Auto Insurance Law

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AUTO INSURANCE:
HOW TO GET ALL THE COVERAGE
AND BEAT THE DEFENSES

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LIABILITY COVERAGE

The Insuring Clause: "Owned Automobile" and "Non-Owned Automobile

The Family Automobile Policy uses the terms "owned automobile" and "non-owned automobile" as a "two-way valve" to either grant coverage or to exclude coverage in Part I – Liability. These terms are insurance policy words of art; understanding their meaning is the key to maximizing liability coverage.

Part I – Liability
Insuring Clause

> "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury . . . arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile . . . ."

To obtain coverage the auto the defendant was driving must be either an "owned automobile" or a "non-owned automobile" **under the policy you are looking at** to obtain liability coverage. If not, there is no liability coverage.

1. The owned automobile.

Originally, auto insurance policies covered the policyholder and his family for each "owned automobile," such as the family Ford, for which a specific premium was paid. This was simple.

However, insurance underwriters realized that its policyholder was not fully covered by merely insuring the "owned automobile." For example, if the owned auto broke down, the policyholder would need a temporary substitute auto. In addition, the policyholder might use the owned auto with a trailer or might replace the insured auto with a new one or buy an additional auto.

To provide additional liability coverage to its policyholder, the underwriters expanded the definition of "owned automobile" to include a trailer; a farm automobile; replacement or newly acquired automobiles; and a temporary substitute automobile. (See page 6 for the policy definition of "owned automobile.")

2. The non-owned automobile.

The expanded "owned automobile" coverage was still not enough protection since the policyholder might drive a vehicle he did not own, which was not covered under his "owned automobile" coverage. For example, if the policyholder borrowed a friend's uninsured car, he would have no liability coverage.

Insurance companies earn premiums only on the "owned automobiles" set forth in the declarations page. Providing liability coverage on autos the policyholder does not own gives the policyholder extra coverage, "for free," and at the same time increases the insurance company's risk of loss. The more often the policyholder drives a "non-owned automobile," the greater the insurance company's risk of an accident with resulting increased claims and payouts. Therefore, the underwriters did not want to provide additional "free coverage" for non-owned vehicles which were regularly driven by its policyholders.

Casual, infrequent use of an auto owned by another, such as when the policyholder borrowed his neighbor's car, was what the underwriters intended when they first developed "non-owned automobile" coverage. Casual, infrequent use would not significantly increase the insurance company's risk of loss, and at the same time would give its policyholder added liability protection.

DEFINITION OF NON-OWNED AUTOMOBILE

The standard family auto policy, Part I, Liability, defines "non-owned automobile".

> "Non-owned automobile means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative other than a temporary substitute vehicle."

SCOPE OF NON-OWNED AUTO COVERAGE

The traditional policy definition of "non-owned automobile" accomplishes the underwriter's goal of providing "free" coverage only for the casual, infrequent use of a non-owned automobile. Vehicles regularly used by the policyholder, for which no additional premium is paid, are excluded. For example, if the policyholder were a traveling salesman, a company Ford "furnished for his regular use" while calling on customers would be excluded from coverage on the policyholder's personal auto policy insuring his Chevrolet. The policyholder's use of the Ford is not casual or infrequent, and is excluded from coverage under the policyholder's personal auto insurance since it falls outside the definition of "non-owned automobile." (The salesman would have primary coverage on the company Ford under the company's policy, but not excess "non-owned auto" coverage under the salesman's personal auto policy).

In addition, if the policyholder owns two cars, each insured under a separate policy, *liability* coverage on car 1 does not apply to car 2, and visa-versa when the policyholder drives car 1 or car 2. Neither car is an "owned automobile" nor a "non-owned automobile" on the **other** policy.

Similarly, if the named insured resides in the same household with his son, the son's car is excluded from the traditional definition of "non-owned automobile" since it is "owned by or furnished for the regular use of a relative," and is therefore not covered under the father's liability coverage.[1] As an example, assume a father, who insures his Cadillac for $1 million with GEICO, borrows his son's car, insured with Colonial for $25,000. The standard definition of "non-owned automobile" in the father's policy excludes *liability* coverage to the father, under his GEICO policy, while using his son's car. The father would only be entitled to $25,000 under his son's policy. If the son's car were uninsured, the father would have no coverage.[2] The underwriters presumed that autos which are furnished for the regular use of a relative residing in the same household would be used by the policyholder (named insured) more than on a casual, infrequent basis. Hence, the term "relative" was inserted into the definition of "non-owned automobile."

Understanding the purpose for "non-owned automobile" coverage is essential to understanding the scope of the coverage. More than 25 years ago, the Supreme Court of Virginia commented on the then "new non-owned automobile coverage" in Quesenberry v. Nichols and Erie.[3]

> "In recent years some companies have written policies to cover a "non-owned" automobile . . . Other policies obtain the same result by extending the driver's regular insurance to casual driving of cars other than his own without the payment of extra premium, by the use of the 'drive other cars' clause or 'use of other automobiles' clause . . . The general purpose . . . is to protect the insured against liability . . . from the infrequent or casual use of automobiles other than the ones described in the policy. **Usually excluded is protection against liability with respect to the insured's frequent use of another automobile** . . . ." [Emphasis added]

THE "GOLDEN CLAUSE"

The "**Other Insurance Clause**" found in the liability section of the standard Family Auto Policy provides excess liability coverage to a defendant driving an auto he does not own – a **non-owned auto**.[4] The "Other Insurance Clause" has been called the "Golden Clause" because it is the basis for excess liability coverage.

The "Other Insurance Clause" found in Part I, Liability of the Family Auto Policy provides:

> Other Insurance. If the insured has other insurance against a loss covered by Part I (Liability) of this policy . . . . the insurance with respect to . . . non-owned automobile shall be **excess** insurance over any other collectible insurance.

Non-Owned Auto Coverage Excess – Example

As an example, Don Denver borrowed his neighbor's car insured with Nationwide. Don is insured with GEICO with $100,000 liability limits. Don negligently injures Alan Anderson who obtains a $125,000 judgment against Don. The neighbor's car, insured with Nationwide for $25,000 in liability limits, provides primary liability coverage of $25,000. Don's own carrier, GEICO, provides **additional excess**, non-owned auto liability coverage of $100,000, since Don was driving a non-owned auto.

If Don borrowed his son's car (resident relative), the son's car, insured with Nationwide, would not fit the definition of a "non-owned auto" (owned by a resident relative), and Don would have no excess "non-owned auto" coverage under his own GEICO policy, only primary liability coverage under his son's Nationwide Policy.

THE THREE (3) STEPS OF COVERAGE ANALYSIS

Coverage analysis involves three steps:

- **RTP** – Read the policy;
- **RTS** – Read the statute;
- **RTC** – Read the cases (especially those found in the annotations to the statute).

YOU REPRESENT PRISCILLA PLAINTIFF

Priscilla Plaintiff was severely injured in an automobile wreck caused by the negligence of Larry Student, a third year law student on his way to the law library. Priscilla was driving her Chevrolet and Larry was driving his girlfriend's Ford, with her permission.

The defendant, Larry Student, lived at home with his mother and brother as part of the same household. Larry owned a 2002 yellow Toyota Celica. Larry Student, his mother, and brother all had separate minimum liability policies in the amount of $25,000

covering their own vehicles, respectively, with Stonewall Dixie, Maryland Casualty and Bankers and Shippers.

Once a month, Larry Student had dinner at his girlfriend's mother's house. After dinner, Larry would drive his girlfriend's Ford, insured with Colonial with $25,000 liability coverage, to the law library instead of driving his own yellow Toyota since he liked to listen to the CD player in his girlfriend's Ford. His 2002 Toyota didn't even have a working radio! En route, this collision occurred.

Priscilla Plaintiff lived at home with her mother and two sisters, Elizabeth and Theresa, as part of the same household. Priscilla's Chevrolet, which was totaled in the wreck, was insured with USAA with UM limits of $25,000. Priscilla's mother had two cars on the same policy insured with Goodville Mutual with UM limits of $500,000; sister Elizabeth's car was insured with Erie, with UM limits of $300,000; sister Theresa's car was insured with Travelers with UM limits of $300,000.

Priscilla Plaintiff has incurred $300,000 in medical bills and is left with a permanent injury as a result of Larry Student's negligence. A detailed settlement brochure has been submitted to the Colonial Insurance Company, the carrier insuring the car Larry was driving at the time of the wreck. In response, a policy limits offer of $25,000 has been made to settle Priscilla's case. What do you do?

You represent Priscilla Plaintiff.

MAXIMIZING RECOVERY WITH EXCESS "NON-OWNED AUTO" LIABILITY COVERAGE

Use the three steps of coverage analysis: RTP (Read the Policy); RTS (Read the Statute); and RTC (Read the Cases). Let's begin by reading selected standardized parts of the Family Auto Policy – Part I – Liability. (Since the State Corporation Commission pre-approves all auto liability insurance policies, most companies generally use the same standardized format).

RTP (Read the Policy)

Part I – Liability

Coverage A – Bodily Injury Liability: To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of: (A) bodily injury . . . arising out of the ownership, maintenance or use of the **owned automobile** or any **non-owned automobile** . . . .

Persons Insured:

The following are insured's under Part I:

(1) With Respect to the Owned Automobile.

(a) the named insured and any resident of the same household;

(b) "**Omnibus Clause**" – any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission; and

(c) [deleted – not relevant].

(2) With Respect to a Non-Owned Automobile.

(a) the named insured;

(b) any relative, but only with respect to a private passenger automobile or trailer, provided his actual operation or (if he is not operating) the other actual use thereof is with the permission, or reasonably believed to be with the permission, of the owner and is within the scope of such permission, and

(c) [deleted – not relevant].

Definitions: Under Part I [selected]:

"Insured" means a person or organization described under "Persons Insured";

"Relative" means a relative of the named insured who is a resident of the same household;

"Owned Automobile" means:

(a) a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded;

(b) A trailer owned by the named insured;

(c) A private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided . . .;

(d) A temporary substitute automobile.

"Non-Owned Automobile" means an automobile or trailer not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile.

RTS (Read the Statute)

The key statute involving liability coverage is Code §38.2-2204; the "**omnibus clause" (permissive user) statute**. Code §38.2-2204(A) requires all Virginia auto insurance policies have an "omnibus clause" extending liability coverage to all persons using the insured motor vehicle "**with the expressed or implied consent of the named insured.**" The term "omnibus" is derived from the Latin meaning "all persons" – hence the name "omnibus clause". This standard clause is found on page 6 (Part I – Liability "Persons Insured" (1)(b)). Any policy provision which limits this omnibus coverage is void. Code §38.2-2204(D); *Southside Distributing Company v. Travelers*.[5]

Code §38.2-2204, the "omnibus clause" statute, mandates that all auto liability policies contain a provision "insuring the named insured, **and** any other person using . . . the motor vehicle with the express or implied consent of the named insured, against liability . . . as a result of negligence in the operation or use of such vehicle . . . ."

The "omnibus clause" statute was amended in July 2005 to provide coverage, under the **same policy** for the negligence of a permissive user **and** negligence of the named insured when the named insured negligently **entrusts** an auto to a permissive user. For example, assume the named insured has an auto policy with liability limits of $25,000/$50,000, and negligently entrusts his auto to a friend who negligently injures your client, the plaintiff. The friend, as a permissive user, is entitled to the policyholder's (named insured's) "omnibus" liability coverage of $25,000. The named insured is also entitled to any additional $25,000 in liability coverage under the same policy insuring his/her auto for his **negligent entrustment**.

Now, let's return to your case of Priscilla Plaintiff. The defendant, Larry Student, had permission to drive his girlfriend's car, which was insured with Colonial. Code §38.2-2204 requires that Colonial extend "omnibus" ("permissive user") liability coverage to Larry.

THE SEARCH FOR EXCESS LIABILITY COVERAGE

RTC (Read the Cases)

Two landmark Virginia Supreme Court cases discuss the term "furnished for the regular use" contained in the policy definition of non-owned automobile – "not owned by or **furnished for the regular use** of either the named insured or any relative" – (emphasis added). Both cases involve State Farm: one case is Smith and the other case is Jones.

a. Casual, Infrequent Use Allowed

Elaine Mellow, four months pregnant, left her furniture and automobile, insured by State Farm, in California after her husband died, to stay with her brother-in-law and sister in Norfolk, Virginia, until the birth of her baby. Elaine Mellow drove her brother-in-law's uninsured car 10 times during a two-month period before her auto collision. On three occasions she drove the car for her own purposes and on seven occasions she drove the car to assist her sister, who could not drive. Elaine Mellow was sued by the other driver. Since the car she was driving was uninsured, she looked to her State Farm policy back in California to provide liability coverage. State Farm denied coverage on the ground that "non-owned automobile" coverage was excluded because her brother-in-law's car, which was involved in the collision, had been furnished for Elaine Mellow's **regular use**. The Supreme Court of Virginia in *State Farm Mut. Auto. Ins. Co. v. Smith*[6] held that the brother-in-law's uninsured car was not furnished for Elaine Mellow's regular use since her use of the car was sporadic and controlled (**casual and infrequent**). Accordingly, it was a "non-owned automobile" and State Farm was required to provide liability coverage to its insured, Elaine Mellow.

b. Frequent Use Not Allowed

Paul Jones was a route salesman for The Southern Vending Company in Richmond. The company furnished Jones a 1978 Ford van which he used every day in his job. Jones drove the van 30 miles a week, six days a week, over a two- to three-year period. In addition to primary coverage on the company van, ("owned auto" coverage under the company policy as the salesman was a permissive user), the trial court found excess liability coverage on Jones' personal auto policy holding the van was a "non-owned automobile" since the van was not furnished for his regular use but for Jones' regular use of his employer. The Supreme Court of Virginia in *State Farm Mut. Auto. Ins. Co. v. Jones*[7] reversed, holding that the van was furnished to Jones for his regular use and therefore did not qualify as a "non-owned automobile" under the terms of Jones' own State Farm policy. The Virginia Supreme Court quoted from *State Farm Mut. Auto. Ins. Co. v. Smith*,[8] stating the purpose for "non-owned automobile" coverage: "The general purpose and effect of such a policy is to protect the insured against liability arising from the use of his automobile, and in addition, from the infrequent or casual use of automobiles other than the one described in the policy. Usually excluded is protection against liability with respect to the insured's frequent use of another automobile." (Remember: under the "Other Insurance Clause" – "non-owned auto" liability coverage is **excess** over any other collectible insurance).

LIABILITY COVERAGE ANALYSIS – THE THREE STEPS

1. Primary Coverage – Follow the Car Occupied by the Defendant

Generally, the vehicle the defendant was driving provides primary liability coverage. (Exception – garage policies covering the auto business, such as dealers,

repair shops, and parking lots – Code §38.2-2205 provides that such insurance is excess and limited to $25,000).

Larry was driving his girlfriend's car insured with Colonial. Colonial has offered its minimum policy limits of $25,000, which is inadequate in view of the magnitude of Priscilla's injuries. Let's search together for excess, non-owned auto liability coverage to find the pot of gold at the end of the coverage rainbow.

2. The Search for Excess Liability Coverage

a. Follow the Driver

Larry Student's 2002 yellow Toyota, which was not involved in this collision, is insured with Stonewall Dixie. Larry is covered under his Stonewall Dixie policy if he was driving an "owned automobile" or a "non-owned automobile" at the time of the collision (see page 6). His girlfriend's Ford is not an "owned automobile" under the terms of Larry's policy since it is not described in Larry's policy, nor is it a "newly acquired automobile" nor a "temporary substitute automobile." However, his girlfriend's car is a "non-owned automobile" **under the terms of Larry's policy** if it was not furnished for Larry's "regular use". *State Farm Mut. Auto. Ins. Co. v. Smith*[9] held that casual, infrequent use is *not* considered "regular use" within the definition of "non-owned automobile". Since his girlfriend's car was only furnished for Larry's use once a month to go to the law library, this most likely will be considered infrequent, casual use, and coverage should be allowed. Accordingly, an additional $25,000 in liability coverage is available under Larry's policy with Stonewall Dixie.

b. Follow the Driver Home

Following Larry home brings us to his mother's $25,000 liability policy with Maryland Casualty and his brother's $25,000 liability policy with Bankers and Shippers. Since Larry was driving a "**non-owned automobile**" at the time of this collision, he is an insured under both **his mother's and brother's policies**. (See page 6). Each policy covers "any relative (residing in the same household)" with respect to a "non-owned automobile" if such automobile is a private passenger automobile or trailer, provided permission from the owner was granted, and "the relative" (Larry) was driving within the scope of permission, which is the case here. Accordingly, Larry is covered for "non-owned auto" liability insurance under both his mother's liability policy with Maryland Casualty and his brother's liability policy with Bankers and Shippers for an additional $25,000 each per policy.

NON-OWNED AUTO COVERAGE AND LACK OF PERMISSION TO DRIVE – THE STATUTE CONTROLS

The family auto policy requires a driver to have permission of the named insured (owned auto) or permission of the owner (non-owned auto) for coverage to apply. Generally, the named insured and the owner are the same person.

As an example, assume Allen Anderson rents a rental car from Avis. Avis is the owner of the rental car and the named insured under an Allstate policy insuring Avis and the rental car. The rental agreement between Allen Anderson, the renter, and Avis, prohibits anyone but Allen Anderson from driving the rental car. Assume, contrary to the rental agreement, Allen allows his friend, Barry Brown, to drive the rental car. Barry Brown negligently injuries Charles Clark, who recovers a $100,000.00 judgment against Barry Brown, the driver. You represent Charles Clark, the plaintiff. Smile - - if the defendant, Brown, was driving a "non-owned auto" - - for you have found the pot of god at the end of the coverage rainbow.

COVERAGE ANALYSIS: FOLLOW THE CAR, FOLLOW THE DRIVER AND FOLLOW THE DRIVER HOME

1. Follow the Car

The rental car is an "owned auto" under Avis' auto policy with Allstate. The "omnibus clause" of the Allstate policy (page 7 above) does not provide coverage because the driver, Barry Brown, was not using the rental car with permission of the named insured (Avis).

2. Follow the Driver

The defendant, Barry Brown, was driving a non-owned auto. The rental car fits the definition of a non-owned auto (page 6 above). Does Barry Brown have non-owned auto coverage under his own policy with Bankers & Shippers even though he did not have permission to drive the rental car from the named insured - - Avis? Answer: Yes.

a. **Read the Policy (RTP)** - - pages 5-7 above. The standard auto policy provides:

"Persons Insured: With respect to a non-owned auto:

(a) the named insured. [Barry Brown]"

3. Follow the Driver Home

Barry Brown lives with his father as part of the same household. Barry's father has a separate auto policy with Frontier Insurance Company with liability limits of

$50,000.00. Barry was driving a non-owned auto, the rental car. Does Barry have non-owned auto coverage under his father's policy with Frontier?

a. **Read the Policy (RTP)** - - (the father's policy)

"Persons Insured:

With Respect to a Non-Owned Automobile:

(a) the named insured;

(b) **any relative** [Barry Brown – son], but only with respect to a private passenger automobile . . . provided his actual operation . . . is with the permission, or reasonably believed to be with the **permission, of the owner** and is within the scope of such permission."

Barry's father's insurance company, Frontier, sends you, as the plaintiff's lawyer, a letter denying coverage on the ground that Barry Brown, the rental car driver, did not have permission from the owner (Avis) to drive the rental car. The rental agreement provided that only the renter, Allen Anderson, had permission to drive. What do you do, you represent the plaintiff, Charles Clark?

The Three Steps of Coverage Analysis

- RTP
- RTS
- RTC

RTP – Read the Policy

You have just read the policy. The policy denies coverage since the driver did not have permission from Avis, the owner of the rental car.

RTS – Read the Statute

The next steps are **RTS**. Virginia Code §38.2-2204 provides:

> "Every policy . . . of liability insurance . . . insuring private passenger automobiles . . . that has as the named insured, an individual . . . that includes . . . use of a **non-owned auto** . . . any provision requiring permission of the owner of such automobile . . . for insurance to apply, shall be construed to include **permission of the custodian** in the provision requiring permission of the owner."

RTC – Read the Cases

In Gordon v. Liberty Mutual Ins. Co., 675 F. Supp. 321 (E.D. Va. 1987) the renter of a rental car gave permission to his friend, Rossie, to drive the car even though the rental agreement prohibited anyone but the renter from driving the car. Rossie resided with his parents as part of their household. The court held that under 38.2-2204, permission of the **custodian** (the renter) was sufficient for non-owned auto coverage under Rossie's parents' auto policy. **The statute "trumped" the policy language.** Accord, Kandrac v. Va. Farm Bureau Mut. Ins. Co., 13 Cir. L.E. 1165 46 Va. Car. 171 (1998); Libscomb v. GEICO, 13 Cir. HH 3743, 43 Va. Cir. 326 (1997).

DON'T SIGN THAT RELEASE – ENTER UIM COVERAGE

Maximizing recovery for Priscilla Plaintiff does not end when all sources of liability coverage have been exhausted. A famous 20th century philosopher commented, "It ain't over 'til it's over."[10] We must look to uninsured motorist coverage (UIM) as an additional source of coverage.

An uninsured motorist claim may be cut off if the plaintiff signs a release, releasing the defendant without the consent of the UIM carrier.[11]

The underinsured defendant is the party who is sued. The UIM carrier is not named as a defendant, but is merely served with a copy of the suit papers and may answer and defend or "may sit back on the sidelines" and do nothing. Code §38.2-2206(F). The plaintiff must be "legally entitled to recover" against the defendant as a condition precedent to obtaining UM/UIM coverage.[12] Judgment, in the underlying tort action, is rendered only against the underinsured defendant(s). It is judgment against the underinsured defendant(s), with valid service of process on the UIM carrier, before judgment which triggers the UIM carrier's contractual obligation to pay. State Farm Mut. Auto. Ins. v. Kelly.[13]

If the plaintiff accepts the defendant's liability limits and signs a release, the defendant is released from liability. If the defendant is released from liability, the underlying tort claim is ended without a judgment against the underinsured defendant. Since a valid judgment against the defendant is what triggers the UIM carrier's obligation to pay, the plaintiff's UIM claim may be cut off with the signing of the liability release unless a total liability and UIM settlement is achieved simultaneously with the consent of the UIM carrier.[14]

An underinsured motorist carrier has subrogation rights, allowing it to seek its money back against the defendant, Larry Student, after payment of the UIM claim to the plaintiff.[15] If the plaintiff releases the defendant, without the UIM carrier's consent, she has extinguished the UIM carrier's subrogation rights.

To settle both the liability and UIM claims, before judgment, the UIM carrier must give its "consent to settle" and must waive its subrogation rights.[16] After judgment, no release is necessary since the judgment itself triggers the obligation of the liability carrier and the UIM carrier to pay. Once a valid judgment is rendered, the UIM carrier's subrogation rights become fixed by law.

FRUSTRATING VIRGINIA PUBLIC POLICY

A liability carrier's demand for a release, which cuts off the plaintiff's UIM claim, if signed, and the UIM carrier's refusal to waive it subrogation rights against the defendant by invoking its "consent to settle clause" creates a "catch-22" standoff, frustrating Virginia's public policy of encouraging settlement of meritorious claims. Courts have described this "catch-22" standoff as "cast[ing] the insured victim into a limbo that utterly frustrates the legislative purpose of providing maximum and expeditious protection to innocent victims of financially irresponsible motorists . . . [and] also frustrates the legitimate expectations of the insured victim who purchases UIM coverage."[17]

Some states have solved this problem by shifting the costs of defense to the UIM carrier after the liability carrier has offered it's full policy limits. Other states, such as Maryland and North Carolina, give the UIM carrier the option of protecting its subrogation rights by tendering to the plaintiff a check in the amount of the liability carrier's policy limit offer or waiving its subrogation rights. These approaches support public policy by encouraging settlement of meritorious claims.

It was hoped that the passage of Code §38.2-2206(K) would allow settlement with the liability carrier without the need for the plaintiff to sign a release in an UIM case.

CODE §38.02-2206(K)
SETTELEMENT WITHOUT RELEASE

> "A liability insurance carrier . . . may pay the entire amount of its available coverage without obtaining a release of a claim if the claimant has underinsured motorist coverage in excess of the amount so paid . . . [and] shall promptly give notice to its insured and to the insurer which provides the underinsured motorist coverage that it has paid the full amount of its available coverage."

Section 38.2-2206(K) has been rarely used. Most insurance carriers will not settle a liability claim before judgment without obtaining a release since the liability carrier still has a duty to defend the defendant even after it has offered its policy limits. This position is based upon the duties created by the "insuring clause" contained in Part

I – Liability of the Family Automobile Policy, which creates a duty to pay and a duty to defend, declaring ". . . to pay on behalf of the insured . . . and defend any suit . . . ."

In Superior Ins. Co. v. Cencewizki,[18] Judge William H. Ledbetter ruled that in a UIM case a liability carrier, which has offered its policy limits pursuant to Code §38.2-2206(K), cannot "walk away" from the case since it still has a duty to defend.

Virginia's "catch-22" liability – UIM settlement standoff requires a legislative or judicial remedy.

MAXIMIZING RECOVERY WITH UNDERINSURED MOTORIST COVERAGE

Introduction

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 cover the plaintiff must pay the underinsured portion of the claim.

Underinsured motorist coverage is a subdivision of uninsured motorist coverage. All Virginia automobile insurance policies and all Virginia self-insured vehicles must contain both UM and UIM coverage. Hackett v. Arlington County.[19] The same statute, Code §38.2-2206 mandates both UM and UIM coverage.

To calculate the total amount of underinsured motorist coverage available to Priscilla 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, RTC (Read the Policy); RTS (Read the Statute); and RTC (Read the Cases). (In Priscilla Plaintiff's case, the "RTP step" is eliminated for brevity since the standard UM and UIM policy endorsements generally "track" the UM/UIM statute regarding insuring provisions and persons insured except for the policy definition of a second class insured, which is broader than the statute. See page 20.

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

". . . 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 subjection 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."

2. Persons Insured Under the Statute

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."

3. The Statute Creates Two Classes of Insureds

In Insurance Company of N. Am. v. Perry,[20] 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 Insures 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.[21]

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 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.

5. Second Class Coverage

Virginia Code §38.2-2206(B) provides second class 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 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 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).

a. The Boomerang Effect

Assume the named insured negligently injures his passenger, a second class insured, but fails to cooperate with his carrier, who then denies the named insured liability coverage for his non-cooperation. The named insured's auto has thus become uninsured. However, the passenger is now entitled to UM coverage under the named insured's policy as a second class insured. Liability coverage, which was denied, has "boomeranged" into UM coverage insuring the passenger. Allstate Ins. Co. v. Jones, 261 Va. 444, 544 S.E.2d 320 (2001). Same result if coverage were denied for an intentional act committed by the named insured causing injury to his passenger. An intentionally caused injury, by itself, is no defense to UM coverage, as long as the passenger's injury was caused by the named insured's use of the vehicle as a vehicle. Fireman's Fund v. Sleigh, 267 Va. 768 (2004).

b. Second Class Coverage Expanded – "Using"

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".

(i) Crossing the Road to Board a School Bus

In Newman v. Erie Ins. Exch., 256 Va. 501, 507 S.E.2d 384 (1998), 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. 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.

(ii) Changing a Flat Tire

In Edwards v. GEICO, 256 Va. 128, 500 S.E.2d 819 (1998), 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.

(iii) The Highway Worker Placing Road Signs

In Randall v. Liberty Mut. Ins. Co., 225 Va. 62, 496 S.E.2d 54 (1998), 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. 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.

(iv) Hand Signals Directing a Truck Driver

In Slagle v. Hartford Insurance Co. of the Midwest, 267 Va. 629, 594 S.E.2d 582 (2004), the 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. The Slagle opinion is recommended reading since it contains an excellent analysis of all prior case law.

6. Second Class Derivative Coverage

A permissive passenger in an automobile the driver does not own is entitled to all UM coverage insuring the driver under the standard UM endorsement to the family automobile policy. Nationwide Mut. Ins. Co. v. Hill.[22]

As an example, assume Mary Ann and Rebecca borrow their neighbor Paul's car with Paul's permission. Mary Ann drives Paul's car and Rebecca is the front seat passenger. The car is wrecked by the negligence of both Mary Ann and an uninsured driver, Mr. Jones. Mary Ann's passenger, Rebecca, is hurt and brings 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 is an insured of the second class under Paul's policy with Nationwide. Rebecca is also an insured of the first class under her own automobile policy with Allstate. If Rebecca resides in the same household with her mother and sister, she is also an insured of the first class under each of their separate policies.

Mary Ann, the driver of Paul's car, lives with her grandfather, Wesley, as part of the same household. Mary Ann is insured with Maryland Casualty and her grandfather Wesley is insured with State Farm.

According to the decision of Nationwide Mut. Ins. Co. v. Hill,[23] Rebecca, the passenger, is entitled to "second class derivative UM coverage"[24] under all policies affording UM coverage to her driver, Mary Ann, who was driving a "non-owned automobile". 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 §38.2-2205(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."

The policy language reads:

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, 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.

Read the Cases (RTC). According to Hill,[25] Rebecca (the passenger) "derives" UM coverage from all policies providing 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 Mary Ann's policy with Maryland Casualty and 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", excess liability coverage is provided to Mary Ann (see page 6) and by policy definition, Paul's car is "an insured motor vehicle" under the UM endorsement on Mary Ann's Maryland Casualty policy and on her grandfather's State Farm policy; and (2) Rebecca was "occupying an insured motor vehicle", Paul's car.

The standard auto policy language is broader than the statute. Section 38.2-2206(B) refers to "**the** motor vehicle to which the policy applies," whereas the policy refers 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" was **ambiguous** and should be construed against the insurer. However, Judge Markow did not address the issue of ambiguity in his decision.

7. Liability and UM Coverage from the Same Policy

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

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[26] 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. 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., 254 Va. 416, 492 S.E.2d 628 (1997), 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. 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.

8. Liability and UIM Coverage From the Same Policy

In Dyer v. Dairyland, 267 Va. 725, (2004), 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. The key, as in Nationwide v. Hill, is **two** joint-tortfeasors. The plaintiff's driver, a joint tortfeasor, in Dyer 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 are distinguishable from the Trisvan case since Trisvan involved only **one** defendant.

9. 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) 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). See detailed discussion for calculating UIM coverage at page 27. 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**.

On January 8, 2002, Judge Joanne F. Alper from 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, 17 Cir. C00767, 57 Va. Cir. 257 (2002).

However, on February 19, 2003 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 under the same policy. MacDougall, et al. v. Hartford Ins. Grp., et al., Law No. 197637, 61 Va. Cir. 181 (2003). Accord, Virginia Farm Bureau v. Beach, 2004 WL 3247188 (Circuit Court Stafford County, Haley, J.).

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. Ins. Co.[27]

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" 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[28] 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."[29]

1. 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 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 liked "big numbers." He argued that the coverage

from Maryland Casualty should be stacked by multiplying the coverage of $15,000 per vehicles 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 based its decision in Cunningham v. Insurance Co. of N. Am.[30] on the maxim, "you get what you pay for". The Court held that 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. 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, 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.

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 coverage on each vehicle. A critical fact distinction between the Goodville Mut. Ins. Co. v. Borror[31] and Cunningham 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[32] held stacking of multiple vehicles on the same uninsured motorist policy is allowed if the "limits of liability clause" (which prevents stacking) is ambiguous, like the clause used in Cunningham,[33] but stacking is not allowed when the "limits of liability clause" is "clear and unambiguous", like the one used by Goodville Mutual.

Most, but not all, insurance carriers, which regularly issue policies in Virginia, now use the "limits of liability clause" approved by the Supreme Court in Borror.[34] this clause is set forth below and is found in the Borror[35] 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 of UM coverage on separate policies (Interpolicy stacking), relying on, each time, on its landmark decision of Bryant v. State Farm Mut. Auto. Ins. Co.[36] The Bryant decision, again, was cited as authority in 1994 in Nationwide Mut. Ins. Co. v. Hill,[37] invalidating the liability payment set-off provisions (c) and (e) contained in the "Limits of Liability Clause" contained in the standard UM endorsement.

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

(i) Allowed if the "limits of liability" clause is ambiguous. Cunningham v. Insurance Co. of N. Am.[38] and Goodville Mut. Cas. Co. v. Borror.[39]

(ii) Not Allowed if the "limits of liability" clause is clear and unambiguous. Goodville Mut. Cas. Co. v. Borror.[40]

Statutory Basis of "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 define 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 Different 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.[41] 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 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).[42]

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,[43] 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."

E. 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 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.[44]

For example, assume the plaintiff has $100,000 in UM coverage and Tortfeasor-1 and Tortfeasor-2 each have separate policies with $50,000 ($100,000 - $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 automobile liability insurer would pay $50,000 ($100,000 combined), and the plaintiff's automobile insurance carrier would pay $100,000 in UIM coverage.

2. 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 sough 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., 254 Va. 416, 292 S.E.2d 628 (1997).

The court in Trisvan in a footnote at 254 Va. 416, 422, reaffirmed Nationwide Mut. Ins. Co. v. Hill, 247 Va. 78, 439 S.E.2d 335 (1994), 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. (Nationwide v. Hill is discussed at pages 19-21 of this outline.) See also, Dyer v. Dairyland, 267, Va. 725 (2004) discussed at page 21 of this outline, which applied the reasoning of Hill to UIM claims. **The key distinction: two tortfeasors versus the one tortfeasor in Trisvan.**

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

G. 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.,[45] and self-insured vehicles, Code §46.2-368(B); Catron v. State Farm Mut. Auto. Ins. Co., 255 Va. 31, 496 S.E.2d 436 (1998).

If the plaintiff were occupying a vehicle covered by a garage policy, Code §38.2-2205(B)(3), or a self-insured vehicle, Code §46.2-368(B), the UM coverage on that vehicle, which 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 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 providing $300,000 in uninsured motorist coverage, with Erie and Travelers, respectively.

Since Priscilla resides at home and is part of the same household[46] 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." (Page 15). As noted, Allstate Ins. Co. v. Meeks[47] 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

years before in the case of Goodville Mut. Cas. Co. v. Borror,[48] intrapolicy stacking (multiple coverage on the same policy) is prohibited.

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

(1) Her mother's Goodville Mutual Policy.....$500,000

(2) Sister, Elizabeth's, Erie Policy.....$300,000

(3) Sister, Theresa's, Travelers Policy.....$300,000

3. Calculating Priscilla Plaintiff's UIM Coverage

Priscilla Plaintiff's UIM coverage is calculated using the formula set forth above at page 27:

(a) UM Coverage – Plaintiff	(b) Liability Coverage - Defendant
1. Priscilla Plaintiff USAA.....$25,000 2. Priscilla's Mother Goodville Mutual.....$500,000 3. Sister, Elizabeth Erie.....$300,000 4. Sister, Theresa Travelers.....$300,000 TOTAL UM COVERAGE.....$1,125,000	1. Larry's Girlfriend Colonial.....$25,000 2. Larry Student Stonewall Dixie.....$25,000 3. Larry's Brother Bankers & Shippers.....$25,000 4. Larry's Mother Maryland Casualty.....$25,000 TOTAL LIABILITY COVERAGE.....$100,000
$1,125,000 - $100,000 = $1,025,000 (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).

Now, it is your turn. Apply the analysis you have just learned to your next case. You will maximize your client's recovery.

[1] About 1989, State Farm amended the definition of "non-owned automobile" in Part I – Liability of its Family Auto Policy – Policy Form 9846F.8 (preferred risks); Policy Form 9946F.9 (higher risks); but *not* Policy Form 9346F.8 (non-voluntary, assigned risks). The "6989AS and 6989AG Amendatory Endorsements" provide" "The definition of 'non-owned automobile' means an automobile or trailer not owned by, or furnished for the regular use of: (1) the named insured; or (b) any relative unless at the time of the accident or loss: (a) the automobile is or has been described on the declarations page of a liability policy within the preceding 30 days; and (2) the named insured or a relative who does not own such automobile is the driver. A temporary substitute automobile is not considered a non-owned automobile."

This State Farm amendment provides excess "non-owned automobile" liability coverage to the policyholder, his spouse, and to relatives residing in the same household who drive each other's owned autos, provided the auto involved in the collision is insured or was insured 30 days before the collision by *any* insurance company. In the example, if the father were insured with State Farm, excess "non-owned automobile" coverage could be provided the father while driving his son's car if the son's car "is or has been described on the declarations page of a liability policy within the preceding 30 days."

This is a significant expansion by State Farm of "non-owned automobile" liability coverage, which normally is not provided by other insurance companies. For example, assume son Gary, insured with GEICO and his son Sam, insured with State Farm, residing in the same household with their father, on separate occasions borrow their father's car, the same Ford, insured with Frontier Insurance Company. Son, Gary, negligently injures plaintiff-1 and son, Sam, negligently injures plaintiff-2 while driving their father's car. All autos carry minimum limits liability coverage of $25,000. Both plaintiff-1 and plaintiff-2 win $50,000 judgments against son Gary and against son Sam for their separate accidents.

Plaintiff-1 recovers only $25,000 from Frontier, the primary carrier insuring the father's car since Gary's GEICO policy contains the *standard* definition of "non-owned automobile" (page 2). The GEICO policy excludes excess "non-owned automobile" coverage since Gary was driving a car "owned by or furnished for the regular use of . . . any relative," i.e., his father.

Plaintiff-2 recovers $50,000. $25,000 from Frontier and $25,000 in excess "non-owned automobile" liability coverage from Sam's State Farm policy which contains the *amended* definition of "non-owned automobile" quoted above.

[2] See note 1. In the first example, if the father insured his Cadillac with State Farm, instead of with GEICO, the father would be entitled to $25,000 liability coverage on his son's Colonial policy and $1,000,000 in "non-owned automobile" liability coverage under his own State Farm policy. However, in the second example, the father would *not* be entitled to any "non-owned automobile" liability coverage under his own State Farm policy if his son's auto was uninsured for more than 30 days.

[3] *Quesenberry v. Nichols and Erie*, 208 Va. 667 at 670, 672 (1968).

[4] Emick v. Dairyland Ins. Co., 519 F.2d 1317, 1327 (4th Cir. 1975) held that non-owned automobile coverage issued by a Massachusetts insurance company, Middlesex Mutual, insuring two vehicles on a single policy could not be combined to double coverage by multiplying the number of vehicles on the same policy by the policy limits for each [correct law]. The Court in dicta id. At 1325, suggested the same result even if separate policies were issued on each vehicle to the same named insured. In the author's opinion, this is incorrect law in Virginia today in view of the standard "Other Insurance" clause, found in all Virginia family automobile policies. In other states, some insurers insert a "two or more policy" clause to limit "non-owned auto" coverage from being "excess" on the second separate policy issued by the same carrier to the same insured, e.g., where the policyholder insures car-1 and car-2 on separate policies with the same insurer and the policyholder was driving a "non-owned" auto. In this situation, the policyholder has excess "non-owned auto" covered only on one policy, not on both. The dicta in Emick has been criticized since the decision failed to make any distinction between primary and excess liability coverage, nor did the Court "address the 'other coverage' clause," which provides excess coverage "on all valid and collectible insurance against such loss." Parsons v. Parsons, 413 N.W.2d 184 at 187-188 (Minn. Ct. App. 1987). Coverage under each policy is triggered when the insured drives a non-owned automobile and the primary liability coverage has been exhausted. Id. at 189.

[5] *Southside Distributing Company v. Travelers*, 213 Va. 38, 189 S.E.2d 681 (1972).

[6] *State Farm Mut. Auto. Ins. Co. v. Smith*, 206 Va. 280, 142 S.E.2d 562 (1965).

[7] *State Farm Mut. Auto. Ins. Co. v. Jones*, 238 Va. 467, 383 S.E.2d 734 (1989).

[8] *State Farm Mut. Auto. Ins. Co. v. Smith*, *supra*, note 6.

[9] *State Farm Mut. Auto. Ins. Co. v. Smith*, *supra*, note 6.

[10] Yogi Berra, New York Yankees.

[11] The present endorsement to Part IV of the Family Automobile Policy entitled "Uninsured Motorists Insurance (Virginia)" contains exclusion (a) ("the consent to settle clause"), which provides, "this insurance does not apply (a) to bodily injury or property damage with respect to which the insured or his legal representative shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefore." Failure to obtain "consent to settle" based upon exclusion (a), in an UM case has been held to exclude UM coverage on the ground that the UM carrier's subrogation rights have been prejudiced. Virginia Farm Bur. Mut. Ins. Co. v. Gibson, 236 Va. 433, 374 S.E.2d 58 (1988). On January 12, 1996, the Supreme Court of Virginia went further. In Osborne v. National Union Fire Ins. Co., 251 Va. 53, 465 S.E.2d 835 (1996), the court held that a UM carrier need not show prejudice to deny coverage for violation of the "consent to settle clause".

The previous UIM endorsement (pre-July 1993) ("Supplementary Uninsured Motorist Insurance – Underinsured Motorist (Virginia)") provided that, "exclusion (a) in the UM endorsement does not apply to the UIM coverage afforded by this endorsement." For cases involving the previous UIM endorsement, a strong argument can be made that the UIM carrier waived its subrogation rights and is estopped from taking the position that the plaintiff has cut off his UIM claim by signing a liability release since the former standard UIM endorsement stated that exclusion (a) in the UM endorsement did not apply to UIM coverage.

[12] Va. Code Ann. §38.2-2206(A) (Repl. Vol. 1994) ("to pay the insured all sums he is legally entitled to recover"). Aetna Cas. & Sur. Co. v. Dodson, 235 Va. 346, 367 S.E.2d 505 (1988) (holding an UM carrier has no obligation to pay a claim resulting from the negligence of a co-employee since the plaintiff is "not legally entitled to recover" as the Workers' Compensation statute is the exclusive remedy and bars a negligence claim of one employee against the other for injuries incurred during employment).

If the defendant discharges the plaintiff's negligence claim in bankruptcy, is the UIM carrier relieved of its contractual obligation to pay on the ground that the plaintiff is "not legally entitled to recover" on the underlying tort claim? Condition No. 6, entitled "Action Against Company" Part I – Liability of the Family Automobile Policy, provides: "Bankruptcy or insolvency of the insured's estate shall not relieve the company of any of its obligations hereunder." Condition No. 6, which requires the defendant's liability carrier to pay after the defendant's bankruptcy, is not carried forward into Part IV – the UM endorsement of the Family Automobile Policy. However, courts which have decided this issue have held the UM / UIM carrier is the real party-in-interest, and liable to the plaintiff if the defendant was legally at fault. The defendant's bankruptcy does not relieve the defendant of "legal liability", but only relieves him of the obligation to pay, which has been discharged in bankruptcy. Wilkinson v. Vigilant Ins. Co., 236 Ga. 456, 224 S.E.2d 167 (1976); Bauer v. Consolidated Underwriters, 518 S.W.2d 879 (Tex. Civ. App. 1975).

In 1997 the General Assembly amended the definition of "uninsured motor vehicle" in §38.2-2206(B) to include "(v) the owner or operator of the motor vehicle is immune from liability for negligence under the laws of the Commonwealth or the United States . . . ." Beginning in July 1997, an injured plaintiff can now bring an uninsured motorist claim for injuries from a motor vehicle accident caused by an immune tortfeasor, such as state, local and federal governments. In Welsh v. Miller & Long Co. of Md., 258 Va. 447, 521 S.E.2d 767 (1999), the Virginia Supreme Court in upholding Aetna Casualty & Surety Co. v. Dodson, supra, held that the statutory term "immune" contemplated total exemption from liability, such as enjoyed by state and local governments, and not a suit by one fellow employee against another which is barred by the worker's compensation statute.

[13] State Farm Mut. Auto. Ins. Co. v. Kelly, 238 Va. 192, 380 S.E.2d 654 (1989). However, on the issue of bad faith, two circuit courts have held that an UM / UIM carrier may be liable to the plaintiff for bad faith refusal to negotiate with the plaintiff before judgment under Code §8.01-66.1(D)(1). Copenhaver v. Davis, 29 Va. Cir. (Cir. Ct. Louisa Co. 1992); Crawford v. Allstate

Inc. Co., 8 VLW 468 (Cir. Ct. City of Hampton 1993); Kostyal v. Nationwide, (Cir. Ct. City of Hampton, 1996, Law No. 3338, 10 VLW 1278 (4/22/96)). In addition, the Virginia Unfair Claim Settlement Practices Act, 38.2-510(6) prohibits an insurance carrier, "as a general business practice," from "not attempting in good faith to make prompt, fair and equitable settlements of claims (including UM/UIM claims) in which liability has become reasonably clear."

[14] See Note 11.

[15] Va. Code Ann. §38.2-2206(G) (Repl. Vol. 1994); Family Automobile Policy UM endorsement "Conditions" incorporates standard condition 13 subrogation providing "in the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefore against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights."

[16] See Note 11.

[17] Daley-Sand v. West American Ins. Co., 564 A.2d 965, 971 (Pa. Super. 1989) (citing cases from several jurisdictions).

[18] Superior Ins. Co. v. Cencewizki, Case No. CH 94-155 (Cir. Ct. of City of Fredericksburg, Jan. 27, 1995, Judge Wm. H. Ledbetter).

[19] 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 required self-insurers to provide UM coverage 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.

[20] Insurance Company of N. Am. v. Perry, 204 Va. 833, 837, 134 S.E.2d 418 (1964).

[21] Allstate Ins. Co. v. Meeks, 207 Va. 897, 153 S.E.2d 222 (1967).

[22] Nationwide Mut. Ins. Co. v. Hill, 247 Va. 78 (1994).

[23] Id.

[24] "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.

[25] Id.

[26] Id.

[27] Bryant v. State Farm Mut. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (1965).

[28] Id.

[29] Id., 205 Va. at 901.

[30] Cunningham v. Insurance Co. of N. Am., 213 Va. 72, 189 S.E.2d 832 (1972).

[31] Goodville Mut. Cas. Co. v. Borror, 221 Va. 967, 275 S.E.2d 625 (1981).

[32] Id.

[33] Cunningham, supra note 30.

[34] Borror, supra, note 31.

[35] Id. 221 Va. at 970.

[36] Bryant, supra note 27.

[37] Hill, supra note 22.

[38] Cunningham, supra note 30.

[39] Borror, supra note 31.

[40] Id.

[41] Superior Insurance Company v. Postell, et al., (22nd Judicial Circuit, October 27, 1992, CH Case No. 91-200; cert. denied).

[42] USAA Casualty Ins. Co. Alexander, 248 Va. 185 at 194-195 (1994).

[43] Id.

[44] Nationwide Mut. Ins. Co. v. Scott, 234 Va. 573, 363 S.E.2d 703 (1988).

[45] GEICO v. Universal Underwriters Ins. Co., 232 Va. 326, 350 S.E.2d 612 (1986).

[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, supra note 6; Phelps v. State Farm Mut. Ins. Co., 245 Va. 1 (1993); Nationwide v. Robinson (1995) Case No. HE-563-4 (Cir. Ct. City of Richmond) (April 4, 1995) 9 VLW 1242 (4-17-95), 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".

[47] Allstate Ins. Co. v. Meeks, supra note 21.

[48] Borror, supra note 31.