January 1989

A Gap in the North Carolina Motor Vehicle Liability Policy Statute: Joint Tortfeasors - When and How Does Underinsured Motorist Coverage Apply?

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A GAP IN THE NORTH CAROLINA MOTOR VEHICLE LIABILITY POLICY STATUTE: JOINT TORT-FEASORS—WHEN AND HOW DOES UNDERINSURED MOTORIST COVERAGE APPLY?

INTRODUCTION

Attempts to utilize underinsured motorist coverage create various problems. Courts differ on the proper application of underinsured motorist coverage to accidents involving joint tort-feasors. Problems arise when one of the tort-feasors is underinsured while the other tort-feasor is insured. May a claimant recover under his underinsured motorist coverage if he receives payments from one or more tort-feasors greater than or equal to his limits?

North Carolina courts' consideration of the problem of underinsured motorist coverage and joint tort-feasors is limited. This Comment discusses two considerations which affect the applicability of underinsured motorist coverage in a joint tort-feasor situation. These considerations are: first, the statutory and policy provisions for underinsured motorist coverage; and second, the effects of setoffs, assignments and subrogation rights against underinsured motorist coverage limits. The effect of the second consideration upon the first determines how underinsured motorist coverage applies in a joint tort-feasor situation. This Comment examines North Carolina's underinsured motorist coverage statute, a standard North Carolina automobile insurance policy and applicable

2. For a discussion of various jurisdictions' approaches to underinsured motorist coverage and joint tort-feasors See infra notes 165-196.
4. Underinsured motorist coverage is a relatively new type of insurance coverage. In 1979, the North Carolina General Assembly amended N.C. Gen. Stat. § 20-279.21(b)(3), the provision for uninsured motorist coverage, to provide underinsured motorist coverage. Act of May 29, 1979, ch. 679, § 1, 1979 N.C. Sess. Laws 720-21 (codified at N.C. Gen. Stat. 20-279.21(b)(4) (Supp. 1988)). Therefore, the courts have not considered many cases involving underinsurance questions.
5. The effect of the insurer's right to a setoff must be considered in light of the limits of liability of underinsured motorist coverage. Hamilton, at 323, 335 S.E.2d at 231.
common law.

**PURPOSE AND POLICY**

The North Carolina General Assembly enacted the uninsured motorist statute "to provide some financial recompense to innocent persons who received bodily injury . . . through the wrongful conduct of an uninsured motorist who cannot be made to respond in damages." Similarly, the objective of underinsured motorist coverage is to provide protection to the insured against negligent motorists who do not maintain adequate liability insurance. Underinsured motorist coverage provides additional coverage when the insured is injured by motorists with liability limits less than the insured's underinsured motorist coverage limits. The North Carolina Court of Appeals, in Silvers v. Horace Mann Ins. Co., recognized that underinsured motorist coverage provides coverage "to place the insured in the position that would have existed if the tort-feasor had carried liability insurance limits equal to the liability coverage carried by the insured."
Underinsured motorist coverage developed as a result of inadequacies in uninsured motorist coverage. Gaps existed in uninsured motorist coverage in situations where uninsured motorist coverage was only offered in amounts up to the minimum financial responsibility requirements. For example, suppose a party sustained damages totalling $100,000.00 as a result of a collision with an uninsured motorist. The injured party was only able to obtain uninsured motorist coverage equal to the minimum financial responsibility requirement of $25,000.00. Therefore, the injured party bore the damages, $75,000.00, exceeding his uninsured motorist coverage of $25,000.00.

Gaps also occurred in cases where higher uninsured motorist coverage limits existed. However, application of the uninsured motorist coverage required that the claim result from a motorist with no insurance. Again, suppose a party sustained damages totalling $100,000.00 as a result of a collision with a motorist who only maintained the minimum liability limits of $25,000.00. Even if the injured party maintained uninsured motorist coverage with limits of $100,000.00, the uninsured motorist coverage would not


12. 3 I. SCHERMER, supra note 11, at § 35-2.
13. Id. at § 35-4.
14. Id.
15. Id.
16. Id.
17. Id. at § 35-4.
18. E.g., Tucker v. Peerless Ins. Co., 41 N.C. App. 302, 254 S.E.2d 656 (1979) Plaintiff obtained a $15,000.00 judgment against the owner and the operator of the vehicle responsible for plaintiff's injuries. After settling with five other claimants, only $11,000.00 of liability coverage remained. In plaintiff's claim against his uninsured motorist coverage, the court held the vehicle responsible for the injuries was not uninsured. It was not uninsured because liability coverage with $15,000.00 limits was maintained. Therefore, plaintiff was not entitled to recover under his uninsured motorist coverage.
apply. The tort-feasor was not considered an uninsured motorist because he maintained minimum liability insurance.

**Statutory and Policy Provisions for Underinsured Motorist Coverage**

The North Carolina underinsured motorist coverage statute and underinsured motorist coverage policies do not directly address how underinsured motorist coverage applies when the insured is injured by joint tort-feasors. Two problems arise in applying underinsured motorist coverage in the joint tort-feasor situation. First, statutory and policy provisions defining limits of liability clearly indicate that underinsured motorist coverage limits are to be applied one time in any one accident. The one-time application is without regard to the number of vehicles, insured or underinsured, which are involved in the accident. Second, application of underinsured motorist coverage is attempted by employing statutory and policy clauses provided specifically for other applications. These provisions are the definitional, exhaustion and stacking clauses.

**A. Statutory Provisions**

1. **Statutory Provisions Defining Limits of Liability**

The statutory definitions of limits of liability provide guidance in determining how underinsured motorist coverage is applied in a joint tort-feasor situation. An insured is entitled to a one-time application of his underinsured motorist coverage limits because of injury in any one accident with an underinsured motorist.

The statutory requirements for both uninsured and underinsured motorist coverage determine the limits of liability required for underinsured motorist coverage. N.C. Gen. Stat. § 20-279.21(b)(4).
279.21(b)(4) provides that an insurer must offer underinsured motorist coverage under two circumstances. First, the insured must obtain liability coverage in excess of the minimum limits required by the financial responsibility laws of North Carolina. Second, the insured must obtain uninsured motorist coverage in an amount equal to the liability coverage. The underinsured motorist coverage provided must equal the insured's liability coverage. The underinsured motorist provision states that the uninsured motorist coverage provisions apply to underinsured motorist coverage. Because N.C. GEN. STAT. § 20-279.21(b)(4) does not specifically define the underinsured motorist coverage limits, the uninsured motorist coverage limits definition is applicable.

The uninsured motorist coverage provision requires "limits for bodily injury" in the amount specified by the financial responsibility act. The limits are "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles..." The financial responsibility act requires limits of "twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident..." In other words, the recovery available under uninsured motorist coverage to any one person in any one accident is limited to the uninsured motorist coverage limits.
Because N.C. Gen. Stat. § 20-279.21(b)(4) incorporates the statute's uninsured motorist provision, the same application of the limits of liability applies to underinsured motorist coverage.\(^9\) The uninsured motorist limits provision affirms that an insured is only entitled to one application of his underinsured motorist coverage limits in any one accident.\(^9\) For example, suppose an insured is involved in one accident with five underinsured vehicles. The insured is only entitled to an amount equal to one application of his underinsured motorist coverage limits.\(^9\) The insured could not apply the limits separately to each underinsured vehicle.\(^9\)

2. The Effect of Statutory Provisions Defining Underinsured Motor Vehicle

Arguments have been made that the statute's definition of an underinsured motor vehicle determines the application of underinsured motorist coverage in a joint tort-feasor situation.\(^9\) However, the definition should be utilized strictly as definitional.\(^9\) The underinsured motor vehicle definition should not be used to deter-

39. See supra notes 28-29.
41. See supra text accompanying notes 36-38.
42. Id.
43. E.g., Nationwide Mutual Ins. Co. v. Scott, 234 Va. 573, 363 S.E.2d 703 (1988) (The passenger plaintiff was injured in a two car collision. Both drivers were underinsured. Each of the underinsured motorists' liability carriers paid its limits. The limits were $25,000.00 and $50,000.00. The plaintiff was insured against underinsured motorists under a policy issued by defendant with limits of $100,000.00 per person, per accident. The Virginia Court of Appeals interpreted the Virginia statute defining underinsured motorist coverage. The statute provided:

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 such vehicle . . . is less than the total amount of uninsured motorist coverage afforded any person injured as a result of the operation or use of such vehicle.

Id. at 576, 363 S.E.2d at 705. The court held this provision did not entitle the insurer to an offset of the "aggregate of obligations due a claimant under multiple liability policies insuring multiple vehicles . . ." because the statute was framed in the singular form. Id. at 577, 363 S.E.2d at 705.

44. See Nationwide Mutual Ins. Co. v. Massey, 82 N.C. App. 448, 36 S.E.2d 268 (1986)(recognizing that regardless of how uninsured motorist coverage is defined, coverage is reduced by all sums paid by those legally responsible for the accident).
mine actual available underinsured motorist coverage.\textsuperscript{46}

N.C. GEN. STAT. § 20-279.21(b)(4) initially defines an underinsured motor vehicle by including such a vehicle in the uninsured motor vehicle definition.\textsuperscript{46} The statute further defines an underinsured motor vehicle as a “highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner’s policy”\textsuperscript{47}

The latter definition is a source of confusion in a joint tortfeasor situation.\textsuperscript{48} The definition refers to an underinsured motor vehicle in the singular.\textsuperscript{49} The definition includes language to the effect that the difference between the underinsured motorist coverage limits and the sum of all liability policy limits applicable at the time of the accident.\textsuperscript{50} This language creates an ambiguity if used to determine how much underinsured motorist coverage is available.\textsuperscript{51} The language could be interpreted to mean only the policies actually applicable to the underinsured vehicle.\textsuperscript{52} On the other hand, the language could mean all policies applicable to the insured’s claim without regard to which vehicle maintains the liability policies.\textsuperscript{53}

45. Id.
46. N.C. GEN. STAT. § 20-279.21(b)(3) (Supp. 1988) defines an uninsured vehicle as follows:

[A] motor vehicle as to which there is no bodily injury liability insurance and property damage liability insurance in at least the amounts specified in subsection (c) of G.S. 20-279.5, or there is such insurance but the insurance company writing the same denies coverage thereunder, or has become bankrupt, or there is no bond or deposit of money or securities as provided in G.S. § 20-279.24 or 20-279.25 in lieu of such bodily injury and property damage liability insurance, or the owner of such motor vehicle has not qualified as a self-insurer under the provisions of G.S. 20-279.33, or a vehicle that is not subject to the provisions of the Motor Vehicle Safety and Financial Responsibility Act . . . .

47. N.C. GEN. STAT. § 20-279.21(b)(4).
49. N.C. GEN. STAT. § 20-279.21(b)(4).
50. Id.
51. Id.
52. E.g., Nationwide, at 577, 363 S.E.2d at 705.
53. E.g., Hamilton, supra note 48.
The effect of the ambiguity is easily seen in an example. Suppose an insured maintains underinsured motorist coverage with limits of $100,000.00. The insured is involved in an accident caused by two negligent drivers and sustains damages in excess of $125,000.00. One of the drivers is fully insured and maintains liability coverage with limits of $100,000.00. The other driver has liability coverage with minimum limits of $25,000.00. If the first interpretation is applied, the insured would be entitled to recover $75,000.00 under his underinsured motorist coverage. Seventy-five thousand dollars is the difference between the $100,000.00 underinsured limits and the $25,000.00 liability limits on the underinsured vehicle only. If the second interpretation is applied, the insured is not entitled to recover under his underinsured motorist coverage. The total liability limits available from both the insured and the underinsured driver are $125,000.00. This sum exceeds the insured’s underinsured motorist coverage limits of $100,000.00.

When the definitional provision is utilized to determine how coverage applies, the ambiguity arises. Clearly this provision’s purpose and best use is to define an underinsured motor vehicle. The provision should not be used to determine actual available underinsured motorist coverage.

3. The Effect of The Statutory Exhaustion Clause

North Carolina’s statute provides that underinsured motorist coverage “applies when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of

55. Id.
56. Id.
57. Id.
58. E.g., Nationwide, 234 Va. at 576, 363 S.E.2d at 705.
59. Id.
60. E.g., Hamilton, 77 N.C. App. at 323, 335 S.E.2d at 231.
61. Id.
62. Id.
63. See supra text accompanying notes 43-62.
64. Id.
65. Id.
the underinsured highway vehicle have been exhausted." 66 This provision, called an exhaustion clause, refers to the application of liability policies to the underinsured highway vehicle in the singular. 67 As with the definitional provision, the exhaustion clause may be used to determine the applicable underinsured limits in a joint tort-feasor situation. 68 Under the exhaustion clause, the insured would be entitled to recover his underinsured motorist coverage limits. 69 The limits would be reduced only by payments made to the insured by the underinsured motor vehicle's liability carrier. 70 Recovery under the insured's underinsured motorist coverage would be without regard to any other payments received from other tort-feasors. 71 However, the exhaustion clause has another purpose. 72 The purpose is to state that the underinsured motorist coverage will not apply until all policies applicable to the underinsured vehicle have been exhausted. 73 In other words, the underinsured vehicle's liability carrier must pay its entire limits before the underinsured motorist coverage applies. 74 Also, if the underinsured vehicle has more than one applicable liability policy, each policy must pay its limits before the underinsured motorist coverage applies. 75 Like the definitional provision, this provision should not be used to compute the actual available underinsured motorist coverage. 76

4. The Effect of the Statutory Provision for Stacking

The underinsured motorist statute provides that:

The limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the

67. Id.
68. See supra note 44.
70. Id.
71. Id.
72. Id.
74. Id.
75. See generally 3 I. Schermer, supra note 11, §§ 35-70-71 (discussing the applicability of the exhaustion clause).
76. See supra text accompanying note 45.
total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies: . . . .77

This provision refers to the exhausted liability policy in the singular.78 It could be argued that underinsured motorist coverage applies after the exhaustion of any one liability policy.79 However, the clear intent of this provision is to allow stacking of the claimant's underinsured motorist coverages.80 The stacking provision has no bearing on the application of underinsured motorist coverage in a joint tort-feasor situation.81

The statutory definition of limits of liability guides application of underinsured motorist coverage when an insured is injured by joint tort-feasors.82 The limits of liability provisions provide a one-time application of underinsured motorist coverage limits in any one accident.83 The application is without regard to the number of vehicles involved in the accident.84 The statutory definitional, exhaustion and stacking provisions do not determine the amount of an insured's recovery when involved in an accident with joint tort-feasors.85

B. Standard Policy Provisions for Liability Limits for Underinsured Motorist Coverage

Policy provisions provide answers to underinsured motorist coverage gap questions not covered by the statute.86 When the statute is silent as to a particular coverage question, the policy gov-

77. N.C. GEN. STAT. §20-279.21(b)(4).
78. Id.
79. Id.
80. See generally 3 I. SCHERMER, supra note 11, §§ 35-57-66 (discussing the process of stacking).
81. See supra text accompanying note 80.
82. See supra text accompanying note 26.
83. See supra text accompanying note 40.
84. See supra text accompanying notes 40-42.
85. See supra text accompanying notes 65, 76 & 81.
cerns the application of insurance. Though the language of policies varies from company to company, policies essentially parallel the statute.

State Farm's policy includes an underinsured motor vehicle in its definition of an uninsured motor vehicle. The policy states that an uninsured motor vehicle is a vehicle:

To which, with respect to damages for bodily injury only, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is:

- equal to or greater than the minimum limit specified by the financial responsibility law of North Carolina; and
- less than the limit of liability for this coverage.

This definition describes an underinsured motor vehicle. Therefore, the policy applies its uninsured motorist provisions to an underinsured motor vehicle.

The policy provides for underinsured motorist coverage as follows:

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:

1. Bodily injury sustained by an insured and caused by an accident; and
2. Property damage caused by an accident.

The policy tracks the statutory language in defining the limits of liability for underinsured motorist coverage. The maximum limits of liability for all damages for bodily injury are set forth in the

87. See Hendricks v. Guaranty Co., 5 N.C. App. 181, 182, 167 S.E.2d 876, 878 (1969) ("Where a statute is applicable to a policy of insurance, the provisions of the statute enter into and form a part of the policy to the same extent as if they were actually written in it. In case a provision of the policy conflicts with a provision of the statute favorable to the insured, the provision of the statute controls.") (quoting Wright v. Casualty Co., 270 N.C. 577, 582, 155 S.E.2d 100, 104 (1967)); See generally 8 C J. APPLEMAN, supra note 11, § 5067.15.

88. Compare N.C. GEN. STAT. § 20-279.21(b)(4) with State Farm, supra note 6.

89. See State Farm, supra note 6, at 20.
90. Id.
91. Id.
92. Id.
93. Id. at 9.
94. N.C. GEN. STAT. § 20-279.21(b)(3) (Supp. 1988) (providing in part that uninsured motorist coverage must be provided "for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles. . .").
declarations page under “Limits of Liability Per Policy” as “Each Person, Each Accident”. The policy further defines the limits of liability:

Subject to this limit for each person, the limit of bodily injury liability shown in the Declarations for each accident for Uninsured Motorist Coverage is our maximum limit of liability for all damages for bodily injury resulting from any one accident.

It is clear the insurer intends to provide one application of the underinsured motorist coverage limits as a result of any one accident.

Similarly to the statute, the policy defines an uninsured motor vehicle. The definition includes a vehicle to which no liability policy applies or the applicable policy denies coverage. An uninsured motor vehicle is also a vehicle which maintains coverage less than the minimum limits required by the financial responsibility laws of North Carolina. Finally, a vehicle operated by a hit and run driver is also an uninsured motor vehicle. However, the policy more specifically describes its limits of liability:

This is the most we will pay for bodily injury . . . regardless of the number of:
1. Insureds;
2. Claims made;
3. Vehicles or premiums shown in the Declarations; or
4. Vehicles involved in the accident.

Clearly this provision specifically limits the insured to a one-time application of the policy limits in any one accident. The number of vehicles, insured or underinsured, involved in the accident is irrelevant. For example, consider an insured with underinsured motorist coverage limits of $100,000.00 involved in an automobile collision with five underinsured vehicles. The insured is only enti-

95. See State Farm, supra note 6, at “Declarations Page”.
96. Id. at 10.
97. Id.
98. See supra note 47 and accompanying text.
99. See State Farm, supra note 6, at 9 & 20.
100. Id.
101. Id.
102. Id. at 10 & 21.
103. Id.
104. Id.
105. Id.
tled to underinsured motorist coverage proceeds in the amount of $100,000.00. The insured would not be entitled to apply the limits once to each underinsured vehicle. Statutory and policy provisions for liability limits show that underinsured motorist coverage is available to an insured. The underinsured motorist coverage limits are available as a result of injuries sustained in any one accident. The limits apply once regardless of the number of parties responsible for the accident.

THE EFFECT OF SETOFFS, ASSIGNMENTS, AND SUBROGATION RIGHTS

Both the statute and typical policy provisions provide for subrogation rights and assignments of judgments or settlements by the insured. In examining these rights, it is apparent the insurer is entitled to a set off against the underinsured motorist coverage limits. The set off is in the amount of any recovery obtained by a judgment or a settlement. When there are joint tort-feasors, an insurer is entitled to a setoff in the amount of any recovery by the insured against any and all tort-feasors. The setoff is applied to the one-time application of the underinsured motorist coverage limits.

A. Statutory Provisions for Setoffs, Assignments and Subrogation Rights

The underinsured motorist statute sets forth the insurer’s rights to subrogation and assignment. N.C. GEN. STAT. 20-279.21(b)(4) provides:

In the event of payment of a claim against the underinsured motorist coverage when the liability policy on the underinsured vehicle hasn’t paid, the underinsured motorist insurer shall be ei-

106. See supra text accompanying note 103.
107. Id.
108. N.C. GEN. STAT. § 20-279.21(b)(4); See supra text accompanying note 93.
109. See supra text accompanying notes 27, 95, & 96.
110. See supra text accompanying note 103.
111. N.C. GEN. STAT. § 20-279.21(b)(4); 3 I. SCHERMER, supra note 11, at §§ 35-26; See State Farm, supra note 6, at 10.
112. Id.
113. Id.
115. Hamilton, 77 N.C. App. at 323, 335 S.E.2d at 231.
ther: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, provided that the amount of the insurer's right by subrogation or assignment shall not exceed payments made to the claimant by the insurer.

In the event that an underinsured motorist insurer, following the approval of such application, pays in settlement or partial or total satisfaction of judgment moneys to the claimant, such insurer shall be subrogated to or entitled to an assignment of the claimant's rights against the owner, operator, or maintainer of the underinsured highway vehicle. . . . 117

These provisions set forth the insurer's rights to subrogation and assignment.118 Like the statutory provisions defining an underinsured vehicle, the exhaustion clause and the stacking clause, this provision is written in the singular.119 The statute provides no answer for the situation of joint tort-feasors.120 The statute does not specify whether the underinsured motorist coverage carrier is entitled to subrogation against all those legally liable for the insured's injuries.121 Therefore, the applicable policy determines the total set off rights.122

B. Standard Policy Provisions for Setoffs and Subrogation Rights

Underinsured motorist coverage policies specifically set forth the insurer's rights to setoffs and subrogation.123 These rights amount to a credit against the underinsured motorist coverage limits.124 The credit is in the amount of any recovery made by the insured.125 The recovery includes all amounts received from any person legally liable for the insured's injury.126 A typical policy

117. Id.
118. Id.
119. See supra text accompanying notes 49, 67 & 78.
120. N.C. GEN. STAT. § 20-279.21(b)(4).
121. Id.
122. See supra note 87 and accompanying text.
123. See generally A. WINDT, INSURANCE CLAIMS AND DISPUTES § 10.05 at 529-533 (discussing subrogation).
125. Id.
126. Hamilton v. Travelers Indemnity Co., 77 N.C. App. 318, 335 S.E.2d 228
provision providing for a setoff against underinsured motorist coverage reads:

Any amount otherwise payable for damages under this coverage shall be reduced by all sums:

1. Paid because of the bodily injury . . . by or on behalf of persons or organizations who may be legally responsible.\textsuperscript{127}

This provision unambiguously provides that the underinsured motorist coverage limits are reduced by all sums recovered by an insured from all persons legally liable to the insured.\textsuperscript{128} This provision speaks directly to the joint tort-feasor situation.\textsuperscript{129}

Another example is in order. Consider an insured who is injured by the joint negligence of two drivers.\textsuperscript{130} One of the drivers has liability limits of $100,000.00.\textsuperscript{131} The other driver has liability limits of $25,000.00.\textsuperscript{132} The insured can recover the total liability

(1985) (In *Hamilton*, defendants Roberts and Lawrence were racing. Roberts struck plaintiff and plaintiff died. Lawrence's liability carrier paid its policy limits of $25,000.00. Roberts' liability carrier paid its limits of $15,000.00. Plaintiff had uninsured motorist coverage with limits of $25,000.00. Court allowed set off against uninsured motorist limits in total amount received by plaintiff. Plaintiff was unable to recover under his uninsured motorist coverage.; Nationwide Mutual Ins. Co. v. Massey, 82 N.C. App. 448, 346 S.E.2d 268 (1986); See also 3 I. Schermer, supra note 11, at § 35-45; See Davidson v. United States Fidelity and Guaranty Co., 78 N.C. App. 140, 141, 336 S.E.2d 709 (1985) (In *Davidson*, plaintiff filed a declaratory judgment action against his underinsured motorist coverage carrier. Plaintiff's underinsured motorist coverage limits were $25,000.00 per person. Plaintiff's damages resulting from an automobile accident with an underinsured driver were in excess of $100,000.00. The underinsured driver's liability carrier settled with the insured and paid its limits of $25,000.00. The underinsured motorist coverage contained a provision providing that "any amounts payable under this coverage shall be reduced by all sums: 1. Paid because of bodily injury or property damage by or on behalf of persons or organizations who may be legally responsible." *Davidson*, 78 N.C. App. at 141, 336 S.E.2d at 710. The court determined that this provision unambiguously allowed the insurer to set off any recovery by plaintiff against the underinsured motorist coverage limits. The plaintiff was entitled to nothing since the underinsured motorist coverage limits of $25,000.00 were reduced by the underinsured motorist's liability limits of $25,000.00.), aff'd, 316 N.C. 551, 342 S.E.2d 523 (1986).

127. See *State Farm*, supra note 6, at 10.
128. Id.
129. Id.
130. See generally Nationwide Mutual Ins. Co. v. Massey, 82 N.C. App. 448, 449, 346 S.E.2d 268, 269 (1986) (discussing insurance policy provision reducing coverage by "all sums paid by . . . those legally responsible").
131. Id. at 448, 346 S.E.2d at 269.
132. Id.
limits of $125,000.00 from the tort-feasors as those persons legally responsible for his injuries.\textsuperscript{133} If the insured has underinsured motorist coverage limits of $100,000.00, the insurer is entitled to a setoff against the $100,000 policy limits.\textsuperscript{134} The setoff is in the amount of $125,000.00.\textsuperscript{135} Therefore, underinsured motorist coverage does not apply.\textsuperscript{136}

Underinsurance polices contain specific subrogation clauses.\textsuperscript{137} For example:

\begin{quote}
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.\textsuperscript{138}
\end{quote}

This provision means that the insurer is subrogated to the insured's right to recover.\textsuperscript{139} The subrogation right is against any person whose act caused the insurer to make payment under the underinsured motorist coverage.\textsuperscript{140}

Policy provisions for setoffs and subrogation apply to all amounts recovered by an insured.\textsuperscript{141} The policy provisions do not distinguish between recoveries made against the underinsured vehicle and any other responsible vehicle.

C. Fundamentals of Joint Tort-Feasors' Liability and Setoffs

An analysis of joint tort-feasors' liability helps explain the propriety of setoffs in the amount of total recoveries from all tort-feasors.\textsuperscript{142} Two or more tort-feasors are jointly liable for a plaintiff's injuries when each tort-feasor's negligence joins and concurs to produce the injury.\textsuperscript{143} Each tort-feasor is individually liable for his share of the damages.\textsuperscript{144} In addition, if one tort-feasor does not pay his share of the damages, the other tort-feasor is liable for the

\begin{itemize}
\item[133.] Id. at 449, 346 S.E.2d at 269.
\item[134.] Id. at 450, 346 S.E.2d at 270.
\item[135.] Id.
\item[136.] Id.
\item[137.] See State Farm, supra note 6, at 2l.
\item[138.] Id.
\item[139.] Id.
\item[140.] Id.
\item[141.] Hamilton v. Travelers Indemnity Co., 77 N.C. App. 318, 323, 335 S.E.2d 228, 231 (1985).
\item[143.] Barber v. Wooten, 234 N.C. 107, 109, 66 S.E.2d 690, 691, (1951); Tart v. Register, 257 N.C. 161, 167, 125 S.E.2d 754, 758 (1962).
\item[144.] Id.
\end{itemize}
entire amount. At common law, payment of a judgment by one or more of the tort-feasors satisfied the judgment. Today, statutes provide for contribution in a joint tort-feasor situation. One joint tort-feasor who satisfies an entire judgment has a cause of action against the other joint tort-feasor for his proportionate share.

The theory behind joint tort-feasor liability and contribution logically applies to the right to a setoff against underinsured motorist coverage limits. Because each tort-feasor is individually liable for a judgment, payments made by either liability carrier should be set off against the plaintiff's underinsured motorist coverage limits.

Some jurisdictions utilize the joint tort-feasor liability analysis in determining if underinsured motorist coverage applies. In Schutt v. Allstate, plaintiff obtained judgments of $2,500.00 and $25,000.00 against defendants Long and Munos, respectively. Munos was an uninsured driver. Defendant Long's liability insurer satisfied the judgment. Plaintiff pursued recovery under her own uninsured motorist coverage. The parties agreed to arbitration in a declaratory judgment action. The arbitrators awarded plaintiff $2,500.00. The Illinois Court of Appeals held the insurer was entitled to a setoff in the amount of the previous payment against the arbitrators' award. The court found the policy setoff provision valid based on a joint tort-feasor analysis.

145. Tart, 257 N.C. at 167, 125 S.E.2d at 758.
150. Id.
151. Id. at ___, 478 N.E.2d at 648.
152. Id. at ___, 478 N.E.2d at 646.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id.
159. Id. at ___, 478 N.E.2d at 648, (citing Popovich v. Ram Pipe & Supply Co., 82 Ill.2d 203, 412 N.E.2d 518 (1980)).
Under well established principles, amounts paid by one or more of the tort-feasors are to be applied in reduction of the damages recoverable from those remaining in the suit. . . . Payments made by one of the tort-feasors on account of the tort either before or after judgment diminish the claim of an injured person against all others responsible for the same harm.\textsuperscript{160}

By statute, Florida recognizes the purpose of underinsured motorist coverage to provide coverage to an insured for uncompensated damages up to the underinsured limits.\textsuperscript{161} The statute provides that underinsured motorist coverage shall be over and above, but not duplicative of benefits available to an insured under any liability coverage.\textsuperscript{162} The Florida courts consistently interpret the statute to mean that an insured’s underinsured motorist coverage applies only over and above any available liability insurance.\textsuperscript{163} This interpretation has been specifically applied to joint tort-feasor situations:

Where two tort-feasors are jointly and severally liable for damages caused to the third person in an automobile accident, although one tort-feasor is uninsured or underinsured, if the other tort-feasor has liability insurance with policy limits equal to, or greater than, those contained in uninsured motorist coverage possessed by the injured third person, the injured third person cannot recover under his own uninsured motorist policy.\textsuperscript{164}

\section*{D. Other Jurisdictions' Applications of Setoffs, Assignments and Subrogation Rights}

Other jurisdictions have confronted the problem of underinsured motorist coverage in joint tort-feasor situations.\textsuperscript{165} Some recognize that uninsured and underinsured motorist carriers are entitled to setoffs in the amount of total recovery.\textsuperscript{166}

\begin{itemize}
\item \textsuperscript{160} Id.
\item \textsuperscript{161} \textsc{Fla. Stat. Ann.} § 627.727(1) (West 1983).
\item \textsuperscript{162} Id.
\item \textsuperscript{164} Scharfschwerdt, 430 So. 2d at 579 (quoting Sparks v. Allstate Ins. Co., 413 So.2d 899 (Fla. Dist. Ct. App. 1982)).
\item \textsuperscript{165} Other jurisdictions' treatment of joint tort-feasor and underinsured motorist coverage situations are discussed. However, an exhaustive discussion of how all jurisdictions which have addressed the issue is not intended.
\item \textsuperscript{166} Ackermann v. Prudential, 83 Ill. App. 3d 590, 404 N.E.2d 534 (1980);
\end{itemize}
The Illinois Court of Appeals upheld the lower court's decision in *Ackermann v. Prudential* that an insurer is "entitled to reimbursement from the [plaintiff] to the extent that it makes payment to him for uninsured motorist coverage, if he recovers from either tort-feasor."\(^\text{167}\) In *Ackermann*, the plaintiff filed a complaint for declaratory judgment.\(^\text{168}\) The plaintiff's uninsured motorist carrier asserted its right to subrogation against a settlement offer to the plaintiff.\(^\text{169}\) The subrogation right was asserted in accordance with the terms of the policy.\(^\text{170}\) The plaintiff passenger was injured in a collision between an uninsured and an insured vehicle.\(^\text{171}\) The insurer of the second vehicle made a settlement offer.\(^\text{172}\) The policy provided that the uninsured carrier was entitled to reimbursement from the proceeds recovered from any person legally responsible for plaintiff's injuries.\(^\text{173}\) The court recognized that the policy made no distinction between "proceeds received from an insured tort-feasor or an uninsured tort-feasor."\(^\text{174}\)

The Massachusetts Supreme Court recognized an insurer's right to a credit against the underinsured motorist coverage limits in *Bertassi v. Allstate*.\(^\text{175}\) The pedestrian plaintiff was injured when he was struck by an automobile driven by defendant Ryan.\(^\text{176}\) Ryan was driving home from his job with defendant Harmony Lodge.\(^\text{177}\) The plaintiff was leaving defendant VIP Lounge.\(^\text{178}\) Plaintiff settled with defendants for $10,000.00 each.\(^\text{179}\) Plaintiff maintained two policies which provided underinsured motorist coverage with limits totaling $35,000.00.\(^\text{180}\) The court held the underinsured carrier was entitled to a setoff equal to plaintiff's settle-
ment with both defendants, Harmony Lodge and VIP Lounge.\footnote{181}

The Minnesota Court of Appeals held in \textit{Boehm v. Citizens Security Mutual} that the underinsurer was allowed a setoff against the underinsured motorist coverage limits.\footnote{182} The setoff was an amount equal to the lowest liability limits of any tort-feasor plus any additional amount already tendered by any other tort-feasor.\footnote{183} In \textit{Boehm}, the plaintiff was injured in a three car collision.\footnote{184} Plaintiff had underinsured motorist coverage with limits of $600,000.00.\footnote{185} The defendants Bartzs had liability limits of $50,000.00, while defendant Pringle had liability limits of $500,000.00.\footnote{186} The defendants respectively offered $50,000.00 and $12,500.00 to plaintiff to settle.\footnote{187} Plaintiff pursued her claim under her underinsured motorist coverage.\footnote{188} The Court of Appeals affirmed the lower court's ruling allowing a deduction of any award, or $62,500.00 from the plaintiff's underinsured motorist coverage limits.\footnote{189}

The New Jersey Superior Court, Appellate Division, has also addressed the issue of joint tort-feasors and underinsured motorist coverage in \textit{Nikiper v. Motor Club of Am. Cos.}.\footnote{190} The court recognized that an insured who settled with joint tort-feasors for an amount exceeding her underinsured motorist coverage limits was not entitled to further recovery.\footnote{191} Plaintiff sustained injuries as a passenger in an auto driven by Nikiper.\footnote{192} Plaintiff settled with two tort-feasors for a total amount of $155,000.00.\footnote{193} Plaintiff's underinsured motorist coverage limits were $100,000.00.\footnote{194} Because plaintiff's recovery exceeded her underinsured motorist coverage limits, she was not entitled to her underinsured motorist cover-

\footnotesize

\footnote{181. \textit{Id.} at --, 522 N.E.2d at 952.}
\footnote{182. \textit{Boehm v. Citizens Security Mutual}, 414 N.W.2d 232, 234 (Minn. 1988).}
\footnote{183. \textit{Id.} at 234-35.}
\footnote{184. \textit{Id.} at 232.}
\footnote{185. \textit{Id.}}
\footnote{186. \textit{Id.}}
\footnote{187. \textit{Id.} at 233.}
\footnote{188. \textit{Id.}}
\footnote{189. \textit{Id.} at 234-35.}
\footnote{191. \textit{Id.} at --, 557 A.2d at 333.}
\footnote{192. \textit{Id.}}
\footnote{193. \textit{Id.}}
\footnote{194. \textit{Id.}}
The court determined that even though one of the tort-feasors was underinsured, the underinsured motorist coverage carrier was clearly entitled to a setoff.196

As evidenced by these cases, jurisdictions address the issue of setoffs against underinsured motorist coverage limits in various ways. The application of setoffs determines how underinsured motorist coverage is provided in a joint tort-feasor situation.

PROPOSED LEGISLATION

A proposed amendment to the underinsured motorist statute is currently before the North Carolina Senate and the North Carolina House of Representatives.197 The proposed bill has the potential to clear up the problems associated with underinsurance in joint tort-feasor situations.198 The pertinent portion of the bill to amend N.C. GEN. STAT. § 20-279.21(b)(4) follows:

In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the total amount paid to the claimant pursuant to the exhausted liability policy or policies and the total limits of THE OWNER'S underinsured motorist coverages provided in the OWNER'S policies of insurance under which the claimant is claiming underinsured motorist coverage; . . . .199

The proposed amendment entitles the insurer to reduce the applicable underinsured motorist coverage by amounts received by the insured from "the liability policy or policies".200 The proposal continues to be somewhat ambiguous.201 The proposal could be read to reduce the underinsured motorist coverage only by the liability policies on the underinsured vehicle.202 The proposed amendment apparently intends to reduce the underinsured motorist coverage by all liability policy payments.203 However, changing the amendment to read "the total amount paid to the claimant pursuant to any exhausted liability policy or policies . . . " would

195. Id. at --, 557 A.2d at 335.
196. Id. at --, 557 A.2d at 334.
198. Id.
199. Id.
200. Id.
201. Id.
202. Id.
203. Id.
remove all doubt. Passage of a bill of this nature is necessary to clarify the use of underinsured motorist coverage in joint tort-feasor situations.

CONCLUSION

Because of the novelty of underinsured motorist coverage, application must be determined from both the underinsured motorist coverage statute and the policy issuing the coverage. A particular problem concerning coverage arises when an insured is injured by joint tort-feasors, one who is insured and one who is underinsured. The tort-feasors' are jointly and severally liable to the plaintiff. Therefore, the liability carriers for both tort-feasors may settle with the insured or satisfy the insured's judgment. As a result, the plaintiff may receive a combined amount in excess of the underinsured motorist coverage limits.

May the insured plaintiff then proceed against his underinsured motorist carrier for unreimbursed damages? An insurer's set-off, assignment and subrogation rights entitle the insurer to reduce any payment made pursuant to underinsured motorist coverage. The insurer can reduce the underinsured motorist coverage limits by the insured's total recovery from all tort-feasors. Therefore, the insured cannot proceed against his underinsured motorist carrier when he has recovered an amount in excess of his underinsured motorist coverage limits.

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204. Id.
205. Id.