy limits.[168] At least two states' statutes require that he actually obtain a judgment in excess of the tortfeasor's liability limits.[169] In Mississippi, as in most states, prior liability limits exhaustion is not a statutory requirement. Where prior liability limits exhaustion is not statutorily commanded, the insured has an absolute right to a determination of the liability

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164. Finney v. Farmers Ins. Co. of Washington, 21 Wash. App. 601, 606, 586 P. 2d 519, 524 (Wash. Ct. App. 1978).

165. Gregory v. Allstate Ins. Co., 134 Ga. App. 461, 464, 214 S.E.2d 696, 698 (Ga. Ct. App. 1975).

166. A. WIDISS, *supra* note 19, § 4.2, n.18, at 146.

167. State Security Ins. Co. v. Goodman, 6 Ill. App. 3d 1008, 286 N.E.2d 274 (1972); Cuozzo v. Lumbermans Mut. Cas. Co., 60 Misc. 2d 294,303 N.Y.S.2d 12 (N.Y. Sup. Ct. 1969); Cohen v. Atlantic National Ins. Co., 24 A.D.2d 896, 264 N.Y.S.2d 807 (N.Y. App. Div. 1965).

168. *See* CONN. GEN. STAT. § 38.175(b)(1) (Supp. 1981); N.Y. Ins. Law § 167.2(a) (McKinney Supp. 1980-81); TENN. CODE ANN. § 56-1148 (1980 Supp.); *Cf.* ILL. REV. STAT. ch. 75, § 143 (1980 Supp.) (referring to a reduction in underinsured motorist limits based on the actual damages recovered under the tortfeasor's policy).

169. KY. REV. STAT. ANN. § 304.39-320 (Bobbs-Merrill Supp. 1980); S.D. COMP. LAWS ANN. § 58-11-9 (Supp. 1980).

and damage issues without first pursuing his claim against the tortfeasor.[170] As has been stated in reference to Florida's underinsured motorist statute: "To require the [insured] . . . to first obtain payment of a judgment or settlement is requiring more than the statutory intention and effectively limits the effect of this statute . . . ."[171]

Where exhaustion of the tortfeasor's limits is not required by statute, policy provisions requiring the same restrict the coverage mandated by the statute and are unenforceable. The intent of the statute cannot be circumvented by the carrier's incorporation of provisions into the policy requiring a policy limits settlement with the tortfeasor. Such contractual provisions violate the public policy expressed in the statute and are void.[172]

Claims are often settled for less than a liability carrier's policy limits to avoid the expense and delay of litigation. Settlement for less than the tortfeasor's limits should not preclude an underinsured motorist recovery. In *United States Fidelity & Guaranty Co. v. Gordon*[173] the insurer contended that settlement in the sum of $9,600, where the tortfeasor's limits were $10,000, constituted a conclusive determination by the insured of the amount of actual damages sustained, and that settlement for less than the tortfeasor's policy limits relieved it of any obligation under its policy. This contention was rejected by the trial court. In affirming, the Florida Court of Appeals stated:

> The fact that [the insured] settled for an amount less than the full amount of liability limits carried by [the tortfeasor] is not determinative of the amount of damages actually sustained . . . . Settlements are often made for reasons which have little to do with the amount of damages sustained by the injured party. In this case, [the insured] decided to settle for $400 less than the policy limits because he was advised that the cost of continuing litigation would probably exceed the additional $400 he might receive. Further, there were no assets available to which a judgment in excess of the [liability] policy limits could attach.[174]

The injured party was allowed to pursue his underinsured motorist

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170. Weinstein v. Am. Mut. Ins. Co. of Boston, 376 So. 2d 1219 (Fla. Dist. Ct. App. 1979); Liberty Mut. Ins. Co. v. Reyer, 362 So. 2d 390 (Fla. Dist. Ct. App. 1978); Harthock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971).

171. Weinstein v. Am. Mut Ins. Co. of Boston, 376 So. 2d 1219 (Fla. Dist. Ct. App. 1979).

172. Southeastern Fidelity Ins. Co. v. Earnest, 378 So. 2d 787 (Fla. Dist. Co. App. 1979); Liberty Mut. Ins. Co. v. Reyer, 362 So. 2d 390 (Fla. Dist. Ct. App. 1978), *cert. denied,* 368 So. 2d 1369 (Fla. 1979).

173. 359 So. 2d 480 (Fla. Dist. Ct. App. 1978).

174. *Id.* at 482.

claim in spite of his settlement for less than the tortfeasor's liability limits.[175]

The result in *Gordon* is consistent with the policy and intent of both the Florida and Mississippi statutes. Under the Mississippi statute the injured party may pursue his claim directly against the carrier without first securing judgment against the tortfeasor.[176] The statute contains no requirement that the tortfeasor's liability limits be exhausted before the underinsured motorist benefits are pursued. It is required only that the underinsured motorist coverage applicable to the injured person exceed the tortfeasor's bodily injury liability limits.[177] A policy which purports to require a prior settlement with the tortfeasor or exhaustion of the tortfeasor's liability limits requires more than the statutory intention and limits the effect of the statute. Such policy provisions should be void and unenforceable under the Mississippi statute.[178]

Settlement Without Insurer Consent

Most uninsured motorist policies contain a "consent to settle" clause which provides that the insured forfeits his rights under the uninsured motorist policy if he settles with the tortfeasor without the consent of the company.[179] The standard policy provides that coverage is inapplicable: "to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this coverage shall, without

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175. To the same effect is Colonial Penn. Ins. Co. v. Salti, 84 A.D.2d 350, 446 N.Y.S.2d 77 (1982). In *Colonial Penn.*, the insurance company argued that the plaintiff's settlement for less than the tortfeasor's policy limits precluded recovery under the underinsured motorist endorsement. The court said the argument failed under both Florida and New York law, stating:

> It is obvious from the injuries suffered by each of the Saltis that the $145,000 settlement did not represent the full measure of their damages. As the record discloses, the Saltis settled their action to avoid the rigors and inconvenience which a trial, at their advanced age, would have posed, and the distinct possibility that the outcome of such a trial would have been a judgment substantially uncollectible, against the underinsured Petryszyns, who were primarily, if not solely, responsible for the accident.

466 N.Y.S.2d at 80.

In the Untied States Fidelity & Guar. Co. v. State Farm Mut. Auto. Ins. Co., 369 So. 2d 410 (Fla. Dist. Ct. App. 1979), the insurance company contended that plaintiff's *offer* to settle with the tortfeasor's liability carrier prior to trial, set the amount of palintiff's damages and precluded recovery under the underinsured motorist coverage. Rejecting this argument, the Florida Court said: "Even an actual settlement, much less the mere demand involved in this case, does not fix the 'value' of injuries actually sustained by the insured." 369 So. 2d at 411.

176. Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 460 (Miss. 1971).

177. MISS. CODE ANN. § 83-11-103(c)(iii) (Supp. 1982).

178. *See, e.g.*, Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 769, 777-78 (Miss. 1973); Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428 (Miss. 1973); Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 459 (Miss. 1971); *see also* Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 439 (N.D. Miss. 1976) (insurance company's obligations to insured fixed by statute and could not be circumvented by policy provisions), *aff'd mem. per curiam*, 539 F.2d 574 (5th Cir. 1976).

179. A. WIDISS, *supra* note 19, § 5.7 at 168.

written consent of the company, make any settlement with any person or organization who may be legally liable therefor."[180]

Insofar as the "consent to settle" clause purports to apply to a tortfeasor other than the uninsured motorist, the provision is invalid in Mississippi.[181] When applied to such tortfeasors, the clause is an abridgement of the coverage required by the statute, and is void.[182] With regard to the insured tortfeasor, however, the clause is valid,[183] at least where meaningful subrogation rights of the carrier are prejudiced by the settlement.[184]

In *United States Fidelity & Guaranty Co. v. Hillman,*[185] the USF&G uninsured motorist policy contained the standard "consent to settle" clause. The insured, Hillman, settled with the uninsured tortfeasor and signed a general release without the knowledge or consent of her uninsured motorist carrier. The release precluded any recovery by the uninsured motorist carrier through subrogation under the Act. Plaintiff's violation of the "consent to settle" clause, and the resulting prejudice to the insurer's subrogation rights as vested by statute, precluded recovery under the uninsured motorist policy.

The uninsured motorist carrier, however, may not unreasonably withold its consent to a settlement. Because uninsured motorist coverage is mandated by statute for the protection of the insured and his family, the carrier owes a high degree of duty to deal in "good faith" with its insureds. Failure to comply with this standard, as in unreasonably withholding consent to a settlement, may subject the carrier to punitive damages for "bad faith," in addition to actual damages suffered.[186]

Effecting The Liability Settlement

A complicating factor in settlement with the tortfeasor's liabili-

180. United States Fidelity and Guar. Co. v. Hillman, 367 So. 2d 914, 916 (Miss. 1979).

181. Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 459-60 (Miss. 1971).

182. *Id.*

183. United States Fidelity and Guar. Co. v. Hillman, 367 So. 2d 914 (Miss. 1979).

184. Southeastern Fidelity Ins. Co. v. Earnest, 378 So. 2d 787 (Fla. Dist. Ct. App. 1979); Johnson v. Home Indem. Co. 377 So. 2d 40 (Fla. Dist. Ct. App. 1979).

185. 367 So. 2d 914 (Miss. 1979).

186. For a thorough discussion of the obligation of an insurance carrier to its insured under Mississippi law *see* W. DENTON AND W. WALKER, BAD FAITH LITIGATION IN MISSISSIPPI (1981). With specific regard to uninsured motorist insurance, *see* Richards v. Allstate Ins. Co., 693 F.2d 502 (5th Cir. 1982) (punitive damages of $375,000 held proper with actual damages of $2,500 where insurance company failed to delete from policy provision held invalid under Mississippi law); Aitken v. State Farm Mut. Auto. Ins. Co., 404 So. 2d 1040 (Miss. 1981) (justifiable reason existed for company's refusal to pay claim and punitive damages were therefore improper); and Black v. Fidelity & Guar. Ins. Underwriters, Inc. 582 F.2d 984 (5th Cir. 1978) (case remanded for jury determination of punitive damages for company's refusal to pay claim amounting to an independent tort).

ty carrier is the duty of the liability carrier to defend and the statutory subrogation rights of the underinsured motorist insurer. The obligations of the liability carrier to its insured are two-fold: in addition to the duty to pay its coverage, the carrier has a duty to defend its insured.[187] The underinsured motorist carrier, on the other hand, has a statutory right of subrogation against the negligent motorist.[188] The injured party is obligated to take no action which will prejudice these subrogation rights.[189] Before paying its policy limits the liability carrier often wants a full release discharging the tortfeasor from any further liability. Execution of such a release would prejudice the underinsured motorist carrier's subrogation rights. Procedurally, how is the injured party to settle with the tortfeasor's carrier without jeopardizing his underinsured motorist claim?

In some cases the problem may be avoided by settling with both carriers at the same time. Simultaneous releases to the tortfeasor and both carriers will shift the problems of subrogation and defense from the injured party to the carriers. Unfortunately, this option is usually available only where liability is clear and damages clearly exceed the combined limits of coverage. In many cases, whether the damages exceed the combined limits of the policies is a matter of dispute. The injured party must settle with the liability carrier yet preserve his right to litigate to the extent of his underinsured motorist claim.

In some states the underinsured motorist statutes dictate the procedure for settlement. In Florida, for instance, a statutory procedure is prescribed by which the claimant submits to the underinsured motorist carrier the proposed liability settlement.[190] The carrier must approve the settlement, waive its subrogation rights, and arbitrate the claim, or the unjured party may file suit against both carriers.[191] In Mississippi, however, as in most states, the procedure for settlement with the liability carrier is not specified in the underinsured motorist statute.

Because underinsured motorist coverage is new under the Mississippi statute, no standard procedure has yet arisen for settlement with the liability carrier while preserving the underinsured motorist claim. A procedure which appears to be working in initial cases is as follows: Counsel for the injured party gives notice

187. Travelers Indem. Co. v. East, 240 So. 2d 277 (Miss. 1970).
188. MISS. CODE ANN. § 83-11-107 (1972).
189. United States Fidelity and Guar. Co. v. Hillman, 367 So. 2d 914 (Miss. 1979).
190. FLA. STAT. ANN. § 627.727 (6) (West. Supp. 1983).
191. *Id.*

of the claim to the underinsured motorist carrier as soon as it appears that the underinsured motorist coverage and the insured's damages exceed the tortfeasor's liability limits. When the terms of a proposed settlement with the liability carrier are reached, the proposal is submitted to the underinsured motorist carrier. If the tortfeasor lacks assets from which subrogation may be had as a practical matter, the underinsured motorist carrier may waive its rights of subrogation. Counsel for the injured party requests in writing that the carrier waive its subrogation rights and agree not to invoke as a defense any release or covenant not to sue executed by the injured party. If subrogation is not practical the underinsured carrier, prompted by its duty to act in "good faith," will usually waive the subrogation rights and allow its insured to execute the necessary release.

If the tortfeasor does have substantial assets in addition to his liability insurance, subrogation may be a right the underinsured carrier will not waive. In such cases a release or convenant not to sue must be drafted to meet the approval of both the tortfeasor's liability carrier and the carrier of the underinsured motorist coverage. Again, unreasonable withholding of such approval could subject either or both carriers to exposure for punitive damages.[192] Insurance companies and their knowledgeable counsel generally cooperate in effecting such settlements.

DIRECT ACTIONS AND JOINDER

Where no settlement is possible the injured party has the right to sue.[193] It is well established that the injured party has a right of direct action against the underinsured carrier under the Mississippi Uninsured Motorist Act.[194] Liability of the negligent motorist may be established in the contract suit against the unin-

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192. *See supra* note 186.

193. MISS. CODE ANN. § 83-11-109 (1972) provides:

> No [uninsured motorist] endorsement or provisions shall contain a provision requiring arbitration of any claim arising under any such endorsement or provisions. The insured shall not be restricted or prevented in any manner from employing legal counsel or instituting or prosecuting to judgment legal proceedings, but the insured may be required to establish legal liability of the uninsured owner or operator.

Policy provisions attempting to require arbitration as a prerequisite to litigation are in violation of the statute and are invalid. *E.g.*, Logan v. Aetna Casualty and Sur. Co., 309 F. Supp. 402, 407 (S.D. Miss. 1970) (compulsory arbitration agreements held unenforceable in Mississippi).

194. Farned v. Aetna Casualty & Sur. Co., 263 So. 2d 790, 791 (Miss. 1972) (insured may establish legal liability of uninsured motorist in direct action against insurer). *See also*, Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 460 (Miss. 1971).

sured motorist carrier without first proceeding in tort against the tortfeasor.[195]

Where settlement with the tortfeasor's liability carrier may not be had, the injured party has the option under the Mississippi Act of suing the tortfeasor alone, and giving notice to bind the underinsured motorist carrier. The injured party may also join the tortfeasor and the underinsured motorist carrier as defendants in one suit. Since abolition of the prohibition against joinder of actions in tort and contract[196] and adoption of the new Mississippi Rules of Civil Procedure,[197] such joinder seems proper.[198] Both the tortfeasor's liability carrier and the underinsured motorist carrier are bound by the action so long as notice is properly given to each.[199]

DUTY OF THE CARRIER TO DISCLOSE COVERAGE

What is the legal duty of an insurance company with regard to the disclosure of its uninsured motorist coverage? Often an insured will submit to his carrier a collision or "med pay" claim unaware of the broad coverage afforded by his uninsured motorist insurance. The carrier's failure to inform the insured of his extended coverage may constitute an independent tort exposing the carrier to liability for punitive damages.[200]

In *M.F.A. Mutual Insurance Co. v. Flint*,[201] the Tennessee Supreme Court held that the duty of an uninsured motorist carrier to deal with its insureds "fairly and in good faith" required the carrier to inform its insureds of the extent of coverage under their uninsured motorist policy. Mr. Flint had an M.F.A. automobile policy which provided both medical payment and uninsured motorist coverage. Mrs. Flint and her daughter were injured in a collision caused by the negligence of an uninsured

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195. Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 460 (Miss. 1971). A direct action against the insurance company may be the *only* cause of action available under the terms of the policy. *See* State Farm Fire & Casualty Co. v. Wightwick, 320 So. 2d 373 (Miss. 1975) (a default judgment obtained by the insured against the tortfeasor was not enforceable against the uninsured motorist carrier because the policy required that the liability of the carrier be determined only in a direct action against the carrier); St. Paul Fire & Marine Ins. Co. v. Arnold, 254 So. 2d 872 (Miss. 1971) (insurance company not consenting to an action is not bound thereby).

196. MISS. CODE ANN. § 11-7-36 (Supp. 1982).

197. MISS. R. CIV. P. 18-20.

198. *See* Phillips, A Guide to Uninsured Motorist Insurance Law in Mississippi, 52 MISS. L.J. 255, 302-304 (1982).

199. Courtney v. Stapp, 232 Miss. 752, 100 So. 2d 606 (1958); State Mut. Ins. Co. v. Watkins, 181 Miss. 859, 180 So. 78 (1938); and *see, supra,* notes 154-67.

200. Richards v. Allstate Ins. Co., 693 F.2d 502 (5th Cir. 1982); State Farm Mut. Auto Ins. Co. v. Borden, 371 So. 2d 28 (Ala. 1979).

201. 574 S.W.2d 718 (Tenn. 1978).

motorist. Both Mrs. Flint and her daughter suffered permanent disabling injuries. An M.F.A. adjuster settled the claim with the Flints for their lost wages and medical expenses. The Flints were not aware of the coverage afforded by their uninsured motorist policy, and the insurance company's adjuster did not advise them of such coverage. The Tennessee Supreme Court set aside the releases thus procured. The court said the insured, paying premiums for uninsured motorist protection, is entitled to the reasonable expectation that he will be dealt with fairly and in good faith.[202]

> Insurance policies are contracts of the utmost good faith and must be administered and performed as such by the insurer. Good faith 'demands that the insurer deal with laymen as laymen and not as experts . . . [citation omitted].' When a loss occurs which because of its expertise the insurer knows or should know is within the coverage, and the dealings between the parties reasonably put the company on notice that the insured relies upon its integrity, fairness and honesty of purpose, and expects his right of payment to be considered, the obligation to deal with him takes on the highest burden of good faith.[203]

The court held that the duty of the carrier to deal fairly and in good faith required the company to inform the insureds as to the extent of coverage afforded them under the uninsured motorist provisions of their policy before negotiating a settlement.[204] In *Rutherford v. Tennessee Farmers Mutual Insurance Co.*,[205] the court made reference to the *Flint* decision, stating that the same duty of good faith is owed by a carrier to its insured with respect to *under*insured motorist coverage.

In the Louisiana case of *Palombo v. Broussard*, [206] a carrier failed to properly advise its insureds with respect to their stacking rights. The court said that the carrier owed a duty to its insureds with respect to such rights under their uninsured motorist coverage to act reasonably, fairly, and in good faith. Settlement under one policy without advising the insureds of applicability of another policy issued by the same company violated this duty.[207] In the Alabama case of *State Farm Mutual Automobile Insurance Co. v. Borden*,[208] an award of punitive damages was sustained when the company failed to tell the insureds they had valid claims

202. *Id.* at 720.
203. *Id.* at 720-21.
204. *Id.* at 722.
205. 608 S.W.2d 843 (Tenn. 1980).
206. 370 So.2d 216 (La. Ct. App. 1979).
207. *Id.* at 219-220.
208. 371 So. 2d 28 (Ala. 1979).

for pain and suffering, loss of services, and loss of consortium under their uninsured motorist coverage.

To date no Mississippi case has been reported on the failure of a carrier to disclose its uninsured motorist coverage. The reasoning of the Alabama and Tennessee courts in *Borden*[209] and *Flint*,[210] however, would seem to apply also in Mississippi. The carrier clearly has an obligation under Mississippi law to deal fairly and in good faith with its insured in settlement of a claim.[211] Breach of this obligation in uninsured motorist cases may subject the carrier to liability for punitive as well as actual damages.[212] The duty of the company to its insureds carries the obligation to properly inform them of coverage afforded under the uninsured and underinsured motorist provisions of its policy.[213]

CONCLUSION

Uninsured motorist insurance provides valuable protection and benefits to thousands of Mississippi motorists. The success of the Mississippi Uninsured Motorist Act illustrates the successful interworkings of the legislature and the Mississippi Supreme Court on behalf of the citizens of this state. Mississippi uninsured motorist insurance law has always been a viable body, expanding and growing as necessary to provide protection for the citizens of the state. The addition of the underinsured motorist feature to

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209. *Id.*

210. 574 S.W.2d 718.

211. Travelers Indem. Co. v. Weatherbee, 368 So. 2d 829 (Miss. 1979); Standard Life Ins. Co. of Indiana v. Veal, 354 So. 2d 239 (Miss. 1978).

212. Richards v. Allstate, 693 F.2d 502 (5th Cir. 1982); Black v. Fidelity & Guar. Ins. Underwriters, Inc. 582 F.2d 984 (5th Cir. 1978).

213. 693 F.2d 502. (An award of $375,000 punitive damages was affirmed. Allstate had retained within its standard policy the exclusion held invalid in Lowery v. State Farm Mut. Auto Ins. Co., 285 So. 2d 767 (Miss. 1973). Allstate failed to inform insureds of the exclusion's invalidity and as a result the trial court found Allstate grossly negligent. The Court justified $375,000 award and pointed out:

> Punitive damages are awarded not as compensation to the plaintiff but as "punishment for the wrongdoing of the defendant and as an example so that others may be deterred from the commission of similar offenses . . . " Snowden v. Osborn, 269 So. 2d 858, 860 (Miss. 1972). . . . An additional consideration in determining whether a punitive award is excessive is whether the plaintiff has performed a public service by bringing the wrongdoer to account. *See* Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 151, 141 So. 2d 226, 233 (1962). Here Richard's suit [693 F.2d 502], has benefitted all Allstate policyholders by directly causing deletion of Exclusion 2 from the standard Mississippi policy.

693 F.2d at 505-06.

A pending Mississippi case involving the failure of the insurance company to properly advise its insureds of the coverage afforded by uninsured motorist protection is St. Arnaud v. Allstate Ins. Co., Civil Action No. 579-183 (R) pending in the United States District Court for the Southern District of Mississippi. *St. Arnaud* is a class action brought on behalf of all Allstate Policy holders who may be entitled to underinsured motorist coverage benefits under the terms of Allstate's policy, but were never advised of such coverage by Allstate.

the coverage required by statute adds a new dimension to the protection afforded by the Act.

The statutory inclusion of the underinsured concept makes uninsured motorist insurance applicable to an even larger number of people. As the costs of medical care and other expenses resulting from injuries by automobiles continue to rise, underinsured motorist coverage will play an increasingly significant role in the 1980's and beyond. Practitioners representing injured individuals must remain cognizant of the broad applicability of underinsured motorist coverage in cases of serious injury. This article has examined underinsured motorist coverage and issues of substance and procedure likely to arise under the Mississippi Uninsured Motorist Act as amended to include such coverage. Because the underinsured feature is new in the Act, many of these issues will be addressed on a case by case basis as they arise. Hopefully, this article may be of assistance to practitioners and the courts in interpreting and applying underinsured motorist coverage for the benefit of the citizens of Mississippi.