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Insurance

RICHARD H. LEE* AND TERESA L. MUSSETTO**

This article focuses on recent legislative changes and judicial interpretations in the area of automobile insurance. The question whether insurers should be joined as parties defendant with their insureds as a matter of policy remains unanswered, as the Supreme Court of Florida struck down the nonjoinder statute as unconstitutional. The authors examine the new mandatory option for uninsured motorist coverage and the interaction of such benefits with other coverages and exclusions. The stacking of coverages still applies to some policies and may be crucial in underinsured motorist situations. Attention is also given to problems of concurrencies between personal injury protection and other coverages.

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I. INTRODUCTION

Since the last survey article on insurance appeared in this journal,¹ the legislature has directed much of its effort towards requiring less automobile insurance, presumably in the hope that the resulting lower rates may in turn bring about greater compliance with the law. The legislature abolished compulsory liability insurance² by deleting from section 627.733 of the Florida Statutes the requirement that liability insurance sufficient to qualify under the provisions of the Financial Responsibility Law³ be maintained. All that an owner of an automobile need now carry is no-fault cover-

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1. Lee & Polk, *Insurance, 1976 Developments in Florida Law*, 31 U. MIAMI L. REV. 1061 (1977).

2. Florida Insurance and Tort Reform Act of 1977, Fla. Laws ch. 468, § 31.

3. FLA. STAT. §§ 324.021(7), .151 (1979).

age.⁴ Though the amount of that coverage has been increased from \$5,000 to \$10,000,⁵ the deductibles have also risen,⁶ so that it is now possible to operate a motor vehicle legally with a bare minimum of protection for the owner himself and those few others protected by his personal injury protection (PIP) coverage. This seems not unwise if the eventual plan is to increase the coverage drastically. Liability insurance, with its dependence upon fault, has failed to provide adequate protection to the general public who may be injured in automobile accidents.⁷ It can adequately protect the insured from the results of his own negligence, but more is needed. Eventually, an unlimited no-fault system may provide the answer.

In another area, the 1979 Florida Legislature created the Legal Expense Insurance Act,⁸ which has an immense potential impact upon the legal profession. It provides for the recognition and regulation of organizations whose functions are either to pay for legal services, or, what is more significant, to provide such services. Although this new departure is too important to evaluate and comment on in a survey article at this early date, it will be interesting to see what use is made of this new kind of coverage and how it will affect the practice of law.

As always, the courts have been busy with insurance matters, including disputes over uninsured motorist coverage,⁹ the necessity of a written rejection if the coverage is not to equal the liability limits,¹⁰ and stacking,¹¹ despite its abolition by the legislature.¹² Also, there have been decisions regarding concurrency between liability carriers of lessors and lessees of automobiles,¹³ as well as concurrency and overlap between the various first party no-fault coverages.¹⁴ We shall deal with some of the cases in these areas later.

4. Florida Automobile Reparations Reform Act, FLA. STAT. §§ 627.730-.741 (1979).

5. *Id.* § 627.736(1) (1979).

6. *Id.* § 627.739(2) (1979).

7. Often, for example, a plaintiff's claim goes unredressed because a judgment-proof defendant is uninsured or underinsured, or, because of the long delays and high costs of litigation, a needy plaintiff may be forced to settle his claim below his actual losses.

8. 1979 Fla. Laws ch. 103 (to be codified at FLA. STAT. §§ 647.01-.19 (1979)).

9. See notes 29-33 and accompanying text *infra*.

10. See notes 34-52 and accompanying text *infra*.

11. See notes 53-80 and accompanying text *infra*.

12. See note 54 and accompanying text *infra*.

13. See notes 92-104 and accompanying text *infra*.

14. See notes 81-91 and accompanying text *infra*.

II. JOINDER OF INSURERS

One of the most interesting decisions of 1979 to insurance lawyers is *Markert v. Johnston*,¹⁵ because by striking down the statute prohibiting joinder of insurers in suits against their insureds,¹⁶ the Supreme Court of Florida resurrected the ghost of *Shingleton v. Bussey*.¹⁷ *Shingleton*, it will be remembered, permitted direct suit against a tortfeasor's insurer as an additional party defendant, despite a clause in the insurance contract insisting that no action shall lie against the company until a judgment had been rendered against the insured. In *Shingleton*, the possible prejudice implicit in the jury's awareness of the existence of insurance was deemed outweighed by the desirability of allowing the plaintiff to sue the real party in interest. The legislature, apparently feeling that joinder of the insurer might result in larger verdicts, and under pressure to keep insurance costs down, enacted section 627.7262 of the Florida Statutes.¹⁸ This provision created a procedure which assured the plaintiff that the insurance would be available if needed, but which would keep the name of the carrier out of the title of the action, presumably preventing jury speculation on the existence of insurance.

15. 367 So. 2d 1003 (Fla. 1979).

16. FLA. STAT. § 627.7262 (1979).

17. 223 So. 2d 713 (Fla. 1969).

18. FLA. STAT. § 627.7262 provides:

(1) No motor vehicle liability insurer shall be joined as a party defendant in an action to determine the insured's liability. However, each insurer which does or may provide liability insurance coverage to pay all or a portion of any judgment which might be entered in the action shall file a statement, under oath, of a corporate officer setting forth the following information with regard to each known policy of insurance:

(a) The name of the insurer.

(b) The name of each insured.

(c) The limits of liability coverage.

(d) A statement of any policy or coverage defense which said insurer reasonably believes is available to said insurer filing the statement at the time of filing said statement.

(2) The statement required by subsection (1) shall be amended immediately upon discovery of facts calling for an amendment to said statement.

(3) If the statement or any amendment thereto indicates that a policy or coverage defense has been or will be asserted, then the insurer may be joined as a party.

(4) After the rendition of a verdict, or final judgment by the court if the case is tried without a jury, the insurer may be joined as a party and judgment may be entered by the court based upon the statement or statements herein required.

(5) The rules of discovery shall be available to discover the existence and policy provisions of liability insurance coverage.

The supreme court in *Markert* struck down this nonjoinder statute as an unconstitutional intrusion upon its rulemaking power. Justice Alderman, concurring specially, expressed the opinion that the legislature had set forth the public policy of the state regarding joinder of automobile insurance companies and hoped that the supreme court would adopt the substance of the statute as a rule of procedure.¹⁹ This the supreme court has not done. It would seem that the court endorsed the policy expressed in *Shingleton* and agreed that the jury should know that an insurer is the real party in interest. *Markert* seems a constitutionally sound decision, but as a matter of public policy the result appears questionable.

Damico v. Lundberg,²⁰ a recent decision by the District Court of Appeal, Second District, points up the real reason for not allowing joinder of the insurer. In an automobile negligence action, the trial court dismissed defendant's liability carrier in reliance on section 627.7262 and then proceeded to trial on the merits, resulting in a jury verdict for the defendant. On appeal, the court agreed with the plaintiff-appellant that, in light of *Markert*, the dismissal of the insurer was error. The appellant further argued that the error was prejudicial because had the jury known that an insurance company would have to pay any judgment, they might have found liability. The appellate court found no reversible error because "[e]ven had that information been added, the state of the evidence was such that a verdict for appellant would have been incredible."²¹ This rationale suggests that if the question of fault had been closer, the existence of coverage might have been a legitimate factor to be considered by the jury. When could insurance or the lack of it ever be relevant to the issue of liability? May not trial courts refuse to allow joinder of insurers with impunity? Although under *Markert* and *Shingleton* such a refusal may be error, to call it prejudicial is to admit that joinder sways juries, a result the legislature had sought to avoid.

But when liability exists or even when the issue is in doubt, the parties are entitled to full disclosure of insurance and of policy defenses. This is a legitimate factor in settlement, however irrelevant it may be in determining liability. In *Davis v. Nationwide Mutual Fire Insurance Co.*,²² the failure of the defendant's attor-

19. 367 So. 2d at 1006.

20. 379 So. 2d 964 (Fla. 2d DCA 1979).

21. *Id.* at 965.

22. 370 So. 2d 1162 (Fla. 1st DCA 1979).

ney to disclose the full available coverage was held sufficient bad faith to sustain a judgment against the insurers in excess of the policy limits. Even though the plaintiff made no offer to settle, the misrepresentation had affected his decision not to make one. Joinder of the insurers as parties from the beginning would have avoided this result, although the jury might have been affected by its awareness of the coverage. Had the procedure set forth in section 627.7262 been followed, the parties would have had full disclosure but the fact of insurance would have been kept from the jury. It would seem that Justice Alderman's suggestion in his *Markert* concurrence that the substance of the stricken statute be adopted as a rule of procedure has considerable merit.

III. ASSIGNMENT OF POLICIES

Before moving on to a consideration of the cases dealing with uninsured motorist coverage and other automobile insurance matters, it seems appropriate to discuss briefly one case dealing with a general liability policy. Except in marine insurance and in a few specifically recognized exceptions such as death of the insured, a contract of insurance is essentially personal, each party having in view the character, credit, and conduct of the other.²³ As Vance said, "[t]he contract of insurance is not attached to the property which is the subject of the insurance, nor does it run with it to a transferee."²⁴ But in *Maryland Casualty Co. v. Murphy*,²⁵ the District Court of Appeal, Third District, held that absent a clause in the policy prohibiting assignment, a liability policy was assignable without the insurer's consent.

In *Murphy*, the sellers and purchaser of an office building and parking garage prorated the premium on the sellers' liability insurance at the closing. The parties clearly intended to allow the purchaser the benefit of the sellers' insurance, but apparently no one notified the insurance company. Two days after the closing, a third party was injured on the garage premises and made a claim against the insurer. The insurer denied liability because the policy nowhere mentioned the purchaser and covered only the sellers' liability to the injured party.²⁶ The court found that the sellers were not

23. W. VANCE, *HANDBOOK ON THE LAW OF INSURANCE* 96 (3d ed. 1951).

24. *Id.*

25. 342 So. 2d 1051 (Fla. 3d DCA 1977).

26. The sellers may have been liable on the theory that they created the dangerous condition or nuisance which caused the injury and that the purchaser had not been in possession long enough to correct it. See *Pharm v. Lituchy*, 283 N.Y. 130, 27 N.E.2d 811 (N.Y.

at fault and granted summary judgment in their favor, but held their insurer liable.

The court determined that, absent a "no assignment" clause in the policy, the policy was assignable to the purchaser, quoting from section 627.422 of the Florida Statutes, which provides that "[a] policy may be assignable or not assignable, as provided by its terms." A reading of the entire section,²⁷ however, indicates that it contemplates the assignment of the proceeds of a life or disability policy, not an assignment which would substitute one insured for another, or one risk for another. Furthermore, although it is true that the statute permits assignment if provided for in the policy, the conclusion that a failure to provide such also permits assignment seems wholly unwarranted.

Even in the vendor-purchaser situation, in which Florida law gives the purchaser the benefit of the vendor's fire insurance after the signing of the contract and before title passes,²⁸ the vendor remains the insured party. The vendor must have an insurable interest, and the purchaser gets the insurance proceeds not as an insured but through the vendor, as the result of equitable conversion. But in *Murphy* the named insureds had *no* liability. The subject matter of the policy, the sellers' liability, was changed to the purchaser's liability without the consent of the insurer. This is such a substantial departure from the basic principles of contract and insurance law that it should not go unchallenged.

IV. UNINSURED MOTORIST COVERAGE

A. *Excluded Third-Party Beneficiaries*

In tackling the difficult problem of interrelated but distinct coverage, the courts have remained faithful to basic contract prin-

1940).

27. FLA. STAT. § 627.422 (1979) provides:

A policy may be assignable, or not assignable, as provided by its terms. Subject to its terms relating to assignability, any life or disability policy, whether heretofore or hereafter issued, under the terms of which the beneficiary may be changed upon the sole request of the insured, may be assigned either by pledge or transfer of title, by an assignment executed by the insured alone and delivered to the insurer, whether or not the pledgee or assignee is the insurer. Any such assignment shall entitle the insurer to deal with the assignee as the owner or pledgee of the policy in accordance with the terms of the assignment, until the insurer has received at its home office written notice of termination of the assignment or pledge, or written notice by or on behalf of some other person claiming some interest in the policy in conflict with the assignment.

28. *Nelson Properties Inc. v. Denham*, 123 Fla. 382, 167 So. 35 (1936).

ciples. In the field of automobile insurance, questions arise when the third-party beneficiary of an insurance contract (e.g., a family member or an employee of the named insured) attempts to collect under the uninsured motorist (UM) provisions of the named insured's policy, when prevented by an exclusion in its liability section from recovering directly against the tortfeasor-policy holder. For example, in *Reid v. Allstate Insurance Co.*,²⁹ the plaintiff-daughter, injured in the family car while her sister was driving, attempted to collect UM benefits under her father's automobile policy. Because of the household exclusion, she could not maintain suit against her sister as the "insured" on the basis of liability. Another exclusion provided that no vehicle named in the policy as the insured vehicle (here, the family car) could qualify as an uninsured vehicle for purposes of UM protection. Thus, although the automobile involved in the accident was, in fact, uninsured as to the plaintiff, the court held that she could not recover UM benefits under the policy.

A similar result was reached in *Hartford Accident & Indemnity Co. v. Fonck*,³⁰ a case involving the fellow-employee exclusion. In *Fonck*, the plaintiff was injured when one of the employer's vehicles, negligently parked by a fellow employee, toppled over, throwing the plaintiff off the truck bed. In denying the employee recovery under the UM provisions of his employer's policy, the court emphasized that Fonck was a potential insured "solely because of his status of occupying the vehicle as an employee and not because of any coverage he purchased."³¹ While the opinion failed to mention any exclusion in the UM provisions of the policy similar to that considered in *Reid*, the court did reiterate the rationale expressed by the District Court of Appeal, Fourth District, that to hold differently would be, in effect, to nullify an otherwise valid exclusion in the liability contract.³²

The *Reid* and *Fonck* decisions recognize two exceptions to the general rule "that an insurer may not limit the applicability of UM protection."³³ They represent sound policy, however, because in each case the court upheld the basic character of the insurance contract under which the plaintiff had claimed. To have found coverage in either case, would have been to transform a liability policy

29. 344 So. 2d 877 (Fla. 4th DCA 1977), *aff'd*, 352 So. 2d 1172 (1977).

30. 344 So. 2d 595 (Fla. 2d DCA 1977).

31. *Id.* at 596.

32. *See id.* at 597; *Reid v. Allstate Ins. Co.*, 344 So. 2d at 880.

33. *Reid v. Allstate Ins. Co.*, 344 So. 2d at 879.

into an accident policy, which the courts should not and did not do.

B. *Rejection of Uninsured Motorist Coverage*

Where UM coverage does apply, it is the legislative intent that this first-party coverage be available to the insured in limits equal to those of his liability coverage. To that end, section 627.727(2) of the Florida Statutes provides that an insurer must offer UM coverage up to the limits of the policyholder's liability protection.³⁴ From that standpoint, UM coverage may be considered quasi-compulsory in nature. The beneficial effects of such mandatory protection, however, are diminished by provisions in the statute³⁵ which enable the policyholder to reject this coverage in whole or in part.

A rejection of UM coverage, where made, must be an affirmative and informed one; so held the District Court of Appeal, Fourth District, in *Lumbermen's Mutual Casualty Co. v. Beaver*.³⁶ In *Beaver*, the plaintiff bicyclist was covered under a policy issued to another, Norman Welch. The Welch policy provided bodily injury limits of \$100,000/\$300,000 for liability, yet the UM coverage limits were only \$10,000/\$20,000. The defendant's agent, who sold Welch the policy, contended that "to the best of his recollection and knowledge he had advised Welch of his options"³⁷ to purchase UM coverage up to a maximum of the bodily injury limits. The agent had no written proof of Welch's rejection of the higher UM limits; Welch, on the other hand, testified that there was no discussion concerning his UM options.³⁸ The court concluded that the insurer in this case had failed to prove that the insured had affirmatively rejected the statutorily mandated limits. It further approved the rule, promulgated by the State Department of Insur-

34. FLA. STAT. § 627.727(2) (1979) provides:

The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured, or such lower limit complying with the company's rating plan as may be selected by the named insured, but in any event the insurer shall make available, at the written request of the insured, limits up to \$100,000 each person, \$300,000 each occurrence, irrespective of the limits of bodily injury liability purchased, in compliance with the company's rating plan.

35. *Id.* § 627.727(1) (1979) provides that "the coverage required under this section shall not be applicable when, or to the extent that, any insured named in the policy shall reject the coverage."

36. 355 So. 2d 441 (Fla. 4th DCA 1978); *accord*, *American Motorists Ins. Co. v. Weingarten*, 355 So. 2d 821 (Fla. 1st DCA 1978).

37. 355 So. 2d at 442.

38. *Id.*

ance, requiring insurers to maintain evidence that UM coverage up to the bodily injury limits of the policy had been offered to the insured.³⁹

Prior to the decision in *Beaver*, a written rejection of maximum UM coverage was not required. In *Glover v. Aetna Insurance Co.*,⁴⁰ the District Court of Appeal, First District, concluded that since the statute failed to specify the method or means whereby an insured must reject the coverage, an admitted oral rejection sufficed.⁴¹ The First District later held as a point of evidence, in *American Motorists Insurance Co. v. Weingarten*,⁴² that "an informed rejection of additional uninsured motorist coverage cannot, without extrinsic evidence, be implied from the insured's signature on an application for uninsured motorist coverage to lower limits."⁴³ Although these two decisions turned on the factual question of whether the insured had made an informed rejection, it is clear that for the protection of both insurer⁴⁴ and insured,⁴⁵ a written record of such a refusal should be maintained.⁴⁶

39. FLA. ADMIN. CODE § 4-28.02 (1971) (repealed 1979), quoted in 355 So. 2d at 444, provided as follows:

Chapter 71-88, Laws of the State of Florida, as respects the provision for increased uninsured motorist coverage limits, is applicable to policies with effective dates or renewal dates on or after January 1, 1972. Evidence must be maintained by the company that such coverage was offered in limits up to the bodily injury limits of liability applicable to the policy. The applicant or insured may accept limits for uninsured motorist coverage in an amount less than the bodily injury limits of the policy.

The Court in *Beaver* rejected the contention that § 4-28.02 violated FLA. STAT. § 624.308(1) (1971) because it modified or extended § 627.727(1). See 355 So. 2d at 444. 1976 Fla. Laws ch. 76-266, § 3 substantially revised FLA. STAT. § 627.727(1) (1971), rendering the rule obsolete. See Increased Limits—Uninsured Motorist, Rule No. 4-28.02, Fla. Admin. Weekly, Feb. 16, 1979, at 4.

40. 363 So. 2d 12 (Fla. 1st DCA 1978).

41. *Id.* at 13. In *Glover*, it was also apparent that the employer's rejection of UM coverage when purchasing the insurance policy binds the employee.

42. 355 So. 2d 821 (Fla. 1st DCA 1978).

43. *Id.*

44. A written refusal precludes a liability such as that incurred in *Weingarten* or *Beaver* beyond the limits stipulated in the policy.

45. This is particularly true since the insurance policy is a classic example of an adhesion contract. See generally Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931); Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198 (1919).

46. On July 9, 1973, the State Insurance Department issued Bulletin 586, which requires written rejection of UM coverage by the insured effective October 1, 1973. The validity of that regulation was upheld by the Fifth Circuit in *Harris v. United States Fidelity & Guar. Co.*, 569 F.2d 850 (5th Cir. 1978). See *Glover v. Aetna Ins. Co.*, 363 So. 2d 12, 13 (Fla. 1st DCA 1978).

A different problem arises when the lessor-lessee relationship is involved. Section 627.727(1) of the Florida Statutes,⁴⁷ as construed by the District Court of Appeal, Fourth District, in *Mattingly v. Liberty Mutual Insurance Co.*,⁴⁸ provides that the lessee of a vehicle (for a period of at least one year) shall have the sole privilege to reject UM coverage only when he either is the named insured in a policy providing liability coverage on the leased vehicle, or is named on a certificate of a master policy issued to the lessor. In *Mattingly*, the court held that a lessee who was not the named insured in any policy or certificate of a master policy issued to the lessor was bound by the latter's waiver of higher UM limits. In the earlier case of *Guardado v. Greyhound Rent-A-Car, Inc.*,⁴⁹ the District Court of Appeal, Third District, had been explicit in holding that even though the self-insured automobile lessor's waiver was not communicated to the lessee, the lessee was nonetheless effectively bound by it.

Such decisions may be said to advance the principle of freedom of contract; but, in an adhesion contract situation,⁵⁰ they seem rather to provide a loophole for circumventing the "informed and affirmative" waiver requirement which has been established.⁵¹ Further, by undercutting the benefits made available to the ultimate insured, such decisions conflict with the current philosophy of protecting the public as a third party beneficiary of automobile accident insurance.⁵²

C. Stacking and Underinsured Motorists

As a counterbalance to the mandatory option for higher UM

47. FLA. STAT. § 627.727(1) (1979) provides:

When a vehicle is leased for a period of 1 year or longer and the lessor of such vehicle, by the terms of the lease contract, provides liability coverage on the leased vehicle in a policy wherein the lessee is a named insured or on a certificate of a master policy issued to the lessor, the lessee of such vehicle shall have the sole privilege to reject uninsured motorist coverage.

48. 363 So. 2d 147 (Fla. 4th DCA 1978).

49. 340 So. 2d 510 (Fla. 3d DCA 1976).

50. See note 45 *supra*.

51. See *Mattingly v. Liberty Mut. Ins. Co.*, 363 So. 2d 147, 150 (Fla. 4th DCA 1978) (Anstead, J., dissenting).

52. That liability insurance policies have evolved into third-party beneficiary contracts is nowhere better seen than in the case of *Boston Old Colony Ins. Co. v. Gutierrez*, 360 So. 2d 464 (Fla. 3d DCA 1978). There, in a suit brought by the injured party against the tortfeasor's liability insurance carrier, the insurer was held to a verdict of over one million dollars for bad-faith failure to settle with the plaintiff.

coverage limits⁵³ (affording potentially increased levels of first-party motorist protection), section 627.4132 of the Florida Statutes provides for the abolition of "stacking," or the aggregation of benefits accruing to the insured under more than one policy or under multiple coverages within a single policy.⁵⁴ The Supreme Court of Florida, in *Gillette v. State Farm Mutual Automobile Insurance Co.*,⁵⁵ has found this anti-stacking statute to be constitutional. On the theory that an insured is charged with notice of legislation affecting his insurance contract only as of that legislation's effective date, however, the court has also held that the anti-stacking statute applies only after October 1, 1976.⁵⁶ Thus stacking, which is a substantive right, is still applied in those cases dealing with insurance policies issued or renewed prior to that date.⁵⁷

Because of the recent statutory expansion of the uninsured motorist concept to include underinsurance⁵⁸ (levels of tortfeasor

53. See note 34 and accompanying text *supra*.

54. FLA. STAT. § 627.4132 (1979) provides:

If an insured or named insured is protected by any type of motor vehicle insurance policy for liability, uninsured motorist, personal injury protection, or any other coverage, the policy shall provide that the insured or named insured is protected only to the extent of the coverage he has on the vehicle involved in the accident. However, if none of the insured's or name insured's vehicles is involved in the accident, coverage is available only to the extent of coverage on any one of the vehicles with applicable coverage. Coverage on any other vehicles shall not be added to or stacked upon that coverage. This section shall not apply to reduce the coverage available by reason of insurance policies insuring different named insureds.

55. 374 So. 2d 525, 526 (Fla. 1979).

56. *Dewberry v. Auto-Owners Ins. Co.*, 363 So. 2d 1077, 1079-80 (Fla. 1978).

57. As a general rule, for cases not falling within the purview of the anti-stacking statute, "multiple coverages are required to be aggregated on uninsured motorist coverages and medical payments." *Travelers Indem. Co. v. Wolfson*, 348 So. 2d 661, 662 (Fla. 3d DCA 1977); accord, *Tucker v. Government Employees Ins. Co.*, 228 So. 2d 238, 242 (Fla. 1973).

58. FLA. STAT. § 627.727(3) (1979) provides that for purposes of uninsured motorist coverage, the term "uninsured motor vehicle" includes an insured motor vehicle whose liability insurer either is insolvent, or "[h]as provided limits of bodily injury liability for its insured which are less than the limits applicable to the injured person provided under uninsured motorist's coverage applicable to the injured person." This underinsured motorist provision is applicable only to those policies issued or renewed after October 1, 1973, the effective date of the statute. See *York Ins. Co. v. Becker*, 364 So. 2d 858 (Fla. 2d DCA 1978); *Coney v. Reserve Ins. Co.*, 358 So. 2d 261 (Fla. 3d DCA 1978); *Castaneda v. State Farm Mut. Auto. Ins. Co.*, 348 So. 2d 1231 (Fla. 3d DCA 1977).

In *United States Fire Ins. Co. v. Van Iderstyne*, 347 So. 2d 672 (Fla. 4th DCA 1977), an endorsement extending to an additional vehicle the coverage of a preexisting policy (liability \$50,000/\$100,000, UM \$10,000/\$20,000) was issued to plaintiffs one month after the effective date of the uninsured motorist statute, FLA. STAT. § 627.727(2) (1979), which required that UM coverage be not less than bodily injury liability coverage. See note 34 and accompanying text *supra*. When plaintiffs' minor son was subsequently struck and killed by an insured tortfeasor, the court held that the endorsement was a severable, separate contract into

liability insurance lower than the injured party's UM coverage), the issue of whether coverages may be stacked can be crucial in a case involving an *underinsured* tortfeasor. Often the insured's access to his UM benefits will turn upon the resolution of this question.⁵⁹

There appears to be a general consensus among the District Courts of Appeal regarding when and to what extent UM coverages may be stacked. The principle underlying their decisions is apparently to provide the insured,⁶⁰ who has paid additional premiums,⁶¹ with the full measure of those coverages applicable to him, rather than to a particular vehicle.⁶² Thus, while multiple uninsured motorist⁶³ and medical payments⁶⁴ benefits may be stacked, liability⁶⁵

which the court would write the increased UM coverage mandated by the statute (\$50,000/\$100,000). As a result, the tortfeasor with a liability limit of \$25,000 was considered an underinsured motorist and plaintiffs had recourse to their UM coverage. Arguably, the court's rationale permits a harsh result as to the insurer, who was required to provide the increased UM coverage with no corresponding increase in premium. The Supreme Court of Florida would later establish in the *Dewberry* case that individuals are deemed to be on notice of statutory provisions as of their effective date. See note 56 and accompanying text *supra*.

59. Only the court may decide the threshold question of applicability of UM coverage; that determination may not be made through arbitration. See *Vigilant Ins. Co. v. Kelps*, 372 So. 2d 207 (Fla. 3d DCA 1979).

60. The coverage extends to his family as well. The family relationship, and the insured's presumed intention to provide extra coverage for those close to him, have been cited in upholding the stacking of parent-owned policies by a child. See *Hunt v. State Farm Mut. Auto. Ins. Co.*, 349 So. 2d 642 (Fla. 1st DCA 1977). But see *McLennan v. State Farm Mut. Auto. Ins. Co.*, 366 So. 2d 811 (Fla. 4th DCA 1979) (father and son UM stacking disallowed in December 1976 accident, but the date of issuance or renewal of the policies was not stated); cf. *Hartford Accident & Indem. Co. v. Richendollar*, 368 So. 2d 603 (Fla. 2d DCA 1979) (because familial relationship did not obtain, employee could not stack employer's coverage under which he was a beneficiary).

61. As stated by the Supreme Court of Florida in *Tucker v. Government Employees Ins. Co.*,

[a]n insured under uninsured motorist coverage is entitled by the statute to the full bodily injury protection that he purchases and for which he pays premiums. It is useless and meaningless and uneconomic to pay for additional bodily injury insurance and simultaneously have this coverage cancelled by an insurer's exclusion. The premium rates are standard and uniform on a per car basis. The insured's full protection cannot be whittled away by exclusions or limitations which presuppose he only intended to cover himself on the presumed basis of single car auto liability coverage had the uninsured motorist purchased the same.

288 So. 2d 238, 242 (Fla. 1973).

62. The *Tucker* court further elaborated: "We must not confuse uninsured motorist protection as inuring to a particular motor vehicle as in the case of automobile liability insurance. It is bodily injury insurance which protects against such injury inflicted by the negligence of any uninsured motorist." *Id.*; accord, *Maine v. Hyde*, 350 So. 2d 1161 (Fla. 2d DCA 1977) (making same comparison in denying stacking of liability coverage).

63. See *Aetna Life & Cas. Co. v. Stanger*, 367 So. 2d 728 (Fla. 4th DCA 1979). Any UM recovery will, however, be offset by PIP benefits on the theory that UM coverage is excess

and PIP⁶⁶ benefits may not.

It appears to make little difference whether the coverages involved are contained in separate policies⁶⁷ or are multiple coverages under a single policy.⁶⁸ Where an injured individual is the third-party beneficiary of UM provisions in another's policy, he may stack that coverage with his own in determining that the tortfeasor is an underinsured motorist.⁶⁹ The rationale⁷⁰ permitting aggregation of coverages, however, does not extend to those situations in which the claimant attempts to stack the multiple cover-

and therefore should not duplicate coverage. See *Fidelity & Cas. Co. v. Moreno*, 350 So. 2d 38 (Fla. 3d DCA 1977). *But cf.* *Jones v. Travelers Indem. Co.*, 357 So. 2d 231 (Fla. 4th DCA 1978) (Danksch, J., dissenting) ("no duplication of funds paid" where claimant's "damages exceed all available insurance").

64. See *Travelers Indem. Co. v. Wolfson*, 348 So. 2d 661, 662 (Fla. 3d DCA 1977).

65. See *Main v. Hyde*, 350 So. 2d 1161 (Fla. 2d DCA 1977); *Gibbons v. Shockley*, 341 So. 2d 260, 261 (Fla. 3d DCA 1977).

66. See FLA. STAT. § 627.736(4)(e) (1978); *State Farm Mut. Auto. Ins. Co. v. Kilbreath*, 362 So. 2d 474 (Fla. 4th DCA 1978); *Travelers Indem. Co. v. Wolfson*, 348 So. 2d 661 (Fla. 3d DCA 1977); *Chappelear v. Allstate Ins. Co.*, 347 So. 2d 477, 478 (Fla. 1st DCA 1977) (relying upon exclusion in the policy); *State Farm Mut. Auto. Ins. Co. v. Castaneda*, 339 So. 2d 679 (Fla. 3d DCA 1976). *But cf.* *State Farm Mut. Auto. Ins. Co. v. Kilbreath*, 362 So. 2d 474, 475 (Fla. 4th DCA 1978) (Cross, J., concurring specially) ("substantive constitutional questions are posed by a formulation of law that requires citizens of this state to purchase multiple policies of personal injury protection (P.I.P.) insurance on which they are then forbidden to collect").

This latter observation is more compelling under the logic applied by the District Court of Appeal, Fourth District, in construing the anti-stacking statute, FLA. STAT. § 627.4132 (1979). See note 54 and accompanying text *supra*. In light of the apparent legislative intent, the court concluded that in the case of

an injured person to whom several policies are applicable the injured person can recover on the policy providing the largest coverage. In other words, if the injured person would ordinarily be entitled to coverage under several policies he is entitled to the benefits of the policy affording the largest amount of insurance coverage. Construed in that fashion, the section will not apply to reduce the maximum coverage contained in any one applicable policy.

McLellan v. State Farm Mut. Auto. Ins. Co., 366 So. 2d 811, 812 (Fla. 4th DCA 1979).

67. See *Arrieta v. Volkswagen Ins. Co.*, 343 So. 2d 918 (Fla. 3d DCA 1977); *State Farm Mut. Auto. Ins. Co. v. Castaneda*, 339 So. 2d 679 (Fla. 3d DCA 1976); *State Farm Mut. Auto. Ins. Co. v. Anderson*, 332 So. 2d 623 (Fla. 4th DCA 1976); *State Farm Mut. Auto. Ins. Co. v. White*, 330 So. 2d 858 (Fla. 2d DCA 1976); *Government Employees Ins. Co. v. Farmer*, 330 So. 2d 236 (Fla. 1st DCA 1976).

68. See *United States Fidelity & Guar. Co. v. Gordon*, 359 So. 2d 480 (Fla. 1st DCA 1978); *Liberty Mut. Ins. Co. v. Furman*, 341 So. 2d 1056 (Fla. 3d DCA 1977); *Government Employees Ins. Co. v. Dammert*, 335 So. 2d 583 (Fla. 3d DCA 1976); *Government Employees Ins. Co. v. Farmer*, 330 So. 2d 236 (Fla. 1st DCA 1976).

69. See *Lezcano v. Leatherby Ins. Co.*, 372 So. 2d 214 (Fla. 4th DCA 1979) (passenger could stack own and host's UM coverage); *United States Fidelity & Guar. Co. v. Curry*, 371 So. 2d 677 (Fla. 3d DCA 1979) (lessee's employee could stack own and lessor's UM coverage).

70. See note 58 and accompanying text *supra*.

ages of another,⁷¹ or of the tortfeasor and himself.⁷²

In *Behrmann v. Industrial Fire & Casualty Co.*,⁷³ the plaintiff automobile passenger was injured when her insured host-driver collided with another vehicle driven by an uninsured motorist. The plaintiff's own UM coverage was equal to the liability insurance limits of the insured driver; the court held "for that reason alone,"⁷⁴ that the plaintiff was not entitled to collect UM benefits from her defendant insurer, even though she was also an insured for the same limits under her host's UM coverage. Plaintiff was not permitted to stack her insured driver's UM coverage with her own UM coverage in order to exceed her host's liability coverage and cross the statutory threshold for underinsured motorist coverage. In a vigorous dissent,⁷⁵ Judge Schwartz contended that because there was an additional, uninsured tortfeasor, there was no need to stack such uninsured motorist coverages. Reasoning that "[i]f both drivers were insured, the plaintiff would clearly be entitled to recover, in effect, against both of their *liability* carriers," he concluded that, in accordance with the purpose of UM coverage,⁷⁶ the plaintiff was "entitled to the benefit of both coverages, with her own UM properly regarded, not as being 'stacked' upon *her driver's* liability policy . . . but as representing the *other*, uninsured, motorist's liability."⁷⁷

This logic was apparently approved by the District Court of Appeal, Third District, in *Travelers Insurance Co. v. Wilson*.⁷⁸ There, the injured party was involved in an accident with two tortfeasors—one insured to limits equaling plaintiff's own UM coverage, the other (a phantom vehicle) presumably uninsured. The *Wilson* court, while recognizing the general rule that the limits of the UM policy represented a ceiling on recovery, stated that the plaintiff's UM coverage would be applicable if his recovery against the insured tortfeasor fell below that amount.⁷⁹

It is unclear from the *Behrmann* opinion whether the plaintiff

71. See *Hartford Accident & Indem. Co. v. Richendollar*, 368 So. 2d 603 (Fla. 2d DCA 1979).

72. See *Yaden v. Hanover Ins. Co.*, 375 So. 2d 5 (Fla. 4th DCA 1979); *Behrmann v. Industrial Fire & Cas. Ins. Co.*, 374 So. 2d 568 (Fla. 3d DCA 1979).

73. 374 So. 2d 568 (Fla. 3d DCA 1979).

74. *Id.* at 569.

75. *Id.*

76. That is, "to provide the insured with the same protection accorded if the tortfeasor were covered by liability insurance." *Id.*

77. *Id.* (emphasis in original) (citation omitted).

78. 371 So. 2d 145 (Fla. 3d DCA 1979).

79. *Id.* at 148.

sought to recover damages beyond the ceiling set by her own UM limits. When a plaintiff's injuries in a multiple tortfeasor situation warrant recovery up to the limits of his UM policy, however, the *Travelers* formulation seems to provide a more equitable result, assuring compensation in an amount at least equal to the levels of his own coverage.⁸⁰

V. CONCURRENT FIRST-PARTY COVERAGE

A. PIP and Medical Payments Benefits

Now we turn to the interrelation between first-party, no-fault coverages. Personal injury protection (PIP) benefits have been defined as a "creation of the legislature enacted to limit tort suits where two insured vehicles are involved in an accident in instances where the one claiming benefits formerly would have sought recovery from the one at fault."⁸¹ Because PIP is designed to compensate for out-of-pocket medical expenses and lost earning capacity,⁸² the potential for overlap between PIP benefits and those provided under worker's compensation and medical payments coverage is obvious.

The legislature addressed this situation in part by providing that PIP benefits are primary, "except that benefits under any worker's compensation law . . . shall be credited against the benefits provided by subsection (1) and shall be due and payable as loss accrues . . ."⁸³ This latter provision has been ultimately interpreted⁸⁴ to mean that PIP and worker's compensation benefits are

80. See also *State Farm Mut. Auto. Ins. Co. v. Jenkins*, 370 So. 2d 1201 (Fla. 1st DCA 1979); *State Farm Mut. Auto. Ins. Co. v. Diem*, 358 So. 2d 39 (Fla. 3d DCA 1978) ("available benefits" means that amount actually available to insured from underinsured motorist's liability carrier).

81. *Travelers Indem. Co. v. Wolfson*, 348 So. 2d 661, 662 (Fla. 3d DCA 1977). See generally Henderson, *No-Fault Insurance for Automobile Accidents: Status and Effect in the United States*, 56 ORE. L. REV. 287 (1977); Levin & McKenzie, *Personal Injury Protection Coverage*, in *FLORIDA NO-FAULT INSURANCE PRACTICE* 5 (2d ed. 1979).

82. See FLA. STAT. § 627.736(1)(a), (b) (1979).

83. FLA. STAT. § 627.736(4) (1979).

84. See *Comeau v. Safeco Ins. Co. of America*, 356 So. 2d 790 (Fla. 1978), *rev'g* 342 So. 2d 1085 (Fla. 1st DCA 1977). The First District had erroneously held that where worker's compensation and PIP benefits were concurrently received on a pro rata basis, the \$5,000 PIP ceiling applied with regard to the aggregate benefits. Construing § 627.736(4), the supreme court held:

[A]n insurer is required to supplement workmen's compensation benefits until the insurer has itself paid the limits of liability under its policy for required personal injury protection benefits. . . . This statutory provision is intended to give a credit, as a loss accrues, for workmen's compensation benefits, thereby preventing one from recovering for a loss which is not sustained because of

concurrent, and that the exhaustion of the latter is not a prerequisite to receipt of the former. Although there can be no duplication of recovery, the receipt of worker's compensation benefits does not reduce the PIP benefits available for additional losses.⁸⁵

Unfortunately, a similar rationale has not been applied with regard to medical payments benefits, which by contract are usually only applicable to defray expenditures arising in the first year after the accident. In *Florida Farm Bureau Casualty Insurance Co. v. Fichera*⁸⁶ and *Moylan v. State Farm Mutual Auto Insurance Co.*,⁸⁷ the insurers, who had sold both PIP and medical payments coverage in a single policy to their insureds, applied the PIP benefits in the first year to both lost income and medical expenses until the PIP benefits were exhausted, thereafter refusing to apply the medical payments coverage to additional medical expenses incurred after the one-year limit had passed.⁸⁸ The District Court of Appeal, Fourth District, upheld the insurer's refusal to pay in both cases. But Judge Dauksch's special concurrence⁸⁹ in the *Moylan* opinion pointed out that the plaintiff had paid an "additional premium for this supposed additional benefit" which the insurance company was not compelled to provide. "In any event," he concluded, "the legislature might look into the matter for the public."⁹⁰

Although the legislature failed to "look into the matter" in the two years following the *Moylan* decision, the Fourth District discovered an alternative means for circumventing that otherwise unduly harsh and restrictive result. In *Holloway v. State Farm Mutual Auto Insurance Co.*,⁹¹ the court determined that the insureds could maximize their benefits by first exhausting "primary" PIP coverage with claims for lost wages and later applying the same

workmen's compensation benefits, and is not intended to reduce the limits of liability under the statutory minimum required for personal injury protection benefits.

Id. at 794.

85. See *id.*; *Kovarnik v. Royal Globe Ins. Co.*, 363 So. 2d 166 (Fla. 4th DCA 1978); *Fine v. Travelers Ins. Co.*, 342 So. 2d 848 (Fla. 3d DCA 1977); *Charter Oak Fire Ins. Co. v. Regalado*, 339 So. 2d 277 (Fla. 3d DCA 1976).

86. 366 So. 2d 867 (Fla. 4th DCA 1979).

87. 343 So. 2d 56 (Fla. 4th DCA 1977).

88. In light of the *Holloway* decision, a suit by the insured against the insurer for bad-faith failure to act in the best interests of the insured by apportioning benefits might have been appropriate. See note 91 and accompanying text *infra*.

89. 343 So. 2d at 57 (Dauksch, J., concurring specially).

90. *Id.*

91. 370 So. 2d 452 (Fla. 4th DCA 1979).

policy's "excess" medical payments coverage to claims for first-year medical expenses. In practical effect, this allocation of claims allows the same equitable result obtained in coordinating PIP and worker's compensation benefits.

B. Lessors and Lessees

Taking a last look at automobile liability insurance, we focus on the question of primary and excess coverages as it relates to the lessor-lessee situation. Section 627.7263(1) of the Florida Statutes provides that the lessor's "valid and collectible liability insurance . . . shall be primary unless otherwise stated in bold type on the face of the rental or lease agreement. Such insurance shall be primary for the limits of liability and personal injury protection coverage as required by ss. 324.021(7) and 627.736."⁹² This latter stipulation is far from clear. Does it limit the extent to which the lessor's liability insurance shall be primary, rendering any such coverage beyond the required minimum "excess" under the statute? May the lessor's insurer then bring an indemnity action against the lessee for the amount by which the lessor's liability as owner (under a common law dangerous instrumentality theory) exceeds the limited coverage provided in the lease contract?

The Supreme Court of Florida answered this question, as certified to it by the Fifth Circuit in *Insurance Co. of North America v. Avis Rent-A-Car System, Inc.*,⁹³ in the affirmative. In that case, a plaintiff injured by the lessee's negligent employee settled with the insurers of the lessor and lessee for \$350,000. The insurers then litigated their liability *inter se* under their respective policies (lessor: \$500,000 limit; lessee: \$200,000 limit) and under the automobile lease, by which the lessor had agreed to provide insurance for the lessee up to a \$100,000 limit.

The court restated the rule established in *Roth v. Old Republic Insurance Co.*⁹⁴ that "insurance provided to the lessee as part of the rental agreement with the owner places primary financial responsibility on the owner's carrier and bars indemnification from the negligent driver to that extent."⁹⁵ But because *Roth* did not involve multiple layers of insurance coverage, it was held inappli-

92. FLA. STAT. § 627.7263(1) (1979).

93. 348 So. 2d 1149 (Fla. 1977).

94. 269 So. 2d 3 (Fla. 1972).

95. 348 So. 2d at 1152. See *Susco Car Rental Sys. v. Leonard*, 112 So. 2d 832 (Fla. 1959). The insurance coverage provided under the rental agreement in *Roth* was apparently greater than the amount of the claim against the lessor. 348 So. 2d at 1152 n.7.

cable to modify the rule of *Hertz Corp. v. Ralph M. Parsons Co.*⁹⁶ that a lessor could obtain indemnification from a lessee for damages in excess of the insurance protection afforded the lessee by the terms of the rental contract. The lessee's insurer in *Avis* was thus required to indemnify the lessor's insurer for its payments in excess of \$100,000, up to the \$200,000 limit of the lessee's liability policy.⁹⁷

The *Avis* court refused to interpret the Financial Responsibility Law⁹⁸ as requiring coverage under the lease contract to be coextensive with the coverage of the lessor's liability policy:

Neither this statute nor the dangerous instrumentality doctrine asserts any interest of the state with respect to the allocation of risk among commercial enterprises to furnish more than minimal statutory coverage to their customers.

We hold that the public policy of the state was satisfied in this case when the injured's beneficiaries were compensated by the vehicle's owner for the negligent operation of a rented vehicle.⁹⁹

Nothing in the statute, however, prevents the lessor from limiting his primary coverage to the PIP requirement, or from precluding liability by use of an escape clause in the contract,¹⁰⁰ if the statute's notice requirements¹⁰¹ are met.

The District Court of Appeal, Second District, has recognized the validity of, and enforced, such an escape clause, thereby plac-

96. 419 F.2d 783 (5th Cir. 1969). In *Hertz*, the lessor's insurer was indemnified for the excess of the claim above the lease contract coverage by the insurers of both the lessee and the lessee's negligent employee.

97. Although the lessor was liable as the owner for the remaining \$50,000 above the primary lease contract coverage plus the lessee's policy limit, the court also held that the lessor's insurer could seek indemnification in that amount from the negligent employee, the lessee, or their carriers. 348 So. 2d at 1154.

98. FLA. STAT. § 324.151 (1979).

99. 348 So. 2d at 1154 (footnotes omitted). The lessee's insurer argued that the "standard rental agreements sold by rental car companies mislead the public and constitute adhesion contracts to be strictly construed against the companies." *Id.* n.12. See note 45 *supra*.

100. See *American Bankers Ins. Co. v. Leatherby Ins. Co.*, 350 So. 2d 353 (Fla. 2d DCA 1977) (construing 1976 statute). It is also arguable, however, that under the statute the lessor's liability should be primary in any event, up to the limits of PIP coverage.

101. FLA. STAT. § 627.7263(2) provides:

Each rental or lease agreement between the lessee and the lessor shall contain a provision on the face of the agreement, stated in bold type, informing the lessee of the provisions of subsection (1) and shall provide a space for the lessee's insurance company's name if the lessor's insurance is not to be primary.

ing primary liability responsibility on the lessee.¹⁰² The District Court of Appeal, Third District, in contrast, has held that such escape clauses are invalid and unenforceable as against public policy.¹⁰³ In so holding, however, that court has enforced the primary responsibility of the lessor only up to the statutory minimum coverage. Although such decisions reflect the desirable principle of freedom of contract between lessors and lessees with regard to risk-shifting, the notice provisions of the statute should be strictly enforced to avoid abuse in this adhesion contract situation.¹⁰⁴

VI. CONCLUSION

It is clear, in reviewing recent decisions regarding Florida's auto compensation law, that the important role of insurance in automobile reparations is one whose parameters are only slowly and painstakingly being realized. With regard to the necessary goals of any auto reparations system, we would agree with Professor Conard's formulation:

The most important service that economic treatment can perform is to assure the accessibility of medical treatment. Wounds should be healed, bones set, prostheses supplied, psychic readjustment achieved, and occupational retraining provided when needed.

These things should be done, it seems to me, for every victim, regardless of whether or not the victim was himself careless, whether or not the guilty driver can be found, and whether or not he can pay or has purchased adequate insurance. Medical services should be supplied for humanitarian reasons—because the modern conscience demands that no one unnecessarily be left physically impaired. They should also be supplied for economic reasons—because everyone loses when a member of society ceases to contribute to the national product and becomes instead a burden on the shoulders of others.¹⁰⁵

It is true that Florida's no-fault scheme has advanced beyond its embryonic stages, but it is not yet adequate to recompense the horrendous losses, both personal and societal, which occur in the

102. See *American Bankers Ins. Co. v. Leatherby Ins. Co.*, 350 So. 2d 353 (Fla. 2d DCA 1977) (quoting *Avis*).

103. See *Lehman-Eastern Auto Rentals v. Brooks*, 370 So. 2d 14 (Fla. 3d DCA 1979); *Executive Rent-A-Car, Inc. v. Uditsky*, 297 So. 2d 340 (Fla. 3d DCA 1974), *cert. denied*, 310 So. 2d 742 (Fla. 1975).

104. See note 45 *supra*.

105. See Conard, *The Economic Treatment of Automobile Injuries*, 63 MICH. L. REV. 279, 294-95 (1964).

case of automobile accident catastrophes. Statutory changes such as the recent raising of PIP benefit levels do reflect an awareness on the part of the legislature that "the law, like the technology of transportation"¹⁰⁶ must keep abreast of changing times. The measures thus far taken, however, although steps in the right direction, must be further developed before they can begin to accomplish the many goals of auto reparations reform.

106. See Morriss & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. Rev. 913, 932 (1962).