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INSURANCE WITHOUT ASSURANCE: STACKING UNINSURED/UNDERINSURED MOTORIST COVERAGE UNDER COMMERCIAL FLEET POLICIES AFTER *Mascarella v. United States Fidelity and Guaranty Company*

*Jeremy Vanderloo**

OVERVIEW

Since its inception in 1967, the Uninsured Motorist Act[1] has been liberally construed by the Mississippi Supreme Court with a general view toward finding coverage for the insured, especially when the issue relates to aggregation of uninsured or underinsured motorist coverage. The court has allowed a named insured, or a member of his family, to aggregate or stack uninsured motorist insurance coverage regardless of whether the available coverages result from a single multi-vehicle policy or multiple single-vehicle policies. The court has been somewhat more restrictive in its decisions regarding permissive users of the insured's vehicle. In those cases, the court has allowed stacking only under single multi-vehicle policies, regardless of whether in a commercial or non-commercial context. However, the court's most recent decision regarding multi-vehicle underinsured motorist coverage stacking under a commercial policy threatens to upset its prior decisions. This most recent decision may be merely an attempt to back away from what the court sees as an overly lenient disposition towards stacking, or it may be a reversal of more than a decade of commercial stacking law. Unfortunately, the lack of reference to its prior commercial stacking cases, along with apparent inconsistencies among the views of at least one justice, leaves the full impact of this decision in question.

I. INTRODUCTION

Mascarella v. United States Fidelity & Guaranty Co. addressed the issue of whether or not an employee using his employer's vehicle could aggregate the underinsured motorist coverage of all the vehicles covered under the employer's automobile insurance policy.[2] "Claims for coverage by passengers in vehicles covered by fleet policies or by employees of companies with such insurance policies have almost uniformly been treated the same as other claims for coverage by an occupant of an insured vehicle: the courts have denied requests to allow stacking the coverages."[3] Mississippi has deviated from this viewpoint on more than one occasion. Yet the Mississippi Supreme Court in *Mascarella* held that the injured employee could not stack the coverage on his employer's fleet because the injured employee was not a named insured under the policy.[4] In so doing, the court appears to have distanced itself from thirteen years of precedent holding that an employee could stack the benefits of his employer's fleet uninsured motorist coverage when the fleet was insured under a single policy. Therefore, the current status of uninsured motorist stacking law is uncertain.

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1. MISS. CODE ANN. §§ 83-11-101 to 83-11-111 (1999).
2. Mascarella v. U.S. Fid. & Guar. Co., 833 So. 2d 575 (Miss. 2002).
3. ALAN I. WIDISS, UNINSURED & UNDERINSURED MOTORIST INSURANCE § 13.11 at 775 (rev. 2d ed. 1999).
4. *Mascarella*, 833 So. 2d at 580.

II. FACTS

Kade Mascarella was injured in an automobile accident when Alexander Sutherland's automobile struck the vehicle Mascarella was driving.[5] At the time of the accident, Mascarella was on the job as an employee of, and driving a car owned by, Development Concepts, Incorporated [hereinafter Development Concepts].[6] The parties agreed the collision resulted from Sutherland's negligence.[7] Mascarella's medical expenses from his injuries exceeded $65,000, and he claimed he would incur substantial future expenses as well.[8] Sutherland had liability coverage up to $100,000 per person under a policy issued by Progressive Insurance Company.[9] Mascarella's automobile, owned by Development Concepts, was insured under a single fleet insurance policy issued by United States Fidelity & Guaranty Company [hereinafter USF&G].[10] That policy covered eight vehicles owned by Development Concepts with uninsured motorist coverage of $25,000 per vehicle per accident.[11] Development Concepts paid separate uninsured motorist premiums for each of these eight vehicles.[12]

Mascarella settled with Sutherland for the $100,000 liability policy limit.[13] USF&G paid Mascarella $25,000, representing the uninsured motorist coverage of the car Mascarella was driving.[14] Subsequently, USF&G claimed that it had incorrectly paid the $25,000 because Sutherland's automobile did not qualify as an uninsured or underinsured vehicle.[15]

Mascarella filed suit against USF&G in United States District Court in Mississippi.[16] Mascarella alleged wrongful denial and bad faith denial of uninsured motorist benefits.[17] The district court granted USF&G's summary judgment motion.[18] Mascarella appealed to the United States Court of Appeals for the Fifth Circuit.[19] The Fifth Circuit certified the following question to the Mississippi Supreme Court: "Whether an injured insured is entitled to stack the underinsured motorist coverage of other vehicles covered under his fleet policy thereby making the third-party tortfeasor's vehicle an underinsured motor vehicle."[20]

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5. *Id.* at 576.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Mascarella*, 833 So. 2d at 576.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Mascarella*, 833 So. 2d at 575. *See* Mascarella v. U.S. Fid. & Guar. Co., 71 F. Supp. 2d 598 (S.D. Miss. 1999).
17. *Mascarella*, 833 So. 2d at 575.
18. *Id.*
19. *Id.*
20. *Id.* at 575-76.

Mascarella argued that he should be allowed to stack the uninsured motorist coverage of all eight vehicles insured by Development Concepts, creating coverage of $200,000.[21] Since Sutherland's liability coverage was $100,000, stacked coverage of $200,000 on the vehicle Mascarella was driving would result in Sutherland's vehicle being classified as underinsured.[22] Mascarella claimed he was due the difference between this stacked coverage and the sums already paid by both Sutherland and USF&G.[23] USF&G argued that Sutherland's vehicle did not qualify as underinsured because it met neither the statutory nor the policy definitions of an underinsured vehicle.[24]

III. BACKGROUND AND HISTORY OF THE LAW

In order to understand how *Mascarella* has affected the status of uninsured motorist stacking law as it relates to commercial or fleet policies, it is necessary to understand the general background of uninsured motorist stacking law in Mississippi.

A. The Uninsured Motorist Act

Mississippi enacted an uninsured motorist statute for the purpose of providing compensation to innocent injured motorists for injuries caused by financially irresponsible motorists. Mississippi Code Annotated sections 83-11-101 through 83-11-111 comprise the Mississippi Uninsured Motorist Act. The Act states:

> No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1967, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle.[25]

The Act made uninsured motorist coverage mandatory, unless declined in writing.[26] The Act also included in its definition of uninsured motor vehicle a vehicle with no bodily injury liability insurance or with coverage in effect that had been denied by the insurer.[27]

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21. *Id.* at 576. ($25,000 times eight vehicles).

22. *Id. See* MISS. CODE ANN. § 83-11-103(c)(iii) (1999) (An underinsured vehicle is one in which the liability insurance coverage is less than the limits applicable under the injured person's uninsured motorist coverage. Therefore, Mascarella would need any amount of uninsured motorist coverage in excess of $100,000 to qualify Sutherland as an underinsured motorist, because Sutherland's liability limit was $100,000).

23. *Mascarella*, 833 So. 2d at 576.

24. *Id.*

25. MISS. CODE ANN. § 83-11-101(1).

26. *Id.*

27. MISS. CODE ANN. § 83-11-103(c)(i) - (ii).

B. Adoption of Insurance Stacking

Stacking refers to the aggregation of coverage for different insurance policies or separate vehicles.[28] Many jurisdictions allow uninsured motorist stacking, either by statute or through caselaw.[29] The rationale usually cited in support of stacking is that the insured has paid a premium for coverage, so coverage should be available to the injured party.[30] Mississippi first allowed stacking of uninsured motorist insurance in *Harthcock v. State Farm Mutual Automobile Insurance Co.*[31]

Mississippi has also adopted certain rules of construction that relate to uninsured motorist stacking cases. The most significant is that "policies issued [under the Uninsured Motorist Act] are to be construed liberally to provide coverage and strictly to avoid or preclude exceptions or exemptions from coverage."[32] Another important tenet says that "uninsured motorist coverage is personal to insureds, providing coverage for people and not vehicles."[33] These principles are intended to guide the court in interpreting the Uninsured Motorist Act and caselaw that addresses the issue of stacking.

C. Statutory Classes of Insured

The stacking issue was compounded in *Stevens v. USF&G* when the Mississippi Supreme Court held that the Uninsured Motorist Act created "two distinct classes of insured with different coverage accruing to each class."[34] Class I insureds consist of the named insured and his or her spouse plus any of their relatives living in the same household.[35] Class I coverage "against injury inflicted by uninsured motorists is quite liberal, . . . aris[ing] by virtue of the phrase 'while in a motor vehicle or otherwise.'"[36] Class II insureds consist of "any person 'who uses, with the consent, expressed or implied, of the named

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28. 46a C.J.S. *Insurance* § 1676 (1993).

29. *But see* FLA. STAT. ANN. § 627.4132 (1996) (stacking prohibited except in limited circumstances).

30. Wickline v. U.S. Fid. & Guar. Co., 530 So. 2d 708, 714 (Miss. 1988). *See also* Tissell v. Liberty Mut. Ins. Co., 795 P.2d 126, 127 (Wash. 1990) (fundamental policy behind uninsured motorist protection is complete compensation of injured parties). *But see* WIDISS, *supra* note 3, § 35.4 at 258 ("Unless there is evidence that a purchaser was not adequately informed about the nature of the coverage that was offered . . . there is little, if any, public policy which supports claims by individuals that the coverage limits selected and paid for should be disregarded.").

31. Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971).

32. Miss. Farm Bureau Mut. Ins. Co. v. Garrett, 487 So. 2d 1320, 1323 (Miss. 1986) (citing Matthews v. State Farm Mut. Auto. Ins. Co., 471 So. 2d 1223, 1225 (Miss. 1985)).

33. Meadows v. Miss. Farm Bureau Ins. Co., 634 So. 2d 108, 112 (Miss. 1994) (McRae, J., dissenting) (citing State Farm Auto. Ins. Co. v. Nester, 459 So. 2d 787, 793 (Miss. 1984) (quoting JOHN ALLEN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 5080 (1981))).

34. Stevens v. U.S. Fid. & Guar. Co., 345 So. 2d 1041, 1043 (Miss. 1977). *See also* Mullis v. State Farm Mut. Auto. Ins. Co., 252 So. 2d 229, 238 (Fla. 1971) (two classes of insureds); Ohio Cas. Ins. Co. v. Stanfield, 581 S.W.2d 555, 557 (Ky. 1979) (two classes of insureds); Konnick v. Farmers Ins. Co. of Ariz., 703 P.2d 889, 892 (N.M. 1985) (two classes of insureds); Andrew Janquitto, *Uninsured Motorist Coverage in Maryland*, 21 U. BALT. L. REV. 171, 222-28 (1992) (three classes of insureds). *But see* Gerald W. Scott, *Uninsured/Underinsured Motorist Insurance: A Sleeping Giant*, 63 J. KAN. B.A. 28, 33 (1994) (no distinction between named insured and permissive user).

35. *Stevens*, 345 So. 2d at 1043. (citing MISS. CODE ANN. § 83-11-103(b)).

36. *Id.* (quoting MISS. CODE ANN. § 83-11-103(b)).

insured, the motor vehicle to which the policy applies.'"[37] While the court indicated that Class II coverage is not as liberal as Class I coverage, it did not indicate just how broad or narrow Class II coverage is.[38] As will become apparent, the particular title given to insured persons is often mere semantics, while it is the substantive rights which accrue to the injured individuals that are the important issue.[39]

D. Addition of Underinsured Motorist Protection

The legislature created another series of issues when it provided for underinsured motorist protection in 1979. An underinsured vehicle is "[a]n insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under his uninsured motorist coverage."[40] The critical question was no longer simply whether the tortfeasor lacked insurance, but what level of insurance would be credited to each party. Therefore, stacking became a crucial factor in determining recovery amounts.

E. Stacking of Uninsured/Underinsured Motorist Insurance Benefits

1. Uninsured/Underinsured Motorist Stacking for Class I Insureds Is Liberally Granted

In Mississippi, "Class I insureds may stack their own coverage without regard to whether one policy is issued covering multiple vehicles or separate policies are issued."[41] The former is referred to as intrapolicy stacking, while the latter is referred to as interpolicy stacking.

In *Southern Farm Bureau Casualty Insurance Co. v. Roberts*, the Roberts' minor son was injured while riding as a passenger in a motor vehicle.[42] The passenger's parents had three separate insurance policies covering three separate vehicles.[43] The passenger qualified as an uninsured motorist because the driver of the second vehicle was uninsured.[44]

The *Roberts* court allowed the passenger to stack the coverage of all three of his parents' insurance policies noting that "[a] separate premium was paid for each policy, and each policy with its uninsured motorist endorsement was complete within itself."[45] In reaching its conclusion, the court also noted that "if the

37. *Id.*

38. Overruling the trial court, the Mississippi Supreme Court held that Steven's injuries arose out of his use of the wrecker, and therefore, Stevens was covered as a Class II insured. *Stevens*, 345 So.2d at 1044.

39. *See* WIDISS, *supra* note 3, § 13.11 at 768 (there is a basis for distinguishing the rights of Class I and Class II insureds).

40. MISS. CODE ANN. § 83-11-103(c)(iii).

41. JEFFERY JACKSON, MISSISSIPPI INSURANCE LAW § 17:18 at 17-38 (2001).

42. S. Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536, 537 (Miss. 1975).

43. *Id.*

44. *Id.*

45. *Id.* at 538.

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 for which it collected a premium."[46] The passenger, as a Class I insured of his parents' policies, was allowed to interpolicy stack the coverage of those policies.

In *Government Employees Insurance Co. v. Brown*, the plaintiffs, Mr. and Mrs. Brown, were operating their own vehicle when they were struck by an uninsured motorist.[47] The insurer provided the Browns with a single policy covering three vehicles for which the Browns paid separate premiums.[48] The court held that the insureds were entitled to stack their coverage, reasoning that "a presumption arises that coverage of multi-vehicles in one policy, where separate premiums were paid for each endorsement of uninsured motorist coverage, is the same as if such coverage was provided in separate policies covering the same vehicles."[49] Although the court's holding was limited specifically to a single policy covering three vehicles, it indicated an openness to ignoring distinctions between intrapolicy and interpolicy coverage.

In *USF&G v. Ferguson*, the plaintiff was riding as a passenger in her own automobile when her vehicle was struck by a third party tortfeasor.[50] The tortfeasor had $25,000 in liability insurance on her vehicle.[51] The plaintiff insureds had a single policy covering three vehicles, including the accident vehicle.[52] The insureds had previously paid separate premiums for each vehicle, but at the time of the accident, they paid a single higher premium for their coverage.[53] The insureds sought to stack the coverage of all three of their vehicles,[54] as Class I insureds. The insurance company claimed it was not required to stack the coverage on the insureds' three vehicles because the policy had an unambiguous anti-stacking clause.[55]

However, the court allowed the insured to stack the coverage, stating "the public policy of this State mandates stacking of [uninsured motorist] coverage for every vehicle covered under a policy, regardless of the number or amount of the premium(s) paid for [that] coverage."[56] Whereas the insured parties had paid their insurance company to cover all three of their cars with uninsured motorist coverage, the insurer was liable to the insured for that coverage when a valid claim was made.[57] In this case, the court allowed the Class I insured to intrapolicy stack.

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46. *Id.* (quoting Van Tassel v. Horace Mann Mut. Ins. Co., 207 N.W.2d 348, 351-52 (Minn. 1973)).
47. Gov't Employees Ins. Co. v. Brown, 446 So. 2d 1002, 1003 (Miss. 1984)
48. *Id.* at 1005.
49. *Id.* at 1006. See Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379 (Miss. 1977).
50. U.S. Fid. & Guar. Co. v. Ferguson, 698 So. 2d 77, 78 (Miss. 1997).
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Ferguson*, 698 So. 2d at 79.
57. *Id.* at 80.

These cases illustrate how the Mississippi Supreme Court generally grants broad stacking to Class I insureds, who are persons named in the policy or relatives of the named insured living in the same household. But the court does not grant the same latitude to permissive users, called Class II insureds.[58]

2. Uninsured/Underinsured Motorist Stacking for Class II Insureds Is Not as Broad as Class I Stacking

In Mississippi, "[u]nder the usual rule, a permissive user or guest passenger in a vehicle may only stack the host's [uninsured motorist] coverage if the host's policy provides multi-vehicle coverage under a single policy."[59] That is to say, a Class II insured is generally only allowed intrapolicy stacking of uninsured motorist coverage.[60]

In *Wickline v. USF&G*, the plaintiff's daughter was killed when the vehicle in which she was a passenger collided with a vehicle parked on the side of the road.[61] The driver was covered under his father's insurance, issued by the defendant USF&G.[62] The driver's father had four automobiles under the same policy, each paid with separate premiums.[63] The passenger's parents were insured through two of their own policies issued through State Farm Insurance Company.[64]

The Mississippi Supreme Court held that the passenger could stack the driver's insurance coverages to qualify a tortfeasor as underinsured because "[t]he Mississippi statutory definition of uninsured motor vehicle, as amended to incorporate the underinsured concept, compares the limits of the tortfeasor's liability coverage to 'the limits *applicable to the injured person* provided under his uninsured motorist coverage.'"[65] The court described those limits by holding that "[i]f an injured person is insured under more than one policy of uninsured motorist insurance, the limits of each such policy are 'applicable' to him."[66] Finally, the court overruled the trial court by holding that "all classes [of] statutory insureds may recover of the [] insurer all amounts he or she may be entitled to recover as damages from the uninsured motorist, limited only by the limits of [uninsured motorist] coverage multiplied by the number of vehicles insured by the policy."[67] Therefore, the court allowed the passenger to stack her family

58. *See* Joseph Nanney, Jr., *Sutton v. Aetna Casualty & Surety Co.: The North Carolina Supreme Court Approves Stacking of Underinsured Motorist Coverage—Will Uninsured Coverage Follow?*, 68 N.C. L. REV. 1281, 1292 (1990) (addressing reasons why jurisdictions reject Class II stacking).

59. JACKSON, *supra* note 41, § 17:18 at 17-38. *But cf.* Hampton v. Allstate Ins. Co., 616 P.2d 78 (Ariz. 1980); General Accident Ins. Co. v. St. Peter, 482 A.2d 1051 (Pa. Super. 1984); Abshere v. Prudential Ins. Co., 683 P.2d 625 (Wash. App. 1984) (permissive user denied intrapolicy stacking).

60. However, when a permissive user has his own uninsured motorist coverage, his *own* coverage can be stacked with the coverage on the accident vehicle since the permissive user is a Class I insured as to his own uninsured motorist policy. This is regardless of whether or not the permissive user is entitled to stack the insurance coverage of the accident vehicle owner's other vehicle(s).

61. *Wickline*, 530 So. 2d at 710.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 713 (quoting § 83-11-103(c)(iii)).

66. *Id.* (citing *Harthcock*, 248 So. 2d 456).

67. *Wickline*, 530 So. 2d at 715.

vehicle coverage with the coverage of the four vehicles insured under the driver's family policy,[68] which constitutes intrapolicy stacking by a Class II insured.

In *Thiac v. State Farm Mutual Automobile Insurance Co.*, the plaintiff was seriously injured while riding as a passenger in an automobile.[69] The driver had two separate insurance policies covering the accident vehicle and a separate vehicle.[70] The passenger did not have any of her own automobile liability insurance.[71]

The Mississippi Supreme Court denied uninsured motorist coverage to the passenger, "recogniz[ing] that for the purpose of establishing whether an insured host vehicle is, in fact, underinsured, we look no further than the guest passenger's own coverage and the coverage on the host vehicle."[72] Since the passenger had no insurance coverage of her own to stack with the driver's liability coverage, the accident vehicle was not underinsured.[73] However, the court upheld *Wickline*, noting that once a host vehicle qualifies as uninsured, the passenger can stack the coverage of all vehicles under the host driver's policy to recover damages.[74] Therefore, the *Thiac* court indicated that interpolicy stacking of a driver's insurance would be allowed for damages only, after the host vehicle qualified as either uninsured or underinsured.

In *State Farm Mutual Automobile Insurance Co. v. Davis*, the court further distinguished the stacking guidelines established by *Wickline*.[75] The Davis' minor child was killed while riding as a passenger in a pick-up truck.[76] The owner of the pick-up truck had separate insurance policies on the accident vehicle and two other vehicles.[77] The passenger's parents had three insurance policies on three vehicles that covered their child at the time of the accident.[78] The passenger's parents sought to stack the coverage from all six policies, and the trial court allowed them to do so.[79]

The Mississippi Supreme Court reversed the trial court, holding that stacking was inappropriate as to the driver's other insurance policies. The court noted that stacking of those policies was not allowed because the passenger was not an insured under those policies due to the fact that she was not a guest passenger in either of the driver's other vehicles.[80] The court distinguished *Davis* from *Wickline*, noting that in *Wickline* the four cars were covered under the same policy, while in *Davis* the cars were insured under separate policies.[81] Therefore, the

68. *Id.* at 713 (citing *Roberts*, 323 So. 2d 536).
69. Thiac v. State Farm Mut. Auto. Ins. Co., 569 So. 2d 1217, 1218 (Miss. 1990).
70. *Id.*
71. *Id.*
72. *Id.* at 1221.
73. *Id.*
74. *Id.* at 1220.
75. State Farm Mut. Auto. Ins. Co. v. Davis, 613 So. 2d 1179 (Miss. 1992).
76. *Id.* at 1180.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 1181.
81. *Davis*, 613 So. 2d at 1182.

passenger could interpolicy stack her parents' policies as a Class I insured, but she could not interpolicy stack the driver's policies as a Class II insured of those policies.

In *Brown v. Maryland Casualty Co.*, the plaintiff's wife was driving an automobile owned and insured by the plaintiff's father when she was killed in an accident caused by a third party.[82] That tortfeasor had $10,000 in liability insurance.[83] The plaintiff's father had a single insurance policy covering both the accident vehicle and a second vehicle.[84] The plaintiff sought to stack the coverage of both of his father's vehicles.[85]

The court allowed the plaintiff to stack the coverage,[86] extending the holding of *GEICO v. Brown*. The court held that the driver was a Class II insured of the policy by virtue of her use of the covered vehicle.[87] Relying on precedent, the court said, "[t]he justification for stacking lies not in who has paid for the extra protection, but rather that the protection has been purchased. The benefits flow to all persons insured."[88] Therefore, the court allowed a Class II insured to intrapolicy stack the uninsured motorist coverage of the accident vehicle owner.[89]

In *Miller v. Allstate Insurance Co.*, the plaintiff was a passenger in a car owned by her mother but driven by a third party.[90] The driver's parents were insured under a single policy that included four vehicles owned by them.[91] The passenger's mother insured the accident vehicle under a single policy that also included a second vehicle.[92] The passenger sought to stack the coverage of the driver's four automobiles.[93] The court denied stacking on the grounds that the passenger was not an insured under any of the driver's four vehicles because the passenger was not using any of the driver's vehicles at the time of the accident.[94] Therefore, the passenger could not stack uninsured motorist coverage on the driver's single policy because the passenger was neither a Class I nor a Class II insured of the driver's policy.

In *Meadows v. Mississippi Farm Bureau Insurance Co.*, the plaintiff's minor son sustained serious injuries in an automobile accident while riding as a passenger.[95] The vehicle owner's son was driving the automobile.[96] The driver's parents had a total of six separate insurance policies providing uninsured motorist coverage on the accident vehicle and five other vehicles.[97] The trial court denied

82. Brown v. Md. Cas. Co., 521 So. 2d 854, 854 (Miss. 1987).
83. *Id.*
84. *Id.* at 855.
85. *Id.*
86. *Id.* at 856.
87. *Id.* (citing *Stevens*, 345 So. 2d at 1043 (quoting § 83-11-103(b))).
88. *Brown v. Md. Cas.*, 521 So. 2d at 856 (quoting Sayers v. Safeco Ins. Co., 628 P.2d 659, 662 (Mont. 1981)).
89. *Id.* at 857.
90. Miller v. Allstate Ins. Co., 631 So. 2d 789, 790 (Miss. 1994).
91. *Id.*
92. *Id.* at 793.
93. *Id.* at 790.
94. *Id.* at 791.
95. *Meadows*, 634 So. 2d at 109.
96. *Id.*
97. *Id.*

the passenger's request to stack all of the driver's coverages on the grounds that the passenger was not insured under the five vehicles not involved in the accident.[98] The Mississippi Supreme Court affirmed the lower court's decision, saying "Class 2 [insureds] are granted restrictive rights and are afforded coverage only by virtue of their occupancy of the particular vehicle at the time of the accident."[99] Therefore, the Class II insured could not interpolicy stack the underinsured motorist coverage.

These cases illustrate that, outside a commercial context at least, "[t]he right of the Class II insured to stack the host's coverage depends entirely on whether the host has one policy covering a number of vehicles, or separate policies covering a single vehicle."[100] The rule appeared to be clear in Mississippi that a Class II insured may intrapolicy stack but may not interpolicy stack uninsured motorist coverage.[101] The recent decision by the Mississippi Supreme Court, in *Mascarella*, questions the veracity of this rule as it applies to uninsured motorist coverage stacking under commercial policies.

3. Commercial Stacking

"Under some commercial fleet policies, only Class I insureds . . . may stack uninsured motorist coverage, and Class II insureds . . . are only entitled to single vehicle uninsured motorist coverage."[102] However, prior to its most recent decision in *Mascarella,* Mississippi did not always follow this convention.

Apparently applying its liberal rules of construction toward providing coverage,[103] the Mississippi Supreme Court first allowed stacking of uninsured motorist coverage under a commercial policy in *Cossitt v. Nationwide Mutual Insurance Co.*[104] The three plaintiffs, while on a church trip and using a bus insured under a single commercial policy issued to that church, were struck on the side of the road by a third party.[105] The church paid separate premiums for the three buses insured by the defendant insurance company.[106]

The plaintiffs, as Class II insureds, sought to stack the uninsured motorist coverages of all three of the church's buses.[107] Although the insurer conceded

98. *Id.* at 109. However, the court did allow the driver, as a Class I insured, to stack the coverage under his parents' five other vehicles. *Id.* at 109-10.

99. *Id.* at 110 (citing Aetna Cas. & Sur. Co. v. Barker, 451 So. 2d 731, 734 (Miss. 1984); Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 771 (Miss. 1973)).

100. JACKSON, *supra* note 41, § 17:18 at 17-39.

101. For additional examples, see Pearthtree v. Hartford Accident & Indem. Co., 373 So. 2d 267 (Miss. 1979); Bridges, 350 So. 2d 1379.

102. LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE (3d) § 169:53 at 169-114 (1998). *See also* Janet Boeth Jones, Annotation, *Combining or "Stacking" Uninsured Motorist Coverages Provided in Fleet Policy*, 25 A.L.R. 4TH 896, 899 (1983) ("Stacking of uninsured, or underinsured, motorist coverages under a multivehicle policy covering vehicles used in a business . . . has generally not been allowed where the injured party, usually an employee, was neither a named insured or relative residing in his household, nor a designated insured, mentioned by name within the policy.").

103. *See* discussion *supra* Part III.B.

104. Cossitt v. Nationwide Mut. Ins. Co., 551 So. 2d 879 (Miss. 1989).

105. *Id.* at 880.

106. *Id.* at 884.

107. *Id.* at 880, 883. Although the plaintiffs were not actually occupying the bus at the time of the accident, since both parties stipulated that plaintiffs were Class II insureds, the court treated them so. *Id.* at 884.

that plaintiffs were Class II insureds, the insurer argued that only Class I insureds could stack policy coverage, or alternatively, that stacking was not allowed under fleet or commercial policies.[108] The church was the named insured, so there were no individual Class I insureds under the policy.[109]

The Mississippi Supreme Court acknowledged that the usual rationale behind not stacking commercial fleet policies was that the amount of insurance coverage provided by stacking could not reasonably be supported by the premiums paid.[110] However, the court also recognized that these concerns were not persuasive when the fleets involved were no larger than might be owned by a single family.[111] The court reasoned that because the insured had paid three premiums for its three vehicles and was the only designated named insured, the insured should have the same expectation of stacking as an individual policyholder.[112] The court allowed stacking of the insured's coverage for the passengers as Class II insureds, noting that "[the insured] might reasonably be said to have an even greater expectation of stacking for Class II insureds in light of [the insurer's] claim that there are no Class I insureds under the policy."[113] Therefore, the court allowed intrapolicy stacking by Class II insureds (passengers) under a commercial fleet policy when the number of vehicles insured under that single policy was comparable to that owned by a single family.[114]

In *Harris v. Magee*, the employee was enroute to a job-site in his employer's vehicle, when he stopped on the highway to repair his employer's broken down crane on the shoulder of the highway.[115] The employee was struck and killed by a third party tortfeasor's automobile while he was crawling from beneath the crane.[116] The tortfeasor was an uninsured motorist.[117] The employer had a single business automobile policy that provided insurance for the employer's twenty-two vehicles, but did not cover the crane.[118] The employee also owned three vehicles, two of which were separately insured under separate policies.[119]

The employee's wife sought to stack the uninsured motorist coverage of all of the employer's vehicles.[120] The insurer argued that Class II insureds should not be allowed to stack coverage of large commercial fleets.[121]

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108. *Id.* at 884.

109. *Id.* at 883.

110. *Cossit*, 551 So. 2d at 884 (citing Howell v. Harleysville Mut. Ins. Co., 505 A.2d 109, 113 (Md. 1986)). *See also* APPLEMAN, *supra* note 33, § 5101 at 449 ("If it is not reasonable to argue for doubling or tripling of liability limits when there is a single policy owner, and a single company, then it is not reasonable to urge such a position for uninsured motorist coverages.").

111. *Cossitt*, 551 So.2d at 884. This holding was originally read as being limited to fleets of no more than seven vehicles because "many individuals have from three to seven vehicles . . . on one policy for family use." *Id.*

112. *Id.* (citing *Brown v. Md. Cas. Co.*).

113. *Id.*

114. *See* RUSS & SEGALLA, *supra* note 102, § 169:53 at 169-114 ("Whether Class 2 insureds are allowed to stack [under commercial policies] often depends on whether the legislature has enacted liberal stacking rules.").

115. Harris v. Magee, 573 So. 2d 646, 648 (Miss. 1990).

116. *Id.*

117. *Id.*

118. *Id.* at 649.

119. *Id.*

120. *Id.*

121. *Harris*, 573 So. 2d at 652.

The Mississippi Supreme Court reaffirmed the public policy rationale that stacking is intended "to provide protection to innocent motorists injured by financially irresponsible drivers up to the extent of their injuries."[122] The court also reiterated that "the Uninsured Motorist Act must be 'construed liberally to provide coverage and strictly to avoid or preclude exceptions or exemptions from coverage.'"[123] Applying these principles, the court then allowed stacking of the employer's uninsured motorist coverage noting that "[t]his Court, in interpreting [the uninsured motorist] statute, has recognized, as a general rule, that *all classes of statutory insureds* are allowed to stack uninsured motorist coverage."[124]

In trying to minimize any previous distinctions between commercial and individual policies, the court also noted that the "legislature has not seen fit to distinguish a 'commercial fleet' policy from any other auto policy" and "[t]he legislature has not statutorily overruled [the court's] stacking decisions."[125] The court found further justification for its decision by noting the "primary importance [of] the fact that a proposal which would prohibit the stacking of insurance policies was recently rejected through [the] legislative process."[126] The court also held that "[a]s there are no statutory distinctions between the various types of auto policies in our [uninsured motorist] statute, this Court refuses to distinguish them jurisprudentially."[127] Consequently, the *Harris* court extended intrapolicy stacking for a Class II insured (permissive driver) under a commercial fleet policy to include larger fleets, indicating that commercial stacking questions would be answered in the same manner as under an individual or family policy.

The Mississippi Supreme Court continued its liberal construction of uninsured motorist law in *McDaniel v. Shaklee United States, Inc.*[128] The plaintiff was struck by another vehicle while driving an automobile owned by the insured.[129] The insured had "loaned" the car to the driver, who paid the insured for comprehensive and uninsured motorist coverage on the loaned vehicle.[130] The tortfeasor that collided with the driver had liability insurance of $25,000.[131] The insured had self-insured for the first $500,000 in coverage and had addition-

122. *Id.* at 654 (citing *Stevens*, 345 So. 2d at 1043).

123. *Id.* (quoting *Garrett*, 487 So. 2d at 1323).

124. *Id.* at 652 (citing *Wickline*, 530 So. 2d at 715) (emphasis added). (The employer's insurance carrier had also argued the employee was not an insured because he was neither occupying a covered vehicle at the time of the accident, nor was there evidence that he was "getting in" a covered vehicle. The court determined that the employee was a Class II insured because he was performing duties directly related to the use of the vehicle. Harris, 573 So. 2d at 651).

125. *Id.* at 653.

126. *Id.* at 655.

127. *Harris*, 573 So. 2d at 652. *See generally* Michael V. Cory, Jr. & Lanny R. Pace, *Mississippi Uninsured Motorist Law –Where Do We Go from Here?*, 69 MISS. L.J. 455, 476-77 (1999) ("Based on this language, it would appear that the court will utilize the same stacking principles in interpreting a fleet policy (regardless of the number of vehicles insured on the premium charged) as it would any other policy.").

128. McDaniel v. Shaklee U.S., Inc., 807 So. 2d 393 (Miss. 2001).

129. *Id.* at 395.

130. *Id.*

131. *Id.*

al comprehensive coverage provided for all 1,758 vehicles in its fleet under a single policy.[132]

The driver sought to stack the uninsured motorist coverage of the insured's entire fleet.[133] The insurer argued that the driver was a Class I insured of the accident vehicle but was not an insured of any of the remaining fleet based upon the policy.[134] The insurer also argued that the driver's payment for insurance constituted a separate policy on the loaned vehicle which precluded stacking.[135] Finally, the insurer argued that the driver should not be able to stack because he was not an employee of the insured, but merely an independent distributor.[136]

The *McDaniel* court, with Justice Easley concurring, allowed the driver to stack the coverage of the fleet policy.[137] The court rejected the argument that the driver was covered by a separate policy, citing the fact that the vehicle was owned, operated, and insured by the same entity.[138] The court also dismissed the defendant's argument concerning the driver's status as a Class II insured, noting that "*Brown* and *Wickline* reveal that there is no basis for insured classification whatsoever."[139] The court held that the driver was an insured, under both the policy and the statute, by virtue of the fact that he used the vehicle with the insured's consent.[140] In fact, the court indicated that in order to qualify as a statutory insured, all that is necessary is permissive use of the covered vehicle.[141] The court went on to state that "[a]s an 'insured' under the [Uninsured Motorist] Act, [the driver] should be allowed to stack all of the coverage under the [insured's] policy in order to qualify [the tortfeasor] as an underinsured motorist."[142] The court reasoned that "the justification for stacking lies not in who has paid for the extra protection, but rather that the protection has been purchased."[143] The court went even further by proclaiming that "[the driver's] status as an independent distributor is immaterial, just as *the commercial nature of the policy is immaterial.*"[144] Finally, because "public policy demand[ed] stacking be allowed" for the driver, the court allowed him to stack all the coverage under the insured's policy.[145]

The *McDaniel* dissent, joined by Justice Cobb, stated that "Class II insureds should not be permitted to stack coverage in situations involving large commercial fleets."[146] "In cases involving commercial fleet policies, it can hardly be

132. *Id.*
133. *Id.*
134. *McDaniel*, 807 So. 2d at 397.
135. *Id.*
136. *Id.*
137. *Id.* at 399.
138. *Id.* at 397.
139. *Id.* at 398.
140. *McDaniel*, 807 So. 2d at 398.
141. *Id.*
142. *Id.*
143. *Id.* (quoting *Brown v. Md. Cas. Co.*, 521 So.2d at 856). *But see* APPLEMAN, *supra* note 33, § 5106 at 531 ("[T]he proper rule remains that liability is not increased by the fact that a separate premium was charged for each such coverage relating to the [] vehicles.").
144. *McDaniel*, 807 So. 2d at 398 (emphasis added).
145. *Id.* at 398, 399.
146. *Id.* at 399.

argued that the amount of coverage sought by parties such as [the driver] could reasonably be supported by the premium which has been paid."[147] The dissent reasoned that allowing stacking in large commercial fleets would burden the insurance company with too high an exposure for the relatively low premium received.[148]

The *McDaniel* court allowed intrapolicy stacking by a Class II insured (permissive driver) under a commercial fleet policy so long as the party seeking to stack is a statutory insured under the policy. Such an outcome should result in any permissive user being allowed to stack the uninsured motorist coverage of every vehicle under a single policy. However, the *Mascarella* decision appears to challenge this assertion.

In *Glennon v. State Farm Mutual Automobile Insurance Co.*, the plaintiff employee was injured when the vehicle in which she was riding was struck by another automobile.[149] The passenger was using a vehicle owned by her employer and was enroute to a job-site.[150] The passenger was covered under her own uninsured motorist insurance with a $10,000 limit.[151] The employer also had insurance coverage on its three vehicles through three separate policies, with a $25,000 per vehicle limit.[152] The tortfeasor had $25,000 in liability coverage.[153]

The employee sought to stack the coverages of all three of her employer's insurance policies, arguing that she was a Class II insured by virtue of her use of the vehicle.[154] The insurer refused to pay uninsured motorist coverage on the two vehicles not involved in the accident, arguing that Class II insureds have never been allowed interpolicy stacking.[155]

The Mississippi Supreme Court, with Justice Cobb concurring, did not allow the employee to stack the coverages.[156] The court held that "[w]hile admittedly *Wickline* and *Cossitt* did somewhat blur the distinction between Class I and Class II insureds, subsequent decisions have clearly reestablished that these classifications are firmly embedded in our law."[157] Because the employee was not named in her employer's policy, she could not be a Class I insured under the policy.[158] The court noted that "a Class II insured–often called a 'permissive user' or 'guest passenger'– is only covered because he or she is in the covered automobile."[159] The court further went on to point out that "[the Mississippi Supreme] Court has never permitted a Class II insured, employee or otherwise, to stack the [uninsured motorist] coverage of separate policies covering vehicles

147. *Id.* at 400.
148. *Id.*
149. Glennon v. State Farm Mut. Auto. Ins. Co., 812 So. 2d 927, 929 (Miss. 2002).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Glennon*, 812 So. 2d at 929. *See* Travelers Ins. Co. v. Pac, 337 So. 2d 397 (Fla. Dist. Ct. App. 1976) (holding that a permissive user is not allowed to interpolicy stack coverage for lack of relationship with any other insured vehicle).
156. *Glennon*, 812 So. 2d at 930-31.
157. *Id.* at 931.
158. *Id.* at 933.
159. *Id.* at 931.

they were not occupying at the time of the accident."[160] Therefore, the court held that the employee, as a Class II insured, could not stack the uninsured motorist coverage of the employer's other two vehicles not involved in the accident.[161]

The dissent in *Glennon*, joined by Justice Easley, stated that "[b]ecause class status is irrelevant to the issue of [uninsured motorist] coverage, we have previously held that separate policies may be stacked, and to disallow coverage is against public policy."[162] Therefore, the dissent would have allowed interpolicy stacking for either Class I or Class II insureds.[163]

The *Glennon* court rejected interpolicy stacking by a Class II insured (passenger) under a commercial fleet policy due to the fact that a Class II insured is not a statutory insured of any fleet vehicle other than the vehicle occupied at the time of the accident. Up to this point, the court had upheld the general rules regarding intrapolicy and interpolicy stacking. That is to say, a Class I insured was allowed to stack in either an interpolicy or intrapolicy situation, while a Class II insured was only allowed intrapolicy stacking. However, *Mascarella* may have muddled this convention.

IV. INSTANT CASE

The employee driver, Mascarella, argued that he should be allowed to stack the uninsured motorist coverage of all eight vehicles insured by his employer, creating coverage of $200,000.[164] Since the third party tortfeasor's liability coverage was $100,000, stacked coverage of $200,000 on the vehicle Mascarella was driving would result in the tortfeasor's vehicle being classified as underinsured.[165] Mascarella claimed he was due the difference between this stacked coverage and the sums already paid by both the tortfeasor and the insurer.[166] The insurer argued that the tortfeasor's vehicle did not qualify as underinsured, because it met neither the statutory nor the policy definitions of an underinsured vehicle.[167]

The Mississippi Supreme Court, with Justice Easley concurring, and Justice Cobb concurring in part, ignored the insurance class distinctions of the parties. The court held that there was no need to distinguish between Class I and Class II insured parties when determining whether or not a vehicle is underinsured.[168]

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160. *Id.* at 932-33. *See also* WIDISS, *supra* note 3, § 40.6 at 396 ("[T]here is a compelling case that the purchaser shares the insurer's expectation that the underinsured motorist insurance coverage acquired as part of the fleet policy will not be 'stacked.'").

161. *Glennon*, 812 So. 2d at 933.

162. *Id.* at 934.

163. *Id.*

164. *Mascarella*, 833 So. 2d at 576.

165. *Id. See supra* note 22.

166. Mascarella, 833 So. 2d at 576.

167. *Id.*

168. *Id.* at 578. *See also* Box v. State Farm Mut. Auto. Ins. Co., 692 So. 2d 54, 58 (Miss. 1997); Guardianship of Lacy v. Allstate Ins. Co., 649 So. 2d 195, 198 (Miss. 1995); *Davis*, 613 So. 2d at 1180-81.

The court said the only coverage applicable to an injured person is "the uninsured motorist coverage of the vehicle in which he is riding, [and] that of his own vehicles."[169] The court rejected the employee's claim that stacking of the underinsured motorist coverages should be allowed, holding that "an injured insured may stack the [uninsured motorist] coverage of vehicles covered under his own fleet policy with the [uninsured motorist] coverage of the vehicle in which he is a passenger in order to have the third party tortfeasor's vehicle declared underinsured."[170] Comparing him to the plaintiff in *Thiac*,[171] the court said that Mascarella could not stack uninsured motorist coverage, because "having no [uninsured motorist] coverage of his own, [Mascarella had] nothing to stack with the [uninsured motorist] coverage of the car he was driving in order to compare that sum with [the tortfeasor's] bodily injury liability limits."[172] The court therefore found that the tortfeasor's vehicle was not underinsured.[173]

The dissent in *Mascarella*, joined in part by Justice Cobb, argued that "Mascarella should be allowed to stack the uninsured motorist coverage of his employer as an insured and intended beneficiary of the policy."[174] The dissent reasoned that since the terms of the Uninsured Motorist Act are written into every insurance policy, Mascarella fell within the statutory definition of an insured.[175]

The *Mascarella* court, apparently adopting the rationale of *Glennon*, rejected intrapolicy stacking by a Class II insured (permissive driver) under a commercial fleet policy due to the fact that a Class II insured is not a statutory insured of any fleet vehicle other than the vehicle occupied at the time of the accident. Such an outcome is at odds with the general rule stated earlier and reinforced numerous times by the Mississippi Supreme Court.

V. ANALYSIS

A. Impact on the Status of the Law

Having addressed the issue of uninsured motorist stacking as it relates to commercial policies on only four previous occasions, one might expect to see the court fashioning a logical approach for dealing with this issue. Such is not the case. *Mascarella* deals with an area of the law that is, by the Mississippi Supreme Court's own admission, full of "apparent contradictions and ambiguities within the caselaw."[176] Unfortunately, the *Mascarella* Court seems to add to that list of contradictions.

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169. *Mascarella*, 833 So. 2d at 577 (quoting *Wickline*, 530 So. 2d at 713; citing *Roberts*, 323 So. 2d 536).
170. *Id.* at 580.
171. *Thiac*, 569 So. 2d at 1221.
172. *Mascarella*, 833 So. 2d at 580.
173. *Id.*
174. *Id.* at 581.
175. *Id.*
176. *McDaniel*, 807 So. 2d at 396. *See also* Cory, Jr. & Pace, *supra* note 127, at 455 ("Rather than interpreting and applying the statutory language as written, over the years the Mississippi Supreme Court has complicated and materially altered the scope and reach of this legislation.").

1. The Affect of *Mascarella* on Prior Court Decisions

A. The *Mascarella* court focused on a judicially created two-part analysis introduced in *Wickline* but not used in commercial stacking decisions prior to *Mascarella*.

In many of the court's stacking decisions prior to *Mascarella*, the outcome seemed predetermined by the level of emphasis the court placed on the statutory class categorization of the insured.[177] While the titles that are given to the injured party are merely semantic, the privileges that accrue are substantive. *Mascarella* minimized the issue of statutory class distinction and yet still prohibited stacking. The court did so by emphasizing a judicially created two-part test, the development of which was credited to *Wickline*.[178] That test asks two questions: First, whether the tortfeasor's vehicle is either uninsured or underinsured; and second, whether the injured party may stack the uninsured motorist coverage of the accident vehicle.[179]

The *Mascarella* court said that the first question was a threshold question, the settlement of which did not require a need to distinguish between statutory classes.[180] "The only requirement is that the injured party is insured by the policy from which he seeks recovery or meets the definition of 'insured' found at Miss[issippi] Code Ann[otated] [section] 83-11-103(b) (1999)."[181]

Wickline is an example of a case where the court minimized statutory class distinctions and allowed uninsured motorist stacking for a permissive user, also called a Class II insured. After addressing the issue of whether the vehicle was underinsured, the court stated that, "*[t]he* question presented here is whether a guest passenger can aggregate the owner's coverages on the owner's other vehicles."[182] The court did not need to address the issue of whether the passenger could stack the driver's uninsured motorist coverage to qualify the accident vehicle as underinsured, because the passenger already qualified for underinsured motorist protection based on her own insurance coverage. The court, in considering whether the plaintiffs could stack, held that "[t]he sort of stacking here sought, i.e., stacking multiple coverages within a single policy, has been mandated."[183]

However, the court did not rely on its recently created test from *Wickline* when it decided *Cossitt*. Although *Cossitt* dealt with an underinsured motorist stacking issue, the court made no mention whatsoever of the mandatory two-part stacking test. While it is true that the plaintiffs in Cossitt qualified for underin-

177. *Compare McDaniel*, 807 So. 2d at 398 (holding permissive user could stack coverage because there is "no basis for insured classification whatsoever"), *with Glennon*, 812 So. 2d at 931 (holding passenger could not stack because insured "classifications are firmly embedded in [Mississippi] law").

178. *Mascarella*, 833 So. 2d at 576-77.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Wickline*, 530 So. 2d at 713 (emphasis added).

183. *Id.* at 714 (citing GEICO v. Brown, 446 So. 2d 1002; Pearthtree, 373 So. 2d 267; Bridges, 350 So. 2d 1379).

sured motorist protection without stacking,[184] it seems strange that the court would not want to take an opportunity to emphasize a stacking test which had been judicially created less than a year before the *Cossitt* decision.

In *Harris,* the tortfeasor who struck the employee was an uninsured motorist,[185] so the threshold question of whether the accident vehicle was underinsured was moot, and understandably not addressed.

In *McDaniel,* the court again addressed an underinsured motorist stacking issue. The employer's vehicle was covered by $10,000 of uninsured motorist coverage under his fleet policy.[186] The tortfeasor had $25,000 of liability coverage.[187] Therefore, the employer's vehicle could not be underinsured without stacking coverage. The court made no reference to its two-part test, but instead focused on prior decisions regarding whether or not the injured person was an "insured" under the policy at issue. Finding the employee to be an "insured" by virtue of his use of the employer's vehicle, the court followed precedent and allowed intrapolicy stacking for the employee because "[a]s an 'insured' under the [Uninsured Motorist] Act, [the driver] should be allowed to stack all of the coverage under [his employer's] policy in order to qualify [the tortfeasor] as an underinsured motorist."[188] Far from referencing its two-part test, the court completely ignored it, seeming to make the threshold question irrelevant by allowing stacking in order to qualify the tortfeasor's vehicle as underinsured.

Once again, it seems odd that the court failed to mention this two-part test when evaluating the underinsured motorist status in *Glennon.* In this case, the plaintiff would not have qualified the accident vehicle as underinsured without having stacked her own coverage with that of the accident vehicle.[189] However, the *Glennon* court missed another opportunity to either reinforce its judicially created test or explain *McDaniel*'s impact, especially considering the proximity of the Glennon decision with the contrary rule announced by *McDaniel.*

Therefore the question raised is whether *McDaniel* was overruled by *Mascarella.* This would seem to be the required result if the *Wickline* test constitutes a threshold question for each stacking case. But due to a lack of any reference to *McDaniel* in its *Mascarella* decision, this question is unanswered.

B. *Mascarella* reversed a thirteen-year trend that had been gradually expanding uninsured motorist stacking privileges in commercial policies.

In previous cases dealing with commercial intrapolicy uninsured motorist coverage stacking, the Mississippi Supreme Court has, in all three instances, allowed the Class II insured to stack the covered entity's uninsured motorist cov-

184. *Cossitt,* 551 So. 2d at 881.

185. *Harris,* 573 So. 2d at 648.

186. *McDaniel,* 807 So. 2d at 395.

187. *Id.*

188. *Id.* at 398.

189. The torfeasor had $25,000 in liability coverage, the employer had $25,000 in uninsured motorist coverage, and the employee had $10,000 in liability insurance. Since the tortfeasor's insurance equaled the uninsured motorist coverage on the employer's vehicle, the tortfeasor could not be an underinsured motorist unless the employer's coverage was stacked with the employee's coverage. *Glennon,* 812 So. 2d at 929.

erage.[190] However, in *Mascarella*, the court denied the Class II insured the ability to stack the coverage of his employer's single policy.[191] The immediate questions raised are whether the court abandoned thirteen years of precedent, and if so, what compelled the court to do so?

Cossitt is distinguishable in some respects from *Mascarella*, but not to a meaningful degree. In *Cossitt*, the injured persons were the driver and two other passengers on the church bus.[192] Unlike Mascarella, the passengers in *Cossitt* were not employees of the church, as was the driver, nor was there any apparent agency relationship between the church and the two passengers.[193] The *Cossitt* passengers were permissive users of the bus, presumably for the sole purpose of their own enjoyment. Yet, the *Cossitt* court felt compelled, by prior decisions and by public policy, to allow the passengers the protections of the church's uninsured motorist protection, specifically noting the absence of any Class I insureds under the policy.[194] The *Cossitt* court allowed intrapolicy stacking for Class II insureds under a commercial fleet policy.

In *Harris*, the facts are much more similar to *Mascarella.* Both the *Harris* and *Mascarella* employees worked for the policyholder, operating the employer's vehicle for job-related purposes.[195] The *Harris* court found the employee to be a Class II insured as a permissive user.[196] The *Harris* court also felt compelled to allow the employee's widow to stack the coverage of twenty-two vehicles covered by the employer's single policy, refusing to distinguish between types of policies.[197] The *Harris* court, therefore, also allowed intrapolicy stacking for a Class II insured under a commercial fleet policy.

Eleven years later, the court once again upheld intrapolicy commercial stacking, in *McDaniel.* The facts of that case have the greatest similarity to *Mascarella* of any of the prior cases. Both injured persons were driving their employer's vehicle on job-related business at the time of the accident, and neither one was a named insured of the policy under which stacking was sought.[198] McDaniel was not even an employee of the policyholder but rather only an independent distributor,[199] so arguably he would have less of an expectation of stacking the vehicle owner's policies. Yet the *McDaniel* court allowed the driver to stack the uninsured motorist coverage of almost two thousand vehicles, many of which were not even located in Mississippi.[200] Further, the *McDaniel* court appeared to have settled the issue raised in *Mascarella* by its broad proclamation that stacking should be allowed under a commercial policy in order to qualify the tortfeasor as an uninsured motorist.[201] The *McDaniel* court seemed to restrict

190. *See McDaniel*, 807 So. 2d 393; *Harris*, 573 So. 2d 646; *Cossitt*, 551 So. 2d 879.
191. *Mascarella*, 833 So. 2d at 579.
192. *Cossitt*, 551 So. 2d at 880.
193. *Id.*
194. *Id.* at 884.
195. *Mascarella*, 833 So. 2d at 576; *Harris*, 573 So. 2d at 648.
196. *Harris*, 573 So. 2d at 651.
197. *Id.* at 652-53.
198. *Mascarella*, 833 So. 2d at 576; *McDaniel*, 807 So. 2d at 395.
199. *McDaniel*, 807 So. 2d at 395
200. *Id.* at 398-99.
201. *Id.* at 398.

further analysis to the sole question of whether the party seeking to stack coverage was using the covered vehicle.[202] In doing so, the court indicated a broad willingness to allow intrapolicy stacking for a Class II insured under a commercial fleet policy.[203]

Mascarella appeared to reverse the trend established by these prior commercial intrapolicy stacking cases. The line of interpolicy stacking cases in Mississippi prior to *Mascarella* would support the *Mascarella* court's decision if *Mascarella* involved separate insurance policies.[204] However, following the line of cases involving multi-coverage single policy stacking is much more likely to result in a decision to allow stacking.[205] Strangely, the *Mascarella* court largely overlooked its prior intrapolicy stacking cases, instead focusing more closely on its prior interpolicy stacking cases. Perhaps most perplexing, the *Mascarella* court did not even seem to acknowledge the existence of its pro-stacking decisions in *Cossitt, Harris* and *McDaniel.* One possible conclusion is that the court believed that its stacking decisions had gone too far in the direction of allowing stacking and sought to rein in those decisions.[206] Unfortunately, it is unclear how tight of a constriction the court intended, due to a lack of any allusion to its prior intrapolicy commercial stacking cases.

2. The Affect of *Mascarella* on Future Court Decisions

A. *Mascarella* created uncertainty in the court's decision-making process

Mascarella is noteworthy for its potential to cause future problems within this area of the law. Most importantly, *Mascarella* does very little to promote certainty in questions regarding uninsured motorist vehicle stacking. This uncertainty is due in no small part to the voting pattern of Justice Easley. In *McDaniel*, Justice Easley concurred with the majority in allowing intrapolicy commercial stacking for McDaniel, a Class II insured.[207] In *Glennon*, Justice Easley joined the dissent in support of interpolicy commercial stacking for Glennon, also a Class II insured.[208] However, Justice Easley also concurred with the majority in *Mascarella* to deny intrapolicy stacking to Mascarella, another Class II insured.[209] The potential for confusion here seems apparent: in *McDaniel*, the justices were split five to three, with one justice not participating; in *Glennon*, the justices were split five to four; and in *Mascarella*, the justices were split five to three, with one justice concurring in part and dissenting in part. When the court's opinions are decided by such narrow margins, the consistency of the justices becomes much more important.

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202. *Id.*

203. *See supra* note 114.

204. *See Glennon,* 812 So. 2d at 933 (rejecting *interpolicy* stacking of commercial policy); JACKSON, *supra* note 41, § 17:18 at 17-38 to 17-39 ("Class II insured is not allowed to stack the host's coverage under other policies.").

205. *See McDaniel,* 807 So. 2d 393; *Harris,* 573 So. 2d 646; *Cossitt,* 551 So. 2d 879.

206. *See* APPLEMAN, *supra* note 33, at § 5101 ("It is time for those courts, which have been so generous with the funds of others, to take a new look at this problem.").

207. *McDaniel,* 807 So. 2d at 399.

208. *Glennon,* 812 So. 2d at 933.

209. *Mascarella,* 833 So. 2d at 580.

As previously discussed, there are several justifications for distinguishing between intrapolicy and interpolicy stacking.[210] Some states allow only interpolicy stacking,[211] justifying that the coverage provided by the insured must be supported by the premiums received.[212] Mississippi, on the other hand, has generally supported both interpolicy and intrapolicy stacking for Class I insureds but only intrapolicy stacking for Class II insureds. The justification for treating Class II insureds differently is based on the fact that a multi-vehicle policy was intended to provide coverage for all vehicles listed under it, while there is no such expectation when the vehicles are insured under separate policies.

Justice Easley appeared to support both types of stacking for Class II insureds prior to *Mascarella*, where he then denied intrapolicy stacking to the Class II plaintiff. Couple this with the fact that Justice Easley previously agreed to allow Class II intrapolicy stacking in *McDaniel*, and the pattern behind his decision-making process becomes less clear. When contrasting Justice Easley's pattern with that of Justice Cobb, Justice Cobb appears to be much more consistent in rejecting any type of commercial stacking, for either a Class I or Class II insured, as evidenced in *McDaniel, Glennon*, and *Mascarella*. Consistency is a good trait for any court and much more so for the state's highest court.

A justice's inconsistent voting pattern can have the potential for exacerbating problems in future litigation. One basis for the phrase "jackpot justice" is the perception of judicial uncertainty created by apparently arbitrary decisions. Having an indication of a justice's philosophy on an issue would add some stability to the legal process, would enable parties to better plan their transactions, and might help eliminate some of the "apparent contradictions and ambiguities within the caselaw."[213]

B. *Mascarella* created ambiguity in stacking outcome

Mascarella has not overruled *every* previous case that allowed uninsured motorist stacking. To the contrary, the case has virtually no impact on a Class I insured's ability to stack his own coverage. It is unclear, however, whether *Mascarella* overruled *any* previous case that allowed uninsured motorist stacking.

The Mississippi Supreme Court has acknowledged that its own case law regarding uninsured motorist stacking created contradictions and ambiguities. With so much ambiguity in the law, why did the *Mascarella* court abandon an opportunity to specifically overrule those prior cases that conflicted with its

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210. *But see* John F. Buckley, *Underinsured Motorist Coverage: Legislative Solutions to Settlement Difficulties*, 64 N.C. L. REV. 1408, 1417 (1986) ("Neither logic nor equity supports a denial of stacking on multivehicle policies, while permitting stacking of policies that list only one vehicle.").

211. *See* N.C. GEN. STAT. § 20-279.21(b)(4) (Supp. 1985); LeCuyer v. Metro. Prop. & Liab. Ins. Co., 519 N.E.2d 263, 264 (Mass. 1988) (insured could stack under separate policies but not under single policy).

212. *Compare* Philadelphia Indem. Ins. Co. v. Morris, 990 S.W.2d 621, 625-26 (Ky. 1999) (Class II insured "may not rely on reasonable expectations so as to avoid a policy's liability limitations clause.") (citation omitted), *with* Allstate Ins. Co. v. Ferrante, 518 A.2d 373, 377 (Conn. 1986) (right to stack not tied "to the degree of intimacy between the claimant and the policyholder.").

213. *McDaniel*, 807 So. 2d at 396.

holding? Perhaps their failure to specifically overrule a case such as *McDaniel*, which provided a holding nearly opposite to that in *Mascarella*, is an indication that a fact pattern still exists under which *McDaniel* is valid law. After all, the *Mascarella* court did end its opinion with the phrase "[u]nder these facts."[214] This perceived oversight by the court in failing to specifically overrule its prior decisions may also provide support for the proposition that *Mascarella* presents an attempt by the court to rein in what it perceives as excessively liberal commercial stacking decisions, without entirely abandoning commercial stacking for Class II insureds.

B. Impact on Insurance

Clearly the court will allow multi-vehicle stacking in some instances. However, the question arises that in those cases when the court will allow multi-vehicle stacking, which party is entitled to those stacked benefits? The *Mascarella* court restricted stacking to "coverage of vehicles covered *under his own fleet policy*."[215] This rule appears to be at odds with prior holdings by this same court regarding commercial policies and their named insured.

In *Cossitt*, the court allowed Class II insureds to stack coverage under the church's policy.[216] The court specifically noted that the church should have an even greater expectation of Class II stacking because there were no Class I insureds under their policy.[217]

Also compare the *Mascarella* court's rule with that presented in *Steinwinder*.[218] Since few individuals would have fleet policies, a rule limiting stacking to one's "own fleet policy" seems a very restrictive rule, aimed at widely limiting uninsured motorist stacking under commercial policies. This is further evidence that the court has intentionally backed away from its commercial stacking precedent.

Mascarella also seems to rest future decisions of stacking on the terms of the insurance policy by limiting commercial policy stacking to named insureds. Therefore, any business that seeks to provide stacked uninsured motorist coverage for its employees must acquire special endorsements naming those employees as insureds. However, the *Ferguson* court addressed the "need to protect insureds because of their uneven bargaining power in dealing with insurance companies."[219] The court described this imbalance in the following manner:

> To say that an insured may contract with his insurance company to limit stacking is disingenuous. Insurance contracts essentially are contracts of adhesion. The insured has only two choices in

214. *Mascarella*, 833 So. 2d at 580.

215. *Id.* (emphasis added).

216. Cossitt, 551 So. 2d at 884.

217. *Id.*

218. Steinwinder v. Aetna Cas. & Sur. Co., 742 So. 2d 1150, 1155 (Miss. 1999) (holding insurance policy issued to a corporation covers only the corporation, absent coverage specifically extended to humans associated with the corporation).

219. *Ferguson*, 698 So. at 2d at 77.

> 'negotiating' the terms of his policy – he may accept the terms offered by his insurance company, or he may reject them and go to a different insurance company. When the entire insurance industry writes its policies to preclude stacking of [uninsured motorist] coverage, attempting to circumvent case law and defeat public policy, the insured is denied any choice whatsoever.[220]

It appears as though *Mascarella* leaves the door open for insurance companies to take advantage of their uneven bargaining power when it comes to uninsured motorist protections on commercial policies. By leaving stacking decisions dependent upon the contract language, the court gives more control to insurance companies who write the contracts.

However, there is an even more problematic result to this decision. With its decision in *Mascarella*, the court potentially places the final decision about stacking in the hands of an individual who may not even be a party to the disputed insurance policy. The *Mascarella* decision essentially leaves both the insurer and the insured at the "mercy" of any third party tortfeasors. This outcome is a result of the *Wickline* test that makes a third-party tortfeasor's insurance limits determinative of whether stacking can be allowed.

The issue is more easily explained by example, so consider the following scenario. Had Mascarella been struck by an uninsured motorist, under apparently valid precedent of the Mississippi Supreme Court, Mascarella would have been allowed to stack the entire coverage of his employer's fleet. Under this scenario, it does not matter that Mascarella has no insurance of his own, because he is covered by his employer as a Class II permissive user.[221] This is also the result if Mascarella had been struck by an insured motorist with any level of liability insurance below the $25,000 uninsured motorist coverage on Mascarella's vehicle.[222] However, because Mascarella was struck by a person with a higher liability limit ($100,000), Mascarella was denied stacking.

Presumably the only factor that prevented Mascarella from stacking the coverage of his employer's fleet is the level of coverage of the third party involved in the accident. Such a rule would benefit neither the insurer nor the insured, and would make it nearly impossible to determine your level of coverage until *after* the accident occurred. This seems like a very arbitrary rule that may well be added to the court's list of contradictions and ambiguities. Such a rule makes it nearly impossible to guard against risk, which is the purpose behind insurance in the first place. One observer to *Ferguson* noted that, in that case, the court solved one problem by replacing it with another.[223] Hopefully, *Mascarella* does not have the same effect.

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220. *Id.* at 80.

221. *See Harris*, 573 So. 2d 646; *Stevens*, 345 So. 2d at 1041.

222. *See Md. Cas. v. Brown*, 521 So. 2d at 854.

223. Joseph Sclafani, *Stacking the Deck Against the Insurance Industry*, 19 MISS. C. L. REV. 251, 268 (1998) ("Prior to *Ferguson*, the court stated that insureds had no choice but to purchase policies which contained anti-stacking clauses. Now, insureds have no choice but to purchase stacked coverage.").