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## ARBITRATION: UNINSURED MOTORIST ENDORSEMENT

### INTRODUCTION

As the prospects for peaceful settlement between an insured and his uninsured motorist carrier fail, attention is drawn to the policy's enforcement terms. Most (though not all) uninsured motorist endorsements written in the United States today include an arbitration clause and its "corollary," a permission to sue or consent to be bound clause.<sup>1</sup> These terms were designed to protect the insurer's interests where the measure of the insurer's disbursement might be decided in a settlement or lawsuit to which it would not be a party.

This paper will deal with the problem of enforceability against an objecting party, and the *scope* of such arbitration proceedings, that is, which specific issues of law or fact may or must be resolved through arbitration.

The attitudes of the courts to arbitration after it has been concluded will be considered in the section of *judicial review*. A portion of the paper is then devoted to arbitration in Wisconsin. The final section considers some of the factors which make arbitration attractive or unattractive to the parties.

### I. ENFORCEABILITY

This section canvasses the treatment of various states of the question of whether arbitration provisions are enforceable against the desires of one or the other of the parties. Although either party may choose to raise this issue, in the typical situation it is the insured who for one reason or another has decided to reject arbitration. Once either the insured or his uninsured motorist carrier has chosen to resist, three alternatives are presented: (a) To continue an effort toward settlement, (b) to simply become or remain inactive, or (c) to commence suit with or without an express waiver of arbitration by the other party. The other party is then also faced with a choice: (a) to expressly agree to waive arbitration, (b) to continue settlement efforts, (c) to become or remain inactive (d) to commence suit, or (e) to attempt to enforce the arbitration provision by commencing arbitration proceedings and/or procuring a stay of judicial proceedings pending arbitration.<sup>2</sup>

By implementing one or another of these courses of action, the party is faced with several potential issues: (1) If he does not in a timely way begin properly to enforce arbitration, he may create circumstances out of which a waiver to his right to insist on arbitration would later be

<sup>1</sup> See appendix *infra* at 436.

<sup>2</sup> The standard language contemplates arbitration upon the written demand of either the insured or his insurer. The language of a particular endorsement may vary, however. See *Bradt v. Allstate Ins. Co.*, 21 Mich. App. 529, 175 N.W.2d 876 (1970), where arbitration could commence only upon demand of the insured.

implied; (2) If he begins to enforce, he may waive his right to rely subsequently on certain defenses. Thus, the question of enforceability also involves the problem of waiver, both of the right to rely on arbitration and of certain conditions precedent to recovery.

The pattern outlined above becomes more complex where the insured faces two or more joint tortfeasors rather than one, especially where not all tortfeasors are without insurance coverage. In *Motorists Mut. Ins. Co. v. Tomanski*,<sup>3</sup> the two joint tortfeasors were regarded as a single unit in the sense that, since at least one of the tortfeasors was insured, there was in fact insurance available. The tortfeasors rather than the uninsured motorist carrier were seen as primarily liable to insureds, and since there was some primary insurance coverage on their part, it was held that the contingency of an uninsured motorist tort liability had not yet occurred. The court allowed that arbitration would become available to insureds, however, if and when the insured tortfeasor was found not liable, or his insurance coverage unavailable to insureds.<sup>4</sup>

Further problems may arise where there are multiple policies or multiple insurers. Generally, it seems that each uninsured motorist insurer would be able to require a separate arbitration under each of its policies. Apart from expense and delay, of course, this would raise a question of *res judicata*. On the other hand, in *Pennsylvania Gen. Ins. Co. v. Barr*,<sup>5</sup> where the insured demanded arbitration under three separate policies issued by two insurers, the court saw no difficulty in the ordering of one arbitration for all the parties.

It may be noted at this point that in most respects the arbitration provisions were intended to operate as a unit with the permission to sue, or in later policies, the consent to be bound clause—such that conduct which implies a waiver of the right to enforce arbitration will usually also waive the right to rely on these other “corollary” clauses. The principles of waiver remain the same, of course, and are applied whenever reliance is placed on a policy limitation or exclusion.

Now, where the attempt is made to enforce, and the right has not been waived, the law of the various states will resolve the question in different ways.

#### A. *English Rule, Common Law*

Generally the common law distinguished agreements to arbitrate present disputes from agreements to arbitrate future disputes. The

<sup>3</sup> 21 Ohio App. 2d 271, 257 N.E.2d 399 (1970).

<sup>4</sup> *Morateck v. Milw. Auto. Ins. Co.*, 34 Wis. 2d 95, 148 N.W.2d 704 (1967); *Fouquier v. Travelers Ins. Co.*, 204 So. 2d 400 (La. App. 1967); See also ORE. REV. STATS. § 743.792(11) (c) where insured is given an option of either recovering under the endorsement—or of suing the tortfeasor(s), with insurer's consent.

<sup>5</sup> 435 Pa. 456, 257 A.2d 550 (1969). One of the two insurers had attempted to stay arbitration pending a judicial “determination” of the endorsement limits which had inadvertently been left blank.

former were binding in terms of normal contract law, to the extent that a breach was subject to an action for damages, while the latter were voidable by either party up to an actual submission to arbitration.<sup>6</sup> Thus, in a jurisdiction applying the common law the arbitration provisions cannot be specifically enforced if the issue is raised prior to submission. The rule is generally based on a reluctance to deprive the parties of the safeguards of the judicial system.

Two states<sup>7</sup> are reported to have no legislation modifying the above common law attitude—in one of these, the arbitration terms were held enforceable (Vermont) while in the second state (South Dakota) there are no reported cases.<sup>8</sup>

Thirteen other states have modified this common law rule and now specifically enforce the agreement, but only as to present disputes, where it is assumed the parties are more aware of the consequences of their agreement. Cases in these states thus refuse to enforce, up to the point of the final submission to arbitration. (Alabama, Colorado, Delaware, Idaho, Indiana, Iowa, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Utah.) Thus, in these fifteen states the uninsured motorist arbitration agreement is unenforceable.

#### B. *Statutory Arbitration Provisions*

Many states prescribe various technical requirements intended to promote an equal bargaining position and greater awareness on insured's part of arbitration ramifications. For instance, Texas requires that counsel for both parties sign the arbitration agreement.<sup>9</sup> Other states require insured or insurer to acknowledge, file, or execute a bond. Rhode Island requires that the arbitration clause be placed near the parties' signatures.<sup>10</sup>

The Uniform Arbitration Act or a substantially similar "modern arbitration statute" has been enacted in eighteen of the remaining states. Since these states either make no legislative reference to uninsured motorist arbitration or have no uninsured motorist legislation at all, enforceability as to future disputes hinges on the Uniform Act. (Alaska, Arizona, Florida, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Washington, Wisconsin and Wyoming).<sup>11</sup>

The two remaining states (California and Oregon) have also adopted "modern arbitration laws" as above, but have also expressed the

<sup>6</sup> 5 AM. JUR. 2d, *Arbitration & Award* sec. 11.

<sup>7</sup> This material as to the states is based on Widiss, *A Guide to Uninsured Motorist Coverage*, 1969, at p. 174 *et seq.*

<sup>8</sup> Widiss equates Okla. with Vt. here, but Okla. statutorily reinstated uninsured motorist arbitration recently. 36 OKLA. STAT. § 3636 (1969).

<sup>9</sup> TEX. REV. CIV. STAT. Title 10, Art. 224 (1966).

<sup>10</sup> GEN. LAWS § 10-3-2 (1956).

<sup>11</sup> N.H. REV. STAT. § 268.8 (1966) merely refers to arbitration.

arbitration provision in their respective uninsured motorist statutes.<sup>12</sup> It is said therefore that legislative approval is reflected independent of the general arbitration statutes in these two states.

*C. Legislative and Administrative Provisions*<sup>13</sup>

Two cases present the issue of whether the Federal Arbitration Act has application to arbitration proceedings under the uninsured motorist endorsement.

*Booth v. Seaboard Fire & Marine Ins. Co.*,<sup>14</sup> held uninsured motorist arbitration to be unenforceable under Nebraska law as against the state constitution and public policy. As to insurer's argument of enforceability based on the Federal Act, the court seemed to experience no great difficulty.

Seaboard however claims that the federal arbitration act, 9 U.S.C. sec. 1 et seq. applies. The federal act applies to contracts "evincing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract. . . ." 9 U.S.C. sec. 2.

. . . (However) . . .

It is the opinion of this court that the *South Eastern Underwriters* case does not hold that individual contracts (of insurance) are commerce.

The court found no case where the federal act had ever been applied to an individual insurance contract, and without further reasoning held that:

the federal arbitration act is inapplicable to this case. . . . However, . . . even if the federal arbitration act were applicable, the defendant has waived . . . arbitration.<sup>15</sup>

*Hamilton Life Ins. Co. v. Republic National Life Ins. Co.*,<sup>16</sup> was an appeal from a judgment compelling arbitration of a dispute under a reinsurance contract between two insurance companies. The contract contained a "broad" commercial arbitration clause covering:

All disputes . . . upon which an amicable understanding cannot be reached . . . and the arbitrators shall place a liberal construction upon this agreement free from legal technicalities. . . .

In its attempt to avoid arbitration (and presumably payment on its contract), Republic urged that arbitration was precluded under the Federal Arbitration Act as to a reinsurance contract by virtue of the McCarran-Ferguson Act.<sup>17</sup> The court read the act more narrowly:

<sup>12</sup> CAL. STATS. § 11580.2 *et seq.*; ORE. REV. STATS. §§ 743.78(6)-743.792.

<sup>13</sup> 9 U.S.C. § 1 *et. seq.* (1947).

<sup>14</sup> 285 F. Supp. 920 (D. Neb. 1968).

<sup>15</sup> *Ibid.*

<sup>16</sup> 408 F.2d 606 (2d Cir. 1969).

<sup>17</sup> 15 U.S.C. 1011 *et. seq.*

“(The McCarran Act) was not intended to preclude the application of federal statutes to insurance *unless* they invalidate, impair or supersede applicable state legislation regulating the business of insurance.” (District Court quote)

To avail itself of the McCarran Act, then, appellant must show that the . . . Arbitration Act would “invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance.” 15 USC Sec. 1012(b)

It is quite plain that arbitration statutes, including those of Texas and New York, are not statutes regulating the business of insurance any law enacted by any state for the purpose of regulating the method of handling contract disputes generally.<sup>18</sup>

In fact, the court endorsed arbitration here under the Federal Act, but since a reinsurance contract was not viewed as the “business of insurance,” there is no direct conflict with *Booth*. However, the above language indicates the possibility of application to uninsured motorist arbitration.

The value of an application of the Federal Act where arbitration is already enforceable depends on the provisions of the endorsement. From the standpoint, at least, of a party suing to vacate an award on the grounds of bias or partiality, the Act does not seem to provide much help.

In *Catz American Co. v. Pearl Grange Fruit Exchange*,<sup>19</sup> a case applying the Federal Act and involving commercial arbitration, Pearl had the burden of clearly proving that the arbitrators engaged in conduct so “biased and prejudiced as to destroy the fundamental fairness” of the proceeding.

Restrictive Legislative or State Insurance Commission Rules in thirteen states prevent the insurer from enforcing arbitration. In eight of these jurisdictions, the arbitration agreement may not even appear in the endorsement. (*Statute*: Arkansas, Georgia, Mississippi, South Carolina, Tennessee, Virginia and West Virginia. *Ins. Commission Rule*: Kentucky).

In five states, the provision may appear in the policy, even though unenforceable against the insured (Connecticut, Kansas, Louisiana, Missouri and Nevada).

Insurance Commissioners' rules with respect to approval and filing can, as with other policy terms, create an issue as to enforceability.<sup>20</sup>

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<sup>18</sup> *Hamilton Life Ins. Co. v. Republic National Life Ins. Co.*, *supra* note 16, at 611.

<sup>19</sup> 292 F. Supp. 549 (S.D. N.Y. 1968).

<sup>20</sup> *Ellison v. Safeguard Mut. Ins. Co.*, 209 Pa. Super. 492, 229 A.2d 482 (1967) held arbitration not enforceable despite departmental action since it had no legislative authority to issue arbitration regulations.

#### D. *Minor Unnamed Insured*

It is reported that agreements to arbitrate future disputes are generally not enforceable against minors.<sup>21</sup> Cases are said to turn generally on specific statutory reference to minors.

Where a minor institutes arbitration, however, it has been held that he could not later disclaim the award.<sup>22</sup>

#### E. *Enforcement By Insured*

Enforcement not by insurer but by insured presents the issue of whether the insurer is bound even in jurisdictions where it has been held that the insured is not bound. To the mutuality objection, Widiss responds with the analogy of the rule of construction of ambiguous policy terms against the insurer.<sup>23</sup> One approach is a Louisiana Statute providing that submission to arbitration shall be optional with the assured.<sup>24</sup>

Such statutes apparently reflect legislative doubt as to whether the insured can ever be bound by an agreement to arbitrate as it exists in the uninsured motorist endorsement. Widiss takes the view that under current insurance marketing conditions, such an agreement cannot be truly voluntary, and that it can be attacked on a contract of adhesion basis.<sup>25</sup> However, such charges can of course be leveled against nearly every insurance policy provision and it does not seem clear that the arbitration provisions can be successfully distinguished in this regard.<sup>26</sup>

#### F. *Waiver By the Insurer*<sup>27</sup>

As stated in the introduction to this section, even where arbitration is enforceable, the insurer by its conduct may be deemed to have waived its right to enforce arbitration; or more properly, to have waived the right to assert the arbitration provision as a defense against insured's action where the assertion was not timely made. The question of whether

<sup>21</sup> 5 AM. JUR. 2d, *Arbitration and Award* § 62 (1962); *Chernick v. Hartford Accident & Indem. Co.*, 8 App. Div. 2d 264, 187 N.Y.S.2d 534 (1959) *aff'd*, 8 N.Y.2d 756, 201 N.Y.S.2d 774, 168 N.E.2d 110, Annot. 24 A.L.R.3d 1337, 78 A.L.R.2d 1288 (1960); *Dickson v. Hoffman*, 305 F. Supp. 1040 (D. Kan. 1969); *Hickey v. Ins. Co. of N. America*, 239 F. Supp. 109 (E.D. Tenn. 1965); *Kessler v. Cosmopolitan Mut. Ins. Co.*, 218 N.Y.S.2d 357 (Sup. Ct. 1961). *See also* *Short v. Grange Mut. Cas. Co.*, 307 F. Supp. 768 (S.D. W.Va. 1969) where arbitration was said to be unenforceable against plaintiff, a minor *third-party beneficiary* to the insurance contract.

<sup>22</sup> *Fernandez v. Grange Mut. Cas. Co.*, 224 So. 2d 724 (Fla. App. 1969).

<sup>23</sup> Widiss, *supra* note 7, at 197.

<sup>24</sup> LA. REV. STAT. ANN. § 22.1406(d) (5).

<sup>25</sup> Widiss, *supra* note 7, at 189.

<sup>26</sup> Widiss, *supra* note 7, at 187.

<sup>27</sup> A contract right to enforce may be waived, before or after commencement of suit, by express words or necessary implication from conduct not consistent with a claim that the parties were obligated—in this context, to arbitrate. For example, a general answer failing to assert the right to arbitrate, a denial that there is anything to arbitrate, and slowness in performing required preliminary steps can result in waiver. 5 AM. JUR. 2d *Arbitration and Award* § 51 (1962).

there has been a waiver is typically raised in the insured's complaint in an action against its insurer. Where there is sufficient evidence, the issue of waiver goes to the jury. Thus, waiver has been found where the insurer neglected to press for arbitration in the face of insured's suit which had been pending for two years,<sup>28</sup> and in another case where the insurer allowed insured's suit against the uninsured motorist to reach judgment and insured's suit on the judgment against insurer to commence, all with full knowledge.<sup>29</sup>

However, mere knowledge on the part of the insurer of activities of its insured which are inconsistent with, or contrary to the arbitration agreement may not be sufficient to support a waiver. This is especially true where the court stresses that the duty—or opportunity—to press for arbitration was mutual.<sup>30</sup>

Conversely, where insurer did not have timely knowledge of its insured's inconsistent activities, a jury finding of waiver has been overturned.<sup>31</sup>

A waiver has also been implied on the basis of insurer's affirmative conduct. In *Schramm v. Dotz*,<sup>32</sup> the Wisconsin court held that by seeking a dismissal over an extended period of time rather than indicating a desire for arbitration, the insurer waived its right to insist on arbitration. Schramm collided with the defendant uninsured motorist in November, 1959, and their negotiations were to no avail. In September of 1961, Schramm sued his uninsured motorist insurer Badger Mutual and the uninsured motorist. Trial was eventually set for February 5, 1963. On Feb. 1, insurer procured an order to show cause why its affirmative defense (arbitration) raised in its answer should not be tried separately. Insurer's affidavit alleged that no arbitration demand had even been made. This motion, as well as trial motions to dismiss and for directed verdict were denied. The Supreme Court, in finding waiver, pointed out that Ch. 298 constituted a set of exclusive remedies for enforcement of an agreement to arbitrate, which was not enforceable at common law.

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<sup>28</sup> *Poray v. Royal Globe Ins. Co.*, 90 N.J. Super. 454, 217 A.2d 916 (1966); *United States Fidelity & Guar. Co. v. Williams*, 177 So. 2d 47 (Fla. App. 1965).

<sup>29</sup> *Booth v. Seaboard Fire & Marine Ins. Co.*, 285 F. Supp. 920 (D. Neb. 1968) *dicta*.

<sup>30</sup> *Chernick v. Hartford Accident & Indemnity Co.*, 8 App. Div. 2d 264, 187 N.Y.S.2d 534 (1959) *aff'd*, 8 N.Y.2d 756, 201 N.Y.S.2d 774, 168 N.E.2d 110 (1960); *Niazi v. St. Paul Mercury Ins. Co.*, 121 N.W.2d 349 (Minn. 1963); *but see Bielski v. Wolverine Ins. Co.*, 379 Mich. 280, 150 N.W.2d 788 (1967).

<sup>31</sup> *Riley v. State Farm Mut. Auto. Ins. Co.*, 420 F.2d 1372 (6 Cir. 1970).

<sup>32</sup> 23 Wis. 2d 678, 127 N.W.2d 779 (1964); *see also Kelly v. Citizens Mut. Ins. Co.*, 19 Mich. App. 177, 172 N.W.2d 537 (1969); *Government Employees Ins. Co. v. Whitaker*, 218 So. 2d 198 (Fla. App. 1969). Contribution uncertainties led insurer to falsely assert non-receipt of required records, for purposes of delay.



By providing for a stay pending arbitration, the statute (Sec. 298.02) implicitly denies the validity of a provision that no action may be brought until arbitration has been had. . . . Defendant had a clear right to a stay . . . (But) defendant at no time moved the court for a statutory stay. It consistently and repeatedly sought dismissal. . . . It maintained this position for an extended period. . . .<sup>33</sup>

Where the policy provided arbitration under the American Arbitration Association Rules, and the insurer had refused to join AAA, thus requiring insured to pay a \$250 filing fee instead of the usual \$50, insurer was held to have waived its right to compel arbitration.<sup>34</sup>

#### G. *Waiver by Insured*

The above principles apply, of course, with equal effect against the insured. Thus, the insured does not waive his right to compel arbitration by bringing action against the uninsured motorist contrary to the permission to sue clause *if* he had no knowledge of the other motorist's uninsured status.<sup>35</sup>

#### H. *Other Acts*

Insureds were held not to have waived arbitration where insured's counsel made an agreement during arbitration, which was continued pending the outcome in a related suit, that if judgment in the related suit became final it would defeat the arbitration claim.<sup>36</sup>

However, where insureds gave a release to insurer of all claims under uninsured motorist coverage and later commenced suit despite the release, on the basis of after-discovered injuries, the release was held to be a waiver of arbitration by insureds.<sup>37</sup>

#### I. *Waiver of Conditions Precedent Defenses*

Generally, an insured is under a duty to cooperate with his insurer. As elements of this duty are conditions precedent to recovery under the policy as a whole: notice of accident, proof of loss, submission to medical examination, submission to examination under oath, and consent to the obtaining of medical information.

<sup>33</sup> Schram v. Dotz, 23 Wis. 2d 678 at 682, 127 N.W.2d 779 (1964).

<sup>34</sup> Hall v. Nationwide Mut. Ins. Co., 189 So. 2d 224 (Fla. App. 1966).

<sup>35</sup> In Motor Vehicle Accident Indem. Corp. v. McTootle, 236 N.Y.S.2d 588 (Sup. Ct. 1963) upon discovery of tortfeasor's uninsured status, insured dropped the suit by stipulation and demanded arbitration. Waiver was said to be an intentional abandonment of a known right, and no prejudice to insurer was shown. Accord: Mailman v. Motor Vehicle Accident Indem. Corp., 36 Misc. 2d 825, 235 N.Y.S.2d 14 (Sup. Ct. 1962); Application of Travelers Indem. Co., 235 N.Y.S.2d 718, *aff'd* 246 N.Y.S.2d 1015 (1962); McGorman v. Motor Vehicle Accident Indem. Corp., 285 N.Y.S.2d 922 (1962) where mere institution of suit not waiver, but continued action over two years in face of disclaimer held to constitute waiver; Scheck v. Motor Vehicle Accident Indem. Corp., 243 N.Y.S.2d 288 (1967) where waiver found where insured had knowledge of right to arbitration prior to suit.

<sup>36</sup> Loscalzo v. Federal Mut. Ins. Co., 39 Cal. Rptr. 437 (Ct. App. 1964).

<sup>37</sup> Commercial Ins. Co. of Newark v. Copeland, 56 Cal. Rptr. 794 (Ct. App. 1967).

As stated in the introduction to this Section, insurer's right to assert these unfulfilled conditions may generally be waived by the initiation of arbitration where insurer partakes in the proceedings.<sup>38</sup> However, where the insurer preserves its demand in its arbitration pleadings, and the condition precedent is a continuing one, there may be no waiver.<sup>39</sup>

## II SCOPE OF ARBITRATION

Among the states where arbitration is enforceable, a further question arises as to whether the various issues which arise between the insured, the uninsured motorist, and the uninsured motorist carrier may—or must—be resolved by either arbitration or court adjudication. The question usually arises prior to arbitration, and turns on a construction of the insured's policy language as to what in fact was the agreement of the parties.<sup>40</sup> This determination can also be affected by public policy considerations favoring or disfavoring arbitration in general, fears of a "flood of peacemeal litigation," or a deference to apparent legislative wishes.

### A. *Literal or Restrictive Construction*

A literal construction of the standard arbitration provisions limits the arbitrator's jurisdiction to:

1. Whether insured is legally entitled to recover from owner or operator of the uninsured motorist vehicle, excluding other issues under other terms in the endorsement (or policy as a whole), such as coverage, and condition precedent issues, and
2. Amount of damages.

The problem, of course, is in delineating exactly which issues are subsumed thereunder. The usual approach is to regard "coverage" questions as precedent to the above issues of liability and damages. Thus, it is said that until it is established that the policy covers the event of the accident, or that certain conditions precedent to recovery have not been violated, a consideration of liability or damages is premature. Among the issues which have accordingly been held to be "coverage" questions are:

- a. Whether claimant was an "insured" or an "occupant" under the policy.
- b. Whether the bodily injuries were "caused by accident."
- c. Whether the other vehicle was in fact uninsured.
- d. Whether tortfeasor's insurer disclaimed liability.
- e. Whether the other vehicle was a "hit-and-run" vehicle, whether there was physical contact with such other vehicle, or whether the other driver's identity was ascertainable.

<sup>38</sup> *Progressive Mut. Ins. Co. v. Wright*, 229 So. 2d 645 (Fla. App. 1969).

<sup>39</sup> *Emcasco Ins. Co. v. Alvarez*, 110 Ill. App. 2d 307, 249 N.E.2d 190 (1969).

<sup>40</sup> Note 1 *supra*. Such language can vary in different policies, of course. This problem has arisen in California where different policy and statutory language has seemed to breed confusion in successive cases.

- f. Whether claimant met his duties under the policy, such as timely notice to the insurer.
- g. Whether a statute of limitations bars the claim.
- h. Whether "other insurance" negates insurer's liability.<sup>41</sup>

Frequently in these situations the insurer wishes to resolve the "coverage" question after its insured has already demanded or commenced arbitration. The success of the insurer's attempt then to secure a judicial stay of arbitration often turns on procedural issues of proper timing and form.<sup>42</sup>

### B. *New York: Limited Jurisdiction*

One of the first decisions in the country to squarely meet the issue of scope, *Rosenbaum v. American Sur. Co. of N.Y.*,<sup>43</sup> has become the most oft-cited representative of the literal interpretation cases. The decision has since been followed in New York—a state generating perhaps more uninsured motorist arbitration cases than all other states combined. The opinion and its dissent enumerate arguments which have found their way into every subsequent case which faced the issue.

Plaintiff's insured husband died as a result of being struck by an allegedly uninsured motorist. She and her husband were covered by a policy including a standard uninsured motorist endorsement.

She sued the uninsured motorist, who defaulted. Her claim under the endorsement met with insurer's denial of liability, and she then moved for an order compelling arbitration, supported by an affidavit alleging the tortfeasor's uninsured status. Special Term ultimately ordered a jury trial as to whether decedent had been struck by an un-

<sup>41</sup> *Widiss, supra* note 7, at 206.

<sup>42</sup> Several recent New York cases have rejected attempts to stay an arbitration because statutory requirements as to form and timing were not complied with. *Monarch Ins. Co. v. Pollack*, 32 App. Div. 2d 819, 302 N.Y.S.2d 432 (1969); *Jonathan Logan Inc. v. Stillwater Worsted Mills, Inc.*, 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1968) commercial arbitration; *Boxill v. Motor Vehicle Accident Indem. Corp.*, 33 App. Div. 2d 13, 304 N.Y.S.2d 633 (1969) stay refused despite technical violation of timely notice to police of hit and run; *but see Medica v. Motor Vehicle Accident Indem. Corp.*, 32 App. Div. 2d 771, 301 N.Y.S.2d 693 (1969) where permanent stay granted since party failed to show reasonableness of delay; *General Accident Fire and Life Assur. Corp. Ltd. v. Cerretto*, 60 Misc. 2d 216, 303 N.Y.S.2d 223, (Sup. Ct. 1969) statutory stay time limit cannot be waived by parties' agreement; *Cosmopolitan Mut. Ins. Co. v. Moliere*, 31 App. Div. 2d 924, 298 N.Y.S.2d 561 (1969).

Service of the stay was upheld where conforming with AAA Rule 30 (by mail) despite a contrary procedural statute in *Bauer v. Motor Vehicle Accident Indem. Corp.*, 31 App. Div. 2d 239, 296 N.Y.S.2d 675 (1969). N.B. The *Accident Claims Rules* of the American Arbitration Assoc. have been condensed and re-written, effective as of January 1, 1970. No substantial change was made.

Two New York cases seem to be conflicting as to whether failure to stay arbitration in time precluded the insurer from raising a coverage issue. *All-state Ins. Co. v. Ness*, 32 App. Div. 2d 912, 302 N.Y.S.2d 492 (1969) ten day time limit—C.P.L.R. Sec. 7503(c); *Frame v. American Motorists Ins. Co.*, 31 App. Div. 2d 872, 297 N.Y.S.2d 247 (1969) ten day limit expressed in the arbitration demand.

<sup>43</sup> 11 N.Y.2d 310, 183 N.E.2d 667 (1962).

insured motorist, and if so, that arbitration proceed. The Appellate Division reversed. The Court of Appeals, in a four to three decision, agreed with Special Term:

The policy endorsement did not cover all controversies between insured and insurer. It . . . made arbitrable two fact issues only: as to fault ("legally entitled") and as to damages if fault should be established.

The arbitration clause was particular, not general.

"No one is under a duty to resort to arbitration unless by clear language he has so agreed."

Where the covenant to arbitrate is made subject to conditions precedent, the existence of such conditions when disputed is an issue for the court.

The *Dissent* urged that:

The arbitration clause in . . . clear language, provides that: "The *matter or matters* upon which the insured and company do not agree shall be settled by arbitration." (emphasis supplied by the Court)

The phrase "*matter or matters*" . . . is certainly explicit enough. . . . We should not read into that agreement a provision for piecemeal treatment of a specified area of dispute by two separate and distinct procedures. . . . (W)e will be adding a new type of cause to an already overburdened court calendar. . . . The policy endorsement was drawn by the company for which the insured paid an extra premium and now finds, six years after the fatal injury, that she has not yet been able to pin the company down. . . .<sup>44</sup>

The *Rosenbaum* case, resolving the earlier split in New York, has been followed in principle in Colorado,<sup>45</sup> Connecticut, Illinois and Michigan.

### C. Connecticut

In *Fragar v. Pennsylvania Gen. Ins. Co.*,<sup>46</sup> and *Viselli v. American Fidelity Co.*,<sup>47</sup> the Connecticut Supreme Court clearly established that the physical contact issue was not arbitrable under the standard endorsement. The court found that the proper procedure in resolving non-arbitrable issues was to sue in court, prior to arbitration, to have not only the arbitrability of the issue, but also the "coverage" issue itself resolved. In *Fragar*, the court rejected a warning of a flood of unwarranted and piecemeal litigation. Both cases arose out of proceedings prior to arbitration.

<sup>44</sup> *Id.* at 670.

<sup>45</sup> *International Service Ins. Co., v. Ross*, 457 P.2d 917 (Colo. 1969).

<sup>46</sup> 231 A.2d 531 (Conn. 1967).

<sup>47</sup> 237 A.2d 561 (Conn. 1967).

#### D. Illinois

Two cases in early 1968 placed Illinois firmly within the narrow approach to arbitral jurisdiction. *Liberty Mut. Fire Ins. Co. v. Loring*,<sup>48</sup> an intermediate level decision, held that the physical contact issue must be arbitrated, in the procedural manner outlined in the Connecticut cases above. The Supreme Court, in *Flood v. Country Mut. Ins. Co.*,<sup>49</sup> reversed an intermediate court and held the issue whether claimant was an insured person under the policy to be non-arbitrable. As a case of "first impression," it cited as support Michigan and Connecticut cases, and the New York *Rosenbaum* case. The Connecticut-type procedure was prescribed.

*Di Carlo v. State Farm Auto Ins. Co.*,<sup>50</sup> where insured attempted to enforce arbitration under the ad hoc type provision, is discussed at p. 430.

#### E. Michigan

In *Western Cas. & Sur. Co. v. Strange*,<sup>51</sup> defendant was driving insured's auto and was struck by another auto which had been sideswiped by one *Sharp*, who fled. Insured's policy was standard. Defendant filed an arbitration demand, and plaintiff filed a declaratory relief complaint, in that coverage issues existed and were not arbitrable.

"Since the only arbitrable matters are those specified in the insurance contract . . . we must look at the language.

. . . .  
Interpretations of this, or similar, language have not been presented to the Michigan Supreme Court. Under a similar arbitration provision . . . New York held in *Rosenbaum* . . . that (whether the vehicle was uninsured) was for court determination. This interpretation was adopted by the Superior Court of Connecticut. . . . It appeals to us as reasonable and proper, and we adopt it. . . .<sup>52</sup>

#### F. California: "Expanded" Jurisdiction

It has been claimed that California cases represent the view that all or nearly all issues arising between the parties are arbitrable, on the basis of three rationales:

1. Strong legislative policy as seen in fact that the California Insurance Code (11580.2) expressly calls for arbitration. (Only one other state, Oregon, has legislated the standard arbitration language into its insurance statutes.<sup>53</sup>)
2. Public policy generally favoring arbitration.
3. Fear of a flood of "piecemeal litigation."

<sup>48</sup> 91 Ill. App. 2d 372, 235 N.E.2d 418 (1968).

<sup>49</sup> 41 Ill. App. 2d 91, 242 N.E.2d 149 (1968).

<sup>50</sup> 82 Ill. App. 2d 414, 226 N.E.2d 514 (1967).

<sup>51</sup> 3 Mich. App. 733, 143 N.W.2d 572 (1966).

<sup>52</sup> *Id.* at 574.

<sup>53</sup> ORE. REV. STATS. §§ 743.783-743.792.

A reading of the California cases makes that state's inclusion in this category doubtful, however. Four California cases have been cited standing for an unlimited jurisdiction: *American Ins. Co. v. Gernand*,<sup>54</sup> *Esparza v. State Farm Mut. Auto. Ins. Co.*,<sup>55</sup> *Federal Mut. Ins. Co. v. Schermerhorn*,<sup>56</sup> *Jordan v. Pacific Auto Ins. Co.*<sup>57</sup> It has been implied that these cases represent the view of the state's highest court, while the cases reflecting a more limited view or arbitral jurisdiction are the unreviewed work of intermediate courts.<sup>58</sup>

The distinction made in Widiss between the stated scope of arbitral jurisdiction on the one hand, and the further question of which "coverage" issues lie outside the stated scope on the other hand, is useful in a comparison of the New York and California cases. Generally it can be said that the New York cases prescribe a narrow scope of arbitral jurisdiction and enumerate coverage issues which lie outside this scope, whereas California cases often (though not always) espouse a widened scope, while at the same time enumerating many of the same "coverage" issues as outside the scope. Thus, while the *results* in California and in New York have seemed in accord, both states can easily be distinguished in this connection from Pennsylvania.<sup>59</sup>

<sup>54</sup> 68 Cal. Rptr. 810 (Ct. App. 1968).

<sup>55</sup> 65 Cal. Rptr. 245 (Ct. App. 1968).

<sup>56</sup> 48 Cal. Rptr. 325 (Dist. Ct. App. 1965).

<sup>57</sup> 42 Cal. Rptr. 556 (Dist. Ct. App. 1965).

<sup>58</sup> See Widiss, note 7 at 210-11. The *Jordan* case exemplifies a critical distinction important though at times unrecognized in these cases: It is one thing to hold, as in *Jordan*, that a "coverage" issue is arbitrable when it has been voluntarily submitted by the parties for arbitration; but it is another matter to hold that the issue must in all events be arbitrated, whether submitted voluntarily or not. It is true that *Jordan* was a Supreme Court case, and that much of its language seems to prescribe an all-inclusive arbitration, but the Court took care to establish the fact of a voluntary submission by both parties of the issue of whether the tortfeasor was uninsured.

*Esparza* in turn was an intermediate court decision. Moreover, the court seemed to rely on language in the arbitration clause before it, which was somewhat broader than that in the standard endorsement—a difference noted in *Fisher v. State Farm Mut. Auto. Ins. Co.*, 243 Cal. App. 2d 749, 52 Cal. Rptr. 721 (1966).

The *Gernand* case was also an intermediate court decision, in fact heard by the same court that decided *Esparza* (2nd Dist. Ct. of App. Div. 1). There was little fresh reasoning, and the opinion cited and seemed to rest on the earlier *Jordan* and *Esparza* cases.

In *Federal Mut. Ins. Co. v. Schermerhorn*, another intermediate level opinion (First District Court of App. Div. 2), a coverage question was raised by the insurer as to a policy held by the allegedly uninsured motorist, and insurer filed a declaratory action on the issue, asking for a preliminary injunction stopping the AAA hearings. The insurer lost the issue, but the injunction was granted. On appeal, the court decided to dissolve the injunction, pointing out that subrogation would be available to the insurer, that insurer admitted to insured's right to arbitration, and that the issue of the uninsured status of the tortfeasor was arbitrable. The court cited *Jordan*, which had been rendered after the instant injunction was granted. Thus, this case does support a wide view of scope, but it does not carry a great deal of independent weight.

<sup>59</sup> See discussion below at 425.

The confusion in California has not gone entirely unnoticed in that state's appellate opinions. The court in *Hernandez v. State Farm Ins. Co.*<sup>60</sup> observed that, after all, the words of the statutory policy endorsement are clear on their face in allowing only the issues of liability and damages as within proper arbitral jurisdiction, and enumerated support for its view.<sup>61</sup> In *Felner v. Meritplan Ins. Co.*,<sup>62</sup> a different Court of Appeal reaffirmed the earlier philosophy of the *Jordan* line of cases, and expressly asked for Supreme Court guidance:

. . . (W)e find an increasing number of uninsured motorist decisions which have removed legal and factual issues from the arbitrators and transferred them to the courts.

The kaleidoscopic pattern of decisions in this field must certainly be a difficult one for trial courts and arbitration tribunals to interpret.<sup>63</sup>

<sup>60</sup> 77 Cal. Rptr. 196 (Cal. App. 1969).

<sup>61</sup> The court affirmed a denial of a petition to vacate an award, holding that insureds had waived whatever right they may have had to a court adjudication of the "coverage" question of physical contact. Insureds had voluntarily submitted the issue, and had offered proof on its merits at the hearing. Citing *Esparza and Gernand* on the same coverage question, the court acknowledged some doubt as to whether insureds could have been compelled to submit the issue the court stated that:

"The problem is that section 11580.2 of the Insurance Code provides for arbitration of just two issues: 1. whether the insured is legally entitled to recover damages; and 2. the amount thereof. Thus, unless the right to a judicial determination is waived by proceeding to arbitration, the following issues between insurer and insured have been held not to be arbitrable: *Pacific Automobile Ins. Co. v. Lang*, 265 Cal. App. 2d—(265 A.C.A. 946,952), 71 Cal. Rptr. 637 (factual question of contract); *Campbell v. Farmers Ins. Exch.*, 260 Cal. App. 2d 105, 67 Cal. Rptr. 175 (policy limits); *Farmers Ins. Exch. v. Ruiz*, 250 Cal. App. 2d 741, 745-746, 59 Cal. Rptr. 13 (question whether injured person additional assured); *Commercial Ins. Co. of Newark, New Jersey v. Copeland*, 248 Cal. App. 2d 561, 564-565, 56 Cal. Rptr. 794 (legal effect of release). Cf. *Allstate Ins. Co. v. Orlando*, 262 Cal. App. 2d 858, 865, 69 Cal. Rptr. 702; *Pacific Indem. Co. v. Superior Court*, 246 Cal. App. 2d 63, 66-68, 54 Cal. Rptr. 470; and *Aetna Cas. Surety Co. v. Superior Court*, 233 Cal. App. 2d 333, 339-340, 43 Cal. Rptr. 476, all holding that the timeliness of a demand for arbitration under Section 11580.2(h) is not arbitrable."

Several other cases support a narrow view of arbitral jurisdiction: *Key Ins. Exch. v. Biagini*, 58 Cal. Rptr. 408 (Cal. App. 1967); *Niagara Fire Ins. Co. v. Cole*, 44 Cal. Rptr. 889 (Cal. App. 1965); *Calhoun v. State Farm Mut. Auto. Ins. Co.*, 62 Cal. Rptr. 177 (Cal. App. 1967); *Fisher v. State Farm Mut. Auto. Ins. Cokg* 52 Cal. Rptr. 721 (Cal. App. 1966) where however an exceptionally wide scope was read into the endorsement words ". . . or do not agree as to the amount payable hereunder."

<sup>62</sup> 86 Cal. Rptr. 178 (1970). In this 2nd Dist., Div. 2 case, the insurer had disclaimed liability at the arbitration hearing alleging a lack of physical contact. After hearing the evidence, the arbitrator found physical contact. In opposing confirmation, the insurer demanded the right to a de novo evidentiary hearing on the issue. The Court of Appeal found, however, that the issue was within the submission agreement of the parties as denoted in the statutory policy language. In any event, the court added, the insurer waived any defect in arbitral jurisdiction when it submitted the issue at the arbitration hearing.

<sup>63</sup> *Felner v. Meritplan Ins. Co.*, *supra* at 182.

G. *Pennsylvania: Unlimited Jurisdiction*

Recent cases reaffirm that in Pennsylvania seemingly any issue arising between the insured and his uninsured motorist carrier must be arbitrated.

In *Merchants Mut. Ins. Co. v. American Arbit. Ass'n*,<sup>64</sup> after receiving the arbitration demand, insurer filed a complaint seeking preliminary injunction restraining arbitration, arguing that a statute of limitations issue required court determination. To distinguish the earlier *Kunn*<sup>65</sup> case (whether tortfeasor was uninsured is arbitrable) and the *Medycki*<sup>66</sup> case (whether proof of loss requirement was fulfilled is arbitrable), insurer argued that the instant issue of violation of the policy notice provision applied to the entire policy. The court agreed, but insisted that arbitration of the issue would affect only the uninsured motorist coverage in the policy.

In *Allstate Ins. Co. v. Taylor*,<sup>67</sup> a court decree holding a son not to be a resident of insured father's household was vacated, and the petition for declaratory judgment was ordered dismissed. It was held by the Pennsylvania Supreme Court that the issue was within the scope of arbitration, even though the insurer has stipulated to insured's request for a judicial determination of the issue.

*Great American Ins. Co. v. American Arbit. Assoc.*<sup>68</sup> is also instructive as to the evolving arbitration procedure in Pennsylvania. Where an injured taxicab passenger, whose insurer later became insolvent, demanded arbitration under her brother's policy, it was agreed to arbitrate in two parts: The first to decide coverage; the second, if coverage was found, to decide damages. Insurers' attempt to enjoin the second part was denoted as "a patent attempt . . . to evade the dictates of a long series of recent cases in this Court dealing with the arbitration clause. . . ." Insurer urged misconduct in the first hearing. In affirming, the court recited the rule that only fraud, misconduct, or corruption such that results in an unjust, inequitable and unconscionable award would suffice, and that none had been shown. The court added that the only proper form of review of arbitration was a petition to vacate an award—and that here no award had yet been rendered.

<sup>64</sup> 248 A.2d 842 (Pa. 1969).

<sup>65</sup> *National Grange Mut. Ins. Co. v. Kuhn*, 428 Pa. 179, 236 A.2d 758 (1968).

<sup>66</sup> *Harleysville Mut. Ins. Co. v. Medycki*, 431 Pa. 67, 244 A.2d 655 (1968).

<sup>67</sup> 434 Pa. 21, 252 A.2d 618 (1969).

<sup>68</sup> 260 A.2 769 (Pa. 1969); See also *Preferred Risk Mut. Ins. Co. v. Martin*, 260 A.2d 804 (Pa. 1970); *Pennsylvania Gen. Ins. Co. v. Barr*, 435 Pa. 456, 257 A.2d 550 (1969); *Gulf Ins. Co. v. American Arbitration Association & Smith*, 311 F. Supp. 989 (E.D. Pa. 1970). Significantly, Pennsylvania has enjoyed success under its compulsory arbitration plan, in effect since 1958, and applicable to all civil claims for amounts of \$3000 and under. The plan was intended primarily to reduce court congestion. A treatment of this scheme and its effect on uninsured motorist arbitration in Pennsylvania is beyond the scope of this paper.



### H. Florida

Although Florida is said to have represented the narrower New York view, in a 1965 case the court affirmed a jury resolution not only on one of the "coverage" issues, but also, in the same trial, the liability and damage issues.<sup>69</sup> Here and in later cases, then, insurer's denial of coverage in some respect would act as a waiver of arbitration. Indeed, Widiss suggests that either party can eliminate arbitration at will merely by raising a coverage-type issue.<sup>70</sup> A recent case supports this view:

Insured filed an "unsworn" complaint in a Florida District Court alleging that insurer had denied that its policy coverage of \$10,000 on each of three insured autos owned by insured would be available. Insurer filed a motion to dismiss and compel arbitration, with affidavit admitting the fact of and extent of coverage of \$30,000. On appeal, the Supreme Court reversed for insurer with directions to compel arbitration, distinguishing earlier cases where coverage had been in issue.<sup>71</sup>

### III. JUDICIAL REVIEW OF ARBITRATION PROCEEDINGS

A court can affect arbitration proceedings generally at either of two points—before or after. (Though we noted in Pennsylvania, where arbitration can be a split affair, that the court entered the picture in the "half-time break.")

Once arbitration is concluded, the standard form endorsement<sup>72</sup> simply states that a judgment on the arbitration award may be entered in any court having jurisdiction, and that insured and insurer agree to be bound by the properly-made award. A court, then, may be asked to vacate, modify, or confirm an award, or may order a remand for either a lower court adjudication or another arbitration hearing.<sup>73</sup> Court activities at this latter stage are the subject of this section.<sup>74</sup>

Initially, it is useful to note the importance of the elements of law discussed in previous sections of this paper as they affect the exercise of judicial review of arbitration proceedings. We can note where, for instance, the wording of a particular arbitration clause and the scope of arbitral jurisdiction accorded thereunder affect the outcome on re-

<sup>69</sup> United States Fidelity & Guar. Co. v. Williams, 177 So. 2d 47 (Fla. App. 1965).

<sup>70</sup> Widiss, *supra* note 7, at 213.

<sup>71</sup> Sun Ins. Office Ltd. v. Phillips, 230 So. 2d 17 (Fla. Dist. Ct. App. 1970); The "narrow" view is supported by Hilton v. Citizens Ins. Co., 201 So. 2d 904 (Fla. App. 1967); See also Prudence Mut. Cas. Co. v. Humphreys, 220 So. 2d 381 (Fla. Dist. Ct. App. 1969).

<sup>72</sup> The State Farm arbitration clause is silent.

<sup>73</sup> 5 However, see statute providing a version of an arbitration reference to a court at arbitrator's or party's request for binding decision on a law issue. NEV. REV. STATS. § 38.140

<sup>74</sup> Another aspect of judicial review not treated here is the preliminary question of whether court rulings compelling or staying arbitration or staying suit pending arbitration are themselves appealable. See Lawyers' Arbitration Letter, Appealable Orders, American Arbitration Association, No. 38 (May 15, 1969).

view. Also, review is affected by the terms of a state's general arbitration statutes, where applicable, which usually prescribe some grounds for the vacating or modification of arbitration awards. Also, arbitration rules can have a crucial impact where they are incorporated into the policy (as are AAA Rules).

The earlier discussion of common law arbitration might also be recalled here. It has been said that, where a state has enacted a version of the Uniform Arbitration Act and the state's insurance code is silent as to arbitration, the provisions of the Act are applied.<sup>75</sup> However, this is not universally true. In *Owens v. Concord Mut. Ins. Co.*,<sup>76</sup> insurer appealed from a confirmation of claimant's AAA award, urging that the insured motorist endorsement had been rejected when the policy was issued, thus subtracting from the insurance contract any provision for arbitration. The majority and the dissent disagreed as to whether insurer waived this "pre-arbitral legal issue" by appearing at the hearing and defending on the merits. The majority decided that where no reference to arbitration appears in a contract, judicial review of arbitration is to base itself, not on the Pennsylvania Arbitration Act, but on the common law arbitration rules—which clearly require a waiver of all pre-award "procedural defects." the Court stated the test to be met under the common law for vacatur:

If the appeal is from a common law award, appellant, to succeed, must show by clear, precise and indubitable evidence that he was denied a hearing, or that there was fraud, misconduct, corruption or some other irregularity of this nature on the part of the arbitrator which caused him to render an unjust, inequitable and unconscionable award, the arbitrator being the final judge of both law and fact, his award not being subject to disturbance for a mistake of either.<sup>77</sup>

Common law arbitration can also, when applied, affect the formalities of confirmation of an award.<sup>78</sup>

<sup>75</sup> See also WIS. STATS. ANN. § 298.10 (1967).

<sup>76</sup> 210 Pa. Super. 235, 232 A.2d 14 (1967). Generally, see Aksen, *Judicial Review of Uninsured-Motorist Arbitration Awards*, 48 ORE. L. REV. 74 (1968).

<sup>77</sup> *Owens v. Concord*, *supra* at 16. In *Carpenter v. North River Ins. Co.*, 436 S.W.2d 549 (Tex. App. 1968) the court noted that:

(I)t is almost uniformly held that the statutory (arbitration act) remedy is cumulative and the common law remedy remains available to those who choose to use it.

The court enforced an award here on a common law basis despite the exclusion of insurance contracts from the Texas Arbitration Act, where both parties volunteered to arbitrate.

<sup>78</sup> *Smith v. Safeguard Mut. Ins. Co.*, 212 Pa. Super. 83, 239 A.2d 824 (1968), held that the Clerk of Court lacks power to reduce the award to judgment without a previous entry of judgment by a court. *Bartilucci v. Safeguard Mut. Ins. Co.*, 212 Pa. Super. 414, 242 A.2d 916 (1968), held, in turn, that a judgment could be entered by a court on a common law award without requiring the parties to bring a separate suit in *assumpsit*. Both cases, of course were focused on the standard endorsement language "judgment upon any award rendered may be entered in any court having jurisdiction thereof."

### A. *Grounds for Vacatur or Modification*

That the arbitrator has *erred in law or fact* or *exceeded his powers* is a basis for review—though reportedly seldom successful. As in the case of normal judicial appellate review, it is clear that more is needed than a mere showing that the reviewer would have decided the matter differently.<sup>79</sup>

*Brewer v. Allstate Ins. Co.*<sup>80</sup> held for instance that a mistake of law or fact was not such an excess of powers, noting the Oregon Statute granting arbitrator the power “to decide both the law and facts involved in the case” and also asserting that, since the “principal purpose of arbitration is to avoid litigation,” judicial review was to be confined “to the strictest possible limits.” The problem in *Brewer* was that the AAA arbitration placed the burden of proving the uninsured motorist to be in fact uninsured on the claimant. The Court clearly disagreed, but left the award undisturbed.

Similarly, in *Interinsurance Exchange v. Bailes*,<sup>81</sup> no excess of power was found where arbitrator’s findings of fact were different from a court’s in a prior declaratory relief action. Insured’s plea of *res judicata* was denied.

We saw earlier that the scope of the arbitrator’s jurisdiction can be an issue for judicial determination before, after, and even during the arbitration proceedings. Two Illinois cases for example, vacated an award where the arbitrator exceeded his authority and decided “coverage” issues held beyond the proper scope.<sup>82</sup>

In *Smaglia v. Fireman’s Fund Ins. Co.*,<sup>83</sup> the arbitrator’s error was his rejection as “unnecessary” medical testimony relevant and important to a proper finding of decedent’s future earnings. In remanding for another arbitration, the court denoted the conduct “a denial of a full and fair hearing, which warranted vacating an award *even at common law.*” (Emphasis supplied)

In *Country Mut. Ins. Co. v. National Bank of Decatur*,<sup>84</sup> an award was vacated where the arbitrator exceeded his authority in rendering an award on a wrongful death claim where demand for arbitration had not been filed within the required two years. The court noted that “there are certain legal rights . . . which the parties cannot waive. . . .”

<sup>79</sup> *Brewer v. Allstate Ins. Co.*, 436 P.2d 547 (Ore. 1968); *Barbuto v. Motor Vehicle Accident Indem. Corp.*, 29 App. Div. 2d 927, 289 N.Y.S.2d 118 (1968).

<sup>80</sup> *Ibid.*; See also *Allen v. Interinsurance Exch. of Auto. Club of S. Calif.*, 80 Cal. Rptr. 247 (Ct. App. 1969).

<sup>81</sup> 33 Cal. Rptr. 544 (1963).

<sup>82</sup> *Safeway Ins. Co. v. Parker*, 105 Ill. App. 2d 208, 245 N.E.2d 75 (1969) (physical contact); *Allstate Ins. Co. v. Johnson*, 243 N.E.2d 5 (Ill. App. 1969) (other insurance provision). Nevada upheld an award in similar circumstances involving coverage issues, where the parties were found to have voluntarily submitted. *Northwestern Security Ins. Co. v. Clark*, 448 P.2d 39 (Nev. 1968).

<sup>83</sup> 432 Pa. 133, 247 A.2d 577 (1968).

<sup>84</sup> 109 Ill. App. 2d 133, 248 N.E.2d 299 (1969).

The time limit was termed a "condition to the right to sue and . . . not merely a statute of limitation . . . which a defendant may interpose or waive as he sees fit."

The fact that an award is merely *inadequate or excessive* is rarely a successful basis of review. In *Torano v. MVAIC*,<sup>85</sup> a young widow with two children was awarded \$500. (Her husband collided with a bridge abutment before being struck by the uninsured motorist). Aksen finds no cases where insurer tried to have an award reduced—but then the limits are usually only 10/20.<sup>86</sup> Insurers, of course, often argue on the basis of endorsement provisions for medical payments, workmen's compensation, and other offsets.

Another ground for review occasionally appearing is the *failure to grant general damages* as well as specials. In reversing the affirmation of an award on this basis, California noted statutory language requiring "a determination of all questions submitted to the arbitrators . . . necessary to determine the controversy."<sup>87</sup> General damages were regarded as a part of the complete controversy. The new insurance code of Oregon would more expressly support this result in stating that insurer is to pay sums which insured is legally entitled to recover as "general and special damages from the owner. . . ."<sup>88</sup>

Another basis for review is a finding of *lack of impartiality*—for instance, failure to disclose an objectionable relationship. This latter is especially pertinent where AAA rules apply, since these rules require disclosure of "any circumstances likely to create a presumption of bias . . ."<sup>89</sup>

*Violations of AAA Rules*, excepting the "failure to disclose" rule mentioned above, rarely support a successful action to vacate. In *Murry v. Civil Service Employees Ins. Co.*,<sup>90</sup> the court decided to overlook a violation of the rule against communication between the arbitrator and a party occurring before service on both parties to the formal award, along with a violation of Rule 36 in that the award was never actually served.

Other instances of violation have resulted in vacatur, however. In *Smith v. Northwest Schools, Inc.*,<sup>91</sup> failure to render the award within the required thirty days under AAA rules constituted sufficient

<sup>85</sup> 19 App. Div. 2d 356, 243 N.Y.S.2d 434 (1963) *aff'd*, 15 N.Y.2d 882, 206 N.E.2d 353 (1965).

<sup>86</sup> Aksen, *supra* note 77, at 85.

<sup>87</sup> *Banks v. Milwaukee Ins. Co.*, 55 Cal. Rptr. 139 (1966).

<sup>88</sup> ORE. REV. STAT. § 743.792(1) (a).

<sup>89</sup> *Merolla v. Motor Vehicle Accident Indem. Corp.*, 231 N.Y.S.2d 760 (Sup. Ct. 1629) where arbitrator was undisclosed counsel of record in Motor Vehicle Accident Indem. Corp. member insurer company, vacatur granted. The position of arbitrator was described as "a quasi-judicial position." See also *Del Vecchio v. Del Vecchio*, 32 App. Div. 2d 1060, 303 N.Y.S.2d 1018 (1969).

<sup>90</sup> 62 Cal. Rptr. 659 (1967).

<sup>91</sup> N.Y.L.J. (Mar. 3, 1969).

grounds under the applicable New York statutes for vacatur, where AAA's request for an extension of time was refused in writing by a party before he received the late award. In *Karaskiewicz v. Allstate Ins. Co.*,<sup>92</sup> the arbitrator, on request, accepted a memorandum after hearings had closed without an official reopening of hearings. (AAA rules 26, 27) The Court held that a variance in these agreed-upon procedures was sufficient for vacatur, though it denied this remedy on other grounds.

*Ex-Parte Arbitration*, where a party refuses to attend the hearings, at times results in a default award. The AAA procedures allow for this, and it has been upheld in commercial and labor cases. *Di Carlo v. State Farm Auto Ins. Co.*<sup>93</sup> is instructive as to ad hoc arbitration in this connection.

Aksen also reminds us that there must be a *valid arbitration provision*. For instance, *Ellison v. Safeguard Mut. Ins. Co.*<sup>94</sup> shows a successful attack on a default arbitration award, where insurer argued that neither a state insurance arbitration regulation (standard language—AAA) nor judicial action could create arbitration where both the statutes and the policy were silent. Insurer therefore had no duty to arbitrate and never consented to or appeared at the hearing.

It is conceded that it is the option of the arbitrator whether to provide "*findings*" or *reasoning* to support the award. Therefore, such findings or their absence become a basis for review only where they furnish counsel with other grounds for objection.<sup>95</sup> For instance, while the court did not vacate the award in *International Service Ins. Co. v. Ross*,<sup>96</sup> it vacated a judgment confirming the award and remanded for a trial on the merits of insurer's defenses relating to policy exclusions, proof of claim, and medical reports. The court found that the lack of a record of the hearing and the absence of indication in the award and lower court judgment that these defenses were properly considered made remand necessary. There had been two separate arbitrations, one of which was ex parte as to the insurer.

An interesting New York case, *Mole v. Queen Ins. Co. of America*,<sup>97</sup> disposed of several arguments as to whether *freshly discovered evidence* can be a basis for a vacatur or modification. The court found that it had no power to receive a motion to vacate on these grounds, and, based on the doctrine of "*functus officio*" ("a task performed") ruled that an arbitrator was precluded from any further action once an award was made. The court pointed out that the location of fresh evidence was

<sup>92</sup> 109 Ill. App. 2d 370, 248 N.E.2d 756 (1969).

<sup>93</sup> 82 Ill. App. 2d 414, 226 N.E.2d 514 (1967).

<sup>94</sup> 209 Pa. Super. 492, 229 A.2d 482 (1967).

<sup>95</sup> *Brewer v. Allstate Ins. Co.*, *supra* note 79.

<sup>96</sup> 457 P.2d 917 (Colo. 1969).

<sup>97</sup> 14 App. Div. 2d 1, 217 N.Y.S.2d 330 (1961).

not among the *exclusive* statutory grounds in New York on motion to vacate. Further, the court found no general power to grant equitable relief here. Also, the statute granting a "new trial" on the grounds of fresh evidence was distinguished, with the obvious reminder that there was no original trial. The court rejected any suggestion that it even had a right to inquire into the basis for the arbitrator's decision.<sup>98</sup>

### B. *Disposition*

The above cases involving judicial review of awards generally provided some form of remand—to a lower court or to the arbitrator. In *Banks v. Milwaukee Ins. Co.*,<sup>99</sup> it was held proper, upon vacatur, to remand to the arbitrators.

The Oregon Statutes so provide, allowing that if the arbitrators disregard instructions on remand that the court may then proceed on its own.<sup>100</sup> In a New York case, *MVIAC v. Cody*,<sup>101</sup> the award was merely modified. The lower court confirmation had allotted \$2,350 of a \$6,050 award to claimant's attorney for fees and disbursements. On appeal, it was held that, where the amount paid to claimant by the workmen's compensation carrier exceeded the total award, the entire amount was due the carrier, and there was no fund to which the attorney's inferior lien could attach.

### C. *Federal Review*

Another aspect of court review not extensively treated here is the possibility of using a federal court, at any stage, for the review or determination of an arbitration issue. In *Van Horn v. State Farm Mut. Auto Ins. Co.*,<sup>102</sup> the Court of Appeals affirmed a Michigan District Court which sustained insurers' motion to dismiss claimant's action. The court felt the action was premature, and that a cause of action was lacking where there was no allegation that arbitration was conducted. Claimant, in removing the action from state court, argued that insurer had waived arbitration. The court held that all reasonable remedies for adjudicating claims established by an insurer must be exhausted before a suit is brought, even where the usual jurisdictional amount and diversity grounds are present.

<sup>98</sup> Many state arbitration laws have replaced the earlier "functus officio" rationale with a provision permitting a modification in an award upon timely application and notice to the opposing party (Uniform Arbitration Act, Sec. 9). Akse reports that the few cases on this matter deal with matters of form, and the statutes generally do not allow for sweeping or fundamental change in the award.

<sup>99</sup> 55 Cal. Rptr. 139 (1966).

<sup>100</sup> ORE. REV. STATS. Sec. 33.330(5) (1967).

<sup>101</sup> 24 App. Div. 2d 807, 300 N.Y.S.2d 587 (1969). See also *Carter v. State Farm Mut. Auto. Ins. Co.*, 224 So. 2d 802 (Fla. Dist. Ct. App. 1969) held: two of three arbitrators erred under endorsement in taxing against insurer the total of arbitration fees as part of a second ex parte "supplemental" award, modification granted.

<sup>102</sup> 391 F.2d 910 (6 Cir. 1968). See also *Rogers v. United States Auto. Ass'n*, 410 F.2d 598 (6 Cir. 1969).

## IV. WISCONSIN: ARBITRATION, UNINSURED MOTORIST ENDORSEMENT

There is a minimum of case law in Wisconsin involving uninsured motorist arbitration. However, the value to the practitioner of cases from other similar jurisdictions should be apparent. It will be recalled that at least eighteen states generally *enforce* arbitration under similar versions of the Uniform Arbitration Act (Alaska, Ariz., Fla., Hawaii, Ill., Mary., Mass., Mich., Minn., N.H., N.J., N.Y., Ohio, Okla., Penn., Wash., *Wis.*, Wyo.) Several of these states have adopted a consistent "literal view" toward the *scope* of arbitration.

A. *Wisconsin Case Law*

There appears to be only one Wisconsin case dealing very extensively with uninsured motorist arbitration: *Schramm v. Dotz*,<sup>103</sup> discussed earlier, held that the insurer had waived its right to compel arbitration where it had continued to insist on dismissal rather than arbitration.

In *Morateck v. Milwaukee Auto Mut. Ins. Co.*,<sup>104</sup> as to the subsidiary issue of whether uninsured motorist coverage exists where only one of the two joint tortfeasors was uninsured, coverage was apparently found. The opinion reports only that the parties "waived" arbitration under the endorsement and stipulated instead to Circuit Judge Leo Hanley as arbitrator.

See also *Allstate Ins. Co. v. Charneski*,<sup>105</sup> where separate trials on the policy defense issue and negligence issue were recommended. Arbitration was apparently not urged by the parties.

The following, though not uninsured motorist arbitration cases, are relevant as to general arbitration law in Wisconsin:

It was held in *City of Madison v. Frank Lloyd Wright Foundation*<sup>106</sup> that statutory arbitration in Wisconsin is specifically enforceable—thus arbitration itself can be ordered to proceed. This case involved a contract for architectural services under which a fee dispute was found arbitrable, thereby causing the court to grant a stay of the city's declaratory judgment action pending arbitration. The court also pointed out that every contract subject to Wisconsin law containing an arbitration agreement not clearly excluding the application of the Wisconsin Arbitration Act incorporates that Act.<sup>107</sup> Moreover, even where the agreement prescribes the rules of some authority as applicable, the Wisconsin Act provisions apply if there is a conflict.

*Denhart v. Waukesha Brewing Co.*,<sup>108</sup> held that generally *res judicata* applies to arbitral awards.

<sup>103</sup> 23 Wis. 2d 678, 127 N.W.2d 779 (1964).

<sup>104</sup> 34 Wis. 2d 95, 148 N.W.2d 704 (1967).

<sup>105</sup> 16 Wis. 2d 325, 114 N.W.2d 489 (1962).

<sup>106</sup> 20 Wis. 2d 361, 122 N.W.2d 409, 20 A.L.R.3d 545 (1963).

<sup>107</sup> WIS. STATS. CH. 298.

<sup>108</sup> 21 Wis. 2d 583, 124 N.W.2d 664 (1963).

*International Union v. Hamilton Beach Mfg. Co.*<sup>109</sup> held as to a labor contract that arbitration is not enforceable without an agreement to arbitrate, and that to find such an agreement is within the jurisdiction of a court.

*Darling v. Darling*,<sup>110</sup> held that where an award failed to receive confirmation as a statutory award, it might yet be enforced by an action upon it.

*Donaldson v. Buhlman*,<sup>111</sup> held that various aspects or parts of an award can at times be severable, so that if one portion is held invalid, another may yet be enforceable. This case also recited the test to be met to vacate a common law award.

#### V. EVALUATION

Where arbitration is enforceable, the question is generally one of timing—when to commence arbitration. Where arbitration is unenforceable, the question (at least for insured) should be one of choice—between arbitration and an action at law. In either event, several factors enter into an evaluation of arbitration as a device suitable to a client's needs at any given time.

At the outset, it should be noted that two different formats for arbitration exist: (1) the "ad hoc" method<sup>112</sup> instituted and still used wherever permitted<sup>113</sup> by the State Farm Mut. Auto Ins. Co. and a perhaps-increasing number of other insurers, and (2) the system administered by the American Arbitration Association<sup>114</sup> which is incor-

<sup>109</sup> 40 Wis. 2d 270, 162 N.W.2d 16 (1968).

<sup>110</sup> 16 Wis. 675 (1863).

<sup>111</sup> 134 Wis. 117, 114 N.W. 431 (1908).

<sup>112</sup> *Di Carlo v. State Farm Mut. Auto. Ins. Co.*, 82 Ill. App.2d 414, 226 N.E.2d 514 (1967) illustrates partially the operation of the State Farm arbitration clause. In a typical fact situation, insurer and insured were unable to agree on the claim, insured chose an arbitrator, and State Farm refused to cooperate. Insured then prevailed upon an Illinois Circuit Court to appoint an arbitrator—presumably to represent State Farm. The two arbitrators met, rendered an ex parte award in insured's favor, and sent a copy to State Farm, who again refused to pay. Insured then filed a complaint to confirm and enforce the award. (This complaint went into default, but State Farm managed to vacate the judgment the same day, alleging an office mix-up) State Farm then filed a motion to dismiss the complaint, admitting the crucial allegation of physical contact, but urging that the award had not been rendered properly under either the endorsement or the state arbitration act (Uniform Act). Motion was granted.

The Illinois Court of Appeals affirmed, pointing out that the policy provided no alternative for insured, where insurer refused to choose an arbitrator, except to proceed under the Arbitration Act. Under the Act provisions, however, insured had not properly served the summons necessary to begin, and the award was therefore vacated.

<sup>113</sup> State Farm reports that it must use the AAA system in its policies issued in Connecticut, Massachusetts, New York, and Texas. Another variance occurs in California, where a statute requires that only one arbitrator be used.

<sup>114</sup> Uninsured motorist arbitration is only one segment of the operations of the American Arbitration Association, which does not itself act as arbitrator, but administers uninsured motorist arbitrations through its "Accidents Claims Panel Tribunal" and has assembled a specific set of rules for its "Accident



porated into the Standard Uninsured Motorist Endorsement. The following discussion will distinguish these systems where it is thought to be significant to the overall evaluation.

The *speed* of arbitration compared with litigation will vary in different areas. It is generally conceded that arbitration *per se* is faster, though it has been said that practical scheduling problems lead to surprising delays in many instances. This problem would be more serious under the "ad hoc" system, where five attorneys must be brought together at one time. Aksen reports that an arbitration can "often" be completed "within eight weeks."<sup>115</sup> An Illinois survey in 1965 indicated an average duration under AAA auspices to be fourteen weeks.<sup>116</sup> A New York survey indicated an average duration of eight and one-half months.<sup>117</sup>

The comparative *mechanics* can be important. For instance, AAA rules do not provide for discovery except at the arbitrators' discretion.<sup>118</sup> Most pleading requirements are not applicable to arbitration, of course.<sup>119</sup> Also, under AAA, the admission of evidence is almost completely at the arbitrator's discretion. The ad hoc endorsement prescribes the usual evidence rules, though it is unclear whether any practical difference results. We have already noted the relative lack of right to judicial review of arbitration awards.

Relative *cost* can be a factor:

*AAA Fees (Rules sec. 37, 38, 39)*

- a. \$50 administrative, paid by the party who initiates arbitration.
- b. \$100, plus an added variable amount paid as part of an annual assessment under the contract arrangement between AAA and

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Claims Tribunal." Thus, this non-profit New York-chartered corporation maintains panels of volunteer attorney-arbitrators in over 1600 communities, administered through some twenty-one regional offices (nearest: Chicago or Minneapolis). Arbitrations in uninsured motorist disputes, numbering 9,944 in 1968, generated over one-half of AAA's operating income that year. (Operations of this segment are said to be a financially self-sustaining cycle, while some other areas of AAA effort have drawn support from private foundations.)

The nearest AAA regional office furnishes upon request: Accident Claims Tribunal Rules, Arbitration of Uninsured Motorist Claims (brief booklet), and four copies of the form Demand for Arbitration.

<sup>115</sup> Aksen, *Arbitration Under the Uninsured Motorist Endorsement*, 504 INS. L. J. 17 (1965).

<sup>116</sup> Pretzel, *Uninsured Motorist*, 515 INS. L. J. 711 (1965).

<sup>117</sup> Aksen, *supra* note 118.

<sup>118</sup> Only one state has authorized discovery in its arbitration legislation (CAL. INS. CODE, § 11580.2 provides that the Superior Court, however, has jurisdiction over discovery.) Note however, WIS. STAT. § 298.07 providing that "Upon petition, approved by the arbitrators . . ." a court may direct the taking of depositions. Also, the endorsement requires claimant to submit to a physical examination, and to an examination under oath. See *Harleysville Mut. Cas. Co. v. Adair*, 421 Pa. 141, 218 A.2d 791 (1966) on discovery under AAA arbitration.

<sup>119</sup> Under AAA, the initiating party serves the Demand For Arbitration setting forth the matter in dispute, amount claimed, and remedy sought. The other party then may file an Answer. (AAA 1970 Rules sec. 4) Formal Stipulations, briefs, and Submission Agreements are also used.

various insurance associations, who sponsored the program at its start, and who continue the relationship. Of late, this \$100 fee can remain unpaid if insurer anticipates that court action prior to arbitration will eliminate the need for arbitration. Also, if paid under these circumstances, it is later refundable.

c. \$25 paid by each party for any subsequent hearing.

d. \$10 adjournment fee.

e. \$3 per hour "overtime" fee.

f. Various possible minor expenses

g. An Oregon statute requires that arbitrators be paid \$50.00 per day. No other state as yet appears to require such payment.

### "Ad hoc" Arbitration Fees

"Expenses of arbitration" are borne equally. The total is said to average \$700-750. Arbitrators are paid, generally, at their "office time" hourly rates. Attorney and expert witness fees are not regarded, though, as "expenses of arbitration." (See arbitration clause.)

Also, it is often said that the time needed to prepare for and "try" a hearing is as great as is needed for a trial. Note again that the usual uninsured motorist coverage limit is 10/20, and that even the normal adjudicative proceedings in most states which enforce arbitration require three stages: a court hearing on the stay, a trial of "coverage" issues, and the arbitration hearing itself.

The *size of awards* and *impartiality of arbitrators* are perhaps by far the most critical factors—for both plaintiff and defendant.

Aksen has on several occasions mentioned tentative survey findings generated by the Project for Effective Justice of the Columbia University School of Law.<sup>120</sup> The conclusion is that there is a "very low incidence of dissatisfaction with the conduct of the arbitration," and that "on the average, the result (amount of award) obtained in the arbitration of a moderate personal injury case would be the same as though it were tried before a jury."

However, it has been said that the AAA panels are "loaded" with "plaintiff's attorneys;"<sup>121</sup> though it has also been said that there is simply a much greater number of "plaintiff's attorneys" practicing law. Also, especially in Pennsylvania, where we have noted the heavy emphasis placed on arbitration, the looseness and informality of hearings is said to work in the plaintiff's favor.

<sup>120</sup> Widiss, *supra* note 7, at 248 et seq.

<sup>121</sup> As to the procedure for selecting an arbitrator, AAA submits a list of names, administratively chosen from the Accident Claims Panel, to the parties, who can object to some or all names included (since 1964). AAA selects usually one (has discretion at the request of a party to appoint three, 1970 Rules Sec. 8) and notifies parties. An oath is administered.

All members of the Accident Claims Panel are attorneys, generally experienced in negligence and insurance law (1970 Rules Sec. 3). Once appointed, objection to an arbitrator can only be an allegation of his financial or personal interest in the result (1970 Rules Sec. 9). An arbitrator has a duty to disclose anything "likely to create a presumption of bias . . ." (1970 Rules Sec. 9).

Apparently there is even greater dissatisfaction with the AAA arbitration system than has appeared in regularly published materials or commentary.<sup>122</sup> Significantly, one major auto insurer has indicated that even under its ad hoc method, awards tend to be measurably higher on the same injuries than jury trial awards.<sup>123</sup> At the same time, this insurer reportedly has absolutely no intention of considering the adoption of the standard AAA provision.

Another auto insurer, dissatisfied with its results under the AAA system, reports that the Insurance Rating Board is currently considering the adoption of the following language:

. . . the matter or matters upon which such person and the company do not agree shall be settled by arbitration, which shall be conducted in accordance with the rules of the American Arbitration Association *unless other means of conducting the arbitration are agreed to between the insured and the company . . .*" (emphasis supplied)

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#### APPENDIX

The standard uninsured motorist endorsement, in two separate sections, states that certain disputes between insurer and insured are to be arbitrated if these parties cannot reach agreement:

The 1966 Standard Form, Part I: Coverage reads:

The company will pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured 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; provided, for the purposes of this endorsement, 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.

The 1966 Form, Part VI: Additional Conditions, F Arbitration reads:

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

<sup>122</sup> The Defense Research Institute, Milwaukee, Wisconsin, recently conducted a correspondence survey of the experience of major auto insurers with the arbitration systems. This writer appreciates having been given the opportunity to review these materials. The conclusions drawn however are solely those of the writer.

<sup>123</sup> One device used to control the "runaway award" is an advance agreement between the parties: regardless of the amount set, claimant agrees to be satisfied with a definite maximum in return for the insurer's promise to pay a definite minimum. Where the amount set falls between these agreed limits, of course, it would be accepted by both parties. This type of "control contract" is said to be gaining in popularity. Coulson, Uninsured Motorist Coverage Arbitration, 16th Annual Workshop, Nat'l Association of Independent Insurers, Washington, D.C. at 188 (April 1970).

SECTION III—UNINSURED MOTOR VEHICLE  
COVERAGE INSURING AGREEMENTS

COVERAGE U—DAMAGES FOR BODILY INJURY CAUSED BY UNINSURED MOTOR VEHICLES

To pay all sums which the *insured* or his legal representative shall be legally entitled to recover as damages from the owner or operator of an *uninsured motor vehicle* because of *bodily injury* sustained by the *insured*, caused by accident and arising out of the ownership, maintenance or use of such *uninsured motor vehicle*, 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.

Arbitration. If any *person* making claim under coverage U and the company do not agree that such *person* is legally entitled to recover damages from the owner or operator of an *uninsured motor vehicle* because of *bodily injury* to the *insured*, or do not agree as to the amount payable hereunder, then each party shall, upon written demand of either, select a competent and disinterested arbitrator. The two arbitrators so named shall select a third arbitrator, or if unable to agree thereon within 30 days, then upon request of the *insured* or the company such third arbitrator shall be selected by a judge of a court of record in the county and state in which such arbitration is pending. The arbitrators shall then hear and determine the question or questions so in dispute, and the decision in writing of any two arbitrators shall be binding upon the *insured* and the company, each of whom shall pay his or its chosen arbitrator and shall bear equally the expense of the third arbitrator and all other expenses of the arbitration, provided that attorney fees and fees paid to medical or other expert witnesses are not deemed to be expenses of arbitration but are to be borne by the party incurring them. Unless the parties otherwise agree, the arbitration shall be conducted in the county and state in which the *insured* resides and in accordance with the usual rules governing procedure and admission of evidence in courts of law.

Erie Insurance Exchange, Erie, Pennsylvania, in Jan., 1969, switched from an AAA clause to the following:

C. Under Part III, Coverage A-2—Uninsured Motorists Insurance—Condition 1. "Arbitration" is hereby amended to read:

Arbitration. If any person making claim hereunder and the ERIE does not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the Insured, or do not agree as to the amount payable hereunder, then each party shall, upon written demand of either, select to a competent and disinterested arbitrator. These two arbitrators shall select a third competent and disinterested arbitrator, or if unable to agree thereon within 30 days, then upon request the Insured or the ERIE such third arbitrator shall be selected by a judge of a court of record in the county and state in which such arbitration is pending. The arbitrators shall then hear and determine the question or questions so in dispute, and the Insured and the ERIE each agree to consider itself bound and to be bound by the decision in writing of any two arbitrators. The Insured and the ERIE shall pay his or its chosen arbitrator and shall bear equally the expense of the third arbitrator and all other expenses of the arbitration, provided that attorney fees and fees paid to medical and other expert witnesses are not deemed to be expenses of arbitration but are to be borne by the party incurring them. Unless the parties otherwise agree, the arbitration shall be conducted in county and state in which the Insured resides and in accordance with the usual rules governing procedure and admission of evidence in courts of law. Except for the provisions set forth above, any arbitration hereunder shall be conducted under and accordance with the provisions of the Arbitration Act of the jurisdiction in which the arbitration takes place, if any such Act exists; otherwise, in accordance with the law of that jurisdiction pertaining to common law arbitration."

Except for the final sentence, this is essentially the State Farm provision.

The American Family Insurance Group, Madison, Wisconsin has used the provision below. It is essentially the State Farm provision with a clause deleted, referring to attorney and expert witness fees.

**Arbitration.** If any person making claim hereunder and the company do not agree that such person is legally entitled to recover damages from the owner or operator of an uninsured automobile because of bodily injury to the insured, or do not agree as to the amount payable hereunder, then each party shall, upon written demand of either, select a competent and disinterested arbitrator. The two arbitrators so named shall select a third arbitrator, or if unable to agree thereon within 30 days, then upon request of the insured or the company such third arbitrator shall be selected by a judge of a court of record in the county and state in which such arbitration is pending. The arbitrators shall then hear and determine the question or questions so in dispute, and the decision in writing of any two arbitrators shall be binding upon the insured and the company, each of whom shall pay his or its chosen arbitrator and shall bear equally the expense of the third arbitrator and all other expenses of the arbitration. Unless the parties otherwise agree, the arbitration shall be conducted in the county and state in which the insured resides and in accordance with the usual rules governing procedure and admission of evidence in courts of law

Deleted language.

“ provided that attorney fees and fees paid to medical or other expert witness are not deemed to be expenses of arbitration but are to be borne by the party incurring them.” (State Farm)