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Uninsured Motorist Insurance - Stacking Comes to Louisiana

Jeff McHugh David

NOTES

UNINSURED MOTORIST INSURANCE—STACKING COMES TO LOUISIANA

Plaintiff was injured when the automobile in which she was a guest passenger collided with a negligent uninsured motorist. Neither vehicle provided uninsured motorist coverage for her damages of $25,000.00. Plaintiff, however, was personally insured under three separate liability policies,[1] each furnishing $5,000.00 in uninsured motorist coverage. All three policies contained a standard "pro-rata" clause.[2] The First Circuit Court of Appeal upheld the judgment of the trial court which limited recovery to $5,000.00 pro-rated among the three policies. The Louisiana supreme court reversed and awarded plaintiff $5,000.00 on *each* of the three policies. *Held*, the standard "pro-rata" clause is invalid where its effect is to reduce recovery on an individual policy below the statutory minimum.[3] *Graham v. American Casualty Co.*, 261 La. 85, 259 So.2d 22 (1972).

In a similar case, plaintiff was awarded $22,902.63 in damages resulting from injuries sustained while a guest passenger in a vehicle which collided with an automobile driven by a negligent uninsured motorist. For purposes of uninsured motorist coverage, he qualified as an insured under two policies issued to the host vehicle. Following *Graham*, the supreme court awarded plaintiff $5,000.00 on each policy. Plaintiff's personal liability policy afforded uninsured motorist protection in the amount of $10,000.00,[4] but contained a standard "excess" clause.[5] The court

1. Plaintiff, a minor, carried a policy in her own name and qualified as an insured under two policies issued to her father.

2. The standard "pro-rata" clause reads: "[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." N. RISJORD & J. AUSTIN, AUTOMOBILE LIABILITY INSURANCE CASES 292 (Supp. 1967).

3. LA. R.S. 22:1406(D)(1) (Supp. 1962) reads: "No automobile liability insurance . . . shall be delivered or issued for delivery in this state . . . unless coverage is provided . . . in not less than the limits described in the Motor Vehicle Safety Responsibility Law of Louisiana . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . ." LA. R.S. 32:900(B) (Supp. 1962) requires a minimum coverage of $5,000 per person and $10,000 per accident.

4. Plaintiff's policy was issued in Florida where the minimum uninsured motorist endorsement is $10,000/$20,000. FLA. STAT. § 627.0851 (1969).

5. The standard "excess" clause reads: "With respect to bodily injury to an insured while occupying a highway vehicle not owned by the named

held that the "excess" clause, like the "pro-rata" clause, is invalid if it reduces the possible recovery on a single policy below the minimum prescribed in R.S. 22:1406. Plaintiff was allowed to recover the statutory minimum under his personal policy *in addition* to the payments received from his host's insurers. *Deane v. McGee*, 261 La. 686, 260 So.2d 669 (1972).

Uninsured motorist (hereinafter UM) coverage first appeared nationally in 1956[6] when the insurance industry, in response to threats of compulsory insurance programs from state legislatures,[7] promulgated an endorsement to be attached to the family automobile liability policy. As many states began to adopt the endorsement by statute,[8] the likelihood of an injury being covered by more than one policy increased, with the result that insurers attempted to limit liability by including "other insurance" clauses in their policies.[9]

The "other insurance" condition in a standard UM endorsement normally contains two provisions: an "excess" clause applicable when the insured is riding in a car driven or owned by another person who has also acquired similar coverage;[10] and a "pro-rata" clause applicable when the insured has other available insurance providing the same coverage.[11] Initial debate in the

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insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance." N. RISJORD & J. AUSTIN, AUTOMOBILE LIABILITY INSURANCE CASES 292 (Supp. 1967).

6. *See* Notman, *A Dicennial Study of the Uninsured Motorist Endorsement*, 43 NOTRE DAME LAW. 5, 6 (1967). UM coverage was actually offered by some companies as early as 1954. *See* Plummer, *Handling Claims Under the Uninsured Motorist Coverage*, 415 INS. L.J. 494 (1957).

7. For a complete early history of UM coverage see Murphy & Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L.J. 700 (1959).

8. For a comprehensive list of all state financial responsibility laws see Ghiardi & Wienke, *Recent Developments in the Cancellation, Renewal and Recision of Automobile Insurance Policies*, 51 MARQ. L. REV. 219, 244 n.147 (1968).

9. *See* Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. U.L. REV. 497 (1967).

10. *See* note 5 *supra*; *e.g.*, if *A*, a guest passenger, is covered by a $10,000 UM endorsement, and *B*, *A*'s host, is insured by a $5,000 UM endorsement, *A*'s insurer is liable only for injuries to *A* in excess of $5,000 to a maximum of $5,000. If *A* and *B* have identical policy amounts, the "excess" clause acts as an "escape" clause, *i.e.*, *A*'s insurer "escapes" liability completely. *See also* Note, 27 LA. L. REV. 114, 115 (1966).

11. *See* note 2 *supra*; *e.g.*, if *A* was insured by two UM endorsements, *X* for $5,000 and *Y* for $20,000, he could recover only $4,000 from endorsement *X* and $16,000 from endorsement *Y*. If both *X* and *Y* were for identical amounts, *e.g.*, $5,000, each would provide $2,500 for *A*'s injuries. *See also* Note, 27 LA. L. REV. 114, 115 (1966).

courts concerning these provisions involved the issue of which "other insurance" clause governed between two different policies,[12] with little consideration given to statutory repugnancy. But in 1965, the Supreme Court of Appeals of Virginia applied that state's UM insurance statute to invalidate an "excess" clause and granted recovery to a plaintiff guest passenger from his own insurer despite the fact that he had collected on an identical policy issued to his host.[13] This approach began to be applied to both "pro-rata" and "excess" clauses in many jurisdictions, and today so-called "stacking"[14] of UM endorsements is allowed in at least a substantial minority of states.[15]

Louisiana's UM statute was promulgated in 1962.[16] The validity of the "excess" clause was upheld by the Third Circuit in *LeBlanc v. Allstate Insurance Co.*,[17] and this decision was followed by the other circuits.[18] Although cases involving the "pro-

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12. *See generally* 11 AM. JUR. TRIALS *Uninsured Motorist Claims* (1966); *see also* Annot., 76 A.L.R.2d 502 (1961) ("excess" clause v. "pro-rata" clause); Annot., 69 A.L.R.2d 1122 (1960) ("excess" clause v. "excess" clause); Annot., 21 A.L.R.2d 611 (1952) ("pro-rata" clause v. "pro-rata" clause).

13. Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (1965), *criticized in* Comment, 52 VA. L. REV. 538, 553 (1966).

14. Stacking occurs when a claimant is allowed to recover up to the maximum amount from two or more applicable insurance policies, despite the inclusion of an "excess" or "pro-rata" clause in one or more of the policies. There are at least four situations in which stacking of UM endorsements may be attempted: (1) Two endorsements may be issued to two different insureds covering two different automobiles; (2) multiple policies may be issued by the same or by different companies to the same insured; (3) it may sometimes be possible to attack the UM coverage provided by one insurer on top of another carrier's bodily injury coverage; (4) finally, an attempt may be made to stack the UM coverage on top of the bodily injury coverage provided by the same policy. *See* Roberts, *Uninsured Motorist Coverage: "Stacking"; Credit for Medical Payments; Claimant's Failure to Submit to Medical Examination*, 19 LA. B.J. 211 (1971).

15. For a recent article espousing the view that "stacking" is now allowed in a majority of states see Comment, 17 S.D.L. REV. 152 (1972).

16. Act 187 of 1962, now LA. R.S. 22:1406(D) (Supp. 1962).

17. 194 So.2d 791 (La. App. 3d Cir. 1967) noted in 28 LA. L. REV. 130 (1967). The LeBlanc decision was based upon an excerpt from 12 COUCH ON INSURANCE 2d § 45:623 at 570 (1964) in which the author states that the purpose of UM insurance is "to give the same protection to a person injured by an uninsured motorist as he would have if he had been injured in an accident caused by an automobile covered by a standard liability insurance policy"; *see also* Allen, *Several Outstanding Problems Involving Uninsured Motorist Coverage*, 31 ALA. LAW. 368 (1970), in which *LeBlanc* is described as the rule of "limited stacking."

18. Broussard v. Whitaker, 238 So.2d 228 (La. App. 3d Cir. 1970); Long v. United States Fire Ins. Co., 236 So.2d 521 (La. App. 4th Cir. 1970); Jackson v. State Farm Mut. Auto. Ins. Co., 235 So.2d 621 (La. App. 2d Cir. 1970); Rolling v. Miller, 233 So.2d 723 (La. App. 4th Cir. 1970); Lott v. Southern Farm Bureau Cas. Ins. Co., 223 So.2d 492 (La. App. 1st Cir. 1969).

rata" clause were less numerous, it appeared that the circuit courts would acknowledge its validity as well.[19]

In the *Graham* case, however, the supreme court chose to follow the growing national trend, despite the decisions at the appellate level. Because plaintiff's host vehicle did not provide UM coverage, the court appropriately observed that the "excess" clauses in her policies were inapplicable and that the issue was whether the respective "pro-rata" clauses were to be given effect.[20] After quoting R.S. 22:1406(D), the court observed that the statute neither prohibits insurers from offering more than minimum coverage, nor prevents an insured from recovering the minimum from more than one insurer:

> "What the law does require is that each policy provide not less than the minimum $5,000.00 coverage. Proration does not take place when the damage claimed exceeds the sum of the policies under which the claimant is entitled to recover benefits under the uninsured motorist protection."[21]

In *Deane*,[22] the court turned to the issue of "excess" clause validity. Citing *Graham*, they again emphasized that the statute sets forth a *minimum*, not a *maximum* amount that UM endorsements must provide. Because the "excess" clause in plaintiff's policy would have allowed his insurer to escape liability completely,[23] it was found repugnant to the statute. The court added, however, that in no instance would a plaintiff be allowed to recover more than his actual loss.[24]

19. Deane v. McGee, 253 So.2d 655 (La. App. 1st Cir. 1971), *rev'd*, 261 La. 686, 260 So.2d 669 (1972); Bailes v. Southern Farm Bureau Cas. Ins. Co., 252 So.2d 123 (La. App. 3d Cir.), *writs granted*, 259 La. 950, 253 So.2d 791 (1971); *cf.* Box v. Doe, 221 So.2d 666 (La. App. 4th Cir. 1969); Graham v. American Cas. Co., 244 So.2d 372 (La. App. 1st Cir. 1971), *rev'd*, 261 La. 85, 259 So.2d 22 (1972).

20. "The effectiveness of the 'excess' clause is dependent upon primary insurance in the host vehicle—a condition not fulfilled under these facts." Graham v. American Cas. Co., 261 La. 85, 92, 259 So.2d 22, 24 (1972).

21. Graham v. American Cas. Co., 261 La. 85, 93, 259 So.2d 22, 25 (1972).

22. *Deane* was decided under Florida law; however, the court in dictum noted that "the decision to apply Florida law is not too significant here. By our . . . decision in Graham v. American Casualty Company, and the principles announced there, we would reach the same result reached by Florida . . . if we applied Louisiana law." Deane v. McGee, 261 La. 686, 697, 260 So.2d 669, 673 (1972).

23. *See* Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 Nw. U.L. REV. 497 (1967).

24. Presumably the "excess" and "pro-rata" clauses will be given at least partial effect by the courts if damages are less than the sum of the applicable policy limits; *see, e.g.*, Box v. Doe, 221 So.2d 666 (La. App. 4th Cir. 1969).

In support of its position in *Graham*, the court cited the Massachusetts case of *Johnson v. Travelers Indemnity Co.*,[25] and two Louisiana cases, *Box v. Doe*[26] and *Wilks v. Allstate Insurance Co.*[27] It is submitted that while *Johnson* lends some support to the court's conclusion,[28] the two Louisiana cases cannot be termed authority. In fact, the *Wilks* case would appear to support a decision *rejecting* the "stacking" of UM endorsements.[29]

As a result of the decisions in the instant cases, it is now possible for victims of automobile accidents to double or even triple their recovery over that previously allowed. The holdings also assure purchasers of UM endorsements that they will receive full coverage for each premium paid.[30] Additionally, motorists

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25. _____ Mass. _____, 269 N.E.2d 700 (Mass. 1971).

26. 221 So.2d 666 (La. App. 4th Cir. 1969).

27. 195 So.2d 390 (La. App. 3d Cir. 1967).

28. *Johnson* is similar factually to *Graham*. Its holding was based on the Massachusetts UM statute which reads in part: "No motor vehicle *policy* . . . shall be issued in amounts less than the legal minimum . . . ." (Emphasis added.) The defendant in *Graham*, in applying for rehearing, argued that because the Louisiana statute does not contain the word "policy," but refers broadly to "automobile liability insurance coverage," it simply requires $5,000 *total coverage* and does not prescribe that each individual policy provide that amount. The court evidently considered the difference negligible. *See* LA. R.S. 22:1406(D) (Supp. 1962); MASS. GEN. LAWS ch. 90 § 34L (1932).

29. In *Box v. Doe*, the "pro-rata" clauses of two UM endorsements *were applied* by the court to divide the total judgment evenly between two insurers. Damages, however, were less than $5,000. *Wilks* involved general liability policies, not UM endorsements. In *Wilks* the court held that two primary insurers, each issuing a policy of $5,000, were solidary obligors for that amount. If this is indeed the case, it would dictate a result in *Graham* directly contrary to the one reached by the court. If insurers are liable *in solido* for $5,000, the insured may certainly recover that amount from *any one*, but he may not recover a total *in excess* of that amount. *Fremin v. Collins*, 194 So.2d 470 (La. App. 4th Cir. 1967), a case which did, in fact, involve UM endorsements rejected the concept that primary UM insurers were solidary obligors, and intimated that a *separate* liability might be established. This would appear to be stronger authority than *Wilks* for the *Graham* holding. Interestingly, *Fremin* was cited by plaintiff in the *Graham* case at the appellate level, but apparently abandoned in favor of *Wilks* before the supreme court. For a discussion of *Wilks*, *Fremin* and related cases see *The Work of the Louisiana Appellate Courts for the 1966-1967 Term —Insurance*, 28 LA. L. REV. 372 (1968).

30. This is the argument most often presented by proponents of "stacking"; *see, e.g.*, Safeco Ins. Co. v. Robey, 399 F.2d 330, 336 n.5 (8th Cir. 1968): "[S]eparate policies issued for separate considerations should afford the protection ostensibly offered by the insurance companies." Simpson v. State Farm Mutual Auto. Ins. Co., 318 F.Supp. 1152, 1156 (S.D. Ind. 1970): "[I]t would be unconscionable to permit insurers to collect a premium for a coverage which they are required by statute to provide, and then avoid payment of loss because of language of limitation devised by themselves."

may now purchase more extensive UM coverage by simply buying several policies.[31]

However, the cases have clearly overturned more than five years of jurisprudence at the appellate level, and in so doing, have created some perplexing problems. First, the situation now exists in which a plaintiff who is insured under more than one UM endorsement is in a better position when injured by a driver with *no* insurance than by a motorist carrying a minimum liability policy.[32] Second, a person who insures two cars under separate policies is now in a somewhat better position than one who insures two cars under the *same* policy. The latter will be unable to "stack" since he has only one policy. He would, however, pay a slightly lower rate.[33] Third, the situation in which a plaintiff who is injured by joint tortfeasors, one insured and one uninsured, may be affected. It is now possible that recovery may be granted on both the insured tortfeasor's liability policy *and* the plaintiff's UM endorsement.[34] Finally, the decisions will probably cause insurance rates to rise.

In a concurring opinion in *Graham,* Justice Barham observed that the decision did not "sufficiently set forth legal reasoning, law, or jurisprudence to sustain the result which is obtained."[35] While this may be true, it is doubtful that more extensive treatment could have solved the problems which these cases have cre-

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31. Insurance companies have been reluctant to offer more than minimum UM insurance on each policy, *see* A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 1.13 (Supp. 1971-72). Act 137 of the 1972 Louisiana Legislature, in amending LA. R.S. 22:1406 (Supp. 1962), may also affect this situation. Section D(1)(B) of the act requires insurers to offer UM coverage to an insured in amounts up to the insured's general liability coverage.

32. Act 137 of the 1972 Louisiana Legislature may have, albeit inadvertently, rectified this anomaly created by the court by amending R.S. 22:1406(D). Paragraph (2)(b) now reads: "For the purposes of this coverage the term 'uninsured motor vehicle' shall, subject to the terms and conditions of such coverage, also be deemed to include an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the uninsured motorist coverage carried by an insured."

33. *E.g.,* motorist *A* insures his two cars under a single $5,000/$10,000 UM endorsement at a cost of $12. Motorist *B* insures his two cars under separate $5,000/$10,000 endorsements at a total cost of $14. *B* may now recover up to $10,000, while *A,* who cannot "stack," will be limited to $5,000. The higher premium paid by B (15%) hardly seems to justify his increased recovery (100%). (Rates taken from PRIVATE PASSENGER AUTOMOBILE MANUAL Rule 16A (Louisiana Exception Sheets) (1968).

34. For a discussion of this subject see Comment, 32 LA. L. REV. 431, 442 (1972).

35. Graham v. American Cas. Ins., 261 La. 85, 96, 259 So.2d 22, 26 (1972).

ated. Legislatures in other states have taken steps to clarify their financial responsibility laws following similar decisions.[36] Perhaps, this would be an appropriate response in Louisiana as well.

Jeff McHugh David

BEYOND FOOD AND DRINK: ADDED PROTECTION FOR THE INJURED CONSUMER?

Suit was brought on behalf of two minors by their father against the defendant insurer and its insured claiming damages for the death of cattle sprayed with defendant's arsenic-based product. The dip had been allegedly administered in substantial compliance with published directions. The trial court allowed recovery. The appellate court reversed, finding that the plaintiff failed to establish by a preponderance of the evidence that the spray was properly mixed by plaintiffs and, further, that the plaintiff offered no proof of negligence on the manufacturer's part. In reversing the appellate court's decision, the supreme court *held*, that the mixture was proper and that no proof of particular negligence was necessary. *Weber v. Fidelity & Casualty Insurance Co.*, 259 La. 599, 250 So.2d 754 (1971).

At common law, three modes of recovery have been granted to the injured consumer. The first is under a contractual warranty of "merchantable quality," or fitness for intended purpose. If this warranty is not express, it is considered to be implied in the sale or delivery of all products. Recovery in warranty, however, is encumbered by the availability to the manufacturer of the defenses surrounding the law of contracts: no reliance, privity, notice, and disclaimer. Since a great deal of contract law precludes recovery under warranty, common law jurisdictions have resorted to many fictions in order to circumvent established rules.[1] Moreover, beginning with the decision of the New Jersey court in *Henningsen v. Bloomfield Motors, Inc.*,[2] which did away with the privity requirement in warranty re-

36. At least two state legislatures have passed laws specifically prohibiting "stacking" after courts had reached decisions similar to *Deane* and *Graham*, *see* CALIF. INS. CODE § 11580.2 (West 1955); IOWA CODE ANNO. § 516A.2 (1946).

1. This history of warranty is thoroughly discussed in Prosser, *Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

2. 32 N.J. 568, 161 A.2d 69 (1960).