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"STACKING" UNINSURED MOTORIST PROTECTION, MEDICAL PAYMENTS, AND PERSONAL INJURY PROTECTION COVERAGES IN TEXAS

EDWARD J. YORK, JR.

A considerable amount of litigation has arisen over the past few years concerning the "stacking" of insurance coverages.¹ Stacking refers to aggregating coverage limits between policies or among provisions within a single policy.² The issue as to whether uninsured motorist protection and medical payments clauses in standard automobile liability policies should be stacked has been settled by the Texas courts.³ Generally, stacking is permitted for medical payments coverage while it is denied for uninsured motorist coverage.⁴ The cases, however, present some difficulty in determining the real basis for their decisions and are therefore subject to some criticism.

The stacking of personal injury protection (PIP) benefits,⁵ on the other

1. See generally Comment, *Pyramiding of Insurance Coverage Under the Standard Family Automobile Liability Policy*, 14 VILL. L. REV. 279 (1969).

2. See *Blocker v. Aetna Cas. & Sur. Co.*, 332 A.2d 476, 477 (Pa. Super. Ct. 1975); *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 680 (Tex. 1974).

For example, A is involved in an accident with an uninsured motorist while riding in B's car. A has a single insurance policy covering his two automobiles and B has an insurance policy covering the car involved in the accident. Both policies contain uninsured motorist protection clauses. If both A and B's insurance policies provide protection to A then the payments made are said to be stacked since he is receiving multiple benefits from one accident up to the amount of his actual damages. A may also attempt to recover the amount of two uninsured motorist limits under his own policy for the reason that he has two cars insured and has paid separate premiums for each. In *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793, 796-97 (Tex. 1972), a case with facts identical to the example, stacking was permitted between the different policies, but was not permitted as to coverages in the insured's policy.

3. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 684 (Tex. 1974) (denying stacking of uninsured motorist provisions); *Southwestern Fire & Cas. Co. v. Atkins*, 346 S.W.2d 892, 895 (Tex. Civ. App.—Houston 1961, no writ) (allowing medical payments stacking). Uninsured motorist clauses are designed to protect an insured person who is injured by a motorist who is uninsured, or is a hit-and-run driver. TEX. INS. CODE ANN. art. 5.06-1 (Supp. 1975); 12 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* § 45:619, at 566-67 (2d ed. 1964). Medical payments clauses are extensions of accident and automobile liability coverages but without regard to fault on the part of the insured. See 13 G. COUCH, *CYCLOPEDIA OF INSURANCE LAW* 48:71, at 563, and § 48:73, at 564-65 (2d ed. 1965).

4. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 684 (Tex. 1974); *Southwestern Fire & Cas. Co. v. Atkins*, 346 S.W.2d 892, 895 (Tex. Civ. App.—Houston 1961, no writ).

5. TEX. INS. CODE ANN. art. 5.06-3 (Supp. 1975). The PIP provisions are discussed more extensively later in the article. Basically, PIP protection is the same as

hand, has never been considered by a Texas appellate court. PIP is analogous to uninsured motorist clauses in that it is a statutorily required provision in all insurance policies, and is subject to the same policy exceptions and exclusions as are uninsured motorist provisions in most policies.⁶ It is also comparable to medical payments clauses, in a generic sense, in that the same type of benefits are provided without regard to fault on the part of the insured.

This comment will review the Texas law concerning stacking of uninsured motorist protection and medical payments provisions within a single multi-car policy, particularly with a view towards predicting whether personal injury protection stacking will be permitted.

STACKING UNINSURED MOTORIST COVERAGES

In *Westchester Fire Insurance Co. v. Tucker*,⁷ the Texas Supreme Court disallowed stacking of uninsured motorist provisions in a single multi-car policy, thus resolving earlier conflicting decisions.⁸ *Westchester* was a combined opinion involving two conflicting decisions from different courts of civil appeals. In *Westchester* an automobile policy was issued to the insured covering his two vehicles. The policy contained the standard uninsured motorist clauses in the stated bodily injury limits of \$10,000 for each person and \$20,000 for each accident. An uninsured motorist negligently collided with one of the insured's vehicles causing stipulated damages of \$15,000. In another case, *Dhane v. Trinity Universal Insurance Co.*,⁹ the facts were sub-

that provided by medical payments clauses providing payment for medical expenses and loss of earnings.

6. The wording of the provisions in most automobile liability policies is usually very much the same. For convenience, throughout the text, references to uninsured motorist clauses and medical payments clauses will refer to the provisions as given in the appellate decision in which they appear. Due to the recent development of personal injury protection coverage, no standard policy provisions, that is model policies, are available in any source material. See 95 CCH AUTO. L. REP. ¶ 2460. The lack of any textual reference, plus the absence of cases on personal injury protection have resulted in the use of provisions from the Texas Standard Automobile Endorsement, Form 241 (1973).

7. 512 S.W.2d 679 (Tex. 1974).

8. Stacking had been previously prohibited. *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793 (Tex. 1972), noted in 4 ST. MARY'S L.J. 444 (1972); *Allstate Ins. Co. v. Zellars*, 462 S.W.2d 550, 554 (Tex. 1970). *Contra*, *Hartford Accident & Indem. Co. v. Turner*, 498 S.W.2d 8, 9 (Tex. Civ. App.—Houston [1st Dist.] 1973), *rev'd per curiam*, 512 S.W.2d 687, 688 (Tex. 1974) (stacking allowed); *Westchester Fire Ins. Co. v. Tucker*, 494 S.W.2d 654, 655 (Tex. Civ. App.—Houston [14th Dist.] 1973), *rev'd*, 512 S.W.2d 679, 684 (Tex. 1974) (stacking allowed). The cases leading up to *Westchester* have been examined at length in other comments and will not be reviewed here. See generally Comment, *A Collation of Recent Texas Cases on Stacking and Uninsured Motorist Coverage*, 11 HOUS. L. REV. 466 (1974); Comment, *Pyramiding of Uninsured Motorist Protection: The Confusion Inherent in Overgeneralization*, 5 ST. MARY'S L.J. 568 (1973).

9. 497 S.W.2d 323 (Tex. Civ. App.—Waco 1973), *aff'd sub nom.* *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679 (Tex. 1974).

stantially the same except that the policy covered three automobiles. The insured plaintiffs in both cases contended that since they had paid separate premiums for each of the automobiles in their respective policies, they should be entitled to recover the policy limits for each automobile separately at least up to the total amount of their damages. The insurance companies maintained that the extra premium was merely consideration for uninsured motorist coverage on each added automobile, and therefore, the coverages should not be stacked.

The Houston Court of Civil Appeals in *Westchester* agreed with the plaintiffs and allowed the policy limits for each automobile to be stacked, reasoning that the plaintiff had paid for uninsured motorist coverage on *both* cars through two separate premiums, therefore, consideration had been given for two separate uninsured motorist coverages.¹⁰ In *Dhane*, the Waco Court of Civil Appeals took a contrary view. It noted that no ambiguity existed in a policy clause which excluded uninsured coverage on vehicles owned by the insured but for which he had not paid a specific premium.¹¹ In other words, although a premium paid on automobile number one covers the insured regardless of which car he is riding in, or even if he does not occupy an automobile, the above exclusion operates to deny coverage where the insured is riding in vehicle number two or three if he owns them but has not paid a premium to insure them. This reasoning supported the point of view of the defendant-insurer that the extra premiums paid for subsequent automobiles were to provide uninsured coverage only for the added vehicles. Again, using the above example, the extra premiums paid would provide coverage to the insured while occupying the second and third vehicles where previously no such coverage existed.

The supreme court upheld the latter point of view.¹² The court first noted that the policies presented no ambiguities as to wording.¹³ The separability clause, for instance, stated that where there is more than one automobile insured, the terms of the policy apply separately to each. This clause specifically applied to the liability, medical payments, and physical damage portions of the policy and not to the uninsured motorist protection.¹⁴ Further-

10. *Westchester Fire Ins. Co. v. Tucker*, 494 S.W.2d 654, 655 (Tex. Civ. App.—Houston [14th Dist.] 1973), *rev'd*, 512 S.W.2d 679 (Tex. 1974).

11. *Dhane v. Trinity Universal Ins. Co.*, 497 S.W.2d 323, 327 (Tex. Civ. App.—Waco 1973), *aff'd sub nom. Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679 (Tex. 1974).

12. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 684 (Tex. 1974).

13. *Id.* at 682. This lack of ambiguity is important since cases which allow stacking of medical payment clauses are usually based upon ambiguities in the insurance contract which are resolved against the insurer. See *Greer v. Associated Indemn. Corp.*, 371 F.2d 29, 32 (5th Cir. 1967); *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 686 (Tex. 1974); *Harlow v. Southern Farm Bureau Cas. Ins. Co.*, 439 S.W.2d 365, 368 (Tex. Civ. App.—Austin 1969, no writ).

14. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 682 (Tex. 1974).

more, the wording in the uninsured motorist clause, which stated the insurer would "pay all sums," could not possibly be construed to extend policy limits to the amount of actual damages suffered by the insured.¹⁵

The court then observed that the uninsured motorist clause stipulated the limit of liability under that provision to be the limit of the insurer's liability for all damages sustained by one person in one accident. Combining this clause with the \$10,000/\$20,000 upper limit found in the policy declarations, the total liability to any one person in any one accident was \$10,000.¹⁶ With the total liability thus expressly stated, no stacking could be permitted to increase that liability.¹⁷

The court rejected the Houston court's argument that the insured had paid separate consideration for risk exposure on both automobiles. They reasoned that under a standard policy, uninsured motorist protection was provided for the named insured, including relatives living in the same household, and any guest occupying an insured automobile. Therefore, a guest has no coverage unless riding in an insured automobile.¹⁸ Moreover, the exclusions section of the policy provided that coverage did not extend to an insured while occupying an automobile owned by him but for which he had not paid a premium. The result of both provisions was that the legal consideration for including second and subsequent vehicles was the protection given to the insured (including relatives) and guests while occupying the additional automobiles.¹⁹ The fact that there was adequate consideration given, in conjunction with the purpose of the clause limiting liability, supported the insurer's contention that there should be no stacking.

The court also decided whether consideration had been given by the insurer for the second and third premiums. The court stated that the extra premium covered the insured and relatives while occupying or being struck by the additional insured vehicle, and guests while occupying the additional

15. *Id.* at 682-83.

16. *Id.* at 683.

17. In holding that the separability and limit of liability clauses were unambiguous the supreme court avoided the necessity of using general rules of construction to construe a policy in favor of the insured. For a review of these rules see *Kelley v. American Ins. Co.*, 316 S.W.2d 452, 455 (Tex. Civ. App.—Texarkana 1958), *aff'd on other grounds*, 325 S.W.2d 370 (Tex. 1959). Courts have relied extensively on these rules of construction to allow stacking of medical payment coverages. See, e.g., *Lerman v. Implement Dealers Mut. Ins. Co.*, 382 S.W.2d 285, 289 (Tex. Civ. App.—Houston 1964, writ ref'd n.r.e.); *Southwestern Fire & Cas. Co. v. Atkins*, 346 S.W.2d 892, 894-95 (Tex. Civ. App.—Houston 1961, no writ); cf. *Westchester v. Rhoades*, 405 S.W.2d 812, 816 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.); *Willingham v. Fidelity & Cas. Co.*, 288 S.W.2d 884, 886 (Tex. Civ. App.—Galveston 1956, no writ).

18. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 684 (Tex. 1974).

19. *Id.* at 684; *accord*, *Bogart v. Twin City Fire Ins. Co.*, 473 F.2d 619, 621-24 (5th Cir. 1973); see *American Liberty Ins. Co. v. Ranzau*, 481 S.W.2d 793, 797-98 (Tex. 1972).

insured vehicle.²⁰ The extra premium, by implication, would be charged for additional automobile usage. If the insurer charged an extra premium to a single insured owning more than one automobile, there would still be adequate, or at least legal, consideration in having coverage extended to the second and subsequent vehicles.²¹

The rule against stacking uninsured motorist protection has been followed in a majority of jurisdictions. The reasoning advanced by most courts, as in *Westchester*, is that due to the increased risk in having two vehicles on the highway, there is sufficient consideration and justification for charging a separate premium for additional vehicles covered by the same policy.²² There is, however, contrary authority in other jurisdictions. In *Wilkinson v. Fireman's Fund Insurance Co.*,²³ the plaintiff's son, while a passenger in an automobile not owned by the insured, was killed in an accident with an uninsured motorist. Both the plaintiff and the driver of the car in which the plaintiff's son had been riding had automobile liability policies, each covering three automobiles with uninsured coverages in the amount of \$5,000/\$10,000. The plaintiff sought \$15,000 from each of the two insurers on the basis that the policy limits in each policy should be stacked. The Louisiana Court of Appeals upheld the district court's decision to stack damages.²⁴ The court's reasoning was based on the fact that the Louisiana uninsured motorist statute required insurance "with respect to any motor vehicle;"²⁵ therefore, a policy which insured only the named vehicle violates the statute and is void by law. The result is that whenever a policy is issued to an insured, all automobiles are covered; where separate policies are issued, separate uninsured motorist recoveries will be allowed; and where one policy covers multiple vehicles, and separate premiums are paid for each, multiple recoveries should also be permitted.²⁶

20. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 684 (Tex. 1974).

21. It could well be argued that a second premium would be grossly unfair since a single insured with no relatives covered by the terms of the policy could drive only one car at any one time. There would be no increased risk to the insurer in such cases except where the insured allowed persons to borrow his automobiles, thus providing them with coverage. Upon rehearing, the *Westchester* court considered and dismissed the plaintiff's contention that premium rates were unfair under the holding of the case. *Id.* at 686-87. Since it is the province of the State Board of Insurance to fix reasonable and adequate rates, the court refused to further examine the question.

22. See, e.g., *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 Pacific Ins. Group*, 448 P.2d 357 (Ore. 1968).

23. 298 So. 2d 915 (La. Ct. App. 1974).

24. *Id.* at 919.

25. *Id.* at 918 (emphasis original).

26. *Id.* at 918-19. The Louisiana Supreme Court refused to review this case on the basis that there was "no error of law." *Wilkinson v. Fireman's Fund Ins. Co.*, 302 So. 2d 306 (La. 1974). In *Blocker v. Aetna Cas. & Sur. Co.*, 332 A.2d 476 (Pa. Super. Ct. 1975) the court allowed two recoveries under one policy on the basis that ambiguities in the insurance contract would be resolved against the insurer. The policy in that

The *Wilkinson* case and other Louisiana opinions do not treat the consideration aspect relied upon in other jurisdictions; instead they employ the novel rationale that the wording of the uninsured motorist statute requires insurance policies to give protection with respect to *any* automobile. It is interesting to note that similar wording is used in the Texas uninsured motorist statute;²⁷ however, this language has not influenced the Texas Supreme Court to deviate from what it considers to be the better line of reasoning in denying stacking.²⁸

The salient point raised by the Texas courts in cases concerning stacking of uninsured motorist coverage is that valid consideration has been given by each party to the insurance contract. Despite the interpretation given the policies and statutes, when a vehicle is added to a policy, additional risk is incurred by the insurer for which the insured should compensate. Where the risk is virtually the same regardless of the number of automobiles the insured may place on the highway, then no added consideration should be charged for the additional vehicles, or in the alternative, where additional premiums are charged, additional coverage should be given.

MEDICAL PAYMENTS AND RELATED CLAIMS

The consideration argument has been used by Texas courts, as well as other jurisdictions, when construing insurance clauses providing for medical payments made necessary as the result of an automobile accident.²⁹ In addition, conflicting policy provisions have allowed the courts to construe the insurance contracts in favor of the insured. The leading case in Texas is *Southwestern Fire & Casualty Co. v. Atkins*,³⁰ where the plaintiff was issued one policy which provided coverage on her two automobiles for personal injury, property damage liability, and medical payments. The plaintiff's daughter was injured when struck by a third vehicle, and pursuant to the medical payments clause of the policy the insurer tendered payment of \$500—the policy limit—even though medical expenses incurred as a result of the accident were in excess of \$1,000. Since premiums were charged separately for each car, the plaintiff sought recovery of an additional \$500 from the insurer.³¹

case, however, did not expressly exclude from uninsured motorist coverage other automobiles owned by the insured for which premiums had not been paid. *Id.* at 479.

27. TEX. INS. CODE ANN. art. 5.06-1(1) (Supp. 1975) states: "[N]o 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 . . ." (emphasis added).

28. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 684 (Tex. 1974).

29. *Southwestern Fire & Cas. Co. v. Atkins*, 346 S.W.2d 892 (Tex. Civ. App.—Houston 1961, no writ); *accord*, *Kansas City Fire & Marine Ins. Co.*, 356 S.W.2d 613 (Ark. 1962). See generally Comment, *Insurance-Pyramiding Medical Payment Coverages in Automobile Policies*, 10 WAKE FOREST L. REV. 737 (1974).

30. 346 S.W.2d 892 (Tex. Civ. App.—Houston 1961, no writ).

31. The pertinent contractual provisions were as follows: The coverage portion of

Based upon the policy provisions limiting liability, the insurer contended that its liability could not exceed \$500, while the plaintiff sought to stack the coverages on the basis of the separability clause. In affirming the district court's decision to allow stacking, the Houston Court of Civil Appeals initially took cognizance of the consideration equities. Separate premiums had been charged for each car, thus if separate policies had been written, the insured could have recovered \$500 per car and, if the insured had only paid one premium, she still could have recovered \$500. In other words, unless double recovery was permitted, there would be no consideration for the payments of the premium on the second car.³² Recognizing this lack of consideration the court indicated that the insurer had suffered no increased risk by issuing coverage on the second automobile.³³ The policy terms clearly provided coverage for the insured and each relative injured in an accident while occupying or through being struck by *an* automobile. In other words, the terms of the policy followed the insured rather than the automobiles listed in the policy. The insured and her family were covered regardless of which vehicles had been charged with the premiums. Under uninsured motorist provisions, the premiums are charged "to" the automobile in the sense that other automobiles are excluded, that is, other vehicles belonging to the insured upon which no premium has been paid. No such limitation applied in *Atkins*.

Due to conflicting contractual provisions, the court employed generally accepted rules of construction to afford the plaintiff a double recovery.³⁴ In such a case, the limit of liability clause was offset by the separability clause, thus allowing a \$500 recovery for each car.³⁵ Whereas the limit of liability clause stated that \$500 was the total recovery allowed any one person in any one accident, the separability clause provided that the policy terms applied separately to each car. The two provisions were in obvious conflict and, therefore, the policy was construed in favor of the insured to permit double

the policy contained the heading "Medical Payments" under which liability was limited to \$500. The premiums charged for this coverage were listed separately as \$8.00 for car number one and \$7.00 for car number two. The medical payment clause stated that the insurer would pay all medical expenses incurred as a result of the accident to the named insured and each relative while occupying or in being struck by an automobile. The total liability was stated to be the liability in the policy declarations for one person and any one accident. Finally, there was a provision which stated when two or more automobiles were insured, the terms of the policy applied to each separately. *Id.* at 893-94.

32. *Id.* at 894.

33. It may be argued that a family with two or more cars will have increased total exposure time to accident risks over a family with one car; however, courts are not prone to review the statistical aspect of insurance rates. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 687 (Tex. 1974).

34. *Southwestern Fire & Cas. Co. v. Atkins*, 346 S.W.2d 892, 894 (Tex. Civ. App.—Houston 1961, no writ).

35. *Id.* at 894.

recovery.³⁶ This conclusion is sound in that it provides for a reasonable construction of the policy. It is also logical to allow double recovery where double premiums are paid at no increased risk to the insurer. It should be noted, however, that the policy terms provided coverage regardless of whether the vehicle involved, if any, was insured or not.

Atkins has been cited frequently by courts with approval.³⁷ Of special interest are portions of another court's opinion allowing stacking of medical payments protection in *Dhane v. Trinity Universal Insurance Co.*³⁸ It should be noted that in *Dhane* the policy provisions were slightly different from those in *Atkins*. The medical payments clause in *Dhane* provided coverage for medical expenses as the result of an accident to: (1) the named insured and each relative injured while occupying an insured automobile, a non-owned automobile, or through being struck by an automobile, and (2) to guests injured while occupying an insured automobile.³⁹

The court of civil appeals initially followed the general rules of construction, stating that an ambiguity present in a policy should be construed in favor of the insured.⁴⁰ The ambiguity involved the above stated medical payments clause and the separability clause. In combining the terms of both clauses the court construed the policy to cover medical expenses incurred by the named insured and each relative: (a) while occupying an automobile for which a specific premium indicated that coverage was afforded; (b) while occupying a non-owned automobile; or (c) through being struck by an automobile.⁴¹ Upon examination of this clause as rewritten by the court, it is clear that subdivision (a) provided coverage for each separate vehicle, while subdivision (b) provided coverage in accidents where *any* uninsured vehicles were involved. Thus subdivision (a) would dictate that stacking not be allowed while subdivision (b) indicates otherwise.⁴²

Interpreting subdivision (c), the court observed that the clause would apply where the insured was a pedestrian, or was riding in any automobile, whether insured or not. This reasoning would also seem to require stacking of benefits. Consequently, the policy was capable of several constructions, and, because the plaintiff had been struck by an automobile, she was entitled to a stacking of benefits under the three-car policy.⁴³

36. *Id.* at 895.

37. *Greer v. Associated Indemn. Corp.*, 371 F.2d 29, 33 (5th Cir. 1967); *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 686 (Tex. 1974); *Harlow v. Southern Farm Bureau Cas. Ins. Co.*, 439 S.W.2d 365, 368 (Tex. Civ. App.—Austin 1969, no writ).

38. 497 S.W.2d 323, 328 (Tex. Civ. App.—Waco 1973), *aff'd sub nom.* *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679 (Tex. 1974).

39. *Id.* at 325.

40. *Id.* at 327.

41. *Id.* at 328.

42. *Id.* at 328.

43. *Id.* at 328. In *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679 (Tex.

From the foregoing cases,⁴⁴ it is clear that ambiguous language in an insurance contract is an important factor in permitting an insured to stack coverages. Once it is determined that the various medical payments and related provisions are ambiguous as to the amount of coverage provided, most courts will employ the rules of construction which allow an insured multiple recovery. Only a few cases, such as *Atkins*, have explored the consideration argument which is so prominent in the uninsured motorist cases.

THE TEXAS PERSONAL INJURY PROTECTION STATUTE

In 1973 the Texas Legislature adopted a version of "no-fault" insurance in requiring that all automobile liability insurance policies include provisions for personal injury protection unless specifically rejected by the insured.⁴⁵ In essence, the statute requires that an automobile liability policy provide to the insured, members of his household, and any authorized operator or passenger including a guest occupant, up to \$2,500 per person for payment of certain expenses incurred as the result of an automobile accident.⁴⁶ The expenses that are recoverable include necessary medical, surgical, hospital, and funeral services. Loss of income where the injured person is an income producer is also provided as well as necessary expenses for services ordinarily performed for care and maintenance of the family where the injured is not an income producer.⁴⁷ The benefits required by the Act are payable irrespective of fault, and no right of subrogation accrues to an insurer in paying such benefits.⁴⁸

PIP is similar in nature to some "no-fault" statutes in other states.⁴⁹ For example, in Massachusetts, the pioneer of "no-fault" insurance legislation,

1974), the supreme court merely affirmed the holding of the court of civil appeals concerning the stacking of medical payments coverage, stating that it remained in general agreement that the stated medical payments limits were to be stacked where necessary to cover the expenses of the named insured or a relative. *Id.* at 686. From this general approval of stacking medical payments, it is unclear how the supreme court would hold in a situation where the terms of the medical payments clause are both clear and explicit, and worded as precisely as an uninsured motorist clause. The opinion does not make the distinction as to whether the court approved stacking medical payments per se, or whether it merely approved the general rules to be followed in construing insurance contracts.

44. In *Government Employees Ins. Co. v. Sweet*, 186 So. 2d 95 (Fla. Dist. Ct. App. 1966), the court allowed stacking for the same reasons given in *Dhane*; that is, conflicts in the policy provisions are construed in favor of the insured. *Id.* at 97. See *Bracy v. American Family Mut. Ins. Co.*, 204 N.W.2d 174 (Neb. 1973) where stacking of medical payments coverage was denied on the basis that the exclusion provisions in the policy were clear and unambiguous. *Id.* at 175-76.

45. TEX. INS. CODE ANN. art. 5.06-3(a) (Supp. 1975).

46. *Id.* art. 5.06-3(b).

47. *Id.* art. 5.06-3(b).

48. *Id.* art. 5.06-3(c).

49. For a general overview of the various legislation in other states, see *Fire Cas. & Sur. B. Nc-1* (1974).

coverage paying up to \$2,000 in benefits is required for the insured, members of his household, authorized operators or passengers including guest occupants, and any pedestrians struck by the insured, regardless of fault in the causation of the accident.⁵⁰ The benefits cover reasonable expenses for necessary medical and hospital services, and payments for services that would have been performed for the benefit of household members.⁵¹ Moreover, the statute provides for recovery of lost wages for employed individuals, including the self-employed, and loss of earning power for the unemployed.⁵²

The major distinction between the Texas and Massachusetts statutes is the partial elimination of tort actions under the Massachusetts system.⁵³ In that state a person injured in an automobile accident may bring an action to recover damages for pain and suffering only if the reasonable and necessary expenses incurred in treating the injury are greater than \$500 unless the injury causes death, the loss of a body member, disfigurement, or results in certain losses of sight or hearing.⁵⁴ Under the Texas PIP the only restriction to litigation is the denial of subrogation rights to an insurer paying PIP benefits.⁵⁵

Uninsured motorist protection, medical payments, and other considerations provide a guide as to how policy provisions required by the personal injury protection statute will be construed with regard to stacking of coverage in a single multi-car policy. In the typical automobile policy, the wording of PIP coverage is closely related to that used in uninsured motorist protection provisions. For example, as noted, the separability clause in *Westchester Fire Insurance Co. v. Tucker*⁵⁶ did not affect the uninsured motorist provisions. In the standard policy, PIP is also unaffected by the separability clause.⁵⁷

The Texas Supreme Court in *Westchester* also held that the phrase "to pay all sums" used in the uninsured motorist clause created no doubt in defining the limit of an insurer's liability.⁵⁸ The same reasoning is equally applicable

50. MASS. GEN. LAWS ANN. ch. 90, § 34A (1975). For a brief summary of the Massachusetts no-fault provisions, see 13 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 48:179.2, at 157-59 (Supp. 1974).

51. MASS. GEN. LAWS ANN. ch. 90, § 34A (1975).

52. *Id.* This last provision has a limitation in that any employee wage continuation benefits are deducted from a lost earnings amount and only 75 per cent of this amount is recoverable through the statutory benefits. *Id.*

53. Compare *id.* § 34M (1975), with TEX. INS. CODE ANN. art. 5.06-3 (Supp. 1975).

54. MASS. GEN. LAWS ANN. ch. 231, § 6D (1974).

55. TEX. INS. CODE ANN. art. 5.06-3(c) (Supp. 1975).

56. 512 S.W.2d 679, 682 (Tex. 1974).

57. In the Texas Standard Automobile Endorsement the separability clause is in the "conditions" section of the policy. The PIP Endorsement states that certain policy conditions are to apply to the PIP clauses; the separability clause is not included among them. Texas Standard Automobile Endorsement, Form 241 (1973).

58. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 682 (Tex. 1974).

to PIP where the insurer agrees to "pay all reasonable and necessary . . . expenses."⁵⁹ Just as the clause limiting liability tempers the "pay all sums" provision under uninsured motorist coverage, the PIP provision restricts the "pay all reasonable and necessary expenses" phrase.

In *Westchester*, it was likewise noted that the clause limiting liability made it clear that stacking was improper.⁶⁰ The limitations of liability applicable to PIP are less clear. In the standard policy it is stated that "the total aggregate limit of liability for all benefits . . . shall not exceed the limit of liability set out in the schedule of this endorsement."⁶¹ On the surface, the extent of liability would seem to be the limit set out for each automobile. An argument can be made, however, that since the limit isn't specifically tied to the liability limits for one person or accident, but rather to the schedule as a whole, stacking will be allowed. Reference to the schedule, it may be argued, would allow aggregation of all the limits of liability for the designated automobiles.

The PIP provisions also parallel the uninsured motorist provisions in *Westchester* as they relate to the argument that additional premiums charged by the insurer for additional vehicles are supported by consideration.⁶² PIP coverage is provided to the insured, his relatives, and non-relatives while occupying or using an insured automobile.⁶³ An insured automobile is defined as one described in the schedule as an insured vehicle to which bodily injury liability coverage applies.⁶⁴ Furthermore, the PIP exclusions section disallows recovery where injury is sustained while occupying or being struck by an owned but uninsured automobile.⁶⁵ These provisions indicate that the consideration for extra PIP premiums on additional vehicles is the coverage afforded: (1) the insured and his relatives when occupying or being struck by the additional vehicles, and (2) guests while occupying the additional vehicles. The result, therefore, is identical to that given the uninsured motorist clauses. Additionally, premiums are charged for the further risk involved in covering second and subsequent vehicles.

In contrast is the fact that medical payments clauses are afforded different treatment than uninsured motorist or PIP clauses. Most significantly, the separability clause applies to medical payments coverage while specifically excluding uninsured motorist and PIP clauses. Furthermore, the separate premiums paid for medical payments are construed to provide for multiple coverage as a result of contractual ambiguities which make it difficult to de-

59. Texas Standard Automobile Endorsement, Form 241 (1973).

60. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 683 (Tex. 1974).

61. Texas Standard Automobile Endorsement, Form 241 (1973).

62. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 684 (Tex. 1974).

63. Texas Standard Automobile Endorsement, Form 241 (1973).

64. *Id.*

65. *Id.*

termine the consideration given by insurers for additional premiums charged. No such ambiguities exist in uninsured motorist or PIP provisions. Although a generic relationship exists between medical payments and PIP as to the type of benefits paid, the similarity ends there. Thus, the construction given by the courts to uninsured motorist provisions, coupled with the fact that PIP clauses are almost identical in wording, infers that no stacking of PIP should be allowed.

Other aspects of PIP such as the wording of the statute itself should be considered. In section (b) of the PIP section of the Insurance Code, provisions are made for PIP coverage to include various types of medical expenses and loss of income.⁶⁶ At the end of this section, where it is indicated which losses are recoverable, it is specifically provided that "[t]he personal injury protection in this paragraph specified shall not exceed \$2,500 for all benefits, in the aggregate, for each person."⁶⁷ This wording gives rise to some questions as to the drafter's intent. One interpretation suggests that the maximum amount recoverable under PIP is \$2,500. Another interpretation is that the PIP coverage is \$2,500 as to the various benefits provided, that is, recovery of medical expenses, and of lost earnings or household services. If the second interpretation is indeed the correct one, then the \$2,500 limitation applies only to the various types of expenses for which reimbursement will be made, but does not in any way affect the question of stacking arising out of insurance policy interpretation conflicts.⁶⁸

Aside from the \$2,500 limitation provision and the clause providing that an insurer may increase the amount of benefits payable, there is no wording indicative of legislative intent concerning stacking. Consequently, interpretation must eventually come from cases construing actual insurance policies. There are two possible ramifications, however, arising from the fact that PIP is a legislative product. One is that PIP even more closely relates to uninsured motorist coverage, for that is also a statutory creation. If there has been any motivation on the part of courts regarding extension of coverage limitations in uninsured motorist coverage cases, such motivation will also apply to personal injury protection. The second consideration involves the weight given to PIP's statutory origin when deciding issues of public policy in cases involving interpretation and construction of insurance policies. In

66. TEX. INS. CODE ANN. art. 5.06-3(b) (Supp. 1975).

67. *Id.* 5.03-1(b).

68. To illustrate these interpretations, assume the insured sustained \$2,500 medical expenses and \$2,500 loss of earnings. The first interpretation would limit his recovery to \$2,500, that being the maximum amount allowed by the statute in any one accident. The second interpretation would hold this restriction to mean that only a total of \$2,500 could be recovered as between the medical expenses and loss of earnings; that is, the insured could not add the two types of damages to gain a \$5,000 recovery. This second interpretation, however, would not affect stacking two PIP recoveries. The second interpretation leaves open the question of how many single recoveries can be had under the insurance policy.

Westchester and previous cases public policy has been used to negate the effect of certain aspects of an insurance contract.⁶⁹ Of course, there is no doubt that this same recognition of public policy will have to be given to PIP by the courts.

It has been mentioned that PIP is similar to medical payments in a generic sense. This is true because both coverages provide recovery of medical expenses (PIP additionally provides for loss of earnings). Also, both coverages provide benefits regardless of fault on the part of the insured. How significant the relationship is between the two types of protection remains to be determined.

CONCLUSION

The question as to stacking of uninsured motorist protection and medical payments clauses in Texas has been settled; however, the question remains as to whether stacking of personal injury protection coverages will be permitted. A balancing test resolving the treatment to be given personal injury protection would weigh heavily against stacking. The precedent, via uninsured motorist clauses, seems to indicate that stacking will be denied for PIP. It is true that some possible conflicts in insurance clauses may allow rules of construction to provide a means of securing more than one recovery. The better approach, however, would be to deny stacking on the strength of precedent and better logic.

69. *Westchester Fire Ins. Co. v. Tucker*, 512 S.W.2d 679, 685 (Tex. 1974).