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THE EXCLUSIONS SECTION OF THE UNINSURED MOTORIST ENDORSEMENT OF THE AUTOMOBILE INSURANCE POLICY

INTRODUCTION

The uninsured motorist endorsement of the automobile insurance policy is a form of first party coverage intended to protect injured insureds whose misfortune at the hands of a motorist without liability insurance would mean that they would otherwise be uncompensated. The exclusions section of the uninsured motorist endorsement of the automobile insurance policy attempts to qualify the general insuring agreement, which, "[Reduced] to simple terms, says that the company agrees to pay the insured all sums which he or his legal representative shall be legally entitled to recover as damages for bodily injury, sickness or disease, caused by accident, arising out of the ownership, maintenance or use of an uninsured automobile."1

The exclusions sections cannot be fully understood without an examination of the other sections of the uninsured motorist endorsement, because there is a considerable amount of overlap. For example, a determination of whether a person qualifies as an insured under the endorsement involves an examination of both the definitions and the exclusions sections of the policy, and in considering the reference to workmen's compensation in the exclusions section, it is necessary to examine the "set-off" provisions in the limits of liability section.

The exclusions section of the standard2 uninsured motorist endorsement is divided into three distinct parts. Generally, one part states that coverage will be excluded if the insured is occupying an owned-but-not-insured automobile at the time of the accident; the second part excludes coverage if the insured settles, without his insurers' consent, with anyone who may be legally liable for his injuries; and the third part provides that any payments under the endorsement are not to inure to the benefit of any workmen's compensation or disability benefits carrier. The separate portions of the exclusions section will be discussed in this order.

1 Schallert, Uninsured Motorist Coverage—Bane or Blessing? 1968 Ins. L.J. 917, 918.
2 Throughout this paper reference will be made to the 1963 Countrywide Uninsured Motorist Endorsement as the "standard endorsement." However, for comparison, reference will also be made to the endorsement as found in the Northwestern National Insurance Group's "Family Combination Automobile Policy" and in the State Farm Mutual Automobile Insurance Company's "Automobile Policy." The exclusions will be discussed in the order in which they are found in the exclusions section of the Northwestern Nat'l Policy. The exclusions as found in all three endorsements are set out in the Appendix to this paper.
COMMENTS

THE FIRST EXCLUSION:

"OCCUPYING AN OWNED-BUT-NOT-INSURED AUTOMOBILE"

The standard wording that has been developed for the "occupying an owned-but-not-insured automobile" exclusion is:

This endorsement does not apply:

(b) to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by a named insured or any relative resident in the same household, or through being struck by such an automobile, but this exclusion does not apply to the principal named insured or his relatives while occupying or if struck by an automobile while owned by an insured named in the schedule or his relatives.3

In other policies4 the exclusion states that the policy does not apply "to bodily injury to an insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative, or through being struck by such an automobile." This variation does not contain the last clause of the exclusion as it appears in the standard endorsement. The variation has been described as an earlier version of the standard endorsement "in which the exclusion was worded so as to apply to all relatives who owned a private passenger automobile."5 The exclusion as found in the State Farm Mutual Automobile Insurance Company’s policy6 uses the term "land motor vehicle" instead of "automobile"; "land motor vehicle" apparently represents a newer variation of the language of the standard endorsement, drafted in response to the difficulty that the word "automobile" has caused.7

The Purpose of the Exclusion

The "occupying an owned-but-not-insured automobile" exclusion ostensibly represents an attempt to refine the definition of who is an "insured" under the uninsured motorist endorsement. The exclusion applies to those described in clause (a)(1) of the definitions section of the standard endorsement:

3 This exclusion does not appear in the 1956 Countrywide Uninsured Motorist Endorsement.
5 A. Widiss, A Guide to Uninsured Motorist Coverage § 2.9, at 28 n.25 (1969) (emphasis added) [hereinafter cited as Widiss].
7 See discussion, page 11, infra. The State Farm language was introduced in late 1966: 
      "[It] is to be noted that a policy issued by a major insurance company in November, 1966, uses the terminology ‘land motor vehicle’ . . . . State Farm Mutual Automobile Policy 9536.6 (Illinois), issued for the policy period commencing November 4, 1966." Notman, A Decennial Study of Uninsured Motorist Endorsements, 43 Notre Dame Law. 5, 14 n.58 (1967), reprinted in 1968 Ins. L.J. 22, n.58.
(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.8

The exclusion, however, "is primarily designed to induce [such insureds] to acquire liability insurance for every automobile owned by the purchaser of the insurance or by family members who reside with the purchaser."9 This is largely so because the insurer wishes to limit somewhat the risk to which it is exposed unless it can be assured of a concomitant premium return.

The court in Smitke v. Travelers Indemnity Co.10 stated that the exclusion is a "legitimate business purpose of an insurance company."11 The exclusion in Smitke was contained in a definition of "relative" applicable to the definition of "persons insured" in the uninsured motorist endorsement.12 When the plaintiff, who himself owned an automobile, was injured through the negligence of an uninsured motorist in whose car he was riding, he sought coverage under the uninsured motorist endorsement of his father's policy with Travelers. Although the plaintiff was a relative residing in his father's household, Travelers denied coverage because of the exclusion, and, against the plaintiff's allegations that the policy provisions were "ambiguous . . . unreasonable and capricious in effect,"13 the court held for the insurer, stating that the definition of "relative" was perfectly clear. The court said that "Although we could agree . . . that ownership of an automobile by a relative may diminish rather than increase the risks covered, decreasing the risk does not appear to be the purpose of the exclusion."14 "[The] purpose of the exclusion is to require any resident relative who owns an automobile to obtain this coverage as a part of a policy of his own."15

Contrary to what the court in Smitke surmised, it may be argued that the insurer does wish to decrease the risks covered through the use of the exclusion, and that there is no real distinction between this desire and the apparent inducement to relatives who own automobiles to obtain their own coverage. Yet Smitke gives effect to what insurers apparently have intended by the exclusion's use, and the case is a good starting

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9 Wimiss § 2.9, at 28.
10 264 Minn. 212, 118 N.W.2d 217 (1962).
11 118 N.W.2d at 219.
12 ""[Relative]" means a relative of the named insured who is a resident of the same household, provided neither he nor his spouse owns a private passenger automobile." 118 N.W.2d at 218.
13 118 N.W.2d at 218.
14 Id. at 219.
15 Id.
point from which to begin an examination of the validity and enforceability of the exclusion.\footnote{For a criticism of the apparent purpose of the exclusion, see generally, WINDS \S 2.9, at 28-29. Four reasons are given why the exclusion is difficult to justify:

(1) to allow the insurer to withhold coverage from an insured for lack of the small additional premium necessary for coverage of a second vehicle seems of "dubious merit";

(2) Because uninsured motorist coverage is theoretically posited on the negligence of the unrelated uninsured motorist, there is little reason for any limitation other than that of fault;

(3) The assumption is "unwarranted" that relatives would buy insurance from the same company;

(4) The exclusion conflicts with a public policy favoring indemnification, unless the victims themselves are at fault. \textit{Id.} \S 2.9, at 29.}

\textit{The Validity and Enforceability of the Exclusion}

\textit{Validity and Enforceability Upheld}

\textit{Smitke v. Travelers Indemnity Co.} is a cogent statement in support of the "occupying an owned-but-not-insured automobile" exclusion. Several other courts have also found the exclusion valid and enforceable. In \textit{Spencer v. Traders \& General Insurance Co.}, the plaintiff was riding in an automobile owned and driven by an uninsured motorist when it collided with another automobile owned and driven by an uninsured motorist. The plaintiff sought coverage under the uninsured motorist endorsement of a policy issued to the sister of the driver with whom she had been riding. The sister's insurer denied coverage, alleging that, because the plaintiff had been occupying an automobile owned but not insured by a relative of the sister, the exclusion should be given effect. The Louisiana Court of Appeals held that the plaintiff was excluded from coverage and rejected the plaintiff's argument that, notwithstanding the exclusion, the automobile in which she had been riding was an "insured automobile" because it was a "temporary substitute." The court said that whether the automobile was a "temporary substitute" or not was immaterial. Noting that the language of the insurance contract was "clear and unambiguous" and that there was no apparent conflict with any public policy, the court went on to say that:

The purpose of the exclusion obviously is to protect the insurer against situations where an insured could pay for one policy providing uninsured motorist coverage on one vehicle, and then claim coverage while occupying any and all other vehicles owned by residents of the same household, on the assertion that any one of these other vehicles was being used as a temporary substitute for the owned automobile. Even when such an assertion is false, it would be difficult, if not impossible, for the insurer to disprove it.\footnote{171 So. 2d 723 (La. App. [3d Cir.] 1965). \textit{See also} the companion case of \textit{Rhodes v. Traders \& Gen. Ins. Co.}, 171 So. 2d 727 (La. App. 1965).}
Three years after *Spencer* was decided, another Louisiana Court of Appeals was faced with the same exclusion. In *Rushing v. Allstate Insurance Co.*, the plaintiffs were injured in an accident with an uninsured motorist while riding in a Ford truck owned and operated by Rushing, who was also a plaintiff. Rushing also owned a Chevrolet insured by Allstate with uninsured motorist protection, but the Ford was uninsured. The plaintiffs claimed coverage under Allstate’s policy on the Chevrolet, but Allstate invoked the “occupying an owned-but-not-insured automobile” exclusion. While the plaintiffs argued that the exclusion contravened the Louisiana statute requiring uninsured motorist coverage, the court held that it saw “[Nothing] in the statute which requires an insurer to extend uninsured motorist protection under one policy to one who has elected not to insure another vehicle owned by him . . . .”

In *United States Fidelity & Guaranty Co. v. Webb,* the language of the exclusion was different from that in *Spencer* and *Rushing* and was phrased in exactly the same terms as the standard endorsement. It thus contained an “exception” to the exclusion by providing for a schedule in which an insured could be listed—presumably for an additional premium. The exclusion then would not apply if the “principal named insured” or a relative was injured while occupying, or was struck by, an automobile owned by the insured named in the schedule.

Webb owned two automobiles, but only one of them was insured with the United States Fidelity & Guaranty Co. When he was involved in an accident with an uninsured motorist while driving his own uninsured automobile, the insurer was able to invoke the exclusion because the schedule had been left blank. Webb thus did not fall within the exception to the exclusion. The court held that the purpose of the exception was “[To] provide additional uninsured automobile coverage to Webb and his relatives . . . . Had Webb desired to do so, he could have secured this additional coverage for himself and his relatives on his own uninsured vehicle . . . .”

*Validity and Enforceability Denied*

Less than two years after its decision in *Webb v. United States Fidelity & Guaranty Co.*, the Florida First District Court of Appeals again had before it a case in which the first exclusion was at issue. In that case, *Travelers Indemnity Co. v. Powell,* the court held that the exclusion was void, but it was able to do so largely because the exclusion did not contain the “exception” found in *Webb* and in

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21. 216 So. 2d at 876.
22. 191 So. 2d 869 (Fla. App. [1st Dist.] 1966).
23. Id. at 870.
24. 206 So. 2d 244 (Fla. App. [1st Dist.] 1968).
Mr. and Mrs. Powell each owned an automobile, insured by separate insurers, and each of their automobile insurance policies provided uninsured motorist coverage. They were injured in a collision with an uninsured motorist while riding in Mr. Powell's car. Mr. Powell's insurer paid him the limits of his uninsured motorist coverage, but when the Powells also made claim for additional amounts under Mrs. Powell's endorsement with Travelers, the insurer attempted to invoke the exclusion and deny coverage, arguing that Mr. Powell's automobile was an "other than an insured automobile."

The court rejected Travelers' argument, agreeing with the Powells that, "[I]t is not the intent of the statute to limit coverage to an insured by specifying his location or the particular vehicle he is occupying at the time of injury." The court went on to say, "[T]here is no difference in [this'] exclusion clause . . . and 'set-off' provisions or 'other insurance' provisions [declared invalid in Sellers v. United States Fidelity & Guaranty Co., 185 So 2d 689 (Fla 1966)]. Both are more restrictive than the terms of the statute. If one is void, so is the other." But Travelers had argued that the Webb decision was controlling and the court was forced to reconsider what it has said in that case. Noting that the Webb "exception" was not present in Mrs. Powell's policy, the court called its language in Webb "unfortunate" in light of the facts in Powell, but said:

However, we adhere to the Webb decision, it being our view, at that time and today, that it was not the intent of Section 627.0851, Florida Statutes, to allow a member of a family to purchase one liability policy and claim total coverage thereunder for the entire family while vastly increasing the risk to his insurer . . . Therefore, the Webb decision is not controlling under the facts of the case sub judice.

It is difficult to see how the risk to the insurer is less under the facts in Powell than under those in Webb. The cases are factually distinguishable, but if the court's concern in Powell is with coverage more restrictive than that allowed by statute, such a possibility is no less remote under Webb when an insured occupies an uninsured automobile owned by him. Furthermore, it has been pointed out that the Powells were better off to have collided with an uninsured motorist, where they were able to recover under both their policies, than with a

25 Cf. Northwestern Nat'l Ins. Co. Policy, Exclusion (a), which does not contain the Webb and the standard endorsement "exception".
26 FLA. STAT. ANN. § 627.0851 (1968).
27 206 So. 2d at 246.
28 Id. at 247.
29 Id.
motorist insured for only the statutory limits. If the statutory limits on bodily injury are the same as the limits under the uninsured motorist endorsement, the Powells theoretically could have collected twice as much by colliding with an uninsured motorist. In addition, in Florida it would seem that the insured who owns two or more automobiles can get higher uninsured motorist coverage limits by insuring each automobile with a different insurer.\textsuperscript{31}

Much the same result was reached in the California case of \textit{Lopez v. State Farm Fire & Casualty Co.}\textsuperscript{32} as was reached in \textit{Powell}. In \textit{Lopez}, a widow and her children sought a declaration that they were entitled to recover, under the uninsured motorist endorsement of a policy issued to one of the children, for the wrongful death of their husband and father who had been killed by an automobile driven by an uninsured motorist. The court affirmed a lower court finding that the decedent was an insured under his daughter's policy, in spite of the fact that he also owned an uninsured automobile. The exclusion was denied effect because, as expressed in California's Insurance Code,\textsuperscript{33} the state's policy requires uninsured motorist coverage. While such coverage could be omitted from a policy upon written agreement of the insured and the insurer, "[The] mere acceptance of a liability policy with terms more restrictive than the statute is not to be deemed a waiver of the statutory coverage."\textsuperscript{34} The rationale of \textit{Smitke v. Travelers Indemnity Co.} was rejected because "No Minnesota statute required uninsured motorist coverage."\textsuperscript{35}

A later California case was couched in much the same terms as \textit{Lopez}. \textit{Valdez v. Federal Mutual Insurance Co.},\textsuperscript{36} while involving a "named driver exclusion," held than an express, not implied, waiver of uninsured motorist coverage is required. The court was careful to point out that while the California statute, as amended in 1961, allowed deletion of uninsured motorist coverage by the insured, any waiver must

\textsuperscript{31} \textit{Id.} at 5867.
\textsuperscript{32} 250 Cal. App. 2d, 58 Cal. Rptr. 243 (1967).
\textsuperscript{33} \textit{CAL. INS. CODE} § 11580.2 (1969).
\textsuperscript{34} 58 Cal. Rptr. at 245.
\textsuperscript{35} \textit{Id.} at 245.
\textsuperscript{36} 77 Cal. Rptr. 411 (Cal. App. 1969). As noted in the text, \textit{Valdez} involved a "named driver" exclusion in which the policy stated that, "[Such] insurance as is afforded by this policy does not apply with respect to any claim arising from accidents which occur while any automobile is being operated by: [the named driver]." \textit{Id.} at 412. The court partly relied on Hendricks v. Meritplan Ins. Co., 263 Cal. App. 2d 133, Cal. Rptr. 682 (1962), which concerned a "25-year-old" exclusion. See also Southeast Title & Ins. Co. of America v. Devine, 211 So. 2d 587 (Fla. App. 1968) ("25-year-old" exclusion applicable to persons not members of insured's family held contrary to public policy and void); Butts v. State Farm Mut. Auto. Ins. Co., 207 So. 2d 73 (Fla. App. 1968), (exclusion purporting to relieve insurer of liability to insured's minor son held invalid as more restrictive than the terms of Florida's uninsured motorist statute; the court relied heavily on Travelers Indem. Co. v. Powell, 206 So. 2d 244 (Fla. App. 1966) .
specifically refer to such coverage. Furthermore, partial exclusions "present a serious conflict between the insurance required by the statute and the insurance offered by the insurer [and] invites [sic] an interpretation that the endorsement was not intended to exclude the named relative for the uninsured motorist coverage." While "named driver" and "25-year-old" exclusions form part of what have been called "endorsements with less comprehensive coverage," and are not exclusions that properly fall within the exclusions section of the automobile liability policy, *Valdez* indicates the aversion some courts feel toward any restrictions on coverage, especially when statutory mandates are present.

The language of the exclusion was not set out in *Allstate Insurance Co. v. Meeks*, but when Meeks collided with an uninsured motorist while driving his own uninsured Chevrolet, he sought coverage under the uninsured motorist endorsement of his policy on his Ford. Allstate resisted his claim, contending that the policy issued to Meeks on the Ford did not extend to him while he was operating the "other" automobile. The court allowed recovery, looking to the language of Virginia's uninsured motorist statute, and stated that the statute did not restrict the insured's coverage to the vehicle named in the policy. "On the contrary, the coverage extends to him while he is 'in a motor vehicle,' that is, in any motor vehicle, 'or otherwise.'"

*National Service Fire Insurance Co. v. Mikell* represents a somewhat novel attempt by an insurer to use the exclusion. An automobile owned by the decedent was not designated as an insured vehicle in an automobile liability policy issued to the plaintiff (decedent's wife) by the defendant-insurer. An uninsured motorist crashed into some gasoline pumps near which the decedent was standing while waiting for gas for his car; the resulting explosion caused a fire which killed the decedent, and his wife attempted to recover under the uninsured motorist provision of her policy. While the terms of the exclusion were not specified, the insurer argued that the accident arose from the ownership, maintenance, or use of a non-designated vehicle. The court held for the plaintiff, stating that it was "unpersuaded" that the "accident . . . arose from the operation of a non-designated automobile owned by a member of [plaintiff's] household . . . ."
Motorcycles

Cases involving motorcycles and the "occupying an owned-but-not-insured automobile" exclusion are relatively numerous when the total number of cases construing the exclusion is considered. The exclusion states that bodily injury coverage to a named insured while occupying an automobile (other than an insured automobile) owned by the named insured or a relative is excluded. Thus, if the named insured is riding on an owned-but-not-insured motorcycle at the time of his accident with an uninsured motorist, and if the insurer can establish that the motorcycle is an "automobile," coverage is precluded.

In Westerhausen v. Allied Mutual Insurance Co., the decedent was killed when he collided with an uninsured motorist while operating his own uninsured motorcycle. His widow made a claim under the uninsured motorist endorsement of an automobile insurance policy issued to her husband on their family car. The insurer attempted to invoke the exclusion by arguing that the decedent's motorcycle was an "automobile" within the meaning of the exclusion, but the court rejected this argument and looked to the insurer's definition of "automobile" elsewhere in the policy. The court noted that the insurer had defined "automobile" for other purposes as a four-wheeled vehicle, and the widow was allowed recovery under the uninsured motorist endorsement.

Westerhausen was followed by the court in Valdes v. Prudence Mutual Casualty Co., where an insured was allowed recovery under the uninsured motorist endorsement of a policy covering two family automobiles owned by him, although he was riding on his uninsured motor scooter at the time that he was involved in an accident with an uninsured motorist. Finding that the facts of the case and the language of the exclusion were nearly identical to those in Westerhausen, the court said, "[The] "automobile" as that term is used in the exclusionary clause . . . does not include . . . [the motor scooter] . . . and

44 Wis. § 2.9, at 28 n.24, and § 2.30, at 59, notes that the exclusion is now often phrased in terms other than "automobile," stating that "highway vehicle" is now used often; the State Farm Mut. Auto. Ins. Co. Policy, Exclusion (B), says "land motor vehicle." See also note 7 supra. Thus, it may be expected that the number of cases concerned with whether a motorcycle is an "automobile" will decrease.

45 This comparison of motorcycles and automobiles for purposes of the first exclusion should be distinguished from such a comparison for purposes of defining an uninsured automobile (or uninsured "motor vehicle," or uninsured "highway vehicle"). In the latter comparison, is an uninsured motorcycle an uninsured automobile when it collides with the automobile of an insured, or when it strikes him as he is crossing a street? While these questions are beyond the scope of this article, it is interesting to note the court's varying response to this distinction when confronted with cases concerned with motorcycles and the first exclusion, and when confronted with cases concerned with motorcycles and the definition of uninsured automobile.

46 258 Iowa 969, 140 N.W.2d 719 (1966).

47 207 So. 2d 312 (Fla. App. 1968).
... the exclusionary clause does not . . . relieve [the insurer] of its liability under the policy of insurance.  

But in *Shipley v. American Standard Insurance Co.*, under facts similar to those in the *Westerhausen* and *Valdes* cases, the court gave effect to the exclusion, stating that:

An uninsured motorist endorsement should be interpreted in light of statutory requirements concerning coverage. The statute was designed to protect innocent victims of negligent and financially irresponsible motorists . . . . An overriding public policy of protecting an owner-operator who inexcusably has no applicable bodily injury liability coverage is not presently discernable.

It is interesting to compare the above cases with one not involving the exclusion, but instead construing "uninsured automobile," where it is alleged that such "uninsured automobile" is a motorcycle. This was the situation in *Voris v. Pacific Indemnity Co.* An uninsured motorist endorsement was attached to a policy insuring the plaintiff's automobile 25 days after California passed its uninsured motorist statute, but three months before the statute's effective date. Although the endorsement used the term "automobile," rather than the statutory "motor vehicle," the court had little trouble in determining that, since the insurer must have intended to use the endorsement after the statute became effective, it must have intended that "automobile" would apply to all motor vehicles listed in the statute. Thus, the plaintiff was allowed recovery under her endorsement after being struck by an uninsured motorcyclist. While it is questionable whether the insurer really did intend that "automobile" should cover motorcycles before the statute became effective, *Voris* does indicate that a court may be more willing to find that a motorcycle is an automobile for one purpose than for another.
In spite of this, the same California Court of Appeals did not even reach the question of whether a motorcycle is an automobile when it decided the recent case of Aetna Insurance Co. v. Hurst. The facts in Hurst were similar to those in Westerhausen, Valdes and Shipley. The insured alleged that the first exclusion precluded Hurst, who had collided with an uninsured motorist while riding his own uninsured motorcycle, from recovery under the uninsured motorist endorsement of a policy on his wife's automobile. The court, however, simply held that the exclusion restricted the uninsured motorist coverage required by the California statute:

Section 11580.2 "becomes in effect a part of every policy of insurance to which it is applicable to the same effect as if it was written out in full in the policy itself." It follows that any policy provision which would narrow the coverage mandated by the statute will not be enforced.

In view of our determination that exclusion (a) of plaintiff's insurance policy was in conflict with the statute as applied to Hurst, it becomes unnecessary for us to undertake any interpretation of that clause.

Although ostensibly a case in which the court's only concern might have been whether a motorcycle is an automobile, Hurst instead turned to those cases (e.g., Allstate Insurance Co. v. Meeks) decided in states whose statutory language was similar to California's and held the exclusion invalid at the outset. A similar result is conceivable in any state (like Virginia) in which the first exclusion is viewed as in conflict with statutory uninsured motorist language.

The Second Exclusion:

"No Settlement Without Consent"

The standard wording of the "no settlement without consent" exclusion is:

This endorsement does not apply:

(a) to bodily injury to an insured with respect to which such insured, his legal representative or any person entitled to payment under this endorsement shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefore.

55 Id. at 157-58.
56 207 Va. 897, 153 S.E.2d 222 (1967).
57 See also Northwestern Nat'l Ins. Co. Policy, Exclusion (b); State Farm Mut. Auto. Ins. Co. Policy, Exclusion (a). The wording of the exclusion in the Northwestern National Policy is the same as in the standard endorsement; the wording of the exclusion in the State Farm Policy differs only in its addition of "or care or loss of services recoverable by such an insured" following the opening "to bodily injury to an insured."
COMMENTS

This language is comparatively new, for prior to 1963 this exclusion as found in the standard endorsement also contained a prohibition of "prosecution to judgment of any action against any person or organization who may be legally liable therefor." This pre-1963 language, taken alone, was generally called a "permission to sue" (or "no suit") clause, and, in spite of the revision of the 1956 standard endorsement seven years ago, it continues to have considerable vitality. As part of the 1963 revision, the "prosecution to judgment" prohibition (i.e., the "permission to sue" clause) was removed from the exclusions section, leaving only the prohibition of settlement without consent exclusion. "[The prosecution to judgment prohibition] is now treated in a different manner and appears earlier in the endorsement, immediately following the basic agreement. Such prosecution is no longer treated as an event that will defeat coverage. Rather it is now provided that "no such judgment shall be conclusive of the issues of liability or damages as between the insured and the company."  

As presently constituted, this new provision can be called a "consent to be bound" clause to distinguish it from the older wording in the exclusions section of the "permission to sue" clause. While a considerable number of cases have already construed the new "consent to be bound" provision, they will not be discussed here because they are outside the rather arbitrary limits set by the provisions of the exclusions section.

However, some discussion of the original "permission to sue" clause is necessary for a better understanding of the present "no settlement without consent" exclusion for three reasons: (1) as already noted, the "permission to sue" (or "prosecution to judgment" prohibition) language is still found in the exclusions sections of some policies, (2) some cases begun before the 1963 revision of the standard endorse-
ment are still being litigated, and (3) many of the reasons for upholding or denying the validity or enforceability of the "permission to sue" clause have vitality when the newer, "no settlement without consent" exclusion is considered. In addition, it must be noted that, while the pre-1963 standard endorsement contained the "permission to sue" clause in the exclusions section, there was at the same time a prohibition of settlement—a prohibition now phrased in terms of the "no settlement without consent" provision in the second exclusion.

The Pre-1963 "Permission to Sue" Clause

**BACKGROUND**

Two reasons are generally given for the use of a clause providing for the exclusion of uninsured motorist coverage if an insured prosecutes to judgment any action against anyone who may be legally liable to him for bodily injury: (1) to protect the insurer's subrogation rights against the uninsured motorist (for which provision is made in the "Trust Agreement" section of the endorsement) and (2) to assure that no judgment or settlement will be obtained in a situation in which the insurers' rights are inadequately protected, that is, "[To] prevent the insured from making a nominal settlement (or covenant) with a joint tortfeasor and then claiming substantial damages from his own carrier." These reasons have often formed the basis of those decisions holding the "permission to sue" clause enforceable. However, as originally envisioned, the "permission to sue" clause was also designed to avoid or limit an insurer's conflict of interest. "The theory was that the insurer could invoke this clause to preclude any action by the insured against the uninsured motorist until after the insurance company's liability under the uninsured motorist endorsement was determined—and thereby avoid the conflict of interest which arises when both sides have claims pending at the same time." 65

**Validity and Enforceability Upheld**

**Lack of Ambiguity**

Some cases simply have held that the language of the "permission to sue" clause is "specific, clear and unambiguous," requiring "no construction or interpretation by [the] court," and that it conflicts with no statutory, or public, policy. In Oren v. General Accident Fire & Life Assurance Corp. a husband and wife died from injuries suffered in an accident with an uninsured motorist. The administratrix of their estates brought suit without the consent of the decedents' insurer and

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65 Widiss § 7.4, at 257-58.
67 Id.
recovered judgments against the uninsured motorist. She then demanded that the insurer arbitrate under the uninsured motorist endorsement of its policy. In a separate action the insurer invoked the "permission to sue" clause and alleged that the administratrix had violated the policy's terms. The court agreed with the insurer, holding that the exclusion's language was "plain, unambiguous, and specific." There were no allegations that the insurer refused its written consent to the suit or that any of its conduct would result in waiver or estoppel.

Oren was cited and followed in both Phoenix Insurance Co. v. Bowen, in which the insured settled with an uninsured motorist for "$1.00 and other valuable consideration," and in Aetna Insurance Co. v. Jordan, in which the court held that the trial court had erred in finding that the "permission to sue" clause was void as a matter of public policy.

But in Bass v. Aetna Casualty & Surety Co., a case decided by another Florida court, the issue presented was whether the "permission to sue" clause could exclude coverage if, at the time of the insured's suit, the insured did not know that the tortfeasor was in fact uninsured. The court stated that, "Insofar as [Oren, Phoenix and Jordan] have held exclusion clauses to be valid, we concur. But insofar as those decisions have left unanswered the issue of the effect of an exclusion clause where no prejudice has been shown to the insurer, and where circumstances indicate no violation of good faith by the insured, we must look further." The court went on to say that while prejudice to the insurer is usually presumed, as in "lack of notice" cases, if in "consent" cases like Bass the insured can carry the burden of showing no prejudice to the insurer, coverage will not be denied.

In Travelers Indemnity Co. v. Kovalski, the insured prosecuted his claim against an uninsured motorist to judgment without his insurer's consent, and then demanded arbitration. In a declaratory judgment action, the insurer alleged that the breach of the "permission to

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68 Id.
69 178 So. 2d 751 (Fla. App. [3d Dist.] 1965).
70 189 So. 2d 408 (Fla. App. [1st Dist.] 1966).
71 199 So. 2d 790 (Fla. App. [4th Dist.] 1967), cert. dismissed, 206 So. 2d 212 (Fla. 1968).
72 Id. at 792.
73 "[The] Florida position on lack of notice cases is that prejudice to the insurer is presumed, with the burden upon the one seeking to impose liability to show that no prejudice did result." Id. at 793.
74 See also McInnis v. State Farm Mut. Auto Ins. Co., 208 So. 2d 481 (Fla. App. 1968). Insureds settled with the insurer of the employer of the employee with whom they had collided, even though the employee was uninsured and was driving the truck without his employer's consent; they then sought their own insurer's consent to sue the employee. In a declaratory judgment action by their insurer, held, the insureds had breached the "permission to sue" exclusion. "Such a breach will be presumed to have prejudiced the insurer, and in the absence of an allegation by [the insureds] that no prejudice has in fact resulted, [they] may not recover." Id. at 482.
The "permission to sue" clause precluded coverage for the insured. The court, admitting that insurance contracts are to be liberally construed in favor of insureds and noting California's statute requiring uninsured motorist coverage (although the statute allowed a "permission to sue" clause with the same language found in the then standard endorsement), said, "[Language] used in an insurance contract must be given its plain and ordinary meaning, and when it is unambiguous it must be given that effect." Thus, like the Florida cases discussed above, the court in Kowalski did not find it necessary to go beyond the language of the policy to give effect to the "permission to sue" clause.

In Portillo v. Farmers Insurance Exchange, the "permission to sue" clause was again held to be enforceable. The plaintiffs—a widow and her children—sued two tortfeasors, only one of whom was insured, and obtained a judgment for the wrongful death of their husband and father in the amount of $65,000. They then filed suit against the insured motorist's carrier and settled with it for $23,000 without their own insurer's consent (although they did have their insurer's consent to exhaust their right against the two tortfeasors). The plaintiffs subsequently sued their own insurance carrier under the uninsured motorist endorsement for the $42,000 balance. The court found that "The provisions of the policy are explicit," and "'[there] is no room for construction . . . .'" and held that the failure of the insureds to get the insurer's written consent to the settlement was a failure to comply with the contract's terms. The court rejected without comment the plaintiff's argument that the exclusion was inapplicable because the settlement was not made with one who "may be" liable, but with one whose liability had already been fixed by judgment.

Both Kowalski and Portillo were later distinguished in Calhoun v. State Farm Mutual Automobile Insurance Co., on the basis that the insurer's denial of coverage in those cases was not made until after the insured's breach of the insurance contract. The insurer's denial of coverage in Calhoun took place five months before its insured's settlement with an uninsured motorist and was held to preclude the insurers' invocation of the exclusion. It must be noted, however, that the court found that the insurer had rather arbitrarily and "erroneously and wrongfully" denied its insured's claim.

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76 43 Cal. Rptr. at 845.
77 238 Cal. App. 2d 58, 47 Cal. Rptr. 450 (1965).
78 The "uninsured" motorist was a serviceman who had an "on base" liability policy that covered his automobile only while it was on a military reservation.
79 47 Cal. Rptr. at 452.
80 Id. at 451. See also Donaldson, Uninsured Motorist Coverage, 36 INS. COUNSEL J. 397, 416 (1969).
82 62 Cal. Rptr. at 180.
Insurer's Conduct

Some cases, while agreeing with the general validity of the "permission to sue" clause, have held that the insurer's conduct in a particular instance may bar it from reliance on the exclusion. As already noted, this was the result in Calhoun v. State Farm Mutual Automobile Insurance Co. Furthermore, an insured may be allowed to show that the insurer was unreasonable or arbitrary in withholding its consent to suit (or settlement), thus rendering the exclusion invalid and unenforceable.\(^8\)

In Childs v. Allstate Insurance Co.,\(^4\) the insured, Childs, collided with an uninsured motorist. Childs' insurer, Allstate, from whom he had obtained a policy with an uninsured motorist endorsement, investigated and decided that the accident was Childs' fault. Allstate then paid the property damage claim of the motorist with whom Childs had collided and refused to pay Childs' claim against it under the uninsured motorist endorsement. Childs then prosecuted to judgment an action against the uninsured motorist without Allstate's consent and brought action against Allstate for the amount of the judgment. Because Allstate had "determined independently for itself without arbitral or other apparent aid" that Childs was responsible for the accident, the court refused to give the "permission to sue" clause effect, holding that the insurer was "simply not in a position to invoke this provision of the policy."\(^5\) But the court chose not to "consider [the] efficacy and validity [of the clause] under other circumstances,"\(^6\) preferring to confine itself to the facts of the case under consideration.

In Levy v. American Automobile Insurance Co.\(^7\) the insurer refused to give its consent to a suit against an uninsured motorist after a long series of negotiations with its insureds had produced no results. Even though the insureds refused to demand arbitration, their later judgment against the uninsured motorist was held not to bar recovery against the insurer under the uninsured motorist endorsement. To give effect to the exclusion, the court held, would result in effectively forcing the insureds to arbitrate. "There was an implied promise on the part

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\(^8\) As to withholding consent to settlement, see generally Widiss, Perspectives on Uninsured Motorist Coverage, 62 Nw. U. L. Rev. 497, 505 (1967); see also Portillo v. Farmers Ins. Exch., 238 Cal. App. 2d 58, 47 Cal. Rptr. 450, 453 (1965).


\(^5\) 117 S.E.2d at 871.

\(^6\) Id. at 871. See also Shibley v. Travelers Indem. Co., 15 App. Div. 2d 696, 223 N.Y.S.2d 841 (1962), where the court held a question of fact was presented whether an insurer had waived its ability to rely on the "permission to sue" clause by defending its named insured "in the very trial to which the provision would seem to require written consent." 223 N.Y.S.2d at 842. The action had been brought by a passenger in the insured's automobile who had been injured in a collision with an uninsured motorist.

\(^7\) 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961).
of the Insurance Company that it would not unreasonably or arbitrarily withhold its written consent."

A similar result was reached in *Andeen v. Country Mutual Insurance Co.*, where eleven months of negotiation resulted in an unsatisfactory offer by the insurer. The insured then obtained a much higher judgment against the uninsured motorist and later sought to collect the amount of the judgment from their insurer, who had refused its consent to the suit. The insurer alleged a breach of the "permission to sue" clause, but the court relied on *Levy* and noted that even though mandatory arbitration agreements are now valid under Illinois law, still "[An insurance company] cannot . . . deliberately prevent the performance of a condition precedent to liability and then take advantage of such wrongful conduct to avoid responsibility under the contract."

Much of the impetus for the court's decision in *Andeen* was given by the insurer's almost total lack of action with regard to its insured's claim after the eleven months' negotiation had failed.

Defendant insurance company was kept fully advised throughout the proceeding before us. It received written notice of the filing of the complaint and also specific written notice of the time for the hearing in the proceeding against the uninsured motorist. The company had every opportunity to defend the suit if it desired to do so or to demand arbitration if that is what desired. The company did nothing.

The court did not say whether the insurer's consent to suit was sought or whether, if it was, the insurer was arbitrary in its denial. Thus, unless the insurer's low settlement offer was considered a waiver of its right to rely on the exclusion, the court seems to be looking to the insurers' conduct after the insured's breach of the "permission to sue" clause as a basis for its decision. On this basis, *Levy* is distinguishable, although the court in *Andeen* looked to *Levy* for support of its position than an insurer may be precluded from using the "permission to sue" clause.

In *Bielski v. Wolverine Insurance Co.*, the insurer allegedly refused the insured's repeated requests to arbitrate, and the insured later took a $10,000 default judgment against the uninsured motorist. The

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88 *Id.* at 164, 175 N.E.2d at 611.
90 70 Ill. App. 2d at 363, 217 N.E.2d at 817.
91 *Id.* at 366, 217 N.E.2d at 818.
92 In fairness to the insured, however, it must be pointed out that the uninsured motorist had been intoxicated at the time of the accident and that the statute of limitations on dramshop actions in Illinois is one year. Thus, the insured had less than one month in which to file his action after the insurer had made its settlement offer.
insurer then attempted to invoke the "permission to sue" clause in an action brought by its insured against it to recover on the judgment. The court held that a question of fact was presented as to whether the insurer had waived its rights to arbitration, for it could waive such rights "regardless of what plaintiff [-insured] did or failed to do." Although the insurer had demanded arbitration after the insured began his suit against the uninsured motorist, "If [a] defendant's conduct has already worked a waiver of its rights to arbitration, its subsequent demand [cannot] revive them." Furthermore, if it is shown that the insurer has waived the arbitration provision in the uninsured motorist endorsement, the insurer can no longer rely on the "permission to sue" clause, in spite of the fact that the insured may have prosecuted an action to judgment. The Bielski court stated that it felt that the two provisions are corollaries, "the exclusion clause serving to lend greater force to arbitration requirements," and, if the insurer waives arbitration, "the purpose of the former disappears." Such a statement is appropriate in a state which, like Michigan, upholds the enforceability of arbitration provisions. If the "permission to sue" clause is enforceable and the insurer has not waived its right to demand arbitration, the insurer can withhold its consent to suit, at least until its obligations have been determined by arbitration. But if it waives its right to demand arbitration (i.e., if the arbitration clause is then not enforceable), to still give validity to the "permission to sue" clause would mean that the insured would be unable to proceed against the uninsured motorist unless he was willing to forego any benefits under his own policy.

Riley v. State Farm Mutual Automobile Insurance Co. was another case which, like Bielski, involved both Michigan law and the possible waiver of arbitration. In Riley, the fact that the insurer had decided that an accident involving an uninsured motorist was due to the fault of its own insured, such that it settled with the uninsured motorist, was held not to be "a sufficient basis from which to infer a waiver" of its right to seek arbitration. The insureds had brought an action against the uninsured motorist without their insurer's consent almost two years after the accident, giving their insurer only three days' notice of the action. There was no evidence that they had requested arbitration of the insurer. It was held that the "permission to sue" clause was enforceable because the insureds' action against the uninsured motorist had resulted in a $156,000 judgment. The court said that:

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94 150 N.W.2d at 791.
95 Id. at 791.
96 Id. at 791.
98 420 F.2d 1372 (6th Cir. 1970).
99 Id. at 1377.
[We] find [nothing] illegal in the . . . exclusionary provision of the policy.

Without such a provision the insured could do exactly what he did here, namely, file suit, obtain a default judgment against a person whom the insurer had no right to defend, and claim the judgment as binding on the insurance company on the ground of res judicata.100

In Naparstek v. Citizens Mutual Insurance Co.,101 a passenger obtained a judgment against an uninsured motorist and then attempted to recover the judgment from his host’s uninsured motorist carrier. The plaintiff asserted that the insurer had waived, or was estopped from, reliance on the “permission to sue” clause because of certain “promises, representations, and guarantees,” made by the insurer and upon which the plaintiff had allegedly relied. The plaintiff’s principal allegation seems to have been that the insurer withheld the policy’s terms from him, including the exclusionary clause, until two months after he obtained judgment against the uninsured motorist. The court rejected the plaintiff’s argument, finding that while the insurer did not voluntarily offer to send the plaintiff a copy of the policy, still the plaintiff had made no effort to learn the policy’s terms before he took judgment. “We cannot say that plaintiff has raised the fact issue whether he relied upon any silence or failure of defendant to inform the plaintiff of the exclusionary clauses.”102 Bielski and Andeen were found to be readily distinguishable.

**Subrogation**

As already noted, one reason for the inclusion of the “permission to sue” clause was the protection of the insurer’s right of subrogation against the uninsured motorist. “Any settlement made or judgment secured by the insured, without the consent of the insurer, limits [the right of recovery from the uninsured motorist] and can possibly indirectly increase the risk by limiting the recovery against the uninsured motorist to a sum less than that paid out under the policy.”103

The “permission to sue” clause was held valid and enforceable in Cotton States Mutual Insurance Co. v. Torrance104 largely on that

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100 Id. at 1375, 1376.
102 172 N.W.2d at 211.
103 Cotton States Mut. Ins. Co. v. Torrance, 110 Ga. App. 4, 137, S.E.2d 551 (1964), aff’d 220 Ga. 639, 140 S.E.2d 840 (1965). With § 7.7, at 261, states, however, that the danger that the insurer’s position would be jeopardized if litigation between the insured and the uninsured motorist is held determinative of whether the insured is legally entitled to recover or of the amount of damages could be obviated by the kind of language found in the post-1963 “consent to be found” clause.
basis—that to hold otherwise would severely limit the insurer's rights against the uninsured motorist.\footnote{But see Gulf American Fire & Cas. Co. v. McNeal, 115 Ga. App. 286, 154 S.E.2d 411 (1967), where the "permission to sue" clause was found to be repugnant to the Georgia statute (Ga. Code Ann. § 56-407.1(a) (Supp. 1967)) requiring uninsured motorist protection. Cotton States was distinguished on the basis that the cause of action in that case arose before the statute's effective date. However, McNeal also calls the "permission to sue" clause "a policy provision for forfeiture of the uninsured motorists coverage." 154 S.E.2d at 417.}
The clause, however, was characterized by the court in Cotton States as not properly an exclusion but, instead, "a forfeiture of rights by conduct of the insured after liability might have attached under the terms of the policy."\footnote{137 S.E.2d at 553 (emphasis added). See also Kirouac v. Healey, 104 N.H. 137, 181 A.2d 634 (1962), where the court held that the "permission to sue" clause simply forces the insured claimant to make a choice suing the uninsured motorist and seeking a recovery under the policy. This result was reached in the face of the New Hampshire statute (N.H. Rev. Stat. Ann. § 268:8 (1957)) stipulating that nothing contained in the statute should be construed so as to deprive an insured-claimant "in litigating his claim against the uninsured motorist from a right of trial by jury." Widiss § 7.7, at 261 n.12; Kelly, Kirouac v. Healey: Comments on the Uninsured Motorist Endorsement in New Hampshire, 7 N.H. BAR J. 92 (Jan. 1965).}

In Kisling v. MFA Mutual Insurance Co.,\footnote{399 S.W.2d 245 (Mo. App. 1966).} the plaintiff-insured was involved in an accident with both an insured and an uninsured motorist. Her automobile insurance policy with MFA contained an uninsured motorist endorsement. She settled with the insured motorist, giving a covenant not to sue, but did so without the consent of her insurer. She subsequently sued MFA under the uninsured motorist coverage of her policy. The court called the second exclusion in the exclusions section the "consent exclusion," noting that it was divided into two parts: (1) what the court called the "judgment prohibition" (i.e., the "permission to sue" clause) and (2) the "settlement prohibition." Kisling is a kind of bridge to those cases (to be discussed later), which are only concerned with the post-1963 version of the second exclusion where the only prohibition is one against settlement, the reference to prosecution to judgment having been moved to the "consent to be bound" clause. Three years before Kisling, in State ex rel. State Farm Mutual Automobile Insurance Co. v. Craig,\footnote{364 S.W.2d 343 (Mo. App. 1963).} the same court had held that the "judgment prohibition" portion of the exclusion was void as against public policy. But the insured in Kisling had settled with an insured motorist without her own insurer's consent, and so the court was forced to construe not the "judgment prohibition," but the "settlement prohibition." The court held that the "settlement prohibition" was enforceable:

From a public standpoint, it is particularly desirable and important in states such as Missouri, where uninsured motorist coverage presently is made available on a permissive basis for a
modest premium, that the risk assumed under such coverage, and thus the cost thereof, should not be increased unreasonably and unnecessarily. The settlement prohibition looks toward that end . . . . No consideration of public policy has been advanced, and we know of none, which . . . should or does preclude the parties to an insurance policy from so contracting.109

Thus, while upholding the invalidity of the "judgment prohibition" or "permission to sue" clause of the second exclusion, first propounded in Craig, the court in Kisling upheld the "settlement prohibition" portion—and, in so doing, it looked to the protection of the insurer's interests and, impliedly, to its rights of subrogation.110

Obviously the "permission to sue" and "settlement prohibition" clauses would be valueless in the first instance unless the insurer has a right of subrogation. The insurer's subrogation rights are provided for in the "Trust Agreement" section of the standard endorsement which provides, inter alia, that:

Trust Agreement: In the event of payment to any person under this endorsement:
(a) the company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any person or organization legally responsible for the bodily injury because of which such payment is made;111

The "Trust Agreement" section also provides that the insured will hold in trust for the insurance company all rights of recovery which he has against the tortfeasor. One commentator has stated that this latter provision has at least two purposes: (1) it keeps the insurer out of any case as a real party in interest, and (2) it avoids the rule prohibiting assignment of a personal tort.112

Subrogation for uninsured motorist insurance has been felt to have both distinct advantages and disadvantages. Of the advantages it has been said:

It allows for lower premium rates if the potential subrogation rights are taken into consideration, and it permits the tortfeasor, who is primarily liable, to be held responsible whenever he is not judgment proof. When coupled with the "no settlement without consent" exclusion, the right of subrogation prevents the insured from fixing the ultimate incidence of loss by accidental,

109 399 S.W.2d at 251.
110 But see Gattenby v. Allstate Ins. Co. ______ S.W.2d ______ (Mo. App. 1967), where a "settlement prohibition" was held void as against public policy.
111 See also Northwestern Nat'l Policy, Trust Agreement (a); State Farm Mut. Auto. Ins. Co. Policy, Trust Agreement (a). As to the "Trust Agreement" generally, see Winiss §§ 5.2-5.5, at 162-66.
112 32 Mo. L. Rev. 159, 161 (1967). The same author notes that whether this second purpose is successful depends on whether a distinction should be drawn between assignment and subrogation. Id. at 161.
capricious or collusive means, or from getting double recoveries. It does not give rise to the underlying reasons for holding assignments of personal torts to be void as against public policy. Further, since the trust agreement is a form of conventional or contractual subrogation, to deny it effect could be an infringement of freedom of contract.133

On the other hand, disadvantages of subrogation may include the possibility that if subrogation rights are not included in insurers' rate structures, the insurers will garner a real "bonus" at the expense of the insureds. Furthermore, the subrogation claim may complicate and discourage settlements because of (1) the necessity of consent or, (2) the possibility of multiple subrogation claims where the plaintiff is covered by overlapping policies.

**Strict Construction: "Judgment"**

Some courts have attempted to ameliorate the effect of the "permission to sue" clause by imposing a strict construction on the term "judgment."114 In *Terzian v. California Casualty Indemnity Exchange*,115 a judgment was obtained by an insured without the consent of his insurer after the uninsured motorist had been discharged in bankruptcy. Since the discharge had released the uninsured motorist from liability for the insured's injuries in the insured's suit against him, the uninsured motorist was not "legally liable therefor." Because the judgment had been entered upon a stipulation, the insured was held not to have "prosecuted his claim to judgment" within his policy's exclusion. And, in *Carter v. American Fire & Casualty Co.*,116 the insureds brought action against an uninsured motorist without their insurer's consent and received a summary judgment in their favor on the issue of liability. They then proceeded to a trial on the issue of damages and received jury verdicts. But while the verdicts were recorded, judgments were never entered on them. For this reason, the court held that the insureds had not prosecuted their actions to judgment within the meaning of the "permission to sue" clause. At the same time the court rejected the insurer's argument that, because entry of judgment is only a ministerial function, it is the equivalent of a "prosecution to judgment." The results in both the *Terzian* and *Carter* cases seem consistent with the general rule that insurance contracts are to be liberally interpreted in favor of the insured and coverage. Indeed, the court in *Carter* said, "The provisions of a policy of insurance which tend to limit or avoid liability are to be construed most strictly against the insurer."117

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113 32 Mo. L. Rev. 159, 162-63 (1967).
117 Id. at 464.
The Pre-1963 "Permission to Sue" Clause
Validity and Enforceability Denied

Courts that have refused to uphold the validity and enforceability of the "permission to sue" clause generally have done so for one of three reasons.

Restriction of Insured's Rights
A statute or public policy may prohibit any restriction on the rights of an insured to a court determination of his contractual rights. State ex rel. State Farm Mutual Automobile Insurance Co. v. Craig, in which the court held that the "judgment prohibition" section of the second exclusion was void as against public policy, has already been mentioned in a preceding section. In that case the court, after holding that a mandatory arbitration provision was unenforceable and that the "general rule is that the [insurance] contract cannot oust jurisdiction of the courts as to a determination in respect to liability," went on to add:

The ["consent"] exclusion as a bar to suit must fall along with the arbitration clause. The exclusion would reasonably be applicable in situations where arbitration is required; but, when this is not the case, it would be against public policy to permit a prohibition against resort to the courts for remedy without the consent of the person ultimately liable.

It was the earlier case of Boughton v. Farmers Insurance Exchange that apparently first stated the rule that any restrictions on an insured's ability to enforce his contractual rights are to be disregarded. (In this connection, it should be noted that in both Craig and Boughton arbitration provisions were also held void and unenforceable; this fact forms a second reason for holding "permission to sue" clauses unenforceable and will be taken up in the next section.) In Boughton, the court said that:

In as much as the insurer agreed to pay all sums insured shall be legally entitled to recover from an uninsured motorist and the "no action" provision would restrict insured from enforcing these rights, we hold such provision to be void.

Arbitration Agreements are Unenforceable
Because a mandatory arbitration provision has been held unenforceable in some jurisdictions, it has been said that an insurer cannot seek to discourage or penalize the insured from seeking recovery directly against the uninsured motorist. In the jurisdictions where a mandatory arbitration provision is enforceable, it has been stated that the insurer

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118 364 S.W.2d 343 (Mo. App. 1963).
119 Page 383 supra.
120 364 S.W.2d at 345.
121 Id. at 346.
is in a good position to argue that the "permission to sue" clause should also be deemed enforceable "because the combination of the two clauses allows the company to avoid the conflict of interest problem." The dilemma that an insured may face in a jurisdiction which denies enforceability to mandatory arbitration provisions is illustrated by a statement from Dominici v. State Farm Mutual Automobile Insurance Co.: Without arbitration [in states where arbitration agreements are unenforceable] plaintiffs are left without a remedy to establish the applicability of the uninsured motorist clause and the amount of damages. [The insurer] cannot be allowed to take the premium with one hand while refusing recovery with the other. Such a consideration also influenced the decisions in the Craig and Boughton cases already discussed. Dominici, like Craig and Boughton, was decided in a jurisdiction (Montana) where contracts to arbitrate future disputes are unenforceable. Holding that "[The] question of this type of arbitration is inexorably tied to the ["permission to sue"] clause [and that they] complement one another to the point one cannot exist without the other," the Dominici court said that the "permission to sue" clause "necessarily becomes unreasonable and must fall."

**Insurer Can Participate In Action**

A third reason that can be given for refusing to uphold the validity and enforceability of the "permission to sue" clause is that the insurer can intervene as a third party defendant and participate in litigating both liability and damages, or can enter the case through the plaintiff-insured's use of joinder. The court in State ex rel. State Farm Mutual Automobile Insurance Co. v. Craig in speaking of the provision in the "Conditions" section of the uninsured motorist endorsement, in which the insured is usually required to furnish his insurer with a copy of the summons and complaint in any action he brings against the uninsured motorist, said that:

Of what value and to what purpose is this provision if the insurer is required to sit idly without power or right to intervene to protect its interest in event of default? . . . We think such provision is indicative of the intention that the "accident" insurer should have some right to take some action in a case which determines whether there are facts which make it effectively "bound."

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124 Widiss § 7.6, at 260.
126 390 P.2d at 810.
127 Id. at 809.
130 364 S.W.2d 343 (Mo. App. 1963).
131 Id. at 349.
The Post-1963 "No Settlement Without Consent" Provision

Background

It will be remembered that in 1963 the "permission to sue" clause was removed from the exclusions section of the uninsured motorist endorsement. What was left in the second exclusion was a provision prohibiting settlement without the insurer's written consent with any person or organization who may be legally liable for the insured's bodily injuries. At the same time, the "consent to be bound" language was added immediately following the statement of the basic insuring agreement. "Prosecution, therefore, [does] not act to bar the UM claim, but settlement with any such third party, without the written consent of the insurer, [remains] an exclusion." The number of decided cases construing the new "consent to be bound" clause are beyond the scope of this paper.

Some of the older cases that were decided when the second exclusion contained both "permission to sue" and "no settlement without consent" language did, in fact, involve settlement, e.g. Kisling v. MFA Mutual Insurance Co. The cases that follow involve the post-1963 wording. The cases considering policies whose exclusionary language is phrased in terms of "no settlement without consent" contain much of the same reasoning for granting or denying enforceability at the "permission to sue" cases.

In Grain Dealers Mutual Insurance Co. v. Van Buskirk, the court said that the purpose of the "no settlement without consent" exclusion is "to protect the company from the payment of claims which have not been determined by a court." It held that the agreement to reduce the amount of an ad damnum in an action against an uninsured motorist was not a settlement, agreeing, however, that any settlement would preclude the insureds' recovery. And, Labove v. American Employers Insurance Co., in upholding the exclusion, held the rea-

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132 "[No] statement explaining this modification has been made generally available." Winiss § 7.8, at 262.
134 See O'Flaherty, note 62 supra.
135 299 S.W.2d 245 (Mo. App. 1966). They were included with their "permission to sue" counterparts solely from the standpoint of organization; those cases in the "permission to sue" section were so placed because the language of the exclusion was that of the pre-1963 variety.
137 215 A.2d at 473.
138 189 So. 2d 315 (La. App. 1966). While the language of the exclusion in the policy involved, as quoted by the court, says nothing of "prosecution to judgment," nor is the date of the accident giving rise to the action specified, both the date of the case and the court's statement that Portillo v. Farmers Ins. Exch., 47 Cal. Rptr. 450 (Cal. App. 1965), and Phoenix Ins. Co. v. Bowen, 178 So. 2d 751 (Fla. App. 1965), construed "the exclusionary clause in question" indicates that the exclusion in Labove may have been of the pre-1963 kind.
sons for enforcing the "no settlement without consent" exclusion include: (1) the prevention of settlement with those who "may be" liable before the insurer has had notice of the proposed settlement, (2) the possible desire of the insurer to enter into the negotiations between its insured and the uninsured motorist, and, (3) the possibility that the insurer's subrogation right would be lost by any settlement.\footnote{139}

Validity and Enforceability Upheld or Denied

Like the cases which have upheld the general validity of the "permission to sue" exclusion while also holding that the insurer's conduct may prevent assertion of its insured's breach of the clause, \textit{Volkswagen Insurance Co. v. Taylor}\footnote{140} held that by participating in arbitration proceedings after it knew of its insured's settlement and release, an insurer could not later insist that the "no settlement without consent" exclusion relieved it of liability. The plaintiff had been a passenger in an automobile that first collided with an automobile driven by an uninsured motorist and then was struck by an insured motorist with whom the plaintiff later settled. Because the trial court had credited against the arbitration award for the plaintiff the amount the plaintiff had received in his settlement with the insured motorist, the court said that it was hard to see how the settlement had prejudiced the insurer's rights of subrogation.

In \textit{Mid-Central Mutual Casualty Co. v. Spanjer},\footnote{141} another case in which an insurer attempted to use the "no settlement without consent" exclusion to avoid liability, Mid-Central had issued a policy to Spanjer, whose automobile had been loaned to some friends when they were struck by a hit-and-run motorist. Mid-Central sought a declaration that its policy wasn't in force at the time of the accident. While this action was pending, the driver and passengers settled for $6,000 with another insurer under a policy covering the driver. Then Mid-Central and the defendants—the driver and the passengers—entered into an agreement to arbitrate all issues except the effect of the amount already paid in settlement. The arbitrator made an award to the defendants, whereupon Mid-Central alleged that it was not indebted in any way to the defendants.

The court disagreed with Mid-Central, stating that Mid-Central could not rely on the "no settlement without consent" exclusion:

Paragraph 2(a) of the arbitration agreement provides that one of the issues to be determined by the arbitrators is "whether all of the terms and conditions of the endorsement . . . have been complied with by claimants (defendants) . . . ."

\footnote{139} \textit{Id.} at 318.
\footnote{140} 201 So. 2d 624 (Fla. App. 1967).
\footnote{141} 101 Ill. App. 2d 468, 243 N.E.2d 452 (1968).
The language of the agreement reserving for determination by the court the "effect of previous payments..." does not reserve the issue of consent. In the absence of a specific waiver in the arbitration agreement of the effect of the denial of liability, we hold that plaintiff cannot now rely on the exclusion.\textsuperscript{142}

It will be remembered that in the discussion of the "permission to sue," \textit{Kisling v. MFA Mutual Insurance Co.}\textsuperscript{143} was cited as holding that the "settlement prohibition" portion of the second exclusion was enforceable. But \textit{Kisling} was not the last word on the subject in Missouri. Just a little over a year later, under facts similar to those in \textit{Kisling}, another Missouri court, in \textit{Gattenby v. Allstate Insurance Co.},\textsuperscript{144} held that the "settlement prohibition" was void as against public policy. While arising under the pre-1963 language of the standard endorsement, \textit{Gattenby} distinguished \textit{Kisling} on the somewhat tenuous basis that \textit{Kisling} only had to consider a rather specific attack on the clause and was able to hold it enforceable under the narrow facts presented in that case. But the \textit{Gattenby} court felt that the objections to the "settlement prohibition" made in it were "much broader" and, in holding the exclusion void, based its decision on the proposition that compromises and settlements are favored by the law and that without them court calendars would become hopelessly clogged.

In finding the "no settlement without consent" exclusion void, the court in \textit{Guthrie v. State Farm Mutual Insurance Co.},\textsuperscript{145} applying Virginia law, said that the insurer and insured in an uninsured motorist setting are essentially adversaries, thus largely obviating any need for cooperation, and also said that the statutory prohibition\textsuperscript{146} of any restriction on an insured's right of recovery contained only the exception that the insurer receive service of process when suit is brought against an uninsured motorist.\textsuperscript{147}

Finally, while upholding the validity and enforceability of the exclusion in the normal situation, the court in \textit{Michigan Mutual Liability Co. v. Karsten}\textsuperscript{148} held that the exclusion did not apply under the facts of that case. The insured settled with the insured tortfeasor, but did not settle with the uninsured tortfeasor; the court "limited" the application of the exclusion by saying, "[The] exclusion clause does not prohibit a settlement with a joint tortfeasor liable for injuries arising out of the ownership, maintenance or use of his own insured vehicles."\textsuperscript{149}  

\textsuperscript{142} \textit{Id.} at 474, 243 N.E.2d at 455.
\textsuperscript{143} 399 S.W.2d 245 (Mo. App. [Springfield] 1966).
\textsuperscript{144} \_\_\_\_\_\_ S.W.2d \_\_\_\_\_ (Mo. App. 1967).
\textsuperscript{145} 279 F.Supp. 837 (S.C. 1968).
\textsuperscript{146} VA. \textit{Code ANN.} § 38-1-381 (g) (Supp. 1968).
\textsuperscript{147} 13 Mich. App. 46, 163 N.W.2d 670 (1968).
\textsuperscript{148} 163 N.W.2d at 672.
In reviewing the relatively small number of cases construing the newer "no settlement without consent" exclusion, it can be seen that the courts in many instances have looked for guidance to the older cases that arose under the pre-1963 endorsement. The fact that the number of cases since 1963 is small may indicate that insurers are careful to assert the possibility of exclusion before the insured settles, or the possibility of settlements with uninsured motorists simply may be few in number when the likelihood is considered that many uninsured motorists would have little to contribute to settlement in any event.

**THE THIRD EXCLUSION:**

**WORKMEN'S COMPENSATION**

The standard wording that has been developed for the "workmen's compensation or disability benefits" exclusion is:

*This endorsement does not apply:*

. . . .

(c) so as to inure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any person or organization qualifying as a self-insurer under any workmen's compensation or disability benefits law or any similar law.\(^{149}\)

It has been seen that a principal reason for the insurers' inclusion of both the old "permission to sue" clause and the later "no settlement without consent" exclusion in their policies was a desire to protect their rights of subrogation against the uninsured motorist-tortfeasor. The "workmen's compensation" exclusion attempts to prevent subrogation by a workmen's compensation or disability benefits carrier to an insured's right against the uninsured motorist carrier. "The effect of this exclusion is to bar a workmen's compensation carrier from taking credit against its liability for payments made under the uninsured motorist endorsement."\(^{150}\) Because this statement seems as applicable to the "set-off" provision in the "Limits of Liability" section of the standard endorsement, and seems somewhat in conflict with the statement that precedes it, some distinction should be made between the third exclusion and the "set-off" provision. The "set-off" provision in the "Limits of Liability" section purports to reduce "amounts payable under [the uninsured motorist] indorsement by the amount paid to the insured on account of the same injury under any workmen's compensation clause."\(^{151}\) This "Limits of Liability" clause is a "set-off" or "reduction"

\(^{149}\) The exclusion is found in exactly the same form in both the Northwestern Nat'l and State Farm Mut. Auto. Ins. Co. policies; Northwestern Nat'l Policy, Exclusion (c); State Farm Mut. Auto. Ins. Co. Policy, Exclusion (c). In addition, the same language was used in the 1956 standard endorsement.


\(^{151}\) See cases construing this clause in Annot., 24 A.L.R.3d 1369 (1969).
provision and is intended to prevent double recovery by an injured person eligible to receive workmen's compensation or other disability benefits—a double recovery that would come at the expense of the uninsured motorist insurance carrier. The third "exclusion," on the other hand, is intended to prevent the accrual of benefits to the workmen's compensation or disability benefits carrier—not to the injured person.

Relatively few cases have construed the "workmen's compensation" exclusion. Perhaps the first was *Horne v. Superior Life Insurance Co.*,¹⁵² where the court agreed with the exclusion's apparent premise that the "provision . . . attempts to foreclose the possibility that a workmen's compensation carrier will be allowed to secure subrogation from the uninsured motorist carrier."

It is reasonable to conclude that is was not contemplated by the [Virginia] General Assembly that the employer's right of subrogation under the Workmen's Compensation Act should extend to the employee's rights under the uninsured motorist coverage of a liability.¹⁵⁴

The court also held, however, that the employer's statutory right of subrogation against the negligent third party-tortfeasor (i.e., the uninsured motorist in these cases) is superior to that of the uninsured motorist insurance carrier under the state's uninsured motorist statute. Such a holding appears to be consistent with the general rule that while those who pay workmen's compensation may not recover their losses from the uninsured motorist carrier, no rights of the workmen's compensation carrier are foreclosed as against the third party-tortfeasor, and, in such a case, the workmen's compensation carrier generally has a prior right as against the uninsured motorist carrier.¹⁵⁶

But while *Horne* upheld the exclusion, the two federal courts in Arkansas have each refused to give effect to the provision. In *Jones v. Morrison*¹⁵⁶ the court found that the decision in *Horne*, which held that recovery by the injured insured against the uninsured motorist carrier was not a "recovery against any other party" (i.e., so as to allow the workmen's compensation carrier subrogation rights against an uninsured motorist insurance carrier), was in conflict with Arkansas's workmen's compensation act. The court said that any recovery, of whatever nature, is compensation for injuries, and the act provides reimbursement for the workmen's compensation carrier whenever possible.

¹⁵³ WIDISS § 2.67, at 124.
¹⁵⁴ 123 S.E.2d at 404.
The Jones court added that when there can be no reimbursement, as when an employee is injured by his own acts or by those of his employer, it is simply a risk of business that the workmen’s compensation carrier has agreed to assume. But such is not the case when a negligent third party is present. The act’s purpose is not to provide a double recovery by the employee from both the compensation carrier and the third party-tortfeasors; thus, his recovery from any third party “compensates” him and, having been paid, the compensation carrier is entitled to reimbursement to the extent provided in the state’s workmen’s compensation act.

Jones was further applied in Boehler v. Insurance Company of North America, where an insured who had received both workmen’s compensation and uninsured motorist benefits resisted the compensation carrier’s attempt to seek enforcement of its statutory right of subrogation. The court allowed the attempt, holding that an uninsured motorist carrier “has no legitimate interest in keeping the proceeds of uninsured motorist insurance out of the hands of a workmen’s compensation carrier.”

It seems clear that the Workmen’s Compensation Act expresses a public policy favorable to subrogation, and the provision here in question tends to militate against that policy.

While it has been noted that “some interesting litigation is developing” with regard to the “workmen’s compensation” exclusion, the provision has been a part of the standard endorsement since uninsured motorist coverage was first seriously promulgated in 1956, and the relative scarcity of cases construing the provision indicates, perhaps, that much more litigation is occurring over the “set-off” provision in the “Limits of Liability” section of the endorsement.

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158 Id. at 871.
159 Widiss § 2.67, at 124.
160 See also Booth v. Seaboard Fire & Marine Ins. Co., 285 F. Supp. 920 (Neb. 1968), where the court was presented with a question of whether a Nebraska statute granting subrogation rights to a workmen’s compensation carrier also granted “a compensation carrier subrogation rights against uninsured motorist coverage benefits.” The court held that a compensation carrier is not entitled to reimbursement from uninsured motorist coverage payments, but is only entitled to subrogation against the uninsured motorist.
Appendix
1963 Countrywide Uninsured Motorist Endorsement

In consideration of the payment of the premium for this endorsement and subject to all of the terms of this endorsement, the company agrees with the named insured as follows:

INSURING AGREEMENTS

I. Damages for Bodily Injury Caused by Uninsured Automobile: The company will pay all sums which the insured or his legal representative shall be legally entitled to recover 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, determina-
tion as to whether the insured or such representative is legally en-
titled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured or such representative and the company or, if they fail to agree, by arbitration.

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

II. Definitions:
(a) "insured" means:
(1) the named insured as stated in the policy therein also referred to as the "principal named insured" 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 operating an insured automobile; and
(3) any person, with respect to damages he is entitled to recover because of bodily injury in which this endorsement applies sas-
tained by an insured under (1) or (2) above.

The insurance applies separately with respect to each insured, but the application of the insurance to more than one insured shall not operate to increase the limits of the company's liability.
(b) "insured automobile" means an automobile:
(1) listed in the schedule as an insured automobile to which the bodily injury liability coverage of the policy applies;
(2) while temporarily used as a substitute for an insured automobile as described in subparagraph (1) above, when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;
(3) while being operated by a named insured or by his spouse if a resident of the same household, but the term "insured automobile" shall not include:
(4) an automobile while used as a public or light delivery vehicle;
(5) an automobile while being used without the permission of the owner;
(6) under subparagraphs (2) and (3) above, an automobile owned by the principal named insured or by any named insured designated in the schedule or by any resident of the same household as such insured; or
(7) under subparagraphs (2) and (3) above, an automobile furnished for the regular use of the principal named insured or any resident of the same household.

(c) "uninsured automobile" means:
(1) an automobile with respect to the ownership, maintenance or use of which there is, in at least the amounts specified by the financial responsibility law 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 willing the same denies coverage thereunder; or
(2) a hit and run automobile as defined, but the term "uninsured automobile" shall not include:
(3) an insured automobile;
(4) an automobile which is owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law, motor carrier law or any similar law;
(5) an automobile which is owned by the United States of America, Canada, a state, a political subdivision or any such government or an agency of any of the foregoing;
(6) a land motor vehicle or trailer operated on rails or crawler-tracks or wheeled for use as a residence or premises and not as a vehicle; or
(7) a farm type tractor or equipment designed for use principally off public roads, except where actually upon public roads.

(8) "hit-and-run automobile" means an automobile which causes bodily injury to an insured arising out of physical contact of such auto-
mobile with the insured or with an automobile which the insured is occupying at the time of the accident, provided: (1) there cannot be ascertained the identity of either the operator or owner of such "hit-and-run automobile," (2) the insured or his representative has a duty to report 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 state-
ment under oath that the insured or his legal representative has a cause or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and settling forth the facts in sworn statement, and (3) at the company's request, the insured or his legal representative makes available for inspection the automobile which the insured was occupying at the time of the accident.

(e) "occupying." The word "occupying" means in or upon or entering into or alighting from.
(f) State. The word "state" includes the District of Columbia, a territory or possession of the United States, and a province of Canada.

III. Policy Period, Territory. This endorsement applies only to accidents which occur on and after the effective date hereof, during the policy period and within the United States of America, its territories or pos-
sessions, or Canada.

EXCLUSIONS

This endorsement does not apply:
(a) to bodily injury to an insured with respect to which such insured, his legal representative, or any person entitled to payment under this endorsement shall, without written consent of the company, make any settlement with any person or organization who may be legally liable therefor,
(b) to bodily injury to an insured while occupying an automobile other than an insured automobile owned by a named insured or any rela-
tive resident in the same household, or through being struck by such an automobile, but this exclusion does not apply to the prin-
cipal named insured or his relatives while occupying or if struck by an automobile owned by an insured named in the schedule or his relatives,
(c) to as to insure directly or indirectly to the benefit of any workmen's compensation or disability benefits carrier or any person or organ-
ization qualifying as a self-insurer under any workmen's compensa-
tion or disability benefits law or any similar law.
EXCLUSIONS — SECTION III

THIS INSURANCE DOES NOT APPLY:

(a) TO BODILY INJURY TO AN INSURED, OR CARE OR LOSS OF SERVICES RECOVERABLE BY AN INSURED, WITH RESPECT TO WHICH SUCH INSURED, HIS LEGAL REPRESENTATIVE OR ANY PERSON ENTITLED TO PAYMENT UNDER THIS COVERAGE SHALL, WITHOUT WRITTEN CONSENT OF THE COMPANY, MAKE ANY SETTLEMENT WITH ANY PERSON OR ORGANIZATION WHO MAY BE LEGALLY LIABLE THEREFOR;

(b) TO BODILY INJURY TO AN INSURED WHILE OCCUPYING OR THROUGH BEING STRUCK BY A LAND MOTOR VEHICLE OWNED BY THE NAMED INSURED OR ANY RESIDENT OF THE SAME HOUSEHOLD; IF SUCH VEHICLE IS NOT AN OWNED MOTOR VEHICLE;

(c) SO AS TO INURE DIRECTLY OR INDIRECTLY TO THE BENEFIT OF ANY WORKMEN'S COMPENSATION OR DISABILITY BENEFITS CARRIER OR ANY PERSON OR ORGANIZATION QUALIFYING AS A SELF-INSURER UNDER ANY WORKMEN'S COMPENSATION OR DISABILITY BENEFITS LAW OR ANY SIMILAR LAW.

LIMITS OF LIABILITY

(a) The limit of liability stated in the declarations as applicable to “each person” is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person in any one accident, and subject to the provision, the limit of liability stated in the declarations as applicable to “each accident” is the total limit of the company's liability for all such damages for bodily injury sustained by two or more persons in any one accident.

(b) Any amount payable under this coverage because of bodily injury sustained in an accident by a person who is an insured under this coverage shall be reduced by:

1. all sums paid on account of such bodily injury by or on behalf of

   (i) the owner or operator of the uninsured motor vehicle and

   (ii) any other person or organization jointly or severally liable together with such owner or operator for such bodily injury including all sums paid under coverage A;

2. the amount paid and the present-value of all amounts payable on account of such bodily injury under any workmen's compensation law, disability benefits law or any similar law;

3. all sums paid or payable on account of such bodily injury under coverages C and M of a policy issued by this company.

(c) Any payment made hereunder to or for any insured shall be applied in reduction of the amount of damages which he may be entitled to recover from any person who is an insured under coverage A.

DEFINITIONS — SECTION III

The definitions of Automobile, Bodily Injury, Newly Acquired Automobile, Occupying, Owned Motor Vehicle, Person, Resident and Temporary Substitute Automobile under Section I apply to Section III and under Section III:

Hit-and-Run Motor Vehicle—means a land motor vehicle which causes bodily injury to an insured arising out of physical contact of such vehicle with the insured or with a vehicle which the insured is occupying at the time of the accident.

Insured—The unqualified word “insured” means

1. the first person named in the declarations and while residents of his household, his spouse and the relatives of either;

2. any other person while occupying an insured automobile;

3. any person, with respect to damages he is entitled to recover because of bodily injury to which this coverage applies sustained by an insured under (1) or (2) above.

Insured Automobile—means:

1. an owned motor vehicle provided the use thereof is by such first named insured or spouse or any other person to whom such first named insured or spouse has given permission to use such vehicle if the use is within the scope of such permission;

2. an automobile not owned by the named insured or any resident of the same household, other than a temporary substitute automobile, while being operated by such first named insured or spouse, but the term Insured automobile shall not include any motor vehicle while being used as a public or livery conveyance, or any motor vehicle while being used without the permission of the owner.

(1) there cannot be ascertained the identity of either the operator or owner of such hit-and-run motor vehicle;

(2) the insured or someone on his behalf shall have reported the accident within 24 hours to a police 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 or causes of action arising out of such accident for damages against a person or persons whose identity is unascertainable, and setting forth the facts in support thereof; and

(3) at the company's request, the insured or his legal representative makes available for inspection the vehicle which the insured was occupying at the time of the accident.

A:

1. an automobile:

2. the relatives of either;

3. the operator or owner of the vehicle which the insured is occupying at the time of the accident.

B:

1. the relatives of either;

2. the operator or owner of the vehicle which the insured is occupying at the time of the accident.

C:

1. the relatives of either;

2. the operator or owner of the vehicle which the insured is occupying at the time of the accident.