

OFTEN OVERLOOKED SECTIONS OF THE FINANCIAL RESPONSIBILITY ACT**By Theodore B. Smyth
Raleigh, North Carolina****I. N.C. Gen. Stat. § 20-279.21(c)**

...“Such operator’s policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him or any motor vehicle not owned by him, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner’s policy of liability insurance.”

The predecessor statute to N.C. Gen. Stat. § 20-279.21(c), referred to as § 20-227.3, originally did not provide coverage for any operators unless that person was operating a vehicle not owned by him. Then under the new Financial Responsibility Act, pursuant to N.C. Gen. Stat. § 20-279.21(c), which was enacted effective January 1, 1954, the definition of an operators’ policy was expanded to include an insured’s operation of a vehicle owned by him or her within 30 days following the date of the delivery of the vehicle to the insured. *See, Lynn v. Farm Bureau Mut. Automobile Ins. Co., 264 F.2d 921 (4th Cir. 1959)* (reviewing history of statutory authority for “operators’ policy”). In that case something called an “operators’ or non-owners’ liability insurance policy” was issued to the insured in question. In another early case involving this archaic concept of coverage, *Lofquist v. Allstate Ins. Co., 263 N.C. 615, 140 S.E.2d 12 (1965)* the court distinguished an owners’ policy from an operators’ policy and held that an owners’ policy would not protect an owner from operating a motor vehicle other than the one listed in the owners’ policy. Once again, the policies at issue authorized by separate statutory provisions, N.C. Gen. Stat. § 20-279.21(b)(2) for an owners’ policy and subsection (c) for an operators’ policy, were at that time pure distinct types of policies. In that case the court declined to extend coverage from an owners’ policy for the owner’s use of another vehicle not listed in the policy.

In *Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Co., 283 N.C. 87, 194 S.E.2d 834 (1973)*, the court again addressed what appeared to be a so-called “owners’ policy” which insured a specific listed owned auto. There the court held that there was no coverage for liability arising out of the use of another vehicle not listed in the policy by an employee of the named insured, since the policy at issue was an owners’ policy rather than an operators’ policy, and since the vehicle in question was not listed on the policy. The court declined to strike

down as invalid for a pure owners' policy, a provision excluding coverage for use of a vehicle not owned by the insured.

This dichotomy between owners' and operators' policies continued in *Ohio Casualty Ins. Co. v. Anderson*, 59 N.C. App. 621, 298 S.E.2d 56 (1982), where the court noted that the Financial Responsibility Act provides for two kinds of policies, "owners" and "operators." In that case the parties stipulated that the policy in question was "an owners' policy." In that case the court addressed whether a father who had transferred title to a vehicle to his son without his knowledge and yet procured liability insurance in his own name constituted an "owner" for purposes of an owners' policy. The court held that equitable title was sufficient to trigger coverage through an owners' policy.

A recent case addresses the current morphing of the so-called operators' policy, but is unfortunately an unpublished decision and thus of little precedential value. *Shierts v. Atlantic Casualty Ins. Co.*, 165 N.C. App. 705, 601 S.E.2d 331 (2004). The court held that a garage owner's policy, which insured only non-owned autos, used in the insured's garage business, and thus operated as an operators' policy of sorts, would create no obligation to provide underinsured motorist coverage. The court concluded that only with owners' policies pursuant to subsection (b)(2) would there be an obligation to also provide underinsured motorist coverage, for failure to obtain a valid selection/rejection of such UIM coverage.

It should be noted that operators' policies are very rare these days, unlike in the 1950's and 60's, and the garage policy with coverage only for non-owned autos and the non-owned auto endorsement to a business owners' policy are among the few areas where something that looks like a pure operators' policy is still to be found.

Most all policies these days are a hybrid of owners' coverage and operators' coverage, and not only insure John Doe and his family for operation of the family vehicle insured through the policy, but also insure them for operation of non-owned autos so long as they are not also owned by the family, or provided for a family member's regular use, with certain limited exceptions.

Thus, the most recent decision addressing the scope of operators' coverage is something of a puzzling read. In *Hernandez v. Nationwide Mut. Ins. Co.*, _____ N.C. App. _____, 615 S.E.2d 425 (2005) the person seeking coverage was insured through an auto insurance policy which covered her family's vehicles. In what does not seem to be expressly otherwise stated by statute, the court seemed to hold that the provisions of N.C. Gen. Stat. § 20-279.21(c) relating to operators' policies are "required by North Carolina Motor Vehicle Safety and Financial Responsibility Act." The court reasoned that under this coverage, so long as the vehicle was not provided for the regular use of the insured, there was no statutory provision barring coverage, when the vehicle had not yet been officially transferred with title to the insured. This decision, in some respects, reflects the realities on the ground with the standard personal auto policies that provide aspects of both owners' and operators' coverage, and fills in gaps formerly enforced with pure owners' and pure operators' policies providing two exclusive subsets of coverage in earlier decades.

II. N.C. Gen. Stat. § 20-279.21(d)

...“Such motor vehicle liability policy shall state the name and address of the named insured, the coverage afforded by the policy, the premium charged therefore, the policy period and the limits of liability, and shall contain an agreement or be endorsed that insurance is provided thereunder in accordance with the coverage defined in this Article as respects bodily injury and death or property damage, or both, and is subject to all the provisions of this Article.”

Subsection (d) seems to state what is a basic tenant of writing insurance contracts, that all the key components of the standard insurance policy should be utilized in a motor vehicle liability policy, to wit: “the name and address of the named insured, the coverage afforded by the policy, the premium charged therefore, the policy period and the limits of liability, and...an agreement...as respects bodily injury and death or property damage, or both...” One could infer from this mandate that the failure of the insurer to provide all of these details in a policy would make the policy fatally defective in its contents, and perhaps subject the insurer to liability for failure to provide these basic minimal pieces of information. The standard Rate Bureau approved personal auto policy as well as any typical business auto policy declarations page should have all of this information as a matter of course.

III. N.C. Gen. Stat. § 20-279.21(e)

...“Uninsured or underinsured motorist coverage that is provided as part of a motor vehicle liability policy shall insure that portion of a loss uncompensated by any workers’ compensation law and the amount of an employer’s lien determined pursuant to G.S. 97-10.2(h) or (j). In no event shall this subsection be construed to require that coverage exceed the applicable uninsured or underinsured coverage limits of the motor vehicle policy or allow a recovery for damages already paid by workers’ compensation. The policy need not insure a loss from any liability damage to property owned by, rented to, in charge of or transported by the insured.”

Prior to 1999 North Carolina had an extensive body of case law examining the interaction among a claimant who also received workers’ compensation benefits, a workers’ compensation insurer with a right to subrogation, and a UM/UIM insurer, which had a setoff against its coverage for workers’ compensation benefits. This complicated area of the law was totally revamped by the legislature in 1999, rendering most all of the prior precedent on this subject obsolete for future inquiry. The Legislature amended N.C. Gen. Stat. § 20-279.21(e) in 1999. The amendment is entitled “AN ACT TO CLARIFY THAT LIABILITY, UNINSURED, AND UNDERINSURED COVERAGE IS NOT REDUCED BY RECEIPT OF SUBROGATED WORKERS’

COMPENSATION BENEFITS.” This statutory change appears to tilt the advantage back to the claimant and the subrogated workers’ compensation insurer and against the auto UM/UIM insurer. The statutory provision is interesting in its wording. Clearly it contemplates that an injured plaintiff/employee will receive any payout uncompensated by workers’ compensation up to the policy limits (and presumably subject to other appropriate policy setoffs such as amounts paid by the liability insurer), but it is slightly more ambiguous on amounts paid by the workers’ compensation insurer to the plaintiff/employee. The last part of the first sentence seems to allow no setoff to the extent that there is “an employer’s lien determined pursuant to G.S. 97-10.2 (h) or (j).” This would suggest that any lien from the workers’ compensation insurer would be recoverable against the UM/UIM insurer. (Please note that it is not the literal payout by the employer but rather the “amount of an employers’ lien,” which is subject to reduction or even elimination by a trial court judge under certain state statutory circumstances.) The confusion to this reader arises with the following sentence which provides that “[i]n no event shall this subsection...allow a recovery for damages already paid by workers’ compensation.” This seems to be at odds with the preceding sentence, since “damages already paid by workers’ compensation” are the very stuff that “an employer’s lien” is made of.

Several recent cases interpreting the new version of 20-279.2(e) set forth the equation to be applied in determining the amount of underinsured motorist coverage available where there is a workers’ compensation claim involved. It appears that they establish the equation to be that first the UIM subtracts the amount from its coverage that is received by the plaintiff from the liability carrier. This is subtracted from the UIM coverage limit. That establishes the total amount of UIM coverage potentially available. At or below that limit the UIM exposure is the total amount of the value of the claimants’ bodily injury claim minus any amounts previously paid by liability coverage. To the extent that the workers’ compensation insurer has waived part of its subrogated recovery of benefits as part of its workers’ compensation settlement with the claimant, that waived amount is not recoverable from the UM/UIM insurer by either of the workers’ compensation insurer or the claimant. *See, Walker v. Penn National Security Ins. Co., 168 N.C. App. 555, 608 S.E.2d 107 (2005); Austin v. Midgett, 166 N.C. App. 740, 603 S.E.2d 855 (2004).*

IV. N.C. Gen. Stat. § 20-279.21(f)

“...Every motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:

- (1) Except as thereafter provided, the liability of the insurance carrier with respect to the insurance required by this Article shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy.

“...If the plaintiff initiating the action against the insured has complied with the provisions of this subsection, then, in such event, the insurer may not cancel or annul the policy as to such liability and the defense of noncooperation shall not be available to the insurer. Provided, however, nothing in this section shall be construed as depriving an insurer of its defenses that the policy was not in force at the time in question, that the operator was not an “insured” under the policy provisions, or that the policy had been lawfully canceled at the time of the accident giving rise to the cause of action.”

Reading the above-referenced excerpts together, although they are not contiguous in the statute, it appears that the Legislature wanted to guarantee a minimum safety net of coverage to an innocent motorist regardless of how bad the tortfeasor has behaved, either in the operation of his or her vehicle or in interaction with the insurance company before or after said accident.

First, the rights granted under § (f)(1) are locked in at the moment of the accident, and cannot be altered in any way regardless of what happens after that moment of the accident, as to minimal financial responsibility limits. *See, Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Co., 283 N.C. 87, 194 S.E.2d 834 (1973); Lane v. Iowa Mut. Ins. Co., 258 N.C. 318, 128 S.E.2d 398 (1962).*

The rather draconian features of this statute, geared to protect innocent motorists, have been unsuccessfully challenged on their constitutionality by an insurance carrier. *See, Jones v. State Farm Mut. Auto Ins. Co., 270 N.C. 454, 155 S.E.2d 118 (1967).*

While the statute does indirectly provide protection to the tortfeasor insured, its chief design is for the protection of innocent motorist. *See, Marks v. Thompson, 282 N.C. 174, 192 S.E.2d 311 (1972).* (“liability insurance is purchased both to protect the insured from actual out-of-pocket loss and to give protection, within the policy limits, to any person for whose injuries the insured becomes legally liable.”) While the courts have clearly sought to protect an innocent motorist through subsection (f)(1), they have not done the same for the defendant insured. *See, e.g., Grows Hill Poultry Corp. v. American Mut. Ins. Co., 34 N.C. App. 224, 237 S.E.2d 564 (1977)* (holding that defendant insured who voluntarily advances payment to innocent motorist cannot use subsection (f)(1) to mandate reimbursement of settlement funds, since statute designed only to protect innocent motorists and not insured).

In *Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 238 S.E.2d 597 (1977)*, the Supreme Court summed up this provision as follows:

“...The primary purpose of this compulsory motor vehicle liability insurance is to compensate innocent victims who have been injured by financially irresponsible motorists. The victim’s rights against the insurer are not derived through the insured, as in the case of voluntary insurance. Such rights are statutory and become absolute upon the occurrence of injury or damage inflicted by the named insured, by one driving within his permission, or by one driving while in lawful possession of the named insured’s car, regardless of whether or not the nature or circumstances of the injury are covered by the contractual terms of the policy...”

293 N.C. at 440-441, 238 S.E.2d at 604.

Thus, with a statutory mandate to provide coverage no matter what the tortfeasor has done, the North Carolina courts have repeatedly upheld coverage up to the minimum limits under a wide variety of circumstances where coverage would otherwise be defeated. For example, in *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964), the North Carolina Supreme Court held that even when the defendant intentionally ran down the victim on a sidewalk with his automobile, the minimum limits coverage would be available. The court noted “the victim’s rights against the insurer are not derived through the insured as in the case of voluntary insurance.” 261 N.C. at 291, 134 S.E.2d at 659.

Similarly, in *Odom v. Nationwide Mut. Ins. Co.*, 101 N.C. App. 627, 401 S.E.2d 87 (1991), the Court of Appeals held that upon a showing of fraud in applying for a policy of insurance the insurer could avoid coverage above the minimum financial responsibility limits, but could not avoid coverage for those minimum limits. In *Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 473 S.E.2d 427 (1996), the Court of Appeals applied the same reasoning for UIM coverage, although in that case it held that since underinsured motorist coverage is written only with policies in excess of the minimum limits, the coverage mandated in that case would be voidable due to fraud in applying for the insurance.

Similarly, it appears that late notice and the failure to cooperate would also (at least by wording of the statute) not serve as a basis for voiding minimum financial responsibility limits, although as will be discussed *infra*, the failure to give notice of an action to the Reinsurance Facility will not bind an assigned risk policy to a similar obligation. *Cf. Strickland v. Hughes*, 273 N.C. 41, 160 S.E.2d 313 (1968) (while assigned risk insurer cannot intervene in tort action when it suspects collusion between plaintiff and defendant, it can thereafter litigate fraud allegedly perpetrated by the plaintiff, who under the circumstances would not be an innocent motorist).

While the mandatory provisions of (f)(1) are very strong and strictly followed regardless of the burden to the insurer, they have not been extended to policies other than those which insure the actual vehicle operated by the tortfeasor at the time of the accident, and coverage derived from policies not listing the vehicles are deemed to provide voluntary coverage only. *Woodruff v. State Farm Mut. Ins. Co.*, 260 N.C. 723, 133 S.E.2d 704 (1963).

V. **N.C. Gen. Stat. § 20-279.21(f)**

“...As to policies issued to insureds in this State under the assigned risk plan or through the North Carolina Motor Vehicle Reinsurance Facility, a default judgment taken against such an insured shall not be used as a basis for obtaining judgment against the insurer unless counsel for the plaintiff has forwarded to the insurer, or to one of its agents, by registered or certified mail with return receipt requested, or served by any other method of service provided by law, a copy of summons, complaint, or other pleadings, filed in the action. The return receipt shall, upon its return to plaintiff’s counsel, be filed with the Clerk of Court wherein the action is pending against the insured and shall be admissible in evidence as proof of notice to the insurer. The refusal of the insurer or its agent to accept delivery of the registered mail, as provided in this section, shall not affect the validity of such notice and any insurer or agent of an insurer refusing to accept such registered mail shall be charged with knowledge of the contents of such notice. When notice has been sent to an agent of the insurer such notice shall be notice to the insurer. The word “agent” as used in this subsection shall include, but shall not be limited to, any person designated by the insurer as its agent for the service of process, any person duly licensed by the insurer by the State as an insurance agent, any general agent of the company in the State of North Carolina, and any employee of the company in a managerial or other responsible position, or in North Carolina Commissioner of Insurance; provide, where the return receipt is signed by an employee of the insurer or an employee of an agent for the insurer, shall be deemed for purposes of this subsection to have been received. The term “agent” as used in this subsection shall not include a Motor Vehicle Reinsurance Facility.”

“The insurer, upon receipt of summons, complaint or other process, shall be entitled, upon its motion, to intervene in the suit against its insured as a party defendant and to defend the same in the named of its insured. In the event of such intervention by an insurer it shall become a named party defendant. The insurer shall have 30 days from the signing of the return receipt acknowledging receipt of the summons, complaint or other pleading in which to file a motion to intervene, along with any responsive pleading, whether verified or not, which it may deem necessary to protect his interest: Provided, the court having jurisdiction over the matter may, upon motion duly made, extend the time for the filing of responsive pleading or continue the trial of the matter for the purpose of affording the insurer a reasonable time in which to file responsive pleading or defend the action. If, after receiving copy of the summons, complaint or other pleading, the insurer elects not to defend the action, if coverage is in fact provided by the policy, the insurer shall be bound to the extent of its policy limits to the judgment taken by default against the insured, and noncooperation of the insured shall not be a defense.”

“...Provided further that the provisions of this subdivision shall not apply when the insured has delivered a copy of the summons, complaint or other pleadings served on him to his insurance carrier within the time provided by law for filing answer, demurrer or other pleading.”

The above-quoted provisions from (f)(1) taken together, although not completely contiguous, describe the procedural requirements for putting a carrier on notice when it has written a policy as an assigned risk through the Reinsurance Facility. This was obviously intended to provide some minimal protection to insurers that are writing less than desirable risks.

If the plaintiff pursues a claim to judgment without following the notice provisions to the insurer issuing the policy, then the judgment is not binding on that insurer. Thus, in *Love v. Nationwide Mut. Ins. Co.*, 45 N.C. App. 444, 263 S.E.2d 337, petition denied, 300 N.C. 198, 269 S.E.2d 617 (1980), the Court of Appeals held that such an insurer who had not been served with a copy of the complaint and summons was not bound by the result, even though in that case the result had been achieved not by a “default judgment” as referenced in the statute, but rather by a non-jury trial before a judge (albeit apparently without the other side present in court). The court there held that regardless of whether the ultimate judgment was achieved through default or by way of a trial, the thrust of the statute was to give the liability carrier the opportunity to participate, and that had not happened.

The service should be of a copy of the complaint and summons on the assigned risk insurer. It apparently does not apply to non-assigned risk policies as well, even when the policy should have been designated an assigned risk policy. *Beasley v. Hartford Accident & Indemnity Co.*, 11 N.C. App. 34, 180 S.E.2d 381 (1971). The court there argued that although the result may not have been desired, “to hold otherwise would require every plaintiff to send copy of summons and complaint by registered mail to the carrier of the liability insurance of the owner of the vehicle involved in every accident resulting in litigation to avoid the pitfall of the possibility of the vehicle involved being a replacement vehicle registered in a different name than the applicant for assignment of risk. This was obviously not intended by the General Assembly.” 11 N.C. App. at 42, 180 S.E.2d at 386. Cf., *Kennedy v. Starr*, 62 N.C. App. 182, 302 S.E.2d 497 (1983) (in concurring opinion a highly critical discussion as to why the requirement of notice to the insurer “should be one of general applicability” since the separate treatment for non-assigned risk policies “reflects an inadequacy in the legal system”).

When an insurer pursuant to an assigned risk policy does receive notice, it is not permitted to directly intervene into the underlying tort action (although certainly it could provide defense counsel), but it may in subsequent litigation challenge the verdict on the basis of fraud or collusion. *Strickland v. Hughes*, 273 N.C. 481, 160 S.E.2d 313 (1968).

VI. N.C. Gen. Stat. § 20-279.21(f)(2)

“...The satisfaction by the insured of a judgment for such injury or damage shall not be a condition precedent to the right or duty of the insurance carrier to make payment on account of such injury or damage;”

This provision indicates that there is no linkage between the ability of a tortfeasor to pay a judgment and the obligation of the insurer to pay. Rather, the statute has been interpreted to create a direct duty by the insurer to pay the claim to the third-party plaintiff, a judgment creditor. See, e.g., *Gardner v. The North Carolina State Bar*, 316 N.C. 285, 341 S.E.2d 517 (1986) (“companies providing automobile insurance are required by statute to pay such damages directly”). The duty to pay the plaintiff exists even if “the insured is insolvent and unable to discharge his liability.” *Marks v. Thompson*, 282 N.C. 174, 192 S.E.2d 311 (1972). As an aside, it appears that any insurance provision indicating the insolvency of an insured that would bar recovery of liability coverage, violates North Carolina insurance regulations. See 11 N.C.A.C. 10.1204 (indicating that “a provision in a liability policy that relieves the company of liability on account insolvency of the insured is a prohibited policy provision).

VII. N.C. Gen. Stat. § 20-279.21(f)(3)

“...The insurance carrier shall have the right to settle any claim covered by the policy, and if such settlement is made in good faith, the amount thereof shall be deductible from the limits of liability specified in subdivision (2) of subsection (b) of this section...”

Generally, an insurer has a right to settle any claim covered by the policy, in a good faith settlement as such is binding on the insured. See, *Powe v. Odell*, 312 N.C. 410, 322 S.E.2d 762 (1984); *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977); *Bradford v. Kelly*, 260 N.C. 382, 132 S.E.2d 886 (1963). However, in certain circumstances an insured defendant may not want to be bound by the settlement of his insurer, for example, when he has a contravening claim against that claimant for negligence, and he contends that the person making the claim is the actual tortfeasor in the accident. In that instance, the settlement by the insurer is not binding on the insured unless he or she pleads it as a bar to a counterclaim, in which case the use of the settlement acts as a ratification. See, *Bradford v. Kelly*, 260 N.C. 382, 132 S.E.2d 886 (1963); *Gamble v. Stutts*, 262 N.C. 276, 136 S.E.2d 688 (1964); *McKinney v. Morrow*, 18 N.C. App. 282, 196 S.E.2d 585 (1973).

In looking at this provision, there is some interesting language relating to the duties and obligations of an insurer as it relates to settlement. In *Marks v. Thompson*, 282 N.C. 174, 192 S.E.2d 311 (1972), the North Carolina Supreme Court noted that whether within or in excess of the required limits “the insurer, through its counsel and adjusters, has the right and the

obligation to defend the action against its insured and to conduct negotiations for settlement.”
282 N.C. at 185, 192 S.E.2d at 318.

In a rather unusual case, *Cash v. State Farm Mut. Auto Ins. Co.*, *137 N.C. App. 192, 528 S.E.2d 372, affirmed per curiam, 353 N.C. 257, 538 S.E.2d 569 (2000)*, the North Carolina Court of Appeals made an extended analysis of the rights and duties of a liability insurer as to settlement. The insured in that case sued its insurer for settling with claimants that the insured thought were not entitled to recover, and alleged its insurance would unjustifiably increase. The court indicated that an insurer in that instance could settle without the insured’s approval, and that a cause of action for bad faith would not arise if the settlement was within policy limits. The court further indicated that an insurer may consider its own interest in settling, and that there was no fiduciary duty by an adjuster to settle a claim. On the other hand, the opinion also indicated that any settlement must be made in good faith and there is a duty of good faith to engage in settlement negotiations. Further, the insurer has a duty to consider the insured’s interest in any settlement. The court also defined the term good faith in that decision as “absence of malice....honesty of intention, and freedom from knowledge of circumstances which ought to put one upon inquiry,” quoting from *Black’s Law Dictionary*. *137 N.C. App. at 203, 528 S.E.2d at 379.*

VIII. N.C. Gen. Stat. § 20-279.21(f)(4)

“...The policy, the written application therefore, if any, and any rider or endorsement which does not conflict with the provisions of the Article shall constitute the entire contract between the parties.”

This provision is relatively straightforward and describes the contents of an automobile insurance contract. What is noteworthy in provision (f)(4) is that it includes the “written application” as part of the “entire contract” between the insurer and the insured. Generally, applications are not made a part of an insurance contract except most notably in a number of non-auto type policies such as life insurance. One might argue in the right case that if provisions in the written application contradict the provisions in the policy, to the advantage of the insured, that such provisions in the application could arguably constitute part of the “entire contract” and thus perhaps override contrary policy provisions, or at least create ambiguity.

IX. N.C. Gen. Stat. § 20-279.21(g)

“...Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage shall not be subject to the provision of this Article. With respect to a policy which grants such excess or additional coverage the term “motor vehicle liability policy” shall apply only to that part

of the coverage which is required by this section.”

The most useful thing perhaps about subsection (g) is that it helps sort what types of coverage and policies are required by the Motor Vehicle Financial Responsibility Act, and what are “excess or additional coverages.” In *Woodruff v. State Farm Mut. Auto Ins. Co.*, 260 N.C. 723, 133 S.E.2d 704 (1963), the court held that coverage for a substitute vehicle would not constitute coverage required by the Financial Responsibility Act, as part of an owners’ policy, and thus would be “additional” coverage under § (g). As to liability coverage, in *Nationwide Mut. Ins. Co. v. Aetna Life & Casualty Co.*, 283 N.C. 87, 194 S.E.2d 834 (1973), the court held that an operators’ policy of automobile liability coverage, which insured people rather than vehicles, would constitute voluntary additional coverage pursuant to subsection (g). See also, *Caison v. Ins. Co.*, 36 N.C. App. 173, 243 S.E.2d 429 (1978) (holding that financial responsibility minimum limits apply only to people having “lawful possession” of an insured vehicle to statutory minimum limits, and not the coverage in excess of that).

In *Progressive American Ins. Co. v. Vasquez*, 350 N.C. 386, 515 S.E.2d 8 (1999), the court held that an umbrella or excess policy would not constitute coverage required by the Financial Responsibility Act. This is even though the coverage at issue was UIM coverage, since the court noted that there is a specific statute allowing umbrella and excess policies to exclude UIM coverage. See, N.C. Gen. Stat. § 58-3-152.

On the other hand, the UM benefits available under a business auto policy were determined to be mandated by the Financial Responsibility Act, and not “additional” coverage pursuant to subsection (g) in *Bray v. North Carolina Farm Bureau Mut. Ins. Co.*, 341 N.C. 678, 462 S.E.2d 650 (1995). A similar result was reached in *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759 (1989), as it related to underinsured motorist coverage. In *Sutton* the court specifically rejected the notion that UIM coverage would be “excess or additional coverage” under subsection (g). Since it would not be voluntary, it would be subject to the provisions of Article 9A of Chapter 20. Compare, *Hartford Underwriters Ins. Co. v. Becks*, 123 N.C. App. 489, 473 S.E.2d 427 (1996) (holding that underinsured motorist coverage was voluntary since it required liability limits in excess of minimum limits pursuant to § (f)(1), such that fraud in application would bar coverage).

It can be very important whether the Financial Responsibility Act governs particular policies or coverages, as it may affect the ability of an insurer to try to undo the coverage through fraud in an application or otherwise, or it might affect the ability of the insurer to assert an exclusion or limitation which would otherwise be in contravention of the Financial Responsibility Act.

X. N.C. Gen. Stat. § 20-279.21(h)

“...Any motor vehicle liability policy may provide that the insured shall reimburse the insurance carrier for any payment the insurance carrier would not have been obligated

to make under the terms of the policy except for the provisions of this Article.”

Subsection (h) purports to allow an insurer to seek reimbursement from an insured for which it would not otherwise be obligated to provide coverage but for the requirements of the Financial Responsibility Act. Thus, in *Allstate Ins. Co. v. Webb*, 10 N.C. App. 672, 179 S.E.2d 803 (1971), the court held that a provision was enforceable to obtain reimbursement from a person for whom the insurance company was required to provide coverage due to the Financial Responsibility Act.

It should be noted that this statute does not compel reimbursement, but only provides that an insurer may provide such a provision in its contract. See, *Nationwide Mut. Ins. Co. v. Chantos*, 293 N.C. 431, 238 S.E.2d 597 (1977).

Interestingly enough, in the new version of the North Carolina Rate Bureau form for the personal auto policy (NC 00 01) which was just approved by the North Carolina Department of Insurance, (effective date 4/1/06), the policy adds a provision under the PART F-GENERAL PROVISION for recovery of amounts that the insurer is required to pay pursuant to the Financial Responsibility Act. It provides “if we make payment under PART A-Liability Coverage which we would not have otherwise made in the absence of the preceding sentence, then we shall have the right to recover such payment from any insured who made a fraudulent statement, is engaged in fraudulent conduct, or made a material misrepresentation. It is not contained in the current version of the Rate Bureau personal auto policy.

XI. N.C. Gen. Stat. § 20-279.21(i)

“...Any motor vehicle liability policy may provide for the prorating of the insurance thereunder with other valid and collectible insurance.”

This provision has not been extensively utilized by the courts. In *North Carolina Farm Bureau Mut. Ins. Co. v. Hilliard* the court in a dispute among several auto insurers on their relative responsibility for underinsured motorist coverage noted that subsection (i) “does allow an insurance liability policy to provide for the prorating of the insurance thereunder with other valid and collectible insurance.” 90 N.C. App. 507, 369 S.E.2d 386 (1988). However, on that case the court did not hold or indicate that other apportionments of responsibility among insurance companies were not also permissible, and cited several cases where one clause that was excess beat out another clause that was not excess. Thus, this provision does not seem to be at all determinative on many coverage disputes.

XII. N.C. Gen. Stat. § 20-279.21(j)

“...The requirements for a motor vehicle liability policy may be fulfilled by the policies of one or more insurance carriers which policies together meet such requirements.”

Subsection (j) allows a combination of policies to together combine to provide the minimum required financial responsibility obligations. *See, e.g., United Services Auto Assoc. v. Universal Underwriters Ins. Co., 332 N.C. 333, 420 S.E.2d 155 (1992); Allstate Ins. Co. v. Shelby Mut. Ins. Co., 269 N.C. 341, 152 S.E.2d 436 (1967); See also, Utica Mut. Ins. Co. v. Canal Ins. Co., 23 N.C. App. 715, 209 S.E.2d 552 (1974).*

XIII. N.C. Gen. Stat. § 20-279.21(k)

“...Any binder issued pending the issuance of a motor vehicle liability policy shall be deemed to fulfill the requirements for such a policy.”

Subsection (k) provides the obvious public policy desire that a binder stand in the place of a motor vehicle liability policy until such policy is issued. If there is ever a dispute concerning the coverage afforded through a binder, subsection (k) should mandate that at a minimum the binder contains all the requirements of the Financial Responsibility Act.

XIV. N.C. Gen. Stat. § 20-279.21(l)

“...A party injured by an uninsured motor vehicle covered under a policy in amounts less than those set forth in G.S. 20-279.5, may execute a contractual covenant not to enforce against the owner, operator, or maintainer of the uninsured vehicle any judgment that exceeds the liability policy limits, as consideration for payment of any applicable policy limits by the insurer where judgment exceeds the policy limits. A covenant not to enforce judgment shall not preclude the injured party from pursuing available uninsured motorist benefits, unless the terms of the covenant expressly provide otherwise, and shall not preclude an insurer providing uninsured motorist coverage from pursuing any right of subrogation.”

This provision appears to be a companion provision to the amendment to N.C. Gen. Stat. § 20-279.21(b)(4), specifically authorizing the use of a Covenant Not To Execute when one is seeking payment of the primary liability coverage and yet wants to preserve a claim for uninsured or underinsured benefits. Since a vehicle is deemed to be uninsured as well as underinsured when it has liability coverage but not at the minimum financial responsibility

limits (such as when an out-of-state policy is at issue), one could theoretically seek payment of liability coverage in the context of an uninsured motorist claim and desire such a covenant. If such is done, it would be advisable to follow the same procedure of giving notice in writing more than 30 days prior to execution of the document, to the UM carrier or carriers so that they may decide whether they want to advance and preserve their subrogation rights. Interestingly enough, the last sentence of subsection (l) purports to allow a UM insurer to subrogate against a tortfeasor even if a covenant not to enforce judgment is obtained by the insured! This would seem to cut against the traditional notion that when the insured releases the tortfeasor he or she cuts off UM subrogation as well, since traditionally the UM carriers' rights have been derived through the insured's claim. This statutory provision has not been litigated, but appears to be advantageous to the UM insurer that wants to subrogate and disadvantageous to the defendant and its liability insurer.