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IN THE SUPREME COURT OF FLORIDA

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

vs. CASE NO. 65,681

JOHN JOHNSON,

Respondent.
_____/

Discretionary Review of the
District Court of Appeal,
First District

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

In this Brief, the parties will be identified by name. State Farm Fire and Casualty Company, the Petitioner, will be referred to as "State Farm." John Johnson, the Respondent, will be referred to as "Johnson." References to the Record on Appeal will be designated by the symbol "[R-]."

STATEMENT OF THE CASE AND FACTS

This cause arose when Johnson was injured while allegedly riding as a passenger in a Chevrolet pick-up truck. There was no other vehicle involved. The pick-up truck was owned by Johnson's uncle, James Townsend, and driven by Reginald Townsend, the son of James Townsend and Johnson's cousin. [R-75]. Johnson claimed that his injuries resulted from the negligence of Reginald Townsend. [R-6]. At the time of the accident, both Reginald Townsend and Johnson resided in the home of James Townsend. [R-6; 75].

It was alleged that State Farm had issued three policies of automobile liability insurance to James Townsend, one policy insuring the Chevrolet truck in which Johnson was riding at the time of this accident, and the other two policies insuring other vehicles owned by James Townsend. [R-75]. Each policy contained identical liability and uninsured motor vehicle provisions, and each policy was in effect on the date of this incident. [R-75].

Each policy provided the following "household exclusion" with regard to liability coverage:

> THERE IS NO COVERAGE:
>
> * * *
>
> 2. FOR ANY BODILY INJURY TO:
>
> * * *
>
> C. ANY INSURED OR ANY MEMBER OF AN INSURED'S FAMILY RESIDING IN THE INSURED'S HOUSEHOLD.

Each policy contained the same uninsured motor vehicle language. Since an understanding of that language is crucial to a just adjudication of this appeal, the uninsured motor vehicle coverage section is photocopied in full as an aid to this Court in this matter:

SECTION III — UNINSURED MOTOR VEHICLE — COVERAGE U

You have this coverage if "U" appears in the "Coverages" space on the declarations page.

We will pay damages for *bodily injury* an *insured* is legally entitled to collect from the owner or driver of an *uninsured motor vehicle.* The *bodily injury* must be caused by accident arising out of the operation, maintenance or use of an *uninsured motor vehicle.*

Uninsured Motor Vehicle — means:

1. a land motor vehicle, the ownership, maintenance or use of which is:
   a. not insured or bonded for bodily injury liability at the time of the accident; or
   b. insured or bonded for bodily injury liability at the time of the accident; but
      (1) the limits of liability are less than required by the financial responsibility act of the state where *your car* is mainly garaged; or
      (2) the limits of liability are less than the limits of uninsured motor vehicle coverage that apply to the *insured;* or
      (3) the insuring company denies coverage or is or becomes insolvent; or
2. a "hit-and-run" land motor vehicle whose owner or driver remains unknown and which strikes:
   a. the *insured* or
   b. the vehicle the *insured* is *occupying*

   and causes *bodily injury* to the *insured.*

An *uninsured motor vehicle* does not include a land motor vehicle:

1. insured under the liability coverage of this policy;
2. furnished for the regular use of *you, your spouse* or any *relative;*
3. owned or operated by a self-insurer under any motor vehicle financial responsibility law, a motor carrier law or any similar law;
4. owned by any government or any of its political subdivisions or agencies;
5. designed for use mainly off public roads except while on public roads; or
6. while located for use as premises.

Who Is an Insured

Insured — means the *person* or *persons* covered by uninsured motor vehicle coverage.

This is:

1. the first *person* named in the declarations;
2. his or her *spouse;*
3. their *relatives;* and
4. any other *person* while *occupying:*
   a. *your car,* a *temporary substitute car,* a *newly acquired car* or a trailer attached to such *car.* Such vehicle has to be used within the scope of the consent of the first *person* named in the declarations or that *person's spouse;* or
   b. a *car* not owned by *you, your spouse* or any *relative* or a trailer attached to such a *car.* It has to be driven by the first *person* named or that *person's spouse* and within the scope of the owner's consent.

   Such other *person occupying* a vehicle used to carry *persons* for a charge is not an *insured.*
5. any *person* entitled to recover damages because of *bodily injury* to an *insured* under 1 through 4 above.

Deciding Fault and Amount

Two questions must be decided by agreement between the *insured* and us:

1. Is the *insured* legally entitled to collect damages from the owner or driver of the *uninsured motor vehicle;* and
2. If so, in what amount?

If there is no agreement, these questions shall be decided by arbitration upon written request of the *insured* or us. Each party shall select a competent and impartial arbitrator. These two shall select a third one. If unable to agree on the third one within 30 days either party may request a judge of a court of record in the county in which the arbitration is pending to select a third one. The written decision of any two arbitrators shall be binding on each party.

The cost of the arbitrator and any expert witness shall be paid by the party who hired them. The cost of the third arbitrator and other expenses of arbitration shall be shared equally by both parties.

The arbitration shall take place in the county in which the *insured* resides unless the parties agree to another place. State court rules governing procedure and admission of evidence shall be used.

We are not bound by any judgment against any *person* or organization obtained without our written consent.

Any settlement agreement for the bodily injury limit of liability of the *person* or organization legally liable for the *bodily injury* must be submitted to us by the *insured* in writing if:

a. the settlement would not fully satisfy the *insured's* claim for *bodily injury;* and
b. an uninsured motor vehicle claim has been or will be made against us.

The *insured* may file suit against us and the legally liable *person* if, within 30 days after our receipt of the settlement agreement, we do not:

a. approve the settlement;
b. waive our rights of recovery against the *person* or organization legally liable for the *bodily injury;*
c. authorize the signing of a full release; and
d. agree to arbitrate the uninsured motor vehicle claim.

The suit shall decide:

a. if the *insured* is legally entitled to collect damages; and

b. if so, how much.

The limit of bodily injury liability of the ***person*** legally liable shall be exhausted before any award may be entered against us. The award against us shall be binding and conclusive on us and the ***insured*** up to our coverage limit.

Payment of Any Amount Due

We will pay any amount due:

1. to the ***insured;***
2. to a parent or guardian if the ***insured*** is a minor or an incompetent ***person;***
3. to the surviving ***spouse;*** or
4. at our option, to a ***person*** authorized by law to receive such payment.

Limits of Liability

1. The amount of coverage is shown on the declarations page under "Limits of Liability — U — Each Person, Each Accident". Under "Each Person" is the amount of coverage for all damages due to ***bodily injury*** to one ***person.*** Under "Each Accident" is the total amount of coverage for all damages due to ***bodily injury*** to two or more ***persons*** in the same accident.
2. Any amount payable under this coverage shall be reduced by:
   a. any amount paid or payable to or for the ***insured*** for ***bodily injury*** under the liability coverage of this policy; and
   b. the total of the bodily injury limits of liability of all other vehicle liability policies or bonds that apply to any ***person*** or organization legally liable for such ***bodily injury.***
3. Any payment made to a ***person*** under this coverage shall reduce any amount payable to that ***person*** under the bodily injury liability coverage.
4. This coverage is excess over, but shall not duplicate, any amount:
   a. paid to or for the ***insured*** by or for any ***person*** or organization who is or may be held legally liable for the ***bodily injury*** to the ***insured*** and who has no vehicle liability policy; and
   b. paid or payable under:
      (1) any worker's compensation, disability benefits, or similar law; and
      (2) the no-fault coverage, or which would be payable except for a deductible.
5. The limits of liability are not increased because:
   a. more than one vehicle is insured under this policy; or
   b. more than one ***person*** is insured at the time of the accident.

When Coverage U Does Not Apply

THERE IS NO COVERAGE:

1. FOR ANY ***INSURED*** WHO, WITHOUT OUR WRITTEN CONSENT, SETTLES WITH ANY ***PERSON*** OR ORGANIZATION WHO MAY BE LIABLE FOR THE ***BODILY INJURY.***
2. FOR ***BODILY INJURY*** TO AN ***INSURED:***
   a. WHILE ***OCCUPYING,*** OR
   b. THROUGH BEING STRUCK BY

   A MOTOR VEHICLE OWNED BY ***YOU, YOUR SPOUSE*** OR ANY ***RELATIVE*** IF IT IS NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY.
3. TO THE EXTENT IT BENEFITS:
   a. ANY WORKER'S COMPENSATION OR DISABILITY BENEFITS INSURANCE COMPANY.
   b. A SELF-INSURER UNDER ANY WORKER'S COMPENSATION, OR DISABILITY BENEFITS OR SIMILAR LAW.
   c. ANY GOVERNMENTAL BODY OR AGENCY.

If There Is Other Uninsured Motor Vehicle Coverage or If You Own More Than One Vehicle

1. Vehicles You Own.
   a. If the vehicle involved in the accident is owned by ***you*** or ***your spouse,*** this coverage applies only if it is:
      (1) ***your car;*** or
      (2) a ***newly acquired car.*** THIS COVERAGE DOES NOT APPLY IF THERE IS OTHER UNINSURED MOTOR VEHICLE COVERAGE ON THE ***NEWLY ACQUIRED CAR.***
   b. If ***your car*** is also described in a policy issued to ***you*** by another company, the total limits of liability shall not exceed those of the coverage with the highest limits of liability. We are liable only for our share of the damages. Our share is the per cent that the limit of liability of the coverage issued by us bears to the sum of the limits of liability of the coverages issued by us and the other company.
2. Policies Issued by Us to You.

   If coverage under two or more motor vehicle policies providing uninsured motor vehicle coverage issued by us to ***you*** applies to the same accident, the total limits of liability under all such coverages shall not exceed that of the coverage with the highest limit of liability.
3. Vehicles Other Than Your Car.

   If a ***temporary substitute car*** or a vehicle not owned by ***you, your spouse,*** or any ***relative*** has uninsured motor vehicle coverage on it, this coverage is excess.
4. Other Uninsured Motor Vehicle Coverage Available From Other Sources.

   Subject to items 1, 2 and 3, if other uninsured motor vehicle coverage applies, we are liable only for our share of the damages. Our share is the per cent that the limit of liability of the coverage issued by us bears to the total of all uninsured motor vehicle coverage applicable to the accident.

Initially, in a separate proceeding,[1] Johnson sued his cousin Reginald Townsend, his uncle James Townsend, and State Farm for damages under the liability portion of the State Farm policy insuring the Chevrolet truck in which Johnson was riding at the time of the accident. [R-76]. In his Complaint in that case, Johnson alleged that the liability policy insuring the Chevrolet truck "inured to the benefit of the Plaintiff, John W. Johnson, Jr." In defense, State Farm affirmatively alleged as follows:

> At the time and place alleged in the complaint, the plaintiff, John W. Johnson, Jr. was the nephew by marriage of defendant James L. Townsend and they resided together at 10695 McLaurin Road, Jacksonville, Florida, they were members of the same household and, therefore, the applicable policy of automobile liability insurance does not provide coverage for the circumstances alleged in the complaint.

[R-76].

Final Judgment was entered for State Farm based upon the policy provision which excluded liability coverage for bodily injury to "any insured or any member of an insured's family residing in the insured's household" [the "member of the household" exclusion].

Johnson then instituted this action, first seeking to recover uninsured motor vehicle benefits under the policy

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[1]Case No. 81-12728 CA, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida, styled "John W. Johnson, Jr., Plaintiff vs. James Townsend, Reginald Townsend and State Farm Mutual Automobile Insurance Company [sic], a corporation, Defendants."

insuring the Chevrolet truck. [R-1-2]. After State Farm moved to dismiss on the basis of Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977) [R-3], Johnson amended his Complaint to attempt instead to recover uninsured motor vehicle benefits under the two other policies maintained by James Townsend. [R-6-7]. Johnson thus abandoned any attempt to recover uninsured motor vehicle coverage benefits under the State Farm policy insuring the Chevrolet truck. [R-76].

After State Farm's Motion to Dismiss Amended Complaint [R-8-9] was denied, State Farm filed its Amended Answer in which State Farm admitted the existence of the two other insurance policies, each of which contained uninsured motor vehicle coverage, but denied that any benefits thereunder were available to Johnson. [R-42-44]. By way of affirmative defenses, State Farm alleged that (1) the Chevrolet truck in which Johnson was an occupant was insured and, therefore, the uninsured motor vehicle coverage of the State Farm policies did not apply; (2) Johnson was excluded from coverage as a result of the member of the household exclusion; (3) Johnson had failed to demand arbitration, a condition precedent to bringing this action; and (4) Johnson himself was guilty of negligence. [R-43-44].

State Farm then filed a Motion for Summary Judgment, contending that there were no uninsured motor vehicle coverage benefits avilable to Johnson under the two subject policies. [R-52]. In its Memorandum in support of Defendant's Motion for

Summary Judgment [R-53-59], State Farm argued that there were no uninsured motor vehicle coverage benefits available to Johnson because he was not involved in an accident with an uninsured motor vehicle, and because he was excluded from coverage under the "member of the household" exclusion. However, in the event that the trial court ruled that Johnson could recover uninsured motor vehicle benefits, State Farm contended, Johnson had failed to comply with the policy provisions regarding demand for arbitration. If coverage was found, State Farm argued, Johnson's claims for damages must be submitted to arbitration. [R-53-59].

Following the trial court's denial of State Farm's Motion for Summary Judgment [R-64], State Farm moved for a rehearing or for a clarification of the trial court's Order Denying Motion for Summary Judgment. [R-65-66]. At the hearing on State Farm's motion, the trial court indicated that it did not feel it could decide the question of coverage on a motion for summary judgment, but that, at the scheduled pre-trial conference, the trial court would decide whether to try the coverage issue before the court or before a jury. [R-70-71]. State Farm submitted its Pre-Trial Memorandum to assist the court in this determination. [R-70-74].

At the pre-trial conference, the court indicated that, as there were no disputed issues of fact, the court would decide the coverage question without a jury. [R-75]. The parties stipulated to the facts and agreed that the issue of

insurance coverage was a question of law which could be decided by the court without presentation of testimony. [R-75-76].

In its Final Judgment, the trial court found that the Chevrolet truck in which Johnson was a passenger at the time of this accident was not an uninsured motor vehicle under the two policies and, as a result, that Johnson was not entitled to recover uninsured motor vehicle benefits under the two policies. Accordingly, the lower court entered judgment in favor of State Farm and against Johnson. [R-75-77].

Johnson subsequently filed a Motion for Rehearing, raising for the first time the question whether he could recover underinsured motor vehicle benefits, even though he had never presented a claim for same. [R-78-79]. The trial court, in its discretion, denied Johnson's Motion. [R-80].

Johnson then appealed to the First District the Final Judgment in favor of State Farm and the denial of Johnson's motion for rehearing.

In its opinion filed May 31, 1984, [451 So.2d 898 (Fla. 1st DCA 1984)], [Appendix A], the First District Court of Appeal reversed the trial court's Final Judgment, basing its decision upon Curtin v. State Farm Mutual Automobile Insurance Co., 449 So.2d 293 (Fla. 5th DCA 1984). The First District stated that the Chevy truck was an "uninsured vehicle" because State Farm had "denied coverage," thus triggering an uninsured motor vehicle definition within the policy. The First District thus held that the Chevrolet truck in which Johnson was riding

was an uninsured vehicle and that Johnson was entitled to present a claim under the uninsured motor vehicle coverage of the two insurance policies issued by State Farm on the two other vehicles owned by James Townsend.

State Farm timely moved for a rehearing of this decision, which rehearing was denied in an order entered on July 6, 1984. On August 1, 1984, State Farm timely filed its Notice Invoking Discretionary Jurisdiction of this Court. By order dated December 18, 1984 this Court accepted jurisdiction and dispensed with oral argument.

SUMMARY OF ARGUMENT

I.

In an issue of first impression in Florida, this Court is asked to hold that the raising of an applicable exclusion to a policy covering an admittedly insured motor vehicle is distinct from a "denial of coverage." State Farm, below, affirmatively alleged that a liability insurance policy did not provide coverage due to a valid and applicable household exclusion. Said raising of an exclusion does not trigger the uninsured motor vehicle definition of the policy because no coverage was denied. A denial of coverage, unlike an exclusion, takes an affirmative step on the part of the insurer to deny coverage where it otherwise existed, because of some omission or commission on the part of the insured, such as failing to notify the insurer of a claim or suit or failing to cooperate with the insurer. An exclusion, on the other hand, as this Court has noted, is a limitation of coverage that does not operate to negate coverage. Rather, an exclusion operates automatically and emanates from the contract itself. An exclusion operates to provide no coverage in the first place; a denial of coverage withdraws coverage that otherwise would be applicable but for some act on the insured's part violating the contract.

II.

Even if it is found that State Farm "denied coverage," the subject policies excluded by definition a motor vehicle furnished for the regular use of the insured or his relatives.

III.

Even if it is found that the "regular use" provision of the subject policies is inapplicable, the subject motor vehicle is not an "uninsured motor vehicle" from whose owner or driver Johnson is legally entitled to recover damages. The statute requires an "uninsured motor vehicle," which the Chevy truck in this case is not. The instant truck is fully insured through a policy of liability insurance issued to its owner, Johnson's uncle. Just because that policy is not applicable to Johnson because of the valid household exclusion, the truck does not change into an uninsured vehicle.

Brown has imprecise language in it that has led the district courts to carve out large areas of uninsured motor vehicle coverage where none was intended by either the legislature or by the insurers when writing policies for insureds and when setting rates. The language in Brown should be revisited and brought in harmony with the intent of the legislature.

IV.

There is no logical, practical or policy justification for upholding household exclusion clauses in the liability portions of insurance policies but striking them down in the

uninsured motor vehicle portions. The rationale for the clause -- protection from collusive lawsuits between family members -- is just as valid in the uninsured motor vehicle context as in the liability context. This Court should recede from Mullis and uphold household exclusions in both sections of the policies.

V.

The appellate court abused its discretion in awarding $2,000.00 attorneys' fees since there is no evidence in the record by which the court could determine the reasonable value of the lawyers' services.

ARGUMENT

I. THE FIRST DISTRICT ERRED IN ITS FINDING THAT THE RAISING OF AN APPLICABLE EXCLUSION TO AN ADMITTEDLY INSURED VEHICLE IS A "DENIAL OF COVERAGE."

This is apparently an issue of first impression in Florida. Succinctly, when an insurer alleges that a policy of automobile liability insurance does not provide coverage because of a specified exclusion detailed in that policy, that act of exclusion is not a denial of coverage. Accordingly, an insured motor vehicle does not become an uninsured motor vehicle simply on the basis of a policy exclusion.

In the case sub judice, the First District held that the Townsend vehicle was an uninsured vehicle "because State Farm had 'denied coverage' and because a contrary interpretation would violate the intent of Florida's Uninsured Motorist Statute . . . ." This was patently error. An examination of this case below as well as the insurance policies in question shows the fallacy of the First District's holding.

In the earlier separate proceeding brought by Johnson for damages under the liability portion of the State Farm policy insuring the truck in which Johnson was riding at the time of the accident, Johnson had alleged that that liability policy (issued to his uncle, James Townsend) inured to his benefit. State Farm denied same, and affirmatively alleged that since Johnson resided with his uncle, the named insured,

and thus were members of the same household, "the applicable policy of automobile liability insurance does not provide coverage for the circumstances alleged in the complaint." The rationale for this allegation, of course, was the "household exclusion" portion of the liability part of the policy, which reads:

> SECTION 1 - LIABILITY - COVERAGE A
>
> * * *
>
> THERE IS NO COVERAGE
>
> * * *
>
> 2. FOR ANY BODILY INJURY TO:
>
> * * *
>
> c. Any insured or any member of an insured's family residing in the insured's household.

State Farm was granted a final judgment in the earlier proceeding on the basis of this agreed-upon and valid exclusion.

Johnson then instituted the present action. In paragraph five of his Amended Complaint, Johnson alleged that

> the plaintiff resided in the home of the insured owner, thus precluding him from claiming for bodily injury damage against said policy in the liability coverage section due to the specific exclusion found at the top of page 6, paragraph 2c of Exhibit A -- "any member of an insured's family residing in the insured's household."

Notwithstanding this clear affirmation that the policy itself did not provide coverge to Johnson due to a policy exclusion,

Johnson sought uninsured motor vehicle coverage benefits under the two other Townsend policies pursuant to this following provision:

> Uninsured Motor Vehicle -- means:
>
> 1. A land motor vehicle, the ownership, maintenance or use of which is
>
> * * *
>
> b. insured or bonded for bodily injury liability at the time of the accident; but
>
> * * *
>
> (3) the insuring company denies coverage . . . .

State Farm moved for summary judgment on the coverage issue and argued to the trial court that the fact that liability coverage was unavailable to Johnson as a result of the "household exclusion" in the liability policy did not ipso facto amount to a denial of coverage which would trigger the above-quoted policy definition of uninsured motor vehicle. [R-62]. Johnson conceded that the subject Chevrolet truck was insured[2] but argued that State Farm's raising of the defense of the household exclusion in the prior litigation activated the "denial of coverage" section of the uninsured motor vehicle

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[2]"State Farm . . . reiterates that the Chevy truck was 'insured.' We agree that it was!" [Johnson's Initial Brief to the First District, at p. 5].

"We do not deny that the truck had insurance coverage . . . ." [Johnson's Reply Brief to the First District, at p. 3].

provisions. In its Final Judgment, the trial court disagreed with Johnson's position and held that the truck was not uninsured, thus agreeing with State Farm's argument that lack of coverage due to a policy exclusion is not equal to a denial of coverage. [R-75-77].

Without discussing how it arrived at its conclusion that the trial court was wrong, the First District specifically focused only on the "denial of coverage" language and held that the raising of an applicable exclusion is a "denial of coverage." As authority, the First District cited the Fifth District's Curtin v. State Farm Mutual Automobile Insurance Co., 449 So.2d 293 (Fla. 5th DCA 1984). Curtin, however, is no authority for the First District in the instant case. The language in Curtin that State Farm "denied coverage" was not necessary to the holding of that case and was thus dicta. In Curtin, the rationale of the case's holding was that the subject motor vehicle was not insured at the time of the accident because policy exclusions in that case could be interpreted to be the equivalent of no coverage, thus triggering a policy provision which stated that "uninsured motor vehicle" meant a land motor vehicle not insured at the time of the accident. In no wise was the Curtin vehicle held to be an insured vehicle which through a denial of coverage became uninsured. The Curtin court specifically held that there were no policies covering the Curtin vehicle. Distinguishably, however, in the case sub judice, all parties

have agreed -- as has the First District in its opinion -- that the Townsend truck was not a vehicle "not insured at the time of the accident." All parties have agreed that the subject truck was insured, and thus Curtin and its rationale are significantly inapplicable. What this leaves us with, of course, is the First District's holding being based on a single case that is importantly inapposite factually as well as legally. For this reason, the First District's opinion is in reality a ruling of first impression in Florida on the issue of exclusions versus a denial of coverage.

Research has disclosed no Florida cases directly on point. Some cases, however, do mention the terms "denial of coverage" and "exclusions" in the same context. Curtin, as mentioned above, does so in dicta. In this Court's own opinion of LaMarche v. Shelby Mutual Insurance Co., 390 So.2d 325 (Fla. 1980), Justice Overton comes closest when he stated that

> an exclusion does not provide coverage but limits coverage.

390 So.2d at 326. This clearly reaches to the heart of the issue and State Farm's argument made to and accepted by the trial court below. According to the policy terms, the operation of a valid exclusion from coverage does not constitute a "denial of coverage" triggering the alternate definition of uninsured motor vehicle. Rather, as noted in

LaMarche, an exclusion from coverage merely constitutes a "limitation" of coverage and does not operate to provide or negate coverage. As a limitation on coverage, an exclusion operates automatically to limit coverage and emanates from the contract itself. On the other hand, a denial of coverage takes an affirmative step on the part of the insurer to deny coverage where it otherwise existed, because of some omission or commission on the part of the insured.

Random examples from the identical policies issued by State Farm and under which Johnson is claiming coverage may provide clarity on this point. Under the liability portion of the policies, it is agreed that

> THERE IS NO COVERAGE:
>
> 1. While any vehicle insured under this section is:
>
>   a. Rented to others or used to carry persons for a charge.

Clearly, this is an exclusion that limits coverage so that an insured is well aware that the policy does not provide coverage while his motor vehicle is being rented to others or used to carry persons for a charge. This limitation is inherent in the insuring agreement and operates automatically, with no affirmative act or act of omission required in order to trigger this exclusion's application. Furthermore, the insured is conscious of exactly for what coverage he is paying a premium, and the insurer, likewise, is cognizant of exactly for what coverage it is accepting a premium. No action on the insured's

part, whether it be renting his motor vehicle to others or carrying persons for a charge, and no inaction on the insured's part, whether it be not renting his motor vehicle to others or not carrying persons for a charge -- will provide the insured coverage under this policy provision. The provision inherently lies in the insuring agreement and operates automatically and nothing -- short of paying an additional premium for specific coverage to, in fact, include coverage for his motor vehicle while rented to others or while used to carry persons for a charge -- changes that fact.

Similarly, under the liability portion of the policies, it is agreed that

> THERE IS NO COVERAGE
>
> * * * *
>
> 2. FOR ANY BODILY INJURY TO:
>
> * * *
>
> c. Any insured or any member of an insured's family residing in the insured's household.

This likewise is an exclusion that limits coverage. Specifically, this is the "resident of the household" exclusion. This limitation of coverage is inherent in the insuring agreement and similarly operates automatically. As detailed above, this was the policy exclusion under which Johnson was not provided coverage under the State Farm policy issued to his uncle. It is the insuring agreement itself that

so provides. Coverage was not denied; rather, and plainly so, coverage was limited. An insured is conscious of exactly what coverage for which a premium is being paid and the insurer is cognizant of exactly for what coverage it is accepting a premium. No denial of coverage is necessary vis-a-vis Johnson since he, as an undisputed resident member of the insured's household, is provided no coverage in the first place -- the policy itself, automatically, so excludes him.

The situation is far different with a denial of coverage. A denial of coverage takes an affirmative step on the part of the insurer to deny coverage where it otherwise existed, because of some omission or commission on the part of the insured. For example, an insurer may deny coverage, even though it accepted a premium for such coverage and even though an insured expected such coverage, in the situation where an insured failed to report a "hit-and-run" accident to the police within 24 hours and to the insurer within 30 days, pursuant to the following provision in the Townsend/State Farm policy:

> REPORTING A CLAIM - INSURED'S DUTIES
>
> * * *
>
> 4. The person making claim also shall:
>
> * * *
>
> d. under the uninsured motor vehicle coverage:
>
> (1) report a "hit-and-run" accident to the police within 24 hours and to us within 30 days.

Case law in Florida is well-settled that said provision is valid and that an insurer can deny coverage upon an insured's failure to perform the required duties under the policy. See Torres v. Protective National Insurance Co. of Omaha, 358 So.2d 109 (Fla. 3d DCA 1978); McKay v. Highlands Insurance Co., 287 So.2d 393 (Fla. 3d DCA 1973). This denial does not operate automatically but requires the insured to fail to perform. If the insured had performed, and had fulfilled the policy requirement, there would have been coverage, since the insured paid for said coverage. But upon the insured's violation of the terms of this policy provision, an insurer can take the affirmative step of denying coverage, where it otherwise had existed. This contrasts sharply with a policy exclusion which provides that no coverage existed in the first place in a certain area.

State Farm could cite from the Townsend policy other agreed-upon and legally-valid provisions, the violation of which would enable the insurer to deny coverage. These would include: the duty of the insured to notify the insurer of a claim or suit made against the insured; the duty of the insured to cooperate with the insurer in making settlements, securing and giving evidence, and attending and getting witnesses to attend hearings and trials; and the duty of the insured not to settle, without the insurer's written consent, with any person or organization who may be liable for the insured's bodily

injury. Suffice it to say, the violation of these valid policy provisions, if claimed by the insurer, would take away some part or all of coverage that an insured would otherwise have. An insurer would thus deny coverage and thus put the insured on notice that, because of some action or inaction on his part, the insurer is rejecting liability on behalf of the insured. Again, this is wholly different from the exclusion provisions of a policy where coverage never existed in the first place.

In the case sub judice, State Farm -- in the initial and separate lawsuit under the Townsend policy -- affirmatively alleged as a defense that the Townsend policy "[did] not provide coverage for the circumstances alleged in the complaint," due to the fact that Johnson and Townsend resided together at 10695 McLaurin Road, Jacksonville, Florida and were members of the same household. Johnson thus came under the household exclusion and was automatically excluded from coverage pursuant to the operation of the policy itself. Thus, no coverage existed in the first place in Johnson's behalf and State Farm could not, by definition, deny coverage since none existed. State Farm properly alleged that no coverage was provided Johnson under the policy due to an exclusion. Nothing more was required to be done by State Farm, and anything more would have been surplusage.

Accordingly, State Farm -- as the trial court correctly ruled -- did not "deny coverage" and thus the

provision of the uninsured motor vehicle section of the Townsend policies which make an insured vehicle "uninsured" when "the insuring company denies coverage," is not activated. Therefore, the trial court was eminently correct when it held the Chevy truck -- which all parties agreed was an insured vehicle -- not to be an uninsured motor vehicle.[3] Therefore, the First District erred in its reversal of the trial court's Final Judgment in favor of State Farm and its opinion should be quashed. This Court should hold, furthermore, that the raising of an applicable exclusion to an admittedly insured vehicle is not a "denial of coverage" that would trigger an uninsured motor vehicle definition.

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[3]Two final points bear brief mention at this juncture. First, it would be untenable for Johnson to argue that the "deny coverage" provision of the Townsend policies is ambiguous and that that ambiguity must be construed against the insurer and in favor of the insured. State Farm would agree that the law is settled that ambiguities in policies are construed against an insurer and in favor of coverage. State Farm would argue, however, that the "deny coverage" provision is not ambiguous but is patently obvious. State Farm's argument, in the Brief, above, shows the lack of ambiguity. Second, some case law in Florida makes reference in passing to a "denial" of coverage due to an "exclusion" in the policy. For example, Pickett v. Woods, 404 So.2d 1153 (Fla. 5th DCA 1981), American Manufacturers Mutual Insurance Co. v. Horn, 353 So.2d 565 (Fla. 3d DCA 1977), and Lee v. State Farm Mutual Automobile Insurance Co., 339 So.2d 670 (Fla. 2d DCA 1976), all have undifferentiated comments that imprecisely intermix "denial" with "exclusion" without precisely defining either term. These references are, at best, only imprecise court usage of insurance policy concepts. Such imprecision, in cases where the issue under review was not the distinction between the two terms, cannot be the foundation for or authority for a decision determining the precise relationship of the two concepts.

II. THE FIRST DISTRICT ERRED BY NOT FINDING THAT THE SUBJECT MOTOR VEHICLE WAS NOT AN UNINSURED MOTOR VEHICLE BECAUSE IT WAS FURNISHED FOR THE REGULAR USE OF THE NAMED INSURED.

Assuming, arguendo, that this Court does not agree with State Farm's position under Issue I, supra, State Farm is still entitled to have this Court quash the opinion of the First District below. The reason is that even if it is found that State Farm "denied coverage" and thus the Chevy truck is defined as an uninsured motor vehicle, a further definition in the subject policies expressly and validly excludes a motor vehicle from being uninsured if said vehicle was furnished for the regular use of the named insured, his spouse, or any relative. By not so holding, the First District erred.

In both its Answer to the Amended Complaint [R-13] and Amended Answer [R-43], State Farm affirmatively alleged that the automobile policies referenced in the amended complaint contained certain exclusions which operated to exclude Johnson from coverage. State Farm alleged that the policies provided this language:

> An uninsured motor vehicle does not include a land motor vehicle:
>
> * * *

2. furnished for the regular use of you, your spouse or any relative;

[R-13; 43]. In its Memorandum in support of its motion for summary judgment, State Farm argued that Johnson had alleged that he was a relative of the named insured and owner of the vehicle and that he resided with the named insured/owner at the time of the accident. Furthermore, the truck, being owned by Johnson's uncle, was clearly furnished for the regular use of the uncle, the named insured. [R-56-57]. In its Final Judgment, the trial court did not reach the issue of "the regular use" language because of its ruling that the admittedly-insured motor vehicle was not uninsured since State Farm had not denied coverage. The First District, however, when it overruled the trial court and incorrectly found that there had been a denial of coverage, then erred by not applying the valid "regular use" exclusion to the subject truck.

It is undisputed that the Chevrolet truck is owned by the named insured and furnished for his regular use. Therefore, by the specific policy language agreed-upon by the insured and State Farm, "an uninsured motor vehicle does not include a land motor vehicle . . . furnished for the regular use of the insured or any relative." Pursuant to relevant case law, such policy language is valid and legally enforceable. In Barlow v. Auto-Owners Insurance Co., 358 So.2d 1128 (Fla. 4th DCA 1978), while some of the facts are distinguishable from the instant set of facts, the holding and rationale are

clearly appurtenant. In Barlow, the plaintiff passenger was injured by a negligent driver who had no liability insurance. The plaintiff sought to recover under his uninsured motor vehicle policy covering the automobile within which he was injured and of which he was the owner. The policy contained this language:

> Uninsured Automobile . . . shall not include: (a) an automobile owned by or furnished for regular use to the named insured . . . .

358 So.2d at 1128. The trial court denied recovery to the plaintiff under the policy and the plaintiff appealed. In its opinion, the district court noted that the plaintiff "urges us to declare this provision in the insurance contract to be void as against public policy; particularly Section 627.727(1)." 358 So.2d at 1128. This the district court refused to do, and affirmed the validity of the particular exclusion.

The district court grounded its decision in Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977). In Reid, the Florida Supreme Court upheld a "family household exclusion" as being valid and as not being against public policy, as well as an uninsured motor vehicle exclusion. The Barlow court stated it could not distinguish its fact from Reid, affirmed the trial court, and parenthetically remarked in closing that any future remedy is up to the legislature (which as of this date has not seen fit to undo the import of the Barlow decision).

Given that Barlow mandates that a "regular use" exclusion in uninsured motor vehicle coverage is valid and not against public policy, State Farm requests that if this Court does indeed believe that State Farm "denied coverage" rather than raised an applicable exclusion, that it hold that the subject motor vehicle cannot be an uninsured motor vehicle because the truck was furnished for the regular use of the insured or his relative. Accordingly, the opinion of the First District should be quashed and the Final Judgment in favor of the State Farm reinstated.

III. THE SUBJECT MOTOR VEHICLE WAS NOT AN UNINSURED MOTOR VEHICLE FROM WHOSE OWNER JOHNSON WAS LEGALLY ENTITLED TO RECOVER DAMAGES.

Even if this Court does not agree with State Farm's argument as presented in Issue II, supra, and finds the "regular use" exclusion inapplicable, the subject motor vehicle still is not an uninsured motor vehicle from whose owner Johnson was legally entitled to recover damages. As such, State Farm is not required to pay damages to Johnson. In support thereof, State Farm would cite relevant case law in its favor and also show the inapplicability of seemingly unfavorable decisions.

The polestar of any discussion of uninsured motor vehicle coverage is section 627.727, Florida Statutes (1983), the uninsured motor vehicle statute. The heart of the statute is in section one:

> (1) No motor vehicle liability insurance policy shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemented thereto 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.

The key language within that section are the words "legally entitled to recover damages from owners or operators of

uninsured motor vehicles." State Farm respectfully submits that overly expansive language in prior decisions of this Court has silently shifted clear legislative wording into a side-stream of judicially-wrought coverage extensions that at present do injustice to the will of the legislature. An example will make this clear.

A key case in the trend of the courts granting to insureds uninsured motor vehicle coverage not paid for and not taken into account by insurers when setting rates, is Brown v. Progressive Mutual Insurance Co., 249 So.2d 429 (Fla. 1971). The issue under review in that case was the "physical contact" clause requiring physical contact by the insured or his vehicle with a hit-and-run vehicle. The holding of the case was that said physical contact requirement was void as against public policy. In overly-broad language, however, the Court stated the now oft-quoted principle that

> In deciding whether a person is entitled to the protection of Fla. Stat. §627.0851 [predecessor to section 627.727], F.S.A., the question to be answered is whether the offending motorist has insurance available for the protection of the injured party, for whose benefit the statute was written. . . .

249 So.2d at 430 (emphasis supplied). State Farm respectfully suggests that that hallmark statement was in error when written and is in error today. The proof of that error is apparent in the cases of the various district courts that contradict each

other, because some follow the Brown wording while others follow the legislative wording. The legislative wording clearly provides, and has provided, for protection of persons who are legally entitled to recover damages from owners or operators of uninsured motor vehicles, not from uninsured motorists as stated in Brown. The distinction, while seemingly mundane, takes on paramount importance in cases such as the one sub judice.

Taylor v. Safeco Insurance Co., 298 So.2d 202 (Fla. 1st DCA 1974), apparently recognizes this distinction. In Taylor, plaintiff's decedent was killed while riding as a passenger in a motor vehicle loaned to him by Henry and driven by his brother. The court found that the vehicle's owner was not liable to the bailee, the decedent, for the negligence of his brother. Taylor then sought uninsured motor vehicle coverage alleging the Henry vehicle to be uninsured since the owner was not liable to the decedent, and since the driver was uninsured. The First District disagreed with that course of action. It stated that Taylor's argument "ignores the clear wording of the statute." 298 So.2d at 204. The court stated that Taylor may certainly be legally entitled to recover damages from the tortfeasor driver (the brother), but that the driver had no insurance. That driver, the offending motorist, thus had no insurance "available for the protection of the

injured party, for whose benefit the statute was written." But the Taylor court correctly held that the automobile was not an uninsured motor vehicle and hence denied recovery under the statute. The reasoning, of course, was that the owner of the vehicle had the vehicle fully covered by insurance to the extent required by law. The fact that the owner's policy was inapplicable to Taylor did not change the logical fact that the motor vehicle was insured. In Taylor, then, had the wording of Brown been followed, Taylor should have recovered under her policy since, literally, the question of whether the offending motorist had insurance available for the protection of the injured party had to be answered in the negative. By that reasoning, the offending motorist was an uninsured motorist. But the statute, as pointed out by the Taylor court, allows recovery from owners or operators of uninsured motor vehicles; the subject vehicle, as noted, had the full level of insurance on it. Thus, since the wording of the statute was followed, recovery was denied.

In the similar case of Centennial Insurance Co. v. Wallace, 330 So.2d 815 (Fla. 3d DCA 1976), the Third District likewise appreciated the express wording of the legislative will and held that a winch truck, self-insured by the corporate owner, was not an uninsured motor vehicle even though the plaintiff could not recover from the truck's owner due to the worker's compensation immunity. The tortfeasor was uninsured

since his insurer denied responsibility; he was, in Brown's words, the uninsured motorist with no insurance available for the protection of the injured party. But since the truck was insured through corporate self-insurance, recovery was denied. There was, simply, no uninsured motor vehicle to trigger the application of section 627.727.

On the other hand, Lee v. State Farm Mutual Automobile Insurance Co., 339 So.2d 670 (Fla. 2d DCA 1976), shows the judicial sleight-of-hand necessary to stuff round concepts into square theories. In Lee, a passenger was injured in a motor vehicle owned and operated by his brother. The brother had more coverage on the motor vehicle than required by the Florida Financial Responsibility Act. That coverage was exhausted, however, by payment to the estates of two other passengers who had died from injuries caused by the accident. Plaintiff, the passenger's father, sought to recover under two of his own policies, claiming that the owner/operator was thus uninsured. The Lee court showed its Brown-induced confusion by stating that "[t]he question presented here is whether in these circumstances Steven is uninsured under appellants' uninsured motorist insurance." 339 So.2d at 671. With that question, it was foregone that the court would hold that the policy provision requiring a policy "applicable at the time of the accident" was indeed ambiguous and therefore construed in favor

of the insured. The error, of course, is that the question in Lee should not have been whether the offending motorist was uninsured or not. Rather, the question, as mandated by section 627.727, should have been whether the motor vehicle was insured or not. And, under Lee's facts, the motor vehicle was insured even above that required by the financial responsibility laws. Lee is wrongly decided.[4]

The same holds true for Boynton v. Allstate Insurance Co., 443 So.2d 427 (Fla. 5th DCA 1984), a case presently pending before this Court [Case No. 64, 838]. Boynton cites Brown for the "issue" that the question to be answered is whether the "offending motorist" had insurance available for the protection of the injured party. Boynton discusses Centennial Insurance Co. v. Wallace, but simply rejects that case. It then held, continuing a long line of district court cases that ignore the express wording of the legislative

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[4]State Farm would also submit that Lee does not support the opinion of the First District in the instant case or the opinions in Boynton and Curtin. In Lee, the Second District was faced with a policy providing uninsured motor vehicle coverage which defined an "uninsured motor vehicle" as a vehicle as to which there was "no bodily injury liability bond or insurance policy applicable at the time of the accident . . . ." 339 So.2d at 671. The Second district Court, adopting the position of a Massachusetts court, held that the term "applicable" was ambiguous and should be construed in favor of the insured. As a result, based solely upon the particular policy language in question (and not upon the considerations raised by Johnson below), the Second District held that the plaintiff could recover under the uninsured motor vehicle coverage of certain policies. In the instant case, there is no such ambiguity in the State Farm policies.

pronouncement, that if the offending insured motorist has no insurance available for the protection of the injured party [citing Brown], then that insured motor vehicle becomes uninsured! In Boynton, the subject motor vehicle clearly was insured, since its lessee, Xerox, had a policy covering it. That policy, though, was inapplicable to the plaintiff. Had the Boynton court correctly phrased the issue pursuant to the statute as being whether the motor vehicle was insured or not,[5] (since an injured party can recover damages only from owners or operators of uninsured motor vehicles), then it would have decided the case differently. The subject motor vehicle in Boynton simply was not uninsured, and hence the plaintiff was not legally entitled to recover damages from its owners or operators under his uninsured motor vehicle policy.

The Boynton dissent, by Judge Upchurch, shows a clear understanding of the confusion created by Brown and its progeny in what "the issue" is. First, the dissent correctly points out the distinction between "entitled to recover" and "legally entitled to recover." State Farm will not burden this Court with a reiteration of that distinction, as that issue has been

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[5]As an example of its confusion, the district court stated that the existence of the Xerox policy of insurance on the subject motor vehicle "is really irrelevant." 443 So.2d at 429. The framers of section 627.727, of course, would think the existence of the policy to be of momentous relevance.

briefed by the parties before this Court in that case. State Farm does, however, suggest that the result of the majority's argument in Boynton, by in effect dropping the word "legally" as a requirement for an entitlement of recovery, expands the risk undertaken by uninsured motor vehicle carriers beyond that which was ever contemplated prior to that decision, and certainly beyond that contemplated by the legislature when it proposed the uninsured motor vehicle law.

Second, the Boynton dissent correctly notes that the wording of the uninsured motor vehicle statute includes "uninsured motor vehicle" (emphasis supplied). As Judge Upchurch stated, "the vehicle was not uninsured by the definition in the policy or as provided by law. In fact, the vehicle had in effect all the liability insurance required by law." 443 So.2d at 432 (emphasis supplied). Accord, Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1978) (where this Court stated that a motor vehicle is not an uninsured motor vehicle simply because liability coverage on that vehicle may not be available to a particular individual).

Which brings us full circle to the case sub judice. In the present case on appeal, the Townsend Chevy truck was not an uninsured motor vehicle under the statute because Johnson's uncle, James Townsend, had a policy of liability insurance with State Farm to insure said truck. The fact that that policy was

inapplicable to Johnson because of a valid exclusion does not transform that insured truck into something uninsured. Similar to Taylor v. Safeco and Centennial v. Wallace, section 627.727 requires an uninsured motor vehicle. State Farm's policy with the vehicle owner provides the insurance; the vehicle, therefore, was insured.[6]

To hold otherwise would be to play havoc with liability insurance rate structures. To hold otherwise would be to create a large class of "uninsured" insured vehicles. At present, if a motor vehicle has no liability insurance, it is uninsured. At present, if a motor vehicle has liability insurance, it is insured. By the instant decision,[7] there would now be created a class of motor vehicles that are "uninsured insured." They have policies of

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[6]The Boynton argument, as well as that presented in Curtin v. State Farm Mutual Automobile Insurance Co., 449 So.2d 293 (Fla. 5th DCA 1984), is logically fallacious. It proceeds: "An unresponsive or unenforceable insurance policy equals no policy. No policy equals uninsured. Therefore, an unresponsive or unenforceable insurance policy equals uninsured." Correctly, an unresponsive or unenforceable insurance policy (due to a valid exclusion, be it worker's compensation immunity or the household exclusion) equals an unresponsive or unenforceable policy. The policy is limited in whom it covers, but doesn't cease to exist. And, a motor vehicle with a policy on it, though it be limited, is still a motor vehicle with a policy on it. And, a motor vehicle with a policy on it is insured. Therefore, an unresponsive or unenforceable policy equals insured.

[7]And by Boynton and Curtin.

liability insurance on them [they are insured] but, because those policies are inapplicable due to a valid exclusion, they are uninsured. Hence, they are "uninsured insured motor vehicles." The uninsured motor vehicle statute, however, speaks not to that hybrid and illogical judicial construct but only to "uninsured motor vehicles."

State Farm is requesting that it be treated as fairly as any individual. State Farm is not suggesting that it be allowed to have any more rights than an individual. Rather, it proposes that Johnson have all of the uninsured motor vehicle coverage paid for -- but no more. There was no broad uninsured motor vehicle coverage paid for under any of the policies at issue; all, it will be remembered, had the household exclusion as well as regular use exclusion. Certainly, there is nothing improper in writing in limitations in policies. Rather, it is clear from section 627.737(3), Florida Statutes (1983), that the legislature intended for uninsured motor vehicle coverage to have limits specified in the actual insurance contract:

> For the purpose of this coverage, the term "uninsured motor vehicle" shall, subject to the terms and conditions of such coverage, . . .

If this Court continues the Brown-led misstatement of section 627.727 and enlarges the class of uninsured motor vehicles to include those with insurance, it will be writing into insurer's policies an area of coverage not agreed upon, or even contemplated, when written. The result will be havoc with rate

structures, as well as inequities with other uninsured motorist insureds. Such a step, if it is to be taken, is for the legislature.

State Farm therefore requests this Court to recede from its inaccurate and misleading language in Brown and to clarify for the district courts that section 627.727 requires an uninsured motor vehicle, and not an "uninsured motorist" or an "uninsured insured motor vehicle."

IV. THE OPINION OF THE FIRST DISTRICT EFFECTIVELY EMASCULATES THE VALIDITY OF THE "HOUSEHOLD EXCLUSION" IN FLORIDA.

As noted above, Johnson was unable to recover under the liability portion of the specific policy insuring the Chevy truck due to the household exclusion within said policy. He then sought recovery under two identical policies covering other vehicles owned by his uncle under the uninsured motor vehicle provision. To allow him to do so will be to effectively destroy the household exclusion in Florida.

State Farm is familiar with this Court's opinion in Mullis v. State Farm Mutual Automobile Insurance Co., 252 So.2d 229 (Fla. 1971), and would submit that there is no logical distinction between the "member of the household" exclusion in a liability policy -- which has been upheld by this Court in Reid v. State Farm Fire and Casualty Co., 352 So.2d 1172 (Fla. 1977) -- and the same exclusion in a uninsured motor vehicle coverage context. In both situations,

> The reason for the exclusion is obvious: to protect the insurer from over friendly or collusive lawsuits between family members.

352 So.2d at 1173. Collusive lawsuits "nearly always would exist where plaintiff and insured defendant are bound by ties of kinship and are living together." Automobile Club Insurance Co. v. Craig, 328 F.Supp. 988, 990 (E.D. Ky. 1971). This situation is clearly present in the instant case.

Plaintiff Johnson, the driver Reginald Townsend [Johnson's cousin] and the owner James Townsend [Johnson's uncle] are all relatives admittedly residing in the same household! The specter of a collusive lawsuit is more than real in the instant case. It is precisely because of this type of factual situation that insurers have been allowed to insert household exclusions in the liability portions of their policies. To disallow the application of the household exclusion in an uninsured motor vehicle context - when the raison d'etre for that exclusion remains -- is patently illogical.

In Lammers v. State Farm Mutual Automobile Insurance Co., 261 So.2d 757 (Ala. Civ. App. 1972), the Alabama courts were presented with just such a situation as we have before this Court. The Alabama court recognized that insurers can by appropriate exclusions protect themselves from friendly family lawsuits through the use of the household exclusion clause in a liability policy. The Alabama court then cogently asked:

> What availeth it to an insurance company to escape liability under the "household exclusion" clause and then finds itself caught in the net of the "uninsured motorist" clause?

261 So.2d at 765. The court solved this dilemma by upholding the household exclusion under both the liability as well as the uninsured motor vehicle sections of the policy. Interestingly, it based its decision on the fact that "[i]f the legislature . . . had seen fit to make uninsured motorist coverage

nullify, in practical effect, such 'household exclusion' clauses, it surely would have done so when it adopted the Uninsured Motorist Coverage' statute . . . ." 261 So.2d at 765.

An interesting parallel exists in this regard to distinguish Curtin v. State Farm from the case sub judice. The Curtin court was faced with a situation where the negligent tortfeasor driver was "a friend of the family." The Curtin court therefore distinguished Reid since it felt that Reid should only be restricted to suits between family members. Then, in a fit of extremism, the Curtin court stated that "the problem with applying Reid to this case is that the exclusion sought . . . would encompass all kinds of motorists other than family members: felons and thieves; friends and acquaintances. The actual negligent driver here was not a family member." 449 So.2d at 296 (emphasis in original). Be that as it may, with State Farm not cognizant of a spate of uninsured motor vehicle coverages cases involving felons and thieves, it is undeniable that Johnson and the two Townsends are related and admittedly do live in the same household. That scenario is what is before this Court. State Farm wishes this Court not to be swayed by cries of what may happen if "felons and thieves; friends and acquaintances" are involved in motor vehicle accidents and claim uninsured motor vehicle coverage. Rather, since this Court has correctly upheld the "member of the household" exclusion in liability policies specifically because of

over-friendly or collusive lawsuits between family members [Reid], and since that justification does not cease to exist merely because claim is made under the uninsured motor vehicle portion of a policy, this Court should recede from Mullis and hold the household exclusion applicable in uninsured motor vehicle cases.

V. THE FIRST DISTRICT ABUSED ITS DISCRETION IN AWARDING AN ATTORNEY'S FEE OF $2,000.00 TO JOHNSON FOR THIS APPEAL.

Subject to the above arguments, State Farm alternatively argues:

Pursuant to section 627.428(1), Florida Statutes (1983), Johnson moved for an award of attorney's fees before the First District Court of Appeal should he be successful on that appeal. No evidence was presented to that court as to what a reasonable attorneys' fee would be. In its Order entered on May 31, 1984, the district court awarded Johnson an attorney's fee of $2,000.00 on the appeal. This award, without any evidence in support thereof, was a palpable abuse of discretion.

The standard provided by section 627.428(1) for an award of attorney's fees is "a reasonable sum." As this Court stated in the seminal case of Baruch v. Giblin, 164 So. 831, 833 (Fla. 1935), in order to arrive at a reasonable value of a lawyer's services, the court must resort to the record to ascertain the amount of labor performed and consider evidence by expert witnesses competent to testify as to the value of the services rendered.

In the instant case, the First District did not have before it any evidence upon which it could base an award of attorney's fees to Johnson. In awarding a fee of $2,000.00

without an iota of evidence to support the award, the district court clearly abused its discretion. Should this Court rule against State Farm on the preceding issues, this Court should reverse the award of attorneys' fees and remand to the district court for the presentation of evidence on this issue, or, alternatively, remand to the trial court for said evidentiary hearing.

CONCLUSION

State Farm respectfully requests this Court to quash the opinion of the First District which held that the raising of an applicable exclusion to an admittedly insured vehicle is a "denial of coverage" under an uninsured motor vehicle policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to David R. Lewis, Esquire, 2468 Atlantic Boulevard, Jacksonville, Florida 32207; and to Lane Burnett, Esquire, 331 East Union Street, Jacksonville, Florida 32202 this 7th day of January, 1985.

Jerry J. Waxman
Attorney