




1980

Kentucky Law Survey: Insurance

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Recommended Citation

Straub, Earl Frederick Jr. (1980) "Kentucky Law Survey: Insurance," *Kentucky Law Journal*: Vol. 68 : Iss. 3 , Article 5.
Available at: <https://uknowledge.uky.edu/klj/vol68/iss3/5>

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Insurance

BY EARL FREDERICK STRAUB, JR.*

INTRODUCTION

In recent years, insurance law has received inadequate treatment in the Kentucky Law Survey, being discussed independently only once in the past five years.¹ The growing body of law surrounding Kentucky's uninsured motorist statute² and the recently developing case law concerning the Kentucky Motor Vehicle Reparations Act (MVRA)³—the “no-fault” cases—make it necessary to examine insurance law separately.

As the above two areas produced the most significant insurance cases during the survey year, this article will be devoted entirely to them.⁴ Only cases decided during the survey

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¹ Savage, *Kentucky Law Survey—Insurance*, 66 Ky. L.J. 631 (1977-1978).

² KY. REV. STAT. § 304.20-020 (Supp. 1978) [hereinafter cited as KRS].

³ KRS §§ 304.39-101 to .39-340 (Supp. 1978) [hereinafter cited as MVRA or the Act].

⁴ During the survey year, the court of appeals also decided *Medical Protective Co. v. Davis*, 581 S.W.2d 25 (Ky. Ct. App. 1979), a significant insurance law decision, although unlike the other cases handed down by the Kentucky appellate courts during the year. The question presented the court was “the extent of the liability, if any, of an insurance company which has offered to defend a malpractice action under a reservation of rights when the insured refuses to accept the conditional defense and sustains a default judgment. . . .” *Id.* at 25. The Medical Protective Company was the malpractice carrier for Dr. Benjamin Jackson. Dr. Jackson was sued for malpractice and on the day of service, the insurer “notified Dr. Jackson that it would take the necessary steps to protect his interest but only upon a strict reservation of its rights and defenses under the policy.” *Id.* at 26. Dr. Jackson refused to accept the defense offered by the insurer under those conditions and decided to conduct his own defense without assistance of counsel. He failed miserably, the court striking his pleadings and entering a default judgment against him. As to the insurer's liability, the court of appeals stated:

That an insured may seek to defend himself without counsel after refusing to accept a defense offered under a reservation of rights is one of the risks an insurer must take when it elects to offer a defense under a reservation of rights. If it is correct in its position that the policy does not afford coverage or has been breached in some way, then it prevails regardless of whether the insured accepts the defense—but it offers such a defense at its peril, because if the insured refuses to accept it and elects to defend himself, the company is bound by the result, in the absence of fraud or collusion, unless it can establish that the policy did not afford coverage or was breached by the insured.

year have been given lengthy discussion, but because it is difficult to discuss any legal problem apart from its historical context, placing the cases in their proper chronological perspective was given a high priority.⁵

I. UNINSURED MOTORIST CASES

All motor vehicle liability insurance policies issued in Kentucky must provide coverage for the insured in case of injury caused by an uninsured motorist.⁶ This coverage, statutorily required since 1966, has proved to be a fruitful source of litigation.⁷ During the survey year the Kentucky Supreme Court considered two important issues in uninsured motorist law: (1) the validity of certain contractual exclusions limiting or precluding coverage and (2) the principle of "stacking."

A. *Validity of Contractual Exclusions*

1. *Owned But Uninsured Vehicles*

The Court on two occasions addressed the issue of whether "a clause in an automobile insurance policy . . . which excludes from uninsured motorist coverage accidents arising out of the use of vehicles owned by an insured other than the automobile described in the liability portion of the policy" is valid.⁸ In both cases the Court held that the clause was valid. *MFA Insurance Cos. v. Whitlock*,⁹ the first of the two cases to reach the Court, was controlling of the second, *Safeco Insurance Co. of America v. Hubbard*.¹⁰

Id. at 26-27. Since no suggestion of fraud or collusion was made and the company was unable to provide noncoverage, the insurer was held liable to the limits of its policy.

⁵ This chronological approach is especially necessary for the uninsured motorists cases which must be reconciled with more than a decade of precedent.

⁶ KRS § 304.20-020(1) (Supp. 1978).

⁷ This survey year alone produced three Kentucky Supreme Court decisions on the subject. *Ohio Cas. Ins. Co. v. Stanfield*, 581 S.W.2d 55 (Ky. 1979); *Safeco Ins. Co. of America v. Hubbard*, 578 S.W.2d 49 (Ky. 1979); and *MFA Ins. Cos. v. Whitlock*, 572 S.W.2d 856 (Ky. 1978).

⁸ *MFA Ins. Cos. v. Whitlock*, 572 S.W.2d 856 (Ky. 1978); *Safeco Ins. Co. of America v. Hubbard*, 578 S.W.2d 49 (Ky. 1979). *Whitlock* and *Hubbard* will be treated textually accompanying notes 10-33 *infra*.

⁹ 572 S.W.2d 856 (Ky. 1978).

¹⁰ 578 S.W.2d 49 (Ky. 1979). Both *Whitlock* and *Hubbard* reversed court of ap-

In *Whitlock*, Richard and Judy Whitlock were injured when their 1962 Chevrolet was struck by a pickup truck. When they were unable to collect damages from the uninsured tortfeasor, the Whitlocks sought recovery from MFA under the uninsured motorist endorsement of a policy issued on Richard's 1966 Ford.¹¹ MFA refused to pay, asserting that the Whitlocks were occupying Judy's uninsured 1962 Chevrolet at the time of the accident and that the MFA policy on Richard's Ford "specifically exclude[d] from coverage accidents arising out of the use of any vehicle owned by Richard, Judy or their relatives, other than Richard's 1966 Ford."¹² If the exclusion was found to be valid there was no coverage.

*Safeco Insurance Co. of America v. Hubbard*¹³ presented the same problem in a slightly different setting. Glenn Hubbard, as personal representative for his son, Douglas, who was killed in his own car in an accident with an uninsured motorist, sued Safeco to recover under the uninsured motorist provision of both his and Douglas' insurance policies. Safeco agreed to pay the limit of its policy on Douglas' car but denied liability under the two policies issued to Glenn on other automobiles. Those policies contained exclusions similar to the one in the MFA policy issued to Richard Whitlock.¹⁴ Although Douglas' automobile was an insured automobile in the ordinary sense, the policy defined "insured automobile" as the automobile described in the policy.¹⁵ Again, no coverage existed if the clause was valid.

In both cases the Court, relying on *Commercial Union*

peals holdings that the exclusion was invalid. The court of appeals decisions were *Whitlock v. Redman*, CA-411-MR (Ky. Ct. App. April 8, 1977) and *Safeco Ins. Co. of America v. Hubbard*, No. 74-1129 (Ky. Ct. App. Feb. 3, 1978). See *Savage*, *supra* note 1, at 633.

¹¹ 572 S.W.2d at 856.

¹² *Id.* at 857. The policy provided that the uninsured motorist protection "does not apply: (a) To bodily injury to an insured while occupying a highway vehicle (other than an insured automobile) owned by the named insured, his spouse, or a relative, or through being struck by such a highway vehicle. . . ." *Id.* The policy further defined "insured automobile" as either "the described automobile" or "a non-owned automobile while being operated by a named insured." *Id.*

¹³ 578 S.W.2d 49 (Ky. 1979).

¹⁴ *Id.* at 50.

¹⁵ *Id.*

*Insurance Co. v. Delaney*¹⁶ and *State Farm Mutual Insurance Co. v. Christian*¹⁷ for the proposition that such exclusions are valid as long as they are reasonable, limited its inquiry to the reasonableness of the exclusions.¹⁸ Despite the contrary position taken in the lower courts and the uncertainty in this area of Kentucky law prior to *Whitlock*,¹⁹ the Court summarily held the exclusions valid.²⁰ In light of the conflicting viewpoints of the Kentucky Court of Appeals and the Kentucky Supreme Court, a thorough analysis of the Court's determination is necessary.

In 1973, one commentator concluded an in-depth analysis of the Kentucky position on uninsured motorist law by stating: "Despite the few decisions handed down by the Kentucky Court there is a definite trend to favor the insured by following the statutory policy of compensating the policyholder for injuries received through the fault of an uninsured motorist."²¹ Although *Whitlock* and *Hubbard* have cast doubt on the continuing validity of this conclusion, there was little question about its accuracy at the time it was written. The

¹⁶ 550 S.W.2d 499 (Ky. 1977). *Delaney* involved a policy exclusion that eliminated state-owned vehicles from the definition of uninsured automobiles, thereby precluding coverage under the uninsured motorist endorsement when the uninsured tortfeasor was driving a state-owned car or truck. The Court held this exclusion was reasonable and, therefore, not in derogation of the uninsured motorist statute, KRS § 304.20-020. *Id.* at 500.

¹⁷ 555 S.W.2d 571 (Ky. 1977). In *Christian*, the Court was confronted with an exclusion for owned, uninsured vehicles, but the vehicle in question was a motorcycle, which the policy also excluded. Since the Court was more concerned with the motorcycle exclusion than the owned, uninsured vehicle exclusion, *Christian's* precedential citation should be used carefully.

¹⁸ *MFA Ins. Cos. v. Whitlock*, 572 S.W.2d 856, 857 (Ky. 1978); *Safeco Ins. Co. v. Hubbard*, 578 S.W.2d 49, 50 (Ky. 1979).

¹⁹ The uncertainty of Kentucky law is evidenced by *McNutt v. State Farm Mut. Auto. Ins. Co.*, 369 F. Supp. 381 (W.D. Ky. 1973), *aff'd*, 494 F.2d 1282 (6th Cir. 1974). The federal district court was faced with a fact pattern virtually identical to that which the Supreme Court of Kentucky later would face in *Hubbard*, and that federal court decided Kentucky law would not allow such an exclusion to preclude coverage. In addition, the Kentucky Supreme Court in *Whitlock* noted the confusion surrounding the area. 572 S.W.2d at 857.

²⁰ *MFA Ins. Cos. v. Whitlock*, 572 S.W.2d at 857; *Safeco Ins. Co. v. Hubbard*, 578 S.W.2d at 50. The opinion in *Whitlock* was written by Justice Clayton; *Hubbard* was authored by Justice Reed. No dissent was filed in either case.

²¹ Note, *Uninsured Motorist Coverage—Charting the Kentucky Course*, 62 Ky. L.J. 467, 504 (1973-1974).

statement was based on a 1970 case, *Meridian Mutual Insurance Co. v. Siddons*,²² which has served as the focal point of numerous Kentucky decisions since 1970²³ and was a major factor in the court of appeals' determinations in *Whitlock* and *Hubbard*. It is unfortunate that the Kentucky Supreme Court chose not to discuss *Siddons* in either *Whitlock* or *Hubbard* since any understanding of Kentucky uninsured motorist law is incomplete without reconciling that decision. By examining the cases from *Siddons* to the present, however, the Court's summary disposition of such a debatable issue can be understood.²⁴

²² 451 S.W.2d 831 (Ky. 1970). Ronald Siddons' stepson, John Schweinhart, was struck and killed by an uninsured motorist while crossing a street. Judgment was obtained against the uninsured motorist for \$15,000. Lola Siddons, Schweinhart's administratrix, sued Meridian Mutual to recover on the uninsured motorist endorsements on two policies issued to Ronald Siddons under which John Schweinhart was an additional insured. Meridian Mutual contended that its maximum liability was \$10,000, since the policy included a typical other insurance clause which stated:

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

Id. at 833-34.

The Court held that this clause was void since it purported to reduce recovery below the statutory minimum of \$10,000 required on each policy. *Id.* at 834.

²³ The following is a list of selected cases with holdings based at least in part on *Siddons*: *McNutt v. State Farm Mut. Ins. Co.*, 369 F. Supp. 381 (W.D. Ky. 1973), *aff'd*, 494 F.2d 1282 (6th Cir. 1974) (Kentucky courts would invalidate an exclusion of the type later found to be valid in *Whitlock*); *Ohio Cas. Ins. Co. v. Berger*, 311 F. Supp. 840 (E.D. Ky. 1970) (setoff for medical expenses disallowed); *State Farm Mut. Ins. Co. v. Fireman's Fund Am. Ins. Co.*, 550 S.W.2d 554 (Ky. 1977) (reduction of uninsured motorist benefits by the amount of workman's compensation benefits paid disallowed); *Zurich Ins. Co. v. Hall*, 516 S.W.2d 861 (Ky. 1974) ("other insurance" provision in automobile liability insurance policy is void when it purports to reduce uninsured motorist benefits); *Allstate Ins. Co. v. Napier*, 505 S.W.2d 169 (Ky. 1974) (reaffirmation of the propriety of stacking the coverage of two separate policies).

²⁴ At the time the Court decided *Whitlock*, this issue was more debatable than the opinion implies. See note 19 *supra* for discussion of the uncertainty in the law. The federal court in *McNutt* relied on two decisions in making its "educated guess as to what result the Court of Appeals of Kentucky would reach" were it faced with the same issue. 369 F. Supp. at 383. Those decisions were *Siddons* and *Allen v. West Am. Ins. Co.*, 467 S.W.2d 123 (Ky. 1971) (holding that a household exclusion which effectively denies uninsured motorist coverage is reasonable and therefore not in deroga-

In *Siddons*, two provisions in an insurance policy, an "other insurance" clause and a clause requiring that payments under the Medical Payments Coverage of the liability section reduce the insurer's liability for uninsured motorist coverage,²⁵ received the Court's scrutiny. The Court held that both clauses "violate[d] KRS 304.682(1) [now KRS § 304.20-020(1)] by undertaking to reduce liability below the statutorily required minimum [of \$10,000] or to impose qualifications on coverage not recognized by the statute,"²⁶ and were therefore void.

This interpretation of the uninsured motorist statute led to numerous invalidation attacks against insurance companies attempting to reduce their liability for uninsured motorist coverage.²⁷ Not all attempts by insurance carriers to lessen their liability were unsuccessful,²⁸ as an analysis of the cases

tion of the statute). The *McNutt* court decided:

The exclusion relied upon by the insurance company here is nothing more than an attempt to thwart the purposes of the statute, since, if it is construed as the defendants would have it construed, it would deny to the owners of more than one automobile insurance policy and the owner of more than one automobile the right to recover on more than one policy, when the injury occurred in one of the automobiles covered by the policies. The designation of the so-called exclusion as an "[e]xclusion" does not operate to make it valid where it is in repugnance to the statute, and here it is plain that the clause is in repugnance to the statute.

369 F. Supp. at 385. That prediction as to what the Kentucky Court would do with such an issue turned out to be incorrect. Yet, when the Court was faced with the issue in *Whitlock* and in *Hubbard*, no mention of *McNutt* was even made.

²⁵ The "other insurance" clause is set out at note 22 *supra*. The other provision which Meridian claimed limited its coverage provided:

The Company shall not be obligated to pay under this Coverage that part of the damages which the Insured may be entitled to recover from the owner or operator of an uninsured automobile which represents expenses for medical services paid or payable under the Medical Payments Coverage of the policy.

451 S.W.2d at 835.

²⁶ *Id.*

²⁷ See note 23 *supra* for a list of cases involving such attacks.

²⁸ See, e.g., *State Farm Mut. Auto. Ins. Co. v. Christian*, 555 S.W.2d 571 (Ky. 1977) (motorcycle exclusion upheld); *Preferred Risk Mut. Ins. Co. v. Oliver*, 551 S.W.2d 574 (Ky. 1977) (motorcycle exclusion upheld); *State Farm Mut. Ins. Co. v. Fireman's Fund Am. Ins. Co.*, 550 S.W.2d 554 (Ky. 1977) (requirement that the uninsured motorist coverage not benefit the workmen's compensation carrier upheld); *Commonwealth Union Ins. Co. v. Delaney*, 550 S.W.2d 499 (Ky. 1977) (exclusion of a state-owned vehicle from the definition of uninsured automobile is valid); *Allen v.*

reveals an interesting trend. The Court will, in situations where actual damages are in excess of the minimum benefits required by the uninsured motorist statute, deny an insurance company the benefit of a policy provision purporting to reduce its liability under uninsured motorist coverage because of collateral payments, if the result will be a payment of uninsured motorist benefits of less than the statutorily required minimum. If the company attempts to avoid coverage altogether, however, by excluding the alleged insured or class of insureds from the scope of its contractual coverage, the Court will uphold the terms of the contract if the exclusion is reasonable. Thus the plaintiff in *Siddons* recovered in full under two separate policies which were issued to him on his motor vehicles for the death of his stepson to whom no specific exclusion applied. Whitlock, however, was unable to recover because he was occupying an automobile subject to a specific exclusion. The Court apparently has made a value judgment that in the latter instance it is reasonable for an insurance company to exclude from its uninsured motorist coverage an automobile operated by the insured without the required liability coverage²⁹ or to limit recovery to the policy actually cov-

West Am. Ins. Co., 467 S.W.2d 123 (Ky. 1971) (upheld provision excluding uninsured members of insured's household from liability coverage and uninsured motorist coverage). Two cases decided prior to *Siddons* also upheld policy requirements precluding coverage: *Allstate Ins. Co. v. Boston*, 439 S.W.2d 65 (Ky. 1969) (requirement of notice to company prior to suit is a valid condition precedent, non-compliance with which is a bar to recovery); *Rosenbaum v. Safeco Ins. Co. of America*, 432 S.W.2d 45 (Ky. 1968) (upheld provision excluding a farm wagon from the definition of an uninsured automobile). See also *Savage*, *supra* note 1, at 631, for cases upholding the policy requirement that contact be made between the uninsured vehicle and the insured vehicle—the "hit and run" cases.

For a general treatment of uninsured motorist law outside of Kentucky, see P. PRETZEL, *UNINSURED MOTORISTS* (1972); A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* (1969).

For more recent discussion of specific problems in uninsured motorist law in other states see Davis, *Uninsured Motorist Coverage: Some Significant Problems and Developments*, 42 Mo. L. REV. 1 (1977); Comment, *Uninsured Motorist Coverage in Louisiana*, 24 LOYOLA L. REV. 85 (1978); Comment, *The Kansas Uninsured Motorist Statute—"Other Insurance Clauses" and the Problem of the "Unnamed Insured,"* 16 WASHBURN L.J. 764 (1977).

²⁹ KRS § 304.39-090 (Supp. 1978) requires the owners of all motor vehicles to obtain appropriate security. Carrying liability insurance coverage is one proper way to achieve compliance with the statute.

ering the occupied vehicle when an insured is covered by more than one policy.³⁰

If the above analysis is a fair characterization of the Court's decisions, it is difficult to reconcile a determination that the "other insurance" clause³¹ which was denied effect in *Siddons* was in derogation of the statute, yet the owned, "uninsured" vehicle exclusion in *Whitlock* and *Hubbard* was not.³² Apparently, an insurance company may avoid the *Siddons* problem by hedging the uninsured motorist coverage with various *reasonable* exclusions until a pedestrian is no longer covered or by possibly stipulating that coverage exists only when the insured is occupying the vehicle named in the policy.³³ Eventually, the Court may be forced to draw the line with respect to reasonable exclusions and either reconcile *Siddons* with the more recent trend or declare it no longer viable in this respect.

2. *Reduction of Uninsured Motorist Benefits by Payments Made Under Personal Injury Protection*

In *State Farm Mutual Automobile Insurance Co. v. Fletcher*,³⁴ the Court considered the validity of a clause in Kentucky No Fault automobile insurance policies which allowed the insurance company to reduce any amount payable under its uninsured motorist protection "by the amount of any personal

³⁰ See *Safeco Ins. Co. of America v. Hubbard*, 578 S.W.2d 49 (Ky. 1979).

³¹ See note 22 *supra* for delineation of the "other insurance" clause utilized in *Siddons*.

³² From a practical standpoint, there is little reason to distinguish between the decedent in *Siddons*, a pedestrian, and the decedent in *Hubbard*, who was occupying his own "uninsured" automobile. Nevertheless, the owned, uninsured vehicle exclusion (which applies only through precise use of policy definitions) avoids coverage in *Hubbard* where an "other insurance" clause would not be able to restrict coverage in light of *Siddons*.

³³ If it is reasonable for the insurer to deny coverage based on the status or location of the insured at the time of the accident, such as being an occupant of an owned, but uninsured vehicle, riding upon a motorcycle, or living in the same household as the defendant, then it may be reasonable to exclude an insured from coverage for taking the risks encountered by a pedestrian. The problem in a case like *Siddons* then would not be how much coverage was afforded, but whether there was any coverage at all. If such an exclusion was deemed to be reasonable, no coverage would exist.

³⁴ 578 S.W.2d 41 (Ky. 1979).

injury protection benefits [PIP] paid or payable under this or any other automobile insurance policy. . . .”³⁵ The Court had little trouble upholding the trial court’s and the court of appeals’ decisions that the clause was invalid:

By its plain terms, the effect of the policy provision in issue here is to reduce the amount payable under UM [uninsured motorist] coverage by the amount payable under PIP coverage in every case. To put it another way, PIP coverage is always set off against UM coverage regardless of the nature and source of the damages for personal injury.

This means that in any case in which PIP is payable less than \$10,000.00 UM is payable. This result is repugnant to the mandate of the legislature that not less than \$10,000.00 UM coverage be provided. This policy provision is void because public policy will not permit the contract to take away that which the statute requires to be given.³⁶

Fletcher is another case in the line refusing to allow an insurance company to decrease the dollar amount payable under the uninsured motorist coverage below the statutory minimum of \$10,000.³⁷ The decision reiterates the Kentucky position that if coverage is found to exist and if sufficient damages are proved, the insured must pay the minimum statutory amount. *Fletcher* is of further significance because it details the relationship of uninsured motorist coverage to the Motor Vehicle Reparations Act. Consideration of that facet of the decision will be delayed until discussion of cases involving

³⁵ *Id.* at 43. The entire provision was: “(a) any amount payable under the uninsured motorist coverage [UM] shall be reduced by the amount of any personal injury protection benefits [PIP] paid or payable under this or any other automobile insurance policy because of bodily injury sustained by an eligible injured person.” *Id.*

The MVRA refers to those benefits paid pursuant to the Act as basic reparation benefits [hereinafter BRB], but insurance policies often refer to the same type of benefits as personal injury protection [hereinafter PIP]. PIP benefits also can include first party coverage not required to be paid under BRB. When speaking of no-fault coverage, the terms can be used interchangeably.

Further discussion of BRB as they relate to uninsured motorist protection is delayed until discussion of the MVRA. See notes 102-111 and accompanying text *infra*.

³⁶ 578 S.W.2d at 43. (citing *State Farm Mut. Ins. Co. v. Firemen’s Fund Am. Ins. Co.*, 550 S.W.2d 554 (Ky. 1977)).

³⁷ See note 23 *supra* for other cases in this line.

the MVRA.³⁸

B. *Stacking*

In the final uninsured motorist case to be discussed herein,³⁹ *Ohio Casualty Insurance Co. v. Stanfield*,⁴⁰ the plaintiff, Stanfield, was seriously injured when his police motorcycle was struck by an uninsured motor vehicle. Stanfield was covered under policies issued by two insurers. He also had two separate policies with Buckeye Union Insurance Company covering his personal vehicle. In addition, Ohio Casualty Insurance Company, his employer's insurer, insured all sixty-three Newport Police Department vehicles under one policy, although separate premiums were computed on each vehicle.⁴¹

The major issue presented to the Court was the extent of Ohio Casualty's liability. The parties agreed that, as an employee of the Newport Police Department, Stanfield was insured under the Newport policy with Ohio Casualty and therefore that Ohio Casualty was liable. The litigants disagreed considerably, however, over the amount of that liability. The insurer admitted liability only to the extent of the \$10,000 minimum statutory coverage afforded to one vehicle whereas Stanfield claimed he should be able to "stack" the coverages provided for all vehicles insured under the policy, increasing Ohio Casualty's potential liability to \$630,000.⁴²

³⁸ See text accompanying notes 102-111 *infra* for discussion of the MVRA aspect of *Fletcher*.

³⁹ Although *Hanover Ins. Co. v. Blincoe*, 573 S.W.2d 930 (Ky. Ct. App. 1978), also involves uninsured motorist law, it is discussed in the text accompanying notes 122-125 *infra* because of its significant impact on the relationship between the MVRA and uninsured motorist coverage.

⁴⁰ 581 S.W.2d 555 (Ky. 1979). This case is a reversal of the court of appeals' decision, No. CA-65-8-MR (Ky. Ct. App. Dec. 16, 1977). See *Savage*, *supra* note 1, at 632 for a discussion of the court of appeals' opinion.

⁴¹ 581 S.W.2d at 555-56.

⁴² *Stacking* was recognized judicially in Kentucky in *Meridian Mut. Ins. Co. v. Siddons*, 451 S.W.2d 831 (Ky. 1970), although the Court never used the term. The effect of stacking is that where two or more insurance policies are available to the insured, the limits of each policy are stacked upon each other to increase the source of compensation rather than splitting the liability proportionately among the insurers. Thus beginning with the primary coverage, each limit is exhausted before taking the next policy, and each policy is available up to its stated limit.

Stanfield relied on *Meridian Mutual Insurance Co. v. Siddons* which held that, when an insurer provides an insured with more than one insurance policy, each policy is required by statute to contain the minimum coverage and that an "other insurance" clause which frustrates the statutory command is invalid. Under *Siddons*, one policy is treated as primary and the other as excess, stacking them if sufficient damages are shown. There is no reason why this principle cannot logically be extended beyond two policies if the insured proves both coverage and damages.⁴³

Justice Reed, writing for the Court in *Stanfield*,⁴⁴ did not disagree with the concept of stacking, but "the type of insured who is seeking to stack coverages"⁴⁵ was more significant to him. The named insured, the city of Newport, was entitled to broad protection as the first class insured. A named insured is entitled to uninsured motorist coverage irrespective of whether he or she was occupying one of the covered automobiles and, as payor of the total premium, could recover separately for each vehicle.⁴⁶ Stanfield, however, was a second class insured under the policy, insured only while "occupying

⁴³ It should also be pointed out that the decision does not foreclose stacking of coverages under a single policy/multiple vehicle situation if the named insured is seeking the stacked coverage. A final decision in that regard must await the proper circumstances. The treatment of that issue in other jurisdictions has been inconsistent. See Comment, *Intra Policy Stacking of Uninsured Motorist and Medical Payments Coverages—To Be or Not To Be*, 22 S.D.L. Rev. 349 (1977).

⁴⁴ Justice Stephenson dissented from the portion of the majority opinion permitting stacking. While agreeing that the majority opinion was a "logical extension of *Siddons*," Justice Stephenson believed that *Siddons* and its progeny were not consistent with or mandated by the uninsured motorist statute and should be overruled. 581 S.W.2d at 559-60 (Stephenson, J. dissenting).

⁴⁵ 581 S.W.2d at 556.

⁴⁶ Two problems must be noted with respect to the distinction in classes of insured persons as made by the Court. First, under the Ohio Casualty policy, no named insured will take advantage of uninsured motorist benefits. It simply is not possible for the City of Newport to suffer personal injury, the only type of injury compensable by uninsured motorist protection.

Second, the broad protection afforded to first class insureds is not really as broad as the Court suggested. Justice Reed stated: "Insureds of the first class are protected regardless of their location or activity from damages caused by injury inflicted by an uninsured motorist." *Id.* *Whitlock* and *Hubbard* reveal that the protection is not so all-encompassing.

an insured highway vehicle"⁴⁷ and insured only because of that status. Since he derived his rights from occupying an insured vehicle, Stanfield's right to recover attached to that one vehicle. The Court held that Stanfield was "precluded from stacking the coverage in his employer's policy"⁴⁸ and thus was entitled to receive only the 10,000 protection which accompanied the motorcycle upon which he was riding.⁴⁹

In one respect, *Stanfield* is a clear reaffirmation of *Siddons* and culminates a decade of judicial approval of stacking.⁵⁰ In another respect, however, the resolution of the case represents a strong judicial reluctance to extend the *Siddons* rationale beyond its original scope.

II. MOTOR VEHICLE REPARATIONS ACT

The MVRA recently has become a focus of judicial attention.⁵¹ The Act, adopted amid much "controversy",⁵² was a recent source of confusion, and finally is being clarified by the

⁴⁷ 581 S.W.2d at 557 (quoting *Sturdy v. Allied Mut. Ins. Co.*, 457 P.2d 34 (Kan. 1969)).

⁴⁸ 581 S.W.2d at 559.

⁴⁹ In reading the opinion it becomes clear that the Court did not want "an employee who did not pay the premium [to] stack coverages contained in his employer's liability policy." 581 S.W.2d at 556. It is interesting to note that payment of the premium was not regarded as significant in *Siddons* where one policy did not contain the required uninsured motorist coverage and therefore no premium could have been charged. 451 S.W.2d at 833.

⁵⁰ *Stanfield* unequivocally held that if the primary coverage provided by Ohio Casualty was exhausted, Stanfield could stack the coverage afforded in his two policies with Buckeye Union on his personal vehicles. 581 S.W.2d at 559. It would be interesting to know, although apparently it was not argued, whether Stanfield's personal policies contained any exclusions of the type found valid in *Whitlock* and *Hubbard* and discussed in the text accompanying notes 8-33 *supra*. Since the Court was not faced with any such exclusions, the only question it had to consider with regard to the two separate personal policies was the propriety of stacking as announced originally in *Siddons*. For a general treatment of stacking, see *PRETZEL, supra* note 28, at 87-88.

⁵¹ At the time of the last survey of Kentucky insurance law, only two MVRA cases had been decided. One of those, *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975), upheld the constitutionality of the MVRA; the other was a court of appeals decision which was affirmed by the Supreme Court during this past survey year, *United States Fidelity and Guar. Co. v. Smith*, 580 S.W.2d 216 (Ky. 1979). See *Savage, supra* note 1, at 638-40.

⁵² *Fann v. McGuffey*, 534 S.W.2d 770, 772 (Ky. 1975). See also Note, *Kentucky No-Fault: An Analysis and Interpretation*, 65 Ky. L.J. 466, 470-71 (1976-77).

appellate courts of the Commonwealth. The courts by no means have eliminated all of the problems surrounding the Act, but recent court opinions afford some assistance.

The uninsured motorist cases discussed above are part of a distinct line, necessitating presentation of those cases in their historical context. Because of the unique nature of Kentucky's no fault law⁵³ and the absence of prior decisions, the recent MVRA cases are best analyzed by organizing them according to subject matter⁵⁴ and focusing on the courts' interpretation of the Act. To the extent possible, trends as well as the consistencies and inconsistencies in the judicial approaches will be indicated.

A. *Constitutionality and Application*

The MVRA's constitutionality was tested prior to the effective date of the Act in *Fann v. McGuffey*.⁵⁵ In *Fann*, the Court upheld the Act against a broad constitutional attack⁵⁶ while reserving for later consideration, under more appropriate circumstances, decision on the specific application of the Act to certain situations.⁵⁷ During the past year, two of those situations arose.⁵⁸

⁵³ The Kentucky MVRA is a combination of the Uniform Motor Vehicle Accident Reparations Act and the version of the Florida No-Fault Act which was in effect at the time Kentucky drafted its own Act. See Note, *supra* note 52, at 466.

⁵⁴ The no-fault cases have been grouped into three major areas: (1) cases dealing with the constitutionality and application of the Act in particular cases; (2) several cases that provide insight into the way that benefits under the Act must be coordinated to provide recovery and reimbursement to all parties involved; and, (3) cases that examine the statutory threshold for suits involving pain and suffering.

⁵⁵ 534 S.W.2d 770 (Ky. 1975). The case was decided on June 27, 1975, just prior to the July 1, 1975 effective date of the Act.

⁵⁶ 534 S.W.2d at 772-76. In reaching its decision, the Court provided a broad overview of the Act.

⁵⁷ The question of what constituted sufficient operation or use to subject one to the Act's limitations, 534 S.W.2d at 774 n.19, and the application of the Act to non-resident motorists, *Id.* at 775 n.27, were reserved explicitly for another occasion.

⁵⁸ In *Lyle v. Swanks and Madison Standard Serv. Station*, 577 S.W.2d 427 (Ky. Ct. App. 1979), another situation arose which was not addressed by *Fann*. Lyle, the plaintiff, sued a service station for personal injuries which occurred on the defendant's property. He claimed that the Act did not apply to automobile accidents which occur on private property though admitting that he had no claim if the Act applied. The court held that the Act does not define where accidents *must* occur, and as long as the claimant has operated, maintained, or used a motor vehicle on the roadways of

1. *Sufficient Operation or Use*

The question of what constitutes sufficient operation or use of a motor vehicle to result in an injured party being classified as an operator or user and thus subject to the MVRA's limitations on his right of recovery was addressed by the court of appeals in *Probus v. Sirles*.⁵⁹ In *Probus*, Mary Probus was injured while a passenger in her husband's automobile. Neither Mary nor her husband carried automobile liability insurance. The couple brought an action against Joseph Sirles, the other driver, seeking damages for personal injuries. The Jefferson Circuit Court dismissed the complaint. On appeal, the Probuses made a number of constitutional attacks on the Act.⁶⁰ Their strongest argument was the claim that Mary's tort rights were not limited by the Act because she did not own a car, having only recently obtained her driver's license, and because she also did not live in a household with a basic reparation insured.⁶¹ The court of appeals rejected this argument and held that Mary Probus was "an operator or user within the meaning of KRS 304.39-202"⁶² because she had en-

the state and has not filed the proper rejection, he is subject to the limitations of the Act. *Id.* at 428-29.

⁵⁹ 569 S.W.2d 707 (Ky. Ct. App. 1978). *Probus* was actually the third decision determining the amount of use which is sufficient to bring one within the Act's limitations. See also *Atchison v. Overcast*, 563 S.W.2d 736 (Ky. Ct. App. 1977) and *Dixon v. Cowles*, 562 S.W.2d 639 (Ky. 1977).

⁶⁰ Five other attacks on the Act were disposed of on the basis of *Fann v. McGuffey*, 534 S.W.2d 770 (Ky. 1975). Those arguments were: (1) that the plaintiff was not covered by the Act since she was not covered under any automobile liability insurance policy; (2) that indigents, because of their financial inability to obtain insurance, were discriminated against by the Act in violation of equal protection; (3) that the Act abridges the plaintiffs' privileges and immunities; (4) that the Act violated the commerce clause by impeding the flow of interstate commerce; and (5) that the Act deprived the plaintiffs of their constitutionally protected right to travel. 569 S.W.2d at 709-11.

⁶¹ 569 S.W.2d at 709.

⁶² *Id.* *Probus* was decided under a prior version of the Act in which "user" was defined as "a person who is a basic reparation insured or would be a basic reparation insured if such person had not rejected the limitations upon his tort rights. . . ." 1974 Ky. Acts, ch. 385, § 2(14) (repealed 1978). A "basic reparation insured" was defined as

[a] person identified by name as an insured in a contract of basic reparation insurance complying with this act and [w]hile residing in the same household with a named insured, the following persons not identified by name as

gaged in driving while preparing for her license exam. While *Fann v. McGuffey* left "open the question of how much operation or use will suffice"⁶³ to limit one's tort rights, the court in *Probus* determined that even minimal operation of a motor vehicle was sufficient.

2. Nonresident Motorists

The MVRA does not on its face distinguish between Kentucky residents and nonresidents; rather it seemingly is applicable to any injury accident occurring in Kentucky.⁶⁴ The applicability of the MVRA to nonresident motorists came before the Kentucky courts for the first time in *Stinnett v. Mulquin*.⁶⁵ In *Stinnett*, two Indiana residents who were injured in an automobile accident in Kentucky brought suit in Jefferson Circuit Court. The trial judge dismissed the action, holding that it was barred by the Act. The court of appeals reversed, stating that the "overriding question in determining this matter [was] whether the appellants had an affirmative opportunity to reject the legislatively imposed limitation on an individual's tort right to sue."⁶⁶ Thus the *Stinnetts'* claim could be barred only if they had proper opportunity to reject the restrictions imposed by the Act. The case was remanded to the trial court "to determine the fact of whether an affirma-

an insured in any other contract of basic reparation insurance complying with this act: a spouse or other relative of a named insured; and a minor in the custody of a named insured or of a relative residing in the same household with the named insured if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.

1974 Ky. Acts, ch. 385, § 2(3).

The present version of the Act defines "user" as "a person who resides in a household in which any person owns or maintains a motor vehicle." KRS § 304.39-020(15) (Supp. 1978). The present definition will avoid results like that in *Dixon v. Cowles*, 562 S.W.2d 639 (Ky. Ct. App. 1977), where the court held that a passenger in an uninsured auto who did not own or maintain an automobile in the state, but who was the wife of the operator of the uninsured automobile was not a basic reparation insured and thus not a "user." She was therefore not barred from bringing a tort action even though she would have been a "user" and barred from bringing an action if her husband had complied with the statutes and obtained insurance.

⁶³ 534 S.W.2d at 774 n.19.

⁶⁴ KRS § 304.39-030(1) (Supp. 1978).

⁶⁵ 579 S.W.2d 374 (Ky. Ct. App. 1978).

⁶⁶ *Id.* at 375.

tive opportunity was provided the appellants to reject the limitation on the right to sue."⁶⁷

The court based its decision on the premise that "constitutional protection should be afforded equally to those who are affected by Kentucky law"⁶⁸ and that such protection required that nonresidents be given the opportunity to reject the limitations on the right to sue.⁶⁹ This is interesting in light of *Fann v. McGuffey*, which upheld the Act on the basis of implied consent, not actual consent.⁷⁰ The *Fann* Court specifically rejected the notion that a lack of an opportunity to reject was fatal to the applicability of the Act.⁷¹ Although *Fann* is not directly on point with *Stinnett* because none of the parties to *Fann* had standing "to litigate the rights of non-resident motorists,"⁷² consistency would require that nonresidents be deemed to have accepted the provisions of the Act by the "registration, operation, maintenance or use of a motor vehicle and use of the public roadways" of the Commonwealth, just as residents are deemed to have accepted the Act under those conditions.⁷³ *Stinnett* seems to restrict severely the scope of the MVRA by placing nonresidents on a different plane from Kentucky residents, opening Kentucky's courts to nonresidents when a Kentucky citizen would find the doors closed.

⁶⁷ *Id.* at 376.

⁶⁸ *Id.* at 375.

⁶⁹ It should be noted that in *Probus v. Sirles*, 569 S.W.2d 707 (Ky. Ct. App. 1978), a state resident's right to bring an action was limited by the Act although she was not given an opportunity to reject its restriction. See text accompanying notes 59-63 *supra* for a detailed discussion of *Probus v. Sirles*.

Furthermore the nonresidents in *Probus* were paid BRB by their insurer who provided the coverage pursuant to KRS § 304.39-100(2) (Supp. 1978). Thus these defendants sought to gain from the Act but not be bound by its limitations.

⁷⁰ 534 S.W.2d 770, 776 (Ky. 1975).

⁷¹*Id.* at 778. In its discussion of the constitutionality of the Act as applied to those persons unable to reject because of a legal disability, the Court said: "As expressly stated in KRS 304.39-060(1), implied consent to the law hangs on one's use of the highways, not on the failure to reject, which really is in the nature of an added attraction." *Id.*

⁷² *Id.* at 779.

⁷³ KRS § 304.39-060(1) (Supp. 1978).

B. *Coordination of Benefits*

Extensive litigation has arisen from the provisions of the MVRA which describe the duties and rights of the basic reparation obligor.⁷⁴ Although the Act has undergone some change through a 1978 amendment to KRS § 304.39-070, the prior version of the statute is still relevant to accidents occurring before the amendment.⁷⁵

1. *Computing Loss*

The MVRA allows the reparation obligor to setoff workman's compensation benefits, social security benefits and certain income tax savings against reparation payments to the insured.⁷⁶ In *United States Fidelity and Guaranty Co. v. Smith*,⁷⁷ the Court instructed in the mechanics of computation of the setoff.

In *Smith*, Peggy Smith, widow of the decedent, brought an action against United States Fidelity and Guaranty Company (U.S.F.&G.), her husband's employer's reparation obligor, to collect basic reparation benefits (BRB). U.S.F.&G. denied payment, claiming that Smith already had received workmen's compensation benefits and a recovery from the tortfeasor's liability insurer which exceeded the amount paya-

⁷⁴ In addition to the cases discussed herein, three additional cases have been decided in Kentucky since the end of the survey year. See *Hargett v. Dodson*, 26 Ky. Law Summ. 11, at 2 (Ky. Ct. App. July 27, 1979) (discretionary review granted December 13, 1979, 591 S.W.2d 373 (Ky. 1979)); *Progressive Cas. Ins. Co. v. Kidd*, 26 Ky. Law Summ. 11, at 1 (Ky. Ct. App. July 27, 1979) (discretionary review granted December 13, 1979, 591 S.W.2d 373 (Ky. 1979)); and *Carlson v. McElroy*, 589 S.W.2d 754 (Ky. Ct. App. 1979).

⁷⁵ KRS § 304.39-070 as originally adopted was virtually the same as the first three subsections to the present version. The 1978 amendment added subsections (4) and (5) and the exception in subsection (3) referring to KRS § 304.39-140(3). 1978 Ky. Acts, ch. 215, § 4, ch. 384 § 104.

⁷⁶ KRS § 304.39-250 (Supp. 1978) provides the basic rule; the "except as otherwise provided" clause pertains to KRS § 304.39-120 which sets out exceptions. There is also a maximum \$10,000 of BRB payable. KRS § 304.39-050(3) (Supp. 1978). See also Note, *supra* note 52, at 478-81, 512-17.

⁷⁷ 580 S.W.2d 216 (Ky. 1979). The Supreme Court affirmed the court of appeals decision, No. CA-1369-MR (Ky. App. Jan. 16, 1978), which received extensive discussion in the last Kentucky Law Survey on insurance. See *Savage*, *supra* note 1, at 638-40.

ble to her as BRB. U.S.F.&G. argued that these recoveries from collateral sources should be setoff against the BRB payable, thus eliminating U.S.F.&G.'s liability.⁷⁸ The Supreme Court rejected this argument and remanded the case to the circuit court with the following instruction: "If it should be determined . . . that the insured incurred loss not otherwise compensated, the insurer, U.S.F.&G., shall be liable for that loss not to exceed the limits of liability as set forth in the policy of insurance."⁷⁹ The reasons for the Court's decision are clear. KRS § 304.39-120 requires that workmen's compensation benefits be "subtracted in calculating net loss"⁸⁰—net loss being the amount compensable by BRB.⁸¹ Thus the first step in the calculation is to determine the claimant's actual economic loss, then to deduct those items permitted by the Act.⁸² The resulting figure is net loss for which BRB are payable up to the policy limits or the amount of the net loss, whichever is less. It is therefore possible that in some cases the policy limit may not be reached and full BRB not paid, but the allowable deductions are never initially subtracted from the policy limits as was argued by U.S.F.&G.⁸³

The court of appeals was presented with a similar argument by an insurer in *Ammons v. Winklepleck*.⁸⁴ At first blush, *Ammons* bears little resemblance to *Smith*. In *Ammons*, the insurer fully paid the BRB and then attempted a reduction of the amount payable for bodily injury liability by the amount of BRB already paid. *Smith* concerned an insurer's attempt to reduce the amount of BRB payable. Both decisions, however, bear upon the relationship between BRB and collateral sources and illustrate the judicial interpretation of the statutory policy forbidding double recovery.

In *Ammons*, Sheryl Ann Winklepleck was injured seri-

⁷⁸ 580 S.W.2d at 217-18.

⁷⁹ *Id.* at 218.

⁸⁰ KRS § 304.39-120(1) (Supp. 1978).

⁸¹ *Id.* § 304.39-020(2) (Supp. 1978), defines BRB as "benefits providing reimbursement for net loss" with the maximum amounts of such payments totaling \$10,000.

⁸² 580 S.W.2d at 219-20.

⁸³ *Id.* at 219.

⁸⁴ 570 S.W.2d 287 (Ky. Ct. App. 1978).

ously in a single car accident while she was a passenger in John Ammon's automobile. Indiana Insurance Company provided both bodily injury liability coverage and BRB coverage with limits of \$25,000 and \$10,000, respectively. After paying \$10,000 in BRB and \$15,000 for bodily injury liability, Indiana Insurance contended that it had fulfilled its obligations. Winklepleck argued that an additional \$10,000 was payable. Because actual damages exceeded the policy limits,⁸⁵ the relationship of BRB to this collateral source (bodily injury liability coverage) was directly in question.

The insurer argued that the insurance statutes expressed a policy forbidding double recovery and that payment of BRB to the full limits under the bodily injury liability coverage would constitute a double recovery to the extent of the BRB paid.⁸⁶ Judge Park, writing for the court, disagreed. "Winklepleck has not recovered twice for the same items of damage."⁸⁷ Basic reparation payments were payable regardless of fault and extinguished Ammons' liability to the extent that those benefits were payable.⁸⁸ However, damages incurred beyond the \$10,000 maximum of BRB or for noneconomic items of loss, if the threshold was met, were compensable by Ammons' liability coverage. Obviously, "[u]nder the MVRA, the [bodily injury liability] coverage and the BRB coverage had been exhausted."⁸⁹ Permitting full recovery under each coverage did not constitute double recovery since each coverage applied to separate items of loss.⁹⁰

2. Subrogation

KRS § 304.39-070, which provides for subrogation of the insured's right of recovery to the reparation obligor, was amended in 1978.⁹¹ Although *Ohio Security Insurance Co. v.*

⁸⁵ *Id.* at 288.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 289.

⁹¹ 1978 Ky. Acts, ch. 215, § 4, ch. 384, § 104.

*Drury*⁹² was litigated under the prior statute, it is instructive in understanding the amendment.⁹³ In *Drury*, the plaintiff, Francis Drury, was injured in an automobile collision with the tortfeasor, Wessel. After collecting the \$10,000 limit of BRB from his reparation obligor, Drury sought further recovery from Wessel. Wessel's liability insurer, Ohio Security, made an out of court settlement offer for the policy limits of \$10,000, although Drury's claim was conceded to be worth much more. Drury's reparation obligor intervened pursuant to KRS § 304.39-070(3), seeking recovery from Ohio Security for the \$10,000 in BRB it paid Drury. The issue presented was whether Ohio Security was liable for a total of \$20,000, \$10,000 to Drury and \$10,000 to his reparation obligor, on a policy with a \$10,000 limit. The court of appeals held that Ohio Security was required to pay the full \$20,000.⁹⁴ The court pointed out that the right of subrogation in KRS § 304.39-070(3) is not true subrogation in the sense that there is a transfer of the rights of the insured to the insurer, since the insured has no right of recovery to the extent BRB are paid or payable.⁹⁵ Instead, the reparation obligor's right of recovery is a right of "reimbursement by virtue of the provision of [KRS § 304.39-070(3)], or by operation of law."⁹⁶ Since "the purpose of the statute is to allocate, still under a fault concept, the ultimate responsibility for the benefits paid to injured parties,"⁹⁷ the court of appeals agreed with the trial court's determination "that KRS § 304.39-070(3) creates a separate right of recovery in the basic reparation obligor,"⁹⁸ thus requiring

⁹² 582 S.W.2d 64 (Ky. Ct. App. 1979).

⁹³ In addition, cases discussed subsequently continue to be important since many other cases which must be decided under the original Act still undoubtedly exist at some stage of the litigation process. See Note, *supra* note 52, at 512-17 for a discussion of this statutory subrogation. See also note 75 *supra* for the recent changes to KRS § 304.39-070 (Supp. 1978).

⁹⁴ 582 S.W.2d at 67.

⁹⁵ *Id.* at 68. (citing *State Farm Mut. Auto. Ins. Co. v. Fletcher*, 578 S.W.2d 41 (Ky. 1979) and KRS § 304.39-060(2)(a) (Supp. 1978)).

⁹⁶ *Id.*

⁹⁷ *Id.* at 67.

⁹⁸ *Id.* For more recent cases involving the rights of the basic reparation obligor under KRS § 304.39-070, see *Hargett v. Dodson*, 26 Ky. L. Summ. 11, at 2 (Ky. Ct. App. July 27, 1979) [hereinafter cited as KLS] (discretionary review granted Decem-

reimbursement of BRB paid without regard to policy limits.

Subsection (4) to KRS § 304.39-070, which was added by the 1978 amendment,⁹⁹ limits a liability carrier's obligation to the policy limits. The policy limit is first used to satisfy any claim brought by an injured party under KRS § 304.39-060(2)(a) or (b).¹⁰⁰ If any coverage remains, it is subject to the subrogation claim of the reparation obligor pursuant to KRS § 304.39-070(3).¹⁰¹ In *Ohio Security*, Drury's claim would have exhausted the liability limits, leaving nothing for the reparation obligor. While this restricts the subrogation rights of a BRB payor, it holds down the loss to a liability insurer, thereby spreading the costs to more insurers.

3. *Relationship with Uninsured Motorist Benefits*

The Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Fletcher*¹⁰² invalidated a policy provision which attempted to reduce uninsured motorist benefits payable by the amount of PIP¹⁰³ paid or payable.¹⁰⁴ Significantly, the Court did not stop after declaring the policy provision void, but also attempted to harmonize the policies behind KRS § 304.20-020.¹⁰⁵ The Court determined that KRS §

ber 13, 1979, 591 S.W.2d 373 (Ky. 1979)); *Progressive Cas. Ins. Co. v. Kidd*, 26 KLS 11, at 1 (Ky. Ct. App. July 27, 1979) (discretionary review granted December 13, 1979, 591 S.W.2d 373 (Ky. 1979)); and *Carlson v. McElroy*, 584 S.W.2d 754 (Ky. Ct. App. 1979).

⁹⁹ See note 75 *supra* for delineation of the form of the amendment.

¹⁰⁰ See text accompanying notes 112-13 *infra* for discussion of KRS §§ 304.39-060(2)(a) and 304.39-060(2)(b).

¹⁰¹ This result is reached by reading KRS § 304.39-070(4) (Supp. 1978) in conjunction with KRS § 304.39-140(3) (Supp. 1979).

¹⁰² 578 S.W.2d 41 (Ky. 1979). This case was previously discussed in connection with uninsured motorist law in the text accompanying notes 34-38 *supra*.

¹⁰³ PIP is essentially the same as BRB in this respect, PIP being the insurance policy designation for BRB. See note 35 *supra* for an explanation of these abbreviations.

¹⁰⁴ Presumably a similar provision reducing PIP by the amount of uninsured motorist benefits paid or payable would likewise be void in light of the express language in the MVRA that "basic reparation benefits shall be paid without deduction or set-off." KRS § 304.39-250 (Supp. 1978).

¹⁰⁵ KRS § 304.20-020 (Supp. 1978) concerns uninsured motorist coverage while BRB are guaranteed by KRS § 304.39-030 (Supp. 1978).

304.39-070(2),¹⁰⁶ which subrogates the right to proceed against an unsecured tortfeasor to the reparation obligor, was the key to the process. The result of that statute is that "the insured no longer owns the claim against the uninsured tortfeasor for damages compensable under PIP";¹⁰⁷ that claim is held by the reparation obligor. As a result, the uninsured motorist carrier has no liability to the extent BRB are paid or payable.¹⁰⁸ If damages exceed \$10,000 or are not the type of damages compensable by BRB,¹⁰⁹ however, the uninsured motorist carrier must pay up to its limit of liability.¹¹⁰ "Hence, in an appropriate case an insured may collect the limits of both the PIP and the UM coverages. The only interdiction is that there be no double recovery for the *same items of damage*."¹¹¹ The result is that BRB are always payable, and in cases where other types of damages are appropriate or where the maximum payment of BRB does not fully compensate the victim, uninsured motorist benefits are payable up to the policy limits.

C. *Threshold*

The MVRA cases discussed above primarily concern that part of the Act which abolishes liability to the extent BRB are payable.¹¹² A second limitation under the Act prohibits the recovery of "damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury, sickness or disease"¹¹³ unless certain conditions are met. The first of those conditions is that the plaintiff's medical expense must exceed

¹⁰⁶ 578 S.W.2d at 44. An uninsured motorist can be pursued directly by the basic reparation obligor *and* by the uninsured motorist carrier, if both must pay their insured. KRS § 304.20-020(4) (Supp. 1978).

¹⁰⁷ 578 S.W.2d at 44.

¹⁰⁸ *Cf. Ammons v. Winklepleck*, 570 S.W.2d 287 (Ky. Ct. App. 1978), in which the relationship of bodily injury liability coverage and BRB are discussed.

¹⁰⁹ *See, e.g., Hanover Ins. Co. v. Blincoe*, 573 S.W.2d 930 (Ky. Ct. App. 1978), which held that a suit for pain and suffering against an uninsured motorist is not limited by the threshold requirement of the Act.

¹¹⁰ 578 S.W.2d at 44.

¹¹¹ *Id.* (emphasis added). *See* Judge Park's discussion of separate items of damage in *Ammons v. Winklepleck*, 570 S.W.2d 287, 288-89 (Ky. Ct. App. 1978).

¹¹² KRS § 304.39-060(2)(a) (Supp. 1978).

¹¹³ KRS § 304.39-060(2)(b) (Supp. 1978).

\$1,000.¹¹⁴ The most important case involving this limitation during the survey year was *Bolin v. Grider*.¹¹⁵ The issue presented in *Bolin* was the manner in which a factual dispute over this threshold requirement should be presented to the jury.¹¹⁶

In *Bolin*, Stephen Grider sued Beverly Bolin, alleging \$1,028 in medical expenses. His right to maintain the suit was dependent upon "establishing that his 'medical expense' exceeds \$1,000.00."¹¹⁷ There was no evidence rebutting the statutory presumption¹¹⁸ that the expenses submitted were reasonable; the only related evidence tended to show that the medical expenses were not in fact caused by the collision which led to the lawsuit.¹¹⁹ Both the court of appeals and the Supreme Court ordered the case remanded for a new trial because of the inadequacy of the instruction to the jury on the threshold issue.¹²⁰ The Court tendered its own jury instruction: "Are you satisfied from the evidence that Grider incurred charges in excess of \$1,000.00 for reasonably needed products, services and accommodations, including those for medical care and physical rehabilitation, as a result of the collision of July 7, 1975?"¹²¹

The other significant case concerning the threshold provision turned on the plain language of KRS § 304.39-060(2)(b).

¹¹⁴ *Id.* Medical expense is defined by KRS § 304.39-020(5)(a) (Supp. 1978). The other conditions in KRS 304.39-060(2)(b) (Supp. 1978) relate to the seriousness of the injury suffered by the plaintiff and have not yet received judicial interpretation in Kentucky.

¹¹⁵ 580 S.W.2d 490 (Ky. 1979). *Higgins v. Searcy*, 572 S.W.2d 623 (Ky. Ct. App. 1978), also was decided during the survey year and concerned the threshold requirement. Following *Duncan v. Beck*, 553 S.W.2d 476 (Ky. Ct. App. 1977), the court held in *Higgins* that the plaintiff must produce some evidence of permanent injury when the medical expenses do not total \$1,000. The plaintiff in *Higgins* had not required medical treatment since twenty months earlier and the court granted summary judgment to the defendant because the plaintiff's expenses did not total \$1,000.

¹¹⁶ 580 S.W.2d at 490.

¹¹⁷ *Id.*

¹¹⁸ See KRS § 304.39-020(5)(a) (Supp. 1978). *Bolin* also discussed this section of the Act. 580 S.W.2d at 491.

¹¹⁹ 580 S.W.2d at 490.

¹²⁰ The instruction given by the trial court read: "Do you believe from the evidence that the necessary and reasonable medical expenses incurred by Stephen Grider as a direct result of this collision on July 7, 1975, exceed \$1,000.00?" *Id.*

¹²¹ *Id.* at 491.

In *Hanover Insurance Co. v. Blincoe*,¹²² Robert Blincoe was awarded \$10,000 for pain and suffering by the Jefferson Circuit Court against Hanover Insurance Company, his uninsured motorist carrier.¹²³ The insurer paid Blincoe the BRB which he was due, but denied any obligation to pay under the uninsured motorist provision unless Blincoe could prove that his action against the uninsured tortfeasor met the threshold requirements of KRS § 304.39-060(2)(b). The court held that the threshold requirement "is specifically applied only to actions in tort brought against 'the owner, registrant, operator or occupant of a motor vehicle with respect to which *security has been provided* as required in this subtitle.'" ¹²⁴ Since the subsection did not pertain to actions against uninsured tortfeasors, Blincoe's tort rights were not limited in this respect and the uninsured motorist carrier had to pay regardless of the threshold requirement.¹²⁵

¹²² 573 S.W.2d 930 (Ky. Ct. App. 1978).

¹²³ *Id.* at 931.

¹²⁴ *Id.* (emphasis by the court).

¹²⁵ Liability still is abolished to the extent BRB are paid or payable, thus no double recovery results. See *State Farm Mut. Auto. Ins. Co. v. Fletcher*, 578 S.W.2d 41 (Ky. 1979).