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Uninsured Motorist Protection

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the juvenile is accused of an offense which if committed by an adult would be a felony.[41]

Destruction of Juvenile Records

Act 561 alters the procedure for obtaining the destruction of juvenile records. Previously, the juvenile was afforded the right to the immediate destruction of records pertaining to matters which had been dismissed.[42] The new Act continues the prior law and provides that persons adjudged neglected or in need of supervision and juveniles adjudicated delinquent as a result of committing minor criminal acts[43] can obtain the destruction of their records at any time. Prior law also allowed *any* juvenile offender to obtain the destruction of his records after two years.[44] Under the new provision, a delinquent who is unable to obtain the immediate destruction of his records may do so five years after his final discharge, provided he was not adjudged delinquent on the basis of a violent crime against the person.[45]

Joseph Bradley Ortego

UNINSURED MOTORIST PROTECTION

Uninsured motorist (UM) insurance is designed to protect the insured from injury by an automobile not covered by liability insurance.[1] In effect, it insures against a tortfeasor's lack of insurance.[2] A

41. *See* CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE, STANDARDS FOR JUVENILE AND FAMILY COURTS 34-35 (1966), which recommends that the child be accused of a felony before jurisdiction is waived. *See also* MICH. STAT. ANN. § 27.3178 (598.4) (1944).

42. LA. R.S. 13:1586.1 (1950).

43. The Act includes the following within the non-exclusive enumeration of minor criminal acts: simple criminal damage to property, criminal mischief, criminal trespass, theft where the misappropriation or taking amounts to a value less than one hundred dollars, receiving stolen things when the value of the thing is less than one hundred dollars, unauthorized use of movables. La. Acts 1974, No. 561, *amending* LA. R.S. 13:1586.1(E) (Supp. 1972).

44. LA. R.S. 13:1586.1(F) (Supp. 1972). Prior to the change, Louisiana's two year period was one of the shortest in the country.

45. Violent crimes against the person include first degree murder, manslaughter, negligent homicide, aggravated battery, aggravated assault, aggravated rape, simple rape, aggravated kidnapping, armed robbery and extortion. La. Acts 1974, No. 561, *amending* LA. R.S. 13:1586.1(F) (Supp. 1972).

1. UM insurance is not to be confused with "no-fault" insurance in force in other states. Under UM insurance, the insured recovers from his own insurer, but fault is still an important issue. Thus, the insured must establish the legal liability of the uninsured motorist to recover under the UM provisions of his own policy.

2. I. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 17.01 (1974).

plan of compulsory UM protection, adopted by the Louisiana legislature in 1962,[3] required automobile liability insurers to issue UM coverage of not less than $5,000/$10,000, unless the insured chose to reject such coverage.[4] The term "uninsured motor vehicle" was defined to include not only a motor vehicle with no liability insurance but also an insured vehicle for which the liability insurer was insolvent.[5] A 1972 amendment expanded the definition of "uninsured motor vehicle" to include a vehicle with liability coverage less than the UM coverage carried by the insured, thus allowing the insured to recover the difference between the underinsured tortfeasor's liability limits and his own injuries up to his UM limits.[6] The amendment also expanded UM protection by *permitting* the insured to increase UM limits up to the amount of liability insurance carried under the policy.[7] Act 154 of 1974[8] further expands UM protection by imposing an

3. Louisiana's uninsured motorist statute, LA. R.S. 22:1406(D) (Supp. 1962), was adopted by Act 187 of 1962.

4. LA. R.S. 22:1406(D)(1) (Supp. 1962) (as it appeared before 1972). This statute required the insurer to issue UM coverage "in not less than the limits described in the Motor Vehicle Safety Responsibility Law . . ." found in LA. R.S. 32:900 (Supp. 1962), which requires a minimum coverage of $5,000/$10,000.

5. LA. R.S. 22:1406(D)(2) (Supp. 1962) (as it appeared before 1972).

6. LA. R.S. 22:1406(D)(2) (Supp. 1962), *as amended by* La. Acts 1972, No. 137 § 1 (as it appeared before Act 154 of 1974).

7. *Id.* § 1406(D)(1)(b).

8. La. Acts 1974, No. 154 § 1 amends and reenacts paragraphs (1) and (2)(b) of R.S. 22:1406(D) as follows:

> "D. (1) No automobile liability insurance . . . shall be delivered or issued for delivery . . . unless coverage is provided therein or supplemental thereto, in not less than the limits of bodily injury liability provided by the policy . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles . . . provided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage or select lower limits.
>
> (2)(b) For purposes of this coverage the term uninsured motor vehicle shall . . . also be deemed to include an insured motor vehicle when the automobile liability insurance coverage on such vehicle is less than the amount of damages suffered by an insured and/or the passengers in the insured's vehicle at the time of an accident. . . ."

Act 154 became effective at twelve o'clock noon on July 31, 1974, and any policy written or renewed subsequent to that date must provide the extended UM coverage required, even if the insurer failed to discuss the additional coverage with the insured and did not receive additional premium payment for it. One may assert that Act 154 will apply to *all* policies in effect as of July 31, 1974. However, the Act specifically states that no policy "shall be *delivered* or *issued for delivery*" without the additional UM coverage. LA. R.S. 22:1406(D)(1) (Supp. 1962), *as amended by* La. Acts 1974, No. 154 § 1 (emphasis added). Hence, the 1974 amendment can have no effect on policies written prior to July 31, 1974. In *Doucet v. Insurance Co. of N. Am.*, 302 So. 2d 731

affirmative duty on the insurer to provide UM coverage at least equal to the limits of bodily injury liability (BI) provided by the policy, unless the insured chooses to reject this coverage or selects lower UM limits.[9] The definition of "uninsured motor vehicle" was also changed to include an insured motor vehicle with liability coverage which is less than the amount of damages which the injured insured or his passengers are entitled to recover.[10]

The change in the definition of "uninsured motor vehicle" is important because all the insured must now establish is that the *damages* he has suffered are greater than the liability limits of the tortfeasor. In effect, UM coverage is now excess coverage over the tortfeasor's BI liability limits and no longer operates as an absolute limit of recovery. For example, if a plaintiff proved damages of $8,000 and had $5,000 UM coverage and his tortfeasor had BI limits of $5,000, there could be no recovery under either the 1962 statute or the 1972 statute. Assuming the tortfeasor's insurer was solvent, the plaintiff would be denied recovery under Act 187 of 1962 merely because the tortfeasor was in fact insured. Recovery would also be denied under the 1972 amendment because the tortfeasor's BI liability coverage was not less than the plaintiff's UM coverage. However, recovery of $3,000 will be allowed the insured under the 1974 amendment because this amount is the difference between the insured's damages and the BI limits of the tortfeasor. Added to the $5,000 BI coverage received from the tortfeasor's insurer, the UM recovery will thus fully compensate the plaintiff.[11]

One issue raised by the passage of Act 154 is its effect on "stacking," first allowed in Louisiana in 1972 in the cases of *Graham v.*

(La. App. 3d Cir. 1974), plaintiff's contention that Act 154 should apply retrospectively because it is remedial or curative in nature was found to be without merit, since the Act was deemed to be a broadening of coverage by the Louisiana legislature.

9. LA. R.S. 22:1406(D)(1) (Supp. 1962), *as amended by* La. Acts 1974, No. 154 § 1. While many states require rejection of UM coverage to be in writing, the new Louisiana statute makes no specific mention of the procedure; thus, oral waivers may be valid. However, to avoid needless litigation the insurer should require a written waiver of the UM limits. Information Letter No. 7 from H. P. Walker, Administrator of the Louisiana Insurance Rating Commission, to all insurers licensed to write property, casualty and surety insurance in Louisiana, October 4, 1974, at p. 2.

10. LA. R.S. 22:1406(D)(2) (Supp. 1962), *as amended by* La. Acts 1974, No. 154 § 1.

11. *See Doucet v. Insurance Co. of N. Am.*, 302 So. 2d 731 (La. App. 3d Cir. 1974), where recovery was denied on a UM policy covering the vehicle in which plaintiffs were guest passengers, because the UM coverage was equal to the tortfeasor's BI coverage. The court admitted that recovery would have been justified under the 1974 Act, but because the accident occurred in 1973, Act 137 of 1972 was the applicable law.

American Casualty Co.[12] and *Deane v. McGee.*[13] "Stacking" is the practice of allowing the insured to recover under each insurance policy up to its limits when there are two or more applicable policies, or up to the limits of the policy for each vehicle when two or more vehicles are insured under the same policy, despite policy language which would restrict such recoveries.[14] In *Graham*, the Louisiana supreme court refused to enforce a "pro-rata clause"[15] which attempted to limit recovery to the highest applicable policy limits, to which all policies would have contributed in proportion to their limits. In *Deane*, the court also held void an "excess clause"[16] which would have restricted UM recovery under the policy to the amount the UM limits of the policy exceeded the UM limits of any other primary policy under which the insured could recover.[17] These results were reached by interpreting the statutory minimum requirement as a minimum coverage *per policy* and not per accident in the case of multiple applicable policies, and as minimum coverage *per vehicle* and not per policy in the case of multiple vehicles covered by the same policy. Reasoning that "pro-rata," "excess" and similar clauses[18] could result

12. 261 La. 85, 259 So. 2d 22 (1972).

13. 261 La. 686, 260 So. 2d 669 (1972).

14. For a discussion of when "stacking" may be attempted see Roberts, *Uninsured Motorist Coverage: "Stacking"; Credit for Medical Payments: Claimant's Failure to Submit to Medical Examination*, 19 LA. B. J. 211 (1971). *See also* Note, 33 LA. L. REV. 145 (1972).

15. The "pro-rata clause" in *Graham* stated: "[I]f the insured has other similar insurance available to him and applicable to the accident, the damages shall be claimed 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 limits of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance." 261 La. at 91, 259 So. 2d at 24.

16. The excess clause in *Deane* stated: "[T]he insurance . . . shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile 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." 261 La. at 690, 260 So. 2d at 671.

17. *See Bailes v. Southern Farm Bureau Cas. Ins. Co.*, 252 So. 2d 123 (La. App. 3d Cir. 1971), holding a "pro-rata clause" valid prior to *Graham* and *Deane*. Before *Deane*, every circuit of the Louisiana courts of appeal upheld "excess clause" provisions. *See, e.g.*, 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); Lott v. Southern Farm Bureau Cas. Ins. Co., 223 So. 2d 492 (La. App. 1st Cir. 1969); Leblanc v. Allstate Ins. Co., 194 So. 2d 791 (La. App. 3d Cir. 1967).

18. "Exclusionary clauses" and "reduction clauses" have also been held void on the basis of *Graham* and *Deane*. "Exclusionary clauses" purport to deny coverage when the insured was injured by an uninsured motorist while occupying an *owned* vehicle which is not described in the policy and/or which no premium has been paid

in a reduction of recovery on an individual policy below the statutory minimum,[19] the courts refused to enforce them. At the same time, the courts found nothing in the statute which prohibited recovery of more than the statutory minimum; nor was there a prohibition from receiving the minimum from more than one insurer if the damages warranted such recovery.[20]

On the basis of this jurisprudence, it would appear that "stacking" is implanted in Louisiana law to allow maximum UM recovery. However, the 1972 and 1974 amendments to the uninsured motorist statute may provide a limit on the amount the insured may recover through "stacking," as illustrated by the recent decision of the Third Circuit Court of Appeal in *Barbin v. United States Fidelity and Guaranty Co.*[21] In *Barbin*, defendant insurer appealed a judgment allowing plaintiffs to "stack" UM coverage provided under one policy covering plaintiffs' two automobiles. Although recognizing that the public policy underlying the *Graham* and *Deane* decisions was to hold UM insurers "liable to the full extent required by the statutory minimum provisions,"[22] the majority in *Barbin* pointed to the burden placed on UM insurers and disallowed "stacking" by seizing on language in the 1972 amendment which required the insurer to permit the insured to increase his UM coverage "to any amount *not in excess* of the limits of the automobile liability insurance carried by such insured."[23] Since Barbin had provided the public with protection

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thereunder. The courts have held these clauses inapplicable in two situations: (1) When the insured carried UM coverage on two or more owned vehicles, he has been allowed to "stack" so as to recover under all the UM policies rather than only the one covering the vehicle he was occupying when injured. *See* Crenwelge v. State Farm Mut. Auto. Ins. Co., 277 So. 2d 155 (La. App. 3d Cir. 1973). *See also* Roberie v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 923 (La. App. 3d Cir. 1974); Rascoe v. Wilburn, 295 So. 2d 201 (La. App. 3d Cir. 1974). (2) When the insured carried *no* UM coverage on the owned vehicle he was occupying at the time of the injury but does have UM coverage on one or more other owned vehicles, he may recover under the policies on the other vehicles. *See* Elledge v. Warren, 263 So. 2d 912 (La. App. 3d Cir. 1972).

A "reduction clause" would deduct from the recoverable amount all payments made to the insured by the owner or operator of the uninsured automobile or by anyone jointly or severally liable with such owner or operator as well as any workmen's compensation benefits paid because of injury caused by an uninsured motorist. *See* Smith v. Trinity Universal Ins. Co., 270 So. 2d 637 (La. App. 2d Cir. 1972).

19. Graham v. American Cas. Ins. Co., 261 La. 85, 93-94, 259 So. 2d 22, 24-25 (1972).

20. *Id. See also* Deane v. McGee, 261 La. 686, 693-94, 260 So. 2d 669, 671-72 (1972).

21. 302 So. 2d 631 (La. App. 3d Cir.), *writ granted*, 305 So. 2d 125 (1974).

22. *Id.* at 633.

23. *Id.*, *citing* LA. R.S. 22:1406(D)(1)(b) (Supp. 1962), *as amended by* La. Acts 1972, No. 137 § 1 (as it appeared before Act 154 of 1974).

from his own negligence in an amount of $5,000/$10,000 coverage, the court reasoned that "stacking" should not be allowed to increase his UM protection to $10,000/$20,000, because this would result in UM limits "in excess of" the BI liability limits carried by the insured.[24] Therefore, under the *Barbin* rule, an insured may "stack" UM coverage up to, but not in excess of, his BI liability coverage.[25]

In dissent, Judge Frugé noted that the language of the UM statute upon which the court relied in *Graham* and *Deane* had not been changed by the 1972 amendment. Moreover, the language interpreted by the majority to reach a result contrary to those cases was not meant to limit the amount of coverage the insurer *may* provide but instead mandated the amount the insurer *must* provide.[26] According to the dissent, the insured should be able to purchase UM coverage over his BI limits and should therefore be allowed to "stack" over this amount for maximum recovery.[27]

Act 154 of 1974 does not contain the "not in excess of" language of the 1972 Act, but rather requires the insurer to issue UM coverage "in not less than the limits of bodily injury liability provided by the policy. . . ."[28] Such phrasing supports the theory of Judge Frugé's dissent because the provision now unequivocably sets a minimum rather than a maximum amount of coverage. Because of this minimum coverage requirement, the rationale of *Graham* and *Deane* may still be applicable to allow the insured to "stack" his UM coverage up to the amount of his damages. Furthermore, the failure of the legislature to prohibit "stacking" may be interpreted as sanctioning the practice in order to fulfill the public policy of maximum protection against uninsured motorists.[29]

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24. The court stated, "This expression of legislative intent overrides the statement of public policy expressed in the jurisprudence." 302 So. 2d at 631.

25. The court recognized that *Barbin* was in direct conflict with its recent decision in *Wilkinson v. Fireman's Fund Ins. Co.*, 298 So. 2d 915 (La. App. 3d Cir. 1974), which allowed the plaintiff to "stack" coverage of several cars provided in a single policy. The court stated, "We distinguish Wilkinson because the accident in that case occurred and the policy was issued before the 1972 amendment. Here the accident occurred and the policy was issued after the 1972 amendment." 302 So. 2d at 633.

26. Barbin v. United States Fidelity & Guar. Co., 302 So. 2d 631, 634 (Frugé, J., dissenting).

27. *Id.*

28. LA. R.S. 22:1406(D)(1) (Supp. 1962), *as amended by* La. Acts 1974, No. 154 § 1.

29. In *Elledge v. Warren*, 263 So. 2d 912 (La. App. 3d Cir. 1972), the Third Circuit employed a different interpretation of uninsured motorist protection than that expressed later in *Barbin*. "The purpose of the statute is to protect completely, those willing to accept its protection, from all harm, whatever their status—passenger, driver, pedestrian—at the time of injury, produced by uninsured motorists. The only

However, a strong policy argument in support of applying the majority's rationale to the UM statute as amended in 1974 is that "stacking" should no longer be permitted above the BI limits because it could amount to undue hardship on the insurer and undue reward to the insured. When "stacking" was first allowed in Louisiana, UM insurers were only required to provide basic $5,000/$10,000 coverage.[30] Because this coverage often proved inadequate, "stacking" was necessary to allow the insured maximum recovery when injured by an uninsured motorist. After the passage of Act 154, however, the insured automatically receives UM coverage equal to the BI coverage he acquires to protect himself from liability. It would appear inequitable for the insured to benefit from "stacking" when it provides him with a greater recovery than he has offered to one to whom he may be found liable.[31] The basic intent of UM insurance is to provide the insured with the protection he would have had if the accident had been caused by an automobile covered by a standard liability policy.[32] Act 154 appears to provide this protection without "stacking."

The appropriateness of stacking under the 1972 amendment will be decided by the Louisiana supreme court when it hears the *Barbin*

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restrictions are that the plaintiff must be an insured, the defendant motorist uninsured, and that plaintiff be legally entitled to recover. We will not enlarge upon these qualifications and restrict the coverage of such a socially desirable policy by allowing insurance companies to pursue alleged 'business interests.'" *Id.* at 918-19.

30. *See* note 4 *supra*.

31. Compared to the amount of protection received, UM yearly rates are relatively inexpensive: $7 for $5,000/$10,000 and only $40 for $100,000/$300,000 coverage. On the other hand, BI liability yearly rates range from $30 to $61 for $5,000/$10,000 coverage and from $54 to $110 for $100,000/$300,000 coverage, depending upon the area of the state in which the insured resides. Insurance Services Office, Private Passenger Auto Manual, Louisiana Section, (Rates stated in effect Oct. 1974). Thus, by means of "stacking" not limited to the insured's BI limits, the insured with UM coverage may recover two, three, or even more times as much from an auto insurer as a person without UM protection, and this greater coverage is less expensive. For example, an insured *A* may own two automobiles each with BI coverage of $100,000/$300,000. Under Act 154, he would also be entitled to UM coverage of $100,000 on each auto. If *A* is injured by uninsured motorist *B* while riding as a guest passenger in *C*'s auto, (also with $100,000 UM coverage), *A* may recover up to $300,000: $100,000 from the policy of the auto in which he was a guest passenger and an equal amount from each of the two policies he purchased for his own vehicles. However, if *A* had been at fault while driving one of his automobiles and had injured *B*, *B* could recover only $100,000 from *A*'s insurance company. Any damage suffered over and above this amount would have to be recovered from *A*'s personal assets. The inequity is apparent. Of course, under no circumstances will the insured be able to recover an amount greater than the actual damages he has suffered.

32. 12 G. COUCH, ENCYCLOPEDIA OF INSURANCE LAW 570 (2d ed. 1964).

case.[33] Although the court's holding will not be binding under the new law, it may indicate whether the policies underlying "stacking" are now outweighed by increased burden on the insurer.

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THE PIGGYBACK STATUTE

Following the national trend of state reliance upon the federal government for determination and collection of state income taxes,[1] Act 341 of the 1974 regular session[2] conforms the Louisiana state income tax to the provisions of the United States Internal Revenue Code. The United States Congress sanctioned this movement by the Federal-State Tax Collection Act of 1972[3] which allowed federal collection of state income tax, provided the state elected to participate in the process[4] and complied with other conditions outlined in the Internal Revenue Code.[5] Under such an unmodified plan, "piggybacking" significantly lessens the taxpayer's burden as he merely completes his federal return and the Internal Revenue Service is allowed to deduct an appropriate portion of the tax paid for his state income tax.[6] The scheme arguably facilitates more efficient administration of state income tax laws[7] and results in quicker payment of withholding taxes to the states than do the methods currently employed.[8]

33. The Louisiana supreme court granted writs to hear *Barbin* on December 20, 1974. 305 So. 2d 125.

1. S. REP. No. 1050, 92d Cong., 2d Sess. 3891 (1972): "[A] significant number of states have, of their own accord, already adopted income taxes that conform substantially with Federal income tax laws." Even before the "piggyback" legislation, Louisiana law required a taxpayer who filed both a state and federal return to include his federal net income in the state return. LA. R.S. 47:103(B) (1950).

2. The Act amends Chapter 1 of Title 47 of the Louisiana Revised Statutes by adding Part III, consisting of sections 290-98.

3. INT. REV. CODE OF 1954, §§ 6361-65.

4. *Id.* § 6361(a).

5. *Id.* § 6362 outlines the conditions a state's tax laws must meet to be eligible for the program.

6. The Internal Revenue Service returns this tax to the state under the provisions of INT. REV. CODE OF 1954 §§ 6361(c)(1), (2).

7. O. OLDMAN & F. SCHOETTLE, STATE AND LOCAL TAXES AND FINANCE 674 (1974) [hereinafter cited as OLDMAN & SCHOETTLE]. *See* S. REP. No. 1050, 92d Cong., 2d Sess. 3891-92 (1972). *But see* note 12 *infra*.

8. S. REP. No. 1050, 92d Cong., 2d Sess. 3892 (1972).