Uninsured Motorist Coverage in Maryland

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UNINSURED MOTORIST COVERAGE IN MARYLAND

Andrew Janquitto†

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I. INTRODUCTION

In 1972, the Maryland General Assembly drastically altered Maryland’s public policy regarding reparations for automobile acci-

dent victims by enacting "substantial changes in the insurance law pertaining to motor vehicles." The legislative changes were designed to protect members of the public "from the economic harm produced by automobile accidents." The most significant change was the addition of sections 538 through 546 to the Annotated Code of Maryland, Article 48A—the Insurance Code. These sections comprised Subtitle 35, entitled "Motor Vehicle Casualty Insurance."

Designed to supplement the Transportation Article's financial responsibility provisions, Subtitle 35 mandates that every automobile

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4. See Sun Cab Co., 305 Md. at 810, 506 A.2d at 643 (stating addition of Subtitle 35 to motor vehicle insurance law was "of particular significance"). The list of changes was extensive, as the court of appeals explained:

In addition to mandating compulsory automobile insurance with required coverages, Ch. 73 of the Acts of 1972 effected many other changes, such as creating the Maryland Automobile Insurance Fund, a state-owned automobile insurance company, to insure persons having difficulty obtaining automobile insurance policies in the private sector, abolishing the former assigned risk program, abolishing the former Uninsured Motorists Claims and Judgment Fund and transferring to some extent its functions to the Maryland Automobile Insurance Fund, enacting new procedures for the cancellation and nonrenewal of automobile insurance policies, and authorization under some circumstances for prejudgment interest in money judgments in automobile personal injury cases.

Jennings, 302 Md. at 357-58 n.3, 488 A.2d at 169 n.3.

5. Section 547 was added by Act of May 15, 1975, ch. 775, 1975 Md. Laws 3345; § 547A was added by Act of June 1, 1982, ch. 844, 1982 Md. Laws 4660.


7. These provisions regulate owners, and to some extent operators, of motor vehicles by requiring each owner of a motor vehicle registered in Maryland to provide proof of financial responsibility. MD. CODE ANN., TRANSP. § 17-104 (1992). The financial responsibility provisions are self-regulating and self-enforcing. See Grant v. Allison, 616 F. Supp. 1219, 1222 (D. Md. 1985). The Motor Vehicle Administration may not "issue or transfer the registration of a motor vehicle unless the owner or prospective owner of the vehicle furnishes evidence satisfactory to the Administration that the required security is in effect." MD. CODE ANN., TRANSP. § 17-104(a) (1992). Failure to maintain the required security will result in an automatic suspension of the vehicle's registration, id. § 17-106(a)(1), and the imposition of fines, id. § 17-106(e)(1). Moreover, a person "who has knowledge that a motor vehicle is not covered by the required security" is forbidden to drive the vehicle, id. § 17-107(a)(1); or, if he is the owner, to "knowingly permit another person to drive it," id. § 17-107(a)(2). A violation of this provision is a misdemeanor. Id. § 27-101(a). The violation does not give rise to civil liability, and, although the statutory scheme is comprehensive, there is "nothing in the legislative scheme meant to imply an independent, private cause of action against financially irresponsible owners and operators." Grant, 616 F. Supp. at 1222.
liability policy issued, sold or delivered in Maryland must include personal injury liability coverage, property damage liability coverage, personal injury protection, and uninsured motorist coverage. These required coverages generally mirror the Transportation Article's required security. Certain amounts of coverage, again mirroring the required security under the financial responsibility provisions, are also required. If a policy "omits or purports to exclude a particular coverage required by law, the omission or exclusion is ineffective, and the insurance policy will be applied as if [it contained] the minimum required coverage." The enactment of Subtitle 35 repre-

8. The phrase "issued, sold, or delivered" has not been given any specific judicial interpretation by Maryland courts. Each of the words presumptively has independent meaning, but the Insurance Code suggests that "issued" and "sold" are synonymous. Compare Md. Ann. Code art. 48A, § 481A (1991) (policies "issued or delivered") with id. § 541(c)(2) (1991 & Supp. 1992) (policies "issued, sold, or delivered") and Act of May 26, 1992, ch. 641, 1992 Md. Laws 3749, 3754, § 2 ("issued or delivered"). The "issuing" of a policy is clearly different than the "delivery" of a policy. See 1 George J. Couch, Cyclopedia of Insurance Law, §§ 10:1-10:2 (1959 & Supp. 1983). "Delivery" was probably used in the 1972 statute to account for policies issued or sold before January 1, 1973, but physically delivered after that date. See 12A Couch, supra, § 45:692 (2d ed. rev. 1981 & Supp. 1991) (stating construction of statutes and policies issued under compulsory insurance law to be made in favor of the legislature's purpose). The language was then carried over for the same reason when uninsured motorist insurance became mandatory for policies issued, sold, or delivered after January 1, 1975. The primary purpose of the "issued, sold, or delivered" phrase, however, is to ensure that all policies that become binding contracts in Maryland will be interpreted according to Maryland law and the requirements of Subtitle 35. For a discussion of final acts that will bind the insured and insurer to a contract, see Grain Dealers Mutual Insurance Co. v. Van Buskirk, 241 Md. 58, 65-66, 215 A.2d 467, 471-72 (1965), and Sun Insurance Office v. Mallick, 160 Md. 71; 81, 153 A. 35, 39 (1931). See also infra notes 13 & 89 (discussing choice of laws questions regarding uninsured motorist claims).


resented a shift from relying solely on the personal financial responsibility of motorists to provide compensation to automobile accident victims to a recognition of public responsibility with regard to those victims. This responsibility arises from Maryland's interest in the welfare of its citizens and in the social and economic problems following in the wake of a serious injury. Subtitle 35 is part of a comprehensive automobile insurance scheme designed to alleviate the state's burden of providing disability benefits to victims of motor vehicle accidents. By regulating owners, operators, and insurers of


13. In resolving a conflict of law issue, the court of appeals stated in Hutzell v. Boyer, 252 Md. 227, 249 A.2d 449 (1968), that the State of Maryland has a genuine interest in the welfare of a person injured within its borders, who may conceivably become a public charge due to a disabling injury. The social and economic problems following in the wake of a serious injury as they may affect the dependents of the person injured are properly matters of public concern.

Id. at 233, 249 A.2d at 452; accord Belcher v. Government Employees Ins. Co., 282 Md. 718, 387 A.2d 770 (1978). In Belcher the court of appeals rejected the appellant's position that personal jurisdiction over an absent defendant could be acquired by attaching the insurer's obligations under the motor vehicle insurance policy insuring that defendant. In reaching its decision, the court noted:

Our decision today is not rendered without cognizance of the petitioners' strong public policy arguments in favor of allowing suits against insurers in situations similar to the one presented in this case. There is more than a modicum of appeal in their contention that the General Assembly's action in setting up a system of compulsory automobile insurance . . . indicates its growing belief that all those injured while using the highways of this State should be properly recompensed. Furthermore, citizens of Maryland will have to bear the brunt of the expense when the injured are forced to rely on public aid for support due to their loss of employment and concomitant inability to pay medical bills incurred as a result of their injuries — even though the insurer has collected his fees to pay for just such occurrences and very likely has set up a reserve fund containing all the money necessary to reimburse the injured parties.

Id. at 726, 387 A.2d at 775.

14. The insurance scheme contains three major components: compulsory motor vehicle liability insurance, mandatory uninsured motorist coverage, and the Uninsured Division of the Maryland Automobile Insurance Fund (MAIF). The components are intended to be "complementary — when one is inapplicable another should compensate the injured party." Donna M. Maag, Comment, Compensation for Victims of Uninsured Motorist Accidents, 12 U. BALTIMORE L. REV. 314, 315 (1983) (citing Ralph P. Higgins, Note, Uninsured Motorist Coverage Laws: The Problem of the Underinsured Motorist, 55 NOTRE DAME
motor vehicles, the insurance scheme protects the state's interest, providing economic protection to nearly all Maryland residents.\textsuperscript{13}

Personal injury protection and uninsured motorist coverage play lead roles in the insurance scheme. The state's desire to provide immediate economic relief to all motor vehicle accident victims is accomplished by personal injury protection, which provides medical, hospital and disability benefits\textsuperscript{16} without regard to fault,\textsuperscript{17} therefore constituting a type of "limited no-fault" coverage.\textsuperscript{18} Uninsured motorist insurance is specifically designed to ensure compensation for victims of uninsured or underinsured motorists.\textsuperscript{19} Besides filling the

L. REV. 541, 541-42 (1980)). Added to this three-tiered system is the Property and Casualty Insurance Guaranty Corporation (PCIGC), which guarantees obligations owed to insureds of insolvent motor vehicle liability insurance companies. PCIGC protects both claimants and insureds by providing "a mechanism for the prompt payment of covered claims under certain insurance policies and to avoid financial loss to residents of Maryland who are claimants or policyholders of an insurer . . . which has become insolvent." Md. ANN. CODE art. 48A, § 504(a) (1991); accord McMichael v. Robertson, 77 Md. App. 208, 549 A.2d 1157 (1988) (discussing the PCIGC in connection with uninsured motorist insurance).

15. See National Grange Mut. Ins. Co. v. Pinkney, 284 Md. 694, 399 A.2d 877 (1979), where the court of appeals noted that under the combination of required uninsured motorist endorsements in policies issued in Maryland and the provision for payment from the Maryland Automobile Insurance Fund, the only persons injured in Maryland not afforded protection equal to the minimum which would be provided under an omnibus clause are those persons from places not having the equivalent of our Maryland Automobile Insurance Fund and a few people disqualified in such instances as that under Art. 48A, § 243H(a)(1)(i) where a claimant might have been riding in an uninsured motor vehicle owned by him. Id. at 704-05, 399 A.2d at 881-82. Since Pinkney, the uninsured motorist statute has expanded the ambit of the permissible exclusions. See infra notes 341-43 and accompanying text.


19. The uninsured motorist in Maryland is most likely to live in an urban area (68.4%); be Caucasian (65.1%); be male (76.9%); be 21 to 44 years old (71.6%); have no points on his driving record (59.4%); and have a class "D" license (67.4%). STEPHEN V. VERSACE, MARYLAND DEP'T OF TRANSP., THE NATURE AND EXTENT OF THE UNINSURED MOTORIST IN MARYLAND 31 (1977). Although Versace's study is sixteen years old, his conclusions are interesting and, in some cases, startling. For instance, based upon a finding within his study that the uninsured rate in Maryland was 2.8%, he concluded that "the evidence clearly indicates that the problem of the uninsured in Maryland has been grossly over-estimated." Id. at 31-32. But see REPORT OF THE INSURANCE
gaps inherent in financial responsibility and compulsory insurance legislation, uninsured motorist insurance directly furthers the state's desire to shift the risk of loss to the private sector by providing the injured insured with a minimum amount of compensation.

Uninsured motorist insurance was initially an optional coverage, but became mandatory in 1975. As originally designed, uninsured motorist coverage in Maryland was supposed to place the accident victim in the same position as if the uninsured tortfeasor maintained liability coverage in an amount equal to the minimum required coverage under the financial responsibility laws of Maryland. The Maryland legislature has made substantial changes to the uninsured motorist statute since its enactment. Instead of providing recovery of the minimum required coverage, the uninsured motorist statute now seeks to provide the victim of an uninsured motorist the opportunity for full recovery.

This article analyzes uninsured motorist insurance in Maryland. It discusses various topics that have been addressed by Maryland courts and attempts to clear up the confusion surrounding the concept of stacking of uninsured motorist coverages. Particular attention is paid to how the nature of uninsured motorist coverage changed with

Task Force of the House Economic Matters Committee (Jan. 1983) (finding the number of uninsured motor vehicles in Maryland ranges from 90,000 to 300,000); see also I Alan I. Widiss, Uninsured and Underinsured Motorist Insurance § 1.12 (2d ed. 1987) (estimating that 5 to 20 percent of motorists nationwide are uninsured).

20. Winner v. Ratzlaff, 505 P.2d 606, 610 (Kan. 1973). Maryland's courts have indicated that automobile insurance is compulsory in Maryland. See, e.g., Jennings v. Government Employees Ins. Co., 302 Md. 352, 360, 488 A.2d 166, 170 (1985). Technically, however, Maryland is not a true compulsory automobile insurance state, for a vehicle owner in Maryland is not required to have an automobile liability policy, but instead may offer another form of security. Md. Code Ann., Transp. §§ 17-103(a)(1)-(2) (1992). Since the usual form of security is an automobile insurance policy, however, id. § 17-103(a)(1), and because a self-insurer must provide the same coverage as if he maintained an automobile liability policy, see infra note 58, Maryland may be characterized as a de facto compulsory insurance state.


the introduction of "underinsured" motorist coverage in 1981. In addition, this article considers several issues that have not been addressed by Maryland courts.

Because any analysis of uninsured motorist insurance must focus on both the statutory requirements and the insurance policy provisions, this article uses the 1989 Maryland Uninsured Motorist Endorsement to the Personal Auto Policy as its primary reference point. Earlier versions of the Maryland Uninsured Motorist Endorsement are considered in order to highlight the new provisions of the 1989 version. Moreover, the earlier versions retain their significance despite being modified or replaced by other forms because, as one commentator has noted, "uninsured motorist coverage provisions figure in litigations long after revisions or new forms are introduced." Reference will also be made to the 1966 Standard Form, not only because modified versions of that form continue to be used in Maryland, but also because the substantial body of law that has developed regarding its provisions is helpful in culling discernable judicial trends and in construing the terms and provisions in the 1989 Maryland Uninsured Motorist Endorsement.

II. THE STANDARD FORMS AND THEIR REVISIONS

In order to understand uninsured motorist insurance in Maryland, a basic appreciation of three standard insurance forms is required: the 1966 Standard Uninsured Motorist (UM) Form, the 1977 Personal Auto Policy, and the Maryland Uninsured Motorist Endorsement to the 1977 Personal Auto Policy. Many judicial trends

23. See infra notes 108-18 and accompanying text.
24. Topics beyond the scope of this article include contractual arbitration provisions and procedure, property damage claims, self insurers, trial procedure, and uninsured motorist insurance in commercial auto policies.
25. There are, for instance, significant differences between the 1987 and 1989 versions of the Maryland Uninsured Motorist Endorsement. See infra note 27 and accompanying text.
26. 1 WMSS, supra note 19, § 3.1.
27. Uninsured motorist insurance in commercial automobile policies is beyond the scope of this article; however, the Maryland Uninsured Motorist Endorsement (ISO Form CA 21 13) to the Commercial Auto Policy (ISO Form CA 00 01) (both created by the Insurance Services Office, see infra note 38) is similar to the Maryland Uninsured Motorist Endorsement to the Personal Auto Policy. There are slight differences, and, arguably, uninsured motorist coverage in a commercial policy deserves different treatment than uninsured motorist coverage in a personal policy. See infra note 419 and accompanying text. The Maryland Uninsured Motorist Endorsement to the Commercial Auto Policy currently bears a 3 90 revision mark (earlier versions: 12 87 and 5 83).
can be understood only in connection with specific forms, and, in reality, only in connection with a particular revision of a specific form. References to a "standard policy," usually in reference to the 1966 Standard UM Form, are, at best, misleading; it is "both unwise and unwarranted to assume that any particular dispute involves the standard terms," since the language of any insurance contract will govern as long as it does not contravene public policy.

In no instance, however, may the policy provide less coverage than what the statute requires. The original 1966 Standard UM Form, developed by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau as part of the Family Automobile Policy, is no longer used in Maryland because several of its sections have been invalidated by Maryland courts or superseded by statutory provisions. Some companies, however, continue to use forms, which, to some extent, mirror the language used in the 1966 Standard Form.

Although the 1966 Standard Form, as modified, continues to be used, a growing number of insurance companies have switched to the Personal Auto Policy. The Personal Auto Policy was developed in 1977 by the Insurance Services Office, a national nonprofit or-

28. It is unfortunate in this regard that many of the court opinions do not recite the particular policy language at issue.

29. One commentator writes that "[s]ince 1966, there has been a wide divergence in the forms used, as many states require certain language while voiding other provisions. Similarly, as the trend to more readable policies gains momentum, the traditional language is less prevalent." 3 Rowland H. Long, The Law of Liability Insurance § 24.01 (1992).

30. 1 Widiss, supra note 19, § 3.5.


32. The only other commentary on uninsured motorist coverage in Maryland follows this approach. See Maag, supra note 14. This is understandable given the number of cases that have considered the 1966 Standard Policy.

33. See 1 Widiss, supra note 19, §§ 3.1-.2. The form was initially developed in 1956, then revised in 1958, 1963, and, finally, 1966. See also 3 Long, supra note 29, § 24.01.


35. The 1966 Standard Form contained mandatory arbitration provisions. Md. Ann. Code art. 48A, § 541(c)(2)(iv) (Supp. 1992), provides that any uninsured motorist insurance provision that "commands or requires the submission of any dispute between the insured and the insurer to binding arbitration, is prohibited and shall be of no legal force or effect." Part C of the Personal Auto Policy also contains an arbitration clause.

36. 3 Long, supra note 29, § 24.01 ("Although many insurance companies still follow the basic provisions of the [1966] Standard Form, several insurers, including many of the larger companies, utilize their own forms under which provisions may differ from the Standard Form. Thus, situations may arise in which coverage would exist under the Standard Form but not under the applicable provisions of an individual policy, or vice versa.").

37. Id.
ganization which drafts model forms for the insurance industry. The Personal Auto Policy which bears the PP 00 01 identification, was revised several times in the 1980s, most recently in December 1989 by the Insurance Services Office in response to court decisions, legislation, regulation, or perceived need by the insurance industry for changes in coverage. Part C of the Personal Auto Policy contains the uninsured motorist insurance provisions.

The Maryland Uninsured Motorist Endorsement, which bears a PP 04 59 identification, supersedes Part C of the Personal Auto Policy. It is significantly different from the 1966 UM form, but is similar to Part C of the Personal Auto Policy. Many of the definitions in the general definition section of the Personal Auto Policy, however, as well as many of the notice and cooperation provisions, apply to coverage under the Maryland Uninsured Motorist Endorsement, and care must be taken to consider the entire policy. Like the Personal Auto Policy, the Maryland Uninsured Motorist Endorsement was revised several times in the 1980s. Although the Insurance Services Office developed the Maryland Uninsured Motorist Endorsement specifically in response to the Maryland uninsured motorist statute and Maryland case law, some companies use Part C of the Personal Auto Policy with slight modifications, excising or modifying those portions that are not valid under Maryland law.

38. Insurance Services Office, Inc., is a non-profit organization that provides statistics gathering and advisory actuarial and rating services to the property and casualty insurance industry, as well as supplying advisory forms and insurance manuals to the industry. Letter from John P. Salvato, Insurance Services Office, Inc., to author Andrew Janquitto (Jan. 25, 1990) (on file with the University of Baltimore Law Review). Where necessary or helpful, citations and other references herein to forms issued by, and subject to the copyright of, the Insurance Services Office, Inc., are delineated by the term "ISO Form . . . ."

39. Letter from John P. Salvato, Insurance Services Office, Inc., to author Andrew Janquitto (Dec. 6, 1989) (on file with the University of Baltimore Law Review); see also 1 Widiss, supra note 19, §§ 3.1-.2.

40. Revision dates appear on the ISO forms immediately following the identifying form mark. Thus, the December 1989 revision bears the mark PP 00 01 12 89. Prior versions of the Personal Auto Policy include April 1986 (4 86) and June 1980 (6 80). In August 1983, the Personal Auto Policy was revised by an amendatory endorsement (ISO Form PP 00 03). Additionally, the Insurance Services Office offers endorsement PP 01 68, to be used with the Personal Auto Policy, which is specifically tailored to Maryland law regarding the scope of liability insurance.

41. Letter, supra note 39.

42. In addition, the Maryland Uninsured Motorist Endorsement replaces paragraph C.2. of Part E of the Personal Auto Policy. See supra note 40.

43. The revisions occurred in February 1982 (2 82), June 1983 (6 83), May 1986 (5 86), December 1987 (12 87), and December 1989 (12 89). See Letter, supra note 39; see also Letter, supra note 38.

44. The Maryland Insurance Commissioner has the authority to review all motor
III. THE NATURE OF UNINSURED MOTORIST COVERAGE

Uninsured motorist insurance is considered first-party coverage by Maryland courts. In reality, however, it is neither first-party nor third-party insurance. It has aspects of both, and has been called a hybrid form of coverage. True first-party coverage is premised on payment directly to the insured without regard to fault. Personal injury protection falls into this category. Third-party insurance, in vehicle liability policies issued, sold, or delivered in the State of Maryland. Section 546 of the Insurance Code states as follows:

The Commissioner shall have the authority to issue and promulgate all necessary rules, regulations and definitions not inconsistent with the provisions of this subtitle, and to review all policies of motor vehicle liability insurance issued, sold, or delivered in this State to determine whether they are in compliance with this subtitle and the rules, regulations, and definitions promulgated thereunder.

\[\text{MD. ANN. CODE art. 48A, § 546 (1991); see also id. § 541(c)(2)(iii) (Supp. 1992) ("The coverage required under this subsection (c) shall be in such form and subject to such conditions as may be approved by the Commissioner of Insurance."). Approval by the Insurance Commissioner does not, however, render the provision enforceable. See State Farm Mut. Auto. Ins. Co. v. Maryland Auto. Ins. Fund, 277 Md. 602, 605-06, 356 A.2d 560, 562 (1976) ("[Although] the construction placed upon a statute by administrative officials soon after its enactment should not be disregarded except for the strongest and most compelling reasons, it is also true that an administrative interpretation contrary to the clear and unambiguous meaning of the statute will not be given effect."). Moreover, the Insurance Commissioner's approval does not require the Motor Vehicle Administration to accept the policy as satisfying the financial responsibility provisions. 59 Op. Att'y Gen. 451, 457 (1974).}\]

45. E.g., Reese v. State Farm Mut. Auto. Ins. Co., 285 Md. 548, 552, 403 A.2d 1229, 1231-32 (1979) ("[U]ninsured motorist coverage is in insurance parlance 'first party coverage' like collision, comprehensive, medical payments or personal injury protection, and not 'third party coverage' such as personal injury or property damage liability insurance."). The Court of Appeals of Maryland has defined "a first party claim" as "the demand an insured may make on his or her own insurer pursuant to the terms of the insurance contract between them," Insurance Comm'r v. Property & Cas. Ins. Guar. Group, 313 Md. 518, 525 n.3, 546 A.2d 458, 461 n.3 (1988), whereas "a third party claim" refers to the claim which a third party has against the insured tort-feasor."

46. ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW § 4.9(d) (1971).

47. See Reese, 285 Md. at 552, 403 A.2d at 1231-32. Personal injury protection is considered "[b]asic required primary coverage." Md. ANN. CODE art. 48A, § 539 (1991 & Supp. 1992) (heading). The meaning of the term "primary" as used in Maryland's statute is not the same, however, as the insurance industry's definition. The Court of Appeals of Maryland explained as follows:

Primary coverage generally refers to the policy that first must answer for the loss. As used [in section 538], however, it may well have referred to first-person as opposed to third-party coverage. In that sense, the term would apply equally to [personal injury protection], collision and [uninsured motorist], but not to liability coverage.

contrast, premises payment to a person not a party to the insurance contract based on the acts of the insured; liability coverage is the typical example. 48

Unlike other first-party coverages, uninsured motorist insurance is based on a showing of fault. In this sense it is unique, being "the only widely marketed first-party insurance that predicates indemnification on the negligent conduct of a third party." 49 The insurer does not pay benefits to its insured unless and until the liability of the uninsured tort feasor is established. Moreover, the insurer has the right to defend the insured's claim for uninsured motorist benefits by asserting all of the defenses that the tortfeasor possesses. 50 On the other hand, the insurer retains its identity as an insurer, and owes the insured a duty to act in good faith. 51 Uninsured motorist claims, then, are simultaneously "quasi-adversarial" and "quasi-fiduciary." 52

Although the insurer stands in the shoes of the tortfeasor, uninsured motorist insurance is not designed to benefit the tortfeasor, though it may have that indirect effect. The primary purpose of uninsured motorist insurance "is to assure financial compensation to the innocent victims of motor vehicle accidents who are unable to recover from financially irresponsible uninsured motorists." 53 The uninsured motorist statute is a remedial piece of legislation and, as such, courts construe it liberally. 54 The remedial nature of the uninsured motorist statute points to another unique aspect of uninsured motorist insurance: "The courts have been disposed to favor the

48. See Reese, 285 Md. at 552, 403 A.2d at 1231-32.
51. The duty of good faith is not a separate tort duty. See infra notes 518-19 and accompanying text. Notwithstanding the duty to act in good faith, the insurer is still able to assert whatever policy defenses it possesses: misrepresentation in the application, failure to pay premiums, breach of duty to cooperate, and breach of duty to notify. See infra note 52 and accompanying text.
interests of the insureds to a greater degree than was previously true in regard to any other insurance coverage."

Maryland's uninsured motorist statute requires that every insurance policy contain coverage for damages which "[t]he insured is entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injuries sustained in an accident arising out of the ownership, maintenance or use of such uninsured motor vehicle." In addition, the insurance must cover damages that "[t]he surviving relatives ... of the insured are entitled to recover from the owner or operator of an uninsured motor vehicle because of the death of the insured as the result of an accident arising out of the ownership, maintenance or use of the uninsured motor vehicle."

Self-insurers must provide uninsured motorist insurance, but neither the state, nor the owners of private buses or taxis, are required to maintain uninsured motorist insurance. Uninsured motorist insurance is also not required for vehicles not registered for use on a highway. The minimum required uninsured motorist protection is $20,000 for injury or death of any one person in an accident, $40,000 for injury or death of any two or more persons per accident, and $10,000 for property damage in any one accident.

55. WIDISS, supra note 19, § 3.6.
57. Id. § 541(c)(2)(ii).
58. In Mayor and City Council of Baltimore v. Rose, 47 Md. App. 481, 424 A.2d 160 (1981), Rose, a Baltimore City firefighter, was injured while riding on a fire engine that was struck by an uninsured motor vehicle. The City was self-insured. The court rejected the City's contention that it was not liable for uninsured motorist benefits because Rose had not complied with notice requirements concerning suits against the City, stating that "the City, having elected to act as its own insurer, was required to assume the same responsibilities and provide the same minimum coverage as a private carrier" and could not impose additional conditions on, or further limit the extent of, coverage which it provided. Id. at 485, 424 A.2d at 162; accord MD. CODE ANN., TRANSP. § 17-103(a)(2) (1992).
60. MD. ANN. CODE art. 48A, § 538(b) (1991), defines a motor vehicle as an automobile and any other vehicle, including a trailer, operated or designed for operation upon a public road by any power other than animal or muscular power but does not include a vehicle as defined in §§ 11-105 [a bus] and 11-165 [a taxi] of the Transportation Article of the Annotated Code of Maryland. See also MD. CODE ANN., TRANSP. §§ 11-105, -165 (1992); Pope v. Sun Cab Co., 62 Md. App. 218, 488 A.2d 1009 (1985), aff'd sub nom. Maryland Auto. Ins. Fund v. Sun Cab Co., 305 Md. 807, 506 A.2d 641 (1986) (discussing taxi exclusion).
62. See id. § 541(c)(2)(i); see also MD. CODE ANN., TRANSP. § 17-103(b) (1992).
These amounts comport with the minimum amounts of required coverage under the financial responsibility provisions, as well as with the public policy embraced in Subtitle 16A of the Insurance Code. Subtitle 16A creates the Maryland Automobile Insurance Fund (MAIF). MAIF serves two functions and is divided into two divisions. The Insured Division of MAIF is the liability insurer of last resort in Maryland. It provides "automobile insurance to those eligible persons who are unable to obtain it in the private market." In addition to being the liability insurer of last resort, MAIF is the statutory successor to the Unsatisfied Claim and Judgment Fund. In order to make a claim against the Uninsured Division of MAIF, "the claim [must not be] covered by a policy of motor vehicle liability insurance." If a victim has his own uninsured motorist

Section 541(c)(2) does not expressly require that insurers provide uninsured motorist property damage coverage; most insurers, however, offer this type of coverage. The Maryland Uninsured Motorist Endorsement, for instance, provides:

We will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" because of:

2. "Property damage" caused by an accident.

ISO Form PP 04 59 12 89, I. Part C - Uninsured Motorist Coverage, Insuring Agreement. Property damage is defined as injury to or destruction of a covered motor vehicle or property contained in a covered motor vehicle. Some insurers, however, do not offer uninsured motorist property damage coverage. Whether this is permissible has not been decided in Maryland. Arguably, however, uninsured motorist property damage protection of $10,000 is mandatory. Section 541(c)(2)(v) of the Insurance Code states that in no instance may the uninsured motorist coverage be less than the coverage afforded a qualified person under section 243H and 243-I of the Insurance Code. Md. Ann. Code art. 48A, § 541(c)(2)(v) (Supp. 1992). Those sections require property damage coverage of $10,000. See id. §§ 243H(a)(1)-(3), 243-I(a) (1991). In addition, Title 17 of the Transportation Article also requires property damage liability protection of $10,000. See Md. Code Ann., Transp. § 17-103(b) (1992). For consistency, the Title 17 required security, the mandatory uninsured motorist insurance, and the compensable losses recognized by the Uninsured Division of MAIF should be the same. Moreover, the Motor Vehicle Administration apparently interprets Title 17 and § 541(c)(2) as mandating uninsured motorist property damage coverage. When a person seeks to become a self-insured under Title 17, he must provide uninsured motorist coverage of $20,000/ $40,000 for bodily injury or death as well as $10,000 for property damage. See Application for Maryland Self-Insurer (FR-1), available from the Motor Vehicle Administration.

65. Id. § 243B(a).
insurance, then he must pursue that coverage. In this regard, the Uninsured Division of MAIF functions as the uninsured motorist insurer of last resort. The maximum amounts payable under the Uninsured Division of MAIF in section 243-I for bodily injury are $20,000 per person and $40,000 per occurrence. The maximum amount payable for property damage is $10,000 per occurrence. There are five deductions, or set-offs, from the maximum amounts recoverable against the fund.

The scope of required coverage under the uninsured motorist statute must be ascertained by cross-reference to the Uninsured Division of MAIF. Section 541(c)(2)(v) provides that "[i]n no case shall the uninsured motorist coverage be less than the coverage afforded a qualified person under [MAIF] Article 48A, §§ 243H and 243-I." Section 243H delineates the type of claims that can be made against the Uninsured Division of MAIF. Section 243-I states the amounts of required coverage. The articulation of sections 541(c)(2) and 243H is best seen in two cases concerning hit-and-run vehicles.

In State Farm Mutual Automobile Insurance Co. v. Maryland Automobile Insurance Fund, Daniel Saxon was injured while driving an automobile owned by Kathleen Koegel. Saxon claimed that the accident was caused when he was forced to take evasive action to avoid striking another vehicle, which then fled the scene. There was no physical contact between the Saxon vehicle and the phantom vehicle. State Farm insured the Koegel vehicle. The uninsured motorist provisions of the State Farm policy required physical contact between the insured vehicle and a phantom vehicle. Saxon made a claim for uninsured motorist benefits, and State Farm denied coverage based on the lack of physical contact.

Saxon then sought recovery from MAIF, which, in turn, filed a declaratory judgment action against State Farm, seeking a declaration that the State Farm policy's physical contact requirement was contrary to Maryland law. The trial court ruled that Saxon was covered.

68. Uninsured motorist coverage is primary to any right of recovery from MAIF. Id.
70. Id.
72. Id. § 541(c)(2)(v) (Supp. 1992).
74. Id. at 602-03, 356 A.2d at 561.
75. Id. Saxon qualified as an additional insured because he was using the vehicle with Koegel's permission. Id.
76. Id.
77. Id.
78. Id.
by the State Farm policy, and State Farm appealed. The sole question before the court of appeals was the interpretation of section 541(c)(2)'s cross-reference to sections 243H and 243-I.

The court first examined section 243H to determine the scope of coverage afforded by that section. Section 243H recognizes three different claims involving uninsured motorists. Section 243H(a)(1) establishes a qualified person's right to make a claim against MAIF when an accident was caused by a phantom vehicle, but does not contain any distinction between impact and non-impact phantom drivers. Therefore, the court ruled that the State Farm policy provided less coverage than section 243H(a)(1): "The aggregate of risks against which the State Farm endorsement insures is 'less than' the aggregate against which MAIF provides protection under § 243H, since the former does not insure against the non-impact phantom driver who causes an accident, while the latter does." Accordingly, the court held that State Farm's impact requirement violated section 541(c)(2) and was void.

Eleven years after State Farm v. MAIF, the court of appeals again considered the interplay of sections 541(c)(2) and 243H(a)(1).

79. MAIF petitioned for a writ of certiorari, and the court of appeals granted the petition. Id. at 603, 356 A.2d at 561.
80. At the time of the dispute, the cross-reference to sections 243H and 243-I was contained in Md. Ann. Code art. 48A, § 541(c). It is now contained in § 541(c)(2)(v). For consistency herein, both the earlier and later versions will be referred to as section 541(c)(2)(v).
81. The first type of claim involves an unidentified motorist, Md. Ann. Code art. 48A, § 243H(a)(1) (1991); the second involves a disappearing motorist, id. § 243H(a)(2), and the third, an uninsured motorist, id. § 243H(a)(3). An "unidentified motorist" is "an owner or operator of a motor vehicle whose identity and whereabouts are not known." Md. R. BW1(a)(5) (1992). A "disappearing motorist" is "an uninsured owner or operator who was originally identified but whose present whereabouts cannot be ascertained for the purpose of serving process." Md. R. BW1(a)(4) (1992). An "uninsured motorist" is "an owner or operator of a motor vehicle whose whereabouts are ascertainable for the purpose of serving process, but who was uninsured at the time of the act or omission." Md. R. BW1(a)(6) (1992).
82. Section 243H(a)(1) also covers claims caused by a stolen vehicle. It states that the following may be made against MAIF:

Claims for the death of or personal injury to a qualified person or for damages to property in excess of $100, arising out of the ownership, maintenance or use of a motor vehicle in this State where the identity of the motor vehicle and of the operator and owner thereof cannot be ascertained or it is established that the motor vehicle, at the time of the accident occurred, was in the possession of some person other than the owner without the owner's consent and that the identity of the person cannot be ascertained.

83. State Farm v. MAIF, 277 Md. at 605, 356 A.2d at 562.
84. Id.
In *Lee v. Wheeler*,Ark and Olivia Lee, Maryland residents, were injured in an automobile accident in Washington, D.C., when a vehicle driven by Marlene Wheeler swerved to avoid an unidentified vehicle that had suddenly entered her traffic lane. Wheeler's vehicle struck the Lees' vehicle. The Lees sued Wheeler in tort. They also sued their insurer, Pennsylvania General Insurance Company, seeking uninsured motorist insurance as a result of the phantom vehicle's negligence. The Lees recovered against Wheeler, but their claims against Pennsylvania General were dismissed because the insurance policy contained a provision that required physical contact with the phantom vehicle in order for the uninsured motorist provision to apply. The trial court found that the physical contact requirement was valid under District of Columbia law. The Lees appealed to the United States Court of Appeals for the District of Columbia Circuit, which disagreed with the trial court and ruled that Maryland law should apply. Uncertain whether Maryland courts would follow *State Farm v. MAIF* and invalidate a provision requiring impact with a phantom vehicle when the accident occurs outside of Maryland, the court certified the issue to the Court of Appeals of Maryland.

The court of appeals began its analysis in *Lee* with a review of *State Farm v. MAIF* and section 541(c)(2). Reaffirming its interpre-

86. *Id.* at 235, 528 A.2d at 913.
87. *Id.*
88. *Id.*
89. *Lee v. Wheeler*, 810 F.2d 303, 304-05 (D.C. Cir. 1987). The court noted that Maryland law applied because the policy issued by Pennsylvania General was clearly a Maryland contract and "[t]he fact that the accident occurred in the District does not endow the District with an interest in the contractual relationship between the contracting parties." *Id.* at 305. The hybrid nature of uninsured motorist insurance often gives rise to choice of law difficulties. *See 1 Widiss, supra* note 19, § 7.15. In Maryland, the nature, validity and construction of contracts are generally governed by the doctrine of *lex loci contractus*. Under this doctrine, the interpretation and enforcement of the policy is determined by the law of the state where the policy became a binding contract. *Id.* The scope of the policy, and whether certain exclusions are permissible, would also be governed by the law of the state where the contract was made. An automobile insurance policy issued, sold, or delivered in Maryland is meant to comply with Maryland law. Since the insured's right to recover uninsured motorist benefits is based on a contract theory, the law of Maryland should thus apply. *See Galford v. Nicholas*, 244 Md. 275, 281, 167 A.2d 783, 786 (1961) (stating that insurer's liability under an automobile liability policy is generally to be determined in accordance with the law of the place where the contract was entered into, not some other jurisdiction).
90. *Lee*, 810 F.2d at 306. The federal appellate court noted that *Reese v. State Farm Mutual Automobile Insurance Co.*, 285 Md. 548, 403 A.2d 1229 (1979), implicitly supported the Lees' position that § 541(c)(2) mandated coverage of accidents occurring out of state, but did not find *Reese* conclusive. *Lee*, 810 F.2d at 306 n.4.
tation of section 541(c)(2) in State Farm v. MAIF, the court rejected Pennsylvania General's argument that section 541(c)(2) contained an implied territorial limitation when read in conjunction with section 243H(a)(1). According to the court, no territorial limitation was evident. The court then noted that sections 541(c)(2) and 234H did not "always operate to qualify or supplement each other." In the court's view, section 541(c)(2) established "a floor below which an insurer may not go, but it [did] not establish a ceiling." Given the "broadly-protective public policy" underlying the uninsured motorist statute, the court invalidated Pennsylvania General's physical contact provision in order to "safeguard the integrity of the uninsured motorist law and promote its remedial purpose of compensating the innocent victims of motor vehicle accidents."  

91. Lee, 310 Md. at 238, 528 A.2d at 914-15. Pennsylvania General based its argument on Md. Ann. Code art. 48A, § 243H(a)(1), which "authorize[d] qualified persons to present claims against MAIF for personal injuries 'arising out of ownership, maintenance or use of a motor vehicle in this State... (emphasis supplied).'" Lee, 310 Md. 233, 238, 528 A.2d 912, 914. The court of appeals declined to rule whether § 243H(a)(1) had a residential requirement: In our discussion of § 243H(a)(1) we have assumed arguendo, that it does include a residential requirement with respect to claims against MAIF. That is the way Pennsylvania General reads the law, but we reject Pennsylvania General's conclusion even if the law be read that way. We note, however, that this reading of the statute is not inevitable. We expressly do not decide whether it is correct. Lee, 310 Md. at 243 n.4, 528 A.2d at 917 n.4. The federal appellate court, however, noted that a "parsing of the statutory language suggests the possibility that section 243H(a)(1) can apply to accidents that occur outside of Maryland." Lee, 810 F.2d at 305-06.

92. Lee, 310 Md. at 242, 528 A.2d at 916-17.
93. Id. at 243, 528 A.2d at 917.
94. Id. The Court of Appeals of Maryland did not decide whether a physical contact provision would apply above-and-beyond the $20,000/$40,000 required minimum:

Pennsylvania General among other things argues that its exclusion of non-impact phantom vehicle claims should be held to be enforceable as to claims that exceed the statutory mandatory minimum coverage required by Maryland law. Because that point is not encompassed within the certified question, we decline to address it. For the same reason, we likewise express no opinion on the issue raised by amici in this case: whether Maryland law prohibits a physical contact requirement in uninsured motorist coverage in commercial policies as opposed to personal policies. Id. at 235-36 n.1, 528 A.2d at 913 n.1 (citation omitted); see Royal Ins. Co. v. Austin, 79 Md. App. 741, 558 A.2d 1247 (1989) (discussing physical contact requirement in commercial automobile policy). In Austin, the Court of Special Appeals of Maryland decided that the phrase "hit and run" in a commercial uninsured motorist endorsement included instances of nonphysical contact and did not consider the validity of a physical contact requirement in a commercial policy. Id. at 746-48, 558 A.2d at 1250.
The court’s holding in Lee is illustrative not only of the expansive interpretation that courts give the uninsured motorist statute, but also serves to recognize that reference to section 243H must be done with great care. An exacting scrutiny of both section 541(c)(2) and section 243H must be made when addressing a scope of coverage issue. In addition, a review of all of the provisions of the uninsured motorist statute must be made. Although they are related, sections 541(c)(2) and 243H have different functions and, as the Lee court noted, they “do not always operate to qualify or supplement each other.” Therefore, section 541(c)(2) may provide for broader coverage than the minimum delineated in 243H. In Lee, for example, section 541(c)(2)’s “arising out of” clause was determined to be more expansive than 243H(a)(2)’s “arising out of” provision. The Lee court’s notion that section 541(c)(2) establishes a floor, rather than a ceiling, then, is merely a statement that the public policy underlying the uninsured motorist statute will give effect to more comprehensive provisions in that statute over less comprehensive provisions in section 243H of Subtitle 16A.

Lee also reinforces the often repeated proposition that only expressly authorized exclusions will be recognized by the courts. Statutory exclusions from, or limitations on, uninsured motorist insurance must be clear and unambiguous; any doubts will be resolved based on the underlying remedial nature of the uninsured motorist statute. In this sense, the public policy underlying the uninsured motorist statute acts as a limitation on the insurer’s ability to contract...

95. Lee, 310 Md. at 240, 528 A.2d at 916.
97. The definition of uninsured motor vehicle in § 541(c)(1) is clearly broader than the definition of uninsured motor vehicle in § 243L(f). Section 541(c)(1) defines “uninsured motor vehicle” to include a vehicle with less insurance than the injured person’s uninsured motorist coverage. Md. Ann. Code art. 48A, § 541(c)(1) (1991 & Supp. 1992). In this way, the uninsured motorist coverage mandated by Subtitle 35 functions as a type of underinsured motorist coverage as well. Moreover, an “insured” under § 541(c)(2) is not necessarily the same as a “qualified person” under § 243H. See Erie Ins. Exch. v. Reliance Ins. Co., 63 Md. App. 612, 617-18, 493 A.2d 405, 407-08 (1985).
98. In contrast to § 243H(a)(1), § 541(c)(2)’s “arising out of” clause did not contain the prepositional phrase “in this State.” See supra note 91 and accompanying text.
99. In Lee, the court stated that “[a] corollary principle in our construction of Art. 48A is that we will not imply exclusions nor recognize exclusions beyond those expressly enumerated by the legislature.” Lee, 310 Md. at 239, 528 A.2d at 915.
freely. The insurer is not restrained from contracting for coverage beyond that contemplated by the statute; the insurer, however, has no legal right to contract for coverage below the statutory minimum, even if it could find a willing insured. Any provision which conditions, limits, or dilutes the unqualified uninsured motorist coverage mandated by the statute is void and unenforceable, and Maryland courts have “consistently rejected attempts by insurers, as well as insureds and the insurance commissioner, to circumvent the plain language of the required coverage provisions of the statutes dealing with automobile insurance.” Only those policy provisions that narrow the insurer’s liability in a manner consistent with the statute are valid.

IV. MARYLAND’S REDUCTION UNDERINSURED MOTORIST COVERAGE

In 1981, the Maryland legislature broadened the concept of uninsured motorist insurance to include a type of underinsured motorist coverage. Before 1981, an uninsured motor vehicle was defined as a vehicle carrying no liability insurance. This definition

101. Id. at 730, 436 A.2d at 471.
103. Before 1981, the statute did not contain a definition of uninsured motor vehicle, but the Uninsured Division of MAIF defined an uninsured motor vehicle as

a motor vehicle as to which there is not in force security meeting the requirements of Title 17 of the Transportation Article; and a motor vehicle as to which there is in force a liability policy meeting the requirements of that title where a receiver or conservator has been appointed by a court of competent jurisdiction for the insurance company issuing said liability policy.

Md. Ann. Code art. 48A, § 243L(f) (1991). In addition, since 1965, the Insurance Code has required that:

Any endorsement or provision protecting the insured against damage caused by an uninsured motor vehicle, contained in any policy of insurance issued and delivered in this State, shall be deemed to cover damage caused by a motor vehicle of which the liability insurer is or becomes insolvent or otherwise unable to pay claims, in like manner and to like extent as for damages caused by a motor vehicle as to which no liability insurance exists.

was changed in 1981 to include any vehicle insured with liability coverage less than the amount of uninsured motorist insurance possessed by the victim. At the same time, the legislature also added section 541(c)(3), which provides that "[t]he limit of liability for an insurer providing uninsured motorist coverage under this subsection is the amount of that coverage less the sum of the limits under the liability insurance policies, bonds, and securities applicable to the bodily injury or death of the insured." 

The 1981 amendments, as the court of appeals noted in Hoffman v. United Services Automobile Assoc., make mandatory uninsured motorist insurance operate as underinsured motorist coverage. The statute's definition of "uninsured motor vehicle" as including underinsured motor vehicles, however, has led to substantial confusion.


"[U]ninsured motor vehicle" means a motor vehicle whose ownership, maintenance, or use has resulted in the bodily injury or death of an insured, and for which the sum of the limits of liability under all valid and collectible liability insurance policies, bonds, and securities applicable to the bodily injury or death is less than the amount of coverage provided to the insured under this subsection.


106. 309 Md. 167, 522 A.2d at 1325-26. The court noted that the statutory definition includes "what in insurance parlance is referred to as . . . 'underinsured' motorist [coverage]." Id. at 174, 522 A.2d at 1323.

107. See infra notes 129-30 and accompanying text. Uninsured motorist and underinsured motorist coverages are sometimes treated differently by courts. See generally 2 WIDISS, supra note 19, § 32.2. Since Maryland defines an uninsured motor vehicle to be one that is either uninsured or underinsured, it appears that Maryland courts would not treat the coverages differently. There are valid reasons, however, for treating them differently. The injured insured has three alternatives when pursuing a claim involving an uninsured motorist: (1) he may sue the tortfeasor in tort, obtain a judgment and then enforce the judgment against the uninsured motorist insurer; (2) the injured insured may sue the uninsured motorist insurer and, as part of his case, prove that the tortfeasor's negligence proximately caused his injuries; and (3) the injured insured may combine the tort and contract claims in a single action. Lane v. Nationwide Mut. Ins. Co., 321 Md. 165, 170 & n.3, 582 A.2d 501, 503 & n.3 (1990); Nationwide Mut. Ins. Co. v. Webb, 291 Md. 721, 736, 436 A.2d 465, 474 (1981). The right to combine the tort and contract claims when an underinsured motor vehicle is involved is questionable, as is the insurer's right to intervene when the claimant sues only in tort and an underinsured motor vehicle is...
of uninsured motor vehicle is best seen in Christensen v. Wausau Insurance Co.\textsuperscript{109}

Wayne Christensen was injured in an automobile accident with a vehicle driven by Herb Herrmann. Herrmann was insured by MAIF under a policy that provided liability coverage of $20,000/$40,000. Christensen's injuries and damages exceeded $20,000, and MAIF tendered its per person policy limit in full settlement of any claims Christensen had against Herrmann. Christensen then sued his insurance company, Wausau, to recover underinsured motorist benefits. Christensen's policy with Wausau provided uninsured motorist coverage of $20,000/$40,000 and underinsured motorist coverage of $20,000/$40,000. Christensen paid a separate premium of six dollars for the underinsured motorist coverage. The policy, however, did not define underinsured motorist coverage.\textsuperscript{110}

At trial, the court ruled that Christensen was not entitled to recover anything from Wausau because he had already collected $20,000 from Herrmann and the Wausau policy provided only $20,000 in underinsured motorist coverage. The trial court equated uninsured motorist insurance with underinsured coverage. Christensen appealed, and the court of special appeals reversed. The court rejected Wausau's argument that uninsured motorist and underinsured motorist coverage were synonymous, stating that "[t]he adoption of Wausau's contention would appear to make Wausau's inclusion of both terms in the coverages . . . an exercise in futility."\textsuperscript{111} The court then concluded that Wausau's "use of the terms uninsured motorist and underinsured motorist on the policy without a definition" created an ambiguity that should be resolved against the drafter of the policy.\textsuperscript{112}

Because the Wausau policy did not contain a definition of underinsured motorist coverage, the court sought to provide one. Noting that "[uninsured motorist] coverage is applicable where the

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\textsuperscript{110}. Id. at 697-98, 519 A.2d at 777.
\textsuperscript{111}. Id. at 699, 519 A.2d at 778.
\textsuperscript{112}. Id. at 699-701, 519 A.2d at 779.
vehicle involved in an accident is without insurance or is insured for less than the liability limits required by the State law," the court stated that underinsured motorist coverage "is applicable where the tortfeasor carries insurance which comports with the legal limits but is inadequate to cover all of the damages incurred." Since Christensen had paid an extra premium for the underinsured motorist coverage, the court held that he could collect the $20,000 from Wausau above and beyond the $20,000 he had collected from MAIF.

The Wausau court's holding is a recognition that, generally, uninsured motorist coverage is not synonymous with underinsured motorist coverage. Under Maryland's statutory scheme, however, an uninsured motor vehicle is synonymous with an underinsured motor vehicle. In Aetna Casualty & Surety Co. v. SOURAS, this fact led the court of special appeals to reject the definition of underinsured motorist coverage contained in the Wausau opinion. SOURAS, however, should not be read as overruling Wausau; rather it overrules only the Wausau court's definition of underinsured motorist coverage. The decision in Wausau is fundamentally correct, and its definition of underinsured motorist is not completely inconsistent with the statute.

There are two different types of underinsured motorist coverage: floating and reduction. Floating underinsured motorist coverage, as

113. Id. at 700, 519 A.2d at 778. The court ignored the policy definition of uninsured motor vehicle as including a vehicle with insurance that met the financial responsibility requirements but whose applicable liability limits were less than the uninsured motorist limits provided by the Wausau policy.

114. The court stated that "[w]hile many states have statutes that specifically define UIM coverage . . . the State of Maryland does not." Id. (footnote omitted). In a footnote, the court recognized that Maryland's uninsured motorist statute did address the concept of an underinsured motor vehicle. Id. at 700 n.1, 519 A.2d at 778 n.1.

115. The Wausau court rejected Wausau's position that uninsured motorist and underinsured motorist had the same meaning under the Maryland law: "'Uninsured' clearly is not the same as 'underinsured' and '[a] court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity, and words do not become ambiguous simply because lawyers or laymen contended for different meanings.'" Id. at 699, 519 A.2d at 778 (citations omitted) (alteration in original).


117. In SOURAS, the court of special appeals, after adopting the Hoffman court's statement that the 1981 amendments made uninsured motorist coverage operate as underinsured motorist coverage, stated that the court's "indication to the contrary in Christensen v. Wausau Insurance Co., 69 Md. App. 696, 519 A.2d 776 (1987), decided prior to Hoffman is expressly overruled." SOURAS, 78 Md. App. at 76 n.2, 552 A.2d at 910 n.2.

its name implies, floats on top of any recovery from other sources up to the total value of the insured's injuries. If an insured's damages exceed the tortfeasor's liability limits, then the underinsured motorist insurer pays the difference between the injured insured's damages and the tortfeasor's liability limits up to the underinsured motorist policy limits. If an insured's damages exceed the tortfeasor's liability limits, then the underinsured motorist insurer pays the difference between the injured insured's damages and the tortfeasor's liability limits up to the underinsured motorist policy limits. Floating underinsured motorist coverage focuses on the injured insured's damages, not on the tortfeasor's liability limits. In contrast, reduction underinsured motorist coverage focuses on the relationship between the insured's underinsured motorist limits and the tortfeasor's liability coverage. In reduction underinsured motorist coverage, the tortfeasor's liability coverage acts to reduce the limit of underinsured motorist benefits. Unlike floating underinsured motorist coverage, where the injured insured's damages may entitle him to recover the full amount of the policy, the most an injured insured is able to recover under a reduction underinsured motorist policy is the amount of his underinsured motorist limits minus the amount of the tortfeasor's limits.

Although reduction underinsured motorist coverage may cause hardship in certain cases, it is more prevalent than floating underinsured motorist coverage. The type of underinsured motorist coverage created by the 1981 and 1983 amendments is reduction underinsured motorist coverage. In this light, the Wausau decision makes absolute sense, and the Souras court's overruling of the


120. If the injured insured has $100,000 in floating underinsured motorist coverage and incurs damages of $120,000 as a result of the negligence of a motorist with liability coverage of $20,000, then the injured insured collects the $20,000 from the tortfeasor and $100,000 from his underinsured motorist insurer.

121. See 3 LONG, supra note 29, § 24.22. Rhodes uses the term "excess" underinsured motorist coverage to refer to floating underinsured motorist. Id. The Elovich court describes reduction underinsured motorist coverage as "decreasing layer" coverage. Elovich, 707 P.2d at 1324.

122. Aetna Cas. & Sur. Co. v. Souras, 78 Md. App. 71, 77-78, 552 A.2d 908, 911-12 (1989). An issue not decided by the Maryland courts is whether the words "valid and collectible" in § 541(c)(1) allow an insured to recover uninsured motorist benefits when the tortfeasor has liability limits that equal the injured insured's uninsured motorist limits, but because there are multiple claimants the insured collects less than the tortfeasor's liability limits. See infra Part VI.

123. If the injured insured has $100,000 in reduction underinsured motorist coverage and he incurs damages of $120,000 as a result of the negligence of a motorist with liability coverage of $20,000, then the injured insured collects the $20,000 from the tortfeasor but only $80,000 ($100,000 minus $20,000) from his underinsured motorist insurer.

124. In the example discussed supra note 123, the insured is not compensated fully for his loss.

125. See 3 LONG, supra note 29, § 24.22.
definition of underinsured motorist coverage was unnecessary. All Wausau stands for is that, since uninsured motorist coverage must by statute include reduction underinsured motorist coverage, and since Christensen paid the extra premium, he must have purchased floating underinsured motorist coverage. The uninsured motorist statute, by the 1981 amendment, may operate as reduction underinsured motorist coverage, but it does not operate as floating underinsured motorist coverage. Nor, however, does the statute preclude an insurer's offering floating underinsured motorist coverage.

In 1983, the public responsibility theory underlying Maryland's insurance scheme was further embedded in Maryland law by the addition of section 541(f), which, according to the court of appeals, "clearly allows 'excess uninsured' or 'underinsured' motorist coverage in separate policies issued by the same or another insurer." The

126. The Wausau court's definition of underinsured motorist coverage is clearly a definition of floating underinsured motorist coverage. The Souras court evidently believed that Wausau was engaged in statutory construction, but the Wausau court did not interpret the uninsured motorist statute as requiring floating underinsured motorist coverage; it merely interpreted the policy as providing floating underinsured motorist coverage. See supra note 114. The Wausau court's definition of underinsured motorist coverage, then, should not have been overruled; however, the Wausau court's definition of uninsured motorist coverage in light of the 1981 amendments is obviously wrong. This fact may have influenced the Souras court.

127. The court of appeals has noted that "[o]ne usually gets in this life only what he pays for. Insurance coverage is no exception." C & H Plumbing & Heating, Inc. v. Employers Mut. Cas. Co., 264 Md. 510, 517, 287 A.2d 238, 241-42 (1972) (quoting Old Colony Ins. Co. v. Moskios, 209 Md. 162, 177, 120 A.2d 678, 685 (1956) (Hammond, J., dissenting)). In this regard, the Wausau court noted that the trial court's interpreting underinsured motorist coverage in the Wausau policy to mean uninsured motorist coverage was clearly incorrect sans a specific statutory or policy definition. Any other interpretation of underinsurance would mean that the victim cannot recover part of the underinsurance limit he has bought and paid for, and that portion of the limits also would be illusory. For example, if Wayne Christensen were forced to deduct from the underinsurance limits of $20,000, the $20,000 of liability insurance received from MAIF, his recovery would be nil and the $20,000 of underinsurance that was purchased would be unavailable to him notwithstanding damages which he suffered in excess of $20,000. Christensen v. Wausau Ins. Co., 69 Md. App. 696, 701, 519 A.2d 776, 779 (1987). As a final note, the court stated that if Wausau had been more careful in drafting its policy, the issue could have been avoided. Id.


129. Hoffman v. United Servs. Auto. Ass'n, 309 Md. 167, 179, 522 A.2d 1320, 1326 (1987). Section 541(f) provides that "[p]olicies of insurance that have as their primary purpose to provide coverage in excess of other valid and collectible insurance or qualified self insurance may include uninsured motorist coverage
court of appeals' notion that section 541(f) provides for "excess uninsured" or "underinsured" motorist coverage is somewhat misleading. The use of "underinsured" as a synonym for "excess uninsured," and the failure to differentiate between reduction underinsured motorist coverage and floating underinsured motorist coverage, certainly add to the confusion. Section 541(f) must be read in conjunction with section 541(h)'s prohibition that the higher amounts of uninsured motorist coverage may not "exceed the amounts of the motor vehicle liability coverage provided by the policy." The court's statement, then, is best understood as a recognition that excess liability policies, such as umbrella or catastrophe policies, may provide post-1981 uninsured motorist insurance, which, by definition, includes reduction underinsured motorist coverage. Section 541(h), however, precludes the existence of policies that function solely as "excess uninsured" motorist insurance policies. Therefore, "excess uninsured" coverage can exist only if it is contained in a policy providing comparable liability coverage. This comports with the legislative design to equate uninsured motorist coverage with liability coverage, and to encourage the public to purchase higher amounts of liability and uninsured motorist coverage. Notwithstanding the 1981 and 1983 amendments, a person may not turn his misfortune into a profit. The statute clearly prevents him from recovering on "either a duplicative or supplemental basis."

The 1981 and 1983 amendments modified the underlying purpose of the uninsured motorist statute. Before the introduction of reduction underinsured motorist coverage in Maryland, courts uniformly stated that the purpose of uninsured motorist coverage was to place the insured in the same position as if the uninsured tort feasor maintained the minimum amounts of coverage mandated by the financial responsibility provisions of the Transportation Code.

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as provided in subsection (c) of this section." MD. ANN. CODE art. 48A, § 541(f) (1991). The statute does not require the excess policies to contain uninsured motorist coverage but, if the policy has a step down provision, then it would have to provide the required minimum coverage.


light of the 1981 and 1983 amendments, the uninsured motorist statute is now designed to place the injured insured in the same position as if the tortfeasor maintained liability insurance in amounts equal to the injured insured’s uninsured motorist limits. The financial responsibility provisions are no longer the benchmark; rather, the injured insured’s uninsured motorist limits are the guide. Therefore, it is no longer accurate to state that the uninsured motorist statute is designed solely to protect victims from financially irresponsible uninsured motorists. Under the current statutory definition, a motorist may be financially responsible, yet still, by statutory definition, “uninsured” because he is not as financially responsible as the injured motorist.

Providing compensation to persons injured by financially responsible but inadequately insured motorists reflects the state’s desire to shift the losses associated with uninsured motorists. Reduction underinsured motorist insurance assures a full recovery for innocent victims of motor vehicle accidents. The recovery, however, is from the private sector, not the state, and the state’s purpose of shifting the burden of carrying victims of motor vehicle accidents on the public welfare roles is accomplished by the additional insurance benefits flowing to the injured insured. In this sense, both the insurance buying public and the state are protected. The insurance industry bears the burden, but it is able to spread the risk by adjusting premiums.

V. FROM MANDATORY OFFERING OF HIGHER LIMITS TO MANDATORY HIGHER LIMITS

The shift in design from guaranteeing a recovery to providing an opportunity to receive a full recovery was furthered in 1989 when the legislature placed an affirmative obligation on the insurer to offer

under such coverage have available the full statutory minimum to exactly the same extent as would have been available had the tortfeasor complied with the minimum requirements of the financial responsibility Law.” (quoting Webb v. State Farm Mut. Auto. Ins. Co., 479 S.W.2d 148, 152 (Mo. Ct. App. 1972)).

135. See supra notes 53-54 and accompanying text.
136. It is interesting to note that underinsured motorist coverage is an insurance industry creation. The stacking of uninsured motorist coverage presented an underwriting dilemma to the industry. In response, the Insurance Services Office introduced the concept of underinsured motorist coverage in the 1977 Personal Auto Policy because it hoped to “restrict the effect of the court decisions which allowed the ‘stacking’ of uninsured motorists insurance.” 1 Widdiss, supra note 19, § 3.1. See infra notes 366, 389 and accompanying text.
its insureds in writing the opportunity to contract for the higher uninsured motorist limits. The amended statute became law on July 1, 1989. Before the 1989 amendment, the uninsured motorist statute required only that each insurer make higher limits of uninsured motorist coverage "available" to its insureds. Several weeks before the 1989 amendment became law, the Court of Special Appeals of Maryland ruled in Libby v. Government Employees Insurance Co. that the "shall be available" language in the pre-1989 version of section 541(c)(2) imposed an affirmative obligation on the insurer to notify its insured of the availability of higher uninsured motorist limits in "a manner reasonably calculated to get the information into the hands of [the insured]." According to the court, the affirmative duty is fulfilled when the insurer takes reasonable steps to inform its policy holders that the additional coverage is available.

In affirming the trial court's decision, the Libby court rejected the insured's argument that the court should adopt a four-part test set forth by the Supreme Court of Minnesota, and adopted by other jurisdictions. The Minnesota test required that the insurer

137. Act of May 25, 1989, ch. 542, 1989 Md. Laws 3428, repealed by Act of May 26, 1992, ch. 641, 1992 Md. Laws 3749. The 1989 version provided that "[t]here shall be offered in writing to the insured the opportunity to contract for higher amounts than [$20,000 per person/$40,000 per occurrence] if these amounts do not exceed the amounts of the motor vehicle liability coverage provided by the policy." Id. (emphasis added).


139. The pre-1989 version of section 541(c)(2) stated that "[t]here shall be available to the insured the opportunity to contract for higher amounts than [$20,000/$40,000] if these amounts do not exceed the amounts of the motor vehicle liability coverage provided by the policy." Act of May 19, 1981, ch. 510, 1981 Md. Laws 2122, 2123, repealed by Act of May 25, 1989, ch. 542, 1989 Md. Laws 3428) (emphasis added).


141. Id. at 726-27, 558 A.2d at 1240.

142. Id.

143. The four-part test set forth in Hastings v. United Pacific Insurance Co., 318 N.W.2d 849, 851-53 (Minn. 1982), requires:

   (1) If the offer is made in other than face to face negotiations, the notification process must be commercially reasonable;

   (2) The insurer must specify the limits of its option coverages and not merely offer them in general terms;

   (3) The insurer must intelligibly advise the insured of the nature of the optional coverages; and

   (4) The insured must be advised that optional coverages are available for a relatively modest premium.

144. See generally 2 WIDISS, supra note 19, § 32.4. Minnesota subsequently repealed the mandatory offering statute when it adopted a no-fault scheme. Widiss notes that at the time Minnesota adopted its no-fault scheme, "the Minnesota courts had already considered a fairly substantial body of disputes involving
make an offer in a commercially reasonable manner. Since the pre-1989 version of section 541(c)(2) did not require the insurer to make an offer, the Libby court refused to apply the four-part test or to decide whether the four-part test would be applicable to the amended version of section 541(c)(2).

Underlying the Libby court's "reasonable manner" test is the tenet that the "insured must be given sufficient information to make an intelligent decision about optional coverages." Other states have adopted mandatory offering statutes that "require — either explicitly or implicitly — an insurer to place the purchaser in a position to make an informed rejection of the coverage." Placing the insured in a position to make a knowing decision lies at the foundation of the insurer-insured relationship.

Questions related to the adequacy of the offers made by insurers." He argues that "[a]lthough these requirements are no longer applicable in Minnesota, the doctrines developed in these decisions are certainly relevant to the consideration of these questions in states with similar statutory requirements."  

145. According to the Libby court, none of the other jurisdictions had defined "commercially reasonable." Libby, 79 Md. App. at 726, 558 A.2d at 1240. It is obvious that the Libby court's "reasonable manner" requirement considers insurance industry practice:

Enclosing the M-9 form [the availability notice] as a "stuffer" in the questionnaire package was a reasonable method (a "commercially reasonable" method) of giving notice to the insured of the available opportunity to increase his uninsured motorist coverage. We do not believe that the inclusion of additional "stuffers" advising the insured of the availability of other insurance from GEICO in any way detracted from the reasonableness of the notification.

Id. at 728, 558 A.2d at 1241.

146. The Libby court examined § 541(c)(2) closely. Finding that there was "some subtle but arguably significant difference between the language of the Maryland statute" and uninsured motorist statutes from Minnesota and Tennessee, the court concluded that the "made available" language of Minnesota's statute and the "shall be provided an opportunity" language of Tennessee's statute implied an "obligation to take some affirmative action specifically directed to the insured." Id. at 726, 558 A.2d at 1240. In contrast, Maryland's language had "a somewhat more passive connotation." Id. Also important to the court was the legislative history of section 541(c)(2):

We find it particularly significant that, as originally introduced in the General Assembly during its 1981 legislative session as Senate Bill 17, the proposed act contained language to the effect that the insurer be obligated to offer the coverage. That language was stricken out and the statute, as passed, merely provided that an opportunity to purchase be available.

Id. at 725, 558 A.2d at 1240.

147. 2 WIDISS, supra note 19, § 32.5 n.13.

148. Id. § 32.5; see also 3 LONG, supra note 29, § 24.10 (stating that a waiver of additional coverage can be made only with "knowledge of such a right and an evident purpose to surrender it").

Several guidelines are discernable from the *Libby* court's interpretation of the pre-1989 version of section 541(c)(2). Mailing an availability notice to the insured is a reasonable manner of getting the information to the insured even if the insured receives but does not read the notice. The insurer is not obligated to provide a separate and independent notice of additional uninsured motorist coverage. Rather, it can provide the additional coverage notice along with other notices sent out in its ordinary course of business. The insurer may not, however, intentionally attempt to obscure the information by hiding it among various stuffers. While an oral communication could satisfy the affirmative obligation under the pre-1989 version of section 541(c)(2), the July 1, 1989, amendment precludes oral offerings. Under the 1989 amendments, an insurer cannot refuse to underwrite a person because he desires to contract for higher uninsured motorist limits.

Several issues were left unresolved by the *Libby* court. The court, for example, did not address whether the notice requirement was fulfilled if the insurer mailed availability information that was not received by the insured. The mere mailing, however, would appear to be enough. The court also did not decide whether the insurer had the burden of proving that it fulfilled its affirmative obligation. The holding suggests that the issue of whether the insurer notified the insured in a reasonable manner is almost always a factual one that must be considered on a case-by-case basis. Imposing the burden on the insurer furthers the legislative purpose of protecting the innocent victims of uninsured motorists.

854 (1975) (stating that insured has right to be fully informed of insurer's conflict of interest over the conduct of the defense of a claim against the insured); State Farm Mut. Auto. Ins. Co. v. White, 248 Md. 324, 332, 236 A.2d 269, 273 (1967) (stating that insured has right to be fully informed of the possibility of a verdict in excess of his policy limits).


151. *But see Tucker v. Country Mut. Ins. Co.*, 465 N.E.2d 956, 959 (Ill. App. Ct. 1984). In *Tucker*, the court concluded that the notice provided to the insured was insufficient because it was “obscured” by being part of a letter advising the insured of an increase in her premium. *Id.* at 961. The *Tucker* court then adopted the Minnesota approach. *Id.* at 960-61.

152. Effective July 1, 1989, personal injury protection can be waived by the named insured. Under *MD. ANN. CODE* art. 48A, § 539(g)(1) (1991), “[a]n insurer may not refuse to underwrite a person because the person refuses to waive the [personal injury protection] coverage and benefits described under this section.” If the insurer fails to underwrite a person who refuses to waive personal injury protection, then the insurer is subject to sanctions, including a revocation of its certificate of authority or a fine of between one hundred dollars and fifty thousand dollars. *Id.* § 539(g)(2); see *id.* 48A, §§ 55, 55A (1991 & Supp. 1992).

153. *See 3 LONG, supra* note 29, § 24.11.

The *Libby* court also did not decide whether reformation of the policy is an appropriate remedy.155 The trial court had apparently treated the issue of whether the plaintiff would have purchased the additional insurance as a factual one.156 A problem with this approach is that it requires the insured to prove that he would have purchased the higher insurance limits. This has the effect of replacing the insured’s right to knowingly choose his coverage limits with “the right to have a fact finder later speculate about how the contemplated decision making process would have come out.”157 A better approach would be to hold that the additional uninsured motorist coverage is included as a matter of law when the insurer fails to make an effective offer.158 This approach would follow the general rule; the 1989 changes to personal injury protection suggest that Maryland would follow the general rule and require uninsured motorist limits equal to the policy’s liability limits.159

156. The trial court “expressly found that if Mr. Libby had fully understood his right to obtain the additional coverage he would have paid the extra premium and obtained $500,000/$1,000,000 uninsured motorist coverage.” *Id.* at 720-21, 558 A.2d at 1237. As a practical matter, the insured will have little difficulty offering evidence that he would have purchased the additional uninsured motorist coverage, for in all but the rarest cases the only evidence bearing on the issue will be the insured’s own testimony, and it is doubtful that an insured would testify that he would not have purchased the insurance. A person who is not a party to the contract does not have standing to assert that the purchaser would have purchased the higher limits. *Cf.* Compass Ins. Co. v. Woodard, 489 So. 2d 1157, 1158 (Fla. Dist. Ct. App. 1986) (finding permissive user lacked standing to object to improper procedures surrounding insured's rejection of uninsured motorist limits equal to liability limit).
157. O’Hanlon v. Hartford Accident & Indem. Co., 522 F. Supp. 332, 336 (D. Del. 1981), aff’d, 681 F.2d 807 (3d Cir. 1982); see also Arms v. State Farm Mut. Auto. Ins. Co., 465 A.2d 360, 363 (Del. Super. Ct. 1983) (adopting the O’Hanlon approach, and “declin[ing] to entertain any inquiry into [the insured’s] probable choice had the required offer been tendered.”). The insurer’s failure to comply with the mandatory offering provision “will keep the offer of additional coverage alive, to be elected by the insured at any time, including after the accident.” Arms, 465 A.2d at 361 (citing O’Hanlon); accord United Servs. Auto. Ass’n v. Hovanec, No. 90-1377 (Md. Ct. Spec. App. May 17, 1991) (per curiam) (unreported). In Hovanec, the court ruled that reformation was not appropriate because of a lack of mutual mistake, fraud or duress. *Id.* slip op. at 10-11. The court did rule that the insured had the right to “purchase retroactively the additional UM coverage.” *Id.* slip op. at 11. Because Hovanec is unreported, however, it serves neither as precedent nor as persuasive authority. See Md. R. 8-114(a).
158. 2 Widiss, *supra* note 19, § 32.5; see 3 Long, *supra* note 29, § 24.11 (“[W]here the insurer fails to offer such coverage, additional coverage may be written into the policy in amounts equal to the policy’s liability limits.”).
In the *Libby* case, since the named insured failed to exercise his right to purchase higher uninsured motorist coverage, the court did not have to consider who has the power to reject the additional coverage. In general, the rejection must be made by the named insured and is then binding on his resident relatives and other users of the insured vehicle.\textsuperscript{160} Good practice suggests that the insured be required to reject the additional coverage in writing,\textsuperscript{161} thus providing the insurer with a verifiable record of the offer and rejection, and precluding the insured from later asserting that the rejection was not made knowingly.\textsuperscript{162}

The insurer is obligated to offer the additional coverage when the purchaser applies for the insurance. A broad reading of *Libby* suggests that the insurer is also required to reiterate the offer with each renewal package.\textsuperscript{163} In addition, material changes in the existing coverage during a policy period may also obligate the insurer to renew the offer of additional coverage.\textsuperscript{164} Subsequent offers of additional coverage must be made in a manner consistent with the original offer, fully informing the insured of his options. Only then is his decision to accept or reject the additional coverage voluntary and informed.

\textsuperscript{160} See generally 3 LONG, supra note 29, § 24.10. But cf. Md. AN. CODE art. 48A, § 539(f)(1)(iii) (1991) (making waiver of personal injury protection binding on named insureds, all listed drivers, and "all members of the first named insured's family residing in the first named insured's household who are 16 years of age or older").


\textsuperscript{162} Even if the insured rejected the additional coverage, that rejection would be effective only if made knowingly, a standard for which the insurer generally bears the burden of proof. 2 WIDISS, supra note 19, § 32.5; see also 3 LONG, supra note 29, § 24.10 ("Clearly, the burden of proving that a knowing rejection was made, rests on the insurer, with the validity of the rejection being a question of fact."); cf. Md. AN. CODE art. 48A, § 539 (1991) (stating that rejection of personal injury protection must be affirmative and based on the insured's being fully informed of the nature, extent, cost of personal injury protection, as well as the consequences of his waiver).

\textsuperscript{163} At the very least, the *Libby* court implicitly recognized that, even if the statute does not require reiterating the offer with each renewal, it would constitute good insurance practice to do so. As the facts in *Libby* demonstrate, GEICO's practice of mailing the M-9 form as part of the renewal package was its saving grace. See *Libby* v. Government Employers Ins. Co., 79 Md. App. 717, 727, 558 A.2d 1236, 1241 (1989) (affirming trial court's finding that GEICO corrected any error it may have made when Libby purchased the insurance by later including the M-9 availability form in the renewal package).

\textsuperscript{164} See 3 LONG, supra note 29, § 24.11.
In 1992, the General Assembly of Maryland answered many of the questions left unresolved by Libby when it enacted Senate Bill 767 as chapter 641 of the laws of that year. Chapter 641 is the logical extension of mandatory offering of higher amounts of uninsured motorist coverage. Effective October 1, 1992, the uninsured motorist statute requires that, with respect to private passenger motor vehicles, the uninsured motorist coverage limits must be identical to the liability insurance limits unless the insured affirmatively waives the higher coverage in writing. An insurer may not refuse, however,

166. The following language was added to the statute:

(g) (1) Unless waived by the first named insured under this subsection, the amount of uninsured motorist coverage under a policy of private passenger motor vehicle insurance shall be equal to the amount of liability coverage provided under the policy.

(2) Where the liability insurance coverage under a policy or binder of private passenger motor vehicle insurance is in excess of that required under § 17-103 of the Transportation Article, if the first named insured does not wish to obtain uninsured motorist benefits in the same amount as the liability insurance coverage, the first named insured shall make an affirmative written waiver of having uninsured motorist benefits in the same amount as the liability coverage.

(3) (i) Before a first named insured makes a waiver under this subsection, the first named insured must be informed in writing of the nature, extent, benefit, and cost of the level of the uninsured motorist coverage being waived.

(ii) A waiver made under this subsection shall be made on a form required by the Commissioner.

(iii) The form may be part of the contract of insurance.

(iv) The form shall clearly and concisely explain in 10 point boldface type:

1. The nature, extent, benefit, and cost of the level of the uninsured motorist coverage that would be provided under the policy if not waived by the first named insured;

2. That a failure of the first named insured to make a waiver requires an insurer to provide uninsured motorist coverage in an amount equal to the amount of the liability coverage, where the liability insurance coverage under a policy or binder of private passenger motor vehicle insurance is in excess of that required under § 17-107 of the Transportation Article;

3. That an insurer may not refuse to underwrite a person because the person refuses to make a waiver of the excess uninsured motorist coverage under this subsection; and

4. That a waiver under this subsection must be an affirmative, written waiver.

(4) Failure of the first named insured to make an affirmative written waiver under this subsection requires an insurer to provide uninsured motorist coverage in an amount equal to the amount of the liability coverage, where the liability insurance coverage under a policy or binder of private passenger motor vehicle insurance is in
to underwrite a person because he elects not to purchase the reduced coverage.\textsuperscript{167}

Requiring the insured to elect reduced coverage is more palatable than requiring the insured to elect higher coverage. The result of the insured's inaction is more protection. This "default setting" recognizes the realities of life and coincides with the legislative aim of uninsured motorist insurance of providing a full recovery.

VI. VALID AND COLLECTIBLE

An issue not yet decided by the Maryland courts is whether Maryland's uninsured motorist statute allows an insured to recover uninsured motorist benefits when the tortfeasor has liability limits that equal the injured insured's uninsured motorist limits, but the insured collects less than the tortfeasor's liability limits because there are multiple claimants. An anomalous situation occurs if recovery is denied — the claimants would have been in a better position had the tortfeasor been truly uninsured.\textsuperscript{168} Jurisdictions that have consid-

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\textsuperscript{168} See Porter v. Empire Fire & Marine Ins. Co., 475 P.2d 258, 263 (Ariz.), modified on other grounds, 476 P.2d 155 (Ariz. 1970). See, however, Gorton v. Reliance Insurance Co., 391 A.2d 1219 (N.J. 1978), where the Supreme Court of New Jersey rejected this very argument: "We acknowledge the oft-cited anomaly that those in the position of these claimants would find themselves in a better position were the tortfeasor's vehicle totally uninsured rather than underinsured. However, the objective of the legislature as we perceive it was to protect the public from a noninsured, financially irresponsible motorist, not one who is insufficiently insured. The protection intended is against
ered the issue are divided. In Maryland, the dispute appears to hinge on the interpretation of the terms "valid and collectible" in section 541(c)(1) and "applicable" in section 541(c)(3). Most likely, the General Assembly did not consider the issue when it added those sections in 1981.

The court of appeals recently skirted the "amounts received" issue in two cases involving issues similar to this situation, but in which the plaintiffs maintained uninsured motorist coverage greater than the liability insurance maintained by the tortfeasors. In Waters v. United States Fidelity & Guaranty Co., John Waters was injured while a passenger in a vehicle operated by Edward Schreier and insured by Continental Insurance Company. The Schreier vehicle crossed the center line and struck a vehicle operated by Shirley Dunham, who was also seriously injured. The Continental policy had a single combined liability limit of $100,000, which Waters and Dunham divided. Dunham received $97,000 and Waters received $3,000. Waters then made an uninsured motorist claim against his

an "uninsured" motorist, not one who is "under insured." The legislature required that a minimum level of coverage be available for each accident when more than one person was injured. It did not undertake to guarantee an irreducible minimum sum available to every injured person under every set of circumstance but simply to make available a policy offering minimum levels of coverage.

Id. at 1223-24 (citation omitted). Unlike Maryland's statute, the New Jersey statute at the time did not incorporate uninsured motorist coverage. See Md. Ann. Code art. 48A, § 541(c)(1) (1991 & Supp. 1992). The entire purpose of uninsured motorist insurance is to provide the insured with the opportunity for a full recovery.


170. Section 541(c)(1) defines "uninsured motor vehicle" as a motor vehicle whose ownership, maintenance, or use has resulted in the bodily injury or death of an insured, and for which the sum of the limits of liability under all valid and collectible liability insurance policies, bonds, and securities applicable to the bodily injury or death is less than the amount of coverage provided to the insured under this subsection.


171. Section 541(c)(3) provides that the insurer's liability is "the amount of [its uninsured motorist] coverage less the sum of the limits under the liability insurance policies, bonds, and securities applicable to the bodily injury or death of the insured." Id. § 541(c)(3) (1991 & Supp. 1992).

172. See 1 Widiss, supra note 19, § 8.22 (noting that "most of the statutes were based on a legislative 'model' that did not specifically contemplate this coverage issue").

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insurer, United States Fidelity & Guaranty Company (USF&G), which provided $100,000/$300,000 uninsured motorist coverage. The trial court ruled that the Schreier vehicle was not uninsured, and Waters appealed. The court of special appeals affirmed in an unreported decision, holding that

it is only when the tortfeasor's limit of liability is less than the limit of liability provided to the insured under his uninsured motorist provision that the automobile is considered to be uninsured. The "limit of liability" is found on the declaration page of the insurance policy; it is not calculated by factoring in settlement agreements with other injured claimants.174

Upon grant of certiorari, the court of appeals examined the language and legislative history of Maryland Code Annotated, article 48A, section 541(c) and its 1981 amendment, and concluded that a "tortfeasor is an uninsured motorist . . . whenever the amount of uninsured motorist coverage purchased by the insured exceeds the amount of liability insurance carried by the tortfeasor."175 Reversing the court of special appeals, the court of appeals concluded that, because two persons were injured in the accident, the per accident limitation — Schreier carried $100,000 per accident coverage while Waters carried $300,000 per accident coverage — was critical in permitting Waters to "proceed against his uninsured motorist carrier . . . for the remainder of his damages, up to the per person limit of $100,000."176

The court of appeals followed this same reasoning in Erie Insurance Co. v. Thompson.177 There, Leslie Thompson was injured in an accident while a passenger in a vehicle operated by Sam Lee. Lee was also injured. Two other passengers, Alma Lee and Graham Lee, died as a result of injuries they received. The accident was caused by the negligence of Bernard Walker, the operator of another vehicle, who was insured by MAIF under a policy that provided liability coverage of $20,000 per person and $40,000 per occurrence. Ohio Casualty Company insured Sam Lee under a policy that contained a single combined motorist limit of $100,000. Erie Insurance Company insured Thompson under a policy with coverage limits of $100,000 per person and $300,000 per accident. Thompson, Sam Lee, the Estate of Alma Lee, and the Estate of Graham Lee made claims

175. Waters, 328 Md. at 713, 616 A.2d at 891.
176. Id. at 714-15, 616 A.2d at 891.
against Walker, and MAIF paid $10,000 to each claimant. The four
claimants then sought uninsured motorist coverage from Ohio Casualty, which paid $30,000 to Thompson and the same amount to
Sam Lee, thus exhausting its limits. Thompson then turned to Erie, contending that since she had received $40,000 ($10,000 from MAIF
and $30,000 from Ohio Casualty), she should be entitled to $60,000
of coverage from Erie. The trial court ruled in favor of Erie, and
Thompson appealed to an en banc panel of circuit court judges. The
panel reversed, and during the pendency of an appeal to the court
of special appeals, the court of appeals issued a writ of certiorari.178

Finding the principle set forth in Waters to be controlling, the
court of appeals affirmed the decision of the en banc panel. The
court noted that, as in Waters, “the per accident limits of the other
policies applicable to the plaintiff Thompson were less than the per
accident limit of the plaintiff’s uninsured motorist coverage.”179
Because the amount available to the plaintiff under the other applicable policies was less than the amount available under her Erie
uninsured motorist coverage, the court found the plaintiff “entitled
to recover from Erie the difference, as long as her total recovery
[did] not exceed her damages or the $100,000 limit.”180

As noted, both Waters and Thompson avoided the more difficult
issue of whether a vehicle is uninsured when its liability limits are
identical to the claimant’s uninsured motorist limits but the claimant
receives less than his uninsured motorist limits because of the presence
of other claimants. As an example, consider the situation in which
the tortfeasor has a $20,000/$40,000 policy and injures four persons.
The four claimants divide the $40,000 four ways, each receiving
$10,000. One of the claimants has an uninsured motorist policy that
provides $20,000/$40,000 coverage. That claimant demands $10,000
from his or her uninsured motorist insurer, arguing that since he or
she received only $10,000 from the tortfeasor, the tortfeasor’s vehicle
is uninsured. The uninsured motorist insurer counters by arguing that
the tortfeasor’s vehicle is not uninsured because the liability limits
equal the claimant’s uninsured motorist limits. Based upon the opinions in Waters and Thompson, it is difficult to predict how the
court of appeals will rule on this issue. The opinions contain language
supportive of both sides of the issue. For instance, upon review of
the history of uninsured motorist coverage in Maryland, the Waters
court stated the applicable limits-to-limits test four different times.
First, the court stated:

178. Id. at 533, 625 A.2d at 323.
179. Id. at 537, 625 A.2d at 325.
180. Id. at 538, 625 A.2d at 325.
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By Ch. 510 of the Acts of 1981, the General Assembly amended § 541(c) and, inter alia, defined an uninsured motor vehicle. The concept of "uninsured" was broadened to include any vehicle insured with liability limits in an amount "less than the amount of coverage provided to the insured under this subsection."181

Later in the opinion, the court reaffirmed the test: "The [1981] amendments allow an insured to purchase a higher amount of uninsured motorist insurance which will become available when the insured's uninsured motorist coverage, as well as his damages, exceed the liability coverage of the tortfeasor."182 Still later, the court stated: "Consequently, a tortfeasor is an uninsured motorist, as defined by § 541(c), whenever the amount of uninsured motorist coverage purchased by the insured exceeds the amount of liability insurance carried by the tortfeasor."183 Finally, the court summed up its review of the uninsured motorist statute as follows: "Under this scheme, a court must compare the amount of liability insurance carried by the tortfeasor with the amount of uninsured motorist coverage carried by the injured party."184 Since, however, the Waters court was able to find coverage by comparing a single combined limit to the per occurrence split limit, the repeated references to the limits-to-limits test may be treated by future courts as mere dicta. In addition, the opinions in Waters and Thompson, particularly the latter, focus acutely on the concept of "available coverage," leading to the inference that when a per occurrence liability limit is divided among several claimants, the "available" limit is what was actually received, not that which was theoretically available.185

181. Waters, 328 Md. at 711, 616 A.2d at 889.
182. Id. at 712, 616 A.2d at 889.
183. Id. at 713, 616 A.2d at 890.
184. Id. at 714, 616 A.2d at 890.
185. The Waters court's view that the type of uninsured motorist coverage mandated by § 541(c) is "gap" coverage certainly suggests this conclusion, see id. at 712 n.5, 616 A.2d at 891 n.5, as does the manner in which it determined that only $3,000 was "available" to Waters, see id. at 715 n.6, 720, 616 A.2d at 891 n.6, 893. The entire opinion in Thompson can be read as sanctioning an amounts-received-to-limits approach in order to effectuate the legislative goal of the uninsured motorist statute. See Erie Ins. Co. v. Thompson, 330 Md. 530, 538, 625 A.2d 322, 325 ("Because what was available under the applicable policies, however, was less than what was available under her Erie uninsured motorist coverage, the plaintiff under Art. 48A, § 541(c)(3), is entitled to recover from Erie the difference, as long as her total recoveries do not exceed her damages or the $100,000.00 per person limit.").
Notwithstanding this inference, the remedial nature of the Maryland uninsured motorist statute arguably supports recovery when the amounts received by the insured are less than his uninsured motorist coverage. To the contrary, however, the language of section 541(c)(1), when read in conjunction with section 541(c)(3), suggests that "collectible" refers to liability insurance that the insured was entitled to collect — not what he actually collected. Both sections refer to the "sum of the limits" of the liability insurance. The legislative history of the 1981 amendments to section 541(c) also offers some support for the view that the method of determining an uninsured motor vehicle is to compare "liability limits" to "uninsured motorist limits," as opposed to comparing the "amount collected" to "uninsured motorist limits."

186. See supra note 54 and accompanying text.
187. See supra notes 170-71.
188. In 1981, the Maryland legislature amended section 541(c) by broadening the definition of uninsured motor vehicle to include an underinsured motor vehicle, thus making section 541(c) function as both uninsured and underinsured motorist coverage. See supra notes 103-05. These changes were proposed in Senate Bill 17. The purpose of the amendments to section 541(c) were discussed in an undated report by the Staff of Senate Committee on Economic Affairs:

When an uninsured motor vehicle is involved in an automobile accident causing injury, the injuries shall be compensated by the insurance company which insures the person injured, to the limits of the UM coverage. . . . Although some companies offer limits in excess of the mandated 20/40 coverage, Senate Bill 17 mandates that all companies offer higher limits than 20/40, e.g. 100/300.

As it stands now, if you sued a person who has insurance in the minimal limits of 20/40 and obtained a judgment for say $50,000.00, you would collect $20,000.00 from the guilty party and have no source to satisfy the balance of your judgment, i.e. $30,000.00.

S.B. 17 will do this. The $30,000.00 will be paid from the injured party's own UM coverage (if the injured party has UM in excess of the guilty party's liability coverage). So that if the guilty party had 20/40 and the injured party had UM coverage of 20/40 the injured party obviously would have no source from which to collect the excess verdict in the case mentioned above.

As it is now, under present law, if the guilty party has liability insurance, he can never be considered an uninsured motorist and the UM coverage of the injured party can never come into play.

S.B. 17 will change this and make available the UM coverage of the injured party for the judgment in excess of the guilty party's liability coverage.

A case in Florida has already held this. If S.B. 17 is passed the injured party in Maryland who finds himself in this situation will not have to sue his UM carrier. The legislature will have anticipated such a law suit and the UM carrier must pay the difference.

Committee Report on Senate Bill 17 (1981) (microfilmed on Department of Legislative Reference's microfilm file, S.B. 17 (1981)) (emphasis added). It is not certain which Florida case served as the catalyst or model. Most likely it was Williams v. Hartford Accident & Indemnity Co., 382 So. 2d 1216 (Fla.
Additionally, an insured's ability to purchase higher uninsured motorist limits weighs against allowing recovery when the tortfeasor's liability limits equal the uninsured motorist limits, but the injured insured has collected less than the liability limits because of other claimants. Nowhere in the public policy of Maryland is recovery of a certain amount guaranteed. Rather, each insured is given the opportunity for a full recovery. By exercising his right to purchase higher limits, the insured assures himself of a recovery. Since the insured cannot purchase uninsured motorist limits that exceed his liability limits, the legislative aim of protecting the public is fulfilled when the insured purchases the higher limits.

Still, the remedial nature of the uninsured motorist statute is a strong factor, and "valid and collectible" in section 541(c)(1) and "applicable" in section 541(c)(3) are susceptible to different read-

189. See supra notes 133-36.
ings.\textsuperscript{193} On other occasions, the Court of Appeals of Maryland has ignored statutory language in order to effectuate public policy.\textsuperscript{194} If the concept of a full recovery is to be fulfilled, then a claimant should be able to seek uninsured motorist benefits when he receives an amount from the tortfeasor's liability insurance that is less than the uninsured limit he purchased. His reasonable expectations demand this result,\textsuperscript{195} and the state's desire to shift the loss to the private sector would be frustrated if another result were reached. When faced with this situation, several states have enacted provisions that define an uninsured (or underinsured) motor vehicle as one whose liability limit has been reduced by payments to multiple claimants to an amount less than the insured's uninsured (or underinsured) limit.\textsuperscript{196} If Maryland's uninsured motorist statute is eventually interpreted as precluding recovery when the liability limits have been exhausted by payment to multiple claimants, the General Assembly should not hesitate to join these states in redefining the concept of an uninsured motor vehicle. Another alternative is for the legislature to abandon the concept of reduction underinsured motorist coverage and adopt floating underinsured motorist coverage, which provides the insured with a certain sum regardless of the amount of liability insurance available to the insured.\textsuperscript{197} Floating underinsured motorist coverage is the next logical step in the movement toward guaranteeing a full recovery, and the public responsibility theory underlying Maryland's comprehensive insurance scheme demands such progression.

VII. PUNITIVE DAMAGES

The "entitled to recover" language of the uninsured motorist statute unquestionably obligates the insurer to indemnify the injured

\textsuperscript{193} But cf. American Motorists Ins. Co. v. Gould, 569 A.2d 1105, 1110 (Conn. 1990) (holding that "in ordinary parlance an insurance policy would be 'applicable' if it covered any portion of a tortfeasor's liability rather than all of it," and adding that the policies in question "did not become inapplicable simply because the sum of their liability limits was less than was necessary to satisfy all of the claims arising out of the accident").

\textsuperscript{194} See Tucker v. Fireman's Fund Ins. Co., 308 Md. 69, 80, 517 A.2d 730, 735 (1986) (holding that allowing a person sitting on a stool in a parking lot attendant's booth to recover personal injury protection benefits as a "pedestrian" is consistent with the real intention of the personal injury protection statute, "even though arguably contrary to the literal meaning of the word").

\textsuperscript{195} See 1 Widiss, supra note 19, § 8.22, at 406 ("An insured could reasonably anticipate that the uninsured motorist coverage, which is a first-party insurance, would apply in the event that injuries were caused by a negligent third party and either no indemnification or inadequate indemnification was provided by the tortfeasor's insurance.").


\textsuperscript{197} See supra notes 119-20 and accompanying text.
insured for compensatory damages he is entitled to recover from the tortfeasor. Maryland courts have not decided, however, whether an uninsured motorist carrier's liability encompasses punitive damages from the uninsured tortfeasor. The statute does not expressly permit or prohibit the exclusion of punitive damages. An insured is "entitled" to recover punitive damages from the tortfeasor if the tortfeasor demonstrated actual malice. Whether the insurer's indemnification duty extends to the punitive damages is another matter, and persuasive arguments exist on both sides. Other jurisdictions are split, and the issue is complex.

Without doubt, several conceptual problems emerge if an insured can recover punitive damages as part of his claim against the uninsured motorist carrier. In considering punitive damages, for instance, a jury is entitled to weigh the tortfeasor's financial ability to pay, but this traditional measure is absent because the typical uninsured is financially irresponsible. This is, perhaps, merely an evidentiary problem. If carried to its extreme, however, a conceptually more difficult matter arises; theoretically, an insured may be able to show that he is entitled to recover punitive damages based on the actions of the driver of a phantom vehicle. Awarding the insured punitive damages in such an instance is, at best, speculative. Still, such difficulties do not warrant the exclusion of punitive damages. The


exclusion, if it exists, must be found in the purpose of the uninsured motorist statute.

Indeed, the ultimate resolution of the punitive damages issue may depend on what the court of special appeals has called "the elusive creature known as 'legislative intent.'"204 The primary source of legislative intent is the language of the statute,202 but the language of the uninsured motorist statute is hardly conclusive. "'Damages' seemingly encompasses all damages.206 The phrase 'because of bodily injury' is arguably more restrictive, and other courts have construed it as covering only compensatory damages. In Braley v. Berkshire Mutual Insurance Co.,207 for instance, the Supreme Court of Maine held that the phrase excluded coverage for punitive damages, reasoning that punitive damages are not awarded as compensation because of bodily injury even though proof of some injury is generally a prerequisite for an award of punitive damages.208 According to the court, punitive damages were awarded "'for the protection of society and societal order' . . . and to deter similar misconduct by the defendant and others.'"209

The Braley court's reasoning is consistent with Maryland's view of punitive damages.210 If "'because of'" means "'as a result of,'" then

205. See, e.g., Insurance Comm'r v. Property & Cas. Ins. Guar. Corp., 313 Md. 458, 463, 546 A.2d 458, 463 (1988) (citing Kaczorowski v. City of Baltimore, 309 Md. 505, 525 A.2d 628 (1987)). A court, however, is "'not limited to the words of the statute but may consider other external manifestations or persuasive evidence, including related statutes, pertinent legislative history and other material, that fairly bears on the fundamental issue of legislative purpose or goal.'" Id.
206. The court of appeals has noted that "'[u]nfortunately terms like 'injury,' 'actual injury,' 'damage' and 'harm' are used in different decisions, and often within the same decision, to represent different concepts.'" Hearst Corp. v. Hughes, 297 Md. 112, 118, 466 A.2d 486, 489 (1983).
207. 440 A.2d 359 (Me. 1982).
208. Id. at 361. Maine's uninsured motorist statute required insurers to cover "'damages for bodily injury.'" The policy in question covered "'damages . . . because of bodily injury.'" The court did not discuss whether there was any difference between the statute's use of for and the policy's use of because, but the former seems more restrictive than the latter.
209. Id. at 361 (quoting Kaklegian v. Zakarian, 123 A. 900 (Me. 1924)).
210. The court of special appeals has explained that:

Punitive damages are inherently different from compensatory damages and the reasons for the award of each differ sharply. The award of compensatory damages is an attempt to make the plaintiff whole again by monetary compensation. In contrast, the award of punitive damages does not attempt to compensate the plaintiff for harm suffered by him but rather is exemplary in nature and is over and above any award of compensatory damages. The fundamental purpose of a punitive damage award is to punish the wrongdoer for misconduct.
punitive damages result, not from the bodily injuries, but from the conduct of the tortfeasor. Nevertheless, the exclusion of punitive damages under Maryland's uninsured motorist statute is not a fait accompli. At best, the phrase "damages ... because of bodily injury" is susceptible to more than one interpretation, and there is some indication that Maryland courts would construe it to cover punitive damages. Reading the uninsured motorist statute as a whole suggests that punitive damages are covered. The act allows recovery even if the tortfeasor acted intentionally. Also, the absence

and to deter future egregious conduct by others.

Exxon Corp. v. Yarema, 69 Md. App. 125, 137, 516 A.2d 990, 997 (1986). Furthermore, "punitive damages may not be awarded absent compensatory damages." Id. at 138, 516 A.2d at 997.

211. In his dissent in Mullins v. Miller, Justice Drowota wrote:

It would appear that the language of the [Tennessee] statute, "damages . . . because of bodily injury, sickness or disease, including death, resulting therefrom," more properly describes compensatory than punitive damages since "because of" means "by reason of" or "on account of." Punitive damages are not strictly speaking damages awarded "because of bodily injury" but because of intentional, willful or grossly negligent acts of the tortfeasor.

Mullins v. Miller, 683 S.W.2d 669, 673 (Tenn. 1984) (Drowota, J., dissenting).

212. In First National Bank of St. Mary's v. Fidelity & Deposit Co., 283 Md. 228, 232, 389 A.2d 359, 362 (1978), the court cited with favor Southern Farm Bureau Casualty Insurance v. Daniel, 440 S.W.2d 582 (Ark. 1969). In Daniel, the court stated:

When we consider that under our law, one cannot become legally obligated to pay punitive damages unless actual damages have been sustained and assessed, we find that punitive damages constitute a sum which the insured becomes legally obligated to pay as damages because of bodily injuries sustained.

Daniel, 440 S.W.2d at 584 (citing Carroway v. Johnson, 139 S.E.2d 908 (S.C. 1965)).

213. The definition of "accident" under Md. ANN. CODE art. 48A, § 538(a) (1991), indicates that the uninsured motorist statute requires coverage for injuries received by an insured as a result of an assault and battery arising out of the use, operation or maintenance of an automobile: an accident "means any occurrence involving a motor vehicle, other than an occurrence caused intentionally by or at the direction of the insured, from which damage to any property or injury to any person results." Id. Clearly, when an insured is assaulted, and a motor vehicle is used as the instrument of the assault, the insured's injuries are covered. A non-vehicular assault is another matter, however, one wherein the insured must show a close connection between the uninsured vehicle and the intentional tort. See Elliot v. Jamestown Mut. Ins. Co., 27 Md. App. 566, 342 A.2d 319 (1975). The majority of cases involving intentional injuries are outside coverage because the injuries do not arise out of the use of the motor vehicle. But cf. Frazier v. Unsatisfied Claim & Judgment Bd., 262 Md. 115, 277 A.2d 57 (1971) (finding that injuries sustained by mother and child when unidentified person in another automobile threw a firecracker into their car arose in the "ownership, operation or use" of unidentified motor vehicle).
of a clear statutory exclusion should not be ignored. If the legislature had wanted to exclude punitive damages, it could have expressly done so.

The structure of Maryland's comprehensive insurance scheme manifests a clear legislative intent that all damages that can legally be recovered under a liability policy should also be recoverable under an uninsured motorist policy. Most automobile liability policies do not exclude coverage for punitive damages. An anomalous situation arises when the liability portion covers punitive damages, but the uninsured motorist portion does not. The insured would have been better off had he been injured by an insured motorist. The opposite

214. In St. Mary's, the court noted that "when the General Assembly has desired to forbid protection by insurance from the equivalent of exemplary damages, it has done so explicitly." 283 Md. at 239, 389 A.2d at 365. But see Laird v. Nationwide Ins. Co., 134 S.E.2d 206 (S.C. 1964), wherein the Supreme Court of South Carolina held that the intent of the South Carolina uninsured motorist statute was to cover only compensatory damages:

There is no provision in the Uninsured Motorist Statutes which, either expressly or by implication, requires that the uninsured motorist endorsement must insure against any and all liability. There is nothing said or implied that the insurer would be liable for punitive or exemplary damages. If such damages had been in contemplation of the Legislature, it could have easily provided therefor in said statutes. Id. at 210. The South Carolina legislature later amended the uninsured motorist statute to require coverage for punitive damages. See S.C. CODE ANN. § 38-77-30(4) (Law. Co-op. 1976) (defining damages to include both actual and punitive damages).

215. See MD. CODE ANN., CTS. & JUD. PROC. § 5-399.2(a)(1) (Supp. 1992) (providing specifically that immunity of State not waived with regard to punitive damages); see also MD. CODE ANN., STATE GOV'T § 12-104(b) (1989 & Supp. 1992) (same).


217. Liability coverage for punitive damages is not addressed by either the financial responsibility provisions or the motor vehicle casualty insurance provisions. The Insurance Services Office does not produce any specific form excluding punitive damages from the liability portion of the policy, thus leaving the decision to each insurer. See Letter, supra note 39.

218. As the Supreme Court of Tennessee explained:

It seems illogical to us, for example, that an insured motorist could recover $10,000 in compensatory damages and $40,000 in punitive damages if he were struck by an insured drunken driver with $50,000 limits, but that he could only recover $10,000 if he were struck by an uninsured drunken driver, even though the insured's own policy provides limits of $50,000 for damages caused by an uninsured mo-
is true if uninsured motorist coverage covers punitive damages, but liability coverage does not. Logic and the reasonable expectations of the insured dictate a consistency between the two coverages, and public policy suggests punitive damages should be covered under both liability and uninsured motorist coverages.

Many of the courts that have rejected the availability of punitive damages in uninsured motorist coverage have relied on public policy considerations. The *Braley* court, for instance, justified its decision by reasoning that not only was the purpose of the uninsured motorist statute to compensate, but also that the purposes of punitive damages (to punish the wrongdoer and to deter others) were not accomplished if recovery does not come from the wrongdoer. Other courts have expressed similar reasoning. Most of these jurisdictions also prohibit coverage of punitive damages under a liability policy on similar grounds. Maryland, however, has rejected the "lack-of-deterrence" reasoning in regard to whether punitive damages are covered by a liability policy. In *First National Bank of St. Mary's v. Fidelity & Deposit Co.*, the court of appeals considered whether a comprehensive liability policy issued to a bank covered punitive damages. The policy provided coverage for all damages "because of injury."
In holding that insurance coverage for punitive damages was not against public policy, the court concluded that even though an insurer may ultimately be responsible for paying the punitive damages, the punitive damages award still retained its deterrent function because the insured would pay higher premiums and would have difficulty obtaining insurance.225

There are, admittedly, substantial underwriting differences between liability coverage and uninsured motorist coverage. Some commentators argue that the deterrent effect of higher premiums on the tortfeasor is not present in the uninsured motorist context because the victim, not the tortfeasor, ultimately bears the cost of the higher premiums.226 It is true that charging higher uninsured motorist premiums to cover the risk of punitive damages does not deter uninsured tortfeasors, and, essentially, punishes the insurance buying public as a whole.227 It is equally true, however, that the uninsured motorist held that the policy covered punitive damages. The court stated as follows:

[I]nsurance companies have not shown a reluctance in the past to write into their policies such restrictions as they deem to be in their best interest, yet no restriction relative to the issue at bar appears in the policy issued by [the insurer.] Surely . . . these companies have been cognizant of the fact that they might be called upon to pay an award [of punitive damages] such as that at issue in this case. As a consequence, they probably have considered such a possibility in establishing rates.

Id. at 242-43, 389 A.2d at 367. Even if punitive damages could be excluded from coverage, see supra note 215, St. Mary's suggests that punitive damages must be specifically excluded. See supra note 223.

225. According to the court, [i]t cannot properly be said that permitting payment of exemplary damages by an insurance company eliminates deterrence, notwithstanding the fact the loss is thus spread across a number of policy holders through the payment of premiums. This is so because those who are demonstrated by experience to be poor risks encounter substantial difficulty in obtaining insurance, a fact such persons know. St. Mary's, 283 Md. at 242, 389 A.2d at 366.

226. See, e.g., David Leitner, Punitive Damages and First Party Automobile Liability Insurance Coverages, 54 DEF. COUNS. J. 112, 119 (1987). Leitner argues that the insurer's underwriting function is totally absent from the uninsured motorist situation because the insurer cannot, by reference to the uninsured motorist, decide the risk of loss. In the liability context, the insurer is able to judge the risk of the insured's exposure to punitive damages by reference to the insured and can underwrite the policy accordingly. The uninsured motorist, in contrast, is clearly beyond the reach of the insurer's underwriting function. Neither the insured nor the insurer control his actions, and the insurer cannot project the risk of loss and assess higher premiums in the same manner that it would under a liability policy. The insurer, therefore, must spread the risk of loss by raising uninsured motorist premiums.

227. Leitner, supra note 226, at 119.
Several courts have suggested that the deterrent effect from the insurer's pursuing its subrogation rights against the uninsured tortfeasor is negligible because the subrogation claim is more theoretical than real. Such criticism is unfounded, for the insurer's ability to recover via subrogation is more real than what might be expected. If anything, the presence of punitive damages increases the insurer's ability to recover because the grossly negligent uninsured motorist will not be able to extinguish the judgment through bankruptcy. He is, therefore, not as collection proof as might be imagined. Furthermore, every judgment against an uninsured motorist in Maryland has some deterrent effect. Finally, the stigma attached to

228. E.g., Hutchinson v. J. C. Penny Cas. Ins. Co., 478 N.E.2d 1000 (Ohio 1985). The subrogation right certainly has more potential to achieve the desired deterrence than raising the tortfeasor's premiums in the context of a liability policy. After all, the uninsured motorist will be saddled with the judgment, which will be significantly more than a relatively small premium hike. In his dissent in St. Mary's, Judge Levine wrote:

It is probably true that poor risks will be required to pay higher premiums to acquire the desired coverage and that this ostensibly will have a slight deterrent effect. But the impact of a hike in insurance premiums payable over the course of several months and probably deductible for income tax purposes, plainly will be far less than that caused by a lump sum judgment for which the defendant is solely responsible. It is precisely the threat of sudden and severe economic loss which lends credibility to the deterrence theory of punitive damages.

St. Mary's, 283 Md. at 249, 389 A.2d at 370 (Levine, J., dissenting).


230. In a 1955 letter to insurance companies, the New York Superintendent of Insurance indicated that the New York Department of Motor Vehicles had estimated that "33 1/3 percent recovery could be had from culpable uninsured motorists." Calvin M. George, Answering Inquires Caused by Uninsured Motorist, 1956 INS. L.J. 715, 718. Other courts indicate that insurance companies overrate the value of subrogation. See, e.g., Sahloff v. Western Cas. & Sur. Co., 171 N.W.2d 914 (Wis. 1969).

231. See 11 U.S.C. § 523(a)(6) (1988) (providing that an individual debtor is not discharged from any debt "for willful and malicious injury by the debtor to another entity or to the property of another entity"); see also id. § 523(a)(9) (1988 & Supp. 1991) (providing that debtor cannot extinguish a judgment arising out of his operation of a motor vehicle while legally intoxicated). Under the bankruptcy code, an entity includes a person. Id. § 101(15) (Supp. 1991). In Maryland, punitive damages can no longer be based on driving while intoxicated absent a showing of actual malice. See Komornik v. Sparks, 331 Md. 720, 629 A.2d 721 (1993).

232. If the insurer obtains a judgment against the tortfeasor, the insurer, the motor vehicle administration, upon proper application by the insurer, may suspend the tortfeasor's driver's license and vehicle registration. Md. CODE ANN., TRANSP. § 17-204 (1992).
punitive damages has some deterrent value. Thus, there is no over­
riding public policy in Maryland that suggests that uninsured motorist
benefits be limited to compensatory damages; rather there is a
stronger public policy to cover punitive damages under both liability
and uninsured motorist coverages than to exclude them.

Although the punitive damage issue awaits judicial resolution,
recent changes in the Maryland Uninsured Motorist Endorsement
bring the issue to center stage. Until January 1988, the Maryland
Uninsured Motorist Endorsement did not expressly exclude punitive
damages. The earlier versions of the Maryland Uninsured Motorist
Endorsement mirrored the statute’s provision that the insured was
legally entitled to recover “damages . . . because of bodily injury.” The
1966 Standard Form likewise did not expressly limit the insurer’s
indemnification duty. Beginning in January 1988, however, punitive
damages under the Maryland Uninsured Motorist Endorsement were
excluded by a separate amendatory endorsement. This exclusion
was incorporated into the 1989 Maryland Uninsured Motorist En­
dorsement, which also limits the insured’s recovery to “compens­
satory damages” in the granting clause. The 1989 Maryland

(“There is no public policy against an insurance company’s promise to pay an
insured the amount which the insured party has become entitled to recover
because of the recklessness of some [uninsured] third party. The plaintiffs in
this case have been adjudged to be legally entitled to recover “damages . . . because of bodily injury.”)
234. In St. Mary’s, the court suggested that public policy demanded coverage of
punitive damages, noting that the community as a whole “would be outraged
and have substantial difficulty in comprehending reasons for a holding to the
contrary.” First Nat’l Bank of St. Mary’s v. Fidelity & Deposit Co., 283 Md.
235. The earlier versions of the Maryland Uninsured Motorist Endorsement stated
that the insurer would pay “damages which a covered person is legally entitled
to recover from the owner or operator of an uninsured motor vehicle because
of . . . [b]odily injury.” ISO Form PP 04 02 82, I. Part C - Uninsured
Motorist Coverage.
236. The 1966 Standard Form states that the insurer will “pay all sums which the
insured . . . shall be legally entitled to recover as damages . . . because of
bodily injury . . . sustained by the insured.” Arguably, the 1966 Standard
Form’s use of “all sums” is broader than the pre-1988 versions of the Maryland
Uninsured Motorist Endorsement’s use of “damages.” The 1989 Commercial
Maryland Uninsured Motorist Endorsement also uses the phrase “all sums.”
237. Letter, supra note 39. This endorsement bears a PP 04 05 1 88 identification.
238. The endorsement states that the insurer does “not provide Uninsured Motorists
Coverage for punitive or exemplary damages.”
239. The granting clause in the 1989 Maryland Uninsured Motorist Endorsement
provides that:

We will pay compensatory damages which an “insured” is legally
Uninsured Motorist Endorsement's attempt to limit the insurer's liability to compensatory damages is its most significant provision, but it remains to be seen whether the 1989 Maryland Uninsured Motorist Endorsement is consistent with the statute. 240

VIII. INSUREDs

The uninsured motorist statute requires coverage for damages which the insured is entitled to recover from the owner or operator of an uninsured motor vehicle, because of

1. "Bodily injury" sustained by an "insured" and caused by an accident;  
2. "Property damage" caused by an accident. Only sections 1., 2., 4., and 5., of the definition of "uninsured motor vehicle" apply to "property damage."  
The owner's or operator's liability for these damages must arise out of the ownership, maintenance or use of the "uninsured motor vehicle." We will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have been exhausted by payment of judgments or settlements.

ISO Form PP 04 59 12 89, I. Part C - Uninsured Motorist Coverage, Insuring Agreement (emphasis added).

240. A policy inconsistent with the statute is void. E.g., Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Gartelman, 288 Md. 151, 416 A.2d 734 (1980); see also supra note 11 and accompanying text. Assuming that the statute does not require coverage for punitive damages, then the specific exclusion of punitive damages in the 1989 Maryland Uninsured Motorist Endorsement is proper and enforceable. See supra note 239. A judicial finding that the statutory phrase "damages . . . because of bodily injury" is susceptible to more than one interpretation, however, could perhaps result in the inclusion of punitive damages if the policy fails to contain a specific exclusion. For example, despite an insurer's use of the identical statutory language in the policy, a court may arrive at a different result in interpreting the contract language because of the doctrine of contra proferentum. Although the rules of statutory and contract construction are virtually identical, the court may, under certain circumstances, construe ambiguous language in a contract against the insurer, which drafted the policy. Thus, the identical language may result in a finding that the statute requires coverage only for compensatory damages but that the policy provides coverage for punitive damages because it fails to exclude them in clear and unmistakable terms. In Mullins v. Miller, 683 S.W.2d 669 (Tenn. 1984), for example, the court stated:

Again, if the uninsured motorist statutes themselves should be construed as not to require coverage for punitive damages as a matter of law, it would be a very simple matter for insurance carriers to so write their policies as to limit insurance coverage to compensatory damages only, if permitted by the Commissioner. The present policy contains no such limitations but obligates the insurance carrier to pay all sums which the insured is legally entitled to recover from an uninsured motorist. In our opinion this coverage includes awards of punitive damages up to the policy limits.

Id. at 671; see supra note 219.
of an uninsured motor vehicle because of bodily injuries. The uninsured motorist statute also requires coverage for damages that the insured's surviving relatives are entitled to recover under Maryland's Wrongful Death Act. The statute does not define "insured," but does define "named insured." The differentiation is significant, revealing the intent to extend uninsured motorist coverage to the named insured's resident relatives and permissive users of the insured vehicle. Certainly, the interplay between the uninsured motorist statute and the Transportation Article's financial responsibility provisions demands that omnibus insureds under the liability provisions of the policy be covered under the uninsured motorist endorsement. At least one opinion supports this conclusion. The uninsured motorist statute, however, clearly broadens the group of persons protected beyond omnibus insureds by requiring coverage for non-relative passengers, not just non-relative operators. The statute also im-

242. Id. § 541(c)(2)(ii).
244. There is no express statutory requirement that an automobile liability policy contain an omnibus provision protecting those persons operating the vehicle with the express or implied permission of the named insured. National Grange Mut. Ins. Co. v. Pinkney, 284 Md. 694, 704, 399 A.2d 877, 882 (1979). The requirement of an omnibus provision flows naturally, however, from the financial responsibility provisions. Moreover, the insurance commissioner will not approve any policy without an omnibus clause. Maryland Indem. Ins. Co. v. Kornke, 21 Md. App. 178, 180 n.3, 319 A.2d 603, 605 n.3 (1974) (citing Mt. Beacon Ins. Co. v. Williams, 296 F. Supp. 1094 (D. Md. 1969)).
245. Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Gartelman, 43 Md. App. 413, 421 n.3, 405 A.2d 779, 785 n.3 (1979) (quoting with approval State Farm Auto. Ins. Co. v. Reaves, 292 So. 2d 95 (Ala. 1974)), aff'd, 288 Md. 151, 416 A.2d 734 (1980). In Reaves, the court stated "[w]hile we do not read the statute as requiring every automobile liability insurance policy to include an 'omnibus clause,' nevertheless once an automobile liability policy is issued extending coverage to a certain class of insureds under such a clause, uninsured motorist coverage must be offered to cover the same class of insureds." Reaves, 292 So. 2d at 99; accord Federal Kemper Ins. Co. v. Schneider, 58 Md. App. 690, 474 A.2d 224 (1984) (declining on procedural grounds to decide whether someone listed as an occasional young driver on his mother's policy was afforded uninsured motorist protection while occupying another vehicle).
246. The uninsured motorist statute does not expressly require coverage for passengers. This, however, is clearly the intent. See Md. Ann. Code art. 48A, §§ 541(c)(v)(1)-(2) (Supp. 1992) (providing that passengers may be excluded under certain circumstances, suggesting that occupants must be covered under all other circumstances); see also id. § 543(c) (1991) (providing that a passenger's uninsured motorist policy will apply as primary coverage when that person is occupying a vehicle not covered by uninsured motorist insurance).
Explicitly requires coverage for persons who have derivative claims for consequential damages as a result of bodily injuries. 247 Consistent with the statute, the Maryland Uninsured Motorist Endorsement specifically establishes three classes of persons' ability to recover under the policy. 248 This classification also accounts for the surviving

247. Md. Ann. Code art. 48A, § 541(c)(2)(i) (Supp. 1992), states that the uninsured motorist insurance must cover damages "[t]he insured is entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injuries sustained in an accident arising out of the ownership, maintenance, or use of such uninsured motor vehicle." It does not state that uninsured motorist insurance covers only "damages which the insured is entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injuries sustained [by that insured] in an accident." The intentional ambiguity (i.e., "sustained" by whom?) is significant, revealing an intent to extend uninsured motorist insurance to derivative claims. Cf. Forbes v. Harleysville Mut. Ins. Co., 322 Md. 689, 709-10, 589 A.2d 944, 948 (1991) (stating that the uninsured motorist statute is designed to place the injured insured in the same position he would have been in had the tortfeasor maintained liability insurance). The Maryland Endorsement granting clause is consistent with this interpretation. It states that:

[The insurer] will pay compensatory damages which an "insured" is legally entitled to recover from the owner or operator of an "uninsured motor vehicle" because of:

(1) "Bodily injury" sustained by an "insured" and caused by an accident . . .

ISO Form PP 04 59 12 89, I. Part C - Uninsured Motorist's Coverage, Insuring Agreement (emphasis added). The coverage of the 1966 Standard Form granting clause is narrower:

The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle . . .

1966 Standard Form, 2 Widdiss, supra note 19, app. A, at 25 (emphasis added). Several modified versions of the 1966 Standard Form eliminated the prepositional phrase "by the insured."

248. The Court of Special Appeals of Maryland has noted that "[i]nsurance policies, like the regulations of the Internal Revenue Service, are often not the easiest things to read and understand. Definitions tend to chase each other." Erie Ins. Exch. v. Reliance Ins. Co., 63 Md. App. 612, 616, 493 A.2d 405, 407 (1985). The definition of "insured" under the Maryland Uninsured Motorist Endorsement is a prime example. It reads as follows:

"Insured" as used in this endorsement means:

1. You or any "family member."
2. Any other person "occupying your covered auto."
3. Any person for damages that person is entitled to recover because of "bodily injury" to which this coverage applies sustained by a person described in 1. or 2. above.

ISO Form PP 04 59 12 89, I. Part C - Uninsured Motorists Coverage, Insuring Agreement. The definitions section of the Personal Auto Policy defines "you"
relatives entitled to recover when an insured is killed by an uninsured motor vehicle.

A. Clause 1 Insureds

The first class of insureds, called "clause 1 insureds," consists of the named insured, the named insured's spouse, and members of the named insured's household. Many of the terms used in defining the boundaries of clause 1 — spouse, resident, family, household — have been the subject of litigation in Maryland. The Court of Appeals of Maryland has said that the phrase "resident of the same household" is not ambiguous. "The words themselves are clear, simple and in general use. Put together they express a simple, homely, familiar concept." The court of appeals has also defined "household" to mean "all dwellers in a house under the common control of one person." In the court of appeals' view, "family" has been viewed as synonymous with "household."

The coverage granted to clause 1 insureds is personal and comprehensive: it does not run with the insured vehicle. Rather, the policy covers clause 1 insureds in a variety of situations: when they are occupying a vehicle insured under the policy, when they are occupying most other vehicles, when they are riding bicycles, and when they are pedestrians.

as the named insured and the named insured's spouse "if a resident of the same household." ISO Form PP 00 01 12 89, Definitions. "Family member" is defined as "a person related to you by blood, marriage or adoption who is a resident of your household. This includes a ward or foster child." Id. "Occupying" is defined as "in, upon, getting in, on, out or off." Id. These definitions are applicable to the Maryland Uninsured Motorist Endorsement.

249. The 1966 Standard Form used three clauses, (a), (b), and (c) to delineate the categories of insureds. Commentators generally follow these classifications. The 1956 Standard Form used 1, 2, and 3. In the 2/82 and 6/83 versions of the Maryland Uninsured Motorist Endorsement, the term "insured" was replaced by "covered person." The 6/80 version of the Personal Auto Policy also used the phrase "covered person" in Part C.

252. Peare v. Smith, 110 Md. 531, 534, 73 A. 141, 142 (1909) ("The word 'family' ... has a variety of meanings according to the connection in which it is used, and it should be so construed in each case as to give it the significance appropriate to its use. . . . The words 'family' and 'household' are often interchangeably used."). But see Hicks v. Hatem, 265 Md. 260, 267, 289 A.2d 325, 328 (1972) ("[T]he use of both of the words 'family' and 'household' in the [household] exclusionary clause leads us to believe that they were not intended to be used in a synonymous fashion.").
253. See generally 1 WIDISS, supra note 19, § 4.2.
by section 541(c)(2) limit the comprehensive coverage extended to clause 1 insureds.^^254

B. **Clause 2 Insureds**

Under the Maryland Uninsured Motorist Endorsement, "clause 2 insureds" are all persons "occupying" an insured motor vehicle.^^255 This includes both non-resident relative operators and non-relative resident passengers.^^256 Whether a person is occupying a vehicle is important not only in determining coverage, but also in deciding priority of coverage.^^257 The judicial treatment of occupancy, more than any other issue, with the exception of stacking of coverages,^^258 demonstrates the remedial nature of uninsured motorist coverage. Courts have endeavored to provide uninsured motorist benefits to an innocent victim, either by contorting the concept of "occupancy," or by employing the doctrine of *contra proferentum*.

Maryland's uninsured motorist statute does not define "occupying."^^259 The Personal Auto Policy defines "occupying" as "in, upon, getting in, on, out or off" an automobile.^^260 The definition has not received much judicial treatment. The 1966 Standard Form definition — "in or upon, entering into or alighting from" — did, however, receive attention from the courts.^^261 In particular, the words "in or upon, entering into or alighting from" are not synonymous; each is meant to broaden the ambit of coverage in some respect. Some courts have found the 1966 Standard Form definition ambig-

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256. Resident relative operators and passengers would qualify under clause 1.
257. See infra notes 431, 436 and accompanying text.
258. See infra notes 365-66 and accompanying text.
259. See DeJarnette v. Federal Kemper Ins. Co., 299 Md. 708, 475 A.2d 454 (1984). In *DeJarnette*, the court noted that neither occupy [n]or use is contained in the definition section of the [uninsured motorist] statute. Neither are they defined in the Transportation Article section 11-101, *et seq.* "We have repeatedly stated that where the legislature has chosen not to define a term used in a statute, that term should, . . . be given its ordinary and natural meaning." By not defining these words in the statute, there is nothing to indicate the legislature "intended to express a technical meaning."
261. See 1 Widdiss, *supra* note 19, § 5.2.
uous. More precisely, the word "upon" is usually the most troublesome part of the definition.\textsuperscript{262} Neither the Personal Auto Policy definition, nor the 1966 Standard Form definition has been given a specific construction by the Maryland courts;\textsuperscript{263} nor is it certain whether the Maryland courts would deem it ambiguous.\textsuperscript{264} Courts in other jurisdictions have approached the issue of occupancy in various ways. The most definite test requires physical contact between the victim and the insured vehicle.\textsuperscript{265} It is an imperfect, often capricious guide, and has thus been implicitly rejected by the Court of Appeals of Maryland.\textsuperscript{266}

In Goodwin v. Lumbermen's Mutual Casualty Co.,\textsuperscript{267} Raymond Goodwin drove his wife, Mildred, and five passengers — Effie and Webster Cooper, Marie and Earl Kronau, and Virginia Blum — to a wedding reception in his vehicle.\textsuperscript{268} Mr. Goodwin parked his vehicle

\begin{itemize}
  \item \textsuperscript{262} In Michigan Mutual Insurance Co. v. Combs, 446 N.E.2d. 1001 (Ind. Ct. App. 1983), the court held that the meaning of "upon" a vehicle was to be liberally construed. As such, the court found that Michael Combs, who was helping his brother, Cannon, fix Cannon's car, which Cannon had parked on the side of the road, was "occupying" Cannon's vehicle when he was working on the distributor of the motor and only his knees rested on the bumper. In so holding, the court rested its decision on the policy of contra proferentum, finding that the phrase "upon" a vehicle was ambiguous. The Combs court specifically rejected the "physical contact" rule, and adopted the "reasonable relationship" test, stating that it is the claimant's relationship with the insured automobile that determines whether the claimant was "upon" the automobile so as to have been "occupying" it for purposes of coverage. \textit{Id.} at 1006. Similarly, in Manning v. Summit Home Insurance Co., 623 P.2d 1235 (Ariz. Ct. App. 1980), the court held that a person standing five feet from the rear of the insured vehicle, but helping the insured put snow chains on the tires, was "upon" the vehicle, and, therefore, an insured under the uninsured motorist provision of the policy. The Manning court, like the Combs court, found that the term "upon" was ambiguous and construed the policy against the drafter. \textit{Id.} at 1238.
  \item \textsuperscript{263} \textit{But see infra} notes 267-81 and accompanying text.
  \item \textsuperscript{264} Maryland courts have consistently held that language in insurance contracts must be given its customary and normal meaning. DeJarnette v. Federal Kemper Ins. Co., 299 Md. 708, 717, 475 A.2d 454, 460-61 (1984). Moreover, when the language in an insurance policy is plain and unambiguous, there is no room for construction. Travelers Ins. Co. v. Benton, 278 Md. 542, 545, 365 A.2d 1000, 1003 (1976).
  \item \textsuperscript{265} 2 \textsc{No-Fault and Uninsured Motorist Automobile Insurance} § 24.10(3)(b)(i) (1993).
  \item \textsuperscript{266} \textit{Cf.} Contrisciane v. Utica Mut. Ins. Co., 459 A.2d 358, 360 (Pa. Super. Ct. 1983) ("The decedent was 'using' the motor vehicle when he left his passenger in the vehicle to go and exchange information with [the other driver] and the police officer and must, therefore, be found to have been 'occupying' the vehicle at that time. Any other interpretation of the term 'occupying' would be in derogation of and repugnant to the Uninsured Motorist Act.").
  \item \textsuperscript{267} 199 Md. 121, 85 A.2d 759 (1952).
  \item \textsuperscript{268} \textit{Id.} at 123, 85 A.2d at 760.
\end{itemize}
on a one way street with the driver’s side to the curb. After the reception, the seven individuals started to return to the parked vehicle, but Mr. Goodwin, Mr. Cooper and Mr. Kronau were detained. Mr. Goodwin gave the keys to Mrs. Blum, who returned to the vehicle with the other women. Mrs. Blum unlocked the right front door and was reaching inside the car to unlock the back door, when another automobile sideswiped the Goodwin vehicle and struck all four women. At the time of impact, Mrs. Goodwin was standing behind Mrs. Blum, holding the right front door open. Mrs. Cooper had her hand on the handle of the right rear door, waiting for Mrs. Blum to unlock it, and Mrs. Kronau was standing behind Mrs. Goodwin.

The women made claims under the medical payment provision of Mr. Goodwin’s automobile policy, which provided coverage for bodily injury caused “while in or upon, entering or alighting from” the insured automobile. Goodwin’s insurer, Lumbermen’s, denied coverage, arguing that the women were not occupying the vehicle at the time of the accident. The trial court held in favor of the insurer, but the court of appeals reversed, ruling that all four women were occupying the vehicle at the time of the accident.

After conceding that the women were neither “in” nor “alighting from” the vehicle, the court wrestled with the meanings of “upon” and “entering.” The court stated that:

A technical approach to the problem necessarily leads to difficulty. Viewed in such a light, a person might have to be actually partly in, or upon, the car before he could be considered to be entering it. But he is covered not only when “in” or “upon”, but also while “entering.” The terms are not synonymous, although sometimes two of them may cover the same situation. A person getting in might be completely inside the car. In that case, he would be both “entering” and “in.” On the other hand, he might be partly in and partly out, in which case he would be covered by the word “upon”, and also

269. Id. at 124, 85 A.2d at 760.
270. Id.
271. Id.
272. Id. at 125, 85 A.2d at 760.
273. Id. at 124, 85 A.2d at 760.
274. Id. at 125, 85 A.2d at 760.
275. Id. at 122, 85 A.2d at 760.
276. Id. (quoting policy).
277. Id. at 127, 85 A.2d at 762.
278. Id. at 123, 85 A.2d at 760.
279. Id. at 132, 85 A.2d at 764.
280. Id. at 125, 85 A.2d at 761.
might be covered by the word "entering," or by the word "alighting," depending on which way he was going. The court then ruled that Mrs. Blum, who had unlocked the front door with the key and was reaching in to unlock the rear door catch, was "upon" as well as "entering into" the car. The other women, the court held, were all "entering into" the car.

It is clear that the Goodwin court did not consider actual physical contact to be determinative. Mrs. Kronau, for example, was not touching the vehicle at the time of the accident, yet she was still covered under the policy. The opinion makes clear that two factors are necessary for a person to qualify as an occupant. First, the person must be in close proximity to the vehicle. Second, the person must intend to use the vehicle as a passenger or a driver.

The Goodwin approach is consistent with the majority of states that have considered the issue. The Goodwin two-factor test is, however, essentially a restatement of the "intended use" test employed by other courts. The "intended use" test, unfortunately, can be as inflexible as the "physical contact" test. Since the

281. Id. at 131, 85 A.2d at 763-64. The court's treatment of "upon" as meaning "actually partly in" suggests that the word has a narrow meaning. But see infra note 284.

282. According to the court, the women "had all completed their approach to the car, they were not coming up to it with the purpose of entering it, they had reached it, and they were actually engaged in the process of getting in." Goodwin, 199 Md. at 131, 85 A.2d at 763-64.

283. In his concurring opinion, Judge Henderson wrote "I accept the court's rather broad interpretation of the word 'entering,' as used in the policy, to cover the case of Mrs. Kronau, who was certainly not touching the parked automobile but had finished her approach to it." Id. at 133-34, 85 A.2d at 765 (Henderson, J., concurring).

284. See, e.g., Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Bristow, 150 S.E.2d 125 (Va. 1966). In Bristow, the court held that the plaintiff, who was struck by an uninsured vehicle while assisting another driver whose car had stalled, was not "occupying" the stalled vehicle because he did not intend to use the stalled vehicle as a passenger or driver. At the time of the impact, the plaintiff was standing in front of the open hood of the stalled car and had his hands on the engine wiring. According to the court, the word "upon" in an occupancy provision must be read in relation to the word it defines ("occupying") and to the other words in the provision ("in," "entering into," and "alighting from") in which it is found. As the court stated:

   Within the purposes contemplated here, a person may be said to be "upon" a vehicle when he is in a status where he is not actually "in" or is not in the act of "entering into or alighting from," the vehicle, but whose connection therewith immediately relates to his "occupying" it.

   Id. at 128.

Goodwin decision nearly forty years ago, a third approach has gained considerable acceptance. This approach is broader than the "physical contact" and "intended use" tests, and requires only a reasonable connection between the putative insured and the vehicle.\textsuperscript{286}

Courts embracing the "reasonable connection" standard examine a variety of factors. The requirement of actual physical contact and intended use are the two most important factors, but are not by themselves conclusive. Rather, the courts balance the totality of circumstances and decide the issue of occupancy on a case-by-case basis.\textsuperscript{287} Given the remedial nature of Maryland's uninsured motorist statute, the Maryland courts should not hesitate to adopt the more liberal "reasonable connection" test.\textsuperscript{288}

C. Clause 3 Insureds

The third class of insureds under the Maryland Uninsured Motorist Endorsement includes any person who is entitled to recover damages because of "bodily injury" to a clause 1 or 2 insured.\textsuperscript{289} Clause 3 is specifically designed to bring under coverage those persons, such as a parent or a spouse, who have derivative claims because of injuries received by a person who qualified as an insured under clause 1 or 2.\textsuperscript{290} Maryland courts have not had the opportunity to consider the scope of clause 3, and there is substantial difference over its interpretation in other jurisdictions.\textsuperscript{291} There is general agreement, however, that clause 3 provides a right of recovery under the policy to parents who suffer economic damages because of bodily injuries sustained by their minor children, or to a spouse who suffers

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Petrella). In his dissenting opinion, Judge Petrella concluded that the test for occupancy should not require "immediate use":

Many situations could arise where a person might be "upon" the vehicle lawfully, although not "immediately" using it or intending to use it for transportation, for example, repairing it, lashing baggage to the top of the vehicle even though it was not intended to be used that particular day or perhaps by that person as means of transportation.

\textit{Id. at 82.}


\textsuperscript{287} See id. (noting that courts have also employed several other tests, including the reasonable proximity test and the highway-or-vehicle oriented test).

\textsuperscript{288} \textit{But see} Breard v. Haynes, 394 So. 2d 1282, 1284 (La. Ct. App.) ("While the public policy is to extend uninsured motorist coverage so far as reasonable, nevertheless, we believe that the insurer has the right to require at least a 'physical relationship' with the insured vehicle."), \textit{cert. denied}, 399 So. 2d 598 (La. 1981).

\textsuperscript{289} See ISO Form PP 04 59 12 89, I. Part C - Uninsured Motorists Coverage, Insuring Agreement.

\textsuperscript{290} See 3 LONG, supra note 29, § 24.32.

\textsuperscript{291} See id.
economic damages because of bodily injuries sustained by the other spouse. A historical basis exists for this interpretation. The 1956 Standard Form (predecessor to the 1966 Standard Form) defined insured to include “any person, with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which the endorsement applies.”

Several courts have extended the scope of clause 3 beyond the 1956 Standard Form’s “care and loss of services” language to include non-economic losses. Indeed, one commentator argues that persons such as “parents, guardians, executors, and administrators” as well as “persons who pay the medical bills of an injured person, or suffer damages that result from a wrongful death, are entitled to indemnification as ‘clause 3’ insureds.” In Maryland, the breadth of clause 3 is limited considerably by substantive legal rights. The first question that must be addressed in evaluating clause 3 claims is whether the clause 3 putative insured is legally entitled to recover those damages under the law.

Under current Maryland law, for instance, a parent is entitled to compensation for medical expenses and loss of services incurred as a result of injuries sustained by the parent’s minor child. Such a claim falls squarely within clause 3. A loss of consortium claim is another claim that would be covered under clause 3. Several

292. I Widiss, supra note 19, § 6.1 n.2 (emphasis added). The terms of the 1966 Standard Form are not as explicit, but should be read in light of the 1956 Standard Form. Id. n.1. Widiss adds that “[i]n light of both the literal meaning of the present ‘clause (c)’ and the terms of its precursor, it seems clear that ‘clause (c)’ means persons such as a parent or spouse are entitled to recover for consequential damages including medical expenses or loss of services under the uninsured motorist coverage.” Id.

293. Id. § 6.1.

294. See Hudson v. Hudson, 226 Md. 521, 174 A.2d 339 (1961) (finding infant’s cause of action for his own personal injuries to be separate and distinct from his parent’s cause of action for medical expenses and lost services). The pecuniary value of these services in modern society is questionable. Cf. Gaver v. Harrant, 316 Md. 17, 32, 557 A.2d 210, 218 (1989) (noting that a minor child is entitled to solatium damages under the wrongful death act because “the ‘pecuniary loss’ rule, if strictly applied, could result in no recovery at all if the victim was an unproductive member of society, very old or young, or disabled”).

295. A loss of consortium claim is clearly a “derivative” claim in the sense that it derives from bodily injury to one spouse. In most jurisdictions, a consortium claim falls within the ambit of clause 3. See 3 Long, supra note 29, § 24.20. Maryland’s theoretical view of a loss of consortium claim as a joint claim brought by husband and wife presents a semantic hurdle to coverage. See Deems v. Western Md. Ry., 247 Md. 95, 114, 231 A.2d 514, 525 (1967). The joint nature of a loss of consortium claim seemingly excludes the non-physically injured spouse from coverage under a strict reading of clause 3 because the non-physically injured spouse cannot bring the loss of consortium claim by
derivative claims which would come under clause 3 in other jurisdictions, however, are not recognized in Maryland at the present time.

In Maryland, a minor child would not be able to recover for loss of parental society and affection because of non-fatal injuries to a parent; nor would a parent be able to recover for loss of filial relations because of non-fatal injuries to a minor child. Arguably, a spouse may be entitled to recover for the loss of services resulting from bodily injury to a physically injured partner, as well as for the value of nursing services that the spouse renders to the physically injured partner. The law is somewhat uncertain as to whether “loss of services” and “nursing service” claims are separate and distinct from a loss of consortium claim. If such a claim exists separate

herself. That is, the non-injured spouse is not a person entitled to consortium damages because of bodily injuries to her spouse. Nevertheless, a more appropriate reading is to allow the consortium claim. The intent of the statute is to extend coverage in this manner, and Maryland’s view of a loss of consortium claim indicates that, even though the claim is a joint action for damage to the marital entity, its underlying purpose “is to compensate the individual persons who form that relationship for the personal injury which they both sustain.” Phipps v. General Motors Corp., 278 Md. 337, 355, 363 A.2d 955, 965 (1976). In contrast, a non-married cohabitant would not be a person entitled to recover under a loss of consortium claim. See Gillespie-Linton v. Miles, 58 Md. App. 484, 495, 473 A.2d 947, 953 (1984). The “per person” limit would apply to the physically injured spouse’s claim and to the joint loss of consortium claim because there is only one bodily injury. See Travelers Indem. Co. v. Cornelsen, 272 Md. 48, 51, 321 A.2d 149, 150 (1974); Daley v. United Servs. Auto. Ass’n, 312 Md. 550, 559, 541 A.2d 632, 636 (1988); see also Pacific Indem. Co. v. Interstate Fire & Cas. Co., 302 Md. 383, 403 n.3, 488 A.2d 486, 496 n.3 (1985) (discussing single liability limit to bodily injury of child and derivative claim of parent).

296. Gaver, 316 Md. at 33, 557 A.2d at 218 (refusing to recognize the child’s right to a parental consortium claim, leaving it to the legislature to recognize the claim).


298. See Coastal Tank Lines v. Canoles, 207 Md. 37, 113 A.2d 82 (1955) (holding that wife could not recover for loss of services, but whether husband could recover was not decided).

299. But see Edmonds v. Murphy, 83 Md. App. 133, 165-70, 573 A.2d 853, 868-71 (1990) (concluding, after lengthy discussion, that “in this day and age ‘consortium’ includes both pecuniary and nonpecuniary components which can be the subject of loss”), aff’d, 325 Md. 342, 601 A.2d 102 (1992) (without discussing the consortium issue); see also Note, Maryland Prescribes Joint Action for Negligently Caused Loss of Consortium, 27 Md. L. Rev. 403, 415 (1967) (“[T]he loss of services of a wife or an unemployed husband to the marital entity are still recoverable. Damage to the ‘service’ element of consortium is somewhat easier to quantify than the other elements, since specific evidence of the replacement value of the spouse’s services can frequently be submitted to the court or jury.”).
from the loss of consortium, then it falls within clause 3. Regardless of where the claim falls, the per person, not the per occurrence, limit applies. This is true of all clause 3 claims; they are derivative claims involving a single bodily injury.

A more troublesome clause 3 issue is whether a bystander recovery action would also give rise to a derivative action under clause 3 or to a separate action. The significance is important because of the limit of liability clause. In Maryland, a person can recover for emotional distress and shock caused by witnessing the injury or death of a close relative, if the person seeking recovery is in the zone of danger. Arguably, a bystander recovery claim is not derivative; it is a direct and separate claim for bodily injuries, which would invoke the “per occurrence” limits under the policy. If this is the case, then the bystander bringing a claim must qualify as an insured under either clause 1 or clause 2. Conceptually, the better view is

300. A better view is that the loss of services and the value of the nursing care are part of the physically injured spouse’s claim. See, e.g., Plank v. Summers, 203 Md. 552, 562, 102 A.2d 262, 267 (1954) (allowing injured party to recover value of medical and hospital services furnished gratuitously to the injured party); see also RESTATEMENT (SECOND) OF TORTS § 924 cmt. f (1977). If the loss of services and value of nursing care claims fall within the injured spouse’s claim, then the deprived spouse is not a person who is legally entitled to recover those damages under Clause 3.

301. Compare Bowman v. Williams, 164 Md. 397, 165 A. 182 (1933) (allowing recovery to father who was in zone of danger) with Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952) (denying recovery to mother who witnessed death of her two children from a place of safety).

302. In Daley v. United Services Automobile Assoc., 312 Md. 550, 559, 541 A.2d 632, 636 (1988), the court of appeals applied the “per person” limit to parents’ solatium damage claim arising from the death of their child. The court refused to adopt the parents’ argument that the “per occurrence” limit should apply based on Employers Casualty Insurance Co. v. Foust, 105 Cal. Rptr. 505 (Cal. Ct. App. 1972) because

[t]he theory of [bystander] liability upon which Foust is based was not alleged against Dyer by the Daleys. Instead, the Daleys pleaded a statutorily created claim for solatium damages based on the theory that Dyer’s negligence had caused the death of their son. The Daleys never asserted that Dyer, by his negligence, had breached a duty owed to each of the Daleys which proximately caused them emotional distress and resulting physical injuries. Daley, 312 Md. at 559, 541 A.2d at 636. It is unlikely, however, that the bystander suffered a “bodily injury” within the meaning of the policy. The emotional trauma, though it may manifest itself in a tangible way, was not a bodily injury. But see Loewenthal v. Security Ins. Co., 50 Md. App. 112, 436 A.2d 493 (1981) (holding that a general liability insurance policy with coverage for “bodily injury” gave rise to a duty to defend a claim for pain, suffering, and mental anguish).

303. The problem does not arise if the person injured as the direct result of physical impact is a clause 1 insured and the bystander is also a clause 1 insured (e.g.,
that a bystander recovery action falls under clause 3 to which the "per person" limit would apply.\textsuperscript{304}

One of the most difficult clause 3 issues was addressed indirectly by the court of appeals in 1991. In \textit{Forbes v. Harleysville Mutual Insurance Co.},\textsuperscript{305} the court ruled that the uninsured motorist statute required coverage for wrongful death claims. \textit{Forbes} was a monumental decision because, in 1988, the court of special appeals had ruled in \textit{Globe American Casualty Co. v. Chung}\textsuperscript{306} that wrongful death claims were not covered by the uninsured motorist statute. \textit{Chung} caused considerable unrest in the legal community, and from it sprang \textit{Forbes} and the 1991 amendments to section 541(c)(2).\textsuperscript{307}

In \textit{Chung}, Bo Hyun Chung was killed on July 11, 1983, as a result of the negligence of Barbara Ann Orejuela, an uninsured motorist. At the time of the accident, Chung was insured by Globe American Casualty Company. The policy had a $20,000/$40,000 uninsured motorist bodily injury limit. Chung was survived by his wife, four adult children, and one minor child. Chung's widow and minor child\textsuperscript{308} brought a wrongful death action against Orejuela. Judgment was entered on June 21, 1984, against Orejuela and in favor of Chung's widow and minor child.\textsuperscript{309} Chung's widow was awarded $250,000 compensatory damages and $250,000 punitive damages. In addition, Chung's minor child was awarded $100,000 compensatory damages, plus $100,000 punitive damages.\textsuperscript{310} Chung's widow and minor child then sought satisfaction of the judgment under the uninsured motorist provision of the Globe policy. Globe paid the per

members of the same household). If, however, the person injured as the direct result of physical impact is a clause 2 insured, then the bystander would be able to recover only under his own policy, if at all.

\textsuperscript{304} The \textit{Daley} court stated that "[s]olatium injuries, as any other consequential injuries, are subject to the each person limit." \textit{Daley}, 312 Md. at 560, 541 A.2d at 636 (emphasis added).

\textsuperscript{305} 322 Md. 689, 589 A.2d 944 (1991).


\textsuperscript{307} Following the court of special appeals decision in \textit{Chung}, the court of appeals granted certiorari in that case and also granted certiorari in \textit{Forbes}, and another case, \textit{Ray v. State Farm Mutual Automobile Insurance Co.}, 322 Md. 751, 589 A.2d 975 (1991). The court of appeals issued its opinion in \textit{Chung} on May 10, 1991, the same day it issued the \textit{Forbes} opinion. Four days later, the court issued the \textit{Ray} opinion.

\textsuperscript{308} The adult children probably had no compensable damages under Maryland's Wrongful Death Act. See \textit{MD. CODE ANN., CTS. & JUD. PROC.} § 3-904(d) (1989) (providing that a \textit{minor} child is entitled to both pecuniary losses and solatium damages as a result of the death of a parent).

\textsuperscript{309} The opinion lists June 21, 1985, as the date of the judgment, but the chronology of events suggests that June 24, 1984, is the correct date.

\textsuperscript{310} \textit{Chung}, 76 Md. App. at 528, 547 A.2d at 655. The award of punitive damages
On April 29, 1985, Chung’s adult son, acting as the personal representative of Chung’s estate, instituted a survival action against Globe under the uninsured motorist provisions of the policy. Globe denied liability on the ground that it had fulfilled its contractual obligations by paying the $20,000, and, in fact, had been released from any further obligations under the policy. Chung’s estate and Globe filed cross-motions for summary judgment. On July 13, 1987, the trial court denied Globe’s motion for summary judgment and granted the estate’s motion, ruling that the estate had a valid survival claim under the policy. The parties entered into a consent judgment, and an appeal was taken.\textsuperscript{311}

On appeal, the court of special appeals first considered the scope of the language “because of bodily injury,” contained in section 541(c)(2). It then considered the breadth of the Globe policy’s granting clause.\textsuperscript{312} Focusing on the policy language that required Globe to pay “all sums which the insured or his legal representative shall be legally entitled to recover as damages,” the court considered the differences between survival and wrongful death actions.\textsuperscript{313} Posing the question as “which type of claim, if not both, is referred to by the statutorily required Uninsured Motorist provision of liability policies in Maryland,”\textsuperscript{314} the court decided that

\textsuperscript{311} Chung, 76 Md. App. at 530-31, 546 A.2d at 657. The parties entered into the consent judgment with the understanding that the appeal would follow. \textit{Id.} After the decision by the court of special appeals, the court of appeals granted certiorari, then vacated the decision on the ground that an appeal from a consent judgment was not appropriate. Globe Am. Cas. Co. v. Chung, 322 Md. 713, 716-17, 589 A.2d 956, 957 (1991).

\textsuperscript{312} The granting clause required the insurance company

\texttt{[t]o pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured highway vehicle because of bodily injury or property damage, caused by accident and arising out of the ownership, maintenance or use of such uninsured highway vehicle . . . .}

Chung, 76 Md. App. at 532, 547 A.2d at 657 (quoting policy). The court however, ignored the definition of bodily injury. See \textit{infra} note 315 and accompanying text.

\textsuperscript{313} \textit{Id.} at 532-41, 547 A.2d at 658-62. The court also rejected the estate’s claim that the “per occurrence” limits applied to the survival action, citing Daley v. United Services Automobile Assoc., 312 Md. 550, 541 A.2d 632 (1988), for the proposition that “solatium damages in a wrongful death action . . . were not bodily injuries independent of the injury to the child.” Chung, 76 Md. App. at 541, 547 A.2d at 657.

\textsuperscript{314} Chung, 76 Md. App. at 541, 547 A.2d at 662.
[t]here can be no question but that the reference is to the survival claim and not the wrongful death claim. The policy provision itself refers to "the insured or his legal representative." The thing that "the insured or legal representatives" is entitled to recover is "damages . . . because of bodily injury." As the case law has made indisputably clear, surviving relatives in a wrongful death action have no claim for the bodily injury of the insured. Theirs is a new action based exclusively on death.315

The court affirmed the trial court's decision, finding "the clear terms of both the controlling statute and the Uninsured Motorist provision of the policy itself to limit the coverage to 'the insured or his legal representative' for the bodily injuries suffered by the insured."316 The Chung court's holding, that the uninsured motorist statute did not require coverage for wrongful death claims, seriously misconstrued the language and intent of the uninsured motorist statute. Read as a whole, the uninsured motorist statute indicated very clearly an intent to extend coverage to claims arising because of the death of an insured.317

The holding in Chung was unfortunate for another reason. In considering the breadth of coverage under the Globe policy, the court of special appeals failed to consider the entire policy. The policy, a modified version of the 1966 Standard Form, used three clauses, (a), (b), and (c), to designate the classes of insureds.318 A clause (c) insured was defined as "any person, with respect to damages . . . entitled to recover because of bodily injury to which this insurance

315. Id. The court found support for its holding in the uninsured motorist statute: Any conceivable doubt in this regard is dissipated by reference to [section 541], which mandates the Uninsured Motorist coverage. There the reference is only to "the insured . . . because of bodily injuries sustained." There is no mention made of either legal representatives or surviving relatives. The inclusion of the term "or legal representatives" in the Uninsured Motorist endorsement itself is nothing more than a recognition that a survival action would be available on behalf of the insured "insured" provided for by § 541.  

Id. The court also justified its holding by noting the purpose of the uninsured motorist statute was to compensate injured motorists, "not to provide a fund for the benefit of any person not party to the contract who might have some alleged cause of action against an uninsured motorist." Id. (quoting In re Estate of Reeck, 488 N.E.2d 195, 199 (Ohio 1986) (Holmes, J., dissenting)). But see supra notes 53-54 and accompanying text.

316. Chung, 76 Md. App. at 532, 547 A.2d at 657.
317. See Forbes v. Harleysville Mut. Ins. Co., 322 Md. 689, 589 A.2d 944 (1991) (holding that the legislature's intent was for uninsured motorist coverage to be broad, and thus include wrongful death claims).
applies sustained by an insured under (a) or (b) above."319 Under
the additional definitions section of the Globe policy, "bodily injury" was defined as "bodily injury, sickness or disease, including death, sustained by an insured under (a) or (b) of the Persons Insured provision."320 Under this definition, the claimants in the wrongful death action certainly qualified as clause (c) insureds because they were persons entitled to recover damages in case of bodily injury, which by policy definition included death as sustained by Bo Hyun Chung, who was a clause (a) insured.321

In short, the Chung court not only misread the statute, but it misread the policy as well. The court of appeals also fell partially into this trap in Forbes when it ignored the language of the policy, and concentrated instead on the statute. The Harleysville insurance policy defined "covered person" as:

1. You [the named insured] or any family member.
2. Any other person occupying your covered auto.
3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1 or 2 above.322

As in Chung, the wrongful death claimants were clause 3 insureds — persons legally entitled to recover damages because of bodily injury (which by definition included death) to a clause 1 or 2 insured. Therefore, the Forbes court could have reached its decision without ever considering the statutory requirements. The policy clearly extended coverage to the wrongful death claimants. Perhaps the Forbes court ignored the policy language in order to settle the issue. A ruling based solely on the policy language would have generated future litigation based on the statutory language.

The Forbes court also focused on the statute because the attorneys for Harleysville argued that the deceased did not qualify as a clause 1 or 2 insured. The deceased, Carol Forbes, separated from her husband, Robin, on August 4, 1984, and moved into an apartment with Delbert Dean. Three weeks later, on August 27, 1984, Robin and Carol Forbes's two minor children, George and Connie,

319. Id.
320. Id. (emphasis added).
321. Similarly, wrongful death claims would be covered by the 1989 Maryland Uninsured Motorist Endorsement. The 12/89 version of the Personal Auto Policy defines "bodily injury" in the general definitions' section as "bodily injury, sickness or disease, including death." ISO Form PP 00 01 12 89, Definitions. This definition is applicable to Part C-Uninsured Motorists Coverage and to the Maryland Uninsured Motorist Endorsement, which supersedes Part C.
322. Forbes, 322 Md. at 703, 589 A.2d at 951.
moved into the apartment. On September 22, 1984, Carol Forbes was killed and George and Connie were injured in a motor vehicle accident while passengers in a vehicle owned and operated by Dean. The accident was Dean’s fault. He was uninsured. Robin Forbes, individually and as parent and next friend of George and Connie, sued Dean and Harleysville. The complaint contained five counts. The first two counts sought compensatory damages for George and Connie for the injuries they sustained. Counts three, four and five were wrongful death claims brought by Robin, George and Connie. The trial court held that the wrongful death claimants could not recover under the Harleysville policy because Carol Forbes was not an “insured” under the policy. Robin Forbes, individually and on behalf of his children, appealed to the court of special appeals. While the appeal was pending, the court of special appeals issued its decision in Chung. Robin Forbes petitioned for a writ of certiorari, which the court of appeals granted.

After deciding that the uninsured motorist statute required coverage for wrongful death claims, the court of appeals turned its attention to the issue of Carol Forbes’s insured status under the Harleysville policy. The court noted in passing that a “strong argument could be made that Carol Forbes was a ‘named insured’ for the purposes of uninsured motorist coverage regardless of the definitions in the insurance policy.” Assuming that she was not a “named insured,” the court ruled that she qualified as Robin Forbes’s resident spouse. As an alternative holding, the court ruled that the minor children’s wrongful death claims were within the mandatory uninsured motorist coverage, regardless of Carol Forbes’s status as an insured under the policy. According to the court

> [i]t is true that certain language in Art. 48A, § 541(c)(1) and (3), refers to “death of the insured.” . . . [T]his language merely reflects the General Assembly’s contemplation that wrongful death claims are covered by the uninsured motorists provisions and that, when an insured is killed in a motor vehicle accident with an uninsured tortfeasor, the statutory beneficiaries are entitled to wrongful death benefits under the mandatory uninsured motorist coverage. We do not believe, however, that the language of § 541(c)(1) and (3) means that the deceased must always be an “insured” under the particular language of the insurance policy.

> The basic coverage language of § 541 (c) is set forth in paragraph (2) and requires coverage “for damages which the insured is entitled to recover from the owner or operator

323. Id. at 702, 589 A.2d at 950.
324. See id. at 703-08, 589 A.2d at 951-53 (discussing definitions of family).
of an uninsured motor vehicle because of bodily injuries [including death] sustained in an accident arising out of the ownership, maintenance, or use of such uninsured motor vehicle." The Forbes children’s wrongful death claims squarely fall within this statutory language even if their mother at the time of the accident was not an "insured" under the language of Harleysville’s policy. The children are "insureds" under the Harleysville policy. Under Maryland’s wrongful death statute, the children are legally entitled to damages from the owner or operator of an uninsured motor vehicle because of the death of their mother sustained in an accident arising out of the operation of the uninsured vehicle. In fact, a judgment against the owner and operator of the uninsured vehicle has been recovered on their behalf. The claims of the insured children clearly are embraced by the critical coverage language of § 541(c)(2).

Moreover, the purpose of the uninsured motorist statute supports coverage of the children’s wrongful death claims without regard to Carol Forbes’s status under the language of the insurance policy. . . . [T]he purpose of the statutorily mandated uninsured motorist coverage is to put the insured (including the insured children) in the same position as they would have been if the tortfeasor had maintained liability insurance. If the tortfeasor in this case had maintained liability insurance, the children’s wrongful death claims would have been paid up to the limits of that liability coverage. Since the tortfeasor failed to have liability insurance, and since the children did have uninsured motorist coverage, their claims should similarly be covered up to the limits of the uninsured motorist insurance. 325

The Forbes holding that the uninsured motorist statute requires coverage for wrongful death claims is unquestionably correct. The public responsibility theory underlying Maryland’s insurance scheme demands coverage for wrongful death claims. The state has a significant interest in protecting not only those individuals injured by uninsured motorists, but also their dependents. 326 The intent of the uninsured motorist statute is to provide uninsured motorist benefits to all persons who could have recovered tort damages had the tortfeasor maintained liability insurance. 327 The court’s decision that

325. Id. at 708-10, 589 A.2d at 953-54 (citations omitted).
326. See supra note 13.
327. Widiss notes:
   Even if the uninsured motorist statute is not phrased in terms of requiring coverage for "bodily injury . . . including death resulting
Carol Forbes was a resident of Robin Forbes’s household is debatable, but hardly shocking given the nature of the separation. However, the court’s “alternative holding,” that the uninsured motorist insurance had to cover the wrongful death claims even if Carol Forbes was not an insured under the policy, is questionable in many respects.

In one sense, probing the depths of the “alternative holding” of Forbes is unnecessary in light of the amendments to section 541(c)(2). In the 1991 legislative session, while Forbes was pending before the court of appeals, House Bill 1112 was proposed to amend section 541(c)(2). That bill was eventually enacted as Chapter 625 of the Laws of 1991, and it became law on July 1, 1991.328 Section 541(c)(2), as amended, reads:

In addition to any other coverage required by this subtitle, every policy of motor vehicle liability insurance issued, sold or delivered in this State after July 1, 1975, shall contain coverage in at least the amounts required under Title 17 of the Transportation Article, for damages, subject to policy limits, which:

(1) The insured is entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injuries sustained in an accident arising out of the ownership, maintenance or use of such uninsured motor vehicle; and

(2) The surviving relatives, as defined in § 3-904 of the Courts Article, of the insured are entitled to recover from the owner or operator of an uninsured motor vehicle because of the death of the insured as the result of an accident arising out of the ownership, maintenance or use of the uninsured motor vehicle.329

therefrom,” recovery should be available to the insured or a legal representative if there is a right in that state to recover for wrongful death.

1 Wmss, supra note 19, § 6.2 n.1; see also 3 Long, supra note 29, § 24.21 (“Today, the vast weight of authority supports wrongful death recoveries. The prevailing theory being that the intent, whether contractual or statutory, is to provide insurance which would place the innocent victim and his dependents in the same position which they would have been in had the adverse vehicle been covered by liability insurance.”).

329. Md. Ann. Code art. 48A, § 541(c)(2) (1991 & Supp. 1992) (emphasis added). A wrongful death claim is, nevertheless, subject to the single per person limit, not the per occurrence limits, see Globe Am. Cas. Co. v. Chung, 322 Md. 713, 717 n.2, 589 A.2d 956, 958 n.2 (1991), and, as a practical matter, many survival actions will exhaust the per person policy limit, “leaving little, if any, funds available for a derivative claim, such as loss of consortium or wrongful death,” 3 Long, supra note 29, § 24.21.
In clear and unmistakable terms, the uninsured motorist statute requires coverage for wrongful death claims. In equally clear terms, it requires that the deceased be insured under the policy. To this extent, then, Chapter 625 invalidates the *Forbes* "alternative holding" as of July 1, 1991.

Because the *Forbes* court was construing the pre-1991 version of the uninsured motorist statute, however, the "alternative holding" is arguably valid in a pre-1991 setting. Whether the court of appeals will re-examine its "alternative holding" in light of Chapter 625 remains to be seen. The legislative history of House Bill 1112 reveals the difficult issue the court would face in such a situation. As proposed, House Bill 1112 was designed "[f]or the purpose of requiring a policy of motor vehicle liability insurance to provide coverage for damages which the surviving relatives of the insured are entitled to recover from the owner or operator of an uninsured motor vehicle because of the death of the insured." After the first reading, the House Committee on Economic Matters changed the purpose paragraph to reflect that the bill was "clarifying" that motor vehicle policies had to contain such coverage. This version was then sent to the Senate, which, earlier in the legislative session, had passed Senate Bill 626. Similar to House Bill 1112, Senate Bill 626 was designed to amend section 541(c) to require coverage for wrongful death claims.

After reviewing House Bill 1112, the Senate Finance Committee made two amendments to the bill to conform it to Senate Bill 626. The first amendment rejected "clarifying" and reinstated "requiring." The second amendment made changes to the wording of the bill itself. The senate version was then sent to the House, but the House refused to accept the amendments. The Senate refused to

331. Id. at 1500 (reprinting amendments to H.B. 1112, as adopted by the House of Delegates on March 19, 1991).
recede from its proposal, and the dispute was sent to a conference committee. What resulted from the committee was an obvious compromise: the Senate’s first amendment (to the purpose paragraph) was adopted; its second amendment was rejected. House Bill 1112 was then enacted into law as Chapter 625. The Governor vetoed Senate Bill 626 because it became redundant once House Bill 1112 was signed into law.

Without question, the difference between “clarifying” and “requiring” is significant. If Chapter 625 clarified the original intent of the legislators, then the Forbes “alternative holding” is not valid in a pre-1991 setting. It does not, however, necessarily follow that the Forbes “alternative holding” is valid in a pre-1991 setting, because the “requiring” version of the purpose paragraph was adopted. House Bill 1112 was proposed because of the decision reached by the court of special appeals in Chung. The conflict over “clarifying” or “requiring” occurred before the decision in Forbes. The General Assembly focused on the larger issue of mandating uninsured motorist insurance to cover wrongful death claims, not on the smaller issue of whether the deceased had to be an insured under the policy. But, in deciding that the uninsured motorist statute should cover wrongful death claims, the General Assembly required that the deceased had to be an insured under the policy. Both the Senate and the House agreed on this important point, which should not go unnoticed. It is also important to note that the 1991 amendments, when read into section 541(c)(2), require every policy of motor vehicle liability insurance issued, sold, or delivered in Maryland after July 1, 1975, to contain coverage for wrongful death claims. This is not a retroactive piece of legislation, and it could not be. Rather it is

338. See 1991 Md. Laws 3903-04 (Governor’s veto message for S.B. 626).
339. See undated Floor Report for House Bill 1112, maintained by the Department of Legislative Reference, Annapolis, Maryland.
340. Statutes are presumed to operate prospectively, see, e.g., Washington Suburban Sanitary Comm’n v. Riverdale Heights Volunteer Fire Co., 308 Md. 556, 560, 520 A.2d 1319, 1321 (1987), but there is no absolute bar to retrospective application. See, e.g., Spielman v. State, 298 Md. 602, 607, 471 A.2d 730, 733 (1984). The presumption for prospective application can be rebutted by a clear expression to the contrary in the statute, see, e.g., State Farm Mut. Auto. Ins. Co. v. Hearn, 242 Md. 575, 582, 219 A.2d 820, 824 (1966). Although the 1991 amendments to section 541(c)(2) can be viewed as containing such a clear expression of retroactivity, a retroactive application would probably be unconstitutional. See U.S. Const. art. I, § 10 ("No State shall . . . pass any . . .")
a clear sign that the General Assembly's 1991 amendment was designed to clarify the original intent, notwithstanding the use of "requiring" in the purpose paragraph. This may explain the willingness of the house to compromise: it obviously felt that the debate over "clarifying" or "requiring" in the purpose paragraph was inconsequential in light of the clear message in the amendment itself.

IX. PERMITTED EXCLUSIONS

Maryland's uninsured motorist statute explicitly permits only two exclusions from coverage: the "owned-but-uninsured" exclusion and the "named-driver" exclusion.\(^{341}\) No other exclusions are expressly permitted. The court of appeals has repeatedly stated that "where the Legislature has required specified coverages in a particular category of insurance, and has provided for certain exceptions or exclusions to the required coverages, additional exclusions are generally not permitted,"\(^{342}\) Despite this principle, the court of special appeals has upheld the validity of a third exclusion — the "owned-but-otherwise-insured" exclusion.\(^{343}\)

A. The Owned-But-Uninsured Exclusion

Section 541(c)(2)(v)(I) allows insurers to exclude from coverage the named insured and his resident relatives "when occupying, or struck as a pedestrian by, an uninsured motor vehicle that is owned by the named insured or a member of his immediate family residing in his household."\(^{344}\) From the insurer's standpoint, the exclusion limits its potential exposure by preventing the extension of uninsured motorist coverage to a second or third vehicle when the insured has

\(^{341}\) See Lee v. Wheeler, 310 Md. 233, 528 A.2d 912 (1987); see also infra parts IX. A. (discussing the "owned-but-uninsured" exclusion) and IX. B. (discussing the "named driver" exclusion).


\(^{343}\) See infra part IX. C.

paid a premium based on his owning only one vehicle.\textsuperscript{345} More importantly, the exclusion furthers Maryland’s comprehensive insurance scheme by encouraging “the owner of an uninsured motor vehicle to become insured by imposing upon him the penalty of exclusion from coverage for failure to obtain insurance.”\textsuperscript{346}

Bringing resident relatives within the exclusion is a fairly recent legislative invention. Originally, the uninsured motorist statute did not contain an express owned-but-uninsured exclusion.\textsuperscript{347} The section merely provided that the coverage could not be less than that afforded a qualified person under section 243H. Section 243H(a)(1)(i) provided a specific exclusion only when the injured insured was occupying a vehicle he owned. This exclusion did not extend to resident relatives occupying the uninsured vehicle because the purpose of encouraging financial responsibility was “not furthered by penalizing other insured persons who cannot obtain insurance for uninsured motor vehicles which they do not own.”\textsuperscript{348} The owned-but-uninsured exclusion in section 541(c)(2) was broadened by the legislature in 1982 to include resident relatives.\textsuperscript{349} Extending the ambit of the owned-but-uninsured exclusion to resident relatives recognizes that the insurer has a significant interest in being able to assess risks and determine premiums in accordance with the risks. In this sense, the exclusion balances the public policy that victims should be entitled to recover uninsured motorist benefits with the interests of the insurer.\textsuperscript{350}


The legislature apparently concluded that if this irresponsible group were excluded from coverage, its members and future potential members might be induced to become insured so that they might qualify for coverage. If this legislative optimism proved sound, the number of uninsured vehicles - the evil that produced the statute - would be lessened.

\textit{Id.}

\textsuperscript{347} See generally Gartelman, 288 Md. at 151, 416 A.2d at 734 (discussing the owned-but-uninsured exclusion without the resident relative extension).

\textsuperscript{348} Id. at 154, 416 A.2d at 739.

\textsuperscript{349} Act of May 19, 1981, ch. 573, 1981 Md. Laws 2321.

\textsuperscript{350} The Maryland Uninsured Motorist Endorsement incorporates the owned-but-uninsured exclusion in two ways. First, it specifically states that the insurer does not provide uninsured motorist coverage for any clause 1 insured while “while ‘occupying’ or when struck by, any motor vehicle owned by such person which is not insured for this coverage under this policy.” ISO Form PP 04 59 12 89, I. Part C - Uninsured Motorist Coverage, Exclusions A. 1. Second, the endorsement’s definition of “uninsured motor vehicle” states that an uninsured motor vehicle does not include “any vehicle or equipment owned by or furnished or available for regular use of the named insured or a member of
B. The Named Driver Exclusion

Section 541(c)(2)(v)(2) allows insurers to exclude coverage for "[t]he named insured, members of his family residing in the household, and all other persons having other applicable automobile insurance and occupying, or struck as a pedestrian by, the insured motor vehicle operated or used by a person excluded from coverage under section 240C-1 of this article." Section 240C-1(a)(1) allows an insurer to exclude nearly all coverage when a vehicle is operated by a named excluded driver. Under this section, the named driver is excluded from liability, collision, personal injury protection and uninsured motorist coverage. Additionally, the owner of the vehicle, the owner’s family members, and the named excluded driver’s family members are also excluded from that same coverage when a covered vehicle is operated by a named excluded driver. Non-resident relative passengers, however, are excluded from personal injury protection and uninsured motorist coverage only if such coverage is available under another motor vehicle insurance policy. The named driver exclusion, like the owned-but-uninsured exclusion, balances the insurer’s interests with the public policy of affording uninsured motorist benefits to those injured by the negligence of others. Making

his household.” Id. The validity of excluding coverage when the insured is operating a vehicle furnished or available for his regular use is questionable. In Provident General Insurance Co. v. McBride, 69 Md. App. 497, 518 A.2d 468 (1986), cert. denied, 309 Md. 326, 523 A.2d 1013 (1987), the court of special appeals upheld the “owned by a named insured” portion of the provision, but did not address whether the insured who is using an uninsured motor vehicle “furnished or available for . . . regular use” but not owned by him or a family member may be excluded from coverage. Id. at 504, 518 A.2d at 472.

353. The Maryland Insurance Code, § 240C-1(a)(1) states as follows:

The policy may be endorsed to specifically exclude all coverage for any of the following when the named excluded driver is operating the motor vehicle(s) covered under the policy whether or not that operation or use was with the express or implied permission of a person insured under the policy:

(i) The excluded operator or user;
(ii) The vehicle owner;
(iii) Family members residing in the household of the excluded operator or user or vehicle owner; and
(iv) Any other person, except for the coverage required by sections 539 and 541(c)(2) of this article if such coverage is not available under any other automobile policy.

uninsured motorist benefits available to certain passengers who lack personal uninsured motorist coverage comports with the statute's purpose of protecting persons from economic harm caused by uninsured motorists and concomitantly recognizes the insurer's underwriting concerns.\textsuperscript{355}

C. The Owned-But-Otherwise-Insured Exclusion

The Maryland Uninsured Motorist Endorsement contains an express "owned-but-otherwise-insured" exclusion.\textsuperscript{356} Other policies contain an implicit "owned-but-otherwise-insured" exclusion: the definitions in the policy, when read together with the coverage grant, act as an exclusion.\textsuperscript{357} The "owned-but-otherwise-insured" exclusion should not be confused with the "owned-but-uninsured" exclusion.\textsuperscript{358} The "owned-but-otherwise-insured" exclusion excludes coverage when an insured is injured while an operator or passenger in a vehicle that is owned by him or a family member but insured by another motor vehicle insurer.

In \textit{Powell v. State Farm Mutual Automobile Insurance Co.},\textsuperscript{359} the Court of Special Appeals of Maryland upheld an express "owned-but-otherwise-insured" exclusion. Kenneth Powell was injured by an uninsured motorist while driving his wife's car, a Nissan insured by State Farm. The State Farm policy covering the Nissan had $20,000/$40,000 in uninsured motorist coverage. At the same time, State Farm insured a motor vehicle owned by Kenneth Powell under a

\begin{footnotesize}
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  \item \textsuperscript{355} See Nationwide Mut. Ins. Co. v. Miller, 305 Md. 614, 505 A.2d 1338 (1986).
  \item \textsuperscript{356} The Maryland Uninsured Motorist Endorsement states that the insurer does not provide uninsured motorist coverage for any clause 1 insured "while 'occupying' or when struck by, any motor vehicle owned by such person which is not insured for this coverage under this policy." ISO Form PP 04 59 12 89, I. Part C-Uninsured Motorist Coverage, Exclusions A. 1.
  \item \textsuperscript{357} One policy currently used in Maryland incorporates the "owned-but-otherwise-insured" exclusion through the definition of "bodily injury" and "insured auto." The coverage grant provides: "We will pay damages for \textit{bodily injury} and \textit{property damage} caused by an accident which the \textit{insured} is legally entitled to recover from the owner or operator of an \textit{uninsured motor vehicle} arising out of the ownership, maintenance or use of that vehicle." GEICO, Family Automobile Insurance Policy, Section IV — LOSSES WE PAY at 32. "\textit{Bodily injury}" is defined as "\textit{bodily injury}, sickness, or disease, including death, sustained by \textit{you}, \textit{your relatives} or any other person \textit{occupying} an \textit{insured auto} with \textit{your consent}." \textit{Id.} Section IV-DEFINITIONS 4(c) at 30. An insured vehicle includes an auto operated by the named insured, \textit{see id.}, but excludes "an auto owned by or furnished for the regular use of an insured." \textit{Id.} Section IV-DEFINITIONS 4(c)(iii) at 30.
  \item \textsuperscript{358} See generally supra part IX. A. (discussing the "owned-but-uninsured" exclusion).
  \item \textsuperscript{359} 86 Md. App. 98, 585 A.2d 286 (1991).
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different policy. The State Farm policy covering Kenneth Powell's automobile had $100,000/$300,000 in uninsured motorist coverage. That policy contained the following exclusion:

"THERE IS NO COVERAGE:

. . .

2. FOR BODILY INJURY TO YOU . . . WHILE OCCUPYING . . . A MOTOR VEHICLE OWNED BY YOU, YOUR SPOUSE OR ANY RELATIVE, and which is not insured under the liability coverage of this policy."

Powell sought uninsured motorist benefits from both the State Farm policy covering the Nissan and the State Farm policy covering his vehicle. The trial court held that he was limited to the $20,000/$40,000 limit under the policy covering the Nissan.

The court of special appeals affirmed. First, the court found that the exclusion was consistent with the uninsured motorist statute. "To permit such an exclusion will encourage families to obtain coverage for all of their vehicles and thus maximize compliance with the purpose of the statute." In contrast, the court found that Powell's position would lead to an absurd (and undesirable) result:

To hold as appellant also urges, i.e., that his wife's vehicle was not uninsured because it was covered under another policy, would be to permit an owner to buy excess coverage under one policy for one vehicle at a relatively small premium and coverage under a separate policy for his other vehicles at a lesser cost, and have the excess coverage of the first policy apply to the vehicles covered under the subsequent policies.

As an alternative holding, the court reasoned that even if the exclusion was invalid, the result would not change: "If the policy exclusion at issue were to be determined to be in conflict with the statute, it would only be in conflict as to the minimum required coverage, i.e., $20,000/$40,000. As to any excess coverage it would be a valid exclusion."

360. Evidently, the Powells were newlyweds and had not coordinated the insurance on the two vehicles. Id. at 109, 585 A.2d at 291.
361. Id. at 100, 585 A.2d at 287 (quoting policy) (alterations in Powell).
362. Id. at 108, 585 A.2d at 291.
363. Id. at 110, 585 A.2d at 291 (footnote omitted).
364. Id. at 113, 585 A.2d at 293. Powell is questionable on several grounds. Numerous states, perhaps the majority, have ruled that the "owned-but-other-insured" exclusion is invalid unless the applicable uninsured motorist statute expressly permits it. See, e.g., Calvert v. Farmers Ins. Co., 697 P.2d 684 (Ariz. 1985); Harvey v. Travelers Indem. Co., 449 A.2d 157 (Conn. 1982). Maryland's uninsured motorist statute does not expressly permit the exclusion.
Of all the uninsured motorist issues that have been addressed by Maryland courts, the issue of "stacking" of coverage has generated perhaps the most confusion. Stacking in essence enables a claimant to recover a higher amount for one vehicle when it is insured on a policy covering multiple vehicles so as to obtain maximum amount payable for all vehicles. Certain judicial habits in the drafting of opinions have contributed to the confusion. The difference between intrapolicy and interpolicy stacking, and the fact that several of the stacking cases have involved both intrapolicy and interpolicy issues, has compounded the problem. Finally, section 541(c)(1)'s definition of uninsured motor vehicle as including an underinsured motor vehicle has certainly fueled the controversy by indicating that underinsured vehicles are the same as uninsured vehicles.

Reconciling the Maryland stacking cases is difficult, if not impossible. While many of the cases can be understood only in

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365. Section 543(a) of the Maryland Insurance Code prevents a person from recovering uninsured motorist or personal injury protection benefits "from more than one motor vehicle liability policy or insurer on either a duplicative or supplemental basis." Md. Ann. Code art. 48A, § 543(a) (1991); see Travelers Ins. Co. v. Benton, 278 Md. 542, 365 A.2d 1000 (1976) (discussing stacking of personal injury protection benefits).

366. Opinions that lack reference to the pertinent statutory and policy provisions are certainly troublesome guides. Moreover, courts sometimes view the stacking issue as being only a matter of statutory construction and have not considered the insurance contract provisions. Other courts have taken the opposite approach, and still others have mixed the two inquiries (what does the statute require and what does the policy provide) into one inquiry.

367. Intrapolicy stacking involves aggregating the coverages within a single policy. Interpolicy stacking involves aggregating the coverages from two or more policies.

368. See supra note 97 and accompanying text.

369. In Hoffman v. United Services Automobile Assoc., 309 Md. 167, 522 A.2d 1320 (1987), the court of appeals struggled to reconcile Travelers Insurance Co. v. Benton, 278 Md. 542, 365 A.2d 1000 (1976), Yarmuth v. Government Employees Insurance Co., 286 Md. 256, 407 A.2d 315 (1979), and Rafferty v. Allstate Insurance Co., 303 Md. 63, 492 A.2d 290 (1985), and admitted that "[w]hile there is language in those opinions which may seem to support USAA's position [that interpolicy stacking is prohibited], it was written in a different context." Hoffman, 309 Md. at 177, 522 A.2d at 1324-25. The court then explained that "the language of § 543(a) supports a construction of the section whereby an additional recovery under the required minimum uninsured motorist coverage of a second policy is precluded, but a recovery under the optional excess underinsured motorist coverage of a second policy is not precluded." Id. (emphasis added).
relationship to the statute in effect at the time of the accident, or because of particular policy language, a few of them cannot be reconciled on either basis. Reconciliation is also not possible merely on the basis that the 1981 amendments changed the nature of uninsured motorist coverage. If the cases are to be reconciled at all, it must be done on the basis that the courts' treatment of the issue of stacking evolved in conjunction with the shift in public policy brought about by the 1981 amendments.

The issue of stacking uninsured motorist coverages first appeared in dicta in a case concerning the stacking of liability coverages. In Oarr v. Government Employees Insurance Co., Charlene Daugherty was involved in an accident with Judith Oarr. Daugherty was insured by Government Employees Insurance Company (GEICO) under a policy that provided $20,000/$40,000 liability coverage. Two vehicles were listed on the policy. Daugherty was driving one of them. Oarr sued Daugherty, and a consent judgment of $40,000 was entered against Daugherty. GEICO paid $20,000 to Oarr, but then Oarr filed a declaratory judgment action against GEICO, alleging that GEICO was liable for the other $20,000 because of an ambiguity in the policy. Oarr also contended that since Daugherty had paid two separate premiums for the two vehicles, the liability coverages should stack.

The court quickly disposed of Oarr's second argument, noting that Maryland law did not require stacking. Without such a requirement, the court held that the terms of the policy would control, and that stacking would be allowed only if "the policy provides for it, not because the law requires it." The court then turned its attention to the GEICO policy language.

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371. Id. at 124, 383 A.2d at 1113. Two issues were presented to the court: whether the policy was ambiguous, and whether stacking should be allowed because the insured had paid separate premiums for two separate vehicles. In response to the second question, the court noted that

"The second issue, as framed, may be disposed of rather quickly. We are aware of no provision of Maryland law, nor any regulation of the Insurance Commissioner, that would require a policy insuring more than one vehicle to provide for the "stacking" of liability coverage. In the absence of such a supervening requirement, therefore, the terms of the policy will control. Thus, if there is to be "stacking", it will be because the policy provides for it, not because the law requires it."

Id. at 124, 383 A.2d at 1113-14 (footnote omitted).
372. Id. at 124, 383 A.2d at 1114.
373. The court stated that "[t]o determine whether Ms. Oarr is entitled to recover the other $20,000 from GEICO, we must therefore look solely to the insurance policy to see what limit of liability has been expressed therein. Consequently, the second issue will be treated as part of the first." Id. at 124, 383 A.2d at
Relying on cases that permitted stacking of uninsured motorist benefits, Oarr contended that the GEICO policy was ambiguous because there was a contradiction between the limit of liability provision and the policy's separability clause. Although the limit of liability provision clearly indicated that the insurer's liability was limited to $20,000 per person, the separability clause arguably allowed the stacking of the $20,000 per person liability coverage for each insured automobile, giving a total protection of $40,000 per person. In Oarr's view, this created an ambiguity that should have been construed against the insurer. The court disagreed, and distinguished the uninsured motorist stacking cases relied on by Oarr:

It is not necessary for us to determine whether we would follow this line of reasoning with respect to the "stacking" of medical payment and uninsured motorist coverages, and we expressly decline to make such a determination. That issue is not before us in this case. Suffice it to say that there is a clear and decisive distinction between [medical payment and uninsured motorist] coverages, on the one hand, and the liability coverage at issue here, on the other, which makes the rationale underlying the "stacking" of the former, even if we were to adopt it, inapplicable to the latter.

In the court's view, liability coverage was automobile based. In contrast, uninsured motorist coverage was person based. The court

1114. The Oarr court's statement that the "second issue shall be treated as part of the first" may have created confusion over the analytical approach a court must take in determining the stacking issue in an uninsured motorist context. What the Oarr court meant was that the second issue would be answered by a review of the policy because there was no statute permitting or prohibiting stacking.

374. Id. at 125-26, 383 A.2d at 1114.
375. The provision stated as follows:

Regardless of the number of automobiles or trailers to which this policy applies, the limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of the bodily injury sustained by one person as the result of any one occurrence.

Id. at 126, 383 A.2d at 1114 (quoting policy).

376. The separability clause stated that "[w]hen two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each." Id. (quoting policy). Oarr argued that this provision provided Daugherty with $40,000/$80,000 worth of liability coverage, not $20,000/$40,000. Id. at 126-27, 383 A.2d at 1115.

377. Id. at 129, 383 A.2d at 1116.
378. The court noted that
therefore held that the separability clause did not allow stacking of liability coverage. Moreover, since the insurer had clearly indicated that its liability was limited to the amount in the declaration regardless of the number of automobiles to which the policy applied, the court held that the policy was not ambiguous.\(^{379}\)

Seven months after \(Oarr\), the court of special appeals once again had the opportunity to consider stacking of uninsured motorist coverage in \(Langston v. Allstate Insurance Co.\)\(^{380}\) The \(Langston\) court was obviously influenced by the \(Oarr\) court's treatment of intrapolicy stacking.\(^{381}\) In \(Langston\), Lawrence Langston was injured as a result of the collision between an uninsured motorist and a motorcycle on which he was a passenger. The motorcycle was insured by a Universal Underwriters Insurance Company policy that provided $15,000 in uninsured motorist insurance.\(^{382}\) Langston recovered the $15,000, then

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\(^{379}\) The court noted the following:

In this policy . . . the insurer has made a special effort to make clear that the limit of its liability is as stated in the declarations. The "limit of liability" clause states that \textit{regardless of the number of automobiles to which the policy applies}, the limit is as so stated. No clearer expression of intent is needed.

\(Id.\) at 130, 383 A.2d at 1118 (footnote omitted).


\(^{381}\) The \(Langston\) court noted that Judge Wilner, writing for this Court in \(Oarr v. Government Employees Ins. Co.\), "expressly" declined to consider the issue put to us in this appeal. Judge Wilner did, however, refer in [note] 9 to a number of cases, including those cited in the present opinion, that permitted "stacking."

\(Id.\) at 428 n.8, 392 A.2d at 569 n.8 (citation omitted).

\(^{382}\) The procedural history of the case is complicated. Lawrence Langston, a Maryland resident, was injured in the accident while attending school in Florida. Langston recovered the $15,000, then brought an arbitration proceeding against Allstate in Florida pursuant to the terms of the policy. Meanwhile, Allstate brought a declaratory judgment action in Maryland. Allstate then sought to stay the arbitration proceeding by filing a complaint for injunction and a motion of temporary stay. Langston filed a counterclaim, and opposed the motion to stay. The court denied the motion to stay and the arbitration hearing was held. The arbiters made an award of $40,000 subject to a judicial determination of the amount of the applicable policy limits.

Langston contended that he was entitled to $40,000; Allstate contended
sought to recover under a policy issued by Allstate to his mother. The Allstate policy insured two vehicles, with an uninsured motorist limit for each vehicle of $20,000 per person, $40,000 per accident. The mother's policy also contained a limit of liability clause.

On appeal, Allstate argued that section 543(a) prohibited inter-policy "stacking or pyramiding" of coverages. The court avoided the question, however, stating, "[w]e shall not answer that question because as we see it neither 'stacking nor pyramiding' is involved." In refusing to address the principal question, the court first noted that section 543(a) did not apply to intrapolicy stacking, only to interpolicy stacking. Second, the court observed that in actuality Langston was neither seeking to stack nor to pyramid his recovery, defining both of those terms as "the recovering by a claimant 'several times over for his injuries.'" Noting that section 543(a) forbids "duplication of benefits" or recovery on a "supplemental basis," the court defined duplication of benefits as "payment in full twice or more for the same claim" and recovery on a supplemental basis as "securing remuneration over and above the recovery from an uninsured motorist of all that the claimant is legally entitled to recover."

Recognizing that Langston's personal injuries and damages far exceeded the $40,000 he maintained Allstate owed him under the policy, the court concluded that he was neither trying to duplicate nor supplement his recovery. Rather, he was trying only to recover that he was entitled to $5,000 — the difference between the $15,000 received from Universal Underwriters and the $20,000 per person liability limit of the Allstate policy. Langston then moved for summary judgment in Florida. At the same time, Allstate moved for summary judgment in Maryland. The Florida court granted Langston's motion, and Allstate appealed. The Maryland court granted Allstate's motion and Langston appealed. The Florida appellate court reversed the trial court's decision, deciding that Allstate's filing the declaratory judgment action in Maryland divested Florida of jurisdiction to determine the issue. Id. at 419-20, 392 A.2d at 562-65; see also Allstate v. Langston, 358 So. 2d 1387 (Fla. 1978) (discussing the Florida appeal).

383. Langston, 40 Md. App. at 428, 392 A.2d at 569.
384. Id.
385. The court noted the following:

Allstate fails to note that this section only applies when there is "more than one motor vehicle liability policy or insurer . . . ." (Emphasis supplied.) Since there is only one motor vehicle liability policy covering the Langston vehicles and since Allstate is the only insurer from whom recovery is sought under section 541 of Article 48A, Section 543(a) of that article is not apposite to the present case.

386. Id. at 429, 392 A.2d at 569 (citing WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE (1969)).
387. Id. at 429-30, 392 A.2d at 569-70.
his full loss and was not trying to make a profit by recovering more than the total loss.

Having decided that section 543(a) did not prevent Langston from aggregating coverages within the policy, the court concluded that "in Maryland the payment of a premium for uninsured motorist insurance on each of two or more separate motor vehicles permits recovery on each, but only to the extent of one full recovery for any loss sustained by the insured." The court based its decision largely on the insured's reasonable expectations. In the court's view, the insured paid a double premium for the uninsured motorist coverage and reasonably expected that he would obtain double coverage. Given the remedial nature of the uninsured motorist statute and the extent of Langston's injuries, the court felt compelled to allow Langston to recover from Allstate.

The court also ruled that Langston was entitled to recover the full $40,000 from Allstate, and that Allstate was not entitled to offset the $40,000 with the $15,000 paid by Universal Underwriters. In so doing, the court specifically rejected the application of Allstate's "other insurance" clause, resting its decision on McKoy v. Aetna.

388. Id. at 436, 392 A.2d at 573.
389. The Langston court quoted at length from Sturdy v. Allied Mutual Insurance Co., 457 P.2d 34 (Kan. 1969). In Sturdy, the insured paid a separate premium on each of his two cars. While operating one vehicle, he sustained injuries as a result of the negligence of an uninsured motorist. The policy provided $10,000/$20,000 for each vehicle and contained a separability provision identical to the one in the Allstate policy insuring Langston. The Sturdy court noted that if the insurer had intended to restrict the limit of liability to $10,000 in one policy where more than one automobile is covered, this could have been very easily accomplished in plain, unmistakable language. We are accustomed to purchasing insurance which follows the person in units or multiples, with the premium fixed by the insurer accordingly. When we pay a double premium we expect double coverage. This is certainly not unreasonable but, to the contrary, is in accord with general principles of indemnity that amounts of premiums are based on amounts of liability.

Langston, 40 Md. App. at 433-34, 392 A.2d at 571-72 (quoting Sturdy, 457 P.2d at 41-42) (emphasis added in Langston).
391. The Allstate policy's "other insurance" clause provided as follows: With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under this coverage shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.

Id. at 426, 392 A.2d at 568 (quoting policy).
In McKoy, because of an ambiguity between the limit of liability provision and the granting clause in the injured insured’s policy, the Court of Appeals of Maryland allowed an injured insured to collect $20,000 in uninsured motorist coverage when the tortfeasor had $10,000 in liability coverage. McKoy, like Langston, was an attempt by the court to provide a full recovery to a seriously injured insured. The Langston court went further than the McKoy court, however, by implying that public policy supported a full recovery by Langston.\(^3\)

The Langston court’s interpretation of section 543(a) was quickly disapproved by the court of appeals in Yarmuth v. Government Employees Insurance Co.\(^4\) Yarmuth did not overrule Langston. Indeed, although Langston has been disapproved by the court of appeals on at least three occasions,\(^5\) it has not been expressly overruled.\(^6\) The dissatisfaction arising from Langston comes not from its decision that intrapolicy stacking is allowed,\(^7\) but from dicta that has been used by others to support the premise that interpolicy stacking of minimum required coverage is allowed.

The dispute in Yarmuth arose out of a collision between a tractor trailer operated by Fred Kile, an uninsured motorist, and an automobile driven by Albert Starr. The collision resulted in the deaths of Starr, his wife, and their son. A daughter, Hillary, survived. The


\(393.\) The Langston court stated as follows:

Some courts have held that the “other insurance” clause of motor vehicle liability policies was generally valid and not repugnant to the statute requiring uninsured motorist coverage. They have taken the view that “the statute was not designed to provide the insured with greater insurance protection than would have been available had the insured been injured by a person having a policy containing the minimum required statutory limits.” The decisions adopting the “other insurance” clause reasoning are in conflict with [McKoy v. Aetna Casualty & Surety Co., 281 Md. 26, 374 A.2d 1170 (1977)], wherein the court of appeals implicitly rejected that approach and refused to follow the view that the “other insurance” clause limited the insured’s right of recovery to the amount he could obtain from the uninsured motorist.

Langston, 40 Md. App. at 431, 392 A.2d at 570 (citations omitted).


\(396.\) The Rafferty court expressly declined to overrule Langston. Rafferty, 303 Md. at 72, 492 A.2d at 295.

automobile operated by Starr was owned and insured by his employer, Motorola, Inc. Zurich Group Insurance Companies issued a policy covering this vehicle which provided uninsured motorist benefits of $20,000/$40,000. At the time of the accident, Starr owned a Maryland-registered 1971 Dodge automobile which was insured under a policy issued by GEICO. This policy also provided uninsured motorist benefits of $20,000/$40,000.398

Zurich paid its $40,000 to the claimants,399 who then sought an additional $40,000 in uninsured motorist benefits under the GEICO policy insuring Starr’s 1971 Dodge. GEICO argued that section 543(a) barred recovery. The claimants, in turn, contended that the prohibition against duplicative or supplemental recovery of uninsured motorist benefits in section 543(a) did not bar their interpolicy claim and should allow them to recover under the GEICO policy since they did not seek more than full indemnification for their injuries. They relied on the Langston court’s interpretation of “supplemental.”400

The Yarmuth court disagreed with both the claimants’ argument and the Langston definition of “supplemental.” After defining supplemental as an attempt “to fill the deficiencies in the uninsured motorist coverage of the primary policy by claiming under a second policy,”401 the court then addressed the claimants’ interpretation of section 543(a). The court concluded that

[this interpretation] would result in an unwarranted judicial enactment of an amount of uninsured motorist coverage that is greater than the minimum statutory limits as specified by the General Assembly. This would give a victim of an uninsured motorist greater insurance protection than would be available if he had been injured by an insured motorist having only the minimum required liability insurance.402

In a footnote, the court of appeals stated that its conclusion “makes evident our disagreement with a contrary construction placed upon section 543(a) in dicta by the court of special appeals in [Langston].”403

398. Yarmuth, 286 Md. at 258-59, 407 A.2d at 316.
399. The claimants consisted of the personal representatives of the decedents’ estates and the guardians of Hillary Starr.
400. See supra notes 386-87 and accompanying text.
401. Yarmuth, 286 Md. at 264, 407 A.2d at 319. The Yarmuth court agreed with the Langston court’s definition of “duplicative.” Id.
402. Id. at 265, 407 A.2d at 319 (footnote omitted).
403. Id. at 265 n.3, 407 A.2d at 319 n.3. The Yarmuth court also indicated that Travelers Insurance Co. v. Benton, 278 Md. 542, 365 A.2d 1000 (1976), was apparently not brought to the attention of the Langston court. Yarmuth, 286 Md. at 265 n.3, 407 A.2d at 319 n.3.
In rejecting the claimants' position, the *Yarmuth* court gave effect to GEICO's "other insurance" provision, which was similar to the excess provision in the Allstate policy that insured Langston.\(^{404}\)

Relying on a case that had interpreted section 543(a) in connection with a personal injury protection claim,\(^{405}\) the court held that GEICO's "other insurance" provision was consistent with the uninsured motorist statute.\(^{406}\) In the court's view, "other insurance" clauses in the uninsured motorist context were valid as long as they neither reduced the injured insured's total recovery below the statutory minimum nor violated the public policy established by section 543(a).\(^{407}\)

*Yarmuth*’s treatment of stacking should be understood in light of the uninsured motorist statute then in effect. At that time, the statute did not allow for underinsured motorist coverage. The court’s holding that interpolicy stacking of uninsured motorist benefits was

\(^{404}\) The provision stated as follows:

With respect to bodily injury to an insured while occupying a motor vehicle not owned by the named insured, the insurance under this amendment shall apply only as excess insurance over any other similar insurance available to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability for such other insurance.

*Yarmuth*, 286 Md. at 260, 407 A.2d at 317.


\(^{406}\) *Yarmuth*, 286 Md. at 264-65, 407 A.2d at 319.

\(^{407}\) *Id.* at 265, 407 A.2d at 319. There are three general types of "other insurance" clauses: (1) the escape clause; (2) the excess clause; and (3) the pro-rata clause. See *Consolidated Mut. Ins. Co. v. Bankers Ins. Co. of Pa.*, 244 Md. 392, 223 A.2d 594 (1966). For a general discussion of coordination of "other insurance" clauses in liability policies, see *Continental Insurance Co. v. State Farm Mutual Automobile Insurance Co.*, 71 Md. App. 148, 524 A.2d 110, *cert. denied*, 310 Md. 491, 530 A.2d 273 (1987). The Maryland Uninsured Motorist Endorsement contains an anti-stacking provision, an excess-escape clause, and a pro-rata clause:

If there is other applicable similar insurance available under more than one policy or provision of coverage:

1. Any recovery for damages for "bodily injury" sustained by an "insured" may equal but not exceed the higher of the applicable limit for any one vehicle under this insurance or any other insurance.

2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance but only to the extent that the limit of liability under this policy exceeds the limit of such other collectible insurance.

3. 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.

ISO Form PP 04 59 12 89, I. Part C-Uninsured Motorist Coverage, Other Insurance.
not allowed if the insured had collected the statutory minimum was consistent with the statutory purpose of placing the injured insured in the same position as if the uninsured tortfeasor maintained the minimum amounts of coverage mandated by the financial responsibility provisions section of the transportation code.\textsuperscript{408} Under the pre-1981 statute, if the policy which provided secondary coverage had the same limits as the policy which provided primary coverage, then the injured insured was prohibited by section 543(a) from recovering under the secondary policy. If the primary policy's uninsured motorist limits were less than the required minimum, then the injured insured was able to look to a second policy providing the required minimum to make up the difference between the first policy's limits and the second policy's limits.\textsuperscript{409} The insured, however, was not able to recover more than the statutory minimum even if the secondary policy provided additional coverage.\textsuperscript{410} This situation was rectified by the 1981 amendments. However, the change in the statute's basic design resulting from the 1981 amendments was ignored in the next stacking case.

In \textit{Rafferty v. Allstate Insurance Co.},\textsuperscript{411} Maureen Rafferty and two other women were killed in a January 9, 1982, automobile accident with an uninsured motorist. Rafferty was a passenger in an automobile driven by Laura Berg and insured by State Farm under a policy that provided uninsured motorist insurance of $50,000/$100,000. At the time, Rafferty was insured by Allstate with uninsured motorist benefits of $20,000/$40,000. The Allstate policy insured three vehicles. State Farm divided its per occurrence limit of $100,000 equally among the estates of Rafferty and the two other women.\textsuperscript{412} Rafferty's estate then sought uninsured motorist benefits

\begin{itemize}
\item \textsuperscript{408} See \textit{supra} notes 56, 62 and accompanying text.
\item \textsuperscript{409} In \textit{Rafferty v. Allstate Insurance Co.}, 303 Md. 63, 492 A.2d 290 (1985), the court noted that
\begin{quote}
[the] estate contends that § 543(a) is "not a \textit{per se} prohibition against recoveries under more than one policy." With this we agree, but we believe the instances in which more than one policy may be utilized are limited to those in which the primary insurer's uninsured motorist coverage is less than the statutory minimum. For example, given the facts of this appeal, had the primary insured been from out of state and purchased coverage for less than the Maryland statutory minimums, then Ms. Rafferty's estate could have recovered from Allstate up to the $20,000 minimum.
\end{quote}
\textit{Id.} at 72, 492 A.2d at 295; \textit{see also} Parsons v. Erie Ins. Group, 569 F. Supp. 572, 581 (D. Md. 1983) (stating that under § 543(a), the combined recovery under two policies cannot be greater than the $20,000 statutory minimum).
\item \textsuperscript{410} \textit{But see} McKoy v. Aetna Cas. & Sur. Co., 281 Md. 26, 374 A.2d 1170 (1977); Langston v. Allstate Ins. Co., 40 Md. App. 414, 392 A.2d 561 (1978); \textit{see also infra} notes 392-93 and accompanying text (discussing Langston).
\item \textsuperscript{411} 303 Md. 63, 492 A.2d 290 (1985).
\item \textsuperscript{412} Each estate received $33,333.33. The opinion is not clear whether Berg was
from Allstate, contending that the $20,000 per person limit should be stacked, entitling it to insurance totalling $60,000. The estate then demanded $26,666.67 from Allstate — the difference between $33,333.33 recovered from State Farm and the $60,000 total aggregated coverage under the Allstate policy. Allstate denied coverage, and the trial court ruled that the estate was not entitled to recovery under the Allstate policy. The estate filed a petition for a writ of certiorari and Allstate filed a cross-petition. The court of appeals granted both petitions. On appeal, the court decided that the estate could not recover under the Allstate policy, holding that when the primary policy contains uninsured motorist benefits in an amount equal to or greater than the required $20,000/$40,000 minimum, then the injured insured may not collect under a second policy.

*Rafferty* may be one of those cases that reached the correct result for the wrong reason. If *Rafferty* is understood as a rejection of intrapolicy stacking, then the decision makes sense on interpolicy stacking grounds. The court, however, expressly declined to rule on the intrapolicy issue and based its decision on the prohibition of interpolicy stacking under section 543(a). *Rafferty* also cannot be understood as resting on specific contractual provisions. The opinion did not refer to any provision in the Allstate policy that prohibited stacking, nor, in fact, did the court refer to any provision of the Allstate policy at all. In many ways, *Rafferty* is simply atavistic, reflecting pre-1981 thinking in a post-1981 context.

one of the women killed in the collision. The facts suggest that she was. The other woman is not identified.

413. *Rafferty*, 303 Md. at 66, 492 A.2d at 292.

414. *Id.* at 71-72, 492 A.2d at 294. Since State Farm had provided coverage in excess of the statutory $20,000/$40,000 minimum, the estate could not recover under the Allstate policy. *See also* Travelers Ins. Co. v. Benton, 278 Md. 542, 365 A.2d 1000 (1976) (stacking of required minimum personal injury protection benefits not allowed).

415. If the court had rejected intrapolicy stacking, then the second uninsured motorist policy provided only $20,000 per person, or less than the $33,333.33 collected by the insured under the first uninsured motorist policy. Interpolicy stacking of the required minimum coverage under the second policy is not allowed under either the pre- or post-1981 uninsured motorist statute. *See supra* note 402 and accompanying text. Hoffman v. United Services Automobile Assoc., 309 Md. 167, 183, 522 A.2d 1320, 1328 (1987), implies that *Rafferty* must be understood as a rejection of intrapolicy stacking. *See infra* note 429 and accompanying text.

416. *Rafferty*, 303 Md. at 67, 492 A.2d at 292-93. The court, however, seemed receptive to intrapolicy stacking:

While we comprehend the estate's theory that it is entitled to $60,000 coverage because Mr. Rafferty paid premiums for $20,000 coverage on each of his three cars, we believe § 543(a) requires us to hold that when more than one insurance policy is at issue, as is clearly the case here, recovery must be limited to the statutory minimum.

*Id.* at 71, 492 A.2d at 294.

417. In a footnote, the court mentioned that the other insurance clause in the
Because the *Yarmuth* and *Rafferty* decisions did not address intrapolicy stacking, the *Langston* notion of intrapolicy stacking survived. In *Howell v. Harleysville Mutual Insurance Co.*, however, the court of appeals held that intrapolicy stacking of uninsured motorist benefits in a commercial fleet policy was not allowed in Maryland. *Howell* involved a commercial fleet policy that covered nineteen vehicles and had a limit of liability of $50,000 for any one accident. Howell was severely injured in a November 13, 1982, collision with an uninsured motor vehicle. At the time, Howell was driving one of nineteen vehicles owned by his employer. Howell argued that since his employer paid separate premiums for each of the nineteen vehicles, he was entitled to a total coverage of $950,000 in uninsured motorist benefits ($50,000 x 19). The court rejected this argument, noting that the limit of liability clause provided the following: "Regardless of the number of covered autos, insureds, claims made or vehicles involved in the accident, the most [the insurer] will pay for all damages resulting from any one accident is the limit of UNINSURED MOTORISTS INSURANCE shown in the declarations." Based on the clear terms in the limit of liability clause, the court held that the most that Howell could recover was $50,000.

The facts in *Howell* were so peculiar that the court rested its decision partly on the concept that absurd results should be avoided. Nevertheless, *Howell* signalled the end of the judicial infatuation with intrapolicy stacking.

Allstate policy made the State Farm policy primary because Rafferty was occupying a non-owned vehicle. *Id.* at 66 n.2, 492 A.2d at 292 n.2. The court did not, however, mention that the other insurance clause provided that the Allstate policy afforded excess coverage to a policy on any non-owned vehicle. If *Rafferty* is understood as a rejection of intrapolicy stacking, then the other insurance clause in the Allstate policy would have prevented Rafferty from recovering under the Allstate policy. *See supra* note 407.

418. *See supra* notes 102-03 and accompanying text.
420. *Id.* at 443, 505 A.2d at 113 (quoting policy).
421. *Id.* at 442-43, 505 A.2d at 113. After finding no ambiguity in the contract, the court indicated that "[i]f, however, there were an ambiguity, the doctrine of absurd results would prevail." *Id.* at 443, 505 A.2d at 113.
422. Arguably, intrapolicy stacking is still viable today. *Howell* and *Hoffman* do not stand for the proposition that intrapolicy stacking of uninsured motorist benefits is not allowed under any circumstances in Maryland. Rather, they stand for the proposition that intrapolicy stacking was not allowed given the language of the policies in question. If *Langston* is understood as allowing intrapolicy stacking under the particular policy in question, then intrapolicy stacking is still viable. The 1989 Maryland Uninsured Motorist Endorsement seeks to prevent intrapolicy stacking in several ways. First, the endorsement specifically limits the insurer's liability to the amount shown on the declaration sheet. Second, the endorsement provides that the insurer's limit of liability is
Seventeen days before the decision in Howell was filed, the court of special appeals in Gunn v. Aetna Casualty & Surety Co.,423 ruled that intrapolicy stacking was still viable. Judge Wilner, the author of the Oarr opinion, wrote the opinion in Gunn. In 1982, James Gunn, his wife, and his sister-in-law were severally injured in an accident with an uninsured motor vehicle. Gunn was insured by Aetna under a policy that provided a combined single limit of $50,000 per accident. Three vehicles were insured under the policy. Gunn and the two other claimants demanded $150,000 from Aetna. The trial court ruled in favor of the insurer, and the claimants appealed.424 Guided by the fact that Langston had been disapproved but never overruled, the Gunn court held that the claimants were entitled to the $150,000.425 After the Howell opinion was filed, the court of special appeals withdrew the Gunn opinion, and, on April 15, 1986, filed a short per curiam decision, reversing its earlier decision and ruling that the claimants were not able to stack the limits.426 The claimants filed a petition for a writ of certiorari, which the court of appeals denied.427

One year later, the court of appeals completed the rejection of intrapolicy stacking as a means of providing a deeper pocket of recovery for a seriously injured insured. In Hoffman v. United Services Automobile Ass'n,428 the court held that intrapolicy stacking in a family automobile policy was not allowed. Oddly enough, the

the most the insurer will pay regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations, or vehicles involved in the accident.

425. Id.
426. The opinion, in its entirety, read as follows:

On February 11, 1986, we filed an Opinion in this case in which we concluded that our earlier decision in Langston v. Allstate Ins. Co. remained valid and that the Circuit Court for Prince George's County had erred in declining to act in accordance with it. Seventeen days later, in an unrelated case, Howell v. Harleysville Mutual Ins. Co., the Court of Appeals made clear that Langston was not the law, and indeed adopted a view completely opposite to that expressed in Langston. We thereupon recalled our February 11, Opinion. It follows that our earlier decision in this case cannot stand. For the reasons set forth in Howell, we conclude that the judgment below should be affirmed.

Gunn, No. 85-718, slip op. at 1 (citations omitted).
Hoffman court did not even address Langston. As in Howell, the Hoffman court relied on the limit of liability clause in the policy in deciding that intrapolicy stacking was forbidden. The court went one step further, however, rejecting the "pay double premiums, expect double coverage" reasoning in Langston. Concluding that the double premium was justified because the added vehicle increased the insurer's risk, the Hoffman court noted that the insurer, "by insuring two vehicles, had greater passenger and mileage exposure than if it had insured only one. The premium on the second vehicle, therefore, was not illusory but paid for the increased risk of added passengers and miles."\footnote{429}

While completing the rejection of intrapolicy stacking, Hoffman embraced the concept of interpolicy stacking by ruling that section 543(a) did not apply to underinsured motorist coverage.\footnote{430} Hoffman was decided after Rafferty, but the facts giving rise to the coverage issue occurred before the facts giving rise to the dispute in Rafferty. In this respect, Hoffman is the opposite of Rafferty, representing post-1981 thinking in a pre-1981 context. The accident giving rise to the coverage dispute in Hoffman occurred in July 1980. Kenneth Hoffman and his wife, Sandra, were seriously injured in an automobile accident while they were passengers in an automobile driven by Richard Whelan. Sandra Hoffman died as a result of her injuries. The driver of the other vehicle was Richard Nowakowski. At the time of the accident, the Hoffmans were insured by United Services Automobile Association (USAA), under a policy which provided uninsured and underinsured motorist coverage of $300,000 per person/$500,000 per accident. Whelan was insured by Hanover Insurance Company under a policy containing uninsured and underinsured motorist coverage of $50,000/$100,000. Nowakowski was insured by Travelers Insurance Company with liability coverage of $20,000/$40,000.

Kenneth Hoffman, individually and as personal representative of his wife's estate, sued Nowakowski. Whelan also brought suit against Nowakowski. An agreement was reached among the parties, and the insurance limits from the policies were apportioned among the claimants. The estate of Sandra Hoffman received $20,000 from Nowakowski's liability coverage and $30,000 from Whelan's underinsured motorist coverage ($50,000 per person limit minus the $20,000 paid by Travelers). Kenneth Hoffman received $5,398 from Travelers and $8,389 from Hanover. Hoffman, again acting individually and as personal representative of his wife's estate, then sued USAA to obtain underinsured motorist benefits under the policy. USAA argued

\footnote{429. Hoffman, 309 Md. at 182-83, 522 A.2d at 1327-28.}
\footnote{430. Id. at 177, 522 A.2d at 1325.}
that section 543(a) prevented Hoffman from stacking the USAA policy on top of what he had received from Travelers and Hanover. The court rejected USAA's position, ruling that Hoffman could collect from USAA because it was underinsured motorist coverage.431

Although the accident in Hoffman occurred before Maryland's uninsured motorist statute was amended to include, by the definition of uninsured motor vehicle, reduction of underinsured motorist coverage,432 Hoffman clearly indicates that interpolicy stacking is allowed in Maryland, but that normal rules involving interpretation of policies and coordination of "other insurance" clauses apply. In this regard, the stacking of policies in an underinsured motorist context is really not a true stacking (a mere aggregation of the coverage limits of each policy), but, rather, a coordination of the coverage limits in which the injured insured is entitled to coordinate the coverage limits up to the highest limit provided by the policies.433 The Hoffman court's treatment of interpolicy stacking results in the fundamental concept that the injured insured's total potential recovery is the amount of the highest underinsured motorist coverage of the policies involved.434

431. The Hoffman opinion did not address the manner in which the USAA coverage would be stacked. Since Hoffman and his wife had both received bodily injuries, the $500,000 per occurrence limit would have applied. Had all the policies been issued in accordance with Maryland law, then the estate would have recovered in this fashion: It had already collected $20,000 from Travelers (the per person liability coverage) and $30,000 from Hanover (the difference between Hanover's $50,000 underinsured motorist coverage per person limit and the $20,000 per person liability limit in the Travelers policy). Assuming the estate could prove damages of at least $300,000, then it would have been entitled to $250,000 from USAA ($300,000 per person underinsured motorist limit minus $50,000 received from Travelers and Hanover). This provided the estate with a total potential recovery of $300,000 — the highest limit provided by the policies. Because the Hanover policy had been issued in accordance with Connecticut law, the coordination of the policies was slightly different.

After the Court of Appeals of Maryland answered the certified question presented by the United States District Court for the District of Connecticut, the district court in Connecticut considered the coordination of the Travelers, Hanover, and USAA policies with respect to Mr. Hoffman's individual claim. Because Connecticut law required intrapolicy stacking, the court found that the Hanover policy, which insured two vehicles, actually provided $100,000 per person, not $50,000. Hoffman v. United Servs. Auto. Ass'n, 671 F. Supp. 922, 925 (D. Conn. 1987).

432. See supra notes 103-05 and accompanying text.

433. The estate's total potential recovery was the amount of the highest coverage limit provided by the three policies (the $300,000 provided by USAA). See infra note 436. The estate was not entitled to merely add up the coverages ($20,000 plus $50,000 plus $300,000) because of the "other insurance" clauses. See supra note 407. This assumes that the policies offered reduction underinsured motorist insurance, not floating underinsured motorist insurance.

434. If, for example, the USAA policy in Hoffman had provided only a $50,000
In many ways, the decision in *Hoffman* shifted the focus from whether policies can be coordinated to how the policies should be coordinated. Because an insured is often protected by several layers of insurance at the same time, the dispute over which policy provides the primary coverage is significant.

Confusion over the coordination of policies remains, however. Recently, the court of special appeals, in *Schuler v. Erie Insurance Exchange*, erroneously noted that when a person is covered by two automobile policies providing uninsured motorist coverage, he may choose which policy he wants to cover him, because, under *Rafferty*, he is precluded from recovering under two policies. In *Schuler*, Thomas Schuler was injured when he was struck by an uninsured motorist. At the time of the accident, Schuler was standing beside his 1983 Camaro, which was insured by a MAIF personal liability policy with uninsured motorist limits of $20,000/$40,000. Schuler’s wife, Lena, owned a 1980 BMW, which was insured by an Erie commercial liability policy with uninsured motorist limits of $100,000/$300,000. Lena Schuler was the general manager of Rainbow Hair Designers, a Maryland corporation. The Erie policy was purchased by Sylvan Nahamani, who the court describes as the “owner” of

per person underinsured motorist coverage limit rather than a $300,000 limit, then the estate would not have been able to collect anything from USAA because the “other insurance” clause would have prevented such a recovery: The estate had already received $50,000 ($20,000 from Travelers and $30,000 from Hanover), which was the limit of the USAA policy. Simply put, the estate's total potential coverage in this scenario would have been $50,000, the highest coverage limit of the three policies involved. Again, this assumes that the polices offered reduction underinsured motorist insurance, not floating underinsured motorist insurance.


436. In *Hoffman*, the Travelers policy provided primary liability coverage; the Hanover policy provided primary underinsured motorist coverage because the Hoffmans were passengers in the vehicle insured by Hanover; and the USAA policy provided secondary underinsured motorist coverage. If the USAA policy had provided primary underinsured motorist coverage (e.g., the Hoffmans were occupying their own vehicle at the time of the accident), then Hanover would not have had to contribute anything because the USAA policy would have exhausted the Hoffmans’ potential coverage. The uninsured motorist statute does not expressly contain any provision for priority of coverages, but Md. ANN. CODE art. 48A, § 543(c) (1991) provides that a passenger’s uninsured motorist policy will apply as primary coverage when that person is occupying a vehicle not covered by uninsured motorist insurance, suggesting that a passenger’s policy ordinarily applies as a secondary layer of coverage. The “other insurance” provision in the Maryland Uninsured Motorist Endorsement is consistent with this implication. *See supra* note 407.

Rainbow Hair Designers. The BMW was listed on the Erie policy, and Rainbow Hair Designers paid the premiums. Evidently, this was one of the benefits of Lena Schuler’s employment.

Thomas Schuler made a claim for uninsured motorist benefits under the Erie policy because it provided higher limits than his policy. The court noted that this election would have been proper had Schuler been covered by both the MAIF and Erie policies. Fortunately, the court correctly held that Schuler was not covered by the Erie policy. Thus, the court was prevented from allowing Shuler to practice what it had erroneously preached.

438. Rainbow Hair Designers was actually a corporation. Id. at 509 n.6, 568 A.2d at 878 n.6.

439. The Erie policy obligated Erie to pay “damages that the law entitles you or your legal representative to recover from the driver or owner of an uninsured motor vehicle.” Id. at 506, 568 A.2d at 875 (quoting policy). The policy defined “you,” “your,” and “named insured” as the subscriber, the subscriber’s resident spouse, and others named in item 1 of the declarations. “Subscriber” was defined as the person who signed the application for the policy. The policy listed Rainbow Hair Designers as the named insured. The policy also extended uninsured motorist protection by a provision entitled “Others We Protect”:

(1) Any Relative, and
(2) Anyone else, while occupying any auto we insure . . .
(3) Anyone else who is entitled to recover damages because of bodily injury to any person protected by this coverage.


441. The court stated as follows: “That [Schuler] may make this election between the two carriers is supported by the holding in Rafferty v. Allstate Ins. Co., 303 Md. 63, 492 A.2d 290 (1985). By statute, a recovery from one carrier precludes a recovery against the other.” Schuler, 81 Md. App. at 501, 568 A.2d at 875; see supra notes 411-14 and accompanying text (discussing Rafferty).

442. In holding that Thomas Schuler was not covered by the Erie policy, the court arrived at the correct result. The court stated as follows:

If Rainbow Hair Designers had intended to include the owners of the five cars as named insureds it could have done so simply by including the named individuals under the named insured portion of the declaration sheet in the policy. Having failed to do so, we conclude that Rainbow did not intend to extend this additional protection to the owners of the insured cars. As we see it, to hold otherwise would require us to rewrite the Erie policy.

Schuler, 81 Md. App. at 508, 568 A.2d at 878. Nevertheless, the fact that Lena Schuler owned the BMW but Erie insured it under a policy where Lena Schuler was not listed as a named insured, coupled with a misunderstanding of the concept of “occupying,” caused notable confusion. Erie contended that Lena Schuler and her husband were covered by the policy only when they were occupying the BMW or one of the other listed automobiles. The court rejected
view that an insured may make an election when covered by two policies ignores the "other insurance" clauses in the policies, and misunderstands the concept of "occupying." Had Schuler been covered by both the MAIF and Erie policies, then the "other insur-

Erie's position:

We find no support for the proposition that one must be either a driver or a passenger in the BMW for coverage to apply. Pedestrian injuries are covered [under the policy] since the only exclusion from UM coverage is where the uninsured vehicle is owned by the insured or by a relative.

Assuming that [Lena Schuler] had been struck as a pedestrian in the course of her travels in the BMW, coverage would apply. This is so because she obviously uses her car with the knowledge and consent of her employer. This does not mean, however, that had she, rather than [her husband], been struck while standing beside [her husband's] Camaro that the Erie policy would provide UM coverage to her.

*Id.* at 507, 568 A.2d at 877. If the court had considered the definition of "occupying" in the Erie policy, then it would have realized that the uninsured motorist coverage would have applied to Thomas Schuler and Lena Schuler only if they had been "occupying" the BMW. The Erie policy defined "occupying" as "in or upon, getting into or getting out of." Record Extract at 8, Schuler v. Erie Ins. Exch., 81 Md. App. 499, 568 A.2d 873 (1990) (No. 89-451). If the Schulers were not "occupying" the BMW, then the uninsured motorist coverage would not apply to them because they did not qualify as clause 1 insureds, despite the fact that Lena Schuler owned the vehicle.

Under the clear terms of the policy, Thomas Schuler did not qualify as the named insured (Rainbow Hair Designers), the subscriber (Nahamani), the subscriber's resident spouse or relative, or a person named in the declarations. He therefore, did not qualify as a clause 1 insured; nor did he qualify as a clause 2 insured because he was not occupying the BMW (or another insured vehicle under the policy) at the time of the accident. Moreover, contrary to what the court noted, Lena Schuler would not necessarily have qualified for uninsured motorist benefits under the Erie policy had she been struck "as a pedestrian in the course of her travels with the BMW." As a pedestrian, she would have qualified as a clause 2 insured only if she been "occupying" the BMW within the definition of that phrase. That is, she would have been entitled to coverage only if she had been "in or upon, getting into or getting out of" the BMW (or, for that matter, any of the other insured vehicles under the policy). In this regard, the court misunderstands that the status of being a pedestrian overlaps with the definition of "occupying." That is, a person can be a pedestrian (a person on foot) but still be "occupying" a vehicle within the definition of that term under an uninsured motorist policy (e.g., a person who has just stepped out of a vehicle and is standing next to it with the door open is a pedestrian but is still occupying the vehicle). See *supra* notes 259-88 (discussing the concept of "occupying"). For a discussion of the concept of being a "pedestrian" for purposes of personal injury protection, see Tucker v. Fireman's Fund Insurance Co., 308 Md. 69, 517 A.2d 730 (1986).

Thomas Schuler, as the named insured under the MAIF policy, clearly qualified as a clause 1 insured. Lena Schuler was also named as a named insured. Appendix to Appellee's Brief at 39, Schuler v. Erie Ins. Exch., 81 Md. App.
Uninsured Motorist Coverage

"occupying" provisions in the policies would determine the priority of coverage. If Schuler was not "occupying" the Camaro within the definition of that term in the MAIF policy at the time of the accident, then the MAIF and Erie policies would have provided pro-rata coverage. On the other hand, if Schuler had been "occupying" the Camaro, then the MAIF policy would have provided primary coverage and the Erie policy would have provided excess coverage.

The notion that Schuler would be able to recover from only one policy, and that he could choose which policy based on the limits of liability, defeats the underwriting basis of the "other insurance" clause.

499, 568 A.2d 873 (1990) (No. 89-451). As clause 1 insureds, they were protected under the MAIF policy even if they were not "occupying" the Camaro. See infra note 444.

444. The opinion states that Schuler was standing next to his Camaro. It does not discuss whether he was "occupying" the Camaro within the definition of that term in the MAIF policy. The MAIF policy defined "occupying" as "in or upon or entering into or alighting from." Appendix to Appellee's Brief at 39, Schuler v. Erie Ins. Exch., 81 Md. App. 499, 568 A.2d 873 (1990) (No. 89-451).

445. The MAIF policy contained the following "other insurance" provision:

With respect to bodily injury to an insured while occupying a highway vehicle not owned by such insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance, and this insurance shall then only apply in the amount by which the limit of liability of this coverage exceeds the applicable limit of liability of such other insurance.

Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him as applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this insurance applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

Appendix to Appellee's Brief at 40, Schuler v. Erie Ins. Exch., 81 Md. App. 499, 568 A.2d 873 (1990) (No. 89-451). The Erie policy contained the following "other insurance" provision:

Bodily Injury—if anyone we protect has other similar insurance that applies to the accident, we will pay our share of the loss. Our share will be the proportion the limit of protection of this insurance bears to the total limit of liability of all applicable insurance. Recovery will not exceed the highest limit available among the applicable policies.

For bodily injury to anyone we protect while occupying a motor vehicle you do not own, we will pay the amount of the loss up to the applicable limit(s) shown on the Declarations for one auto, less the amount paid or payable by other insurance.

Hoffman, unlike Schuler, clearly indicates a greater appreciation of the functions of insurance underwriting. The rejection of intra-policy stacking is a tacit admission that intrapolicy stacking assails the foundation of the insurance industry.446 In contrast, interpolicy stacking (i.e., interpolicy coordination of policies through their "other insurance" provisions) comports with the underwriting function. Indeed, the insurance industry introduced the concept of underinsured motorist coverage to forestall intrapolicy stacking.447 More importantly, Hoffman reflects an awareness that the insurance-buying public benefits by interpolicy stacking. In this regard, Hoffman embraced the end sought by the Langston court — a full recovery by the insured — but rejected the Langston court’s means — intrapolicy stacking.

XI. THE WORKERS’ COMPENSATION OFFSET

The public policy of providing a full recovery to an injured insured is also evident in the workers’ compensation offset provision contained in the uninsured motorist statute. Section 543(d) enables the insurer to offset its liability by deducting workers’ compensation benefits actually received by the insured seeking uninsured motorist benefits. It provides as follows: “Benefits payable under personal injury protection and uninsured motorist coverage shall be reduced to the extent that the recipient has recovered benefits under workers’ compensation laws of any state or the federal government.”

446. See Maag, supra note 14, at 331 (“To allow intra-policy stacking is unfair to the insurance company because liability would be increased and the company would be unable to clearly assess the risk so as to reflect it in the price of the premium.”).

447. See supra note 136.

448. Md. Ann. Code art. 48A, § 543(d) (1991 & Supp. 1992). When a person is eligible for both personal injury protection and uninsured motorist coverage, the workers’ compensation recovery is deducted from the aggregate of personal injury protection and uninsured motorist coverages. See Revis v. Maryland Auto. Ins. Fund, 322 Md. 683, 688, 589 A.2d 483, 485 (1991). In Revis, the insured had $2,500 in personal injury protection and $25,000 in uninsured motorist coverage. He collected $11,061.71 in workers’ compensation benefits, then made a claim for uninsured motorist and personal injury protection. MAIF agreed to pay $13,938.29 (the difference between the $25,000 uninsured motorist and the workers’ compensation award). MAIF refused to pay any personal injury protection, claiming, in essence, that it could deduct the workers’ compensation recovery twice — once from the uninsured motorist and once from the personal injury protection. The court ruled that MAIF’s refusal was invalid and that Revis was entitled to the $2,500 in personal injury protection:

Under the express terms of §§ 539(a) and 541 Revis was entitled to $27,500 in PIP and UM payments had he not filed a workers’
Section 543(d), like section 543(a), is designed to prevent double recovery. As section 543(d) clearly states, the workers' compensation offset applies only if the insured has recovered the compensation benefits. The court of appeals has construed "has recovered" to mean actual receipt. Accordingly, if the insured is entitled to workers' compensation benefits but does not make a claim, the uninsured motorist insurer is not entitled to offset the compensation that the insured would have received or is likely to receive in the future. The "has received" standard is much different than the comparable standard in Subtitle 16A for required reductions from claims against the Uninsured Division of MAIF.

Maryland courts have not decided whether an employee is barred by the exclusivity provision of Maryland Workers' Compensation Act from making an uninsured motorist claim against his employer's automobile insurer. Logically, the employer's immunity does not extend to the uninsured motorist insurer. A conceptually more

compensation claim.

Considering the language of § 543(d), the statutory scheme in which it appears, and the purpose of the General Assembly in enacting that comprehensive statutory scheme, we hold that the § 543(d) reduction of PIP and UM benefits by any workers' compensation recovery is to be applied to the total benefits due the insured under the PIP and UM coverages provided in the policy. Where the workers' compensation recovered by the insured is less than the total of the amounts due the insured under the PIP and UM coverages, the insured is entitled to the difference. Thus, the circuit court erred in permitting MAIF to deduct the workers' compensation recovery twice, first from the UM benefit and then from the amount due Revis under his PIP coverage.


450. Gable, 313 Md. at 704, 548 A.2d at 136-39 ("The language of § 543(d) shows a legislative intent to provide offsets only from workmen's compensation benefits actually received and not for future benefits.").

451. See MD. ANN. CODE art. 48A, § 243-I(b)(5) (1991 & Supp. 1992) ("has received or is likely to receive").

452. The situation often arises when the employee is injured by an uninsured motorist while the employee is operating or occupying a company-owned vehicle. The exclusivity issue also arises with regard to no-fault benefits. See 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 71.24(e) (1989).

453. In Boris v. Liberty Mutual Insurance Co., 515 A.2d 21 (Pa. Super. Ct. 1986), Charles Boris was injured by an uninsured motorist while driving a company truck. He filed a workers' compensation claim, then sought recovery under his
difficult issue arises when the employer is self-insured. Since the self-insured employer must provide the same benefits available under an insurance policy, however, it would appear that the injured worker would not be barred.\textsuperscript{454} The offset provision in section 543(d) reflects a legislative intent that the injured worker’s uninsured motorist claim be excluded by the availability of workers’ compensation benefits only to the extent necessary to avoid a double recovery.\textsuperscript{455} To hold that an injured worker is restricted to filing a workers’ compensation claim and to pursuing the uninsured motorist, from whom he will undoubtedly not be able to collect even if he obtains a judgment, is inconsistent with the public policy of providing a full recovery to

employer’s automobile fleet policy with Liberty Mutual. Liberty Mutual was both the workers’ compensation insurer and the automobile liability insurer for Boris’ employer. In turn, Liberty Mutual denied uninsured motorist coverage to Boris based on the exclusivity provision of Pennsylvania’s workers’ compensation act. The Boris court rejected Liberty Mutual’s position, stating that

the employer’s freedom from suit under the Workers’ Compensation Act does not logically extend to the carrier of uninsured motorist benefits. The injured employee who seeks such coverage asserts only that he was injured at the hands of some third party who was not adequately insured. The employer cannot be implicated in such wrongdoing in the slightest.

\textit{Id.} at 24.

\textsuperscript{454} See Hines v. Potomac Elec. Power Co., 305 Md. 369, 377-79, 504 A.2d 632, 636-37 (1986). In that case, Hines, an employee of Potomac Electric Power Company (PEPCO), was injured by an uninsured motorist while driving a PEPCO vehicle. The vehicle was self-insured by PEPCO. Hines made a workers’ compensation claim and received approximately $35,000 in benefits. He then made personal injury protection and uninsured motorist claims against PEPCO. The exclusivity issue was not addressed, but the holding suggests that the exclusivity provision of Maryland’s workers’ compensation act would not bar an employee’s claim.

\textsuperscript{455} Cf. Perkins v. Insurance Co. of N. Am., 799 F.2d 955, 962 (5th Cir. 1986). Because Mississippi lacked a set-off provision in its uninsured motorist statute, the \textit{Perkins} court concluded that a workers’ compensation claim was the exclusive remedy. The \textit{Perkins} court also rested its decision on the fact that Perkins, who had been injured while a passenger in his employer’s vehicle and as a result of the co-employee driver’s negligence, was not legally entitled to recover damages from the co-employee driver. The driver was uninsured; he did not have his own personal auto policy, and he was not covered by his employer’s automobile policy because of a “co-employee” exclusion. However, the driver was entitled to tort immunity because the Mississippi workers’ compensation statute barred suits between employees. As Perkins demonstrates, the issue of the injured employee’s right to recover uninsured motorist benefits from the employer’s insurer often arises in other states when a company vehicle becomes uninsured because the employee-driver is excluded by a co-employee clause in the employer’s motor vehicle liability policy. In Maryland, co-employee exclusions are invalid. \textit{See} Larimore v. American Ins. Co., 314 Md. 617, 626, 552 A.2d 889, 893 (1989).
victims of uninsured motorists.\textsuperscript{456} Uninsured motorist insurance and workers' compensation benefits provide separate and distinct types of coverage, but workers' compensation benefits certainly do not fully compensate the injured worker.\textsuperscript{457}

Consistent with the concept of a full recovery, section 543(d) also implicitly prevents the workers' compensation insurer from asserting a lien on the uninsured motorist benefits received by the injured employee. Subtitle 9 of the Maryland Workers' Compensation Act, addressing liability of third parties, is the successor to section 58 of Article 101.\textsuperscript{458} Section 9-901 preserves the injured worker's right to sue "a person other than an employer" when that person is liable for the employee's injury or death.\textsuperscript{459} Section 9-902 preserves the compensation insurer's right to recoup the amount of the workers' compensation award in two ways. First, under section 9-902(a), the workers' compensation insurer can bring a claim against the "third party who is liable for the injury or death of the covered employee."\textsuperscript{460} This must be done within two months after the Workers' Compensation Commissioner has made the award.\textsuperscript{461} If the workers' compensation insurer does not bring the action within the two month period, then the employee is allowed to sue the third party,\textsuperscript{462} and the workers' compensation insurer holds a statutory lien on the third-party settlement.\textsuperscript{463} The language and legislative history of Subtitle 9 clearly preserve the workers' compensation insurer's right to any monies recovered by the injured worker from a third-party tortfeasor,\textsuperscript{464} but it is doubtful that Subtitle 9 could, without some strain,

\begin{itemize}
\item \textsuperscript{456} In Boris v. Liberty Mutual Insurance Co., 515 A.2d 21 (Pa. Super. Ct. 1986), the court held that denying a worker the right to uninsured motorist benefits "would be contrary to the voluminous case law demanding broad applicability of the Uninsured Motorist Act." \textit{Id.} at 25.

\item \textsuperscript{457} The Boris court found significant the fact that workers' compensation benefits do not provide for pain and suffering, but uninsured motorist coverage does. \textit{See id.} The fact that the employer paid two premiums for two different types of insurance coverage is also significant. Often, both workers' compensation insurance and uninsured motorist insurance is provided to the employer by the same insurer. Even this factor, however, would not provide an exclusivity defense to the uninsured motorist insurer. While the injured employee's uninsured motorist action may coincidentally be against the same insurer that was his employer's workers' compensation insurer, the uninsured motorist action is not against the insurer in its capacity as workers' compensation insurer. Instead, it is against the insurer in its capacity as uninsured motorist insurer.

\item \textsuperscript{458} \textit{See MD. CODE ANN., LAB. & EMP.} §§ 9-901 to -903 (1991 & Supp. 1992) (Revisor's Notes); \textit{see also id.} Tables of Comparable Sections.

\item \textsuperscript{459} \textit{Id.} § 9-902.

\item \textsuperscript{460} \textit{Id.} § 9-902(a).

\item \textsuperscript{461} \textit{See id.} § 9-902(c).

\item \textsuperscript{462} \textit{Id.}

\item \textsuperscript{463} \textit{See id.} §§ 9-902(e), (f); \textit{see also id.} § 9-903.

\item \textsuperscript{464} The second report of the Commission to Study Maryland's Worker's Compen-
be interpreted as allowing a workers' compensation insurer to assert a lien against uninsured motorist benefits flowing to the injured worker. The majority of other jurisdictions that have considered the issue have determined that the workers' compensation insurer has no right to assert a lien on the uninsured motorist benefits.

The Maryland Uninsured Motorist Endorsement contains a workers' compensation offset provision and an anti-subrogation exclusion. The offset provision is contained in the "Limitation of Liability" section, which provides that any amounts otherwise payable for damages under [uninsured motorist coverage] shall be reduced by all sums:

2. Paid or payable because of the "bodily injury" under any of the following or similar law:
   a. workers' compensation law; or
   b. disability benefits law.

The anti-subrogation provision operates as an exclusion:
This coverage shall not apply directly or indirectly to benefit:

sation Laws and the Operation of the State Industrial Accident Commission referred to tort actions: "The Study Commission believes that the fact that disability or death resulted under circumstances giving rise to an action against a third party tortfeasor, should not operate, under any circumstances, to decrease the benefits properly allowable under Article 101." Brocker Mfg. & Supply Co. v. Mashburn, 17 Md. App. 327, 333, 301 A.2d 501, 504 (1973) (quoting study commission) (emphasis added).

Although it could be argued that under Subtitle 9 an uninsured motorist insurer is a third person, the reference to "joint tort-feasors" in MD. CODE ANN., LAB. & EMP. § 9-901(2) makes it clear that Subtitle 9 is designed to preserve the employee's common law right to proceed against a third-party tortfeasor for personal injuries. An uninsured motorist action is a contract action. Moreover, the reference to "damages" in Subtitle 9 is another clear indication that the type of action contemplated by that section is a tort action. Uninsured motorist benefits are not "damages"; they are first-party coverage benefits that compensate the injured insured for damages he is legally entitled to recover from the uninsured motorist. Cf. 61 Op. Att'y Gen. 483, 487 (1976) ("Similar to a workmen's compensation award, an insurer's payment of economic loss benefits approximates an award of previously fixed compensation, as distinguished from damages.") (citing Hurt v. Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co., 175 Md. 403, 2 A.2d 402 (1938)).

Larson states that "[a] comparatively recent problem in double recovery presents the question of whether a[n] insurer that has paid compensation benefits should have a lien upon the proceeds of the claimant's private uninsured motorist policy. At this writing, the almost unanimous holding disfavors any such lien." 2A LARSON, supra note 452, § 71.23(a).

ISO Form PP 04 59 12 89, I. Part C-Uninsured Motorist Coverage, Limit of Liability. The reduction does not apply if the tortfeasor's vehicle has liability insurance. See id. This is so because the compensation insurer can satisfy its lien from the tortfeasor's liability policy.
Uninsured Motorist Coverage

1. Any insurer or self-insurer under any of the following or similar law:
   a. workers' compensation law; or
   b. disability benefits law.
2. Any insurer of property.

The offset provision tracks section 543(d). The anti-subrogation provision is designed "to prevent subrogation by a workers' compensation or disability benefits insurer to the insured's right against the uninsured motorist." Although Maryland courts have not addressed the validity of the anti-subrogation provision, other states have upheld it. In these states, the validity of the offset provision is of utmost importance. If the offset provision is valid, then the anti-subrogation provision is also valid. In Maryland, the uninsured motorist statute permits an offset, and it is therefore inescapable that the anti-subrogation provision precludes the workers' compensation insurer from asserting a lien on the uninsured motorist benefits received by the injured worker.

Likewise, the workers' compensation insurer would not have a right to the uninsured motorist benefits withheld by the uninsured motorist insurer. The offset provision and the anti-subrogation clause are mutually constitutive opposites; the latter is valid because the former is valid. Together, they seek to provide a full recovery and prevent a double recovery. Underpinning both workers' compensation and uninsured motorist coverage is the concept that the injured party should not receive double recovery for his loss. This prohibition is accomplished by allocating the loss between the workers' compensation insurer and uninsured motorist insurer. Certainly, from an

468. ISO Form PP 04 59 12 89, 1. Part C-Uninsured Motorist Coverage, Exclusions, B.
469. The offset provision, however, refers to amounts "paid or payable." This conflicts with § 543(d)'s reference to "has recovered." See supra note 448.
470. See 3 LONG, supra note 29, § 24.42(2).
471. See generally id.
472. Larson notes that "if the offset is valid, the question whether the compensation insurer has a lien against the proceeds of the uninsured motorist policy is quickly answered, since there are no such proceeds left after the offset that can be identified with the compensation insurer's lien." 2A LARSON, supra note 439, § 71.23(c). He concludes that "[t]he issue of such an insurer's lien, then . . . can arise only in two situations: When no such offset exists, or when such an offset has been found void." Id. This conclusion "is even more obviously true if the clause forbidding that any of the proceeds of the policy should inure to the benefit of the compensation insurer is found valid." Id. § 71.23(c) n.44.
473. Larson notes that the anti-subrogation clause is valid in those cases where the workers' compensation offset is valid. Id. § 71.23(b).
474. In this way, the workers' compensation insurer shares the total loss with the
administrative standpoint, the uninsured motorist offset, in combination with the elimination of the workers' compensation lien on the uninsured motorist benefits, is the most efficient means of assuring that the injured motorist will not enjoy a double recovery.\footnote{475}{Cf. \textit{Gray v. State Rds. Comm'n}, 253 Md. 421, 429, 252 A.2d 810, 815 (1969); \textit{Unsatisfied Claim & Judgment Fund Bd. v. Salvo}, 231 Md. 262, 189 A.2d 638 (1963). At the time of these two cases, the Unsatisfied Claim and Judgment statute contained a provision eliminating the workers' compensation lien where a payment from the Unsatisfied Claim and Judgment Fund had been reduced by amounts received through workers' compensation. The lack of a corresponding provision for a workers' compensation offset, however, rendered the lien prohibition ineffective. Thus, in \textit{Salvo} the court denied the Fund the right to reduce its payment by the amount of Salvo's workers' compensation award, and in \textit{Gray}, the court upheld the Workmen's Compensation Commission's determination that Gray's workers' compensation insurer was entitled to credit for the amount Gray had received from the Fund. The current uninsured motorist statutory scheme is in one sense the opposite of the Unsatisfied Claim and Judgment Act that was the subject of the disputes in \textit{Salvo} and \textit{Gray}. Unlike the current uninsured motorist statute, which contains a workers' compensation offset, thus denying the workers' compensation insurer the right to subrogation against the uninsured motorist insurer and placing the primary payment obligation upon the workers' compensation insurer, the statutory scheme at the time of \textit{Salvo} and \textit{Gray} placed primary payment responsibility upon the Fund. In noting that after the time of Gray's accident, the Unsatisfied Claim and Judgment statute had been amended to provide for a reduction in Unsatisfied Claim and Judgment Fund payments by the amount of workers' compensation awards (consequently activating the lien prohibition), the \textit{Gray} court commented that the amended procedure "presents a more orderly method of preventing a double recovery, while conserving the assets of the Unsatisfied Claim and Judgment Fund."}}
uninsured motorist benefits are not an amount recovered by the injured worker in a suit against a third-party tortfeasor, section 9-903’s credit does not apply. Although it is designed to preclude double recovery, section 9-903 was not designed to prevent the injured worker from obtaining a full recovery. Similarly, the uninsured motorist statute seeks to balance the desire to provide a full recovery and the need to prevent a double recovery. A person, however, can recover both workers’ compensation and uninsured motorist benefits and still not be fully compensated. Therefore, an injured worker who has received both workers’ compensation and uninsured motorist benefits should be able to reopen the workers’ compensation claim if he can show that he has not been compensated fully.

477. It is clear that, if the uninsured motorist insurer is not a third party in §§ 9-901 or 9-902, then the uninsured motorist benefits are not “the amount” received by the injured employee in § 9-903. The cases dealing with the credit provision in section 58 refer to monies received by the injured worker from a third party tortfeasor. See, e.g., Brocker Mfg. & Supply Co. v. Mashburn, 17 Md. App. 327, 301 A.2d 501 (1973).

478. See Mashburn, 17 Md. App. at 339, 301 A.2d at 506. The Mashburn court stated as follows:

We think it clear that the intent of the 1957 amendment was, in essence, that an injured employee may, by the combined result of his compensation claim and a proceeding against a negligent third party, recover more than he could recover under the Act, but he can never recover less. If he were to receive less from the third party than he is entitled to receive under the Act, he may “reopen the claim . . . to recover the difference between the amount . . . received [from the third party] . . . and the full amount of compensation which would be . . . payable” under Art. 101. A reading of the Study Commission’s Report, together with the 1957 enactment can, in our opinion, lead to no other reasonable interpretation.

The construction placed upon § 58 by appellants would deprive the appellee of benefits under the Act by limiting recovery to the amount obtained from the negligent third party (less any sum he is called upon to reimburse the employer-insurer), and would almost certainly discourage third party actions by other claimants where there is a possibility, such as here, of large future medical payments and thereby defeat the will of the General Assembly.

Id. at 337, 301 A.2d at 506.

479. Fundamental fairness, however, and the general prohibition against a double recovery will preclude the worker from securing additional workers’ compensation benefits if the commissioner decides that the worker will recover twice. Thus, despite the lack of a specific statutory provision supporting the credit, the workers’ compensation insurer is protected. In this sense, the workers’ compensation insurer’s credit is not absolute. The workers’ compensation insurer, however, is protected and may avoid future compensation payments depending on the resolution of the “double recovery” issue by the compensation commissioner.
XII. NOTIFICATION AND COOPERATION DUTIES

The hybrid nature of uninsured motorist insurance creates numerous notification and cooperation problems between the insured and the insurer. The Personal Auto Policy and the Maryland Uninsured Motorist Endorsement place affirmative duties of notification and cooperation on the insured. These duties are designed to afford the uninsured motorist insurer the opportunity to litigate the uninsured motorist claim and to preserve the uninsured motorist insurer's subrogation rights against the tortfeasor. The injured insured has three alternatives when pursuing a claim involving an uninsured motorist. First, he may sue the tortfeasor in tort, obtain a judgment and then enforce the judgment against the uninsured motorist insurer. Second, he may sue the uninsured motorist insurer and, as part of the case, prove that the tortfeasor's negligence proximately caused his injuries. Third, the injured insured may combine the tort and contract claims in a single action. Maryland courts seem to favor the third approach because it promotes judicial economy and gives each party his day in court.

480. Part E of the Personal Auto Policy provides:

We have no duty to provide coverage under this policy unless there has been a full compliance with the following duties:

A. We must be notified promptly of how, when and where the accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

B. A person seeking any coverage must:
   1. Cooperate with us in the investigation, settlement or defense of any claim or suit.
   2. Promptly send us copies of any notices or legal papers received in connection with the accident or loss.
   3. Submit, as often as we reasonably require:
      a. to physical exams by physicians we select. We will pay for those exams.
      b. to examination under oath and subscribe the same.
   4. Authorize us to obtain:
      a. medical reports; and
      b. other pertinent records.
   5. Submit a proof of loss when required by us.

C. A person seeking Uninsured Motorists Coverage must also:
   1. Promptly notify the police if a hit-and-run driver is involved.
   2. Promptly send us copies of the legal papers if a suit is brought.

ISO Form PP 00 01 12 89, II. Part E-Duties After an Accident or Loss. The Maryland Uninsured Motorist Endorsement replaces paragraph C. 2. with:

2. Promptly notify us if a suit is brought. We request that a copy of any legal papers served accompany the notice.

ISO Form PP 04 59 12 89, II. Part E-Duties After an Accident or Loss.

Under the first alternative, the insured does not have to obtain the insurer’s permission to sue the tortfeasor, and any “consent to sue” provision is unenforceable. The judgment is binding on the insurer if it had notice of the action and reasonable opportunity to intervene. Even a default judgment is binding on the uninsured motorist insurer as long as the uninsured motorist insurer’s due process right to a day in court was fulfilled. The insured’s ability to first obtain a default judgment against the tortfeasor and then enforce it against the uninsured motorist insurer leads to procedural difficulty. Because the insured does not have to notify the uninsured motorist insurer of a possible uninsured motorist claim until he reasonably believes he has such a claim, the first notice an insurer may have of the uninsured motorist claim is after a default order has been entered against the tortfeasor. Even if the insurer intervenes in the tort action, it may not be able to remove the order of default entered against the uninsured tortfeasor. The insurer’s role then would be limited to litigating the damage aspects of the case. Without the “due process” protection, an injured insured would
always try to obtain a default judgment against the uninsured motorist before notifying the insurer of the uninsured motorist claim, thereby precluding litigation of whether the insured is legally entitled to recover uninsured motorist benefits. The uninsured motorist insurer seeks to preclude this eventuality by imposing specific notification and cooperation duties on the insured.489

The injured insured's second alternative raises significant problems with respect to the statute of limitations. In many states, the limitation periods for tort and contract actions are different.490 Maryland litigants do not have this problem because the same three year period applies to both contract and tort actions.491 Nevertheless, inequities can arise because of the application of the discovery standard to the limitation periods. Since an uninsured motorist claim is a breach of contract action, the statute of limitations does not begin to run until the insured knows or should know that the uninsured motorist insurer is denying liability.492 In contrast, the limitation period for the tort action against the uninsured motorist ordinarily begins to run on the date of the accident.493

This conflict between the running of the tort and contract limitation periods may prejudice the insurer's ability to recoup any uninsured motorist benefits it may pay to its insured. While Maryland courts have not directly addressed the theory on which the uninsured motorist insurer can recover from the uninsured tortfeasor, the court of special appeals has correctly observed that it is a right of subrogation. According to the court, "[i]n the extent it has paid uninsured motorist benefits, the insurer stands in the shoes of its insured and succeeds to his claim. That is the essence of subrogation."494 Indeed, the insurer's only possible theory on which to base its recovery against the tortfeasor is subrogation.495 Although some states ex-

489. See supra note 480. The Maryland Uninsured Motorist Endorsement also states that

[n]o judgment for damages arising out of a suit brought against the owner or operator of an "uninsured motor vehicle" is binding on us unless we:

1. Received reasonable notice of the pendency of the suit resulting in the judgment; and
2. Had a reasonable opportunity to protect our interests in the suit.

ISO Form PP 04 59 12 89, I. Part C - Uninsured Motorists Coverage, Insuring Agreement.

490. See 3 LONG, supra note 29, § 24.49.
493. The action would arise at the point when the insured knew or should have known he had a claim against the tortfeasor.
495. The uninsured motorist insurer's claim cannot be based on contribution. The
pressly authorize the insurer’s subrogation right. Maryland does not. By preserving the injured insurer’s right to proceed against the uninsured tortfeasor, however, section 542 implicitly establishes the uninsured motorist insurer’s right of subrogation.

Resting the insurer’s right of recovery from the tortfeasor on a right of subrogation is troublesome. Because an insured does not have an uninsured motorist claim until he knows or should know the uninsured motorist insurer is denying liability, the insurer may not receive any notice of the uninsured motorist claim until after the tort limitation period has expired, thereby precluding a subrogation claim. The insured may even be able to manipulate the limitations periods to deny the insurer a right of subrogation.

Uninsured tortfeasor and the uninsured motorist insurer certainly do not stand in oequaii jure. See generally 5A Md. L. ENCYCL. Contribution §§ 1-5 (1982) (discussing joint liability based upon legal relationship). Nor are the tortfeasor and the uninsured motorist insurer in pari delicto. The liability of the uninsured motorist insurer rests on a contractual basis and, therefore, the uninsured motorist insurer cannot be considered a joint tortfeasor under the Uniform Contribution Among Joint Tortfeasors Act. See Md. ANN. Code art. 50, § 16 (1991) (defining joint tortfeasors as “two or more persons jointly or severally liable in tort for the same injury”); see also Robinson v. Adco Metals, Inc., 663 F. Supp. 826, 831-33 (D. Del. 1987). Similarly, the insurer would not have an indemnity claim. The right to indemnification derives either from a contract between the indemnitor and the indemnitee or, absent a contract, from a special relationship between the indemnitor and the indemnitee. See generally 12 Md. L. ENCYCL. Indemnity §§ 1-8 (1961). Neither situation is present when the uninsured motorist insurer pays uninsured motorist benefits to its insured.


496. See generally 3 No-FAULT AND UNINSURED MOTORIST AUTOMOBILE INSURANCE § 31.100 (1993).

497. Section 542 of the Maryland Insurance Code provides that “[n]othing in this subtitle shall be deemed to affect the right of any person to claim and sue for damages or losses sustained by him as the result of a motor vehicle accident.” The section does not preserve the insurer’s right to recoup personal injury protection payments. Md. ANN. Code art. 48A, § 542 (1991); see id. § 540(c) (eliminating subrogation); see also id. § 481B (prohibiting subrogation with regard to medical payments under a motor vehicle insurance policy).


499. Arguably, the insured insurer’s act of making a personal injury protection claim against his insurer should place the insurer on notice that litigation may result from the accident. Thus, not only is the insurer prepared to defend its insured in case the other party in the accident seeks compensation, but the
The Personal Auto Policy contains a subrogation provision. Once the insurer compensates the insured, the insurer has the right to proceed against the tortfeasor. Any recovery made by the insurer reimburses the insurer; any excess inures to the benefit of the insured. The Personal Auto Policy and the Maryland Uninsured Motorist Endorsement address the conflict in limitation periods by placing an affirmative obligation on the insured to preserve the insurer’s right to recover damages from the uninsured tortfeasor. The Personal Auto Policy and the Maryland Uninsured Motorist Endorsement also require that the insured notify the insurer of a suit against the tortfeasor in a timely fashion.

The insured may also impair the insurer’s subrogation rights by entering into a settlement agreement with the tortfeasor. The insurer should also be aware that a possible uninsured motorist claim may result should its insured seek compensation from the other party.

500. Cf. Cotham & Maldonado v. Board of County Comm’rs, 260 Md. 556, 273 A.2d 115 (1971) (rejecting the theory that the limitations period on an indemnity claim arises from the date of the wrong because “by the manipulation of the time of filing suit and the speed with which the plaintiff then proceeded, the plaintiff could easily place [the party asserting an indemnity claim] outside the statutory period”).

501. Part F of the Personal Auto Policy contains the following subrogation agreement:

A. If we make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another we shall be subrogated to that right. That person shall do:
   1. Whatever is necessary to enable us to exercise our rights; and
   2. Nothing after loss to prejudice them.

ISO Form PP 00 01 12 89, Part F. It also contains a “trust agreement,” which states:

B. If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall:
   1. Hold in trust for us the proceeds of the recovery; and
   2. Reimburse us to the extent of our payment.

I’d.


503. See supra note 501.

504. See supra note 480. In other states, insurers seek to protect themselves by including a limitation period within the contract. See 3 LONG, supra note 29, § 24.49 (“An increasing number of companies are adding endorsements to their uninsured motorist coverage setting forth the time period within which claims may be made. These periods run from six months to three years.”). Such a provision would be invalid in Maryland. See MD. ANN. CODE art. 48A, § 377B (1991). Several states have enacted a specific limitations period applicable to the uninsured motorist insurer’s subrogation claim. California, for example, provides that an insurer may bring a subrogation action within three years of the date of the payment to the insured. See CAL. INS. CODE § 11580.2(g) (West 1988).

505. A general release granted to a tortfeasor arguably would not release the insurer
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The introduction of reduction underinsured motorist coverage makes this problem even more acute because the financially responsible but underinsured tortfeasor’s liability insurer will try to obtain a general release from the injured party before paying its liability limits. The cooperation provisions of the Personal Auto Policy are designed to prohibit the insured from entering into any settlement agreement without the knowledge and consent of the insurer. If the uninsured providing the uninsured motorist coverage. The scope of the release must be determined by the intent of the parties and, absent a specific provision releasing the victim’s uninsured motorist insurer from liability under the first-party claims, the insurer would still be obligated to provide uninsured motorist benefits. See Globe Am. Cas. Co. v. Chung, 76 Md. App. 524, 546 A.2d 654 (1988) (refusing to allow general release given to an insurer providing protection against robbery and burglary to operate as a release of an uninsured motorist insurer because the uninsured motorist insurer “was not a party to the release, paid no consideration to be released, and was unaware of the existence of the release at the time it was originally executed”), vacated, 322 Md. 713, 589 A.2d 956 (1991); cf. Thomas v. Erie Ins. Exch., 229 Md. 332, 182 A.2d 823 (1962) (holding that general release of tortfeasor released injured party’s right to benefits under the medical payment provision of the tortfeasor’s policy).

506. See supra notes 107-08 and accompanying text.

507. Some states have enacted provisions to protect the motorist who complies with the financial responsibility provisions but, nevertheless, is underinsured in comparison to the injured party. See, e.g., Home Ins. Co. v. Maldonado, 515 A.2d 690 (Del. 1986) (discussing Delaware’s statute). In Maryland, the uninsured motorist insurer will still be able to pursue the tortfeasor even if the tortfeasor has complied with the financial responsibility provisions. The situation is no different than when the injured party obtains a judgment against the tortfeasor in excess of the tortfeasor’s liability limits; the fact that the tortfeasor complied with the financial responsibility provisions does not preclude the injured party from pursuing a recovery above and beyond the liability limits. But cf. 2 Wide, supra note 19, § 44.4 (“The assertion of a right of subrogation — by the uninsured motorist insurer in regard to the tortfeasor or the tortfeasor’s insurer — is inimical to the very character of the uninsured motorist coverage so long as the insured has not been fully indemnified.”).

508. See supra note 480. The 1966 Standard Form contains a specific “consent to settle” clause:

This insurance does not apply . . . to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this insurance who shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor[.]

1 Wide, supra note 19, app. A at 14. The validity of a “consent to settlement” clause in Maryland has not been addressed specifically. In Nationwide Mutual Insurance Co. v. Webb, 291 Md. 721, 436 A.2d 465 (1981), the court indicated that “[u]nlike consent to sue clauses, consent to settle clauses are generally upheld, at least to the extent that settlements, consent judgments, releases, covenants not to sue, etc., between insureds and the uninsured motorists are not binding upon insurers unless the insurers have given their consent.” Id. at 740, 436 A.2d at 476; see also Grain Dealers Mut. Ins. Co. v. Van Buskirk, 241 Md. 58, 69, 215 A.2d 467, 473 (1965) (“The purpose of the exclusion in
motorist insurer does not know about, or knows but does not approve of, an insured's settlement with the uninsured tortfeasor, then the insured certainly has breached his duty to cooperate. Whether this violation relieves the insurer of its obligations under the policy is another question.

Under the Maryland Insurance Code, an insurer must show actual prejudice in order to escape its contractual obligations based on an insured's breach of his duty to notify or to cooperate. No Maryland court has addressed the concept of "actual prejudice" in an uninsured motorist context. Courts from other jurisdictions are regard to settlement is to protect the company from the payment of claims which have not been determined by a court, but merely by agreement of the parties themselves.

As a practical matter, the uninsured motorist insurer should disapprove of a settlement only if there is a real possibility that it can collect money above and beyond the liability policy. Once the uninsured motorist insurer becomes aware of the possible settlement, it can then investigate the tortfeasor's assets. If there is no reasonable probability of recouping any uninsured motorist payments, then there is no reason to withhold approval of the settlement. See generally 3 No-Fault and Uninsured Automobile Insurance § 30.80(4) (1993). For an excellent discussion of the problems of settling claims when the tortfeasor has liability insurance and the injured claimant wants to seek uninsured motorist benefits, see J. Sue Myatt, Settlement Procedures in Underinsured Motorist Cases: The Underinsurer's Dilemma Between Preserving the Insurer's Subrogation Right and Protecting the Insured's Settlement Right, 14 J. Corp. Law 175 (1988).

It is not clear whether § 482 would apply to an insurer seeking to disclaim uninsured motorist coverage based on its insured's failure to notify or cooperate. Section 482's prejudice requirement is applicable when "any insurer seeks to disclaim coverage on any policy of liability insurance issued by it." Id. (emphasis added). "Liability" insurance is not defined by the Insurance Code; however, § 482 is contained in Subtitle 28, entitled "Casualty Insurance," which contains a specific section addressing uninsured motorist coverage. See id. § 481A (requiring uninsured motorist insurance to cover damage caused by a vehicle insured by an insolvent insurer). Uninsured motorist insurance falls into the definition of casualty insurance. See id. § 68 (defining casualty insurance as "[i]nsurance against legal, contractual or assumed liability for death, injury or disability of any human being . . . ."). The holding in Government Employees Insurance Co. v. Harvey, 278 Md. 548, 336 A.2d 13 (1976), also supports the conclusion that § 482 is applicable to an insurer who disclaims uninsured motorist coverage based on its insured's failure to notify or cooperate. In Harvey, the court of appeals held that § 482 was not applicable to an insurer who sought to disclaim coverage based on its insured's failure to submit a proof of loss for personal injury protection within the express statutory time period mandated by Md. Ann. Code art. 48A, § 544(a)(1) (1991). See generally Note, A Legal Process Analysis for a Statutory and Contractual Construction of Notice and Proof of Loss Insurance Disclaimers — Government Employees Insurance Co. v. Harvey, 38 Md. L. Rev. 299 (1978). Since Subtitle 35 does not impose any specific time limit for making an uninsured motorist claim, § 482's "actual prejudice" standard should apply.

divided. Some courts hold that all the insurer has to do is show that its subrogation rights were eliminated.\footnote{512} Other courts take a narrower view, holding that the insurer must show not only that its subrogation rights were eliminated but also that, if the rights had not been eliminated, it would actually have been able to collect from the tortfeasor.\footnote{513} Showing a denial of an opportunity is, of course, less burdensome than showing the opportunity would have been successful. Allowing the insurer to escape its indemnification obligation because of a theoretical loss of its subrogation rights is inconsistent with the remedial nature of the uninsured motorist statute.\footnote{514}

XIII. EXTRA-CONTRACTUAL LIABILITY

The uninsured motorist insurer's liability is not necessarily limited by the amount of uninsured motorist insurance provided in the policy. Maryland does not allow the recovery of extra-contractual damages based on an uninsured motorist insurer's bad faith refusal to pay an uninsured motorist claim.\footnote{515} In \textit{Johnson v. Federal Kemper Insurance Co.},\footnote{516} the court rejected the application of bad faith liability to first-party situations, reasoning that first- and third-party claims presented different situations.\footnote{517} The court also rejected the insured's argument that the Insurance Code's Unfair Claims Act created a right to extra-contractual damages.\footnote{518} The \textit{Johnson} court's holding does not, however, insulate the uninsured motorist insurer from extra-contractual liability. An insurer's unreasonable and bad faith refusal to pay a claim may constitute a conversion.\footnote{519} Moreover,
the insured may have a claim for intentional infliction of emotional distress. Either claim would support punitive damages if the insured could show actual malice; the standard, however, is difficult to meet.

The uninsured motorist insurer may also be liable for attorney's fees incurred by the insured under certain circumstances. Maryland courts have not addressed whether an insured is entitled to recover attorney's fees when he establishes coverage in a declaratory judgment action. A separate declaratory judgment action, though rare, may arise when the insurer disclaims coverage on an independent coverage ground. Neither the uninsured motorist statute nor the Uniform

the allegations in Food Fair Stores v. Hevey, 275 Md. 50, 338 A.2d 43 (1975):

The allegations in this case, that the insurer failed to pay a claim when it had no good faith defense to payment under the terms of the insurance contract, are analogous to those in Hevey. As in Hevey, the alleged unjustified withholding of payments by the insurer here, if true, constitutes the tort of conversion. The conversion is sufficiently intertwined with the insurance contract, as it was with the employment contract in Hevey, as to fit the Court of Appeals' definition of tort arising out of a contractual relationship.

Caruso, 558 F. Supp. at 435.


521. The Caruso court noted that "[w]hile the decision here with respect to first party claims may seem harsh, it does not preclude insureds from seeking punitive damages when insurers refuse or delay payment; it merely elevates the standard for recovery." Caruso, 558 F. Supp. at 435 (footnote omitted).

522. In Maryland, the insured is clearly not entitled to recover attorney's fees when he brings a contract action against the insurer under the uninsured motorist provisions of the contract because he is not legally entitled to recover attorney's fees from the uninsured motorist. In some states, the award of attorney's fees in uninsured motorist cases is allowed by statute. In absence of such legislation, courts, in general, will decline to award attorney's fees. See generally 2 Widiss, supra note 19, § 20.5.

523. In Nationwide Mutual Insurance Co. v. Webb, 291 Md. 721, 436 A.2d 465 (1981), the court of appeals noted that an uninsured motorist carrier may have legitimate "coverage defenses" to an uninsured motorist claim. The court noted that the uninsured motorist carrier could assert these defenses in a separate action or as a counterclaim in the uninsured motorist case:

When an initial claim is in tort, a counterclaim, cross-claim or third-party claim may be in contract, and vice versa. Thus, if the insurer intervenes in the underlying tort case, the plaintiff insured could amend his declaration and add a contract claim against the insurer ground upon the uninsured motorist endorsement. Moreover, in a circuit court action, if an insured plaintiff fails to assert a contract claim against the insurer under the endorsement, but if an actual controversy concerning coverage exists apart from the "tort" issues the insurer could make a claim against the plaintiff under the Declaratory Judgment Act.

Id. at 742-43, 436 A.2d at 477 (citations omitted). If the insurer brings a
Declaratory Judgments Act\(^\text{224}\) authorizes the award of attorney's fees to an insured who brings a declaratory judgment action to determine coverage under an uninsured motorist endorsement.

In Maryland, attorney's fees are ordinarily not awarded in a declaratory judgment action.\(^\text{225}\) They are recoverable when an insured brings a declaratory judgment action to establish the insurer's duties to defend and indemnify.\(^\text{226}\) This is a well-established exception.\(^\text{227}\) The court of appeals has admitted that the recovery of the attorney's fees is based on an "unrefined" legal theory,\(^\text{228}\) and recently refused to extend the exception to an action involving a breach of a policy of health insurance.\(^\text{229}\) Nevertheless, the award is usually justified on two grounds. First, the insurer is said to have "authorized" the expenditure of the fees by its failure to defend.\(^\text{230}\) Second, the fees are considered part of the damages sustained by the insured as a result of the insurer's breach of its contractual duty.\(^\text{231}\) Awarding attorney's fees on the ground that the insurer authorized them is always questionable, even in third-party situations. On the other hand, the attorney's fees certainly arise naturally from the uninsured motorist carrier's disclaiming coverage.\(^\text{232}\) Public policy also supports declaratory judgment action as a counterclaim to the insured's uninsured motorist claim, or just raises the independent coverage issues as affirmative defenses to the insured's uninsured motorist claim, then, assuming that attorney's fees are appropriate, the court will have to award attorney's fees to the insured who successfully defends the counterclaim or rebuts the affirmative defenses. The insured would not otherwise be entitled to the attorney's fees he incurred in pursuing his uninsured motorist claim. See supra note 514.


\(^{525}\) See American Home Assurance Co. v. Osbourn, 47 Md. App. 73, 84, 422 A.2d 8, 15 (1980).


\(^{528}\) See id. at 537, 489 A.2d at 547.

\(^{529}\) See Collier v. MD-Individual Practice Ass'n, 327 Md. 1, 10-17, 607 A.2d 537, 541-45 (1992). In Collier, the court of appeals refused to award attorney's fees in a case involving an action to compel health insurance coverage. Id. The court's treatment of this issue in the context of first-party health insurance casts significant doubt on the likelihood of recovery of attorney's fees in the uninsured motorist coverage context. See id.


\(^{531}\) Id.; see American Home Assurance Co. v. Osbourn, 47 Md. App. 73, 84, 422 A.2d 8, 14 (1980).

\(^{532}\) In Johnson, the court rejected the insured's claim for punitive damages: [The insured] did not assert at the trial level, any tort claim other
the extension of the exception to the uninsured motorist context.

The Maryland appellate courts have not attempted to analyze the "unrefined legal theory" underlying the award of attorney's fees in third-party situations. It is clear, however, that the award of attorney's fees is a public policy decision aimed at punishing the insurer and deterring it from leaving the insured to fend for himself.533 If the insurer were not liable for the attorney's fees then it would refuse to defend every time the insured was sued, thereby leaving the insured to defend the tort actions, subjecting the insured to a possible default judgment, and placing the burden on the insured to bring a declaratory judgment action against the insurer to establish coverage. The award of attorney's fees in third-party situations is especially appropriate because a third party—the injured plaintiff in the tort case—is involved. By "punishing" the insurer, the court sends a message to the insurance industry that the insurer's duty to defend is near absolute, and that there is a public policy to protect insureds in tort cases by providing them with a defense. Making the insurer liable for the attorney's fees incurred by the insured in the declaratory judgment action also encourages resolution and settlement of tort actions.534 In short, the award of attorney's fees protects the insured and encourages proper handling of claims.

Awarding attorney's fees when an insurer wrongfully refuses to defend a tort claim against its insured recognizes the significant differences between first and third-party coverage. Admittedly, the potential harm to the insured in third-party instances does not exist in a first-party instance. A first-party dispute is merely a dispute between two parties to a contract,535 and third parties, such as injured

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533. Cf. St. Luke Evangelical Lutheran Church v. Smith, 318 Md. 33, 568 A.2d 35 (1990) (noting that an award of attorney's fees generally serves as a tool for punishing wrongful conduct in ruling that a jury could consider the amount of the plaintiff's reasonable attorney's fees when calculating an award of punitive damages).

534. For a discussion of the insurer's duty to defend, see Andrew Janquitto, Insurer's Duty to Defend in Maryland, 18 U. BALI. L. REV. 1 (1988).

535. In Johnson, the court, after addressing the element of bad faith in third-party claims, stated that

a first party claim presents an entirely different situation. The insured
members of the public, are not involved. Resolving the dispute lies within the power of the insured and insurer. Nevertheless, the overriding public policy that innocent victims of uninsured motorists should be compensated weighs in favor of extending the exception to the uninsured motorist context. Awarding attorney's fees when the insured establishes the existence of uninsured motorist coverage in a declaratory judgment action certainly protects the insured and encourages proper handling of claims.\(^5\)

XIV. CONCLUSION

Uninsured motorist insurance in Maryland serves several vital purposes. It fills the gaps inherent in Maryland's comprehensive motor vehicle insurance scheme by placing the injured insured in the same position he would have been in had the tortfeasor maintained liability insurance. As originally designed, uninsured motorist coverage was supposed to place the accident victim in the same position as if the uninsured tortfeasor maintained liability coverage in an amount equal to the minimum required coverage under the financial responsibility laws of Maryland. Beginning in 1981, and continuing through the 1980's and into the 1990's, the Maryland legislature made substantial changes to the uninsured motorist statute. These changes reflected the shift in public policy underlying the uninsured motorist statute from providing a minimum recovery to providing the opportunity for a full recovery. In this sense, uninsured motorist insurance furthers the state's desire to shift the burden of caring for victims of motor vehicle accidents from the state to the private sector. A private loss, after all, is more palatable than a public evil.

\(^5\) A separate declaratory judgment action is often unnecessary. Rather, the injured victim should sue the insurer directly. As part of his case, the victim would have to prove that he was insured under the policy — an essential element in every uninsured motorist case. The insurer, if it has an independent coverage defense, can then raise that defense, as well as raising whatever defenses it had to the uninsured motorist claim, e.g. no liability of the uninsured motorist, no proximate cause, no damages, contributory negligence, etc. Bifurcation of the trial may be appropriate to avoid confusion, and a resolution of the independent coverage issues may obviate the need for trial of the uninsured motorist claim.