The Uninsured Automobile

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THE UNINSURED AUTOMOBILE

There are three major areas of inquiry into the meaning of "uninsured automobile" as used in standard insurance contracts: (1) the positive definition of an uninsured automobile; (2) the exclusion section; and (3) the definition of a hit-and-run automobile.

**The Definition of "Uninsured Automobile"**

The term "uninsured automobile" is defined in the 1963 Countrywide Endorsement as:

an automobile with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility laws of the state in which the insured automobile is principally garaged, 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.

In order to understand the endorsement and why it is written in those terms, it is necessary to consider the first Uninsured Motorist Endorsement written in 1956. This endorsement classified an automobile as "uninsured" when there was "no bodily injury liability bond or insurance policy applicable at the time of the accident." 2

The threshold determination before the uninsured motorist endorsement can be considered is whether or not the vehicle involved comes within the definition of the term used in the policy either as an "automobile" or "motor vehicle." Some insurance companies have attempted to avoid liability when faced with claims by insureds who were injured in accidents with negligent, financially irresponsible persons who were not driving automobiles, but some other type of vehicle. 3 One of the typical non-automobiles is the uninsured motorcycle. In New York two cases have considered the term "automobile." In Witt v. New Hampshire Ins. Co., 4 an accident occurred in the state of New York. A passenger, injured on an uninsured motorcycle, was held to be protected under an uninsured motorist endorsement covering his own automobile. The court reasoned that the motorcycle was an uninsured automobile under the New York statutory definition of motor vehicles, as to accidents occurring in New York. 5

In Askey v. General Accident Fire and Life Assurance Corp., the

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1 1963 Countrywide Endorsement § (c) (1).
2 1956 Countrywide Endorsement § (c) (1).
3 See Rosenbaum v. Safeco Ins. Co. of America, 432 S.W.2d 45 (Ky. App. 1968), in which a horse-drawn carriage was determined not to be an automobile.
4 N.Y. Sup. Ct. 1968 reported in N.Y. Law J., 2/2/68 at p. 21, cl 8.
5 N.Y. Ins. Code, § 601 subd. a (Supp. 1968)
6 54 Misc. 2d 63, 281 N.Y.S.2d 669 (1967).
accident occurred in Canada. and the lower court held that the motor-
cycle was not an uninsured automobile because the New York statute
applied only to an accident occurring in New York. The Appellate
Division, however, reversed the decision, because "the denial of lia-
bility because the accident occurred in Canada runs contrary to the
recent conceptual determinations of this question."7

Generally, the courts have concluded that regardless of the term
used in the endorsement, the insurer ought not to be allowed to restrict
coverage in this way. These decisions are usually based on the ap-
picable uninsured motorist statute of the state which generally uses
the term "uninsured motor vehicle." The courts have reasoned that
insurers are required to provide coverage for injuries resulting from
an accident with any uninsured highway vehicle, including motorcycles.9

A Wisconsin case10 has come to a different conclusion. In that case
the plaintiff, defendant and insurer were all residents of Iowa, and Iowa
law was applied in order to determine the question of whether or not
a motorcycle is an uninsured automobile. The court relied on the Iowa
case of Westerhausen v. Allied Mutual Ins. Co.11 and held that a mo-
torcycle was not an automobile. In Westerhausen the court was inter-
preting the definition of automobile in the liability section of the policy.
The policy had defined an automobile as a four wheeled vehicle. The
Wisconsin court said it would be inconsistent to apply a different
definition to an automobile in the Uninsured Motorist section than the
court in Iowa had applied to the liability section. Therefore, it was
held that under Iowa law a motorcycle was not an uninsured motor
vehicle. If the Wisconsin court had applied Wisconsin law the result
might have been different. The Wisconsin Statute Section 204.30(5)
relating to uninsured motorist coverage uses the term "motor vehicle"
instead of automobile. It seems that the use of the term motor vehicle
will bring a motorcycle within the definition of an uninsured motor
vehicle. Most insurance policies are now using the term motor vehicle
instead of automobile. One writer in the field of uninsured motorist
coverage has suggested that it seems justifiable and reasonable to ex-
tend coverage—even in the face of explicit policy language purporting
to restrict coverage to damages caused by an uninsured automobile—
since it is clear that the hazard created by the uninsured motorcycle
is exactly the same as that created by the uninsured automobile.12

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8 Id. at 633, 290 N.Y.S.2d at 761.
In this case the California statute used the term motor vehicle instead of
automobile. The court held that the term motor vehicle was broader than
the term automobile.
10 Spain v. Allied Mutual Ins. Co., Circuit Court of Dane County (1968).
11 258 Ia. 969, 140 N.W.2d 719 (1966).
After it has been determined that the vehicle involved was within the class insured, it is necessary to determine whether there is "... no bodily injury liability bond or insurance policy applicable. ..."13 When making this determination consideration must be given not only to whether or not the driver of the motor vehicle has insurance, but also to whether or not the owner of the vehicle has insurance.

There may be instances where a vehicle though covered by a liability insurance policy may be held to be uninsured. This generally arises in a situation where the policy does not provide protection for, or expressly excludes coverage of the injury. The case of Whitney v. American Fidelity14 is a very good example of such a situation. A vehicle in which the insured was a guest passenger was in an accident. The vehicle was only covered by compulsory motor vehicle liability insurance, which provided no coverage for injuries to guests. The court held that the vehicle in which the insured was riding was an uninsured motor vehicle. The court said that a vehicle carrying only compulsory insurance could arguably be said not to have any insurance applicable at the time of the accident. The court gave the word "applicable" the definition "capable of being applied."

There are other situations in which, although the vehicle is insured, there is no insurance applicable, such as: where a vehicle is owned by an employer whose liability policy excludes from the insureds thereunder any employee of the owner with respect to an injury to a fellow employee,15 where the insured is injured while a passenger in his own vehicle,16 where there are non-permissive users,17 and where the vehicle is driven by an unlicensed driver18 or a thief.19

On the other hand, the exclusion of intentional injury under a liability policy does not render a vehicle uninsured. In McCarthy v. MVAIC20 a woman was injured when her brother-in-law intentionally collided with her. The brother-in-law's automobile liability policy did not cover that type of situation so she made claim under her uninsured motorist endorsement. The court held that she was not involved in an accident with an uninsured vehicle. The insurance policy was held

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13 Supra, note 1.
16 Bowsher v. State Farm Fire & Cas. Co., 244 Ore. 549, 419 P.2d 606 (1966). It should be noted that many uninsured motorist endorsements also provide that any vehicle owned by the named insured cannot be an uninsured motor vehicle. This will be discussed later in the exclusion section of this paper.
to be perfectly valid and in force at the time of the accident. The court said that this was not within the risk covered by the brother's policy nor was the injury caused by an accident.

There are also cases where an insurer denies liability on a policy in force at the time of the accident. Denial of liability may result from failure to report the accident or failure to cooperate. The injured party is then faced with a tortfeasor who has become financially irresponsible following the accident even though he had insurance at the time of the accident.

In 1958 the case of Matter of Berman (Travelers Indem. Co.) raised the issue that the uninsured motorist endorsement applies only where there is no insurance applicable at the time of the accident. The insurer argued that since a policy was applicable at the time of the accident the later denial of coverage did not put the injured party within the uninsured motorist provision. The court, literally construing the definition of an uninsured motor vehicle, held that such a denial of coverage following an accident did not make the tortfeasor's automobile an uninsured automobile. In 1966, this decision was overruled by the New York Court of Appeals in the Matter of Vanguard Ins. Co. v. Polchlopek, where the court held that even though the uninsured motorist endorsement did not provide for a situation in which the insurer disclaims liability, Section 167(subd. 2-a) of the New York Insurance Law included such a situation in its definition of uninsured automobile. The court relied heavily on this statutory definition although admitting that it was not controlling because this was a contractual matter. The court also reasoned that public policy, being the protection of motorists injured by financially irresponsible people, could best be served by endorsement holding that an insurance policy disclaimed subsequent to the accident is insurance "not applicable at the time of the accident."

In order to avoid the problem in the Matter of Berman several states adopted a statutory provision requiring that the uninsured motorist endorsement must provide indemnification in instances involving a denial of coverage by an offending motorist’s liability insurer. The

23 N.Y. INS. LAW § 167 (Supp. 1968).
25 CAL. INS. CODE § 11580.2(b) (Deering 1963); FLA. STAT. ANN. § 627.0851(2) (1966); GA. CODE ANN. § 56-407.1(b) (Supp. 1966); KY. REV. STAT. § 304.682
Countrywide Endorsement was then revised and the clause "... but the company writing the same denies coverage thereunder..." was added.

The addition of the above clause to the endorsement does not solve the problem completely; in fact, it even creates some other problems. Many insurance companies feel that the uninsured motorist coverage should not apply where the disclaimer of coverage by the primary insurance company was false and tendered in bad faith. The argument has not found much favor with the courts. In St. Paul Mercury Ins. Co. v. American Arbitration Ass., an allegation that the decision of the company to disclaim liability was false and tendered in bad faith was held not to relieve the company obligated on an uninsured motorist endorsement. The reasoning was that the denial of coverage, whether it was made for a valid reason or not, was such a denial of coverage as would satisfy the requirement of the endorsement. This view also was taken in a number of New York rulings. But in 1965, the New York Court of Appeals made a pronouncement on the disclaimer clause. In MVAIC v. Malone, the court held that:

a unilateral declaration of non-coverage by the insurer of an alleged tortfeasor did not ipso facto and without judicial investigation satisfy the requirement ... that alleged tortfeasor must have been uninsured, and MVAIC had opportunity ... to litigate before the court, ... the question whether alleged tortfeasor's policy was validly cancelled.

This reasoning was followed in other New York cases. It seems that in New York it will be necessary for the person seeking to recover for injuries, caused by a motorist whose liability insurer later denies liability, to show the validity of the disclaimer. Perhaps the reason for these holdings is that the MVAIC is a quasi-public corporation and the courts are reluctant to rule against it.

The real key to how the courts will construe the disclaimer provision seems to be whether or not they consider the language am-
biguous. If they find an ambiguity they will hold against the insurer and in favor of the injured insured.

Another problem which arises in regard to the disclaimer provision is the amount of evidence needed to show that the other motorist’s insurer has denied coverage and that the tortfeasor is an uninsured motorist. For example, in *Page v. Insurance Co. of North America,* allegations that the insurer of the other motorist refused plaintiff’s written claim were held not to satisfy the necessary evidentiary requirements. The court noted that coverage and claim are not synonymous since it is common knowledge that an insurer will often deny a claim even though coverage may eventually be afforded. In such a situation, the insurance company which paid the claim under the uninsured motorist endorsement will always retain subrogation rights against the company which denied liability.

Insolvency of the insurance company raises interesting problems with respect to the uninsured motorist endorsement. The 1956 Countrywide Endorsement makes it apparent that the endorsement does not provide protection to an insured who is in an accident with a tortfeasor who has insurance in existence at the time of the accident but whose insurance company thereafter is unable to provide coverage because of its insolvency. There is a diversity of opinion as to whether or not insolvency of the tortfeasor’s insurance company is sufficient to put the insured within the uninsured motorist endorsement. The decision usually depends on the type of insurance policy applicable at the time of the accident. Therefore, it will be necessary to discuss the cases in terms of the policy provisions.

A. Policy only requiring no insurance applicable at the time of the accident.

Courts have in many instances given a literal construction to this clause and have refused to consider the situation of a subsequent insolvent insurer. In *Apotas v. Allstate Ins. Co.* the court found that the phrase was clear and unambiguous, therefore precluding any construction of the clause against the insurer. The court held that the subsequent insolvency did not affect or change the fact that there was insurance applicable at the time of the accident. Another court has held that to construe the clause any other way would be in effect a rewriting of the contract and the addition of a provision which did not previ-
ously exist.\textsuperscript{36} In Dreher v. Aetna Casualty and Surety Co.,\textsuperscript{37} a motorist was held not to be within the uninsured provision because of the subsequent insolvency of the tortfeasor's insurer. At the time of this decision the Illinois Legislature was considering whether or not to extend coverage under such a circumstance. The court, while acknowledging the pending legislation and the policy of liberally construing the insurance contract in favor of the insured, declined to allow the claim. The court said that the policy was not ambiguous and that there was no compelling public policy which required them to extend coverage.

B. Denial of Coverage Clause.

In many instances a statute\textsuperscript{38} or a policy definition\textsuperscript{39} may render a vehicle uninsured where the insurer denies coverage. There seems to be a split of authority over whether or not the subsequent insolvency of the insurer can be said to be a denial of coverage. States which have in their statutory definition of an uninsured motorist the denial of coverage clause generally hold that the subsequent insolvency of the insurer is a denial of coverage. This result has been reached in the states of Virginia,\textsuperscript{40} South Carolina,\textsuperscript{41} California\textsuperscript{42} and New York.\textsuperscript{43} However, some courts feel that even though the statutory definition may include a denial of coverage clause, the status of the coverage will not be affected by the subsequent insolvency of the insurer. In Michigan Mut. Liability Co. v. Pokerwinski,\textsuperscript{44} the court held that the term "denies coverage" carried an affirmative connotation, such as rejection of a policyholder as an insured or a defense that the policy did not cover a particular accident, and that, while the result may be the same, the court would not twist the terms used.\textsuperscript{45}

In states which do not have a statutory definition of uninsured motorist, or have a definition which does not contain a denial of coverage clause, it was held by the court in Bendelow v. Traveler's Indem. Co., 52 Misc. 2d 327, 293 N.Y.S.2d 629 (1968).
clause, one must rely on the policy. Therefore, in *Illinois Ins. Co. v. Rose*\(^{46}\) the court was faced with a situation similar to *Dreher*\(^{47}\) although in this case there was a denial of coverage clause in the policy. The court applied the rationale of *Pattani v. Keystone Insurance Co.*\(^{48}\) and held that the subsequent insolvency of the insurer was a denial of coverage. *Pattani* was decided without the benefit of any statutory definition of an uninsured motorist. The court reasoned that even though Pennsylvania did not have a statutory definition, the definition of an uninsured motorist in the policy was similar to statutory provisions in other jurisdictions which have held that in such situations the vehicle was uninsured.\(^{49}\)

Whether or not the case is decided with the aid of a statute or by interpretation of the policy provision, it seems that, if the basic philosophy of uninsured motorist coverage is to protect against the financially irresponsible, coverage should be extended in all instances when the tortfeasor is deprived of his insurance for whatever reason.

C. The Insolvency Provision

In order to overcome the problems raised by the subsequent insolvency of the insurer many states have passed statutes which require insurance policies to contain a provision which extends coverage in the event of insolvency.\(^{50}\) A question has been raised as to the time within which the insolvency must occur in order for the coverage to apply.\(^{51}\)

There may be instances where the tortfeasor *has* insurance but in an amount smaller than the amount of the uninsured motorist endorsement under which the insured claims. This usually arises where the tortfeasor has insurance which satisfies the financial responsibility

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\(^{46}\) 93 Ill. App. 2d 461, 235 N.E.2d 675 (1968).

\(^{47}\) 83 Ill. App. 2d 141, 226 N.E.2d 287 (1967).


\(^{49}\) *Id.* at 336, 231 A.2d at 405. See also *Stephens v. Allied Mut. Ins. Co.*, 182 Neb. 562, 156 N.W.2d 123 (1968). In that case the court held that since the phrase “denies coverage” was that of the insurer it was open to construction if ambiguous. The court reasoned that a reasonable person could well have understood the phrase “denies coverage” to mean a failure to meet the liability of the insured tortfeasor. It did not matter if it was a voluntary denial of coverage or an involuntary denial as in the case where the insurer becomes insolvent. *Accord:* *McCaffrey v. St. Paul Fire & Machine Ins. Co.*, 108 N.H. 373, 236 A.2d 490 (1967); *Griffin v. Government Employee Ins.*, Ne. 564 P.2d 502 (1970).

\(^{50}\) See Appendix A. In some cases the question of retroactivity of these statutes has been raised. The courts generally apply them prospectively only and therefore determine coverage on some other ground. See e.g., *Dreher v. Aetna Cas. and Sur. Co.*, 83 Ill. App. 2d 141, 226 N.E.2d 287 (1967); *Illinois Ins. Co. v. Rose*, 93 Ill. App. 2d 461, 235 N.E.2d 675 (1968); *Farkas v. Hartford Acc. and Indem. Co.*, Minn. 173 N.W.2d 21 (1969).

\(^{51}\) *See* *Fireman’s Ins. Co. of Newark v. Diskin*, 255 Cal. App. 2d 562, 63 Cal. Rptr. 177 (1967).
requirement of a state which has a lower standard than the state in which the insured resides.\(^5\) In \textit{Taylor v. Preferred Risk Mut. Ins. Co.}\(^5\) an out of state automobile did not carry sufficient insurance to satisfy the California responsibility law. The vehicle did, however, carry sufficient insurance to comply with the requirements of the state in which his motor vehicle was principally garaged. The court held that the automobile would be considered an uninsured vehicle in California to the extent of the difference between the tortfeasor's policy limits and the minimum financial responsibility law of California.\(^5\)

One case has carried this one step further. In \textit{White v. Nationwide Mut. Ins. Co.},\(^5\) the insured, a Virginia resident, was involved in an accident with a Tennessee resident. In Virginia the Financial Responsibility Act requires a minimum of $15,000 per person. The Tennessee driver had only $10,000 coverage per person. A $22,000 judgment was rendered against the Tennessee driver. The Virginia driver sued his insurer and the defendant's insurer for the judgment. The defendant's insurer paid $10,000, and the Virginia resident demanded $12,000 from his insurer under his uninsured motorist provision. The Federal District Court stated that, since the tortfeasor did not have limits sufficient to meet the Virginia Financial Responsibility Law, the injured party was entitled to recover from his insurer.

The insurer argued that its liability should only be for the $5,000 difference between the tortfeasor's insurance and Virginia's Financial Responsibility minimum. The insured argued he was entitled to $12,000. The Federal Court held that the total amount of the uninsured motorist policy was available to satisfy the judgment. The court applied the rationale of \textit{Bryant v. State Farm Mut. Auto Ins. Co.},\(^5\) which had relied on the Virginia statutory scheme which allows an injured passenger to collect under both his own uninsured motorist endorsement and that of the driver's uninsured motorist endorsement.\(^5\)

These decisions caused the 1956 Countywide Endorsement to be amended and the clause "... in at least the amount specified by the

\(^5\) See Appendix A for the variations in policy limitations.


\(^5\) See also, Calhoun v. State Farm Mut. Auto. Ins. Co., 254 Cal. App. 2d 407, 62 Cal. Rptr. 177 (1967). Accord: Stevens v. American Service Mut. Ins. Co., 234 A.2d 305 (D.C. 1967), (where the policy limits were $20,000 and the financial responsibility requirement was $30,000, the motorist was held uninsured to the extent of $10,000); Carrigan v. Allstate Ins. Co., 108 N.H. 131, 229 A.2d 179 (1967), (the court said that there was no rational difference or distinction between a partially insured and a totally uninsured motorist. In either case there is not the required insurance under the Financial Responsibility Law); Allstate Ins. Co. v. Fusco, 223 A.2d 447 (R.I. 1966); Cruzado v. Underwood, 39 Misc. 2d 59, 242 N.Y.S.2d 74 (1963).

\(^5\) 205 Va. 897, 140 S.E.2d 817 (1965).

financial responsibility law of the state in which the insured highway
vehicle is principally garaged . . .” 58 was added.

The problem which still exists where the injured party has unin-
sured motorist coverage in excess of the statutory minimum59 but the
tortfeasor only has minimum insurance. Several courts have not al-
lowed recovery in such a situation.60 One court said that since the
tortfeasor had the statutory minimum coverage the injured party
was not injured by an uninsured motorist, and that the policy was
intended to protect those injured by an uninsured motorist and not an “under-
insured motorist.” 61

It should be remembered that the policy limits are those of the
principal place of garaging and not the place of the accident. Therefore,
if the insured is involved in an accident with an uninsured motorist
in a state which has higher limits than the insured’s state, he is limited
to the amount in his policy, and his insurer is not obligated to pay the
minimum amount prescribed in the state where the accident occurred.

The Exclusion Section

An intricate part of the definition of the uninsured automobile is
the section which defines what an uninsured automobile shall not in-
clude:

(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 finan-
cial 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 not as a vehicle, or
(5) a farm type tractor or equipment designed for use prin-

58 The following states specifically adopted legislation defining an uninsured
vehicle as one which does not have bodily injury insurance or a bond in
the minimum amount specified at the time of the accident by the Financial
Responsibility Laws of the state:
Two states still reflect the language of the 1956 Countrywide Endorsement:
Cal. Ins. Code § 11580.2(b) and N.Y. Ins. Laws § 167 (McKinney 1966).
59 Two states, Oklahoma and Virginia, allow coverage to be written above the
requirements of the Financial Responsibility Laws.
icipally off public roads, except while actually on public roads.62

Exclusion (1) operates when the insured63 is a passenger in the insured automobile and an uninsured person is driving the vehicle. The insured automobile may become an uninsured automobile for various reasons: (1) there may be a “Family Exclusion” in the liability section of the policy; 64 (2) the insurer may deny coverage under the liability section for various reasons, i.e., lack of notice, lack of cooperation, etc.; (3) the company may become insolvent.

There are few cases which interpret this exclusion section and they show a split of authority as to its validity.

In *Barras v. State Farm Mut. Auto Ins. Co.*65 the insured was a passenger in her own car driven by an uninsured driver. An accident occurred and the insured was injured. The “family exclusion” clause barred the insured from coverage under the liability section. The insured brought a declaratory judgment action against her insurer to have the uninsured motorist provision declared applicable. The court held that the exclusion of the insured automobile was valid. The court relied on the Georgia statute,66 which defines an uninsured automobile as a motor vehicle, other than a motor vehicle owned by the named insured. The court reasoned that since the statute and policy were consistent the exclusion was valid.67

An interesting situation arose in *Hale v. State Farm Mut.*68 The insurer had issued two automobile liability policies to Mr. and Mrs. Hale. One policy covered a Comet owned jointly by them while the other covered a Metro owned solely by Mrs. Hale. While Mr. Hale was driving the Comet and Mrs. Hale was driving the Metro, they collided.

Mrs. Hale sued Mr. Hale and the insurer refused to defend because the policy issued on the Comet excluded “bodily injury to the insured or a member of the same family.” Mrs. Hale then instituted a claim

62 1963 Countrywide Endorsement (c) (2).
63 1963 Countrywide Endorsement
(a) “Insured” means:
(1) the named insured as stated in the policy . . . and any person designated as named insured in the schedule and, while residents of the same household, the spouse of any such named insured and relatives of either;
(2) any other person while occupying an insured automobile; and
(3) any person, with respect to damages he is entitled to recover because of bodily injury . . . .

64 It should be noted that some states statutorily prohibit the “Family Exclusion” clause.
67 *See also* Lofberg v. Aetna Cas. and Sur. Co., 68 Cal. Rptr. 541, 70 Cal. Rptr. 269 (on rehearing) (1968).
68 256 Cal. App. 2d 177, 63 Cal. Rptr. 819 (1967).
under the uninsured motorist endorsement issued on her Metro. The insurer denied coverage, contending that exclusion number (1) deprived Mrs. Hale of coverage. The court held the exclusion valid because Mrs. Hale was the owner of the Comet, which was "an automobile furnished for the regular use of the named insured" and therefore could be excluded as insured automobile.

However, in *Murphy v. Criterion Ins. Co.* Murphy was a passenger in an automobile owned and operated by Weiner and insured by Criterion. Murphy sustained injuries in a one car accident. Criterion denied coverage under the liability section because of late notice. Murphy instituted action under Weiner's uninsured motorist endorsement. The company invoked Exclusion (1), but the court held that Murphy was an insured and entitled to coverage under the uninsured provision. The court stated that:

> Notwithstanding express exclusions from the definition of "uninsured automobile" contained in the endorsement, it has been stated that . . . 'a disclaimer or denial of liability by an insurance company may place the automobile in the position of an insured automobile, . . . if, but only if, the effect of the disclaimer or denial is to deprive the injured person of the protection afforded by a standard automobile policy. . . .' With respect to the apparent inconsistencies in the definition sections of the endorsement . . . the courts will give to the language a construction most favorable to the insured (Murphy), and one which results in coverage rather than denial of coverage.\(^{70}\)

The court concluded that the uninsured endorsement existed independently and apart from the policy to which it was annexed and remained viable even though the principal policy was rendered unenforceable by reason of a disclaimer.

The reasons for the exclusion are justifiable where the named insured is the injured party, but where a person classified as an insured under the definition of persons insured\(^{71}\) is injured, it seems that New York has the better view. No action by the operator of a vehicle should deprive the claimant of his rights, and if the insurance carrier disclaims liability because of an act or failure to act on the part of the owner, or because of the insolvency of the insurer, the passenger should remain an "insured" and not be affected by the exclusion.\(^{72}\)

Exclusion (2)—self-insurer . . . is a justifiable exclusion because there is in fact insurance applicable at the time of the accident. But the problem arises when the self-insurer can't respond to a claim which he is obligated to pay. In these situations it seems logical that the courts

\(^{69}\) 57 Misc. 2d 52, 293 N.Y.S.2d 851 (1968).

\(^{70}\) *Id.* at 54, 293 N.Y.S.2d at 853.

\(^{71}\) *Supra* note 63.

\(^{72}\) Garcia v. MVAIC, 41 Misc. 2d 585, 589, 246 N.Y.S.2d 841, 843 (1964).
will treat this as an insolvency. Thus, according to case or statutory requirements as to insolvency the uninsured motorist provision should provide coverage.

Exclusion (3) is a justifiable exclusion for basically the same reasons which apply to the self-insurer. The governmental agencies and entities so excluded are usually capable of responding to claims against them. However, in states which still have the doctrine of sovereign immunity the insured is precluded from recovery from either the governmental entity or his insurer. Professor Widiss has suggested that:

It seems to this writer that a more realistic approach would be to alter the endorsement so as to provide coverage in accidents with vehicles owned by government bodies when indemnification is unavailable from such government body, either because it is immune from suit, because its liability is limited or because it does not possess adequate resources.73

One case74 has held such an exclusion void. The action arose in Arkansas which at the time of the accident followed the doctrine of governmental immunity. The court held that under the Arkansas uninsured motorist statutory scheme, the purpose was to provide a basic minimum coverage against the uninsured motorist and the exclusion could not abrogate the statutory requirement. The Federal District Court stated that:

The obvious intent of the Legislature in enacting the Uninsured Motorist Act was to provide insurance to policyholders such as plaintiff... against compensation for injuries in a collision with an uninsured motor vehicle at least to the extent provided by the statute... .

... (If this provision) ... (is) held valid the purpose of the Arkansas statute, which is to provide a basic minimum coverage against the financially irresponsible motorist, would be frustrated. This basic coverage may not be abrogated nor diminished by the small print in an insurance contract.75

Exclusions (4) and (5) have both been held valid because the vehicles excluded are not normally considered as automobiles or motor vehicles under the definition supplied by the Legislature. In Woods v. Progressive Mut. Ins.76 an automobile liability insurance policy excluded a land motor vehicle or trailer if operated on rails or crawler treads, but the court held that this exclusion did not bar recovery for the death of the insured's daughter-passenger when his vehicle was involved in a collision with an uninsured bulldozer propelled and operated on crawler treads. Since the bulldozer was "a self-propelled device in,

73 A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE, § 2.47 at p. 93 (1969).
74 Vaught v. State Farm Fire & Cas. Co., 413 F.2d 539 (8th Cir. 1969).
75 Id. at 541. (Quoting the Federal District Court at 283 F. Supp. 384, 388, 390 (E.D. Ark. 1968).
upon or by which any person was or might be transported upon a highway,” the bulldozer was a motor vehicle within the definition of the Michigan Motor Vehicle Law, the Motor Vehicle Accident Claims Act and the Insurance Code.

The Hit-and-Run Automobile

The final inquiry of the term “uninsured automobile” relates to a hit-and-run automobile. The hit-and-run automobile is defined in the Countrywide Endorsement as:

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 24 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 oath that the insured or his legal representative has a cause of action...

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To understand the Countrywide Endorsement three requirements must be considered: the requirement of contact, of lack of identity, and of timely notice.

The Contact Requirement

The basic reason for the contact requirement is the prevention of fraudulent claims. It is easy to conceive of a situation in which a driver, through his own negligence, has lost control of his vehicle and driven off the highway. His contention could be that he was run off the highway by some unknown or “mystery” vehicle. To preclude such a claim the insurance companies have written the physical contact requirement into the policies. Some states have passed statutes which specifically require contact as a prerequisite to recovery. Under the contact requirement the question is whether direct contact or only indirect contact is necessary. In New York, under the statutory requirement of physical contact, earlier cases construed the requirement strictly and held that direct contact was required. The requirement

77 1963 Countrywide Endorsement (c) (2). In Lenngren v. Traveler’s Indem. Co., 26 Misc. 2d 1084, 203 N.Y.S.2d 136 (1960), a policy did not contain the hit-and-run provision. The reasoning was based on the fact that it could not be determined whether or not there was a policy applicable at the time of the accident.


79 N.Y. INS. LAWS §§ 600-626.

brought a harsh result in Petition of Portman.\(^81\) In that case a blind woman was struck by an insured automobile and then struck again by the insured automobile when it was struck by a hit-and-run automobile. The New York court denied recovery to her for the second impact because there was no physical contact between her and the hit-and-run automobile. This case was overruled in \textit{MVVAIC v. Eisenberg}\(^82\) when the court held that indirect contact was sufficient.

Indirect contact occurs when \(A\) (hit-and-run automobile) strikes \(B\) who then strikes \(C\) (insured). Thus, under a statutory requirement of physical contact, California has held that even though physical contact requirement was designed to eliminate those claims which were fictitious or fraudulent, it was not designed to lessen coverage.\(^83\) The court compared this situation to the contact requirements in the common-law distinctions between trespass and trespass on the case. In trespass, a direct contact was required, but in trespass on the case, indirect contact was sufficient. Therefore, the striking of \(B\) by \(A\) causing \(B\) to strike \(C\) was a sufficient contact to allow recovery. The court also stated that physical contact should not be required in cases where fraud does not exist. In \textit{Page v. Insurance Co. of North America},\(^84\) however, the court denied recovery to a person who was struck by a vehicle which had swerved in order to avoid being struck by a third vehicle, holding that there was not even "indirect contact." The court noted that if the Legislature had intended that bodily injury need only result from physical contact proximately caused by a hit-and-run driver rather than direct contact with a hit-and-run driver it would have so provided.\(^85\)

In states which do not have a statutory requirement of physical contact, courts have generally held that either direct or indirect contact is necessary.\(^86\) For example, in \textit{Amidzich v. Charter Oak Fire Ins. Co.},\(^87\) the court held that the words "physical contact" require that there be at least a minimal touching between two automobiles.

In Florida an interesting situation arises under the statutory definition of hit-and-run vehicles.\(^88\) The statute does not require physical

\(^{81}\) 33 Misc. 2d 385, 225 N.Y.S.2d 560 (1962).
\(^{84}\) 256 Cal. App. 2d 374, 64 Cal. Rptr. 89 (1960).
\(^{87}\) 44 Wis. 2d 45, 170 N.W.2d 813 (1969).
\(^{88}\) FLA. STAT. ANN. § 627.0851 (Supp. 1968).
contact but does require that the identity of the driver be known. Thus, in a situation in which there was no physical contact but the identity of the driver was unknown,\textsuperscript{89} the court said that:

\textquote{(The Company) ... having enlarged the definition of uninsured motorist the company had the legal right to limit the enlargement to cases in which there was physical contact. In other words what the policy gives, the policy may take away, but what the statute gives the policy may not take away.}\textsuperscript{90}

Therefore, in cases where there is direct contact or indirect contact, i.e., when the hit-and-run driver strikes some object which in turn strikes the claimant, recovery will be allowed. But what about the situation in which the injured driver through his skill in operating a motor vehicle avoids a collision with a hit-and-run driver, and in so doing is injured. This is definitely a case where there may be some fraudulent claims, but it would appear justifiable to allow recovery when there is sufficient corroboration from impartial witnesses.\textsuperscript{91} It should be noted that the State of Virginia does not require any physical contact nor does it require corroboration of the claimant’s testimony.\textsuperscript{92}

\textbf{The Identity Problem}

The second requirement of the hit-and-run provison is that the identity of the operator or owner of such a highway vehicle be unascertainable. The identity question has not been given as strict an interpretation as the physical contact requirement. For example, in\textit{ Mangus v. Doe},\textsuperscript{93} the insured was hit in the rear by a vehicle operated by an unknown. The insured could have ascertained the identity of the driver but failed to do so because he did not think he was injured. Four months later, he learned that he had a ruptured disc and then filed a report with the Division of Motor Vehicles. The trial court dismissed

\textsuperscript{89} Raspall v. Beneficial Fire & Cas. Ins. Co., 226 So. 2d 465 (Fla. 1969). It is possible in Florida to collect under both situations of hit and run, i.e., if there is not any physical contact but the driver is known and if there is physical contact but the driver is unknown. \textit{See also}, Progressive Mut. Ins. Co. v. Brown, 229 So. 2d 645 (Fla. 1969).

\textsuperscript{90} Id. at 467.

\textsuperscript{91} Esparza v. State Farm Mut. Auto. Ins. Co., 257 Cal. App. 2d 496, 65 Cal. Rptr. 245 (1968). The court held that a claimant was entitled to arbitration in an instance where it appeared from the pleadings that there was no physical contact. See Chadwick and Peche, \textit{California’s Uninsured Motorist Statute Scope and Problems}, 13 Hasting\textsc{S}’s L. J. 194, 198 (1961) and Aksen, \textit{Arbitration of Uninsured Motorist Endorsement Claims}, 24 Ohio St. L. J. 559, 602 (1963).


\textquote{(T)he uninsured motorist statute is silent on the requirement of contact between the “John Doe automobile” and the “insured automobile. . . .” Here again this is not a suit against the insurance company, which is not a defendant, in this proceeding, to recover on the endorsement. The right of the plaintiff to bring this action to establish legal liability on the uninsured motorist and to recover damages is not given by the endorsement but by the statute. . . . 154 S.E.2d at 165.}

\textsuperscript{93} 203 Va. 518, 125 S.E.2d 169 (1962).
the action because the tortfeasor was not an unknown within the meaning of the statutory definition. The Virginia Supreme Court of Appeals reversed. The court refused to interpret the statute as requiring due diligence to ascertain the identity of the offending driver, especially when it appeared that no injury had occurred. The court, commenting on the possibility of fraudulent claims, said that:

. . . . (P)ersons who have valid causes of action should not be denied the right to recover because of the possibility of the presentation of fraudulent claims by others. If fraudulent actions do arise they may be ferreted out in the same manner in which courts and juries handle such situations in other cases.94

In a New York case,95 with facts similar to those in Mangus, except that the accident was reported within twenty-four hours, recovery was allowed. The court felt that the reporting of the accident within twenty-four hours minimized the possibility of fraud. In another case96 a driver struck an infant-plaintiff. The driver gave the infant's mother his name, address, and telephone number, but these were later found to be false. The court held that all the requirements for a hit-and-run vehicle had been met. The fact that the infant's mother did not take sufficient precautions in obtaining the identity of the driver was held not to bar the injured infant from recovery.97

*Walsh v. State Farm Auto Mut. Ins. Co.*,98 presents another situation where the insured was unable to identify the driver. In *Walsh* identity could not be ascertained because of the irate and provocative behavior of the driver. The insured, a woman, was afraid to get out of her automobile and confront the driver. The court held that the definition in the policy was not limited to the driver who flees the scene of the accident but also to those situations in which the insured might reasonably fear for her own safety.

The burden of proving inability to identify the driver is always on the party seeking to recover. Not only must the driver's identity be unascertainable but also that of the owner. If the owner is identified and the car was being driven without his permission, there would be no coverage under the hit-and-run provision of the uninsured motorist endorsement. However, recovery would be allowed under the clause ".... no liability insurance. ... applicable at the time of the accident."

From the cases discussed it can readily be seen that the courts

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94 125 S.E.2d at 168.
97 See also McKay v. MVAIC, 56 Misc. 2d 777, 290 N.Y.S.2d 234 (1968); Petition of Casanova, 36 Misc. 2d 489, 232 N.Y.S.2d 713 (1962). In both instances the inadvertance of the police officer in obtaining the identity of the driver was sufficient to make the driver a hit-and-run driver under the statutes.
COMMENTS

have broadened the definition of a hit-and-run driver as commonly understood by the layman. Even though the driver does not flee the scene of the accident he may still be determined by the courts to be a hit-and-run driver, if his identity is unascertainable for some other justifiable reason. In cases in which the injuries do not manifest themselves until later there is a possibility of fraudulent claims but, as the Virginia court said in *Mangus*, the courts and juries may be able to ferret out the fraudulent claims just as they do in other cases.99

The Notice Requirement

The notice requirement has two elements. The first is that the accident shall be reported within twenty-four hours to the police, peace officer or judicial officer or to the Commissioner of Motor Vehicles. Second, the company shall receive notice of the accident within thirty days. Both of these elements were inserted so as to prevent fraudulent claims, and generally courts have upheld these provisions for that reason. The requirement of notice within thirty days to the insurance company is necessary to give the insurer the opportunity to investigate the accident and determine the validity of the claim.

The New York courts represent the strict application of these conditions precedent to recovery. In *Bonavisa v. MVAIC*100 the insured failed to report the accident for three days and it was held that he had not met the necessary prerequisites to recovery. The court said:

It is a common and usual course of conduct to report to the police station incidents of the character which would give rise to a cause of action under the provisions of this statutory section. Almost invariably a crime is involved, and a crime which outrages at least the person injured. Also, it is universally appreciated that, failing a prompt report, apprehension or identification of the malefactor is difficult to the point of virtual impossibility. . . . (A) statute such as this, providing for recovery against a defendant who has no means of contesting facts, should provide reasonable precautions against fraud. To prevent an application of fraudulent character, it is reasonable to insist that the party should give a good and solid explanation of why he did not do what people in the same situation commonly do.101

The New York courts have also held that failure to notify insurer of the accident for four months constituted grounds for denying coverage under the uninsured motorist provision, notwithstanding the fact that the claimant was in the hospital and under the impression that an attorney was working on the case.102 In that case the fact that the insurer was on notice of the accident because another claimant had filed a claim was held not to make any difference.

99 *Supra* note 94.


101 Id. at 964, 198 N.Y.S.2d at 833-34.

The rationale for the decisions in New York may be the fact that the time limitations and other conditions precedent are statutorily delineated. However, the use of a statutory rule may also work to the detriment of the insurer. In *Nationwide Mut. Ins. Co. v. Sours* the statute did not provide for the thirty-day notice requirement to the insurer. The court held that since it was not required by statute the policy could not require it and therefore such a provision was invalid. Recovery may also be allowed unless the insurer can show it was prejudiced because of the non-compliance with the statute.

In states that do not have statutes delineating notice requirements, the policy becomes the determinative factor. When the policy is the main consideration the insurer must always contend with the possibility that the court will find an ambiguity in the policy. If the court finds an ambiguity, it will apply a rule of construction most favorable to the insured.

Leslie J. Mlakar

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104 205 Va. 602, 139 S.E.2d 51 (1964).
106 See also, Hanover v. Carroll, 50 Cal. Rptr. 704 (1966), where the insured was entitled to coverage despite the failure to file within 30 days but did report the accident within twenty-four hours, and the insured failed to show prejudice. Accord: Utica Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co., 280 F.2d 469 (4th Cir. 1960).
## APPENDIX

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a. Insured may purchase Uninsured Motorist limits up to the limits of bodily injury coverage afforded by the policy.

b. The insurer must agree to forgo any rights to execute upon the property of any party who is the insured of the insolvent insurer, provided that such party shall assign all rights against such insolvent insurer as an insured under a liability policy.

c. In the event of a payment by the uninsured motorist insurer because of the insolvency of the tortfeasor insurer, the uninsured motorists insurer's right to recovery or reimbursement shall not include any rights against the tortfeasor but it shall proceed directly against the insolvent insurer or its receiver.

d. In the event of a payment by the Uninsured Motorist Insurer because of insolvency of the tortfeasor's insurer the uninsured motorist insurer is not entitled to any right of recovery against such tortfeasor in excess of the proceeds recovered from the assets of the insolvent insurer.

e. Larger amounts may be offered and purchased if desired.

f. Insured may purchase additional uninsured motorist coverage up to the limits of liability coverage afforded under his policy.