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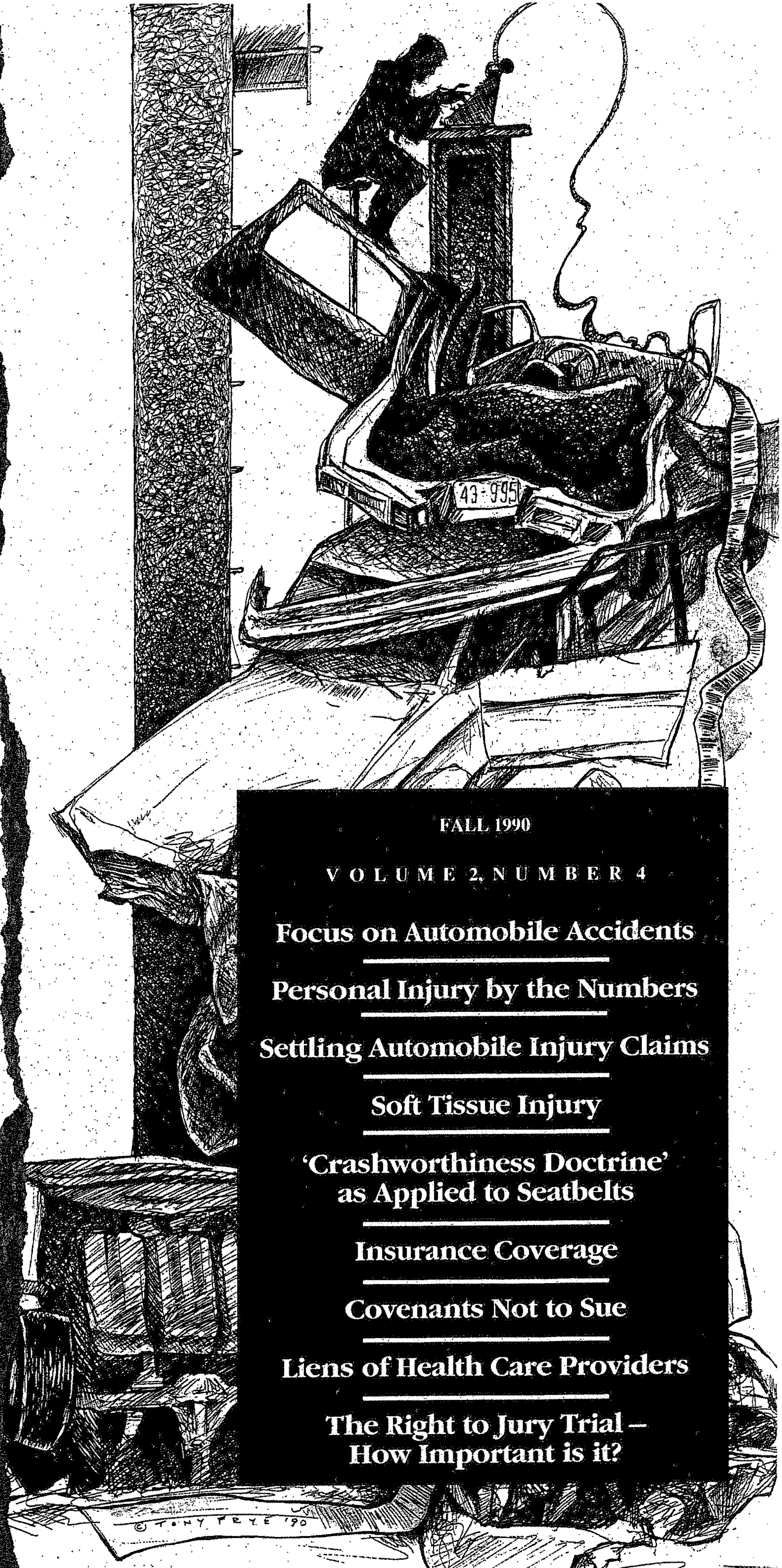

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Insurance Coverage For Automobile Injury Cases

by Irvin V. Cantor

Lock on liability? Large damages? Without an adequate source of recovery, usually insurance coverage, it does not matter how good your automobile injury case otherwise appears. Since all a trial lawyer can do for injured persons is recover money, it must be determined at the outset if there is a source from which to obtain such funds. The quest for insurance coverage for your client can be confusing and complex. This article is intended as only a basic framework. It cannot address the many nuances attorneys undoubtedly face. More importantly, this article is not a substitute for the essential task of reading both the statutes and the insurance policies.

Methods of Determining Coverage

Typically in automobile injury cases, trial lawyers must determine the existence and extent of the tortfeasor's liability coverage, uninsured motorist coverage, underinsured motorist coverage and the medical payment coverage. This inquiry involves examining several insurance policies:

1 *Those covering the vehicles involved in the collision;*

2 *Those covering the vehicles owned by the drivers (and their relatives) involved in the collision;*

3 *Those covering the vehicles owned by a client's relative living in the same household.*

At the initial interview, instruct the client to bring the policy on the vehicle involved in the collision and any vehicle owned by him or a relative living in the same household. The complete text and declaration sheet of each policy should be obtained. In most instances, the client will not have access to the tortfeasor's policy. Additional ways to discover coverage prior to filing suit include obtaining the police accident report and citizen reports from the Division of Motor Vehicles, interviewing the investigating officer, and notifying the tortfeasor and requesting him to turn the matter over to his carrier. Even though many insurance adjustors refuse to disclose policy limits, you should routinely request such information.

After suit is filed, the "discovery of the existence and content of any insurance agreement" is allowed.[1] Interrogatories, depositions, and Requests for Production of Documents may be used to discover such coverage. It generally is wise to serve insurance interrogatories on the defendant with the initial pleading.

Automobile Liability Coverage

The standard family automobile policy contains a clause whereby the insurer agrees "to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of...bodily injury or property damage...arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile."

"Owned automobile" generally refers to the vehicle described in the policy for which a premium is charged or certain temporary substitute vehicles. "Non-owned automobile" generally refers to a vehicle not owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute vehicle. With respect to the "owned automobile," the persons covered generally are the named insured, his or her spouse if a resident of the same household, any resident of the same household who is a relative of either, and any other person using the vehicle with the permission of the named insured. With respect to the "non-owned automobile," the persons covered generally are the named insured and any relative, but only with respect to a private vehicle, provided his or her actual operation is within the scope of permission granted by the owner. The actual policy should be examined for the specific definitions of "owned" and "non-owned" automobiles and the persons covered with respect to each category. Virginia has an "omnibus clause" in Va. Code Ann. §38.2-2204, which defines the term "insured" to include any person using the vehicle with the permission, express or implied, of the named insured. This statute requires all motor vehicle liability policies issued or delivered in Virginia, covering motor vehicles principally garaged or used in the state, to include such specific language.

There obviously are circumstances where more than one liability carrier has coverage for your client's injuries. Customarily, the carrier for the vehicle involved in the crash has primary coverage and the non-owned driver's carrier has excess coverage. Consider the following example:

> Alan's car is insured with Company A. Bill's car is insured with Company B. Alan, driving Bill's car, injures plaintiff. Plaintiff recovers from Company B, up to the policy limits, and then from Company A, as excess carrier, up to its limits.

Where separate policies provide identical coverage, the carriers pay on a *pro rata* basis, equally sharing the loss. Consider the following example:

> Alan has two cars, one insured with Company A and one insured with Company B. Alan, driving his friend's uninsured car, injures plaintiff. Plaintiff recovers one- half from each carrier, up to the limits of the policies.

There generally is no stacking of liability policies, whether multiple vehicles are on the same policy or separate policies. Consider the following example:

> Alan has two cars insured with Company A and one car insured with Company B. Each policy has limits of 25/50. Alan, driving one of the cars insured with Company A, injures plaintiff. Plaintiff can recover only $25,000 from Company A. Plaintiff cannot stack either insurance company's coverages.

Uninsured Motorist Coverage

Virginia's uninsured motorist coverage statute is located at Va. Code Ann. §38.2-2206. It is a comprehensive and complex statute, far beyond the scope of this article, and must be read carefully.

All Virginia automobile insurance policies must include uninsured motorist coverage ("UM" coverage"). The UM carrier must pay any judgment rendered to the insured against an uninsured motorist. The UM limits on all Virginia policies are automatically equal to the liability limits of the policy unless the insured has specifically rejected in writing such additional coverage.[2]

Two classes of insureds are afforded UM coverage. Those of the first class are the named insured and while a resident of the same household, his spouse and relatives of either. Those of the second class are any person who uses the motor vehicle to which the policy applies with the express or implied consent of the named insured, and a guest in such motor vehicle. Insureds of the first class are entitled to UM coverage whenever the injury is caused by an uninsured motorist, regardless of the location of the insured at the time of the injury. Coverage for insureds of the second class is restricted to situations where the insureds are permissibly suing, or are guests in the vehicles to which the policy applies.

UM coverage generally applies to vehicles for which:

1 *There either is no liability insurance or inadequate insurance. The current minimum policy limits in Virginia are 25/50/20, which requires $25,000 coverage for bodily injury or death of one person, $50,000 coverage for bodily injury or death of two or more persons, and $20,000 coverage for damage to property;*[3]

2 *The carrier denies coverage for some reason;*

3 *No bond or other security has been paid in lieu of insurance;*

4 *The owner has not qualified as self-insured;* or

5 *The owner or operator is unknown ("John Doe" claim). To bring a John Doe claim, the plaintiff must prove both that there was a vehicle and the operator is unknown. If the John Doe claim arises from an accident where no contact has been made between the John Doe vehicle and the vehicle occupied by the insured (or the insured, himself), then for the insured to recover, the accident must be promptly reported to either the insurer or a law enforcement officer.*[4]

For purposes of litigation, the UM carrier always should be served with process where UM coverage is sought. This is required by subsections (E) and (F) of Va. Code Ann. §38.2-2206. Venue for UM actions is determined under the general venue statutes. John Doe cases are treated as if the action was against the UM carrier, thus enabling the case to be brought, for example, where the UM carrier has a registered office or agent or where it regularly conducts business activity.[5] Since interstate travel is so prevalent, counsel should be careful to consider the conflict of laws questions that so often arise in cases involving out-of-state accidents or insureds. Generally, in such cases, the tort law of the accident forum is applied, but the UM law of the state wherein the policy is issued controls the insurance issues, such as definitions of an "uninsured motorist," stacking and John Doe claims.

Stacking of UM coverage is permitted where the insured has available two or more separate policies providing UM coverage. However, where two or more vehicles are insured on the same policy, stacking is not allowed.[6] With regard to the priority of UM coverage where the insured has more than one available source, the UM coverage on the vehicle occupied by the insured is primary.

Underinsured Motorist Coverage

Underinsured motorist coverage ("UIM" coverage) is a subject that comes up in a surprisingly large percentage of automobile injury cases. In fact, in situations where the victim has serious injuries or is one of several persons injured in a crash, invoking UIM coverage is the rule rather than the exception.

UIM coverage also is statutory in Va. Code Ann. §38.2-2206. Subsection B states, in pertinent part:

> A motor vehicle is "underinsured" when, and to the extent that, the total amount of bodily injury and property damage coverage applicable to the operation or use of the motor vehicle and available for payment for such bodily injury or property damage...is less than the total amount of uninsured motorist coverage afforded any person as a result of the operation or use of the vehicle.

This definition, amended in 1988, changes the prior statute, which did not include the "and available for payment" language. Previously, where several persons were injured in a crash, it was possible that a claimant was unable to fully collect his UIM benefits. The new law removes this

possibility. The following example illustrates this change:

> Tortfeasor has liability coverage of 25/50. Two of three injured claimants have settled with tortfeasor's carrier for $25,000 each. The third claimant has UM limits of 50/100 on his own policy. The old statute, calculating UIM coverage as the difference between the applicable liability limit of $25,000 and the UM limit of $50,000, would afford this claimant UIM coverage in the amount of $25,000. The new statute requires that coverage be available as well as applicable. Consequently, since the available coverage under the tortfeasor's policy is now zero, this claimant would be afforded the full $50,000.

Where your client is the only crash victim, the UIM calculation is rather straightforward. If your client's damages exceed the limits of the tortfeasor's policy, then the excess damages are recoverable from your client's available UM coverage.

Stacking of UIM coverage under the present statute has not been addressed by the Virginia Supreme Court. In a case involving the old statute, stacking of UIM coverage was rejected.[7] However, the present statute arguably provides broader coverage than the version considered in *Mitchell*, and stacking may be allowed.[8] Priority of UIM coverages is set forth in the statute as follows:

1 *The policy covering the vehicle occupied by the injured person;*
2 *The policy covering a vehicle not involved in the accident under which the injured person is a named insured; and*
3 *The policy covering a vehicle not involved in the accident under which the injured person is an insured other than a named insured.*

Medical Payments Coverage

Medical payments coverage ("Med pay" coverage) is involved in the vast majority of automobile injury cases. Most automobile policies provide for med pay coverage. Med pay recovery usually can be obtained much more easily and quickly than liability recovery. The expeditious recovery of med pay often is helpful to clients who must wait a long, and sometimes frustrating, period of time to collect any liability proceeds.

Medical payments, medical expenses, and loss of income insurance are Virginia's "no fault" coverages, insofar as they provide compensation for injuries without regard to fault. Although the terms "medical payments" and "medical expense" are used interchangeably, they are different. Medical payments coverage is governed by Va. Code Ann. §38.2-124, which sets forth what optional coverage the carrier may provide. Medical expense coverage is governed by Va. Code Ann. §38.2-2201, which sets forth the mandatory coverage the carrier must provide if the insured requests it. Until the recent case of *State Farm Mutual Ins. Co. v. Seay*,[9] it was unclear which statute applied to the payment of medical bills. The *Seay* opinion states that medical expense coverage is that insurance specifically requested by the insured pursuant to Code §38.2-2201 (previously Code §38.1-380.1). Since most insureds do not make specific requests for statutory medical expense coverage, virtually all persons have medical payments coverage pursuant to Code §38.2-124.

Va. Code §38.2-124 is the successor to the former statute 38.1-21. When Title 38.1 was recodified to Title 38.2, the new statute was rewritten slightly, so that the language defining who is covered is contained in the sentence dealing with loss of income coverage and not medical payments coverage. In the recent case of *State Farm Mut. Ins. Co. v. Major*,[10] the Virginia Supreme Court held that the statute defines only those who must be covered against loss of income coverage and not against medical payment coverage. In *Major*, the denial of medical payments coverage to an insured who was injured "through being struck by a motor vehicle" was upheld. The net effect of *Major* is that nothing really is in the current statute to regulate who is covered for medical payments insurance. Hopefully, this will be cleared up by new legislation during the 1991 legislative session.

Section 38.2-124 requires the med pay carrier to pay "medical, chiropractic, hospital, surgical and funeral expenses." Stacking of med pay coverage is clearly spelled out by statute, requiring the stacking of the limits of coverage for each vehicle listed on any policy of personal automobile insurance, up to a limit of four vehicles per policy.

Conclusion

A thorough understanding of the sources of insurance coverage for automobile injury cases is essential for the plaintiff's counsel. Usually, multiple policies and coverages must be considered in each case. Hopefully, this article has shed some light on the issues that typically arise. However, the necessity of reading the actual policies and statutes cannot be emphasized enough.

Notes

1. Rule 4:1 (b)(2), Rules of the Supreme Court of Virginia; Rule 26(b)(2), Federal Rules of Civil Procedure.
2. Va. Code §38.2-2206(A).
3. Va. Code Ann. §46.2-472.
4. Va. Code Ann. §38.2-2206(D).
5. See *Hodgson v. Doe*, 203 Va. 938, 128 S.E.2d 444 (1962).
6. *Goodville Mut. Cas. Co. v. Borror*, 221 Va. 967, 275 S.E.2d 625 (1981).
7. *Mitchell v. State Farm Mutual Auto. Ins. Co.*, 227 Va. 452, 318 S.E.2d 288 (1984).
8. See, e.g., *Integrity Insurance Co. v. Turnage*, Henrico County Circuit Court, Case No. 85-L-76, April 11, 1986.
9. *State Farm Mutual Ins. Co. v. Seay*, 236 Va. 275, 373 S.E.2d 918 (1988).
10. *State Farm Mut. Ins. Co. v. Major*, Va. , 389 S.E.2d 307 (1990).

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