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# UNINSURED MOTORIST COVERAGE

ROBERT T. COX\*

## I. INTRODUCTION

The ever increasing number of motor vehicle accidents on the nation's highways has made compensation of innocent victims of automobile accidents a significant social problem. Where the tort-feasor is solvent or adequately insured the innocent victim has recourse for his injury; but where the tort-feasor is uninsured and financially irresponsible, the innocent traffic accident victim too often is left without compensation. A large step toward the solution of this problem was offered by the casualty insurance industry in December of 1956 in the form of uninsured motorist coverage. It permits the insured to obtain financial protection under *his own* automobile policy against the risk of being injured or killed in an automobile accident with an uninsured motorist.

Other solutions to the uninsured motorist problem have been offered in the form of motor vehicle financial responsibility laws and compulsory insurance laws. The first financial responsibility law was enacted in Connecticut in 1926.<sup>1</sup> Since that time all of the fifty states have adopted some form of legislation requiring proof of financial responsibility in the operation of motor vehicles.<sup>2</sup> These financial responsibility laws have definitely brought an increase in the number of insured automobiles on the nation's highways, yet they do not protect the driving public against the irresponsible uninsured motorist. These laws generally require proof of future financial responsibility, but they allow the financially irresponsible motorist the first accident before the financial responsibility laws apply. No protection is provided to the first victim of the financially irresponsible motorist.

Laws enacted by Massachusetts in 1925, by New York in 1957, and by

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1. Law of January 1, 1926, ch. 183, [1925], Conn. Public Acts 3598 (repealed 1927). For a description of the increase in uninsured motorist statutes see Notman, *A Decennial Study of Uninsured Motorist Endorsements*, 540 INS. L.J. 22 (1968); Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFFALO L. REV. 283 (1960).

2. Notman, *supra* note 1, at 23.

North Carolina in 1958, have made automobile liability insurance compulsory.<sup>3</sup> Such laws have failed, however, as a panacea to the problem of the financially irresponsible motorist. They afford no protection against the hit-and-run driver or the non-resident driver. They are also ineffective when an insurance company disclaims coverage under policy defenses such as lack of cooperation by the insured.<sup>4</sup> Uninsured motorist coverage was created to remedy these deficiencies in the financial responsibility laws, compulsory insurance laws, and other legislation.<sup>5</sup> The effectiveness and desirability of uninsured motorist coverage is indicated by the fact that presently forty-six states, including Missouri,<sup>6</sup> have enacted some form of mandatory uninsured motorist insurance law.<sup>7</sup>

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3. MASS. ANN. LAWS ch. 90, § 34 A-J (1957), as amended, (Supp. 1966), ch. 175, § 113 A-G (1959), as amended, (Supp. 1966); Law of April 16, 1956, ch. 655, [1956], McKinney's Session Laws of New York 758 (repealed 1959); N.C. GEN. STAT. §§ 20-309 to -319 (1965).

4. Notman, *A Decennial Study of Uninsured Motorist Endorsements*, 540 INS. L.J. 22 (1968).

5. Unsatisfied Judgment laws have been enacted in New Jersey, Maryland, Michigan and North Dakota providing for the payment of unsatisfied judgments from a special fund established by assessment.

6. § 379.203, RSMo 1959.

1. No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in § 303.030, RSMo, for the protection of persons insured 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, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage in writing; and provided further, that unless the insured named in the policy requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured had rejected the coverage in connection with a policy previously issued him by the same insurers. Provisions affording such insurance protection against uninsured motorists issued in this state prior to October 13, 1967, shall, when afforded by any authorized insurer, be deemed, subject to the limits prescribed in this section, to satisfy the requirements of this section.

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 herein because of insolvency.

3. An insurer's insolvency protection shall be applicable only to accidents occurring during a policy period in which its insured's uninsured motorist coverage is in effect where the liability insurer of the tort-feasor becomes insolvent within two years after such an accident. Nothing herein contained shall be construed to prevent any insurer from affording insolvency pro-

## II. UNINSURED MOTORIST STATUTES

The uninsured motorist statutes seek to compel the acceptance of uninsured motorist coverage on motor vehicles registered or principally garaged in the state.<sup>8</sup> One announced purpose of these statutes is to minimize losses to the people of the state who are involved in accidents with uninsured or financially irresponsible motorists.<sup>9</sup> Another purpose is to provide protection against the risk of inadequate compensation by placing the injured policyholder in the same position as if the tort-feasor had carried automobile liability coverage with the minimum limits prescribed by the state financial responsibility law.<sup>10</sup> In jurisdictions where uninsured motorist statutes have been enacted, the terms, definitions, and conditions of the statutes enter into and become a part of the insurance contract.<sup>11</sup> It is important to keep these purposes in mind when evaluating the construction placed upon these statutes by the courts in the cases which are discussed below.

The Missouri statute states that no automobile liability insurance policy "shall be delivered or issued for delivery" without containing uninsured motorist coverage unless the insured rejects the coverage in writing.<sup>12</sup> Once rejected, unless the insured requests such coverage in writing, it need not be provided in renewal policies issued by the same insurer. Policies in force at the effective date of the statute are not affected until renewed or reissued.<sup>13</sup> It has been held that the furnishing of a new declaration page which

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tection under terms and conditions more favorable to its insureds than is provided hereunder.

4. In the event of payment to any person under the coverage required by this section, and subject to the terms and conditions of such coverage, the insurer making such payment shall, to the extent thereof, be entitled to the proceeds of any settlement or judgment resulting from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury for which such payment is made, including the proceeds recoverable from the assets of the insolvent insurer.

7. For a survey of these statutes see the chart analysis at the end of this article.

8. For example, see the Missouri statute, note 6 *supra*.

9. *Mission Ins. Co. v. Brown*, 63 Cal.2d 508, 47 Cal. Rptr. 363, 407 P.2d 275 (1965).

10. *Sterns v. M.F.A. Mut. Ins. Co.*, 401 S.W.2d 510 (K.C. Mo. App. 1966); *Chandler v. Government Employees Ins. Co.*, 342 F.2d 420 (5th Cir. 1965); *Motors Ins. Corp. v. Surety Ins. Co.*, 243 S.C. 487, 134 S.E.2d 631 (1964); *Peterson v. State Farm Mut. Auto. Ins. Co.*, 238 Ore. 106, 393 P.2d 651 (1964).

11. *Stevens v. American Service Mut. Ins. Co.*, 234 A.2d 305 (D.C. Cir. 1967); *Voris v. Pacific Indem. Co.*, 213 Cal. App.2d 29, 28 Cal. Rptr. 328 (1963).

12. § 379.203, RSMo 1959, note 6 *supra*.

13. *Lee v. Michigan Millers Mut. Ins. Co.*, 158 S.E.2d 774 (S.C. 1968); *Ball v. California State Auto. Ass'n. Inter-Ins. Bureau*, 201 Cal. App.2d 85, 20 Cal. Rptr. 31 (1962). As in all but ten of the other states now having uninsured motorist

merely clarifies an existing policy does not amount to a renewal or reissuance of the policy.<sup>14</sup> Where a policy is endorsed, however, to add an additional vehicle or additional coverage, the endorsement will constitute the issuance of a policy within the meaning of the statute.<sup>15</sup>

### III. OPERATION OF THE COVERAGE

The insuring agreement found in the 1963 Standard Family Automobile Liability Policy<sup>16</sup> promises:

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

Uninsured motorist coverage is a relatively new subject for judicial interpretation. Cases in this early state of development have not as yet shown sufficiently clear trends to justify statements of well-settled rules or principles.<sup>17</sup> Many of the decisions in states having uninsured motorist statutes are beclouded with statutory interpretations which limit their applicability in other jurisdictions even to similar fact situations. In view of this quagmire of conflicting statutory and policy provisions, the courts have been careful to specifically limit their findings to the particular issues and facts before them.

#### A. *Protection for the Insured, Not the Uninsured*

It is important to recognize that uninsured motorist coverage is not intended to provide liability insurance for the uninsured motorist. The insured is protected by the coverage against the risk of inadequate com-

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laws, the insured may expressly reject the coverage in writing. *Myers v. National Auto. & Cas. Ins. Co. v. Civil Serv. Employees Ins. Co.*, 252 Cal. App.2d 599, 60 Cal. Rptr. 743 (1967).

14. *Sanders v. National Casualty Co.*, 157 So.2d 436 (Fla. App. 1963).

15. *Gulf American Fire & Cas. Co. v. McNeal*, 115 Ga. App. 286, 154 S.E.2d 411 (1967).

16. For an annotated copy of the 1963 Standard Family Automobile Liability Policy, see N. RISJORD & J. AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES, STANDARD PROVISIONS AND APPENDIX* (1964).

17. See the discussion in *Seabaugh v. Sisk*, 413 S.W.2d 602 (Spr. Mo. App. 1967).

pensation, but the uninsured motorist is not insured against liability.<sup>18</sup> The protection of the uninsured motorist coverage is restricted only to those persons falling within the policy definition of "insured."<sup>19</sup> In keeping with the theory that the coverage was not intended to benefit the uninsured motorist by providing him with free liability insurance, the 1963 Standard Family Automobile Liability Policy provides in the "trust agreement" section that, *inter alia*, the insured shall take "such action as may be necessary or appropriate" to recover damages from the tort-feasor, and that the carrier shall be reimbursed out of the recovery for its payments and expenses. The policy thus clearly contemplates that the uninsured motorist may have to pay something for his negligence.<sup>20</sup>

### B. Damages Recoverable

The sums which the insured or his legal representative may recover under the uninsured motorist coverage must arise out of bodily injury to the insured, including resulting sickness, disease, or death. The damages recoverable by the insured have been held not to include punitive damages.<sup>21</sup> This is consistent with the purpose of the uninsured motorist coverage, which is simply to provide compensation to the insured for bodily injuries suffered as a result of an accident with an uninsured motorist. In addition, the punishment objective of punitive damages would not be served by permitting the insured to recover under his own insurance coverage, which is designed to compensate him for his actual injuries.

### C. The Insured or "His Legal Representative"

Uninsured motorist coverage provides for the payment of all sums which the "insured or his legal representatives" shall be legally entitled to recover as damages for "bodily injury" sustained by the insured. The extent to which an insured can recover damages for bodily injury suffered by

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18. *Horne v. Superior Life Ins. Co.*, 203 Va. 282, 123 S.E.2d 401 (1962); *Hobbs v. Buckeye Union Cas. Co.*, 212 F. Supp. 349 (W.D. Va. 1962).

19. Recovery under the coverage has been denied to a workmen's compensation subrogee in *Horne v. Superior Life Ins. Co.*, *supra* note 19. Recovery has also been denied to a joint tort-feasor seeking contribution in *Hobbs v. Buckeye Union Cas. Co.*, *supra* note 19.

20. For example, if the uninsured motorist is solvent and has assets which could be recovered by the subrogee insurance company, then he will end up compensating the insurance company for the payments made under the uninsured motorist coverage.

21. *Hanna v. State Farm Mut. Auto. Ins. Co.*, 233 F. Supp. 510 (E.D. S.C. 1964); *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964).

another insured remains unsettled.<sup>22</sup> This problem may arise where the plaintiff, included in the policy definition of "insured," is seeking recovery on a derivative claim where the injured party is also an "insured" under the policy. In *Sterns v. M.F.A. Mutual Insurance Company*,<sup>23</sup> suit was brought by the parents of a girl killed in an accident involving an uninsured motorist where both the parents and a daughter were within the definition of insured in the policy. It was contended that the parents were entitled to recover, not as the daughter's legal representatives, but as insureds under the policy. Defendant insurer's demurrer was sustained. A second action was filed against the defendant insurance carrier, the father asserting that, as administrator of his daughter's estate, he was her "legal representative" and was "legally entitled to recover" under the wrongful death statute<sup>24</sup> from the uninsured motorist the damages sustained by the *parents*. After the dismissal of this suit by the trial court upon similar motion, the cases were consolidated for appeal. The Kansas City Court of Appeals was able to avoid the question of whether the parents could recover as insureds by finding that the parents had a right of recovery as the "legal representatives" of the insured. The court noted that the term "legal representative" has no fixed meaning within the law, and that the purposes of uninsured motorist insurance included indemnification of survivors and dependents of insureds who suffer bodily injury resulting in death from the negligence of an uninsured motorist.

We uphold that purpose by declaring that the term "legal representative" used in the policy, as it applies to a person or persons claiming damages for a wrongful death, includes all persons who may have the right to bring an action under [the wrongful death statute], and that its meaning is not restricted to an administrator or executor.<sup>25</sup>

A Florida decision<sup>26</sup> chose the same route in allowing compensation to a plaintiff who was an "insured" under the policy as well as a "legal repre-

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22. Fairgrave and Forney, *Uninsured Motorist Coverage*, 33 INS. COUNSEL J., 665 (1966). At least one reported case has denied recovery to one insured for damages resulting from bodily injury to another. *Moore v. Allstate Ins. Co.*, 108 Ga. App. 60, 131 S.E.2d 834 (1963).

23. 401 S.W.2d 510 (K.C. Mo. App. 1966).

24. § 537.080, RSMo 1959 (Repealed). § 537.080, RSMo 1967 Supp. was enacted in lieu thereof.

25. *Sterns v. M.F.A. Mut. Ins. Co.*, 401 S.W.2d 510, 519 (K.C. Mo. App. 1966).

26. *Zeagler v. Commercial Union Ins. Co.*, 166 So.2d 616 (Fla. Ct. App. 1964); *See also Davis v. U.S.F. & G. Co. of Baltimore, Md.*, 172 So.2d 485 (Fla. 1965).

sentative." The widow of an insured who was killed in an accident with an uninsured motorist asserted a claim under the wrongful death act. The court, relying upon the statutory requirement that mandatory uninsured motorist coverage included recovery for wrongful death, imposed upon the insurer the obligation to provide such coverage.<sup>27</sup>

A strained construction of the term "legal representatives," however, should not be necessary to allow wrongful death recoveries under the Standard Family Policy and similar policies. To maintain an action on the policy for wrongful death, the plaintiff may establish either that he is the legal representative of the deceased insured or that he is entitled to recover as an insured under the policy. The definition of "insured" in the Standard Family Policy includes any person entitled to recover damages because of bodily injury sustained by ". . . the named insured and any relative" or "any other person while occupying an insured automobile." This would include those people with derivative claims for loss of services or consortium, or with a claim under the wrongful death act.

The Missouri uninsured motorist statute<sup>28</sup> was enacted after the decision in the *Sterns* case. It requires coverage for "protection of persons *insured 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. . . ." The policy considered in the *Sterns* case did not contain this additional classification of insureds,<sup>29</sup> and plaintiff's contention that the parents were "additional insureds" was not considered by the court.

The courts have generally failed to consider that the cause of action sued upon under the wrongful death statute is an independent cause of action created by statute rather than the cause of action surviving to the administrator or executor as the insured's legal representative.<sup>30</sup> Recovery as an insured by the party bringing the wrongful death claim where this additional classification is found is consistent with the purpose of uninsured

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27. A vigorous dissent, finding no ambiguity or inconsistency in the language of the uninsured motorist coverage, contended that the holding of the majority constituted a rewriting of the policy. *Id.* at 618-19.

28. See note 6 *supra*.

29. Some policy forms including the 1959 Special Automobile Policy limit recovery by this class of insureds to damages for care and loss of services. See N. RISJORD & J. AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES, STANDARD PROVISIONS AND APPENDIX*, 115 (1964).

30. See, e.g., *Zeagler v. Commercial Union Ins. Co. of N. Y.*, 166 So.2d 616 (Fla. Ct. App. 1964); *Sterns v. M.F.A. Mut. Ins. Co.*, 401 S.W.2d 510 (K.C. Mo. App. 1966).

motorist coverage. It places the insured or his heirs in the same position as if the uninsured motorist had been insured, avoids the fiction that insured's heirs are the insured's legal representatives, and preserves to the administrator or executor the right without qualification to maintain claims as the insured's "legal representative" under the survival of action statute<sup>31</sup> where the insured's death did not result from the bodily injuries sustained.

#### D. Possibility of Multiple Recoveries

Where it is not definitely established that the insured died as a result of the injuries sustained in the accident involving an uninsured motorist, the insurer may be faced with the threat of having to pay more than one person.<sup>32</sup> For example, a wrongful death recovery by a widow may not bar recovery by the administrator or executor under the survival statute<sup>33</sup> in Missouri, even though the claims are inconsistent and adverse. Although recognizing that the legislature intended only one recovery in this situation, the Supreme Court of Missouri stated in such a case that it knew of no principle "by which a judgment in either of the pending damage actions would bar the other," or by which either party plaintiff "would be estopped by a verdict or judgment in the other case as to any fact issue litigated in such other case."<sup>34</sup> Where such double liability may arise, the insurance company may obtain releases from both the owner of the wrongful death claim and the administrator or executor of the estate. If settlement is not desired or available, it is suggested that the interpleader procedure may be employed to bind conclusively all of the possible claimants in one adjudication.<sup>35</sup>

#### E. Damages "Legally Entitled" to be Recovered

In an action against the insurer, the insured has the burden of establishing not only that the other motorist was uninsured, but also that the other motorist is legally liable to the insured.<sup>36</sup> The policy states that only

31. § 537.020, RSMo 1959.

32. See, e.g., *Smith v. Preis*, 396 S.W.2d 636 (Mo. 1965); *Harris v. Groggins*, 374 S.W.2d 6 (Mo. En Banc 1963); *Donahue v. St. L. Pub. Serv. Co.*, 374 S.W.2d 79 (Mo. 1963); *Plaza Express Co. v. Galloway*, 280 S.W.2d 17 (Mo. En Banc 1955).

33. § 537.020, RSMo 1959.

34. *Plaza Express Co. v. Galloway*, 280 S.W.2d 17, 22-23 (Mo. En Banc 1955), quoted in *Harris v. Groggins*, 374 S.W.2d 6, 14 (Mo. En Banc 1963).

35. See *Plaza Express Co. v. Galloway*, *supra* note 35.

36. *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606, 609 (K.C. Mo. App. 1963).

those damages which the insured is "legally entitled" to recover from the uninsured motorist and which are "caused by accident" may be the subject of a collectible uninsured motorist claim. In some jurisdictions this will not mean that the insurance company cannot be sued until the rendition of a judgment against the actual tort-feasor,<sup>37</sup> but it may mean that the insured must actually *be able* to bring a viable suit against the tortfeasor. Hence, when an automobile operated by an uninsured motorist struck an automobile in which his wife was riding, it was held that she could not maintain an action under her uninsured motorist coverage because she would be precluded from suing her husband by the common law bar to suits by one spouse against the other.<sup>38</sup>

#### IV. DEFINITION OF INSURED

The 1963 Standard Family Automobile Liability Policy defines "insured" to mean:

- (a) the named insured and any relative;
- (b) any other person while occupying an insured automobile; and
- (c) any person, with respect to damages he is entitled to recover because of bodily injury to which this part applies sustained by an insured under (a) or (b) above.

The definitions of "named insured" and "relative" found in the liability coverage section of the policy are applicable to the uninsured motorist coverage. "Relative" as used in the standard policy means a relative of the named insured who is a resident of the same household.<sup>39</sup> An additional qualification is found in some policies, including the Special Package Automobile Policy,<sup>40</sup> where "relative" means "a person related to the named insured by blood, marriage or adoption, who is a resident of the same household, provided neither such relative nor his spouse owns a private passenger automobile." This additional restriction has been found to be neither unreasonable nor inconsistent with the objectives of the coverage.<sup>41</sup>

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37. *Hill v. Seaboard Fire & Marine Ins. Co.*, note 37 *supra*; *Writing v. Fidelity & Cas. Co.*, 270 N.C. 577, 155 S.E.2d 100 (1967). Missouri also held in *Basore v. Allstate Ins. Co.*, 374 S.W.2d 626 (K.C. Mo. App. 1963), that an insured was not required to obtain a judgment against a hit and run driver in order to establish her right to recover on the policy.

38. *Noland v. Farmers Insurance Exchange*, 413 S.W.2d 530 (K.C. Mo. App. 1967).

39. It also includes the spouse of the named insured, residing with him. *Basore v. Allstate Ins. Co.*, 374 S.W.2d 626 (K.C. Mo. App. 1963).

40. *N. RISJORD & J. AUSTIN*, *op. cit. supra* note 16, at 141.

41. *Smitke v. Travelers Indem. Co.*, 264 Minn. 212, 118 N.W.2d 217 (1962); *See also Lopez v. State Farm Fire and Cas. Co.*, 250 C.A.2d 210, 58 Cal. Rptr. 243 (1967), holding policy definition contrary to California statutory definition.

Cases construing the requirement that the relative be a resident of the same household have reached a variety of results.<sup>42</sup> A married daughter staying with her parents while her husband attended a university in another town was found to be a resident of the same household as her insured husband.<sup>43</sup> Also found to be residents of the same household as the named insured were three individuals on military duty,<sup>44</sup> including one stepson of a New York named insured who was injured as a passenger in a car while stationed in Hawaii.<sup>45</sup>

Coverage is also provided by the definition of "insureds" for "any other person while occupying an insured automobile." "Occupying" as used in the Standard Family Policy means "in or upon or entering into or alighting from." Where a police officer was struck while walking along the highway near his police cruiser, it was held that, since he was 164 feet away from the police cruiser at the time the injuries were sustained, he was not "occupying" the insured vehicle at the time of the accident.<sup>46</sup> Similarly, where the insured was injured while leaning over the engine of a disabled vehicle when it was struck in the rear by an uninsured motorist, he was found not to be "upon" an insured vehicle within the meaning of the policy since "upon" must have some connection with "occupying."<sup>47</sup> Since he had not occupied and did not intend to occupy the disabled vehicle he did not qualify as an insured under the policy on the disabled vehicle. Some policies, such as the Special Package Automobile Policy, do not contain a specific definition of "occupying" under the uninsured motorist coverage. In these

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42. *Am. Universal Ins. Co. v. Thompson*, 62 Wash.2d 595, 384 P.2d 367 (1963); *Balletti v. Motor Vehicle Accident Indem. Corp.*, 16 App. Div. 2d 814, 228 N.Y.S.2d 768 (Sup. Ct. 1962); *Liprie v. Mich. Millers Mut. Ins. Co.*, 143 So.2d 597 (La. Ct. App. 1962); *LaMarch v. Md. Cas. Co.*, 35 Misc. 2d 641, 231 N.Y.S.2d 121 (Sup. Ct. 1962); *Matwijko v. Walter Zoladz Lumber, Builders Supply and Fuel Corp.*, 16 App. Div. 2d 1024, 230 N.Y.S.2d 77 (Sup. Ct. 1962); *Fidelity and Cas. Co. v. Jackson*, 297 F.2d 230 (4th Cir. 1962); *Zuckerman v. Motor Vehicle Accident Indem. Corp.*, 13 App. Div. 2d 574, 212 N.Y.S.2d 179 (Sup. Ct. 1961).

43. *White v. Nationwide Mut. Ins. Co.*, 361 F.2d 785 (4th Cir. 1966), *aff'd*, *White v. Nationwide Mut. Ins. Co.*, 245 F. Supp. 1 (W.D. Va. 1965).

44. *Allstate Ins. Co. v. Jahrling*, 16 App. Div. 501, 229 N.Y.S.2d 707 (Sup. Ct. 1962); *McGuinnen v. Motor Vehicle Accident Indem. Corp.*, 35 Misc. 2d 827, 231 N.Y.S.2d 795 (Sup. Ct. 1962).

45. *Appleton v. Merchants Mut. Ins. Co.*, 16 App. Div. 2d 361, 228 N.Y.S.2d 442 (1962).

46. *Insurance Co. of North America v. Perry*, 204 Va. 833, 134 S.E.2d 418 (1964). Also rejected was the contention that he was a "legal representative" of the named insured, the City of Norfolk, Virginia.

47. *Pennsylvania National Mut. and Cas. Ins. Co. v. Bristow*, 207 Va. 381, 150 S.E.2d 125 (1966).

cases reference must be made to the use of the term in other coverages, such as medical payments.<sup>48</sup>

The third class of "insureds" under the policy definition are those who sustain damages as a result of bodily injury to insureds included in either of the other classes. This broad class would include insureds maintaining claims of loss of services and consortium, medical expenses, and other derivative losses. The United States Government was permitted to recover under this section of the definition when an army officer insured by Government Employees Insurance Company was injured while traveling in his personal car.<sup>49</sup> It was held that the United States qualified as "a person" entitled to recovery because of bodily injury to the named insured for medical expenses pursuant to the Federal Medical Care Recovery Act.<sup>50</sup> But a collision carrier, on the other hand, is not allowed recovery as an insured against an uninsured motorist carrier even though the insured could have recovered his property damage from his uninsured motorist carrier instead of his collision carrier.<sup>51</sup>

## V. DEFINITION OF INSURED AUTOMOBILE

While coverage is afforded the named insured or any relative while a pedestrian or when occupying other vehicles, the coverage afforded any other person applies only while such person is occupying an insured automobile as defined in the policy. An "insured automobile" is defined in the 1963 Standard Family Automobile Policy as: (a) an automobile described in the policy for which a specific premium charge indicates that coverage is afforded; (b) a newly acquired automobile; (c) a temporary substitute automobile; and (d) a non-owned automobile operated by the named insured. The definition includes a trailer being used in connection with the

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48. *Inter-Ocean Ins. Co. v. Norris*, 205 Tenn. 217, 326 S.W.2d 437 (1959); *Green v. Farm Bureau Mut. Auto Ins. Co.*, 139 W.Va. 475, 80 S.E.2d 424 (1954); *Christoffer v. Hartford Accident and Indem. Co.*, 123 Cal. App.2d 979, 267 P.2d 887 (1954); *Wolf v. Am. Cas. Co.*, 2 Ill. App.2d 124, 188 N.E.2d 777 (1954); *Sherman v. N.Y. Cas. Co.*, 78 R.I. 393, 82 A.2d 839 (1951); *Young v. State Auto Ins. Assoc.*, 72 Pa. D. & C 399 (1949); *Ross v. Protective Indem. Co.*, 135 Conn. 150, 62 A.2d 340 (1948); *Independence Ins. Co. v. Jeffries*, 299 Ky. 680, 172 S.W.2d 566 (1943); *New Amsterdam Cas. Co. v. Rust*, 169 Tenn. 22, 46 S.W.2d 70 (1932); *Reynolds v. Life & Cas. Ins. Co. of Am.*, 166 S.C. 214, 164 S.E. 602 (1932); *Stewart v. N. Am. Accident Ins. Co.*, 226 Mo. App. 361, 33 S.W.2d 1005 (K.C. Mo. App. 1931); *Guaranty Trust Co. v. Continental Life Ins. Co.*, 159 Wash. 683, 229 P. 585 (1930).

49. *Government Employees Ins. Co. v. United States*, 376 F.2d 836 (4th Cir. 1967).

50. 42 U.S.C. § 2651 (1964).

51. *Motors Ins. Co. v. Surety Ins. Co.*, 243 S.C. 487, 134 S.E.2d 631 (1964).

automobile. The term "insured automobile" does not include: (a) Any automobile or trailer owned by a resident of the same household as the insured; (b) Any automobile while used as a public or livery conveyance; (c) Any automobile while used without the permission of the owner.

An individual owning more than one automobile should carry uninsured motorist coverage on *all* automobiles in order to avoid being without this coverage when operating an owned automobile not covered by a specific policy. Similarly, if a named insured is operating an automobile owned by a resident of the same household, the coverage afforded by the named insured's policy would not apply. Since the uninsured motorist coverage is primarily on a "described automobile" basis, the protection of the coverage cannot be obtained on all owned vehicles by insuring only one.<sup>52</sup>

An insured automobile operated by someone other than the owner must be operated with the owner's permission in order to come within the protection of the policy.<sup>53</sup> The Standard Family Policy provides coverage when a non-owned automobile is operated by the named insured with the permission of the owner. Other policies,<sup>54</sup> however, may afford coverage to the named insured, his spouse, and any relative while occupying a non-owned automobile.

Although a non-owned automobile operated by the named insured with permission may qualify as an insured automobile, this provision is limited by the exclusion from the definition of "insured automobile" of any automobile or trailer owned by a resident of the same household as the named insured. This is well illustrated where plaintiff owned a Ford automobile which was not insured, but was a resident of the same household as Brown, who carried a family automobile policy insuring her Buick automobile. While driving his Ford, plaintiff and a passenger were injured in a collision with an uninsured motorist. In actions brought against Brown's insurer, plaintiff contended that his Ford was a temporary substitute automobile for Brown's Buick and that it was, therefore, an insured automobile under Brown's policy. It was held that, even assuming that his Ford was a temporary substitute automobile, it could not be an "insured" automobile, since it was owned by a resident of the same household as the named insured, Brown.<sup>55</sup>

52. *Nationwide Mut. Ins. Co. v. Akers*, 340 F.2d 150 (4th Cir. 1965).

53. *Nationwide Mut. Ins. Co. v. Harleysville Mut. Cas. Co.*, 203 Va. 600, 125 S.E.2d 840 (1962).

54. For example, see the policy involved in *Davidson v. Eastern Fire and Cas. Ins. Co.*, 245 S.C. 472, 141 S.E.2d 135 (1965).

55. *Spencer v. Traders and General Ins. Co.*, 171 So.2d 723 (La. Ct. App. 1965); *Rhodes v. Traders and General Ins. Co.*, 171 So.2d 727 (La. Ct. App. 1965).

## VI. DEFINITION OF UNINSURED AUTOMOBILE

A. *Generally*

In the Standard Family Automobile Liability policy, an "uninsured automobile" is defined to mean:

- (a) an automobile or trailer with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility law . . . no bodily injury liability bond or insurance policy applicable at the time of the accident with respect to any person or organization legally responsible for the use of such automobile, or with respect to which there is a bodily injury liability bond or insurance policy applicable at the time of the accident but the company writing the same denies coverage thereunder or
- (b) a hit-and-run automobile;

but the term "uninsured automobile" shall not include:

- (1) an insured automobile or an automobile furnished for the regular use of the named insured or a relative,
- (2) an automobile or trailer owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
- (3) an automobile or trailer owned by the United States of America, Canada, a state, a political subdivision of any such government or an agency of any of the foregoing,
- (4) a land motor vehicle or trailer if operated on rails or crawler-treads or while located for use as a residence or premises and not as a vehicle, or
- (5) a farm-type tractor or equipment designed for use principally off public roads, except while actually upon public roads.

Four separate types of situations may arise under the definition of an uninsured automobile. These situations are: (1) no bodily injury liability bond or insurance policy applicable at the time of the accident; (2) liability insurance is applicable, but the insurance company writing it denies coverage; (3) there is insurance coverage applicable, but the limits are less than the amounts specified by the financial responsibility law in the state where the insured automobile is principally garaged; (4) The adverse vehicle is a hit-and-run automobile. The definition of an uninsured automobile in each case where the language of the definition was considered has been found to be clear and unambiguous.<sup>56</sup>

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56. *Swaringin v. Allstate Ins. Co.*, 399 S.W.2d 131 (St. L. Mo. App. 1966); *Hardin v. Am. Mut. Fire Ins. Co.*, 261 N.C. 67, 134 S.E.2d 142 (1964); *Fed. Ins. Co. v. Speight*, 220 F. Supp. 90 (E.D. S.C. 1963).

In place of the term "uninsured automobile" some policies use the term "uninsured highway vehicle."<sup>57</sup> Where the adverse vehicle involved in the accident is other than a conventional private passenger automobile, reference must be made to the policy language and in some instances to statute to determine if the coverage applies. For example, where the named insured was struck by an uninsured motorcycle while walking in a crosswalk, the uninsured motorist carrier contended that the word "automobile" under the uninsured motorist coverage did not include a motorcycle. The California statute making uninsured motorist coverage mandatory used the term "motor vehicle," which was defined to include motorcycles. In finding coverage, the court held that the insurer must be deemed to have intended that the word "automobile" in the uninsured motorist coverage should apply to all motor vehicles which were enumerated in the statute.<sup>58</sup>

The term "motor vehicle" is not defined in the Missouri uninsured motorist statute, but is defined elsewhere in the Missouri statutes as "any self-propelled vehicle not operated exclusively upon tracks, except farm tractors."<sup>59</sup> Protection is required by the Missouri uninsured motorist statute against "uninsured motor vehicles." Consequently, notwithstanding a policy reference to the term "uninsured automobile," it is likely that policies affording uninsured motorist coverage delivered or issued for delivery in Missouri would apply to the wider range of vehicles included in the statutory definition of the term "motor vehicle."

### B. No Liability Bond or Insurance Policy Applicable

Applicable liability insurance need not specifically cover the adverse automobile, nor must it necessarily be automobile insurance, in order to take the adverse vehicle out of the definition of uninsured automobile. In a case where an employer's general liability policy insured against the negligent acts of employees while operating an automobile, it was found that an employee driving an otherwise uninsured car on the business of his

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57. This is the term used in the 1966 version of the Standard Family Automobile Liability Policy. N. RISJORD & J. AUSTIN, *op. cit. supra* note 16, at 290 (1967 Supp.).

58. *Voris v. Pacific Indem. Co.*, 213 Cal. App.2d 29, 28 Cal. Rptr. 328 (1963). See also *Westerhausen v. Allied Mut. Ins. Co.*, 258 Ia. 969, 140 N.W.2d 719 (1966); *Askey v. General Accident Fire & Life Assur. Corp.*, 30 App. Div. 2d 632, 290 N.Y.S.2d 759 (1968); *Shipley v. American Standard Ins. Co.*, 183 Neb. 109, 158 N.W.2d 238 (1968).

59. § 301.010, RSMo 1959.

employer was not operating an uninsured vehicle within the definition of the uninsured motorist coverage.<sup>60</sup>

### C. Denial of Coverage

The "denial of coverage" provision was added in 1963 to the definition of an uninsured automobile in the Standard Family Automobile Policy. The inclusion of this provision has proved perplexing to both insurance companies and judges. The meaning of the phrase "denies coverage" was considered at length in the Missouri case of *Seabaugh v. Sisk*.<sup>61</sup> The question was whether insolvency of the insurer of the adverse vehicle constituted a denial of coverage. The court noted that:

All of the prior cases, still a mere handful in number, which have undertaken to define, or have turned upon the meaning of, the words "denies coverage" or the phrase "to deny coverage," have been reported within the past six years and all have arisen in states in which public policy theretofore had been formulated and declared in legislative enactments designed to provide compensation for innocent persons injured by negligent uninsured motorists, either by making uninsured motorist coverage mandatory in all automobile liability policies issued in those states . . . or by establishing so-called unsatisfied claim and judgment funds . . . or by setting up a statutory plan combining the features of the first two alternatives. . . .<sup>62</sup>

At the time this decision was rendered, the Missouri uninsured motorist statute had not been enacted. The court noted the distinction made in a New York case<sup>63</sup> between "denial of coverage" and "disclaimer of liability."

To deny coverage is to take the position that for some reason or other the policy does not encompass the particular accident . . . disclaimer of liability usually arises where there is coverage, but because of some action on the part of the insured, the company refuses to respond. This refusal could be for lack of cooperation by the insured, fraud perpetrated by the insured on the company or serving late notice of the accident, just to mention a few.<sup>64</sup>

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60. U.S. Fidelity & Guaranty Co. v. Byrum, 206 Va. 815, 146 S.E.2d 246 (1966).

61. 413 S.W.2d 602 (Spr. Mo. App. 1967).

62. *Id.* at 607.

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

64. *Id.* at 1005, N.Y.S.2d at 874-75.

The Missouri court in *Seabaugh* regarded the New York definition "as accurate and sound," but found that the insolvency of the adverse vehicle insurance carrier was a breach of contract, not a denial of coverage. The court noted that the phrase "denies coverage" is not a "linguistic 'Mother Hubbard' within whose enveloping warmth may be gathered all circumstances, conditions and contingencies arising subsequent to an accident which might prevent an . . . (insured) from making full financial recovery from the tort-feasor."<sup>65</sup>

Where the insured is injured in a collision intentionally caused by the other driver it is arguable that the other driver is uninsured since the typical liability policy does not afford coverage for injuries which are intentionally caused. In *McCarthy v. Motor Vehicle Accident Indemnification Corporation*,<sup>66</sup> it was held, however, that the other car was not an uninsured vehicle. The court distinguished a finding that the insurance company is not liable "because the injuries were not caused by accident" from a finding that the company is not liable because the policy was not in force at the time in question or because there had been a breach of condition of the policy by the insured.

Automobiles on which liability coverage existed at the time of the accident have been found to be uninsured automobiles within the meaning of the policy definition or applicable statutory definition in cases where the carrier has denied liability on the ground that the vehicle was being operated by a non-permissive user,<sup>67</sup> or on the ground of the non-cooperation of the insured.<sup>68</sup>

Recovery has been allowed where the named insured was a passenger in his own automobile when the driver collided with another automobile.<sup>69</sup> The uninsured driver was held to be operating an "uninsured motor vehicle" within the meaning of the insured's policy, since the bodily injury liability

65. *Seabaugh v. Sisk*, 413 S.W.2d 602, 609 (Spr. Mo. App. 1967).

66. 16 App. Div.2d 35, 224 N.Y.S.2d 909 (1962), *aff'd*, 12 N.Y.2d 922 (1963). See also *Doe v. Faulkner*, 203 Va. 522, 125 S.E.2d 169 (1962).

67. *Carlos v. Motor Vehicle Accident Indem. Corp.*, 24 App. Div.2d 747, 263 N.Y.S.2d 670, *rev'd on other grounds*, 17 N.Y.2d 614, 268 N.Y.S.2d 930, 216 N.E.2d 26 (1966); *Buck v. U.S. Fidelity & Guaranty Co.*, 265 N.C. 285, 144 S.E.2d 34 (1965).

68. *McDaniel v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 815, 139 S.E.2d 806 (1965); *Rosen v. U.S. Fidelity & Guaranty Co.*, 23 App. Div.2d 335, 260 N.Y.S.2d 677 (1965); *Berman v. Traveler's Indem. Co.*, 11 Misc.2d 291, 171 N.Y.S.2d 869 (Sup. Ct. 1958).

69. *Bowsher v. State Farm Fire and Cas. Co.*, 244 Ore. 549, 419 P.2d 606 (1966).

coverage did not afford coverage for the driver with respect to the injury to the insured. Similarly, a passenger who was an insured under his father's uninsured motorist coverage was allowed recovery under the father's uninsured motorist coverage since his father's liability policy did not afford coverage for injury to guests in the insured vehicle.<sup>70</sup>

#### D. *Insolvency of the Liability Carrier*

A problem arises with the subsequent insolvency of the liability insurer on the adverse vehicle. The question of whether insolvency makes the adverse vehicle an uninsured automobile within the policy definition requiring "no applicable insurance," or whether insolvency is a denial of coverage has been widely considered and with varied results. This frequent source of litigation has largely been eliminated by the extensions of coverage filed in most states by companies and filing bureaus, providing for coverage for injuries caused by motorists whose insurance company is or becomes insolvent. Also, many states, including Missouri, have enacted provisions for insolvency. The Missouri statute provides that the term "uninsured motor vehicle" shall be deemed to include an insured automobile when the liability insurer is "unable to make payment with respect to the legal liability of its insured within the limits specified herein because of insolvency."<sup>71</sup> Prior to the enactment of this statute, Missouri courts had twice rejected the argument that the insurer's insolvency creates an uninsured status.

The policy in one case<sup>72</sup> defined an uninsured automobile as one on "which there is no bodily injury liability insurance applicable at the time of the accident." The liability carrier on the adverse vehicle became insolvent after the accident. A claim was made by the insured under the uninsured motorist coverage of her own policy. The court found that the definition was plainly susceptible of only one meaning: that even though the insurer *subsequently* became insolvent, the insured was not involved in an accident with an uninsured automobile as defined in the policy. In *Seabaugh v. Sisk*,<sup>73</sup> the policy defined an uninsured automobile as one having "no bodily injury liability bond or insurance policy applicable at the time of the accident." This policy definition was referred to by the

70. *Whitney v. American Fidelity Co.*, 350 Mass. 542, 215 N.E.2d 767 (1966).

71. § 379.203, RSMo 1959. The statute provides that the insolvency must occur within two years after the accident.

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

73. *Seabaugh v. Sisk*, 413 S.W.2d 602 (Spr. Mo. App. 1967).

court as "the no policy definition." Another definition considered by the court comprehended a situation where an "insurance policy [is] applicable at the time of the accident, but the company writing the same denies coverage thereunder." This was referred to by the court as the "denial of coverage definition." The court found that the adverse vehicle was not an uninsured automobile under either the "no policy definition" or the "denial of coverage" definition, holding that the failure of the insolvent insurance company to defend the adverse driver was a breach of the contract rather than a denial of liability.<sup>74</sup>

#### E. *Liability Limits Less than Required by State Law*

In 1963, the definition of "uninsured automobile" in the Standard Family Policy was amended to include an automobile which is insured, but which has liability limits less than the amount specified by the financial responsibility law of the state in which the insured automobile is principally garaged. But even in cases where this broader definition has not been expressly added to the policy upon which suit is brought, jurisdictions having mandatory uninsured motorist laws tend to reach the same result. For example, the wife of a named insured was injured in a California collision with an automobile operated by a Texas resident having liability insurance with limits of \$5,000 for each person. The minimum limits required under California law were \$10,000 for each person. The California court allowed the wife of the named insured to recover, finding that the legislative intent was to give protection in accord with the limits of the California financial responsibility statute.<sup>75</sup> Similarly, an automobile that did not have the minimum limits prescribed by New Hampshire law was held to be an uninsured automobile to the extent that the insurance on the adverse vehicle fell short of the statutory limit.<sup>76</sup> On the other hand, where the insured recovers the maximum limits under the tort-feasor's liability policy and then attempts to recover under his own uninsured

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74. It is interesting to note that the court cited *Pattani v. Keystone Insurance Co.*, 209 Pa. Super. 15, 223 A.2d 899 (1966), which was later reversed, 426 Pa. 332, 231 A.2d 402 (1967).

75. *Taylor v. Preferred Risk Mutual Ins. Co.*, 225 Cal. App.2d 80, 37 Cal. Rptr. 63 (1964); *accord*, *Calhoun v. State Farm Mut. Auto. Ins. Co.*, 254 Cal. App.2d 407 (1967).

76. *Carrigan v. Allstate Ins. Co.*, 108 N.H. 131, 229 A.2d 179 (1967); *Stevens v. Allied Serv. Mut. Ins. Co.*, 234 A.2d 305 (N.H. 1968); *Mich. Mut. Liab. Co. v. Pokorwinski*, 8 Mich. App. 475, 154 N.W.2d 609 (1967); *McCaffery v. St. Paul Fire & Marine Ins. Co.*, 108 N.H. 373, 236 A.2d 490 (1967).

motorist coverage in addition, his complaint will be summarily dismissed if the tort-feasor's liability coverage is in the amounts required by the applicable financial responsibility law.<sup>77</sup>

The burden of proving that the other motorist in the accident was uninsured within the policy definition rests with the insured seeking the protection of the uninsured motorist coverage.<sup>78</sup> Establishment of this uninsured status is essential for recovery,<sup>79</sup> but the proper methods of discharging this burden are far from clear.<sup>80</sup> A showing that the insurer's adjuster had attempted and was unable to ascertain that coverage existed at the time of the accident, but that the company learned that the policy of the other driver had been cancelled before the accident, was held in one case to be sufficient.<sup>81</sup> Plaintiffs in other cases, however, have not fared as well.<sup>82</sup> For example, it has been held that failure by an insurer to defend an action against an adverse driver does not create a presumption that the adverse driver was uninsured.<sup>83</sup>

#### F. *Hit-and-Run Automobiles*

The fourth uninsured automobile situation is the hit-and-run vehicle which is defined in the Standard Family Policy to mean:

An automobile which causes bodily injury to an insured arising out of physical contact of such automobile with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (a) there cannot be ascertained the identity of either the operator or the owner of such 'hit-and-run automobile'; (b) the insured or someone on his behalf shall have reported the accident within twenty-four hours to a police, peace or judicial officer or to the Commissioner of Motor Vehicles, and shall have filed with the company within 30 days thereafter a statement under

77. *Detrick v. Aetna Cas. and Sur. Co.*, 158 N.W.2d 99 (Iowa 1967).

78. *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963); *Levy v. Am. Auto. Ins. Co.*, 31 Ill. App.2d 157, 175 N.E.2d 607 (1961).

79. *Green v. U.S. Fidelity v. Guaranty Co.*, 181 So.2d 198 (Fla. Ct. App. 1965).

80. Notman, *A Decennial Study of Uninsured Motorist Endorsements*, 540 INS. L.J. 22 (1968).

81. *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963).

82. *Pan Am. Fire & Cas. Co. v. Loyd*, 411 S.W.2d 557 (Tex. Ct. App. 1967); See also *Application of Motor Vehicle Accident Indem. Corp.*, 28 Misc.2d 492, 214 N.Y.S.2d 600 (1961).

83. *Ross v. Hardware Mut. Cas. Co.*, 13 Misc.2d 739, 173 N.Y.S.2d 941 (1958).

oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and (c) at the company's request, the insured or his legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident.

### 1. Physical Contact Requirement

The physical contact requirement in the definition, intended to avoid false and fraudulent claims, has been strictly applied.<sup>84</sup> Pedestrians injured by automobiles knocked into them by hit-and-run vehicles,<sup>85</sup> and an insured who was forced to strike a parked vehicle by an unknown and unidentified driver,<sup>86</sup> were unable to maintain uninsured motorist claims since there were no physical contacts with the hit-and-run motorists causing the accidents.

These results in earlier cases have given way to a more liberal interpretation of the physical contact requirement, particularly where the existence of the accident-causing vehicle can be established or where a statute dispensing with physical contact is involved.<sup>87</sup> For example, a transmission of physical force, rather than actual contact, between the hit-and-run vehicle and the insured vehicle may be sufficient.<sup>88</sup> Where an insured collided with an automobile which had been struck and knocked into the path of his automobile by a hit-and-run vehicle, the court said that the physical contact requirement designed to prevent false claims should not be extended to defeat coverage in cases where fraud does not exist.<sup>89</sup> This approach is desirable as long as there is substantial evidence of the existence and culpability of the hit-and-run motorist.

84. *Liberty Mut. Fire Ins. Co. v. Loring*, 91 Ill. App.2d 342, 235 N.E.2d 418 (1968); *Cokes v. Nationwide Ins. Co.*, 151 S.C. —, 161 S.E.2d 175 (1968).

85. *Petition of Portman*, 33 Misc.2d 385, 225 N.Y.S.2d 560 (Sup. Ct. 1962); *Bellavia v. Motor Vehicle Accident Indem. Corp.*, 28 Misc.2d 420, 211 N.Y.S.2d 356 (1961).

86. *Prosk v. Allstate Ins. Co.*, 82 Ill. App.2d 457, 226 N.E.2d 498 (1967).

87. *Pulliam v. Doe*, 246 S.C. 106, 142 S.E.2d 861 (1965); *Costa v. St. Paul Fire and Marine Ins. Co.*, 228 Cal. App.2d 651, 39 Cal. Rptr. 775 (1964).

88. *Motor Vehicle Accident Indem. Corp. v. Eisenberg*, 18 N.Y.2d 1, 271 N.Y.S.2d 641, 218 N.E.2d 524 (1966); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 70 Wash.2d 587, 424 P.2d 648 (1967).

89. *Inter-Insurance Exchange v. Lopez*, 238 Cal. App.2d 441, 47 Cal. Rptr. 834 (1965).

## 2. Inability to Ascertain Identity of Owner or Operator of Hit-and-Run Vehicle

The automobile of the insured plaintiff in one case was struck from the rear by another motorist while she was stopped for a traffic light. Noticing that the driver of the other car was behaving in "an erratic and provocative manner," she was afraid to get out of her automobile. Plaintiff proceeded forward when the traffic light changed, being followed for several blocks by the threatening motorist. It was argued by defendant insurance company that she could have ascertained the identity of the owner or operator and, therefore, she was not entitled to uninsured motorist coverage on the basis of being struck by a hit-and-run driver. Nevertheless, plaintiff was permitted to recover on the theory that she was not required to ascertain the other driver's identity at the risk of her own physical safety.<sup>90</sup>

What if an insured could ascertain the identity of the other driver in a collision, but fails to do so, honestly thinking that no bodily injury had been sustained? It has been held that such an insured, who later finds that bodily injuries have been sustained, is not barred from claiming coverage.<sup>91</sup> Another case allowed recovery where an insured pedestrian was taken to the hospital by the motorist who had struck him, but was given a false name and address by the driver.<sup>92</sup> These cases suggest that it is not necessary that the adverse driver actually "run." The only requirement is that the identity of the operator or the owner of the adverse vehicle cannot reasonably be ascertained.

## 3. Need for Judgment Against the Hit-and-Run Driver

The hit-and-run situation presents a definite problem to the insured in states requiring that, as a condition precedent to maintain a suit against the insurer under the uninsured motorist coverage, a judgment for damages be obtained against the adverse driver. Virginia<sup>93</sup> and South Carolina<sup>94</sup>

90. *Walsh v. State Farm Mut. Auto. Ins. Co.*, 91 Ill. App.2d 156, 234 N.E.2d 394 (1968).

91. *Riemenscheider v. Motor Vehicle Accident Indem. Corp.*, 47 Misc.2d 549, 262 N.Y.S.2d 950 (Sup. Ct. 1965), *aff'd*, 26 App. Div.2d 309, 274 N.Y.S.2d 71 (1966); *Mangus v. Doe*, 203 Va. 518, 125 S.E.2d 166 (1962).

92. *Darby v. Motor Vehicle Accident Indem. Corp.*, 52 Misc.2d 1045, 277 N.Y.S.2d 302 (Sup. Ct. 1967).

93. Va. Code Ann. § 38.1-381(e) (Cum. Supp. 1964).

94. S.C. CODE § 46-750, 31-39 (1963).

have provided for actions against a John Doe hit-and-run motorist. Missouri, on the other hand, is one of the jurisdictions which allow suit to be brought directly against the insurance carrier without obtaining a separate judgment.<sup>95</sup> States which have yet to decide the issue may also be persuaded to allow a direct action against the insurer where the adverse driver's identity is unascertained. Even though a judgment may be required when the adverse driver is ascertained, it would seem more practical, when the adverse driver is unascertained, to allow proof of the legal liability of the hit-and-run driver in the same action by which recovery from the insurer is sought.

#### 4. Limitation of Damages

Should an insured's recovery for bodily injury be limited to the injury sustained by the actual physical contact with the hit-and-run vehicle or should it also include the injuries sustained as a direct and proximate result of the contact? In a Missouri case<sup>96</sup> where this question arose, the Kansas City Court of Appeals stated that:

[the policy] does not say that the insured's recovery is limited to that personal injury occurring at the exact moment of the collision and that it does not also include injury occurring thereafter as the direct and proximate result of such collision. As we view it, personal injuries that are the direct and proximate result of the collision arise out of the use of the automobile and are caused by the accident.<sup>97</sup>

#### VII. EXCLUSIONS

The coverage afforded by the Standard Family Automobile Liability Policy does not apply:

- (a) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile;
- (b) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to pay-

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95. Suit may be brought directly in Missouri regardless of whether the tortfeasor is unascertained or simply uninsured. *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963); *Basore v. Allstate Ins. Co.*, 374 S.W.2d 626 (K.C. Mo. App. 1963).

96. *Basore v. Allstate Ins. Co.*, note 96 *supra*.

97. *Id.* at 630.

ment under this coverage shall, without written consent of the company make any settlement with any person or organization who may be legally liable therefor;

- (c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workmen's compensation or disability benefits law or any similar law.

Some policy forms contain a combined settlement and judgment prohibition excluding coverage for bodily injury to an insured if the insured "shall, without written consent of the company, make any settlement with or prosecute to judgment any action against any person or organization who might be legally liable therefor."<sup>98</sup> The provision excluding coverage where the insured, without the written consent of the insurance company, obtains a judgment against the adverse driver has been taken out of the Standard Family Automobile Policy, and it now provides instead that a judgment obtained in an action brought by the insured without the written consent of the company shall not be conclusive on the issues of liability and damages between the insured and the company.<sup>99</sup>

In Missouri, the "consent" exclusion as a bar to suit was struck down in 1963 along with the arbitration clause in a holding that it is against public policy "to permit a prohibition against resort to the courts for remedy without the consent of the person ultimately liable."<sup>100</sup> In a subsequent case, the Springfield Court of Appeals agreed that the judgment prohibition was invalid and unenforceable in Missouri, but found that the settlement prohibition was valid and that the prohibitions contained in the single exclusion were separable.<sup>101</sup> The court stated that although the judgment prohibition does tend to oust the jurisdiction of the courts, "it is just as clear" that the settlement prohibition does not.<sup>102</sup>

98. N. RISJORD & J. AUSTIN, *AUTOMOBILE LIABILITY INSURANCE CASES, STANDARD PROVISIONS AND APPENDIX*, at 71.

99. No judgment against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company, of the issues of liability of such person or organization or 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. N. RISJORD & J. AUSTIN, *op. cit. supra* note 98, at 199.

100. *State ex rel. State Farm Mutual Ins. Co. v. Craig*, 364 S.W.2d 343, 346 (Spr. Mo. App. 1963).

101. *Kisling v. M.F.A. Ins. Co.*, 399 S.W.2d 245 (Spr. Mo. App. 1966). This case is noted in Williams, *Uninsured Motorist Insurance—Subrogation—Settlement With Tortfeasor*, 32 Mo. L. REV. 159 (1967).

102. *Kisling v. M.F.A. Ins. Co.*, *supra* note 102, at 251.

But the court added the caveat that the insurer's response to an insured's request for written consent to a proposed settlement will be subject to judicial scrutiny to insure that a withholding of consent is not arbitrary or unreasonable.<sup>103</sup> In view of an additional statement by the court that "we express no opinion and intend no holding except as applied to the specific situation before us,"<sup>104</sup> and in view also of the fact that a contrary result was reached by the Kansas City Court of Appeals where a settlement had been made with an *insured* joint tort-feasor,<sup>105</sup> the validity of the settlement prohibition in Missouri is still unsettled. The new Missouri statute making uninsured motorist protection compulsory unless expressly rejected also provides simply that the insurer shall be entitled to the proceeds of any settlement or judgment obtained by the insured person or organization legally responsible for the injury.<sup>106</sup>

The settlement prohibition in the standard policy, like the judgment prohibition, is intended to protect the insurance company's right of subrogation created by the "Trust Agreement" section. This section permits recovery by the insurer "from any person or organization legally responsible for the bodily injury" sustained by the insured for which the insurer has made payment. If the insured is free to make a settlement by release or covenant with the uninsured motorist, the company's rights under the trust agreement section may be lost. To deny the insurance company its recovery from the person or persons responsible for the insured's injuries would in effect make it the liability insurer of the uninsured motorist, which

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103. *Id.* at 251-252.

104. *Ibid.*

105. *Gattenby v. Allstate Ins. Co.*, K.C. Mo. App. No. 24,617, filed April 3, 1967 (not officially reported). The case was transferred to the Missouri Supreme Court, but was settled before the court was able to consider it. The Kansas City Court of Appeals in *Gattenby* noted that the attack on the settlement exclusion was much broader than the attack in the *Kisling* case and concluded:

that the public policy in Missouri, as well as of other states which have considered this question, is that contracts which attempt to prohibit a party from settling his claim against a third party, without first obtaining the consent of the other party to the contract, are void . . . It follows that the contract provision contained in Paragraph 2 of the exclusions and the party here in issue is void and unenforceable as against our public policy. We specifically point out that what we have said herein is not necessarily applicable to a situation where a plaintiff attempts to settle his claim against the uninsured motorist and thereby binds the insurance company issuing the policy providing the uninsured motorist coverage. That situation is not presented for our decision in this case and we expressly refrain from any holding or statement concerning any such problem.

106. § 379.203, RSMo 1967 Supp.

is contrary to the purpose of the coverage. In a recent Florida case,<sup>107</sup> the insurer contended that the insured's settlement with the insurer of the employer of an uninsured motorist was a violation of a policy exclusion containing both the settlement and judgment prohibitions. The court, in upholding the validity of the settlement prohibition, stated:

[I]t is clear that the defendant breached the exclusion clause of their uninsured motorist coverage. Such a breach would be presumed to have prejudiced the insurer and in the absence of an allegation by the defendant that no prejudice has in fact resulted, defendant may not recover.<sup>108</sup>

Neither the settlement prohibition nor the judgment prohibition accords to an insurer the right to reject or ignore an insured's request for written consent to a proposed settlement or suit. For example, where the insurance company has received notice of the insured's suit against the tort-feasor, but does not acknowledge that fact, it cannot later attempt to avoid coverage by contending that it has not given its written consent to the prosecution to judgment.<sup>109</sup>

#### VIII. REDUCTION OF LIABILITY—RECEIPT OF OTHER BENEFITS

The "Limits of Liability" section of the Standard Family Automobile Policy provides that payments under the uninsured motorist coverage are reduced by: (1) all sums paid by or on behalf of the owner or operator of the uninsured automobile and any other person or organization jointly or severally liable with such owner or operator; (2) the amount paid and the present value of all amounts payable under any workmen's compensation law, disability benefit law, or other similar law; and (3) payments made under the bodily injury coverage of the same policy. In addition, the company is not obligated to pay damages paid or payable under the medical payments coverage. It has been suggested that the insured has no choice in deciding whether to make a claim under the uninsured motorist coverage in lieu of a claim for workmen's compensation or disability benefits, and that he must seek any

107. *McInnis v. State Farm Mut. Ins. Co.*, 68 Auto. Ins. Cases 5814 (Fla. 1968).

108. *Id.* at 5814.

109. *Andeen v. Country Mut. Ins. Co.*, 70 Ill. App.2d 357, 217 N.E.2d 814 (1966).

payments available under the latter.<sup>110</sup> The workmen's compensation carrier usually is subrogated to the insured's cause of action against the uninsured motorist, but the carrier has not been allowed to recover as subrogee under the uninsured motorist coverage.<sup>111</sup> The result of this is that the workmen's compensation carrier or the disability insurance carrier is left with little or no chance of recovering anything. But again, the purpose of uninsured motorist coverage is not to provide a subrogation fund for other carriers.

The limits of liability section of the Standard Family Automobile Policy states that the limits of coverage stated in the declarations for "each person" and "each accident" are the total limits of the company's liability for all damages. This includes damages for care or loss of services because of bodily injury sustained as a result of any one accident.<sup>112</sup> The hapless insured in one case was hit almost simultaneously by two uninsured motorists. The insured contended that two accidents had occurred, and therefore claimed double the amount of the "each accident" limit of liability stated in the policy. It was held that only one accident had occurred and that the insured's claim could not exceed the limit of liability stated in the declarations.<sup>113</sup>

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110.

Since the contract of insurance itself states that the policy does not apply "so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier," it would appear that the injured party has no choice. If a claim were made under an uninsured motorist coverage in lieu of making a claim for compensation, it is clear that such a recovery would inure to the benefit of the workmen's compensation carrier indirectly in the sense that payment from the uninsured motorist source would reduce or extinguish any workmen's compensation or disability benefits liability. Therefore, if there is a possible claim either under workmen's compensation or disability benefits, whether such claim is asserted or not, the value of such claim must be taken into account in reducing the amount of recovery, if any, to which the injured person is entitled under the Uninsured Motorist Coverage. The value thus computed must take into account not only the workmen's compensation or other payments which have become due but also the present value of all future payments should they be involved.

34 INS. COUNSEL J. 74 (1967).

111. *Horne v. Superior Life Ins. Co.*, 203 Va. 282, 123 S.E.2d 401 (1962). Case questioned at 284 F. Supp. 1022.

112. *Hilton v. Citizens Ins. Co. of N.J.*, 201 So. 2d 904 (Fla. Ct. App. 1967), Limit of liability stated in declaration held to be limit for all damages including husband's claim for derivative damages resulting from bodily injury to wife; *Safeco Ins. Co. v. McManemy*, 432 P.2d 537 (Wash. 1967), Limit of \$25,000 stated in single limits policy applicable and not financial responsibility limits of \$10,000/\$20,000.

113. *State Farm Mut. Auto. Ins. Co. v. Drewry*, 316 F.2d 716, 191 F. Supp. 852 (W.D. Va. 1963); *Drewry v. State Farm Mut. Auto. Ins. Co.*, 204 Va. 231, 129 S.E.2d 681 (1963).

The provision reducing recovery under the uninsured motorist coverage by the amount paid and the present value of all amounts payable under any workmen's compensation law has been the subject of conflicting decisions in the courts. Some states have allowed a setoff.<sup>114</sup> Others in recent cases have found that the state uninsured motorist laws, seeking to place the insured in the same position as he would have been if the tort-feasor had had liability insurance, contemplate that the uninsured motorist coverage is to be available in addition to any benefits that may be received under workmen's compensation.<sup>115</sup> In one case a street sweeper was struck by an uninsured motorist while in the scope of his employment. Recovery was allowed under his uninsured motorist coverage in addition to over \$5,000 of workmen's compensation benefits he had already received, the court holding that the workmen's compensation setoff provision of the policy was invalid because it diminished the protection that the uninsured motorist statute required the insurer to provide.<sup>116</sup>

The limits of liability provision dealing with medical payments coverage would allow the insured to recover the limit of liability under each coverage if his medical expenses exceed the limit of liability of the medical payments coverage and if his remaining medical expenses and other damages total or exceed the limit of liability under the uninsured motorist coverage. For example, an insured having coverage limits of \$1,000 under the medical payments coverage and \$10,000 under the uninsured motorist coverage would be entitled to recover a total of \$11,000 if his medical expenses exceeded \$1,000 and other damages were more than \$10,000.

The conflict found in the decisions regarding setoffs can be attributed to differences in policy provisions and the varying interpretations of state uninsured motorist laws. Florida courts have considered several cases in this area. They have disallowed some setoffs due to the absence of a setoff provision,<sup>117</sup> but have allowed the medical payment

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114. *Niekamp v. Allstate Ins. Co.*, 52 Ill. App.2d 364, 202 N.E.2d 126 (1964); *Jarrett v. Allstate Ins. Co.*, 209 Cal. App.2d 804, 26 Cal. Rptr. 231 (1962); *Jones v. Morrison*, 287 F. Supp. 1016 (W.D. Ark. 1968).

115. *Southeast Title & Ins. Co. v. Austin*, 202 So.2d 179 (Fla. 1967); *Mason v. Allstate Ins. Co.*, 189 So. 2d 907 (Fla. Ct. App. 1966); *Standard Accident Ins. Co. v. Gavin*, 184 So.2d 229 (Fla. Ct. App. 1966); *Peterson v. State Farm Mut. Auto. Ins. Co.*, 238 Ore. 106, 393 P.2d 651 (1964).

116. *Peterson v. State Farm Mut. Auto. Ins. Co.*, *supra* note 115.

117. *Hack v. Great Am. Ins. Co.*, 175 So.2d 594 (Fla. Ct. App. 1965); *Sims v. National Cas. Co.*, 171 So.2d 399 (Fla. Ct. App. 1965).

setoff in others.<sup>118</sup> A contrary result was reached where the policy provided in language similar to the Standard Family Automobile Policy that "the company shall not be obligated to pay . . . that part of the damages which the insured may be entitled to recover from the owner or operator of an insured automobile which represents expenses for medical services paid or payable under the Medical Payments Coverage of the policy."<sup>119</sup> The court disallowed the setoff, adopting a public policy argument that the medical payments setoff provision reduces the minimum coverage required by statute.

Different language dealing with the setoff of medical payments was considered in a Louisiana case<sup>120</sup> where the policy provision reduced losses payable under the uninsured motorist coverage by "all sums paid on account of such bodily injury under Coverage C (Medical Payments) . . . of this policy." It was stipulated that the damages suffered by the five passengers in the uninsured automobile exceeded the per accident policy limits of \$10,000 and that each had medical expenses exceeding the medical payments limit of \$500. The insurer had paid the \$10,000 limit under the uninsured motorist coverage, and the issue was whether the policy should be construed to award the five plaintiffs \$2,500 under the medical payments coverage in addition. It was held that the insurer had clearly and unambiguously limited its liability, and that the policy provisions were not contrary to statute or public policy.<sup>121</sup>

## IX. THE "OTHER INSURANCE" CLAUSE

### A. *Existence of Other Insurance Coverage Available to the Insured*

It often occurs, particularly in states where the uninsured motorist coverage is mandatory, that more than one policy affording this coverage is applicable in a particular accident. This is true where, for example, the driver and the passenger in a car struck by an uninsured motorist both have policies carrying an uninsured motorist endorsement. The first

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118. *Damsel v. State Farm Mut. Auto. Ins. Co.*, 186 So.2d 825 (Fla. Ct. App. 1966).

119. *Phoenix Ins. Co. v. Kincaid*, 199 So.2d 770, 771 (Fla. Ct. App. 1967). See also *State Farm Mut. Auto. Ins. Co. v. Carrico*, 200 So.2d 265 (Fla. Ct. App. 1967).

120. *Morgan v. State Farm Mut. Auto. Ins. Co.*, 195 So.2d 648 (La. Ct. App. 1967).

121. The medical payments setoff was also held not contrary to law, public policy or statute in *Robey v. North-Western Security Ins. Co.*, 270 F. Supp. 466 (W.D. Ark. 1967).

part of the "other insurance" clause found in the Standard Family Automobile Liability Policy<sup>122</sup> applies where the insured is occupying an automobile not owned by the named insured. It states that in this situation the coverage shall be the excess above any other coverage available to the insured. It further provides that this excess applies only to the extent that its limits exceed the limits of the other uninsured motorist coverage. In other words, where *A* is the driver of his own car, and *B* is his passenger, *B*'s coverage under his own policy (with a \$15,000 limit) is in addition to the coverage available to him under *A*'s policy (with a \$10,000 limit), but only to the extent that the limits of his own policy exceed those of *A*'s policy. Therefore, the net coverage afforded *B* under his own policy in this situation is only \$5,000.

The second portion of the clause provides that except as to accidents involving an insured occupying an automobile not owned by the named insured, the uninsured motorist coverage prorates with other applicable coverage up to the higher of all applicable limits. This means that *A*'s recovery under his own policy (with a \$10,000 limit) will prorate with the coverage available to him under another applicable policy (with a \$15,000 limit), up to the sum of the limits of both policies (\$25,000). Therefore, if *A* suffers damages amounting to \$15,000 or more, the coverage available to *A* under his own policy is \$6,000, or two-fifths of his damages which are deemed not to exceed the higher limit (\$15,000).

A majority of cases have given full force and effect to the other insurance clause. They have limited the insured's recovery to an amount represented by the highest limit of all applicable policies. Other courts have found that the other insurance clause is void because of its

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122.

With respect to bodily injury to an insured while occupying an automobile not owned by the named insured, the insurance under Part IV shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such automobile as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance. Except as provided in the foregoing paragraph, if 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 applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

N. RISJORD & J. AUSTIN, *op. cit.* *supra* note 98, at 205.

repugnance to statute.<sup>123</sup> These cases have allowed a stacking or pyramiding of coverages, producing a combined recovery much greater than the insured would have realized had the uninsured motorist been insured with the minimum limits prescribed by the financial responsibility law.

Decisions of federal courts in Florida and Virginia rejecting the argument that different coverages may be combined or stacked were subsequently nullified by contrary state decisions. In *Travelers Indemnity Company vs. Wells*,<sup>124</sup> the United States Court of Appeals for the Fourth Circuit rejected an attempt to stack \$15,000/\$30,000 limits on two policies to yield \$30,000/\$60,000 limits on recovery. Since the limits in the two policies were exactly the same, and each met the statutory requirement, the court found that no excess was involved and stated that "the provision is too inexplicit to give footing for stretching the uninsured endorsement beyond its terms."<sup>125</sup> Following the *Wells* case, the Virginia Supreme Court expressly rejected the holding of *Wells*.<sup>126</sup> The insured had been driving a truck owned by his father when he was struck and injured by an uninsured motorist against whom he obtained a judgment for \$85,000. Payment was made to the policy limits of \$10,000/\$20,000 under the policy on the father's truck. He then brought suit on his own policy. The other insurance clause was held to be void, since the policy issued to him undertook to pay all sums which he should be legally entitled to recover as damages. To hold that the insured could not recover because he had received part of the sum he is "legally entitled to recover" from the uninsured motorist "is to amend the statute, not to construe it,"<sup>127</sup> said the court.

A similar reversal of a federal court interpretation of an uninsured motorist statute occurred in Florida.<sup>128</sup> The United States Court of Appeals for the Fifth Circuit also rejected an attempt to stack coverages, stating that Florida's policy in providing for the coverage "was

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123. *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967); *Smith v. Pacific Auto. Ins. Co.*, 240 Ore. 167, 400 P.2d 512 (1965); *Harleysville Mut. Cas. Co. v. Blumling*, 429 Pa. 389, 241 A.2d 112 (1968). See also *Childers v. Southern Farm Bureau Cas. Ins.*, 282 F. Supp. 866 (E.D. Ark. 1968).

124. 316 F.2d 770 (4th Cir. 1963).

125. *Id.* at 774.

126. *Bryant v. State Farm Mut. Auto. Ins. Co.*, 205 Va. 897, 140 S.E.2d 817 (1965). See also *White v. Nationwide Mut. Ins. Co.*, 361 F.2d 785 (4th Cir. 1966).

127. *Bryant v. State Farm Mut. Auto. Ins. Co.*, *supra* note 126, at 902, S.E.2d at 820.

128. *Chandler v. Government Employees Ins. Co.*, 342 F.2d 420 (5th Cir. 1965).

to afford the public generally with the same protection that it would have had if the uninsured motorist had carried the minimum of \$10,000/\$20,000 limits as public liability coverage.<sup>129</sup> Then the Florida Supreme Court in a subsequent case stated that the Florida uninsured motorist statute operates to invalidate the other insurance clauses.<sup>130</sup>

The majority of jurisdictions, however, have given effect to and have upheld the other insurance clause,<sup>131</sup> viewing the clause as clearly specifying the amount of coverage intended to be extended where more than one policy is applicable. For example, in an Iowa case<sup>132</sup> where the insured was "occupying a non-owned automobile" at the time of the accident, the court stated:

To disregard the provisions of both policies and allow plaintiff to collect to the extent of the policy limit of each policy, as asked by the plaintiff, is . . . absurd in the face of positive policy limitations. . . . It is clear that the companies intended to sell less coverage and the insureds [to] buy less coverage when occupying an automobile not owned by the named insured.<sup>133</sup>

A third approach is represented by a construction of the other insurance clause where *B* had been a passenger in an automobile operated by *A* that collided with an uninsured motorist.<sup>134</sup> *B* received \$3,000 of the \$5,000 limit from *A*'s insurer in a distribution made by the court. *B* then sued his own carrier on a policy with the same limits as *A*'s policy. It was held that the purpose of the uninsured motorist statute was "to give the same protection to a person injured by an uninsured motorist as he would have had if he had been injured in an accident

129. *Id.* at 421.

130. *Sellers v. United States Fidelity Co.*, 185 So.2d 689 (Fla. 1966), *quashing* *U.S. Fidelity & Guaranty Co. v. Sellers*, 179 So.2d 608 (Fla. Ct. App. 1965).

131. *Goodbody & Company v. Penjaska*, 8 Mich. App. 64, 153 N.W.2d 665 (1967); *Tindall v. Farmers Auto. Management Corp.*, 83 Ill. App.2d 165, 226 N.E.2d 397 (1967); *Darrah v. Cal. State Auto. Assn.*, 259 Cal. App.2d 245, 66 Cal. Rptr. 374 (1968); *Russell v. Paulson*, 18 Utah 2d 157, 417 P.2d 658 (1966); *Phoenix Assur. Co. v. Larsen*, 240 Cal. App.2d 94, 50 Cal. Rptr. 111 (1966); *Miller v. Allstate Ins. Co.*, 66 Wash. 871, 405 P.2d 712 (1965); *Kirby v. Ohio Cas. Ins. Co.*, 232 Cal. App.2d 9, 42 Cal. Rptr. 509 (1965); *Grunfeld v. Pac. Auto. Ins. Co.*, 232 Cal. App.2d 4, 42 Cal. Rptr. 516 (1965); *Md. Cas. Ins. Co. v. Howe*, 106 N.H. 422, 213 A.2d 420 (1965); *Globe Ind. Co. v. Bakers Estate*, 22 A.D.2d 658, 253 N.Y.S.2d 170 (1964).

132. *Burcham v. Farmers Ins. Exchange*, 255 Iowa 69, 121 N.W.2d 500 (1963).

133. *Id.* at 75, N.W.2d 503.

134. *LeBlanc v. Allstate Ins. Co.*, 194 So.2d 791 (La. Ct. App. 1967), and *Courville v. State Farm Mut. Auto. Ins. Co.*, 194 So.2d 797 (La. Ct. App. 1967), companion cases.

caused by an automobile covered by a standard liability insurance policy."<sup>135</sup> Since *B* could recover a total of \$5,000, he was entitled to receive only an additional \$2,000 from his own carrier. The court professed to follow the majority rule, but nevertheless reached a result different from that which would have been obtained under a strict application of the other insurance clause. Under the majority view, *B* would probably have been precluded from any recovery against his own carrier, since the limit of coverage in his policy was identical to that of *A*'s policy, under which he had already received payment.

#### B. "Availability" of Other Insurance

The question of whether other similar insurance was "available" to the insured was presented where the plaintiff-insured<sup>136</sup> was a passenger in an automobile driven by another when struck by an uninsured motorist. The driver was insured under a policy affording both liability and uninsured motorist coverage. The driver's insurer settled with plaintiff under the liability coverage for \$10,000, plaintiff executing a covenant not to sue. Plaintiff then brought an action against his own uninsured motorist carrier, contending that other similar insurance was not available. He argued that since the driver's insurer was permitted by the policy terms to set off liability coverage payments against the uninsured motorist coverage, and since the \$10,000 already paid to plaintiff was the limit of liability under the uninsured motorist coverage, the driver's insurer was relieved of any liability to the plaintiff under its uninsured motorist coverage. Therefore, he claimed that he was not foreclosed from recovering under his own policy by the availability of "other similar insurance." Plaintiff was successful—the court agreed that the settlement under the driver's liability coverage rendered the uninsured motorist coverage of the driver's policy "unavailable" to plaintiff. The term "available" was construed to mean, "actually available for the use of the injured party."<sup>137</sup>

### X. ENFORCEMENT OF UNINSURED MOTORIST CLAIMS

#### A. *Methods of Enforcement*

Ordinarily, three avenues are open to the insured for the enforcement of an uninsured motorist claim. First, the insured may seek to

135. *Courville v. State Farm Mut. Auto. Ins. Co.*, *supra* note 134 at 796, quoting from 12 G. COUCH, *INSURANCE*, § 45:623 (2d ed. 1964).

136. *Kraft v. Allstate Ins. Co.*, 6 Ariz. App. 276, 431 P.2d 917 (1967).

137. *Id.* at 279, 431 P.2d at 920.

enforce his claim by arbitration; second, suit can be brought against the uninsured motorist; and third, an action can be maintained directly against the uninsured motorist insurance carrier. In the states where the arbitration requirement<sup>138</sup> is not rendered unenforceable by statute<sup>139</sup> or decision,<sup>140</sup> the insured generally must submit the issues of damages and of legal liability of the uninsured motorist to arbitration.<sup>141</sup> In other states, including Missouri, the insured may look directly to the courts for enforcement of his claim. The second alternative, bringing suit against the uninsured motorist, is available to the insured except in jurisdictions where the arbitration clause is binding.

A suit against the uninsured motorist has been held to be a condition precedent to recovery or suit against the insurer in some jurisdictions.<sup>142</sup> In other states, including Missouri, it is neither necessary nor a condition precedent that the insured sue and obtain a judgment against the uninsured motorist before maintaining an action against

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Provided, for the purposes of this coverage, determination as to whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration. No judgement against any person or organization alleged to be legally responsible for the bodily injury shall be conclusive, as between the insured and the company of the issues of liability of such person or organization or 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.

N. RISJORD & J. AUSTIN, *op. cit. supra* note 98, at 199.

139. See chart analysis at the end of this article.

140. Arkansas—Wortman v. Safeco Ins. Co. of Am., 227 F. Supp. 468 (E.D. Ark. 1963), Statute; Georgia—Gulf Am. Fire & Cas. Co. v. McNeal, 115 Ga. App. 286, 154 S.E.2d 411 (1967); Illinois—Levy v. Am. Auto. Ins. Co., 31 Ill. App.2d 157, 175 N.E.2d 607 (1961); Louisiana—Macaluso v. Watson, 171 So.2d 755 (La. Ct. App. 1965), Statute; Missouri—State *ex rel.* State Farm Mut. Ins. Co. v. Craig, 364 S.W.2d 343 (Spr. Mo. App. 1963); Hill v. Seaboard Fire and Marine Ins. Co., 374 S.W.2d 606 (K.C. Mo. App. 1963), Statute; Montana—Dominici v. State Farm Mut. Auto. Ins. Co., 143 Mont. 406, 390 P.2d 806 (1964), Statute; Oklahoma—Boughton v. Farmers Ins. Exchange, 354 P.2d 1085 (Okla. 1960), Contrary to public policy; South Carolina—Childs v. Allstate Ins. Co., 237 S.C. 455, 117 S.E.2d 867 (1961), Statute; Tennessee—Hickey III v. Ins. Co. of N. Am., 239 F. Supp. 109 (E.D. Tenn. 1965); Utah—Barnhart v. Civil Service Employees Ins. Co., 16 Utah 2d 223, 398 P.2d 873 (1965), Statute.

141. Kuvin, *Arbitration Under Uninsured Motorist Coverage*, 16 FED. OF INS. COUNSEL Q. 30 (1965); Notman, *A Decennial Study of Uninsured Motorist Endorsements*, 540 INS. L.J. 22 (1968); Fieting, *Arbitration under the Uninsured Motorist Coverage*, 28 INS. COUNSEL J. 629 (1961).

142. O'Brien v. Government Employees Ins. Co., 372 F.2d 335 (3rd Cir. 1967); King v. State Farm Mut. Auto. Ins. Co., 117 Ga. App. 192, 160 S.E.2d 230 (1968).

the insurer.<sup>143</sup> In a direct action, the insured has the burden of proving: (1) That the other motorist was uninsured, (2) that the other motorist is legally liable to the insured, and (3) the amount of this liability.<sup>144</sup> A wide range of defenses, in addition to policy defenses, are available to the insurer to defeat the insured's claim in a direct action. In establishing that the insured is not "legally entitled to recover" from the uninsured motorist, the insurer may raise substantive defenses that would have been available to the uninsured motorist.<sup>145</sup>

The written consent of the insurer must be requested to avoid exclusion of coverage in a jurisdiction in which the judgment prohibition has been upheld.<sup>146</sup> This written consent should also be requested even in jurisdictions where the judgment prohibition has been struck down, in order to assure that a judgment obtained will be conclusive and binding upon the insurer. Where the insurer is not a party to the action against the uninsured motorist, but has notice of the pending action and does nothing to protect its rights in that action, the question of damages and of legal liability of the uninsured motorist may be conclusively determined as between the insurer and the insured and may not be relitigated.<sup>147</sup>

In Missouri and other jurisdictions it is now clear that an insurer can protect itself from an adverse determination where the uninsured motorist fails to defend, by intervening and defending on behalf of the uninsured motorist.<sup>148</sup> In *State ex rel State Farm Insurance Company v. Craig*, the Springfield Court of Appeals emphasized that its holding was limited to "the facts peculiar to the case," where the uninsured motorist had totally refused to defend the action. Hence it is not clear in Missouri whether intervention will be permitted where the uninsured motorist defends, but the defense is not as vigorous or as complete as

143. *State ex rel. State Farm Mut. Ins. Co. v. Craig*, 364 S.W.2d 343 (Spr. Mo. App. 1963); *Wright v. Fidelity & Cas. Co.*, 270 N.C. 577, 155 S.E.2d 100 (1967).

144. *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963); *Noland v. Farmers Ins. Exchange*, 413 S.W.2d 530 (K.C. Mo. App. 1967).

145. See *Traveler's Indem. Co.*, 226 N.Y.S.2d 16 (1962); *Aetna Cas. & Surety Co. v. Mills*, 192 So.2d 59 (Fla. Ct. App. 1966).

146. *Addeen v. Country Mut. Ins. Co.*, 70 Ill. App.2d 357, 217 N.E.2d 814 (1966).

147. *Boughton v. Farmers Ins. Exchange*, 354 P.2d 1085 (Okla. 1960).

148. *State ex rel. State Farm Mut. Ins. Co. v. Craig*, 364 S.W.2d 343 (Spr. Mo. App. 1963); *Kirouac v. Healey*, 104 N.H. 157, 181 A.2d 634 (1962); *Levy v. Am. Auto. Ins. Co.*, 31 Ill. App.2d 157, 175 N.E.2d 607 (1961); *Continental Ins. Co. v. Smith*, 115 Ga. App. 667, 155 S.E.2d 713 (1967); *State Farm Mut. Auto. Ins. Co. v. Glover*, 113 Ga. App. 815, 149 S.E.2d 852 (1966).

the insurance company would desire. It is suggested that intervention in such cases should be permitted. The suit would not be complicated by the injection of new issues into the suit since policy defenses would have to be raised in a declaratory judgment action or in a subsequent suit by the insured against the insurer.<sup>149</sup> One problem which is raised by intervention, however, is that of the conflict of interest between the insurer and the insured.<sup>150</sup> This conflict becomes acute when the uninsured motorist asserts a counterclaim against the insured for negligence, where the insurer has also provided the insured with liability coverage. The insurer owes its insured a defense under the liability coverage, but a vigorous defense establishing that the uninsured motorist was solely negligent would establish an element of the insured's case for recovery under his uninsured motorist coverage. Except in comparative negligence jurisdictions, only a finding that the insured and uninsured motorist were jointly culpable would avoid insurer's liability on one coverage or the other. Many of these problems can be avoided in Missouri and other jurisdictions, where suit may be brought directly against the insurer on the uninsured motorist coverage.

#### B. *Limitations Period—Contract or Tort?*

The uninsured motorist coverage does not state a period of time within which claims must be presented. The question of which statute of limitations applies to actions maintained under this coverage remains unsettled in most jurisdictions. Arguments advanced for the application of the tort statute of limitations center around three primary contentions: First, the insured's claim for injury derives from the tortious acts of the uninsured motorist and possesses the character of an action *ex delicto*; second, application of the contract statute of limitations could extinguish the insurer's subrogation rights against the uninsured motorist; and, third, upon expiration of the tort statute of limitations, which is substantially shorter than the contract statute of limitations in most jurisdictions, the insured is no longer "legally entitled to recover" from the uninsured motorist and therefore cannot maintain a claim against

149. See *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963).

150. *United Services Auto. Ass'n. v. Logue*, (Ga. 1968) (Unreported at date of publication). One court refused to countenance the situation. *Holt v. Bell*, 392 P.2d 361 (Okla. 1964).

the insurer.<sup>151</sup> A Missouri holding<sup>152</sup> that the nature of the action against the uninsured motorist carrier is contractual, and subsequent dictum in another case,<sup>153</sup> indicates that the statute of limitations for contract actions may be controlling in Missouri. Such a holding would be unfortunate from the point of view of the insurance company and would constitute a modification of the intended nature of the coverage. The Tennessee Supreme Court, in holding that the six year contract statute of limitations, rather than the one year tort statute, applied to an insured's remedy for injuries sustained in an accident with a hit-and-run motorist, expressly noted that the identity of the hit-and-run driver was not known or ascertainable and that the insurer had no subrogation right that could have been prejudiced by the application of the contract statute of limitations.<sup>154</sup> Where such rights do exist and where the uninsured motorist's identity is known, suit against the insurer after the tort statute of limitations has run would in effect make the insurance company the liability insurer of the uninsured motorist by cutting off all recourse by the insurer against the uninsured motorist. This situation could foster collusion between the uninsured motorist and the insured in that the insured could delay maintaining his claim until after the tort statute of limitations had run. This would bar any recourse against the uninsured motorist for his negligence, since the tort statute of limitations would bar the claim against the uninsured motorist.

It is argued in support of the application of the tort statute of limitations that the insured is not "legally entitled to recover" damages from the uninsured motorist after the tort statute of limitations has run. This raises the question of whether the insured need only have a

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151. Pretzel, *Uninsured Motorist: Uneasy Money—Unless Modified*, INS. LAW J. 719 (1965); Kuvin, *The Effect on Uninsured Motorist Proceedings of Statute of Limitations; Survival Of Actions Act; Wrongful Death Act; Subrogation Rights*, 29 INS. COUNSEL J. 127 (1962).

152. *Hill v. Seaboard Fire & Marine Ins. Co.*, 374 S.W.2d 606 (K.C. Mo. App. 1963). Referring to an action by the insured directly against the insurer, the court stated: "Nor is such suit a tort action merely because the insured under the terms of the contract sued or must show he is entitled to recover damages from the owner or operator of an uninsured automobile." *Id.* at 611.

153. In *Noland v. Farmers Ins. Exchange*, 413 S.W.2d 530 (K.C. Mo. App. 1967), the same court referred to the *Hill* case: "We also held that the action was upon contract (not tort) and that the terms of the contract governed." *Id.* at 533. For the contrary position that the action is *ex delicto* rather than contractual, see *Fremin v. Collins*, 194 So.2d 470 (La. Ct. App. 1967).

154. *Schleif v. Hardware Dealers Mut. Fire Ins. Co.*, 218 Tenn. 489, 495, 404 S.W.2d 490, 493 (1966).

cause of action against the uninsured motorist, or whether the insured's claim must be enforceable. This question has not been firmly resolved by the few cases in this area.<sup>155</sup> Application of the tort statute of limitations, however, is consistent with the objective of uninsured motorist coverage of placing the insured in the same position as he would have been had the adverse motorist been insured. If the insured's claim against the tort-feasor is not enforceable, he is not "legally entitled to recover" damages from the tort-feasor, and should not be allowed recovery under his uninsured motorist coverage.

## XI. CONCLUSION

Generally, it is clear that uninsured motorist coverage has been a great aid in providing protection against the risk of injury through the negligence of a financially irresponsible motorist. There are, however, many problems related to the application of the coverage for which no satisfactory answer has yet been found. In this regard, it is suggested that the courts should keep in mind the purpose of the coverage when deciding the existence and extent of the coverage afforded a claimant in any given case. In some instances, the decisions have excluded coverage by an overly strict construction of the language of the policy, while in other cases the courts have gone too far in determining the *extent* of protection that was intended to be afforded by the coverage.

Uninsured motorist coverage is a relatively new creature to the law, and there are many additional problems for which the solution is not clear simply because there has not been sufficient litigation to produce a thorough examination of the issues and of the relevant policy considerations. It is hoped that this article has contributed something to the isolation and examination of these issues so that an understanding of the most desirable and practical formula for the operation of this coverage can be achieved.

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155. *Fireman's Ins. Co. v. Diskin*, 255 Cal. App.2d 502, 63 Cal. Rptr. 177 (1968). Claim against insurer precluded by insured's failure to bring action against uninsured motorist or insurer within one year tort statute of limitation. *See also* *Travelers Indem. Co. v. Bell*, 213 Cal. App.2d 541, 29 Cal. Rptr. 67 (1963); and, *Booth v. Fireman's Fund Ins. Co.*, 197 So.2d 352 (La. Ct. App. 1967), which held action against insurer *ex contractu*.

## APPENDIX

CHART ANALYSIS OF UNINSURED MOTORIST LAWS\*

## MANDATORY UNINSURED MOTORIST LAWS

State	Effective Date	Limits	Applicable to PD	Insolvency Provision	Arbitration Clause Permitted
Connecticut.....	10/1/67	\$20/20	No	Yes	Yes
Illinois.....	7/1/67	10/20	No	Yes	Yes
Maine.....	1/1/68	10/20	No	None	Yes
Massachusetts..	10/15/68	5/10	No	Yes	Yes
New Hampshire..	9/1/57	10/20	No	Yes	Yes
New York.....	1/1/59	10/20	No	None	Yes
Oregon.....	1/1/60	5/10	No	Yes	Yes
South Carolina..	1/1/60	10/20/5	Yes \$200. ded.	Yes	No
Vermont.....	7/1/68	10/20	No	Yes	Yes
Virginia.....	7/1/58	20/30/5	Yes \$200 ded.	None	No
West Virginia...	6/5/57	10/20/5	Yes \$300 ded.	Yes	No

## STATUTORY UNINSURED MOTORIST LAWS WITH RIGHT OF REJECTION

Alabama.....	1/1/66	\$10/20	No	None	Yes
Alaska.....	1/1/67	15/30	No	None	Yes
Arizona.....	1/1/66	10/20	No	None	Yes
Arkansas.....	6/9/65	10/20	No	Yes	No
California.....	7/1/68	15/30	No	Yes	Yes
Colorado.....	7/1/66	10/20	No	None	Yes
Delaware.....	11/1/68	10/20	No	Yes	Yes
Florida.....	7/1/61	10/20	No	Yes	Yes
Georgia.....	1/1/64	10/20/5	Yes \$250 ded.	Yes	No
Hawaii.....	9/1/65	10/20	No	None	Yes
Idaho.....	5/31/61	10/20	No	Yes	Yes
Indiana.....	1/1/66	10/20	No	None	Yes
Iowa.....	7/1/67	10/20	No	Yes	Yes
Kansas.....	7/1/68	10/20	No	Yes	Yes
Kentucky.....	10/1/66	10/20	No	Yes	No
Louisiana.....	10/1/62	5/10	No	Yes	No
Michigan.....	1/1/66	10/20	No	Yes	Yes
Minnesota.....	1/1/68	10/20	No	Yes	Yes
Mississippi.....	1/1/67	5/10	No	Yes	No
Missouri.....	10/13/67	10/20	No	Yes	Yes
Montana.....	1/1/68	10/20	No	None	Yes
Nebraska.....	10/19/63	10/20	No	Yes	Yes
Nevada.....	8/18/67	10/20	No	None	Yes
New Mexico.....	1/1/68	10/20	Yes \$250 ded	None	Yes
North Carolina..	8/1/61	5/10/5	Yes \$100 ded.	Yes	Yes
Ohio.....	1/1/66	10/20	No	None	Yes
Oklahoma.....	7/1/68	5/10	No	Yes	Yes
Pennsylvania....	1/1/64	10/20	No	None	Yes
Rhode Island....	1/1/63	10/20	No	None	Yes
South Dakota....	7/1/66	10/20	No	Yes	Yes
Tennessee.....	1/1/68	10/20	No	Yes	No
Texas.....	10/1/67	10/20	No	Yes	Yes
Utah.....	7/1/67	10/20	No	None	Yes
Washington.....	7/1/68	15/30	No	Yes	Yes
Wisconsin.....	1/21/66	10/20	No	Yes	Yes

\*Source: National Association of Independent Insurers.