Auto Accident
Part II of III

Understanding Auto Insurance Law:
maximizing recovery with underinsured motorist coverage

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This article is the second in a three-part series for the VTLA *Journal*. The first article, which appeared in the Spring 1995 issue, discussed the liability aspect of maximizing coverage and its relationship with underinsured motorist coverage. This article discusses maximizing coverage with underinsured motorist insurance. The third part will continue the analysis with medical expense benefits coverage (Fall 1995 issue).

I. Introduction

A. Uninsured motorist coverage (UM) and underinsured motorist coverage (UIM)

Part IV of the Standard Family Auto 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.[1] 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. The defendant is 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 cover the plaintiff must pay the underinsured portion of the claim.

Underinsured motorist coverage is a subdivision of uninsured motorist coverage. All Virginia auto liability insurance policies must contain both an UM and an UIM endorsement. Va.Code Ann. §38.2-2206(A) (1995 Suppl.) set forth below. Likewise, all Virginia self-insured vehicles (except local government vehicles insured through the Virginia Municipal Liability Pool) must provide **both** UM and UIM protection. *Hackett v. Arlington County*;[2] Va.Code Ann. §46.2-368(B) (1995 Supp.)[3]

To calculate the total amount of underinsured motorist coverage available to the plaintiff, we must first determine the total amount of uninsured motorist coverage (UM) available to her. With respect to uninsured motorist coverage, we must ask two questions:

- "Who" is an Insured?; and
- When is "Stacking" of Coverage Permitted?

To find the answers to these questions, follow the three step analysis, RTP (read the policy); RTS (read the statute); and RTC (read the cases). (The "RTP step" is discussed at page 28, *infra*.)

B. The UM and UIM Statute - Code §38.2-2206

1. The UM/UIM Statutory Insuring Provisions

UM STATUTE - CODE §38.2-2206(A) (1995) INSURING PROVISIONS[4]

"... 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 Section 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 this 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."

2. Persons Insured Under the Statute

INSURED - (1995) CODE §38.2-2206(B)[5]

"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."

3. The Statute Creates Two Classes of Insureds

In *Insurance Company of N. Am. v. Perry*,[6] the Supreme Court of Virginia recognized that the legislature had intended to create two separate classes of insureds:

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 (a permissive passenger)' to which the policy applies."

4. 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. In A Motor Vehicle:

A first class insured is covered 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.

b. Any Motor Vehicle — Example: James Meeks' 1954 Chevy:

James 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*[7]

c. "Or Otherwise":

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 motor vehicle. For example, the first class insured can be walking down the street, sitting at the drug store counter having lunch or even taking

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 he/she may be.

C. Second Class Derivative Coverage

A permissive passenger in an auto which is either a "temporary substitute auto" or a "non-owned auto" under a policy covering the driver is entitled to **all** UM coverage insuring the **driver** under the standard UM endorsement to the family auto policy. *Nationwide Mut. Ins. Co. v. Hill*[8] The basis for "second class derivative UM coverage" is the policy **definition** of a second class insured, which is **broader** than the statutory definition.

In *Hill, supra*, Mary Ann and Rebecca borrowed their neighbor Paul's car, which was registered in Virginia, 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, was killed and her estate brought an UM claim against Mr. Jones and a liability claim against her driver, Mary Ann.

Since Rebecca was a permissive passenger in Paul's car, she was an insured of the **second class** under Paul's policy with Nationwide, with liability and UM limits of $50,000 per person.

Mary Ann, the driver of Paul's car, lived with her grandfather, Wesley, as part of the same household. As a result, Mary Ann was a first class insured under her grandfather's State Farm auto insurance policy, with liability and UM limits of $100,000 per person.

According to the decision of *Nationwide Mut. Ins. Co. v. Hill,*[9] Rebecca is entitled to "**second class derivative UM coverage**"[10] under all policies affording UM coverage to her driver, Mary Ann, who was driving a "non-owned auto." How can Rebecca (the passenger) obtain "derivative UM coverage" from all policies insuring Mary Ann (the driver) when Rebecca is not a resident of Mary Ann's household and is a mere second class insured in Paul's car? The answer lies in our 3-step coverage analysis: RTP (Read the Policy); RTS (Read the Statute); and RTC Read the Cases). The statute, Code §38.2-2206(B) does not provide "derivative UM coverage" from Mary Ann to Rebecca, but the **policy** does. Read the Policy (RTP), Part IV - the UM endorsement under "II. Persons Insured" and "V. Definitions."

UM POLICY PROVISIONS

> 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 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.

Read the Cases (RTC). According to *Hill,*[11] Rebecca (the passenger) "derives" UM coverage from all policies providing liability and UM coverage to her driver, Mary Ann, since (1) Paul's car is an "insured motor vehicle" because bodily injury and property damage liability coverage **under her grandfather's policy** with State Farm covers Mary Ann while she is driving an "owned automobile" and a "non-owned automobile" with permission of the owner. Since Paul's car is a "non-owned automobile,"[12] excess liability coverage is provided to Mary Ann under her grandfather's policy, and by policy definition, Paul's car is "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.

Nationwide (which insured Paul's car) and State Farm (which provided excess non-owned auto liability coverage to Mary Ann) each paid Rebecca's estate their full $50,000 and $100,000 liability policy limits, respectively, for the negligence of Mary Ann, the driver of Paul's car. However, they sought to reduce their corresponding UM payments to Rebecca's estate 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 payments by any liability payments made to a plaintiff under the **same** policy. The Supreme Court of Virginia in *Hill v. Nationwide Mut. Ins. Co.*[13] 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. Accordingly, Rebecca's estate recovered a total of $300,000: $150,000 in liability coverage for the negligence of Mary Ann, and, $150,000 in UM coverage for the negligence of the uninsured joint defendant, Mr. Jones.

D. Stacking of UM Coverage

1. Statutory Basis for Stacking - "All Sums"

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. Auto. Ins. Co.*[14]

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."

2. Stacking — The First Generation

Bernard Bryant Jr. 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" 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*[15] held State Farm's policy language conflicted with the statute and was void, holding:

> ". . . 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."[16]

3. Stacking — The Second Generation

George Cunningham, 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 North 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 liked "big numbers." He argued that the coverage from Maryland Casualty should be stacked by multiplying the coverage of $15,000 per vehicle x 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 vehicle ($15,000 x 3 vehicles on the same policy = $45,000).

The Supreme Court of Virginia based its decision in *Cunningham v. Insurance Co. of N. Am.*[17] on the maxim, "you get what you pay for." The Court held that Cunningham could stack UM coverage on his own vehicles (he was the named insured) since he had paid three separate premiums for UM coverage on three separate vehicles. However, Cunningham could not stack the UM 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. Cunningham's estate was entitled to (1) $15,000 from Maryland Casualty as a second class insured and (2) $45,000 in stacked coverage from INA as a first class insured.

Thus, in *Cunningham, supra*, the Supreme Court of Virginia entered the second generation of stacking uninsured motorist coverage. Following the *Cunningham* decision, **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.[18]

4. Stacking — The Third Generation

Roger Borror had two cars insured with Goodville Mutual Insurance Company on the **same** policy. Separate premiums were paid for each car. Roger Borror was injured by the negligence of an uninsured motorist and sought to stack (combine) the UM coverage on each vehicle. A critical fact distinction between the *Goodville Mut. Cas. Co. v. Borror*[19] and *Cunningham, supra*, cases was that Goodville Mutual had a clear and unambiguous "limitation of liability clause" in its policy, while INA in the *Cunningham* case did not.

The Supreme Court of Virginia in *Borror*[20] held stacking of UM coverage on multiple vehicles on the same policy is allowed if the "limits of liability clause" (which prevents stacking) is ambiguous, like the clause used in *Cunningham*,[21] but stacking is not allowed when the "limits of liability clause" is "clear and unambiguous," like the one used by Goodville Mutual.[22]

All insurance carriers, which regularly issue policies in Virginia, now use the "limits of liability clause" approved by the Supreme Court in *Borror*.[23] This clause is set forth below and is found in the *Borror*[24] decision:

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 this 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 this 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)*

5. Stacking Today

a. Stacking of Separate Policies (Interpolicy Stacking Allowed)

The Supreme Court of Virginia has consistently struck down insurance industry attempts to limit stacking on **separate policies** (interpolicy stacking), relying each time on its landmark decision of *Bryant v. State Farm Mut. Auto. Ins. Co.*[25] The Bryant decision again was cited as authority in 1994 in *Nationwide Mut. Ins. Co. v. Hill*,[26] invalidating the liability payment set-off provisions (c) and (e) in the "Limits of Liability Clause" contained in the standard UM endorsement.

b. Stacking of UM Coverage on Multiple Vehicles on the Same Policy (Intrapolicy Stacking)

(1) Allowed if the "limits of liability" clause is ambiguous. *Cunningham v. Insurance Co. of N. Am.*[27] and *Goodville Mut. Cas. Co. v. Borror*[28]

(2) Not allowed if the "limits of liability" clause is clear and unambiguous. *Goodville Mut. Cas. Co. v. Borror*[29]

E. Statutory Basis for "Underinsured Motorist Coverage"

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 defined in subsection B of this section..."

38.2-2206(A)
(PRE-1993)

> [Where the insured contracts for higher limits], the endorsement or provisions for these limits shall obligate the insurer to make payment for bodily injury or property damage caused by the operation or use of an underinsured motor vehicle to the extent that the vehicle is underinsured as defined in subsection B of this section.

1. The Difference Between The 1993 Amendment and The Pre-1993 Amendment to 38.2-2206(A)

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.*[30] 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.

On June 10, 1994, the Supreme Court of Virginia did **not** accept Judge Davis' reasoning, holding in *USAA Casualty Ins. Co. v. Alexander*:

> "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)*[31]

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*,[32] 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.

2. Statutory Definition of Underinsured Motor Vehicle

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."

F. The Underinsured Motorist Coverage Calculation

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

Total Amount of Plaintiff's UM 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.

1. Two Tortfeasors

If a 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*[33]

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

G. Priority of UIM Coverage

1. Statutory Priority - Code §38.2-2206(B)

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."

2. The Statutory "Credit"

As noted, 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 available 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 a named insured," must pay $50,000 in underinsured motorist coverage according to the order of priority set forth in the statute.

The statutory "credit" is only applied in an UIM case. It is **not** applied when the defendant is uninsured. In the example, if the defendant was **uninsured**, GEICO would be the primary UM carrier and Allstate would be the excess UM carrier — each paying its full $50,000 policy limits for total UM coverage of $100,000.

H. Underinsured Motorist Coverage Analysis

1. Primary Coverage - Follow the Car Occupied by the Plaintiff

Generally, the vehicle the plaintiff was occupying at the time of the collision provides primary uninsured motorist coverage. Exceptions are vehicles covered by garage policies, Code §38.2-2205(B)(3); *GEICO v. Universal Underwriters Ins. Co.*[34] and self-insured vehicles, Code §46.2-368(B).

If the plaintiff were occupying a vehicle covered by a garage policy or a self-insured vehicle, the UM coverage on that vehicle which, by the above statutes, may not exceed $25,000/$50,000 (minimum limits), would be excess if there were other primary coverage available; otherwise, the coverage would be primary.

Since Priscilla Plaintiff[35] was driving her Chevrolet, she is entitled to primary UM coverage with her own carrier, USAA, with UM policy limits of $25,000.

2. The Search for Excess UIM Coverage

a. Follow Priscilla Plaintiff Home

Following Priscilla Plaintiff 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 insuring one car with $300,000 in uninsured motorist coverage, with Erie and Travelers, respectively.

Since Priscilla resides at home and is part of the same household[36] 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 **each** of these three policies "while in a motor vehicle or otherwise." As noted, *Allstate Ins. Co. v. Meeks*[37] is authority for mandating coverage to a first class insured while occupying **any** motor vehicle, including motor vehicles not listed in any policy.

Priscilla's mother insures two cars on her Goodville Mutual policy. If Goodville Mutual is still using the same "clear and unambiguous" limits of liability clause it used in 1981 in the case of *Goodville Mut. Cas. Co. v. Borror*,[38] intrapolicy stacking (multiple coverage on the same policy) is prohibited.

Priscilla Plaintiff is provided the following UM coverage by being a resident of the same household with her mother and two sisters (as a first class insured):

(1) Her mother's Goodville Mutual Policy $500,000.00
(2) Sister, Elizabeth's Erie Policy $300,000.00
(3) Sister, Theresa's Travelers Policy $300,000.00

3. Calculating Priscilla Plaintiff's UIM Coverage

Priscilla Plaintiff's UIM coverage is calculated using the formula set forth above at page 31, *supra*.

(a) UM Coverage - Plaintiff	(b) Liability Coverage - Defendant[39]
1. Priscilla Plaintiff - USAA $25,000	1. Larry's Girlfriend - Colonial $25,000
2. Priscilla's Mother - Goodville Mut. .. $500,000	2. Larry Student - Stonewall Dix. .. $25,000
3. Sister, Elizabeth - Erie $300,000	3. Larry's Brother - Bankers & Ship. $25,000
4. Sister, Theresa - Travelers $300,000	4. Larry's Mother - Maryland Cas.... $25,000
TOTAL UM COVERAGE **$1,125,000**	TOTAL LIABILITY COVERAGE **$100,000**
$1,125,000.00 - $100,000.00 = $1,025,000.00 (UIM)	

The total underinsured motorist coverage afforded to Priscilla Plaintiff is calculated by subtracting the total amount of liability coverage - Column (b) from the total amount of uninsured motorist coverage - Column (a).

4. Calculating the "Statutory Credit"

Since Priscilla is entitled to underinsured motorist (UIM) coverage under more than one policy, the statutory priority set forth in Code §38.2-2206(B), page 31 *supra*, determines how much each UIM carrier pays.

USAA, which insures the car the plaintiff was occupying, (category 1) receives a "statutory credit" for the first $25,000 in collectible liability coverage and pays nothing. ($25,000 UM coverage **minus** $25,000 liability coverage credit = 0)

Goodville Mutual, Erie, and Travelers, each in category 3 of the statutory priority (Code §38.2-2206(B)), receives a proportionate share of the remaining $75,000 "statutory credit" based upon the ratio of each insurer's UM policy limit divided by the total of the remaining UM coverage policy limits as follows:

(1) Goodville Mutual $\frac{\$500,000}{1,100,000} \times \$75,000 =$ $34,090.90 ("credit")

(2) Erie $\frac{\$300,000}{1,100,000} \times \$75,000 =$ $20,454.55 ("credit")

(3) Travelers $\frac{\$300,000}{1,100,000} \times \$75,000 =$ $20,454.55 ("credit")

Total "Statutory Credit" $75,000.00

If Priscilla Plaintiff receives a judgment of at least $1,125,000, each liability carrier in column (b) pays its $25,000 policy limits totalling $100,000 and the respective UIM carriers in column (a) pay UIM coverage totalling $1,025,000 as follows:

(1) Goodville Mutual
$500,000 - $34,090.90 ("credit") = $465,909.10

(2) Erie
$300,000 - $20,454.55 ("credit") = $279,545.45

(3) Travelers
$300,000 - $20,454.55 ("credit") = $279,545.45

Total UIM $1,025,000.00

Conclusion

The Commonwealth of Virginia, through its General Assembly and Supreme Court, has been a pioneer in the development of underinsured motorist coverage — insurance which protects the citizens of this Commonwealth against the hardships resulting from the negligence of inadequately insured drivers.

Endnotes

1. Most often a defendant is uninsured if (1) he/she has no insurance; (2) his/her liability limits are less than Virginia's minimum limits of $25,000/$50,000 (out-of-state policies); (3) his/her insurance carrier has denied coverage for "any reason whatsoever"; or (4) his/her identity is unknown — a "John Doe" defendant. Va.Code Ann. §38.2-2206(B) (Repl.Vol. 1994).
2. *Hackett v. Arlington County*, 247 Va. 41 (1994). *But see, Virginia Municipal Liability Pool v. Kennon*, 247 Va. 254 (1994) regarding UM coverage on local government vehicles. Many local governments insure their motor vehicles through the Virginia Municipal Liability Pool (VMLP). The VMLP was created in 1986 pursuant to Code §§15.1-503.4:1, *et seq.* This legislation declares that the pools are not insurance companies, but are "deemed" to be self-insurers. Unlike the self-insurance statute, Code §46.2-368(B), which requires self-insurers to provide UM and UIM protection on its vehicles, the General Assembly excluded the pools from this requirement, "unless it elected by resolution of its governing authority to provide such coverage to its pool members." *Kennon, supra*, at 257. Henry Kennon, the Sheriff of Louisa County, was injured by an underinsured motorist, while riding in his county-owned sheriff's car. The Supreme Court of Virginia in *Kennon* held there was no UM/UIM coverage on the Sheriff's police car since the governing body of the VMLP never passed a formal resolution electing to provide UM coverage in strict accordance with its enabling legislation.
3. In 1994, the Supreme Court of Virginia in *Hackett v. Arlington County, id.*, held that Code §46.2-368(B), which expressly requires self-insureds to provide uninsured motorist protection, also requires that underinsured motorist protection be provided by a self-insurer since UIM coverage is a subdivision of UM coverage. The 1995 amendment to Code §46.2-368(B) clarified the obligation of a self-insurer to provide **both** UM and UIM coverage by inserting the words "or underinsured." Effective 7/1/95, Code §46.2-368(B) contains the wording "uninsured **or underinsured** motorist." *(emphasis added).*
4. Code §38.2-2206(A) was amended in 1995 to reverse *State Farm v. Weisman*, 247 Va. 199, 441 S.E.2d 16 (1994) which held that **both** named insureds (a husband and a wife who reside in the same household are **each** a named insured) must reject higher limits of UM coverage for the rejection to be valid. Effective 7/1/95, "any **one** named insured" may validly reject higher limits of UM coverage. The 1995 amendment to Code 38.2-2206(A) further declares: "This rejection of the additional uninsured motorist insurance coverage by **any one** named insured shall be binding upon all insureds ..." *(emphasis added).*
5. Code §38.2-2206(B) was amended in 1995 to expand the definition of an insured by inserting the words "wards, or foster children." Effective 7/1/95, a ward or foster child of either the named insured or his/her spouse is elevated to the status of a first class insured while residing in the same household with the named insured.

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6. *Insurance Company of N. Am. v. Perry*, 204 Va. 833, 837, 134 S.E.2d 418 (1964).
7. *Allstate Ins. Co. v. Meeks*, 207 Va. 897, 153 S.E.2d 222 (1967).
8. *Nationwide Mut. Ins. Co. v. Hill*, 247 Va. 78 (1994).
9. *Hill, id.*
10. "Second class derivative UM coverage" is a term coined by the author to describe the coverage a passenger derives from the UM coverage of her driver according to the holding of *Nationwide Mut. Ins. Co. v. Hill*, 247 Va. 78, *supra*. The term "second class derivative UM coverage" is not found in the decision itself.
11. *Hill, id.*
12. Non-owned auto liability coverage was discussed in Part I of this article, *The Journal of the Virginia Trial Lawyers Association* (Spring 1995), pp. 15-16.
13. *Hill, supra* note 8.
14. *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965).
15. *Bryant, supra* note 14.
16. *Bryant, id.*, 205 Va. at 901.
17. *Cunningham v. Insurance Co. of N. Am.*, 213 Va. 72, 189 S.E.2d 832 (1972).
18. *Cunningham, supra*, note 17.
19. *Goodville Mut. Cas. Co. v. Borror*, 221 Va. 967, 275 S.E.2d 625 (1981).
20. *Borror, supra* note 19.
21. *Cunningham, supra* note 17.
22. *Borror, supra* note 19.
23. *Borror, supra* note 19.
24. *Borror, id.*, 221 Va. at 970.
25. *Bryant, supra* note 14.
26. *Hill, supra* note 8.
27. *Cunningham, supra* note 17.
28. *Borror, supra* note 19.
29. *Borror, ibid.*
30. *Superior Insurance Company v. Postell, et al.*, (22nd Judicial Circuit, October 27, 1992, CH Case No. 91-200; cert. denied).
31. *USAA Casualty Ins. Co. v. Alexander*, 248 Va. 185, at 194-195 (1994).
32. *USAA Casualty Ins. Co., supra* note 31.
33. *Nationwide Mut. Ins. Co. v. Scott*, 234 Va. 573, 363 S.E.2d 703 (1988).
34. *GEICO v. Universal Underwriters Ins. Co.*, 232 Va. 326, 350 S.E.2d 612 (1986).
35. The facts of the Priscilla Plaintiff example were set forth in Part I of this article, *The Journal of the Virginia Trial Lawyers Association* (Spring 1995), pp. 17-18.
36. The Supreme Court of Virginia has consistently defined the policy 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. Auto. Ins. Co.*, 245 Va. 1, 426 S.E.2d 450 (1993). *See also Nationwide Mut. Ins. Co. v. Robinson*, 9 VLW 1242 (April 17, 1995), Case No. HE-563-4 (Cir.Ct.City of Richmond; April 4, 1995), Judge Randall G. Johnson, holding 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 determining UM coverage.
37. *Allstate Ins. Co. v. Meeks, supra* note 7.
38. *Borror, supra* note 19.
39. Liability coverage insuring the defendant was discussed in Part I of this article, *The Journal of the Virginia Trial Lawyers Association* (Spring 1995), pp. 19-20.