

Personal Injury

Maximizing your client's recovery with underinsured motorist coverage

by Gerald A. Schwartz

Many times a defendant's auto liability coverage is inadequate to cover the magnitude of your client's injuries. If this is the case, underinsured motorist coverage can help maximize your client's recovery.

Part C of the new ISO Personal Auto Policy, mandatory for use by all carriers on July 1, 2008, (formerly Part IV of the Standard Family Automobile Policy), provides uninsured motorist coverage (UM) and underinsured motorist coverage (UIM). Uninsured motorist coverage protects insured accident victims against negligent drivers who have no insurance or who are immune from negligence under Virginia or federal law. Underinsured motorist coverage protects insured accident victims against negligent drivers who have insurance, but whose insurance is *inadequate* to cover the magnitude of the plaintiff's injuries. For example, assume a defendant with minimal \$25,000 policy limits severely injures the plaintiff, who has uninsured motorist limits of \$100,000. The defendant is not uninsured since he has minimum limits coverage. However, compared to the plaintiff's coverage, and the magnitude of the claim, the defendant is said to be *underinsured* because the defendant's insurance is inadequate. Therefore, the defendant is said to be underinsured by \$75,000 (the difference between the plaintiff's UM coverage of \$100,000 and the defendant's \$25,000 liability coverage). The insurance carrier(s) who insure the plaintiff must pay the underinsured portion of the claim.

Underinsured motorist coverage is a subdivision of uninsured motorist coverage. The same statute, Code §38.2-2206 mandates both UM and UIM coverage. All Virginia automobile insurance policies and all Virginia self-insured vehicles must contain both UM and UIM coverage. *Hackett v. Arlington County*.¹

To calculate the total amount of underinsured motorist coverage available to your client we must first determine the total amount of uninsured motorist coverage (UM) available to her. The total amount of liability coverage for the defendant is sub-

tracted from the total amount of uninsured motorist coverage afforded your client to arrive at your client's underinsured motorist coverage. With respect to uninsured motorist coverage, we must ask two questions:

- "Who" is an insured? and
- When is "stacking" of coverage permitted?

The UM/UIM statutory insuring provisions

UM Statute – Code §38.2-2206(A) (1995) Insuring Provisions

" . . . No policy . . . of liability insurance . . . shall be issued . . . unless it contains an endorsement . . . to pay *the insured all sums* that he is *legally entitled to recover* as damages from the owner or operator of an *uninsured motor vehicle*, with limits not less than [\$25,000 per person/\$50,000 per accident] . . . those limits shall equal but not exceed the limits of liability insurance provided by the policy, unless any one named insured rejects the additional uninsured motorist insurance coverage by notifying the insurer as provided in Section B of §38.2-2202. The endorsement . . . shall also obligate the insurer to *make payment* for bodily injury or property damage caused by the operation or use of an *underinsured motor vehicle* to the extent that the vehicle is underinsured, as defined in subsection B of the section. The endorsement . . . shall also provide for at least \$20,000 coverage in damage or destruction of the property of the insured in any one accident but may provide an exclusion of the first \$200 for the loss or damage as a result of any one accident involving an unidentifiable owner or operator of an uninsured motor vehicle."

Persons Insured Under §38.2-2206

Insured – (1995) Code §38.2-2206(B)

“Insured . . . means (1) the named insured and, while resident of the same household, the spouse of the named insured, and relatives, wards, or foster children of either, *while in a motor vehicle or otherwise*, and (2) any person who *uses* the motor vehicle to which the policy applies, with the expressed or implied consent of the named insured, and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above.”

In *Insurance Company of N. Am. v. Perry*, the Supreme Court of Virginia recognized that the legislature had intended to create **two separate classes of insureds**:²

First Class Insureds: “An insured of the first class is the named insured and, **while resident of the same household**, the spouse of the named insured, and relatives of either, while in a motor vehicle or otherwise.” (The 1995 amendment added “wards, or foster children.”)

Second Class Insureds: “Second class insureds are ‘any person who uses the motor vehicle to which the policy applies with the express or implied consent of the named insured (a permissive user) and a guest in the motor vehicle’ to which the policy applies.”

First Class Insureds are covered while in a motor vehicle or otherwise

A first class insured gets first class coverage. *First class insureds are covered wherever they may be*, provided the injury results from the ownership, maintenance or use of an uninsured or underinsured motor vehicle. The key to understanding coverage issues involving first class insureds is to think of the first class insured as having the applicable insurance policy “glued to his or her person.”

A first class insured is covered while in *any* motor vehicle, not just the motor vehicle for which a premium is paid which is listed on the declarations page. A first class insured can be riding a bus, riding a motorcycle, riding in a dump truck, riding in a cement mixer, driving a logging rig – *any* motor vehicle and is covered. Remember, the policy insuring first class insureds is “glued to the person of the first class insured” and covers the first class insured wherever he or she may be. A good example is the case of James Meeks. Meeks owned two cars: a 1954 Chevrolet, which was uninsured, and a 1957 Ford which was insured with Allstate. While

driving the uninsured 1954 Chevrolet, Meeks was injured by an uninsured motorist. Meeks sought uninsured motorist coverage, not on the car he was driving since it was uninsured, but on the 1957 Ford, insured with Allstate. Meeks was an insured of the first class – the named insured – under the Allstate policy insuring the 1957 Ford. The Supreme Court of Virginia granted coverage to Meeks holding that since Meeks was a first class insured he need not be occupying the vehicle set forth in the declarations page, but any motor vehicle, even his own uninsured 1954 Chevrolet. *Allstate Ins. Co. v. Meeks*.³

The term “or otherwise” provides coverage to a first class insured *outside a motor vehicle* as long as the first class insured is injured by an uninsured or underinsured motor vehicle. For example, the first class insured can be walking down the street, sitting at the drug store counter having lunch, or even talking a bath at home, when a motor vehicle crashes through the wall injuring him. Remember, the first class insured has the UM endorsement “glued to his or her person” and is covered wherever she/he may be.

Second Class Coverage and the expanding definition of “using”

Virginia Code §38.2-2206(B) provides second class UM/UIM coverage to any person who uses, or is a passenger in, the insured vehicle with the permission of the named insured. For example, assume Albert lets Barry drive his Audi which is insured with Allstate. Cathy is a passenger. Both Barry and Cathy are injured by the negligence of an uninsured or underinsured motorist. Barry and Cathy are second class insureds under Albert’s Allstate policy since (1) Barry was using Albert’s car with his permission and (2) Cathy was a permissive passenger (a guest) in Albert’s car at the time of the crash. In addition, Barry is a first class insured under his own policy with Bankers & Shippers Inc. Co. and Cathy is a first class insured under her own policy with Colonial at the same time. (Remember: first class insureds are covered wherever they may be - - as if the policy were glued to their person).

Virginia Code §38.2-2206(B) grants second class coverage to “any person who uses the [covered] motor vehicle . . .” The scope of second class coverage can be expanded by expanding the statutory definition of “uses.”

In *Newman v. Erie Ins. Exch.*, the Virginia Supreme Court held that a child hit by a car while crossing the road to board a stopped school bus with its warning lights and “stop arm” activated, was *using* the school bus, and entitled to second class UM coverage insuring the school bus.⁴ The court reasoned that the child was “using” the school bus’ specialized safety equipment with the immediate intention to become a passenger when hit by the car.

In *Edwards v. GEICO*, the Virginia Supreme Court held that a plaintiff injured by an uninsured

motorist while changing a flat tire on another person's parked car, intending to then drive it to a gas station to repair the tire, was "using" the car and entitled to second class coverage insuring the car.⁵

In *Randall v. Liberty Mut. Ins. Co.*, the Virginia Supreme Court held a highway worker was a second class insured under a policy insuring his employer's truck when the plaintiff was struck by a car while placing road closing signs on the highway.⁶ Although the plaintiff was 6-10 feet behind the truck when struck, the court reasoned he was "using" the truck since he was using the truck's warning lights and following VDOT safety procedures which made the truck a "specialized vehicle" designed to be used for such things as placing lane closing signs on the highway by VDOT workers.

In *Slagle v. Hartford Insurance Co. of the Midwest*, the Virginia Supreme Court held that a construction manager using hand signals to direct a tractor-trailer driver to position a large piece of construction equipment along a public road was "using" the tractor-trailer, and thus entitled to UIM coverage under the tractor-trailer's insurance policy when struck by an underinsured motorist.⁷ The *Slagle* opinion is recommended reading since it contains an excellent analysis of all prior case law.

Nationwide v. Hill: Expanded Second Class UM coverage to a passenger under the old UM endorsement

In *Nationwide Mut. Ins. Co. v. Hill*, Rebecca, a passenger, was held to be entitled to UM coverage under her driver's grandfather's policy which contained an UM endorsement which is no longer in use effective July 1, 2008.⁸

Under the facts of *Nationwide Mut. Ins. Co. v. Hill*, Mary Ann and Rebecca borrowed their neighbor Paul's car with Paul's permission. Mary Ann drove Paul's car and Rebecca was the front seat passenger. The car was wrecked by the negligence of both Mary Ann and an uninsured driver, Mr. Jones. Mary Ann's passenger, Rebecca, died and her administrator brought an UM claim against Mr. Jones and a liability claim against her driver, Mary Ann.⁹

Since Rebecca was a permissive passenger in Paul's car, she was an insured of the *second class* under Paul's policy with Nationwide. Mary Ann, the driver of Paul's car, lived with her grandfather, Wesley, as part of the same household. Her grandfather was insured with State Farm.

Under the facts of *Hill*, Rebecca, the passenger, was entitled to UM coverage under her driver's grandfather's policy with State Farm.¹⁰ How could Rebecca (the passenger) obtain UM coverage from the grandfather's policy when Rebecca was not a resident of the grandfather's household, and was a mere second class insured in Paul's car? The answer lies in the 3-step coverage analysis: RTP (Read the Policy); RTS (Read the Statute); and RTC (Read the Cases). The statute, Code §38.2-

2206(B) did not expressly provide UM coverage to Rebecca, but the *policy, in effect at the time*, did. Read the Policy (RTP) - - the UM endorsement:

Old UM endorsement withdrawn 7/1/08

Persons Insured: Each of the following is an insured under this insurance [UM]
 . . .
 (a) the named insured and, while residents of the same household the spouse and relatives, wards, or foster children of either [First Class Insureds];
 (b) *any other person while occupying an insured motor vehicle* [Second Class Insureds] . . . ;
 (c) [deleted].

Definitions: "*Insured motor vehicle*" means a motor vehicle registered in Virginia with respect to which *the bodily injury and property damage coverage of the policy applies* but shall not include a vehicle while being used without the permission of the owner.

According to *Hill*, Rebecca (the passenger) was afforded UM coverage from the driver's grandfather's policy since (1) Paul's car was an "insured motor vehicle" under the grandfather's State Farm policy because bodily injury and property damage liability coverage *under the grandfather's policy* with State Farm covered Mary Ann while she was driving a "non-owned automobile" with permission of the owner.¹¹ Since Paul's car was a "non-owned automobile," excess liability coverage was provided to Mary Ann under her grandfather's policy and by policy definition, Paul's car was "an insured motor vehicle" under the UM endorsement on her grandfather's State Farm policy; and (2) Rebecca was "*occupying* an insured motor vehicle," Paul's car.

The old UM policy language was broader than the statute. Section 38.2-2206(B) refers to "**the** motor vehicle to which the policy applies," whereas the old UM endorsement referred to **any** motor vehicle where liability coverage under the policy applies by use of the term . . . "**a** motor vehicle."

In *McDuff v. Progressive*, Case No. CL06-5494, Circuit Court for the City of Richmond 2007, VLW No. 007-8-174, Judge Markow held that for the driver's UM/UIM coverage to **apply**, the plaintiff's driver, who did not own the car, must herself be found negligent. The fact that liability coverage under the driver's policy would apply if the driver were negligent was not sufficient. The plaintiff's lawyer in *McDuff* argued that the policy language "applies" (found in the old UM endorsement) was **ambiguous** and should be construed against the insurer. However, Judge Markow did not address the issue of ambiguity in his decision.

The new UM endorsement, SCC Form PP14030105, defines a “second class insured” as “any other person occupying or using ‘**your covered auto**’” The new UM endorsement defines “your covered auto” to include vehicles shown in the declarations, a newly acquired auto, any trailer you own or any temporary substitute auto or trailer. It does **not** include a “non-owned auto” *i.e.*, Paul’s car in the *Hill* decision.¹²

The SCC, Bureau of Insurance, made the new form UM endorsement “available for use” by carriers on July 1, 2006, with a mandatory “must adopt” date of July 1, 2008.

The court in *Hill* based its holding on the old UM endorsement.¹³ Under the new UM endorsement, which contains different policy language defining a “second class insured”, the decision in *Hill*¹⁴ likely would be different – the passenger would not be entitled to UM coverage under her driver’s grandfather’s policy since Paul’s car, in the *Hill*¹⁵ decision, would not fall under the definition of “your covered auto” in the new UM endorsement, PP14030105.

Liability and UM coverage from the same policy

In *Nationwide Mut. Ins. Co. v. Hill*, Nationwide (which insured Paul’s car) paid Rebecca, the passenger, its full \$50,000 liability policy limits for the negligence of Mary Ann, the driver.¹⁶

However, it sought to reduce its UM payment to Rebecca for the negligence of the uninsured joint-tortfeasor, Mr. Jones, invoking the standard “set-off” provision in the “Limits of Liability Clause” which reduces UM payment by any liability payments made to a plaintiff under the *same* policy. The Supreme Court of Virginia in *Nationwide Mut. Ins. Co. v. Hill* held this standard “set-off” provision invalid since it placed a restriction on the mandate of the UM statute “to pay all sums” that an insured is legally entitled to recover against an uninsured motorist.¹⁷ The plaintiff recovered policy limits from *both ends of the same Nationwide policy*: \$50,000 in liability coverage and \$50,000 in UM coverage.

In *Trisvan v. Agway Ins. Co.*, the Supreme Court of Virginia reaffirmed a plaintiff’s ability to recover from both the liability and UM coverage of the same policy provided *two defendants* are involved, as in *Hill*, the driver and the uninsured motorist.¹⁸

However, the court held in the **one car crash case** where the driver is the **only** negligent defendant, the plaintiff (passenger) is not entitled to **both** liability and UIM coverage under the driver’s policy.

Liability and UIM coverage from the same policy

In *Dyer v. Dairyland*, the Supreme Court applied the reasoning of *Nationwide v. Hill*, *supra*, to the

UIM context, holding that the plaintiff, a passenger on the defendant’s motorcycle, was entitled to both liability and UIM coverage under her driver’s motorcycle policy.¹⁹ The key, as in *Nationwide v. Hill*, *supra*, is **two** joint-tortfeasors. The plaintiff’s driver, a joint tortfeasor, in *Dyer*, *supra*, had \$100,000 in liability and UM coverage on the **same** policy. The plaintiff was entitled to \$100,000 in liability coverage for her driver’s negligence under his policy and \$75,000 in UIM coverage under the same policy since the other driver (a joint tortfeasor) only had \$25,000 in liability coverage and was underinsured by \$75,000 (\$100,000 UM - \$25,000 liability). Thus, the plaintiff was entitled to \$175,000 from her driver’s policy and \$25,000 from the second negligent driver’s policy.

The *Hill* and *Dyer* cases, *supra*, are distinguishable from the *Trisvan* case, *supra*, since *Trisvan* involved only **one** defendant.

UM and UIM coverage from the same policy

William O’Neil was seriously injured in an auto crash caused by two defendants: Watkins and an unknown driver, John Doe. O’Neil’s medical expenses exceeded \$900,000. Defendant Watkins had liability coverage of \$100,000 and the plaintiff (for discussion purposes only) had UM coverage of \$300,000 with USAA, which afforded O’Neil \$200,000 in *underinsured motorist coverage (UIM)* with his own carrier. (\$300,000 UM minus \$100,000 Watkins liability = \$200,000 UIM from USAA). USAA offered its \$200,000 in UIM coverage. O’Neil then sought an additional \$300,000 policy limit recovery from his carrier, USAA, under his *uninsured motorist endorsement* against the **uninsured defendant, John Doe**. Judge Joanne F. Alper of the Circuit Court of Arlington County, ruled in favor of O’Neil holding that Virginia Code §38.2-2206(A), “mandates **independent** statutory protection for UM and UIM drivers.” (Emphasis added). *O’Neil v. USAA*.²⁰

However, Judge Arthur B. Vieregg of the Circuit Court of Fairfax County reached a different result, on similar facts, holding that Code §38.2-2206(A) does **not** provide both UM and UIM coverage under the same policy. *MacDougall, et al. v. Hartford Ins. Grp., et al.*²¹ *Accord, Virginia Farm Bureau v. Beach, et al.*²²

Stacking of UM/UIM Coverage

The statute (Code §38.2-2206) is King. The terms of the statute control. Any policy language which places a limitation on any term of the uninsured motorist statute is void. *Bryant v. State Farm Mut. Ins. Co.*²³

The statutory basis for “stacking” of coverage is the term “**all sums**” contained in the uninsured motorist statute, Code §38.2-2206.

Code §38.2-2206(A) – BASIS FOR
STACKING “ALL SUMS”

§38.2-2206(A)

“To pay the insured *all sums* that he is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle.

The first generation of stacking, in 1965, involved Bernard Bryant, Jr. Bernard resided in the same household as his father, Bryant, Sr. Bryant, Sr. owned a 1958 Ford truck insured by State Farm and was the named insured. Bryant, Jr. owned a motor vehicle himself and was the named insured on a *separate* policy issued by State Farm naming Bryant, Jr. as the named insured. On the date of the collision, Bryant, Jr. was driving his father’s 1958 Ford truck and was injured by the negligence of an uninsured motorist and recovered a judgment in the amount of \$85,000. The minimum limits in 1959 were \$10,000 / \$20,000. Each policy with State Farm had minimum limit coverage. Bryant, Jr. was an insured of the first class while driving his father’s truck since he was a relative residing in his father’s household. State Farm offered Bryant, Jr. the full policy limits covering his father’s vehicle (the vehicle he was occupying). Bryant, Jr. also was a named insured under his own policy issued by State Farm. State Farm refused payment on the excess policy issued directly to Bryant, Jr. on the ground that “the other insurance clause” contained in the UM endorsement resulted in zero payment. The State Farm “other insurance clause” used in 1959 had an “escape clause” – when the insured was occupying an automobile not owned by him. This “escape clause” allowed State Farm to “escape” from making any payment whatsoever if the excess coverage on Bryant, Jr.’s car did not *exceed* the coverage on Bryant, Sr.’s car (the occupied vehicle). (\$10,000 from Bryant, Jr.’s policy minus \$10,000 from Bryant, Sr.’s policy = zero).

The Supreme Court of Virginia in *Bryant* held State Farm’s policy language conflicted with the statute and was void, holding:²⁴

“... The insurance policy issued by State Farm to Bryant, Jr. undertakes the limit and qualify the provision of the statute [pay all sums]. It undertakes to pay the insured not ‘all the sums which he shall be legally entitled to recover as damages’ as the statute commands, but only such sum as exceeds ‘any other similar insurance available’ to him; i.e., the amount by which the applicable limit of the policy ‘exceeds the sum of the applicable limits of all other insurance.’ Further, this provision places a limitation upon the requirement

of the statute and conflicts with the plain terms of the statute. It is therefore illegal and of no effect.”²⁵

The second generation of stacking, in 1972, involved George Cunningham. George, employed by the Virginia Department of Highways, was riding in a highway vehicle when he was killed by the negligence of an uninsured motorist. The Virginia Department of Highways had 4,368 state-owned vehicles, each insured with Maryland Casualty for the minimum limits at the time of \$15,000 / \$30,000 each. George Cunningham owned three cars himself which were insured with Insurance Company of Northern America (INA). All three Cunningham vehicles were listed on the same policy. A separate premium was paid for each vehicle. The administrator of Cunningham’s estate argued that the coverage from Maryland Casualty should be stacked by multiplying the coverage of \$15,000 per vehicle times all of the state-owned vehicles insured with Maryland Casualty, for total coverage exceeding \$65,000,000. The administrator also argued that Cunningham had available \$45,000 in uninsured motorist coverage from his own carrier, INA, by stacking the coverage on each vehicles (\$15,000 x 3 vehicles on the same policy = \$45,000).

The Supreme Court of Virginia, in *Cunningham v. Insurance Co. of N. Am.*, held that absent plain and unmistakable language to the contrary, Cunningham could stack the coverage on his own vehicles (he was the named insured) since he had paid three separate premiums for coverage on three separate vehicles.²⁶ The court stated, “When we pay a double premium, we expect double coverage...” However, Cunningham could not stack the coverage on the state-owned vehicle he was occupying since he was not the named insured, but a mere second class permissive user, having paid no premium.

Thus, in *Cunningham*, *supra*, the Supreme Court of Virginia entered the second generation of stacking uninsured motorist coverage. Following the *Cunningham* decision, *supra*, **a first class insured** could stack (combine) uninsured motorist coverage on multiple vehicles **on the same policy** for which separate premiums were charged. Mere permissive users (insureds of the second class) could not stack coverage on **someone else’s policy**.

The third generation of stacking was brought to us in 1981 by Roger Borrer. Roger had two cars insured with Goodville Mutual Insurance Company on the **same** policy. Separate premiums were paid for each car. Roger Borrer was injured by the negligence of an uninsured motorist and sought to stack (combine) the coverage on each vehicle.

The Supreme Court of Virginia in *Goodville Mut. Cas. Co. v. Borrer*²⁷ held, “It is now the rule in Virginia that stacking of UM coverage will be permitted unless clear and unambiguous language exists on the face of the policy to prevent such multiple coverage.” A critical fact distinction between *Good-*

*ville Mut. Cas. Co. v. Borrer*²⁸ and the *Cunningham*²⁹ decision was that the Court in *Borrer*³⁰ held that Goodville Mutual had a clear and unambiguous “limits of liability” clause in its UM endorsement which prevented stacking. The Virginia Supreme Court in the *Borrer* decision, *supra* held:

“We conclude that the language of Goodville’s policy, viz., ‘**(r)egardless of the number of... motor vehicles to which this insurance applies,**’ is clear and unambiguous and requires the construction that stacking is not permissible. With the foregoing language, the policy plainly limits Goodville’s UM liability for damages to any one person as a result of any one accident to \$25,000. The mere fact that two vehicles are insured and two separate premiums are charged is of no consequence in light of the express language of the policy.” (emphasis added)

The court failed to report in its *Borrer* decision, *supra*, that the Goodville policy also contained **within the UM endorsement itself**, a “schedule” setting forth “limits of liability: bodily injury \$25,000 each person; \$50,000 each accident” and that the declarations page of the Goodville policy referred the policyholder back to the UM endorsement for the “each person/each accident” limit of liability [“self contained clarity of the UM endorsement”].³¹

Most insurance carriers which regularly issue policies in Virginia use the “magic words” of the Goodville policy, “regardless of the number of... motor vehicles to which this insurance applies...” in its “limits of liability” clause, but unlike the Goodville Mutual policy, refer the policyholder to the declarations page for the actual “each person/each accident” limit of liability. The Goodville Mutual “limits of liability” clause quoted by the court in the *Borrer* decision, *supra*, is reproduced below with the court’s original emphasis of the “magic words.”

Limits of Liability Clause

“Regardless of the number of . . . motor vehicles to which this insurance applies (a) the limit of liability for bodily injury stated in the schedule as applicable to ‘each person’ is the limit of the company’s liability for all damages because of bodily injury sustained by one person as a result of any one accident, and, subject to the above provision respecting ‘each person’, the limit of liability stated in the schedule as applicable to ‘each accident’ is the total limit of the company’s liability for all damages because of bodily injuries sustained by two or more persons as a result of any one accident.” (Original emphasis).

With regard to stacking under separate policies, the Supreme Court of Virginia has consistently struck down insurance industry attempts to limit stacking of UM/UIM coverage on separate policies (interpolicy stacking). *Bryant v. State Farm Mut. Auto. Ins. Co.*;³² *USAA Casualty Ins. Co. v. Alexander*;³³ *Nationwide Mut. Ins. Co. v. Hill*;³⁴ and *Dyer v. Dairyland*.³⁵

With regard to stacking of UM/UIM coverage for multiple vehicles on the same policy, the “magic words” quoted in the *Goodville* decision, *supra*, “regardless of the number of... motor vehicles to which this insurance applies...” was considered to prevent stacking until June 4, 2009, when the Supreme Court of Virginia decided *Virginia Farm Bureau Mut. Ins. Co. v. Williams, et al.*, Record No. 081900.

The Supreme Court, in *Virginia Farm Bureau Mut. Ins. Co. v. Williams, et al.*, *supra*, held that Virginia Farm Bureau’s “limits of liability” clause containing the “magic words” of the *Goodville* decision, “regardless of the number of... motor vehicles to which this insurance applies,” would not prevent stacking of UM coverage on multiple vehicles, with separate premiums, on the same policy if the schedule or declarations setting forth the “each person” limit of liability created an ambiguity.

The Virginia Farm Bureau policy in *Williams, supra*, unlike the Goodville Mutual policy in *Borrer, supra*, did not set forth the “each person” limit of liability in the UM endorsement itself, but instead referenced the declarations page of the policy. The declarations page set forth three separate vehicles with three separate charged premiums with “each person” UM coverage of (1) \$300,000; (2) \$300,000; and (3) \$250,000, respectively, for each vehicle for a total of \$850,000. The declarations page created two separate ambiguities which were not resolved by the anti-stacking “magic words” from the *Borrer* decision, *supra*.

Ambiguity (1): Whether the UM limit of liability for “each person” was the three limits **combined**, i.e., \$850,000, or one of the three individual vehicle limits of liability?

Ambiguity (2): If the UM limit of liability for “each person” was not to be combined, which individual vehicle limit of liability would apply, i.e. \$300,000 or \$250,000?

The Supreme Court of Virginia, in *Virginia Farm Bureau Mut. Ins. Co. v. Williams, et al.*, *supra*, held that an ambiguity was thus created which was not prevented by the anti-stacking “magic words” of the *Goodville* decision, *supra*, and declared that the Virginia Farm Bureau policy afforded Williams UM/UIM coverage in the total amount of \$850,000 holding, at pages 9-10 of the slip opinion:

“We stated [in *Goodville Mutual v. Borrer*] that the phrase ‘[r]egardless of

the number of... motor vehicles to which this insurance applies' was a clear and unambiguous provision prohibiting stacking [citation omitted].

Although the policy that is the subject of the present appeal contains the same phrase, that similarity must be considered in the context of the other policy language. In reviewing the balance of the policy language, we observe that the present policy contains a significant difference from the policy we considered in *Goodville*. There, the UM endorsement contained a schedule stating the limits of liability for 'each person' at \$25,000. **This statement was clearly and unambiguously set forth at the beginning of the UM endorsement**, and no other portions of the policy address this same subject.

Unlike the policy in *Goodville*, the present policy does not state the limits of liability for 'each person' in a schedule **within** the UM/UIM endorsement. Instead, the UM/UIM endorsement refers the reader to the '[d]eclarations' page of the policy in which there are three references to the term 'each person' [a different UM endorsement structure than *Goodville*]. Two of those references state a limit of liability for 'each person' in the amount of \$300,000, while the third reference states a limit of liability for 'each person' in the amount of \$250,000.

These different sets of coverage, when considered along with the 'anti-stacking' language of the UM/UIM endorsement, leave unresolved the question whether all three separate limits for 'each person' apply [Ambiguity: 1], and, if not, which of the single separate limits for 'each person' is applicable [Ambiguity: 2]. This disparity in the stated limits of liability for 'each person' manifests an **ambiguity** regarding the extent of total coverage for 'each person' under the policy...

Because we must construe this ambiguity in Williams' favor, we hold that Williams is entitled to 'stack' the UM/UIM coverage for all three vehicles listed in the policy..." (emphasis added)

The new Bureau of Insurance Standard Form UM endorsement in the new ISO Personal Auto Policy available for use by carriers on July 1, 2006, and mandatory effective July 1, 2008, as well as the prior standard form UM endorsement, all have the same **structure** as the Virginia Farm Bureau UM endorsement in the *Williams* decision, *supra*. The "limits of liability" clause and the "per person" limit of liability set forth therein are not "self contained [for] clarity" in the UM endorsement itself

as approved by the Court in the *Goodville* decision, *supra*.³⁶ Rather, the policyholder is referred to the declarations page to find the "per person" limit of liability.

The Bureau of Insurance does not provide a standard form declarations page for the new ISO Personal Auto Policy. Each carrier uses its own form declarations page which must contain the information required by Virginia Code §38.2-305 (insured name, address, policy period, premium, etc.). Many carriers use a similar declarations page and UM endorsement structure which the court in the *Williams* decision, *supra*, held created an ambiguity entitling the insured to stack the UM/UIM coverage on multiple vehicles on the same policy.

Coverage analysis involves three steps: (1) Read the Policy - RTP; (2) Read the Statute - RTS; and (3) Read the Cases - RTC. It is important to read the policy (RTP), and the declarations page in view of the *Virginia Farm Bureau v. Williams, et al.* decision, *supra*, to determine whether the UM coverage on multiple vehicles can be stacked.

The brief filed with the Virginia Supreme Court on behalf of Virginia C. Williams and Robert H. Williams, may be obtained from VTLA (please see the Hot Documents page at www.vtla.com).

Stacking separate minimum limits policies

§38.2-2206(A) (1993)

Underinsured Motorist Coverage

" . . . The endorsement or provisions [uninsured motorist insurance coverage] shall also obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent the vehicle was underinsured as define in subsection B of this section"

The 1993 Amendment deleted the phrase "where the insured contracts for higher limits." The General assembly deleted this language in view of Judge Davis' decision in *Superior Insurance Company v. Postell, et al.*³⁷ Judge Davis held that the clause in the UM / UIM statute, "where the insured contracts for higher limits," requires a plaintiff to have uninsured motorist coverage in an amount greater than minimum limits for underinsured motorist coverage to apply.

The Supreme Court of Virginia, in a separate case involving the pre-1993 statute, did *not* accept Judge Davis' reasoning, holding in *USAA Casualty Ins. Co. v. Alexander*:³⁸

"We therefore resolve the present ambiguity by holding that when, as here, an injured person has purchased only **"minimum limits"** UM coverage, but

has a “**total** amount of uninsured motorist coverage afforded” that is greater than the statutory minimum, an insurer shall be deemed obligated to make payment “to the extent the vehicle is underinsured,” as defined in Code §38.2-2206(B).” (Emphasis added).

As an example, assume the plaintiff is an insured under three separate policies, each with \$25,000 minimum limits UM coverage and the defendant has minimum liability limits of \$25,000. According to *USAA Casualty Ins. Co. v. Alexander*, the plaintiff can stack the three minimum limit UM policies to obtain \$50,000 in UIM coverage. \$25,000 (stacked) x 3 = \$75,000 **minus** \$25,000 (defendant’s liability coverage) = \$50,000 UIM coverage.³⁹

The underinsured motorist coverage calculation

The statutory definition of “Underinsured Motor Vehicle” provides the basis for calculating the plaintiff’s UIM coverage.

Underinsured Motor Vehicle Code §38.2-2206(B)

Code §38.2-2206(B): Definition of Underinsured Motor Vehicle

“A motor vehicle is [the vehicle occupied by the defendant] ‘*underinsured*’ when, and to the extent that, the **total** amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage . . . is **less** than the **total** amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of the vehicle.”

“**Available for payment**” means the amount of liability insurance coverage [covering the defendant] applicable to the claim of the injured person for bodily injury or property damage **reduced by the payment of any other claims** arising out of the same occurrence.”

A simple method for calculating the total UIM coverage afforded the plaintiff is to use the formula:

Total Amount of plaintiff’s UIM coverage minus
Total Amount of defendant’s liability coverage =
Total amount of plaintiff’s UIM coverage.

To do the calculation:

- a. List in column (a) the coverage on each policy affording the plaintiff uninsured motorist coverage (UM);
- b. List in column (b) the coverage on each liability policy covering the defendant, reduced by payment to other claimants in the same accident, if applicable;
- c. Subtract the total of column (b) from the total of column (a) to obtain the total amount of underinsured motorist coverage (UIM) afforded to the plaintiff.

If the plaintiff’s injury is caused by the negligence of two tortfeasors, UIM coverage is calculated by subtracting the liability coverage for **each** joint tortfeasor from the plaintiff’s UM coverage. *Nationwide Mut. Ins. Co. v. Scott*.⁴⁰

For example, assume the plaintiff has \$100,000 in UM coverage and Tortfeasor-1 and Tortfeasor-2 each have separate policies with liability coverage of \$50,000. The plaintiff has UIM coverage of \$100,000. If the plaintiff received a \$200,000 judgment against both tortfeasors, each tortfeasor’s automobile liability insurer would pay \$50,000 and the plaintiff’s automobile insurance carrier would pay \$100,000 in UIM coverage (\$100,000 UM - \$50,000 **per** tortfeasor).

Liability and UIM coverage not allowed on the same policy – one defendant (plaintiff passenger: defendant driver)

Bernard Trisvan was a passenger in a car driven by Marcus Smith. Mr. Smith was insured with minimum liability and UM limits of \$25,000, respectively, with Integon. Bernard Trisvan lived with his father and was a first class insured under his father’s policy with Agway Ins. Co. providing \$100,000 in UM coverage. Trisvan’s driver, Marcus Smith, negligently crashed the car causing a **one car collision** severely injuring Trisvan. The driver’s insurance company, Integon, offered its \$25,000 liability limits to Trisvan. Trisvan then sought underinsured motorist coverage with Agway. Trisvan sought to stack **his driver’s \$25,000 UM coverage** with his father’s \$100,000 Agway UM coverage for a total of \$125,000 in UM coverage, which Trisvan argued provided him \$100,000 in underinsured motorist coverage (UIM) from Agway. Agway argued that Trisvan could not use the driver’s \$25,000 UM coverage as a “floor” to stack upon.

The Supreme Court of Virginia held that Trisvan was not entitled to both liability and UM coverages from his driver’s policy since his driver (Smith) was the **only tortfeasor**. *Trisvan v. Agway Ins. Co.*⁴¹

The court in *Trisvan* in a footnote at 254 Va. 416, 422, reaffirmed *Nationwide Mut. Ins. Co. v. Hill*,⁴² where a plaintiff, who was a passenger in a defendant’s car, was able to recover under both ends of his driver’s policy – liability coverage against his

driver and uninsured motorist coverage against an uninsured joint tortfeasor. See also, *Dyer v. Dairyland*, which applied the reasoning of *Hill* to UIM claims.⁴³ **The key distinction: two tortfeasors versus the one tortfeasor in *Trisvan*.**

Priority of UIM coverage and the statutory credit

Code §38.2-2206(B)
Statutory Priorities of UIM Coverage

“If an injured person is entitled to **underinsured motorist coverage under more than one policy**, the following order of priority of policies applies and any amount available for payment shall be **credited** against such policies in the following order of priority:

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

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

Recovery under the endorsement or provisions shall be subject to the conditions set forth in this section.”

To determine the amount of UIM coverage the total amount of liability coverage insuring the defendant is subtracted from the total amount of UM coverage afforded to the plaintiff. The total amount of UM coverage is not paid; only the **difference**. When an insured is entitled to underinsured motorist coverage under more than one policy, this difference is called “**a credit**,” since the statute declares, “any amount [of liability coverage] available for payment shall be credited against such policies [UM policies providing the plaintiff UM coverage].”

For example, assume the plaintiff received a \$100,000 judgment; the defendant’s liability limits are \$50,000 / \$100,000; the plaintiff has \$50,000 / \$100,000 UM coverage on his car, which was involved in the collision, with GEICO and is also a

resident relative insured under his mother’s Allstate policy providing \$50,000 / \$100,000 in UM coverage. The plaintiff has a total of \$100,000 in underinsured motorist coverage and is underinsured by \$50,000. The defendant’s liability carrier must pay its \$50,000 liability limits. GEICO, providing “the policy covering a motor vehicle occupied by the injured person at the time of the accident,” is given a “**credit**” for the defendant’s \$50,000 liability payment and ends up paying nothing. Allstate, the plaintiff’s mother’s carrier providing “the policy covering a motor vehicle not involved in the accident under which the injured person is an insured other than the named insured,” must pay \$50,000 in underinsured motorist coverage according to the order of priority set forth in the statute.

Underinsured motorist coverage analysis

Assume you represent Priscilla Jones who was seriously injured by the negligence of Larry Smith. Priscilla Jones was driving her Ford, insured with USAA with UM limits of \$25,000. She resides with her mom and two sisters, Elizabeth and Theresa, all members of the same household. Each has the following UM coverage: Mom-Goodville Mutual for \$500,000; Elizabeth-Erie for \$300,000; Theresa-Travelers for \$300,000. The defendant is insured with Colonial with \$25,000 in liability coverage.

Generally, the vehicle the plaintiff was occupying at the time of the collision provides primary underinsured motorist coverage. An exception is a self-insured vehicle.⁴⁴

If the plaintiff were occupying a self-insured vehicle, the UM coverage on that vehicle, which may not exceed \$25,000 / \$50,000 (minimum limits), would be secondary and applies only if there were no other coverage available.⁴⁵

Since Priscilla Jones was driving her Ford, she is entitled to primary UM coverage with her own carrier, USAA, with UM policy limits of \$25,000.

Following Priscilla Jones home brings us to her mother’s policy with Goodville Mutual, insuring two cars each with \$500,000 in uninsured motorist coverage and her two sisters’ policies, each providing \$300,000 in uninsured motorist coverage, with Erie and Travelers, respectively.

Since Priscilla Jones resides at home and is part of the same household⁴⁶ with her mother and two sisters, Elizabeth and Theresa, she is **an insured of the first class** under each policy. The uninsured motorist statute, Code §38.2-2206, mandates that Priscilla be covered under these policies “while in a motor vehicle or otherwise.” As noted, *Allstate Ins. Co. v. Meeks* is authority for mandating coverage to a first class insured while occupying **any** motor vehicle, including motor vehicles not listed in any policy.⁴⁷

Priscilla Jones’ mother insures two cars on her Goodville Mutual policy. If Goodville Mutual

2. *Insurance Company of N. Am. v. Perry*, 204 Va. 833, 837, 134 S.E.2d 418 (1964).
3. *Allstate Ins. Co. v. Meeks*, 207 Va. 897, 153 S.E.2d 222 (1967).
4. *Newman v. Erie Ins. Exch.*, 256 Va. 501, 507 S.E.2d 384 (1998).
5. *Edwards v. GEICO*, 256 Va. 128, 500 S.E.2d 819 (1998).
6. *Randall v. Liberty Mut. Ins. Co.*, 225 Va. 62, 496 S.E.2d 54 (1998).
7. *Slagle v. Hartford Insurance Co. of the Midwest*, 267 Va. 629, 594 S.E.2d 582 (2004).
8. *Nationwide Mut. Ins. Co. v. Hill*, 247 Va. 78, 439 S.E.2d 335 (1994).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Trisvan v. Agway Ins. Co.*, 254 Va. 416, 492 S.E.2d 628 (1997).
19. *Dyer v. Dairyland*, 267 Va. 725, 599 S.E.2d 628 (2004).
20. *O'Neil v. USAA*, 17 Cir. C00767, 57 Va. Cir. 257 (2002).
21. *MacDougall, et al. v. Hartford Ins. Grp., et al.*, 61 Va. Cir. 181 (Cir. Ct. Fairfax County, 2003).
22. *Virginia Farm Bureau v. Beach, et al.*, 65 Va. Cir. 537 (Circuit Court Stafford County, Haley, J., 2003).
23. *Bryant v. State Farm Mut. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965).
24. *Id.*
25. *Id.*, 205 Va. at 901.
26. *Cunningham v. Insurance Co. of N. Am.*, 213 Va. 72, 189 S.E.2d 832 (1972).
27. *Goodville Mut. Cas. Co. v. Borrer*, 221 Va. 967, 275 S.E.2d 625 (1981).
28. *Id.*
29. *Cunningham, supra* note 26.
30. *Borrer, supra*, note 27.
31. Brief of appellees Williams at 17. *Virginia Farm Bureau Mut. Ins. Co. v. Williams, et al.*, Va. Sup. Ct., Record No. 081900 (June 4, 2009).
32. *Bryant, supra*, note 23.
33. *USAA Casualty Ins. Co. v. Alexander*, 248 Va. 185 (1994).
34. *Nationwide Mut. Ins. Co. v. Hill, supra*, note 8.
35. *Dyer v. Dairyland, supra*, note 19.
36. Brief of appellees Williams at 17. *Virginia Farm Bureau Mut. Ins. Co. v. Williams, et al.*, Va. Sup. Ct., Record No. 081900 (June 4, 2009).
37. *Superior Insurance Company v. Postell, et al.*, CH Case No. 91-200 (22nd Judicial Circuit, 1992).
38. *USAA Cas. Ins. Co. v. Alexander*, 248 Va. 185 at 194-195, 445 S.E.2d 145 (1994).
39. *Id.*
40. *Nationwide Mut. Ins. Co. v. Scott*, 234 Va. 573, 363 S.E.2d 703 (1988).
41. *Trisvan v. Agway Ins. Co., supra*, note 18.
42. *Nationwide Mut. Ins. Co. v. Hill, supra*, note 8.
43. *Dyer v. Dairyland, supra*, note 19.
44. Virginia Code §46.2-368(B). Even though the self-insurer provides minimum limits secondary UM coverage, the self-insurer is first in line to receive the "statutory credit" for the defendant's liability coverage, if the plaintiff were occupying a self-insured vehicle. For example, if the defendant had \$25,000 in liability coverage and the plaintiff had \$100,000 in UM coverage, under his own personal policy with State Farm, the self-insurer would receive the \$25,000 "statutory credit" and State Farm would be responsible for up to \$100,000 in UIM coverage. *Catron v. State Farm Mut. Auto. Ins. Co.*, 225 Va. 31 496 S.E.2d 436(1998). On the other hand, if the plaintiff were a customer test driving a dealer's auto insured under the dealer's commercial garage policy, the full amount of the UM coverage on the garage policy would be primary, even though for purposes of liability coverage, the garage policy would provide only minimum limits, secondary liability coverage. *Harlow v. Nationwide Ins. Co., et al. v. Morris*, 2005 WL2560226 (No. LR-2967-1, Cir. Ct. City of Richmond, 2005, Hughes J.).
45. Virginia Code §46.2-368(B).
46. The Supreme Court of Virginia has consistently defined the term "household" as "a collection of persons in a single group, with one head, living together, a unit of permanent and domestic character, under one roof." *State Farm Mut. Auto. Ins. Co. v. Smith*, 206 Va. 280, 142 S.E.2d 562 (1965); *Phelps v. State Farm Mut. Ins. Co.*, 245 Va. 1, 426 S.E.2d 484 (1993); *Nationwide v. Robinson*, 36 Va. Cir. 193 (Cir. Ct. City of Richmond, 1995), where Judge Randall G. Johnson held that a 16-year-old boy, in the joint custody of both parents, was a resident of each parent's separate household for purposes of UM coverage. This 12-page opinion reviews existing case law and explores, in depth, the legal concept of "resident of the same household." However, if the named insured makes a material misrepresentation in the insurance application by failing to "list all household members of driving age," the policy could be declared void with no coverage. *Portillo v. Nationwide Mutual Fire Insurance Company*, 277 Va. 193, 671 S.E.2d 153 (2009).
47. *Allstate Ins. Co. v. Meeks, supra*, see note 3.
48. *Borrer, supra*, see note 27. But see, *Virginia Farm Bureau Mut. Ins. Co. v. Williams, et al.*, Va. Sup. Ct., Record No. 081900 (June 4, 2009).



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