



4-1-1980

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Ralph P. Higgins

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Recommended Citation

Ralph P. Higgins, *Uninsured Motorist Coverage Laws: The Problem of the Underinsured Motorist*, 55 Notre Dame L. Rev. 541 (1980).
Available at: <http://scholarship.law.nd.edu/ndlr/vol55/iss4/5>

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Uninsured Motorist Coverage Laws: The Problem of the Underinsured Motorist

I. Introduction

Following World War II, the United States experienced a tremendous increase in the number of automobiles traveling its roads and highways.¹ This influx of automobiles resulted in a greater number of people suffering personal injuries in traffic accidents. A problem often arose when injured motorists sought to recover damages for injuries caused by negligent motorists. Frequently, a trial court would award damages to an injured party only to find that the negligent party could not meet the financial burden of the judgment.² Thus, the injured party received little or no compensation. With an increase in accidents, this problem presented itself more and more not only to the victimized public, but also to the judiciary and legislatures.

Several different attempts have been made at solving the problem of the financially irresponsible motorist. This note will briefly describe these attempts and point out gaps that presently exist in them. An in-depth examination will then be made of uninsured motorist insurance which evolved to improve upon earlier approaches. This system, however, is not without its problems.

II. The Financially Irresponsible Motorist—Attempted Solutions

One attempted solution to the financially irresponsible motorist problem makes compulsory the possession of automobile insurance. Massachusetts was the first state to adopt this approach, in 1927.³ A typical statute⁴ provides that no motor vehicle can be registered in the state unless the application for registration is accompanied by a "certificate." The certificate is given by an insurance company stating that it will insure the applicant for registration of the motor vehicle with respect to that motor vehicle.

A number of problems, however, inhere in this solution. First of all, nothing prevents an irresponsible motorist from acquiring the insurance in accord with the laws and then permitting it to lapse. Second, a responsible operator might have insurance at the time of the accident, but the insurance company might deny coverage under a condition subsequent.⁵ Finally, a motorist may drive simply without registering the car while he has no in-

¹ Comment, *An Examination of the Meaning and Scope of the Basis of the Uninsured Motorist Policy Endorsement: "All Sums the Insured Is Legally Entitled to Recover,"* 53 MARQ. L. REV. 320 (1970).

² Soich, *Uninsured Motorist Coverage: Past, Present and Future*, 6 DUQ. U. L. REV. 341 (1968).

³ 1 I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE* § 1.01, at 1-5 (rev. ed. 1979).

⁴ MASS. ANN. LAWS ch. 90, § 1A (1975).

⁵ Automobile liability policies ordinarily contain an express provision requiring the insured, if a claim is made or suit is brought against him, to forward immediately to the insurance company every demand, notice, summons, or other process received by him or his representative.

If an automobile liability insurance policy expressly makes the insured's failure to comply with a forwarding of papers provision a ground of forfeiture, or makes his compliance a condition precedent to liability, the insured loses his right of action by his failure to forward the suit papers to the insurer.

14 G. COUCH, *COUCH ON INSURANCE* §§ 51:198-99 (2d ed. 1965).

insurance. In all of these cases, the victims remain uncompensated if the negligent motorist is otherwise financially unable to compensate the injured party.

A second attempted solution requires posting security bond with the state. The bond is a condition precedent to the lawful operation of a motor vehicle within the state. In 1957, North Carolina adopted this scheme.⁶ Before a person can operate a car within the state, he is required to give proof of financial responsibility. To constitute adequate proof, the bond must be filed with the Commission of Motor Vehicles and be from an authorized surety company.

Gaps exist which make this solution inadequate, also. For example, once a bond is posted and the owner of the motor vehicle is registered to operate the vehicle in the state, there is no practical sanction to compel the operator to keep up the bond. Or, an owner may simply fail to obtain a license for his vehicle, and drive anyway. As a result, the victims of an accident with the uninsured remain uncompensated and the purpose for the statute is defeated.

A third possible answer to the dilemma posed by a negligent motorist who is not financially able to compensate his victims is uninsured motorist coverage.

Uninsured motorist coverage appeared in the mid-1950's as a gap filler. In 1955, insurance companies offered liability insurance endorsements which provided certain benefits for injuries caused by uninsured motorists.⁷ In that same year, the National Bureau of Underwriters promulgated the standard Uninsured Motorist Endorsement.⁸ As a result of this activity, states initiated legislation requiring insurance companies to offer uninsured motorist coverage with every automobile liability policy issued within the state. Such laws now exist in virtually every state.⁹

Uninsured motorist coverage is an agreement between the insured and his own insurance company. The company agrees to protect the insured if he is injured in an automobile accident, the losses from which, because of the negligent motorist's lack of insurance coverage, would otherwise be uncompensated.¹⁰

This coverage avoids problems unaffected by requiring compulsory automobile liability insurance or the posting of a bond as a condition precedent to the operation of a motor vehicle. The injured party carries the insurance himself. The insured may recover when injured by any financially irresponsible motorist. Thus, he is not left uncompensated when the tortfeasor defies the law and drives without purchasing any insurance or allows his coverage to lapse. For these reasons, uninsured motorist coverage presents a viable solution to fill the gap untouched by either of the first two solutions.

III. Analysis of Uninsured Motorist Coverage

Uninsured motorist coverage is unusual as compared to other forms of in-

6 N.C. GEN. STAT. § 20-309 (1978).

7 Comment, *supra* note 1, at 324.

8 *Id.*

9 2 I. SCHERMER, *AUTOMOBILE LIABILITY INSURANCE* § 17.01, at 17-4 (rev. ed. 1979).

10 *Symposium—Uninsured Motorist Endorsement*, 53 MARQ. L. REV. 319 (1970).

insurance underwriting. The insurance company writing the coverage is insuring an undesirable and unknown risk: a financially irresponsible motorist. Another oddity involved in uninsured motorist coverage concerns the relationship between the insured and his carrier. Normally the victim and his carrier join together in suit against the tortfeasor and his carrier. Under this unique coverage, the victim is forced to pursue his claim against his own insurance company. By the very nature of the coverage, parties to a friendly contractual agreement, freely entered into, become adversaries.¹¹ Despite the unusual nature of such coverage, it thrives as a solution to the problem of the uninsured motorist.

Currently, uninsured motorist coverage is statutorily required to be offered by every automobile insurance carrier in almost every state.¹² As with most insurance, uninsured motorist insurance is solely a statutory creation. Thus, the importance of statutory construction is essential to analysis of this coverage. Most of the statutes now in force share three common elements. First, every statute compels every domestic automobile insurance carrier to make uninsured motorist coverage available within the state.¹³ In addition, the statutes¹⁴ establish a minimum dollar limitation for coverage in one of two ways.¹⁵ Either a specific limit is expressly set in the statute, or provisions delegate this authority to some state agency. Finally, the statutes allow the insured, at his option, the right to reject this protection and assume for himself the risk of sustaining noncompensable injuries.¹⁶ These three elements, however, do not solve all construction problems.

Uncertainty in the construction of uninsured motorist coverage, beginning in the mid-1960's, became a problem. Statutes providing that the insured would be protected if he were "entitled to recover damages from owners or operators of uninsured motor vehicles . . ."¹⁷ posed problems. In its ordinary sense, the term "uninsured" would encompass only those instances when the tortfeasor had no insurance at all. Imaginative attorneys and flexible courts, however, have not construed "uninsured" in this manner. "Uninsured" has not been limited to the negligent motorist who carried no insurance at all. The concept includes cases in which the tortfeasor is "underinsured."¹⁸

A tortfeasor, generally, can be "underinsured" in three ways. The first is illustrated as follows: the State of X requires that all motorists carry automobile liability insurance of \$10,000 per victim, up to a total of \$20,000 for any accident (\$10,000/\$20,000). Driver P is injured in an accident caused by the negligence of driver D. P's injuries amount to \$7,500. D carries automobile insurance in the amount of \$5,000/\$10,000. As obligated under its policy with D, D's insurance company pays P \$5,000. Thus, P's recovery from D is less than the injury amount. For purposes of this note, this scenario represents a "Type

11 Hentemann, *Uninsured Motorist Defined*, 16 CLEVELAND MAR. L. REV. 504 (1967).

12 SCHERMER, *supra* note 9.

13 *Id.*

14 See OHIO REV. CODE ANN. § 3937.18 (Page Supp. 1978); PA. STAT. ANN. tit. 40, § 2000 (Purdon 1971).

15 *Id.*

16 SCHERMER, *supra* note 9.

17 PA. STAT. ANN. tit. 40, § 2000 (Purdon 1971).

18 See text accompanying notes 19-72 *infra*.

A" case. In this case, D's coverage was less than the statutory minimum and P's injuries were greater than D's policy limits but less than the statutory limitation.

In the same State of X, with minimum statutory requirements of \$10,000/\$20,000, P is involved in an accident caused by the negligence of D, and P is awarded \$25,000 in damages. D carries insurance which meets the minimum amounts required, \$10,000/\$20,000. D's insurance company pays P \$10,000, which does not compensate for P's injuries. For purposes of this note, this fact pattern represents a "Type B" case. In this case, D's coverage met the statutory minimum, but P's injuries were greater than the minimum limits.

In State X, once more, D carries insurance meeting the minimum statutory requirements \$10,000/\$20,000. His negligence results in an accident causing injuries to P₁, P₂, and P₃. P₁'s injuries are found to be \$7,000. However, D's insurance company only offers P₁ \$5,000. It has paid P₂ and P₃ each \$7,500 and has a remaining policy obligation of only \$5,000. For purposes of this note, this scenario represents a "Type C" case. D's coverage met the statutory minimum, but P's injuries were greater than the amount available to him due to amounts paid to other injured claimants.

In all these cases, the relevant question is: when does an "underinsured" motorist become an "uninsured" motorist for purposes of uninsured motorist coverage?

A. Type A Cases

Type A cases manifest themselves in one of two ways. Tortfeasor D could be a resident of State X and merely fail to obtain adequate insurance as required by the state. On the other hand, D could be a resident of another state, Y, where the minimum statutory requirements are less than they are in X. Thus D could meet the requirements of his home state Y yet fall short of the requirements of the state where the accident occurred, X.

A general rule has developed over the past fifteen years, holding a tortfeasor who carries less insurance for automobile liability than is required by state law to be an "uninsured" motorist for the purposes of uninsured motorist coverage.¹⁹ The primary rationale behind this rule was expressed by the Missouri Court of Appeals in *Webb v. State Farm Mutual Automobile Insurance Co.*,²⁰ where the insured's daughter was struck by a Type A motorist. According to the Missouri court, the legislature's purpose in enacting the uninsured motorist statute was to make available the minimum statutory coverage to each injured party. By finding the tortfeasor "uninsured" and allowing the injured party to recover from her own carrier, the court fulfilled this purpose. Uninsured motorist provisions should, according to the court, "give the same protection to the person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability policy (*i.e.*, one that meets the statutory minimum)."²¹

19 SCHERMER, *supra* note 9, § 22.04 at 22-6.

20 479 S.W.2d 148 (Mo. Ct. App. 1972).

21 *Id.* at 151.

Type A cases, in which coverage is less than the statutory minimum, fall into two groups, depending upon whether "uninsured motorist" is statutorily defined or not. In some jurisdictions, the term "uninsured motorist" has not been defined statutorily. The courts, nonetheless, have found reasons to include "underinsured" within that term.²² In other jurisdictions, where the term "uninsured motorist" has been defined by the legislatures, courts have included "underinsured" within the term "uninsured" although the Type A motorist may not fall explicitly within the definition.²³

1. No Statutory Definition

In *Allstate Insurance Co. v. Fusco*,²⁴ Allstate had delivered a policy providing automobile insurance to Ralph Fusco. The policy provided that Allstate pay Fusco all sums to which he would be legally entitled to recover as damages from the owner or operator of an uninsured automobile. Fusco was killed while a passenger in a car operated by Baumgardner, who was insured up to \$5,000 for injury to one person, and \$10,000 for any accident. Allstate's uninsured policy provisions with Fusco provided limits of \$10,000/\$20,000 which coincided with the state's minimum statutory requirements. Fusco's wife claimed that Baumgardner was uninsured and, as a consequence, that Allstate must pay her \$5,000, the difference between Baumgardner's policy and the minimum statutory requirement. The Supreme Court of Rhode Island agreed.

The court based its decision on several grounds. It concluded that the legislative history suggested that statutes dealing with uninsured motorist coverage in Rhode Island must, as a matter of public policy, be construed to include any difference between liability insurance carried by the tortfeasor and the minimum limits mandated by the legislature. In response to Allstate's argument that out-of-state decisions relied on statutory definitions of uninsured automobiles, the court said, "the distinctions upon which Allstate relies are based on syntax rather than substance."²⁵ The court held that a statutory definition was not required to find Baumgardner uninsured. It concluded that Baumgardner was operating an uninsured automobile to the extent that the bodily insurance limits carried by him were less than the \$10,000/\$20,000 mandated by the Rhode Island General Assembly. A similar ruling was made by the same court five years later.²⁶

2. Statutory Definition

Where "uninsured motorist" is defined by statute, a number of courts have decided that a Type A motorist is uninsured. This result has been reached where a Type A motorist is clearly within the definition, as in *Cruzado v. Underwood*.²⁷ However, the result has been the same even though the Type A

²² See text accompanying notes 24-26 *infra*.

²³ See text accompanying notes 27-38 *infra*.

²⁴ 101 R.I. 350, 223 A.2d 447 (1966).

²⁵ *Id.* at 354, 223 A.2d at 451.

²⁶ *Pickering v. American Employers Ins. Co.*, 109 R.I. 143, 282 A.2d 584 (1971).

²⁷ 39 Misc. 2d 859, 242 N.Y.S.2d 74 (Sup. Ct. 1963).

motorist may not fall explicitly within the definition as announced by the legislature.²⁸ In *Cruzado v. Underwood*²⁹ Cruzado sued Underwood in New York for personal injuries caused by Underwood's negligent driving in New York. Underwood, a resident of Rhode Island, was insured for \$5,000/\$10,000, in conformity with the requirements of Rhode Island. At the time, New York law set the minimum at \$10,000/\$20,000. The sole issue was whether the defendant's automobile would be recognized as an "uninsured motor vehicle" under the New York statute.

The court's holding that Underwood's automobile was an "uninsured motor vehicle" under New York law was arrived at by statutory analysis. New York insurance law defined an "insured motor vehicle" as one to which there was maintained proof of financial security.³⁰ "Uninsured motor vehicles" were all other motor vehicles. "Proof of financial security" was "proof of the ability to respond in damages for liability arising out of the ownership, maintenance or use of a motor vehicle as evidenced by an owner's policy of liability insurance."³¹ An "owner's policy of liability insurance" afforded coverage meeting the minimum provisions set by regulation. At the time, the superintendent of insurance set the minimums at \$10,000/\$20,000. Despite compliance with Rhode Island law, Underwood was found uninsured for purposes of New York law and thus, the court allowed Cruzado to recover from his own company. Later cases in New York have followed this analysis.³²

Even where the statutory definition of "uninsured motor vehicle" appears to exclude an underinsured vehicle, courts have included underinsured within the meaning of uninsured because of the belief that it more accurately reflects the legislature's intent. In *Taylor v. Preferred Risk Mutual Insurance Co.*,³³ Taylor, a Californian, was injured in a collision on a California highway with a car registered and insured in Texas. The bodily injury liability insurance carried by the Texas driver had maximum limits of only \$5,000 for injury to one person. Taylor, suffering injuries in excess of \$5,000, asserted a claim against his insurance company under its uninsured motorist clause. His insurer denied liability. At the time, California required coverage limits for uninsured motorists to be at least equal to those required by the financial responsibility law, i.e., \$10,000 for injury to one person. An "uninsured motor vehicle" was defined as one to which "there is *no bodily injury liability* insurance . . . applica[ble] at the time of the accident."³⁴

The California District Court of Appeals construed the definition of "uninsured motor vehicle" to define as uninsured "a vehicle carrying insurance or bond in limits less than the financial responsibility requirements of the Vehicle Code."³⁵ It believed this construction more nearly approached the

28 See text accompanying notes 33-38 *infra*.

29 39 Misc. 2d 859, 242 N.Y.S.2d 74 (Sup. Ct. 1963).

30 *Id.* at 860, 242 N.Y.S.2d at 75.

31 *Id.*

32 *Lunger v. Hartford Accident & Indem. Co.*, 38 A.D.2d 857, 330 N.Y.S.2d 123 (App. Div. 1972); *Buglione v. Motor Vehicle Accident Indemnification Corp.*, 32 A.D.2d 525, 299 N.Y.S.2d 661 (App. Div. 1969).

33 225 Cal. App. 2d 80, 37 Cal. Rptr. 63 (Dist. Ct. App. 1964).

34 *Id.* at 81-82, 37 Cal. Rptr. at 64.

35 *Id.* at 82, 37 Cal. Rptr. at 64.

legislature's intent, which was to fill the gap in financial responsibility law "which, although it provides minimum coverage requirements, in fact comes into operation only after the first accident caused by an irresponsible motorist."³⁶ The victim of this first accident would be uncompensated. As the court said, "the declared . . . policy of this state is to give monetary protection to those who . . . suffer injury through negligent use of the highways by others."³⁷ To fulfill this policy, they found the tortfeasor uninsured. This position was reaffirmed in a later California case.³⁸

3. Amount of Recovery

When a court decides that a motorist is "uninsured" under Type A for any reason, the amount of recovery for the insured becomes important. *Taylor, Cruzado* and *Fusco* represent the majority view.³⁹ Assume that D has insurance of \$5,000/\$10,000 and the state requirement is \$10,000/\$15,000. If D negligently injures P, P is entitled to recover \$5,000 under his own uninsured motorist coverage. This represents the difference between \$10,000 (statutory minimum) and \$5,000 (D's insurance coverage for liability). \$5,000 is the extent of recovery even if P's injuries are greater than the statutory minimum.

The amount of recovery was determined differently in *White v. Nationwide Mutual Insurance Co.*⁴⁰ There, a negligent motorist, with coverage of only \$10,000 per person, was found to be uninsured. The applicable Virginia statute declared that a vehicle was uninsured if it was covered by less than \$15,000 (the statutory minimum) insurance for a single person.⁴¹ The district court awarded plaintiff a \$22,000 judgment for injuries against the negligent motorist, and ruled that the plaintiff was entitled to collect \$12,000 under the uninsured motorist endorsement. The insurance company appealed the ruling to the extent that the award exceeded the statutory minimum of \$15,000, less the \$10,000 recovery under the tortfeasor's policy. The Fourth Circuit affirmed, ruling that the insured's carrier's exposure for uninsured motorist coverage could not be reduced by the negligent driver's insurance coverage.

The court of appeals realized that its decision was contrary to decisions in other jurisdictions. However, the court, bound by earlier state court decisions, followed the precedent set in *Bryant v. State Farm Mutual Automobile Insurance Co.*,⁴² which had set out Virginia law. In other states, according to the court, the purpose of the uninsured motorist statutes was to provide protection only up to the minimum statutory limits for injuries caused by financially irresponsible motorists. The design of the statutes, therefore, was not to give greater protection than would have been available had the insured been injured by an operator insured up to the minimum statutory limits. This meant recovery

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Calhoun v. State Farm Mutual Auto. Ins. Co.*, 254 Cal. App. 2d 407, 62 Cal. Rptr. 177 (Ct. App. 1967).

³⁹ See text accompanying notes 24-38 *supra*.

⁴⁰ 361 F.2d 785 (4th Cir. 1966).

⁴¹ VA. CODE §§ 38.1-381(c), 46.1-1(8) (Supp. 1964).

⁴² 205 Va. 897, 140 S.E.2d 817 (1965).

under the uninsured motorist coverage of the difference between the statutory minimum and the amount of insurance the tortfeasor actually had.

In *Bryant*, the Supreme Court of Appeals of Virginia held the recovery limit under an uninsured motorist policy would be the amount of the insured's judgment against the uninsured motorist. The court said Virginia law required that the insured be paid all sums which he was legally entitled to. The statute contained no limitations or qualification that the recovery amount be reduced by the wrongdoer's insurance policy. Utilizing this principle, the circuit court awarded plaintiff \$12,000 under her uninsured motorist endorsement.

When a tortfeasor has bodily liability insurance in amounts less than required by statute, he will generally be considered "uninsured."⁴³ The amount of recovery the insured may have is usually the difference between the financial responsibility law and the tortfeasor's policy amount.⁴⁴ The result is the same whether the court has a statutory definition of "uninsured motorist" or not. *White* suggests another approach in determining recovery amount but it stands alone. Although its result is arguably desirable, few other courts have seen fit to follow *White's* reasoning.

B. Type B Cases

Whether an "underinsured" motorist can be considered "uninsured" also arises in the situation where the tortfeasor carries insurance and even meets the requirements of a state's financial responsibility law. The problem remains if the tortfeasor's insurance is not sufficient to compensate the injured party for all of his injuries. This is a Type B case.⁴⁵

*Taft v. Sweeney*⁴⁶ is a leading Type B case. In *Taft*, Taft was injured by Sweeney who had liability coverage of \$15,000/\$30,000. This met the minimum amounts required by New Jersey law. Pursuant to its obligations, Sweeney's insurance company paid \$15,000 to Taft. Taft, however, sought additional recovery under his uninsured motorist provisions. He contended that Sweeney was uninsured to the extent that Sweeney's policy limits were inadequate to compensate him fully for the injuries he suffered. The case turned on the interpretation of "uninsured" in the New Jersey statute,⁴⁷ which required the insurance company to pay all sums which the insured could recover from the owner of an "uninsured" automobile.

The Superior Court of New Jersey ruled against Taft. Sweeney had been insured up to the statutory minimum and the court found nothing in the statute suggesting that uninsured motorist coverage should be available as excess insurance. A policy which met the statutory minimum limits of coverage did not render the owner uninsured merely because it proved an inadequate source of compensation for the injured party. As the court stated, "the essential requirement for such coverage is lack of insurance, not inadequate insurance."⁴⁸ The

43 See text accompanying notes 24-38 *supra*.

44 See text accompanying note 39 *supra*.

45 See text following note 18 *supra*.

46 149 N.J. Super. 282, 373 A.2d 712 (Super. Ct. App. Div. 1977).

47 N.J. STAT. ANN. § 17:28-1.1 (West Supp. 1979).

48 149 N.J. Super. 282, 285; 373 A.2d 712, 713 (Super. Ct. App. Div. 1977).

legislative intent was to guarantee an available source of recovery up to the statutory minimum and this intent was fulfilled.

The court in *Detrick v. Aetna Casualty and Surety Co.*⁴⁹ used different reasoning to reach the same result as *Taft*. Instead of relying upon legislative intent and statutory interpretation, the *Detrick* court looked to the language of the uninsured motorist insurance policy to reach its conclusion. Numerous items, appearing in the relevant insurance sections, were defined as "words of common meaning and understanding in accord with dictionary definitions."⁵⁰ "Underinsurance" was defined as "insurance in an amount insufficient to cover the possible loss or to satisfy the requirements of a coinsurance clause."⁵¹ "Un" was said to be a prefix meaning "not."⁵² With reference to these definitions the court said the policy was not ambiguous. It added that no authority in the policy existed defining the word "uninsured" to mean "underinsured" in relation to this plaintiff's situation. Finding only one possible construction, the court held that the tortfeasor did not fall into the "uninsured" category.

As a general principle, when a wrongdoer carries insurance in compliance with the minimum statutory limits, but such insurance is inadequate to compensate the injured party, courts uniformly refuse to classify the underinsured tortfeasor as uninsured.⁵³ Whether they rely on statutory interpretation, including legislative history, or exegesis of the policy, the result is properly the same.

C. Type C Cases

Type C cases represent the scenario where D carries insurance meeting the minimum statutory requirements, of say \$10,000/\$20,000. His negligence results in an accident causing injuries to P₁, P₂ and P₃. P₁'s injuries are found to be \$7,000. However, D's insurance company only offers P₁ \$5,000. It has paid P₂ and P₃ each \$7,500 and has a remaining policy obligation of only \$5,000. Because the proceeds of D's insurance will be divided among the injured claimants, a party may receive less than his damage amount. In such a situation it has been argued that the underinsured motorist, D, should be considered uninsured, even though he meets the minimum statutory limits.

In *Porter v. Empire Fire and Marine Insurance Co.*⁵⁴ the Arizona Supreme Court determined that a Type C motorist is uninsured. Porter had been in an accident in which he and four others were injured. The wrongdoer had \$10,000/\$20,000 liability coverage as required by the Arizona Financial Responsibility Act.⁵⁵ Porter received a \$10,000 judgment and then entered into a proposed settlement with the tortfeasor's insurance company. He was to receive \$2,500 of the \$20,000 of insurance proceeds available for allocation among the injured parties. This amount was all that remained after payments were made to the other injured parties. Porter brought suit against his own

49 261 Iowa 1246, 158 N.W.2d 99 (1968).

50 *Id.* at 1253, 158 N.W.2d at 104.

51 *Id.*

52 *Id.*

53 SCHERMER, *supra* note 9, § 22.04 at 22-7.

54 106 Ariz. 274, 475 P.2d 258 *modified*, 106 Ariz. 345, 476 P.2d 155 (1970).

55 ARIZ. REV. STAT. ANN. § 28-1170, subsec. B, para. 2 (1976).

uninsured motorist carrier for the difference between the \$10,000 minimum protection afforded by the Act and the \$2,500 received. The Arizona Supreme Court awarded him the difference.

The *Porter* court's reasoning had two aspects. First, the court contrasted the theoretical with the actual. Theoretically, because the wrongdoer carried the minimum amount of insurance, insurance proceeds in the amount of \$10,000 were available to Porter. However, the court contrasted this figure with the actual coverage upon which Porter could rely and found a great disparity. The court said that to find the tortfeasor insured in this instance and deny Porter recovery under his uninsured motorist coverage would be to leave Porter as they found him, "grossly uninsured against irresponsible motorists despite his attempt to insure himself against such a contingency and contrary to the intention of the Legislature."⁵⁶ The Arizona court refused to do so.

Secondly, the *Porter* court desired to avoid an undesirable logical consequence of the contrary holding. If the court had ruled against Porter here, he would have received greater compensation had the tortfeasor had no insurance at all. In that instance, no doubt would have existed that the tortfeasor had been uninsured. Porter could have received a full \$10,000 from his own company: To have the injured party fare better financially when the tortfeasor is uninsured, than when the tortfeasor is insured up to the minimum statutory limits, would be an inequitable result.

The Supreme Court of Hawaii in *Palisbo v. Hawaiian Insurance and Guaranty Co.*⁵⁷ agreed with *Porter*. Palisbo, Ramos and two others were passengers in a car operated by Clemente. Clemente's negligent driving resulted in injury to the passengers in the automobile. Palisbo and Ramos filed suit against Clemente and were awarded \$30,000 and \$42,027.21, respectively. Clemente was insured by State Farm in the statutory minimum amount of \$10,000 and \$20,000. The insurance company filed an interpleader in the circuit court. The court awarded \$6,000 to Palisbo, \$6,500 to Ramos and \$7,500 to the other injured parties.

Palisbo and Ramos at the time of the accident were covered by uninsured motorist provisions. Their policies provided for recovery up to \$10,000/\$20,000. Both filed suit against their own carriers to recover under these policies, claiming that Clemente was uninsured. The trial court agreed and ordered their companies to pay. Palisbo received \$4,000 (\$10,000-6,000) and Ramos \$3,500 (\$10,000-6,500).

On appeal, the Supreme Court of Hawaii affirmed. The court ruled that the Uninsured Motorist Statute was designed to enable the purchaser to assure himself of not less than the minimum protection provided for in the financial responsibility law. To deny Palisbo and Ramos recovery here would be to defeat this legislative purpose. The court relied on *Porter* and said that it most closely expressed the intent of Hawaii's legislature in enacting the uninsured motorist law. Construing the statute liberally, as was done in *Porter* to achieve the "remedial purposes and legislative intent,"⁵⁸ the court held that "for at

56 106 Ariz. 274, 279; 475 P.2d 258, 263 (1970).

57 57 Haw. 10, 547 P.2d 1350 (1976).

58 *Id.* at 15, 547 P.2d at 1354.

least the minimum amounts specified by . . . law, the tortfeasor is . . . uninsured to the extent of the insufficiency for the purposes of the statute."⁵⁹ The amount of recovery allowed by the Hawaiian court was equal to the difference between the amount the insured received from tortfeasor's insurance and the face value of his uninsured motorist policy.

Porter and *Palisbo* are the leading Type C cases holding that underinsured means uninsured. Almost all the other jurisdictions that have addressed this question have held to the contrary.⁶⁰ *Simonette v. Great American Insurance Co.*⁶¹ typifies this majority viewpoint.

J.P. Simonette, Jr. and Carroll were passengers in an automobile driven by Good. Due to Good's negligence, the car crashed, killing Simonette, Jr. and Carroll. Good's automobile insurance policy, issued by Safeco Insurance Company, insured him to \$20,000 for each person and up to \$20,000 for each accident. Safeco paid \$10,000 to the Simonette estate and \$10,000 to Carroll's estate. The damages however for the wrongful death of Simonette, Jr. exceeded \$10,000. Simonette, the administrator of Simonette Jr.'s estate, had an insurance policy covering his son which provided uninsured motorist coverage of \$20,000/\$20,000. He claimed, as administrator, that the estate was entitled to \$10,000, the difference between the \$20,000 uninsured motorist coverage and the \$10,000 paid by Safeco. He argued that Good was "underinsured" and that he should be considered "uninsured" for purposes of recovery under the uninsured motorist policy.

The Connecticut Supreme Court disagreed with Simonette. This court concluded that Good, although underinsured was not uninsured. Referring to the statutes, the court found no ambiguity in the term "uninsured." It could not be construed to mean "underinsured" in relation to the deceased's injury. As the *Detrick*⁶² court did, the court looked at the defined meaning of the term "uninsured" in the policy and said it could not mean "underinsured." Although the injured party would "be better off"⁶³ if the tortfeasor had obtained no insurance at all, the court said its decision was mandated by the legislature. It refused to read into the statute something which was manifestly absent. The court acknowledged the harshness of its conclusion, but adhered to the strict language of the law. Some courts have been forced to look to the insurance policy itself to determine the meaning of "uninsured motor vehicle." At the time *Smiley v. Estate of Toney*⁶⁴ was decided, no Illinois statute defined the term "uninsured motor vehicle." The Appellate Court of Illinois looked at the insurance policy itself for the full meaning of the term "uninsured vehicle."

The insurance policy issued to the plaintiff in *Smiley* provided that, "uninsured vehicle means a vehicle with respect to which there is no bodily injury liability bond or . . . insurance policy."⁶⁵ The court found the language of this policy to be plain, concise and unambiguous. Using the terms in their ordinary sense, the tortfeasor was not in fact an uninsured motorist.

59 *Id.*

60 *See* note 69 *infra*.

61 165 Conn. 466, 338 A.2d 453 (1973).

62 *See* text accompanying notes 49-52 *supra*.

63 165 Conn. 466, 471; 338 A.2d 453, 456 (1973).

64 44 Ill. 2d 127, 254 N.E.2d 440 (1969).

65 *Id.* at 130, 254 N.E.2d at 441.

The Type C issue has also arisen in jurisdictions having statutory definitions of "uninsured motorist or uninsured motor vehicle." In *Brake v. MFA Mutual Insurance Co.*,⁶⁶ Missouri law defined "uninsured motor vehicle" to "include an insured motor vehicle where the liability insurer . . . is unable to make payment . . . because of insolvency."⁶⁷

This court found that an "underinsured" motorist was not "uninsured." The terms in the statute⁶⁸ and insurance policy were terms of common meaning and understanding. The prefix "un" meant "not," and since the tortfeasor had insurance meeting the statutory minimum, his vehicle was clearly not uninsured. Under the guise of interpretation, the court also reasoned that it could not extend the scope of the uninsured motorist law unless the statute itself provided an exception. The statute in Missouri provided no exception that would cover Type C cases; therefore, the tortfeasor could not be considered "uninsured." This rationale has been followed in most other jurisdictions.⁶⁹

Generally, courts will not disregard the plain import of the words and phrases chosen by the state general assembly. A Type C underinsured motorist will not be deemed uninsured for purposes of uninsured motorist coverage. Only a few⁷⁰ courts have ruled to the contrary. All⁷¹ of the other courts have decided, for one reason or another, that they will not equate the two terms in a Type C arrangement.

IV. Conclusion

The era of litigation over "underinsured" motorists is far from over. People, faced with increasing prices and tighter budgets, may feel that automobile insurance is a "luxury." This, coupled with higher medical costs, larger personal injury awards and rising premiums for the insurance itself, each year produces a great number of uninsured and underinsured motorists. Every day the chances of being injured by a financially irresponsible motorist increase.

When a tortfeasor has no insurance or less than the statutory minimum, the self-insured can secure some protection, at least up to the statutory minimum, by purchasing uninsured motorist coverage. This decreases some of the risk involved, but not all since recovery is limited. Most courts feel that what the insured received from the tortfeasor's insurance company should be subtracted from the statutory minimum to get the amount of recovery. The *White*⁷² court provided greater recovery. There the amount the insured received was not affected by the amount recovered from the tortfeasor's policy. The insured

66 525 S.W.2d 109 (Mo. Ct. App.), *cert. denied*, 423 U.S. 894 (1975).

67 *Id.* at 111.

68 Mo. REV. STAT. § 379.203 (Vernon 1968).

69 *Chafin v. Aetna Ins. Co.*, 550 F.2d 575 (10th Cir. 1976); *Lund v. State Farm Mut. Auto. Ins. Co.*, 342 F. Supp. 917 (W.D. Okla. 1972); *Travelers Ins. Co. v. Bouzer*, 39 Cal. App. 3d 992, 114 Cal. Rptr. 651 (Ct. App. 1974); *Golphin v. Home Indem. Co.*, 284 So.2d 442 (Fla. Dist. Ct. App. 1974); *Cotton States Mut. Ins. Co. v. Austin*, 143 Ga. App. 309, 238 S.E.2d 253 (1977); *Gorton v. Reliance Ins. Co.*, 77 N.J. 563, 391 A.2d 1219 (1978); *Simmons v. Hartford Accident & Indem. Co.*, 543 P.2d 1384 (Okla. 1975); *Villareal v. Texas Farmers Ins. Co.*, 510 S.W.2d 633 (Tex. Civ. App. 1974); *Kemp v. Fidelity Cas. Co. of New York*, 504 S.W.2d 633 (Tex. Civ. App. 1973).

70 *Guthrie v. State Farm Mut. Auto. Ins. Co.*, 279 F. Supp. 837 (D.S.C. 1968).

71 Note 69 *supra*.

72 See text accompanying notes 40-42 *supra*.

recovered to the full extent of his policy. It is doubtful that many courts will follow this aberration without direction from their state legislatures.

If the tortfeasor has the statutory minimum coverage, as in Type B and Type C, the injured party faces apparently insurmountable problems. In a Type B situation there seems to be little recourse. The injured party has received the minimum amount of insurance set by the state. If that does not compensate him for his injuries, the problem lies not in the uninsured motorist coverage. Rather, the minimum amounts set by the state legislature are inadequate. This suggests a fairly simple solution in the legislative arena, not a problem with the adequacy of uninsured motorist coverage as a gap filler.

Type C situations also pose a difficult problem. There has been a split, however small, between the courts on how to deal with this problem. *Porter* and *Palisbo* represent the minority view, holding it inequitable to deny the insured recovery when what he receives in insurance from the tortfeasor is far less than the minimum statutory amount. Other courts have rejected this viewpoint, suggesting that if there is to be change, it will have to come from the legislature. Considering the complete rejection by the courts of allowing recovery in a Type C situation, legislative response seems to present the only answer.

Legislative action in the uninsured motorist area, however, seems unlikely. Although a legislative response clarifying the definition in some areas may be helpful, a complete revision seems unnecessary. The policy behind uninsured motorist coverage is to protect the insured in an accident with the uninsured as if the uninsured were, in fact, insured. The courts interpreting the statutes in light of this policy have come close to that goal. In the hard cases, Types B and C, the problem lies not with uninsured motorist coverage and a solution should not be attempted which would result in a change of the basic uninsured motorist coverage. Those situations should be dealt with by other means, such as increasing the minimum amount of insurance coverage. Only in that way can legislatures effect a positive change.

Ralph P. Higgins