



Virginia Auto Insurance Law

October 2012

by **Gerald A. Schwartz**

Alexandria, Virginia

This page intentionally left blank.

Contents

Introduction to the Second Edition	11
Section I: Coverage Analysis	13
I. The Three Steps of Coverage Analysis	13
II. The Four Black Letter Rules For Maximizing Recovery	13
III. Rules for Primary and Excess Coverage	14
A. Liability Coverage	14
B. Rules for Uninsured Motorist (UM) Coverage	15
C. Rules for Underinsured Motorist (UIM) Coverage	15
D. Rules for Medical Expense Benefits (MEB) Coverage	16
IV. Understanding the Underwriting “Master Plan”	16
V. The Insurance Policy	17
A. The Virginia Personal Auto Policy	18
1. The Five Sub-Parts	18

2. The Declarations Page	19
3. Material Misrepresentations Void the Policy	19
Section 2: Liability Coverage	23
I. The Insuring Agreement	23
A. "Accident" and <i>AES v. Steadfast</i> (2012)	23
B. Compensatory and Punitive Damages	24
II. The Four Questions To Ask When Seeking Liability Coverage	25
A. Who Is An Insured For Liability Coverage?	25
1. The "Named Insured" - The Policyholder:	25
2. "Family Member":	25
3. "Non-Resident Relative Listed Drivers":	26
4. "Permissive Users":	26
5. "Non-Permissive Users":	26
B. Liability - What Autos Are Covered?	27
1. The Covered Auto:	27
2. Non-Owned Auto:	27
III. The Other Insurance Clause	33
A. No Excess Coverage Example	33
B. <i>Pro-Rata</i> Excess Coverage Example	34
C. Full Excess Coverage Example	34
D. Temporary Substitute Auto - Generally	34
1. The Rental Car	35
2. The Auto Dealer's Loaner Car	35
E. Non-Owned Auto Excess Coverage	35

1. Casual and Infrequent Use – Excess Coverage Allowed	36
2. The Neighbor’s Car Furnished For the Named Insured’s Regular Use - Excess Coverage Excluded	36
3. The Neighbor’s Car as a “Temporary Substitute” - Excess Coverage Allowed	36
IV. You Represent Priscilla Plaintiff	37
A. RTP (Read the Policy)	37
B. RTS (Read the Statute) - The “Omnibus Clause” - Permissive User Statute	40
1. Permission - Reasonable Belief To Use The Auto: “Fast Eddie”	41
2. Permission: Daughter “Steals” Dad’s Car	41
3. Permission: Prom Night - No Drinking and Driving	42
4. Is the Named Insured Excluded From Coverage When Driving A “Non-Owned Auto” Without Permission	42
5. Lack of Permission to Drive a Non-Owned Auto: Enter the “Custodian”	43
C. Negligent Entrustment - Double/Triple Coverage	45
D. The Search for Excess Liability Coverage for Priscilla Plaintiff	46
1. RTP and RTS	46
2. RTC (Read the Cases)	46
E. Don’t Sign That Release - Enter UIM Coverage	48
F. Frustrating Virginia Public Policy	49

Section 3: Maximizing Recovery with Uninsured and Underinsured Motorist Coverage **53**

I. Introduction	53
II. The UM and UIM Statute – Code §38.2-2206	54
A. The UM/UIM Statutory Insuring Provisions	54
B. Persons Insured Under the Statute	55
C. The Statute Creates Two Classes of Insureds	55

D. First Class Insureds Are Covered while in a Motor Vehicle or Otherwise	55
1. In a Motor Vehicle	56
2. Any Motor Vehicle – Example: James Meeks’ 1954 Chevy	56
3. “Or Otherwise”	56
4. Policy Exclusion (A.2.) – Void for First Class Insured	56
III. Resident of the Household	57
A. Spouse of the Named Insured	57
1. When a Spouse Ceases to be a Resident of the Household Does He/She Lose First Class UM/UIM Coverage?	58
2. After Death of the Husband, Does the Surviving Widow Lose Her Status as Spouse for Purposes of Coverage?	58
3. Is a Fiance A “Spouse” or “Relative” for Purposes of First Class UM/UIM Coverage?	59
4. Cohabiting Couple Holding Themselves Out as Married: Is the Partner Entitled to First Class UM/UIM Coverage Under the Named Insured’s Policy?	59
B. The Two Requirements for Being a “Family Member”	59
1. Related to the Named Insured	60
2. “Household” Member	60
C. The Intent Requirement to be a Resident of the Named Insured’s Household	61
1. State Farm v. Smith	61
2. William Patterson - Member of the “Renegades” Motorcycle Group	62
3. Ernest Dawson - Long-Haul Truck Driver	62
4. Donna Elizabeth Price Staying With Mother - In Transition Between Boyfriends	63
5. The Case of Alan Argenbright - In Transition With a Pregnant Girlfriend	63
6. College Students - Generally Residents of the Family Household While Living Away From Home	64

7. Members of the Military Generally Remain Residents of Their Original Household	64
8. Resident of Two Households at the Same Time	65
9. Proving Your Client’s Intent to be a Resident of the Named Insured’s Household - A Checklist	65
IV. Second Class Coverage	66
A. Code Definition of Second Class Insured	66
B. No Permission for Driver: No UM Coverage for Passenger	66
C. The Current Policy Changes the Law	67
D. The Boomerang Effect	67
E. Second Class Coverage Expanded – “Using”	68
1. Crossing the Road to Board a School Bus	68
2. Changing a Flat Tire	68
3. The Highway Worker Placing Road Signs	68
4. Hand Signals Directing a Truck Driver	69
F. Non-Resident Relative Listed Driver, Insured Driver or Operator	69
V. The UM/UIM Endorsement Insuring Agreement	70
A. Ownership, Maintenance or Use of a UM/UIM Vehicle	70
B. Use of the UM/UIM Vehicle as a Vehicle	71
C. “Accident,” Intentional Injury and <i>AES v. Steadfast</i> (2012)	71
VI. Obtaining Separate Coverages From the Same Policy	72
A. Liability and UM Coverage from the Same Policy	72
B. Liability and UIM Coverage From the Same Policy	72
C. UM and UIM Coverage from the Same Policy	73
VII. Stacking of UM/UIM Coverage	73
A. Statutory Basis for Stacking – “All Sums”	73

B. Stacking – The First Generation	74
C. Stacking – The Second Generation	74
D. Stacking – The Third Generation	75
E. Stacking the Fourth Generation	76
F. Stacking Today	78
1. Stacking of Separate Policies (Interpolicy Stacking Allowed)	78
2. Stacking of Multiple Vehicles on the Same Policy (Intrapolicy Stacking)	78
G. Stacking Separate Minimum Limits Policies	78
H. Statutory Definition of Underinsured Motor Vehicle	79
I. The Underinsured Motorist Coverage Calculation	79
1. Two Tortfeasors	80
2. Single Limit UM/UIM Policy Limits	80
3. The One Car Crash Case: <i>Trisvan v. Agway</i>	81
J. Priority of UIM Coverage	82
1. Statutory Priority – Code §38.2-2206(B)	82
2. The Statutory “Credit”	82
VIII. Underinsured Motorist Coverage Analysis	83
A. Primary Coverage – Follow the Car Occupied by the Plaintiff	83
B. The Search for Excess UIM Coverage	83
1. Follow Priscilla Plaintiff Home	83
C. Calculating Priscilla Plaintiff’s UIM Coverage	84
Section 4: Stacking Medical Expense Benefits	87
I. What Are Medical Expense Benefits?	87
II. What is Stacking of Medical Expense Benefits?	87

III. “The Non-Owned” and “Temporary Substitute” Auto -- The Pot of Gold At the End of the MEB Coverage Rainbow	88
A. “Non-Owned Auto” MEB Coverage Stacking	88
B. Medical Expense Benefits Stacking “Bonus”	88
1. Medical Expense Benefits Stacking “Bonus” Example - Non-Owner Driver of Non-Owned Auto	89
IV. Stacking MEB Coverage -- Residents of Two Households	89
V. How Do You Become a Medical Expense Benefits “Pinball Wizard?”	90
A. MEB Insuring Agreement	90
D. The MEB Other Insurance Clause	92
1. The Priority of MEB Recovery	92
VI. MEB Exclusions	93
A. MEB Exclusion (2.d.) - Vehicles Owned by or Furnished/Available for the Regular Use of the Named Insured - Example	94
B. MEB Exclusion (2.e.) - Vehicles Owned by or Furnished/Available for the Regular Use of a Family Member - Example	94
C. MEB Exclusion (2.e.) “Family Member” Driving Non-Owned Auto - Example	95
D. MEB Exclusion (2.e.) “Family Member” Passenger in Auto Furnished for Regular Use – Example	95
E. Available for Regular Use – “The Keys” – Example	95
VII. MEB Duties After Accident	96
Notes	99
Appendix I	107
Proving Plaintiff’s Intent to be a Resident of Named Insured’s Household - A Checklist	

This page intentionally left blank.

Introduction to the Second Edition

Understanding auto insurance law is your key to maximizing a client's recovery. A large verdict is worthless unless you can find insurance coverage to pay it. This book is designed to show you, step by step, how to obtain maximum coverage for your clients. It is written interactively—guiding you through the policy, the statutes, and the cases that you must analyze to maximize your client's recovery in your next case.

On July 1, 2008, the Bureau of Insurance mandated that all insurance carriers use a new form auto policy called the Virginia Personal Auto Policy. The current policy substantially restructured the format of the prior policies and changed the playing field expanding and limiting coverage. The second edition of this book has been rewritten using the current Virginia Personal Auto Policy.

The Virginia Trial Lawyers Association is about sharing, mentoring and making our members better lawyers. I know first hand. As a young lawyer, I attended all of VTLA's CLE seminars. I learned and was inspired. With this book and seminar, I would like to continue that tradition. If you have any questions about auto insurance law, feel free to contact me. I will be glad to help others, as others helped me.

Auto insurance law is exciting. This book will teach you how to put the pieces together to maximize your client's recovery. Let's begin to do it together.

Gerald A. Schwartz
Alexandria, Virginia
October 2012

This page intentionally left blank.

Coverage Analysis

I. The Three 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).

When using this 3-step analysis, always keep in mind the four black letter rules of law for maximizing coverage.

II. The Four Black Letter Rules For Maximizing Recovery

- If insurance policy terms 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. *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965); *State Farm Mut. Auto. Ins. Co. v. Manojlovic*, 215 Va. 382, 209 S.E.2d 914 (1974).
- If the statute does not provide coverage, but the policy does (the current policy is broader than the statute regarding permission to use/occupy the covered auto) --

coverage is provided. *Hill v. State Farm Mut. Auto. Ins. Co.*, 237 Va. 148, 375 S.E.2d 727 (1989).

- If the 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*, 243 Va. 228, 415 S.E.2d 131 (1992); *USAA v. Webb*; 235 Va. 655, 369 S.E.2d 196 (1988).
- If the governing statute is remedial and was enacted for the benefit of injured persons, such as the UM, UIM and Omnibus clause statutes, and the statute itself contains an ambiguity, allowing for two opposite interpretations, the statute will be interpreted liberally to provide coverage. *USAA Casualty Ins. Co. v. Alexander*, 248 Va. 185, 445 S.E.2d 145 (1994).

III. Rules for Primary and Excess Coverage

A. Liability Coverage

1. Follow the car driven by the defendant first to obtain primary liability coverage (the carrier insuring the car)
2. Follow the defendant driver for excess “named insured” liability coverage (the defendant’s personal carrier)
3. Follow the defendant driver home for excess “family member” (resident relative) liability coverage

Note 1: To obtain excess coverage the defendant must be driving a motor vehicle he does not own either (1) a “non-owned auto” or (2) a “temporary substitute auto” to escape being excluded from coverage by liability exclusions (B.2.) and (B.3.). If the police report shows the name and address of the defendant driver to be different from the vehicle owner, there is a high likelihood the defendant was driving either a “non-owned auto” or a “temporary substitute” auto. Ninety percent of excess liability cases involve a “non-owned auto.”

Note 2: Exception: Garage policies insuring the auto business, such as dealers, repair shops and parking lots - Virginia Code §38.2-2205 limits garage policy liability insurance to cases where the “non-garage” driver has no liability coverage. Then and only then

does the garage policy provide minimum limit liability coverage of \$25,000/\$50,000. (The “garage keepers exclusion” only applies to liability coverage not UM or UIM coverage. Seals v. Erie Ins. Exchange, 277 Va. 558, 674 S.E.2d 860 (2009)).

B. Rules for Uninsured Motorist (UM) Coverage

1. Follow the car occupied by the plaintiff for primary UM coverage
2. Follow the plaintiff for excess “named insured” UM coverage (the plaintiff’s personal carrier)
3. Follow the plaintiff home for excess “family member” (resident relative) UM coverage.

Note 1: All UM coverage insuring the plaintiff under separate policies is stacked. The plaintiff can be injured by an uninsured motorist while occupying any motor vehicle or as a pedestrian.

Note 2: UM coverage on a self-insured vehicle is secondary (last) and limited to minimum limits of \$25,000/\$50,000.

Note 3: Trap: In cases where there is more than one UM carrier, settlement with only one UM carrier or with the uninsured defendant without permission of all UM carriers bars the UM claim against the UM carriers who did not consent to the settlement if they can show prejudice. This is a violation of the UM endorsement “consent to settle” clause.¹

C. Rules for Underinsured Motorist (UIM) Coverage

Follow the rules for statutory priority and the statutory credit set forth in Virginia Code §38.2-2206(B).

Note 1: Trap: If the plaintiff settles with any party without the consent of the UIM carrier(s) he has violated the “consent to settle” clause in the UM/UIM policy endorsement. UIM coverage is barred if the UIM carrier can show prejudice.²

D. Rules for Medical Expense Benefits (MEB) Coverage

The plaintiff is afforded medical expense benefits (MEB) coverage from the carrier insuring the driver of the car he was occupying when someone else owns the car. The author calls this MEB “bonus” coverage. When a “non-owner” drives the car occupied by the injured plaintiff, the plaintiff can also obtain additional MEB coverage from the driver’s “family members” (resident relative MEB coverage “double bonus” MEB coverage) as well as MEB coverage from the car owner, the plaintiff himself, under his separate policy and from the plaintiff’s family members (resident relative coverage on their separate policies). The order of priority for primary and excess MEB coverage on separate policies (interpolicy stacking) with stacking of 4 cars per policy (intrapolicy stacking) is as follows:

1. Follow the car occupied by the plaintiff
2. Follow the driver (“bonus” coverage)
3. Follow the driver home for “family member” (resident relative) coverage (“double bonus” coverage)
4. Follow the plaintiff
5. Follow the plaintiff home for “family member” (resident relative coverage)

Note 1: The plaintiff must be occupying either a “non-owned auto” or a “temporary substitute auto” under all policies to avoid exclusion of MEB coverage under MEB exclusions (5.) and (6.).

Note 2: MEB coverage must be offered by the carrier but it is optional with the insured.

IV. Understanding the Underwriting “Master Plan”

Insurance policies are designed to achieve certain objectives such as 1) afford the most coverage to the person who pays the premium (the named insured) and his family; 2) give the most coverage to the “covered autos” listed on the declarations page which generate paid premiums, and; 3) reduce the insurance company’s risk of loss and resulting claims payouts. Understanding this “master plan” will help you understand why certain persons and autos are afforded preferential coverage over others. Generally, the named insured is afforded the most coverage followed by his spouse, family members who are residents of his household, followed by permissive users and lastly non-permissive users who have no coverage. For example, if the spouse ceases to be a resident of the named insured’s household, she loses coverage after 90 days while the named insured retains full coverage. Exclusions in the liability and medical expense benefits parts of the policy exclude coverage to family members when driving certain non-owned autos while the named insured and spouse are “saved” from exclusion. A family member of the named insured’s household is afforded

liability coverage even when he drives the named insured's car without permission ("Son, don't drive my hot rod Lincoln") while a non-family member, even if a trusted friend, doing the same has no coverage.

With regard to Uninsured and Underinsured Motorist coverage the named insured, spouse and family members get first class coverage. They are covered whenever injured while in any motor vehicle or as a pedestrian. Others get second class coverage and must be occupying the "covered" auto to be afforded coverage.³

"Covered autos", owned by the named insured, which are listed on the declarations page generate premiums. "Non-owned autos" do not. As a result, the "master underwriting plan affords more coverage to the "covered" auto. For example, liability and medical expense benefits (MEB) coverage is only afforded when a "non-owned auto" is driven/occupied casually and infrequently to reduce the carrier's risk of loss.⁴

V. The Insurance Policy

All insurance policies applicable to your case must be read by the attorney. The first step in coverage analysis is "Read the Policy" (RTP). If you cannot readily obtain the applicable policy, a specimen policy from the Bureau of Insurance is the next best thing.

The Virginia State Corporation Commission, Bureau of Insurance develops standard form auto policies and policy endorsements for use in Virginia "whenever it believes that any form of policy...or endorsement...is so extensively used that a standard form is desirable."⁵ For example, the SCC has adopted Commercial Auto Forms which include Business Auto Coverage Forms for vehicles used by businesses; Garage Coverage Forms for vehicles used in the automobile business (dealers, repair shops and parking garages); Trucker Coverage Forms for use in commercial trucking; Snowmobile Forms; and Personal Auto Forms for use by individuals and families; as well as other "forms", policies and endorsements. These may be downloaded from the State Corporation Commission website, "Bureau of Insurance www.scc.virginia.gov" or simply "Google" "Personal Auto Forms Virginia Bureau of Insurance," "Commercial Auto Forms, Virginia Bureau of Insurance." These form policies are copyrighted by the "Insurance Services Office" (ISO) which prepares insurance forms for carriers to use across the country. Even though the "ISO" forms, developed for national use, are modified by the Bureau of Insurance for use in Virginia, they are still construed as being drafted by the insurance company for purposes of deciding coverage issues, such as ambiguities in the policy. Virginia Code §38.2-2200 requires insurance companies to use "the precise language" of the standard forms filed and adopted by the Commission (State Corporation Commission - Bureau of Insurance). Whenever an SCC form policy or endorsement conflicts with the statute, the statute controls and the form policy provision is null and void. *United States v. Geico*, 409F. Supp. 986 (E.D. Va. 1976) However, if an SCC form policy used by a carrier requires greater coverage than provided by the statute, the carrier will be required to provide the expanded coverage. *Neff v. Providence Washington Ins. Co.*, 1998 U.S. Dist. LEXIS 15866 (W.D. Va. 1998).

Insurance companies may voluntarily expand coverage from the standard form. Most auto

policies used in Virginia are substantially identical to the standard form personal auto policy and personal auto endorsements. However, you must always Read the Policy (RTP) as your very first step of coverage analysis. Part A - Liability, Exclusion (B.1.a.) of the Bureau of Insurance form personal auto policy excludes coverage when an insured uses “any vehicle which has fewer than four wheels”, e.g., a motorcycle. The USAA Personal Auto Policy, for example, omits this exclusion.

This book will use the current SCC, Bureau of Insurance form auto policy and endorsements found at http://www.scc.virginia.gov/boi/co/pc/pa_forms.aspx.

A. The Virginia Personal Auto Policy

The Virginia Personal Auto Policy (formerly the “Family Auto Policy”) consists of six essential coverage parts:

- Part A - Liability
- Part B - Medical Expense and Income Loss Benefits Coverage
- Part C - Uninsured Motorist (UM) and Underinsured Motorist Coverage &UIM)
- Part D - Coverage for Damage to Your Auto
- Part E - Duties After An Accident or Loss
- Part F - General Provisions

I. The Five Sub-Parts

Each of the six coverage parts of the Personal Auto Policy (Parts A-I) contains the following important sub-parts:

- An **Insuring Agreement** (containing the words “to pay”) - describing what and who is covered;
- **Definitions** - Defining Terms (A longer definition section also is found at the beginning of the policy)
- **Exclusions** - Describing when coverage does not apply, such as intentionally caused bodily injury;
- A **Limits of Liability Clause** - Which describes the full extent of coverage for each person with reference to the number of vehicles, premiums paid and persons insured. For example, the Limits of Liability Clause in the standard UM and UIM endorsement prohibits stacking of coverage on multiple vehicle in the same policy (intrapolicy stacking); and

- **Other Insurance Clause** -- Describing when and what the company will pay if an insured is covered under several insurance policies.

2. The Declarations Page

The declarations page identifies the coverages and premiums; the specific endorsements to the policy; the name and address of the policyholder (named insured); the name and address of the agent; the policy number; the policy period; and a description of the insured vehicles.

The coverage set forth in the declarations page is described as either a “split limit” or a “single limit.” For example, “\$25,000/50,000” is a “split limit” of bodily injury liability coverage. \$25,000 is the insurance company’s maximum liability for “each person” per “each occurrence” and \$50,000 is the insurance company’s maximum limit of coverage for all claims resulting from “each occurrence.” Assume David Drake has minimum bodily injury liability limits of “\$25,00/50,000” and injures five people, each of whom recovers a \$30,000 judgment against him. The maximum bodily injury liability coverage David’s auto insurance company can pay to any one person is \$25,000 and the maximum for all payments is \$50,000. If his insurance company pays the first plaintiff \$25,000, there is only \$25,000 left in coverage for the remaining four plaintiffs with judgments totaling \$120,000.

A “single limit” combines the maximum coverage for each person and the maximum coverage for all persons injured in the same occurrence into one limit. For example, if a defendant has a single limit bodily injury liability coverage of “\$500,000,” \$500,000 is the maximum the company is obligated to pay to any one claimant or to all claimants who are injured in a single accident.

3. Material Misrepresentations Void the Policy

To obtain an insurance policy, the prospective policyholder must complete an “application for insurance” either in writing, orally or through the internet. The insurance company relies upon the representations made by the applicant in deciding whether he/she is a suitable risk, and issues its policy and determines its premium based upon these representations. The insurance company has the right to be told the truth by the applicant. Many of the representations made are printed onto the declarations page. The “declarations page” is so named because it contains the “declarations” of the policyholder which were set forth in the insurance application.

Code §38.2-309 allows an insurance company to bar recovery to its policyholder if the company clearly proves that its insured made a misrepresentation which was untrue and material to the risk at the time the insurance company assumed the risk. In *Brant v. Parsio*, 27 Va. Cir. 339 (1992), Judge Haley of the Circuit Court of Stafford County held a policyholder’s misrepresentation in the declarations of the policy that her address was in New York [when she lived in Stafford County, Virginia] was material to the risk, allowing cancellation of the policy, as one of the court’s

grounds for barring the plaintiff from recovering UM benefits under her auto insurance policy. More recently, the Supreme Court of Virginia held that if the policyholder makes a material misrepresentation in the application for insurance by failing to list all household members of driving age, the policy could be declared void with no coverage. *Portillo v. Nationwide Mutual Fire Insurance Company*, 277 Va. 193, 671 S.E.2d 153 (2009).

The insurance carrier must prove both reliance and materiality to void a policy “*ab initio*” for a material misrepresentation made by the policyholder. *Montgomery Mutual v. Riddle*, 266 Va. 539, 587 S.E.2d 513 (2003). The insurance company must clearly prove it would not have issued the policy but for the material misrepresentation which would substantially increase its underwriting risk of loss.

This page intentionally left blank.

This page intentionally left blank.

2 Liability Coverage

I. The Insuring Agreement

Liability coverage is found in Part A of the Virginia Personal Auto Policy. The Insuring Agreement, also known as the “Insuring Clause” provides:

“We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident...”

A. “Accident” and *AES v. Steadfast* (2012)

The Virginia Supreme Court has consistently held an intentionally caused injury is not an “accident” or “occurrence” and thus is not covered under the liability section of an insurance policy. The leading case is *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, 223 Va. 145, 147, 286 S.E. 2d 255, 226 (1982). Intentionally caused injuries fall outside the Virginia Personal Auto Policy “insuring agreement’s” definition of “accident”. In addition, intentionally caused injuries are excluded under Part A Liability Exclusion (A.1.) (intentional injury). However, intentionally caused injuries become valid uninsured motorist claims as long as the injury to the plaintiff results from the defendant’s use of his vehicle as a vehicle. *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, *supra*; *Fireman’s Fund Ins. Co. v. Sleigh*, 267 Va. 768, 594 S.E.2d 604 (2004); *Lexie v. State Farm*, 251 Va. 330, 396, 469 S.E. 2d 61, 64 (1996) (“Drive-by shooting injuries” and the like are excluded).

In *Utica Mut. Ins. Co. v. Travelers Indem. Co.*, *supra*, the court held that the defendant’s

liability insurer, Travelers, “did not afford coverage for the intentional acts of its insured” but . . . “the denial would leave Utica Mutual Insurance Company, the UM carrier for Gray (the plaintiff) liable”. The Court held that the terms “accident” and “occurrence” are synonymous and refer to an incident that was unexpected from the viewpoint of the insured.

On April 20, 2012 the Virginia Supreme Court rendered its opinion on rehearing in *AES Corp. v. Steadfast Insurance Company*, 283 Va. 609, 725 S.E.2d 532 (2012), a commercial general liability policy, (CGL) declaratory judgment action whose facts are far removed from those we see in auto accident cases. In *AES* the Supreme Court stated, “in the Complaint, Kivalina (the plaintiff, an Alaskan village) plainly alleges that *AES* **intentionally** released carbon dioxide into the atmosphere as a regular part of its energy-producing activities. Kivalina also alleges that there is a clear scientific consensus that **the natural and probable consequence of such emissions is global warming and damages such as Kivalina suffered**. Whether or not *AES*’s intentional act constitutes negligence, the natural or probable consequence of that intentional act is not an accident under Virginia law. The court held that *AES* was not afforded coverage under its CGL policy with Steadfast Insurance Company, holding:

“Under the CGL policies, Steadfast would not be liable because *AES*’s acts as alleged in the Complaint were **intentional** and the consequences of those acts are alleged by Kivalina to be not merely foreseeable, but natural or probable. Where the harmful consequences of an act are alleged to have been not just possible, but the **natural and probable consequences of an intentional act**, choosing to perform the acts deliberately, even in ignorance of the fact, does not make the resulting injury an “accident” even when the Complaint alleges that such action was negligent.”

Justice Mims in his concurring opinion noted that *AES* involved a commercial general liability policy not an auto or homeowners policy and “the words ‘accident and occurrence’ may have a different meaning in those contexts”.

It is unlikely the *AES* decision will have an impact on coverage for motor vehicle torts unless the plaintiff’s injury results from the natural and probable consequences of the defendant’s intentional act. For example, if the defendant intentionally drives his car into a crowd of people at 95 m.p.h., the natural and probable consequences of his intentional act would be that injury would result even if the defendant did not want to hurt anyone. As long as the defendant was “using his vehicle as a vehicle” (*Lexie v. State Farm, supra*), the injured person would be afforded uninsured motorist coverage on all policies insuring him. *Utica Mut. Ins. Co. v. Travelers Indem. Co., supra*; and *Fireman’s Fund Ins. Co. v. Sleigh, supra*.

B. Compensatory and Punitive Damages

In contrast to prior auto policies, the current liability insuring agreement does not contain the terms “all sums” -- “to pay on behalf of the insured “all sums” which the insured shall become legally obligated to pay as damages because of bodily injury...” Nevertheless, the current insuring

agreement is ambiguous on whether both compensatory and punitive damages are recoverable under the Part A - Liability. Since the term “damages” is not limited to “compensatory” damages and there is no policy exclusion in the current policy for punitive damages, this ambiguity will be construed in favor of liability coverage for punitive damages. *USAA v. Webb*, 235 Va. 655, 369 S.E.2d 196 (1988).

II. The Four Questions To Ask When Seeking Liability Coverage

When analyzing an insurance policy to obtain liability coverage, we must answer four questions:

- Who is an insured?
- What autos are covered?
- Does an exclusion take away coverage?
- Has the insured complied with all duties after an accident?

A. Who Is An Insured For Liability Coverage?

The statutes and cases discuss five types of people who drive cars. Generally, the closer the person is to the named insured the greater the coverage.

I. The “Named Insured” - The Policyholder:

The named insured is the person who buys insurance. Also included as a named insured is the spouse of the named insured while residing in the named insured’s household and for up to 90 days after ceasing to be a resident of the household. The policy refers to the named insured as “you and your.”

2. ”Family Member”:

The named insured’s family, including in-laws (yes, your mother-in-law), are covered while residing with you (the named insured) as part of your household. A “family member” is covered under the named insured’s policy even if he drives the named insured’s car without permission.

Example: Father (named insured) tells his son “Never drive my ‘hot rod Lincoln’”. The son, without permission, drives the “hot rod Lincoln” and crashes

the car into Paula Plaintiff. As long as the son is a resident of the named insured's household (a "family member"), permission is not required and coverage is afforded.

3. "Non-Resident Relative Listed Drivers":

Listed drivers are people who are listed as an additional driver on the named insured's policy. Most often, they are family members who do not reside with the named insured, such as a married daughter who keeps her dad's car at her separate residence, a domestic partner, or a fiancé residing with the named insured. Since listed drivers are not generally "resident relatives" of the named insured, permission is required for coverage (to avoid the lack of permission exclusion). The listed driver must have "a reasonable belief that she is entitled to use the vehicle." Listed drivers have liability coverage under the named insured's policy while driving a "covered auto" and a "non-owned auto." If a "family member" of the named insured (daughter while living away at college) is set forth on the policy as a "listed driver" she is still a "resident relative" entitled to the same level of coverage as a "family member" above.

4. "Permissive Users":

"Permissive users" refer to people who use the named insured's "covered auto" with permission. Permissive users are also called "omnibus" insureds and are covered under the named insured's policy only while driving the "covered auto".

Example: Harold lets his friend, Pete, use his Cadillac to do an errand. Pete is a "permissive user" of Harold's car under Harold's GEICO policy which insures Harold's Cadillac."

5. "Non-Permissive Users":

Non-permissive users refer to people at the lowest level of drivers/users of an auto. They are furthest from the named insured and have no coverage under the named insured's policy. They are "insurance outcasts."

Example: Dan, while driving Nancy's car, without her permission, injures Paula Plaintiff. Since Dan is a "non-permissive user" he is excluded from coverage under Nancy's policy. He is an "insurance outcast" under her policy.

B. Liability - What Autos Are Covered?

Part A - Liability of the Virginia Personal Auto Policy covers two types of autos:

- The covered auto; and
- Non-owned autos - autos which are not owned by or furnished/available for the regular use of either the named insured or family members, not specifically excluded from coverage.

I. The Covered Auto:

When cars first became popular many years ago, life was simple. A family owned one car. The policyholder paid a premium and got auto insurance. The family car was the only “covered auto.” This auto was listed on the policyholder’s declarations page showing the coverage and the premium paid. The “covered auto” formerly was called the “owned auto” under prior policies

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

To provide additional liability coverage to the policyholder, the underwriters expanded the definition of “covered auto” to include a trailer; a replacement auto; a newly acquired auto; and a temporary substitute auto. The term “your covered auto” in the Virginia Personal Auto Policy includes within its definition all of these autos.

2. Non-Owned Auto:

a. The History of “Non-Owned Auto Coverage:

The expanded “covered auto” coverage was still not enough protection since the policyholder might drive a vehicle he did not own, which was not covered under his “covered auto” 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 “covered autos” 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 an auto he does not own, 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 auto" 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 -- a win-win for everyone.

Understanding the purpose for "non-owned auto" coverage is essential to understanding the scope of the coverage. In 1968, the Supreme Court of Virginia commented on the then "new non-owned auto coverage" in *Quesenberry v. Nichols and Erie*, 208 Va. 667, 159 S.E.2d 636 (1968).

"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]

Casual, infrequent use of an auto not listed on the named insured's declarations page is the rationale for "non-owned" auto coverage. Situations which result in frequent use of such autos result in no coverage. Autos owned by the named insured, other than the covered auto, such as a second car or autos owned by a family member and those furnished or available for the regular use of the named insured or a family member have a high probability of not being used casually and infrequently. As a result, they have traditionally been excluded from liability coverage under the named insured's auto policy. The prior policies accomplished this result with a definition of "non-owned automobile" which excluded autos owned by or furnished for the regular use of the named insured or a family member. The prior auto policies, in the liability insuring clause itself, granted or excluded coverage by using the terms, "owned automobile" and "non-owned automobile."

Prior Auto Policy -
Liability Insuring Clause

<p>"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 <u>owned automobile</u> or any <u>non-owned automobile...</u>"</p>
--

b. The Concept of "Non-Owned Auto" Coverage as an Exclusion:

The term "non-owned automobile" is no longer found in the liability insuring agreement of the Virginia Auto Policy. Where is it and what happened to the concept of "non-owned auto"

coverage? Answer: It is now an exclusion—exclusion (B.2.) and (B.3.) to counterbalance the policy liability insuring agreement which provides coverage for “any auto accident” with no exclusion whatsoever for the category of auto involved in the accident. The format of the Virginia Auto Policy reminds one of Mark Twain’s definition of an insurance policy -- “The big print in the front (insuring agreement) gives you coverage and the little print in the back - (exclusions) takes it away.”

c. Non-Owned Auto Coverage Expanded:

Non-owned auto coverage is expanded in the Virginia Auto Policy by the “saving the named insured from exclusion” clause in exclusion (B.3.) Prior auto policies excluded the named insured from liability coverage involving vehicles owned by or furnished/available for the regular use of a family member.

Liability Exclusion (B.2.) and (B.3.)

B. We do **not** provide Liability Coverage for the ownership, maintenance or use of:

...2. Any vehicle, other than your covered auto, which is:

- a. Owned by you; or
- b. Furnished or available for your regular use.

3. Any vehicle, other than your covered auto, which is:

- a. Owned by any family member; or
- b. Furnished or available for the regular use of a family member.

[Saving the Named Insured from Exclusion clause]

However, this Exclusion (B.3.) does not apply to you [named insured] while you are maintaining or occupying any vehicle which is:

- a. Owned by a family member; or
- b. Furnished or available for the regular use of a family member.

d. The Scope of Non-Owned Auto Coverage

Exclusions (B.2.) and (B.3.) are a “mouthful.” It is hard to grasp quickly because exclusions are written in the negative (“we do not provide liability coverage for...”). Think positively - - turn the policy exclusion around into a positive to show what is covered.

The Scope of The “Current” Policy -
“Non-owned Auto” Coverage

“Non-owned Auto” coverage is provided to an insured when the auto he is using is not owned by, nor furnished or available for, the regular use of either the named insured or a family member. [‘Saving the Named Insured from Exclusion’ clause:] Coverage is allowed when the **named insured** is using an auto owned by or furnished for the regular use of a family member. [emphasis added]

e. Vehicle Owned By Named Insured Other Than A Covered Auto -- Policy Exclusion(B.2.a.)

Harold owns a Cadillac insured with GEICO for \$1,000,000.00. He also owns a second car, an old Honda, insured with Harleysville for \$25,000.00. The Cadillac is listed on the GEICO declarations page and the Honda is listed on the Harleysville declarations page. Each is a “covered auto” only on the separate policy where it is listed. If Harold, while driving his Honda, injures Paula Plaintiff who obtains a million dollar judgment, Harold is only covered under his Harleysville policy insuring his Honda for \$25,000.00. He is not entitled to liability coverage under his GEICO policy since the Honda is not a “covered auto” under the GEICO policy. Exclusion B.2.(a) excludes coverage to Harold, under his GEICO policy, while driving a vehicle owned by him (the Honda) other than a “covered auto” (the Cadillac on the GEICO policy).

f. Vehicle Furnished/Available For Named Insured’s Regular Use -- Policy Exclusion (B.2.b.)

Harold owns two personal cars: a Cadillac insured with GEICO and a Honda insured with Harleysville. Harold is a traveling salesman. His company Ford is furnished for his “regular use” while calling on customers five day per week. Harold injures Paula Plaintiff while driving the company Ford. He is excluded from coverage on his personal auto policies with GEICO and Harleysville while using the company Ford under exclusion (B.2.b.) since the Ford is “furnished for his regular use.” (Harold would have primary liability coverage on the company Ford under the company’s auto policy, but not excess liability coverage under his own personal auto policies because of exclusion (B.2.b.) (If the company Ford were uninsured, Harold would have no liability coverage.)

g. Vehicle Owned By a Family Member -- Policy Exclusion (B.3.a.)

Harold owns only one car, a Cadillac insured with GEICO for \$1,000,000.00. Harold's two children, Sue and Tom, reside with him as part of his household. Sue does not own a car. Harold's son, Tom, owns his own Toyota Corolla insured with Travelers for \$25,000.00.

Example 1: Daughter Sue drives brother Tom's Toyota: While driving her brother Tom's Toyota, Sue injures Paula Plaintiff who obtains a judgment for \$1,025,000.00. Sue is covered for \$25,000.00 under Tom's Travelers' policy insuring his Toyota. She is excluded from excess liability coverage under her father Harold's GEICO policy under exclusion (B.3.a) since Sue was driving a vehicle owned by a family member, her brother. The "saving the named insured from exclusion" clause in Exclusion (B.3.) only "saves" the named insured, Harold, from exclusion.

Example 2: Assume, instead of Sue, Harold is driving his son Tom's Toyota insured with Travelers. At first blush, Harold, the named insured under his GEICO policy, is excluded from coverage under his GEICO policy while driving his son's Toyota since exclusion (B.3.a) excludes Harold from coverage under his GEICO policy while using "any vehicle other than your covered auto (the Cadillac) which is owned by a family member (Tom)." This would be the result under the prior auto policy. But the "saving the named insured from exclusion" clause in the current auto policy, exclusion (B.3.) expands coverage and "saves" Harold, the named insured from being excluded. The "saving the named insured from exclusion" clause in exclusion (B.3.) states:

Saving the Named Insured From Exclusion (B.3.)

However, this exclusion (B.3.) does not apply to **you** (named insured) while **you** are maintaining or occupying any vehicle which is: (a) owned by a family member..."

As a result, Harold is provided \$25,000.00 in liability coverage under his son's policy with Travelers insuring the Toyota he was driving as primary liability coverage. In addition, Harold

is entitled to \$1,000,000.00 in excess liability coverage with GEICO, insuring his Cadillac, not involved in the collision since Harold is the named insured (**you**) under his GEICO policy.

NOTE: *If son Tom were driving Harold's Cadillac - same result since he is the named insured under his Travelers' policy. Tom would be afforded \$1,000,000.00 in liability coverage under his dad's GEICO policy as primary liability coverage and \$25,000.00 in excess liability coverage under his Travelers' policy. There would be a different result for daughter Sue because she is merely a "family member" and not a named insured under either policy. Remember, the "saving the named insured from exclusion" clause only saves the named insured from exclusion when driving an auto "owned by or furnished/available for the regular use of a family member."*

h. Vehicle Furnished/Available for the Regular Use of a Family Member -- Exclusion (B.3.b)

Example 1: Same facts and coverage as in the previous example except daughter Sue is driving her boyfriend's, Allen's, Audi insured with Allstate. Allen visits Sue's house every day. Allen's car is furnished or available for Sue's regular use. She regularly drives Allen's car three times per week. Paula Plaintiff seeks to collect her \$1,025,000.00 judgment against sister Sue. Sister Sue is provided \$25,000.00 in primary liability coverage with Allstate, insuring Allen's Audi. Sue is excluded from liability coverage under her dad's policy with GEICO and her brother Tom's policy with Travelers, under exclusion (B.3.b.) since Allen's car was "furnished or available for the regular use of a family member" (Sue).

Example 2: Same facts and coverage except Sue's dad, Harold, is driving Allen's Audi. Is Harold excluded from excess liability coverage under his GEICO policy under exclusion (B.3.b.) since the car he was driving was "furnished or available for the regular use of a family member" (daughter Sue)? Like the previous example, at first blush it would appear that Harold is excluded from coverage under his GEICO policy. However, the "saving the named insured from exclusion" clause in exclusion (B.3.b.) saves

Harold from exclusion under his policy with GEICO as Harold is the named insured only under his GEICO policy.

Saving the Named Insured From Exclusion (B.3.)

However, this exclusion (B.3.) does not apply to you (named insured - Harold) while you are maintaining or occupying any vehicle which is.. (b) furnished or available for the regular use of a family member.." (daughter Sue)

III. The Other Insurance Clause

The "Other Insurance Clause" is a basis for providing excess liability coverage to an insured driving an auto he/she does not own -- either a "temporary substitute auto" or a "non-owned auto."⁶

The vehicle the defendant is driving provides primary liability coverage. (Exception – garage policies covering the auto business, such as dealers, repair shops, and parking lots – Virginia Code §38.2-2205 provides that such liability insurance is excess and limited to \$25,000/\$50,000.)⁷

The "Other Insurance Clause" found in Part A, Liability Coverage of the Virginia Personal Auto Policy, provides:

OTHER INSURANCE

If there is other applicable liability insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide for a vehicle you do not own, including any vehicle while used as a temporary substitute for your covered auto [and a non-owned auto] shall be excess over any other collectible insurance.

A. No Excess Coverage Example

Assume Angela borrows her neighbor Fred's car, insured with Nationwide for \$25,000/\$50,000. Angela insures her own Audi with Allstate for \$50,000/\$100,000. She resides with her mom as part of the same household. Her mom insures her Mazda with Montgomery Mutual for \$100,000/\$300,000. While driving Fred's car Angela negligently injures Paula Plaintiff who obtains a \$25,000 judgment against Angela. Nationwide, which insures the car involved in the crash is primary – it pays first its \$25,000.00 policy limit. Since the judgment did not exceed \$25,000 the excess carriers are not required to make any payment. The result would be the same if Fred's car were a "temporary substitute" auto.

B. Pro-Rata Excess Coverage Example

Assume the same facts as in example A, except Paula Plaintiff obtains a judgment against Angela for \$50,000. Nationwide is primary since it insureds the car involved in the crash and pays first – its full \$25,000 policy limits – leaving \$25,000 to be paid by the excess carriers *pro-rata* according to the “other insurance” clause in Angela and her mom’s separate policies. The total excess policy limits are: Angela – Allstate \$50,000 and mom – Montgomery Mutual \$100,000 totaling \$150,000. Allstate’s *pro-rata* share is $\$50,000/\$150,000 \times \$25,000.00 = \$8,333.33$. Montgomery Mutual’s *pro-rata* share is $\$100,000/\$150,000 \times \$25,000.00 = \$16,666.66$.

C. Full Excess Coverage Example

Assume the same facts as in the previous examples, except Paula Plaintiff obtains a \$175,000 judgment against Angela. All carriers would pay their full policy limits to satisfy the judgment: Fred – Nationwide \$25,000; Angela – Allstate \$50,000; and mom – Montgomery Mutual \$100,000.00. If in examples A, B and C Angela borrowed Fred’s car because her Audi was “out of normal use” due to a breakdown, Fred’s car would be a “temporary substitute” auto rather than a “non-owned auto”. The result would be the same.

D. Temporary Substitute Auto - Generally

A “temporary substitute auto” is an auto you (the named insured/spouse) does not own which is used temporarily as a substitute for your “covered auto.” Most often this happens when the “covered auto” breaks down or is in the repair shop. Common “temporary substitute” autos are rental cars and dealer/repair shop “loaner cars.”

Under the Virginia Personal Auto Policy a “temporary substitute auto” is a “covered auto” when it is:

Temporary Substitute

“Any auto or trailer you do not own while used as a temporary substitute for any other vehicle described in this definition [“your covered auto”] which is out of normal use because of its (a) breakdown; (b) repair; (c) servicing; (d) loss; or destruction...”

I. The Rental Car

A rental car is a “temporary substitute” auto if it is a temporary substitute for your “covered auto” due to its breakdown, repair, servicing, loss or destruction. However, if the rental car is used for another purpose, such as while on vacation out of town, it is not by definition a “temporary substitute” - but a “non-owned auto.”

Example: Harold’s Cadillac insured with GEICO for \$1,000,000.00 is at the dealer for servicing. Harold obtains a rental car insured with Hertz for \$100,000.00. Harold negligently drives the rental car and injures Paula Plaintiff who obtains a \$1,100,000.00 judgment against Harold. Hertz provides primary liability coverage to Harold for \$100,000.00 and GEICO provides Harold with \$1,000,000.00 in excess liability coverage. Under Harold’s GEICO policy, the Hertz rental car is a “temporary substitute.” If Harold rented the rental car while on vacation it would be a “non-owned auto” with the same result.

2. The Auto Dealer’s Loaner Car

Assume the same facts as the rental car example, except Harold is given a “loaner” car to drive by the Cadillac dealer while his Cadillac is in for servicing. The loaner is insured under the dealer’s garage policy with Grange Insurance Company. Harold has no liability coverage under the dealer’s garage policy even though he is driving the dealer’s car at the time of the collision. Why? Virginia Code §38.2-2205 codifies the “garage keeper’s exclusion” for liability coverage found in all Virginia garage policies insuring auto dealers, repair shops and parking lots.

“Permissive User” liability coverage is excluded from the dealer’s policy if the “permissive user” [Harold] has his own liability coverage. If not, the garage policy provides liability coverage limited to minimum limits of \$25,000.00. Same result for liability coverage if instead of using the dealer’s “loaner,” Harold were test driving a new Cadillac and crashed it, injuring Paula Plaintiff.⁸

E. Non-Owned Auto Excess Coverage

The term “non-owned auto” is an insurance industry “word of art.” It describes certain autos that are not excluded from coverage under the policy. They are autos the named insured and his family members do not own that are driven casually and infrequently. Traditionally, they are autos “not owned by or furnished/available for the regular use of named insured and family members.” Autos driven by the named insured which are either owned by or furnished/available for the regular use of family members are now no longer excluded from coverage under the “saving clause” in Part A - Liability exclusion (B.3.). This is an expansion of coverage from prior policies.

1. Casual and Infrequent Use – Excess Coverage Allowed

Once every other month, Harold borrows his neighbor Fred Rogers' car (non-owned auto) insured with Nationwide for \$25,000.00 with Fred's permission. While driving the neighbor's car, Harold negligently injures Paula Plaintiff who obtains a \$1,025,000.00 judgment against Harold.

Nationwide provides primary liability coverage of \$25,000.00. GEICO, which insures Harold's personal Cadillac for \$1,000,000.00, provides \$1,000,000.00 in excess liability coverage since Harold was driving a car he did not own, not furnished/available for his regular use – a “non-owned auto.”

2. The Neighbor's Car Furnished For the Named Insured's Regular Use - Excess Coverage Excluded

Assume in the last example, Fred Rogers is really a good neighbor making his car available for Harold's regular use every Monday, Wednesday and Friday. Harold in fact does drive Fred's car three days a week, every week, because Fred's car is a fancy sports car. In this situation, Harold would have no excess liability coverage with GEICO which insures his personal Cadillac for \$1,000,000.00 since Harold would be driving “a vehicle other than [his] covered auto which is “... furnished or available for [Harold's] regular use.” Fred's car no longer fits the definition of a “non-owned auto.” As a result, Harold is excluded from excess liability coverage under his own GEICO policy by Exclusion (B.2.).

3. The Neighbor's Car as a “Temporary Substitute” - Excess Coverage Allowed

Assume in the last example that Harold's Cadillac would not start Tuesday morning due to a dead battery. Harold's Cadillac is in “breakdown” mode. Harold then borrows his neighbor's car. The neighbor's car is now a “temporary substitute” for Harold's “broken down” Cadillac even though the neighbor's car is regularly furnished for Harold's regular use. As a “temporary substitute” the neighbor's car falls under Harold's GEICO's policy definition of “your covered auto.” Is Harold excluded from \$1,000,000.00 in excess liability coverage under his GEICO policy when driving his neighbor's car as a “temporary substitute?” Answer: No. Why? Read the policy (RTP):

Part A Liability - Exclusion (B.2.b.)

“We do not provide liability coverage for the ownership, maintenance or use of... any auto **other than your covered auto** which is... furnished or available for your regular use.”

Exclusion (B.2.b.) exempts “your covered auto” from exclusion. Since the neighbor's car is now a “temporary substitute;” it falls within the policy definition of “your covered auto.” As a result, it is “saved” from the jaws of exclusion (B.2.b.) and Harold is entitled to \$1,000,000.00 in

excess liability coverage with GEICO. What is the rationale for this exception affording coverage to Harold while using a “temporary substitute” over a “non-owned auto” since both cars are not owned by Harold, the named insured, or his spouse? Answer: “Covered autos” are looked upon more favorably by insurance underwriters since insurance premiums are charged upon “covered autos” listed on the policy declarations page. “Non-owned autos” generate no premium. As a result, as “temporary substitute” for a “covered auto” is afforded the same coverage as a “covered auto” – a higher degree of coverage. See “Understanding the Underwriting Master Plan” above

IV. You Represent Priscilla Plaintiff

Priscilla Plaintiff is 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 is driving her Chevrolet and Larry is driving his neighbor’s Ford, with her permission.

The defendant, Larry Student, lives at home with his mother and brother as part of the same household. Larry owns a yellow Toyota Celica. Larry Student, his mother, and brother all have 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 every other month, Larry Student borrows his neighbor’s Ford, insured with Colonial with \$25,000 liability coverage, to go to the law library instead of driving his own yellow Toyota. This collision occurs while Larry is driving his neighbor’s car.

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

Priscilla Plaintiff incurs \$300,000 in medical bills and is left with a permanent injury as a result of Larry Student’s negligence. You submit a detailed settlement brochure 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 is made to settle Priscilla’s case. What do you do?

You represent Priscilla Plaintiff. Use the three steps of coverage analysis to maximize recovery with excess “non-owned” auto liability coverage: **RTP** – Read the Policy; **RTS** – Read the Statute; and **RTC** – Read the Cases.

Let’s begin by reading selected standardized parts of the current Virginia Personal Auto Policy – Part A – Liability. (The State Corporation Commission mandates all auto insurance carriers use the standardized form Personal Auto Policy).

A. RTP (Read the Policy)

Liability Coverage - Selected Definitions

1. You and your refer to:
 1. the named insured shown in the Declarations; and
 2. The spouse if a resident of the same household. [90 days after change of residence...]
3. **Family member** means a person related to you by blood, marriage, or adoption who is a resident of your household. This includes a ward or foster child.
4. **Your covered auto** means:
 1. Any vehicle... shown in the Declarations.
 2. A newly acquired auto.
 3. Any trailer you own.
 4. Any auto or trailer you do not own while used as a **temporary substitute** for any other vehicle described in this definition which is out of normal use because of its:
 - a. Breakdown;
 - b. Repair;
 - c. Servicing;
 - d. Loss; or
 - e. Destruction...”
5. **Insured...** means:
 1. You or any family member for the ownership, maintenance or use of **any** auto or trailer
 2. Any person using or responsible for the use of your covered auto...” (“Omnibus Clause”)

Liability Insuring Agreement

We will pay damages for bodily injury or property damage for which any insured becomes legally responsible because of an auto accident...

Liability Exclusions (Selected)

A. We do not provide Liability Coverage for any insured:

Intentional Injury

1. Who intentionally causes bodily injury or property damage exclusion [2 - 7 deleted]

No Permission

8. Using a vehicle without a reasonable belief that that insured is entitled to do so. This Exclusion (A.8.) does not apply to a family member using your covered auto which is owned by you. [Example: Son steals dad's "hot rod Lincoln"]

B. We do not provide liability coverage for the ownership, maintenance or use of:

Autos Falling Outside "Non-Owned Auto" Status

2. Any vehicle other than your covered auto, which is:
 - a. Owned by you; or
 - b. Furnished or available for your regular use.
3. Any vehicle, other than your covered auto, which is:
 - a. Owned by any family member; or
 - b. Furnished or available for the regular use of a family member.

“Saving the Named Insured From Exclusion Clause”

However, this Exclusion (B.3.) does not apply to you (named insured) while you are maintaining or occupying any vehicle which is:

- a. Owned by a family member; or
- b. Furnished or available for the regular use of a family member.

Duties After an Accident or Loss for Liability Coverage (Part E)

We have no duty to provide Liability Coverage... under this policy if the failure to comply with the following duties is prejudicial to us.

I. Notice

A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

B. An insured as defined under Part A, seeking Liability Coverage or any person seeking coverage under part D, must:

2. Cooperation

1. Cooperate with us in the investigation, settlement, or defense of any claim or suit.

3. Forward Copies of Suit/Legal Papers

2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss... [Additional duties deleted]

B. RTS (Read the Statute) - The “Omnibus Clause” - Permissive User 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”. Any policy provision which limits this omnibus coverage is void. Code §38.2-2204(D); *Southside Distributing Company v. Travelers*, 213 Va. 38, 189 S.E.2d 681 (1972).

The Standard “Omnibus Clause” is found in Part A - Liability - Definition of Insured:

Insured means... 2. “Any person using or responsible for use of your covered auto.”

The Virginia Personal Auto Policy’s requirement for permission is broader than the statute -- a change from prior policies. Under the Virginia Personal Auto Policy, the “omnibus insured” (“permissive user”) need not have the “expressed or implied” consent of the named insured to use his auto as required by the statute. The “permissive user” need only have a “reasonable belief that [he] is entitled to do so.” This is a major expansion of coverage.

1. Permission - Reasonable Belief To Use The Auto: “Fast Eddie”

Harold tells his 17 year-old daughter, Becky, “I don’t want any of your friends driving my Honda. Only you have permission to drive it.” On the way to the movies, Becky lets her date “fast” Eddie, drive the Honda. She never tells Eddie that he does not have her dad’s permission to drive. Eddie drives too fast and a crash results. GEICO, the dad’s carrier, denies liability coverage since Eddie did not have permission from Becky’s dad (the named insured) to drive his Honda. Usually the statute voids narrower, restrictive coverage language inconsistent with the statute. But in the current policy, the policy language is broader than the omnibus statute and provides coverage. Becky’s date, Eddie, need only have “a reasonable belief that he was entitled (to drive the Honda)” to avoid being excluded from coverage by liability exclusion (A.8.).

2. Permission: Daughter “Steals” Dad’s Car

Assume the facts are changed from the last example. Harold tells his daughter “I don’t want you driving my Cadillac anytime, anywhere. Do you understand?” Becky says “Yes daddy.” The next day Becky steals the keys and crashes her dad’s Cadillac. Can GEICO deny liability coverage for lack of permission? Read the Policy (RTP). Becky, as the daughter of the named insured is a “family member” and can use the Cadillac without permission. Exclusion (A.8.) does not apply to a “family member” while driving the “covered auto”, here the Dad’s Cadillac.

“We do not provide liability coverage for any insured . . .(8.) using a vehicle without a reasonable belief that the insured is entitled to do so. This exclusion (A.8) does not apply to a family member [Becky] using your covered auto which is owned by you” [Harold, the named insured.]

3. Permission: Prom Night - No Drinking and Driving

It's Becky's prom night. "Fast" Eddie is Becky's date. He meets Harold at the door - Harold tells him, "Eddie, you can use my Cadillac to take my daughter to the prom, but you do not have permission to drive if you have been drinking. Eddie agrees, but after the prom, Eddie and Becky go drinking. On the way home, Eddie is impaired and crashes Harold's Cadillac injuring Paula Plaintiff. GEICO denies liability coverage because Eddie did not have Harold's (the named insured) permission to drive the Cadillac after drinking. Can GEICO exclude coverage to Eddie? No. Eddie is a "permissive user" under Harold's GEICO policy. Virginia Code §38.2-2204, the "Omnibus Statute," mandates "permissive user" coverage. Restricting a "permissive user's" "manner of operation" of the vehicle (driving drunk), places a restriction on the statute and is void. *City of Norfolk v. Ingram*, 235 Va. 433, 367 S.E.2d 725 (1988). Accordingly, Eddie is covered under Harold's GEICO policy. Note: The "no drinking" exclusion is found in most all rental car agreements and is void.

4. Is the Named Insured Excluded From Coverage When Driving A "Non-Owned Auto" Without Permission

Assume Harold drives his neighbor's, John McCoy's, Mercedes without his permission and injures Paula Plaintiff. Since Harold had no reasonable belief that he was entitled to drive McCoy's Mercedes, he is excluded from coverage under McCoy's auto policy insuring the Mercedes. Simple. But does Harold have liability coverage under his GEICO policy? Follow the 3 steps. (1) Read Harold's GEICO policy [RTP]. McCoy's Mercedes is a "non-owned auto." Therefore, exclusions (B.2) and (B.3) do not apply - Good so far. But what about the "lack of permission" exclusion -- (A.8.)?

Liability Exclusion (A.8.) Permission

A. We do not provide Liability Coverage for any insured...

8. Using a vehicle without a reasonable belief that that insured is entitled to do so. This Exclusion (A.8.) does not apply to a family member using your covered auto which is owned by you.

Is Harold is caught in the "jaws" of exclusion (A.8.) when he drives a non-"covered auto" (the neighbor's Mercedes) without permission? Since the neighbor's Mercedes is **not** a "covered auto" on Harold's GEICO policy, does exclusion (A.8.) apply to Harold, the named insured? If so, Harold would have no liability coverage. This would be a major loss of coverage appearing for the first time in the current policy effective July 1, 2008.

The second step in policy analysis is "Read the Statute" (RTS). Virginia Code §38.2-2204(A) does not require an insurer issuing a policy "upon" any motor vehicle owned by the named insured [Harold's Cadillac] to also insure a motor vehicle the policyholder does not own.

The third step in policy analysis is to Read the Cases (RTC). In *American Motorists Ins.*

Co. v. Kaplan, et. al., 209 Va. 53, 161 S.E.2d 675 (1968), the court suggested that “non-owned auto” coverage is not mandatory under the statute.

Excluding liability coverage to the named insured [Harold], while driving an auto not owned by the named insured [the neighbor’s Mercedes] without “a reasonable belief that he is entitled to do so,” is a surprise to Harold, the named insured, who is now left uninsured. It is contrary to his “reasonable expectations” as the policyholder - especially since his prior “Family Auto Policy” provided such coverage. Under the prior “Family Auto Policy” the named insured was afforded liability coverage under his own auto policy when driving a “non-owned automobile.” even without permission of its owner. Part 1 - Liability, of the prior policy provided: “Persons Insured: ...(2) with respect to a non-owned automobile, (a) the named insured; (b) any relative... provided his actual operations is with the permission, or reasonably believed to be with the permission, of the owner, and is within the scope of permission.” Under prior policies, when driving a non-owned auto, a relative required permission of its owner [McCoy], not the named insured [Harold].

To be valid, a policy exclusion must be “clear and unambiguous.” *Cotchan v. State Farm Fire & Cas. Co.*, 250 Va. 232, 462 S.E.2d 78 (1995). Any ambiguity is construed in favor of coverage. See Section I, Part II, above. Harold can be saved from exclusion under his Geico policy if exclusion (A.8.) is ambiguous. The definitions section of the policy states, “throughout this policy ‘you and your’ refer to 1. the named insured...and 2. the spouse if resident of the same household.” Does the term “that that insured” in exclusion (A.8.) create an ambiguity whether or not it includes the named insured since the named insured is always referred to as “you and your” throughout the policy? If so, the ambiguity is construed against Geico in favor of coverage for Harold.

5. Lack of Permission to Drive a Non-Owned Auto: Enter the “Custodian”

Assume Harold rents a rental car from Avis while on vacation. 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 Harold, the renter, and Avis prohibits anyone but Harold from driving the rental car. Both Harold and his daughter, Becky, are aware of this prohibition. Assume, contrary to the rental agreement, Harold allows his daughter, Becky, to drive the rental car. Becky negligently injures Charles Clark, who recovers a \$1,000,000.00 judgment against Becky, the driver.

a. Coverage Analysis:

(1) Follow the Car

The rental car is “a covered auto” under Avis’ auto policy with Allstate. Liability exclusion (A.8.) of the Allstate policy excludes coverage when the driver does not have a reasonable belief she is entitled to drive the rental car. Since Becky knew she was not allowed to drive the rental car, coverage is excluded.

(2) Follow the Driver

The defendant, Becky, was driving a “non-owned auto.” The rental car fits

the definition of a non-owned auto. Becky did not have permission to drive the rental car from the named insured, Avis, and did not have a reasonable belief she was entitled to drive it. Does Becky have “non-owned auto” coverage under her dad’s policy with GEICO? Answer: No.

Read the Policy (RTP) Harold’s GEICO Policy)

The policy insuring agreement provides coverage “for which any insured becomes legally responsible because of **an** auto accident.” Becky is an insured under her dad’s policy with GEICO because she is a “family member.” However, Becky is excluded from coverage under her dad’s GEICO policy by exclusion (A.8.).

(3) Follow the Driver Home

Becky lives with her brother Tom as part of her dad’s household. Becky’s brother has a separate auto policy with Travelers. Becky was driving a “non-owned auto” under Tom’s policy, the rental car. Does Becky have non-owned auto coverage under her brother’s policy with Travelers?

Read the Policy (RTP) -- (Tom’s Travelers’ policy).

Becky is an insured under her brother’s Travelers’ policy because she is a “family member.” However, she also is excluded from liability coverage under Tom’s policy by exclusion (A.8.) because Becky did not have “a reasonable belief” that she was entitled to drive the rental car.

GEICO, Becky’s father’s insurance company, and Travelers, her brother Tom’s insurance company, each send you, as the plaintiff’s lawyer, a letter denying coverage under their respective policies. The grounds -- Becky, 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, Harold, had permission to drive. What do you do, you represent the Plaintiff, Charles Clark? Follow the three steps (1) Read the Policy (RTP), Read the Statute (RTS), and Read the Cases (RTC).

You have just read all policies. They deny coverage under exclusion (A.8.) To use a baseball analogy, “There is no joy in Mudville. Mighty Casey has struck out.” But don’t give up. Remember what Yogi said, “It ain’t over till it’s over.” Go to the second step in our analysis for coverage.

(4) RTS - Read the Statute

Virginia Code §38.2-2204(A) provides:

“Every policy... of liability insurance... insuring private passenger automobiles... that has as the named insured, an individual [Harold and Tom]... that includes... use of a non-owned auto... any provision requiring permission of the owner of such automobile [Avis]... for insurance to apply, shall be construed to include permission of the custodian [Harold] in the provision requiring permission of the owner.”

(5) 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 crashed injuring the plaintiff. The rental car company denied liability coverage since Rossie did not have a reasonable belief he was entitled to drive the rental car. The plaintiff’s lawyer searched for “non-owned auto” coverage. He found that the rental car driver, Rossie, resided with his parents as part of their household. The court held that under 38.2-2204(A), permission of the custodian (the renter to Rossie) 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). Accordingly, liability coverage for driving a “non-owned auto” under both Harold’s GEICO’s policy and Tom’s Travelers’ policy is available to Becky -- the defendant in your case.

C. Negligent Entrustment - Double/Triple Coverage

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** both for the negligence of a permissive user and the negligence of the named insured when the named insured negligently entrusts an auto to a permissive user. Coverage is afforded to the negligent driver, (“trustee”) and to the named insured(s) (“negligent entrustor(s)”). Coverage is provided up to the per person/per accident limit. For example, assume the named insured has an auto policy with liability limits of \$100,000/\$300,000, and negligently entrusts, along with his wife, his auto to an intoxicated 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 \$100,000. Coverage under the current policy is broader than the statute. It is not restricted to negligent entrustment. The policy provides coverage “when one accident involves more than one insured.”

The named insured and his wife, each are also entitled to any additional \$100,000 in liability coverage under the same policy insuring the “covered auto” for negligent entrustment up to the “per occurrence” limit of \$300,000 since both negligently entrusted their car to an unfit impaired driver. If the “entrusted” car were a “non-owned” or “temporary substitute” auto under the driver’s personal auto policy, the driver’s policy would provide excess coverage as well.

D. The Search for Excess Liability Coverage for Priscilla Plaintiff

Now, let’s return to your case of Priscilla Plaintiff. The defendant, Larry Student, had permission to drive his neighbor’s car, which was insured with Colonial. Code §38.2-2204(A) requires that Colonial extend “omnibus” (“permissive user”) liability coverage to Larry. In response to your settlement brochure, Colonial, the primary liability carrier, has offered its policy limits -- \$25,000.00. The defendant, Larry, has given notice of the accident and notice of the claim to all liability carriers.

I. RTP and RTS

We have just read the defendant driver Larry’s and his brother’s and mother’s separate policy, as well as the statutes. Now it’s time to Read the Cases (RTC).

2. RTC (Read the Cases)

Two landmark Virginia Supreme Court cases discuss the term “furnished for the regular use” of either the named insured or any family member” contained Part A - Liability Exclusions (B.2.b.) and (B.3.b.). 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*, 206 Va. 280, 142 S.E.2d 562 (1965), 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*, 238 Va. 467, 383 S.E.2d (734 (1989)), 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, supra*, 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).

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

Larry was driving his neighbor’s car insured with Colonial. As noted, Colonial has offered its minimum policy limits of \$25,000.

4. Follow the Driver

Larry Student’s 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 a “covered auto” or a “non-owned auto” at the time of the collision. His neighbor’s Ford is not a “covered auto” under the terms of Larry’s policy since it is not described in Larry’s policy, nor is it a “newly acquired auto” nor a “temporary substitute auto.” However, his neighbor’s Ford is a “non-owned auto” under the terms of Larry’s policy if it was not “furnished or available” for Larry’s “regular use”. *State Farm Mut. Auto. Ins. Co. v. Smith, supra*, held that casual, infrequent use is not considered “regular use” within the definition of “non-owned automobile”. Since his neighbor’s car was only furnished for Larry’s use once every other month to go to the law library, this is 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.

5. 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. Larry is insured for liability coverage under his mother's and brother's separate policies since he is a "family member." Since Larry was driving a "non-owned auto" at the time of this collision, he escapes exclusions (B.2.) and (B.3.) in all policies. Accordingly, Larry is covered while driving a "non-owned auto" 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.

E. 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. We must look to underinsured motorist coverage (UIM) as an additional source of coverage.

An underinsured motorist claim may be cut off if the plaintiff signs a release, releasing the defendant without the consent of the UIM carrier which prejudices the UIM carrier. This is a violation of the "consent to settlement" clause (UM/UIM Endorsement Exclusion (A. 1.))⁹

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.¹⁰

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.¹¹ *State Farm Mut. Auto. Ins. v. Kelly*, 238 Va. 192, 380 S.E.2d 654 (1989).

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.¹²

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.¹³

If the plaintiff prejudicially releases the defendant, without the UIM carrier's consent, she has extinguished the UIM carrier's subrogation rights, and violated the "consent to settle" clause.

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.¹⁴

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.

F. 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 its subrogation rights against the defendant by invoking its "consent to settle clause" creates a "catch-22" settlement 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."¹⁵ Even in cases where liability is clear and the defendant has no assets for the UIM carrier to obtain through subrogation, some UIM carriers still refuse to make reasonable offers. Needless litigation results requiring the defendant's liability carrier, which has offered its policy limits, to spend money on litigation costs and expert witnesses while the plaintiff is forced to do the same. Everyone loses except the UIM carrier. Judge Charles E. Poston in *MacTaggart v. Ochsendorf*, Law No. CL04-401 (Cir. Ct. City of Norfolk, 10/25/05) on the record called this practice of the UIM carrier "absolutely shameful."

Some states have solved this problem by shifting the costs of defense to the UIM carrier after the liability carrier has offered its 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)

SETTLEMENT 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 agreement" contained in Part A – Liability Coverage of the Virginia

Personal Auto Policy which creates a duty to pay and a duty to defend, declaring “We will settle or defend any claim or suit asking for damages which are payable under the terms of this policy...”

In *Superior Ins. Co. v. Cencewizki*, Case No. CH94-155 (Cir. Ct. of City of Fredericksburg, Jan. 27, 1995), 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.

In 2010, the Virginia General Assembly enacted §38.2-2206(L), (amended in 2011), in an attempt to encourage UIM carriers to settle meritorious UIM claims when the liability carrier has made an “irrevocable offer in writing... to pay the total amount of liability coverage available for payment...” Under Section (L.), after 60 days the cost of defense would be shifted from the liability carrier (which has the duty to defend) to the UIM carrier to encourage the UIM carrier to save defense costs with early settlement of the UIM claim.

Virginia Code Section 38.2-2206 (L)

“If the liability insurer or insurers providing coverage to an underinsured motor vehicle owner or operator make an irrevocable offer in writing, which may be contingent upon waiver of subrogation, to pay the total amount of liability coverage available for payment with reference to a claim for property damage or bodily injury, 60 days following written notice of the offer to any insurer or insurers providing underinsured coverage that have been served pursuant to this section, the insurer or insurers providing liability coverage shall be relieved of the cost of defending the owner or operator incurred thereafter, including expenses as well as reasonable and necessary attorney fees, and the insurer or insurers providing the underinsured motorist coverage shall reimburse the liability insurer or insurers for the costs to defend the underinsured motor vehicle owner or operator to the date of the underinsured motorist insurer’s offer of its limit of coverage. The liability insurer or insurers shall nonetheless retain the duty to defend their insured. If underinsured motorist coverage is provided by more than one insurer, the cost to defend shall be assumed in the same order of priority as set forth in subsection B with regard to the payment of underinsured benefits upon the offer of each underinsured motorist insurer’s limit of coverage. This subsection, including the liability insurer’s irrevocable offer and the underinsured insurer’s liability for defense costs, shall not apply in the event of either a jury verdict being returned in an amount equal to or less than the total liability coverage available for payment or a dispositive ruling dismissing the plaintiff’s complaint, including but not limited to the plaintiff taking a voluntary nonsuit. This subsection shall not apply to costs incurred in connection with an appeal.”

Liability carriers should be encouraged to use Section (L.), more frequently to avoid frustrating Virginia’s public policy of settling meritorious UIM claims—otherwise, the purpose of Section (L.) will be defeated.

This page intentionally left blank.

This page intentionally left blank.

3 Maximizing Recovery with Uninsured and Underinsured Motorist Coverage

I. Introduction

Part C of the Virginia Personal Auto Policy provides uninsured motorist coverage (UM) and underinsured motorist coverage (UIM). Uninsured motorist coverage protects insured accident victims against negligent drivers who have no insurance 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*, 247 Va. 41, 439 S.E.2d 348 (1994).¹⁶ 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?

II. The UM and UIM Statute – Code §38.2-2206

A. The UM/UIM Statutory Insuring Provisions

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

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

B. Persons Insured Under the Statute

Insured - 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.”

C. The Statute Creates Two Classes of Insureds

In *Insurance Company of N. Am. v. Perry*, 204 Va. 833, 837, 134 S.E.2d 418 (1964), 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.”

D. First Class Insureds Are Covered while in a Motor Vehicle or Otherwise

A first class insured gets first class coverage. First class insureds are covered wherever they may be, provided the injury results from the defendant’s ownership, maintenance or use of an uninsured or underinsured motor vehicle as a vehicle. (Drive-by shooting cases are excluded.) 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”.

1. 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.

2. 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*, 207 Va. 897, 153 S.E.2d 222 (1967).

3. “Or Otherwise”

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

4. Policy Exclusion (A.2.) – Void for First Class Insured

The Virginia Personal Auto Policy, effective July 1, 2008, for the first time excludes UM/ UIM coverage to a first class insured when using a non-“covered” auto without a reasonable belief that that insured is entitled to do so.” UM/UIM Exclusion (A.2.) provides:

We do not provide Uninsured Motorist Coverage - for bodily injury or property damages sustained by any insured...

2. Using a vehicle without a reasonable belief that that insured is entitled to do so. This exclusion (A.2.) does not apply to a family member using your [named insured’s] covered auto which is owned by you [named insured].

For example, assume Harold, the named insured on his GEICO policy, is rear-ended by an uninsured motorist while driving his neighbor's, John McCoy's Mercedes without John's permission. Harold, of course, is excluded from second class UM coverage under McCoy's policy. But for the first time, Harold is now excluded from first class UM coverage under his own GEICO policy. This is a drastic loss of first class UM coverage with conflicts with and restricts the UM statute §38.2-2206 (A) and (B). As such exclusion (A.2.) is void. See the first blackletter rule in Section 1, Part II.

Harold is a first class insured (the named insured) under his own GEICO policy. Virginia Code §38.2-2206(B) mandates that a first class insured (Harold) is covered under his own policy "while in a motor vehicle or otherwise". The statute does not require Harold to have John McCoy's permission or "a reasonable belief that he is entitled" to drive McCoy's car, for Harold to be afforded first class coverage under his **own policy** while driving McCoy's car. Requiring Harold to "have a reasonable belief he is entitled" to use McCoy's car conflicts with and restricts Virginia Code §38.2-2206(B) and is void.

In addition, UM/UIM Exclusion (A.2.) conflicts with and restricts §38.2-2206(A) which requires the carrier (GEICO) to "pay **all sums** that he (Harold) is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle..." The first class insured's UM carrier, under exclusion (A.2.) would not be paying "all sums" but "no sums". As a result, the exclusion, applied to a first class insured (Harold) is void. *Bryant v. State Farm Mut. Auto Ins. Co.*, 205 Va. 897, 140 S.E. 2d 817 (1965). *Nationwide Mut. Ins. Co. v. Hill*, 247 Va. 78, 439 S.E. 2d 335 (1994)

III. Resident of the Household

To be afforded first class UM/UIM status, a spouse or relative of the named insured (including in-laws) must be a resident of the named insured's (policyholder's) household. The Virginia Personal Auto Policy uses the term "family member" to refer to relatives of the named insured who are residents of his household. In the policy "Definitions" section, "family member" is defined as:

"Family Member" means a person related to you by blood, marriage, or adoption who is a resident of your [named insured] household. This includes a ward or foster child."

A. Spouse of the Named Insured

The spouse of the named insured (policyholder) also has first class insured status under the UM/UIM endorsement to the Virginia Personal Auto Policy:

"If a resident of the same household [as the named insured]."

I. When a Spouse Ceases to be a Resident of the Household Does He/She Lose First Class UM/UIM Coverage?

Answer: Yes, but coverage is extended under the current policy only for a short time—usually 90 days.

The Virginia Personal Auto Policy still considers the spouse to have first class insured status only for a short time after he/she ceases to be a resident of the household until the earlier of:

- 90 days following change of residency;
- The effective date of another policy listing the spouse as a named insured; or,
- The end of the policy period.

After this time period ends, the non-resident spouse is no longer a first class insured since he/she is no longer “a resident of the name insured’s household.”

Example: Harold and Brenda are married and live in the same household. Harold owns a Cadillac insured with GEICO. Harold is the named insured. One day Brenda leaves, telling Harold, “I never intend to come back.”

The household is “broken.” Brenda is no longer a resident of Harold’s household since she left with no intent to return. If Brenda is injured by an uninsured drunk driver while walking to work within 90 days of leaving Harold’s household, the policy still grants her first class uninsured motorist status. She is entitled to uninsured motorist coverage under Harold’s GEICO policy. If she were injured after 90 days, Brenda would not be entitled to uninsured motorist coverage under Harold’s GEICO policy.

2. After Death of the Husband, Does the Surviving Widow Lose Her Status as Spouse for Purposes of Coverage?

Answer: No.

In *Campbell v. Panicali*, 151 N.Y.S. 2d 524 (1956), the court held:

“Policies should not be written as a trap, and yet that is what the insurance company [Allstate] contends should be the determination in the case... Although Mr. Panicali died, she [Mrs. Panicali] was an insured from the inception of the policy, and she remained an insured as the date of the accident, and she is entitled to coverage.”

Part F - General Provisions” of the Virginia Personal Auto Policy, “Transfer of Your Interest

in the Policy” provides that if the named insured dies “the surviving spouse, if a resident of the same household at the time of the death, coverage applies to the spouse as if a named insured shown in the declarations... coverage will only be provided until the end of the policy period.”

3. Is a Fiance A “Spouse” or “Relative” for Purposes of First Class UM/UIM Coverage?

Answer: Generally, no. “A fiancé is not a relative.” Widiss and Thomas, *Uninsured and Underinsured Motorist Coverage*, 3rd Edition, §4.6.

In *Mercury Ins. Co. v. Pearson*, 169 Cal. App. 4th 1064 (Cal. Ct. App. 2008), Pearson was listed as an additional driver under his fiancé’s auto policy. He was injured while crossing the street by an uninsured motorist. The Court of Appeals denied first class UM coverage to Pearson since, as the fiancé of the named insured, he was not a spouse of the named insured nor a **relative** residing in her household.

4. Cohabiting Couple Holding Themselves Out as Married: Is the Partner Entitled to First Class UM/UIM Coverage Under the Named Insured’s Policy?

Answer: Under current law, generally , no. See 36 A.L.R. 4th 588 §5 - Cohabiting Persons Not Formally Married, see also, *State Farm Mut. Auto Ins. Co. v. Pizzi*, 208 N.Y. Sup. 152, 502 A.2d 160 (1986), holding that an adult woman cohabiting with a man was neither a “spouse,” “relative,” nor “family member” entitled to first class uninsured motorist coverage from the man’s auto policy.

In *Harford Ins. Co. v. Cline*, 139 P.3d 176 (N.M. Supreme Ct. 2006), Charles Cline and Judith Davis lived together for several years holding themselves out as husband and wife in a state that did not recognize common law marriage. While driving an auto not covered on Charles’ auto policy, Judith was seriously injured by an underinsured motorist. The New Mexico Supreme Court denied first class UM/UIM coverage to Judith since she was neither a “named insured” nor a “family member” under the partner’s policy which defined “family member” as a “person related by blood, marriage or adoption to the named insured...” Even though New Mexico, by executive order, allowed domestic partners of state employee to have the same benefits as married couples, the court held it was not against the public policy of New Mexico to exclude domestic partners from the definition of “family member” in an auto insurance policy.

B. The Two Requirements for Being a “Family Member”

To be a first class insured under the named insured’s policy, the injured person must fit the policy definition of “family member” by satisfying two policy requirements:

- Be related to the named insured or spouse and

- Be a resident of the named insured's household.

I. Related to the Named Insured

The policy definition of “family member” requires that the injured person be “related to you” [named insured or spouse] by:

1. blood;
2. marriage;
3. adoption; or
4. ward or foster child.

The injured person may be the child, parent, niece/nephew or cousin of the named insured or spouse. In addition, the injured person may be an “in-law” of the named insured, such as the son-in-law.

2. “Household” Member

The Supreme Court of Virginia first defined “household” in *State Farm Mutual Auto Ins. Co. v. Smith*, 206 Va. 280, 142 A.W.2d 562 (1965) as follows:

“Whether the term ‘household’ or ‘family’ is used, the term embraces a collection of persons as a single group, with one head, living together, a unit of permanent and domestic character, under one roof; a ‘collective body of persons’ living together within one curtilage, subsisting in common and directing their attention to a common object, the promotion of their mutual interests and social happiness.”

The court noted:

“The word ‘household’ which has been defined... connotes a settled status; a more settled or permanent status is indicated by ‘resident of the same household’ than would be indicated by resident of the same house or apartment.”

The Supreme Court of Virginia and the U.S. District Court cases discussing who is a resident of the household have consistently quoted, with approval, the old definition of “household” used by the Supreme Court of Virginia in *State Farm Mutual Auto Ins. Co. v. Smith*, 206 Va. 280, 142 A.W.2d 562 (1965).

C. The Intent Requirement to be a Resident of the Named Insured's Household

Courts hold that a relative must intend to be a resident of the named insured's household. To prove intent, courts require that the relative seeking coverage "must clearly evidence that intention through his actions." *Allstate Insurance Co. v. Patterson*, 231 Va. 358, 344 S.E.2d 890 (1986). "Actions" include:

- Participating in household tasks and activities; and
- Having regular and quality residential contacts with the household.

I. State Farm v. Smith

Elaine Mellow, who was four months pregnant, left her residence in California with her two infant sons, after her husband died to stay with her sister and brother-in-law in Norfolk, Virginia. She intended to return to California after the birth of her third baby. Elaine Mellow took her family's clothing with her when she moved to Norfolk but did not bring any furniture or appliances, leaving them in California along with her automobile. Two months after her arrival in Norfolk, Elaine Mellow was involved in an auto accident. One week after the accident, Elaine Mellow left Norfolk at the suggestion of her mother-in-law and returned to California to stay with her.

The Supreme Court of Virginia held that Elaine Mellow was not a resident of her sister and brother-in-law's household because she intended only to live with them for a limited and temporary period of time intending to return to California after the birth of her baby. The court held:

"The proper conclusion to be drawn from the facts in this case is that Elaine R. Mellow was a visitor or sojourner in the Frost home...

She came to Norfolk for a limited period of time, limited to the remaining period of her pregnancy. Her original plan was altered by another invitation; she left the Frost home upon receiving the invitation to live with her mother-in-law. Had she originally intended to be, or subsequently become, a resident of the Frost household, it is unlikely she would have agreed to change her settled status upon receiving another invitation... The evidence as a whole does not support a finding that Elaine R. Mellow was a resident of the Frost household." (206 Va. 285-286). (emphasis added)

a. Using *State Farm v. Smith* In Reverse to Obtain First Class UM/UIM Coverage

The key fact relied upon by the Supreme Court in *Smith* was Elaine Mellow's intent to stay in Norfolk temporarily -- a limited period of time measured by the happening of a specific event --

the birth of her third child. When that event happened, she intended to return home to California.

If you represent a relative of the named insured, who intends to be temporarily away from home for a period of time measured by completion of a specific event, such as college, an internship, a stint in the armed forces, rely on *State Farm v. Smith, supra*, and point out that your client intended to be away from home only temporarily until completion of the event.

2. William Patterson - Member of the “Renegades” Motorcycle Group

William Patterson was unemployed and stayed at his parents’ home only when he wasn’t staying at one of the many Renegade club houses or visiting about. He led a nomadic existence, staying at his parents’ house only 10% of the time. The court held Patterson’s actions showed he had only casual, erratic contacts with his parents’ household with no degree of regularity and therefore was not a resident of his parents’ household as a matter of law. *Allstate Insurance Co. v. Patterson, supra*.

3. Ernest Dawson - Long-Haul Truck Driver

Ernie Dawson worked as a long-haul truck driver. His job required him to be on the road for several weeks residing in his truck or in motels while on the road. When off work, Ernie Dawson returned to his mother’s house for periods ranging from four days to a week. Ernie kept his personal belongings at his mother’s house, including clothes, personal records, tools and his motorcycle. Ernie assisted his mother by cleaning, cooking and doing maintenance work. He also helped his mother by purchasing groceries and paying household bills on occasion. Ernie received his mail not at his mother’s house, but at a P.O. box. His daughter collected his mail from the P.O. box while he was on the road because Ernie did not want to burden his mother with getting his mail due to her advanced age.

Ernie was injured in a motor vehicle crash and sought UIM coverage under his mother’s policy with Auto Owners Insurance Company. If Ernie was a member of his mother’s household, he would be a first class insured under her policy and entitled to UIM coverage.

Auto Owners Insurance Company argued that Ernie Dawson’s contacts with his mother’s household were casual and erratic, just like James Patterson, the nomadic member of the motorcycle group who regularly stayed at Renegade club houses - rather than his parents’ household.

The court denied the insurance carrier’s motion for summary judgment distinguishing *Allstate v. Patterson, supra*. on the ground that Ernie Dawson was away from his mother because he was working as a long-haul truck driver spending the majority of his free time at his mother’s home, while James Patterson spent his free time at Renegade club houses. The court distinguished the *Patterson* case and denied summary judgment for the insurer holding:

“Although there are significant similarities between this case and

Patterson, there is a key difference that renders summary judgment inappropriate. The majority of the time Dawson was away from his mother's home he was working. While he was on the road Dawson spent most of his time in his truck or occasionally in hotel rooms. By contrast, Patterson had no regular employment and lived in various club houses by choice. Dawson's time spent on the road does not necessarily undercut his claim that he used his mother's home as his home because he spends the majority of his free time at his mother's home. Patterson, who was unemployed, had virtually unlimited free time and yet chose to spend 90% of his time at various club houses and apartments, contradicting his claim that he viewed himself as residing in his parents' household. The amount of time spent at a claimed residence is an important factor to be weighed, but is not dispositive. For example, in *Phelps v. State Farm Mutual Automobile Insurance Company*, 426 S.E.2d 484 (Va. 1993), the Supreme Court of Virginia indicated that a college student may still reside in her parents' household even though she spends most of the year away at school. The import of Patterson and Phelps is that regularity and quality of contacts, not duration alone, are the most significant factors determining residence in a household." (emphasis added)

Dawson v. Auto-Owners Insurance Co., No. 6:07cv00037, 2008 WL1836506 (W.D. Va. April 23, 2008).

4. Donna Elizabeth Price Staying With Mother - In Transition Between Boyfriends

Donna Elizabeth Price died from injuries she suffered in an auto collision. Nine days before her accident, Donna left the trailer where she, her child and boyfriend lived to return to her mother's residence. She intended to move in with a new boyfriend. Her mother testified that Donna did not want to live in Ironto, but wanted to "get away." The court held that Donna was in transition from one boyfriend to another, and was merely staying temporarily with her mother. Therefore, Donna was not a resident of her mother's household, and not entitled to first class UM/ UIM coverage under her mother's auto policy. *Furrow, Adm. v. State Farm Mutual Auto Ins. Co.*, 237 Va. 77, 375 S.E.2d 738 (1989).

5. The Case of Alan Argenbright - In Transition With a Pregnant Girlfriend

In the summer of 2008, before his May, 2009 auto accident, Alan Argenbright had two girlfriends, Jelena and April. Alan spent some nights with Jelena at his father's residence and other nights at April's residence. When April became pregnant, Alan broke-up with Jelena and began staying with April at her father's house "pretty consistently." On occasion Alan would stay with a

male friend or with his father.

One month before his May 3, 2009 auto accident, Alan and April signed a month-to-month lease on a Churchville, Virginia house. Before his auto accident, Alan set-up utility accounts in his name, furnished the house, and moved his personal belongings there. He also began giving the Churchville address as his permanent address before his accident. On the night of the accident, Alan gave that address to the police and his health care providers. Alan argued that he was a resident of his father's household and entitled to UIM coverage under this father's policy. With regard to the Churchville house, Alan argued that when he signed the lease on the Churchville house, he intended merely to "test the waters" before deciding if he would live there permanently.

The court held that Alan was living on a temporary and transitional basis at his father's house while waiting for completion of repairs to the Churchville house. The court, citing *Furrow v. State Farm, supra.* (the nomadic motorcyclist case) held that Alan's temporary stay at his parents' house, during a transition period, was insufficient to make him a resident of his parents' household. The court further held that the evidence showed that Alan was in the process of starting his own "unit of permanent and domestic character" with his pregnant girlfriend, April, at the Churchville house when the accident occurred. The court held that Alan demonstrated an intent to be a resident of the Churchville house and a member of his own household, not a permanent, settled member of his father's household. *The Automobile Insurance Company of Hartford Connecticut v. Argenbeight*, Civil Action No. 5:09cv00088 (W.D. Va. June 17, 2010).

6. College Students - Generally Residents of the Family Household While Living Away From Home

In *Phelps v. State Farm Mut. Auto. Ins. Co.*, 245 Va. 1, 426 S.E.2d 484 (1993), the Supreme Court of Virginia quoted, with approval, a Utah case, *Am. States Ins. Co., Western Pac. Div. v. Walker*, 486 P.2d 1042, 1044 (Ut. 1971), stating the general rule, "Ordinarily, when a child is away from home attending school, he remains a member of the family household..." The Utah case also stated, "It is a matter of intention and choice, rather than one of geography, whether a student remains a resident of his parents' household while living away from home." The Supreme Court, in *Phelps, supra.* held that two daughters never intended to return to their mother's household once they left for college following their mother's wishes, "When you turn 18, you are on your own." The Supreme Court of Virginia was clear to note, in *Phelps v. State Farm* at 245 Va. 1, 10, that its decision did not alter the general rule that a child at school remains a member of the family household, stating, "This is not a typical college student case, and our decision to reverse is confined to the particular facts involved."

7. Members of the Military Generally Remain Residents of Their Original Household

The general rule is that members of the military, particularly minors, remain residents of their original household absent a manifest intent to change residences or establish a new household.

Taylor v. United Services Auto Assn., 684 So.2d 890 (1966); Widiss and Thomas, *Uninsured and Underinsured Motorist Insurance*, 3rd Ed. Section 4.12. In *Allen v. Maryland Cas. Co.*, 259 F.Supp. 505 (1966), the U.S. District Court for the Western District of Virginia held that a minor did manifest an intent not to be a resident of his parent's household before enlisting in the Navy by running away from home at age 17.

In *Government Emp. Ins. Co. v. Erie Ins. Exchange*, 222 Va. 342, 282 S.E.2d 238 (1981), the Supreme Court of Virginia held that a Marine stationed at nearby Quantico, who had military permission to live at home and stay there whenever his military duties permitted, was a resident of his father's household for insurance coverage purposes.

In *Erie Ins. Co. v. Commerton, et al.*, Civil Action No. 98-0025-A, U.S. District Ct., W.D. Va. Abingdon Division (5-27-99), Judge Glen Williams held that a Marine recruit injured by an auto while at boot camp was a member of his parents' household and entitled to first class UM/UIM coverage under his parents' policy. The court declined to hold that "a person loses his or her status as a member of a household the instant he or she leaves home to embark on a new -- and uncertain -- career" holding:

"A young person may travel to a new town or even a new country in the hope that plans for the future will be realized, all the while knowing that if the plans do not come to fruition by a certain date, he or she will simply return home to make new plans. Until an individual makes a more definite break with his parents' household than is shown in this case, the court will not hold as a matter of law that the person is not still a resident of that household for insurance purposes." Memorandum Opinion pp. 7-8.

8. Resident of Two Households at the Same Time

In *Nationwide Mut. Ins. Co. v. Robinson*, 36 Va. Cir. 193 (Circuit Court of City of Richmond, 1995), 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. As such he would be entitled to first class UM/UIM coverage under both parents' auto policies. The *Robinson* decision was cited, with approval, in *Lester v. Nationwide Mut. Ins. Co.*, 586 F.Supp. 2d 559 (2008).

9. Proving Your Client's Intent to be a Resident of the Named Insured's Household - A Checklist

Courts require the plaintiff to prove intent to be a resident of the named insured's household through his/her actions.

The secret to winning "a resident of the named insured's household" case is in the details. After a detailed interview with the plaintiff, his/her friends, family members, neighbors and even

the mailman, make a list of the “good” and “bad” facts to prepare your case.

A checklist to prove the plaintiff’s intent to be a resident of the named insured’s household is set forth in Appendix No. 1.

IV. 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 or underinsured motorist. Barry and Cathy are second class insureds under Albert’s Allstate policy since (1) Barry was using Albert’s car with his permission and (2) Cathy was a permissive passenger (a guest) in Albert’s car at the time of the crash. (The policy term “occupying” includes both a driver and a passenger while inside the vehicle.) In addition, Barry is a first class insured under his own policy with Bankers & Shippers Ins. 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. Code Definition of Second Class Insured

Virginia Code §38.2-2206(B) defines a second class insured as:

“Any person who uses the motor vehicle to which the policy applies with the express or implied consent of the named insured and a guest in the motor vehicle to which the policy applies...”

B. No Permission for Driver: No UM Coverage for Passenger

Nationwide v. Harleysville Mutual, 203 Va. 600, 125 S.E. 2d 840 (1962) is a classic no permission no UM/UIM coverage case decided under prior UM/UIM endorsements. The case involves Ginger Dudley, her mom, Ginger’s friend, Elizabeth, and a tortfeasor named Ralph. Ginger, a teenager, wants to go to the movies with her friend, Elizabeth. She asks her mom for permission to drive the family car. Her mom says what every parent would say: “Yes, Ginger, you can drive but absolutely no one else can drive.” Ginger says what every teenager would say: “Yes, mom I promise.” You know what happens. A good looking teenage boy ends up driving -- his name is Ralph. He crashes the car and Elizabeth, the passenger, is hurt. Harleysville, which insures the car, denies liability coverage to Ralph on the ground he did not have permission from the named insured, Ginger’s mom, to drive the car.

Elizabeth’s attorney sought to “boomerang” the carrier’s denial of liability coverage into uninsured motorist coverage since (1) the vehicle was now uninsured; and (2) Elizabeth was a second class UM insured since she was a “guest” (passenger) in the vehicle.

The Supreme Court of Virginia (in a case between insurance carriers to determine primary UM coverage), held Elizabeth was not entitled to UM coverage under the vehicle owner's policy because Ralph lacked permission to drive. The Court reasoned that since Ralph lacked permission from Ginger's mom to drive, that Elizabeth was not a "permissive" passenger either. The court, relying on both the statute and the old policy UM endorsement, held:

"...She [Elizabeth] was merely an occupant or 'guest' in a motor vehicle which was being used without the permission, expressed or implied, of the named insured [Elizabeth's mom]. She, therefore, does not come within the definition of an 'insured,' insofar as the statute or Harleysville's [UM] endorsement on its policy is concerned, and neither she [Elizabeth, the passenger], nor Ralph Vasser [the driver] is entitled to recover from Harleysville [vehicle owner's carrier]."

C. The Current Policy Changes the Law

On July 1, 2008, the Bureau of insurance mandated use of the current Virginia Personal Auto Policy which substantially changed the requirement for permission in all parts of the policy, including in the UM/UIM endorsement:

UM/UIM Endorsement Exclusion (A.2.)

We do not provide Uninsured Motorist Coverage - for bodily injury or property damages sustained by any insured...

2. Using a vehicle without a reasonable belief that that insured is entitled to do so. This exclusion (A.2.) does not apply to a family member using your [named insured's] covered auto which is owned by you [named insured].

When it comes to permission, the current policy under certain circumstances now gives more coverage than the statute. In the *Nationwide v. Harleysville Mutual* case, neither Ralph, the driver, nor Elizabeth, the passenger, knew that Mrs. Dudley told her daughter, Ginger, that no one else had permission to drive. Accordingly, both the driver and passenger did **not** have a reasonable belief that they were not entitled to use Mrs. Dudley's car. Under the current policy, the result in *Nationwide v. Harleysville Mutual* would be different. Harleysville would be required to provide liability coverage to the driver, Ralph. If it were proven that Ralph knew he did not have permission to drive, Elizabeth, the passenger, still would have UM coverage under the car owner's policy as long as she did not know Ralph was a "non-permissive driver." (See Black Letter Rule 2, page 2 - The policy, if broader than the statute, provides coverage when the statute does not.)

D. 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. 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 under the same policy. *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. *Utica Mut. Ins. Co. v. Travelers Indem. Co.* 223 Va. 145, 286 S.E.2d 225 (1982) (uninsured defendant intentionally forced plaintiff's car off the road). *Fireman's Fund Ins. Co. v. Sleight*, 267 Va. 768, 594 S.E.2d 604 (2004) (defendant intentionally slammed her car door into meter maid's shoulder).

E. 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".

1. 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.

2. 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.

3. 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.

4. 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.

F. Non-Resident Relative Listed Driver, Insured Driver or Operator

Occasionally, a person, who does not fit the policy definition of a "family member" is listed on the Declarations page as a "driver," "insured driver," or "operator." They have been held to be second class insureds.

Example: Dad owns a Toyota insured with Travelers and allows his daughter and son-in-law to use it as their primary auto garaged at their separate residence. They are listed on the Travelers' Declarations page as "additional drivers." If the daughter or son-in-law were injured by an uninsured motorist while passengers in a friend's car or as pedestrians, are they covered under the dad's Travelers' policy insuring the Toyota?

In *Lester v. Nationwide Mut. Ins. Co.*, 586 F.Supp.2d 559 (2008), the U.S. District Court, D. South Carolina, held Virginia law would not entitle a non-resident relative driver listed on the Declarations page as an "insured driver" to first class UIM coverage under the named insured's policy.

Quoting from a South Carolina case, *In re Smith v. (Ex Parte) United Services Automobile Association*, 365 S.C. 50, 614, S.E.2d 652 (Ct. App. 2005), the court in *Lester* held:

"The issue was "whether an insured who is listed on the policy as an 'operator' can stack UIM coverage." *Id.* at 53, 614 S.E.2d at 653. "The Smiths' argument [was] essentially that USAA's inclusion of Smith as an 'operator' on the declarations page of the policy created an ambiguity as to whether she was a named insured and such ambiguity should be resolved in favor of coverage." *Id.* at 54, 614

S.E.2d at 654. While the court noted that some courts have found in favor of coverage in similar situations, the majority view “is that listing a driver on the declarations page... does not make that person a named insured.” *Id.* at 54-55. The court stated,

[E]ven though “operator” is not defined in the policy, the policy is not ambiguous. Where a term is not defined in a policy, it is to be defined according to the usual understanding of the term’s significance to the ordinary person. The term “operator” has been construed somewhat more expansively than “driver” in this state, but has not been contemplated to extend beyond mere use of the vehicle. In addition, the policy defines “you” and “your” as “the named insured” shown in the declarations.” The only person listed in the “Named Insured” box on the declarations page was Washnok. Thus, we see no ambiguity. *Id.* at 55-56, 614 S.E.2d at 654-55 (internal quotation marks and citations omitted). “Because Smith was not the named insured (or the named insured’s spouse or resident relative), but was only using the vehicle with Washnok’s permission, she is a Class II insured,” and as such, the court concluded Smith was not entitled to stack coverage. *Id.* at 56, 614 S.E.2d at 655.

While the court acknowledges it has found no Virginia case on point, the court concludes that Virginia would not determine Plaintiff is entitled to UIM coverage simply because he is listed as an “insured driver.” Because the court finds no ambiguity in the Policy language, and because the Policy language does not provide UIM coverage for Plaintiff, the court grants Nationwide’s Motion for Summary Judgment.”

V. The UM/UIM Endorsement Insuring Agreement

A. Ownership, Maintenance or Use of a UM/UIM Vehicle

The UM/UIM endorsement “insuring agreement” requires that the plaintiff’s injury must “arise out of the ownership, maintenance or use” of the defendant’s uninsured or underinsured motor vehicle. If not, there is no UM/UIM coverage. For example, assume Harold is hit head on while driving his Cadillac by Stan Smith driving a Subaru. Stan swerves to avoid hitting a drunk, Dan Denver, lying on the road. As a result, Stan hits Harold head-on in Harold’s lane of travel. Harold sues Dan Denver as Stan is not negligent. Since Dan is uninsured, Harold brings an uninsured motorist claim with GEICO his UM carrier and serves GEICO. If Harold obtains a judgment against Dan Denver, is GEICO required to pay? Answer no, since Harold’s injury did not arise out of Dan’s “ownership, maintenance or use of an uninsured motor vehicle.” Dan Denver was lying on the roadway, drunk, which caused Stan to swerve into Harold’s lane causing this head

on collision.

B. Use of the UM/UIM Vehicle as a Vehicle

Patricia Lexie was shot and killed in a drive by shooting by an uninsured motorist while a passenger in her husband's car insured with State Farm. Patricia Lexie's estate brought a wrongful death UM claim with State Farm. The Supreme Court of Virginia held the estate was not afforded UM coverage because Patricia's death did not arise out of the "use" of the defendant's uninsured vehicle "as a vehicle". The court stated the ordinary meaning of "use" of the defendant's uninsured motor vehicle did not contemplate it being used as "an outpost from which an assailant may inflict intentional injury with a firearm." The Supreme Court held there was no "causal relationship between the incident and employment of the [uninsured defendant's] automobile as a vehicle. . . ." *Lexie v. State Farm Mut. Auto. Ins. Co.*, 251 Va. 390, 469 S.E.2d 61 (1996).

Where a causal relationship can be shown between the incident causing the plaintiff injury and use of the defendant's uninsured/underinsured motor vehicle "as a vehicle", UM/UIM coverage is allowed. For example, in *Nationwide Mut. Ins. Co. v. Smelser*, 264 Va. 109,563 S.E.2d 760 (2002) the Supreme Court of Virginia held there was a causal relationship between use of the defendant's uninsured vehicle and Mrs. Smelser's shoulder injury. In *Smelser*, a passenger in a moving uninsured car intentionally tried to steal Mrs. Smelser's purse. He reached out the car window and grabbed Mrs. Smelser's purse straps dragging Mrs. Smelser along the pavement, causing her shoulder injury.

In *Fireman's Fund Ins. Co. v. Sleigh* 267 Va. 768, 594 S.E.2d 604 (2004) the Supreme Court of Virginia held the defendant used her uninsured vehicle "as a vehicle" when she intentionally slammed her driver's side door into the plaintiff, a meter maid, writing her a parking ticket. The court commented that "car doors are designed and manufactured to be opened and closed. . . . Here Gibson's (the uninsured motorist) use of her car door as designed was use of the uninsured vehicle "as a vehicle" and was causally related to Sleigh's injury.."

C. "Accident," Intentional Injury and AES v. Steadfast (2012)

Unlike the statute, the policy UM/UIM "insuring agreement" requires that bodily injury be sustained by an insured "caused by an accident with an uninsured or underinsured motor vehicle". A denial of UM/UIM coverage on the grounds that the uninsured defendant's conduct was not an "accident", but intentional, conflicts with the statute and Virginia case law. UM coverage is afforded when an uninsured defendant's conduct is intentional, as long as the defendant's use of his vehicle "as a vehicle" causes the plaintiff's injury.

In *Fireman's Fund Ins. Co. v. Sleigh, supra*, the Supreme Court held the intent of the uninsured defendant is irrelevant:

"In *Utica Mutual v. Travelers Indemnity*, 223 Va. 145, 147-48, 286 S.E.2d 225, 226 (1982), we found an [UM] insurer liable for injuries sustained by its insured's passenger as a result of a willful tort by an

uninsured motorist who deliberately ran the insured's car off the road. Thus, it is clear that in Virginia the intent of the uninsured tortfeasor is irrelevant to the question of coverage; rather, the determinative issue is the nature of the employment of the uninsured vehicle. . . .”

Punitive damages against an uninsured/underinsured defendant are recoverable against the UM/UIM carrier. *Lipscombe v. Security Ins. Co.*, 213 Va. 81, 189 S.E.2d 320 (1972). In view of the existing case law above, the recent Supreme Court decision of *AES Corp. v. Steadfast Insurance Co.*, 283 Va. 609, 725 S.E.2d 532 (2012) should have no effect on uninsured and underinsured motorist coverage involving “the natural and probable consequences” of an uninsured defendant’s intentional acts.

VI. Obtaining Separate Coverages From the Same Policy

A. Liability and UM Coverage from the Same Policy

Rebecca was injured while a passenger in Paul’s car, insured for \$50,000 with Nationwide, driven by her friend Mary Ann. The crash was caused by the joint negligence of Mary Ann and an uninsured driver, Mr. Jones. Rebecca sought recovery against Mary Ann under the liability part of the Nationwide policy which insured Paul’s car. In addition, she sought recovery under the uninsured motorist part of the same Nationwide policy since she was a second class UM insured and Mr. Jones was an uninsured motorist. Nationwide paid Rebecca its full \$50,000 liability policy limits for the negligence of Mary Ann, the driver -- a “permissive user” of Paul’s car. However, Nationwide 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 UM “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*, 247 Va. 78, 439 S.E.2d 335 (1994), 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 [Rebecca] 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.¹⁷

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 parts 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.

B. Liability and UIM Coverage From the Same Policy

In *Dyer v. Dairyland Ins. Co.*, 267 Va. 726, 594 S.E.2d 592 (2004), the Supreme Court applied the reasoning of *Nationwide v. Hill*, 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*, *supra*, 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.

C. 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). (\$300,000 UM minus \$100,000 Watkins liability = \$200,000 UIM from USAA). USAA offered its \$200,000 in UIM coverage.

O'Neil then sought an additional \$300,000 policy limit recovery from his carrier, USAA, under his uninsured motorist endorsement against the uninsured defendant, John Doe.

Judge Joanne F. Alper 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 (Arlington County Cir. Ct., 2002).

Judge Arthur B. Vieregge 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.*, 61 Va. Cir. 181 (Fairfax County Cir. Ct, 2003). Accord, *Virginia Farm Bureau v. Beach, et al*, 65 Va. Cir. 537 (Stafford County Cir. Ct., 2003)

VII. Stacking of UM/UIM Coverage

A. 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.*, 205 Va. 897, 140 S.E.2d 817 (1965).

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.”

B. 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, supra*, 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.”

C. 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.*, 213 Va. 72, 189 S.E.2d 832 (1972) 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.

D. Stacking – The Third Generation

Roger Borrer had two cars insured with Goodville Mutual Insurance Company on the same policy. Separate premiums were paid for each car. Roger Borrer was injured by the negligence of an uninsured motorist and sought to stack (combine) the coverage on each vehicle. The Supreme Court of Virginia in *Goodville Mut. Ins. Co. v. Borrer*, 221 Va. 967, 275 S.E.2d 625 (1981), held "It is now the rule in Virginia that stacking of UM coverage will be permitted unless clear and unambiguous language exists on the face of the policy to permit such multiple coverage." A critical fact distinction between the *Goodville Mut. Ins. Co. v. Borrer* and the *Cunningham* decision was that the Court in *Borrer* held that Goodville Mutual had a clear and unambiguous "limits of liability" clause in its UM endorsement which prevented stacking. The Virginia Supreme Court in the *Borrer*, decision, held:

"We conclude that the language of Goodville's policy, viz... 'Regardless of the number of... motor vehicles to which this insurance applies,' is clear and unambiguous and requires the construction that stacking is not permissible. With the foregoing language, the policy plainly limits Goodville's UM liability for damages to any one person as

a result of any one accident to \$25,000. The mere fact that two vehicles are insured and two separate premiums are charged is of no consequence in light of the express language of the policy.” (emphasis added)

The court failed to report in its *Borrer* decision that the Goodville policy also contained within the UM endorsement itself, a ‘schedule’ setting forth ‘limits of liability: bodily injury \$25,000 each person; \$50,000 each accident’ and that the declarations page of the Goodville policy referred the policyholder back to the UM endorsement for the ‘each person/each accident’ limit of liability -- “the self contained clarity of the UM endorsement.”¹⁸

E. Stacking the Fourth Generation

Virginia Williams lived at home with her father who had three vehicles insured on his Virginia Farm Bureau policy for UM/UIM coverage: The first for \$300,000; the second for \$300,000; and the third for \$250,000. Virginia was in a bad car accident and sought to stack the UIM coverage of all three vehicles for a total of \$850,000. Since Virginia Farm Bureau used the “magic words” approved by the Supreme Court in *Goodville Mutual v. Borrer*, in its UM “Limits of Liability” clause, it denied stacking for multiple vehicles on Virginia’s dad’s policy.

The Supreme Court, in *Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, 677 S.E.2d 299 (2009), held that Virginia Farm Bureau’s ‘limits of liability’ clause containing the ‘magic words’ of the *Goodville* decision, ‘regardless of the number of... motor vehicles to which this insurance applies,’ would not prevent stacking of UM coverage on multiple vehicles, with separate premiums, on the same policy if the schedule or declarations setting forth the ‘each person’ limit of liability created an ambiguity.

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

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

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

The Supreme Court of Virginia, in *Virginia Farm Bureau Mut. Ins. Co. v. Williams, et al.*,

held that an ambiguity was thus created which was not prevented by the anti-stacking ‘magic words’ of the *Goodville* decision, and declared that the Virginia Farm Bureau policy afforded Williams UM/UIM coverage in the total amount of \$850,000 holding:

“We stated [in *Goodville Mutual v. Borrer*] that the phrase ‘[r] egardless of the number of... motor vehicles to which this insurance applies’ was a clear and unambiguous provision prohibiting stacking [citation omitted].

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

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

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

Because we must construe this ambiguity in Williams’ favor, we hold that Williams is entitled to ‘stack’ the UM/UIM coverage for all three vehicles listed in the policy...”

Although there were two ambiguities described in *Williams*, every court which has considered *Williams* has stated the rationale for the decision was the “different sets of coverage” -- two vehicles had \$300,000 in UM coverage and the third had \$250,000. It is very rare to have different amounts of UM coverage for multiple vehicles insured under a single policy. As a result, all intrapolicy stacking cases after *Williams*, unlike *Williams*, had the same amount of UM/UIM

coverage on each vehicle. In each case, courts denied stacking on the distinguishing ground that “the different sets of coverage” which created the ambiguity in *Williams* did not exist in the cases the followed.¹⁹

F. Stacking Today

I. Stacking of Separate Policies (Interpolicy Stacking Allowed)

The Supreme Court of Virginia has consistently struck down insurance industry attempts to limit stacking of UM/UIM coverage on separate policies (Interpolicy stacking), relying each time, on its landmark decision of *Bryant v. State Farm Mut. Auto. Ins. Co.*, *supra*. The *Bryant* decision was cited as authority in *Nationwide Mut. Ins. Co. v. Hill*, 247 Va. 78, 439 S.E.2d 335 (1994) for invalidating the liability payment set-off provisions contained in the “Limits of Liability Clause” of the UM endorsement.

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

a. Allowed if the “limits of liability” clause is ambiguous. *Cunningham v. Insurance Co. of N. Am.* and *Goodville Mut. Cas. Co. v. Borrer*.

b. Not Allowed if the “limits of liability” clause is clear and unambiguous. *Goodville Mut. Cas. Co. v. Borrer*.

c. Allowed if there is different UM coverage in the declarations page. *Virginia Farm Bureau v. Williams*

G. Stacking Separate Minimum Limits Policies

Sherman Alexander and his son, Scott, were injured in an auto collision. The defendant had minimum limits liability coverage of \$25,000.00. Sherman and Scott were insured under three separate resident relative. minimum limits. policies of \$25,000.00. Could Sherman and Scott Alexander stack the three separate minimum limits policies?

The Supreme Court of Virginia, in *USAA Casualty Ins. Co. v. Alexander*, 248 Va. 185, 445 S.E.2d 145 (1994), said they could, holding:

“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).

The court allowed Sherman and Scott to stack the three minimum limits UM policies to obtain \$50,000 each in UIM coverage. $\$25,000 \text{ (stacked)} \times 3 = \$75,000$ minus \$25,000 (defendant’s liability coverage) = \$50,000 UIM coverage.

H. Statutory Definition of Underinsured Motor Vehicle

Underinsured Motor Vehicle Code §38.2-2

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.”

I. The Underinsured Motorist Coverage Calculation

A simple method for calculating the total UIM coverage afforded to the plaintiff is to use the statutory formula set forth in Virginia Code §38.2-2206(B), above:

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:

1. List in column (a) the coverage on each policy affording the plaintiff uninsured motorist coverage (UM);
2. 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;
3. 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.

I. 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 total amount of the plaintiff's UM coverage. *Nationwide Mut. Ins. Co. v. Scott*, 234 Va. 573, 363 S.E.2d 703 (1988).

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. Single Limit UM/UIM Policy Limits

In cases where two plaintiffs are afforded the same single limit UM/UIM coverage (e.g. \$300,000/\$300,000), their UIM coverage is obtained by:

1. First calculating the UIM coverage for each from the single limit; and
2. Limiting the combined total to the single limit cap. *Nationwide Gen. Ins. Co. v. Heresi et. al.* No. 1:11cv1025(LMB/TRJ) (US Distr. Ct. E.D. 5/15/2012)

In *Nationwide v. Heresi et. al.* a husband and wife, while riding in the family auto insured with Nationwide, with a single limit liability and UM/UIM coverage of \$300,000/\$300,000 were killed by a negligent defendant insured with State Farm for \$100,000/\$300,000. State Farm offered each estate \$100,000 in liability coverage. Each case had a value in excess of \$300,000. The court held: first, calculate UIM coverage of each then, second, limit the combined total to the single limit cap of \$300,000. In *Nationwide*, both the husband's and wife's estates were under-insured by \$200,000 (\$300,000 UM minus \$100,000 liability equals

\$200,000 UIM). Since the combined total could not exceed the single limit cap of \$300,000 per accident, one estate—the first to go to judgment—would receive \$200,000 and the other \$100,000 unless the plaintiffs agreed to share the \$300,000 equally, which they did in the Nationwide case. The court rejected Nationwide’s position that it was not required to pay its total \$300,000 single limit cap per accident, but only \$200,000.

3. The One Car Crash Case: *Trisvan v. Agway*

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

The Supreme Court of Virginia held that Trisvan was not entitled to both liability and UM coverages from his driver’s policy since his driver (Smith) was the only tortfeasor. *Trisvan v. Agway Ins. Co.*, 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. See also, *Dyer v. Dairyland*, 267, Va. 725 (2004) discussed above, which applied the reasoning of *Hill* to UIM claims. The key distinction: two tortfeasors versus the one tortfeasor in *Trisvan*.

J. Priority of UIM Coverage

I. 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. 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.

VIII. Underinsured Motorist Coverage Analysis

A. 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. An exceptions is self-insured vehicles, Code §46.2-368(B), which provide excess UM coverage.

With regard to underinsured, self-insured and garage motor vehicles, the priority set forth in Virginia Code §38.2-2206(B) controls. *Catron v. State Farm Mut. Auto. Ins. Co.*, 255 Va. 31, 496 S.E.2d 436 (1998).²⁰

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

B. The Search for Excess UIM Coverage

I. 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 household²¹ with her mother and two sisters, Elizabeth and Theresa, she is an insured of the first class under each policy. The uninsured motorist statute, Code §38.2-2206, mandates that Priscilla be covered under these policies "while in a motor vehicle or otherwise." As noted, *Allstate Ins. Co. v. Meeks*, 207 Va. 897, 153 S.E.2d 222 (1967), 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, each for \$500,000. Under the “limits of liability” clause in the current UM/UIM endorsement, 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

C. Calculating Priscilla Plaintiff’s UIM Coverage

Priscilla Plaintiff’s UIM coverage is calculated as follows:

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

This page intentionally left blank.

This page intentionally left blank.

4 Stacking Medical Expense Benefits

I. What Are Medical Expense Benefits?

Medical expense benefits (MEB) is separate “no fault” coverage for medical bills and funeral expenses incurred²² in a motor vehicle accident available to an insured from insurance companies that insure him for MEB coverage. MEB coverage (also known as “med-pay”) must be offered by insurance companies, but the coverage is optional on the part of the policyholder who must pay a separate premium to obtain this coverage.²³ The fact that your client received MEB coverage should not be taken into account by liability or UM/UIM carriers in reducing the value of the liability or UM/UIM claim by the amount of MEB benefits your client received.²⁴

II. What is Stacking of Medical Expense Benefits?

Stacking refers to “adding up” coverage, one on top of another like stacking pancakes.

The MEB statute, §38.2-2201(C), provides for stacking of up to four vehicles from the same policy. For example, Andrew insures four cars with Allstate with MEB coverage of \$2,000.00 per car. He is injured in a motor vehicle accident while driving his insured Ford. Andrew is entitled to \$8,000.00 in MEB coverage. This is called intrapolicy stacking—stacking within one policy. Stacking between separate policies is called interpolicy stacking.

III. “The Non-Owned” and “Temporary Substitute” Auto -- The Pot of Gold At the End of the MEB Coverage Rainbow

Whenever your client occupies a “non-owned” auto or a “temporary substitute” auto, you have found the pot of gold at the end of the MEB coverage rainbow. The MEB endorsement “insuring agreement,” the definition of “insured” and the “other insurance clause” form the basis for stacking coverages which can light-up like a “pinball machine,” especially if your client resides in the same household with relatives who each have MEB coverage under their own separate policies. By occupying a “non-owned auto” or a “temporary substitute auto” your client avoids being excluded from coverage by MEB exclusions (2.d.) and (2.e.).

A. “Non-Owned Auto” MEB Coverage Stacking

Your client, Allen, borrows one of his neighbor’s, Fred Rogers’, four cars with Fred’s permission and is rear-ended by another car. Allen incurs \$100,000.00 in medical bills. Allen is insured with Allstate and lives in a big house with his parents, brother and sister. Each have separate policies insuring four cars. Allen is afforded the following MEB coverage.

Neighbor Fred -- Nationwide - \$5,000 x 4 cars....	\$ 20,000.00
Allen -- Allstate - \$5,000.00 x 4 cars	\$ 20,000.00
Parents -- GEICO - \$5,000.00 x 4 cars.....	\$ 20,000.00
Brother -- State Farm - \$5,000.00 x 4 cars.....	\$ 20,000.00
Sister -- SAFECO - \$5,000.00 x 4 cars.....	\$ <u>20,000.00</u>
Total MEB Coverage.....	\$100,000.00

The key: Allen was occupying a non-owned auto.

B. Medical Expense Benefits Stacking “Bonus”

If your client is a passenger in a “non-owned” auto or “temporary substitute auto” driven by someone beside its owner, he is entitled to a special bonus found only in the MEB endorsement. Your client is entitled to the driver’s own MEB coverage, in addition to all the other MEB coverages available.

I. Medical Expense Benefits Stacking “Bonus” Example - Non-Owner Driver of Non-Owned Auto

Assume the same facts as in the previous example, except Allen’s friend, Barbara Bonus, drives neighbor Fred’s car with his permission. Allen, a passenger, incurs \$120,000.00 in medical expenses. Barbara Bonus insures her four cars with \$5,000.00 each in MEB coverage with Bankers Insurance Company. Allen is afforded the following coverage:

Neighbor Fred -- Nationwide - \$5,000 x 4 cars....	\$ 20,000.00
*Barbara Bonus - Bankers - \$5,000.00 x 4 cars....	\$ 20,000.00
Allen -- Allstate - \$5,000.00 x 4 cars	\$ 20,000.00
Parents -- GEICO - \$5,000.00 x 4 cars.....	\$ 20,000.00
Brother -- State Farm - \$5,000.00 x 4 cars.....	\$ 20,000.00
Sister -- SAFECO - \$5,000.00 x 4 cars.....	\$ <u>20,000.00</u>
Total MEB Coverage.....	\$120,000.00

Note the “bonus” coverage insuring the driver. Again, remember the key: Your client was occupying a “non-owned auto” or a “temporary substitute auto” with “bonus” MEB coverage when someone beside the owner is driving the car.

IV. Stacking MEB Coverage -- Residents of Two Households

In *Nationwide Mut. Ins. Co. v. Robinson*, Case 36 Va. Cir. 193 (Cir. Ct. City of Richmond, 1995), 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. Judge Johnson’s holding in *Nationwide Mut. Ins. Co. v. Robinson*, is equally applicable 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*, 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 stacking of coverage on each car on each policy,

up to four cars per policy (intrapolicy stacking).

V. How Do You Become a Medical Expense Benefits “Pinball Wizard?”

Read the policy (RTP). Read the MEB endorsement’s “Insuring Agreement, Definition of “Insured” and the “Other Insurance Clause.” Do it now and become a MEB “pinball wizard” yourself.

A. MEB Insuring Agreement

<p>If the...Declarations indicate that Medical Expense Benefits apply, ... we will pay... medical expense benefits [medical and funeral expenses] to an insured who sustains bodily injury... caused by an accident arising out of the ownership, maintenance or use of a motor vehicle as a motor vehicle... for services rendered within 3 years from the date of the accident.</p>

Like the Part-A liability “Insuring Agreement,” the MEB “Insuring Agreement” is very broad with no limitation on the type of motor vehicle. Limitations on coverage are found in the MEB exclusions and in the MEB definition of insured. However, the MEB “Insuring Agreement” does have one important limitation: The motor vehicle causing the injury must have been used “as a motor vehicle,” excluding MEB coverage for “drive-by shooting” type of cases.

B. MEB Definition of Insured

1. Insured as used in this endorsement means:
- a. You or any family member who sustains bodily injury:
 - (1) While occupying; or
 - (2) While not occupying but when struck by;
a motor vehicle.

 - b. Any other person who sustains bodily injury while occupying:
 - (1) Your covered auto;
 - * (2) A motor vehicle not owned by you or any family member
[neighbor Fred's car] if the bodily injury results from the
operation of that motor vehicle by you [Barbara Bonus] or
any family member [Barbara Bonus' sister]; or
 - (3) Any auto or trailer you do not own while used as a temporary
substitute for your covered auto which is out of normal use
because of its:
 - (a) Breakdown;
 - (b) Repair;
 - (c) Servicing;
 - (d) Loss; or
 - (e) Destruction.

C. MEB Stacking: "Double Bonus" Coverage

Assume the same facts as above where Allen is injured as a passenger in Fred's car driven by Barbara Bonus. Add one fact – Barbara lives with her sister Betty Bonus who insures her four cars

on one policy with Travelers. Read Barbara and Betty Bonus' policies (RTP) – the MEB “definition of insured” above.

The basis for MEB “bonus” coverage is the policy definition of insured (1.b.(2) above). We are reading Barbara Bonus' Banker's policy. Barbara is operating a motor vehicle which she does not own (neighbor Fred's car). Allen is “any other person who sustained bodily injury while occupying.. (b.(2)) above – a motor vehicle not owned by you [Barbara Bonus] or any family member [sister Betty Bonus] if Allen's bodily injury results from the operation of that vehicle [Fred's car] by you [Barbara Bonus].

Now let's read Betty Bonus' policy which has the same MEB “definition of insured” in (1.b.(2)) above. Allen is entitled to MEB coverage on all 4 cars on Betty Bonus' Travelers policy because Fred's car was driven by a “family member” of Betty Bonus – her sister Barbara Bonus. You have now obtained “double bonus” MEB coverage. You are now an “MEB pinball wizard”.

D. The MEB Other Insurance Clause

If there is other valid and collectible Medical Expense and Income Loss Benefits Coverage applicable under one or more policies, the following priorities of recovery will apply:

First Priority: The Medical Expense and Income Loss Benefits Coverage of the owner of the motor vehicle the Insured was occupying at the time of the accident.

Second Priority: The Medical Expense and Income Loss Benefits Coverage of the operator of the motor vehicle the insured was occupying at the time of the accident.

Third Priority: The Medical Expense and Income Loss Benefits Coverage of the Insured.

I. The Priority of MEB Recovery

As noted, whenever your client is occupying a “non-owned auto” or a “temporary substitute auto” you have found the pot of gold for MEB recovery. Note: MEB coverage is optional, so let's hope all policyholders pay the premium and have MEB coverage. Follow the priority of MEB recovery set forth in the MEB “Other Insurance Clause” when searching for the MEB “pot of gold.” Follow each policy in the order of priority to search for MEB coverage as follows:

1. Follow the Car (occupied by your client);
2. Follow the Driver (“Operator”, a car he does not own);
3. Follow the Driver Home (search for policies insuring resident relatives of the driver since they provide MEB to passengers in cars operated by family members)
4. Follow Your Client (his personal coverage);
5. Follow Your Client Home (search for policies insuring resident relatives since your client is a first class MEB insured under each).

VI. MEB Exclusions

Exclusions “take away” coverage. The MEB exclusions lawyers see most often are:

- The Intentional Act Exclusion
- The Worker’s Compensation Exclusion - If your client has Worker’s Compensation benefits available for the motor vehicle accident, MEB are excluded;
- Lack of Permission - Your client did not have “a reasonable belief that he was entitled to occupy the vehicle.”
- Autos Owned By or Furnished/Available for the Regular Use of the Named Insured/ Family Member - If the car occupied by your client is **not** a covered auto, a “temporary substitute,” or a “non-owned auto,” MEB exclusions (2.d.) and (2.e.) below exclude coverage:

We do not provide MEB coverage...to any insured for...bodily injury:

(2.d.) Sustained while occupying a motor vehicle (other than your covered auto) which is:

1. Owned by you; or
2. Furnished or available for your regular use.

(2.e.) Sustained while occupying any motor vehicle (other than your covered auto) which is:

1. Owned by any family member; or
2. Furnished or available for the regular use of any family member. However, this exclusion (2.e.) does not apply to you. [Saving the Named Insured From Exclusion.]

The current MEB endorsement uses the same concept of “non-owned auto” as an exclusion as used in Part A- Liability to exclude MEB coverage. A detailed discussion of this exclusion for liability coverage is found in Section II (B.2.a.-h.), above. The same analysis applies to medical expense benefits coverage.

*Note: The exclusion also applies to insureds who regularly **occupy** the “excluded” vehicle as a passenger.*

A. MEB Exclusion (2.d.) - Vehicles Owned by or Furnished/Available for the Regular Use of the Named Insured - Example

Harold, the named insured, insures his Cadillac with GEICO for \$5,000 in MEB. His Honda is not insured on the GEICO policy. If Harold is injured in an accident while occupying his Honda (either as a driver or a passenger, Harold is excluded from his GEICO MEB coverage under Exclusion (2.d.1.) since he was occupying a motor vehicle “owned by you” - the named insured. Same result under exclusion (2.d.2.) if Harold were occupying (either as a driver or passenger) a vehicle “furnished or available for [his] regular use.” Harold need only be “occupying” a vehicle “furnished/available for his regular use.” For example, if Harold is injured while a passenger in his regular work “car pool” driven by his neighbor every Monday - Friday, Harold would be excluded from MEB coverage under his GEICO policy.

B. MEB Exclusion (2.e.) - Vehicles Owned by or Furnished/Available for the Regular Use of a Family Member - Example

Harold’s children, Sue and Tom, live with him as members of his household. Sue does not own a car but Tom does -- a Toyota insured with Travelers. Harold is injured while a passenger in Tom’s Toyota. Is Harold excluded from MEB coverage under his GEICO policy since he was “occupying a motor vehicle (1.) owned by any family member”, his son Tom?

Answer: No. Harold is “saved” from exclusion under the “Saving the Named Insured from Exclusion” clause found in MEB Exclusion (2.e.):

However, this Exclusion (2.e.) does not apply to you [named insured and spouse].

The “Saving the Named Insured from Exclusion” clause found in MEB Exclusion (2.e.) is an expansion of MEB coverage from the prior auto policy. The prior auto policy contained the well known “exclusion e” which excluded a named insured, like Harold, from MEB coverage while occupying a family member’s car.

C. MEB Exclusion (2.e.) “Family Member” Driving Non-Owned Auto - Example

Daughter Sue is a passenger in her neighbor Fred’s Ford for the first time when hit by another car. Fred has MEB with Nationwide. Since Fred’s car is not “furnished or available for the regular use of any family member” [Harold, Sue or Tom], Sue is entitled to excess MEB coverage on her dad’s GEICO policy and her brother’s Travelers policy. [Note: An injured person is always entitled to MEB coverage insuring the vehicle she is occupying for primary MEB coverage even if it is furnished for her regular use.]

D. MEB Exclusion (2.e.) “Family Member” Passenger in Auto Furnished for Regular Use – Example

Same facts as in example C, above, except neighbor Fred is driving Sue, Tom and Harold to the Washington Nationals baseball game from Alexandria in his Ford. Fred, who has season tickets, regularly drives Sue, Tom and Harold to the game twice a week, all season, April to September. En route to the last game of the season Fred’s car is rear-ended by another driver. Fred’s carrier pays its primary MEB coverage to Sue, Tom and Harold. Are they entitled to excess MEB under Harold’s GEICO policy and under Tom’s Travelers policy – insuring Harold’s Cadillac and Tom’s Toyota, respectively?

Sue, Tom and Harold are all excluded from Harold’s MEB coverage under his GEICO policy and under Tom’s Travelers policy by exclusion (2.d.2.) since they were occupying (passengers) a vehicle [Fred’s car] which was “furnished/available for their regular use.”

Assume slightly different facts: Only Tom has been a regular passenger in Fred’s car. Sue and Harold are passengers for the very first time. Are Sue and Harold afforded MEB coverage under Tom and Harold’s policies when injured as passengers in Fred’s car? Daughter Sue would be excluded from excess MEB under Tom and Harold’s policies by exclusion (2.e.2.) since her injury was “sustained while occupying any motor vehicle [Fred’s car] which was . . . furnished/available for the regular use of any family member” [brother Tom] who was a regular passenger in Fred’s car, to the baseball game twice a week, all season. However, Harold would be entitled to excess MEB coverage under his GEICO policy under the “saving the named insured from exclusion” clause in MEB exclusion (2.e.). But the “saving” clause does not “save” Harold from exclusion from MEB coverage under his son Tom’s Travelers policy because Harold is not the named insured under Tom’s Travelers policy – only a “family member” subject to exclusion.

E. Available for Regular Use – “The Keys” – Example

Harold’s neighbor Fred has a job that requires him to be out of town six months at a time, every year. Fred, being a good neighbor, tells Harold, “Harold here is an extra set of car keys. My car is available for you to use as often as you like.” Harold is injured in an accident the very first time he drives Fred’s car. Is Harold entitled to MEB coverage under his own GEICO policy insuring his Cadillac? Answer – No. Harold is excluded under MEB exclusion (2.d.2.) which excludes

coverage while Harold was “occupying a motor vehicle [Fred’s car] . . . furnished or available for your [Harold’s] regular use.” Fred’s statement to Harold and Harold’s possession of an extra set of keys is evidence that Fred’s car was “available” for Harold’s regular use. [The same analysis applies to exclude excess liability coverage under Part A – Liability of the policy.]

VII. MEB Duties After Accident

Part E of the policy requires an insured to comply with certain duties to obtain coverage including:

1. Notice of the Accident
2. Written Proof of Claim if Required
3. Forward Legal Paper/Notices
4. Submit to Physical Examination
5. Authorize carrier to Obtain Medical Records

The carrier cannot deny MEB if the injured person fails to provide prompt notice of the accident unless the carrier can show prejudice.

This page intentionally left blank.

This page intentionally left blank.

Notes

1. The “Consent to Settle” clause, is Exclusion (A.1.), in the Virginia Personal Auto Policy UM/UIM endorsement. It provides: “We do not provide Uninsured Motorists coverage for bodily injury or property damage sustained by any insured if that insured or the legal representative settles the bodily injury or property damage claim with any person or organization who may be legally liable and such settlement prejudices our right to recover payment” (emphasis added). The Virginia Personal Auto Policy added “prejudice” to the “consent to settle” clause on July 1, 2008. Other SCC standard form UM endorsements may not have the new “prejudice” requirement in their “consent to settle” clause exclusion. For example, the SCC standard form “Commercial Auto UM Endorsement” (CA 21 21 11 02) does not. Under prior policies the insurer could deny coverage without a showing of prejudice. For example, in *Osborne v. National Union Fire Ins. Co.*, 251 Va. 53, 465 S.E.2d 835 (1996), the Virginia Supreme Court held that the primary UM carrier need not show prejudice to deny UM coverage when the plaintiff settled with the excess UM carrier first, without the primary UM carrier’s consent. The new UM endorsement would require the UM carrier in Osborne show prejudice to bar coverage. In *Virginia Farm Bur. Mut. Ins. Co. v. Gibson*, 236 Va. 433, 374 S.E.2d 58 (1988), the plaintiff sued two joint tortfeasors: an insured defendant, named Michael Buckingham, and John Doe (an unknown driver) the latter under the plaintiff’s UM coverage. The plaintiff settled with Buckingham’s liability carrier and proceeded to trial against the uninsured “John Doe.” The Supreme Court held the plaintiff violated the “consent to settle” clause in the UM endorsement by settling with Buckingham, without the consent of the plaintiff’s UM carrier. The UM carrier claimed prejudice because it lost its subrogation rights against Buckingham, and denied UM coverage. Exclusion (A.1.) in the current auto policy does not mention “underinsured motorist coverage” (UIM), only “uninsured motorist coverage.” Is this an ambiguity sufficient to prevent the “consent to settle” clause from barring UIM coverage when the plaintiff prejudicially settles with a defendant’s liability carrier without the UIM carrier’s consent?

2. See endnote 1.
3. Virginia Code §38.2-2206(A).
4. Section II, (B.2.a.) The History of “Non-Owned Auto Coverage”.
5. Virginia Code §38.2-2220

6. *Emick v. Dairyland Ins. Co.*, 519 F.2d 1317, 1327 (4th Cir. 1975) held that non-owned auto 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. 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. 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.

7. The “garage keepers” exclusion found in all garage policies, pursuant to Virginia Code §38.2-2205, applies only to liability coverage not UM/UIM coverage. *Seals v. Erie Ins. Exchange*, 277 Va. 558, 674 S.E.2d 860 (2009).

8. *Id.*

9. See endnote 1, *Virginia Farm Bur. Mut. Ins. Co. v. Gibson, supra*.

10. VA Code §38.2-2206(A) (“to pay the insured all sums he is legally entitled to recover”). The Supreme Court held, in *Aetna Cas. & Sur. Co. v. Dodson*, 235 Va. 346, 367 S.E.2d 505 (1988) that 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 Worker’s 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? No. Part F of the Virginia Personal Auto Policy entitled “General Provisions” provides: “Bankruptcy or insolvency of the insured or the insured’s estate shall not relieve us [the company] of any obligations under this policy.” 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....” An injured plaintiff can bring an uninsured motorist claim for injuries from a motor vehicle accident caused by an immune tortfeasor, such as a state, local or the federal government. 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.

In *Couplin v. Metropolitan Washington Airport Authority*, 19 Cir. CL 2003218892, 73 Va. Cir. 450 (Cir. Ct. of Fairfax County, 2007) the plaintiff sued a Metro ambulance driver for “gross” and “ordinary” negligence. He also served his UM carrier. The jury found the ambulance driver not guilty of “gross” negligence. As a result, the ambulance driver was immune from liability under Virginia law. The plaintiff then brought a motion for summary judgment, arguing that his UM carrier, State Farm, was obligated to pay the plaintiff’s UM claim since the ambulance driver was “immune” from liability for “ordinary” negligence under §38.2-2206(B)(v). The circuit court held that the UM statute mandates a valid UM claim for a plaintiff injured by a driver found only partially exempt from liability for “ordinary” negligence.

In *Johnson v. Puckett*, 23 Cir. CL08347, 80 Va. Cir. 310 (Cir. Ct. City of Roanoke, 2010) , the court held that a police officer, who was found immune while driving his police car, and the City of Roanoke, must remain parties in “name only” for the sole purpose of the plaintiff obtaining a judgment that can be enforced against its insurers [UM carrier]. Section (F) of §38.2-2206 requires the lawsuit “shall proceed against the named defendant [found immune] although any judgment obtained against an “immune defendant” shall be entered in the name of “immune defendant” and shall be enforceable against the [UM] insurer...”

11. However, on the issue of bad faith, at least three 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, Ins. 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.”

12. See endnotes 1 and 9.

13. Virginia Code §38.2-2206(G) provides for subrogation stating “Any insurer paying a claim under the [UM/UIM] endorsement or provisions required by subsection A of this section [UM statute] shall be subrogated to the rights of the insured [plaintiff] to whom the claim was paid against the person causing injury, death or damage [defendant] and that person’s [defendant’s liability] insurer.” In addition, Part F, “Our Right to Recover Payment” of the Virginia Personal Auto Policy provides: “A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person [plaintiff] shall do: 1. Whatever is necessary to enable us to exercise our rights;

and 2. Nothing after loss to prejudice them...”

14. See endnotes 1 and 9

15. *Daley-Sand v. West American Ins. Co.*, 564 A.2d 965, 971 (PA. Super. 1989) (citing cases from several jurisdictions).

16. 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 that 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. With regard to metro buses operated in Northern Virginia by the Washington Metropolitan Area Transit Authority, one U.S. District Court judge has ruled that no UM/UIM coverage is required due to the unique nature of the interstate compact creating the WMATA. *Harmon v. WMATA*, CA 95-1466, U.S. District Court, Alexandria, Cacheris, J. (1996).

17. The Virginia Personal Auto Policy UM/UIM Endorsement, “Limits of Liability” clause has a similar “set off provision” which was held void in *Nationwide Mut. Ins. Co. v. Hill*, 247 Va. 78, 439 S.E.2d 335 (1994). Section (B.1.) of the current UM/UIM “Limits of Liability” clause provides:

“Any damages payable under this coverage [UM/UIM]: shall be reduced [“set off”] by all sums paid because of bodily injury or property damage by or on behalf of persons or organizations who may be legally responsible.” (emphasis added).

Just like in *Nationwide Mut. Ins. Co. v. Hill*, supra, the current “set off provision” attempts to “subtract” all payments made under the liability portion of the policy from “all sums” the carrier owes the insured under the UM/UIM portion of the policy. As held in *Nationwide Mut. Ins. Co. v. Hill*, supra, the current “set off” provision in the UM/UIM endorsement is void.

18. Brief of Appellee Williams at 17, *Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, 677 S.E.2d 299 (2009).

19. The following cases have distinguished *Virginia Farm Bureau Mut. Ins. Co. v. Williams*, 278 Va. 75, 677 S.E.2d 299 (2009) and denied UM/UIM intrapolicy stacking of coverage on multiple vehicles on the same policy. No case other than the original Williams decision has allowed intrapolicy stacking of UM/UIM coverage. *Lloyd v. Travelers Property Casualty Insurance*

Co., 727 F.Supp. 2d 452 (E.D. Va. 2010); *Hostettler v. Auto-Owners Insurance Co.*, 744 F.Supp. 2d 543 (E.D. Va. 2010); *Trigo v. Travelers Commercial Insurance Co.*, 755 F. Supp. 2d 749 (W.D. Va. 2010); *Camper v. Erie Insurance Exchange*, Wythe County Circuit Court; Case No: CL10-133; June 9, 2011; *Melville v. Nationwide Mutual Insurance Co.*, Henrico County Circuit Court; Case No: CL10-2216; December 10, 2010; *Greer v. Augusta Mutual Insurance Co.*, Franklin County Circuit Court; Case No. CL10-4480; October 29, 2010 *Clous v. Cutright*, Norfolk Circuit Court; Case No: CL10-39; October 21, 2010; *Ferrell v. Nationwide Mutual Insurance Company, et al.*, Chesterfield County Circuit Court (Case No: CL10-1092, Sept. 13, 2010) (appeal to the Supreme Court of Virginia - denied (Record No: 102329)); *Davis v. Nationwide Mutual Insurance Co.*, Colonial Heights Circuit Court; Case No: CL10-555; Aug. 31, 2010 (appeal to the Supreme Court of Virginia - denied (Record No: 102328)); *Collier v. Erie Insurance*, Page County Circuit Court; Case No: CL10-86; Sept. 27, 2010 (appeal to the Supreme Court of Virginia - denied (Record No: 102415)); *Joyce v. Nationwide Mutual Insurance Co.*, Danville Circuit Court; Case No: CL09-833; June 25, 2010; *O'Brien v. Oatman, et al.*, City of Richmond Circuit Court; Case No: CL09-5381; June 23, 2010 (appeal to the Supreme Court of Virginia - denied (Record No: 102307)); *Patterson v. Nationwide General Insurance Co.*, Chesterfield Circuit Court; Case No: CL09-2805; April 26, 2010 (appeal to the Supreme Court of Virginia - denied (Record No: 101635)); *Salzman v. Kanchev*, Circuit Court for the City of Chesapeake; Case No: CL09-1566; February 4, 2010.

20. Even though the self-insurer provides minimum limits secondary UM coverage under Virginia Code §46.2-368(B), in UIM cases, the self-insurer is first in line to receive the “statutory credit” for the defendant’s liability coverage, if the plaintiff were occupying a self-insured vehicle. For example, assume the defendant had \$25,000 in liability coverage, and the plaintiff were occupying a self-insured vehicle. If the plaintiff had \$100,000 in UM coverage under his own personal policy with State Farm, the self-insurer would receive the defendant’s \$25,000 “statutory credit” and owe no UIM coverage while State Farm would be responsible for up to \$100,000 in UIM coverage. *Catron v. State Farm Mut. Auto. Ins. Co.*, 225 Va. 31, 496 S.E.2d 426 (1998). On the other hand, if the plaintiff were a customer test driving a dealer’s auto insured under the dealer’s commercial garage policy, the full amount of the UM/UIM coverage on the garage policy would be primary, even though for purposes of liability coverage, the garage policy would provide only minimum limits, secondary liability coverage. *Harlow v. Nationwide Ins. Co., et al. v. Morris*, 2005 WL2560226 (No. LR-2967-1, Cir. Ct. City of Richmond, 2005, Hughes J.); *Seales v. Erie Ins. Exchange*, 674 S.E.2d 860 (2009).

21. See Section IV, Maximizing Recovery with Underinsured Motorist Coverage, Part III, “Resident of the Household.”

22. Medical bills which are “written off” by a healthcare provider pursuant to a negotiated contract with a health insurance company or by Medicaid or Medicare, are not “incurred” for purposes of MEB coverage. Virginia Code §38.1-2201 (A)(3). However, the full amount of the bill is “incurred” in tort cases under the “collateral source rule.” *Acuar v. Letourneau*, 260 Va. 180, 531 S.E.2d 316 (2000); *Radvany v. Davis*, 262 Va. 308, 551 S.E.2d 347 (2001); Virginia Code §38.1-2201(A)(3) defines when an expense is “incurred” for purposes of MEB coverage as:

“3. An expense described in subdivision 1 shall be deemed to have been incurred:

- a. If the insured is directly responsible for payment of the expense;
 - b. If the expense is paid by (i) a health care insurer pursuant to a negotiated contract with the health care provider or (ii) Medicaid or Medicare, where the actual payment with reference to the medical bill rendered by the provider is less than or equal to the provider's usual and customary fee, in the amount of the actual payment; however, if the insured is required to make a payment in addition to the actual payment by the health care insurer or Medicaid or Medicare, the amount shall be increased by the payment made by the insured;
 - c. If no medical bill is rendered or specific charge made by a health care provider to the insured, an insurer [HMO, like Kaiser], or any other person, in the amount of the usual and customary fee charged in that community for the service rendered.”
23. Virginia Code §38.2-2201(A) and (B).
24. Virginia Code §38.2-2211 and §38.2-2216

This page intentionally left blank.

This page intentionally left blank.

Appendix I

Proving Plaintiff's Intent to be a Resident of Named Insured's Household - A Checklist

An injured person can maximize his uninsured/underinsured motorist recovery if he can prove he is a resident relative of the named insured's household—the gateway to first class coverage.

The vast majority of cases involve a relative (1) residing at the named insured's home at the time of the accident, after being away from home; or (2) residing elsewhere at the time of the accident. "Home" refers to the named insured's household.

- 1. Plaintiff has his/her own room at home vs. sleeps on the sofa.
- 2. Plaintiff has clothes remaining at home.
- 3. Plaintiff has important personal belongings at home. (list all)
- 4. Plaintiff uses home appliances, i.e., washer/dryer and household sundries.
- 5. Plaintiff has keys and full use of the home without asking permission.
- 6. Plaintiff uses home mailing address on:
 - A. His/Her Drivers License
 - B. Motor Vehicle Registration

- C. Bank Checks
 - D. Police Report - After Accident
 - E. Hospital Records - Accident Treatment
 - F. Billing Statements
 - G. Tax Returns
 - H. Dependant on Named Insured's Return
 - I. Files In-State Tax Return
- 7. Receives mail at home.
 - 8. Registered to vote - home address.
 - 9. Named insured at home provides financial support.
 - 10. Divorced parent (named insured) at home has legal custody of plaintiff.
 - 11. If away at out-of-state college and plaintiff pays "in-state tuition" - explain.
 - 12. Plaintiff receives public assistance benefits at home address.
 - 13. Events after accident: recuperated at home.
 - 14. Plaintiff is away from home for a limited, temporary time with the intent to return home upon completion of a specific event, i.e., graduation, internship, job assignment, birth of a child.
 - 15. Plaintiff is experimenting with independence having his/her own temporary residence while keeping named insured's home as "home."
 - A. Short-term lease, room mates
 - B. Named insured guarantor on lease
 - C. Plaintiff uses second-hand furniture
 - D. Named insured reimburses plaintiff for rent, utilities, phone, living expenses
 - E. Plaintiff on named insured's health plan
 - F. Plaintiff does not have his/her own auto insurance policy
 - G. See other applicable items on checklist
 - 16. If at home, plaintiff intends to remain at home indefinitely - not in transition to another

residence.

- 17. Describe how often plaintiff is at home. If away a lot - explain, e.g., long haul trucker - spends free time at home.
- 18. Describe plaintiff's household tasks while at home:
 - A. Cooking
 - B. Cleaning and maintenance of house
 - C. Yard work
 - D. Purchase groceries
 - E. Helps pay household bills
 - F. Other
- 19. Describe plaintiff's participation in household group activities and recreational activities with household members:
 - A. Eats meals together with household members
 - B. Recreation activities and sporting events together
 - C. Attend church and community events together
 - D. Watch favorite television shows and videos together
 - E. Go to movie theatres together
 - F. Go to favorite restaurants together
 - G. Go shopping together
 - H. Attend family events together
- 20. Interview household members, neighbors and the mail carrier.