INSURANCE—INVALIDITY OF "OTHER INSURANCE" CLAUSES IN A DOUBLE COVERAGE SITUATION—*McFarland v. Motor Club of America Insurance Co.*, 120 N.J. Super. 554, 295 A.2d 375 (Ch. 1972).

Plaintiff Vander McFarland, a passenger in a vehicle owned and operated by Andrew McFarland, sustained injuries resulting in special damages of $2,530 as a result of an automobile collision caused by the negligence of the uninsured owner and operator of another vehicle.[1] Vander collected the $10,000 limit available to him under Andrew McFarland's uninsured motorist clause with the Allstate Insurance Company.

Claiming damages for expenses, personal injuries, and pain and suffering which exceeded the $10,000 ceiling of the Allstate uninsured motorist clause, plaintiff, Vander McFarland, sought further compensation under the uninsured motorist provision in his own policy with defendant, Motor Club of America. Defendant denied liability for any excess over the $10,000 provided by Allstate claiming that the "other insurance" clause in its policy precluded recovery in multiple coverage situations unless its own policy limits exceeded the limits of the additional policy.[2] Further, the defendant contended that even where its policy limits exceed the limits of the Allstate policy, recovery is restricted to the difference between the two policy coverages despite the fact that the claimant's damages exceed that amount. Both the Allstate and Motor Club of America policies had coverage limits of $10,000 which the defendant claims is the maximum required under the New Jersey uninsured motorist statute.[3] Thus, by defendant's interpretation

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1 McFarland v. Motor Club of America Ins. Co., 120 N.J. Super. 554, 555, 295 A.2d 375, 376 (Ch. 1972).

2 The clause in question reads:

> "Other insurance: With respect to bodily injury to an insured while occupying an automobile not owned by the name insured, the insurance under Part IV (UM) shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance . . . ."

Id. at 557, 295 A.2d at 377.

3 *Id.* at 556-57, 295 A.2d at 376-77. N.J. STAT. ANN. § 17:28-1.1 (1970) provides in part:

> No automobile liability policy or renewal of such policy . . . shall be delivered or issued for delivery in this State with respect to any motor vehicle registered or principally garaged in this State unless coverage is offered in connection therewith, in limits for bodily injury or death set forth in section 9 of chapter 174 of the laws of 1952 (C. 39:6-69), under provisions approved by the Commissioner of Banking and Insurance, for payment of all or part of the sums which the

of the "other insurance" clause, plaintiff was denied recovery under the second policy.

Both parties moved for summary judgment in the Superior Court of New Jersey Chancery Division, and in *McFarland v. Motor Club of America Insurance Co.*,[4] the court found that N.J. STAT. ANN. § 17:28-1.1, which requires uninsured motorist clauses to be offered in any automobile liability policy sold in New Jersey, merely sets out a minimum recoverable amount. The court held that the statute was not a bar to recovery beyond that minimum amount but only a restriction against dual recoveries for the same loss. Thus "[w]here an insured's loss exceeds the limits of one policy, he may proceed against the other available policies."[5] Where the "other insurance" clause acts to deny recovery paid for, it is "violative of public policy and is invalid."[6]

The New Jersey uninsured motorist problem was first dealt with by the Unsatisfied Claim and Judgment Fund Law[7] which provided protection to New Jersey residents who sustained bodily injury or property damage due to the negligence of an uninsured motorist. The legislative scheme created a fund against which innocent victims could claim for financial recovery. The Fund was unsuccessful economically due to its financial life-source.[8] The method of funding involved assessments on uninsured motorists, basically a disadvantaged group, un-

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insured or his legal representative shall be legally entitled to recover as damages from the operator or owner of an uninsured automobile . . . .

N.J. STAT. ANN. § 17:28-1.2 (1970) allows rejection of the offer:

> The named insured shall elect to accept or reject the offer of coverage required pursuant to section 2 of this act. Such election shall be in writing and upon receipt thereof by the insurer such coverage shall or shall not be provided in the policy according to said election.

4 120 N.J. Super. 554, 295 A.2d 375 (Ch. 1972).

5 *Id.* at 563, 295 A.2d at 380.

6 *Id.*

7 N.J. STAT. ANN. § 39:6-61 (1961). The Fund was created by assessments made on anyone registering a vehicle in the state both insured and uninsured and on the net direct written premiums of any company selling automobile liability insurance in the state. Such assessments were set by the Director of Motor Vehicles.

8 See N.J. DIVISION OF MOTOR VEHICLES MANAGER'S ANNUAL REPORT TO THE UNSATISFIED CLAIM AND JUDGMENT FUND BOARD 5-12 (1971) which indicates that the Fund was in some financial difficulty even when N.J. STAT. ANN. §§ 17:28-1.1, 1.2 were enacted. Although the Fund seems adequate as per the following:

Income:	$9,351,619.89
Funds Paid Out & Expenses:	6,326,436.56
Excess:	$3,025,183.33

reserves in the Fund have been less in the latest high payment years than they were in the early low payment years.

derstandably incapable of supporting the financial responsibility of compensating the innocent victims.[9] In an attempt to remedy the problem, the legislature shifted the burden to the insured motorists themselves by allowing that class to purchase protection against the uninsured.[10] The amount of coverage set forth in the resulting statute is $10,000 for injury to or death of one person in any one accident, $20,000 for injury to or death of more than one person in any one accident, and $5,000 for damage to property in any one accident, such limits being identical to those contained in the Unsatisfied Claim and Judgment Fund Law.[11]

Pursuant to this legislative mandate a single form of coverage against uninsured motorists was to be used by insurers in New Jersey, generally paralleling endorsements used in other states.[12] The endorsements provide protection through the insurance company's agreement to pay all sums within the policy limits which the insured or his representative is legally entitled to recover from the uninsured motorist.[13] This type of endorsement was introduced in 1955 by the insurance industry to counteract the various enactments and proposals for compensation on behalf of the insured[14] *i.e.*, compulsory insurance laws,[15] unsatisfied judgment funds,[16] and compensation without fault.[17] As a

9 *See* Stanton, *Protection Against Uninsured Motorists in New Jersey*, 3 SETON HALL L. REV. 19, 20 (1971) wherein the author noted:

> Uninsured motorists are a relatively small class of persons, but they include within their ranks . . . a disproportionately high number of economically poor persons and a disproportionately high number of socially inadequate persons.

10 Prior to this enactment uninsured motorist coverage was available only for out-of-state accidents. Law of April 19, 1961, ch. 11, § 1, [1961] N.J. Laws 34, *as amended* N.J. STAT. ANN. § 17:28-1 (1970).

11 N.J. STAT. ANN. § 39:6-69 (1961).

12 *See* Stanton, *supra* note 9, at 54-60.

13 The National Bureau of Casualty Underwriters (the association of stock companies) and the Mutual Insurance Rating Bureau (the association of mutual companies) jointly create standard provisions for liability insurance coverage. National Bureau of Casualty Underwriters, Uninsured Motorist Endorsement, No. UM 1-4, May 1, 1966. *See* Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. U.L. REV. 497, 500-01 (1967).

14 *See* Widiss, *supra* note 13, at 498-99.

15 *See* McVay, *The Case Against Compulsory Automobile Insurance*, 15 OHIO S.L.J. 150 (1954); Marx, *A Reply to "The Case Against Compulsory Automobile Compensation Insurance,"* 15 OHIO S.L.J. 157 (1954); Comment, *The Financially Irresponsible Motorist: A Survey of State Legislation*, 10 VILL. L. REV. 545, 546-47 (1965). *See also* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 76-102 (1965).

16 Several states had enacted legislation forming unsatisfied judgment funds in the 1950's: *e.g.*, MD. ANN. CODE art. 66½, §§ 150-179 (Repl. 1967); MICH. COMP. LAWS §§ 257.1101 *et seq.* (1965); N.J. STAT. ANN. §§ 39:6-61 to -91 (1961); N.Y. INS. LAW §§ 600-26 (McKinney 1966).

17 The Saskatchewan plan of compensation without fault had been in existence prior

result, a majority of the states have adopted the uninsured motorist protection approach.[18]

Due to the widespread use of such protection, the probability of being covered by multiple policies increased. The insurance industry responded by inserting "other insurance" clauses[19] drafted to restrict multiple recovery and consequently reduced the potential liability of the insurer.[20] *McFarland* illustrates precisely this situation. The defendant insurer effectively reduces its own exposure to liability in any situation where other insurance is available (Allstate's primary coverage) to "the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance."[21] The insurance industry in practice provides coverage as per the minimum limits of financial responsibility laws of each state. Therefore where two policies cover the same loss the limits are usually identical, thereby negating the paid-for protection of the "other insurance" policy.[22]

"Other insurance" clauses are primarily directed at the problem of double insurance or concurrent coverage problems, which occur when two or more insurers cover the same person for a loss resulting from the same risk.[23] These clauses were first used in the property insurance field to guard against over-insurance particularly where the

to mid-1950's. *See* Lang, *The Nature and Potential of the Saskatchewan Insurance Experiment*, 14 U. FLA. L. REV. 352 (1962).

18 See Ghiardi & Wienke, *Recent Developments in the Cancellation, Renewal and Rescission of Automobile Insurance Policies*, 51 MARQ. L. REV. 219, 244 n.147 (1967-68).

19 In support of this proposition one author has noted that:

> When an insured is injured while occupying a highway vehicle *not* owned by the named insured, the standard endorsement provides that the insured's policy applies only as *excess* coverage over any other similar insurance available to such an insured and applicable as primary insurance.

Widiss, *supra* note 13, at 522 (footnote omitted).

20 *Id.*

21 120 N.J. Super. at 557, 295 A.2d at 377. Defendant contended:

> "[T]he UM [uninsured motorist] insurance which applies to the vehicle claimant is occupying is viewed as primary insurance, so that the claimant's own uninsured motorist endorsement (if any) applies *only* in the event that its coverage is more extensive than the primary coverage and then only for the *amount* of such 'excess.' "

Id.

22 Donaldson, *Uninsured Motorist Coverage*, 36 INS. COUNSEL J. 397, 426 (1969). The *McFarland* court noted:

> Under this construction, Motor Club need only adopt the $10,000 and $20,000 minimums of N.J.S.A. 17:28-1.1 as its maximum coverage offered, in order to escape liability to its insured guest whenever the host-driver has similar coverage. In no instance will the Motor Club coverage be "more extensive" than the "primary coverage."

120 N.J. Super. at 557, 295 A.2d at 377. *See also* Stanton, *supra* note 9, at 49.

23 *See generally* Russ, *The Double Insurance Problem—A Proposal*, 13 HASTINGS L.J. 183 (1961); Comment, *Conflicts Between "Other Insurance" Clauses in Automobile Liability Policies*, 20 HASTINGS L.J. 1292 (1969).

injury to be compensated was fraudulently inflicted on the insured's property. Since this defrauding scheme is relatively rare in the automobile insurance area, the purpose of these clauses is merely an effort to reduce the insurer's liability.[24]

The categorization of "other insurance" clauses is delimited by the extent of liability to which the insurer is exposed. The first type is the "escape" clause which denies all liability in a double coverage situation.[25] Thus the escape clause provides a windfall for the insurer since it collects premiums while incurring no liability. The "excess" clause limits the insurer's liability to the amount of loss sustained beyond the policy limits of the other insurer.[26] A variation of the "pure" excess is the "limited" excess clause which allows the insurer to confine its liability to the difference between its own policy ceiling and the total amount of all other available coverage.[27] This type has also been referred to as a "modified escape"[28] clause since the operative effect of such a clause, where the amount of all other insurance coverage equals or exceeds the limits of the particular policy, relieves the "limited" excess insurer of all liability.[29] The last principal type of "other insurance" clauses is the pro rata[30] form which provides that a proportionate share of the loss will be paid by the insurer according to some court-estab-

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[24] *See* Russ, *supra* note 23; Comment, *"Other Insurance" Clauses: The Lamb-Weston Doctrine*, 47 ORE. L. REV. 430 (1968).

[25] *E.g., Zurich Gen. Accident & Liab. Ins. Co. v. Clamor*, 124 F.2d 717 (7th Cir. 1942):

> The insurance [policy] was not applicable to "any person . . . with respect to any loss against which he has other valid and collectible insurance."

Id. at 718.

[26] *E.g.*, Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co., 28 N.J. 554, 147 A.2d 529 (1958):

> If the insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; *provided, however, the insurance under this policy . . . shall be excess insurance over any other valid and collectible insurance.*

Id. at 556-57, 147 A.2d at 530.

[27] *E.g.*, Vignali v. Farmers Equitable Ins. Co., 71 Ill. App. 2d 114, 216 N.E.2d 827 (1966):

> [T]he insurance hereunder shall apply only as excess insurance over any similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this endorsement exceeds the sum of the applicable limits of liability of all such other insurance.

Id. at 119, 216 N.E.2d 830.

[28] *See* Russ, *supra* note 23, at 184.

[29] *See* Comment, *supra* note 23, at 1295.

[30] *E.g.*, Woodrich Constr. Co. v. Indemnity Ins. Co. of N. America, 252 Minn. 86, 189 N.W.2d 412 (1958):

> If the insured has other insurance against a loss covered by this policy

lished formula.[31] The clause under dispute in *McFarland* was the "limited" excess type which allows the insurer to sell a nullity to the insured since most uninsured motorist policies are issued with limits identical to the provisions of the state financial responsibility laws, thus the possibility of any excess is essentially eliminated.[32]

Some courts have attempted to balance the injustices created by the insurer's use of such clauses with the threat of double recovery on the part of the insured by determining primary and secondary liability.[33] Labeling an insurer primarily or secondarily liable has been accomplished in a number of ways, all of which circumvented the necessity of interpreting the "other insurance" clauses themselves.[34] One method was a court determination of which policy in a concurrent coverage situation was specific to the loss involved as compared to another policy which was general in nature.[35] Once determined, the specific insurer was found to be primarily liable and the general insurer responsible only for the portion remaining, thus becoming an excess insurer.[36]

An alternate approach evolved from the property field in which the policy with the earliest effective date was deemed to be primarily liable.[37] Courts considering cases involving automobiles adopted this interpretation and gave effect to any subsequent insurer's "other insurance" clause under the theory that at the time the first policy was written, no other insurance existed to activate its policy's "other insurance" clause. This approach was effective in leaving the later policies' "other insurance" clauses operative.[38] The third solution was to hold

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> the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

Id. at 100, 89 N.W.2d 422.

31 *See* Comment, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319, 330-31 (1965).

32 *See* Comment, *The Meaning, Scope and Validity of the Other Insurance Provisions Which Apply to the Uninsured Motorist Endorsement*, 53 MARQ. L. REV. 397, 398-99 (1970).

33 *See* Note, *Automobile Liability Insurance—Effect of Double Coverage and "Other Insurance" Clauses*, 38 MINN. L. REV. 838, 841-55 (1954).

34 *Id.* For methods of handling double coverage, *see also* Russ, *supra* note 23, at 184-85; Comment, *supra* note 31, at 321-22.

35 *See generally* Comment, *supra* note 23, at 1297-98; Note, *supra* note 33, at 841-43.

36 *See, e.g.*, Hartford Steam Boiler Inspection & Ins. Co. v. Cochran Oil Mill & Ginnery Co., 26 Ga. App. 288, 105 S.E. 856 (1921); Trinity Universal Ins. Co. v. General Accident, Fire & Life Assur. Corp., 138 Ohio St. 488, 35 N.E.2d 836 (1941).

37 Russ, *supra* note 23, at 184; Snow, *Other Insurance Clauses—Multiple Coverage*, 40 DENVER L. CENTER J. 259, 265 (1963).

38 *See* Funke v. Minnesota Farmers' Mut. Fire Ins. Ass'n, 29 Minn. 347, 13 N.W.

the insurer of the primary tortfeasor primarily liable[39] to the full limits of its policy, while the secondary insurer, under whose coverage the primary tortfeasor was merely an additional insured, was held liable for the excess beyond the limits of the former policy.[40]

However the modern approach has been to treat the "other insurance" problem, when presented in the uninsured context, in either of two ways; through an analysis of the "other insurance" clause itself, or through an interpretation of the financial responsibility statutes' legislative purpose.[41] The majority of the courts felt that the concurrent recovery problems could best be resolved by employing the first approach.[42] Thus, when confronted with various combinations of other insurance clauses, these courts have developed a body of general rules to resolve the inherent conflicts.[43]

In 1952 the ninth circuit rejected the general rules approach as a

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164 (1882). For automobile cases, *see* New Amsterdam Cas. Co. v. Hartford Accident & Indem. Co., 108 F.2d 653 (6th Cir. 1940); Michigan Alkali Co. v. Bankers Indem. Ins. Co., 103 F.2d 345 (2d Cir. 1939).

39 Fidelity & Cas. Ins. Co. v. Sears, Roebuck & Co., 124 Conn. 227, 199 A. 93 (1938).

40 Comment, *supra* note 31, at 322. *See, e.g.*, American Auto. Ins. Co. v. Penn Mut. Indem. Co., 161 F.2d 62 (3d Cir. 1947).

41 Stanton, *supra* note 9, at 49-50:

> Those courts which have prohibited stacking have relied both on the express language of the "other insurance" provision and upon the view that the basic purpose of insurance against uninsured motorists is to put the claimant in as good a position as he would have been in, had the negligent uninsured motorist had insurance in the *minimum* amounts required under the financial responsibility laws . . . . Courts which have allowed stacking have done so either on the basis of manipulating the language of the "other insurance" provision, or on the basis that where there are two endorsements, each separately paid for, there should be recovery under both when the coverage limit of only one of them is inadequate to pay the damages involved, or on the basis of a combination of these two reasons.

42 In this approach three situations are possible: (1) a single "other insurance" clause, which generally is given effect if not against public policy, (2) similar "other insurance" clauses which are paired as follows; pro rata vs. pro rata, excess vs. excess, and escape vs. escape, (3) different "other insurance" clauses with possible pairs including; pro rata vs. excess, pro rata vs. escape, and excess vs. escape. For a full discussion, see Comment, *supra* note 31, at 322-30; Comment, *supra* note 23, at 1299-1307; Note, *supra* note 33, at 847-55.

43 When similar "other insurance" clauses are paired, the general solution is that the liability is prorated by a method deemed equitable by the court. *See* Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co., 28 N.J. 554, 147 A.2d 529 (1959).

The pairing of different "other insurance" clauses has been solved in a variety of ways: (1) excess vs. pro rata—full effect is given the excess clause exposing the insurer with the pro rata clause to primary liability, *see* American Auto. Ins. Co. v. Republic Indem. Co. of America, 52 Cal. 2d 507, 341 P.2d 675 (1959); (2) escape vs. pro rata—pro rata clause is held to be primary, *see* McFarland v. Chicago Express, Inc., 200 F.2d 5 (7th Cir. 1952); (3) excess vs. escape—an escape clause policy is normally found primarily liable while an excess clause policy is thereafter responsible for any unsatisfied portion; *see* Zurich Gen. Accident & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1942).

solution to conflicting "other insurance" clause situations.[44] The new course was delineated in *Oregon Automobile Insurance Co. v. United States Fidelity & Guaranty Co.*[45] The court ordered a proration where dissimilar "other insurance" clauses clashed.[46] Therefore the court avoided a reconciliation between the excess vs. escape clauses in conflict and prorated the loss among all the insurers concerned in proportion to their respective policy limits.[47] *Lamb-Weston, Inc. v. Oregon Automobile Insurance Co.*,[48] an Oregon Supreme Court decision, followed the lead set by the court of appeals by holding:

> [W]hether one policy uses one clause or another, when any come in conflict with the "other insurance" clause of another insurer, regardless of the nature of the clause, they are in fact repugnant and each should be rejected in toto.[49]

Although the *McFarland* court did not analyze the situation as one involving conflicting "other insurance" clauses and was not required to consider proration, the court adopted the reasoning of *Lamb-Weston* —the Oregon Rule,[50] and found the clause repugnant and void against public policy.[51] The court considered the "other insurance" clause as not constituting a concurrent coverage situation in which the same risk and same loss were protected by several policies.[52] On the contrary, the excess-escape clause was deemed ineffective since no other similar insurance was available regarding any amount above the $10,000 limit, therefore

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44 *See* Comment, *supra* note 24, at 435.

45 195 F.2d 958 (9th Cir. 1952). This case involved a conflict between an excess and an escape clause which, under the existing majority rule would have mandated that the excess clause be given effect.

46 The court reasoned:

> In our opinion the "other insurance" provisions of the two policies are indistinguishable in meaning and intent. One cannot rationally choose between them. . . . [W]e think [they] must be held mutually repugnant and hence be disregarded. Our conclusion is that such view affords the only rational solution of the dispute in this case.

Id. at 960 (footnote omitted).

47 *Id.*

48 219 Ore. 110, 341 P.2d 110 (1959) (involving a conflict between an excess clause and a pro rata clause). For a discussion of the case, *see* Comment, *supra* note 24.

49 219 Ore. at 129, 341 P.2d at 119. This reasoning was followed in two uninsured motorist cases: Sparling v. Allstate Ins. Co., 249 Ore. 471, 439 P.2d 616 (1968); Smith v. Pacific Auto. Ins. Co., 240 Ore. 167, 400 P.2d 512 (1965).

50 The *McFarland* court rejected the reasoning of Morelock v. Millers' Mut. Ins. Ass'n, 49 Ill. 2d 234, 237-38, 274 N.E.2d 1, 3 (1971) which failed to adopt the "Oregon Rule." 120 N.J. Super. at 561, 562, 295 A.2d at 379.

51 120 N.J. Super. at 563, 295 A.2d at 380.

52 *Id.* at 561, 295 A.2d at 379.

> [D]efendant's "other insurance" clause would then serve only to preclude dual recoveries by forcing the insured to first report to the "primary" company and then to his own insurer for the excess, which would not be "available" from the "primary" company. This is consonant with N.J.S.A. 17:28-1.1, which provides for payments "of all or part of the sums which persons insured . . . shall be *legally entitled* to recover."[53]

The court, by rejecting the rationale in *Morelock v. Millers' Mutual Insurance Association*[54] which held the excess clause to be an unambiguous indication of the contractual intent of the parties and a valid policy within the legislative intent of the financial responsibility laws,[55] indicated its own holding would be based on the alternative method of analysis—public policy and compliance with the statute requiring uninsured motorist coverage.[56]

Courts have been divided on the validity of "other insurance" clauses as determined by the purpose of uninsured motorist legislation.[57] The philosophy holding these clauses valid (the conservative approach), supports the proposition that the purpose of uninsured motorist coverage is to

> give the same protection to a person injured by an uninsured motorist as he would have if he had been injured in an accident caused by an automobile covered by a standard liability insurance policy.[58]

Furthermore, several authorities in the insurance field maintain that the coverage should compensate the injured only to the extent that the

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53 *Id.* (emphasis added).

> The term "legally entitled" has been interpreted as import[ing] into the Endorsement all the normal rules governing tort liability and damages. Accordingly, in order to collect under the Endorsement, the insured must be able to prove an automobile tort case against the uninsured motorist.

Stanton, *supra* note 9, at 29 (footnote omitted).

54 49 Ill. 2d 234, 274 N.E.2d 1 (1971).

55 *Id.* at 238, 274 N.E.2d at 3:

> "Construing an insurance contract accurately and giving it the effect which its language clearly commands, is not *ipso facto* a breach of public policy merely because it disappoints the innocent victim of an uninsured motorist." [The] . . . legislature's intent . . . is satisfied by coverage which assures . . . compensation . . . to at least the same extent compensation "is available for injury by a motorist who is insured in compliance with the Financial Responsibility Law."

Id. (quoting in part from Putnam v. New Amsterdam Cas. Co., 48 Ill. 2d 71, 86, 89, 269 N.E.2d 97, 104, 106 (1970)).

56 120 N.J. Super. at 561-62, 295 A.2d at 379.

57 *See* Soich, *Uninsured Motorist Coverage; Past, Present, and Future*, 6 DUQ. L. REV. 341, 342-56 (1968); Stanton, *supra* note 9, at 48-50.

58 12 G. COUCH, COUCH ON INSURANCE 2d, § 45:623 (1964) (footnote omitted).

tortfeasor's liability insurance meets the limits required by the financial responsibility laws.[59]

The first circuit court decision expanding this theory was *Travelers Indemnity Co. v. Wells*[60] which held that the financial responsibility law did not provide an injured passenger with uninsured protection beyond the amounts set by the statute through "stacking" of policies, that is, combining the driver's insurance with the passenger's own uninsured motorist policy. The court reasoned that "stacking" would place the innocent victim of a negligent uninsured in a better position than one involved with a negligent, minimally insured motorist.[61]

This reasoning was the most common approach used in upholding insurance agreements containing an "other insurance" clause.[62] It was followed in *Maryland Casualty Co. v. Howe*:[63]

> The design and purpose of the uninsured motorist insurance statute was to provide protection only up to the minimum statutory limits for bodily injuries caused by financially irresponsible motorists. The statute was not designed to provide the insured with greater insurance protection than would have been available had the insured been injured by an operator with a policy containing minimum statutory limits.[64]

Several other jurisdictions have adopted this reasoning.[65]

The *McFarland* court, however, followed a different approach in interpreting the uninsured motorist statutory purpose. It found that

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59 Denny, *Uninsured Motorist Coverage—Present and Future*, 52 VA. L. REV. 538, 556-60 (1966).

60 316 F.2d 770 (4th Cir. 1963). This proposition was reconsidered in Virginia in Bryant v. State Farm Mut. Auto. Ins. Co., 205 Va. 897, 140 S.E.2d 817 (1965) which adopted the "liberal" approach. *See* Soich, *supra* note 57, at 343.

61 316 F.2d at 773.

62 Soich, *supra* note 57, at 350.

63 106 N.H. 422, 213 A.2d 420 (1965).

64 *Id.* at 424, 213 A.2d at 422.

65 *See, e.g.*, Harris v. Southern Farm Bureau Cas. Ins. Co., 274 Ark. 961, 448 S.W.2d 652 (1970); Morelock v. Millers' Mut. Ins. Ass'n, 49 Ill. 2d 234, 274 N.E.2d 1 (1971); Putnam v. New Amsterdam Cas. Co., 48 Ill. 2d 71, 269 N.E.2d 97 (1970); Tindall v. Farmers Auto. Management Corp., 83 Ill. App. 2d 165, 226 N.E.2d 397 (1967); Burcham v. Farmers Ins. Exch., 255 Iowa 69, 121 N.W.2d 500 (1963); Webb v. State Farm Mut. Auto. Ins. Co., 479 S.W.2d 148 (Mo. App. 1972) (While the "conservative" statutory interpretation was used, a "liberal" result was reached by refusing to allow medical payment coverage to reduce uninsured motorist coverage.); Globe Indem. Co. v. Baker's Estate, 22 App. Div. 2d 658, 253 N.Y.S.2d 170 (1964); Russell v. Paulson, 18 Utah 2d 157, 417 P.2d 658 (1966) (This case involved a pro rata vs. limited excess clause situation which gave the limited excess clause effect.); State Farm Mut. Auto. Ins. Co. v. Bafus, 77 Wash. 2d 720, 466 P.2d 159 (1970); Miller v. Allstate Ins. Co., 66 Wash. 2d 871, 405 P.2d 712 (1965) (The case involved pro rata vs. escape clause conflict, which upheld the escape clause as what was intended by the contracting parties.)

N.J. STAT. ANN. § 17:28-1.1 requires that financially responsible people be provided for recovery of damages and since this statute was found to allow recovery from all possible sources, the excess clause is a nullity.[66] The court relied on *Safeco Insurance Co. of America v. Jones*,[67] an Alabama decision, as typifying the correct analysis. Presented with an identical fact pattern *Safeco* reviewed the case law which established the "new majority"[68] and cited *Sellers v. United States Fidelity & Guaranty Co.*[69] as the precursor of its decision. The *Sellers* court held that "other insurance" clauses cannot limit amounts of coverage contrary to the statutory minimum:[70]

> The statute is designed to protect the insured as to his actual loss within such limits, but being of statutory origin it is not intended that an insured shall receive more from such coverage than his actual loss, although he is the beneficiary under multiple policies issued pursuant to [the statute] . . . .[71]

Similarly, the Virginia supreme court in *Bryant v. State Farm*

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[66] 120 N.J. Super. at 560, 295 A.2d at 379.

[67] 286 Ala. 606, 243 So. 2d 736 (1970). Similar reasoning has been used in later Alabama cases, *see* Hogan v. Allstate Ins. Co., 287 Ala. 696, 255 So. 2d 35 (1971); State Farm Mut. Auto. Ins. Co. v. Cahoon, 287 Ala. 462, 252 So. 2d 619 (1971); Preferred Risk Mut. Ins. Co. v. Holmes, 287 Ala. 251, 251 So. 2d 213 (1971). (The latter two cases used the "liberal" approach and held that workmen's compensation benefits received could not be set off against uninsured motorist policies.)

[68] 286 Ala. at 614, 243 So. 2d at 742. It has been calculated that the majority of states now allow "stacking," finding the "other insurance" clause violative of the public policy espoused in the financial responsibility laws. Comment, *The Invalidity of the "Other Insurance" Provision: A New Majority*, 17 S.D.L. REV. 152, 165 (1972).

[69] 185 So. 2d 689 (Fla. 1966).

[70] *Id.* at 692. The *Sellers* case was followed in: Transportation Ins. Co. v. Wade, 11 Ariz. App. 14, 461 P.2d 190 (1970) (Plaintiff's decedent was killed while a passenger in his own vehicle due to negligence of an uninsured motorist. Recovery was granted under both the driver's and owner's policies); Travelers Indem. Co. v. Williams, 119 Ga. App. 414, 167 S.E.2d 174 (1969) (Guest passengers injured in an accident caused by the negligence of an uninsured, recovered under the owner's policy as well as their own); Stephens v. Allied Mut. Ins. Co., 182 Neb. 562, 156 N.W.2d 133 (1968) (Plaintiff was negligently injured by another who was insured by defendant insurance company. Subsequently, the insurer became insolvent. Thus, using the public policy argument behind the uninsured motorist statute, the court held that the insurer is not allowed to set off against its own uninsured motorist policy, medical insurance payments on the owner's uninsured motorist policy); Moore v. Hartford Ins. Co., 270 N.C. 532, 155 S.E.2d 128 (1967) (Plaintiff's wife was killed while a passenger in an insured vehicle as a result of the negligence of the uninsured motorist in the other vehicle. Husband was granted recovery under the driver's policy as well as the owner's uninsured motorist policy); Harleysville Mut. Cas. Co. v. Blumling, 429 Pa. 389, 241 A.2d 112 (1968). Plaintiff, while driving his employer's vehicle was injured due to the negligence of the uninsured motorist in the other vehicle. Recovery was allowed under the employer's policy as well as the uninsured motorist coverage on plaintiff's own automobile).

[71] Sellers v. United States Fidelity & Guar. Co., 185 So. 2d 689, 692 (Fla. 1966).

Mutual Automobile Insurance Co.[72] found that such limited excess clauses violate the statutory mandate in that they fail to allow the recovery of all sums to which the insured is legally entitled, and not only those sums as exceed the other applicable limits.[73] Thus the court decided that the insured should collect the unpaid portion of his judgment within the limit of his policy. This reasoning typifies the "liberal" approach.

The *McFarland* court, in order to strike the excess-escape clause as against public policy, needed a vehicle to implement its determination since no statutory authorization existed in N.J. STAT. ANN. § 17:28-1.1 to permit the voiding of such invalid clauses.[74] Analogizing from cases in which the court invalidated restrictive clauses geared to limit omnibus coverage,[75] the court concluded that the power to delete such inconsistent clauses was grounded in N.J. STAT. ANN. § 39:6-48 (b)[76] which provides that a policy that has a more restrictive omnibus coverage is automatically amended to conform to the statutory standard.

The court was then compelled to establish the purpose of the statute to determine whether the "other insurance" clause was contrary to the legislative intent.[77] Relying on the analysis of *Selected Risks Insurance Co. v. Zullo*,[78] the court found the general purpose of the

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72 205 Va. 897, 140 S.E.2d 817 (1965).

73 *Id.* at 901, 140 S.E.2d at 820.

74 120 N.J. Super. at 559, 295 A.2d at 378.

75 The prototype of such an omnibus clause is provided by N.J. STAT. ANN. § 39:6-46(a) (Supp. 1972-73). The policy shall:

> [I]nsure the insured named therein and any other person using or responsible for the use of any such motor vehicle with the express or implied consent of the insured . . . .

Cases promoting the insured's rights to recovery under the omnibus clause include: Selected Risks Ins. Co. v. Zullo, 48 N.J. 362, 225 A.2d 570 (1966) ("scope of permission" limitation was nullified); Newark Ins. Co. v. Concord Ins. Co., 115 N.J. Super. 147, 278 A.2d 508 (App. Div. 1971) ("duly licensed" requirement was deleted); Kish v. Motor Club of America Ins. Co., 108 N.J. Super. 405, 261 A.2d 662 (App. Div. 1970), *cert. denied*, 55 N.J. 595, 264 A.2d 68 (1970) (striking an exclusionary clause relating to the insured, his spouse or minor children); Willis v. Security Ins. Group, 104 N.J. Super. 410, 250 A.2d 158 (Ch. 1968), *aff'd*, 53 N.J. 260, 250 A.2d 129 (1969) (invalidating an exclusion against individuals driving the insured's automobile with his permission when such individuals had valid and collectible insurance in $10,000/$20,000 minimums under their own policies).

76 N.J. STAT. ANN. § 39:6-48(b) (1961) providing in part:

> [A]ny policy of motor vehicle liability insurance furnished as proof of financial responsibility . . . shall be deemed amended to conform with and to contain all the provisions required by this act, any provision of the policy or certificate to the contrary notwithstanding.

77 120 N.J. Super. at 559, 295 A.2d at 378.

78 48 N.J. 362, 371, 225 A.2d 570, 575 (1966).

Motor Vehicle Security Responsibility Law,[79] the Unsatisfied Claim and Judgment Fund Law,[80] and the Motor Vehicle Liability Security Fund Act[81] was to provide victims of auto accidents financially responsible parties from whom claims could be satisfied.

Turning then to N.J. STAT. ANN. § 17:28-1.1, to which the aforementioned legislative purpose is imputed, the court found that the Act did not limit the insured's right to claim additional damages to the amount by which the "other insurance" policy limit exceeds the primary policy coverage.[82] Thus, since the legislature did not include a ceiling in the statute, neither could the insurer create one through a self-imposed limiting provision.[83] To adopt the contrary would be to render the endorsement nugatory, since in reality no excess generally exists in a multiple coverage situation.[84]

The *McFarland* decision seems to reiterate the philosophy of Professor Widiss, who maintained:

> Such provisions are justifiable where indemnification has been complete, but their propriety seems highly suspect when invoked by an insurance company to avoid liability when the claimant has not been fully compensated.[85]

Additionally, the author noted that "judicial hostility" against exclusions or limitations in the endorsements has been increasing in order to further the policy of indemnifying victims of negligent, financially irresponsible motorists and to stem the tendency of the insurer to deny liability by imposing narrower limits than the state statutes require.[86]

This "hostility" theory may shed light on the *McFarland* rationale by which the court opted to follow the "liberal" approach, although N.J. STAT. ANN. § 17:28-1.1 tends to support the "conservative" interpretation. The New Jersey uninsured motorist statute does not expressly characterize its limit as either a minimum or maximum.[87] The statute describes the limit by a reference to N.J. STAT. ANN. § 39:6-69, which sets out the application procedure for payment from the Un-

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79 N.J. STAT. ANN. §§ 39:6-23 to -60 (1961).

80 N.J. STAT. ANN. §§ 39:6-61 to -91 (1961).

81 N.J. STAT. ANN. §§ 39:6-92 to -104 (1961).

82 120 N.J. Super. at 560, 295 A.2d at 379.

83 *Id.*

84 *Id.*

85 A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE § 8.1, at 283 (1969).

86 *Id.* at § 8.6, 288-89.

87 N.J. STAT. ANN. § 17:28-1.1 (1970) states in part:

[C]overage is offered in connection therewith, in limits . . . set forth in section 9 of chapter 174 of the laws of 1952 (C. 39:6-69) . . . .

satisfied Claim and Judgment Fund.[88] The limits established in this statute are the maximum amounts one can recover from the fund regardless of whether a victim is fully compensated or not.[89]

In contradistinction, the leading "liberal" approach cases, in Virginia, the *Bryant* decision and in Florida, the *Sellers* case both involved uninsured motorist statutes with specific language setting minimum limits.[90] Thus the fact that words such as "limits not less than X amount" are notably missing from the New Jersey statute made the court's task more difficult. The *McFarland* court summarily adopted the reasoning used in *Safeco*, which, the court stated, involved a similarly constructed statute.[91] However, upon closer scrutiny the Alabama statute does not in fact parallel the New Jersey provision, but like the Florida and Virginia laws, includes language setting only minimum limits of recovery.[92] Thus, the strength of *Safeco* as a precedent for *McFarland* is somewhat diminished. Instead, the New Jersey decision essentially adopted the philosophy of the "liberal" courts, as outlined in *Safeco*, espousing the public policy argument of just compensation, and predicating this philosophy on the premise that

> since the statutes did not specifically authorize the limitations or exclusions included in the coverage terms by the company, the insurer ought not to be allowed to avoid liability for injuries

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88 N.J. STAT. ANN. § 39:6-69 (1961) provides in part:

> [D]irecting payment out of the fund, of the amount unpaid upon such judgment for bodily injury or death, which does not exceed, or upon such judgment for damage to property which exceeds the sum of $100.00 and does not exceed—
>
> (a) The maximum amount or limit of $10,000.00 . . . on account of injury to, or death of, 1 person, in any 1 accident, and
>
> (b) The maximum amount or limit, subject to such limit for any 1 person so injured or killed, of $20,000.00 . . . in any 1 accident, and
>
> (c) The maximum amount or limit of $5,000.00 . . . for damage to property in any 1 accident.

89 Dixon v. Gassert, 26 N.J. 1, 8, 138 A.2d 14, 18 (1958):

> [The Unsatisfied Claim & Judgment Fund Law] does not reflect an intention to make every claimant completely whole, but rather to provide some measure of relief up to a maximum . . . .

See also Bacon v. Miller, 113 N.J. Super. 271, 275, 273 A.2d 602, 606 (App. Div. 1971).

90 VA. CODE ANN. § 38.1-381(b) (1970) provides in part: "[W]ithin limits which shall be *no less than* the requirements of § 46.1-1(8), as amended from time to time. . . ." (emphasis added).

FLA. STAT. ANN. § 627.727(1) (1972) (this has incorporated the former statute, FLA. STAT. ANN. § 627.0851 (Supp. 1970)) provides: "[I]n not less than the limits described in § 324.021(7) . . . ."

91 120 N.J. Super. at 561-63, 295 A.2d at 379-80.

92 ALA. CODE TIT. 36 § 74(46)(c) (Supp. 1969) provides in part: "[Coverage is provided] to a limit, exclusive of interest and costs, of not less than [statutory amounts] . . . ."

falling within the general scope defined by the uninsured motorist statute.[93]

Further complicating the logic of *McFarland* is the fact that N.J. STAT. ANN. § 17:28-1.1 has been interpreted as having the legislative purpose of relieving the Unsatisfied Claim and Judgment Fund of financial burdens from claims relating to uninsured motorists.[94] However this interpretation is valid only where the primary insurer issues uninsured motorist coverage for an amount less than $10,000 and the passenger's own policy is for an identical amount. If the latter policy is restricted through its "other insurance" clause to allow recovery only to the difference between its policy and any other available insurance, the insured could then proceed to collect against the Fund. Thus, the Fund would be responsible for the difference between the primary insurer's policy and the $10,000 maximum set by the statute.[95] Consequently, "stacking" would then effectively relieve the Fund. However, since N.J. STAT. ANN. § 17:28-1.1 requires uninsured motorist protection to be provided in the same monetary limits as does the Fund,[96] such a situation could never arise. Thus the Fund is relieved in the *McFarland* situation whether the excess provision be invalidated or not.[97]

Rejecting this view of the statute, the *McFarland* court relied on general rules of interpreting insurance contracts;[98] that ambiguities are resolved in the insured's favor[99] and exclusionary clauses are strictly interpreted against the insurer.[100] Although the result is appealing and it is logically just for an insured to receive his paid-for protection, the construction of the New Jersey statute does not lend

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93 A. WIDISS, *supra* note 85, § 8.6, at 289 as quoted in Safeco Ins. Co. of America v. Jones, 286 Ala. 606, 613, 243 So. 2d 736, 741 (1970).

94 *See* Hannan v. Employers Commercial Union Ins. Co., 117 N.J. Super. 485, 489, 285 A.2d 83, 85 (L. Div. 1971); Exum v. Marrow, 112 N.J. Super. 570, 574, 272 A.2d 298, 300 (L. Div. 1970).

95 N.J. STAT. ANN. § 39:6-69 (1961).

96 N.J. STAT. ANN. § 17:28-1.1 (1970).

97 The *McFarland* court recognizes this inconsistency: "This purpose is, of course, accomplished even by limiting an insured to proceeding against one insurer, as defendant urges." 120 N.J. Super. at 559, 295 A.2d at 378.

98 *Id.* at 560-61, 295 A.2d at 379.

99 Bryan Constr. Co. v. Employers' Surplus Lines Ins. Co., 60 N.J. 375, 377, 290 A.2d 138, 140 (1972).

100 Chicago Ins. Co. v. Security Ins. Co., 111 N.J. Super. 291, 295, 268 A.2d 296, 298 (App. Div. 1970).

itself to the "liberal" interpretation except by the general theory of uninsured motorist protection and public policy.[101]

The justice of allowing "stacking" is self-evident where an innocent victim of a negligent uninsured must bear the financial burdens of not being fully compensated because his paid-for protection has been negated by the insurer's built-in "hands-off" clause. The *McFarland* court recognized the need for full compensation in such circumstances to ease the financial burdens threatening the motoring public when involved with an uninsured. However, the "stacking" principle will inevitably shift a greater burden to the insurance companies with the usual effect of spreading the costs to the public in the form of higher premium rates.

Further discounting the force of the *McFarland* decision is the fact that as of January 1, 1973, New Jersey enacted a no-fault plan, The New Jersey Automobile Reparation Reform Act.[102] This act establishes compulsory liability insurance[103] as well as compulsory uninsured motorist protection.[104] In essence, the number of uninsured drivers should be drastically reduced when no-fault becomes fully operational. Among those who may still fall into the class of the financially irresponsible are operators of commercial vehicles, hit-and-run vehicles, out-of-state vehicles, and, of course, those who fail to comply with the no-fault legislation. In these cases, the uninsured motorist policy remains a viable instrument. Additionally, since a passenger would look first to his own policy to recover for personal injury, despite the cause of the accident, the need and opportunity to "stack" policies for recovery of such special damages is reduced. However, the *McFarland* fact pattern may arise in that even under no-fault, a tort claim may be made if injuries sustained are above $200, exclusive of hospital costs.[105] Thus, once a passenger recovers his medical expenses under his own policy, retaining a right to a tort claim, and thus a sum to which he is legally entitled to recover,[106] he could make a claim under the auto-

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101 A suggested resolution to the problem of interpreting uninsured motorist statutes is to introduce new state legislation that incorporates "other insurance" clauses. Such statutes would provide the limits, if any, of coverage and the method by which the loss will be allocated.

See Comment, *Limitations of Liability Within Uninsured Motorist Insurance Policies and Their Validity Under Mandatory Statutes*, 52 NEB. L. REV. 158, 176-78 (1972). *See, e.g.*, CAL. INS. CODE § 11580.2(c)(2) (West 1972).

102 Law of January 1, 1973, ch. 70, [1973] N.J. Laws 180.

103 *Id.* § 3.

104 *Id.* § 14.

105 *Id.* § 8.

106 N.J. STAT. ANN. § 17:28-1.1 (1970).

mobile's uninsured motorist endorsement, reverting lastly to his own uninsured coverage if not yet fully compensated. *McFarland's* impact as a victory for the public may be tempered through the effects of no-fault as well as the potential diffusion of the costs to the insureds through higher premium payments.

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