

Twenty-Five Years of Uninsured Motorist Coverage: A Silver Anniversary Cloud with a Tarnished Lining

I. INTRODUCTION

The American system of automobile accident reparations had a bright forecast in 1898, when the first automobile liability policy was offered to the motoring public.¹ Shortly thereafter, a cloud appeared in the form of financially irresponsible drivers—motorists who were unable to monetarily recompense the damages caused by their negligent driving.² As the number of uncompensated accident victims increased,³ several state legislatures, including Indiana's,⁴ responded by enacting financial responsibility laws.⁵ These laws generally re-

¹Plummer, *The Uncompensated Automobile Accident Victim*, 1956 INS. L.J. 459, 463.

²A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, § 1.1 (1969).

³*Id.*

⁴IND. CODE § 9-2-1-15 (1976). The Indiana statute is representative of the legislation enacted in most states. It provides:

Proof of financial responsibility shall mean proof of ability to respond in damages for liability thereafter incurred, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of fifteen thousand dollars (\$15,000) because of bodily injury to or death of any one (1) person, and, subject to said limit respecting one (1) person, in the amount of thirty thousand dollars (\$30,000) because of bodily injury to or death of two (2) or more persons in any one (1) accident, and in the amount of ten thousand dollars (\$10,000) because of injury to or destruction of property in any one (1) accident. Proof in the amounts required by this section shall be furnished for each motor vehicle registered by such person.

Id.

⁵All fifty states have some form of financial responsibility legislation in force at the present time. There are basically two forms: (1) the "one accident" form, which requires proof of financial responsibility only *after* the owner/operator has been involved in an accident, and (2) the "one judgment" form, which requires proof of financial responsibility after the owner/operator has had a judicial or administrative judgment of fault rendered against him. For a comprehensive evaluation of state legislative steps treating the financially irresponsible motorist, see Comment, *The Financially Irresponsible Motorist: A Survey of State Legislation*, 10 VILL. L. REV. 545 (1965) [hereinafter cited as Comment].

Indiana's statute is essentially the "one accident" form. See IND. CODE § 9-2-1-4 (Supp. 1980). However, it should be emphasized that this is only a *general* classification. The financial responsibility statutes of each state may vary significantly as to their administration and enforcement mechanisms. For example, in Indiana the Commissioner of the Bureau of Motor Vehicles is given considerable discretion as to who must file proof of financial responsibility after an accident. Administrative regulations provide:

(a) Upon receipt of an accident report in which no proof of financial responsibility is indicated for either or both of the parties involved in the

quired that each person registering an automobile in the state demonstrate his ability to answer financially, up to the statutory limits,⁶ for any bodily injury or property damage liability incurred through the "ownership, maintenance or use of a motor vehicle."⁷

The financial responsibility laws failed to remedy the uninsured motorist problem, principally because they were not "triggered" for enforcement until the owner was involved in at least one accident.⁸ A few insurance companies, motivated by the demand for a better solution to the uninsured motorist dilemma and the increasing probability of governmental intervention, offered "unsatisfied judgment" endorsements as a supplement to their automobile liability policies.⁹

accident, the Bureau of Motor Vehicles shall notify the party or parties that they must provide proof of financial responsibility.

(b) The individual(s) shall be informed that they may provide proof of financial responsibility by any of the foregoing methods (proof of insurance, bond, release) or that they may request a fault hearing.

(c) The fault hearing conducted by the Bureau of Motor Vehicles will determine from the best evidence available whether the party requesting the hearing in the opinion of the Commissioner or his duly authorized hearing officer could reasonably be considered at fault in the accident.

(d) Based upon this determination, only the party(s) determined to be at fault shall be required to provide proof of financial responsibility.

140 IND. AD. CODE § 1-3-1(4) (1979).

⁶The most common minimum statutory requirements presently in force are \$15,000 for bodily injury to, or death of, one person and \$30,000 per accident. In addition, Indiana requires \$10,000 minimum "coverage" for property damage (\$15,000/\$30,000/\$10,000). See note 4 *supra*. The Indiana Financial Responsibility Act originally established limits of \$5,000/\$10,000/\$1,000. Ch. 159, § 14, 1947 Ind. Acts 491. In 1957, the minimums were increased to \$10,000/\$20,000/\$5,000. Ch. 140, § 2, 1957 Ind. Acts 291. In 1971, the minimums were increased to the present \$15,000/\$30,000/\$10,000. Act of Mar. 30, 1971, Pub. L. No. 120, § 2, 1971 Ind. Acts 546.

⁷IND. CODE § 9-2-1-15 (1976).

⁸Financial responsibility laws also provided no remedy to persons involved in accidents with "hit and run" drivers, stolen automobiles, and automobiles driven without the owner's consent. See Comment, *supra* note 5, at 550.

⁹Plummer, *supra* note 1, at 463. Although the financial responsibility acts and unsatisfied judgment endorsements predominated, they were not the only weapons used to battle the financially irresponsible motorist. Today's arsenal has roots going back over fifty years:

Since 1925 there has been a constant effort by the insurance companies and the public to minimize the number of uninsured or financially irresponsible operators upon the public highways. Some of the major plans or laws that have been proposed or adopted to do this are as follows: the Massachusetts compulsory automobile liability law, the motor vehicle financial responsibility laws, the Saskatchewan Automobile Accident Insurance Act, the New Jersey Unsatisfied Claim and Judgment Fund Law, the unsatisfied judgment insurance endorsements, the uninsured motorists voluntary endorsements, the compulsory motor vehicle indemnification fund, the equal responsibility amendment, and the automobile compensation plan.

Id. at 459.

This coverage protected the insured when he was injured by an uninsured motorist, but a significant drawback was that the insured needed a judgment against the uninsured motorist as a condition precedent to recovery of his policy benefits.¹⁰

A marked improvement occurred when Uninsured Motorists [UM] coverage was introduced approximately twenty-five years ago.¹¹ UM coverage allowed the insured to collect his policy benefits without securing a judgment against the uninsured motorist.¹² Unfortunately, some parties insured by UM coverage soon consumed as much time litigating policy disputes against their insurers as they had previously spent obtaining judgments against financially irresponsible motorists.¹³

However, many state legislatures viewed UM coverage as the best alternative available for dealing with the uninsured motorist epidemic.¹⁴ Beginning in 1957,¹⁵ many states enacted statutes which required UM coverage to be included in all automobile liability policies delivered by licensed insurers.¹⁶ Today, all fifty states statutorily mandate UM coverage.¹⁷

As more states required UM coverage, the insurance industry developed standard policy provisions to effectuate both uniformity

¹⁰See A. WIDISS, *supra* note 2, § 1.9.

¹¹Moser, *The Uninsured Motorist Endorsement*, 1956 INS. L.J. 719, 719. "Although the coverage in somewhat varying forms was offered by a few carriers prior to 1954, the most widely presently used form was devised for the policyholders resident in the State of New York to meet the agitation for compulsory insurance in that state." *Id.* at 719-20.

¹²A. WIDISS, *supra* note 2, § 1.8.

¹³*Id.* § 1.12.

¹⁴*Id.* § 1.11.

¹⁵New Hampshire became the first state to require UM coverage in all automobile liability policies issued in the state. See N.H. REV. STAT. ANN. § 268:15-a (1977).

¹⁶Indiana's Uninsured Motorist Coverage Act, enacted in 1967, reflects many of the statutory provisions presently in force in most states. It provides, in part:

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 Acts 1947, chapter 159, sec. 14 [9-2-1-15], as amended heretofore and hereafter, 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.

IND. CODE § 27-7-5-1 (1976).

¹⁷Maldonado, *Requiring Underinsured Motorist Coverage in Ohio*, 6 OHIO N.U.L. REV. 534, 534 (1979).

and cost savings.¹⁸ Most policies in circulation today contain some, if not most, of these standard provisions.¹⁹ However, many insurers have added, deleted, and modified certain of these provisions in an attempt to limit their liability.²⁰ These alterations have caused a lack of uniformity among different policies and insurers which has helped to create an increase in litigation of UM coverage questions.

Much of the litigation in the first fifteen years of UM coverage concerned definitional problems, such as the meaning of "automobile"²¹ and "uninsured."²² Some of these questions are still at issue, but since the early 1970s, the bulk of UM litigation has involved the amount of coverage available and the scope of the class insured.²³ There are several reasons for this shift.

First, although insurance companies voluntarily implemented UM coverage in their standard automobile liability policies, many have concentrated their efforts in the past twenty-five years on limiting their liability through exclusionary provisions.²⁴ Some of these limitations have been accepted by the courts, while others continue to be the source of heated litigation.²⁵

Second, the majority of state legislatures have done little to change or update their UM statutes.²⁶ Most UM statutes mandate that automobile liability policies contain UM coverage commensurate with the minimum liability requirements established by the financial responsibility laws.²⁷ However, the general wording of most UM statutes has caused courts to struggle to discern more than an amorphous legislative intent.²⁸

¹⁸See P. PRETZEL, UNINSURED MOTORIST § 15 (1972).

¹⁹*Id.*

²⁰See A. WIDISS, *supra* note 2, § 2.2.

²¹See generally *Madison County Mut. Ins. Co. v. Goodpasture*, 49 Ill. 2d 555, 276 N.E.2d 289 (1971).

²²See generally *Knickerbocker Ins. Co. v. Faison*, 22 N.Y.2d 554, 240 N.E.2d 34, 293 N.Y.S.2d 538, *cert. denied*, 393 U.S. 1055 (1968).

²³See generally *State Farm Mut. Auto. Ins. Co. v. Crockett*, 103 Cal. App. 3d 652, 163 Cal. Rptr. 206 (1980); *Fernandez v. Selected Risks Ins. Co.*, 82 N.J. 236, 412 A.2d 755 (1980).

²⁴A. WIDISS, *supra* note 2, § 1.12.

²⁵See, e.g., Note, *Insurance: Validity of the Owned-but-Uninsured Motor Vehicle Exclusion Under the Uninsured Motorist Act*, 28 OKLA. L. REV. 894 (1975); Note, *Contractual Attempts to Limit Liability Under Uninsured Motorists Coverage*, 47 U. CIN. L. REV. 245 (1978).

²⁶See note 16 *supra*. Indiana's Act has remained substantially unchanged from the version enacted in 1967.

²⁷*Id.*

²⁸See A. WIDISS, *supra* note 2, § 1.12. "[F]or the most part . . . such statutes are no more than statements that the companies shall include an uninsured motorist endorsement in all automobile liability policies issued or delivered in that state." *Id.* at 16.

Third, courts which interpret UM statutes are faced with additional conflicts between confusing insurance policy provisions and public policy.²⁹ In resolving these conflicts, many courts have inconsistently applied "established" rules of insurance contract construction.³⁰ As a result, many of these conflicts remain unresolved, and many of the resolutions remain in conflict.³¹

Finally, the insured frequently finds that these three factors have worked to his detriment because it is only *after* he is damaged by an uninsured motorist that he discovers his UM coverage does not approximate either the coverage he thought he had or the coverage necessary to satisfy his claim. As a result, his losses are undercompensated. Moreover, the number of "undercompensated insureds" is not likely to decrease in the near future, especially because under our present system of accident reparations, a small loss is likely to result in overcompensation, while a large loss will probably be undercompensated.³²

The general inflation of the past decade has pushed the dollar value of many 1970s small losses into the large loss category for the 1980s.³³ Nonetheless, most state legislatures have not raised the minimum requirements in their financial responsibility laws to adequately offset this increase.³⁴

The cloud of the uninsured motorist is inevitably in any forecast for improvement of the present system, but some of the silver lining can be restored by making some critically needed changes. This Note will examine how the undercompensated accident victim is

²⁹Frequently, a major conflict arises when the victim of a financially irresponsible motorist incurs serious injuries. Because most insurers set their UM coverage limit at the statutorily mandated minimum, an insured with more than minimum damages faces insufficient compensation. When the insurer tries to further limit the insured's recovery through exclusionary clauses, difficult questions must be resolved involving the relative bargaining position of the parties, ambiguity, and the intent of the parties.

³⁰Note, *A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts*, 13 U. MICH. J.L. REF. 603 (1980).

³¹See, e.g., notes 83-84 *supra* and pt. III of text.

³²One study determined that an individual with an actual loss of \$250 who files a claim for \$1,000 may well receive the \$1,000 in an out-of-court settlement, primarily because the actual loss added to litigation expenses would cost the insurance company more than \$1,000. See FED. JUDICIAL CENTER, *AUTOMOBILE ACCIDENT LITIGATION* 7 (1970). Another study revealed that seriously injured victims with medical expenses of \$5,000 or more recovered only 55 percent of their expenses, while victims with medical expenses of less than \$5,000 recovered an average of 90 percent of expenses. See 1 U.S. DEPT OF TRANSPORTATION, *ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES* 28 (1970). See also A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* (1964); Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

³³See P. PRETZEL, *supra* note 18, § 8.

³⁴*Id.* See also note 26 *supra*.

affected by some of the significant current problems inherent in UM litigation and will suggest changes which could help improve his prospects for adequate compensation.

II. BASIC UM COVERAGE

Many of the currently litigated UM insurance problems are exacerbated when courts and commentators fail to focus their analyses on the basic nature of the coverage. A significant factor which has blurred this focus is that UM coverage is frequently contained as a part of, or an endorsement to, an automobile liability policy.³⁵ This integration has caused confusion when various policy provisions appear to apply to both coverages.³⁶ Therefore, UM coverage must be distinguished from liability coverage to avoid hopeless confusion in interpreting contract provisions.

A. Nature of UM Coverage

UM coverage extends protection to the insured for damages caused by the negligent driving of a financially irresponsible motorist.³⁷ It differs from liability coverage in several respects, but perhaps the most significant is that UM coverage is direct or "first-party" coverage, because payment of the proceeds goes directly to the insured—the first party under the insurance contract.³⁸ Liability coverage is generally viewed as "third-party" coverage, because payment is made to the injured third party for liability incurred by the insured first party.³⁹ Therefore, liability coverage protects innocent third parties from the negligent driving of an insured first party, while UM coverage protects the insured first party from an uninsured third party.⁴⁰

A second key difference is that UM coverage is "personal" to the insured, whereas liability coverage attaches to a particular insured automobile.⁴¹ The UM endorsement protects the insured from

³⁵See Brin, *Reduction and Exclusion Clauses in Uninsured Motorist Coverage*, 5 ST. MARY'S L.J. 439 (1973).

³⁶See, e.g., *Indiana Farmers Mut. Ins. Co. v. Speer*, 407 N.E.2d 255 (Ind. Ct. App. 1980).

³⁷See note 16 *supra*.

³⁸M. WOODROOF, F. FONSECA & A. SQUILLANTE, *AUTOMOBILE INSURANCE AND NO-FAULT LAW* § 1:18 (1974) [hereinafter cited as WOODROOF].

³⁹*Id.*

⁴⁰*Id.* § 1:19. The authors point out that liability insurance serves as "dual" protection. It protects the insured for liability he incurs through negligent driving and it protects the victims of the insured's negligent driving. However, the authors note that the widespread availability of liability coverage has caused it to be more commonly viewed as protection for the victim than for the insured. *Id.* § 1:20.

⁴¹See A. WIDISS, *supra* note 2, § 2.8.

damages caused by an uninsured motorist, even when the insured is not occupying a vehicle insured under his UM policy.⁴² The insured is covered when driving or riding in another automobile or even if struck while he is a pedestrian.⁴³

A third distinction is that UM coverage is generally extended to any passengers in the vehicle insured under the UM policy.⁴⁴ Liability coverage is intended to cover only the negligent *operation* of an automobile by the insured or his permittee.⁴⁵

These basic differences between liability and UM coverages also illustrate that the risk involved in insuring against a loss is vastly different under each coverage. A person representing a significant risk for liability coverage may pose an inconsequential risk for UM purposes. For example, a teenager may represent a significant liability risk as a driver, but as a passenger, his presence in an automobile struck by an uninsured motorist has small bearing on the risk assumed by UM coverage.⁴⁶

B. Mandatory UM Coverage

The intent of most state legislatures in enacting mandatory UM coverage was to insure that the victim of an accident with a financially irresponsible motorist would be placed in at least the same position by UM coverage as if the uninsured motorist had actually carried the minimum amount of liability coverage.⁴⁷ Most insurance companies have constructed their UM coverage to do exactly that—to provide the minimum coverage.⁴⁸

UM coverage has been standardized almost from its inception.⁴⁹ A joint drafting committee consisting of representatives from the

⁴²*Id.*

⁴³*Id.*

⁴⁴*Id.* § 2.10.

⁴⁵See WOODROOF, *supra* note 38, § 4:10.

⁴⁶Because a teenage driver may be more likely to have an accident, his chances of being injured by an uninsured motorist will increase. However, UM coverage is not "no-fault" insurance because "[t]he insured seeking recovery from his own insurer must prove those same elements he would be expected to prove if the uninsured motorist were insured." P. PRETZEL, *supra* note 18, § 6 at 9. If the teenager's driving contributed to the cause of the accident, then his recovery of UM benefits would be reduced.

⁴⁷See note 16 *supra*.

⁴⁸Although some insurance companies have begun to offer UM coverage with limits higher than the statutory minimums upon the request of the insured, the vast majority of insurers automatically tender only the minimum coverage. P. PRETZEL, *supra* note 18, § 8. See generally Maldonado, *supra* note 17.

A few states statutorily require that insurance companies make available UM coverage up to the bodily injury limits of the policy.

⁴⁹See A. WIDISS, *supra* note 2, § 2.2.

National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau has promulgated standard provisions for UM coverage since 1956.⁵⁰ The most recent promulgation is contained in the 1966 Standard Form Uninsured Motorist Endorsement.⁵¹ While many policies vary in minor respects from these standard provisions, the 1966 Standard Form can be used generally to illustrate the coverage contained in most automobile liability policies currently in force.

III. CURRENT DISPUTES INVOLVING UNDERCOMPENSATED INSUREDS

Two clauses of the Standard Form UM Endorsement, the "omnibus" clause and the "other insurance" clause, have been the subject of much of the current litigation by undercompensated accident victims.⁵² Courts and insureds alike have been confused by both clauses. Frequently, the judicial resolutions of this confusion have also been in conflict.⁵³

A. "Other Insurance" and the Stacking Issue

The Standard Form contains a clause which has been labeled the "other insurance" clause.⁵⁴ Its purpose is to limit the insurer's liability in cases where the insured has more than one source of insurance compensation available. This "multiple coverage" situation stimulates questions concerning the insured's ability to "stack" the coverages of more than one UM endorsement. Often, the validity of an "other insurance" clause is key to determining whether stacking will be allowed.⁵⁵

1. *The "Stacking" Concept.*—"Stacking" of UM coverage involves the accumulation of benefits which are supplied by more than one UM endorsement, thereby increasing the total amount which the injured insured can recover.⁵⁶ The availability of this increased recovery is placed at issue when an individual has damages which exceed the coverage limits contained in one UM endorsement.⁵⁷

⁵⁰*Id.*

⁵¹STANDARD COVERAGE PART, PROTECTION AGAINST UNINSURED MOTORISTS (1966) [hereinafter cited as 1966 STANDARD FORM]. For the complete text of the 1966 Standard Form and its predecessors, see A. WIDISS, *supra* note 2, at 291 app. A, 1.

⁵²See note 62 *infra*.

⁵³See notes 61-62 *infra* and accompanying text.

⁵⁴See 1966 STANDARD FORM, *supra* note 51, pt. VI. E.

⁵⁵See P. PRETZEL, *supra* note 18, § 25.5 (B).

⁵⁶*Id.*

⁵⁷The insured can exceed the coverage limits of one UM endorsement without suffering extensive injuries. For example, if five occupants in a vehicle struck by an

These additional UM coverages become available in three basic situations.

First, X should have UM coverage under the liability policy which covers an automobile he owns.⁵⁸ Additionally, many of the non-owned vehicles in which X rides will also have UM protection for passengers.⁵⁹ If X is injured by an uninsured motorist while riding in such a non-owned vehicle, he will qualify as an "insured" under both of these UM coverages. If X's damages exceed the UM limit of the policy covering the non-owned vehicle, he will probably seek additional compensation under his own UM policy. Thus, X will try to stack the UM benefits of his own policy on top of the non-owned policy benefits.

Second, X may own several automobiles, with a separate liability policy for each automobile. X will be an "insured" under each policy. If X is injured by an uninsured motorist he may try to stack the UM limit in *each* owned *policy* until he is fully compensated.

Third, X may have one liability policy which covers all of his automobiles. Since each automobile will have a UM coverage limit, X may try to stack the UM limit for *each* owned *automobile* to increase his recovery.

2. *Judicial Reaction to Stacking.*—Courts have confronted the stacking issue in a multitude of cases involving a myriad of fact situations.⁶⁰ The confusion flowing from the conflicting resolutions of

uninsured motorist each sustain \$6,000 in injuries, a \$30,000 maximum recovery would be exhausted quickly.

⁵⁸Since all fifty states require UM coverage to be issued with every automobile liability policy, X will get UM coverage when he insures his automobile for liability. See notes 16-17 *supra*. The only circumstance in which X would not have UM coverage would be if X bought automobile insurance in a state whose statute allowed him to reject the coverage.

⁵⁹See note 44 *supra* and accompanying text.

⁶⁰See, e.g., *Burke v. Aid Ins. Co.*, 487 F. Supp. 831 (D. Kan. 1980) (Executrices, whose husbands were killed in a county-owned vehicle, argued that the \$15,000 per person UM coverage applicable to each county-owned vehicle could be stacked forty-four times (the county's UM policy covered a total of forty-four vehicles) for a "recovery pool" of \$660,000.); *Goodrich v. Lumbermens Mut. Cas. Co.*, 423 F. Supp. 838 (D. Vt. 1976) (Daughter could stack UM coverage of her policy and her father's policy when she was injured by an uninsured motorist who drove his car into her parents' house.); *State Farm Mut. Auto. Ins. Co. v. Sinacola*, 385 So. 2d 115 (Fla. Dist. Ct. App. 1980) (Father and son, who were both injured while passengers in the father's car when a non-family member was driving, could stack the father's UM benefits onto the driver's UM benefits. The litigation concerning this two-car accident involved five UM policies and three insurance companies.); *Briley v. Falati*, 367 So. 2d 1227 (La. Ct. App. 1979) (lessee of rental car denied stacking of UM benefits applicable to all sixty-six vehicles the lessor insured under one UM policy); *Linderer v. Royal Globe Ins. Co.*, 597 S.W.2d 656 (Mo. Ct. App. 1980) (Employee injured by uninsured motorist when driving one of 1,420 of the employee's "fleet" vehicles sought stacking of the \$20,000 per acci-

these cases may be attributable to a general judicial insensitivity to the specific facts involved in each case and their relationship to the disputed policy provisions.⁶¹

Several commentators have analyzed these various fact situations and propounded arguments both for and against stacking of UM coverage.⁶² Unfortunately, these arguments have often fallen prey to the same problems, misunderstandings, and confusion which have plagued the courts in this area. Therefore, to avoid these common pitfalls, an understanding of the policy provisions in dispute is critical.

3. *The Excess-Escape Clause.*—The “other insurance” clause is applicable to two different common situations and it is divided into two sections: (1) the “excess-escape” clause,⁶³ and (2) the “pro-rata” clause.⁶⁴

The Standard Form “excess-escape” clause 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 the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.⁶⁵

The “excess-escape” clause is intended to apply when an insured is injured while occupying a non-owned vehicle.⁶⁶ If this non-owned automobile has UM coverage, then the insured can only recover under his own UM coverage to the extent that its benefits exceed those supplied by the “primary policy”—the policy which covers the non-owned vehicle.⁶⁷

For example, if A is injured while riding in a non-owned vehicle and his host, B, has a policy providing \$15,000 in UM coverage, then

dent UM coverage applicable to each company car under the employee's “fleet” UM policy. In denying stacking, the court noted that the insurer would face potential liability of \$20,164,000,000 under the employee's argument.).

⁶¹See East, *Pyramiding of Uninsured Motorist Protection: The Confusion Inherent in Overgeneralization*, 5 ST. MARY'S L.J. 568 (1973).

⁶²See generally Davis, *Uninsured Motorist Coverage: Some Significant Problems and Developments*, 42 MO. L. REV. 1 (1977); East, *supra* note 61; Note, *Stacking of Uninsured Motorist and Medical Expense Insurance Coverages in Automobile Insurance Policies*, 13 GA. L. REV. 1014 (1979).

⁶³See 1966 STANDARD FORM, *supra* note 51, pt. VI. E.

⁶⁴See *id.*

⁶⁵*Id.*

⁶⁶See A. WIDISS, *supra* note 2, § 2.60.

⁶⁷*Id.*

if A's UM policy limit is also \$15,000, the "excess-escape" clause limits A's total recovery to the \$15,000 limit of the primary insurance. A's insurer thereby "escapes" liability. If A's UM policy limit is \$20,000, then A could recover a maximum of \$5,000—the "excess" over B's policy limit—under his own policy.

Most courts have refused to enforce the "excess-escape" clause for three fundamental reasons. All three were used by the court in *Simpson v. State Farm Mutual Automobile Insurance Co.*,⁶⁸ the first Indiana decision which interpreted the "excess-escape" clause.⁶⁹

In *Simpson*, the plaintiff was a passenger in a non-owned vehicle which was struck by an uninsured motorist. The host's insurer paid its full UM policy limit of \$10,000 to the plaintiff, but her personal injuries exceeded \$30,000. The plaintiff was also an "insured" under two separate automobile liability policies which her mother maintained with State Farm. However, State Farm denied coverage because of the "excess-escape" clause in each of the policies. Subsequently, the plaintiff sued to recover each of the \$10,000 UM limits in the State Farm policies. In rejecting State Farm's request to enforce the "excess-escape" clause, the federal district court held:

(1) Nowhere in any of the statutes . . . does the legislature attempt to fix any maximum limit of recovery; such statutes merely fix minimum requirements. (2) Since the statutes simply provide that each policy of insurance issued must contain uninsured motorist protection in minimum amounts . . . , it follows that any attempt on the part of an insurer to limit the effect of such clauses must be in derogation of the statute. (3) 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 insurers to collect a premium for a coverage which they are required by statute to provide, and then to avoid payment of a loss because of language of limitation devised by themselves.⁷⁰

As a result, the plaintiff was allowed to stack the UM coverages of the two State Farm policies.

The only other Indiana case which contained an "excess-escape" clause question was *Patton v. Safeco Insurance Co. of America*.⁷¹

⁶⁸318 F. Supp. 1152 (S.D. Ind. 1970).

⁶⁹The "excess-escape" clause in *Simpson* was very similar to the Standard Form. See notes 65-67 *supra* and accompanying text.

⁷⁰318 F. Supp. at 1156.

⁷¹148 Ind. App. 548, 267 N.E.2d 859 (1971).

The Pattons were injured by an uninsured motorist while they were riding in a non-owned automobile. The host's insurer paid benefits under its UM policy, but, as in *Simpson*, these benefits were insufficient to cover the Pattons' injuries. Safeco also provided UM coverage through a policy which was issued on the Pattons' family car, but Safeco claim that the "excess-escape" clause in that policy negated its liability.

The Indiana Court of Appeals disagreed. It held that Indiana's UM Coverage Act was aimed at each automobile policy and not at each "insured."⁷² Therefore, the court reasoned that no legislative intent existed to support limiting the insured's recovery to one UM policy.⁷³ Consequently, the court voided the "excess-escape" clause and allowed the Pattons to recover from their Safeco policy.⁷⁴

Simpson and *Patton* illustrate the rationales which most jurisdictions have used to allow the insured to stack UM coverages in the "non-owned" situation.⁷⁵ The decision to allow stacking is the most equitable and well-reasoned result. The insured should not be penalized for riding in another vehicle which also has UM coverage, yet this is the effect of enforcing the "excess-escape" clause. Nevertheless, one observer has argued that the UM premium charged reflects the limited coverage provided; therefore, limiting the coverage is not unconscionable.⁷⁶ This position is based on two tenuous presumptions and works a particular hardship on the under-compensated motorist.

First, it presumes that the insured was informed of this limitation by the insurer and that he knowingly accepted it. Given the confusion which UM policy provisions have caused among the nation's courts and counsel, it is unreasonable to assume that the average insured party is meaningfully aware of how the "excess-escape" clause operates.

Second, the argument presupposes that insurance companies do *in fact* charge a UM premium with the knowledge that the insured will have other insurance available to him a certain percentage of the time. This places enormous trust in actuarial skills.⁷⁷ A more

⁷²The court relied primarily on the "derogation of the statute" argument used in *Simpson*. *Id.* at 553, 267 N.E.2d at 862.

⁷³*Id.* at 555, 267 N.E.2d at 864.

⁷⁴*Id.*

⁷⁵"[M]ost of the courts which have considered the issue for the first time during the past two years have invalidated [the excess-escape clause]." A. WIDISS, *supra* note 2, § 2.60 (Supp. 1980). About two-thirds of the thirty-plus jurisdictions which have considered the "excess-escape" limitation have refused to enforce it. *Id.*

⁷⁶See Note, *Uninsured Motorists Coverage In Indiana: A Review and Proposal for Change*, 13 VAL. U.L. REV. 297, 319 (1979).

⁷⁷Since UM coverage is personal to the insured, such a calculation would be more

reasonable presumption is that insurers account for situations in which their policy will be the only UM coverage available to the insured and charge the premium accordingly. Why then should the insurer benefit by the fortuitous circumstance of the insured's occupancy in another "covered" automobile? More significantly, why should the insured suffer? The three justifications adopted by the *Simpson* court present the best resolution of this issue.

4. *The "Pro-Rata" Clause.*—The second situation involving the "other insurance" clause is when the insured is riding in or driving a vehicle which he owns and insures. This circumstance triggers the operation of the "pro-rata" section of the "other insurance" clause.⁷⁸

The Standard Form "pro-rata" clause provides:

Except as provided in the [excess-escape clause], 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.⁷⁹

The "pro-rata" clause is inserted to limit the carrier's liability by apportioning the insured's recovery among the policies available.⁸⁰ For example, A has separate UM policies for both of his owned automobiles with \$30,000 limits in each. If A incurs \$60,000 in damages, then the "pro-rata" clause will limit his recovery to \$30,000, with \$15,000 supplied by each policy.

Courts have been more willing to enforce the "pro-rata" clause.⁸¹ However, they have distinguished two situations to which the clause applies, enforcing it in one while voiding it in the other. The first situation involves an insured with multiple UM policies available, for example, separate policies on several owned automobiles. In this situation, the "pro-rata" clause functions like the "excess-escape" clause because it limits the insured's liability under each policy to

complicated than determining the probability that the insured would be riding in or driving an owned as opposed to a non-owned vehicle. It would also have to recognize the insured's potential for sustaining injury as a pedestrian and the probability that the non-owned automobile would have UM coverage applicable to the insured.

⁷⁸See A. WIDISS, *supra* note 2, § 2.61.

⁷⁹See 1966 STANDARD FORM, *supra* note 51, pt. VI. E.

⁸⁰See A. WIDISS, *supra* note 2, § 2.61.

⁸¹See, e.g., *Westhoff v. American Interinsurance Exchange*, 250 N.W.2d 404 (Iowa 1977); *Pettid v. Edwards*, 195 Neb. 713, 240 N.W.2d 344 (1976); *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793 (Tex. 1972).

less than the statutorily mandated amount.⁸² Consequently, most courts have held the clause to be repugnant to the statutory mandate and have allowed the insured to stack his benefits in this "inter-policy" situation.⁸³

The second situation concerns an insured with *one* policy which covers several owned automobiles. This "intra-policy" stacking question has generally been resolved against the insured,⁸⁴ but the judicial responses are frequently confusing. Much of this confusion may be justifiable because of the applicability of two other policy provisions: (1) the limits of liability clause,⁸⁵ and (2) the separability clause.⁸⁶

There are several Indiana decisions which involve the intra-policy stacking issue. In *Jeffries v. Stewart*,⁸⁷ Indiana's case of first impression, the insured's son was injured while attempting to jump on a dump truck driven by an uninsured motorist. The insured had one policy which covered three different owned vehicles. The UM coverage limit was \$10,000 and the son's injuries totaled \$30,000. The insurer did not rely on the "pro-rata" clause to avoid stacking, rather it argued that the limits of liability clause resolved any ambiguity in the policy.⁸⁸

The court of appeals keyed on this ambiguity between the limits of liability clause and the separability clause.⁸⁹

⁸²See A. WIDISS, *supra* note 2, § 2.61.

⁸³See, e.g., *General Mut. Ins. Co. v. Gilmore*, 294 Ala. 546, 319 So. 2d 675 (1975); *Safeco Ins. Cos. v. Vetre*, 174 Conn. 329, 387 A.2d 539 (1978); *Barnes v. Government Emps. Ins. Co.*, 142 Ga. App. 377, 236 S.E.2d 9 (1977); *Glidden v. Farmers Auto. Ins. Ass'n*, 57 Ill. 2d 330, 312 N.E.2d 247 (1974); *United Farm Bureau Mut. Ins. Co. v. Runnels*, 382 N.E.2d 1015 (Ind. Ct. App. 1978).

⁸⁴See, e.g., *Arminski v. United States Fidelity & Guar. Co.*, 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).

⁸⁵See 1966 STANDARD FORM, *supra* note 51, pt. III(a). This clause provides: The limit of liability stated in the [declaration] 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] 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.

Id.

⁸⁶The Standard Form does not contain a separability clause. However, it is commonly worded: "When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability . . ." *Liddy v. Companion Ins. Co.*, 390 N.E.2d 1022, 1032 (Ind. Ct. App. 1979).

⁸⁷159 Ind. App. 701, 309 N.E.2d 448 (1974).

⁸⁸*Id.* at 705, 309 N.E.2d at 451.

⁸⁹*Id.* at 707, 309 N.E.2d at 452. The court bypassed the opportunity to base its decision on the UM statute. *Id.* at 706, 309 N.E.2d at 452.

[W]hen an insurance contract is ambiguous so as to be susceptible of more than one interpretation, that construction most favorable to the insured will be adopted.

. . .

[The] separability clause . . . effectuates a contract of insurance *separately as to each car insured*, and binds *each policy with all the provisions* and conditions of the single policy.⁹⁰

The court found further justification for allowing the insured to stack his coverages because the insured had paid a separate UM premium for each of his three cars.⁹¹ Thus, stacking was permitted and the insured avoided undercompensation.

However, *Jeffries* is the only bright spot in Indiana for the potential undercompensated motorist. Four subsequent Indiana decisions have refused to allow intra-policy stacking.⁹² The two most recent cases, *Liddy v. Companion Insurance Co.*⁹³ and *Indiana Insurance Co. v. Ivers*,⁹⁴ held that insurers could limit their UM liability if the policy provisions were clear and unambiguous.⁹⁵

Both courts distinguished *Jeffries* because in *Liddy* and *Ivers* the separability clause contained in each policy was made expressly inapplicable to the UM coverage.⁹⁶ In each case, the insured argued that because separate UM premiums were assigned to each insured automobile, stacking should be allowed.⁹⁷ Both courts rejected this contention because of the insurer's assumption of additional risk through the addition of more automobiles to the policy.⁹⁸ The *Ivers* court further elaborated by stating "that this underwriting fact justifies additional premium charges for the additional risk assumed by the company."⁹⁹

Many insurance companies have removed the separability clause from their automobile policies, while others have modified it so that

⁹⁰*Id.* at 706-07, 309 N.E.2d at 452 (emphasis added).

⁹¹*Id.* at 708, 309 N.E.2d at 453.

⁹²*Trinity Universal Ins. Co. v. Capps*, 506 F.2d 16 (7th Cir. 1974); *Miller v. Hartford Accident & Indem. Co.*, 506 F.2d 11 (7th Cir. 1974); *Indiana Ins. Co. v. Ivers*, 395 N.E.2d 820 (Ind. Ct. App. 1979); *Liddy v. Companion Ins. Co.*, 390 N.E.2d 1022 (Ind. Ct. App. 1979).

⁹³390 N.E.2d 1022 (Ind. Ct. App. 1979).

⁹⁴395 N.E.2d 820 (Ind. Ct. App. 1979).

⁹⁵*Id.* at 825; 390 N.E.2d at 1034.

⁹⁶395 N.E.2d at 823; 390 N.E.2d at 1034. In *Liddy*, the separability clause was applicable to "Part I, Coverages A and B of this policy, and separate automobiles under Part II of this policy." The UM coverage was "Part I, Coverage D." *Id.* at 1032-33.

⁹⁷395 N.E.2d at 823-24; 390 N.E.2d at 1032.

⁹⁸395 N.E.2d at 824; 390 N.E.2d at 1032.

⁹⁹395 N.E.2d at 824.

it is expressly inapplicable to the UM coverage. Thus, the under-compensated motorist will have to find ambiguity in other provisions or attack the "additional risk" argument if he is to be adequately compensated in the intra-policy situation.

The "additional risk" rationale does contain several inconsistencies. The Indiana Court of Appeals could have distinguished *Liddy* and *Ivers* from *Jeffries* on another ground to make the "additional risk" argument more acceptable in the intra-policy situation. The victim in *Jeffries* was injured in a non-owned vehicle, while the insureds in *Liddy* and *Ivers* were both injured in owned vehicles.

This distinction is significant since the insurer covers certain "insureds" whether they are occupying an owned vehicle, a non-owned vehicle, or no vehicle at all.¹⁰⁰ Therefore, as to this class of "insureds," the insurer accepts no additional UM risk when more vehicles are added to the coverage.¹⁰¹ The only additional risk which the insurer assumes is for those persons who become "insureds" by riding in additional insured automobiles.¹⁰² Therefore, the "additional risk" argument does not appropriately apply to an intra-policy situation when an insured is occupying a non-owned vehicle or is a pedestrian.

Consequently, the only support for the "additional risk" theory comes from the insurer's coverage of those who become "insureds" by riding in the additional insured vehicles.¹⁰³ At least one jurist has recently contended that this position is untenable in view of modern insurance practices.¹⁰⁴ Frequently, the UM premium charged for adding automobiles to the original policy is substantially similar to the UM premium charged for the original vehicle.¹⁰⁵ Thus, the insured has little reason to believe that only "reduced" coverage is being supplied.¹⁰⁶

¹⁰⁰Under the Standard Form these "insureds" are the insured and his family. They have UM coverage when occupying *any* vehicle or when struck as a pedestrian. This coverage is supplied by one policy on a single automobile.

¹⁰¹Because these "insureds" are covered all of the time already, the only way they could increase their risk for UM purposes would be to be in more than one place at the same time.

¹⁰²Each automobile added to the UM policy increases the number of passengers who could potentially suffer injury. In addition, additional automobiles increase the potential for an accident with an uninsured motorist by increasing the exposure to traffic.

¹⁰³See note 102 *supra*.

¹⁰⁴See *Menke v. Country Mut. Ins. Co.*, 78 Ill. 2d 420, 430, 401 N.E.2d 539, 544 (1980) (Clark, J., dissenting).

¹⁰⁵See *generally* *Menke v. Country Mut. Ins. Co.*, 78 Ill. 2d 420, 401 N.E.2d 539 (1980).

¹⁰⁶Justice Clark of the Supreme Court of Illinois has noted: "In my opinion, no reasonably prudent insurance consumer would expect the first \$4 policy to cover his

In other instances, the UM premium is a single lump sum for all automobiles covered under the policy. Accordingly, the insured cannot determine the UM premium for each car, so he has no indication that he is getting "reduced" coverage for additional automobiles. Many courts have allowed insurers to further hide this "reduction" by stretching the meaning of "clear and unambiguous" when applied to complex UM policy provisions.¹⁰⁷ If courts continue to accept the additional risk argument, then they should require insurers to give clear notice of the coverage reduction to the insured.¹⁰⁸

*B. Which Definition of "Insured" Controls:
Liability or UM?*

Every automobile liability policy contains a clause which has been labeled the "omnibus" clause. This clause defines those persons who are "insureds" under the liability policy. An "omnibus" clause is also commonly found in the UM section of the policy¹⁰⁹ and defines

entire family in every conceivable situation and the second \$4 policy to cover only those individuals who used his second (or third) car with permission." *Id.* at 431, 401 N.E.2d at 545.

¹⁰⁷See *id.* at 424, 401 N.E.2d at 541. The majority opinion found no ambiguity, while Justice Clark depicted the following scenario in his dissent:

[O]n page 3, the insured is unqualifiedly told that this policy will provide indemnification for injuries caused by uninsured motorists. On page 4, the policy purports to list "Exclusions Under Section II." The "other automobile insurance within the company" clause is not listed or explained under this heading. Also on page 4 is a heading entitled "Limits of Liability." But the exclusion relied upon is not found there either. On page 5, there is the heading "Other Insurance," but the exclusion at issue in this case is not to be found there either. I think a reasonable person would expect to find the exclusion at issue under one of these headings and would be misled if not discussed there.

On page 4, however, there is the heading "Conditions Under Section II," which states only that 15 general conditions apply to this policy. I suppose the careful reader will then wade through the soporific wording of sections III and IV, find on page 9 "General Conditions," see the magic clause on page 10, remember that it applies to Section II, and conclude therefrom that his or her \$4 premium purchases next to nothing. If the plaintiff wanted to discover the actual risk he was purchasing, he would have had to read page 3, which refers to page 1, read therein the definitions of "Persons Insured" and understand that people using the second or third vehicle with his permission were the only persons receiving uninsured motorist coverage under his second or third policy provisions.

Id. at 432-33, 401 N.E.2d at 545.

¹⁰⁸An example of clear notice is, "The premium paid for uninsured motorist coverage in this policy purchases no additional insurance coverage for you and your family. It only buys coverage for people using your second (or third) vehicle with your permission." *Id.*

¹⁰⁹See 1966 STANDARD FORM, *supra* note 51, pt. II. This clause provides coverage for:

those persons who are "insureds" under the UM provisions.¹¹⁰ When the liability "omnibus" clause and the UM "omnibus" clause differ as to who is "insured," a coverage question naturally arises.

A significant conflict has recently developed among courts which have considered whether the definition of "insured" contained in the liability provisions or in the UM provisions of the policy should control.¹¹¹ As with stacking, the facts of each case must be closely examined to satisfactorily resolve the question.

Several courts have held that the legislative intent was to have all persons insured under the liability provisions of the policy afforded UM coverage.¹¹² These courts routinely have found that the liability definition of "insured" should control over the UM definition of "insured" when a conflict existed.¹¹³ Therefore, one court stated: "While the statute does not specifically define 'insured' for the purposes of determining who is allowed to recover under the uninsured provision, it is our interpretation that the legislature intended persons insured under the liability policy to be those who would recover under the uninsured motorist coverage."¹¹⁴

Two recent decisions by the appellate courts of Michigan¹¹⁵ and Indiana¹¹⁶ have taken this language and used it to reach decisions which are clearly a step backward for the undercompensated accident victim and, it is submitted, are just as clearly wrong.

The Indiana case, *Indiana Farmers Mutual Insurance Co. v. Speer*,¹¹⁷ involved a conflict between the definition of "persons insured" in the liability provisions of the policy and the UM endorsement. The plaintiff's policy provided the standard UM coverage for one of two vehicles he owned. Plaintiff's wife and daughter were occupying the other owned vehicle when they were struck by an un-

-
- (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.

Id. (emphasis deleted).

¹¹⁰*Id.*

¹¹¹*See, e.g.,* *Indiana Farmers Mut. Ins. Co. v. Speer*, 407 N.E.2d 255 (Ind. Ct. App. 1980); *Washington v. Travelers Ins. Co.*, 92 Mich. App. 151, 284 N.W.2d 754 (1979).

¹¹²*See* *Vernon Fire & Cas. Ins. Co. v. American Underwriters, Inc.*, 171 Ind. App. 309, 356 N.E.2d 693 (1976). *See also* note 116 *infra*.

¹¹³*See* *Vernon Fire & Cas. Ins. Co. v. American Underwriters, Inc.* 171 Ind. App. 309, 313-14, 356 N.E.2d 693, 693 (1976).

¹¹⁴*Id.*

¹¹⁵*Washington v. Travelers Ins. Co.*, 92 Mich. App. 151, 284 N.W.2d 754 (1979).

¹¹⁶*Indiana Farmers Mut. Ins. Co. v. Speer*, 407 N.E.2d 255 (Ind. Ct. App. 1980).

¹¹⁷*Id.* at 255.

insured motorist. The daughter was injured and his wife was killed. The trial court granted a partial summary judgment in plaintiff's favor, ruling that the UM coverage extended protection to the wife and daughter while occupying the other automobile.¹¹⁸

The insurer argued on appeal that the "owned but uninsured" exclusion applied to the wife and daughter and also that they were not insureds under the liability portion of the policy. The Indiana Court of Appeals held that the wife and daughter were not "persons insured" by the liability provisions and, as a result, the UM coverage did not extend to them.¹¹⁹ The court cited cases from Michigan¹²⁰ and Alabama¹²¹ in support of this holding.

All but one of these cases, *Washington v. Travelers Insurance Co.*,¹²² fall short of providing sound authority for the *Speer* court's decision.¹²³ Each court cited held that UM coverage must be extended to all persons insured under the liability provisions.¹²⁴ Therefore, once a policy provides liability coverage for a class of insureds, that class cannot subsequently be *narrowed* by placing exclusionary clauses in the UM coverage.¹²⁵ In this sense, the liability "omnibus" clause does "control" over the UM "omnibus" clause. However, *Speer* and *Washington* were the only cases involving UM provisions which defined an insured class which was broader than the liability "omnibus" definition.¹²⁶

Both courts seized upon the concept that "liability controls over UM," and then applied that reasoning to *narrow* the class of insureds in the UM definition.¹²⁷ They continued this misapplied rationale in holding that the legislative intent was to extend UM to those persons insured in the liability "omnibus" clause and therefore, UM coverage which was broader than liability coverage was adverse to the legislative intent.¹²⁸ Such reasoning effectively precludes an insured from having more people covered under his UM protection than are covered by liability provisions.

There are several reasons why these holdings are untenable.

¹¹⁸*Id.* at 256.

¹¹⁹*Id.* at 259.

¹²⁰*Pappas v. Central Nat'l Ins. Group*, 400 Mich. 475, 255 N.W.2d 629 (1977).

¹²¹*State Farm Auto. Ins. Co. v. Reaves*, 292 Ala. 218, 292 So. 2d 95 (1974); *United States Fidelity & Guar. Co. v. Perry*, 361 So. 2d 594 (Ala. Civ. App. 1978).

¹²²92 Mich. App. 151, 284 N.W.2d 754 (1979).

¹²³Only the *Washington* court was faced with a UM "omnibus" clause which was broader than the liability "omnibus" clause. *Id.* at 154, 284 N.W.2d at 756.

¹²⁴*See Indiana Farmers Mut. Ins. Co. v. Speer*, 407 N.E.2d at 258.

¹²⁵*Id.* at 259.

¹²⁶*See* 407 N.E.2d at 258; 92 Mich. App. at 154, 284 N.W.2d at 756.

¹²⁷407 N.E.2d at 258-59; 92 Mich. App. at 154, 284 N.W.2d at 755-56.

¹²⁸*See* note 127 *supra*.

First, as several noted commentators have observed,¹²⁹ UM coverage is *separate* from liability coverage, notwithstanding that both coverages may be delineated in a single insurance policy.

Because the purpose of the omnibus clause is to ensure that the liability coverage on the car is available to persons injured as the result of negligence attributable to drivers using the car with the owner's permission (that is, the protection of those foreign to the contractual designations of who is an "insured") it is highly illogical to apply it to define those eligible to recover under a separate contractual coverage provided by the policy.¹³⁰

Second, many courts have reasoned that if the UM coverage meets the requirements detailed in the statute, then the insurance contract which the parties have made should not be altered.¹³¹ Nevertheless, both the *Speer* and *Washington* courts used their statutes to narrow the coverage which was offered and paid for.¹³²

A third flaw in these decisions is the use of legislative intent arguments in dealing with fact situations which are arguably outside the scope of legislative intent.¹³³ Most legislatures have set forth base limits for UM coverage which must be complied with.¹³⁴ Once these base limits have been provided, it is incorrect to use legislative intent to determine the existence or scope of coverage beyond the base limits. As several courts have noted, the statutes set a *minimum* to be met—they do not mandate a *maximum*.¹³⁵ Therefore, the parties should be free to contract for as broad a coverage as they mutually agree upon. To hold otherwise is to restrict all victims of uninsured motorists to the minimum recovery allowed under the statute. Such a restriction will only increase the number of undercompensated victims and the amount by which they are undercompensated.¹³⁶

IV. CONCLUSION

The number of undercompensated UM victims can only increase

¹²⁹See P. PRETZEL, *supra* note 18, § 43; see also A. WIDISS, *supra* note 2, § 2.13.

¹³⁰Davis, *supra* note 62, at 5 n.24.

¹³¹See A. WIDISS, *supra* note 2, § 1.15.

¹³²See note 126 *supra* and accompanying text.

¹³³See A. WIDISS, *supra* note 2, § 3.11.

¹³⁴See note 4 *supra* and accompanying text.

¹³⁵See note 28 *supra*.

¹³⁶Since there are already a significant amount of UM victims who are undercompensated, inflation is certain to add to their numbers if only the minimum coverage is available. See P. PRETZEL, *supra* note 18, § 34.

if the current system is not improved.¹³⁷ The responsibility for making these improvements must be shared by the courts, legislatures, and insurers.

Each court which is faced with a UM coverage question should carefully examine the specific facts involved in each case. Over-generalizations are dangerous and have created much of the confusion which presently exists.¹³⁸ The judiciary can also motivate insurers to adequately inform insureds about coverage limitations by refusing to enforce complex and misleading policy provisions. However, courts should enforce policy language which is truly clear and unambiguous,¹³⁹ and they should refrain from judicially expanding UM coverage when the limitations are legitimate.

Most state legislatures should re-evaluate their mandatory UM statutes and financial responsibility acts to determine if changes or clarifications need to be made. For example, Indiana's Financial Responsibility Act has not been amended since 1971.¹⁴⁰ Because most current "undercompensated" UM cases involve damages between \$30,000 and \$50,000, an increase in the minimum limits could significantly reduce the number of victims who actually end up being undercompensated.

Although a few insurance companies have begun to make UM coverage available with higher limits, the vast majority continue to issue policies which provide only the statutorily mandated minimums.¹⁴¹

Automobile liability insurance is available with various limits, therefore it seems reasonable to offer the insured some choice of expanded UM coverage. This would increase the insured's knowledge of his UM coverage and would allow those insureds who prefer the minimum limits to intelligently reject additional coverage.

Insurers should not wait for courts to force them to make policy provisions more understandable to the insured. At least one state insurance commission has strongly suggested that insurance companies take the initiative in simplifying policy language.¹⁴² This

¹³⁷*Id.*

¹³⁸See note 17 *supra* and accompanying text.

¹³⁹See note 107 *supra*.

¹⁴⁰See note 6 *supra*.

¹⁴¹See note 17 *supra*.

¹⁴²See WASH. INS. COMM. BULLETIN 78-2 (1978), which provides in part:

The purpose of this Bulletin is to state the Insurance Commissioner's Guidelines for Readable Auto Insurance Policies. Companies issuing auto insurance in this State should take note of these guidelines and make every effort to comply with them by January 1, 1979 or earlier if possible.

1. The provisions of this Bulletin apply to all policies providing Insurance on Private Passenger Type Automobiles owned or rented under a long term lease by an individual or husband and wife.

effort should be joined with increased information to the insured as to exactly what kind of coverage his premium buys.

Additionally, insurance companies should attempt to balance the needs of the individual insured against the costs saved by using standardized forms. The insured could be allowed to supplement the coverage delineated in the Standard Form without rendering the form obsolete. When Standard Form provisions meet judicial disfavor in a particular state, they should be removed from the policy forms issued in that state instead of spending useless litigation time trying to get them enforced.

2. General Guidelines:

The automobile insurance policy is a legal document. The policy revision process must proceed with the highest degree of care and caution to maintain its legal status.

The revised policy shall be organized so the text follows logical thought patterns.

General policy provisions applicable to all or several coverages may be located in a common area separate from the other coverages.

Eliminate the nonessential provisions of the policy and simplify it whenever possible. The simplification shall be such that the text is readable and understandable by the average person buying insurance.

Clearly delineate between policy sections and columns. Provide adequate "white space" for easy reading.

Use everyday conversational language to the extent possible. Words used primarily by the insurance industry, such as "Premium," "Declarations Page," "Endorsement" and "Exclusion" should be eliminated as much as possible.

Use illustrations or graphic devices, such as color and layout to enhance the readability.

3. Specific Guidelines:

Use not less than 10 point type size. The type face may be selected by the company but its character should be easily read by the average person buying insurance.

Captions or headings shall be designed to stand out clearly and distinctly.

Use paper which permits the reader to read the front side of the page without visual interference from the print on the back and vice versa under normal reading conditions.

Technical or special words or phrases used throughout the policy may be defined once and used without further definition in the policy if they are italicized, printed in bold face type or otherwise distinguished.

Include a table of contents or a reasonable index for easy reference.

Use familiar words and simple sentences.

Use a personal style such as "his," "her," "you," and "we," "us" and "our."

4. Readability Testing:

A bona fide readability test shall be applied to each policy. The "Filing" of the form should identify the test used and specify the score or results.

5. When submitting a filing which does not fully comply with these guidelines, submit a statement listing the areas of noncompliance and the

Finally, the insured driver can only make a reasonable choice when he is adequately informed about his alternatives. The potential undercompensated victim deserves a chance to provide for "excess" losses before such possibility becomes a harsh reality. Courts, legislatures, and insurers should give him this chance.

ROBERT D. MAAS

reasons therefor. If it is necessary to alter coverages such change must be explained in the filing. The Commissioner shall review the reasons contained in the variance statement in determining the acceptability of the filing.

6. Our goal for this Bulletin is to produce readable policies, without unwarranted expansion or contraction of policy coverage under the guise of readability.

