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Comments

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I. Introduction

Increased consumer buying has focused on the automobile industry and as a result "[t]he U.S., with its 60 million families and 100 million cars, is fast approaching the reality of two cars in every garage."1 Paralleling this growth, the insurance industry has made it highly convenient for the head of a household to insure more than one automobile under the same policy. A commonly issued form policy which provides such coverage is the Standard Family Automobile Liability Policy.2 Ordinarily, insurance protection for a second automobile is provided a policyholder for his payment of an increased premium. Although this procedure appears to be a simple, straightforward approach to insuring a family's second automobile, the payment of the additional premium in conjunction with confusing provisions within the Family Policy have in some cases enabled the insured to obtain compensation the insurer never intended.

In recent years, policyholders owning two or more automobiles insured under the same policy have attempted to increase the sum recoverable under their policies to an amount equal to the monetary limit of coverage multiplied by the number of automobiles insured. This practice is referred to in the insurance industry as "pyramiding of coverage." The basis for this practice has been the separability clause in the Standard Family Automobile Liability Policy. This clause reads in pertinent part: "When two or more automobiles are insured hereunder the terms of this policy shall apply separately to each . . . ."3 The contention of an insured who attempts to pyramid his coverage is essentially that, when two or more automobiles are insured under the same policy, the language of the separability clause means that the stated limit of coverage, being a term of the policy, should be applied separately to each car, i.e., should be multiplied by the number

2. See pp. 280–81 infra. The Standard Family Automobile Liability Policy is a form policy drafted by an association of automobile insurance carriers commonly known as the "Bureau Companies." This group consists of the majority of automobile insurance companies. They belong to one of three associations: The National Bureau of Casualty Underwriters, the National Automobile Underwriters Associations, and the Mutual Insurance Rating Bureau. Elliott, The Family Automobile Policy, 37 Neb. L. Rev. 581 n.1 (1958).
of cars insured. At first blush this contention may seem absurd; however, on closer analysis of the coverage provisions of an automobile liability policy, it appears tenable.

Attempts to pyramid have met with varied success depending on the particular type of insurance coverage in controversy. On the one hand, under medical payments coverage, there is a split of authority as to whether pyramiding should be permitted. On the other hand, under the personal injury liability coverage, the cases are unanimously opposed to pyramiding.

The ensuing analysis will focus on the cases which have arisen under the 1958 draft of the Family Policy and which have interpreted the separability clause and its effect on automobile insurance policy terms relating to medical payments and personal injury liability coverage. In addition, the effect of the 1963 revision of the Family Policy will be discussed. Finally, because courts have found the Family Policy ambiguous, suggestions for future revisions will be made.

Further, since the ultimate determination of whether to allow pyramiding is based upon an interpretation of the particular policy before the court, two well established rules for the construction of insurance policies will be stressed throughout this Comment. First, the policy as written should be the basic guide for determining what is the amount and type of coverage intended by the parties to the insuring contract, and second, ambiguous language should be construed strictly against the insurer and in favor of the insured.

II. MEDICAL PAYMENTS COVERAGE

A. 1958 FAMILY AUTOMOBILE POLICY

In the 1958 draft of the Standard Family Policy, the insuring clause pertaining to medical payments states that the insurance company agrees "[t]o pay all reasonable expenses incurred within one year from the date of accident for necessary medical . . . services . . . ." The persons who are to receive these benefits are divided into two groups:

Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," caused by accident, while occupying or through being struck by an automobile;

5. See pp. 280-95 infra. For a collection of the cases, see Annot., 21 A.L.R.3d 900 (1968).
7. Risjord at 54. The first draft of the Family Automobile Policy was the 1956 version. Since no cases have been found which were decided under that year's policy, the provisions contained in that version will not be discussed.
8. Risjord at 181.
10. Id. § 7401, at 50-87.
Division 2. To or for any other person who sustains bodily injury, caused by accident, while occupying

(a) the owned automobile, while being used by the named insured . . . [or another permissive driver] . . . or

(b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the named insured . . . or (2) its operation or occupancy by a relative . . . .

The coverage afforded by Division 1 is extremely broad. It covers the insured or a member of his family in three different situations: (1) while he is occupying an owned vehicle, (2) while he is occupying a non-owned vehicle, and (3) as a pedestrian. Unlike Division 2, wherein coverage is limited to persons injured by the named insured, his relative, or another permissive driver, Division 1 makes no distinction between an owned or non-owned automobile. An exclusionary clause excepts from coverage under Division 1 any owned automobile not defined in the policy as an owned automobile.

In addition, there is a limitation of liability provision which states:

The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

The declarations referred to states: "The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto." To date the courts have only dealt with situations involving "Division 1 persons," either the insured or a member of his family. In this discussion, situations two and three, i.e., those involving a non-owned automobile and a pedestrian, will be analyzed together because, contrary to the owned automobile situation, there is no exclusionary clause applicable to these situations, and therefore the contentions which can be made in either of them are applicable to both.

The landmark pyramiding decision is Sullivan v. Royal Exch. Assurance Co. In this case the insurer issued to the insured the 1958 version of the Family Policy insuring two automobiles. The terms of the policy included medical expense insurance with a $2,000 limit for "each person." While this policy was in effect, the insured's child was struck by a car owned by a third person, resulting in expenses in excess of $4,000. The

12. Id. at 62-63 (emphasis added).
13. See p. 286 infra.
14. Riordan at 63 (emphasis added).
15. Id. at 54 (emphasis added).
17. It is implicit in the pyramiding concept that the insured's damages be in excess of the policy's stated limit of recovery. The other insurance clause, which is the basis of this implication, states:
If there is other automobile medical payments insurance against a loss covered by . . . [the medical payments section] of this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable
insured argued that the separability clause controlled the limit of liability provision and therefore the $2,000 limitation term of the policy should be applied separately and individually to each automobile insured under his policy, thereby providing $4,000 coverage. The court rejected this argument on the basis of the well established rule that courts should not indulge in a forced construction of the policy in order to cast liability upon the insurer if he has not assumed it. Moreover, while the court recognized the basic rule that ambiguities or uncertainties in insurance contracts should be resolved in favor of the insured, it found no ambiguity, noting that the intention of the parties should be "gathered from the whole instrument . . . ." The Sullivan court reasoned that the separability and limit of liability clauses were consistent with each other, rather than contradictory, and that the specific limitation of liability clause under the medical expenses section should prevail over the general separability clause which applied to all parts of the policy.

In support of this conclusion the court cited Standard Accident Ins. Co. v. Winget. In this case, the insured, while driving his automobile, struck the plaintiff who sought damages in excess of the limit of recovery contained in the personal injury section of the policy, but less than the policy's limit for each accident. The plaintiff argued that the insurer was liable for damages which were more than the limit set for each person because the limit for each accident was not reached. Rejecting this contention, the court held that the limitation set for each accident did not create a fund to be distributed to persons injured by the insured in one accident, but that the policy read in its entirety, shows distinctly that there is an additional limit set for each person.

The Sullivan court's reliance on Winget appears misplaced since the clauses before the court in Winget were not as confusing as those in Sullivan. On this basis, it is submitted that the Sullivan court may have been too hasty in reaching its decision because the policy before it could have easily been found ambiguous. Ordinarily, ambiguous insurance con-

limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible automobile medical payments insurance . . . . RIsford at 63. The effect of this clause is to prorate the recovery allowed under any medical payment insurance, should the damages not reach the total limit of all applicable policies. Thus, the insured is precluded from recovering more than his actual damages. In a pyramiding context, since courts reach this result by reading the one policy as two, see p. 283 infra, the same proration would preclude pyramiding if the damages were not in excess of the policy limits.

18. 181 Cal. App. 2d at 646-47, 5 Cal. Rptr. at 879-80.
22. 181 Cal. App. 2d at 646-47, 5 Cal. Rptr. at 880.
23. 197 F.2d 97 (9th Cir. 1952). The court also discussed another similar case, Lowery v. Zorn, 184 La. 1054, 168 So. 297 (1936).
tracts should be construed in favor of the insured and the considerations set forth by the court in *Sullivan* do not seem of sufficient weight to merit disregarding that rule of construction. A policyholder could be easily misled by the language of the 1958 version of the Family Policy. A fortiori, a determination that language of a policy is ambiguous is not objectionable as a forced construction of the terms of the insurance contract or as imposing unassumed or unintended liability upon the insurer.

The first case to allow pyramidling in the non-owned or pedestrian situation involving the insured or a member of his family was *Southwestern Fire & Cas. Co. v. Atkins*. As in *Sullivan*, the insured's child was struck by a third party's car, and the damages sought were in excess of the stated limit of recovery. The court held that the separability clause when read with the limit of liability clause should provide for double recovery. As the basis for the court's decision, it adopted the following argument of the insured. He could collect the stated limit of recovery in his policy if only one car were insured since the incident for which insurance protection was purchased, *i.e.*, an injury sustained by being struck by a third person's automobile, had occurred. Furthermore, he had paid an additional premium because two automobiles were insured under the one policy. If two policies had been in effect, double recovery would be permitted since both policies would contain provisions insuring against the incurred loss which was above the limit of a single policy. Therefore, if a double recovery were not allowed under the single policy in question there would be no consideration for the additional premium charged for the medical expense insurance on the second car included in the policy. Moreover, a double recovery was said to be necessary in this context, because otherwise the insured would suffer a forfeiture of a benefit to which he was entitled under the policy.

Despite this finding the court did not ignore the rule requiring that insurance policies be read as a whole to determine the coverage afforded. The insurance company presented an argument based on this premise in the hope of establishing that the specific limit of liability clause should control over the general separability clause. The Court of Civil Appeals of Texas rejected this argument, saying that similar limit of liability provisions are "commonly placed in such policies where there is only one car insured." Furthermore, the court stated that if the insurance company intended to restrict its liability under the policy to that applicable if only one vehicle were insured thereunder, it should have so "stipulated in no uncertain language, and it should not have charged a premium on

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27. Id. at 894.
28. Id.
29. Id. at 895.
30. Id. at 895.
each car separately."31 Since this was not done, the court implied that the policy when read as a whole could be interpreted by an insured to provide for double recovery.

One possible criticism may be made of the Atkins opinion. Implicit in the "no consideration" approach is the fact that the policy is ambiguous. If the policy were not ambiguous, it would be extremely difficult to justify the no consideration argument, since the court should then apply the rule that unambiguous policies should be read for their normal import and, under this rule, pyramiding would be denied. Thus, the no consideration approach appears to be a unique, judicially constructed fiction adopted as the primary reason for allowing pyramiding, rather than a supportive argument to allow pyramiding once the policy had been found to be ambiguous.

The court in Atkins extended its analysis one step further than the court in Sullivan. It recognized the rule that the meaning of insurance policies should be gathered from the entire instrument;32 yet presented a rationale for subordinating the applicability of this rule. The Atkins court, therefore, cannot be criticized for ignoring a firmly established rule of construction. Moreover, because it stated this rationale and presented a logical argument for interpreting insurance contracts to provide for pyramided coverage, the Atkins decision appears to be better reasoned than Sullivan.

The Supreme Court of Appeals of Virginia, in Central Sur. & Ins. Corp. v. Elder,33 on facts similar to both Sullivan and Atkins specifically rejected the Sullivan solution and adopted the Atkins rationale.34 The Elder decision sets forth in its facts a clear indication that the Family Policy, as written, is ambiguous. Soon after Elder’s wife had been injured in an accident, the claim superintendent for the Central Surety & Insurance Corporation informed the insured's lawyer that he, the claim superintendent, believed the policy provided for double recovery.35 As stated above, it is reasonable to assume that an insured would reach this same conclusion upon reading his policy.36

31. Id.


34. 204 Va. at 197, 129 S.E.2d at 655.

35. 204 Va. at 197-98, 129 S.E.2d at 655.

36. In Government Employees Ins. Co. v. Sweet, 186 So. 2d 95, 96 (Fla. Dist. Ct. App. 1966), a case involving an owned vehicle, the insurance company admitted that in the non-owned automobile situation it would be "impossible to determine which automobile afforded coverage" thereby leading to an ambiguity. See also Greer v. Associated Indemn. Corp., 371 F.2d 29 (5th Cir. 1967), a case involving an attempt to pyramid liability coverage where the court said that medical payments pyramiding "does not seem unreasonable in view of the different terminology incorporated in the insuring agreement of the medical payments provisions which broadly extends coverage to automobile-produced injuries regardless of its ownership or status as insured or uninsured." Id. at 34.
It would appear to follow from this that the Atkins-Elder approach rather than that adopted in Sullivan is in accord with the established rules of construction. This does not imply that the insurance companies intended to allow pyramiding in this area — they no doubt intended otherwise — but since the policy could be misleading, any possible loss should fall upon the insurer rather than the insured.

The situation presented by an accident involving an owned automobile raises a more complex problem. Insurance coverage in this context refers to accidents which involve the named insured or a member of his family occupying an owned automobile. Two additional clauses of the Family Policy heretofore not discussed must be analyzed — the exclusionary clause in the medical payments section and the clause defining owned automobile. The basic problem in the owned automobile situation, however, remains the same, i.e., the courts must decide whether to allow or deny pyramiding by studying the policy before them. Thus, the effect of the separability clause on the stated limit of liability and the limitation of liability provisions must still be analyzed. It is the additional consideration of the exclusionary clause and the definition of owned automobile which adds to the complexity of the problem.

In the non-owned automobile situation the courts apparently felt that there was no way the insured could allocate the limits of liability contained in the policy to each automobile insured because the separability clause created an ambiguity. Thus, since the insured could be misled into believing that the policy extended a broader coverage than the insurer intended, the courts found that the insured would be prejudiced if pyramiding were not permitted. It is submitted that in the owned automobile

37. But see N. RISJORD & J. AUSTIN, 3 AUTOMOBILE LIABILITY INSURANCE CASES, Case 2734, at 3495–96 (1965), where it was said in an editorial comment on the Elder case:

The decision was wrong, since the Two or More Automobiles Condition applies the coverage separately to each of two or more automobiles "insured hereunder", but has nothing to do with the accident here which involved an entirely separate automobile that was not "insured hereunder".

Risjord and Austin also criticized the Atkins case, N. RISJORD & J. AUSTIN, 2 AUTOMOBILE LIABILITY INSURANCE CASES, Case 2286, at 3761–62 (1965), and although they agreed with Sullivan, said: "Perhaps a better reason for justifying it is that the child was not injured by either automobile insured by the policy so that the provision that the policy applied separately to each automobile really had nothing to do with the case." N. RISJORD & J. AUSTIN, 2 AUTOMOBILE LIABILITY INSURANCE CASES, Case 2032, at 2356–57 (1965).

38. This is made apparent in the Texas State Board of Insurance rules and regulations relied upon by the insurer in Atkins to show that pyramided coverage was not intended. "The inclusion of more than one automobile under the policy shall not operate to increase the limits of the company's liability for the coverage under . . . [the medical payments provision]." 346 S.W.2d at 894.

39. See pp. 280–81 supra.

40. Cf. Vaughn v. Atlantic Ins. Co., 397 S.W.2d 874 (Tex. Civ. App. 1965), where the Texas court refused to apply Atkins because of a different factual setting. In Vaughn, although there were two automobiles and two policies, it was argued that pyramiding should arise. After a discussion of the exclusionary clause, the court refused to accept this contention. See also Gonzales v. Farmers Ins. Exch., 399 S.W.2d 888 (Tex. Civ. App. 1965).

41. See note 36 supra.
situation the exclusionary clause *if clearly written* could logically be read to allocate the coverage to one and only one automobile insured under the policy. This means of allocating coverage to one of the owned automobiles would obviate pyramiding results because ambiguity would no longer exist.

The exclusionary clause excepts from coverage injuries “sustained by the named insured or a relative (1) while occupying an automobile owned by or furnished for the regular use of, either the named insured or any relative, other than an owned automobile defined herein as an owned automobile.”<sup>42</sup> The definition of an owned automobile is “a private passenger, farm or utility automobile or trailer owned by the named insured, and includes a temporary substitute automobile.”<sup>43</sup> Since this clause merely defines an owned automobile as a vehicle owned by the insured it is of little help in clarifying the insurer’s intent. However, the fact that the exclusionary clause purports to limit the policy’s coverage to only the specific automobiles designated in the policy as owned automobiles should not be ignored.<sup>44</sup> If the exclusionary clause effectively carries out its purpose in the context of two owned automobiles insured under the same policy, the second car could not possibly be a designated automobile unless a specific premium were paid to include it in the policy coverage. Otherwise, it would not be an owned automobile designated in the policy and would be excluded from coverage. When an insured pays a second premium he knows that two automobiles are individually insured, and limits of liability apply respectively to each. Thus, he should realize when one of the automobiles is involved in an accident the coverage for the non-involved vehicle is inapplicable. Furthermore, reliance on the separability clause would then hinder rather than aid an insured because, by its very import, the clause should reaffirm the insured’s knowledge that the limit of liability term applies separately to each vehicle.<sup>45</sup>

In this area of pyramiding insurance coverage there are two decisions. Both *Travelers Indem. Co. v. Watson*<sup>46</sup> and *Government Employees Ins. Co. v. Sweet*<sup>47</sup> allowed pyramiding but on the basis of conflicting rationales. The *Watson* court’s basic premise was that notwithstanding the exclu--

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42. Risjord at 63.
43. Id. at 58.

> The language used in the exclusion must be taken in its ordinary and usual sense, and must be given such interpretation as was probably in the contemplation of the parties when the policy was issued.


47. 186 So. 2d 95 (Fla. Dist. Ct. App. 1966).
sionary clause the policy was plain and unambiguous and must be construed as though two policies, which would provide double recovery, were in effect. The *Sweet* rationale was that the limit of liability and the separability clauses were hopelessly irreconcilable, therefore ambiguous and, as a result, the policy must be construed in favor of the insured.

The *Watson* case involved the construction of a single policy under which two owned automobiles were insured, and arose from an automobile accident in which the insured’s wife was injured while occupying one of the two insured automobiles. The court first said that the policy should be treated as though it were two policies, which treatment would permit double coverage under a rationale similar to that developed in *Atkins*.

Secondly, the court rejected the insurer’s argument that the exclusionary clause would not support this reasoning because that clause should clearly indicate that only the coverage on one car was available to compensate the insured. It said that this argument, even if valid, would not apply to the present situation because the exclusionary clause was not applicable in this area under the following reasoning. The court recognized that certain owned automobiles were excluded from the policy’s protection. However, when it analyzed the policy’s definition of owned automobile, it found that the automobile in which the insured’s wife was riding was by policy definition an owned automobile, *i.e.*, it was “a private passenger, farm or utility automobile . . . owned by the named insured” and, therefore, it would not be excluded from the policy’s protection even if no premiums were paid to include it within the policy’s coverage. It followed from this, according to the court, that the exclusionary clause could not be a basis for refuting a two-policy interpretation.

The rationale of *Watson* is more readily criticized than the result. The court found that the policy was unambiguous; however, the exclusionary clause, because it referred to a meaningless definition of owned automobile, in effect did not exclude any owned vehicle. But it would be absurd for the insurance company to insert the exclusionary clause if it intended the result of *Watson*. Under *Watson*, that clause is a nullity because it only excludes an owned vehicle which is not a “private passenger, farm or utility automobile or trailer . . . .” Thus, it can fairly be said that the Family Policy as written did not adequately set forth the insurer’s intent. Assuming this to be so, the policy would be ambiguous, and under the ambiguity rule, a result favoring pyramiding of coverage could be reached. However, by holding the policy unambiguous, the *Watson* court is subject to criticism for not reading the policy logically, but rather in a “forced” manner.

48. 111 Ga. App. at 102-03, 140 S.E.2d at 508-09.
49. 186 So. 2d at 97.
50. 111 Ga. App. at 102-03, 140 S.E.2d at 508.
51. 111 Ga. App. at 103-04, 140 S.E.2d at 508-09.
52. *But see* N. Risford & J. Austin, 3 AUTOMOBILE LIABILITY INSURANCE CASES, Case 3404, at 4392-93 (1965), where it was said that the *Watson* decision was “an even worse distortion of the policy” than that of *Elder* and *Atkins*. 
The theory that the policy's exclusionary clause as written was ambiguous is supported by American Indem. Co. v. Garcia. In this case the insured was successful in obtaining medical payments coverage for the vehicle not described in the policy under a policy insuring only one of two owned vehicles. The court said that the exclusion of the 1958 policy referred to the definition of owned automobile as given in the policy. However, when they studied this definition, the court determined that it was broad enough to include all owned automobiles, and, in effect, acceptance of the insurance company's argument that this clause clarified the area would require that the language of the exclusionary clause be changed by judicial construction from, "other than an automobile defined herein as an 'owned automobile'," to "other than an automobile described herein as an 'owned automobile'." The court concluded that this could not be done since a person reading the broad definition of owned automobiles could have neglected to obtain medical payments coverage on his second car, because it was his understanding that the coverage afforded by the first automobile policy was sufficient to cover any owned automobile.

The Garcia rationale appears sounder than that adopted by the court in Watson. Instead of completely ignoring the ambiguity present in the exclusionary clause, as did Watson, the court used it as the basis for deciding for the insured.

The Garcia approach also appears sounder than that used in Government Employees Ins. Co. v. Sweet. On facts similar to Watson the Florida District Court of Appeals in Sweet, citing the Atkins-Elder ambiguity theory, found that the separability clause was hopelessly in conflict with the stated limit of liability, thereby providing for double insurance protection. It rejected the insurance company's argument that there is no ambiguity in the owned automobile situation. Although the insurer admitted that the policy was ambiguous in the non-owned or pedestrian situation, he contended that in the owned automobile situation there is no ambiguity because an insured reading the policy in light of the exclusionary clause would recognize that he was paying an additional

54. Id. at 147 (emphasis added).
55. Id. But see Gonzales v. Farmers Ins. Exch., 399 S.W.2d 888 (Tex. Civ. App. 1966). In Gonzales a policyholder had both of his automobiles insured under the same policy, but neglected to obtain medical payments coverage on one car which was subsequently involved in an accident. The policy had provisions similar to the 1958 Family Policy. However, the court said the policyholder evidenced no intent to obtain medical payments coverage on the second car and that under the separability clause, it read the policy as though two separate policies were in effect. Therefore, the car for which no medical payments coverage was purchased was not covered by the insurance on the non-involved insured automobile, since it was not described in the policy. Id. at 890.
It is interesting to note that in both Garcia and Gonzales a writ of error was refused by the Texas supreme court because they found no reversible error, yet, the courts reached technically inconsistent results.
57. Id. at 97.
58. Id. at 96.
premium to obtain coverage for his second automobile,\(^{60}\) and therefore the policy limits on coverage could now be properly allocated. However, the court said this was not a realistic reading of the policy since such an interpretation would mean that the insured paid one premium in order to obtain coverage when he drove one of his owned automobiles and any other car in the world except his other owned automobile, whereas he would be paying the additional premium, which reflected a slight discount because it covered an additional car under the same policy, in order to insure only the one additional automobile.\(^{60}\)

Although the result of the *Sweet* decision appears sound at first glance, the opinion may be criticized for not rejecting the insurer's argument on the basis of the rationale of *Garcia* where the exclusionary clause was found ineffective to accomplish its purported purpose.\(^{61}\) In addition, the court's reliance on the *Atkins-Elder* approach\(^{62}\) is misplaced because those cases involved the non-owned automobile situation where the exclusionary clause is inapposite.

The *Watson* and *Sweet* decisions, based on conflicting rationales, are themselves indicative of the confusion in the pyramiding area. Perhaps the courts in both cases decided that they should permit pyramiding and then searched for a justification. Evidence of this possibility may be gleaned from Chief Justice Feton's opinion in *Watson*:

> If the insured could collect for medical expenses under two policies insuring different automobiles when the wife was struck by an automobile belonging to some third person, which he can do, *he can certainly do so under one policy*, insuring two automobiles, which contains no provision limiting medical payments to injuries received while occupying an insured automobile in which the wife or relative was riding.\(^{63}\)

Justice Feton then cited the cases which allowed pyramiding in the non-owned automobile situation. The court must have reasoned that it would be unfair to allow pyramiding when a non-owned vehicle was involved, yet deny it when an owned vehicle was involved. Moreover, although the court found the policy unambiguous, it stated:

> If the insurance company had decided to exclude payments for injuries received by a wife or relative while occupying any automobile other than an automobile *particularly* described in the policy, it could very easily have said so.\(^{64}\)

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59. *Id.*

60. *Id.* at 97. In Hilton v. Citizens Ins. Co., 201 So. 2d 904 (Fla. Dist. Ct. App. 1967), the insured unsuccessfully attempted to pyramid his "uninsured motorist" coverage. The court distinguished *Sweet* on the basis of a more detailed limitation of liability clause in the policy before it. *Id.* at 906.

61. See p. 288 supra.

62. See pp. 283–85 supra.

63. 111 Ga. App. at 104, 140 S.E.2d at 509 (emphasis added).

64. *Id.* (emphasis added). This reasoning, which stressed the insurance companies' ability to say clearly what they intended to say, was made more convincing by the case...
This statement appears to warn insurance companies to state clearly and succinctly what the intended coverage actually is and, if they use vague exclusions or definitions to limit recovery, the courts will not effectuate their intent.

In none of the decided cases under the 1958 Family Policy was a Division 2 person involved, i.e., a person other than a named insured or a member of his family. Of course, such a person could collect only if he were injured while a named insured, his relative, or another permissive driver were operating the vehicle. It will be recalled that under this division a specific distinction is made between the owned and non-owned automobile situations. This type of treatment in the insuring clause could result in a significantly different result in the owned, as opposed to the non-owned, automobile situation. Division 2 specifically mentions the owned automobile. Thus, it could be argued that this singular language indicates that the "other persons coverage" is confined to the car which causes his injuries. It could be said that even though the definition of "owned automobile" is confusing, this reference to a single car would be enough to remove the ambiguity in this context, and therefore preclude pyramiding of coverage. In the non-owned automobile situation, however, the ambiguity would still appear to be present, since there remains the problem of determining which automobile's medical payments coverage should apply to the accident.

B. 1963 Family Automobile Policy

The 1963 Standard Family Automobile Policy, which amended the 1958 policy, has clarified to a degree the intended coverage in the owned automobile situation of Division 1, yet makes no change which would

of Hansen v. Liberty Mut. Fire Ins. Co., 116 Ga. App. 528, 157 S.E.2d 768 (1967). Hansen involved an attempt to pyramid medical payments and accidental death benefit coverage under a policy containing no separability clause. The court did not permit pyramiding because the limit of liability clause specifically excluded it. However, it permitted pyramiding of the accidental death benefit coverage, notwithstanding the absence of the separability clause, because the limitation of liability clause failed to state a clear limit of recovery. They therefore relied on Watson since accidental death insurance is similar to medical payments coverage.

65. A possible argument which the insured could raise is that the insurer would be estopped from excluding coverage by use of the exclusionary clause or limit of liability clause of the policy. An estoppel argument was unsuccessfully attempted in Pusti v. Nationwide Mut. Ins. Co., 415 Pa. 318, 203 A.2d 660 (1964). The elements of estoppel set forth in Pusti were:

(1) a policy condition
(2) which policy condition would void the entire policy and frustrate the entire purpose of the insured, and
(3) the insurer's knowledge that the policy condition was inconsistent with the facts of the insured's situation.


66. See Jarrett v. Allstate Ins. Co., 209 Cal. App. 2d 804, 809, 26 Cal. Rptr. 231, 234 (1962), where the court said: "In construing insurance contracts, the standard to be used is the understanding of the ordinary person."

67. See p. 281 supra.

68. Id.
clarify the non-owned or pedestrian situation. There were two significant revisions implemented by the 1963 policy. The insurance provided for the named insured or a member of his family is still set forth in Division 1; however, the factual situations covered are now specifically described. The coverage extends to such persons:

a. while occupying the owned automobile,
b. while occupying a non-owned automobile . . . [or]
c. through being struck by an automobile or by a trailer of any type . . . \(^69\)

The definition of owned automobile was also changed to "[a] private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded . . . ."\(^70\) This change eliminates the problem inherent in the 1958 definition of owned automobile which was broad enough to include any owned vehicle whether described in the policy or not.\(^71\)

The changes made in 1963 will not effectively eliminate the ambiguity present when the insured is injured while occupying a non-owned vehicle or is struck by a vehicle.\(^72\) These changes do not meet the requirements of Atkins, i.e., that the insurer specifically state that it does not intend to provide for pyramided coverage. Since the policyholder could still interpret the policy as if two policies were written, thereby providing for pyramided coverage, nothing would warrant the conclusion that now the policy when read as a whole would set forth in clear and concise language the insurer's intent.

The 1963 policy, however, does clarify the intended coverage when the insured is injured while occupying an owned automobile. The one decision interpreting the effect of the 1963 revisions on the problem of pyramiding medical payments supports this contention. In Guillory v. Grain Dealers Mut. Ins. Co.,\(^73\) the insurance company issued the 1963 policy to cover the insured's two automobiles. While the insured was driving one of these cars he was involved in an accident, sustaining injuries exceeding in cost the policy's stated limit of recovery. Thus, the circumstances were similar to those in Watson and Sweet, in that an owned automobile was involved. The Louisiana Court of Appeals in Guillory held that the policy did not provide for pyramided coverage. In its opinion the court relied on the rule that the insurance contract itself is

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69. Risjord at 191.
70. Id. at 185–86 (emphasis added).
71. See p. 287 supra.
72. See Greer v. Associated Indem. Corp., 371 F.2d 29, 34 (5th Cir. 1967), where the court, while discussing the reasonableness of the cases allowing the pyramiding of medical payments, said in dicta: "We may assume, without deciding, and as the recent cases seem to bear out that the 1963 amendments, while altering the terminology of the medical payments section, do not appear to have significantly affected the broad coverage afforded."
the best evidence of the parties' intentions, and that if no ambiguity is present, it should be read for its normal import. It reasoned that if the insured was riding in an owned automobile for which no medical payments insurance was purchased, he would not be entitled to recover for his injuries since neither an owned automobile, as interpreted in the policy, nor a non-owned automobile was involved in the accident.

Although the court did not discuss the Watson and Sweet decisions, it is doubtful that they would have been influential since the revisions in the 1963 draft clearly set forth the intended coverage, which the 1958 draft, construed in Watson and Sweet, did not. The court referred to the specific conditions which had to be met before the insurer's liability for payments arose and impliedly found that the policy's definition of owned automobile precluded the insured from recovering against the insurer if he was injured while riding in an owned, but uncovered automobile.

As mentioned earlier, there have been no decisions interpreting the effect of the separability clause on a "Division 2 person," i.e., any other person injured by the named insured, his relative, or another permissive driver while any of these people are operating the vehicle. It was previously determined that under the 1958 policy such a person would have a difficult task establishing an argument in support of pyramiding if he were injured by one of the owned automobiles. The only possible basis for allowing pyramiding was the vague definition of "owned automobile" contained in the 1958 policy. Since that definition has been clarified in the 1963 policy, such a person would have an even more difficult task. Moreover, it was determined that when a Division 2 person was in an accident involving a non-owned vehicle, this person could probably establish a successful argument for pyramiding based on ambiguity. Since the 1963 policy has not clarified the coverage when a non-owned automobile is in an accident, there is nothing to change the suggested result.

Although pyramiding could no longer properly be permitted under the 1963 version of the Family Policy in the owned automobile situation because no ambiguity would be present, the unfairness, referred to by the Watson court of allowing pyramiding in the non-owned situation, but denying it in the owned, remains since an ambiguity argument could still successfully be made to support a pyramiding result in the non-owned situation. It would not be surprising, therefore, for a court disposed such as the one in Watson to disregard the distinction between the owned and non-owned situations. Moreover, in Kansas City Fire & Marine Ins. Co.

74. Id. at 763.
75. Id. at 764.
76. The Guillory court recognized the factual distinctions between the owned and non-owned situation since they dismissed both Atkins and Elder as not being directly on point.
77. 203 So. 2d at 764.
78. See p. 290 supra.
79. Id.
80. Id.
v. Epperson, 81 a case decided under the 1958 Family Policy, the court failed to distinguish between the two situations because it considered that distinction unimportant. 82 It is still possible for a court to make the same comment when the 1963 Family Policy is in controversy. Although, technically, an insurance company should not be liable for double recovery under the 1963 Family Policy when one of the insured cars is involved in an accident, the possibility remains that a court will decide in favor of the insured and allow pyramiding because of either a feeling of unfairness or because of a failure to properly distinguish the factual situations. 83

C. Suggested Revisions

The foregoing considerations strongly suggest a need for further revisions of the medical payments section of the Standard Family Automobile Policy. Although there have been few attempts to pyramid medical payments coverage, as the knowledge of the possibility of such action becomes more widespread there is a probability that the number of attempts to pyramid will increase. Additionally, despite the 1963 draft, there are numerous policyholders of the 1958 version whose policies are annually renewed without changing the policy to reflect revisions made after their policy was initially issued. Since there is no indication that insurance companies will vary this practice in the immediate future, it may reasonably be assumed that even with further revisions of the 1963 Family Policy the problem will not be entirely overcome. Nonetheless the drafting of a more understandable policy is the starting point in clarifying the intent of the insurer.

The Family Policy could be revised to include provisions similar to those in the 1966 Standard Provisions for the General Automobile Liability Policy, 84 which were written after more than 9 years of study by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau. 85 Although these provisions were not intended to supersede the Family Policy, they serve to indicate that a similarly well-constructed policy could also be drafted to rectify the problems arising under the Family Policy.

The deletion of the separability clause, the basis for pyramiding attempts, from the Family Policy would eliminate a source of confusion as to the type and amount of coverage provided. The 1966 Standard Provisions do not contain a separability clause, yet provision is made for multiple car coverage. This is effectuated by the use of a very broad insuring clause, covering "each insured who sustains bodily injury, caused by accident, while occupying or, while a pedestrian, through being struck by a highway

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81. 234 Ark. 1100, 356 S.W.2d 613 (1962).
82. 234 Ark. at 1102, 356 S.W.2d at 614.
83. See p. 289 supra.
vehicle." There are no restrictions with respect to cars owned by the insured, but not mentioned in the policy. However, if the insurance industry wished to restrict coverage to include only owned automobiles for which a premium is charged in the Family Policy, they could follow the approach used by the Standard Provisions section which affords coverage to persons other than the named insured. This division affords coverage:

[T]o or for each person who sustains bodily injury, caused by accident, while occupying a designated automobile which is being used by a person for whom bodily injury liability insurance is afforded under this policy with respect to such use . . .

The designated automobile is then determined by reference to a schedule which states the vehicles which are to be included in the term "designated automobile." The policyholder may elect from a number of options which automobiles are to be included in the term "designated automobile." One option includes any automobile described in the schedule. Thus, the coverage is limited only to vehicles for which the insured pays a premium. By this revision the insured would know exactly the extent of his coverage and insurance companies would not have to concern themselves with decisions allowing double recovery in the owned vehicle situation.

Notwithstanding the elimination of the separability clause by the use of more precise language in the insuring clause to describe the automobile for which coverage is afforded, all the ambiguities in the Family Policy will not be overcome. There remains the problem of possible misunderstanding when the insured is injured while occupying a non-owned automobile or is struck as a pedestrian. It could still be argued that since two cars are insured and neither is involved in the accident, the coverage afforded by both should apply to allow pyramiding. This argument is buttressed by the fact that the insured is paying an additional premium to insure his second car.

This argument becomes more feasible when the case of Hansen v. Liberty Mut. Fire Ins. Co., is analyzed. In this case, the insured attempted to pyramid his medical payments and accidental death benefit coverage even though there was no separability clause in his policy. The Georgia court, the same court which decided Watson, refused to allow the insured to pyramid his medical payments insurance, not only because of the absence of the separability clause, but also because of the preciseness of the limit of liability provision which states that "regardless of the number of . . . automobiles . . . [to] which this policy applies . . . the limit for Medical Expense Coverage . . ." will be the amount stated in the policy. The importance of this provision was made apparent when the court

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86. Risjord at 270 (Supp. 1967).
87. Id.
88. Id. at 202.
89. Id.
91. Id. at 531, 157 S.E.2d at 770.
permitted the insured to pyramid his accidental death payments coverage because there was no specific limit on this coverage other than the monetary limit for each named insured. Thus, the Hansen court found that the policy provision relating to accidental death payments coverage must be read as if separate policies for each car were written, thereby allowing multiple recovery.92

This problem could be alleviated by adding to the present limit of liability provision a sentence similar to that added to the 1966 Standard Provisions which reads: "When more than one medical payments coverage afforded by this policy applies to the loss, the company shall not be liable for more than the amount of the highest applicable limit of liability."93 This clause makes apparent to the reader of the policy that the insurance company does not intend to insure the policyholder for more than the stated limit of liability. A court in construing such a clause would not be justified in allowing pyramiding on the basis of ambiguity. This phrase unequivocally indicates to the insured that the coverage limit set forth in the policy is the "highest applicable limit of liability."

The incorporation of these suggested revisions in the Family Policy would aid both the insurer and the insured. The former would save the costs of both suits and adverse judgments, and the insured would clearly understand the exact nature of the coverage he has purchased.

III. Automobile Liability Insurance

The attempts to pyramid liability insurance have met with unanimous disapproval in the courts. The one decision under the 1963 Family Policy thoroughly analyzed the problem before deciding not to allow pyramiding.94 The two decisions under the 1958 policy summarily reached the same result by maintaining that the purpose of the separability clause was to assure the application of the policy provisions to whichever automobile is involved in the accident.95 Neither of the latter courts analyzed the insuring clause to determine whether an ambiguity was present in the language of the policy.

The probable reason for the disapproval of pyramiding in the liability area is the nature of this insurance coverage. Liability insurance is narrower than medical payments coverage because it does not extend beyond the particular car causing the liability96 and because a prerequisite to the insurer's obligation is that the insured be the cause of the injury.97 Since the cause is necessarily associated with the operation of a particular

92. Id.
96. Medical payments insurance provides for broad coverage, and has been likened to accident insurance. Breen, The New Automobile Policy, 1955 Ins. L.J. 328, 331. Liability insurance, however, has traditionally been associated with a particular automobile.
automobile, it would seem illogical to extend the coverage of a car not involved in the accident to the vehicle which was in the accident. However, notwithstanding the different nature of liability insurance, there remains the possibility that a policyholder could be misled by an ambiguity, thereby requiring a decision against the insurer.

As in the discussion of medical payments insurance, the analysis of the liability provisions of the Family Policy will focus on the 1958 policy followed by discussion of the effect of the 1963 revisions. Separate treatment will again be given to the non-owned and owned automobile situations, and recommendations for revisions will follow.

A. 1958 Family Automobile Policy

The 1958 Family Policy divides the liability coverage into two parts: Coverage A — Bodily Injury Liability, and Coverage B — Property Damage Liability. By the insuring clause the company agrees:

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

A. bodily injury . . . sustained by any person;

B. injury to or destruction of property . . . arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile . . . .

The definition of "owned automobile" is the same as was discussed with reference to medical payments. Thus, on its face the policy coverage is very broad. It covers the insured while driving any non-owned automobile and the only indication that not all owned vehicles are included within the policy is the use of the article the instead of an.

In addition there is a limit of liability provision which reads:

The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence; the limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of the company's liability for all such damages arising out of bodily injury sustained by two or more persons as the result of any one occurrence.

The limit of property damage liability stated in the declarations as applicable to "each occurrence" is the total limit of the company's liability for all damages . . . as the result of any one occurrence.

98. RISJORD at 56 (emphasis added).
99. See p. 286 supra.
100. For a case in which it was held that "each person" was not ambiguous, see Valdez v. Interinsurance Exch. of the Auto. Club, 246 Cal. App. 1, 54 Cal. Rptr. 906 (1966).
101. RISJORD at 61-62.
This provision is similar to that used in the medical payments area. It has language limiting coverage for any one occurrence to the amount stated in the declarations, but again there is nothing which purports to limit the coverage when more than one automobile is insured under the policy. The declarations which are referred to are the same as those which set forth the limit of medical payments coverage. It is important that the language of the declarations be kept in mind. They read: "The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto."\(^{102}\)

Since the separability clause is a term of the policy it applies to the liability provisions\(^ {103}\) as well as the medical payments section. With these provisions in mind it is now possible to analyze the pyramiding possibilities in the liability insurance area.

The only case which involved an attempt to pyramid liability payments in the non-owned automobile situation was Polland v. Allstate Ins. Co.\(^ {104}\) In this case a "Crusader Policy," which is similar to the Family Policy and includes a separability clause, was issued to the insured. The court held in a one page opinion that this clause was not uncertain or ambiguous, but only rendered the policy applicable to whichever car was involved in an accident.\(^ {105}\)

Although this doubt was the purpose of the clause, it does not mean that an ambiguity was not present. An insured, reading this portion of his policy, would notice that he was covered while driving any non-owned automobile. It is possible that the insured would be confused upon reading the separability clause in conjunction with the limit of liability provisions and the declarations which state that the limit of liability is to be read "subject to all the terms of the policy having reference thereto."\(^ {106}\) This is especially true since he must pay an additional premium with no additional coverage in the non-owned automobile situation. This is essentially the same problem as was present in the medical payments non-owned automobile situation,\(^ {107}\) and, although the more restrictive nature of liability insurance may be a justification for not allowing pyramiding in this area, a summary dismissal of the ambiguity argument does not appear justified.

As in the non-owned automobile situation, there has been only one case decided under the 1958 Family Policy interpreting the effect of the separability clause in the owned automobile situation. In Pacific Indem. Co. v. Thompson,\(^ {108}\) the court did not allow pyramiding on the basis

\(^{102}\) Id. at 54.


\(^{105}\) 25 App. Div. 2d at 17, 266 N.Y.S.2d at 287.

\(^{106}\) See pp. 283-84 supra.

\(^{107}\) Id.

that the specific limit of liability provision controlled the general separability clause.\textsuperscript{109}

Although the court in Thompson did not discuss ambiguity, it would appear that this argument is not tenable for the following reasons.\textsuperscript{110} In addition to the general nature of liability insurance, which ordinarily requires that a particular car be the cause of an accident before the insurance company is liable for damages arising out of the accident, the insuring clause has specific language referring to the owned automobile. Upon reading the policy the insured should realize that only when the owned automobile is the cause of the accident will the insurer be liable. The insurance coverage of the non-involved car could not be attributable to the accident because it was not by the maintenance, operation, or ownership of the non-involved car that the liability arose. A possible problem with this argument is that the definition of owned automobile is broad enough to include any owned automobile whether or not described in the policy.\textsuperscript{111} However, there remains the specific requirement that one and only one car must be the cause of the accident.

B. 1963 Family Automobile Policy

In the 1963 revised Family Policy only one significant change was made in the liability provision. The definition of "owned automobile" was changed to read "'owned automobile' means a private passenger, farm or utility automobile described in this policy for which a specific premium charge indicates that coverage is afforded."\textsuperscript{112} The requirement is still present that an accident must be caused by the owned car, yet the policy now states clearly and exactly the intended limit of coverage.

In the one decided case in this area, Greer v. Associated Indem. Corp.,\textsuperscript{113} the court said of this change:

Far from aiding . . . [the insured] . . . the separability argument now compels a holding adverse to her claim. Applying the separability concept, the provision of the theoretical "separate policy" insuring the noninvolved automobile could not possibly be interpreted to extend coverage to the . . . [insured] . . . because her injuries did not arise as the result of the "ownership, maintenance, or use of the owned automobile . . . described in this policy . . ." and . . . for which a specific premium charge" is made.\textsuperscript{114}

Since the only significant change in the 1963 policy pertaining to liability coverage was the revised definition of "owned automobile," there would be nothing to remove the possible ambiguity in the non-owned automobile situation.

\textsuperscript{109} 56 Wash. 2d at 716, 355 P.2d at 12.
\textsuperscript{111} See pp. 287-89 supra.
\textsuperscript{112} RISJORD at 185-86 (emphasis added).
\textsuperscript{113} 371 F.2d 29 (5th Cir. 1967).
\textsuperscript{114} Id. at 33 (emphasis added).
C. Suggested Revisions

Since pyramiding has yet to be permitted in the liability insurance area, it would appear that the need for revising the Family Policy with respect to such coverage is less critical. However, this is not entirely true because it is possible that a court, particularly in the non-owned vehicle situation, could find an ambiguity and allow pyramiding. If this were done, the insurance industry would suffer more adverse consequences than when medical payments are involved. Medical payments coverage usually has a $2,000 limit per person, whereas liability coverage for property damage is likely to be $5,000 and liability for personal injury insurance is commonly set at $10,000 to $100,000 per person. Therefore, as the possibility of pyramiding becomes better understood and more well known, an insurance company could very easily find itself obligated to pay double this higher limit of liability.

As in the medical payments area, the deletion of the separability clause would be a significant step in clarifying the insurer's intent. In addition, in the owned automobile situation, the 1966 Standard Provisions suggest the manner to provide for the multiple automobile coverage by using the designated automobile approach. The 1966 Standard Provisions also suggest an addition to the limit of liability provision which would clarify the intended coverage in the non-owned vehicle situation. This clause states in part that regardless of the number of automobiles to which the policy applies the limit shall be that set forth in the declarations. By implementing these suggested revisions the insurance industry could avoid several potential problems.

IV. Conclusion

The foregoing discussion indicates the confusion and uncertainty which has arisen because of poorly drafted policy provisions. At present, neither insurance companies nor policyholders can be certain of the coverage provided by the Family Automobile Policy. Since the question has only arisen in ten cases in different jurisdictions, the problem is in its embryonic stages. The insurance industry, therefore, would be well advised to take the necessary steps to resolve this problem before it multiplies throughout the nation. Before the problem is resolved, however, the courts which must settle future controversies should make an effort to reach their decisions based on sound principles of insurance law after a thorough study of the policy and the factual situation before them.

Edward J. Ciechon, Jr.

116. Risjord at 265 (Supp. 1967); see p. 294 supra.
117. Id. at 267.