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INSURANCE

RICHARD H. LEE* AND EDWARD S. POLK**

This article focuses on recent legislative changes and judicial interpretations in the area of automobile insurance. Amendments to the Financial Responsibility Laws of Florida have, inter alia, lowered the requisite amount of insurance coverage, shifted the primary insurance burden from the automobile lessor to the lessee's insurer, and disallowed joinder of the liability carrier as a party to the litigation. Florida's no-fault statute has undergone its most severe changes to date. The authors note that the amendments are intended to limit victims' rights to recover damages from tortfeasors, the size of awards that victims may recover, and the number of fraudulent claims. Uninsured motorist coverage has been limited by the elimination of stacking, but broadened by including underinsured motorists within its provisions. Attention is also given to developments in medical malpractice insurance and the new statutory mandate for readable insurance policies.

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Recent changes in insurance law in Florida have been so pervasive and of such magnitude that little is familiar. Yesterday's heated disputes over the nature of equitable distribution,¹ and the

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1. See *State Farm Mut. Auto. Ins. Co. v. Tote*, 325 So. 2d 57 (Fla. 3d Dist. 1976); *Liberty Mut. Ins. Co. v. Avila*, 317 So. 2d 784 (Fla. 3d Dist. 1975); *American Fire & Cas. Co. v. Oller*, 313 So. 2d 67 (Fla. 4th Dist. 1975); *Central Nat'l Ins. Co. v. Fernandez*, 307 So. 2d 906 (Fla. 3d Dist. 1975); *Reyes v. Banks*, 292 So. 2d 39 (Fla. 4th Dist. 1974).

scope of *Shingleton v. Bussey*,² have become academic exercises. The source of most of this obsolescence has been the Florida legislature which in 1976 substantially amended the Financial Responsibility Law³ and the Automobile Reparations Reform Act.⁴ In response to legislative initiative and to modern common law concepts, such as the doctrine of comparative negligence, the courts have also made changes in insurance law.

I. AUTOMOBILE LIABILITY INSURANCE

A. *Financial Responsibility Laws*

Most forms of liability insurance protect the insured against the risk of a legal obligation to pay damages to another upon the occurrence of a certain event.⁵ Such protection is provided by automobile policies,⁶ but in recent years the courts have determined that automobile liability insurance exists as much for the benefit and protection of the general public as for the insured.⁷ Legislatures have responded with financial responsibility laws making minimum amounts of such coverage compulsory for at least some drivers.⁸

In 1973 the Florida Legislature increased the minimum limits of liability from \$10,000 for any individual in one accident and \$20,000 for two or more people in a single accident (\$10,000/\$20,000) to \$15,000/\$30,000.⁹ In 1976, however, the legislature reverted to the \$10,000/\$20,000 requirement.¹⁰ The reduction was undoubtedly intended to encourage greater compliance with the law. Two circum-

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

3. FLA. STAT. ch. 324 (1975).

4. FLA. STAT. §§ 627.730-.741 (1975).

5. W. VANCE, LAW OF INSURANCE § 196 (3d ed. 1951).

6. The typical automobile insurance agreement provides that the company "will pay for an insured all damages which the insured shall be legally obligated to pay because of: 'injury arising out of the use of the automobile.'" But the typical agreement also provides a "no action" clause which requires full compliance by the insured with all of the terms of the policy and which, in the event of noncompliance, gives the insurer a number of personal defenses against the payment of the insured's legal obligations. See W. YOUNG, LAW OF INSURANCE, Family Automobile Policy, App. 6 (1971).

7. See, e.g., *Balts v. Balts*, 273 Minn. 419, 142 N.W.2d 66 (1966) (the prevalence of insurance may remove the intra-family immunity to suit of a child when sued by its parent). See also *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930); W. YOUNG, *supra* note 6, at 574-75.

8. See Laufer, *Insurance Against Lack of Insurance?*, 1969 DUKE L.J. 227.

9. 1973 Fla. Laws ch. 73-180, § 2 (codified at FLA. STAT. § 324.021(7) (1975)).

10. 1976 Fla. Laws ch. 76-266, § 1 (codified at FLA. STAT. § 324.021(7) (Supp. 1976)).

stances make questionable whether the lower financial responsibility requirements will have the desired effect: (1) liability rates are not proportioned exactly to the limits of coverage, so that the lower required limits will not result in proportionately lower automobile insurance rates, and (2) for many Florida drivers most or all of the reduction effected by lowering coverages was absorbed by a rate increase which took effect on the same day as the new act.¹¹ Thus, it appears that the ultimate cost of insurance has not been reduced appreciably.

Another change in the Financial Responsibility Law was to increase from \$200 to \$500 the amount of property damage which would bring into play the provisions of the Financial Responsibility Law for loss of license and registration unless there was liability insurance or a settlement with the injured party.¹² This change appears to recognize the impact of inflation on automobile repair costs and attempts to limit the scope of the statute to matters of substance.

It remains to be seen whether the benefit to the driver of lower mandatory limits of coverage will be coupled with stricter enforcement of the financial responsibility laws. The Financial Responsibility Law in Florida is a "one-bite statute," requiring proof of responsibility only after an accident had occurred.¹³ Although the Florida Automobile Reparations Reform Act (No-fault) makes it mandatory for all registered vehicles to comply with the minimum limits of liability coverage set forth in the Financial Responsibility Law or provide other satisfactory security,¹⁴ there is at present no viable means of compelling performance until an accident occurs.¹⁵ Thus, Florida remains for all practical purposes a "one-bite" state, and experience indicates that substantial numbers of vehicles on Florida highways are without liability insurance.¹⁶

B. *Leased Vehicles*

Traditionally the insurer of a vehicle bears the primary responsibility for injury caused by third parties using the vehicle with the

11. Miami Herald, Sept. 30, 1976, § A, at 1, col. 5.

12. FLA. STAT. § 324.051(2)(a) (Supp. 1976).

13. FLA. STAT. § 324.051(2)(a) (1975).

14. FLA. STAT. § 627.733(1) (1975).

15. See [1972] FLA. ATT'Y GEN. ANN. REP. 264.

16. Miami Herald, Dec. 29, 1976, § A, at 6, col. 1.

insured's consent. In such a case the owner's policy affords primary coverage,¹⁷ or as is commonly said, "insurance follows the vehicle." Policies usually provide that the drive-other-cars coverage for the normal insured is excess¹⁸ and a third-party driver is covered primarily under the omnibus clause of the owner's policy. Where a claim involving a third-party driver is made most insurers support these provisions. They feel that the certainty of the rule outweighs the temporary advantages which might be obtained by a "battle of forms." All insurers do not take this position. Insurers of leased vehicles, in particular, have tried to shift the primary coverage to the lessee-driver's insurer.

Until July 1, 1976, the efforts of the lessor's insurers to shift their burden to the lessee's insurer met with no success.¹⁹ However, the enactment of section 627.7263 of the Florida Statutes, effective July 1, 1976,²⁰ specifically provides that with regard to rental cars the driver's insurance shall be primary. Regardless of the language of the driver's policy the statutory language will control. The change

17. The 1955 Standard Family Automobile Liability Policy defines an insured as:
III. *Definition of Insured* (a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word insured includes the named insured and, if the named 'insured' is an individual, his spouse if a resident of the same household, and also includes any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or such spouse or with the permission of either.

RISJORD & AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES-STANDARD PROVISIONS AND APPENDIX 18-19* (1964); *reprinted in* R. KEETON, *INSURANCE LAW* 77 n.12 (1971). Florida Statutes section 324.151 (1975) requires that in order for a motor vehicle liability policy to be proof of financial responsibility it "shall insure the owner named therein and any other person as operator using such motor vehicle . . . with the express or implied permission of such owner"

18. "[T]he insurance with respect to a temporary substitute automobile or a non-owned automobile shall be excess insurance over any other collectible insurance." Family Automobile Policy, App. 6, W. YOUNG, *supra* note 6, at 693; *see* Aaacon Auto Transp. Inc. v. Demshar, 312 So. 2d 479 (Fla. 4th Dist. 1975).

19. *E.g.*, *Diversified Servs., Inc. v. Jackson*, 330 So. 2d 830 (Fla. 3d Dist. 1976). The court in *Jackson* relied upon the decision in *Roth v. Old Republic Ins. Co.*, 269 So. 2d 3 (Fla. 1972), and held that the lessor's insurer could not limit the coverage of its omnibus provision because this would be inconsistent with the public policy of the Financial Responsibility Law requiring omnibus protection. *See* note 17 *supra*. The court also stated that no right of indemnification existed on the part of the lessor or his insurer against the lessee-tortfeasor.

The decision denying limitation of the omnibus provision was correct. An omnibus insurer should not recover from its own insured for the very loss it insured him against. The statement that no right of indemnification exists between the lessor-owner and the lessee-tortfeasor, however, was dictum, and does not seem to be supportable. It is one thing to deny an insurer indemnification from its insured; it is another to deny a passive tortfeasor recovery from the active wrongdoer in the absence of insurance.

20. 1976 Fla. Laws ch. 76-56 § 1 (codified at FLA. STAT. § 627.7263 (Supp. 1976)).

will no doubt be pleasing to automobile rental companies. It will be interesting to see if their charges for "insurance" will be affected.

The problem of priority between insurers should not be confused with the underlying question of liability between the owner and the driver. The driver presumably is liable because of his negligence. The owner will be liable either on a theory of respondeat superior or upon Florida's unique "dangerous instrumentality doctrine."²¹ As far as the injured third party is concerned, both the owner and driver are primarily liable. As between the owner and the driver, presumably, their liability will depend upon the application of rules of indemnification and contribution.

C. *Nonjoinder of Insurance Company in Litigation*

In 1969 Florida became the first state to adopt direct action by judicial fiat, when the supreme court decided *Shingleton v. Bussey*.²² This decision permitted liability insurers to be included as defendants in lawsuits arising out of the negligent acts of their insureds. The *Shingleton* rule as it applied to automobile liability insurers was changed by the legislature in 1976.²³ In cases arising out of accidents occurring on or after October 1, 1976, the liability carrier may not be joined as a party to the action until after the trial, unless it intends to assert a policy or coverage defense. Notwithstanding this change, final judgment may include an award against the insurance company, even though it was not previously a defendant. There is no express prohibition against mentioning the fact of insurance; therefore, it is possible the courts may be unable to prevent a statement to the jury regarding the existence of coverage. It is also likely that juries are sufficiently aware of automobile insurance to assume that when suit is brought against the tortfeasor, and not as an uninsured motorist claim, the defendant is probably covered by insurance. If the legislative purpose in enacting this nonjoinder section was to diminish the use of the "deep-pocket theory" in determining jury awards, then it may only achieve limited success.

A possible constitutional question might be posed by the new statute based upon a suggestion in the *Shingleton* case that the right

21. See Ford, *Torts, Survey of Fla. Law*, 18 U. MIAMI L. REV. 854-57 (1964); Note, *The Dangerous Instrumentality Doctrine: Unique Automobile Law in Florida*, 5 U. FLA. L. REV. 412 (1952).

22. 223 So. 2d 713 (Fla. 1969).

23. FLA. STAT. § 627.7262 (Supp. 1976) (added by 1976 Fla. Laws ch. 76-266, § 12).

to join an insurer in litigation is required by due process. Prior to *Shingleton*, a plaintiff would have to first recover a judgment against the tortfeasor, then file another action against the insurance company in order to enforce the judgment.²⁴ The *Shingleton* court found fault with this procedure:

The unfettered right of a plaintiff to sue defendants jointly is so universal and essential to due process that it can rarely be curtailed or restricted by private contract between potential defendants.

. . . .
 . . . It is an anomaly in the law and discriminatory for the parties to a contract to attempt to deny non-consenting members of the public a full, complete, adequate remedy at law which is constitutionally guaranteed all citizens.²⁵

The fact that such procedures are now dictated by statute rather than by the "no action" clause²⁶ of a policy does not alter the effect on the plaintiff who is a third party. If it were violative of due process for the insurer and insured to contract for such a provision, it should not be less so because the legislature has required it.

D. *Judicial Interpretation*

Much judicial energy has been expended over the past few years on matters that are now moot. The scope of *Shingleton* and the meaning of equitable distribution took up considerable space in case reports.²⁷ But the most serious issue recently resolved by the Supreme Court of Florida involved the impact of the comparative negligence rule on the liability of insurers. The question first raised in *Stuyvesant Insurance Co. v. Bournazian*,²⁸ was: Where comparative negligence requires mutual setoffs, must the respective insurers of the litigating parties pay the full claim against their insureds, or

24. *E.g.*, *Artille v. Davidson*, 126 Fla. 219, 170 So. 707 (1936), *overruled by Shingleton v. Bussey*, 223 So. 2d 713 (Fla. 1969).

25. 223 So. 2d at 717-18.

26. No action shall lie against Allstate until after full compliance with all the terms of this policy nor, as respects insurance afforded under Section 1, (liability), until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and Allstate.

Family Automobile Policy, App. 6, W. YOUNG, *supra* note 6, at 702.

27. *See* note 1 *supra*.

28. No. 46,573 (Sup. Ct. Fla. filed Mar. 10, 1976) (opinion on rehearing Dec. 16, 1976).

should they receive the benefit of the setoffs? The supreme court in *Bournazian* at first allowed the insurer the benefit of the setoff; but on reconsideration the court held that the setoff applied only between the uninsured parties to a negligence action and in no way affected the contractual liability of the paid insurers.

There has been the usual volume of opinions interpreting insurance policies. The phrase "arising out of the use of the insured vehicle" was interpreted to cover death to a person struck by a beer can thrown from a fast-moving automobile,²⁹ but not to cover injury to a child who walked into a protruding bolt on a parked car.³⁰ The phrase was also interpreted to exclude the death of an insured's son who was killed while removing a pistol from beneath the seat of his father's car.³¹ The term "accident" under the medical payments coverage of an automobile liability policy was held to include a cerebral vascular accident, or broken blood vessel in the brain, the cause of which was unknown.³² The fact that the "accident" occurred while the insured stooped to examine a gas stove in his travel trailer was sufficient to bring the event within the coverage of the automobile medical payments coverage.

An automobile liability policy is no longer regarded primarily as a means of indemnifying the insured, but rather as a means of protecting the public. This shift in emphasis has caused much of the inefficiency presently attributed to the fault concept in automobile tort law. Mandatory liability coverage is obviously intended to protect the public. Decisions such as *Shingleton*,³³ which permit the carrier to be joined in an action against the insured, may even be construed to suggest an independent liability resting on the insurance company. Subsequent decisions, however, have considerably weakened this suggestion.³⁴ As an example, *Ramos v. Northwestern Mutual Insurance Co.*³⁵ is in direct conflict with the imposition of independent liability upon the insurer. In that case the court, contrary to recent trends elsewhere, refused to hold an automobile liability insurer liable where the insured's failure to cooperate substan-

29. *Valdes v. Smalley*, 303 So. 2d 342 (Fla. 3d Dist. 1974).

30. *O'Dwyer v. Manchester Ins. Co.*, 303 So. 2d 347 (Fla. 3d Dist. 1974).

31. *Watson v. Watson*, 326 So. 2d 48 (Fla. 2d Dist. 1976).

32. *Roberson v. United Servs. Auto. Ass'n*, 330 So. 2d 745 (Fla. 1st Dist. 1976).

33. 223 So. 2d 713 (Fla. 1969).

34. *See Beta Eta House Corp. v. Gregory*, 237 So. 2d 163 (Fla. 1970).

35. 325 So. 2d 87 (Fla. 3d Dist. 1975), *aff'd*, No. 48-510 (Sup. Ct. Fla. filed May 26, 1976), *rehearing denied*, No. 48-510 (Sup. Ct. Fla. filed May 26, 1976).

tially prejudiced the insurer.

If the need is to protect the public from the financial effects of the inevitable accidents resulting from the use of an automobile, a more efficient means must be found. The concept of no-fault represents a valid effort in the search. Unfortunately, no-fault and the traditional tort system do not seem to work well together. Vested interests do not willingly retire. There are no easy answers, but unless the costs, both financial and social, of our motorized society can be brought within controllable limits, the likelihood of federal intervention, of total no-fault, of severe limits on recovery for pain and suffering, and of a shift from a judicial to an administrative system of control appear inevitable.

II. NO-FAULT AUTOMOBILE INSURANCE

In 1971, the Florida legislature in the Florida Automobile Reparations Reform Act adopted the concept of no-fault automobile insurance, effective January 1, 1972.³⁶ The stated purposes were twofold:

[T]o require medical, surgical, funeral and disability insurance benefits to be provided without regard to fault under motor vehicle policies that provide bodily injury and property damage liability insurance, or other security, for motor vehicles registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish and inconvenience.³⁷

In addition, a third goal of reducing insurance premiums was reflected in the statute's initial requirement that rates for required financial responsibility coverages be reduced by not less than fifteen percent on the effective date of the Act.³⁸ Since its original enactment, the Florida Automobile Reparations Reform Act has been altered, amended, and overhauled several times, most recently and most drastically in 1976. The courts, of course, have made their contributions to the process, deciding constitutional challenges to various portions of the Act³⁹ as well as rendering interpretations of

36. 1971 Fla. Laws ch. 71-252 (codified at FLA. STAT. §§ 627.730-.741 (1975)).

37. FLA. STAT. § 627.731 (1975).

38. FLA. STAT. § 627.741(2) (1971) (repealed by 1976 Fla. Laws ch. 76-266, § 13).

39. See *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974) (holding FLA. STAT. § 627.737 (1973) unconstitutional in part); *Kluger v. White*, 281 So. 2d 1 (Fla. 1973) (holding FLA. STAT. § 627.738 (1973) invalid).

its meaning.

The 1976 amendments attempt to accomplish three things: (1) limit further the accident victim's right to recover damages from his tortfeasor;⁴⁰ (2) limit the amount actually recovered by those accident victims who are able to maintain claims against their tortfeasors,⁴¹ and (3) reduce the incidence of fraud in accident claims.⁴²

A. *Tortfeasor's Immunity*

Tortfeasors who have complied with the law by maintaining minimum liability coverages are granted immunity from claims by an injured party except where a certain threshold is passed.⁴³ Under the original Act there were eight such thresholds: (1) medical expenses in excess of \$1,000; (2) permanent disfigurement; (3) a fracture of a weight-bearing bone; (4) a compound, comminuted, displaced, or compressed fracture; (5) loss of a body member; (6) permanent injury within reasonable medical probability; (7) permanent loss of a bodily function; or (8) death.⁴⁴ Until the 1976 revision of the Act there was no major legislative alteration of this scheme. However, the right to maintain an action on the basis of a fracture of a weight-bearing bone was held unconstitutional as a denial of equal protection.⁴⁵

The 1976 revision replaced the earlier thresholds with the following: (1) loss of a body member; (2) permanent loss of a bodily function; (3) permanent injury within a reasonable degree of medical probability; (4) significant permanent scarring or disfigurement; (5) serious nonpermanent injury which has a material degree of bearing on the individual's ability to resume his normal life-style during substantially all of the 90 day period following the injury, and the effects of which are medically or scientifically demonstrable at the end of such period; or (6) death.⁴⁶ It is not immediately clear whether the new criteria resolve more uncertainty than they create. It is suggested that this revision is so ambiguous that the bar can

40. See FLA. STAT. § 627.737(2), (3) (Supp. 1976). This school codifies in the damage limitation requirements.

the insurer's right to equitable distribution and the collateral source rule.

42. See FLA. STAT. §§ 627.7375, 626.989 (Supp. 1976). These sections were created specifically to deal with fraudulent insurance claims.

43. FLA. STAT. § 627.737(1) (Supp. 1976).

44. FLA. STAT. § 627.737(2) (1973).

45. *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9 (Fla. 1974).

46. FLA. STAT. § 627.737(2), (3) (Supp. 1976).

reasonably expect contradictory judicial determinations. Furthermore, certain criteria could again be the subject of constitutional attacks.

Conspicuously absent from the list of tort thresholds is the one most frequently employed in the past—medical expenses exceeding \$1,000 in value. Without such a provision the Act may be unconstitutional. As an example, those plaintiffs whose only avenue for making a claim would be based on medical expenses greater than \$1000 could possibly challenge the 1976 revision by analogizing to the decision of the Supreme Court of Florida in *Kluger v. White*.⁴⁷ In *Kluger* the court held Florida Statute section 627.738 unconstitutional because it denied the right of access to the courts guaranteed by the Florida Constitution.⁴⁸ Section 627.738 precluded tort claims for property damage not exceeding \$550. The court held that a remedy cannot be abolished by the legislature without providing a reasonable alternative, unless there is an overpowering public necessity and no alternative method of meeting that public necessity can be shown. Using this rationale, removal of \$1000 in medical expenses as a threshold could possibly be viewed as abolition of a remedy.

The new statute thus appears especially vulnerable where the individual has exhausted his first party benefits with no additional recourse, while other victims have additional alternatives under other thresholds. Assume, for example, that an accident victim sustains nonpermanent injuries which incapacitate him for less than ninety days. Should the total of his medical expenses, out-of-pocket expenses and lost income exceed \$5,000, he will have exhausted his Personal Injury Protection (PIP) benefits⁴⁹ without acquiring the right to recover his excess damages from any source whatsoever.

The subsection of the Act relating to "serious non-permanent injury which has a material degree of bearing on the injured person's ability to resume his normal activity and life-style during all or substantially all of the ninety day period after the occurrence of the injury,"⁵⁰ is a new threshold. It is probably the single most confusing section of the statute because of the subjective nature of its terms. The section's language offers no guidance in determining when this particular threshold has been passed. The words, "serious," "mate-

47. 281 So. 2d 1 (Fla. 1973).

48. FLA. CONST. art., 1 § 21.

49. FLA. STAT. § 627.736 (Supp. 1976).

50. FLA. STAT. § 627.737(2)(e) (Supp. 1976).

rial," "normal activity," and "medically or scientifically demonstrable" converge in one paragraph to create a standard with virtually no predictable parameters. Moreover, this subsection creates an additional problem of proof for the plaintiff. In addition to proving liability on the part of the defendant and the damages sustained, plaintiffs may now be required to establish their normal activities and life-styles prior to and immediately after the accident. As a result, courts may expend substantial time hearing evidence on plaintiff's life-style. Although the statute makes such evidence material, it may prevent the court from focusing on those facts giving rise to the cause of action.

The subsection of the Act pertaining to "significant permanent scarring or disfigurement,"⁵¹ leaves the definition of its operative terms to judicial interpretation. It is not clear what standard will be used to measure significance—visibility to others, size of the scar, location on the body, impairment of one's personal beauty, or some other criteria.

B. *Subrogation, Equitable Distribution and Collateral Sources*

Another of the major changes brought about by the 1976 Act concerns the right of the first party insurer to recover sums paid out by it on behalf of an injured who recovers a tort settlement or judgment. Personal Injury Protection (PIP) carriers were previously protected by the doctrine of equitable distribution.⁵² The PIP carrier would be reimbursed from the amount recovered from the tortfeasor for a portion of the benefits it had initially paid out. Rarely, however, would a PIP carrier recover all or even a substantial part of its expenditure.⁵³ Thus, the insured was able to apply a portion of his no-fault benefits toward offsetting the costs of the tort action.

Section 727.736(3) was rewritten in 1976 to do away with all right of recovery by the PIP carrier.⁵⁴ Under the new Act the PIP carrier may not recover any of the sums it has paid out, but the plaintiff is also precluded from recovering such amounts from the tortfeasor. Thus, the victim's personal injury protection enures to the benefit of the wrongdoer's insurer. This proposition is shocking at first, but becomes more palatable when it is realized that in the

51. FLA. STAT. § 627.737(2)(d) (Supp. 1976).

52. FLA. STAT. § 627.736(3) (1975) (amended Supp. 1976).

53. See cases cited *supra* note 1.

54. FLA. STAT. § 627.736(3) (Supp. 1976).

long run the benefits will be shared by all carriers, and could result in considerably less litigation. In addition, it should be noted that the traditional collateral source rule, whereby the tortfeasor is not allowed credit for any available sources which reduce the victim's net damage, has been eliminated. As a result the loss will be borne by the no-fault carrier up to the no-fault limits. Therefore, litigation of claims within those limits could be considerably reduced. As an example, where the PIP carrier pays benefits in the amount of \$3,000, and the parties agree that the claim is worth \$10,000 (or if a jury reaches that verdict), the defendant's company will only pay \$7,000, while the no-fault carrier will pay \$3,000. The plaintiff will be fully compensated from the two sources and will not be required to reimburse his PIP carrier through equitable distribution.

One undesired effect of this new procedure may be to increase settlement demands by plaintiffs in order to absorb the collateral source and still produce a sufficient fund to pay their attorneys. This result could either increase the amount paid per claim or, by decreasing the likelihood of settlements, increase the number of lawsuits. Neither consequence is desirable. Another possible result is that premiums for the PIP portion of the policy will be increased, since there is no subrogation or other means of recovering benefits paid out. However, it is generally recognized that subrogation recoveries are windfalls and play no part in rate making.

Finally, it is not clear how this new provision will apply to individuals who either are covered under a PIP deductible, pursuant to section 627.739,⁵⁵ or are not protected by no-fault insurance. Section 627.736(3) provides that "an injured party or his legal representative . . . shall have no right to recover any damages for which personal injury protection benefits are *paid or payable*."⁵⁶ It is not clear whether "paid or payable" refers to those items collectible under a policy or simply any amount which is eligible for PIP benefits under the statute. If the latter, then one who elects a PIP deductible cannot be compensated for this amount because he waived the insurer's liability for the amount of the deductible and section 627.736(3) precludes any right of recovery. Thus, the victim becomes a collateral source whose protection enures to the tortfeasor's benefit. A far more equitable interpretation of section 627.736(3)

55. The insured may elect personal injury protection deductibles in varying amounts, the maximum being \$2,000. FLA. STAT. § 627.739 (Supp. 1976).

56. FLA. STAT. § 627.736(3) (Supp. 1976) (emphasis added).

would be that "payable" applies only to those benefits actually collectible under the terms of an existing policy. This interpretation would enable the insured to recover the amount of the deductible from the tortfeasor.

C. *Fraud*

Reacting to the public outcry over skyrocketing premiums and publicity imputing this to fraudulent claims, the 1976 legislature created a Division of Fraudulent Claims⁵⁷ within the Department of Insurance and established authority and procedures for it.⁵⁸ Upon request by an automobile insurance company, the Division is to investigate the facts surrounding a claim and report any violations found by it to the proper state's attorney or licensing agency. The measure is designed to help remedy one of the evils of the tort system, the collusive or otherwise dishonest claim for damage resulting from non-existent or exaggerated injuries. It is conceded that strong measures are necessary to deal with these problems, but the stronger the measure, the greater the potential for abuse.

The dangers inherent in the system designed by the legislature are evidenced by the provision relieving informants from liability. The Act provides that neither the informing insurance company nor its agents or employees shall be subject to libel or other civil liability by virtue of providing the Division of Fraudulent Claims with a report of alleged fraud or any other requested information.⁵⁹ This absolute privilege is deemed necessary to protect informers from suits filed by those informed upon. In view of the nature of the offense, the likelihood of litigation would be great were the privilege not absolute. However, there is no requirement that the informer shall have acted in good faith. It is always possible that an insurer could use the law to harass an aggressive and zealous plaintiff's attorney. In such a situation an attorney would have no way to protect himself. An even greater risk lies in the fact that neither the report nor the subsequent investigation are confidential. The potential for abuse is obvious. Unsubstantiated charges could destroy reputations without an appropriate forum for vindication. There-

57. FLA. STAT. § 20.13(7) (Supp. 1976).

58. FLA. STAT. § 626.989 (Supp. 1976). There are also provisions for criminal liability. See FLA. STAT. § 627.7375 (Supp. 1976).

59. FLA. STAT. § 626.989(3) (Supp. 1976).

fore, the implementation of this new Act will require the restraint and sound discretion of the Division of Fraudulent Claims as well as the insurance industry.

III. UNINSURED MOTORIST COVERAGES

In recent years one of the most active areas of insurance law in Florida has been protection against uninsured motorists.⁶⁰ This protection enables an insured to be recompensed from his own carrier, up to the limits of his uninsured motorist coverage, as if the uninsured motorist had purchased automobile liability insurance in compliance with the Financial Responsibility Law. By its terms the statute recognizing uninsured motorist coverages provides that automobile liability insurance issued within the state must contain uninsured motorist coverage, unless rejected by "any insured named in the policy."⁶¹ The statute further directs that the coverage shall be excess over any benefits available under workmen's compensation or other disability benefits law.⁶²

A. Waiver

The right of an insured to waive the coverage has been thoroughly litigated in recent years. The District Court of Appeal of Florida, First District, has stated that because the coverage is required by statute and must be affirmatively rejected, the waiver must be knowingly made.⁶³ Thus, where the insured waives coverage on the advice of an agent, because of a mistaken belief that it would be coextensive with the free medical care received as a military family, the waiver may not have been knowingly made.

The rejection must be knowingly made by an "insured named in the policy."⁶⁴ The latter phrase has been narrowly construed twice by the Third District, in substantially identical cases, *Protective National Insurance Co. v. McCall*⁶⁵ and *Weathers v. Mission Insurance Co.*⁶⁶ In both cases the husband was the named insured but the

60. 1961 Fla. Laws ch. 61-175 added the first uninsured vehicle provision (originally codified at FLA. STAT. § 627.0851 (1961) and now at FLA. STAT. § 627.727 (1975)).

61. FLA. STAT. § 627.727(1) (1975).

62. *Id.*

63. *Wilson v. National Indem. Co.*, 302 So. 2d 141 (Fla. 1st Dist. 1974).

64. FLA. STAT. § 627.727(1) (1975).

65. 310 So. 2d 324 (Fla. 3d Dist. 1975).

66. 258 So. 2d 277 (Fla. 3d Dist. 1972).

wife purchased the policy. It was not discovered that the wife had executed the waiver until after the claim arose. In each case the court held the waiver to be invalid because the husband was the named insured, and the wife was not qualified to reject the coverage. The *McCall* court's position was not altered by the fact that the claim was submitted by Mrs. McCall, the signer of the waiver, for her own injuries.⁶⁷

Similarly, the courts will not enforce a rejection executed *after* the accident. In *Manchester Insurance & Indemnification Co. v. Jones*,⁶⁸ the insured was visited in the hospital by his agent, eight days after the accident. The court disallowed the company's argument that the waiver should relate back to the date of the application for insurance.

B. Stacking by Individuals

Among the major changes brought about by the legislation in the 1976 version of the no-fault law is the provision that uninsured motorist benefits are limited by the coverage on the vehicle actually involved in the accident. Where the accident is sustained in a different vehicle, benefits are limited by the coverage of any one of the insured vehicles.⁶⁹ This new section rejects the judicial viewpoint which allowed individual insureds to aggregate or "stack" the coverages from separate vehicles.⁷⁰ Prior to the new statutory provision, if one carried uninsured motorist protection of \$10,000/\$20,000 on each of three vehicles, he would be entitled to stack the coverages, effectively giving him a policy of \$30,000/\$60,000.⁷¹ Under the 1976 Act he would be limited to the \$10,000/\$20,000 limit on any one of his vehicles.

The judicial rationale favoring stacking of coverages had been first enunciated by the First District in *Travelers Indemnity Co. v. Powell*,⁷² where a husband and wife were allowed to stack the coverages they had obtained under separate policies. Another case de-

67. 310 So. 2d at 325, 326.

68. 317 So. 2d 786 (Fla. 3d Dist. 1975).

69. FLA. STAT. § 627.4132 (Supp. 1976).

70. See generally *Tucker v. Government Employees Ins. Co.*, 288 So. 2d 238 (Fla. 1973); *Sellers v. Government Employees Ins. Co.*, 214 So. 2d 879 (Fla. 1st Dist. 1968), cert. dismissed, 229 So. 2d 873 (Fla. 1969).

71. See *State Farm Mut. Auto. Ins. Co. v. Anderson*, 332 So. 2d 623 (Fla. 4th Dist. 1976).

72. 206 So. 2d 244 (Fla. 1st Dist. 1968).

cided by the First District the same year extended the reasoning one step further. If a husband and wife may stack coverages obtained through separate policies, then they should be able to stack where the vehicles are listed on the same policy. As the court noted in *Sellers v. Government Employees Insurance Co.*,⁷³ this is especially persuasive when a separate premium is paid for uninsured motorist coverage on each automobile. *Sellers* was reaffirmed in the case of *Tucker v. Government Employees Insurance Co.*,⁷⁴ in which the court held that where a separate premium was charged and paid for each vehicle in a combination policy, the limits could be stacked.

By the time the 1976 legislature convened, the status of the uninsured motorist provisions of a policy was clear. The courts saw section 627.727⁷⁵ as defining public policy in favor of each individual being given a source of recovery for damages incurred by the negligence of uninsured drivers.⁷⁶ As such, the right to the benefits would not be denied lightly, and the extent of coverage would be as broad as possible. Indeed, the courts appeared willing to find for the insured whenever possible. The legislature, however, in setting out to deal with the ever-increasing cost of automobile insurance rejected this judicial policy by eliminating stacking.

Notwithstanding this change the legislature increased the amount of uninsured motorist coverage which must be made available for purchase by the insured. Previously the coverage was to be offered in an amount equal to the limit of liability coverage written into the policy.⁷⁷ The new statute provides that the insurer shall make available limits as high as \$100,000/\$300,000, regardless of the amount of liability coverage.⁷⁸ This latter provision preserves the basic advantage of stacking; higher limits of coverage may still be obtained if one is willing to pay for them.

73. 214 So. 2d 879 (Fla. 1st Dist. 1968), *cert. dismissed*, 229 So. 2d 873 (Fla. 1969).

74. 288 So. 2d 238 (Fla. 1973).

75. FLA. STAT. § 627.727(1) (1975).

76. *See, e.g., Mullis v. State Farm Mut. Auto. Ins. Co.*, 252 So. 2d 244 (Fla. 1971). In *Mullis*, the supreme court accepted the principle that uninsured motorist coverage on one vehicle could protect the insured while operating a different vehicle. A named insured operating an uninsured vehicle and injured by an uninsured motorist was held to be covered by his uninsured motorist policy. A provision excluding from the policy injuries sustained in vehicles not covered by the policy was found to be ineffective on the ground that the legislature intended to afford protection from uninsured motorists.

77. FLA. STAT. § 627.727(1) (1975).

78. FLA. STAT. § 627.727(2) (Supp. 1976).

C. Corporate Stacking

Another facet of the stacking question has been the applicability of the doctrine to commercial policies, that is, may the coverages from multiple vehicles owned by a corporation be stacked? Proponents of the concept might argue that the broad language and underlying reasoning of the *Sellers* and *Tucker* line of cases should extend the doctrine to the commercial area. The Third District has held otherwise,⁷⁹ however, relying on the 1972 decision of the Supreme Court of Virginia in *Cunningham v. Insurance Co. of North America*.⁸⁰

The Virginia case established two classes of insureds, a class of named insureds consisting of those who pay the multiple premiums, and a separate class of omnibus insureds, whose only claim under the policy is that they were occupants of the vehicle at the time of the accident. The first class is entitled to stack the coverages on the basis of the company's contractual commitment, since multiple premiums have been paid by the claimant. The second class of insureds, however, may not stack because there is no contractual relation between the carrier and such insureds.⁸¹ The court expressed some concern that the omnibus insured in that case was asking to stack coverages on 4,368 vehicles. This would provide to each individual a maximum liability coverage amounting to \$65,520,000. The total exposure per accident would result in a virtually bottomless supply of exposure for the carrier.

Doubtless, the result in *Cunningham* was compelled by the thought of an insurance carrier being saddled with outrageous exposure on large fleet policies. However, does the small "fleet," which frequently may be part of a family business, present a different issue? This situation was faced by the Third District in *Marks v. Travelers Indemnity Co.*⁸² and by the Supreme Court of Alabama in *General Mutual Insurance Co. v. Gilmore*.⁸³ In each case the applicable policy covered seven vehicles. The district court in *Marks*, following *Cunningham*, denied any right to stack where the claimant's status as an insured was based entirely on his occupancy of the vehicle. The Alabama Supreme Court, however, reached the

79. *Marks v. Travelers Indem. Co.*, 339 So. 2d 1123 (Fla. 3d Dist. 1976).

80. 213 Va. 72, 189 S.E.2d 832 (1972).

81. 213 Va. at 74-78, 189 S.E.2d at 834-36.

82. 339 So. 2d 1123 (Fla. 3d Dist. 1976).

83. 294 Ala. 546, 319 So. 2d 675 (1975).

opposite result by creating a category limited to the regular users of a particular vehicle. The court reasoned that the regularly assigned driver of a vehicle is the individual most likely to be in need of the policy benefits. As a result, the court concluded that the driver becomes a third party beneficiary to the contract, entitled to all its benefits. This apparently strained holding in *Gilmore* was substantially diluted by the same court six months later in *Lambert v. Liberty Mutual Insurance Co.*⁸⁴ There, the facts were closer to *Cunningham* than they were to either *Marks* or *Gilmore* in that a fleet of 1,699 vehicles were insured under one policy. The Alabama court followed the Virginia case thereby leaving *Gilmore* alone in its permissive treatment of stacking by occupants of a commercial vehicle.

The majority rule appears to be that which was expressed by the Supreme Court of Virginia. *Gilmore*, which represents a minority view, may break down when applied to a policy that covers more than a small number of vehicles. In the case of a small commercial fleet there may be relief for drivers of cars owned by a small or family business if the courts are willing to limit the number of vehicles whose coverages may be stacked. Thus far, the courts in Florida and elsewhere have been unwilling to attempt such a demarcation, preferring to use a uniform rule. This uniformity appears a more logical and equitable course. At any rate, the problem is of limited duration in Florida since stacking is not permitted for accidents occurring after October 1, 1976.⁸⁵

D. *Underinsured Motorists*

Occasionally, a policyholder suffers severe injuries in an accident caused by a negligent driver who only has the bare minimum of liability coverage. In such cases the liability limits of the tortfeasor's policy may be wholly inadequate to compensate the victim for his damages. Prior to 1973 the term "uninsured motorist" in the Florida Statute⁸⁶ included one whose policy was issued by a liability insurer unable to pay because of insolvency. It did not include any provision for drivers whose limits of coverage were inadequate to meet the circumstances. Where victims sought to establish such a

84. 331 So. 2d 260 (1976).

85. FLA. STAT. § 627.4132 (Supp. 1976).

86. FLA. STAT. § 627.727(2) (1973).

right, the courts adamantly rejected the argument.⁸⁷ These decisions were based on a literal reading of the statute and the definition of an uninsured motorist. In 1973 the statute was amended, and uninsured motorist coverage was expressly extended to cover the underinsured motorist.⁸⁸ The courts have been just as consistent in allowing underinsured motorist claims under the 1973 statute as they were in rejecting such coverage previously.⁸⁹ Underinsured motorist coverage may be stacked in the same manner as uninsured motorist coverage.⁹⁰

IV. MEDICAL MALPRACTICE

The 1976 legislature continued to struggle with the problems caused by skyrocketing costs of medical malpractice insurance. In addition to the medical liability mediation panels previously created,⁹¹ emphasis was placed upon a Medical Incident Committee.⁹² One committee is to be established by each "health care facility" in the state and is to investigate any injury or adverse incident to a patient which is brought to its attention. The committee may award compensation to the injured person if it determines that a compensable injury has occurred.⁹³ Accepting such an award will not prohibit the patient from bringing suit in the courts, but the compensation awarded him and the value of any rehabilitative services given him will be deducted from any damages he may eventually receive.⁹⁴ The abolition of the collateral source rule will also reduce his recovery.⁹⁵ Moreover, no claimant is to be awarded general damages exceeding \$250,000.⁹⁶

87. *American Fire and Cas. Co. v. Dawson*, 320 So. 2d 38 (Fla. 2d Dist. 1975); *Summers v. Jackson*, 307 So. 2d 235 (Fla. 4th Dist. 1975); *Lange v. State Farm Mut. Auto. Ins. Co.*, 300 So. 2d 68 (Fla. 1st Dist. 1974); *Liberty Mut. Ins. Co. v. Clay*, 299 So. 2d 95 (Fla. 4th Dist. 1974); *Hayston v. Allstate Ins. Co.*, 290 So. 2d 67, (Fla. 3d Dist. 1974).

88. 1973 Fla. Laws ch. 73-180 (codified at FLA. STAT. § 627.727(3)(b) (Supp. 1976)).

89. *Lee v. State Farm Mut. Auto. Ins. Co.*, 339 So. 2d 670 (Fla. 2d Dist. 1976); *State Farm Mut. Auto. Ins. Co. v. White*, 330 So. 2d 858 (Fla. 2d Dist. 1976); *State Farm Mut. Auto. Ins. Co. v. Anderson*, 332 So. 2d 623 (Fla. 4th Dist. 1976).

90. *State Farm Mut. Auto. Ins. Co. v. White*, 330 So. 2d 858 (Fla. 2d Dist. 1976); *State Farm Mut. Auto. Ins. Co. v. Anderson*, 332 So. 2d 623 (Fla. 4th Dist. 1976).

91. FLA. STAT. § 768.133 (1975) (currently codified at FLA. STAT. § 768.44 (Supp. 1976)).

92. FLA. STAT. § 768.42 (Supp. 1976). This committee was created to implement an expanded internal risk management plan (formerly codified at FLA. STAT. § 395.18 (1975), now at FLA. STAT. § 768.41 (Supp. 1976)).

93. FLA. STAT. § 768.42(6) (Supp. 1976).

94. FLA. STAT. § 768.42(9) (Supp. 1976).

95. FLA. STAT. § 768.50 (Supp. 1976).

96. FLA. STAT. § 768.42(9)(c) (Supp. 1976).

Under the statute liability insurance must be maintained by the health care facility.⁹⁷ Limited liability is offered to encourage physicians and others who provide health service to participate in a patient's compensation fund which will assist in paying malpractice claims brought against them.⁹⁸ The legal problems which may arise from this effort to cure the malpractice crisis are beyond the scope of this article. Presently, they involve questions of tort and constitutional law far more than insurance law. The courts will experience great problems in interpreting this legislation. The problem facing hospitals which are required to set up malpractice courts may be even greater.

V. THE READABLE INSURANCE POLICY

The 1976 legislative enacted a so-called "Policyholder's Bill of Rights." This enactment is a set of broad principles to be implemented by the Department of Insurance of Florida as part of its continuing regulation of the industry's trade practices.⁹⁹ Such legislation is mandated by the McCarran Act¹⁰⁰ which was passed to forestall federal intervention in what is now clearly recognized as a business affecting interstate commerce. All states have similar laws, and many have had them for about thirty years.

The Florida Bill of Rights is new, however, and among its provisions is one calling for a "readable policy."¹⁰¹ Pursuant to this provision the Department of Insurance has now set forth requirements aimed at achieving readability.¹⁰² Noteworthy provisions call for larger type, for an index and for a distinction between captions and text. Whether the total result will be an improvement, however, remains doubtful. The insurance policy, the classic contract of adhesion, is rarely read by the insured or, for that matter, by the insurer. It is a product sold at a set price. Its meaning is not to be found in the words that comprise it but in the decisions that interpret it. Policy language changes slowly. The typical marine policy, for instance, would be more intelligible to a seventeenth century merchant than to a modern semanticist. Obscure as it is, much of

97. FLA. STAT. § 768.42(1) (Supp. 1976).

98. FLA. STAT. § 768.54 (Supp. 1976).

99. FLA. STAT. § 626.9641 (Supp. 1976).

100. Pub. L. No. 15, 59 Stat. 33 (1945) (codified at 15 U.S.C. § 1011 (1970)).

101. FLA. STAT. § 626.9641(f) (Supp. 1976).

102. Fla. Dept. of Ins., Emergency Rule Nos. 4ER76-2, 4ER76-3, 4ER76-4.

the value of archaic language resides in its history. To start anew is a noble effort, but it is one which may result in a flood of litigation. Over one hundred years ago Chief Justice Doe, in discussing the language of policy forms, said, "Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it."¹⁰³

The Insurance Department's guidelines require that "a reasonable policy shall not sacrifice the precision and accuracy of a legal contract in form or appearance" but at the same time "[p]olicy wording shall be informal Short sentences and words in common usage shall be used, whenever possible."¹⁰⁴ One can but wish the draftsmen good luck, and hope that their labors are not in vain. To quote Chief Justice Doe again,

Men have a right to be dealt with with some regard for the state of mind and body, of knowledge and business, in which they are known actually to exist. Whether they ought to be what they are, or not, the fact is, that, in the present condition of society, men in general cannot read and understand these insurance documents.¹⁰⁵

103. *DeLancey v. Insurance Co.*, 52 N.H. 581, 588 (1873).

104. Fla. Dept. of Ins., Emergency Rule No. 4ER76-3.

105. *DeLancey v. Insurance Co.*, 52 N.H. 581, 590 (1873).