

Uninsured Motorist Coverage—A Survey

The much debated and vexatious problem of the uninsured and financially irresponsible motorist has led liability insurance carriers in recent years to offer an endorsement or new clause on their automobile liability insurance policies known as *uninsured motorist insurance*. Essentially, this coverage affords protection to the insured when he is injured as a result of the negligence of an uninsured motorist. Although satisfying a long felt social need to overcome the injustices produced by financially irresponsible motorists, this coverage is fraught with procedural and substantive difficulties. It is the purpose of this note to define and explain the more troublesome terms of a typical policy of this nature, and to explore the procedural problems encountered by both the insured and his insurer in implementing the policy. Although such coverage has evoked a good deal of professional discussion,¹ its late birth is reflected by a pittance of litigation construing it.

The need to protect the innocent victims of negligent, uninsured motorists arose within a few years after the automobile came into general use and was reflected in early state legislation requiring either compulsory insurance² or proof of financial responsibility.³ Since then, every state except Alaska,⁴ as well as many foreign countries,⁵

1. See, e.g., Cheek, *Recovery Procedure Under the Uninsured Motorist Coverage of the Family Liability Policy*, 1960 INS. L.J. 723; Murphy & Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L.J. 700 (1959).

2. Mass. Laws & Resolves 1927, ch. 127, §§ 1, 2. For a history of state legislation, see Risjord & Austin, *The Problem of the Financially Irresponsible Motorist*, 24 U. KAN. CITY L. REV. 82 (1955).

3. E.g., Conn. Pub. Laws 1925 ch. 183.

4. A complete list of citations, arranged alphabetically by states, is set forth in Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present & Future*, 8 BUFFALO L. REV. 215, 218 n.8 (1959). It is to be noted that the legislative approaches to the problem group themselves primarily into four categories: 1) financial responsibility laws; 2) unsatisfied judgment funds; 3) workmen's compensation plans; and 4) compulsory insurance. Bohlinger, *Which Road for the Uninsured Motorist?*, 1951 INS. L.J. 433. For discussions and comparisons of the categories, see Bambrick, *A Look at the New Jersey Unsatisfied Claim and Judgment Fund*, 1956 INS. L.J. 725; Baillie, *The Manitoba Road for the Uninsured Motorist*, 1952 INS. L.J. 109; Green, *An Insurer Looks at the New Jersey Unsatisfied Judgment Fund Law*, 1956 INS. L.J. 728; Kuvin, *Automobile Liability Insurance: What Is Its Future Course?*, 1956 INS. L.J. 407; Murphy & Netherton, *Public Responsibility and the Uninsured Motorist*, 47 GEO. L.J. 700 (1959); Risjord & Austin, *The Problem of the Financially Irresponsible Motorist*, 24 U. KAN. CITY L. REV. 82 (1955); Ward, *New York's Motor Vehicle Accident Indemnification Corporation: Past, Present & Future*, 8 BUFFALO L. REV. 215 (1959); Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9

has adopted similar statutes. Helpful as such measures may be in encouraging motorists to purchase liability insurance, they still afford no protection to the victim of an uninsured motorist who is unable to post the required statutory bond. There is small comfort in the knowledge that the negligent motorist may lose his driving privileges by reason of his failure to comply with the financial responsibility law when his victim is faced with serious and permanent injuries.

I. ADOPTION OF UNINSURED MOTORIST COVERAGE

Uninsured motorist coverage was first proposed by liability insurance carriers both as a result of their concern for the victims of irresponsible motorists and because of their dislike for state-imposed programs of compulsory insurance and public unsatisfied judgment funds.⁶ The forerunner of the uninsured motorist provision was unsatisfied judgment insurance which was offered for the first time in 1925 by the Utilities Indemnity Exchange, predecessor to the Utilities Insurance Company.⁷ However, this insurance was of only limited value in that it was payable only after the insured's claim was reduced to judgment and was demonstrably shown to be uncollectible.

The first *true* uninsured motorist coverage appeared in 1956 when the National Bureau of Casualty Underwriters and the Mutual Insurance Rating Bureau drafted and promulgated such insurance as an endorsement to their standard family automobile policy, which permitted recovery for bodily injury not exceeding the dollar limit imposed by the state financial responsibility laws.⁸ Thus, an insured victim of an uninsured motorist may be in as good a position as he

BUFFALO L. REV. 283 (1959-60); Insurance As To Uninsured Motorist, Annot., 79 A.L.R.2d 1252 (1961).

5. For a general discussion of the programs in the Canadian Provinces, England, France, Switzerland, Australia, Japan and New Zealand, see Ward, *The Uninsured Motorist: National and International Protection Presently Available and Comparative Problems in Substantial Similarity*, 9 BUFFALO L. REV. 283 (1959-60).

6. Massachusetts (MASS. ANN. LAWS c. 90, § 113A-G (1946)) and New York (N.Y. VEHICLE & TRAFFIC LAW §§ 93-93K) require compulsory insurance. North Dakota (N.D. REV. CODE §§ 39-1701-1710 (Supp. 1957)) and New Jersey (N.J. REV. STAT. §§ 3A: 6-61-91 (Supp. 1958)) provide for unsatisfied judgment funds. Unsatisfied judgment funds usually permit residents of the state, when injured within the state by a financially irresponsible motorist, to recover a limited amount of compensation from a state fund. The fund is generally financed by an assessment on each vehicle registered in the state.

7. George, *Insuring Injuries Caused by Uninsured Motorists*, 1956 INS. L.J. 715.

8. The National Bureau's coverage was called *Family Protection Automobile Coverage*, while the Mutual Bureau's was called *Family Protection Against Uninsured Motorist* insurance. See Plummer, *Handling Claims Under The Uninsured Motorist Coverage*, 1957 INS. L.J. 494.

would be in had the other driver carried bodily injury liability insurance equal in amount to that required under the financial responsibility law of the particular state.

The uninsured motorist clause suggested by the National Bureau of Casualty Underwriters to its members typifies the general endorsement in use today.⁹ In the insuring agreement the company promises:

To pay all sums which the insured . . . shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury . . . sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile; provided . . . determination as to whether the insured . . . is legally entitled to recover such damages, and if so the amount thereof, shall be made by agreement between the insured and the company or, if they fail to agree, by arbitration.¹⁰

Although the great majority of claims under this clause are handled without dispute,¹¹ it is not always clear which persons fit the definition of uninsured, or what the result will be when the insured files suit against the uninsured motorist without the permission of his insurer, as required in most policies, or fails to submit the amount of damages to arbitration. An attempt will be made to clarify these situations in the material which follows.

II. PROBLEMS IN DEFINING POLICY TERMS

Persons Uninsured

Since the policy, by its terms, is payable only where the insured is injured by an uninsured motorist, it remains to be determined just when one is *uninsured* within the meaning of the policy. Under the Bureau policy¹² the term includes automobiles with respect to which

9. The clause is Part IV of the Standard Provisions For Automobile Combination Policies, Family Automobile Form, First Revision, May 1, 1958; prepared by the National Bureau of Casualty Underwriters, 125 Maiden Lane, New York 38, New York [hereinafter cited as Bureau Policy].

10. Bureau Policy, Coverage J, Uninsured Motorist, Damages for Bodily Injury.

11. As outlined in the policy, when the insured is injured and learns the adverse party has no insurance, he must notify his company of his intention to use the uninsured clause. The company investigates and determines for itself whether the adverse party fits the definition of *uninsured* in the policy. The insurer would then try to settle the question of liability, and the amount of damages with the insured. If, for some reason, they cannot reach a settlement, either party would have the option to demand arbitration. The arbitration procedure outlined in the policy follows special rules of the American Arbitration Association, and the arbitrator's decision is final. Before arbitration the insured may file suit against the uninsured motorist but may not pursue it to judgment without the permission of the company.

12. Bureau Policy.

there is no bodily injury liability bond or insurance policy applicable at the time of the accident,¹³ or an automobile classified as "hit-and-run."¹⁴ However, not included is an automobile defined within the policy as an *insured* automobile,¹⁵ an automobile owned by the named insured or by any resident of the same household,¹⁶ an automobile owned or operated by a self-insurer within the meaning of any motor vehicle financial responsibility law,¹⁷ an automobile owned by a governmental body¹⁸ or one operated on rails or crawler treads¹⁹ or of the tractor type.²⁰

Closely linked with the definition of uninsured is the procedural problem of how the insured demonstrates to his insurer that he was, in fact, injured by an uninsured motorist. Does the injured simply ask the other party, file suit against him, rely upon filings of non-insurance with the state motor vehicle responsibility unit, or must he employ an independent investigation? Beyond this, how would the insured, in an action against his own insurer under the uninsured motorist clause, demonstrate to the satisfaction of the court that the responsible motorist was uninsured? In the only instance where this question has been raised before an appellate court, no satisfactory result was reached. In *Levy v. American Automobile Ins. Co.*,²¹ counsel for plaintiff-insured made every conceivable attempt to establish the non-insurance of the negligent motorist, all of which were rejected by the court. Plaintiff obtained a judgment against the uninsured motorist and then brought this action against his own insurer to recover under the uninsured motorist clause of his policy. In establishing that an uninsured motorist was involved in the accident, plaintiff's attorney testified that after he failed to get a response from letters requesting that the original defendants contact their insurers, he made a personal investigation and that both individuals told him they were uninsured. This testimony was introduced, over objection, as declarations against financial interest without any showing, as required by Illinois law, that the declarants were unavailable to testify. The Illinois Court of Appeals held this reversible error and remanded for retrial without

13. Bureau Policy, Coverage J, Uninsured Automobile § (a).

14. Bureau Policy, Coverage J, Uninsured Automobile § (b).

15. Bureau Policy, Coverage J, Uninsured Automobile § (1).

16. Bureau Policy, Coverage J, Uninsured Automobile § (2).

17. Bureau Policy, Coverage J, Uninsured Automobile § (3), (such as buses of a city public service company or long-haul units of a common carrier); see Plummer, *Handling Claims Under the Uninsured Motorist Coverage*, *op. cit. supra* note 8, at 495.

18. Bureau Policy, Coverage J, Uninsured Automobile § (4).

19. Bureau Policy, Coverage J, Uninsured Automobile § (5).

20. Bureau Policy, Coverage J, Uninsured Automobile § (6).

21. 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961).

deciding whether the testimony would have been sufficient to establish non-insurance had the declarants been shown to be unavailable. Further, the insured's argument that there was an assent by silence to the issue of non-insurance was held equally without merit. Finally, the fact that no insurer for the wrongdoer contacted the insured also failed to supply the necessary element of proof of non-insurance.²² Upon retrial of the case, plaintiff introduced certified letters from the Illinois Secretary of State showing that the operators' licenses of the alleged uninsured parties had been suspended for failure to comply with the Financial Responsibility Law.²³ The results on retrial are unknown, but this method of proof would appear to be adequate.²⁴ The overall result of the *Levy* case would seem to place an unnecessarily severe burden of proof on the insured in situations of this kind, and it is difficult to imagine what degree of proof of non-insurance would satisfy the court. It would seem far more advisable to require insurers to indicate in the policy just what proof of non-insurance would satisfy the policy requirement.

Some degree of clarification has been achieved in defining *uninsured* by various state statutes, probably as a result of dissatisfaction with an earlier judicial attitude. For example, in the New York case of *In re Berman*,²⁵ the court held that *uninsured* could not be extended to include a motorist whose insurance company had denied coverage by reason of lack of co-operation of its insured. The obvious injustice of this ruling was changed by a statute²⁶ which broadened the definition to include cases where liability insurance exists but coverage is denied. Similar statutes are now in effect in California²⁷ and South Carolina.²⁸

It will be recalled that the Bureau policy provision²⁹ limits its coverage to the dollar limit required under the state financial responsibility laws. If in a given case the state dollar requirement is \$10,000 and the insured is injured by a motorist who carries only \$5,000 in liability insurance, can it be said, for purposes of the uninsured motorist clause, that the negligent driver is *uninsured* to the extent of \$5,000? Legislation in Florida³⁰ and South Carolina³¹ has specifically

22. *Ibid.*

23. Letter from Fred S. Posner, attorney for Plaintiff, to author, Oct. 2, 1961.

24. *Ibid.*

25. 11 Misc. 2d 291, 171 N.Y.S.2d 869 (Sup. Ct. 1958).

26. N.Y. INS. LAW § 167(2) (a) (1961).

27. CAL. INS. CODE § 11580.2(b) (Deering, Supp. 1961).

28. S.C. INS. CODE § 46-750.21(3) (b) (Supp. 1960).

29. Bureau Policy, Coverage J, Uninsured Motorist, Damages for Bodily Injury.

30. FLA. MOTOR VEHICLE STAT. § 324.051(4) (1958).

31. S.C. INS. CODE § 46-750.21(a) (Supp. 1960).

provided an affirmative answer to the question. However, bearing in mind the underlying purpose of this type of insurance, it is difficult to perceive any rational distinction between a partially insured and a totally uninsured motorist, since in either case insurance does not exist in an amount equal to that required under the financial responsibility laws.

An allied problem in defining *uninsured* arises where the insured is injured by a hit-and-run driver. Although the standard policy includes the hit-and-run-contingency within its definition of uninsured,³² it also requires physical contact between the hit-and-run automobile and the insured or the automobile in which he is riding,³³ ostensibly to prevent fraud. However, assume that a hit-and-run automobile collided with a third vehicle, forcing it into the insured. Although there has not been strict compliance with the policy requirements, should the courts apply the traditional doctrines of "factual causation" or "proximate cause" so as to bring the insured within the coverage of the policy? The point has, as yet, not been determined, but since this "contact" requirement exists to prevent fraud, where a legitimate claim is made out and the test of factual causation is met, the policy exclusion should fail.³⁴

Prohibition Against Multiple Recovery

The uninsured motorist clause is limited in scope so that it only applies when no other insurance is applicable.³⁵ Thus, with respect to

32. The hit-and-run automobile is defined as one which causes bodily injury to an insured arising out of the physical contact of such automobile with the insured or with an automobile in which the insured is riding, provided the identity of either the operator or the owner of the hit-and-run automobile cannot be ascertained. Further, the insured or someone on his behalf must report the accident within 24 hours to a police officer and within 30 days file a statement under oath with the insurer that the insured or his legal representative has a cause of action against a person whose identity is unascertainable. And finally, at the company's request, the insured or his legal representative must make available for inspection the automobile in which the insured was riding at the time of the accident. (Bureau Policy, Coverage J, Definitions, "hit-and-run" automobile.) New York has provided for the hit-and-run situation under its elaborate insurance code. N.Y. INS. LAW § 617 (1961). The necessity for strict compliance with the procedural requirements of the New York statute is illustrated in *Bonavisa v. MVAIC*, 21 Misc. 2d 963, 198 N.Y.S.2d 332 (Sup. Ct. 1960), where the injured party in a hit-and-run-accident waited three days to notify the police, although the statute required notification within 24 hours. The injured party was refused recovery.

33. Bureau Policy, Coverage J, Definitions, "hit-and-run" automobile.

34. Aguilar, *Uninsured Motorist Coverage*, 36 J. S. B. CAL. 205 (1961) poses the problem.

35. Bureau Policy, Coverage J, Exclusions (c), states that the policy may not, "inure directly or indirectly to the benefit of any workmen's compensation or

bodily injury to an insured occupying an automobile not owned by himself, if he can recover under any other uninsured motorist insurance, such as that carried on his host's automobile, then his own policy will apply only as excess.³⁶ Some policies even go so far as to provide that in such a situation, the host's insurance is *solely* applicable and no coverage whatsoever is provided under the named insured's uninsured clause.³⁷ Further, if the insured has several uninsured motorist clauses applicable to himself, as where he owns several automobiles insured by different companies, any claim made by him cannot exceed the policy with the highest limits of liability. All such companies contribute only in proportion to the total possible coverages.³⁸ Broadly speaking, the limits of liability under uninsured motorist provisions are: 1) limited under the financial responsibility law of the state where the coverage is written; 2) reduced by the amount of any payment under bodily injury coverage in the same accident; 3) reduced by the payment of workmen's compensation claims; 4) prorated between two policies containing like endorsements in the insured's name; and 5) reduced by medical payments claims (in some policies).³⁹

The Trust Agreement

If a claim by the insured under his policy is honored by his company, what recourse has the company in recouping its losses from the negligent, uninsured motorist? Subrogation, the standard recovery device of insurance companies, is unavailable in this situation since it is well established that an unliquidated claim for bodily injury is unassign-

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." This provision has received judicial sanction in *Commissioner v. Miller*, 4 App. Div. 2d 481, 166 N.Y.S.2d 777 (Sup. Ct. 1957).

36. Bureau Policy, Coverage J, Other Insurance. For other provisions and uses, see Bureau Policy, Coverage J, Limits of Liability § (b). If claim is made under the uninsured section, and claim is also made against any person insured under the liability section of the policy because of bodily injury sustained in an accident by a person who is an insured under the uninsured portion: (1) any payment made under the uninsured portion for any such person shall be applied in reduction of any amount which he may be entitled to recover from any person insured under the liability section; and (2) any payment made under the liability portion to or for any such person shall be applied in reduction of any amount which he may be entitled to recover under the uninsured portion.

37. Address by Ross G. Hume, Legal Counsel for State Farm Mutual Auto Ins. Co., of Bloomington, Illinois, to the Illinois State Bar Meeting in Chicago, Nov. 1959.

38. Bureau Policy, Coverage J, Other Insurance.

39. For a more detailed discussion of each limitation see Cheek, *op. cit. supra* note 1, at 725.

able.⁴⁰ However, the uninsured motorist provision produces the same effect as subrogation through the use of a *trust agreement*⁴¹ which entitles the company, to the extent of any payment made by it, to the proceeds of any settlement or judgment which results from the exercise of any rights of recovery of the insured against any person legally responsible. The insured is said to hold in trust for the company all rights of recovery he has against the other party, and must do whatever is proper to secure payment from the wrongdoer including filing suit, if necessary.⁴² However, the efficacy of such an arrangement can be seriously questioned, since the company, once payment is made to its insured under the policy, is faced with the prospect of working with a disinterested insured.

III. SPECIAL PROBLEMS IN RECOVERY PROCEDURE

It will be recalled that the standard uninsured motorist clause requires the submission of the dispute to arbitration when the insured and the company cannot reach agreement. Coupled with this is the prohibition which forbids the insured to seek judgment against the uninsured motorist without first obtaining the written consent of the company. These recovery procedures are, of course, conditions precedent to the company's liability on the policy and it is not likely that an insurance company would give its consent to a suit against the uninsured motorist by its insured if its insured had failed to arbitrate, since the judgment thereby obtained would, in all probability, be determinative as against the company both as to its liability under the

40. *Wilcox v. Bierd*, 330 Ill. 571, 162 N.E. 170 (1928); *Coughlin v. New York Cent. R.R.*, 71 N.Y. 443 (1877); *Morgenbesser, Some Legal Aspects of the New York, Uninsured Motorists Coverage*, 28 N.Y.B. BULL. 132 (1956).

41. Bureau Policy, Coverage J, Trust Agreement.

42. This action will be in the insured's name, and in the event of recovery, the company will be reimbursed for its expenses, costs, and attorneys' fees. The insured also has to execute and deliver to the company any paper which may be appropriate to secure the rights and obligations of the insured and the company, and the insured can do nothing that might prejudice the insurer's rights. Illinois has recently held that this form of trust agreement is valid as a subrogation clause, and is not an assignment of a cause of action, although that case dealt with dram shop insurance. See *Remsen v. Midway Liquors Inc.*, 30 Ill. App. 2d 132, 174 N.E.2d 7 (1961).

There appear to be opposite views as to the value of the trust agreement to the insurance company. One view is that the trust agreement is useless. Once the company releases funds to its insured and obtains a trust agreement, then, from a practical point of view, the company is faced with the prospect of working with a disinterested insured. The argument for the agreement is that pressure can be exerted against a reluctant insured to make him co-operate. Further, under financial responsibility laws the uninsured motorist may lose his driver's license and registration plates unless he furnishes the state with a signed release. This motivates the uninsured motorist to co-operate and make some payments.

policy and the amount of damages. Presumably, in a state which sanctions such arbitration agreements, if the insured refused to submit his claim to arbitration, but instead recovered judgment against the uninsured motorist without the company's permission, the insurer could successfully resist payment on the policy on the grounds that the insured had failed to comply with the recovery procedure set forth in the policy. This would appear to be the result in at least twenty jurisdictions⁴³ which have overruled the common law prohibition against the enforcement of contracts to arbitrate future disputes.

However, a few jurisdictions still adhere to the common law rule that a contract for the arbitration of future disputes is unenforceable. For instance, Missouri provides that:

Any contract or agreement hereafter entered into containing any clause or provision providing for an adjustment by arbitration shall not preclude any party or beneficiary under such contract or agreement from instituting suit or other legal action on such contract at any time, and the compliance with such clause or provision shall not be a condition precedent to . . . recover in such action.⁴⁴

Such a rule is also recognized in Illinois,⁴⁵ Oklahoma⁴⁶ and South Carolina.⁴⁷ Thus, if the mandatory arbitration provisions could not be enforced and the company denied permission to its insured to bring suit, this would leave the insured without a remedy. The injustice of such a result was recognized by the South Carolina court in *Childs v. Allstate Ins. Co.*,⁴⁸ where the insurance company insisted that its own insured was negligent and thus not entitled to benefits under the uninsured motorist clause. The insured obtained judgment against the uninsured motorist without the company's permission and then sought

43. *Government Employees Ins. Co. v. Brunner*, 12 Cal. Rptr. 547 (Ct. App. 1961); *Ezell v. Rocky Mountain Bean & Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925); *Park Constr. Co. v. Independent School Dist.*, 209 Minn. 182, 296 N.W. 475 (1941); *United Ass'n of Journeymen Union v. Stine*, 351 P.2d 965 (Nev. 1960); ARIZ. REV. CODE §§ 12.1501-10 (1956); CAL. CODE CIV. PROC. § 1280 (Deering 1959); CONN. GEN. STAT. §§ 52-408-421 (1958); FLA. STAT. ANN. §§ 57.01-.09 (1943); HAWAII REV. LAWS ch. 188, § 1 (1955); LA. REV. STAT. tit. 9, § 4201-17 (1950); MASS. ANN. LAWS ch. 251, § 14 (1956); MICH. STAT. ANN. § 27.2483 (1943); N.H. REV. STAT. ANN. § 542:2 (1955); N.J. REV. STAT. §§ 2A:24-1 to -2 (1951); N.M. STAT. ANN. §§ 22-3-1 to -8 (1953); OHIO REV. CODE §§ 2711.01-.12 (Baldwin's 1958); ORE. REV. STAT. § 33.220 (1953); PA. STAT. ANN. tit. 5, § 161 (1930); R.I. GEN. LAWS ANN. § 10.3.2 (1956); WASH. REV. CODE ANN. §§ 7.04.010—180 (1961); WISC. STAT. ANN. §§ 298.01—14 (1958).

44. Mo. REV. STAT. § 435.010 (1959).

45. *Levy v. American Auto. Ins. Co.*, 3 Ill. App. 2d 157, 175 N.E.2d 607 (1961).

46. *Boughton v. Farmers Ins. Exch.*, 354 P.2d 1085 (Okla. 1959).

47. *Childs v. Allstate Ins. Co.*, 237 S.C. 455, 117 S.E.2d 867 (1961).

48. *Ibid.*

to recover from his insurer, who defended on the ground that it had not given permission to sue as required by the policy. On appeal by the company after an adverse trial court judgment, this defense was summarily dismissed, the court saying:

Having determined independently and for itself without arbitral or other apparent aid, that respondent was at fault and legally responsible for the collision with the uninsured driver (whose property damage claim it paid) and having on that account denied liability to respondent under the uninsured motorist provision of the policy, appellant is simply not in position to invoke this provision of the policy.⁴⁹

It is submitted that this is the only just result where arbitration clauses are unenforceable. A further conclusion following from this position is that if liability and damages may not be finally determined by arbitration, a judgment against the uninsured motorist by the insured must necessarily be binding upon the company on both issues. This was exactly the result reached in Oklahoma in *Boughton v. Farmers Ins. Exch.*⁵⁰ This necessarily has the effect of subjecting an insurance company to liability in an action in which it was not a party and in which it had no opportunity to submit evidence or cross examine. Such a result, however, would not be altogether unsatisfactory in a modern code pleading jurisdiction where a broad scope of third-party practice and intervention is permitted. It is submitted that the insurance company, in a state which will not enforce mandatory arbitration agreements, would be well advised to simply give permission to its insured to seek judgment against the uninsured motorist and then intervene in the action as a third party defendant. It could thereby actively participate in litigating both liability and damages. It is curious to note, however, that this would place the insurer in the unique position of attempting to prove contributory negligence on the part of its own insured and to minimize his damages. There is serious question whether confidential statements made by the insured to his company prior to suit would be admissible by the company to prove the negligence of its own insured in the latter's suit on the policy. Certainly the insured could and would assert the defense of privileged communication.

But what is an insurance company to do in a state which neither recognize contracts to arbitrate future disputes nor permits third party intervention? Farmers Insurance Exchange, faced with this dilemma after the decision in *Boughton* placed a new clause in its insuring agreement which provides, in substance, that any judgment obtained by its insured against an uninsured motorist is not binding

49. 237 S.C. at 462, 117 S.E.2d at 871.

50. 354 P.2d 1085 (Okla. 1959).

on the company either as to liability or damages.⁵¹ Whether such a provision will stand the test of judicial scrutiny is yet to be determined. The clause would probably be ignored in those jurisdictions which allow third-party intervention since it would tend to foster a multiplicity of suits.

CONCLUSION

The need for protection against the financially irresponsible motorist has long been apparent. The evil of unsatisfied-judgment insurance is that the insurer will not know his standing until a final judgment against the uninsured motorist has proved to be uncollectible. The insurer therefore has no opportunity to limit what might be an excessively high judgment and no chance to recover against the wrongdoer. This, of course, tends to raise the premium rates.

On the other hand, there is equal confusion associated with uninsured motorist coverage. Such coverage, however, alleviates some of the evils associated with unsatisfied judgment insurance through the use of agreement and arbitration devices. Further, intervention by the insurer, where permitted, has proved to be a valuable tool for the insurer in protecting its rights but must be used with caution and discretion in view of the traditional jury prejudices against insurance companies appearing in their own name. Thus, uninsured motorist coverage, although no panacea, has certainly helped fill the financial vacuum left by irresponsible motorists. It is, as yet, too early to tell whether its use will be further extended.

51. Farmers Insurance Exchange Automobile Policy, Act-134, 33d Ed. Coverage X, Benefits for Bodily Injury Caused by Uninsured Motorists (3).



