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Insurance -- Waiver of Uninsured Motorist Coverage

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Because of the phenomenal increase of automobile accidents in the United States over the past thirty years, most drivers have purchased automobile liability insurance. Thus the average driver's concern for his own economic well-being has ensured that in a majority of accidents, the injured party has a reliable source, an insurance company, to compensate him for at least part of his damage. However, a significant number of persons are injured by negligent drivers who have neither liability insurance nor private funds to provide compensation. State legislatures have moved to ease the difficulties of these injured persons[1] and statutes in forty-six states[2] require that some type of uninsured motorist coverage[3] be offered in all automobile liability insurance policies. In thirty-five states,[4] however, the statute allows the insured to reject such coverage.

The Pennsylvania statute[5] considered in *Johnson v. Concord Mu-*

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[1]*See* A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, 3-17 (1969) for a history of uninsured motorist protection laws in general.

[2]Maryland, New Jersey and North Dakota have unsatisfied judgment funds from which those injured by uninsured motorists may be compensated. Wyoming has no provision for victims of uninsured motorists. *See* 3 *Cum.-San. L. Rev.* 200, 202 n.9 (1972).

[3]This coverage provides for the policy holder and other insureds in the event of an accident caused by an uninsured and financially irresponsible driver. Under most endorsements, the injured insured is able to collect, from his own insurance company, compensation for injury up to the amount that would have been paid had the uninsured driver carried the minimum insurance required by the state financial responsibility laws.

Most endorsements are somewhat limited however in that, in general, insurers will not offer uninsured motorist coverage in amounts over the state minimum requirement for liability insurance. Further, uninsured motorist coverage deals, for the most part, only with recovey for personal injury. If a motorist wishes to have coverage for property damage, he must obtain it through purchase of collision insurance. See A. WIDISS, *supra* note 1, at 136-37.

[4]Connecticut, Illinois, Maine, Massachusetts, New Hampshire, New York, Oregon, South Carolina, Vermont, Virginia and West Virginia have statutes requiring mandatory inclusion of uninsured motorist coverage in insurance policies issued within the state. See A. WIDISS, *supra* note 1, at 310.

[5]At the time of the *Johnson* decision the statute provided:

> No policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle 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 provided therein or supplemental thereto in limits for bodily injury or death as are fixed from time to time by the General Assembly . . . under provision approved by the Insurance Commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death resulting therefrom: Provided, however, that the named insured shall have the right to reject such coverage in writing . . . .

tual Insurance Co.[6] allowed such a waiver. However, in defining valid waiver, the legislature went no further than to specify that the rejection be in writing. In *Johnson*, the plaintiff had purchased a liability policy and had signed a statement at the bottom of the binder-application that claimed, "I HEREBY STATE THAT I DO NOT DESIRE UNINSURED MOTORIST COVERAGE IN MY AUTO LIABILITY POLICY." After being involved in an accident with an uninsured motorist, plaintiff Johnson brought a suit in equity against his insurance company seeking reformation of his policy. Johnson alleged that his signature under the above statement did not constitute a valid rejection of uninsured motorist coverage and that therefore the coverage was improperly excluded from his policy.

In deciding this case, the Pennsylvania court was faced for the first time with interpreting the validity of a signed written waiver placed in the policy to comply with statutory requirements. Relying heavily on California cases dealing with a statute[7] which was at that time similar to Pennsylvania's, the court ruled that the statute gave insureds a legal right to uninsured motorist coverage which could be waived only with "knowledge of such a right and an evident purpose to surrender it."[8] Since the court found that the statement plaintiff had signed was insufficient on its face to constitute a valid and knowledgeable waiver, the burden was on the insurer to prove that the insured had "intelligently and knowingly" waived coverage.[9] Since the testimony taken at the trial did not reveal that uninsured motorist coverage had been discussed in detail by plaintiff and the insurance agent, the court held that the insurer had not met its burden of proof and "[i]n these circumstances, the insured's signature, is insufficient to establish an effective rejection of his statutory right of protection."[10]

In finding the waiver ineffective, the court disregarded the traditional rules of waiver applied in contract cases in which the intent of the parties is not examined if the meaning of the binding words is obvious.[11] Instead, the court applied the more stringent rules of waiver

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PA. STAT. ANN. tit. 40 § 2000 (1963), *as amended*, PA. STAT. ANN. tit. 40 § 2000 (1971).

[6]450 Pa. 614, 300 A.2d 61 (1973).

[7]CAL. INS. CODE § 11580.2 (West 1963), *as amended*, CAL. INS. CODE § 11580.2 (West Supp. 1973).

[8]450 Pa. at ____, 300 A.2d at 65.

[9]450 Pa. at ____, 300 A.2d at 65, citing Litchenberger v. American Motorists Ins. Co., 7 N.C. App. 269, 172 S.E.2d 284 (1970).

[10]450 Pa. at ____, 300 A.2d at 65.

[11]5 S. WILLISTON, CONTRACTS § 681 (3d. 1961).

of personal liberty rights announced in recent criminal cases that stress the individual's knowledge of his rights and his voluntary decision to forego them.[12]

The basis of this decision can be found partly in past judicial interpretation of legislative intent in passing uninsured motorist statutes. For example, in *Bankes v. State Farm Mutual Auto Insurance Co.*[13] the insured while riding on a newly acquired motorcycle, had been killed by an uninsured motorist. His insurance company refused to compensate the family on the grounds that the policy in effect at the time of the accident specifically did not cover newly acquired uninsured "land motor vehicles." The company further argued that this exclusion was authorized by the Insurance Commissioner since he had approved policy forms which provided that uninsured motorist coverage would not apply to injury suffered by a policyholder while occupying an uninsured "automobile" owned by him. In invalidating the "land motor vehicle limitation," the court spoke of the legislative intent in passing the statute—to provide protection for innocent victims of highway accidents.[14] In order to carry out this intent the statutory provisions must be given liberal construction, and any limits of the policy repugnant to the protective purpose of the act must be disregarded.[15] In this case, the approved "automobile" exclusion could not be broadened to a "land motor vehicle" exclusion since it was the intent of the legislature to provide coverage, rather than to restrict it.[16]

The need for liberal construction of the statute and narrow reading of policy exceptions to uphold legislative intent was also the basis for decision in an earlier Pennsylvania case. In *Harleysville Mutual Insurance Co. v. Blumling*,[17] the insured while at work was involved in an accident with an uninsured motorist. He was originally compensated

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[12]See Brady v. United States, 397 U.S. 742 (1970); Miranda v. Arizona, 384 U.S. 436 (1966). As will be discussed later, the test of knowledgeable and intelligent waiver of uninsured motorist coverage had been applied previously in other state courts. *See* text accompanying notes 19-25 *infra*.

[13]216 Pa. Super. 162, 264 A.2d 197 (1970).

[14]"The intent of this act is that the insured recover those damages which he would have received had the uninsured motorist maintained a liability policy." *Id.* at 168, 264 A.2d at 200.

[15]*Id.* at 165, 264 A.2d at 198.

[16]In regard to the "automobile" exclusion which had been approved by the Insurance Commissioner and relied on by State Farm, the court noted, although it did not decide, that this exclusion was probably never contemplated by the legislature. As a basis for this, the court mentioned that the legislature had considered this specific limitation in a 1968 amendment to the uninsured motorist act, but had excluded it from the final amendment. *Id.* at 167, 264 A.2d at 199.

[17]429 Pa. 389, 241 A.2d 112 (1968).

through his employer's uninsured motorist coverage, and his own company denied coverage on the basis of a limiting clause in his policy that provided for deduction of previously paid compensation. The Pennsylvania Supreme Court ruled this limitation invalid through a liberal construction of the statute. Although the statute provided that the insured would have at least 10,000 dollars coverage under his policy, this could not be construed to limit his total recovery to only 10,000 dollars if another's policy had provided him with compensation.[18]

The *Johnson* case can be distinguished from the previous cases in several respects. In both *Bankes* and *Blumling*, the insured had purchased and paid for coverage, and in each case the insured was clearly covered for some uninsured motorist loss. *Bankes* and *Blumling* established that Pennsylvania courts, using liberal construction of the statute to satisfy legislative intent, would not look favorably on company restrictions placed on uninsured motorist endorsements. However, in *Johnson* the court was presented with a slightly different problem, perhaps more difficult to resolve even by using the precedent of liberal construction. Johnson had not paid for any uninsured motorist coverage and had signed a waiver form that had been specifically provided for by statute.

To hold for the insured in this case, the court would not have to liberally construe a broad statute giving general coverage, but would have to define or limit a seemingly explicit portion of the statute that allowed waiver. However, the same public policy that mandated liberal statutory construction to accomplish legislative intent has been found to also require narrow and strict construction of that portion of the statute allowing rejection of coverage.[19]

Other jurisdictions have previously decided cases concerning waiver of uninsured motorist protection and have concluded that waiver of coverage is effective only if the waiver manifests the intentional relinquishment of the right to protection. In *Hagar v. Elite Insurance Co.*[20] an injured policyholder had also signed a simple waiver of uninsured motorist coverage.[21] As in *Johnson*, the insured claimed that neither his

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[18]*Id.* at 395, 241 A.2d at 115.

[19]450 Pa. at ____, 300 A.2d at 64.

[20]22 Cal. App. 3d 505, 99 Cal. Rptr. 423 (1971).

[21]The waiver signed here read:

> The applicant hereby agrees with the company that the coverage of Uninsured Motorists, is excluded from the policy and that the policy shall afford no coverage for damage caused by uninsured motor vehicles under the provision of the applicable section of the insurance code of the state in which this insurance is written.

statutory right to the coverage nor the terms of the coverage had been explained to him. The California court, in holding this waiver inadequate, distinguished this case from other contract cases. "Because such coverage is indicated by the legislature to be a matter of public policy, a claim of deletion is not determined simply by reference to the rules that courts otherwise apply to determine the intent of contracting parties."[22] Since the motorist has a legal right to insurance under the statute, this right must be explicitly explained and clearly understood. Mere mention of the availability of uninsured motorist protection is not enough to show a clear explanation and the insured's signature under a one line waiver is not sufficient to claim clear understanding.[23]

The possible ambiguities of a similar simple waiver statement were pointed out, again by the California court, in *Bohlert v. Spartan Insurance Co.*[24] in which the court explained,

> [T]he language providing that "the policy shall afford no coverage for the damage caused by an uninsured motor vehicle" does not show the prospective insured that it means damage incurred *by him*; he could readily construe it to mean coverage for damage caused *to others* by an "uninsured motor vehicle" for whose operation he was responsible. . . .[25]

Considering these possible ambiguities of a single waiver and the statutory right of the insured to receive coverage, the court found that "[b]ecause the language is ambiguous to this extent, it does not—on its face—meet the standard that an agreement excluding uninsured motorist coverage must be 'conspicuous, plain and clear' to constitute an 'effective waiver' thereof."[26]

However, liberal construction of the statute has not always defeated policy limitations. In *Dreher v. Aetna Casualty and Surety Co.*[27] the plaintiff was injured by a motorist whose insurance company later became insolvent. Aetna denied liability because the plaintiff's policy defined an "uninsured automobile" as "an automobile with respect to the ownership, maintenance or use of which there is no bodily liability

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If Uninsured Motorist Coverage NOT Desired, Sign Here

[22] *Id.* at 507, 99 Cal. Rptr. at 424.

[23] *Id.* at 509, 99 Cal. Rptr. at 425.

[24] *Id.* at 510, 99 Cal. Rptr. at 426.

[25] 3 Cal. App. 3d 113, 83 Cal. Rptr.. 515 (1969).

[26] *Id.* at 119, 83 Cal. Rptr. at 519.

[27] *Id.* at 120, 83 Cal. Rptr. at 519-20

[27] 83 Ill. App. 2d 141, 226 N.E.2d 287 (1967).

bond or insurance policy applicable *at the time of the accident. . . .*"[28]

The court was presented with the issue of whether this definition precluded recovery from Aetna. The Illinois statute[29] in effect at the time of the accident made no reference to the definition of an uninsured automobile. However, the legislature, at the time of the decision, was considering a law that would explicitly extend uninsured motorist protection to the situation in which the negligent driver's company became insolvent after the accident. Even so, the court ruled,

> [W]e find nothing either in the statute or the case law to sustain the contention that the public policy of this State, at the time, required that an insurance company extend coverage beyond the terms of its contract of insurance to include an automobile which was insured at the time of the accident but which consequently becomes uninsured by reason of the involvency of the carrier.[30]

The Pennsylvania superior court took this same view in a similar situation in *Levy v. Keystone Insurance Co.*[31] in deciding

> [a]ny ambiguity in a contract of insurance is to be construed most strongly in favor of the insured and against the insurer. Furthermore, it would seem that in the light of the reasons behind uninsured motorist

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[28]*Id.* at 142, 226 N.E.2d at 288.

[29]Act of June 4, 1963, § 1 [1963] Ill. Laws 1029 (codified, *as amended* ILL. ANN. STAT. ch. 73 § 1065.151 (Smith-Hurd Supp. 1972).

[30]83 Ill. App. 2d at 143, 226 N.E.2d at 289. In North Carolina, the state supreme court was faced with a similar situation in Rice v. Aetna Cas. & Sur. Co., 267 N.C. 421, 148 S.E.2d 223 (1966) (per curiam). The version of North Carolina General Statutes § 20-279.21(3) which was in effect at the time of the accident discussed in *Rice* was silent on the question of whether subsequent insolvency of the insurer would make a previously insured vehicle "uninsured" for the purposes of the statute. Ch. 640 [1961] N.C. Sess. Laws 831.

However, in 1965 the legislature amended the statute to include in the term "uninsured motor vehicle," a vehicle "where the liability insurer thereof is unable to make payment . . . because of insolvency." N.C. GEN. STAT. § 20-279.21(b)(3) (1965). Later in 1965, in Buck v. United States Fid. & Guar. Co., 265 N.C. 285, 144 S.E.2d 34 (1965), the supreme court recognized the legislative intent in passing the amendment and in dicta noted that the statutory addition would preclude denial of uninsured motorist coverage in situations in which the negligent motorist's insurance company became insolvent after the accident.

In deciding *Rice*, however, the North Carolina court, like the Illinois court in *Dreher*, refused to retroactively apply the amended statutory definition. Further, the North Carolina court, unlike the Illinois court, took no notice of the new legislative intent, even in view of *Buck* which implied judicial recognition of the new policy. *See Note, Insurance — Statutory Definition of an Uninsured Motor Vehicle When the Liability Insurer is Insolvent or Denies Coverage*, 45 N.C.L. REV. 551 (1966).

[31]209 Pa. Super. 15, 223 A.2d 899, (1966) *rev'd sub nom.* Pattani v. Keystone Ins. Co., 426 Pa. 332, 231 A.2d 402 (1967).

> coverage . . . a liberal construction should be given to any such provision in an insurance policy. Nevertheless, we find no ambiguity in these contracts and we cannot, within the realm of judicial reason expand the definition of an uninsured motorist to fit the facts of these cases. . . .[32]

In Illinois, the position the court took in *Dreher* was effectively replaced by passage of a statute.[33] In Pennsylvania, the decision of the superior court was overruled by the supreme court.[34] Explicitly citing liberal construction of the statute as necessary to achieve legislative intent, the supreme court held the term "uninsured motorist" to include not only those motorists uninsured at the time of the accident, but also those whose insurance companies were unable to pay compensation due to insolvency.[35]

In a Florida waiver case involving uninsured motorist insurance, *Kohly v. Royal Indemnity Co.*,[36] an appellate court considered and rejected the public policy argument. The plaintiff had been injured by an uninsured motorist while driving a rented car. The rental company, Hertz, had purchased liability insurance for its customers but had rejected uninsured motorist coverage. The specific statutory provision read, "[T]he coverage required under this section shall not be applicable where *any* insured *named* in the policy shall reject the coverage. . . ."[37] The plaintiff contended that *any* should be read to mean "every" or that *named* should be ignored. Under this interpretation, the plaintiff argued that he, as an insured under the policy, had not been given the opportunity to reject coverage and therefore, it should be extended to him as a matter of right.

The court considered decisions holding that the public policy behind the Florida statute required that insureds injured by uninsured motorists be able to recover as if the negligent motorist had a liability policy. However, it did not extend liberal construction to cover this case. It rejected plaintiff's contention regarding the statutory construction and relied on previous cases which had held "that the term 'named

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[32] *Id.* at 19-20, 223 A.2d at 901 (citations omitted).

[33] ILL. ANN. STAT. ch. 73 § 1065.151 (Smith-Hurd Supp. 1972) (originally enacted as Act of June 4, 1963, § 1 [1963] Ill. Laws 1029).

[34] Pattani v. Keystone Ins. Co., 426 Pa. 332, 231 A.2d 402 (1967).

[35] *Id.* at 338, 231 A.2d at 405. This liberalizing decision was cited in Johnson as precedent for its construction of the statute in the waiver situation. 450 Pa. at ____, 300 A.2d at 64.

[36] 190 So. 2d 819 (Fla. App. 1966).

[37] FLA. STAT. ANN. § 627.0851 (1963), *as amended*, FLA. STAT. ANN. § 627.727 (Supp. 1972) (emphasis added).

insured' has a restricted meaning and does not apply to persons other than those named in the policy."[38] Thus Hertz, as the insured named in the policy, had the right to reject the insurance and bind all others.

Other Florida cases have dealt with related situations and applied liberal construction to effect a broad coverage when specific limitations were placed on persons receiving coverage.[39] However, the statutory language discussed in *Kohly* may well be too explicit to raise a question of liberal construction and any changes in the law will have to come through legislation.[40]

Although the trend toward more liberal construction of an ambiguous waiver clause was well established even before *Johnson*, the mere presence of such a clause will not give the insured recovery if the insurer can show that the insured made a knowledgeable waiver. In *Pechtel v. Universal Underwriters*,[41] the court found the waiver clause to be confusing, but that surrounding facts and the policyholder's own testimony tended to show he knew what he was waiving.[42] In light of this proof, a passenger of the policyholder who was injured in an accident with an

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[38]190 So. 2d at 821.

[39]*See* Southeast Title & Ins. Co., 224 So. 2d 718 (Fla. App. 1969) where the court held that an endorsement that specifically excluded from liability 3 of the insured's sons who were under 25 would not exclude them from uninsured motorist coverage due to the legal right they had to such insurance. *See also* First Nat'l Ins. Co. v. Devine, 211 So. 2d 587 (Fla. App. 1968).

[40]In Weatherford v. Northwestern Mutual Ins. Co., 239 Cal. App. 2d 567, 49 Cal. Rptr. 22 (1966), the California Court of Appeals examined a similar contention by a plaintiff that the statutory provisions giving "any named insured" the right to reject coverage should be construed to mean that waiver of coverage should be allowed only of all the insureds rejected it. Here the California appellate court quoted with approval the memorandum of the trial court which concluded that "any" means one not all and that the policy of deciding thus was a legislative, rather than a judicial matter.

[41]15 Cal. App. 3d 194, 93 Cal. Rptr. 53 (1971).

[42]However, according to the author's reading of the case, the court does not satisfactorily clarify its finding that the policy holder knew what provisions he was waiving. He picked up the policy application at a motorcycle dealer's and did not discuss it with an agent. He rejected a provision entitled "Family Protection Against Uninsured Motorist" which the plaintiff contended was ambiguous because it could have led the purchaser to believe that he only waived protection for his family, but retained the other incidents of uninsured motorist coverage. The only proof to which the court refers of the purchaser's knowledge of coverage provisions is that he discussed the policy with Navy buddies. In concluding the court says, "Finally, if the applicant had inquired [of an agent] as to whether he could exclude the family protection and secure uninsured motorist's coverage for himself alone, he would have received a negative answer." *Id.* at 205, 93 Cal. Rptr. at 61.

This statement, which seems to uphold an ambiguous waiver on the grounds that the policy holder *could* have had the ambiguity clarified if he had asked, does not seem to be in agreement with other California rulings which have held against the insurer if the policy itself did not make the waiver clear. *See* Bohlert v. Spartan Ins. Co., 3 Cal. App. 3d 113, 83 Cal. Rptr. 515 (1969).

uninsured motorist was not allowed to recover simply because the waiver itself was ambiguous.

Johnson is clearly a product of the liberalizing trend shown by the courts in dealing with automobile insurance cases. However, *Kohly* and *Pechtel* were also decided by courts which had accepted and indeed led in the trend. This clearly indicates that there is question as to how far the courts are willing to go to give the insured protection.

Liberal construction of the statute and "knowing and intelligent" waiver of statutory rights were the only precedents mentioned in *Johnson*. However, the ruling might also be taken as an example of Keeton's theory of honoring the reasonable expectations of the insured.[43] Briefly described, this theory allows the policyholder to collect under policy terms that explicitly bar recovery because "insurers ought not to be allowed to use qualifications and exceptions from coverage that are inconsistent with the reasonable expectations of a policyholder having an ordinary degree of familiarity with the type of coverage involved."[44] Keeton goes on to explain that the policy holder ought to be allowed to recover "even though the insurer's form is very explicit and unambiguous, because insurers know that ordinary policyholders will not in fact read their policies."[45] While this principle could not be used to deny the insurer an opportunity to include exceptions to coverage in a policy, qualifications that would defeat the reasonable expectations could be upheld only if the policyholder was "fully informed" of their nature.[46]

While the principle of honoring reasonable expectations is too broad to be universally applicable and has only occasionally been recognized in the cases, Keeton sees it as the direction in which insurance law seems to be moving, and as a better explanation of the results in many cases which are justified on other grounds.[47]

This theory can be aptly applied to the *Johnson* facts inasmuch as Johnson's previous policy had included uninsured motorist coverage[48] and the statute itself gave him a right to coverage unless rejected. While the new policy did contain an exception to what he might "reasonably expect" on the basis of past experience, there was no evidence that he

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[43] R. KEETON, INSURANCE LAW — BASIC TEXT § 6.3, at 350-61 (1971).
[44] *Id.* at 351.
[45] *Id.*
[46] *Id.* at 361.
[47] *Id.* at 351-57.
[48] 450 Pa. at ____, 300 A.2d at 62, n.1.

was fully informed of the nature of such an exception.[49]

No matter how it is viewed, however, *Johnson* and the cases that it followed present serious problems for legislatures. If the courts interpret the policy behind the uninsured motorist protection statutes as strongly as *Johnson* would seem to indicate, yet still put limitations on public policy considerations as in *Kohly* and *Pechtel,* broadly worded statutes with imprecise waiver limitations can only create litigation. Legislative response to this problem has followed several different directions. Legislatures in eleven states[50] have prevented the problem by making coverage mandatory. Pennsylvania, by amending the statute considered in *Johnson*, dealt with the issue by severely limiting the situations in which waiver of coverage will be allowed.[51] California, whose 1963 statute[52] was similar to the Pennsylvania law construed in *Johnson* and whose court decisions were heavily relied on in *Johnson*, amended its uninsured motorist statute, effective January 1, 1973, to include a specific waiver form explaining the right to and the meaning of uninsured motorist coverage. The statute explicitly states that "execution of such an agreement shall relieve the insurer of liability under this section."[53]

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[49]*Id.* at ____, 300 A.2d at 65.

[50]*See* note 4 *supra.*

[51]PA. STAT. ANN. tit. 40 § 2000 (1971), *amending* PA. STAT. ANN. tit. 40 § 2000 (1963) states that rejection, in writing, is only allowed by

> (1) An owner or operator of (i) any motor vehicle designed for carrying freight or merchandise, (ii) any motor vehicle operated for the carriage of passengers for hire or compensation, having in either instance been granted a certificate of public conveyance or a permit by the Pennsylvania Public Utility Commission or been issued a certificate of public convenience and necessity or a permit by the Interstate Commerce Commission and (2) An owner or operator of any other motor vehicle designed for carrying freight or merchandise or operated for the carriage of passengers for hire whose employees are insured under the provisions of The Pennsylvania Workmen's Compensation Act . . . .

[52]CAL. INS. CODE § 11580.2 (West 1963), *as amended,* CAL. INS. CODE § 11580.2 (West Supp. 1973).

[53]The required waiver states:

> The California Insurance Code requires an insurer to provide uninsured motorists coverage in each bodily injury liability insurance policy it issues covering liability arising out of the ownership, maintenance, or use of a motor vehicle. Such section also permits the insurer and the applicant to delete such coverage completely or with respect to one or more natural persons designated by same when operating a motor vehicle. Uninsured motorists coverage insures the insured, his heirs, or legal representatives for all sums within the financial responsibility limits which such person or persons are legally entitled to recover as damages for bodily injury, including any resulting sickness, disease, or death, to him from the owner or operator of an uninsured motor vehicle not owned or operated by the insured.

CAL. INS. CODE § 11580.2 (West Supp. 1973).

While it is too early to ascertain[54] whether the California or Pennsylvania approaches will curtail all waiver litigation in these states, it is not inconceivable that insureds will still have the opportunity to litigate their claims. Especially in the case of the California statute, the issue might be raised that because of some special circumstance—inability to understand English or cursory treatment by an insurance agent—the specified waiver could not be applied in an individual instance. This problem could become increasingly pressing, especially if, as Keeton indicates, the theory of honoring the reasonable expectations of the insured becomes the trend in insurance case law.[55]

While this note has dealt only with the problem of waiver of uninsured motorist coverage protection, the waiver issue is not confined to this narrow area. Problems can be readily anticipated in new areas, especially under No Fault statutes, such as the one in effect in Massachusetts[56] in which the policyholder is given the right to property protection under his policy, but has the opportunity to waive his coverage if he was at fault in an accident, or to forego coverage entirely.[57] Although no cases have yet been reported in this area, it is not hard to imagine a situation in which a policyholder might claim an ineffective waiver of his right to coverage, either because he did not understand what he was waiving in choosing less than complete coverage or because he reasonably expected full coverage because of the term "No Fault" and the publicity that has surrounded discussion of this concept.[58]

Examined from this broader perspective, the need to deal with the waiver problem in the narrow area of uninsured motorist protection becomes more compelling. While it cannot be suggested that all automobile insurance waiver problems may be solved by reference to this one issue, steps taken here might serve as guidelines for action in other areas. Most courts, as reflected in *Johnson*, have taken the approach that public policy mandates protection for the victim of the uninsured motorist. However, judicial construction of public policy might be limited, as shown in *Kohly* and *Pechtel* and consequently, results are often uncertain. It seems clear that if the legislative aim is one of *public* protection, it is now up to the legislatures to make their policy clear and either make uninsured motorist coverage strictly mandatory or limit the

[54]Research has revealed no reported cases dealing with these waivers.

[55]R. KEETON, *supra* note 43, § 6.3 at 357.

[56]MASS. GEN. LAWS ANN. ch. 90, § 34M (Supp. 1972).

[57]MASS. GEN. LAWS ANN. ch. 90, § 340 (Supp. 1972).

[58]*See* text accompanying notes 43-47 *supra.*

waiver opportunities to narrowly defined groups, such as the current Pennsylvania law. Only after such action can each member of the public be assured of protection.

SANDRA R. JOHNSON

Securities Regulation—*Glenn Turner:* Closer to Economic Realities

A transaction comes within the purview of the federal securities laws[1] only if it can be brought within one or more of the terms listed in the statutory definition of a security.[2] The traditional test enunciated by the Supreme Court[3] for one of these terms, the "investment contract," has been criticized by some state courts[4] and by several commentators.[5] Such criticism, however, was absent in the federal court opinions when the Oregon federal district court, in *SEC v. Glenn W. Turner Enter-*

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[1]Securities Act of 1933, 15 U.S.C. §§ 77a-aa (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-z (1970).

[2]Securities Act of 1933, § 2 (1), 15 U.S.C. § 77 (b)(1) (1970); Securities Exchange Act of 1934, § 3 (a)(10), 15 U.S.C. § 78c (a)(10) (1970). Section 77 (b)(1) reads:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferrable share, investment contract, voting-trust certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security," . . . .

Securities Act of 1933, § 2 (1), 15 U.S.C. § 77 (b)(1) (1970).

The definition in the 1933 Act is "virtually identical to that contained in the 1934 Act." Tcherepnin v. Knight, 389 U.S. 332, 335-36 (1967).

If the transaction alleged to be a security does not fall within one of the specific categories delineated in the definition, reference should be made to the more general classifications. SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 350-51 (1943).

[3]SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

[4]*See, e.g.*, Florida Discount Centers, Inc. v. Antinori, 226 So. 2d 693 (Fla. Dist. Ct. App. 1969), *aff'd*, 232 So. 2d 17 (Fla. 1970); State v. Hawaii Market Center, Inc., 52 Hawaii 642, 485 P.2d 105 (1971); *cf.* Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961); State v. Silbergerg, 166 Ohio St. 101, 139 N.E.2d 342 (1956).

[5]*See, e.g.*, Augustine & Hrusoff, *Franchise Regulation*, 21 HASTINGS L.J. 1347 (1970); Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula*, 18 W. RES. L. REV. 367 (1967); Coleman, *A Franchise Agreement: Not a "Security" Under the Securities Act of 1933*, 22 BUS. LAW. 493 (1967); Goodwin, *Franchising in the Economy: The Franchise Agreement as a Security Under Securities Acts, Incuding 10b-5 Considerations*, 24 BUS. LAW. 1311 (1969); Long, *An Attempt to Return "Investment Contracts" to the Mainstream of Securities Regulation*, 24 OKLA. L. REV. 135 (1971); *Franchise Symposium: Franchising as a Security*, 33 OHIO ST. L.J. 718 (1972); Note, *Pyramid Schemes: Dare to Be Regulated*, 61 GEO. L.J. 1257 (1973).