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Stacking of Uninsured Motorist Coverage

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COMMENTS

STACKING OF UNINSURED MOTORIST COVERAGE

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I. INTRODUCTION

Most states prohibit the issuance of automobile liability insurance unless coverage is also provided for injury incurred due to the acts of an operator of an uninsured motor vehicle.¹ While most states make uninsured motorist (UM) insurance mandatory, a few states make UM coverage optional. UM coverage provides the insured with the same protection that would be available had the insured been in an accident with a vehicle that maintained proper liability insurance.² UM protection obligates the insurer to pay for damages incurred through the operation, ownership, or maintenance of a motor vehicle.³ With UM protection, the victim recovers from his own insurance company.

The amount of coverage statutorily required generally mirrors that required for bodily injury or death. Missouri follows the majority of states by mandating that UM protection be provided in all automobile liability policies issued in the state.⁴ The current minimum is twenty-five thousand dollars for

1. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 3.1, at 127 (1969); Comment, *Insurance Law: The Kansas Uninsured Motorist Statute—"Other Insurance Clauses" and the Problem of the "Unnamed Insured,"* 16 WASHBURN L.J. 764 (1977); see AM. JUR. 2D DESK BOOK, 319-27 (1979) (chart analyzing major auto compensation laws indicating states with mandatory uninsured motorist coverage).

2. *Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 76, 269 N.E.2d 97, 106 (1970); AUTO. L. REP. (CCH) ¶ 2000.

3. AUTO. L. REP. (CCH) ¶ 2000.

4. MO. REV. STAT. § 379.203 (Supp. 1983) provides:

No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any 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 not less than the limits for bodily injury or death set forth

bodily injury or death of one person in any one accident and up to fifty thousand dollars per accident ("25/50" coverage).⁵

An insured often is involved in an accident with an uninsured motorist where more than one policy will be applicable. For instance, an insured may be a passenger involved in an accident with an uninsured motorist. The host driver presumably has UM coverage which covers occupant passengers. Moreover, the occupant has insurance that provides coverage to him while riding in his car as well as while a passenger or driver in another. Assume both policies provide the statutory 25/50 minimum UM protection (\$25,000 per person, \$50,000 per accident). If the occupant suffers more than \$25,000 in injuries, the question arises whether the insured may "stack" the two available policies of \$25,000 each to compensate for \$50,000 of injury. This is an example of inter-policy stacking.⁶

A similar question arises in the intra-policy setting. This occurs when an insured owns two automobiles and insures them both with the same insurer on the same policy. If the insured is involved in an accident with an uninsured motorist, the question is whether the insured can "stack" the UM coverage of the two automobiles. Although the courts vary, the general trend has been to allow stacking in an increasing number of circumstances.

II. INTER-POLICY STACKING

The language of the UM section of insurance policies is very similar. The 1963 Standard Family Combination Automobile Liability Policy is a typical policy providing for UM coverage.⁷ Most policies, including the 1963 Stan-

in section 303.030, RSMo, 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. Such legal entitlement exists although the identity of the owner or operator of the motor vehicle cannot be established because such owner or operator and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification. It also exists whether or not physical contact was made between the uninsured motor vehicle and the insured or the insured's motor vehicle. Provisions affording such insurance protection against uninsured motorists issued in this state prior to October 13, 1967, shall, when afforded by any authorized insurer, be deemed, subject to the limits prescribed in this section, to satisfy the requirements of this section.

5. MO. REV. STAT. § 303.030.5 (Supp. 1983). These limits were effective August 13, 1982. Prior to that time, the limits were \$10,000 for bodily injury to one person and \$20,000 per accident (10/20) coverage. *Id.* § 303.030.5 (1978).

6. Thus, "[i]ntra-policy stacking is the aggregation of the limits of liability for uninsured-motorist coverage of each car covered in one policy, whereas inter-policy stacking involves the aggregation of coverage under more than one policy." *Taft v. Cerwonka*, 433 A.2d 215, 217 n.3 (R.I. 1981).

7. There are currently several standard-form motor vehicle liability policies in use. Committees representing insurance companies of the Mutual Insurance Rating Bureau and the National Bureau of Casualty Underwriters (renamed the Insurance

dard Family Combination Policy, provide UM coverage not only for the named insured, but also for those occupying an insured automobile.⁸ Thus, the named insured is protected by his UM coverage when involved in an accident while in his own car as well as when he is riding as a passenger in someone else's car, or even when struck by an automobile as a pedestrian. The "occupancy insured" coverage extends only to those involved in accidents while riding in an insured automobile. For instance, when the named insured is the host of a guest, the guest is covered by the host's UM coverage as an "occupancy insured," provided that the host is driving an "insured" automobile covered by the host's policy.⁹

The Standard Family Combination Policy also includes several provisions which attempt to limit the amount of coverage. In the inter-policy setting, "other insurance" clauses come into play.¹⁰ These clauses, such as the "excess-escape" clause, attempt to limit the amount of available insurance to the difference between the amount covered by the primary insurance and the maxi-

Rating Bureau in 1968) prepared these standard policies. AUTO. L. REP. (CCH) ¶ 2000. Many of the large stock and mutual casualty companies have adopted these standard policies. The Standard Family Combination Automobile Policy and the Standard General-Automobile Liability and Garage Insurance Policy Forms are representative of such policies. Most insurance companies utilize standard-form policies. Several independent companies, such as Allstate Insurance Company and State Farm Mutual Automobile Insurance Company, use their own policies. *Id.*

8. The 1963 Standard Family Combination Automobile Policy states:

To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile. . . .

AUTO. LAW REP. (CCH) ¶ 2271.

"Insured" means:

(a) the named insured and any relative; (b) any other person while occupying an insured automobile; and (c) any person, with respect to damages he is entitled to recover because of bodily injury to which this Part applies sustained by an insured under (a) or (b) above.

Id. §§ 2275-78. The Allstate and the State Farm forms also provide UM protection for occupants of insured automobiles. *Id.* ¶¶ 2675-78, 3264-66.

9. It is also likely that the guest has auto insurance that has UM coverage which would apply to him as a "named insured."

10. Automobile liability policies typically utilize three types of "other insurance" provisions: the "pro-rata clause," the "excess clause," and the "escape clause." *Putnam v. New Amsterdam Casualty Co.*, 48 Ill.2d 71, 76, 269 N.E.2d 97, 99 (1970). The pro-rata clause comes into play when other insurance is available. This clause typically states that the company will be "liable only for the proportion of the loss represented by the ratio between its policy limit and the total limits of all available insurance." *Id.* The "excess clause" provides that the company is liable only for amounts over and above other insurance. The "escape clause" renders the policy void "with respect to any hazard as to which other insurance exists." *Id.* These clauses are frequently used in combination in automobile liability policies.

imum amount covered under the secondary insurance.¹¹ For instance, if an insured is a passenger in a host's automobile and is involved in an accident with another, uninsured, motorist, two UM policies are available: the host's policy and the guest's policy. The primary insurance could be deemed that maintained by the host, while the guest's personal UM coverage would be considered secondary.¹² Assuming both policies provide the requisite minimum UM

11. The 1963 Standard Family Combination Automobile Policy provides: Other Insurance. With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing 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 such other insurance.

AUTO. LIAB. INS. (CCH) ¶ 2315. The Allstate and State Farm policies have similar provisions. See *id.* ¶¶ 2711, 3420-21. This clause is essentially an "excess-escape" hybrid. *Putnam*, 48 Ill. 2d at 77, 269 N.E.2d at 100. The first part of the first paragraph is the "excess" clause, providing that if other insurance is available, the policy will apply only to the excess. The second part of this paragraph is the "escape," limiting liability to the amount the policy limits exceed that of the other policy. *Id.* Although the clause purports to provide "excess" coverage, as a practical matter most UM coverage is for the minimum amount required by state law. Consequently, there is rarely any "excess." *Id.*; see A. WIDISS, *supra* note 1, § 2.59, at 106-07.

The second paragraph is the "pro-rata" provision. This provision is effective only if the excess-escape clause does not apply. Comment, *supra*, note 1, at 765-66 n.9; see Annot., 28 A.L.R.3d 551, 552 n.3 (1969). For instance, if the insured has two policies, each with the statutory minimum coverage (25/50), each policy would presumably cover the damage up to the maximum coverage provided. Even if the insured suffers \$50,000 of damages, the pro-rata clause provides that each policy will pay only \$12,500, the pro-rata share of the limit of liability. See A. WIDISS, *supra* note 1, § 2.61, at 114.

As seen from the insured's point of view, the pro-rata clause has the same effect as the excess-escape clause. A. WIDISS, *supra* note 1, § 2.61, at 113. In both instances, the clauses attempt to limit total recovery to the maximum coverage amount specified, generally the minimum amount required by statute. *Id.* The pro-rata clause helps the insurers to divide that maximum amount among themselves, rather than being liable for the full amount alone.

12. Frequently, the host's policy and the guest's policy will contain conflicting "other insurance" clauses. For instance, both policies may be standard policies containing verbatim excess-escape clauses. Each attempts to place primary liability on the other insurer while limiting their coverage to only the "excess" of the other insurer. Courts traditionally attempt to reconcile the policies by making a determination as to which one shall be deemed "primary." *Werley v. United Servs. Auto. Ass'n*, 498 P.2d 112, 117 (Alaska 1972). Courts have advanced several methods for making such a determination. One possibility is to consider the policy issued first to be primary. See,

coverage, now 25/50, the secondary policy's "other insurance" clause would preclude recovery under the secondary policy. This clause limits recovery from the secondary insurer to the "amount by which the limit of liability for this coverage [\$25,000 per person] exceeds the applicable limit of liability of such other insurance [the host's insurance, also \$25,000]." Since there is no "excess," the insured would be precluded under this clause from recovering anything from his insurance company.¹³

The "excess-escape" clause seemingly prohibits stacking in the inter-policy setting. A majority of courts, however, including Missouri, have struck the "excess-escape" clause on various theories and have allowed inter-policy stacking.¹⁴ Missouri first struck the clause in *Steinhaeufel v. Reliance Insurance*

e.g., *New Amsterdam Casualty Co. v. Hartford Accident & Indem. Co.* 108 F.2d 653, 656 (6th Cir. 1940). Another theory looks to the primary tortfeasor and deems his policy to be primary. *See, e.g.*, *American Auto Ins. Co. v. Pennsylvania Mut. Indem. Co.*, 161 F.2d 62, 63 (3d Cir. 1947). Also used is a theory placing liability on the insurer more specifically covering the risk. *See, e.g.*, *Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Oil Mill & Ginnery Co.*, 26 Ga. App. 288, 294, 105 S.E. 856, 857 (1921). For a discussion of the primary/secondary problem and the various theories advanced, see Watson, *The "Other Insurance" Dilemma*, 54 ILL. B.J. 486, 488-89 (1966).

A growing number of jurisdictions have taken a different approach, adopting the Lamb-Weston doctrine which does not deem either policy primary. *Werley*, 498 P.2d at 117. Rather, under this doctrine the court finds conflicting "other insurance" clauses mutually repugnant and strikes down both clauses. The loss is then prorated between the insurers, up to the respective policy limits, as if the policies had never contained "other insurance" clauses. *Id.* The Lamb-Weston doctrine originated in *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F.2d 958, 960 (9th Cir. 1952). Missouri adopted this doctrine in *Arditi v. Massachusetts Bonding & Ins. Co.*, 315 S.W.2d 736, 743 (Mo. 1958).

13. If, however, the guest's personal UM policy limits were 50/100, this coverage limit would exceed that of the host's by \$25,000. In this case, the secondary insurer would also pay \$25,000, if the insured suffered \$50,000 of injury.

14. *See, e.g.*, *Kackman v. Continental Ins. Co.*, 319 F. Supp. 540, 542 (D. Alaska 1970); *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152, 1157 (S.D. Ind. 1970); *Safeco Ins. Co. of Am. v. Jones*, 286 Ala. 606, 614, 243 So. 2d 736, 742 (1970); *Sellers v. United States Fidelity & Guar. Co.*, 185 So. 2d 689, 692 (Fla. 1966); *State Farm Mut. Auto. Ins. Co. v. Barnard*, 115 Ga. App. 857, 859, 156 S.E.2d 148, 149 (1967); *Meridian Mut. Ins. Co. v. Siddons*, 451 S.W.2d 831, 834-35 (Ky. 1970); *Van Tassel v. Horace Mann Ins. Co.*, 296 Minn. 181, 187, 207 N.W.2d 348, 352 (1973); *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456, 459-60 (Miss. 1971); *Steinhaeufel v. Reliance Ins. Cos.*, 495 S.W.2d 463, 468 (Mo. Ct. App. 1973); *Protective Fire & Casualty Co. v. Woten*, 186 Neb. 212, 217, 181 N.W.2d 835, 838 (1970); *Motor Club of Am. Ins. Co. v. Phillips*, 66 N.J. 277, 287, 330 A.2d 360, 369 (1974); *Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 544, 155 S.E.2d 128, 136 (1967); *Curran v. State Auto Mut. Ins. Co.*, 25 Ohio St. 2d 33, 38, 266 N.E.2d 566, 569 (1971); *Sparling v. Allstate Ins. Co.*, 249 Or. 471, —, 439 P.2d 616, 618 (1968); *Harleysville Mut. Casualty Co. v. Blumling*, 429 Pa. 389, —, 241 A.2d 112, 115 (1968); *Vernon v. Harleysville Mut. Casualty Co.*, 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964); *Fidelity & Casualty Co. v. Gatlin*, 470 S.W.2d 924, 928 (Tex. Civ. App. 1971); *Bryant v. State Farm Mut. Ins. Co.*, 205 Va. 897, 902, 140 S.E.2d 817, 820 (1965); *see also* A. WIDISS, *supra* note 1, § 2.60, at 210 n.4 (Supp. 1981)

*Cos.*¹⁵ In *Steinhaefel*, the plaintiff operated a truck owned by his employer when, due to the negligence of another driver, he became involved in an accident with an uninsured motorist. Reliance Insurance had issued a policy to plaintiff's employer which contained 10/20 UM coverage. The plaintiff also had a policy issued on his personal automobile which contained 10/20 UM coverage. This policy, by stipulation, was deemed the secondary policy and it contained an "excess-escape" clause.¹⁶ Plaintiff sustained \$15,000 of damages and sought to stack the secondary policy limits on top of his employer's primary coverage. As previously discussed, the excess-escape clause, if upheld, would preclude recovery from the secondary insurer.

The court looked to the purpose behind Missouri's uninsured motorist statute and struck the clause as being against public policy.¹⁷ The court acknowledged that the clause was clear and unambiguous.¹⁸ The court pointed out, however, that legislation specifically required UM insurance and that the statute contained no restriction on the insurer's liability. The purpose of the UM legislation was to "close the gap in the protection afforded the public under existing financial responsibility laws and, within fixed limits, to provide compensation to innocent persons injured by motorists who lack financial responsibility."¹⁹ The court held that the clause was void as against public policy and that the insurer may not limit its statutorily imposed liability by the use of an excess-escape clause.²⁰ The court relied in part on the fact that the insured had paid for coverage under the terms of the statute and consequently should receive the benefit of the coverage. To refuse such benefit would provide a windfall to the insurer.²¹

Other courts have applied this "premium payment" rationale, finding that it would be unconscionable to preclude recovery on the grounds of the excess-escape clause when the insurer collects a premium.²² At least one commentator argues that this unconscionability argument is specious.²³ It is argued that the premium charged was based upon the assumption by the insurer that the excess-escape clause was valid. The premium charged presumably reflected the

(lists 31 states that have invalidated the excess-escape clause).

15. 495 S.W.2d 463 (Mo. Ct. App. 1973).

16. *Id.* at 465. For a discussion of primary/secondary determination, see note 12 *supra*.

17. *Id.* at 468.

18. *Id.* at 466.

19. *Id.*

20. *Id.* at 468.

21. *Id.* at 467.

22. *See, e.g.,* *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970); *Protective First & Casualty Co. v. Woten*, 186 Neb. 212, 215, 181 N.W.2d 835, 838 (1970); *Harleysville Mut. Casualty Co. v. Blumling*, 429 Pa. 389, 396, 241 A.2d 112, 115 (1968); Comment, *Stacked Recovery Under the Uninsured Motorist Endorsement of the Automobile Liability Policy*, 9 VAL. U.L. REV. 135, 144-45 (1974).

23. Comment, *supra* note 22, at 144-45.

fact that in inter-policy situations where the policy involved was the secondary policy, only the "excess" would be paid.²⁴

In the situation where the insurer purchases several policies and pays a premium for each one, the unconscionability argument appears applicable, but upon further analysis it becomes specious. The risk of exposure of the insurer increases when a second car is added since named insureds and occupancy insureds are covered. The potential membership of the class of occupancy insureds is increased because there are now potentially two cars on the road at once. It is therefore argued that it would be unreasonable to preclude an insurer from charging more than one premium regardless of the number of vehicles insured.²⁵ The premium increased because the risk did, but this should not allow an insured to stack coverage as well.

Other courts have invalidated the excess-escape clause even though only one premium was charged. In *Meridian Mutual Insurance Co. v. Siddons*,²⁶ the insurer issued two policies covering two cars owned by the plaintiff. The first policy provided UM protection and a premium was charged for it.²⁷ The second policy didn't mention UM coverage and nothing was charged for it. The court treated the second policy as including UM coverage because Kentucky law requires every policy to have such coverage.²⁸ The plaintiff's stepson, also a named insured, was struck and killed by an uninsured motorist. Plaintiff sought to stack the UM coverage of both policies. The court held that the excess-insurance clause was against the clear meaning and policy of the Kentucky UM statute which expressly required that *each policy* provide the minimum statutory coverage.²⁹ The "other insurance" clause conflicts with this statutory requirement and is therefore void.³⁰

A minority of courts reject inter-policy stacking. Several different theories have been advanced to find "excess-escape" clauses valid and thereby reject inter-policy stacking.³¹ One such argument is the "substituted coverage" the-

24. *Id.* at 144.

25. *Id.* at 146.

26. 451 S.W.2d 831 (Ky. 1970).

27. *Id.* at 832.

28. *Id.* at 833.

29. *Id.* at 834.

30. *Id.*

31. *See, e.g.,* *Chandler v. Government Employees Ins. Co.*, 342 F.2d 420, 421 (5th Cir. 1965) (inter-policy stacking by named insured under two policies issued by different insurers rejected); *Travelers Indem. Co. v. Wells*, 316 F.2d 770, 774 (4th Cir. 1963); *Transportation Ins. Co. v. Wade*, 106 Ariz. 269, 274, 475 P.2d 253, 258 (1970); *M.F.A. Mut. Ins. Co. v. Wallace*, 245 Ark. 230, 232, 431 S.W.2d 742, 744 (1968); *Grunfeld v. Pacific Auto Ins. Co.*, 232 Cal. App. 2d 4, 8, 42 Cal. Rptr. 516, 519 (1965); *Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 89, 269 N.E.2d 97, 106 (1970); *Burcham v. Farmers Ins. Exch.*, 255 Iowa 69, 75, 121 N.W.2d 500, 503 (1963); *Le Blanc v. Allstate Ins. Co.*, 194 So. 2d 791, 796 (La. Ct. App. 1967); *Cohen v. Liberty Mut. Ins. Co.*, 35 A.D.2d 719, 720, 315 N.Y.S.2d 265, 266 (1970); *Lyon v. Hartford Accident & Indem. Co.*, 25 Utah 2d 311, 316, 480 P.2d 739, 743 (1971); *Miller v. Allstate Ins. Co.*, 66 Wash. 2d 871, 876, 405 P.2d 712, 715 (1965).

ory. This theory looks to the purpose behind the state's uninsured motorist statute—placing the insured in the same position he would have been in had the tortfeasor been insured.³² In Missouri, if the tortfeasor complies by purchasing the minimum bodily injury insurance required, \$25,000 per person and \$50,000 per accident, only this amount would be available.³³ Thus, if an insured is allowed to stack, the minority argues that he is better off to be involved in an accident with an uninsured motorist than one with the minimal statutory requirements. By stacking, the insured can increase the minimum coverage from 25/50 to 50/100. Since this is not the purpose behind the enactment of the uninsured motorist statutes, courts uphold the “other insurance” or “excess-escape” clauses and prohibit inter-policy stacking.³⁴ Missouri rejected the “substituted coverage” theory in *Gordon v. Maupin*.³⁵

In *Putnam v. New Amsterdam Casualty Co.*,³⁶ plaintiffs were guests in a friend's car and were involved in a collision with an uninsured motorist. The host had UM coverage with 10/20 limits. The damages suffered by the plaintiffs exceeded \$20,000. The host's insurer consequently paid the full \$20,000 limit, with the plaintiffs recovering \$7,500 as their apportioned share.³⁷ The plaintiffs then sought recovery under the UM provisions of their own policies and asked the court to allow “stacking” of the host's policy and the guests' policies.

The court held the plaintiffs could not stack their UM coverage.³⁸ The court pointed out that had the uninsured motorist maintained the minimum liability insurance required by Illinois law, the plaintiffs would have already recovered from their host's policy the minimum amount, \$20,000.³⁹ The court stated that if such stacking “were mandated as a matter of public policy, motorists would be in the unusual position of preferring that any injuries sustained be at the hands of uninsured motorists rather than motorists who comply with the Financial Responsibility Law.”⁴⁰

Courts following the minority position also argue that the insured obtains

32. Hart, *Stacking of Motor Vehicle Insurance Coverage in Missouri 2x (The Deep Pocket)* (pt. I), 35 J. MO. BAR. 173, 180 (1979).

33. MO. REV. STAT. § 303.030 (Supp. 1983) requires minimum bodily injury insurance of \$25,000 per person, \$50,000 per accident.

34. See, e.g., *Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 89, 269 N.E.2d 97, 106 (1970).

35. 469 S.W.2d 848, 851 (Mo. Ct. App. 1971).

36. 48 Ill. 2d 71, 269 N.E.2d 97 (1970).

37. *Id.* at 73, 269 N.E.2d at 98.

38. *Id.* at 89, 269 N.E.2d at 106.

39. *Id.* at 84, 269 N.E.2d at 104.

40. *Id.*; see also *Travelers Indem. Co. v. Wells*, 316 F.2d 770, 774 (4th Cir. 1963); *Maryland Casualty Co. v. Howe*, 106 N.H. 422, 424, 213 A.2d 420, 422 (1965) (“The [UM] statute was not designed to provide the insured with greater insurance protection than would have been available had the insured been injured by an operator with a policy containing minimum statutory limits.”); Annot., 79 A.L.R.2d 1252 (1961).

a windfall if stacking is allowed because he receives extra coverage that he did not intend to purchase.⁴¹ Missouri refuted this argument in *Steinhaeufel* by pointing out that to refuse stacking by the insured provides a windfall to the insurer since the insured had paid the premiums for such UM coverage.⁴²

III. INTRA-POLICY STACKING

A minority of courts, including Missouri, have expanded stacking to allow intra-policy stacking as well.⁴³ As previously mentioned, the intra-policy stacking question frequently arises when the insured owns two cars and places both on the same policy, generally paying separate premiums for each. Since under both policies the insured may be the named insured, the question arises as to whether stacking of the two is allowed. In this situation, the excess-insurance clause does not come into play because there is only one insurance policy involved.⁴⁴

In the intra-policy arena the "limits of liability" clause steps into the picture. This clause basically attempts to limit recovery to the stated policy limits on one policy and thereby prevent intra-policy stacking.⁴⁵ Courts that allow

41. Hart, *supra* note 32, at 180-81.

42. 495 S.W.2d at 467. A related issue comes up when insurers seek to set-off the amount payable under the UM section with payments made under other sections. For instance, insurers have attempted to reduce the amount payable under the UM coverage by the amount paid under the medical pay provisions of the same policy. Missouri has refused to allow such a reduction. *Webb v. State Farm Mut. Auto. Ins. Co.*, 479 S.W.2d 148, 152 (Mo. Ct. App. 1972). Similarly, the court in *Douthet v. State Farm Mut. Auto. Ins. Co.*, 546 S.W.2d 156 (Mo. 1977) (en banc), refused to allow the insurer to deduct amounts received by the insured under Workmen's Compensation. The court stated that such a reduction would be contrary to the public policy expressed in MO. REV. STAT. § 379.203 (1978). 546 S.W.2d at 159. Accordingly, the court found that the policy provision reducing the sums payable under the policy by the amount of workmen's compensation payments was void. *Id.* at 159. Insureds sometimes also seek to stack medical payment provisions of automobile liability policies. *See* Annot., 25 A.L.R.4th 66 (1983).

43. Although the courts are split, the trend appears to favor intra-policy stacking. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Harper*, 125 Ga. App. 696, 700, 188 S.E.2d, 813, 816 (1972); *Clayton v. Alliance Mut. Casualty Co.*, 212 Kan. 640, 647 512 P.2d 507, 515, *reh'g denied*, 213 Kan. 84, 515 P.2d 1115 (1973); *Harrington v. Alabama Farm Bureau Mut. Casualty Ins. Co.*, 295 So. 2d 210, 213 (La. Ct. App. 1974); *Crenwelge v. State Farm Mut. Auto. Ins. Co.*, 277 So. 2d 155, 163 (La. Ct. App. 1973); *Johnson v. Travelers Indem. Co.*, 359 Mass. 525, 528, 269 N.E.2d 700, 702 (1971); *Van Tassel v. Horace Mann Ins. Co.*, 296 Minn. 181, 187, 207 N.W.2d 348, 352 (1973); *Boyd v. State Farm Mut. Auto. Ins. Co.*, 260 S.C. 316, 321, 195 S.E.2d 706, 708 (1973); *Landvatter v. Globe Sec. Ins. Co.*, 100 Wis. 2d 21, —, 300 N.W.2d 875, 878 (1980).

44. The excess-insurance clause limits recovery to the amount "by which the limit of liability for this coverage exceeds the applicable limit of liability of such *other insurance*." *See* note 11 *supra*.

45. The 1963 Standard Family Combination Automobile Insurance Policy provides:

intra-policy stacking find this clause void much the same way the excess-insurance clause is struck down in the inter-policy stacking setting.⁴⁶

In the intra-policy setting, some courts distinguish between stacking on a "fleet" policy and stacking on a "non-fleet" policy. For the purposes of this article, "fleet" policies include those policies expressly referred to as fleet policies as well as garage policies and any other policy covering numerous vehicles owned by a business or governmental entity.⁴⁷ Courts appear more reluctant to allow stacking on fleet policies than non-fleet policies; they are particularly hesitant to allow stacking on either by occupancy insureds.⁴⁸

A. *Intra-Policy Stacking with Respect to Named Insureds*

In the non-fleet area, a minority of courts allow intra-policy stacking by a named insured. Several justifications have been advanced in support of intra-policy stacking.⁴⁹ Missouri first approved such stacking in *Cameron Mutual*

Limits of liability:

(a) The limit of liability for family protection coverage stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care or loss of services, 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 as applicable to "each accident" is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.

AUTO. L. REP. (CCH) ¶ 2310. Both the Allstate and the State Farm forms include this limits-of-liability clause almost verbatim. *See id.* ¶¶ 2706, 3257.

46. *See* notes 14-22 and accompanying text *supra*.

47. For an annotation of cases dealing with stacking of coverage provided by fleet policies, see Annot., 25 A.L.R.4th 896 (1983).

48. *Taft v. Cerwonka*, 433 A.2d 215, 219 n.7 (R.I. 1981).

49. Some courts maintain that the limits of liability clause is ambiguous and construe it against the insurer. *See, e.g., Employers Liab. Assur. Corp. v. Jackson*, 289 Ala. 673, 679, 270 So. 2d 806, 810 (1972); *Squire v. Economy Fire & Casualty Co.*, 69 Ill. 2d 167, 176, 370 N.E.2d 1044, 1049 (1977); *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 792, 457 P.2d 34, 42 (1969); Annot., 23 A.L.R.4th 12, 55-61 (1983). Other courts have found a conflict between the "separability" clause and the "limits of liability" clause. *See, e.g., Jeffries v. Stewart*, 159 Ind. App. 701, 710, 309 N.E.2d 448, 452 (1974); *Mountain W. Farm Bureau v. Neal*, 169 Mont. 317, 325, 547 P.2d 79, 82 (1976); *Virginia Farm Bureau Mut. Ins. Co. v. Wolfe*, 212 Va. 162, 183 S.E.2d 145 (1971); *see also* Annot., 23 A.L.R.4th 12, 68-71 (1983). Still others strike the limits of liability clause as against public policy, in much the same way courts strike down "other insurance" clauses. *See, e.g., Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538 (Mo. 1976) (en banc). Others are proponents of the premium payment rationale: since the insured has paid for the coverage he should receive the benefit of stacked recovery. *See, e.g., Curran v. Fireman's Fund Ins. Co.*, 393 F. Supp. 712, 715 (D. Alaska 1975); *Great Cent. Ins. Co. v. Edge*, 292 Ala. 613, 616, 298 So. 2d 607, 610 (1974); *Kemp v. Allstate Ins. Co.*, 183 Mont. 526, 534, 601 P.2d 20, 24 (1979); *see also* Annot., 23 A.L.R.4th 12, 41-49 (1983).

Insurance Co. v. Madden.⁵⁰ In *Cameron*, the defendant insured two cars on the same policy. The declaration page of the policy issued to the defendant listed separately the itemized coverages for each of the two vehicles.⁵¹ 10/20 UM coverage was listed for each car and a three dollar premium per car was assessed.⁵² The defendant's wife was killed in an accident due to the negligence of an uninsured motorist, and it was stipulated that defendant suffered damages in excess of \$10,000. Consequently, he sought to stack the two policies to attain \$20,000 coverage. The court held that the policies could be stacked.⁵³

The policy in contention in *Cameron* contained a "limits of liability" clause similar to the 1963 Standard Family Combination Automobile Insurance Policy.⁵⁴ The plaintiff/insurer argued that this clause clearly and unambiguously limited recovery to \$10,000.⁵⁵ The policy also contained a separability clause which provided that the terms of the policy were to apply separately to each automobile if two or more automobiles were insured under the same policy.⁵⁶ The insurer argued that this clause clearly and unambiguously provides that only the policy covering the vehicle involved in the accident shall apply.⁵⁷

The *Cameron* court accepted the principle set forth by the Missouri Court of Appeals for the Western District in *Galloway v. Farmers Insurance Co.*⁵⁸ When an insured holds two separate policies with the same insurer, both containing limits of liability clauses, public policy, as expressed by Missouri Revised Statutes Section 379.203,⁵⁹ mandates that such clauses shall be ignored and stacking will be allowed.⁶⁰ Once this premise is accepted, the only ques-

50. 533 S.W.2d 538 (Mo. 1976) (en banc).

51. *Id.* at 539.

52. *Id.*

53. *Id.* at 545.

54. See note 45 *supra*.

55. 533 S.W.2d at 539.

56. *Id.* at 540.

57. *Id.* at 539.

58. 523 S.W.2d 339 (Mo. Ct. App. 1975).

59. (Supp. 1983).

60. In *Galloway*, the same insurer issued two separate policies to the plaintiff, both containing an UM provision. The defendant argued that stacking between the two policies was prohibited by the "Other Insurance in the Company" clause. That clause provided:

With respect to any occurrence, accident or loss to which this and any other insurance policy or policies issued to the insured by the Company also apply, no payment shall be made hereunder which, when added to any amount paid or payable under such other insurance policy or policies, would result in a total payment to the insured or any other person in excess of the highest applicable limit of liability under any one such policy.

Id. at 340. Compare the 1963 Standard Family Combination Automobile Insurance "excess-escape" clause, *supra* note 11. The Missouri Court of Appeals for the Eastern District had previously allowed inter-policy stacking where the host driver carried one policy and the injured party carried a second policy. *Steinhauefel*, 495 S.W.2d at 463.

tion remaining is whether the court should distinguish between an insurance company that issues two separate policies and an insurer that elects to consolidate the coverage of several vehicles into one policy.⁶¹

The *Cameron* court stated that the emphasis of section 379.203 is not on whether the insurer chooses to issue two separate policies or elects to consolidate coverage into a single policy.⁶² It would be an anomaly to say that after an insurer writes coverage for several vehicles and collects the premium; the question of how much coverage is offered consequently revolves around whether the insurer issued two separate policies or consolidated coverage into one.⁶³ The enforceability of excess-escape clauses should not revolve around such a distinction.⁶⁴ Such a distinction is not implicated by the language of section 379.203.⁶⁵

The court emphasized that the question of stacking should not depend on the draftsmanship of limiting clauses. An insurer should not be permitted to collect a premium for a given coverage and then snatch it away with a limiting clause, regardless of how clear and well drafted it is.⁶⁶ Consequently, the *Cameron* court held that the public policy evidenced by section 379.203 precludes an insurer from limiting coverage to just one policy.⁶⁷

In *Cameron*, the court specifically stated that, because the limiting clause was against public policy, it was unnecessary to determine if the combination of the "limitations of liability" clause and the "separability" clause created an ambiguous contract.⁶⁸ Other courts have relied on these two clauses to support a holding that these clauses create an ambiguity and are therefore void.⁶⁹ In

The plaintiff in *Galloway* attempted to distinguish *Steinhaefel* in that in *Galloway*, the injured party carried *both* policies himself, with only one insurer. The *Galloway* court refused to recognize such a distinction, stating that public policy, as expressed in § 379.203, specifically requires all automobile liability insurance policies to provide a minimum UM protection of 25/50 which cannot be diminished by the policy provisions. 523 S.W.2d at 343. The court said this was true whether the policy was issued by the same insurance company or two different companies. *Id.*

61. *Cameron*, 533 S.W.2d at 542.

62. *Id.* at 544.

63. *Id.*

64. *Id.* *Cameron* quoted *Tucker v. Government Employees Ins. Co.*, 288 So.2d 238, 242 (Fla. 1973) at length, stating in part:

It is an anomaly to contend that if two automobiles are combined in the coverage of one auto liability insurance policy with uninsured motorist protection added that an exclusion of the kind here involved may be validly inserted, but that if a separate policy covered each automobile such exclusion is invalid. The mere form of a policy—a combination coverage—should not be the predicate for an exclusion of additional coverage.

Id.

65. 533 S.W.2d at 544.

66. *Id.* The *Cameron* court quoted *Great Cent. Ins. Co. v. Edge*, 292 Ala. 613, 617, 298 So. 2d 607, 609 (1974) for this proposition.

67. 533 S.W.2d at 544-45.

68. *Id.* at 545.

69. *Jeffries v. Stewart*, 159 Ind. App. 701, 707, 309 N.E.2d 448, 452 (1974);

Mountain West Farm Bureau v. Neal,⁷⁰ the insured held a single policy covering four vehicles.⁷¹ The insurer sought a declaratory judgment finding that the insured could not stack coverage.⁷² The insurance policy contained a limits of liability clause essentially identical to that contained in the 1963 Standard Family Combination Insurance Policy.⁷³ The policy also contained a "separability" clause. This provision stated that "[w]hen two (2) or more automobiles are insured hereunder, the terms of Section III shall apply separately to each"⁷⁴ The court held that when these two clauses were considered together, they were "contradictory, ambiguous and beyond reconciliation."⁷⁵

Under the limits of liability clause, the court noted that coverage for "each person" would be limited to \$10,000, the policy limit.⁷⁶ Pursuant to the separability clause, however, the limits of liability clause governed each automobile separately.⁷⁷ This would provide coverage of \$10,000 per automobile for a total coverage of \$40,000. Thus, under the separability clause, stacking would be allowed.⁷⁸ Under Montana law, ambiguities in insurance policies are construed liberally in favor of insureds and strictly against insurers.⁷⁹ Applying this rule of construction, the court resolved the ambiguity created by the separability clause and the limits of liability clause against the insurer and consequently allowed intra-policy stacking.⁸⁰

A third rationale frequently relied on is the "double-premiums" or "premium payment" rationale. In *Taft v. Cerwonka*,⁸¹ the court addressed the issue of intra-policy stacking. The court allowed intra-policy stacking based in part upon the double-premiums rationale. The court noted that the insured had paid two separate premiums for the uninsured motorist coverage on his two vehicles.⁸² The court stated that the mere fact that the insurer had consolidated the coverage into a single policy should not preclude stacking.⁸³ To so hold would clearly defeat the reasonable expectations of the insured who had paid two premiums for such coverage.⁸⁴ The court emphasized that, had the insured paid separate premiums for two separate policies, stacking certainly

Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 790, 457 P.2d 34, 41 (1969); *Mountain W. Farm Bureau v. Neal*, 169 Mont. 317, 322-23, 547 P.2d 79, 82 (1976); Annot., 23 A.L.R.4th 12 (1983); see note 49 *supra*.

70. 169 Mont. 317, 547 P.2d 79 (1976).

71. *Id.* at 319, 547 P.2d at 80.

72. *Id.* at 320, 547 P.2d at 80.

73. *Id.* at 321, 547 P.2d at 81; see note 45 *supra*.

74. 169 Mont. at 322, 547 P.2d at 81.

75. *Id.* at 322, 547 P.2d at 82.

76. *Id.* at 323, 547 P.2d at 82.

77. *Id.*

78. *Id.*

79. *Id.* at 322, 547 P.2d at 82.

80. *Id.* at 323, 547 P.2d at 83.

81. 433 A.2d 215 (R.I. 1981).

82. *Id.* at 218.

83. *Id.*

84. *Id.*

would be allowed.⁸⁵

Many courts which have invalidated the "excess-escape" clause and allowed inter-policy stacking have refused to extend such stacking to the intra-policy setting.⁸⁶ Cases which allow the insurer to limit liability by incorporation of the "limits of liability" clause are based on several grounds. In *Allstate Insurance Co. v. McHugh*,⁸⁷ the plaintiff was a named insured under a policy which insured two automobiles. The court held that payment of separate premiums of five dollars each was insufficient justification for allowing stacking since the risk to the insurer correspondingly increased. The court thus rejected the double-premiums argument.⁸⁸

The *McHugh* court also rejected the ambiguity argument relied on by other courts. The limitation clause provided that "'each person' is the limit of Allstate's liability for all damages arising out of bodily injury sustained by any one person in any one occurrence."⁸⁹ The separability clause provided that "[w]hen two or more automobiles are insured by this policy, the terms of this policy shall apply separately to each."⁹⁰ The court found that the limits of liability clause unambiguously prevented stacking. The court cited *Pollard v. Allstate Insurance Co.*⁹¹ in support of the position that the separability clause merely renders the policy applicable to whichever car is insured under the policy.⁹² The *McHugh* court stated that it must enforce the insurance agreement as it existed and could not rewrite the agreement for the parties.⁹³

In *Talbot v. State Farm Mutual Automobile Insurance Co.*,⁹⁴ the court found that the limits of liability provision is consistent with the uninsured motorist statute and therefore prohibits intra-policy stacking by a named in-

85. *Id.*

86. *Arminski v. United States Fidelity & Guar. Co.*, 23 Mich. App. 352, 355, 178 N.W.2d 497, 499 (1970); *Allstate Ins. Co. v. McHugh*, 124 N.J. Super. 105, 111, 304 A.2d 777, 779 (Ch. Div. 1973), *aff'd*, 126 N.J. Super. 458, 315 A.2d 423 (1974); *Kennedy v. American Hardware Mut. Ins. Co.*, 255 Ore. 425, 426, 467 P.2d 963, 963 (1970).

87. 124 N.J. Super. 105, 304 A.2d 777 (Ch. Div. 1973).

88. *Id.* at 108, 304 A.2d at 778. The court set forth an example of how this might occur:

It is conceivable that Frank McHugh [plaintiff] 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 and justification for charging a separate premium at the same rate for additional cars on the same policy.

Id.

89. *Id.* at 109, 304 A.2d at 779.

90. *Id.*

91. 25 A.D.2d 16, 266 N.Y.S.2d 286 (1966).

92. 124 N.J. Super. at 110, 304 A.2d at 779.

93. *Id.* at 111, 304 A.2d at 780.

94. 291 So. 2d 699 (Miss. 1974).

sured.⁹⁵ The parties were free to contract with respect to UM coverage in any way they desired so long as the statutory minimum was provided.⁹⁶ Therefore, since they could contract "free of statutory restraint" with respect to excess coverage, they could certainly contract to limit coverage, by use of a limiting clause, to the minimum coverage statutorily required. Since the "limits of liability" provision did this, it was consistent with the statute.⁹⁷

In *Grimes v. Concord General Mutual Insurance Co.*,⁹⁸ the Supreme Court of New Hampshire rejected the premium payment rationale relied on in part by the Missouri Supreme Court in *Cameron*.⁹⁹ In *Grimes*, the insured argued that, since he had paid multiple premiums for several vehicles insured under one policy, he was entitled to stack the limits of liability.¹⁰⁰ The court refused to concede that the insured, by so doing, was paying a premium for which he received nothing.¹⁰¹ The court pointed out that, by adding another vehicle to the policy, the risk to the insurer increased.¹⁰² Since both named insureds and occupants are covered by the uninsured motorist provision of the policy, the risk increases, since both vehicles can be on the road simultaneously, carrying passengers in both as well.¹⁰³ The court did recognize that the payment of double premiums is a factor to be considered in determining the insured's reasonable expectations.¹⁰⁴

With respect to fleet policies, intra-policy stacking of UM coverage is rarely allowed.¹⁰⁵ Courts appear more inclined to allow stacking by a named insured under a fleet policy than by an occupancy insured.¹⁰⁶ In *Marchese v. Aetna Casualty & Surety Co.*,¹⁰⁷ the insurer had issued a "garage" policy covering twenty "dealer's plates" to an automobile sales corporation. Twenty premiums were paid for UM coverage on the fleet.¹⁰⁸ An employee of the corporation was involved in an accident with an uninsured motorist and attempted to "stack" the uninsured motorist coverage on all twenty vehicles. The maximum UM coverage was \$15,000 per vehicle for a potential total exposure of \$300,000. The court found that the employee was a named insured because the policy provided that he would be one of the employees to whom a

95. *Id.* at 701.

96. *Id.*

97. *Id.*

98. 120 N.H. 718, 422 A.2d 1312 (1980).

99. *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538 (Mo. 1976) (en banc); see notes 50-68 and accompanying text *supra*.

100. 120 N.H. at 719, 422 A.2d at 1313.

101. *Id.* at 721, 422 A.2d at 1315.

102. *Id.*; see also Comment, *supra* note 22, at 158-59.

103. *Id.*

104. *Id.*

105. Annot., 25 A.L.R.4th 896, 899 (1983).

106. For a discussion of courts allowing stacking by an occupancy insured see notes 161-68 and accompanying text *infra*.

107. 284 Pa. Super. 579, 426 A.2d 646 (1981).

108. *Id.* at ___, 426 A.2d at 647.

dealer's plate would be issued.¹⁰⁹ The court affirmed an award of \$250,000 by an arbitrator to the employee, thereby allowing stacking.¹¹⁰

The court allowed stacking by the named insured employee even though he had paid none of the premiums on the policies. Moreover, the court refused to recognize the limits of liability clause, finding it repugnant to the policy reasons behind the state Uninsured Motorist Act.¹¹¹ The court added that it was irrelevant whether the coverage is contained in a single policy or multiple policies. The policy justifications for stacking are equally applicable in both.¹¹²

In *Burns v. Fernandez*,¹¹³ the court refused to permit stacking on a fleet policy by an occupancy insured. The court intimated, however, that a named insured would be permitted to stack on a fleet policy. The court noted that Louisiana had adopted the "premium payment" rationale in *Briley v. Falati*.¹¹⁴ The theory behind the premium payment rationale is that those who pay the premiums (*i.e.*, the named insured) may stack and those who do not pay for such coverage may not.¹¹⁵ In *Fernandez*, the employer, New Orleans Easter Seal Society (NOESS), had taken out a fleet policy covering 26 vans. The plaintiff was an employee of NOESS and was involved in an accident with an uninsured motorist while driving one of the Society's vans. The court held that, since the employer, not the employee/plaintiff, had paid the premiums on the 26 vans, stacking by the employee would not be permitted.¹¹⁶ The court went on to state in dicta, "[t]he premium payment rationale supports a finding that the premium paid was only sufficient to permit stacking by NOESS."¹¹⁷ Thus, it appears that Louisiana would permit such intra-policy stacking on a fleet policy by a named insured, since the named insured generally pays the premiums.¹¹⁸

In *Lundy v. Aetna Casualty & Surety Co.*,¹¹⁹ the court confronted the question of whether a named insured would be allowed to stack coverage on three vehicles insured under one policy. The court upheld such stacking, point-

109. *Id.* at ___, 426 A.2d at 649.

110. Several other courts have allowed intra-policy stacking by a named insured on a fleet policy. *See, e.g.*, *Florida Farm Bureau Casualty Co. v. Andrews*, 369 So. 2d 346, 347 (Fla. Dist. Ct. App. 1978), *cert. denied*, 381 So. 2d 766 (Fla. 1980), *cert. denied*, *Andrews v. Florida Farm Bureau Casualty Co.*, 381 So. 2d 764 (Fla. 1980); *Posey v. Commercial Union Ins. Co.*, 332 So. 2d 909, 915 (La. Ct. App. 1976); *see also* Annot., 25 A.L.R.4th 896, 899-903 (1983).

111. 284 Pa. Super. at ___, 426 A.2d at 649.

112. *Id.* at ___, 426 A.2d at 649.

113. 401 So. 2d 1033 (La. Ct. App. 1981).

114. 367 So. 2d 1227 (La. Ct. App. 1979), *writ denied*, 369 So. 2d 1379 (La. 1979). *See* note 49 and accompanying text *supra* for other cases adopting the premium payment rationale.

115. 401 So. 2d at 1037.

116. *Id.*

117. *Id.*

118. Subsequent to this decision, Louisiana enacted anti-stacking legislation. *See* note 167 *infra*.

119. 92 N.J. 550, 458 A.2d 106 (1983).

ing out that there would be no real difference between allowing stacking when three separate policies had been issued (inter-policy stacking), which the courts clearly allow, and allowing stacking here, where all three cars happened to be covered on one piece of paper (intra-policy stacking).¹²⁰

More importantly, the court in dicta approved intra-policy stacking by a named insured on a fleet policy.¹²¹ The court referred to a classic argument used by courts opposing such stacking as being "somewhat farfetched." The court cited the example used by Appleman.¹²²

Appleman hypothesized a situation in which an insured issued a single policy on a fleet of 1,000 cars, providing UM coverage of \$50,000 for each vehicle. If stacking were allowed, total exposure would be 50 million dollars. Thus, he argued, courts are reluctant to allow stacking.¹²³ The *Lundy* court refuted this argument, first pointing out that the above assumes the insurer was forced to sell the policy.¹²⁴ This, of course, is not the case. Furthermore, the court stated that presumably an insurer, knowingly and willingly issuing a policy with a potential liability of 50 million dollars, would adjust the premiums accordingly. The court concluded that in such a situation stacking would indeed be proper.¹²⁵

Other courts have refused to allow intra-policy stacking by a named insured on a fleet policy.¹²⁶ In *Holland v. Hawkeye Security Insurance Co.*,¹²⁷ the insurer had issued a policy to an individual doing business as an electric company. The single policy insured nine automobiles. A named insured was involved in an accident with an uninsured motorist while operating one of the vehicles. The policy contained a "limits of liability" clause which the court upheld, thus precluding stacking by the named insured. The court emphasized that the state financial responsibility laws set a minimum amount of UM coverage at 10/20 and did not mandate coverage in excess of this amount. Consequently, an insurer is free to limit such coverage to the statutory minimum amount.¹²⁸

120. *Id.* at ___ n.2, 458 A.2d at 109 n.2.

121. *Id.* at ___, 458 A.2d at 109.

122. 8C J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 5101, at 444, 449-51 (1981).

123. See note 153 and accompanying text *infra*.

124. 92 N.J. at ___, 458 A.2d at 109 n.2.

125. *Id.*

126. *Gallups v. Aetna Casualty & Sur. Co.*, 513 F. Supp. 1074, 1076 (N.D. Ala. 1981); *Burke v. Aid Ins. Co.*, 487 F. Supp. 831, 835 (D. Kan. 1980); *Holland v. Hawkeye Sec. Co.*, 230 N.W.2d 517, 520-21 (Iowa 1975).

127. 230 N.W.2d 517 (Iowa 1975).

128. *Id.* at 521; see Annot., 25 A.L.R. 4th 896, 903-04 (1983); *cf.* the occupancy insured stacking cases dealing with fleet policies, notes 146-68 and accompanying text *infra*.

B. *Intra-Policy Stacking with Respect to Occupancy Insureds*

This situation arises when a guest is riding in the host's car and is involved in an accident with an uninsured motorist. If the guest does not have UM coverage but the host does, and in fact the host has coverage on several cars, the question becomes whether the occupancy insured can stack the host's coverage. In this situation, the occupant is insured only because of his occupancy in the particular insured vehicle. Consequently, the vast majority of courts refuse to allow stacking of the additional coverage on the other automobiles in which the occupant was not riding.¹²⁹

In *Hines v. Government Employees Insurance Co.*,¹³⁰ Warren Harper owned two automobiles insured under the same policy by the same insurance company.¹³¹ Harper loaned his automobile to the plaintiff, and the plaintiff was involved in an accident with an uninsured motorist.¹³² Harper's policy had the minimum UM coverage of \$20,000 per accident. The plaintiff, as an occupancy insured, attempted to stack the coverage to \$40,000.¹³³ The policy contained a "limits of liability" clause. The plaintiff argued that *Cameron*, which allowed intra-policy stacking by a named insured, should be extended to the intra-policy occupancy insured situation.¹³⁴

The court refused to extend stacking to this situation. The court distinguished the *Cameron* intra-policy named insured situation by pointing out that in the named insured setting, the coverage for the named insured is not dependent on presence in an insured vehicle. No coverage exists for an occupancy insured, however, unless he is riding in the insured vehicle.¹³⁵ Obviously, a guest can only be an occupant in one car at a time and thus should only be entitled to occupancy insured status with respect to that one vehicle. The court added that insurers were not statutorily required to provide UM protection to mere occupants.¹³⁶ The court also stated that the "limits of liability" clause

129. *Moomaw v. State Farm Mut. Auto. Ins. Co.*, 379 F. Supp. 697, 702 (S.D. W. Va. 1974); *Holloway v. Nationwide Mut. Ins. Co.*, 376 So. 2d 690, 694 (Ala. 1979); *Travelers Ins. Co. v. Pac.*, 337 So. 2d 397, 399 (Fla. Ct. App. 1976), *cert. denied*, 351 So. 2d 407 (Fla. 1977); *Holland v. Hawkeye Sec. Ins. Co.*, 230 N.W.2d 517, 521 (Iowa 1975); *Sturdy v. Allied Mut. Ins. Co.*, 203 Kan. 783, 790, 457 P.2d 34, 39 (1969); *Ohio Casualty Ins. Co. v. Stanfield*, 581 S.W.2d 555, 559 (Ky. 1979); *Hines v. Government Employees Ins. Co.*, 656 S.W.2d 262, 266 (Mo. 1983) (en banc); *Lopez v. Found. Reserve Ins. Co.*, 98 N.M. 166, 172, 646 P.2d 1230, 1236 (1982); *Cunningham v. Ins. Co. of N. Am.* 213 Va. 72, —, 189 S.E.2d 832, 835 (1972); Annot., 25 A.L.R. 4th 896, 906-913 (1983) (fleet policies); Annot., 23 A.L.R. 12, 81-88 (1983) (intra-policy stacking by an occupancy insured on non-fleet policy).

130. 656 S.W.2d 262 (Mo. 1983) (en banc).

131. *Id.* at 263.

132. *Id.*

133. *Id.*

134. *Id.* at 264. For a discussion of *Cameron*, see notes 50-68 and accompanying text *supra*.

135. 656 S.W.2d at 265.

136. *Id.* (citing *Waltz v. Cameron Mut. Ins. Co.*, 526 S.W.2d 340, 345 (Mo. Ct.

was clear and unambiguous and did not conflict with the separability clause.¹³⁷ Furthermore, the *Hines* court refused to recognize a distinction between fleet and non-fleet policies. In *Linderer v. Royal Globe Insurance Co.*,¹³⁸ the Missouri Court of Appeals for the Eastern District had already refused to allow intra-policy stacking by an occupancy insured on a fleet policy.¹³⁹ Thus, *Hines* confirmed suspicions that intra-policy stacking was precluded for occupancy insureds under non-fleet as well as fleet policies.

A few courts have allowed an occupancy insured to stack coverage on non-fleet policies.¹⁴⁰ In *Blocker v. Aetna Casualty & Surety Co.*,¹⁴¹ the court allowed intra-policy stacking by an occupancy insured. In this case, the plaintiff was a guest in a car operated by the host. The host insured both the car in the accident and another under one policy.¹⁴² The host/driver paid a separate premium for the UM coverage for each vehicle. The court found that the "limits of liability" clause and the "separability" clause created an ambiguity which should be resolved against the insurance company.¹⁴³ The court refused to distinguish between named insureds and occupancy insureds, pointing out that the insurer's own policy provided that both named insureds and those occupying an insured vehicle were covered.¹⁴⁴ The court emphasized that the purpose of the uninsured motorist act was to protect innocent victims from irresponsible drivers and that the statute requires liberal construction to achieve this legislative intent.¹⁴⁵

The majority of courts refuse to allow stacking by occupancy insureds, particularly on a fleet policy. Missouri first rejected such "fleet" stacking by occupancy insureds in *Linderer v. Royal Globe Insurance Co.*¹⁴⁶ In *Linderer*, the plaintiff was involved in an accident with an uninsured motorist while he

App. 1975)).

137. *Id.* The separability clause in this case stated that it was not to be construed to increase the limits of the company's liability. *Id.* at 266. Other courts which rely on the two clauses creating ambiguity lacked such clarifying language. See note 49 *supra*.

138. 597 S.W.2d 656 (Mo. Ct. App. 1980).

139. In *Hines*, the plaintiff attempted to distinguish *Linderer* on the grounds that there is a difference between "fleet" coverage as in *Linderer*, and *Hines*, where an individual simply happens to own more than one car. The court found "such a distinction is difficult to draw on a theoretical basis, especially when an implied limitation on freedom to contract is involved, and we see no reason for recognizing it." 656 S.W.2d at 266. For a discussion of intra-policy stacking by an occupancy insured on fleet policies, see notes 146-68 and accompanying text *infra*.

140. *Estate of Calibuso v. Pacific Ins. Co.*, 62 Hawaii 424, 428, 616 P.2d 1357, 1360 (1980); *Kemp v. Allstate Ins. Co.*, 183 Mont. 526, 534, 601 P.2d 20, 24 (1979); *Annot.*, 23 A.L.R.4th 12, 81-85 (1983).

141. 232 Pa. Super. 111, 332 A.2d 476 (1975).

142. *Id.* at 112, 332 A.2d at 477.

143. *Id.* at 116, 332 A.2d at 479. The *Neal* court relied on this same argument to allow intra-policy stacking by a *named* insured. *Mountain W. Farm Bureau v. Neal*, 547 P.2d 79, 82 (Mont. 1976); see notes 70-80 and accompanying text *supra*.

144. 232 Pa. Super. at 118, 332 A.2d at 479.

145. *Id.* at 118, 332 A.2d at 479-80.

146. 597 S.W.2d 656 (Mo. Ct. App. 1980).

was driving one of his employer's cars. The employer had a fleet of 1,420 cars, all insured by the same insurer. The employer paid a premium of \$5 per vehicle for the uninsured motorist coverage and had the statutory minimum of \$10,000 per person, \$20,000 accident on each vehicle. The plaintiff was the named insured on a personal policy held on his own automobile.¹⁴⁷

The plaintiff argued that he should be able to stack the coverage available on each of the 1,420 fleet cars. The defendant argued that the "limits of liability" clause clearly precluded such stacking. In *Cameron*, Missouri allowed intra-policy stacking by a named insured on a non-fleet policy.¹⁴⁸ The *Linderer* court refused to extend intra-policy stacking to occupancy insureds.¹⁴⁹

The court found that the justifications that allowed stacking under multi-vehicle policies for insureds of the first class (named insureds) is inapplicable to insureds of the second class (occupancy insureds).¹⁵⁰ The *Linderer* court first found that the application of the principle of reasonable expectations cut against allowing stacking. The court quoted Professor Keeton's analysis of this principle which insures that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations!"¹⁵¹ The court then cited *Lambert v. Liberty Mutual Insurance Co.*¹⁵² with approval. The *Lambert* court said that an individual would reasonably expect that the insurer would honor the UM coverage on each automobile he owned and therefore allowed intra-policy stacking with respect to named insureds. An individual would not necessarily have this same expectation, however, when the coverage arises merely because of his occupancy in the vehicle.¹⁵³

A named insured who purchases UM protection on two vehicles expects

147. *Id.* at 657.

148. See notes 50-68 and accompanying text *supra*.

149. 597 S.W.2d at 661.

150. *Id.*

151. R. KEETON, BASIC TEXT ON INSURANCE LAW § 6.3(A), AT 351 (1971).

152. 331 So. 2d 260, 264 (Ala. 1976).

153. 597 S.W.2d at 661. In *Lambert v. Liberty Mut. Ins. Co.*, 331 So. 2d 260 (Ala. 1976), the court precluded intra-policy stacking by an occupancy insured under a fleet policy. The court applied the principle of reasonable expectations as set forth by Professor Keeton. The court stated:

Can it be seriously contended that Seaboard [the employer] expected that the \$4.00 premium it paid for uninsured motorist coverage on each of its 1,699 vehicles would purchase coverage for all permissive occupants of its vehicles to the tune of \$16,900,000? Clearly, such an expectation would not have been a reasonable one under the terms of the commercial fleet policy here in question. The status of Lambert (for purposes of uninsured motorist coverage) as an insured solely by virtue of his occupancy of the vehicle, is clearly distinguishable from the status of a named insured who is entitled to stack coverages by virtue of his personal payment of an additional premium for each vehicle insured under a multi-vehicle policy.

331 So. 2d at 265.

to be able to recover in accordance with the coverage he paid for. Moreover, an insured would expect similar recovery on both policies if a member of his family were injured. The court drew a distinction, however, with respect to a fleet policy. The court stated that it is not reasonable for an employee to expect coverage under all policies insuring a corporate fleet of 1,420 vehicles. One would not expect coverage up to \$14,200,000 (the total coverage if stacking were allowed) merely because the employee happened to be occupying one vehicle of the fleet at the time of the accident.¹⁵⁴ The court went on to say that allowing stacking in such a situation would clearly be contrary to the intent of the legislature:

If stacking were required for fleet policies there would be \$14,200,000 of coverage for each Union Electric vehicle and the total exposure for the entire fleet of 1,420 vehicles would be 1,420 times \$14,200,000 or \$20,164,000,000, obviously an argument to absurdity, but the actual exposure amounts to millions of dollars.¹⁵⁵

The court added that to allow such stacking would be unconscionable, since there would be no way the insurer could limit the coverage of a fleet to less than millions of dollars for each vehicle.¹⁵⁶

In the named insured, intra-policy stacking setting, courts frequently allow stacking on the premise that the insured paid for the coverage and therefore should be allowed to collect. The *Linderer* court said that in the occupancy insured arena, the "premium payment" rationale was inapplicable. Moreover, the court refused to accept the argument that a denial of stacking allows the insurer to collect a premium and then take away the coverage.¹⁵⁷ The court pointed out that denying stacking merely prohibited the shifting of coverage from one vehicle to another. The coverage on the vehicle not involved in the accident is still in force, but cannot be shifted to the vehicle involved in the accident. Thus, the insured gets what he paid for.¹⁵⁸ Accordingly, the *Linderer* court refused to extend intra-policy stacking to occupancy insureds.¹⁵⁹ The court allowed coverage under the employer policy covering the specific car in which the employee was driving. Moreover, stacking was allowed with the employer policy covering the specific car, and the coverage provided by the plaintiff's personal policy. This is merely the inter-policy stacking situation which the Missouri court upheld in *Steinhaeufel v. Reliance*

154. 597 S.W.2d at 661.

155. *Id.* At least one court finds this hypothetical somewhat "farfetched" and believes insurers take this into account in rate-setting. See notes 119-25 and accompanying text *supra*.

156. 597 S.W.2d at 661; cf. *Lundy v. Aetna Casualty & Sur. Co.*, 92 N.J. 550, —, 458 A.2d 106, 109 n.2 (1983) (insurance company presumably would adjust its rates to cover large expenses); notes 119-25 and accompanying text *supra*.

157. 597 S.W.2d at 661.

158. *Id.*

159. *Id.* at 662; see also *Cano v. Travelers Ins. Co.*, 656 S.W.2d 266 (Mo. 1983) (en banc).

*Insurance Cos.*¹⁶⁰

Very few courts have allowed intra-policy stacking by an occupancy insured on a fleet policy. In *Holmes v. Reliance Insurance Co.*,¹⁶¹ plaintiff Kenneth Byoune was driving a car owned by his employer, Humphrey Chevrolet Company. The car was a "demonstrator" and Humphrey Chevrolet maintained a garage liability policy issued by Reliance Insurance Company.¹⁶² Reliance covered 160 automobiles under this policy and a charge of \$3 per "dealer plate" was assessed for the uninsured motorist protection.¹⁶³

The court allowed stacking of the uninsured motorist protection provided on all 160 cars.¹⁶⁴ The court relied on *Wilkinson v. Fireman's Fund Insurance Co.*,¹⁶⁵ an earlier decision where intra-policy stacking by a named insured was allowed. In *Wilkinson*, the court relied on the double-premiums rationale. Since the insured purchased uninsured motorist coverage on several cars and paid separate premiums for each, the insured was entitled to stack.¹⁶⁶ The *Holmes* court extended this rule to any other insured as defined in the UM section of the policy, such as an occupancy insured.¹⁶⁷ The court noted that

160. 495 S.W.2d 463 (Mo. Ct. App. 1973); see notes 15-21 and accompanying text *supra*.

161. 359 So. 2d 1102 (La. Ct. App. 1978).

162. *Id.* at 1104.

163. The policy itself, however, did not designate this as a "fleet" policy. *Id.*

164. *Id.* at 1106.

165. 298 So. 2d 915 (La. Ct. App. 1974).

166. 359 So. 2d at 1106.

167. *Id.* Louisiana has enacted anti-stacking legislation. LA. REV. STAT. ANN. § 22:1406(D)(1)(c) (West 1978) provides:

If the insured has any limits of uninsured motorist coverage in a policy of automobile liability insurance, in accordance with the terms of Subsection D(1), then such limits of liability shall not be increased because of multiple motor vehicles covered under said policy of insurance and such limits of uninsured motorist coverage shall not be increased when the insured has insurance available to him under more than one uninsured motorist coverage provision or policy; provided, however, that with respect to other insurance available, the policy of insurance or endorsement shall provide the following. . . .

The statute goes on to define the UM coverage on the vehicle in which the injured party was an occupant as the primary policy, thereby preventing the problem courts face in determining which policy shall be deemed primary. See note 12 *supra* for a brief discussion of the primary/secondary dilemma. Subsection (ii) provides:

Should that primary uninsured motorist coverage be exhausted due to the extent of damages, then the injured occupant may recover any excess from other uninsured motorist coverage available to him. In no instance shall more than one coverage from more than one uninsured motorist policy be available as excess over and above the primary coverage available to the injured occupant.

For cases applying the anti-stacking statute, see *Block v. Reliance Ins. Co.*, 433 So. 2d 1040 (La. 1983); *Herbert v. Breaux*, 398 So. 2d 1299 (La. Ct. App.), *cert. denied*, 401 So. 2d 986 (La. 1981); *Thibodeaux v. Oliver*, 394 So. 2d 684 (La. Ct. App.), *cert. denied*, 397 So. 2d 1360 (La. 1981).

Florida has also enacted anti-stacking legislation. FLA. STAT. ANN. § 627.4132

the insured had paid three dollars per dealer plate and 160 cars were covered by UM protection. The insured was thus entitled to stack.

IV. CONCLUSION

The majority of states now require insurers to offer a statutory minimum of UM coverage if the insurer desires to issue policies within the state. Consequently, there has been substantial recent litigation concerning the ability of policy holders to "stack" UM coverage. In order to promote the financial responsibility laws of the given state, and to protect the insured who has purchased such protection, courts are permitting stacking in an increasing number of situations.

The vast majority of courts allow inter-policy stacking, particularly by a named insured. Many courts are extending this stacking to the intra-policy setting, with several courts going so far as to allow intra-policy stacking by an occupancy insured. Although the courts are divided as to when, if ever, stacking is allowed, it is clear that the current trend is to allow stacking in an increasing number of situations.

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(West Supp. 1974-1983) states:

If an insured or named insured is protected by any type of motor vehicle insurance policy for liability, personal injury protection, or other coverage, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. However, if none of the insured's or named insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with applicable coverage. Coverage on any other vehicles shall not be added to or stacked upon that coverage.

This section does not apply:

- (1) To uninsured motorist coverage.
- (2) To reduce the coverage available by reason of insurance policies insuring different named insureds.

See Allstate Ins. Co. v. Piatt, 417 So. 2d 705 (Fla. Dist. Ct. App. 1982).
168. 359 So. 2d at 1106.

