University of Arkansas at Little Rock Law Review

Volume 21 | Issue 3 Article 1

1999

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WHY ARKANSAS SHOULD OVERTURN ITS ANTI-STACKING PRECEDENT: A LOOK AT AGGREGATING UNINSURED AND UNDERINSURED MOTORIST COVERAGE

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I. INTRODUCTION

In July of 1998, in a 4-3 decision, the Arkansas Supreme Court declined an invitation to overturn its 30-year-old precedent against aggregating (or "stacking") uninsured motorist coverage.[1] In other words, the court upheld as valid a clause in an automobile insurance policy which forbade the insured from obtaining uninsured motorist coverage benefits from more than one policy to compensate her after she was injured by an uninsured motorist. It made no difference that her actual damages from the wreck exceeded the amount of coverage which she sought. Since that decision was handed down, David Newbern, one of the four justices in the majority, retired from the court and was replaced by Lavenski Smith. The newly made up court will undoubtedly have the opportunity to again consider stacking. It is a relentless

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1. *See* Youngman v. State Farm Mut. Auto. Ins. Co., 334 Ark. 73, 971 S.W.2d 248 (1998) (declining to overturn M.F.A. Mut. Ins. Co. v. Wallace, 245 Ark. 230, 431 S.W.2d 742 (1968)). Justice Donald Corbin dissented in *Youngman* and was joined by Justices Tom Glaze and Ray Thornton.

issue,[2] having repeatedly found its way to the highest courts in several states, with eventual success for the insureds more often than not. It has made it to the Arkansas Supreme Court six times, but, as of yet, without success for the insureds.[3] Although the court's anti-stacking precedent has stood for over 30 years, it has teetered more than once during that time. Last year's 4-3 decision marked the second time that the anti-stacking view prevailed among Supreme Court justices by only one vote.[4]

This article covers the evolution of stacking cases in Arkansas and, to a lesser extent, across the nation. The authors suggest that Arkansas' allegiance to the diminishing, minority, anti-stacking view is, and has always been, predicated on an infirm case law foundation. The authors further suggest that a pro-stacking position would not only be fair to Arkansas insureds, but would also be in accord with the public policy of Arkansas as found in its uninsured and underinsured motorist statutes,[5] as well as its other statutes. Many other states have reached that conclusion based on similar statutes.[6] A pro-stacking position would also be consistent with the most recent case handed down by the Arkansas Supreme Court on the stacking of underinsured coverage.[7] Thus, the authors suggest that Arkansas should follow a pro-stacking rule governing both uninsured and underinsured coverage.

II. "STACKING" AND "ANTI-STACKING CLAUSES" DEFINED

Couch on Insurance says "The term 'stacking' is used to describe a situation where all available policies are added together to create a larger pool from which the injured party may draw in order to compensate him for his

2. *See* 4 Rowland H. Long, THE LAW OF LIABILITY INSURANCE § 24.04 (1) (1998) (stating that stacking is "[o]ne of the most litigated and otherwise controversial aspects of uninsured motorist coverage today . . . ."); Harrington v. Stevens, 434 S.E.2d 212, 213 (N.C. 1993) (referring to stacking of uninsured and underinsured motorist coverage as a "fruitful source of litigation"); Nelson v. Employers Mut. Cas. Co., 217 N.W.2d 670, 673-74 (Wis. 1974) (referring to the stacking of uninsured coverage as a "subject of considerable discussion").

3. *See Wallace*, 245 Ark. 230, 431 S.W.2d 742; Harris v. Southern Farm Bureau Cas. Ins. Co., 247 Ark. 961, 448 S.W.2d 652 (1970); Holcomb v. Farmers Ins. Exch., 254 Ark. 514, 495 S.W.2d 155 (1973); Farm Bureau Mut. Ins. Co. v. Barnhill, 284 Ark. 219, 681 S.W.2d 341 (1984); Crawford v. Emcasco Ins. Co., 294 Ark. 569, 745 S.W.2d 132 (1988); *Youngman*, 334 Ark. 73, 971 S.W.2d 248. *Holcomb* and *Crawford* were not stacking cases in that the insureds did not seek to recover benefits under more than one uninsured coverage. Those cases did, however, turn on the validity of the same insurance policy clauses which are referred to herein as "anti-stacking" clauses and thus bear relevance to the stacking debate.

4. Both *Youngman*, 334 Ark. 73, 971 S.W.2d 248, and *Holcomb*, 254 Ark. 514, 495 S.W.2d 155, were 4-3 decisions.

5. *See* ARK. CODE ANN. §§ 23-89-403 & 23-89-209 (Michie Supp. 1997).

6. *See infra* notes 146 & 147.

7. *See* Ross v. United Serv. Auto. Ass'n, 320 Ark. 604, 899 S.W.2d 53 (1995).

actual loss where a single policy is not sufficient to make him whole."[8] Stacking, therefore, does *not* allow an insured to obtain a double recovery or a windfall of any sort.[9] It merely increases the *pool* of insurance money available to an insured who becomes injured. To obtain that money, the insured still must prove that his injuries justify whatever recovery he seeks. Although the concept of stacking might be applied to any number of insurance coverages, this article focuses on the stacking of uninsured and underinsured motorist coverage.[10]

Insurance companies have sought to reduce their exposure under both uninsured and underinsured coverages by inserting clauses into their policies to forbid insureds from stacking those coverages. Those clauses are sometimes called "other insurance," "excess-escape," "owned-but-not-occupied," or "limit of liability" clauses.[11] No matter what they are called or how they are worded, they are all intended to prevent stacking. In this article, the authors will not make distinctions between the different types of such clauses, but will collectively refer to them as "anti-stacking" clauses.[12]

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8. *See* 12A GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:628, at 77 (2d rev. ed. 1981 & Supp. 1997). *See also* LEE R. RUSS, COUCH ON INSURANCE § 169:4, at 169-15-16 (3d ed. 1998) ("Stacking is the insured's recovery of damages under more than one policy until the insured satisfies all of his or her damages or exhausts the limits of all available policies.") (citing Continental Ins. Co. v. Shives, 492 S.E.2d 808 (S.C. Ct. App. 1997)); PAUL W. PRETZEL, UNINSURED MOTORISTS § 25.5(B), at 87 (1972) (noting that stacking "usually denotes the availability of more than one policy to the same insured").

9. *See* ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 13.12, at 628 (2d ed. 1992) ("Several of the courts have specifically taken care to point out that invalidating the other insurance clauses does not abrogate the rule that an insured is only entitled to recover those damages that were actually sustained and that a claimant may not recover more than the amount that is necessary to provide complete indemnification."); RUSS, *supra* note 8, § 169:12, at 169-28 ("It is clear that in the stacking of uninsured motorist coverages, the injured person may not recover more than his or her actual loss.") (citations omitted.)

10. The nature of uninsured and underinsured coverage are explained herein at *infra* notes 18-23 and accompanying text.

11. An example of an "excess-escape" clause is found in *Youngman*, 334 Ark. at 75, 971 S.W.2d at 249, and reads:

> *If There Is Other Uninsured Motor Vehicle Coverage . . . .*
>
> 3. If the *insured* sustained *bodily injury* while *occupying* a vehicle not owned by *you*, *your spouse* or any *relative*, this coverage applies:
>
> a. as excess to any uninsured motor vehicle coverage which applies to the vehicle as primary coverage, but
>
> b. only in the amount by which it exceeds the primary coverage.

Id. (emphasis in original).

12. For the curious, however, one commentator addresses some, although not all, of the distinctions as follows: "Other insurance clauses are generally of three types: (1) calling for proration of coverage between the multiple policies; (2) stating that the policy will be 'excess' to any other applicable coverage; (3) seeking to avoid any contribution at all." RUSS, *supra* note

III. LEGISLATIVE AND JUDICIAL HISTORY IN ARKANSAS

A. Legislative History

Stacking disputes arise from statutes. That is because the uninsured and underinsured coverages which insureds have so persistently sought to stack over the years were written into automobile insurance policies under statutes providing for those coverages. Those statutes are part of a legislative scheme designed to ensure that persons injured in car wrecks receive compensation for their injuries. Looking to the legislative history of Arkansas' uninsured and underinsured statutes is important not only for context, but also because courts often look to the legislative history of a statute to determine the intent behind its enactment,[13] which is important to the stacking debate.

Throughout the previous decades, Arkansas, like many other states, adopted a number of laws as part of the above-mentioned scheme. In 1965, it adopted an uninsured motorist statute;[14] in 1973, it adopted a "no-fault" statute;[15] and, in 1987, it adopted a mandatory liability insurance statute[16] and

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8, § 169:9, at 169-23. Similarly, in *Woolston v. State Farm Mut. Auto. Ins. Co.*, 306 F. Supp. 738, 741 (W.D. Ark. 1969), U.S. District Judge J. Smith Henley addressed the distinctions as follows:

> Generally speaking, it may be said that there are three types of "other insurance clauses" that conventionally appear in such policies. One type of clause prohibits "other insurance," and the policy is void if there is other insurance. Another type provides that if there is other insurance the coverage provided by the policy in question is "excess coverage" only. The third type provides that if there is other insurance a loss is to be prorated between or among the insurers.

Id.

13. *See* ACW, Inc. v. Weiss, 329 Ark. 302, 313, 947 S.W.2d 770, 775 (1997).

14. *See* 1965 Ark. Acts 464, codified at ARK. CODE ANN. § 23-89-403 (Michie Supp. 1997).

15. *See* 1973 Ark. Acts 138, codified at ARK. CODE ANN. § 23-89-202 (Michie 1992). The purpose of the no-fault statute is to make insureds whole on minor automobile injury damage claims without regard to fault and without expensive and extended litigation. *See* Aetna Ins. Co. v. Smith, 263 Ark. 849, 854, 568 S.W.2d 11, 14 (1978). Toward that end, it requires insurance companies to provide their insureds with minimal levels of medical expense benefits (up to $5,000), income disability benefits (up to more than $7,000), and death benefits (up to $5,000) for injuries sustained in car wrecks, regardless of who is at fault. The insured has the option of rejecting the coverage, but only if he does so in writing.

16. *See* 1987 Ark. Acts 442, codified at ARK. CODE ANN. § 27-22-104 (Michie Supp. 1997). The mandatory liability insurance statute requires insureds to carry at least $25,000 of liability insurance collectable by persons they negligently injure in car wrecks. *See* ARK. CODE ANN. § 27-22-104(b)(1) (Michie Supp. 1997). There are some exceptions for self-insured and commercial vehicles. *See* Phillip D. Oliver, *None for the Road: Addressing the Problem of Uninsured Vehicles and Drivers in Arkansas*, 21 U. ARK. LITTLE ROCK L. REV. 167, 170-71 (1998). The statute is designed to eliminate the "judgement-proof" driver. In other words, if every driver were to comply with the statute, every person injured in a car wreck would have at least $25,000 of coverage from the negligent driver's insurance company (or would be

an underinsured motorist statute.[17] The major points of focus in this article are the uninsured and underinsured statutes.

The uninsured statute requires insurance companies to include coverage in policies for the protection of persons insured thereunder who are legally entitled to recover damages from uninsured motorists.[18] In other words, it provides for coverage when the negligent driver is not covered by liability insurance. It must be provided by the insurance company, unless the insured rejects it.[19] Theoretically, the uninsured statute removes all uninsured motorists from the road by putting the injured party in as good a position as he would have been in had he been injured by a minimally insured motorist.[20]

The underinsured statute[21] was the legislature's attempt to provide persons injured in car wrecks with something more than minimal coverage. It requires insurance companies to make at least $25,000 of additional coverage available to persons injured by drivers carrying liability insurance, but who nonetheless have insufficient coverage or resources to fully compensate those persons for their injuries. It can only be rejected by the insured in writing.[22] The fact that underinsured coverage is intended to *fully* compensate injured parties, rather than *minimally* compensate them, provides an additional reason for allowing insureds to stack underinsured coverage.[23] That is because insureds are often unable to achieve full compensation without stacking underinsured coverage.

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allowed to split a pool of $50,000 if more than one person were injured). However, as Professor Oliver writes, a comparison of the data submitted by insurance companies and the state's records of registered vehicles indicates that approximately 17% of the vehicles registered in Arkansas are not insured and that there is no means of ascertaining the number of vehicles that are neither registered nor insured. *See id.* at 175.

17. *See* 1987 Ark. Acts 335, codified at ARK. CODE ANN. § 23-89-209 (Michie Supp. 1997).

18. *See* ARK. CODE ANN. § 23-89-403(a) (Michie Supp. 1997).

19. *See* ARK. CODE ANN. § 23-89-403(b) (Michie Supp. 1997).

20. *See* Winslow Drummond, *Uninsured Motorist Coverage—A Suggested Approach to Consistency*, 23 ARK. L. REV. 167 (1969) (suggesting that an uninsured motorist statute would, theoretically, remove all uninsured motor vehicles from the highways because an insured was guaranteed, in effect, that any vehicle with which he might collide would be covered by liability insurance either through a policy applicable to the other vehicle or through his own policy).

21. *See* ARK. CODE ANN. § 23-89-209.

22. *See* ARK. CODE ANN. § 32-89-209(a)(1).

23. This is discussed more thoroughly herein at *infra* notes 153-159 and accompanying text.

B. Judicial History

1. *Early Stacking Cases*

The Arkansas Supreme Court considered the issue of stacking, in a different context, even before Arkansas enacted the uninsured and under-insured statutes. In 1962, three years before the first of those two statutes (the uninsured statute) was enacted, the court considered whether an insured would be allowed to stack two medical expense coverages from a policy covering two cars.[24] In a unanimous opinion written by Justice George Rose Smith, the court allowed the insured to stack. Noting that a separate premium had been paid for each coverage, Justice Smith said it was reasonable to think that the second premium was intended to afford "some corresponding added benefit" to the insured.[25] Stated another way, where a premium is paid, coverage should be afforded. Justice Smith and the court reached their decision despite an anti-stacking clause in the policy. The clause was ambiguous and thus invalid.[26]

Five years later, in 1967, Justice Smith again wrote for a unanimous court on stacking.[27] That time, however, the court forbade the insured from stacking funeral benefit coverage from two policies. Finding the anti-stacking clause unambiguous, the court upheld it. In time, the court would come to follow a rule emerging from the above two cases, *i.e.*, an insured may stack coverage, but only in the absence of an unambiguous anti-stacking clause. Practically speaking, that means that Arkansas became an anti-stacking state, as insurance companies invariably include anti-stacking clauses in their policies, and they have been able over time to eliminate most of the ambiguous language. Each case in which a court finds a clause to be ambiguous is an opportunity for the insurance companies to further refine their policies to eventually appease the courts on their policy language. Arkansas' anti-stacking rule, however, has always been in the minority, has seen much of its underpinnings vanish, has twice come within one vote of being overruled,[28] and may be vulnerable to being overruled by a newly constituted court even today.

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24. *See* Kansas City Fire & Marine Ins. Co. v. Epperson, 234 Ark. 1100, 356 S.W.2d 613 (1962).

25. *See id.* at 1102, 356 S.W.2d at 614.

26. *See id.*

27. *See* Varvil v. M.F.A. Mut. Ins. Co., 243 Ark. 692, 421 S.W.2d 346 (1967).

28. *See Youngman*, 334 Ark. 73, 971 S.W.2d 248; *see also Holcomb*, 254 Ark. 514, 495 S.W.2d 155.

2. *Cases Involving Stacking Uninsured Coverage*

Most stacking cases, in Arkansas and elsewhere, involve uninsured coverage, rather than underinsured coverage. That is because uninsured coverage arrived on the scene first. Arkansas, for example, enacted an uninsured statute 22 years before it enacted an underinsured statute.[29] The first case arising from Arkansas and concerning the stacking of uninsured coverage was decided in federal court, not state court. In 1967, in *Robey v. Safeco Ins. Co. of America*,[30] U.S. District Judge John Miller surveyed the stacking decisions from across the nation. In accord with them, he allowed the insured to stack uninsured coverage under the Arkansas uninsured statute, despite anti-stacking clauses in the insurance policies. Judge Miller said,

> There is no provision under the Arkansas law that prevents an insurance company from issuing as many policies to an insured as it may be able to sell, and such insured is entitled to collect under the policies the full amount of injuries within the limits of the policies suffered by him proximately caused by the negligence of an uninsured motorist.[31]

That might be reworded to say "If you collect the premiums, you pay the benefits."

The victory in *Robey I* was not complete for the insured. Judge Miller held that the anti-stacking clauses in two policies issued to the same insured by the same insurance company, Safeco, were not applicable "with respect to each other."[32] With little explanation, however, he treated the anti-stacking clauses as valid with respect to a third policy issued by another insurance company. To the extent, therefore, that the insured had already collected benefits from the other insurance company, his recovery from Safeco was reduced. Otherwise, the insured was allowed to collect the full uninsured benefits under the two Safeco policies, regardless of the anti-stacking clauses contained therein.

A three-judge panel of the Eighth Circuit Court of Appeals affirmed Judge Miller's decision without dissent.[33] Like Judge Miller's opinion before

29. The uninsured statute was enacted by Act No. 464 of 1965. The underinsured statute was enacted by Act No. 335 of 1987.

30. 270 F. Supp. 473 (W.D. Ark. 1967) ("*Robey I*"), *aff'd* in part by Safeco Ins. Co. of America v. Robey, 339 F.2d 330 (8th Cir. 1968) ("*Robey II*").

31. *Id.* at 486-87.

32. *Id.* at 487.

33. *See Robey II*, 399 F.2d 330.

it, the Eighth Circuit's opinion was thoroughly researched, containing an in-depth survey of the nation's stacking decisions. Widiss would later refer to the Eighth Circuit's opinion as "widely discussed and cited."[34] Following its research, the Eighth Circuit said the "sounder view of the law" was found in those cases holding that anti-stacking clauses violated the minimum protection requirements of uninsured statutes.[35] The Eighth Circuit also quoted from one court which said that to permit an insured to collect a premium and then exclude coverage through an anti-stacking clause "shocks the conscience of this court."[36]

Between the date of Judge Miller's opinion in *Robey I* and the date that the Eighth Circuit affirmed it in *Robey II*, a second uninsured stacking case was decided in an Arkansas federal court.[37] There, U.S. District Judge J. Smith Henley, who was later elevated to the Eighth Circuit, also allowed the insured to stack uninsured coverage, deferring to Judge Miller's "thorough consideration" of the issue in *Robey I*.[38] Thus, as of August of 1968, two U.S. District Judges from Arkansas and a unanimous three-judge panel of the Eighth Circuit Court of Appeals had sided with the majority view in favor of stacking uninsured coverage (at least with regard to policies issued to the same insured by the same insurance company) regardless of whether anti-stacking clauses were written into the policies. Arkansas was, at least in part, a pro-stacking state.

That changed the very next month. In September of 1968, the Arkansas Supreme Court considered the stacking of uninsured coverage for the first time in *M.F.A. Ins. Co. v. Wallace*.[39] In a two-page opinion, it held contrary to Judges Miller and Henley of Arkansas, contrary to the Eighth Circuit, and contrary to the long list of pro-stacking cases analyzed in the two *Robey* opinions. The Arkansas Supreme Court upheld an anti-stacking clause in *Wallace*, saying that it was not repugnant to the uninsured statute and was, therefore, valid.

Wallace was soon criticized for its weak underpinnings, particularly its reliance on *Maryland Casualty Co. v. Howe*.[40] Because *Wallace* relies on

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34. *See* WIDISS, *supra* note 9, § 13.6, at 582.

35. *See Robey II*, 399 F.2d at 335-36.

36. *See id.* at 338 (quoting from Kraft v. Allstate, 431 P.2d 917, 920 (Ariz. Ct. App. 1967)). For a discussion of other courts finding anti-stacking clauses to be unconscionable, *see* infra note 147.

37. *See* Childers v. Southern Farm Bureau Cas. Ins. Co., 282 F. Supp. 866 (E.D. Ark. 1968).

38. *See id.* at 869.

39. 245 Ark. 230, 431 S.W.2d 742 (1968).

40. 213 A.2d 420 (N.H. 1965), *overruled by* Courtemanche v. Lumbermans Mut. Cas. Co., 385 A.2d 105 (N.H. 1978); Vigneault v. Travelers Ins. Co., 382 A.2d 910 (N.H. 1978).

Howe, it is necessary to analyze *Howe* to determine the integrity of *Wallace*. A U.S. District Judge in Indiana did just that in 1970, two years after *Wallace* was handed down. The Indiana judge analyzed the then-existing uninsured stacking cases, including *Wallace*, in the course of invalidating an anti-stacking clause involved in the case before him.[41] *Howe* lacked value in the eyes of the Indiana judge because it relied on three cases which in turn lacked value. Thus, in the eyes of the Indiana judge, *Wallace* also lacked value.

The first case relied on by *Howe* was an Iowa state court case which was decided four years *before* Iowa enacted an uninsured statute and was thus "completely lacking in authority" in situations where an uninsured statute was involved.[42] The second was a Fourth Circuit Court of Appeals decision projecting that the Virginia Supreme Court would adopt an anti-stacking rule.[43] That decision "lost all of its vitality," the Indiana judge reasoned, when the Supreme Court of Virginia specifically rejected it and held an anti-stacking clause to be invalid in contravention of Virginia's uninsured statute.[44] The third was a decision in which the Fifth Circuit Court of Appeals held an anti-stacking clause to be enforceable under Florida law.[45] It too was rejected by that state's Supreme Court as being in conflict with the Florida uninsured statute.[46]

The Indiana judge concluded that the underpinnings of *Howe* had been "totally undermined," which in turn meant, according to the Indiana judge, that the Arkansas Supreme Court's decision in *Wallace*, which relied on *Howe*, had been undermined.[47] U.S. District Judge Oren Harris later recounted the Indiana court's analysis of *Wallace* in his 1978 overview of the history of stacking cases in Arkansas, writing that the Indiana judge had "dismissed" *Wallace* as "devoid of precedential value" due to the weakness of *Howe*.[48] *Howe* itself has now been overruled.[49]

There were no dissents in *Wallace*. That, however, changed five years later, in 1973, when the Arkansas Supreme Court next considered an

41. *See* Simpson v State Farm Mut. Auto. Ins. Co., 318 F. Supp. 1152 (S.D. Ind. 1970).

42. *See Simpson*, 318 F. Supp at 1154 (discussing Burcham v. Farmers Ins. Exch., 121 N.W.2d 500 (Iowa 1963)).

43. *See* Travelers Indem. Co. v. Wells, 316 F.2d 770 (4th Cir. 1963).

44. *See Simpson*, 318 F. Supp at 1155 (citing Bryant v. State Farm Mut. Auto. Ins. Co., 140 S.E.2d 817 (Va. 1963), as specifically disapproving *Travelers*, 316 F.2d 770).

45. *See* Chandler v. Government Employees Ins. Co., 342 F.2d 420 (5th Cir. 1965).

46. *See Simpson*, 318 F. Supp. at 1155 (citing Sellers v. United States Fidelity & Guar. Co., 185 So.2d 689 (Fla. 1966), as repudiating *Chandler*, 342 F.2d 420).

47. *See Simpson*, 318 F. Supp. at 1155.

48. *See* Dugal v. Commercial Standard Ins. Co., 456 F. Supp. 290, 295 (W.D. Ark. 1978).

49. *See supra* note 40.

uninsured anti-stacking clause in *Holcomb v. Farmers Ins. Exch.*[50] The court again upheld the anti-stacking clause, but a division emerged among the seven justices, three of whom dissented. Justice John Fogleman, writing for all three, said that he regretted seeing the court align itself with the "pitifully small minority."[51]

Like *Wallace*, *Holcomb* has been criticized. Most pointedly, Justice John Purtle, of the Arkansas Supreme Court, criticized *Holcomb* in a dissenting opinion written 15 years later in another stacking case, *Crawford v. Emcasco Ins. Co.*[52] Justice Purtle pointed out that one of the three cases relied on by the majority in *Holcomb* was overruled just two years after being decided (and seven months *before Holcomb* was handed down).[53] There, an Illinois appellate court decided that upholding an anti-stacking clause would contravene the Illinois uninsured statute, as well as the "weight and trend of authority," a reference to the pro-stacking majority.[54] A second case relied on by the majority in *Holcomb* was overruled by the Arizona Supreme Court, which likewise found anti-stacking clauses to be violative of that state's uninsured statute.[55] A third case relied upon by the majority in *Holcomb* lost part of its vitality when the Nebraska Supreme Court held contrary to it in 1970, two years after it was decided and three years *before Holcomb* was handed down.[56]

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50. 254 Ark. 514, 495 S.W.2d 155 (1973).

51. *See Holcomb*, 254 Ark. at 523, 495 S.W.2d at 160 (Fogleman, J., dissenting) (joining Fogleman, J., in his dissent were Harris, C.J., and George Rose Smith, J.).

52. 294 Ark. at 573, 745 S.W.2d at 135 (Purtle, J., dissenting).

53. *See id.* at 574, 745 S.W.2d at 135 (Purtle, J., dissenting) (citing Doxtater v. State Farm Mut. Auto. Ins. Co., 290 N.E.2d 284 (Ill. App. Ct. 1972), as overruling McElyea v. Safeway Ins. Co., 266 N.E.2d 146 (Ill. App. Ct. 1970)).

54. *See Doxtater*, 290 N.E.2d at 289.

55. *See* Calvert v. Farmers Ins. Co. of Arizona, 697 P.2d 684 (Ariz. 1985) (overruling Owens v. Allied Mut. Ins. Co., 487 P.2d 402 (Ariz. Ct. App. 1971)). *Owens* had the added weakness of being an expressly limited holding. That is, the 3-2 majority said "we do wish to emphasize that our opinion here is *limited* to the fact situation before the court and the particular policy considerations inherent in that fact situation." *Owens*, 487 P.2d at 403-04 (emphasis added). Because that fact situation did not involve stacking, the court's holding could not be said to extend to stacking cases.

56. In *Bose v. American Family Mut. Ins. Co.*, 181 N.W.2d 839 (Neb. 1970), the Nebraska Supreme Court held contrary to *Shipley v. American Standard Ins. Co.*, 158 N.W.2d 238 (Neb. 1968), which the Arkansas Supreme Court cited in *Holcomb*, 254 Ark. at 520, 495 S.W.2d at 158. Although it did not overrule *Shipley*, the Nebraska Supreme Court, in *Bose*, held an anti-stacking clause to be invalid as against the spirit of Nebraska's uninsured statute and the insured's reasonable expectations. *See Bose*, 181 N.W.2d at 841. Eleven years later, in 1981, the Nebraska Supreme Court opted to follow *Bose*, and not *Shipley*, in *Eich v. State Farm Mut. Auto. Ins. Co.*, 305 N.W.2d 621, 625 (Neb. 1981). Nebraska was one of 29 states which the Wisconsin Supreme Court listed as being in the *pro*-stacking majority in 1974. *See infra* note 105.

Continuing with his criticism of *Holcomb*, Justice Purtle said that the Arkansas uninsured statute required insurance companies to issue uninsured coverage "for the protection of *persons*" which was distinguishable from the insurance company's "attempt to make the coverage vehicular."[57] On that basis, he said, *Holcomb* could not stand scrutiny under the uninsured statute.[58] The Arkansas Supreme Court has twice been invited to overrule *Holcomb*, but has so far passed.[59]

Crawford, the forum for Justice Purtle's criticism of *Holcomb*, is another anti-stacking decision afflicted with weak underpinnings. The *Crawford* majority relied on one case that has since been overturned and another that was overruled three years *before Crawford* was decided.[60] In each case, the overturning or overruling court emphasized that uninsured coverage was *personal* in nature, not vehicular,[61] just as Justice Purtle argued in his dissenting opinion in *Crawford*.[62]

The last case from the Arkansas Supreme Court on stacking uninsured coverage was *Youngman v. State Farm Mut. Auto. Ins.*, which was handed down in 1998.[63] *Youngman* was another 4-3 decision, just as *Holcomb* had been 25 years earlier. Following the doctrine of *stare decisis*, the court disallowed stacking, despite acknowledging that, "According to Widiss, thirty-

57. *See Crawford*, 294 Ark. at 573, 745 S.W.2d at 135 (Purtle, J., dissenting) (quoting from ARK. CODE ANN. § 23-89-403(a) (emphasis added)).

58. *See id.* (Purtle, J., dissenting).

59. In *Lucky v. Equity Mut. Ins. Co.*, 259 Ark. 846, 849, 537 S.W.2d 160, 162 (1976), the court declined an invitation to overrule *Holcomb*, saying that the construction given in *Holcomb* to the uninsured statute had "become as much a part of the statute as the words of the General Assembly." *Id.* In *Crawford*, 294 Ark. at 571, 745 S.W.2d at 134, the court again declined the chance to overrule *Holcomb*, saying that, although *Holcomb* represented the minority view, that view had since "gained acceptance (or remained the rule) in a number of other jurisdictions." *Id.* That statement lends itself to criticism, as discussed herein, given that the consensus among commentators is that the anti-stacking view is, and long has been, in decline. *See infra* notes 104-116 and accompanying text.

60. *See Crawford*, 294 Ark. at 571, 745 S.W.2d at 134 (citing Safeco Ins. Co. of America v. Hubbard, 578 S.W.2d 49 (Ky. 1979), *overruled by* Chaffin v. Kentucky Farm Bureau Ins. Co., 789 S.W.2d 754 (Ky. 1990) & Rodriguez v. Maryland Indem. Ins. Co., 539 P.2d 196 (Ariz. Ct. App. 1975)), *overruled by* Calvert v. Farmers Ins. Co. of Arizona, 697 P.2d 684 (Ariz. 1985)).

61. In *Chaffin*, the Kentucky Supreme Court wrote that, in its previous decision in *Hubbard*, it had failed to take into account the "personal nature of uninsured motorist coverage or the insured's reasonable expectations with regard to insurance coverage which has been bought and paid for," which made Hubbard "erroneous" and "contrary to the public policy of Kentucky." *Chaffin*, 789 S.W.2d at 757-58. In *Calvert*, the Arizona Court of Appeals said "our Uninsured Motorist Act was created 'for the protection of persons,' and not for the protection of the insured vehicle." *Calvert*, 697 P.2d at 689.

62. *Crawford*, 294 Ark. at 573, 745 S.W.2d at 135 (Purtle, J., dissenting).

63. 334 Ark. 73, 971 S.W.2d 248 (1998).

six states have rejected other insurance clauses on a variety of bases."[64] Writing for the three dissenting justices, Justice Donald Corbin argued that it was time to overrule the precedent.[65] The authors of this article agree.

3. *Cases Involving Stacking Underinsured Coverage*

The Arkansas Supreme Court has only twice considered cases involving the stacking of *underinsured* coverage, as opposed to *uninsured* coverage. It reached different results each time. In 1992, the court handed down the first of those two decisions in *Clampit v. State Farm Mutual Automobile Insurance Co.*[66] There, the court decided that an anti-stacking clause did not violate either the underinsured statute or the public policy of Arkansas.[67] Thus, the court upheld the clause as valid. The court also said that the law of other jurisdictions was in a "transitional stage" and the jurisdictions in the minority had not diminished.[68] That contravenes the authorities discussed in this article, which support the proposition that the trend has always been in favor of stacking.[69]

The *Clampit* majority quoted most extensively from a decision by the Idaho Supreme Court in *Dullenty v. Rocky Mountain Fire & Casualty Co.*[70] *Dullenty*, however, constitutes another weak underpinning in that the 3-2 majority there stressed that its holding did not reach certain stacking scenarios.[71] The *Dullenty* majority did *not* rule, for instance, that an insured who paid separate premiums for coverages could not stack them.[72] Justice Corbin pointed out as much in his dissent.[73] The two dissenting justices in *Dullenty* further pointed out that the holding of the three-justice majority was against the "overwhelming majority."[74] The *Clampit* majority also relied on

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64. *Youngman*, 334 Ark. at 79, 971 S.W.2d at 251.
65. *See id.* at 80-82, 971 S.W.2d at 251-52 (Corbin, J., dissenting).
66. 309 Ark. 107, 828 S.W.2d 593 (1992).
67. *See id.* at 107, 828 S.W.2d at 594.
68. *See id.* at 114, 828 S.W.2d at 597.
69. *See infra* notes 104-116 and accompanying text.
70. 721 P.2d 198 (Idaho 1986) (overruled on other grounds by Colonial Penn Franklin Ins. Co. v. Welch, 811 P.2d 838 (Idaho 1991)).
71. The *Dullenty* majority said "We do *not speak to and specifically reserve* the question in a circumstance as is presented in Hammon [v. Farmers Insurance Group, 107 Idaho 770, 692 P.2d 1202 (1984)] where an insured under two or more motor vehicle liability policies, each issued by the same carrier, and each of which insures a separate vehicle, and in each of which policies issued by the same carrier the insured has elected to and paid a premium for uninsured motorist coverage." *Dullenty*, 721 P.2d at 206-07 (emphasis added).
72. *See id.*
73. *See Clampit*, 309 Ark. at 115, 828 S.W.2d at 598 (Corbin, J., dissenting).
74. *See Dullenty*, 721 P.2d at 215 (Huntley, J., dissenting, with the concurrence of Bistline, J.).

a Florida case which provided weak precedential value in that Florida, unlike Arkansas, had temporarily outlawed, by statute, the stacking of uninsured coverage.[75] The *Clampit* majority relied on five cases that did not involve stacking in any form,[76] and it relied on one case in which the court actually *allowed* the insured to stack underinsured coverage.[77]

The logic used by the court in *Clampit* is also troublesome. The court "concede[d] the distinction" between uninsured and underinsured coverage.[78] Uninsured coverage, it said, was designed to provide the "minimum recovery" required by law.[79] Underinsured coverage, on the other hand, was designed to provide compensation "to the *extent of the injury,* subject to the policy limit."[80] Despite conceding that distinction, the court said "we fail to see how the distinction would change the result in *Crawford*, nor does appellant suggest how it would."[81] The point being pressed by the insureds in *Clampit*, however, was that giving effect to the purpose behind underinsured coverage would have allowed the insureds to collect more than the minimum recovery required by law ($25,000), but instead to collect, through stacking, damages "to the extent of injury," or as close thereto as possible.[82]

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75. *See Clampit*, 309 Ark. at 115, 828 S.W.2d at 597 (citing New Hampshire Insurance Group v. Harbach, 439 So. 2d 1383 (Fla. 1983) (in turn citing FLA. STAT. ANN. § 627.4132 (West 1976)). The Florida anti-stacking statute was later amended to remove uninsured coverage from the kinds of coverage that could not be stacked. *See Harbach*, 439 So. 2d at 1385.

76. *See Clampit*, 309 Ark. at 114-15, 828 S.W.2d at 597 (citing Williams-Diehl v. State Farm Fire and Cas. Co., 793 P.2d 587 (Colo. Ct. App. 1989); Deel v. Sweeney, 383 S.E.2d 92 (W. Va. 1989); Clark v. State Farm Mut. Auto. Ins. Co., 743 P.2d 1227 (Utah 1987); Equitable Gen. Ins. Co. v. Williams, 620 S.W.2d 608 (Tex. App. 1981); Hill v. Nationwide Mut. Ins. Co., 535 S.W.2d 327 (Tenn. 1976)). In each of the above cases, an insured failed to qualify for a single coverage. In none of them did an insured seek to stack two or more coverages.

77. *See Clampit*, 309 Ark. at 113, 828 S.W.2d at 597 (citing Veach v. Farmers Ins. Co., 460 N.W.2d 845, 848 (Iowa 1990). Noting that the purpose of uninsured coverage was "to ensure minimum compensation to victims of uninsured motorists," while the goal of underinsured coverage was "full compensation," the court in *Veach* allowed the insured to stack underinsured coverage. *Veach*, 460 N.W.2d at 848.

78. *See Clampit*, 309 Ark. at 109, 828 S.W.2d at 595.

79. *See id.* at 109, 828 S.W.2d at 595. Pursuant to ARK. CODE. ANN. § 27-22-104(b)(1), the minimum recovery required by law includes $25,000 of coverage for bodily injury or death to any one person in any one car wreck.

80. *Id.* at 110, 828 S.W.2d at 595.

81. *Id.*

82. In their appeal brief, the appellants-insureds in *Clampit* wrote,

> State Farm can be expected to direct the Court's attention to the case of Holcomb v. Farmers Ins. Exchg., 254 Ark. 514, 495 S.W.2d 155 (1973) and its progeny which, if broadly read, hold that a similar "other vehicle" exclusion prevents the stacking of *un*insured motorist coverages. Appellants are equally quick to point out that these cases do not address *under*insured motorist coverage. This is an important

Also problematic is the *Clampit* majority's reliance on the Iowa case of *Kluiter v. State Farm Mut. Auto. Ins. Co.*[83] The *Clampit* majority said that the *Kluiter* court drew "no distinction" between uninsured and underinsured motorist coverage.[84] Given that the *Clampit* court had already acknowledged that there was such a distinction, *Kluiter* would seem to have little precedential value. Of greater precedential value is that, in 1990, three years after the Iowa Supreme Court handed down *Kluiter* and two years *before* the Arkansas Supreme Court handed down *Clampit*, the Iowa Supreme Court did draw a distinction between uninsured and underinsured coverage and allowed an insured to stack underinsured coverage based on that distinction.[85]

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distinction. The basic purpose of uninsured motorist coverage is to enable a person purchasing an automobile liability insurance policy "to obtain for an additional premium protection against death or injuries at the hands of an uninsured motorist as they would have had if that motorist had obtained for himself the minimum coverage required by the Safety Responsibility Act." Childers v. Southern Farm Bur. Cas. Ins. Co., 282 F. Supp. 866, 868 (E.D. Ark. 1968). On the other hand, the basic thrust of underinsured motorist coverage is to *fully* compensate an insured for his damages. *See* 7 Am. Jur. 2d, Automobile Insurance § 322 (1980). It assumes that the minimal liability coverage set by law is simply not enough in many cases to make the injured insured whole, an end that the General Assembly has found should be accomplished. *See* Ark. Code Ann. § 23-89-209 and Acts amendatory thereof.

Abstract and Brief for Appellants at 29-30, Clampit v. State Farm Mut. Auto. Ins. Co., 309 Ark. 107 (1992) (No. 91-285) (emphasis in original).

83. 417 N.W.2d 74 (Iowa 1987).

84. *See Clampit*, 309 Ark. at 110, 828 S.W.2d at 595.

85. The words of the Iowa Supreme Court on this issue from *Veach v. Farmers Ins. Co.*, 460 N.W. 845, 848 (Iowa 1990), are worth repeating at length:

> We are aware that we have upheld a "not-owned-but-insured" [*i.e.*, anti-stacking] clause in the uninsured motorist context. The difference in treatment between uninsured motorist and underinsured motorist coverage is due to the differing objectives of each type of coverage.
>
> The purpose of uninsured motorist coverage is to ensure minimum compensation to victims of uninsured motorists. The goal of underinsured motorist coverage, on the other hand, is full compensation to the victim to the extent of the injuries suffered. We have adopted a "broad coverage" view of underinsured motorist coverage, while taking a "narrow coverage" view of uninsured motorist coverage. This means that benefits that are duplicative in the uninsured motorist context are not necessarily so in the underinsured motorist context.
>
> In the case of both uninsured motorist and underinsured motorist coverage we look to see whether the goal of the type of insurance involved will be met. With uninsured motorist coverage this means looking to see whether the insured will receive minimum compensation as set by statute. With underinsured motorist coverage it means looking to see if the victim will be fully compensated. Because Greg Veach has not yet been fully compensated, the enforcement of the "not-owned-but-insured" [*i.e.*, anti-stacking] clause would frustrate the purpose of underinsured motorist coverage.
>
> Because the "owned-but-not-insured" [*i.e.*, anti-stacking] clause in this case frustrates the purpose of underinsured motorist coverage and because it is contrary to "common sense and the consuming public's general understanding of coverage

The insured fared better before the Arkansas Supreme Court in the second underinsured stacking decision in *Ross v. United Services Automobile Ass'n*,[86] handed down in 1995, three years after *Clampit*. In *Ross*, the court framed the issue as whether the insured could stack underinsured coverage "when underinsured coverage is implied by operation of law."[87] At the time that she was injured by an underinsured motorist, the insured in *Ross* was covered by a policy encompassing four family vehicles.[88] The policy did not contain underinsured coverage, and the insured had not paid any premiums for that coverage.[89] The insurance company, however, did not have written proof that the insured had rejected underinsured coverage, even though the underinsured statute said that any such rejection had to be made "in writing."[90] By operation of law, therefore, the court implied underinsured coverage to exist for each vehicle in the minimum amount required under the underinsured motorist statute, or $25,000 per vehicle.[91] The insurance company did not dispute that. It did dispute the insured's contention that she should be allowed to stack the four underinsured coverages that had been implied to exist. The court looked to other jurisdictions for guidance and found only two cases in which courts had considered the issue of stacking underinsured coverage implied by law. In both cases, the courts had allowed the insureds to stack the underinsured coverage. In neither, however, did the courts indicate that stacking should be *limited* to those cases where coverage was implied by operation of law.[92]

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under these circumstances," we hold that the exclusion is invalid. The foal of full compensation has not been met in this case. The ruling of the district court on this point is affirmed. [All citations omitted.]

86. 320 Ark. 604, 899 S.W.2d 53 (1995).

87. *See id.* at 605, 899 S.W.2d at 54.

88. *See id.*

89. This is evidenced by the fact that underinsured coverage was implied to exist by operation of law because there was no signed rejection for the coverage. *See id.* at 606, 899 S.W.2d at 54.

90. *See* ARK. CODE ANN. § 23-89-209(a)(1).

91. *See Ross*, 320 Ark. at 606, 899 S.W.2d at 54 (citing Shelter Mutual Ins. Co. v. Irvin, 309 Ark. 331, 831 S.W.2d 135 (1992); Shelter Mutual Ins. Co. v. Bough, 310 Ark. 21, 834 S.W.2d 637 (1992)).

92. *See id.* at 609, 899 S.W.2d at 56 (citing Holman v. All Nation Ins. Co., 288 N.W.2d 244 (Minn. 1980); Riffle v. State Farm Mut. Auto Ins. Co., 186 W.Va. 54, 410 S.E.2d 413 (1991)). In the first case, the Minnesota Supreme Court wrote that the "declared policy of this court" was to stack first-party coverage, without drawing a line between coverage obtained by the payment of premiums and that obtained by operation of law. *See Holman*, 288 N.W.2d at 251. In the second case, the West Virginia Supreme Court of Appeals did not even mention "stacking," except in a footnote which read "We have previously permitted the stacking of underinsured motorist coverage." *See Riffle*, 410 S.E.2d at 414 n.2 (citing State Auto. Ins. Co. v. Youler, 396 S.E.2d 737 (W. Va. 1990)).

Importantly, the court in *Ross* looked to the language of the Arkansas underinsured statute. The relevant portion of that language required insurance companies to provide underinsured coverage (unless rejected in writing) for "any" motor vehicle.[93] From that, the court concluded "[b]ecause we find the statute requires the insurance company to offer as a minimum, underinsured coverage for *each* car, we further conclude that when an insured has more than one car covered with the insurance company, the insured *may stack* the minimum coverages that should have been offered."[94] Thus, the court allowed the insured to stack underinsured coverage of $25,000 for each of four cars, for a total of $100,000.

Many courts have invalidated anti-stacking clauses under the same reasoning that the Arkansas Supreme Court used in *Ross*, but without limiting their holdings to cases where the coverage came into existence by operation of law. Interestingly, the court's reasoning in *Ross* closely tracked that of an opinion written 30 years earlier by a Virginia appellate court and discussed in Judge Miller's above-mentioned opinion in *Robey I*, the first uninsured stacking case to arise from Arkansas. In the Virginia case, the court was faced with deciding the validity of an anti-stacking clause under an uninsured statute which was, in Judge Miller's words, "practically identical" to the Arkansas uninsured statute.[95] The Virginia court held in favor of stacking because, quite simply, that state's uninsured statute required that uninsured coverage be included in insurance policies and thus such coverage could not be taken away by anti-stacking clauses.[96] "That is the plain language," the court wrote. "It means that every such policy shall so undertake. There is no limitation or qualification of this language anywhere in the statute, nothing at all to indicate that it does not mean what it says."[97] An Indiana judge ruled accordingly, writing that "[s]ince the [uninsured] statutes simply provide that each policy of insurance issued must contain uninsured motorist protection in minimum amounts, without qualification except as noted, it follows that any attempt on the part of an insurance company to limit the effect of such clauses must be in derogation of the statute."[98] Similarly, a Pennsylvania court invalidated an anti-stacking clause because it was "in derogation of and repugnant to the Uninsured Motorist Act which requires uninsured motorist coverage in all policies of insurance with respect to each motor vehicle."[99]

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93. *See id.* at 609, 899 S.W.2d at 56 (citing ARK. CODE ANN. § 23-89-209(a)).

94. *Id.* at 610, 899 S.W.2d at 56 (first emphasis original; second emphasis added).

95. *See Robey I*, 270 F. Supp. at 482 (discussing Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (Va. Ct. App. 1965)).

96. *See id.* (quoting from Bryant, *supra*).

97. *Id.*

98. *Simpson*, 318 F. Supp. at 1156.

99. Sones v. Aetna Cas. & Sur. Co., 411 A.2d 552, 554 (Pa. Super. Ct. 1979) (emphasis

Although the issue framed in *Ross* was whether stacking would be allowed "when underinsured coverage is implied by operation of law,"[100] logic and fairness do not support limiting the holding of *Ross* to those rare cases in which coverage is implied by operation of law. *Ross* is best viewed as a public policy case. The public policy of Arkansas is found in its constitution and, more importantly here, its statutes.[101] In *Ross*, the court looked to the underinsured statute and found therein language favoring the stacking of underinsured coverage. It should not matter whether that coverage came into existence by operation of law or the payment of premiums. Once the coverage exists, by whatever means, it is governed by the language of the underinsured statute. If that language favors stacking, as the Court found in *Ross*, it favors stacking no matter how the coverage came into existence. Thus, logic suggests that the holding of *Ross* should be extended to cases in which the underinsured coverage came into existence through the insured's payment of premiums. That would also be the fair result. Otherwise, the *only* insureds who would qualify to stack underinsured coverage would be those who did *not* pay for it, but who instead had the fortune to happen upon such coverage by operation of law.

Although the court indicated at the end of its opinion in *Ross* that the anti-stacking clause involved there was either ambiguous or not on point,[102] that did not transform *Ross* from a public policy case into an ambiguity case. The majority's opinion in *Ross* did not turn on ambiguity. Before addressing the ambiguity (or non-applicability) of the anti-stacking clause, the court had already reached its conclusion in favor of stacking by looking to the language of the underinsured statute, where public policy is found. Once the court determined that clauses purporting to forbid the stacking of underinsured coverage ran contrary to the language of the underinsured statute, ambiguity became an academic issue. That is because once anti-stacking clauses are declared to run counter to the language of a statute, they become invalid, whether ambiguous or not.[103] While it may not be possible to reconcile *Ross* with *Clampit*, *Ross* followed *Clampit* by three years and has the advantage of being the court's last pronouncement on stacking underinsured coverage.

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added) (discussed in WIDISS, *supra* note 9, § 13.15, at 645).

100. *Ross*, 320 Ark. at 608, 899 S.W.2d at 56.

101. *See* Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 249, 743 S.W.2d 380, 385 (1988).

102. *See Ross*, 320 Ark. at 610, 899 S.W.2d at 56.

103. *See also* WIDISS, *supra* note 9, § 13.15, at 644 (discussing Allstate Ins. Co. v. Maglish, 586 P.2d 313, 315 (Nev. 1978), where the court said "Although we question whether the liability limiting clause is unequivocal as alleged by Allstate, we need not address that issue since the clause is void if contrary to public policy . . . .").

IV. THE NATIONAL TREND IN FAVOR OF STACKING

Across the country, the anti-stacking view has always been, and remains, the minority view. As mentioned above, in the 4-3 decision handed down by the Arkansas Supreme Court in *Holcomb* in 1973, the three dissenting justices expressed their regret that Arkansas had aligned itself with the "pitifully small minority" of states upholding anti-stacking clauses.[104] The following year, 1974, the Wisconsin Supreme Court listed 29 states among the pro-stacking majority and only nine, including Arkansas, among the anti-stacking minority.[105] In 1981, Couch declared "the trend appears to be in favor of stacking" and cited cases from 28 states in which anti-stacking clauses had been declared invalid.[106] That same year, the United States Supreme Court acknowledged a Minnesota Supreme Court opinion which "emphasized that a majority of States allow stacking and that legal decisions allowing stacking 'are fairly recent and well considered in light of current uses of automobiles.'"[107] Four years later, in 1985, the Arizona Supreme Court counted 26 states that had found anti-stacking clauses to be invalid in contravention of uninsured statutes,[108] and two states were added to that list a year later, for another count of 28 pro-stacking states.[109]

The trend proved to be the same for underinsured coverage once cases involving that form of insurance began to accumulate. In 1995, Widiss said there was a "substantial body" of judicial precedent which affirmed the right of an insured to stack underinsured coverage.[110] Widiss cited cases from 20

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104. *See Holcomb*, 254 Ark. at 523, 495 S.W.2d at 160 (Fogleman, J., dissenting, joined by Harris, C.J., and George Rose Smith, J.).

105. *See* Nelson v. Employers Mut. Cas. Co., 217 N.W.2d 670, 673-74 nn. 2-3 (1974). Among the pro-stacking majority, the court listed Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Virginia, and West Virginia. Among the anti-stacking minority, the court listed Arkansas, California, Illinois, Iowa, New Hampshire, New York, Tennessee, Utah, and Washington.

106. *See* COUCH, *supra* note 8, § 45:628, at 77 n. 3 (citing cases from Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, and Wyoming).

107. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 307 (1981) (quoting Allstate Ins. Co. v. Hague, 289 N.W.2d 43, 49 (Minn. 1979)).

108. *See* Calvert v. Farmers Ins. Co., 697 P.2d 684, 687 (Ariz. 1985).

109. A dissenting justice in *Dullenty v. Rocky Mountain Fire & Cas. Co.*, 721 P.2d 198 (Idaho 1986), said that Arizona and Ohio could be added to the list appearing in *Calvert*. *See Dullenty*, 721 P.2d at 212 (1986) (Bristline, J., dissenting).

110. *See* WIDISS, *supra* note 9, § 40.4, at 248.

states in support of that statement.[111] By 1998, it cited three more, for a total of 23.[112]

As is apparent from the previous discussion herein, the Arkansas Supreme Court did not immediately acknowledge the trend in favor of stacking. In 1988, the court recognized that giving effect to anti-stacking clauses was the "minority view," but contended that the minority view had "gained acceptance (or remained the rule)" in other jurisdictions.[113] Four years after that, in 1992, the court said the law in other jurisdictions was in a "transitional stage" and that the jurisdictions in the minority had not diminished.[114] By 1998, however, the court seemed to agree that Arkansas was in a lonely minority, as it wrote that "[a]ccording to Widiss, thirty-six states have rejected other insurance clauses on a variety of bases."[115] The court nonetheless found "no grounds to depart from our precedent."[116] The authors of this article seek to articulate those grounds.

V. WHAT ARKANSAS SHOULD DO

A. Public Policy versus Ambiguity

Insureds seeking to overcome anti-stacking clauses often look for ambiguity in those clauses because the well established rule is that ambiguous clauses are invalid.[117] The Arkansas Supreme Court, like many others, has found such ambiguity on occasion.[118] Victories for insureds based on

111. *See* WIDISS, *supra* note 9, § 40.4 at 248 n.1 (citing cases from Arizona, Connecticut, Florida, Georgia, Iowa, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, West Virginia, and Wisconsin).

112. *See* WIDISS, *supra* note 9, § 40.4, at 63-65 (citing cases from, among other states, Illinois, Kentucky, and Oklahoma).

113. *See Crawford*, 294 Ark. at 571, 745 S.W.2d at 134.

114. *See Clampit*, 309 Ark. at 114, 828 S.W.2d at 597. *Clampit* concerned underinsured coverage, as opposed to uninsured coverage.

115. *See Youngman*, 334 Ark. at 79, 971 S.W.2d at 251.

116. *See id.* at 80, 971 S.W.2d at 251.

117. "Few doctrines are more well established in the law of contracts, as well as more particularly in regard to the construction of insurance policies, than the proposition that ambiguities in contract documents are resolved against the party responsible for the drafting." WIDISS, *supra* note 9 § 13.6, at 582-83 (citing ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES AND COMMERCIAL PRACTICES § 6.3(a)(2) (1988)).

118. *See Barnhill*, 284 Ark. at 221, 681 S.W.2d at 342-43 (holding that an anti-stacking clause was "undoubtedly ambiguous" and thus invalid). *See also Woolston*, 306 F. Supp. at 742 ("[T]he Court is of the opinion that the 'other insurance clause' involved in this case is at best ambiguous in a situation involving the issuance of two policies by the same company, and that

ambiguous policy language, however, are always short-lived. Insurance companies will be quick to rewrite policy language that has been declared to be ambiguous (and thus invalid) in a published court opinion. That means that, when a stacking case is decided in an insured's favor based on ambiguous policy language, that case will soon be rendered ineffective for future insureds. To try to win the stacking debate on the behalf of insureds based on arguments concerning ambiguous policy language is, therefore, to shoot at a moving target. The answer is not in ambiguity; it is in public policy.

Illustrative of that is the Mississippi Supreme Court's decisively pro-stacking opinion handed down in 1997 in *United States Fidelity & Guar. Co. v. Ferguson*.[119] Before *Ferguson*, Mississippi, like Arkansas now, allowed insurance companies to contractually forbid stacking, so long as the policy language was not ambiguous.[120] That led the Mississippi Supreme Court to complain, in *Ferguson,* that insurance companies had responded by rewriting their policy language and altering their premium schemes to "circumvent" its decisions.[121] The court put an end to that in *Ferguson* by looking to its public policy and announcing that it "mandates stacking."[122] In Mississippi, the rule is now clear: an insured may stack uninsured coverage, regardless of anti-stacking clauses, ambiguous or not. *Ferguson* shows that a comprehensive rule based on public policy can be more helpful to insureds than a string of decisions based on ambiguous policy language.

B. The Public Policy Argument

Even though the statutes of most states do not directly address stacking, the majority of courts allow stacking, even in the face of anti-stacking clauses. The basis for those pro-stacking decisions is usually public policy.[123] As one

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it must be construed most strongly in favor of the plaintiffs.").

119. 698 So. 2d 77 (Miss. 1997).

120. *See id.* at 79.

121. *See id.*

122. *See id.* at 79 ("We now affirmatively declare that the public policy of this State mandates stacking of [uninsured motorist] coverage for every vehicle covered under a policy, regardless of the number or amount of the premiums(s) paid for [uninsured motorist] coverage.").

123. Widiss writes:

> Most of the appellate decisions are based on the judicial view of each state's public policies, as represented by the enactment of the statutes which establish the legislative requirements that apply to the uninsured motorist coverage. In these opinions, courts typically conclude that insurance companies are precluded from reducing the coverage so long as the claimant has not been fully indemnified. In the view of these courts, legislative requirements were enacted in order to assure injured claimants a source of indemnification and, therefore, a claimant should be allowed to seek compensation from several coverages when a claimant has not been fully

commentator says, "In the absence of a more direct statute addressing stacking, it is usually necessary to analyze what public policy is embodied in the general [uninsured or underinsured] statute."[124]

Arkansas does not have a statute directly addressing stacking, as Justice Brown alluded to in *Ross*.[125] Thus, it is necessary to analyze Arkansas' uninsured and underinsured statutes,[126] as well as its entire statutory scheme concerning the indemnification of persons injured in car wrecks, to discern what public policy is embodied therein concerning stacking. That does not mean that the public policy will be expressly stated in those statutes. The general rule, also followed in Arkansas, is that a state's public policy is found in its constitution and statutes.[127] That public policy must usually be discerned by the courts, as has been the case in Arkansas in the past.[128]

> indemnified. Several judges have reasoned that so long as the uninsured motorist insurance legislation does not expressly permit provisions that reduce the insurers' liability in this situation, companies may not reduce or avoid liability through terms in the coverage. There are also a few opinions which have concluded that even though the uninsured motorist statutes do not include any express statements about the Other Insurance [*i.e.*, anti-stacking] clauses, the particular phrasing of the statutory language of the general requirement precludes insurers from including Other Insurance provisions that reduce a company's liability.

WIDISS, *supra* note 9, § 13.12, at 624.

124. *See* RUSS, *supra* note 8, § 169:13, at 169-32. *See also* M.F.A. Mut. Ins. Co. v. Bradshaw, 245 Ark. 95, 99-100, 431 S.W.2d 252, 254 (1968) (explaining that an insurance company's contract with its insured is may be limited by "statute and public policy.") (citations omitted).

125. *See Ross*, 320 Ark. at 611, 899 S.W.2d at 57 (Brown, J., concurring in part and dissenting in part). In *Ross*, Justice Brown wrote that the underinsured statute was "silent on the issue of stacking." That does *not* mean that a public policy in favor of stacking cannot be discerned from the underinsured statute. Close on point in that regard, in a recent tort case, Justice Brown wrote that a duty of care and the attendant standard of care could be "found in a statute that is silent on civil liability." *See infra* note 128.

126. *See* ARK. CODE ANN. §§ 23-89-403 & 23-89-209 (Michie 1997).

127. *See* Sterling Drug, Inc. v. Oxford, 294 Ark. 239, 249, 743 S.W.2d 380, 385 (1988). *See also* Drummond, *supra* note 20, at 168 ("[A]s a practical matter, all uninsured motorist claims must be viewed in the context of an insuring agreement whose interpretation or validity may be determined by the provisions of this statute or, more importantly, the *public policy* which that statute is intended to implement." (emphasis added)).

128. One example of the Arkansas Supreme Court discerning public policy from a statute where it was not expressly stated is found in *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988). There, an employee sued his employer for wrongful discharge. The employee claimed that the employer had forced his resignation upon belief that he had blown the whistle on it by reporting it to the federal government for submitting false information during contract negotiations. The court agreed that the employer had wrongfully discharged the employee and that it had done so in violation of the public policy of Arkansas. To find that public policy, the court looked to a criminal statute forbidding retaliation against witnesses, informants, and jurors. *See* ARK. CODE ANN. § 5-53-112. The criminal statute had no literal application to *Oxford*. *Oxford* was a civil case, not a criminal case, and the plaintiff was neither

To discern whether the public policy of Arkansas supports stacking uninsured and underinsured coverage, one must look to the big picture. The first thing to recognize in that picture is the backdrop of a "strong public policy against exclusion of coverage."[129] Or, as Widiss plainly writes, "Indemnification is to be favored."[130] That, after all, is the reason behind Arkansas' legislative scheme designed to provide sources of indemnification for persons injured in car wrecks. As previously discussed herein, that scheme includes not only uninsured and underinsured statutes, but also a mandatory liability insurance statute and a "no-fault" statute.[131]

Within that scheme, the Arkansas legislature attached special importance to uninsured and underinsured coverage. The legislature considered those two forms of coverage critical enough to mandate that insurance companies offer them to insureds, who must take affirmative steps to reject them.[132] The Arkansas Supreme Court took note of that in *Shelter Ins. Co. v. Irvin*.[133] There, the court considered the original version of the underinsured statute, which merely required insurance companies to "make available" underinsured coverage to their insureds.[134] Pursuant to the statute, Shelter listed underinsured coverage among the optional coverages on its insurance application.[135]

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a witness, an informant, nor a juror under the language of the statute. To find the public policy, however, the court drew an inference. The statute, it inferred, illustrated a "public policy favoring citizen informants or crime fighters." *Oxford*, 294 Ark. at 250, 743 S.W.2d at 386. That public policy, it said, was "contravened if an employer discharges an employee for reporting a violation of state or federal law." *Id.* Thus, the public policy at issue in *Oxford* was not expressly stated in any statute, but was nonetheless "found in" one.

A more recent example arose in March of 1999, when the Arkansas Supreme Court overturned its longstanding precedent and sided with the majority of states by recognizing common-law liability for the negligence of vendors licensed by the state who sell alcoholic beverages to intoxicated persons who, in turn, cause injury to third persons in *Jackson v. Cadillac Cowboy*, No. 98-574, 1999 WL 144487 (Ark. 1999). There, the court drew an inference from a part of the Arkansas Alcohol Beverage Control Act which prohibited the sale of alcohol to a habitual drunkard or an intoxicated person. *See* ARK. CODE ANN. § 3-3-209. Writing for the majority, Justice Robert Brown said "Although these ABC statutes do not specifically provide for civil liability, a duty of care and the attendant standard of care may be found in a statute that is silent on civil liability." *Jackson*, 1999 WL 144487, at *3 (citing RESTATEMENT (SECOND) OF TORTS § 286 cmt. d (1965)).

129. State Farm Mut. Auto. Ins. Co. v. Beavers, 321 Ark. 292, 297, 901 S.W.2d 13, 16 (1995) (citations omitted).

130. WIDISS, *supra* note 9, § 13.11, at 603.

131. *See supra* notes 14-17 and accompanying text.

132. *See* ARK. CODE ANN. §§ 23-89-403(b) & 23-89-209(a)(1).

133. 309 Ark. 331, 831 S.W.2d 135 (1992).

134. *See* 1987 Ark. Acts 335. The legislature later strengthened that requirement by amending the underinsured statute to provide that insurance companies "shall provide underinsured motorist coverage to the named insured unless rejected in writing by the insured." 1991 Ark. Acts 209.

135. *See* Shelter Mut. Ins. Co. v. Irvin, 309 Ark. 331, 333, 831 S.W.2d 135, 136 (1992).

That was not good enough. The court said that, while other coverages (collision, comprehensive, fire, theft, and windstorm) were not statutorily mandated, "the General Assembly considered underinsured coverage *significant and vital* enough to require by law that this new coverage be offered to insureds."[136] Because, in the court's eyes, Shelter had not done enough to "make available" underinsured coverage to its insured, the court implied that coverage to exist by operation of law, even though the insured had not paid a premium for it. The court later commented in *Ross*, "[t]here is no language in the underinsured statute requiring that result, but *Irvin* was based on our recognition of *public policy*,"[137] further support for the notion that public policy may be discerned from the uninsured and underinsured statutes.

The Arkansas legislature did not statutorily forbid the stacking of uninsured and underinsured coverage, even though it did forbid the stacking of another form of coverage. As previously discussed,[138] Arkansas' "no-fault" statute provides for, among other things, minimum medical benefits coverage for insureds injured in car wrecks.[139] In *Travelers Insurance Co. v. Estes*,[140] the insureds sought to stack medical benefits coverage. The Arkansas Supreme Court rejected the insureds' argument, saying the flaw in it was its "total disregard" of the portion of the no-fault statute which said that the medical payments coverage "shall apply only to occupants of the insured vehicle . . . and to none other."[141] Because an insured will never be an "occupant" of more than one insured vehicle in a single car wreck, an insured will never be able to stack medical coverage under the no-fault statute. In other words, the no-fault statute itself contains an anti-stacking clause. By contrast, the uninsured and underinsured statutes do *not* contain anti-stacking clauses. The inference to be drawn from that is that the legislature did *not* intend for insureds to be forbidden from stacking uninsured and underinsured coverage. That is especially true for underinsured coverage, as the underinsured statute was enacted *after* the no-fault statute and even *after Estes*.[142]

There is already support from the Arkansas Supreme Court's decision in *Ross* that the public policy of Arkansas favors stacking. As previously

136. *Shelter*, 309 Ark. at 335, 831 S.W.2d at 137 (emphasis added).
137. *Ross*, 320 Ark. at 608, 899 S.W.2d at 55 (emphasis added).
138. *See supra* note 15.
139. *See* ARK. CODE ANN. § 23-89-202.
140. 283 Ark. 61, 670 S.W.2d 451 (1984).
141. *See id.* at 64, 670 S.W.2d at 453.
142. The underinsured statute was enacted by Act No. 335 of 1987, three years after the court decided *Estes* in 1984.

discussed,[143] the Arkansas Supreme Court concluded in *Ross* that, based on the language of Arkansas' underinsured statute, insureds may stack underinsured coverage which is implied by operation of law.[144] As also previously discussed, while the issue framed in *Ross* was limited to cases where underinsured coverage was implied by operation of law, rather than by the payment of premiums, there is no basis in logic or fairness to confine the result in *Ross* to only those rare cases where the insured happened upon underinsured coverage by operation of law. Arkansas' uninsured and underinsured statutes promote indemnification for persons injured in car wrecks by requiring insurance companies to provide uninsured and underinsured coverage for *every* vehicle unless the insured affirmatively rejects that coverage.[145] Insurance companies should not be permitted to ostensibly provide what is required by statute (*i.e.*, uninsured and underinsured coverage), to collect premiums for doing so, and then to take the coverage away through anti-stacking clauses. Many courts have found that to run against public policy.[146] Some have even found it "unconscionable."[147]

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143. *See supra* notes 86-103 and accompanying text.

144. *See Ross*, 320 Ark. at 610, 899 S.W.2d at 56.

145. *See* ARK. CODE ANN. §§ 23-89-403 & 23-89-209(a)(1).

146. *See* Abramson v. Aetna Cas. & Sur. Co., 76 F.3d 304 n.1 (9th Cir. 1996) (citing from Walton v. State Farm Mut. Auto. Ins. Co., 518 P.2d 1399, 1402 (Haw. 1974), where the court said "it was unconscionable to permit an insurer to collect a premium for the coverage and then allow the insurer to avoid payment by use of anti-stacking language"); North River Ins. Co. v. Tabor, 934 F.2d 461, 466 (3rd Cir. 1991) ("The other main reason cited by the Pennsylvania courts in striking down anti-stacking provisions is protection of the reasonable expectations of the insured. This reflects the concept that the insured, having paid multiple premiums, is entitled reasonably to believe that he has multiple coverage."); Kent v. Middlesex Mut. Assurance Co., 627 A.2d 1319 (Conn. 1993) ("[A]n insurer may not avoid liability for stacking, even though language in the policy purports to do so, if the insured has paid a separate, additional premium for underinsured motorist coverage. To permit an insurer to so limit its liability under such circumstances would deprive the insured of a benefit for which the policyholder has paid, a result not consistent with the reasonable expectations of the parties."); Sturdy v. Allied Mut. Ins. Co., 457 P.2d 34, 42 (Kan. 1969) ("When we pay a double premium we expect double coverage. . . . Defendant argues that what plaintiff is seeking amounts to pyramiding coverage but nothing is said about pyramiding the premiums which effectuate the coverages."); Allstate Ins. Co. v. Dicke, 862 S.W.2d 327, 329 (Ky. 1993) (anti-stacking provision held void with regard to underinsured coverage: "when separate items of 'personal' insurance are bought and paid for, there is a reasonable expectation that the coverage will be provided."); Swartz v. Metropolitan Property & Cas. Co., 949 S.W.2d 72, 78 (Ky. Ct. App. 1997) (insured allowed to stack coverage for different vehicles insured under single policy where insurance company, while ostensibly charging only one premium, in fact based premium on whether policy covered single or multiple vehicles); United States Fidelity & Guar. Co. v. Ferguson, 698 So. 2d 77, 79 (Miss. 1997) (even before categorically declaring anti-stacking provisions void as against public policy in *Ferguson*, Mississippi courts "allowed the aggregation of UM coverage despite anti-stacking clauses based upon ambiguity in the language of the policy or the fact that separate premiums were charged for each car."); Jimenez v. Found. Reserve Ins. Co., Inc., 757 P.2d 792, 794, 795 (N.M. 1988) ("Stacking is an appropriate means

In further support of that notion, Couch says "the general rule is that where the insured paid premiums on more than one policy of insurance, he may recover from each carrier up to the total proceeds which the tortfeasor was liable to pay."[148] Widiss adds "A premium has been paid for each of the coverages and the insurance policy has been issued. It seems both equitable and desirable to permit recovery under more than one coverage until the claimant is fully indemnified . . . ."[149] Justice Stevens, of the United States Supreme Court, once wrote "the [pro-stacking] rule is consistent with the economics of a contractual relationship in which the policyholder paid three separate premiums for insurance coverage for three automobiles, including a separate premium for each uninsured motorist coverage."[150] Justice Corbin, of the Arkansas Supreme Court, has articulated similar notions in at least two dissenting opinions.[151] Justice Smith's words from the first Arkansas Supreme

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to compensate for losses suffered by an insured through no fault of his or her own. [Citation omitted.] By so holding, effect is given to the reasonable expectations of the insured who purchased the multiple coverage."); Wilson v. Allstate Ins. Co., 912 P.2d 345 (Okla. 1996) (insured could stack underinsured benefits under two policies pursuant to both public policy and the insured's reasonable expectations where insurance company collected higher premium for two cars which was almost double the premium charged for single-car coverage); Lake v. Wright, 657 P.2d 643, 646 (Okla. 1982) ("[I]t would be manifestly unjust to permit the insurer to avoid its statutorily imposed liability by its assertion of 'other insurance clauses' which would deny the insured from receiving that for which he has paid a premium."); Cardoso v. Nationwide Mut. Ins. Co., 659 A.2d 1097 (R.I. 1995) (insured could stack under Rhode Island's underinsured statute only if he paid separate premiums); West Bend Mut. Ins. Co. v. Playman, 489 N.W.2d 915 (Wis. 1992) (court applied, in underinsured case, its earlier holding that, "'[w]here an insured pays separate premiums, he or she receives separate and stackable uninsured motorist protections whether the coverage is provided in one or more than one policy.'"); Schult v. Rural Mut. Ins. Co., 536 N.W.2d 135 (Wisc. Ct. App. 1995) (where insured paid separate premiums he was entitled to stack coverage regardless of anti-stacking clauses). *See also Clampit*, 309 Ark. at 116, 828 S.W.2d at 598 (Corbin, J., dissenting).

147. *See, e.g.*, Walton v. State Farm Mut. Auto. Ins. Co., 518 P.2d 1399, 1402 (Haw. 1974) ("it was unconscionable to permit an insurer to collect a premium for the coverage and then allow the insurer to avoid payment by use of anti-stacking language"); *Simpson*, 318 F. Supp. at 1156 ("it would be unconscionable to permit insurers to collect a premium for 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."). *See also* WIDISS, *supra* note 9, § 13.6, at 582 (citing *Simpson* and saying, "In decisions invalidating Other Insurance clauses, several courts have commented that 'it would be unconscionable to permit insurers to collect a premium for 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.'").

148. COUCH, *supra* note 8, § 45:628, at 72.

149. WIDISS, *supra* note 9, § 13.6, at 583.

150. Allstate Ins. Co. v. Hague, 449 U.S. 302, 328 (1981) (Stevens, J., concurring) (also quoted in *Clampit*, 309 Ark. at 116, 828 S.W.2d at 598 (Corbin, J., dissenting)).

151. *See Youngman*, 334 Ark. at 82, 971 S.W.2d at 252 (Corbin, J., dissenting) ("the added premium is consistently being paid, but the coverage is less than consistently being provided."). *See also Clampit*, 309 Ark. at 116, 828 S.W.2d at 598 (Corbin, J., dissenting) ("the Clampits

Court case on stacking, discussed above, are also in accord. It is reasonable to think, he said, that an additional premium charged for an additional coverage on an additional car is intended to afford "some corresponding added benefit to the insured."[152]

C. The Special Case for Stacking Underinsured Coverage

For the reasons expressed throughout this article, the authors believe that insureds should be allowed to stack both uninsured and underinsured coverage. There is, however, an additional justification for stacking underinsured coverage.

The Arkansas Supreme Court has recognized that the uninsured and underinsured statutes serve different purposes. The court considered the purpose of uninsured coverage for the first time over 30 years ago in *Wallace,* where it said the uninsured statute was designed to provide the insured with the protection that "would have been available had the insured been injured by an operator with a policy containing the *minimum* statutory limits required by the Motor Vehicle Safety Responsibility Act."[153] The court again considered the matter last year, in *Youngman*, where it said essentially the same thing: "Recall that the purpose of section 23-89-403 [the uninsured statute] is to put the injured party in as good a position as it would have been in had the uninsured motorist been *minimally* insured as required by the statute."[154] Federal decisions arising out of Arkansas have been in accord.[155]

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paid an *additional* premium to obtain *additional* underinsured motorist coverage. This additional paid consideration eliminates any supposed prejudice to State Farm under the 'free ride' theory advanced by the Dullenty opinion and relied upon by the majority of this court.") (emphasis in original).

152. *Epperson*, 234 Ark. at 1102, 356 S.W.2d at 614 (regarding the stacking of medical expense coverage).

153. *Wallace*, 245 Ark. at 232, 431 S.W.2d at 744 (emphasis added); *see also Barnhill*, 284 Ark. at 222, 681 S.W.2d at 343 ("Certainly the spirit of the uninsured motorist protection statute . . . is to provide *minimum* protection at a reasonable cost to the residents of Arkansas.") (Purtle, J. dissenting) (emphasis added). "Motor Vehicle Safety Responsibility Act" refers to Act No. 347 of 1953, which established the minimum amounts for liability insurance coverage, as currently set forth in Ark. Code Ann. § 27-19-605.

154. *Youngman*, 334 Ark. at 79, 971 S.W.2d at 251 (emphasis added).

155. In *Childers*, 282 F. Supp. at 868, Judge Henley said "Clearly the basic purpose of [the uninsured statute] was to enable Arkansas motorists purchasing automobile insurance to obtain for an additional premium protection against death or injuries at the hands of a uninsured motorist as they would have had if that motorist had obtained for himself the minimum coverage required by the Safety Responsibility Act." Judge Miller quoted that passage with approval in *Howard v. Grain Dealers Mut. Ins. Co.*, 342 F. Supp. 1125, 1130 (W.D. Ark. 1972), where he added "This is the principal theory and basic rationale for the mandatory offering of uninsured motorist coverage in Arkansas." (citing Vaught v. State Farm Fire & Casualty Co., 413 F.2d 539 (8th Cir. 1969); Alexander v. Pilot Fire & Casualty Insurance Co., 331 F. Supp. 561 (E.D.

Under that reasoning, it might be argued that, because the uninsured statute was intended to provide insureds with the floor of coverage that each motorist was required by law to carry ($25,000 today),[156] but nothing more, there is no need to stack uninsured coverage. The benefits from one uninsured coverage, after all, should always provide at least the $25,000 floor required by law. That reasoning will not hold in the case of underinsured coverage.

Underinsured coverage is not triggered until the tortfeasor's insurance company has paid its liability limits, which, by statute, will always be at least $25,000.[157] Before the injured party receives his first dollar of underinsured benefits, therefore, he will normally have already collected at least $25,000 from the tortfeasor's liability insurance company. Thus, underinsured coverage is designed to provide an injured party with something more than the $25,000 floor of required coverage. It is designed to afford the injured party with *full* compensation for his injuries.[158] Often times, full compensation can only be achieved by stacking underinsured coverage. Other courts and commentators agree on this.[159]

In *Clampit*, the Arkansas Supreme Court said it "concede[d] the distinction" between uninsured and underinsured coverage.[160] While uninsured coverage was designed to provide the "minimum recovery" required by law, the court said, underinsured coverage was designed to provide

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Ark. 1971)).

156. *See* ARK CODE ANN. § 27-19-605(a).

157. *See* ARK. CODE ANN. § 27-22-104 (Michie Supp. 1997).

158. *See also* Robert Burk, *Shelter Mutual Insurance Co. v. Irvin–The Arkansas Supreme Court's Retroactive Application of the Amended Underinsured Motorist Act*, 46 ARK. L. REV. 737, 739 (1993) ("The policy reasons behind legislation requiring underinsured motorist coverage to be made available to the insured are arguably different than those behind uninsured motorist coverage, since this coverage provides recovery beyond the minimum safety net inherent in the uninsured policy.")

159. For a thoroughly articulated statement in support of this position, see the quoted passage from the Iowa Supreme Court in *Veach* at *supra* note 85. *See also* Hernandez v. Farmers Insurance Co., 460 N.W.2d 842, 844 (Iowa 1990) ("The purpose of underinsured motorist coverage is aimed at *full compensation* of the victim . . . [and] we see no duplication of benefits until the victim has been fully compensated." (as quoted in WIDISS, *supra* note 9, § 40.4, at 255 n.2 (emphasis added)); North River Ins. Co. v. Tabor, 934 F.2d 461, 466 (3rd Cir. 1991) ("Throughout the several programs adopted by Pennsylvania for automobile insurance, its courts have consistently seen a legislative intent to provide for the *fullest coverage* possible for injured insureds, not in excess of their damages, –and this intent has extended into the current MVFRL era. [Citations omitted.] Accordingly, in repeatedly striking down the anti-stacking provisions, one reason cited by the Pennsylvania cases has been the insurer's improper attempt to cut back the coverage of insureds in violation of the statute's intent." (as quoted in WIDISS, *supra* note 9, § 40.4, at 255 n.2 (emphasis added)).

160. *See Clampit*, 309 Ark. at 109, 828 S.W.2d at 595.

compensation "to the *extent of the injury*, subject to the policy limit."[161] This distinction is not only apparent from the widely recognized purposes of uninsured and underinsured statutes, it has some additional basis in the language of the two statutes. The underinsured statute, unlike the uninsured statute, says that coverage shall enable the insured to recover the "amount of damages" which he is "legally entitled to recover" from an underinsured tortfeasor.[162] That connotes full compensation, not minimal compensation. By contrast, the uninsured statute merely says that coverage is to be provided "for the protection" of insureds who are legally entitled to recover damages from uninsured tortfeasors.[163]

VI. CONCLUSION

Arkansas should overturn its longstanding anti-stacking precedent and join the majority of states by allowing insureds to stack uninsured and underinsured coverage, if their injuries so warrant, regardless of the anti-stacking clauses always found in their insurance policies. Beginning in 1968, when the Arkansas Supreme Court first held an anti-stacking clause to be valid in *Wallace*, the case law used to support that rule has been fragile. It has only grown more fragile with time. Many of the cases cited by the Arkansas Supreme Court in support of the anti-stacking rule have been overturned. Others have lost their vitality for other reasons. Some had no vitality in the first place. In *Ross*, decided four years ago, the Arkansas Supreme Court laid the foundation for invalidating anti-stacking clauses based on the public policy found in the uninsured and underinsured statutes. In *Holcomb* and again in *Youngman*, decided just last year, the court came within a vote of invalidating anti-stacking clauses. The present, newly constituted court may finally do so.

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161. *Id.* at 109-10, 828 S.W.2d at 595 (emphasis added); *see also* State Farm Mut. Auto. Ins. Co. v. Beavers, 321 Ark. 292, 296, 901 S.W.2d 13, 16 (1995) (quoting from *Clampit*).

162. The entire operative passage reads "The coverage shall enable the insured or the insured's legal representative to recover the amount of damages for bodily injuries to or death of an insured which the insured is legally entitled to recover from the owner or operator of another motor vehicle whenever the liability insurance limits of such other owner or operator are less than the amount of the damages incurred by the insured." ARK. CODE ANN. § 23-89-209(a)(3).

163. The entire relevant passage reads "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 and is not less than limits described in § 27-19-605, under provisions filed with and approved by the Insurance Commissioner, 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." ARK. CODE ANN. § 23-89-403(a)(1).

Insurance companies simply should not be permitted to ostensibly afford the coverage provided for by the uninsured and underinsured statutes, to collect premiums for doing so, and then to take that coverage away through anti-stacking clauses–all while insureds go without full compensation for their injuries.