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UNINSURED MOTORIST COVERAGE: SOME SIGNIFICANT PROBLEMS AND DEVELOPMENTS

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One of the most difficult problems besetting the American legal system in this century has been the motorist who negligently inflicts personal injuries far beyond his capacity to provide compensation for such injuries.¹ The existence of liability without assets to satisfy such liability creates what has been called a "solvency gap."² The solvency gap must, however, be carefully distinguished from what has been called a "liability gap" (circumstances where there are socially significant personal injuries but no legal principles under which the burden of the loss can be shifted to sources other than victims).³ Most of the so-called "no fault" proposals are directed to closing the liability gap⁴ and are unrelated to measures adopted for closing the solvency gap because the latter (including the uninsured motorist coverage) do not change the traditional rules of tort law. Solvency gap remedies are simply designed to provide greater assurance of compensation once applicable liability rules have been satisfied. A solvency gap exists when

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1. The literature devoted to the practical and theoretical strains imposed upon legal systems which arose from the invention and widespread use of the automobile is staggering in volume. Two classic discussions which also contain comprehensive bibliographies are Walter E. Meyer Research Institute of Law, *DOLLARS, DELAY AND THE AUTOMOBILE VICTIM* (1968) and W. BLUM and H. KALVEN, *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM* (1964).

2. G. GREGORY & H. KALVEN, *CASES AND MATERIALS ON TORTS* 784 (2d Ed. 1969).

3. *Id.*

4. Almost all of the no-fault plans deal with the solvency gap problem, but they do so by merely modifying or incorporating pre-existing devices for handling that problem. Thus, solvency gap remedies are perhaps the least controversial aspects of such plans. *Id.* at 784.

all the traditional requirements for shifting the loss are met but where there are no assets capable of satisfying the legal liability involved.

An obvious way to help close the solvency gap is to adopt a system of compulsory liability insurance for those who wish to own and operate motor vehicles. This was the course Massachusetts chose to follow in 1927.⁵ Systems of compulsory liability insurance were not widely adopted, however,⁶ and the insurance industry, alarmed over the consequences which seem to ensue under a compulsory liability insurance system,⁷ devised an alternative in the form of an uninsured motorist coverage provision.⁸ Two standard forms—the 1956 Standard Form and the 1966 Standard Form—were introduced by the insurance industry. Variations of these forms are in widespread use today, and some form of uninsured motorist coverage is mandated by the statutes of many states.⁹ It may be reasonably inferred, therefore, that the “necessity” which resulted in the invention of the concept of uninsured motorist coverage was insurance industry hostility towards compulsory liability insurance legislation, just as the “omnibus clause” originated as a preferable substitute for the less discriminating and more expensive “owner liability legislation.”¹⁰

Uninsured Motorist Coverage: Basic Theory

The theory behind uninsured motorist coverage assumes a negligent driver who, although uninsured, is legally responsible for the insured's

5. Mass. Acts and Resolves 1925, ch. 346, effective in 1927. Experience under the Massachusetts law is recounted in R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 76-83 (1965).

6. Only New York and North Carolina chose to follow the compulsory liability insurance experiment initiated by Massachusetts. N.Y. Sess. Laws 1956, ch. 655; N.C. Sess. Laws 1957, ch. 1393.

7. E.g., McVay, *Reply to The Case Against Compulsory Liability Insurance*, 15 OHIO ST. L.J. 161 (1954). An exhaustive, although admittedly incomplete, bibliography of articles, books and pamphlets inveighing against compulsory liability insurance can be found in R. KEETON & J. O'CONNELL, *supra* note 5, at 86-89.

8. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 10-17 (1969), [hereinafter cited as A. WIDISS].

9. A. WIDISS *supra* note 8, at 20-23. By the end of 1968 forty-six states required automobile liability insurers to include uninsured motorist coverage as a part of their liability policies, but only eleven of those denied the insured the right to “reject” the coverage. A. WIDISS, *supra* note 8, at 15-16, 132, 306-09. The Missouri legislation was originally in the form of a mandatory offering with right of rejection. Mo. Laws 1967, 570-71. In 1971 the law was amended so as to require uninsured motorist coverage in any automobile liability insurance policy delivered or issued in the state. Mo. Laws 1972, 1005-06 (perfecting a technical inaccuracy in the enacting clause of earlier legislation, Mo. Laws 1971, 398). The legislation now appears as § 379.203, RSMO 1975 Supp.

10. G. GREGORY & H. KALVEN, *supra* note 2, at 641. Although he does not cite a direct relationship between the creation of the omnibus clause and the insurance industry fear of owner liability legislation, Professor James' attribution of the opening up of “. . . possibilities of compensation even where there is no liability. . .” to “. . . progressive business practices on the part of the companies. . .” certainly suggests this relationship. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 563 (1948).

personal injuries: that is, a defendant in the traditional sense whose negligence has caused personal injuries and who has no affirmative defenses available to avoid liability. In such a situation, if the injury-producing motorist has no liability insurance, the insurance company of the injured plaintiff agrees, by virtue of the uninsured motorist coverage, to pay the plaintiff (its own insured) the personal injury damages attributable to the negligent act of the uninsured motorist (up to a certain maximum amount, typically \$10,000).¹¹

Because the contractual agreement to pay is explicitly conditioned upon the existence of legal liability in the uninsured motorist, there is no change in the applicable principles of tort law. Moreover, even though the obligation to pay arises out of a contract between the company and its insured, since it is explicitly conditioned upon the negligence of the uninsured motorist, it is not a "no fault" coverage such as the comprehensive, collision and medical payments coverages of the typical automobile policy.¹² A good number of the practical problems which have arisen in the application and interpretation of the uninsured motorist coverage provisions of particular policies are directly related to this hybrid origin—that is, a contractual obligation which arises only when there is an independently created tort liability.

A final point deserves special emphasis. Where mandated by statute, the uninsured motorist coverage provided by the standard policy normally closes the solvency gap only with respect to personal injuries. Only six jurisdictions authorize uninsured motorist endorsements for property damage, and these jurisdictions impose deductibles ranging from \$100 to \$300.¹³ Despite this fact, many persons unfamiliar with the coverages afforded by the typical automobile insurance policy assume that their uninsured motorist coverages include property damage losses sustained from an uninsured motorist and are keenly disappointed when they learn that there is no coverage for property damage.

Moral: keep constantly in mind that the uninsured motorist coverage is based upon contract, although conditioned upon the existence of tort liability. The terms of the contract are, therefore, of supreme importance and decisively determine the existence and extent of coverage. Property damage is rarely covered by the uninsured motorist provisions of the policy.

Missouri Legislation

Although many companies were offering uninsured motorist endorsements to Missouri motorists prior to 1967, it was not until that year that the

11. A. WIDISS, *supra* note 8, at 73, 129-31. §§ 303.030, 379.203, RSMo 1975 Supp. (\$10,000 per person or \$20,000 for two or more persons).

12. It is not widely recognized that three out of the five coverages in the great majority of automobile liability policies were no fault coverages and had been so for years before the term "no fault" became a household word. See Abraham, *Automobile Insurance Rates and No-Fault Insurance*, 35 TEX. B.J. 117 (1972).

13. A. WIDISS, *supra* note 8, at 137; Cox, *Uninsured Motorist Coverage*, 34 MO. L. REV. 1, 38 (1969) (Georgia, New Mexico, North Carolina, South Carolina, Virginia and West Virginia).

General Assembly enacted legislation requiring companies doing business in Missouri to make such coverage a part of the policy issued unless expressly rejected by the insured.¹⁴ In 1971 uninsured motorist coverage was made mandatory. Thus a person buying automobile insurance which meets the requirements of the Safety Responsibility Law¹⁵ must receive and carry Uninsured Motorist Protection whether he wants it or not. This is in contrast to the Medical Payments Coverage which may be offered in the policy, but which is not required to be offered, and which the insured is not required to accept.¹⁶

The Missouri legislation requires uninsured motorist coverage for the protection of persons insured under any policy of automobile liability insurance delivered or issued for delivery in the State of Missouri.¹⁷ Beyond that, however, the statute is silent. This permits a wide variety of endorsements and provisions, some of which are very broad and others surprisingly narrow. Because the legislation does not provide for a standard or uniform provision, and because no power to prescribe such a uniform provision is delegated to the Superintendent of Insurance, the protection extended by any given policy of insurance may not be nearly as comprehensive as someone inexperienced in the field might assume. This simple fact is, perhaps, the most surprising aspect of the law in this field, and it has given rise to a significant amount of litigation.

Another significant development in Missouri concerns arbitration of claims. The original architects of the uninsured motorist protection concept incorporated a compulsory arbitration of claims requirement into the coverage (presumably as a safeguard against excessive awards). However, the Missouri legislation contains no comparable requirement. In fact, the Missouri courts have ruled that a compulsory requirement of this sort in an insurance contract is unenforceable.¹⁸

Moral: developments in uninsured motorist coverage in Missouri have unique characteristics and do not necessarily "track" those associated with interpretations of the standard forms.

Who is an "insured?"

The Missouri legislation does not mandate protection for *any* person injured by an uninsured motorist but only requires coverage for those who

14. Mo. Laws 1967, 570-71.

15. § 303.030, RSMo 1975 Supp.

16. For the different consequences which ensue in construing the mandated uninsured motorist provisions as opposed to the merely permissible medical payments provisions see *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538 (Mo. En Banc 1976).

17. § 379.203, RSMo 1975 Supp.

18. The otherwise critical and controversial aspects of the arbitration provisions of the uninsured motorist coverage are discussed in A. WIDISS, *supra* note 8, at 174-51. The Missouri statute is neutral. § 379.203, RSMo 1975 Supp. The leading case holding compulsory arbitration requirements in the uninsured motorist endorsements unenforceable is *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963).

are insured by the carrier issuing the policy.¹⁹ Most policies, including the 1966 Standard Form,²⁰ define the insured quite broadly for purposes of uninsured motorist protection. Typically, policies cover injuries and relational claims (wrongful death and loss of consortium, for example) of named and designated insureds as well as covering any person occupying the insured vehicle.²¹ However, because the Standard Form is not required by statute in Missouri, the persons eligible to claim under the uninsured motorist provision may be significantly fewer than under the Form.

Two Missouri decisions illustrate the prejudicial consequences which can result from the absence of a uniform coverage requirement. In one case suit was brought against the carrier for injuries inflicted by an uninsured motorist.²² In this case the suit was brought by the child of the insured who was riding in the insured car at the time of collision with the uninsured motorist. The policy did not independently define who was an "insured" for the purposes of uninsured motorist coverage, although the uninsured motorist clause was described as "Family Protection against Uninsured Motorist."²³ However, the only definition of who was an "insured" under the terms of the policy was that in the omnibus clause which defined "insured" in the standard fashion as the named insured, the spouse of the named insured, and any person driving the car with the permission of the named insured.²⁴ Because a non-driving child was not an "insured" under the explicit terms of the policy, the court was required to deny coverage for the family member. The other Missouri decision was a factually similar case in which a passenger in the insured vehicle, who would clearly be entitled to protection under the definitions in the Standard Policy, was denied coverage because the policy definition of "insured" did not cover persons who were occupying the insured vehicle but who were not driving the vehicle.²⁵

Moral: check your policy to determine whether the definition of "insured" for the purposes of the uninsured motorist protection includes, in

19. § 379.203, RSMO 1975 Supp.

20. A. WIDISS, *supra* note 8, at 292-94.

21. *Id.* at 292.

22. *Surface v. Ranger Ins. Co.*, 526 S.W.2d 44 (Mo. App., D. Spr. 1975).

23. The insurance industry has not settled on a uniform phrase to identify the uninsured motorist coverage. It is variously referred to as "Uninsured Motorist Coverage", "Family Protection Insurance", "Innocent Victim Coverage", and, as in the case discussed, "Family Protection Against Uninsured Motorists." A. WIDISS, *supra* note 8, at 15.

24. Because the purpose of the omnibus clause is to ensure that the liability coverage on the car is available to persons injured as the result of negligence attributable to drivers using the car with the owner's permission (that is, the protection of those foreign to the contractual designations of who is an "insured") it is highly illogical to apply it to define those eligible to recover under a separate contractual coverage provided by the policy. For a thorough discussion of the application of the omnibus clause in one particular jurisdiction (Illinois), see Gosnell, *Omnibus Clauses in Automobile Insurance Policies*, 1950 INS. L.J. 237.

25. *Waltz v. Cameron Mut. Ins. Co.*, 526 S.W.2d 340 (Mo. App., D.K.C. 1975).

addition to those covered by the omnibus clause, members of the insured's family and other persons merely occupying the insured vehicle at the time of the accident.

·What is an "Uninsured Motor Vehicle?"

A semantic incongruity, common to both the Standard Forms and to the Uninsured Motorist Statutes, promises to provoke both uncertainty and wasteful litigation. That incongruity is the term "uninsured motor vehicle."²⁶ Although the motor vehicle is the instrument through which the tortfeasor inflicts harm, it is not the *vehicle* which is held liable but the *operator*. Therefore, a more precise term would be "vehicle being operated by a person whose legal responsibility for damages negligently inflicted is not covered by any liability insurance provision." This would more clearly and accurately reflect that the policy provides a source of compensation for someone negligently harmed by an uninsured motorist.

It may be argued that the term "uninsured motor vehicle" is simply a shorthand expression for the more elaborate definition proposed in the foregoing paragraph. This is the result which follows under the Standard Form which defines "uninsured Motor Vehicle" as one being operated by a person to whom no liability insurance provision is applicable.²⁷ However, under Missouri law, no such form definition is applicable. Thus, it is theoretically possible to deny the uninsured motorist protection to a person injured through the negligence of an uninsured motorist, because the *vehicle* through which the injury is inflicted is "insured" even though the particular driver is not.

The foregoing possibility is clearly suggested by the opinion of the Missouri Court of Appeals for the St. Louis District in *Miles v. State Farm*

26. . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of *uninsured motor vehicles*. . . .

§ 379.203(1), RSMO 1975 Supp. (emphasis added).

The company will 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 highway vehicle*. . . .

1966 Standard Form. A. WIDISS, *supra* note 8, at 292 (emphasis added).

27. "uninsured highway vehicle" means:

(a) a highway vehicle with respect to . . . which there is . . . no bodily injury liability . . . insurance policy applicable . . . to any person . . . legally responsible for the use of such vehicle. . . .

1966 Standard Form. A. WIDISS, *supra* note 8, at 295.

It is clear that the burden of proof is on the claimant to establish the absence of insurance, and this is not always an easy burden to discharge. *Goodson v. M.F.A. Ins. Co.*, 429 S.W.2d 294 (K.C. Mo. App. 1968); *Hill v. Seaboard Fire and Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963). However, a recent amendment to the relevant statute permits the existence or denial of coverage made by the tortfeasor in his accident report to be subpoenaed and introduced into evidence for the purpose of establishing either the presence or absence of insurance. § 303.310, RSMO (1976 Supp.); 2 VERNON'S MISSOURI LEG. SERV. 130 (1976).

*Mutual Insurance Co.*²⁸ The plaintiff allowed his brother to drive his car with the plaintiff as a passenger. Apparently the brother was not covered by the omnibus clause or the plaintiff was excluded by a standard "owned car" or "relative" exclusion so that there was no coverage under the liability provisions of the policy. The plaintiff asserted, however, that because his brother was an uninsured motorist, he was entitled to recover under the uninsured motorist provision of his policy. The court rejected this contention holding that the uninsured motorist coverage did not apply to this particular accident.

The result in the *Miles* case is not surprising because it is a result which would follow were the provisions of the typical policy applied to these facts. Such a policy would have exempted the vehicle under the so-called "owned car" exemption.²⁹ The problem in *Miles* is that the court did not identify a particular policy provision which would exclude coverage in this situation. It simply ruled that, irrespective of the brother's uninsured status, the vehicle itself had a liability insurance policy applicable to it, and, therefore, it could not be said that the vehicle in question was an "uninsured motor vehicle."³⁰ This alarming interpretation suggested by the *Miles* opinion would result in the exclusion of recovery under uninsured motorist coverage whenever there is any liability insurance policy applicable to the vehicle being driven by an uninsured motorist.

Moral: check your policy to determine whether "uninsured motor vehicle" is defined so as to include a vehicle being operated by a person to whom no liability policy is applicable. If there is no such definition, beware of the exclusionary dictum suggested by the *Miles* case.

Who is "legally entitled to recover?"

A condition to recovery under the typical uninsured motorist provision, and a mandated requirement of the Missouri statute, is that the person making the claim be ". . . legally entitled to recover damages from owners

28. 519 S.W.2d 378 (Mo. App., D. St. L. 1975).

29. "Exclusions

. . .

(a) to bodily injury to an insured while occupying a highway vehicle (other than an insured highway vehicle) owned by the named insured. . . .

1966 Standard Form. A. WIDISS, *supra* note 8, at 292. For a case exemplifying the application of such an exclusionary provision see *Barton v. American Family Mut. Ins. Co.*, 485 S.W.2d 628 (Mo. App., D.K.C. 1972).

30. The issue is whether plaintiff is correct in contending his brother "was at the time of the collision operating an uninsured automobile." The policy language refutes this contention. Plaintiff's driver may have been an "uninsured motorist," but he was not driving an "uninsured motor vehicle." The fact the driver was uninsured does not permit the judicial finding that plaintiff's injuries were sustained due to the operation of an "uninsured motor vehicle."

Miles v. State Farm Mut. Ins. Co., 519 S.W.2d 378, 379 (Mo. App., D. St. L. 1975).

or operators of uninsured motor vehicles. . . .³¹ The term "legally entitled" is a conspicuously ambiguous term and an obvious invitation to litigation. Does it mean that technical defenses to the tort action (diplomatic or sovereign immunity, for example) defeat an action under the uninsured motorist clause? Another question arises in connection with the intra-familial immunities which, although largely repudiated in many jurisdictions,³² are still a considerable bar in Missouri.³³ Most policies contain contractual provisions covering this area which will serve as a safeguard to insurers in the event that the Missouri law is changed. However, if a policy fails to disqualify a relative from benefits, does the doctrine bar such a plaintiff under the uninsured motorist provision simply because in the tort action the actual defendant could plead the immunity?³⁴

In *Reese v. Preferred Risk Mutual Insurance Co.*³⁵ the Missouri Court of Appeals for the District of St. Louis reviewed the many decisions from other jurisdictions which had interpreted the phrase, "legally entitled to recover," and took the widely held liberal provision that the phrase dealt purely with the substantive condition of carelessness or fault on the part of the uninsured motorist and was not directed to the technical or procedural disabilities which the uninsured motorist may invoke or be able to invoke in the tort action.³⁶ This decision followed from the fact that under the Missouri statutes³⁷ and under the provisions of many uninsured motorist endorse-

31. § 379.203(1), RSMO 1975 Supp.

32. E.g., *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 539 P.2d 566 (1975); *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P.2d 639 (1972). See also, Note, 38 WASH. L. REV. 371 (1963).

33. In *Ebel v. Ferguson*, 478 S.W.2d 334 (Mo. En Banc 1972), three judges of the Missouri Supreme Court declared that as between husband and wife, it is not an "immunity" which prohibits suit but the fact that no cause of action can arise. Two other judges concurred in the result but based their concurrence on the ground that considerations of public policy dictated the retention of the immunity. The remaining two judges of this remarkably divided court would have abrogated the inter-spousal immunity. See also, *Akers & Drummond, Tort Actions Between Members of the Family*, 26 MO. L. REV. 152 (1961).

34. In *Noland v. Farmers Ins. Exchange*, 413 S.W.2d 530 (K.C. Mo. App. 1967) the court ruled that where the uninsured motorist is the spouse of the claimant, the inter-spousal immunity doctrine foreclosed recovery against the uninsured motorist carrier. However, this decision occurred before the enactment of the statute mandating uninsured motorist coverage and was distinguished in the subsequent case of *Reese v. Preferred Risk Mut. Ins. Co.*, 457 S.W.2d 205, 209 (St. L. Mo. App. 1970). As precedent, therefore, *Noland* is of doubtful reliability today.

35. 457 S.W.2d 205 (St. L. Mo. App. 1970).

36. We agree with the interpretation placed on this phrase by these courts and hold that the phrase refers to fault on the part of the uninsured motorist. The phrase involves the causal negligence on the part of the uninsured motorist (and the absence of contributory negligence where submitted) and the resulting damages to the insured. Also we believe this phrase is ambiguous and as such must be construed in favor of the insured. *Reese v. Preferred Risk Mut. Ins. Co.*, 457 S.W.2d 205, 208 (St. L. Mo. App. 1970).

37. § 379.203, RSMO 1975 Supp.; *Basore v. Allstate Ins. Co.*, 374 S.W.2d 626 (K.C. Mo. App. 1963). See also *Cox, Uninsured Motorist Coverage*, 34 MO. L. REV. 1, 8-9 (1969).

ments,³⁸ it is no longer required that the plaintiff reduce his claim against the uninsured motorist to a judgment.

The good news of *Reese*, however, is somewhat, although not entirely, offset by a subsequent decision of the same court in *Crenshaw v. Great Central Insurance Co.*³⁹ In *Crenshaw* damages for wrongful death were sought under the terms of the uninsured motorist clause. At the time that the claim against the carrier was filed, the statute of limitations on the wrongful death claim against the uninsured motorist had run. Because of this fact, Commissioner Houser ruled that there was no ground for a claim against the uninsured motorist and that the plaintiff was therefore not “. . . legally entitled to recover.”⁴⁰ The opinion in *Crenshaw* fails to underscore the fact that the statute of limitations applicable to wrongful death claims is unique in that it is “statutory” or “built-in” and therefore an integral part of the cause of action itself.⁴¹ As such, it is automatically “borrowed” in conflicts cases whether there is a borrowing statute or not.⁴² In addition, it need not be pleaded as an affirmative defense in order to be available as a defense in the action itself.⁴³ *Crenshaw* is an unfortunate retreat from the high ground of *Reese*. However, because it is clearly distinguishable from *Reese*, it should be limited to its precise facts.

Moral: under the weight of authority and the holding of the Missouri Court of Appeals in the *Reese* case, technical defenses available to the uninsured motorist-tortfeasor do not necessarily mean that the injured party is denied recovery under the provisions of the uninsured motorist coverage. However, the *Crenshaw* case indicates that if the defense is so substantively intertwined with the basic right to recover, it may operate as a barrier even though it is nominally a “technical” defense.

The Underinsured Motorist

In some jurisdictions a plaintiff is entitled to treat the “underinsured motorist” as an “uninsured motorist” if he is otherwise unable to recover damages up to the minimum required by the mandatory provisions of the financial responsibility law.⁴⁴ In such a situation the plaintiff is able to

38. A. WIDISS, *supra* note 8, at 12, 40-43.

39. 527 S.W.2d 1 (Mo. App., D. St. L. 1975).

40. *Crenshaw v. Great Central Ins. Co.*, 527 S.W.2d 1, 4-5 (Mo. App., D. St. L. 1975).

41. *Frazer v. Partney*, 314 S.W.2d 915 (Mo. 1958); *noted Rahoy, Torts—Wrongful Death Statute in Missouri—Application of General Statutes of Limitation*, 24 MO. L. REV. 397 (1959). *See also* Davis, *Wrongful Death*, 1973 WASH. U.L.Q. 327, 354-57.

42. *Martinez v. Mo. Pac. R.R.*, 296 S.W.2d 90 (Mo. 1956); Davis, *Tort Liability and the Statutes of Limitation*, 33 MO. L. REV. 170, 177-81, 214-24 (1968).

43. *Baysinger v. Hanser*, 355 Mo. 1042, 199 S.W.2d 644 (1947); Davis, *supra* note 42, at 179.

44. *E.g.*, *Taylor v. Preferred Risk Mut. Ins. Co.*, 225 Cal. App. 2d 80, 37 Cal. Rptr. 63 (1964). *See also* Annot., 26 A.L.R.3d 883, 894-97 (1969); A. WIDISS, A GUIDE

recover the difference between what he has recovered from the underinsured motorist and that which he would ordinarily have been entitled to recover from the uninsured motorist carrier had the limits of the financial responsibility law been satisfied.

The problem is well illustrated by the Missouri Court of Appeals decision in *Brake v. MFA Mutual Insurance Co.*⁴⁵ The tortfeasor-motorist had the minimum limits of \$10,000 per person and \$20,000 per accident⁴⁶ prescribed by the Missouri Safety Responsibility Law. There were eight claimants, however, and almost all of them had damages in excess of any pro rata distribution of the \$20,000 limit (\$2500 per person; however, because some of the claims involved relational beneficiaries under the provisions of Missouri's Wrongful Death Act, the trial court prorated under a nonlinear formula).⁴⁷ The principal plaintiff had a wrongful death claim with a conceded value of \$50,000. However, under the formula for prorating adopted by the trial judge, plaintiff received only \$4000 from the tortfeasor's liability insurer. Two policies extending uninsured motorist coverage to the plaintiff had been issued by defendant MFA, and plaintiff sought to stack these coverages in order to recover an additional \$20,000. Plaintiff's basic argument was that the tortfeasor was "uninsured," at least for the purposes of Missouri's Uninsured Motorist Coverage statute. Other jurisdictions had accepted this argument and had permitted plaintiffs in such circumstances to recover under uninsured motorist provisions on the theory that the "underinsured" motorist was "uninsured" for at least part of the plaintiff's actual damages.⁴⁸ The Court of Appeals chose not to follow such decisions, however, and ruled that "[w]e cannot in good conscience hold that 'uninsured' includes 'underinsured'."⁴⁹

The significance of this decision is perhaps better appreciated if one considers the undeniable fact that the plaintiff would have been better off (by at least \$16,000) if the tortfeasor motorist had been totally uninsured than where, as here, he had liability insurance woefully below the amount necessary to meet the actual claims which his negligence had generated.

Moral: if there is any liability insurance available to cover negligently inflicted injuries (and especially if such liability insurance meets the limits mandated by Missouri's Safety Responsibility Law), the tortfeasor may not, technically, be "uninsured." As a result, plaintiff cannot recover under his uninsured motorist coverage even if the tortfeasor's liability insurance is

TO UNINSURED MOTORIST COVERAGE 68 (1976 Supp.); and Widiss, *Perspectives on Uninsured Motorist Coverage*, 62 NW. L. REV. 497 (1967).

45. 525 S.W.2d 109 (Mo. App., D. St. L.), cert. denied, 423 U.S. 894 (1975).

46. § 303.030, RSMo 1975 Supp.

47. *Brake v. MFA Mut. Ins. Co.*, 525 S.W.2d 109, 110 (Mo. App., D. St. L.), cert. denied, 423 U.S. 894 (1975).

48. See note 44 *supra*.

49. *Brake v. MFA Mut. Ins. Co.*, 525 S.W.2d 109, 114 (Mo. App., D. St. L.), cert. denied, 423 U.S. 894 (1975).

only a fraction of that available under the uninsured motorist provisions of the plaintiff's policy. Plaintiffs, therefore, will be better off in many situations when the tortfeasor has *no insurance* than when he has only the bare minimum required by statute. In a situation where the liability coverage can meet only a fraction of what he otherwise might recover under the uninsured motorist provisions of his own policy, plaintiff will thus find himself in anomalous alignment with the liability carrier in seeking to *avoid* liability coverage on the tortfeasor-motorist.

Carrier Insolvency

Two unfortunate decisions handed down prior to the enactment of Missouri's first statute dealing with uninsured motorist coverage construed the uninsured motorist provisions of the particular policies at issue to be inapplicable where the tortfeasor-motorist was covered by a liability policy, even though the carriers issuing the policy were insolvent.⁵⁰ Apparently in response to these decisions, Missouri law now defines an "uninsured motor vehicle" as one where the liability insurer thereof is unable to make payment because of insolvency.⁵¹ To be protected under this statute, however, the insolvency must occur within two years of the date of the injury-producing accident. In a sense this is something like a "junior" statute of limitations because a failure to establish liability within the two years during which the tortfeasor's insurance carrier is solvent could result in an unenforceable judgment should the carrier later become insolvent, despite the fact that the tort claim is enforceable for a period of five years.⁵² Although it is doubtful that the loss of any chance for compensation under the circumstances hypothesized could be the basis for a malpractice charge, the statute does place a premium upon prompt prosecution of the tort claim because carrier insolvency subsequent to the two year limit cuts off the chance for an uninsured motorist claim.

The only decision construing this portion of the statute holds that the time of carrier insolvency is a factual question and does not depend upon any formal decree.⁵³ In that case the uninsured motorist carrier denied coverage on the theory that the tortfeasor-motorist's insurance carrier had become insolvent more than two years after the date of the accident. Although the final judicial decree establishing such insolvency was issued outside the two year period, there was overwhelming circumstantial evidence indicating that insolvency had occurred at a point much earlier in time and clearly within the two year period. For this reason the statutory require-

50. *Seabaugh v. Sisk*, 413 S.W.2d 602 (Spr. Mo. App. 1967); *Swaringin v. Allstate Ins. Co.*, 399 S.W.2d 131 (St. L. Mo. App. 1966).

51. § 379.202(2), RSMO 1975 Supp.

52. A professional discussion of the need for vigilance on the part of the injured person's attorney where there is an uninsured motorist claim and a risk of carrier insolvency can be found in A. WIDISS, *A GUIDE TO UNINSURED MOTORIST COVERAGE* 67 (Supp. 1976).

53. *Porter v. Georgia Cas. & Sur. Co.*, 508 S.W.2d 27 (Mo. App., D. St. L. 1974).

ment was satisfied, and the injured person was permitted to recover under the uninsured motorist provision of his own policy.

Moral: if there are indications that the tortfeasor's liability carrier is not in top financial condition a reasonable establishment of liability is important. If the carrier does become insolvent, evidence establishing that the condition of insolvency arose within the two years of the date of the accident is critical, and all circumstantial evidence relating to that point should be carefully collected and submitted.

"Hit-and-Run" Coverage

Although most policies which provide uninsured motorist protection define "uninsured automobile" in terms of the hit-and-run situation,⁵⁴ there is nothing explicit on this point in the Missouri statute.⁵⁵ Complicating the situation is the case when the unidentifiable car causes an injury-producing accident but has no contact with the vehicle occupied by the injured persons. This is a complicating factor because the policy provisions typically require a "contact" with the claimant's vehicle by the hit-and-run vehicle in order for the uninsured motorist provisions to apply.

In Missouri it is clear that when persons sustain injuries in the vehicle in which they are riding resulting from the negligence of an uninsured motorist, but there is no contact between the vehicles, such persons can recover under any applicable uninsured motorist coverage only if the uninsured motorist is identified and the absence of insurance proved.⁵⁶ However, when there is "contact" between the hit-and-run vehicle and the vehicle in which the claimant is riding, it is unnecessary for the claimant to identify the motorist or establish the absence of insurance in order to recover under the applicable uninsured motorist coverage.⁵⁷

Suppose, however, that the particular policy under which the claimant seeks protection has no definition of uninsured motorist which includes the "hit-and-run" vehicle. Would the Missouri statute mandate the coverage in the situation where the "contact" requirement is fully satisfied? Maybe. The decision in *Ward v. Allstate Insurance Co.*⁵⁸ is exasperatingly ambiguous on this point because it dealt with the "no contact" and "unidentifiable" motorist situation. It held that the statute would mandate coverage (whether in the

54. The 1966 Standard Form provides in relevant part as follows:
 "hit-and-run-vehicle" means a highway vehicle which causes bodily injury . . . arising out of physical contact . . . with the insured or with a vehicle which the insured is occupying . . . provided: (a) there cannot be ascertained the identity of either the operator or owner of such highway vehicle . . . "uninsured highway vehicle" means: . . . (b) a hit-and-run vehicle. . . .

A. WIDISS, *supra* note 8, at 294-95.

55. § 379.203, RSMo 1975 Supp.

56. *Ward v. Allstate Ins. Co.*, 514 S.W.2d 576 (Mo. En Banc 1974).

57. *Id.*

58. 514 S.W.2d 576 (Mo. En Banc 1974).

policy or not) where there is injury caused by an *identified* motorist who is proved to be uninsured, whether there is contact or not. But the opinion is formulated in such a way as to suggest by implication that where there is contact and the injury producing vehicle cannot be identified, that the statute would mandate coverage here as well.

. . . (A) fair reading of the Missouri *statute* . . . is that, in the absence of physical contact, there can be no recovery under the "hit-and-run" *policy* provision. . . .⁵⁹

Moral: contact is not a requirement that needs to be satisfied in order to establish liability under the uninsured motorist coverage of any policy issued in Missouri so long as the vehicle is identified and the non-existence of liability insurance established. It is questionable, however, whether the Missouri statute *requires* a contacting "hit-and-run" vehicle to be considered an "uninsured motor vehicle" in the absence of a policy provision so defining it. A good deal thus depends upon the language of the policy. In the absence of both contact and identification, there is no coverage (absent an explicit policy provision) under the normal uninsured motorist endorsement.

The "Trust Agreement"

The Missouri statute clearly establishes the right of the uninsured motorist insurer which has paid its insured under the contractual provisions of that coverage to recover from its insured the amounts which it has paid in the event that the insured is successful in enforcing a judgment for money damages or obtaining payments from the tortfeasor.⁶⁰ The typical policy mechanism for implementing this right to reimbursement is called a "trust agreement." The trust agreement, although giving the insurance carrier a right of subrogation upon payment of damages to the insured, does not result in an assignment of the insured's cause of action or make the insurer a real party in interest.⁶¹ Because this agreement frequently requires the uninsured motorist payee to sue the tortfeasor ". . . if requested in writing by the company . . .",⁶² the question arises whether the failure to honor that request can be a ground for avoiding an otherwise vested obligation on the part of the insurer to pay under the uninsured motorist provision.

The answer to this question appears to be "no" in Missouri, although the only authority is a federal case declaring what is logically the Missouri law.⁶³ The federal decision relies on the rule established in *Reese v. Preferred Risk Mutual Insurance Co.*⁶⁴ In *Reese* the Missouri Court of Appeals held that the claimant did not lose his right to recover under the uninsured motorist

59. *Id.* at 578.

60. § 379.203(4), RSMo 1975 Supp.

61. *Kroeker v. State Farm Mut. Ins. Co.*, 466 S.W.2d 105 (K.C. Mo. App. 1971).

62. 1966 Standard Form. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 297 (1969) [hereinafter cited as A. WIDISS].

63. *French v. Farmers Ins. Co.*, 354 F. Supp. 105 (E.D. Mo. 1972).

64. 457 S.W.2d 205 (St. L. Mo. App. 1970).

provision when the trial court dismissed, with prejudice, its action against the tortfeasor to which it had previously joined the defendant uninsured motorist carrier. The federal decision is a logical declaration of what the Missouri law must be. It would be contradictory to permit the carrier to join the tortfeasor or require the claimant to sue the tortfeasor as a condition precedent to payment under the uninsured motorist provision while not permitting the carrier to object to a dismissal of the action against the tortfeasor.⁶⁵

Moral: although the trust agreement provides the insurer with a right to reimbursement under certain circumstances, it does not result in an assignment of the insured's cause of action to the insurer. In addition, the uninsured motorist carrier may not require its insured to sue the tortfeasor, if the agreement requires the insured to do so upon the insurer's written request, as a condition to honoring its obligation to pay under the uninsured motorist provision of the policy. If the insured's action against the tortfeasor is dismissed with prejudice, the insurer may still remain obligated to pay under the uninsured motorist provision.⁶⁶

Intervention and Joinder

The Missouri Supreme Court ruled in 1975 that the uninsured motorist carrier may be joined by the claimant in claimant's action against the tortfeasor.⁶⁷ This holding was a reversal of earlier cases which had not allowed the carrier to be joined. These earlier cases drew a technical distinction between "transaction" and "occurrence" and held that since the rule permitting joinder used those terms in the disjunctive, joinder was not possible where the transaction and the occurrence were the same.⁶⁸ Although these cases did not allow the carrier to be joined by the claimant, the carrier was permitted to intervene in the action against the tortfeasor.⁶⁹ It was this inconsistency which prompted the court to reverse its position and no longer to allow the insurance carrier exclusively to decide whether or not to become a part of the claimant's action.⁷⁰

65. 354 F. Supp. at 110.

66. *Reese v. Preferred Risk Mut. Ins. Co.*, 457 S.W.2d 205 (St. L. Mo. App. 1970).

67. *State ex rel. Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655 (Mo. En Banc 1975).

68. *State ex rel. Campbell v. James*, 263 S.W.2d 402 (Mo. En Banc 1953); *Wells v. Hartford Acc. & Indemn. Co.*, 459 S.W.2d 253 (Mo. En Banc 1970); *State ex rel. Adrian Bank v. Luten*, 488 S.W.2d 636 (Mo. En Banc 1973). These cases were overruled insofar as they had held that the words "transaction" and "occurrence" were not synonymous and that joinder was therefore impermissible where there was a coalescence thereof in *State ex rel. Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655 (Mo. En Banc 1975). See Crahan, *Expansion of Permissive Joinder of Defendants in Missouri*, 41 MO L. REV. 199 (1976).

69. *Beard v. Jackson*, 502 S.W.2d 416 (Mo. App., D. St. L. 1973); *Wells v. Hartford Accident & Indemn. Co.*, 459 S.W.2d 253 (Mo. En Banc 1970).

70. *State ex rel. Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655, 664 (Mo. En Banc 1975). See also Crahan, *supra* note 68, at 202-07.

Although in the action which the injured person brings against the tortfeasor the uninsured motorist carrier may intervene on its own motion (against the will of the plaintiff),⁷¹ or be joined in that action (against the will of the carrier),⁷² it is clear that the carrier may not cross-claim against the tortfeasor with whom it shares co-defendant status.⁷³ This denial of the cross-claim power is consistent with earlier decisions which prohibit assignment of the claimant's cause of action,⁷⁴ deny the carrier's power to compel litigation with the tortfeasor,⁷⁵ and declare that the uninsured motorist carrier's rights against the insured are not rights of indemnity but only equitable interests in whatever sums the insured *may* eventually recover from the tortfeasor.⁷⁶

An intriguing variant on some of the foregoing rules is presented by the decision in *State ex rel. Safeco v. Scott*.⁷⁷ The insured in that action was one May, who had allegedly sustained injuries at the hands of uninsured motorist Jenkins. May sued his own carrier, Safeco, to recover under the uninsured motorist provisions of his insurance contract. In this situation, as pointed out earlier, May might have joined the uninsured motorist.⁷⁸ Safeco, however, could not join the uninsured motorist, and if May had elected to join the motorist, Safeco could not have filed a cross-claim against the motorist.⁷⁹ If May had sued only the uninsured motorist it is clear that Safeco could have intervened in that action, but again Safeco could not have filed a cross-claim against the motorist Jenkins.⁸⁰

Under the aforementioned facts, no serious problem is created. However, a passenger in the May vehicle also sustained injuries in the collision. The passenger, Voepel, was clearly an insured under the uninsured motorist provision of Safeco's contract with May. Voepel sued Safeco, alleging protection under the uninsured motorist provision of Safeco's contract with May, and also sued May and Jenkins for negligence. Voepel was allowed to intervene in May's action against Safeco which had the effect of consolidat-

71. *State ex rel. Manchester Ins. & Indemn. Co. v. Moss*, 522 S.W.2d 772 (Mo. En Banc 1975).

72. *State ex rel. Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655 (Mo. En Banc 1975).

73. *State ex rel. Manchester Ins. & Indemn. Co. v. Moss*, 522 S.W.2d 772 (Mo. En Banc 1975).

74. *Travelers Indemn. Co. v. Chumbley*, 394 S.W.2d 418 (Spr. Mo. App. 1965); *Kramer v. Laspe*, 94 S.W.2d 1090 (St. L. Mo. App. 1936); *see* Annot., 19 A.L.R.3d 1054 (1968).

75. *French v. Farmers Ins. Co.*, 354 F. Supp. 105 (E.D. Mo. 1972).

76. *Kroeker v. State Farm Mut. Auto. Ins. Co.*, 466 S.W.2d 105 (K.C. Mo. App. 1971).

77. 521 S.W.2d 448 (Mo. En Banc 1975).

78. *State ex rel. Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655 (Mo. En Banc 1975).

79. *State ex rel. Manchester Ins. & Indemn. Co. v. Moss*, 522 S.W.2d 772 (Mo. En Banc 1975).

80. Cases cited note 68 *supra*; *State ex rel. Manchester Ins. & Indemn. Co. v. Moss*, 522 S.W.2d 772 (Mo. En Banc 1975).

ing the actions. The Missouri Supreme Court refused to issue the writ of prohibition sought by Safeco to prevent this result.⁸¹

This decision generates two unusual and noteworthy results. First, although the carrier is normally barred from joining the putative tortfeasor in the insured's action against the carrier under the uninsured motorist clause,⁸² a third party who alleges coverage under the same uninsured motorist clause of the same policy may join the putative tortfeasor as well as the policholder as tort defendants in an action against the carrier for uninsured motorist benefits. The passenger (third party) may apparently do this by intervening in the policy holder's original action for uninsured motorist benefits against the carrier.⁸³ Whether or not the original insured (May) can object to the joining in this action of the putative tortfeasor is not clear because in *Safeco* the original insured (May) apparently had no objection either to Voepel's intervention or to Voepel's adding as defendants both the putative tortfeasor (Jenkins) and May.⁸⁴ The second result generated by this decision is that since the insurance carrier can thus be joined as a party in the action, it would seem virtually impossible for the carrier to retain any of the protection it would normally enjoy under the "no action" clause with respect to the negligence claim by Voepel against May.⁸⁵ In other words, at the trial it is going to be very obvious that it may not be just "some insurance company" which will ultimately pay any judgment returned against May but will be the named defendant in the action, Safeco.⁸⁶

Moral: the uninsured motorist carrier may *not* join the alleged tortfeasor as a party defendant. If the tortfeasor is joined, the uninsured

81. *State ex rel. Safeco Ins. Co. v. Scott*, 521 S.W.2d 448 (Mo. En Banc 1975).

82. The prohibition against compulsory joinder by the defendant insurance company of the uninsured motorist logically follows from the rules that (1) it is unnecessary for the claimant first to recover a judgment against the uninsured motorist as a condition to recovering under the policy, *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606, 611 (K.C. Mo. App. 1963), and (2) a clause requiring the plaintiff to sue the uninsured motorist as a condition to payment under the policy is unenforceable in Missouri. *French v. Farmers Ins. Co.*, 354 F. Supp. 105, 110 (E.D. Mo. 1972).

83. *State ex rel. Safeco Ins. Co. v. Scott*, 521 S.W.2d 448 (Mo. En Banc 1975).

84. *Id.* at 449.

85. The "no action" clause prohibits the person seeking a recovery under a policy of liability insurance from proceeding directly against the insurance carrier unless and until the legal liability of the insured has been legally established. *See, e.g., Clarke v. Organ*, 329 S.W.2d 670, 674 (Mo. En Banc 1959).

86. In addition to giving full effect to the "no action" clauses of the standard automobile policy, *see note 85 supra*, the Missouri courts have refused to permit a direct action against the insurer where the cause of action arose in Louisiana, and in which jurisdiction the direct action has been classified as a substantive right. *Noe v. United States Fidelity & Guar. Co.*, 406 S.W.2d 666 (Mo. 1966). The Missouri courts have also refused to follow a trend which permits the insurance company to be made a party to the action on the theory that the contractual obligation to defend the tortfeasor is a "debt" subject to an attachment by the plaintiff in his action for personal injuries. *State ex rel. Gov't Employees Ins. Co. v. Lasky*, 454 S.W.2d 942 (St. L. Mo. App. 1970). *Contra, Seider v. Roth*, 117 N.Y.2d 111, 216 N.E.2d 312 (1966).

motorist carrier may *not* cross-claim against the tortfeasor. The insured may, however, join the tortfeasor if it wishes. If the insured independently prosecutes a claim against the tortfeasor, the uninsured motorist carrier is clearly entitled to intervene in that action to protect its interests.

Stacking

The complexities of the typical automobile insurance policy, when combined with the pluralistic range of contractual associations applicable to most individuals today, are such that a given vehicle-connected injury frequently will be the subject of multiple insurance coverage. When there is this multiple coverage, it often happens that the limits of any one of the covering policies are such that the available insurance is insufficient to cover the loss. The question then arises whether the claimant may resort to one or more of the additional policies for coverage of the deficiency.

The question repeatedly arises with respect to liability coverage and has generated a universe of complex contractual language, rules of thumb, public policy rulings and technical rules beyond the scope of this discussion.⁸⁷ It is perhaps enough, at this point, to note that the industry device to protect itself is called the "other insurance" clause. Such a clause either provides that the insurer is responsible only for the "excess" of that not otherwise picked up by another applicable policy or provides that it is under no obligation to make any payments if there is *any* coverage in another policy.⁸⁸ When all applicable policies set forth "other insurance" provisions, the problem of selecting the primarily responsible carrier is dishearteningly similar to the *renvoi* problem which arises in conflicts of law.⁸⁹

With respect to the uninsured motorist coverage, however, the matter has been considerably simplified by the legislative provision making such coverage mandatory. In a series of decisions the Missouri courts have ruled that because the coverage is required by statute, no carrier can reduce his obligation below the statutory minimums. Thus, even though the statutory minimum is \$10,000 per person and \$20,000 per accident in the mandatory uninsured motorist provision, if there are three policies applicable to the circumstances of the loss the coverage may be \$30,000 per person or \$60,000 for all claims for personal injury arising out of the accident.⁹⁰

Different rules are applied in the case of multiple coverage depending upon whether the insurance is required by statute (as uninsured motorist coverage now is in Missouri) or only permitted by statute. This difference is

87. *Compare* Zurich Gen. Accident & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941) with Employers Mut. Cas. Co. v. MFA Mut. Ins. Co., 384 F.2d 111 (10th Cir. 1967). See also Annots., 76 A.L.R.2d 502 (1961), 69 A.L.R.2d 1122 (1960).

88. See, e.g., 1966 Standard Form VI e. in A. WIDISS, *supra* note 62, at 296-97. See also Annot., 28 A.L.R.3d 551 (1969).

89. See, e.g., Westbrook, *A Survey and Evaluation of Competing Choice-of-Law Methodologies: The Case for Eclecticism*, 40 MO. L. REV. 407 (1975); and RESTATEMENT (SECOND) CONFLICT OF LAWS § 8 (1971).

90. Cameron Mut. Ins. Co. v. Madden, 533 S.W.2d 538 (Mo. En Banc 1976).

illustrated by the case of *Gordon v. Maupin*⁹¹ where the plaintiff and two other passengers were injured as a result of the negligence of an uninsured motorist. The driver of the car in which they were riding had uninsured motorist coverage of \$10,000. The two other passengers received about \$8400 as compensation for their injuries which left only about \$1600 coverage for the plaintiff. However, the same carrier which had issued the policy covering the driver of the vehicle had also issued a policy to the plaintiff giving her uninsured motorist coverage while a passenger in another vehicle.⁹² Plaintiff thus had two coverages available, except for the provision in her own policy which disowned any obligation if "other" insurance were "available."

In this situation the courts have three choices. The least liberal alternative, the so-called "substituted coverage" theory, denies the plaintiff access to her own uninsured motorist coverage unless the coverage elsewhere afforded is below that required by the appropriate Safety or Financial Responsibility Law. If the coverage "available" is equal to that which would have been available had the uninsured motorist had a policy in compliance with the Responsibility Law, the "other" insurance clause bars the plaintiff from recovering under her own policy, even though the amount available to her is less than that mandated by the Responsibility Law because of the existence of competing claims. The most liberal approach permits the injured plaintiff to "stack" the available policy coverages up to the limit of her actual damages, even if such "stacking" permits a recovery above the "per person" minimum requirements mandated by the Responsibility Law. The third approach permits the plaintiff to "stack," but only up to the per person minimum limitation imposed by the Responsibility Law in force when the policy is issued. Thus, if the plaintiff had had \$15,000 in injuries and there were multiple uninsured motorist coverages available which, if "stacked," would have exceeded \$15,000, she still would have only been permitted to recover \$10,000, the minimum mandated by the Safety Responsibility Law.⁹³

The court in *Gordon* adopted the third approach and pointed out that it would have made no difference if the driver had been covered by a different insurance company than the one covering the plaintiff.⁹⁴ Shortly after this decision, however, the Missouri General Assembly amended the relevant provision of the statute so as to require this type of uninsured motorist coverage to be a part of every automobile liability insurance policy issued in

91. 469 S.W.2d 848 (St. L. Mo. App. 1971) noted Haseltine, *Uninsured Motorist Coverage—Other-Insurance Clause—"Available" Interpreted*, 38 MO. L. REV. 340 (1973).

92. *Gordon v. Maupin*, 469 S.W.2d at 849.

93. The opinion of the court in *Gordon v. Maupin* is not explicit about the ceiling imposed by the Safety Responsibility Law on the extent of recovery where there are multiple coverages, but its refusal to characterize the process approved as a "stacking" process clearly permits that inference. *Id.* at 851-52.

94. *Id.* at 849.

the state.⁹⁵ This legislative change was subsequently declared to have altered the observations made in *Gordon v. Maupin* so that the coverages of multiple policies applicable to the claim can now be "stacked" in order to cover the full extent of the claim (if the total of the stacked coverages is equal to or in excess of the claim).⁹⁶ Thus, the dicta in *Gordon v. Maupin* which would have limited stacking to the Responsibility Law's per person minimum is obsolete because it was interpreting a statutory provision subsequently repealed.⁹⁷

In *Webb v. State Farm Mutual Automobile Insurance Co.*⁹⁸ the carrier sought to deduct those payments which it had already made to or on behalf of the insured under the entirely different policy coverage governing medical payments from the amounts it was obligated to pay the insured under its uninsured motorist coverage. The court ruled that these contractual provisions were distinct from each other and represented independent minimums legislatively declared. Therefore, it held that it would be against public policy to allow the carrier to reduce its payment below the minimum coverage under the uninsured motorist protection (\$10,000) simply because some of those losses were also covered by an independent contractual obligation (medical payments coverage) between the insured and the carrier.⁹⁹

In *Steinhaeufel v. Reliance Insurance Cos.*¹⁰⁰ the plaintiff sustained \$15,000 damages as the result of the negligence of an uninsured motorist. His damages thus were \$5000 above the standard uninsured motorist coverage limit of the typical policy. Plaintiff settled with the insurance company of his employer, whose uninsured motorist coverage applied to the plaintiff, for the maximum coverage of \$10,000. Plaintiff then sought to recover the additional \$5000 from his own uninsured motorist coverage on his policy with State Farm. The trial court found against Steinhaeufel but the Missouri Court of Appeals for the District of St. Louis reversed. The court held that when the General Assembly elected to make uninsured motorist coverage mandatory and established minimum levels of coverage it expressed a public policy which was opposed to allowing any insurer the opportunity to reduce its obligation below that limit. Thus, the dicta in *Gordon v. Maupin* did not apply to Steinhaeufel and he was permitted to "stack" the State Farm coverage upon the Reliance coverage so as to give him his full damages of \$15,000.

95. Mo. Laws 1971, 398. Because of a technical defect in the title of the 1971 Bill, the law was repealed and superseded by another act with identical language. Mo. Laws 1972, at 1005, § 1; § 379.202, RSMO 1975 Supp.

96. *Steinhaeufel v. Reliance Ins. Cos.*, 495 S.W.2d 463 (Mo. App., D. St. L. 1973).

97. *Id.* at 466-67. See note 95 *supra*.

98. 479 S.W.2d 148 (Mo. App., D.K.C. 1972), noted, Hellmuth, *Uninsured Motorist Coverage—Validity of Medical Setoff Clause*, 38 MO. L. REV. 346 (1973).

99. 479 S.W.2d at 152, 38 MO. L. REV. at 347.

100. 495 S.W.2d 463 (Mo. App., D. St. L. 1973).

It has been said that the court of appeals in *Steinhaeufel* rejected the so-called "substituted coverage" theory which was also said to have been the "most convincing" rationale for the Missouri Court of Appeals, Kansas City District, decision in *Webb*.¹⁰¹ That comment, unfortunately, is erroneous. The so-called "substituted coverage" theory was not mentioned in either *Webb* or *Steinhaeufel* and was clearly rejected in *Gordon v. Maupin*. The rationale marshalled in *Webb* in order to justify the result in that case was not the so-called "substituted coverage" theory, which would have limited all "available" uninsured motorist coverages to the statutorily declared minimum irrespective of the number of claims, but the actual approach adopted in *Gordon v. Maupin*. That approach would permit any person suffering injury at the hands of an uninsured motorist to recover under "stacked" uninsured motorist coverages up to a maximum amount which would be the minimum established by the Safety Responsibility Law. However, although no single individual would be permitted to recover more than the established minimum, the combined claims resulting from the same accident would be allowed to exceed that limit, a situation which the so-called "substituted coverage" theory would not permit. Thus, it is clear that the so-called "substituted coverage" theory was clearly rejected by both the *Gordon* and *Webb* decisions.¹⁰²

Because the policies construed in *Gordon v. Maupin* were issued and the contractual provisions invoked at a time prior to the enactment of the Uninsured Motorist Law, the court was not faced with the question whether the contractual obligation to pay legislatively mandated minimums might be avoided by a particular obligor on the ground that other available insurance would satisfy such a minimum requirement. All the court had to face in *Gordon* was whether independent policies could be "stacked" so as to permit the injured person to recover up to the maximum uninsured motorist

101. Koeningsdorf, *Uninsured Motorist Coverage—Validity of Anti-Stacking Provisions and Workmen's Compensation Set-off Clause*, 39 MO. L. REV. 96, 103 (1974). The notewriter's error is attributable to an earlier notewriter's confusion of the so-called "substituted coverage" theory, which marshalls uninsured motorist claims and limits recoveries on the fictional assumption that the *tortfeasor* had insurance in compliance with the Safety Responsibility Law, with the actual theory adopted in *Gordon v. Maupin*, 469 S.W.2d 848 (St. L. Mo. App. 1971). The "substituted coverage" theory would permit each *person* injured by an uninsured *tortfeasor* to recover up to the limit imposed by the Safety Responsibility Law, even though the *aggregate* of payments received under the multiple uninsured motorist coverages exceeded that which the Safety Responsibility Law requires as a minimum. Hellmuth, *Uninsured Motorist Coverage—Validity of Medical Set-off Clause*, 38 MO. L. REV. 346, 354-55 (1973).

102. Both cases emphasize the proposition that it is the legislative policy to give to the injured person an opportunity to recover up to the minimum mandated by the statute and not to regulate or restrict the claims on a hypothesis that the *tortfeasor* had the minimum. *Gordon v. Maupin*, 469 S.W.2d 848, 851 (St. L. Mo. App. 1971); *Webb v. State Farm Mut. Auto Ins. Co.*, 479 S.W.2d 148, 152 (Mo. App., D.K.C. 1972).

coverage available under a particular policy or the minimum per person limit established by the Safety Responsibility Law, whichever was lower.¹⁰³

In *Webb*, however, the court was faced with a legislatively mandated contractual provision, the uninsured motorist coverage. The court held that, in view of the statutory mandate, that obligation could not be reduced simply because the same elements of damage might also be the subject of compensation pursuant to another independently assumed contractual provision, even though assumed by the same company.¹⁰⁴

The result in *Steinhaeufel*,¹⁰⁵ which refused to permit particular carriers to reduce their obligations to pay legislatively mandated minimums on the theory that the legislation was designed only to provide the injured party with that legislatively established minimum, was clearly heralded by the theory in *Webb*. The only difference, really, was that *Webb* dealt with whether a legislatively mandated coverage could be reduced by whatever amounts the same carrier had advanced to the plaintiff under an independently assumed and voluntarily entered into contractual agreement.¹⁰⁶ It is important to note that the court did not deal with the question whether payments made independently to the plaintiff pursuant to a legislatively mandated uninsured motorist obligation may be used to reduce the obligation of the carrier under the voluntary contract to make medical payments.¹⁰⁷

In *Steinhaeufel* the court simply said that where both contractual obligations were legislatively mandated, the carrier may not reduce its obligation to pay even though, as a result, the plaintiff will receive more than the statutory minimum because of the existence of multiple coverages.¹⁰⁸ This permitted "stacking" may place the injured person in a better position when he is struck by an uninsured motorist than when he is struck by one insured in compliance with the Safety Responsibility Law. A plaintiff with \$20,000 worth of injuries and multiple uninsured motorist coverage may recover the full \$20,000 if the tortfeasor is uninsured. If the tortfeasor is insured, he might only recover the mandated minimum per person coverage of \$10,000.¹⁰⁹

It should be noted that *Steinhaeufel* dealt with a situation where the claimant was covered by policies independently issued to different insureds.

103. *Gordon v. Maupin*, 469 S.W.2d 848 (St. L. Mo. App. 1971).

104. *Webb v. State Farm Mut. Auto Ins. Co.*, 479 S.W.2d 148, 152-53 (Mo. App., D.K.C. 1972).

105. *Steinhaeufel v. Reliance Ins. Cos.*, 495 S.W.2d 463 (Mo. App., D. St. L. 1973); *noted Koeningsdorf, Uninsured Motorist Coverage—Validity of Anti-Stacking Provisions and Workmen's Compensation Set-off Clause*, 39 MO. L. REV. 96 (1974).

106. *Webb v. State Farm Mut. Auto Ins. Co.*, 479 S.W.2d 148 (Mo. App., D.K.C. 1972).

107. *Id.* at 151-52.

108. *Steinhaeufel v. Reliance Ins. Cos.*, 495 S.W.2d 463 (Mo. App., D. St. L. 1973); *Koeningsdorf, Uninsured Motorist Coverage—Validity of Anti-Stacking Provisions and Workmen's Compensation Set-off Clause*, 39 MO. L. REV. 96 (1974).

109. *See Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 550 (Mo. En Banc 1976) (dissenting opinion).

In a 1975 decision of the Court of Appeals for the District of Kansas City, *Galloway v. Farmers Insurance Co.*,¹¹⁰ the same rule was applied in the situation where there were multiple policies issued to the same insured. An earlier decision of the Court of Appeals for the District of St. Louis, *Automobile Club Inter-Insurance Exchange v. Diebold*,¹¹¹ which would seem to have compelled a different result was both questioned and distinguished by *Galloway*. The court stated: "Whether *Diebold* was correctly decided or not, that decision cannot deny stacking in this case."¹¹²

The final word in the evolution of judicial decisions on the stacking question came in *Cameron Mutual Insurance Co. v. Madden*,¹¹³ when the Missouri Supreme Court put to rest the decision in the *Diebold* case. The court held that the *Diebold* rationale was inapplicable even to a situation in which there is a single policy to a given insured which includes multiple vehicles. Five members of the court ruled that the statutory requirement that every policy of motor vehicle insurance issued in this state include uninsured motorist protection to a minimum limit resulted in coverage to the full extent of each individual coverage within a single policy. This means, of course, that the uninsured motorist protection available to any particular claimant varies directly with the number of policies applicable to the claim as well as to the number of vehicles covered by a particular policy.

Judges Seiler and Holman dissented. They declared that an equally plausible interpretation of the statute was the notion accepted in *Gordon v. Maupin* that the only intention of the General Assembly when it made uninsured motorist protection mandatory was an intention to have available to injured persons at least that amount of coverage mandated by the Safety Responsibility Law.¹¹⁴

Cameron also involved the question whether the medical payments coverages for the different vehicles covered by the single policy could be stacked. Medical payments coverage, unlike uninsured motorist coverage, is not required by statute. The policy in *Cameron* provided that: "When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each."¹¹⁵ This policy language coupled with the fact that the company charged two separate premiums for the medical payments coverage applicable to each car insured under the policy and that if it had been the intention of the insurer to limit the coverage to the single amount applicable to one of the vehicles covered it could have done so ". . . in clear and unambiguous language . . ." ¹¹⁶ combined to make the conclusion inescap-

110. 523 S.W.2d 339 (Mo. App., D.K.C. 1975).

111. 511 S.W.2d 135 (Mo. App., D. St. L. 1974) *overruled* case cited note 109 *supra* at 545.

112. *Galloway v. Farmers Ins. Co.*, 523 S.W.2d 339, 343 (Mo. App., D.K.C. 1975).

113. 533 S.W.2d 538 (Mo. En Banc 1976).

114. *Cameron Mut. Ins. Co. v. Madden*, 533 S.W.2d 538, 548-51 (Mo. En Banc 1976) (dissenting opinion).

115. *Id.* at 546 (majority opinion).

116. *Id.*

able that the medical payments coverages could be stacked.¹¹⁷ However, the court clearly indicated that it was both possible and legitimate for an insurance carrier to draft its policy in such a way that the medical payments could not be stacked. This would not be against public policy because medical payments coverage is not statutorily mandated.¹¹⁸

Moral: there appears to be no limitation on the stacking of uninsured motorist coverages provided that the particular injury is within the contractual provisions of the policy coverages stacked. Policy language prohibiting or designed to avoid stacking of such uninsured motorist coverage provisions is unenforceable as against public policy. The coverages can be stacked in order to allow the injured person to recover his actual damages to the extent of the stacked total. Multiple recoveries for the same injury are not possible under the uninsured motorist provisions.

Medical payments coverages can also be stacked if the policy language permits, but insurance policy clauses may be drawn to prevent stacking. If a policy includes both medical payments coverage and uninsured motorist coverage, stacking or double recoveries can be obtained where the loss is within the minimum limits mandated by the statutory provision governing uninsured motorist coverage and also covered by an independent medical payments coverage.¹¹⁹

Conclusion

Although the complexities and interacting coverages of the typical automobile insurance policy leave many important questions unresolved, the Missouri courts have, except in the case of the underinsured motorist,¹²⁰ taken a quite liberal position towards injured claimants in their constructions of the applicability of the mandated uninsured motorist coverage provisions. This is quite as it should be because the uninsured motorist coverage provision is an industry created substitute for more comprehensive, and possibly more socially desirable, solvency gap remedies. Some disturbing holdings which result from ambiguities in the statutory language, such as the use of the term "uninsured motor vehicle" when it is the uninsured driver to which the legislative policy is directed, have created traps for the unwary.¹²¹ Thus, as is illustrated by the very recent decisions involving stacking, it is extremely important to determine all of the possibly applicable policies in any injury-producing accident caused by an uninsured motorist.

117. *Id.* at 547.

118. *Id.*

119. *Webb v. State Farm Mut. Auto Ins. Co.*, 479 S.W.2d 148 (Mo. App., D.K.C. 1972); *Hellmuth, Uninsured Motorist Coverage—Validity of Medical Set-off Clause*, 38 MO. L. REV. 346 (1973).

120. *Brake v. MFA Mut. Ins. Co.*, 525 S.W.2d 109 (Mo. App., D. St. L. 1975); see text accompanying note 49 *supra*.

121. See text accompanying notes 22-25 *supra*.

