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ARBITRATION OF UNINSURED MOTORIST ENDORSEMENT CLAIMS

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INTRODUCTION

In an atomic world where the very threat of the "bomb" is blamed for practically everything from early marriages to hives, the thought of injuries from automobile accidents perhaps seems insignificant. Nevertheless, the menace of death or personal injury from the "old-fashioned" automobile is still a threat to our daily existence. Until we have devised a method whereby motor vehicle accidents can themselves be eliminated, the temporary expediency of paying for the damages involved will remain paramount.

Compensation by insurance is, of course, the chief method by which we have attempted to solve the problem of the traffic accident victim. For almost 40 years, attempts have been made in one form or another by every state except Alaska to legislate some type of compulsory insurance or financial responsibility law.[1] These efforts, however, have not been adequate to protect against the driver who for some reason or another is classified as an uninsured motorist.

Several solutions have been devised to protect against the uninsured motorist. All of them have been aimed at supplementing either the financial responsibility law or compulsory insurance legislation enacted by the various states. Three states[2] have created what may be termed an unsatisfied judgment plan or fund from which innocent victims of automobile accidents caused by uninsured motorists can collect. The main drawback to these fund plans is that the claim must first be reduced to judgment against the offender in the normal course

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1 See Ward, "New York's Motor Vehicle Accident Indemnification Corporation: Past, Present & Future," 8 Buffalo L. Rev. 215, 218 n.8 (1959).

2 North Dakota, New Jersey and Maryland. These plans are described in Ward, "The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity," 9 Buffalo L. Rev. 283, 285-288 (1959-1960).

of litigation. Other states, by legislation[3] or administrative rulings,[4] require insurance companies to include an uninsured motorist endorsement in the standard provisions of automobile liability policies. In addition, the insurance industry itself has voluntarily written this standard form uninsured motorist endorsement in its policies on a nationwide basis.[5] This endorsement contains provisions for arbitration in case of certain disputes. This article will deal with this type of protection offered by insurance companies to protect against uninsured motorists and in particular with the arbitration feature thereunder.

Scope and Coverage

A majority of automobile insurance policies now afford coverage designed to protect an insured against bodily injury losses caused by financially irresponsible motorists. The standard type of uninsured motorist endorsement is one in which the insurer promises:

> [T]o pay all sums which the insured shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided determination as to whether the insured is legally entitled to recover such damages, and if so, the amount thereof, shall be made by agreement between the insured and the company or, if they fail to agree, by arbitration.[6]

The scope of this provision for arbitration, as may be expected in any new type of policy provision, was the subject of several court decisions. Insurance companies held the view that the arbitrator's jurisdiction was limited to two issues:

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[3] *E.g.*, N.H. Rev. Stat. Ann. § 268.15 (1957); Va. Code Ann. §§ 38.1-381 (Supp. 1962); Cal. Ins. Code § 11580.2; N.Y. Ins. Law. Art. 17-A (Supp. 1963); Fla. Stat. § 627.0841 (1961); S.C. Code § 46-750.23 (Supp. 1960); Louisiana, Act No. 187, Approved July 4, 1962, effective Oct. 1, 1962.

[4] Oregon, ORS 736.317 directs that all automobile liability policies issued or delivered in Oregon shall provide uninsured motorist coverage, "under provisions approved by the State Insurance Commissioner." Pursuant to this statutory directive, the Insurance Commissioner promulgated Ruling No. 39 on Sept. 28, 1959. This ruling refers to the statute and provides that every policy issued, delivered, rewritten or renewed on or after Jan. 1, 1960, shall contain an Uninsured Motorist Clause.

[5] This first appeared in 1956 when the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau drafted and promulgated such insurance as an endorsement to their standard family automobile policy. For a discussion of these, see Plummer, "Handling Claims Under the Uninsured Motorist Coverage," 1957 Ins. L.J. 494. (This will hereinafter be referred to as the standard endorsement.)

[6] Standard Endorsement, Insuring Agreement I. For further discussion of policy terms, see Comment, "Uninsured Motorist Insurance: California's Latest Answer to the Problem of the Financially Irresponsible Motorist," 48 Calif. L. Rev. 516, 519 (1960); Comment, "Uninsured Motorist Coverage—A Survey," 1 Wash. U.L.Q. 134, 136 (1962); Note, "Uninsured Motorist Coverage in Florida," 14 U. Fla. L. Rev. 455, 458 (1962).

(1) The legal liability, *i.e.*, negligence, if any, of the uninsured driver owing to the insured; and

(2) the amount of the insured's damages.

Until recently, the scope of the arbitrator's authority under the provisions of this type of endorsement was not clear. Prior to 1962, the various intermediate appellate courts in New York were in disagreement as to whether the above-mentioned arbitration clause was limited to the issue of negligence and the resulting question of damages.[7] In *Rosenbaum v. American Sur. Co. of New York*,[8] the Court of Appeals finally determined the issue by interpreting the standard endorsement as a promise by the insurer to pay damages for which the uninsured motorist should be held liable. However, the arbitration provision was limited to only two issues:

(1) The fault of the uninsured motorist, and

(2) the damages incurred if the fault should be established.

This case held specifically that there was no agreement to arbitrate questions of coverage, such as whether the vehicle causing the accident was in fact uninsured. Questions of this type were held to be preliminary issues that should more properly be decided by a court. The uninsured status of the automobile was likened to a condition precedent, the existence of which, when in dispute, was a matter solely for judicial determination.[9]

Applicable Statute of Limitations—Tort or Contract

In writing uninsured motorist coverage, the insurance companies did not place any time limitations within which the insured had to file his claim. Accordingly, the normal statute of limitations applicable in each state would prevail. The question arises, however, which statute applies to an insured's claim against his insurer under the uninsured motorist endorsement.[10]

In most states the statute of limitations for actions based on written contracts is several years longer than that applied to negligence suits. In Ohio, for instance, the statute of limitations in contract actions is 15 years,[11] and the statute of limitations for negligence actions is 2 years.[12]

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7 *Compare* Zurich Ins. Co. v. Camera, 14 App. Div. 2d 669, 219 N.Y.S.2d 748 (1961), *with* Phoenix Assur. Co. v. Digamus, 9 App. Div. 2d 998, 194 N.Y.S.2d 770 (1961).

8 11 N.Y. 2d 310, 183 N.E.2d 677, 229 N.Y.S.2d 375 (1962).

9 As no other state has ruled on this question, a decision from the highest court of New York is likely to be strongly relied on throughout the country.

10 For other discussions of the statute of limitations problems, see Comment, 48 Calif. L. Rev. 516, 531 (1960); Note, 14 U. Fla. L. Rev. 455, 471 (1962).

11 Ohio Rev. Code Ann., § 2305.6 (Baldwin Supp. 1958).

12 Ohio Rev. Code Ann. § 2305.10 (Baldwin Supp. 1958).

The insurance companies have tried to sustain the position that the tort statute of limitations applies. This argument is based on the dual rationale that:

(1) The insured's claim for personal injuries is founded in negligence and if the insured allows this statute to run, he no longer has a valid claim under the uninsured motorist endorsement which allows recovery only for the sums which the insured is legally entitled to recover;[13] and

(2) the lapse of the shorter negligence statute of limitations by the insured against the uninsured motorist, would preclude the insurance company from any subrogation rights it has under the policy.[14]

The intent of uninsured motorist endorsements, namely to afford protection to innocent victims of uninsured motorists should help resolve this issue in favor of the longer statute of limitations. In fact, the few pertinent decisions hold that the longer contract statute of limitations applies to uninsured motorist claims against the insurer.[15]

ENFORCEABILITY OF THE ARBITRATION CLAUSE

Whether the arbitration feature of the standard form endorsement is capable of specific enforcement will probably be dependent upon the law of the state where the policy is written. This means that these agreements to arbitrate the issues of liability and damages are compulsory only in those states which by statute or judicial fiat have departed from the common law view[16] of hostility toward contracts to arbitrate future controversies.

At present, twenty states have passed legislation upholding the enforceability of contractual agreements to arbitrate future disputes.[17]

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[13] This argument was rejected in Ceccarelli v. Travelers Indem. Co., 204 N.Y.S.2d 550 (Sup. Ct. 1960).

[14] See Security Ins. Co. v. Rogers, N.Y.L.J., Oct. 4, 1960, p. 14, col. 2.

[15] In addition to the *Ceccarelli* case, *supra* note 13, see LaMarsh v. Maryland Cas. Co., 35 Misc. 2d 641, 231 N.Y.S.2d 121 (Sup. Ct. 1962); Travelers Indem. Co. v. DeBose, 226 N.Y.S.2d 16 (Sup. Ct. 1962).

[16] For a complete list of these states, see McLaughlin, "Arbitration Under Uninsured Motorist Insurance," 1962 Ins. L.J. 353.

[17] Ariz. Rev. Stat. Ann. §§ 12-1501 to 1515 (1962); Cal. Civ. Proc. Code § 1280 (1955); Conn. Gen. Stat. Rev. § 52-408 (1958); Fla. Stat. § 47.11 (1961); Hawaii Rev. Laws 1955, Chapter 188, §§ 188-1 to -15; Ill. Ann. Stats., Chapter 10, §§ 101-123 (Smith-Hurd, Supp. 1961); La. Rev. Stat. Ann. § 9:4201 (1950); Mass. Ann. Laws ch. 251, § 1 (Supp. 1961); Mich. Stat. Ann. § 27.2483 (1943); Minn. Stat. Ann. § 572.08 Supp. 1960; N.H. Rev. Stat. Ann. § 542.1 (1955); N.J. Rev. Stat. § 2A:24-1 (Supp. 1961); N.Y. Practice Manual § 1448 (Clevenger 1961); Ohio Rev. Code Ann. § 2711.01 (Page Supp. 1961); Ore. Rev. Stat. § 33.210 (1961); Pa. Stat. Ann. tit. 5, § 161 (1930); R.I. Gen. Laws Ann. § 28-9-1 (1956); Wash. Rev. Code Ann. § 704.010 (1961); Wis. Stat. Ann. § 298.01 (1958); Wyo. Stat. Ann. § 1-1048.3 (Supp. 1961).

In addition, there are cases from Colorado[18] and Nevada[19] which have judicially declared that agreements to arbitrate future disputes are valid and enforceable without the aid of any enabling statutes. Further, the District of Columbia, which has available to it the Federal Arbitration Statute,[20] may also be said to be a jurisdiction in which future arbitration agreements will be enforced.

Although the modern trend is clearly in favor of making agreements to arbitrate future disputes enforceable, the old tradition of declaring said agreements to be against the public policy of a jurisdiction still persists. Clear evidence of this old hostility toward arbitration has been manifested by Virginia[21] and South Carolina[22] where, despite statutory enactments requiring uninsured motorist coverage, arbitration of future disputes thereunder is specifically prohibited. Another state, Oklahoma,[23] has judicially chosen to pursue the common law, which permits either party to revoke an arbitration agreement at any time prior to the rendition of an award. The remaining states will have to determine at the appropriate time whether they will adhere to the old doctrine or adopt the modern view previously mentioned. However, it should be noted that the lack of enforceability in a particular state of the agreement to arbitrate should not prevent voluntary submission[24] to arbitration of disputes concerning legal liability or damages arising under the standard form uninsured motorist endorsement.

Indeed, by writing this coverage the insurance companies have indicated their willingness to arbitrate. The insured, even in common law jurisdictions, would seem to have the option of having his claim adjudicated by an arbitrator or by the court. Once both parties have participated in a hearing which culminates in an award, all states will, in all probability, enforce them.

ADVANTAGES OF ARBITRATION

The standard form uninsured motorist endorsement is unique in two ways. First, it has provided a remedy to an innocent victim of an irresponsible motorist, where none existed before. Prior to this coverage, the injured party was left not only with his pain and suffering

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18 Ezell v. Rocky Mountain Bean & Elevator Co., 76 Colo. 409, 232 Pac. 680 (1925).

19 United Ass'n of Journeymen Union v. Stine, 76 Nev. 189, 351 P. 2d 965 (1960).

20 9 U.S.C. §§ 1-14 (1954).

21 Va. Code Ann. § 38.1-381(g) (Supp. 1958).

22 S.C. Code § 46-750.23-6 (Supp. 1960).

23 Boughton v. Farmers Ins. Exch., 354 P.2d 1085 (Okla. 1960), 79 A.L.R.2d 1245 (1961).

24 Submission agreements in effect provide that the *existing* controversy between the insured and the insurer shall be submitted to arbitration. Such agreements are irrevocable in almost all states.

but, in addition, with practically no way to recover any monetary damages. Secondly, a method has been established whereby he can collect for his injuries, through procedures which are speedy and economical.

To date, most writers in the field have lauded the arbitral forum only as a substitute for the clogged calendars that exist in most of our courts throughout the country in the trial of a negligence suit.[25] This writer feels, however, that many features of arbitration in settling uninsured motorist disputes have been overlooked. The two parties to an uninsured motorist dispute are in and of themselves different from those in the usual negligence action. A negligence suit normally pits an injured plaintiff against an alleged tort-feasing defendant, where both of the real parties in interest are present and able to defend themselves. The typical uninsured motorist controversy involves only the injured plaintiff and his own automobile insurance carrier. In most instances, the true tortfeasor himself is not present at the hearing and oftentimes cannot even be found. Can it be said that a jury would be better able to cope with questions of law and fact concerning liability and damages of the uninsured motorist? In such circumstances, it is submitted that not only would this noble group of 12 persons be ill-equipped to render a true judgment, but in fact might only unduly complicate the presentation of the case due to a possible prior predisposition against a clearly established insurance company defendant.

Perhaps many members of the plaintiff's negligence bar in fact prefer a jury for this very reason. However, if we are to evolve a system of law by which the best possible justice prevails, there must be an inherent change in the old negligence tradition of "let the insurance company pay, they can well afford it." Assuming, *arguendo*, that we have overcome the argument against depriving a person of his right to trial by jury, what then would prevent submitting these uninsured motorist disputes to a court without a jury? Surely, the well-trained judge, calling to the fore his vast experience of liability and damages, is best suited to decide such disputes.

The only answer to this stems from a belief among jurists and lawyers alike, who themselves feel that uninsured motorist disputes—with their usual maximum liability provisions, not exceeding $10,000 per person,[26]—can be quite capably handled by experienced members of the bar on an *ad hoc* basis. Further proof of the contention that well-trained lawyers are perfectly capable of deciding such questions

25 See, *e.g.* King, "Arbitration of Automobile Accident Claims," 14 U. Fla. L. Rev. 328 (1962).

26 The usual uninsured motorist endorsement has a limit of liability of $10,000 per person and $20,000 for each accident.

may be evidenced from the very favorable results obtained under the compulsory arbitration system installed in Pennsylvania,[27] as well as the arbitration of small claims in the New York courts.[28]

Others have argued that a member of the bench should not be burdened with the relatively simple questions that are involved under the uninsured motorist endorsement.

To Whom is the Endorsement More Beneficial?

Many attorneys believe that the arbitration feature of the endorsement is more beneficial to the insurance companies than to the general public at large. The facts refute this argument.

When writing this new type of coverage, insurers could have provided for a sliding scale of recovery similar to workmen's compensation type procedures, whereby the injured party recovers a certain amount which is attributable to the injury involved. At least one insurance company has so provided.[29] Surely this method can be said to be more advantageous to the insurer.

By including arbitration as the method of resolving unsettled questions, the insurance companies have, in effect, created unknown problems for themselves. For instance, the adjuster, when faced with a claim by the insured under the uninsured motorist endorsement, has a problem which he has heretofore never had to meet.[30] He is not able to sit back and apply his normal experience, thus getting the lowest possible settlement for his employer because the party seeking monetary damages is himself a client paying insurance premiums to the firm. He cannot use the standard attitude of offering a low sum of money to the insured on the theory that "a bird in the hand is worth two in the bush."[31]

In the normal negligence claim, the plaintiff's attorney knows full well that a $1000 settlement today is better than a possible $1300 judgment returned some three years after the accident from a court. Now when the settlement offered is not satisfactory to the claimant's attorney, he merely files his demand for arbitration and the

[27] For discussion of the Pennsylvania system, see Rosenberg & Schubin, "Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania," 74 Harv. L. Rev. 448 (1961) and King, *op. cit. supra* note 25, at 331.

[28] In New York, small claims up to $300.00 are usually heard by members of that State's Bar. These attorneys serve as arbitrators without compensation.

[29] State Farm Mutual Automobile Insurance Company.

[30] For ethical problems facing the adjuster, see, Comment, 48 Calif. L. Rev. 516, 536 (1960).

[31] This attitude undoubtedly developed as a result of crowded court calendars inasmuch as the adjuster knows full well the average negligence suit takes years to get to trial.

threat of the impending hearings either forces more advantageous settlement or else the arbitration is held without need for further delay.

We have already seen how the courts' interpretation of the applicable contract statute of limitations works to the detriment of the insurance companies under the loss of subrogation rights.[32] True, it can be said that the insurance companies have devised a procedure whereby there will be a smaller backlog of their own pending files inasmuch as arbitration makes possible the quick disposition of the case, thereby lessening the insurer's costs which are admittedly high when their files are kept open.[33] But does this mean that the insured suffers? Clearly, the records of the American Arbitration Association would indicate to the contrary.[34] Service of the demand for arbitration in most instances causes the insurance companies involved to effectuate quick settlements with their insureds at amounts higher than previously offered.

Of those cases which are actually heard by arbitrators, the vast majority result in awards in favor of the insured.[35] It is this writer's opinion, therefore, that the provision for arbitration of disputes concerning liability and damages under the uninsured motorists endorsement is extremely advantageous to the injured insured claimant and is of substantially greater value to him than it is to the insurance company.[36]

ARBITRATION UNDER AMERICAN ARBITRATION ASSOCIATION RULES

Now let us look at the arbitration procedures themselves and see how they work. The standard form uninsured motorist endorsement contains a provision for arbitration which reads as follows:

> Arbitration. If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of the amount of payment which may be owing under this endorsement, then, upon written demand of either, the matter or matters upon which such person and the company do not agree shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Such person and the company each agree to

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32 See *supra* note 15.

33 See King, *op. cit supra* note 25, at 348-349.

34 In 1962, 2,711 uninsured motorist arbitrations were filed with the American Arbitration Association.

35 This clearly indicates a boon to policyholders since most cases are undoubtedly settled by negotiation between the insured and his insurer.

36 See King, *op. cit. supra* note 25, at 349.

consider itself bound and to be bound by any award made by the arbitrators pursuant to this endorsement.[37]

The American Arbitration Association is a nationally recognized and well-known non-profit organization dedicated to the furtherance of the knowledge and use of arbitration. This organization, with regional offices in leading cities[38] throughout the country,[39] maintains panels of arbitrators who are experts in their respective fields and are available to hear disputes anywhere in the continental United States.

In arranging for arbitration of uninsured motorists disputes, the insurance industry has agreed with the American Arbitration Association to establish procedures whereby the injured policyholder may have his disputes adjudicated quickly and with negligible expense. To finance this program, and to maintain the arbitration machinery, an arrangement is in effect by which the insurance companies subscribe to an annual fund so that their policyholders can obtain arbitration through the American Arbitration Association facilities at nominal cost.

Under the current agreement, insurance companies participating in this plan are assessed on the basis of their total automobile bodily injury liability premiums written in the United States, with certain exclusions.[40] Policyholders of the participating companies are permitted to use the American Arbitration Association facilities at rates considerably lower than the Association's regular Commercial Arbitration Rules. The claimant merely advances a $50 filing fee[41] for initiating the arbitration, and the determination as to whether this sum is to be reimbursed rests with the arbitrator.[42]

Not all insurance companies, however, are participating in this Special Accident Claims Tribunal Budget, which permits access to the Accident Claims Tribunal Rules. Some insurers, although providing for arbitration through the facilities of the American Arbitration

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37 Standard Endorsement, Condition 6.

38 In Ohio, for instance, the American Arbitration Association has regional offices in Cincinnati and Cleveland.

39 Other American Arbitration Association regional offices are located in Atlanta, Boston, Charlotte, Chicago, Dallas, Denver, Detroit, Hartford, Los Angeles, New York, Philadelphia, Pittsburgh, San Francisco, Seattle, Syracuse, and Washington, D.C. The National Headquarters is at 477 Madison Ave., New York 22, N.Y.

40 The cost per company for membership in the Special Accident Claims Tribunal Budget is based on yearly Automobile Bodily Injury premiums and Family Protection coverage written in the continental U.S., excluding Alaska, Arkansas, Hawaii, Kansas, Maryland, New Jersey, New York, North Carolina, Oklahoma, South Carolina, Virginia and Puerto Rico.

41 American Arbitration Association, Accident Claims Tribunal Rules, Rule VIII, § 37 (1961).

42 *Ibid.*

Association, have felt that the infrequency of arbitrations involved does not merit their contributing to this fund.

When a policyholder is insured with a non-participating company, the arbitration facilities are then charged at the commercial rate, pursuant to the Commercial Arbitration Rules.[43]

The American Arbitration Association, in turn, has established a special panel of arbitrators with a membership consisting entirely of attorneys at law, nominated by local bar associations or fellow attorneys who have previously served as arbitrators for the Association. The very nature of the uninsured motorist dispute and the requirement that there must be a legal determination of liability seemed definitely to preclude the use of laymen as arbitrators.[44]

In addition, special requirements of procedure known as the Accident Claims Tribunal Rules[45] were prepared to facilitate expeditious, efficient tribunal services.

Commencing Arbitration

Initiating the arbitration is a relatively simple task. When a policyholder and his insurer disagree over the amount of a claim made by the former, and it becomes apparent that settlement negotiations have been unfruitful, claimant should notify the insurer of his intention to seek arbitration.

The arbitration is commenced by service of a demand for arbitration upon the insurance company, which states in essence the nature of the claim and the amount of relief sought.[46] Due to the widespread use of arbitration in uninsured motorist disputes, the American Arbitration Association has printed forms which are available for distribution upon request.[47]

The demand for arbitration, as it is called, should quote the applicable arbitration provision of the endorsement and indicate the monetary amount requested by the claimant. Four copies of the demand form should be filled out, two being mailed to the nearest American Arbitration Association regional office available to the claimant, one to the other party, which is usually an insurance com-

[43] American Arbitration Association, Commercial Arbitration Rules, Rule IX, § 47 (1954).

[44] In many commercial arbitrations conducted by the American Arbitration Association, businessmen who are experts in the area of dispute, are utilized as arbitrators.

[45] American Arbitration Association, Accident Claims Tribunal Rules, (1961).

[46] American Arbitration Association, Accident Claims Tribunal Rules, Rule III, § 7 (1961).

[47] Copies of the rules are obtainable by request to any American Arbitration Association regional office.

pany,[48] and the fourth retained by the claimant for his own records.

To prevent delay in the processing of the case, two copies of the insurance policy should be included with the demand forms sent to the American Arbitration Association. Further, the demand or notice of intention to arbitrate need not be personally served upon the respondent. The Rules of the American Arbitration Association permit the mailing of these papers to be sufficient notice of the impending arbitration.[49]

Once the demand has been properly filed with the American Arbitration Association and the other party to the dispute, one of several things may occur.

Settlement

A settlement may be effectuated between the parties. This is perhaps the ideal situation and no further discussion is necessary except to caution claimant's attorneys that they may wish to take into consideration in their settlement negotiations the fact that the $50 filing fee, under the Accident Claims Tribunal Rules, is non-refundable.[50]

Lack of Jurisdiction

A respondent may contest the jurisdiction of the arbitrator on the ground that arbitration cannot be made mandatory in his state due to the lack of a modern arbitration statute enforcing the arbitration feature of the endorsement.[51] In such cases, the arbitrator may not proceed without mutual agreement of the parties, which can only be obtained by a written submission agreement.[52] This situation will occur only when an insurer files a demand for arbitration and the insured prefers to have the claim litigated in a court. This can occur only in those states previously mentioned which do not make enforceable future agreements to arbitrate. It is not applicable when the insured initiates the matter because the insurance company has clearly shown its intention to arbitrate by writing this feature into the endorsement. To date, there has never been a case wherein an insurance company has tried to renege or refute arbitration in states without modern arbitration laws.

[48] Under the Standard Endorsement, either the insurer or the insured may commence the arbitration.

[49] American Arbitration Association, Accident Claims Tribunal Rules, Rule III, § 7 (1961).

[50] American Arbitration Association, Accident Claims Tribunal Rules, Rule VIII, § 37 (1961).

[51] See *supra* note 16.

[52] Provision for submissions may be found in American Arbitration Association, Accident Claims Tribunal Rules, Rule III, § 9 (1961). The Association has submission forms which are also available upon request.

Conditions Precedent

The insurer, when respondent, may object on the grounds that certain conditions precedent to arbitration may not yet have been complied with. The single delaying feature of arbitration of uninsured motorist disputes lies in this area. Very often a claimant's attorney, in his haste to have the dispute arbitrated, will overlook certain policy provisions which should be completed prior to the arbitration. The most common of these conditions precedent are:

(1) Thê insured shall give to the company written proof of claim, under oath if required, which includes particulars on the nature and extent of the injuries;[53] and

(2) the insured shall submit to examinations under oath, and physical examinations by physicians selected by the company.[54]

There have been few court cases interpreting the right of the insured to proceed to arbitration before complying with these conditions precedent, but the few cases in this area seem to hold that the insurance companies have a right to obtain these prior examinations before the arbitrator may determine legal liability and damages.[55]

Exceptions to this rule are, of course, permissible when it can be shown that the company, by some conduct, has waived its right to enforce these conditions precedent. Such waiver has been shown by failure of the company to request these examinations within a reasonable time prior to arbitration.[56]

Another related issue is the key question of whether or not the particular vehicle causing the accident was in fact uninsured. Since the endorsement by its terms is payable only where the policyholder is injured by an uninsured motorist, the uninsured status of the vehicle involved must be determined within the meaning of the policy.

When the insured claimant and the insurance company are unable to agree on whether or not a particular vehicle is uninsured, the question must be pre-determined by a court of competent jurisdiction rather than by the arbitrator.[57] The endorsement applies only if the insured collides with an uninsured automobile. The definition of an

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[53] Standard Endorsement, Condition 2.

[54] *Ibid.*

[55] Motor Vehicle Accident Indemnification Corp. (MVAIC) v. DiCeglio, 214 N.Y.S.2d 600 (Sup. Ct. 1961).

[56] See Aksen, "Uninsured Motorist Coverage: A Guide to MVAIC and Arbitration," 15 Arb. J. (n.s.) 166, 182 (1960). Much of the material on arbitration procedures is taken from the author's earlier article. Despite the fact that the latter publication was written solely for New York State, the arbitration procedures are applicable countrywide.

[57] See the *Rosenbaum* case, *supra* note 8.

uninsured automobile is one on which there is no bodily injury bond or insurance policy applicable at the time of the accident.[58]

Under normal principles of insurance law, it would seem that the claimant has the burden of proving that the other vehicle was uninsured. This stems from the requirement that a person making claim against an insurance company must plead and prove sufficient facts to bring himself within the risk and coverage of the policy provisions.

However, the amount of proof needed to show that a driver is in fact uninsured need not be overwhelming. An uncontradicted motor vehicle report by an automobile owner stating that his vehicle was driven by an operator without his permission has been held sufficient.[59] Further, where the tortfeasor is admittedly uninsured and is available, an affidavit from him to the effect that he had no insurance should also be sufficient.

A difficulty can arise where the third party uninsured motorist, who failed to make an accident report or statement to the State Department of Motor Vehicles cannot be found. It is submitted that when such occurs, the judiciary should pay heed to the intent of the uninsured motorist endorsements to protect citizens against financially irresponsible motorists and allow the burden of proof to be shifted to the insurance company respondent to show that the car was in fact insured. If the insurer fails in such proof, the matter should then be allowed to go to arbitration.

THE HIT-AND-RUN AUTO

Also included in the definition of an uninsured vehicle is the "hit-and-run" automobile. The term hit-and-run is defined in the standard form endorsement[60] as one that causes bodily injury by physical contact with the claimant or the automobile which he was occupying at the time of the accident providing the following conditions exist:

(1) There cannot be ascertained the identity of either the operator or the owner of such "hit-and-run" automobile;

(2) the insured or someone on his behalf shall have reported the accident within 24 hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for

[58] Standard Endorsement, Definitions, (c).

[59] Lowe v. Ocean Acc. Guarantee Corp., Ltd., 21 Misc. 2d 1042, 193 N.Y.S.2d 361 (Sup. Ct. 1959).

[60] Standard Endorsement, Definitions (d).

damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and
(3) at the company's request, the insured or his legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident.[61]

In order to prevent fraudulent claims, the above limitations have been placed upon an accident with the so-called hit-and-run driver. It is not necessary for the claimant to prove that the hit-and-run vehicle was uninsured, as such proof would hardly be obtainable. Claims presented against a hit-and-run automobile do not present very many problems except that which requires proof of physical contact.[62] In the usual fact pattern, all that is required is that both cars or a car and a person come together, causing injury to the policyholder.

An unresolved difficulty in this area is the situation where a hit-and-run car, for instance, collides with a second car, forcing the latter insured car to come into contact with the policy-holder.[63] In this situation there is obviously no contact between the insured car and the hit-and-run vehicle which was the sole and proximate cause of the accident. Although there would be no strict compliance with the policy provisions here, the courts, when asked, should apply the traditional doctrines of proximate cause so as to bring the insured within the terms of the policy provisions.[64] Certainly where a legitimate claim is made out and factual causation is proved, the policy exclusion of physical contact should fail. Arbitrators, when allowed to rule on this question, have applied the doctrine of proximate cause and granted the appropriate recovery to the insured for his injuries.

MATTERS FOR COURT DETERMINATION

Motion to Compel Arbitration. If the insurance company should refuse to proceed with the arbitration, the claimant in those 20 states which have modern arbitration statutes has the option of proceeding ex parte[65] or making a motion in court to compel the insurance company

[61] *Ibid.*

[62] For cases dealing with the physical contact requirement, see, MVAIC v. Downey, 11 N.Y.2d 995, 229 N.Y.S.2d 745 (1962); Grogin v. MVAIC, 231 N.Y.S.2d 935 (Sup. Ct. 1962); MVAIC v. Herrington, 33 Misc. 2d 455, 227 N.Y.S.2d 471 (Sup. Ct. 1962).

[63] The problem was posed in Aguilar, "Uninsured Motorist Coverage," 36 Calif. S.B.J. 205, 208 (1961).

[64] See Comment, "Uninsured Motorist Coverage—A Survey," *supra* note 6, at 139.

[65] American Arbitration Association, Accident Claims Tribunal Rules, Rule V, § 23 (1961) provides: "Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party; the Arbitrator shall require the other party to submit such evidence as he may require for the making of an award."

to appear.[66] On this motion to compel arbitration, the insurer may set forth any reasons it has for claiming that arbitration is not timely. Such defenses might be failure to comply with the condition precedent contained in the policy, lack of physical contact under a hit-and-run claim, or late filing of the notice of intention to file the claim due to an applicable statute of limitations.

All questions of fact may be presented in opposition to a motion to compel arbitration. Upon these motions the court will in the first instance determine whether there is a substantial issue of fact and will direct a trial thereof only if satisfied that there is such an issue.

The preliminary court hearing would be similar to the hearing of a motion for summary judgment; therefore, papers of both parties should set forth evidentiary facts. The court's function is limited to determining:

(1) Whether the claimant comes within the policy provisions of being an insured person; and

(2) whether the necessary conditions precedent contained in the endorsement have been complied with.

There is no determination of legal liability or damages made here.

APPOINTMENT OF ARBITRATORS

Assuming there are no legal impediments to the administration by the American Arbitration Association, after the demand is filed, the respondent may, if he desires, file an answering statement with the administrator within seven days after he receives notice of demand for arbitration.[67] A copy of this answer should also be sent to the claimant. If no answer is filed within the stated time, it is assumed that the claim is denied.[68] In this way, a failure to file an answer does not in any way operate to delay the arbitration.

Under the American Arbitration Association Rules, the arbitration is conducted by one arbitrator unless special reasons are shown whereby three arbitrators would be required.[69] The final decision as to whether one or three arbitrators will be appointed rests in the discretion of the administrator.

The lawyer members of the panel who are appointed serve with-

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[66] Such motions are extremely rare in uninsured motorist arbitrations as the insurance companies always make a notice of appearance after being served with a demand for arbitration.

[67] American Arbitration Association, Accident Claims Tribunal Rules, Rule III, § 7 (1961).

[68] *Ibid.*

[69] *Id.* Rule IV, § 11.

out fee in accident claims arbitrations.[70] In prolonged or special cases, however, the parties may agree to compensate them. Any such arrangements to compensate the arbitrators must be made through the Association as administrator of the case.[71] Inasmuch as the average accident claims arbitration requires only one day of hearings, in 99% of the cases the arbitrators receive no compensation.

The American Arbitration Association has strict qualifications which apply to the panel members serving on accident claims matters. No one may serve as an arbitrator if he has any financial or personal interest in the result of the arbitration. Further, the arbitrator is required to disclose[72] any circumstances which would be likely to create even a presumption of bias or which in any way may disqualify the arbitrator from service. In such circumstances the administrator immediately appoints a substitute arbitrator. Even if an arbitrator should fail to disclose some possible relationship, either party may at any time advise the association of any reason why he believes the arbitrator should withdraw or be disqualified. After consideration thereof, the administrator may declare the office vacant and appoint a substitute arbitrator.[73]

THE HEARING

The time and place of the hearing are selected by the arbitrator, and the parties are entitled to receive at least five days notice.[74] If the parties desire a particular locality for holding the arbitration, they should notify the administrator within seven days from the date of the filing of the demand for arbitration. Failure to request a particular locale within the time specified bars a later request. Where one party objects to the locale selected by the other, or where the parties cannot agree, selection will be made by the administrator. If one party selects a locale which is not objected to, then that locale will be prescribed.[75]

Once the arbitrator has been chosen, any and all adjournments must be requested of him through the administrator. Where reasonable ground is given for adjournment, the arbitrator normally grants the privilege, as failure to grant an adjournment for good cause shown

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[70] *Ibid.*

[71] *Ibid.*

[72] Failure to disclose a relationship is grounds to vacate the award. Merolla v. MVAIC, 231 N.Y.S.2d 760 (Sup. Ct. 1962).

[73] American Arbitration Association, Accident Claims Tribunal Rules, Rule IV, § 13 (1961).

[74] *Id.* Rule V, § 14.

[75] *Id.* Rule III, § 10.

may be grounds for vacating the award. It is usual that the arbitration is concluded in a single hearing at the time originally set.

In many states arbitrators have power to subpoena or summon witnesses. The party requiring the production of persons or records need merely request the arbitrator to issue a subpoena upon a showing of the materiality of the requested evidence or testimony involved.

The hearing itself is conducted in very much the same manner as a hearing before a referee, although strict rules of evidence do not apply and a stenographic record is not kept unless specifically requested by one of the parties. The arbitrator, though bound to give a legal determination of liability, is not required to adhere to the rigid rules of procedure in receiving evidence which apply in court.[76] As a result, the arbitrator is usually quite liberal in receiving evidence, especially since refusal to hear material evidence is a ground for vacating the award. Counsel should bear in mind that the amount of evidence received is not at all determinative of the weight or credit which it will have on the ultimate determination in the case. As arbitrators in accident claims cases are experienced members of the bar, there need be no fear that pertinent evidence will be disregarded. Objections to the admission of evidence should be minimized as freedom from interruption of testimony makes it possible to get a clearer and more connected account from witnesses.

Presentations of opening and closing remarks are helpful. However, as with granting of postponements for good cause, it is usually within the discretion of the arbitrator to allow or deny them.

The arbitrator is not allowed to conduct any independent investigation or to receive evidence except in the presence of the parties. However, the parties may mutually agree to give the arbitrator permission to conduct an ex parte investigation.

When the hearings are closed, the arbitrator will usually reserve decision. The award must be rendered in writing within thirty days from the closing of hearings.[77] If briefs are to be submitted, then the date the award is due must be within thirty days of the filing of briefs.[78]

Any time prior to the award being rendered the parties may settle the case between themselves. "If the parties settle their dispute during the course of the arbitration, the arbitrator, upon request, may set forth the terms of the agreed settlement in an award."[79]

76 See King, *supra* note 25, at 342.

77 American Arbitration Association, Accident Claims Tribunal Rules, Rule VII, § 32 (1961).

78 *Ibid.*

79 *Id.* Rule VII, § 35.

Right to Counsel

By providing for arbitration as the means for settling liability and damage disputes, the insurance companies have sanctioned a procedure whereby an injured policyholder may collect his claim without the need for an attorney. As a practical matter, however, the records of the American Arbitration Association indicate that no accident claims case has ever been processed where a claimant has not been represented by counsel.

Further, the Accident Claims Tribunal Rules specifically protect a person's right to have an attorney at the arbitration proceeding.[80]

The Award

Under American Arbitration Association procedure, the arbitration award is in writing and signed either by the sole arbitrator or by a majority if there be more than one.[81] The award must be executed in the manner required by law. As a practical matter this requires in some states, in addition to the arbitrator's signature, an acknowledgement thereto.

There is no requirement upon the arbitrator to render written opinions or explain the reasons for his award.[82] Very often, however, the arbitrators do give certain findings or memorandum opinions when they feel it necessary. The most common type findings include a breakdown of special and general damages which the arbitrator has awarded.

The award is given to the administrator who in turn simultaneously mails a copy to each party. Legal delivery of the award is made when it is placed in the mail by the tribunal clerk of the Association.[83]

Enforceability of the Award

Once the award has been rendered in an uninsured motorist arbitration, there are relatively few grounds for setting it aside. In general, the only basis for obtaining a vacatur stems from some type of fraud or misconduct by the arbitrator. This includes refusal to hear material and pertinent evidence or failure to postpone hearings when sufficient cause is shown, as well as imperfectly executing a final and definite award.

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[80] *Id.* Rule V, § 15.

[81] *Id.* Rule VII, § 33.

[82] United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Hale v. Friedman, 281 F.2d 635 (D.C. Cir. 1960).

[83] American Arbitration Association, Accident Claims Tribunal Rules, Rule VII, § 36 (1961).

Proof of the inviolability of the award itself is best evidenced by three recent appellate cases from New York. The Court of Appeals in *Phillips v. American Cas. Co.*[84] held that an award may not be impeached for any error of law or fact. In this case, $2000 was granted for the death of a 42-year-old insured, who had been in excellent health, earned $13,000 a year and contributed to the support of a sister and invalid mother with whom he lived. The award was sustained despite the dissenting judge's opinion characterizing it as so "shockingly inadequate as to be tantamount to evident partiality."

In another decision the Appellate Division confirmed an award granting the exact amount of the "special damages" incurred, but which allowed no recovery for the alleged wrongful death. The court refused to change the award, which was rendered "in full settlement of all claims submitted to this arbitration."[85]

The last of the trio of decisions reaffirmed the view that, absent fraud or misconduct on the part of the arbitrator, the terms are unassailable and must be complied with by both parties. Here, one party to an uninsured motorist arbitration sought to vacate an award because of "newly discovered evidence." In denying this relief, the court said: "If a motion to reopen the proceeding on the ground of newly discovered evidence could be entertained, the arbitration award would be the beginning rather than the end of the controversy and the protracted litigation which arbitration is meant to avoid would be invited."[86]

Normally, when the claimant wins an award the insurance company promptly performs by making payment pursuant to the terms of the award and the matter has been expeditiously brought to a conclusion.

CONCLUSION

The constant increase in the number of automobiles entering upon the roads and highways of this country has brought to light the problem of the financially irresponsible motorist. Compulsory insurance laws requiring proof of financial stability by themselves have proved to be not completely satisfactory solutions to all potential injured persons. Provisions requiring uninsured motorist coverage by various state legislatures have been a major step in protecting the insured victims who are injured by uninsured motorists. The standard form endorsement, with its provision for arbitration of liability and damages, has permitted a procedure whereby an injured insured may

84 9 N.Y.2d 873, 216 N.Y.S.2d 694 (1961).

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

86 Mole v. Queen Ins. Co. of America, 14 App. Div. 2d 1, 217 N.Y.S.2d 330 (1961).

make a claim and collect for his damages when disputed by the insurer, quickly and with minimal expense. The various financial responsibility laws, together with the uninsured motorist endorsements constitute a sound beginning toward solving the problem of compensating the innocent victim of an uninsured motorist.