

**UNINSURED MOTORIST LAW**  
**June 5, 2002**

**ISSUES RELATING TO**  
**AVAILABLE POLICY LIMITS**

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## I. STACKING COVERAGES

### A. General Rule

The injured insured may pyramid or stack the UM coverage of all available policies and recover to the extent of the damages and the available stacked limits.<sup>1</sup> Where the tortfeasor is completely uninsured, an insured may stack multiple policies of uninsured motorist coverage to recover an actual loss within the aggregate limits of the multiple policies.<sup>2</sup> Similarly, where the tortfeasor is underinsured, an insured may stack multiple policies of uninsured motorist coverage to recover that portion of the actual loss which exceeds the tortfeasor's available general liability coverage.<sup>3</sup> Of course, this also includes recovering the tortfeasor's liability policy limits. An insured may also stack multiple policies of minimum uninsured motorist coverage even if the tortfeasor is minimally insured with general liability coverage.<sup>4</sup>

An example: three minimum coverage UM policies providing \$25,000 per person. The Tortfeasor is covered by policy with the minimum per person limits of \$25,000. The total available UM is \$50,000 for a total of \$75,000 available insurance.

An "other insurance" provision that attempts to limit UM coverage to sums that are in excess of other uninsured motorist protection conflicts with the statute and is unenforceable.<sup>5</sup> Many uninsured motorist endorsements contain what is commonly referred to as an "other insurance" provision. The existence of an "other insurance"

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<sup>1</sup> O.C.G.A. § 33-7-11(b)(1)(D)(ii); State Farm Mut. Auto. Ins. Co. v. Georgia Farm Bureau Mut. Ins. Co., 255 Ga. 166, 336 S.E.2d 237 (1985)

<sup>2</sup> Crafter v. State Farm Ins. Co., 251 Ga. App. 642, 554 S.E.2d 571 (2001); James v. Allstate Ins. Co., 209 Ga. App. 659, 434 S.E.2d 526 (1993); Georgia Farm Bureau Mut. Ins. Co. v. Owens, 178 Ga. App. 446, 343 S.E.2d 699 (1986)

<sup>3</sup> Futch v. J.C. Penney Casualty Ins. Co., 182 Ga. App. 169, 354 S.E.2d 869 (1987)

<sup>4</sup> State Farm Mut. Auto. Ins. Co. v. Hancock, 164 Ga. App. 32, 295 S.E.2d 359 (1982)

<sup>5</sup> State Farm Mut. Auto. Ins. Co. v. Murphy, 226 Ga. 710, 177 S.E.2d 257 (1970)

provision does not preempt application of the priority of coverage rules. Basically, these types of provisions are a nullity unless there is a factual scenario where the stacking rules do not apply.

### **B. Single UM Policy Covering Multiple Vehicles**

As a general rule, where there is a single policy providing uninsured motorist coverage on multiple vehicles, stacking of the UM coverage on the separate vehicles is not permitted.<sup>6</sup> While this is the general rule, there is no statutory prohibition to stacking the UM limits of vehicles listed under one policy, and if the insurance contract contains what is known as a “separability clause,” a single policy covering multiple vehicles may be treated as multiple policies to permit stacking of the separate coverage.<sup>7</sup> A “separability clause” provides that when there are two or more automobiles insured under the policy, the terms of the policy apply separately to each automobile. If a policy contains a “separability clause,” most, if not all, automobile insurance policies contain provisions excluding the applicability of the clause as it relates to the uninsured motorist coverage. Sometimes the UM coverage is contained within a policy endorsement that specifically excludes the application of a “separability clause.” It will be a rare day when a Plaintiff finds a single policy covering multiple vehicles containing a “separability clause” that allows the stacking of uninsured motorist coverage.

In *Georgia Farm Bureau Mut. Ins. Co. v. Owens*,<sup>8</sup> the plaintiffs wanted to stack the decedent’s fleet policy covering nine vehicles. He had a UM endorsement on the policy

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<sup>6</sup> *Jenkins v. Lanigan*, 196 Ga. App. 424, 396 S.E.2d 28 (1990)

<sup>7</sup> *Leader National Ins. Co. v. Berry*, 157 Ga. App. 627, 278 S.E.2d 170 (1981) (but, since the policy in question did not apply separability clause to uninsured motorist coverage endorsement, then separability clause could not be used).

<sup>8</sup> 178 Ga. App. 446, 343 S.E.2d 699 (1986)

for \$10,000. The Court of Appeals held that since the policy was renewed for more than ten years, the insured knew what the policy limits were and that the policy contained a clause prohibiting stacking. The clause was upheld and stacking denied.

### **C. Does Insured have to be Named Insured?**

In order to stack uninsured motorist coverage, the insured need not be a named insured under each policy. As long as the plaintiff qualifies as an insured under the policy, the coverage can stack with other applicable uninsured motorist policies. If a person qualifies as an insured under a policy, they are as much an “insured” as the named insured or policyholder.<sup>9</sup> Thus, all policies containing UM coverage under which a plaintiff qualifies as an insured can be stacked regardless of how remote the connection.

### **D. Set-off for Liability Coverage**

Where the total available UM coverage exceeds the tortfeasor’s total available liability coverage, the tortfeasor is deemed an uninsured motorist to the extent that they are underinsured. For example, assume the tortfeasor has minimum liability limits of \$25,000 and the insured has UM coverage of \$50,000. The tortfeasor is underinsured in the amount of \$25,000, the difference between the available UM coverage and the available liability coverage. The UMC is entitled to a set-off to the extent of the total available liability coverage.<sup>10</sup> In other words, the UMC’s exposure is reduced by the amount of the liability limits. What is important to remember is that the total amount of insurance available will never exceed the total amount of the UM coverage available.

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<sup>9</sup> Ford v. Georgia Farm Bureau Mut. Ins. Co., 191 Ga. App. 735, 382 S.E.2d 659 (1989)

<sup>10</sup> Georgia Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 255 Ga. 166, 336 S.E.2d 237 (1985); Ford v. Georgia Farm Bureau Mut. Ins. Co., 191 Ga. App. 735, 382 S.E.2d 659 (1989); Travelers Indemnity Co. v. Maryland Casualty Co., 190 Ga. App. 455, 379 S.E.2d 183 (1989)

For example, suppose the insured has \$100,000 in UM coverage available and the tortfeasor has \$25,000. The plaintiff, in most circumstances,<sup>11</sup> will not recover more than \$100,000 in insurance coverage benefits because the UMC is entitled to reduce its exposure by the total liability limits. Thus, \$100,000 is still available, but it is divided between the UMC (\$75,000) and the liability carrier (\$25,000). The liability carrier's limits, \$25,000 in this example, must be exhausted before the UM coverage is reached. Thus, if the insured's claim does not exceed the tortfeasor's available liability coverage, then the insured's UMC has no exposure. Likewise, if the tortfeasor's available liability coverage equals or exceeds the total available UM coverage, then the tortfeasor is, by definition, not underinsured and the UMC faces no exposure because the UM coverage is completely offset by the available liability coverage.<sup>12</sup>

## **II. ORDER OF COVERAGE & SET-OFFS**

### **A. Who is Primary and Secondary?**

Quite often, the plaintiff is entitled to stack UM coverage under many policies involving different insurance companies. As a result, it becomes important to determine which carrier provides the primary UM coverage and which carrier or carriers provide secondary UM coverage. You can bet that the insurance carriers will want to know the answer to this question.

For example, the plaintiff is an insured under two policies issued by different insurers and each policy provides \$25,000 in UM coverage. If the insured's actual loss is \$20,000, then a question arises as to how to apportion payment between the two carriers.

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<sup>11</sup> This does not contemplate excess verdicts and bad faith.

<sup>12</sup> Dewberry v. State Farm Mut. Auto. Ins. Co., 197 Ga. App. 248, 398 S.E.2d 266 (1990)

The primary/secondary issue arises in two situations: 1) where the tortfeasor is completely uninsured,<sup>13</sup> and 2) where the tortfeasor is underinsured.<sup>14</sup> In determining who pays first, the rules are the same in both settings. The courts have adopted two tests for determining priority of coverage in uninsured motorist cases. Unlike liability coverage that follows the rule that the “insurance follows the car” to sort out primary/secondary liability coverage, the UM context follows two different tests. They are commonly referred to as the “receipt of premium” test and the “more closely identified with” test.

### **B. Receipt of Premium Test**

The “receipt of premium test” applies in those cases where the plaintiff paid a premium to one of the UM carriers involved. The UM carrier that actually received the premium from the insured pays first and the other carrier(s) follow.<sup>15</sup>

In *Georgia Farm Bureau Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*,<sup>16</sup> the plaintiff was a passenger in a vehicle owned and driven by someone else that was struck by the tortfeasor. The tortfeasor had \$10,000 in liability coverage, the plaintiff had \$10,000 in UM, and the owner of the vehicle had \$10,000 in UM. The trial court and Court of Appeals held that the UM coverage should be prorated. The Georgia Supreme Court held that the plaintiff’s own UMC was primary because she paid the premiums to that company.<sup>17</sup>

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<sup>13</sup> *Futch v. J.C. Penney*, supra

<sup>14</sup> *Georgia Farm Bureau*, 255 Ga. 166, 336 S.E.2d 237 (1985)

<sup>15</sup> *National General Ins. Co. v. United Services Auto. Ass’n*, 224 Ga. App. 821, 482 S.E.2d 727 (1997)

<sup>16</sup> 255 Ga. 166, 336 S.E.2d 237 (1985)

<sup>17</sup> *Id.* See also, *Allstate Ins. Co. v. Fire & Casualty Ins. Co. of Connecticut*, 181 Ga. App. 610, 353 S.E.2d 38 (1987) (Applied receipt of premium test)

The receipt of premium by the UMC from the plaintiff is controlling to the exclusion of any other factors which might otherwise lead to a different conclusion as to which carrier pays first.<sup>18</sup> In other words, the “receipt of premium” test is the default test, the one that is used first if applicable. This is true even if there is an “other insurance” clause in the plaintiff’s policy stating that if other insurance exists, this policy is secondary. Nearly every automobile insurance policy contains such a clause and the policy language is preempted by the legal tests.

In *National General Ins. Co. v. United Services Auto. Ass’n.*,<sup>19</sup> two UMCs, one out of state, were involved. The National General policy was issued in Michigan to a Michigan resident who was riding in a car owned and driven by a Georgia resident. The Michigan resident was injured in a collision that occurred in Georgia. The Georgia resident who owned the car had a policy issued by United Services Auto. Ass’n issued and delivered in Georgia. The dispute was over which was the primary carrier and, therefore, the court determined that Georgia law was applicable and clear. The court followed the “receipt of premium test” and found that because National General received the insured’s premiums, it was primarily responsible for providing coverage for this collision.

### **C. More Closely Identified with Test**

The “receipt of premium” test presupposes that the plaintiff paid the premium on at least one of the UM policies involved. However, there are many scenarios where the plaintiff is not the named insured and does not pay the premium yet is an insured under several policies. When confronted with these issues, the Georgia Courts fashioned an additional test to determine which carrier pays first. The additional test is called the

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<sup>18</sup> *Continental Ins. Co. v. Southern Guaranty Ins. Co.*, 193 Ga. App. 395, 388 S.E.2d 16 (1989)

<sup>19</sup> 224 Ga. App. 821, 482 S.E.2d 727 (1997)

“more closely identified with test.”

The “more closely identified with” test was adopted in *Travelers Indemnity Co. v. Maryland Casualty Co.*<sup>20</sup> There, the plaintiff was injured in a collision while driving a vehicle owned by her employer. The plaintiff sued the tortfeasor who had \$15,000 in liability coverage and the plaintiff’s employer was the named insured under a policy issued by Travelers that provided \$40,000 in UM coverage. The plaintiff’s mother was the named insured under a policy issued by Maryland Casualty that provided \$50,000 in UM coverage to the plaintiff as a family member of her mother’s household. Therefore, the plaintiff qualified as an insured under both UM policies for a total of \$90,000 in available UM coverage.

The issue was which insurance company would pay first. The critical factor of “receipt of premium” was not present so the Court of Appeals looked for another factor to provide a clear rule in determining primary UM responsibility. The Court of Appeals reasoned that there is a distinction between a named insured, or family member of a named insured, and one who is covered merely because of occupying the vehicle involved and that the legal closeness of identity inherent in the family unit is akin to the factor of premium payment. Both considerations present a single and uniformly occurring fact that addresses the relationship of the injured person to the policy rather than the circumstances of the injury to the policy. The Court of Appeals held that it is this status, rather than the context of the incident, that controls.<sup>21</sup>

The insured’s family relationship was selected over the insured’s employment relationship as the deciding factor. In doing so, the court sought to avoid diseconomies in

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<sup>20</sup> 190 Ga. App. 455, 379 S.E.2d 183 (1989)

<sup>21</sup> *Id.* at 457, 379 S.E.2d at 186

litigation. The court reasoned that it was easier, from a factual standpoint, to establish the more permanent status of a resident relative of the named insured than the more fleeting “incident context” of employment. The latter would demand proof that the claimant was both an employee and acting within the scope of her employment at the time of the accident. The Court of Appeals recognized that such considerations of employment are often in dispute and are not susceptible of simple resolution. The family relationship is rarely in dispute.

Thus, the Court of Appeals affirmed the trial court’s conclusion that the plaintiff was “more closely identified with” her mother’s UM coverage with Maryland Casualty than with her employer’s coverage with Travelers. The mother’s policy was found to be primary and the employer’s carrier, Travelers, was entitled to the set-off in the amount of the tortfeasor’s liability coverage limits. The “more closely identified with” test does not focus on the relationship between the circumstances of the collision and a particular policy of insurance, but rather, the relationship of the injured party to the policies of insurance.

The dispute in *Southern Guaranty Ins. Co. v. Premier Ins. Co.*<sup>22</sup> is another illustration of the “more closely identified with” test. The plaintiff was driving an automobile owned by her husband at the time of the collision which had a UM policy issued by Premier. Southern Guaranty insured the vehicle under a policy issued to a dance school owned and operated by the plaintiff as a sole proprietorship. The husband paid the premiums on both policies, and the vehicle was the plaintiff’s primary vehicle.

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<sup>22</sup> 219 Ga. App. 413, 465 S.E.2d 521 (1995)

The “the receipt of premium test” was not considered appropriate in this case because the husband paid the premiums on both policies. The Court of Appeals applied the “more closely identified with test” to examine the relationship between the plaintiff to the policies rather than the circumstances of injury to the policies.

The Court of Appeals found that because the dance studio was a sole proprietorship, its obligations were the insured plaintiff’s obligations and any of its benefits accrued directly to her. More importantly, it was not a separate and distinct entity capable of being the true named insured under the policy. Therefore, the Court of Appeals concluded, Southern Guaranty provided the primary coverage to the insured.

Stacking and priority of coverage were also the subjects in *Canal Ins. Co. v. Merchant*<sup>23</sup> which resolved a dispute between two uninsured motorist carriers regarding which company was obligated to pay first. Canal insured a tractor-trailer that broke down while hauling chicken feed to Claxton Poultry Company. Claxton sent two company vehicles, both insured by Northbrook, and four individuals who were employees of Claxton, to transfer the chicken feed from the disabled vehicle. While this was being done, an intoxicated driver drove into the transfer site injuring the employees. The tortfeasor was insured with the minimum liability limits. The plaintiff did not pay the premiums for either of the UM policies he was covered under so the “receipt of premium” test was not applicable. Accordingly, the “more closely identified with” test was applied and the Court of Appeals determined that because there was no relationship between the employees and the Canal policy, and because the Northbrook policy was issued to the employees’ employer, Claxton, the employees had a connection with that

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<sup>23</sup> 225 Ga. App. 61, 483 S.E.2d 311 (1997)

policy. Therefore, Northbrook was determined to be the primary uninsured motorist carrier.

#### **D. Can Coverage be Prorated?**

Generally, UM coverage is not prorated, but one can imagine many scenarios where neither the “receipt of premium” test or the “more closely identified with” test apply. For example, suppose that an adult resident living with his mother and father is hit by an uninsured motorist. He is covered by his mother’s and father’s policies and he does not have a policy of his own. Neither test works so what do you do? The first answer is to look to the UM policies’ language. If both have identical “other coverage” clauses, then a strong argument can be made that the court should probably prorate the coverage and split them equally.<sup>24</sup>

#### **E. What if the Primary Coverage is Not Available?**

What if the primary coverage is not used because of denial of coverage, lapse in coverage or for some other legal reason? The simple answer is that the secondary coverage becomes the primary coverage.<sup>25</sup> All of the available policies move up in line.

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<sup>24</sup> See Holyoke Mut. Ins. Co. v. Cherokee Ins. Co., 192 Ga. App. 757, 386 S.E.2d 524 (1989)

<sup>25</sup> See United States Fire Ins. Co. v. Capital Ford Truck Sales, Inc., 257 Ga. 77, 355 S.E.2d 428 (1987); J.C. Penney Casualty Ins. Co. v. Woodard, 190 Ga. App. 727, 380 S.E.2d 282 (1989)