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A DECENNIAL STUDY OF THE UNINSURED MOTORIST ENDORSEMENT

*Robert G. Notman**

I. Background

The horseless carriage was a most remarkable creation in its day. This bouncing, belching tribute to man's ingenuity was viewed with reverent awe by some, with resolute contempt by others. The evolution of this machine into the modern and magnificent automobile that emerges from today's assembly line is an inspiring story of progress. Equally impressive, unfortunately, is the record of deaths and injuries that have resulted from the operation of the automobile. Just as the number of automobiles and drivers has increased steadily with each passing year, so have the casualties mounted. Ironically, the cherished holiday weekends are the periods of greatest traffic mortality. The tragic loss of lives and the crippling injuries, with the accompanying grief, sorrow, pain and disability are the obvious and immediate product of the great highway slaughter. One step removed is the often tremendous financial loss incurred by the victims or their surviving dependents. Such loss is alleviated, of course, for those who are "fortunate" enough to be struck down by tortfeasors who prove to be financially responsible for their actions. All too often, though, the damage is done by those drivers who prefer to "chance it" — to gamble that they will never cause an accident and, therefore, will never be called upon to respond financially. The chance taken is primarily with the future welfare of the potential victims rather than with their own welfare.

It became quite apparent long ago that some form of legal compulsion was necessary to afford an adequate measure of protection to automobile accident victims. The Connecticut legislature was the first to manifest this awareness by enacting a "Financial and Safety Responsibility Law."¹ This act, effective January 1, 1926, called for the reporting of any motor vehicle accident which involved either personal injuries or property damage amounting to \$100 or more. Upon an administrative finding of fault, the registration and driving privileges of the owner and driver could be suspended until the offenders established proof of future financial responsibility. This proof could consist of a liability insurance policy in the amount of \$10,000 for death or personal injury, and \$1,000 for property damage.² Eleven years later, New Hampshire became the first state to provide for the commencement of financial responsibility procedures upon the mere happening of an accident without regard to fault.³

All fifty states have now adopted some form of legislation addressed to

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1 Law of January 1, 1926, ch. 183, [1925] Conn. Public Acts 3958 (repealed 1927).

2 See Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFFALO L. REV. 283 (1960).

3 Law of July 14, 1937, ch. 160, [1937] N.H. Laws 293, as amended, Law of April 10, 1941, ch. 63, [1941] N.H. Laws 74 (repealed 1949).

the subject of financial responsibility of motorists.⁴ This is highly commendable. Unfortunately, nearly all such legislation is lacking in one very significant respect reminiscent of the old common-law rule applied to the canine species of tortfeasor: one "free bite" is allowed. The procedure looks to the *second* accident, not the first, and requires proof of only *future* financial responsibility.

However, not all legislatures have "gone to the dogs." Massachusetts adopted the first compulsory insurance program as of January 1, 1927.⁵ Under this approach, a prerequisite to registration is a liability insurance policy of \$5,000 per person, \$10,000 per accident. Property damage is not included. Apparently this scheme left something to be desired, because thirty years elapsed before New York, on February 1, 1957, became the second state to try compulsory insurance. The limits were \$10,000 and \$20,000, respectively, as well as \$5,000 in property damage coverage.⁶ The dynamic duo became a triad a year later when North Carolina followed suit.⁷

Among the weaknesses of either of the above plans are loopholes pertaining to nonresident drivers, hit-and-run occurrences, and company disclaimers for want of co-operation or lack of permission to drive.

Another approach to the problem which also has met with limited success is the indemnity fund plan adopted in Maryland,⁸ New Jersey⁹ and North Dakota.¹⁰ This plan calls for payment of loss out of a general fund established for that purpose through assessments, with specific qualification procedures spelled out for the claimant.¹¹

At long last, in December of 1956 the insurance industry took matters into its own hands by promulgating an endorsement to be attached to the family automobile policy. Under this endorsement, the insured can recover damages from his own insurer upon showing that he was legally entitled to such damages from an uninsured motorist. The endorsement covers death, personal injury, sickness and disease with maximum limits corresponding to state financial responsibility law requirements.

This approach found favor quickly among various groups, including legislators. In 1957, New Hampshire enacted legislation requiring that this endorsement be included in all policies issued or delivered in the state upon vehicles principally garaged therein.¹² Virginia followed in 1958,¹³ California in 1959,¹⁴ Illinois in 1963.¹⁵ Today a substantial number of states have such legislation.

4 The most recent state to enact such legislation is Alaska. ALASKA STAT. §§ 28.20.010 — 640 (Supp. 1962). For a complete list of statutory citations by states, see Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present and Future*, 8 BUFFALO L. REV. 215, 218 n.8 (1959).

5 MASS. ANN. LAWS ch. 90, §§ 34 A-J (1957), as amended, (Supp. 1966), ch. 175, §§ 113 A-G (1959), as amended, (Supp. 1966).

6 Law of April 16, 1956, ch. 655, [1956] McKinney's Session Laws of New York 758 (repealed 1959).

7 N.C. GEN. STAT. §§ 20-309 to -319 (1965).

8 MD. ANN. CODE art. 66½, §§ 150-79 (1967).

9 N.J. STAT. ANN. tit. 39, §§ 6-61 to -91 (1961), as amended, (Supp. 1966).

10 N.D. CENT. CODE §§ 39-17-01 to -10 (1960), as amended, (Supp. 1967).

11 For a scholarly analysis of these plans, consult Ward, *supra* note 2.

12 N.H. REV. STAT. ANN. § 268.15 (1966).

13 VA. CODE ANN. § 38.1-381 (Supp. 1966).

14 CAL. INS. CODE § 11580.2 (Supp. 1966).

15 ILL. ANN. STAT. ch. 73, § 755a (Smith-Hurd 1965).

In some of these states the coverage is absolutely mandatory; in others it must be offered but may be rejected by the insured. Rejections are very rare, however, since the cost of this endorsement is truly nominal — slightly more than a penny a day.¹⁶ New York now has in effect what has been described as a combined plan, utilizing the uninsured motorist coverage in conjunction with a central indemnity fund, both of which are operated by an entity known as the Motor Vehicle Accident Indemnification Corporation.¹⁷

Although one writer has characterized the use of the uninsured motorist endorsement as "a snare and a delusion,"¹⁸ it has gained wide acceptance and appears here to stay. More and more cases arising under such coverage are turning up in the advance sheets of various reporters, and these decisions are casting some light upon the rather shadowy picture prevalent during its infancy. The purpose of this article is to examine, in some detail, the provisions of typical uninsured motorist endorsements in the light of court decisions that have interpreted them during these first ten years.

II. The Basic Agreement; Definitions

Under the endorsement, the insurer agrees

to pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom . . . sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile. . . .¹⁹

It should be observed that the language requires the loss to have been caused by "accident." This would seem to exclude any injury sustained as a direct result of a collision that was brought about deliberately. Such was the decision in the New York case of *McCarthy v. Motor Vehicle Accident Indemnification Corporation*,²⁰ in which another motorist intentionally drove his car into the plaintiff's vehicle. The offending driver had a standard automobile liability policy, but his carrier denied coverage on the ground that this was not an

16 For example, the premium charged by State Farm Mutual is \$2.20 per six months or \$4.40 annually. This averages out to 1.2 cents per day.

17 N.Y. INS. CODE § 600-626, *as amended*, (Supp. 1967). A detailed analysis of the New York plan appears in Ward, *supra* note 2, at 289. See also Gerwin, *An Analysis of the Operation of the Motor Vehicle Accident Indemnification Corporation*, 11 N.Y.L.F. 623 (1965); Ward, *supra* note 8.

18 7 APPLEMAN, INSURANCE LAW AND PRACTICE § 4331, at 209 (1962). By characterizing this newest approach as a "snare and a delusion" Appleman is apparently referring to the policy provisions which limit the method of recovery to arbitration. That is, the litigant is, by means of a contract provision, denied access to the courts in establishing his claim against the carrier. *Id.* at § 4331.

19 The language quoted here, and in subsequent sections of this article, is from the 1963 Standard Family Automobile Liability Policy, *as revised*, January 1, 1963. The full text of this policy is contained in 4 RISJORD & AUSTIN, AUTOMOBILE LIABILITY INSURANCE CASES 181 (1964).

It is to be noted that coverage does not ordinarily include property damage. In at least two states, however, South Carolina and Virginia, statutes require that the coverage include property damage. S.C. CODE ANN. § 46-750.14 (1962); VA. CODE ANN. § 38.1-381 (Supp. 1966).

20 16 App. Div. 2d 35, 224 N.Y.S.2d 909 (1962).

"accident." The plaintiff then turned to her own uninsured motorist coverage, but the court closed that door as well. This was viewed as an assault and thus beyond the contemplated scope of the contract.

A. Who Is an "Insured"?

In the standard policy, the "insured" is defined as "the named insured and any relative" and "any other person while occupying an insured automobile." Some of the companies expressly include the spouse of the named insured, and relatives of both, but only "while residents of his household."²¹ Applying a rather liberal construction to this household residency requirement, a New York court held that such coverage extended to a named insured's stepson, injured as a passenger in a car while on military duty in Hawaii.²²

It is apparent from the definition that two classes of insureds are established. Members of the first class, *i.e.*, "the named insured and any relative," receive preferential consideration since they are covered as pedestrians or while occupying any automobile; thus, a person need only carry this endorsement on a policy insuring one of several vehicles he may own. On the other hand, all others receive coverage only while they are occupying the "insured automobile."

The concept of "occupying" an automobile can be a rather intriguing subject. This term is defined in the standard policy, relative to all coverages, as meaning "in or upon or entering into or alighting from." Most of the reported cases that have dealt with this subject have arisen under the "medical payments" clause rather than the uninsured motorist endorsement. These opinions are equally applicable to the latter, though, and a brief survey of them is therefore appropriate.

Among the plaintiffs who failed to qualify within this definition are: one whose arm was crushed by a wheel drum when the car slipped off the jack as he was changing a rear tire;²³ one who was riding on the running board;²⁴ and one who, with his passenger, was rudely interrupted by the front bumper of another car as he stood answering nature's call at the rear of his stopped vehicle.²⁵

More fortunate were the following plaintiffs: one who was struck by another automobile as he was in a bent knee or "haunches" position with hands on his left rear wheel;²⁶ one who was leaning over the front of his parked car tying on the front bumper;²⁷ four who were riding on running boards of cars;²⁸ and two

21 See, *e.g.*, State Farm Mutual Automobile Policy 9536.6 (Illinois) issued in 1966.

22 *Appleton v. Merchants Mut. Ins. Co.*, 16 App. Div. 2d 361, 228 N.Y.S.2d 442 (1962). The rationale behind the decision was that, since mere physical presence is not enough to create residency, a temporary physical absence does not destroy residency.

23 *Green v. Farm Bureau Mut. Auto. Ins. Co.*, 139 W. Va. 475, 80 S.E.2d 424 (1954).

24 *New Amsterdam Cas. Co. v. Rust*, 164 Tenn. 22, 46 S.W.2d 70 (1932). However, in a later Tennessee case this decision was distinguished, and coverage was granted to a truck driver who leaped onto the running board to apply the brakes on a rolling truck. *Inter Ocean Ins. Co. v. Norris*, 205 Tenn. 217, 326 S.W.2d 437 (1959).

25 *Ross v. Protective Indem. Co.*, 135 Conn. 150, 62 A.2d 340 (1948).

26 *Christoffer v. Hartford Acc. & Indem. Co.*, 123 Cal. App. 2d 979, 267 P.2d 887 (1954).

27 *Lokos v. New Amsterdam Cas. Co.*, 197 Misc. 40, 93 N.Y.S.2d 825 (Mun. Ct. 1949), *aff'd without opinion*, 197 Misc. 43, 96 N.Y.S.2d 153 (Sup. Ct. 1950).

28 *Independence Ins. Co. v. Jeffries*, 294 Ky. 680, 172 S.W.2d 566 (1943); *Stewart v. North American Acc. Ins. Co.*, 33 S.W.2d 1005 (Mo. App. 1931); *Reynolds v. Life & Cas. Ins. Co.*, 166 S.C. 214, 164 S.E. 602 (1932); *Guaranty Trust Co. v. Continental Life Ins. Co.*, 159 Wash. 683, 294 Pac. 585 (1930).

who were struck by their own automobiles after the cars had been hit by oncoming vehicles.²⁹ An additional pair of successful plaintiffs underwent similar experiences. In *Sherman v. New York Casualty Company*,³⁰ the plaintiff parked his car in a shed-like structure. After he got out of the car, he noticed that his pride and joy was rolling backward toward a stone wall located some twenty-five feet distant. He quickly placed his hands upon the rear of the car, but was forced backward with it. However, he very deftly managed to hold onto the license plate with his left hand and a taillight with his right hand, while putting his knee on the rear bumper. In this unique position, he shrewdly rode out the balance of the trip and crashed into the wall, fracturing both his legs.

Mr. Sherman's counterpart in nearby Pennsylvania actually upstaged him a bit. The facts in *Young v. State Automobile Insurance Association*³¹ could well have provided the premise for an Alfred Hitchcock presentation. The central characters, Mr. and Mrs. Young, arrived home together in the family car. He alighted from the vehicle and walked in front of it to open the doors of the garage. Surely acting out of sheer inadvertence, as opposed to sudden irresistible impulse, the better half then put the car into forward motion. Ever alert, Mr. Young discerned his plight and reacted admirably. He leaped onto the front end of the car and clung there as the unit crashed through the rear wall of the garage, across two adjacent residential lots and finally came to rest. In entering judgment for the insured (and injured) Mr. Young, the court remarked that there are many positions not normally taken while using an automobile that, nevertheless, place the individual "in" or "upon" such automobile.

B. What Is an "Insured Automobile"?

In the standard policy, an "insured automobile" is defined as: (a) the automobile described in the policy, (b) a temporary substitute therefor, or (c) an automobile operated, but not owned, by the named insured. Also included within this term is a trailer being used with an automobile described in (a), (b), or (c) above, but specifically excluded is any automobile or trailer owned by a resident of the same household as the named insured, any automobile being used as a public or livery conveyance, or any automobile being used without the owner's permission.

C. What Is an "Uninsured Automobile"?

The term "uninsured automobile" is defined in the Standard Family Automobile Policy as:

- (a) an automobile or trailer with respect to the ownership, maintenance or use of which there is, in at least the amount specified by the financial responsibility law of the state in which the insured automobile is principally garaged, no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such automobile, or with respect to which

29 *Wolf v. American Cas. Co.*, 2 Ill. App. 2d 124, 118 N.E.2d 777 (1954); *Katz v. Ocean Acc. & Guar. Corp.*, 202 Misc. 745, 112 N.Y.S.2d 737 (Mun. Ct. 1952).

30 78 R.I. 393, 82 A.2d 839 (1951).

31 72 Pa. D. & C. 394 (Lycoming County Ct. 1949).

there is a bodily injury liability bond or insurance policy applicable at the time of the accident, but the company writing the same denies coverage thereunder, or (b) a hit-and-run automobile.

Although this definition is broken down into two parts, it would seem that there are clearly three separate situations contemplated: (1) where there is no such bond or policy; (2) where there is a bond or policy but coverage is denied; and (3) where a hit-and-run automobile is involved. The "denial of coverage" provision was not expressly included in this definition until 1963. Accordingly, in a 1958 case that involved a denial of coverage due to breach of the co-operation clause, a New York court ruled that the claimant's uninsured motorist clause was inapplicable.³²

The question has frequently arisen as to whether an insurer in effect "denies coverage" when it becomes insolvent subsequent to the accident. State courts are divided on this issue. An affirmative answer has been given in California,³³ South Carolina³⁴ and Virginia.³⁵ In addition, there are now statutes in effect in Florida, Illinois, South Carolina and Louisiana that expressly include insolvency situations within the definition of "uninsured motor vehicle."³⁶ On the other hand, a negative reply to this question has been given by the courts in Michigan,³⁷ Missouri,³⁸ New York³⁹ and North Carolina.⁴⁰

To qualify within the meaning of "hit-and-run," the third possibility as an "uninsured automobile," the standard endorsement requires that no fewer than five elements be proved: (1) physical contact between such automobile and the insured or the automobile occupied by him; (2) the identities of both the owner and the operator of such automobile are unascertainable; (3) the insured or someone on his behalf reported the accident within 24 hours to a police, peace or judicial officer or the Commissioner of Motor Vehicles; (4) the insured or someone on his behalf filed with the company, within 30 days after the accident, a statement under oath that the insured or his legal representative has a cause of action arising out of such accident against a person or persons whose identity is unascertainable, setting forth the facts in support thereof; and (5) the insured or his legal representative made available for inspection, at the company's request, the automobile that the insured was occupying at the time of the accident.

The statutory requirement of physical contact⁴¹ was literally construed in the earlier cases, and some of the results were rather harsh and unrealistic. Very little imagination is necessary to conceive of situations in which grievous injuries

32 *Berman v. Traveler's Indem. Co.*, 11 Misc. 2d 291, 171 N.Y.S.2d 869 (Sup. Ct. 1958).

33 *Katz v. American Motorist Ins. Co.*, 53 Cal. Rptr. 669 (Cal. App. 1966).

34 *North River Ins. Co. v. Gibson*, 244 S.C. 393, 137 S.E.2d 264 (1964).

35 *State Farm Mut. Auto. Ins. Co. v. Brower*, 204 Va. 887, 134 S.E.2d 277 (1964).

36 *See, e.g.*, ILL. ANN. STAT. ch. 73, § 755a (Smith-Hurd 1965), *as amended*, July 1, 1967.

37 *Topolewski v. Detroit Auto. Inter-Ins. Exch.*, 6 Mich. App. 286, 148 N.W.2d 906 (1967).

38 *Swaringin v. Allstate Ins. Co.*, 399 S.W.2d 131 (Mo. App. 1966).

39 *Uline v. Motor Vehicle Accident Indemnification Corp.*, 28 Misc. 2d 1002, 213 N.Y.S.2d 871 (Sup. Ct. 1961).

40 *Hardin v. American Mut. Fire Ins. Co.*, 261 N.C. 67, 134 S.E.2d 142 (1964).

41 N.Y. INS. CODE § 617 (1966).

can be incurred without actual contact with the "mystery" vehicle. One slightly exaggerated hypothetical situation vividly illustrates the point: a pedestrian observes an automobile out of control and coming up over the curb directly toward him; demonstrating commendable poise and athletic prowess, the pedestrian executes a graceful half-gainer through Macy's display window and thereby avoids contact with the errant automobile. As his "reward" for this impressive maneuver, he incurs the unkindest cuts of all — perhaps the most painful of which is the denial of benefits under his uninsured motorist endorsement.

An equally heartrending experience actually occurred in *Petition of Portman*,⁴² a New York case decided in 1961. A blind woman was knocked to the ground by an insured automobile and then struck again by the same car when it was rammed by a hit-and-run car. Recovery for the injuries sustained as a result of the second impact was denied because there was never any direct physical contact between her and the hit-and-run car. Oddly, an opposite result presumably would have been reached had the first impact thrown her upon the hood of the insured automobile, in line with the earlier discussed judicial construction placed upon the concept of "occupying." She would then have been an "occupant" of the insured automobile and, thus, an "insured" under that driver's policy at the time of the second impact. This harsh result was expressly disapproved in a subsequent case decided by the New York Court of Appeals in 1966.⁴³ Recovery was allowed there when the plaintiffs' vehicle was struck head on by a car that crossed the center line of an expressway after being rear-ended by a hit-and-run automobile. Such a result is certainly more in line with the general purpose intended by legislation requiring uninsured motorist protection. Other cases indicate that this liberal view will eventually prevail, at least insofar as such chain reaction occurrences are concerned.⁴⁴

Similarly, there seems to be a considerable amount of leeway permitted in connection with the requirement of nonascertainment of the offending owner's or operator's identity. For example, in a Virginia case⁴⁵ the facts showed that the plaintiff insured *could have* determined such identity, but had failed to do so simply because, at the time of the accident, he believed he was not injured. Four months later he discovered that he had suffered a ruptured disc as a result of the mishap. The court ruled that his earlier omission was not a bar to recovery, and stated: "For us to say that an insured had the duty to exercise due diligence to ascertain the identity of an unknown motorist would be reading into the statute language which does not there appear."⁴⁶

The same result was reached by a New York court in a case involving a very slight rear-end collision.⁴⁷ Both drivers inspected the vehicles, observed no damage, and reported no injuries. Consequently, they both left the scene with-

42 33 Misc. 2d 385, 225 N.Y.S.2d 560 (Sup. Ct. 1961).

43 *Motor Vehicle Accident Indemnification Corp. v. Eisenberg*, 18 N.Y.2d 1, 218 N.E.2d 524, 271 N.Y.S.2d 641 (1966).

44 *See, e.g., Inter-Insurance Exch. of Auto. Club v. Lopez*, 238 Cal. App. 2d 441, 47 Cal. Rptr. 834 (1966); *Costa v. St. Paul Fire and Marine Ins. Co.*, 228 Cal. App. 2d 651, 39 Cal. Rptr. 774 (1964); *Basore v. Allstate Ins. Co.*, 374 S.W.2d 626 (Mo. App. 1963).

45 *Mangus v. Doe*, 203 Va. 518, 125 S.E.2d 166 (1962).

46 *Id.* at 520, 125 S.E.2d at 168.

47 *Riemenschneider v. Motor Vehicle Accident Indemnification Corp.*, 262 N.Y.S.2d 950 (Sup. Ct. 1965), *aff'd*, 26 App. Div. 2d 309, 274 N.Y.S.2d 71 (1966).

out exchanging identification. On the following day, the plaintiff entered a hospital with headaches and other pain. It was held that there was indeed a "hit-and-run" vehicle even though it did not run away.

A slight variation from the two cases just mentioned is *Darby v. Motor Vehicle Accident Indemnification Corporation*,⁴⁸ a 1967 New York decision. In this case, the offending driver struck a nine-year-old boy and remained to take the boy and his mother to a hospital. Unfortunately, he gave the mother an incorrect name and address. Because the man could not later be correctly identified, he was declared unascertainable, and a hit-and-run situation was held to exist.

Thus, it seems that court interpretation of the meaning of the policy term "hit-and-run" has resulted in a qualification of both the "hit" and the "run." There is no longer a requirement that the plaintiff or his car actually be hit by the mystery car itself, and there is no absolute requirement that such car must have run away from the scene.

This spirit of liberality was absent, however, when a New York court considered the necessity for strict compliance with the aforementioned requirement that authorities be notified within 24 hours of the accident. The injured party had waited three days before contacting the police. This period was held to be roughly two days too long, and the claimant was denied recovery by the court.⁴⁹ It should be pointed out, though, that the time limitations and other details are actually spelled out by statute in New York.⁵⁰ In many states, these details are not spelled out legislatively and come into play exclusively by application of the policy clause itself. It would seem that the insurance carriers would favor a statutory recitation of their policy language, since this could serve to avoid the construction rule of contracts that calls for any ambiguities in insurance contracts to be construed in favor of the insured and against the insurer who drew the contract. With a statute, ambiguities become a matter of statutory construction.⁵¹

Assuming that one is involved in an ordinary accident (not hit-and-run) with another vehicle believed to be uninsured, how does one go about proving that fact to the satisfaction of a court? This much is clear — the plaintiff has the burden of establishing this fact, usually in a declaratory judgment action.⁵² Confusion reigns, however, on the matter of what constitutes adequate proof of the uninsured status. One writer has summed up the situation with the statement that "this subject is as hazy as the mist of a very dense forest."⁵³ An

48 52 Misc. 2d 1045, 277 N.Y.S.2d 302 (Sup. Ct. 1967).

49 *Bonavisa v. Motor Vehicle Accident Indemnification Corp.*, 21 Misc. 2d 963, 198 N.Y.S.2d 332 (Sup. Ct. 1960).

50 N.Y. INS. CODE § 608(b) (1966).

51 The Virginia Statute, VA. CODE ANN. § 38.1-381 (Supp. 1966), is another that purports to set out in detail the specific terms and obligations of the required policy. The fourth element of "hit-and-run" mentioned earlier — the filing of a statement with the company within 30 days — is not among the statutory requirements. The result of this omission is that a 30-day notice requirement in a policy has been struck down as invalid in that state. *Nationwide Mut. Ins. Co. v. Sours*, 205 Va. 602, 139 S.E.2d 51 (1964).

52 *Levy v. American Auto. Ins. Co.*, 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961); *Application of Motor Vehicle Accident Indemnification Corp.*, 214 N.Y.S.2d 600 (Sup. Ct. 1961).

53 *Kovin, Uninsured Motorist Arbitration Under the Illinois Statute*, 21 ARB. J. 229, 236 (1966).

illustration in support of his conclusion is *Levy v. American Automobile Insurance Company*,⁵⁴ an Illinois decision handed down in 1961. The proof offered by the plaintiff's attorney consisted of his own testimony that he had sent letters to both the driver and the owner of the offending vehicle, requesting that they inform their insurance company of the accident; that failing to receive any response, he made a personal investigation of the matter during which both individuals orally advised him that they were not insured. Their remarks were admitted, over objection, as declarations against financial interest—an exception to the hearsay rule. This was held on appeal to be reversible error, since no showing had been made that these two declarants were unavailable to testify personally, as required in order to qualify under Illinois law as an exception to the hearsay rule. The appellate court was equally unimpressed with counsel's argument that there had been "assent by silence," that is, that the fact was proved by the absence of any contact by any insurer for the third parties.⁵⁵

The case was remanded for retrial without any judicial indication as to whether the "declarations against interest" would have sufficed had the two declarants been shown to be unavailable. On retrial, however, counsel did not rely upon the declarations. He introduced certified letters from the Illinois Secretary of State that showed that the operator's licenses of the alleged uninsureds had been suspended for failure to comply with the Financial Responsibility Law. Although the outcome of the retrial is unknown to this writer, it is believed that this type of proof is of high and convincing quality and should suffice.⁵⁶

III. Exclusions

The standard policy contains an exclusions section that provides that the uninsured motorist coverage shall not apply:

(a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile; (b) to bodily injury to an insured with respect to which such insured . . . shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor; (c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier. . . .

A motorcycle has been judicially determined *not* to be an "insured automobile" within the meaning of that term in the exclusions section. In *Westerhauser v. Allied Mutual Insurance Company*,⁵⁷ the plaintiff's husband was killed when struck by an uninsured automobile while he was riding his two-

54 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961). The facts which follow are set forth in Note, *Uninsured Motorist Coverage—A Survey*, 1962 WASH. U.L.Q. 134 (1962). Apparently the author acquired such knowledge through direct communication with plaintiff's counsel.

55 31 Ill. App. 2d 157, 166; 175 N.E.2d 607, 611 (1961).

56 The suggestion has been made that the insurers should be required to indicate in the policy just what proof of noninsurance would satisfy the policy requirements. Note, *Uninsured Motorist Coverage—A Survey*, 1962 WASH. U.L.Q. 134, 138 (1962).

57 140 N.W.2d 719 (Iowa 1966).

wheeled motorcycle. The carrier resisted the claim under this endorsement on the ground that the decedent was occupying an "automobile" (other than the insured auto) owned by the named insured or a relative and that therefore the exclusion was applicable. The court said that although a motorcycle is probably a motor vehicle, it certainly is not an automobile, and the exclusion does *not* apply.⁵⁸

There are at least two obvious purposes for the settlement provision: the first is to protect the company's subrogation rights under the trust agreement of the endorsement, and the second is to prevent the insured from making a nominal settlement (or covenant) with a joint tortfeasor and then claiming substantial damages from his own carrier.⁵⁹ In prior years this prohibition extended not only to settling but also to prosecuting to judgment an action against the alleged tortfeasor without the written consent of the company. Indeed, this is the way many policies are still worded. However, the Standard Policy was revised in January of 1963, at which time the "prosecuting to judgment" prohibition was moved out of the exclusions section of the endorsement. The matter is now treated in a different manner and appears earlier in the endorsement, immediately following the statement of the basic agreement. Such a prosecution is no longer treated as an event that will defeat coverage. Rather, it is now provided that no such judgment shall be conclusive of the issues of liability or damages as between the insured and the company. These two issues are thus reserved for future arbitration as provided elsewhere in the endorsement.

It has been held that the provision requiring the insurer's consent for prosecution of an action against the uninsured motorist is inapplicable if the insurer has conducted its own investigation and denies all liability on the ground that the insured, and not the uninsured driver, was at fault in the accident.⁶⁰ Moreover, this power to withhold consent is not absolute, but must be exercised with reason and discretion. Its abuse may bring about some rather disastrous results from the carrier's standpoint.

A striking illustration of this occurred in a recent Illinois case, *Andeen v. Country Mutual Insurance Company*.⁶¹ The insured filed suit against the uninsured motorist and forwarded copies of the process to his insurance company. No acknowledgment or reply was forthcoming from the company, nor did the company make any appearance in the suit. Subsequently, the plaintiff forwarded notice of the hearing or trial date and requested written consent to prosecute the action to judgment. Once again, the carrier failed to respond. The trial culminated in judgments totalling \$76,251.75. The insured then brought suit to collect \$60,000 of this sum (the policy limit) from the carrier under the

58 Interestingly, it is to be noted that a policy issued by a major insurance company in November, 1966, uses the terminology "land motor vehicle," not "automobile," in this exclusion. State Farm Mutual Automobile Policy 9536.6 (Illinois), issued for the policy period commencing November 4, 1966. No doubt this change is purely coincidental.

59 See Kirkland, *Recent Developments in Uninsured Motorists Coverage*, 1964 NEGLIGENCE L.F. 33.

60 Childs v. Allstate Ins. Co., 237 S.C. 455, 117 S.E.2d 867 (1961). See also 79 A.L.R.2d 1252, 1255 (1961).

61 70 Ill. App. 2d 357, 217 N.E.2d 814 (1966), cert. denied, 385 U.S. 1036 (1967). This policy contained an *optional*, not mandatory, arbitration provision; neither party demanded arbitration.

uninsured motorist coverage. The insurer contended that it was not liable because, *inter alia*, it had not given its written consent to prosecute to judgment. The court, however, was not impressed with this contention and entered judgment in favor of the insured for the full \$60,000. In the course of its opinion, the appellate court referred to an earlier Illinois case and quoted from that opinion as follows:

There was an implied promise on the part of the Insurance Company that it would not *unreasonably or arbitrarily* withhold its written consent. The company gave no reason for its refusal to allow the plaintiffs to obtain a judgment against the uninsured motorist. . . . Under these circumstances, the action of the company in arbitrarily withholding its written consent constitutes a violation of the implied provisions of the policy and consequently the exclusion clause is not a bar to this action.⁶² (Emphasis added.)

The court in *Andeen* concluded with this language:

Defendant insurance company was kept fully advised throughout the proceedings before us. It received written notice of the filing of the complaint and also specific written notice of the time for the hearing The company had every opportunity to defend the suit if it desired to do so or to demand arbitration The company did nothing. It did not ask for arbitration nor did it defend the suit against the uninsured motorist. It cannot take advantage of its own failure to act in order to avoid liability under the contract of insurance.⁶³

Such reasoning may also be applicable in a situation where a carrier unreasonably withholds its consent to a settlement.

IV. Conditions

A. Proof of Claim; Medical Reports

The endorsement provides that, "as soon as practicable," the insured or other person making claim furnish a written proof of claim containing full particulars of the nature and extent of injuries and treatment. Examinations or statements made under oath are required, as is submission to physical examinations as often as reasonably required by the company.

B. Notice of Legal Action

The insured or his representative must forward to the company copies of the summons and complaint immediately upon initiation of any suit against the alleged tortfeasor. This requirement is not excused by the company's actual knowledge of such litigation,⁶⁴ and a judgment obtained without satisfying this condition is ordinarily void.⁶⁵ However, in at least one instance, a carrier has

62 *Id.* at 363, 217 N.E.2d at 817, quoting from *Levy v. American Auto. Ins. Co.*, 31 Ill. App. 2d 157, 164, 175 N.E.2d 607, 611 (1961).

63 *Id.* at 366, 217 N.E.2d at 818.

64 *Creteau v. Phoenix Assur. Co.*, 202 Va. 641, 119 S.E.2d 336 (1961). See *Matthews v. Allstate Ins. Co.*, 194 F. Supp. 459 (E.D. Va. 1961).

65 See *Creteau v. Phoenix Assur. Co.*, 202 Va. 641, 119 S.E.2d 336 (1961).

been held to have waived this requirement when it requested medical reports and conducted a physical examination without objecting to the noncompliance.⁶⁶

C. Limits of Liability

Under the standard endorsement, the liability of the carrier is expressly limited to those amounts specified as minimum in the financial responsibility statute of the respective state. This total amount will be reduced by: (1) any payment made under the bodily injury coverage in the same accident; (2) any payment made under the medical payment clause; and (3) any amount paid or payable to the insured under the workmen's compensation or disability benefits law. The operation of this reduction, or set-off, provision may be illustrated by this example: Assume *A* is a passenger in *B*'s automobile which is covered up to \$10,000—\$20,000 limits when it is involved in an accident with an uninsured automobile owned and driven by *C*. Assume also that both *B* and *C* are negligent. *A* would have claims against both drivers under the single policy of *B*. His claim against *B* would arise under the bodily injury coverage, and his claim against *C* could be pursued under the uninsured motorist clause in an action against *B*'s insurer. In any event, though, his total recovery is limited to \$10,000.⁶⁷

The set-off regarding medical expense payments operates in the following manner: an insured who sustains total damages of \$3,500, of which \$1,000 represents medical bills, would recover \$1,000 under the medical pay coverage and \$2,500 under the uninsured motorist clause. On the other hand, there would be no set-off if the total damages exceed the policy limits applicable to such damages. Thus, if the insured sustains total damages of \$11,500, of which \$1,000 represents medical bills, the \$1,000 is recoverable under the medical payment coverage, and the full \$10,000 limit is recoverable under the uninsured motorist clause. The total recovery would therefore be \$11,000—the entire combined limits under both coverages of the policy.

The provision calling for reduction of the amount otherwise payable to the extent of any workmen's compensation benefits received by the insured has been held invalid in some states.⁶⁸ The theory applied by the courts of these states is that the premium was paid as consideration for the state-required coverage specified in the financial responsibility law, and the right of the insured to that coverage is contemplated to be over and above any benefits he may receive under the Workmen's Compensation Act. The validity of the provision has been upheld in other states.⁶⁹

A New York court has held that state disability benefits received by the insured are not to be deducted from his recovery under this provision.⁷⁰ That

66 *Merchants Mut. Ins. Co. v. Wildman*, 12 App. Div. 2d 664, 209 N.Y.S.2d 242 (1960).

67 This illustration is patterned after that which appears in Hume, *Uninsured Automobile Insurance Coverage*, 48 ILL. B.J. 176, 180 (1959).

68 *E.g.*, *Mason v. Allstate Ins. Co.*, 189 So. 2d 907 (Fla. 1966); *Peterson v. State Farm Mut. Auto. Ins. Co.*, 238 Ore. 106, 393 P.2d 651 (1964).

69 *E.g.*, *Jarrett v. Allstate Ins. Co.*, 209 Cal. App. 2d 804, 26 Cal. Rptr. 231 (1962); *Niekamp v. Allstate Ins. Co.*, 52 Ill. App. 2d 364, 202 N.E.2d 126 (1964).

70 *Daniciewicz v. Motor Vehicle Accident Indemnification Corp.*, 50 Misc. 2d 844, 271 N.Y.S.2d 735 (Sup. Ct. 1966).

court was impressed with the fact that the employee contributes toward his disability coverage, whereas no such contribution is made toward the workmen's compensation program.

D. Other Insurance

As of the 1963 revision, the standard uninsured motorist endorsement established two basic categories:

(1) with regard to bodily injury to the insured while occupying an automobile *not owned by a named insured*, then this insurance applies only as excess over any other similar insurance available to such insured occupant, and applies then only in the amount by which its *limits* exceed the total combined limits of all such other insurance [which usually means no application at all];

(2) in all other cases where the insured has other uninsured motorist coverage available to him [as where he owns two cars, each with this coverage effective, but is injured as a pedestrian or an occupant in an *uninsured* automobile] his two or more policies would prorate up to the higher of the applicable limits.⁷¹

This provision initially was given a literal, strict interpretation by the courts, often with predictably harsh results. An excellent example is the case of *Travelers Indemnity Company v. Wells*.⁷² A federal court there held that the insured passenger's own policy (\$30,000) was inapplicable even though the entire \$30,000 limits of his driver's policy had been exhausted in paying prior judgments obtained by the driver himself for his injuries and for the death of his son. This was a situation in which both policies had identical limits and, therefore, the second policy did not apply. Such situations, in view of results such as this, obviously induce races to the courthouse.⁷³

The *Wells* case has been expressly disapproved in subsequent cases, the first of which was *Bryant v. State Farm Mutual Automobile Insurance Company*.⁷⁴ In this case, the plaintiff was driving a truck owned by his father when he was struck and injured by an uninsured vehicle. After securing a judgment of \$85,000 against the uninsured motorist, he then sought to collect the limits under both his father's policy and his own policy (the limits were identical). The court held

71 In considering these categories, it should be noted that in most situations there will be no difference between the specific limits of one policy applicable to a given situation and a second such policy. The explanation for this is that most companies write their uninsured motorist coverages for the *minimum* limits required by the particular state financial responsibility law (\$10,000—\$20,000 in most states). This is not generally a legal necessity, however. In most, if not all, states the intention of the legislature was to establish *minimum* limits for this type of protection—not maximum limits. One Illinois decision, *Deterding v. State Farm Mut. Auto. Ins. Co.*, 78 Ill. App. 2d 29, 222 N.E.2d 523 (1966), held this to be the intent of the Illinois legislature. This case was followed the next year by the enactment of an amendment to the Insurance Code which expressly stated that "nothing in this Section shall be construed to prevent any insurer from extending coverage under terms and conditions more favorable to its insureds than is required hereunder." ILL. REV. STAT. ch. 73, § 755a(2) (1965), *as amended*, July 1, 1967.

72 316 F.2d 770 (4th Cir. 1963).

73 Such a "race" apparently was never staged in the *Wells* case, though, because all occupants of the car were represented by the same counsel.

74 205 Va. 897, 140 S.E.2d 817 (1965).

that the amount of the recovery under both policies was to be measured by the amount of the insured's judgment limited by the aggregate limits of coverage under *both* policies. The "other insurance" clause was held invalid by reason of the provisions of the Virginia uninsured motorist statute.

Shortly after the *Bryant* case was decided by the Virginia Supreme Court of Appeals, the federal district court was faced once again with a similar dispute. The court indicated that it would have allowed the plaintiff to recover the full amount of his judgment limited by the aggregate limits of both policies if the uninsured motorist provisions had been applicable to the case. In the course of its opinion, the court cited the *Bryant* case and accepted its holding.⁷⁵ Similarly, this "pyramiding" of coverages was approved in a 1966 Florida case, *Sellers v. United States Fidelity & Guaranty Company*.⁷⁶ The court stated that an insured under two or more policies "can proceed against any one or more of them, but in any event he shall not be entitled to recover from all of them more than the amount of his loss"⁷⁷

Consequently, on this question of "other insurance," it seems that the courts are now adopting a more realistic approach with regard to the problem of "other insurance." This change in attitude is premised primarily on two propositions: (a) the coverage afforded by the first policy, when exhausted, is not actually other "available" insurance and therefore the second policy is applicable; (b) the purpose of uninsured motorist coverage is to provide compensation for innocent victims of financially irresponsible motorists, and to hold otherwise would defeat that purpose.

E. Arbitration

The standard policy, as revised in January, 1963, provides as follows:

. . . [F]or the purpose of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

This arbitration clause is easily the most controversial provision in the entire endorsement. It has been estimated that it is definitely valid and enforceable in only twenty-three states⁷⁸ and the District of Columbia, probably void in seven states,⁷⁹ and in the remaining twenty states "it would be purely a guess."⁸⁰ Generally, the reason assigned for considering it void is that it would act to oust

⁷⁵ *Pulley v. Allstate Ins. Co.*, 242 F. Supp. 330 (E.D. Va. 1965).

⁷⁶ 185 So. 2d 689 (Fla. 1966).

⁷⁷ *Id.* at 692.

⁷⁸ Arizona, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, and Wyoming. For statutory and case citations, see Hume, *The Uninsured Motorist Coverage*, 12 FEDERATION OF INS. COUNSEL Q. 7, 9 (1962).

⁷⁹ *Id.* at 10. These states are Idaho, Nebraska, North Carolina, Oklahoma, South Carolina, Utah, and Virginia.

⁸⁰ *Id.*

the courts of jurisdiction to determine future disputes. In any event, the provision is not binding on minors and they cannot be required to arbitrate.⁸¹

When the arbitration clause first appeared in the endorsement, it was optional and could be invoked only if the insured so desired. Subsequently the clause was altered to make arbitration optional to either party and, more recently, to make it mandatory and the exclusive means of resolving the essential issues in the event of disagreement. It has been held by one court, however, that if neither party serves a demand for arbitration — the plaintiff suing for a declaratory judgment and the defendant making no motion to stay the action and no request for arbitration — and both parties move for summary judgment, arbitration is waived by the parties.⁸²

It may well be that an insurance carrier would be much better off without an arbitration clause in the policy because of the danger of double payment. The theory behind this statement is that in a court, where the insured files a complaint and the uninsured motorist files a counterclaim, a jury can find in favor of only one party. If the company is found liable to the uninsured motorist under its bodily injury liability coverage, it would not be liable to the insured. Moreover, it is conceivable that both litigants could be found negligent, in which case the company would be home free with purse intact.

Add an arbitration clause, though, and the result could be much different. Assume the uninsured motorist sues the insured, an action which must be defended by the carrier. If that suit collects dust due to a congested trial docket or from some other reason, the insured may well succeed in recovering an award against the carrier by arbitration before a judgment can be rendered. That award would not affect the uninsured motorist's court action since he was not a party to the arbitration. Thus, the latter individual might ultimately obtain a jury verdict against the insured. The carrier would then end up paying both parties and probably wondering what went wrong.⁸³

A source of considerable confusion and uncertainty has been the question of exactly which issues may be arbitrated. On the surface it seems a bit surprising that there exists any doubt in this regard, for the policy language appears quite clear and unambiguous: "determination as to *whether* the insured . . . is legally entitled to recover such damages, and if so the *amount* thereof . . . shall be made by . . . arbitration." (Emphasis added.) Thus, it would seem that two issues are arbitrable: liability and damages. Unfortunately, there seems to be disagreement among the various courts on this point — even among different courts within a given state. For example, the "majority rule" in New York apparently favors a narrow scope of arbitration. For most New York courts, this mode of resolution is *not* open to such questions as whether there was in fact an "uninsured automobile,"⁸⁴ or whether the plaintiff qualifies as an "in-

81 *Chernick v. Hartford Acc. & Indem. Co.*, 8 App. Div. 2d 264, 187 N.Y.S.2d 534 (1959), *aff'd*, 8 N.Y.2d 756, 168 N.E.2d 110, 201 N.Y.S.2d 774 (1960); *Benfante v. Commercial Ins. Co.*, 5 Misc. 2d 772, 162 N.Y.S.2d 715 (Sup. Ct. 1957).

82 *McCarthy v. Motor Vehicle Accident Indemnification Corp.*, 16 App. Div. 2d 35, 224 N.Y.S.2d 909 (1962), *aff'd*, 12 N.Y.2d 922, 188 N.E.2d 405, 238 N.Y.S.2d 101 (1963).

83 This theoretical, if not likely, possibility is posed by Hume, *supra* note 71, at 11.

84 *Rosenbaum v. American Sur. Co.*, 11 N.Y.2d 310, 183 N.E.2d 667, 229 N.Y.S.2d 375 (1962); *Motor Vehicle Accident Indemnification Corp. v. Linder*, 17 App. Div. 2d

sured,"⁸⁵ or whether a "hit-and-run" automobile was involved.⁸⁶ Such matters have been held to be arbitrable, however, in other cases decided within the same state.⁸⁷

Some other issues which are generally considered beyond the scope of arbitration in New York, and which therefore must be determined by declaratory judgment, are: whether timely notice was given,⁸⁸ whether the proceeding is barred by the statute of limitations,⁸⁹ whether a valid disclaimer was in fact made,⁹⁰ and whether a report was made to the proper officials.⁹¹ The narrow, "two-issue" interpretation is similarly applied in Connecticut,⁹² Florida,⁹³ Michigan⁹⁴ and Ohio.⁹⁵ The broader view seems to have been adopted in California⁹⁶ and Massachusetts.⁹⁷

Arbitration is initiated by either the insurer or the insured by serving a "Demand for Arbitration" on the opposite party and sending two copies thereof to the American Arbitration Association (A.A.A.). This demand briefly describes the claim and quotes the arbitration provision of the policy.⁹⁸ The party initiating the proceeding also advances a nonrefundable filing fee of \$50. Fees for second and subsequent hearings — which are quite rare — are \$25 for each party.⁹⁹

There has been some uncertainty manifested on the question of which statute of limitations applies in considering the timeliness of the arbitration demand. The insurance coverage arises out of contract, but a recovery depends upon proof of legal liability, which involves proof of negligence on the part of the uninsured motorist, proximate cause, and so forth. Application of the contracts limitations period would be most favorable to the insured, since it is at least several years longer than the torts limitations period in nearly all states.

610, 230 N.Y.S.2d 372 (1962); Application of Phoenix Assur. Co., 9 App. Div. 2d 998, 194 N.Y.S.2d 770 (1959); Motor Vehicle Accident Indemnification Corp. v. Kreskowski, 35 Misc. 2d 973, 231 N.Y.S.2d 592 (Sup. Ct. 1962); Mitkewicz v. Travelers Ins. Co., 22 Misc. 2d 637, 198 N.Y.S.2d 101 (Sup. Ct. 1960); *In re Allstate Ins. Co.*, 26 Misc. 2d 859, 207 N.Y.S.2d 645 (Sup. Ct. 1960).

⁸⁵ *McGuiness v. Motor Vehicle Accident Indemnification Corp.*, 32 Misc. 2d 949, 225 N.Y.S.2d 361 (Sup. Ct. 1962).

⁸⁶ *Motor Vehicle Accident Indemnification Corp. v. Comerchero*, 34 Misc. 2d 52, 227 N.Y.S.2d 285 (Sup. Ct. 1962); *In re Motor Vehicle Accident Indemnification Corp.*, 33 Misc. 2d 455, 227 N.Y.S.2d 471 (Sup. Ct. 1962); *In re Motor Vehicle Accident Indemnification Corp.*, 227 N.Y.S.2d 868 (Sup. Ct. 1961).

⁸⁷ *In re Zurich Ins. Co.*, 14 App. Div. 2d 669, 219 N.Y.S.2d 748 (Sup. Ct. 1961); *Royal Indem. Co. v. McMahon*, 10 App. Div. 2d 926, 200 N.Y.S.2d 950 (Sup. Ct. 1960).

⁸⁸ *In re Nationwide Mut. Ins. Co.*, 39 Misc. 2d 782, 241 N.Y.S.2d 589 (Sup. Ct. 1962); *In re Di Stefano*, 235 N.Y.S.2d 13 (1962).

⁸⁹ *In re Nationwide Mut. Ins. Co.*, 39 Misc. 2d 782, 241 N.Y.S.2d 589 (Sup. Ct. 1962).

⁹⁰ *Motor Vehicle Accident Indemnification Corp. v. Lucash*, 16 App. Div. 2d 975, 230 N.Y.S.2d 262 (Sup. Ct. 1962).

⁹¹ *In re Motor Vehicle Accident Indemnification Corp.*, 227 N.Y.S.2d 868 (Sup. Ct. 1961).

⁹² *Hartford Acc. & Indem. Co. v. Travelers Ins. Co.*, 25 Conn. Sup. 414, 206 A.2d 847 (1964).

⁹³ *American Fidelity Fire Ins. Co. v. Clark*, 174 So. 2d 106 (Fla. App. 1965); *Zeagler v. Commercial Union Ins. Co.*, 166 So. 2d 616 (Fla. App. 1964).

⁹⁴ *Western Cas. & Sur. Co. v. Strange*, 3 Mich. App. 733, 143 N.W.2d 572 (1966).

⁹⁵ *Murtaugh v. American States Ins. Co.*, 25 Ohio Op. 2d 106, 187 N.E.2d 518 (1963).

But see *McKinney v. Allstate Ins. Co.*, 6 Ohio App. 2d 136, 216 N.E.2d 887 (1966).

⁹⁶ *Jordan v. Pacific Auto Ins. Co.*, 232 Cal. App. 2d 127, 42 Cal. Rptr. 556 (1965).

⁹⁷ *Employers' Fire Ins. Co. v. Garney*, 348 Mass. 627, 205 N.E.2d 8 (1965).

⁹⁸ AMERICAN ARBITRATION ASS'N, ACCIDENT CLAIMS TRIBUNAL RULES § 7.

⁹⁹ *Id.* at § 37.

The principal argument advanced in favor of the shorter torts period is that any further delay will impair or destroy the company's subrogation rights against the uninsured motorist. This argument tends to overlook the fact that the company could prevent the statute from running on these subrogation rights merely by requesting the insured to file suit against the uninsured motorist prior to arbitration. He would be obligated to comply with such a request by reason of the co-operation clause of the policy. Ignoring this element of control available to the carrier, a second argument is that by allowing the period to lapse the insured has lost his claim against the uninsured motorist and thus is not "legally entitled to recover" from him; therefore, the policy coverage is not applicable. The technically correct answer would be that the *right* (legal entitlement) is still there; only the *remedy* is lost. Concededly, there is some truth to the counter-argument here that a right without a remedy is a little bit like a camera without film or a comb without teeth — it is of rather limited utility. However, in this instance the insured still has a remedy *against his insurer*. In any event, it now appears well established that it is the contracts statute of limitations that is to apply.¹⁰⁰

After the arbitration demand has been filed, the opposing party may file an answer in duplicate with the A.A.A. within seven days. If no answer is filed the claim will be taken as denied.¹⁰¹ The arbitrator (usually one, but some policies now call for three) is then appointed from a special panel consisting of attorneys who have been nominated by bar associations around the country or from other attorneys who are arbitrators. The arbitrator serves without pay.¹⁰² Either party may advise the A.A.A. of any reason why he believes the arbitrator appointed should not serve; following consideration of such complaint, the A.A.A. may appoint a substitute.

Five days' notice is given to the parties prior to hearings. Any party is entitled to be represented by counsel¹⁰³ and nearly every party is so represented. The hearings are informal but orderly. The complaining party ordinarily presents his evidence first, although this procedure may be reversed by the arbitrator. The burden of proof does not rest on one party more than the other; each party must attempt to convince the arbitrator.¹⁰⁴ Direct communication between the parties and the arbitrator, other than at the formal hearings, is prohibited.¹⁰⁵ Any award must be rendered by the arbitrator within thirty days after the hearings are closed.¹⁰⁶ If the parties happen to settle their differences during the arbitration, the arbitrator may, upon their request, set forth the terms of the agreed settlement in an award.¹⁰⁷

One writer has expounded the belief that "the very fact that arbitration is aimed at an 'award' rather than a 'verdict' indicates the unlikelihood of any

100 *La Marsh v. Maryland Cas. Co.*, 35 Misc. 2d 641, 231 N.Y.S.2d 121 (Sup. Ct. 1962); *In re Travelers Indem. Co.*, 226 N.Y.S.2d 16 (Sup. Ct. 1962); *Cecarilli v. Travelers Indem. Co.*, 204 N.Y.S.2d 550 (Sup. Ct. 1960).

101 AMERICAN ARBITRATION ASS'N, ACCIDENT CLAIMS TRIBUNAL RULES § 7.

102 *Id.* at § 11.

103 *Id.* at § 15.

104 *Id.*

105 *Id.* at § 31.

106 *Id.* at § 32.

107 *Id.* at § 35.

rejection of the claim in its entirety."¹⁰⁸ It does seem as though the word "award" connotes an affirmative. However, this is little more than a matter of semantics, inasmuch as one dictionary definition of the word is "a judgment or final decision; . . . the decision of arbitrators in a case submitted to them. . . ."¹⁰⁹

Experience has shown that the vast majority of the arbitration proceedings have resulted in decisions in favor of the insured.¹¹⁰ With respect to the amount of those awards, a 1960 poll of the leading insurance companies revealed that over 90 percent felt the amounts were roughly equivalent to verdicts customarily returned by juries.¹¹¹

The standard arbitration clause recites that "such person and the company each agree to consider itself bound and to *be bound* by any award" In some of the newer policies, requiring three arbitrators, it is provided that the written decision of any two of them shall be binding. The finality of the awards is evident from a reading of some of the reported cases. In one, the court refused to disturb an award granting the exact amount of the special damages incurred (*i.e.*, funeral, burial and incidental expenses), while allowing nothing for the wrongful death.¹¹² In another, the court held that an award may not be impeached for any error of law or fact and affirmed an award of \$2,000 for the death of a 42-year-old insured who had been in the peak of health, earned \$13,000 a year and contributed to the support of a sister and an invalid mother with whom he lived.¹¹³

A tremendous upward trend in the use of the arbitration clause of the endorsement is reflected in the figures below. These figures represent the number of cases filed on a national basis through the American Arbitration Association:

| | |
|------|-------|
| 1959 | 496 |
| 1960 | 681 |
| 1961 | 1,727 |
| 1962 | 2,711 |
| 1963 | 3,910 |
| 1964 | 4,823 |
| 1965 | 6,343 |

The number of arbitration claims filed during the first two months of 1966 was 20 percent greater than the number filed during the same period in 1965.¹¹⁴

F. Trust Agreement

The endorsement also contains a trust agreement between the insured and the carrier, which comes into effect upon payment by the latter to any person under the endorsement. By the trust agreement, co-operation is promised by the insured in any suit filed in the insured's name. The agreement states that "in the

¹⁰⁸ Hapner, *A Dozen Problems in Arbitration of Uninsured Motorist Claims Under American Arbitration Association Rules*, 34 INS. COUNSEL J. 92, 96 (1967).

¹⁰⁹ WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY (1965).

¹¹⁰ See King, *Arbitration of Automobile Accident Claims*, 14 U. FLA. L.REV. 328 (1962).

¹¹¹ Hume, *The Uninsured Motorist Coverage*, 12 FEDERATION OF INS. COUNSEL Q. 7, 10-11 (1962).

¹¹² *Wainwright v. Globe Indem. Co.*, 14 App. Div. 2d 971, 221 N.Y.S.2d 409 (1961).

¹¹³ *Phillips v. American Cas. Co.*, 9 N.Y.2d 873, 175 N.E.2d 825, 216 N.Y.S.2d 694 (1961).

¹¹⁴ Christensen, *Uninsured Motorist Arbitration*, 1966 INSURANCE ADJUSTER 41-42.

event of recovery, the company shall be reimbursed out of such recovery for expenses, costs and attorneys' fees incurred by it in connection therewith." This subrogation action may be brought not only against the uninsured or other vehicle operator, but against "any person or organization." This includes owners and operators of taverns involved in a dramshop suit.¹¹⁵

V. Conclusion

Ten years have now elapsed since New Hampshire initiated the mandatory use of this new breed of insurance known as "uninsured motorist coverage." Concededly, the endorsement is no panacea. It is still the subject of much controversy, and perhaps even more bewilderment and confusion. The path to a just award under this coverage is lined with pitfalls, ruts and hazardous curves in the form of conditions, exclusions and restrictive definitions. Such is true, however, of the path to recovery under most types of insurance. Whatever the criticism, this experiment is registering a high degree of success in achieving its objective—to alleviate many of the woes heretofore borne by the innocent victims of financially irresponsible motorists. It seems to be here to stay.

115 *Remsen v. Midway Liquors*, 30 Ill. App. 2d 132, 174 N.E.2d 7 (1961).