GAME OVER? A CALL FOR REFORM IN ILLINOIS INSURANCE LAW'S TREATMENT OF TEST DRIVERS*

Kyle Christopher Oehmke**

I. INTRODUCTION

Without a doubt, an automobile is one of the biggest and most important investments that nearly every American makes. Both excitement and uncertainty often fill the decision-making process of which make, model, and year to ultimately buy. In order to aid in making this difficult yet necessary decision, many new and used car dealerships allow their customers to test drive vehicles in which they have shown interest.[1] While "the goal of a test drive is to experience–as closely as possible–the same type of driving conditions the car will be used for after purchase,"[2] it is undeniable that some, if not most, of those taking a test drive push the pedal to the metal more than usual.[3] This tendency, coupled with car accidents that occur for any number of other reasons, perhaps provides explanation to the numerous test driving accidents that occur annually.[4]

Test driving accidents provide for fascinating litigation in the context of Illinois insurance law. Illinois law requires both car dealerships and individual

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* Best Legal Comment (2008), Southern Illinois University Law Journal.

** Law Clerk, The Honorable J. Phil Gilbert, United States District Judge, Southern District of Illinois. J.D., *cum laude*, Southern Illinois University School of Law. The author would like to thank Professor Christine Chance for her substantive suggestions regarding Illinois insurance law and Natalie Gregory for her editorial expertise. The author would also like to thank his wonderful family, friends, and law journal colleagues.

1. The concept of the vehicular test drive is novel in itself. While the average American makes several big purchases throughout his or her lifetime, very few of these purchases permit individuals to "try out" the specific model in which they are interested.
2. Philip Reed, 10 Steps to Finding the Right Car for You, http://www.edmunds.com/advice/buying/articles/78388/page008.html (last visited Apr. 8, 2009).
3. This could be the case for any number of reasons. The experience can be very exciting because, for the first time, one could be driving the "car of their dreams." Additionally, the driver's non-ownership of the vehicle could ease the everyday pangs of automotive responsibility.
4. As an interesting side note and explanation of this Comment's title, *Test Drive* is the title of a long-running racing video game franchise. The first installment of the series, originally released in 1987, offered "[A] mix of racing simulation and arcade game [that] consist[ed] of driving a choice of 5 sports cars on a mountain strip at the fastest speed possible without getting caught by the cops." Moby Games, Test Drive, http://www.mobygames.com/game/test-drive (last visited Apr. 8, 2009).

drivers to maintain automotive insurance that meet distinct minimum amounts. As one could guess, the very existence of two policies which require different amounts has posed interesting legal issues for Illinois courts. Over the years, these issues have largely been addressed and have carved out a relatively predictable area of the law. Specifically, in the event of a third party liability claim, the insurance of dealerships will always be primary and will always be held to its higher coverage limits. However, insurance primacy regarding damage to the test driven vehicle is allocated to the lower limits of the individual's policy.

In spite of the fairly straightforward status quo, the author of this Comment urges reconsideration of Illinois test driver treatment. The underlying theme of this Comment is that, without significant reevaluation of the treatment of Illinois' test drivers, the right of dealerships to contract is substantially impaired, injured third parties are not provided with a sufficient sense of compensatory expectation, and negligent test driving is inadequately deterred. Before diving into considerations that support such overhaul, it is necessary to first explore the legal background up to the seminal decision of *State Farm Mutual Auto Insurance Company v. Universal Underwriters Group*,[5] which laid much of the relevant jurisprudential groundwork that exists to this day. Accordingly, Section II of this Comment chronicles the early obligations of new and used car dealers, the passage and text of the Illinois Mandatory Insurance Act, the pre-*State Farm* split that existed among Illinois courts, and, finally, exposition of the *State Farm* decision. Section III explores recent developments in test driver law since the decision in *State Farm* was handed down. Specifically, Section III looks at *State Farm*'s immediate influence over Illinois case law, post-*State Farm* amendments to the Illinois Vehicle Code, and limitations on *State Farm*'s ruling. In offering a reevaluation and critique of Illinois' current treatment of negligent test drivers, Section IV provides the analysis of this Comment. In short, Section IV emphasizes the need for reform in the realms of insurer primacy and the coverage dichotomy in the test driver scenario. Before closing, Section IV praises precedent that holds the test driver's insurer as liable for damage to the dealership's vehicle. Section V offers a conclusion which serves as summary to the thesis of this Comment.

Throughout this Comment, one may be inclined to position himself or herself against the corporate entity, which is often typecast as ruthless and self-interested. However, the benefits that the public derives from test drives are undeniable. Only through an objective lens does the inherent need for reform

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5. 695 N.E.2d 848 (Ill. 1998).

unveil itself. Furthermore, while not every reader may feel that they will ever be affected by test driver treatment in Illinois, it should be noted that this Comment also helps to unravel the intricacies of the liability insurance which all of the state's drivers are required to carry.

II. LEGAL BACKGROUND

Any discussion of Illinois test drivers and liability insurance must begin with a discussion of the early statutory requirements of the state's car dealerships and the general mandatory insurance law that went into effect in 1990. Mandatory insurance caused a flood of litigation to hit the courts during that decade and continues to weigh on the state's treatment of its test drivers. Eight years after the mandatory insurance law went into effect, the Illinois Supreme Court handed down the seminal decision of *State Farm Mutual Automobile Insurance Company v. Universal Underwriters Group* (hereinafter, *State Farm*).[6] The case directly addressed the issue of test drivers and insurance coverage in the event of a liability claim. This Section of the Comment will offer a chronological exploration of this essential legal background. It is divided into the following four parts: Part A explores the early statutory requirements of car dealers in Illinois, especially with respect to liability insurance or lack thereof; Part B deals with the text and circumstances surrounding the passage of Illinois' mandatory insurance law; Part C addresses the state's early case law, specifically the pre-*State Farm* split regarding permissive drivers that existed among the state's appellate courts; and, finally, Part D provides a detailed exposition of the *State Farm* decision.

A. Early Statutory Obligations of Illinois Car Dealers

Prior to the passage of Illinois' liability insurance requirement for individual drivers in 1989, specific, albeit comparatively primitive, guidelines existed for new and used car dealerships. While these older statutory guidelines provided little resolution on the issue of test driver liability, the analysis of this Comment will draw upon the trajectory of the statutes in Section IV. It is therefore necessary to briefly examine these laws.

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6. *Id.*

Statutes concerning Illinois car dealers did not come about until 1970.[7] Many of these original laws, as well as their many amendments over the years, remain intact. One example of this would be the requirement that, before one can even begin engaging in the sale of new or used automobiles, they must first be licensed to do so by the Secretary of State.[8]

In their original incarnations, the statutes made no mention of any liability insurance requirements of a dealership as a means of obtaining licensure or otherwise.[9] However, in 1983, the General Assembly amended the statutes to include such prerequisites to licensure.[10] Specifically, the amendments required "a statement that the applicant has complied with the . . . liability insurance requirement."[11] This requirement called for the following policy limits: "liability coverage in the minimum amounts of $100,000 for bodily injury to, or death of, any person, $300,000 for bodily injury, or death of, two or more persons in any one accident, and $50,000 for damage to property."[12] These exact limits for dealerships survive to this day. These statutes would not be significantly amended again until after the decision in *State Farm*, more than twenty years later.[13] Meanwhile, the insurance requirements of Illinois' individual drivers would soon be greatly affected.

B. The Illinois Mandatory Insurance Law

On August 11, 1989, the Illinois General Assembly and Governor James R. Thompson added a series of amendments, known collectively as the Illinois Mandatory Insurance Law,[14] to the Illinois Vehicle Code.[15] These amendments went into effect on January 1, 1990, making Illinois the forty-first state to enact a form of mandatory liability insurance.[16] Although such

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7. *See* Ill.Rev.Stat.1991, ch. 95 1/2, Illinois Vehicle Code Section 5–101 (1970) (current version at 625 ILL. COMP. STAT. 5/5–101 (2006)) (this section of the Vehicle Code dealt with new car dealers); Ill.Rev.Stat.1991, ch. 95 1/2, Section 5–102 (1970) (current version at 625 ILL. COMP. STAT. 5/5–102 (2006)) (this section dealt with used car dealers).
8. Section 5/5–101(b); Section 5/5–102(b).
9. *See* Section 5/5–101; *see also* Section 5/5–102.
10. Section 5/5–101, *amended by* Act of Sept. 23, 1983, P.A. 83–764; Section 5/5–102, *amended by* Act of Sept. 23, 1983, P.A. 83–764.
11. Section 5/5–101(b)(7); Section 5/5–102(b)(5).
12. *Id*. This will hereinafter be referred to as a $100,000/$300,000/$50,000 policy.
13. Section III/Part B of this Comment discusses these changes.
14. Illinois Mandatory Insurance Law, P.A. 86–0149 (codified as amended in scattered Sections of 625 ILL. COMP. STAT.).
15. Judge Clifford L. Meacham & Judge Wayne R. Andersen, *Illinois' Mandatory Insurance Law*, 78 ILL. B.J. 298 (1990) [hereinafter Meacham].
16. *Id*.

lawmaking tweaked a number of things within the Vehicle Code, the bulk of its impact came from Title 625, Chapter 5, Section 7–601, which survives verbatim to this day: "[N]o person shall operate, register, or maintain registration of, and no owner shall permit another person to operate, register or maintain registration of, a motor vehicle designed to be used on a public highway unless the motor vehicle is covered by a liability insurance policy."[17] The mandate of this broad-sweeping law applied to every Illinois driver. The amount of required liability insurance for individual drivers has remained the same over the years: "[At least] $20,000 because of bodily injury to or death of any one person, and . . . [at least] $40,000 because of bodily injury to or death of 2 or more persons, and . . . [at least] $15,000 because of injury to or destruction of property of others."[18]

Obvious policy concerns ensured the law's ultimate passage. Prior to the requirement of mandatory insurance, roughly twenty percent of Illinois' 7.4 million drivers were uninsured.[19] Some studies reported that up to half of the driving population in urban areas lacked insurance.[20] Just imagine: you recently were involved in a car accident that was not your fault. You rightfully believe that this always stressful and occasionally horrifying experience demands remedy from our legal system. The driver does not have liability insurance on his car because it is not required by the state. Not only that, but, following a civil judgment in your favor, it becomes clear that the tortfeasor has no regular income or personal assets which may be successfully garnished or liquidated.

As one can imagine, this hypothetical was a common reality just two decades ago. By making liability insurance mandatory and enforcing fines for those in noncompliance, Illinois minimized the risk of such a crushing blow and attempted to provide aggrieved persons with greater redress under its laws. Perhaps the state's First Appellate District put it best: "[The] principal purpose [of mandatory automobile liability insurance] is to protect the public by securing payment of their damages."[21]

C. Mandatory Insurance and Illinois Test Drivers: the Pre-*State Farm* Split

Upon passage of the Illinois Mandatory Insurance Law, a host of litigation flooded the state's courts. Case law concerning test drivers carved

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17. 625 ILL. COMP. STAT. 5/7–601 (2006).
18. *Id*. Section 5/7–203. This will hereinafter be referred to as a $20,000/$40,000/$15,000 policy.
19. Meacham, *supra* note 15, at 298.
20. *Id*.
21. State Farm Mut. Auto. Ins. Co. v. Fisher, 735 N.E.2d 747, 751 (Ill. App. Ct. 2000).

out a fascinating niche to this judicial onslaught. Prior to the decision in *State Farm*, majority and minority viewpoints existed in Illinois on the issue of whether the liability insurance of automobile owners covered permissive users. Resolution of the issue directly addressed the question of who paidout when a test driver crashed. While the First, Second, and Fifth Appellate Districts comprised a majority that held permissive drivers as insureds of the bailor's insurer, the Fourth District took a minority position which allocated financial responsibility to the insurer of the bailee.[22]

Notably, the policies at issue in these appellate court decisions were identical to one another and to the language later explored in *State Farm*. These policies stated, in relevant part, the following: "WHO IS AN INSURED . . . any other person or organization required by law to be an INSURED while using an AUTO covered by this Coverage Part within the scope of YOUR permission."[23] Courts of the majority view placed a premium on the "plain and ordinary meaning of the . . . policy's definition of insured."[24] With Illinois' mandatory insurance in mind, these courts reasoned that a permissive driver constituted a person legally required to be insured as prescribed by the policy.[25] Coverage followed accordingly. Meanwhile, the state's minority perspective emphasized that, when the legislature wants the bailor's insurer to provide coverage, they explicitly state as much.[26] The minority understanding ultimately asserted that "the garage policy was intended to cover only uninsured or underinsured customers."[27] The fundamental differences in the courts' reasoning demonstrated the intricacies and tough questions posed by the policy. As the rift among the courts continued to swell, the Illinois Supreme Court decided to put its foot down.

D. *State Farm v. Universal Underwriters*

On April 16, 1998, the Supreme Court of Illinois decided *State Farm v. Universal Underwriters*,[28] and, in doing so, promulgated tremendous state

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22. *See* Universal Underwriters Ins. Group v. Griffin, 677 N.E.2d 1321 (Ill. App. Ct. 1997); Madison State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Group, 674 N.E.2d 52 (Ill. App. Ct. 1997), *aff'd* 695 N.E.2d 848 (Ill. 1998); Madison Mut. Ins. Co. v. Universal Underwriters Group, 621 N.E.2d 270 (Ill. App. Ct. 1993); *but see* Steinberg v. Universal Underwriters Ins. Co., 650 N.E.2d 14 (Ill. App. Ct. 1995).
23. *State Farm*, 695 N.E.2d at 849.
24. *See, e.g.*, *Madison Mut.*, 621 N.E.2d at 272.
25. *Id*.
26. *Steinberg*, 650 N.E.2d at 16 (specifically, the court turned to the car rental and taxicab owner provisions of the vehicle code).
27. *Id*. at 17.
28. 695 N.E.2d at 849.

precedent regarding the intersection between test drivers and related insurance claims. During his test drive of a Jeep owned by Joyce Pontiac GMC, Rodney Luckhart negligently hit and injured both the driver and passenger of another vehicle; subsequently, Luckhart's automobile liability insurer, State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"), paid out on the property damage and personal injury claims against its client.[29] Subsequently, State Farm brought a subrogation claim against the dealer's insurer, Universal Underwriters Group (hereinafter "Universal") to recoup the roughly $9,000 payment.[30] Following decisions by the trial and appellate courts in which State Farm prevailed, the Illinois Supreme Court granted a writ of certiorari in order to decide "whether a car dealer's garage insurance policy covers the liability of a separately insured customer who is involved in an accident while test-driving one of the dealer's vehicles."[31]

In order to understand the arguments of the parties, one must first review the garage policy that Universal provided to Luckhart.[32] The parties disputed whether Luckhart constituted "any other person or organization required by law to be an INSURED."[33] Relying on the mandatory liability insurance requirements of the Illinois Vehicle Code,[34] State Farm contended that Luckhart fell under this proviso of the garage policy, regardless of any other liability coverage he held.[35] On the other hand, while Universal conceded that one may not test drive a vehicle without the requisite amount of liability insurance, it maintained that the Vehicle Code does not specify whether the driver must be covered by the policy of the dealer.[36] In other words, Universal argued that it should only be liable in the event of an uninsured or underinsured driver.

The court made it clear that its decision turned on whether an omnibus clause, which extends liability coverage to those who use the named insured's automobile with his permission, existed in the policy at issue.[37] With the specific mandatory insurance provisions of the Illinois Vehicle Code making no explicit mention of such a clause, the court turned its focus to Section 7-317.[38] The Section defined "motor vehicle liability policy" as "an 'owner's

29. *Id*.
30. *Id*.
31. *Id*. at 841–42.
32. This policy is provided in greater detail in Section II/Part C of this Comment.
33. *State Farm*, 695 N.E.2d at 841–42.
34. *See* 625 ILL. COMP. STAT. 5/7–601 (2006).
35. *State Farm*, 695 N.E.2d at 843.
36. *Id*.
37. *Id*. at 844.
38. *Id*.

policy' or an 'operator's policy' of liability insurance . . . [that] shall insure the person named therein and *any other person using or responsible for the use of such motor vehicle or vehicles with the express or implied permission of the insured*."[39] Applying basic principles of statutory construction to this definition, the court held that liability insurance policies extend beyond the owner of the vehicle to also include those using the vehicle with the permission of the policyholder.[40] Accordingly, Universal would have to pay up unless another legal theory provided safe haven for the insurer.

While Universal did not give up without a fight, the court made short work of the defendant's alternative arguments. First, Universal posited that Section 7–317 only applied to policies used as proof of future responsibility in a separate article of the Illinois Vehicle Code and, as a result, did not touch Section 7–601.[41] The court reminded Universal that the legislature qualified the definition by explicitly stating "as it is used in this Act," which referred to the Code in its entirety, and thus included Section 7–601.[42] Universal next argued that an exception to the statute shielded any potential liability of the defendant.[43] Specifically, the exception applied to "vehicles complying with laws which require them to be insured in amounts meeting or exceeding the minimum amounts required under [Section 7–601]."[44] The court found that this exception only applied to insurance requirements involving coverage dictated by the mandatory insurance statute.[45] This interpretation required an omnibus clause if the exception were to apply, rendering Universal liable regardless of the exception's invocation.[46] Finally, in a seemingly last ditch effort to turn the tide of liability, Universal contended that its policy only provided coverage once Luckhart's other insurance ran dry.[47] In responding to this assertion, the court turned to custom of the insurance industry, where "primary liability is generally placed on the insurer of the owner of an automobile rather than on the insurance of the operator."[48] The high court made clear that even if it accepted Universal's contention as true, its effect

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39. 625 ILL. COMP. STAT. 5/7–317(a),(b)(2) (2006) (emphasis added).
40. *State Farm*, 695 N.E.2d at 844.
41. *Id*. at 845.
42. *Id*.
43. *Id*.
44. 625 ILL. COMP. STAT. 5/7–601(b)(6) (2006). Pursuant to this statute, Universal's role as a seller of new vehicles meant that the insurer had to carry liability coverage of at least $100,000/$300,000/$50,000, which clearly exceeded the $20,000/$40,000/$15,000 requirement of the mandatory insurance statute. *State Farm*, 695 N.E.2d at 845.
45. *State Farm*, 695 N.E.2d at 845.
46. *Id*. at 845–46.
47. *Id*. at 846.
48. *Id*. (quoting 7A AM. JUR. 2d *Automobile Insurance* § 543 (1997)).

violated the state's public policy as put forth by the General Assembly through the Code.[49]

In neatly deconstructing the positions of Universal one argument at a time, the Illinois Supreme Court ultimately affirmed the rulings of the lower courts and upheld State Farm's subrogation action for the $9,000 at issue.[50] However, the legal rationale that served as the groundwork for the court's decision stands for much more in hindsight. The court made it clear that "in the absence of any statutory language qualifying [the Code's mandate], the statute must be construed to require primary coverage [of the vehicle owner's insurer]."[51] When one bears in mind that omnibus clauses required by statute must be read into every relevant automobile liability policy, it becomes clear that the decision of the court in *State Farm* established firm legal rooting on the side of permissive test drivers in Illinois.[52]

III. RECENT DEVELOPMENTS

The influence and effects of *State Farm* spread quickly throughout Illinois. While the initial impact of the case may have left dealership insurers unhappy, limitations of the *State Farm* ruling soon emerged. Dedicated to uncovering these recent developments, this section of the Comment first illustrates the binding effect of *State Farm* over subsequent case law. Following such review, this Comment takes a brief step back from the lens of the judiciary and chronicles relevant post-*State Farm* amendments to the Illinois Vehicle Code. Finally, this section returns to the state's jurisprudence and looks at common law limitations placed on the *State Farm* ruling, as well as statutory backlash to such common law limitations.

A. *State Farm*'s Influence over Illinois Case Law

Decided a mere three and a half months after *State Farm*, the case of *John Deere Insurance Co. v. Allstate Insurance Co.*[53] provides a great illustration of the binding state precedent promulgated by *State Farm*. Decided by Illinois' First District Appellate Court, the case presented facts and issues regarding coverage of permissive test drivers that were very similar to those heard in *State Farm*. As such, the auto dealer could not escape the grasp

49. *State Farm*, 695 N.E.2d at 846.
50. *Id*.
51. *Id*.
52. *Id*. at 844.
53. 698 N.E.2d 635 (Ill. App. Ct. 1998).

of stare decisis. The decision of the Illinois Supreme Court effectively mooted the issues of whether the driver constituted an insured under the policy and whether Illinois law required auto dealers to cover their permissive users by requiring an affirmative answer to both questions.[54]

Nevertheless, the court did get the chance to exhibit judicial discretion in deciding whether the liability of the dealer should exceed $20,000/$40,000/$15,000.[55] Relying on the fact that distinct minimum coverage provisions exist for automobile dealerships and that insurance certification requires approval from the office of the Secretary of State, the court held the dealer to the $500,000 limit stipulated in its certificate of insurance.[56] The holding and rationale in *John Deere* made clear that "the legislature intended that the amount of liability insurance which must be carried on a particular automobile is not determined by the operator of the automobile but, rather, the automobile itself."[57] Indeed, things were looking glum for the state's automobile dealers.

B. Post-*State Farm* Amendments to the Illinois Vehicle Code

While stare decisis lent a certain degree of predictability to Illinois cases concerning test drivers in the wake of *State Farm*, relevant amendments to the Illinois Vehicle Code kept things interesting. The legislative and executive branches added identical amendments to the state's statutes dealing with new and used car dealerships which set forth specific guidelines in the event of test drive liability.[58] These amendments survive to this day.

Officially approved on August 22, 2002, the statutory amendments added a number of things to the Vehicle Code. First, the amendments provided a definition of "test driving," which occurs upon the following:

> [W]hen a permitted user who, with the permission of the [new or used] vehicle dealer or an employee of the [new or used] vehicle dealer, drives a vehicle owned and held for sale or lease by a [new or used] vehicle dealer that the person is considering to purchase or lease, in order to evaluate the performance, reliability, or condition of the vehicle.[59]

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54. *Id*. at 638.
55. *Id*. (again, this is the minimum amount mentioned under the mandatory insurance statute).
56. *Id*. at 640.
57. *Id*. at 639.
58. *See* 625 ILL. COMP. STAT. 5/5–101 (2006), *amended by* Act of Aug. 22, 2002, P.A. 92–835; 625 ILL. COMP. STAT. 5/5–102 (2006), *amended by* Act of Aug. 22, 2002, P.A. 92–835.
59. Section 5/5–101(b)(6); Section 5/5–101(b)(4). Meanwhile, a "permitted user" is "a person who, with the permission of the [new or used] vehicle dealer or an employee of the [new or used] vehicle dealer, drives a vehicle owned and held for sale or lease by the [new or used] vehicle dealer which the person

Next, the amendments reiterated the decision made by the Illinois Supreme Court in *State Farm*. Specifically, the statute now states that "when a permitted user is 'test driving' a [new or used] vehicle dealer's automobile, the [new or used] vehicle dealer's insurance shall be primary and the permitted user's insurance shall be secondary."[60] In other words, the driver's insurance will not be touched until the limits of the dealership's policy are fully depleted. Finally, the amendments made an important distinction between a "test driver" and a "permitted user . . . [who], with the permission of the [new or used] vehicle dealer, drives a vehicle owned or held for sale or lease by the [new or used] vehicle dealer for loaner purposes while the user's vehicle is being repaired or evaluated."[61] While the dealership's insurer is primarily liable in the event of negligent test driving as mentioned, the driver of a loaner car may not get off so easily. If a permissive driver negligently injures a third party while driving a loaner vehicle, then the driver's insurance will become primary and the dealership will be rendered secondary so long as the *driver's* coverage is at least $100,000/$300,000/$50,000 (i.e. the same minimum policy limits of the dealership).[62] If the driver of a loaned vehicle from a new car dealership carries any less than these limits, then the dealership's coverage is primary;[63] however, keep in mind that no individual driver is required to carry more than the $20,000/$40,000/$15,000 minimum limits.[64]

The importance of these amendments cannot be emphasized enough. Codification of the *State Farm* ruling illustrates acquiescence to that decision on the part of the Illinois legislature and executive branches. While *State Farm* provided tremendous precedent to lower courts bound by its decision-making, subsequent codification impresses upon one that the law is here to stay.

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is considering to purchase or lease, in order to evaluate the performance, reliability, or condition of the vehicle." As mentioned in the above text, a "permitted user" is also defined under this statute as "a person who, with the permission of the [new or used] vehicle dealer, drives a vehicle owned or held for sale or lease by the [new or used] vehicle dealer for loaner purposes while the user's vehicle is being repaired or evaluated."

60. *Id.*

61. *Id.* The statutes state that "loaner purposes" is "when a person who, with the permission of the [new or used] vehicle dealer, drives a vehicle owned or held for sale or lease by the [new or used] vehicle dealer while the user's vehicle is being repaired or evaluated." *Id.*

62. *Id.* (emphasis added).

63. *Id.*

64. The importance of the distinction between new vehicles used for test driving and those used for loaner purposes will be analyzed throughout Section IV/Part A of this Comment.

C. Limitations on the *State Farm* Ruling

Turning back to Illinois common law, while the *John Deere* approach became the norm for courts in addressing permissive test driver issues,[65] the safety net of auto dealer's insurance did not always catch negligent drivers. Two major limitations on *State Farm* emerged in Illinois' courts, which will be addressed in the following two subparts. Subpart 1 examines the general policy of driver liability with respect to damage to the dealership's car. Subpart 2 looks at "step-down" provisions and their past treatment within the state's courts.

1. Damage to the Dealership's Vehicle

Illinois case law did provide some sanctuary to its car dealers in the instance of a test drive gone badly. In *Universal Underwriters Group v. Pierson*,[66] the First District, which previously decided *John Deere*, addressed "whether applicable statutory and contractual principles require the dealer's insurer to defend and indemnify the driver for damages to the dealer's car."[67] As subrogee of the dealership, Universal sought approximately $3,000 from Pierson for damage to the auto driven on his test drive.[68] Universal's claim rested on Part 500 of the policy, which stated under an "Exclusions" Section as follows: "This insurance does not apply to . . . personal property, including AUTOS, owned by, rented or leased to, used by, in the care, custody or control of, or being transported by the INSURED."[69] Pierson found little room for argument in the contract itself, choosing instead to rely on the momentum that followed *State Farm*. Specifically, Pierson touted Illinois mandatory insurance law, post-*State Farm* case law, and the notion that the public policy of Illinois stands "in favor of permissive drivers."[70]

The court ultimately held Pierson liable for damage to the dealership's auto since her argument ignored the "crucial element" of Illinois mandatory insurance, in that it only requires vehicle owners to carry *liability* insurance.[71]

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65. *See, e.g.*, Browning v. Plumlee, 737 N.E.2d 320 (Ill. App. Ct. 2000) (again, an approach further supported by the 2002 codification).
66. 787 N.E.2d 296 (Ill. App. Ct. 2003).
67. *Id*. at 297.
68. *Id*. (the underwriter bowed to *State Farm* and accepted coverage of damage to the person and property of the third party).
69. *Id*. (according to the policy's language, each "Part" constituted a separate insurance contract).
70. *Id*. at 298.
71. *Id*. (emphasis added).

A number of courts and Commentators backed up the First District's understanding of liability insurance, which did not include losses involving the driver or her vehicle.[72] Unwilling to admit defeat, Pierson argued in the alternative that legal principles cut against an insurer pursuing a subrogation claim against one of its insureds.[73] However, the court found little merit in this assertion. Binding precedent "held that an insurer may maintain a subrogation action against a party which is its insured under another policy;" subsequently, the existence of distinct liability and collision policies allowed Universal to successfully seek compensation from Pierson.[74]

2. "Step-Down" Provisions and the Right to Contract

In *Pierson*, the First District undoubtedly sent a strong message to Illinois' test drivers: be careful when driving, as you will not escape financially unscathed. Judicial sway in favor of dealership underwriting did not stop there. On September 20, 2007, the Supreme Court of Illinois reentered the scene with its decision in *State Farm Mutual Automobile Insurance Co. v. Illinois Farmers Insurance Co.* (hereinafter *State Farm II*).[75] Notably, while the facts of this case indeed dealt with permissive drivers, they did not involve the test drive of a vehicle.[76] The case presented the issue of "whether . . . 'step down' provisions, which reduce [an insurer's] policy limits for permissive users . . . are void and unenforceable because they violate Illinois public policy."[77] In other words, while *State Farm* made it clear that the dealer's insurer had to pay up in liability claims stemming from permissive drivers, the *State Farm II* court had to address whether the insurer could slip a clause into the contract that minimized those amounts being paid.[78]

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72. *Id*. For instance, the court turned to a ruling by the Second Circuit which found that "liability insurance is designed to protect an insured from claims for damages owed to a third person, and not from losses that the insured suffers directly." Mazzaferro v. RLI Ins. Co., 50 F.3d 137, 139 (2d Cir. 1995). Also, since the liability policy is, by definition, one of liability to others, and not for personal or property damages sustained by the named insured, there can be no coverage of loss sustained by him or her to his or her person or his or her property when he or she is operating the insured vehicle." 7L. Russ & T. Segalla, Couch on Insurance, Section 110:11, at 110–19 through 110–20 (3d ed. 1997).
73. *Pierson*, 787 N.E.2d at 299.
74. *Id*. (relying on Benge v. State Farm Mut. Auto. Ins. Co., 697 N.E.2d 914 (Ill. App. Ct. 1998)).
75. 875 N.E.2d 1096 (Ill. 2007).
76. *See* Brief of the Defendant-Appellant, Illinois Farmers Insurance Company at 5–8, State Farm Mut. Auto. Ins. Co. v. Ill. Farmers Ins. Co. (No. 04–839).
77. *State Farm II*, 875 N.E.2d at 1098.
78. *Id*. Here, Illinois Farmers' step-down provision sought to reduce the policy limits to the minimum of $20,000/$40,000/$15,000 as required by the Illinois Safety and Family Financial Responsibility Law. 625 ILL. COMP. STAT. 5/7–203, 7–317(b) (2006).

Upon review of the text and policy of the state's mandatory insurance law, the court ruled that the step-down provisions did not violate public policy.[79] The legislature did not enumerate any concerns regarding step-down provisions in relevant portions of the Illinois Vehicle Code.[80] In fact, such provisions undeniably satisfied the statutory provisions, and the court found that "when the legislature intends different types of coverage in excess of the minimum statutory requirements . . . it chooses plain, unambiguous language to indicate its intent."[81] The court concluded by saying that the concerns of the individual and his insurer would be better served by the General Assembly than the state supreme court.[82]

D. Recent Statutory Backlash Concerning Step-Down Clauses

Not long after the *State Farm II* court held that concerns over step-down provisions would be best served by the state legislature, the General Assembly and Governor Rod Blagojevich answered the call. The two branches of Illinois government worked together to enact Public Act 95–395,[83] which went into effect on January 1, 2008. The law added the following provision to the Illinois Insurance Code:

> [A]ny policy of private passenger automobile insurance must provide the same limits of . . . coverage to all persons insured under that policy, whether or not an insured person is a named insured or permissive user under the policy. If the policy insures more than one private passenger automobile, the limits available to the permissive user shall be the limits associated with the vehicle used by the permissive user when the loss occurs.[84]

The law undoubtedly thwarts the sly contractual maneuvering that underlies step-down provisions. This new law serves as an excellent illustration of the democratic principle of separation of powers and also draws the line as to where Illinois currently stands with regard to its test drivers.

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79. *State Farm II*, 875 N.E.2d at 1108.
80. *Id*. at 1102.
81. *Id*. at 1101. (as support for this assertion, the court turned to 215 ILL. COMP. STAT. 5/143a–2(4) (2006)).
82. *Id*. at 1107.
83. Act of Aug. 23, 2007, P.A. 95–395.
84. 215 ILL. COMP. STAT. 5/143.13a (West 2008).

IV. ANALYSIS

Having chronicled the intersection of test drivers and insurance in Illinois, one should now have a good idea of the state's law on the subject. Basically, the courts read an omnibus clause into every test driving contract that is signed in the state, regardless of whether it is actually listed on the paper. Common legal principles flow from there: "a policy's omnibus clause may not be more restrictive of coverage than the statutory omnibus clause; if the clause employed contains exclusions which are impermissible under the statute, such exclusions are void."[85] In one of the most recent amendments to the Illinois Insurance Code, the legislature and executive found that step-down provisions are indeed more restrictive than the statutory omnibus clause. As such, the state's dealers will always be held to the minimum policy limits of $100,000/$300,000/$50,000. Also, Illinois common law dictates that the dealership's coverage will serve as the primary insurance. The insurance of the driver, which typically contains the minimum policy limits of $20,000/$40,000/$15,000, will not be invoked unless that of the dealership is fully exhausted. The only other instance where the driver's insurer will pay is with respect to the damage to the test driven vehicle. In other words, liability regarding any bodily injury or death as well as property damage to any third parties typically rests mostly, if not entirely, with the dealership.

The analysis that follows offers both reassessment and critique of the status quo concerning test driver treatment in Illinois. In an effort to aid the reader, it is broken down into three Parts. Part A reevaluates the law regarding insurer primacy and argues on behalf of a rebuttable presumption as opposed to dealership primacy per se. Part B examines the coverage dichotomy that exists between dealerships and individual drivers and supports a test driver exception to the recent law that prohibits step-down clauses in permissive user contracts. Lastly, Part C applauds Illinois precedent which holds the test driver liable for damage to the dealership's vehicle; however, Part C also asserts that this precedent does not sufficiently level the playing field between dealerships and their customers in the event of a test drive. The reform discussed in Parts A and B must be heeded if equity is to truly be served.

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85. 7 AM. JUR. 2d *Automobile Insurance* § 225 (2008).

A. Reevaluation of Insurer Primacy

While Illinois common law and the Illinois Vehicle Code dictate that primary coverage falls on the dealer's insurer in the event of test driver negligence, this rule represents one significant impediment of a dealership's right to contract in the test driver scenario. Reevaluation of the law surrounding insurance primacy and test drivers is a must, especially in light of the mandatory insurance law of 1990. Following discernment of the origin and rationale underlying the current law, this Comment will offer a critique of the status quo. Underlying such critique will be support for the establishment of a rebuttable presumption of dealership primacy rather than existing primacy per se. While the current rule holds merit, a rebuttable presumption would still compensate injured third parties, better nurture the parties' right to contract, and discourage reckless test driving.

1. Origin and Rationale of the Status Quo

Little legislative history exists as to why the current rule predominates. Obviously, the fact that Illinois car dealers had to carry liability insurance long before the Illinois Mandatory Insurance Act bears mentioning. The state held car dealers to a higher standard than individuals from the get go. Accordingly, it is quite possible that judicial and governmental contentedness contributed directly to the current status quo.

Further explanation comes from the most recent Restatement (Third) of Torts. While the Restatement discusses test drives in the context of strict liability, relevance to insurer primacy cannot be denied. The Restatement holds that a test drive ordinarily constitutes a bailment because it involves a short transfer of possession.[86] One of the common law rules governing bailments is that "when [a] defendant is in the business of selling the same type of product as is the subject of the bailment, the seller/bailor is subject to strict liability for harm caused by defects."[87] As such, the Restatement treats those dealers who only allow for test drives and those who realize a sale identically.[88]

Relevance of the bailment analogy is further supported by the 2002 amendments to the Illinois Vehicle Code. These amendments state that a car used for loaner purposes, as opposed to one used for a test drive, will render

86. RESTATEMENT (THIRD) OF TORTS § 20(f) (1998).
87. *Id.*
88. *Id.*

the driver's coverage primary, so long as his policy matches the minimum limits of the dealership.[89] The amended statute provides no explicit rationale for this unusual distinction in insurance treatment. The most obvious explanation is that, in the loaner car scenario, dealerships are not trying to invite or solicit a sale. Since the dealership is not enjoying the benefit of any bargain, with the exception of business stemming from the repair work and the rare opportunity for a car sale, the legislature allowed for insurance primacy to be shifted more easily to the driver.[90] Indeed, the statute itself makes the evidence of a bailment clearer.

Several policy reasons explain why the dealer bears the burden of primacy in the strict liability context of negligent test driving. Foreseeability of defects and possible accidents serves as a policy touchstone, not the fact that title has passed to the customer.[91] Also, the dealership typically remains more financially "equipped" than an individual in the event of an accident.[92] One final concern is that "the dealer invites and solicits the use of the demonstrator car and therefore should not expect to evade responsibility if something goes wrong."[93] Again, while this discussion of the Restatement of Torts is confined to strict liability, much of it rings true for insurance primacy in the context of test drives, especially the existence of a bailment and business invitation and solicitation.

2. A Critique of the Status Quo

With the above in mind, one could reasonably argue that damages stemming from the negligence of test drivers should no longer be first allocated to the dealer. First, the strict liability argument regarding foreseeability holds little merit in the realm of insurer primacy. Unlike a manufacturing defect, the negligent driving of a customer is difficult, if not impossible, to foresee unless an employee accompanies every customer on his or her test drive. Even if the obvious inefficiencies of constant test driver accompaniment and oversight were ignored, the unexpected nature of

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89. Although the statute puts a premium on the driver holding high coverage, it should be reiterated that Illinois law does not require coverage that exceeds the minimum $20,000/$40,000/$15,000 limits. This Comment critiques the discrepancy in required coverage amounts for dealerships and individual drivers in Section IV/Part B.

90. One could reasonably argue that the dealership should not have to provide coverage in the loaner car scenario, or, at the very least, such coverage should be secondary, regardless of its amount. However, the author leaves this issue for another day.

91. O'Malley v. Am. LaFrance, No. 00–CV–1421 (E.D.N.Y. Dec. 30, 2002).

92. *Id*.

93. *Id*.

accidents cannot be easily dismissed. Furthermore, while a dealership could possibly obtain a record of the driver's run-ins with the law, any preemptive action would be largely speculative and raises concerns of unfair prejudice to the driver.

The argument that dealerships are better financially equipped than individual drivers holds little weight as well. Since 1990, mandatory liability insurance has made sure that drivers in Illinois provide redress to third party victims.[94] Although the driver may not have the money himself to pay off the third party claim, mandatory insurance provides a means of possibly making the injured "whole" again. The possibility of a "judgment proof" debtor is not a problem because, as one might speculate, car dealers in Illinois cannot legally allow someone to test drive a vehicle if they do not carry the requisite insurance. Of course, if the driver's insurance did not fully compensate the third party, invocation of the dealership's insurance as secondary coverage would be appropriate.

The Restatement's discussion of test drives as bailments provides the strongest argument in support of the current rule. In allowing test drives of the cars on its lot, a dealership receives the great benefit of extra car sales and word-of-mouth promotion. With such a great benefit to the bailor/dealer, a lower standard of care is imputed to the bailee/driver in the strict liability context.[95] Meanwhile, in the insurance primacy context, this equates to the dealer's coverage being placed as primary. However, such reasoning ignores one crucial fact: the benefits enjoyed by the customer. As previously discussed, buying a new car is one of the biggest purchases that one will ever make. The test drive undoubtedly aids in the decision-making process and allows for a little fun behind the wheel as well.[96] This mutual benefit would arguably impute an ordinary standard of care to the bailee under strict liability analysis and, following this logic through to the realm of insurance primacy, the reasonable presumption that primary coverage should not always be the responsibility of the dealer.[97] While the legislature considered the inherent benefits to drivers in the loaner car scenario and permitted possible

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94. While this amount is obviously less than that required of the dealer, redress still exists, especially when one considers the dealership's insurer as secondary coverage.

95. *See, e.g.*, JAMES L. WINOKUR, R. WILSON FREYERMUTH & JEROME M. ORGAN, PROPERTY AND LAWYERING 140 (West Group) (2002).

96. This is even acknowledged by the statutory definition of "test driving," which is "when a permitted user. . . drives a vehicle. . . . owned . . . by a vehicle dealer that the person is considering to purchase or lease, *in order to evaluate the performance, reliability, or condition of the vehicle*." 625 ILL. COMP. STAT. 5/5–101 (2006) (emphasis added); 625 ILL. COMP. STAT. 5/5–102 (2006) (emphasis added). For the statute's full text, *see supra* text accompanying note 59.

97. Insurance follows the vehicle in a number of contexts in Illinois. This assertion is only meant to address the test driver scenario.

reallocation of primacy, it failed to acknowledge the benefits afforded to test drivers and unfairly stuck dealerships with primacy per se.

3. Establishing a Rebuttable Presumption as a Means of Reform

A number of alternatives could take the place of the blanket rule that currently exists. The soundest alternative to placing primacy on the dealership per se would be to set up a rebuttable presumption in favor of the driver. Courts could look at a number of factors to determine whether the presumption is rebutted, including the degree of negligence or recklessness on behalf of the driver, the amount of liability insurance carried by the driver (i.e. whether it meets or exceeds that carried by the dealership), the extent to which the dealership discussed and contracted the terms of insurer primacy with the customer, and so on. A rebuttable presumption that examined such factors would not only promote the right to contract between the parties. It could also dissuade recklessness of test drivers. Bottom line: if one knows that his insurance may be on the line in the event of a test driving accident, he may be less tempted to push the pedal to the metal.[98]

One may wonder why any presumption of primacy should exist, which still somewhat impedes the parties' right to contract. Establishment of a rebuttable presumption is favorable to an "unlimited" right to contract due to the undeniably greater bargaining power of the dealership. If the parties were free to assign insurance primacy, then the driver's liability insurer would always provide primarily coverage due to a likely "take it or leave it basis" approach of dealerships via adhesion contracts. Prospective automobile customers would greatly suffer. By setting up a rebuttable presumption, a chord is struck that promotes the ordinary fiscal responsibility of dealerships as well as test driver responsibility.

To summarize discussion of insurer primacy in the limited scenario of test drivers, Illinois is left with two options: either answer the call for greater fact-finding and decision-making by the state judiciary or retain the status quo that allocates primary liability to the dealership. Both the prospect of a rebuttable presumption in favor of the driver and the current rule of dealership primacy per se presumption carry distinct merit. The author of this Comment enjoys the idea of reinvigoration of test driver treatment and right to contract and subsequently supports abolition of the current law. While the status quo

98. Another alternative to primacy per se would be a schema that resembles current treatment of loaner cars. Basically, if the driver's policy limits matched those required of the dealership, then primacy would shift to him.

looks to be around for some time to come,[99] reevaluation of the current law no doubt makes sense in light of the Illinois Mandatory Insurance Act.

B. Reassessment of the Coverage Dichotomy

Limitation on a dealership's right to contract with test drivers is not strictly confined to the realm of insurer primacy. One other significant inhibition rests in the discrepancy between the minimally required coverage amounts of the two entities. As previously discussed, while Illinois dealerships are held to minimum policy limits of $100,000/$300,000/$50,000, individuals are held to the much lower policy limits of $20,000/$40,000/$15,000. This discrepancy is simply unacceptable, and the following analysis will explain why as well as offer potential solutions. After critiquing the different required amounts, this analysis will look into two proposed resolutions to the dilemma. The underlying theme of this discussion is that recent legislation which prohibits step-down provisions is inappropriate in the test driver scenario and that such contractual maneuvering should be reinstated.

1. Problems with the Law as It Now Stands

Bearing a strong similarity to the law governing insurer primacy, little legislative history exists as to why distinct coverage amounts govern dealerships and their test drivers. Once again, legislative contentedness serves as one possible explanation of the status quo. Illinois law forced dealerships to carry liability insurance in specific amounts on their cars long before it required different amounts of individuals. This temporal difference perhaps demanded less uniformity than two simultaneously passed bills. Nonetheless,

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99. Even though the author of this Comment supports the rebuttable presumption as an opportunity for reform on the primacy issue, it must be noted that the longstanding approach of Illinois courts is not without merit. First, the general rule that insurance follows the vehicle, not the driver, is deeply rooted in Illinois common law. The approach, which has served Illinois law for decades, spans numerous contexts in discerning primary coverage. This status quo dictates that analysis of the test driver scenario should be no different. Furthermore, the most obvious policy rationales of this rule, simplicity and promotion of uniformity, are strong ones. Typically, in deciding insurance issues, judges must confront the intricacies of insurance contracts and subsequently make tough rulings in litigation. Having a simple rule that neatly discerns insurer primacy gives Illinois judges one less thing to worry about. One less issue will need to be litigated, and judges can dive right into meatier contractual issues. Finally, this approach avoids the theoretical dilemma of an uninsured driver. Of course, as discussed earlier in this Comment's analysis, this potential misfortune would not exist in the test driver scenario due to the requirement that dealerships run insurance checks on their customers.

the General Assembly *had* to know of the amounts required of dealerships when writing the Illinois Mandatory Insurance Act and still chose to impose much lower limits on individuals. Legislative emphasis on the existence of a bailment in the test drive scenario is therefore an alternative explanation for the coverage discrepancy. In stressing the benefits afforded to the dealership in allowing test drives, the legislature likely felt that dealerships should carry the burden of higher insurance premiums. The General Assembly also probably thought that, in holding themselves out to the public, dealerships are given the opportunity to prosper; as such, car dealers should not be allowed to avoid any financial consequences or potential liability.

This presumed rationale of the Illinois legislature does not justify the inherently suspect discrepancy in the coverage required of dealerships and individuals for three main reasons. First, for the very same reasons explored by this Comment in the insurance primacy context, governmental contentedness and the bailment analogy do not provide adequate grounds for distinct treatment of the parties. Second, facial comparison of the required coverage amounts smacks of unreasonableness. The prescribed policies as a whole bear no proportionality to one another,[100] nor do their bodily injury and components exhibit any pattern.[101] This in itself should raise eyebrows and, at the very least, demand explanation from the legislature on how it reached such amounts. Finally, in requiring different minimum amounts, the legislature misses the point of having mandatory liability insurance in the first place. The policy behind such insurance is to provide a means of making the injured third party "whole" again. This policy is unjustifiably and unfairly skewed in keeping distinct coverage amounts, which creates a status quo that more strongly resembles a lottery than a means of remedy. If a third party gets hit by a test driver, two policies provide relief for any claims made, one of which includes the much higher $100,000/$300,000/$50,000 amounts. However, if the same third party is "unlucky" and gets hit by a non-test driver, the driver's liability policy (likely, the $20,000/$40,000/$15,000 minimum amounts) is the only third party coverage that comes into play. The mere existence of this "lottery" promotes unbalance and distracts mandatory insurance from its compensatory function.

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100. For example, while the dealership's policy for injury to a single third party is five times that of the driver, injury to multiple parties is over seven times that of the driver.

101. For example, while a dealership's policy for injury to multiple third parties is three times that of liability sustained by a single third party, the driver's policy for injury to more than one party is twice that of injury to a single third party.

2. Step-Down Clauses Provide the Answer

To avoid the above chronicled problems stemming from different coverage requirements, the following two options exist that could equalize the liability of dealerships and test drivers: 1) raise the minimum required limits for individual drivers under the Illinois Mandatory Insurance Act in 1990; or, 2) reestablish step-down provisions as a valid contractual maneuver in the test driver scenario.[102] Given the rise in the rate of inflation and the cost of healthcare since passage of the Illinois Mandatory Insurance Act, the first option definitely deserves mention. The injuries or property damage resulting from a serious car crash can be substantial, and one could subsequently argue that the required minimum policy limits of individual drivers should be increased to $100,000/$300,000/$50,000, which would match that of dealerships. While this contention carries merit, such a change would have a profound economic impact by forcing higher premiums on every driver in Illinois. The economic feasibility of this plan is unknown to the author; as such, this Comment leaves the relevant cost-benefit analysis for the state's economists.

The more viable and feasible alternative in circumventing the coverage dichotomy is to reinstate the allowance of step-down provisions in test driving contracts. Even though Public Act 95–395 renders step-down provisos void as of January 1, 2008,[103] the author of this Comment supports an amendment to allow for an exception in the test driver scenario.[104] In other words, new and used car dealerships should be allowed to contract terms that would place them on the same financial hook as the driver. Enactment of such an amendment would promote the right to contract between the parties and acknowledge the bailment's dual benefit. Additionally, allowing dealerships to contract down the amount of their liability would effectively mitigate both the lack of uniform limits among Illinois vehicles and the undesirable lottery of recovery that currently exist. Indeed, unless the General Assembly reduces the policy requirements of dealerships to $20,000/$40,000/$15,000 (which is unlikely to

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102. While a third option, lowering the mandatory minimum coverage of dealerships, should not go unmentioned, longstanding legislative contentedness and other policy rationale would undoubtedly prevent any serious debate of the idea.

103. The law likely survives constitutional analysis. Its distinct treatment of dealerships and test drivers would be subject to rational basis review, which often leads to a finding of constitutionality so long as the law is rationally related to a legitimate governmental interest.

104. While direct repeal of Public Act 95–395 provides an alternative means of addressing the author's concerns, the effects of such action go beyond this Comment's focus. This Comment is only concerned with a dealership's right to contract after the Illinois Mandatory Insurance Act. Repeal of the new law would affect the rights of private individuals as well as countless other entities.

ever happen), step-down provisions should be reintroduced to the test driver arena. This, coupled with an overhaul of insurer primacy, would restore the general right to contract and place the parties on more equal footing.

C. The "Property" Safeguard Insufficiently Balances the Parties' Interests

Having read this Comment's critique of traditional Illinois insurer primacy and coverage requirements in the test driver scenario, one may forget the sole safeguard that currently exists for dealerships. Remember, when the test driver is the at-fault party in an accident, Illinois precedent holds that the individual's automobile insurance must pay up with respect to damage to the dealership's vehicle. This makes perfect sense in the schema as it currently exists. From a practical standpoint, if dealerships assumed liability for all property damage stemming from a test driving accident (in addition to primary liability for all bodily injury), there would be very little incentive to allow for test driving. The possibility of a sale would be dwarfed by the potential for enormous liability. From a public policy standpoint, if one must pay for damage to the dealership's property, this will undoubtedly renew the underwriting of the individual's insurer and force higher premiums upon him in the future. Not only does this mechanism demand personal accountability, but it will arguably deter negligent driving in the future. Finally, when viewing the issue from the perspective of Illinois courts, one cannot ignore the contractual terms or provisions that frequently address the matter,[105] or the mutuality of benefit derived from the bailment. Bearing these factors in mind, the author of this Comment supports the ruling in *Pierson* and the right of dealerships to contract on this issue.

Unfortunately, while this particular stance of Illinois courts is commendable, the general status quo of test driver treatment as a whole is inadequate. The playing field between car dealerships and test drivers must be further leveled. Specifically, in addition to following the precedent promulgated in cases such as *Pierson*, the above call for reform of insurer primacy and the coverage dichotomy must be heeded. Only through such recognition of the right to contract will the bargaining power of the parties be restored. Additionally, the legal requirements of the parties will become more uniform, injured third parties will receive a greater sense of compensatory expectation, and an adequate deterrent of negligent test driving will be set up throughout the state.

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105. *Pierson*, discussed in Section III/Part C/Subpart 1 of this Comment, details one such proviso.

V. CONCLUSION

If this Comment conveys just one theme to its reader, the author hopes that it is the fascinating interplay which occurs among car dealerships, individuals, and the insurers of both in the event of a test driving accident in Illinois. While the law as it currently stands is relatively straightforward and carries certain merit, sufficient legislative explanation of the status quo has never been proffered. This lack of validation begs for reevaluation of the current law, and this Comment has subsequently suggested reform in the areas of insurer primacy and the coverage dichotomy. Adherence to such reform would not only promote the right to contract between dealerships and drivers but also deter negligent test driving throughout the state. Although the law may not change anytime soon, the need for greater equity in this particular legal arena is unwavering and remains a blemish on Illinois insurance law.