

**Auto Accident  
Part III of III**

# Understanding Auto Insurance Law: maximizing recovery with medical expense benefits coverage

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This article is the third 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. The second article, which appeared in the Summer 1995 issue, discussed maximizing coverage with underinsured motorist insurance.

## I. Introduction

Part II of the standard Family Automobile Policy provides for "no-fault" coverage, and is divided into two sections: Section I - Medical Expense Benefits; and Section II - Income Loss Benefits. Both must be offered by the insurance company but the coverage is optional and need not be accepted by the policyholder.

This article only will discuss Section I - Medical Expense Benefits (MEB) Coverage.

Medical expense benefits (MEB) coverage is accident insurance. Medical bills are paid by the plaintiff's insurance company without regard to who is at fault - hence the term "no fault" coverage.

If the plaintiff is entitled to MEB coverage under more than one policy, the MEB "other insurance"

clause, which was discussed in Part I of this article, *Journal of the Virginia Trial Lawyers Association*, (Spring 1995) p.17, determines the priority of payment between insurance companies.

Medical expense benefits (MEB) are payable when an insured person incurs medical bills as a result of an injury while "occupying" a motor vehicle or when "struck" by one, such as a pedestrian. The policy defines "occupying" as "in or upon or entering or alighting from" a motor vehicle.<sup>1</sup>

Effective July 1, 1991, Virginia's two "no-fault" statutes, §38.2-124 (med pay) and §38.2-2201 (med expense), were combined. Section 38.2-124(B) references the specific medical expense and loss of income benefits payable to "any person" as set forth in §38.2-2201(A).

The long history of medical expense and medical payment coverage is beyond the scope of this article. For a detailed discussion, see W. Coleman Allen Jr.'s, *Sources of Coverage*, pp. 48-61 (VTLA 1995) and Edward L. Allen, "The Changing Law in Medical Payments Insurance Coverage in Virginia," *VTLA Journal*, (Spring 1994).

A new standard "Medical Expense Benefits" and "Income Loss Benefits" endorsement (Form A799(g)) was approved by the State Corporation Commission and became effective in September, 1993. Part I of the 1993 endorsement is called "Medical Expense Benefits," abbreviated MEB. It references only Code §§38.2-2201 and uses the term

"medical expense" to refer to medical chiropractic and related bills. The prior endorsement was called "Expenses for Medical Services" and used the term "medical payments".

The three steps of coverage analysis will be used again: RTP (Read the Policy); RTS (Read the Statute); and RTC (Read the Cases). Let's begin by reading the statutes.

## II. RTS (Read the Statute)

### CODE §38.2-124(B): "NO FAULT BENEFITS"

Code §38.2-124

B. Any policy of "motor vehicle insurance"... may include appropriate provisions obligating the insurer to pay medical expense and loss of income benefits arising out of the death or injury of any person, as set forth in subsection A of §38.2-2201... These provisions shall obligate the insurer to make payment regardless of any legal liability of the insured or any other person."

### CODE §38.2-2201: MEB AND LOSS OF INCOME BENEFITS

Code §38.2-2201 - Provisions for Payment of Medical Expense and Loss of Income Benefits

A. Upon request of an insured, each insurer...shall provide...as a minimum coverage (i) to persons occupying the insured motor vehicle; and (ii) to the named insured and, while resident of the named insured's household, the spouse and relatives of the named insured while in or upon, entering or alighting from or through being struck by a motor vehicle while not occupying a motor vehicle, the following health care and disability benefits for each accident:

1. All reasonable and necessary [medical chiropractic and related] expenses resulting from the accident and incurred within three years after the date of the accident, up to \$2,000 per person; however, if the insured does not elect to purchase such limit the insurer and insured may agree to any other limit; and

2. [\$100 per week loss of income benefits up to one year]

B. [...Late notice or no notice must prejudice insurer for denial of coverage to be valid...]

C. [...Stacking of coverage - maximum of four vehicles per policy allowed...]

## A. Code §38.2-2201(A) Creates Two Classes of Insureds

### 1. First Class Insureds:

The named insured (the policyholder) and his/her family (relatives of the same household) are **first class insureds**.

A first class insured gets first class coverage. A first class insured, provided a policy exclusion does not apply, is entitled to MEB coverage:

(1) While occupying any motor vehicle since the statute, when referring to a first class insured, uses the term a motor vehicle; and

(2) When struck by a motor vehicle, while not occupying a motor vehicle, such as a pedestrian.

### 2. Second Class Insureds

**Second Class Insureds** are persons other than the named insured and his/her family. Second class insureds get second class coverage under someone else's policy. Second class insureds are entitled to MEB coverage under someone else's policy because of their status as a "mere occupier" of another policyholder's insured auto.

### 3. Insureds of Both Classes

A person may be a first class insured under his/her own policy or under the policy of a resident relative and at the same time be a second class insured under someone else's policy while occupying that person's auto.

For example, Alan is a first class insured under his own policy with Allstate and under his sister's policy with State Farm. At the same time Alan is a second class insured while occupying George's car under George's policy with Geico.

## B. Reasonable and Necessary Medical Expenses

Code §§38.2-2201(A)(1) requires the plaintiff's insurance company to pay "all **reasonable and necessary** expenses for medical chiropractic [and related] expenses resulting from the accident..."

Many insurance companies routinely refuse to pay all of a policyholder's medical bills under the MEB endorsement on the grounds that the claimed treatment was (1) not reasonable - the provider's charges were "too high"; (2) the treatment was not necessary or was excessive; or (3) the treatment was not a result of the accident.

### 1. Bad Faith

The insurance company must act in good faith and have a reasonable basis for refusing to pay all of its insured's medical bills. Failure to do so will give the insured a remedy under Code §§8.01-66.1(D)(2) for a first party bad faith claim against his/her insurance company. Code §§8.01-66.1(D)(2) provides for an award of attorney's fees, costs and double interest when the judge finds that an insurance company acted in bad faith in failing to pay the insured's MEB claim in excess of \$1,000.<sup>2</sup>

**CODE §§ 8.01-66.1(D)**

§8.01-66.1 - Remedy for Arbitrary Refusal of Motor Vehicle Insurance Claim

D (1) Whenever a court... finds that an insurance company... denies, refuses or fails to pay to its insured a claim of more than \$1,000 in excess of the deductible, ... and it is subsequently found by the judge... that such denial, refusal, or failure to pay was not made in good faith, the company shall be liable to the insured in the amount... due... plus interest... at double the rate... from the date the claim was submitted to the insurer... together with reasonable attorney's fees and expenses.

D (2) The provisions of this subsection shall... include ... refusal or failure to pay ... motor vehicle ... medical payments [benefits] ... when the refusal was not made in good faith.

**a. Smith v. State Farm**

In *Smith v. State Farm*,<sup>3</sup> reported on the front page of the March 28, 1994, edition of *Virginia Lawyers Weekly*, the court found that State Farm had acted in bad faith in its refusal to pay a med pay claim. In addition to payment of all medical bills, State Farm was ordered to pay an attorney's fee of \$2,449.56 and costs of \$950.

**C. Incurred Within 3 Years**

Code §§38.2-2201(A)(1) mandates that an insurance company pay medical expense benefits "**incurred** within 3 years after the date of the accident."

**1. Future Treatment**

Lisa Hodges scarred her right arm in an auto wreck. She was seen by a plastic surgeon who "advised that because Hodges' arm had only recently healed, the surgery, which involved a number of separate procedures, spaced approximately two months apart, could not be completed within one year from the date of the accident." Within the policy period Lisa Hodges signed a memorandum, which was sent to her med pay carrier, by her attorney, agreeing to pay the plastic surgeon and the hospital the quoted charges to revise the scars on her right arm. Unfortunately this memorandum was never sent to the plastic surgeon or to the hospital.

The Supreme Court in *Virginia Farm Bureau Mutual Ins. Co. v. Hodges*<sup>4</sup> held that the plaintiff's bills were **not incurred** within the policy period, then one year; now 3 years holding:

"... In our opinion, the language unambiguously requires that Hodges pay or be legally obligated to pay these medical expenses within the one year period in order for them to have been "incurred" within the terms of the policy...

A binding contract is not formed until the offeree (plaintiff) communicates an acceptance to the offeror (the plastic surgeon)... No acceptance by Hodges or her attorney was ever communicated to the doctors..." (emphasis added).

**III. RTP (Read the Policy)**

**MEB INSURING CLAUSE & DEFINITIONS**

The company will pay, in accordance with Sections 38.2-2201 or 46.2-465 (certified policies) of the Code of Virginia, to or on behalf of each injured person, medical expense benefits as a result of bodily injury caused by accident and arising out of the ownership, maintenance or use of a motor vehicle as a motor vehicle.

"Injured person" means

- (a) the named insured or any relative who sustains bodily injury while occupying a motor vehicle or if struck by a motor vehicle while not occupying a motor vehicle;
- (b) any other person who sustains bodily injury while occupying
  - (1) the insured motor vehicle;
  - (2) a non-owned automobile which the named insured or relative is operating; or
  - (3) a temporary substitute automobile.

"Occupying" means in or upon or entering or alighting from.

**A. Stacking**

**1. Overview**

Stacking refers to the combining or "adding up" of coverage. The statute Code §§38.2201, and the policy provide for two types of stacking of MEB coverage (1) interpolicy stacking and (2) intrapolicy stacking.

**Interpolicy** stacking involves stacking between **separate** policies whereas **intrapolicy** stacking involves stacking within the **same single policy**. The terms "inter" and "intra" used in stacking are analogous to the meaning of these terms used in commerce. For example "**interstate** commerce" refers to business between two or more states; whereas "**intrastate** commerce" refers to business within a single state.

**Interpolicy** stacking is often referred to as **horizontal** stacking. You, as the plaintiff's attorney move horizontally between separate policies to stack coverage for your client. **Intrapolicy** stacking, in contrast, involves **vertical** stacking, where you, as the plaintiff's attorney, move "vertically" down a

declarations page of a single policy stacking the coverages on car #1, car #2, car #3 and car #4, the statutory maximum.<sup>5</sup>

As an overview of inter- and intrapolicy stacking, assume Albert Anderson resides as part of the same household with his mother Martha. Albert insures five cars on his Allstate policy each with \$2,000 in MEB coverage. His mother insures her four cars with Massachusetts Mutual each with \$2,000 in MEB coverage. While driving a neighbor's car (a "non-owned auto"),<sup>6</sup> Albert is injured and incurs \$36,000 in medical bills. His neighbor insures his four cars on a single policy with Nationwide, each with \$5,000 in MEB coverage. The neighbor resides with his father as part of the same household. The neighbor's father insures his four cars with Frontier Insurance Company, each on a single policy with \$2,000 in MEB coverage.

Code §§38.2-2201(C) and the "limits of liability" clause in the standard MEB endorsement allow stacking of up to a maximum of four vehicles per policy (intrapolicy stacking). Albert is entitled to \$8,000 in MEB coverage under his own Allstate policy. (\$2,000 per car x 4 car maximum = \$8,000). Let's move "horizontally" (interpolicy) to Albert's mother's policy. Since Albert is a first class insured under his mother's policy with Massachusetts Mutual, he is covered under her policy. Let's now move "vertically", intrapolicy, down her policy from car #1 to car #4. Albert is entitled to stack the coverage on his mother's 4 cars on her single policy (intrapolicy stacking) for an additional \$8,000 in MEB coverage.

Let's move "horizontally" (between policies again) this time to the neighbor's policy. Albert is a second class insured under his neighbor's policy with Nationwide since Albert was occupying his neighbor's car when injured. Albert is entitled to stack (intrapolicy) the coverage on his neighbor's four cars for an additional \$20,000 in MEB coverage (\$5,000 per car x 4 = \$20,000).<sup>7</sup> However, Albert is not entitled to stack the coverage on his neighbor's father's policy since Albert is not a relative residing in his neighbor's household (first class insured), but a mere second class insured, "a person occupying [his neighbor's] insured motor vehicle" and is not covered under the neighbor's father's policy.<sup>8</sup>

As a result of interpolicy and intrapolicy stacking, Albert the injured person, is entitled to \$36,000 in MEB coverage.

## 2. Interpolicy Stacking Detailed Analysis

As a teaching example of interpolicy stacking, assume Andy Andrews (plaintiff) was injured in a Buick owned by Barry Benson, driven by Charles Clark. (Barry can't drive because he has a broken hand.) Andy, Barry and Charles each have MEB coverage on their own separate policies, and each resides in the same household with relatives who also have MEB coverage on their separate policies.

### a. Follow the car

Andy Andrews was a passenger in Barry Benson's Buick. The Buick was insured by Barry with Bankers & Shippers Insurance Company with \$2,000 in MEB coverage. Andy is entitled to \$2,000 in MEB coverage from Bankers & Shippers, since Andy, the passenger, is an "injured person" under the MEB insuring clause of **Barry's policy** with Bankers & Shippers:

"Injured person" means ... (b) any other person (Andy) who sustains bodily injury while occupying (1) "the insured motor vehicle."

Since Andy was occupying Barry's Buick, the "insured motor vehicle," he is entitled to MEB coverage under the owner's policy with Bankers & Shippers.

### b. Follow the driver

Charles Clark was driving Barry Benson's car, a "non-owned auto".<sup>9</sup> Andy, the injured passenger, is entitled to MEB coverage under the driver's, Charles Clark's policy with Colonial if Andy is an "injured person" under the MEB insuring clause of Charles' policy with Colonial. Let's read the definition of "injured person" contained in **Charles' Colonial policy**:

"Injured person" means ... (b) any other person (Andy) who sustains bodily injury while occupying ... (2) a non-owned automobile which the named insured (Charles) or a relative is operating."

Charles is the named insured under his policy with Colonial. Since Charles was **operating** Barry's car - a "non-owned automobile," Andy, the passenger, is entitled to \$2,000 in MEB coverage under his driver's personal auto policy with Colonial.

### c. Follow the driver home

Charles, the driver, is part of the same household, with his wife, his sister and his mother-in-law. Charles and his wife are insured on the same policy with Colonial. Charles' sister and mother-in-law are each insured on separate policies - Sister: Stonewall Dixie - \$2,000 MEB Coverage; Mother-in-Law: Maryland Casualty - \$5,000 MEB Coverage.

Is Andy, the passenger, entitled to MEB Coverage under separate policies insuring his driver's sister and mother-in-law? To answer this question we must determine if Andy is an "injured person" under both policies insuring Charles' sister and mother-in-law. Let's read the definition of "injured person" in

Charles' sister's and mother-in-law's respective policies:

"'Injured person' means ... (b) any other person (Andy) who sustains bodily injury while occupying ... (2) a non-owned automobile which the named insured or a relative is operating."

Andy, the passenger in Barry's Buick is entitled to MEB coverage under his driver's sister's and mother-in-law's separate policies since his driver, Charles, is a **relative** residing in their household, and Charles, a relative, was **operating** a "non-owned auto." Accordingly, Andy has an additional \$2,000 in MEB coverage under Charles' sister's policy with Stone-wall Dixie and \$5,000 in MEB coverage under Charles' mother-in-law's policy with Maryland Casualty.

**d. Follow the plaintiff**

Andy is insured with Allstate. He is the named insured. He has one car on his policy with \$2,000 in MEB coverage.

Andy is an "injured person" under his own Allstate policy, while occupying Barry's Buick. Andy, the named insured, fits the standard MEB definition of an "injured person" since he was occupying a motor vehicle at the time of his injury.

"Injured person means (a) the named insured (Andy) or any relative who sustained bodily injury while occupying a motor vehicle."

The MEB insuring clause and the policy definition of "injured person" does not require a first class insured to be occupying a motor vehicle listed on his/her declarations page to obtain coverage. Provided a policy exclusion does not bar coverage, a first class insured is covered for MEB benefits under his own auto policy and under all separate policies insuring relatives of the same household while occupying a "non-owned auto"<sup>10</sup> or a "temporary substitute auto."<sup>11</sup>

**e. Follow the plaintiff home**

Andy is part of the same household, with his brother Gary and his father Frank. Andy's brother Gary and his father Frank each own one car with \$2,000 in MEB coverage insured with GEICO and Fireman's Fund, respectively.

Is Andy an "injured person" under the MEB endorsement of both his brother Gary's policy with GEICO and his father Frank's policy with Fireman's Fund?

Let's read Andy's brother's and father's policies:

"Injured person means (a) the named insured (father and brother) or any relative (Andy) who sustains bodily injury while occupying a motor vehicle."

Andy is entitled to \$2,000 in MEB coverage under his brother's policy with GEICO and his father's policy with Fireman's Fund since he is their resident relative and is insured "while occupying a motor vehicle" (Barry's Buick).

**f. The Temporary Substitute Auto**

The MEB endorsement does not define "temporary substitute auto," but refers to the definition contained in Part I, Liability:

"Temporary substitute automobile" means an automobile or trailer, not owned by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile or trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction.

To illustrate how you can maximize MEB coverage for your client, while he/she is occupying a "temporary substitute auto" assume the same facts as the previous example except Barry's Buick, driven by Charles with Barry and Andy as passengers, breaks down in front of a friend, Tommy Walker's house. Tommy Walker gives permission to Charles to drive his Toyota, as a temporary substitute for Barry's broken down Buick. En route to their final destination, Andy is injured, in an auto collision, which totals Tommy's Toyota. Tommy's Toyota is insured with Traveler's. He resides as part of the same household with his mother who is insured with Wausau, and with his uncle Ernie, who is insured with Erie. All separate policies contain MEB coverage.

Let's read the MEB policy definition of "injured person" and continue our detailed analysis of interpolicy stacking.

### MEB DEFINITION OF INJURED PERSON

"Injured person" means:

- (a) the named insured or any relative who sustains bodily injury while occupying a motor vehicle or if struck by a motor vehicle while not occupying a motor vehicle;
- (b) any other person who sustains bodily injury while occupying
  - (1) the insured motor vehicle;
  - (2) a non-owned automobile which the named insured or relative is operating; or
  - (3) a temporary substitute automobile.

Following the car occupied by the injured person, Andy, brings us to Tommy's MEB coverage with Travelers. Andy is an "injured person," (b)(1), *supra* under Tommy's policy since Andy was occupying Tommy's "insured motor vehicle," and is entitled to coverage.

Following Tommy home brings us to his mother's and uncle's policies with Wausau and Erie respectively. Andy, the injured passenger, is not covered under their policies since he does not fall under their policy definition of "injured person" because Tommy's Toyota is not (1) "the insured motor vehicle", (b)(1) *supra*, under their Wausau or Erie policies, (2) a "non-owned automobile" (b)(2), *supra*, which the named insured Mrs. Walker or Uncle Ernie, or a relative, Tommy, was operating, and (3) "a temporary substitute automobile" (b)(3), *supra*, under Mrs. Walker's or Uncle Ernie's Wausau and Erie policies, respectively.

Following the driver, Charles Clark, and following him home, gives Andy coverage under Charles' policy and under his resident relatives' policies since Charles was "operating" a "non-owned automobile," (b)(2), *supra*.

Following Andy gives him coverage (a), *supra*, under his own policy with Allstate, and following Andy home gives him MEB coverage under his resident relatives' policies since Andy, a first class insured, was "occupying a motor vehicle."

Who is left - Barry? Charles was initially driving Barry's Buick which broke down en route. As a temporary substitute, Charles drove Tommy's Toyota with Andy and Barry as passengers. Andy was not occupying Barry's broken down Buick at the time of his injury, and Barry could not even drive the Toyota because of his broken hand. Is Andy, the injured passenger, entitled to MEB coverage under Barry's

policy with Bankers & Shippers? Let's read the definition of "injured person" in **Barry's Bankers & Shipper's policy**.

"Injured person means ... (b) any other person who sustains bodily injury while occupying ... (3) a temporary substitute automobile."

Tommy's Toyota fits the definition of "a temporary substitute automobile" under Barry's policy since it is "a temporary substitute for [Barry's] owned automobile," his Buick, "when withdrawn from normal use because of its breakdown..." Accordingly, Andy, is entitled to MEB coverage under Barry's policy. Andy is not entitled to MEB coverage under Barry's resident relatives' policies since Tommy's Toyota is not (1) their "insured motor vehicle" ((a), *supra*); (2) a "non-owned automobile which the named insured or relative (Barry) [was] operating" ((b)(2), *supra*); nor (3) a "temporary substitute automobile" under the resident relatives' policy ((b)(3), *supra*). Although an auto can be a "non-owned automobile" under several policies, an auto can only be a "temporary substitute automobile" under one policy - Barry's policy since Tommy's car is a temporary substitute only for Barry's Buick.

### g. Resident of Two Households

In *Nationwide Mut. Ins. Co. v.*

*Robinson*,<sup>12</sup> Judge Randall G. Johnson, in a well written opinion, 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. Since the Supreme Court of Virginia has stated, "the classification of insureds set out in [the medical expense statute now 38.2-2201(A)] is **essentially equivalent** to that defined in [the UM statute, now Code §§38.2-2206(B)] and we look for guidance to our decisions in cases involving such [UM] coverage [when deciding medical expense coverage issues],<sup>13</sup> Judge Johnson's holding in *Nationwide Mut. Ins. Co. v. Robinson*<sup>14</sup> should apply with equal force to MEB coverage.

As an example, assume 7-year-old Joey is struck by an auto when crossing the street and incurs substantial medical bills. Joey's parents, Alberta and Norman are divorced, live in separate households on the same street, and have joint custody of little Joey. Joey has a room, clothes and toys in both households and spends 50 percent of his time at each household. Alberta and Norman come from big families and each resides separately as part of the same household with their respective parents, brothers, sisters, three cousins and a dog.

According to the decision of *Nationwide Mut. Ins. Co. v. Robinson*,<sup>15</sup> little Joey is a resident of **both** his

mother's and father's separate households. Joey is a first class insured under his mother Alberta's policy with Allstate and under his father Norman's policy with Nationwide. In addition, Joey is a first class insured under **all** auto policies insuring each relative residing in **both** his mother's and father's separate households, and is entitled to stack the MEB coverage on each policy (interpolicy stacking) and also is entitled to further stack the coverage on each car on each policy, up to four cars **per policy** (intrapolicy stacking).

**h. The Key to Maximizing Coverage**

The key to maximizing MEB coverage is to find all policies containing a MEB endorsement under which the plaintiff is an "injured person" and (1) move "horizontally" between these policies to stack coverage, as we did in the previous examples, and (2) move "vertically" to stack the coverage further on **each** policy by "adding up" the MEB coverage on each policy, up to a maximum of four cars per policy (intrapolicy stacking).

**3. Intrapolicy Stacking**

**A. Intrapolicy Stacking by a First Class Insured**

**(i) Authority**

The authority for intrapolicy stacking of MEB coverage is Va. Code Ann. §§38.2-2201(C), and the 1993 MEB "limits of liability" clause which mandate intrapolicy stacking on a single policy up to a maximum of four autos per policy.

Before intrapolicy stacking was mandated by statute, the "separability clause" which is still present as Condition 4, contained in the "Conditions" section in the back of the policy entitled, "Two or More Automobiles (Parts I, II and III)" was the basis for stacking med pay or medical expense coverage on multiple autos on a single policy (intrapolicy stacking).

**CONDITION 4 - SEPARABILITY CLAUSE**

"When two or more automobiles are insured hereunder, the terms of this policy (MEB coverage) shall apply separately to each (auto)..."

The Supreme Court of Virginia in *Surety Corp. v. Elder*<sup>16</sup> held the "separability" clause in effect created "two policies of insurance in one" giving the insured "the same protection and coverage as if two policies of insurance were issued."

Before intrapolicy stacking was mandated by statute, the insurance industry attempted to offset the

"separability" clause, (which provided the basis for intrapolicy stacking) with the "limits of liability" clause. These attempts failed. In *Farm Bureau Mut. Ins. Co. v. Wolfe*,<sup>17</sup> the Supreme Court of Virginia held that the medical payments "limits of liability" clause did not effectively limit stacking of multiple vehicles on the same policy by a first class insured, as afforded by the "separability" clause, since the "limits of liability" clause failed to contain the underlined "magic words" which would eliminate intrapolicy stacking: "**Regardless of the number of vehicles to which the policy applies**, the limit of liability for medical payments stated in the declarations as applicable to 'each person' [the policy limit per car] is the limit of the company's liability for all expenses incurred by ... each person..." (emphasis added).

The identical separability clause cited in *Elder & Wolfe* is still present as Condition 4 in the present family auto policy form, and the 1993 MEB "limits of liability" clause, does not contain the underlined magic words, which, the court in *Wolfe* stated, would effectively eliminate intrapolicy stacking. However, today, the underlined "magic words" could not eliminate intrapolicy stacking of up to four vehicles per policy since a "higher authority" mandates such stacking - the statute, Code §§38.2-2201(C).

**(ii) Intrapolicy Stacking Example**

Providing a policy exclusion does not bar coverage, a first class insured can stack MEB coverage on up to a maximum of four vehicles (1) on his/her own policy, and (2) on the policy of a relative of the same household, such as a son, parent, sibling, cousin or in-law.

As an example, assume Alice is injured while a passenger in Bart's Bronco (a "non-owned auto") insured with Bankers & Shippers Insurance Company. Bart insures three cars on his Bankers & Shippers policy, the Bronco occupied by Alice, as well as a Chevrolet and a Pontiac, each with \$5,000 in MEB coverage.

Alice owns two cars each insured with \$2,000 in MEB coverage on the same policy with Allstate.

Alice resides, as part of the same household, with her two sisters, Carol and Sandra. Carol insures her two cars on a single policy with Colonial and Sandra insures her two cars on a single policy with State Farm, each policy containing \$2,000 in MEB coverage per car. Alice incurred \$27,000 in medical bills.

Alice is a first class insured under sister Carol's and sister Sandra's policy since all sisters reside in the same household. Code §38.2-2201(A) mandates coverage for a first class insured, "while in ... **a motor vehicle.**"

Alice is entitled to stack the MEB coverage on her own policy (intrapolicy stacking) and on each sister's policy, (interpolicy stacking followed by intrapolicy stacking) as follows, since she is a first class insured under each policy:

Alice (Allstate)	
2 cars x \$2,000 per car .....	\$4,000
Sister Carol (Colonial)	
2 cars x \$2,000 per car .....	\$4,000
Sister Sandra (State Farm)	
2 cars x \$2,000 per car .....	\$4,000

In addition to being a first class insured under her own policy and under her sisters' policies, Alice is a **second class** insured under Bart's policy. Alice is entitled to \$5,000 in MEB coverage from Bankers & Shippers, the insurance company insuring Bart's Bronco, which she was occupying at the time of the injury, since she was a permissive occupant - a second class insured. Code §38.2-2201(A) and Bart's policy provide MEB coverage to a second class insured, while "occupying the insured motor vehicle" (Bart's Bronco).

#### b. Intrapolicy Stacking by a Second Class Insured

"Can a second class insured - a person merely occupying an insured auto, who is not part of the vehicle owner's household, stack medical expense benefits coverage on multiple cars on the owner's policy"? In our example, can Alice stack \$5,000 each in MEB coverage on Bart's other cars, listed on his same policy, his Chevrolet and Pontiac (which were not involved in the collision) for an additional \$10,000 in MEB coverage?

To answer this question, follow the same three steps of coverage analysis: RTP (Read the Policy); RTS (Read the Statute); and RTC (Read the Cases). Let's begin by reading the cases.

##### (i) *Nationwide Mut. Ins. Co. v. Shelton* (1983)<sup>18</sup>

Mark Shelton was injured while a passenger in David Worthy's auto, incurring over \$47,000 in medical bills. Mark Shelton was a first class insured under his father's policy with Great American which insured three cars, each with \$5,000 in med pay benefits. Great American paid Mark \$15,000 by stacking the coverage on his father's three cars (\$5,000 per car x 3 cars = \$15,000). David Worthy's auto was insured with Nationwide. Three cars were insured on the Worthy Nationwide policy, including the car occupied by Mark Shelton, each with \$5,000 in med pay benefits. Nationwide paid Mark Shelton \$5,000 in med pay benefits which covered the car he was occupying, but refused to pay Mark the med pay coverage on the other two cars listed on the Worthy policy, since Mark Shelton was a second class insured - a mere permissive occupant.

The Supreme Court of Virginia in *Nationwide Mut. Ins. Co. v. Shelton*,<sup>19</sup> held that unlike a first class insured, a second class insured - a permissive occupant, could not stack the med pay coverage on

his owner's policy holding:

"Paraphrasing the rule in *Cunningham* [a case involving stacking UM coverage on a single policy], we hold that Shelton, an insured of the second class, is limited in his medical payments claim to the coverage provided the specific vehicle he was occupying when injured in that he is not entitled to stack the coverages provided to other vehicles insured in the policy". [Footnote 3 at 225 Va. 321 stated, "By Acts 1983 c. 197, 370, the General Assembly amended Code §§38.1-380.1 [now is 38.2-2201(C)] by adding language pertaining to stacking of medical payments coverages. That amendment effective July 1, 1983, is inapplicable here. emphasis added]"

*Nationwide v. Shelton*<sup>20</sup> was decided in 1983. Two very important factors are present now, which were not present in the Shelton case: (1) No statute mandating stacking of med pay or med expense coverage governed the Shelton case. Indeed, the Supreme Court, in footnote 3 at 225 Va. 320-321 stated the new stacking provision in the med pay statute was "inapplicable here;" and (2) the Nationwide policy in Shelton did not contain a provision in the "limits of liability" clause mandating stacking. The 1993 MEB endorsement (Form A799(g)) does.

##### (ii) The 1991 MEB Statute

Neither Code §§38.2-124(B) nor Code §§38.2-2201 distinguish between a first and second class insured with regard to stacking of MEB coverage.

Code §§38.2-124(B) provides the basis for intrapolicy stacking by a second class insured by use of the word, "**any person** as set forth in subsection A of §§38.2-2201" (emphasis added). Code §§ 38.2-2201(A) *supra* sets forth two classes of "persons" - a first class insured and a second class insured. Section 38.2-2201(A) describes a second class insured as, "**persons** occupying the insured motor vehicle" (emphasis added).

Subsection (C) of 38.2-2201 mandates stacking of up to four motor vehicles per policy, declaring:

#### CODE §38.2-2201(C) - INTRAPOLICY STACKING

"In any policy of personal automobile insurance in which the insured has purchased coverage under subsection A of this section, every insurer providing such coverage arising from the ownership, maintenance or use of no more than four motor vehicles shall be liable to pay up to the maximum policy limit available on every motor vehicle insured under that coverage if the health care or disability expenses and costs mentioned in subsection A of this section exceed the limits of coverage for any one motor vehicle so insured."



The Supreme Court in *Nationwide Mut. Ins. Co. v. Shelton*,<sup>21</sup> based its decision that a second class insured (a permissive occupant) could not stack the med pay/med expense coverage on his owner's policy on the statutory and policy distinction between a first and second class insured. However, no statute mandating intrapolicy stacking was in effect at the time *Nationwide v. Shelton*<sup>22</sup> was decided.

Code §§38.2-2201(C), which now mandates stacking of MEB coverage on a single policy of up to four vehicles, does not distinguish between first class and second class insureds, which was the rationale preventing second class stacking in *Nationwide v. Shelton*.<sup>23</sup> Accordingly, Code §§38.2-2201(C), by implication, supersedes the Shelton decision.

In addition, if the statute itself, which was enacted for the benefit of injured persons, contains an ambiguity, allowing for two opposite interpretations, the statute will be construed liberally to provide coverage, *USAA v. Alexander*.<sup>24</sup>

**(iii) The 9/1/93 MEB Endorsement**

The 1993 MEB endorsement contains a new "limits of liability" clause (not present in the *Nationwide policy in Nationwide v. Shelton*,<sup>25</sup>) expressly mandating intrapolicy stacking, which does not distinguish between "first class" and "second class" insureds.

**1993 MEB LIMITS OF LIABILITY CLAUSE<sup>26</sup>**

Regardless of the number of:

- 1. persons or organizations who are insureds under this policy,
- 2. persons who sustain bodily injury, or
- 3. claims made or suits brought on account of bodily injury;

The company's liability for Medical Expense Benefits to or on behalf of any one person who sustained bodily injury shall not exceed:

- (a) the limit of liability for Medical Expense Benefits stated in the declarations as applicable to each injured person when there is only one insured motor vehicle; or
- (b) the sum of the highest limits of liability for Medical Expense Benefits stated in the declarations as applicable to each injured person for each insured motor vehicle up to a maximum of 4, when the medical expense costs incurred by the injured person exceed the limit of liability for any one vehicle so insured.

The 1993 MEB endorsement allows a second class insured (a "class b injured person" - a permissive occupant) to stack MEB coverage on his/her owner's

policy since the policy itself allows stacking of up to four vehicles for "each injured person" and a second class insured is defined by the policy as "an injured person."

If the 1993 MEB endorsement does not expressly allow intrapolicy stacking by a second class insured, stacking of coverage will still be allowed if the policy language creates an ambiguity. It is black letter law that if an insurance policy contains an ambiguity, coverage is provided since insurance policies are liberally construed in favor of coverage if two opposite interpretations are possible. *Granite State Ins. Co. v. Bottoms*;<sup>27</sup> *USAA v. Webb*.<sup>28</sup>

**B. Seatbelt Benefits**

United Services Automobile Association (USAA) and Royal Insurance Co. pay an additional \$10,000 in medical expense benefits and a \$10,000 death benefit if an insured, who has MEB coverage, is injured or killed while wearing a seatbelt, in a child seat, or protected by an airbag.

**USAA SEATBELT BENEFIT INSURING CLAUSE AND DEFINITION OF INSURED**

These benefits are payable only if, at the time of the accident, medical expense benefits coverages was in effect, applicable to the accident and the insured was:

- 1. Wearing a seatbelt or;
- 2. Occupying a seat in an automobile in which he was protected by a passive passenger restraint device installed by the manufacturer...

The company will pay up to \$10,000 for reasonable expenses incurred for necessary medical services caused by bodily injury sustained by an insured in an automobile accident. The company will pay only for expenses incurred within three years from the date of the accident...

"Insured" as used in this endorsement means: (1) Named insured or any relative while occupying any auto; (2) Any other person while occupying an owned auto.

**C. Conditions**

To trigger the insurance company's duty to pay medical expense benefits, an insured seeking coverage must first comply with policy conditions - conditions precedent for coverage. The most common MEB conditions are "Notice" and "Medical Reports; Proof of Claim."

## 1. Notice

### MEB NOTICE CLAUSE

Notice. In the event of an accident, the company requires that written notice containing particulars sufficient to identify the injured person and also reasonably obtainable information respecting the time, place and circumstances of the accident shall be given by or on behalf of each injured person to the company or any of its authorized agents as soon as practicable. The failure or refusal of the injured person to give such notice shall not relieve the company of its obligation to pay unless such failure to refusal prejudices the company in establishing the validity of any claim under this coverage...

Code §§38.2-2201(B) and the MEB notice condition itself require an insurance company to pay MEB benefits unless it can prove prejudice resulting from an insured's failure or refusal to give notice of the accident "as soon as practicable."

## 2. Medical Reports; Proof of Claim

### MEB CONDITION

Medical Reports; Proof of Claim. As soon as practicable the injured person or someone on his behalf shall give to the company written proof of claim under oath, if required, including full particulars of the nature and extent of the injuries and treatment received and contemplated and such other information as may assist the company in determining the amount due and payable. The injured person shall submit to physical examinations by physicians selected by the company at the expense of the company when and as often as the company may reasonably require.

#### a. *Allstate Ins. Co. v. Eaton*

In *Allstate v. Eaton*,<sup>29</sup> the Supreme Court held that an insured making a medical expense claim must submit to all reasonable requests for an insurance company "IME," **under the MEB endorsement** even though Eaton also was making an uninsured motorist claim under the same policy, from the same accident, and was in an adversarial relationship with his own carrier as a result of the UM claim. Failure of an insured to submit to the MEB carrier's

reasonable requests for "independent" medical exams will result in breach of this MEB policy condition and loss of MEB benefits.

The policy condition refers only to "physical examinations by **physicians** selected by the company". Therefore, an insured's refusal to be examined or interviewed by any other health care professional, such as a "rehabilitation nurse" selected by the company is not a breach of this policy condition.

## D. Exclusions

More than 100 years ago, Mark Twain referred to an insurance policy as, "the front of the policy provides coverage and the little print in the back takes it away." Mark Twain was referring to exclusions.

The 1993 standard MEB endorsement contains the following exclusions which "take away" coverage.

### MEB EXCLUSIONS<sup>30</sup>

This insurance does not apply:

- (a) for intentional injury to oneself;
- (b) when the same benefits are payable under a workmen's compensation, employer's disability or similar law;
- (c) when the insured auto is used as a public or livery conveyance, such as a taxi; unless the policy designates the auto as such;
- (d) non-permissive use of a covered vehicle;
- (e) to the named insured or any resident relative while occupying any motor vehicle owned by, furnished or available for the regular use of such named insured or relative which is not an "insured motor vehicle";
- (f) injury due to war.

### 1. Exclusion (e)

Exclusion (e) first appeared in the 1993 MEB endorsement. Exclusion (e) uses the concept of "non-owned automobile", found in part I Liability of the family auto policy to exclude coverage. If "non-owned auto" liability coverage in part I of the policy would insure the "injured person" where he/she, a defendant, the injured person also is covered for MEB benefits.<sup>31</sup>

The full text of exclusion (e), is set forth on the next page.

**1993 MEB EXCLUSION (E)**

Medical Expense Exclusion (e)

Exclusions: This insurance does not apply... (e) to bodily injury sustained by the named insured or any relative (residing in the same household as the named insured) while occupying any motor vehicle owned by or furnished or available for the regular use of such named insured or relative and which is not an insured motor vehicle.

Definitions: "Insured motor vehicle" means a motor vehicle with respect to which (a) the named insured is the owner; and (b) the bodily injury liability or property damage liability insurance of the policy applies and (c) the insurance under this coverage applies and for which a specific premium has been charged.

Sam was injured while driving his son's Pontiac. Does exclusion (e) exclude MEB coverage to Sam under his Sentry policy? To find the answer, let's read Sam's policy (RTP).

Exclusion (e): This insurance does not apply to bodily injuries sustained by the named insured, (Sam)... while occupying any motor vehicle owned by ... [a] relative, (his son) and which is not an insured motor vehicle.

Exclusion (e), excludes Sam from MEB coverage since he was occupying a motor vehicle owned by, a relative, his son Paul, which does not fit the definition of "an insured motor vehicle" under Sam's policy with Sentry.

**c. The son's girlfriend's car**

Paul's girlfriend, Gloria, visits Sam's household everyday. Paul drives his girlfriend's uninsured yellow Toyota about four times per week, every week. Paul's father, Sam, borrowed Gloria's Toyota to do an errand and is injured in an auto wreck. Does exclusion (e) exclude Sam from MEB coverage under his Sentry policy insuring his Saab, which was not involved in the wreck? To find the answer, let's read Sam's policy again (RTP):

Exclusion (e): This insurance does not apply to bodily injury sustained by the named insured (Sam)... while occupying any motor vehicle... furnished or available for the regular use of ... [a] relative, (son, Paul) and which is not an insured motor vehicle.

Exclusion (e) bars MEB coverage to Sam under his Sentry policy since at the time of his injury he was occupying a motor vehicle furnished for the regular use of a relative, his son, Paul.

**d. The neighbor's car**

Sam has borrowed his neighbor's uninsured car, once a month for the last year, and was injured in an auto collision the last time he drove it. Does exclusion (e) bar Sam from MEB coverage under his Sentry policy, insuring his Saab which was not involved in the collision? Answer: - No. Sam has coverage under his own auto policy with Sentry since he was occupying a "non-owned automobile" - an automobile not owned by or furnished or available for the regular use of the named insured, (Sam) or a relative of his household."<sup>32</sup>

**e. Is exclusion (e) valid?**

To determine if a policy exclusion is valid, we must continue the analysis with the next steps RTS (Read the Statute) and RTC (Read the Cases).

The following examples illustrate the scope of MEB exclusion (e).

**a. The Second Car**

Sam owns two cars - a Saab insured with Sentry and a Honda insured with Hartford. Sam purchases MEB coverage on the Saab, but not on the Honda. Sam was injured while driving his Honda and seeks MEB coverage on his Saab, which was not involved in the collision. Sam is the named insured (a first class insured under both policies). Does exclusion (e) exclude MEB coverage to Sam on his Sentry policy while occupying his Honda. Let's read the policy (RTP).

Exclusion (e): This insurance does not apply to bodily injury sustained by the named insured (Sam)... while occupying any motor vehicle owned by ... such named insured (Sam)... and which is not an insured motor vehicle.

Exclusion (e), excludes MEB coverage to Sam while occupying his Honda since Sam's Honda is owned by him and "is not an insured motor vehicle," under his Sentry policy. Only Sam's Saab fits the definition of an insured motor vehicle under his Sentry policy. An "insured motor vehicle" within the MEB definition is one which is set forth on the declarations page of the named insured's policy under which coverage is sought (here, Sentry).

**b. The son's car**

Sam and his son Paul reside together as part of the same household. Sam insures his Saab with Sentry and his son Paul insures his Pontiac with Progressive. Sam has \$2,000 in MEB coverage on his Sentry policy and Paul has none on his policy.

## (1) RTS (Read the statute)

## CODE §§38.2-2201(A)

Upon request of an insured, each insurer... shall provide... [MEB] coverage... (ii) to (first class insureds) the named insured and, while resident of the named insured's household, the spouse and relatives of the named insured while in or upon... a motor vehicle....

Code §§38.2-2201(A) clearly provides a first class insured (the named insured and resident relatives) with MEB coverage while in any motor vehicle since the statute mandates coverage while in or upon... a motor vehicle. The restrictive language contained in exclusion (e), which excludes coverage to a first class insured, is not set forth in the statute. It is a general black letter rule of law that if terms in an insurance policy conflict with and restrict the coverage mandated by the statute, coverage is provided. The offending policy term is void and is replaced by the statutory language. See for example, *Bryant v. State Farm Mut. Auto. Ins. Co.*;<sup>33</sup> *State Farm Mut. Auto. Ins. Co. v. Manojlovic*;<sup>34</sup> and *USAA v. Yanconiello*.<sup>35</sup>

## (2) RTC (Read the Cases)

(a) *State Farm Mut. Auto. Ins. Co. v. Gandy*(1989)<sup>36</sup>

Harold Gandy's foot was run over by a forklift while he was standing on private property. The forklift was not registered with the DMV; was not licensed; and was "used only in the private yard of the company which owned it." The Supreme Court assumed, without deciding, that the forklift was a "motor vehicle."

Gandy's medical bills totalled \$836.36. He brought a claim under his medical payment coverage with State Farm to pay these medical bills. State Farm argued that coverage was excluded under a standard exclusion, "...the policy does not apply...to bodily injury...sustained by the named insured...through being struck by ...equipment designed for use principally off public roads, while not upon public roads." Gandy argued that this exclusion was invalid since it was not specifically allowed by Code §38.2-124.

Code §38.2-124, unlike its sister "no-fault" statute, Code §38.2-2201, has "no teeth." Code §38.2-124(B) leaves it entirely to the insurance carrier, to **voluntarily provide** "appropriate provisions" for "no fault" benefits stating:

"Any policy of liability insurance may include appropriate provisions obligating the insurer to pay medical expense and loss of income benefits..." (emphasis added).

The Supreme Court of Virginia, in *Gandy*, held the forklift exclusion valid since it was clear and reasonable and did not conflict with the statute. The Court distinguished its prior decisions (*Jerrell* and *Seay*) stating, "those decisions dealt with **policy language of inclusion, not exclusion**...Reasonable exclusions not in conflict with the statute in an insurance contract will be enforced...[provided the] exclusionary language...is clear and unambiguous..."

(b) *Baker v. State Farm Mut. Auto. Ins. Co.*(1991)<sup>37</sup>

Bill Baker was a bus driver. While on the job, Bill pulled the muscles in his back when the steering wheel of his bus locked-up. Bill brought a claim under his State Farm medical expense coverage for his medical bills under Code §38.2-2201. State Farm denied coverage on a policy exclusion, "...bodily injury sustained...to the extent that benefits therefore are in whole or in part payable under any Worker's Compensation law...." Bill argued that the Worker's Compensation exclusion was invalid because it was not authorized by Code §38.2-2201.

In *Baker*, a divided Supreme Court followed *Gandy*, holding:

"Here, a clear and unambiguous provision reasonably excludes medical payments coverage where those benefits are payable under a workers' compensation statute. Here, as in *Gandy*, the 'statute does not address or prohibit, policy exclusions'. Nor is there a conflict or inconsistency between the statutory provisions and the policy exclusion.' "

A vigorous, three-Justice dissent, led by Justice Lacy, distinguished Code §38.2-124(B) ("any policy may include appropriate provisions...") of *Gandy* and its strongly-worded sister "no fault" statute, Code §38.2-2201, dissenting:

"The validity of any policy exclusion should be measured against the coverage requirements of the applicable statute. Here, the statute at issue is §38.2-2201, not §38.2-124, and there are differences in the nature and requirements of coverage written under each of the sections . . . Examining the policy exclusion in issue in light of the coverage requirements of the appropriate statute, §38.2-2201, dictates a reversal of the trial court's judgment . . . The policy exclusion allows the company to avoid paying benefits if such benefits are compensable under workers' compensation regardless of whether the insured actually received any payment under worker's compensation. Validating this exclusion, as the majority does today, completely vitiates the coverage required by §38.2-2201 . . . If a policyholder purchases coverage under §38.2-2201, the insurer is not entitled to exclude or

lessen the level of coverage mandated by the statute, as State Farm has attempted to do here.”

**(c) Horace Evans v. State Farm Mut. Auto. Ins. Co. (1994)<sup>38</sup>**

Horace Evans was injured while riding his motorcycle, which had no MEB coverage. Horace Evans also owned a car insured with State Farm. The State Farm policy excluded MEB coverage to Horace Evans while occupying another motor vehicle not listed on his State Farm policy under exclusion (e).

State Farm argued that exclusion (e) was clear and reasonable and not in conflict with Code §§38.2-2201(A) citing *Gandy*<sup>39</sup> and *Baker*.<sup>40</sup>

Judge Randall G. Johnson, of the Circuit Court of the City of Richmond, denied coverage, relying on the Supreme Court decision of *Baker v. State Farm Mut. Auto. Ins. Co.*,<sup>41</sup> holding at page 3 of his letter opinion:

“... State Farm argues that the *Baker* holding is controlling here. I agree ... It is true that *Baker* deals with an exclusion for injuries compensable under workers’ compensation, while *Wells* and the present case deal with an exclusion for owned but noninsured vehicles.[exclusion(e)] That distinction, however, is without substance...”

Horace Evans filed an appeal with the Virginia Supreme Court; however, the court denied his application for a writ of appeal, without comment on October 28, 1994. (Sup. Ct. Record No. 94-1220).

**(d) Cotchan et al. v. State Farm Fire and Cas. Co.<sup>42</sup> and Gambale v. Nationwide Mut. Ins. Co.<sup>43</sup> (Sept. 15, 1995)**

The *Cotchan* and *Gambale* cases involve substantially identical facts as found in *Horace Evans v. State Farm Mut. Auto. Ins. Co.*<sup>44</sup> Christopher Cotchan and David Gambale were injured in separate collisions while riding their owned motorcycle. Each motorcycle had liability coverage but no med expense benefits coverage. However, Christopher Cotchan was a first class insured under his parent’s auto coverage with State Farm which provided MEB coverage on the family auto and David Gambale had MEB coverage on his personal auto insurance policy with Nationwide. Both State Farm and Nationwide, respectively, denied MEB coverage to the injured motorcycle drivers, each a first class insured, under the auto policies, relying upon exclusion (e).

The Supreme Court heard oral argument on the *Cotchan* and *Gambale* cases on June 6, 1995. The insurance carriers argued that *State Farm v. Baker* was controlling. The plaintiffs argued that the facts of *Cotchan* and *Gambale* were distinguishable from

*State Farm v. Baker*<sup>45</sup> since Code §§38.2-2201(A) is **silent** regarding the worker’s compensation exclusion in *Baker*, but expressly mandates coverage to Cotchan and Gambale while riding a motorcycle since Code §§38.2-2201(A) mandates coverage to a first class insured (the plaintiffs) “while in or upon **a motor vehicle**.” Therefore, the plaintiffs argued, that exclusion (e) in *Cotchan* and *Gambale* conflicted with Code §§38.2-2201(A) whereas there was no conflict with the statute in *State Farm v. Baker*<sup>46</sup> since the statute was silent regarding the worker’s compensation exclusion held valid by the Supreme Court in *Baker*.

The Supreme Court issued its decision in *Cotchan et al., v. State Farm Fire & Cas. Co.*<sup>47</sup> on Sept. 15, 1995, and issued an order in *Gambale v. Nationwide Mut. Ins. Co.*<sup>48</sup> The majority held that exclusion (e) was clear, unambiguous and reasonable and not in conflict with the statute, relying upon its prior decisions in *Gandy* and *Baker*. Justices Carrico, Lacy and Kennan dissented. “There is a direct conflict or inconsistency between the policy exclusion and the statute, and the exclusion cannot stand,” wrote Chief Justice Carrico for the dissent.

[To order a copy of the full text of the *Cotchan* opinion, call VTLA’s Fax on Demand service at 1-800-809-0379 and request document number 1447.]

**IV. You represent Priscilla Plaintiff**

The three series of articles entitled “Understanding Auto Insurance Law: Maximizing Coverage” have used the case of Priscilla Plaintiff to explain how to maximize insurance coverage. Article I (Spring 1995) involved maximizing liability coverage and article II (Summer 1995) involved maximizing UIM coverage. In this last article, we conclude our representation of Priscilla Plaintiff by maximizing her recovery with MEB coverage.

At the time of her auto wreck, Priscilla Plaintiff was wearing a seatbelt while driving her Chevrolet, insured with USAA. 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 totalled in the wreck, was insured with USAA with MEB coverage of \$2,000. Priscilla’s mother had two cars on the same policy insured with Goodville Mutual with MEB coverage of \$5,000 per car; sister Elizabeth’s car was insured with Erie with MEB coverage of \$5,000; and sister Theresa’s car was insured with Travelers with MEB coverage of \$5,000. Priscilla Plaintiff has incurred \$300,000 in medical bills and is left with a permanent injury as a result of this wreck. You, as Priscilla Plaintiff’s attorney, are trying to maximize her recovery with MEB coverage. What do you do? Let us search together for MEB coverage.

## A. Medical Expense Benefits (MEB) Coverage Analysis

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

Priscilla Plaintiff was driving her Chevrolet insured with USAA at the time of her collision. She is insured for \$2,000 in medical expense benefits under her USAA policy. In addition, since Priscilla Plaintiff was wearing a seatbelt, she is entitled to additional USAA "seatbelt coverage" of \$10,000. (RTP - Read the Policy - the seatbelt endorsement found at page 37.)

### 2. Follow the Plaintiff Home

Following the plaintiff home brings us to Priscilla's mother's and two sisters' policies, each providing MEB coverage. Is Priscilla Plaintiff entitled to the medical expense benefits coverage under these policies? For an answer, follow the three-step analysis - RTP, RTS and RTC.

The MEB insuring clause of the policies tracks Code §38.2-2201(A) (page 31) and provides benefits to "each injured person...as a result of bodily injury caused by accident arising out of the ownership, maintenance or use of a motor vehicle used as a motor vehicle." The definition of "injured person" includes the named insured or any relative (of the same household) injured while occupying a motor vehicle. Priscilla Plaintiff would be an insured under the MEB insuring clause of her mother's and sisters' policies since she was occupying a motor vehicle (Priscilla's Chevrolet - a motor vehicle not listed on her mother's or sisters' policies). Reading the MEB exclusions in her mother's and sisters' policies (page 38), Priscilla Plaintiff is **excluded** from MEB coverage, under exclusion (e) since Priscilla was driving a motor vehicle "owned by or furnished or available for the regular use of "a relative" (Priscilla).

Does the statute, Code §38.2-2201(A) (page 40), void exclusion (e) as conflicting with and restricting the statutory coverage provided to Priscilla Plaintiff, as a first class insured, when injured while in "a motor vehicle"? Read the Cases (RTC). On Sept. 15, 1995, the Supreme Court of Virginia answered this question in the negative, upholding exclusion (e), when it rendered its decision in the cases of *Cotchan et al., v. State Farm Fire & Cas. Co.* (Record No. 941858)<sup>49</sup> and *Gambale v. Nationwide Mut. Ins. Co.* (Record No. 941882).<sup>50</sup>

## Endnotes

1. In *Lord v. State Farm*, 224 Va. 283, 295 S.E.2d 796 (1982) the named insured was a pre-law student who was assaulted while attempting to enter his car. When injured the plaintiff had just placed his law books against his car and was reaching into his pocket for his keys. The majority, assumed without deciding that Lord was "occupying" his car at the time of the assault but denied medical expense coverage because of late notice. (Va. Code Ann. §§38.2-2201(B) (Repl. Vol. 1994) which now requires an insurer to prove prejudice to deny a MEB claim for "late notice" over-rules the *Lord* decision.) The dissent disagreed with the majority's holding on notice and found that Lord was **entering** his car when injured and thus was "**occupying**" his auto within the meaning of the medical expense endorsements of his State Farm auto policy.
  2. Va. Code Ann. §§8.01-66.1(A) provides the same remedy as Code §§8.01-66.1(D)(2) for bad faith refusal to pay a MEB claim for \$1,000 or less. However the damages are slightly different for small claims - "double the amount due" plus "reasonable attorneys fees and expenses."
  3. *Smith v. State Farm* 8VLW 1076 (Cir. Ct. of Prince William County, Jan. 1994). *Lawyers Weekly* reported that State Farm denied Smith med pay benefits for the following reasons:
    - (1) The plaintiff waited three and one-half weeks before reporting the accident and going to the emergency room. During that time, the plaintiff took no time off from her job as a baggage handler at Dulles;
    - (2) There also was evidence that the plaintiff, before going to the emergency room, indicated to the defendant that if the defendant did not pay, she would say her neck was hurting;
    - (3) Emergency room personnel referred the plaintiff to an orthopedic surgeon. The plaintiff did not see the orthopedic surgeon, but instead went to a chiropractor; and
    - (4) The auto accident occurred at low speeds, with extremely minor property damage."
- Lawyers Weekly* at 8 VLW 1076 (March 28, 1994) further reported, "... At the trial on the good faith issue, the plaintiff's doctor and a defense doctor who performed an independent medical examination both testified that she indeed had been hurt in a car accident.

The insurance company attempted to show that the injuries were fabricated. But on the stand, its adjuster was unable to point to any medical record that showed she was not injured or that her treatment was inappropriate...

Judge Richard B. Potter made specific findings of fact that the company had not acted in good faith in refusing med pay coverage..."

The bad faith action in *Smith v. State Farm* was brought under Va. Code Ann. §§8.01-209 (Repl. Vol. 1994). The attorney for Smith, suggests it is more advantageous to bring a bad faith claim under Va. Code Ann. §§8.01-66.1(D)(2) (Repl. Vol. 1994) since Code §§8.01-66.1(D)(2) provides for **double interest** while Code Ann. §§8.01-209 does not. A sample Motion for Judgment, sample interrogatories and sample request for production of documents to

- be used in a bad faith claim pursuant to Va. Code §§8.01-66.1(D), prepared by Smith's attorney, John D. Whittington, are found in the 300-page outline for the VTLA May 1994 Annual Tort Seminar titled, "Everything You Need to Know to Settle Auto Accident Cases."
4. *Virginia Farm Bureau Mutual Ins. Co. v. Hodges*, 238 Va. 492, 385 S.E.2d 612 (1989).
  5. Va. Code Ann. §§38.2-2201(C) (Repl. Vol. 1994) mandates stacking of medical expense coverage on up to four motor vehicles per policy.
  6. The concept of "non-owned auto" was discussed in Part I of this article, the *Journal of the Virginia Trial Lawyers Association* (Spring 1995) pp. 18-19. A "non-owned auto" is defined in Part I, Liability as "an automobile or trailer not owned by or furnished for the regular use of the named insured or any relative, other than a temporary substitute automobile". The definition of "non-owned auto" contained in the MEB endorsement is substantially the same except it adds the proviso that the auto cannot be used as a "public or livery conveyance." Since Exclusion (a) in Part I, Liability excludes coverage for a "non-owned auto" while used as a public or livery conveyance, the scope of coverage for a "non-owned auto" in Part I, Liability and in Part II, Medical Expense Benefits is substantially the same.
  7. See page 36 for a detailed discussion of intrapolicy stacking by a second class insured.
  8. Va. Code Ann. §§38.2-2201(A) (Repl. Vol. 1994).
  9. See note 6, *supra*.
  10. See note 6, *supra*.
  11. A "temporary substitute auto" is defined at p. 33 of this article. To escape the bar to coverage found in MEB exclusion (e), the "temporary substitute auto" occupied by the insured must not be "owned by or furnished or available for the regular use of either the named insured or a [resident] relative."
  12. *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. This 12-page opinion reviews existing case law and explores in depth the legal concept of "resident of the same household." The opinion is suggested reading and may be obtained from VTLA's "fax on demand service" at 1-800-809-0379, VTLA opinion number 3317.
  13. *Nationwide Mut. Ins. Co. v. Shelton*, 225 Va. 316, 319, 302 S.E.2d 36 (1983).
  14. *Nationwide Mut. Ins. Co. v. Robinson*, See *supra* note 12.
  15. *Id.*
  16. *Surety Corp. v. Elder*, 204 Va. 192, 195, 129 S.E.2d 651 (1963).
  17. *Farm Bureau Mut. Ins. Co. v. Wolfe*, 212 Va. 162, 164-165, 183 S.E.2d 145 (1971).
  18. *Nationwide Mut. Ins. Co. v. Shelton*, 225 Va. 316, 302 S.E.2d 36 (1983).
  19. *Id.* at 225 Va. 320-321.
  20. *Nationwide Mut. Ins. Co. v. Shelton*, *supra* note 18.
  21. *Id.*
  22. *Id.*
  23. *Id.*
  24. *USAA v. Alexander*, 248 Va. 185 at 194-195, 445 S.E.2d 145 (1994).
  25. *Nationwide Mut. Ins. Co. v. Shelton*, *supra* note 18.
  26. Note that the 1993 MEB "Limits of Liability" clause does not contain the magic words "regardless of the number of vehicles to which this policy applies" which the court in *Farm Bureau Mut. Ins. Co. v. Wolfe*, 212 Va. 162, 183 S.E.2d 145 (1971) stated would effectively eliminate intrapolicy stacking.
  27. *Granite State Ins. Co. v. Bottoms*, 243 Va. 228, 415 S.E. 2d 131 (1992).
  28. *USAA v. Webb*, 235 Va. 655, 369 S.E.2d 196 (1988).
  29. *Allstate Ins. Co. v. Eaton*, 248 Va. 426, 448 S.E.2d 652 (1994).
  30. The six MEB exclusions have been paraphrased by the author for easier understanding. The previous med pay endorsement entitled, "Part II - Expenses for Medical Services" excluded in "exclusion (b)" injuries resulting from "(1) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads and (2) a vehicle operated on rails or crawler-treads". The subject matter contained in old "exclusion (b)" is not specifically set forth in the 1993 MEB list of six exclusions, (a)-(f). However, old "exclusion (b)" still excludes coverage in the new 1993 MEB endorsement since the exclusion is contained in the definition of "motor vehicle" - "motor vehicle" means a self-propelled land motor vehicle or trailer **other than** [vehicles (1) and (2) set forth in old exclusion (b), *supra*].
  31. The definition of "insured motor vehicle" in the 1993 MEB endorsement only covers an auto owned by the named insured for which a specific premium is charged, which is usually the auto listed on the declarations page of the policy. The definition of "insured motor vehicle" in the MEB endorsement is much **narrower** than the comparable definition of "owned automobile" contained in Part I, the liability section of the standard family auto policy. The definition of "owned automobile" in Part I includes coverage for (d) "a temporary substitute automobile."
 

Exclusion (e) bars a first class insured from MEB coverage under his/her own policy or under the policy of a resident relative if the first class insured is occupying a "temporary substitute automobile" which is "owned by or furnished or available for the regular use of... [a resident] relative." For example, assume Fred insures his Ford with Farm Bureau and resides with his son (Stan) insured with State Farm and his son Harold insured with Hartford. Fred's Ford breaks down and Fred uses his son Stan's car as a "temporary substitute auto" and is involved in an auto wreck. Fred is excluded from MEB coverage, by exclusion (e), under his policy with Farm Bureau and under his son's policy with Hartford since Fred was "occupying any motor vehicle owned by... [a] relative (his son Stan). The scope of "temporary substitute auto" coverage is **narrower** in Part II, Medical Expense Benefits than in Part I, Liability, of the standard family auto policy. Under Part I, Liability, a father, like Fred, would be provided liability coverage under his own auto policy while driving his son's car as a "temporary substitute auto" whereas exclusion (e) in Part II, would exclude coverage to the father.
  32. See note 6, *supra*. In example (d) Sam drove his neighbor's uninsured car once per month for one



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year before his auto collision. According to *Smith v. State Farm Mut. Auto. Ins. Co.* 206 Va. 280, 142 S.E. 2d 562 (1965) this is sporadic and controlled (casual and infrequent) use. Accordingly, since the neighbor's car was not "furnished or available" for Sam's **regular** use, the neighbor's car falls within the definition of "non-owned automobile," (and **outside** exclusion (e)), providing liability and medical expense benefits (MEB) coverage to Sam under his own Sentry policy. Compare, *State Farm Mut. Auto Ins. Co. v. Jones*, 238 Va. 467, 383 S.E.2d 734 (1989) where medical expense coverage was denied to the policyholder under his personal auto policy with State Farm when injured while driving a van which he drove everyday for his employer. The van was not a "non-owned auto" since it was "furnished or available for Jones' regular use."

33. *Bryant v. State Farm Mut. Auto Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965).
34. *State Farm Mut. Auto. Ins. Co. v. Manjlovic*, 215 Va. 382, 209 S.E.2d 914 (1974).
35. *USAA v. Yanconiello*, 226 Va. 423, 309 S.E.2d 324 (1983).
36. *State Farm Mut. Auto. Ins. Co. v. Gandy*, 238 Va. 257, 383 S.E.2d 717 (1989)
37. *Baker v. State Farm Mut. Auto. Ins. Co.*, 242 Va. 74, 405 S.E.2d 624 (1991)
38. *Horace Evans v. State Farm Mut. Auto. Ins. Co.*, VLW May 2, 1994; Case No. LX 198-3 (Cir.Ct., City of Richmond, April 20, 1994), Judge Randall G. Johnson, cert. denied, (Sup. Ct. Record No. 941220).
39. *Gandy*, *supra* note 36
40. *Baker*, *supra* note 37
41. *Id.*
42. *Cotchan et. al. v. State Farm Fire & Cas. Co.* (Sup. Ct. Record No. 941858; \_\_\_ Va. \_\_\_) decision announced Sept. 15, 1995. Opinion available from VTLA's Fax on Demand service, 1-800-809-0379, document number 1447.
43. *Gambale v. Nationwide Mut. Ins. Co.* (Sup. Ct. Record No. 941882) order announced Sept. 15, 1995.
44. *Horace Evans*, *supra* note 38.
45. *Baker*, *supra* note 37.
46. *Id.*
47. *Cotchan et. al. v. State Farm Fire & Cas. Co.*, *supra*, note 42.
48. *Gambale v. Nationwide Mut. Ins. Co.*; *supra* note 43.
49. *Cotchan et. al. v. State Farm Fire & Cas. Co.*, *supra* note 42.
50. *Gambale v. Nationwide Mut. Ins. Co.*; *supra* note 43.