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COMMENTS

STACKING OF BASIC ECONOMIC LOSS BENEFITS UNDER THE MINNESOTA NO-FAULT AUTOMOBILE INSURANCE ACT

[Wasche v. Milbank Mutual Insurance Co., 268 N.W.2d 913 (Minn. 1978)].

I. INTRODUCTION

An extensive amount of litigation has been generated in recent years over the stacking of insurance coverages. Frequently an injured person will sustain damages in excess of the benefits available under a single insurance policy. When an injured person fits the description of an "insured" under two or more policies, the limits of each policy coverage may be added to the others until the insured is indemnified to the full extent of the actual injuries suffered or until the combined policy coverages are exhausted.1 "Stacking" refers to this right of an insured to recover benefits from more than one policy.

The question of whether stacking would be permitted first arose in the area of uninsured motorist insurance.2 Today a majority of states, including Minnesota,3 permit an injured victim to stack uninsured motorist coverages when multiple vehicles and policies are involved.4 The


4. See A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.60, at 128-29 (Supp. 1976). Inter-policy stacking occurs when there is more than one policy available to the
second area in which the stacking question has arisen is in the field of no-fault automobile insurance. In 1974 the Minnesota Legislature adopted the Minnesota No-Fault Automobile Insurance Act (Minnesota Act). Because the Minnesota Act requires every automobile registered...
in Minnesota to be insured by the owner, an injured person might be an insured under more than one policy. Consequently, the question arose under no-fault automobile insurance, as it did under the uninsured motorist cases, whether an injured person would be permitted to stack basic economic loss benefits, such as medical expenses, wage loss, and other out-of-pocket expenses resulting from the injury, to the extent of actual loss suffered.

The Minnesota Supreme Court recently was presented with the issue of whether basic economic loss benefits may be stacked under the Minnesota Act. In a consolidated appeal of two lower court cases, the court

7. MINN. STAT. § 65B.48(1) (1978) states:
   Every owner of a motor vehicle of a type which is required to be registered or licensed or is principally garaged in this state shall maintain during the period in which operation or use is contemplated a plan of reparation security under provisions approved by the commissioner, insuring against loss resulting from liability imposed by law for injury and property damage sustained by any person arising out of the ownership, maintenance, operation or use of the vehicle. The plan of reparation security shall provide for basic economic loss benefits and residual liability coverage in amounts not less than those specified in section 65B.49, subdivision 3, clauses (1) and (2). The non-resident owner of a motor vehicle which is not required to be registered or licensed, or which is not principally garaged in this state, shall maintain such security in effect continuously throughout the period of the operation, maintenance or use of such motor vehicle within this state with respect to accidents occurring in this state.

8. The terms first-party benefits, basic economic loss benefits, basic reparation benefits, and personal injury protection benefits are synonymous and will be used interchangeably throughout this Comment.

9. See MINN. STAT. § 65B.44 (1978), as amended by Act of May 25, 1979, ch. 221, 1979 Minn. Sess. Law Serv. 469 (West). Basic economic loss benefits are most often paid by an injured party's own insurance carrier and commonly reimburse an insured or an insured's heirs for certain expenses. See MINN. STAT. § 65B.47(4)(a) (1978). Under section 65B.44, an injured victim is entitled to numerous benefits, including $20,000 for medical expenses, see id. § 65B.44(1)(a), and $10,000 for wage loss and other related expenses. See id. § 65B.44(1)(b). Medical expense benefits commonly reimburse an injured victim for such expenses as surgery, x-rays, nursing services, prescription drugs, semi-private hospital rooms, and rehabilitative treatment. See id. § 65B.44(2), as amended by Act of May 25, 1979, ch. 221, § 1, 1979 Minn. Sess. Law Serv. 469 (West). An injured person also is entitled to disability and income loss benefits, subject to a maximum of $200 per week, resulting from his or her inability to work. See MINN. STAT. § 65B.44(3), as amended by Act of May 25, 1979, ch. 221, § 2, 1979 Minn. Sess. Law Serv. 469 (West). Moreover, an injured party is entitled to reimbursement of up to $15 per day for expenses incurred in hiring a substitute to do the daily household chores that the injured party normally would have done. See MINN. STAT. § 65B.44(5) (1978). Additional benefits provided by section 65B.44 include funeral and burial expense benefits of up to $1,250, see id. § 65B.44(4), and survivors economic loss benefits of up to $200 per week for the contribution that a decedent would have provided to surviving dependents for their support had the decedent not died as a result of the motor vehicle accident. See id. § 65B.44(6).

in *Wasche v. Milbank Mutual Insurance Co.*\(^{11}\) affirmed two lower court decisions, holding that under the Minnesota Act an injured person may stack basic economic loss benefits to the extent of actual injuries suffered when two or more insurance policies are applicable on the same priority level.\(^{12}\)

In the first case, Grace Wasche was injured in a collision between two California automobiles while she was visiting in California.\(^{13}\) Wasche, a Minnesota resident, was a passenger in one of the involved automobiles.\(^{14}\) She sustained medical expenses in excess of $46,000 and, upon her subsequent death, her estate incurred funeral expenses in excess of $1,900.\(^{15}\) At the time of the accident, Wasche maintained residence in Minnesota with her daughter-in-law, Delores Wasche, who owned two automobiles and maintained a separate plan of insurance for each automobile.\(^{16}\) Although Grace Wasche did not own an automobile, she was insured as a household member under her daughter-in-law's two insurance policies.\(^{17}\) Because Grace Wasche's injuries exceeded the first-party benefits of either of Delores Wasche's insurance policies,\(^{18}\) the personal representative of Grace Wasche's estate sought to stack the first-party benefits of both policies.\(^{19}\) Milbank Mutual Insurance Company, the insurer under both policies, tendered payment of one policy limit, $21,250, for medical and funeral expenses, but refused to tender payment of the second policy limit, asserting that the Minnesota Act precluded stacking of basic economic loss benefits.\(^{20}\) Holding that basic economic loss benefits could be stacked, the trial court granted sum-

\(^{11}\) 268 N.W.2d 913 (Minn. 1978).

\(^{12}\) See id. at 919. The Minnesota Act establishes a series of priority levels that determine which insurance policy the injured party must look to for recovery of first-party benefits. See MINN. STAT. § 65B.47 (1978). Because the injured party will frequently be an insured under two or more policies on the same priority level, a question arises whether the injured party's first-party benefits may be stacked. See id. § 65B.47(5).

\(^{13}\) See 268 N.W.2d at 915. Although the accident occurred in California and involved two California vehicles, Wasche still was entitled to receive basic economic loss benefits under the Minnesota Act. The Minnesota Act provides that a person injured in an accident occurring outside Minnesota who is an insured or an occupant of a motor vehicle insured in this state will be entitled to receive first-party benefits. See MINN. STAT. § 65B.46(1)-(2) (1978).

\(^{14}\) See 268 N.W.2d at 915.

\(^{15}\) See id.

\(^{16}\) See id.

\(^{17}\) See id. at 916 n.4. Grace Wasche was an insured under her daughter-in-law's two policies because Grace was not identified by name in any other insurance policy while residing in the household of Delores Wasche, the named insured. See MINN. STAT. § 65B.43(5) (1978). For the full text of section 65B.43(5), see note 29 infra.

\(^{18}\) See 268 N.W.2d at 915.

\(^{19}\) See id.

\(^{20}\) See id.
mary judgment for Wasche's estate upon suit for the additional coverage.\textsuperscript{21}

In the second case, Clark Bock suffered serious injuries in a single car accident while driving one of the two vehicles that he owned.\textsuperscript{22} His medical expenses exceeded $20,000 and therefore exceeded the policy limits on the vehicle in which he was injured.\textsuperscript{23} Mutual Service Casualty Insurance Company insured both of Bock's vehicles, with each vehicle insured under a separate policy.\textsuperscript{24} Clark's father, who was living with Clark at the time of the accident, also owned an automobile that was insured by Mutual Service, although it was insured under the father's name.\textsuperscript{25} Each of the three policies provided basic economic loss benefits in the amount of $20,000 for medical expenses and $10,000 for wage loss, replacement services loss, and other out-of-pocket losses,\textsuperscript{26} as mandated by the Minnesota Act.\textsuperscript{27}

When Clark sought to stack the first-party benefits of all three policies to the extent of his actual injuries, Mutual Service asserted that the provisions of the Minnesota Act precluded the stacking of first-party benefits.\textsuperscript{28} The trial court granted Clark Bock's summary judgment motion to stack his own insurance policies up to the combined policy limits of $40,000 but denied his motion to stack the father's policy, holding that Clark was not an insured under that policy.\textsuperscript{29}

\begin{itemize}
  \item 21. See id.
  \item 22. See id.
  \item 23. See id.
  \item 24. See id.
  \item 25. See id.
  \item 26. See id.
  \item 27. See Minn. Stat. § 65B.44 (1978), as amended by Act of May 25, 1979, ch. 221, 1979 Minn. Sess. Law Serv. 469 (West).
  \item 28. See 268 N.W.2d at 915-16.
  \item 29. See id. at 915. The definition of "insured" is set out in subdivision 5 of section 65B.43 of the Minnesota Act, which provides:
  
  "Insured" means an insured under a plan of reparation security as provided by sections 65B.41 to 65B.71, including the named insured and the following persons not identified by name as an insured while (a) residing in the same household with the named insured and (b) not identified by name in any other contract for a plan of reparation security complying with sections 65B.41 to 65B.71 as an insured:
  
  (1) a spouse,
  (2) other relative of a named insured or
  (3) a minor in the custody of a named insured or of a relative residing in the same household with a named insured.

  A person resides in the same household with the named insured if that person usually makes his home in the same family unit, even though he temporarily lives elsewhere.

  Minn. Stat. § 65B.43(5) (1978). Under this definition, Clark Bock was not an insured under his father's policy, although living in the same household, because he was "identified by name" as an insured under his own insurance policies. Thus, the statutory
Although Minnesota permitted the stacking of uninsured motorist coverages at the time the Minnesota Act was adopted, both insurers in Wasche maintained that the Legislature did not intend to permit the stacking of basic economic loss benefits under the Act. This Comment will analyze the rationale of the Wasche court by focusing on both the statutory language of the Minnesota Act and the uninsured motorist decisions of earlier years. Additionally, this Comment will discuss the future problems that the Minnesota Supreme Court and Legislature may be expected to address as a result of the Wasche decision.

II. ANALYSIS OF THE WASCHE DECISION

In holding that basic economic loss benefits may be stacked, the Minnesota Supreme Court reasoned that the provisions of the Minnesota Act did not expressly prohibit stacking. Moreover, the court stated that neither insurer offered compelling reasons to distinguish the stacking of compulsory basic economic loss benefits from the stacking of uninsured motorist coverage, which was permitted at the time no-fault automobile insurance was adopted.

A. Statutory Construction

The insurers in Wasche argued that the statutory language of the Minnesota Act expressly prohibited stacking of no-fault benefits. First, they asserted that stacking was inconsistent with the purposes and pro-

language expressly excluded him from coverage under his father's policy.

A recent Minnesota case, Anderson v. Illinois Farmers Ins. Co., 269 N.W.2d 702 (Minn. 1978), discussed the distinction between "insured" as interpreted prior to no-fault and as interpreted after no-fault. In Anderson, the plaintiff was injured while riding as a passenger in an uninsured automobile. The plaintiff was an "insured" while in her own automobile, which was properly insured. At the time of the accident, she was living with her stepfather who also owned two automobiles that were insured under two separate policies. The stepdaughter received the full policy limits of her uninsured motorist coverage. Her medical expenses, however, exceeded the $10,000 policy limit and she then attempted to collect benefits under her stepfather's policies. The stepfather's insurance company argued that the plaintiff was not an "insured" under the definition of "relative" in her stepfather's policy and because she was an "insured" under her own insurance policy. Id. at 703-04.

The insurer asserted that the restrictive language in its insurance policy was consistent with a similar restriction imposed by the Minnesota Act that narrowly defined the word "insured." See id. at 704-05. The Minnesota Supreme Court said, however, that plaintiff was an "insured" under her stepfather's policy, holding that "[in contrast to the present no-fault law's explicit exclusion of persons already insured from coverage under another policy [section 65B.43(5)], the failure to so restrict 'relative' in § 65B.22, expresses a purpose to include even those who own their own automobile." Id. at 705.

30. See 268 N.W.2d at 917.
31. See id.; notes 33-94 infra and accompanying text.
32. See 268 N.W.2d at 918-19; notes 95-115 infra and accompanying text.
33. See 268 N.W.2d at 917.
visions of the Minnesota Act.\textsuperscript{34} Second, they claimed that the Minnesota Act limited recovery of basic economic loss benefits to a maximum of $30,000\textsuperscript{35} regardless of the number of insurance policies applicable.\textsuperscript{36} Finally, the insurers maintained that the Minnesota Act expressly pro-

34. See id. at 914-15.
36. See 268 N.W.2d at 917. The Oregon Supreme Court recently refused to allow stacking under its no-fault statute. In Southwestern Ins. Co. v. Winn, 274 Or. 695, 548 P.2d 1311 (1976), the supreme court held that under the statutory provision then in effect, stacking of personal injury protection benefits was not permitted even though the injured party sustained medical expenses in excess of one policy limit. \textit{Id.} at 699-700, 548 P.2d at 1313. In \textit{Winn}, the insured was injured while riding as a passenger in a nonowned automobile that was properly covered with no-fault insurance. The injured passenger also owned an automobile that was insured with the necessary insurance coverage. Under Oregon law, the primary insurer is the insurer of the host vehicle. Thus, the injured passenger received the full amount of first-party benefits from the host's insurance carrier. When the injured party made a claim for first-party benefits under his own insurance policy, the insurer denied liability and brought an action for a declaratory judgment. \textit{Id.} at 697-99, 548 P.2d at 1311-13. The statutory provision in effect at the time of the \textit{Winn} decision read as follows:

(1) The insured, members of his family residing in the same household and guest passengers injured while occupying the insured motor vehicle \textit{shall be primary, but such benefits except for guest passengers may be reduced or eliminated} if they are similarly provided under another motor vehicle liability policy that covers the injured person, or if the injured person is entitled to receive under the laws of this state or any other state or of the United States, workmen's compensation benefits or any other similar medical or disability benefits.


In reversing the trial court's decision, the Oregon Supreme Court stated that the statutory phrase "may be reduced or eliminated" prevents the injured party from recovering basic economic loss benefits from his own insurer when the insurer of the host vehicle already has paid the full amount of its basic economic loss benefits to the injured passenger. 274 Or. at 700, 548 P.2d at 1313.

Although not applicable to the \textit{Winn} case, an amendment to section 743.810 in 1975 significantly altered the operative provisions of that section. \textit{See Act of July 8, 1975, ch. 784, § 3, 1975 Or. Laws 2248, 2251 (amending \textit{Or. Rev. Stat.} § 743.810 (1973)). Prior to the 1975 amendment, subdivision 1 of section 743.810 stated that first-party benefits covering the insured could be "reduced or eliminated if they are similarly provided under another motor vehicle liability policy that covers the injured person." Act of June 28, 1971, ch. 523, § 4, 1971 Or. Laws 912, 913, as amended by Act of July 21, 1973, ch. 551, § 4, 1973 Or. Laws 1214, 1216 (current version at \textit{Or. Rev. Stat.} § 743.810 (1977)). This language clearly prohibited stacking even though the insured had other available policies. However, the 1975 amendment eliminated the phrase "are similarly provided under another motor vehicle liability policy that covers the injured person." \textit{See Act of July 8, 1975, ch. 784, § 3, 1975 Or. Laws 2248, 2251 (amending \textit{Or. Rev. Stat.} § 743.810 (1973)). Currently, first-party benefits may be reduced or eliminated only by worker's compensation benefits or other similar insurance. \textit{See Or. Rev. Stat.} § 743.810(2) (1977). As a result of this modification, the insurer apparently cannot reduce or eliminate the first-party
hibited stacking when more than one policy was applicable.\textsuperscript{37}

\section{Legislative Purpose}

Based on the purposes of the Minnesota Act,\textsuperscript{38} the Wasche court concluded that the legislators did not intend to prohibit the stacking of first-party benefits.\textsuperscript{39} If stacking were prohibited, a primary purpose of the Minnesota Act—to relieve the severe economic distress suffered by an uncompensated accident victim\textsuperscript{40}—would be defeated; an injured party would remain uncompensated for any medical expense loss in excess of the statutory minimum of $20,000,\textsuperscript{41} even though basic economic loss benefits were available under a second policy. Second, permitting the stacking of first-party benefits is consistent with the goal of avoiding duplicate recovery,\textsuperscript{42} because stacking the available coverage benefits the insured has under other applicable policies. By its own admission, the Winn court said that section 743.810, as amended in 1975, "if applied to a case such as this, may require a different result." 274 Or. at 700, 548 P.2d at 1313. Consequently, if presented with the stacking issue again, the Oregon Supreme Court may permit an insured to stack first-party benefits.

\textsuperscript{37} See 268 N.W.2d at 917; MINN. STAT. § 65B.47(5) (1978).
\textsuperscript{38} MINN. STAT. § 65B.42 (1978) provides:
The detrimental impact of automobile accidents on uncompensated injured persons, upon the orderly and efficient administration of justice in this state, and in various other ways requires that sections 65B.41 to 65B.71 be adopted to effect the following purposes:

(1) To relieve the severe economic distress of uncompensated victims of automobile accidents within this state by requiring automobile insurers to offer and automobile owners to maintain automobile insurance policies or other pledges of indemnity which will provide prompt payment of specified basic economic loss benefits to victims of automobile accidents without regard to whose fault caused the accident;

(2) To prevent the overcompensation of those automobile accident victims suffering minor injuries by restricting the right to recover general damages to cases of serious injury;

(3) To encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such treatment;

(4) To speed the administration of justice, to ease the burden of litigation on the courts of this state, and to create a system of small claims arbitration to decrease the expense of and to simplify litigation, and to create a system of mandatory inter-company arbitration to assure a prompt and proper allocation of the costs of insurance benefits between motor vehicle insurers;

(5) To correct imbalances and abuses in the operation of the automobile accident tort liability system, to provide offsets to avoid duplicate recovery, to require medical examination and disclosure, and to govern the effect of advance payments prior to final settlement of liability.

\textsuperscript{39} See 268 N.W.2d at 919-20.
\textsuperscript{40} See MINN. STAT. § 65B.42(1) (1978).
\textsuperscript{41} See id. § 65B.44(1)(a).
\textsuperscript{42} See id. § 65B.42(5). The Minnesota Act also provides for setoffs and coordination of benefits when the insured is entitled to receive benefits from any other source as a result
indemnifies an insured only to the extent of the actual loss suffered and does not permit double recovery. In both lower court cases in Wasche, the plaintiffs had sustained medical expenses in excess of the coverage available under a single policy. Although permitted to stack first-party benefits, neither insured received duplicate payments for the same element of loss; rather, the insureds were compensated only for their actual injuries.

The insurance companies' argument that the Legislature intended to prohibit stacking does have merit, however. Permitting the first-party benefits to be stacked may cause an increase in the cost of insurance of injuries arising out of the maintenance or use of a motor vehicle. See id. § 65B.61, as amended by Act of May 3, 1979, ch. 57, 1979 Minn. Sess. Law Serv. 86 (West). Although not defined by the Minnesota Act, "duplicate recovery," as used throughout this Comment, means that the insured may not be paid twice for the same injury. See, e.g., Ruder v. West Am. Ins. Co., 151 Ind. App. 433, 434-35, 280 N.E.2d 68, 69 (1972); Welch v. Hartford Cas. Ins. Co., 221 Kan. 344, 349-50, 559 P.2d 362, 367 (1977).


44. In rejecting Milbank Mutual's assertion that stacking is in derogation of the Minnesota Act, the lower court stated:

Stacking the basic economic loss benefits under the two policies presently before this Court does not of course result in a windfall to plaintiff since even the stacked coverage does not meet her actual losses.

In the view of this Court, this case represents only one more step in a long litany of unsuccessful efforts by insurers to dilute statutorily mandated insurance coverages for which separate premiums have been paid.

To permit this defendant to receive premiums for $40,000 in medical expense loss coverage but to only be liable for $20,000 in losses, when the insured has suffered a $46,000 loss, would result in an unconscionable windfall to defendant to which this Court will not be a party. Such form of unjustified enrichment was neither intended by the Minnesota Legislature in enacting the No-Fault Act nor has it ever been tolerated by our Supreme Court.


45. To date, 24 states have enacted no-fault plans that provide for some form of first-party coverage to insureds. See note 5 supra. No-fault plans can be grouped into three basic categories. See J. O'CONNELL & R. HENDERSON, TORT LAW, NO-FAULT AND BEYOND 278-84 (1975). One plan provides for first-party benefits but places no restriction on the insured's right to sue in tort. This plan is labelled the "add-on" plan. See id. at 279-81. The second plan is characterized as the "pure" no-fault plan. While providing for first-party benefits, this plan prohibits any tort action against a third party up to a specified dollar amount, which is commonly referred to as the "tort threshold." See id. at 283-84. The third category is the "modified" plan that retains a modified fault determination. See id. at 281-82. For a list of states that fall under each of the three no-fault plan categories, see Note, supra note 5, at 126-27. For the tort threshold requirements of the no-fault states, see Steenson, No-Fault in a Fault Context: Tort Actions and Section 65B.51 of the Minnesota No-Fault Automobile Insurance Act, 2 WM. MITCHELL L. REV. 109, 162-65 (1976). The tort threshold for medical expenses under the Minnesota Act recently was raised to $4,000. See Act of Mar. 28, 1978, ch. 711, § 1, 1978 Minn. Laws 681, 681 (amending MINN. STAT. § 65B.51(3) (1976)).
premiums, thus less affluent persons may not be able to afford insurance coverage. Although unable to afford the increased premium rates, less affluent motorists may continue to drive their automobiles as a matter of necessity, even though they are uninsured. When an uninsured motorist is involved in an accident, however, that person may be unable to obtain immediate compensation for the injuries sustained. Thus, one of the primary purposes of the Minnesota Act—the prompt payment of basic economic loss benefits without regard to fault—may be defeated as a result of stacking.

46. See 268 N.W.2d at 919 n.13. The insurance companies in Wasche asserted that stacking no-fault benefits would increase premium rates. See id. at 919 n.11. This assertion, however, is speculative. The manner in which the no-fault insurance premiums were calculated rested upon disputed issues of fact and the extent to which the premiums charged on each additional vehicle accurately reflected a concomitant increase in the insurer's risk when the number of drivers remained constant in the household. See id. Thus, the Wasche court determined that stacking was permitted as a matter of legislative intent under the Minnesota Act without deciding the issue of adequacy of present premium rates. For a further discussion of the effect of stacking on insurance premium rates, see notes 169-78 infra and accompanying text.

47. See notes 169-78 infra and accompanying text.

48. Since the passage of the Minnesota Act, however, the number of uninsured motorists has decreased. See note 171 infra.

49. Under the Minnesota Act, payment of basic economic loss benefits to the injured party normally will be determined according to the priority of payment provision, see Minn. Stat. § 65B.47 (1978), or through the assigned claims plan, see id. § 65B.64, as amended by Act of May 25, 1979, ch. 190, § 4, 1979 Minn. Sess. Law Serv. 331 (West), "a gap-closing device designed to provide insurance coverage when there is no plan of security under which an injured person can make his claim." Steenson, supra note 45, at 118. An uninsured motorist, however, generally will not be entitled to recover basic economic loss benefits under the priority of payment provision unless that person is injured while driving an insured motor vehicle, see Minn. Stat. § 65B.47(4)(b) (1978), or comes within the commercial vehicle exception. See id. § 65B.47(1)-(3).

Similarly, a person will not be entitled to recover basic economic loss benefits through the assigned claims plan for injuries sustained, if at the time of the injury the injured person owned a private passenger vehicle but failed to insure it as is required by the Act. See id. § 65B.64(3), as amended by Act of May 25, 1979, ch. 190, § 4, 1979 Minn. Sess. Law Serv. 331 (West). The assigned claims plan also is drafted to prohibit compensating members of the owner's household who knew or should have known that the owner's vehicle was uninsured. See id. The Minnesota Supreme Court allowed children of an uninsured motorist to recover first-party benefits under the assigned claims plan, however, when the children had no knowledge of the parents' failure to insure. See Kaysen v. Federal Ins. Co., 268 N.W.2d 920, 926-27 (Minn. 1978). The 1979 Minnesota Legislature has expressly adopted this position by providing that minor children shall be entitled to participate in the assigned claims plan even though their parents are not insured. See Act of May 25, 1979, ch. 190, § 4, 1979 Minn. Sess. Law Serv. 331 (West) (amending Minn. Stat. § 65B.64(3) (1978)).

2. Basic Economic Loss Benefits Limited to a Maximum of $30,000

In addition to claiming that stacking was contrary to the purpose provision of the Minnesota Act, the insurers in Wasche maintained that the statutory language of section 65B.44 limited recovery of first-party benefits to a maximum of $30,000. The insurers keyed on the phrase "and shall provide for a maximum of $30,000 for loss arising out of the injury of any one person," arguing that, based on this phraseology, the Legislature intended to prohibit the stacking of no-fault benefits.

In interpreting this language, the Minnesota Supreme Court held that section 65B.44, subdivision 1 does not preclude stacking but only serves to define the basic unit of coverage required by the Minnesota Act, so

51. 268 N.W.2d at 914-15; see Minn. Stat. § 65B.42 (1978); notes 38-50 supra and accompanying text.
52. See 268 N.W.2d at 917.
53. Minn. Stat. § 65B.44(1) (1978). The full text of section 65B.44(1) provides:
   Basic economic loss benefits shall provide reimbursement for all loss suffered through injury arising out of the maintenance or use of a motor vehicle, subject to any applicable deductions, exclusions, disqualifications, and other conditions, and shall provide a maximum of $30,000 for loss arising out of the injury of any one person, consisting of:
   (a) $20,000 for medical expense loss arising out of injury to any one person; and
   (b) A total of $10,000 for income loss, replacement services loss, funeral expense loss, survivor's economic loss, and survivor's replacement services loss arising out of the injury to any one person.
Id. § 65B.44(1) (emphasis added).
54. See 268 N.W.2d at 917.
55. See id. Section 65B.49 enumerates the various types of coverage the insurer must offer to its insured. The mandatory offer provision of section 65B.49 provides:
   On and after January 1, 1975, no insurance policy providing benefits for injuries arising out of the maintenance or use of a motor vehicle shall be issued, renewed, continued, delivered, issued for delivery, or executed in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, under provisions approved by the commissioner, requiring the insurer to pay, regardless of the fault of the insured, basic economic loss benefits.
   A plan of reparation security shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged, the term and limits of liability, and shall contain an agreement or endorsement that insurance is provided thereunder in accordance with and subject to the provisions of sections 65B.41 to 65B.71.
   In addition to providing for a minimum of $30,000 in first-party benefits, each insurance policy issued in this state must provide the insured with liability coverage in the amounts of $25,000 per person, $50,000 per accident, and $10,000 for property damage (25/50/10) and uninsured motorist coverage in the amount of $25,000 per person and $50,000 per accident (25/50). See id. § 65B.49(3)-(4). The insurer also must offer the insured additional medical expense benefits and liability coverage benefits over and above the
that each person injured is entitled to receive a minimum of $30,000 in
first-party benefits, which includes $20,000 for medical expenses and
$10,000 for wage loss, funeral expenses, and other out-of-pocket losses.\footnote{56}
Two arguments support the court's conclusion.

First, section 65B.44, subdivision 1 is a definitional, not an operative,
provision and merely defines basic economic loss benefits.\footnote{57} The remain-
ing subdivisions of section 65B.44 merely enumerate the specific losses
and dollar amounts that will be covered by first-party benefits.\footnote{58} This
definitional provision therefore should not be construed to address the
stacking question.

Second, an insurance carrier must offer additional first-party benefits
to an insured under section 65B.49, subdivision 6, indicating that the
Legislature did not intend to fix a ceiling on the total dollar amount of
first-party benefits recoverable by an insured.\footnote{59} Subdivision 6 of section
65B.49 provides that an insurer must offer an insured, in addition to the
basic mandatory coverage, optional first-party benefits in the amounts
of $10,000 and $20,000.\footnote{60} Because additional basic economic loss benefits

\footnote{56. See \textit{MINN. STAT.} § 65B.44(1) (1978).}
\footnote{57. See Brief of Amicus Curiae at 14, Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913 (Minn. 1978).}
\footnote{58. See \textit{MINN. STAT.} § 65B.44(2)-(8) (1978), as amended by Act of May 25, 1979, ch. 221, 1979 Minn. Sess. Law Serv. 469 (West). For a general discussion of the benefits section 65B.44 provides, see note 9 supra.}
\footnote{59. When presented with the fixed ceiling argument, the lower court in Bock v. Mutual Serv. Cas. Ins. Co., No. 734850 (Minn. 4th Dist. Ct. Jan. 9, 1978), succinctly stated:
While the defendant is correct that the provision [section 65B.44] prescribes a maximum ceiling, the maximum ceiling is that required to be purchased by the insured under one policy of insurance for one motor vehicle. The court does not believe that the legislature intended for this provision to impose a $30,000 maximum recovery of economic loss benefits by anyone insured in the situation where the insured is covered by multiple no-fault insurance policies.
Support for this determination of legislative intent is also found in M.S.A. 65B.49, Subd. 6, which allows an insured to purchase additional optional coverages upon the payment of higher corresponding premiums. It is clear, then, that the legislature did not intend that an insured be limited to an absolute ceiling of $30,000 in basic economic loss benefits per accident. In light of this provision allowing an insured to obtain additional coverage, there is nothing in the Act which prevents an insured from obtaining such additional coverage through the purchase of a separate policy of insurance which provides for the same basic economic loss benefits as outlined in M.S.A. 65B.44.
\textit{Id.}}
\footnote{60. Subdivision 6 of section 65B.49 provides:
Reparation obligors shall offer the following optional coverages in addition to compulsory coverages:
(a) Medical expense benefits subject to a maximum payment of $10,000;
(b) Medical expense benefits subject to a maximum payment of $20,000;}

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may be purchased under section 65B.49, subdivision 6, the word "maximum" does not place an absolute ceiling on the amount of first-party benefits recoverable by an accident victim.

As additional support for its conclusion that the word "maximum" does not place an absolute ceiling on the amount of first-party benefits recoverable, the Wasche court cited with approval the recent Nevada Supreme Court decision of Travelers Insurance Co. v. Lopez, which held that basic reparation benefits could be stacked. The pertinent wording of the Nevada Motor Vehicle Insurance Act (Nevada Act), similar to that of the Minnesota Act, stated that first-party benefits are "not to exceed $10,000 per person per accident." The insurers in Lopez contended that this language, when read in conjunction with the definition of basic reparation benefits and the "priority among insurers"

(c) Residual bodily liability coverage of not less than $25,000 for damages for injury to one person in any one accident arising out of the maintenance or use of a motor vehicle, subject to a limitation of $50,000 for damages arising out of any one accident;

(d) Basic economic loss benefits to all persons purchasing liability coverage for injuries arising out of the maintenance or use of a motorcycle;

(e) Underinsured motorist coverage offered in an amount at least equal to the insured's residual liability limits and also at lower limits which the insured may select, whereby the reparation obligor agrees to pay damages the insured is legally entitled to recover on account of a motor vehicle accident but which are uncompensated because the total damages exceed the residual bodily injury liability limit of the owner of the other vehicle. The reparation obligor is subrogated to any amounts it pays and upon payment has an assignment of the judgment if any against the other person to the extent of the money it pays; and

(f) Uninsured motorist coverage in addition to the minimum limits specified in subdivision 4, so as to provide total limits of uninsured motorist coverage equal to the residual bodily injury liability limits of the policy, or smaller limits as the insured may select. This coverage may be offered in combination with the coverage under clause (e).


61. See id. § 65B.44(1).

62. See 268 N.W.2d at 918.


65. Id. § 8, 1973 Nev. Stats. at 823. The Minnesota Act has similar language. Compare id. (benefits payable are not to exceed $10,000 per person) with MINN. STAT. § 65B.44(1) (1978) (basic economic loss benefits shall provide a maximum of $30,000 for loss arising out of an injury to any one person).

66. The definition of "basic reparation benefits" under the Nevada act provides:

1. "Basic reparation benefits" means the net benefits payable for injury arising out of the maintenance or use of a motor vehicle.

2. "Basic reparation benefits" do not include benefits for harm to property.

provision of the Nevada Act, limited recovery of basic reparation benefits under all applicable policies to a total of $10,000. Stating that the Nevada Legislature did not intend to prohibit stacking, the Nevada court stressed that the availability of additional first-party benefits under the Nevada Act undercut the insurance companies' argument that the Legislature intended to limit recovery of basic reparation benefits to a maximum of $10,000 per accident. Thus, the court permitted the stacking of first-party benefits to the extent of the actual loss.

In summary, the statutory interpretation by the Wasche court, stating that a "maximum of $30,000 for loss arising out of the injury of any one person" does not necessarily place an absolute ceiling on basic economic loss benefits when more than one policy is applicable, is

67. The priority provision of the Nevada Act provided:
If two or more obligations to pay basic reparation benefits are applicable to an injury under the priorities set out in this section, benefits are payable only once and the reparation obligor against whom a claim is asserted shall process and pay the claim as if wholly responsible.


68. See 93 Nev. at 465, 567 P.2d at 472.

69. See id. at 466, 567 P.2d at 473.

70. The optional reparation benefits provision of the Nevada Act provided:
Basic reparation insurers shall offer such additional optional coverage for added reparation benefits as may be required by regulations promulgated by the commissioner of insurance. Added reparation benefits shall include without limitation:

1. Benefits payable in excess of the limitations provided in NRS 698.070.
2. Collision and upset damage.

Act of Apr. 24, 1973, ch. 530, § 36, 1973 Nev. Stats. 822, 831 (repealed 1979). The Nevada Act is similar to the Minnesota Act in that both require the insurer to offer first-party benefits in amounts over and above the basic unit of coverage required by statute. Compare id. (additional optional coverage must be offered) with MINN. STAT. § 65B.49(6) (1978) (reparation obligors must offer optional coverage in addition to compulsory coverages).

71. In discussing the availability of optional coverage under the Nevada Act, the Nevada Supreme Court stated:

Legislative intent supportive of our determination is further reflected in that provision is made to the end that insurers can provide ‘additional optional coverage for added reparation benefits.’ NRS 698.360. This section has a chilling effect on Travelers' contention that it was the intent of the Legislature to limit the recovery of basic reparation damages to $10,000 per accident. Although arguendo, the additional reparation benefits contemplated by NRS 698.360 are to be provided only upon the payment of higher corresponding premiums, there is nothing preventing the securing of additional reparation benefits through the purchase of a separate policy of insurance providing for the same basic reparation benefits.

93 Nev. at 466, 567 P.2d at 473 (emphasis in original).


73. See 268 N.W.2d at 917.
STACKING OF NO-FAULT BENEFITS

Supported by sound rationale. Whereas section 65B.44 merely lists the basic economic loss benefits provided under each unit of coverage without reference to multiple units of coverage, section 65B.49, subdivision 6 provides that optional first-party benefits may be purchased in addition to the basic unit of coverage set out in section 65B.44, subdivision 1. Thus both section 65B.44, subdivision 1 and section 65B.49, subdivision 6 can be given a meaningful interpretation only if the term "maximum" as used in subdivision 1 of section 65B.44 is limited to the basic unit of coverage relating to one automobile. Taken together, the two provisions clearly support the court's conclusion that the Legislature did not intend to prohibit the stacking of first-party benefits.

3. Express Prohibition of Stacking

After concluding that the language "a maximum of $30,000" only served to define the basic unit of coverage required by the Minnesota Act and did not address the stacking question, the Wasche court considered the "priority of benefits" provision under the Minnesota Act, which provides that if two or more obligations to pay basic economic loss benefits are applicable to an injury, "benefits are payable only once."

The insurance carriers in Wasche contended that this language expressly precluded the injured person from recovering first-party benefits in excess of one policy limit. Unpersuaded by this argument, the Minnesota court held that the "benefits are payable only once" language of section 65B.47, subdivision 5 was intended merely to prevent double

74. See MINN. STAT. § 65B.44 (1978), as amended by Act of May 25, 1979, ch. 221, 1979 Minn. Sess. Law Serv. 469 (West); note 58 supra and accompanying text.
75. See MINN. STAT. § 65B.49(6) (1978); note 55 supra and accompanying text.
76. See 268 N.W.2d at 917; notes 51-75 supra and accompanying text.
77. See 268 N.W.2d at 917.
78. MINN. STAT. § 65B.47(5) (1978). The priority of benefits provision provides:

If two or more obligations to pay basic economic loss benefits are applicable to an injury under the priorities set out in this section, benefits are payable only once and the reparation obligor against whom a claim is asserted shall process and pay the claim as if wholly responsible, but he is thereafter entitled to recover contribution pro rata for the basic economic loss benefits paid and the costs of processing the claim. Where contribution is sought among reparation obligors responsible under subdivision 4, clause (c), proration shall be based on the number of involved motor vehicles.

Id. (emphasis added). For a general discussion on contribution and indemnity, see Note, Contribution and Indemnity—An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts, 5 WM. MITCHELL L. REV. 109 (1979).

79. See 268 N.W.2d at 917. The insurers contended that the phrase "benefits are payable only once" is unambiguous, see Appellant's Brief and Appendix at 11, Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913 (Minn. 1978), citing the general rule of construction, if the statutory language is clear and unambiguous, there is no room for statutory interpretation. See, e.g., Minnesota-St. Paul Sanitary Dist. v. City of St. Paul, 240 Minn. 434, 437, 61 N.W.2d 533, 535-36 (1953).
recovery for the same elements of loss and, further, to prorate that loss among multiple insurers on the same priority level.\textsuperscript{40} The Wasche court arrived at this conclusion through an examination of both the Uniform Motor Vehicle Accident Reparations Act (UMVARA)\textsuperscript{81} and the Travelers Insurance Co. v. Lopez decision.\textsuperscript{42}

When the Minnesota Legislature enacted section 65B.47, subdivision 5 of the Minnesota Act, it adopted verbatim the language of the UMVARA priority provision.\textsuperscript{83} Under UMVARA an injured victim is entitled to unlimited medical benefits,\textsuperscript{84} making stacking unnecessary to recoup actual losses. Because the stacking of first-party benefits will never arise under UMVARA, the UMVARA priority provision merely is intended to prevent double recovery and to prorate those losses among multiple insurers on the same priority level. Therefore the Minnesota Legislature’s verbatim adoption of the language of UMVARA in enacting section 65B.47, subdivision 5 of the Minnesota Act cannot be said to be indicative of a legislative intent to prohibit stacking. Instead, as the Wasche court reasoned, the purpose of the priority provision is to prevent duplicate recovery for the same elements of loss\textsuperscript{85} and to appor-

\textsuperscript{80} See 268 N.W.2d at 918.

\textsuperscript{81} See Uniform Motor Vehicle Accident Reparations Act, §§ 1-47 [hereinafter cited as UMVARA]; notes 83-86 infra and accompanying text.

\textsuperscript{82} 93 Nev. 463, 567 P.2d 471 (1977); see notes 87-91 infra and accompanying text.

\textsuperscript{83} The priority provision of UMVARA provides:

\begin{quote}
If two or more obligations to pay basic reparation benefits are applicable to an injury under the priorities set out in this section, benefits are payable only once and the reparation obligor against whom a claim is asserted shall process and pay the claim as if wholly responsible, but he is thereafter entitled to recover contribution pro rata for the basic reparation benefits paid and the costs of processing the claim. Where contribution is sought among reparation obligors responsible under paragraph (3) of subsection (c) proration shall be based on the number of involved motor vehicles.
\end{quote}

UMVARA § 4(d). Except for UMVARA’s use of the words “basic reparation benefits,” rather than “basic economic loss benefits” as used in the Minnesota Act, the substantive language of the two statutes is identical. Compare id. with Minn. Stat. § 65B.47(5) (1978).


\textsuperscript{85} The argument that “benefits are payable only once” expressly prohibits stacking of basic economic loss benefits was initially raised by Milbank Mutual in the lower court proceedings. The court rejected the assertion stating:

\begin{quote}
This provision [section 65B.47(5)] does not address, much less preclude, the stacking of basic economic loss benefits where the insured is covered under more than one policy and the actual basic economic losses exceed the coverage provided under one policy.
\end{quote}

Subd. 5 simply prevents an insured from recovering benefits in excess of his losses by providing that benefits are payable only once, and further provides for
tion those losses among the insurance carriers.66

The court also relied on the Lopez decision in interpreting section 65B.47, subdivision 5.67 In Lopez the Nevada Supreme Court was presented with the identical issue concerning the construction of its no-fault insurance act.68 The language set out in the priority section of the Nevada Act also stated that “benefits are payable only once.”69 The insurance carriers in Lopez contended that this language clearly prohibited the stacking of multiple insurance coverages when both insurers were on the same priority level.66 The Nevada Supreme Court concluded, however, that the priority provision of the Nevada Act simply was intended to limit the payment of basic reparation benefits to a single priority level rather than to prohibit the stacking of multiple insurance coverages.71

86. Section 65B.47, subdivision 5 of the Minnesota Act merely incorporates the common insurance technique of prorating losses among the at-fault carriers so that no double recovery is received for the same loss. See 268 N.W.2d at 918. For example, assume that a person owns two automobiles and has them insured by separate insurance carriers. If the insured is in an accident and sustains $30,000 in medical expenses, the insurance carriers would prorate the loss between themselves; each would be responsible for payment of $15,000 for a combined total of $30,000. In the above illustration, the insured was compensated in full for the economic loss without exceeding the policy limits of the individual insurance coverages—$20,000. If stacking were not permitted and the insured was limited to the coverage under one policy—$20,000—he would not have been compensated in full for his economic loss; yet, the insurers would have been permitted to prorate the limits of one policy coverage. Thus, each carrier only would have been responsible for $10,000, with neither carrier exhausting the limits of its policy coverage. Hence, the insurance carriers would have received an unearned windfall on the premiums paid because the insured was required to maintain coverage on each vehicle owned but was not entitled to receive the full benefits of the individual policies.

87. See 268 N.W.2d at 918.

88. See 93 Nev. at 464, 567 P.2d at 472.


90. See 93 Nev. at 465, 567 P.2d at 472-73.

91. See id. at 466-67, 567 P.2d at 473. In permitting first-party benefits to be stacked, the Lopez court said:

[T]here exists no legislative prohibition against the “stacking” of insurance policies when both insurers are at the same level of priority, as is the case here. There are public policy and other considerations which support this conclusion. For example, the insured Lopez, paid premiums on two policies of insurance covering the same vehicle. Both policies of insurance provided for the payment of basic reparation benefits. Injuries and expenses sustained by the insured are in excess of $20,000. Requiring the payment by Travelers of the policy limit would not result in a windfall to Lopez, nor would it result in any prejudice to
Thus, relying on the historical background of the UMVARA priority provision and the rationale of the Lopez decision, the Wasche court's resolution of the stacking issue is based on sound principles and rationale. In concluding that basic economic loss benefits may be stacked, the Wasche court cogently reasoned that the "benefits are payable only once" language found in subdivision 5 of section 65B.47 merely was intended to prevent double recovery for the same elements of loss and to prorate the loss among insurance carriers.

B. Uninsured Motorist Decisions

In addition to the statutory construction argument, the Wasche court was persuaded by the rationale of its earlier decisions permitting the stacking of uninsured motorist coverage. The court stressed two simi-

the insurance company, in that the insurance company has accepted the payment of premiums and has, in effect, assumed the risk that injury to the insured may occur. The premiums collected by Travelers are deemed to have comprehended this potential.

Id. 92. See notes 81-91 supra and accompanying text.

93. See 268 N.W.2d at 918. The Georgia Court of Appeals recently held that no-fault benefits could not be stacked even though the insured had not been fully compensated for his actual losses. See Georgia Cas. & Sur. Co. v. Waters, 146 Ga. App. 149, 153-54, 246 S.E.2d 202, 206 (1978). The court's denial of stacking first-party benefits in Waters, however, is easily distinguishable from the Wasche decision. First, Georgia has an automobile-related plan in which insurance coverage follows the car rather than a person-related plan as Minnesota has under its no-fault statute. Compare id. at 152-53, 246 S.E.2d at 205 with Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913, 916 (Minn. 1978). Consequently, if a person is injured while occupying another vehicle or is injured while a pedestrian then that person must look to the insurance carrier of the other automobile and not to his own insurance carrier to recover first-party benefits. See GA. CODE ANN. § 56-3402(b) (1977).

Second, the Georgia Motor Vehicle Accident Reparations Act [hereinafter cited as Georgia No-Fault Act] clearly and unambiguously prohibits the stacking of first-party benefits when more than one policy is available. The antistacking provision of the Georgia statute reads as follows:

The total benefits required to be paid under this section without regard to fault as the result of any one accident shall not exceed the sum of $5,000 per each individual covered as an insured person or such greater amount of coverage as had been purchased on an optional basis as provided elsewhere in this Chapter, regardless of the number of insurers providing such benefits or of the number of policies providing such coverage.

GA. CODE ANN. § 56-3403b (1977) (emphasis added). The Georgia No-Fault Act, then, expressly prohibits the stacking of first-party benefits, unlike the Minnesota Act which does not have a comparable antistacking provision. See Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913, 919 n.12 (Minn. 1978).

94. See 268 N.W.2d at 918.

95. See id. The Minnesota Supreme Court first announced its approval of the stacking concept in the landmark cases of Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973) and Pleitgen v. Farmers Ins. Exch., 296 Minn. 191, 207 N.W.2d 535 (1973), two companion cases holding that an injured person could stack uninsured motorist coverages.
larities between the Minnesota Act and the uninsured motorist statute. First, no-fault insurance was adopted at a time when stacking multiple coverages was the recognized rule in the context of uninsured motorist insurance. Second, the court noted that both statutes compelled the vehicle owner to maintain coverage on each vehicle owned, the insured paying an additional premium for each vehicle covered. Thus, unable to find a material distinction between the cases construing the uninsured motorist statute and cases involving no-fault insurance, the Wasche court indicated that the similarities between the two statutes were indicative of a legislative intent to allow the stacking of basic economic loss benefits under the Minnesota Act.

The former Minnesota uninsured motorist statute has since been repealed and reenacted as part of the Minnesota Act. See Minn. Stat. § 65B.49(4) (1978). The statute in effect at the time of Van Tassel required the insurers to offer uninsured motorist coverage and provided as follows:

No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, under provisions approved by the commissioner of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, including colliding motor vehicles whose operators or owners are unknown or are unidentifiable at the time of the accident, and whose identity does not become known thereafter, because of bodily injury, sickness or disease, including death, resulting therefrom; provided that the named insured shall have the right to reject in writing such coverage; and provided further that, unless the named insured requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer. The policy limits of the coverage required to be offered by this section shall be as set forth in Minnesota Statutes 1965, Section 170.25, Subdivision 3, until January 1, 1971; thereafter, at the option of the insured, the uninsured motorist coverage shall be equal to those provided in the policy of bodily injury liability insurance of the insured or such lesser limits as the insured elects to carry.

Act of May 24, 1967, ch. 837, § 1, 1967 Minn. Laws 1735 (current version at Minn. Stat. § 65B.49(4) (1978)).

96. See 268 N.W.2d at 918-19.
97. See id. at 918; notes 100-02 infra and accompanying text.
98. See 268 N.W.2d at 918-19; notes 103-15 infra and accompanying text.
1. Stacking of Uninsured Motorist Benefits

In permitting first-party benefits to be stacked, the Wasche court reasoned that if the Legislature had intended to prohibit stacking it would have done so expressly. Because the Legislature was aware that the stacking of uninsured motorist coverage was permitted, the court stated that the Legislature would have provided for an antistacking provision under the Minnesota Act if it had intended such a prohibition. Moreover, the Minnesota Legislature in 1978 rejected an anti-

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100. See 268 N.W.2d at 919. Stacking of personal injury protection benefits also has been litigated in a number of lower courts in Florida. In State Farm Mut. Auto. Ins. Co. v. Castaneda, 339 So. 2d 679 (Fla. Dist. Ct. App. 1976), appeal dismissed, 359 So. 2d 1211 (Fla. 1978), the District Court of Appeals held that first-party benefits could not be stacked even though Florida permitted uninsured motorist benefits to be stacked. Unlike the uninsured motorist provision of the Florida Statutes, the Florida Automobile Reparations No-Fault Reform Act [hereinafter cited as Florida No-Fault Act] expressly authorizes the insurer to limit the coverage of first-party benefits. See 339 So. 2d at 680-81. The court also held that because the insurance policy was clear and unambiguous, it was unnecessary to interpret the insurance contract. See id. at 681. In the second of Florida’s four stacking cases, another district court denied the stacking of first-party benefits when the insured had a single policy covering two vehicles. In Chappellear v. Allstate Ins. Co., 347 So. 2d 477 (Fla. Dist. Ct. App. 1977), the court cited with approval the Castaneda decision and concluded that a different result is not warranted simply because a single policy covering two vehicles was in effect as opposed to Castaneda in which each vehicle was insured by a separate policy. See id. at 478. The court in Travelers Indem. Co. v. Wellson, 348 So. 2d 661 (Fla. Dist. Ct. App. 1977), also held that basic economic loss benefits could not be stacked beyond the minimum coverage allowed in the Florida No-Fault Act. See id. at 662-63. In the most recent Florida decision, State Farm Mut. Auto. Ins. Co. v. Kilbreath, 362 So. 2d 474 (Fla. Dist. Ct. App. 1978), the Florida District Court of Appeals held that personal injury protection benefits from four separate policies could not be stacked. In reversing the trial court decision, the Kilbreath court stated that the insurance policy and statutory provisions clearly and unambiguously prohibited stacking. See id. at 475.

The Minnesota Supreme Court’s decision in Wasche to permit stacking can be distinguished from the Florida decisions. According to the Florida No-Fault Act, first-party benefits follow the car. See Fla. Stat. Ann. § 627.736(2)(a) (West 1972 & Cum. Supp. 1979). Thus, coverage is attributable to a specific automobile. Under the Minnesota Act, however, coverage follows the insured rather than the car, see Minn. Stat. § 65B.47(4)(a) (1978), unless the insured is injured by a commercial vehicle. In that instance, the insurer of the commercial vehicle would be responsible for primary coverage rather than the insured party’s own insurance carrier. See id. § 65B.47(1)-(3).

101. See 268 N.W.2d at 919. The Georgia Supreme Court, in State Farm Mut. Auto. Ins. Co. v. Murphy, 226 Ga. 710, 177 S.E.2d 257 (1970), held that uninsured motorist coverages could be stacked, see id. at 713-15, 177 S.E.2d at 260, while in Georgia Cas. & Sur. Co. v. Waters, 146 Ga. App. 149, 246 S.E.2d 202 (1978), the Georgia Court of Appeals held that first-party benefits under its no-fault statute could not be stacked. The Waters court distinguished the uninsured motorist decisions on the basis that the no-fault statute expressed a legislative intent to prohibit the stacking of first-party benefits that was not
STACKING OF NO-FAULT BENEFITS

stacking bill that would have conclusively denied the stacking of first-party benefits. Therefore, the Legislature's failure to provide for an antistacking provision at a time when the stacking of uninsured motorist insurance was permitted and its recent rejection of an antistacking bill, clearly support the court's reasoning that the Legislature did not intend to prohibit stacking.

2. Mandatory Coverage

A second reason set forth by the Wasche court in support of stacking first-party benefits is that both the no-fault and the uninsured motorist statutes require an owner of a motor vehicle to maintain insurance coverage on each vehicle. Proponents of the "mandatory coverage argu-

present in the uninsured motorist cases. See id. at 153, 246 S.E.2d at 206. For a discussion of the distinctions between the Georgia No-Fault Act and the Minnesota Act, see note 93 supra.


If two or more insurance policies covering basic economic loss benefits are in force, the amount of recovery shall not exceed the amount which could be recovered in basic economic loss benefits under one policy. The existence of two or more insurance policies covering basic economic loss benefits shall not increase the amount of recovery for basic economic loss benefits beyond that provided by one insurance policy.

Id.

103. See 268 N.W.2d at 918-19. In addition to the mandatory coverage argument, the Minnesota court also relied on an unconscionability argument in its uninsured motorist decisions. See, e.g., Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 187, 207 N.W.2d 348, 351-52 (1973). Similar to the reasoning of the mandatory coverage argument, the unconscionability argument emphasizes the windfall to the insurer if stacking is denied. The gist of this argument is that to permit the insurers to collect a premium and to then avoid full payment of the loss because of the pro rata provision contained in their insurance policies would be unconscionable. In the context of no-fault automobile insurance, the Minnesota Supreme Court in Wasche did not rely on the unconscionability argument in reaching its decision, indicating instead that stacking was decided as a matter of legislative intent. See 268 N.W.2d at 919 n.11. The court noted that the manner in which no-fault premiums were calculated rested upon disputed issues of fact. See id.

Mutual Service, one of the insurers in the Wasche case, asserted in the lower court proceedings that the stacking of first-party benefits was not necessary to prevent an unearned premium windfall to the insurer in the no-fault context:

[T]he separately stated premiums on two policies reflect the increase of risk to the insured of having two vehicles on the highways. Obviously, two vehicles represent a greater risk than one does, and members of a two-car family are more likely to be injured than members of a one-car family, simply because they are out on the road more. (To the extent the risk is less than doubled, the multiple vehicle discount given here accommodates that.) For this reason it is necessary to charge separate premiums for basic economic loss coverages for the separate vehicles. Put another way, the separate premiums on separate policies are for the increased breadth of coverage occasioned by the increased risk. But they in no way pay for the increased depth of coverage which plaintiff claims to be
ment" contend that to deny stacking in this instance will result in an insurer “diluting” its coverage below the statutory minimum as set forth by the Minnesota Legislature in section 65B.44, subdivision 1. The insurance carriers, on the other hand, assert that the pro rata provision of the “other insurance” clause contained in the insurance contract entitled to. Such increased depth of coverage is paid for by the extra premium charged for optional coverages in excess of the statutory minimums. Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Motion for Summary Judgment at 6-7, Bock v. Mutual Serv. Cas. Ins. Co., No. 734850 (Minn. 4th Dist. Ct. Jan. 9, 1978) (emphasis in original). Therefore, the insurers argued that the additional premium is consideration for the increased breadth of coverage rather than for the increased depth of coverage.

The better reasoning, however, would reach just the opposite conclusion; the addition of a second vehicle to a household does not necessarily result in an increased risk exposure to the insurance carrier. Unless permitted to stack first-party benefits, the insured would receive no value for the second premium. Two principal arguments mitigate the increased risk exposure theory. First, no-fault insurance is first-party insurance and is personal in nature; the named insured and his insureds are entitled to first-party benefits regardless of which vehicle they are driving, riding in, or injured by. See MINN. STAT. § 65B.47(4)(a) (1978). Therefore, the risk of injury is the same to the insureds whether they have one vehicle or two vehicles. Second, there are numerous ways in which an insured may be involved in an accident yet still be entitled to coverage under his own no-fault policy. For example, an insured could be struck by another vehicle while bicycling, while crossing the street as a pedestrian, or while occupying or driving another vehicle. In all of these instances the insured would look to his own policy first for coverage because basic economic loss benefits follow the insured, not the vehicle. But see MINN. STAT. § 65B.47(1)-(3) (1978) (insurer of commercial vehicle has primary responsibility). Consequently, the risk exposure to an insured and his family is not significantly greater if multiple vehicles are owned than if just one vehicle is owned because a person can be injured in a number of different ways that have no relationship to the number of vehicles owned.

Thus, the extra premium the insured pays for having an additional motor vehicle in the household is not justifiable on the basis that it is consideration for the concomitant increase in risk exposure due to there being another vehicle on the highway. Unless allowed to stack first-party benefits, the insured would be paying a second premium without gaining a corresponding benefit from such payment. This would result in a windfall to the insurer in the form of an uneared premium, clearly in derogation of the principles enunciated by the Minnesota Supreme Court in its uninsured motorist decisions. See Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 187, 207 N.W.2d 348, 351-52 (1973).

104. To illustrate the “dilution” argument, assume that B owns two automobiles that are insured by the same insurance carrier under separate policies and for which separate premiums have been paid. B is involved in an accident sustaining $30,000 in medical expenses. If the court were to adopt the rationale of the insurance carrier, B only would recover $20,000 out of the $30,000 that was incurred in medical expenses even though he would have been compensated in full if allowed to stack the policies. The insurance carrier would argue that it has not “diluted” the statutorily mandated insurance coverage under the Act because B did receive $20,000 for his medical expenses—the amount payable under one policy.

105. The pro rata provision becomes operative when an insured owns two or more vehicles or is an insured under two or more policies. The standard language used in the “other insurance” clause generally provides as follows:

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expressly prohibits the stacking of basic economic loss benefits, limiting an insurer's liability to the coverage available under a single insurance policy regardless of the number of vehicles involved.\textsuperscript{106}

No eligible injured person shall recover duplicate benefits for the same elements of loss under this or any similar insurance including self-insurance. In the event the eligible injured person has other similar insurance including self-insurance available and applicable to the accident, the maximum recovery under all such insurance shall not exceed the amount which would have been payable under the provisions of the insurance providing the highest dollar limit, and the Company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this coverage and such other insurance.


106. Mutual Service, one of the insurers in the \textit{Wasche} case, had maintained that the "other insurance" provision in its policy expressly prohibited stacking. See \textit{Wasche v. Milbank Mut. Ins. Co.}, 268 N.W.2d 913, 915-16 (Minn. 1978). The Minnesota Supreme Court summarily held, however, that a clause in an insurance policy purporting to prohibit the stacking of first-party benefits, for which separate premiums have been paid, is against public policy and void as repugnant to the statute. See \textit{id.} at 920. The supreme court, in so holding, again looked to the rationale of its uninsured motorist decisions in reaching that conclusion. See \textit{id.}

In the uninsured motorist context, numerous states have concluded that the "other insurance" clause is repugnant to public policy. The most influential decision in this area is the landmark case of Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Or. 110, 341 P.2d
If the insurance carriers' argument is accepted, then if an insured, owns two automobiles, both of which are covered by the same insurer, the injured party would receive only the amount payable under one policy. Although this outcome may appear consistent with the provisions of section 65B.44, subdivision 1(a) requiring $20,000 in first-party medical benefits, the insured may remain uncompensated when the losses exceed the limits of one policy coverage. Thus, if an injured party owns two automobiles that are insured by different insurance carriers for which separate premiums have been paid, the two companies would apportion the medical expenses of one policy limit between themselves. Assuming $20,000 of medical loss benefits are available

110 (1959). Recognizing the absurdity of attempting to apply the provisions of the other insurance clause logically, the Oregon Supreme Court stated:

The "other insurance" clauses of all policies are but methods used by insurers to limit their liability, whether using language that relieves them from all liability (usually referred to as an "escape clause") or that used by St. Paul (usually referred to as an "excess clause") or that used by Oregon (usually referred to as a "prorata clause"). In our opinion, whether one policy uses one clause or another, when any come in conflict with the "other insurance" clause of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto.

Id. at 129, 341 P.2d at 119.

The Minnesota Supreme Court recently was asked to struggle "with the war of semantics among insurance companies" and determine whether the insurance policy containing the "excess" clause or the insurance policy containing the "escape" clause provided the primary coverage. In Western Nat'l Mut. Ins. Co. v. United States Fire Ins. Co., 269 N.W.2d 34, 36-37 (Minn. 1978), the court imposed liability upon the insurance policy containing the "escape" clause in the absence of any clear and unambiguous provision to the contrary.

The first paragraph of the other insurance clause commonly is referred to as the "excess-escape" clause while the second paragraph commonly is referred to as the "pro rata" clause. The language of the other insurance clause as used by the insurance industry typically reads:

With respect to bodily injury to an insured while occupying a highway vehicle not owned by the named 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 apply only in the amount by which the limit of liability for 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 and 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 coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.


107. See note 104 supra.
under one policy, each company would pay the insured $10,000. By upholding the validity of the pro rata clause as it applied to one policy limit, the court apparently would have contravened the statutory requirement that each insurer provide its insured with $20,000 of medical loss benefits. Consequently, any attempt by an insurer to pay less than the full $20,000 in medical loss benefits under its policy, while the insured remained uncompensated for the actual losses incurred, would permit the insurer to dilute its insurance obligation below the statutory minimum. Furthermore, insurance carriers would be receiving an unearned windfall because their insureds would be unable to collect benefits from the second policy.

The Minnesota Supreme Court first recognized that an insurer would be reducing its coverage below the statutory minimum, unless stacking were permitted, in the context of the court's uninsured motorist decisions. In perhaps the most quoted language of any Minnesota uninsured motorist decision, Chief Justice Knutson succinctly stated the rationale behind the dilution argument:

It seems to us that, in spite of the attempt by the insurer to limit its liability to one policy or to the amount recoverable under one policy, the fact that the legislature required an uninsured-motorist provision in all policies, added to the fact that a premium has been collected on each of the policies involved, should result in the policyholder's receiving what he paid for on each policy, up to the full amount of his damages. It is true that such holding results in permissible recovery exceeding what he would have received if the uninsured motorist had been insured for the minimum amount required under our Safety Responsibility Act. But, if the question must be resolved on the basis of who gets a windfall, it seems more just that the insured who has paid a premium should get all he paid for rather than that the insurer should escape liability for that which it collected a premium.

Because every automobile registered in Minnesota is required by the Minnesota Act to be insured, an insurance carrier similarly would be reducing its coverage below the statutory minimum and receiving an

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108. See Minn. Stat. § 65B.44(1)(a) (1978). For purposes of discussion, the argument set forth in the text is made under the assumption that the insured only has the minimum amount of medical coverage, $20,000, under each policy. The insured may purchase additional first-party benefits under the Minnesota Act if so desired. See id. § 65B.49(6)(e); notes 59-61 supra and accompanying text.
109. See note 103 supra.
uneared windfall unless stacking were permitted. Therefore, the better rationale, as adopted in *Wasche*, permits first-party benefits to be stacked to the extent of an insured's actual injuries or until the combined policy coverages are exhausted.  

By adopting this position, the Minnesota Supreme Court has prevented an insurer from diluting its mandatory insurance coverage below the statutory minimum. Moreover, the *Wasche* court has reached a result that is consistent with one of the purposes of the Minnesota Act—"to relieve the severe economic distress of uncompensated accident victims"—without violating another purpose of the Act—the prevention of duplicate recovery.

III. Future Problems

By permitting first-party benefits to be stacked, the Minnesota Supreme Court has resolved, at least temporarily, one controversial issue under the Minnesota Act. As a result of the court's decision in *Wasche*,

113. Applying this rationale to the situation in which the injured party owns two automobiles that are insured by different insurance carriers, the insured would be compensated for the full $30,000. Each insurance company would pay its pro rata share of $15,000, well within the limits of the individual insurer.

114. MINN. STAT. § 65B.42(1) (1978); see notes 38-50 supra and accompanying text.

115. MINN. STAT. § 65B.42(5) (1978); see notes 38-50 supra and accompanying text.

116. In perhaps the most far-reaching stacking decision to date, a Hennepin County District Court has held that a nonresident policyholder who is injured in Minnesota may stack first-party benefits under the Minnesota Act even though the nonresident policyholder's own state does not have a no-fault automobile insurance system. See Petty v. Allstate Ins. Co., No. 749298 (Minn. 4th Dist. Ct. Apr. 3, 1979).

In *Petty*, the plaintiffs, California residents, were injured in Minnesota while visiting their daughter. At the time of the accident the plaintiffs were driving their daughter's car which was insured by State Farm Mutual Automobile Insurance Company. The plaintiffs owned two automobiles insured under a single policy by defendant Allstate Insurance Company. The automobile insurance policy was issued to plaintiffs in their home state of California. At the time of the accident, Allstate was licensed to write insurance in Minnesota as well as in California.

The plaintiffs sought to recover from Allstate wage loss benefits up to the combined policy limits of $20,000. Allstate paid the full amount of wage loss benefits under one coverage, $10,000, but refused to provide additional wage loss benefits under the insurance covering the second vehicle, asserting that the *Wasche* decision did not apply because the plaintiffs were nonresidents and had not paid any premiums to entitle them to no-fault benefits. The lower court did not find this distinction important, stating:

Defendant [Allstate] contends that *Wasche* is not controlling in this case because plaintiffs, as California residents, were not required to pay any premiums for no-fault benefits. It is argued that since the policy covering the two insured vehicles does not expressly provide for the coverages sought to be stacked, the fundamental basis for coverage stacking is lacking.

The Court, however, is unpersuaded that the situation herein presented mandates a different result than that reached in the *Wasche* case. Pursuant to Section 65B.50, Subd. 1, upon the occurrence of the accident, defendant was required to provide no-fault benefits to the non-resident plaintiffs under their policy whether or not plaintiffs paid premiums for such benefits. Since the
however, both the Minnesota Supreme Court and the Legislature may be called upon to address at least three issues that arise from the court’s “stacking” decisions. An issue with which the supreme court will be confronted is whether underinsured motorist coverage §7 may be stacked and, if so, how the setoff provision §18 of the underinsured motorist section operates. Second, the Legislature may be asked to clarify the applicability of the word “insured” as currently defined by the Minnesota Act; §19 that is, did the Legislature intend to permit the stacking of basic economic loss benefits when all vehicles are insured under the same name but to deny stacking when one household member is the named insured under a policy separate from that of another household member? Finally, in light of the court’s decision to permit stacking of first-party benefits, the Legislature will be asked to consider the ramifications of stacking on insurance premium rates. §20

A. Underinsured Motorist Coverage

Having determined that both uninsured motorist and basic economic loss benefits may be stacked, §21 the Minnesota Supreme Court probably will be presented with the issue of whether multiple underinsured motorist coverages may be stacked. Should the court answer this question separate coverages automatically converted to coverages required under the [Minnesota] Act, the combined limits of basic economic loss benefits under both coverages were available to compensate plaintiffs for actual loss caused by the automobile accident.

Id. (emphasis in original).

Based on the current language of the Minnesota Act, the lower court probably was correct in permitting the California plaintiffs to stack the wage loss benefits of their insurance policy. The Minnesota Act requires a nonresident owner of a motor vehicle to maintain a plan of no-fault automobile insurance while operating a motor vehicle in this state. See MINN. STAT. § 65B.48(1) (1978). Moreover, section 65B.46, subdivision 1 states that “[i]f the accident causing injury occurs in this state, every person suffering loss from injury arising out of maintenance or use of a motor vehicle has a right to basic economic loss benefits.” Arguably, therefore, the Minnesota Legislature intends to treat nonresident victims of accidents occurring in this state the same as it treats Minnesota residents. If the Minnesota Legislature had intended a different result between resident and nonresident accident victims it would have so provided.

117. The Minnesota Legislature requires all no-fault insurers to offer optional underinsured motorist coverage to their insureds. See MINN. STAT. § 65B.49(6)(e) (1978). For a discussion of underinsured motorist benefits, see notes 121-35 infra and accompanying text.

118. The underinsured motorist setoff provision is contained in MINN. STAT. § 65B.49(6)(e) (1978). For a discussion of the underinsured motorist setoff provision, see notes 136-56 infra and accompanying text.


120. See notes 169-78 infra and accompanying text.

121. See 268 N.W.2d at 918-19.
in the affirmative, holding that multiple underinsured coverages may be stacked, the court then must decide whether the first-party insurer is entitled to setoff the amount of money that has been paid to its insured by the negligent tortfeasor from the amount of the insured’s underinsured motorist coverage.

1. Stacking

By definition, underinsured motorist coverage is applicable when the policyholder obtains a judgment against a negligent tortfeasor in excess of the tortfeasor’s liability limits. Unable to obtain full compensation from the at-fault party’s liability coverage, an insured must look to underinsured motorist coverage to obtain payment for any uncompensated injuries. If an insured has two or more policies with underinsured motorist protection, the question arises whether these coverages may be stacked.

In addressing this question, the Minnesota Supreme Court need only turn to its uninsured motorist decisions for an answer to the stacking question. Two principal arguments support the conclusion that stacking underinsured benefits should be permitted. First, the underinsured motorist provision under no-fault is similar to the uninsured motorist provision that was in effect when the court held that uninsured motorist benefits could be stacked. Second, no material difference exists be-

122. The word “underinsured” has been interpreted differently by the courts. Some courts define an underinsured motorist as a tortfeasor who has insurance, but in amounts less than required by the laws of the injured party’s state. See, e.g., Security Nat. Ins. Co. v. Hand, 31 Cal. App. 3d 227, 235, 107 Cal. Rptr. 439, 444 (1973). In some jurisdictions, underinsured motorist coverage is not set out in a separate statutory provision. Thus, the courts in those jurisdictions define uninsured motorist to include not only one without insurance but also one with less insurance than that required by the state whose law applies to the accident. See, e.g., Calhoun v. State Farm Mut. Auto. Ins. Co., 254 Cal. App. 2d 407, 409-10, 62 Cal. Rptr. 177, 178-79 (1967).

Unlike most jurisdictions, Minnesota has a separate statutory provision for underinsured motorist coverage. See Minn. Stat. § 65B.49(6)(e) (1978). The term “underinsured” is not, however, defined in the statute. The Minnesota Supreme Court, in Lick v. Dairyland Ins. Co., 258 N.W.2d 791 (Minn. 1977), stated that a tortfeasor is not underinsured when he carries liability insurance in an amount equal to the underinsured motorist coverage of the recovering party. Id. at 795. The definition of “underinsured,” as applied in Lick, probably is no longer authoritative in light of recent amendments to the underinsured motorist statute. See notes 149-56 infra and accompanying text.


tween the stacking of underinsured motorist benefits and the stacking of medical payment benefits, which was permitted prior to the adoption of no-fault.\textsuperscript{126}

The first argument supporting the stacking of underinsured motorist benefits is that the statutory requirements governing uninsured motorist insurance coverage and underinsured motorist insurance coverage are similar. Section 65B.49, subdivision 4 of the Minnesota Act requires that every insurance policy issued in this state must contain uninsured motorist coverage.\textsuperscript{127} Similarly, section 65B.49, subdivision 6(e) requires an insurer to offer underinsured motorist coverage to an insured.\textsuperscript{128} Insurance carriers contend, however, that because uninsured motorist coverage is mandatory while underinsured motorist coverage is optional under the statute, the stacking of underinsured motorist coverages should not be permitted.\textsuperscript{129} This distinction, however, should not be controlling because the uninsured motorist statute in effect at the time the court held that uninsured motorist coverages could be stacked is essentially the same as the underinsured motorist statute in effect under no-fault; no procedure established for accepting coverage) with Act of May 24, 1967, ch. 837, § 1, 1967 Minn. Laws 1735, 1735 (current version at MINN. STAT. § 65B.49(4) (1978)) (uninsured motorist provision in effect when stacking uninsured motorist coverages first permitted; coverage accepted unless rejected in writing).

126. Just as underinsured motorist coverage is optional under the Minnesota Act, so was medical payment coverage optional at the time of the uninsured motorist decisions. See Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 189, 207 N.W.2d 348, 353 (1973).

127. Section 65B.49(4) provides:

1. No plan of reparation security may be renewed, delivered or issued for delivery, or executed in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in the amounts of $25,000 because of injury to or the death of one person in any accident, and subject to the said limit for one person, $50,000 because of bodily injury to or the death of two or more persons in any one accident, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of injury.

2. Every owner of a motor vehicle registered or principally garaged in this state shall maintain uninsured motor vehicle coverage as provided in this subdivision.

3. "Uninsured motor vehicle" means any motor vehicle or motorcycle for which a plan of reparation security meeting the requirements of sections 65B.41 to 65B.71 is not in effect.

4. No recovery shall be permitted under the uninsured motor vehicle provisions of this section for basic economic loss benefits paid or payable, or which would be payable but for any applicable deductible.

MINN. STAT. § 65B.49(4) (1978).

128. See id. § 65B.49(6)(e) (1978). For the full text of subdivision 6(e), see note 60 supra.

Previously, uninsured motorist coverage was included in an insured's policy unless rejected in writing by the insured; presently the Minnesota Act does not specifically state the procedure for accepting underinsured motorist coverage. Thus, just as the court permitted the stacking of uninsured motorist coverage when that coverage was optional, so should the court permit the stacking of underinsured motorist coverage when this coverage is optional. Furthermore, once electing to purchase underinsured coverage, an insured should be entitled to receive the full benefits from each policy for which a premium was paid. The assertion that underinsured motorist benefits should not be stacked also is refuted by the stacking of medical payment coverages in earlier years. Under prior Minnesota Supreme Court decisions, insureds were permitted to stack medical payment coverages even though the purchase of such coverage was entirely optional with an insured. Once an insured elected to purchase medical payment coverage, the fact that such coverage was optional did not prevent an insured from stacking these benefits. Because an insured had paid a separate premium for

130. Compare Act of May 24, 1967, ch. 837, § 1, 1967 Minn. Laws 1735 (current version at Minn. Stat. § 65B.49(4) (1978)) with Minn. Stat. § 65B.49(6)(e) (1978) (underinsured motorist provision). In Pleitgen v. Farmers Ins. Exch., 296 Minn. 191, 207 N.W.2d 535 (1973), a dispute arose as to whether the uninsured motorist statute as passed in 1967, or the statute as amended in 1969 applied. See id. at 194, 207 N.W.2d at 537. Under the 1969 amendment to the uninsured motorist statute, the insured was no longer permitted to reject such coverage in writing. See Act of May 23, 1969, ch. 630, 1969 Minn. Laws 1087, 1088 (repealed 1974). The Minnesota Supreme Court in Pleitgen, however, did not find this distinction particularly significant with regard to the stacking question. There the court stated:

We cannot see that this difference in language in these two statutory provisions can have any bearing on the outcome of this case, because both statutes, under our decision in Van Tassel, require each policy to offer coverage of "not less than $10,000 because of bodily injury to or death of one person ... and ... not less than $20,000" for injury to two or more persons in a single accident. Thus, under either statute, the insurer is not free to restrict coverage to less than the minimum limits for each policy.

296 Minn. at 194, 207 N.W.2d at 537 (emphasis added). The supreme court in Van Tassel v. Horace Mann Mut. Ins. Co., 296 Minn. 181, 207 N.W.2d 348 (1973) also indicated that the legislative changes were not relevant to the resolution of the stacking question. See id. at 183 n.1, 207 N.W.2d at 349 n.1.


133. The question of stacking medical payment benefits has been extensively litigated. Presently, the overwhelming majority of the states permit medical payments to be stacked. See, e.g., Westchester Fire Ins. Co. v. Tucker, 512 S.W.2d 679, 685-86 (Tex. 1974); Dhane v. Trinity Universal Ins. Co., 497 S.W.2d 323, 328 (Tex. Civ. App. 1973); Comment, Stacking of Medical Payments Limits Under the Family Automobile Policy, 9 Creighton L. Rev. 402, 407 (1975) ("The majority of courts which have considered the issue have
medical payment coverage, the court reasoned that an insured should receive the benefit of each provision for which a premium was paid because medical coverage was not purchased for the benefit of the insurer. This reasoning is equally applicable to the stacking of underinsured motorist coverage. Although underinsured motorist benefits are optional, once an insured elects this coverage an additional premium must be paid. An insured therefore should be entitled to receive the benefits of such coverage.

2. Setoffs

If the court concludes that underinsured motorist benefits may be stacked, the operation of the setoff provision under the Minnesota Act must be considered. Two different views have been expressed on how the setoff provision should operate. One view is that when a policyholder obtains a judgment against a negligent tortfeasor in excess of the tortfeasor's liability insurance coverage, the policyholder obtains payment...
on the unsatisfied judgment to the extent of his own underinsured motorist coverage. Proponents of the second view contend that the amount paid by the tortfeasor's liability carrier is deducted from the limits of the underinsured motorist coverage. Under this view, if a tortfeasor's liability insurance meets or exceeds the underinsured motorist coverage, the tortfeasor is not considered to be underinsured and

damage occurs; such liability may not be cancelled or annulled by any agreement between the reparation obligor and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

(b) The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the reparation obligor to make payment on account of such injury or damage.

(c) The reparation obligor shall have the right to settle any claim covered by the residual liability insurance policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability for the accident out of which such claim arose.

MINN. STAT. § 65B.49(3) (1978).


For purposes of illustration, assume that X is properly insured under the Minnesota Act and has underinsured motorist coverage in the amount of 25/50. X is in an accident with Y who is also properly insured under the Minnesota Act and maintains residual liability coverage in the statutory minimum amounts of 25/50. X obtains a judgment against Y for $40,000. After Y's insurance carrier tenders the limits of its liability coverage to X, X still remains uncompensated to the extent of $15,000. X would then receive the remaining amount from his underinsured motorist coverage. The mathematical computations under this view would be as follows:

(1) Total damages sustained .................................. $ 40,000
(2) Tortfeasor's liability coverage .......................... (25,000)
(3) Uncompensated damages after payment by tortfeasor's liability carrier .......................... 15,000
(4) Underinsured motorist coverage ($25,000 available; $15,000 needed for full reimbursement) .......................... (15,000)
(5) Amount X remains uncompensated ..................... 0

139. See, e.g., Thiry v. Horace Mann Mut. Ins. Co., 269 N.W.2d 66, 68 (Minn. 1978) (tortfeasor is not underinsured when carrying liability insurance in an amount equal to underinsured motorist coverage carried by plaintiff); Lick v. Dairyland Ins. Co., 258 N.W.2d 791, 795 (Minn. 1977) (tortfeasor is not underinsured when tortfeasor's liability coverage and decedent's underinsured motorist coverages are the same); Arends v. Mutual Serv. Cas. Ins. Co., No. 41768 (Minn. 7th Dist. Ct. July 24, 1978) (plaintiffs entitled to stack underinsured motorist benefits but the $50,000 paid by tortfeasor's liability carrier must be deducted from the stacked benefits).

Assuming the same facts as described in note 138 supra, the mathematical computations under the second view would be as follows:
therefore no payments will be made pursuant to an underinsured motorist provision.\(^\text{140}\)

The Minnesota Supreme Court decision has adopted the second view, holding that the insured is not entitled to recover underinsured motorist benefits when the tortfeasor’s liability coverage is equal to the insured’s

- Total damages sustained: $40,000
- Tortfeasor’s liability coverage: $25,000
- Uncompensated damages remaining after payment by tortfeasor’s liability carrier: $15,000
- Underinsured motorist coverage: $25,000
  - Less: liability coverage paid: $25,000
  - Excess of underinsured motorist coverage over liability coverage: $0
- Amount X remains uncompensated after applying setoff provision: $15,000

If, under the second view, X was an insured under two policies and was allowed to stack the underinsured motorist benefits of each policy, the computations would be as follows:

- Total damages sustained: $40,000
- Tortfeasor’s liability coverage: $25,000
- Uncompensated damages remaining after payment by tortfeasor’s liability carrier: $15,000
- Underinsured motorist coverage: $50,000
  - Underinsured motorist coverage available: $50,000
  - Less: Liability coverage paid: $25,000
  - Excess of underinsured motorist coverage over liability coverage: $25,000
  - (25,000 available; only 15,000 needed)
- Amount X remains uncompensated: $0

140. See note 122 supra.
141. See Lick v. Dairyland Ins. Co., 258 N.W.2d 791 (Minn. 1977). The Minnesota court recently affirmed the holding of Lick in Thiry v. Horace Mann Mut. Ins. Co., 269 N.W.2d 66 (Minn. 1978). Under either view, the injured party must exhaust the defendant’s liability coverage before collecting benefits from the injured party’s underinsured motorist coverage. In the illustrations set out in notes 138 and 139 supra, X’s recovery of first-party benefits has not been considered in determining the amount X has received. The Minnesota Act states, however, that all basic economic loss benefits shall be deducted first from any tort recovery where the negligence cause of action arose out of the maintenance, operation, ownership, or use of a motor vehicle. See MINN. STAT. § 65B.51(1) (1978). For example, if X were an insured under two policies and sustained $70,000 in medical expenses, the computation would be as follows:

- Total medical expense: $70,000
- Less: first-party benefits (2 x 20,000 =
  40,000 stacked benefits): $40,000
- Less: tortfeasor’s liability coverage: $25,000
- Uncompensated damages: $5,000
- Underinsured motorist coverage
underinsured motorist coverage. In Lick v. Dairyland Insurance Co.,

View 1: Underinsured motorist coverage available (2 x 25,000 = 50,000 of stacked benefits) ........................ 50,000
OR

View 2: Total underinsured motorist coverage (2 x 25,000 = 50,000 of stacked benefits) ........................ 50,000
Less: liability coverage .................................. (25,000)
Excess: amount of underinsured motorist coverage available ........................................ 25,000
Amount of underinsured motorist coverage needed for full reimbursement ...................... (5,000)

(6) Amount X remains uncompensated .................... 0

Thus, basic economic loss benefits must be deducted first from the total amount of economic loss incurred before determining the amount recoverable under the underinsured motorist section by operation of the setoff provision. Here, X would be compensated in full under either view because there are sufficient underinsured motorist benefits available under both views.

142. 256 N.W.2d 791 (Minn. 1977). The underinsured motorist statute in effect at the time of Lick and Thiry v. Horace Mann Mut. Ins. Co., 269 N.W.2d 66 (Minn. 1978) provided:

Beginning January 1, 1972, underinsured motorist coverage, whereby subject to the terms and conditions of such coverage the insurance company agrees to pay its own insured for such uncompensated damages as he may recover on account of an automobile accident because the judgment recovered against the owner of the other vehicle exceeds the policy limits thereon, to the extent of the policy limits on the vehicle of the party recovering or such smaller limits as he may select less the amount paid by the liability insurer of the party recovered against. His insurance company shall be subrogated to any amounts it so pays, and upon payment shall have an assignment of the judgment if any against the other party to the extent of the money it pays.

Act of May 27, 1971, ch. 581, § 1, 1971 Minn. Laws 1082, 1082-83 (emphasis added). The language was reenacted as part of the Minnesota Act with minor modification. Compare id. with Act of Apr. 11, 1974, ch. 408, § 9, 1974 Minn. Laws 762, 773-74 (current version at MINN. STAT. § 65B.49(6)(e) (1978)). That section of the Minnesota Act originally provided:

Underinsured motorist coverage whereby subject to the term and conditions of such coverage the reparation obligor agrees to pay its insureds for such uncompensated damages as they are legally entitled to recover on account of a motor vehicle accident because the total damages they are legally entitled to recover exceed the residual liability limit of the owner of the other vehicle, to the extent of the residual liability limits on the motor vehicle of the person legally entitled to recover or such smaller limits as he may select less the amount paid by reparation obligor of the person against whom he is entitled to recover. His reparation obligor shall be subrogated to any amounts it pays and upon payment shall have an assignment of the judgment if any against the other person to the extent of the money it pays.

a pre-no-fault case, the court held that when the tortfeasor carried liability insurance in an amount equal to the underinsured motorist coverage carried by the plaintiff's decedent, the negligent tortfeasor was not underinsured. Furthermore, the court held that the decedent's insurance carrier was entitled to set off from its insured's underinsured motorist coverage the amount paid by the tortfeasor's liability insurer. As a result, the decedent's estate was unable to recover the uncompensated portion of the judgment from the decedent's underinsured motorist coverage.

Until recently, the court's decision in *Lick* seemed to be mandated by the express language of the Minnesota Act, which provided that the amount of an insured's underinsured motorist coverage, "less the amount paid by the reparation obligor [liability carrier] of the person against whom he is entitled to recover," shall be paid by the insurer toward the unsatisfied judgment of its insured. Thus, in *Lick* the insured was unable to obtain any payments from his underinsured motorist coverage when the tortfeasor's liability insurance coverage was in the same amount.

143. The Minnesota Act was passed in 1974 and became effective on January 1, 1975. See Minnesota No-Fault Automobile Insurance Act, ch. 408, 1974 Minn. Laws 762, 786 (amended 1975, 1976, 1977, 1978, and 1979) (codified as Minn. Stat. §§ 65B.41-.71). The Minnesota Act did not apply, however, to accidents occurring before January 1, 1975, even though the cases were not decided until after its effective date. *Id.* § 35, 1974 Minn. Laws at 786. The accident in *Thiry* v. Horace Mann Mut. Ins. Co., 269 N.W.2d 66 (Minn. 1978) occurred on November 29, 1974 and the accident in *Lick* v. Dairyland Ins. Co., 258 N.W.2d 791 (Minn. 1977) occurred on July 2, 1974. Thus, the Minnesota Supreme Court applied the pre-no-fault underinsured motorist statute in both *Thiry* and *Lick*. The pre-no-fault underinsured motorist statute and the original no-fault underinsured motorist statute, before its recent amendment, had remarkably similar language. See note 142 supra.

144. See 258 N.W.2d at 795.

145. See id. at 794.

146. See id. at 794-95. The Minnesota Supreme Court interpreted the pre-no-fault underinsured motorist statute in both *Lick* and *Thiry*. The Minnesota Act, however, does not have any effect on the underinsured motorist provision because the underinsured motorist provision operates the same now as it did then. Hence, the determinative factor in applying the underinsured motorist statute is not whether the case arose under no-fault but whether the amendments have modified the setoff language as it existed in the underinsured motorist statute both before and after the effective date of the Minnesota Act. See notes 149-56 infra and accompanying text.


148. This outcome is troublesome in that the underinsured motorist coverage never will be applicable in an accident with another Minnesota resident, assuming that the amounts of the underinsured motorist and residual liability coverages are equal. See *Lick* v. Dairyland Ins. Co., 258 N.W.2d 791, 794 n.3 (Minn. 1977). If the underinsured motorist carrier is permitted to setoff the tortfeasor's liability payment against the limits of the underinsured motorist coverage, the injured person will not be compensated for any damages that remain unpaid by the negligent tortfeasor. Consequently, an insured will have paid a premium for underinsured motorist coverage without receiving a corresponding benefit.
In 1977, however, the Legislature amended the underinsured motorist provision, significantly altering the language of that section. The language deleted by the Legislature was nearly identical to the language on which the *Lick* court relied in resolving the setoff issue. This result arguably indicates a legislative intent to preclude an insurer from setting off the amounts paid by a liability carrier against the insured's underinsured motorist coverage. By removing the phrase "less the amount paid by reparation obligor of the person against whom he is entitled to recover" from the underinsured motorist section, the Minnesota Legislature has indicated, in clear and unambiguous terms, an intent to prevent an insurer from reducing the amounts of liability coverage received by its insured from the insured's underinsured motorist coverage.

Thus, the underinsured motorist provision, because of the recent amendment, now operates in a manner such that an insurer can no longer reduce its underinsured motorist coverage by the amount of the...
STACKING OF NO-FAULT BENEFITS

B. Definitional Problem: "Insured" Under Whose Policy?

A matter that the Minnesota Legislature must address immediately is the manner in which the application of the word "insured," as defined by statute, acts as a limiting provision on stacking. For purposes of determining whether coverage is available under a particular policy, section 65B.43, subdivision 5 provides that an "insured" includes the "named insured" and numerous other unnamed insureds, including the spouse, other relatives of the named insured, and minors in custody of the named insured, who reside in the same household with the named insured and who are not identified by name in any other no-fault insurance policy. The problem that arises as a result of this definitional provision is that first-party benefits may be stacked when all vehicles in the household are insured by the same named insured, whereas first-party benefits cannot be stacked if the household members insure their own vehicles under separate policies, because the spouse, relative

155. See notes 137-38 supra and accompanying text.
156. See notes 103-15 supra and accompanying text.
158. Although not defined by statute, a "named insured" is the person listed in the policy indorsement and is generally the one responsible for payment of the insurance premiums. Some courts distinguish between the named insured and the unnamed insured by providing the named insured with a "broad reservoir of coverage" that may be unavailable to the unnamed insured. See, e.g., Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 791, 457 P.2d 34, 40-41 (1969). See also Washburn L.J. 764 (1977).
159. See Minn. Stat. § 65B.43, subd. 5(1)-(3) (1978).
160. See, e.g., Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913, 916-17 n.4 (Minn. 1978). To illustrate this point further, assume that a husband and a wife have two automobiles. If the husband is the named insured on both policies, the wife apparently would be permitted to stack the first-party benefits of both policies. Because the wife is the spouse of the named insured, resides in the same household as the named insured, and is not identified by name as an insured in another no-fault policy, stacking would be permitted. See Minn. Stat. § 65B.43(5) (1978).
161. See, e.g., Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913, 916-17 n.4 (Minn. 1978). If the fact situation in note 160 supra is altered slightly, the definitional problem becomes apparent. Assume, instead, that a husband and a wife each own an automobile. Each person is the named insured under his or her respective no-fault policy. If the wife subsequently is injured in an automobile accident and sustains $30,000 in medical expenses, she will not be permitted to stack her husband's policy onto hers; although she resides in the same household, she is not an insured under her husband's policy because she is
of the named insured, or minor in custody would be identified by name as an insured in another no-fault policy. Consequently, those insureds who are unaware of this technicality may be left with uncompensated damages even though the insurance coverages, if combined, would not have been exhausted.

The statutory history of section 65B.43, subdivision 5 supports the proposition that the Legislature did not intend that the word "insured" would have a limiting effect on stacking. Subdivision 5 was taken nearly verbatim from the language of UMVARA. The comments to UMVARA indicate that UMVARA defines "insured" only for purposes of identifying which policy provides coverage when more than one no-fault policy is available. Because UMVARA provides for unlimited medical benefits, stacking will never occur, as stacking, by definition, requires identified by name in her own insurance policy, thereby excluding her from coverage under her husband's policy. See Minn. Stat. § 65B.43(5) (1978).

162. In one of the consolidated cases in Wasche, Clark Bock owned two automobiles, both of which were insured in his name. Clark’s father resided in the same household and also owned an automobile, which the father separately insured in his name. Clark sought to stack both of his policies as well as that of his father’s. Focusing on the language of section 65B.43, subdivision 5, the Wasche court permitted Clark to stack his policies but not the father’s policy, reasoning that Clark was not an insured under the father’s policy because Clark was identified by name in another no-fault policy. See Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913, 916-17 n.4 (Minn. 1978). Even if Clark had been permitted to stack his father’s policy, he still would not have been completely compensated for the loss that he incurred. The court’s decision to deny stacking of the father’s policy, therefore, apparently is inconsistent with one of the express purposes of the Minnesota Act—to relieve the severe economic expense incurred by accident victims. See Minn. Stat. § 65B.42(1) (1978); notes 38-44 supra and accompanying text.

163. Whether the Legislature intended such a result seems doubtful. See notes 38-44 supra and accompanying text.

164. UMVARA defines “basic reparation insured” as:

(i) a person identified by name as an insured in a contract of basic reparation insurance complying with this Act (Section 7(d)); and

(ii) while residing in the same household with a named insured, the following persons not identified by name as an insured in any other contract of basic reparation insurance complying with this Act: a spouse or other relative of a named insured; and a minor in the custody of a named insured or of a relative residing in the same household with a named insured. A person resides in the same household if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.


165. The comments to section 1 of UMVARA indicate that a relative who is a named insured in one insurance policy is not an insured under another policy. Thus, “[t]his qualification [of not being a named insured under another policy] serves to ameliorate the problems of identifying the policy which provides coverage where there is more than one basic reparation policy covering members of the same family unit.” UMVARA § 1, Comment (1972).

166. See note 84 supra.
finite policy limits. Thus, the definition of "insured," as adopted by the Minnesota Legislature from UMVARA, should not be construed to be a limitation on stacking when it was not so construed under UMVARA.\textsuperscript{167} Although the Minnesota Act does place finite limits on first-party benefits, the intent of providing for full coverage under the Minnesota Act can be accomplished only if an injured party is permitted to stack all policies within the same household, regardless of which "insured" category the injured person falls under.

In summary, to deny stacking based-on the mere fortuity of the person listed as the named insured in an insurance policy may result in an inequitable application of the Minnesota Act. Although the Wasche court held that members of the same household could not stack the first-party benefits of other members of the household if listed as named insureds under separate policies,\textsuperscript{168} the court was unable to set forth any sound, logical reasoning as to why the two categories of "insureds" should be distinguished for purposes of stacking. Therefore, the Legislature must clarify the definition of "insured," as failure to do so may result in an arbitrary application of the stacking principle.

C. Effect of Stacking on Premium Rates

Although the Wasche court correctly interpreted the Minnesota Act as it pertains to stacking, the stacking of first-party benefits may have serious ramifications on premium rates,\textsuperscript{169} leading to increased costs for no-fault insurance.\textsuperscript{170} If premiums are increased substantially, those insureds with lower incomes may be unable to afford insurance coverage, resulting in more uninsured motor vehicles on the highways and, in turn, more uncompensated accident victims.\textsuperscript{171} This result would defeat

\textsuperscript{167} See note 164 supra.

\textsuperscript{168} See 268 N.W.2d at 916-17 n.4.

\textsuperscript{169} Mutual Service contended that its underwriters did not take stacking into consideration when determining no-fault automobile insurance premiums but that as a result of stacking, premium rates may be increased. See Appellant's Brief and Appendix at 5-8, A-15 to -19, Wasche v. Milbank Mut. Ins. Co., 268 N.W.2d 913 (Minn. 1978) (brief of appellant Mutual Service Casualty Insurance Company). For a discussion of an opposing viewpoint, however, see note 103 supra.

\textsuperscript{170} One of the philosophies behind the no-fault system is that the burden of the losses is to be borne by the system that is responsible for creating those losses, rather than by the public at large. Insurance coverage is mandatory under the Minnesota Act and therefore most losses can be paid from within the system. Because the system that causes the loss must pay for the loss, the policyholder ultimately will have to bear this increased cost to the system in the form of increased premium rates. If the increased costs to the policyholder would create a hardship, it may be appropriate to question whether such a result was intended by the Legislature. See Note, supra note 5, at 121 n.7.

\textsuperscript{171} The compulsory nature of no-fault automobile insurance has resulted in an increase in the percentage of insured vehicles. Prior to the adoption of no-fault, the percentage of uninsured vehicles in Minnesota at any one time was probably between 9\% and
a primary purpose of the Minnesota Act which is to relieve the severe economic distress of an uncompensated accident victim.\textsuperscript{172}

Two factors suggest that stacking first-party benefits may have a detrimental impact on insurance premiums. First, stacking first-party benefits is potentially available in every situation in which an insured is injured, because first-party benefits are payable without regard to fault.\textsuperscript{173} Second, first-party benefits are payable regardless of whether another involved motor vehicle is insured.\textsuperscript{174}

Unlike first-party benefits, stacking uninsured motorist coverage is applicable only in limited circumstances: first, the injured victim must not be at fault\textsuperscript{175} and, second, the negligent tortfeasor must be uninsured.\textsuperscript{176} Thus, the circumstances that would warrant the stacking of first-party benefits will occur with much greater frequency than would occur under uninsured motorist coverage. Arguably, the additional expenditures that insurance carriers will incur as a result of stacking first-party benefits will not be statistically insignificant for purposes of calculating insurance premiums.\textsuperscript{177}

\textsuperscript{22\%} based on studies conducted by the Minnesota Department of Public Safety and the United States Department of Transportation. Studies conducted by the Minnesota Department of Public Safety after the adoption of no-fault indicate a decrease in the percentage of uninsured vehicles to approximately 4\%. The 4\% uninsured vehicle figure is based on a sampling of 7\% to 10\% of the motor vehicle registrations and a check on all accidents to determine if insurance coverage is in force. See Letter from James P. Kelly, Insurance Analyst, Insurance Division, Minnesota Department of Public Safety (March 13, 1979) (on file in William Mitchell Law Review office).

Although Minnesota's compulsory no-fault insurance law has not resulted in 100\% compliance, it has reduced substantially the percentage of motorists driving without insurance coverage. Because a higher percentage of motorists is insured, the likelihood of an insured victim not having insurance benefits against which to recover is smaller. Consequently, most accident victims now are able to obtain immediate compensation for their injuries.

\textsuperscript{172} See MINN. STAT. § 65B.42(1) (1978). For the full text of section 65B.42, see note 38 supra.

\textsuperscript{173} See MINN. STAT. § 65B.49(1) (1978).

\textsuperscript{174} Unless the injured party's injuries exceed the amount of basic economic loss benefits available, the insured will have no need to resort to the uninsured motorist benefits.

\textsuperscript{175} Subdivision 4 of section 65B.49 provides that only those "who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of injury," may recover uninsured motorist coverage. MINN. STAT. § 65B.49, subd. 4(1) (1978). For the full text of subdivision 4 of section 65B.49, see note 127 supra.

\textsuperscript{176} See MINN. STAT. § 65B.49(4) (1978).

\textsuperscript{177} Under the Minnesota Act, the basic unit of first-party coverage provides an insured with $20,000 in medical loss benefits. See id. § 65B.44(1)(a). Recent studies conducted in Massachusetts revealed that less than five percent of all claims made for medical expenses under the Massachusetts no-fault law exceeded $1,500. See Widiss, Bovbjerg & Cavers, The Massachusetts Study, in NO-FAULT AUTOMOBILE INSURANCE IN ACTION: THE EXPERIENCES IN MASSACHUSETTS, FLORIDA, DELAWARE AND MICHIGAN 201 (1977) [hereinafter cited as NO-FAULT IN ACTION].
Whether the stacking of basic economic loss benefits has an effect on premium rates has not yet been statistically determined. The Legislature must address this problem, however, in order to maintain insurance premium rates at a level affordable to all, seeking a solution that will be equitable to both the policyholder and the insurance carrier. In doing so, the Legislature must keep in mind a primary purpose of the Minnesota Act—to relieve the severe economic distress of uncompensated accident victims—which stacking accomplishes. At the same time, the Legislature must find a way to ameliorate the added cost to the insurance industry without having an adverse effect or putting an undue burden on the system’s policyholders.

IV. A SUGGESTED SOLUTION

In accordance with the Wasche decision, insurance carriers must assume that the stacking of insurance coverages will be permitted and must consider that factor when calculating premium rates, regardless of what type of antistacking provision is written into the insurance policy. Permitting the stacking of basic economic loss benefits, however, may be more medicine than the doctor ordered, because it may have an adverse impact on insurance rates, thus making no-fault automobile insurance unaffordable to some. If the stacking of first-party benefits is assumed to increase insurance rates, then the more equitable approach may be for the Legislature to increase the basic unit of first-party coverage from $30,000 to $50,000, while enacting antistacking legislation that would limit basic economic loss benefits to the amount recoverable under one policy, regardless of the number of policies applicable.

Although the percentage of catastrophic medical claims (claims in excess of $25,000) arising out of automobile accidents is low, the amount of financing needed to cover those losses may not be. For example, a preliminary study conducted by the National Association of Independent Insurers [hereinafter cited as NAII] of catastrophic medical claims in Michigan revealed that NAII insurers have established reserves totalling $32,000,000 for medical expenses of $25,000 and over. The NAII insurers insure approximately 43% of the private passenger vehicles in Michigan. See Jones, The Michigan Study, in NO-FAULT IN ACTION, supra, at 381. Thus, if all insurers writing automobile insurance in Michigan are considered, the aggregate reserves set aside for medical expenses in excess of $25,000 may exceed $64,000,000.

179. See note 165 supra.
180. See notes 169-77 supra and accompanying text.
182. The 1979 Minnesota Legislature considered an antistacking bill that would reach a result similar to the solution proposed by this Comment. The bill, as passed by the Senate, prohibited not only the stacking of first-party benefits but also prohibited the stacking of uninsured and underinsured motorist coverages as well. The Senate bill also would have raised the basic unit of coverage to $50,000, with $30,000 being allocated to
Raising the basic unit of first-party benefits to $50,000, allocating $35,000 for medical expenses and $15,000 for wage loss, replacement services loss, and other out-of-pocket expenses, would result in more equitable treatment among insureds. The increase in first-party benefits would be more accommodating to those households owning only one vehicle; the members of those households are more likely to be fully compensated for their injuries than they were before because, owning only one vehicle, stacking was of no benefit to them. Moreover, members of multicable households will not be substantially affected by the one-policy limitation because the additional medical benefits available under one policy may be sufficient to compensate in full the vast majority of injuries sustained. Thus, although limiting first-party benefits to the amount recoverable under one policy, the increased amount of coverage for medical expense loss benefits and $20,000 being allocated to income loss benefits. The language prohibiting the stacking of first-party benefits would read as follows:

Unless the language of the policies provides otherwise, if two or more insurance policies are available to provide basic economic loss benefits to an insured, the amount of recovery shall not exceed the amount which could be recovered in basic economic loss benefits under one policy. The existence of two or more insurance policies covering basic economic loss benefits shall not increase the amount of recovery for basic economic loss benefits beyond that provided by one insurance policy.

S.F. No. 58, § 2, 71st Minn. Legis., 1979 Sess. (underscoring deleted).

During the legislative session the House of Representatives also considered the anti-stacking bill as passed by the Senate. The Financial Institutions and Insurance Standing Committee amended S.F. No. 58 and the bill as passed by that committee only would have prohibited the stacking of first-party benefits and would have excluded any prohibition on stacking uninsured and underinsured motorist benefits. Due to the numerous problems encountered by the 1979 Legislature, the bill, as amended by the Financial Institutions and Insurance Standing Committee, failed to be scheduled for floor consideration by the full House before the 1979 legislative session ended. Thus, the Wasche decision remains the applicable law in Minnesota as it pertains to stacking. Based on the recent activities of the 1979 Legislature, however, the likelihood of the 1980 Legislature passing some form of antistacking legislation seems to be a certainty.

Although an antistacking provision will not prevent an insurer from collecting an additional premium when more than one vehicle is owned, such a provision possibly may prevent insurance costs from escalating beyond the amount attributable to ordinary inflation. By keeping insurance costs to a minimum, an insurer may be able to keep insurance rates at an affordable level. Because of an antistacking provision, an insured hopefully will be able to purchase $50,000 of first-party benefits for the same price as it now costs to purchase $30,000 of first-party coverage. Thus, the additional first-party benefits available to an insured under the proposed solution will lessen the impact of a premium windfall to an insurer when multiple vehicles are insured. See notes 103-15 supra and accompanying text.

183. A study of the Michigan no-fault law disclosed that in the period from October 1, 1973 to December 31, 1975, approximately 200 claims were reported for medical expenses of $50,000 and over. See Jones, The Michigan Study, in No-FAULT IN ACTION, supra note 177, at 381-82 (Table 1). These figures were obtained by the NAIH, whose member companies insure about 43% of the private passenger vehicles in Michigan. See id. at 381.
should ensure full recovery of most parties' economic losses.

Assuming, however, that the stacking of first-party benefits does not affect premium rates,184 raising first-party coverage to $50,000 while adopting an antistacking provision still is the most equitable resolution to the stacking problem because it permits insureds owning only one vehicle to receive more benefits for their insurance dollar. Again, members of multicar households may not be substantially prejudiced by the antistacking legislation because the increased amount of first-party coverage should be sufficient to cover all but the most serious injuries.185

Finally, by adopting the solution proposed by this Comment, the Minnesota Legislature will have resolved the definitional problem under the Minnesota Act, which currently permits dissimilar treatment between multicar households having one named insured and multicar households having more than one named insured.186 Because the stacking of first-party benefits would no longer be permitted, the need to come within the coverage of a second policy would not arise. Thus, the definitional problem, as it currently exists, would be resolved.

V. CONCLUSION

The Wasche court's recent decision to permit the stacking of first-party benefits was supported by sound principles and rationale. To the extent coverage is available, the court's decision ensures that an injured party will be fully compensated for any injuries sustained. Of foremost importance under a mandatory coverage scheme, however, is the need to keep insurance rates at affordable levels. While the decision in Wasche provides the insured with maximum insurance coverage, the effect of the decision may be felt by the policyholders in the form of increased insurance rates. If, as a result of stacking, the premium rates become unduly burdensome to the policyholder, the Legislature may have to promulgate new or amend existing statutory provisions pertaining to stacking so that the motoring public will be able to purchase insurance coverage at reasonable rates.

184. See notes 169-78 supra and accompanying text. Interestingly, a recent study conducted in Michigan, a no-fault state that permits unlimited medical benefits, see Mich. Comp. Laws Ann. § 500.3107(a) (West Cum. Supp. 1978-1979), concluded that the effect of the Michigan No-Fault Act was to reduce the effective cost of insurance to the policyholders. See Jones, The Michigan Study, in No-FAULT IN ACTION, supra note 177, at 379-93. Basing its conclusion on the Consumer Price Index, the Michigan Study indicated that prices in general had increased 30% since the inception of its no-fault statute, yet no-fault insurance rates only had increased 20% in the same time period. See id.
185. See note 177 supra.
186. See notes 157-68 supra and accompanying text.