

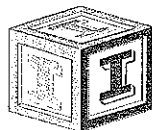


# Legal Beat

By MICHAEL SEAN QUINN

## Stacking and Statutes

Stacking is one of the hot areas in insurance. The trouble is, the word "stacking" has so many meanings that it's not always clear what's being debated or discussed. In general, stacking is aggregating. Stacking policies is, therefore, trying to obtain recovery under more than one policy.



Insurance aficionados distinguish between vertical stacking and horizontal stacking. One form

of vertical stacking is usually intended by all parties up front. An insured buys a primary policy, an umbrella policy, a next layer excess policy which follows the form of the umbrella policy, a next layer up which has its own form, and so on. Insurance, of course, is sold in layers so that risks can be divided and distributed.

Vertical stacking involves technical problems, however. Layers of different contracts don't always fit together. One major issue is whether the excess carriers "drop down" when the primary carrier is insolvent and primary carriers from other years have exposure. Another technical problem centers on how to deal with "other insurance" clauses in excess policies. Should they be treated the same as similar clauses in primary policies or should they be given more deference, since the insurance policies are by their very nature excess insurance.

Horizontal stacking is rather more interesting. This type of aggregation arises when one lengthy event, process, series of events, or a multi-year exposure to injurious conditions triggers several policies. Environmental claims have initiated the "Era of Multiple Triggers," and sometimes it makes sense.

In former years, when a glimpse of stacking was looked on as something lacking, one injurious accident could trigger at most one policy. Usually, that policy was triggered when injurious consequences of the accident manifested themselves. Some states opted for the years in which the accident occurred, or the injurious exposure took place. Still, in general, only one policy could be triggered. The manifestation rule and the rule that requires that for every injury only one policy can be triggered is still the rule in Texas for property damage. This is true in many

states. Interestingly, and perhaps unfortunately, some district courts in Texas have a yen to stray.

Probably, the present "Era of Multiple Triggers" (when anything goes) has come to Texas for situations in which there has been exposure and injury over many years. If a person has been exposed to asbestos fibers over 20 years, and those fibers have pierced his lung tissues, wiggled around, and caused injury over a long series of years, why should only one policy respond? As indicated, for generations it was conven-



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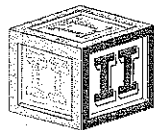
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the injury-in-fact rule. Sometimes, the injury-in-fact approach and the continuous trigger doctrine amount to the same thing. Practicality is one thing; however, theory is another. Conceptually, the two triggers are quite distinct.

An even more bold theory of horizontal stacking involves both primary policies and excess policies. In one case, the insured's counsel settled some of the insurance aspects of a multi-year environmental exposure case involving gradual groundwater contamination by taking (through settlement) one half of each of ten primary policies. The insured then spent the proceeds of that settlement on remediation.

Thereafter, the insured stacked together the money it received from the primary carriers and alleged that the lower limits of three excess carriers were penetrated, because the insured had spent all it needed to trigger the excess policies. The insured made this argument (almost with a straight face), even though the excess policies required the exhaustion of the underlying primary policy. Traditionally, an insurance policy is not exhausted until it has paid policy limits. The fact that somebody else has paid a sum of money equal to policy limits is not the same as the exhaustion of that policy.



Yet another interesting variation on stacking has been roiling around recently in Texas courts.

This version of stacking involves only one policy, and the question is whether different parts of the policy can be stacked.

Some plaintiffs have sought and accepted payments under their Personal Injury Protection (PIP) coverage after having been injured in a wreck, and then they have turned around and sought another recovery under the uninsured/underinsured (UM/UIM) motorist coverage contained in the same policy. PIP coverage is no-fault first-party coverage for medical payments, and the like. UM/UIM insurance is first-party coverage with (roughly speaking) three prerequisites. First, the insured must be injured in an auto accident. Second, the insured must not be to blame (on balance). Third, the tortfeasor must have no insurance or insufficient insurance.

The fundamental idea these plaintiffs have used is the so-called collateral source doctrine from the law of torts. If someone is injured, and that person receives insurance benefits, for example, from his own health carrier, he can still sue the tortfeasor for the entire value of his injury. The defendant may not offset this amount and reduce his obligation to pay by the amount the plaintiff has received from the

insurer. Of course, one reason for this rule is that insurance companies often take subrogation recoveries out of the recoveries of their insureds. They do not always do so, however, but even if they don't, injured plaintiffs are entitled to full compensation from tortfeasors.

Moreover, even if the injured plaintiff's Uncle Oscar gives him money to pay his medical bills, the plaintiff is still entitled to full compensation from the tort-

feasor. Obviously, this means that tort victims sometimes receive double recoveries. This whole notion is mildly inconsistent with the fundamental philosophy of tort law, which is to compensate victims, but not enrich them.

UM/UIM coverage, which is contractual in nature, is often thought to be analogous to tort liability. In other words, when an irresponsible motorist does not have appropriate coverage, it is often said, in casual conver-

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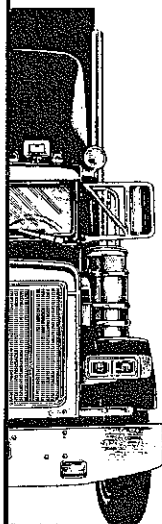
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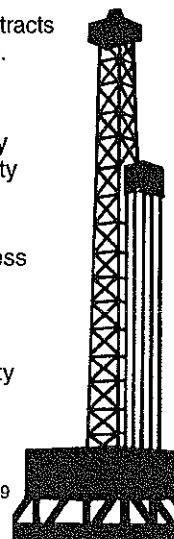
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sation, that the UM/UM policy steps into the shoes of the tortfeasor for litigation purposes. If this analogy were perfect, then the collateral source rule would require that UM/UM benefits be stacked on top of PIP benefits, even if this involved double recovery by the insured.

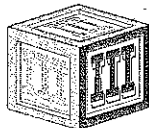
The Supreme Court of Texas has repeatedly held that stacking is permissible when both PIP and UM/UM coverage are necessary in order to fully compensate the tort victim. The Supreme Court has insisted upon this view, even though auto insurance contracts generally forbid double recoveries of this sort. The Supreme Court has simply invalidated them by referring to appropriate sections of the Texas Insurance Code.

Here is the currently utilized standard language that actually authorizes stacking to compensate the accident victim fully:

In order to avoid insurance benefits payments in excess of actual damage sustained, subject only to the limits set out in the declarations and other applicable provisions of this coverage, [the insurer] will pay all covered damages not paid or payable under...Personal Injury Protection Coverage.

Notice that the language of the standard insurance contract is designed to prevent double recoveries, not to prevent stacking

per se, when stacking is necessary to obtain full compensation.



This year a different question came up. A number of injured motorists have obtained full compensation under PIP coverages, and then have sought to obtain the same amounts (and even more) under their UM/UM coverages. They should be able to do this, if uninsured and underinsured motorist coverage genuinely steps into the shoes of the tortfeasor/defendant.

Of course, the standard insurance policies just quoted forbid this, but the plaintiffs' bar has suggested that the preventive language in the insurance policies is inconsistent with various Texas statutes. Their arguments are not entirely without merit.

These controversies came to a head in the Supreme Court of Texas in July of this year. Two cases involving the same issue were consolidated for review. These suits were *Mid-Century Insurance Company of Texas v. Kidd* and *Nationwide Mutual Insurance Company v. Gerlich*. Both cases were decided in July 1, 1999. To its credit, the Supreme Court exercised common sense and construed the components of the Insurance Code in a rea-

sonable manner to prohibit double recoveries.

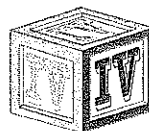
Many plaintiff's lawyers are grumpy about the *Kidd-Gerlich* decision. They are wrong. First, both UM/UM coverage and PIP coverage are subject to quite low upper

## Stacking Coverages

- Stacking insurance coverages is aggregating them.
- There are many kinds of stacking: vertical, horizontal, multi-year, and single policy.
- PIP and UM/UM coverages can be stacked to compensate a blameless injured insured fully.
- PIP and UM/UM cannot be stacked to give an injured insured more than full recovery.

limits. As a consequence, attempts to stack PIP and UM coverage generally create only small dollar cases. Pursuing these cases is a waste of time. The lawyers' time could be better devoted to other things, and the litigants could make more money tending bar on the weekend.

Moreover, the theory of these cases was silly to begin with. The purpose of insurance is to compensate people for losses. The purpose of the tort system is to compensate people for injuries. It has never been the purpose of either one to underwrite double recoveries. The hopes of the plaintiffs in the cases were fatuous from the start. The lawyers devised them to try to take advantage of Texas statutes, which were designed to see to it that people got fully compensated. The statutory purpose was never to create windfalls.



Thus, the stacking of PIP and UM coverages within a single policy for those fully compensated by their PIP coverage is a thing of the past. One can only hope that the Supreme Court of Texas will exercise the same good judgment when it comes to other illegitimate forms of stacking. Those questions will not be resolved until the new millennium, however. □

Quinn is a shareholder with Sheinfeld, Maley and Kay (Austin) and is currently teaching Insurance Law in the Law School at the University of Texas-Austin.



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