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Tracking Ohio Insurance Coverage: The Genesis and Demise of *Savoie*

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TRACKING OHIO INSURANCE COVERAGE: THE GENESIS AND DEMISE OF *SAVOIE*

I. INTRODUCTION

The Ohio Supreme Court recently rewrote automobile insurance law in *Savoie v. Grange Mutual Insurance Co.*[1] The court, according to dissenting Chief Justice Thomas Moyer, completely abandoned the doctrine of *stare decisis* and violated the fundamental tenet of separation of powers.[2] Although Moyer's dissent may overstate the problem, the court's decision in *Savoie* shocked the insurance industry and fostered robust debate in Columbus.[3] On July 21, 1994, the legislature properly rejected *Savoie* by passing Amended Substitute Senate Bill No. 20.[4]

This Comment examines the genesis of the *Savoie* court's holding and the underlying reasons for its demise. Section II illustrates the Ohio Supreme Court's previous decisions in wrongful death cases and cases involving uninsured/underinsured insurance law.[5] Section II also clarifies the following areas of insurance case law: (1) types of underinsured motorists statutes;[6] (2) insurance policy interaction with the wrongful death statute;[7] (3) case decisions before and after the enactment of Ohio Revised Code section 3937.18(E);[8] and (4) the calcula-

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1. 620 N.E.2d 809 (Ohio 1993).

2. *Id.* at 817-21 (Moyer, C.J., dissenting). See *infra* notes 301-09 and accompanying text for a summary of Moyer's dissent.

3. In fact, on June 28, 1994, the Senate and House Conference Committee squarely addressed *Savoie*. Am. S.B. 20, 120th General Assembly, Reg. Sess. (June 28, 1994).

4. Am. Sub. S.B. 20, 120th General Assembly, Reg. Sess. (July 21, 1994). Senate Bill 20 replaced § 3937.18 effective October 10, 1994. *Id.*

5. *See infra* notes 16-213 and accompanying text. *See also* Jose E. Maldonado, *Requiring Underinsured Motorist Coverage In Ohio*, 6 OHIO N.U. L. REV. 534 (1979); Amy J. McKee, Comment, *Unraveling The Underinsured Motorist Web: Ohio Underinsured Motorist Coverage*, 20 AKRON L. REV. 749 (1987); Michael S. Miller, Comment, *Redefining Underinsured Motorist Coverage In Ohio*, 44 OHIO ST. L.J. 771 (1983).

6. *See infra* notes 21-40 and accompanying text.

7. *See infra* notes 41-104 and accompanying text.

8. *See infra* notes 105-67 and accompanying text. Effective June 25, 1980, Ohio Revised Code § 3937.18 was amended to include the following provision: "(E) Any automobile liability or motor vehicle liability policy of insurance that includes uninsured motorist coverage may include terms and conditions that preclude stacking of uninsured motor vehicle coverages." 1979-80 Ohio Laws 1459. An identical provision was included in Ohio Revised Code § 3937.181. 1979-80 Ohio Laws 1460 (regarding underinsured motorist coverage, enacted in same bill).

In 1982, the provisions were consolidated and revised to read as follows: "(G) Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section may include terms and conditions that preclude stacking of such coverages." OHIO REV. CODE ANN. § 3937.18 (effective through Oct. 9, 1994) (Anderson 1989). To

tion of possible insurance coverage, including set-off provisions.[9] Section III details the operative facts underlying *Savoie* and examines the trial court, appellate court, and supreme court decisions.[10] Section IV consists of three parts. The first part of Section IV explores the *Savoie* court's encroachment on the freedom to contract.[11] The second part of Section IV criticizes the court for its usurpation of legislative power.[12] The third part of Section IV focuses on the *Savoie* court's disregard for *stare decisis*.[13] Section V examines the quick legislative response to *Savoie*.[14] This Comment concludes that the *Savoie* court exceeded its power and that the Ohio legislature properly rejected this exercise of unwarranted judicial fiat.[15]

II. BACKGROUND

The Background first focuses on the types of underinsured statutes that states currently use.[16] Next, the discussion focuses on the evolution of the wrongful death claim and the Ohio Supreme Court's interpretation of these claims in relation to insurance policies.[17] The focus of the discussion then shifts to Ohio Revised Code Section 3937.18 and the Ohio Supreme Court's ensuing difficulty in formulating consistent policy both before and after the enactment of section 3937.18(G).[18] The Background then discusses set-off provisions and their effect on the amount of available insurance coverage to compensate for damages.[19] Finally, the Background provides a summary of the Ohio court's prior positions with respect to the issues addressed in *Savoie*.[20]

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avoid confusion, all references in this Comment will cite to § 3937.18(G), the currently valid statute.

9. *See infra* notes 168-208 and accompanying text. Ohio's set-off provision is contained in Code § 3937.18(A)(2) and provides: "The limits of liability for an insurer providing underinsured motorist coverage shall be the limits of such coverage, *less those amounts actually recovered* under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured." OHIO REV. CODE ANN. § 3937.18(A)(2) (effective through Oct. 9, 1994) (Anderson 1989) (emphasis added).

10. *See infra* notes 214-309 and accompanying text.

11. *See infra* notes 310-62 and accompanying text.

12. *See infra* notes 363-404 and accompanying text.

13. *See infra* notes 405-30 and accompanying text.

14. *See infra* notes 431-60 and accompanying text.

15. *See infra* notes 461-62 and accompanying text.

16. *See infra* notes 21-40 and accompanying text.

17. *See infra* notes 41-104 and accompanying text.

18. *See infra* notes 105-67 and accompanying text.

19. *See infra* notes 168-208 and accompanying text.

20. *See infra* notes 209-13 and accompanying text.

A. Ohio Requires That an Insurer Provide Underinsurance

In 1980, Ohio's General Assembly responded to a growing crisis in the insurance field.[21] Injured parties often received inadequate compensation for actual damages.[22] Minimum financial responsibility statutes failed to keep up with escalating damages or medical claims.[23] In addition, the dichotomy that existed between those injured by uninsured motorists and those injured by tortfeasors with either minimum insurance or insurance that had been exhausted through the payment of multiple claims compelled the legislature to act to provide equal treatment.[24]

Two distinct types of underinsurance statutes exist in the United States.[25] The first type of statute concentrates on a comparison between the actual damages the potentially underinsured driver causes and the amount of liability insurance available for compensation.[26] If the damages exceed the liability policy limits, this condition activates the victim's underinsured coverage, entitling the victim to collect for substantiated damages up to the underinsured coverage limits.[27] This first type of statute attempts to provide full compensation for the victim's injuries.[28] The second type of statute involves a more mechanistic approach.[29] It compares the policy limits of the tortfeasor and victim at

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21. *See* OHIO REV. CODE ANN. § 3937.181 (repealed 1982) (Anderson 1989).

22. 3 MATTHEW BENDER & CO., NO-FAULT AND UNINSURED MOTORIST AUTOMOBILE INSURANCE § 30.00 (1993); *see also* 3 ALAN I. WIDISS, UNINSURED AND UNDERINSURED MOTORIST INSURANCE § 31.1 (2d ed. 1992); Timothy Young, Note, *Insurance Law: Ohio's Underinsured Motorist Coverage: A New Loophole*—Hill v. Allstate Insurance Company, 50 Ohio St. 3d 243, 553 N.E.2d 658 (1990), 16 U. DAYTON L. REV. 751 (1991).

23. BENDER, *supra* note 22, § 30.00.

24. BENDER, *supra* note 22, § 30.00.

25. BENDER, *supra* note 22, § 30.40.

26. BENDER, *supra* note 22, § 30.40[2][a]. *See* ARIZ. REV. STAT. ANN. § 20-259.01(E) (1990); IOWA CODE ANN. § 516A.2(3) (West Supp. 1994); LA. REV. STAT. ANN. § 22:1406 (West 1978 and Supp. 1994); WASH. REV. CODE ANN. § 48.22.030(1) (West 1984).

27. BENDER, *supra* note 22, § 30.40[2][a]. Insurance policies contain two types of limitations. First, the "Per Person" limit usually states: "The limit of liability shown in the Declarations for 'each person' for Bodily Injury Liability is our maximum limit of liability for all damages, including damages for care, loss of services or death, arising out of bodily injury sustained by any one person in any auto accident." Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809, 812 (Ohio 1993). The second type of limitation, the "Per Accident" limit, typically states: "Subject to this limit for each person, the limit of liability shown in the Declarations for 'each accident' for Bodily Injury Liability is our maximum limit of liability for all damages for bodily injury resulting from any one accident." *Id.* "This is the most we will pay regardless of the number of 1. Insureds; . . . 2. Claims made; . . . or 4. Vehicles involved in the accident." *Id.*

28. BENDER, *supra* note 22, § 30.20.

29. BENDER, *supra* note 22, § 30.40[2][b].

the time of the accident.[30] If the victim's limits exceed the tortfeasor's limits, the underinsured coverage becomes available.[31]

In Ohio's first underinsured statute, the General Assembly tried to provide a combination of both types of underinsured statutes.[32] The Ohio statute did not clearly express whether the victim's damages or underinsured limits were to be compared with the tortfeasor's liability limits to determine if the tortfeasor was underinsured.[33] The legislature ambiguously proclaimed: "Underinsured motorist coverage means coverage . . . where the limits of coverage available for payment to the insured . . . are insufficient to pay the loss up to the insured's uninsured motorist coverage limits."[34] The language "insufficient to pay the loss" suggested actual damages should control.[35] The language "up to the insured's uninsured motorist coverage limits," however, suggested a comparison of the tortfeasor's liability policy limit and the insured's uninsured policy limits.[36] This contradictory language caused confusion and ultimately prompted the legislature to repeal the statute.[37]

In 1982, the General Assembly amended the uninsured motorist statute to include a new underinsured provision.[38] The General Assem-

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30. BENDER, *supra* note 22, § 30.40[2][b]. *See* FLA. STAT. ANN. § 627.727(3)(b) (West 1984 & Supp. 1994); GA. CODE ANN. § 33-7-11(b)(1)(D)(ii) (1990); ME. REV. STAT. ANN. tit. 24-A, § 2902(1) (West 1990); MASS. GEN. LAWS ANN. ch. 175, § 113L(2) (West 1987 & Supp. 1994); MISS. CODE ANN. § 83-11-103(c)(iii) (1972); N.J. STAT. ANN. § 17.28-1.1e (West 1994); N.M. STAT. ANN. § 66-5-301(B) (Michie 1978).

31. BENDER, *supra* note 22, § 30.40[2][b].

32. Act of March 26, 1980 § 3937.181, 1980 Ohio Laws 1458-61 (repealed 1982). " '[U]nderinsured motorists coverage' means coverage . . . protecting an insured . . . where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are insufficient to pay the loss up to the insured's uninsured motorist coverage limits." *Id.* § 3937.181(A); *see* Young, *supra* note 22, at 756.

33. *See* Act of March 26, 1980 § 3937.181(A), 1980 Ohio Laws 1459 (repealed 1982); *see* Young, *supra* note 22, at 756.

34. Act of March 26, 1980 § 3937.181(A), 1980 Ohio Laws 1459 (repealed 1982).

35. Young, *supra* note 22, at 756.

36. Young, *supra* note 22, at 756.

37. *See* Act of March 24, 1982 § 3937.18, 1982 Ohio Laws 2936-39.

38. Act of March 24, 1982 § 3937.18(A)(2), 1982 Ohio Laws 2936. Section 3937.18(A) read as follows:

> (A) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless both of the following are provided:
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> (1) Uninsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for bodily injury or death under provisions approved by the superintendent of insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom;

bly deleted the phrase "insufficient to pay the loss."[39] The legislature's deletion of the phrase corroborates the intent to determine underinsured coverage using a comparison of the tortfeasor's liability policy limits and the victim's underinsured policy limits.[40]

B. Wrongful Death Claims

Ohio has a wrongful death statute.[41] Together with section 2125.02, the administrative wrongful death statute, Ohio Revised Code section 2125.01 provides for the proper presentation of a wrongful death claim.[42] Section 2125.02 creates a rebuttable presumption that the wrongful death results in injury to certain relatives of the decedent.[43] This presumption provides a cause of action to accrue, notwithstanding the lack of privity between the tortfeasor, the liability insurer, and the potential claimant.[44] The claimant's cause of action against the uninsured/underinsured carrier results from the coverage mandated by section 3937.18 in conjunction with the administrative wrongful death statute.[45]

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(2) Underinsured motorist coverage, which shall be in an amount of coverage equivalent to the automobile liability or motor vehicle liability coverage and shall provide protection for an insured against loss for bodily injury, sickness, or disease, including death, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage at the time of the accident. The limits of liability for an insurer providing underinsured motorist coverage shall be the limits of such coverage, less those amounts actually recovered under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.

OHIO REV. CODE ANN. § 3937.18(A) (effective through Oct. 9, 1994) (Anderson 1989).

39. OHIO REV. CODE ANN. § 3937.18(A) (effective through Oct. 9, 1994) (Anderson 1989).

40. Young, *supra* note 22, at 756-57.

41. OHIO REV. CODE ANN. § 2125.01 (Anderson 1994). This section provides in pertinent part as follows:

When the death of a person is caused by wrongful act, neglect, or default which would have entitled the party injured to maintain an action and recover damages if death had not ensued, the person . . . liable if death had not ensued . . . shall be liable . . . for damages, notwithstanding the death of the person injured . . . .

Id.

42. *Id.* § 2125.02. This section provides in pertinent part:

[A]n action for wrongful death shall be brought in the name of the personal representative of the decedent for the exclusive benefit of the surviving spouse, the children, and the parents of the decedent, all of whom are rebuttably presumed to have suffered damages by reason of the wrongful death, and for the exclusive benefit of the other next of kin of the decedent.

Id. § 2125.02(A)(1).

43. *Id.* § 2125.02(A)(1) (stating that the relatives presumed injured include the decedent's surviving spouse, children, and parents).

44. *See id.* § 2125.02.

45. OHIO REV. CODE ANN. § 3937.18 (effective through Oct. 9, 1994) (Anderson 1989).

Under either liability or uninsured/underinsured coverage, insurers attempted to limit wrongful death recovery to a single per person limit of the policy.[46] Prior to the ruling in *Savoie*, the Ohio Supreme Court had decided that a liability insurer may limit wrongful death recovery to a single per person limit.[47] In contrast, the court had ruled that an insurer of an uninsured/underinsured policy could not limit the recovery unless it met certain criteria.[48] The next part of the discussion focuses on the Ohio Supreme Court's previous holdings regarding insurers' attempts to limit wrongful death recovery to a single per person limit of a policy.

1. An Uninsured/Underinsured Motorist Policy May Not Limit Wrongful Death Recovery to a Single Per Person Limit

Wood v. Shepard[49] is the seminal case that depicts the interplay between Ohio Revised Code sections 2125.01, 2125.02, and 3937.18.[50] In *Wood*, the surviving spouse brought a wrongful death action in his capacity as the administrator.[51] The decedent was survived by her spouse and her two children.[52] The administrator sought a declaratory judgment to stack or combine two underinsured policies that Professionals Insurance Company had issued to the Woods.[53] The administrator also sought a court determination that any payment received from the tortfeasor was to be set off against total damages rather than against the limits of Professionals' policy.[54] Finally, the administrator requested that the court allow each of the Woods to assert separate claims under their underinsured policy, instead of collectively subjecting all the claims to a single per person limit.[55]

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46. *See supra* note 27.

47. Burris v. Grange Mut. Cos., 545 N.E.2d 83 (Ohio 1989).

48. Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809 (Ohio 1993).

49. 526 N.E.2d 1089 (Ohio 1988).

50. *Id.* For a complete discussion and analysis of *Wood v. Shepard*, see James E. Fitzgerald, Note, Hill v. Allstate Insurance Co.: *Buckle Up Ohio*—Wood v. Shepard *is on Some Rough Road*, 17 OHIO N.U. L. REV. 201 (1990); Gary D. Plunkett, *Unknown Effects of* Wood v. Shepard *on Uninsured and Underinsured Motorist Coverage in Ohio*, 39 CLEV. ST. L. REV. 49 (1991).

51. *Wood*, 526 N.E.2d at 1090.

52. *Id.*

53. *Id.* at 1089-90. "Stacking" is an insurance term used when limits in different policies are combined to allow for recovery from multiple policies. Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809, 810 (Ohio 1993). The Professionals Insurance policies covered the Wood family's two cars. *Wood*, 526 N.E.2d at 1090. These policies provided uninsured/underinsured motorist coverage of $100,000 per person and $300,000 per accident. *Id.* The tortfeasor's coverage with State Farm provided for liability limits of $50,000 per person and $100,000 per accident. *Id.* at 1089.

54. *Wood,* 526 N.E.2d at 1090.

55. *Id.* If the *Wood* court had allowed the claimants to stack the policies and consolidated the claims, the maximum coverage would have been $100,000 under each policy, or $200,000 total.

As a preliminary matter, the *Wood* court denied the enforceability of the set-off and the anti-stacking provisions of Professionals' policies.[56] Instead, the *Wood* court focused on the interplay among Code sections 2125.01, 2125.02, and 3937.18.[57] First, the court reiterated that section 2125.01 creates a statutory cause of action for wrongful death.[58] Next, the court articulated that the General Assembly mandated, under section 2125.02, that both the children and the surviving spouse of a decedent could recover wrongful death damages.[59]

The *Wood* court acknowledged that the decedent's personal representative brought these wrongful death claims collectively in the representative's name.[60] The court, however, viewed the claim presentation as a procedural technicality.[61] Returning to the language of section 2125.02, the court noted that the listed parties presumptively suffered damages.[62] The *Wood* court stated that "[s]ince each of these persons is presumed to have suffered damages resulting from the death, it logically follows that each person has a compensable claim."[63]

The court then focused its attention on section 3937.18.[64] It asserted that the General Assembly did not specifically provide insurers the option to collectively limit wrongful death claims to a single per person liability limit.[65] Since section 3937.18 provides insurers the option to include both anti-stacking and set-off provisions, the court found it significant that section 3937.18 did not provide for wrongful death limitations.[66] Thus, the court held that each of the Woods was entitled

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56. *Id.* "Intra-family stacking is the stacking of uninsured/underinsured limits of policies and coverages purchased by family members living in the same household." *Savoie*, 620 N.E.2d at 810. "Inter-family stacking is the aggregation of uninsured/underinsured limits of policies purchased by two or more people who are not members of the same household." *Id.* The *Wood* court stated that intra-family stacking provisions were enforceable if they were "clear, conspicuous and unambiguous." *Wood*, 526 N.E.2d at 1090 (following Karabin v. State Automobile Mut. Ins. Co., 462 N.E.2d 403 (Ohio 1984) and Dues v. Hodge, 521 N.E.2d 789 (Ohio 1988)).

57. *Wood*, 526 N.E.2d at 1091.

58. *Id.*

59. *Id.*

60. *Id.* at 1092.

61. *Id.*

62. *Id.* Presumably, those people not listed in the statute can be consolidated under a single per person limit. A wrongful death creates three different classes of claimants: (1) those presumed injured under section 2125.02; (2) other relatives or dependents not listed; and (3) a survivorship action on behalf of the estate. Henry A. Hentemann, *Uninsured/Underinsured Motorist Coverage: "Life After Savoie"*, 3 OHIO ASS'N CIV. TRIAL ATT'YS Q. REV., Summer 1994 at 8.

63. *Wood*, 526 N.E.2d at 1092.

64. *Id.* at 1093.

65. *Id.*

66. *Id.*

to separate $100,000 per person limits subject to the $300,000 per accident limit.[67]

2. The Court Limits the Reach of *Wood's* Holding

The next major case that the Ohio Supreme Court heard on the interplay between underinsured coverage and section 2125.02 was *Hill v. Allstate Insurance Co.*[68] In *Hill*, Haywood Shaw was killed while riding as a passenger in a vehicle that collided with a train.[69] Linda Hill, his daughter, was appointed executrix of his estate and filed a claim with Allstate Insurance for compensation from Shaw's underinsured policy on behalf of herself, Shaw's son, and Shaw's father.[70] Hill based her claim on Shaw's wrongful death and sought a declaration that each of the wrongful death claimants was entitled to a separate per person limit up to decedent's $100,000 per accident limit.[71]

The Ohio Supreme Court addressed the question of whether a decedent's underinsured motorist coverage was "available to an insured's estate and next of kin on a wrongful death claim where the insured's policy limits are identical to those of the tortfeasor."[72] The court first looked to Ohio Revised Code section 3937.18(A)(2) for the definition of an underinsured motorist.[73] The *Hill* court interpreted this provision of the statute as follows: "[s]imply put, the underinsured motorist statute requires an insurer to provide coverage to its insured when the tortfeasor's coverage is less than the limits of the insureds' uninsured motorist coverage at the time of the accident."[74] Since the tortfeasor's liability policy and the decedent's underinsured coverage had identical limits, the *Hill* court concluded the tortfeasor was not underinsured and coverage was not available.[75]

The court then distinguished *Wood*, explaining that *Wood* involved a tortfeasor with lower per person and per accident limits than the vic-

67. *Id.* at 1094. Only one of Professionals' policies was at risk because the court upheld the validity of the intra-family anti-stacking provision. *Id.* at 1090.

68. 553 N.E.2d 658 (Ohio 1990); *see also* Fitzgerald, *supra* note 50; Young, *supra* note 22, at 751.

69. *Hill*, 553 N.E.2d at 659.

70. *Id.* Two passengers died in the accident. *Id.* The tortfeasor's insurance settled with both passengers' estates for $50,000 each. *Id.* The tortfeasor's policy provided for $50,000 per person limits and a $100,000 per accident limit. *Id.*

71. *Id.*

72. *Id.* at 660.

73. *Id.* See *supra* note 38 for the text of Ohio Rev. Code Ann. § 3937.18(A)(2).

74. *Hill*, 553 N.E.2d at 660. This interpretation was bound to cause problems. In *Hill*, more than one person was injured by the tortfeasor, and the policy limits were split to satisfy those claimants. *Id.* In actuality, the amount available to compensate the claimants was less than the underinsured policy limits, but at the time of the accident the limits were identical. *Id.*

75. *Id.*

tim.[76] The *Hill* court relied on the decedent's insurance contract with Allstate, particularly the contract's definition of an underinsured automobile.[77] The provision unambiguously provided for a comparison of policy limits.[78] The court stated that absent a contractual provision to the contrary, underinsured coverage is not available if the liability and underinsured policy limits are identical.[79]

Finally, the court mistakenly rejected Hill's argument that the claimants would have been in a better position if the tortfeasor had been uninsured.[80] Because the court ruled that Allstate did not have to provide underinsured coverage to Hill and the liability insurer was responsible for the $50,000 per person limit, the available funds to Hill totaled $50,000.[81] If the tortfeasor lacked insurance, however, *Wood* controlled and those presumed injured under Code section 2125.02 had $100,000 of uninsured coverage available.[82] Thus, the court narrowed the applicability of *Wood* to cases where the victim met the threshold requirement of possessing higher limits than the tortfeasor.

3. A Liability Policy May Limit Wrongful Death Claims to the Per Person Limit

One year after *Wood*, the Ohio Supreme Court was confronted with an analogous situation involving a liability policy.[83] In *Burris v. Grange Mutual Cos.*,[84] the court had the opportunity to expand its recent holding in *Wood* to a tortfeasor's liability policy.[85] In *Burris*, Sanford Burris, Sr. died in an automobile accident as a result of a tortfeasor's negligence.[86] The son who administered the estate, his mother, and eight brothers and sisters survived the decedent.[87] The ad-

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76. *Id.*
77. *Id.* at 661.
78. *Id.* The part of Shaw's policy the Court found to be controlling is as follows:
SS UNINSURED MOTORISTS BODILY INJURY $50,000 EACH PERSON - $100,000 EACH ACCIDENT
An uninsured auto is:
(5) An underinsured auto which has liability protection in effect and applicable at the time of the accident in an amount equal to or greater than the amounts specified for bodily injury liability by the financial responsibility laws of Ohio, but less than the limits of liability of coverage SS of this policy.
Id. at 660.
79. *Id.* at 661.
80. *Id.*
81. *Id.*
82. *Id.*
83. Burris v. Grange Mutual Cos., 545 N.E.2d 83 (Ohio 1989).
84. *Id.*
85. *Id.* at 85.
86. *Id.*
87. *Id.*

ministrator brought a wrongful death claim against the tortfeasor pursuant to section 2125.02.[88] The tortfeasor's liability policy provided for coverage of $100,000 per person and $300,000 per accident.[89] Burris' son, in his capacity as administrator, settled the case for $90,000.[90]

Mrs. Burris, the decedent's mother, appealed to the Ohio Supreme Court.[91] She argued that the Grange liability policy provided $300,000 of coverage to the wrongful death claimants instead of $100,000.[92] Mrs. Burris advanced alternative arguments supporting her position.[93] First, she relied on *Wood*, arguing that to interpret an uninsured or underinsured policy to provide more coverage than a liability policy would be manifestly unfair to insurers.[94] Second, Mrs. Burris contended that the policy language itself was ambiguous.[95] She maintained that "the phrase 'sustained by two or more persons' modified 'damages' rather than modifying 'bodily injury'."[96]

The *Burris* court rejected both arguments.[97] First, the court distinguished *Wood*, reaffirming the court's finding that an insurer's inability to preclude coverage with uninsured/underinsured motorist policies derives from statutory authority.[98] The *Burris* court found that no similar statute existed that proscribed liability insurers from limiting wrongful death recovery to a single per person limit.[99] The court also distinguished between underinsured and liability policies on the basis of privity.[100] The *Burris* court found the lack of privity significant, since in an uninsured/underinsured policy the insurer voluntarily assumed the risk and agreed to abide by section 3937.18.[101]

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88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 87.
93. *Id.*
94. *Id.*
95. *Id.* at 89.
96. *Id.* Mrs. Burris was referring to the "Limits of Liability" provision which reads, in pertinent part, as follows:

> [T]he limit of such liability stated in the declarations as applicable to 'each occurrence' is, subject to the above provision respecting each person, the total limit of the company's liability for all such damages arising out of bodily injury sustained by two or more persons as the result of any one occurrence.

Id. Per accident limits are often referred to as "per occurrence" limits.
97. *Id.* at 87-90.
98. *Id.* at 88. The statute to which the court referred was Ohio Revised Code § 3937.18. *Id.*
99. *Id.*
100. *Id.* Unlike the underinsured claimant who possesses contractual privity with the insured, the tort claimant and insurer are not in privity. *Id.*
101. *Id.*

As to Mrs. Burris' second contention, the court looked to other jurisdictions and concluded that the language the insurer used was not ambiguous.[102] The court stated that "the number of persons sustaining consequential damages was irrelevant for the purpose of determining the amount of coverage available."[103] Thus, the *Burris* court held that the insurer could limit wrongful death claims under the liability policy to the single $100,000 per person limit.[104]

C. *The Validity of Anti-Stacking Provisions*

Two distinct time periods exist in Ohio law with respect to the insurance industry's ability to preclude stacking of insurance policies.[105] This section of the Background will address each time period in a separate subsection.[106] The first subsection will focus on the court's rulings on anti-stacking provisions prior to the enactment of Ohio Revised Code section 3937.18(G).[107] The second subsection will focus on the court's rulings on anti-stacking provisions in cases decided after the section was enacted.[108]

1. Case Law Prior to Enactment of Code Section 3937.18(G)

Prior to the enactment of section 3937.18(G), an insurer could not preclude an insured from stacking coverages.[109] The first case in this subsection illustrates the Ohio Supreme Court's handling of inter-family stacking.[110] The next case in this subsection illustrates the court's handling of intra-family stacking.[111]

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102. *Id.* at 90.

103. *Id.* Of course, the insurance contract itself would have to have limiting language.

104. *Id.* In State Farm Auto Ins. Co. v. Rose, the court attempted to clarify when an insurer could not limit an insured to a single per person limit. 575 N.E.2d 459 (Ohio 1991). The *Rose* court reaffirmed the holding in *Burris*, and then stated in dictum, "we further limit the holding in *Wood*, . . . and find it applicable only to those instances where the policy limitations in uninsured or underinsured motorist provisions do not track the corresponding limitation on liability coverage, and are ambiguous on their face." *Id.* at 462. Since the issue was not before the court, the words carried no weight as precedent. The court's dicta, however, indicated its future direction to observers.

105. *See infra* notes 109-39 and accompanying text.

106. *See infra* notes 109-39 and accompanying text.

107. *See infra* notes 109-39 and accompanying text.

108. *See infra* notes 140-67 and accompanying text.

109. *See infra* notes 112-39 and accompanying text.

110. *See infra* notes 112-26 and accompanying text. For a definition of inter-family stacking, see *supra* note 56.

111. *See infra* notes 127-39 and accompanying text. For a definition of intra-family stacking, see *supra* note 56.

a. Inter-Family Stacking

Curran v. State Automobile Mutual Insurance Co.[112] involved an insurer's attempt to preclude inter-family stacking.[113] In *Curran*, an uninsured tortfeasor struck and injured five people, one fatally.[114] The owner of the car in which the victims rode had an uninsured motorist policy which provided for coverage limits of $10,000 per person and $20,000 per accident.[115] The owner's insurance carrier agreed to pay the policy limits.[116]

Mrs. Curran filed a declaratory judgment against her own insurer to determine if she had the right to collect under her underinsured policy.[117] Mrs. Curran's policy limits were identical to the limits of the car owner's policy.[118] The Ohio Supreme Court framed the issue as whether an insurer, forced to provide uninsured motorist coverage by virtue of Code section 3937.18, may then preclude such coverage using an "other insurance clause" if other similar insurance exists.[119] The court viewed the issue of whether these "other insurance" clauses were valid as dispositive.[120]

First, the court reiterated the purpose of uninsured motorist protection: "Uninsured motorist coverage . . . is designed to protect persons injured in automobile accidents from losses which because of the tort-feasor's [sic] lack of liability coverage, would otherwise go uncompensated."[121] Next, the *Curran* court looked to the language of section 3937.18 and noted that an insured is allowed to collect from the insured's own insurance carrier if the injured insured otherwise would be legally entitled to recompense.[122] The court decided that giving effect to the "other insurance" provision would "thwart . . . [the] legislative intent."[123] The *Curran* court, therefore, held that an insurer may not escape liability when the liability insurer does not compensate the in-

112. 266 N.E.2d 566 (Ohio 1971).

113. *Id.* at 568.

114. *Id.* at 567.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* Both policies provided for $10,000 per person and $20,000 per accident of uninsured motorist coverage. *Id.*

119. *Id.* at 568. See *infra* notes 160, 266 for examples of "other insurance" clauses (anti-stacking provisions).

120. *Curran*, 266 N.E.2d at 568.

121. *Id.* at 569 (quoting Abate v. Pioneer Mut. Casualty Co., 258 N.E.2d 429, 432 (Ohio 1970)).

122. *Id.* In other words, if an uninsured motorist carried insurance, this person would have been entitled to collect from the tortfeasor's liability insurer. *See id.*

123. *Id.*

sured to the full extent of his injuries.[124] The court permitted the insured to stack the inter-family coverages.[125] As a result, Mrs. Curran was entitled to her own underinsured policy protection of $10,000 per person, notwithstanding any amount received from the tortfeasor, up to her substantiated damages.[126]

b. Intra-Family Stacking

The Ohio Supreme Court dealt with intra-family stacking in *Grange Mutual Casualty Co. v. Volkman.*[127] In *Volkman*, an uninsured motorist injured the insured's two daughters.[128] The Volkman family owned three automobiles.[129] Separate, identical Grange insurance policies covered the vehicles.[130] Each policy provided for uninsured motorist coverage in the amount of $10,000 per person and $20,000 per accident.[131] The daughters sought to stack the insurance coverage.[132] Grange contended that only one policy would be available for indemnification.[133]

The *Volkman* court stated the issue as "whether it is permissible for an insurer, which is providing uninsured motorist coverage to its insured's three vehicles under *individual* policies of insurance, to avoid liability under all but one of those coverages by inserting in each insurance contract the 'other owned vehicle' exclusion set out above."[134] The court perceived no difference between the "other insurance" clause used in *Curran*, and the "other owned vehicle" exclusion the insurer was attempting to enforce here.[135]

The *Volkman* court remarked that, in both provisions, insurers attempted to avoid their statutory obligation.[136] Section 3937.18 required

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124. *Id.*

125. *Id.* The court made clear that an insured may not recover more than the insured's actual loss. *Id.*

126. *Id.*

127. 374 N.E.2d 1258 (Ohio 1978).

128. *Id.* at 1258.

129. *Id.* at 1258-59.

130. *Id.*

131. *Id.* at 1259.

132. *Id.*

133. *Id.* Grange primarily relied on the following policy provision for its position: "Exclusions: This policy does not apply under Part IV [Protection Against Uninsured Motorists]: (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile." *Id.*

134. *Id.* at 1259-60 (emphasis added). The court had previously decided in Weemhoff v. Cincinnati Insurance Co., 325 N.E.2d 239 (Ohio 1975), that an insured could not stack uninsured motorist coverage provided under one policy for both automobiles, even though separate premiums had been paid. *Volkman*, 374 N.E.2d at 1260.

135. *Id.* at 1261.

136. *Id.*

that an insurer provide uninsured motorist coverage with each policy of insurance delivered in the state.[137] The court recognized that it would be inequitable to allow insureds to stack their coverage with a third party, as the court held in *Curran*, but to prohibit stacking among the policies the insureds themselves purchased.[138] The *Volkman* court then held that insureds may stack all uninsured motorist coverage that the insureds might hold under separate policies of insurance for which they have paid separate premiums.[139] Thus, both of the Volkman daughters had $30,000 of uninsured coverage available from which to recoup damages.

2. Case Law After Adoption of Code Section 3937.18(G)

After the adoption of section 3937.18(G),[140] the Ohio Supreme Court reversed its decision regarding an insured's ability to stack coverages. Because the legislature did not specify in the statute when insurers could preclude stacking, the court was forced to decide that issue.[141] First, the court resolved the issue of whether an insurer could preclude intra-family stacking.[142] Second, the court resolved whether an insurer could preclude inter-family stacking.[143] In addition, the court articulated the criteria insurers needed to use in order to have valid anti-stacking provisions.[144]

a. Intra-Family Stacking

Karabin v. State Automobile Mutual Insurance Co.[145] concerned intra-family stacking after the General Assembly amended Ohio Revised Code 3937.18 to include section (G).[146] In *Karabin*, an uninsured motorist's car struck a pedestrian.[147] The pedestrian had two automobile insurance policies in effect, each insuring separate vehicles.[148] Each policy provided for uninsured motorist coverage of $50,000 per person, and both policies contained anti-stacking provisions which stated that the insurer's liability would not exceed the highest applicable limit

137. *Id.*
138. *Id.*
139. *Id.*
140. See *supra* note 8 for the text of section 3937.18(G).
141. *See infra* notes 145-67 and accompanying text.
142. *See infra* notes 145-56 and accompanying text.
143. *See infra* notes 157-67 and accompanying text.
144. Dues v. Hodge, 521 N.E.2d 789 (Ohio 1988) (holding insurer may preclude stacking of uninsured/underinsured coverage, as long as insurer uses language that is clear, conspicuous, and unambiguous).
145. 462 N.E.2d 403 (Ohio 1984).
146. *Id.*
147. *Id.* at 404.
148. *Id.*

under any one policy.[149] The insurer agreed to honor the claims under one policy, but refused to allow the insured to stack the policies.[150]

The issue presented in *Karabin* was whether a provision in an insurance contract that attempts to limit the amount of available uninsured/underinsured coverage is allowable pursuant to section 3937.18.[151] The *Karabin* court examined the recent amendment to this statute and concluded that an insurer could now limit uninsured/underinsured coverage through the use of anti-stacking language.[152] The court dismissed the insured's argument that *Curran* controlled this issue: "It is clear to this court that approval for anti-stacking restrictions in uninsured motorist coverage has indeed emanated from the General Assembly."[153] Rejecting the insured's contention that stacking as used in section 3937.18(G) only applied to intra-policy aggregation, the court stated that the term stacking was not ambiguous and that it covered the intra-family situation.[154] The *Karabin* court viewed section 3937.18(G) as a legislative mandate that permitted an insurer to restrict its liability using anti-stacking language.[155] The *Karabin* court, therefore, held that section 3937.18(G) allowed insurers to preclude the stacking of intra-family uninsured coverage.[156]

b. Inter-Family Stacking

The second scenario involving anti-stacking provisions and the court's response after the enactment of section 3937.18(G) is illustrated in *Hower v. Motorists Mutual Insurance Co.*[157] *Hower* involved four separate insurance policies: the tortfeasor's liability policy; the driver's underinsured policy; and the two passengers' (the Howers) underinsured policies.[158] After an arbitrator determined the amount of the Howers' damages, both the tortfeasor's liability insurer and the driver's

149. *Id.* In this case, that would mean the insurer would not provide coverage for damages that exceeded $50,000 for any one person's personal injury.

150. *Id.* Thus, while the insurer contended that only $50,000 of coverage was available, the insured wanted $100,000 of coverage.

151. *Id.*

152. *Id.*

153. *Id.* at 405.

154. *Id.* at 406. In other words, the court rejected the insured's argument that the statute proscribed the aggregation of the liability limits and the uninsured motorist limits in a single policy of insurance.

155. *Id.*

156. *Id.*

157. 605 N.E.2d 15 (Ohio 1992).

158. *Id.* at 16-17. The tortfeasor had liability insurance with limits of $25,000 per person and $50,000 per accident. *Id.* at 17. The driver had underinsured coverage of $50,000 per person and $100,000 per accident. *Id.* at 16. The passengers, who were husband and wife, each had policies with Motorist Mutual which provided each of the Howers with uninsured/underinsured coverage of $50,000 per person and $100,000 per accident. *Id.* at 17.

underinsured carrier satisfied the obligations to the maximum of the policies.[159] The two passengers then requested coverage from their underinsured policies, but Motorist claimed that the policies contained valid anti-stacking provisions and refused coverage.[160]

The *Hower* court recognized as the sole issue the enforceability of the "other insurance" provision in the policy.[161] In a case decided before the legislature amended section 3937.18(G), the Ohio Supreme Court found a similar clause repugnant to the statute.[162] The *Hower* court decided that revised section 3937.18(G) superseded the court's prior holdings.[163] The *Hower* court scrutinized the phrase, "other . . . similar insurance" contained in the Motorist's anti-stacking provision.[164] The appellate court noted that the phrase was capable of two interpretations: "(1) it refers to other insurance issued by the same insurer, or (2) it refers to insurance issued by other insurers."[165] The Ohio Supreme Court rejected the appellate court's interpretation and found the phrase unambiguous.[166] The supreme court found that the insured need not purchase the insurance from the same company for this provision to have effect.[167] The *Hower* court held that an insurer may limit its maximum liability to the highest limit of any similar policy applicable to the accident. The court upheld this anti-stacking provision even though the similar policy was an inter-family policy.

D. Calculation Of Possible Coverages

Even if a court allows an insured to stack policy limits, the insured confronts another hurdle before being fully compensated for damages. Ohio Revised Code section 3937.18(A)(2) grants insurers the ability to

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159. *Id.* Unfortunately for the Hower family, the wife still had $93,000 of uncompensated damages and the husband still had $10,000 of uncompensated damages. *Id.*

160. *Id.* Motorist's anti-stacking provision read in pertinent part as follows:

> OTHER INSURANCE
>
> If there is other applicable similar insurance, we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. If this policy and any other policy providing similar insurance apply to the same accident, the maximum limit of liability under all the policies shall be the highest applicable limit of liability under any policy. However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.

Id.

161. *Id.*

162. Curran v. State Auto. Ins. Co., 266 N.E.2d 566 (Ohio 1971).

163. *Hower*, 605 N.E.2d at 18.

164. *Id.* at 19.

165. *Id.*

166. *Id.*

167. *Id.*

reduce potential liability by allowing them to subtract amounts the claimant receives from others legally liable.[168]

This section of the background addresses three distinct issues which impact on an insured's ability to collect full compensation for damages. The first subsection examines the general rule that absent a specific policy provision, the uninsured/underinsured carrier is not entitled to reduce its policy limits by the amount the insured recovered from other sources.[169] In the second subsection, the focus changes to the language of the insurance policy which governs whether an insurer may "set off" or subtract amounts the insured receives from other sources.[170] The third subsection discusses whether, if multiple underinsured policies are involved, along with a tortfeasor's liability policy, the underinsured carrier may set off amounts received from both liability and underinsured types of policies.[171]

1. Absent a Specific Provision the General Rule is to Disallow Set-Off

The first pertinent case involving the court's handling of set-off is *Gomolka v. State Automobile Mutual Insurance Co.*[172] In *Gomolka*, State Auto issued three policies of insurance to the insureds.[173] During preliminary proceedings, the court found that these policies provided $900,000 of possible underinsured coverage.[174] The tortfeasor carried a liability policy with a $100,000 per accident limit.[175]

The question presented to the *Gomolka* court was whether the tortfeasor's $100,000 liability policy should be deducted from the Gomolkas' total damages or the $900,000 of applicable underinsured coverage.[176] State Auto argued that the clause "any amount payable . . . shall be reduced by" meant that the total coverage available, $900,000, should be reduced by $100,000.[177] The insured contended that the phrase "any amount payable" should be construed to mean

168. OHIO REV. CODE ANN. § 3937.18(A)(2) (effective through Oct. 9, 1994) (Anderson 1989). See *supra* note 9 for the text of Ohio's statutory set-off provision.

169. *See infra* notes 172-81 and accompanying text.

170. *See infra* notes 182-98 and accompanying text.

171. *See infra* notes 199-208 and accompanying text.

172. 436 N.E.2d 1347 (Ohio 1982).

173. *Id.*

174. *Id.* The coverage limits under each of the three individual policies was $100,000 per person and $300,000 per accident. *Id.* Since the policies contained no anti-stacking provision the insurer could not preclude the insureds from stacking the policy limits. *Id.* Finally, since the accident injured multiple insureds, the insurance company faced full exposure of $900,000. *Id.*

175. *Id.*

176. *Id.* at 1348. Although the court used the term "uninsured motorist coverage," technically the relevant coverage was underinsured motorist coverage. *Id.*

177. *Id.*

"any damages compensable."[178] To resolve the set-off issue, the *Gomolka* court examined the express language of the insurance policy.[179] The court accepted the insured's interpretation and held that the $100,000 the tortfeasor's insurer paid, could only be set off against the insured's total damages.[180] The *Gomolka* court thus held $900,000 of underinsured motorist coverage existed to compensate the insured.[181]

2. The Insurance Policy Language Governs Set-Off

In *James v. Michigan Mutual Insurance Co.*,[182] the court clarified its position regarding set-off.[183] In *James*, an underinsured motorist injured James in an automobile accident.[184] The tortfeasor carried liability coverage of $12,500 per person, but James had compensable injuries exceeding $37,500.[185] The tortfeasor's liability insurer paid the $12,500 limit of the policy, and the insured sought compensation from his $25,000 underinsured policy with Michigan Mutual.[186] Michigan Mutual contended that it had a right to set off the amount the insured had recovered from the tortfeasor's insurer and paid the insured $12,500.[187]

Michigan Mutual made a two-pronged argument to support its claim of entitlement to the $12,500 set-off.[188] First, Michigan Mutual relied on the statutory language of Code section 3937.18(E) which at that time provided in pertinent part:

> In the event of payment to any person under the coverages required by this section and subject to the terms and conditions of such coverages, the insurer making such payment to the extent thereof is entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made . . . .[189]

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178. *Id.* at 1349.

179. *Id.* In particular, the court looked at the following clause for guidance: "Any amount payable under the Uninsured Motorists Coverage . . . shall be reduced by (1) all sums paid on account of such bodily injury by or on behalf of (i) the owner or operator of the uninsured highway vehicle[.]" *Id.*

180. *Id.*

181. *Id.*

182. 481 N.E.2d 272 (Ohio 1985).

183. *Id.*

184. *Id.* at 272-73.

185. *Id.* at 273. James carried uninsured/underinsured policy limits of $25,000 per person and $50,000 per accident. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

Michigan Mutual contended that the text of the statute limited the insurer's legal responsibility to compensate the insured.[190] Second, the insurer argued that contract law permitted it to limit its obligations.[191]

The *James* court first analyzed section 3937.18(C).[192] The court noted that while the statute did provide the insurer with a right of subrogation, the subrogation right was not absolute.[193] The court continued its inquiry, however, and proceeded to analyze the James' underinsured policy.[194]

The *James* court focused on the purpose behind underinsured motorist coverage. The court asserted that persons injured by an underinsured motorist should fare no worse than those injured by an uninsured motorist.[195] The court then concluded that the general rule of subrogation did not apply.[196] The *James* court therefore held that:

> A set off from the limits of underinsured motorist coverage . . . is not contrary to the public policy behind the enactment of section 3937.181(C), so long as such set off (1) is clearly set forth in the terms of the underinsured motorist coverage and (2) does not lead to a result wherein the insured receives a total amount of compensation that is less than the amount of compensation that he would have received if he had been injured by an uninsured motorist.[197]

The court held that Michigan Mutual was entitled to set off the $12,500 the insured received from the tortfeasor's insurer, and that James was entitled to $12,500 of underinsured coverage.[198]

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190. *Id.*

191. *Id.* at 274. Michigan Mutual had a subrogation clause in the contract which read: "If we make a payment under this policy and the person to or for whom payment is made recovers damages from another, that person shall: 1. Hold in trust for us the proceeds of the recovery; and 2. Reimburse us to the extent of our payment." *Id.*

192. *Id.*

193. *Id.* The court stated the general rule of subrogation that "where an insured has not interfered with an insurer's subrogation rights, the insurer may neither be reimbursed for payments made to the insured nor seek set off from the limits of its coverage *until the insured has been fully compensated* for his injuries." *Id.* (citing Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382 (1872)) (emphasis in original).

194. *Id.* In the James' underinsured policy, the "Limit Of Liability" section contained a clause that stated: "However, the limit of liability shall be reduced by all sums paid because of the bodily injury by or on behalf of persons or organizations who may be legally responsible." *Id.*

195. *Id.*

196. *Id.* at 274-75.

197. *Id.* at 275. Thus, James was entitled to $25,000—the $12,500 James received from the tortfeasor's insurer and $12,500 from James's own underinsurance carrier, the same amount James would have received if the tortfeasor was not insured.

198. *Id.*

3. Set-Off Applies to Liability and Other Underinsured Policies

In *Hower*, the tortfeasor and insureds possessed identical policy limits.[199] The court, after concluding that Motorists Mutual had a valid anti-stacking provision in the policy, then addressed the Howers' contention that Code section 3937.18(A)(2) did not allow for set-off among underinsured policies.[200] After receiving underinsured benefits from the owner of the vehicle, the Howers wanted to collect further uncompensated damages from their own underinsured policy.[201] The Howers contended that their underinsured carrier was entitled to set off amounts paid by the tortfeasor's insurer, but not to set off amounts paid by the driver's underinsured carrier.[202] Motorists Mutual argued, however, that the mandate of section 3937.18(A)(2) was met since the Howers received the amount of benefits they would have received if the motorist was uninsured.[203]

To resolve whether an underinsured carrier could set off only amounts received from a tortfeasor's liability policy or whether the underinsured carrier could also set off amounts received from another underinsured policy, the *Hower* court interpreted section 3937.18(A)(2).[204] The court focused on the words in the last clause, which incorporates the policies of all "persons liable to the insured."[205] The *Hower* court accepted the trial court's definition of "all who have made payment to the insured," noting that the statute did not define the phrase "[p]ersons liable to the insured."[206] The court further found that setting off other underinsured coverage would not undermine the purpose of the underinsured statute.[207] Thus, the *Hower* court permitted the insurer to set off the other underinsured payments its insured received.[208]

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199. Hower v. Motorists Mut. Ins. Co., 605 N.E.2d 15 (Ohio 1992). *See supra* notes 157-67 and accompanying text.

200. *Id.* at 19. The Howers relied on Ward v. Wayne Mut. Ins. Co., 587 N.E.2d 478 (Ohio Ct. App. 1991).

201. *Id.* at 20.

202. *Id.*

203. *Id.* As mentioned previously, each of the Howers had uninsured motorist coverage of $50,000 per person and $100,000 per accident. *Id.* Additionally, because the Howers each cumulatively received $50,000 from the tortfeasor's liability policy and the driver's underinsured policy, the Howers were in no worse position than if the motorist was uninsured. *Id.*

204. *Id.*

205. *Id.* See *supra* note 9 for the text of the set-off clause.

206. *Hower*, 605 N.E.2d at 20.

207. *Id.*

208. *Id.*

E. Summary of the Status of Insurance Law Prior to Savoie

As case law evolved, the Ohio Supreme Court resolved four distinct issues. First, the court ruled that multiple wrongful death claimants could not be limited to a single per person limit in an uninsured/underinsured clause unless the tortfeasor and underinsured coverage possessed identical limits.[209] Second, the court permitted a liability insurer to limit multiple wrongful death claimants to a single per person limit of its policy.[210] Third, the court decided that an insurer may preclude all types of stacking under Code section 3937.18(G).[211] Fourth, the court ruled that an insurer was entitled to set off from the limits of its policy an insured's recovery from other sources.[212] The *Savoie* court's decision would reverse the Ohio court's previous stance on these issues.[213]

III. Facts and Holding: The Trial, Appellate and Supreme Court Decisions

A. Statement of the Facts

On September 28, 1989, Christina L. Savoie was a passenger in an 1982 Honda Accord driven by Gary R. Miller.[214] Earl R. Miller, Gary Miller's father, owned the automobile and gave his son permission to use the vehicle.[215] While driving the vehicle northbound on U.S. Route 62 in Holmes County, Gary Miller lost control of the car and crossed the center line.[216] The Miller vehicle collided with David Byland's 1976 Chevrolet Custom Deluxe pickup truck, which was traveling in the southbound lane.[217]

Christina Savoie suffered severe trauma and died instantaneously.[218] David Byland suffered extensive personal injury.[219] The par-

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209. Wood v. Shepard, 526 N.E.2d 1089 (Ohio 1988); Hill v. Allstate Ins. Co., 553 N.E.2d 658 (Ohio 1990).

210. Burris v. Grange Mut. Cos., 545 N.E.2d 83 (Ohio 1989).

211. Dues v. Hodge, 521 N.E.2d 789 (Ohio 1988); *see* Hower v. Motorists Mut. Ins. Co., 605 N.E.2d 15 (Ohio 1992); Karabin v. State Auto. Mut. Ins. Co., 462 N.E.2d 403 (Ohio 1984).

212. James v. Michigan Mut. Ins. Co., 481 N.E.2d 272 (Ohio 1985).

213. Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809 (Ohio 1993).

214. *Savoie*, 620 N.E.2d at 811-12. The parties involved in this case included: Mary Savoie, the administratrix of the estate of Christina L. Savoie, Grange Mutual Insurance Company, and Motorists Mutual Insurance Company. *Id.* Christina Savoie's parents were Donald and Mary Savoie. *Id.*

215. *Id.*

216. Statement of Stipulated Facts at 1, Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809 (1993).

217. Statement of Stipulated Facts, *supra* note 216, at 1.

218. Statement of Stipulated Facts, *supra* note 216, at 1.

219. Statement of Stipulated Facts, *supra* note 216, at 1.

ties acknowledged that Gary Miller's negligence was the sole cause of the death of Christina Savoie and the injuries to David Byland.[220] At the time of the accident, Grange Mutual Insurance Company insured Earl Miller's vehicle for liability coverage.[221] Miller's policy provided for maximum limits of $100,000 per person and $300,000 per accident.[222] Earl Miller's policy covered Gary Miller's operation of the vehicle.[223] Grange paid $75,000 to Byland to fully settle his claim for personal injuries.[224]

Mary Savoie, acting as the administratrix of the estate of Christina Savoie, filed a wrongful death action against Gary Miller and Earl Miller pursuant to Ohio Revised Code section 2125.02.[225] Savoie's claim also sought recovery for the class of injured persons under the Savoie family's uninsured/underinsured policies.[226] Motorists Mutual Insurance Company insured the Savoie family under two separate policies at the time of the accident.[227] The first policy Motorists issued to Donald Savoie provided for uninsured/underinsured motorist coverage with maximum limits of $100,000 per person and $300,000 per accident.[228] The terms of this policy also provided insurance coverage for Mary and Christina Savoie.[229] The second Motorists' policy issued to Donald Savoie also provided for uninsured/underinsured motorists coverage and maximum limits of $100,000 per person and $300,000 per accident.[230] The terms of this second policy provided insurance coverage for Mary, Debbie, and Christina Savoie.[231]

B. The Trial Court's Decision

In a complaint seeking a declaratory judgment filed on June 26, 1990, Mary Savoie, as the administratrix of the estate of Christina Savoie, asked the Holmes County Court of Common Pleas to determine the amount of coverage available to the three wrongful death claimants.[232] Specifically, Mary Savoie sought a determination by the trial court as to the rights and duties among herself, Donald Savoie,

220. *Savoie*, 620 N.E.2d at 810.
221. *Id.*
222. Statement of Stipulated Facts, *supra* note 216, at 2.
223. Statement of Stipulated Facts, *supra* note 216, at 2.
224. *Savoie*, 620 N.E.2d at 811.
225. *Id.* See *supra* notes 42-104 and accompanying text for a discussion of Ohio Revised Code § 2125.02.
226. *Savoie*, 620 N.E.2d at 811.
227. Statement of Stipulated Facts, *supra* note 216, at 2.
228. Statement of Stipulated Facts, *supra* note 216, at 2.
229. Statement of Stipulated Facts, *supra* note 216, at 2.
230. Statement of Stipulated Facts, *supra* note 216, at 2-3.
231. Statement of Stipulated Facts, *supra* note 216, at 2.
232. Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809, 811 (Ohio 1993).

Christina's sister Debbie Savoie, Grange Mutual, Miller's liability insurer, and Motorists Mutual, the provider of underinsured coverage to the Savoie family.[233]

Initially, the trial court concluded that the Savoie family was entitled to the $300,000 per accident limit of Miller's policy with Grange Mutual.[234] Further, the trial court determined that the two uninsured/underinsured policies Donald Savoie maintained with Motorists Mutual could not be " 'stacked' or combined."[235] Lastly, the court determined that the Savoie family could not recover compensation from the underinsured policies with Motorists Mutual, since the policy limits were identical to Miller's policy limits with Grange Mutual.[236] Thus, instead of having a potential insurance pool of $825,000 from which to recover, the court limited the Savoie family to a maximum recovery of $225,000.[237]

On October 30, 1991, the trial court, citing new precedent, filed amended findings of fact and conclusions of law.[238] The court held that Grange Mutual could collectively limit the Savoie family to the $100,000 per person limit in the liability policy instead of the remaining $225,000 of coverage.[239] Mary Savoie appealed.[240]

C. *The Appellate Court's Decision*

On April 17, 1992, the Court of Appeals for Holmes County reversed the trial court's decision in part.[241] The court of appeals ruled that the trial court had erred when it found that the Savoies were collectively limited to the $100,000 per person limit of the Grange Mutual liability policy.[242] Instead, the appellate court held that the Savoies were entitled to the per accident limit of $300,000.[243] The court of appeals affirmed the remainder of the trial court's decision.[244]

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233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. The $825,000 is calculated by adding the $225,000 still available from the tortfeasor's liability policy ($300,000 minus the $75,000 paid to David Byland), together with each of Donald Savoie's Motorists Mutual policies' $300,000 per accident limits.
238. *Id.* The trial court cited the new case of State Farm Auto. Ins. Co. v. Rose, 575 N.E.2d 459 (Ohio 1991).
239. *Savoie*, 620 N.E.2d at 811.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.* The liability insurance coverage available to the Savoies now equaled $225,000 (Grange Mutual's per accident limits were $300,000, but Grange Mutual had exhausted $75,000 in settling Byland's injury claim).
244. *Id.*

Mary Savoie filed a Notice of Appeal to the Ohio Supreme Court, protesting the appellate court's decision that uninsured/underinsured motorists coverage was not available to the Savoies.[245] Additionally, Grange Mutual filed a Notice of Appeal protesting the appellate court's decision to allow the Savoies $300,000 of liability coverage under Miller's policy.[246] Initially, the supreme court refused to hear the dispute, but upon a motion for rehearing the court agreed to review the record.[247]

D. The Ohio Supreme Court's Decision

1. The Majority Opinion

Mary Savoie raised three questions relative to automobile insurance law: (1) Are liability policies, which attempt to limit multiple wrongful death claimants to the per person limit of a policy, enforceable?; (2) Assuming the uninsured/underinsured policy applies in a wrongful death case, are multiple claimants limited to a single per person limit of the policy?; (3) If the liability and the uninsured/underinsured policies contain identical limits, when is it permissible to stack coverage?[248] The supreme court addressed each of these issues separately.[249]

First, the court addressed the insurers' attempts to limit multiple wrongful death claimants to a single per person limit in a liability policy.[250] Mary Savoie advanced the argument that each person that the court recognizes to have a valid wrongful death claim should be entitled to a separate per person limit, or in this case, a total of $300,000.[251] Conversely, Grange Mutual contended that multiple claimants must be merged under one per person limit since the wrongful death statute requires that the administrator bring one action for the class of beneficiaries.[252]

The *Savoie* court rejected Grange Mutual's contentions, stating that the approach it advocated would be inconsistent with both the General Assembly's and the court's previously articulated views.[253] To

245. Grange Mut. Ins. Co's. Brief at 2, Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809 (Ohio 1993) (No. 92-952).

246. *Id.*

247. *Id.*

248. *Savoie*, 620 N.E.2d at 812.

249. *Id.*

250. *Id.*

251. *Id.* Again, the maximum amount that the Savoie family could recover from Grange Mutual under the Miller policy was $225,000; *see supra* note 243.

252. *Id.* This requirement is to facilitate "presentment of wrongful death claims." *Savoie*, 620 N.E.2d at 809; *see supra* notes 41-43.

253. *Savoie*, 620 N.E.2d at 812.

support its reasoning, the court quoted from the Bill of Rights of the Ohio Constitution: "The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law."[254] The *Savoie* court then held that "[c]onsistent with this view, each person who is presumed to have been damaged as a result of a wrongful death, to the extent of his or her damages, may collect from the tortfeasor's liability policy [here Miller's] up to its per person limits subject to any per accident limit."[255] The court further remarked that "[l]iability policy provisions which purport to consolidate wrongful death damages suffered by individuals are unenforceable because they directly violate the public policy expressed by the General Assembly and this court."[256] Therefore, in resolving this issue, the court held that the Savoies were not collectively limited to the $100,000 per person limit.[257] Rather, the Savoie family could collect for their damages up to the $300,000 per accident limit.[258]

Proceeding as if an underinsured claim was present, the *Savoie* court then addressed whether an uninsured/underinsured policy could collectively limit wrongful death claimants to a single per person limit of liability.[259] The court explained that *Wood v. Shepard*[260] was completely dispositive of that issue.[261] Each of the Savoies presumed to be damaged under section 2125.02 had a separate claim subject to a separate per person policy limit, and the total of all claims could not exceed the underinsured policy's per accident limits.[262] Thus, assuming that Miller was underinsured, the Savoies would not be collectively limited under either of their underinsured policies to the $100,000 per person limits.[263] Instead, to the extent the Savoies proved damages, they could recover up to the $300,000 per accident limits.[264]

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254. *Id.* (quoting from OHIO CONST., art. I, § 19(a)).

255. *Id.* at 812-13.

256. *Id.* at 813.

257. *Id.*

258. *Id.* Each of the Savoies was entitled to recover up to $100,000 of damages subject to the $225,000 per accident limit. For example, if each parent demonstrated damages of $100,000, and Debbie Savoie demonstrated damages of $25,000, then the available insurance money would fully compensate them. If, however, four relatives were entitled to recover $100,000 each, and the policy contained a $300,000 per accident limit, assuming the policy had not paid other benefits, each would receive $75,000 of damages.

259. *Id.* at 816.

260. 526 N.E.2d 1089 (Ohio 1988) (holding that each insured entitled to assert wrongful death claim under section 2125.02 is entitled to separate per person claim).

261. *Savoie*, 620 N.E.2d at 816.

262. *Id.*

263. *Id.*

264. *Id.*

Third, the *Savoie* court addressed when it is permissible to stack uninsured/underinsured motorist policies.[265] Since Motorists Mutual insured the Savoie family under both policies, Motorists Mutual sought to have its anti-stacking clauses upheld.[266] The court noted that the anti-stacking provisions in the policies were clear, conspicuous, and unambiguous as required by the Ohio Supreme Court in *Dues v. Hodge*.[267] The *Savoie* court then traced the development of anti-stacking provisions and the court's previous responses to such provisions.[268]

Prior to 1980, the court had regularly struck down anti-stacking provisions as "repugnant to the purpose of the uninsured/underinsured motorist statute when used by an insurer to deny coverage to an insured, because other uninsured coverage is available to the insured under a different policy from a different insurer."[269] In response to the court's repeated rejection of anti-stacking provisions, the General Assembly amended Ohio Revised Code section 3937.18 in 1980 to include a provision that allowed insurers to preclude stacking.[270] Thereafter, the Ohio court interpreted the provision to allow insurers to contractually preclude all types of stacking.[271]

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265. *Id.* at 813. *Savoie* presented two types of stacking issues. First, the Savoies wanted to stack the policies they themselves purchased (intra-family stacking). Second, the Savoies wanted to stack the tortfeasor's policy limit ($300,000) with their underinsured policies' limits (inter-family stacking). *Id.* at 812.

266. *Id.* at 813. The anti-stacking language in both policies was identical. *Id.* The inter-family anti-stacking provisions in the policies read as follows:

> OTHER INSURANCE
>
> If there is other applicable similar insurance available under more than one policy or provision of coverage:
>
> 1. Any recovery for damages for bodily injury sustained by an insured may equal but not exceed the higher of the applicable limit for any one vehicle under this insurance or any other insurance.
>
> 2. Any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.
>
> 3. We will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits.

Id.

Motorists Mutual also had an intra-family provision which stated: "Two or More Auto Policies: If this policy and any other auto insurance policy issued to you by us apply to the same accident, the maximum limit of our liability under all the policies shall not exceed the highest applicable limit under any one policy." *Id.*

267. 521 N.E.2d 789 (Ohio 1988); *see supra* note 144.

268. *Savoie*, 620 N.E.2d at 813.

269. *Id.* (citing both Curran v. State Auto. Mut. Ins. Co., 266 N.E.2d 566 (Ohio 1971); and Grange Mut. Casualty Co. v. Volkman, 374 N.E.2d 1258 (Ohio 1978)). The statute's purpose is to provide compensation for injured motorists who, through no fault of their own, do not have sufficient liability insurance available to them. *Curran*, 266 N.E.2d at 569.

270. OHIO REV. CODE ANN. § 3937.18(E) (Anderson 1989).

271. *Savoie*, 620 N.E.2d at 813. For example, the court did not concern itself with the number of policies involved or the number of premiums paid, as long as the language used by the

The *Savoie* court proceeded to analyze the current version of the anti-stacking provision in section 3937.18.[272] The court noted that the statute allows an insurer to contractually preclude the stacking of any type of coverage.[273] The *Savoie* court found ambiguous whether the legislature intended section 3937.18(G) to allow insurers to preclude intra-family stacking, inter-family stacking, or both.[274] The court narrowly construed the provision, holding that insurers may contractually preclude intra-family stacking, but may not preclude inter-family stacking.[275] The *Savoie* court stated that insurers collected full, unreduced premiums in inter-family stacking situations, yet the insurers then attempted to limit the coverage to the insureds based on the fortuitous existence of other insurance.[276]

The court distinguished intra-family stacking, because the insurers may downwardly adjust premiums to account for multiple family policies.[277] In intra-family situations, the court remarked that since insurers reduce premiums, it logically follows that an insurer may restrict or limit benefits.[278] The *Savoie* court decided to cease enforcement of inter-family anti-stacking provisions, thus limiting the court's previous decision in *Dues*.[279]

Lastly, the *Savoie* court addressed how a court should determine if underinsured coverage is available to the insured.[280] In *Savoie*, Motorists Mutual, the uninsured/underinsured carrier, argued that the Savoies were not entitled to collect under its policy.[281] Motorists asserted that the limits of the Savoie family's policy were identical to those of the Miller policy which had been issued by Grange Mutual.[282]

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insurer was unambiguous, clear, and conspicuous. *Id.* (citing Dues v. Hodge, 521 N.E.2d 789 (Ohio 1988)).

272. *Id.* Ohio Revised Code § 3937.18(G) provides: "Any automobile liability or motor vehicle liability policy of insurance that includes coverages offered under division (A) of this section may include terms and conditions that preclude stacking of such coverages." OHIO REV. CODE § 3937.18(G) (effective through Oct. 9, 1994) (Anderson 1989).

273. *Savoie*, 620 N.E.2d at 814.

274. *Id.*

275. *Id.*

276. *Id.* The court found this practice unconscionable.

277. *Id.*

278. *Id.* Since the court restricted intra-family stacking, the remainder of this discussion will proceed as if the Savoie family had only one underinsured policy issued by Motorists Mutual.

279. *Id.* at 809.

280. *Id.*

281. *Id.* at 813.

282. *Id.* at 810. The policy limits in both the Grange Mutual and Motorists Mutual policies were $100,000 per person and $300,000 per accident. *Id.*

Motorists Mutual reasoned that because the limits of the two policies were identical, the tortfeasor, Miller, was not underinsured.[283]

The *Savoie* court reviewed the purpose underlying Code section 3937.18 to resolve whether Miller was underinsured.[284] Noting that the court had previously recognized in *James v. Michigan Mutual Insurance Co.*[285] that "an individual covered by an underinsurance policy is entitled to receive compensation in an amount no less than he would receive if he had been injured by an uninsured motorist," the court determined that the Savoies were entitled to collect on their underinsured policy with Motorists Mutual.[286] The court ruled, however, that the Savoies could collect up to the $300,000 per accident limit of the policy to the extent that their damages exceeded the Grange Mutual liability coverage of $225,000, for a possible total recovery of $525,000.[287] Thus, the Savoie court reconciled the earlier part of its decision, in which it permitted inter-family stacking but not intra-family stacking.[288] The court recognized that its holding contradicted its 1990 holding in *Hill v. Allstate Insurance Co.*,[289] and the court proceeded to expressly overrule *Hill*.[290]

2. The Douglas Concurrence

Justice Andy Douglas concurred in the majority's holding because he believed that the decision would better enable the court to resolve future cases based upon the individual facts instead of upon the category into which they were designated.[291] Justice Douglas expressed discomfort with the supreme court's past attempts at interpreting the scope of automobile insurance coverage.[292] According to Justice Douglas, the court's past decisions merely confused automobile insurance

283. *Id.* at 815. Previously, in *Hill*, the court held that an underinsured carrier avoids liability to its insured when the tortfeasor's limits are identical to the insured's limits. 553 N.E.2d 658, 659 (Ohio 1990). *See supra* notes 68-82 and accompanying text.

284. *Savoie*, 620 N.E.2d at 815.

285. 481 N.E.2d 272 (Ohio 1985).

286. *Savoie*, 620 N.E.2d at 815. Presumably, the Savoies could collect up to $75,000 (the $300,000 underinsured policy limit minus the $225,000 recovered from the Grange Mutual liability policy).

287. *Id.*

288. *Id; see supra* note 278.

289. 553 N.E.2d 658 (Ohio 1990) (holding insurer need not pay underinsured coverage if tortfeasor and insured possess identical limits).

290. *Savoie*, 620 N.E.2d at 815.

291. *Id.* at 816. Douglas explained that while he did not agree with every detail of the majority opinion, he agreed with the holding. *Id.* For example, Douglas disagreed with the citation to the Ohio Constitution. *Id.*

292. *Id.* In fact, Douglas began his concurrence by stating, "[f]or far too long now various majorities of this court have been attempting, in interpreting liability, uninsured and underinsured automobile policies, to place square legal pegs in round legal holes." *Id.*

law.[293] Douglas believed the majority opinion would begin to resolve the confusion in this area of law.[294]

Justice Douglas explained what he considered to be the problem with the court's past attempts at resolving these conflicts.[295] He stated that the Ohio court had been "attempting to apply the same law to differing fact patterns."[296] The court's past approach failed to discern the distinctions between uninsured and underinsured cases, multiple-claim and single-claim cases, and wrongful death and personal injury cases.[297] Douglas disagreed with what he thought to be the court's past "reasoning for result."[298] According to Douglas, the *Savoie* decision would return the court to a new beginning.[299] Then, the Ohio Supreme Court could resolve future disputes based on statutes, logic, and reason, rather than inapplicable precedent.[300]

3. The Dissent

Chief Justice Thomas Moyer and Justice J. Craig Wright dissented.[301] Justices Moyer and Wright based their dissent on what the justices considered to be the majority's disregard for clear legislative intent and a failure to adhere to the doctrine of *stare decisis*.[302] The dissent cited cases prior to the enactment of section 3937.18(G) and asserted that this section countermanded those decisions.[303] Justice Moyer then cited cases to demonstrate that the court previously held that "such clauses were enforceable when clear, conspicuous, and unambiguous."[304]

Moyer acknowledged the majority's concern that insurers were taking advantage of unwary insureds through the use of anti-stacking provisions.[305] Moyer concluded, however, that adequate protection was provided by the standard enunciated in *Dues* that the language insurers use must be clear, unambiguous, and conspicuous.[306] Rather than ac-

293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.* at 817.
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* (Moyer, C.J., dissenting).
302. *Id.* at 817-19.
303. *Id.* at 818. See *supra* note 272 for the text of § 3937.18(G).
304. *Savoie*, 620 N.E.2d at 818 (Moyer, C.J., dissenting). Among the cases cited by Justice Moyer were both *Karabin* and *Dues*. *Id. See* Karabin v. State Automobile Ins. Co., 462 N.E.2d 403 (Ohio 1984); Dues v. Hodge, 521 N.E.2d 789 (Ohio 1988).
305. *Savoie*, 620 N.E.2d at 818.
306. *Id.*

cept the majority's explanation that *Dues* contravened earlier cases, however, Moyer pointed out that section 3937.18(G) legislatively overruled these prior cases, and *Dues* simply reflected that fact.[307] Moyer then asserted that the majority's construction of section 3937.18(G) amounted to judicial fiat.[308] The court, Moyer stated, should "refrain from judicially limiting legislation whose result it simply does not like," as this judicial limiting violated the tenet of separation of powers.[309]

IV. ANALYSIS

This analysis criticizes the *Savoie* court's decision on three bases.[310] First, the analysis attacks the *Savoie* court's decision for violating the freedom to contract.[311] Second, the analysis criticizes the *Savoie* decision for refusing to show deference to the legislative intent behind section 3937.18.[312] Finally, the analysis questions the court's complete abandonment of stare decisis.[313]

A. Freedom to Contract

The *Savoie* court violated the fundamental principle of freedom to contract.[314] Unless prohibited by statute, the courts should enforce a bargained for exchange.[315] In examining insurance contracts, therefore, the courts should determine whether insurance coverage exists "utilizing therein the familiar rules of construction and interpretation applicable to contracts generally."[316] These rules of construction require that words and phrases be given their plain and ordinary meaning if the words express the intent of the parties.[317]

If a policy term is ambiguous, the insured will receive the more favorable interpretation, since the insurer prepared the policy.[318] When the language used in an insurance contract is clear and unambiguous, however, the courts should not rewrite a policy to provide the insured

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307. *Id.*
308. *Id.*
309. *Id.* at 821.
310. *See infra* notes 314-430 and accompanying text.
311. *See infra* notes 314-62 and accompanying text.
312. *See infra* notes 363-85 and accompanying text.
313. *See infra* notes 386-430 and accompanying text.
314. U.S. CONST. art. I, § 10, cl. 1 and OHIO CONST. art. I § 1.
315. Of course there are other ways to avoid contractual obligations, such as fraud, duress, or mistake. *See generally* JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 334-92 (West 1987).
316. Gomolka v. State Auto. Mut. Ins. Co., 436 N.E.2d 1347, 1348 (Ohio 1982); *see also* Wagner v. National Fire Ins. Co., 8 N.E.2d 144 (Ohio 1937).
317. *Gomolka*, 436 N.E.2d at 1348.
318. *Id.* at 1348-49.

coverage not bargained for in the contract.[319] Both the Grange Mutual liability policy and the Motorists Mutual underinsured policies contained clear, definite terms.[320] The *Savoie* court refused to enforce the policies' terms, and therefore failed to follow its own established rules of construction.[321]

The *Savoie* court rewrote the terms and conditions of Grange Mutual's liability policy with Earl Miller.[322] The Grange Mutual liability policy clearly, conspicuously, and unambiguously limited the wrongful death damages to its per person limit.[323] The court ruled, however, that an insurer may not limit multiple claimants arising out of a person's wrongful death to a liability policy's single per person limit.[324] In reaching this determination, the *Savoie* court stated that an insurer's attempt to limit these damages would "violate the policy expressed by the General Assembly and this court."[325] The court, furthermore, noted that the liability insurer in *Savoie* ignored the elevated status given to wrongful death claims in Ohio.[326]

Earl Miller purchased certain levels of coverage to indemnify himself against possible loss.[327] According to Code section 4509.01(K), a person may indemnify oneself against whatever loss the person chooses, so long as the insurance meets the statutory minimum.[328] Miller's policy provided more than the statutory minimum.[329] Therefore, the court should enforce the policy as written. In its zeal to compensate the victims, however, the *Savoie* court ignored that the contract was between Earl Miller and Grange Mutual.[330]

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319. *Id.* at 1348.

320. Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809, 812-14 (Ohio 1993).

321. *Id.* at 809.

322. *Id.*

323. *Id.*

324. *Id.* at 810. The court's syllabus stated as follows:

> Each person who is presumed to have been damaged as a result of a wrongful death claim may, to the extent of his or her damages, collect from the tortfeasor's liability policy up to its per person limits subject to any per accident limit. Liability policy provisions which purport to consolidate wrongful death damages suffered by individuals into one 'each person' policy limits are unenforceable.

Id.

325. *Id.* at 813.

326. *Id.* at 812.

327. *Id.* at 810. As previously stated, the coverage Miller purchased provided for $100,000 per person and $300,000 per accident. *See supra* note 282. Insurance coverage serves a dual role, its foremost purpose is to indemnify the insured against loss. *See generally* ROBERT E. KEETON, INSURANCE LAW BASIC TEXT §§ 1.2, 3.1 (1971). Its secondary purpose is to compensate the victim. *Id.* The *Savoie* court concentrated not on the primary purpose behind insurance, but on the secondary purpose of compensating the victim. *Savoie*, 620 N.E.2d at 809.

328. OHIO REV. CODE ANN. § 4509.01(K) (Anderson 1994).

329. *Savoie*, 620 N.E.2d at 810.

330. *Id.* at 821 (Moyer, C.J., dissenting).

The court's result-oriented approach does not withstand scrutiny. As Justice Moyer questions in his dissent, if, in wrongful death actions, a liability insurer cannot contractually limit its exposure with a per person limit, why were the Motorists Mutual and Grange Mutual policies' $300,000 per accident limits enforceable?[331] The *Savoie* court's reasoning is suspect when one considers scenarios that involve tortfeasors with different liability limits.

For example, if tortfeasor "A" has a $20,000 per person limit and a $40,000 per accident limit, and is responsible for a wrongful death with two claimants, then the maximum recovery for the wrongful death claimants is the $40,000 per accident limit. If the same person is killed, however, by tortfeasor "B", who has $100,000 per person policy limits and a $300,000 per accident limit, then the maximum recovery to the two wrongful death claimants is $200,000. If the court enforces the policy provision in tortfeasor "B's" accident, the two wrongful death claimants still fare better than if the court does not enforce the policy provision in tortfeasor "A's" accident. In tortfeasor "B's" case, the insurer is required to provide coverage of $100,000 versus the $40,000 of coverage in tortfeasor "A's" case. Thus, the court recognizes that an insurer may limit its liability through the use of different coverage levels.[332]

The court's underlying reasoning is illogical. The court finds that section 2125.02 overrides the insured's contract with the insurer, yet the total policy limits for indemnification remain.[333] In fact, the court recognizes that an insurer may legitimately limit coverage based on the bargained for contract.[334] The *Savoie* court's rationale would only work if all persons carried the same amount of coverage.

The legislature enacted the wrongful death statute to allow each person presumed injured because of that person's relationship to the decedent the right to a separate claim.[335] Instead of the *Savoie* court's holding that each person's claim is subject to a different per person limit, each claim is compensable within the per person limit and should be compensated pro-rata. The legislature did not enact Code section 2125.02 to override a citizen's private right to contract.

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331. *Id.*

332. *Id.* Another scenario the *Savoie* court overlooked concerns cases where multiple wrongful death claimants, each now entitled to a separate per person limit, exceed the per accident limit. For example, four wrongful death claimants assert a claim against a policy with $100,000 per person limits and a $300,000 per accident limit. Following the *Savoie* court's reasoning, a court should not enforce the $300,000 per accident limit, but allow each claimant to recover $100,000, or $400,000 total.

333. *Id.* at 816.

334. *Id.*

335. OHIO REV. CODE ANN. § 2125.01 (Anderson 1992).

Second, the *Savoie* court interfered with the freedom to contract when it rewrote the underinsured policies between Motorists Mutual and the Savoies. The Motorists Mutual underinsured policies, similar to the Grange Mutual liability policy, limited all claims arising out of a bodily injury to a single person to the $100,000 per person limit.[336] The *Savoie* court, in an apparent attempt to revive the *Wood* holding,[337] held that: "Each person, who is covered by an uninsured/underinsured policy and who is presumed to be damaged by wrongful death [pursuant to R.C. 2125.0[2][sic],] has a separate claim subject to a separate per person policy limit."[338] Since the Motorists Mutual provision stated that the Savoies' claims were to be consolidated under the per person limit, the court refused to enforce the provision.[339] Rather, the *Savoie* court stated that the claims could not be consolidated, thus, the Motorists Mutual policies now possessed potential underinsured coverage of $300,000 instead of the $100,000 bargained for in the contract.[340] A cursory examination of the underinsured policies reveals that the *Savoie* court provided the Savoies with additional coverage.[341] Although the court could better justify its decision based upon the *Wood* holding rather than upon its ruling on the Grange Mutual liability policy, the court still intruded into the freedom of contract.[342]

Additionally, the *Savoie* court drafted a new Ohio anti-stacking law, disregarding the contractual provision between the Savoies and Motorists Mutual.[343] The court held that an insurer may preclude intra-family stacking, but not inter-family stacking.[344] The *Savoie* court stated in the second part of its syllabus that:

> Insurers may contractually preclude intra-family stacking—the stacking of uninsured/underinsured limits of policies and coverages purchased by family members living in the same household. Insurers may not contractually preclude inter-family stacking—the aggregation of uninsured/underinsured limits of policies purchased by two or more people who are not members of the same household.[345]

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336. *Savoie*, 620 N.E.2d at 812.

337. See *supra* notes 49-67 and accompanying text for a discussion of *Wood*.

338. *Savoie*, 620 N.E.2d at 810.

339. *Id.* at 816.

340. *Id.* The court upheld Motorists Mutual intra-family anti-stacking provision, so only one policy was at risk. *Id.* at 815.

341. *Id.* at 813.

342. See *supra* notes 49-67 and accompanying text for a discussion of *Wood*; *cf. supra* notes 83-104 and accompanying text discussing *Burris*.

343. *Savoie*, 620 N.E.2d at 814.

344. *Id.* at 810.

345. *Id.*

In this case, the Savoies' underinsured policies contained "other insurance" clauses.[346] Comporting with the requirements enunciated in *Dues v. Hodge*,[347] the policy language was clear, conspicuous, and unambiguous.[348] The *Savoie* court decided, however, to no longer support the inter-family anti-stacking provision in the Motorists Mutual policies.[349] The court's refusal to enforce the anti-stacking provision now exposed Motorists Mutual to an unforeseen risk, since the underinsured coverage was now mutually exclusive of any other coverage.[350]

The court articulated that it could not enforce the anti-stacking provision because of a "concern that liability insurers are collecting multiple premiums for multiple policies, while limiting recovery by anti-stacking language—the import of which is not known or understood by the insured consumer until tragedy strikes."[351] Not only is the *Savoie* court's paternalistic approach unwarranted, but the court proffers no factual basis for arriving at this conclusion. Thus, the *Savoie* court's holding is troublesome for four reasons.

First, the premise underlying the *Savoie* court's statement is that insureds are cognizant that stacking is possible. This premise is faulty since stacking is not a well known concept outside of the insurance industry, with the exception of people in the legal profession. When purchasing insurance, most individuals never consider the possibility of stacking insurance policies. Second, Motorists Mutual's "other insurance" clause contained in its policies explains the availability of coverage as most individuals would understand it.[352] Third, the *Savoie* court refuses to enforce inter-family anti-stacking provisions, yet the court enforces intra-family provisions on the theory that an insurer may provide reduced premiums on the latter policies.[353] The court, however, provides neither support for its conclusion, nor guidance to the lower courts.[354] The court makes no distinction between policies purchased from the same insurer or different insurers. Thus, the *Savoie* court's decision to enforce intra-family but not inter-family anti-stacking provisions is based on a faulty premise and unsupported by fact.

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346. *Id.* at 813; see *supra* note 266 for the text of the "other insurance" clause.

347. 521 N.E.2d 789 (Ohio 1988).

348. *Savoie*, 620 N.E.2d at 813; *see supra* note 144.

349. *Savoie*, 620 N.E.2d at 813. The court considered the inter-family and anti-stacking provisions unconscionable.

350. *Id.* at 816.

351. *Id.* at 813.

352. *Id.*

353. *Id.* at 815.

354. *Id.* at 814-15.

Finally, the *Savoie* court rewrote the underinsured policy by not allowing for set-off.[355] The court held: "An underinsurance claim must be paid when the individual covered by an uninsured/underinsured policy suffers damages that exceed those monies available to be paid by the tortfeasor's liability carriers."[356] The Motorist Mutual policy specifically stated that an insured may recover an amount no greater than the highest limit of any insurance applicable to the accident.[357] The Savoies purchased the underinsured policy to provide a fund to insure that a specific amount would always be available for their damages. The Savoies chose the amount of $300,000.[358] The court disallowed the set-off, however, and the Savoies were now entitled to recover from an insurance pool of $525,000.[359] Therefore, the *Savoie* court interfered with a private contract, creating rights and duties where none previously existed.

In sum, the *Savoie* court's failure to give credence to the terms of the insurance contracts is problematic. Insurance rates will need to be adjusted to absorb these unforeseen liabilities.[360] Insurance companies create the claim-paying pool through the collection of premiums.[361] Premiums are fixed through the use of actuarial science, and one factor that is necessary to the calculation is potential liability.[362] Thus, the *Savoie* court has judicially mandated a rate hike.

B. Usurpation of the Legislative Branch

The *Savoie* court's mandate to Motorists Mutual to provide underinsured protection to the Savoies violates section 3937.18(A)(2) of the Ohio Revised Code and is contrary to legislative intent.[363] In contrast to the General Assembly's first attempt at providing underinsured coverage, the legislature clearly expressed in section 3937.18(A)(2) that the courts should compare a tortfeasor's liability limits and the insured's underinsured coverage limits at the time of the accident to resolve the question of whether underinsured coverage exists.[364] Section

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355. *Id.* at 815-16.

356. *Id.* at 810.

357. *Id.* at 813.

358. *Id.* at 810.

359. *Id.* at 815-16.

360. Hentemann, *supra* note 62, at 21. Hentemann writes that the average uninsured/underinsured coverage will increase by about $40.00 per year, or to an annual premium of about $100.00. *Id.*

361. Hentemann, *supra* note 62, at 21.

362. Hentemann, *supra* note 62, at 21. Hentemann writes it is estimated that Ohio insurers will have to pay an additional $250,000,000 on existing claims. *Id.*

363. *See supra* notes 21-40 and accompanying text.

364. OHIO REV. CODE ANN. § 3937.18(A)(2) (effective through Oct. 9, 1994) (Anderson 1989); *see supra* notes 32, 37.

3937.18(A)(2) emphasized that coverage limits should be compared at the time of the accident.[365] This type of statute provides an efficient manner for determining the existence of underinsured coverage.[366] Not only does section 3937.18 enable insurers and insureds alike to easily determine when an underinsured claim is present, section 3937.18 also satisfies the purpose of putting a motorist in as good a position as if an uninsured motorist struck them.[367]

When the General Assembly repealed section 3937.181 and enacted section 3937.18(A)(2), the Legislative Service Commission analyzed the new statute.[368] The Commission described the intent behind section 3937.18(A)(2) as two-fold:

> (1) To make clear that, at the time of the accident, a determination can be made that the underinsured motorist coverage applies to the occurrence by reason of the fact that the limits of all insurance and liability bonds are less than the limits of his (presumably) underinsured motorist coverage. If the limits of the persons liable to the insured are equal to or more than the insured's underinsured motorist coverage, it would be clear that the coverage was not applicable [unless, of course, any insurer or surety for any of the persons liable later denies coverage or becomes insolvent].
> (2) To make clear that the insurer is not liable to the insured for any amounts that would duplicate the insured's actual recovery of amounts under insurance and bonds covering persons liable to the insured; and also that the insurer is not liable for any amounts of damages sustained by the insured in excess of the limits of the underinsured motorist coverage.[369]

Failing to respect the legislative purview, the *Savoie* court redrafted the statute.

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365. OHIO REV. CODE ANN. § 3937.18(A)(2) (effective through Oct. 9, 1994) (Anderson 1989). The legislature chose this comparison rather than comparing the tortfeasor's limits with the amount of damages caused. *Id.*

366. BENDER, *supra* note 22, § 30.00. The major flaw in a statute that compares limits at the time of the accident is the inequitable result that occurs when multiple claimants are involved. Since the policy limits are compared at the time of the accident, the limits may not be truly reflective of the actual amount of coverage available to the injured party. Some states have squarely addressed the issue by providing a hybrid statute. For example, the West Virginia legislature enacted a statute which shows its intent to expand underinsured motorist coverage from this usual underinsured statute. West Virginia Code § 33-6-31(B) states: "Underinsured motor vehicle . . . but limits of that insurance are either (i) less than limits the insured carried for underinsurance motorist coverage, or (ii) *has been reduced by payments to others injured in the accident to limits less than limits the insured carried for underinsured motorist coverage.*" W. VA. CODE § 33-6-31(B) (1992) (emphasis added).

367. *See supra* notes 21-40 and accompanying text.

368. Appellee, Motorists Mut. Ins. Co. Brief at 16, Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809 (Ohio 1993)(No. 92-952).

369. *Id.* at 16-17.

In redrafting the statute, the court first allowed the Savoies to stack the inter-family policies even though the limits were identical.[370] The General Assembly's mandate in section 3937.18 specifically states that one must compare the limits of policies at the time of the accident.[371] Despite the Savoies' underinsured policies and Miller's liability policy containing identical coverage limits, the *Savoie* court ruled that Motorists Mutual must provide up to its $300,000 per accident coverage to the Savoies.[372]

The court asserted that the basis of its holding was the knowledge that insurers are collecting full premiums for the underinsured coverage, and then may escape liability if the tortfeasor possesses equal or higher coverage limits (read unconscionable).[373] Again this premise is specious, since the insurance company bases the premium itself on potential payout.[374] If insurance companies wrote underinsured policies as the *Savoie* court is mandating, the premiums would be priced higher to reflect the potential risk.[375] The policies would be no more than supplemental liability policies, activated whenever an insured suffered damages in excess of the tortfeasor's policy limit.

Second, the *Savoie* court contradicted another portion of section 3937.18. Section 3937.18(A)(2) provides insurers the ability to reduce their payout from underinsured policies by the amounts the injured party receives from other sources, such as liability policies.[376] When the *Savoie* court ordered Motorists Mutual to provide underinsured coverage to the Savoies, the court refused to allow the insurer its statutory right of set-off.[377] Instead of forcing Motorists Mutual to provide $75,000 of coverage, the difference between its $300,000 per accident limit and the $225,000 Grange Mutual paid the Savoies, the court ruled that Motorists Mutual must provide $300,000 of underinsured coverage.[378]

The *Savoie* court, in refusing to follow legislative directive, has adopted a "floating layer theory of underinsured motorist coverage, triggered when the amount of the injured's damages exceed the

370. *Savoie*, 620 N.E.2d at 815.

371. OHIO REV. CODE ANN. § 3937.18 (effective through Oct. 9, 1994) (Anderson 1989).

372. *Savoie*, 620 N.E.2d at 815-16.

373. *Id.* at 814. The court found unconscionable the inter-family anti-stacking provisions. *Id.* at 813.

374. Hentemann, *supra* note 62, at 21.

375. Hentemann, *supra* note 62, at 21.

376. OHIO REV. CODE ANN. § 3937.18(A)(2) (effective through Oct. 9, 1994) (Anderson 1989).

377. *Savoie*, 620 N.E.2d at 815-16.

378. *Id.*

tortfeasor's liability limits."[379] The court's interpretation is more consistent with the wording used in section 3937.181, now repealed, than with current section 3937.18(A)(2).[380]

The *Savoie* court ruled that it was unable to determine by the language of the section 3937.18(A)(2) whether the legislature intended to allow insurers to "preclude inter-family stacking, intra-family stacking or both."[381] The methodology behind the court's analysis becomes apparent upon closer examination. To arrive at the result desired, the court needed not only to ignore the language of section 3937.18(A)(2), which required a comparison of policy limits, but also to ignore the set-off provision.[382] Thus, the *Savoie* court premised its holding on its interpretation that section 3937.18(A)(2) is inapplicable to inter-family stacking, finding these anti-stacking provisions unconscionable.[383] The court's holding that anti-stacking provisions did not apply in inter-family cases provided the court the necessary leeway to reach the desired result.[384] The ultimate result was to avoid not only the stacking provision, but also the set-off provision.[385] The *Savoie* court, therefore, violated the legislative mandate which allowed insurers to preclude stacking, and, additionally, it disregarded the specific directive of set-off contained in section 3937.18(A)(2).

C. *The Abandonment of Stare Decisis*

The *Savoie* court effectively abandoned stare decisis in reaching its decision.[386] In refusing to adhere to precedent, the court has impugned its credibility.[387] As Chief Justice Moyer articulated in his dissent, "[m]y primary objection to these holdings, which overrule three

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379. Amy J. McKee, Comment, *Unraveling the Underinsured Motorist Web: Ohio Underinsured Motorist Coverage*, 20 U. AKRON L. REV. 749, 752 (1987).

> Under this theory an insured's underinsured motorist coverage "floats" on top of any recovery from other sources up to the total value of the insured's injuries. If the injured insured collects from the tortfeasor's insurer insufficient funds to adequately compensate him for his injuries, the underinsurance carrier must pay the difference between its insured's damages and the tortfeasor's liability limits up to the underinsurance policy limits.

Id. at 752 n.30 (citing Elovich v. Nationwide Ins. Co., 707 P.2d 1319 (Wash. 1985)).

380. *Savoie*, 620 N.E.2d at 814; *see supra* notes 32, 37.

381. *Savoie*, 620 N.E.2d at 814.

382. OHIO REV. CODE ANN. § 3937.18 (effective through Oct. 9, 1994) (Anderson 1989); see *supra*, note 9 for the text of the set-off provision.

383. *Savoie*, 620 N.E.2d at 814.

384. *Id.*

385. *Id.* at 809. Otherwise, the *Savoie* court would have been forced to acknowledge the enforceability of the set-off provision. *Id.* Motorists Mutual would then be responsible for the difference in the policies of $75,000, its $300,000 policy limit minus the $225,000 the Savoies received from Grange Mutual.

386. *See supra* notes 68-104, 140-213 and accompanying text.

387. *Savoie*, 620 N.E.2d at 821 (Moyer, C.J., dissenting).

recent decisions and limit another, is this court's continued disrespect for *stare decisis*."[388] Justice Moyer believed that the *Savoie* court's failure to recognize that similar fact patterns need to receive similar results is contrary to justice.[389] Further, Moyer asserted "[t]here has always been tension between certainty and stability in the law and the drive to satisfy a judge's individual desire to do justice."[390] The *Savoie* court's desire to provide sympathetic justice will lead to a climate of uncertainty in which future decisions cannot be predicted.[391] The court, in creating a climate of uncertainty, frustrates an individual's right to justice.[392]

In proceeding to its desired result, the *Savoie* court's first hurdle was its recent holding in *Burris v. Grange Mutual Cos.*[393] The *Burris* court had recently faced an identical situation but had refused to expand the *Wood* holding to cover a liability policy.[394] The *Burris* court found that liability policies, unlike underinsured policies, had no statutory requirement to keep insurers from limiting tort claimants to the per person limit of the policy.[395]

In *Savoie*, less than four years later, the court completely reversed its position.[396] The *Savoie* court offered little to support its radical change in position except for a specious analysis.[397] The change is more disconcerting since the court did not base its decision on new information. Rather, the court stated that Grange Mutual's attempt to limit wrongful death damages to the per person limit was against the public policy articulated by both the General Assembly and the court.[398] The *Savoie* court's basis for the statement, Ohio Constitution Article I and Code section 2125.02, were both in force at the time of the *Burris* deci-

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388. *Id.* at 821.

389. *Id.*

390. *Id.*

391. *Id.*

392. *Id.*

393. 545 N.E.2d 83 (Ohio 1989).

394. *Burris*, 545 N.E.2d at 83.

395. *Id.* at 88. Again, the *Burris* court found it significant that an insurer that provided uninsured/underinsured coverage assumed the risk and duties of section 3937.18. *Id.*

396. *Savoie*, 620 N.E.2d at 809.

397. *Id.* As Justice Moyer stated,

> [t]he majority overrules these cases, asserting that the framers of the Ohio Constitution, the General Assembly and this court have all indicated that 'damages for wrongful death claims should not be limited.' Section 19a, Article I of the Ohio Constitution, however, states only that wrongful death damages shall not be limited '*by law*.' This means that there may be no artificially imposed cap, by statute or judicial decision, on total damages recoverable for wrongful death.

Id. at 821.

398. *Id.* at 814.

sion.[399] Therefore, the *Savoie* court's holding, which allowed the Savoies the per accident limit of the Grange policy, had no basis in law or fact. Rather, the court, in an effort to compensate the insureds, simply decided to change policy.

Next, the *Savoie* court had to decide if the tortfeasor was underinsured in order to determine whether Motorists Mutual must provide the Savoies underinsured coverage.[400] Recently, the court had decided that a tortfeasor was not underinsured if the tortfeasor's policy limits were identical to the insured's limits.[401] In fact, in 1990, the *Hill* court, when interpreting section 3937.18(A)(2), stated: "[s]imply put, the underinsured motorist statute requires an insurer to provide coverage to its insured when the tortfeasor's coverage is *less* than the limits of the insured's uninsured motorist coverage at the time of the accident."[402] This statement by the court would apparently resolve the question for most citizens. The *Savoie* court ruled, however, that the tortfeasor was underinsured and Motorists Mutual must provide coverage.[403] The *Savoie* court, therefore, did not follow its own precedent, since both the Savoies and Miller possessed identical coverage limits.[404]

Ruling that underinsured coverage existed, the *Savoie* court limited *Dues* and overruled *Hower*.[405] First, the *Dues* court had held that an insurer may preclude the stacking of coverages under section 3937.18(G) as long as the language used was "unambiguous and clear and conspicuous."[406] In *Savoie*, Motorists Mutual had used language in the policy that met the requirement articulated in *Dues*.[407] The court, however, never addressed the language Motorists Mutual used because the court held that an insurer could not preclude inter-family stacking.[408] Second, the *Savoie* court overruled *Hower* since *Hower* concerned inter-family stacking, and the *Hower* court had upheld an inter-family anti-stacking provision.[409]

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399. *Id.* at 821.

400. *Id.* at 813-15.

401. Hill v. Allstate Ins. Co., 553 N.E.2d 658 (Ohio 1990); *see supra* notes 68-82 and accompanying text.

402. *Hill*, 553 N.E.2d at 660.

403. *Id.* at 660-61.

404. *Savoie*, 620 N.E.2d at 815.

405. *See supra* notes 144, 157-67 and accompanying text.

406. Dues v. Hodge, 521 N.E.2d 789, 792 (Ohio 1988).

407. *Savoie*, 620 N.E.2d at 813.

408. *Id.* at 814.

409. *Id.* at 815. Although *Hower* did not involve wrongful death claimants, the *Savoie* court's ruling on inter-family stacking should be applicable to personal injury cases. Hower v. Motorists Mut. Ins. Co., 605 N.E.2d 415 (Ohio 1992); *see also* Newman v. United Ohio Ins. Co., 631 N.E.2d 157 (Ohio 1994); Hillman v. Hastings Mut. Ins. Co., 626 N.E.2d 73 (Ohio 1994), *vacated in part*, 631 N.E.2d 157 (Ohio 1994).

The only previous insurance case law the *Savoie* court did not disagree with was *Karabin*.[410] The *Karabin* court upheld the validity of an insurer's intra-family anti-stacking provision.[411] The Motorists Mutual policy in *Savoie* contained the identical provision as the policy contained in *Karabin*.[412] In holding that an insurer may preclude intra-family stacking, the *Savoie* court noted that "[i]n intra[-]family stacking situations, insurers can provide reduced premiums for clients who purchase multiple uninsured/underinsured policies for separate vehicles."[413] The court reasoned that since insurers reduced premiums, they should be able to limit benefits.[414]

Again, the *Savoie* court's reasoning is suspect. For the court's reasoning to be valid, one must make two assumptions. First, one must assume that family members living in the same household have procured their insurance from the same company. Second, one must assume that the providers of the underinsured coverage have indeed reduced the premiums. In establishing this blanket holding that insurers may preclude intra-family stacking, the court is once again trying to "place square legal pegs in round legal holes."[415] Absent these two assumptions, the *Savoie* court's underlying reason for not allowing insurers to preclude inter-family stacking may also be applicable in intra-family stacking.

Following the *Savoie* court's reasoning, the insurer should not restrict or limit the benefits in two situations.[416] The first situation is if an insured has obtained policies from different insurers.[417] The second situation is if the insured procured the policies from the same insurer and the insurer did not reduce the premiums.[418] The court provides no facts supporting the reason for not allowing the Savoies to stack their underinsured coverage. Although Motorists Mutual provided both underinsured policies, the court did not cite evidence from which one could deduce that the insurer had reduced the Savoies' premiums and thus, should be allowed to restrict the benefits.[419]

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410. Karabin v. State Auto. Mut. Ins. Co., 462 N.E.2d 403 (Ohio 1984).

411. *Id.*

412. *Savoie*, 620 N.E.2d 809; *see supra* note 266.

413. *Id.* at 814.

414. *Id.*

415. *Id.* at 816 (Douglas, J., concurring).

416. *Id.* at 814-15.

417. *Id.*

418. *Id.*

419. *See* Statement of Stipulated Facts, *supra* note 216, at 2.

Lastly, the *Savoie* court ignored its prior rulings with regard to set-off provisions.[420] Previously the Ohio court had held in *James v. Michigan Mutual* that:

> [a] setoff from the limits of underinsured motorist coverage, therefore, is not contrary to the public policy behind the enactment of R.C. 3937.181(C), so long as such set off (1) is clearly set forth in the terms of the underinsured motorist coverage and (2) does not lead to a result wherein the insured receives a total amount of compensation that is less than the amount of compensation that he would have received if he had been injured by an uninsured motorist.[421]

In *Savoie*, the terms of the underinsured motorist coverage clearly set forth the set-off provision.[422] The court cited *James* for the proposition that an insured "is entitled to receive compensation in an amount no less than what he would receive if he had been injured by an uninsured motorist."[423] Then the court proceeded to ignore the holding in *James*.[424]

The *Savoie* court held that the Savoies were entitled to collect up to the $300,000 limits of their policy with Motorists Mutual to the extent that their damages exceed the $225,000 for which the court ruled Grange Mutual was responsible.[425] The court held that Motorists Mutual's set-off provision was not enforceable and Motorists Mutual's full policy limits were at risk.[426] In essence, the *Savoie* court overruled *James*.[427] The court held that an insurer was not entitled to set-off with respect to inter-family stacking. Motorists Mutual, therefore, had potential liability of $300,000 instead of the difference between the Savoies recovery from Grange Mutual and the underinsured limits, or $75,000.

The *Savoie* court, in its desire to provide insureds with added protection, did more harm than good. The credibility of the court is seriously undermined when similar fact situations receive dissimilar results.[428] For better or worse, the doctrine of *stare decisis* is important

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420. *Savoie*, 620 N.E.2d at 815.

421. James v. Michigan Mut. Ins. Co., 481 N.E.2d 272, 275 (Ohio 1985).

422. Statement of Stipulated Facts, supra note 216, at 2. Under the LIMIT OF LIABILITY section of the policy the coverage read: "With respect to coverage under Section 2 of the definition of uninsured motor vehicle, the limit of liability shall be reduced by all sums paid because of bodily injury by or on behalf of persons or organizations who may be legally responsible." *Id.* at 6.

423. *Savoie*, 620 N.E.2d at 815 (citing *James*, 481 N.E.2d at 274).

424. *Savoie*, 620 N.E.2d at 815.

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.* at 821 (Moyer, C.J., dissenting).

to the efficient and consistent administration of justice. An individual or corporation should be able to conform his or her conduct to the law as pronounced by the court.[429] The altering of the court's composition should not lead to such radical changes because problems will surely result.[430]

V. LEGISLATIVE RESPONSE

On July 21, 1994, the Ohio legislature enacted Amended Substitute Senate Bill No. 20 (Bill).[431] The Bill contained an amended version of Ohio Revised Code section 3937.18.[432] The effective date of the

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429. *Id.*

430. For a discussion on coalition building within the Ohio Supreme Court, see Cynthia L. Sands, Note, Cincinnati Insurance Company v. Phillips*: The Ohio Supreme Court Attempts To Reconcile Limitation Of Liability Language With Ohio's Wrongful Death Statute*, 20 CAP. U. L. REV. 781 (1991).

431. Am. Sub. S.B. 20, 120th General Assembly, Reg. Sess. (July 21, 1994) (Baldwin 1994).

432. OHIO REV. CODE ANN. § 3937.18 (effective Oct. 10, 1994) (Anderson Supp. 1994). The pertinent parts of the amended version of the Ohio Revised Code § 3937.18 read as follows:

> (A) No automobile liability or motor vehicle policy of insurance . . . coverages are provided to persons insured under the policy for loss due to bodily injury or death suffered by such persons:
>
> (1) Uninsured motorist coverage, . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, . . . including death, suffered by any person insured under the policy.
>
> (2) Underinsured motorist coverage . . . shall provide protection for an insured against loss for bodily injury . . . including death, suffered by any person insured under the policy, where the limits of coverage available for payment to the insured under all bodily injury liability bonds and insurance policies covering persons liable to the insured are less than the limits for the insured's uninsured motorist coverage. Underinsured motorist coverage is not and shall not be excess insurance to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection not greater than that which would be available under the insured's uninsured motorist coverage if the person . . . were uninsured at the time of the accident. The policy limits of the underinsured motorist coverage shall be reduced by those amounts available for payment under all applicable bodily injury liability bonds and insurance policies covering persons liable to the insured.
>
> (G) Any automobile liability . . . insurance . . . may, without regard to any premiums involved, include terms . . . that preclude any and all stacking of such coverages, including but not limited to:
>
> (1) interfamily stacking, which is the aggregating of the limits of such coverages by the same person or two or more persons, whether family members or not, who are not members of the same household;
>
> (2) intrafamily stacking, which is the aggregating of the limits of such coverages purchased by the same person or two or more family members of the same household.
>
> (H) Any automobile liability . . . insurance that includes coverages offered under division (A) of this section and provides a limit of coverage for payment for damages for bodily injury, including death, sustained by any one person in any one automobile accident, may, notwithstanding Chapter 2125. of the Revised Code, include terms and conditions to the effect that all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to bodily injury,

amended version of Revised Code section 3937.18 is October 10, 1994.[433] In the amended version of section 3937.18,[434] the legislature responded to the recent Ohio Supreme Court decision of *Savoie v. Grange Mutual Insurance Co.*[435] Disagreeing with the *Savoie* court's four-part holding, the legislature acted quickly to alleviate any negative ramifications of the *Savoie* decision.

The legislature refused to allow the *Savoie* court to rewrite Ohio insurance law. Not only did the legislature amend the language of section 3937.18, but the legislature also published the underlying intent of its amendments in separate sections of the Bill.[436] The legislature amended sections 3937.18(A), (A)(1), (A)(2), (G), and (H).[437] The *Savoie* court relied on the previous version of each of these subsections in section 3937.18 to reach its conclusions.[438]

The Ohio legislature expressly addressed each of the four parts of the *Savoie* court's syllabus.[439] In part one of its syllabus, the *Savoie* court held that a tortfeasor's insurer may not consolidate claims for wrongful death under a single per person policy limit.[440] Rather, the liability insurer must compensate those persons presumed injured under section 2125.02 as separate claims subject only to the per accident limit of the policy.[441] Similarly, in part four of its syllabus, the *Savoie* court held "each person who is covered by uninsured/underinsured and who is presumed damaged pursuant to R.C. 2125.0[2][sic] has a separate claim subject to a separate per person policy limit."[442] In section 3937.18(H), the legislature specifically provided that:

> Notwithstanding Chapter 2125 of the Revised Code, . . . all claims resulting from or arising out of any one person's bodily injury, including death, shall collectively be subject to the limit of the policy applicable to

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including death, sustained by one person, and, for the purpose of such policy limit shall constitute a single claim. Any such policy limit shall be enforceable regardless of the number of insureds, claims made, vehicles or premiums shown in the declarations or policy, or vehicles involved in the accident.

Id.

433. *Id.*

434. Am. Sub. S.B. 20, 120th General Assembly, Reg. Sess. §§ 7-10 (July 21, 1994) (Baldwin 1994).

435. 620 N.E.2d 809 (Ohio 1993).

436. Am. Sub. S.B. 20, 120th General Assembly, Reg. Sess. §§ 7-10 (July 21, 1994) (Baldwin 1994).

437. *See supra* note 431, *compare with* notes 8, 9, 38, 272.

438. *Savoie*, 620 N.E.2d at 809-10.

439. *Id.* at 810.

440. *Id.*

441. *Id.*

442. *Id.*

> bodily injury, including death, sustained by one person, and . . . shall constitute a single claim.[443]

To prevent misinterpretation of its intent, the legislature articulated the purpose underlying the amendment to section 3937.18(H).[444] The legislature pronounced that policy provisions purporting to limit multiple claims to a single per person policy limit involving injury or death to any one person are enforceable.[445] Therefore, the legislature enacted section 3937.18(H) to supersede the *Savoie* court's ruling, which held that neither liability nor uninsured/underinsured policies may collectively limit wrongful death claimants to a single per person limit of the policy.[446]

The Ohio legislature also declared that the courts should enforce an insurer's inter-family anti-stacking provision. In part two of its syllabus, the *Savoie* court noted a distinction between intra-family and inter-family anti-stacking provisions.[447] The court refused to enforce the inter-family anti-stacking provisions, labeling those provisions unconscionable.[448] In refusing to enforce the inter-family anti-stacking provision, the court effectively created two separate pools from which the Savoie family could recover compensation.[449] In section 3937.18(G) the legislature responded by adding the following language: "Any automobile liability . . . that includes coverages offered under division (A) . . . may, without regard to the premiums involved, include terms that preclude any and all stacking . . . including but not limited to: (1) interfamily stacking . . . [and] (2) intrafamily stacking . . . ."[450] In addition, the legislature expressly asserted that the intent of these additions was to supersede the *Savoie* court's holding with respect to stack-

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443. OHIO REV. CODE ANN. § 3937.18(H) (effective Oct. 10, 1994) (Anderson Supp. 1994).

444. Am. Sub. S.B. 20, 120th General Assembly, Reg. Sess. § 10 (July 21, 1994) (Baldwin 1994). Section 10 of the Bill reads as follows:

> It is the intent of the General Assembly in enacting division (H) of section 3937.18 . . . to supersede the effect of the holding . . . in Savoie v. Grange Mut. Ins. Co. (1993) . . . that declared unenforceable a policy limit that provided that all claims for damages resulting from bodily injury, including death, sustained by any one person in any one accident would be consolidated under the limit of the policy applicable to bodily injury, including death, sustained by any one person, and to declare such policy provisions enforceable.

Id.

445. *Id.*

446. OHIO REV. CODE ANN. § 3937.18(H) (effective Oct. 10, 1994) (Anderson Supp. 1994).

447. Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809, 810 (Ohio 1993).

448. *Id.* at 814.

449. *Id.*

450. OHIO REV. CODE ANN. § 3937.18(G) (effective Oct. 10, 1994) (Anderson Supp. 1994).

ing.[451] Therefore, contrary to the *Savoie* court's ruling that an insurer may not preclude inter-family stacking, the legislature declared that this was a permissible practice.

Lastly, the Ohio legislature provided specific guidance on how to determine when an underinsured claim exists.[452] In part three of its syllabus, the *Savoie* court held "[a]n underinsured claim must be paid when the insured suffers damages in excess of the tortfeasor's liability policy limits."[453] The legislature rejected the concept that underinsured coverage was excess coverage.[454] Instead, the legislature amended section 3937.18(A)(2) to include the following language:

> Underinsured motorist coverage is not and shall not be *excess insurance* to other applicable liability coverages, and shall be provided only to afford the insured an amount of protection *not greater than* that which would be available under the *insured's uninsured motorist coverage* if the *person or persons liable were uninsured* at the time of the accident.[455]

The legislature intended to clarify two things with the changes made in section 3937.18(A)(2).[456] First, an underinsured claim arises only when the tortfeasor's liability limit is less than the potential claimant's limit.[457] Second, if the potential claimant demonstrates that the

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451. Am. Sub. S.B. 20, 120th General Assembly, Reg. Sess. § 9 (July 21, 1994) (Baldwin 1994). Section 9 reads as follows:

> It is the intent of the General Assembly in amending division (G) of section 3937.18 . . . to supersede the effect of the holding . . . in Savoie v. Grange Mut. Ins. Co. . . . relative to the stacking of insurance coverages, and to declare and confirm that the purpose and the intent of the 114th General Assembly in enacting division (G) . . . was, . . . and the intent of the General Assembly in amending section 3937.18 . . . is, to permit any motor vehicle insurance policy that includes uninsured motorist coverage and underinsured motorist coverage to include terms . . . to preclude any and all stacking of such coverages, including interfamily and intrafamily stacking.

Id.

452. OHIO REV. CODE ANN. § 3937.18(A)(2) (effective Oct. 10, 1994) (Anderson Supp. 1994).

453. *Savoie*, 620 N.E.2d at 810.

454. OHIO REV. CODE ANN. § 3937.18(A)(2) (effective Oct. 10, 1994) (Anderson Supp. 1994); Am. Sub. S.B. 20, 120th General Assembly, Reg. Sess. §§ 7, 8 (July 21, 1994) (Baldwin 1994).

455. OHIO REV. CODE ANN. § 3937.18(A)(2) (effective Oct. 10, 1994) (Anderson Supp. 1994) (emphasis added in text).

456. Am. Sub. S.B. 20, 120th General Assembly, Reg. Sess. § 7, 8 (July 21, 1994) (Baldwin 1994).

457. *Id.* Section 7 reads as follows:

> It is the intent of the General Assembly in amending division (A) (2) of section 3937.18 of the Revised Code to supersede the effect of the holding of the Ohio Supreme Court in the October 1, 1993 decision in Savoie v. Grange Mut. Ins. Co. (1993), 67 Ohio St. 3d 500, relative to the application of underinsured motorist coverage in those situations involving accidents where the tortfeasor's bodily injury liability limits are greater than or equal to the limits of the underinsured motorist coverage.

tortfeasor maintained lower limits, the claimant is entitled to the difference between the tortfeasor's limits and the underinsured policy limits.[458] Thus, the legislature countermanded the *Savoie* court's approach to determining the existence of underinsured coverage.[459] In addition, whereas the *Savoie* court refused to allow underinsured carrier to set-off the amounts its insureds received from tortfeasor's liability policy from underinsured policy limits, the legislature has pronounced set-off to be an acceptable practice.[460]

VI. Conclusion

The *Savoie* court failed to respect an individual's freedom to contract. The contractual provisions the *Savoie* court rewrote were neither unfair nor ambiguous. Rather, the justices felt compelled to compensate the Savoies at the insurer's expense. The court justified its ruling on a number of different theories.[461] The court, however, upheld similar provisions in the recent past. In rewriting the contracts, the *Savoie* court did not conceptualize the implications of its decision. The court did not merely provide compensation to innocent victims, but forced one party to absorb losses not bargained for in the contract.

While the *Savoie* majority previously constituted a minority coalition on the court, the justices' desires to change policy is not a valid reason to change law. As Chief Justice Moyer wrote in subsequent decisions, "although I disagree with the court's holding in *Savoie*, it is now the law of the land and I am bound by the doctrine of stare decisis."[462] If the other justices followed the doctrine, the *Savoie* decision would not have happened.

Id.

458. *Id.* Section 8 reads as follows:

> It is the intent of the General Assembly in amending division (A)(2) of section 3937.18 of the Revised Code to declare and confirm that the purpose and intent of the 114th General Assembly in enacting division (A)(2) of section 3937.18 in Am. H.B. 489 was, and the intent of the General Assembly in amending section 3937.18 of the Revised Code in this act is, to provide an offset against the limits of the underinsured motorist coverage of those amounts available for payment from the tortfeasor's bodily injury liability coverage.

Id.

459. *Id.* The *Savoie* court compared the tortfeasor's policy limits with the amount of damages he caused. Savoie v. Grange Mut. Ins. Co., 620 N.E.2d 809 (Ohio 1993). The damages exceeded the policy limits, therefore, the court determined underinsured coverage existed. *Id.* at 810.

460. Am. Sub. S.B. 20, 120th General Assembly, Reg. Sess. § 8 (July 21, 1994) (Baldwin 1994).

461. For example, the court found that inter-family stacking provisions were unconscionable; additionally it found that a liability insurer's attempt to limit wrongful death claimants to a single per person limit was against public policy. *Savoie*, 620 N.E.2d at 812-13.

462. *See, e.g.*, Peace v. Prudential Prop. & Casualty Ins. Co., 623 N.E.2d 1194, 1194 (Ohio 1993). Justice Wright, the other dissenting justice in *Savoie*, stated:

Perhaps more troubling was the majority's complete disregard for the separation of powers and the role of the legislative branch. The *Savoie* court shielded its blatant usurpation of the legislature's power by reading unexpressed intent into statutes. The justices' expressed premise fails to withstand scrutiny, since the court proffered no evidence of the legislature's reputed intent. Rather, the legislature's quick rejection of *Savoie* and the subsequent amendment to section 3937.18 displays true legislative intent. Compassion forces one to side with the Savoies and to hope they may recover all compensation rightfully available to them. The court's role, however, is to interpret the law as written and to dispense justice. The *Savoie* court seems to have forgotten its role.

Matthew Devery McCormack

> I must dissent in continuing protest to the majority's sundry holdings in *Savoie* . . . . As stated in the dissent in *Savoie*, that holding lacks sound reasoning, reverses ten years of established case law and flouts the will of the General Assembly. Thus, I feel compelled to remain in this posture until the General Assembly has had the opportunity to undo the damage caused to the public by this unfortunate, result-oriented decision.

Id. at 1194.