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## PYRAMIDING OF UNINSURED MOTORIST PROTECTION: THE CONFUSION INHERENT IN OVERGENERALIZATION

MYRON E. EAST, JR.

Mass production and the prosperity following the Second World War placed the automobile within the grasp of the general public in this country. Unfortunately, as the number of vehicles increased, so did the number of accidents, and necessarily, the amount of personal injury litigation and insurance claims. The various state legislatures recognized the growing public concern about unrecovered losses incurred in automobile accidents and passed the financial responsibility laws,<sup>1</sup> but a serious problem still existed as many drivers remained uninsured. In response, the insurance carriers provided a new insurance policy endorsement, which has come to be known as "Uninsured Motorist Coverage" or "Family Protection Insurance." This coverage basically provides protection to insureds "against bodily injury inflicted by an uninsured motorist, after the liability of the uninsured motorist has been established."<sup>2</sup> In 1957 the state of New Hampshire became the first state to require this type of coverage for all automobile policies written within that state, and for all automobiles principally garaged or used there.<sup>3</sup> Other states soon followed and as of 1972 a total of 48 states had passed legislation requiring uninsured motorist coverage.<sup>4</sup>

A significant problem has arisen in situations involving uninsured motorists since frequently more than one policy of insurance is applicable to a given accident. It becomes necessary to determine how the policies relate to one another and whether or not the policy limits may be "stacked" or

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1. The financial responsibility laws were passed to remedy the problem of motorists without adequate resources to pay damage claims arising from their negligence. The primary purpose of these laws was to encourage drivers to insure themselves if they lacked financial responsibility. The laws required that the insurer write liability insurance in minimum amounts. Some laws threatened the suspension of a driver's license if the motorist was proved unable to satisfy a claim arising from a motor vehicle accident. Other states required future proof of financial responsibility, while a few states demanded that all drivers purchase liability insurance. For a discussion of the financial responsibility laws as well as a history of the events leading to the passage of the uninsured motorist statutes see A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* 3 to 17 (1969).

2. *Sturdy v. Allied Mut. Ins. Co.*, 457 P.2d 34, 42 (Kan. 1969). See generally 12 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 45.619, at 556 (2d ed. R. Anderson 1964); A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* § 1.8, at 12 (1969).

3. N.H. REV. STAT. ANN. §§ 268:15 to 268:15a (Supp. 1972).

4. The two states that do not have legislation requiring uninsured motorist coverage as of this writing are Maryland and North Dakota.

"pyramided" so that an insured would be entitled to the quantitative limits of all policies possibly applicable to offset his losses. Under the Standard Family Combination Automobile Policy<sup>5</sup> this would not be possible because insurance policy provisions prevent pyramiding. Notwithstanding the policy language, several courts have allowed the coverage to be stacked, their holdings usually grounded upon a decision that the limitations in the policy are contrary to the uninsured motorist statutes, or are ambiguous and must therefore be construed strictly against the carrier. Other courts have given effect to the policy provisions and refused to allow stacking. Many decisions and articles discussing the subject are confused, others confusing.<sup>6</sup>

One common problem proceeds from overgeneralization. Case after case upholds or renounces the "other insurance" clause referring to the clause in the singular. In fact, there are two separate "other insurance" clauses<sup>7</sup> in addition to a "limits of liability"<sup>8</sup> clause and other policy provisions which are activated in various situations concerning uninsured motorists.<sup>9</sup> Furthermore, the considerations involved in the stacking of uninsured motorist clauses may vary depending upon the given factual situation. Court and counsel should categorize the occurrences into three broad areas: non-owned, multipolicy, and multicar stacking. In doing so they could avoid some of the confusion heretofore present in handling uninsured motorist litigation.

#### NON-OWNED STACKING

The most litigated category of stacking cases arises when an insured is injured in an automobile *not owned* by the named insured.<sup>10</sup> The typical

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5. Standard Family Comb. Auto. Policy (Jan. 1, 1963 Rev.). Throughout this comment references will be made and examples drawn using the insurance policy language of the Standard Family Combination Automobile Policy; a model policy. If, however, discussion centers around a particular case, the insurance policy mentioned will be the policy of the parties involved in the litigation. The great majority of cases in the insurance area involve situations where the Standard Family Policy itself, or a policy almost identical, is applicable. Therefore, discussion based upon the Standard Family Policy has relevance to most situations an attorney will be faced with in the uninsured motorist field. The provisions of the Standard Family Combination Automobile Policy are set out in CCH 1973 AUTO. L. REP., Ins. Policy Provisions ¶¶ 2001-2340.

6. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.3, at 24 (1969) which speaks to the difficulty and controversy in the area as a natural consequence of the introduction of a new coverage, but more significantly as being a product of divergent attitudes and objectives.

7. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Other Insurance (Jan. 1, 1963 Rev.).

8. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Limits of Liability (Jan. 1, 1963 Rev.).

9. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Exclusions (Jan. 1, 1963 Rev.).

10. The named insured is the purchaser of the policy which provides coverage for himself, his family, all those individuals occupying the insured automobile, and those entitled to recover damages because of injury to those insured above. Standard

situations are those where a guest is riding in, or an insured person is driving, a non-owned automobile. If there is uninsured motorist protection on the automobile as well as upon the person, the stacking question arises, and the insurance policy provision known as the "excess-escape" clause is activated.

With respect to bodily injury to an insured while occupying an automobile *not owned* by the named insured, the insurance under Part IV [uninsured motorist protection] shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance; and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.<sup>11</sup>

The operation of this clause may be seen more clearly through example. Assume a guest passenger is covered by a liability policy with liability limits for uninsured motorist protection in the amount of \$10,000 per person and \$20,000 per accident.<sup>12</sup> The guest is riding in a vehicle insured in the same amount, and that vehicle is struck, and the guest is injured due to the negligence of an uninsured motorist. The guest is an insured under his own policy, and also the host's policy since he is a "person . . . occupying an insured automobile."<sup>13</sup> The claim of the guest under the host's policy is recoverable since that policy is generally considered primary,<sup>14</sup> but when the guest makes a claim under his own policy the "excess-escape" clause is asserted. If the clause is given effect there can be no further recovery. Although the guest's coverage is excess over any other similar insurance, the insurance applies only to the extent that the policy coverage exceeds the

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Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists; Definitions, "Insured" (Jan. 1, 1963 Rev.).

11. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Other Insurance (Jan. 1, 1963 Rev.).

12. Hereinafter this comment will show the policy limits of liability as it is commonly referred to in the insurance industry. In the example above, the \$10,000 per person and \$20,000 per occurrence limits would be shown as \$10/20. Were the limits \$50,000 and \$100,000 respectively, \$50/100 would be used.

13. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Definitions, "Insured" (Jan. 1, 1963 Rev.).

14. See *Transportation Ins. Co. v. Wade*, 475 P.2d 253 (Ariz. 1970); *Harris v. Southern Farm Bureau Cas. Ins. Co.*, 448 S.W.2d 652 (Ark. 1970); *Darrah v. California State Auto. Ass'n*, 66 Cal. Rptr. 374 (Dist. Ct. App. 1968); *Morelock v. Millers' Mut. Ins. Ass'n*, 274 N.E.2d 1 (Ill. 1971); *Lott v. Southern Farm Bureau Cas. Ins. Co.*, 223 So. 2d 492 (La. Ct. App. 1969); *Maryland Cas. Co. v. Howe*, 213 A.2d 420 (N.H. 1965); *Globe Indem. Co. v. Baker's Estate*, 253 N.Y.S.2d 170 (Sup. Ct. 1964); *Shoffner v. State Farm Mut. Auto. Ins. Co.*, 494 S.W.2d 756 (Tenn. 1972); *Lyon v. Hartford Acc. & Indem. Co.*, 480 P.2d 739 (Utah 1971). *But see* *Kackman v. Continental Ins. Co.*, 319 F. Supp. 540 (D. Alas. 1970); *Werley v. United Servs. Auto. Ass'n*, 498 P.2d 112 (Alas. 1972); *Thurman v. Signal Ins. Co.*, 491 P.2d 1002 (Ore. 1972); *Sparling v. Allstate Ins. Co.*, 439 P.2d 616 (Ore. 1968). See generally *Lamb-Weston, Inc. v. Oregon Auto Ins. Co.*, 346 P.2d 643 (Ore. 1959).

coverage of the other insurance. Since the liability limits are the same, there can be no further recovery under the guest's policy.<sup>15</sup>

Cases construing the effectiveness of the "excess-escape" clause are sharply split. As most uninsured motorist coverage is statutorily required, many cases turn upon whether or not the clause is in conflict with the statute. The cases that validate the clause, and therefore allow no stacking, do so under an interpretation that the statute, in effect, fixes the amount recoverable to the standards set by the financial responsibility laws.<sup>16</sup> The purpose of the statute is to guarantee that the assured will recover the amount he would have received were he injured in an accident with a motorist insured in the minimum statutory amount.<sup>17</sup> A different interpretation considers the statute to require protection for that part of the population which has no protection from uninsured motorists.<sup>18</sup> If there is recovery under one policy, that segment is protected. Therefore, a recovery under a second policy could be justifiably denied because the claimant does not fall within the class to be protected by the statute.<sup>19</sup> One court has determined that the "excess-escape" clause is not in conflict with the uninsured motorist statute since the assured has the statutory right to reject the coverage.<sup>20</sup> The insured is merely exercising his right under the statute when he enters into an insurance contract providing for a reduction in coverage.

In some states the uninsured motorist statute expressly allows clauses which prohibit double coverage. The Oregon statute sets forth suggested

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15. Were the limits of liability on the insured's own policy \$20/30, his company would be liable for \$10,000, the amount by which his policy limits exceeded that of the other insurance, up to his policy's liability limit.

Most uninsured motorist statutes require coverage in the amount of \$10/20, and most policies are written in this amount. As a result, in the common occurrence there is no further recovery if additional policies apply.

16. *Transportation Ins. Co. v. Wade*, 475 P.2d 253, 257 (Ariz. 1970); *Harris v. Southern Farm Bureau Cas. Ins. Co.*, 448 S.W.2d 652, 654 (Ark. 1970); *Grunfield v. Pacific Auto. Ins. Co.*, 42 Cal. Rptr. 516, 518 (Dist. Ct. App. 1965); *Kirby v. Ohio Cas. Co.*, 42 Cal. Rptr. 509, 512 (Dist. Ct. App. 1965); *Morelock v. Millers' Mut. Ins. Ass'n*, 274 N.E.2d 1, 3 (Ill. 1971); *Putman v. New Amsterdam Cas. Co.*, 269 N.E.2d 97 (Ill. 1970); *Long v. United States Fire Ins. Co.*, 236 So. 2d 521, 524 (La. Ct. App. 1970); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 235 So. 2d 621, 623 (La. Ct. App. 1970); *Rolling v. Miller*, 233 So. 2d 723, 727 (La. Ct. App. 1970); *Lott v. Southern Farm Bureau Cas. Ins. Co.*, 223 So. 2d 492, 494 (La. Ct. App. 1969); *Courville v. State Farm Mut. Auto. Ins. Co.*, 194 So. 2d 797 (La. Ct. App. 1967); *Le Blanc v. Allstate Ins. Co.*, 194 So. 2d 791, 795-96 (La. Ct. App. 1967); *Maryland Cas. Co. v. Howe*, 213 A.2d 420, 421-22 (N.H. 1965); *Shoffner v. State Farm Mut. Auto. Ins. Co.*, 494 S.W.2d 756, 759 (Tenn. 1972); *Lyon v. Hartford Acc. & Indem. Co.*, 480 P.2d 739, 742-43 (Utah 1971).

17. Cases cited note 16 *supra*.

18. *Transportation Ins. Co. v. Wade*, 475 P.2d 253 (Ariz. 1970).

19. *Id.* at 257.

20. *Werley v. United Servs. Auto. Ass'n*, 498 P.2d 112, 115 (Alas. 1972). The Alaska Supreme Court stacks the policies nonetheless. This is done on the basis of ambiguities within the policy. *Id.* at 119; *cf. Garcia v. Southern Farm Bureau Cas. Ins. Co.*, 490 S.W.2d 616; 617 (Tex. Civ. App.—El Paso 1973, no writ).

insurance policy provisions, which contain clauses almost identical to those found in the Standard Family Combination Automobile Policy.<sup>21</sup> The Tennessee, California, and Iowa statutes generally allow the same treatment although the statutory language is less explicit.<sup>22</sup>

The majority of jurisdictions allow stacking and consider the "excess-escape" clause to place an unauthorized limit upon the statutorily designed coverage, which sets a minimum, but no maximum on the amount recoverable.<sup>23</sup> Since the statutes provide that all policies are to have uninsured motorist coverage, any clause purporting to dilute or deny coverage will be stricken thereby allowing pyramiding.<sup>24</sup> The statute is controlling and contains no limitations such as those within the insurance policy. The insurer may not "avoid its statutorily imposed liability by the insertion in the policy of a limiting clause which restricts the insured from receiving the benefits of that coverage."<sup>25</sup>

In seeking to determine which of the conflicting views regarding the stacking of uninsured motorist coverage should be followed, it is unfortunate that the statutes themselves give little indication as to what the legislatures in-

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21. Compare ORE. INS. CODE § 743.792(9)(a), (9)(b) (1971), with Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Other Insurance (Jan. 1, 1963 Rev.). Subsection (9)(a) authorizes an "excess" rather than an "excess-escape" clause. In *Thurmon v. Signal Ins. Co.*, 491 P.2d 1002 (Ore. 1971), an excess-escape clause was voided since it was considered more restrictive than the excess clause allowed by the statute. Liability was nonetheless limited to one policy's limit since the "pro rata" clause, authorized by subsection (9)(b), became operative and precluded a duplicate recovery.

22. CAL. INS. CODE § 11580.2(c)(2) (Supp. 1973); IOWA CODE ANN. § 516A (1973); TENN. CODE ANN. § 56-1152 (1968).

23. *Tulley v. State Farm Mut. Auto. Ins. Co.*, 345 F. Supp. 1123, 1128 (S.D.W. Va. 1972); *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970); *Hogan v. Allstate Ins. Co.*, 255 So. 2d 35, 37-38 (Ala. 1971); *Safeco Ins. Co. v. Jones*, 243 So. 2d 736, 742 (Ala. 1970); *Alliance Mut. Cas. Co. v. Duerson*, 510 P.2d 458, 460 (Colo. Ct. App. 1973); *Fidelity & Cas. Co. v. Darrow*, 286 A.2d 288, 292-93 (Conn. 1971); *State Farm Mut. Auto. Ins. Co. v. Murphy*, 177 S.E.2d 257, 260 (Ga. 1970); *Travelers Indem. Co. v. Williams*, 167 S.E.2d 174, 176 (Ga. Ct. App. 1969); *Patton v. Safeco Ins. Co.*, 267 N.E.2d 859, 864 (Ind. Ct. App. 1971); *Collins v. Motorist Mut. Ins. Co.*, 194 N.W.2d 148, 152 (Mich. Ct. App. 1971); *Pleitgen v. Farmers Ins. Exch.*, 207 N.W.2d 535, 537 (Minn. 1973); *Harthcock v. State Farm Mut. Auto. Ins. Co.*, 248 So. 2d 456, 462 (Miss. 1971); *Steinhaeufel v. Reliance Ins. Co.*, 495 S.W.2d 463 (Mo. Ct. App. 1973); *Sullivan v. Doe*, 495 P.2d 193, 200 (Mont. 1972); *Protective Fire & Cas. Co. v. Woten*, 181 N.W.2d 835, 838 (Neb. 1970); *McFarland v. Motor Club of America Ins. Co.*, 295 A.2d 375, 380 (N.J. Super. Ct. 1972); *Moore v. Hartford Fire Ins. Co. Group*, 155 S.E.2d 128, 136 (N.C. 1967); *Turner v. Nationwide Mut. Ins. Co.*, 182 S.E.2d 6, 8 (N.C. Ct. App. 1971); *Curran v. State Auto. Mut. Ins. Co.*, 266 N.E.2d 566 (Ohio 1971); *Pickering v. American Employers Ins. Co.*, 282 A.2d 584, 590 (R.I. 1971); *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793, 797 (Tex. Sup. 1972); *Fidelity & Cas. Co. v. Gatlin*, 470 S.W.2d 924, 927 (Tex. Civ. App.—Dallas 1971, no writ); *Bryant v. State Farm Mut. Auto. Ins. Co.*, 140 S.E.2d 817, 820 (Va. 1965).

24. Cases cited note 23 *supra*.

25. *Steinhaeufel v. Reliance Ins. Co.*, 495 S.W.2d 463, 468 (Mo. Ct. App. 1973).

tended.<sup>26</sup> In *Safeco Insurance Co. v. Jones*<sup>27</sup> the uninsured motorist statutes were described as falling within three categories: (1) those authorizing the "other insurance" clauses; (2) those construed to limit recovery to the statutory minimum; and (3) those construed to allow recovery under more than one policy up to the amount of the claimant's injuries.<sup>28</sup> It would be more technically correct to consider the statutes as falling within two general categories: those which authorize the "other insurance" clauses and policy limitations, and those which fail to deal with the aspect of pyramiding. A comparison of the statutes themselves seldom shows any distinction which would warrant contrary decisions by the courts construing them. Certainly much of the confusion inherent in the pyramiding question is the result of legislative action which provides no guideline for the courts to follow.

The arguments for and against stacking are cogent ones. The statutes do provide that all policies must contain uninsured motorist coverage. Yet the state financial responsibility laws set standards for required liability coverage and most probably the legislatures did not intend to indirectly amend these laws by the passage of the uninsured motorist statutes. Undoubtedly if stacking is allowed, an insured will recover more if he collides with an uninsured motorist than with a driver insured in compliance with the standards set by the financial responsibility laws. Then again, why shouldn't he be allowed recovery to the full extent of his injuries if he is an insured under more than one policy. As the statutes are silent, or at best subject to two reasonable, but divergent interpretations, other factors are and should be considered by the courts. A court may ultimately declare an insurance policy provision valid or invalid, but its decision may well depend on factors which have no basis in the statutes themselves.

Frequently the courts will ignore the statute and look to the policy language itself. The "excess-escape" clause provides that the insurance coverage is to apply "only as excess insurance over any other similar insurance available to such insured."<sup>29</sup> In a non-owned situation with multiple claimants the word "available" becomes quite significant. Assume a situation with four passengers riding in a vehicle insured with \$10/20 limits of liability. Each is injured due to the negligence of an uninsured motorist to the extent of \$10,000. The host's policy distributed among the four would provide \$5,000 each, \$5,000 less than the amount of their injuries. A passenger

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26. Compare ALA. CODE, tit. 36, § 74(62a) (Supp. 1971), with ARK. STAT. ANN. § 66-4003 to 66-4006 (1966). Despite the similarity, Alabama stacks policy limits in almost all situations while the Arkansas courts stack in none. See, e.g., *Safeco Ins. Co. v. Jones*, 243 So. 2d 736 (Ala. 1970); *M.F.A. Mut. Ins. Co. v. Wallace*, 431 S.W.2d 742 (Ark. 1968).

27. 243 So. 2d 736 (Ala. 1970).

28. *Id.* at 737.

29. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Other Insurance (Jan. 1, 1963 Rev.) (emphasis added).

seeking to "stack" his own policy may argue that since there are multiple claimants, the host's insurance is actually *unavailable* to the injured passenger, and therefore his policy should be applicable up to its limits of liability. The outcome of such an argument will depend upon whether the court considers "available" to mean actually available or theoretically available. Coverage will be found and stacking allowed if it is determined that the host's insurance must be actually available.<sup>30</sup> If, however, available is determined to mean theoretically available there can be no pyramiding since the other insurance was "available" even though it was exhausted due to the multiple claimants.<sup>31</sup>

Another argument favoring stacking is founded upon a contended ambiguity in the insurance policies. In the non-owned stacking situations the "excess-escape" clause is activated in the insurance policy of the non-owner. The "pro rata" clause is found in the owner's policy and determines the limits of liability when there is "other similar insurance available"<sup>32</sup> to cover losses. A few jurisdictions have rendered the "excess-escape" clause inoperative by finding it to be in conflict with the "pro rata" clause in the non-owner's policy.<sup>33</sup> These courts contend that when the two clauses are read together there is in fact no coverage. The court, therefore, must rewrite the policies to protect the interest of all parties and to provide them with the coverage they sought when the policy was obtained. Unable to discern which of the two policies are primary, the courts apply Oregon's "*Lamb-Weston*"<sup>34</sup> doctrine and hold the "excess-escape" and the "pro rata" clauses mutually repugnant and therefore void.<sup>35</sup> The outcome reached is that coverage is afforded and shared proportionally up to the sum of the policy limits.<sup>36</sup> Most

30. See, e.g., *Kraft v. Allstate Ins. Co.*, 431 P.2d 917 (Ariz. 1967); *Gordon v. Maupin*, 469 S.W.2d 848 (Mo. Ct. App. 1971); *McFarland v. Motor Club of America Ins. Co.*, 295 A.2d 375 (N.J. Super. Ct. 1972).

31. See, e.g., *Tindall v. Farmers Auto. Mgmt. Corp.*, 226 N.E.2d 297 (Ill. App. 1967).

32. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Other Insurance (Jan. 1, 1973 Rev.). The pro rata clause will be discussed in depth in the following section of this comment.

33. *Kackman v. Continental Ins. Co.*, 319 F. Supp. 540 (D. Alas. 1970); *Werley v. United Servs. Auto. Ass'n*, 498 P.2d 112 (Alas. 1972); see *Sparling v. Allstate Ins. Co.*, 439 P.2d 616 (Ore. 1968); *Smith v. Pacific Auto. Ins. Co.*, 400 P.2d 512 (Ore. 1965). *Sparling* and *Smith* have been preempted by Oregon's uninsured motorist statute, ORE. INS. CODE § 743.792(9)(a), (9)(b) (1971), which authorizes clauses limiting coverage. *But see Thurman v. Signal Ins. Co.*, 491 P.2d 1002 (Ore. 1971) which holds that the statutory language must be followed closely, and voids the insurance policy's excess-escape clause as it was more restrictive than its counterpart in the statute.

34. See *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 346 P.2d 643 (Ore. 1959).

35. *Kackman v. Continental Ins. Co.*, 319 F. Supp. 540 (D. Alas. 1970); *Werley v. United Servs. Auto. Ass'n*, 498 P.2d 112 (Alas. 1972); *Thurman v. Signal Ins. Co.*, 491 P.2d 1002 (Ore. 1971); *Sparling v. Allstate Ins. Co.*, 439 P.2d 616 (Ore. 1968); *Smith v. Pacific Auto. Ins. Co.*, 400 P.2d 512 (Ore. 1965).

36. *Smith v. Pacific Auto. Ins. Co.*, 400 P.2d 512 (Ore. 1965).



courts have refused to rewrite the contract in this manner and find the language of these clauses unambiguous. These courts have found the owned automobile coverage primary<sup>37</sup> since the "excess" insurance of the non-owner is not "other similar insurance" to that provided by the owned automobile because it applies only after the insurance on the owned automobile is exhausted.<sup>38</sup>

#### MULTIPOLICY STACKING

The second classification includes situations where an insured has more than one policy insuring himself and his owned automobiles. If the insurance policy language is given effect, the total amount recoverable is a single policy limit. The operative clause in the policy is generally called the "pro rata" clause.

[I]f the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this Coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.<sup>39</sup>

The operation of the "pro rata" clause may be seen in a hypothetical. Assume the insured has two policies, each with \$10/20 limits, covering two different automobiles. This insured is struck and injured by a negligent uninsured motorist. The insured has coverage under both policies, but the "pro rata" clause is activated so that the amount each insurance company will pay is their pro rata share, and further, each share is limited to the higher of the applicable policies. In the foregoing example, the insured's recovery would be limited to \$10,000 and each company would be liable for \$5,000.<sup>40</sup>

As was the case in the non-owned situations, an inquiry must be made as

37. See *Transportation Ins. Co. v. Wade*, 475 P.2d 253 (Ariz. 1970); *Harris v. Southern Farm Bureau Cas. Ins. Co.*, 448 S.W.2d 652 (Ark. 1970); *Darrah v. California State Auto. Ass'n*, 66 Cal. Rptr. 374 (Dist. Ct. App. 1968); *Morelock v. Millers' Mut. Ins. Ass'n*, 274 N.E.2d 1 (Ill. 1971); *Lott v. Southern Farm Bureau Cas. Ins. Co.*, 223 So. 2d 492 (La. Ct. App. 1969); *Maryland Cas. Co. v. Howe*, 213 A.2d 420 (N.H. 1965); *Globe Indem. Co. v. Baker's Estate*, 253 N.Y.S.2d 170 (Sup. Ct. 1964); *Shoffner v. State Farm Mut. Auto. Ins. Co.*, 494 S.W.2d 756 (Tenn. 1972); *Lyon v. Hartford Acc. & Indem. Co.*, 480 P.2d 739 (Utah 1971).

38. See, e.g., *Morelock v. Millers' Mut. Ins. Ass'n*, 274 N.E.2d 1 (Ill. 1971); *Tindall v. Farmers Auto. Mgmt. Corp.*, 226 N.E.2d 397 (Ill. Ct. App. 1967); *Vignali v. Farmers Equitable Ins. Co.*, 216 N.E.2d 827 (Ill. Ct. App. 1966).

39. *Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Other Insurance* (Jan. 1, 1963 Rev.).

40. If one of the policy limits had been \$20/30, the insured would be entitled to a total recovery of \$20,000. The loss would be prorated such that the policy with the \$10,000 limits would pay for one-third of the recovery while the policy with the \$20,000 limits would contribute the other two-thirds.

to the effect of the clause on the statutorily mandated coverage. A significant number of jurisdictions, still the minority, however, reason that the purpose of the statute is to provide minimum protection commensurate with the financial responsibility laws, and to place the assured in the same position as he would have been had the uninsured motorist been insured to the statutory minimums.<sup>41</sup> They therefore deny stacking. The majority view is that the "pro rata" clause conflicts with the uninsured motorist statutes requiring the clause to be vitiated and the policy limits to be pyramided.<sup>42</sup> "To prohibit the issuance of any such policy without the proscribed minimum coverage is to require that each policy issued shall provide this coverage."<sup>43</sup> Any policy reducing this coverage is in derogation of the statute and the "pro rata" clause which reduces coverage is therefore voided.

Factors beyond the statutes are of great importance in the multipolicy stacking situation. Insurance contracts are to be construed favorably toward the assured where policy ambiguities exist.<sup>44</sup> It has been argued that an ambiguity exists when multiple policies are issued by a single insurer. The "pro rata" clause applies "if the insured has *other similar insurance* available."<sup>45</sup> If *other* insurance means *insurance from another company*, there is no other insurance when the multiple policies are written by the same carrier.<sup>46</sup> This construction is founded upon the idea that the purpose of the "pro rata" clause is to prorate the loss so that no carrier must pay a dis-

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41. M.F.A. Mut. Ins. Co. v. Wallace, 431 S.W.2d 742, 744 (Ark. 1968); Mid-Century Ins. Co. v. Koch, 90 Cal. Rptr. 280, 283 (Dist. Ct. App. 1970); Glidden v. Farmers Auto. Ins. Co., 296 N.E.2d 84, 86 (Ill. Ct. App. 1973); Nationwide Mut. Ins. Co. v. Ealy, 289 A.2d 113, 115 (Pa. Super. Ct. 1972); Martin v. Christensen, 454 P.2d 294, 296 (Utah 1969).

42. Markam v. State Farm Mut. Auto. Ins. Co., 326 F. Supp. 39, 44-45 (W.D. Okla. 1971); Simpson v. State Farm Mut. Auto. Ins. Co., 318 F. Supp. 1152 (S.D. Ind. 1970); State Farm Mut. Auto. Ins. Co. v. Johnson, 190 S.E.2d 113, 116 (Ga. Ct. App. 1972); State Farm Mut. Auto. Ins. Co. v. Harper, 188 S.E.2d 813, 816-17 (Ga. Ct. App. 1972); Meridian Mut. Ins. Co. v. Siddons, 451 S.W.2d 831 (Ky. 1970); Graham v. American Cas. Co., 259 So. 2d 22, 25 (La. 1972); Johnson v. Travelers Indem. Co., 269 N.E.2d 700, 702 (Mass. 1971); Boettner v. State Farm Mut. Auto. Ins. Co., 201 N.W.2d 795, 798 (Mich. 1972); Collins v. Motorist Mut. Ins. Co., 194 N.W.2d 148, 151-52 (Mich. Ct. App. 1971); Van Tassel v. Horace Mann Ins. Co., 207 N.W.2d 348 (Minn. 1973); Bose v. American Family Mut. Ins. Co., 181 N.W.2d 839, 841 (Neb. 1970); Boyd v. State Farm Mut. Auto. Ins. Co., 195 S.E.2d 706, 708 (S.C. 1973); United Servs. Auto. Ass'n v. Bratton, Docket No. 15028, Tex. Civ. App.—San Antonio, December, 15, 1971 (unpublished).

43. Boyd v. State Farm Mut. Auto. Ins. Co., 195 S.E.2d 706, 707 (S.C. 1973).

44. See generally G. COUCH, ENCYCLOPEDIA OF INSURANCE LAW § 15:82 (1959).

45. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Other Insurance (Jan. 1, 1963 Rev.) (emphasis added).

46. Safeco Ins. Co. of America v. Robey, 399 F.2d 330, 338 (8th Cir. 1968); Woolston v. State Farm Mut. Ins. Co., 306 F. Supp. 738, 742 (W.D. Ark. 1969); United Servs. Auto. Ass'n v. Dokter, 478 P.2d 583, 584-85 (Nev. 1970). But see Kraft v. Allstate Ins. Co., 431 P.2d 917, 920 (Ariz. 1969); M.F.A. Mut. Ins. Co. v. Wallace, 431 S.W.2d 742, 744 (Ark. 1968); Glidden v. Farmers Auto. Ins. Ass'n, 296 N.E.2d 84, 86 (Ill. Ct. App. 1973).

proportionate amount of loss when two policies are applicable.<sup>47</sup> Therefore, when there is only one carrier there is no longer the necessity for the clause.<sup>48</sup> Consequently, "other insurance" should be considered as insurance separate and distinct from the combined policies of any one carrier. As a basis for invalidating the "pro rata" clause this reasoning is attenuate.<sup>49</sup> It seeks to annul the whole of the "pro rata" clause, which fixes the amount recoverable as well as provides for proration, on the basis of an argument that applies only to the latter function.

The payment of insurance premiums is a primary determinant in deciding whether or not applicable policies should be stacked. Some courts have reasoned that since an insured has paid two separate premiums for uninsured motorist protection, he should be entitled to double protection up to his amount of loss.<sup>50</sup> It would be unconscionable to permit insurers to collect a premium for statutorily required coverage "and then to avoid payment of a loss because of language of limitation devised by themselves."<sup>51</sup> Courts taking a contrary view agree with the contention that one should receive what he has paid for, but reason that when one purchases uninsured motorist coverage, he purchases that coverage as written with the premiums rated in consideration of the policy conditions, exclusions and limitations.<sup>52</sup>

In discussing the policy premium arguments, the courts have looked at the problem much too simplistically. There is a strong argument for stacking the multiple policies when the insured is injured in a non-owned automobile, or when he is struck by such an automobile. The standard policy provides that an insured has coverage when occupying a non-owned automobile and in all other situations (*i.e.*, when occupying an owned auto).<sup>53</sup> If the in-

47. See, *e.g.*, *United Servs. Auto. Ass'n v. Dokter*, 478 P.2d 583, 584 (Neb. 1970).

48. *Id.* at 584.

49. One noted authority apparently disagrees.

In *Woolston* [*Woolston v. State Farm Mut. Ins. Co.*, 306 F. Supp. 738 (W.D. Ark. 1969)], the court makes an extremely persuasive case . . . . The court particularly stressed the argument that where both of the endorsements were in policies issued by the same company, there was an ambiguity created that should be construed against the insurer.

A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 2.61, at 92 n.2 (Supp. 1973).

50. See generally *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970); *Safeco Ins. Co. of America v. Jones*, 243 So. 2d 736, 741 (Ala. 1970); *Sturdy v. Allied Mut. Ins. Co.*, 457 P.2d 34, 39 (Kan. 1969); *Boettner v. State Farm Mut. Ins. Co.*, 201 N.W.2d 795, 798 (Mich. 1972); *Van Tassel v. Horace Mann Ins. Co.*, 207 N.W.2d 348 (Minn. 1973); *Bose v. American Family Mut. Ins. Co.*, 181 N.W.2d 839, 841 (Neb. 1970); *Westchester Fire Ins. Co. v. Tucker*, 494 S.W.2d 654, 655 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ granted); *Cunningham v. Insurance Co. of North America*, 189 S.E.2d 832, 837 (Va. 1972).

51. *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152, 1156 (S.D. Ind. 1970).

52. See, *e.g.*, *Patton v. Safeco Ins. Co. of America*, 267 N.E.2d 859, 863 (Ind. Ct. App. 1971); *Martin v. Christensen*, 454 P.2d 294, 296 (Utah 1969).

53. *Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists* (Jan. 1, 1963 Rev.).

sured has two policies, he is paying premiums for non-owned coverage on both policies for coverage he would already have under one policy. There is, therefore, a logical justification for the pyramiding of multiple coverages when the assured is in a non-owned vehicle.<sup>54</sup>

No such justification exists in multipolicy situations when the insured is injured in one of his owned automobiles. In these instances an insured is paying a premium for owned automobile protection which contemplates only the owned automobile listed in each policy.<sup>55</sup> Allowing the coverages to be stacked would provide the insured with twice the coverage contemplated by the premium paid. Certainly coverage should be provided on the policy which listed the automobile involved in the accident, but to do more would entail rewriting the insurance contract as well as fabricating a coverage for which no premium had been given. Finding a double recovery here would be analogous to allowing the assured a single recovery on a policy as a result of an accident in an owned and uninsured automobile.<sup>56</sup> There is no premium charged for uninsured motorist coverage on the uninsured vehicle. To create coverage would allow an insured the benefit of the premium paid on the listed vehicle, for coverage on the uninsured vehicle. The portion of the premium providing non-owned coverage is inapplicable since it contemplates the occasional use of non-owned vehicles, and not the regular use of an owned automobile. If there is coverage on the uninsured vehicle, it is provided without the consideration of a premium charge. If double coverage is received in a multipolicy situation where the assured is injured in a scheduled vehicle, there is double coverage for which only one premium has been paid. There should be no recovery if the vehicle is uninsured, and only a single recovery if the vehicle is owned and listed in the policy.

#### MULTICAR STACKING

The multicar category encompasses those situations where an insured has one policy which covers more than one automobile. As there is only one policy, in a strict sense it is inappropriate to speak of "stacking" or "pyramiding" policy limits. Nor can there be a conflict with the uninsured

54. See, e.g., *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970); *Graham v. American Cas. Co.*, 259 So. 2d 22, 24-25 (La. 1972).

55. Cf. *United States Fidelity & Guar. Co. v. Webb*, 191 So. 2d 869, 870 (Fla. Dist. Ct. App. 1966); *Allstate Ins. Co. v. McHugh*, 304 A.2d 777, 778 (N.J. Super. Ct. 1973).

56. See *United States Fidelity & Guar. Co. v. Webb*, 191 So. 2d 869, 870 (Fla. Dist. Ct. App. 1966); cf. *Travelers Indem. Co. v. Powell*, 206 So. 2d 244 (Fla. Dist. Ct. App. 1968). Allowing the policies to be stacked in such a situation would "allow a member of a family to purchase one liability policy and claim total coverage thereunder for the entire family while vastly increasing the risk to his insurer by knowingly owning and operating a fleet of uninsured vehicles upon the highways." *Id.* at 247 (*Powell* nonetheless stacked multiple policies in an owned vehicle accident).

motorist statutes requiring each policy to provide uninsured motorist coverage in minimum amounts.<sup>57</sup> The single multicar policy does provide coverage in accord with the required standard. Attorneys have attempted to circumvent this by arguing that due to ambiguities there are in essence as many coverages as there are automobiles listed,<sup>58</sup> and therefore coverages should be stacked up to the amount of the claimant's injuries. Counsel has emphasized that in some policies automobiles are listed by endorsements,<sup>59</sup> and that there are as many endorsements as there are automobiles listed.<sup>60</sup> Further, the "separability" clause,<sup>61</sup> which provides that the terms of the policy are to apply separately to each automobile listed, demands a finding of multiple policies or coverages.<sup>62</sup> In those rare instances where multiple vehicles are attached to the policy by endorsement, those endorsements merely affix the vehicle scheduled to the policy and by their own terms do not create separate policies in themselves.<sup>63</sup> The majority of cases construing the "separability" clause reject the implication of double coverage.<sup>64</sup> The most reasonable interpretation is that this clause simply renders the policy applicable to whichever vehicle is involved in

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57. *See, e.g., Morrison Assurance Co. v. Polak*, 230 So. 2d 6, 7-8 (Fla. 1970). The court distinguishes the "multipolicy" and "non-owned" situations from "multicar" circumstances. In the former two categories, the "other insurance" clause violates the statute. Florida, therefore, stacks the policy limits. Not so with "multicar" policies, as those policies, notwithstanding the number of vehicles attached, provide the coverage required by statute. *But cf. Government Employees Ins. Co. v. Sweet*, 186 So. 2d 95, 97 (Fla. Dist. Ct. App. 1966).

58. *See Sturdy v. Allied Mut. Ins. Co.*, 457 P.2d 34, 41 (Kan. 1969); *Hartford Acc. & Indem. Co. v. Turner*, 498 S.W.2d 8, 9 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ); *Westchester Fire Ins. Co. v. Tucker*, 494 S.W.2d 654, 655 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ granted); *Cunningham v. Insurance Co. of North America*, 189 S.E.2d 832, 837 (Va. 1972); *Lipscombe v. Security Ins. Co.*, 189 S.E.2d 320, 323 (Va. 1972); *cf. Government Employees Ins. Co. v. Sweet*, 186 So. 2d 95, 97 (Fla. Dist. Ct. App. 1966).

59. An endorsement is a provision added to an insurance policy which alters it in scope or application. It takes precedence over the written policy language in cases of conflict. Here the endorsement is stapled to the policy and adds the vehicle on the endorsement to the insurance policy.

60. *See, e.g., Otto v. Allstate Ins. Co.*, 275 N.E.2d 766, 768 (Ill. Ct. App. 1971); *Polland v. Allstate Ins. Co.*, 266 N.Y.S.2d 286, 287 (Sup. Ct. 1966); *Doerpinghaus v. Allstate Ins. Co.*, 185 S.E.2d 615 (Ga. Ct. App. 1971).

61. Standard Family Comb. Auto. Policy, Condition 4 (Jan. 1, 1963 Rev.) states: "TWO OR MORE AUTOMOBILES—Parts I, II, and III: When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each . . ."

62. *Polland v. Allstate Ins. Co.*, 266 N.Y.S.2d 286, 287 (Sup. Ct. 1966). *See Doerpinghaus v. Allstate Ins. Co.*, 185 S.E.2d 615 (Ga. Ct. App. 1971); *cf. Government Employees Ins. Co. v. Sweet*, 186 So. 2d 95, 97 (Fla. Dist. Ct. App. 1966).

63. *E.g., Otto v. Allstate Ins. Co.*, 275 N.E.2d 766, 769 (Ill. Ct. App. 1971).

64. *E.g., Allstate Ins. Co. v. Shmitka*, 90 Cal. Rptr. 399, 405 (Dist. Ct. App. 1970); *Otto v. Allstate Ins. Co.*, 275 N.E.2d 766, 769 (Ill. Ct. App. 1971); *Allstate Ins. Co. v. McHugh*, 304 A.2d 777, 779 (N.J. Super. Ct. 1973); *Polland v. Allstate Ins. Co.*, 266 N.Y.S.2d 286, 287 (Sup. Ct. 1966); *cf. Pacific Indem. Co. v. Thompson*, 355 P.2d 12 (Wash. 1960). *But cf. Government Employees Ins. Co. v. Sweet*, 186 So. 2d 95, 97 (Fla. Dist. Ct. App. 1966).

an accident.<sup>65</sup> In future decisions the "separability" clause will become less a matter of contention as the standard policies today expressly render that clause inapplicable to uninsured motorist coverage.<sup>66</sup>

Further enforcing the arguments against duplicate coverage is the "limits of liability" clause:

(a) The limit of liability for family protection coverage stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages . . . because of bodily injury sustained by one person as the result of any one accident and . . . the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages . . . because of bodily injuries sustained by two or more persons as the result of any one accident.<sup>67</sup>

To allow stacking would duplicate coverage in a single policy in derogation of the clear and unambiguous language found in this clause. The clause definitely states the limits of liability on the policy to be that listed in the declarations, irrespective of the number of vehicles appended to the policy. The courts have generally effected the clause and used it as a basis for denying duplicate coverage in multicar situations.<sup>68</sup>

The crux of the multicar problem concerns the policy premium arguments. Has the insured paid a multiple premium which should entitle him to a multiple recovery? The majority of cases have held that there is no such justification.<sup>69</sup> In the normal multicar policy a premium for uninsured motorist coverage will be charged for each automobile listed, but the premium

65. Allstate Ins. Co. v. Shmitka, 90 Cal. Rptr. 399, 404 (Dist. Ct. App. 1970); Otto v. Allstate Ins. Co., 275 N.E.2d 766 (Ill. Ct. App. 1970); Allstate Ins. Co. v. McHugh, 304 A.2d 777, 779 (N.J. Super. Ct. 1973); Polland v. Allstate Ins. Co., 266 N.Y.S.2d 286, 287 (Sup. Ct. 1966); cf. Pacific Indem. Co. v. Thompson, 355 P.2d 12 (Wash. 1960) (court refuses to stack bodily injury liability limits notwithstanding "separability" clause argument).

One case has construed an uninsured motorist statute, interestingly, in much the same way as courts have interpreted the "separability" clause:

We think it clear that this phrase, "with respect to each motor vehicle," as used in [the uninsured motorist statute], plays no part in fixing the minimum dollar limits required of liability coverage. Rather, it relates to the scope of the policy, assuring its application to any one of the listed vehicles which becomes involved in an accident . . . .

Nationwide Mut. Ins. Co. v. Bair, 186 S.E.2d 410, 411 (S.C. 1972) (court's emphasis).

66. Standard Family Comb. Auto. Policy, Conditions (Jan. 1, 1963 Rev.).

67. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Limits of Liability (Jan. 1, 1963 Rev.).

68. Allstate Ins. Co. v. Shmitka, 90 Cal. Rptr. 399, 404 (Dist. Ct. App. 1970); Morrison Assurance Co. v. Polak, 230 So. 2d 6, 8 (Fla. 1969); Doerpinghaus v. Allstate Ins. Co., 185 S.E.2d 615 (Ga. Ct. App. 1971); Otto v. Allstate Ins. Co., 275 N.E.2d 766, 769 (Ill. Ct. App. 1971); Allstate Ins. Co. v. McHugh, 304 A.2d 777, 779 (N.J. Super. Ct. 1973).

69. Allstate Ins. Co. v. Shmitka, 90 Cal. Rptr. 399, 402 (Dist. Ct. App. 1970); Morrison Assurance Co. v. Polak, 230 So. 2d 6, 8 (Fla. 1970); Ringenberger v. General Acc. Fire & Life Assurance Corp., 214 So. 2d 376, 377 (Fla. Dist. Ct. App. 1968);

charged additional vehicles is usually less than that on the first vehicle.<sup>70</sup> Surely the charge for the additionally scheduled automobile is a legitimate one since the risk incurred by the company has been increased with the addition of a regularly used vehicle.<sup>71</sup> Instead of providing coverage for one regularly used automobile, the policy now provides coverage for one, two or more.<sup>72</sup> In addition, had an owned automobile been unlisted, it would have been excluded from coverage by the "other owned and unlisted automobile" clause.<sup>73</sup> The consideration for the second premium is simply to render this exclusion inoperative and thus provide coverage.<sup>74</sup>

In some instances the premium charges for additionally scheduled automobiles has been identical to that charged for coverage on the first vehicle. In *Sturdy v. Allied Mutual Insurance Co.*,<sup>75</sup> the court held that a separate

*Hilton v. Citizens Ins. Co.*, 201 So. 2d 904, 906 (Fla. Dist. Ct. App. 1967); *Doeringhaus v. Allstate Ins. Co.*, 185 S.E.2d 615 (Ga. Ct. App. 1971); *Otto v. Allstate Ins. Co.*, 275 N.E.2d 766, 770 (Ill. Ct. App. 1971); *Allstate Ins. Co. v. McHugh*, 304 A.2d 777, 778 (N.J. Super. Ct. 1973); *Castle v. United Pac. Ins. Group*, 448 P.2d 357 (Ore. 1968); *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793, 797 (Tex. Sup. 1972); *Allstate Ins. Co. v. Zellars*, 462 S.W.2d 550, 555 (Tex. Sup. 1970); *Dhane v. Trinity Universal Ins. Co.*, 497 S.W.2d 323, 327 (Tex. Civ. App.—Waco 1973, writ granted). *Contra*, *Employers Liability Assurance Corp. v. Jackson*, 270 So. 2d 806, 810 (Ala. 1970); *Sturdy v. Allied Mut. Ins. Co.*, 457 P.2d 34, 41-42 (Kan. 1969); *Westchester Fire Ins. Co. v. Tucker*, 494 S.W.2d 654, 655 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ granted); *Lipscombe v. Security Ins. Co.*, 189 S.E.2d 320, 323 (Va. 1972); *Cunningham v. Insurance Co. of North America*, 189 S.E.2d 832, 837 (Va. 1972).

70. *See, e.g.*, *Otto v. Allstate Ins. Co.*, 275 N.E.2d 766, 770 (Ill. Ct. App. 1971). *But see* *Sturdy v. Allied Mut. Ins. Co.*, 457 P.2d 34, 49 (Kan. 1969).

71. *See, e.g.*, *Allstate Ins. Co. v. Shmitka*, 90 Cal. Rptr. 399, 402 (Dist. Ct. App. 1970); *Allstate Ins. Co. v. McHugh*, 304 A.2d 777, 778 (N.J. Super. Ct. 1973). *McHugh* provides an example of how the risk is increased:

It is conceivable that Frank McHugh could be operating one vehicle with multiple passengers therein, his wife operating the second vehicle with multiple passengers therein. All the passengers in *both* vehicles are covered under [the uninsured motorist coverage]. This increased risk provides sufficient consideration and justification for charging a separate premium at the same rate for additional cars in the same policy.

*Id.* at 778.

72. *See, e.g.*, *Allstate Ins. Co. v. McHugh*, 304 A.2d 777, 778 (N.J. Super. Ct. 1973).

73. As stated in Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Exclusions (a) (Jan. 1, 1963 Rev.).

Exclusions. This policy does not apply under Part IV [Uninsured Motorist Protection]:

(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 . . . .

An automobile is not considered insured unless it is scheduled on the insurance policy. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Definitions, "Insured Automobile" (Jan. 1, 1963 Rev.).

74. *E.g.*, *Ringenger v. General Acc. Fire & Life Assurance Corp.*, 214 So. 2d 376, 377 (Fla. Dist. Ct. App. 1968); *Dhane v. Trinity Universal Ins. Co.*, 497 S.W.2d 323, 327 (Tex. Civ. App.—Waco 1973, writ granted).

75. 457 P.2d 34 (Kan. 1969).

and equal premium payment demanded that double coverage be afforded.<sup>76</sup> One can readily see the court's rationale in *Sturdy*, but to hold in such a manner, based only upon the premium payment, entails rewriting the contract solely on the basis that an insured made a bad bargain. Even if one is to accept the decision in *Sturdy*, it should apply only as that court used it—where the assured is injured in a non-owned automobile, or struck by such an automobile. The double premium is paid for duplicate non-owned coverage, not for owned vehicle protection.

Recent Texas decisions have become engrossed in the policy premium arguments and have reached conflicting conclusions in multicar cases. Texas' first case involving uninsured motorist stacking was *Allstate Insurance Co. v. Zellars*.<sup>77</sup> In *Zellars*, an insured with a multicar policy was injured while driving a non-owned automobile. Zellars had two automobiles scheduled on his policy, and paid \$4 for uninsured motorist coverage on the first auto and \$3 for coverage on the second. The Texas Supreme Court refused to find double coverage. They reasoned that the second premium simply made the policy applicable to vehicle number two. The second premium was less than the first since the insured already had secured non-owned coverage with the premium payment on the first automobile.<sup>78</sup> *Zellars* was followed by *Fidelity & Casualty Co. v. Gatlin*.<sup>79</sup> *Gatlin* was a typical non-owned case in which the Dallas Court of Civil Appeals stacked insurance policy limits under the theory that the "excess-escape" clause limited the coverage required by the uninsured motorist statute.<sup>80</sup> There is no conflict between *Gatlin* and *Zellars* even though stacking was allowed in one and denied in the other. The underlying factual basis in each case is different; *Gatlin* is a non-owned case while *Zellars* is multicar. The Texas Supreme Court recognized this distinction in *American Liberty Insurance Co. v. Ranzau*.<sup>81</sup> Ranzau was a guest with a multicar policy who was injured in an insured non-owned automobile. The court allowed Ranzau's policy to be stacked upon the limits of the owner's policy and adopted the view expressed in *Gatlin*.<sup>82</sup> They also reaffirmed the *Zellars* decision by holding that the payment of a lesser premium for the scheduling of an additional automobile does not purchase additional non-owned protection, and therefore could not serve as a basis for finding two coverages in the single multicar policy.<sup>83</sup>

*Westchester Fire Insurance Co. v. Tucker*<sup>84</sup> concerned a multicar policy

76. *Id.* at 42.

77. 462 S.W.2d 550 (Tex. Sup. 1970).

78. *Id.* at 555-56.

79. 470 S.W.2d 924 (Tex. Civ. App.—Dallas 1971, no writ).

80. *Id.* at 928.

81. 481 S.W.2d 793 (Tex. Sup. 1972), noted 4 ST. MARY'S L.J. 444 (1972).

82. *American Liberty Insurance Co. v. Ranzau*, 481 S.W.2d 793, 796 (Tex. Sup. 1972).

83. *Id.* at 798.

84. 494 S.W.2d 654 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ granted);



and, unlike *Ranzau*, an accident in one of the owned and listed automobiles. The Houston Court of Civil Appeals, 14th District, relying upon *Ranzau*, agreed that the scheduling of the additional automobile did not purchase duplicate non-owned coverage.<sup>85</sup> It did, however, provide additional owned coverage, and since two premiums were paid for owned automobile protection, the policy limits should be doubled.<sup>86</sup> The court's decision is an unfortunate one proceeding from a misinterpretation of the word "additional" and what the additional premium actually purchased. There was no additional premium paid for non-owned coverage, so it follows that the policies should not be stacked to provide for double coverage in such an instance. One should not infer, however, that since an additional premium was paid for owned automobile protection on vehicle number two, that double protection should be afforded vehicle number one. "Additional" coverage was provided in the sense that no longer was vehicle number two excluded from the operation of the insurance policy under the "owned and unlisted automobile"<sup>87</sup> exclusion. Actually the payment of the second premium brought the insured from a zero coverage situation to one in which a single policy limit was contemplated. Such a decision ignores the "limit of liability" clause and the risk assumed by the insurer. The nature of this risk is the very reason no duplicate coverage should be provided. There are two owned automobiles, both regularly used. The reason the premium charged the second automobile for owned protection corresponds to that charged the first is simply because the risk of insuring it is theoretically the same. There are two vehicles regularly used, and two premiums paid. If one is involved in an accident, there should logically be one coverage applicable.

*Dhane v. Trinity Universal Insurance Co.*<sup>88</sup> presents the more rational view. In *Dhane* three vehicles were scheduled on a multicar policy. The assured, while operating one of the listed automobiles, was injured by a negligent uninsured motorist. He sought the recovery of three policy limits arguing that since there had been three premiums paid for owned coverage, he should have the benefit of three coverages. The Waco Court of Civil Appeals rejected this contention, denied stacking the coverages, and held that the additional premiums charged were solely intended to provide

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*accord*, *Hartford Acc. & Indem. v. Turner*, 498 S.W.2d 8, 9 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

85. *Westchester Fire Ins. Co. v. Tucker*, 494 S.W.2d 654, 655 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ granted).

86. *Id.* at 655. *Accord* *Hartford Acc. & Indem. v. Turner*, 498 S.W.2d 8, 9 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ).

87. Standard Family Comb. Auto. Policy, Part IV, Protection Against Uninsured Motorists, Exclusions, (a) (Jan. 1, 1963 Rev.). See *Garcia v. Southern Farm Bureau Ins. Co.*, 490 S.W.2d 616 (Tex. Civ. App.—El Paso 1973, no writ); *Stagg v. Travelers Ins. Co.*, 486 S.W.2d 399 (Tex. Civ. App.—Beaumont 1972, no writ).

88. 497 S.W.2d 323 (Tex. Civ. App.—Waco 1973, writ granted).

coverage for injuries caused by an uninsured motorist while the insured was occupying the vehicle for which the additional premium was paid.<sup>89</sup> Eventually the Texas Supreme Court must resolve this dichotomy. Hopefully they will adopt the view expressed in *Dhane*.

#### CONCLUSION

How should each of the situations be handled? The non-owned cases present probably the most difficult problem, and perhaps the path followed by the Arizona courts is the best solution. Aware of the inequities in giving effect to the "excess-escape" clause in accidents where there are multiple claimants in the non-owned automobile, the Arizona courts have interpreted the uninsured motorist statute to demand a minimum of coverage pursuant to that required in the financial responsibility laws.<sup>90</sup> They will, therefore, "stack" a guest's policy upon that of the host up to the \$10,000 per person limit prescribed in the statute.<sup>91</sup> Each assured is thereby guaranteed protection in the amount of the statutory minimum.

The solution is clearer in multipolicy cases. Because there is a duplication of the premium payment for accidents in non-owned automobiles, or in instances where an insured is struck by such an automobile, the claimant with multiple policies should be entitled to double coverage.<sup>92</sup> When, however, the insured is injured in one of his owned automobiles, only one policy limit should be recoverable. The premium paid in each policy for owned automobiles contemplates only the owned and listed automobile in each policy, so stacking the multiple policies would provide the insured with double coverage for which no premium was paid.

In the multicar cases there should be no stacking. The insurance policy is clear and unambiguous now that the "separability" clause has been rendered inapplicable in almost all policies, and as always, only an interpre-

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89. *Id.* at 327; *cf.* *Garcia v. Southern Farm Bureau Ins. Co.*, 490 S.W.2d 616 (Tex. Civ. App.—El Paso 1973, no writ); *Stagg v. Travelers Ins. Co.*, 486 S.W.2d 399 (Tex. Civ. App.—Beaumont 1972, no writ). The "owned and unlisted automobile" exclusion was upheld in both *Stagg* and *Gracia*.

90. *Transportation Ins. Co. v. Wade*, 475 P.2d 253, 257 (Ariz. 1970).

91. *Id.* at 257.

92. In those instances where an assured with multiple policies is injured in a non-owned automobile, there may be a "non-owned" stacking question as well as a "multipolicy" question. At first impression one may see a conflict between the decision to stack the multiple policies when the assured is injured in a non-owned automobile, and the position of the Arizona courts in limiting stacking to the statutory minimum. Not so. Stacking is limited to the statutory minimum when the assured has purchased insurance in this amount. The assured may purchase additional coverage if he desires by purchasing two policies with duplicate non-owned coverage. If each of his policies provided for \$10/20 limits, he now effectively has a \$20,000 per person limit. The assured may, therefore, stack his multiple policy limits upon any recovery under the owned vehicle policy, up to his per person limit of \$20,000. *Cf.* *Bacchus v. Farmers Ins. Group Exch.*, 475 P.2d 264, 267 (Ariz. 1970).

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*COMMENTS*

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tation providing for single liability limits can be garnered from the limits of liability clause. There is clearly one policy providing a single limit of recovery. This position is enforced since there is no statutory conflict, and further, since in the great majority of cases, the premium charged the additionally listed automobile is less than that of the first listed vehicle. There is, therefore, no duplicate non-owned coverage, and the premium paid on the extra vehicles simply renders the "owned and unlisted automobile" exclusion ineffective to deny coverage.

Necessarily these pyramiding questions are challenging ones, inherently complicated since court and counsel are forced to apply statutes and equities to complicated factual situations involving multiple parties and conflicting contracts. Though hard questions, the answers are more easily found if the situations are categorized so that arguments may be brought directly to bear upon the uniqueness of each.