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### "Stacking" in Montana in 1999

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# INSURANCE CONSUMER COUNSEL'S COLUMN

## "STACKING" IN MONTANA IN 1999

By PROFESSOR GREG MUNRO

"Stacking" occurs when an insured recovers benefits by combining multiple limits of a specific automobile insurance coverage such as Uninsured Motorist, Underinsured Motorist, or Medical Pay under policies issued by the same auto insurance company. "Stacking" applies to aggregation of coverages by reason of multiple autos insured under a single policy as well as multiple autos insured under separate policies as long as the autos are insured with the same company. Stacking issues arose with the marketing of first-party Uninsured Motorist coverage in the 1970s which marketing was spurred by the statutes such as Montana's Sec. 33-23-201 MCA requiring mandatory offer of UM coverage. Stacking issues followed the availability of Underinsured Motorist coverage

in the 1980s after states passed mandatory liability protection statutes such as Montana's Sec. 61-6-301 MCA (incorporating the minimum limits of Sec. 61-6-103 MCA). Litigation of stacking issues during the last three decades reflects the fact that American homes once featured single car garages and sport three car garages in the 1990s. The expansion of fleets of commercial vehicles gave stacking issues additional importance in terms of repercussions for insurers and buyers of business auto coverage.

The 1997 Lege (to borrow Molly Iwin's term) passed two acts, Ch. 263 and 495, L. 1997, amending the 1981 anti-stacking statute, Sec. 33-23-201 MCA, with the avowed purpose of blocking stacking of any automobile insurance coverage in Montana. Per-

haps the saddest and most anti-consumer aspect of the amendments is the public policy that they supplanted. Since the Montana Supreme Court first allowed recovery of multiple Uninsured Motorist limits in *Sullivan v. Doe*, 159 Mont. 50, 495 P.2d 193 in 1972, it has consistently supported its stacking decisions with the public policy statement that insurers should not be able to include in policies language that defeats coverages for which the consumer has paid a premium. In 1997, the legislature trumped almost 30 years of adherence to that consumer-friendly public policy with a statute that says insurers may in fact collect premiums for policies whose language defeats the coverage bought.

Nevertheless, reports of the demise of stacking may be premature. First, for an indefinite time, the state courts will still be litigating stacking issues for claimants involved in auto accidents and covered by insurance policies whose policy terms were already underway at the time of the effective date of the 1997 anti-stacking amendments. Second, Ch. 495, L. 1997, while clear in its overall intent to prohibit stacking in all forms, is likely to be the subject of challenge in the courts on several grounds that will be discussed later. Consequently, issues of stacking of auto insurance policy coverages will be relevant for several more years even if the 1997 amendments are the effective death knell for stacking in Montana. Consequently, counsel for insurance consumers will need to know what law applies to each of three classes of possible stacking claims as will be discussed below.

Some stacking history is important here. Under the aegis of a consistent public policy, the court, over the past three decades, developed a well-reasoned and cohesive set of cases



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dealing with stacking questions in Montana. In 1972, when two police patrolmen were injured in a head-on collision with an auto thief in Butte, the Montana Supreme Court allowed them to recover UM benefits under the City of Butte's auto policy and under each of their own single policies. *Sullivan v. Doe*, 159 Mont. 50, 495 P.2d 193. Technically, that was not stacking, since it involved recovery of a single limit on policies with different companies. However, in *Chaffee v. U.S. Fid. & Guar. Co., et al*, 181 Mont. 1, 591 P.2d 1102 (1979), the court stacked three UM coverages under a single policy where the insureds paid separate premiums to insure three motor vehicles with USF&G. The court noted that UM coverage is not dependent on the insured "occupying" the vehicle named in the policy and said that it depends on the premiums paid and not on the number of policies. The court held that the attempt to restrict UM coverage to one limit by placing three vehicles under one policy violated Sec. 33-23-201 MCA which mandates that insurers offer UM coverage to protect against injury by owners or operators of uninsured motor vehicles.

Five months later, the court reviewed a case in which a young woman named Kim Kemp was killed in a collision with an uninsured motorist while a passenger in one of two autos insured by Allstate in Vermont for UM coverage under a single policy. Kemp's parents insured three autos in New York paying separate premiums under the same policy. The case became nationally significant when the court stacked the UM coverages under both policies allowing Kemp's estate recovery of all five limits. *Kemp v. Allstate Ins. Co.*, 183 Mont. 526, 601 P.2d 20 (1979).

While insurers could tolerate stacking where separate premiums were paid for separate policies, they could not abide the result of *Chaffee v. USF&G* and *Kemp v. Allstate* which stacked coverages for vehicles insured under the same policy. What was worse, the employer in a claim

that would later reach the Supreme Court as *Guiberson v. Hartford Cas. Ins. Co.*, 217 Mont. 279, 704 P.2d 68 (1985), insured 14 delivery vehicles with State Farm, presumably under some type of fleet policy, and claimant Guiberson's lawyers were arguing that he should be entitled to stack all 14 UM limits of \$25,000 each for a total UM recovery of \$350,000. Such prospects resulted in industry lobbying which led to passage of the first "anti-stacking" act, Ch. 212, L. 1981 codified in Sec. 33-23-203 MCA.

The statute took effect in October of 1981 and appeared to block stacking of all coverages but only in those situations in which multiple vehicles were insured under the same policy. It is interesting to note that, in the years after the statute, State Farm placed an insured's multiple vehicles under separate policies and collected separate premiums, and Farmers Insurance Company placed an insured's multiple vehicles under

the same policy collecting separate premiums, while USF&G and Allstate placed multiple vehicles under the same policy but reportedly charged a single premium for UM coverage.

In 1993, in *Bennett v. State Farm Mut. Auto. Ins. Co.*, 261 Mont. 386, 862 P.2d 1146, the court declared void State Farm's "other insurance" clause which prohibited stacking of Underinsured Motorist coverage where the autos were insured under separate policies with the same insurer. State Farm's clause provided that "the total limits of liability under all such coverages shall not exceed that of the coverage with the highest limit of liability..." The court noted that it had historically embodied in its decisions stacking UM coverage the public policy "that an insurer may not place in an insurance policy a provision that defeats coverage for which the insurer has received valuable consideration." The court rejected as irrelevant State Farm's

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position that such public policy applied only to UM coverage which is protected by statute (Sec. 33-23-201 MCA), stating that "the purpose of underinsured motorist coverage is to provide a source of indemnification for accident victims when the tortfeasor does not provide adequate indemnification." The court reasoned that the public policy that favors adequate compensation for accident victims is supported by the same public policy considerations that invalidated anti-stacking provisions in UM coverage. Finally, the court found that the insured should be entitled to a reasonable expectation of UIM coverage up to the aggregate limits of the policies purchased.

The court limited the ability of passengers who are not family members to stack UM and Medical Pay coverage in *Chilberg v. Rose*, 273 Mont. 414, 903 P.2d 1377 (1995). There it upheld Mid-Century Insurance Company's UM definition of "insured" that required passengers to be "occupying" the insured vehicle to recover benefits. The policies in-

volved covered the named insured and "any other person while occupying your insured car." The court held that Chilberg could by definition only be an "insured" in the vehicle he was "occupying" as a passenger. It distinguished its decisions stacking UM coverage in *Sayers v. Safeco Ins. Co. of America*, 192 Mont. 336, 628 P.2d 659 (1981) and in *Kemp*, supra, because each passenger in those cases was an "insured" by definitions under those policies. The court, in *Chilberg*, affirmed its history of allowing stacking and its long-time public policy rationale of "prohibiting insurers from defeating coverage which the insured reasonably expected" [by paying separate premiums], but noted that a passenger like Chilberg has not paid the premiums for the coverage and has no such expectation.

In 1996, in *Farmers Alliance Mut. Ins. Co. v. Holeman*, ("Holeman I") 278 Mont. 274, 924 P.2d 1315, the court ruled that the anti-stacking statute did not apply to the non-compulsory Underinsured Motorist and Medical Pay coverages.

The court determined that the statute applied only to a "motor vehicle liability policy" and that the term meant only the liability coverages required by statute. Under the Motor Vehicle Liability Act, Sec. 61-6-301 MCA (which incorporates requirements from the Motor Vehicle Safety and Responsibility Act, Sec. 61-6-103[2] MCA), the legislature requires per person, per vehicle, and property damage liability coverage for protection of third parties. The court recognized those coverages as constituting a "motor vehicle liability policy" within the meaning of the anti-stacking statute. However, since the legislature also requires, as part of Montana's statutory scheme, a minimum first-party Uninsured Motorist coverage under Sec. 33-23-201 MCA, the court also recognized Uninsured Motorist coverage as a required or compulsory coverage which was expressly included and could not be stacked under the anti-stacking statute. Ultimately, the court determined Underinsured Motorist coverage and Medical Pay coverage to be "excess" or "additional" coverages

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to which the anti-stacking statute did not apply and held that the statute doesn't prohibit stacking of UIM and Medical Pay coverage where separate premiums are paid for each motor vehicle under a single policy.

*"Holeman I"* left unanswered the question of whether the insurer could prohibit stacking of "excess" or "additional" coverages through policy language. *Ruckdaschel v. State Farm Mut. Auto. Ins.*, 285 Mont. 395, 948 P.2d 400 (1997) did not involve the 1981 anti-stacking statute, because the insured sought to recover Medical Pay coverage under three separate State Farm policies. (Remember that the 1981 statute only blocked stacking of limits for multiple vehicles under a single policy.) Each of the policies provided for Medical Pay coverage of \$5,000 but contained an amendatory endorsement which provided that, if the insured had two or more policies providing Medical Payments coverage, then the "total limits of liability under all such policies shall not exceed that of the policy with the highest limit of liability." The language effectively purported to block stacking of the Medical Pay coverage, so that State Farm offered only \$5,000 under one policy. Save for the fact that *Ruckdaschel v. State Farm* involved Medical Pay coverage and *Bennett v. State Farm* involved Underinsured Motorist coverage, the court found the public policy issues to be identical and, in stacking the coverages, quoted *Bennett*: "An insurer may not place in an insurance policy a provision that defeats coverage for which the insurer has received valuable consideration."

*Holeman I*, *Ruckdaschel*, and the fact that *Farmers Alliance Mutual v. Holeman*, 1998 Mont. 155, 961 P.2d 114, (*Holeman II*) was pending on the issue of validity of anti-stacking policy language for "additional" coverages, prompted the auto insurance industry to approach the legislature and seek to block stacking once and for all. In fact, the legislature amended the anti-stacking statute, Sec. 33-23-203 MCA, through two separate acts. Ch. 263, L. 1997, amended the statute for the express purpose of "Establishing Subrogation Rights in Motor Vehicle Policies," while Ch. 495, L. 1997 was designed to prohibit stacking of any auto insurance coverage whether it is required or excess. While passage of the two acts has anti-stacking proponents gleefully digging the grave for stacking, Mark Twain's words about the reports of the death being greatly exaggerated may be apropos.

Recall that the 1981 statute, Sec. 33-23-203 MCA, provided the following coverage limits for vehicles under a single "motor vehicle liability policy": First, the limit of coverage for an accident was the limit for the vehicle involved in the accident. Second, if the insured vehicle wasn't in the accident, the limit was the highest limit for any one vehicle insured under the policy. Third, limits could not be added together. Fourth, the policy could contain limitations, exclusions, or reductions of coverage "to prevent duplicate payment for the same element of loss." Finally, Sec. 33-23-204, which was added in 1987, defined a "motor vehicle liability policy" as that required by Title 61, Chapter 6, (the required coverages).

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In Ch. 495, L. 1997, the legislature made the following changes to that statute by addition and deletion of language:

1. Applied the anti-stacking provisions to vehicle coverages under multiple policies as well as single policies
2. Forbade stacking regardless of "number of policies issued by the same company" or the "number of premiums paid"
3. Applied the anti-stacking language to "each coverage"
4. Provided that "for a specified coverage" the insurer "shall clearly inform or notify" the insured in writing of limits and "whether the coverage from one policy or motor vehicle may be added to the coverage of another..."
5. Defined "motor vehicle liability policy" to include "all additional coverages" including UM, UIM, and Med Pay

It is important to note that Chapter 494 deleted the 1981 language including UM coverage under the prohibition of stacking in single policies while adding UM to the definition of "motor vehicle liability policy" in Sec. 33-23-204 to block stacking of that coverage in the future.

Ch. 263, L. 1997 had a narrower purpose. While Sec. 33-23-203 MCA already contained subsection (2) which provided that "A motor vehicle liability policy may also provide for other reasonable limitations, exclusions, or reductions of coverage which are designed to prevent duplicate payments

for the same element of loss," Chapter 263 added "subrogation" into the provisions approved in subsection (2) and added language to insure that subsection (2) applied to "another casualty policy that provides coverage for an injury that necessitates damages or benefit payments." Aside from those changes, the legislature, in enacting Chapter 263, left the rest of the statute intact including its reference to a "motor vehicle liability policy" and the definition of such policy which the Montana Supreme Court had construed in *Farmers Alliance Mut. Ins. Co. v. Holeman*, ("Holeman I") to exclude the excess or additional Medical Pay and Underinsured Motorist coverages. What is the import of the fact that the legislative body, in Chapter 263, left the statute intact save for approving subrogation clauses and assuring that subsection (2) would apply to "another casualty policy" while leaving subsection (1) to apply to only a "motor vehicle liability policy" (meaning, under *Holeman*, required coverages only)?

Consider also the fact that the same legislature passed Chapter 495 making no reference to the amendments of Chapter 263. It is important that the two amendments and their inconsistent implicit retention of past statutory language were codified by the Code Commissioner into a single combined amended version of 33-23-203 and 204 MCA. The enactment of these two chapters and the Code Commissioner's approach to codification raise several issues which are likely to result in disagreement. For instance, how is one to read the intent

of the legislature in enacting each of the two chapters insofar as each left non-identical portions of the anti-stacking statute intact? Can one argue that language left intact in Ch. 263 was intended to be the amended statute and that the same is true of language left intact in Ch. 495? Can one argue that the legislature's work requires that there be separate conflicting codifications of 263 and 495?

Subsection (3) requiring notice by insurers will be a source of disputed issues. What is a "specified coverage"? Is there any coverage that is not "specified"? When does the insurer have to notify the insured? What is the remedy if the insurer didn't "clearly inform or notify the insured in writing"? What if the insurer and the insured disagree as to when the insured was to be notified? Does the insurer only have to notify if the coverages "may be added" (an unlikely happening), keeping silent if the consumer will not be allowed recovery? Is the insured considered notified in writing because the policy already contains anti-stacking language in the "other insurance" clause or the "limitation of liability" clause? Does the insurer have to give notice if the legislature said the coverages can't be stacked, but the policy language doesn't?

Note that Ch. 495, L. 1997 involves both an "applicability" date and an "effective" date. The applicability date determines to which insurance policy the amendments apply. Chapter 495 provided that the amendments to Sec. 33-23-203 and 204 "applies to all motor vehicle liability policies issued or renewed after [the effective

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date of this act].” The effective date of the act is May 2, 1977. Consequently, earliest applicability date (being any date after May 2, 1977) is May 3, 1997. The effective date of the amendments, May 2, 1997, is the date the statute was effectively amended, so that certain pertinent language from the 1981 statute was deleted and language from the 1997 acts was added and became effective but only for those policies to which the amended statute applies. Take note, by the way, that Chapter 263 states no effective date or applicability date. Neither does Ch. 212, L. 1981, which is the 1981 anti-stacking amendment. If the 1997 amendments are compiled in the same statute, what is the applicability date and effective date of that compilation?

Though the effective date of Chapter 495 was May 2, 1997, as a matter of applicability, an auto insurance policy issued on May 2, 1997, would not be subject to the 1997 amendments during the term of that policy. Hence, it is possible that accidents occurring as late as May 1, 1998 (the end of such one-year policy terms) would result in stacking of coverages under policies to which the 1997 amendments will not apply. Since such claims are now only a year old and many haven't yet been filed as lawsuits, litigation and appeal of stacking issues may go on for several years.

Needless to say, for accidents occurring during the May 2, 1997 to May 2, 1998, window and perhaps six months later, counsel seeking to stack should acquire the policies and every notice, rider, or endorsement from the insurer, so that counsel knows the status of notice to the insured. Lack of notice may be the key to getting a favorable court ruling on stacking.

The first inquiry for counsel seeking to stack will be what law to apply. The law governing an auto insurance stacking claim will depend on the term of the insurance coverage. Three scenarios exist depending on the policy term. First, if the accident occurred under coverage of a policy whose term began on or after May 3, 1997, then by the provisions of the 1997 amendments, no coverage under the policy can be stacked. Second, if the accident occurred under a policy issued before the applicability date of May 3, 1997 and before the effective date of May 2, 1997, then the 1981 anti-stacking statute and the stacking decisions of the Montana Supreme Court would apply so that only stacking of required coverages under a single policy would be prohibited. Third, what of the cases occurring on or after the statute's effective date of May 2, 1997 and under policies that did not expire until as late as May 2, 1998? For those cases, the 1997 amendments would not apply, but the 1997 amendment was effective as of May 2, 1997 to delete some provisions of the 1981 anti-stacking statute as of that date. For example, Chapter 495, effective May 2, 1997, deleted from the 1981 anti-stacking statute the language that previously included Uninsured Motorist coverage as a coverage that could not be stacked if multiple cars were under one policy. To be sure, Chapter 495, L. 1997 added language blocking stacking for any coverage, but that language though effective does not apply to the policy that expires as late as

May 2, 1998. Considering the deletions made by the 1997 amendments, it is possible the courts will face arguments that neither deleted portions of the 1981 statute or the 1997 amendments apply to some stacking issues. Consequently, for a single policy issued May 2, 1997 and covering multiple autos for UM coverage, one could argue the 1981 statute no longer blocks stacking (UM language removed effective May 2, 1997 by Chapter 495), and the 1997 amendment doesn't apply to that policy.

Note that the 1997 amendments retained the 1981 language approving "other" provisions "designed to prevent duplicate payments for the same element of loss..." This language indicates that the anti-stacking provisions under subsection (1) of the statute are designed to prevent duplicate payment for the same element of loss. Courts construing the statute should be reminded that its overarching intent is to prevent duplication of payment for the same element of loss. Wise counsel will not be in a position of seeking duplicate payment for the same loss. While insurance contract law will allow duplicate payment under Medical Pay coverage, tort law doesn't allow duplicate payment for the same element of loss. The goal of an adequate recovery is to get all damages paid once, and that doesn't violate the legislative intent of Sec. 33-23-203 MCA. A gravely injured plaintiff seeking to recover from his or her own insurer, UM, UIM or Med Pay benefits where damages exceed all limits of coverage will be in the best position to

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argue the public policy and legislative intent of the statute after its amendment in 1997.

Also, it appears counsel will raise issues about whether the amendments impair rights in effect on the effective date of the legislation, which can be argued is impermissible under Article II, Section 31 of the Montana Constitution. Hence, as you can see, the 1997 legislative rush to extend the anti-stacking statute to all coverages may have produced inconsistencies, ambiguities, and issues in the codified result that can plague the attempt to end stacking. Inventiveness of counsel in challenging the newly amended statute in the effort to assure adequate insurance coverage may create a hole in the anti-stacking dam created by the 1997 legislature.

Finally, and very importantly, counsel should note the court's decision in *Dakota Fire Ins. Co. v. Oie*, 1998 MT 288, 55 St. Rep. 1179, in which the court held that the 1981 anti-stacking statute (as of 1991) did not apply to block stacking of uninsured motorist coverage of multiple vehicles under a single policy where the insured paid separate premiums. The court asked "to what extent did the provisions of Sec. 33-23-203, MCA (1991), supersede the doctrine of reasonable expectations and the public policy recognized by this court favoring the enforcement of coverage for which an insurer has received valuable consideration." The court noted that the statute's language made it apply to block stacking "regardless of the number of motor vehicles" but didn't address whether the number of premiums paid made a difference. Of critical importance here is the implication that the public policy of the reasonable expectations doctrine and the court's long cited public policy of protection of insureds who pay multiple premiums may prevail over a conflicting legislative enactment. The fight isn't over yet.

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brain function ability. This means that it is practically impossible to predict what type of cognitive impairments will result from a combination of brain damage and psychiatric illness, and the test results cannot be looked at or analyzed in a vacuum.

## CONCLUSION

It is not, in any way, being suggested that every person who is in a car crash, whether they strike their head or not, has suffered a traumatic brain injury. I hope that the content of this article will be of assistance for people in understanding some of the realities about traumatic brain injury and for helping persons surviving traumatic brain injury to obtain the respect, dignity, and care and treatment they deserve and are entitled to.

*CHARLES N. (NICK) SIMKINS is a trial lawyer specializing exclusively in representing persons and families surviving traumatic brain injury and/or spinal cord injury. Mr. Simkins is an elected board member of the Brain Injury Association, past board member of the Michigan Head Injury Alliance, a member of the American Trial Lawyers Association Executive Committee on Traumatic Brain Injury, Editor, ATLA Newsletter on Traumatic Brain Injury, Editor of National Head Injury Foundation book entitled "Analysis, Understanding, and Presentation of Cases Involving Traumatic Brain Injury," Editor, Melvin Belli Society Newsletter and a consultant to trial lawyers throughout the United States. Over the last several years, Mr. Simkins, whose office is in Northville, Michigan, has achieved numerous multi-million dollar verdicts and settlements in cases involving traumatic brain injury.*

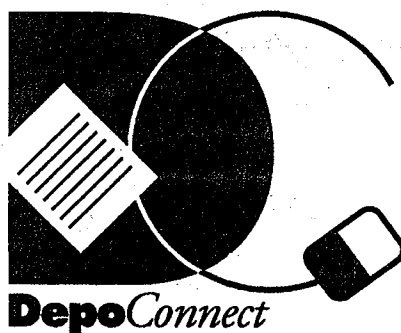
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