

September 1971

## Insurance–Pyramided Recovery Under Multiple Uninsured Motorist Provisions

W. Taylor Boone Jr.  
*West Virginia University College of Law*

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Insurance Law Commons](#)

---

### Recommended Citation

W. T. Boone Jr., *Insurance–Pyramided Recovery Under Multiple Uninsured Motorist Provisions*, 73 W. Va. L. Rev. (1971).

Available at: <https://researchrepository.wvu.edu/wvlr/vol73/iss3/19>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact [ian.harmon@mail.wvu.edu](mailto:ian.harmon@mail.wvu.edu).

As Justice Douglas emphasized in his dissent, the practical effect of *Davis* may be cancel section 302 (b) (1) from the Code.<sup>37</sup> Nevertheless, the decision ends the confusion surrounding the lower courts' application of the "flexible net effect" test under which a legitimate business purpose might make a stock redemption not "essentially equivalent to a dividend." As the result of this decision there are no doubts remaining as to the application of section 318 to section 302 (b) (1). On the other hand, as previously mentioned, the decision does not deal with the possibility of exceptions to section 318, such as family hostility.<sup>38</sup>

*Robert R. Fredeking II*

---

<sup>37</sup> *United States v. Davis*, 90 S. Ct. 1041, 1048 (1970).

<sup>38</sup> FEDERAL TAXATION, CURRENT CASES AND COMMENTS 982 (Commerce Clearing House 1970).

---

### Insurance—Pyramided Recovery Under Multiple Uninsured Motorist Provisions

As a result of a collision between an automobile, not covered by an uninsured motorist provision, and an uninsured vehicle, Mark Arminski, young suffered injuries in excess of \$20,000. An action for bodily injuries was instituted in Mark's behalf by his father, Dr. Thomas Arminski, to whom the defendant insurance company had issued a policy covering two cars and providing for family protection and uninsured motorist coverage. Dr. Arminski had paid two separate premiums for the uninsured motorist coverage. The defendant's liability for bodily injuries under the family protection clause was limited to \$10,000 for each person and \$20,000 for each accident.

The trial court found that defendant insurer, because it charged two separate premiums for its coverage, was liable for \$20,000 notwithstanding the limitation of the family protection clause. On appeal the Michigan Court of Appeals, adopting a literal reading of the policy, *held*: reversed and remanded for judgment to be entered in favor of defendant. *Arminski v. United States Fidelity and Guaranty Co.*, 178 N.W.2d 497 (Mich. Ct. App. 1970).

The trial court distinguished the present case from the only Michigan decision on point, *Horr v. Detroit Automobile Inter-*

*Insurance Exchange*,<sup>1</sup> which involved policies from two different companies having the same limitation on liability for bodily injuries as the *Arminski* policy. In the *Horr* case recovery against the two companies involved was limited to \$10,000 and each company was held liable ratably for its share. Since the *Horr* case involved two different insurers, the trial court felt that it was only equitable to make them ratably responsible. The *Arminski* case involved a single insurer receiving two separate premiums for the coverage provided. For that reason the trial court concluded that the limitation should not apply.

Although the Michigan trial court was reversed, many state courts have agreed with its liberal interpretation where multiple premiums are paid, despite liability-limiting provisions. In *Bryant v. State Farm Mutual Automobile Ins. Co.*,<sup>2</sup> a Virginia case, the insured (Bryant) had a judgment for \$85,000 against an uninsured motorist and had collected \$10,059 under the uninsured motorist provision of his father's policy. He then attempted to recover the unpaid part of the judgment within the limits of his own policy, in spite of the policy's provision that the insurer undertook to pay only such sums as exceeded any other similar insurance available to him.<sup>3</sup> In finding such a liability-limiting provision inconsistent with Virginia substantive law, the court relied upon the Virginia statute dealing with liability insurance on motor vehicles. The statute provides:

Nor shall any such policy or contract relating to ownership, maintenance or use of a motor vehicle be so issued or delivered unless it contains an endorsement or provisions undertaking to *pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . .*<sup>4</sup>

In addition to the amount recovered under his father's insurance policy, Bryant was permitted to recover from his own insurer. The court held that the company was required by statute to pay to the insured "all sums" which he was legally entitled to recover from the owner or operator of the uninsured motor vehicle. That sum was the unpaid part of his judgment within the limit of the policy. "To say that he is not entitled to recover anything under

<sup>1</sup> 379 Mich. 562, 153 N.W.2d 655 (1967).

<sup>2</sup> 205 Va. 897, 140 S.E.2d 817 (1965).

<sup>3</sup> Each policy in the *Bryant* case had a limit of \$10,000 for each person injured.

<sup>4</sup> VA. CODE ANN. § 38.1-381 (b) (Michie 1970) (emphasis supplied).

this policy because his father had a policy under which he has received part of the sum he is entitled to recover from the uninsured motorist is to amend the statute, not construe it."<sup>5</sup>

Many courts, in contrast, have preferred the literal interpretation adopted by the Michigan Court of Appeals in *Arminski*<sup>6</sup> limiting liability to the amount stated on the face of the policy. *Pacific Indemnity Co. v. Thompson*<sup>7</sup> adopted such an interpretation. In that case the petitioner's husband was killed in a collision with a car driven by the son of the insured, William Thompson. The car was one of three covered by respondent insurance company's single policy. Since the policy limit on each of the three cars owned by Thompson for lesion or death of one person was \$10,000, the petitioner felt that the maximum coverage should be three times that sum. However, the court denied such recovery and followed the policy language strictly. This provided that "[t]he limit of bodily injury liability stated in the declarations as applicable to 'each person' [\$10,000] is the limit of the company's liability for all damages . . . arising out of bodily injury sustained by one person as the result of any one occurrence . . . ."<sup>8</sup>

<sup>5</sup> 140 S.E.2d at 820. Virginia has consistently interpreted the uninsured motorist law liberally. See, e.g., *Storm v. Nationwide Mut. Ins. Co.*, 199 Va. 130, 135, 97 S.E.2d 759, 762 (1957): "The legislation having been enacted for the benefit of the injured parties, it is to be liberally construed so that the purpose intended may be accomplished."

For other cases allowing recovery on the basis of multiple premiums having been paid, see *Smith v. Pacific Auto. Ins. Co.*, 240 Ore. 167, 400 P.2d 512 (1965); *Safeco Ins. Co. of America v. Robey*, 399 F.2d 330 (8th Cir. 1968); *Government Employees Ins. Co. v. Sweet*, 186 So. 2d 95 (Fla. Ct. App. 1966); *Sellers v. United States Fidelity & Guar. Co.*, 185, So. 2d 689 (Fla. 1966).

Indiana's uninsured motorist insurance statute forbids an insurance carrier to limit the coverage in its policies so as to reduce or eliminate its liability if "other insurance" is available to the insured, or payments are made pursuant to other coverage of the policy. The United States District Court, Southern District of Indiana, concluded that it would be unconscionable to permit insurers to collect a premium for a coverage which they are required by statute to provide, and then to avoid payment of a loss through language of limitation devised by themselves. *Simpson v. State Farm Mutual Automobile Insurance Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970).

<sup>6</sup> 178 N.W.2d 497 (Mich. Ct. App. 1970). The court, again relying on the *Horr* case, found that the Michigan Supreme Court had given a literal meaning to the language in the policy in question. "A literal reading of the policy in the present case limits the defendant's liability to \$10,000 coverage for each person." *Id.* at 499.

<sup>7</sup> 56 Wash.2d 715, 355 P.2d 12 (1960).

<sup>8</sup> *Id.* at 12. *Pacific Indemnity* is distinguishable from *Bryant* (*supra* note 5) in that here the three vehicles were covered by a single policy upon which a single premium was paid. Many courts, as seen in the cases referred to in this article, have pyramided the coverage on the theory that the insured paid multiple premiums.

In *Hilton v. Citizens Insurance Company of New Jersey*,<sup>9</sup> the plaintiffs, husband and wife, owned two automobiles for which the defendant insurer issued a single automobile liability policy. While the wife was driving one of the insured vehicles, she was injured when her car was hit by a truck operated by an uninsured motorist. The Florida court upheld the \$20,000 per accident limit on the insurer's liability, finding that the policy could not be construed to provide total coverage of \$40,000 for each accident.<sup>10</sup> It is notable, however, that the plaintiffs in *Hilton* sued under a single automobile liability policy. The court distinguished *Sellers v. United States Fidelity and Guaranty Co.*<sup>11</sup> on that basis, suggesting that separate liability policies in *Hilton* would have afforded multiple recovery.<sup>12</sup>

In West Virginia the question of whether multiple premiums warrant multiple recovery has not yet arisen. Our uninsured motorist statute, which is similar to Virginia's has been in effect since 1967 and provides that "[no] policy or contract [shall] be . . . issued or delivered unless it shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be

---

<sup>9</sup> 201 So. 2d 904 (Fla. Ct. App. 1967).

<sup>10</sup> "To hold with the contention of appellants would amount to rewriting the clear and unambiguous terms of the insurance policy sued upon and to impose upon appellee twice the amount of liability it agreed to assume for the premium charged in exchange for the coverage granted." *Id.* at 906.

<sup>11</sup> 185 So. 2d 689 (Fla. 1966).

<sup>12</sup> As we construe *Sellers* it held that if a motorist insured under two or more liability policies containing uninsured motorist coverage suffers damages in excess of the policy limits on any one policy, he can look to all policies in which he is an insured for recovery of the total amount of his damages, and that the "other insurance" clause contained in such policies was held to be void as contrary to the requirements of the statute.

201 So. 2d at 905.

The Supreme Court of Arizona has taken a compromise view on this issue in recent rulings on two companion cases. In the first case, an administrator of the estate of an automobile passenger who had been killed in a car accident in which an uninsured motorist was at fault was not entitled to the cumulative benefits of the uninsured motorist provisions of both decedent's and the automobile driver's liability policies. In deciding that the "other insurance" clause of the driver's policy was not contrary to public policy, the court stated that "the means for providing such extended insurance coverage lies solely within the province of the Legislature." *Transportation Ins. Co. v. Wade*, 475 P.2d 253, 258 (Ariz. 1970).

On the other hand, the court, in the companion case, permitted an insured to recover an additional \$7,500 under his uninsured motorist coverage for injuries sustained in an accident caused solely by the negligence of another who, because of the four-way splitting of the liability policy, received only \$2,500 for his injuries. The court reasoned that an injured party should be able to recover the full amount of his damages up to the minimum prescribed by the Arizona Financial Responsibility Act. *Porter v. Empire Fire & Marine Ins. Co.*, 475 P.2d 258 (Ariz. 1970).

legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle . . . ."<sup>13</sup> The limits for such coverage are \$10,000 for bodily injury to or death of one person in any one accident, and \$20,000 for two or more persons in a single accident.<sup>14</sup>

The similarity between West Virginia's statute and Virginia's would indicate that West Virginia might reach the same conclusion as *Bryant*. Moreover, the West Virginia Supreme Court of Appeals has ruled with respect to insurance cases that where the language of a policy is equivocal and susceptible to more than one construction, it is to be construed liberally in favor of the insured and strictly against the insurer.<sup>15</sup>

Finally, an indication that West Virginia will construe any liability-limiting clause liberally appears in *Collins v. New York Casualty Co.*<sup>16</sup>

Because the purpose of an omnibus clause in an automobile public liability insurance policy is *not to limit the insurer's liability, but to provide additional coverage*, the clause is designed to protect not only those entrusted with the use of the automobile, but the public in general, and *therefore the provisions of the clause should be liberally applied to effectuate the purpose for which it was incorporated in the policy.*<sup>17</sup>

Public policy would dictate that the more liberal view is to be preferred, for it is certainly the more propitious for those whom liability insurance is intended to protect—the public in general. Indeed, it would smack of apostasy to allow insurers to collect a premium for a coverage which they are required by statute to provide, and then to avoid payment of a loss because of liability-limiting language of their own contrivance.

*W. Taylor Boone, Jr.*

---

<sup>13</sup> W. VA. CODE ch. 33, art. 6, § 31 (b) (Michie Supp. 1970).

<sup>14</sup> W. VA. CODE ch. 17D, art. 4, § 2 (Michie 1966).

<sup>15</sup> *Green v. Farm Bureau Mut. Auto Ins. Co.*, 139 W. Va. 475, 80 S.E.2d 424 (1954); *Farley v. American Auto. Ins. Co.*, 137 W. Va. 455, 72 S.E.2d 520 (1952); *Davis v. Combined Ins. Co. of America*, 137 W. Va. 196, 70 S.E.2d 814 (1952); *Adkins v. Kentucky Cent. Life & Accident Ins. Co.*, 131 W. Va. 638, 48 S.E.2d 436 (1948).

<sup>16</sup> 140 W. Va. 1, 82 S.E.2d 288 (1954).

<sup>17</sup> *Id.* at 12, 82 S.E.2d at 295 (emphasis supplied).