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the instant case represents a refusal to abandon that basic concept of tort law which holds that a person should not escape liability for his negligent acts, as advocated by the *Capitola* decision. Hopefully the courts will follow the *Brown* application of the common law concept of personal accountability for wrongdoing and recognize the limitation which must be placed upon *Capitola*.

John S. Reagan

INSURANCE—OTHER INSURANCE PROVISIONS—AN OTHER INSURANCE PROVISION IS INEFFECTIVE IN LIMITING RECOVERY FROM AN INSURER FOR ACTUAL DAMAGES CAUSED BY AN UNINSURED MOTORIST. *American Liberty Insurance Co. v. Ranzau*, 481 S.W.2d 793 (Tex. Sup. 1972).

Paula Ranzau, minor daughter of the plaintiff, sustained serious injuries in an automobile accident while a passenger in a vehicle owned by Colonel Victor Raphael. The collision, caused by the negligence of an uninsured motorist, resulted in excess of \$50,000 in actual damages to the Ranzaus. Raphael's insurer paid the Ranzaus \$10,000 under the uninsured motorist coverage of his policy. The plaintiff had in force a similar policy with the defendant insurance company which likewise provided for a \$10,000 limit on uninsured motorist protection. In this policy there was an "other insurance" clause which precluded a recovery in excess of \$10,000. The plaintiff brought suit in an attempt to recover an additional \$10,000 from American Liberty Insurance Company,¹ alleging that the "other insurance" provision of their policy was invalid. This contention was based on the theory that the clause contravened the requirements of Texas Insurance Code Annotated article 5.06-1.² The trial court held the "other insurance" clause of

¹ The plaintiff also attempted to recover an additional \$10,000 on the theory that, as the plaintiff had paid premiums to the defendant insurance company on two automobiles, there should be \$20,000 uninsured motorist protection for one injured while riding in a non-owned automobile. Held: Where the insureds under uninsured motorist coverage did not pay an additional premium for non-owned automobile coverage as to a second automobile listed in their policy when they paid an additional premium for uninsured motorist coverage on the second automobile, the insureds were entitled to recover only a \$10,000 policy limit under uninsured motorist coverage for a one person injury, and not \$20,000 under the theory that extra uninsured motorist premiums paid on the second vehicle also paid for added non-owned automobile coverage. Cf. *Allstate Ins. Co. v. Zellars*, 462 S.W.2d 550 (Tex. Sup. 1970); *Southwestern Fire & Cas. Co. v. Atkins*, 346 S.W.2d 892 (Tex. Civ. App.—Houston 1961, no writ).

² TEX. INS. CODE ANN. art. 5.06-1 (Supp. 1972), wherein it is stated:

No automobile liability insurance . . . covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state unless coverage is provided therein or supplemental thereto, in the limits described in the Texas Motor Vehicle Safety-Responsibility Act, under provisions prescribed by the Board, for the protection of persons insured thereunder who are

the Ranzau policy invalid. Held—*Affirmed*. An “other insurance” provision is ineffective in limiting recovery from an insurer for actual damages caused by an uninsured motorist. The insured, under uninsured motorist coverage, is not precluded from recovering in excess of the statutory minimum of \$10,000 from his insurer even though he may have recovered \$10,000 from another insurer where the actual loss is in excess of \$10,000.

The initial uninsured motorist statute was enacted in New Hampshire in 1957.³ Since that time a majority of the states have enacted their own uninsured motorist statutes,⁴ with a conspicuous degree of uniformity.⁵ The standard form under the various uninsured motorist statutes is to provide “protection afforded an insured by first party insurance against bodily injury inflicted by an uninsured motorist, after the liability of the uninsured motorist for the injury has been established.”⁶ It has also been stated:

This insurance is intended, *within fixed limits*, to provide financial recompense to innocent persons who receive injuries, and the dependents of those who are killed, through the wrongful conduct of motorists who, because they are uninsured and not financially responsible, or because they are unknown, cannot be made to respond in damages.⁷

As a result of the plurality of uninsured motorist legislation, the insurers began to insert “other insurance” or “excess insurance” provisions in their automobile liability policies in an attempt to limit recovery for automobile collisions resulting from the negligence of an uninsured motorist. The effect of the “other insurance” provision is to limit the liability of the insurer to a specified maximum amount recoverable by the insured. This is accomplished by stipulating within the policy that if other insurance is paid to the insured, then the insurance provided by the insurer will be utilized only as excess insurance up to the applicable limit of the policy.

Prior to the predominance of uninsured motorist legislation the validity of the “other insurance” provision was based on a strict contractual construction of the policy involving the intent of the parties

legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom

³ *Safeco Ins. Co. of Am. v. Jones*, 243 So. 2d 736, 767 (Ala. 1970).

⁴ *Widiss, Perspectives On Uninsured Motorist Coverage*, 62 Nw. U.L. Rev. 497, 499 (1967).

⁵ ALA. CODE tit. 36, § 74(62a) (Supp. 1971); ARIZ. REV. STAT. ANN. § 20-259.01 (Supp. 1972); GA. CODE ANN. § 56-407.1 (1971); NEB. REV. STAT. § 60-509.01 (1968); TEX. INS. CODE ANN. art. 5.06-1 (Supp. 1972).

⁶ *Sturdy v. Allied Mut. Ins. Co.*, 457 P.2d 34, 36 (Kan. 1969).

⁷ G. COUCH, 12 COUCH ON INSURANCE § 45:623, at 569 (2d ed. R. Anderson 1964) (emphasis added).

One of the primary cases to confront the issue of the "other insurance" provision was *Burcham v. Farmers Insurance Exchange*.⁸ The court, in holding the "other insurance" clause valid, stated that "[t]o disregard the provisions of both policies and to allow plaintiff to collect to the extent of the policy limit of each policy, as asked by plaintiff, is equally absurd in the face of positive policy limitations."⁹ The court had stated previously that "[a] fair construction of the intention as expressed in the policies is that each company intended to provide and the insureds intended to buy coverage to the extent stated in the excess-escape clause."¹⁰ The State of Iowa had not yet enacted uninsured motorist legislation¹¹ and therefore, although the *Burcham* case is one of the most often cited in support of "other insurance" provisions, it lacks authority in situations where a state statute is involved. Yet the *Burcham* decision seems to apply in those cases where the court determines the validity of "other insurance" on a contractual basis instead of statutory interpretation.¹²

In contrast, a majority of the state legislatures have now given the courts uninsured motorist statutes upon which to rely. In giving a strict reading of the policy provisions, the court in *Travelers Indemnity Co. v. Wells*¹³ found that the legislation did not provide an injured guest protection against an uninsured motorist beyond the statutory maximum through a combination of the hosts' insurance and the insurance policy the guest had in service for himself. Although *Wells* is one of the most frequently cited authorities among decisions supporting the validity of the "other insurance" provisions,¹⁴ its importance was negated by the subsequent decision of *Bryant v. State Farm Mutual Automobile Insurance Co.*¹⁵ which construed the uninsured motorist law as being for the benefit of the injured party. Here it was recommended that the statute be given a liberal construction so that the intended purpose of the legislature could be fully enacted, and the "other insurance" provision was invalidated.¹⁶ Notwithstanding the

⁸ 121 N.W.2d 500, 501 (Iowa 1963).

⁹ *Id.* at 503.

¹⁰ *Id.* at 503.

¹¹ IOWA CODE ANN. § 516A (Supp. 1972).

¹² 45 C.J.S. *Insurance* § 922 (1946) stating:

In the absence of contrary stipulations the insured may recover the full amount of the loss . . . regardless of the fact that there are other policies covering the same property. The insured is limited, however, to but one full indemnity so that if he has fully recovered from one insurer he cannot recover from another.

¹³ 316 F.2d 770 (4th Cir. 1963).

¹⁴ See generally *M.F.A. Mut. Ins. Co. v. Wallace*, 431 S.W.2d 742 (Ark. 1968); *Globe Indem. Co. v. Baker*, 253 N.Y.S.2d 170 (Sup. Ct. 1964); *State Farm Mut. Auto. Ins. Co. v. Bafus*, 466 P.2d 159 (Wash. 1970).

¹⁵ 140 S.E.2d 817 (Va. 1965).

¹⁶ *Id.* at 819.

effect of *Bryant*, the *Wells* case remains as heavily relied upon authority.¹⁷

A number of jurisdictions have construed uninsured motorist statutes as intending to limit the recovery of the injured insured rather than to give him full protection. The Supreme Court of New Hampshire, in relying on *Burcham* and *Wells*, found that "[t]he design and purpose of the uninsured motorist insurance statute was to provide protection only up to the minimum statutory limits for bodily injuries caused by financially irresponsible motorists."¹⁸ The court came to this decision by interpreting the purpose of the legislature in enacting the uninsured motorist statute as not intending to provide the insured party with more protection than would have been available to him had he been injured by an insured motorist.¹⁹ Some jurisdictions have even gone so far as to give "other insurance" clauses legislative sanction.²⁰

However the courts have begun to question the validity of "other insurance" provisions²¹ and a noticeable trend has been established invalidating "other insurance" clauses as being contrary to public policy. In interpreting the Florida uninsured motorist statute,²² the

¹⁷ R. LONG, *THE LAW OF LIABILITY INSURANCE* § 24.15, at 46 (1972) which, in citing *Wells* as authority, states:

Neither statutory nor contractual limits of liability are increased by uninsured motorist coverage issued to multiple claimants where an "other insurance" clause explicitly excludes coverage when a passenger is injured while riding in an automobile not owned by him and the host has applicable uninsured motorist coverage. It is not the purpose of the uninsured motorist coverage to provide an injured guest with coverage beyond the statutory amounts through a combination of host's insurance and insurance issued to the guest. If the construction of the provision were otherwise, the uninsured motorist coverage would afford to policyholders a solvency on the part of the uninsured motorist greater than that required of him to qualify as an insured motorist under a financial responsibility law.

¹⁸ *Maryland Cas. Co. v. Howe*, 213 A.2d 420, 422 (N.H. 1965).

¹⁹ *Id.* at 422. See also *Russell v. Paulson*, 417 P.2d 658, 661 (Utah 1966) which referred to this as the majority rule. See generally *Lott v. Southern Bureau Cas. Ins. Co.*, 223 So. 2d 492, 494 (La. Ct. App. 1969) wherein the court stated that the defendant, by limiting its coverage with an "other insurance" clause, "merely protected itself against the eventuality of double recovery by an insured."

²⁰ See *Safeco Ins. Co. of Am. v. Jones*, 243 So. 2d 736, 737 (Ala. 1970) which found that Louisiana and California have specifically sanctioned "other insurance" by way of statute. See, e.g., *IOWA CODE ANN.* § 516A.2 (Supp. 1972) which states:

Nothing contained in this chapter shall be construed as requiring forms of coverage provided pursuant hereto, whether alone or in combination with similar coverage afforded under other automobile liability or motor vehicle liability policies, to afford limits in excess of those that would be afforded had the insured thereunder been involved in an accident with a motorist who was insured under a policy of liability insurance with the minimum limits . . . prescribed Such forms of coverage may include terms, exclusions, limitations, conditions, and offsets which are designed to avoid duplication of insurance or other benefits.

²¹ See *State Farm Mut. Auto. Ins. Co. v. Murphy*, 177 S.E.2d 257 (Ga. 1970); *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456 (Miss. 1971); *Curran v. State Auto. Mut. Ins. Co.*, 266 N.E.2d 566 (Ohio 1971); *Sparling v. Allstate Ins. Co.*, 439 P.2d 616 (Ore. 1968); *Harleysville Mut. Cas. Co. v. Blumling*, 241 A.2d 112 (Pa. 1968).

²² *FLA. STAT.* § 627.0851 (Supp. 1971).

Florida Supreme Court stated that "the statute does not limit an insured only to one \$10,000 recovery under said coverage where his loss for bodily injury is greater than \$10,000 and he is the beneficiary of more than one policy" ²³ The court went on to conclude that there was no latitude in the statute for an insurer to limit its liability through an "other insurance" clause and that therefore the clause should be "judicially rejected" as being in conflict with the statute. ²⁴

It has been said that the purpose of the uninsured motorist statutes is to give monetary protection to those persons who while lawfully making use of the highways themselves suffer injuries from the negligent use of the highways by others. ²⁵ The statutes are therefore intended to benefit the injured insured party, ²⁶ and should be most strongly construed in his favor. ²⁷ It has been concluded that the prevalent policy is to construe the statute as allowing recovery on more than one policy, although the statutory limit on one policy is exceeded, if the injured parties' injuries are greater than the limits of one of the policies. ²⁸

To date courts of fifteen states have invalidated "other insurance" clauses. ²⁹ It has been stated, however, that in relation to "other insurance" provisions, "[W]e have a confusing situation in that there are apparently two schools of thought among the courts as to how the provision should be construed." ³⁰ Thus it may be concluded that there is a decided split among the jurisdictions in construing the effectiveness of "other insurance" clauses.

The Texas courts, in a case of first impression, *Fidelity & Casualty Insurance Co. v. Gatlin*, ³¹ interpreted the Texas uninsured motorist statute ³² as "enacted by our Legislature for the benefit of the innocent

²³ *Sellers v. United States Fidelity & Guar. Co.*, 185 So. 2d 689, 692 (Fla. 1966).

²⁴ *Id.* at 690.

²⁵ *Katz v. American Motorist Ins. Co.*, 53 Cal. Rptr. 669, 672 (1966).

²⁶ *Bryant v. State Farm Mut. Auto. Ins. Co.*, 140 S.E.2d 817 (Va. 1965).

²⁷ *State Farm Mut. Auto. Ins. Co. v. Matlock*, 446 S.W.2d 81, 86 (Tex. Civ. App.—Texarkana 1969), *rev'd in part, aff'd in part*, 462 S.W.2d 277 (Tex. Sup. 1970). The court stated that "[i]n a policy of insurance that is open to different constructions, the construction given will be most favorable to the insured."

²⁸ *Safeco Ins. Co. of Am. v. Jones*, 243 So. 2d 736, 742 (Ala. 1970).

²⁹ *Id.*; *Tuggle v. Government Employees Ins. Co.*, 207 So. 2d 674 (Fla. 1968); *State Farm Mut. Auto. Ins. Co. v. Murphy*, 177 S.E.2d 257 (Ga. 1970); *Morelock v. Millers' Mut. Ins. Ass'n*, 260 N.E.2d 477 (Ill. Ct. App. 1970); *Sturdy v. Allied Mut. Ins. Co.*, 457 P.2d 34 (Kan. 1969); *Meridian Mut. Ins. Co. v. Siddons*, 451 S.W.2d 831 (Ky. Ct. App. 1970); *Keyes v. Beneficial Ins. Co.*, 197 N.W.2d 907 (Mich. Ct. App. 1972); *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456 (Miss. 1971); *Stephens v. Allied Mut. Ins. Co.*, 156 N.W.2d 133 (Neb. 1968); *Moore v. Hartford Fire Ins. Co. Group*, 155 S.E.2d 128 (N.C. 1967); *Curran v. State Auto. Mut. Ins. Co.*, 266 N.E.2d 566 (Ohio 1971); *Sparling v. Allstate Ins. Co.*, 439 P.2d 616 (Ore. 1968); *Harleysville Mut. Cas. Co. v. Blumling*, 241 A.2d 112 (Pa. 1968); *Fidelity & Cas. Ins. Co. v. Gatlin*, 470 S.W.2d 924 (Tex. Civ. App.—Dallas 1971, no writ); *Bryant v. State Farm Mut. Auto. Ins. Co.*, 140 S.E.2d 817 (Va. 1965).

³⁰ *Donaldson, Uninsured Motorist Coverage*, 34 INS. COUNSEL J. 57, 78 (1967).

³¹ 470 S.W.2d 924 (Tex. Civ. App.—Dallas 1971, no writ).

³² TEX. INS. CODE ANN. art. 5.06-1 (Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6701h, § 21 (Supp. 1972).

victim of a financially irresponsible motorist"³³ which should be "liberally construed to fully accomplish that purpose."³⁴ Chief Justice Williams concluded:

By enacting the law the Legislature did not attempt to fix any maximum limit of recovery but merely established a minimum requirement. The statute is plain in its direction that each policy of insurance issued must contain uninsured motorist protection in minimum amounts, without qualification, and it necessarily follows that any attempt on the part of an insurer to limit the effect of such provision must be held to be in derogation of the statute itself.³⁵

The court found that the Texas uninsured motorist statute sets a minimum amount of coverage but does not place a limit on the total amount of recovery as long as that amount does not exceed the amount of the total loss.³⁶ Furthermore, the court reasoned that the insured has the right to proceed under other available policies where his loss exceeds the limits of one policy.³⁷

The court in the instant case was faced with the unusual contention by the defendant insurance company that the Texas Insurance Code expressly authorizes the State Board of Insurance to subject policy limits of liability to reasonable regulations.³⁸ Accordingly, the Board had prescribed the "other insurance" provision as consistent with the statutory requirements and therefore the "other insurance" provision should be held valid. This contention implies that such authorization is tantamount to legislative sanction. The court dealt with this contention by stating that the Board of Insurance "may not act contrary to but only consistent with, and in furtherance of, the expressed statutory purposes,"³⁹ and that therefore the Board's approval of "other insur-

³³ *Fidelity & Cas. Ins. Co. v. Gatlin*, 470 S.W.2d 924, 927 (Tex. Civ. App.—Dallas 1971, no writ). See also *Employers Mut. Liab. Ins. Co. v. United Bonding Ins. Co.*, 450 S.W.2d 689, 693 (Tex. Civ. App.—Austin 1970, no writ) where the court said in citing *Gonzalez v. Texas Dept. of Public Safety*, 340 S.W.2d 860 (Tex. Civ. App.—El Paso 1960, no writ), that "the purpose [of the Motor Vehicle Safety-Responsibility Act] is to promote safe driving practices and to require all owners and operators of motor vehicles using the highways to discharge their financial responsibility to others for damages to persons or property occasioned by the exercise of the privilege or license of using the public highways."

³⁴ *Fidelity & Cas. Ins. Co. v. Gatlin*, 470 S.W.2d 924, 927 (Tex. Civ. App.—Dallas 1971, no writ).

³⁵ *Id.* at 927.

³⁶ *Id.* at 928.

³⁷ *Id.* at 928. See Dudley, *Uninsured Motorist Problems*, 33 TEX. B.J. 356, 357 (1970). Mr. Dudley stated, "The Other Insurance Provision is an endeavor of Insurance Companies to keep the Insured from collecting on more than one Policy."

³⁸ TEX. INS. CODE ANN. art. 5.06-1 (Supp. 1972).

³⁹ *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793, 796 (Tex. Sup. 1972). Other jurisdictions have considered the same contention with similar results. See *State Farm Mut. Auto. Ins. Co. v. Barnard*, 156 S.E.2d 148 (Ga. Ct. App. 1967) giving priority to statutory intent over authorization by a State Board of Insurance. See also *State ex rel. Nat'l Life Ins. Co. v. Hyde*, 241 S.W. 396 (Mo. 1922) finding that such authorization is only looked to when the statute in question is unclear and ambiguous.

ance" clauses was ineffective.⁴⁰

The *Ranzau* decision clearly places Texas in line with the current trend to invalidate "other insurance" provisions. This is certainly a desired result, as the statutory interpretation proves beneficial to the injured insured and does not place a limitation on the amount of damages recoverable after he has innocently suffered damages through the negligence of an uninsured motorist. This interpretation, which in effect determines that the legislature intended to fix a minimum amount of recovery instead of a maximum sum of uninsured motorist protection, creates a mandatory safeguard for the drivers of the state. If the legislature disagrees with this interpretation, it has the alternative of amending the statute so as to circumscribe the recovery by the insureds. Such was the reasoning in *Transportation Insurance Co. v. Wade*⁴¹ which nevertheless gave full credence to the "other insurance" provision.⁴² Therefore any attempt by the insurance companies to limit recovery is a contravention of the statute and will not be tolerated.

This interpretation displays a manifest intent by the courts to give outright protection to the individual. Undoubtedly this is the better view as there would be little purpose in enacting uninsured motorist legislation that would entitle the insured to only halfhearted protection. There is an even more potent argument, however, against allowing insurers to restrict coverage by the allowance of "other insurance" clauses. It would be the height of injustice to permit insureds to pay premiums on two policies which the insurers are required by statute to furnish, and then allow the insurers to pay on only one policy by limitations which they themselves have contrived, thereby depriving the policyholder of that for which he has paid. Such activity should not be condoned by the courts, and they have seen fit to prohibit this goal by refusing to allow the effectiveness of "other insurance" provisions. This is the only fair and reasonable response to the question of the validity of "other insurance" clauses and hopefully additional jurisdictions will follow this trend and refuse the limitations created in this manner.

J. Michael Myers

⁴⁰ *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793, 797 (Tex. Sup. 1972).

⁴¹ 475 P.2d 253 (Ariz. 1970).

⁴² *Id.* at 258.