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# Sutton v. Aetna Casualty & Surety Co.: The North Carolina Supreme Court Approves Stacking of Underinsured Motorist Coverage--Will Uninsured Coverage Follow

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# *Sutton v. Aetna Casualty & Surety Co.*: The North Carolina Supreme Court Approves Stacking of Underinsured Motorist Coverage—Will Uninsured Coverage Follow?

Underinsured motorist coverage protects innocent victims of automobile collisions from tortfeasors with insufficient liability coverage to compensate fully the injured party.[1] A type of "first party insurance,"[2] underinsured motorist coverage pays the injured party the difference between the insured's liability limit and the amount of the tortfeasor's liability coverage paid to the insured.[3] As one element of North Carolina's Motor Vehicle Safety and Financial Responsibility Act of 1953,[4] underinsured motorist coverage supplements uninsured motorist coverage. The latter protects the insured when the tortfeasor has little or no insurance.[5] Despite sharing the unitary purpose of compensating innocent insureds, the statutory provisions governing each type of coverage are unique.[6] This statutory distinction has led to inconsistent protection for injured motorists.[7]

In 1985 the North Carolina General Assembly amended the state's underinsured motorist statute to permit aggregation, or stacking,[8] of underinsured motorist policies.[9] The amendment explicitly provided for interpolicy stacking,[10] but was ambiguous regarding intrapolicy stacking.[11] The North Carolina

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1. *See* 2 A. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE §§ 31.1-31.5, at 3-7 (2d ed. 1987) (discussing the development and use of underinsured motorist coverage); *infra* notes 32-33 and accompanying text.

2. 12A G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:628, at 74 (2d rev. ed. 1981). First party insurance pays the insured directly, whereas third party coverage pays others injured through the fault of the insured. *See also* N.C. GEN. STAT. § 20-279.21(b)(3) (1989) (defining "persons insured" for uninsured motorist and underinsured motorist coverages).

3. *See* N.C. GEN. STAT. § 20-279.21(b)(4) (1989). Of course the injured party may not recover more than her actual damages. Moore v. Hartford Fire Ins. Co. Group, 270 N.C. 532, 543, 155 S.E.2d 128, 136 (1967). Underinsured motorist coverage is commonly referred to as UIM. *See* Sutton v. Aetna Casualty & Sur. Co., 325 N.C. 259, 260, 382 S.E.2d 759, 760 (1989). Uninsured motorist coverage is commonly referred to as UM. *See* 8C J. APPLEMAN, INSURANCE LAW AND PRACTICE § 5066, at 2 (1981).

4. N.C. GEN. STAT. §§ 20-279.1 to - .39 (1989) (original version at ch. 1300, 1953 N.C. Sess. Laws 1262, 1262-1280). The North Carolina General Assembly added UIM coverage to the Act in 1979. Act of May 29, 1979, ch. 675, 1979 N.C. Sess. Laws 720, 720-721 (codified as amended at N.C. GEN. STAT. § 20-279.21(b)(4)); *see infra* text accompanying notes 24-32.

5. N.C. GEN. STAT. § 20-279.21(b)(3); *see infra* note 30.

6. *See* N.C. GEN. STAT. § 20-279.21(b)(3), (4).

7. *Compare* Government Employees Ins. Co. v. Herndon, 79 N.C. App. 365, 368, 339 S.E.2d 472, 474 (1986) (interpreting N.C. GEN. STAT. § 20-279.21(g) to limit stacking of uninsured motorist policies) *with* Sutton v. Aetna Casualty & Sur. Co., 325 N.C. 259, 268, 382 S.E.2d 759, 765 (1989) (rejecting the same statute as a limitation on stacking of underinsured motorist policies).

8. Stacking is the aggregation of insurance coverages when more than one coverage applies. 12A G. COUCH, *supra* note 2, § 45:628, at 77; *see* P. 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"); *infra* text accompanying notes 33-35.

9. Act of July 10, 1985, ch. 666, § 74, 1985 N.C. Sess. Laws 862, 862-64 (codified at N.C. GEN. STAT. § 20-279.21(b)(4) (1989)). See *infra* note 69 for relevant text of the amendment. *See generally* Note, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C.L. REV. 1408 (1986) (discussing the impact of the 1985 amendment).

10. Interpolicy stacking refers to the practice of aggregating coverages from more than one

Supreme Court recently resolved the statute's ambiguity in *Sutton v. Aetna Casualty & Surety Co.*[12] Purporting to follow the legislative intent of the state's Financial Responsibility Act, the court held that an insured may stack all applicable underinsured motorist coverages whether the insured owns one or more policies.[13]

This Note examines *Sutton* and the supreme court's statutory interpretation. It reviews attempts by insurers to preclude stacking through policy provisions and examines the resulting North Carolina case law. The Note details the inconsistent treatment of uninsured and underinsured motorist coverages under North Carolina law and criticizes distinctions made between the two types of coverage as arbitrary and inequitable. The Note concludes that stacking underinsured motorist coverage protects innocent victims of automobile accidents and that the North Carolina courts should extend stacking to uninsured motorist coverage as well. The Note further concludes that minor statutory revisions could allow more motorists to derive greater benefit from both types of coverage.

In May 1986 Sherry Sutton suffered severe injuries when an oncoming vehicle struck her car.[14] Sutton filed suit seeking compensatory damages against the estate of the other driver. The other driver had automobile liability insurance with a liability limit of 50,000 dollars per person.[15] At the time of the accident Sutton owned two insurance policies issued by Aetna Casualty & Surety Company. Each policy covered two vehicles; separate premiums for underinsured motorist coverage were paid on each of the four insured vehicles.[16]

Alleging medical expenses of more than 70,000 dollars, Sutton filed a declaratory judgment action against her insurer to stack all four of her underinsured motorist coverages.[17] Both of Sutton's policies contained a limitation of liability clause.[18] One purpose of such a clause is to preclude intrapolicy stack-

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insurance policy. Intrapolicy stacking refers to the practice of aggregating coverages from two or more vehicles covered by a single policy. For example, A owns two vehicles covered by separate insurance policies. Combining the coverages would be interpolicy stacking. If both of A's vehicles were covered by the same policy, aggregating the two coverages would be intrapolicy stacking.

11. *See* Note, *supra* note 9, at 1416-17 (noting the ambiguity of North Carolina law).

12. 325 N.C. 259, 382 S.E.2d 759 (1989).

13. *Id.* at 265, 382 S.E.2d at 763. The decision eliminates a potentially arbitrary and unfair distinction between interpolicy and intrapolicy aggregation. *See* Note, *supra* note 9, at 1417 (noting that "[n]either logic nor equity" supports the distinction between interpolicy and intrapolicy stacking). *But see* LeCuyer v. Metropolitan Property and Liab. Ins. Co., 401 Mass. 709, 710, 519 N.E.2d 263, 264 (1988) (rejecting intrapolicy stacking, but noting the insured would have been allowed to stack if separate policies had been maintained on each insured vehicle).

14. *Sutton*, 325 N.C. at 262, 382 S.E.2d at 761.

15. *Id.* Nationwide Insurance Company, the other driver's insurer, paid the entire $50,000 coverage into court for Sutton's benefit. *Id.*

16. *Id.* at 261, 382 S.E.2d at 761. The policy covering the vehicle Sutton drove the day of the accident provided $50,000 per person UIM bodily injury coverage on each vehicle. Sutton's other policy provided $100,000 UIM coverage per person for each of the two vehicles covered. Plaintiff-Appellant's Brief at 2, *Sutton* (No. 539PA88).

17. *Sutton*, 325 N.C. at 262, 382 S.E.2d at 761. Sutton sought both interpolicy and intrapolicy stacking. By the time her case reached the supreme court, her medical expenses exceeded $100,000. Plaintiff-Appellant's Brief at 2, *Sutton* (No. 539PA88).

18. The limitation of liability clause was identical in the two policies. It provided in part: "*The limit of bodily injury liability shown in the Declarations . . . is the most we will pay for bodily injury . . . regardless of the number of*: [¶]1. COVERED PERSONS; [¶]2. Claims made; [¶]3. *Vehicles or premiums*

ing when a single policy covers more than one vehicle.[19] Upholding the limitation of liability clause in Sutton's policies, the trial court rejected intrapolicy stacking and found as a matter of law that "[t]he limit of liability for [Sutton's] underinsured coverage for any one person is established by the terms of the applicable policies without regard to the number of vehicles listed in said policies or the premiums paid on said policies."[20] After Sutton filed an appeal, the supreme court took the unusual step of granting discretionary review before the court of appeals heard the case.[21]

Reversing the trial court, the supreme court rejected the limitation of liability clause as contrary to the underinsured motorist statute.[22] Writing for a unanimous court, Chief Justice Exum noted that when a statute applies to an insurance policy, "the provisions of that statute become part of the terms of the policy," and if the policy conflicts with the statute, "the provisions of the statute will prevail."[23]

North Carolina, like many states,[24] protects the public from the high costs of automobile collisions by requiring all motor vehicle owners to show proof of financial responsibility.[25] Almost invariably this is accomplished through automobile liability insurance.[26] The North Carolina Financial Responsibility Act specifies the minimum amount of liability coverage required to establish financial responsibility.[27]

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*shown in the Declarations*; or [¶]4. Vehicles involved in the accident." *Sutton*, 325 N.C. at 261-62, 382 S.E.2d at 761 (emphasis in original).

19. *See* 2 A. WIDISS, *supra* note 1, § 41.5, at 87.

20. *Sutton*, 325 N.C. at 261, 382 S.E.2d at 760-61. The trial court approved interpolicy stacking of Sutton's two policies. Plaintiff-Appellant's Brief at 4, *Sutton* (No. 539PA88).

21. There are only four circumstances in which the supreme court may certify a cause for discretionary review prior to determination by the court of appeals. The court may certify the cause if:

(1) The subject matter of the appeal has significant public interest, or

(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

(3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or

(4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

N.C. GEN. STAT. § 7A-31(b) (1989).

22. See *infra* note 69 for relevant text of the statute.

23. *Sutton*, 325 N.C. at 263, 382 S.E.2d at 762 (citing Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977)).

24. *See* 1 A. WIDISS, *supra* note 1, § 1.12, at 14 (noting that approximately one-half of the states require motorists to show financial responsibility).

25. *See* N.C. GEN. STAT. § 20-309 (1989). "Financial responsibility shall be by a liability insurance policy or a financial security bond or a financial security deposit or by qualification as a self-insurer . . . ." *Id.* § 20-309(b). In one recent year, one out of fifteen licensed drivers in North Carolina was involved in an automobile accident. COLLISION REPORTS SECTION, NORTH CAROLINA DIVISION OF MOTOR VEHICLES, NORTH CAROLINA TRAFFIC ACCIDENT FACTS 1988, at 1. Although the number of fatalities per miles driven has dropped dramatically over the last twenty years, the number of injuries reported per miles driven has remained relatively constant. *Id.* at 9.

26. Liability insurance offers a larger amount of protection for a small capital outlay compared to the alternate methods of showing financial responsibility. *See, e.g.*, N.C. GEN. STAT. § 20-279.25 (1989) (minimum amount of financial security demonstrated by deposit of $60,000).

27. The Act currently requires minimum coverage of "twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for

In addition to liability coverage, the Act requires motor vehicle liability policies to include uninsured motorist coverage unless the insured specifically rejects coverage.[28] For policies written in amounts above the statutory minimum, underinsured motorist coverage is also compulsory unless the insured rejects it.[29] Uninsured motorist coverage protects the insured when he is injured in a collision through no fault of his own and the tortfeasor has less liability insurance than the Financial Responsibility Act requires.[30] Underinsured motorist coverage "is an outgrowth from and development of uninsured motorist insurance."[31] It protects the insured when the tortfeasor has at least the minimum required liability coverage, but less coverage than the insured and insufficient coverage to compensate fully the insured.[32]

Stacking uninsured or underinsured motorist coverage permits an injured insured to increase his recovery following an accident by "add[ing] all available policies together to create a greater pool in order to satisfy his actual damages."[33] Stacking is a hotly contested issue because the insured's desire to obtain a full recovery of his damages conflicts with the insurer's wish to minimize the exposure of the insurance company. To achieve their goals, insurers have devised a variety of policy provisions to preclude aggregated coverages.[34] There is

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one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident." *Id.* § 20-279.21(b)(2). Ten thousand dollars property damage coverage is also required. *Id.*

28. *Id.* § 20-279.21(b)(3). For policies issued after October 1, 1986, rejection of either uninsured motorist coverage or underinsured motorist coverage by the insured must be in writing. *Id.* § 20-279.21(b)(3), (4).

29. *Id.* § 20-279.21(b)(4). Because the insured may reject coverage, different panels of the court of appeals have employed conflicting rationales regarding whether UM and UIM coverage are legally mandatory. *Compare* Aills v. Nationwide Mut. Ins. Co., 88 N.C. App. 595, 597, 363 S.E.2d 880, 882 (1988) ("[u]nderinsured motorists coverage is not required by law (since the insured may reject the coverage)"), *with* Government Employees Ins. Co. v. Herndon, 79 N.C. App. 365, 366, 339 S.E.2d 472, 473 (1986) ("Uninsured motorist liability insurance coverage is compulsory in North Carolina.").

30. N.C. GEN. STAT. § 20-279.21(b)(3) (1989). An uninsured motor vehicle is "a motor vehicle as to which there is no bodily injury liability insurance" in at least the amount legally required, or where the insurer "denies coverage . . . or has become bankrupt." *Id.*

31. *Sutton*, 325 N.C. at 263, 382 S.E.2d at 762 (citing J. SNYDER, JR., NORTH CAROLINA AUTOMOBILE INSURANCE LAW § 30-1 (1988)).

32. N.C. GEN. STAT. § 20-279.21(b)(4). An underinsured highway vehicle is "a highway vehicle with respect to . . . which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner's policy." *Id.* In North Carolina underinsured motorist coverage is available only if uninsured coverage is also included in the policy. *Id.* State statutes vary greatly in their treatment of UIM coverage. *See, e.g.*, NEV. REV. STAT. § 687B.145(2) (1985) (includes UIM within the definition of UM); OKLA. STAT. ANN. tit. 36, § 3636(C) (West Supp. 1990) (UM applies anytime the insured has a claim for more than the amount of the tortfeasor's coverage, "regardless of the amount of coverage of either of the parties in relation to each other.").

33. 12A G. COUCH, *supra* note 2, § 45:651, at 207. Some courts restrict the term "stacking" to circumstances in which an insured attempts to recover on his own multiple coverages, as opposed to an insured who aggregates policies owned by different insureds. *See, e.g.*, Nationwide Ins. Co. v. Gode, 187 Conn. 386, 388-89 n.2, 446 A.2d 1059, 1060 n.2 (1982) ("Stacking is derived from the presumption that when the named insured purchases uninsured motorist coverage on more than one automobile, he intends to buy extra protection for himself and his family, regardless of whether his injury occurs in any one of his insured vehicles or elsewhere." (quoting Travelers Ins. Co. v. Pac, 337 So. 2d 397, 398 (Fla. Dist. Ct. App. 1976), *cert. denied*, 351 So. 2d 407 (Fla. 1977))).

34. *See* J. SNYDER, JR., NORTH CAROLINA AUTOMOBILE INSURANCE LAW § 33-1, at 205 (1988) ("The policy provisions by which uninsured motorist policies usually seek to prevent aggre-

a split of authority among the states regarding the efficacy of policy provisions that purport to limit aggregation of coverages.[35]

The "other insurance" or "excess escape" clause attempts to limit or preclude interpolicy stacking by either a declaration that other insurance policies which may be applicable must be exhausted first, or by a limitation of the total liability of the insurer to the limits of one policy.[36] In 1967 the North Carolina Supreme Court first considered an "other insurance" clause that purported to preclude interpolicy stacking of uninsured motorist coverage in *Moore v. Hartford Fire Insurance Co. Group*.[37] Beth Moore died after the car in which she was a passenger collided with an uninsured tortfeasor.[38] Two uninsured motorist policies covered Mrs. Moore at the time of the accident; one issued to her husband, the other to the third party with whom Mrs. Moore was riding.[39] Invoking the "other insurance" clause contained in Mr. Moore's policy, his insurer denied payment, arguing that because the third party's policy had paid for Mrs. Moore's injuries, and both policies had the same 5,000 dollar limitation of liability, Mr. Moore's policy was excess and inapplicable.[40] The supreme court rejected the policy provision, holding that the Financial Responsibility Act "does not permit 'other insurance' clauses in the policy which are contrary to the statutory limited amount of coverage."[41] The court concluded that "our statute is designed to protect the insured as to his actual loss within such limits."[42]

*Moore* allowed the plaintiff to stack coverages owned by different insureds.

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gate coverage are generally known as 'other insurance clauses,' 'excess insurance clauses,' and 'limit of liability clauses.' " (footnote omitted)).

35. *See* 12A G. COUCH, *supra* note 2, § 45:628, at 77 (noting the split of authority and the current trend which seems to be in favor of stacking); *see also* Note, *Stacking of Uninsured Motorist Coverage in Nebraska: A Need for Clarification*, 19 CREIGHTON L. REV. 487, 495-98 (1985-86) (noting three main justifications for stacking: public policy, ambiguity of policy provisions, and payment of multiple premiums).

36. J. SNYDER, JR., *supra* note 34, § 33-3, at 207-08. The "Other Insurance" provision in the standard automobile policy provides:

> [I]f there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

*Id.* app. at 263.

37. 270 N.C. 532, 155 S.E.2d 128 (1967).

38. *Id.* at 533, 155 S.E.2d at 129.

39. *Id.*

40. *Id.* at 536, 155 S.E.2d at 131. The "other insurance" clause provided that the husband's policy would apply "only in the amount by which the applicable limit of liability of this [policy] exceeds the sum of the applicable limits of liability of all such other insurance." *Id.* at 534, 339 S.E.2d at 129. Both policies provided $5,000 for injury to one person and $10,000 for injuries to two or more people. Because there were three injured passengers, Plaintiff had recovered only $3,333.33 from the third party's insurer. *Id.*

41. *Id.* at 543, 155 S.E.2d at 136. North Carolina's uninsured motorist statute defines the minimum level of coverage that may be issued by the insurer. N.C. GEN. STAT. § 20-279.21(b)(3) (1989); *see* N.C. GEN. STAT. § 20-279.5(c) (1989). When *Moore* was decided, the statute required $5,000 coverage for injuries to one person. *Moore*, 270 N.C. at 534-35, 155 S.E.2d at 130.

42. *Moore*, 270 N.C. at 543, 155 S.E.2d at 136; *see also* Turner v. Nationwide Mut. Ins. Co., 11 N.C. App. 699, 703, 182 S.E.2d 6, 8 (rejecting "other insurance" clause as "contrary to the intent and provisions" of the uninsured motorist statute), *cert. denied*, 279 N.C. 397, 183 S.E.2d 247 (1971).

The injured party clearly qualified as a "person insured" under each of the policies in question, as well as the uninsured motorist statute.[43] One well-respected writer in the insurance field has noted that the "logic" of stacking breaks down when insureds who own multiple vehicles attempt to aggregate their coverage.[44] Insurers charge separate premiums for each insured vehicle because of increased exposure for the insurance company. This is true of the multiple premiums paid for uninsured motorist (UM) or underinsured motorist (UIM) coverage on multiple vehicles.[45] Courts that have upheld "first party" stacking generally have ignored the increased exposure to the insurance company in insuring multiple vehicles. The improbability of multiple accidents involving uninsured tortfeasors may underlie the unwillingness of the courts to address this issue.[46]

In *Hamilton v. Travelers Indemnity Co.*[47] the court of appeals considered whether an injured party may stack uninsured motorist coverages owned by the same insured. In *Hamilton* the plaintiff sued his insurer, seeking to stack uninsured motorist coverages on three vehicles that he owned. A single insurance policy issued by the defendant covered all three vehicles. The policy contained a limitation of liability clause similar to that in *Sutton*. Unlike the statute construed in *Sutton*, however, North Carolina's uninsured motorist statute does not mention stacking. Citing *Moore*, the court found stacking permissible under North Carolina law.[48] The court also cited *Woods v. Nationwide Mutual Insurance Co.*,[49] a case in which the supreme court upheld stacking of medical payments coverage when the policy provisions could be interpreted to allow it.[50] From these cases the *Hamilton* court concluded that stacking UM coverage is permitted only if allowed by the terms of the policy.[51] The limitation of liability clause in the policy at issue purported to preclude stacking. Because there was no clear conflict between the policy provision and the uninsured motorist statute, the court upheld the policy provision which prohibited stacking.[52]

Under the *Hamilton* rationale, stacking would rarely, if ever, occur. Because the insurance companies always draft policy language, insurers invariably

43. *See* N.C. GEN. STAT. § 20-279.21(b)(3) (1989); *infra* text accompanying note 105.

44. *See* 8C J. APPLEMAN, *supra* note 3, § 5101, at 444-51.

45. For example, if Husband and Wife own two cars, and purchase uninsured motorist coverage for each car, it is possible that both Husband and Wife will be injured in separate accidents by uninsured drivers. If both may stack the coverages from both vehicles, the insurance company must pay for twice as much coverage as the insureds actually purchased.

46. The Minnesota Supreme Court viewed the issue as a windfall to either the insurer or the insured. "[I]f the question must be resolved on the basis of who gets a windfall, it seems more just that the insured who has paid a premium should get all he paid for rather than that the insurer should escape liability for that for which it collected a premium." Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 187, 207 N.W.2d 348, 352 (1973).

47. 77 N.C. App. 318, 335 S.E.2d 228 (1985), *disc. rev. denied*, 315 N.C. 587, 341 S.E.2d 25 (1986).

48. *Id.* at 323-24, 335 S.E.2d at 232.

49. 295 N.C. 500, 246 S.E.2d 773 (1978).

50. *See id.* at 509, 246 S.E.2d at 779. The court did not distinguish between uninsured motorist coverage, which is required by statute, and medical payments coverage—a totally voluntary coverage unregulated by statute. *Id.* at 508-10, 246 S.E.2d at 778-80; *see also* N.C. GEN. STAT. § 20-279.21(b)(3), (g) (1989) (distinguishing statutorily required coverage from voluntary coverage).

51. *Hamilton*, 77 N.C. App. at 324, 335 S.E.2d at 232.

52. *Id.*

would include a limiting clause to preclude stacking. Recognizing the disparity in bargaining positions, courts in other states have rejected this analysis.[53]

The court of appeals narrowed the scope of stacking UM coverage in *Government Employees Insurance Co. v. Herndon*.[54] In *Herndon* separate insurance policies issued by the same insurer covered two vehicles owned by the insured.[55] Each policy provided 100,000 dollars of uninsured motorist coverage and each contained an "other insurance" clause.[56] After the insured's stepdaughter died as a result of an accident which happened while she was a passenger in a vehicle owned by a third party, the insured sought to stack the uninsured motorist coverages contained in his two policies.[57]

Citing *Moore*, the *Herndon* court found stacking coverages from two or more policies permissible when each policy provides "the mandatory minimum coverage."[58] The Financial Responsibility Act specifies the mandatory minimum amount of uninsured motorist coverage.[59] The Act also provides that the insured is "entitled" to purchase additional coverage up to the amount of his bodily injury liability coverage.[60] The Act specifically excludes "excess or additional" coverages from the requirements of the statute.[61] Therefore, any amount of uninsured motorist coverage above 25,000 dollars for one person and 50,000 dollars for two or more persons is excess or additional.[62]

Because each of the policies in *Herndon* provided much more than the minimum required coverage, the court found that "[t]o the extent that the coverage exceed[ed]" the amount required by law, the policy provisions controlled.[63] Consequently, the "other insurance" clause precluded stacking.[64] *Herndon* reaf-

53. *See* Great Cent. Ins. Co. v. Edge, 292 Ala. 613, 617, 298 So. 2d 607, 610 (1974) ("Cases should not . . . turn on how well the insurer drafts a limiting clause because the law does not permit insurers to collect a premium for certain coverage, then take that coverage away by such a clause no matter how clear or unambiguous it may be."); *see also* Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co., 295 S.C. 538, 555, 370 S.E.2d 85, 94 (1988) (Ness, C.J., dissenting) ("It is common knowledge that consumers are not at arms' length to bargain with the insurance industry."); 8C J. APPLEMAN, *supra* note 3, § 5067.15, at 16 (noting the unequal bargaining positions of insurer and insured).

54. 79 N.C. App. 365, 339 S.E.2d 472 (1986).

55. *Id.* at 365-66, 339 S.E.2d at 472.

56. *Id.* at 366, 339 S.E.2d at 472-73. Each policy provided: "If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy." *Id.*

57. *Id.* at 366, 339 S.E.2d at 473.

58. *Id.* at 367, 339 S.E.2d at 473. The minimum mandatory coverage for UM coverage was and is $25,000 for injury to one person. N.C. GEN. STAT. §§ 20-279.21(b)(3) (1989); 20-279.5(c) (1989).

59. N.C. GEN. STAT. §§ 20-279.21(b)(3); 20-279.5(c).

60. *Id.* § 20-279.21(b)(3).

61. *Id.* § 20-279.21(g). "Any policy . . . may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provisions of this Article." *Id.*

62. *See id.* § 20-279.21(b)(3), (g).

63. *Herndon*, 79 N.C. App. at 368, 339 S.E.2d at 473-74; *see also* American Tours Inc. v. Liberty Mut. Ins. Co., 315 N.C. 341, 350, 338 S.E.2d 92, 98 (1986) ("an insurance company has the right to enter into whatever insuring agreements it wishes to limit its voluntary coverages as opposed to those statutorily required").

64. Government Employees Ins. Co. v. Herndon, 79 N.C. App. 365, 368, 339 S.E.2d 472, 474.

firmed the holding in *Moore* that limiting clauses will not be enforced to preclude recovery up to the minimum statutory coverage, but also established that such clauses will be upheld when applied to coverage beyond the statutory minimum.[65]

Unlike the courts before it, the *Sutton* court found specific statutory authorization for stacking underinsured motorist coverage. The supreme court began its analysis of the statute by emphasizing the importance of legislative intent.[66] Legislative intent, the court stated, can be ascertained "from the nature and purpose of the act," as well as the "phraseology of the statute."[67] Because the Financial Responsibility Act is a remedial statute, the court continued, it should be "liberally construed so that the beneficial purpose intended by its enactment may be accomplished."[68]

The court then reviewed the specific language of the statute.[69] The first clause of the stacking paragraph refers to the owner's "coverages" and "policies."[70] The court found this "clearly suggest[ed] the provision was intended to require both . . . intrapolicy and interpolicy stacking."[71] The second paragraph of this part of the statute refers only to "instances where more than one policy may apply."[72] This implies that the statute requires only interpolicy stacking.[73] The court resolved the ambiguity in the statute by referring to the third clause of the paragraph, which excludes fleet policies.[74] Fleet coverage may insure dozens of vehicles under a single policy. Because a fleet owner is not likely to own more than two or three fleet policies, there is "no reason to distinguish between fleet and nonfleet policies vis-a-vis interpolicy stacking."[75] Noting that intrapolicy stacking of a fleet policy would give the insured coverage "far in excess of what either party bargained for," the court found that the specific exclusion of intrapolicy stacking for fleet vehicles in the statute evinced a legislative intent to

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*But see* Turner v. Masias, 36 N.C. App. 213, 216, 243 S.E.2d 401, 404 (1978) (noting in dictum that an "other insurance" clause "would be invalid to prevent the insured from being made whole").

65. *Herndon*, 79 N.C. App. at 368, 339 S.E.2d at 474.

66. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763.

67. *Id.*

68. *Id.* (citing Moore v. Hartford Ins. Co., 270 N.C. 532, 535, 155 S.E.2d 128, 130-31 (1967)).

69. The statute provides in part:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy [of the tortfeasor] and the total limits of the owner's underinsured motorist *coverages* provided in the owner's policies of insurance; *it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply*, the benefit of all limits of liability of underinsured motorist coverage under all such policies: *Provided that this paragraph shall apply only to nonfleet private passenger motor vehicle insurance* . . . .

*Id.* at 262, 382 S.E.2d at 761 (quoting N.C. GEN. STAT. § 20-279.21(b)(4) (1989) (emphasis by the supreme court)).

70. N.C. GEN. STAT. § 20-279.21(b)(4) (1989).

71. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763.

72. N.C. GEN. STAT. § 20-279.21(b)(4).

73. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763.

74. *Id.* at 266, 382 S.E.2d at 763-64; *see supra* note 69.

75. *Sutton*, 325 N.C. at 266, 382 S.E.2d at 764.

require intrapolicy stacking for nonfleet vehicles.[76] The court, therefore, upheld both intrapolicy and interpolicy stacking.[77]

The *Sutton* court found its analysis strengthened because it was "consistent with the nature and purpose of the act, which . . . is to compensate innocent victims of financially irresponsible motorists."[78] The court noted that an insured pays separate premiums for each UIM coverage, so stacking permits the insured to receive the full benefit of his bargain.[79] Numerous state courts have followed this rationale to permit stacking.[80]

The court also found its interpretation consistent with North Carolina's pre-existing common law which construed automobile insurance policies "to require intrapolicy stacking of medical payments coverage . . . and uninsured motorist coverage."[81] The court cited *Hamilton v. Travelers Indemnity Co.*[82] for the proposition that North Carolina's pre-existing common law construed insurance policies to require stacking of uninsured motorist coverage and stated that *Sutton* was consistent with earlier case law.[83] The court of appeals in *Hamilton*, however, upheld an anti-stacking clause and did not permit stacking.[84]

The *Sutton* court rejected defendant's argument that the statute should not control "to the extent the policy coverages at issue exceed[ed] the mandatory minimum coverage required by the Financial Responsibility Act."[85] The insurer in *Government Employees Insurance Co. v. Herndon* successfully raised this argument to preclude stacking of uninsured motorist coverage.[86] Unlike UM coverage, however, the Financial Responsibility Act requires the amount of underinsured motorist coverage to equal the amount of the insured's bodily injury liability coverage.[87] For this reason, the *Sutton* court held that underinsured motorist coverage "can never be any excess or additional . . . coverage"

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76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 267, 382 S.E.2d at 764.

80. *See, e.g.*, Tucker v. Government Employees Ins. Co., 288 So. 2d 238, 242 (Fla. 1973) (noting that it is "useless and meaningless and uneconomic to pay for additional bodily injury insurance and simultaneously have this coverage cancelled by an insurer's exclusion"); Fidelity & Casualty Co. of N.Y. v. Gatlin, 470 S.W.2d 924, 927 (Tex. Civ. App. 1971) ("It would be unconscionable to permit insurers to collect a premium for a coverage which they are required by statute to provide, and then to avoid payment of a loss because of language of limitation devised by themselves.") (citing Simpson v. State Farm Mut. Auto. Ins. Co., 318 F. Supp. 1152, 1156 (S.D. Ind. 1970)).

81. *Sutton*, 325 N.C. at 267, 382 S.E.2d at 764 (citations omitted). *See* Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 508-09, 246 S.E.2d 773, 779 (1978) (permitting stacking of medical payments coverage); Hamilton v. Travelers Indem. Co., 77 N.C. App. 318, 324, 335 S.E.2d 228, 232 (1985) (rejecting stacking of UM coverage), *disc. rev. denied*, 315 N.C. 587, 341 S.E.2d 25 (1986).

82. 77 N.C. App. 318, 335 S.E.2d 228 (1985), *disc. rev. denied*, 315 N.C. 587, 341 S.E.2d 25 (1986).

83. *Sutton*, 325 N.C. at 267, 382 S.E.2d at 764.

84. *Hamilton*, 77 N.C. App. at 324, 335 S.E.2d at 232. *See supra* text accompanying notes 47-52.

85. *Sutton*, 325 N.C. at 267, 382 S.E.2d at 764.

86. 79 N.C. App. 365, 368, 339 S.E.2d 472, 473-74 (1986). *See supra* text accompanying notes 55-65.

87. *Sutton*, 325 N.C. at 268, 382 S.E.2d at 765; *see* N.C. GEN. STAT. § 20-279.21(b)(4) (1989).

within the meaning of the statute.[88]

This portion of *Sutton* is significant because it exposes an arbitrary and unfair distinction between uninsured and underinsured motorist coverages under the current North Carolina statute. The *Sutton* court noted in dictum the close relationship between underinsured motorist coverage and uninsured motorist coverage, but did not address the inconsistencies that now exist between the two coverages.[89] Since the statute establishes the minimum amount of UM coverage that must be provided, any amount above this minimum is "excess" and the insurer may successfully preclude stacking by an appropriate policy provision.[90] Underinsured motorist coverage, on the other hand, can never be excess, so insurers may not preclude stacking.[91]

It is unclear why the General Assembly failed to provide for stacking of UM coverage while mandating stacking of UIM coverage. When the General Assembly passed the 1985 amendment,[92] both *Moore v. Hartford Insurance Co.*[93] and *Turner v. Nationwide Insurance Co.*[94] strongly suggested that stacking was permissible for UM coverage even without specific statutory authorization.[95] *Sutton* confirmed that the common law of North Carolina favors stacking.[96] The lack of an uninsured stacking statute does not necessarily mean that insurers should be allowed to preclude aggregation. The courts of several states have approved stacking of UM coverage and rejected contrary policy provisions based on both public policy grounds and the payment of multiple premiums.[97]

The North Carolina Supreme Court has long recognized that public policy may limit the contractual rights of insurance companies.[98] Protecting innocent insureds is the "avowed purpose" of the Financial Responsibility Act.[99] Although the legislature explicitly provided for stacking only UIM coverage, the

88. *Sutton*, 325 N.C. at 268, 382 S.E.2d at 765.

89. *Id.* at 264, 382 S.E.2d at 762 ("Given the close relationship between *uninsured* and *underinsured* coverages the principles applicable to *uninsured* motorist intrapolicy stacking should be equally applicable to factual situations giving rise to *underinsured* intrapolicy stacking questions.").

90. *See supra* notes 63-65 and accompanying text.

91. *Sutton*, 325 N.C. at 268, 382 S.E.2d at 765.

92. *See supra* note 9 and accompanying text.

93. 270 N.C. 532, 155 S.E.2d 128 (1967).

94. 11 N.C. App. 699, 182 S.E.2d 6, *cert. denied*, 279 N.C. 397, 183 S.E.2d 247 (1971).

95. *See supra* notes 37-42 and accompanying text.

96. *Sutton*, 325 N.C. at 267, 382 S.E.2d at 764.

97. *See, e.g.*, Jimenez v. Foundation Reserve Ins. Co., 107 N.M. 322, 325, 757 P.2d 792, 795 (1988) ("[A]n insurer's attempt by a limiting clause to preclude stacking of additional coverage separately paid for by the insured violates the clear policy of the uninsured motorist statute, which intends that an injured party be compensated to the extent of coverage obtained by or for the injured party."); Fidelity & Casualty Co. of N.Y. v. Gatlin, 470 S.W.2d 924, 927 (Tex. Civ. App. 1971) (finding limiting provision unconscionable). *But see* Sanders v. St. Paul Mercury Ins. Co., 148 Vt. 496, 507, 536 A.2d 914, 921 (1987) (holding policy provision valid because not unconscionable and not in conflict with the state's underinsured motorist law).

98. "Freedom of contract, *unless contrary to public policy* or prohibited by statute, is a fundamental right included in our constitutional guaranties." Muncie v. Travelers Ins. Co., 253 N.C. 74, 79, 116 S.E.2d 474, 478 (1960) (emphasis added) (citations omitted), *overruled on other grounds*, Great Am. Ins. Co. v. C. G. Tate Constr. Co., 303 N.C. 387, 396, 279 S.E.2d 769, 774 (1981) (holding that failure of insured promptly to notify insurer of accident does not excuse insurer unless its ability to inquire into the circumstances of the accident has been prejudiced by the delay).

99. *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763.

important public policy of protecting innocent victims of automobile accidents is broader than one particular type of coverage. Given the statutory distinctions between UM and UIM coverage, the issue then becomes whether the protection given by UM coverage should extend only to the minimum required coverage, or to the insured's actual loss.

Uninsured motorist coverage was originally designed to place the injured party in the position he would have been in if the tortfeasor had purchased the minimum required liability insurance coverage.[100] Before the advent of UIM coverage, providing the minimum required coverage was the clear purpose behind mandatory first person coverage. The insurance industry created UIM coverage, however, because of recognized deficiencies in UM protection.[101] Despite statements by the North Carolina Supreme Court that the purpose of the Financial Responsibility Act is to protect against "financially irresponsible motorists,"[102] the Act now reaches far beyond these motorists and may protect injured insureds even when the tortfeasor has a great deal of liability coverage.[103] The *Sutton* court noted that requiring stacking "enhances the injured party's potential for full recovery of all damages."[104] Insureds injured by uninsured motorists should have the same potential for full recovery.

North Carolina defines "persons insured" very broadly for UM and UIM coverage. Included are "the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise," and any person using or riding in the vehicle with the permission of the owner.[105] The North Carolina Court of Appeals interpreted the statute to include two classes of "persons insured."[106] The named insured, his spouse, and relatives living with them are Class I insureds, while those persons occupying the vehicle with the owner's permission are Class II insureds.[107] Class I insureds may recover regardless of whether they are in the insured vehicle, while recovery by Class II insureds is predicated upon using or

100. 2 A. WIDISS, *supra* note 1, § 31.1, at 3-4.

101. *Id.* § 31.2, at 4. *See also* ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES—SUMMARY OF FINDINGS 10 (1989) ("Fatality and permanent total disability claims . . . represent a small but very expensive segment of the auto injury population."). The insurance industry projects average economic losses of $314,239 for UM coverage and $416,468 for UIM coverage for permanent total disabilities and fatalities of insureds. *Id.*

102. *E.g.*, *Sutton*, 325 N.C. at 265, 382 S.E.2d at 763.

103. *See* N.C. GEN. STAT. § 20-279.21(b)(4) (1989) (only requirement for recovery under UIM coverage is that tortfeasor have less coverage than the insured). Underinsured motorist coverage may apply even when the tortfeasor has a large liability insurance policy. In contrast, UM coverage will apply only when the tortfeasor has less than $25,000 worth of coverage available to the injured party. The insured who is injured by an uninsured driver needs aggregated coverage more than the insured who is injured by a tortfeasor with a large policy. Had the plaintiff in *Sutton* been injured by an uninsured motorist, her recovery apparently would have been limited to $100,000 (four cars multiplied by $25,000 minimum mandatory coverage), as opposed to the $300,000 UIM coverage she was allowed to aggregate.

104. *Sutton*, 325 N.C. at 267, 382 S.E.2d at 764.

105. N.C. GEN. STAT. § 20-279.21(b)(3) (1989).

106. Crowder v. North Carolina Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 554, 340 S.E.2d 127, 129, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986).

107. *Id.* at 554, 340 S.E.2d at 129-30.

riding in the insured vehicle.[108]

*Sutton* established that limiting provisions may not preclude stacking of UIM coverage for which an insured has paid additional premiums.[109] The decision, however, raises the question as to who may stack underinsured motorist coverage. Plaintiff in *Sutton* was a Class I insured because she was driving her own vehicle at the time she was injured. The supreme court made no distinction between classes because the issue was not before it. The North Carolina courts have yet to determine whether Class II insureds may stack coverages.[110]

Among jurisdictions with well-established traditions of stacking, there is a split of authority on the issue of stacking by Class II insureds.[111] The weight of authority prohibits stacking in this context.[112] The courts that have rejected stacking by Class II insureds have relied on the temporary status of the insureds,[113] the lack of a contractual relationship between the insured and the insurer,[114] the fact that the insured did not pay the premiums for the coverage,[115] and the determination that stacking coverage owned by a third party is not a reasonable expectation of the passenger.[116]

In contrast, the Supreme Court of Connecticut approved stacking by Class II insureds and characterized that state's UM coverage as " 'person oriented' rather than 'vehicle oriented.' "[117] In *Estate of Calibuso v. Pacific Insurance Co.*[118] the Supreme Court of Hawaii rejected the distinction between classes altogether because nothing in the state's statute, or in the insurance policy con-

108. *Id.* at 554-55, 340 S.E.2d at 130. More recently, however, the court of appeals obfuscated the classification scheme. *See* Driscoll v. United States Liab. Ins. Co., 90 N.C. App. 569, 572, 369 S.E.2d 110, 112 (upholding "household-owned vehicle" exclusion and rejecting UIM coverage under daughter's policy for mother injured while riding in husband's automobile), *disc. rev. denied*, 323 N.C. 364, 373 S.E.2d 544 (1988). The limiting clause upheld in *Driscoll* directly contravenes the underinsured motorist statute.

109. 325 N.C. at 267, 382 S.E.2d at 764.

110. The following hypothetical illustrates the issue: If A owns two vehicles, each with UIM coverage, and B, a nonrelative who does not live with A, is injured while riding in A's car, should B be allowed to stack A's coverage?

111. *Compare* Travelers Ins. Co. v. Jones, 529 So. 2d 234, 240 (Ala. 1988) (permitting stacking of UM coverage by passengers because they were within the definition of insured in the policy) *with* Beeny v. California State Auto. Ass'n Inter-Ins. Bureau, 104 Nev. 1, 4-5, 752 P.2d 756, 758 (1988) (rejecting stacking of third party's coverage because coverage arose only by occupying the covered vehicle).

112. *See* Babcock v. Adkins, 695 P.2d 1340, 1342 (Okla. 1984) (citing cases on both sides of the issue and finding that the clear weight of authority rejects stacking); *see also* Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 507-08, 246 S.E.2d 773, 778 (1978) (rejecting stacking of third party's medical payment coverage).

113. *E.g.*, Lopez v. Foundation Reserve Ins. Co., 98 N.M. 166, 172, 646 P.2d 1230, 1236 (1982); Prideaux v. Allstate Ins. Co., 753 P.2d 935, 936-37 (Okla. Ct. App. 1987).

114. *E.g.*, General Accident Ins. Co. v. St. Peter, 334 Pa. Super. 6, 11, 482 A.2d 1051, 1054 (1984).

115. *Id.*

116. *E.g.*, Babcock v. Adkins, 695 P.2d 1340, 1342-43 (Okla. 1984).

117. Allstate Ins. Co. v. Ferrante, 201 Conn. 478, 486, 518 A.2d 373, 377 (1986); *see also* Sayers v. Safeco Ins. Co., 628 P.2d 659, 662 (Mont. 1981) (finding no reason to distinguish between persons insured and policyholders who actually paid the premiums because "[t]he justification for stacking lies not in who has paid for the extra protection, but rather that the protection has been purchased. The benefits flow to all persons insured.").

118. 62 Haw. 424, 616 P.2d 1357 (1980).

strued in that case, made an explicit distinction between classes.[119]

Although only a minority of courts have approved stacking by Class II insureds, a broad reading of the North Carolina stacking provision could reach this result.[120] The North Carolina statute defining "persons insured," however, distinguishes between classes and limits recovery for Class II insureds to circumstances in which they are in a vehicle owned by the named insured.[121] This limitation, in conjunction with the fact that Class II insureds pay no premiums, suggests that stacking by Class II insureds will not be allowed.[122]

Regardless of which UIM insureds may stack, the inequality between UM and UIM stacking remains. One solution to the present disparity between the two types of coverage would be to amend the UM statute and replicate the current UIM scheme by tying the amount of UM coverage to the amount of the insured's liability coverage, thus making UM coverage mandatory within the meaning of the statute. A better solution, however, would be to permit insureds to purchase UM and UIM coverage in any amount, unrestricted by the amount of liability insurance purchased.[123] Although stacking offers insureds a greater opportunity to recover the full amount of their damages, it may not help insureds who own only one vehicle.

It is unclear what purpose is served by limiting the maximum amount of UM/UIM coverage to the amount of liability insurance purchased. Because the Financial Responsibility Act establishes the minimum amount of liability coverage, there is no reason for requiring an insured to carry as much protection for third parties as for herself.[124] Liability insurance is much more expensive than UM/UIM coverage. Consequently, the additional expense may deter many insureds from seeking more protection.[125]

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119. *Id.* at 433, 616 P.2d at 1361-62.

120. *See supra* note 69.

121. *See* N.C. GEN. STAT. § 20-279.21(b)(3) (1989).

122. A recent court of appeals decision, rendered five months after *Sutton*, further obscures the question of who may stack UIM coverage. In Smith v. Nationwide Mut. Ins. Co., 97 N.C. App. 363, 388 S.E.2d 624 (1990), the court upheld a policy provision that precluded stacking by the family of a person killed while driving a family-owned vehicle. *Id.* at 371, 388 S.E.2d at 629. The decision in that case, however, is highly questionable. The court recognized that, had the decedent been riding in a vehicle owned by a third party, stacking would have been permissible. *Id.* As the dissent in that case noted, the death of a Class I insured in a family-owned instead of a neighbor's vehicle "is no proper basis" for determining whether or not stacking applies. *Id.* at 371, 388 S.E.2d at 629-30 (Phillips, J., dissenting). The North Carolina Supreme Court is expected to hear oral argument in *Smith* in the fall of 1990. *See also* Schwochert v. American Family Mut. Ins. Co., 139 Wis. 2d 335, 351, 407 N.W.2d 525, 532 (1987) (upholding a similar policy provision). *But see* Hettenhausen v. Economy Fire & Casualty Co., 154 Ill. App. 3d 488, 493, 507 N.E.2d 121, 125 (1987) (holding a similar policy provision unenforceable because it would defeat the purpose of UIM coverage); Lewis v. Cincinnati Ins. Co., 503 So. 2d 908, 910 (Fla. Dist. Ct. App.) (permitting father to stack son's UM coverage because family members "cannot be restricted to a special class of vehicles"), *rev. denied*, 511 So. 2d 297 (Fla. 1987).

123. Such an amendment would require a specific provision removing UM and UIM coverages from the mandatory/additional coverage dichotomy of the current statute if stacking is to be allowed. There still would need to be a minimum mandatory level of coverage since insurance companies are known for writing coverage at the lowest possible level. *See* A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.37a, at 122-23 (1969 & Supp. 1981).

124. *See* 2 A. WIDISS, *supra* note 1, § 41.7, at 101-02 (noting there is no functional connection between the two types of coverage).

125. *See id.* § 41.5, at 89.

The supreme court's decision in *Sutton* is a positive step in promoting the important public policy of protecting innocent victims of financially irresponsible motorists. It is unclear whether the court will extend the public policy to encompass uninsured motorist coverage. It is clear, however, that the North Carolina General Assembly could offer even more protection to insureds by allowing them to purchase uninsured and underinsured motorist coverage in amounts that are not linked to the amount of liability coverage purchased.

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