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## UNINSURED MOTORIST COVERAGE—RECOVERY UNDER MORE THAN ONE POLICY

While riding in an automobile owned by another the insured was injured in a collision with the vehicle of an uninsured motorist. For purposes of uninsured motorist coverage, she qualified as an insured under the policy issued to the owner of the car in which she was riding. Her husband had a garage liability policy which also covered her for bodily injury caused by an uninsured motorist. After effecting a settlement under the uninsured motorist coverage provided by the insurer of the car in which she was riding, the insured sought to collect from her husband's carrier under its similar coverage. The latter carrier brought suit for a declaratory decree, asserting that under the provisions of its policy it was not liable to the insured because other insurance was available to her through the insurer of the car in which she was a passenger. In ruling adversely to the husband's carrier, the trial court held that the "other insurance" provision which would relieve the carrier from liability was voided by section 627.0851 of the Florida Statutes. The First District Court of Appeal reversed.<sup>1</sup> On petition for certiorari to the Supreme Court of Florida, *held*, decision quashed: An automobile insurance carrier providing coverage against injury by an uninsured motorist in accordance with section 627.0851 of the Florida Statutes may not, after accepting a premium for such coverage, deny coverage on the ground that the insured has similar insurance available to him. *Sellers v. United States Fid. & Guar. Co.*, 185 So.2d 689 (Fla. 1966).

Uninsured motorist coverage first appeared in 1954<sup>2</sup> in the form of an unsatisfied judgment endorsement which a few insurance companies added to their standard form automobile liability policies for a modest premium.<sup>3</sup> One of the prime motives for offering such coverage was to avoid imposition of compulsory insurance programs.<sup>4</sup>

Most insurance policies providing uninsured motorist coverage have one or more "other insurance" clauses which seek to limit the liability of the carrier in situations where more than one policy is applicable to the loss. The Standard Form uninsured motorist endorsement contains one excess-escape and two pro-rata clauses.<sup>5</sup> The excess-escape clause limits the insurer's liability to the amount that its coverage exceeds any other available coverage. Therefore, if other coverage is equal to or greater than the insurer's coverage, the insurer escapes liability. The pro-rata clause

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1. *Sellers v. United States Fid. & Guar. Co.*, 179 So.2d 608 (Fla. 1st Dist. 1965). The court certified its decision as passing on a question of great public interest.

2. See Plummer, *Handling Claims Under the Uninsured Motorist Coverage*, 415 INS. L.J. 494 (1957).

3. The first true uninsured motorist coverage was promulgated by the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau in 1956. *Ibid.*

4. See Note, *Uninsured Motorist Coverage—A Survey*, 1962 WASH. U.L.Q. 134, 135.

5. Note, *Uninsured Motorist Coverage in Florida*, 14 U. FLA. L. REV. 455, 465 (1962).

provides that the insurer will pay the proportion of the loss that its policy limit bears to the total amount of insurance available. Problems arise when two or more policies cover the same loss and each has clauses seeking to limit liability when other insurance is available.<sup>6</sup>

Although several states have statutes requiring insurance companies to provide uninsured motorist coverage in their automobile liability policies,<sup>7</sup> most of the earlier decisions resolved the problem of conflicting "other insurance" clauses by construing the policies against one another. The holdings were sometimes arbitrary and pointed in all directions.<sup>8</sup> Some courts allowed excess-escape clauses to prevail over other types of limiting clauses, thereby placing all of the liability on one insurer<sup>9</sup> while others required that the loss be pro-rated among the carriers involved up to the limit of the highest coverage available.<sup>10</sup> In *Chandler v. Government Employees Ins. Co.*,<sup>11</sup> the Fifth Circuit Court of Appeal, applying Florida law, gave effect to an excess-escape clause in preference to a pro-rata clause in the other policy and held that the insured could not collect under his own policy even though there would be inadequate coverage to the full extent of the claims under the policy which covered the car in which he was riding. In *Maryland Cas. Co. v. Howe*,<sup>12</sup> where each of two policies had an excess-escape clause, the Supreme Court of New Hampshire held that the loss should be pro-rated between the carriers up to the minimum limits required by the state Financial Responsibility Law.<sup>13</sup>

The Supreme Court of Appeals of Virginia, in *Bryant v. State Farm Mut. Auto. Ins. Co.*,<sup>14</sup> held that the statute requiring insurance companies to provide uninsured motorist insurance voided any clause attempting to

6. When one policy contains three such limiting clauses the applicable clause will depend on how the person qualifies as an insured under the policy. Under most automobile insurance policies a person can qualify as an insured in several ways, *i.e.*, as the named insured in the policy, as a member of the named insured's household riding in the car of another, as was the case in *Sellers*, or as a guest in the insured automobile—also the case in *Sellers*. The provision applicable in Mr. Sellers' policy was an excess-escape clause and the provision applicable in the host driver's policy was a pro rata clause.

7. In Kuvin, *Arbitration Under Uninsured Motorist Coverage*, 16 FED. OF INS. COUNSEL Q. 71 (Fall 1965), the states listed as having uninsured motorist statutes are Alabama, Arkansas, Arizona, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Michigan, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina and Virginia.

8. See Note, *Concurrent Coverage in Automobile Liability Insurance*, 65 COLUM. L. REV. 319 (1965).

9. *Chandler v. Government Employees Ins. Co.*, 342 F.2d 420 (5th Cir. 1965) (applying Florida law); *Travelers Indem. Co. v. Wells*, 316 F.2d 770 (4th Cir. 1963) (applying Virginia law); *Burcham v. Farmers Ins. Exch.*, 255 Iowa 69, 121 N.W.2d 500 (1963); *Globe Indem. Co. v. Estate of Baker*, 22 App. Div. 2d 658, 253 N.Y.S.2d 170 (1964).

10. *Maryland Cas. Co. v. Howe*, 106 N.H. 422, 213 A.2d 420 (1965); *Smith v. Pacific Auto. Ins. Co.*, 240 Ore. 167, 400 P.2d 512 (1965).

11. *Supra* note 9.

12. *Supra* note 10.

13. N.H. REV. STAT. ANN. § 268:19 (Supp. 1965).

14. 205 Va. 897, 140 S.E.2d 817 (1965).

restrict the liability of the carrier.<sup>15</sup> The injured party qualified as an insured under two policies, one issued to him and the other to his father. He had obtained a judgment of 85,000 dollars against the uninsured motorist.<sup>16</sup> The insurer paid him the policy limit of 10,000 dollars under one of the policies but refused to pay under the other policy because of the excess-escape clause. The insured brought suit and was allowed to recover to the full limit of the other policy in spite of the fact that this gave him a total recovery of twice the amount of the limits required by Virginia's Financial Responsibility Law.

In construing New Hampshire's similar uninsured motorist statute<sup>17</sup> the court in *Maryland Cas. Co. v. Howe*<sup>18</sup> rejected the *Bryant* decision and stated:

The statute was not designed to provide the insured with greater insurance protection than would have been available had the insured been injured by an operator with a policy containing minimum statutory limits.<sup>19</sup>

This argument was advanced by the insurance company in the instant case but to no avail.<sup>20</sup> The Supreme Court of Florida followed the *Bryant* decision in holding that the statute requiring uninsured motorist insurance voided clauses seeking to limit liability under such coverage.

The uninsured motorist statutes in Virginia<sup>21</sup> and Florida<sup>22</sup> contain subrogation clauses which provide that an insurer making payments under its uninsured motorist coverage is entitled to the proceeds of any recovery against the uninsured motorist.<sup>23</sup> This fact failed to persuade the courts in *Bryant* and *Sellers* that legislative intent dictated against ruling as they

15. VA. CODE ANN. § 38.1-381(b) (Supp. 1966):

Nor shall *any* such policy or contract relating to ownership, maintenance or use of a motor vehicle be so issued or delivered unless it contains an endorsement or provisions undertaking to pay the insured *all sums* which he shall legally be entitled to recover as damages from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than the requirements of § 46.1-1(8) . . . . (Emphasis added.)

16. VA. CODE ANN. § 38.1-381(e)(1) (Supp. 1966), does not require arbitration to collect on uninsured motorist claims and allows the insured to serve process on the insurance company as if the company were a party defendant. The company, in turn, is allowed to file pleadings and defend in its own name or in the name of the uninsured motorist.

17. N.H. REV. STAT. ANN. § 268:15 (Supp. 1965):

No such policy shall be issued or delivered in this state with respect to a motor vehicle . . . registered in this state unless coverage is provided therein . . . in amounts or limits prescribed for bodily injury or death for a liability policy under this chapter . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles . . . .

18. *Supra* note 10.

19. *Id.* at 424, 213 A.2d at 422.

20. Brief for Respondent, p. 3, *Sellers v. United States Fid. & Guar. Co.*, 185 So.2d 639 (Fla. 1966).

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

22. FLA. STAT. § 627.0851(4) (1965).

23. See also *Sellers v. United States Fid. & Guar. Co.*, *supra* note 20 at 691.

did.<sup>24</sup> The motorists of Florida and Virginia are in an unusual position as a result of *Sellers* and *Bryant*. Motorists in both states who qualify as insureds under more than one uninsured motorist policy are now financially better off when struck by an uninsured motorist than by a motorist carrying the minimum limits required by statute. Of course neither state would allow a recovery above the amount of the insured's actual loss, however, more insurance is now available to the insured who suffers a large loss, as was the case in *Bryant*. In *Sellers* the court stated that the insured could proceed to arbitration<sup>25</sup> "against any one or more" of multiple insurers, but in any event "shall not be entitled to recover . . . more than the amount of his loss from bodily injury caused by an uninsured motorist . . ." <sup>26</sup> If he proceeds against more than one insurer "it will then be in order for the insurers to make a pro-ration"<sup>27</sup> among themselves.

The writer favors the result, although not the reasoning, of the instant case because it will provide greater protection against financially irresponsible motorists. Few people in the professions or in high income brackets would chance operation of a motor vehicle with only the minimum amount of liability insurance, yet they are forced to expose themselves to drivers carrying minimum coverage or none at all. In Florida, the only protection available is uninsured motorist coverage in the amount of 10,000/20,000 dollars. It is suggested that Florida would do well to follow the lead of the Virginia legislature in providing by law that insurance companies must allow their customers an opportunity to purchase uninsured motorist coverage in an amount equal to their bodily injury liability coverage.<sup>28</sup> In cases where the insured is injured by a motorist carrying low limits of liability insurance the uninsured motorist coverage could then be applied as excess insurance.<sup>29</sup> This would allow a person to purchase as much protection for himself as he provides for others when he purchases high limits of bodily injury liability insurance.

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24. In California the statute specifically prohibits such a ruling. The CAL. INS. CODE § 11580.2(c)(2) (Deering Supp. 1965) provides:

The insurance coverage provided for in this section does not apply: . . . (2) To bodily injury of the insured while in or upon or while entering into or alighting from an automobile other than the described automobile if the owner thereof has insurance similar to that provided in this section.

25. Unlike the procedure in Virginia (see note 16 *supra*), uninsured motorist claims in Florida are settled by arbitration. Note, *Uninsured Motorist Coverage in Florida*, *supra* note 5, at 472-73.

26. *Supra* note 20, at 692.

27. *Ibid.*

28. VA. CODE ANN. § 38.1-381(b) (Supp. 1966), provides that an insured may purchase additional uninsured motorist coverage up to the limits of his automobile bodily injury liability insurance.

29. *Cf.*, *White v. Nationwide Mut. Ins. Co.*, 361 F.2d 785 (4th Cir. 1966) (applying Virginia law).