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STACKING THE DECK AGAINST THE INSURANCE INDUSTRY:

United States Fidelity and Guaranty Company v. Ferguson
698 So. 2d 77 (MISS. 1997)

*Joseph Sclafani**

I. INTRODUCTION

Stacking, the aggregation of coverage limits contained in single or multiple insurance policies, has been the subject of intense judicial scrutiny for a number of years in Mississippi. In July 1997, the Mississippi Supreme Court handed down a unanimous decision in *United States Fidelity and Guaranty Company v. Ferguson*,[1] holding that anti-stacking clauses contained in insurance policies are void as against public policy.[2] The decision followed a series of cases in which the court, when faced with anti-stacking clauses, avoided them under various conventional contract theories.[3] The *Ferguson* decision went one step further, declaring anti-stacking clauses absolutely unenforceable.

This Note will provide a general background of the development of uninsured motorist (UM) law and show that, from its inception, courts were always willing to find a way to provide insureds maximum UM coverage, even at the expense of the insurer. Next, this Note will explain and analyze the court's most recent attempt to prevent the enforcement of anti-stacking clauses. Finally, this Note will try to anticipate the effect *Ferguson* will have on the insurance industry and explore possible market solutions available to insurance companies.

II. FACTS AND PROCEDURAL HISTORY

On July 18, 1993, Dorothy Ferguson, while riding as a passenger in her Cadillac Seville, was hit by a vehicle negligently driven by Marzee Sipes.[4] As a result of the collision, Mrs. Ferguson suffered over $100,000 in damages.[5] At the time of the collision, Mrs. Ferguson and her husband, Reid Ferguson, had three vehicles, a Cadillac, a GMC truck, and a Pontiac Firebird, insured under a single USF&G policy with a $25,000 limit for Uninsured Motorist Bodily Injury (UMBI) on each vehicle.[6] Under the policy, the Fergusons paid separate premiums for each car for liability and uninsured motorist property damages, but paid only a single premium of $45.00 every six months for UMBI coverage.[7] Marzee Sipes' vehicle was insured by Allstate, with a $25,000 limit on liability.[8]

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1. 698 So. 2d 77 (Miss. 1997).
2. *Id.* at 77.
3. *See infra* Part III.
4. *Id.* at 78.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

On October 11, 1994, Mrs. Ferguson wrote USF&G demanding $75,000, the aggregate amount of the UMBI coverage for the three cars covered under the single policy.[9] The letter stated that Mrs. Ferguson would accept $25,000 from Allstate and $52,000 from USF&G to settle her claim.[10] USF&G responded with a letter stating that because Mrs. Ferguson's policy contained an unambiguous anti-stacking clause and because the total uninsured motorist coverage was greater that the statutory minimum of $10,000 per car,[11] she was only eligible to receive $5,000 ($10,000 per vehicle, times three, less the offset of Allstate's $25,000 payment).[12] USF&G waived its potential subrogation rights against Marzee Sipes, allowing Mrs. Ferguson to release Allstate and Sipes.[13] USF&G then paid Mrs. Ferguson $5,000.[14]

On February 4, 1994, Mrs. Ferguson filed a complaint for declaratory judgment in Lafayette County Circuit Court.[15] Mrs. Ferguson alleged that USF&G had previously paid stacked uninsured motorist coverage and should not be allowed to unilaterally change its policy without notifying its insured.[16] In the alternative, even if USF&G was entitled to limit stacking, she should nonetheless receive $20,000 ($25,000 for the vehicle involved in the collision, plus $10,000 for each of the two vehicles covered under the policy, less the $25,000 credit offset of Allstate).[17]

Following discovery, both parties moved for summary judgment.[18] On December 6, 1994, Judge Kenneth Coleman heard oral argument.[19] Following oral argument, Judge Coleman rendered a bench opinion granting Mrs. Ferguson's motion for summary judgment and denying USF&G's motion.[20] On December 10, 1994, the court entered a *nunc pro tunc* order granting Mrs. Ferguson's motion and ordering USF&G to pay $70,000 ($25,000 for each of the three vehicles, less $5,000 previously paid to Mrs. Ferguson).[21]

III. BACKGROUND AND HISTORY OF THE LAW

A. The Genesis of Uninsured Motorist Coverage

In 1956, uninsured motorist coverage, or family protection insurance, as it is sometimes called, came into existence at the behest of the automobile insurance industry in an effort to address the growing problems created by the rapidly

9. *Id.*
10. *Id.*
11. MISS. CODE ANN. § 83-11-101 (1996).
12. *Ferguson*, 689 So. 2d at 78.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 78-79.
20. *Id.* at 79.
21. *Id.*

increasing number of uninsured vehicles.[22] Uninsured motorist coverage was an attempt by the insurance industry to displace publicly administered judgment-funds and compulsory insurance programs.[23] As such, the purpose of Uninsured Motorist coverage was to "give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy."[24]

The concept became so popular that many states, including Mississippi, began to require that all automobile liability policies include an endorsement for uninsured motorist coverage.[25] This requirement, in its current version, is codified in § 83-11-101 of the Mississippi Code, as follows:

> (1) No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1967, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law, as amended, under provisions approved by the commissioner of insurance; however, at the option of the insured, the uninsured motorist limits may be increased to limits not to exceed those provided in the policy of bodily injury liability insurance of the insured or such lesser limits as the insured elects to carry over the minimum requirement set forth by this section. The coverage herein required shall not be applicable where any insured named in the policy shall reject the coverage in writing and provided further, that unless the named insured requests such coverage in writing, such coverage need not be provided in any renewal policy where the named insured had rejected the coverage in connection with a policy previously issued to him by the same insurer.[26]

In 1973, the Mississippi Supreme Court addressed the Uninsured Motorist Statute for the first time and stated that its purpose "is to provide protection to innocent insured motorists and passengers injured as a result of the negligence of financially irresponsible drivers."[27] The court went on to declare that "[s]uch provisions are to be liberally construed to accomplish such purpose."[28]

As a direct result of the growth in popularity of UM coverage, numerous questions concerning the scope of UM coverage arose. The first question to reach the Mississippi Supreme Court was "[d]oes [a UM] policy cover an insured owner of an automobile and the members of his family who are injured while riding in or on another motor vehicle not mentioned in the insurance policy?"[29] In *Lowery*,

22. Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 431-32 (Miss. 1973).
23. *Id.* at 432.
24. *Id. See* 7 AM. JUR. 2D *Automobile Insurance* 135; Bryant v. State Farm Mut. Auto. Ins. Co., 140 S.E.2d 817 (Va. 1965); Storm v. Nationwide Mut. Ins. Co., 97 S.E.2d 759 (Va. 1957); State Farm Mut. Auto Ins. Co. v. Brower, 134 S.E.2d 277 (Va. 1964) (citing Stephens v. Allied Mut. Ins. Co., 156 N.W.2d 133, 136-37 (Neb. 1968)).
25. MISS. CODE ANN. § 83-11-101 (1996).
26. *Id.*
27. *Rampy*, 278 So. 2d at 432.
28. *Id. See supra* note 22.
29. Lowery v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 769 (Miss. 1973).

James W. Lowery was riding a Honda motor bike when, through no fault of his own, he was struck by a 1963 Ford automobile negligently driven by Joe Palmertree.[30] Mr. Palmertree was an uninsured motorist.[31] Though the motor bike operated by Mr. Lowery was not covered under any insurance policy, he nonetheless contended that, since he lived in the household of his father, he was insured under the terms of a State Farm policy covering the family's 1969 Plymouth.[32] The policy in question contained $5,000 in UMBI coverage.[33] Under the express terms of the policy, however, the "insurance [was] not [to] apply . . . to bodily injuries to an insured while occupying or through being struck by a land motor vehicle owned by a named insured or any resident of the same household, if such vehicle is not [listed in the policy as] an owned motor vehicle."[34] In essence, the question of law before the court was whether "the terms of the . . . [exclusionary provision] conflict with the Mississippi statutes requiring all automobile liability insurance policies to contain an uninsured motorist provision."[35]

The court, after examining the purpose of Mississippi's statutory scheme governing UM coverage, held that if "public policy is violated by any restrictive language inserted in an insurance policy having the effect of defeating the purpose and intent of the statute, such provisions must be considered nugatory and void."[36] The court stated that the "purpose of [Mississippi's Uninsured Motorist Act] is to provide protection to innocent insured motorists and passengers injured as a result of the negligence of financially irresponsible drivers."[37] The court went on to conclude that "[t]he great weight of authority supports appellant's contention that the exclusionary clause in the present case violates the public policy of this state as manifested by the Mississippi Uninsured Motorist Act . . . [t]herefore, judgment will be entered here for [the sum of $5,000] in favor of the appellant . . . ."[38]

In the wake of *Lowery*, the court was faced with the question of whether the "[i]nsured, under the uninsured motorist coverage of his policy, is entitled to the benefit of the aggregate amount of coverage provided in a single insurance policy insuring more than one vehicle."[39] In *Talbot*, William Talbot, the insured, was involved in a collision with an automobile owned and operated by Robert L. Johnson, an uninsured motorist.[40] As a result of the collision, Mr. Talbot sustained damages for bodily injuries in the sum of $9,800.[41] At the time of the accident, Mr. Talbot was the owner of four cars covered under a single State

30. *Id.* at 768.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 769.
35. *Id.*
36. *Id.* at 770 (citing Travelers Indem. Co. v. Powell, 206 So. 2d 244, 246 (Fla. App. 1968)).
37. *Lowery*, 285 So. 2d at 770 (citing *Rampy*, 278 So. 2d at 432).
38. *Lowery*, 285 So. 2d at 777-78.
39. Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 701 (Miss. 1974).
40. *Id.* at 700.
41. *Id.*

Farm insurance policy providing UM coverage in the amount of $5,000 per vehicle.[42] The total premium for all of the coverage was calculated per vehicle.[43] Thus, Mr. Talbot asserted that the total UM coverage available to him under the policy was $20,000, and he could recover the entire $9,800.[44]

State Farm countered this argument by asserting the Limits of Liability clause in the policy.[45] Under the policy,

> [t]he company's limit of liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person in any one accident shall not exceed the amount specified by the financial responsibility law of the state in which this policy is issued for bodily injury to one person in any one accident.[46]

Thus, because the minimum coverage available under the Mississippi Motor Vehicle Responsibility Law[47] was $5,000, Mr. Talbot was limited to a recovery in that amount.[48]

The court, addressing this case as one of first impression, held that

> [t]here [was] no requirement that the coverage shall be more than the minimum thus stated [in the Mississippi Motor Vehicle Safety Responsibility Law] . . . . It follows that the parties to this suit were free to contract as to uninsured motorist coverage in any respect so long as the required coverage is not cut down by the policy provisions.[49]

Thus, because the "limitation clause involved in this case is clear and unambiguous," Mr. Talbot was limited in his recovery to $5,000.[50] In the course of its opinion, the court visited the issue of separate premiums paid by Mr. Talbot for the four vehicles, but held that "the question of premiums has no proper place in determining whether Insured has aggregate coverage under the uninsured motorist provisions of the policy."[51]

In a dissenting opinion, which would later be adopted by a majority of the court, Justice Broom felt that the issue of separate premiums was key to the resolution of the case before the court, suggesting that the case should have been decided as follows:

> (1) The insured before us is entitled to his full damages under all coverages for which a premium has been paid; (2) the 'Limit of Liability' clause will not be permitted to operate in such a fashion as to deprive the insured of benefits for which a premium was paid; [and] (3) the 'Limit of Liability' clause is so word-

42. *Id.*
43. *Id.*
44. *Id.* at 701.
45. *Id.* at 700.
46. *Id.* at 700-01.
47. MISS. CODE ANN. 63-15-1 (1996)
48. *Talbot*, 291 So. 2d at 701.
49. *Id. See* Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971).
50. *Talbot*, 291 So. 2d at 702.
51. *Id.*

> ed as to be susceptible of differing and contradictory meanings and is legally ambiguous, and is therefore to be construed most strongly against its creator, State Farm.[52]

In *Southern Farm Bureau Casualty Insurance Company v. Roberts*, the court was faced with the question of "whether the $10,000 coverage afforded by the uninsured motorist endorsement to three separate policies issued by the same insurer . . . to the same insured . . . can be aggregated or stacked to cover damages for bodily injuries suffered as a proximate result of the negligence of an uninsured motorist."[53] In *Roberts*, the insured was injured as a result of a collision with a truck driven by an uninsured motorist.[54] Mary Roberts, mother of the insured, brought suit against Southern Farm Bureau Insurance Company in the amount of $30,000 based on three separate policies covering three separate vehicles, all insured by Farm Bureau.[55] Farm Bureau countered with an argument analogous to State Farm's argument in *Talbot*, asserting that a Limits of Liability clause prevented the stacking of the coverages.[56]

The court, ruling in favor of Roberts and allowing the stacking of the UM coverages, held that "[a] separate premium was paid for each policy, and each policy with its uninsured motorist endorsement was complete within itself."[57] Unlike *Talbot*, where there was "only one insurance policy with one uninsured motorist endorsement covering a fleet of four automobiles, . . . there were three separate policies and, as required by statute, an uninsured motorist endorsement in each policy."[58] Thus, when the "coverage of uninsured motorist endorsement [is contained] in three separate policies of insurance, [such coverage] could be aggregated."[59]

B. Stacking Based on Policy Ambiguity

Following *Talbot* and *Roberts*, it was clear that the protection provided by uninsured motorist coverage was firmly embedded in public policy and that each insurance policy must provide the minimum coverage required by statute. However, it was unclear whether, under any set of circumstances, UM coverage on multiple vehicles contained in a single policy could ever be stacked. In 1977, the Mississippi Supreme Court was presented with an opportunity to address the question of whether, "under the uninsured motorist coverage of a single automobile policy, . . . [the insured could] aggregate the amount of coverage provided . . . on each of the three insured automobiles."[60]

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52. *Id.* at 707 (emphasis added).
53. Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536 (Miss. 1975).
54. *Id.* at 537.
55. *Id.*
56. *Id.*
57. *Id.* at 538.
58. *Id.*
59. *Id.* at 539.
60. Hartford Accident and Indem. Co. v. Bridges, 350 So. 2d 1379, 1381 (Miss. 1979).

In *Bridges*, the insured was negligently struck and killed as a result of a hit and run accident.[61] The insured's next of kin brought an action against Hartford Insurance Company in the amount of $30,000, representing the aggregate of UM coverage contained in a single insurance policy covering three vehicles.[62] The court began by expressing some reservation about the rule pronounced in *Talbot*, stating that it stood for the "proposition that an insurance company can legally insure more than one automobile in the same policy and limit its uninsured motorist coverage to the minimum amount specified by the financial responsibility law . . . [if] done by clear and unambiguous language."[63]

In the case before the bar, however, the limits of liability clause in the policy was "ambiguous and [needed to] be construed most strongly against its creator."[64] Further,

> [w]hile the charging of a separate premium is not necessarily controlling in determining whether the insured has aggregate coverage under the uninsured motorist provision of the policy, when a separate premium is charged for uninsured motorist coverage it raises a presumption or inference that the coverage in the one policy is the same as would be furnished if such coverage was provided for in separate policies covering the same vehicles.[65]

Thus, because of the "ambiguous" nature of the wording of the policy at bar, the coverage offered under it "could be aggregated and stacked to the extent of the damage suffered by the insured."[66]

Following *Bridges*, the court produced a series of opinions avoiding limits of liability clauses and allowing stacking based on ambiguity. For example, in *Pearthree v. Hartford Accident & Indemnity Co.*, the court, faced with two insurance companies covering the same two automobiles, both under a single policy, held that

> [a] construction permitting aggregation flows from the ambiguity of the limiting clauses in the policies covering more than one automobile, not from the charging of separate premiums, . . . [t]he courts of this State have consistently held that ambiguity and doubt in policies be resolved against the writer of the policy, the insurance company, and in favor of the insured.[67]

Thus, it was clear that all questions of ambiguity regarding anti-stacking clauses would be resolved in favor of the insured, and, in order to avoid such outcomes, the insurance industry would be forced to compose anti-stacking clauses which were clear and unambiguous on their face.

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61. *Id.* at 1380.
62. *Id.*
63. *Id.* at 1381.
64. *Id.* at 1381-82.
65. *Id.* at 1381.
66. *Id.* at 1382.
67. Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 270 (Miss. 1979); *see Bridge*, 350 So. 2d at 1381 (citing State Farm Mut. Auto. Ins. Co. v. Taylor, 233 So. 2d 805 (Miss. 1970)).

C. Stacking Based on the Payment of Multiple Premiums

In 1984, the Fifth Circuit, through a certified question, asked the Mississippi Supreme Court to evaluate the language in a limit of liability clause to determine if it was "sufficiently clear and unambiguous to prevent the aggregation of uninsured motorist coverage and limit liability to $10,000."[68] In *Brown*, a single policy insured three vehicles for which separate premiums were paid.[69] The court began by stating that "[a] motorist is often covered under the uninsured provisions of more than one policy or, in the case of a single policy, by premiums for multi-vehicular coverage."[70] The court restated the rules promulgated in *Talbot* and *Bridges* and held that

> [t]he *Bridges* decision now appears to be the better reasoned holding and we now adopt its rationale and expressly abandon the *Talbot* rationale.[71] We reiterate from *Bridges* that a presumption arises that coverage of multi-vehicles in one policy, where separate premiums were paid for each endorsement of uninsured motorist coverage, is the same as if such coverage was provided in separate policies covering the same vehicles.[72]

The court went on to adopt the dissent of Justice Broom in *Talbot*, holding that "recovery cannot be limited by an insurer for benefits for which a premium is paid by an insured, notwithstanding clear and unambiguous language of attempted limitations by the insurer."[73] Thus, even if the language of the limit of liability clause was clear and unambiguous, it would not be enough to prevent the insured from receiving the benefits for which he paid.[74] Further, the court held, "this Court still recognizes the general principle that in any insurance contract, unclear and ambiguous language will be construed in favor of the insured."[75]

In response to *Brown*, the insurance industry sought to disguise separate premiums charged for multiple coverages in a single policy through the use of lump sum premiums.[76] In *Harrison*, the automobile operated by Dudly Harrison collided with an automobile operated by Timothy Clark.[77] Mr. Clark was an uninsured motorist; thus, Mr. Harrison qualified for uninsured motorist coverage under a single policy issued to him by Allstate covering his two automobiles.[78] The policy provided UM coverage of $10,000 per person and $20,000 per accident.[79] Initially, Mr. Harrison paid a premium of $22.50 for each of his two cars covered under the policy.[80] However, in 1989, Allstate amended its billing struc-

68. Government Employees Ins. Co. v. Brown, 446 So. 2d 1002, 1003 (Miss. 1984).
69. *Id.*
70. *Id.* at 1004.
71. *Id.* at 1006.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. Harrison v. Allstate Ins. Co., 662 So. 2d 1092, 1094 (Miss. 1995).
77. *Id.* at 1093.
78. *Id.*
79. *Id.*
80. *Id.*

ture to charge a single premium of $52.40 for UM coverages under a single policy covering two or more vehicles.[81] This rate for multi-car policies was in excess of the $28.40 charged for policies covering only a single vehicle.[82]

Relying on the change of billing, Allstate tendered a check for UM benefits to Mr. Harrison in the amount of $10,000.[83] On September 25, 1991, Mr. Harrison filed suit in the Circuit Court of Humphreys County against Allstate demanding $20,000 in stacked UM coverage.[84] Allstate responded by filing a motion for summary judgment.[85] The trial court entered summary judgment in favor of Allstate, and Mr. Harrison appealed.[86] On appeal, the Mississippi Supreme Court reversed and remanded the case, holding that

> [a]lthough the policy language precluding stacking is clear, we find that Harrison was actually charged separate premiums for his two vehicles under the guise of one lump sum on his declaration sheet. Because the premium for two cars is $24 more than the premium for one car, Allstate clearly charges an additional premium for the second car. We find this case factually similar to *Brown*, the only difference being that Allstate in the present case charged separate uninsured motorist premiums by lumping them together on the declaration sheet. Thus, Harrison is entitled to stack his uninsured motorist coverage up to his policy limits of $20,000.[87]

As a result of the court's ruling in *Harrison*, the insurance industry was forced to abandon the practice of cloaking separate premiums in the guise of one lump sum.

With *Bridges* and *Brown*, the court had promulgated two ways in which to avoid the attempts of the insurance industry to limit its liability in the context of UM coverage. First, the court could void the terms of the policy if the wording was deemed ambiguous. Second, if the insured paid separate premiums under a single policy for UM coverage, the insured was entitled to the benefits for which he paid and thus could aggregate the UM coverages.

D. Offset and Stacking of Unrelated Policies

In 1979, in an attempt to provide more protection for motorists involved in collisions with parties who do not have adequate insurance to cover their liability, the Mississippi Legislature amended Mississippi's Uninsured Motorist statute, effective January 1, 1980, to broaden the definition of uninsured motorist to include underinsured motorists.[88] Section 83-11-103 was amended to read, in

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 1093-94.
87. *Id.* at 1094-95.
88. MISS. CODE ANN. § 83-11-103 (1996).

part, as follows: "(c) [t]he term 'uninsured motor vehicle' shall mean: . . . (iii) An insured motor vehicle, when the liability insurer of such vehicle has provided limits of bodily injury liability for its insured vehicle which are less than the limits applicable to the injured person provided under his uninsured motorist coverage . . . ."[89]

As a result of the amendment to the UM statute, the insurance industry immediately attempted to reduce its exposure by inserting clauses into policies allowing for the reduction of the amount of UM coverage available by any amount paid to the insured from the underinsured's liability coverage. In 1985, the Mississippi Supreme Court addressed the validity of such "offset" clauses.[90] In *Kuehling*, Ms. Kuehling suffered substantial injuries as a result of a head-on collision with a vehicle negligently driven by Timothy Sparling.[91] Mr. Sparling was insured by a policy with a liability coverage limit of $10,000.[92] Ms. Kuehling settled her claim with Mr. Sparling's insurance company for the maximum available under the coverage.[93] In addition, Ms. Kuehling was insured by State Farm under two separate policies, each with a UM limit of $10,000.[94] State Farm relied on a limit of liability clause which provided that "[a]ny amount payable under this section for bodily injury (property damage) shall be reduced by . . . (2) An amount equal to total limits of liability for bodily injury (property damage) of all liability policies that apply to accident" to pay Ms. Kuehling $10,000, representing the difference between the aggregate of the two UM coverages less the amount received from Mr. Sparling's insurance coverage.[95]

Ms. Kuehling filed suit against her insurance carrier challenging the validity of the limit of liability provision which allowed for the offset of UM benefits under her policy by any amount paid by the tortfeasor's liability insurance.[96] The Supreme Court, reversing the Circuit Court's summary judgment in favor of Ms. Kuehling, entered a summary judgment in favor of State Farm.[97] The court stated that

> the clear language of the policy provided for offsets of the uninsured motorist coverage by amounts paid by the tortfeasor's carrier and are controlling in this case. The uninsured motorist statute does not prohibit such provisions. Therefore, State Farm is entitled to offset the total of its uninsured motorist coverage by the $10,000 settlement awarded to appellee from the tortfeasor's insurance company.[98]

As a result of *Kuehling*, the insurance industry was able to limit its liability for UM coverage by offsetting the amount of money available to the insured from the liability coverage of the uninsured motorist.

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89. *Id.* 83-11-103(c)(iii).
90. State Farm Mut. Auto. Ins. Co. v. Kuehling, 475 So. 2d 1159 (Miss. 1985).
91. *Id.* at 1160.
92. *Id.*
93. *Id.* at 1161.
94. *Id.* at 1160.
95. *Id.* at 1161.
96. *Id.*
97. *Id.* at 1163.
98. *Id.* State Farm Mut. Auto. Ins. Co. v. Eubanks, 620 F. Supp. 17 (N.D. Miss. 1985).

In *Wickline v. USF&G*,[99] the court was faced with two very important questions. First, which UM policy limits are to be aggregated to determine if the negligent tortfeasor is uninsured?[100] Second, once the tortfeasor is deemed uninsured, which policies are available to the injured party?[101] In *Wickline*, Stacie Wickline was riding as a passenger in a car driven by Mills Carter, III.[102] The automobile collided with a parked car on the side of the road, resulting in the death of Ms. Wickline.[103] Mr. Carter's car was insured by USF&G under a single policy which also provided coverage for Carter's other three cars.[104] The liability coverage under the single USF&G policy was $10,000 per person and $20,000 per accident.[105] In addition, Ms. Wickline was insured under two of her own insurance policies, issued by State Farm, with UM coverage of $10,000 per person and $20,000 per accident on each policy.[106] The Wickline family quickly settled with State Farm in the amount of $30,000.[107] In an attempt to settle in a similarly quick fashion, USF&G sent the Wicklines a check for $10,000, representing the maximum amount of liability coverage per person.[108] The Wicklines filed suit against USF&G asserting that they were entitled to $80,000.[109]

The court first addressed the issue of whether Ms. Wickline qualified for UM benefits.[110] The court held that if a party is "injured while riding as a passenger, the uninsured motorist coverage of the vehicle in which he is riding, in addition to that of his own vehicles, is applicable to the injured person."[111] Thus, because the aggregate of the UM coverage available to Ms. Wickline was $30,000 and the liability coverage of Mr. Carter was only $10,000, the Carter vehicle qualified as uninsured.[112]

The court then turned to the issue of how much UM coverage was available to Ms. Wickline under Carter's insurance policy.[113] The court held that Ms. Wickline qualified as an insured under Carter's insurance policy and because the court could

> not on principle distinguish [Wickline's] case from *Brown*, *Pearthree*, and *Bridges*, . . . all classes [statutorily insured] may recover [from] a UM insurer all amounts he or she may be entitled to recover as damages from the uninsured motorist, limited only by the limits of UM coverage multiplied by the number of vehicles insured in the policy.[114]

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99. 530 So. 2d 708 (Miss. 1988).
100. *Id.*
101. *Id.*
102. *Id.* at 710.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 711-13.
111. *Id.* at 713. *See* Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536 (Miss. 1975).
112. *Wickline*, 530 So. 2d at 713.
113. *Id.* at 713-15.
114. *Id.* at 715.

Thus, the Wicklines were entitled to recover $40,000 under Carter's UM coverage, offset by the $10,000 received as a result of liability coverage of the tortfeasor's insurance coverage.[115]

E. Attempts to Limit Stacking to Statutory Minimum Limits

In the wake of *Kuehling* and *Wickline*, it was clear that an insurer could limit its potential liability through the use of offset clauses and that the stacking of unrelated UM coverages was permissible. Thus, since UM coverages contained in separate policies could now be stacked, the question arose as to whether the insurance company could seek to limit this potential liability through the use of anti-stacking clauses which attempted to limit exposure to the statutory minimum.[116] In *Koestler*, the court was faced with two policies providing, in the aggregate, five UM coverages, each with limits of liability well in excess of the statutory minimum and each with clear and unambiguous policy provisions that prevented the stacking of coverages in excess of the statutory minimum.[117] Mr. Koestler owned five automobiles, three insured under one policy and two under a separate policy.[118] Both policies were issued by Casualty Reciprocal Exchange (CRE).[119] He paid separate premiums for each of the five coverages with each coverage providing $250,000 UMBI coverage.[120] Additionally, each policy contained a limit of liability provision providing that, in the event of multiple coverage, the insurance company's liability "[would] not exceed the highest applicable limit of liability under any one policy" — i.e. $250,000 for UMBI.[121] In addition to the coverage afforded under CRE's policies, Mr. Koestler purchased $1,000,000 in bodily injury or wrongful death insurance coverage from Federal Insurance Company.[122] Upon the death of Mr. Koestler, resulting from the negligence of a totally uninsured motorist, Mrs. Koestler filed suit against the insurance carriers in the amount of $2,500,000.[123] The case went to trial, and, during a recess, the two insurance carriers agreed to settle the claim for $1,100,000.[124] Under the terms of the settlement, each would pay $550,000 to Ms. Koestler and the two insurance companies would be allowed to file claims for indemnification against one another.[125]

CRE claimed, as they had all along, that their liability was limited to $250,000, and they thus filed a claim against Federal in the amount of $300,000.[126] Federal felt that CRE's liability was $1,250,000 and that because the settlement of $1,100,000 was less than their potential liability, they should be able to recover

115. *Id.* at 717.
116. Koestler v. Federal Ins. Co., 608 So. 2d 1258 (Miss. 1992).
117. *Id.* at 1259.
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* at 1260.
124. *Id.*
125. *Id.*
126. *Id.*

the entire $550,000.[127] The court addressed the issue of liability by stating that "[i]nsurance policies are privately made law. Except as limited by the public law, we respect the right of insurer and insured to contract freely one with the other."[128] The court went on to say that there was "no public policy against limiting insurance coverages. Over and above legally mandated minimums, the parties have always remained free to agree as they wish."[129] Thus, the court held that "[w]hat is important is that the policies clearly told Koestler what coverage his premiums purchased for him, and what limits of liability entailed that coverage. What we have before us is limits of liability language that no one could fail to understand."[130] The court went on to explore the possible remedies available to Koestler if he objected to the coverage provided under CRE's policy:

> We have no doubt insureds like Koestler could pay a greater premium and purchase multiple UM coverages without the limitation clause, if not now, then soon. Money and the opportunity for profit can move the bureaucratically inert, even in the insurance industry. Beyond this, there is the public remedy across the street. If the Legislature disagrees with our action today, it may well amend the UM statute. It is within the legislative prerogative to provide, in the case of multiple UM coverages or policies, where the insured has paid and the insurer has received a separate premium, the insured may stack and thus recover on each such coverage or policy otherwise according to its terms, and that any language in any such coverage or policy to the contrary is a contract against public policy and is, thus, unenforceable. To date the Legislature has not so enacted, nor may we, consistent with our UM renderings heretofore.[131]

Thus, the court held that the CRE's liability was limited to $250,000 and entered a judgment in favor of CRE, against Federal, in the amount of $300,000.[132]

As a result of *Koestler*, the court validated the use of anti-stacking clauses which limited the insured's exposure to the statutory minimum. However, it was not until 1994 that the court resolved the question of the statutory minimum.[133] In *Garriga*, the court defined the statutory minimum amount of UM coverage an insurance company must provide its insured which may not be reduced by offset clauses.[134] The court cited the language of *Koestler*, stating that "[o]ver and above legally mandated minimums, the parties have always remained free to agree as they wish."[135] After a review of the development of § 83-11-111, the court stated:

> [i]t must be read for what it plainly imports, an option given the insured to increase coverage, over which the insurer has no control other than refusal to increase bodily injury liability limits . . . . The correct interpretation of the

127. *Id.*
128. *Id.* at 1263. *See also* Perry v. Southern Farm Bureau Cas. Ins. Co., 170 So. 2d 628, 630 (Miss. 1965).
129. *Koestler*, 608 So. 2d at 1263.
130. *Id.* at 1263-64.
131. *Id.* at 1264.
132. *Id.*
133. Nationwide Mut. Ins. Co. v. Garriga, 636 So. 2d 658 (Miss. 1994).
134. *Id.* at 659.
135. *Id.* at 663 (citing *Koestler*, 608 So. 2d at 1263).

> statutory scheme as it developed and in its present form is that carriers are commanded by statute to provide coverage up to the amount of liability insurance purchased where the insured so desires and cannot reduce this amount by exception of the type here involved.[136]

In dissent, Justice Pittman took issue with the holding of the court, stating that "the majority now holds that the insured, rather than the Legislature, sets the statutory minimum amount of uninsured motorist coverage limited only by the amount of liability coverage purchased and that this uninsured motorist coverage cannot be reduced by any language contained in the insurance contract."[137] Justice Pittman went on to take the same position as the U.S. District Court in *Porter v. Shelter General Insurance Company*,[138] stating that "the minimum amount of uninsured motorist coverage shall be no less than that required by the Mississippi Motor Vehicle Safety Responsibility Law . . . [providing] that the minimum limits are $10,000 for any one person and $20,000 per accident."[139]

As a result of the court's ruling in *Garriga*, the minimum amount of UM coverage which an insurer must provide an insured, if he so requests, is an amount equal to the amount of liability coverage which the insured purchases. Thus, in essence, if an insurance company wishes to limit the amount of UM coverage which an insured can demand, the company must limit the amount of liability coverage which it sells the insured.

IV. INSTANT CASE

In *Ferguson*, USF&G began its appeal after the Circuit Court's ruling on the parties' cross-motions for summary judgment.[140] The Circuit Court for Lafayette County ruled that Mrs. Ferguson was entitled to receive the aggregate of the three UM coverages available under the single policy issued by USF&G covering the Fergusons' three vehicles.[141] Thus, USF&G was ordered to pay Mrs. Ferguson $75,000, with credit given for the $5,000 previously paid by USF&G, but not allowing an offset of the $25,000 which she received from the negligent tortfeasor's insurance carrier.[142] The Mississippi Supreme Court granted USF&G's appeal and affirmed the lower court's ruling in regard to USF&G's liability.[143] However, the court reversed the lower court's ruling with respect to the holding that USF&G was not allowed to offset the amount of money paid by the tortfeasor's liability carrier and rendered a decision giving USF&G credit for the $25,000 which Mrs. Ferguson had received.[144] Justice Sullivan delivered the opinion of the court, with Justice Smith concurring only in the result and Chief Justice Lee specially concurring in a separate opinion.[145]

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136. *Garriga*, 636 So. 2d at 664-65.
137. *Id.* at 665.
138. 678 F. Supp. 151 (S.D. Miss. 1988).
139. *Id. See* MISS. CODE ANN. § 63-15-11 (1972).
140. United States Fidelity & Guar. Co. v. Ferguson, 698 So. 2d 77, 78 (Miss. 1997).
141. *Id.*
142. *Id.* at 79.
143. *Id.* at 80.
144. *Id.* at 82.
145. *Id.* at 77-78.

A. Justice Sullivan's Opinion

The Court held that

> the public policy of this State mandates stacking of UM coverage for every vehicle covered under a policy, regardless of the number or amount of the premium(s) paid for UM coverage . . . . [Thus,] anti-stacking clauses as applied to UM coverage are against public policy, and contracts contrary to public policy are unenforceable.[146]

In an attempt to justify this conclusion, the court first examined the intent of Mississippi's uninsured motorist laws, followed by an examination of the insurance industry.[147]

The court began by reiterating the purpose of UM coverages: "Uninsured Motorist coverage is designed to provide innocent injured motorists a means to recover all sums to which they are entitled from an uninsured motorist."[148] The court pointed out that, in an attempt to achieve this goal, courts have found "ambiguity in the language of the policy or the fact that separate premiums were charged for each car" as a means to allow stacking of UM coverage, despite anti-stacking clauses.[149] In response to prior decisions, the insurance industry began rewriting its policies to contain plain and unambiguous limit of liability clauses and restructuring its fee schedules.[150] This restructuring, the court held, was nothing more than an attempt "to circumvent case law and defeat public policy."[151]

The court next moved on to an examination of the insurance industry, stating:

> [i]nsurance contracts essentially are contracts of adhesion. The insured has only two choices in 'negotiating' the terms of his policy—he may accept the terms offered by his insurance company, or he may reject them and go to a different insurance company. When the entire insurance industry writes its policies to preclude stacking of UM coverage . . . the insured is denied any choice whatsoever.[152]

Thus, the court concluded by saying, "[b]ased upon the sound economic benefits of allowing stacking and the lack of bargaining power of the insured, we announce a new public policy against anti-stacking provisions in insurance contracts . . . ."[153]

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146. *Id.* at 79. *See* Hertz Commercial Leasing Div. v. Morrison, 567 So. 2d 832, 834-35 (Miss. 1990).
147. *Ferguson*, 698 So. 2d at 79-80.
148. *Id.* at 80.
149. *Id.* at 79.
150. *Id.* at 80.
151. *Id.*
152. *Id.*
153. *Id.* at 82.

The court then moved on to address USF&G's argument that Mrs. Ferguson could not recover benefits in excess of her liability coverage because Mississippi's uninsured motorist law prevents an insured from carrying uninsured motorist coverage in excess of liability coverage.[154] The court, citing the language of *Garriga*, rejected this argument, stating that

> the statutory minimum is 'that amount of coverage that the insured elects up to the amount of liability coverage purchased.' In other words, [Mississippi's uninsured motorist law] authorizes the insured to demand UM coverage up to the amount of his liability coverage limits. Nothing in the statute precludes an insured and insurer from contractually agreeing to a larger amount of UM coverage.[155]

Finally, the court addressed the validity of the offset clause in Mrs. Ferguson's coverage allowing USF&G to limit its exposure by reducing its payment by the amount received from the negligent tortfeasor's insurance.[156] The court upheld the offset clause, concluding that "[i]t is not against public policy to allow an insurance company to maintain an offset clause to recover that portion of damages for which the tortfeasor is insured."[157]

B. Justice Lee's Concurrence

In a concurring opinion, Chief Justice Dan Lee began by stating that "the majority [has] step[ed] across the fine line dividing interpretation of the law with promulgation of the law."[158] He felt that the court's holding interfered with the parties' freedom to contract for insurance coverage and was not sanctioned by Mississippi's uninsured motorist statute.[159] Justice Lee went on to recognize the uneven bargaining power which often exists in the insurer/insured relationship. He reasoned that, as a result of that inequity, all ambiguities must be decided in favor of the insured.[160] However, the parties' freedom to contract is still of the utmost importance and, as such, if the insured has a sufficient understanding of the ramifications of the language of a policy, those terms should be enforced.[161] As in the case of UM coverage, if the insured rejects such coverage in writing, the statutory scheme allows for a policy to be written without coverage.[162] In a similar fashion, an insured should be able to agree to an anti-stacking clause in a policy if a separate waiver is signed. Such a rule, Justice Lee believed, would "balance the interests in permitting private contractual relations between the parties, and honoring the broad intent of the UM statute."[163]

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154. *Id.* at 81.
155. *Id.* (quoting *Garriga*, 636 So. 2d at 659). *See* MISS. CODE ANN. § 83-11-101(1).
156. *Ferguson*, 698 So. 2d at 81.
157. *Id.* at 82.
158. *Id.*
159. *Id.* at 83.
160. *Id.*
161. *Id.*
162. *Id.* at 84.
163. *Id.*

V. ANALYSIS

A. Changing the Rules of the Game

From a practical standpoint, the court, in *Ferguson*, reached the same conclusion it has on numerous other occasions—refusing to enforce the anti-stacking clause contained in the insured's policy and allowing the insured to aggregate the UM coverages available for each vehicle covered under a single policy. However, the rationale which the court employed to reach this result is radical. In the past, the court has turned to conventional theories of contract interpretation to find a basis on which to allow the stacking of UM coverages. In this instance, the court was without such a basis and, thus, declared anti-stacking clauses absolutely void as against public policy.

Prior to *Ferguson*, the rationale employed by the court to avoid anti-stacking clauses was limited to two general theories. First, the court relied on the conventional interpretive tool of resolving all ambiguities in the contractual language against the creator of the contract as a means to avoid anti-stacking clauses. Second, the court relied on the inherent ambiguity created by charging separate premiums for UM coverage as a means to avoid anti-stacking clauses. In both instances, however, the insurance companies were left with simple contractual drafting solutions as a means to "circumvent" or comply with the rulings of the court.[164] In response to the court deeming an anti-stacking clause ambiguous, an insurance company would redraft the clause to provide clarity. Additionally, if the court declared the billing scheme which the insurance company used inherently confusing, the insurance company would simply modify the scheme and charge a single premium, regardless of the number of vehicles covered under a single policy.

As a result of the court's ruling in *Ferguson*, insurance companies will no longer be able to "circumvent" the court's decisions "by rewriting their policy language and altering their premium schemes."[165] Instead, insurance companies will be forced to adapt to the court's ruling by resorting to a market solution. In order to compensate for the increased liability associated with the inability to contractually prevent insureds from stacking UM coverages, insurers will increase premiums. Consequently, relying on the basic economic principle that as price increases, demand decreases, as premiums increase, demand for UM coverage will decrease. Ultimately, as a result of the increase in premiums, insureds will purchase less coverage and the net effect of *Ferguson* will be a decrease in the total amount of coverage available to insureds.

B. The Ferguson Effect

In *Ferguson*, the court attempted to neutralize the perceived superior bargaining power of the insurance industry by preventing companies from including anti-stacking clauses in the policies which they sold. Because of the rationale the

164. *Id.* at 79.
165. *Id.* at 84.

court used to accomplish this end, however, insureds are left with no more bargaining power than they were before *Ferguson*. Prior to *Ferguson*, the court stated that insureds had no choice but to purchase policies which contained anti-stacking clauses. Now, insureds have no choice but to purchase stacked coverage.

By choosing to declare anti-stacking clauses contrary to public policy, the court has, in no way, leveled the playing field between insurers and insureds. Instead, the result of *Ferguson* may be the pricing of some businesses out of the insurance market.[166] For example, if a business wishes to purchase $10,000 of UM coverage for each of the ten vehicles in its fleet, the *Ferguson* opinion will significantly increase its cost. The insured will not be able to contractually limit the coverage available under the policy through the use of an anti-stacking clause. As a result, if the insured wishes to purchase $10,000 worth of coverage for each vehicle, he will have to pay a premium equal to the purchase price of $100,000 worth of coverage per vehicle, thus drastically increasing the cost of coverage.

Though it is clear that the goal of the court in *Ferguson* was to increase the amount of coverage available to insureds, because the court does not presently control the pricing mechanism, *Ferguson* will have the opposite effect. As such, unless the court is willing to implement price controls, the next best alternative available to the court would be to increase the burden on the insurance industry in order for anti-stacking clauses to be enforceable. In his concurring opinion, Chief Justice Dan Lee picked up on this line of reasoning and suggested increasing the burden on the insurance industry by requiring insurers to bring to the attention of the insureds the existence of an anti-stacking clause contained in the policy.[167] Chief Justice Lee points out that, just as in the case of UM coverage in the first place, only upon a signed waiver from the insured may the insurer omit UM coverage from a policy.[168] Likewise, the insurer should have to obtain a separate waiver from the insured in order to prevent the stacking of UM coverages contained in a single policy.[169] In the absence of such a waiver, UM coverage would be automatically stacked.[170]

VI. CONCLUSION

With respect to the outcome, the court's decision in *Ferguson* is not markedly inconsistent with the court's prior decisions addressing anti-stacking clauses con-

166. Although the Mississippi Supreme Court has never "dealt with 'stacking' in a business or commercial policy," a close reading of the court's opinion in *Cossitt v. Nationwide Mutual Insurance Co.* reveals a reluctance on the part of the court to differentiate between individual and commercial insurance policies. 551 So. 2d 879, 884 (Miss. 1989). In *Cossitt*, the court permitted the stacking of UM coverages on three church buses, stating: "We are not faced here with a large, commercial fleet policy. We are of the opinion that, under the facts of the present case, stacking of the aggregate coverage of $75,000 uninsured motorist coverage should be . . . allowed." *Id.* During the course of the opinion, the court cited, with approval, *Howell v. Harleysville Mutual Insurance Co.*, 505 A.2d 109 (1986), which allowed the stacking of UM coverage of seven vehicles in a fleet policy. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

tained in insurance policies. However, with regard to the rationale chosen to accomplish this end, the court's decision is problematic. For the first time, the court turned from conventional tools of contract interpretation to avoid an anti-stacking clause to a more radical means. Though the court may initially succeed in its unstated goal of increasing the amount of coverage to insureds, ultimately, as a result of the court's opinion, available coverage will decrease. The insurance industry will compensate for the increased exposure resulting from *Ferguson* by increasing premiums. As a direct result of price increases, it may be anticipated that, consistent with market principles, insureds will purchase less coverage and, in the long run, the net amount of coverage available to insureds will decrease.