Kentucky Law Journal

Volume 62 | Issue 2 Article 8

1973

Uninsured Motorist Coverage--Charting the Kentucky Course

Thomas M. Cooper
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Insurance Law Commons, and the State and Local Government Law Commons
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Cooper, Thomas M. (1973) "Uninsured Motorist Coverage--Charting the Kentucky Course," *Kentucky Law Journal*: Vol. 62 : Iss. 2 , Article 8.
Available at: https://uknowledge.uky.edu/klj/vol62/iss2/8

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

NOTES

UNINSURED MOTORIST COVERAGE–CHARTING THE KENTUCKY COURSE

In the early 1960's, a man from Elizabethtown, Ky., was severely injured in a two-car collision with a Mississippi motorist who was passing through Elizabethtown. He filed suit and won a default judgment when the defendant failed to appear; however, when plaintiff attempted to satisfy the judgment by seeking full faith and credit in Mississippi, he discovered not only that the Mississippian was uninsured, but also that, anticipating the Kentuckian's action, he had secured a divorce with all of his assets passing to his wife. The man continued to live with his ex-wife and farm his land, but the property transfer pursuant to the divorce decree effectively insulated the property from the judgment creditor. Although a victim of the Mississippian's negligence, the Kentuckian received no compensation for his disabling injuries.[1]

To remedy such inequity, Kentucky, following the lead of New Hampshire and twenty-four other states, enacted a statute in 1966 requiring all automobile insurance companies to provide uninsured motorist protection in their coverage.[2] This protection may be rejected in writing by the policyholder,[3] but it must be offered by all companies underwriting liability coverage in Kentucky.[4]

The policy behind uninsured motorist coverage is simple: it is designed to compensate the insured for bodily injury or death sustained through the fault of an uninsured motorist.[5] Application of the coverage has been more complex, and extensive litigation between insureds and insurers over the interpretation and legal efficacy of policy language has defined certain problem areas. This note will examine these problem areas placing emphasis upon Kentucky law; however, it must be noted that uninsured motorists coverage is relatively unlitigated in this state.[6] Where a Kentucky case has dealt with the problem,

---

[1] Clark v. Suggs, Civil Action No. 2132 (Hardin Cir. Ct. Ky., Dec. 4, 1965).
[2] KY. REV. STAT. § 304.20-020 (1972) [hereinafter cited as KRS].
[3] KRS § 304.20-020(1).
[4] *Id.*
[5] *See, e.g.,* Automobile Club Ins. Co. v. Craig, 328 F. Supp. 988 (E.D. Ky. 1971).
[6] Kentucky has only nine reported cases concerning uninsured motorist coverage.

the focus will be on that case; where the Court of Appeals has not considered the issue, the focus will shift to foreign case law in an attempt to predict the Court's resolution of the particular controversy. Frequent reference will be made to the Standard Uninsured Motorists Endorsement issued by the National Bureau of Casualty Underwriters [hereinafter cited as Standard Endorsement] to provide contractual language essential to discussion of the case law.[7]

I. BACKGROUND

To ensure compensation for accident victims, states have developed various statutory plans. Compulsory liability insurance requires as a condition precedent to vehicle registration that the owner demonstrate proof of minimum liability coverage.[8] An unsatisfied judgment fund financed by vehicle registration fees, assessments against insurance companies, and collections from uninsured motorists provides limited compensation for plaintiffs with unsatisfied judgment claims.[9] The financial responsibility law, which Kentucky has enacted,[10] provides that once a motorist is involved in an accident, his license will be suspended unless he can prove that he has sufficient assets to satisfy a specified judgment. Proof of assets can be satisfied by a current liability policy of 10/20/5 or by bond in the event the driver is not covered by insurance.[11] This "every dog is entitled to his first bite" policy has an effect similar to criminal sanctions. It gives the injured party no compensation for his injuries other than the satisfaction of seeing the state extract its pound of flesh from the tortfeasor—little consolation for the victim of a judgment-proof motorist.

Uninsured motorist coverage was initiated to prevent this injustice. One commentator has described it as a "form of first party insurance designed to protect persons injured in automobile accidents from losses which, because of the tortfeasor's lack of liability coverage,

[7] Casualty Underwriters, *Uninsured Motorist Endorsement*, No. UM-1-4 (May 1, 1966) [hereinafter cited as *Standard Endorsement*]. The *Standard Endorsement* is reprinted as Appendix A in A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE (1969). Similar language is contained in the uninsured motorist endorsement of any liability insurance policy.

[8] *See, e.g.*, N.C. GEN. STATS. §§ 20-309, 20-279.1(11) (1971).

[9] *See* G. HALLMAN, UNSATISFIED JUDGMENT FUNDS (1968).

[10] KRS § 187.290. In Bell v. Burson, 402 U.S. 535 (1971), the Supreme Court declared Georgia's financial responsibility act unconstitutional since it deprived a motorist of his license without an independent inquiry to determine whether there was a reasonable possibility that the uninsured motorist would be adjudged liable in a judicial proceeding. Since KRS § 187.330 employs language similar to GA. CODE ANNOT. § 92A-605 (1972), constitutional due process probably requires an inquiry into liability/fault before suspension of a license in Kentucky.

[11] KRS § 187.330.

would otherwise go uncompensated."[12] The provision essentially fictionalizes the accident, depicting the tortfeasor *as if* he were insured according to the minimum financial responsibility requirements. If liability is ultimately fixed on the uninsured motorist, whether by court decision, arbitration, or by agreement between the company and the insured, the insurer must compensate the policyholder to the policy limits. The company then will be subrogated to the rights of the insured against the tortfeasor. Thus the financially responsible driver has acquired some protection against being injured by an uninsured motorist.[13]

To fully understand the legal development of uninsured motorist insurance, it is essential to realize that insurance companies resisted expanding policy coverage to include this provision. The General Assembly, responding to the need of the motoring public, imposed this requirement on the companies. Unable to circumvent the Book-of-the-Month-Club offer dictated by the statute ("you've got it unless you reject it"), insurance companies have circumscribed their contractual responsibilities with conditions precedent which make it possible for them to avoid indemnification. To recover, the insured must establish that: (1) the motorist was in fact uninsured; (2) the uninsured motorist was at fault; (3) the insured's conduct was free of contributory negligence; (4) the accident was the proximate cause of injuries sustained; (5) all conditions precedent have been met, *i.e.*, notice of suit, cooperation with the company's lawyers, etc.; and (6) the accident arose out of the ownership, maintenance, or use of the uninsured motor vehicle.[14] Insurance representatives assert that these conditions are necessary to protect the companies from fraudulent claims and insist that the legislatures did not intend to put the insured in a stronger position vis-a-vis his own company than he would have against an insured tortfeasor. Consequently, the insured who files an uninsured motorist claim finds himself in an unexpected adversary relationship with his own insurer, the company he had expected to protect his interests.

The statutory language governing uninsured motorist coverage is brief:

> (1) No automobile liability or motor vehicle liability policy of insurance insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of

[12] *Symposium: Uninsured Motorist Endorsement,* 53 MARQ. L. REV. 319 (1970).
[13] *Id.* at 324.
[14] *Id.* at 326-27.

> the ownership, maintenance, or use of a motor vehicle shall be delivered . . . unless coverage is provided therein or supplemented thereto, in limits for bodily injury or death set forth in KRS 187.330(3)[15] under provisions approved by the commissioner, for the protection of persons injured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease including death resulting therefrom; provided that the named insured shall have the right to reject in writing such coverage. . . .
> (2) For the purpose of this coverage, the term "uninsured motor vehicle" shall subject to the terms and conditions of such coverage be deemed to include an insured motor vehicle where the liability insurer thereof is unable to make payment with respect to the legal liability of its insured within the limits specified therein because of insolvency; an insured motor vehicle with respect to which the amounts provided under . . . the insurance policy . . . are less than the limits described in KRS 187.330(3); and an insured motor vehicle to the extent that the amounts provided in the liability coverage applicable at the time of the accident is denied by the insurer writing the same.[16]

The statute and the policy it embodies, *i.e.*, to protect the financially responsible motorist, favor the insured; however, the insurer drafts the contract cognizant of the eventuality of litigation. Where the statutory policy and the contractual terms clash litigation will result. Generally, courts tend to decide in favor of the policy argument, indicative perhaps of their predilection for the underdog and reflective of their hostility *contra proferentem* in adhesion contract disputes. This theme, while seldom expressed, becomes vividly evident as one analyzes the case decisions.

II. WHO IS AN INSURED?

A. *Residents of the Same Household.*

The Standard Endorsement defines the term "insured" as follows:

> (a) The named insured as stated in the policy . . . and any person designated as named insured in the schedule and *while residents of the same household*, the spouse of any such named insured and relatives of either.[17]

The named insured is clearly covered, but disputes often arise regard-

---

[15] KRS § 187.330(3) sets the minimum liability limits that insurance companies must offer in Kentucky: ten thousand dollars because of bodily injury or death to one person in the accident; twenty thousand because of death or injury to two or more persons in one accident; and five thousand dollars because of property damage sustained in any one accident [hereinafter referred to as 10/20/5 coverage].

[16] KRS § 304.20-020.

[17] *Standard Endorsement* § II.

ing coverage of the spouse and other members of the family who may be covered by the omnibus clause. For example, in a recent LaRue Circuit Court suit,[18] the controversy narrowed to whether a daughter residing with her mother who was legally separated from her father could be considered a resident of her father's household and entitled to coverage under his uninsured motorist protection. The plaintiff contended that the endorsement clearly covered the daughter since it was entitled "Family Protection Coverage," that the mother had only temporary custody of the daughter, that the daughter had spent time in the father's residence, and that the trend of foreign courts in similar fact situations was to find that coverage existed. The case was settled prior to a ruling on the motion for summary judgment. One might speculate that the plaintiff settled fearful that the court might rule in favor of the express contractual terms, while the defendant settled fearful that the court might find the phrase "resident of the same household" ambiguous under the circumstances and rule for the plaintiff.

There is no Kentucky case in point on the interpretation of "residence" in an uninsured motorist context; however, there is considerable foreign case law. The courts have reached opposite results depending on whether they adopted a strict or liberal interpretation of the phrase.

The strict standard has required the person covered by the omnibus clause to be actually living under the same roof as the named insured. In a Minnesota case,[19] with a fact pattern similar to the LaRue Circuit Court case, the court said:

> A husband and wife who are separated and not living together are not members of the same household. . . . The son, Raleigh, except for visits of a day or two at a time with his father in LaCrosse, lived under his mother's roof and accordingly was a member of her "household" and was not a member of his father's "household". Raleigh's temporary visits of a day or two did not make him a member of his father's "household."[20]

A Texas court agreed where the issue was whether a husband was covered by his wife's uninsured motorist endorsement when they had separated prior to the accident and were living under separate roofs:[21]

---

[18] Brown's Adm'x v. Davis, Civil Action No. 1697 (Larue Cir. Ct. Ky., Feb. 5, 1973).

[19] Hartford Accident & Indem. Co. v. Casualty Underwriters, Inc., 130 F. Supp. 56 (D. Minn. 1955).

[20] *Id.* at 58-59.

[21] Cunningham v. Members Mut. Ins. Co., 456 S.W.2d 216 (Tex. Ct. App. 1970).

> . . . the evidence establishes the fact as a matter of law that the plaintiff was not a resident of the same household as . . . his wife, at the time of the collision resulting in his injuries, and therefore the contract excluded coverage as to him.[22]

A New York case based its decision on whether the estranged husband and wife were living under the same roof at the time of the accident.[23] In that case, there was evidence that although husband and wife had been separated before and after the accident, they had been living together at the time of the accident. On appeal from summary judgment for the insurer, the court reversed, holding that there was a substantial question of fact as to whether the wife was "a member of the husband's household at the time of the accident."[24]

The liberal view has extended coverage to persons who are not at all times living under the same roof as the named insured. A Louisiana court held that a son was a resident of his father's household and covered by the uninsured motorist endorsement even though at the time of the accident he was temporarily residing with his mother, who was separated from his father.[25] Evidence showed that the son spent varying amounts of time with each parent but that he did not plan to reside permanently with the mother.[26] The court held that it was not necessary for the son to be under his father's roof at all times in order to qualify as a resident of the same household. Similarly, a Wisconsin decision affirmed denial of an insurer's motion for summary judgment in an action where there was a legal separation and custody of the son had been awarded to the mother.[27] However, the father, though living apart, testified that he considered his wife's residence to be *his legal residence,* and the court concluded that, absent a final divorce decree, the son was a resident of the same household.[28]

Beyond the separation of spouses context, courts applying the standard have ruled that coverage extends to a son away from home at college[29] and to an unemancipated son in the military.[30] Coverage was also granted to a step-daughter who did not move into her step-father's house until after the accident because her step-father and

---

[22] *Id.* at 217.
[23] Highsmith v. Motor Vehicle Accident Indemnification Corp., 298 N.Y.S. 2d 648 (App. Div. 1969).
[24] *Id.* at 650.
[25] Fidelity Gen. Ins. Co. v. Ripley, 228 So.2d 238 (La. Ct. App. 1969).
[26] *Id.* There was no legal decree of separation nor had custody of the children been awarded to either parent.
[27] Herbert v. Hanson Gen. Cas. Co. of Wis., 176 N.W.2d 380 (Wis. 1970).
[28] *Id.*
[29] Manuel v. American Employers Ins. Co., 228 So.2d 321 (La. Ct. App. 1969).
[30] Allstate Ins. Co. v. Smith, 88 Cal. Rptr. 593 (Ct. App. 1970).

mother were honeymooning at the time of the accident.[31] The court reasoned that once her mother married, the step-father's home was the daughter's legal residence.

How would the Kentucky Court of Appeals decide a case with a fact pattern similar to the *Brown* case in LaRue Circuit Court?[32] The split in foreign decisions seems to center on each court's interpretation of "household." Courts that deny coverage equate "household" with the actual dwelling place of the insured at the time of the accident, while those that allow coverage interpret "household" broadly and focus on the insured's *intent* to dwell apart permanently. Although the Kentucky Court has never specifically interpreted the phrase "resident of the same household," it has construed similar language contained in the family exclusion clause appearing in many liability policies. By analogy, these cases can be applied to the uninsured motorist context to predict how the court may interpret "resident of the same household" in uninsured motorist cases.

In *Orange v. State Farm Mutual Insurance Co.*[33] the Court of Appeals upheld the insurer's claim that it was not obligated to defend a liability suit against the insured mother by the estate of her unborn child who died as a result of her negligence. Finding that the child was a viable fetus, the Court ruled that the child came within the exclusionary clause in the contract which provided that insurance would not apply "(i) . . . to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured."[34] The Court refused to go into the interpretation of "family" and "household" but rather looked to the purpose of the family exclusion clause:

> We are impressed by the fact that the clear purpose of the exclusion was to protect the insurer from overfriendly lawsuits, which nearly always would exist where plaintiff and insured defendant are bound by ties of kinship and are living together.[35]

The same result was reached in *Kentucky Farm Bureau Mutual Insurance Co. v. Harp*[36] and in a federal case applying Kentucky law, *Automobile Club Insurance Co. v. Combs*.[37] These cases involved contractual terms within a liability policy context. The Court was not faced with the issue of separate households and had little trouble

[31] Box v. Doe, 221 So.2d 666 (La. Ct. App. 1969).
[32] *See* text accompanying note 18, *supra*.
[33] 443 S.W.2d 650 (Ky. 1969).
[34] *Id.* at 651.
[35] *Id.* at 651-52.
[36] 423 S.W.2d 233 (Ky. 1968).
[37] 299 F. Supp. 264 (E.D. Ky. 1969).

determining who lived with whom. As to emancipated children living at home, the Court held in *National Union Fire Insurance Co. v. Carricato* that a clause in a liability policy excluding "the named insured and any resident of the same household" encompassed the insured's emancipated daughter while living in the household of the named insured.[38] Similarly, in *Senn v. State Farm Mutual Automobile Insurance Co.*,[39] the Court held the exclusion clause applicable to the brother of the insured serviceman stationed away from home on the grounds that the serviceman's residence was not his military post but the home he had left to enter service, and therefore his brothers were members of the same household.[40]

In other contexts, the Court has wrestled with the terms "residence" and "household". In a voting situation, the Court held:[41]

> When a person retains a habitation or dwelling, intention to return to *it* is a most important consideration and must oftimes be controlling. On the other hand, when a person no longer has a physical abode in a particular *area* his intention to return to the area is a lesser significance.[42]

In an appeal challenging venue,[43] defendant contended that although he was living in Kentucky at the time of the accident, he intended to return to his domicile, Indiana, and that the proper venue was either the place of the accident (Indiana) or his domicile. The Court distinguished the two terms:

> Although used interchangeably they have a separate and distinct meaning. "Domicil" has a broader meaning than "residence." It includes residence but actual residence is not essential to retain a domicil after it is once acquired. Residence is preserved by an act; domicil by an act coupled with intent. While one may have only a single domicil, he may have several residences. Having acquired a legal residence and domicil as contemplated by the statute, it can only be lost or changed by the exercise of a conscious volition.[44]

In an action to determine which city was entitled to personal

---

[38] 439 S.W.2d 957 (Ky. 1969).

[39] 287 S.W.2d 439 (Ky. 1956).

[40] For federal tax purposes, a serviceman's residence is his organization, *see* Commissioner v. Stidger, 386 U.S. 287 (1967). In effect this means that the soldier stationed in Korea or the marine in Okinawa cannot claim the away-from-home deductions available to a professor touring Europe ostensibly for research purposes. Kentucky taxes its servicemen regardless of duty station as long as they maintain their permanent residence in Kentucky. KRS § 141.215.

[41] Moore v. Tiller, 409 S.W.2d 813 (Ky. 1966).

[42] *Id.* at 816.

[43] Vogt v. Powers' Adm'x, 291 S.W.2d 840 (Ky. 1956).

[44] *Id.* at 842.

property taxes,[45] the Court held for the City of Catlettsburg although decedent for the five years preceding his death had resided in Ashland:

> It follows that although decedent changed his actual residence from Catlettsburg to Ashland in 1907, he did not change his legal residence or domicile until he intended so to do, and his intention in the final analysis is really the only question in issue, and in determining this issue the party's own expressed intention cannot have a controlling effect; where there is a conflict between his intention as expressed and as exhibited by his conduct, the latter will usually control.[46]

Analogizing from decisions in other areas of the law, the Court of Appeals would probably hold that "household" equates with "legal residence" or "domicile" and rule that uninsured motorist coverage extends to the child of a separated insured father since the child is living in the father's legal residence, following the Louisiana[47] and Wisconsin[48] decisions. In contrast, the Court could adhere to the "strict" approach of Minnesota[49] and Texas[50] which consists of examining the evidence to determine who lived where. In fact, the Court used this second approach in the liability insurance context mentioned above.[51] However, in other contexts, it has looked beyond the mere spatial connotations of "residence" or "household." In resolving this controversy, the Court will be faced with the dilemma of whether to look to the policy and spirit of the statute or look to the literal terms of the contract. If it is more persuaded by the policy argument, it can find coverage exists; if it approves the contractual argument, it can deny coverage. Judging from past decisions, the Kentucky Court will tend toward the former and liberally interpret "household" to extend coverage.

B. *Occupying an Insured Highway Vehicle.*

There is a second class of insureds covered by the policy, *i.e.*, "(b) any other person while occupying an insured highway vehicle" with the insured's consent.[52] "Occupying" is defined as ". . . in or upon or entering into or alighting from."[53] Questions of coverage arise in this

---

[45] City of Ashland v. City of Catlettsburg, 189 S.W. 454 (Ky. 1916).
[46] *Id.* at 455.
[47] Box v. Doe, 221 So.2d 666 (La. Ct. App. 1969).
[48] Herbert v. Hanson Gen. Cas. Co. of Wis., 176 N.W.2d 380 (Wis. 1970).
[49] Hartford Accident & Indem. Co. v. Casualty Underwriters, Inc., 130 F. Supp. 56 (D. Minn. 1955).
[50] Cunningham v. Members Mut. Ins. Co., 456 S.W.2d 216 (Tex. Civ. App. 1970).
[51] Kentucky Farm Bureau Mut. Ins. Co. v. Harp, 423 S.W.2d 233 (Ky. 1968).
[52] *Standard Endorsement* § II.
[53] *Standard Endorsement* § V.

area when a person is physically outside of the vehicle. Research reveals no Kentucky case which has interpreted the term "occupying;" however, foreign law illustrates the "entering" or "alighting" aspects of coverage. A New York case ruled coverage extended to a claimant injured while standing next to a taxicab as he attempted to pay the driver,[54] and a Louisiana case extended coverage to a claimant unlocking the insured's car door when struck by an uninsured motorist.[55] Another New York case expanded protection to include a claimant who was injured by a hit-and-run vehicle four or five seconds after alighting from a stalled vehicle.[56] California extended coverage to an insured when struck by an uninsured motorist while standing one to four feet away from the vehicle preparing to install snow chains.[57] Since he had alighted from the car two minutes earlier, the plaintiff based his case on the theory that his physical relationship to the car was sufficient to place him within the protection offered to those who are "upon" an insured vehicle. The California Court of Appeals held that contractual provisions must be read and interpreted in light of the purpose and policy of the uninsured motorist statute, which is to provide compensation for those injured by the use of automobiles through no fault of their own.[58] A Virginia case[59] denied coverage where evidence showed decedent was 164 feet away from the insured vehicle when struck by an uninsured motorist.

These cases point out that as long as there is a reasonable relationship between the vehicle and the insured, manifested by some activity concerning the vehicle, or the insured is within reasonable geographical limits of the vehicle at the time of injury, the courts will extend coverage.

Before one concludes that the Kentucky Court of Appeals would liberally construe the term "occupying", consideration should be given to *Kentucky Water Serv. Co., Inc. v. Selective Insurance Co.*[60] Plaintiff drove his truck onto defendant's premises for the purpose of obtaining a load of water and, while helping defendant's servant with the hose, was injured, allegedly because of the servant's negligence. Plaintiff's liability policy covered any person who suffered injury arising from the *use* of the vehicle, which included loading or unloading, and the omnibus clause covered any person using the automobile with per-

[54] Allstate Ins. Co. v. Flaumenbaum, 308 N.Y.S.2d 447 (S. Ct. 1970).
[55] Box v. Doe, 221 So.2d 666 (La. Ct. App. 1969).
[56] State-Wide Ins. Co. v. Murdock, 299 N.Y.S.2d 348 (App. Div. 1969).
[57] Cocking v. State Farm Mut. Auto. Ins. Co., 86 Cal. Rptr. 193 (Ct. App. 1970).
[58] *Id.* at 196.
[59] Insurance Co. of North America v. Perry, 134 S.E.2d 418 (Va. 1964).
[60] 406 S.W.2d 385 (Ky. 1966).

mission. Defendant's insurance company maintained that plaintiff's insurance company should defend defendant and defendant's servant, since the servant was "using" the vehicle and had injured plaintiff. The Court ruled against the defendant's insurance company holding there was not a sufficient relationship between defendant's servant and plaintiff's vehicle to extend liability coverage under the omnibus clause. The decision may be distinguishable in an uninsured motorist context, but it indicates that the Court of Appeals may define the permissible geographical perimeter narrowly and demand a close relationship between claimant and vehicle before extending coverage.

III. THE UNINSURED VEHICLE

A. *The Hit-and-Run Vehicle*

Having discussed who is entitled to protection as an insured, we must determine who may be classified as an uninsured motorist. The Standard Endorsement speaks in terms of the vehicle rather than the person: ". . . the owner or operator of an uninsured highway vehicle . . ." and ". . . arising out of the ownership, maintenance, or use of such uninsured highway vehicle."[61] If the policyholder is injured by an insured tortfeasor and for some reason, such as lack of notice, the tortfeasor's insurer denies coverage, the policyholder can proceed against his own carrier on the uninsured motorist provision.[62] The same is true if the wrongdoer's insurance company becomes insolvent.[63] If the policyholder is injured by an out-of-state motorist carrying the minimum liability policy of 5/10/5 under that state's financial responsibility law and judgment is for $10,000, the policyholder can recover the remaining $5,000 from his insurer since the motorist was partially uninsured under Kentucky law.[64] These situations are easily handled by the express wording of the statute.

The hit-and-run vehicle also qualifies as an uninsured vehicle. The Standard Endorsement defines a hit-and-run vehicle as

> a vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with a vehicle which the insured is occupying at the time of the accident provided:
> (a) there cannot be ascertained the identity of either the operator or owner of such highway vehicle.[65]

A case recently settled in Jefferson County illustrates the use of this

[61] *Standard Endorsement* § I.
[62] KRS § 304.20-020(2).
[63] *Id.*
[64] *Id.*
[65] *Standard Endorsement* § V.

provision.[66] Plaintiff was traveling on a turnpike when he suddenly realized he was about to rear-end a truck traveling around 30 m.p.h. (minimum speed was 40 m.p.h.). Slamming on his brakes, he avoided striking the truck by a few inches, only to be knocked forward into the truck by defendant's trailing car. The truck sped off, leaving the plaintiff and defendant to disentangle themselves. Plaintiff sued both the defendant for rear-ending him and his insurance company on his uninsured motorist coverage contending that it was the hit-and-run truck's negligence that caused the chain of events leading to his injuries.

The hit-and-run provision, like all uninsured motorist provisions, covers the insured when injured in his own car, or as passenger in another car, or as a pedestrian.[67] The uncertainty of hit-and-run coverage centers on whether a "hit", *i.e.*, physical contact, is required. Suppose the policyholder swerves to avoid a weaving car approaching from the opposite direction and encroaching on his lane, loses control and smashes into an abutment. Can he recover under the hit-and-run provisions when in fact the only "hit" registered was the striking of the abutment? In *Brown v. Progressive Mutual Insurance Co.*[68] the Florida court did not focus on the requirement of a hit which the insurance company argued was necessary in order to obviate spurious claims, but rather it emphasized the public policy of the statute to entitle the policyholder to recover the damages he would have been able to receive had the tortfeasor been located and insured.[69] Commenting on this case, one writer summarized the effect of the decision:

> The instant decision places the emphasis on proof rather than upon relatively arbitrary requirements imposed by and for the benefit of the insurance industry. The advantages of the court's decision far outweigh the possible increase in spurious claims. The court emphasized the burden is on the plaintiff to show that the accident did occur as alleged. Since the physical contact requirements are no longer a condition precedent of recovery, the victim of a hit-and-run accident who has sufficient proof that there was a

[66] Stern v. Aetna Cas. & Sur. Co., Civil Action No. 141099 (Jefferson Cir. Ct. Ky., Mar. 30, 1973).

[67] Consider this situation: plaintiff lived in a small house at a sharp bend of a secondary road. While plaintiff was asleep one night, an unknown driver failed to negotiate the bend, tore through the fence and smashed into his bedroom. Amazingly, the driver was able to extricate his car and make good his escape. Plaintiff's bodily injuries consisted of minor abrasions but his property damages were extensive. However, uninsured motorist coverage only extends to bodily injuries, so the policyholder could not recover for his property damages. *See* KRS § 304.20-020(1).

[68] 249 So.2d 429 (Fla. 1971).

[69] *Id.* at 430.

> negligent tortfeasor will not be refused recovery because of an arbitrary technicality in an insurance contract.[70]

Kentucky's position on the issue of whether physical contact is a condition precedent to recovery under the uninsured motorist endorsement was recently clarified in *Ogden v. Employers Fire Insurance Co.*[71] Plaintiff's decedent was a passenger in a car traveling on a four lane expressway. The driver swerved to avoid colliding with another vehicle encroaching on its lane and struck a guardrail. The encroaching vehicle left the scene and was never identified. Since the driver and a surviving passenger could not testify that the unidentified vehicle had made physical contact with their vehicle, the court granted summary judgment for the defendant insurance company. The Court of Appeals reversed and remanded on the grounds that there was a triable issue of fact whether physical contact was made. However, in dicta, the Court permitted little doubt that physical contact is required:

> To qualify as a "hit and run" vehicle there must have been physical contact with the person injured or the vehicle which he was occupying by the "phantom" vehicle or an object it struck and set in motion. That is to say, in baseball jargon, there must be a hit before there can be a run.[72]

The dicta in *Ogden* requires a harsh result if the policy of the statute is to compensate persons injured as a result of the negligence of an unidentified tortfeasor. If the driver of the vehicle causing the accident were identified and insured, recovery would be permitted without physical contact.[73] It would seem to be within the policy of the statute that the difference between a barely nudged sideswipe and a near miss should not be decisive to plaintiff's case when he can prove that the negligence of the hit-and-run driver caused the accident. However, the dicta in *Ogden* indicates that the unambiguous language of an insurance policy can prevail over the statutory policy of compensating injured persons to deny recovery when a hit-and-run vehicle fails to make physical contact.

B. *Family Exclusion Clauses v. The Uninsured Motorists Endorsement*

In drafting liability policies, insurance companies frequently in-

---

[70] Comment, *Insurance: Elimination of the Physical Contact Requirement From Uninsured Motorist Coverage in Florida*, 24 U. FLA. L. REV. 588, 591 (1972).

[71] 503 S.W.2d 727 (Ky. 1973).

[72] *Id.* at 728.

[73] *See, e.g.*, Carpenter v. Hayden, 447 S.W.2d 351 (Ky. 1969); Davis v. Bennett's Adm'r, 132 S.W.2d 334 (Ky. 1939). *See also* Malone v. Wright, 364 F.2d 818 (6th Cir. 1966).

clude family exclusion clauses which deny coverage to any member of the insured's family who is injured while a passenger in the insured's automobile. For instance, if the father-passenger is injured in his own insured automobile as the result of his son-driver's negligence, the family exclusion clause would prevent the father from recovering *on the father's liability policy.* Such family exclusion clauses were validated by the Court of Appeals in *Third National Bank of Ashland v. State Farm Mutual Automobile Insurance Co.*:[74]

> [T]he clear purpose of the exclusion was to protect the insurer from over-friendly lawsuits, which nearly always would exist where plaintiff and insured defendant are bound by ties of kinship and are living together.[75]

Since liability coverage is precluded by the family exclusion clause, the father may attempt to recover from his insurer under his uninsured motorist protection, since *as to him* the vehicle that caused his injuries was in fact uninsured. The policy states that the company will pay all sums which the insured or his legal representatives would 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 the accident and arising out of the ownership, maintenance, or use of such uninsured automobile.[76]

The policy of the statute is to compensate injured motorists for damages which they would have received but for the fact the tortfeasor was uninsured, and insurance companies must not be permitted to avoid the statutory intent by artful drafting. Further the statute's clear language supports this argument by defining an uninsured motor vehicle as including an insured vehicle where the carrier refuses to pay the judgment.[77]

The company could assert that the *vehicle* is insured even though the coverage does not extend to the family passenger and that uninsured motorist coverage extends only to bodily injury caused by an uninsured motor vehicle.[78] The policyholder contracted for coverage with the exclusion clause and should not be allowed to circumvent its effect by creating the fiction of viewing the vehicle as uninsured. Alternatively, if the court accepts the fiction that the vehicle is uninsured, the company can argue that coverage does not extend to an uninsured automobile owned by the policyholder.[79]

---

[74] 334 S.W.2d 261 (Ky. 1960).
[75] *Id.* at 263.
[76] *Standard Endorsement* § I.
[77] *Id.* at § I(b).
[78] *Id.*
[79] KRS § 304.20-020(2).

Foreign case law has permitted a plaintiff to circumvent the harsh result of the family exclusion clause and recover under the uninsured motorists endorsement. In a Florida case, the plaintiff-passenger was injured as a result of the negligence of her husband who was driving her car. The exclusion clause effectively denied recovery under her own liability policy; however, she argued in a direct action against the insurance company that her husband was an uninsured motorist. The court accepted the policy argument and ruled that the company was liable to the wife under the uninsured motorist coverage.[80]

The same result was reached in Illinois by a more tortuous route. The intermediate appellate court[81] ruled in favor of the insurance company on the grounds that "the theory of uninsured motorist coverage is to protect people from being injured by other drivers who have no insurance, and, presumably *over whom they have no control.*"[82] (emphasis added). The court agreed that it might be consistent with the objectives of uninsured motorists coverage to include this type of situation but reasoned that it was within the province of the legislature, not the courts, to extend the coverage. On appeal, the appellate court was reversed.[83] The Illinois Supreme Court initially recognized the conflict as follows:

> It is clear that there is an inconsistency between the liability coverage provision and the uninsured motorist provision of plaintiff's policy. On the one hand plaintiff is excluded from the liability coverage for the driver, and on the other, the driver does not qualify as an uninsured motorist even though there is no insurance available. . . . [The insurance company] . . . would have us designate the automobile as insured, even though in fact as to the plaintiff it is uninsured.[84]

After stating the policy behind the statute, the court held that "[t]he distinction that the uninsured motorist was the driver of the automobile in which plaintiff was a passenger rather than the driver of another automobile is not decisive."[85] Therefore, the court accepted plaintiff's fiction that *as to him* the vehicle was uninsured and within the coverage, contract terms and definitions notwithstanding.[86]

Kentucky has no case law on the subject, but in a federal diversity

---

80 Hanover Ins. Co. v. Bramlitt, 228 So.2d 288 (Fla. 1969).
81 Barnes v. Powell, 262 N.E.2d 334 (Ill. Ct. App. 1970), *rev'd*, 275 N.E.2d 377 (Ill. 1971).
82 262 N.E.2d at 338.
83 Barnes v. Powell, 275 N.E.2d 377 (Ill. 1971).
84 *Id.* at 379.
85 *Id.* at 379-80.
86 Kirkland, *Updating of Uninsured Motorist Claims*, 53 CHI. B. REC. 202, 204 (1972).

case with the court applying Kentucky law an opposite conclusion was reached.[87] The court agreed with plaintiff that

> [i]f the most literal reading of the statute were applied in the present case, one could logically conclude that because the family exclusion absolves the liability insurer from coverage as to the particular accident, the automobile is thus an uninsured motor vehicle as defined by the statute, the language of the policy notwithstanding.[88]

However, the court decided that such a reading would effectively preclude insurance companies from protecting themselves from collusive family suits and finding no such intent in the statute ruled in favor of the company.[89] In spite of this limited precedent it is this writer's opinion that where the situation narrows to a conflict between the legislative policy favoring the injured policyholder and clear contractual language favoring the insurance company, the Kentucky Court of Appeals will be more persuaded by the legislative intent. This conviction is based upon an analysis of the Court's past decisions, which tend to favor the injured policyholder in uninsured motorist disputes[90] as indicated by the Court's attitude toward "stacking" of uninsured motorist policies.

IV. STACKING

"Stacking" is an insurance term used to describe the procedure by which an insured recovers damages under two separate policies or endorsements. Since the uninsured motorist endorsement is usually restricted to 10/20 coverage, insureds with damage claims which exceed the policy limits may seek to recover under more than one policy, thus "stacking" compensation from one policy on top of that from another. For example, if the plaintiff insured is injured by an uninsured motorist while a passenger in a friend's insured automobile, two uninsured motorist endorsements are involved. He would be covered by the friend's uninsured motorist coverage,[91] the primary

---

[87] Automobile Club Ins. Co. v. Craig, 328 F. Supp. 988 (E.D. Ky. 1971).

[88] *Id.* at 990.

[89] In supporting his decision, Judge Moynahan noticed that the Kentucky Court of Appeals had upheld an exclusionary clause in Kentucky Farm Bureau Ins. Co. v. Harp, 423 S.W.2d 233 (Ky. 1967) while the uninsured motorist statute was in effect. The opinion did not reveal if the policyholder carried uninsured motorist protection. The insured may have rejected the coverage or simply failed to make the argument.

[90] *E.g.*, Meridian Mut. Ins. Co. v. Siddons, 451 S.W.2d 831 (Ky. 1970).

[91] *See Standard Endorsement* § II. "Each of the following is an insured under this insurance to the extent set forth below:

. . . .

(b) any other person while occupying an insured highway vehicle."

insurance, and by the endorsement on his own liability policy.[92] If his damages total $20,000, he might attempt to recover $10,000 from each of the policies.

To prevent stacking, the insurance industry has inserted a clause in their policies called the "other insurance" clause:

> With respect to bodily injury to an insured while occupying a highway vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance and this insurance shall then apply only in the amounts by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.[93]

The company will consider itself liable only if its coverage exceeds that of the primary insurance. Thus if the uninsured motorist coverage under the driver's policy had a 5/10 limit and the passenger carried 10/20 coverage, the passenger could collect from his company only $5,000, the amount by which his policy limits exceed the limits of the driver's policy, the primary insurance. This clause has been named the "excess-escape" clause—"escape" in that if the driver's coverage is equal to or greater than the policyholder's, the company escapes liability; "excess" in that the company considers itself bound only to the extent that its policy limits exceed the driver's policy limits.[94] Since most states require minimum liability coverage of 10/20, the "escape" is the rule, the "excess" the exception.[95]

A second situation in which "stacking" can occur is where the insured owns two insured vehicles and is injured by an uninsured motorist while driving or occupying one of them. The insured may have two separate policies or one policy which covers both cars. In either event, he pays premiums for uninsured motorist coverage on both vehicles,[96] and each endorsement covers the accident. Drafters of insurance contracts, anticipating such stacking, inserted a second paragraph into the "other insurance" clause which provides:

> [I]f the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage

---

[92] *Id.*
[93] *Id.* § VI(E).
[94] A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 106 (1969). [hereinafter cited as A. WIDISS].
[95] *See Id.* at 310 for a list of states requiring only 5/10 minimum coverage.
[96] KRS § 304.20-020.

applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.[97]

In other words, when two policies owned by the insured are applicable to the same accident, the company will consider itself liable for damages no greater than the higher limit of the two policies and then only on a pro-rata basis. To illustrate, if plaintiff's damages are $20,000 and both policies carry the minimum $10,000 coverage, then $10,000 is the maximum that the plaintiff can recover with each company liable for $5,000.[98] This result follows regardless of whether policies are written by the same or separate companies.

In either of the preceding situations the insurer would argue not only that the unambiguous contractual language prohibits stacking, but also that the legislative intent was to provide the policyholder with the same protection he would have if he had been injured by a financially responsible motorist carrying the minimum 10/20 policy and not to improve the insured's position by allowing him to stack uninsured motorist endorsements which at a nominal premium per policy could produce a windfall.[99] The insured, on the other hand, would argue that he has paid premiums for the two policies and that to prohibit him from recovering on each results in unjust enrichment to the insurer. Further, the legislature set only minimum coverage and did not preclude protection either beyond the minimum or double protection. Finally uninsured motorist coverage extends to injuries sustained in places other than the insured's vehicle, and excess coverage is not frowned on in those situations.

The Kentucky Court of Appeals considered these competing arguments in *Meridian Mutual Insurance Co. v. Siddons*[100] where plaintiff sought to "stack" two policies with the same company to recover a judgment of $15,577 against an uninsured motorist. The company relied on the "other insurance" clause as limiting its liability to $10,000.[101] The Court held that the "other insurance" clause was

---

97 *Standard Endorsement* § VI(E).
98 A. WIDISS at 113-14.
99 KRS § 304.2-110 grants authorization to the Commissioner of Insurance to review rates for insurance policies. *Kentucky Administrative Regulations Service* I-13.01 sets forth the criteria the Commissioner will consider in setting such rates. A check with the Commissioner's office reveals that uninsured motorist rates range between $5 and $7 for the statutory minimum of 10/20 coverage.
100 451 S.W.2d 831 (Ky. 1970).
101 An interesting side issue in the case was whether plaintiff was covered by two endorsements. The policy on his car carried the endorsement on which he paid premiums. The policy on his truck did not carry the endorsement, and plaintiff did not pay premiums for the coverage; however, he had not rejected the coverage. The Court dismissed that technicality holding that since Siddons had not rejected

(Continued on next page)

invalid because it conflicted with the statute and that Meridian had furnished 20/40 coverage by virtue of underwriting two separate policies for plaintiff's automobiles. Quickly disposing of defendant's argument that the legislature could not have intended uninsured motorist coverage to put the policyholder in a better position than if he had been injured by a minimally insured motorist, the Court stated:

> As we read the statute it plainly requires *each policy* to contain uninsured motorist coverage of $10,000 and $20,000 (unless rejected in writing by the insured). The only possible ground on which the courts could say that such is not the requirement would be that the requirement is so unreasonable that the legislature surely could not have intended it. We cannot say the requirement is unreasonable. The legislature very well, and reasonably, could have considered that an insured who had occasion to acquire two liability policies would benefit by having a double amount of uninsured motorist coverage. . . . Meridian's counsel do not point out to us any respect on which the statute is unreasonable; they content themselves with arguing that the statute does not intend what it plainly says. We are not persuaded.[102]

The result is inescapable—Kentucky permits "stacking" to satisfy judgments above the limits of the primary insurance. However, in the future the insurance companies may convince the General Assembly to amend the statute to include an "anti-stacking" clause such as Tennessee permits.[103] The Tennessee legislature has validated "other insurance" provisions that place the policyholder in no better position than he would occupy if hit by an individual minimally insured under that state's financial responsibility law.[104]

In conclusion, consider the thoughts of Professor Alan I. Widiss of the University of Iowa, perhaps the foremost authority on uninsured motorist coverage:

> It is true as some insurers have argued that if this approach to indemnification is adopted [*i.e.*, stacking], an insured who is covered by more than one uninsured motorist endorsement will be

(Footnote continued from preceding page)
the coverage, he was covered since the statute required coverage be provided with each policy unless rejected. The Court was not concerned that the company had not collected premiums for that coverage. *Id.* at 832, 835.

[102] *Id.* at 834.

[103] TENN. CODE ANN. § 56-1152 (1968).

> Nothing contained in §§ 56-1148-56-1153 shall be construed as requiring the forms of coverage . . . to afford limits in excess of those that would be afforded had the insured been involved in an accident with a motorist who was insured under a policy of liability insurance with the minimum limits. . . . Such forms of coverage may include such terms, exclusions, limitations, conditions and offsets which are designed to avoid duplication of insurance and other benefits. *Id.*

[104] Comment, *Uninsured Motorist Coverage in Tennessee*, 38 TENN. L. REV. 391, 401 (1971).

> better off than he would have been had he been injured by a negligent motorist carrying the minimum coverage specified by the financial responsibility laws. However . . . [a] premium has been paid for each endorsement and coverage has been issued. It seems both equitable and desirable to permit recovery under more than one endorsement until the claimant is fully indemnified.[105]

Meridian Mutual may give rise to stacking in an additional context. Suppose an insured plaintiff secures a judgment of $20,000 against defendant insured for $10,000, the Kentucky minimum. Could plaintiff seek the $10,000 balance from his own uninsured motorist coverage by arguing that as to half of his damages the motorist was uninsured? Relying on *Meridian Mutual,* he could contend that whenever his total uninsured motorist coverage exceeds the insurance limits of the tortfeasor's policy, even though such policy conforms with the statutory minimum, that motorist is uninsured to the extent his coverage is less than plaintiff's uninsured motorist protection. If this argument fails, the Court has created an anomaly whereby a plaintiff who is covered by two or more uninsured motorist endorsements is in a better position when injured by an uninsured motorist than when injured by a motorist who is insured as required by the financial responsibility law. Carried to its logical conclusion, *Meridian Mutual* provides the basis for extending uninsured motorist protection to this situation.

V. LEGAL ENTITLEMENT

So far we have considered who is covered by the uninsured motorist endorsement, what is an uninsured vehicle, and how stacking is used to satisfy damages for bodily injury arising from the operation, maintenance or use of an uninsured vehicle. We now consider perhaps the most difficult problem regarding uninsured motorist insurance: whether the policyholder is "legally entitled" to recover for damages.[106] The phrase seems to connote that absent agreement or settlement by the insurance company, the plaintiff must go to court and secure a judgment against the uninsured motorist before the company will consider him "legally entitled." However, this approach has been rejected as the *only* approach for determining issues of fault and damages.[107] The standard endorsement provides that the issue of fault and damages "shall be made by agreement between the insured . . . and the company or, if they fail to agree, by arbitration."[108] It should be noted that such an arbitration provision is not binding *per se* in

[105] A. WIDISS at 112.
[106] *Standard Endorsement* § I.
[107] *See generally* Hickey v. Insurance Co. of North America, 239 F. Supp. 109 (E.D. Tenn. 1965).
[108] *Standard Endorsement* § I.

Kentucky.[109] However, the parties can provide for arbitration to settle their personal controversy if certain statutory requirements are followed,[110] and the arbitrator's award will be binding on them.[111] Another method for resolving the dispute would be direct action against the insurer on the contract for determination by the court of whether a plaintiff is legally entitled to damages.[112]

If the insurance company and the policyholder cannot agree, the policyholder will often sue the uninsured motorist and then look to the insurance company for payment of his judgment. However, express policy language creates difficulties for the insured in a suit against the tortfeasor:

> No judgment against any person or organization alleged to be legally responsible for bodily injury shall be conclusive as between the insured and the company, of the issues of liability of such person or organization of the amount of damages to which the insured is legally entitled unless such judgment is entered pursuant to an action prosecuted by the insured with the written consent of the company.[113]

In effect, the endorsement states that the company will not be bound by any court decision in an action undertaken without its consent. This provision is intended to prevent a default judgment or an adverse decision emanating from a collusive suit. By requiring notice of any action prosecuted against an uninsured motorist, the company can defend that action against its insured to assure that its interests are adequately represented. If the uninsured motorist rejects the company's offer to furnish him counsel, the company may enter the action by right of intervention.[114] In the event that the company does not consent to the action, does not enter, and retains the right to refuse to be bound by judgment, the insured may bring it into the

---

[109] KRS § 304.20-050.

[110] KRS §§ 417.010-.011, .020, .030. These statutory requirements reflect the common law reluctance to enforce arbitration agreements when a party might unwittingly have forfeited his right to a judicial determination of the controversy.

[111] Parties may not by contract deprive themselves of the right to resort to courts for settlement of their controversies; but when parties have agreed on a method of arbitration pursuant to statutory regulation, such agreements are valid. Gatliff Coal Co. v. Cox, 142 F.2d 876 (6th Cir. 1944). *See also* KRS § 417.040.

[112] In Puckett v. Liberty Mut. Ins. Co., 477 S.W.2d 811 (Ky. 1972), the Court of Appeals ruled that an insured may sue his insurance company in a direct action to recover under his uininsured motorist coverage without having obtained a judgment against the uninsured motorist. If the uninsured motorist is amenable to process, the company will implead him for indemnification purposes. If not amenable, the Court will not listen to the argument that the absence of the uninsured motorist destroys its subrogation right for "[t]he policy of the statute places the insured party's right to sue in this state above the dubious value of the insurer's right of subrogation." *Id.* at 814.

[113] *Standard Endorsement* § I.

[114] KY. R. CIV. P. 24.01.

action through permissive joinder unless the court is persuaded such action would prejudice the uninsured defendant or the company.[115]

The plaintiff who fails to join the company and proceeds without its consent against the uninsured motorist is ill advised. If he loses the suit, and then proceeds against the company in a subsequent action, the company will argue that the previous judgment in favor of the uninsured motorist is proof that the insured is not "legally entitled" to recovery. Beyond that the issue is *res judicata* between the insured and the uninsured motorist and should the court find for the plaintiff in the present suit, the insurance company would have no subrogation rights against the uninsured motorist. If plaintiff wins the initial suit against the uninsured motorist, he may have to relitigate the case in the subsequent action against the insurer because the insurer will argue that its interests were not adequately represented. Most courts would give little consideration to such an argument, since the insurance company was put on notice and plaintiff has proven that he is legally entitled to damages; however, problems can arise concerning the amount of damages. In the first suit, a jury may have awarded only $3,000 damages when plaintiff sued for $10,000.[116] In the second suit, plaintiff will seek the full $10,000 recovery from the insurance company, but the company will point to the $3,000 judgment as evidence of the extent of damages.[117] Further, $3,000 is the established value of the subrogation rights, and it would be inequitable to allow a greater recovery than the insurance company can hope to recoup. On the other hand, if the plaintiff proceeds against the insurance company first and loses, he still can sue the uninsured motorist in a later suit provided that individual is not a party to the first suit.

Why should the insurance company withhold its consent? A number of valid reasons come to mind: the suit may be initiated in a jurisdiction that allows one family member to sue another as an uninsured motorist; a situation may arise where from all outward circumstances it is unlikely that the uninsured motorist will appear; or *forum non conveniens* in a conflicts case where the forum may apply its own law rather than the law of the place of the wrong. In other words, whenever the insurance company's prospects for favorable judgment are reduced, consent will be withheld. However, it is the plaintiff's prerogative to choose his forum, not the defendant's, and the insurance company should stand in no better position than a defendant.

---

[115] KY. R. CIV. P. 20.01.

[116] Whereas if the insurance company had been a party to the action, the damages awarded may have been higher.

[117] A. WIDISS 266-67.

Actually the "consent" requirement serves the purpose of notifying the insurer that a suit against its interest is contemplated. If the company is given notice of a pending suit, withholds consent, and watches plaintiff win a litigated judgment (as opposed to a default judgment), it is doubtful that a court would uphold the company's refusal to indemnify on the ground that "no judgment shall be conclusive without consent." Notice, not consent, should be the focal point, and notice is adequately provided for under the standard endorsement:

> If before the company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury against any person or organization legally responsible for the use of a highway vehicle involved in the accident, a copy of the summons and complaint or other process served in connection with legal action shall be forwarded immediately to the company by the insured or his legal representative.[118]

In a Kentucky case, *Allstate Insurance Co. v. Boston*,[119] lack of notice was fatal to a policyholder's action against her insurer following a default judgment against an uninsured motorist. Plaintiff insured suffered injuries when her vehicle was struck by an uninsured motorist. She notified Allstate of the accident and promptly filed suit; however, she did not deliver copies of the summons and complaint to the company because at the time she was unaware that the motorist was uninsured. Only later, after the motorist neither responded to summons nor appeared for depositions, did she notify the company that "it is indicated from defendant's conduct that he does not have insurance" and that ultimately she would be seeking recovery on her uninsured motorist coverage. Almost as an afterthought, plaintiff's counsel mentioned he was moving for default judgment the next day![120] Plaintiff received a default judgment, then secured summary judgment in circuit court for recovery from the company. The insurer appealed, arguing that plaintiff failed to fulfill the notice requirements. Plaintiff responded that she had no means of knowing the defendant was uninsured since she was denied opportunity for discovery. As soon as defendant's conduct indicated lack of coverage, she notified the company, albeit the day of the motion for default judgment. Rejecting her argument of substantial compliance, the Court reversed the summary judgment:

> [T]here is a patent reason why the liability carrier must be afforded early and ample notice that its insured has set in motion the processes of law by bringing suit against the adverse driver

---

[118] *Standard Endorsement* § VI(D).
[119] 439 S.W.2d 65 (Ky. 1969).
[120] *Id.* at 66.

> . . . The company is entitled to inform itself as to whether the adverse driver is an uninsured motorist and is also entitled to full opportunity to make such defenses against recovery by its own insured as may be properly available. . . . The prudent course is to notify the insurer whenever action is instituted as required by the policy.[121]

The *Boston* decision raises a question: the statute provides that when an insurance company becomes insolvent or denies coverage on defendant's liability, the plaintiff policyholder can consider that defendant an uninsured motorist.[122] If the plaintiff does not discover this until after judgment, will his uninsured motorist claim be denied because he did not take the "prudent course" and deliver copies of the summons and complaint to his insurance company at the beginning of the action? The Court in *Boston* indicated that result when it conceded plaintiff's claim as to lack of knowledge:

> It is not definitely shown when Mrs. Boston first learned that Barbour was an uninsured motorist. For our purposes we will assume that she did not possess this information when the suit was filed or when the quoted letter of Dec. 14, 1967 was written.[123]

The issue of notice was framed in a summary judgment plea by plaintiff. The Court reversed summary judgment for plaintiff and remanded for further proceedings. Does this mean that the failure to provide notice barred plaintiff from further pursuing her actions against the insurance company? The Court in *Boston* alluded to such a result:

> The same principles which impel courts to hold that an insured can be barred from coverage by failure to comply with policy provisions relating to notice of actions against him are applicable in situations in which the insured files suit in his own behalf.[124]

This is understandable in actions on the liability policy, but in an action on the uninsured motorist endorsement the company can avoid liability since it cannot be bound by a judgment in an action to which it has not given its written consent. How is lack of notice prejudicial in light of that clause? The *Boston* fact pattern is an excellent example of a situation that would justify holding that the insurance company is not bound by a judgment for plaintiff as conclusive of his legal entitlement to damages. However, does that lack of notice mean that plaintiff will be precluded from litigation on the merits by a mere

---

[121] *Id.* at 67.
[122] KRS § 304.20-020(2).
[123] Allstate Ins. Co. v. Boston, 439 S.W.2d 65, 66 (Ky. 1969).
[124] *Id.* at 67.

technicality? Hopefully, the policyholder did not lose her case because of lack of timely notice. Denial of summary judgment in favor of the plaintiff may have been equitable to the defendant under the circumstances, but it would be grossly inequitable if such lack of notice would satisfy grounds for summary judgment for the defendant.

VI. SETTLEMENTS

What has been said of prosecuting suits without consent or notice is even more applicable to settlements. In fact, if the insurance companies could prevail, any settlement without their written consent would bar application of the coverage as indicated by the language of the standard endorsement:

> This insurance does not apply:
> (a) to bodily injury to an insured . . . who shall, without written consent of the company make any settlement with any person or organization who may be legally liable therefore.[125]

If a company grants consent, its liability is reduced by the amount of any settlement received by the policyholder:

> (b) any amount payable under the terms of this insurance . . . shall be reduced by
> (1) all sums paid on account of such bodily injury by or on behalf of
> (i) the owner or operator of the uninsured highway vehicle and
> (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury.[126]

Thus if plaintiff, whose injuries are assessed at $15,000, settles for $5,000 with the uninsured motorist and then seeks the remaining $10,000 from the insurance company on his uninsured motorist endorsement, he will find that the company will only admit liability for $5,000, since the $5,000 settlement reduced its liability by that amount. The result would be unchanged if plaintiff had recovered $5,000 from an out-of-state motorist whose state's minimum insurance limit is 5/10.

If a plaintiff settles with the uninsured motorist without obtaining the company's consent and then seeks the balance of his damages from his insurer, the company can argue persuasively that the settlement was prejudicial. Liability was admitted without opportunity for it to defend, and therefore the insured should be excluded from coverage. Alternatively, even if the plaintiff is legally entitled to

---

[125] *Standard Endorsement,* § I(a).
[126] *Id.* at § III(b)(1).

recover, his policy limits should be reduced by the amount of settlement to prevent double recovery. The latter argument is meritorious, for by settling for a certain sum the uninsured motorist should be considered insured for the amount of the settlement and uninsured for the balance of the alleged damages. Thus he falls directly within the statutory framework.[127]

The company's first argument that settlement has decided liability to its prejudice is a weak one, for the company has a policy clause stating that no judgment of a court will be conclusive of its interests unless prosecuted with its written consent.[128] *A fortiori*, cannot the same be said for a settlement without its written consent? In the subsequent suit the issues of liability and damages will be litigated, so the company will have its day in court. If it wins, no liability arises. If it loses, the damages can be reduced to the extent of the tortfeasor's settlement. Therefore, if damages are set at $10,000 and the uninsured motorist had settled for $3,000, the company is liable for $7,000. Since settlement has saved the company money, it is difficult to identify the prejudice. The idea of the insured forfeiting his coverage for failure to comply with a contractual term providing for "no settlement without consent" is opposed to both the tenor of the statute and common sense. In fact, it would seem that the company could avoid liability completely by arguing that since plaintiff and the uninsured motorist settled for $3,000, that amount should represent all damages, for if the court awards damages against the insurer, plaintiff retains no rights against the uninsured to which the company can be subrogated. Clearly, the argument that settlement without consent is prejudicial to the company is unfounded.

The situation becomes more complex where the accident involves multiple defendants.[129] Consider the following hypothetical: plaintiff is a passenger in a friend's car, and both are injured by an uninsured motorist; each has a policy providing uninsured motorist coverage; plaintiff with the consent of his insurer joins the friend in suing friend's insurance carrier and the uninsured motorist; friend's insurance company settles with plaintiff for $10,000 *without the consent of plaintiff's company*. Plaintiff then wins a $10,000 judgment against the uninsured motorist and seeks payment under his own policy, but his company denies coverage because he settled with the friend's insurance company without its written consent.[130] Thus the issue

---

[127] KRS § 304.20-020(2).

[128] *Standard Endorsement* § I.

[129] *See generally*, Blizzard & Barksdale, *Uninsured Motorist: Validity and Effect of Exclusion Clause*, 23 ALA. LAW. 196 (1972).

[130] *Standard Endorsement* § I(a).

becomes whether plaintiff is excluded from recovery of the $10,000 judgment against the uninsured motorist because he settled with the friend's insurer without the written consent of his own insurer.[131]

The plaintiff would seek to invalidate the consent provision by showing that he is legally entitled to damages. The judgment against the uninsured motorist settles the matter of liability of driver's insurance company. Further, his insurer's consent to the suit against the uninsured motorist establishes its consent to be bound by that judicial determination. The company, of course, would stand on the intent and literal construction of the policy provision, *i.e.*, to notify it of proceedings which might prejudice its interests in a later action.

Under Virginia law, our hypothetical plaintiff could recover from his insurer. In *Guthrie v. State Farm Mutual Automobile Insurance Co.*[132] plaintiff suffered injuries when the bus in which she was riding collided with an uninsured motorist. After covenanting not to sue the bus line for $12,500, she brought suit and obtained a $13,750 judgment against the uninsured motorist. Although her settlement with the bus line was without State Farm's consent, in the action against the uninsured motorist she had substantially complied with all notice requirements; however, the company did not join the suit. A previous Virginia decision[133] permitted stacking so there was no question of reduction of State Farm's coverage by the "other insurance" clause.[134] The sole question was whether the exclusion clause, which became operative by lack of notice of the settlement with the bus line, conflicted with the intent of the statute. The court held for plaintiff:

> There is no need for cooperation between the insurer and the insured in connection with an uninsured motorist because they are, in effect, and practically speaking, adversaries. Therefore, except for the establishment of liability, the only prerequisite which had survived judicial interpretation is that service of process be served on the insurer where suit is initiated against an uninsured. This gives the insurer the right to file pleadings and defend the uninsured motorist.[135]

---

[131] Since Meridian Mut. Ins. Co. v. Siddons, 451 S.W.2d 831 (Ky. 1970) held stacking valid in Kentucky, the settlement with driver's carrier cannot operate to reduce defendant's coverage of $10,000. However, if plaintiff settled with the uninsured motorist for $10,000, defendant could argue that such settlement is an indication of the value of the case and that damages should be limited to that amount.

[132] 279 F. Supp. 837 (D.S.C. 1968).

[133] Bryant v. State Farm Mut. Auto. Ins. Co., 361 F.2d 785 (4th Cir. 1966).

[134] Virginia's minimum limits for uninsured motorist coverage are 15/30. VA. CODE ANN. §§ 38.1-381(c), 46.1-1(8) (1970).

[135] Guthrie v. State Farm Mut. Auto. Ins. Co., 279 F. Supp. 837, 842 (D.S.C. 1968). *Accord*, Gulf Am. Fire and Cas. Co. v. McNeal, 154 S.E.2d 411 (Ga. 1967); Kaplan v. Phoenix and Hartford Ins. Co., 215 So.2d 893 (Fla. Ct. App. 1968). *Contra*, Dancy v. State Farm Mut. Auto. Ins. Co., 324 F. Supp. 964 (S.D. Ala. 1971); LaBoue v American Employer Ins. Co., 189 So.2d 315 (La. App. 1966).

There is no Kentucky decision in point; however, applying existing law to the hypothetical, we can reach certain conclusions. Since *Meridian Mutual Insurance Co. v. Siddons*[136] invalidated the "other insurance" provisions of the standard endorsement, any argument by the defendant that settlement with the friend's insurance company will reduce defendant's coverage to that extent is unacceptable. Further, because plaintiff gave notice to defendant of the suit against the uninsured motorist, the company cannot disclaim that judgment on grounds of prejudice, since it had an opportunity to come forward and defend its interest. Consequently any disclaimer based on lack of consent to the settlement in the first suit would necessarily fail, since settlement with the primary insurance company could not prejudice plaintiff's insurer in the judgment against the uninsured motorist which is determinative of plaintiff's right to recover from his insurer. Consistent with that conclusion, plaintiff could contend that such an exclusion clause conflicts with the public policy of reducing litigation by settlement, since a third party's consent would be necessary to make the settlement.[137]

VII. BAD FAITH DENIAL OF SETTLEMENTS

Under the standard liability provision of an automobile policy, the insurance company agrees to defend the policyholder in any action charging negligence in the operation of the insured automobile. As part of this agreement the insurer reserves the right to control the settlement or litigation of any claims that arise. The policyholder is desirous of a settlement within the policy limits, for if litigation results in an excess judgment, he is personally liable for that excess. The insurance company is not interested in settlement unless its investigation reveals that the settlement is in its best interests. As the offer of settlement approaches the liability limits, the company is more inclined to litigate.[138] When the insurance company refuses to settle within policy limits even though liability is clear[139] and an excess judgment results, courts have held the company liable for the excess if they exercised "bad faith" in refusing to settle within policy

[136] 451 S.W.2d 831 (Ky. 1970).

[137] Blizzard & Barksdale, *supra* note 129, at 200.

[138] Note, *Excess Judgments and the Bad Faith Rule*, 36 ALBANY L. REV. 698, 707-08 (1972).

[139] In Andrews v. Central Sur. Co., 271 F. Supp. 814 (D.S.C. 1967), *aff'd*, 391 F.2d 935 (4th Cir. 1968), the facts showed that the insured was driving too fast for conditions, passed unlawfully, failed to yield the right of way and was driving under the influence when he collided with the victim who burned to death while pinned in the wreckage of his Volkswagon.

limits.[140] In *Crisci v. Security Insurance Co.* the California Supreme Court, in addition to finding the insurance company liable for the excess judgment, awarded the insured $25,000 for mental suffering proximately caused by the insurer's bad faith.[141]

Kentucky recognizes an action by the insured against his insurer when the insurer exercises bad faith in settlement negotiations which results in an excess judgment. In *State Farm Mutual Automobile Insurance Co. v. Marcum*[142] the company refused a reasonable offer to settle within the $20,000 policy limit where liability was clear, and the jury subsequently returned a verdict for $54,389. After plaintiff attempted unsuccessfully to execute the judgment, he brought an action against the company as "implied assignee" of the insured's cause of action for the excess arising out of the insurer's bad faith refusal to accept plaintiff's settlement offer. The Court held that the insurer had exercised bad faith and allowed the plaintiff to satisfy his judgment by proceeding against the debt owed the defendant by his insurer.[143] In a similar case, plaintiff was an explicit assignee of the insured's cause of action, and the Court reversed summary judgment for the insurance company.[144]

Trial lawyers have attempted to apply the bad faith settlement argument to the uninsured motorist context; however, to this writer's knowledge, no appellate case in point has yet arisen. The insurer could arguably be held liable for an excess in the following situation. Suppose plaintiff policyholder has a cause of action for $20,000 against an uninsured motorist. Served with adequate notice, the company offers to undertake the defense of the uninsured motorist. Plaintiff offers to settle within the policy limits which is acceptable to the defendant, but the insurance company refuses to conclude the settlement[145] even though the facts indicate a potential excess judgment. The case is litigated, and the jury awards the plaintiff $20,000. Since the insured could collect only $10,000 on his coverage, he could persuade the uninsured motorist, now his judgment debtor, to assign to him the cause of action against the insurance company on the bad

---

[140] *Id.* The estate offered to settle for $9,950 (the defendant's policy limits were 10/20) which the insurer refused. Judgment was handed down for $144,000! The insurance company was found liable for the excess of $134,000.

[141] 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

[142] 420 S.W.2d 113 (Ky. 1967).

[143] Plaintiff based his action on the garnishment statute, KRS § 426.381, on the theory that as a creditor of the insured he was attempting to garnish an indebtedness owed to the insured by State Farm.

[144] Terrell v. Western Cas. & Sur. Co., 427 S.W.2d 825 (Ky. 1968).

[145] *Standard Endorsement* § I(a).

faith settlement theory. In his action against the insurance company, the plaintiff could argue that the company, by refusing to accept settlement within the policy limits, exercised bad faith and thus is liable to the uninsured motorist for the excess judgment drawing a comparison to *Marcum*.[146] Both involved contracts with insurance companies with set limits of liability; in both, the company had absolute discretion for any settlement, the settlement offer was reasonable considering the risks of final award and the facts, the company rejected the settlement, and an excess judgment resulted. The major distinction is that in the uninsured motorist case refusal to grant consent for settlement *benefitted* the policyholder, whereas in *Marcum* it *harmed* the policyholder. However, from the defendant's point of view, the blocking of settlement by his own counsel, furnished by the insurance company, resulted in an excess judgment.

The outcome will turn on whether the uninsured motorist has a cause of action against the company. Inveighing against that result is the fact that when insurance companies undertake the defense of an uninsured motorist, they require the defendant to sign an agreement wherein he releases the insurance company from liability for any judgment in excess of the policy limits. Further, the insurer can distinguish *Marcum* by pointing out that while in *Marcum* control of the settlement process was governed by the contract between the insured defendant and his insurer no such contract exists between the uninsured defendant and the company. Finally, whereas the bad faith in *Marcum* resulted in harm to the policyholder, in the uninsured motorist context the policyholder has benefitted.

Bad faith settlements may arise in another context. After an accident with an uninsured motorist, suppose the insured contracts a lawyer for $200 to prepare the papers in order to recover the full amount of the policy (the facts warrant recovery in excess of the policy limits). The company refuses to settle, and the insured files suit against the company and recovers a judgment for $10,000. Since the company's refusal to settle resulted in litigation, the plaintiff must pay part of the award in attorney fees, usually assessed on a contingent fee basis. In a subsequent action, the policyholder could argue that the insurance company's bad faith rejection of a reasonable settlement has cost him financial loss. The distinction that in *Marcum* the bad faith resulted in an excess judgment whereas in this case it resulted in increased attorney's fees should not be decisive. The focus should be on the company's bad faith manipulation of the settlement pro-

---

[146] State Farm Mut. Auto. Ins. Co. v. Marcum, 420 S.W.2d 113 (Ky. 1967).

cess.[147] Once again research does not reveal a case where the argument has been advanced, but the analogy to *Marcum* is arguable.

Perhaps the attempt to analogize *Marcum* to the uninsured motorist field is not sound. However, one thing is clear—a bad faith refusal to settle which causes foreseeable hardship to one's client *should* provide a cause of action for the injured client. If that client has a cause of action against the insurance company for the excess judgment, he certainly can assign it to his judgment creditor.[148] Finding the correct theory upon which to base the uninsured motorist's cause of action presents the problem.

VIII. PROCEDURAL MANEUVERINGS IN UNINSURED MOTORIST LITIGATION

Litigation arising out of multivehicular accidents involving uninsured motorists may result in the insurance company simultaneously defending its insured on a liability claim and defending *against* the insured on his uninsured motorist claim. Consider the ramifications of an accident which occurs when an insured, traveling at high speed, brakes to avoid rear-ending a slow-moving truck and is struck from behind by a car whose driver is uninsured but whose passenger is insured. In the resulting litigation, the passenger of the following car (car #2) sues his driver (car #2) and the policyholder (car #1) as joint tortfeasors. The policyholder in turn files a cross claim against the driver of car #2 and a third party complaint against his insurance company, because both the driver of car #2 and the truck driver are uninsured according to policy terms.[149] The driver of car #2 counterclaims against the policyholder. At this point, a diagram is required to clarify the facts:

Complaint:
Passenger (car #2) v. Policyholder (car #1) and uninsured driver (car #2).
Cross Claim:
Policyholder (car #1) v. Uninsured Driver (car #2) and Insurance Company.
Counterclaim:
Uninsured Driver (car #2) v. Policyholder (car #1).

Now, observe the insurance company's action: (1) it answers the passenger's complaint based on its contractual duty to defend the

[147] Barbagelata, *Liabilities Arising From Insurer's Refusal to Settle Public Liability and Uninsured Motorist Claims*, 3 U.S.F.L. REV. 33, 46-47 (1968).
[148] State Farm Mut. Auto Ins. Co. v. Marcum, 420 S.W.2d 113 (Ky. 1967).
[149] *Standard Endorsement* § VI(A).

policyholder against liability claims; (2) it answers the policyholder's complaint against the hit-and-run truck and the uninsured driver of the second car whose defense it has assumed; (3) it replies to the counterclaim of the uninsured motorist based on its obligation to defend the policyholder; (4) it cross claims against the uninsured motorist for indemnity in the event he is found negligent (in which case the company must satisfy the judgment to its policyholder); (5) finally, it cross claims against the uninsured motorist for contribution in the event both the hit-and-run truck and the uninsured motorist are found negligent. Therefore, the company is both defending the policyholder against his adversaries and attacking him by representing his adversaries. Even the most naive policyholder might suspect that there is a double agent in his camp. A finding that the policyholder was contributorily negligent would enable the company to escape liability under the uninsured motorist coverage. On the other hand, it would be required to pay a percentage of the judgment if its policyholder contributed to the passenger's injuries. A vigorous defense of its liability for damages might result in a verdict of lesser damages than the driver of car #2.[150] For example, if the passenger (car #2), the policyholder (car #1), and the uninsured driver (car #2) each seek $10,000 damages and if the court finds the policyholder negligent, the insurance company will be liable for $20,000, *i.e.*, $10,000 to the passenger and $10,000 to the uninsured driver. If the uninsured motorist is found negligent, the company pays only $10,000, *i.e.*, to the policyholder on the uninsured motorist coverage. If both the uninsured motorist and the policyholder are found negligent, the company will only pay a portion of the judgment, *i.e.*, to the passenger under the policyholder's liability coverage. Since the policyholder was "rear-ended" by the uninsured motorist, a jury might find that the policyholder is liable for 20% of the damages while the uninsured motorist is liable for 80%; therefore, the company would be liable for $2,000. Thus its strategy at trial would be to have its insured found jointly negligent with the uninsured motorist with the policyholder's share of the damages assessed at the smallest possible amount.

Less complex is the situation where a policyholder, having taken no action against the uninsured motorist, proceeds directly against the company to recover for injuries received in an accident with an uninsured motorist. Under the terms of the standard endorsement,

[150] *See* Parker v. Redden, 421 S.W.2d 586, 595 (Ky. 1968); Lexington Country Club v. Stevenson, 390 S.W.2d 137, 143 (Ky. 1965).

the insurance company can require the policy holder to join the uninsured motorist as a defendant:

> After notice of claim under this insurance, the company may require the insured to take such action as may be necessary or appropriate to preserve his right to recover damages from any person or organization alleged to be legally responsible for the bodily injury; and in any action against the company may require the insured to join such party or organization as a party defendant.[151]

Once the uninsured motorist is joined, the company undertakes his defense and files a counterclaim. Standing on its right to defend the policyholder against claims for liability, the company acquires an interest in the plaintiff's cause by asserting that right.

> In this context the most favorable result for the insurance company is for both the insured and the uninsured motorist to be adjudged negligent and/or contributorily negligent, thereby precluding recovery by either party. . . . Similarly the insurer's interests may be influenced by the amount of damages sustained by the parties. To illustrate, assume that the insured has actually sustained damages of $20,000, while the uninsured motorist's is only $2,000. In this situation, if negligence is to be allocated exclusively to one of the parties, the company will be interested in a finding that the insured was the negligent driver, thereby limiting the company's liability to $2,000.[152]

Policyholders who perceive this problem have sought to prevent this "dogfall"[153] result. There are two approaches, the Texas approach and the Kentucky approach.

The Texas approach removes the company from the defense of the uninsured motorist. In *Allstate Insurance Co. v. Hunt*,[154] the company agreed to be bound by the policyholder's suit against the uninsured motorist. Plaintiff amended his pleading to join the company as a defendant, and the company in turn moved either for suppression of its name or for a separate trial. The court granted the latter. Then the company assumed the defense of the uninsured motorist. The trial court refused to permit the company to defend the uninsured motorist, and the appellate court affirmed holding that the company's defense of the uninsured motorist would be in direct conflict with the fiduciary obligations the company owes its policyholder. This

---

[151] *Standard Endorsement* § V(C).
[152] A. WIDISS 257.
[153] Term coined by trial lawyers to describe the situation where the company by its courtroom defense of both parties secures a verdict of negligence and contributory negligence thereby enabling it to escape all liability.
[154] 469 S.W.2d 151 (Tex. 1971).

obligation arises from the duty of the company to defend the policyholder and the policyholder's duty to cooperate by submitting to medical exams, tendering accident reports, and in general disclosing all information relevant to the accident. The Court believed that such cooperation would make available to the company confidential information which could be used to undermine the policyholder's position were the company to defend his adversary.[155] As one commentator put it:

> When the insurance company asserts a right to defend an uninsured motorist against its insured, serious ethical problems arise. The canons of ethics of the legal profession prohibit lawyers from representing their clients' adversaries, especially when the client has made confidential disclosures to the attorney.[156]

The Texas approach of removing the insurance company from the defense of the uninsured motorist appears to present a logical solution to the conflict of interest problem.[157] However, this approach is based upon the erroneous premise that the uninsured motorist will assert a vigorous defense to the action which will protect the insurer's position. Frequently, since the uninsured motorist will be judgment proof, a default judgment is probable. Therefore the insurer's liability on the endorsement will be determined by the judgment against the uninsured motorist thus denying to the company the right to protect its financial interest.

The Kentucky approach is illustrated by *O'Bryan v. Leibson*[158] where plaintiff found that when the uninsured motorist counterclaimed the insurance company was represented by the same lawyer on both sides of the litigation. Plaintiff, through her own attorney, moved to strike the company lawyer as an attorney of record for her and to excuse her from further cooperating with her company.[159] The circuit judge granted plaintiff's motion, and the company subsequently applied to the Court of Appeals for a writ of prohibition. Justice Neikirk commented on the company's position on both sides of the litigation:

> A quick survey of the battlefield, as arrayed at this point, would convince even the unsuspecting that Motorists Mutual would shoot away to prove both sides negligent. Motorists Mutual would escape liability, emerge victorious, and leave the litigants to silently steal away to salve their wounds.[160]

---

[155] *Id.* at 153.
[156] Note, *Conflicts of Interest Prevents Insurer from Defending an Uninsured Motorist in an Action for the Insured,* 50 TEX. L. REV. 146, 153 (1971).
[157] Allstate Ins. Co. v. Hunt, 469 S.W.2d 151 (Tex. 1971).
[158] 446 S.W.2d 643 (Ky. 1969).
[159] *See Standard Endorsement* § V(C).
[160] O'Bryan v. Leibson, 446 S.W.2d 643, 644 (Ky. 1969).

The Court held that even though the contract gave the company the right to defend against counterclaims, "the conflict of interest posed overrides this responsibility."[161] Explaining its ruling, the Court stated that it was against public policy and the nature of adversary proceedings for one person to control both sides of the litigation and that "[g]ood conscience and fair dealing require that an insurance company not pursue a course advantageous to itself while disadvantageous to its policyholder."[162]

Thus the Kentucky approach is to remove the company's counsel from plaintiff's defense and excuse the plaintiff from further cooperation with the company. This approach is sensible, since the plaintiff must overcome the allegations of negligence or contributory negligence in the counterclaim in order to recover. Thus, the company's interest in protecting its liability contract are adequately represented by plaintiff's staunch defense against such claims. However, if the insured is adjudged negligent, he may not present an equally vigorous defense on the issue of damages other than to make certain that they do not exceed his policy limits. It is here that the company acquires an interest in the defense. A possible solution offered by Professor Widiss is to bifurcate the trial with the first stage determining liability and the second damages. This allows the company to intervene on the plaintiff's side after he is found negligent, and the company's interest in damages becomes paramount to that of the policyholder.[163]

IX. REVEALING THE INSURER'S INTEREST IN COURT

In the Texas case, the company moved to have its name concealed from the jury or, in the alternative, for a separate trial. The court granted the latter. In a Kentucky case, *Wheeler v. Creekmore*,[164] plaintiff sued an uninsured motorist for damages resulting from an auto accident and joined her insurer as a defendant. She sought to disclose the identification of the company to the jury because, in the words of her attorney, "we think the jury should know who he is and what his interest is, and inquire whether the jurors have any financial interest or other connection or association with that company."[165] The trial court denied her motion, and she appealed. The Court of Appeals reversed:

> The insurance company was in fact a party . . . because it had a direct contractual obligation to Mrs. Wheeler. . . . Since the com-

[161] *Id.*
[162] Id. at 645.
[163] A. WIDISS 280.
[164] 469 S.W.2d 559 (Ky. 1971).
[165] *Id.* at 562.

> pany was a party and was actively represented by counsel we think the jury was entitled to know that fact and to have the company's counsel identified. . . . It is our opinion that the considerations which have prompted the rule against mention of ordinary liability insurance in an automobile negligence case must yield in uninsured motorist cases to the procedural desirability of letting the jury know who are the parties to the litigation where the uninsured motorist carrier elects to participate actively in the trial.[166]

Justice Osborne's concurring opinion went further—he would extend the holding in *Wheeler* to *all* indemnity policies rather than limiting it to uninsured motorist cases:

> There is no other instance in the law of which I have knowledge that permits the real party in interest to an action to remain anonymous. For the life of me, I cannot see why this right should be accorded insurance companies. I believe the time is at hand when we should lay the interests of all parties on the board for the jury to see and consider.[167]

With the decision in *Wheeler* the identity of the lawyer representing the company can be revealed to the jury in uninsured motorist litigation. In some cases, this may work to plaintiff's disadvantage. Consider a multivehicular accident which results in the policyholder suing an insured motorist and his own insurance company in lieu of the uninsured motorist. Since the court held in *Lexington Country Club v. Stevenson*[168] that juries may return verdicts against codefendants assessing their contribution to the judgment,[169] a jury may be predisposed to find the insurance company more at fault than the insured motorist. Suppose the jury awarded damages for $20,000, with the insurance company liable for 75% ($15,000) and the insured motorist liable for 25% ($5,000). If the policy limits were $10,000, the plaintiff would be unable to recover $5,000 of his judgment. To obviate this result, plaintiff could move to introduce evidence of the policy limits as did the plaintiff in *Wheeler*. There, the motion was denied, and plaintiff appealed. Although the Court did not expressly reach this issue, Justice Osborne in his concurring opinion interpreted the majority opinion as permitting plaintiff to disclose to the jury the extent of insurance coverage.[170]

X. STATUTE OF LIMITATIONS

Another source of conflict is the issue of whether an uninsured

---

[166] *Id.* at 562.
[167] *Id.* at 564-65.
[168] 390 S.W.2d 137 (Ky. 1965).
[169] *Id.* at 143.
[170] Wheeler v. Creekmore, 469 S.W.2d 559, 564 (Ky. 1971).

motorist action sounds in tort or in contract. If in tort, the one year statute of limitations applies;[171] if in contract, the fifteen year period applies since the policy is a written contract.[172]

In arguing that uninsured motorist claims sound in tort, the insurance industry reasons that: (1) since the time limit for filing suit against the uninsured motorist has expired, so too has the insured's claim against the company since he cannot be "legally entitled" to recover from the uninsured motorist, and the company is not obligated to indemnify; (2) since the insured's cause of action and the insurer's subrogation right are grounded on defendant's tort, the tort statute of limitations should apply; (3) should the insured be allowed to recover from the insurer after the tort statute has run, the insurer can not assert its subrogation rights against the uninsured motorist.[173]

On the other hand, the policyholder, asserting the applicability of the contract action statute of limitations, may argue: (1) an action against the insurer is grounded solely on contractual rights and the terms of the contract, not on the duty to refrain from injuring another; (2) the tort statute of limitations is a personal defense to the tortfeasor and cannot be extended to the insurer, who does not stand in the shoes of the uninsured motorist; (3) "legally entitled" means only that the insured had a cause of action at one time against an uninsured motorist; (4) since the uninsured motorist is probably not financially responsible, the insurer's subrogation rights are probably worthless, and it would be unjust to bar operation of the coverage solely because the insurer would lose its subrogation rights to the tort statute of limitations.[174]

The arguments on both sides are persuasive. Kentucky has not yet resolved the issue, but since *Wheeler v. Creekmore*[175] placed so much emphasis on the contractual relationship between the insurance company and its insured, an attorney should consider framing his arguments in light of that opinion. In most jurisdictions where the issue has been litigated, the courts have applied the contract statute of limitations.[176]

---

[171] KRS § 413.140.

[172] KRS § 413.090.

[173] *Symposium: Uninsured Motorist Endorsement, supra* note 12, at 338.

[174] *Id.* at 339.

[175] 469 S.W.2d 559, 564 (Ky. 1971).

[176] *See e.g.,* Hartford Accident & Indem. Co. v. Holada, 262 N.E.2d 359 (Ill. Ct. App. 1970); Booth v. Fireman's Fund Ins. Co., 218 So.2d 580 (La. 1968); Hill v. Seaboard Fire & Marine Ins. Co., 374 S.W.2d 606 (Mo. Ct. App. 1963); Schulz v. Allstate Ins. Co., 244 N.E.2d 546 (Ohio 1968); Lessard v. New Hampshire Ins. Co., 258 A.2d 793 (R.I. 1969); Shaloff v. Western Cas. & Sur. Co., 171 N.W.2d 914 (Wis. 1969).

Conclusion

Nothing is as simple as it seems in uninsured motorist litigation. When litigation arises, the insured normally argues the policy of the statute; in defending, the company points to the express terms of the contract. The Kentucky Court of Appeals has been more persuaded by the policy argument except in those instances where the company can show that its interests have been clearly prejudiced by the failure of the insured to comply with a contractual provision. Much of the impact of the Court's decisions has been procedural, *i.e.*, revealing the identity of the insurance company to the jury, removing the company lawyer from the plaintiff's case when the uninsured motorist counterclaims, and allowing a direct action against the insurance company without a prior judgment against the uninsured motorist. The Court has interpreted the policy behind the statute broadly in favor of the insured—broadly enough to amount to interstitial legislation in the case of "stacking". Yet to be resolved is whether the Court will construe the statute broadly on such substantive questions as the family-exclusion issue, the identification of an insured, and the bad faith settlement arguments. Despite the few decisions handed down by the Kentucky Court there is a definite trend to favor the insured by following the statutory policy of compensating the policyholder for injuries received through the fault of an uninsured motorist.

Thomas M. Cooper

Editor's Note: As this issue went to final printing, a trial lawyer directed the author's attention to *Allen v. West American Insurance Company*, 467 S.W.2d 123 (Ky. 1971), which held that an insured cannot sue his insurer on an uninsured motorist theory when his injury is beyond the liability coverage of his policy because of a valid exclusion clause. This case should be included in III. B. *Family Exclusion Clauses v. The Uninsured Motorists Endorsement* in the text accompanying footnotes 87-90.