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## Insurance

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that the defendant indeed was not the natural father of the child, and was not liable for support payments.

Upon the wife's appeal, the Wisconsin Supreme Court reversed the trial court decision and reinstated the original divorce judgment. The issue of paternity of the child was *res judicata* between the original parties to the divorce action, and the trial court may not vacate or modify the original judgment as to this finding of fact. The rationale for the decision was to give finality to divorce judgments. The failure of the defendant to raise the issue of paternity was not "excusable neglect" since the trial court had specifically questioned the defendant about this matter, and the defendant was not granted relief from this divorce judgment.<sup>28</sup>

JOHN KNUTESON

## INSURANCE LAW

### I. CASES OF FIRST IMPRESSION

#### A. "Accident" or "Occurrence"

Although the words "accident" or "occurrence" are found in most standard auto liability policies, it was not until this Term that the Wisconsin Supreme Court was called upon to decide exactly what was meant by such words; at least in reference to the extent of an insurer's liability for damage. The case which attempted to define these terms was *Olsen v. Moore*.<sup>1</sup> The defendant, Moore, was driving east on I-94 when he apparently lost control of his vehicle, crossed over the center median, and collided first with an automobile driven by Nancy Rauwald and then with an automobile driven by Bruno Janekowski. The defendant was insured by Badger State Mutual Casualty Co. which had issued a family combination auto policy providing bodily injury liability in the maximum of \$10,000 per injured person and \$20,000 per occurrence.<sup>2</sup>

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28. WIS. STATS. § 269.46 (1971).

1. 56 Wis. 2d 340, 202 N.W.2d 228 (1972).

2. The Badger State Policy read as follows:

Limits of Liability. The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence; the limit of such liability stated in the declarations as applicable to 'each occurrence' is, subject to the above provi-

In the subsequent trial the jury found the defendant totally negligent. Two questions were raised in motions after verdict; first, whether there were one or two "occurrences" within the scope of the liability policy and, second, whether as a matter of law the defendant was acting within the scope of his employment at the time of the accident. The trial court held there to be but one occurrence. It also held that the scope-of-employment was a question of fact for the jury and found sufficient credible evidence to support its verdict.<sup>3</sup>

In affirming the trial court's decision on the first question, the supreme court noted that the question of what constitutes an "accident" or "occurrence" within the limit of liability provisions of an automobile liability policy was one of first impression in Wisconsin. In delving into the decisions of other jurisdictions the court found a complete split in authority.<sup>4</sup>

An influential majority of jurisdictions utilize the 'cause theory' in analyzing whether one or more 'accidents' or 'occurrences' have resulted . . . . A smaller number of jurisdictions subscribe to the 'effect theory' of liability.<sup>5</sup>

The court preferred the reasoning of the "influential majority" and rejected the "effect theory" in defining the term "occurrence".<sup>6</sup>

The court also affirmed the trial court's determination on the second question finding no facts which would justify overturning the jury verdict.<sup>7</sup>

As the supreme court noted, the question of the extent of an insurer's liability under a clause limiting the risk to a certain dollar amount per "accident" or "occurrence" has caused a dichot-

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sion respecting each person, the total limit of the company's liability for all such damages arising out of bodily injury sustained by two or more persons as the result of any one occurrence.

*Id.* at 345.

3. *Id.* at 343.

4. *Id.* at 344.

5. *Id.* at 346.

6. The court held:

If viewed from the point of view of a cause, it would appear that a single, uninterrupted cause which results in a number of injuries or separate instances of property damage is yet one 'accident' or 'occurrence'. If, however, that cause is interrupted or replaced by another cause, the chain of causation is broken and more than one 'accident' or 'occurrence' has taken place.

*Id.* at 349.

7. *Id.* at 351. The court found facts which negated any control which the employer might have exercised over Moore.

omy among the jurisdictions.<sup>8</sup> This conflict is the result of two theories utilized to define the breadth of the terms "accident" or "occurrence". In actuality, there are no two legal theories, but a difference in philosophical approach to the problem of causation.<sup>9</sup> The majority of courts, taking their direction from *Hyer v. Inter-Insurance Exchange*,<sup>10</sup> hold that the "per accident" or "per occurrence" clause found in the standard liability policy is to be viewed from the standpoint of the *cause* of the accident and not its effect or result. However, the minority, relying on *South Staffordshire Tramways Co. v. Sickness & Accident Assurance Assoc., Ltd.*<sup>11</sup> and *Anchor Casualty Co. v. McCaleb*,<sup>12</sup> have determined that the "per accident" or "per occurrence" clauses should refer to the *result* or *effect* of the accident on the persons injured. Problems arise from the ramifications in applying one theory over the other. As can readily be seen, the insurer would have a considerable interest in preventing the "effect theory" from being adopted. Of course the other party to this contract, the insured, must also be taken into account. Thus, not only are problems of contractual interpretation presented but also a battle of semantics is joined. The use of such words of art as "accident" or "occurrence" and the differing meaning that insurers and insureds place on these words must be considered as a supplementary issue to any question of the applicability of either the "cause" or "effect" theory.

An in depth discussion of the reasoning which created the two positions is beyond the scope of this analysis,<sup>13</sup> but a brief discussion of the two major cases enunciating the two theories might prove beneficial in ascertaining the reasoning of the supreme court in *Olsen*.

As was noted above, the "cause theory" was first enunciated in *Hyer v. Inter-Insurance Exchange*,<sup>14</sup> where the California Court of Appeals held that since one negligent act or omission may be the cause of several resulting injuries or losses, an "accident" or "occurrence" should be defined in reference to cause.<sup>15</sup> The land-

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8. See Annot. 55 A.L.R.2d 1300 (1957). See also, 15 COUCH ON INSURANCE (2d ed. 1966) § 56.20.

9. 44 AM. JUR. 2d Insurance § 1684 (1969).

10. 77 Cal. App. 343, 246 P. 1055 (1926).

11. 1 Law Reports 402 (Q.B. 1891).

12. 178 F.2d 322 (5th Cir. 1949).

13. Such an in depth study is made in Annot., 55 A.L.R.2d 1300 (1957) where specific cases are listed and analyzed on this point.

14. 77 Cal. App. 343, 246 P. 1055 (1926).

15. The court further stated:

mark case espousing the "cause theory" is *Truck Insurance Exchange v. Rohde*.<sup>16</sup> In that case it appeared that the insured's automobile carelessly crossed the center line of a highway colliding with three approaching motorcycles in such a manner that three distinct "thuds" could be heard. The public liability policy issued to the insured contained a provision limiting the liability for bodily injuries to "\$20,000 each person" or "\$50,000 each occurrence".<sup>17</sup> The Supreme Court of Washington held that the terms "accident" or "occurrence" included *all* injuries within the scope of a single proximate cause; and, since there was but one uninterrupted and continuing cause which resulted in all three injuries, there was only one accident.<sup>18</sup>

The "effect theory" initially arose from the English case of *South Staffordshire Tramways Co. v. Sickness & Accident Assurance Assoc., Ltd.*<sup>19</sup> where the House of Lords held that the term "each accident" was to be construed from the point of view of the person injured and not from the point of view of the insurer.<sup>20</sup> It

[A]s commonly used in liability insurance policies, the word 'accident' is predicated on an occurrence which is the cause of the injury. That is to say . . . , the word is employed to denote the cause, rather than effect.

*Id.* at 346, 246 P. at 1057.

16. 49 Wash. 2d 465, 303 P.2d 659 (1956). Between Hyer and Rohde, a federal case was decided, *St. Paul Mercury Indemnity Co. v. Rutland*, 225 F.2d 689 (5th Cir. 1955) which affirmed the Hyer position. This case is also noteworthy in that the McCaleb case was from the same circuit and is seemingly overruled by Rutland. (*see*, dissent in Rutland).

17. 49 Wash. 2d at 469, 303 P.2d at 662.

18. *Id.* at 471, 303 P.2d at 662-63.

The court went on to state:

Proximate cause is an integral part of the words 'accident' or 'occurrence' as used in a contract for liability insurance . . . .

. . . The contract here in question contemplated that injury might occur to more than one person or items of property within a single accident or occurrence.

. . . We are of the opinion that the contract contemplated that the terms 'accident' or 'occurrence' included *all* injuries or damages within the scope of the single proximate cause. [Emphasis supplied]

*Id.*

For further cases in support of the "cause theory", *see*, *Denham v. LaSalle-Madison Hotel Co.*, 168 F.2d 576 (7th Cir. 1948); *Bacon v. Miller*, 113 N.J. Super. 271, 273 A.2d 602 (1971); *Travelers Indemnity Co. v. New England Box Co.*, \_\_\_\_ N.H. \_\_\_\_, 157 A.2d 765 (1960).

19. 1 Law Reports 402 (Q.B. 1891).

20. The House of Lords stated its reasoning as follows:

It is . . . to be borne in mind that the object of the policy is to provide for the insured an indemnity against claims made upon them for injuries resulting from negligence

. . . . This being so . . . it is more appropriate to hold that . . . 'accident' is used from the point of view of the several claimants upon the assured for injuries . . . and that . . . any one 'accident' means any accident to any one claimant upon the insured.

was in *Anchor Casualty Co. v. McCaleb*,<sup>21</sup> where the theory was introduced into American case law. This case involved a blown oil well which caused eruptions intermittently over a period of two days. During this period sand and mud were blown into the air and deposited onto the property of adjacent landowners. The policy of liability insurance provided that the insurer's total liability for each accident was limited to \$5,000 with a \$25,000 limit for all aggregate damage. The circuit court of appeals held that the term "each accident" must be considered from the standpoint of the person whose property was damaged.<sup>22</sup> Thus, where the negligent act operates upon several at one time, it is not one "accident," but rather a separate "accident" to each individual whose property was injured or lost. The dollar limitation amount applies to each of these separate accidents.

Many commentators have attempted to reconcile these two divergent theories to glean some rule which might be utilized when analyzing specific fact situations. The main approach taken towards reconciliation is based on a time-space analysis. This approach views injury or damage in relation to the closeness in time and space between the negligent act and such damage. Thus, if the cause and result are close in time and space the courts are more apt to view the accident as one total event. On the other hand, when enough time has elapsed or the events are widely separated in space the courts are more inclined to view the accidents as separate and distinct.<sup>23</sup>

In viewing both theories, it seems as if the Wisconsin Supreme

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*Id.* at 407.

21. 178 F.2d 322 (5th Cir. 1949).

22. The court relied heavily on the definition of "accident" found in BOUVIER'S LAW DICTIONARY which defined "accident" as an event which "is unusual and unexpected by the person to whom it happens". The court then utilized this definition and stated:

When the separate property of each claimant was damaged, an 'accident' occurred to the property of each owner. If one cause operates upon several at one time, it cannot be regarded as a single incident, but the injury to each individual is a separate 'accident'.

178 F.2d at 324-25.

For further cases supporting the "effect theory" see, *Pennsylvania Home Improvements Co. v. American Casualty Co.*, 4 Pa. D. & C.2d 516, 47 Berks. County L.J. 288 (1955); *Kuhn's of Brownsville, Inc. v. Bituminous Casualty Co.*, 197 Tenn. 60, 270 S.W.2d 358 (1954). See also, Judge Cameroun's dissent in *St. Paul-Mercury Indemnity Co. v. Rutland*, *supra*, note 16.

23. See, Annot., 55 A.L.R.2d 1300, 1304 (1957). See also, *Liberty Mut. Ins. Co. v. Rawls*, 404 F.2d 880 (5th Cir. 1967) where the court alluded to the time-space differential. Cf., *Elston-Richards Storage Co. v. Indemnity Ins. Co. of North America*, 194 F. Supp. 673 (W.D.S.D. Mich. 1960).

Court adopted the most rational and logical of the two. As is always the case in insurance contract interpretation, the court must ferret out the agreement the parties intended to set forth in the contract. To apply the "effect theory" would result in a clearly absurd situation for the insurer. The purpose of clauses limiting the insurer's exposure to liability is to establish realistic guidelines for the insurer to utilize in setting its rates. The upper limits of the policy delineate the total liability that the insurer might expect to be subject to as the result of any careless act by its insured. The "effect theory" would place the insurer in the position of never being able to calculate what its potential liability would be for any one accident.<sup>24</sup>

Of course, the whole problem might be solved by better and more precise draftsmanship of the liability policy provisions. Although the majority of courts do not believe "per accident" or "per occurrence" is ambiguous; the majority of insureds might beg to differ. But irrespective of such ambiguity and the normal rule that the ambiguity is to be construed in favor of the insured, the public interest is best accomplished by following the reasoning of the supreme court and the majority of jurisdictions.

### B. *The Standard Interest Clause*

In another case of first impression, the supreme court had before it a dispute over the "standard interest clause".<sup>25</sup> In *McPhee v. American Motorists Insurance Co.*,<sup>26</sup> the plaintiff sustained injuries by reason of the negligence of Cornith Machinery Company. He initiated a suit in the U.S. District Court, Western District of Wisconsin, and obtained a judgment of \$354,349 plus 5% interest. The judgement was appealed to and affirmed by the U.S. Court of Appeals for the 7th Circuit. At the time of the accident, Cornith

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24. 1 LONG, LAW OF LIABILITY INSURANCE, § 2.14.

25. An example of such a clause is as follows:

The company shall:

(2) . . . pay all expenses incurred by the company, all costs taxed against the insured in any such suit *and all interest accruing after entry of judgment until the company has paid or tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;*

(3) . . .

(4) . . .

and the amounts so incurred except settlements of claims and suits, are payable by the company *in addition to the applicable limit of liability of this policy.* (Emphasis supplied)

26. 57 Wis. 2d 669, 205 N.W.2d 152 (1973).

carried a liability insurance policy with the defendant in the face amount of \$100,000. The defendant admitted liability to the plaintiff in the full amount of the policy plus interest, but disputed the plaintiff's demand for interest on the entire judgment. The trial court determined, as a matter of law, that the liability of the defendant included interest on the entire judgment against Cornith.<sup>27</sup>

The issue before the supreme court, then, was the extent of the insurer's liability for interest on an amount in excess of policy limits.

The court attempted to decipher the language of the policy to determine whether the parties intended "all interest" to mean all interest on the entire amount of any judgment or all interest on such judgment as does not exceed the policy limits. As in *Olsen v. Moore*,<sup>28</sup> *supra*, the court discovered a split in the jurisdictions as to the meaning of "all interest accruing after entry of judgment." A minority of jurisdictions have held that the standard interest clause must be construed as creating a liability for interest only on that part of the judgment for which the insurer is responsible.<sup>29</sup> On the other hand, the court noted that a majority of jurisdictions have construed the standard interest clause as creating liability upon the insurer for interest on the entire amount of the judgment, including any portion in excess of policy limits.<sup>30</sup> After reviewing the arguments pro and con for each position the court stated:

We are of the opinion that a reasonable person in the position of the insured would understand the language used in the American [defendant] policy to mean that American is liable for interest upon the entire judgment. This would include interest on that portion thereof in excess of the policy limits.<sup>31</sup>

The court reached its opinion by a careful dissection of the policy language in light of the maxim that an insurance policy is construed in accordance "to what a reasonable person in the position of the insured would have understood the words to mean."<sup>32</sup> The court reasoned that since the insurer had qualified the duration of its liability for interest,<sup>33</sup> it could have easily restricted "judg-

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27. *Id.* at 672.

28. *See*, n. 3 *supra*.

29. 57 Wis. 2d at 674.

30. *Id.* at 675.

31. *Id.* at 677.

32. *Luckett v. Crowser*, 39 Wis. 2d 224, 157 N.W.2d 94 (1968).

33. *Supra* n. 29.



ment" to limit its liability to interest only upon that portion of the judgment covered by the policy.<sup>34</sup> Also, the court seemed to think that since the insurer had complete control over any litigation from which it might incur liability, it should suffer any accumulated interest caused by its dilatory tactics.<sup>35</sup>

Finally, the court reminded the defendant that by its own contract language, it could have precluded any assessment of interest by merely "paying, tendering or depositing" that part of the judgment for which it would be liable to the court reserving any rights it might later have against the insured or any other party.<sup>36</sup>

Although *McPhee* was the first case to affirmatively decide what position Wisconsin would adopt among the conflicting jurisdictions construing the standard interest clause, the issue had been treated before in *dictum* in *Nichols v. U.S. Fidelity & Guaranty Co.*,<sup>37</sup> where the supreme court held that the policy itself was to be the starting point in any discussion of the two positions.<sup>38</sup> It should be noted that some relief has been afforded by the insurance industry which has drafted a new standard interest clause complying with the entire judgment theory,<sup>39</sup> but many insurers still retain the old policy language as was in issue in *McPhee*.<sup>40</sup>

What are the underlying policy reasons forming the basis for the two positions? The courts<sup>41</sup> which have held that the insurer be

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34. 57 Wis. 2d at 677-78.

35. Clause II (a) of the American policy states:

. . . [T]he Company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.

36. 57 Wis. 2d at 681-82.

It seems that prior to the appeal American had done just what the court suggested by paying the face value of the policy plus interest to the plaintiff and reserving its rights as to the interest on the excess amount of the judgment over its policy limits. See also, 15 COUCH ON INSURANCE (2d ed. 1966) § 56.36.

37. 13 Wis. 2d 491, 109 N.W.2d 131 (1961).

38. *Id.* at 501.

39. See, N. RISJORD & J. AUSTIN, AUTO LIABILITY INSURANCE CASES, STANDARD PROVISIONS AND APPENDIX, (Supp. 1973) where the following language was promulgated: [A]nd all interest on the entire amount of any judgment therein which accrues after entry of judgment and before the company has paid, tendered or deposited in the court that part of the judgment which does not exceed the limit of the company's liability thereon . . . .

As was noted in *McPhee*, this language was adopted to combat decisions which had refused to allow interest on the entire amount of the judgment.

40. *Supra* n. 29.

41. See, *Underwood v. Buzby*, 236 F.2d 937 (3d Cir. 1956); *Draper v. Great American*

required to pay interest on the entire judgment irrespective of policy limits advance certain reasons which have appeared in one form or another in all the cases supporting the position. Thus,

<sup>1</sup>the clause is ambiguous and therefore must be construed against the insurer; <sup>2</sup>the company could have qualified the word 'judgment' had it desired to do so; and <sup>3</sup>the insurer controls the litigation, and by delaying payment it may influence the accumulation of interest.<sup>42</sup>

Those courts<sup>43</sup> which take the position that "all interest" should be limited to interest on the sum of an insurer's total liability as designated by the policy limits justify their position on the grounds that;

<sup>1</sup>the clause is unambiguous and clear; <sup>2</sup>the liability of the insurer for interest on the portion of the judgment in excess of the policy limits amounts to vicarious liability; and <sup>3</sup>the insured has had, during the delay, the use of money in excess of the policy limits.<sup>44</sup>

As was noted above, the future of this conflict seems to have been decided by the insurance industry and the courts have acceded to this view.<sup>45</sup>

Irrespective of whether the supreme court's reasoning or, for that matter, the reasoning of the proponents of the "all interest on the entire judgment" theory is sound, questions will arise which must be answered in the future by the court.

First, upon what amount is this interest to be assessed? *McPhee* states that the interest is to be assessed on the amount of the "judgment". Does this include costs? Does this include interest on

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Ins. Co., 458 S.W.2d 428 (Tenn. 1970); *Powell v. T.A.C. Taxi Co.*, 104 N.H. 428, 193 A.2d 419 (1963); *Plasky v. Gulf Ins. Co.*, 160 Tex. 612, 335 S.W.2d 581 (1960); *River Valley Cartage Co. v. Insurance Co.*, 17 Ill. 2d 242, 161 N.E.2d 101 (1959). See generally, Annot. 76 A.L.R. 2d 983, 907 (1961).

42. See, Note, *Insurance: Interest Payments Under the Supplementary Payments Provision of the Standard Auto Liability Policy*, 52 MARQ. L. REV. 396, 397 (1969).

43. See, *Herzog v. Fidelity & Casualty Co.*, 257 F.2d 840 (10th Cir. 1958); *Standard Accident Ins. Co. v. Winget*, 197 F.2d 97 (9th Cir. 1952); *Factory Mut. Liability Ins. Co. of America v. Cooper*, \_\_\_ R.I. \_\_\_, 262 A.2d 370 (1970); *Coveney v. Nationwide Mut. Ins. Co.*, 58 Misc. 2d 480, 295 N.Y.S. 2d 443 (1968); *Crook v. State Farm Mut. Auto Ins. Co.*, 235 S.C. 452, 112 S.E.2d 241 (1960); *Sampson v. Century Indemnity Co.*, 8 Cal. 2d 476, 66 P.2d 434 (1937). See generally, Annot. 76 A.L.R. 2d 983, 991 (1961).

44. *Supra* n. 42.

45. See, *Peterson v. Western Casualty & Surety Co.*, 19 Utah 2d 26, 425 P.2d 769 (1967) where the court held that the new policy language granting interest on the "entire amount of the judgment" left no room for ambiguity and thus no further conflict on construction.

the interest? Does the interest apply only to the amount of the judgment determined by the jury or the trial court even though such amount may be reduced or, less frequently, increased on appeal?

Second, is there to be a proration of interest when there exists an excess insurer or when two insurers are involved and the judgment exceeds the policy limits of both?

Finally, what constitutes a "payment, tender, or deposit" which will toll the accrual of interest?

Many of these questions have been answered in other states which have adopted the "all interest on entire judgment" theory.<sup>46</sup> It might behoove the practitioner to acquaint himself with these "answers" since *McPhee* has now opened the door to further litigation hopefully honing some of the rough edges of the "standard interest clause".

### C. No Action Clause

A construction of a form of "no action" clause<sup>47</sup> precipitated the dispute in *Skrupky v. Hartford Fire Ins. Co.*<sup>48</sup> In this case, the plaintiffs had purchased a multiperil insurance policy from the defendant. The plaintiffs sustained a loss when some water pipes burst causing damage to their property. The policy excluded recovery from all property not specifically enumerated in the policy. The defendant paid for the damages to the enumerated property but denied any liability for the remaining damaged property, notifying the plaintiffs of that fact. The plaintiff's commenced this suit two years after the loss alleging two causes of action: (1) Breach of warranty in that the defendant's agent induced the plaintiffs to purchase the policy by representing that the policy provided full coverage and that on such representation the plaintiffs purchased the policy, and (2) negligence on the part of the defendant's agent and the defendant in not providing full coverage.<sup>49</sup> The defendant set forth as an affirmative defense the "no action" clause contained

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46. See generally, 8 APPLEMAN, INSURANCE LAW & PRACTICE § 4899 (Supplement, 1973).

47. An example of such a clause is as follows:

No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after the inception of the loss.

48. 55 Wis. 2d 636, 201 N.W.2d 49 (1972).

49. *Id.* at 638.

in its policy. The trial court sustained the plaintiff's demurrer to this affirmative defense.

The supreme court in construing the "no action clause" was concerned specifically with the phrase "suit or action on this policy"<sup>50</sup> which dictated under what situations the twelve-month limitation would apply. The court, therefore, necessarily had to decide whether a cause of action alleging breach of warranty and a cause of action alleging negligence were "on the policy". The court investigated the plaintiffs' complaint and discovered what it thought was in reality a cause of action for reformation disguised as causes of action for breach of warranty and negligence. Citing to *Artmar, Inc. v. United Fire & Casualty Co.*,<sup>51</sup> the court recognized that fraud, mutual mistake and negligence were sufficient grounds for an action to reform the insurance policy. The court was of the opinion that

. . . when a loss occurs that is or should have been covered by an insurance contract, an action or suit to collect must be based on the policy. It is the insurance . . . contract that creates the obligation on the part of the insurance company to pay the loss.<sup>52</sup>

The court further stated:

If the policy does not fully or accurately state the agreement of the insurer and the insured, the remedy is to reform the contract to conform to the agreement. If a party chooses to call his cause of action misrepresentation, fraud, breach of warranty, negligence or mistake, the terms of the policy still control the obligation of the insurer to pay for the loss. *An action to resolve a dispute as to the liability of the insurer to pay for the loss, under these circumstances, is an action on the policy.*<sup>53</sup> (Emphasis supplied)

Generally, a "no-action" clause fixing the period in which to sue an insurer shorter than the time prescribed by the Statute of Limitations is valid provided that such time is not unreasonable.<sup>54</sup> This limiting provision ordinarily applies only to suits "on the policy". The problem arises in defining a suit "on the policy" (the specific issue before the court in *Skrupky*). The supreme court

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50. *Supra* n. 47.

51. 34 Wis. 2d 181, 186, 148 N.W.2d 641, 151 N.W.2d 289 (1967).

52. 55 Wis. 2d at 641.

53. *Id.* at 642.

54. 46 C.J.S. *Insurance* § 1256 (1946); 18 COUCH ON INSURANCE, (2d ed. 1966) § 375.71 et seq.

attempted to place parameters on this phrase but the broad language which it utilized in rendering its opinion may cause future problems. Obviously, the plaintiff in *Skrupky* was attempting to circumvent the "no action clause" by alleging breach of warranty and negligence for what in reality was a reformation action. Thus, the court rightfully held that no matter what the cause of action is labelled it will be "on the policy" if it sounds in reformation. But the court went further. By citing and specifically choosing not to follow *Austin v. Fulton Ins. Co.*,<sup>55</sup> which involved facts similar to those in issue in *Skrupky*,<sup>56</sup> the court implied a broader decision than was necessary to dispose of the case. If the court meant to limit all actions that may arise due to the existence of an insurance policy irrespective of whether the suit specifically referred to a loss payable or that should have been payable under a contract of insurance, then the court overstated the law. Actions in tort for fraud, misrepresentation or deceit may arise for failure to provide insurance.<sup>57</sup> Such actions depend on the misplaced reliance of the plaintiff resulting in no further purchases of insurance to cover against a loss misrepresented as being covered. These actions, therefore, do not depend *per se* "on the policy" but upon the misfeasance of the insurer or its agent. Thus, a distinction must be made between suits which arise due to the insurer's failure to fulfill a duty or condition contained in the policy of insurance (i.e., the duty to defend) and suits which result from matters outside of or collateral to the policy of insurance for which the fact of insurance may just be one element in the cause of action.

*Skrupky* should, therefore, stand as a warning to the careless pleader. If a practitioner wishes to evade the limitations found in the "no action clause", he must be sure that his pleadings allege a cause of action "outside the specific policy of insurance" and which do not rely on specific provisions in the policy for support.

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55. 444 P.2d 536 (Alaska 1968).

56. In *Austin*, the plaintiff suffered damage to his property stemming from the 1964 Anchorage earthquake. The policy excluded losses due to earthquakes and included a "no action clause". The plaintiff alleged five different causes of action as grounds for relief: (1) breach of warranty; (2) breach of an oral contract to provide full coverage without limitation as to the source of the loss; (3) negligence in failing to obtain insurance coverage against earthquake loss; (4) estoppel; and (5) reformation. The court held that the claims based on estoppel and reformation were "on the policy" and, therefore, were subject to the 12-month limitation provision contained in the policy; but as to the claims for negligence and breach of warranty the normal statute of limitations controlled.

57. See, *Asher v. Reliance Ins. Co.*, 308 F. Supp. 847 (N.D. Calif. 1970); 20 APPLEMAN, INSURANCE LAW & PRACTICE, § 11603 (1963) at 525.

#### D. Family Exclusion Clause

Although Wisconsin prohibits the inclusion in an automobile liability policy of a clause excluding from coverage the spouse and relatives of the named insured,<sup>58</sup> this so called "family exclusion clause"<sup>59</sup> is often found in Wisconsin case law especially when the clause is contained in policies issued to out-of-state insureds by out-of-state insurers. Just such a case arose in *Henderson v. State Farm Mut. Ins. Co.*<sup>60</sup>

The litigation was the result of a two car accident between an automobile owned and driven by one Penelope Henderson and insured by State Farm, the defendant, and an automobile owned and driven by one John Howe and insured by American Family Mut. Ins. Co. The plaintiff was a passenger in the Henderson automobile. From the facts it seems that Penelope and the plaintiff were residents of Illinois and the policy had been negotiated, issued and delivered in Illinois. To complicate matters further, Penelope and the plaintiff, though never legally married, had lived together as man and wife for 12 years during which time they were blessed with three children.

The plaintiff sued both insurers. The defendant moved for summary judgment alleging the "family exclusion clause" as an affirmative defense. The trial court dismissed the motion.<sup>61</sup>

On first impression, it would seem that the supreme court was faced with a conflict-of-laws problem. Since the family exclusion clause is invalid in Wisconsin,<sup>62</sup> the defendant contended that Illinois law was applicable.<sup>63</sup> The supreme court neatly sidestepped the conflicts issue by narrowing its investigation to the term "family" as contained in the family exclusion clause.<sup>64</sup> Thus, a definition of "family" was of first priority.

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58. WIS. STATS. § 204.34(2) states:

No policy of insurance, agreement of indemnity or bond referred to in subsection (1) shall exclude from the coverage afforded or the provisions as to benefits therein provided persons related by blood or marriage to the assured.

59. The State Farm Mut. Ins. Co. family exclusion clause reads as follows:  
This insurance does not apply:

. . .

(c) . . . to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured.

60. 59 Wis. 2d 451, 208 N.W.2d 423 (1973).

61. *Id.* at 453.

62. *Supra* n. 58.

63. The family exclusion clause is valid in Illinois (*Miller v. Madison County Mut. Auto. Ins. Co.*, 46 Ill. App. 2d 413, 197 N.E.2d 153 (1964)).

64. As the court emphasized:

The court found that the dictionary definition of "family" was often applied by courts to policies similar to the one presently in issue. In general, the term "included a relationship by blood or marriage."<sup>65</sup> Since contracts of insurance are imbued with the meaning ordinarily conveyed to the popular mind, the court reasoned that to interpret such a clause broadly would be applying in reverse the general rule of insurance construction by rendering effective the insurer's definition of "family".

The court, then, concluded that since the plaintiff was not related to Penelope "by blood or marriage" he was not a member of her family for purposes of the "family exclusion clause".<sup>66</sup>

Even though the "family exclusion clause" presents no difficulty to the practitioner where two Wisconsin residents are involved, when a foreign resident with a foreign insurer is involved in an auto accident in Wisconsin, the clause suddenly rears its head.<sup>67</sup> *Henderson*, then, represents precedent on how the supreme court will construe the "family exclusion clause" contained in foreign insurance policies. Therefore, a brief analysis of the purpose behind the "family exclusion clause" and the reasoning of the courts in construing it narrowly or broadly might be in order.<sup>68</sup>

Generally, in absence of any statutory prohibition, provisions excluding from coverage members of an insured's family or household are valid.<sup>69</sup> The purpose sought to be accomplished by such a clause is to exempt the insurer from liability for claims from one who would "surely and inevitably be partial to the injured party" due to close family ties.<sup>70</sup> According to the prevailing construction

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Before a conflict of law problem is presented, it must appear that the ultimate selection of law will effect the outcome . . . . If the plaintiff was a member of Penelope's family within the meaning of the family exclusion clause, Illinois law would result in a termination of further proceedings against State Farm. Thus, the choice of Wisconsin or Illinois law would be 'outcome determinative'.

59 Wis. 2d at 454-55.

65. State Farm argued that the term "family" should be construed as including any person who is within a given household or within the "family circle" regardless of a blood or marital relationship. 59 Wis. 2d at 459.

66. *Id.* at 460.

67. *See*, *Korth v. Mueller*, 310 F. Supp. 878 (E.D. Wis. 1970) where the court held that § 204.34(2) applied only to insurance contracts issued in Wisconsin. *See also*, *Haines v. Mid Century Ins. Co.*, 47 Wis. 2d 442, 177 N.W.2d 328 (1970) and *Urhammer v. Olson*, 39 Wis. 2d 447, 159 N.W.2d 688 (1968).

68. *See generally*, Annot. 46 A.L.R.3d 1024 (1972) and Annot., 1 A.L.R.2d 822 (1948).

69. 12 COUNCIL ON INSURANCE (2d ed. 1966) § 45.509.

70. *See*, *Peninsula Ins. Co. v. Knight*, 254 Md. 461, 255 A.2d 55 (1969) and *Tomilyonovich v. Tomilyonovich*, 239 Minn. 250, 58 N.W.2d 855 (1953).

of this clause, the term "family" is to be construed to carry out this exclusionary purpose.<sup>71</sup>

The supreme court in *Henderson* cited two cases specifically referring to the applicability of the clause to putative spouses. In *Hunter v. Southern Farm Bureau Casualty Ins. Co.*,<sup>72</sup> the court held that an exclusionary provision excluding members of the insured's family residing in the insured's household precluded the estate of the decedent, killed in an automobile accident, from the benefit of the policy where the insured and the decedent were living together as man and wife at the time of the accident. The South Carolina Supreme Court defined "family" in light of the purpose behind the exclusion and decided that such purpose would best be effectuated by a broad definition of "family".<sup>73</sup>

The Wisconsin Supreme Court, though, chose to rely on *Hicks v. Hatem*,<sup>74</sup> where, under facts nearly identical to *Hunter*, the Maryland Supreme Court reached the opposite result.<sup>75</sup>

Since the generally held purpose of the "family exclusion clause" is to prevent "cozy" or "overfriendly" suits against an insurer, an overly strict definition of the term "family" defeats whatever protection the clause renders to an insurer. It would seem obvious that where two parties live together over a period of time as man and wife, a relationship exists of a type sought to be excluded by the clause. The threat of partiality in any suit against the insurer in this type of situation is as great as where the parties are legally married.

Thus, the supreme court is evidencing a general distaste for such a clause indirectly supporting the same distaste the legislature had for the exclusion when it adopted Section 204.34(2) prohibiting such exclusion.

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71. See, *State Farm Mut. Auto. Ins. Co. v. Thompson*, 372 F.2d 256 (9th Cir. 1967) and *State Farm Mut. Auto. Ins. Co. v. Philips*, 2 Wash. App. 169, 467 P.2d 189 (1970).

72. 241 S.C. 446, 129 S.E.2d 59 (1962).

73. The court stated:

In light of the clear purposes intended to be accomplished by the exclusion clause in question, we think that the term family . . . includes 'such persons as habitually reside under one roof and form one domestic circle.' (citation omitted) If the injured person is a member of such family circle, liability is excluded.

*Id.* at 450, 129 S.E.2d at 61.

74. 265 Md. 260, 289 A.2d 325 (1972).

75. The court held:

It would thus appear that in common parlance and usage the word 'family' more frequently connotes the existence of a marital or blood relationship, or a legal status approximating such a relationship.

*Id.* at 264, 289 A.2d at 327.



*E. Miscellaneous*

Two minor cases of first impression were decided within the August Term 1972. In *Racine County National Bank v. Aetna Casualty & Surety Co.*,<sup>76</sup> the supreme court was called upon to construe a loan exception to a Bankers Blanket Bond.<sup>77</sup> The instigator of this case was a confidence man named Donald Studey. Mr. Studey obtained loans from the plaintiff over a period of two years usually paying off one loan by taking out a larger loan. This pyramiding culminated in one large loan for \$60,000 which was to be secured by 2,500 shares of stock in various corporations held by Studey. After a normal bank inventory an agent of the plaintiff discovered that severe shortages existed in the amount of collateral securing Studey's loan. After having been notified of that fact, Studey requested a release of the securities held by the bank expressing a desire to sell the securities and replace them with other long-term investments to secure the loan. The plaintiff released the securities and Studey promptly absconded with them. The plaintiff was insured under a Bankers Blanket Bond issued by the defendant. The defendant disclaimed any liability alleging an exclusion in the policy for loss caused by a loan situation. The trial court ruled for the defendant based on such an exclusion.<sup>78</sup>

The plaintiff had alleged that a difference existed between a loss due to non-payment of a loan and a loss due to the fraudulent procurement of the collateral which secured the loan. The supreme court, though acknowledging the difference, maintained that the loss still arose from a loan situation.

The facts plainly show that the loss due to the missing securities was dependent upon the nonpayment of the loan. The loss occurred because all of these transactions were so intertwined with the basic loan agreement that to segregate them to support the [plaintiff's] position would make the exclusion provisions meaningless.<sup>79</sup>

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76. 56 Wis. 2d 830, 203 N.W.2d 145 (1973).

77. The bond exclusion stated:

Section 1. This bond does not cover:

...

(d) Any loss the result of the complete or partial nonpayment of or default upon any loan made by or obtained from the insured, whether procured in good faith or through trick, artifice, fraud or false pretense. . .

*Id.* at 835.

78. *Id.*

79. *Id.* at 836.

The court concluded that such a loss was directly due to the loan and without the loan the false procurement of the securities would have had no detrimental effect on the plaintiff.

The general rule for construction of insurance contracts is applicable to Bankers Blanket Bonds.<sup>80</sup> Thus, the provisions are given the effect the parties intended them to have when entering into the agreement.<sup>81</sup> If such provisions are unclear or ambiguous they are to be construed against the person drafting the bond agreement.<sup>82</sup> Most courts have held that the "loan exclusion clause" is unambiguous and, therefore, will negate any coverage under the bond if the loss would not have occurred *but for* the nonpayment of the loan.<sup>83</sup> The reasoning of the supreme court seems to be in accord with the majority of courts which have decided the issue and seems to be in accord with the general rule of insurance contract construction.

The second case dealt with a business interruption endorsement to a fire policy.<sup>84</sup> The dispute in *Adelman Laundry & Cleaners*,

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80. 43 AM. JUR. 2d *Insurance* § 259 (1969).

81. *Id.*

82. *First Nat. Bank v. United States Fidelity & Guaranty Co.*, 150 Wis. 601, 137 N.W. 742 (1912).

83. *See, for example*, *Community Federal Savings & Loan Assoc. of Overland v. General Casualty Co.*, 274 F.2d 620 (8th Cir. 1960) where the court stated:

. . . It is undisputed that the loans were made which remain unpaid in part. While the loan was induced by fraud, it seems clear that the immediate cause of the loss was the nonpayment of the loans. It is entirely clear from the exclusion provision as written that the exclusion extends to losses on loans induced by fraud.

*Id.* at 625. *See also*, *East Gadsden Bank v. United States Fidelity and Guaranty Co.*, 415 F.2d 357 (5th Cir. 1969).

84. The clause reads as follows:

1. Subject to all its provisions, this Policy covers . . . against loss resulting only from necessary interruption of business conducted by the Insured caused by damage or destruction by the peril(s) insured against . . . to real or personal property . . .

23. Riot, Civil Commotion, and Vandalism.—This Policy also insures against loss resulting from necessary interruption of business due to damage to or destruction of described property caused directly by riot, . . . civil commotion, . . .

2. Recovery in the event of loss hereunder shall be the Actual Loss Sustained by the Insured directly resulting from such interruption of business, but not exceeding the reduction in gross earnings less charges and expenses which do not necessarily continue during the interruption of business, for only such length of time as would be required with the exercise of due diligence and dispatch to rebuilt, repair or replace such described property as has been damaged or destroyed, commencing with the date of such damage or destruction and not limited by the date of expiration of this Policy . . .

8. Interruption by Civil Authority.—This Policy is extended to include the actual loss as covered hereunder to include the actual loss as covered hereunder during the period of time, not exceeding two consecutive weeks, when, as a direct

*Inc. v. Factory Ins. Assoc.*,<sup>85</sup> arose from a curfew imposed on the city of Milwaukee during the 1967 civil disturbances. The plaintiff alleged that such curfew which interrupted its business was compensable under an endorsement to a fire policy issued by the defendant. The trial court agreed with the plaintiff.

In reversing the trial court, the supreme court held that for such a loss to be compensable under the endorsement, the business interruption must originally result from actual physical damage or destruction to the property of the insured and not result merely from an order by a civil authority restricting access to the property without any concomitant damage. This seems in accord with the majority view on the subject.<sup>86</sup>

## II. STATUTORY RESTRICTIONS ON INSURANCE CONTRACT LANGUAGE

Prior to analyzing cases dealing with insurance policy language as it relates to certain statutory restrictions, it might be of some interest to note the next installment in the continuing saga of *D'Angelo v. Cornell Paperboard Products Co.*<sup>87</sup> In the August, 1972 Term, *D'Angelo* came back to haunt the supreme court for the third time. The facts, by now, are obvious. The plaintiff, an employee of Fred Olson Motors, Inc., was delivering bales of paper to the defendant. While an employee of the defendant was unloading the bales with a forklift, the plaintiff sustained serious injuries. The defendant was insured under a comprehensive liability policy by Employers Mutual Liability Insurance Co. [Employers]. The defendant had also been issued an auto liability policy by Indemnity Insurance Company of North American [Indemnity]. Employers had paid \$120,000 to the plaintiff in settlement of a third-party liability suit brought by him. After seeking and receiving subrogation rights from the plaintiff and his employer's workmen's compensation carrier, Employers sought to recover \$300,000 from Indemnity alleging that it was primarily liable under its policy. On the first appeal, the supreme court validated the subrogation of Employers by way of assignment to the plaintiff's rights,

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result of the peril(s) insured against, access to the described premises is prohibited by order of civil authority.

85. 59 Wis. 2d 145, 207 N.W.2d 890 (1973).

86. See also, *Two Ceasars Corp. v. Jefferson Ins. Co.*, 280 A.2d 305 (D.C. Court of Appeals 1971) and *Cleland Simpson Co. v. Fireman Ins. Co. of Newark*, 392 Pa. 67, 140 A.2d 41 (1958).

87. 59 Wis. 2d 46, 207 N.W.2d 846 (1973).

but limited the eventual recovery to \$120,000.<sup>88</sup> On a second appeal, the supreme court reversed a ruling of the trial court that a forklift was a "motor vehicle" under the direct action statute, but held that Indemnity had waived any defense on these grounds by asserting a defense based on no policy coverage.<sup>89</sup> In the present case, the specific question of policy coverage was at issue. The trial court ruled that the policy issued by Indemnity did not extend coverage to forklifts.

The supreme court utilized general rules of insurance contract construction to affirm the decision of the trial court. The supreme court could not discover an ambiguity in the policy sufficient to justify a strict construction of the policy language against the insurer. Therefore, the court was confronted with the question of ascertaining the true intention of the parties as evidenced by the policy and any subsequent conduct of the parties in relation to such policy. Employers argued that references to "any automobile" in the insuring agreement<sup>90</sup> of Indemnity's policy could be construed to include forklifts under the policy. The court concluded:

Assuming a forklift is an automobile, we do not read the policy or find the intention of the parties to cover them in the automobile policy, nor can we accept Employer's argument that the insuring clause overrides other parts of the contract. The insuring clause is broad and must be read with all the terms of the policy.<sup>91</sup>

The court went on to rebut Employer's argument that the retrospective-rating feature of the policy was merely for the convenience of ratemaking and not a limitation of the risks covered.

It is impossible for us to see how the retrospective-rating feature includes other risks than those specified . . . . We cannot adopt a rule of construction that retrospective determination of premiums enlarges the hazards assumed.<sup>92</sup>

The decision of the court (hopefully the last for everyone involved in this case) is justified by the facts. Since an insurance contract, like any other contract, is composed of certain rights and duties assumed by the parties, any construction of that contract

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88. *D'Angelo v. Cornell Paperboard Products Co.*, 19 Wis. 2d 390, 120 N.W.2d 70 (1965).

89. *D'Angelo v. Cornell Paperboard Products Co.*, 33 Wis. 2d 218, 147 N.W.2d 321 (1966).

90. *D'Angelo v. Cornell Paperboard Products Co.*, 19 Wis. 2d at 394.

91. 56 Wis. 2d at 51.

92. *Id.* at 52-53.

should ascertain what those rights and duties are either clearly set forth in the contract or from the surrounding circumstances and subsequent conduct of the parties in relation to those rights and duties. If the parties wish to add or subtract from those enumerated provisions and conditions, the burden is upon them to do so upon entering the contract. After-the-fact imputation of liability to a party, whether or not an insurer, places such party in an unbar-gained for position. More specifically, an insurer should not be required to assume a risk which it did not undertake to assume by the unambiguous terms of the contract.<sup>93</sup>

*A. No Action Clause v. The Omnibus Statutory Provision (Section 204.30(5)(a)).*

A "no action clause" received unfavorable treatment in *Nixon v. Farmers Ins. Exchange*.<sup>94</sup> Plaintiffs, a husband and wife, initiated litigation to recover on the uninsured motorist protection provision of the husband's automobile liability policy issued by the defendant. The wife had been injured, as a pedestrian, through the careless operation of an automobile driven by Donald Francis who was uninsured. For over a year, the plaintiff's attorney had exchanged correspondence with the defendant pertaining to possible settlement of the claim. After no accord could be reached, the defendant notified the plaintiff's attorney that no payment would be made since the plaintiffs had failed to proceed within one year pursuant to a "no action clause"<sup>95</sup> contained in the uninsured motorist endorsement. The trial court held that the one year time limitation was binding and entered judgment for the defendant.

As to the effect of such a limitation clause, the supreme court accepted the decision of the trial court that such clause was a condition precedent to coverage. This being so, such a clause must be complied with before a duty of performance arises on the part of the insurer. But, as the court noted, the time limitation must not violate the mandate of the uninsured motorist statute.<sup>96</sup> Just such

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93. See, *Inter-Insurance Exchange v. Westchester Fire Ins. Co.*, 25 Wis. 2d 100, 130 N.W.2d 185 (1964).

94. 56 Wis. 2d 1, 201 N.W.2d 543 (1972).

95. The clause reads as follows:

. . . (3) No cause of action shall accrue to the insured unless within one year from the date of the accident (a) suit for bodily injury has been filed against the uninsured motorist, in a court of competent jurisdiction, or (b) agreement as to the amount due has been concluded, or (c) the insured has formally instituted arbitration proceedings. . . .

96. WIS. STATS. § 204.30(5)(a) (1971).

a violation occurred in this case. As the court stated:

We conclude that the first provision [of the clause] cuts the normal period of the three-year Statute of Limitations in which the injured person is entitled to recover damages and that . . . this provision is in violation of Sec. 204.30(5)(a) Stats., in that it does not provide for the protection of persons 'who are legally entitled to recover damages from owners or operators of uninsured motor vehicles'.<sup>97</sup>

The court, in conclusion, criticized the Wisconsin insurance department for approving such a clause especially in light of the fact that the restriction was a departure from the standard forms set up by the insurance industry.<sup>98</sup>

*Nixon* involved a form of "no action clause" attached to the statutorily required uninsured motorist endorsement. Ancillary to the issue of the validity of such a clause is the general question of what statute of limitations applies to the insured's rights against his insurer under the uninsured motorist endorsement. In *Sahloff v. Western Casualty Ins. Co.*,<sup>99</sup> the supreme court held that an action by an insured against his insurer is an action on the policy and therefore the contract statute of limitations applies. This would be true even though the right of the insurer to recover by subrogation to the insured's rights against the uninsured motorist had been barred by the three-year tort statute of limitations.

As was noted in the discussion of *Skrupky v. Hartford Fire Ins. Co.*,<sup>100</sup> *supra*, the "no action clause" is valid if the time limit imposed is reasonable and there is no statute which would prohibit its use. The Wisconsin Supreme Court found such a prohibition in the uninsured motorist statute. Since any attempt to restrict the uninsured motorist coverage has been viewed with suspicion by the supreme court,<sup>101</sup> *Nixon* represents a reaffirmance of this position. Insofar as the underlying purpose of the uninsured motorist endorsement is to expand insurance coverage, any such artificial time limitation should be treated with disfavor.<sup>102</sup>

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97. 56 Wis. 2d at 5.

98. *Id.* at 6.

99. 45 Wis. 2d 60, 171 N.W.2d 914 (1969). The court, in a well-reasoned opinion, sets forth the general theories that have been utilized to ascertain which statute of limitation should apply and enunciates policy arguments for and against adopting the contract or tort limitation period. *See also*, Annot., 28 A.L.R.3d 580 (1969).

100. 55 Wis. 2d 636, 201 N.W.2d 49 (1972). *See supra* notes 48 to 57.

101. *See generally*, *Symposium: The Uninsured Motorist Endorsement*, 53 MARQ. L. REV. 319 (1969).

102. Professor Widiss questions the validity of such a time limitation unilaterally im-

*B. Omnibus Statute (Section 204.30(3)).*

The width and breadth of the omnibus statute<sup>103</sup> has been a frequent source of litigation in Wisconsin. In *Smith v. National Indemnity Co.*,<sup>104</sup> the supreme court was again called upon to construe this important statute. The plaintiff, in this case, was a passenger in an automobile rented by one Frances Zeche from Doering Rent-a-Car, Inc. The vehicle was involved in a collision from which the plaintiff sustained serious injuries. National Indemnity had issued an automobile liability policy to Doering which, by endorsement, covered the automobile rental to Zeche in the amounts of \$10,000/\$20,000/\$5,000. By a separate endorsement, National Indemnity increased coverage on Doering and its agents to the extent of \$100,000/\$300,000/\$25,000. Doering had represented that renters would be covered by the amount of \$100,000/\$300,000 for any accident occurring while the automobile was in the possession of the renter. Hartford Accident and Indemnity Co. insured the driver of the rental automobile, Zeche. Hartford cross-complained asserting that National was required to provide \$100,000/\$300,000 and not \$10,000/\$20,000 under the omnibus coverage statute. National's motion for summary judgment was denied by the trial court.

The issues before the court were twofold; first, whether the omnibus coverage statute applied to this situation; and, second, if such statute did apply whether the limits of liability afforded the named insured must be extended to the renters of the automobile.<sup>105</sup>

In answering the first issue, the supreme court was confronted with a statutory amendment to section 204.30(3) which allowed certain restrictions on the dollar amount of coverage for specific types of business enumerated in the statute at the minimums set forth in the financial responsibility law.<sup>106</sup> This amendment permitted what the insurer in this case sought to do: limit the dollar amount of liability for statutorily additional insureds while increas-

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posed by an insurance company to restrict uninsured motorist coverage. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, (1969) § 2.26.

103. WIS. STATS. § 204.30(3) (1971).

104. 57 Wis. 2d 706, 205 N.W.2d 365 (1973).

105. *Id.* at 709.

106. WIS. STATS. § 204.30(3) was amended in 1969 as follows:

... but any such policy issued to any auto sales agency, repair shop, service station, storage garage or public parking place may provide that the coverage afforded to anyone other than the named assured, his agents or employees may be limited to the limits of s. 344.01(2)(d).

ing the dollar amount for the named insured under the policy. Since the policy had been issued prior to the effective date of the amendment, the court decided that the old statute would control and, as such, the rent-a-car business was not excluded from its requirements.

The insurer further argued that even if the old statute did apply, section 344.51<sup>107</sup> provided an exception to the general requirement under the omnibus statute to extend indemnity "in the same manner and under the same provisions as . . . is applicable to the named insured to any person or persons . . . while operating any automobile described in the policy."<sup>108</sup> Finding no conflict between the two statutes, the court held that section 204.30(3) controlled.

The brunt of the insurer's argument, though, was not so easily dismissed by the court. The insurer contended that the omnibus statute only required the "coverage" the policy afforded the named insured to be extended to others driving the named insured's automobile, but did not require an extension of the same dollar limits of liability that might have been afforded to the named insured. While admitting that such a restrictive definition of "coverage" could be implied, the court preferred to interpret "coverage" more broadly to include the dollar limits of liability. The court concluded from an investigation of the words used in the omnibus statute that:

[i]ndemnity, like insurance, is more than coverage; it includes coverage in a technical sense and the policy limits—that it is the protection afforded by the policy. Whatever rights the named insured has under the policy are extended by virtue of the omnibus clause. . . . [w]e find no intent that the word 'coverage' be used in a limited sense.<sup>109</sup>

Although the decision in *Smith*, as to the specific facts involved, has been rendered moot by statutory revision, the underlying philosophy of the supreme court is still viable as future precedent. As has been enunciated throughout Wisconsin case law, the underlying public purpose which precipitated the omnibus statute was to insure that third parties injured by an automobile driven by someone other than the named insured with his permission would

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107. This section requires that any person that rents a motor vehicle must have a bond or an insurance policy in the amount of the minimum limits required by the financial responsibility law.

108. WIS. STATS. § 204.30(3) (1967).

109. 57 Wis. 2d at 713.



be compensated for such injuries.<sup>110</sup> Since the purpose, then, of the omnibus statute is to increase coverage, the supreme court has held in the past that the statute is basically remedial in nature and must be liberally interpreted to serve this clear public purpose.<sup>111</sup> Following this line of reasoning, any intended limitation of the coverage afforded by the statute is void unless such a restriction falls under one of the exceptions expressly authorized by the statute. Thus, the coverage afforded the named insured must be the coverage afforded any additional insured dictated by the statute.<sup>112</sup> It seems, therefore, that the supreme court in *Smith* is merely reiterating the general philosophy embodied in the omnibus statute. But *Smith* does present a problem; a problem not so much with this philosophy or public purpose, but rather with the fact that the court would permit that philosophy to cloud its legal thought when confronted with facts which in no way impair that public purpose. In *Smith*, there was a fund available to the injured third party. Even though the fund was not as large as that available to the named insured, until now there has been no requirement that mandated equality in dollar amounts of coverage to all who by chance happen to be additional insureds under the dictates of section 204.30(3). What the court has done is to grant an injured third party a windfall merely because the named insured wished to protect himself beyond the minimums set by the financial responsibility law. If the statutorily additional insured had been uninsured and had been driving his own automobile, the injured party could only expect the limits of the financial responsibility law to compensate him for any such damages as he may have incurred from an accident. Since the omnibus statute prevents the insurer from selecting its risks and thereby controlling its losses, is there any possible rationale to force the insurer to indemnify anyone and everyone who might be fortunate enough to fall under the named insured's coverage to the dollar limits of liability it deems acceptable only on the named insured. The decision in *Smith* seems to establish a dangerous precedent by expanding section 204.30(3) beyond what the public purpose underlying the statute dictates.<sup>113</sup>

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110. *Pavelski v. Roginski*, 1 Wis. 2d 345, 84 N.W.2d 84 (1956).

111. *Derusha v. Iowa National Mut. Ins. Co.*, 49 Wis. 2d 220, 181 N.W.2d 481 (1970).

112. *Shanke v. State Farm Mut. Aut. Ins. Co.*, 246 Wis. 301, 16 N.W.2d 817 (1944).  
*Cf.*, *Amidzich v. Charter Oak Fire Ins. Co.*, 44 Wis. 2d 45, 170 N.W.2d 813 (1969) and  
*Frye v. Thege*, 253 Wis. 596, 34 N.W.2d 793 (1948).

113. The cases the court cites to in support of its contention are all distinguishable. Each case involved a specific attempt on the part of the insurer to *exclude* coverage from certain

*C. Direct Action—Direct Liability Statutes (Sections 204.30(4) and 260.11(1))*

Another case was added this Term to a long list of case attempting to construe and reconcile the direct liability statute<sup>114</sup> with the direct action statute.<sup>115</sup> In *Shipman v. Kenosha Unified School District No. 1*,<sup>116</sup> the plaintiff was injured when he caught his hand on a table saw at a woodworking class held at a school under the defendant's jurisdiction. Employers Insurance of Wausau, the defendant's insurer, issued a combination casualty insurance policy which contained a form of "no action clause".<sup>117</sup> The trial court granted Employers' motion for summary judgment on the basis of the "no action clause".

The issue before the supreme court arose due to the lack of foresight exercised by the legislature when expanding the direct action statute to include all policies of insurance indemnifying against negligence,<sup>118</sup> while leaving untouched the direct liability statute which applied only to insurance covering the negligent "management, control, maintenance, use or defective construction of a motor vehicle."<sup>119</sup> After the policy in this case had been issued, the legislature rectified its mistake<sup>120</sup> and the two statutes are now

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persons. In *Smith*, there was no attempt to exclude coverage, but merely to limit the liability of the insurer. See also, *Olander v. Klapprote*, 263 Wis. 463, 57 N.W.2d 734 (1953).

114. WIS. STATS. § 204.30(4) (1969).

115. WIS. STATS. § 260.11(1) (1969).

116. 57 Wis. 2d 697, 205 N.W.2d 399 (1973).

117. The specific "no action" clause in the policy stated:

5. Action Against Company. No action shall lie against the company unless, as a condition precedent hereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the company as a party to any action against the insured to determine the insured's liability, nor shall the company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

*Id.* at 700.

118. Prior to 1969, the direct-action statute applied only to policies of insurance indemnifying against damages "caused by the negligent operation, management, control, maintenance, use or defective construction of a motor vehicle". [WIS. STATS. § 260.11(1) (1967)].

119. WIS. STATS. § 204.30(4) (1969).

120. WIS. LAWS CH. 26 (1971).

essentially similar.<sup>121</sup> This was of no solace to the plaintiff, though, since the supreme court decided not to apply the statutory revision retroactively. The court supported its reasoning by going into a lengthy analysis of the history behind the two statutes concluding that although the two statutes had similar purposes, they were based on distinct premises. Section 204.30(4) provided a means of imposing substantive liability on an insurer without first determining the potential liability of its insured while section 260.11(1) was a procedural device which allowed a plaintiff to proceed against an insurer directly.<sup>122</sup> The court held that despite the broad provisions of section 260.11(1) an insured could not be held directly liable under section 204.30(4) unless the cause of action arose from the negligent "operation, management, control, maintenance, use or defective construction of a motor vehicle."<sup>123</sup>

As the court noted in *Shipman*, sections 204.30(4) and 260.11(1), although technically different, were intended to be "two horses in the team pulling equally."<sup>124</sup> The legal controversies caused by these two statutes stem from the fact that "one horse" is amended or revised by the legislature before the other, leaving the "team" in a rather precarious position. To analyze the long line of cases<sup>125</sup> distinguishing (possibly without a difference) the two statutes would be inappropriate since it seems that the legislature eventually proceeds to revise that "horse" which is not in "line" evidencing, at least to this writer, that the two statutes are to be construed together. If *Shipman* stands for anything, it is that the supreme court or the legislature (depending on your perspective) has not gotten the hint.

#### D. "Drive the Other Car" Clause vs. Section 343.15(2), License Sponsorship Liability Statute

In *Lempert v. Smith*,<sup>126</sup> the applicability of extending insurance liability coverage to a parent as a statutory driver's license sponsor<sup>127</sup> was before the supreme court. It seems that the plaintiff had been a passenger in an automobile owned and driven by the defen-

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121. See, WIS. STATS. § 204.30(4) (1971) and § 260.11(1) (1971).

122. 57 Wis. 2d at 704.

123. *Id.*

124. *Id.*

125. See e.g., *Hasselstrom v. Rex Chainbelt, Inc.*, 50 Wis. 2d 487, 184 N.W.2d 902 (1970); *Frye v. Angst*, 28 Wis. 2d 575, 137 N.W.2d 430 (1965).

126. 56 Wis. 2d 632, 203 N.W.2d 29 (1972).

127. WIS. STATS. § 343.15(2) (1971).

dant, Gregory Smith, who was seventeen year old son of Robert Smith and a resident of his household. The vehicle owned by Gregory was involved in an accident causing injury to the plaintiff. American Standard Insurance Co. had issued an automobile liability policy to Gregory insuring the vehicle involved in the accident.

At the time of the accident, Robert Smith was Gregory's license sponsor. Robert Smith had obtained a separate policy of insurance on his own automobile from American Family Mutual Insurance Co. Gregory's automobile was not named or described in the father's policy. American Family, having been joined as a defendant, moved for summary judgment contending that irrespective of the imputed liability of its insured under section 343.15(2), the policy covered only the father's automobile and not any other automobile owned by the named insured or any relative of the named insured in the same household not described in the policy declarations.<sup>128</sup> The trial court granted the motion for summary judgment.

The supreme court first eliminated the son's vehicle from coverage under the father's "drive the other car"<sup>129</sup> clause contained in his policy. Since the son's vehicle was not a vehicle owned by the named insured nor a non-owned vehicle under the definition contained in the policy<sup>130</sup> the vehicle was by the language in the

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128. The clause in question was a condition in the American Family Policy. It is set forth as follows:

4. Two or More Automobiles

Except with respect to a temporary substitute automobile or to bodily injury under Part II resulting from the named insured or any relative thereof being struck by an automobile, and except as provided in Condition 2, this policy does not apply to any automobile owned by the named insured or any relative, or, with respect to Part III, a trailer, not described in the declarations of this policy.

<sup>56</sup> Wis. 2d at 636.

129. Part I Liability  
Coverages A & B

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages . . .

arising out of the ownership, maintenance or use of the owned auto or any non-owned auto.

130. Definition Under Part I

owned automobile means a private passenger or utility auto . . . owned by the named insured and includes a temporary substitute auto.

policy itself excluded from coverage. The court explained that the purpose of the policy provisions which exclude liability arising out of the use of another automobile owned by a member of an insured's household was to avoid coverage on several vehicles owned by members of the same family who might use such vehicle interchangeably with the vehicle specifically described in the policy. The court noted:

Without this limitation, a person could purchase just one policy on only one automobile and thereby secure coverage for all the other vehicles he may own or vehicles the members of his family own while residents of the same household.<sup>131</sup>

The court also dismissed the appellant's contention that section 343.15(2), superimposed on the omnibus coverage provision of the policy, rendered the insurer liable.<sup>132</sup> The court considered the policy as a whole and reasoned that the reference to ". . . automobile not owned . . ." in the omnibus coverage provision must be construed with the general definition of "non-owned automobile" found in the policy. Again, this definition would exclude the son's automobile from coverage.

The court therefore concluded that section 343.15(2) should not alter the exclusionary effect of the "drive the other car" clause in a liability policy.<sup>133</sup>

The decision in *Lempert* seems to be in accord with the general rule in Wisconsin and in the other jurisdictions that have decided the effect of the sponsorship statute on certain provisions in the automobile liability policy.<sup>134</sup>

DENNIS J. FITZPATRICK

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non-owned auto means an auto . . . not owned by a named insured or any resident of the same household.

131. The court further stated:

If the father had sought to protect himself for any additional liability he could sustain under the sponsorship statute, he . . . could have purchased an insurance policy to cover it. The obligation of the insurer . . . is spelled out and [it] should be controlled by the terms of the . . . policy it issued.

56 Wis. 2d at 638.

132. Person Insured

The following are insured under Part I

. . . .

(c) Any other person or organization legally responsible for the use of:

(1) An automobile . . . not owned . . . by such person.

133. 56 Wis. 2d at 641.

134. See, *Klatt v. Zera*, 11 Wis. 2d 415, 105 N.W.2d 776 (1960); *Martinez v. Allstate Ins. Co.*, 261 Cal. App. 2d 754, 68 Cal. Rptr. (1968).