REPORT OF THE STATE CORPORATION COMMISSION

PERMITTING THE ISSUANCE OF A

MOTOR VEHICLE INSURANCE POLICY IN VIRGINIA

TO

THE GOVERNOR

AND

GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 2

COMMONWEALTH OF VIRGINIA
RICHMOND
1982

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October 28, 1981

TO: The Honorable John N. Dalton
Governor of Virginia

and

The General Assembly of Virginia

The report contained herein is pursuant to House Joint Resolution No. 322 of the 1981 Session of the General Assembly of Virginia.

This report comprises the response by the Bureau of Insurance of the State Corporation Commission to the directive that a study be conducted on permitting the issuance of a motor vehicle insurance policy in Virginia that excludes from its provisions specifically named drivers who would otherwise be covered by the policy.

Respectfully submitted,

Thomas P. Harwood, Jr.
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HOUSE JOINT RESOLUTION NO. 322

Requesting the Bureau of Insurance of the State Corporation Commission to study a proposal permitting exclusion of coverage for certain named drivers under motor vehicle insurance policies approved for use in the Commonwealth.

Agreed to by the House of Delegates, February 6, 1981
Agreed to by the Senate, February 17, 1981

WHEREAS, Section 38.1-381(a) of the Code of Virginia provides that no policy of motor vehicle liability insurance may be issued or delivered in the Commonwealth unless it contains a provision insuring the named insured and any other person responsible for the use of or using the insured motor vehicle with the consent of the named insured; and

WHEREAS, there are many occasions when this provision of law causes a person to pay a higher insurance premium due solely to the poor driving record or other characteristics of another driver in the household; and

WHEREAS, several states do not prohibit insurance companies from excluding coverage under the policy for a particular named driver; and

WHEREAS, it appears that many insured Virginians would benefit by being able to obtain lower priced motor vehicle insurance policies if Virginia law was amended to permit the exclusion of coverage for a driver named on the exclusion endorsement; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the Bureau of Insurance of the State Corporation Commission is requested to study a proposal permitting exclusion of coverage for certain named drivers under motor vehicle insurance policies approved for use in the Commonwealth.

The Bureau of Insurance is requested to report its findings and recommendations to the House Committee on Corporations, Insurance and Banking and to the Senate Committee on Commerce and Labor by November one, nineteen hundred eighty-one.

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EXECUTIVE SUMMARY

During the 1981 Session, the General Assembly adopted House Joint Resolution No. 322, which requested the Bureau of Insurance of the State Corporation Commission to study a proposal permitting the exclusion of coverage for certain named drivers under motor vehicle insurance policies approved for use in Virginia.

The Resolution stated in part that (1) there are many occasions under current Virginia law when a higher insurance premium is charged solely due to the poor driving record or other characteristics of another driver in the household; (2) several states do not prohibit insurance companies from excluding coverage under the policy for a particular named driver; and (3) it appears that many insured Virginians would benefit by being able to obtain lower priced motor vehicle insurance policies if Virginia law were amended to permit the exclusion of coverage for a driver named on an exclusion endorsement.

The Bureau began its study by conducting a survey soliciting information and opinions on the use of named driver exclusions from the fifty insurance companies writing the most motor vehicle liability insurance in Virginia, from national and state trade associations of insurance companies and agents, and from other interested parties. The report analyzes the responses to this survey. Of those responding, two-thirds favored the use of named driver exclusions and one-third opposed their use.

The report contains a synopsis of current Virginia law pertaining to named driver exclusions. Such exclusions are presently prohibited by virtue of mandatory omnibus coverage provisions in both the Virginia Insurance Code and the Motor Vehicle Safety Responsibility Act.

The positions of the other states on named driver exclusions are then analyzed in the report. Thirty-six states presently permit named driver exclusions. Fifteen states do not permit the exclusions.

The report continues with a survey of court cases from selected states on named driver exclusions. The general trend of the cases is that such exclusions will be upheld where agreed to by the insured and expressed in a clear and unambiguous written endorsement attached to the policy.

After listing and discussing the advantages and disadvantages of permitting the exclusion of named drivers, the report considers a wide range of options, including continued prohibition of named driver exclusions, authorization of named driver exclusions subject to a variety of restrictions, and authorization of named driver exclusions without restriction.

As a result of this study, the Bureau recognizes that there are well-founded arguments on both sides of the named driver exclusion issue. Therefore, the Bureau does not find compelling justification on either side which overrides the concerns raised on the opposing side.

The question whether to permit use of named driver exclusions involves a trade-off between competing goals of maximizing the percentage of financially

responsible motorists in Virginia and providing increased availability of coverage in the voluntary market at a lower premium. To permit use of named driver exclusions would provide greater availability of coverage in the voluntary market, yet would probably result in an increase in the number of motorists without insurance to pay for losses resulting from an automobile accident.

Virginia has a very effective and workable system for dealing with the problem of uninsured motorists. The system strongly encourages but does not require motorists to purchase insurance. This system strikes a reasonable balance between governmental intrusiveness into individual affairs, protection of innocent victims of automobile accidents and cost to policyholders.

The system permits people who do not purchase insurance to pay an annual $200 uninsured motorist fee. This fee helps hold down the cost of uninsured motorist coverage. Also, by mandating availability of higher limits of uninsured motorist coverage and of underinsured motorist coverage, the system affords a person the opportunity to protect himself from the uninsured motorist, rather than having to rely on governmental enforcement.

The Bureau is concerned that widespread use of named driver exclusions would place undue pressure on Virginia's system for dealing with the problem of uninsured motorists. Therefore, the General Assembly may well consider retaining the present prohibition against use of named driver exclusions.

However, the Bureau recognizes that there may be instances where the use of named driver exclusions would be appropriate. Also, over two-thirds of the states, as well as the preponderance of the insurance industry, favor the use of named driver exclusions. Should the General Assembly decide to follow the majority view by permitting use of named driver exclusions, the Bureau believes that the following conditions should be imposed on their use:

1) Named driver exclusions should not be permitted for policies issued under the Virginia Automobile Insurance Plan. It would be inappropriate to exclude drivers from coverage in the market of last resort.

2) Named driver exclusions should not be permitted for policies certified under the financial responsibility law. To allow otherwise would be to thwart the purpose of the financial responsibility law.

3) Named driver exclusions should not be permitted as to the individual named on the declaration sheet of the policy. Because coverage of others is derivative, an exclusion as to that person would amount to a cancellation of the policy.

4) Named driver exclusions should be permitted only on an individual named basis. The Bureau is concerned that otherwise named driver exclusions might be applied in such a way as to exclude all youthful drivers from coverage on a class basis.

Outside of these constraints, the Bureau feels that the insurer and the policyholder should have maximum flexibility and freedom of contract. The Bureau also feels that use of this exclusion should be optional rather than mandatory.

The Bureau is concerned that excluded drivers may be allowed to drive an automobile in contravention of the exclusion. The policyholder may not fully understand the implications of use of the vehicle by a named excluded driver. To assure the maximum possible safeguard in the use of named driver exclusion, the Bureau recommends certain disclosure requirements.

The exclusion should be implemented by a clear and unambiguous endorsement which should be attached to the policy and which should contain the signed consent of the policyholder and the excluded driver. Finally, the endorsement should contain a warning informing the policyholder of the consequences of allowing an excluded driver to operate the vehicle.

To fully accomplish the intent of named driver exclusions, the Bureau recommends that any proposed statute contain a provision excluding coverage for imputed negligence to the policyholder arising out of use of the insured vehicle by the excluded person. Also, the Bureau recommends that the insurance companies be required to maintain records showing the names of all excluded drivers and full particulars underlying the use of each exclusion. This information should be available at the request of the Bureau and would enable the Bureau to monitor use of the exclusion.

I. INTRODUCTION

A. Background

During the 1981 Session, the General Assembly adopted House Joint Resolution No. 322, which requested the Bureau of Insurance of the State Corporation Commission to study a proposal permitting the exclusion of coverage for certain named drivers under motor vehicle insurance policies approved for use in Virginia.

The Resolution stated in part that (1) there are many occasions under current Virginia law when a higher insurance premium is charged solely due to the poor driving record or other characteristics of another driver in the household; (2) several states do not prohibit insurance companies from excluding coverage under the policy for a particular named driver; and (3) it appears that many insured Virginians would benefit by being able to obtain lower priced motor vehicle insurance policies if Virginia law were amended to permit the exclusion of coverage for a driver named on an exclusion endorsement.

The Bureau of Insurance was requested to report its findings and recommendations to the House Committee on Corporations, Insurance and Banking and to the Senate Committee on Commerce and Labor by November 1, 1981.

B. Statement of the Problem

Virginians, like most Americans, have come to regard the automobile as a necessity. It is used for transportation to and from work, for business, for pleasure, for emergencies and for family needs. With the high standard of living enjoyed by Virginians today, many families own more than one automobile. The automobile in fact is probably the most widely owned major asset in Virginia. It is also one of the chief sources of economic loss. The ownership or operation of an automobile exposes an individual to many sources of loss. A person may be killed or injured in an automobile accident, with resulting medical expenses and loss of income; a person may be held legally liable for injuries to others or for damage to the property of others; or the automobile itself may be damaged, destroyed, or stolen.

The cost of automobile insurance has become an essential item in the family budget for most automobile owners today. In Virginia this cost has increased 139% since 1969. It is no wonder that families are looking for ways to reduce the cost of this insurance. This study will analyze one proposed method to reduce the spiraling cost of automobile insurance: permitting the use of named driver exclusions.

The need for named driver exclusions can arise under a variety of factual situations. In certain households, there may be a number of licensed drivers who have good driving records and who would be desirable risks for any insurer. If, however, there is another member of the household who has a bad driving record, the availability and the cost of automobile insurance for the family is affected by this person's poor driving record. The named driver exclusion would permit an insurer desiring to write coverage for the other members of the family to write the insurance at a favorable rate for the balance of the family, excluding the driver with the poor record from coverage under the policy.

Virginia's prohibition of named driver exclusions has resulted in hardship for some insureds. One insured recently complained to the Bureau of Insurance:

> Please note that the reason for their refusal to renew MY insurance is because of the record of my husband. The car insured is in my name and the insurance is supposed to be in my name only. However, I understand that the law is such in Virginia that I cannot have my husband exempted even if he never drives my car, which he doesn't.
>
> . . . I have been with them for something like 15 years and am an excellent driver. I don't feel that I should be penalized because of my husband's record.

C. Overview

Section II of the report consists of a synopsis of current Virginia law pertaining to named driver exclusions. Such exclusions are presently prohibited by virtue of mandatory omnibus coverage provisions in both the Virginia Insurance Code and the Motor Vehicle Safety Responsibility Act.

Section III analyzes the positions of the other states on named driver exclusions. Thirty-six states presently permit named driver exclusions. Fifteen states do not permit the exclusions. Of these 15 states, eleven, unlike Virginia, are compulsory liability states. Thus, Virginia is one of only four non-compulsory liability states prohibiting named driver exclusions.

Section IV consists of a survey of court cases from selected states testing the validity of named driver exclusions. The states represented in this survey include states from all categories of statutory and regulatory positions. The general trend of the cases on named driver exclusions is that such exclusions will be upheld where agreed to by the insured and expressed in a clear and unambiguous written endorsement attached to the policy.

The Bureau of Insurance solicited information and opinions on the use of named driver exclusions from the fifty insurance companies writing the most motor vehicle liability insurance in Virginia, from national and state trade associations of insurance companies and agents, and from other interested parties. Section V analyzes the responses to this survey. Of those responding, two-thirds favored the use of named driver exclusions and one-third opposed their use.

This is an issue with valid points on both sides, as shown by the differing ways such exclusions are addressed in other states and by the different opinions expressed by insurance companies and other parties responding to the survey. A listing and discussion of the advantages and disadvantages of permitting the exclusion of named drivers is contained in Section VI.

The Bureau considered a wide range of options, including continued prohibition of named driver exclusions, authorization of named driver exclusions subject to a variety of restrictions, and authorization of named driver exclusions without restriction. These options are listed and discussed in Section VII.

Finally, the Bureau's recommendations are given in Section VIII.

II. CURRENT VIRGINIA LAW

Section 38.1-381 (a) of the Code of Virginia provides that no policy of motor vehicle liability insurance may be issued or delivered in the Commonwealth unless it contains a provision insuring the named insured and any other person responsible for the use of or using the insured motor vehicle with the consent of the named insured. This required policy provision is known as the omnibus clause.

Section 38.1-381(a2) states that any provision in any policy of insurance which purports to limit or reduce in any respect the coverage afforded by the omnibus clause shall be wholly void. Further, Section 38.1-381 (c) requires uninsured motorists insurance to cover any person using the insured motor vehicle with the consent of the named insured. Also, Section 46.1-504(b) in the Motor Vehicle Safety Responsibility Act requires that motor vehicle liability insurance policies subject to the Act insure the person named and any other person using or responsible for the use of the motor vehicle with the permission of the named insured.

The General Assembly, by requiring the omnibus clause, has expressed its position of providing mandatory coverage for any person driving a motor vehicle with the named insured's consent. The courts have recognized the legislative intent of these provisions by holding that the omnibus clause must be liberally interpreted to promote the clear public policy of broadening the coverage of automobile liability policies. This public policy goal is to provide coverage for those who suffer damage from the negligent use of the car by one operating it with the permission of the owner.* Thus, under present law, when one of the drivers insured under a motor vehicle liability insurance policy develops a driving record representing a degree of risk unacceptable to the insurer, the only recourse for the insurer is to cancel or nonrenew the policy. It should be noted that even where the insurer is willing to continue the coverage, the premium is high because of surcharges resulting from the bad driving record.

After a private passenger motor vehicle liability insurance policy has been in effect for 60 days, Section 38.1-381.5 restricts cancellation to two circumstances: (1) where the named insured, a customary operator of the motor vehicle, or any other operator residing in the same household has had his drivers license suspended or revoked within a specified time period or (2) where the premium is not paid when due. Insurer's right to nonrenew is unrestricted, except that nonrenewal may not result solely because of the age, sex, residence, race, color, creed, national origin, ancestry, marital status, or lawful occupation of anyone who is insured.

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*Liberty Mutual Insurance Co. v. Mueller, 432 F. Supp. 325 (W.D. Va. 1977), aff'd 570 F. 2d 508 (4th Cir. 1978); Emick v. Dairyland Insurance Co., 519 F. 2d 1317 (4th Cir. 1975); American Automobile Insurance Co. v. Fulcher, 201 F. 2d 751 (4th Cir. 1953); Jordon v. Shelby Mutual Plate Glass & Casualty Co., 142 F. 2d 52 (4th Cir. 1944); Nationwide Mutual Insurance Co. vs. Allstate Insurance Co., 304 F. Supp. 343 (W.D. Va. 1969); Davis v. National Grange Insurance Co., 281 F. Supp. 998 (E.D. Va. 1968); Rose v. Travelers Indemnity Co., 209 Va. 755, 167 S.E.2d 339 (1969); Storm v. Nationwide Mutual Insurance Co., 199 Va. 130, 97 S.E.2d 759 (1957); and Liberty Mutual Insurance Co. v. Tiller, 189 Va. 544, 53 S.E.2d 814 (1949).

There are also occasions where a higher premium is charged due to non-driving characteristics such as age, sex or marital status of a driver in the family. The most often cited example is an unmarried male driver under age 25. Even where the insured wishes to have the driver excluded from coverage for premium relief, the company, under current law, cannot honor this request.

The present law does not prohibit exclusion of a named driver for the physical damage coverages, such as collision and comprehensive coverages, but insurers have not sought approval for an endorsement form for so doing. Also, in writing increased limits of motor vehicle liability insurance coverage, an insurer may exclude all males under 25 years of age from such increased limits coverage. Increased limits are limits in excess of those required to avoid paying the $200 uninsured motor vehicle fee upon the annual registration of a motor vehicle ($25,000 because of bodily injury to or death of one person in any one accident, $50,000 because of bodily injury to two or more persons in any one accident, and $10,000 because of injury to or destruction of property in any one accident).

III. POSITIONS OF OTHER STATES

The exclusion of a named driver from the coverage of a motor vehicle liability insurance policy is permitted in 36 of the 51 jurisdictions in this country.

Table 1 shows the number of states classified as to whether they permit the exclusion and as to whether they are compulsory liability insurance states, i.e. whether they require that motor vehicles be covered by liability insurance or that security be provided as a condition for annual vehicle registration.

TABLE 1
Classification of States By Named Driver Exclusion and Compulsory Liability

	Permit Exclusion	Do Not Permit Exclusion	Total
Compulsory	16	11	27
Noncompulsory	20	4	24
Total	36	15	51

One would expect that states taking the strong measure of compulsory liability insurance to provide for coverage to the injured party would be less likely to permit the exclusion than other states. Supporting this idea is the fact that, of the 15 states not permitting the exclusion, eleven are compulsory liability states.

Also, of the 36 states permitting the exclusion, 20 are not compulsory liability states. It should be noted, however, that 16 of the 27 compulsory liability states do allow the exclusion.

Virginia is not a compulsory liability state, although it does require that a vehicle owner obtain liability insurance or other security as a condition to not paying an uninsured motorists fee of $200 to the Division of Motor Vehicles at the annual motor vehicle registration (Motor Vehicle Code, Sections 46.1-167.1 and 167.2).

Table 2 shows the 36 states allowing the exclusion, indicating that 21 of those do so under the express authority of a statute or insurance regulation. The remaining 15 jurisdictions shown in Table 2 allow the exclusion without express statutory or regulatory authority.

TABLE 2
States Permitting Exclusion

State	Compulsory Liability	Express Statutory/ Regulatory Authority
Alabama	No	No
Alaska	No	No
Arizona	No	Yes
Arkansas	No	No
California	Yes	Yes
Colorado	Yes	Yes
Connecticut	Yes	Yes*
Delaware	Yes	Yes
District of Columbia	No	No
Florida	No	No
Idaho	Yes	Yes
Illinois	No	No
Indiana	No	Yes
Iowa	No	No
Maine	No	Yes
Maryland	Yes	Yes
Michigan	Yes	Yes
Mississippi	No	Yes
Missouri	No	Yes
Montana	Yes	No
Nebraska	No	No
Nevada	Yes	No
New Mexico	No	Yes
North Dakota	Yes	Yes
Ohio	No	Yes
Oklahoma	Yes	Yes
Oregon	Yes	No
Pennsylvania	Yes	Yes
South Carolina	Yes	Yes
South Dakota	No	Yes
Tennessee	No	No
Texas	No	Yes*
Vermont	No	No
Washington	No	No
West Virginia	Yes	Yes
Wyoming	Yes	No

*Department of Insurance has promulgated a regulation permitting the exclusion.

Some of the states allowing the exclusion impose certain restrictions on its use. Table 3 reflects these restrictions.

TABLE 3

Restrictions on Use of Exclusion

Restriction	States
1. Permitted only in lieu of cancellation or renewal	Maine
2. Required in lieu of cancellation or nonrenewal	Arizona, Delaware, Mississippi, Missouri, Pennsylvania and Texas
3. Required in lieu of cancellation or nonrenewal or driving record premium increase	Colorado and Maryland
4. Required in lieu of cancellation or nonrenewal or permitted for spouse	North Dakota and Ohio
5. Excluded driver required to obtain other coverage	Delaware and South Carolina
6. Not permitted for policy certified under financial responsibility law	Florida and Texas
7. Individual approval of each exclusion by Department of Insurance required	District of Columbia
8. Defense of named insured required in certain circumstances	California
9. Permitted only for limits above the minimum limits required by law	Idaho and South Dakota
10. Permitted only for spouse and then only if the motor vehicle is jointly owned by husband and wife	Indiana

In nine of the states permitting the exclusion under the express authority of a statute or regulation, the relevant statute or regulation limits the exclusion to those instances where the insurer has the right to cancel or nonrenew the policy in question due to the claims experience or driving record of a insured, such as suspension of his driver's license. In eight of these nine states, the exclusion must be offered in lieu of policy cancellation or nonrenewal. In two (Colorado and Maryland) of these nine states, the exclusion must also be offered in lieu of a premium increase due to the driving record of an insured. In two additional states (North Dakota and Ohio), the exclusion must be offered in lieu of cancellation or nonrenewal and is also permitted if the driver to be excluded is the spouse of the named insured. Some of these states also specify that the excluded driver cannot be the named insured or the principal operator, although Missouri allows a named insured (normally defined as the person named on the declarations page of the

policy and his spouse, if a resident of the same household) to be excluded if there is more than one named insured.

Delaware, a compulsory liability state permitting the exclusion by statute, requires the insurer to offer separate coverage to the excluded driver, who must accept the coverage or furnish proof that such coverage is carried with another insurer or surrender his driver's license. South Carolina, also a compulsory liability state permitting the exclusion by statute, requires that the insurance agent involved determine that an appropriate policy of liability insurance or other authorized security be executed in the name of the excluded driver or that his driver's license be surrendered to the State Highway Department.

One interesting provision in a state permitting the exclusion by statute is the requirement in California that the insurer has to defend the named insured (not the excluded driver) under certain circumstances involving the excluded driver. The obligation is to defend only; there is no obligation to pay a claim. The circumstances giving rise to the obligation to defend are where all three of the following conditions are met: (1) the named insured and the excluded driver are jointly sued, (2) the excluded driver is a resident of the named insured's household, and (3) the excluded driver is insured under a separate policy not providing a defense to the named insured.

One jurisdiction permitting the exclusion (the District of Columbia) requires that each exclusion be submitted to and approved by the Department of Insurance. Two states (Florida and Texas) permitting the exclusion do not permit it for policies certified under the provisions of their financial responsibility laws.

In Idaho and South Dakota the exclusion is permitted only for the limits of liability coverage in excess of the minimum limits required by law. Also, in Indiana the exclusion is permitted, but is restricted to excluding only a spouse and then only if the motor vehicle is jointly owned by the husband and wife.

Fifteen states, including Virginia, do not permit named driver exclusions for liability coverage. These states are shown in Table 4.

TABLE 4

States Not Permitting Exclusion

State	Compulsory Liability
Georgia	Yes
Hawaii	Yes
Kansas	Yes
Kentucky	Yes
Louisiana	Yes
Massachusetts	Yes
Minnesota	Yes
New Hampshire	No
New Jersey	Yes
New York	Yes
North Carolina	Yes
Rhode Island	No
Utah	Yes
Virginia	No
Wisconsin	No

It is important to note that of these 15 states eleven, unlike Virginia, are compulsory liability states. Thus Virginia is one of only four non-compulsory liability states, along with New Hampshire, Rhode Island and Wisconsin, prohibiting named driver exclusions.

IV. REVIEW OF CASE LAW

The courts of many states have considered the question whether named driver exclusions are valid as a matter of public policy, within the setting of the omnibus clause or the financial responsibility laws. In some cases, judicial construction has resulted in a holding at variance with a state's express statutory or regulatory position.

The general rule appears to be that named driver exclusions have been held by the courts not to violate public policy where the exclusion is clear and unambiguous, where it is agreed to by the insured and the insurer, and where it is attached to or made part of the policy by endorsement. Among states permitting named driver exclusions, some limit the effect of the exclusion to the optional coverages, rendering the exclusion void as to minimum liability requirements of any financial responsibility law and as to mandatory no-fault coverage.

This section of the report surveys the relevant case law on this question. It is organized into three sections, each section dealing with states adopting a similar statutory or regulatory position.

A. States Allowing Named Driver Exclusions by Statute or Regulation

The courts have generally upheld statutes authorizing named driver exclusions. A general discussion of the trend of the cases follows. For a detailed analysis of the cases, see Appendix A.

California permits named driver exclusions by statute. There have been no Supreme Court cases directly passing on the validity of named driver exclusions since the enactment of the statute, but lower court cases indicate a clear trend toward permitting such exclusions.

Michigan courts were hostile to the concept of named driver exclusions prior to their statutory authorization, and have required strict compliance with the statutory guidelines since that authorization. This hostility appears to have been based on an expansive interpretation of the Motor Vehicle Accident Claims Act of 1968.

The Missouri courts have given effect to named driver exclusions under general principles of contract law. The courts have expressly held that the named driver exclusion overrides the statutory omnibus clause, absent certification of the policy under the financial responsibility law. In one case, the court voided an exclusion on grounds of ambiguity where the endorsement was not attached to the policy.

The South Carolina Supreme Court has limited the use of named driver exclusions to drivers other than the named insured. The basis of this decision was that the named insured is the source from which all omnibus coverage derives and that if the named insured were excluded, the policy would in effect be cancelled.

Texas courts have upheld named driver exclusions under general principles of contract law. They have, however, limited the effect of the exclusion to optional coverages.

B. States Allowing Named Driver Exclusions without Express Statutory or Regulatory Authority

The courts of these states have generally upheld the validity of named driver exclusion. A general discussion of the trend of the cases follows. For a detailed analysis of the cases, see Appendix B.

In Alabama, the courts have upheld the validity of named driver exclusions under general principles of contract law. The courts have expressly relied on insured's consent to the exclusion and on the clear and unambiguous nature of the exclusion as support for the validity of the exclusion.

Florida courts have uniformly upheld named driver exclusions. The courts have expressly held that the exclusion is valid notwithstanding the financial responsibility law where the policy has not been subject to the certification requirements of that law. Florida courts have also held a named driver exclusion valid as to a named insured on grounds that the named insured still retained an insurable interest in the vehicle.

Illinois courts have consistently upheld the validity of named driver exclusions under general principles of contract law. In upholding these exclusions, the courts have mentioned the clear and unambiguous nature of the endorsement in question.

The Oregon courts have upheld the validity of named driver exclusion under general principles of contract law, subject to the requirements of the financial responsibility law.

C. States Prohibiting Named Driver Exclusions

The courts of these states are divided on the question of validity of named driver exclusions. A general discussion of the trend of the cases follows. For a detailed analysis of the cases, see Appendix C.

Arizona courts have voided named driver exclusions on grounds that the statutory omnibus clause prescribed in the financial responsibility law is incorporated in every motor vehicle liability insurance policy. However, Arizona has recently enacted a statute permitting use of named driver exclusion, but there have been no cases construing this statute to date.

Kansas formerly permitted named driver exclusions except where the policy had been certified pursuant to financial responsibility laws. New Hampshire has held named driver exclusions to be void as a matter of statutory construction.

D. Conclusion

It appears likely that a properly drafted statute permitting named driver exclusions under certain circumstances would be upheld by the Virginia courts.

V. INDUSTRY AND OTHER RESPONSES TO SURVEY

The Bureau of Insurance solicited information and opinions on the use of named driver exclusions from the 50 insurance companies writing the most motor vehicle liability insurance in Virginia, from national and state trade associations of insurance companies and agents, and from other interested parties. This section of the report analyzes the responses to the survey.

A. Insurance Companies

Of the 46 insurance companies responding to the survey of the Bureau of Insurance on the named driver exclusion, 31 (67.4%) were in favor of it and 15 (32.6%) were not.

One of the more enthusiastic company supporters of the exclusion said, ". . . speaking from the standpoint of an insurance company, I do not see any disadvantages; but only advantages to both the company and the motoring public." Another company was more tentative in its support, saying, "The availability of such an endorsement is probably desirable. . . ."

Other company comments received supporting named driver exclusions are as follows:

1. We feel that the Named Driver Exclusion has value and serves a real need, particularly for families containing more than one driver and car. The exclusion, in effect, prevents all members of a family from incurring an economic penalty as a result of the actions of one member.

2. As a company, we feel that the option of using a named driver exclusion in an appropriate case is a useful alternative to rejecting an otherwise desirable risk solely because of the driving record of someone who is not the owner or principal operator of the vehicle. The existence of this option allows the voluntary market to provide greater availability of insurance to desirable risks.

3. Named driver exclusions are accomodations to policyholders. They allow an insurer to write, or continue to write, a risk which the insurer would otherwise decline or cancel. Rather than refuse or cancel an entire policy due to the experience of one driver, an insurer can simply exclude coverage when that driver operates any automobile covered by the policy. And, in many cases, the policyholder will receive a reduction in premium as a result of the exclusion. . .we would like to use the named driver exclusionary endorsement as a service to our valued customers.

4. There are, we believe, legitimate instances when a named driver exclusion is a viable alternative. An example of this might be a case where a member of the named insured's household has a demonstrated history of unsafe operation. Willingness of the named insured to accept coverage, subject to exclusion of that individual, would most likely make insurance more readily available and at lower cost.

5. We favor this type of legislation as proposed in Virginia, since it would allow a resident of a household with superior driving records to enjoy low rates. The rationale of this type of statute seems to be a sound one.

6. If the use of exclusion of named operator endorsements were legal in Virginia, we probably would use this approach on an occasional risk. Our basic approach, however, is to underwrite on the overall characteristics of the risk. Consequently, there would be very little change in our underwriting practices, but we would be glad to have the additional flexibility.

7. In addition to providing better coverage opportunities for the public, this could serve to improve service and public relations between the Insurance Industry and the general public. The use of a Named Driver Exclusion Endorsement would, in our opinion, have a more positive impact on the policyholder than the alternative of coverage termination.

On the other side of the issue one company stated, "We are unenthused about the exclusionary endorsement because it is naive to expect a family member not to ever use a family car. We've found that these agreements don't work." Yet another company was of the opinion that "any advantages attributed to the named driver exclusion are far outweighted by other considerations."

Other company comments received opposing named driver exclusions are as follows:

1. In our opinion Virginia should not amend its law to permit the exclusion of coverage for a driver named on an exclusion endorsement. In the states which have adopted such a statute, it has proven to us to be an ineffective underwriting tool which offers no real advantages for either us or the consumer. In some circumstances it may prove to be a hardship for the consumer because an excluded driver may use the family car without benefit of insurance and be involved in a costly accident. We have no desire to see such a statute passed in the Commonwealth of Virginia.

2. We recommend that the current Virginia law be retained. We are not aware that it has caused any undue hardship for the owners of motor vehicles licensed in the State of Virginia.

3. Our Underwriting Department has somewhat mixed feelings on the issue. Obviously, we run across occasional risks we would like to keep but feel we cannot do so because of the poor experience of one driver in the household. The availability of a named driver exclusion would provide for greater underwriting flexibility. On the other hand, we have even greater concern over the possible utilization of such an exclusion. Were an insurer forced to utilize such an exclusion in lieu of nonrenewal or cancellation, the end result would be one of less underwriting flexibility rather than greater. This would probably have a negative impact upon the voluntary market.

4. It is our feeling that Virginia should not allow the exclusion of coverage for a named driver. While such an exclusion may improve the ability of a particular applicant to obtain insurance, it has the potential for creating a poor relationship between the policyholder and his insurance company should an accident occur involving an excluded driver. The exclusion of coverage to a household resident is not in the best interest of the policyholder, the injured claimant, or the insurance company that must resort to enforcing the exclusion.

5. On balance, our company is philosophically opposed to the named driver exclusion endorsement as we feel it is detrimental to the public interest to allow uninsured drivers on the road. We also feel that in family situations the exclusion of a minor child still leaves other members of the family open to liability without protection.

6. Due to the costs of implementation and processing, use of the named driver exclusion is of dubious value and we do not favor it. Furthermore, there is a question as to whether or not named driver exclusions permitted by statute would withstand challenges on equitable grounds.

7. In most instances, the specific person who is the subject of the named driver exclusion, is a youthful operator with a poor driving record. Most automobile insurers are reluctant to use a named driver exclusion, because (a) it is not in the interest of the public (b) it is unenforceable at the time of the claim (c) results in bad public relations, even if it is enforceable, in that the insurer is denying coverage, and (d) conflicts with parents' vicarious liability laws, that is, liability is passed to the parents in several states.

B. Trade Associations and Others

The three insurance company trade associations who responded to the survey split in their opinions. One recommended the use of the exclusion. Another gave a qualified affirmative answer saying it would support the exclusion "to the extent that a named driver exclusion endorsement could enhance automobile insurance market conditions in Virginia". The third stated that it "has historically opposed regulatory or legislative proposals which would require the use of these endorsements and is generally opposed to their use under any conditions," but then stated that an approach allowing but not requiring the insurance company to offer the exclusion "would be more palatable than mandating that all insurers provide such endorsements on request."

The national office of one agents' group deferred to the state office, which concluded, "though our general feeling is that the exclusion of a driver could create problems, we support fully the need for a study into this problem area." The other major agents' group's national office said that it "has no formal position in favor or opposed to this concept." The state office of this group likewise took no final position for or against the exclusion.

A consumers' group indicated by telephone that it tentatively took a neutral position, but might write to the Bureau. To date the Bureau has received nothing in writing from the group.

VI. ADVANTAGES AND DISADVANTAGES OF NAMED DRIVER EXCLUSIONS

There are numerous advantages and disadvantages of named driver exclusions. This fact is reflected by the differing ways such exclusions are addressed in other states, and by the divergent opinions expressed by insurance companies and other parties responding to the survey. The following is a listing and discussion of the advantages and disadvantages of named driver exclusions.

A. Advantages

1. Increased Availability of Coverage in the Voluntary Market

The principal advantage of the named driver exclusion is that it will allow an insured continued coverage at an acceptable premium under a policy which would otherwise be cancelled or nonrenewed.

There are many instances where one driver in a family develops a driving record which represents a risk not acceptable to an insurer. Under the present law if the insurer is forced to cancel or nonrenew the policy, both the insurer and the insureds suffer as the insurer loses otherwise acceptable business and the good drivers within the family are forced to obtain insurance at a higher premium, perhaps in the residual market. The ability to exclude the high risk driver would permit the insured and the insurer to continue coverage for the balance of the family.

2. Equity of Premium

The excluded driver would likely obtain insurance in the residual market. The premium would be equitably and correctly priced for the high degree of risk he presented. The premium would no longer be subsidized by the good drivers from the rest of the family. Thus, the use of named driver exclusions would prevent all family members from incurring an economic penalty as a result of the actions of one member.

In many cases the good driving policyholder will receive a reduction in premium as a result of the exclusion. Automobile policies are normally rated on the worst driving record of a known prospective operator. Therefore, premiums are generally higher in those instances in which a company is not permitted to exclude coverage for a named driver. If he were to be excluded, the premium would probably fall because the policy would be rated on a more favorable driving record.

Permitting use of named driver exclusions is consistent with Virginia's Open Competition Law in that it permits insurers more ways to provide coverage for insureds at reasonable premiums.

3. Decrease in Residual Market

Currently in Virginia, the mandatory coverage of high risk drivers in a family limits the availability of insurance in the voluntary market for

the balance of the family, all of whom may be acceptable underwriting risks. Permitting the use of named driver exclusions will have the effect of increasing the availability of insurance in the voluntary market to desirable risks.

While there would be an increase in the number of drivers going into the residual market, the total number of drivers in the residual market would decrease as insurers would now be able to cover good drivers from the balance of the family within the voluntary market.

Allowing the use of named driver exclusions would permit at least part of the family to be insured in the voluntary market, rather than putting the family in a position of deciding to buy insurance in the residual or substandard market, or worse, not to buy insurance at all for any member.

4. Contractual Freedom

An insurer in Virginia may, under certain limited conditions, cancel or refuse to renew a motor vehicle policy upon proper notice. If named driver exclusions were permitted, an insurer, becoming aware of a bad loss history or adverse driving record of a driver, which rendered the risk undesirable, would be able to give the policyholder notice of his option either to renew the policy, excluding the high risk driver, or to secure other insurance.

The insurance contract or the modification of the insurance contract excluding the driver, entered into in good faith, at arms length and in a relatively equal bargaining position is a fundamental right. The use of named driver exclusions would permit the consumer to procure the appropriate insurance to meet his needs and means without the restriction or impairment of his right to contract for insurance.

B. Disadvantages

1. Injured Party Not Indemnified

There is a legitimate concern that the individual excluded from coverage will operate the vehicle and negligently inflict injury on a third person and will not have the resources to indemnify the injured person. If the injured party does not have uninsured motorist coverage, and if the excluded driver causing the accident has insufficient financial resources, the injured party may not be able to collect damages at all for his medical expenses, loss of income and pain and suffering. This may not be in the public interest.

2. Courts May Still Impose Liability

Even with a clearly written named driver exclusion, consented to by the insured, the excluded driver may still drive the covered automobile. As

a result, innocent third parties may be injured. The named driver exclusion may therefore be challenged directly as being against public policy.

The exclusion may also be challenged from a procedural standpoint, (failure to comply strictly with procedures for obtaining the insured's consent to the exclusion or to re-secure it upon renewal or where changes in coverage are made). In either event, the intent of the legislature would be defeated.

Some courts have disallowed named driver exclusions where an injured person might have no recourse sufficient to pay his losses. Since courts are sometimes reluctant to hold that the injured party cannot collect damages from anyone, they may as a matter of public policy decide in favor of the injured party and against the insurer regardless of exlusionary provisions. The likelihood of courts imposing liability on the insurers is increased when the excluded driver causing the accident has no other insurance available. It should be noted, however, that courts have been much less hostile to named driver exclusions than to class exclusions.

3. Creates Marital Discord

A disadvantage of named driver exclusions is that they may create marital discord. One can see the implications of husband-wife relations when one spouse must bar the other's use of the automobile. Family relations would be strained and, after an accident involving the excluded driver, suits within the household might be initiated.

4. Difficult to Control Use of Automobile

It may be too difficult to keep family members from driving an automobile, as it is virtually impossible to keep track of the use of the car on a day-to-day basis where the car and keys are available. This of course defeats the intent of named driver exclusions and results in potentially serious consequences for insurers, policyholders and injured third parties.

5. Parent or Spouse May Be Held Vicariously Liable

A person who allows his spouse or child to operate his automobile knowing of the individual's poor driving record and of the risk to innocent third persons may be held vicariously liable in the event the driver causes personal injury or property damage. This possibility is increased if the driving record is so serious that the individual is excluded from coverage under a named driver exclusion. Further, if the exclusion is upheld by the courts, this vicarious liability will be uninsured.

6. Defeats Purpose of Financial Responsibility Law and of Automobile Insurance

Named driver exclusions are inconsistent with the purpose of Virginia's financial responsibility law. This law is designed to assure that an owner of a motor vehicle in Virginia has insurance or enough money to pay for losses which may result from an automobile accident. The most common method of compliance with this law is the purchase of insurance designed to provide accident victims with assured, adequate and prompt payment for their economic losses. Insurance also protects the assets of the insured in the event of a lawsuit stemming from an automobile accident.

The use of named driver exclusions would probably result in an increased number of uninsured operators of motor vehicles within Virginia. The excluded drivers, generally the highest risk drivers, would have to pay the highest rates for liability insurance to comply with the financial responsibility law. Such drivers might drive uninsured.

To allow use of the automobile by certain drivers to defeat coverage also defeats to a large extent the two principal purposes of the automobile insurance policy: indemnification of injured parties and protection of the assets of the insured party.

7. Possible Underwriting Abuses

The use of such exclusions might result in underwriting abuses. A company might, as a normal course of business, exclude all young drivers by using named driver exclusions and thereby force them into the residual market as opposed to using the exclusion only on the basis of an individual's actual driving record.

8. Procedurally Costly

It might be expensive for insurers to require execution of the exclusionary endorsement at the time of each renewal. While the cost would be less if the endorsement were to apply prospectively to all future renewals, the possibility of a successful court challenge invalidating the exclusion would increase if consent were not obtained at each renewal.

VII. POLICY OPTIONS

The Bureau of Insurance considered a wide range of options concerning the use of named driver exclusions. These options include continued prohibition of named driver exclusions, authorization of named driver exclusions without restriction and authorization of named driver exclusions subject to a variety of restrictions.

The Bureau has attempted to separate the various options into their most basic components and to consider the merits of each component of the various options individually. Very few of the options are mutually exclusive. Restrictive options are grouped under categories of restrictions as to persons who are subject to named driver exclusions, circumstances permitting use of the exclusion, coverages subject to exclusion, and limitation of the exclusion to subrogation rights. A discussion of these options follows.

A. Continue Prohibition of Named Driver Exclusions

Disadvantages of this option are that prohibition of named driver exclusions sometimes results in payment of an inequitable premium by good drivers and sometimes compels cancellation or nonrenewal of policies. On the other hand, continued prohibition of named driver exclusions implements the basic goals of the statutory omnibus clause and the financial responsibility law by protecting the interests of innocent third parties.

B. Permit Named Driver Exclusions without Restrictions

Several states seem to have adopted this option by judicial action, subject to general principles of contract law. The advantages of this option are maximum underwriting flexibility and freedom of contract. The chief disadvantage would be that the intent of the financial responsibility laws would be frustrated because greater numbers of innocent third parties would not be indemnified for their injuries. Also, this option would more likely evoke judicial hostility than the more restrictive options.

C. Permit Named Driver Exclusions with Restrictions on Use

1. Who May Be Excluded

a. Permit named driver exclusions except for policyholder (person named on policy declarations sheet).

Arizona, Ohio, and Pennsylvania have adopted this option by statute. Also, South Carolina adopted this approach in the Lovette case, (cited in Appendix A). In that case, the court reasoned that exclusion of the named insured would eliminate the source of omnibus coverage, effectively cancelling the policy. The disadvantage of this option is that it does not provide total underwriting flexibility.

On the other hand, Missouri has explicitly authorized named driver exclusions as to the named insured where there is more

than one named insured under the policy. This variation would answer, to some extent, the flexibility issue raised above without involving the problem addressed in the Lovette case.

b. Permit named driver exclusion only of policyholder's spouse.

Indiana has a limited version of this option, only allowing the exclusion where the policyholder and spouse have joint title to the vehicle. An advantage of this option is that it prevents unwarranted exclusions of younger drivers by prohibiting their exclusion altogether. However, by prohibiting exclusion of other family members, it does not afford the underwriting flexibility and greater equity of premium promoted by some of the less restrictive options. Another disadvantage is that it might create marital discord.

c. Permit named driver exclusions without restrictions as to persons.

The advantage of this option is that it gives the insurer unrestricted flexibility with respect to which drivers may be excluded. The main disadvantage is that it might allow blanket use of the exclusion for whole classes of persons, such as youthful male drivers. Also, some of the disadvantages stated above may apply here.

2. Circumstances permitting use of the exclusion

a. Permit named driver exclusions only in lieu of cancellation or nonrenewal.

Six states employ this option on a mandatory basis. The main advantage of this option where the use of the exclusion is on a mandatory basis is that it permits continuation of coverage in the voluntary market for the balance of the family by excluding the poor driver. A disadvantage of this option is that it restricts the insurer's underwriting flexibility by impinging on the insurer's right to cancel or nonrenew as provided by statute. This is a more severe restriction on the insurer's right to nonrenew than on its right to cancel, as insurers have much more freedom in Virginia to nonrenew than to cancel. Of course, a possible variation is to employ this option on a voluntary basis, as Maine does.

b. Permit named driver exclusions only in lieu of cancellation, nonrenewal, or premium increase.

Two states (Colorado and Maryland) employ this option where the use of the exclusion is on a mandatory basis. This option has the same advantages and disadvantages as option 2.a. above except it provides more underwriting flexibility. The insured can elect either to exclude the poor driver causing the premium increase or to decline the exclusion, keeping that driver insured at the increased premium rate.

(i) Permit exclusion in lieu of premium increases due solely to driving record.

This would prevent insurer from blanket use of the exclusion for whole classes of persons, such as youthful male drivers. However, it would also prevent the insurer from offering the exclusion where the insured might desire it.

(ii) Permit exclusion in lieu of premium increases due to driving record or other characteristics.

This option would of course allow the blanket use of exclusions on a class basis. The advantage of this option is that it would allow the insurer to offer the exclusion where the insured might desire it. Further, underwriting flexibility is enhanced. The disadvantage of this option is that the discretion permitted the insurer is so great that underwriting abuse may result.

c. Permit named driver exclusions based on some objective standard, such as a point system similar to the Safe Driver Plan.

The main advantage of this option is that the exclusion may only be used under clearly defined circumstances. In this case both the insured and the insurer will know the exact criteria for use of the exclusion. The likelihood of judicial hostility will be decreased. Another advantage is that this concrete standard contrasts with the vagueness of application of the nonrenewal or premium increase options. A disadvantage is that underwriting flexibility is much less than in some of the other options.

d. Permit named driver exclusions except where a policy is certified under the financial responsibility law.

The main advantage of this option is that it effectuates the purpose of the financial responsibility laws of protecting innocent third parties. As a result, it is more likely to survive judicial review. The disadvantage is that this option provides less flexibility than would be available with no restriction at all.

e. Permit named driver exclusions except for policies issued under the Virginia Automobile Insurance Plan.

The theory of this approach is that it would be inappropriate to exclude drivers from coverage issued in the market of last resort.

3. Coverages subject to exclusion

a. Permit named driver exclusions except for minimum limits prescribed under the financial responsibility laws.

This approach has been adopted by judicial action in some states, often irrespective of whether the policy under consideration was subject to the certification requirements of the financial responsibility laws. The advantages of this option are that it greatly increases the likelihood of judicial approval of the concept of named driver exclusions and that it effectuates the purpose of the financial responsibility laws by providing recovery to innocent third parties, even if only at low limits. The disadvantage is that it subjects the insurer not only to a duty to pay the claim up to minimum limits, but also to a duty to defend.

b. Permit named driver exclusions without restrictions as to coverage.

The main advantage of this option is that it provides maximum flexibility to both the insurer and insured in structuring coverage. The main disadvantage of this option is that it frustrates the purpose of the financial responsibility law.

4. Limit named driver exclusions to subrogation rights.

This option would prohibit named driver exclusions to the extent that they defeat the recovery of innocent third parties, but permit the insurer to subrogate against the named insured for any losses paid to third parties arising from operation of the vehicle by a named excluded person.

This is the option permitted by California in the Abbott case (cited in Appendix A). The advantages of this option are that it increases the underwriting flexibility of the insurer while still protecting the rights of innocent third parties. Its disadvantages are that it requires the insurer not only to pay the claim but also to provide a defense for the insured and the named excluded person and that it places the insurer in the unenviable position of having to pursue its own insured for recovery of losses.

VIII. BUREAU'S RECOMMENDATIONS

The question whether to permit use of named driver exclusions involves a trade-off between competing goals of maximizing the percentage of financially responsible motorists in Virginia and providing increased availability of coverage in the voluntary market at a lower premium. To permit use of named driver exclusions would provide greater availability of coverage in the voluntary market, yet would probably result in an increase in the number of motorists without insurance to pay for losses resulting from an automobile accident.

Virginia has a very effective and workable system for dealing with the problem of uninsured motorists. The system strongly encourages but does not require motorists to purchase insurance. This system strikes a reasonable balance between intrusiveness of government into individual affairs, protection of innocent victims of automobile accidents and cost to policyholders.

The system permits people who do not purchase insurance to pay an annual $200 uninsured motorist fee. This fee helps hold down the cost of uninsured motorist coverage. Also, by mandating availability of higher limits of uninsured motorist coverge and of underinsured motorist coverage, the system affords a person the opportunity to protect himself from the uninsured motorist, rather than having to rely on governmental enforcement.

There are well-founded arguments on both sides of the named driver exclusion issue. Based on its research, the Bureau does not find compelling justification on either side which overrides the concerns raised on the opposing side.

The Bureau is concerned that widespread use of named driver exclusion would place undue pressure on Virginia's system for dealing with the problem of uninsured motorists. Therefore, the General Assembly may well consider retaining the present prohibition against use of named driver exclusions.

However, the Bureau recognizes that there may be instances where the use of named driver exclusions would be appropriate. Also, over two-thirds of the states, as well as the preponderance of the insurance industry, favor the use of named driver exclusions. Should the General Assembly decide to follow the majority view by permitting use of named driver exclusions, the Bureau believes that the following conditions should be imposed on their use:

1) Named driver exclusions should not be permitted for policies issued under the Virginia Automobile Insurance Plan. It would be inappropriate to exclude drivers from coverage in the market of last resort.

2) Named driver exclusions should not be permitted for policies certified under the financial responsibility law. To allow otherwise would be to thwart the purpose of the financial responsibility law.

3) Named driver exclusions should not be permitted as to the individual named on the declaration sheet of the policy. Because coverage of others is derivative, an exclusion as to that person would amount to a cancellation of the policy.

4) Named driver exclusions should be permitted only on an individual named basis. The Bureau is concerned that otherwise named driver exclusions might be applied in such a way as to exclude all youthful drivers from coverage on a class basis.

Outside of these constraints, the Bureau feels that the insurer and the policyholder should have maximum flexibility and freedom of contract. The Bureau also feels that use of this exclusion should be optional rather than mandatory.

The Bureau is concerned that excluded drivers may be allowed to drive an automobile in contravention of the exclusion. The policyholder may not fully understand the implications of use of the vehicle by a named excluded driver. To assure the maximum possible safeguard in the use of named driver exclusion, the Bureau recommends certain disclosure requirements.

The exclusion should be implemented by a clear and unambiguous endorsement which should be attached to the policy. The endorsement should contain the signed consent of the policyholder and the excluded driver. Finally, the endorsement should contain a warning informing the policyholder of the consequences of allowing an excluded driver to operate the vehicle.

To fully accomplish the intent of named driver exclusions, the Bureau recommends that any proposed statute contain a provision excluding coverage for imputed negligence to the policyholder arising out of use of the insured vehicle by the excluded person. Also, the Bureau recommends that the insurance companies be required to maintain records showing the names of all excluded drivers and full particulars underlying the use of each exclusion. This information should be available at the request of the Bureau and would enable the Bureau to monitor use of the exclusion.

APPENDIX A

Cases from States Allowing Named Driver Exclusion by Statute or Regulation

1) California:

The leading California case on restrictive endorsements prior to enactment of the statute permitting use of named driver exclusions was Wildman v. Government Employees Insurance Co. 48 Cal.2d 31, 307 P.2d 359 (1957). The case involved a policy containing an endorsement defining "insured" as the named insured and his immediate family. The accident giving rise to the case occurred while the car was being driven by an unrelated permittee.

In holding that the provisions of the financial responsibility law are considered part of every policy and that the insurer does not have the right to limit coverage to exclude other than the named insured and his immediate family, the court articulated the classic contract law argument against named driver exclusions:

> The statute requiring omnibus coverage is founded upon principles of public policy and an anomalous situation would be created if the rights of third parties, for whose protection the law was adopted, could be hindered, delayed or defeated by the private agreements of two of the parties to a three-party contract. 302P.2d at 364.

In Bohrn v. State Farm Mutual Automobile Insurance Co. 226 Cal.App.2d 497, 38 Cal. Rptr. 77 (1964) the court applied the reasoning of Wildman to a named driver exclusion as to insured's son. The son had his own "assigned risk" policy on his personal car. The son drove insured's car unaccompanied and struck a pedestrian. The insurer refused to defend insured in an action brought by the injured pedestrian.

Insured argued that the question presented was different from that in Wildman because the exclusion here involved only one person rather than an entire class of persons. The court, quoting from Wildman, held that since the omnibus clause is made a part of every policy of every insurer, all named driver exclusions must be invalid and void.

Abbott v. Interinsurance Exchange of the Automobile Club of Southern California 260 Cal. App. 2d 528, 67 Cal. Rptr. 220 (1968) involved a family policy containing a named driver exclusion as to insured's teenage son. The court held that, under the financial responsibility laws, the policy provided coverage to the son notwithstanding the named driver exclusion; but that the insurer would be permitted to subrogate against the insured to the extent of any amounts paid to a third party.

Allstate Insurance Co. v Dean 269 Cal. App. 2d 1, 76 Cal. Rptr. 543 (1969) concerned the validity of a named driver exclusion as to the husband of the insured. Insured was never furnished with a copy of the endorsement. The husband later drove insured's car and collided with an uninsured motorist. The court held the exclusion invalid because of insurer's failure to provide insured with a copy of the endorsement. One can infer from the court's omission of any reference to the financial responsibility law that the court would uphold a properly implemented named driver exclusion.

In Associated Indemnity Co. v. King 33 Cal. App. 3d 470, 109 Cal. Rptr. 190 (1973) the court held that an insurer could use a named driver exclusion endorsement notwithstanding the financial responsibility laws.

2) Michigan:

In Allstate Insurance Co. v. Motor State Insurance Co. 33 Mich. App. 469, 190 N.W.2d 352 (1970), a policy had been issued to husband and wife as named insured, with a named driver exclusion as to husband. The certificate of insurance accompanying the policy recited that the policy had been issued in accordance with the Motor Vehicle Accident Claim Act of 1968. Notwithstanding that the policy had not been subject to the certification provisions of the Act, the court read the omnibus coverage requirements of the Act into every liability policy and held that the named driver exclusion was against the legislative intent and public policy expressed in the Act and therefore void.

Allstate Insurance Co. v. Detroit Automobile Inter-Insurance Exchange (DAIIE) 73 Mich. App. 112, 251 N.W.2d 266 (1976) concerned the validity of a named driver exclusion as to the husband of insured, where the name of the excluded driver did not appear on the certificate of insurance accompanying the policy. The court recited the statutory requirements for named driver exclusion as follows:

1) authorization by insured.
2) warning notice set forth on face page, declaration sheet or certificate page of the policy.
3) warning notice set forth on the certificate of insurance.

The court then quoted the statutorily mandated warning language:

> Warning - when a named excluded person operates a vehicle all liability coverage is void - no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable. 251 N.W. 2d at 267.

In construing the statutory requirements the court held that the purpose of the warning on the certificate is to warn the insured (not the general public) of the consequences of use of an insured vehicle by a named excluded person. The court concluded that the exclusion was valid because the statute does not require listing of the name of the insured person on the certificate of insurance.

In DAIIE v. Commissioner of Insurance 86 Mich. App. 473, 272 N.W.2d 689 (1979) an insurer brought a declaratory action to contest the Commissioner's decision that named driver exclusions violated the No Fault Act of 1972. The Commissioner stated his position thus:

> . . . named driver exclusions are inconsistant with a policy of compulsory insurance designed to provide accident victims with assured, adequate, and prompt reparation for certain economic losses. The exclusions are intended to reduce premiums, and the excluded drivers are generally the highest risk drivers. Once excluded, there drivers would have to pay the highest rates for residual liability insurance, and this would not encourage such drivers to maintain their own insurance. 272 N.W. 2d at 692.

The court held that named driver exclusions were permissable within the no fault provisions.

In DAIIE v. Felder 94 Mich. App. 40, 287 N.W.2d 364 (1979) an insurer sought to exclude a named driver by use of a warning notice at variance with the statutorily prescribed language. The court held that the exclusion was invalid in light of the clear and unambiguous statutory provision mandating specific language.

3) Missouri:

Empire Fire and Marine Insurance Co. v. Brake 472 S.W.2d 18 (Mo. App. 1971) upheld the validity of a named driver exclusion as to insured's husband. Empire refused to insure the husband because they had recently cancelled his policy due to a poor driving record. The court held that the exclusion was valid when included in the contract, absent certification under the Motor Vehicle Safety Responsibility Act. Since no such certification was required in this case, the exclusion was upheld notwithstanding the statutory omnibus clause.

In American Family Mutual Insurance Group v. Claggett 472 S.W.2d 669 (Mo. App. 1971) the court considered the question whether a named driver exclusion is valid where the policy refers to a numbered endorsement, but no such numbered endorsement is attached. The court held that the language on the face of the policy referring to the endorsement was ambiguous in the absence of the endorsement itself, and that the omnibus clause therefore operated to extend coverage to the named excluded driver.

4) South Carolina:

The statutory authorization for named driver exclusions in South Carolina has been limited to drivers other than a named insured in Lovette v. U.S. Fidelity & Guaranty Co. 266 S.E.2d 782 (S.C. 1980). In that case, the named insured surrendered his license and executed a named driver exclusion as to himself. In holding the exclusion invalid, the court mentioned the general requirements of the statute that a written endorsement be signed both by the named insured and the excluded driver and that the excluded driver either surrender his license or obtain another policy.

The court states the rationale against exclusion of a named insured as follows:

> The exclusion of the named insured from coverage would effectively eliminate from the coverage those automatically included because of their relationship to the named insured and permissive users of the named insured. This is true because of the simple and undeniable fact that the policy contains no named insured from whom permissive use could be derived. To whom would the policy apply after the named insured has been excluded? Insofar as meeting the statutory requirements for coverage as set forth in Section 56-9-810(2), the exclusion of the named insured is, in effect, a cancellation of the policy. 266 S.E. 2d at 784.

5) Texas:

Texas courts have held that named driver exclusions are valid except with respect to mandatory coverage under no fault and financial responsibility laws. In Radoff v. Utica Mutual Insurance Co. 510 S.W.2d 151, (Tex. Civ. App. 1974) the court upheld an endorsement excluding coverage as to insured's son under general principles of contract law.

Greene v. Great American Insurance Co. 516 S.W.2d 739 (Tex. Civ. App. 1974) concerned the validity of a named driver exclusion with respect to uninsured motorist coverage. Insured had executed a named driver exclusion as to her son, who then drove the car and collided with an uninsured motorist. The court held that the exclusion was valid, but that the result would have been different in a case under the Motor Vehicle Safety Responsibility Act.

Unigard Security Insurance Co. v. Schaefer 572 S.W.2d 303 (Tex. 1978) addresses the question whether a named driver exclusion is valid as to personal injury protection (PIP) benefits. The policy was issued with a named driver exclusion as to insured's son. The son drove the car an had an accident, killing himself and one passenger, and seriously injuring two other passengers. The injured passengers and the estate of the deceased passenger sued the insurer for PIP benefits.

The court held that the named driver exclusion does not operate to exclude PIP benefits. The court based its decision on statutory provisions that PIP benefits must be expressly rejected by the insured in writing and that policy exclusions and conditions do not apply to PIP coverage. The court rejected insurer's contention that the named driver exclusion was a partial rejection of PIP coverage.

APPENDIX B

Cases from States Allowing Named Driver Exclusions without Express Statutory or Regulatory Authority

1) Alabama:

In Bell v. Travelers Indemnity Co. of America 355 So.2d 335 (Ala. 1978) the court upheld a named driver exclusion as to insured's husband. The court held that where the exclusion was clear and unambiguous, and was agreed to by the named insured, there was no violation of public policy.

In Alabama Farm Bureau Mutual Insurance Co. v. Williams 384 So.2d 1104, (Ala. Civ. App. 1980) the court upheld a named driver exclusion to a fleet policy where the insurer had required the exclusion as a condition of renewal of the policy. The insured had later resubmitted the name of the excluded driver for reinstatement on the policy after a thirty month waiting period, but the insurer had not acted on insured's request at the time of the accident. The court held that insurer's inaction on the request for reinstatement did not waive the exclusion.

2) Florida:

In Bankers & Shippers Insurance Co. of New York v. Phoenix Assurance Co. of New York 210 So.2d 715 (Fla. 1968) the court upheld the validity of a named driver exclusion as to insured's husband. The court reasoned that the exclusion was valid because the policy was not subject to the certification requirements of the financial responsibility laws.

Hanover Insurance Co. v. Bramlitt 228 So.2d 288 (Fla. App. 1969) involved the validity of a named driver exclusion as to insured's husband. Insured certified the policy under the financial responsibility law although she was not required to do so. The court held the exclusion valid on grounds that there was no requirement that the policy be so certified.

In Insurance Co. of North America v. Coates 318 So.2d 474 (Fla. App. 1975) the court considered the question of the validity of a named driver exclusion as to a named insured. The policy had originally been issued to a corporation, but was later amended to show both the corporation and its president as named insureds, with a named driver exclusion as to the president. The court held that the named driver exclusion was valid even as applied to a named insured, because the named insured still maintained an insurable interest in the vehicle.

3) Illinois:

In Meyer v. Aetna Casualty Insurance Co. 46 Ill. App. 2d 184, 196 N.E. 2d 707 (1964) the court construed a named driver exclusion pertaining to the son of the named insured. The son drove insured's auto and collided with another car. The driver and passenger of the other car recovered a judgment against insured and his son. They then brought a garnishment action against the insurer. In holding the exclusion valid, the court relied on the clear and unambiguous nature of the exclusion endorsement.

Home and Auto Insurance Co. v. Estate of Ferree 14 Ill. App. 3d 662, 303 N.E. 2d 256 (1973) involved a named driver exclusion applied to a named insured. The policy had originally been issued to husband. Husband later obtained an endorsement adding wife as a named insured and at the same time asked the agent to "delete" him from the policy because his license had been revoked. The exclusion was implemented by use of a class exclusion as to male drivers under age 25. After husband's license was reinstated, he drove the automobile and had a fatal accident. The court upheld the validity of the exclusion under general principles of contract law.

4) Oregon:

Hartford Accident and Indemnity Co. v. Kaiser 242 Ore. 123, 407 P.2d 899 (1965) involved the validity of a named driver exclusion as to insured's son. The policy also contained an endorsement providing supplemental coverage to enable insured to comply with the financial responsibility law, which mandated omnibus coverage. There was no indication that the policy was subject to certification provisions of the financial responsibility law.

The court held that the supplemental coverage endorsement superseded the named driver exclusion only to the extent of the minimum coverage requirements of the financial responsibility law, but that inasmuch as the omnibus clause was incorporated in the policy by the supplemental coverage, insurer would have to provide a defense for the excluded driver.

APPENDIX C

Cases from States Prohibiting Named Driver Exclusions

1) Arizona:

In Jenkins v. Mayflower Insurance Exchange 93 Ariz. 287, 380 P.2d 145 (1963), the court held that the omnibus clause prescribed in the Financial Responsibility Act was a part of every policy, and that the insurer could not include a restrictive endorsement negating coverage in derogation of the omnibus clause. The policy contained a recitation that its coverage would be in compliance with the financial responsibility laws of any state, to the extent of the coverage and liability limits required by such financial responsibility law. Arizona's Financial Responsibility Act required that any policy subject to its provisions shall insure the named insured and any other person using the vehicle with the express or implied permission of the named insured.

In rejecting insurer's contention that the policy was not a "motor vehicle liability policy" subject to the Financial Responsibility Act, because the policy had not been certified pursuant to the Act, the court alluded to the primary purpose of the Act as the provision of security against uncompensated damages arising from the operation of motor vehicles. Although this case involved a class exclusion (military personnel) rather than a named driver exclusion, it is used by the court in later cases as authority for the invalidity of named driver exclusions.

Dairyland Mutual Insurance Co. v. Anderson 102 Ariz. 515, 433 P.2d 963 (1967) involved a named driver exclusion as to an employee of a meat packing company. The court, citing Jenkins; held that the statutory omnibus clause is part of every policy and that the named driver exclusion, being in derogation of the omnibus clause, is void.

Harleysville Mutual Insurance Co. v. Clayton 103 Ariz. 296, 440 P.2d 916 (1968) involved a policy containing a named driver exclusion as to insured's husband. The insurer argued that Jenkins should not control because only a single person, rather than a class of persons, was excluded, and because it was reasonable to exclude the husband, who was known to be a bad driver. The court held the exclusion void, citing Jenkins and Dairyland.

These cases were decided before the enactment of Arizona's statute permitting use of named driver exclusions. Since enactment of that statute, there has been no case in Arizona directly concerning the validity of named driver exclusions. However, in Schwab v. State Farm Fire and Casualty Co. 27 Ariz. App. 747, 558 P.2d 942 (1976), the court stated in dicta that such exclusions would be valid under a freedom of contract theory.

2) Kansas:

In Miller v. State Farm Mutual Automobile Insurance Co. 204 Kan. 694, 466 P.2d 336 (1970) the court upheld a named driver exclusion as to insured's son. The court stated that a named driver exclusion endorsement attached to the policy pursuant to an agreement between insured and insurer did not violate the Motor Vehicle Safety Responsibility Act where the policy has not been certified as proof of financial responsibility.

The court ruled similarly in Avery v. Nelson 205 Kan. 311, 469 P.2d 349 (1970), also holding that issuance of the policy to insured was sufficient consideration for the named driver exclusion.

3) New Hampshire:

The New Hampshire Supreme Court struck down a named driver exclusion in Peerless Insurance Co. v. Vigue 115 N.H.492, 345 A.2d 399 (1975). The court held the exclusion to be in violation of a statutory provision that prohibits the policy with attached endorsements from conflicting with certain other statutory provisions. The dissent pointed out that there was no statutory mandate for inclusion of a spouse as insured, and that the exclusion should therefore have been upheld.