Nova Law Review

Volume 6, *Issue* 2 1982 *Article* 3

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Abstract

The Florida Automobile Reparations Reform Act has been in place for ten years.1 Although the statement of purpose in the Act itself is terse,2 the Florida Supreme Court, reviewing the constitutionality of the Act, gave an enumeration of "permissible legislative objectives."

KEYWORDS: insurance, no-fault, florida

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Introduction

The Florida Automobile Reparations Reform Act has been in place for ten years.[1] Although the statement of purpose in the Act itself is terse,[2] the Florida Supreme Court, reviewing the constitutionality of the Act, gave an enumeration of "permissible legislative objectives."[3] Most important among these was the intent to reduce fault-based automobile accident litigation and to facilitate the timely compensation of auto accident victims for out-of-pocket losses.[4] In the main, the Act has

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1. Fla. Stat. § § 627.730-.741 (1971), effective January 1, 1972, to be repealed July 1, 1982.

2. FLA. STAT. § 627.731 (1979) provides:

> The purpose of § § 627.730-627.741 is to require medical, surgical, funeral and disability insurance benefits to be provided without regard to fault under motor vehicle policies that provide bodily injury and property damage liability insurance, or other security, for motor vehicles registered in this state and, with respect to motor vehicle accidents, a limitation on the right to claim damages for pain, suffering, mental anguish and inconvenience.

3. Lasky v. State Farm Ins. Co., 296 So. 2d 9, 16 (Fla. 1974); Chapman v. Dillon, 1982 Fla. Law Weekly 133 (Fla. 1982).

4. 296 So. 2d at 16. A study by the United States Department of Transportation, completed in 1970, disclosed that auto accidents contributed more than 200,000 cases a year to the nation's court load, and consumed 17% of the country's judicial resources. [Reported in Hearings Before the U.S. Senate Commerce Comm., 91st Cong., 2d Sess. 7 (1970)]. (Hereinafter cited as Commerce Comm. Report.)

A study of 1,000 bodily injury claims conducted by the Department of Insurance for the State of New York disclosed that one out of four people injured in auto accidents recovered nothing under the fault-based compensation system. STATE OF NEW

met these objectives.[5]

Amendments of the Act in the intervening years have significantly reduced no-fault benefits.[6] The question whether the reduced benefits

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YORK INSURANCE DEPARTMENT, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT?, A Report to Governor Nelson A. Rockefeller, 1970, at 18. (Hereinafter cited as Rockefeller Report). "[V]ictims . . . face[d] average delays in collecting under auto liability insurance that [were] ten times as long as delays in collecting under collision, homeowners, or burglary insurance and forty times as long as delays under accident and health insurance." *Id.* at 19. On the average it took 15.8 months to settle liability claims, and at the end of three years, 12% of claims remained unpaid. *Id.* at n.26.

Other objectives of the Act enumerated by the *Lasky* court included the reduction of automobile insurance premiums and inefficiency in the liability insurance industry; reduction in public relief rolls; remedy of the inequities in the traditional tort compensation system, whereby minor claims were overcompensated and major claims were undercompensated relative to their true economic value; and remedy of the pressure brought to bear upon an injured party to "accept an unduly small settlement of his claims [to meet] the pressing necessity of paying medical bills. . . . " 296 So. 2d at 16.

That these were worthy objectives is well documented. Under the traditional tort system, victims whose economic losses were more than $25,000 only recovered about a third of their losses, while those with losses of less than $500 recovered an average of four and a half times their economic loss. Commerce Comm. Report at 4-5. Of each dollar paid into the system for liability protection, only forty cents went to compensate accident victims. Commerce Comm. Report at 21. From 1960 to July 1970, the cost of auto insurance went up sixty-five percent while the take-home pay for nonsupervisory and factory workers during the same period went up only forty percent. *Id.* at 23.

5. *See* J. Little, *No-Fault Auto Reparation in Florida: An Empirical Examination of Some of Its Effects,* 9 U. MICH. J. LAW REFORM 1 (1975). Professor Little reported a significant reduction in the time elapsing between accidents and the first receipt of no-fault benefits, and a settling of claims in amounts much closer to verified medical losses than under the common law system. *Id.* at 4. "[C]overage for personal injury benefits was expanded and the cost of processing claims was reduced." *Id.* at 5. "[T]he Florida [no-fault] system can reduce the frequency of personal injury litigation measurably." *Id.* at 3.

6. The 1971 Act provided 100% of medical expenses and 85-100% of lost income, less deductibles. FLA. STAT. § 627.736(1)(1971). It required $5000 of PIP insurance with a maximum deductible of $1000. FLA. STAT. § 627.739 (1971). Changes in 1976 eliminated the $1000 threshold leaving a threshold based on type of injury. (If one did not meet the severity-of-injury threshold, one could not sue at common law, but had to rely exclusively upon no-fault benefits). FLA. STAT. § 627.737(2) (1979). The 1977 changes included the elimination of compulsory liability insurance; reduction in no-fault medical benefits from 100% to 80%, and reduction in income replacement from 80% to 60% of the lost income. FLA. STAT. § 627.736(1) (1979). An injured party may recover the balance in a common law tort action. *See* FLA. STAT. § 627.737(1) (1979).

provide an adequate alternative to rights taken away by the original legislation (principally, the right to recover for pain and suffering) has recently been addressed by the Florida Supreme Court.[7] This article does not review the constitutionality of the Act, as it is probable that no-fault, in one form or another, is here to stay.[8] Rather, I examine a number of specific cases and issues decided under the Act, highlighting the patterns and irregularities found in courts' interpretations of the Act and suggesting instances where the irregularities warrant attention.

This article covers three broad areas: (1) the availability of no-fault benefits to those injured in or by a vehicle which was not a statutorily defined "motor vehicle"; (2) the availability of no-fault benefits to those injured in an insured vehicle, who own, or live with one who owns, an uninsured vehicle, and the availability of benefits to those injured in uninsured vehicles; and (3) the availability of benefits to those who constructively "own" an uninsured vehicle.

Vehicles Not Statutorily Defined as "Motor Vehicles"

The availability of personal injury protection (PIP) benefits[9] to

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The 1978 changes increased no-fault benefits to $10,000 (from $5000), expressly applied the Act to commercial vehicles, tightened the tort threshold to further limit common law suits, and increased the maximum allowable deductible to $8000. FLA. STAT. § 627.739(1) (1979).

7. The Florida Supreme Court recently declared the Act constitutional. Although the no-fault benefits have been reduced from 100% of medical expense to 80%, from 80% of lost wages to 60%, and the permissible deductible has been increased to $8,000, the court found the provisions of section 627.737 still provide a reasonable alternative to the traditional tort action and thus do not violate the right of access to courts. Chapman v. Dillon, 1982 Fla. Law Weekly 133 (Fla. 1982).

8. *See* P. Atiyah, *No Fault Compensation: A Question That Will Not Go Away,* 54 TULANE L. REV. 271 (1980).

The frequency of accidents alone would suggest the permanency of no-fault repartions. Everyone has accidents. Statistics compiled by the Department of Insurance for the State of New York showed that after twenty years of driving, 99% of drivers had at least one accident, and an average driver has a 50% chance of an accident every three years. Rockefeller Report at 3. This is not surprising; for each mile driven, a driver must make 200 observations and 20 decisions, and the average driver makes an error in judgment every two miles. Commerce Comm. Report at 23.

9. FLA. STAT. § 627.736(4)(d) (1979) provides:

(4) BENEFITS; WHEN DUE (d) The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for: 1. Accidental bod-

those injured in or by a vehicle which was not a statutorily defined "motor vehicle"[10] may be derived from five important decisions:[11] *Negron v. Travelers Insurance Co.*,[12] *Camacho v. Allstate Insurance Co.*,[13] *Heredia v. Allstate Insurance Co.* (both the district court and supreme court decisions),[14] and *Lumbermens Mutual Casualty Co. v. Castanga*[15] a supreme court case which is out of step with all that had gone before. The disharmony between the Supreme Court's opinion in *Heredia* and its opinion in *Lumbermens* emerges from an analysis which must begin with *Negron.*

Negron, an employee of the United States Post Office, was injured when the government's tractor-trailer, which he was driving in the scope of his employment, was struck by a private passenger automobile. The court allowed Negron to recover PIP benefits from the insurer of his personal automobile (which was not involved in the accident), reasoning that (1) Negron was not an occupant of a "motor vehicle" as that term is defined in the Act;[16] (2) Negron's injury was "caused by physical contact with a motor vehicle";[17] therefore (3) Negron was en-

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ily injury sustained in this state by the owner while occupying a motor vehicle, or while not an occupant of a motor vehicle . . . if the injury is caused by physical contact with a motor vehicle.

10. FLA. STAT. § 627.732(1) (1977):

"Motor vehicle" means a sedan, stationwagon, or jeep-type vehicle not used as a public livery conveyance for passengers and includes any other four-wheel motor vehicle used as a utility automobile and a pickup or panel truck which is not used primarily in the occupation, profession, or business of the insured.

This definition was changed. Ch. 78-374 § 2, 1978 Fla. Laws 1042. *See* note 58 *infra.*

11. *See also* Cavalier Ins. Corp. v. Myles, 347 So. 2d 1060 (Fla. 1st Dist. Ct. App. 1977) in which Cavalier attempted to deny PIP benefits because the car that struck its insured was registered in another state. The court held that a vehicle registered in another state is a "motor vehicle" nonetheless, and awarded PIP benefits. *Id.* at 1062.

12. 282 So. 2d 28 (Fla. 3d Dist. Ct. App. 1973).

13. 310 So. 2d 330 (Fla. 3d Dist. Ct. App. 1975).

14. 346 So. 2d 1230 (Fla. 3d Dist. Ct. App. 1977) and 358 So. 2d 1353 (Fla. 1978).

15. 368 So. 2d 348 (Fla. 1979).

16. 282 So. 2d at 29.

17. *Id.* at 30.

titled to recover.[18]

The court supported its conclusion that Negron was not an occupant of a "motor vehicle" by considering the statutory definition of the term and an administrative interpretation of the statute by the Department of Insurance.[19] The court rejected the Department's administrative interpretation, which reasoned that because Negron was the occupant of a vehicle not statutorily defined as a "motor vehicle," the coverage of the Act did not apply to him.[20]

The court opined: "[W]e take the words '. . . if the injury is caused by physical contact with a motor vehicle' to mean if the injury results from *a collision with* a motor vehicle."[21] The court did not require that Negron himself come into actual physical contact with a motor vehicle because it felt such a construction would be "technical," and out of keeping with the ordinary meaning of the language of the Act.[22] By so holding, the court declined to limit the benefits of Section 627.736(4)(d)4 to pedestrians—a limitation the legislature may have intended, because the Act was later amended to make benefits available to one injured "while not an occupant of a self-propelled vehicle" rather than "while not an occupant of a motor vehicle."[23]

In *Camacho,*[24] the plaintiff was injured when the truck he owned and was driving collided with another truck. Like Negron, he applied

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18. *Id.*
19. *Id.* at 29.
20. *Id.* at 30.
21. *Id.* (emphasis added).
22. *Id.* For other cases in which PIP benefits were awarded to passengers injured in a vehicle which was not a statutorily defined "motor vehicle", *see* Gateway Ins. Co. v. Butler, 293 So. 2d 738 (Fla. 3d Dist. Ct. App. 1974)(passenger in a "public conveyance" injured when it was struck by an automobile); and State Farm Mut. Auto Ins. Co. v. Butler, 340 So. 2d 1185 (Fla. 4th Dist. Ct. App. 1976)(passenger in a "utility vehicle used in transporting passengers for hire" injured when it hit an automobile). In both cases, PIP benefits were paid by the insurers of the automobiles involved because the passengers in the commercial vehicles did not own a car. Thus they had no insurance from which they could collect on a first-party basis. *See also* Greyhound Rent-A-Car, Inc. v. Carbon, 327 So. 2d 792 (Fla. 3d Dist. Ct. App. 1976) in which the court held that a rental car *is* a "motor vehicle," thus allowing those injured in it to recover PIP benefits.
23. *See* State Farm Mut. Auto. Ins. Co. v. Butler, 340 So. 2d 1185, 1186 (Fla. 4th Dist. Ct. App. 1976); Ch. 77-468 § 33, 1977 Fla. Laws 2076.
24. 310 So. 2d 330 (Fla. 3d Dist. Ct. App. 1975).

for PIP benefits from the insurer of his personal auto. Unlike *Negron,* the trial and appellate courts denied coverage.[25]

The appellate court supported its decision by emphasizing that "the plaintiff [was] operating a truck used primarily in his business [and] was involved in an accident with another truck which counsel stipulated was a 'commercial vehicle.' "[26] "Due to the stipulation of counsel . . . it is undisputed that the plaintiff was involved with a vehicle which is not a motor vehicle as defined in the Florida Automobile Reparations (No-Fault) Act."[27]

Why the court attached so much significance to counsel's stipulation is unclear. Counsel merely stipulated a commercial vehicle was involved; this is not tantamount to a conclusion of law that the commercial vehicle was not a motor vehicle as defined in the Act.[28] The Act's definition of "motor vehicle" includes "a pickup or panel truck. . . ."[29] What the definition does not include is "a pickup or panel truck which is . . . used primarily in the occupation, profession, or business *of the insured.*"[30]

Camacho, like Negron, sustained injury "while *not* an occupant of a motor vehicle" (because he was occupying a "truck used primarily in the occupation, profession, or business *of the insured*"). And because Camacho's injury was caused by physical contact[31] with a truck used primarily in the occupation, profession, or business *of the owner,* not *of the insured,* it would appear to be caused by physical contact with a "motor vehicle." Like Negron, Camacho should have recovered under the benefits section of the Act which provides:

> The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for: 1. Accidental bodily injury sustained in this state by the owner while occupying a motor vehicle, or *while not an occupant of a motor vehicle* if the injury is caused by physi-

25. *Id.* at 332.
26. *Id.* at 331.
27. *Id.*
28. For the definition of "motor vehicle", *see* note 10 *supra.*
29. 310 So. 2d at 331.
30. *Id.*
31. *See* the discussion of "physical contact" in text accompanying notes 21-23 *supra.*

cal contact with a motor vehicle.[32]

This reasoning may seem strained, but in the concurring opinion in *Heredia v. Allstate Insurance Co.*,[33] Judge Carroll suggested such an analysis to the Florida Supreme Court;[34] the court apparently adopted it.[35]

In *Heredia,* the Third District Court of Appeal held that an injured pedestrian, hit by a panel truck used primarily in the business of its corporate owner, could not recover PIP benefits from his family's auto insurer.[36] The concurring judge reluctantly followed precedent he had approved in earlier cases,[37] but admitted the earlier cases might have been wrong, because the statutory definition of motor vehicle excluded only vehicles "used primarily in the occupation, profession, or business *of the insured.*"[38] Since the pedestrian was not injured by a motor vehicle used in his own business (the business of the insured pedestrian), he should recover his statutory first-party insurance benefits.[39] The concurring judge believed the majority members were reading the statute as if it exempted vehicles "used primarily in the occupation, profession, or business of the *owner,*"[40] an inappropriate

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32. FLA. STAT. § 627.736(4)(d) (1971) (emphasis added). This provision was amended in 1977. *See* note 58 *infra.*

33. 346 So. 2d 1230 (Fla. 3d Dist. Ct. App. 1977).

34. *Id.*. at 1231-32. Judge Carroll called into question the wisdom of the *Camacho* decision:

> [H]aving been a member of the panels of this court which decided *Camacho* . . . although I now see some justification for appellant's argument that the language of the statute does not support the result reached . . . , I concur in this court's judgment of affirmance based on the authority of *Camacho* . . . , with the decision in this case being certified as one of public interest, whereby the Supreme Court of Florida will have jurisdiction to review the decision, on certiorari.

Id. at 1232.

35. 358 So. 2d 1353, 1355 (Fla. 1978).

36. The Act provides PIP benefits for statutorily defined relatives living in the same household with the insured. FLA. STAT. § 627.736(4)(d) 3 (1979).

37. Camacho v. Allstate Ins. Co., 310 So. 2d 330 (Fla. 3d Dist. Ct. App. 1975) and Saborit v. Deliford, 312 So. 2d 795 (Fla. 3d Dist. Ct. App. 1975).

38. 346 So. 2d at 1251 (emphasis in original).

39. *Id.* at 1232.

40. *Id.* at 1231 (emphasis in original).

judicial revision where the legislation is clear.[41]

The Florida Supreme Court agreed with the reasoning of Judge Carroll's concurring opinion. It read the statute literally, reversed the district court, and awarded Heredia his PIP benefits.[42] The court noted that the legislature expressly exempted vehicles used in the business of the *insured*.[43] If the legislature had intended to exempt vehicles used in the business of the owner it would have said so.[44] Thus the pedestrian *was* injured by a motor vehicle and could recover under the Act.

The opinion reversing *Heredia* did not mention the *Camacho* decision, even though the majority in the district court had relied upon it. But impliedly, the *Camacho* decision was wrong, for it held that the Act did not apply to commercial vehicles.[45] At a minimum, the supreme court opinion in *Heredia* holds that the Act applies to a pedestrian hit by a commercial vehicle.

Putting *Heredia* and *Negron* together, one might expect the occupant of a commercial vehicle (Negron) hit by a commercial vehicle (Heredia) to recover. Not so.

In *Lumbermens Mutual Casualty Co. v. Castagna,*[46] Castagna was injured when his van, which he used primarily in his business, was struck by a lunch truck. The lunch truck had collided moments before with a Chevrolet automobile. Castagna sought PIP benefits from his own insurer,[47] Lumbermens, who denied coverage, claiming the in-

41. *Id.* at 1232.

42. 358 So. 2d at 1355.

43. *Id.*

44. The court notes that "[t]he Legislature . . . also employed the term 'owner' throughout the same statute, in a variety of contexts. In the face of this selectivity, courts generally are not free to replace one term with the other . . . ." *Id.*

45. Another case in which PIP benefits were awarded to a pedestrian hit by a commercial vehicle is Century Ins. Co. of N.Y. v. Fillmore, 306 So. 2d 548 (Fla. 3d Dist. Ct. App. 1974), which was expressly overruled by *Camacho. Camacho*, 310 So. 2d at 332. Because the supreme court decision in *Heredia* agrees with *Century* on the same facts, and because *Century* was expressly overruled by *Camacho,* impliedly *Camacho* was incorrectly decided. On the other hand, it may be possible to distinguish *Camacho* because, while *Century* and *Heredia* involved a pedestrian and a commercial vehicle, *Camacho* involved two commercial vehicles.

46. 368 So. 2d 348 (Fla. 1979).

47. *Id.* at 349.

sured's injuries were not incurred "while occupying a motor vehicle"[48] and were not "caused by physical contact with a motor vehicle."[49]

Instead of deciding whether Castagna had been injured by physical contact with a "motor vehicle," the *lunch truck,* (a question the supreme court in *Heredia* would have answered in the affirmative because the lunch truck was not owned by the *insured*), the court discussed whether the injury was "caused by physical contact" with the Chevrolet.[50] Having focused on the wrong issue, the court concluded that the physical contact with the Chevrolet was too remote to meet the traditional proximate cause requirements of tort law, which of course is true, but irrelevant.[51] The court stated, without analysis, that "[t]he Chevrolet is a 'motor vehicle' within the statutory definition. The van and lunch truck are not."[52]

The conclusion that the lunch truck is not a "motor vehicle" di-

48. *Id.*

49. *Id.*

50. *Id.* at 350.

51. A discussion of proximate cause is not totally out of place in the context of the No-Fault Act. For example, *see* Royal Indemnity Co. v. Government Employees Ins. Co., 307 So. 2d 458 (Fla. 3d Dist. Ct. App. 1975) in which a woman sitting on a park bench was injured when a moving vehicle struck a parked vehicle and the parked vehicle struck her. The insurer of the parked vehicle paid her PIP benefits and sought reimbursement from the insurer of the moving vehicle. The insurer of the moving vehicle argued that the plain language of the statute required that benefits be paid only when injury is "caused by physical contact with" a motor vehicle (FLA. STAT. § 627.736(4)(d) 4 (1971)), and no contact occurred between the moving vehicle and the park bench-sitter. The Third District Court of Appeal held that the insurer of the moving vehicle should pay, reasoning that the No-Fault Act did not replace common law concepts of causation, "particularly proximate causation." *Id.* at 460. The court said the parked car was "in reality an extension of the [moving] car," and therefore the proximate cause of the injury. *Id. See also* Padron v. Long Island Ins. Co. 356 So. 2d 1337 (Fla. 3d Dist. Ct. App. 1978), and Auto-Owners Ins. Co. v. Pridgen, 339 So. 2d 1164 (Fla. 2d Dist. Ct. App. 1976).

But cf. Feltner v. Harford Accident & Indemnity Co., 336 So. 2d 142 (Fla. 2d Dist. Ct. App. 1976) in which the Second District Court of Appeal held that injury sustained by a man, who after driving a young woman home was struck across the face with a piece of pipe by her irate father, who thought the man was a seducer, was not injury "arising out of the ownership, maintenance or use" of the car. The court did not find a sufficient "causal connection between the use of the automobile and the attack." *Id.* at 143.

52. 368 So. 2d at 349.

rectly contravened the holding in *Heredia.*[53] In a footnote in *Lumbermens,* the court acknowledged that *Heredia* construed the word "insured" in the definition of "motor vehicle."[54] But this acknowledgment failed to distinguish *Heredia,* for in *Heredia* the court only construed the word "insured" to reach the conclusion that the statutory term "motor vehicle" included a commercial truck.[55] Castagna's injury, like Heredia's, was caused by physical contact with a motor vehicle (a commercial truck). The statutory definition of "motor vehicle" was satisfied because the truck that struck Castagna was not used in the business of the insured, Castagna, but rather in the business of its owner.

Assuming *Heredia* had precedential effect, the only issue in *Lumbermens* should have been whether Castagna was the occupant of a "motor vehicle." *Negron* established that he was not. *Negron* permitted the occupant of a conveyance which was not within the statutory definition of "motor vehicle" (a post office tractor-trailer) to recover when hit by a "motor vehicle."[56]

In view of *Negron* and *Heredia,* the Florida Supreme Court should have either held for Castagna, or approved the holding in *Camacho*: the Act does not apply when *two* commercial vehicles collide.[57] Instead, the Court discussed proximate cause, leaving the important issue unclarified.[58]

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53. Recall that *Heredia* concluded that the pedestrian hit by a commercial vehicle had been hit by a "motor vehicle" because the vehicle was not used primarily in the business of the *insured,* but rather used primarily in the business of the *owner.*

54. 368 So. 2d at 349 n.3. This footnote is the only acknowledgment the *Lumbermens* court makes in the *Heredia* decision. It states in part that "[t]he word 'insured' has been held to refer only to insureds who are injured by physical contact within commercial vehicles, and not to owners of commercial vehicles. . . ." *Id.*

55. *See* discussion of *Heredia* in text *supra.*

56. *See* discussion of *Negron* in text *supra.*

57. The appellant contended that the case fell under the no-recovery rule of *Camacho* because the collision involved only commercial vehicles. 368 So. 2d at 350. The opinion ignores this contention.

58. At the time of the decision, the legislature had amended the definition of "motor vehicle" to expressly include commercial vehicles. *See* Ch. 78-374 § 2, 1978 Fla. Laws 1042. The court acknowledged the change in a footnote without any discussion of how the change should affect Castagna. 368 So. 2d at 349 n.3. Although the court expressly stated it was construing FLA. STAT. § 627.736(4)(d) (1975), arguably, the 1978 amendment was merely a clarification of prior law. *See* Williams v. Hartford Accident and Indemnity Co., 382 So. 2d 1216 (Fla. 1980), where the court held that a

Uninsured Vehicles

The uninsured vehicle cases can be divided into four categories: 1) those determining the benefits due to children hurt in insured vehicles, while living with parents who failed to insure the family car, 2) those determining the benefits due persons injured while either driving, riding in, or "occupying" uninsured cars, 3) those determining the benefits due persons injured in an insured car who owned an uninsured car, and 4) those determining the benefits due persons who constructively "owned" an uninsured car. Basic to these cases is the statutory requirement that one cannot recover PIP benefits from a stranger if one owns an uninsured vehicle or is statutorily entitled to insurance benefits from a relative domiciled with him.[59]

Cases in the first category stand for the proposition that children injured while riding in others' insured vehicles can recover PIP benefits in spite of their parents' failure to insure the family car. For example, in *Farley v. Gateway Insurance Co.*,[60] a child, riding in a car insured by Gateway, was allowed to recover from Gateway, despite the fact that he lived with his stepfather, who owned an uninsured car. Gateway argued that Farley's stepfather, by failing to insure, had become a self-insurer under the Act.[61] The court rejected Gateway's construction

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1973 modification of section 627.727 of the Florida Statutes (dealing with uninsured motorist coverage) was formal only, and "was intended by the legislature to clarify and secure from doubt" pre-existing law. 382 So. 2d at 1220. In so doing, the court "disapproved" five cases inconsistent with the opinion. *Id.*

At the time of the *Lumbermens* decision, the legislature had also amended FLA. STAT. § 627.736(4)(d)(1) to provide benefits for injury sustained "while occupying a motor vehicle" or "while not an occupant of a self-propelled vehicle." *See* ch. 77-468 § 33, 1977 Fla. Laws 2076. Although Castagna would not have fit into the category "while not an occupant of a self-propelled vehicle" under the amended law, he would have fit into the category "while occupying a motor vehicle" under the amended law, since the definition of motor vehicle had been expanded to include commercial vehicles.

59. FLA. STAT. § 627.736(4)(d)(4) (1979).

60. 302 So. 2d 177 (Fla. 2d Dist. Ct. App. 1974).

61. FLA. STAT. § 627.733(4) (1979) provides:

> An owner of a motor vehicle with respect to which security is required . . . who fails to have such security in effect at the time of an accident shall have no immunity from tort liability, but shall be personally liable for the payment of benefits under § 627.736. With respect to such benefits, such an owner shall have all of the rights and obligations of an *insurer* under §

of the statute, reasoning that the "Act was intended to *broaden* insurance coverage."[62] The construction urged by Gateway would have reduced coverage.[63] The court also rejected Gateway's argument that the Act required Farley to look to his stepfather as an insurer,[64] reasoning that the questioned provision of the Act was intended to prevent an injured party from collecting insurance benefits twice: once from the insurer of the car in which he was hurt, and once from the insurer of his family car.[65] The court pointed out that there would be no double recovery for Farley. The court concluded that the legislature did not intend

> to acquiesce in the consequence of calamity to a relative [of one who ought to have insured] when such relative is injured in or by a stranger's automobile and can recover [from] the stranger's insurer if the stepfather didn't even own an automobile. Farley should not in effect be penalized just because his stepfather bought an automobile; and the obvious practicalities in these cases preclude a response that he, Farley, can always go against his stepfather if the latter fails to procure insurance therefor.[66]

Finally, the court observed that "insurer" is defined in the statute as one in the business of selling insurance.[67] Farley's stepfather was not in

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§ 627.730-627.741
(emphasis added).

62. 302 So. 2d at 179 (emphasis in original).

63. *Id.*

64. Gateway argued FLA. STAT. § 627.736(4)(d)4b (1973):

> (d) The insurer of the owner of a motor vehicle shall pay . . . for
> 4. . . . injury sustained . . . by any person . . . while occupying the owner's motor vehicle . . . provided the injured person is not himself:
> a. The owner of a motor vehicle with respect to which security is required . . . or
> b. Entitled to . . . benefits from the insurer of the owner of such a motor vehicle.

65. 302 So. 2d at 179.

66. *Id.*

67. *Id.* FLA. STAT. § 624.03 (1973). In State Farm Mut. v. Pierce, 383 So. 2d 1184 (Fla. 5th Dist. Ct. App. 1980), the court cited *Farley* when it refused to make the husband, the owner of an uninsured vehicle, a co-defendant with the insurance company sued for PIP benefits by his wife. The husband was not an insurer and could not be made to share in payment of benefits.

that business.

Commercial Union Insurance Co. v. Williams[68] is similar to *Farley*. Williams was injured while a passenger in an insured motor vehicle, and while residing in the household of a relative (her mother) who owned an uninsured motor vehicle. The First District, like the *Farley* court, allowed Williams to recover PIP benefits from the insurer of the vehicle in which she was a passenger. Commercial Union's argument that Williams' mother, by failing to insure her motor vehicle, had become a self-insurer[69] was rejected by the court, as it had been in *Farley*. Instead, the court concluded that Williams had the *option* of suing *either* her mother, or, "if she prefers," Commercial Union.[70]

In contrast, cases in the second category stand for the proposition that persons injured while either driving, riding in or "occupying" uninsured cars cannot recover PIP benefits. For example, in *State Farm Automobile Insurance Co. v. Kraver*,[71] Carolyn Kraver was driving an uninsured Cadillac, registered and titled in her father's name,[72] when she collided with an automobile insured by State Farm. Carolyn argued that she should recover PIP benefits from State Farm under the *Farley* decision. The court disagreed, reasoning that the plain language of the benefits section of the Act controlled.[73]

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68. 309 So. 2d 617 (Fla. 1st Dist. Ct. App. 1975).

69. *Id.* at 618.

70. *Id.* at 619. *See also* Gateway Ins. Co. v. Butler, 293 So. 2d 738 (Fla. 3d Dist. Ct. App. 1974) in which a child injured in a conveyance struck by a vehicle insured by Gateway was allowed to recover PIP benefits from Gateway, despite the fact that his father, in whose household he resided, owned an uninsured car.

The same result occurs when the child living in the household of a parent who owns an uninsured car is struck by an insured vehicle. *See* Witko v. Liberty Mut. Ins. Co., 348 So. 2d 52 (Fla. 4th Dist. Ct. App. 1977).

71. 364 So. 2d 1259 (Fla. 3d Dist. Ct. App. 1978).

72. The court pointed out that the Cadillac was "purchased" by Carolyn suggesting ownership might have been a latent issue. *Id.* at 1260. *See* FLA. STAT. § 627.736 (4)(d)4.a (Supp. 1976).

73. FLA STAT. § 627.736(4)(d) (1979) provides:

> (d) The insurer of the owner of a motor vehicle shall pay personal injury protection benefits for:
>
> 4. Accidental bodily injury sustained in this state by any other person [than the owner] *while occupying the owner's motor vehicle* or, if a resident of this state, *while not an occupant of a motor vehicle or motorcycle,* if the injury is caused by phys-

Because Ms. Kraver was neither "occupying the [insured] owner's motor vehicle"[74] (she was not occupying the car insured by State Farm) nor was she "not an occupant of a motor vehicle or motorcycle"[75] (for she was in her dad's Cadillac), she did not come within the benefits provided by the statute.

The court found *Farley* inapplicable;[76] sound logic because Farley was "occupying the [insured] owner's motor vehicle"[77] and was not himself "[t]he owner of a motor vehicle with respect to which security is required,"[78] although his stepfather was. Kraver was driving a vehicle which should have been insured and was not. Although both Farley and Kraver were children of parents who failed to insure, Kraver was old enough to know better—and she was *driving.* Farley was merely a passenger, and in an insured car at that.

The decision in *South Carolina Insurance Company v. Rodriguez*[79] is consistent with *Kraver,* but the result is inconsistent with the policy of the Act. Rodriguez, injured when the uninsured motor vehicle in which he was riding collided with a motor vehicle insured by South Carolina Insurance Company, attempted to recover PIP benefits from South Carolina Insurance Company. Rodriguez is distinguishable from Farley, who sought benefits from the insurer of the vehicle in which he was a passenger, and thus was clearly within the description of the benefits section of the statute.[80] Rodriguez did not own a vehicle, nor did he live with one who did. The *Rodriguez* court, relying on *Kraver* and

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ical contact with such motor vehicle, provided the injured person is not himself:

a. The owner of a motor vehicle with respect to which security is required under §§ 627.730-627.741, or

b. Entitled to personal injury benefits from the insurer of the owner of such a motor vehicle. (emphasis added.)

74. *Id.* at (4)(d)4.

75. *Id.* This use of double negatives is not bad grammar, but rather a close tracking of the language of the statute. Recall that the court declined to limit benefits of the Act to pedestrians. *See* the discussion of *Negron* in text *supra.*

76. 364 So. 2d at 1261.

77. FLA. STAT. § 627.736 (4)(d)4 a (1979).

78. *Id.*

79. 366 So. 2d 168 (Fla. 3d Dist. Ct. App. 1979).

80. FLA. STAT. § 627.736 (4)(d)4 (Supp. 1978).

the "clear dictates" of the statute,[81] denied Rodriguez benefits. Presumably,[82] Rodriguez was injured neither while "occupying the [insured] owner's motor vehicle"[83] nor "while not an occupant of a motor vehicle,"[84] thus he was not entitled to benefits. But there was no evidence that passenger Rodriguez was a relative of the uninsured owner (contrasted with the plaintiff in *Kraver* who was driving her father's Cadillac), nor that he had any control over the failure to insure (contrasted with Carolyn Kraver, who actually purchased the Cadillac, although it was registered in her father's name).[85] Thus, *Rodriguez* fails to effect the intent of the Act as stated in *Farley:* "to *broaden* insurance coverage while at the same time reasonably limiting the amount of damages which could be claimed."[86]

Similarly, in *Protective National Insurance Company of Omaha v. Padron,*[87] a passenger, Padron, was injured while riding in an an uninsured car. Padron, however, sought to recover from the insurer of the driver of the car in which he was riding rather than the insurer of the owner of the other car. The Third District Court of Appeal denied recovery,[88] reasoning that the driver's policy provided benefits only for persons occupying the insured car,[89] and the No-Fault Act only requires that the owner of a car purchase insurance, not the driver.[90] The injured passenger did not have no-fault insurance of her own,[91] but whether or not she owned a car was not disclosed. One who does not own a car is not required to have PIP insurance.[92] Indeed, one cannot obtain no-fault protection without owning a car.[93] Assuming the in-

81. 366 So. 2d at 169.
82. The decision is *per curiam.*
83. FLA. STAT. § 627.736 (4)(d)4. *See* language of statute at note 73 *supra.*
84. *Id. See* note 10 *supra.*
85. 364 So. 2d at 1260.
86. 302 So. 2d at 179.
87. 310 So. 2d 432 (Fla. 3d Dist. Ct. App. 1975).
88. *Cf.* Travelers Ins. Co. v. Smith, 328 So. 2d 870 (Fla. 3d Dist. Ct. App. 1976) in which an injured pedestrian was allowed to recover from the *driver's* insurer, despite the owner's failure to insure.
89. 310 So. 2d at 433.
90. *Id.* at 434.
91. *Id.* at 433.
92. FLA. STAT. § 627.733 (1979).
93. *See* McClendon v. United States Fire Ins. Co., 305 So. 2d 237 (Fla. 3d Dist.

jured passenger owned no car, it is not reasonable to deny her coverage under the Act; the exception of those similarly situated warrants legislative and judicial attention. Remedial statutes should be broadly construed so as to achieve their remedial purpose. In enacting the No-Fault Act, the legislature intended to reduce fault-based litigation and to facilitate compensation of accident victims. Leaving a blameless auto passenger to to her common law remedy does not further these goals.

Persons injured while "occupying" an uninsured car have been denied PIP benefits. In *Industrial Fire and Casualty Insurance Company v. Collier*[94] the court interpreted the word "occupying." Collier was injured when changing the tire of his uninsured VW. His disabled vehicle was struck by another car, causing the VW to strike him. He applied for PIP benefits from Industrial, the insurer of his other car, who denied benefits based on an exclusion in its policy which was authorized by the Act.[95] The policy exclusion provided that coverage did not apply while the insured was occupying a motor vehicle which he owned, but had failed to insure under the policy. The policy defined "occupying" to mean "in or upon, or entering into, or alighting from a motor vehicle."[96] The appellate court found that Collier was "occupying" his VW, and thus was excluded from coverage.[97]

Cases in the third category stand for the proposition that persons injured while driving, or riding in an insured car, who own[98] an unin-

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Ct. App. 1974). McClendon was injured driving another's uninsured auto. He applied for PIP benefits from his own insurer under a non-owner policy issued to him. The insurer was held not liable for PIP benefits because McClendon did not own a car, even though his policy contained an uninsured motorist endorsement; presumably this coverage was available only upon a showing of fault. An insurer is not *obligated* to provide no-fault benefits in a policy of insurance if the insured does not own a car. *Id.* at 237-38.

94. 334 So. 2d 148 (Fla. 3d Dist. Ct. App. 1976).

95. *Id.* at 149. FLA. STAT. § 627.736(2) provides: "AUTHORIZED EXCLUSIONS—Any insurer may exclude benefits: (a) For injury sustained by the named insured . . . while occupying another motor vehicle owned by the named insured and not insured under the policy . . . ."

96. 334 So. 2d at 149-50.

97. *Id.* at 150. *See also* Auto-Owners Ins. Co. v. Pridgen, 339 So. 2d 1164, 1165 (Fla. 2d Dist. Ct. App. 1976).

98. The owner of a motor vehicle must insure it. FLA. STAT. § 627.733(1) (1979): "Every owner or registrant of a motor vehicle required to be registered and licensed in this state shall maintain security as required by subsection (3) in effect

sured car, will also be denied the PIP benefits of the Act.

In *Whitaker v. Allstate Insurance Co.*,[99] Pam Whitaker did not recover from Allstate because she owned an uninsured Porsche. She lived with her sister and was injured while driving her sister's car, insured by Allstate. The court affirmed Allstate's refusal to pay PIP benefits based on the "unambiguous proviso" of Section 627.736(4)(d)3 of the Act: "provided the relative . . . is not [herself] the owner of a motor vehicle with respect to which security is required.[100]

Tapscott v. State Farm Mutual Automobile Insurance Co.[101] involved a woman who was injured while driving her father's car. Her action against her father's insurer failed because she was the owner of a vehicle for which security was required under the Act, and her "estranged husband cancelled the insurance on her automobile."[102] Thus she was involuntarily excepted from the benefits provision of the Act.[103]

Because the security requirement is triggered by the requirement that a vehicle be registered in the state,[104] Ms. Tapscott argued that

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continuously throughout the registration or licensing period." In addition, one must look to one's own insurer for PIP benefits, even if injured in another's insured auto. *See* FLA. STAT. § 627.736(4)(d) and Martinez v. Old Security Cas. Co., 327 So. 2d 786 (Fla. 3d Dist. Ct. App. 1976). Main Ins. Co. v. Wiggins, 349 So. 2d 638 (Fla. 1st Dist. Ct. App. 1977) interpreted the word "owner". The First District held that Wiggins, who was injured while standing beside a motor vehicle he was leasing, was not an "owner" because his lease did not include an option to purchase. *Id.* at 639. Because Wiggins owned no other car, and because he lived with his daughter, he was allowed to recover PIP benefits from his daughter's auto insurer. The decision is straightforward enough—one who leases is not an "owner." But the fact that one who leases with an option to purchase *is* an "owner" as specifically defined in FLA. STAT. § 627.732(2) (1979) might well come as a surprise to an unwary lessee.

99. 363 So. 2d 856 (Fla. 4th Dist. Ct. App. 1978).

100. *Id.* at 857. *See also* Protective Nat'l Ins. Co. of Omaha v. Bergouignan, 335 So. 2d 871 (Fla. 3d Dist. Ct. App. 1976).

101. 330 So. 2d 475 (Fla. 1st Dist. Ct. App. 1976).

102. *Id.* at 476.

103. FLA. STAT. § 627.736(4)(d)3(1979):

> (d) The insurer . . . shall pay . . . for 3. Accidental bodily injury sustained by a relative of the owner residing in the same household, under the circumstances described in subparagraph 1. or subparagraph 2., provided the relative at the time of the accident is domiciled in the owner's household and is not [herself] the owner of a motor vehicle with respect to which security is required . . . .

104. *See* Ochoa and Iowa Mut. Ins. Co. v. Lopez, 358 So. 2d 1173, 1174 (Fla.

her car was not required to be registered because it had been inoperable for four days due to clutch and transmission disorders.[105] The court conceded that prior cases excluded "motor vehicles which are neither operated over the public streets or highways of Florida nor maintained for that purpose"[106] from the required security provisions of the Act, but found that Ms. Tapscott had not "abandoned her automobile as a means of transportation on public streets and highways."[107] The insurance on her car was cancelled because her husband abandoned her, not because she had abandoned her car. The court noted that "[a]fter recovery from her injuries, appellant repaired and reinsured her car,"[108] evidencing her intent to maintain the car.

An opposite outcome but one consistent with the result in *Tapscott* was reached in *Malen v. American States Insurance Co.*[109] Wayne Malen owned an uninsured Mercedes Benz. He was injured driving Diane Loos' car, insured by American States. American States denied coverage because Malen was "the owner of a motor vehicle with respect to which security is required . . ."[110] On appeal, Malen recovered because the court determined that his Mercedes was not a vehicle "maintained for operation on the streets and highways . . . ,"[111] pointing to the fact that it had been left unrepaired at a repair shop for six months to be sold "as is."[112] Thus, security was not required for his Mercedes.[113]

3d Dist. Ct. App. 1978), Lopez v. Fidelity & Cas. Co. of N.Y., 384 So. 2d 680, 681 (Fla. 3d Dist. Ct. App. 1980) and FLA. STAT. § 320.02(1) (1979).

105. 330 So. 2d at 476.

106. *Id.* at 477. The court cited Staley v. Florida Farm Bureau Mut. Ins. Co., 328 So. 2d 241 (Fla. 1st Dist. Ct. App. 1976) and Kotich v. Criterion Ins. Co., 38 Fla. Supp. 199 (C.C. Escambia Co. 1973).

107. 330 So. 2d at 477.

108. *Id.*

109. 376 So. 2d 473 (Fla. 1st Dist. Ct. App. 1979).

110. *Id.* American was arguing the exclusion from coverage provided by FLA. STAT. § 627.736(4)(d)4a (1975).

111. 376 So. 2d at 474.

112. *Id.* at 473 citing Ward v. Florida Farm Bureau Cas. Ins. Co., 375 So. 2d 898 (Fla. 1st Dist. Ct. App. 1979) and Tapscott.

113. *See also* Sherman v. Reserve Ins. Co., 350 So. 2d 349 (Fla. 4th Dist. Ct. App. 1977). *Cf.* Williams v. Leatherby, 338 So. 2d 70, 71 (Fla. 3d Dist. Ct. App. 1976). Williams owned an uninsured car, but was injured driving a friend's car. The court held the insurer not liable for PIP benefits, in spite of the fact that Williams'

In *Staley v. Florida Farm Bureau Mutual Insurance Co.*,[114] Staley was injured while a passenger in a car insured by Florida Farm. Staley owned an uninsured auto not involved in the accident. Staley argued that he was entitled to PIP benefits from Florida Farm because he, like Farley, was injured while a passenger in an insured vehicle.[115] The court denied benefits, distinguishing *Farley*.[116] Unfortunately, in distinguishing *Farley*, the court misreported it.[117]

The logical rationale for the outcome in *Staley* is the plain language of the statute, which expressly excludes benefits where the injured person is himself "the owner of a motor vehicle with respect to

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auto had been inoperable and in storage for more than two months before the accident, and was not repaired until after the accident. The court relied upon FLA. STAT. § 627.733(1) which requires every owner of a motor vehicle required to be registered to maintain security on the motor vehicle. But the court failed to examine whether the motor vehicle was "required to be registered," and declined to follow Staley v. Florida Farm Bur. Ins. Co., discussed in text accompanying notes 114-119 *infra*. *Id.* at 72. (In dictum, the *Staley* court had said: "Had appellant's motor vehicle been inoperable or had it been in storage it would not have been a vehicle required to be registered and licensed in Florida." 328 So. 2d at 243.) Apparently the *Williams* court was distracted by the fact that the car had not been insured for a year prior to its inoperability. *Id.* This shouldn't make any difference once the car is inoperable. The No-Fault Act sets penalties for failure to insure, and denial of benefits where they are legally available is not one of them.

114. 328 So. 2d 241 (Fla. 1st Dist. Ct. App. 1976).

115. *Id.* at 243.

116. *Id.*

117. The *Staley* court said Farley was "conceivably 'entitled to collect personal injury benefits from' his stepfather." 328 So. 2d at 243. This is error. The *Farley* court expressly found that the stepfather was not an "insurer," and that "the obvious practicalities" *precluded* the response that Farley could go against his stepfather. 302 So. 2d at 179. Further, the *Staley* court said that the policy of the Act in *Farley* is "to shift the burden of Farley's injury not to his stepfather but to a compensated seller of automobile insurance." 328 So. 2d at 243. The *Farley* court found "the act was intended to *broaden* insurance coverage while at the same time reasonably limiting the amount of damages in which could be claimed," 302 So. 2d at 179, a policy statement in Staley's favor, not against him. Furthermore, the *Farley* court found the "obvious reason" for Section 627.736(4)(d)4b is "to prevent an injured party from receiving a windfall by collecting benefits from the insurance carrier for the owner of a vehicle in which he is riding at the time of the accident and at the same time collecting benefits from the insurance carrier of another motor vehicle owner. . . ." *Id.* This interpretation too would favor Staley's recovery.

which security is required."[118] The best way to distinguish *Farley* from *Staley* is also to refer to the plain language of the statute: Farley was neither the owner of a motor vehicle,[119] nor entitled to PIP benefits from the insurer of the owner.[120] If one is *either,* one is excluded from benefits. Staley fit the first exclusion. Unspoken, but perhaps relevant in *Farley,* is the fact that a child has no control over whether his parent (stepfather) insures or not; Staley should have insured. Spoken, and certainly very relevant in *Farley*, is the obvious practicality: a child doesn't sue his stepfather.[121]

Constructively "Owned" Vehicles

The final category of cases, those determining the availabilty of PIP benefits to those who constructively "own" an uninsured vehicle, is

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118. FLA. STAT. § 627.736(4)(d)4a.

119. *Id.*

120. FLA. STAT. § 627.736(4)(d)4b.

121. In contrast to the denial of PIP benefits in the above cases, persons *have* been allowed to collect medical payments benefits from the insurer of the car in which they were riding, in spite of failing to insure their own cars.

Ward v. Nationwide Mut. Fire Ins. Co., and Johnston v. United Services Auto. Ass'n, 364 So. 2d 73 (Fla. 2d Dist. Ct. App. 1978), consolidated for appeal, involved passengers injured in separate accidents, each in an insured vehicle. Both passengers owned automobiles which they had failed to insure, in contravention of the Act. The appellate court found that the injured plaintiffs were entitled to the insurance benefits they were seeking from the insurer of the owner of the vehicle in which they were injured—"additional and optional medical payments coverage for which a separate premium was charged." *Id.* at 76. They were not seeking nor were they entitled to PIP benefits. *Id.* In response to United Services' argument that it would be unfair to allow Johnston to recover because he had violated the required security provision of the Act, the court responded that the legislature had provided penalties for violation of the Act, and it was not the court's role to fashion new ones, and that "between plaintiffs and defendants, there is nothing unfair in requiring defendants to make payment of benefits which they have contracted to pay under coverage for which they have been paid a premium." *Id.* at 78. The court reminded the defendant that the purpose of provisions in insurance contracts which restrict coverage when other insurance coverage is available is to avoid duplication of coverage, not to escape coverage altogether, as defendant would do. The court warned that "[i]f an insurer intends to restrict coverage, it should use language clearly stating its purpose," for "[w]here there are two interpretations which may fairly be given to language used in a policy, the one that allows the greater indemnity will govern." *Id.* at 77.

perhaps the most disturbing in terms of outcome. These cases construe the meaning of the phrase "named insured" in a policy of insurance in order to impute constructive ownership of a vehicle. The holding of each presents a disturbing result, at odds with consumers' reasonable expectations regarding insurance coverage.[122]

For example, in the consolidated cases of *Rojas* and *Fonseca*,[123] Mrs. Rojas' reasonable expectations were thwarted. Mrs. Rojas, driving her husband's uninsured Oldsmobile, and Mrs. Fonseca, her passenger, were injured in an accident. Mrs. Rojas sought PIP benefits and Mrs. Fonseca sought liability benefits under a policy issued to Mrs. Rojas by

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122. *See* R. KEETON, INSURANCE LAW § 6.3 (1971):

> Insurance contracts continue to be contracts of adhesion, under which the insured is left little choice beyond electing among standardized provisions offered to him, even when the standard forms are prescribed by public officials rather than insurers. . . . Regulation is relatively weak in most instances, and even the provisions prescribed or approved by legislative or administrative action ordinarily are in essence adoptions, outright or slightly modified, of proposals made by insurers' draftsmen.
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> . . .
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> Moreover, the normal processes for marketing most kinds of insurance do not ordinarily place the detailed policy terms in the hands of the policyholder until the contract has already been made. . . . Thus, not only should a policyholder's reasonable expectations be honored in the face of difficult and technical language, but those expectations should prevail as well when the language of an unusual provision is clearly understandable unless the insurer can show that the policyholder's failure to read such language is unreasonable.
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> . . .
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> It is important to note, however, that the principle of honoring reasonable expectations does not deny the insurer the opportunity to make an explicit qualification effective by calling it to the attention of a policyholder at the time of contracting, thereby negating surprise to him.

Id. at 350-52. *See also* Ward v. Nationwide Mut. Fire Ins. Co., 364 So. 2d 73 (Fla. 2d Dist. Ct. App. 1978): "An insurer will not be allowed, by the use of obscure terms, to defeat the purpose for which the policy was procured. . . . (Citing, Roberson v. United Services Auto. Assn., 330 So. 2d 745 (Fla. 1st DCA 1976.) . . . If an insurer intends to restrict coverage, it should use language clearly stating its purpose." *Id.* at 77. *See also* Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981).

123. Fidelity and Cas. Co. of N.Y. v. Fonseca, and Rojas v. Fidelity and Cas. Co. of N.Y., 358 So. 2d 569 (Fla. 3d Dist. Ct. App. 1978) *cert. denied* 365 So. 2d 711 (Fla. 1978).

Fidelity. The policy covered Mrs. Rojas' Ford, and "a temporary substitute vehicle." Mrs. Rojas and Fonseca both argued that they were injured in a temporary substitute vehicle and should therefore recover from Fidelity, since Mrs. Rojas' Ford was out of service and under repair on the date of the accident.[124] The appellate court found that neither Mrs. Rojas nor Mrs. Fonseca could recover, [125] because Mr. Rojas' Olds was not a "temporary substitute vehicle" which the policy defined as a "non-owned" vehicle.[126] It was an "owned," rather than "non-owned", vehicle because Mr. Rojas, by operation of the fine print, was a "named insured" under the policy. His name didn't appear on the policy, but because the policy defined "named insured" to include the resident spouse of the named insured, ownership of the Olds was imputed to Mrs. Rojas.[127] Thus coverage under the policy depended upon the interrelationship of three separate definitions in the policy—"named insured," "non-owned," and "temporary substitute vehicle." By manipulating all these provisions, lawyers could retrospectively determine what coverage was available.

Rojas is wrongly decided for two reasons: the clear and unambiguous language of the policy extends coverage, and the rationale underlying the decision fails to justify the denial of coverage.

The court focused on the wrong policy provision ("named insured") to reach its erroneous conclusion. The insuring clause in Mrs. Rojas' policy obligated Fidelity to pay for damages arising out of the "ownership, maintenance, or use of the *owned* automobile or any *non-owned* automobile."[128] The court decided that since Mr. Rojas was a "named insured" (defined in the policy to include a spouse who resided in the same household), the Olds could not possibly be a "non-owned" vehicle. But the court overlooked the clear and unambiguous definition of an "owned" vehicle contained in the policy: a vehicle "for which a specific premium charge indicates that coverage is afforded."[129] The language of the policy defined a "non-owned" vehicle as one "*not*

124. 358 So. 2d at 570.

125. The policy tied the availability of PIP benefits to the availability of liability insurance under the policy. *Id.* at 571 n.1.

126. *Id.* at 571.

127. *Id.*

128. *Id.* (emphasis in original).

129. *Id.*

owned by or furnished for the regular use of either the named insured or any relative, other than a temporary substitute automobile."[130] A "temporary substitute automobile" was one *"not owned* by the named insured, while temporarily used with the permission of the owner as a substitute for the owned automobile . . . when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction."[131]

No premium was charged nor coverage afforded for the Olds. The policy unambiguously defined a "non-owned" vehicle as one "not owned:" a vehicle as to which no premium was paid. Rojas was indeed a named insured. But payment of benefits depended on the definition of "owned" and "non-owned," not upon the definition of "named insured." Neither Mr. nor Mrs. Rojas "owned" the Olds, because the policy gave a very specific definition to the word "owned," and that definition was incorporated into the definition of "non-owned."[132]

This technical construction is a fitting response to Fidelity's argument that the policy is "clear and unambiguous."[133] To see the fallacy of the insurer's argument, one need only examine the rationale underpinning the court's interpretation of the insurance policy provisions at issue in this case. The court said that the inclusion of both spouses in the definition of named insured "was intended to protect the insurer from assuming risks for which premium payments were not elicited in situations where such risks were likely to eventuate."[134] But in this

130. *Id.*

131. *Id.*

132. The court did not focus on the definition of "non-owned" as "furnished for the regular use of either the named insured or any other relative."

133. 358 So. 2d at 574.

134. *Id.* at 575. Historically, the inclusion of both spouses as "named insureds" in the omnibus clause of an automobile insurance policy was intended to protect the insured, not the insurer. *See* R. KEETON, INSURANCE LAW § 4.7 (1971) (Omnibus Clauses Generally):

> Perhaps the major objective underlying the development of omnibus clauses has been to serve the interests of the insurance purchaser (usually the named insured) in having the benefits of the coverage extend to certain other persons as well as himself—persons who are natural objects of his concern.
>
> . . .
>
> A second objective—to serve the interests of potential victims of incidents to which the insurance coverage applies—has been at most a subsidiary influence in the voluntary expansion of coverage through omnibus

case, a premium was elicited for injury in a temporary substitute vehicle, which is precisely the risk that eventuated. Coverage under these facts is precisely what the insured would have expected she was paying for, whether her "loaner" came from her neighbor, her mechanic or, as in this case, her spouse. The court feared that if the definition of named insured did not include the spouse, "two or more vehicles could be covered by payment of a single premium."[135]

Ironically, in *Boyd v. United States Fidelity and Guarantee Co.*,[136] which the *Rojas* court relied upon, two premiums *were* paid to two different companies, one covering Mr. Boyd's car, and one covering Mrs. Boyd's.[137] "The [*Boyd*] court acknowledged the incongruity of the fact that the husband would be covered in almost any car in the world which he drove with the owner's permission except that of his wife."[138] *Rojas* repeats the irony, yet fails to recognize that this very incongruity defeats the reasonable expectations of the consumer with regard to the scope of coverage.[139]

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clauses, but it has been a primary influence upon legislation requiring or encouraging the inclusion of omnibus clauses in liability insurance coverages.

Id. at 221-22.

See also § 2.11(b) (The definition of Insured):

In general, an omnibus clause of an automobile insurance policy extends the definition of "insured" to persons using the automobile with permission. The earlier forms of omnibus clauses required that the permission be that of the named insured, express or implied.

The 1955 revision *broadened* the definition of "insured" to include the spouse of the insured even without proof of permission and any other person using the vehicle with the spouse's permission.

Id. at 76.

135. 358 So. 2d at 575.

136. 256 So. 2d 1 (Fla. 1971) *reh. denied* (1972).

137. *Id.* at 2.

138. 358 So. 2d at 572. *Cf.* Protective Nat'l Ins. Co. of Omaha v. Bergouignan, 335 So. 2d 871 (Fla. 3d Dist. Ct. App. 1976) in which the court held that a passenger injured in an insured vehicle could not recover PIP benefits because he owned an uninsured vehicle. But the court allowed his spouse who was injured in the same car to recover. Either their policy did not define "named insured" to include a spouse, or the court chose to ignore such a definition.

139. The court also failed to see the implicit hostility to the married state contained therein. For a case in which the Florida Supreme Court urged the importance of marriage, *see* Raisen v. Raisen, 379 So. 2d 352 (Fla. 1979).

The result in *Industrial Fire and Casualty Insurance Co. v. Jones*[140] is equally disturbing. Calvin Jones was injured while driving his mother's uninsured car. Jones resided with his mother and stepfather. He sought PIP benefits from Industrial, the insurer of his stepfather's car. Industrial denied payment based on language in its policy. The policy excluded coverage of any relative of the "named insured" while occupying a motor vehicle "of which the named insured is the owner and which is not an insured motor vehicle under this insurance."[141] The court said Calvin's stepfather "owned" Calvin's mother's uninsured car, not in fact, but by operation of the definition of "named insured" in the policy.[142] The court reached this conclusion despite the fact that the policy defined "named insured" more broadly than the Act defined "named insured."[143] The court found its interpretation necessary to prevent "the ridiculous result of allowing the insurance of one automobile and the coverage on several unnamed automobiles."[144] The

140. 363 So. 2d 1168 (Fla. 3d Dist. Ct. App. 1978).

141. *Id.* at 1169.

142. *Id.* at 1170. *Cf.* Lopez v. Fidelity & Cas. Co. of N.Y., 384 So. 2d 680, 681 (Fla. 3d Dist. Ct. App. 1980). Fidelity argued that coverage should be denied under the provision of the Act which authorizes the insurer to exclude benefits for injury sustained by a relative of the named insured, residing in the same household, while occupying another motor vehicle owned by the named insured but not insured under the policy. The court found the exclusion inapplicable because Rodriguez did not "own" the vehicle occupied by Lopez. Because Lopez was not Rodriguez's spouse (he was his son), he was not caught in the ensnaring definition of "owner" which caught the plaintiffs in *Jones* and *Fonseca.*

143. *Id.* The policy defined "named insured" to include the policy holder or the *spouse* of the policyholder. *Id.* Section 627.732 (1977) defined "named insured" as "a person, usually the owner of a vehicle, identified in a policy by name as the insured under the policy." *Id. Cf.* Cavalier Ins. Corp. v. Myles, 347 So. 2d 1060 (Fla. 1st Dist. Ct. App. 1977): It is axiomatic that the provisions of statutes relating to insurance become a part of any policy issued in the state, and that if the terms of a policy are susceptible of differing interpretations, the interpretation which sustains the claim for indemnity or which allows the greater indemnity will be adopted. *Id.* at 1062 citing Dorfman v. Aetna Life Ins. Co., 342 So. 2d 91 (Fla. 3rd Dist. Ct. App. 1977).

Cf. Andriakos v. Cavanaugh, 350 So. 2d 561, 563 (Fla. 2d Dist. Ct. App. 1977): "[I]nsurance policy . . . will be enforced as if it were in compliance with the Act regardless of its actual terms."

144. 363 So. 2d at 1170. Here the court cited Fidelity & Cas. Co. of N.Y. v. Fonseca, 358 So. 2d 569 (Fla. 3d Dist. Ct. App. 1978) for authority. Ironically, Fonseca had paid for insurance on a "temporary substitute vehicle," but when injured in a

court also observed that "as a practical matter an insurance company may include as a named insured a policyholder's 'spouse' [without actually naming the spouse on the policy] for the simple reason that a policyholder (especially in this day and age) is not apt to have the same spouse at any given point in time."[145]

The court appears to confuse matters of administrative convenience with matters of policy.[146] The *Jones* court relied upon its former decision in *Rojas,* in which it opined that the inclusion of both spouses within the definition of "named insured" protects the insurer "from assuming risks for which premium payments were not elicited in situations where such risks were likely to eventuate."[147] But the court overlooked the fact that in *Rojas* the insured paid a premium for coverage in a temporary substitute vehicle and did not receive the expected coverage.[148] While protection of the profits of the insurer is a worthy concern, in *Jones* that protection comes at the expense of an injured child, who had no control over whether or not his parents properly insured. As the *Farley* court recognized, "obvious practicalities" prevent a suit against the parent.[149] The result in these cases encourages insurance companies to define terms in ways that the consumer would not expect, and in ways which offend the purposes of the Act. The policy exclusion at issue here presents a booby-trap for the unwary consumer.

Conclusion

Florida courts have extended the coverage of the No-Fault Act to those injured in vehicles which were not statutorily defined "motor vehicles." This desirable result furthered the purposes of the Act. But the supreme court erred in *Lumbermens.* It should have extended coverage to one injured in an accident involving two commercial vehicles. In view of the subsequent amendment of the Act to expressly include com-

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car she was driving as a substitute for her own auto, which was being repaired, she recovered nothing in exchange for the premium she had paid.

145. 363 So. 2d at 1170 n.1.

146. It also undermines the marital harmony for which the supreme court expressed great concern in Raisen v. Raisen, 379 So. 2d 352 (Fla. 1979).

147. 358 So. 2d at 575.

148. *See* discussion of *Rojas* in text, *supra.*

149. 302 So. 2d at 179.

mercial vehicles, this injustice should not recur.

The courts have extended the coverage of the Act to children injured in or by insured vehicles despite the fact that their parents owned an uninsured car. This result is consistent with the purposes of the Act. The courts have denied the coverage of the Act to injured persons who actually own an uninsured car. The Act requires owners to purchase personal injury protection insurance, and it is reasonable to expect and require those who own cars to comply. But it is not reasonable to exclude from the Act's benefits those persons who do not own an auto, and thus have no opportunity to insure. If such a person is injured in an uninsured car, recovery of no-fault benefits from the insured driver, or from the insured owner of another car involved in the accident, should be permitted. This result would further the purposes of the Act without undermining the required insurance provision of the Act. The courts' failure to extend coverage on these facts is out of keeping with the purposes of the Act.

Finally, the imputation of constructive ownership of uninsured vehicles to spouses, thus denying the benefits of the Act to them, is a surprising and unfair result. This development is the most inimical to the purposes of the Act. It will eventually undermine the Act, for it invites drafting of insurance policies which avoid the Act's required benefits.