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## STACKED RECOVERY UNDER THE UNINSURED MOTORIST ENDORSEMENT OF THE AUTOMOBILE LIABILITY POLICY

### I. INTRODUCTION

Automobile accidents involving uninsured and negligent motorists have posed many difficult problems to both the insurance industry and states desirous of providing monetary compensation to those sustaining injuries on the nation's highways.<sup>1</sup> In response to the injustice resulting when a non-negligent motorist's claims go uncompensated, all states have now enacted so-called financial responsibility laws.<sup>2</sup> Generally these laws carry a sanction of suspension of the driver's license and vehicle registration of any driver involved in an accident if he is unable to provide proof of "financial responsibility"—i.e., if he is incapable of showing that he is insured to the statutory minimum<sup>3</sup> or of posting bond as required by the Commissioner of Motor Vehicles.<sup>4</sup> The Indiana statute provides a typical sanction:

If the person required to furnish proof of financial responsibility in the future or if the person required to furnish such

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1. Estimates in 1968 indicated that at least 4% of the drivers in every state are uninsured, and in some states this figure may have been as high as 60%. Thus, at that time, there were at least 5 million uninsured motorists in this country who were involved in a proportionate share of automobile accidents. See A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* v (1969) [hereinafter cited as WIDISS].

2. See Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present and Future*, 8 BUFFALO L. REV. 215, 218 n.8 (1959). Connecticut was the first state to adopt such legislation by enacting a "Financial Responsibility Law." Law of January 1, 1926, ch. 183, [1925] Conn. Public Acts 2958 (repealed 1927).

3. At the present time, the common statutory minimum for bodily injury is \$15,000 per person and \$30,000 per accident (15/30) liability limit. See, e.g., IND. ANN. STAT. § 47-1057 (Cum. Supp. 1973), IND. CODE § 9-2-1-15 (1971). Proof that the negligent motorist has obtained the minimum liability vehicle policy with a bona fide insurer can be shown by filing with the commissioner a written certificate of insurance issued by the insurance company certifying that the insured is covered by a policy meeting the minimum requirements of the state statutes. See, e.g., IND. ANN. STAT. § 47-1057 (Cum. Supp. 1973), IND. CODE § 9-2-1-17 (1971).

4. The amount of bond or security required is usually within the discretion of the commissioner sufficient to indemnify the injured party. Most states have a minimum threshold of \$100, and a maximum governed by the amount set in that state for the minimum liability insurance coverage. See, e.g., IND. ANN. STAT. § 47-1047 (Cum. Supp. 1973), IND. CODE § 9-2-1-4 (1971).

security pursuant to the provisions. . . , neglects or refuses to comply with such requirements, the commissioner shall thereupon suspend his current driving license and the registration of every motor vehicle owned by him.<sup>5</sup>

But it soon became obvious that most of these statutes were deficient in a fundamental respect. The negligent and usually judgment-proof uninsured motorist was not susceptible to the statutory sanctions until *after* he was involved in an injury-causing accident.<sup>6</sup> As a result, many serious bodily injuries still went uncompensated since the uninsured driver still had the "first bite."<sup>7</sup> To bridge this remaining gap in the protection of the insured motorist, almost all states<sup>8</sup> have now enacted statutes that make it mandatory for every motor vehicle liability policy to incorporate an uninsured motorist (UM) endorsement.<sup>9</sup>

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5. IND. ANN. STAT. § 47-104(c) (Cum. Supp. 1973), IND. CODE § 9-2-1-4(c) (1971). As for nonresident drivers, most states give the commissioner power to revoke or suspend the license of the motorist, or he may forbid the operation of a motor vehicle within the state. See, e.g., IND. ANN. STAT. § 47-1057 (Cum. Supp. 1973), IND. CODE § 9-2-1-12 (1971).

6. Compulsory insurance for all motorists would obviously be a solution, but most states were very reluctant to take this drastic step which would generate its own difficulties. See Lemmon, *Compulsory Insurance—A Toxic Brew*, 406 INS. L.J. 695 (1956). Furthermore, efforts to revoke or suspend the license of an uninsured motorist involved in an accident regardless of whether he was at fault proved unsuccessful. The Supreme Court has held that a state may not deprive a financially irresponsible driver of his operators license until there is a "reasonable determination of the question whether there is the reasonable possibility of a judgment being rendered against him as a result of the accident." *Bell v. Burson*, 402 U.S. 535, 542 (1971).

7. Notman, *A Decennial Study of the Uninsured Motorist Endorsement*, 43 NOTRE DAME LAW. 5 (1968). The author points out the important fact that these laws actually only require proof of *future* financial responsibility. See also PRETZEL, UNINSURED MOTORISTS 4 (1972) [hereinafter cited as PRETZEL].

8. The only two exceptions are Maryland and New Jersey. These two states do, however, provide a substitute—an "unsatisfied judgment fund." The fund may be raised from gasoline taxes, automobile registration fees or other sources which tend to spread the risk of loss over the entire motoring public. When a loss is sustained and the negligent motorist is uninsured, the state in effect becomes the insurer and pays the meritorious claims to the innocent but injured motorists. Three other states have adopted this fund concept also (Michigan, New York and North Dakota), but these three states use it only to supplement the uninsured motorist endorsement which is also required. See PRETZEL, *supra* note 7, at 163-64.

9. The uninsured motorist endorsement was originally proposed by the insurance industry itself to both forestall compulsory liability insurance and to satisfy a general demand for such a coverage. In 1957, New Hampshire became the first state to require uninsured motorist coverage in all liability policies insuring any motor vehicles used or garaged within that state. See WIDISS, *supra* note 1, at 15. Indiana has a typical uninsured motorist statute and it provides:

The standard UM endorsement provides the insured with rights against his own insurer co-extensive with those he would have had against the uninsured tortfeasor.<sup>10</sup> In event of an accident caused by an uninsured driver, this endorsement protects the purchaser and others defined by the policy by placing the insured in the position he would have been had the other motorist carried the minimum coverage required by the state financial responsibility laws.<sup>11</sup> Such coverage is made available to the insured as an endorsement entitled either "Uninsured Motorist Coverage" or "Family Protection Insurance." Generally an additional premium is charged.<sup>12</sup>

It must be stressed that the UM provision does not insure those covered under the policy for the total amount of the judgment or claim the insured obtains from the financially irresponsible driver.

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No automobile liability or motor vehicle liability policy or insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in [the financial responsibility law, IND. ANN. STAT. § 47-1055 (Cum. Supp. 1973), IND. CODE § 9-2-1-15 (1971)], as amended heretofore and hereinafter, under policy provisions approved by the Commissioner of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

Provided, That the named insured shall have the right to reject such coverage (in writing) and Provided further, That unless the named insured thereafter requests such coverage, in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage, in connection with a policy previously issued to him by the same insurer.

IND. ANN. STAT. § 39-4310 (1969), IND. CODE § 27-7-5-1 (1969).

10. This, of course, puts the insurer in the unique position of "attacking" his own insurer, so this statement must be qualified in at least one important respect. The standard UM endorsement contains an arbitration clause which provides the insured the method for proceeding against his insurer to recover his claims under the UM provision in event of a disagreement. Much controversy has resulted over this arbitration clause, and some states have recently invalidated it. This issue, however, goes beyond the scope of the discussion here, and for a complete treatment of the topic see Hapner, *A Dozen Problems in Arbitration of Uninsured Motorist Claims Under the American Arbitration Rules*, 34 INS. COUNSEL J. 92 (1967). See also Christensen, *Uninsured Motorist Arbitration*, 1966 INSURANCE ADJUSTER 41.

11. This particular definition is somewhat in dispute, but is nevertheless the accepted definition of purpose of uninsured motorist coverage set out by the leading authorities. See 12 COUCH ON INSURANCE 2d § 45: 623 at 570 (1964); WIDISS, *supra* note 1, at 127.

12. Depending on the amount of coverage, the premiums range from \$2 to \$13 per year. The average rate countrywide is \$4. WIDISS, *supra* note 1, at 15 n.36.

The standard UM endorsement and the uninsured motorist statutes afford protection only to certain basic limits, the most common being the minimum liability limit required by the state's financial responsibility laws.<sup>13</sup> Thus, if the insured's claim or judgment against the uninsured motorist is greater than the limits set out by the policy, he remains to that extent uncompensated. In those instances where liability limiting provisions within the UM endorsement are applicable, considerable litigation has resulted.<sup>14</sup> Although the disputes have been vigorous and the holdings diverse, the cases show that several factors must necessarily be entertained: UM statutory construction, rules of interpretation unique to insurance contracts and public policy considerations.

One instance of such litigation results when the insured has more than one policy or uninsured motorist coverage available to him, and it is in this context that "stacking" has occurred.<sup>15</sup> Stacking, the attempt to recover under multiple UM endorsements, consists of placing one coverage upon another and recovering from each successively until all damages are indemnified<sup>16</sup> or until the aggregate policy limits are exhausted. The specific aspects of the problem to be considered in this note can be illustrated by the following two hypotheticals.

*Hypothetical One:* P is injured by a negligent uninsured motorist. P owns several automobiles which are insured under *separate* policies containing similar UM coverage. At the time of the accident P is

(a) occupying host H's vehicle which is insured by a policy issued to H, and that policy contains a UM

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13. Most of the uninsured motorists statutes require that coverage be provided for bodily injury or death in amounts set forth in the financial responsibility laws of the particular state. Insurance companies are extremely reluctant to provide more extensive coverage even when requested by the insured. *Id.* at 136-37.

14. For a general survey of the litigation that has resulted from the various provision limits of the uninsured motorist endorsement see Notman, *A Decennial Study of the Uninsured Motorist Endorsement*, 43 NOTRE DAME LAW. 5 (1968).

15. "Stacking" should be distinguished from permissible "layering." Layering occurs when the insured purchases excess coverage in order to effect a premium saving. In such a case the excess coverage is intended and paid for. The "primary" policy amount is regarded by the excess carrier as a deductible sum. See PRETZEL, *supra* note 7, at 88 n.16.

16. Although the "stacking" of coverages has been permitted, no court has allowed recovery beyond the claimant's damages—i.e., a "double recovery" is forbidden in all cases. See, e.g., *Ruder v. West American Ins. Co.*, \_\_\_ Ind. App. \_\_\_, 280 N.E.2d 68 (1972).

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endorsement covering all occupants of that vehicle;  
or  
(b) either a pedestrian or occupying one of his own vehicles.

*Hypothetical Two:* P is struck and injured by a negligent uninsured motorist. P owns several automobiles, all of which are insured under *one* policy and the UM endorsement shows

- (a) separate and equal premiums listed for each vehicle; or
- (b) separate but decreased premiums for the second and third vehicles; or
- (c) only one premium shown for all vehicles listed in that policy.

This note will summarize and critically examine the various rationales invoked to permit stacking under the several coverage variations outlined above. Included is an analysis of the arguments for permitting stacking in the multiple policy/multiple vehicle situation illustrated in hypothetical one. It is suggested that this type of stacking, which could be called *inter-policy* stacking, be distinguished from the single policy/multiple vehicle instance represented by hypothetical two. In addition, the latter *intra-policy* phenomenon is examined in order to determine the feasibility of permitting stacking in such instances. A large number of courts that have faced the issue now permit stacking.<sup>17</sup> These courts and most authorities see this as a desirable result in that the insured receiving a "stacked" recovery is now afforded broader UM protection. This note will suggest, however, that the stacking concept contains some serious theoretical difficulties and that perhaps the recent extension of stacking to the intra-policy situation will effectuate the very inequities that were thought to be obviated.

## II. INTER-POLICY STACKING: CONFLICT BETWEEN THE UM STATUTE AND THE "EXCESS-ESCAPE" PARAGRAPH

### A. A Contrast: *Indiana and Illinois Decisions*

As illustrated in hypothetical one, inter-policy stacking becomes possible when the injured insured has more than one policy

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17. See Comment, 17 S.D.L. Rev. 152 (1972). The author asserts that the jurisdictions permitting stacking are now in the "recent majority."

available to him. The insurance companies have anticipated such situations, and certain liability limiting provisions have been inserted in the automobile liability policy. One such provision, called the "other insurance" clause, was designed specifically to restrict the insured to recovery under only one policy.<sup>18</sup> The first paragraph of that clause, dubbed the "excess-escape" paragraph, applies when the insured is an occupant of an unowned insured automobile, as shown in hypothetical 1(a). That paragraph provides:

With respect to bodily injury to an insured while occupying a highway vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance, and this insurance shall then apply only in amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.<sup>19</sup>

In the context of hypothetical 1(a), this paragraph provides that the policy applicable to the auto in which P is riding (i.e., H's policy) is "primary" insurance, and P's policy is "secondary" coverage.<sup>20</sup> Thus the paragraph limits P's insurer to coverage only to the amount by which P's UM endorsement limit exceeds the liability limit of H's UM endorsement. If, for example, H's policy granted UM coverage of \$10,000 per person, and P's policy \$15,000 per person, then P's insurer would be liable for only \$5,000—the "excess" over the other insurance. But if both policies have identical UM coverage limits, then P's insurer would "escape" liability entirely, and P would have to look exclusively to his host's policy for recovery.

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18. It should be noted that the "other insurance" clause applies also to the regular liability provisions within the automobile liability policy, other than the uninsured motorist endorsement to be discussed here. For such an expanded treatment of the "other insurance" clause see Comment, *Double Coverage in Automobile Insurance Policies—The Problem of "Other Insurance" Clauses*, 47 TUL. L. REV. 1039 (1973). See also Note, *Automobile Liability Insurance—Effect of Double Coverage*, 58 MINN. L. REV. 838 (1954); Comment, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319 (1965).

19. 1966 Standard Form Uninsured Motorist Endorsement, Part VI: Additional Conditions (E: Other Insurance).

20. The insurance industry has universally agreed with respect to uninsured motorist coverage that the policy covering the vehicle which the insured is occupying will always afford the "primary" coverage.

A recent majority of state courts, including Indiana, have declared this excess-escape paragraph to be void, and have allowed the insured primary recovery under both his host's policy and his own.<sup>21</sup> Other courts considering the paragraph have held it to be an unambiguous and valid liability limiting provision.<sup>22</sup> Although the decisions of several jurisdictions will be mentioned for purposes of discussion, primary emphasis will be focused upon Indiana and Illinois decisions which competently represent the majority and minority views respectively on inter-policy stacking.

A case of first impression in Indiana, *Simpson v. State Farm Mutual Insurance Company*,<sup>23</sup> dealt specifically with the excess-escape paragraph of the "other insurance" clause. Pamela Simpson, a minor, was an insured under two policies issued to her mother by State Farm. Pamela was injured while riding as a passenger in an auto not owned by her mother. The car was struck by a negligent uninsured motorist and Pamela received injuries in excess of \$30,000. Another insurance company which afforded UM coverage with respect to passengers in the vehicle she was occupying, paid to Pamela its full policy limits of \$10,000. The question before the court was whether Pamela could stack her two policies (which also had limits of \$10,000 each) for a total recovery of \$30,000. State Farm asserted the policy defense that because its limits were identical to the limit of the policy issued to Pamela's host, the excess-escape paragraph excused it from any liability.<sup>24</sup> The company

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21. A listing of the leading and most frequently cited cases in this burgeoning area will suffice. *Am. Mut. Ins. Co. v. Romero*, 428 F.2d 870 (10th Cir. 1970); *Safeco Ins. Co. of America v. Robey*, 399 F.2d 330 (8th Cir. 1968); *Markham v. State Farm Mut. Auto. Ins. Co.*, 326 F. Supp. 39 (W.D. Okla. 1971); *Kackman v. Continental Ins. Co.*, 319 F. Supp. 540 (D. Alaska 1970); *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970); *Safeco Ins. Co. of America v. Jones*, 286 Ala. 606, 243 So. 2d 736 (1970); *Patton v. Safeco Ins. Co. of America*, — Ind. App. —, 267 N.E.2d 859 (1971); *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So.2d 456 (Miss. 1971); *Protective Fire & Cas. Co. v. Woten*, 186 Neb. 121, 181 N.W.2d 835 (1970); *Curran v. State Auto. Mut. Ins. Co.*, 25 Ohio St. 2d 33, 266 N.E.2d 566 (1971); *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389, 241 A.2d 112 (1968).

22. *Transp. Ins. Co. v. Wade*, 106 Ariz. 269, 275 P.2d 253 (1970); *Harris v. Southern Farm Bureau Cas. Co.*, 448 S.W.2d 652 (Ark. 1970); *Morelock v. Millers' Mut. Ins. Ass'n of Ill.*, 49 Ill. 2d 234, 274 N.E.2d 1 (1971); *Putnam v. New Amsterdam Cas. Co.*, 48 Ill. 2d 97, 269 N.E.2d 97 (1970); *Cohen v. Liberty Mut. Ins. Co.*, 35 App. Div. 2d 719, 315 N.Y.S.2d 265 (1970); *Lyon v. Hartford Accident and Indem. Co.*, 25 Utah 2d 311, 480 P.2d 739 (1971).

23. 318 F. Supp. 1152 (S.D. Ind. 1970).

24. *Id.* at 1154.



argued that it was the intent of the Indiana uninsured motorist statute to afford protection in such amount as would have been afforded had the uninsured motorist owned a liability policy containing the minimum limits.<sup>25</sup> And since Pamela had already recovered from one source, a further limitation of liability would not violate the purpose of the statute.

In a memorandum decision, Judge S. Hugh Dillion held the excess-escape paragraph in conflict with the Indiana UM statute and therefore void.<sup>26</sup> He concluded that State Farm's argument was unacceptable for three reasons: (1) the UM statute set out only a minimum and not a maximum limit of recovery; (2) the statute simply demands that *each* policy must provide UM protection; and (3) since a premium was paid with respect to each policy, it would be unconscionable to allow the insurer to deny recovery under both policies.<sup>27</sup>

The only other reported case in point in Indiana is *Patton v. Saveco Insurance Company of North America*.<sup>28</sup> In this case, the Pattons were passengers in another's vehicle which was struck by an uninsured motorist. Nine persons, including the Pattons, were either injured or killed. The automobile in which they were riding was insured under a policy issued to the host driver, and it provided for UM coverage up to \$20,000 for each accident. The Pattons sought compensation under that policy. From the total payment of \$20,000 distributed among the nine persons, they received a settlement of \$7,000. The Pattons then sought to recover the balance of their damages under their own policy issued by Saveco, which provided for identical UM coverage. Saveco denied any liability, pointing to the standard excess-escape paragraph in the Patton's policy.<sup>29</sup>

The Indiana appellate court rejected Saveco's argument that coverage under one policy was all that the statute required. The court held that the excess-escape provision was an attempt by the insurer to limit the application of the UM statute and was, therefore, void and unenforceable.<sup>30</sup> The court pointed out that if the

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25. *Id.* at 1155.

26. *Id.* at 1157.

27. *Id.* at 1156.

28. \_\_\_ Ind. App. \_\_\_, 267 N.E.2d 859 (1971).

29. *Id.* at \_\_\_, 267 N.E.2d at 862.

30. *Id.* at \_\_\_, 267 N.E.2d at 864.

legislature had intended to limit the recovery to the limits of one policy even though other policies were available, then the statute would have been directed at the injured parties and not at each policy of insurance.<sup>31</sup>

In contrast with this position, three Illinois decisions have held that the excess-escape paragraph was a valid limitation of liability not in derogation of the Illinois UM statute.<sup>32</sup> In *Morelock v. Millers Mutual Insurance Association of Illinois*,<sup>33</sup> the Illinois Supreme Court found that the same paragraph did not frustrate the legislative purpose and hence was not violative of public policy. The court argued that if the excess-escape paragraph were held to be invalid, the paradoxical result would be that an injured claimant would be better off being struck by an uninsured motorist than he would be had he been struck by a motorist owning the minimum liability insurance.<sup>34</sup> The court interpreted the legislative intent to require no more than that compensation be available to at least the same extent coverage is available for injury by a negligent tortfeasor who is insured in compliance with the state's minimum liability limits.<sup>35</sup>

#### *B. Summary of Arguments Invoked to Invalidate the Excess-Escape Paragraph*

In the decisions voiding this provision, the courts have used several rationales. Each of those arguments is summarized below, and an attempt will be made to show that these arguments are unsound and not harmonious with the basic purpose of the uninsured motorist statutes. Although the recent trend has been to invalidate the paragraph, it is suggested that the minority view represented by the Illinois decisions reflects the better reasoning.

##### 1. Unconscionability

Some courts have used the argument that the excess-escape paragraph is unconscionable on the grounds that the insurer collects

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31. *Id.* at \_\_\_\_, 267 N.E.2d at 862-64.

32. *Morelock v. Millers' Mut. Ins. Ass'n of Ill.*, 49 Ill. 2d 234, 274 N.E.2d 1 (1971); *Putnam v. New Amsterdam Cas. Co.*, 48 Ill. 2d 71, 269 N.E.2d 97 (1970); *Pestka v. Safeway Ins. Co.*, 11 Ill. App. 3d 837, 289 N.E.2d 270 (1973).

33. 49 Ill. 2d 234, 274 N.E.2d 1 (1971).

34. *Id.* at 236, 274 N.E.2d at 3.

35. *Id.*

a premium and then denies liability.<sup>36</sup> One such court stated the "unconscionability" argument in the following manner:

To allow the [insurer] to reduce its liability is a windfall to the [insurer]. The plaintiffs have paid . . . for coverage, and should have the benefit of it if necessary.<sup>37</sup>

Similarly, Judge Dillion in the *Simpson* case argued:

The premium paid with respect to each policy of insurance necessarily includes an amount in payment of the uninsured motorist coverage; it would be unconscionable to permit the insurers to collect a premium . . . and then avoid payment of a loss because of language of limitation devised by themselves.<sup>38</sup>

This unconscionability argument is anomalous in several respects. First, in the situation where, as in *Patton*, the insurer owns only one vehicle, the argument is prima facie inapplicable.<sup>39</sup> This is because the premium charged and collected by the company was undoubtedly actuarially based on the assumption that the excess-escape clause was valid.<sup>40</sup> The premium paid by the insured afforded him a UM endorsement containing an excess-escape paragraph and that is what he received. The relatively inexpensive premium was clearly a valid quid pro quo for the coverage received, and it is indeed difficult to see any unconscionability involved.

36. See, e.g., *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970); *Protective Fire and Cas. Co. v. Woten*, 186 Neb. 212, 215, 181 N.W.2d 835, 838 (1970); *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389, 396, 241 A.2d 112, 115 (1968).

37. *Protective Fire and Cas. Co. v. Woten*, 186 Neb. 212, 215, 181 N.W.2d 835, 838 (1971).

38. 318 F. Supp. at 1156.

39. The *Patton* court, although invalidating the excess-escape paragraph, refused to use the "unconscionability" argument.

The argument with regard to the collection of premiums for uninsured motorist protection while limiting liability via the "excess-escape" clause had some validity in *Simpson* because State Farm could have issued one rather than two policies. However, such an argument adds nothing to the instant case because the premium charged by Safeco's one policy was, without a doubt, computed on the assumption that the "excess-escape" clause was valid and enforceable. It can hardly be contended that the rate charged by Safeco would be the same without the "excess-escape" clause.

— Ind. App. at —, 267 N.E.2d at 863.

40. *Id.*

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Secondly, in the situation where the insurer has issued several policies and charged a premium for each one, the argument is at first glance applicable.<sup>41</sup> Such an instance occurred in the *Simpson* case and the court declared:

In the present case [the insurer] could have written one policy covering both of Mrs. Simpson's automobiles, and thus cut its uninsured motorist coverage in half, had it desired to do so. In collecting two uninsured motorist premiums it took the accompanying gamble.<sup>42</sup>

Under close scrutiny, however, this argument proves to be a specious one. The reasoning overlooks the fact that the scope of the insurer's risk increases with the purchase of the second automobile. Even though the first UM endorsement purchased covers the "named insured," his spouse, and all household relatives of each, *independent* of the owned automobile,<sup>43</sup> it is nevertheless the case that their exposure to the uninsured motorist is increased by the purchase and operation of subsequent automobiles. Moreover, the

41. Such a situation is illustrated in hypothetical one.

42. 318 F. Supp. at 1152.

43. The standard uninsured motorist endorsement sets out three classes of persons who are insured under the varying conditions by this coverage. These classes are defined in the policy as follows:

Each of the following is an insured under this insurance to the extent set forth below:

- (a) the named insured and any designated insured and, while residents of the same household, the spouse and relatives of either;
- (b) any other person while occupying an insured highway vehicle, and;
- (c) any person, with respect to damages he is entitled to recover because of bodily injury to which this insurance applies sustained by an insured under (a) or (b) above.

1966 Standard Form, Part II: Persons Insured. Coverage for those insureds defined by clause (a) exists at all times. They are covered when they are operating or are passengers in any vehicle, including an owned uninsured vehicle. See *State Farm Mut. Auto. Ins. Co. v. Robertson*, \_\_\_ Ind. App. \_\_\_, 295 N.E.2d 626 (1973). The class defined by clause (a) is also afforded protection when its members are pedestrians or engaged in any other activity. See *Motorist Mut. Ins. Co. v. Bittler*, 235 N.E.2d 745 (Ohio 1968).

Clause (b) covers any other person who is permissively occupying the vehicle named in the policy. Thus, the class (a) insureds are protected *independent* of the insured vehicle, while in contrast, the class (b) insureds are protected only by virtue of their occupancy in the insured vehicle.

Clause (c) gives derivative coverage to individuals other than those sustaining the physical injury—the parents, guardians, executors, and administrators of the dead or injured person covered under clause (a) or (b). Thus these persons defined by clause (c) may recover if they have incurred medical expenses on behalf of the injured person, or suffer damages because of loss of wages, wrongful death, etc. *Widiss*, *supra* note 1, at 36.

nonhousehold occupants of each automobile are also covered under the UM endorsement of the policies covering each vehicle. Their coverage is dependent upon occupancy of that insured car, and the potential membership of this second class of insureds increases as each vehicle is insured.<sup>44</sup> The "accompanying gamble" which the insurer takes is for this increased risk—not for multiple coverage which the *Simpson* court awarded the claimant. Thus, it seems unreasonable to hold that the insurer is entitled to only one premium regardless of the number of vehicles the "named insured" owns and insures.<sup>45</sup>

## 2. Principle of Adequate Indemnification

A second rationale which the courts and writer have utilized to invalidate the excess-escape paragraph could be called the "adequate indemnification" argument. One authority opting for the majority view states:

[T]here is confrontation between, on the one hand, the principle of adequate indemnification, and on the other hand, clear and unambiguous policy language which in some way restricts the coverage provided.

. . . .

In this situation, the Other Insurance clause precludes recovery under the insured's own policy, even though primary insurance is either completely exhausted by the other claimants or pro rated among the claimants so that none of them is adequately indemnified.<sup>46</sup>

Similarly, the Nebraska Supreme Court held in *Protective Fire and Casualty v. Woten*:

It is obvious to us that it is undesirable to permit an insurer to satisfy a statutory requirement by a policy provision that reduces or eliminates liability in those instances where its insured is not fully indemnified.<sup>47</sup>

Parallel to this "adequate indemnification" argument is the argu-

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44. *Id.*

45. The precise scope of this increased exposure or risk is to be considered below. See note 90 *infra* and accompanying text.

46. WIDISS, *supra* note 1, at 106.

47. 181 N.W.2d at 838.

ment that the UM statutes demand that the insured should be paid "all sums which he shall be legally entitled to recover as damages."<sup>48</sup> And since the excess-escape paragraph limits recovery to only such sum as exceeds other insurance, it places a restriction upon the requirement of the statute and is therefore void.

But these arguments prove far too much. If the claimant should always be assured "adequate indemnification" and must be paid "all sums he is legally entitled to recover," then it follows that *all* liability limits should be ignored and the claimant's award should then be governed only by the amount of his damages. But if policy limits are to be followed, then the excess-escape paragraph should be valid also, for the policy is likewise limited by that unambiguous provision.

### 3. Plain Meaning Rationale

A third and perhaps most persuasive rationale could be entitled the "plain meaning" argument. This view points out that the typical UM statute simply mandates that "No automobile liability . . . policy . . . shall be delivered or issued . . . in this state unless coverage is provided therein . . . in limits for bodily injury or death set forth in [the financial responsibility act]."<sup>49</sup> This view argues that it is the clear meaning of the statute that each and every policy provide the insured with the minimum limits regardless of whether other insurance is available to him. An example of such a viewpoint is as follows:

We find no words in the statute indicating that one policy is all that the statute requires. The statute requiring coverage does not say how much uninsured motorist coverage shall be provided for each accident . . . . It requires *each policy* to provide the minimum coverage, and the insurer's "other insurance" clause is in direct conflict with the statute and is, therefore, void.<sup>50</sup>

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48. See, e.g., *Safeco Ins. Co. of America v. Roby*, 399 F.2d 330, 336 (8th Cir. 1968); *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970); *Safeco Ins. Co. of America v. Jones*, 243 So. 2d 736, 742 (Ala. 1970); *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389, 395, 241 A.2d 112, 115 (1968).

49. See, e.g., the Indiana Uninsured Motorist statute at note 9 *supra*.

50. *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456 (Miss. 1971). Another noteworthy case using this argument is *Meridian Mut. Ins. Co. v. Siddons*, 451 S.W.2d 831 (Ky. 1970). Even though the insurer in this case had issued two policies, only one premium was charged and collected. The court nevertheless held that the claimant could recover under both policies, even under the one for which he had paid no premium.

The Indiana court in *Patton* also adopted this "plain meaning" rationale and declared:

If the legislature had intended to limit recovery of persons injured by an uninsured motorist to the limits of one policy, even though such persons are covered by more than one policy, [the UM statute] would be directed at the injured parties and not at each policy of insurance.<sup>51</sup>

This overly simplistic rule of construction, however, reflects a nearsighted interpretation of the broad intent and language of the statute. The thrust of the statute is not directed at each policy of insurance, but rather, as the statute itself declares, "the protection of persons insured . . . who are legally entitled to recover damages from the owners and operators of the uninsured motor vehicles. . . ."<sup>52</sup> This broad purpose is further evidenced by the fact that most UM statutes refer to the financial responsibility laws to set the minimum liability limits.<sup>53</sup> The obvious close relationship between the two statutes seems to show that the purpose is to afford the non-negligent insured protection not less than the minimum limits set out by the legislature. The important fact would seem to be that, under one policy or two, the insured be protected against the uninsured motorist to the extent that the statute prescribes.

Furthermore, the argument that the statute demands aggregate recovery under all the policies appears to be an incongruous requirement when the insurer could simply issue only *one* policy covering all the vehicles owned by the named insured, collect only one premium, and thus supposedly "reduce" its coverage to only one allowa-

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Meridian undertakes to distinguish the cases we have relied upon to support our principle holding herein, on the ground that they gave emphasis to the fact that the insured in those cases had paid more than one premium, where as in the instant case [claimant] had paid only one premium. We do not find any merit in that distinction because Meridian, being required by statute to offer uninsured motorist coverage with each policy, was entitled to collect two premiums from the [claimant].

451 S.W.2d at 835. *But see* *Morelock v. Millers' Mutual Ins. Ass'n of Ill.*, 49 Ill. 2d 234, 274 N.E.2d 1 (1971); *Lyon v. Hartford Accident and Indem. Co.*, 25 Utah 2d 311, 480 P.2d 739 (1971).

51. 267 N.E.2d at 864.

52. IND. ANN. STAT. § 39-4310 (1969), IND. CODE § 27-7-5-1 (1969). *See* note 9 *supra*.

53. For an expanded treatment of the origin and history of the uninsured motorists statutes and the financial responsibility laws see Murphy and Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L. J. 700 (1959).

ble recovery. Since this reduction is obviously permissible,<sup>54</sup> the argument that *each* policy issued to the insured covering each vehicle must afford him primary coverage is a meaningless demand. The only possible reason that the statute requires that each policy “provides” UM coverage is to eliminate the possibility where the insured has purchased several policies and only one of them contains an UM endorsement. Thus, if that particular policy were ever cancelled, the insured would be without uninsured motorist coverage—at least until it was added to one of his remaining policies. But that possibility, which would frustrate the purpose of the statute, is eliminated by UM coverage for each policy based on the validity of the excess-escape paragraph. This assures the insured coverage even though one or more of the policies were cancelled—and the insured at no time is charged for or receives less coverage than what he has paid for or what the UM statute broadly requires.

### III. INTER-POLICY STACKING: THE PRO-RATA PARAGRAPH INVALIDATED

A second situation involving the inter-policy stacking issue arises when an insured is injured by a negligent uninsured motorist while he is *not* occupying another’s insured vehicle, but nevertheless is covered by two or more policies (as illustrated in hypothetical 1(b)). In these instances the “pro-rata” paragraph of the “other insurance” clause is applicable. That provision reads:

Except as provided in the foregoing [excess-escape] paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and other such insurance.<sup>55</sup>

This paragraph provides that when the insured has “other similar insurance available,” the amount of recovery is not to exceed the highest of the limits of the several insurance policies. Furthermore, the insurance company will be liable only for a proportionate share

54. See note 42 *supra* and accompanying text.

55. 1966 Standard Form, Part VI: Additional Conditions (E. Other Insurance).



of the insured's claim. Stated another way, this paragraph holds that the damages will be "prorated" among the policies available to the injured insured. The effect of this provision is similar to that of the excess-escape paragraph—the claimant's recovery is restricted to the liability limit fixed by the maximum limit of the highest of the several policies.<sup>56</sup>

In recent years many of the jurisdictions considering the "other insurance" clause have likewise invalidated this paragraph, invoking essentially the same arguments used to void the excess-escape provision.<sup>57</sup> The most common argument used to strike down this liability limiting provision is a combination of the "adequate indemnification" and "unconscionability" rationales.

When there are in fact two separate policies, with two separate uninsured motorist endorsements, it seems justifiable as in the case of the [excess-escape] paragraph to invalidate the limitation upon liability . . . . Of course, there is an advantage to the insured, or as some insurers have put it, a "windfall" to the insured. By the same token, allowing the insurance company to reduce its liability is a "windfall" to the company. In these cases, where two or more endorsements have been separately purchased and paid for, there is the same justification for allowing the claimant to obtain complete indemnification as exists with respect to the excess-escape clause. . . .<sup>58</sup>

The fallacy of this reasoning has been treated earlier,<sup>59</sup> but one

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56. This can be illustrated by using hypothetical 1(b). Suppose P obtains two policies from two different companies, and each has an uninsured motorist policy limit of \$15,000 per person. Even if P is injured to the extent of \$30,000, the pro-rata paragraph restricts his total recovery to \$15,000—\$7,500 from each of the two policies. The same result would occur if both policies were issued by the same company, for then the claimant would likewise theoretically recover only \$7,500 from each policy.

57. *Woolston v. State Farm Mut. Ins. Co.*, 306 F. Supp. 738 (W.D. Ark. 1969); *State Farm Mut. Auto. Ins. Co. v. Murphy*, 266 Ga. 710, 177 S.E.2d 257 (1970); *Graham v. American Cas. Co.*, 261 La. 75, 254 So. 2d 22 (1972); *Boettner v. State Farm Mut. Ins. Co.*, 388 Mich. 482, 201 N.W.2d 795 (1972); *Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 155 S.E.2d 128 (1965). *Contra*, *Maryland Cas. Co. v. Howe*, 213 A.2d 608 (Del. Super. 1970); *Graham v. Am. Gas Co. of Reading, Pa.*, 244 So. 2d 272 (Pa. 1971); *State Farm Mut. Auto. Ins. Co. v. Bafus*, 77 Wash. 2d 720, 466 P.2d 159 (1970).

58. *Widiss*, *supra* note 1, at 115.

59. See notes 36 through 48 *supra* and accompanying text.

similar counter-argument should be mentioned at this point. The type of argument represented in the above quote is misleading in that it implies that the insurer collects a premium for a certain stated coverage and then surreptitiously “reduces” that coverage by the insertion of the “other insurance” clause. Theoretically, however, this analysis is both improper and unjustified. The “other insurance” clause is not a “reduction” of coverage—it is a limitation of liability. The insured has paid a premium for a policy with unambiguous liability limits of which the “other insurance” clause is an integral part, and to afford the insured a recovery that is double the policy limits is to create a new contract between the parties. No court has asserted that the premiums collected were not based on the validity of the policy liability limits, so it is indeed difficult to see that the limitation of recovery to one policy is unconscionable.

*Some Inconsistencies*

At least one court has invalidated the excess-escape clause, but yet held the pro-rata paragraph to be effective. *Nationwide Mutual Insurance Company v. Ealy*,<sup>60</sup> decided by the Pennsylvania Supreme Court, held the pro-rata provision valid and denied the type of stacking illustrated in hypothetical 1(b). Four years earlier, however, the same court had declared the excess-escape paragraph invalid in *Harleysville Mutual Casualty Company v. Blumling*.<sup>61</sup> The claimant in *Blumling* had recovered \$10,000 under the UM provision in his host’s policy. The court allowed the claimant to recover under his own policy also, stating:

[Insurer] has received its premium attributable to this coverage, which the statute requires it to furnish. We will not permit it to avoid its statutorily imposed liability by its unilateral insertion of a liability limiting clause repugnant to the statute.

. . . . .  
We hold . . . that where the loss exceeds the limits of one policy, the *insured may proceed under other available policies up to their individual limits* . . . .<sup>62</sup>

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60. 221 Pa. Super. 138, 289 A.2d 113 (1972).  
61. 429 Pa. 389, 241 A.2d 112 (1968).  
62. 241 A.2d at 115 (emphasis supplied).

It should be noted in passing that the *Blumling* decision soon became a leading case for courts invalidating *both* paragraphs of the "other insurance" clause.<sup>63</sup> And the "plain meaning" and "unconscionability" arguments present in the opinion appear to be the typical rationales used.

Yet, when confronted with a bona fide pro-rata situation in *Ealy*, the same court would not allow the claimant to stack his five policies for which he had paid separate premiums. The same court that decided *Blumling* balked when faced with this multiple policy situation and permitted the insured recovery under only one of his five policies.<sup>64</sup> Obviously compromising their original position in *Blumling* where the insured was allowed to "proceed under other available policies,"<sup>65</sup> the *Ealy* court declared that the thrust of the UM statute was merely to assure that "the innocent victims are not left completely uncompensated"<sup>66</sup> and that the insurance companies are required only to provide "at least minimal coverage."<sup>67</sup> The insured was not allowed to stack because he had "contractually agreed not to cumulate the coverages on the five vehicles."<sup>68</sup>

But it is clear that if the *Ealy* court found the insured's contractual agreement not to stack pursuant to the pro-rata paragraph to have been proper, then this is *a fortiori* true of the excess-escape paragraph in *Blumling*.<sup>69</sup> The court struggled to distinguish *Blumling*:

The repugnant clause in *Blumling* provided the insured with less than the minimum uninsured motorist coverage required by the statute . . . . We see nothing repugnant in the [pro-rata paragraph] in question. Under each policy the insured is given the full protection required in the act. There is nothing in the policy which gives the insured less insurance than is required as there was in *Blumling* . . . .<sup>70</sup>

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63. See Annot., 28 A.L.R.3d 551 (1969).

64. 221 Pa. Super. at 140, 289 A.2d at 115.

65. See note 62 *supra* and accompanying text.

66. 221 Pa. Super. at 140, 289 A.2d at 115.

67. *Id.*

68. *Id.*

69. If the pro-rata paragraph is a valid limitation because it was contractually agreed upon, it seems clear that this argument likewise holds true for the excess-escape paragraph which also limits the insurer's liability.

70. 221 Pa. Super. at 141, 289 A.2d at 116.

It should be clear from a comparison of the above quotes from *Blumling* and *Ealy* that this court seemingly wants to have it both ways on the stacking issue. Apparently sensing the *reductio ad absurdum* that results when inter-policy stacking is permitted,<sup>71</sup> the court attempted to draw a fundamental distinction between the pro-rata and excess-escape paragraphs. No such effectual distinction exists, however,<sup>72</sup> and it is suggested that such an eclectic approach evidences the inherent weakness of the rationales invoked to permit inter-policy stacking. The *Ealy* case is crucial in that it illustrates the absurd coverage extensions that will inevitably result when the stacking concept is carried to its logical extreme. The *Ealy* case is also illustrative of the present confusion among the courts that have permitted inter-policy stacking irrespective of the underlying difficulties with that position outlined above.

#### IV. INTRA-POLICY STACKING

In recent years the "stacking" concept has been extended to a *single* automobile liability policy covering more than one vehicle.<sup>73</sup>

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71. If stacking were allowed in *Ealy*, the insurer would have been liable up to \$.1 million (5 x 10/20 limits) on each automobile for each accident.

72. Suppose, for example, that the claimant in *Ealy* had been riding in an *unowned* insured vehicle. Then only the excess-escape paragraph would have been in issue, as in *Blumling*. Since the court had declared that paragraph invalid in *Blumling*, supposedly the claimant could then stack all five of his policies, in addition to the recovery under his host's policy. Thus there seems to be no effectual distinction between *Blumling* (excess-escape) and *Ealy* (pro-rata). No other court or authority could be found that makes such a fundamental distinction between the two paragraphs of the "other insurance" clause.

73. *Dunn v. Meridian Mut. Ins. Co.*, Civil No. 71 H 329 (N.D. Ind. Nov. 16, 1972); *Tucker v. Government Employees Ins. Co.*, 288 So. 2d 238 (Fla. 1973); *Jefferies v. Stewart*, \_\_\_ Ind. App. \_\_\_, 309 N.E.2d 448 (1974); *Rosson v. Allied Mut. Ins. Co.*, 203 Kan. 795, 457 P.2d 42 (1969); *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 457 P.2d 42 (1969); *Employer's Liability Assur. Corp., Ltd. v. Jackson*, 270 So. 2d 792 (Miss. 1971); *Hartford Accid. and Indem. Co. v. Turner*, 498 S.W.2d 8 (Tex. App. 1973); *Cunningham v. Ins. Co. of North America*, 213 Va. 72, 189 S.E.2d 832 (1972); *Lipscome v. Security Ins. Co. of Hartford*, 213 Va. 81, 189 S.E.2d 320 (1972). *Contra*, *Allstate Ins. Co. v. Schmitka*, 12 Cal. App. 3d 59, 90 Cal. Rptr. 399 (1970); *Ringenburger v. General Accident & Life Assur. Corp., Ltd.*, 214 So.2d 376 (Fla. App. 1968); *Doerpinghaus v. Allstate Ins. Co.*, 296 Ga. App. 627, 185 S.E.2d 615 (1971); *Glidden v. Farmers Auto. Ins. Ass'n*, 11 Ill. App. 3d 81, 296 N.E.2d 84 (1973); *Otto v. Allstate Ins. Co.*, 2 Ill. App. 3d 66, 275 N.E.2d 766 (1971); *Arminski v. United States Fidelity*, 23 Mich. App. 352, 178 N.W.2d 497 (1970); *Allstate Ins. Co. v. McHugh*, 124 N.J. Super. 105, 304 A.2d 777 (1973); *Polland v. Allstate Ins. Co.*, 25 App. Div. 2d 16, 266 N.Y.S.2d 286 (1966); *Kennedy v. American Hardware Mut. Ins. Co.*, 255 Ore. 425, 467 P.2d 963 (1970); *Castle v. United Pacific Ins. Group*, 252 Ore. 44, 448 P.2d 357 (1968); *Nationwide Mut. Ins. Co. v. Blair*, 186 S.E.2d 410 (S.C. 1972); *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793 (Tex. 1972). The jurisdictions permitting intra-policy stacking are clearly in the minority.

The claimant insured under the provisions of the policy is permitted to aggregate the limits of the units of coverage in that policy to satisfy a claim against the insurer. This enables a recovery of a sum equal to the stated liability limits multiplied by the number of vehicles covered under that policy. Several of the courts favoring inter-policy stacking have simply expanded their multiple recovery rationale to incorporate the single policy/multiple vehicle instance.

[W]e perceive no reason why a different rule should apply merely because the insurance coverage afforded on different vehicles is combined in one instead of two policies. This is particularly true when each of the insured vehicles is separately described, the coverage granted under the policy is separately listed for each vehicle, and a separate premium charged . . . to each of the described vehicles . . . .<sup>74</sup>

It is suggested, however, that several distinctions must be drawn between the two instances, and that the rationale for allowing intra-policy stacking is even less persuasive than permitting the former multiple policy type.

First, those jurisdictions that have invoked the "plain meaning" rationale permitting inter-policy stacking have seemingly closed the door to stacking of the one policy/multiple vehicle variety.<sup>75</sup> That reasoning held that the "thrust" of the UM statutes was aimed at each policy and not at each vehicle. Therefore, if the company issues only *one* policy it would appear that the courts using that rationale would have to be satisfied and hold that only one coverage afforded under a *single* policy is harmonious with the UM statutes. Thus the most persuasive rationale for allowing inter-policy stacking is unavailable here to the proponents of intra-policy pyramiding.

Another distinction exists in that the supposedly invalid "other insurance" clause is not in issue here—there is only one policy involved so that provision is inapplicable.<sup>76</sup> Indeed, numerous jurisdictions which have invalidated the "other insurance" clause and allowed inter-policy stacking, have strongly refused to permit stack-

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74. *Sellers v. Governmental Employees Ins. Co.*, 214 So. 2d 879, 882 (Fla. App. 1968).

75. See notes 49 through 53 *supra* and accompanying text.

76. *Otto v. Allstate Ins. Co.*, 2 Ill. App. 3d 66, 71, 275 N.E.2d 766, 771 (1971).

ing within a *single* policy.<sup>77</sup> These courts have generally asserted that multiple policy stacking carries with it no logical or practical implication that “internal” stacking should be permitted, perhaps feeling that the stacking concept has been carried too far. Notwithstanding these disparities, several jurisdictions have held that intra-policy stacking is permissible up to the extent of the claimant’s damages. Again, several unconvincing arguments have been entertained.

### A. *Rationales for Allowing Intra-policy Stacking*

#### 1. One Policy Equals Several Contracts

Some claimants have successfully argued that a common provision in the auto liability policy has the effect of making the one policy covering several vehicles actually several contracts.<sup>78</sup> The relevant provision, called the “separability” clause, reads typically as follows: “When two or more automobiles are insured by this policy, the terms of this policy shall apply separately to each . . . .”<sup>79</sup> The claimants have argued that the effect of this clause is that the insurer has in fact issued separate contracts covering each of the vehicles.<sup>80</sup> The thrust of this argument is that the two “separate” contracts should then be given the same treatment as in the inter-policy situation. In the past this reasoning has been accepted by only a very few courts, and recently an overwhelming number of cases have held that this provision means nothing more than to render the policy applicable to whichever insured vehicle was involved in an accident.<sup>81</sup>

#### 2. Ambiguity Construed Against the Insurer

Although the “other insurance” clause is not involved in the

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77. *Compare* *Arminski v. United States Fidelity*, 23 Mich. App. 352, 178 N.W.2d 497 (1970); *Talbot v. State Farm Mut. Auto. Ins. Co.*, 291 So. 2d 701 (Miss. 1974); *Allstate Ins. Co. v. McHugh*, 124 N.J. Super. 105, 304 A.2d 777 (1973); *Kennedy v. American Hardware Mut. Ins. Co.*, 255 Ore. 425, 467 P.2d 963 (1970) *with* respectively *Blakeslee v. Farm Bureau Mut. Ins. Co.*, \_\_\_\_ Mich. App. \_\_\_\_, 188 N.W.2d 216 (1971); *Harthcock v. State Farm Mut. Ins. Co.*, 248 So. 2d 456 (Miss. 1971); *McFarland v. Motor Club of America Ins. Co.*, 120 N.J. Super. 554, 295 A.2d 375 (1972); *Smith v. Pacific Auto Ins. Co.*, 240 Ore. 167, 400 P.2d 512 (1965).

78. *See, e.g., Jefferies v. Stewart*, \_\_\_\_ Ind. App. \_\_\_\_, 309 N.E.2d 448 (1974).

79. *Annot.*, 37 A.L.R.3d 1263, 1264 (1971).

80. *Id.* at 1263-67.

81. *Id.* at 1266.

intra-policy situation, insurance companies have defined the liability limits applicable to the single policy instance also. The relevant provision is the "Limits of Liability" clause which provides:

The limit of liability stated in the declarations (coverages) as applicable to "each person" is the limit of the company's liability for all damages because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting "each person," the limit of liability stated in the declarations (coverages) as applicable to "each accident" is the total limit of the company's liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident.<sup>82</sup>

The most common rationale among those jurisdiction which permit intra-policy stacking is that the combination of the limits of liability clause and the payment of separate premiums creates an ambiguity which must be strictly construed against the insurer.<sup>83</sup>

In an unreported Indiana decision, *Dunn v. Meridian Mutual Insurance Company*,<sup>84</sup> the court found such ambiguity and allowed the insured to stack within his policy. The claimant, Mr. Dunn, was riding as a guest in another's insured vehicle when he was injured by an uninsured motorist. The vehicle in which he was riding was covered by a policy issued to Dunn's host by Meridian, and the policy also insured two other vehicles owned by the host driver. Dunn's policy, issued by Emasco Insurance Company, also contained UM coverage on two vehicles owned by Dunn. The Meridian policy showed only one premium listed for all the host's vehicles, and the court held that the language of that policy was not so ambiguous as to be susceptible of more than one reasonable interpretation.<sup>85</sup> Dunn was allowed only one recovery under that policy—the coverage applicable to the vehicle in which he was riding. The Emasco policy, however, which listed separate premiums for each automobile, was found to be ambiguous and Dunn was permit-

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82. 1966 Standard Form Uninsured Motorist Endorsement, Part III: Limits of Liability.

83. *Dunn v. Meridian Mut. Ins. Co.*, Civil No. 71 H 329 (N.D. Ind., Nov. 16, 1972); *Jefferies v. Stewart*, — Ind. App. —, 309 N.E.2d 448 (1974); *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 790, 457 P.2d 34, 41 (1969).

84. Civil No. 71 H 329 (N.D. Ind., Nov. 16, 1972).

85. *Id.* at 8.

ted to stack the "coverages" applicable to each vehicle.<sup>86</sup>

[I]t is not entirely clear that the term "coverages" [in the Limits of Liability clause] relates only to entirely distinct coverages of which uninsured motorist coverage is one, rather than separate coverages upon each vehicle for uninsured motorist protection. The Emasco policy uses the plural "coverages" and in addition lists separate premiums for the two cars covered by the policy. The uncertainty thus created probably results because the form used was not designed for a kind of coverage not tied to a particular automobile.<sup>87</sup>

This does not appear to be entirely true, however, for the coverage afforded the second class of insureds (nonhousehold occupants of the named insured's automobiles) is tied to the particular automobile in which they are riding. That class of insureds is not covered when occupying an uninsured vehicle owned by the named insured, even though the named insured, his spouse, and household relatives of each are covered also in this situation. Therefore, in light of the fact that the coverage is dependent on a particular automobile, the ambiguity found appears to be somewhat strained.<sup>88</sup>

### 3. Unconscionability

The unconscionability argument is invoked to sustain intra-policy stacking also, and the basic tenets are equivalent to those used in the multiple policy situation. A concise example of the argument is quoted here for purposes of discussion.

If, in paying one premium for a single automobile, coverage is purchased while occupying the insured automobile along with coverage not tied to that automobile, the question might well be asked, What coverage is intended by pay-

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86. *Id.*

87. *Id.* at 7.

88. See note 43 *supra*. The host's Meridian policy also used the plural "coverages." Thus the only distinction between the two policies was that the Emasco policy had listed several premiums in contrast with the one premium charged by Meridian. It is interesting to note, however, that the court made no mention of the actual cost of the single premium. It might well have been equal to the sum of the separate premiums charged, for example, in the Emasco policy. Thus the distinction drawn between the two policies appears to be very attenuated.



ment of an equal premium for a second automobile?

When we pay a double premium we expect double coverage. This is certainly not unreasonable, but is in accord with general principles of indemnity that amounts of premiums are based on amounts of liability. Insurer argues that what plaintiff is seeking amounts to pyramiding coverages but nothing is said about pyramiding the premiums which effectuate the coverages.<sup>89</sup>

The fallacy of this argument is readily demonstrable. It is true that the first class of insureds is afforded coverage by the payment of the first premium, and that coverage is independent of the owned automobile. Notwithstanding this, the addition of the second and subsequent automobiles does increase the insurer's risk in two respects:

(1) Even though the first class of insureds is afforded UM coverage while they are pedestrians or guests in another's vehicle, it is clear that a family operating a fleet of automobiles simultaneously has a much greater chance of a member being struck and injured by an uninsured motorist than if that family owned and operated only one vehicle. The father commuting home from work in his compact, the mother going to her bridge club in her sedan, and the teenage son driving his new convertible—the entire risk and exposure is much more than when the family owned only the stationwagon.

(2) There is also an increased risk with regard to the second class of insureds—the non-household passengers in each of the vehicles. Thus it is conceivable that the father could be participating in a car pool, the mother picking up her bridge partners, and the son showing his recently acquired vehicle to a carload of friends. *All* the passengers in *all* the vehicles are covered.

This dual aspect of the increased risk provides the answer to the question of what coverage is intended by the payment of a second

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89. *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 791-92, 457 P.2d 34, 41, 42 (1969). *See also* *Cunningham v. Ins. Co. of North America*, 213 Va. 72, 189 S.E.2d 832 (1972).

premium for a second automobile. When one pays a double premium he expects double coverage, but *not when the risk has correspondingly increased*. It is extremely difficult to see how the courts favoring intra-policy stacking can demand that the insurer can collect only one \$4 premium regardless of whether the family owns one vehicle or five. The simple argument that the UM endorsement follows the individual rather than the vehicle and therefore if a premium is collected for separate vehicles the insureds are entitled to multiple coverage, ignores the expansion of risk to both classes of insureds resulting from operation of subsequent vehicles.<sup>90</sup>

*B. Form of Premiums Listed: Equal, Decreased, or Single*

In policies covering multiple vehicles, some insurers have listed separate and equal premiums for each auto, while others have listed one price for the first vehicle and a decreased premium for the remaining autos. Several courts have found a decreased premium on the second and subsequent vehicles to be a relevant factor in denying stacking.<sup>91</sup> Other courts, however, have held the decreased premiums to be irrelevant,<sup>92</sup> and have permitted intra-policy stacking irrespective of this fact.<sup>93</sup> There is considerable confusion among the

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90. See *Allstate Ins. Co. v. McHugh*, 124 N.J. Super. 105, 106, 304 A.2d 777, 778 (1973). There is, however, increased risk incurred by the carrier when insuring separate motor vehicles under Coverage S [the UM endorsement]. It is conceivable that McHugh could be operating one vehicle with multiple passengers therein, his wife operating the second vehicle with multiple passengers therein. All the passengers in both vehicles are covered under Coverage S. This increased risk provides sufficient consideration for charging a second premium at the same rate for additional cars on the same policy.

See also Note, *Limitations of Liability Within Uninsured Motorist Insurance Policies and Their Validity Under Mandatory Statutes*, 52 NEB. L.R. 158, 177 n.80 (1972).

91. See, e.g., *Otto v. Allstate Ins. Co.*, 2 Ill. App. 3d 66, 275 N.E.2d 766, 770 (1971) (decreased premium—stacking denied); *Ringenburger v. General Accident Fire and Life Assur. Corp.*, 214 So. 2d 376, 377 (Fla. 1968) (decreased premium—stacking denied). *Accord*, *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 795, 457 P.2d 42 (1968) (equal premiums—stacking permitted).

92. Most multiple vehicle policies with decreased premiums list a stable decreased premium after the second vehicle; that is, the premium charged for the third and subsequent vehicles usually remains constant.

93. See *Phoenix Ins. Co. v. Stuart*, 270 So. 2d 792 (Ala. 1972) (decreased premium—stacking permitted); *Employer's Liability Assur. Corp., Ltd. v. Jackson*, 270 So. 2d 806 (Ala. 1972) (decreased premium—stacking permitted); *Hartford Accid. and Indem. Co. v. Turner*, 498 S.W.2d 8 (Tex. App. 1973) (decreased premium—stacking permitted). The *Jackson* court stated unequivocally:

We feel that the insured was insured as to two policies whether the policies were

courts regarding this aspect of the UM endorsement format, and it is difficult to estimate what effect the unequal premiums will have on the courts facing stacking in the future. It would seem that if these courts permit stacking on the grounds that the insureds are completely covered by the payment of the first premium, then it is only logically consistent for them to hold that *any* additional premium for whatever amount is a “windfall” to the insurer.<sup>94</sup>

This raises the further question of whether the payment of a *single* premium, even though increased with the addition of each vehicle to the policy, would be the solution.<sup>95</sup> Obviously it would help eliminate the supposed ambiguity that some courts have found within the “limits of liability” clause,<sup>96</sup> but it is contended that this would not satisfy the unconscionability argument. Though there would be only one premium charged, this premium would nevertheless reflect an increase with every vehicle added to the policy. Thus the single premium would merely disguise the additional charge (windfall) for each vehicle, and presumably the proponents of intra-policy stacking would allow aggregate recovery here also. Thus, in order to argue intra-policy stacking cogently, it must be held that the insurer can charge only one *initial* and stable premium for UM coverage even if additional vehicles are added to the policy.

The unavoidable consequence of this is that the universally charged premium will be computed or averaged on the insurer's risk with respect to all of its policies, including those covering numerous vehicles.<sup>97</sup> The effect of this forced alternative can only lead to ine-

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separate or whether both vehicles were listed in the same policy, and we fail to see any distinction in the fact that the premium for the uninsured motorist coverage was one dollar less for the second vehicle.

270 So. 2d at 810.

94. The basic argument for permitting stacking firmly holds that the *first* premium affords the named insured UM coverage irrespective of which (owned or unowned) automobile he occupies. Thus *any* additional premium charge for subsequent vehicles would appear, by this reasoning, to be redundant.

95. For example, a \$4 premium charged for a policy covering one vehicle, an \$8 premium for a policy covering two vehicles, a \$12 premium for three vehicles, etc.

96. See note 85 *supra* and accompanying text.

97. In light of the increased risk, this increased charge will certainly be justified. See note 89 *supra* and accompanying text. See also, WIDISS, *supra* note 1, at 112.

At the same time, it seems eminently justifiable to argue that the [liability limitations] should be modified to extend this coverage uniformly. To the extent that risk is increased, companies can seek an increase in their premiums.

quitable and undesirable results. First, the impecunious student or low-income family who can afford only one automobile will be required to pay that increased actuarially averaged premium in order to obtain the minimum UM coverage. With one increased premium being charged to every insured regardless of the number of vehicles owned by that insured, it is evident that the one-car family will in effect be paying partly for the UM coverage of the more affluent multiple-vehicle family. Second, since most UM statutes permit the insured to reject in writing the UM endorsement, it is possible that the increased premium will be an incentive to waive that coverage.<sup>98</sup>

### *C. Intra-policy Stacking of the Host's Policy*

In the multiple policy situation (illustrated in hypothetical 1(a)) where the passenger can recover under the host's policy covering occupants of that insured vehicle, it is readily apparent that the passenger could not recover under other policies issued to the host insuring other owned vehicles. This is because the coverage afforded the non-household passengers arises only because they are covered by the one policy covering the vehicle which they are occupying—no other policy is available.<sup>99</sup> Thus an occupant insured could never receive a stacked recovery from his host's insurer, even though the host owned several other policies covering his other vehicles.

However, under the recent expansion of the stacking concept to the intra-policy situation, it could conceivably be argued that the occupant insured could receive a stacked recovery from the host's insurer. Indeed, it could be contended that once a person becomes an "insured" he is entitled to *all* the coverage provided by the policy available to him, regardless of whether he becomes insured by virtue of being a named insured or by virtue of being a non-household occupant of the insured vehicle. For if the named insured is entitled to a stacked recovery under the one multiple vehicle policy, then it would follow that his spouse, household relatives and other occupants of the vehicle who are likewise covered by that one policy should receive similar protection.

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98. The uninsured motorist statutes in many states give the insured the right to reject the UM endorsement. Many such states require the rejection in writing. See, e.g., the Indiana uninsured motorist statute at note 9 *supra*.

99. See note 43 *supra*.

In a recent Indiana decision, *Dunn v. Meridian Mutual Insurance Company*,<sup>100</sup> the passenger insured attempted to obtain a stacked recovery under his host's policy which insured three vehicles. The court refused the stacking of the host's policy, but only because one premium had been charged under that policy.<sup>101</sup> The claimant was permitted, however, to stack within his own policy since multiple premiums were charged and paid.<sup>102</sup> Thus the only distinction between the two policies was the number of premiums charged, and it is clear from the language of the opinion that had the host's policy contained multiple premiums, that policy would have been susceptible to a stacked recovery also.<sup>103</sup>

In *Cunningham v. Insurance Company of North America*,<sup>104</sup> the Virginia Supreme Court faced a situation where the host *had* paid separate and equal premiums for the several vehicles covered under the policy. The claimant in this case was confronted with what could be considered the ultimate in intra-policy stacking possibilities. Mr. Cunningham was an employee of the Virginia Department of Highways and was riding in a Department vehicle when it was struck by a negligent uninsured motorist. Maryland Casualty Company (Maryland) had issued to the Department a single automobile liability policy which afforded UM coverage to 4,368 state-owned vehicles. Separate and equal premiums of \$4 were listed for each vehicle. Cunningham was also covered by a policy which afforded

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100. Civil No. 71 H 329 (N.D. Ind., Nov. 16, 1972).

101. *Id.* at 12.

102. *Id.* at 14.

103. The memorandum decision at no time mentions any conceptual difficulty with the passenger obtaining stacked recovery under his host's policy. In fact, it is clear that the only factor that "saved" the host's insurer was that it had listed only one premium. There are, however, two serious difficulties with the non-household passenger attempting to stack within his host's policy. First of all, the unconscionability argument invoked for stacking is not relevant to the non-household class (b) insured. The class (b) insured has paid no premium whatsoever—unconscionability with respect to premium payment is not germane to his status.

Secondly, in light of the recent holding in *Jefferies v. Stewart*, \_\_\_ Ind. App. \_\_\_, 309 N.E.2d 448 (1974), which held that the separability clause renders the single policy to be many "policies," it would be extremely difficult for the class (b) insured to argue that he should recover under all the "policies." Indeed, if there are several "policies," then he could recover under only one of them—the one applicable to the automobile in which he was a passenger. He is clearly not an insured under the other "policies" since he was not occupying the vehicles covered by those "policies."

104. 213 Va. 72, 189 S.E.2d 832 (1972).

UM coverage on three automobiles owned by him, and a premium of \$4 was listed for each of his vehicles. Cunningham received a judgment of \$40,000 from the uninsured motorist and attempted to obtain a stacked recovery under the Maryland policy.<sup>105</sup>

Maryland admitted it provided primary coverage, but argued that the liability limit of the policy was \$15,000 and that the remaining portion should be paid by Cunningham's insurer. Maryland pointed out that to hold otherwise would mean that for the premium of \$4 on each vehicle insured under its policy, each of the 4,368 vehicles would have had a bodily injury limit for each person of \$65,520,000 and total liability limits for each accident of \$131,040,000. Cunningham's insurer, Insurance Company of North America (INA), similarly argued that if stacking were permitted within its policy, it would be liable up to \$90,000 for each accident involving Cunningham.<sup>106</sup>

The court held that Cunningham could stack within his INA policy on the familiar ground that "where he has paid separate premiums he is entitled to separate coverages."<sup>107</sup> But he was allowed only one coverage under the Maryland policy. The court looked to the distinction between the two classes of insureds, and since Cunningham was not a "named insured" under the Department's policy he was entitled to a single recovery only.

A . . . distinction between the type of coverage provided a named insured in a policy and other insureds exists because those of the second class did not buy the policy. He did not pay Maryland one premium or any multiple premiums. This was done by the named insured [Department] to provide the minimum coverage required by the laws of Virginia. The Department did not intend to provide multiple coverage to every permissive user of its vehicles. It purchased the broad coverage for the Department and the statutory coverage for the permissive occupants of its vehicles.<sup>108</sup>

The *Cunningham* case is crucial with respect to the stacking

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105. 213 Va. at 74, 189 S.E.2d at 834.

106. *Id.*

107. *Id.* at 76, 189 S.E.2d at 836.

108. *Id.* at 75, 189 S.E.2d at 835.

concept, for the court was directly confronted with the absurd coverage extensions which unavoidably occur when stacking is permitted. The court attempted to avoid these implications by distinguishing between the two types of coverages purchased under the Maryland policy, but this distinction is fraught with difficulties. If the Department "did not intend" to provide multiple coverage to the occupants of its vehicles, the questions might be asked: What if the Department *had intended* to provide multiple coverage? Would Maryland then be required to provide a stacked recovery? Furthermore, it is not at all clear what "broad coverage" was purchased for the Department apart from the "statutory coverage" for the occupants. Certainly the Department itself could never receive any bodily injuries, so it appears that actually the named insured (the Department) was afforded no coverage at all in consideration for all the premiums. The Department consists of its employees who occupy its vehicles, and it is meaningless to say that the "Department" is granted any coverage, "broad" or otherwise.

This important point leads to the fundamental error in the court's reasoning. Since the \$4 premiums collected under the Department's policy afforded protection for *only* the second class of insureds of each of the vehicles (i.e., the Department employees), and since the court held that it was proper for Maryland to pay only one coverage, then it seems clear that this also applies to Cunningham's INA policy. For if it was proper for Maryland to collect a \$4 premium on each car for only the second class of insureds, then it was likewise proper for INA to collect a \$4 premium on each vehicle when its policy grants coverage to the second class insured occupants of Cunningham's several automobiles. The court's reasoning that "where he has paid additional premiums he is entitled to additional coverages"<sup>109</sup> is, therefore, both unfounded and logically inconsistent with its holding regarding the Maryland policy.<sup>110</sup>

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109. *Id.* at 76, 189 S.E.2d at 836.

110. The class (a) insureds (named insured, spouse, and household relatives of each) was an empty set in the instant case, for the Department of Motor Vehicles itself could never sustain any bodily injuries. Thus, each of the \$4 premiums paid on the Department vehicles was consideration only for the class (b) insureds (permissive occupants). Since the court did not allow stacked recovery under the Department policy, it follows that the \$4 was valid consideration for coverage only for the class (b) insureds.

However, the court did allow Cunningham to stack within his own policy because he had paid separate premiums. But for what were those premiums paid? It seems clear that the

The *Cunningham* case is discussed at length here to illustrate the present conceptual confusion that has resulted in the aftermath of stacked uninsured motorist recovery. The attempted differentiation between the two paragraphs of the "other insurance" clause<sup>111</sup> and the abortive distinction between equal, decreased, and single premiums discussed earlier,<sup>112</sup> likewise illustrate the compounded disparities that now exist among the jurisdictions that permit inter-policy and intra-policy stacking. And such confusion will only be perpetuated if these jurisdictions continue to insist upon stacked recovery in spite of the inconsistencies and inequities which have been generated.

## V. CONCLUSION

Mandatory uninsured motorist coverage has been enacted in an effort to fill the gap in the protection afforded the public by existing financial responsibility laws—the hazard created by the motorist who has not obtained minimum liability insurance. The stacking of these UM coverages is understandable from the point of view that it is perhaps a zealous effort by the courts to provide the insured as much protection as possible. Nevertheless, it has been shown that the stacking concept is theoretically unfounded and can only lead to certain absurd coverage extensions. More importantly, such zealotry enlarging the insurer's coverage will undoubtedly result in the charging of one increased premium to all insureds irrespective of the number of vehicles covered under the policies. This would be inequitable because the insured who owns only one vehicle would then be paying for more than the single coverage he is receiving, since that expensive premium will be actuarially averaged to cover all policies, including those insuring multiple vehicles where the risk to the insurer has increased considerably.

Moreover, the ostensible purpose of the UM endorsement is to provide relatively inexpensive protection to all insureds at least to the minimum liability limits. The swollen premium cost can only frustrate that basic intention. In addition, the costly premium

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additional \$4 premium on his second and third vehicles could be proper consideration *merely* for the class (b) permissive occupants of his vehicles, as was the court's holding regarding the Department's policy.

111. See note 72 *supra* and accompanying text.

112. See notes 91 through 96 *supra* and accompanying text.



might force the more parsimonious insureds to reject that coverage, and the whole purpose behind the UM statutes would perhaps be unnecessarily subverted.

It is apparent, then, that the quixotic rush by some courts to the aid of the unfortunate injured insured will soon ironically culminate in the injustices and confusion that were thought to be dissolved. It is suggested that the jurisdictions facing the stacking issue in the future seriously consider the long-range effects of stacking multiple coverages, instead of merely following the courts that have invalidated the several liability limiting provisions within the UM endorsement of the automobile liability policy.